

BEFORE THE
FEDERAL MARITIME COMMISSION

DOCKET NO. 22-30

SAMSUNG ELECTRONICS

AMERICA, INC.,

COMPLAINANT,

v.

ZIM INTEGRATED SHIPPING SERVICES LTD.,

RESPONDENT.

RESPONDENT'S REPLY TO COMPLAINANT'S PROPOSED FINDINGS OF FACT

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Respondent, ZIM Integrated Shipping Services Ltd. (“ZIM” or “Respondent”) hereby sets forth its Objections and Replies to the Proposed Findings of Fact (“PFF”) of Complainant Samsung Electronics America, Inc. (“Complainant” or “SEA”).

OBJECTIONS

A. ZIM objects to and denies those statements in SEA’s Proposed Findings of Fact (“PFF”) which violate the directive set forth in paragraph 15 of the Scheduling Order entered by ALJ Erin M. Wirth on January 12, 2023 (“Scheduling Order”), which requires:

“Proposed Findings of Fact. This document must set forth proposed findings of fact in numbered paragraphs. Each paragraph shall be limited, as nearly as practicable, to a single factual proposition. Each factual proposition shall be followed by an exact citation to evidence that the party contends will support the proposed finding of fact; e.g. a page number in the appendix.

ZIM objects to PFFs which contain multiple statements, and combine multiple assertions, partial quotations from deposition testimony and excerpts from exhibits and other documents in violation of this directive because they have impeded ZIM’s ability to prepare concise and accurate responses. ZIM further notes that SEA made innumerable citations to the record which were erroneous and required ZIM to “guess” what evidence, if any, that the PFF was relying upon for support. These have been noted by ZIM in its Reply and, where possible, ZIM has attempted to respond, in good faith, to the statements which violate this directive; otherwise, these improper statements are denied. ZIM reserves the right to supplement this Reply to the extent necessary to avoid having been deemed to admit statements which have been improperly advanced by SEA in a form that violates the Scheduling Order.

B. ZIM objects to statements which contain or refer to facts which are not material or relevant, which are denied.

C. ZIM objects to statements which are conclusory or argumentative, which are denied.

D. ZIM objects to the headings embedded in SEA's PFF because their inclusion is not contemplated by paragraph 2 of the Scheduling Order and because they contain assertions which are conclusory and argumentative. ZIM has not deleted these headings in order to maintain the organization that SEA has imposed on its PFF but, to the extent any headings are conclusory or argumentative, ZIM states that they are denied.

E. ZIM objects to SEA's characterization of documents and testimony that speak for themselves, which are denied.

F. ZIM has moved to strike the expert report of John McCown due to his failure to meet any of the three standards imposed by *Daubert v. Merrell Dow Pharms., Inc.* 509 U.S. 579 (1993); specifically, he is not qualified to proffer the opinions he has advanced; his opinions are not based on reliable data; and his statements and opinions are not relevant. ZIM objects to any PFFs which rely upon statements or opinions proffered by Mr. McCown.

ZIM'S REPLY TO COMPLAINANT'S PROPOSED FINDINGS OF FACT

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

Response: Admit.

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.

Response: Admit that the Complaint made allegations concerning ZIM and that the Complaint speaks for itself. ZIM further refers to paragraphs 10-15 of its Answer which set forth its responses to the allegations made in the corresponding paragraphs of the Complaint. CX_00021-22, ZIM Answer ¶¶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.

Response: Admit that the Complaint made allegations concerning ZIM and that the Complaint speaks for itself. ZIM further refers to paragraphs 27-28 of its Answer which set forth its responses to the allegations made in the corresponding paragraphs of the Complaint. CX_00023, ZIM Answer ¶¶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.

- 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.

Response: Admit that the Complaint made allegations concerning ZIM and that the Complaint speaks for itself. ZIM further refers to paragraphs 47-75 of its Answer which set forth its responses to the allegations made in the corresponding paragraphs of the Complaint. CX_00024-26, ZIM Answer ¶¶47-75.

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.

Response: Denied. The first demand by SEA for “reparations” was made by letter dated September 23, 2022 which sought “more than five million dollars (\$5,000,000)...” RX_0016-17, Rapske Dep. Ex. 2. ZIM promptly responded to this demand, requesting:

- (1) identification of the ZIM invoice numbers and dates subject to your claim;
- (2) documents relating to any Dispute filed with ZIM by Samsung;
- (3) details of communications through which ZIM “*repeatedly rejected any attempt by Samsung to discuss [these matters] with ZIM’s billing coordinators.*” RX_0021-22, Rapske Dep. Ex. 4.

SEA did not provide the information requested by ZIM nor did SEA otherwise respond to ZIM’s request for additional information but, instead filed this proceeding on October 25, 2022. CX_00001; CX_02204, CX_02262-63, Rapske Dep. Tr. 32:2-22; 90:18-91:5.

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.

Response: Denied. The Zayas Report states that “SEA and its expert, Smith, have presented a financial damage analysis that utilizes unreasonable assumptions, disregards relevant facts and overly simplifies a complex situation to generate a loss claim that necessarily overstates any loss SEA may have incurred attributable to ZIM’s alleged misconduct.” CX_06503, Zayas Report, ¶7 The Zayas Report further opined that “Smith failed to perform a loss analysis meeting the professional standards for “litigation” services established by the AICPA or reasonableness standards established by courts requiring him to acknowledge and assess other factors that would impact his loss analysis.” CX_06504, *id.* ¶9 (f) The Zayas Report also concluded that SEA’s expert did not comply with applicable accounting standards, stating in ¶37: “Smith’s analysis of SEA’s claimed loss arising from payment of “inland transportation” charges paid ZIM and others does not comply with applicable professional standards as it does not constitute a reasonable analysis and assessment of losses that SEA sustained due to ZIM’s alleged failure to perform under terms of the assumed “store door” arrangement. CX_06511, *Id.* The alleged “direct damages” that SEA describes here are further undermined by testimony from SEA’s Michael Rapske that some charges were the responsibility of SEA rather than ZIM. CX_02249-50, Rapske Dep. Tr. 77:23-78:11 (stating that demurrage caused through SEA warehouse or customer-driven delays to delivery are the responsibility of ZIM but were still included in the alleged damages calculated by SEA).

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.

Response: Denied. The Zayas Report rejected these damages and stated "...these 'additional loss' claims arise from actions SEA undertook in 2021 and 2022 to protect its supply chain." CX_06509, Zayas Report, ¶28 Further, SEA efforts to increase its personnel and storage capacity during a period of 'disruption' was likely a business decision to accommodate the 'disruption' and simultaneously mitigate 'inland transportation' charges going into future periods. Smith is claiming a business decision made by SEA based upon financial, operational and other risks constitutes economic damages to SEA for which ZIM and other ocean carriers are responsible. Smith also testified that SEA would still have acquired some of the facilities *even if ZIM did not exist*. CX_05997-98, Smith Dep. Tr. 51:12-52:11. "In our opinion, these 'additional loss' claims are not supported by the facts and circumstances." CX_06519, *Id.* ¶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.*

Response: Denied as stated. This paraphrases the relief sought in the Complaint by SEA and is not a proposed finding of fact. ZIM refers to its Answer which contained a specific response to the allegation set forth in paragraph 4 of the Complaint. CX_00021, ZIM Answer ¶4.

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.

Response: Denied as stated. This paraphrases the relief sought in the Complaint by SEA and is not a proposed finding of fact. ZIM refers to its Answer which contained a specific response to the allegation set forth in paragraph 1 of the Complaint. CX_00020, ZIM Answer ¶1. Further, the citations to paragraphs 59 and 62 in the BRG Report make no reference to attorneys’ fees, prejudgment interest or post-judgment interest and, accordingly, do not support this PFF. CX_06077-8, 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.

Response: Admit.

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 Rapske¹ Dep. Tr. 33:6.

Response: Admit that SEA is a consumer electronic products company but avers that there is insufficient evidence in the record to support or refute the remainder of the claims set forth in this PFF.

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

¹ VP, Logistics Operations at SEA.

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 Yaacoub² Dep. Tr. 15:17-25.

Response: Admit.

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.

Response: Admit.

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

Response: Admit that the quotation contained in this PFF has been accurately transcribed from the section of ZIM’s webpage entitled *Inland Transport*, found at CX_08315, <https://www.ZIM.com/services/cargo-services/inland-transport>. Deny the characterization of same by SEA as the quotation from the webpage speaks for itself.

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>.

² Director of Finance at ZIM U.S.

Response: Admit that the quotation contained in this PFF has been accurately transcribed from the section of ZIM's webpage entitled *Inland Transport*, found at CX_08315, <https://www.ZIM.com/services/cargo-services/inland-transport>. Deny the characterization of same by SEA as the quotation from the webpage speaks for itself.

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>.

Response: Admit that the quotation contained in this PFF has been accurately transcribed from the section of ZIM's webpage that is entitled *Dry-cargo*, found at CX_08316, <https://www.ZIM.com/services/cargo-services/dry-cargo>. Deny SEA's characterization of same as the quotation from the webpage speaks for itself.

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>.

Response: Denied as stated. ZIM's webpage entitled *Inland Transport*, found at CX_08315, <https://www.ZIM.com/services/cargo-services/inland-transport>, speaks for itself, and SEA's characterization of same is denied.

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 Fernando³ Dep. Tr. 34:18-22.

Response: Admit.

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

Response: Denied. The evidence cited does not support this PFF.

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.*

Response: Denied as stated. Admit that SEA is not a signatory to Service Contracts with ZIM, but it is one of the many Samsung entities who shipped under the terms of the ZIM Service Contracts. While shipping under the contracts, SEA realized the benefits of their terms and conditions and was subject to the obligations of the Service Contracts. RX_1789-1815, Service Contract 7100204807; RX_1817-50, Service Contract Z18436KR; RX_1852-78, Service Contract 7100171730; RX_1880-1906, Service Contract Z19179KR, and RX_1918-47, Service Contract 7100102863.

³ Direct Ship Operations at SEA.

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 Choi⁴ Dep. Tr. 13:20-25, 101:12-102:12.

Response: Denied as stated. The evidence cited does not support this PFF.

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.

Response: Admit.

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.

Response: Denied. The evidence cited does not support this PFF. SEA remains responsible for Demurrage and Per Diem charges pursuant to the Service Contracts under which SEA's cargo moved. See RX_1794-96, Service Contract 7100204807; RX_1822-23, Service Contract Z18436KR; RX_1857-59, Service Contract 7100171730; RX_1885-86, Service Contract Z19179KR, and RX_1921-26, Service Contract 7100102863. Paragraph 12d states that:

“Demurrage’ shall refer to the charges Merchant pays for Carrier’s equipment kept beyond free time allowed for taking delivery of the goods in the port, terminal or depot (whether inland port, rail ramp, or other interchange point. Demurrage shall include all storage, service, and equipment costs, unless otherwise specified.”

Furthermore, SEA does not contend that it was “not responsible for paying any local charges” prior to 2020 when it paid demurrage, equipment detention, prepull and/or

⁴ Senior Director of Logistics at SEA.

storage, and driver detention costs. CX_05931, Smith Rep. Ex. 2; CX_02197, Rapske Dep. Tr. 25:15-18. This is also supported by PFF 69 wherein SEA admits that ZIM would invoice SEA for inland transportation charges prior to the pandemic. SEA historically accepted responsibility for inland charges and does not explain why it should accept no responsibility for them after 2019.

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.

Response: Denied as stated. Admit to the extent that, when ZIM relied on its house truckers to complete cargo movements on behalf of SEA, it could generally be said to be “responsible for handling the movement of goods” as described. Denied to the extent that, particularly in contexts where SEA nominated a CNT to complete the trucker movement of goods, SEA undertook to instruct many CNTs in their handling of the movement of cargo, including by directing the type of delivery (live load versus drop and pick), the order in which cargo was moved by a CNT (including prioritizing other cargo over ZIM’s cargo), and instructing delivery on a timeline that resulted in demurrage or other costs (by instructing truckers to deliver cargo after demurrage would accrue). RX_1208, SEA0139186 (SEA instructing Harvest Transportation to prioritize 126 CMA containers remaining on port over containers from other shipping lines, including 19 ZIM containers); RX_0811-15, SEA0132654-58 (SEA instructing its trucker to complete a live unload rather than a drop and pick despite its rate arrangements with ZIM); RX_1023-25, SEA0046788-90 (showing a container pulled and stored because the last free day was 26 days prior to the customer’s available appointment).

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.

Response: Denied. The evidence cited does not support this PFF. SEA issued delivery instructions directly to its CNTs which included detailed instructions such as, the RDD (requested date of delivery), Delivery Mode (e.g. “drop and hook”), Prepull, Unloading (including a directive to communicate with SEA’s customer regarding the status of unloading), empty container return (including directive to return empty containers prior to the expiration of free time) and bobtail request (i.e., the CNT must obtain approval from SEA for a bobtail move). CX_02783 – 02787, SEA0118711 - 0118715; *see also*, RX_1260-63, SEA0026431-4). SEA’s delivery instructions to its CNTs emphasized that the latter’s KPI (key performance indicators) would be scored based upon the CNTs compliance with these instructions. *Id.* Further, other ocean carriers transported cargo for SEA, which is another reason why the assertion in this PFF that SEA was “entirely dependent on ZIM” is not accurate. CX_02207-8, Rapske Dep. Tr. 35:21-36:6

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.

Response: Denied as stated. Admit that SEA does not have written transportation contracts with CNTs but deny the remainder of this PFF. SEA issued delivery instructions directly to its CNTs which included, among other instructions, the RDD (requested date of delivery), Delivery Mode (e.g. “drop and hook”), Prepull, Unloading (including directives to communicate with customer regarding status of unloading), empty container return (including directive to return empty prior to expiration of free time) and bobtail request (i.e., CNT must obtain approval from SEA for bobtail move). CX_02783 – 02787, SEA0118711 - 0118715; see also, RX_1260-63, SEA0026431-4. SEA’s delivery instructions to its CNT emphasized that the latter’s KPI (key performance indicators) would be scored based upon the CNTs compliance with these instructions. *Id.*

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.

Response: Denied as stated. The evidence cited does not support this PFF. The evidence confirms that SEA changed to a CY/CY model because it was dissatisfied with all steamship lines and not specifically ZIM: “...we couldn’t be reliant on the steamship lines anymore. We had to make the change so we could actually control the drayage carriers and not leave it up to the steamship lines any longer.” CX_02213-4, Rapske Dep. Tr. 41:25 – 42:4. ZIM, according to SEA’s expert, only handled 2.6% of the containers shipped to SEA in the United States (CX_06076, Smith Report, ¶58), so the assertion that SEA changed from a store door to a CY/CY model based upon an ocean carrier which transported 2.6% of its containers is patently false.

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.*

Response: Admit.

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.

Response: Denied as stated. The evidence cited does not support this PFF. SEA's witness testified that SEA changed to a CY/CY model because it was dissatisfied with all steamship lines and not specifically ZIM: "...we couldn't be reliant on the steamship lines anymore. We had to make the change so we could actually control the drayage carriers and not leave it up to the steamship lines any longer." CX_02213-4, Rapske Dep. Tr. 41:25 – 42:4. ZIM, according to SEA's expert, only handled 2.6% of the containers shipped to SEA in the United States (CX_06076, Smith Report, ¶58), so the assertion that SEA changed from a store door to a CY/CY model based upon an ocean carrier which transported 2.6% of its containers is patently false. Furthermore, SEA's expert, Mr. Smith, also testified that SEA's investment in some facilities would have been made even if ZIM did not exist. CX_05997-8, Smith Dep. Tr. 51:12-52:11.

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.

Response: Denied. Aside from referring to testimony which describes the meaning of “CNT”, the evidence cited does not support this PFF. To the contrary, paragraph 12a of the ZIM Service Contracts (“DESIGNATION OF TRUCKING VENDOR”) states, in pertinent part, as follows: “If, upon Contract of the parties, the Merchant is to nominate the Vendor (“Preferred Trucker”), the following shall apply...” RX_1789-1815, Service Contract 7100204807; RX_1817-50, Service Contract Z18436KR; RX_1852-78, Service Contract 7100171730; RX_1880-1906, Service Contract Z19179KR, and RX_1918-47, Service Contract 7100102863. The “Contract of the parties” referenced in this paragraph of the Service Contracts is the Samsung RFQ for Ocean Freight, which mandates at paragraph 6 under the second bullet captioned “Preferred Trucker & Delivery”, that ZIM use the CNTs designated by SEA: “Carriers (ZIM) are required to provide local delivery service with consignee’s preferred trucker if any. (CNT = Customer Nominated Trucker).” RX_0041, Fernando Dep. Ex. 1C.

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.*

Response: Denied. Aside from referring to testimony from an SEA witness who claims that SEA recommends CNTs to ZIM, the evidence cited does not support this PFF. To the contrary, paragraph 12a of the ZIM Service Contracts (“DESIGNATION OF TRUCKING VENDOR”) states, in pertinent part, as follows: “If, upon Contract of the parties, the Merchant is to nominate the Vendor (“Preferred Trucker”), the following shall apply...” RX_1794, Service Contract 7100204807; RX_1821-22, Service Contract Z18436KR; RX_1857, Service Contract 7100171730; RX_1885, Service Contract

Z19179KR, and RX_1925, Service Contract 7100102863. The “Contract of the parties” referenced in this paragraph of the Service Contracts is the Samsung RFQ for Ocean Freight, which mandates at paragraph 6 under the second bullet captioned “Preferred Trucker & Delivery”, that ZIM use the CNTs designated by SEA: “Carriers (ZIM) are required to provide local delivery service with consignee’s preferred trucker if any. (CNT = Customer Nominated Trucker)” See, evidence cited in ZIM’s responses to PFFs nos. 30 and 31. When a CNT was not used in performing a move, SEA directed ZIM to modify arrangements to use the CNT due to reasons including its customer arrangements. RX_0967, SEA0025200 (Ms. Fernando instructing that “[w]e have a CNT for Shippensburg which is Harvest I need these loads to be dispatched to Harvest. . . because this is Lowe’s (drop and hook) Please confirm”). Similarly, for Best Buy deliveries to some locations, upon being reminded that a CNT had been rejected due to its high rates, Ms. Fernando advised special requirements that had been coordinated with CNTs but were not made known to ZIM, causing issues for deliveries. RX_1069-70, SEA0000167-68 (Ms. Fernando noted that “We need to find a trucker with BBY portal access now. Setting up with BBY portal it takes days to be registered and the trucker must have enough patience to [enter] the appt request.” and “If we are going to use a house trucker, I need to make sure they have BBY portal access.”)

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.

Response: Admit that SEA designates CNTs in order to have consistency in the delivery of SEA's loads in part. CX_02345, Fernando Dep. Tr. 25:2-7. SEA's arrangements with its customers also cause SEA to designate certain CNTs. See PFF no. 31. Denies that CNTs are recommended to ZIM by SEA but, to the contrary, ZIM is required use the CNTs designated by SEA. See, evidence cited in ZIM's responses to PFFs nos. 30 and 31.

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.

Response: Denied as stated. Admit that the quoted testimony has been accurately transcribed, but denies that SEA recommends CNTs to ZIM. To the contrary, ZIM is required to use the CNTs designated by SEA. See, evidence cited in ZIM's responses to PFFs nos. 30 and 31.

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.

Response: Denied as stated. The evidence cited does not support this PFF. CNTs can be rejected by ZIM under limited circumstances, such as when the CNT is not a party to the UIIA, has an unsatisfactory safety record, or has a rate higher than authorized in the service contract. . CX_03841-42, Michalski Dep. Tr. 45:18-46:9.

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.

Response: Denied. ZIM is required to use the CNTs designated by SEA: “CNT...is a trucker that our customers effectively advise, in order to handle my business, this is the vendor that needs to be used.” CX_02613, Frigo Dep. 140:23-141:1 “...in terms of how ZIM interacts or works with a CNT versus a house trucker, what is the difference between the two? A. I don’t believe there is a difference outside the fact that they’re the trucker that we’re being—that we’re—that we’re forced to use.” CX_03838, Michalski EBT, 42:2-9. See also, Samsung’s RFQ for Ocean Freight, which mandates that ZIM use the CNTs designated by SEA: “Carriers (ZIM) are required to provide local delivery service with consignee’s preferred trucker if any. (CNT = Customer Nominated Trucker)” See paragraph 6, second bullet captioned “Preferred Trucker & Delivery”, RX_0041, Fernando, Exh. 1C, SEA0111293.

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.

Response: Denied as stated. ZIM approves a CNT that SEA requires it to use by confirming that the CNT is a signatory to the UIIA and that it does not have an unsatisfactory safety rating. CX_03841-2, Michalski Dep. Tr. 45:18-46:9. ZIM further denies that the CNTs designated by SEA are “recommended” to ZIM. To the contrary, ZIM is forced to use the CNTs that are designated by SEA. CX_02613-4, Frigo Dep. 140:23-141:1; CX_03838, Michalski EBT, 42:2-9; RX_0041, Fernando, Exh. 1C, SEA0111293. ZIM further denies that “ZIM and the CNT would enter into an agreement for transportation services.” There was no agreement between ZIM and the CNT designated by SEA, other than a communication confirming the rate to be charged. CX_02614, Frigo Dep, 141: 7-11

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.

Response: Denied. ZIM’s approval of a CNT that is designated by SEA involved confirming that the CNT is a signatory to the UIIA and that it does not have an

unsatisfactory safety rating. CX_03841-2, Michalski Dep. Tr. 45:18-46:9. There was no agreement between ZIM and the CNT designated by SEA, other than a communication confirming the rate to be charged. CX_02614, Frigo Dep, 141: 7-11 Further denies that the movement of cargo was “handled” by ZIM. SEA solely controlled delivery by issuing detailed instructions directly to the CNT which specified the RDD (Requested Date of Delivery) window; directed the CNT to prepull loads before the port/rail LFD (Last Free Day), and to “monitor the empties especially if the loads were pre-pulled earlier and RDD is further and consuming our Free time”; instructed the CNT to “check all empties” and to provide “rates and information” if the bobtails were necessary. Further, SEA advised CNTs that their “KPI will be scored with ON-TIME DELIVERY/PREPULLING/EMPTY MANAGEMENT monitoring and returning the Empty without the LFD/Correct Customer PO and on the POD (using the carrier/trucker’s BOL).” RX_1260-62, SEA0026431-33. SEA also instructed its CNTs on how to prioritize the movement of loads and how the delivery should be made (live unload versus drop and hook and advices on appointment requirements) RX_1208, SEA0139186 (prioritizing loads from CMA over other carriers, including ZIM); RX_2303-03, SEA0027079-80 (instructing that a live load is required along with an appointment for same); RX_0965-71, SEA0025198-SEA0025204 (showing detailed instructions being given by Ms. Fernando to CNT, Harvest, in February of 2020). Notably, SEA’s exercise of control over its CNTs was not a response to SEA’s unsupported assertion that ZIM abdicated its responsibilities under store door moves in response to the pandemic but existed well before that time. RX_1749-53, SEA0004709-13 (December, 2018); RX_1744-46, SEA0004694-96 (January, 2019); RX_1755-59, SEA0002631-35 (June, 2019); RX_1680-82, SEA0002095-97 (June, 2019); RX_1684-85, SEA0000652-53 (June, 2019);

RX_0969-71, SEA0025202-04 (February, 2020); RX_1202-05, SEA0027079-82 (March, 2020)

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.

Response: Denied. SEA determines or decides which CNT is used and issues delivery instructions directly to the CNT. RX_1260-62, SEA0026431-33. ZIM is not responsible for demurrage incurred while a shipment moves under store door terms if the CNT selected by SEA, which ZIM is forced to use, does not perform:

“Any expense or charge in excess of the compensation rate set forth at Appendix G, including demurrage, detention, or other storage fees, which accrue or are assessed as a result of the Merchant’s nomination of a new or alternate Preferred Trucker, or as a result of the Preferred Trucker’s failure to accept or perform a Transport Order, shall be to the account of the Merchant.” RX_1794, Service Contract 7100204807; RX_1821-22, Service Contract Z18436KR; RX_1857, Service Contract 7100171730; RX_1885, Service Contract Z19179KR, and RX_1925, Service Contract 7100102863 (See Section 12a of each contract).

This is particularly true where SEA’s own instructions led to delays in delivering ZIM cargo on SEA’s behalf such as when SEA directed its CNT to prioritize 126 CMA containers for delivery instead of delivering ZIM containers already delayed on the port or instructing its

CNTs to delay delivery, incurring prepull and storage costs, so that it met its customer expectations. RX_1208, SEA0139186 (prioritizing loads from CMA over other carriers, including ZIM); RX_0814-15, SEA0132657-58 (SEA instructed that thirteen containers be pre-pulled a full two weeks before the customer's RDD); RX_1023-25, SEA0046788-90 (SEA instructed that a container be pulled and stored because the last free day was 26 days prior to the customer's available appointment).

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.

