

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 REPLY BRIEF TO
ZIM INTEGRATED SHIPPING SERVICES LTD.'S OPPOSITION BRIEF**

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I. INTRODUCTION

Samsung Electronics America, Inc. (“SEA” or “Complainant”), respectfully submits this reply brief in further support that the evidence, when applied to the Shipping Act of 1984, 46 U.S.C. § 40101 *et seq.* (2019) (the “Shipping Act”), the Federal Maritime Commission’s (“FMC” or “Commission”) regulations, and case law clearly establish that ZIM Integrated Shipping Services, Ltd.’s¹ (“ZIM” or “Respondent”) practices and regulations in handling SEA cargo violated the Shipping Act. In support, SEA submits this reply brief, accompanied by its separate response to ZIM’s proposed findings of fact, and supplemental appendix.

In ZIM’s Opposition brief (“Opp.”), it defines “Samsung” as SEA but then use the name throughout liberally even when referring to other “Samsung” entities. ZIM is well aware that the Complainant is Samsung Electronics America, Inc. and there are other foreign and domestic Samsung entities it references.² Indeed, a search of the name “Samsung” in the business entity databases for the State of Delaware³ and the State of New Jersey⁴ alone generates forty five and fifty four entities respectively. When ZIM is demanding payment for nearly 10,000 charges resulting in millions of dollars in D&D charge revenue, and now attempting to defend its actions

¹ We are all mindful that when drafting and editing this brief, people that work every day at the global headquarters of ZIM are now living under a declaration of war. While SEA and ZIM disagree about container moves that occurred during the last few years, it is a dispute over reparations and not life and death circumstances. SEA’s thoughts are with ZIM’s personnel, families and others impacted at ZIM headquarters and at ZIM’s operations around the world.

² See RX-1836, RX-1807-1808, RX-1836 , RX-1871-1872, RX-1900-1901, RX-1940-1941, identifying a number of Samsung entities: Samsung Electronics; Samsung Display; Samsung Electro-Mechanics; Samsung Electronics Logitech co., Ltd.; SDS Global SCL(M) SDN BHD; Samsung SDS America, INC; Samsung Electronics Home Appliance America (SEHA)); Samsung SDS Global SCL Asia Pacific Pte Ltd; Samsung SDS Global SCL Asia Pacific; Samsung SDS Global Scl America Inc.; Samsung Sds Global Scl Beijing Co Ltd Suzhou Branch); and Samsung Electronics Co., Ltd.

³ <https://icis.corp.delaware.gov/ecorp/entitysearch/namesearch.aspx>

⁴ <https://www.njportal.com/DOR/BusinessNameSearch/Search/BusinessName>

on receipt of those payments in this reparations action, it cannot work in generalities. For the purposes of clarity, SEA denies each instance wherein ZIM uses Samsung without specific definition in a manner material to the PFF or SEA’s responses thereto. ZIM’s choice not to distinguish and acknowledge that there are other separate Samsung entities in its PFF is a microcosm of the invoicing issues previously highlighted by SEA in its initial brief and proposed findings of fact (“SEA PFF”).⁵ However, each of SEA’s responses to a PFF with a “Samsung” reference incorporates this objection and denial for the record.

II. SUMMARY OF ARGUMENT

SEA’s complaint alleges that ZIM violated the Shipping Act in connection with its policies and practices relating to demurrage and detention and related charges on containers moving in inland transportation under store door terms, where Zim was the combined ocean and inland common carrier responsible for arranging and paying for the inland transportation. SEA became increasingly involved with inland truckers and charges during the pandemic because ZIM was increasingly failing to adequately perform the inland movements and was forcing SEA make payments and make other arrangements in order for SEA to keep its cargo moving, and in many cases, in order for SEA to get its cargo at all. ZIM offers up a litany of excuses for its conduct—many of them *post hoc* arguments generated in this litigation, a handful of anecdotal “what-if” alternatives, and ill-convinced and poorly supported contractual arguments—but what ZIM does not do is fundamentally explain how the totality of its misconduct during the pandemic was reasonable under the Shipping Act.

⁵ SEA Initial Br. at 49-52; SEA PFF at ¶¶ 83-93.

ZIM relies so heavily in its opposition on purported contractual lien rights and yet it does not explain how those rights are impacted during store door moves. There is no analysis of what store door obligations mean with contractual lien rights. Only for the first time on page 19 of the Opp. does ZIM even acknowledge SEA's carriage was on store door moves and then, ZIM simply concludes, "ZIM did not abdicate its common carrier responsibilities for store door delivery, or shift the responsibility for inland transportation to Samsung." (Opp. at 19). But when considering all of ZIM's arguments, placing the blame on SEA time and time again for D&D charges, it is impossible to conclude anything other than that: ZIM abdicating its responsibilities on store door moves and embracing a pattern and practice of charging demurrage and detention not as a means to incentivize the movement of cargo, but as a means to provide less and charge more.

It is more than just an abdication by ZIM. It is about ZIM issuing D&D charges, millions and millions of dollars in charges on store door moves, when there was no incentivizing purpose and indeed no legitimate need for ZIM to even have assessed its demurrage and detention charges. The charges are too massive, and they are too numerous. SEA respectfully submits that its record evidence indisputably establishes ZIM's actions and inactions caused and contributed to these D&D charges and do not justify the millions of dollars in charges that SEA was forced to bear.

We now learn in this litigation that ZIM's position in regard to its store door obligations is that with a store door move, when a carrier nominated trucker ("CNT") was involved, ZIM considered that it did not have to complete all of the work necessary to get a box from the port to its inland destination.⁶ This was not made clear in the record, in real time over the past few years

⁶ SEA submits that ZIM was responsible for acts and omissions of all truckers – CNTs or Not – used with SEA containers shipped under store door terms. SEA addresses ZIM's position in regard to its store door obligations more fully in pp. at 33-50 herein.

in dispute, by ZIM employees in emails, communications or actions or SEA could have disabused ZIM of its incorrect premise. But that is the *post hoc* litigation position ZIM has taken now. SEA submits this position falls far short of what the FMC expects of an ocean carrier. What is the point of a combined thought bill of lading if the obligations and costs to complete an inland move is foisted on the consignee when it becomes too difficult to complete services or the simple use of a CNT is involved?⁷ The unilateral conversion of a move from door terms to CY terms is essentially what occurred and would be permitted if ZIM's arguments were adopted, and would have far-reaching implications that the FMC should be concerned about.

While ZIM's aggressive and unfounded positions on the scope of its contractual lien rights and the manner in which it conducts business when a CNT is involved is a main thrust of its arguments in the opposition brief, SEA's reply addresses all of its principal arguments which can be summarized in seven bullet points:

- ZIM was not given a sufficient chance by SEA to settle the D&D charges dispute before seeking relief at the FMC -- *though ZIM has never taken this case seriously for settlement purposes*;
- ZIM claims it was dragged yet again before the FMC to pay reparations for its Finance Hold conduct after being admonished by the D.C. Circuit and the FMC in *Adebisi A. Adenariwo v. BDP International, ZIM Integrated Shipping, Ltd. et al.* – *though it has no good reason why Adenariwo is distinguishable from this matter*;
- ZIM is indignant its unfettered contractual lien rights are being challenged – *though ZIM's claim for charges payments, "on demand", under the lien clause are unreasonable practices*;
- ZIM is concerned that it was "forced" to use CNTs because of an RFP – *though acknowledging the RFP was not with SEA and failing to analyze the actual CNT language in service contracts it clings to*;

⁷ SEA Initial Br. at at 29 (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."); SEA PFF at ¶¶ 14-17.

