

BEFORE THE
FEDERAL MARITIME COMMISSION

DOCKET NO. 22-30

SAMSUNG ELECTRONICS

AMERICA, INC.,

COMPLAINANT,

v.

ZIM INTEGRATED SHIPPING SERVICES LTD.,

RESPONDENT.

**SAMSUNG ELECTRONICS AMERICA INC'S
INITIAL BRIEF IN SUPPORT OF ITS CLAIMS AGAINST
ZIM INTEGRATED SHIPPING SERVICES LTD.**

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I. INTRODUCTION

Samsung Electronics America, Inc. (“SEA” or “Complainant”), respectfully submits that the evidence, when applied to the Shipping Act of 1984, 46 U.S.C. § 40101 et seq (2019) (the “Shipping Act”), the Commission’s regulations, and case law clearly establish that ZIM Integrated Shipping Services, Ltd.’s (“ZIM” or “Respondent”) practices and regulations in handling SEA cargo violated the Shipping Act. While some of the violations were stand-alone issues and some were overarching, all violations point back to ZIM’s unreasonable practices and policies. SEA is entitled to reparations in connection with nearly 10,000 demurrage and detention charges resulting in SEA wrongfully paying over \$10.8 million on ZIM store door moves. In support, SEA submits this initial brief, accompanied by its separate proposed findings of fact, and appendix.

II. SUMMARY OF ARGUMENT – ZIM’S SHIPPING ACT VIOLATIONS

In SEA’s Complaint, it asserts Shipping Act violations based upon ZIM’s departure from standard industry practices with respect to shipments moving under a through bill of lading, (i.e., store door terms). Under store door terms, a carrier is responsible for both the ocean and inland movement of cargo. As a result, the carrier is also responsible for the inland charges (e.g., demurrage and detention charges (“D&D”), except what are supposed to be limited circumstances.

After considerable time, effort, and costs during the discovery process, SEA developed evidence from ZIM witnesses and documents showing that in and around the COVID pandemic ZIM began to shift its practices on store door moves and issue D&D charges to SEA indiscriminately. This shift in policy is unreasonable because the party being charged is not responsible for the inland movement, and charging a party that is not responsible for the inland movement of cargo cannot serve its primary function to incentivize the party to move the cargo.

ZIM, the party responsible for moving the SEA cargo, is not incentivized to move cargo by a charge it does not pay. Similarly, ZIM is not incentivized to move cargo by charges that are paid to ZIM and where ZIM gets receives money from charges when ZIM does not move cargo within free time.

ZIM shifting all payment responsibility for inland D&D charges to SEA for a store door move is an unreasonable practice because: (1) ZIM is requiring payment for D&D charges without first evaluating whether ZIM or SEA is actually responsible for payment of the charges; (2) ZIM cannot satisfy the requirement that it certify that “the common carrier’s performance did not cause or contribute to the underlying invoiced charges”; and (3) the obligation to arrange marine terminal cargo release under a through bill of landing is ZIM’s obligation, not SEA.

To support its shift in policy, ZIM has asserted that SEA’s recommendation of a preferred trucker (“CNT”) shifted ZIM’s common carrier obligations to SEA and that even though a through bill of lading issued for these shipments, it is essentially no different than a container yard (“CY”) move. PFF at ¶ 28. ZIM’s common carrier obligations are not shifted with the presence of a CNT. The recommendation of a CNT does not substantially do anything material; the testimony and evidence shows ZIM still hires and approves the CNT, issues the work orders, and contracts and pays the truckers. Prior to ZIM frequently shifting its logistics and operations duties to SEA, SEA’s personnel were able to facilitate efficient operations when needed. Nothing in the ZIM service contract language rebuts this fundamental principle in store door moves.

By pushing all charges on SEA by default, and with the pay first and finance hold pressure, to the extent that ZIM had a basis to properly claim that SEA was responsible for a D&D charge, it should have addressed that at the time before, or at least at the time of the charge. Having not done so in the first instance, and lacking meaningful dispute resolution practices, ZIM should not

now be permitted to claim that its conduct is effectively sanctioned unless the consignee provides affirmative evidence that it was *not* responsible for specific D&D charges during the course of ZIM's inland container movements.

The evidence also establishes that ZIM had unreasonable invoicing and collection practices, including its weaponization of holds cloaked in finance terms (colloquially called by ZIM "cargo" or "credit holds", and what SEA identifies as a "finance hold"), where it would condition the release of unrelated containers on payment of disputed D&D charges. There are multiple reasons why ZIM's decision to hold cargo, and charge additional D&D charges on impounded held cargo, are in and of themselves an unreasonable practice in violation of the Shipping Act.

First, the cargo that ZIM refused to move was not "available" for pickup because ZIM refused to move it. Charging SEA new D&D charges on cargo that ZIM affirmatively and unilaterally refused to move and which was therefore not available for pickup, did not, and cannot, incentivize SEA to move cargo that ZIM refused to move. There is a specific incentive principle rule on cargo availability for this very reason.

Second, charging SEA new D&D charges on containers that it unilaterally refused to move or release, including containers immediately put on hold upon vessel discharge, held through free time, and forced into demurrage on the sole basis of ZIM's alleged finance hold, did not, and cannot, serve their "intended primary purposes as financial incentives to promote freight fluidity." ZIM's finance holds froze the movement of cargo; this contravenes the general Incentive Principle.

Third, separately and in addition to the failure of ZIM's finance hold practices under the Incentive Principle, ZIM's finance hold practices as enforced against SEA were unreasonable

because the practices were not “fit and appropriate to the end in view” and was excessive and not reasonably related to the service rendered.

The evidence shows that ZIM used the finance holds to coerce collection of disputed invoices, not because of any legitimate credit concerns with SEA’s ability to pay legitimate amounts due. Indeed, no credit concerns were expressed at the time between 2020-2022.

The evidence further establishes that the scope and frequency of ZIM’s use of finance holds to coerce payments was excessive and not reasonably related to the service or cost because ZIM generated far more revenue from the new charges on held cargo than the charges it originally sought to collect as allegedly due and owing, and ZIM released the holds without receiving payment of the full amounts originally sought. ZIM’s profit generation from these practices, far in excess of the costs component of equipment availability, is evident in the expert analysis.

The evidence establishes that ZIM effectively had no dispute resolution process in place. While ZIM has set up an email address for customers to submit billing disputes, it has not established uniform procedures and regulations (written or otherwise) to evaluate demurrage and detention disputes.¹ Nor is there evidence that ZIM’s dispute resolution policy is based on FMC considerations or the Incentive Principle as reflected in the FMC’s Interpretative Rule on Demurrage and Detention Under the Shipping Act. Moreover, ZIM has established an internal “appeals” process, which is not available or accessible to the public. This process styled the “Demurrage Committee” was set up at the management level and periodically reviewed disputes raised by customers. However, this committee only considered waivers of D&D for commercial purposes and did not consider the validity or appropriateness of a charge.

¹ Speight Dep. Tr., Pg. 31:1-9.

The evidence establishes that ZIM had inadequate billing practices and procedures, which resulted in unreasonable billing practices. ZIM's systems were ill-equipped to handle customer billing requirements and errors in the system resulted in late and incorrect billing. ZIM repeatedly issued incorrect invoices, billed the wrong entities, and failed to provide the necessary information to validate the charges. The evidence also establishes that ZIM was aware of these issues, yet employed coercive collection tactics such as finance holds to induce payment of disputed charges. As a result of these unreasonable and oppressive practices, ZIM assessed unreasonable charges against SEA.

While the main thrust of evidence supports SEA's First Cause of Action in the Complaint, unreasonable practices under the Shipping Act, those same facts also overlap to support the findings as to retaliation and refusal to deal as pled in the Second and Third Causes of Action. The evidence reflects that ZIM unreasonably refused to deal by:

- Refusing to provide adequate information in response to requests for information on disputed invoices and charges;
- Failing to properly provide inland transportation arrangements by not appointing alternative inland trucking, and in response to requests to use alternative or house truckers, refusing to do so; and
- Employing abusive finance hold collection practices to refuse to make cargo available for delivery and also form a basis for a finding of retaliation.

The evidence also reflects that ZIM failed to provide certain minimum information required under the Ocean Shipping Reform Act of 2022 ("OSRA"), 46 U.S.C. § 41104(d)(2), for invoices between June 17, 2022 and December 31, 2022, and those examples are provided, *infra*.

III. PROPOSED FINDINGS OF FACTS

SEA's proposed findings of fact, filed concomitantly with this brief, are incorporated by reference. The 351 proposed findings of fact ("PFF"), developed from ZIM and SEA exchanges,

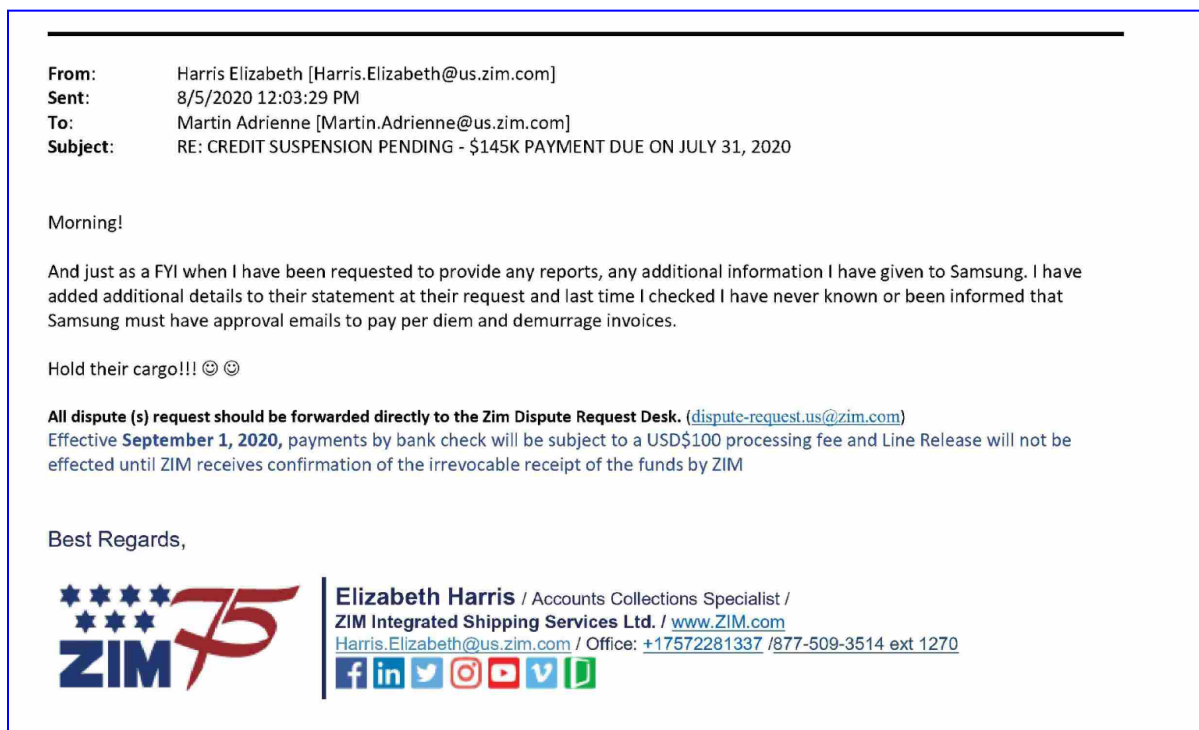
ZIM’s internal documents, and deposition testimony from primarily corporate designated witnesses, support each and every cause of action in SEA’s Complaint.

IV. LEGAL ARGUMENT

As a prelude to addressing SEA’s five causes of action against ZIM and its proofs in Section D, *infra*, with particular emphasis on unreasonable practices of ZIM establishing liability under the Shipping Act, SEA focuses on ZIM’s conduct within the rubric of FMC guidance, rules, and warnings unheeded.

A. ZIM’s Culture of Strong Arm Finance Cargo Holds Shows No Lessons Have Been Learned From Prior FMC Scrutiny of ZIM

“Hold their cargo!!! ☺ ☺”. PFF at ¶ 207.



This is a image of an email exchanged by ZIM personnel during the height of the pandemic in August 2020. *Id.* What would cause a ZIM accounts collections specialist, Elizabeth Harris, to

send a boasting email of two smiling emoji to her colleague, Adrienne Martin, ZIM's US collections manager, when ordering the hold of SEA's cargo at the height of the pandemic in August 2020. PFF at ¶ 208. It reflects an enterprise that is gleefully extracting D&D from a consignee. *Id.* The full email is included in the proposed findings of fact. PFF at ¶ 207.

The use of two smiling emojiis by ZIM personnel is juxtaposed with SEA in the email chain simply trying to get proper "email threads for [ZIM] invoices . . . for obtaining approval" before ZIM imposed a finance hold on SEA cargoes. PFF at ¶ 208. This was no laughing or smiling matter for SEA. The email chain confirms ZIM was non-responsive in its response: "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. PFF at ¶ 209. The decisions were being made by ZIM finance staff who were openly rebuffing SEA's request for additional information and to align the billing process with the consignee.

To return to the posed question -- what causes this sort of behavior in operational-level employees? A culture of strong-arm collections practices, consistent with the senior leadership support, that operated with impunity during the pandemic. ZIM's U.S. Finance team led ZIM's efforts to collect D&D charges from consignees like SEA. ZIM's US CFO, Ms. Ilana Rosenberg, ZIM's US Director of Finance, Mr. Yaacoub Yaacoub, and ZIM's US collections manager, Ms. Adrienne Martin, with support from their direct reports, led ZIM's efforts to collect D&D charges from U.S. customers. These finance hold practices were known, encouraged, and rampant.