Response: Denied. SEA handled the inland movement of cargo and had direct involvement and responsibility in the scheduling and arranging of truckers. SEA issued delivery instructions directly to the CNT it had designated, which specified the RDD (Requested Date of Delivery) window; directed the CNT to prepull loads before the port/rail LFD (Last Free Day), and to "monitor the empties especially if the loads were pre-pulled earlier and RDD is further and consuming our Free time"; instructed the CNT to "check all empties" and to provide "rates and information" if bobtails were necessary. Further, SEA admonished the CNT that "KPI will be scored with ON-TIME DELIVERY / PREPULLING / EMPTY MANAGEMENT monitoring and returning the Empty without the LFD / Correct Customer PO and on the POD (using the carrier/trucker's BOL)." RX_1260-62, SEA0026431-33; RX_1208, SEA0139186 (prioritizing 126 loads from CMA over other carriers, including ZIM); RX_0814-15, SEA0132657-58 (SEA instructed that

thirteen containers be pre-pulled a full two weeks before the customer's RDD); RX_1023-25, SEA0046788-90 (SEA instructed that a container be pulled and stored because the last free day was 26 days prior to the customer's available appointment).

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.

Response: Admit. The Service Contracts further provide: "Any expense or charge in excess of the compensation rate set forth at Appendix G, including demurrage, detention, or other storage fees, which accrue or are assessed as a result of the Merchant's nomination of a new or alternate Preferred Trucker, or as a result of the Preferred Trucker's failure to accept or perform a Transport Order, shall be to the account of the Merchant." RX_1794, Service Contract 7100204807; RX_1821-22, Service Contract Z18436KR; RX_1857, Service Contract 7100171730; RX_1885, Service Contract Z19179KR, and RX_1925, Service Contract 7100102863 (See Section 12a of each contract).

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.

Response: Denied as stated. The delivery instructions issued by SEA to the CNT, which are copied to ZIM, specifically require ZIM to notify SEA of all issues, including a change in the CNT: "SSL responsibility to SAMSUNG is to communicate any issues either from CNT/WO (work order)/House trucker/DO (delivery order)". RX_1262, SEA0026433.

Furthermore, when a CNT is not used, SEA demands information about the circumstances from ZIM. RX_1555, RX_1559, SEA0015721, SEA0015725 (SEA stating that the cargo “should be handled by PBI which is a nominated trucker by Samsung. Please advise us the reason why Kiswani has been dispatched” and later in the email chain “[i]f ZIM and the account holder rejected PBI which is a nominated trucker and decided to use house truckers, the house truckers dispatched has to get there the following [9] containers delivered on time without any extra charges and live unload will be required. . .”).

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.

Response: Denied as stated. The Service Contracts provide that, in the event that the CNT fails to perform, ZIM shall nominate and instruct another vendor; and, that SEA remains responsible for demurrage, detention and storage fees arising from the CNT’s failure to perform: “Any expense or charge in excess of the compensation rate set forth at Appendix G, including demurrage, detention, or other storage fees, which accrue or are assessed as a result of the Merchant’s nomination of a new or alternate Preferred Trucker, or as a result of the Preferred Trucker’s failure to accept or perform a Transport Order, shall be to the account of the Merchant.” RX_1794, Service Contract 7100204807; RX_1821-22, Service Contract Z18436KR; RX_1857, Service Contract 7100171730;

RX_1885, Service Contract Z19179KR, and RX_1925, Service Contract 7100102863 (see Section 12a of each Contract).

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.

Response: Denied as stated. Terminals have different processes by which they collect demurrage that accrues; SEA also relied on various parties to assist with payment of demurrage that was incurred due to a CNT's deficient performance or non-performance of a move. RX_1561-63, SEA0012026-28 (showing Pay Cargo, Cargo Sprint, or wire transfer as payment options to ZIM for demurrage where CNT, PBI, ultimately paid the bill for SEA); RX_1580, SEA0003418 (showing Samsung instruct UPS to complete payment for demurrage accrued due to customer scheduling issues in order to release containers from the terminal).

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.

Response: Denied as stated. SEA's responsibility for demurrage is not limited to the circumstances described in this PFF. See, Service Contracts, PFF 12a, *supra*. ZIM did not have responsibility for demurrage, detention and storage charges when a CNT designated by SEA did not perform, the receiving warehouse did not timely accept containers or the customer failed to clear its cargo. CX_02922, Speight Dep, 123:5-22; CX_04159-4161, Haynie Dep, 153:3-155:4.

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).

Response: Denied. The Service Contracts provide that SEA remains responsible for demurrage, detention and storage fees arising from the CNT’s failure to perform:

“Any expense or charge in excess of the compensation rate set forth at Appendix G, including demurrage, detention, or other storage fees, which accrue or are assessed as a result of the Merchant’s nomination of a new or alternate Preferred Trucker, or as a result of the Preferred Trucker’s failure to accept or perform a Transport Order, shall be to the account of the Merchant.” (cite to Service Contracts) ZIM did not have responsibility for demurrage, detention and storage charges when a CNT designated by SEA did not perform, the receiving warehouse did not timely accept containers or the customer failed to clear its cargo. CX_02922, Speight Dep, 123:5-22; CX_04159-4161, Haynie Dep, 153:3-155:4.

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>].

Response: Denied as stated. The cited testimony describes a 10-15% increase in volume from 2019 – 2020; “a little growth” from 2020 – 2021; and “stabilized” from 2021 – 2022. The cited articles speak for themselves.

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/>.

Response: Denied as stated. The evidence cited does not support this PFF:

“Q. And during the period 2020 to 2022, do you know if there were any instances in which a customer or direct customer’s facility was unable to receive cargo in a timely manner?”

A. I’m sure there are situations. So I am aware that there were times when the customers had delays in receiving inbound...I would call out Lowe’s Tobyhanna location that is – has struggled from time to time with their capacity bringing the product in.” CX_02250, Rapske Dep. Tr. 78:12-23.

Other times, SEA instructed its CNTs to delay delivery for weeks due to customer requirements. *See, e.g.,* RX_0814-15, SEA0132657-58 (showing thirteen containers being pre-pulled a full two weeks before the customer’s RDD); RX_1023-25, SEA0046788-90 (showing a container pulled and stored because the last free day was 26 days prior to the customer’s available appointment).

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/>.

Response: Denied as stated. The cited news report speaks for itself and does not refer to SEA or ZIM.

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.

Response: Denied. The cited testimony does not support the conclusion stated in this PFF that there were any “weaknesses in ZIM’s ability to meet its store door obligations.” To the contrary, “We (ZIM) kept on delivering freight. No change. Our responsibilities didn’t change.” CX_03948, Michalski Dep. Tr. 152:12-13

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.

Response: Denied as stated, for the same reasons set forth in ZIM’s responses to PFFs 25 and 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, ZIM0084271.⁵

Response: Denied. The email cited does not support the conclusion that “trucker shortage issues were laid bare in a March 24, 2021 email...” because it did not refer to SEA cargo but instead involved hazardous containerized cargo which required specialized handling that could only be provided by limited carriers: “Container is Hazardous – requires special / limited carriers” and that “No truck power available 11/22 – 1/11 for this type of move...” CX_07465, ZIM0084274 (emphasis supplied). The footnote also purports to refer to “Bill of Lading: ZIMU1149135”. No such document exists, nor was such a bill of lading referred to, in the ZIM production.

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. 13.⁶

⁵ Bill of Lading: ZIMU1149135.

⁶

Response: Denied as stated. The email referred to in this PFF conveyed Mr. Frigo’s awareness on February 24, 2021 that trucker availability was a challenge. CX_02684, Frigo Dep Tr, 211:23-25. Nevertheless, “We (ZIM) kept on delivering freight. No change. Our responsibilities didn’t change.” CX_03948, Michalski Dep. Tr. 152:8-13

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 Shpitzer⁷ Dep. Tr. 125:3-12.

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

⁷ Commercial Director for the Trans-Pacific Eastbound Trade at ZIM U.S.

Response: Denied. The testimony cited does not support the conclusions stated in this PFF. Admits that ZIM was aware of trucker shortages (CX_02684, Frigo Dep Tr, 211:23-25). Further admits that, if a CNT designated by SEA does not perform, then ZIM's Service Contracts provide that SEA is responsible for accrued demurrage, detention and storage fees: "Any expense or charge in excess of the compensation rate set forth at Appendix G, including demurrage, detention, or other storage fees, which accrue or are assessed as a result of the Merchant's nomination of a new or alternate Preferred Trucker, or as a result of the Preferred Trucker's failure to accept or perform a Transport Order, shall be to the account of the Merchant." RX_1794, Service Contract 7100204807; RX_1821-22, Service Contract Z18436KR; RX_1857, Service Contract 7100171730; RX_1885, Service Contract Z19179KR, and RX_1925, Service Contract 7100102863 (see Section 12a of each Contract) Further, ZIM did not have responsibility for demurrage, detention and storage charges when a CNT designated by SEA did not perform.

"Q. What would be an example of ZIM trucker availability in this sense?

A. It's a ZIM house truck. So there's no preferred trucker involved. We've dispatched from a work order. We need them to pick cargo up, and they say we don't have the availability to pick this cargo up until X date, which I assume would be after the free time.

Q. Okay. In that scenario, that is ZIM's responsibility for resulting charges; is that correct?

A. Correct.

Q. If Samsung with its preferred trucker issues a work order at exactly the same time in exactly the same way and that preferred trucker has precisely the same lack

of availability as a house trucker, that's – the resulting charges, it's ZIM' position, or the consignee's responsibility; is that correct?

A. Correct.

Q. Okay. From a – what is the difference between those situations other than hiring of the preferred – excuse me – the designation of a preferred trucker; is that the only difference?

A. The difference is that, if it's a ZIM house trucker that has no availability, we have the ability to find a trucker that can deliver it sooner.

Q. Does ZIM not have that availability with respect to a preferred trucker arrangement?

A. No.

Q. Why is that?

A. Because the customer has stated, that's the only (trucker) that can deliver the cargo." CX_02925, Speight Dep, 126:14-127:18.

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.

Response: Denied as stated. The email referenced in this PFF speaks for itself and was generated at the beginning of the pandemic without the benefit of hindsight today. As to the quoted language, ZIM's CFO testified: "I think we are talking about the beginning

of the pandemic, and a question about ZIM’s policy regarding, you know, how to address that period with a lot of uncertainty.” CX_05393, Rosenberg Dep Tr, 90:11-16.

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.

Response: Denied as stated. The cited paragraph from Respondent’s liability expert also explained the cause of the increased number of days which resulted in detention and demurrage: “This was not due to an industry-wide container ship line strategy to let containers sit, but rather the unparalleled supply chain congestion that occurred as import container volumes roared back, after the Covid-19 lockdowns and labor shortages hurt capacity. This congestion seriously impacted port terminals, drayage, rail intermodal terminals and customer warehouses.” CX_06773, 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.

Response: Denied as stated. Admit that the cited testimony was transcribed correctly but avers that it was incomplete. Mr. Michalski also testified:

“So from an industry perspective, there was a significant change in the supply chain network throughout North America.

Q. And from a ZIM level, though, there was no change?

**A. We kept on delivering freight. No change. Our responsibilities didn’t change.
CX_03948, Michalski Dep. Tr. 152:8-13.**

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.

Response: Denied. If a container was not available for delivery, then demurrage would not be charged to a customer if it was accrued due to conditions for which ZIM was responsible. Examples were given by ZIM witnesses:

"In the event that ZIM weren't able to deliver a nonpreferred door move, we would be responsible for the demurrage." CX_02645, Frigo Dep Tr, 172:20-22

"ZIM would be responsible on a non-preferred door move where we had the responsibility to find a vendor to deliver in time, if the warehouse were able to receive and it was fully cleared." CX_02647, Frigo Dep Tr, 174:17-21

"Q. ...is it Zim's practice, policy and procedure to charge a consignee for demurrage in a door move when cargo is not available for pickup?

A. No." CX_04169, Haynie Dep Tr, 163:6-11

"If it's not available for pickup, then Zim should not be charging it. It has to be available." CX_04169, Haynie Dep Tr, 163:22-24

Further, the evidence cited does not support the statement in this PFF that "waiver requests related to Port Congestion were denied because of 'No ZIM Error.'"

3. Empty Return Restrictions

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

Response: Denied. There is no evidence cited which supports this PFF. Mr. Michalski testified that he was not aware of any instance where capacity was full and a shipper stored containers on behalf of ZIM. CX_03919-20, Michalski Dep. Tr. 123:14-124:21. Instead, Mr. Michalski had experienced periods of “20, 30, 40, 50 days” where a shipper held a container and did not return it. *Id.*

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

Response: Denied. The evidence cited does not support this PFF and is unclear in its meaning without citing to corresponding testimony or additional context.

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-ZIM0014225.⁸

Response: Denied. The evidence cited does not support this PFF nor does it contain the quoted language. Neither the reference to SEA’s Appendix nor the document referenced by Bates number (appearing at CX_07328) includes this language. RX_1586-87, SEA0015506-07 contains the quote in this PFF and shows that SEA raised questions about

⁸ The email in question did not contain reference to specific container numbers.

containers without any details regarding the container numbers, location of the alleged issues, or other information. When asked to provide an example of a container number and who reported the alleged issues, SEA does not appear to have responded. *Id.*

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.

Response: Denied as stated. The two pages cited from the email in support of this PFF explain that chassis shortages in the U.S. are attributable to consignees: “customer sitting on boxes longer for a variety of reasons hence shortage on chassis.” (emphasis supplied) As to SEA, the email states that SEA had retained 8 containers for more than 30 days, without attributing fault to ZIM. The remainder of the entire email string confirms that containers are not moving due to the failure of consignees to take delivery of their shipments. CX_07236-CX_07246, ZIM0075534-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.

Response: Admit that the email cited in support of this PFF confirms that SEA had, during the time frame described in the email, allowed 1,311 containers to incur detention. The request that Maria Kristina Fernando and Regino Carino “provide the trucker,

shipment status/location and action plan” confirms that this issue was caused by SEA. Deny there is any evidence in the cited email to support the statement that any “ZIM containers” incurred detention.

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.

Response: Denied. The evidence shows that loads *scheduled for delivery* were at most believed to have been canceled by ZIM. CX_07186-CX_07189, SEA0062920-SEA0062923. There is no evidence ZIM actually canceled delivery of these containers. Other empty containers, scheduled for pickup, were at risk of going into per diem because they had been dropped at the customer and there was “low or no inbound volume” from SEA that would support the retrieval of these containers which were not live unloaded. *Id.*

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.

Response: Denied. The email referenced shows only that SEA requested that ZIM stop its per diem clock to accommodate return reservation times available from CSX to XPO. CX_07235, SEA0136021. SEA has not shown with this email alone that XPO did not receive a response from ZIM or that the containers in question led to per diem charges for SEA’s account. *Id.*

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.

Response: Denied. There is no allegation of any specific mismanagement by ZIM of any particular shipment at any particular time or location. There is no evidence cited which supports this vague and general PFF.

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, SEA0051129.⁹ ZIM 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.*

Response: Denied. The complete response from ZIM to the email quoted in this PFF, which is found at CX_07317, SEA0051138 and not at the page set forth above, states: “Good morning. A similar email was sent on 7/22. I advised the cntrs were in demurrage and needed to be paid to load cntrs to train. Demurrage has sent invoices the same day and there was no response from you and your team; email attached for your review. Note, the invoices were through 07/24. New invoices must be sent, +demurrage to assist.” Contrary

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

to the assertion in this PFF, this is one of the many examples of delay caused by SEA's non-responsiveness.

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.

Response: Denied that SEA incurred damage "(a)s a consequence of ZIM's failure to handle rail movement..." The amount of \$540,606 described in this PFF does not appear at CX_06248 nor can it be calculated from the figures listed on that page. Further, ZIM's damages expert has opined that "SEA and its expert, Smith, have presented a financial damage analysis that utilizes unreasonable assumptions, disregards relevant facts and overly simplifies a complex situation to generate a loss claim that necessarily overstates any loss SEA may have incurred attributable to ZIM's alleged misconduct." CX_6503, Zayas Report, ¶7 The Zayas Report further opined that "Smith failed to perform a loss analysis meeting the professional standards for "litigation" services established by the AICPA or reasonableness standards established by courts requiring him to acknowledge and assess other factors that would impact his loss analysis." CX_06504, *Id.* ¶9 (f) The Zayas Report also concluded that SEA's expert did not comply with applicable accounting standards, stating in ¶37: "Smith's analysis of SEA's claimed loss arising from payment of "inland transportation" charges paid ZIM and others does not comply with applicable professional standards as it does not constitute a reasonable analysis and assessment of losses that SEA sustained due to ZIM's alleged failure to perform under terms of the assumed "store door" arrangement. CX_6511, *id.* at ¶37.

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.

Response: Denied as stated. Admit that an ocean carrier is responsible for moving cargo to the inland delivery point under a store door or door to door move and that, in the case of SEA, the consignee is responsible for accrued demurrage, detention and storage fees arising from the failure of SEA's CNT or preferred trucker to perform: "Any expense or charge in excess of the compensation rate set forth at Appendix G, including demurrage, detention, or other storage fees, which accrue or are assessed as a result of the Merchant's nomination of a new or alternate Preferred Trucker, or as a result of the Preferred Trucker's failure to accept or perform a Transport Order, shall be to the account of the Merchant." RX_1794, Service Contract 7100204807; RX_1821-22, Service Contract Z18436KR; RX_1857, Service Contract 7100171730; RX_1885, Service Contract Z19179KR, and RX_1925, Service Contract 7100102863 (see Section 12a of each Contract). See also, CX_02922, Speight Dep, 123:5-22; CX_04159-4161, Haynie Dep, 153:3-155:4.

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).¹⁰

Response: Denied as stated. The documents cited do not support this PFF. CX_000000 is a citation to a document that does not appear in SEA’s Appendix. Furthermore, the evidence cited stands for the premise that SEA was invoiced for charges it accrued pre-pandemic and that those charges were assessed to determine the cause of the charge and the responsibility for paying it. CX_05793-94, BRG Report ¶ 18. Nothing in the evidence cited suggests that SEA was billed less than the inland charges that accrued for its account or that ZIM paid charges for which SEA was responsible. *Id.*

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).

Response: Denied as stated. The documents cited do not support this PFF. CX_07177-CX_07185, SEA0133446-454 are communications between SEA and its preferred trucker regarding the “bobtail” costs for retrieving empty containers; CX_07152-CX_07167, SEA0066159-174 involves the same issue, and furthermore highlights the cumbersome process SEA imposes on its vendors with respect to cost approvals. In response to SEA’s request for “bobtail” costs, SEA’s preferred trucker responded: “We’ve sent you the rates at least 3 times already these are all Savannah empties sitting at Kissimmee.” CX_07163, SEA0066170. In response, the counterpart at SEA responded: “I’m not

¹⁰ 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.

authorized to approve any charges, what I do is gather the information and inform Kristina and she will decide if bobtail is needed. The reason I've (*sic*) keep asking your rate is because of the approving purpose (*sic*)." CX_07163, SEA0066170. To the extent SEA refers to Mr. Smith's report, the report stands only for the premise that SEA reviewed and addressed questions and concerns about invoices it received in a timely manner prior to the pandemic. CX_05793-94, BRG Report ¶ 18.

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 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.

Response: Denied. The cited testimony from Ms. Speight involves ZIM's responsibility when a house trucker, as opposed to a CNT or preferred trucker, fails to perform. In her response, which appears at 135:4-7, Ms. Speight predicates her answer with the comment "...we talked about this earlier" – testimony in which she distinguished between ZIM's responsibility for a house trucker, as a opposed to a preferred trucker. The earlier testimony that Ms. Speight follows:

Q. With respect to ZIM trucker availability, is the – is the relative lack of availability of trucking, does that differ on the basis of whether a particular trucker is a house trucker or acting as a preferred trucker?

A. So if it's a preferred trucker, we're not managing that move. We may be issuing a work order, but it's – you know, we scheduled it in the same way we issue a work order in exactly the same say, but they're not trucker that are controlled by ZIM.

* * * * *

Typically, the preferred trucker is – the preferred truckers are going to work directly with the customer. So they will – the customer will manage their delivery expectations with that trucker. CX_02922, Speight Dep. Tr. 123:5-22

Even SEA’s liability expert, John McCown, who cited the abbreviated testimony at Speight Dep. Tr. 135:4-7 in support of his opinion that a carrier’s responsibility extends to the inland delivery point, reluctantly admitted his error when confronted with the latter testimony:

Q. So you agree, based on Ms. Speight’s testimony, that she’s making a distinction between ZIM’s obligations for a preferred trucker versus a house trucker, correct?

(Objection by counsel)

A. She’s making that distinction. I see that. CX_08771, McCown Dep. Tr. 179:7-15.

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.

Response: Denied. The complete testimony from Ms. Haynie emphasized that ZIM would only be responsible for demurrage if a container was not available for pick-up due to fault on the part of ZIM. Tellingly, when confronted with the testimony that Ms. Haynie gave, even SEA’s expert agreed:

“Q. ...so you agree that this testimony in whole is saying that if a container is not available and it’s ZIM’s fault, it’s not going to charge for demurrage, is that a fair summary of her testimony?

A. Yes, it seems like it. CX_08775, McCown Dep. Tr. 183:19-23

The reliance upon testimony from Mr. Frigo is also misplaced. First, there is no testimony at Dep. Tr. 164:12 (CX_02637) which supports this statement. Indeed, SEA’s counsel has made the same mistake that SEA’s liability expert made, who mistakenly relied upon this same citation and, at his deposition, admitted that he did so in error:

“Q. You, quoted at page 164, line 12 – and I think there’s another typo here, so I’m forewarning you. Just – you agree there’s a typo here, you’re not citing to the right testimony?

A. Yes.” CX_08776, McCown Dep. Tr. 184:15-20

And, when he was directed to the actual testimony from Mr. Frigo that he intended to rely upon, SEA’s expert admitted that it did not support the statement he advanced:

“Q. I’m going to help you find it...Go to page 172.

A. Oh, my gosh.

Q. And I think the lines you intended to cite to were 20 to 22. Just tell me if we’re correct about that?

A. Yes.” CX_08777, McCown Dep. Tr. 185:2-8

And, the actual testimony from Mr. Frigo contradicts this PFF:

“Q. Are you ever involved with D&D charges handled with terminals?

A. I can be on door moves.

Q. Could you walk me through that with regard to door moves?

A. In the event that ZIM weren't able to deliver a nonpreferred door move, we would be responsible for the demurrage.

Q. And what does that mean that ZIM is responsible for the demurrage?

A. On a nonpreferred move where we're selecting the vendor if we're unable to find a vendor that can out-gate it by the last free day, we would be responsible until we could.

Q. Has that always been the case?

A. To my knowledge, yes.

Q. Is this a ZIM policy?

(Objection and discussion between counsel)

A. This has been our practice.” CX_02645, Frigo Dep. Tr. 172:15-173:10

Finally, when confronted with this testimony, SEA's liability expert again admitted it did not support his opinion:

“Q. You agree that in this answer Mr. Frigo is limiting his answer for ZIM's responsibility for demurrage to movements by motor carriers who are nonpreferred, agreed?

A. Agreed. Yes.

Q. Okay. And that this testimony does not apply to a preferred trucker; is that correct?

A. That's correct.” CX_08778, McCown Dep. Tr. 186:4-11

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.

Response: Denied as stated. Admit to the extent that Mr. Smith’s calculation shows less than \$10,000 of demurrage incurred by SEA in 2020. However, according to Mr. Smith’s chart, the D&D charges overall during the four quarters of 2020 included \$156,840 in detention charges which could be considered “sizable.” CX_05931, BRG Report Ex. 2.

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.

Response: Denied. There is no documentary evidence which supports the claim that SEA paid “under protest”, other than the self-serving, post-suit statement by Mr. Rapke at his deposition. To the contrary, SEA did, in fact, pay demurrage in order to have its cargo released prior to the pandemic. See, RX_1576-82, SEA0003414-20 (in May of 2019, a warehouse double booked a delivery, a mistake that resulted in container demurrage. Payment was arranged by Ms. Fernando of SEA through UPS “to Baltimore port directly”); RX_, SEA0005144 (evidencing coordination and guarantee of charges by Ms. Fernando of SEA for container demurrage in February of 2019).

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.

Response: Denied. The “Catch-22 situation” which SEA now alleges was of its own making. Contrary to its assertion in this PFF, SEA had options in terms of how it arranged to pay terminals such as reliance on UPS and its motor carriers for assistance with payment.

RX_1561-67, SEA0012026-32 (evidencing Pay Cargo, Cargo Sprint, or wire transfer as payment options to ZIM for demurrage where CNT, PBI, ultimately paid the bill for SEA); RX_1580, SEA0003418 (confirming Samsung instruction to UPS to complete payment for demurrage accrued due to customer scheduling issues in order to release containers from the terminal).

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.

Response: Denied. SEA has failed to show that demurrage billing practices underwent “significant changes,” and evidence shows the contrary. RX_1580, SEA0003418 (in May of 2019, a warehouse failure resulted in container demurrage that was arranged by Ms. Fernando of SEA to be paid by UPS “to Baltimore port directly”).

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).

Response: Admit. In 2021 and 2022, SEA incurred detention and demurrage charges that were greater than prior years because it and/or the CNTs it required ZIM to utilize allowed thousands of containers to remain on terminals and failed to return empties after the expiration of free time.

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.*

Response: Admit.

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.