- ZIM find its tariff language statements and portal website protects its dispute resolution actions with consignees – *though ZIM relies on current tariff language not in effect from 2019-22, and a portal is not a magical salve for meaningful resolution of charge disputes;*
- ZIM is disappointed it is made to address the proximate cause of harm and unreasonable conduct on a macro scale instead of container-by-container as preferred – *though it had the opportunity to undertake such a defense with its expert and chose not to either;* and
- ZIM is indignant that it is facing a potential judgment for \$10.8 million in direct damages and over \$1.4 million in additional costs and lost profits – *though its reply did not challenge the \$1.4 million in other damages and for direct claims simply demands an invoice-by-invoice analysis is required while not having any FMC precedent to support its theory.*

ZIM’s opposition brief is encapsulated in these seven points, and SEA respectfully replies to each one in its brief. We emphasize “respectfully” because it is regrettable ZIM is agitated it has been put through the scrutiny of an FMC lawsuit such that it resorts to *ad hominem* and truly unfortunate statements about urging “extreme caution” (Opp. at 2) when analyzing the evidence SEA presented in its initial brief and supporting proposed findings of fact. SEA invites the Presiding Officer’s careful scrutiny of the record SEA painstakingly developed in document collection and deposition work on very tight timelines after settlement talks did not result in settlement. When the record contains the entirety of email chains and deposition transcripts, the Presiding Officer will be able to consider the context of all of the arguments made as summarized in the legal brief. To rebut ZIM’s claims, the reply brief addresses ZIM’s complaints as to the evidence proffered in detail and each of the proposed findings of fact with references to the record.

On the issue of resolution of this dispute, because ZIM has highlighted in the record pre-suit settlement letters, SEA will address them. ZIM curiously spends a good deal of advocacy space in its summary of argument addressing correspondences back in September and October 2022 between the parties. It is unclear why, as there is no allegation the disputes were resolved. In

reality, SEA filed suit, as is its right, to stop the three-year look back when no tolling agreement is in place and the first action by ZIM was to seek to extend deadlines on the matter in order to settle the case. The Presiding Officer will recall that on November 18, 2022, ZIM filed an unopposed motion for an extension of time to file an answer and in that pleading it stated, “[s]enior representatives of the parties met in person on Wednesday, November 16 to discuss the possibility of an amicable resolution of the matters which are the subject of the complaint in this proceeding. Both parties are of the view, based on that meeting, that there is a realistic possibility of reaching agreement on a resolution of this matter by year’s end.” (emphasis added).

In ZIM’s opposition brief, ZIM chose to highlight the pre-suit settlement letters between the parties (Opp. at 2, citing RX 0016-0022), and in that letter it was noted that SEA was seeking at the time over \$5 million in D&D charges (as the 2022 data had not been fully assessed, that amount would grow to \$10.8 million in paid D&D charges through December 31, 2022). The settlement record begs the question – if SEA’s D&D charges claims have “no basis” whatsoever, and were the result of SEA’s “chronic delinquency” (Opp. at 3), why would ZIM even entertain settlement with SEA? Let alone have “senior representatives” meet “in person” to address resolution of an “at least” \$5 million claim?

The reason should be obvious. ZIM’s Finance Hold tactics--whether called “credit suspensions” or “cargo holds”—as ZIM prefers (Opp. at 3 fn. 1), would be laid bare during discovery. ZIM is a repeat Finance Hold offender at the FMC, as SEA addressed in highlighting *Adebisi A. Adenariwo v. BDP International, ZIM Integrated Shipping, Ltd. and its agent (Lansal) et al.*, Informal Docket Nos. 1920(1) and 1921(1). SEA Initial Br. at 7-9. The misuse of a contractual lien right, as found by the D.C. Circuit Court of Appeals and the Commission on

remand, has real implications in a private party action and could with the FMC Office of Enforcement. *Adenariwo v. Fed. Maritime Comm'n*, 808 F.3d 74 (D.C. Cir. 2015).

For a publicly-traded company, reporting hundreds of millions of dollars in demurrage charges during 2021 and 2022 to the Securities and Exchange Commission and its investors, SEA's case poses a serious threat to its business practices. Recently, when asked on a podcast about D&D charges becoming revenue centers for ocean lines, and the size of fines to ocean carriers for D&D practices, Daniel Maffei, chairman of the Federal Maritime Commission, provided a number of observations. In regard to whether the ocean carriers used D&D charges as revenue centers during the pandemic, he stated, "[t]here were certainly complaints **and I think there were sufficient evidence that there was abuse let me just sort of say that.** I don't think it's my job to judge motive or any of that kind of stuff. **Companies are under pressure to make money for their shareholders.** And it's up to us to make sure that everybody you know follows the rules so that nobody can get away with something."⁸ (emphasis added). ZIM succumbed to that pressure.

SEA did not take filing its petition against ZIM lightly and has been judicious with the ocean carriers it seeks relief against before the FMC (so far, SM Line is the only other carrier). It takes a good deal of time, energy, and resources to prosecute the claims and seek reparations for millions of dollars it was wrongfully forced to pay to have its containers released so its consumer products could reach American public during the pandemic. SEA reasonably looks to resolve matters. Ultimately, ZIM did not settle this case when it had the chance to do so, and the parties

⁸ See Mike King, Host, September 27, 2023, Audio podcast episode, The Loadstar (Making Sense of the Supply Chain), *FMC Chairman exclusive, container shipping forecast – and what next at Flexport?*, Part 2 at minutes 30-34, <https://theloadstar.com/news-podcast-sept-2023-fmc-chairman-exclusive-container-shipping-forecast-and-what-next-at-flexport/>.

are just completing briefing of the full record now so the time for resolution, before ZIM's practices could be scrutinized, has passed.

The Commission has provided guidance 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 Interpretive Rule on Unreasonable Practices Under the Shipping Act, codified at 46 C.F.R. § 545.4, 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. SEA submits that its initial brief and this brief establish substantial evidence of wrongful actions on a "normal, customary, and continuous basis" in violation of the Shipping Act. And when ZIM's *own* records, certified during its *own* witness sworn deposition testimony, show SEA incurred over \$5.2 million in demurrage charges related to Finance Holds and \$11.5 million in total charges paid to ZIM, SEA's damages demand is more than sufficiently supported.

In sum, when realizing ZIM was not able to do its job on store door moves, SEA brought more human resources to the issue by trying to assist with trucker issues. SEA worked with ZIM to get boxes moving in and out of the inland destinations as one would expect with business partners. It is the profiteering off these store door moves that is unseemly. Indeed, the pandemic-induced travails that faced importers like SEA in the 2022-2023 timeframe correspond precisely with demurrage and detention becoming material, reportable sources of revenue for ZIM. The FMC has not seen D&D charges demanded, and paid, to an extent such as this in its history. The amounts are staggering, and were painful for SEA to incur during the pandemic. Left with no choice but to pay charges during weaponized Finance Hold periods, it did, mindful of the FMC's

regulatory charge and three-year look back for reparations would allow it to seek justice and recompense someday. That day is now and SEA respectfully requests its motion be granted.

III. RESPONSE TO ZIM'S PROPOSED STATEMENT OF FACTS

SEA's Responses to ZIM's Proposed Statement of Facts is attached separately.

IV. ARGUMENT

As this is a reply brief, it is important for the Presiding Officer to first take note of what ZIM has conceded by failing to challenge SEA's positions in its opposition brief. ZIM does not challenge:

- (i) SEA's burden of proof analysis (SEA Initial Br. at. 16-18);
- (ii) That it is subject to FMC jurisdiction (SEA Initial Br. at. 18-19);
- (iii) In SEA's section on ZIM's unreasonable practices in violation of Section 41102(c) of the Shipping Act, ZIM does not challenge three of the factors presented: (a) that ZIM is an ocean common carrier under the Shipping Act (SEA Initial Br. at. 20-21); (b) that ZIM's acts or omissions occurred on a normal, customary, and continuous basis (SEA Initial Br. at. 21-22); and (c) that ZIM's practice relates to or is connected with receiving, handling, storing or delivering property. (SEA Initial Br. at. 22-23).
- (iv) SEA's \$1.4 million in other damages and lost profits outside D&D charges, with no reference to it in its opposition brief whatsoever, as it focuses on its claimed unfairness in SEA seeking full recovery for all of the D&D charges it paid to ZIM under the cloud of Finance Holds. (SEA Initial Br. at 60, 62) (Opp. at 35-37).