This finance hold example is a bridge to the FMC being asked to, yet again, assess the reasonableness of ZIM's practices and procedures under Section 41102(c) of the Shipping Act. The evidence in the record reflects that ZIM utilized finance holds to induce payment of disputed charges. This is the same ZIM practice that was condemned by the FMC in *Adebisi A. Adenariwo*

v. BDP International, ZIM Integrated Shipping, Ltd. and its agent (Lansal) et. Al., Informal Docket Nos. 1920(1) and 1921(1).² ZIM has a history of holding cargo to induce payment for other shipments regardless of liability or fault, and was previously warned by the FMC that doing so was a violation of the Shipping Act. Yet, ZIM has done nothing to change its coercive collection practices, and instead continues to engage in such practices.

In *Adenariwo*, Complainant purchased construction materials from the US to be transported to Nigeria by ZIM. ZIM moved Complainant's cargo in two containers, which were shipped separately. Due to errors in the bill of lading (not the fault of Complainant), when the first container (Container No. 1) arrived at the port it was not released to Complainant and demurrage fees began to accrue. When the second container (Container No. 2) arrived a month later, ZIM's agent refused to release it until Complainant paid the outstanding demurrage fees for the first container. As a result, demurrage fees began to accrue on Container No. 2 as well, ultimately both containers were seized by Nigerian Customs officials and the cargo was auctioned off.

Complainant sought to pursue his claims through the FMC's informal adjudication process and sought reparations in the amount of \$50,000 per container or a total of \$100,000. The settlement officer dismissed the claim for Container No. 1 for failure to timely file the complaint within the Shipping Act's three-year statute of limitations, but held that ZIM had violated section 41102(c) of the Shipping Act by refusing to release Container No. 2 because of the unpaid demurrage fees from Container No. 1. While the settlement officer awarded Complainant reparations in the amount of \$18,308.94, it denied remainder of Complainant's requested relief, finding that it could have mitigated its damages by paying demurrage fees on the two containers,

² Mar. 7, 2013, Served Settlement Officer's Decision.

and securing the release of the cargo.³ The Commission affirmed the settlement officer's reparation award finding that Complainant had a duty to mitigate damages.⁴

On appeal before the United States Court of Appeals for the District of Columbia Circuit, the appellate court held the FMC improperly reduced Complainant's reparations award, finding that under the "the settlement officer's reasoning, a wrongdoer, such as ZIM, can set unlawful conditions for the release of an injured party's property and have the damages it owes the injured party reduced if the injured party cannot or does not meet those unlawful conditions." *Adenariwo v. Fed. Maritime Comm'n*, 808 F.3d 74, 80 (D.C. Cir. 2015). It further held that "[m]itigation does not allow a wrongdoer to shift the cost of its malfeasance to the injured party." *Id.*

The facts in *Adenariwo* are analogous to the issues presented here, and provided ZIM with forewarning of unreasonableness of its D&D collection practices. Rather than reform its practices, ZIM has employed them on a considerably larger scale involving millions of dollars of D&D charges demanded and ultimately paid by SEA to ZIM under duress with its cargo being held hostage. Like *Adenariwo*, ZIM held unrelated SEA cargo to induce payment of disputed D&D charges. Here, the evidence establishes that ZIM's utilization of cargo holds was a normal part of its business operations.

B. The Incentive Principle Within the Context of Assessing ZIM's Conduct

Supply chain ensnarement in 2020-2022, as a result of the COVID-19 pandemic, was not unprecedented. PFF at ¶¶ 46-47. The original purpose of D&D was to incentivize shippers to retrieve their cargo from the port and to promote freight fluidity. This is also known as the "Incentive Principle." However, over time, other issues such as port congestion led to higher D&D

³ *Id.*

⁴ Feb. 20, 2014, Served Order Affirming Settlement Officer's Decision.

charges, even when the delays were beyond the control of shippers. This led the FMC to start investigating D&D practices at the beginning of the last decade, including Fact Finding Investigation No. 28 (“FF28”), led by Commissioner Dye.⁵

The FMC created FF28 to address yet more concerns among the shipping community over D&D problems.⁶ The FMC collected data about D&D practices at various ports, companies, and terminals around the United States to be used in FF28.⁷ The FMC also conducted extensive interviews with importers, exporters, ocean transportation intermediaries, drayage trucking representatives, and other members of the shipping community.⁸

Based on the findings in FF28, on September 17, 2019, the Commission published proposed guidance, in the form of an interpretive rule, about factors it may consider when assessing the reasonableness of demurrage and detention practices and regulations under 46 U.S.C. 41102(c) and 46 CFR 545.4(d). The Commission’s Interpretive Rule made clear to shippers and carriers that 46 U.S.C. § 41102(c) lays out a series of factors to consider when analyzing the reasonableness of D&D procedures. The rule explains that the Commission will *primarily* consider the incentive principle when analyzing reasonableness, and *may* consider a series of non-exhaustive “other factors” including accessibility of detention and demurrage policies and the clarity of terminology. *See Final Rule: Interpretive Rule on Demurrage and Detention Under the Shipping Act*, 85 Fed. Reg. 29638, 29652 (May 18, 2020) (“Interpretive Rule”). Further, in the Incentive Principle rulemaking discussion, the Commission noted questionable store door practices stating that the

⁵ Fact Finding Investigation No. 28 Order of Investigation (Mar. 5, 2018), <https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/ff-28?ord2.pdf/>.

⁶ Fact Finding Investigation No. 28 Final Report (“FF 28 Final Report”), at 4-5, <https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/FF-28?FR.pdf/>.

⁷ FF 28 Final Report at 1

⁸ *Id.*

Commission would keep a close watch for unreasonable store door practices, and that the Commission would determine the unreasonableness of such practices on a case-by-case basis. *Id.* at 29665. This is such a case, and it is egregious.

C. FMC Precedent Applying the Incentive Principle and its Implications for ZIM

The FMC's Office of Administrative Law Judges has since applied the Incentive Principle and the Interpretive Rule in cases before it. In *Hapag-Lloyd, A.G. and Hapag-Lloyd (America) LLC – Possible Violations of § 46 U.S.C. 41102I*, Chief Judge Wirth confirmed that D&D serves the purpose of a financial incentive to promote freight fluidity. The Court evaluated the reasonableness of Hapag-Lloyd's D&D policy with regard to the return of eleven containers, the return policies, and the waiver policies. After reviewing the evidence, the Court confirmed that there were no return appointments available during the days on which a trucking company attempted to return the containers within free time. The Court reasoned that, therefore, the incentive principle was not upheld by the D&D charges during that period, because "no amount of detention could have incentivized the return of the containers." *Hapag-Lloyd, A.G.*, Docket. No. 21-09, 2022 WL 1239377, at *30 (ALJ Apr. 22, 2022).

Likewise, in *TCW, Inc. v. Evergreen Shipping Agency (America) Corp. & Evergreen Line Joint Service Agreement*, Evergreen argued that because TCW's free time had expired, even though complainant was unable to return the cargo, the ocean carrier's continued assessment of per diem was reasonable. Respondents argued that "under the well-established principle of 'once on demurrage, always on demurrage,' as well as the UIIA, the Addendum and respondent's per diem rule, claimant's failure to return the equipment before May²³rd entitled respondent to the now disputed per diem. TCW contractually assumed the risk of a late return of equipment by its

BCO and it was that late return that caused its loss.” *TCW*, FMC Docket. No. 1966(I), 2021 WL 794708, at *7 (ALJ Feb. 19, 2021).

Small Claims Officer Theresa Dike rejected Evergreen’s rationalization and found its charges practices unreasonable because they did not serve the primary function of incentivizing container returns. In doing so, the court cited to Interpretive Rule for the proposition that the shipping community, “should not be penalized by demurrage and detention practices when circumstances are such that they cannot retrieve equipment from or return equipment to marine terminals ‘because under those circumstances the charges cannot serve their incentive function.’” *TCW*, 2021 WL 794708, at *24. Ultimately the court found that, because the port where *TCW* attempted to return the containers was closed, the ocean carrier’s charges were not incentivizing their return. *Id.* at *30. Therefore, they were unreasonable. *Id.* at *31.

These rulings are consistent with the Commission’s rejection of the argument that “once-in-demurrage, always-in-demurrage” acts as an incentive for shippers and truckers to retrieve cargo and return equipment during free time. As the Commission correctly observed, “shippers and truckers have commercial reasons for wanting to get containers off-terminal or returned in a timely fashion.” *Interpretive Rule*, 85 Fed. Reg. at 29653. And in fact, favoring the rule that “once-in-demurrage, always-in-demurrage may also lessen the incentive for ocean carriers and marine terminal operators to perform efficiently.” *Id.*

These recent authorities, the first to begin to confront the unreasonable practices of ocean carriers against shippers during the pandemic, highlight and make clear for the shipping community that the ultimate intent of D&D must be to operate as a financial incentive to promote freight fluidity. Even if a practice has a valid purpose, if it goes beyond what is necessary to achieve that stated purpose, it may still be unreasonable. Thus, when reviewing D&D charges the

question is not whether the charges are lawful or in accord with a tariff but whether the charge is reasonable, and fit and appropriate to end in view. If, as illustrated above, D&D charges do not serve to meet their intended purpose, *i.e.*, incentivize the movement of cargo, they are considered unreasonable under the Shipping Act.

D. ZIM's Breaches of the Shipping Act and OSRA, as alleged in SEA's Complaint, Support Reparations against ZIM

SEA's Complaint asserts Shipping Act violations in five causes of action: (1) Respondent ZIM's failure to establish, observe, and enforce just and reasonable practices related to receiving, handling, storing, and delivering the property of SEA, in violation of 46 U.S.C. § 41102(c) (unreasonable practices); (2) 46 U.S.C. § 41104(a)(3) and 46 U.S.C. § 41102(d) (retaliation); (3) 46 U.S.C. § 41104(a)(10) (refusal to deal); (4) 46 U.S.C. § 41104(a)(15) (invoicing without required information); and (5) 46 U.S.C. § 41104(a)(14) (unreasonable charges). PFF at ¶¶ 1-5, 8. These violations overlap and collectively and independently are the cause of the charges and damages at issue in this proceeding, comprising over \$10.8 million in D&D charges paid and more than \$1.4 million in additional costs incurred as a result of ZIM's violations.⁹

For the shipments at issue, SEA cargo was shipped by Samsung foreign affiliates (or other overseas entities), these entities contracted with ZIM for the transportation services provided, and the shipments moved under "super all in" rates.¹⁰ Super all-in rates included among other things, motor carrier charges, terminal handling charges, and local charges.¹¹ SEA was listed as the consignee, ocean freight charges were covered by Samsung foreign affiliates and pursuant to the service contract, SEA was not responsible for local charges. PFF at ¶¶ 19, 22-23. SEA did not

⁹ PFF at ¶ 7; Expert Report of Greg Smith ("Smith Report").

¹⁰ PFF at ¶ 20; Shpitzer Dep. Exhibit No. 6.

¹¹ PFF at ¶ 23; Shpitzer Dep. Exhibit No. 6.

negotiate and did not have access to the contracts but was generally aware of certain relevant terms of service. PFF at ¶ 20.

The majority of SEA shipments moved under store door terms, also known as carrier haulage. PFF at ¶¶ 21, 319. Under store door terms, cargo moves under a through bill of lading and the ocean carrier bears the responsibility for both the ocean and inland transportation of the cargo, as well as inland transportation costs, including D&D charges. PFF at ¶¶ 40-41. These charges are the consignee's responsibility in limited circumstances where a delay in the shipment was clearly and directly caused by the consignee (*e.g.*, not ready to receive the shipment). PFF at ¶ 277. Otherwise, D&D charges are absorbed by the ocean carrier. PFF at ¶¶ 277-278. SEA historically relied on store door terms. PFF at ¶¶ 239, 279-286. The most compelling proof of this is that SEA did not have any infrastructure to manage inland transportation of containers after they were discharged at marine or rail terminals. PFF at ¶¶ 26, 50, 65, 316. Among other things, SEA did not have a dispatch operation to schedule trucking appointments. PFF at ¶ 26. Nor did SEA have agreements with truckers for inland transportation. PFF at ¶ 26. SEA was entirely reliant on ocean carriers and store door terms because the responsibility for the inland movement and the charges remained with the ocean carrier. PFF at 25.

Ocean carriers like ZIM marketed of their ability to provide store door transportation to shippers. PFF at ¶ 14. Indeed, ZIM proclaims on its website that “We work hand-in-hand with the best providers to offer excellent full-service intermodal transport.... 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.”¹² ZIM further advises the shipping public that the all-in freight rates

¹² PFF at ¶¶ 15-16.

charged by ZIM for store door transportation will maximize convenience and save costs for consignees like SEA.¹³

Before the pandemic, ZIM moved SEA cargo consistent with store door terms, including absorbing D&D charges. PFF at ¶ 17. While SEA would occasionally receive invoices for D&D charges those occurrences were rare. PFF at ¶¶ 69, 68-76. Beginning in 2021, ZIM began to assess exorbitant amounts of D&D against consignees for store door moves regardless of responsibility for the cause. PFF at ¶¶ 76, 77-79. ZIM also began to employ aggressive collection practices for amounts allegedly owed, including disputed invoices, resulting in the use of finance holds as illustrated by the ZIM “Hold their cargo!!! 😊 😊” email in August 2020.