Response: Denied as stated. The testimony cited does not support this PFF. Testimony at CX_03848, Michalski Dep. Tr. 52:2-5 states it was possible that certain areas of the U.S. experienced chassis shortages, and the remaining testimony on that page describes the steps ZIM took to address those shortages:

“We provide TRAC Intermodal (ZIM’s chassis provider) on the chassis side with forecasts on a weekly basis. So the forecast would be given to them to ensure or to plan for chassis in a given service area.” CX_03848, Michalski Dep. Tr. 52:10-13
Testimony at CX_03872, Michalski Dep. Tr. 76:13-21 describes the steps ZIM was taking to eliminate long dwell times and ensure containers were delivered promptly:

“And looking at this email, it – based on the date, which is February 24th, which is a – in the Midwest right in the middle of potentially severe weather, which could contribute to delays, congestion, driver availability. He’s basically telling Dan what has been or what we are doing to help secure truck power to eliminate the long dwell and ensure contains are delivered as quickly as possible.” CX_03872, Michalski Dep. Tr. 76:13-21

Mr. Michalski also testified:

“So from an industry perspective, there was a significant change in the supply chain network throughout North America.

Q. And from a ZIM level, though, there was no change?

A. We kept on delivering freight. No change. Our responsibilities didn’t change. CX_03948, Michalski Dep. Tr. 152:8-13.

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.

Response: Denied as stated. The evidence cited speaks for itself.

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.*

Response: Denied as stated. The evidence cited speaks for itself.

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.*

Response: Denied as stated. The evidence cited speaks for itself. At her deposition, Ms. Rosenberg highlighted the uncertainty that was ongoing at the time the email was written. CX_05395, Rosenberg Dep. Tr. 92:4-20 (highlighting that this email was written during a period with “a lot of uncertainty. . . at the peak of uncertainty in the beginning of the pandemic” as an attempt to determine how to move forward with strategy and policy).

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.

Response: Denied. The cited evidence does not support this PFF.

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.

Response: Denied. No evidence was cited to support this PFF.

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.

Response: Denied. No evidence was cited to support this PFF. If ZIM did misdirect a charge, SEA’s personnel did not undertake to assist with redirecting within Samsung or even reply to ZIM that a charge was misdirected; Ms. Fernando, accordingly to her testimony, would only note that she was not responsible for an invoice. CX_02401, Fernando Dep. Tr. 81:16-82:7.

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-ZIM0025380.¹¹

Response: Denied as stated. Admit that four invoices were identified in the email marked CX_07258-CX_07259 which Peter Kim rejected but deny that SEA has cited evidence which confirm that the rejections were proper.

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.

Response: Denied as stated. Admit that SEA claimed that charges were incorrectly assessed, but deny that SEA has cited evidence which confirm that the rejections were proper. RX_0637-38, ZIM0030255-56 (noting that the overdue balances for SEA were constant and continuous and were not timely paid or disputed by SEA).

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.

Response: Denied as stated. Admit that SEA claimed that charges were incorrectly assessed, but deny that SEA has cited evidence which confirm that the rejections were proper. RX_0637-38, ZIM0030255-56 (noting that the overdue balances for SEA were constant and continuous and were not timely paid or disputed by SEA).

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

¹¹ Referencing containers: ZCSU70876, ZCSU89094, ZCSU84738, ZCSU71353, ZCSU86281, ZCSU87856.

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.

Response: Denied as stated. Admit that Adrienne Martin informed Cristina Marucut that “the remarks provided do not indicate any dispute or billing discrepancies” and thus ZIM was “unable to remove the account from hold.” Deny that SEA has cited any evidence which confirms that the charges were incorrect. RX_0637-38, ZIM0030255-56 (noting that the overdue balances for SEA were constant and continuous and were not timely paid or disputed by SEA).

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.

Response: Denied as stated. Although there were multiple Samsung SDS-affiliated entities shipping under the same contract, SEA failed to respond to invoices addressed to other departments within SEA and its affiliated entities, and thwarted ZIM’s efforts to collect on invoices by refusing to respond to ZIM or redirect invoices to its affiliate partners. See, CX_02442, Fernando Dep. Tr. 122:11-19 and CX_02443-4, Fernando Dep. Tr. 123:13 - 124:3 and response to PFF no. 124, *infra*. This latter behavior highlights the shell game that SEA played, claiming an invoice was issued to the wrong “department” which was, nevertheless, still within SEA.

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.

Response: Denied. On April 22, 2022, Mr. Lee only emailed internal SEA personnel. On May 2, 2022, Mr. Lee included Ms. Bennett on his email. This email string highlights that SEA ignored significant amounts of AR, totaling \$630,301.04, for 2,405 days and only began to look into the underlying charges when a cargo hold was threatened.

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.

Response: Denied as stated. This PFF highlights the confusion created by SEA. The correspondence referenced in this PFF confirms that amounts were due and owing by SEA. The fact that SEA is claiming amounts are owed to ZIM by its affiliates and the affiliates are claiming amounts are owed to ZIM by SEA confirm that all the Samsung entities were delinquent in paying ZIM. The emails also evidence receivables of \$1,337,922.81 which, according to SDS, was owed by SEA. CX_07471-72, ZIM024577-78.

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.

Response: Admit. This highlights two things: SEA was creating confusion about the AR it owed; and, that ZIM did the right thing, i.e., released SDS shipments when ZIM was advised. Ilana testified: “It is not a straightforward, easy resolution, and it is not supported clearly in a straightforward way.” CX_05540, Rosenberg Dep. Tr. 237:23-238:1

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.

Response: Denied as stated. The testimony does not support this PFF. Ms. Rosenberg testified: Yes. When you say timely, we want to be able to – or want/need to be able to be more timely on our now billing processes.” CX_05435, Rosenberg Dep. Tr. at 132:4-6.

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.

Response: Denied. Nothing in the evidence cited suggests that a “well-established business practice.” CX_04638, Cleva Dep. Tr. 109:11-21. Furthermore, ZIM had a robust dispute resolution process in place:

“Q. We’ve discussed the demurrage committee a little bit just now. A part – that’s considered a formal dispute process; is that correct?

A. The submission to the demurrage committee?

Q. Yes. Yes.

A. Yes. That’s a formal process.” CX_4608, Cleva Dep. Tr. 79:1-6

* * * * *

“Q. Is there any other way a customer can bring about disputes to ZIM’s attention with respect to the D&D charges?”

A. Yes, there is.

Q. What is that?”

A. Currently, right now, we have a portal, if you will, on our website, a disputes portal, that customers are invited to use. Before that was in existence, we do have a disputes team within finance that customers can fill out their detail, or reasons for dispute, and submit it to that team, which was also – the instructions of which were on the website prior to the portal.” CX_04608, Cleva Dep. Tr. 79:16-80:3

Further deny that “it was a well established practice at ZIM to issue invoices that included D&D charges that were clearly time-barred.” ZIM America’s CFO, Ilana Rosenberg testified as follows:

Q. In general, does ZIM bill all un-invoiced demurrage regardless how old it is?”

A. In general, unless decided specifically, but, yes.

Q. Including the ones that are – that you have determined to be time barred?”

A. No.

Q. Time-barred demurrage do not go out; is that right?”

A. No. It can go out if the system generates it or its’ generated by system, but if it’s a contractual time bar, and we will adjust or cancel the invoice, the invoice if it went out.

Q. Okay.

A. The idea is that it won’t go out, but if it did, it’ll be adjusted if it’s a contractual time bar.” CX_05427, Rosenberg Dep. Tr. 124:5-18

Finally, deny that this PFF is relevant because it does not concern SEA and there is no evidence that “time barred” invoices were issued to SEA.

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.”)].

Response: Denied as stated. See, response to PFF no. 95 and the complete testimony given by Ms. Rosenberg which is cited therein. This PFF furthermore misrepresents the testimony given by Ms. Rosenberg and Ex. 9 marked at the deposition of Mr. Cleva, and fails to cite to testimony from Mr. Cleva regarding Exhibit 9 which confirmed that “these invoices are valid, albeit very delayed.” CX_04652, Cleva Dep. Tr. 123:9-10. Further, that Mr. Cleva managed this issue in a professional and proactive way by speaking with the customer:

“At this current point in time, I did speak to OEC, but the matter wasn’t necessarily closed. We have a very good relationship with all of our customers, but OEC, the relationship is strong, and if there was some type of commercial arrangement to be made, I was given – I was suggested to search that possibility before we closed it out entirely.” CX_04656, Cleva Dep. Tr. 127:18-24.

Further deny that this PFF is relevant because this it does not concern SEA and there is no evidence that “time barred” invoices were issued to SEA.

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.

Response: Denied. The quoted language does not appear in the evidence cited. Further deny that the invoices referenced in this PFF were invalid or uncollectible. See, reply to PFF no. 96. Further deny that this PFF is relevant because it does not concern SEA, and there is no evidence that “time barred” invoices were issued to SEA.

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.

Response: Denied as stated. In the same exhibit, Yael D’Angeli, Head of Strategic Accounts for ZIM advised the customer who received the email referenced in this PFF: “Our system is sending it automatically. What we are doing instead is to ensure our internal processes are improving so you will see less and less cases of late invoicing. We are monitoring this process and are already seeing better results. Pls send us the disputed invoices and we will review ASAP and amend as per agreement.” CX_04759, Cleva Dep. Exh. 8. Further deny that this PFF is relevant because this it does not concern SEA and there is no evidence that “time barred” invoices were issued to SEA.

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.*

Response: Admit that the abbreviated quotation in this PFF was transcribed accurately. Deny that this PFF is relevant because it does not concern SEA and there is no evidence that “time barred” invoices were issued to SEA.

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.

Response: Admit.

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.

Response: Admit.

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.

Response: Denied as stated. This PFF is exaggerated and not an accurate characterization of the testimony:

Q. ...as far as you know, during your tenure at ZIM, has Samsung been always a strategic account for ZIM?

A. As far as I know, or as long as the program has been in place, yes.”

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.

Response: Denied. This is a misrepresentation of the testimony that is referenced in support of this PFF:

“Q. Time-barred demurrage do not go out; is that right?”

A. No. It can go out if the system generates it or it’s generated by system, but if it’s a contractual time bar, and we will adjust or cancel the invoice, the invoice if it went out.” CX_05427, Rosenberg Dep. Tr. 124:11-18.”

Further, deny that this PFF is relevant because it does not concern SEA and there is no evidence that “time barred” invoices were issued to SEA.

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.

Response: Denied as stated. This PFF exaggerates a unique circumstance in which validly incurred demurrage charges were not billed within the time frames specified in the customers’ service contracts. This email string emphasized that the charges were valid while at the same time recognizing that they would be resisted by the customers: “These are not unjustified however we are fully aware of the challenge to collect on old invoices.” CX_04769. The difficulty in collection was due to the fact that the affected customers were NVOCCs who would not be able to pass the delayed charges through to their customers. In light of this, the email string emphasized “(w)e will negotiate where needed and will be open to compromise in light of the challenges we faced.” And, it was emphasized that the customers be asked “to waive this (time bar) clause for this time (one time, due to out of ordinary circumstances...)” CX_04769. Further deny that this PFF is relevant because it does not concern SEA and there is no evidence that “time barred” invoices were issued to SEA.

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.

Response: Denied as stated. Admit that Mr. Dotan was EVP Countries & Business Development and that he advised Ms. Rosenberg that “90 days in the U.S are 82% from the total over 90 days of the company.” Deny the remainder of this PFF.

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.

Response: Denied as stated. Deny that the quoted language in this PFF has been accurately transcribed from the referenced exhibit. Further deny that “ZIM U.S. Finance team ultimately reports” to Mr. Dotan:

“Q. So at the time, Mr. Goldman (President of ZIM America) reported to Mr. Dotan? Is that correct, or no?

A. No.” CX_05392, Rosenberg Dep. Tr. 89:19-22

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.

Response: Denied as stated. The partial quote transcribed in this PFF misrepresents the intent of Exhibit 11, which confirms the efforts ZIM was engaged in to improve its invoicing system. The entire quotation states: “Zim systems are not set up to execute the manual and special invoicing requirements agreed to within the service contracts. IT enhancements are needed to eliminate/reduce the amount of manual effort spent to invoice according (to) the customer’s requirements. These enhancements will also help to reduce the delays and errors.” CX_05628, Rosenberg Dep. Ex. 11 Further deny that this PFF is relevant because it does not concern or refer to SEA.

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.

Response: Deny that this PFF is relevant because it does not concern or reference SEA. Also deny to the extent that this PFF refers specifically to customers of the ZIM ZEX service rather than the broader customer group to which SEA belongs. 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.

Response: Deny that this PFF is relevant because it does not concern or reference SEA. Deny further to the extent that this refers specifically to customers of ZIM’s ZEX service rather than the broader customer group to which SEA belongs. CX_05651, Rosenberg Dep. Ex. 12 at 5.

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

Response: Denied as stated. This PFF misrepresents the testimony of Ms. Rosenberg:

“...in this particular discussion, as was stated before, we’re talking about consignees with very little connections or relationships with the U.S. agency. Therefore, the information that sometimes was provided to us was – most of the time was incorrect in those cases. So, some of the invoices, the consignees did not receive them because the contact information was not – accurate, for example. Others, they definitely

received them. So there were different scenarios of those lists and those case.” CX-05444-5, Rosenberg Dep. Tr. 141:25-142:9.

Further deny that this PFF is relevant because it does not concern or reference SEA.

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.

Response: Deny that the quotation referenced in this PFF has been accurately transcribed or that the quoted message was sent by ZIM’s U.S. CFO. Deny that this PFF is relevant because it does not concern or reference SEA.

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.*

Response: Deny that this PFF is relevant because it does not concern or reference SEA.

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.

Response: Denied. The term “Finance Hold” is not used in the deposition of Ms. Rosenberg or the evidence cited in this PFF, and is neither recognized nor acknowledged by ZIM in this proceeding. The quotes transcribed and the facts alleged in this PFF do not appear in and are not supported by CX_05672, Rosenberg Dep. Ex. 15. Further deny that this PFF is relevant because the cited exhibit does not concern or reference SEA.

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.

Response: Admit that the quote referenced in this PFF has been accurately transcribed. Deny that this PFF is relevant because it does not concern or reference SEA.

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.

Response: Denied as stated. The term “Finance Hold” is not used in the depositions of Ms. Rosenberg or Mr. Yaacoub or the evidence cited here, and is not recognized nor acknowledged by ZIM in this proceeding. This PFF does not accurately characterize the testimony of Ms. Rosenberg:

Q. So my question to you is, were you wanting to change the speed of the collection process for strategic accounts in response to that global CEO's message?

A. The answer is yes. But I want to explain, as I mentioned before, we are talking about here a period of very high activity with a very high volume. And looking at the time line of the collection versus the collection procedure, we are far behind moving from one step to another, and you can see this large distances and long periods before one step to the other. So the point here is that we will start to get closer to our guidelines, rather than taking month and month between each and every step or several weeks between steps, and that's the point here.

Q. And just for clarity, your point in saying this paragraphs are in an attempt to bring the collection process more in compliance with the collection policy in terms of time line; is that fair to say?

A. It is very fair to say.” CX_05459, Rosenberg Dep. Tr. 156:2-21.

Further, deny that this PFF is relevant because it does not concern or reference SEA.

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.

Response: Denied as stated. The term “Finance Hold” is not used in the depositions of Ms. Rosenberg or Mr. Yaacoub or the evidence cited here, and is not recognized nor acknowledged by ZIM in this proceeding. Admit that the quotes referenced in this PFF have been accurately transcribed. Deny that this PFF is relevant because it does not reference SEA.

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.

Response: Denied as stated. Admit to the extent that the quotation from the email cited in this PFF was accurately transcribed. Deny that this PFF is relevant because it does not reference SEA.

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.

Response: Denied as stated. Admit to the extent that the quotation from the email cited in this PFF was accurately transcribed. Deny that this PFF is relevant because it does not reference SEA and there is no evidence that time barred invoices were issued to SEA.

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,

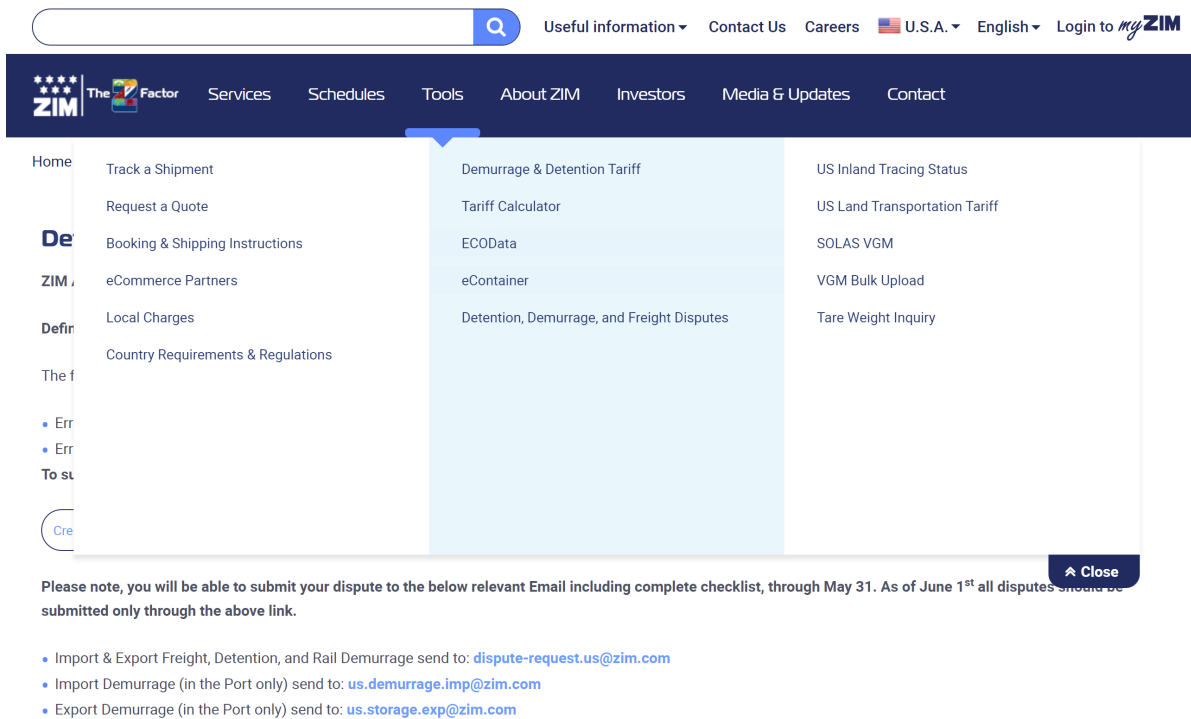
resulting in further detention charges and injuries. CX_02144-CX_02145, Choi Dep. Tr. 95:18-96:20.

Response: Denied. The cited testimony does not support this PFF. In the cited testimony Mr. Choi asserts that ZIM, on its own initiative, should have “pre-pulled” containers from terminals in order to avoid demurrage. There is no testimony regarding container and equipment returns or detention in the cited testimony.

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.

Response: Denied as stated. The term “Finance Hold” is not used in the deposition of Mr. Yaacoub and is not recognized nor acknowledged by ZIM in this proceeding. The quote here misstates the testimony which says “If the invoice is disputed, we don’t do any credit suspension or *cargo hold*.” 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.



Response: Denied. The cited testimony does not support this PFF. Submission of a dispute through the portal found at ZIM’s website is one way to submit a demurrage or detention dispute:

“Q. Is there any other way a customer can bring about disputes to ZIM’s attention with respect to the D&D charges?

A. Yes, there is.

Q. What is that?

A. Currently, right now, we have a portal, if you will, on our website, a disputes portal, that customers are invited to use. Before that was in existence, we do have a disputes team within finance that customers can fill out their detail, or reasons for dispute, and submit it to that team, which was also – the instructions of which were on the website prior to the portal.” CX_4608, Cleva Dep. Tr. 79:16-80:3

In addition, ZIM responded to requests outside of the specific portal, including by email. RX_0838, SEA0014631 (SEA disputed five invoices over email, and ZIM agreed and canceled the invoices).

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>.

Response: Denied. The screen shot from ZIM’s website, CX_08317, contains a hyperlink, “company’s local offices”, which provides the customer with a customer service telephone number and numbers for all of ZIM’s local offices. In addition to using the portal on ZIM’s website, a customer can also request that its account representative present its dispute to the Demurrage Committee:

“Q. How do you decide whether to bring a case before the demurrage committee?

A. Usually, it's driven by a customer escalation, a customer concern.

Q. By customer concern, do you mean customer complaint?

(Objection by counsel)

THE WITNESS: It could be seen as a complaint, sure, an issue raised.

Q. What do you mean by customer concern?

A. Something that the customer might be disputing. Something might be inaccurate. CX_04602, Cleva Dep. Tr. 74:6-19.

Furthermore, ZIM responded to requests outside of the specific portal, including by email. RX_0838, SEA0014631 (SEA disputed five invoices over email, and ZIM agreed and canceled the invoices). Customers could also raise issues directly with ZIM management personnel. CX_03091, Yaacoub Tr. 34:16-21; CX_03093; 36:3-11; Weingartner Tr., CX_04901; 95:4-10.

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.*

Response: Denied. There is no evidentiary support for the second sentence of this PFF. Further, the complete testimony given by Mr. Yaacoub states:

“Q. So it’s your position, once an invoice or the amount is disputed, that invoice, the amount implicated in that invoice is in a – sort of a timeout zone; it doesn’t get – you know, it’s sort of separated from the normal course of business? Am I getting that right?”

(Objection by counsel)

THE WITNESS: Once the invoice is disputed, formally disputed, we won't take any action on those invoices.

Q. By formal dispute, do you mean to say there are informal or nonformal disputes that do not rise to the level of formal dispute?

A . There is a formal dispute procedure they publish on our website –

Q. Okay.

A. --and customers need to follow that procedure.” CX_03199, Yaacoub Dep. Tr. 142:6-24.

Furthermore, ZIM responded to requests outside of the specific portal, including by email from SEA disputing five invoices, and let SEA know that “[i]n the meantime there should be no further collections efforts on them.” RX_0838, SEA0014631.

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.

Response: Denied. The testimony cited does not support this PFF. To the contrary, it confirms the lackadaisical attitude employed by Ms. Fernando who, instead of following any of the processes established by ZIM for contesting a demurrage charge (submission through the ZIM portal or presentation of a dispute to the Demurrage Committee through SEA’s account representative) simply returns the invoice to ZIM. This is highlighted by her handling of invoices which she claimed were sent to her, instead of a different department within SEA:

“Q. If you have an invoice that doesn’t belong to the direct ship team, do you send it to the team that should be dealing with it?

A. You mean within Samsung?

Q. Yes.

A. No.

Q. Why not?

A. Because this is not my task. It should be ZIM’s task to know where to send all the correct invoices.” CX_2442, Fernando Dep. Tr. 122:11-19

Astoundingly, Ms. Fernando admitted she does not even forward invoices to the correct person(s) within SEA:

“Q. So if you receive an invoice, the direct ship team receives an invoice and its not theirs, it belongs a different team within SEA, you don’t’ forward it. You just return it to ZIM and tell them to return it to the correct department?”

(Objection by counsel)

THE WITNESS: If they send us an invoice that it’s SEA, but it’s not under my department, we inform ZIM that it is not direct ship. So now once they receive that one, it’s their job to send those information to the correct department.

Q. Do you tell them what the correct department is?

A. No.” CX_02443-4, Fernando Dep. Tr. 123:13 - 124:3.

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.

Response: Admit that ZIM’s Demurrage committee reviewed cases with information provided by the customer and collected internally. Deny that ZIM relied solely on the Demurrage committee (see response to PFF #121) and deny that the Demurrage committee’s sole function was to determine inaccuracy.

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.

Response: Denied as stated. The testimony from Ms. Rosenberg was that a customer cannot directly request a waiver of demurrage and detention charges of her. CX_05513,

Rosenberg Dep. Tr. 210:4-18. The testimony of Mr. Michalski generally describes the make-up of the Demurrage Committee and how it operates. CX_03891-CX_03893, Michalski Dep. Tr. 95:21-97:15. In addition, customers could appeal directly to ZIM management personnel. Yaacoub Tr., CX_03091; 34:16-21; CX_03093; 36:3-11; Weingartner Tr., CX_04901; 95:4-10.

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.

Response: Denied as stated. The cited testimony of Mr. Cleva states:

Q. How do inaccurate D&D charges get corrected?

A. It’s almost always a retroactive process. If something was invoiced incorrectly or there might be a dispute of some type, we have a demurrage and detention committee that reviews cases based on information provided by both customer and internal to deem whether something might be inaccurate or incorrectly charged. CX_04598, Cleva Dep. Tr. 69:3-10

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.

Response: Denied. The testimony cited does not support the first sentence of this PFF. Admit that Mr. Cleva testified that he was not aware of D&D charges that were not 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.

Response: Admit.

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.

Response: Admit.

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.

Response: Denied as stated. The Collections Policy speaks for itself. Further, the Collections Policy is a guideline which specifies timelines that are frequently extended but never shortened:

Q. Okay. Has this policy been reviewed and approved by yourself?

A . Correct.