The Presiding Officer should find these sections unchallenged and in SEA's favor. And, pursuant to 46 C.F.R. § 545.4, only the fourth and fifth elements of SEA's Section 41102(c) cause

of action remains contested. ZIM's opposition brief, in Sections A-F, focuses on challenging SEA's fourth and fifth elements of Section 41102(c) (that ZIM's practices and regulations are unjust and unreasonable and that these practices and regulations are the proximate cause of SEA's claimed loss), along with challenging SEA's damages, and the second through fifth causes of action in the complaint. Below, SEA replies in order of ZIM's arguments and shows that Zim has improperly and unreasonably attempted to shift its carrier responsibilities onto consignees like SEA to justify its actions under the Shipping Act.

A. ZIM's Exercise of its Lien Rights Was Unreasonable Under Section 41102(c)

Faced with the indisputable evidence establishing ZIM's multiple violations of the Shipping Act, as presented in SEA's Initial Brief and PFF, ZIM argues that its indiscriminate use of Finance Holds is not unreasonable because: (i) its contractual lien rights are lawful; and (ii) ZIM is legally permitted to expand the scope of the lien to cover SEA cargo that may not even have any D&D charges in dispute. ZIM further contends that the lien rights under the service contracts between ZIM and two foreign entities (SDS and Logitech)⁹ afforded ZIM unfettered power to retain any and all cargo in its possession for amounts allegedly owed, even if those charges were disputed and/or were not SEA's responsibility,¹⁰ and an unfettered right to generate millions in new charges as a direct result of holding cargo.

⁹ No third-party discovery was conducted concerning these two foreign entities and neither entity had any involvement in paying the dispute D&D charges. SEA solely paid D&D charges on ZIM moves. The foreign entities have no bearing on this proceeding, and SEA has continued to oppose ZIM's reliance on the purported service contracts. *Infra* at pp. 33-42.

¹⁰ CX_07216. (invoices that form part of the basis for Finance Hold No. 1 were charges for unrelated entities); CX_07275-CX_07276 (informing ZIM that invoices listed in Finance Hold No. 2 were for an unrelated entity); CX_07395 (placing SEA on Finance Hold No. 4, which included charges for unrelated entities).

The issue here is not whether ZIM or any carrier has rights to lien cargo in the abstract. They do. The issue here is whether ZIM exercised those rights in accordance with its own policy and in compliance with law. ZIM did not. Just as police officers have the power of arrest, the proper exercise of that power is not unfettered, but rather it is limited by policy and by applicable law. Just as the power to arrest is more correctly the power to arrest *lawfully*, the right to exercise a cargo lien is the right to exercise a cargo lien *lawfully*. To exercise lien rights, ZIM must *at a minimum* have a valid lien to exercise. Failing that, ZIM has no right to lien cargo at all. Assuming it has a valid lien, then ZIM's exercise of that lien must be in compliance with its own policies and practices, and in compliance with applicable law. ZIM's defense conflates these points, and in essence, ZIM argues that the existence of a lien right means that it has unlimited power to lien cargo. But that is simply not the case. A right to lien cargo, first must have a proper factual basis to exercise it, and second must still be *exercised lawfully*. ZIM did neither.

ZIM's primary defense of its alleged reasonableness hinges on the scope of its purported "contractual lien rights." (Opp. at 4). That is, ZIM argues strenuously about the first step: whether it had the right to lien SEA's cargo in the first place. The reason ZIM encounters problems with the first step is because ZIM exercised purported liens exceptionally broadly—*e.g.*, on invoices for charges of other entities and on disputed invoices—so far beyond traditional common law lien rights that ZIM scrambles to look for contractual expansions of lien rights to justify the underlying basis for the cargo liens.

ZIM generally refers to general service contracts with primarily foreign Samsung manufacturing entities. But ZIM never authenticated any purported service contract in discovery with said "Samsung" entities, let alone any specific service contract provisions, upon which its counsel now seeks to rely on. In citing this purported agreements, ZIM does not identify the: (1)

applicable service contracts or the applicable service contract numbers; (2) whether the service contracts were applicable to the shipments at issue; or (3) the parties to the service contracts.¹¹

This is an improper foundation for a Shipping Act defense and should be afforded no weight.

As stated in the Initial Brief, when assessing the reasonableness of an ocean carrier's practices, the analysis does not turn only on whether there is a right to do a thing or engage in the practice, but also whether the practice is "tailored to meet its intended purpose" and whether it is "fit and appropriate to the end in view." 46 C.F.R. Part 545; *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); see also *Hapag-Lloyd, A.G. and Hapag-Lloyd (Am.) LLC, Possible Violations of 46 U.S.C. § 41102I*, (Docket No. 21-09) (2021 WL 5326281). Further, "[e]ven if a practice has a valid purpose, if it goes beyond what is necessary to achieve that purpose, it may still be unreasonable." *Hapag* at *1 (internal citations omitted).

1. The Lawfulness of a Carrier's Lien is not at Issue, ZIM's Failure to Establish Reasonable Practices and Procedures in Exercising its Lien, i.e., Finance Holds, is at Issue

As ZIM's defense of its actions begins with an incomplete view of common law lien rights in an attempt to defend the sweeping scope of how it viewed those rights. (Opp. at 5). A fuller

¹¹ See **Service Contract No. 7100171730**, Appendix "C" (RX-1871-1872) (listing the following affiliates as parties to the service contract: Samsung Electronics; Samsung Display; Samsung Electro-Mechanics; Samsung Electronics Logitech co., Ltd.; SDS Global SCL(M) SDN BHD; Samsung SDS America, INC; Samsung Electronics Home Appliance America (SEHA)); **Service Contract No. 7100204807**, Appendix "C" (RX-1807-1808) (listing Samsung SDS Global SCL Asia Pacific Pte Ltd; Samsung SDS Global SCL America; Samsung SDS Global SCL (M) Sdn Bhd; Samsung SDS Global SCL Asia Pacific; Samsung SDS Global Scl America Inc.; Samsung Sds Global Scl Beijing Co Ltd Suzhou Branch); **Service Contract No. Z18436KR**, Appendix "C" (RX-1836) (listing Samsung SDS Global SCL Asia Pacific Pte Ltd; Samsung Sds Global Scl America; Samsung Sds Global Scl (M) Sdn Bhd); **Service Contract No. Z19179KR**, Appendix "C" (RX-1900-1901) (listing Samsung Electronics; Samsung Display; Samsung Electro-Mechanics; Samsung Electronics Co., Ltd.; SDS Global SCL(M) SDN BHD; Samsung SDS America, INC; Samsung Electronics Home Appliance America (SEHA)); **Service Contract No. 7100102863**, Appendix "C" (RX-1939-1941) (same as Service Contract No. Z19179KR).

consideration is necessary. A maritime lien is “a privileged claim upon maritime property . . . arising out of services rendered to or injuries caused by that property.” 1 Thomas J. Schoenbaum, ADMIRALTY AND MARITIME LAW § 9-1 (3d ed. 2001). It “attaches simultaneously with the cause of action,” and it is a right against the property in rem. *Id.* While the Commission has recognized a carrier’s right to assert a maritime lien for *unpaid freight*, it has also recognized that the implementation of that lien must be reasonable and should not be used to induce payment for charges unrelated to the shipment at issue. *Petra Pet, Inc. v. Panda Logistics Ltd.*, Docket No. 11-14, 2013 WL 9808694 (FMC Oct. 31, 2013); *see also Bernard & Weldcraft Welding Equip. v. Supertrans Int’l, Inc.*, FMC Docket No. 02-12, 2003 WL 136313 (ALJ Jan. 8, 2003).