As a result of ZIM’s long standing practice of finance hold tactics, ZIM’s demurrage revenue between 2020 and 2021 nearly tripled and continued to increase in 2022. PFF at ¶¶ 239, 238-247, 249. The evidence establishes that the amounts allegedly owed by SEA subject to these finance holds were either disputed, already paid, or were for a completely unrelated entity. Further, ZIM’s invoicing and accounting, were regularly inaccurate due to constant system errors and inadequate software. But because ZIM does not have any meaningful dispute resolution policies or procedures in place, SEA was made to pay these disputed amounts to obtain the release of its cargo. PFF at ¶¶ 123, 119-128.

SEA respectfully submits that the evidence shows ZIM’s regulations and practices in handling cargo including its: (1) unreasonable store door practices; (2) abusive and coercive collection practices; and (3) unreasonable billing/invoicing and dispute resolution practices and policies, violated the Shipping Act.

¹³ PFF at ¶ 17.

1. SEA's Burden of Proof under the Shipping Act

Causes of action alleging violations of 46 U.S.C. § 41102(c) of the Shipping Act (unreasonable practices) place the burden of persuading the FMC that a practice is unreasonable on the complainant, which they must prove by a preponderance of the evidence. 5 U.S.C. § 556(d); 46 C.F.R. § 502.155; *OJ Commerce, LLC v. Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft A/S & Co. KG & Hamburg Sud N. Am., Inc.*, FMC Docket No. 21-11, 2023 WL 3969857, at *20 (ALJ June 7, 2023) (addressing burden of proof in case where the Presiding Officer issued a fine of almost \$10 million to Hamburg Sud for violations of the Shipping Act); *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, FMC Docket No. 08-03, 2014 WL 9966245, at *14 (FMC Dec. 17, 2014) . Under the preponderance standard, a complainant must show that their allegations are more probable than not. *Crocus Inv., LLC v. Marine Transp. Logistics*, FMC Docket No. 15-04, 2021 WL 3732849, at *3 (FMC Aug. 18, 2021).

The party with the burden of persuasion must prove its case by a “preponderance of the evidence.... It is appropriate to draw inferences from certain facts when direct evidence is not available, and circumstantial evidence alone may even be sufficient. It is appropriate to draw inferences from certain facts when direct evidence is not available, and circumstantial evidence alone may even be sufficient; however, such findings may not be drawn from mere speculation.” *Waterman S.S. Corp. v. Gen. Foundries Inc.*, FMC Docket No. 93-15, 26 S.R.R. 1173, 1180 (ALJ Dec. 9, 1993).

ZIM is on notice of this limited burden with regard to liability and the showing of damages sufficient to recover reparations, as noted in the FMC's Final Order on Remand in the *Adenariwo* matter when the claimant was awarded reparations plus interest:

In particular, Claimant “must prove with ‘competent evidence’ that [he] sustained actual loss or injury and that the violation of law was the

proximate cause of that loss or injury with ‘reasonable certainty.’” *Rose Int’l, Inc. v. Overseas Moving Network Int’l, Ltd.*, 29 S.R.R. 119, 187 (FMC 2001) (quoting *Cal. Shipping Line, Inc. v. Yangming Marine Transp. Corp.*, 25 S.R.R. 1213, 1230 (FMC 1990)). Although the Commission will rely on reasonable estimations “when precise evidence measuring financial injury is unavailable because of the nature of the violation,” “alleged damages based on unreliable or speculative evidence are not allowed.” *Rose Int’l, Inc.*, 29 S.R.R. at 197 (quoting *Adair v. Penn-Nordic Lines, Inc.*, 26 S.R.R. 11, 25 (ALJ 1991)) (internal quotation marks omitted).

See Final Order at 7, (FMC Feb. 14, 2017). While SEA’s damages will be addressed further after liability in Section V, the sheer scope of damages is substantial and fully supportable by SEA and ZIM-produced documents, as assessed by SEA’s damages expert.

SEA incurred direct damages in the amount of approximately \$10.8 million, and additional costs and lost profits of approximately \$1.4 million. PFF at ¶ 7. SEA engaged damages expert Greg Smith with the Berkeley Research Group, to perform an analysis of the charges assessed by ZIM to SEA to calculate its damages. PFF at ¶ 313. The data utilized to calculate SEA’s damages, and shown in Exhibit No. 1 to Mr. Smith’s Expert Report, was extracted from SEA’s SAP system. Mr. Smith met with SEA personnel (both in person and via teleconference), on numerous occasion to review and discuss the relevant data contained within its SAP system and the available data and reports run, which captured the relevant charges and associated information for ZIM shipments. PFF at ¶¶ 340. Mr. Smith also reviewed supporting documentation (invoices, waybills and other documentation) with SEA personnel. ZIM also produced data documenting charges paid by SEA for demurrage and detention from its own records, which come from ZIM’s SAP System.

For the period from January 1, 2020 through September 27, 2022, ZIM indicated that SEA had been invoiced for D&D charges totaling \$11.5 million. Mr. Smith compared these amounts to amounts recorded by SEA for the same period. As shown in Exhibit 3 to Mr. Smith Report, ZIM’s analysis of the D&D paid by SEA is \$830,345 *higher* than reported by SEA, which has not

been disputed by ZIM’s rebuttal expert witness Ricardo J. Zayas (“Zayas Report”).¹⁴ Mr. Smith compared the amounts for specific containers and bills of lading common to both datasets and was able to determine that the primary reason for the different amounts is that certain charges invoiced to SEA by third-parties were not identified as charges associated with ZIM shipments, i.e., “missing charges.”¹⁵ Because the amounts were paid by SEA, it appears that when the charges were extracted from SEA’s SAP system it did not identify the missing charges as being associated with ZIM shipments.

2. ZIM is Subject to the FMC’s Jurisdiction

The FMC unquestionably has jurisdiction over SEA’s claims against ZIM. The Shipping Act provides inter alia, that a “person may file with the . . . Commission a sworn complaint alleging a violation of this part.” 46 U.S.C. § 41301(a). Pursuant to this provision, the Commission has jurisdiction over a complaint alleging that a respondent committed an act prohibited by the Shipping Act. *See Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, 30 S.R.R. 991, 2006 WL 2007808, at *8-9 (FMC May 10, 2006); *see also Cargo One, Inc. v. Cosco Container Lines Co., Ltd.*, 28 S.R.R. 1635, 2000 WL 1648961, at *14 (FMC Oct. 31, 2000). For the purposes of 46 U.S.C. §§ 41102(c), 41104(a)(3), 41102(d), 41104(a)(10), 41104(a)(15), and 46 U.S.C. § 41104(a)(14), the FMC has jurisdiction over ZIM as a “common carrier” and a vessel operating “ocean common carrier” as defined in 46 U.S.C. § 40102(7) and (18), which ZIM admits. Dkt. 11, ZIM Answer ¶ 5.

¹⁴ PFF at ¶¶ 6, 320-326, 338. The Expert Rebuttal Report and Mr. Zaya’s testimony does not dispute the amount of D&D charges paid by SEA.

¹⁵ Smith Report Pg. 22, ¶ 43.

The FMC has jurisdiction over matters relating to transportation by water of cargo between the United States and a foreign country by a common carrier. That jurisdiction begins when a common carrier assumes responsibility for transportation of the cargo and ends when the cargo is delivered to the consignee at the place of destination contemplated by the contract of carriage. *See, e.g., Norfolk So. Ry. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 23-27 (2004) (finding that federal maritime law applies to the inland portions of international shipments transported under a through bill of lading); *see also, Kawasaki Kisen Kaisha, Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89, 108 (2010) (finding that ocean transportation occurring under a through bill of lading cannot be separated into ocean and domestic inland transportation); *accord, Mitsui O.S.K. Lines Ltd. v. Global Link Logistics*, 32 S.R.R. 126, 2011 WL 7144008, at *20 (FMC Aug. 1, 2011) (“legislative history demonstrates that Congress intended that the Commission have jurisdiction over through transportation, including the inland segment of such transportation”); *Earlean Edwards Dukart, Complainant v. Ocean Star Int’l Inc., D/b/a Int’l Van Lines*, 2020 WL 13512914, at *6, 2 F.M.C.2d 118, 123–24 (ALJ July 10, 2020).

3. ZIM has failed to establish, observe, and enforce just and reasonable regulations and practices in connection with receiving, handling, storing, or delivering property in violation of Section 41102(c) of the Shipping Act.

The majority of SEA’s legal argument focuses on its **first** Cause of Action in the Complaint, the violation of 46 U.S.C. § 41102(c) (unreasonable practices), and for good reason. The evidence is widespread and damning, supporting a finding of liability.

Section 41102(c) provides that a common carrier “may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.” 46 U.S.C. § 41102(c). The Commission has interpreted

Section 41102(c) as requiring the following elements in order to establish a successful claim for reparations:

- (i) The respondent is an ocean common carrier, marine terminal operator, or ocean transportation intermediary;
- (ii) The claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis;
- (iii) The practice or regulation relates to or is connected with receiving, handling, storing, or delivering property;
- (iv) The practice or regulation is unjust or unreasonable; and
- (v) The practice or regulation is the proximate cause of the claimed loss.

46 C.F.R. § 545.4; *Ports Am. Chesapeake, LLC v. APS E. Coast*, FMC Docket No. 23-04, 2023 WL 5375588, at *9 (ALJ Aug. 16, 2023). SEA’s claims against ZIM, and the unreasonable and unjust practices alleged easily meet the above required elements.

i. ZIM IS AN OCEAN COMMON CARRIER UNDER THE SHIPPING ACT

*In regard to the first Section 41102(c) element, ZIM is a “common carrier” and a vessel operating “ocean common carrier” as defined in 46 U.S.C. § 40102(7) and (18), under the Shipping Act, and is subject to regulation by the FMC. An ocean common carrier is defined as a “vessel operating common carrier” or “VOCC” “that holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation; and assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and uses, for all or part of that transportation, a vessel operating on the high seas . . .” *Id.**

ZIM conducts its business operations in the U.S. through ZIM Integrated Shipping Services Company, Co. LLC, and holds itself out to the general public to provide transportation by water of cargo between various points in the United States and various points in a foreign country for

compensation, through the utilization of vessels for all or part of the transportation. PFF at ¶ 12. For the cargo at issue, ZIM provided both ocean and inland transportation services. PFF at ¶ 24, 27.

ZIM admits the allegation in paragraph 5 of SEA’s Complaint that the FMC has jurisdiction over ZIM as a “common carrier” and a vessel operating “ocean common carrier” as defined in 46 U.S.C. § 40102(7) and (18). PFF at ¶ 13; Dkt. 11, ZIM Answer ¶ 5.

ii. ZIM’S ACTS OR OMISSIONS OCCURRED ON A NORMAL, CUSTOMARY, AND CONTINUOUS BASIS

In regard to the second Section 41102(c) element, for there to be a violation of the Section, the unreasonable practice or regulation “must be normal, customary, often repeated, systematic, uniform, habitual, and continuous manner in which the regulated common carrier was conducting business.” Final Rule, Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 64478 (Fed. Mar. Comm’n Dec. 17, 2018) (discussing the interpretive rule provision promulgated at 46 C.F.R. 545.4(b));, Intercoastal Investigation, 1935, 1 U.S.S.B.B. 400, 432 (1935).

Here, the regulations and practices alleged clearly satisfy the normal, customary and continuous standard under Section 545.4(b). The harm alleged does not relate to a single discrete incident but rather to a large number of shipments and for extended periods of time.¹⁶ For example¹⁷, between 2020 and 2022, 9,984 D&D charges totaling approximately \$10.8 million were assessed for SEA shipments moving under Zim store door terms, and a significant portion of those charges were incurred due to ZIM’s practice of utilizing a finance hold for amounts allegedly

¹⁶ See generally Smith Report Exhibit No. 1. (charges assessed for SEA cargo moving under store door terms).

¹⁷ This is an illustrative example of the impact of finance holds for meeting this continuous basis activities of element two. The full scope of Zim’s weaponization of finance holds is addressed in the unreasonable practices fourth element, *infra*, Section IV D iv.

owed.¹⁸ The evidence further establishes that ZIM’s utilization of finance holds was a normal part of its business operations.¹⁹ Once ZIM placed a customer on a finance hold, all shipments would be held until payment was issued.

While the shipments were on hold, if a shipment was in demurrage or free time expired during the hold, demurrage would be assessed. ZIM repeatedly refused to release SEA cargo due to alleged past due amounts on other shipments²⁰ and testimony from Ilana Rosenberg, ZIM’s US Chief Financial Officer, confirmed that numerous containers were held during a finance hold. Ms. Rosenberg testified that 70 containers were held during a six day finance hold, 200 containers during a one month finance hold, 150 containers during a two week finance hold, and 600 containers during a three month long finance hold.²¹ ZIM repeatedly and continuously assessed charges on SEA cargo during the finance hold.²²

iii. THE PRACTICE OR REGULATION RELATES TO OR IS CONNECTED WITH RECEIVING, HANDLING, STORING, OR DELIVERING PROPERTY

In regard to the third Section 41102(c) element, the Commission has previously held that “Ocean carrier demurrage and detention practices are subject to section 41102(c) and Commission oversight, regardless of whether the practices relate to conduct at ports or inland.” Interpretive Rule, 85 Fed. Reg. at 29650. Here, the practice or regulation in dispute – i.e., ZIM’s practices, policies, and procedures related to the assessment of D&D charges against SEA -- are directly

¹⁸ PFF at ¶ 6; Smith Report Exhibit 2 (“total # included charges ... 9,984”).

¹⁹ Rosenberg Dep. Exhibit No. 18 at 3 (“10 accounts on hold January 10th” and “18 accounts on hold by January 25th”); Rosenberg Dep. Exhibit No. 14 (email communication discussing whether a finance hold should be implemented for disputed invoices to incentivize payment).