Q. Is this more a rule or set of recommendations?

A. It's a guideline to our collection policy.

Q. So there are occasional deviations from the policy, depending on the circumstances?

A. Sometimes, especially with the time line.

Q. In the sense that time line can be shortened or lengthened, depending on the circumstances?

A. It cannot be shortened. Most of the time it takes more than what it says here
–

Q. Got it.

A. To move in the process. CX_05405, Rosenberg Dep. Tr. 102:8-21

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.

Response: Admit.

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.

Response: Admit.

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.

Response: Admit.

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].

Response: Admit.

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.

Response: Denied as stated. The cited testimony from Mr. Yaacoub speaks for itself.

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.

Response: Admit.

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).

Response: Admit.

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 interchanably 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.

Response: Denied. Credit suspension and cargo hold are distinct, and were explained as follows:

“Q. So within ZIM parlance, it is cargo holds and credit suspension?”

A. Yes.

Q. And both are, more or less, the same, functionally?”

A. No. Credit suspension, we remove the credit. Cargo hold, we hold the release of the cargo.

Q. Okay. Can you explain how the credit suspension works, briefly?”

A. If customer have a credit, we won’t take the credit. He need to pay all cash.”

CX_03099-03100, Yaacoub Dep. Tr. 42:19-43:3.

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.

Response: Admit.

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

Response: Denied as stated. The citation which purports to support this PFF is erroneous. Admit that Ms. Rosenberg testified as follows: “Credit suspension is when customer’s credit is being taken when the customer is not – again, based on certain criteria...” CX_05331, Rosenberg Dep. Tr. 28:16-18

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

Response: Admit.

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.

Response: Denied as stated. Admit that Ms. Rosenberg testified as follows: “First is the credit – the credit terms are being taken. Cargo hold is when the containers are being held and not released.” CX_05331, Rosenberg Dep. Tr. 28:22-24. The term “Finance Hold” is not used in the depositions of Ms. Rosenberg or Mr. Yaacoub, and accordingly is not recognized nor acknowledged by ZIM in this proceeding.

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.

Response: Denied as stated. The testimony of Mr. Yaacoub regarding the implementation of a cargo hold is: “They will put the hold on the system, on our system, and that will not allow the container to be released.” CX_03126, Yaacoub Dep. Tr. 69:13-15 The remaining citations to testimony by Ms. Rosenberg and Ms. Haynie do not support this PFF.

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.

Response: Denied as stated. The term “Finance Hold” is not used in the depositions of Ms. Rosenberg or Mr. Yaacoub, and is not recognized nor acknowledged by ZIM in this proceeding. Admit that ZIM imposed cargo holds on SEA containers for the significantly outstanding amounts reflected in CX_01570, ZIM0085708, and that ZIM is entitled to impose maritime liens on SEA shipments within its possession, pursuant to paragraph 8 of the Service Contracts, captioned FREIGHT, CHARGES AND INVOICING, which state in pertinent part, as follows:

The Carrier, its servants or agents, shall have both a maritime and contractual lien on the goods or any part thereof, and the Carrier or its Agent shall have the right to sell such goods, whether privately or by public auction, upon reasonable notice to the Merchant, for all freight (including additional freight payable as is herein stipulated) primage, deadfreight, demurrage, detention, container demurrage, charges, salvage, average of any kind whatsoever, stamps, duties, fines or penalties. The lien hereby accorded may be exercised by the Carrier, its servants or agents notwithstanding that it or they may have parted with actual or constructive possession of the goods. Nothing in this clause shall prevent the Carrier from recovering from the Merchant the difference between the full amount due, and the net amount realized by the exercise of the rights given to the Carrier under this Clause. RX_1792, Service Contract 7100204807; RX_1819-20, Service Contract Z18436KR; RX_1855, Service Contract 7100171730; RX_1883, Service Contract Z19179KR; and RX_1922-23, Service Contract 7100102863.

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”).¹²

Response: Denied as stated. Admit that ZIM imposed cargo holds on SEA containers for the significantly outstanding amounts reflected in CX_01570, ZIM0085708, and that ZIM is entitled to impose maritime liens on SEA shipments within its possession, pursuant to paragraph 8 of the Service Contracts, captioned FREIGHT, CHARGES AND INVOICING. See, response to PFF no. 145, supra. ZIM can neither admit nor deny this PFF to the extent it invokes information on pages CX_07328 and CX_07329 because these emails appear to be in Korean and a translation has not been provided by SEA pursuant to paragraph 4 (d) of the Initial Scheduling Order dated January 12, 2023.

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 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.*

Response: Denied as stated. Admit that ZIM imposed cargo holds on SEA containers for the significantly outstanding amounts reflected in CX_01570, ZIM0085708, and that ZIM is entitled to impose maritime liens on SEA shipments within its possession, pursuant

¹² Five reefer containers are under ZIMUSEL7086080.

to paragraph 8 of the Service Contracts, captioned FREIGHT, CHARGES AND INVOICING. See, response to PFF no. 145, *supra*. ZIM can neither admit nor deny this PFF to the extent it invokes information on pages CX_07328 and CX_07329 because these emails appear to be in Korean and a translation has not been provided by SEA pursuant to paragraph 4 (d) of the Initial Scheduling Order dated January 12, 2023.

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.*

Response: Denied as stated. Asserting dates on which transportation of containers "could have commenced" is speculative and not supported by admissible evidence. Admit that ZIM imposed cargo holds on SEA containers for the significantly outstanding amounts reflected in CX_01570, ZIM0085708, and that ZIM is entitled to impose maritime liens on SEA shipments within its possession, pursuant to paragraph 8 of the Service Contracts, captioned FREIGHT, CHARGES AND INVOICING. See, response to PFF no. 145, *supra*.

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.

Response: Denied as stated. The cited document does not support the facts asserted in this PFF.

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.

Response: Denied as stated. The term “Finance Hold” is not used in the depositions of Ms. Rosenberg or Mr. Yaacoub and is not recognized nor acknowledged by ZIM in this proceeding. Admit that CX_07489, SEA0023285 is an invoice for demurrage during the period February 2, 2022 to March 16, 2022 relating to container TCLU8633718.

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

Response: Admit.

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.

Response: Denied as stated. Admit that arrangements for inland transportation had to be made and that payment for demurrage was required up to the date of delivery. Deny that the documents referenced in this PFF support the assertion that arranging inland transportation would “further delay the process.”

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.*

Response: Denied as stated. The term “Finance Hold” is not used in the depositions of Ms. Rosenberg or Mr. Yaacoub and is not recognized nor acknowledged by ZIM in this proceeding. Admit that an email from Harvest Transport to SEA stated “Please be advised that 4 containers for Piscataway are scheduled for tomorrow Once we missed, the next

appointment will be 2nd week of MARCH” Deny that the documents stamped CX_07384-CX_07388, SEA0053641-645, support the assertion that SEA’s request to release the cargo hold on the containers referenced therein was rejected by ZIM.

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.

Response: Denied as stated. The term “Finance Hold” is not used in the deposition of Mr. Yaacoub and is not recognized nor acknowledged by ZIM in this proceeding. Admit that a schedule was prepared to assist Mr. Yaacoub in his testimony regarding cargo holds imposed by ZIM on SEA (“Yaacoub Schedule”).

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.*

Response: Denied as stated. The term “Finance Hold” is not used in the deposition of Mr. Yaacoub and is not recognized nor acknowledged by ZIM in this proceeding. Admit that the Yaacoub Schedule was prepared to assist Mr. Yaacoub in his testimony regarding cargo holds imposed by ZIM on SEA.

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.

Response: Denied as stated. The term “Finance Hold” is not used in the deposition of Mr. Yaacoub and is not recognized nor acknowledged by ZIM in this proceeding. Admit that, other than the Yaacoub Schedule, Mr. Yaacoub did not have any other documents in

front of him during his deposition but deny that the citation to CX_03803, Yaacoub Dep. Tr. at 26:6-10 supports the assertion in this PFF.

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.

Response: Denied. Pursuant to an Order on Motion to Compel and Cross-Motion to Amend Scheduling Order dated April 3, 2023, the “Close of all discovery” was June 19, 2023, so the schedule, CX_01570, ZIM 0085708, was indeed produced “during discovery.” Further, by the time Mr. Yaacoub was deposed, it became clear that a tactic employed by SEA’s counsel at depositions was to ask ZIM’s witnesses about detailed dates and figures, which no witness could be expected to recall or recite on command, and without showing or allowing the witness to look at documents which had been produced. As it was expected this tactic would be employed when Mr. Yaacoub was deposed, the Yaacoub Schedule (CX_01570, ZIM 0085708) was prepared shortly before his deposition to enable him to answer the detailed questions about cargo holds that it was anticipated SEA’s counsel would ask at his deposition.

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.

Response: Denied as stated. The term “Finance Hold” is not used in the deposition of Mr. Yaacoub and is not recognized nor acknowledged by ZIM in this proceeding. Admit

that the Yaacoub Schedule (CX_01570, ZIM 0085708) records that cargo holds were imposed during the dates set forth in this PFF. Upon information and belief, the October 16, 2021 date recorded in the Yaacoub Schedule is believed to be a typographical error and should be October 6, 2021.

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.*

Response: Denied as stated. The term “Finance Hold” is not used in the deposition of Mr. Yaacoub and is not recognized nor acknowledged by ZIM in this proceeding. Admits that the Yaacoub Schedule (CX_01570, ZIM 0085708) records Demurrage of \$3,802,918; Detention and Handling of \$897,019; and Rail Storage of \$502,331.

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.

Response: Denied as stated. The term “Finance Hold” is not used in the deposition of Ms. Rosenberg and is not recognized nor acknowledged by ZIM in this proceeding. Admit that the testimony quoted in this PFF has been accurately transcribed.

a. Finance Hold No. 1

161. Finance Hold No. 1 was instituted on August 5, 2020 and lasted until “Mid-August 2020.” CX_01570, ZIM0085708.¹³

Response: Denied as stated. The term “Finance Hold” is not used in the evidence cited and is not recognized nor acknowledged by ZIM in this proceeding. Admit that ZIM imposed a cargo hold on August 5, 2020 which lasted until mid-August, 2020. CX_01570, ZIM 0085708.

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.*

Response: Denied. The term “Finance Hold” is not used in the deposition of Ms. Rosenberg and is not recognized nor acknowledged by ZIM in this proceeding. Admit that the Yaacoub Schedule indicates that the cargo hold began on August 5, 2020 and that Ms. Rosenberg testified it began on August 5, 2020:

“Q. So the first cargo holds, you, correct me if I’m wrong, I believe you said August 5th, 2020, was when it started, and it ended six days later on August 11, 2020; is that correct?

A. Correct.” CX_05325 , Rosenberg Dep. Tr. 22:11-15

* * * * *

¹³

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

“Q. Just so I understand, for the first cargo hold that began August 5th to August 11th, 2020, demurrage and SEA shipment was 1500 dollars and 20 – I’m sorry -- \$1,520; is that correct?”

A. Correct. But – okay. Correct.” CX_05326, Rosenberg Dep. Tr. 25:5-9

Further admit that the Yaacoub Schedule indicates that the cargo hold ended in mid-August, 2020 and that Ms. Rosenberg testified it ended on August 11, 2020. Deny that the testimony of Mr. Yaacoub and Ms. Rosenberg are materially inconsistent.

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.

Response: Denied as stated. The term “Finance Hold” is not used in the deposition of Ms. Rosenberg and is not recognized nor acknowledged by ZIM in this proceeding. Admit that Ms. Rosenberg testified that, at the time the first cargo hold was started, the overdue balance owed by SEA was \$143,000 and that \$37,000 was paid to lift the cargo hold.

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.

Response: Denied. The testimony referenced at CX_05332 – CX_05334, Rosenberg Dep. Tr. 29:22-30:5, concerned invoicing for \$1,520 in demurrage that accrued during the first cargo hold referenced in the Yaacoub Schedule. Ms. Rosenberg testified that invoices were “issued and sent to the customer as per our regular process.” As a CFO, and without

being shown the underlying invoice, it is patently ridiculous that Ms. Rosenberg would be able to state the date that one invoice, out of thousands, was sent to SEA without being shown the document. This line of questioning, and SEA's criticism herein of the witness' answers, was typical of the tactic employed at the depositions of ZIM's witnesses who were asked to identify specific dates and amounts, without being shown the underlying documents.

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 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.

Response: Admit that SEA's Maria Kristina Fernando sent an email to Adrienne Martin and Elizabeth Harris at ZIM dated August 5, 2020 and deny the remainder of this PFF. This PFF illustrates the dilatory tactics engaged in by SEA to avoid payment of invoices until the 11th hour, i.e., on August 5, 2020, the date that the first cargo hold was imposed; and ZIM's good faith efforts in dealing with SEA when SEA finally addressed receivables that were significantly in arrears. The outstanding invoices which were summarized in the chart embedded in Ms. Fernando's email confirm how far in arrears that these outstanding invoices were and the scope of the delay employed by SEA to avoid payment:

- The dates of invoices for which Ms. Fernando claimed she needed a “breakdown” ranged from February 27, 2019 to July 7, 2020, i.e., they were outstanding for 1 – 13 months. These invoices totaled \$24,580.26.
- The dates of the “Approved” invoices ranged from February 22, 2019 to April 20, 2020; i.e. invoices which SEA was not contesting were aged 9 – 13 months. And, even though these invoices totaling \$36,554 were approved, Ms. Fernando advised that the invoices would not be paid until ZIM delivered a new set of invoices to “Accounting”: “Some of the invoices were approved and re-approved again, if ZIM will not provide the invoices then this approval and review will be useless and ZIM will not get paid.” CX_07209, SEA0014505.
- The dates of the “Rejected” invoices ranged from November 16, 2019 to April 29, 2020, i.e., from 4 to 9 months. These invoices totaled \$56,800; however the uncontested amounts which appeared in the “Remarks” column of Ms. Fernando’s spreadsheet, totaled \$50,175. This confirms that SEA was withholding payment of \$50,175 for up to nine months, because it was “contesting” a mere \$6,625.
- The last category of invoices, ranging from August 21, 2015 through June 30, 2020 were aged from two months up to five years! Astoundingly, SEA did not assert that these invoices were incorrect - Ms. Fernando held up payment because they were sent to the wrong department within SEA: “Those invoices doesn’t belong to us. Kindly review and send to the correct department.” CX_07209, SEA0014505 This category of invoices totaled \$16,352.

When we drill down on the amounts in Ms. Fernando’s spreadsheet, SEA has in reality only “contested” the following amounts:

1st Summary:	\$24,580.26
2nd Summary:	0
3rd Summary:	\$6,625.00
4th Summary:	<u>\$16,352.00</u>
	\$47,557.26

So, giving the most favorable interpretation to Ms. Fernando’s email, only \$6,625 in charges were actually contested; SEA was asking for “more information” for charges totalling \$24,580.26; and, it was not rejecting the \$16,352.00 which made up the 4th Summary – it was simply telling ZIM to send it to a different department. Notably, at her deposition, Ms. Fernando brazenly admitted that she refused to advise ZIM who to send it to:

“Q. So if you receive an invoice, the direct ship team receives an invoice and its not theirs, it belongs to a different team within SEA, you don’t forward it. You just return it to ZIM and tell them to return it to the correct department?

(Objection by counsel)

THE WITNESS: If they send us an invoice that it’s SEA, but it’s not under my department, we inform ZIM that it is not direct ship. So now once they receive that one, it’s their job to send those information to the correct department.

Q. Do you tell them what the correct department is?

A. No.” CX_02443-4, Fernando Dep. Tr. 123:13 - 124:3.

The email relied upon in this PFF was sent by SEA to ZIM on August 5, 2020. ZIM’s good faith was apparent, in the face of Ms. Fernando’s blatant obstinance, because ZIM had released the first cargo hold on August 11, 2020 after receiving a payment of \$36,710 (CX_01570, ZIM 0085708), an amount that was 25% of the total amount “disputed” by SEA and far less than the “uncontested” amounts set forth in Ms. Fernando’s August 5, 2020 email.

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.

Response: Denied as stated. Admit that Ms. Harris responded to Ms. Fernando via two emails on August 6, 2020 and on August 20, 2020. The August 6, 2020 email from Ms. Harris provided the following responses to Ms. Fernando:

- **1st Summary: the outgate and ingate information requested by Ms. Fernando was provided. CX-07207, SEA0014503**
- **2nd Summary: Ms. Harris confirmed that another set of invoices, which had been approved by Ms. Fernando, would be sent to SEA’s Accounting department. Ms. Harris’ response also stated the obvious, i.e., why SEA required another set of invoices which had already been approved: “Please advise how the invoices have been approved yet Samsung requires a copy?” CX_07208, SEA0014504.**
- **3rd Summary: Ms. Harris confirmed that ZIM would “open a dispute and internally review the invoices based on contract rates.” CX_07208, SEA0014504.**
- **4th Summary: Ms. Harris confirmed that ZIM would investigate SEA’s claim that the invoices had been sent to the wrong “department.”**

On August 20, 2020, Ms. Harris sent a second email summarizing the results of ZIM’s investigation of the disputed invoices, noting the amounts due on the invoices which were found to be valid. CX_07204-07206, SEA0014500-2. Notably, ZIM’s good faith is confirmed by the fact that, on August 11, 2020, it lifted the cargo hold which had been imposed on August 5, 2020, before the August 20, 2020 response was sent by Ms. Harris to SEA.

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.

Response: Denied as stated. The term “Finance Hold” is not used in the evidence cited and is not recognized or acknowledged by ZIM in this proceeding. Further, the term “Demurrage on Demurrage” is not used in any deposition and is accordingly not recognized or acknowledged by ZIM in this proceeding. Admit that, during the cargo hold described in PFFs nos. 165-6, ZIM assessed demurrage of \$705 and detention and handling charges of \$19,295 and that these amounts totaled \$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.

Response: Denied. The term “Finance Hold” is not used in the depositions of Ms. Rosenberg or Mr. Yaacoub and is not recognized or acknowledged by ZIM in this proceeding. Further, the term “Demurrage on Demurrage” is not used in any deposition and is accordingly not recognized or acknowledged by ZIM in this proceeding. The circumstances described in the response to PFF nos. 165 and 166 confirm SEA’s refusal to timely evaluate and pay invoices for demurrage and detention and that the cargo hold was justified.

b. Finance Hold No. 2

169. Finance Hold No. 2 was instituted on May 27, 2021 and lasted until June 30, 2021.

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Response: Denied as stated. The term “Finance Hold” is not used in the depositions of Ms. Rosenberg or Mr. Yaacoub and is not recognized nor acknowledged by ZIM in this proceeding. Admit that the Yaacoub Schedule indicates that the cargo hold referenced in this PFF began on May 27, 2021 and ended on June 30, 2021. CX_01570, ZIM0085708.

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.

Response: Denied as stated. The term “Finance Hold” is not used in the evidence cited here and is not recognized nor acknowledged by ZIM in this proceeding. Admit that the Yaacoub Schedule indicates that the total amount owed by SEA to ZIM was \$2,007,147 and that the “overdue balance” owed by SEA to ZIM, which was the subject of the cargo hold referenced in PFF no. 169, was \$857,914.64 and that the cargo hold was released upon the payment by SEA of \$510,975.

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.

Response: Denied. The term “Finance Hold” is not used in the deposition of Ms. Rosenberg and is not recognized nor acknowledged by ZIM in this proceeding. The \$158,000 figure which appears in Ms. Rosenberg’s deposition was a transcription error. In

¹⁴ ZCSU878021-7, ZIMUSEL200220432, ZCSU860232-3, ZIMUSEL200220431, TEMU677367-8, ZIMUSEL200220430, TCNU543546-5, ZIMUSEL200220429, TCNU252347, ZIMUSEL200220428 DRYU964979-7, ZIMUSEL200220123.

her testimony, Ms. Rosenberg “rounded” the amount of the overdue balance to \$858,000, which the reporter mistakenly transcribed as \$158,000. This latter amount is confirmed by the note prepared by Ms. Rosenberg while preparing for her deposition. RX_0699, ZIM0085709

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.

Response: Denied. This is another email string which illustrates the hurdles that SEA imposed on ZIM with respect to uncontested and approved payments. Specifically, the June 15, 2021 email from Peter Kim stated he had approved payment of \$347,045 but still required that another set of invoices for this amount be transmitted by ZIM:

“I have provide the approved invoice but have not receive the copy of the invoice.

We must have them to send the payment out.

Please check the attached approved invoice and provide the copy PDF file and by tomorrow morning.

SEA Total Approved Amt \$347,045” CX_07277, SEA0052732

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.

Response: Denied. This is another email string which illustrates that SEA impedes, rather than facilitates, the payment of uncontested and approved payments. Specifically, if SEA had approved the invoices, why did it require that ZIM gather and send another set of copies

in order to receive payment? This is another example of the hurdles that SEA created in order to delay, if not avoid, paying uncontested receivables.

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.

Response: Denied as stated. The term "Finance Hold" is not used in the deposition of Mr. Yaacoub or Ms. Rosenberg and is not recognized nor acknowledged by ZIM in this proceeding. This PFF is furthermore not relevant because the cargo hold which is the subject of PFF nos. 169-174 was lifted on the following day. CX_01570, ZIM 0085708

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.*

Response: Denied. The term "Finance Hold" is not used in the depositions of Ms. Rosenberg or Mr. Yaacoub, and is not recognized nor acknowledged by ZIM in this proceeding. Further, the term "Demurrage on Demurrage" is not used in any deposition and is accordingly not recognized or acknowledged by ZIM in this proceeding. The complete email from Ms. Peyton on June 30, 2021 states:

"Morning Peter,

I have received confirmation from Imports team that all shipments that were held are now removed from freight hold. However, these cntrs are now on demurrage hold. Tuckers must schedule cntrs and advise the pick up dates. Once completed,

demurrage invoices will be sent to Samsung team to remit payment PRIRO to removing hold. Note, ZIM cannot cover costs and must be completed by your team.”

CX_07273, SEA0052728

The email simply conveys SEA’s responsibility to pay demurrage on containers, which remained at ZIM’s terminal, through the date(s) they were to be delivered. To do otherwise would provide free storage to SEA. As evidenced in various email exchanges between SEA and ZIM, and because SEA did not have demurrage credit with ZIM, outstanding demurrage on a container at a port or terminal would prevent that container from being available for pickup. CX_07274, SEA0052729 (Ms. Payton is requesting details about the pickup dates to calculate demurrage and invoice SEA); CX____, Smith Dep. Tr. 82:10-20 (stating that SEA did not request a demurrage credit arrangement with ZIM); RX_1561-67, SEA0012026-32 (ZIM explains to SEA that demurrage must be paid, based on the anticipated pickup date, in order for the container to be released).

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.*

Response: Admit.

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.

Response: Admit.

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.

Response: Denied as stated. Admit that SEA was invoiced \$5,440 for 17 days of demurrage for the dates June 22, 2021 through July 9, 2021 (CX_07488) and that this invoice, when added to the invoice described in PFF no. 177 (CX_07487), totals \$12,980. Deny that "ZIM's hold led to \$12,980 in total demurrage charges" as the delivery date, after the cargo hold was released, was within SEA's control.

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.

Response: Denied as stated. The term "Finance Hold" is not used in the deposition of Mr. Yaacoub or the evidence cited here and is not recognized nor acknowledged by ZIM in this proceeding. Further, the terms "demurrage on demurrage" and "detention on detention" are not used in any deposition and are accordingly not recognized or acknowledged by ZIM in this proceeding. Admit to the extent that the Yaacoub Schedule includes a figure for demurrage and rail storage as noted. CX_01570, ZIM0085708. Detention, which is a charge related to delays in the timely return of containers (CX_03868, Michalski Dep. Tr. 72:1-3) is not attributable to a cargo hold. During a cargo hold, nothing prevented SEA from returning equipment to avoid detention charges. See, responses to PFF nos. 172-3; CX_03868, Michalski Dep. Tr., 72:1-3.

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

Response: Denied. The term “Finance Hold” is not used in the depositions of Ms. Rosenberg or Mr. Yaacoub, and is not recognized nor acknowledged by ZIM in this proceeding. Detention, which is a charge related to SEA’s delay in the timely return of containers (Michalski Dep. Tr., 72:1-3) cannot be attributable to a cargo hold because the equipment was in the custody of SEA or its customer at the time detention charges accrued. Furthermore, SEA’s alleged damages are the direct result of SEA’s constant and repeated failures to timely pay and/or dispute charges invoiced to SEA as well as the contractual arrangement between Samsung SDS and ZIM under which SEA’s cargo moved wherein Samsung SDS granted ZIM a maritime lien on the cargo carried by ZIM. RX_0169, ZIM0025659; CX_07228, ZIM0011383; RX_0752, SEA0017749; RX_1792, Service Contract 7100204807; RX_1819-20, Service Contract Z18436KR; RX_1855, Service Contract 7100171730; RX_1883, Service Contract Z19179KR; and RX_1922-23, Service Contract 7100102863.

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.

Response: Denied as stated. The term “Finance Hold” is not used in the depositions of Ms. Rosenberg or Mr. Yaacoub, does not appear in the evidence cited by SEA, and is accordingly not recognized nor acknowledged by ZIM in this proceeding. Admit to the extent the Yaacoub Schedule indicates that a maritime lien was imposed between September 27, 2021 and October 16, 2021 pursuant to the contractual arrangements under which SEA’s cargo was transported. Upon information and belief, the October 16 date in the Yaacoub Schedule is a typographical error, as other documents and testimony confirm that

the cargo hold was lifted on October 6, 2021. RX_0699, ZIM0085709 (Ilana Rosenberg h/w note indicates that this cargo hold ended on October 6, 2021).