ZIM’s view is incomplete because it does not take into account the Shipping Act. As many contractual provisions are unenforceable due to statutory or common law restrictions, the FMC has also recognized that the validity of a lien does not determine whether a carrier has violated the Shipping Act. Rather, the question of whether a carrier has violated the Shipping Act turns on whether it has established reasonable practices *in the implementation* of its lien rights. *Mavl Capital Inc., Iam & Al Group Inc., & Maxim Ostrovskiy v. Marine Trans. Logistics, Inc., et al.*, FMC Docket No. 16-16, 2021 WL 4554718, at *23 (ALJ Sept. 29, 2021). For example, in *Mavl Capital*, the Presiding Officer held that the ocean carrier’s utilization of its lien rights was unreasonable under the Shipping Act. *Id.* at *28. In that case, respondent asserted a lien and liquidated a set of vehicles based upon the terms of its house bill of lading which documented its normal business practice that “the Carrier shall have the right in its absolute discretion to dispose of the Goods and/or to sell the Goods by public auction or private sale without notice to the Merchant.” *Id.* at *1. The FMC found that “complainants established all elements of a Section 41102(c) claim, including that the conduct was unreasonable and that the unreasonable conduct

was a normal business practice.” *Id.* at *28. This authority confirms that the conduct of a party when implementing a lien right matters.

FMC precedent further establishes that holding cargo to induce payment can be in violation of the Shipping Act. *See Bernard & Weldcraft Welding Equip. v. Supertrans Int’l Inc.*, FMC Docket No. 02-12, 2003 WL 136313 at *1, *8 (ALJ Jan. 8, 2003) (“Unfortunately, this is not the first time that an NVOCC has held cargo hostage to its demands for more money which the innocent cargo owner had no legal obligation to pay and whenever such an NVOCC has acted in this manner, it has been held to have violated section 10(d)(1) of the 1984 Act as well as other sections of that law.”). SEA previously addressed the warning by the Commission and the D.C. Circuit to ZIM that its finance hold practices were unreasonable. SEA Initial Br.at 7-9.

Here, the record reflects that ZIM utilized Finance Holds to induce payment by refusing to release both containers with pending charges *and* containers without pending charges.¹² Between 2020 and 2022, ZIM refused to release SEA containers from terminals at U.S. ports due to allegedly past due amounts on otherwise **unrelated SEA shipments that had not yet incurred any demurrage charges**.¹³ For example, during Finance Hold No. 4, ZIM refused to release 40 containers¹⁴. In an email communication dated February 17, 2022, the motor carrier was attempting to arrange inland transportation, and although inland transportation could have commenced on or about February 17, 2022, and despite having no delinquent charges on the containers, the containers were categorized as “not available” because of the Finance Hold.¹⁵ As

¹² SEA PFF at ¶ 145.

¹³ *Id.*

¹⁴ SEA PFF at ¶¶ 147-151.

¹⁵ SEA PFF at ¶¶ 146-148.

a result, the containers were not released until March of 2022 and by then had incurred thousands of dollars in demurrage charges.¹⁶

Thus, the relevant question is not limited to whether ZIM had a legitimate lien right but also extends to whether the exercise of the lien right was unreasonable. Blanket reliance on general lien rights is not an excuse for ZIM's conduct when considering Shipping Act violations.

2. ZIM's Invocation of its Lien Rights Does Not Excuse its Conduct

ZIM relies on common law authority in the Supreme Court's venerable *Bird of Paradise* decision for the unremarkable proposition that an ocean carrier has a lien on cargo for the freight and may retain the goods for unpaid freight amounts. 72 U.S. 545 (1866). ZIM further relies on *In re World Imports Ltd.*, 820 F.3d 576 (3rd Cir. 2016), which provides that a carrier may assert a lien on goods in its possession for amounts owed on cargo no longer in its possession or previously released shipments. (Opp. at 5-8).

But *Bird of Paradise* and *World Imports* are distinguishable and do not excuse ZIM's conduct here. First, as a threshold matter, neither decision references the Shipping Act or the limitations it imposes on ocean carrier conduct. These non-Shipping Act cases concern maritime liens for unpaid ocean freight charges for discrete shipments and where the shippers in both cases had gone bankrupt. In light of the bankruptcy, the priority status of the maritime lien on the cargoes being held in both these cases was the only viable manner for the ship-owning interests to get paid after carrying the cargo to the intended destination. There was little question the unpaid freight was due and owing and that the ship owning interest performed their carriage functions, although neither case addresses whether the carrier's policies and procedures with respect to holding cargo

¹⁶ SEA PFF at ¶¶ 149-151.

for disputed charges was reasonable under the Shipping Act. Nor was there any question or evidence developed challenging the real credit risk posed by the bankruptcy proceedings.

Here, by contrast, there is no evidence in the record that SEA was a real credit risk such that extreme lien measures taken were a necessary or appropriate remedy for the intended purpose. Indeed, this is contradicted by ZIM's own behavior. If ZIM had any doubt of SEA's creditworthiness, it surely would have ceased accepting bookings. It did not. It is undisputed that ZIM continued accepting large numbers of bookings for SEA cargo during the hold periods. *See, e.g.*, (multiple bills of lading issued on August 16, 2020 during Finance Hold No. 1): CX_08889-90, CX_08891-92, CX_08893-94, CX_08895-96, CX_08897-98, CX_08899-00, CX_08901-02, CX_08903-04, CX_08905-06, CX_08907-08, CX_08909-10, CX_08911-12, , CX_08913-14, and CX_08915-16; (bills of lading issued on May 29, 2021 and June 14, 2021 during Finance Hold No. 2): CX_08879-80, CX_08881-82, CX_08883-84, and CX_08885-86, CX_08887-88; (bills of lading issued in September 2021 during Finance Hold No. 3): CX_08917-18, CX_08919-20, CX_08921-22, CX_08923-24, and CX_08925-26; and (bills of lading issued in February and March 2022 during Finance Hold No. 4): CX_08868-69, CX_08870-71, CX_08872-73, CX_08874-75, CX_008876-77, CX_08878, and ZIM0000085.

In addition, in the entirety of ZIM's production of 85,709 pages documents, ZIM did not disclose a single document reflecting any concerns about SEA's creditworthiness.¹⁷ For example,

¹⁷ ZIM's reference to "contemporaneous documents" at footnote 9 of the Opp., without discussion of those documents. The citations provide no refuge. (Opp. at 14). **RX-0152** is a list of customers, including SEA, which identifies amounts allegedly owed, amounts disputed, and current status. SEA is identified as disputing \$44,648. In the status column for SEA, ZIM states that it is "WATCHING – WAITING FOR RESPONSE." Unlike other customers identified **SEA is not listed** as "HIGH RISK," "BAD PAYMENT HISTORY," "RECOMMEND IMMEDIATE CREDIT SUSPENSION", or "NONRESPONSIVE." There is no indication within the document cited of any credit concerns; only that SEA and ZIM were in communications to resolve the amounts allegedly owed to ZIM.

there are no documents in ZIM’s document production from the 2020-2022 timeframe analyzing SEA’s creditworthiness, led alone third-party reports such as credit reports or bond ratings. ZIM’s alleged concerns about SEA’s creditworthiness are a pretextual *post hoc* justification manufactured solely for purposes of this litigation, and merit no weight in the analysis of the reasonableness of ZIM’s practices. The evidence shows that ZIM used Finance Holds as a means to pressure payment of disputed invoices. That was the reason that existed then, and that is the only reason that is relevant now. *See Int’l Longshoreman’s Assoc. v. Gateway Terminals, LLC; Charleston Stevedoring Co., LLC; Ports Am. Florida, Inc.; Ceres Marine Terminals, Inc.; & Ssa Atl., LLC*, FMC Docket No. 22-12, 2023 WL 6445036, at *34 (ALJ Sept. 29, 2023) (rejecting that complainant’s “number of other assertions” in support of its claims as they were not supported by the facts or relevant to the outcome).