²⁰ Smith Report ¶45.

²¹ Rosenberg Dep. Tr. 47:11-48:3.

²² Smith Report, Exhibit No. 9. The charges listed in Smith Report Exhibit No. 9 includes the charge type, charge amount, bill of lading number and container number for each shipment.

related to the movement of cargo in ocean shipping. The D&D charges at issue arise directly from ZIM's handling of SEA cargo and providing transportation services.²³

iv. ZIM'S PRACTICES AND REGULATIONS ARE UNJUST OR UNREASONABLE

*In regard to the fourth Section 41102(c) element, the Section was derived from section 17 of the 1916 Act, and carried through in Section 10(d)(1) of the Shipping Act of 1984, and extensive FMC and judicial precedents thereunder, as requiring a regulation or practice to be reasonable. "Reasonable" may mean or imply "just, proper," "ordinary or usual," "not immoderate or excessive," "equitable" or "fit and appropriate to the end in view." BLACK'S LAW DICTIONARY, 4th Ed.; Investigation of Free Time Practices--Port of San Diego, 9 F.M.C. 525, 547 (FMC 1966). When assessing the reasonableness of a carrier practice the analysis does not turn on the lawfulness of the practice but instead on whether the practice is "tailored to meet its intended purpose," Distrib. Servs. Ltd. v. Trans-Pac. Freight Conf. of Japan & Its Member Lines, 24 S.R.R. 714, 1988 WL 340659, at *7 (FMC Jan 6, 1988) and whether it is "fit and appropriate to the end in view," Port of San Diego, 9 F.M.C. at 547. Courts have also included within the standard of reasonableness as to "whether the charge levied is reasonably related to the services rendered." Volkswagenwerk Aktiengesellschaft v. Fed. Mar. Comm'n, 390 U.S. 261, 282 (1968). Even if a practice has a valid purpose, if it goes beyond what is necessary to achieve that purpose, it may still be unreasonable. Distrib. Servs. Ltd., 1988 WL 340659, at *7.*

With respect to unjust and unreasonable practices relating to D&D, the Commission interprets Section 41102(c) under the Incentive Principle. 46 C.F.R. § 545.5. The Incentive Principle provides that, "[i]n assessing the reasonableness of demurrage and detention practices and regulations, the Commission will consider the extent to which demurrage and detention are

²³ Smith Report Exhibit No. 1.

serving their intended primary purposes as financial incentives to promote freight fluidity.” 46 C.F.R. § 545.5(c)(1).

The Commission also interprets the Incentive Principle in a number of specific “particular applications,” including with respect to:

- (i) Cargo availability. The Commission may consider in the reasonableness analysis the extent to which demurrage practices and regulations relate demurrage or free time to cargo availability for retrieval.
- (ii) Empty container return. Absent extenuating circumstances, practices and regulations that provide for imposition of detention when it does not serve its incentivizing purposes, such as when empty containers cannot be returned, are likely to be found unreasonable.
- (iii) Notice of cargo availability. In assessing the reasonableness of demurrage practices and regulations, the Commission may consider whether and how regulated entities provide notice to cargo interests that cargo is available for retrieval. The Commission may consider the type of notice, to whom notice is provided, the format of notice, method of distribution of notice, the timing of notice, and the effect of the notice.

46 C.F.R. § 545.5(c)(2)(i)-(iii)

Further, the Commission interprets the Incentive Principle with respect to D&D policies such as invoicing/billing and dispute resolution practices and policies, as follows:

- (d) Demurrage and detention policies. The Commission may consider in the reasonableness analysis the existence, accessibility, content, and clarity of policies implementing demurrage and detention practices and regulations, including dispute resolution policies and practices and regulations regarding demurrage and detention billing. In assessing dispute resolution policies, the Commission may further consider the extent to which they contain information about points of contact, timeframes, and corroboration requirements.

46 C.F.R. § 545.5(d)

The Incentive Principle reflects the Commission’s interpretations of long-standing unreasonable practices precedent under 41102(c), specifically applied to D&D matters. *Interpretive Rule*, 85 Fed. Reg. at 29651 fn. 200 (*citing Distrib. Servs. Ltd.*, 1988 WL 340659, at *6). However, the Interpretive Rule does not limit or restrict the scope or manner of all regulations and practices in connection with D&D that could be found to constitute unjust and unreasonable practices under Section 41102(c). 46 C.F.R. § 545.5(f) (“Nothing in this rule precludes the Commission from considering factors, arguments, and evidence in addition to those specifically listed in this rule”).

ZIM’s D&D practices and charges at issue in the Complaint are unjust *and* unreasonable within the meaning of Section 41102(c) for at least four (4) distinct legal bases. The bases differ mainly with respect to element 4 and are set forth in separate sub-sections below. In summary, ZIM’s D&D practices and charges are unjust and unreasonable because:

1. charging D&D to a party not responsible for moving the cargo at issue violates the Incentive Principle, both under the general incentivizing principle at Section 545.5(c)(1), and specifically with respect to charging demurrage when cargo is not available for pick up pursuant to Section 545.5(c)(2)(i);
2. requiring a consignee under a through bill of lading to first pay charges at interim terminals as a condition of the common carrier completing its inland transportation obligations is not reasonably related to the common carrier service being provided nor fit to the end in view;
3. ZIM’s collection practices, specifically its enforcement of finance holds, violated the Incentive Principle, were not fit and appropriate to the end in view, and in all events, went far beyond what was appropriate or necessary for alleged credit and collection concerns; and
4. ZIM’s billing practices exacerbated improper charges and ZIM failed to maintain or enforce meaningful dispute resolution practices.

ZIM did not consider the Incentive Principle in implementing or enforcing its D&D practices. Instead, ZIM focused on expanding collection of D&D charges as a major source of revenue without regard for the regulatory purpose of D&D charges.

a. Charging SEA for Inland Transportation D&D Charges, when ZIM was Responsible to Move the Cargo, Violates the Incentive Principle

D&D charged and paid by SEA did not meet its incentivizing purpose because ZIM was responsible for ensuring removal of SEA cargo from the port. No amount of D&D assessed against SEA would have assisted or promoted freight fluidity. Charging the consignee of cargo under a through bill of lading, *i.e.*, store door move, for inland D&D charges violates the Incentive Principle because the party being charged is not responsible for the inland movement. 46 C.F. R. § 545.5(c)(2). D&D is intended to serve as a financial incentive to shippers to retrieve cargo from the port and to promote freight fluidity.²⁴ As noted by the Small Claims Officer in *TCW*, , D&D charges can be found to be unreasonable when D&D does not incentivize the return or pick-up of cargo at the port. *TCW*, 2021 WL 794708, at *29.

From 2020 onwards, aware of pandemic-era challenges with intermodal transportation logistics, ZIM continued to transport SEA goods on store door terms under through bills of lading or sea waybills for inland delivery in the U.S. Zim's store door terms were preferred because of the convenience of having a full service ocean carrier handle SEA shipments from the port to the place of delivery. SEA cargo moved under super all-in rates, which included among other things, motor carrier charges, terminal handling charges, and local charges. During that same period, ZIM began charging SEA dramatically increasing amounts for D&D charges resulting from ZIM's inland transportation failures and continued to repeatedly fail to properly perform its inland transportation obligations, wrongfully exposing SEA to costs, charges, delays, and other harms.

²⁴ *Interpretive Rule*, 85 Fed. Reg. at 29652.

ZIM, as the party responsible for moving the cargo, is not incentivized to move cargo by a charge it does not pay,²⁵ and ZIM is certainly not incentivized to move cargo by charges that are paid to (or assessed by) ZIM, and when ZIM makes more money when the cargo does not move fluidly within free time.

ZIM's practice also fails under the particular Incentive Principle rule on demurrage at Section 545.5(c)(2)(i) for an analogous reason. The cargo on which SEA was charged demurrage was not available *to SEA* to pick up. The cargo was available *to ZIM* to pick up. In the through bill store door movements, no amount of demurrage assessed on SEA would render the cargo available for pickup by SEA. This general rule is amply illustrated by the exception. SEA only obtained the legal capacity to pick up its cargo during the inland leg of the transportation in the relatively few instances where a through bill of lading was converted from store door to CY. PFF at ¶¶ 328-330. In those rare instances—referred to as terminating or splitting a through bill into separate CY and inland bills of lading—SEA undertook responsibility for inland transportation, and thus the technical ability to pick up its cargo from a marine terminal, but only after ZIM was no longer the common carrier under the through bill of lading. PFF at ¶¶ 29, 317, 328-330.

b. ZIM Unreasonably Shifted its Common Carrier Inland Transportation Responsibilities—including Direct Cargo Release and Payment Responsibility for Inland Demurrage Charges—to the Consignee SEA

ZIM's practice of requiring SEA as the consignee under a through bill of lading to first pay charges at marine and inland terminals before ZIM would continue and/or complete its inland

²⁵ Compare with *Hapag-Lloyd, A.G.*, 2022 WL 1239377, at *32 (no amount of detention charges will incentivize the movement of cargo when Hapag-Lloyd designated empty return locations are full).

transportation obligations was unjust and unreasonable because it was not reasonably related to, nor fit to the end in view, of ZIM's performance of inland common carrier services.

First, ZIM does not have a legitimate basis for transferring a fundamental element of its common carrier obligations to the consignee. Under through bills of lading, it is the common carrier's obligation to move the cargo inland, including arranging for release from terminals and transfer from the vessel to trains and/or trucks.²⁶ To the extent ZIM incurred legitimate charges for its inland transition obligations, ZIM should have paid them (or waived them) in the first instance and completed the carriage to the inland destinations.

Second, having paid or accrued such charges, before assessing such charges on SEA as consignee, ZIM should have evaluated whether there was a basis to charge the consignee at all, or whether the charges should have been paid or waived (or in the case of ZIM's own charges, not charged at all). By failing to do so, ZIM cannot legitimately satisfy the requirement that it certify that "the common carrier's performance did not cause or contribute to the underlying invoiced charges." 46 U.S.C. § 41104(d)(2)(M). Even though ZIM's conduct in this regard commenced prior to OSRA, that timing does not absolve ZIM of its pre-OSRA obligations to enforce just and reasonable regulations and practices. Repeatedly invoicing a party without a legitimate legal basis, and indeed shifting to a practice were ZIM systemically assessed charges on a consignee without first evaluating the potential responsibility of the charged party, is unjust and unreasonable under pre-OSRA section 41102(c) principles.

ZIM's practice is especially egregious because the evidence shows that ZIM knew or should have known that charging SEA was at odds with its understanding of store door terms and

²⁶ PFF at ¶ 42-45; *Interpretive Rule*, 85 Fed. Reg. at 29664 ("the ocean carrier is responsible for arranging transport of a container from the terminal to another location"); Michalski Dep. Tr. 27:7-28:5; Speight Dep. Tr. 135:4-7.

policy positions. ZIM’s website includes a page titled “Inland Transport,” which advertises that ZIM “arranges all elements of your cargo’s journey, including transportation to and from ports, warehouse, ramps, and depots.”²⁷ By agreeing to handle SEA cargo under store door terms, ZIM extended its common carrier responsibility beyond the port.²⁸ ZIM has acknowledged that it is responsible for demurrage under store door moves,²⁹ and agreed that D&D charges, or charges that accrue but are not the fault of the shipper, should not be assessed on the consignee.

Testimony on behalf of ZIM confirms this common carrier obligation. Barbara Speight, ZIM’s Dedicated Service Group Customer Service Manager, (and testifying on behalf of ZIM as its corporate representative) testified that, “[i]f it’s not the customer’s fault, we don’t charge.”³⁰ Similarly, ZIM Equipment Manager Tera Haynie, and testifying on behalf of ZIM as its corporate representative testified in response to a question on whether a customer would normally be charged if a box was not available for pickup, said, “[i]f a container’s not available you cannot charge them.”³¹

Yet, ZIM’s actual practice was in direct contravention to these policy positions. In an apparent attempt to create *post hoc* rationalizations for its unreasonable conduct, ZIM has suggested in the course of this proceeding various dubious theories, such as implying that ZIM was not in fact the common carrier under the though bills of lading at issue, or if it was the common carrier, that it was nevertheless not responsible for the inland movements, or, as a further fall back, that it was not responsible for its charges in connection with the inland movements. These are utterly spurious arguments. PFF at ¶¶ 271, 272-275.

²⁷ PFF at ¶¶ 276; 238-247. McCown Report, ¶¶ 25-26.

²⁸ McCown Report, ¶26.

²⁹ Speight Dep. Tr. 135:4-7.

³⁰ Speight Dep. Tr. 106:22-23. Ms. Speight was designated as ZIM’s corporate representative.

³¹ Haynie Dep. Tr. 163:4-25.

One such *post hoc* theory is premised on ZIM's wildly unsupported assertion that a shipper's mere recommendation of inland trucking companies dramatically changes, and indeed absolves, ZIM of fundamental common carrier transportation obligations. PFF at ¶ 30-33. ZIM's 143(b)(6) corporate representative, concerning service contracts, asserted that a contractual right to recommend an inland trucker (a "preferred trucker" or "customer nominated trucker" or "CNT") automatically transferred all inland transportation costs and charges to the consignee. Shpitzer Dep. Tr. 125:3-12 (testifying that under ZIM's view, a store door move with a right to recommend a preferred trucker was interpreted as similar to a CY move).³²

ZIM's testimony reflects how it *acted*—namely that ZIM did shift the inland transportation costs and charges to SEA, effectively treating the inland transportation as if it was practically no different than a CY move. But ZIM has no basis in law or fact remotely substantiating its "preferred trucker" rationalization for its actions. And the witness in question, despite his designation as a 143(b)(6) witness on service contracts to provide testimony on behalf of ZIM, had no knowledge of, and was not prepared to testify about, any actual Samsung related service contract provisions. Shpitzer Dep. Tr. 72:13-73:21 ("I'm not aware of a specific agreement of ZIM and Samsung").