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.

Response: Denied as stated. The term "Finance Hold" is not used in the depositions of Ms. Rosenberg or Mr. Yaacoub, does not appear in the evidence cited by SEA, and is accordingly not recognized nor acknowledged by ZIM in this proceeding. Admit that the overdue balance and amount paid are consistent with the Yaacoub Schedule and the testimony of Ms. Rosenberg that is cited in this PFF.

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.

Response: Denied as stated. The term "Finance Hold" is not used in the depositions of Ms. Rosenberg or Mr. Yaacoub, and is not recognized nor acknowledged by ZIM in this proceeding. Admit that Jonathan Park of Samsung SDS sent an email to Stacie Peyton at ZIM requesting the release of containers identified therein, with "Remarks" that included the statement, "Trucker will clear the invoice within this week" in addition to other comments and requesting that the cargo hold on the specified containers be released. Deny

that Ms. Peyton was notified regarding a “payment plan” on September 27, 2021 as this is not supported by the evidence cited in support of this PFF. CX_07335.

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.

Response: Denied as stated. Admit that an email dated September 27, 2021 was sent by Stacie Peyton of ZIM to Maria Kristina Fernando at SEA and others stating in pertinent part: “IMPORTANT NOTICE***I was informed Samsung was placed on credit hold. I have notated the shipments in red that are on credit hold. Please have your Finance team speak with ZIM’s Collections team with any questions or concerns.” CX_07326. Denied to the extent that SEA omits reference to the fact that the email from ZIM also included an attached report, not included by SEA in its Appendix. RX_1589, SEA0010730 (the original document was produced by SEA without the attachment referenced).**

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.*

Response: Denied as stated. This PFF omits a critical email, in which ZIM responded to the “request” dated September 28, 2021 that ZIM release five containers in exchange for payment of demurrage accrued only on those five units. ZIM responded by advising that the cargo hold was imposed because SEA owed receivables in the amount of \$1,181,574.31. ZIM’s response, sent by Adrienne Martin on September 29, 2021, was: “The overdue

balance for Samsung is \$1,181,574.31 This is the payment amount required in order to remove the hold.” RX_0701-19, ZIM0014264 – ZIM0014282. In response, Vaishnavi JL from SEA sent an email on September 29, 2021 asking “Can you please give me the invoice details for the value \$1,181,574.31?” CX_07323-4 Admit that, in response, Ms. Martin provided an account statement on September 29, 2021, which was not attached by SEA to its Appendix, which comes in addition to the original document provided by ZIM on September 27, 2021. RX_1594, SEA0010748. The response from Peter Kim again highlights SEA’s strategy to delay payment. Instead of reviewing the underlying invoices provided months earlier by ZIM when the charges were assessed, Mr. Kim claimed that information in the statement provided by Ms. Martin was not sufficient, so he accordingly delayed the payment process by requesting information which SEA already had: “Please provide the detail BOL, container, charge type, starting and end if charge are for demurrage/detention so we can review for the appval (*sic*) and payment.” CX_07322

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.

Response: Denied as stated. The term “Finance Hold” is not used in the depositions of Ms. Rosenberg or Mr. Yaacoub, and is not recognized nor acknowledged by ZIM in this proceeding. Further, the term “Demurrage on Demurrage” is not used in any deposition and is accordingly not recognized or acknowledged by ZIM in this proceeding. Admit that the cited email, which speaks for itself, states “Please allow some time for holds to be

removed . . .” CX_07367, SEA0018177. Further admit that SEA was responsible to clear demurrage on containers that were subject to the cargo hold referenced herein. Deny that the “process was not immediate” as this is unsupported by the evidence cited. To the contrary, on the next day, October 7, 2021, SEA’s motor carrier confirmed that “The containers are released from FRT HOLD.” RX_1600, SEA0018192

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.

Response: Denied as stated. The term “Finance Hold” is not used in the depositions of Ms. Rosenberg or Mr. Yaacoub or the evidence cited in support of this PFF, and is not recognized nor acknowledged by ZIM in this proceeding. Admit that container ZCSU2745374 is referenced in the spreadsheet embedded in the email referenced in this PFF. 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.

Response: . Denied. The information in CX_1850 and CX_07373 do not support this PFF and ZIM0024082 cannot be located in SEA’s Appendix.

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).

Response: Denied. The information in CX_05944 does not support this PFF.

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.

Response: Denied as stated. The term "Finance Hold" is not used in the depositions of Ms. Rosenberg or Mr. Yaacoub or the evidence cited in support of this PFF, and is not recognized nor acknowledged by ZIM in this proceeding. Further, the term "Demurrage on Demurrage" is not used in any deposition and is accordingly not recognized or acknowledged by ZIM in this proceeding. Admit that the Yaacoub Schedule indicates SEA owed \$190,998 in demurrage, \$27,917 in Detention and Handling and that these amounts totaled \$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.*

Response: Denied. The term "Finance Hold" is not used in the depositions of Ms. Rosenberg or Mr. Yaacoub or the evidence cited in support of this PFF, and is not recognized nor acknowledged by ZIM in this proceeding. The circumstances described in the responses to PFF nos. 181 - 186 confirm SEA's refusal to timely evaluate and pay invoices for demurrage and detention and that the cargo hold was justified. Further deny that the charges assessed to SEA constitute "financial damages" which arose due to ZIM's enforcement of a valid maritime lien that was authorized under the contract pursuant to which SEA's cargo was shipped. RX_1792, Service Contract 7100204807; RX_1819-20, Service Contract Z18436KR; RX_1855, Service Contract 7100171730; RX_1883, Service Contract Z19179KR; and RX_1922-23, Service Contract 7100102863 (see Section 8 of each Contract).

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.

Response: Denied. The term "Finance Hold" is not used in the depositions of Ms. Rosenberg or Mr. Yaacoub or in the evidence cited in support of this PFF, and is not recognized or acknowledged by ZIM in this proceeding. Further, the term "demurrage demurrage" is vague and incomprehensible. Denied that Mr. Smith "calculated" demurrage "during the [period of the lien] totaling \$755,472 because the "calculation" includes "analysis dates" for a period from September 27, 2021 until November 11, 2021 when the lien terminated a month prior, on October 11, 2021. SEA's expert included *an additional 31 days in its calculation here without explanation.* CX_05945, BRG Report Ex. 10. Further, the evidence cited includes a chart without an explanation for the figures or any calculations or analysis that were used to arrive at them. *Id See also,* response to PFF no. 67, *supra*, wherein it was noted that the Zayas Report concluded that SEA's expert did not comply with applicable accounting standards.

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).

Response: Denied as stated. The term "Finance Hold" is not used in the depositions of Ms. Rosenberg or Mr. Yaacoub or in the evidence cited in support of this PFF, and is not recognized nor acknowledged by ZIM in this proceeding. Admit that ZIM imposed a cargo hold on January 11, 2022 which lasted until March 17, 2022, to enforce a valid maritime

lien for overdue balances against SEA under the terms of the contract pursuant to which SEA's cargo shipped. **RX_1792, Service Contract 7100204807; RX_1819-20, Service Contract Z18436KR; RX_1855, Service Contract 7100171730; RX_1883, Service Contract Z19179KR; and RX_1922-23, Service Contract 7100102863 (see Section 8 of each Contract).**

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.

Response: Denied as stated. The term "Finance Hold" is not used in the depositions of Ms. Rosenberg or Mr. Yaacoub, and is not recognized nor acknowledged by ZIM in this proceeding. Admit that the Yaacoub Schedule shows an overdue balance of \$1,538,200.64 at the time the maritime lien was imposed by ZIM. CX_01570, ZIM0085708.

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

Response: Denied. The evidence cited does not support this PFF. The pages cite refer to email conversations in September of 2021 and no email dated February 17, 2022 can be located in the documents cited in support of this PFF. CX_07328 - CX_07366, ZIM0014187-ZIM0014225. Further, ZIM can neither admit nor deny this PFF to the extent it invokes information on pages CX_07328 and CX_07329 because these emails appear to be in Korean and a translation has not been provided by SEA pursuant to paragraph 4 (d) of the Initial Scheduling Order dated January 12, 2023.

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.

Response: Denied as stated. Admit that ZIM issued a demurrage invoice in the amount of \$10,180 for container JZPU8028363 for the period February 15, 2022 - March 18, 2022. Deny that this was an “initial” invoice or that the “hold period” extended until March 18, 2022. See, response to PFF no. 193.

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.*

Response: Denied as stated. The evidence cited does not support SEA’s statement. SEA cites to the same evidence in its prior paragraph which includes a total of \$10,180 of demurrage charges. CX_07490, SEA0023289. Evidence produced by SEA indicates that, on Friday, March 18, 2022, PBI, a CNT of SEA, reached out to SEA at 11:45am to request that SEA promptly confirm whether PBI should pick up several containers, including JZPU8028363, for delivery. RX_1633, SEA0127524. Later that afternoon, PBI notified SEA that it had pre-pulled ten SEA containers, not including JZPU8028363, and that it would not proceed with delivery until SEA provided a plan to pay outstanding receivables owed by SEA to PBI. RX_1627, SEA0127518. At 4:15pm, SEA responded to PBI that it had cleared demurrage on five containers. *Id.* PBI pulled the container on Monday, March 21, 2022, following SEA’s confirmation that demurrage was cleared until that day. RX_1626, SEA0127517. This is another example of demurrage incurred by SEA due to its failure to timely pay its vendors such as, in this instance, its own CNT.

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.

Response: Denied. The term “Finance Hold” is not used in the depositions of Ms. Rosenberg or Mr. Yaacoub or in the evidence cited in support of this PFF, and is not recognized nor acknowledged by ZIM in this proceeding. Further, the term “Demurrage on Demurrage” is not used in any deposition and is accordingly not recognized or acknowledged by ZIM in this proceeding. Admit that, according to the Yaacoub Schedule, SEA accumulated \$2,287,561 in demurrage and \$668,646 in Detention and Handling charges and that these amounts totaled \$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.*

Response: Denied. The term “Finance Hold” is not used in the depositions of Ms. Rosenberg or Mr. Yaacoub or in the evidence cited in support of this PFF, and is not recognized nor acknowledged by ZIM in this proceeding. The circumstances described in the responses to PFF nos. 193-198 confirm SEA’s refusal to timely evaluate and pay invoices for demurrage and detention and that the cargo hold was justified. Further deny that the charges assessed to SEA constitute “financial damages” which arose due to ZIM’s enforcement of a valid maritime lien that was authorized under the contract pursuant to which SEA’s cargo shipped. RX_1792, Service Contract 7100204807; RX_1819-20, Service Contract Z18436KR; RX_1855, Service Contract 7100171730; RX_1883, Service Contract Z19179KR; and RX_1922-23, Service Contract 7100102863 (see Section 8 of each Contract).

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.

Response: Denied as stated. Admit that ZIM would charge demurrage if, after free time expired, an SEA customer did not accept delivery before the expiration of free time. Specifically, Mr. Cleva testified: “although we have procured the trucking with an in-house trucker, if you want to call it that, that trucker nor ZIM has control of any delivery windows at the facility Samsung intends to bring this to. So, if things change there, there’s no capacity or it shuts down for whatever reason that might be, again, that could be something outside of ZIM’s control that, if free time has expired, would then trigger charges to accrue.” CX_04591, Cleva Dep. Tr. 62:15-24.

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.

Response: Denied. The term “Finance Hold” is not used in the depositions of Ms. Rosenberg or Mr. Yaacoub or in the evidence cited in support of this PFF, and is not recognized nor acknowledged by ZIM in this proceeding. The evidence to which SEA cites, if Ms. Fernando’s statements are accepted as true, means that SEA owed ZIM \$635,000 and that \$500,000 of charges were for another Samsung entity. CX_07395, SEA0118706. A lien being enforced for \$635,000 would be no less valid than a lien for \$1,135,000 (or \$135,000 instead of \$635,000, depending on how one reads the evidence), undermining SEA’s assertion that cargo was held for the portion of charges that were allegedly for another account. *Id.*

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.*

Response: Admit.

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.

Response: Denied. The term “Finance Hold” is not used in the depositions of Ms. Rosenberg or Mr. Yaacoub or in the evidence cited in support of this PFF, and is not recognized nor acknowledged by ZIM in this proceeding. Denied also to the extent that SEA characterizes the charges assessed to it as “damages” when SEA had control as to whether it paid, disputed or ignored the invoices issued to it. The scope of the charges, the number and duration of the liens, and unpaid balances that accumulated for years prior to payment confirm the scope and extent of SEA’s delinquency, which resulted in millions of dollars in unpaid invoices. CX_01570, ZIM0085708. Furthermore, the Yaacoub Schedule confirms that ZIM released its maritime liens prior to full payment of the amounts owed in every instance.

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.

Response: Denied. The term “Finance Hold” is not used in the depositions of Ms. Rosenberg or Mr. Yaacoub or in the evidence cited in support of this PFF, and is not recognized nor acknowledged by ZIM in this proceeding. Denied also to the extent that

SEA mischaracterizes the testimony to which it cites in support of this PFF. Mr. Cleva described the use of a credit suspension – not a cargo hold – as a tool of last resort to prompt delinquent customers, like SEA, to prompt payment of long overdue balances. CX_04629, Cleva Dep. Tr. 100:8-12. In the testimony of Ms. Rosenberg, also cited by SEA in support of this PFF, she responds to a question regarding the incentive principle and states that demurrage charges are consistent with the incentive principle, that cargo holds are relied upon because they are consistent with the contract under which SEA’s cargo moved and that customers are incentivized to move containers and address unpaid bills by the enforcement of such liens. CX_05329-30, Rosenberg Dep. Tr. 26:12-27:20.

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.*

Response: Denied. SEA cites to testimony, which speaks for itself and which does not support this PFF. As noted in the response to PFF no. 204, *supra*, Ms. Rosenberg’s testimony responded to a question about the incentive principal. CX_05330, Rosenberg Dep. Tr. 27:10-20. The testimony also confirms that not charging a consignee during periods when a maritime lien is in place would provide “no incentive for the customer to move any of the containers” during that period. *Id.* Notably, the testimony cited includes no discussion of “express instructions” from senior ZIM personnel, no reference to consignees, and no suggestion that a lien would be used except as a last resort. *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 . . .”)].

Response: Denied as stated. The November 17, 2021 email, which speaks for itself, was written by Pecky Hui, the Trade Manager for the Pacific unit and stated that “Following our CEO review . . . we are implementing the process for holding cargo and blocking customers” for the ZEX service and provided a list of affected customers which did not include SEA. CX_05651, Rosenberg Dep. Ex. 12 at 5-6. SEA mischaracterizes the email as standing for the proposition that the CEO implemented a new policy, which is not the case, and ignores limitations on the policy described by Mr. Hui which were to apply only to shippers using the ZEX service. *Id.* The last quote which SEA cites to does not appear at CX_05685 which is the first page of a slide deck for the content in the previous cite. It is believed that SEA intended to cite to CX_05681. This testimony is also inapposite because Ms. Rosenberg confirmed that the “overdues” that ZIM sought to reduce did not apply solely to demurrage and detention charges, but any charges that were unpaid, such as freight:

“Q. And when we’re talking about overdues, we’re talking about – just to spell it out – overdues of the D&D charges; is that correct?

A. No.

Q. ...Then what are we talking about when we’re talking about overdues?

* * * * *

A . Anything that is past due.” CX_05471, Rosenberg Dep. Tr. 168:3-11

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.

Response: Denied. The first sentence of this PFF and the reference to “consistent with C-Suite edits” is incomprehensible. Further this PFF is unsupported by the evidence to which SEA cites. There is no evidence which supports the assertion that Ms. Harris’s email is an example of “ZIM’s sharp collections practices,” inclusive of “C-Suite edits” or that the practices were “prevalent during the pandemic.” SEA cites to an email, which speaks for itself, wherein Ms. Harris, a lower-level ZIM employee, internally sent an email to her superior that followed a long email conversation with Ms. Fernando wherein SEA received instructions from Ms. Fernando to 1) resend “all the outstanding invoices” to an email box; 2) provide “email threads” showing approval of each invoice by an SEA person; 3) in the absence of an approval email, to send an email to one of two groups of email addresses (including Ms. Fernando’s own email on one of them suggesting that she could handle at least some invoices independently); and 4) re-send the invoices coupled with each approval to Ms. Fernando to be validated and processed. CX_07226-27, ZIM0011381-82. Thereafter, Ms. Martin of ZIM affirmed that all invoices and documents had been sent according to ZIM’s “standard process” and to the appropriate parties at SEA. CX_07226, ZIM0011381. After further exchanges amongst ZIM personnel regarding the instructions from SEA to perform additional work and redundant invoicing that were not part of the contract’s requirements, Ms. Harris affirmed that she had provided additional support and

documents to SEA when requested but that SEA still would not pay its invoices and thus recommended that SEA's cargo be held according to the terms of the service contract. 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.*

Response: Denied. Nothing in CX_07222 supports the proposition that Ms. Martin was "ZIM-trained." Nothing in CX_07222 supports the characterization of anything as a "pandemic hold." To the contrary, this email confirms that SEA imposes its inefficient processes for handling receivables on ZIM personnel by requiring that ZIM send multiple invoices on demand, to also seek and secure approval from multiple SEA personnel, who Ms. Fernando admittedly refused to identify (CX_0442, Fernando Dep. Tr. 122:11-19; CX_02443-4, Fernando Dep. Tr. 123:13 - 124:3) and then return both the previously-provided invoices and email threads of SEA personnel approving the invoices to a third point of contact before they would be considered for payment as "proper". CX_07226-27, ZIM0011381-82. Objectively and obviously, this process is redundant, nonsensical, and prone to error due to its manual nature. As someone directly impacted by the additional work that resulted from the unreasonable requests and instructions from Ms. Fernando, Ms. Harris's frustrated response, including two smiley face emojis, is understandable and an isolated event. CX_07222, ZIM 0011377. In fact, Ms. Harris, in the same email, notes that she had gone above and beyond to try to perform the additional work SEA requested every time that SEA asked but that, despite these efforts, SEA had still failed to pay its bills. CX_07222, ZIM 0011377. Only after describing her efforts and frustrations did Ms. Harris

recommend that ZIM's maritime lien be put in place on SEA's shipment. *Id.* Moreover, the much-paraded "smiley face" email was sent several hours after ZIM personnel senior to Ms. Harris had reached a decision regarding a cargo hold. CX_07222.

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.

Response: Denied. SEA fails to identify to how "ZIM's response was non-responsive." Denied that SEA's characterization of SEA's requests for redundant materials and additional work on the part of ZIM employees is simply "invoices [being] sent in the proper format." CX_07199; ZIM0011377. SEA has provided no evidence that ZIM agreed to undertake additional work or perform according to its instructions without regard to common sense, personnel constraints, and the time necessary to conform to Ms. Fernando's unreasonable demands, sent many months after the charges had accrued and the invoices had been issued. These expectations also fail to conform to industry standards and ZIM's own standards by which it sends invoices to its customers.

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.

Response: Denied. The term "Finance Hold" is not used in the deposition of Mr. Cleva or the evidence cited in support of this PFF, and is not recognized nor acknowledged by ZIM in this proceeding. SEA characterizes its actions as attempting to "receive clarity on invoice charges" when there is no evidence supporting this assertion in the testimony to which it cites or in the preceding PFFs. Indeed, the preceding PFFs only confirm that SEA

wanted its invoices to be sent to various personnel at SEA, who Ms. Fernando refused to identify (CX_0442, Fernando Dep. Tr. 122:11-19; CX_02443-4, Fernando Dep. Tr. 123:13 - 124:3), and for ZIM to manually request invoice approval, collate those approvals with additional copies of invoices, and then deliver those invoices again, along with approval emails, to Ms. Fernando. See ¶¶208-210, *supra*. SEA does not point to a single instance of SEA personnel asking for assistance with the content of a specific invoice. Furthermore, the evidence to which SEA cites here includes only Mr. Cleva's testimony, which speaks for itself, and which correctly avers that ZIM should not collect D&D charges that are inaccurate. CX_04597, Cleva Dep. Tr. 68:13-69:1. This PFF does not identify any specific operational personnel or actions by such personnel that are purportedly inconsistent with the testimony.

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.

Response: Denied. The term "Finance Hold" is not used in the depositions of ZIM witnesses, and is not recognized nor acknowledged by ZIM in this proceeding. SEA does not cite to any evidence which supports this PFF. Deny that cargo holds imposed by ZIM on SEA's shipments were "frequent" or "repeated." SEA and other Samsung entities allowed overdue balances to accrue, without timely addressing them, which supported the imposition of maritime liens pursuant to ZIM's contractual rights. RX_1792, Service Contract 7100204807; RX_1819-20, Service Contract Z18436KR; RX_1855, Service Contract 7100171730; RX_1883, Service Contract Z19179KR; and RX_1922-23, Service

Contract 7100102863 (all allowing the imposition of maritime liens against cargo interests resulting from overdue balances under Section 8 which includes an agreement that ZIM “shall have both a maritime and contractual lien on the goods or any part thereof. . . for all freight. . . primage, deadfreight, demurrage, detention, container demurrage. . .”); CX_07468, ZIM0023358 (showing outstanding invoices for other Samsung affiliates, including 17 overdue invoices for Samsung Electronics Home Appliance and 20 overdue invoices for Samsung SDS Global SCL America Inc); CX_04707 (showing overdue amounts from other Samsung affiliates, including over \$100,000 overdue from SEHA (Samsung Electronics Home Appliances), \$71,000 from Samsung Austin Semiconductor; \$28,000 from Samsung SDS Global SCL America Inc. and \$24,000 from Samsung HVAC America LLC). This PFF is further denied because it bears no relevance to SEA’s claims.

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.

Response: Denied as stated. Admit that Mr. Park, in an email which speaks for itself, contacted ZIM to request the release of containers that he described as held due to SEA’s overdue balances and non-payment of invoices. CX_05727, Rosenberg Dep. Ex. 26. Denied because this PFF is not relevant to SEA’s claims.

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.

Response: Denied as stated. Admit that, at the time the email was sent, SEA had overdue balances with ZIM and that multiple Samsung entities shipped cargo with ZIM under the contract negotiated between Samsung SDS and ZIM. Deny that this PFF is any relevant to SEA's claims.

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.*

Response: Denied as stated. Ms. Rosenberg's email speaks for itself and highlights the confusion created by SEA's failure to pay or dispute significant receivables owed for shipments moving under Service Contracts between ZIM and Samsung SDS. CX_05723, Rosenberg Dep. Ex. 26 at 1. This PFF is further denied because it has no relevance to the claims made by SEA in this proceeding.

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.

Response: Denied as stated. The term "Finance Hold" is not used in the deposition of Ms. Rosenberg or the evidence cited in support of this PFF, and is not recognized nor acknowledged by ZIM in this proceeding. Denied because SEA cites to evidence which does not support this PFF - CX_0535-36 is a chart of shipments. To the extent that SEA intended to cite to CX_05735 - 6, this PFF is further denied because it is not relevant and has no

bearing on the claims raised by SEA in this proceeding. CX_05735-6 is an email from an Executive Vice President of Samsung SDS, who represents that he is the Head of Logistics for Samsung Electronics, refers to a “DEM pending issue”, includes a summary of overdue balances, represents that several hundred thousand dollars in receivables would be paid, and reiterates that he would “take care of the payment till the end” and assure ZIM that it would, in fact, be paid. CX_05735, ZIM0026294. This email confirms how difficult it was for ZIM to know which Samsung entity was responsible for demurrage and detention charges and which Samsung entity would pay the charges.

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.

Response: Denied as stated. Denied because SEA cites to evidence which does not support this PFF - CX_0535-36 is a chart of shipments. To the extent that SEA intended to cite to CX_05734, this PFF is not relevant and has no bearing on the claims raised by SEA in this proceeding. Admit that Ms. Rosenberg initially stated that the containers identified by Mr. Seo were consigned to “Samsung Electronics” and, upon further review by ZIM, confirmed that the cargo referred to in this PFF belonged to a separate entity and that it was immediately released. CX_05732-4, ZIM 0026291-3.

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.*

Response: Denied as stated. Denied because SEA cites to evidence which does not support this PFF - CX_0534-5 is a chart of shipments. To the extent that SEA intended to

cite to CX_05734, this PFF is not relevant to the claims raised by SEA in this proceeding. Admit that Ms. Rosenberg, upon ZIM's further review, confirmed that the cargo belonged to a separate entity, that the ten containers identified by Mr. Seo would be immediately released, and asked that Mr. Seo "provide the payment plan and resolve the substantial past due asap so we can avoid any further complications with Samsung Electronics." CX_05734, ZIM 0026293

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.

Response: Denied as stated. Denied to the extent that SEA does not provide the document that Mr. Seo states is attached to his email; without the attachment, it is unclear what was provided by Mr. Seo, whether it was comprehensive and/or consistent with instructions given to ZIM by persons such as Ms. Fernando. CX_05733, Rosenberg Dep. Ex. 27. Admit that Mr. Seo preceded the requests described in this PFF with further assurances that "[a]s promised, [he would] take care of payment till the end" for the overdue balances it owed to ZIM. *Id.* Further admit that Mr. Seo acknowledged "We understand and respect ZIM's rules and procedures such as credit suspensions and holds". *Id.*

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.