ZIM’s use of Finance Holds is also independently unreasonable because, here, ZIM’s policy and enforcement did not follow ZIM’s stated position that cargo would not be held if there was a dispute on the underlying charge. CX_03182, Yaacoub (ZIM) Dep. Tr. 125:9-14 (Mr. Yaacoub testifying “If the invoice is disputed, we don’t do any credit suspension or cargo hold.”); CX_03896-CX_03897, Michalski (ZIM) Dep. Tr. 100:14-101:5 (“Q: [F]or a dispute, can you get

RX-0155-RX-0158 is an email from November 5, 2021, with a spreadsheet attachment addressing various strategic accounts. In the email, ZIM US is requesting input from ZIM headquarters regarding credit related to various strategic accounts, and attaches a spreadsheet with ZIM US’s assessment of the credit risk for each strategic account. Row 27 of the spreadsheet is titled “D&B risk assessment: D&B rating - risk indicator/ overall credit condition, Risk category, EMMA Score, Financial stress class, Credit score class, Paydex scores, D&B credit recommendation” which address each strategic account’s credit risk. As reflected in Column 23 of the spreadsheet RX-0158, ZIM confirms that credit concerns were not a real factor for SEA:

Overall assessment of this organization ove[r] [the] next 12 months: **stable condition due to large [business] size**; exhibiting some financial stress; **moderate [potential] for severely [delinquent] payments**; D&B viability rating 6; paydex 72, dbt 12

placed on a freight hold if you're disputing cargo or invoicing; is that correct? A: No.”). The charges were clearly disputed in email after email where SEA personnel would ask and then beg for further supports to understand the charges being imposed or simply confirm the charges were being sent to the right SEA personnel. *See, e.g.*, CX_07208-CX_07217 (Ms. Fernando of SEA disputing multiple invoices from ZIM for which ZIM imposed Finance Hold No. 1); CX_07248 (SEA repeatedly requesting ZIM to provide copies of invoices for approval during Finance Hold No. 2); CX_07274-CX_07283 (SEA emailing ZIM multiple times during Finance Hold No. 2 to request copies of invoices to enable SEA to review and remit payment); CX_07322-CX_07325 (Peter Kim of SEA notifying ZIM U.S.’s Finance team during Finance Hold No. 3 that statement of account provided by ZIM lacked adequate information on containers, type of charge and calculation periods for D&D). The actual purpose, and the undisputed effect, was to coerce collection of disputed charges, and charging new demurrage on cargo for the sole reason that ZIM refused to move or release it, not because of a legitimate credit concern or a legitimate intent to incentivize the movement of cargo. CX_03181-CX_03183, CX_03204, Yaacoub (ZIM) Dep. Tr. 125:15-126:5, 147:11-21. This goes against the Incentive Principle.¹⁸

ZIM makes sweeping claims that if the “Commission were to find that exercise of a contractual lien broader than the common law possessory lien is unreasonable under the Shipping Act, this would have [an] adverse impact on freight fluidity....” (Opp. at 9). But SEA is not seeking to invalidate a carrier’s right to utilize a lien when ocean freight is validly owed. Rather,

¹⁸ The Interpretive Rule made clear to shippers and carriers that 46 U.S.C. § 41102(c) applies to demurrage and detention practices and lays out a series of general and particular factors for evaluating the reasonableness of D&D practices and charges. The rule explains that the Commission must consider the Incentive Principle, *i.e.* “the extent to which demurrage and detention are serving their intended primary purposes as financial incentives to promote freight fluidity,” and may consider a series of non-exhaustive “other factors” including accessibility of detention and demurrage policies and the clarity of terminology. 46 C.F.R. § 545.5.

SEA contends that ZIM's utilization of Finance Holds under the Shipping Act was unreasonable because: (1) the alleged amounts owed that formed the basis of the Finance Holds were for disputed charges¹⁹; (2) ZIM's assessment of D&D when SEA's shipments were not available for pickup was unreasonable and resulted in an additional \$5.2 million in D&D charges according to ZIM's own chart²⁰; (3) ZIM held cargo for any Samsung entity whether SEA or not until it was called out for the practice and had to capitulate and release non-SEA cargo²¹; and (4) ZIM failed to implement reasonable practices and procedures in using finance holds.²² ZIM's contention that the service contract afforded expanded lien rights does not mean that ZIM had carte blanche to not establish reasonable practices in the utilization of a lien.

3. ZIM's Invocation of its Lien Rights Does Not Excuse its Conduct

Equally unavailing is ZIM's statement that service contracts between ZIM and non-party Samsung entities conferred "expanded lien" rights. In connection with this argument, ZIM states its service contracts contain the following provision:

8 – FREIGHT, CHARGES AND INVOICING

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

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

¹⁹ SEA Initial Br. at 32,38-42.

²⁰SEA Initial Br.at 32, 33-35, SEA PFF at ¶ 159.

²¹ SEA Initial Br. at 53; CX_05779-CX 05780, Rosenberg (ZIM) Dep. Ex. 30; SEA PFF at ¶¶ 211-224.

²² SEA Initial Br. at 32-42.

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

See RX-1792; RX-1819-20; RX-1855; RX-1883 and RX-1922-23. (Opp. at 6).

ZIM followed this citation with the conclusion that “[t]hus, the liens were otherwise lawful.” *Id.* Why? What specific clause or language is ZIM citing in support of such sweeping actions undertaken causing millions of dollars in new D&D charges? Simply citing a general service contract clause is not enough.

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

The second paragraph of the quoted provision focuses on using a contractual lien right to sell goods at auction and extracting the amounts owed. ZIM did not sell SEA’s cargo, so this paragraph cannot be the basis of its claimed rights either.

Finally, ZIM well knows that its conduct is regulated by the FMC, interpreting and enforcing the Shipping Act, to ensure any rights and obligations in tariffs and service contracts are reasonably stated *and* reasonably effectuated. The FMC has already promulgated guidance to that

effect: “Ocean carriers and marine terminal operators (and ocean transportation intermediaries) do not have an unbounded right to contract for whatever they want. They are limited by the prohibitions of the Shipping Act, one of which is section 41102(c).” Interpretive Rule on Demurrage and Detention Under the Shipping Act, 85 Fed. Reg. 29638, 29648 (May 18, 2020) (codified as 46 C.F.R. Part 545). ZIM cannot claim by fiat “Thus, the liens are otherwise lawful” by citing some service contract language and concluding that ZIM is justified in any manner of enforcement that flows therefore. It must actually justify its conduct for store door terms and it most certainly has not here.

4. *Adenariwo* is Instructive and Applicable Here

Again focusing on the existence of an underlying lien right, rather than the reasonableness of the practices and procedures for utilizing Finance Holds, ZIM argues that *Adenariwo v. BDP Int’l, et al.*, 33 S.R.R. 223 (FMC 2014), is not applicable because it did not involve “expanded” lien rights under a contract. (Opp. at 6-7). This attempted distinction is unavailing as the facts in *Adenariwo* are analogous here. In *Adenariwo*, the FMC Settlement Officer found that ZIM’s practice of holding an unrelated shipment to induce payment for demurrage charges on an earlier shipment was unreasonable and in violation of the Shipping Act. The Settlement Officer also specifically rejected ZIM’s argument that its refusal to release cargo was lawful and therefore reasonable pursuant to its alleged contractual rights, finding:

The act of holding a shipment for an unrelated shipment’s charges is an unreasonable practice under the Shipping Act. The law permits ZIM, as a carrier, to exercise a valid maritime lien and hold a shipment based on charges that accrued on the bill of lading covering that specific shipment. However, ZIM had a duty to deliver the shipment once that shipment’s charges had been paid. Further, ZIM knew or should have known that holding the cargo would cause damages to the shipper or consignee. **ZIM’s position that its general lien clause permits such an unlawful holding is not persuasive. When ZIM ordered that its agent hold**

container number ZCSU889833-9 when it would otherwise be released, it violated section 41102(c) of the Shipping Act.

Id. at 11 (emphasis added).