In all events, the facts show that whether or not ZIM used a preferred trucker did not alter its inland transportation obligations. SEA did not have operations arranging inland moves.³³ For example, SEA did not have a trucking dispatch operation to arrange for pick-ups or drop-offs of containers, as it is ZIM who is responsible for "getting[] container[s] delivered on time" and it is ZIM who "manages the carriers."³⁴

³² Shpitzer Dep. Tr. Pg. 69:20-23. Shpitzer, Commercial director for the Trans-Pacific Eastbound trade, was designated as ZIM's corporate representative.

³³ Choi Dep. Tr. 74:16-24.

³⁴ PFF at ¶ 39; Choi Dep. Tr. 74:16-20.

The record is clear that utilization of a CNT was a recommendation and not a requirement. PFF at ¶ 35. Jeung Choi, SEA’s Director of Logistics, and testifying as its corporate representative³⁵, observed that a “CNT is a carrier that we would recommend to the shipping liner, but eventually the shipping liner decides whether or not to use that carrier.”³⁶ CNTs were nominated because they were proven trucking companies on designated routes, were familiar with SEA’s warehouses and customer facilities, and in general were intended to *better facilitate cargo fluidity*.³⁷

After receiving a recommendation for a trucker, ZIM made the decision to approve and use any preferred trucker.³⁸ Recommendations for preferred truckers were vetted and approved by ZIM—ZIM reviewed the trucker’s safety records, whether the trucker was in good standing, and participated in the Uniform Intermodal Interchange and Facilities Access Agreement (“UIIA”).³⁹ When and if ZIM approved a trucker, ZIM contracted with the trucker directly to perform ZIM’s inland trucking services.⁴⁰ ZIM’s contracts with preferred truckers were solely between ZIM and the preferred trucker. SEA did not have separate transportation agreements with preferred truckers.⁴¹

Nor did ZIM’s use of preferred truckers have any substantive effect on how ZIM performed inland transportation obligations. Both ZIM and SEA witnesses testified that the operational process was the same for preferred and other ZIM truckers. *See Michalski Dep. Tr.*, 42:11-21

³⁵ Choi Dep. Tr., Pg. 54:21-24. Jeung Choi was designated as SEA’s corporate representative.

³⁶ Choi Dep. Tr. 53:4-7; *see also* Michalski Dep. Tr. 45:15-17 (testifying that a CNT always required approval from ZIM).

³⁷ PFF at ¶ 36; Rapske Dep. Tr. 82:1-7

³⁸ PFF at ¶ 34; Michalski Dep. Tr. 45:15-17. James Michalski, Vice President, Regional Logistics, Mr. Michalski was designated as ZIM’s corporate representative.

³⁹ PFF at ¶ 37-38; Michalski Dep. Tr. 45:10-46;5; Michalski Dep. Exhibit No. 3.

⁴⁰ Michalski Dep. Tr. 31:9-22 (testifying that ZIM contracts directly with a trucker).

⁴¹ Choi Dep. Tr., Pg. 62:21-63:3.

(testifying that “A. It's the same process Q. Okay. So the communications are the same, the dispatch is the same, ZIM's operations with them are the same? A. Yes.”); *see also* Choi Dep. Tr. 70:8-13. ZIM issued the work orders to preferred truckers like with any other ZIM contracted trucker, and indeed, “preferred truckers” were also used by ZIM as ZIM’s “house truckers.”⁴²

c. ZIM’s Collection Practices, Including Specifically its Coercive Finance Holds Practices were Unjust and Unreasonable

ZIM’s use of finance holds to coerce payment of disputed charges, and to generate new D&D revenue on cargo when it was not available for pickup, constitutes unjust and unreasonable practices in violation of Section 41102(c). Specifically, (1) ZIM’s use of finance holds to generate new D&D when the cargo was not available for pickup violates the particular Incentive Principle on cargo availability, 46 C.F.R. § 545.5(c)(2)(i), and the general Incentive Principle on facilitating cargo fluidity, 46 C.F.R. § 545.5(c)(1); and (2) ZIM’s use of finance holds in the absence of actual credit concerns, but instead as a means to coerce payment of disputed invoices, is not appropriate to a legitimate end in view. And ZIM’s resulting collection of new D&D charges far exceeding the underlying amounts in dispute that ZIM originally sought to collect is in all events excessive and independently unreasonable.

Between August 2019 and March 2022, on at least five separate occasions, ZIM suspended movement and release of all SEA containers in ZIM’s system in the United States, including containers within free time, enroute to U.S. ports, and located at the terminal/ports. PFF at ¶¶ 139, 139-144. ZIM implemented these finance holds under the guise of credit concerns over payment

⁴² Frigo. Dep. Tr., Pg. 141:7-8; Michalski Dep. Tr., Pg. 46:13-16; *see also* Speight Dep. Exhibit No. 7 (identifying instances of the allocation of responsibility for store door moves).

of disputed invoices for charges allegedly owed by SEA and others to ZIM. The finance holds lasted for several days or months, and in all cases significant demurrage charges were incurred.⁴³

The toll of the finance holds was calculated by ZIM to inflict pressure and pain on SEA and ZIM's internal records show how effective it was in accomplishing this goal. ZIM was forced to provide SEA a copy of a note that ZIM's US Director of Finance Yaacoub kept on referring to during his deposition testimony. PFF 142. The "note" was incredibly revealing in that it was not produced during the discovery period by ZIM, and once produced post-deposition, it admits that SEA was forced to pay millions of dollars for its cargo moved on ZIM store door terms. PFF at ¶¶ 154-158. To be precise, ZIM's chart shows that **\$5.2 million in D&D charges were assessed during these finance hold periods, approximately \$3.8 million in demurrage and \$900,000 in detention, and \$500,000 in rail storage.**⁴⁴ The rail storage statement is particularly telling; as reflected in Smith Report Exhibit No. 2, between 2020 and 2022, SEA paid \$540,606 in rail storage. *See also* PFF at ¶¶ 67, 65-67. Thus, approximately 92% of rail storage charges incurred can be directly attributable to Zim's weaponization of finance holds. PFF at ¶¶ 154-158.

Additional ZIM documentation lists four 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"). PFF at ¶¶ 161-202. Testimony from ZIM CFO Rosenberg corroborates the dates in Mr. Yaacoub's note: "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

⁴³ Smith Expert Report Exhibit 9.

⁴⁴ PFF at ¶ 159; ZIM0085708.

6th, '21; and the last one was [January 11th], '22 through March 17th." Of particular interest to the FMC, who review data in terms of container impact in connection with Shipping Act violations, are Rosenberg's confirmation of the staggering number of containers caught in the dragnet of ZIM's finance holds; collectively over **1,000**.⁴⁵

ZIM testimony, in regard to finance hold practice, confirmed containers were not available for pick up and ZIM's practice, policy and procedure was to run out free time on containers and charge D&D during the finance hold periods. ZIM US' collections manager Barbara Speight testified that demurrage accrued while containers were unavailable for pickup during a hold:

Q. Okay. So the containers in this scenario, in a credit hold, are not available for pickup?

A. Correct.

Q. Is it ZIM's practice, policy, and procedure with respect to the demurrage and detention, and particularly demurrage in this scenario, to continue to charge demurrage or run out free time and start to charge demurrage for a container that -- while it's unavailable for pickup under a credit hold?

A. Correct.

Q. Is that in a written policy or that's just the -- the practice and actual policy?

A. I've not seen the written policy, if it is a written policy.

Q. Okay. But you have no qualms about knowing that, correct?

A. Correct.

Speight Dep. Tr. 196:9-25.

Q. Okay. Do you -- so a container that was -- was on -- still in free time the day a credit hold gets issued, and if a credit hold lasted three weeks, that container would have -- would have gone to

⁴⁵ PFF at ¶ 160. Rosenberg Dep. Tr., Pg. 47:11-48:3.

demurrage and would have been accruing demurrage during that period of time, correct?

A. Correct.

Speight Dep. Tr. 197:1-7. ZIM further testified that SEA containers continued to accrue demurrage charges during finance holds on the sole basis of ZIM's finance holds, and ZIM charged those amounts to SEA as a matter of ZIM policy and practice. Speight Dep. Tr., 199:7-13; 201:7-21 (agreeing that SEA containers accrued and were charged new demurrage "even though the only reason that the containers are unavailable for pickup is the finance hold.").

As reflected in SEA's chart of paid D&D charges (Smith Report Exhibit No. 2), SEA was assessed \$10,807,038 (through December 31, 2022) in demurrage, detention, and other charges. Demurrage and rail storage charges accrued directly as a result of ZIM's refusal to move cargo from terminals and refusal to release cargo during these periods, and overall, nearly fifty percent (50%) of the total charges SEA paid in connection with its ZIM shipments accrued during these hold periods, in addition to various other conduct that also contributed to the accrual of unreasonable demurrage and detention charges. PFF at ¶ 203, -159-203, 65-67

i. ZIM's use of finance holds violate the Incentive Principle

The cargo that ZIM refused to move was not available for pickup because ZIM refused to move it. Charging SEA new D&D charges on cargo that ZIM affirmatively and unilaterally refused to move and which was therefore not available for pickup, did not, and could not, incentivize SEA to move cargo that ZIM refused to move. *Interpretive Rule*, 85 Fed. Reg. at 29654 (stating that "cargo availability or accessibility refer to the *actual* availability of cargo for retrieval"); *see also* 46 CFR § 545.5(c)(2)(i).

Charging SEA new D&D Charges on containers that it unilaterally refused to move or release, including containers immediately put on hold upon vessel discharge, held through free time, and forced into demurrage on the sole basis of ZIM's alleged finance hold, did not, and could not, serve their "intended primary purposes as financial incentives to promote freight fluidity." ZIM's finance holds froze the movement of cargo. *Interpretive Rule*, 85 Fed. Reg. at 29652 (May 18, 2020); 46 CFR § 545.5(c)(1).

When asked why ZIM charged new demurrage on containers ZIM itself refused to move, and whether ZIM considered how that practice comported with the Incentive Principle, ZIM's corporate testimony (1) admitted that the Incentive Principle was not part of the demurrage policy, and (2) that the finance hold policy was determined by the finance department:

Q. Okay. Does ZIM have a practice, policy, and procedure with respect to when a credit hold is appropriate as a remedy?

A. That's a finance -- that's a finance question. I know they do, but that's a finance question.

Speight Dep. Tr. 184:8-12.

THE WITNESS: I was going to say, again, I can't speak -- I don't know what finance's policy is, what their protocol is for a case in a customer on a credit hold.

Speight Dep. Tr. 187:12-15.

ZIM's Finance department in turn testified that FMC Incentive Principle was not a consideration in the finance hold policy or practice. PFF at ¶ 228. Mr. Yaacoub, again testifying on ZIM's behalf as its corporate representative explained that the purpose of charging during finance holds was "charging the demurrage for the use of the container" merely because a container was remaining at a terminal past free time.⁴⁶ Yaacoub Dep. Tr. 124:24-125:8. And ZIM expressly

⁴⁶ Mr. Yaacoub was designated as ZIM's corporate representative.

testified that while ZIM's use of the finance holds incentivized payment, finance holds *did not incentivize movement of cargo*:

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

A. No.

Q. Okay. How about credit suspension?

A. The same. No.

PFF at ¶ 227, 225-228;

Despite ZIM's witnesses' sworn testimony that the Company was aware that the charges at issue in SEA's complaint included demurrage and detention charges accrued as a result of ZIM's finance holds, none of ZIM's designated witnesses was prepared to testify on the specific amount. Speight Dep. Tr., Pg. 199:8-13 (aware of hold demurrage); Speight Dep. Tr., Pg. 197:8-13 (does not testify on amount of hold charges); Yaacoub Dep. Tr., Pg. 126:11-23 (could not confirm amount of demurrage accrued during hold period); Rosenberg⁴⁷ Dep. Tr., Pg. 41:5-14, Pg. 46:9-12, Pg. 47:3-6 (does not testify on amount of charges).

Neither of ZIM's expert witnesses rebutted or attempted to disagree with SEA's expert testimony regarding the finance hold practices, nor the amount of improper charges resulting from the finance hold practices. PFF at ¶¶ 325, 292-293; *See* testimony of Lee Clair, ZIM's expert witness⁴⁸, Clair Dep. Tr., Pg. 130:5-10 (confirming that Mr. Clair's rebuttal report **does not address finance holds**); testimony of Ricardo J. Zayas, ZIM's expert witness, PFF at ¶ 327 (provided **no comment** regarding the impact of finance holds).

⁴⁷ Ilana Rosenberg, Chief Financial Officer for ZIM in the U.S. and ZIM's designated corporate representative.

⁴⁸ PFF at ¶¶ 287, 288-312. Mr. Clair submitted an expert report in rebuttal to the SEA expert report of John McCown.