Response: Denied. This PFF improperly asserts that Ms. Rosenberg cut off communications with Mr. Seo that are referenced in Exhibit 27 to Ms. Rosenberg’s deposition. This PFF actually cites to Exhibit 28 where Mr. Seo raised a new question with Ms. Rosenberg and others. CX_05747, Rosenberg Dep. Ex. 28 at 1. In her email, Ms. Rosenberg asks Ms. Martin to communicate with Mr. Seo directly to determine what was being asked, to confirm whether the significant past due balance was paid, and to keep her informed “but not copied.” *Id.* Nothing in the evidence cited supports the allegation in this PFF that Ms. Rosenberg “decided not to communicate further with Mr. Seo.”

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.

Response: Denied as stated. The evidence to which SEA cites, CX_05779, is an email dated August 2, 2022 which was marked as Exhibit 30 at the deposition of Ms. Rosenberg. CX_05779 does not include any of the language quoted in this PFF and does not support the assertion alleged therein. *Id.* To the extent that SEA intended to reference CX_05672, deny the assertion of “full payment related to ‘SEA cargo’” because the March 11, 2022 email from Mr. Seo characterizes amounts owed by SEA as “paid,” “under review,” “waiting for details” and a “Claim case.” Admit that the aforementioned email states “please let ZIM US contact right persons in Samsung based on Consignee.” CX_05762, Rosenberg Dep. Ex. 29.

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.*

Response: Denied. The evidence to which SEA cites, CX_05779, is an email dated August 2, 2022 that was marked as Exhibit 30 at the deposition of Ms. Rosenberg and which does not support the assertion made in this PFF. *Id.* To the extent that SEA intended to reference CX_05672, admit that Ms. Rosenberg requested that Ms. Martin and Mr. Yaacoub communicate with Mr. Seo directly: “There were a lot of emails around this issue and, in general, so my decision or what I wanted, to allow the relevant team to continue the discussion...I would like my team to take this discussion further with the customer from certain point.” CX_05538, Rosenberg Dep. Tr. 235:19-25

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.

Response: Denied as stated. In the first communication of this email chain, ZIM advised Tzu Jen and Riya Patel of Samsung on June 27, 2022, that Samsung Electronics America – customer code USSMSUN – had an overdue balance of \$992,212.81. CX_5782. There was no response to this email. On August 1, 2022, ZIM advised Tzu Jen and Riya Patel of Samsung that it had an overdue balance of \$1,337,992.81 which must be paid in order to remove a cargo hold. CX_05781. On August 2, 2022, after the cargo hold had been put in place, Junyeon Kim of Samsung SDS America, Inc. advised that “ZIM seem to be holding cargo of wrong party” and claimed that “these are Samsung ELCETRONICS shipments...” CX_05780. The August 2, 2022 email from Jonathan Park that is referenced

in this PFF, reiterated the assertion that shipments subject to the cargo hold belonged to Samsung SDS and not SEA. This confirms the significant receivables which SEA ignored and allowed to accrue, without dispute or payment. At the very least, this PFF is not relevant because it has no bearing on the claims raised by SEA in this proceeding.

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.*

Response: Denied. The email from Mr. Park was not addressed to Ms. Rosenberg but was instead addressed to "Jim Martino." CX_05779, Rosenberg Dep. Ex. 30. This email further confirms that Ms. Rosenberg, as noted by SEA here, did take appropriate action by requesting that Ms. Martin look into the allegation further and take action to determine if cargo had been improperly held, and to release it if that were the case. *Id.* Further, this PFF is not relevant and has no bearing on the claims raised by SEA in this proceeding.

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.

Response: Denied. The email string marked as Ex. 8 at the Fernando deposition confirms the tactics employed by SEA to delay payment. In response to a final demand from ZIM, in which the outstanding receivable was \$641,238, Ms. Fernando questioned a small charge in the amount of \$8,778: "Can you please advise the meaning of IM FRTINV." And, when informed it stood for Import Freight Invoice, Ms. Fernando informed Adrienne Martin at ZIM that "import Freight Invoice needs to be billed to the origin of the loads."

However, as to the remaining \$632,460, she sought to delay payment by claiming more time was needed to review the invoices. Understandably, Ms. Martin observed “...the invoices are old, why were they not paid until now?” CX_02470 In response, Ms. Fernando employed the dilatory tactics that had served SEA so well stating:

“Because there are different groups to review it

“ZIM is not sending the statement to us...”

“we are seeing old invoices again, which means we need to go back to the old file...”

“There are different communication with the AR team, but it seems like the follow up from ZIM side were oversight that’s why the account with ZIM increase”

CX_02470, SEA0015115

Notably, it is a matter of record that this litany of excuses was coming from an SEA employee who admitted that she simply returned invoices to ZIM that should have been directed to a different department within SEA; did not forward the invoices to the correct department; and did not inform ZIM who the correct person(s) was at SEA to whom the invoices should have been directed. *See*, response to PFF no. 124; and, CX_02443-4, Fernando Dep. Tr. 123:13 - 124:3.

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.

Response: Denied. SEA does not support this PFF with any citation to evidence and does not identify the “practices” that SEA refers to.

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.

Response: Denied. SEA mischaracterizes the testimony to which it cites, which speaks for itself. The “ZIM U.S. Finance team” does not assess “demurrage.” Ms. Rosenberg’s testimony was in response to a question which asked her to define demurrage, and did not discuss the basis for ZIM’s demurrage practices. CX_05326, Rosenberg Dep. Tr. 23:16-22. SEA’s characterization of same is misleading and unsupported by the evidence to which it cites.

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.

Response: Denied. The term “Finance Hold” is not used in the depositions of Mr. Yaacoub or Ms. Haynie or the evidence cited in support of this PFF, and is not recognized nor acknowledged by ZIM in this proceeding. The first statement, that Mr. Yaacoub is in charge of instituting maritime liens against cargo, misstates the testimony cited which is that, in response to questions about the mechanics of a lien against cargo, Ms. Haynie testified that the question should be directed to “Mr. Yaacoub’s department” and that she

did not “know exactly, but [had] heard” that was the case. CX_04301-02, Haynie Dep. Tr. 295:18-296:3. As to whether cargo holds incentivize the movement of cargo, *see* testimony from CX_05330, Ms. Rosenberg, Tr. 27:9-20; and CX_04579, Mr. Cleva, Tr. 50:3-13

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.

Response: Denied. The term “Finance Hold” is not used in the depositions of Ms. Rosenberg or the evidence cited in support of this PFF, and is not recognized nor acknowledged by ZIM in this proceeding. In support of this PFF, SEA has cited to the cover page of Mr. Michalski’s deposition transcript. CX_03797. To the extent that SEA intended rely upon CX_05482, Rosenberg Dep. Tr. at 179:9-12, the testimony cited does not support this PFF. To the contrary, nothing in the testimony cited demonstrates that the utility of a cargo hold was “limited.” *Id. See also*, CX_05330, Rosenberg Dep. Tr. 27:9-20:

“...the hold is, A, according to the contract; and B, that’s the only tool that we have to make the customer or to incentivize the customer to make the payment and move the containers out. Otherwise, if we give the customer free time on the terminal, that has no incentive for the customer to move any of the containers and continue any of the, you know, next steps that we want to encourage.”

See also CX_04579, Cleva Dep. Tr. 50:8-13:

“...it is a last resort usually when monies are owed and the – if a container is held, there is still time-sensitive charges that accrue against that container, which helps to

incentivize a customer to resolve any issues or items that were the direct reason of said hold.”

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.

Response: Denied. None of the persons cited directly “assisted collection of D&D charges” as SEA describes here, and none of the testimony cited stands for the premise that they do assist in the collection of D&D. CX_03007, Speight Dep. Tr. 208:8-15; CX_03894-5, Michalski Dep. Tr. 98:23-99:9; CX_05259-5260, Shpitzer Dep. Tr. 173:11-174:2; CX_04402, Ramage Dep. Tr. 24:18-21; CX_04807, Weingartner Dep. Tr. 61:7-24. Furthermore, none of the cited testimony supports the premise that “ZIM’s D&D decisions were made without considering the Incentive Principle.” Whether or not the witnesses referenced could directly describe the Incentive Principle fails to establish that it was not incorporated into ZIM’s policies and procedures related to D&D. To the contrary, Moshe Shpitzer testified that he confirmed with ZIM’s legal counsel that ZIM’s demurrage and detention rules are in compliance with the FMC rules. CX_5259-30; 173:22-174:2. Ms. Rosenberg also confirmed that ZIM’s rules on demurrage and detention do conform to the Incentive Principle because they incentivize freight fluidity. CX_5327-31, 24:3-28:2.

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.

Response: Denied as stated. Admit that the quoted language in this PFF has been accurately transcribed from the referenced exhibit. Deny that this email is relevant because it does not refer to SEA or to the claims alleged by SEA in this proceeding.

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.*

Response: Denied as stated. Admit that the quoted language in this PFF has been accurately transcribed from the referenced exhibit. Deny that this email is relevant because it does not refer to SEA or to the claims alleged by SEA in this proceeding.

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.*

Response: Denied as stated. Admit that the quoted language in this PFF has been accurately transcribed from the referenced exhibit. Deny that this email is relevant because it does not refer to SEA or to the claims alleged by SEA in this proceeding.

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

Response: Denied as stated. Admit that the quoted language in this PFF has been accurately transcribed from the referenced exhibit. Deny that this email is relevant because it does not refer to SEA or to the claims alleged by SEA in this proceeding.

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.

Response: Denied as stated. Admit that the quoted language in this PFF has been accurately transcribed from the referenced exhibit. Deny that this email is relevant because it does not refer to SEA or to the claims alleged by SEA in this proceeding.

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.

Response: Denied as stated. Admit that Ms. Rosenberg requested additional details about the charges from Mr. Yaacoub. *Id.* Deny that this email is relevant because it does not refer to SEA or to the claims alleged by SEA in this proceeding. Further deny that this proposed finding of fact, or the four that precede it, demonstrate that profit is the determinative factor in the deliberations of the Demurrage Committee. *See*, CX_03883-84, Michalski Dep. Tr. 87:10-88:10 (a summary of events and factual details of the shipment(s) are considered by the Demurrage Committee to determine whether an error was made in billing); CX_3090, Yaacoub Dep. Tr. 33:6-16 (the Demurrage Committee considers the circumstances of the charges and request before internal discussion in order to make a determination); CX_4902-03, Weingartner Dep. Tr. 96:4-95:9 (describing the summary of the shipment-specific details such as the "amount of demurrage or detention involved, the principles to the cargo, the [] summary and validation of any circumstances that may be presented that would be necessary in understanding what happened with the [] particular containers either in the port or out of the port. . ." that are prepared in order to be presented to the Demurrage Committee for its decision making). Finally, Mr. Cleva explained that the Demurrage Committee focused on correcting invoices that were incorrectly issued to a

customer: “If something was invoiced incorrectly or there might be a dispute of some type, we have a demurrage and detention committee that reviews cases based on information provided by both customer and internal to deem whether something might be inaccurate or incorrectly charged. CX_04598, Cleva Dep. Tr. 69:3-10

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.

Response: Denied as stated. The request for production, which speaks for itself, is misstated by SEA here. CX_08529. In its request, which is confusing due to its reference to figures related to freight, comparisons between store door and container yard moves, and connections to demurrage and detention charges, SEA also specifically highlighted “studies, analyses, tracking data, reports, presentations, memorandums, etc.” as part of its request. *Id.* ZIM properly objected to this request on the grounds that it was “overly broad, unduly burdensome and [sought] evidence which is not relevant nor calculated to lead to the discovery of admissible evidence.” RX_1762-87, ZIM Responses to SEA’s First Set of Discovery Requests to ZIM. There was no effort by SEA to clarify or limit its request, nor was there any effort to compel the production of responsive documents. Furthermore, the Presiding Officer made clear in her June 9, 2023, order denying SEA’s motion to compel the deposition of Xavier Destriau that “[m]aking a profit or increasing income, without more, would not violate the Shipping Act.” FMC Dkt. 22-30, Order Denying Motion to Compel Deposition dated June 9, 2023 at 2.

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

Response: Denied. This PFF is not relevant because SEA bears the burden of proving it is entitled to reparations. *See, Point IV D of ZIM’s Reply Brief.* There is accordingly no burden imposed on ZIM to prove a “cost-based justification” for the D&D charges incurred by SEA. Further, SEA does not cite evidence supporting this PFF. To the contrary, numerous ZIM witnesses as well as ZIM’s experts identified costs that accrue to ZIM when demurrage and detention occur, including charges assessed to ZIM by ports for demurrage, lost opportunities associated with detained equipment, and handling charges associated with cargo left at ports. *See, e.g., CX_04657-58, Cleva Dep. Tr. 128:8-129:14 (Mr. Cleva notes that ZIM incurs “actual costs” from port, rail, and other vendors resulting from demurrage and detention charges); CX_05430-31, Rosenberg Dep. Tr. 127:24-128:7 (noting an actual cost accrues to ZIM for demurrage and may be different from the cost ZIM passes on to its customer).*

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.

Response: Denied. This PFF is not relevant because SEA bears the burden of proving that its damages were proximately caused by ZIM’s violations of the Shipping Act and to prove the amount of its damages with reasonable certainty. *See, Points IV D and E of ZIM’s Reply Brief.* The amount of ZIM’s revenue and net income is accordingly not relevant to the issues in this proceeding. Further, SEA has not cited to any testimony or documents in the record to support this PFF.

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%

Response: Denied. This PFF is not relevant because SEA bears the burden of proving that its damages were proximately caused by ZIM’s violations of the Shipping Act and to prove the amount of its damages with reasonable certainty. See, Points IV D and E of ZIM’s Reply Brief. The amount of ZIM’s revenue and net income during the period 2016 – 2022 is accordingly not relevant to the validity or non-validity of a claim relating to demurrage, detention and similar charges and is therefore not relevant to the issues in this proceeding. Notably, SEA’s expert agrees:

Q. If a demurrage claim is analyzed and determined to be valid, does it matter whether or not the ocean carrier that’s issuing that charge is profitable or unprofitable that year?

(Objection by counsel)

A. No.

Q. And by the same token, if a demurrage claim is analyzed and determined to be invalid, does it matter whether or not the ocean carrier that particular year is profitable or unprofitable?

(Objection by counsel)

A. No.” CX_08823, McCown Dep. Tr., 231:4-19

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.*

Response: Denied. This PFF is not relevant because SEA bears the burden of proving that its damages were proximately caused by ZIM’s violations of the Shipping Act and to prove the amount of its damages with reasonable certainty. See, Points IV D and E of ZIM’s Reply Brief. The amount of ZIM’s revenue and net income “during the pandemic” is accordingly not relevant to the validity or non-validity of a claim relating to demurrage, detention and similar charges and is therefore not relevant to the issues in this proceeding. And, as previously established, SEA’s expert agrees. See, response to PFF no. 239.

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>).

Response: Denied. This PFF is not relevant because SEA bears the burden of proving that its damages were proximately caused by ZIM’s violations of the Shipping Act and to prove the amount of its damages with reasonable certainty. See, Points IV D and E of ZIM’s Reply Brief. The amount of ZIM’s net income during Q3 of 2020 and 2019 is accordingly not relevant to the validity or non-validity of a claim for demurrage, detention and similar charges and is therefore not relevant to the issues in this proceeding. And, as previously established, SEA’s expert agrees. See, response to PFF no. 239.

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>).

Response: Denied. This PFF is not relevant because SEA bears the burden of proving that its damages were proximately caused by ZIM’s violations of the Shipping Act and to prove the amount of its damages with reasonable certainty. See, Points IV D and E of ZIM’s Reply Brief. The amount of ZIM’s net income for the third quarter of 2021 is accordingly not relevant to the validity or non-validity of demurrage, detention and similar charges and is therefore not relevant to the issues in this proceeding. And, as previously established, SEA’s expert agrees. See, response to PFF no. 239.

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.

Response: Denied. This PFF is not relevant because SEA bears the burden of proving that its damages were proximately caused by ZIM’s violations of the Shipping Act and to prove the amount of its damages with reasonable certainty. See, Points IV D and E of ZIM’s Reply Brief. Whether D&D charges equate to ZIM’s actual costs is accordingly not relevant to the validity or non-validity of a demurrage claim and is therefore not relevant to the issues in this proceeding. Further, it is normal and reasonable for D&D rates to be somewhat higher than actual costs:

“While costs are a component of how D&D rates are determined, they are far from the only consideration. Ship lines use D&D to incentivize customers to keep

equipment (containers and chassis) moving in order to increase their utilization. It is to the ship line's benefit to get as many loads as possible per container per year. The opportunity cost of not having use of the container is the primary reason ship lines set D&D rates above their equipment costs. Hence, D&D charges encourage container shippers and their customers (the freight "consignees") to quickly move and unload containers so that the ship line can get them back to Asia, either loaded as exports or empty, and to get chassis back to the terminals where they can be reused." CX_06768, Lee Clair Rebuttal Report, ¶29

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.

Response: Denied:

"29. ...opportunity costs of not having containers available were not trivial. Despite 2021 and 2022 being very strong container shipping markets, ZIM still was not using all its available ship capacity, even in the transpacific trade lane. In both 2021 and 2022, ZIM transpacific sailings were using less than 90% of available TEU capacity on more than 10% of the sailings. Nearly half of sailings used between 90% and 100% of available capacity. However, in both years more than 40% of transpacific sailings utilized more than 100% of available capacity, meaning there was the ability to flex even higher if ZIM had the containers to ship (see table below).¹⁵

¹⁵ ZIM analysis of transpacific sailings.

ZIM TransPacific Sailings TEU Utilization*

	2021		2022	
	Sailings	Percent	Sailings	Percent
<50%	4	1%	6	2%
50% to 69.9%	7	2%	4	1%
70% to 89.9%	34	9%	33	9%
90% to 99.9%	179	47%	187	49%
100% to 109.9%	115	31%	97	25%
110% to 129.9%	19	5%	43	11%
>129.9%	19	5%	14	4%
Total	377	100%	384	100%

*Utilization per allocation

Source: ZIM analysis of transpacific sailings

30. This missed 2021 and 2022 potential ZIM shipment volume occurred during a period of record ocean container shipping rates, making each “lost” opportunity even more significant. This analysis does not even include the potential that increased container availability in Asia could also be used to fill out vessels sailing to Europe or other destinations.” CX_06768-9, Lee Clair Report, ¶¶30-1

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).

Response: Denied. This PFF is not relevant because SEA bears the burden of proving that its damages were proximately caused by ZIM’s violations of the Shipping Act and to prove the amount of its damages with reasonable certainty. See, Points IV D and E of ZIM’s Reply Brief. The amount of ZIM’s income from demurrage during the period 2017-2018 is accordingly not relevant to the validity or non-validity of a demurrage claim and is therefore not relevant to the issues in this proceeding. And, as previously established, SEA’s expert agrees. See, response to PFF no. 239.

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).

Response: Denied. This PFF is not relevant because SEA bears the burden of proving that its damages were proximately caused by ZIM’s violations of the Shipping Act and to prove the amount of its damages with reasonable certainty. See, Points IV D and E of ZIM’s Reply Brief. Whether ZIM experienced an increase in its global income from demurrage during the period 2021-2022 is accordingly not relevant to the validity or non-validity of a demurrage claim and is therefore not relevant to the issues in this proceeding. And, as previously established, SEA’s expert agrees. See, response to PFF no. 239.

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.

Response: Denied. This PFF is not relevant because SEA bears the burden of proving that its damages were proximately caused by ZIM’s violations of the Shipping Act and to prove the amount of its damages with reasonable certainty. See, Points IV D and E of ZIM’s Reply Brief. The amount of ZIM’s income from demurrage during the period 2017-2022 is not relevant to the validity or non-validity of a demurrage claim and is therefore not relevant to the issues in this proceeding. And, as previously established, SEA’s expert agrees. See, response to PFF no. 239.

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.

Response: Admit.

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.

Response: Admit.

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.

Response: Admit.

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.

Response: Admit that the quotation in this PFF has been accurately transcribed from language in the cited document. Denied to the extent that the quoted materials are characterized as anything other than guidance to ZIM personnel to consult with the Strategic Accounts Team in dealing with problematic or challenging Strategic Accounts. See CX_04757, 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.

Response: Admit.

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.

Response: Denied. In his testimony, Mr. Cleva was asked whether he knew what the presentation meant by “Samsung example” to which he responded “I have a general idea. I don’t know the specific example.” His complete testimony, which is only partially included in this PFF, was: “There may have been a case where there was monies owed 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. 48:9-18.

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.

Response: Denied. The actual question and answer was:

Q. So was the issue the holding strategic accounts container itself or not having coordinated with the strategic account team prior to taking such action?

(Objection by counsel)

THE WITNESS: The latter, actions such as this for strategic accounts need to be coordinated with strategic accounts.

There was no reference to SEA in the cited testimony, which speaks for itself. 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.

Response: Denied. Ms. Martin, a collections manager, identified accounts subject to cargo holds “this week and next week” to ZIM colleagues. CX_04797-98, Cleva Dep. Ex. 12 at 3-4. Deny that this email is relevant because it does not refer to SEA or to the claims alleged by SEA in this proceeding.

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.

Response: Denied. Deny that this email is relevant because it does not refer to SEA or to the claims alleged by SEA in this proceeding. The cited email speaks for itself and also included an instruction from Ms. D’Angeli that a smaller list, that had been reviewed, be used as those customers that had been notified and the balances reviewed to confirm customer fault. CX_04795, Cleva Dep. Ex. 12 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.

Response: Admit.

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.

Response: Denied. Deny that this email is relevant because it does not refer to SEA or to the claims alleged by SEA in this proceeding. Further, the email cited speaks for itself and, the context surrounding the excerpt restated here includes proposed resolutions and a prompt undertaking by Ms. D'Angeli and Ms. Rosenberg to address the issues identified by ZIM. 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.

Response: Denied. The evidence cited does not support the proposition that SEA suffered \$5.2 million in charges as a result of four cargo holds. The quotation from the email referenced herein, which speaks for itself, has the apparent purpose of providing an update to Mr. Nissim with regard to the Samsung tender, including directing his attention to a report that Samsung Electronics USA would hold its tender while “many non Samsung Electronics business [] want[] to have ZIM’s support continuously.” Further, the conclusion in the email from Ms. D’Angeli is to request additional collaboration with the Strategic Accounts team and customer in advance of cargo holds for Strategic Accounts. CX_07484-85, ZIM0014530-31.

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.

Response: Denied as stated. The testimony cited, which speaks for itself, is that Mr. Cleva considered his role to include assisting finance but that the collection of D&D was “not a primary job function” for him. 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.*

Response: Denied as stated. The testimony cited, which speaks for itself, was limited to questions to Mr. Cleva about his job rather than the entire SA Team. As noted above, Mr. Cleva testified that he considered his role to include assisting finance but that the

collection of D&D was “not a primary job function” for him. CX_04606-07, Cleva. Dep. Tr. 77:17-78:3.

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.

Response: Denied as stated. Mr. Cleva’s testimony, which speaks for itself, does not include details about the frequency with which requests for assistance from any specific finance department were received or any reference to “disputes over invoices.” Mr. Cleva testified that he might be involved in connecting with a customer at a senior level to assist in resolving stalled collection efforts. 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.

Response: Denied. The testimony cited, which speaks for itself, includes reference to a single instance where Mr. Cleva questioned the implementation of a cargo hold one day earlier than anticipated in previous discussions. 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.

Response: Denied. ZIM produced a number of documents in discovery which confirmed that SEA had a high risk of payment delinquency, including evidence confirming SEA did not pay its bills on time; recognition of SEA’s delinquency in making payments by its corporate affiliate, Samsung SDS; numerous spreadsheets identifying SEA as a high risk account and questions about same, including the rating by Dun & Bradstreet, which, as an objective rating system, shows that SEA had a high risk for payment delinquency. RX_0151-52, ZIM0011505; RX_0153 ZIM0011506 (an email titled “Customer Update – High Risk” with attachment that includes SEA due to its overdue balance); RX_0740-42, ZIM0012332; RX_0743, ZIM012335 (ZIM “Overdue Report” and corresponding email which indicate the “action plan” includes collections and “Credit Risk Monitoring” which requires insuring overdue balances, reviewing D&B reports and other credit monitoring efforts); RX_0155-56, ZIM0085640; RX_0157, ZIM0085642 (discussing SEA’s creditworthiness following a request for increased credit, including a reference to various ratings from analysts and D&B); *see also* RX_1636-40, SEA0018297-SEA0018301 (Samsung SDS noting SEA’s delinquency in making payments and failure to make promised payments when delinquent). Contrary to the assertion made in this PFF, ZIM’s productions included a reassessment of SEA for creditworthiness, and do include a reference to SEA’s Dun & Bradstreet rating. RX_0155-56, ZIM0085640, RX_0157 ZIM0085642 (the email assessing creditworthiness and supporting attachment which references a Dun & Bradstreet score). Furthermore, questions about the Dun & Bradstreet report were properly directed to SEA’s liability expert, John. McCown, because he asserted

that SEA had “a market cap of \$365 billion making it the 20th most valuable company in the world,” a statement which he admitted during his deposition testimony was mistaken because he conflated SEA with its Koren parent company, Samsung. CX_08551, McCown Report ¶39. At his deposition, Mr. McCown frankly admitted his error and apologized for it:

“Q. How did you determine the market cap of SEA, Samsung Electronics Ameerica, was 365 billion?