Adenariwo demonstrates that ZIM has a history of relying on purported lien rights to hold cargo to induce payment of disputed charges without due regard for liability or fault, and furthermore, that ZIM was on notice that such practices and policies were in violation of the Shipping Act. ZIM's Director of Finance, Yaacoub Yaacoub, who was responsible for implementing the Finance Hold practices and decisions, testified as ZIM's 143(b)(6) corporate representative that he had no awareness of whether the holds complied with the FMC Incentive Principle, and further that he did not think that the holds promoted [freight fluidity].²³ But *Adenariwo* demonstrates that ZIM should have known.

ZIM's attempts to sidestep *Adenariwo* because it shows that it is a repeat offender: the D.C. Circuit and FMC had previously warned ZIM that its policies and practices in utilizing holds with reliance on lien rights in contracts was a violation of the Shipping Act and ZIM has done nothing to changes its practices since. ZIM ignores this point altogether. But as chairman Maffei just observed on a supply chain podcast, ocean carriers like ZIM should have been very concerned about changing its behavior when on notice by the FMC of wrongdoing to avoid enforcement actions or those filed by private parties like here. "This isn't a game of gotcha. it's a game of trying to make sure that everybody plays by the same rules **and that if you're given a yellow card you change your behavior so you're not given a red card.** We're not interested in putting people out of business if we do that then competition is less and that's worse for the shippers and

²³ CX_03176-CX_03177, CX_03182-CX_03183, CX_03193, Yaacoub (ZIM) Dep. Tr. 119:9-120:2; 125:15-126:5; 136:21-24.

consumers because prices go up so we want to send the right message but we want a healthy industry.”²⁴ (emphasis added). *Adenariwo* was ZIM’s “yellow card.” ZIM’s continued use of Finance Holds against SEA in the manner in which it did should be ZIM’s “red card” and it should face an order by the Presiding Officer of substantial reparations to truly deter ZIM’s behavior.

5. ZIM’s Exercise of its Lien Rights Did Not Promote Freight Fluidity

ZIM’s actions did not promote freight fluidity. ZIM’s claim that “Samsung would not have been in arrears to ZIM had ZIM insisted on payment prior to release from the outset. Thus, by releasing cargo without payment, ZIM was promoting the flow of cargo.” (Opp. at 8). First, ZIM’s assertion that the underlying charges in dispute resulted when it “released cargo without payment” is not substantiated in fact and is contradicted by the evidence established in the record. Tellingly, ZIM cites to no testimony or documentation supporting its statement. Rather, the record clearly establishes, among other things, that ZIM hindered rather than promoted freight fluidity:

- ZIM witnesses admitted that its cargo holds affirmatively caused cargo to *not* move. CX_03193, Yaacoub (ZIM) Dep. Tr. 136:13-20; CX_02979-CX_02980, Speight (ZIM) Dep. Tr. 180:12-181:2.
- ZIM admits that new demurrage charges accrued on cargo held under the Finance Holds, including on cargo still in free time when a hold was put in place. CX_02980, CX_02996, Speight (ZIM) Dep. Tr. 181:3-21; 197:1-7.
- Contrary to ZIM’s pretextual *post hoc* litigation arguments, ZIM’s key corporate representative witnesses testified on ZIM’s behalf that the Finance Holds did not promote freight fluidity. CX_03192-CX_03193, Yaacoub (ZIM) Dep. Tr. 135:10-13, 136:21-24. Instead, they promoted payment. CX_03204, Yaacoub (ZIM) Dep. Tr. 147:11-21.
- SEA incurred \$5.2 million in demurrage charges related to finance holds, almost half of the \$11.5 million in total D&D charges paid by SEA in connection with ZIM containers. SEA PFF at ¶ 159; CX_05806, Smith (SEA) Expert Rep. ¶ 41.

²⁴ See Mike King audio podcast episode, September 27, 2023, *supra*, fn. 9, Part 2 at minutes 30-34.

- ZIM admits that it instituted Finance Holds four times between 2020 and 2022, including a **three-month** long Finance Hold at the height of the pandemic from January to March 2022 when ZIM held over 600 containers—containers that were not moving and tying up critical port, terminal and chassis capacity, and preventing goods from reaching American consumers—on the *sole basis* of ZIM’s purported right and apparent need to ultimately collect what amounted to \$119,615. CX_01570, ZIM0085708.
- ZIM’s US Chief Financial Officer, confirmed 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 the three month long finance hold. CX_05350-CX_05351, Rosenberg (ZIM) Dep. Tr. 47:11-48:3.
- Finance Holds were debilitating to SEA because ZIM would refuse to release **both** containers with pending charges and containers without pending charges. Between 2020 and 2022, ZIM refused to release SEA containers from terminals at U.S. ports due to allegedly past due amounts (“Disputed Containers”) on otherwise unrelated SEA shipments that had not yet incurred any demurrage charges (“Unrelated Containers”). CX_01570, ZIM0085708; CX_02218-CX_02219, Rapske (SEA) Dep. Tr. 46:17-47:8; CX_02285-CX_02307, Rapske (SEA) Dep. Ex. 5; CX_03006, Speight (ZIM) Dep. Tr. 207:17-24.
- SEA was forced to pay ZIM and terminals under protest to have its goods released, and even for ZIM to initiate the intervening inland moves, on store door moves. CX_02214-CX_02215, Rapske (SEA) Dep. Tr. 42:20-43:5.
- Even after SEA issued payments to release the cargo from finance holds, ZIM held cargo that had gone into demurrage during the Finance Hold until payment had been received. CX_07367, SEA0018177.

Finally, ZIM cannot credibly dispute that SEA was clearly motivated and incentivized to move its goods quickly from the port, and relied on ZIM to be able to do so. SEA Initial Br. at 46-47. SEA PFF at ¶¶ 10-11, 18.

6. The charges that formed the basis of the Finance Holds were disputed charges or for unrelated entities.

ZIM claims SEA was “chronically delinquent” in paying ZIM. (Opp. at 7). It also provides the chart below to claim a link between monies owed and paid by SEA to justify its actions:

Duration of Lien	Amount Outstanding on Date of Initiation	Amount Paid to Release Lien
August 5-mid-August, 2020	\$143,225.26	\$36,710
May 27, 2021-June 30, 2021	\$857,914.64	\$510,975
September 27, 2021-October 16, 2021	\$943,708.14	\$638,870
January 11, 2022-March 17, 2022	\$1,538,200.64	\$119,615

(Opp. at 8). But what is striking is that ZIM accepted such a varied amount from the claimed amount. ZIM actually asserts in this litigation that the fact that it eventually released the Finance Holds for a fraction of the amounts that it initially claimed were overdue reflects the reasonableness of ZIM’s conduct. (Opp. at 8). The fact that ZIM released the Finance Holds for a fraction of the amounts that it originally claimed justified the Finance Holds, and did so repeatedly, shows that ZIM’s Finance Holds were patently unreasonable and never based on any sort of cost justification. We know from ZIM testimony that whether charges were valid or time barred, ZIM would aggressively seek them in negotiations with shippers, an action that even made ZIM personnel uncomfortable. *See* CX_04761-CX_04769 (a February 2020 email from ZIM U.S.’s then-President to collect uncollectible, time-barred charges from consignees despite internal warnings of “heavy pushback”).