The FMC's Incentive Principle provides that D&D charges should be utilized to promote cargo fluidity. However, ZIM's finance holds had the effect of disincentivizing the movement of cargo as ZIM was effectively collecting massive sums of D&D revenue by failing to perform its inland transportation obligations.⁴⁹

ii. ZIM's finance hold practice was not "fit and appropriate for the end in view" nor "tailored to meet its intended purpose"

Section § 41102(c) was derived from section 17 of the 1916 Act, and carried through in Section 10(d)(1) of the Shipping Act of 1984, and extensive FMC and judicial precedents thereunder, as requiring a regulation or practice to be "tailored to meet its intended purpose," *Distrib. Servs. Ltd.*, 1988 WL 340659, at *6 and "fit and appropriate to the end in view," *Port of San Diego*, 9 F.M.C. at 547. Courts have also included within the standard of reasonableness as "whether the charge levied is reasonably related to the services rendered." *Volkswagenwerk Aktiengesellschaft v. Fed. Mar. Comm'n*, 390 U.S. 261, 282 (1968).

The evidence shows that ZIM used finance holds to coerce collection of disputed invoices, not because of any legitimate credit concerns with SEA's ability to pay legitimate amounts due. Indeed, no credit concerns were expressed as a reason at the time of the pandemic. PFF at ¶¶ 264, 265-270. ZIM's use of finance holds was therefore not "fit an appropriate for the end in view" considering ZIM's "finance hold" nomenclature. ZIM's finance hold practice was directly contrary to its stated policy that cargo would not be held if the underlying charges were in dispute.⁵⁰ There is no legitimate dispute of fact that the invoices at issue in each underlying finance hold were very

⁴⁹ McCown Report Pg. 6.

⁵⁰ Yaacoub Dep. Tr., Pg. 125:12-14 ("If the invoice is disputed, we don't do any credit suspension or finance hold. We don't take up collection actions on any invoice that is disputed.")

much disputed.⁵¹ Indeed, the evidence shows that the finance holds were unilaterally instituted in response to SEA’s continued dispute of the invoices at issue and requests for additional substantiating information.⁵²

ZIM C-Suite had been pressuring ZIM in the U.S. to collect D&D charges from consignees, including, as shown in ZIM’s own communications and testimony, in situations where ZIM knew invoicing was not proper; charges and invoices were disputed; and in a manner that did not consider (meaningfully or at all) whether such changes and their collection of demurrage and detention was consistent with the FMC’s incentive principle.⁵³ Yet ZIM operations personnel rightfully questioned the reasoning of implementing finance holds against SEA:

We are threatening to hold one of our most profitable customers—who do not have credit with ZIM—but they are claiming not to have all invoices to issue payment.

Internal email Communication dated January 28, 2022 from Jonathan Cleva, Head of Strategic Accounts, North America and testifying on behalf of ZIM as its corporate representative.⁵⁴ Mr. Cleva was self-aware enough to know the damning policy decision by the ZIM C-Suite but was powerless to effectuate change as the longest of the finance holds would continue on until March

⁵¹ Frigo Dep. Exhibit No. 10 at Pg. 1 (email communication regarding three finance hold from January 11, 2022 to March 17, 2022. SEA is requesting additional information, “per ZIM we owe them 635K, I am waiting for the summary From the last statement, there’s \$500K that belongs to SAMSUNG but not for SEA”); Pgs. 1-13 (email communication related to finance hold from August 5, 2020 to Mid-August 2020. SEA was placed on a finance hold for amounts allegedly owed. However, after reviewing the statement provided by ZIM, SEA identified a number of shipments where invoices were disputed, payment had already been issued or were within free time. Upon further review by ZIM, only a small number of invoices were deemed valid.)

⁵² Frigo Dep. Exhibit No. 10 at Pg. 1; *see also* Rosenberg Dep. Exhibit No. 12 at Pg. 1-2 (discussing implementing finance hold on shippers due to alleged overdue balances. Communications indicate that overdues were due to ZIM errors. “We got so many customers feedback that their CNEE do NOT got our invoice for DEM/DET at destination, or they already arranged the payment but still in our outstanding.”).

⁵³ McCown Report Pg. 6.

⁵⁴ Cleve Dep. Exhibit No. 7 at Pg.1. Mr. Cleva was designated by ZIM to testify as its corporate representative.

17, 2022, as seen in the preceding section. Ultimately, finance holds were repeatedly utilized to incentivize payment on numerous customer accounts.⁵⁵ Based on the evidence, the change occurred in large part because ZIM began treating D&D charges as a revenue stream. Between 2020 and 2021, ZIM's demurrage revenue stream nearly tripled, and revenue continued to increase in 2022.⁵⁶

In an email communication dated November 17, 2022, from ZIM Headquarters' Business Unit, ZIM explained that ZIM's Global CEO wanted to address overdue balances in the US would be "implementing the process for holding cargo and blocking shippers for customers with demurrage and detention in the US."⁵⁷ In that same email chain, ZIM Taiwan emailed the ZIM U.S. team expressing concern that the majority of their customer feedback was that the consignee was not receiving the invoices for amounts allegedly due.⁵⁸

Despite the concerns, in an internal email communication on November 24, 2021, the finance department notified strategic accounts that ZIM intended to push the payment deadline to November 29, 2021. If customers failed to issue any payments (regardless of whether in dispute) ZIM would suspend credit and hold the release on all containers until paying the full account.⁵⁹ By January 4, 2023, a week before ZIM placed SEA on a three month long finance hold, ZIM's CEO instructed ZIM U.S. to dramatically reduce the overdues within three weeks.⁶⁰

⁵⁵ Jonathan Cleva Dep. Exhibit 10; Jonathan Cleva Dep. Exhibit 11; Haynie Dep. Exhibit No. 10 ("I don't know how to take this situation. Is it really ZIM's official position to hold our cargo in the middle of the negotiation?").

⁵⁶ PFF at ¶¶ 239, 238-247; McCown Report at pg. 6; Yaacoub Dep. Exhibit Nos. 7&8.

⁵⁷ Roenberg Dep. Exhibit No. 12 at pg 5.

⁵⁸ Rosenberg Dep. Exhibit No. 12 at pg. 1.

⁵⁹ PFF at ¶¶ 145, 146-153. Rosenberg Dep. Exhibit No. 14.

⁶⁰ Rosenberg Dep. Exhibit No. 16.

Finally, it is evident that ZIM's enforcement of finance holds was excessive and needlessly punitive. It is well-established that under § 41102(c), a regulation or practice must be tailored to meet its intended purpose. Even if a practice has a valid purpose, if it goes beyond what is necessary to achieve that purpose, it may still be unreasonable. *Distrib. Servs. Ltd.*, 1988 WL 340659, at *7.

The evidence shows that the scope and frequency of ZIM's use of finance holds to coerce payments was excessive and not reasonably related to the service or cost. ZIM generated far more revenue from the new charges on held cargo than the charges it originally sought to collect as allegedly due and owing. PFF at ¶¶ 204, 205-206. As explained above, the evidence does not substantiate that ZIM had a valid basis under its own policy to use finance holds to coerce payment of disputed invoices. PFF at ¶¶ 210, 204-209. But even if ZIM had a legitimate basis to institute a finance hold, ZIM had much more tailored means to seek collection. PFF at ¶¶ 129, 129-138.

d. ZIM Billing Practices and Faulty Dispute Resolution

ZIM has not established clear dispute resolution processes and procedures, and its current billing practices do not provide transparency or sufficient information to determine the validity of the charges. When determining the reasonableness of a carrier's D&D practices, the Commission may consider "the existence, accessibility, content, and clarity of policies implementing demurrage and detention practices and regulations, including dispute resolution policies and practices and regulations regarding demurrage and detention billing. In assessing dispute resolution policies, the Commission may further consider the extent to which they contain information about points of contact, timeframes, and corroboration requirements." 46 CFR 545.5(d); ; *see also Mediterranean Shipping Co., S.A.-possible Violations of the Shipping Act*, 46 U.S.C. §§41102(c), 40501 and 41104(a)(2)(a), FMC Docket No. 23-08, 2023 WL 5220345, at *1 (FMC Aug. 10, 2023) (granting

an order of Investigation and Hearing to determine whether certain carrier practices were a violation of the Shipping Act, including billing practices).

The Commission has recognized that to ensure cargo fluidity, “it is important that dispute resolution processes and procedures be: (a) clearly established; (b) made available on public webpages; and (c) include information about who – which person or organizational unit – should be contacted to discuss and resolve any demurrage and detention disputes that arise.”⁶¹

As noted in the Notice of Proposed Rulemaking [for the Interpretive Rule on Demurrage and Detention], the “efficacy (and reasonableness) of dispute resolution policies also depends on demurrage and detention bills having enough information to allow cargo interests to meaningfully contest the charges.” *Interpretive Rule*, 85 Fed. Reg. at 29661. Thus, establishing clear billing processes and procedures, and direct avenues to pursue billing questions is an essential component of a party’s D&D practices. Failure to do so may be a violation of the Shipping Act. For example, in *Hapag-Lloyd, A.G.*, , the Presiding Officer determined that the ocean carrier’s dispute procedures were unreasonable.⁶² The carrier had failed to update its procedures in accordance with the Incentive Principle, provide updated training to its employees and establish clear procedures and policies to dispute charges (e.g., preference for specific types of evidence).⁶³

Here, the evidence indicates that ZIM did not have a meaningful dispute resolution process in place. While ZIM has set up an email address for customers to submit billing disputes, it has not established uniform procedures and regulations (written or otherwise) to evaluate demurrage

⁶¹ FF 28 Final Report at. 29-30.

⁶² *Hapag-Lloyd, A.G.*, 2022 WL 1239377, at *33

⁶³ *Id.* at *32.

and detention disputes.⁶⁴ Nor is there evidence that ZIM's dispute resolution policy is based on FMC considerations or the incentivizing principle.

i. ZIM does not have meaningful dispute resolution policies and procedures

D&D disputes are reviewed by separate departments. Because ZIM considers demurrage disputes a customer service issue, any dispute submitted by a customer is evaluated by the ZIM employee that invoiced the customer. Detention disputes are evaluated by the finance department.

For a strategic account like SEA, any demurrage disputes submitted were evaluated by ZIM's Dedicated Service Group ("DSG"). PFF at ¶¶ 251, 248-263. Once a dispute was received by DSG it would do a cursory review, and make a determination of whether to enforce or waive a charge. SEA had no further redress. As noted above, ZIM did not provide any training or guidance with respect to the Shipping Act. Nor did ZIM have any written policies or guidelines. As reflected in the testimony of Barbara Speight (Manager of ZIM's DSG Team), any dispute submitted by SEA or any other customer would not be evaluated with the Incentive Principle in mind:

Q. When I asked you earlier about the Federal Maritime Commission, is -- you had some awareness for the Shipping Act and the FMC, no training. Was your awareness, or does your awareness include anything with respect to the FMC's incentive principle for demurrage and incentive charges or in the incentive rule?

A. It does not.

Speight Dep. Tr. 208:8-15.

The only other avenue to dispute charges is an internal "appeals" process, which is not available to the public. PFF at ¶¶ 230-237. It is titled the "Demurrage Committee" and set up at the management level, it periodically reviews disputes raised by customers. ZIM's "Demurrage

⁶⁴ Speight Dep. Tr., Pg. 31: 1-9.

Committee” is an internal commercial group comprised of seven to eight members—typically department heads (*e.g.*, finance, trade, intermodal)—who meet on a weekly basis to review disputed demurrage charges.⁶⁵

Because the Demurrage Committee is an internal group it is not accessible to customers, and in order to have disputed charges reviewed by the Demurrage Committee, a ZIM employee has to submit a request for consideration on a customer’s behalf, which does not always occur for every charge. For example, SEA’s charges were never reviewed by the Demurrage Committee.⁶⁶ Customers are not able to communicate directly or submit evidence regarding a disputed charge. A ZIM employee provides a summary of the disputed charges and identifies the customer and bill of lading number. No additional documentation (email communications, shipping documentation) is reviewed.

Q. Okay. Is there, like, a written policy to determine how it's decided? Do you guys have guidelines in place, or is it one of the -- is it a meeting where everybody just discusses it? Like, what considerations are given when you determine to waive[demurrage] something?

A. There's no written guidelines. There's no written policy.

Michalski Dep. Tr., Pg. 89:6-13. Critically, though, this committee apparently assumed that all D&D charges were properly assessed, and only considered waivers of D&D for commercial purposes – they did not review or consider whether the D&D charges were properly assessed in the first place. Moreover, the Incentive Principle is not a factor when determining whether to waive D&D charges:

Q. Okay. So whenever you make a decision regarding demurrage and detention, you're not considering the incentivizing principle; is that correct?

⁶⁵ Michalski Dep. Tr. 86:2-7,13-14; Michalski Dep. Tr. 89:6-13

⁶⁶ Michalski Dep. Tr., Pg. 106: 19-107:5

A. I have no knowledge of that.

Q. Okay. Do you know if any of the other members in the committee know of that principle?

A. I would not have any idea if they know about that principle or not.

Michalski Dep. Tr., Pg. 99:2-9.

Accordingly, waiver of demurrage charges by the Demurrage Committee are based on commercial considerations. For example, as reflected in the Demurrage Committee Spreadsheet, container availability was not a factor in determining whether to waive demurrage. The chart is a list of charges that was waived by the Demurrage Committee in 2021, and a number of waiver requests related to Port Congestion were denied because of “No ZIM Error.” ZIM0078153.

ii. ZIM does not provide guidance or training on FMC regulations, the Shipping Act or the Interpretive Rule

While ZIM has admitted that it was aware of the Interpretive Rule, it has not taken any steps in its policies and procedures to address the Interpretive Rule nor is the “incentivizing principle” a factor when addressing disputed invoices.

Testimony from ZIM employees and designated corporate representatives establishes that ZIM does not have any written policies and procedures to address the Interpretive Rule, no meaningful training was provided to employees regarding the interpretive rule (in particular no training or guidance of any substance prior to OSRA), nor is there a written policy regarding demurrage and detention.