A. Well, I didn’t – that’s a typo. What I meant, obviously was Samsung itself. SEA I don’t have a – obviously is part of Samsung.

* * * * *

Q. Okay. So when you were—

A. So I apologize.” CX_08790, McCown Dep. Tr. 198:9-22

This testimony further highlights how SEA demands it be treated as a separate company when being threatened with cargo holds for non-payment of seriously overdue receivables, but melds within its parent company when it suits its purposes. Notably, even SEA’s expert admitted that all of the Samsung entities were “one big Samsung family:”

“Q. When you were talking about a market cap of 365 billion, you’re talking about the parent—

A. Yes.

Q. --Samsung Electronics Co., Ltd. in Korea with all of its consolidated companies –

A. Yes.

Q. --SEA?

A. Yes.

Q. Okay. And so SEA as well as the other Samsung subsidiaries should be treated with the same creditworthiness as Samsung Korea should be treated with; is that your—

A. Certainly in my view, yes.

Q. So it's like SEA is part of a – one big Samsung family?

A. Yes. CX_08790-1, McCown Dep. Tr. 198:23-199:15

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”).

Response: Denied. The evidence cited does not support this PFF. SEA is listed in numerous emails with attachments showing that it was a “high risk” account and an account characterized as “doubtful debt” due to SEA’s failure to pay its debts to ZIM on time. RX_0151-52, ZIM 0011505; RX_0153, ZIM 0011506 (an email titled “Customer Update – High Risk” with attachment that includes SEA due to its overdue balance); RX_0740-42, ZIM0012332; RX_0743, ZIM012335 (ZIM “Overdue Report” and corresponding email which indicate the “action plan” includes collections and “Credit Risk Monitoring” which requires insuring overdue balances, reviewing D&B reports and other credit monitoring efforts); RX_0155-56, ZIM0085640; RX_0157, ZIM0085642 (discussing SEA’s creditworthiness following a request for increased credit, including a reference to various

ratings from analysts and D&B). Furthermore, ZIM produced documents calling into question SEA's status as a credit risk, including a spreadsheet evaluating a request by SEA for increased credit where ZIM described SEA as having a "moderate potential (sic) for severely delinquent (sic) payments; D&B viability rating 6; paydex 72, dbt 12." ZIM0085642.

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.

Response: Denied. As noted in the response to PFF no. 264, Mr. McCown admitted that he conflates SEA with its parent, Samsung Electronics Co., Ltd. in Korea, when describing SEA's credit risk in his report. CX_08551, McCown Report ¶39. Furthermore, ZIM's firsthand experience with SEA demonstrates that SEA was, in fact, a credit risk by accumulating debts in the hundreds of thousands of dollars on multiple occasions. CX_05341, Rosenberg Tr. 38:3-7 (SEA accrued an overdue balance of \$143,000 in August of 2020); CX_01570, ZIM0085708; (SEA accrued an overdue balance of \$858,000 in May of 2021); CX_05349, Rosenberg Tr. 46:13-19 (SEA accrued an overdue balance of \$944,000 in September of 2021); CX_01570, ZIM0085708 (SEA accrued over \$1,538,000 in overdue payments in January of 2022).

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.

Response: Denied as stated. Admit that the quoted testimony from Mr. McCown's deposition has been accurately transcribed. Denied to the extent that SEA was "cautious before making payments based on its D&D experiences" which is unsupported by the evidence cited. See also, response to PFF no. 265.

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).

Response: Denied as stated. The term "Finance Hold" is not used in the depositions of ZIM witnesses or the evidence cited in support of this PFF, and is not recognized nor acknowledged by ZIM in this proceeding. Admit that cargo holds were necessary to obtain payment from SEA. Deny that ZIM accepted cargo from SEA for "putative store-door moves." The evidence cited confirms that SEA accumulated detention and demurrage charges during the periods in question. Furthermore, SEA attempts to suggest that ZIM failed to handle delivery instructions when, in actuality, SEA provided delivery instructions directly to its CNTs, and even directed its CNTs to prioritize the trucking of other ocean carriers' containers over containers that were transported by ZIM. RX_1465-74, SEA0127765-74 (coordinating a delivery appointment with CNT after the last free day based on the type of delivery and appointment availability); RX_1208, SEA0139186 (SEA instructing Harvest Transportation to prioritize 126 CMA containers accumulating demurrage over containers from other shipping lines, including 19 ZIM containers); ;

RX_0811-15, SEA0132654-58 (SEA instructing its trucker to complete a live unload rather than a drop and pick despite its rate arrangements with ZIM).

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.

Response: Denied as stated. Admit that demurrage revenue increased and decreased due to the volumes of cargo shipped during this period. Even SEA’s expert, John McCown agreed:

“Q. And if you see an increase in the volume of containers, would you also expect to see an increase in demurrage?

A. It wouldn’t be unreasonable at all to see an increase in demurrage consistent with that volume increase. That’s correct.” CX_06717, McCown Dep. Tr. 125:8-13

The evidence cited does not support the existence of any causal link between the passage of OSRA and the decrease in demurrage charges.

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.

Response: Denied. ZIM produced documents referencing D&B reports, including a D&B score generated to assist with evaluating whether SEA should be granted an increased amount of credit and the regular monitoring of D&B reports to assist with assessing credit risks for overdue accounts, including SEA. RX_0155, ZIM0085640, RX_0157, ZIM0085642 (noting SEA’s D&B viability score with regard to a credit request);

RX_0740-43, ZIM0012332, ZIM0012335 (noting ZIM’s process of reviewing D&B reports for credit risks associated with top overdue accounts, including SEA as one of the top 35 overdue accounts in June of 2020); RX_0748, ZIM0013687; RX_0750, ZIM0013689 (noting that SEA was a moderate credit risk based on its score and providing D&B reports for customers on the attached spreadsheet, including SEA, in July of 2022).

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.

Response: Denied as stated. Admit that SEA’s selection of a CNT shifted liability for demurrage and detention associated with the deficient performance or non-performance of a CNT on store door moves. Deny that responsibility for demurrage or detention when a CNT was used was “typically” for the account of ZIM. SEA’s responsibility for demurrage and detention for the deficient performance or non-performance of a CNT derives from the contractual arrangement between ZIM and Samsung SDS or Samsung Logitech, the contract under which the shipments in question were shipped. RX_1794, Service Contract 7100204807; RX_1821-22, Service Contract Z18436KR; RX_1857, Service Contract 7100171730; RX_1885, Service Contract Z19179KR, and RX_1925, Service Contract 7100102863 (see Section 12a of each Contract).

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.

Response: Denied. Under the terms of the contracts between ZIM and Samsung SDS or Samsung Logitech under which cargo moved, the liability for detention and demurrage charges resulting from a CNT's deficient performance or non-performance was for the account of SEA. RX_1794, Service Contract 7100204807; RX_1821-22, Service Contract Z18436KR; RX_1857, Service Contract 7100171730; RX_1885, Service Contract Z19179KR, and RX_1925, Service Contract 7100102863 (see Section 12a of each Contract).

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.

Response: Denied as stated. Admit that ZIM faced challenges in February of 2021 in securing truck capacity to service its needs in some markets. Deny SEA's characterization of "store door responsibility" as requiring ZIM to provide trucking services where a CNT is nominated by a customer such as SEA. ZIM was obligated to provide the services referenced in the email cited in this PFF in the absence of a CNT nomination. CX_02790, Frigo Dep. Ex. 13 (distinguishing units where ZIM is providing a house trucker from 192 shipments that are "for preferred truckers" and thus not the responsibility of ZIM to secure trucking services).

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.

Response: Denied as stated. Admit to the extent that a trucker stated it was unable to pick up three containers in Jacksonville in July of 2021 for reasons other than capacity. Denied, because the evidence cited shows email exchanges occurring over several weeks where the CNT, UPS (an agent of SEA), and SEA attempt to identify who will pay demurrage that accumulated in Jacksonville for SEA’s cargo during a cargo hold and thereafter when SEA, its CNT, and UPS struggled to coordinate and arrange payment. 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).

Response: Denied. In the evidence cited, Ms. Speight describes her expectations being inaccurate due to her recollection that “I knew that Samsung was ZIM trucker availability. . . .” CX_03044, Speight Dep. Ex. 5. This evidence does nothing to suggest that ZIM was at fault for SEA’s shipments as alleged by SEA in this PFF. Furthermore, in her testimony, when asked about this exact language, Ms. Speight explicitly noted that her expectations were related to shipments where SEA relied on truckers other than its CNTs, stating “[s]o ZIM trucker availability would be there were door moves that used ZIM house

truckers. They were not preferred truckers. So they were truckers that ZIM provided.”
CX_02918-29, Speight Dep. Tr. 119:11-120:8.

VIII. INDUSTRY PERSPECTIVES REGARDING LIABILITY AND DAMAGES

A. Industry Views Regarding Expert Liability¹⁶

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.

Response: Denied. Mr. McCown’s had no “operating” experience while employed by McLean Industries / U.S. Lines, which went bankrupt in 1986. CX_08584-86 (resume entries showing heavy financial experience with non-international companies with limited similarities to ZIM and the international shipping industry). His lack of relevant experience was summarized by Lee Clair in his rebuttal report:

“McCown’s discussion of the container ship line pricing levels and structures while he worked with US Lines has no bearing on pricing practices 35+ years later. In fact, US Lines went bankrupt in 1986 (footnote omitted). The ocean container shipping industry looks very little like it did when McCown worked in the industry.”
CX_06765, Clair Report, p. 5, ¶20

His tenure at Trailer Bridge also falls short of the experience needed to qualify as an expert in this case:

Trailer Bridge’s fleet is barges rather than ships with holds, and Trailer Bridge’s container fleet is composed of domestic containers, rather than international (ISO) containers. Trailer Bridge has no service transporting containers from Asia to the

¹⁶ ZIM has moved to strike the expert report of John McCown and objects to all PFFs which rely upon statements or opinions that he has proffered.

U.S. that compete with the type of service that ZIM provided to SEA. CX_06766, Clair Report, p. 6, ¶22.

Throughout his career, Mr. McCown has never had involvement in the operational matters that form the crux of this dispute, such as:

- Vessel operations – CX_08611, McCown Dep. Tr, 19:19-21
- Container and chassis operations – CX_08613, McCown Dep. Tr, 21:19-22
- Establishing demurrage, detention or other accessorial rates - CX_08615, McCown Dep. Tr, 23:6-12
- Invoicing freight, demurrage or detention charges - CX_08615, McCown Dep. Tr, 23:6-12
- Collecting receivables - CX_08622, McCown Dep. Tr, 30:12-19

Finally, the most telling factor regarding his lack of competence as an expert in this case is founded upon Mr. McCown’s admission that he has never analyzed a demurrage claim in his entire career. CX_08822, McCown Dep. Tr. 231:1-3.

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.

Response: Denied as stated. Admit that the language cited was accurately transcribed from Mr. McCown’s report. Deny that Mr. McCown’s statement is correct because Mr. McCown does not cite to evidence to support it. CX_08537, McCown Report ¶ 13. Mr McCown’s “industry standard practices” are not rooted in the international

shipping industry but rather in his unrelated experience with U.S. Lines and Trailer Bridge, both of which went bankrupt. CX_08675-78, McCown Dep. Tr. 83:14 -86:25 (identifying the basis of his opinion as his experience with U.S. Lines and Trailer Bridge). Mr. McCown, when asked during his deposition, furthermore could not explain what is meant by “industry standard practice.” CX_08675-78, McCown Dep. Tr. 83:14 -86:25 (McCown attempting to rely on his experience before struggling to articulate what is meant by “industry standard practice”).

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.*

Response: Denied as stated. The evidence cited does not support the conclusion stated in this PFF. Furthermore, as noted above, Mr. McCown’s statement, without citing to any evidence but according to his testimony is rooted in his opinion that ZIM is comparable to U.S. Lines and/or Trailer Bridge in this regard. CX_08675-78, McCown Dep. Tr. 83:14 -86:25 (identifying the basis of his opinion as his experience with U.S. Lines and Trailer Bridge). Furthermore, Mr. McCown’s failure to articulate what is meant by “industry standard practice” undermines the point he attempted to make in his opinion. CX_08675-78, McCown Dep. Tr. 83:14 -86:25 (McCown attempting to rely on his experience before struggling to articulate what is meant by “industry standard practice”).

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.*

Response: Admit that Mr. McCown did not encounter operations in the international shipping industry such as those in question here, particularly in light of his

limited experience with two bankrupt shipping firms with operations that were substantially different from ZIM's. Deny that ZIM unilaterally decided that "store-door terms became inapplicable if a consignee nominated a preferred trucker." RX_1794, Service Contract 7100204807; RX_1821-22, Service Contract Z18436KR; RX_1857, Service Contract 7100171730; RX_1885, Service Contract Z19179KR, and RX_1925, Service Contract 7100102863 (contracts showing in Section 12a of each Contract that Samsung SDS and Samsung Logitech entered into contracts under which Samsung SDS, Samsung Logitech, and their affiliates assumed liability for detention and demurrage that resulted from a CNT with a deficient performance or non-performance of its obligations). Deny that Mr. McCown's experiences as a "shipowner" or "industry thought leader" apply under the circumstances relevant to this litigation. CX_08584-86 (resume entries showing financial experience with domestic companies with limited similarities to ZIM and the international shipping industry).

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

Response: Denied. This PFF differs from the statement in Mr. McCown's report: "free days that were considered typical and reasonable were built into the rates per container." CX_08539, McCown Report ¶ 19. Furthermore, Mr. McCown does not cite to evidence which supports this assertion and provides no explanation for what is meant by "typical and reasonable." *Id.*

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

Response: Denied. This characterization does not extend beyond Mr. McCown's experience at U.S. Lines, which went bankrupt in 1986, as stated in his report (describing the \$3 per day demurrage cap as stemming from his experience "at U.S. Lines"). CX_08539, McCown Report ¶ 19. Further, Mr. McCown's is not competent to give this opinion because he was not involved in the fixing, invoicing or collection of D&D for U.S. Lines CX_08615, McCown Dep. Tr, 23:6-12; he did not review, study or analyze the D&D practices of other ocean carriers while at U.S. Lines CX_08745, McCown Dep. Tr. 153:4-14; and he could not comment on the current demurrage and detention practices of other ocean carriers. CX_08669-8670, McCown Dep. Tr. 77:16-78:16.

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.*

Response: Denied. The evidence cited states only that Mr. McCown worked for Trailer Bridge, a Jones Act carrier that provided both store door and container yard service. CX_08540, McCown Report ¶ 20. Further denied that rates were "much 'lower'" as overstated by SEA above; Mr. McCown stated only that "CY rates were lower 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.

Response: Denied as stated. Admit that Mr. McCown asserted this in his report and denied to the extent that Mr. McCown fails to cite to any evidence to support this assertion. CX_08540, McCown Report ¶ 22. Further, at his deposition, Mr. McCown admitted to two

examples where this statement was not accurate: U.S. Lines (CX_08760, McCown Dep. Tr. 168:12-20, and Trailer Bridge, after he left the company. CX_08760-1, McCown Dep. Tr. 168:21-25.

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

Response: Denied. SEA cites to Mr. McCown’s report for this proposition but Mr. McCown fails to cite to any evidence supporting the quoted language. CX_08540, McCown Report ¶ 22.

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.

Response: Denied. The 2008 recession and the pandemic which began in 2020 were twelve years apart. This PFF, attributable to Mr. McCown’s report, again relies on a statement unsupported by any citation to evidence in the record. CX_08542, McCown Report ¶ 23. Further, Mr. McCown admitted that shippers can negotiate accessorial charges, i.e. lower demurrage rates and longer free time when entering into service contracts with ocean carriers:

“Q. In your experience, can a shipper, when it’s negotiating its service contract with the ocean carrier, also deal with demurrage and detention rates?

A . Yes.

Q. It can negotiate lower rates; is that fair?

A . Yes. Yes.

Q. And also, free time, it can negotiate longer free times than are provided for in the tariff?

A. Yes.” CX_08763, McCown Dep. Tr. 171:4-12.

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.*

Response: Denied. This statement is unsupported by a citation any evidence in the record, other than Mr. McCown’s report which itself fails to cite any supporting evidence. Furthermore, this PFF is not relevant because SEA bears the burden of proving that its damages were proximately caused by ZIM’s violations of the Shipping Act and to prove the amount of its damages with reasonable certainty. See, Points IV D and E of ZIM’s Reply Brief. Whether the shipping industry reported losses during the 2016-2019 time period is not relevant to the validity or non-validity of a demurrage claim and is therefore not relevant to the issues in this proceeding.

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

Response: Admit.

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.

Response: Admit that Mr. Clair has a rail background. Denied that Mr. Clair “never worked at a ship-owning company” in light of his extensive experience providing

consulting services to supply chain companies, including ocean carriers. CX_06762, Clair Report ¶ 1. (describing work such as “consulting projects for container ship lines, ports, and freight shippers” as well as work “on projects for railroads, trucking companies, drayage companies, intermodal providers, third-party logistics providers, and transportation equipment leasing companies”). SEA’s reference to “toys and dog products” is unclear from the evidence cited, but Mr. Clair’s experience and qualifications as an expert are supported by his resume and testimony. CX_06784-86 (resume of Mr. Clair showing extensive industry experience, publications, and expert testimony).

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.

Response: Denied. This PFF is not supported by the testimony cited. To the contrary, and after being asked about a number of “niche” ocean carriers whose operations were not comparable to ZIM, Mr. Clair responded as follows to SEA counsel’s questions:

Q. Okay. Would Hanjin be a comparable shipping line to ZIM?

A. I’m not sure where you’re going. I thought we were talking about Trailer Bridge on paragraph 21.

Q. Mr. Clair, can you answer my questions?

A. Any of the carriers that are one of the larger – more global reach carriers, call it top 15, would be comparable – would be similar.

Q. Okay. And would Hanjin be one of those carriers?

A. Most likely.” 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.

Response: Denied as stated. Admit that Mr. Clair stated that his consulting experience gives him an understanding of the ocean shipping and supply chain industries. Deny that his experience is “limited” with regard to “ocean freight” or that he has only an understanding of “ocean terminology and general information.” Mr. Clair’s experience demonstrates significant experience with ocean carriers, ocean freight, detention and demurrage issues, as well as other subjects related to SEA’s claims. 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.

Response: Denied as stated. Admit that Mr. Clair has not been directly employed by an ocean carrier but has consulted for ocean carriers. CX_06923, Clair Dep. Tr. 134:18-20; CX_06963-4, 174:24-175:7. Denied to the extent that SEA misstates the testimony regarding Mr. Clair’s experience about detention, demurrage and ocean carriers. CX_06923, Clair Dep. Tr. 134:18-20 (responding to questions about specific engagements, Mr. Clair stated he had not completed a project “with any ocean carrier related to their demurrage and detention policies”); CX_06945, 156:7-12 (Mr. Clair stated that he had not

specifically authored publications about the ocean carrier industry or demurrage and detention); CX_06947, 158:10-14 (Mr. Clair stated that he had not specifically lectured about ocean carriers or demurrage and detention).

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.

Response: Denied as stated. Admit that Mr. Clair was not directly employed by an ocean carrier but has been engaged by ocean carriers as a consultant and that Mr. Clair's report observed deficiencies in Mr. McCown's experience with regard to the issues in this case. Denied to the extent that Mr. Clair focused on attacking Mr. McCown's knowledge of the shipping industry in his answers to questions posed by SEA's counsel at this deposition. CX_06961-64, 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.

Response: Denied. The evidence cited does not support this PFF. Appendix B to Mr. Clair's report cites to substantial evidence from the record which is appropriate for a rebuttal report. CX_06787, Clair Report App. B. The cited testimony, which does not support this PFF, speaks for itself. CX_06957-58, 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.

Response: Denied as stated. Admit that Mr. Clair was formally retained approximately six weeks before he issued his report. Denied to the extent that SEA alleges Mr. Clair’s “project manager and junior analysts did the bulk of the work for the report” or that Mr. Clair’s colleagues were the sole custodians of files or information which is unsupported by the evidence to which SEA cites. CX_06816-7, Clair Dep. Tr. 27:19-28:6 (identifying persons supporting Mr. Clair and supervised by Mr. Clair who assisted in preparing the report), CX_06988, 199:18-20 (noting that Mr. Clair had six weeks to prepare his report). The allegations set forth in this PFF are not supported.

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.

Response: Denied. The testimony described in response to PFF no. 295, which more accurately describes the process employed by Mr. Clair to prepare his report, states, “I wrote the outline of what we were going to do, then I outlined where we were going to get information or what information we needed, and then my project manager did a first draft, and then I edited, and then I did the final draft.” CX_06829, Clair Dep. Tr. 40:5-11. The testimony cited by SEA further lacks context, including a failure to describe how Mr. Clair reviewed facts in consultation with his colleague before forming his opinions. 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.

Response: Denied. This PFF is not supported by the cited testimony. Mr. Clair was not asked why he reviewed only a few select samples of fact witness depositions in the testimony cited. CX_06832, Clair Dep. Tr. 43:3-10. He was asked why he chose “not to rely on deposition testimony from one of the parties...” *Id.* SEA also quotes only a portion of the response, which speaks for itself. *Id.* Mr. Clair’s report references five deposition transcripts that were relied upon in the formation of his opinions. CX_06787. In his testimony, Mr. Clair stated that he reviewed a number of documents that were not relied upon and that were properly not included in his Appendix B. CX_06828, Clair Dep. Tr. 39:13-18; CX_06830, Clair Dep. Tr. 41:1-19.

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.

Response: Denied as stated. Admit that Mr. Clair testified that he did not view SEA witnesses’ testimony as relevant to the formation of the opinions in his report. Denied to the extent that SEA characterizes Mr. Clair’s testimony as having gaps because, if SEA had properly managed the seven hours to which it was entitled to question Mr. Clair, its counsel could have addressed the “gaps in his testimony” which are alleged in this PFF. CX_07076; Clair Dep. Tr. 287:9-18 (Ms. Shen mistakenly claiming that, at the seven-hour mark, she

had thirty minutes of questioning remaining). Further, denied because the subject of the alleged gaps are not addressed in Mr. McCown's report and therefore are not necessary to a rebuttal report and, in any event are not relevant to SEA's claims in this proceeding.

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.

Response: Denied. In his testimony, which speaks for itself, Mr. Clair described his analysis of ZIM's global trade lanes as something that was reviewed and discussed on a "cursory," "superficial" level before focusing on the "most important" trade lanes and ports for the analysis he performed. CX_06967, Clair Dep. Tr. 178:9-179:8. Additionally, contrary to SEA's assertion in this PFF, Mr. Clair explicitly states in the testimony cited that "we talked [with] ZIM's attorneys and said which trade lanes are the ones that are most important for this case and which ports." *Id.* Finally, SEA's focus on trade lanes in this PFF are misplaced, as noted by Mr. Clair in his testimony, because demurrage and detention occur at ports and terminals rather than on specific trade lanes. CX_06968, McClair Dep. Tr. 179:10-15.

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.

Response: Denied as stated. The cited testimony, which speaks for itself, describes whether ZIM, if a CNT fails to perform, should be responsible for securing alternative transportation arrangements for a shipment. CX_06845-45, Clair Dep. Tr. 56:20-57:25.

Mr. Clair testified that, when a CNT fails to perform a move, ZIM and SEA should communicate to determine how to move forward with securing transport for the cargo. *Id.*

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.

Response: Denied. Mr. Clair testified that, under store door terms where ZIM provided a house trucker and the trucker's performance alone led to an issue, that ZIM would be responsible for the deficient performance. CX_06852-5, Clair Dep. Tr. 63:4-66:1. Deny that Mr. Clair obfuscated his answers because SEA's counsel posed a hypothetical question that was unclear and did not respond to Mr. Clair's efforts to have the question clarified. CX_07063-07071, Clair Dep. Tr. 274:9-282:24.

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.

Response: Admit.

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.

Response: Denied. The evidence cited does not support the allegation stated in this PFF. SEA cites to testimony, which speaks for itself, that cannot seriously be read to support its assertions in this PFF because each segment of testimony cited is an incomplete discussion of a hypothetical question about ZIM’s responsibility for demurrage; discussion of port and terminal costs associated with storing containers; and discussion regarding the return of containers without discussing the need for consequences for the non-return of equipment. CX_06849, Clair Dep. Tr. 60:6-18 (a portion of testimony which raises a broad question with incomplete facts and asking for a determination of responsibility for demurrage); CX_06856-57, Clair Dep. Tr. 67:18-69:21 (Mr. Clair responding directly to a question about port and terminal costs resulting from containers in demurrage); CX_06977-CX_06978, Clair Dep. Tr. 188:10-189:14 (questions related to the return of equipment and discussion regarding responsibility where a customer would not or could not empty a container for its return).

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.