ZIM’s chart does nothing to address how those D&D charges were appropriate. It simply argues that the charges allegedly existed and thus they were appropriate and its conduct was reasonable because it ultimately did not extract every dollar. But that is ZIM’s litigation position, not its reasoning at the time. At the time, ZIM’s practice followed a “hold first, fix issue later”

mindset.²⁵ As evidenced in the record, ZIM repeatedly imposed finance holds, without assessing the accuracy or validity of the underlying charges or the ensuing charges on containers unrelated to the original disputed charges.²⁶

For example, between August 5, 2020 to mid-August 2020 (Finance Hold No. 1), ZIM placed SEA cargo on hold asserting that SEA owed approximately \$145,000. SEA PFF at ¶ 163.²⁷ During the Finance Hold, ZIM assessed additional demurrage totaling approximately \$20,000.²⁸ On August 5, 2020, SEA was placed on hold. That day, SEA asked ZIM to provide documentation to verify the validity of the charges, and noted that a number of the invoices were incorrectly billed, including several charges for unrelated entities.²⁹ On August 20, 2020, SEA requested a response from ZIM regarding the disputed invoices.³⁰ Later that day, ZIM responded with a significantly shorter list of amounts allegedly owed, and SEA paid \$36,710 to remove the Finance Hold.³¹

The record reflects that ZIM was reckless and cavalier in its utilization of Finance Holds and, similar to its approach in billing, did little to confirm whether the shipments its was holding were in fact SEA cargo. Instead, ZIM held numerous containers for unrelated entities, including foreign entities not within the corporate structure of SEA. ZIM now attempts to claim that “[e]ach

²⁵ SEA PFF at ¶¶ 211-224.

²⁶ SEA PFF at ¶¶ 85-93, 211-224.

²⁷ CX_07204-07220. ZIM’s Opp. cites this email communication as a basis for establishing that SEA was chronically delinquent in paying ZIM. See Opp. at 14. ZIM claims that the email communication shows invoices for outstanding for months or even years. *Id.* However, as reflected in the email, the invoices allegedly owed since 2015 and 2017 were in fact not for SEA and were later removed from the amounts owed. CX_07216.

Doc Date	Due Date	Invoice #	B/L #	Amount	Container Number(s)	DS NOTES
8/21/2015	9/20/2015	SAVR157179	ZIMUSEL2135000	\$1,197.90	ZCSU8252170	NOT SAMSUNG load
6/22/2017	6/22/2017	DSAV1730016913	ZIMUBKK8003720	\$1,560.00	ZCSU8785796	NOT SEA other SAMSUNG

²⁸ SEA PFF at ¶ 167.

²⁹ CX_07209-CX_07216.

³⁰ CX_7206.

³¹ CX_7204-CX_7206; SEA PFF at ¶ 163.

and every lien exercised by ZIM was justified by outstanding sums owed by Samsung, some of which were acknowledged by and/or paid by Samsung and/or Samsung's affiliated companies." (Opp. at 3). However, what ZIM neglects to mention is that these foreign entities were paying ZIM charges to obtain the release of shipments inappropriately held by ZIM.

ZIM represents that foreign entities statements contradict SEA's argument that the finance holds were unreasonable. In support of this theory, ZIM extracts a single sentence from an email by Samsung SDS. (Opp. at 5, fn. 2); CX_05733. However, when taken as a whole, the email only further supports SEA's contention that ZIM's utilization of finance holds was unreasonable. The email communication from Samsung SDS to ZIM's US CFO, Ilana Rosenberg, states as follows:

As promised, I will take of the payment till the end and I have TWO IMPORTANT things to ask you.

1. Please contact right persons based on Consignee. Attached #4 is the list of Samsung Contact. In order to effectively communicate and expedite payment, information and invoices should be provided to the relevant parties, accordingly.
2. Please take your action based on Consignee. We understand and respect ZIM's rules and procedures such as credit suspensions and holds. **However, every single Consignee in Attached #4 is the separate legal business entity and should be treated as separate one.**

CX_05733 (emphasis added). In another example of ZIM's questionable practices connected with its self-serving chart of "monies owed," 10 containers for a separate foreign entity were included in a Finance Hold No. 5. On February 25, 2022, Samsung SDS requested the release of the containers noting they should not be subject to a hold. That same day Ms. Rosenberg responded:

Dear Ho Dong Seo,

Thank you for your email below.

Pls allow me to clarify:

The total past due is 589K; that amount is after the application of the 71k payment that you've mentioned below. **The 10 containers**

detailed below were consigned to Samsung Electronics (not SDS)

ZIM/Collection team provided Samsung all requested data, information, cnt numbers, dates etc to resolve all questions and complete the payment process.

As I'm sure you understand, we can't accept our customer constantly and continuously maintaining such substantial unpaid past due amounts.

Nevertheless, as a onetime courtesy, we agree to release the below 10 containers subject to a payment plan covering full past due (589K).

Once you confirm the payment plan for 589K, with full and final payment no later than by March 10th, we will release the 10 cnts immediately upon the receipt of the payment plan.

Pls note it will be a onetime courtesy.

To avoid credit suspensions and holds in the future, we encourage Samsung to pay the due amounts on time. Hope this unpleasant situation will be quickly resolved.

CX_05734-CX_05735.

On March 3, 2022 (six days later), ZIM's US CFO Ms. Rosenberg acknowledged the error and released the containers stating "After further review, we understand that the 10 cnts below belong to a separate entity, C&T (which was not mentioned below). Following that understanding, we will release the 10 cnts immediately (because, as stated in my below email, the hold is related only to Samsung Electronics)." CX_05734.

CX_07471-CX_07475 also tells a similar story, **approximately seven (7) months later ZIM was still holding unrelated shipments.** On August 2, 2022, Samsung SDS America Inc. emailed ZIM that "[w]e, Samsung SDS America are facing a serious issue with our customer due to an issue that ZIM has not releasing numerous containers which belong to our customers... **We, Samsung SDS is a totally different entity and separately operated company from Samsung Electronics.**" (emphasis added).

Importantly, the first issue in the reasonableness analysis of ZIM's Finance Holds is whether there is a legitimate factual basis for the liens upon which the Finance Holds were based. These examples support a rejection of ZIM's argument that its simple chart of D&D charges owed, and partially paid, justifies its Finance Hold practices. Contrary to ZIM's claims that SEA was chronically past due, the evidence show that ZIM was chronically overcharging and under explaining, giving SEA very good reason to not pay the amounts ZIM was demanding because they were riddled with improper and disputed charges. ZIM's admission of the difference between what it claimed justified the Finance Holds and the payments SEA made to end the holds succinctly shows that SEA was justified in not paying disputed charges, and that ZIM was not reasonable in holding cargo hostage on the basis of substantially erroneous demands.

Due to ZIM's unjust and unreasonable regulations and practices, SEA incurred charges in the amount of \$10.8 million and paid those amounts. Yet ZIM contends that "Samsung had an inefficient and unreasonably cumbersome invoice approval process that made timely payment difficult if not impossible." (Opp. at 14). ZIM complains that following SEA's invoicing process, *i.e.* sending invoices to the correct email address, was unduly burdensome and difficult for ZIM. ZIM further complains that SEA was chronically delinquent because SEA repeatedly asked for information confirming the charges. ZIM seeks to place all billing onto SEA, and fails to take responsibility for its inadequate billing process, stating that SEA "took a very passive role in dealing with billing issues, putting the onus on ZIM to figure out where to send invoices for the various Samsung entities (RX-0159) and refusing to assist in resolving problems until a cargo hold was imminent or in place." (Opp. at 15). Yet, the evidence ZIM cites to in support of its contentions only further supports that ZIM fell well short of its obligations to reasonably provide billing information so that it can withstand questions and reasonable scrutiny.

RX-0159 is a communication from SEA to ZIM responding to ZIM's threat to implement a finance hold if payment is not received. SEA again explained its billing process and notes that "there are invoices that you have sent belongs to different subsidiaries and were are not the correct department." RX-0159, RX-0769-RX-0782, is a portion of an email communication related to Finance Hold No. 1. SEA provided the full email communication in CX_07204-CX_07221, which shows that a number of the charges were incorrectly invoiced to SEA, which ZIM later acknowledged. *Supra* at pp. 9-10. What is the purpose of ZIM having a dedicated service team for SEA if it cannot get charges details properly addressed to the consignee of goods? On a store door move, where ZIM is being paid for gold star service, why should these obligations be foisted on SEA? ZIM has no good answer and contends SEA should figure out ZIM's invoices and send them to the right people. That is a new burden which ZIM is looking to create out of whole cloth.