Q. Okay. Have you received any training with respect to the Shipping Act in your job?

A. Have not.

PFF at ¶ 229; Speight Dep. Tr. 50:9-11; Frigo Dep. Tr. 22:20-22 (no training related to the Shipping Act), 65:3-10 (no training or corporate materials regarding the Incentive Principle);

Michalski Dep. Tr. 81: 13-17 (no training or guidance on the Shipping Act); Ramage Dep. Tr. 24:18-21 (no training on the FMC or the Shipping Act); Weingartner Dep. Tr. 61:7-24 (no Shipping Act compliance training); Haynie Dep. Tr. 130:11-18 (no training on the Incentive Principle).

e. ZIM Made No Changes to its Policy to Address Supply Chain Issues During the Pandemic

On March 11, 2020, the World Health Organization declared that COVID-19 was officially characterized as a pandemic. Because people were spending more time at home, there was a surge in demand for household appliances and other durable goods (*e.g.*, refrigerators, freezers, and washing machines). This increased demand resulted in manufactures and retailers, ramping up efforts to meet consumer demand, and some retailers were reporting a two-month backlog on goods. PFF at ¶ 18. Thus, SEA was clearly motivated and incentivized to move its goods quickly from the port, and relied on ZIM to be able to do so. PFF at ¶¶ 10-11, 18.

Because of this increased demand, ports were at full capacity and in some instances, vessels often had to anchor offshore and overflow locations had to be set up. PFF at ¶¶ 48-49, 314-315. This coupled with trucker shortages, port and terminal congestion, inclement weather and chassis shortages impacted the container industry. U.S. ports experienced increased dwell times, landslide bottlenecks, and continued chassis shortages well into 2022. PFF at ¶¶ 48-49, 51-52. Indeed, in an email from Mr. Goldman to Mr. Dotan, ZIM acknowledges this impact, suggesting that they need 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.”⁶⁷

⁶⁷ PFF at ¶¶ 54, 53-57, 80-82; Rosenberg Dep. Exhibit No. 6

Notably, in the ZIM rebuttal Zayas Report, ZIM contends that SEA’s claim for damages fails to consider relevant facts, including “the supply chain disruptions’ arising from the COVID-2019 pandemic.”⁶⁸ The Zayas Report goes on to state that “Despite knowledge of pre-pandemic deviations from the “store door” agreement, Smith assumed that the “supply chain disruptions” he discussed in his report did not and would not contribute to additional occasions in which SEA would have been responsible for any “inland transportation charge.””⁶⁹

Yet, testimony from ZIM indicates that the “supply chain disruptions” from the pandemic did not warrant any change to ZIM’s operations or impact ZIM’s operations.

Q. Shifting gears a little. When COVID-19 or the pandemic began in early 2020, how was your job impacted or your role?

A. How was it impacted?

Q. Was there any change?

A. To my role, no.

Q. Was there any change to any of your employees?

A. Aside from working from home for a month or two, no.

Q. Did anybody in your department or you have to take on any additional responsibilities?

A. No.

Q. So there was -- there wasn't any longer hours or there wasn't any significant change during the pandemic; is that accurate?

A. No significant change.

Q. Was there any change?

A. In day-to-day function and duties?

⁶⁸ Zayas Report at Pg. 2.

⁶⁹ Zayas Report at Pg. 20.

Q. Uh-huh. Other than working from home.

A. No. The business didn't change. Containers were still being dispatched. Containers were still being delivered. Equipment was being positioned for bookings. So, no, no significant change in daily operations.

Q. And then, for ZIM, was there any impact to ZIM?

A. No.

Michalski Dep. Tr. 150:25-151:24.

Q. Ms. Speight, do you -- did ZIM's practices, policies, and procedures with respect to inland transportation charges relating to congestion or equipment availability change over time or as a result of the pandemic?

A. No.

Speight Dep. Tr. 112:9-14.

While the evidence reveals, that during the Pandemic ZIM's policies and procedures were changed to increase revenues, ZIM did not make any changes to handle ongoing supply chain issues for its customers. Because ZIM failed to address supply chain disruptions, shifted its practices related to store door moves, and engaged in aggressive collections practices, ZIM contributed to the delays in the movement of cargo. But as reflected in the below chart tripled its revenue, with incredible spikes in global demurrage revenue:⁷⁰

	<u>2017</u>	<u>2018</u>	<u>2019</u>	<u>2020</u>	<u>2021</u>	<u>2022</u>
Contain Rev	2,617	2,836	2,847	3,492	9,699	10,952
Total TEU's	2,429	2,914	2,821	2,841	3,481	3,380
Rev/TEU	1,077	973	1,009	1,229	2,786	3,240
Total Rev	2,978	3,248	3,299	3,992	10,729	12,562
Dem%	8.46%	8.46%	8.68%	8.89%	9.10%	9.31%
Demurrage	252	275	286	355	976	1,170
Demurr/TEU	104	94	101	125	280	346

⁷⁰ PFF at ¶¶ 239, 238-247; McCown Report at Pg. 36, ¶ 69. All figures are in millions except for the per TEU estimates for demurrage.

Indeed, ZIM, as a publicly traded company, was forced to acknowledge in its March 13, 2023 SEC filing that just within the last year ZIM had an increase (in annual revenue from 2021 to 2022) of “\$242.9 million in income from demurrage.”⁷¹ SEA knows full well how ZIM accomplished such staggering demurrage revenues; primarily off the backs of American consignees like SEA.

f. ZIM’s Invoicing Shortfalls Contribute to Spiraling D&D

While ZIM admits that only valid and correctly issued D&D charges should go to customers, ZIM still issued all D&D charges to its customers, including SEA, assuming – without verification of any kind – their validity.⁷² Due to ZIM’s utilization of finance holds, SEA was forced to pay disputed charges to obtain the release of its cargo. Prior to issuing payment for charges, SEA’s standard operating procedures required the charges to be validated and approved. As discussed above, ZIM Headquarters began to pressure ZIM U.S. to collect D&D charges from consignees, including, as shown in ZIM’s own communications and testimony, in situations where ZIM knew invoicing was not proper; charges and invoices were disputed; and in a manner that did not consider (meaningfully or at all) whether such charges and their collection of D&D was consistent with the FMC’s Incentive Principle.

The validation process required SEA to confirm certain information, including the dates the charges were incurred, and the amount of free time. Once the charges were validated the invoices would be submitted to accounting for approval, where SEA would review the charges to determine if they were incurred due to SEA or were the responsibility of ZIM. The approval process involved SEA reviewing shipping documentation to confirm whether charges were

⁷¹ PFF at ¶¶ 83, 84-93; McCown Report at ¶ 66 (quoting ZIM’s Form 20-F annual report to the SEC).

⁷² Cleva Dep. Tr. at 68:17-69:1; 98:9-14].

incurred due to other factors (e.g., chassis shortages, congestion, etc.). If it was determined that the charges were incurred due to factors outside of SEA's control, SEA would dispute the charges directly to ZIM.

However, ZIM's system did not have the capability to handle specific invoicing requests. Moreover, testimony from ZIM CFO Rosenberg confirms that throughout her tenure, ZIM has always had issues or problem with timely billing, which resulted in significant overdue balances.⁷³ In email communications between ZIM U.S.'s Finance team, and ZIM U.S. CFO Ms. Rosenberg, Ms. Rosenberg notes 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."⁷⁴ In response, ZIM US Finance team explained that "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. PFF at ¶ 107; Rosenberg Dep. Exhibit 11 at p. 3. Thus, the invoicing delays and errors were due to ZIM's inadequate systems, which ZIM was aware of and understood to cause "overdue balances." PFF at ¶¶ 105-107. Despite this, ZIM Global CFO later determined that to address overdue balances it would "implement[] the process for holding cargo and blocking shippers for customers with overdue demurrage and detention in the US." PFF at ¶ 108; Rosenberg Dep. Exhibit 12 at p. 5. In response to the finance holds, 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." PFF at ¶¶ 109-110; Rosenberg Dep. Exhibit 12 at p. 1.

ZIM's defective billing systems continued to create additional errors in billing. PFF at ¶¶ 111-118. On December 17, 2021, ZIM CFO Ms. Rosenberg wrote to Eyal Ben-Amram (ZIM's

⁷³ PFF at ¶¶ 94-104.

⁷⁴ PFF at ¶¶ 105-106.

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.” PFF at ¶ 111; Rosenberg Dep. Exhibit 13 at p. 1.

Despite these issues in ZIM’s systems, ZIM was still preparing to institute another finance hold against SEA. PFF at ¶ 113. On January 11, 2022, communications between Ms. Yael D’angeli (Head of Strategic Account Unit of ZIM) and U.S. Finance team, including Ms. Rosenberg, indicate the complete disregard for ensuring that charges were assessed correctly. “[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.⁷⁵

Particularly damaging was ZIM’s charge first, ignore later practice and ZIM collections personnel asking for payment of invoices already paid. ZIM repeatedly invoiced SEA for charges for unrelated entities. PFF at ¶¶ 211, 212-224. For example, 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.⁷⁶ Indeed, during the three-month long finance hold, SEA notified ZIM that it had levied over \$366,000 of D&D charges on several containers that did not belong to SEA.⁷⁷ However, ZIM’s collection manager Adrienne Martin informed Cristina Marucut,

⁷⁵ PFF at ¶¶ 113; Rosenberg Dep. Exhibit 15 at p. 1].

⁷⁶ PFF at ¶ 85; ZIM 0025379-ZIM0025380]

⁷⁷ PFF at ¶ 88; ZIM0013363-ZIM0013364]

Manager of SEA’s Direct Ship Operations, that “the remarks provided do not indicate any dispute or billing discrepancies” and thus ZIM was “unable to remove the account from hold.”⁷⁸

In addition, ZIM would repeatedly place unrelated entities on a finance hold assuming they were connected to SEA. For example, during the three-month long finance hold, non-party Samsung SDS America repeatedly emailed ZIM regarding placing its cargo on hold. “We fully understand that [SEA is on a finance hold], but again, the below containers belong to Samsung SDS America, and ZIM Line have overdue balances with Samsung Electronics America. We are totally different affiliates and nothing involve with Samsung Electronics.”⁷⁹

g. ZIM Practices and Regulations Regarding Empty Returns is Unjust or Unreasonable

The Commission’s regulations at 46 C.F.R. § 545.5(c)(ii) state as follows regarding returns of empty containers, “[a]bsent extenuating circumstances, practices and regulations that provide for imposition of detention when it does not serve its incentivizing purposes, such as when empty containers cannot be returned, are likely to be found unreasonable.” More specifically, the Commission addressed the fact pattern at issue here: “[I]f an ocean carrier directs a trucker to return a container to a particular terminal, and that terminal refuses to accept the container, no amount of detention can incentivize its return.” *Notice of Proposed Rulemaking: Interpretive Rule on Demurrage and Detention Under the Shipping Act (Notice Interpretive Rule)*, 84 Fed. Reg. 48850, 48853, 48855 (Fed. Mar. Comm’n Sept. 17, 2019) (“Absent extenuating circumstances, assessing detention in such situations, or declining to pause the free time or detention clock, would likely be unreasonable.”).

⁷⁸ PFF at ¶ 89; ZIM0013363]

⁷⁹ Rosenberg Dep. Exhibit No. 26.

In *Hapag-Lloyd, A.G.*, the ocean carrier assessed detention charges for eleven containers. However, the evidence revealed that trucker was unable to return the containers within free time due to no appointment availability. The Presiding Judge held that the assessment of detention was unreasonable because “no amount of detention could have incentivized the return of the containers.” 2022 WL 1239377 at *30.

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. PFF at ¶¶ 58-64. These ZIM delays, as the party responsible for arranging and directing the trucker, should not have resulted in charges. But ZIM charged with impunity.⁸⁰

v. THE PRACTICE OR REGULATION IS THE PROXIMATE CAUSE OF THE CLAIMED LOSS

*In regard to the fifth and final Section 41102(c) element, to prove unjust and unreasonable shipping practices under 46 U.S.C. 41102(c), the complainant must prove that the practice or regulation was the proximate cause of the claimed loss. 46 C.F.R. § 545.4(e). Under 46 U.S.C. § 41305(b), a complainant is entitled to reparations for “actual injury caused by a violation of this part.” 46 U.S.C. § 41305(b); see also, Way Interglobal Network, LLC v. Shenzhen Uniflex SCM Ltd., FMC Docket No. 22-28, 2023 WL 130654 at *4 (FMC Jan. 4, 2023) (denying motion to dismiss because allegations of unpaid freight, invoiced demurrage, pending demurrage for freight not yet invoiced, internal time, and financial consequences from adverse impacts to supplier relationships damage is plausible so as to establish standing, but not proven).*

⁸⁰ PFF at ¶¶ 58-64; Choi Dep. Tr. at 95:18-96:20 (discussing ZIM’s failure to procure a prepull yard or off dock container yard, to prevent additional demurrage charges).

To meet this burden, “a party must show that it is entitled to a specific reparation, i.e., that it sustained actual loss or injury and that the violation of law was the proximate cause of that loss or injury with ‘reasonable certainty.’” *Rose Int’l, Inc. v. Overseas Moving Network Int’l, Ltd.*, 29 S.R.R. 119, 2001 WL 865708 at *80 n.75, (FMC 2001); *see also William R. Adair v. Penn-Nordic Lines, Inc.*, Docket No. 1695(F), 26 S.R.R. 11, 1991 WL 383091 at *23, (ALJ Sept. 24, 1991) (“proof of injury or damages must rest on reliable evidence that shows that the violation of law was the proximate cause of the damages.”). Commission precedent has held that **payment** of D&D charges is sufficient. *Hapag-Lloyd, A.G.*, 2022 WL 1239377 at *34; *A Customs Brokerage, Inc. v. Cargocare Logistics USA, Inc. et.al.*, Docket No. . 1987(I), at 14 (ALJ July 17, 2023) (Claimant “demonstrates that it incurred damages in the amount of \$20,970 (FF 36), the amount it seeks as reparations, because of the double payments it was forced to make to obtain its shipments due to Respondents’ conduct.”).