Response: Denied as stated. SEA’s characterization of the testimony, which speaks for itself, is vague and misleading. Specifically, Mr. Clair testified that “[e]very carrier treats all their accessorial charges, demurrage, detention, the rest, in a different way” and

that carriers have their “own strategies of what they’re trying to do.” CX_06855-56, Clair Dep. Tr. 66:23-12. In its second and third sentences, it is not clear what “this way” or “that way” refer to nor does either sentence find support from the cited testimony. Furthermore, the cited testimony does not include the words “independent” or “research” or similar terms. 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.

Response: Denied. Mr. Clair stated in his testimony, which speaks for itself, that he was familiar with the Incentive Principle and relied on OSRA 2022 in formulating his opinions as noted in Appendix B of his report. CX_06868-63, Clair Dep. Tr. 69:22-74:12 (stating that he was familiar with the Incentive Principal when SEA’s counsel presented it); CX_06787 (showing that Mr. Clair relied on the FMC’s summary of D&D initiatives on its website in formulating his opinion). The latter cited testimony does not support this PFF as it only includes questions related to whether Mr. Clair evaluated whether ZIM violated the Shipping Act or the FMC’s incentive principle rather than whether he was familiar with either. CX_06909-CX_06910, Clair Dep. Tr. 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.

Response: Deny that Mr. Clair lacked familiarity as alleged in this PFF. Admit that the cited testimony, which speaks for itself, has been transcribed correctly.

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.

Response: Denied. Mr. Clair testified that he believed he “saw some of the policies” but would have to refresh his memory to be sure. CX_06899-CX_06900, Clair Dep. Tr. 110:16-111:7. In the cited testimony, which does not support the allegation that Mr. Clair was unprepared to “opine on the efficacy/robustness of ZIM's dispute procedure,” Mr. Clair stated that in his rebuttal report, he responded only to those opinions raised by SEA's expert. CX_06918, Clair Dep. Tr. 129:2-18. Furthermore, Mr. Clair testified that he reviewed a number of documents that were not relied upon and that were therefore not included in his Appendix B. CX_6828, Clair Dep. Tr. 39:13-18; CX_6830, Clair Dep. Tr. 41:1-19.

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.

Response: Denied. Mr. Clair's testimony, which speaks for itself, was that he focused on responding to opinions raised by Mr. McCown and the information necessary to form his own opinions. CX_06918, CX_06957, CX_06967, CX_0687, Clair Dep. Tr. 129:2-10; 168:13-21, 178:9-15. Furthermore, none of the testimony cited by SEA supports the premise that Mr. Clair did not perform “any other kind of analysis or [pull] from personal knowledge of the shipping industry.” *Id.*

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.

Response: Denied as stated. Mr. Clair’s testimony, which speaks for itself, stated that analysis regarding the validity of D&D charges is a shipment-specific analysis that would have been a significant undertaking and likely could not have been completed during the period of time during which he completed his report. CX_06909, CX_06986-CX_06987, Clair Dep. Tr. 120:2-13, 197:19-198:25; CX_06765, Clair Report ¶19 (highlighting that necessary case-specific analysis was not performed by SEA’s experts). Mr. Clair’s opinion was that he viewed this information as critical to determining liability for D&D charges on a container-specific basis, and that Mr. McCown’s report was deficient because it lacked container-specific facts that would inform which party was responsible for D&D in each individual circumstance. CX_06765, Clair Report ¶19.

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.

Response: Denied as stated. The testimony cited, which speaks for itself, was that Mr. Clair may or may not have been able to complete the container-specific analysis necessary to determine responsibility for each D&D charge alleged by SEA if he had been retained six months earlier. CX_06989, Clair Dep. Tr. 200:4-23. Given that discovery

closed on June 29, 2023, the hypothetical questions as to when he could have been engaged are misleading because ZIM's experts relied on documents and information provided by SEA in this proceeding, many of which were not available during the hypothetical period posited by SEA's counsel. FMC Docket 22-30, Order On Motion To Compel And Cross-Motion To Amend Scheduling Order, April 3, 2023.

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).

Response: Denied as stated. Mr. Clair's testimony was directed by the questions posed by SEA's counsel. Mr. Clair cited to the record extensively in his report and memorialized reliance on a number of documents in forming his opinions. CX_06787, Clair Report App. B. Admit to the extent that the evidence cited shows SEA's warehouses caused demurrage when they could not provide timely delivery appointments. 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.

Response: Denied. SEA attempts to include multiple facts into this single proposed finding of fact in a manner which is untenable. Furthermore, SEA attempts to downplay issues created by warehouse availability when citing evidence which directly states “*Carrier advised the soonest the warehouse can accept is 4/20 at 7 am.*” CX_07127-CX_07133, Clair Dep. Ex. 10. SEA’s description of this series of events is denied because it ignores key gaps in communication from SEA and misstates the timeline of communication, including requests for information from SEA by ZIM on April 15 and no response from SEA until April 22 when SEA raises a question regarding the location of the cargo. CX_07127-CX_07133, Clair Dep. Ex. 10 (the email chain ending on April 15); CX_07142-CX_07145, Clair Dep. Ex. 12 (showing email from SEA on April 22, not April 19). Furthermore, SEA’s efforts to suggest that it was only notified of the issue following the last free day undermine the notice that would have been provided to UPS as the notify party and the obvious notice that was provided to the trucker that was unable to progress the container due to SEA’s warehouse constraints. CX_07127-CX_07133, Clair Dep. Ex. 10 (noting that the carrier had already accepted the delivery and attempted to arrange delivery prior to the escalatory

email to SEA's personnel which addressed the issue of customer availability to accept the cargo).

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.

Response: Denied. Mr. McCown's report provided little insight beyond his finance-based roles with two domestic ocean carriers that went bankrupt and have little in common with ZIM or the facts of this case. See, ZIM's Motion to Strike Expert Report of John D. McCown, dated September 26, 2023 which describes why he is not competent to act as an expert in this case, and explains why his opinions are not based on reliable evidence and the opinions and statements he proffers are not relevant. Further, Mr. McCown's broad statements to the effect that demurrage should be \$3 per day, when ocean carriers charge substantially higher amounts to avoid the port and terminal standstill that would undoubtedly result from such a low demurrage fee, and that he had "no awareness" of other carrier's practices while forming opinions on the industry standards in his report, undermine any credibility he might have when opining on the international shipping industry or the facts of this case. CX_08539, McCown Report ¶19; CX_08782 McCown Dep. Tr. 190:18-191:1(Mr. McCown stated "I have no awareness of what was going on with other carriers" when responding to a question about pandemic-related issues faced by SEA and its ocean carrier suppliers). Mr. Clair's report, on the other hand, is rooted in experience

with the broader supply chain, including rail and trucking, and experience with global ocean carriers which are actually comparable to ZIM. CX_06784-86, Clair Report App. A.

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.

Response: Denied as stated. Mr. Smith's resume, which speaks for itself, is available in the record. RX_1911-16; Smith Rep. App. A. Mr. Smith's opinion regarding his own experience is repeated here by SEA. 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.

Response: Admit.

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>.

Response: Admit.

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.

Response: Admit. SEA's decision to transport cargo on a container-yard basis rather than a store-door basis was a commercial decision as was its choice to invest in inland

transportation management infrastructure. CX_05795-CX_05796, BRG Report ¶ 22; see also, CX_06519, Zayas Rebuttal Report, p. 18, ¶62.

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.

Response: Admit. An industry shift caused SEA to make a business decision to expand its storage capacity and staff. CX_06519, Zayas Rebuttal Report, p. 18, ¶62.

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.

Response: Denied as stated. The evidence cited, which speaks for itself, is not described in Mr. Smith’s report as an “industry standard.” CX_05796, BRG Report ¶ 23. Admit that the quotation set forth in this PFF has been accurately transcribed from the BRG Report.

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.

Response: Admit that the majority of SEA cargo was moving on a store door basis and very little cargo was moving on a CY basis and that, accordingly, very few charges were incurred with respect to cargo moving on a CY basis.

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

Response: Admit.

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.

Response: Admit.

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.

Response: Denied. The evidence cited does not support the statement made in this PFF. Mr. Zayas testified that he performed an analysis and formulated the opinions contained in his report in response to Mr. Smith's report. CX_06552-53, Zayas Dep. Tr. 30:9-31:1. Furthermore, Mr. Zayas's report summarizes the analysis he performed. CX_06507-20, ¶¶22-65.

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.

Response: Admit that Mr. Zayas did not personally interview any ZIM employees. Denied to the extent that Mr. Zayas testified that he did make inquiries *to counsel* regarding specific information and documents rather than directly asking ZIM for the documents or information. CX_06569-CX_06570; 47:21-48:10. Denied to the extent that Mr. Zayas “only had his associate conduct two interviews”; Mr. Zayas’s colleague participated in interviews and provided to Mr. Zayas details and information resulting from the interviews. CX_06559-CX_06561, 37:6-39:21.

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.

Response: Denied. This statements in this PFF are not supported by the cited testimony. In response to a question regarding the analysis he performed, Mr. Zayas testified: “Yes, rudimentary in the sense that we looked at materials that were provided as it related to those two containers and determined that there had been a – putting aside the legal issues that you spoke about earlier, that there had been some shift in how to treat those containers, and there were other factors – and this goes to the point that I’m trying to raise throughout the report – there were factors that relate to containers that should be assessed that were not assessed in Mr. Smith’s report.” CX_06615-CX_06616, Zayas Dep. Tr. 93:18-94:4. Deny that the cited testimony supports the assertion in this PFF that Mr. Zayas admitted his conclusions are “malleable.”

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.

Response: Denied. The assertion in this PFF is not supported by the cited testimony. The term Finance Hold is not used in the cited testimony and is not recognized nor acknowledged by ZIM in this proceeding. Further, Mr. Zayas testified that he did not comment on the alleged damages resulting from the cargo holds as distinct from the damages claim as a whole. 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.

Response: Denied. The assertion in this PFF is not supported by the cited testimony. The term Finance Hold is not used in the cited testimony and is not recognized nor acknowledged by ZIM in this proceeding. Further, SEA mischaracterizes Mr. Zayas's testimony, which speaks for itself. Mr. Zayas testified only that he did not have an opinion related specifically to the cargo holds or paragraphs 45 to 54 of Mr. Smith's report. 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.

Response: Denied as stated. The term Finance Hold is not used in the cited testimony and is not recognized nor acknowledged by ZIM in this proceeding. Admit to the extent that Mr. Zayas did not offer opinions specifically on cargo hold issues. Deny that Mr. Zayas testified that he "did not know anything" related to the cargo holds. SEA cites to testimony, which speaks for itself, wherein Mr. Zayas notes that he knew "there were

various cargo holds instituted at different points” but that he was not aware of cargo holds during a specific seven-month period. CX_06711, Zayas Dep. Tr. 189:3-13.

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.

Response: Admit.

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

Response: Denied as stated. SEA cites to testimony, which speaks for itself, wherein Mr. Zayas describes the two containers in question as evidence that Mr. Smith’s assessment of liability for all \$10.8 million of demurrage and detention paid by SEA during the time period does not sufficiently address the individual circumstances of each shipment. CX_06605, Zayas Dep. Tr. 83:8-16 Immediately before this testimony, Mr. Zayas provided the explanation for his concerns. CX_06603-5, Zayas Dep. Tr. 81:1-83:7. “What I don’t see in Mr. Smith’s report is an effort to assess causation for the \$10.8 million.” *Id.* 81:15-17.

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.

Response: Denied. The testimony cited – which SEA fails to acknowledge when describing the rejection as “inexplicable” - includes the reason for SEA’s preferred trucker, Southern Companies, being rejected: because “the rate was rejected.” CX_06695, Zayas

Dep. Tr. 173:18-21 (despite attempts by SEA’s counsel to direct Mr. Zayas’s attention away from the reason on different pages of the exhibit, he noted “On page 4, it says the rate was rejected”); RX_1170-77, SEA0047461-68 (the exhibit that was being reviewed which states twice that Southern Companies was rejected as the preferred trucker in the particular lane due to its rate). Because Southern Companies was rejected as a trucker, SEA instructed ZIM to “please terminate loads as CY port.” *Id.* The two containers in question then remained on the port for months *despite at least six reminders* from ZIM to SEA to retrieve them and accumulated nearly \$100,000 in demurrage each. CX_06513-14, Zayas Rep. ¶45 (the containers arrived in August of 2021 and accruing \$96,000 in demurrage each); RX_1643, SEA0110020 (SEA reminded SEA on October 28, 2021, that the two containers remained on port awaiting pickup and accumulating demurrage); RX_1656, SEA0018262 (ZIM reminded SEA again on November 19, 2021, that the containers were still at the port and accruing demurrage; in the same chain, Ms. Fernando is directed by Mr. Peter Kim to “check below 2 containers and advise”); RX_1659, SEA0114501 (SEA reminded ZIM of the two containers, explaining in bold that they were accruing massive amounts of demurrage on December 9, 2021); RX_1663, SEA0105537 (ZIM reminded SEA again on December 10, 2022, about the containers it had left on the terminal); RX_1674, SEA0051483 (ZIM reminded SEA again on December 13, 2021, that the containers remained in demurrage with approximately \$45,000 in storage each); RX_1677, SEA0111316 (ZIM again reminded SEA of the two containers on February 7, 2022).

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.*

Response: Denied. The term Finance Hold is not used in the cited testimony and is not recognized nor acknowledged by ZIM in this proceeding. Further, this PFF lacks sufficient clarity and specificity to enable ZIM to formulate a response. SEA notes “those examples” which, to the extent they refer to the two containers described in PFF no. 332, are vague and ambiguous in the context of this PFF. The two containers in the previous paragraph were converted to container-yard movements at SEA’s request. RX_1170-77, SEA0047461-68. SEA also fails to clarify the time period to which it refers and cites to evidence that does not include any reference to \$1.5M or anything beyond a discussion about whether the containers were properly converted to container-yard shipments and whether Southern Companies was properly rejected as a CNT. CX_06695-CX_06696, Zayas Dep. Tr. 173:10-174:3. SEA also fails to provide any evidence which supports its assertion in this PFF that ZIM made an admission that \$1.5M had been charged on containers which remained store moves, as it cites only to deposition testimony from Mr. Zayas.

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.

Response: Denied. The assertion in this PFF is not supported by the cited testimony.

Mr. Zayas testified:

Q. All right. Mr. Zayas, before we took a short break, we looked at paragraph 45 to 54 of Smith report – of Smith expert report, correct?

A. Yes, sir.

Q. Okay. And just for a clear record, in your expert report, you do not separately discuss these – the paragraphs in -- paragraphs 45 to 54 of the Smith report relating to Mr. Smith's take on the impact of the credit or cargo hold?

A. That is correct.

Q. And sitting here today, you're not specifically testifying about the paragraphs 45 to 54 of Mr. Smith's report relating to Mr. Smith's take on the impact of credit or cargo hold, correct?

A. I am not offering an opinion on the cargo hold issue. CX_06725, Zayas Dep. Tr. 203:4-16.

Furthermore, as discussed in ¶332, Mr. Zayas did a sufficient analysis to understand that 1) Southern Companies was rejected as a CNT for the two containers in question; 2) SEA requested that the containers be converted to container-yard shipments, terminating at the port; and 3) SEA proceeded to allow over \$90,000 of demurrage to accrue for *each container* over the span of months in spite of multiple reminders from ZIM. See ¶332, *supra*.

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.

Response: Denied as stated. SEA's attempt to characterize "store door moves" and "responsibility" broadly ignore the particular facts of the issues in the case. Mr. Zayas noted in his testimony, which speaks for itself, that in a "traditional store door scenario," the carrier would bear responsibility for delivery to a final destination. CX_06565, Zayas Dep. Tr. 43:7-22. He also testified that barring some factor which would attribute "some

responsibility” to SEA, ZIM would bear the costs of moving product. CX_6567, Zayas Dep. Tr. 45:14-24. Mr. Zayas also testified that “[w]ithout other intervening factors” then ZIM would be generally responsible for store door movements. CX_06713-CX_06714, Zayas Dep. Tr. 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.

Response: Denied. SEA’s characterization of the testimony is contradicted by the evidence to which it cites. In the testimony cited by SEA, which speaks for itself, Mr. Zayas correctly stated that, under store door terms, ZIM would ordinarily have an arrangement with the trucker to return the equipment. CX_06661, Zayas Dep. Tr. 139:17-25. (“under store door [terms], I would expect ZIM to contract with the truck.”) Furthermore, SEA only cites to a single example for its broad mischaracterization of the scope of Mr. Zayas’s knowledge of the industry.

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.

Response: Admit to the extent that Mr. Zayas described himself as unable to discuss OSRA during his testimony. Deny that Mr. Zayas “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.” The evidence cited to by SEA does not support this statement in this PFF. CX_06620-CX_06621, CX_06666-CX_06668, Zayas Dep. Tr. 98:24-99:12, 144:12-146:2. The evidence cited is a discussion about whether or not ZIM’s profitability is relevant to a determination of liability in this proceeding. *Id.* Furthermore, Mr. Zayas’s report makes his opinion clear that invoices should be disputed on a container by container basis to determine who is at fault or, more specifically, whether the invoice is valid as applied to SEA. CX_06511-12, Zayas Report ¶¶38-42.

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.

Response: Denied. The testimony cited, which speaks for itself, does not support this PFF. In its first citation, SEA cites to a partial answer from Mr. Zayas while the remainder of the answer belies the assertion made by SEA:

“SEA is contending we shouldn't have paid this. Well, in my experience, that burden now is on them to say we aren't paying this because X, Y, and Z, this was your responsibility. The scenario that we're dealing with here is -- and I've made reference to this a couple of times -- it's an oversimplified presentation and it disregards the reality of both the relationship and what was going on during the time frame.” CX_06618, CX_06625-CX_06626, Zayas Dep. Tr. 96:9-97:13

Similarly, the other testimony cited includes a portion of a discussion wherein Mr. Zayas presses the importance of a container-specific analysis of charges while

noting that the invoicing procedure is the initial exchange of details from ZIM to SEA. CX_06623-25, Zayas Dep. Tr. 101:11-103:20.

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.

Response: Admit.

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.

Response: Denied. The assertion made in this PFF is not supported by the cited testimony. In the testimony cited by SEA, which speaks for itself, Mr. Zayas stated that he did review ZIM's D&D policies; "I have reviewed [the detention and demurrage policies] as they relate only to this matter, not in a broad – not at a broad level." CX_06541, Zayas Dep. Tr. 19:8-12. Admit that Mr. Zayas did not offer an opinion on the efficacy of the dispute process. CX_06627, Zayas Dep. Tr. 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.

Response: Admit to the extent that Mr. Zayas's testimony, which speaks for itself, includes testimony that Mr. Zayas did not see SEA on the exhibit presented to him. Denied to the extent that the service contracts between ZIM and Samsung SDS did not govern the relationship between ZIM and SEA. RX_0642-78, ZIM0032817-50 (Ms. Fernando requested the "2020 contract information" from ZIM so that she could use it as her

“guideline to check [ZIM’s] charges” and received contract number Z19179KR which was the one of the contracts referenced by Mr. Zayas); RX_1789-1815, Service Contract 7100204807; RX_1817-50, Service Contract Z18436KR; RX_1852-78, Service Contract 7100171730; RX_1880-1906, Service Contract Z19179KR, and RX_1918-47, Service Contract 7100102863 (attachments to ZIM0032817, including the contract numbered Z19179KR, per diem rates, demurrage rates and free days, and other documents containing the terms of the agreement).

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.

Response: Denied as stated. Mr. Smith’s report, which speaks for itself, describes the documents that he reviewed in formulating his opinions. Mr. Smith’s analysis did not consider the possibility that SEA was responsible for some portion of the charges in dispute. CX_05987, Smith Dep. Tr. 41:6-14. (“Q: Does your loss analysis include any adjustment or consideration of inland transportation charges which may be the responsibility of SEA? A: No, it does not.” Effectively, when Mr. Smith “analyzed” each category of evidence described above, these efforts were only to determine the amount and sum of charges SEA paid.

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.

Response: Denied. As discussed in the testimony cited to by SEA, Mr. Zayas, in preparing a rebuttal report, largely focused on responding to Mr. Smith’s report. CX_06615-CX_6616, Zayas Dep. Tr. 93:18-94:12. Furthermore, Mr. Zayas’s analysis identified some individual shipments as well as categorical assessments of charges that were not included in Mr. Smith’s damages calculation but should have been. *Id.* For example, Mr. Zayas identified the two containers, collectively totaling over \$192,000 in demurrage, that should not have been attributed to ZIM, and he identified customers and locations where charges were excessive when compared to other customers and geographies. CX_06511-16 ¶¶38-50.

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.

Response: Admit.

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.

Response: Denied as stated. Admit that Mr. Zayas’s analysis did not include a review of the entire universe of documents related to the two containers. Deny that his analysis was insufficient to form the opinion expressed in his report regarding the containers.

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.

Response: Admit.

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.

Response: Denied as stated. SEA quotes a portion of Mr. Zayas’s testimony, which speaks for itself, where he describes considerations that should be made in a more fulsome analysis of each charge alleged by SEA.

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.

Response: Denied as stated. Admit to the extent that a container-specific analysis should be undertaken to determine liability for each charge claimed by SEA. Denied to the extent that SEA seeks to call into question the validity of Mr. Zayas’s analysis. See ¶332, supra. As highlighted in Mr. Zayas’s report, Mr. Smith relied on unreasonable assumptions and ignored the necessity and importance of container-by-container evaluations of charges that could be uncovered by even “rudimentary” analysis such as that of Mr. Zayas with

regard to the two containers. CX_06508, Zayas Report ¶¶24-25 (Mr. Smith’s assumptions, including the loss period, terms of the cargo movement, responsibility of charges, were unreasonable); CX_06510-11, Zayas Report ¶¶31-37 (Mr. Smith did not conform to professional standards in performing his analysis); CX_06513-14, Zayas Report ¶45 (shows that even a basic analysis of two containers shows that SEA drove demurrage costs exceeding \$96,000 per container).

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.

Response: Denied as stated. Mr. Zayas’s position that SEA’s alleged damages should be supported by a container-specific analysis is not “in contravention” with the scope of the review Mr. Zayas performed to show misplaced liability by Mr. Smith and SEA. CX_06639-CX_06640, Zayas Dep. Tr. 117:22-118:2. To the contrary, Mr. Zayas’ “rudimentary” review, which is supported by the fulsome review discussed in ¶332, *supra*, undermines the premise that Mr. Smith’s analysis was sufficient. Pursuant to SEA’s logic, even a cursory analysis of the charges by Mr. Smith would have uncovered deficiencies in his assumptions. Instead, Mr. Smith assumed that all charges were for the account of ZIM without further investigation, even the largest charges that he included in his alleged damages:

“Q: Does your loss analysis include any adjustment or consideration of inland transportation charges which may be the responsibility of SEA?

A: No, it does not. CX_05987, Smith Dep. Tr. 41:6-14.

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.

Response: Denied. SEA's damages calculation is unsupported by meaningful analysis, and SEA's expert failed to conform to professional standards, relied on unreasonable assumptions, and failed to consider categorical or container-specific facts in formulating his opinions. CX_06506-11, ¶¶20-37. Moreover, such charges have not been proven with reasonable certainty nor has SEA demonstrated that ZIM was the proximate cause of the entirety of these charges.

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.

Response: Denied as stated. Admit that SEA's damages expert made the statements quoted by SEA in this PFF and that Mr. Smith did nothing more than add up "all charges

posted (recorded) by SEA to its SAP system during the period. . . .” Denied to the extent that Mr. Smith’s calculations “aid in determining damages” when they do nothing more than add the charges that SEA paid on cargo carried by ZIM during a particular period without regard to the relevant circumstances of the charges. 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.

Response: Denied. SEA attempts to characterize a business decision to transition from a store-door to container-yard model as “damages”. CX_05997, Smith Dep. Tr. 51:12-52:11 (stating that the move was to avoid costs and that “Samsung would have established some of [the facilities]” even if “ZIM did not exist”). SEA also seeks to justify this expense when it could have simply shifted its cargo previously carried with ZIM to another carrier as it has since done. CX_05998, *id* at 52:12-14 (ZIM carried only 2.6% of SEA’s cargo from 2020-2022). SEA also sought to benefit from the overflow facilities that it built because of trucking arrangements and customer needs. CX_05997, *id* at 51:12-20. In fact, SEA chose to arrange for off-dock storage “prepulls” and storage when its customers had required delivery dates (RDDs) after the last free day of port time. RX_0814-15, SEA0132657-58 (showing thirteen containers being pre-pulled a full two weeks before the customer’s RDD); RX_1023-25, SEA0046788-90 (showing a container pulled and stored because the last free day was 26 days prior to the customer’s available appointment). These delays and resulting charges were further confirmed by SEA witness testimony and show that SEA had an

interest in building out facilities for reasons having nothing to do with ZIM's performance of its obligations. CX_02249-50, Rapske Tr. 77:13-78:5; 78:12-23.

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.

Response: Admit that this PFF describes the relief which SEA seeks but deny that SEA is entitled to same.

Respectfully Submitted,

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Dated: September 26, 2023

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of September, 2023, a true and correct copy of the foregoing Reply to Proposed Findings of Fact of Complainant Samsung Electronics America, Inc. was served via email on counsel for the Complainant in FMC Docket No. 22-30.

/s/ Kathryn Sobotta