During the period of 2020 to 2022, ZIM began assessing exorbitant D&D charges against SEA.⁸¹ The D&D charges related to store door moves of which SEA was not responsible. ZIM, as the carrier, was responsible for both the ocean and inland transportation, and should have only assessed D&D charges for instances where SEA was the direct and proximate cause of the delay. Moreover, due to ZIM’s collection and billing practices, SEA was placed on multiple finance holds, which resulted in additional charges. Due to ZIM unjust and unreasonable regulations and practices, SEA incurred charges in the amount of \$10.8 million and paid those amounts. Accordingly, ZIM’s practice and regulations were the proximate cause of the loss. PFF at ¶ 318. In sum, SEA’s overwhelming evidence confirms it has satisfied all five elements of section Section 41102(c), in order to find liability against ZIM.

⁸¹ *See* Smith Report Exhibit No. 2.

4. ZIM’s Actions Constitute Retaliation Under 46 U.S.C. § 41102(d)

SEA’s **Second** Cause of Action in the Complaint addressed ZIM retaliation. The added protections against retaliation were created by Section 5 of OSRA, promulgated under Section 41102(d), and were effective immediately upon the law’s enactment on June, 17 2022. Section 41102(d) of OSRA provides that “a common carrier, marine terminal operator, or ocean transportation intermediary, acting alone or in conjunction with any other person, directly or indirectly, may not— resort to any other unfair or unjustly discriminatory action for any other reason. “The Commission recently issued the Statement on Retaliation ‘to clarify that it will interpret 46 U.S.C. § 41104(a)(3) – the anti-retaliation provision – broadly to effectuate Congress’s intent that shippers feel free to air their grievances to the Commission, and to address new shipping practices and new forms of retaliation.”” *OJ Commerce*, 2023 WL 3969857, at *33, *Citing Statement on Retaliation by the Commission*, 3 F.M.C.2d at 201. On December 15, 2022, in a press release⁸², Chairman Daniel B. Maffei stated as follows:

The Ocean Shipping Reform Act made it clear that it is absolutely illegal for ocean carriers to discriminate or retaliate against a shipper for filing a complaint or challenging a charge. The FMC will thoroughly investigate any allegation of illegal behavior and prosecute aggressively when warranted. This is something that everyone in a company, from the newest sales associate to the CEO, must understand and that is why the VOCC Audit Team is carrying this message directly to ocean carriers serving the United States. Even a simple verbal threat to a shipper from an ocean carrier employee could undermine U.S. law and will not be tolerated.

ZIM violated section 41102(d) because it repeatedly implemented finance holds against SEA or another entity for amounts allegedly owed even when in dispute or were inaccurately levied. SEA’s

⁸² December 15, 2022, FMC Probing Shipping Lines’ Anti-Retaliation Compliance, <https://www.fmc.gov/fmc-probing-shipping-lines-anti-retaliation-compliance/>

ample evidence of finance hold activity in Section IV D iv, *supra*, also supports SEA’s retaliation claim under the Shipping Act.

5. ZIM’s Actions Constitute a Refusal to Deal Under 46 U.S.C. § 41104(a)(10)

In regard to SEA’s **Third** Cause of Action in the Complaint, Section 41104(a)(10) provides that an ocean carrier will not unreasonably refuse to deal or negotiate. Reasonableness is necessarily a case-by-case determination. “The Commission has found various situations that inform what refusal to deal entails.”⁸³ It has found that a common carrier must avoid shutting out any person or party for reasons not connected to legitimate transportation-related factors.⁸⁴ For example, a common carrier’s repeated refusal to respond to email or telephone requests for negotiations over an extended period of time may be viewed as an unreasonable method of shutting another party out. NPRM Refusal to Deal, 87 Fed. Reg. at 57676-77; *OJ Commerce, LLC*, 2023 WL 3969857, at *22, 29 (ALJ June 7, 2023).

To establish a refusal to deal, a party must prove an actual refusal to even entertain the proposal or to engage in good faith discussions. *See OJ Commerce, LLC*, 2023 WL 3969857, at *28 . The FMC has held that a refusal to deal is not unreasonable if it is “justified by particular circumstances in effect.” *Docking & Lease Agreement By & Between City of Portland, ME & Scotia Prince Cruises Ltd.*, FMC Docket No. 04-10, 2004 WL 1895827, at *3 (FMC Aug. 23, 2004). Rather, a refusal to negotiate under the Act means refusal “by a marine terminal operator to give actual consideration to an entity’s efforts at negotiation.” *Canaveral Port Auth.-Possible Violations of Section 10(B)(10), Unreasonable Refusal to Deal or Negotiate*, FMC Docket No. 02-02, 2003 WL 723336, at *18 (FMC Feb. 24, 2003). In *Canaveral Port Authority*, the FMC found

⁸³ Docket No. 22-24, Definition of Unreasonable Refusal to Deal or Negotiate with Respect to Vessel Space Accommodations Provided by an Ocean Common Carrier.

⁸⁴ *Id.*

an unreasonable refusal to deal where a marine terminal operator, without good cause, expressly refused to conduct a mandatory hearing to discuss and consider an application by a tug company for a tug and towing franchise at the port. *Id.*

As also reflected above, ZIM's utilization of finance holds to force payment of disputed charges, in addition to being a violation of Section 41102(c), constitutes an unreasonable refusal to deal. ZIM refused to address disputed invoices or provide additional necessary or requested information and instead, unreasonably placed cargo on hold to force payment from SEA, without actually having to address invoice disputes. Moreover, as reflected above in the August 2020 "Hold their cargo!!! 😊😊" email, instead of responding to SEA's request for additional information regarding charges, ZIM instead opted to implement a finance hold.

6. Certain ZIM Invoices Violated OSRA's new Guard Posts as to Invoicing Without Required Information under Under 46 U.S.C. § 41104(a)(15)

In regard to SEA's **Fourth** Cause of Action in the Complaint, upon the passage of OSRA, ocean carriers are required to comply with demurrage or detention billing practices, promulgated under 46 U.S.C. § 41104(a)(15). Section 41104(a)(15) provides that D&D issued to a party must provide the following information:

- (A) Date that container is made available.
- (B) The port of discharge.
- (C) The container number or numbers.
- (D) For exported shipments, the earliest return date.
- (E) The allowed free time in days.
- (F) The start date of free time.
- (G) The end date of free time.
- (H) The applicable detention or demurrage rule on which the daily rate is based.
- (I) The applicable rate or rates per the applicable rule.
- (J) The total amount due.
- (K) The email, telephone number, or other appropriate contact information for questions or requests for mitigation of fees.

(L) A statement that the charges are consistent with any of Federal Maritime Commission rules with respect to detention and demurrage.

(M) A statement that the common carrier's performance did not cause or contribute to the underlying invoiced charges.

46 U.S.C. § 41104(d)(2). The evidence establishes that ZIM has failed to provide all of the above required information in its D&D invoices. For example Exhibit No. (SEA00112539), which identifies an invoice erroneously issued by ZIM to SEA for an unrelated entity, and lists demurrage charges for seven containers. The invoice does not include the date each container is actually made available, and the start of free time is not the same for each container. Further, while ZIM provides an email address for disputes, as noted above, ZIM has failed to establish meaningful dispute resolution practices where a party would receive a response related to its dispute arising from the invoice. As such, certain ZIM invoices are not in accordance with Section 41104(a)(15) of OSRA.

7. Certain ZIM Invoices Also Violated OSRA's new Guard Posts as to Invoicing Unreasonable Charges Under 46 U.S.C. § 41104(a)(14)

In support of SEA's **Fifth** and final Cause of Action under the Complaint, Section 41104(a)(14) provides that an ocean carrier "either alone or in conjunction with any other person, directly or indirectly, shall not assess any party for a charge that is inconsistent or does not comply with all applicable provisions and regulations, including subsection (c) of section 41102 or part 545 of title 46, Code of Federal Regulations (or successor regulations)." The evidence reflects that ZIM repeatedly assessed unreasonable charges against SEA, in violation of section 41102(c).

In deposition testimony, ZIM admitted 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.⁸⁵

⁸⁵ Cleva Dep. Tr.. at 68:17-69:1; 98:9-14].

Further, ZIM's policy and practices of assessing D&D charges for store door moves, is also in violation of Section 41104(a)(14) because ZIM was responsible for inland transportation charges, including D&D charges except in limited circumstances where SEA was directly responsible for the charges. Yet, the evidence reflects that ZIM assessed D&D charges against SEA regardless of actual liability.

V. SEA DAMAGES AND ULTIMATE RECOVERY OF ATTORNEY FEES

In D&D charges alone, SEA paid \$10.8 million during the relevant period on ZIM moves, a staggering amount for which it seeks reparations before the FMC. PFF at ¶ 348. The “goal of awarding damages is to make the injured party whole,” thus, the “proper measure of damages is not reduced to one simple formula, but must be evaluated on the individual facts of the case and calculated in order to make the injured party whole.” *Kobel v. Hapag-Lloyd A.G.*, FMC Docket No. 10-06, 2014 WL 5316331, at *14 (ALJ July 30, 2014) (Remand Initial Decision), *aff'd* 2015 WL 3465821 (FMC May 26, 2015) (“Kobel Remand ID”).

Regarding calculation methods for reparations claims before the Commission, “[t]he method chosen depends on the evidence available and which calculation more accurately measures the actual loss.” *MAVL Capital*, 2022 WL 2209421, at *3. As reflected in Smith Report Exhibit Nos. 1 (all D&D charges paid, with container numbers, bill of lading numbers, invoice amounts, etc. reflected) and 9 (a sub-set of Exhibit 1 data to laser focus on the finance hold charges), SEA through the use of SEA's system data has established the actual charges paid on ZIM moves. PFF at ¶¶ 348-350.

Here, SEA has methodically and thoroughly supported all five causes of action in the Complaint and established that it has suffered actual injury directly related to ZIM's violations of the Shipping Act. *See* Smith Report Exhibit Nos. 2 & 10; *see also OJ Commerce, LLC*, 2023 WL

3969857, at *46 (addressing “[t]he above has not changed – Hamburg still has not identified specific problems with the detailed information provided in the spreadsheet. Indeed, OJC has presented a wealth of rich actuals data (data about financials that have already occurred as opposed to what was forecast)” With liability established, the FMC should order reparations be awarded to SEA. SEA seeks, at a minimum, the principal amount of \$10.8 million in direct damages and over \$1.4 million in additional costs incurred as a result of ZIM’s violations. SEA further seeks and is entitled to its attorneys’ fees and costs in this proceeding in due course. 46 U.S. Code § 41305. PFF at ¶ 9, 351.

ZIM does not dispute the amount of SEA’s damages. ZIM’s rebuttal expert to SEA’s damages expert (Mr. Gregory Smith) is Mr. Ricardo Zayas. PFF at ¶¶ 320-341. (Zayas Report) have been calculated to be \$10.8 million dollars. Smith Report. 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. However, Mr. Zayas’ report reflects that he does not dispute the validity of the amount of charges incurred by SEA nor does he dispute the impact of the finance holds. In fact, as noted above, ZIM’s data provides that SEA incurred \$5.2 million in demurrage charges related to finance holds and \$11.5 million in total charges paid to ZIM.

Further, it is ZIM’s position that it is on SEA to show the impropriety of D&D charges on a container-by-container basis. PFF at ¶¶ 308, 324, 337 342. However, this position directly contravenes guidance established by the Commission that when reviewing the reasonableness of ocean carrier practices it looks to the practices as a whole, not on an individual basis. This is especially apparent in the Commission Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 64478, where the Commission held that a single discrete shipment does not constitute a violation of the Shipping Act. Rather, for a violation to be found, the ocean carrier must be engaged in a

practice or regulation on a normal, customary, and continuous basis and that such practice or regulation is unjust or unreasonable in order to violate that section of the Shipping Act. The main focus of the Commission *is not* on the charges at an individual level but on the behavior as a whole. This is acutely so when the unreasonable conduct at issue implicates large numbers of containers, such as Cargo Hold No. 4, which tied up no fewer than 600 containers.⁸⁶

Moreover, were the parties directed to review evidence on a container by container basis, not only would it add considerable attorney fees and costs for ZIM to pay (with SEA having established liability), but it will not provide the refuge ZIM perceives. PFF at ¶¶ 342-347. When ZIM's liability expert attempted to address the charges for a container impacted by claimed warehouse issues on the part of SEA, further investigation into emails following that particular container revealed that the issues stemmed from when ZIM failed to meet trucker shortages on store door moves. *See* PFF at ¶¶ 311. The micro container-by-container review of information is a false safe harbor for ZIM which should be rejected.

VI. CONCLUSION

As a result of ZIM's unreasonable practices and procedures, SEA should be awarded \$10.8 million in direct damages and over \$1.4 million in additional costs and lost profits, and such other and further relief as is deemed just and proper. Doing so will remind ZIM it should correct the manner in which it treats shippers. And it will send a message to other ocean carriers to correct similar policies and practices it employed during the pandemic.

Dated: August 23, 2023

Respectfully Submitted,

⁸⁶ Rosenberg Dep. Tr., Pg. 47:11-48:3.

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CERTIFICATE OF SERVICE

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

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