7. ZIM's Exercise of its Lien Rights Was Not Consistent with the Incentive Principle and the Interpretive Rule

ZIM's lien section ignores the importance of the Incentive Principle which independently governs regulated conduct regardless of purported contractual lien rights. There must be an incentivizing justification for assessing new demurrage charges on cargo that ZIM unilaterally decided to prevent from moving or releasing.

ZIM did not, and could not, incentivize SEA to move cargo that ZIM refused to move. First, under store door terms, ZIM was responsible for arranging the inland movement and intervening terminal releases. Corporate-designee testimony on ZIM's behalf admitted that when ZIM instituted a Finance Hold, ZIM directed the truckers not to pick up the cargo for inland moves, and directed terminals to hold cargo. CX_02992-CX_02995, Speight (ZIM) Dep. Tr. 193:22-196:11. In store door moves, if ZIM is not providing work orders to truckers, and ZIM is directing

terminals to not release cargo, there is literally noting SEA could have done itself to move the cargo that was fundamentally not available to SEA. Interpretive Rule, 85 Fed. Reg. at 29654 (discussing that “cargo availability or accessibility refer to the actual availability of cargo for retrieval”); *see also* 46 C.F.R. § 545.5(c)(2)(i).

ZIM does not deny that the shipments at issue were unavailable for pick up. Instead, ZIM ignores its own behavior by shifting the responsibility to SEA, arguing the Finance Holds incentivize freight fluidity because (1) the underlying charges were the result of cargo ZIM previously released without charge (thus allegedly promoting movement of that cargo), and (2) payment of disputed charges overall promotes cargo fluidity. These arguments are wrong. The underlying charges were not unpaid demurrage on other cargo previously released. As discussed above, they were various categories of disputed charges on other parties and for detention, which is a charge that accrues after cargo is released, not before release. As to the notion that holding cargo to coerce unrelated payments incentivizes freight fluidity, perhaps ZIM’s own witness said it best when he testified that Finance Holds promote payment, not movement of cargo. CX_03204, Yaacoub (ZIM) Dep. Tr. 147:11.

And even if all of ZIM’s arguments on this were true, they still do not explain away why ZIM charged new demurrage—in an astonishing amount—on containers it chose to hold. Aside from the absence of an incentivizing purpose, ZIM implies that there was a compensatory element to new demurrage, *e.g.* storage costs and lost opportunity. (Opp. at 12-13). Even if this were true, which is highly doubtful, the fact that ZIM racked up over [400%] more in new charges than the amounts in allegedly disputed charges that received to release the holds is patently unreasonable

and excessive ([\\$5.6] million in *new* charges vs. \$1.3 million to release).³² ZIM produced no documents or testimony reflecting any cost-based justification or rationale for these charges as confirmed by its damages expert. CX_06790, Clair (ZIM) Dep. Tr. 128:3-15.

ZIM claims that SEA failed in its responsibility to pay timely. (Opp. at 28).³³ However, the record establishes that the outstanding amounts owed were incurred due to ZIM’s failure to establish reasonable practices and procedures related to its door moves. For example:

- ZIM’s defective billing systems continued to create additional errors in billing. SEA PFF at ¶¶ 111-118.
- The majority of SEA cargo was moving under a store door basis, which ZIM admits. ZIM Reply PFF at ¶ 319. Because SEA was not responsible for the inland transportation, and the responsibility rested with ZIM, no amount of D&D assessed by ZIM could have incentivized the movement of the shipments.

³² The record shows that SEA was already very incentivized to pick up its cargo due to customer demand for its products during the pandemic, and repeatedly asked ZIM to allow it to do so. CX_02212, CX_02248-CX_02249173, Rapske (SEA) Dep. Tr. 40:4-16, 76:25-77:22, 78:12-23. To the extent that ZIM had “lost opportunity” costs or storage costs as a result of its decision to hold cargo, ZIM still did not need to charge SEA for such charges, and should not have, but its employees making Finance Hold decisions were not aware of or did not make those decisions based on the Incentive Principle. CX_03176-CX_03177, CX_03182-CX_03183, CX_03193, Yaacoub (ZIM) Dep. Tr. 119:9-120:2; 125:15-126:5; 136:21-24.

³³ It is curious that on page 28 of the Opp., for the first time, ZIM claims there were outstanding freight charges being held against SEA, in addition to D&D, and this is a justification for its aggressive collection activities, citing CX 5627-5629. But the documentation cited does not discuss or reference issues with outstanding ocean freight. *Id.* Instead, the documentation confirms that **its own** defective billing systems were causing continued errors in billing, as admitted in this internal ZIM chart at. CX_05628:

BILLING ISSUES	1,842,282	<p>Billing issues include:</p> <ul style="list-style-type: none"> • EDI transmission issues • Manual billing process delayed due to increase in volumes • Late correctors 	<ul style="list-style-type: none"> • Weekly meetings with FI and CS/DSG to define a timeline to resolve existing issues and prevent future billing delays. 	<p>Zim systems are not set up to execute the manual and special invoicing requirements agreed to within the service contracts. IT enhancements are needed to eliminate/reduce the amount of manual effort spent to invoice according the customer's requirements. These enhancements will also help to reduce the delays and errors.</p>
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- ZIM’s D&D charges practice during the pandemic was replete with systematic errors and did not factor in issues such as port congestion, chassis shortage, or trucker issues, among others. SEA PFF at ¶ 84.
- ZIM repeatedly issued D&D charges to SEA that were owed by separate divisions of Samsung global affiliates and for which SEA itself was not responsible. SEA PFF at ¶ 85; CX_07204-CX_07221.

ZIM had no right to lien SEA’s cargo and its pretextual *post hoc* justifications should be rejected as they are unsupported by the evidence.

B. ZIM Was Responsible for Acts and Omissions of All Truckers – CNTs or Not – Used With SEA Containers Shipped Under Store Door Terms

1. Neither The RFQ Nor The Service Contracts “Require” ZIM To Use CNTs and Responsibility To Vet, Pay, and Manage CNTs Rested With ZIM At All Relevant Times Under Store Door Terms

The crux of ZIM’s CNT argument is that (i) certain language in a 2021 Request for Quote for Ocean Freight (“RFQ”) by an unnamed Samsung “affiliate” that purportedly forced ZIM to use CNTs recommended by SEA; and (ii) such language’s alleged incorporation into two out of five service contracts that ZIM contends governed the SEA-ZIM relationships.³⁴ But neither the RFQ nor the service contracts say so anywhere, and a review of both documentations only highlights the deficiencies in ZIM’s argument:

- There is no indication that the RFQ is intended to be incorporated into the service contracts and as discussed more fully below, the record supports that it is not a document that is included in a service contract. (CX_04487-88, Ramage (ZIM) Dep. Tr. 109:24-110:9)

³⁴ ZIM claims that “there is no dispute that [SEA] designated CNTs, and there is a list of such CNTs,” implying that SEA recommended CNTs for the entire “2,980 containers over more than a 3-year period.” (Opp. at 2, 33). But a cursory examination of the record ZIM relies upon (RX-0023-28) reveals that they are undated lists of certain entities that appear to have been identified by SEA as some of their CNTs. Nowhere in these documents does it make ‘undisputed’ that any carrier in general, let alone ZIM in particular, was contractually obligated to use the CNTs listed. Nor do the documents represent any type of agreement or assignment of a CNT to transport specific SEA containers.

- The RFQ clearly states that the “information is solely for the purpose of enabling LSP to prepare the requested business proposal and price quotation.” RX-0031.
- The RFQ does not identify applicable routes or rates and is undated. Thus, it is unclear whether it even relates to movement of SEA cargo. RX-0030-RX-0049.
- Neither the RFQ or the service contracts are signed nor have they been finalized. For example, RX-1870 and RX-1939 noted instructions to “[EMBED AcroExch.Document11]” and “[EMBED Word.Document.12 \s]” with respect to the 2021 RFQ. This appears to contemplate further revisions to the documents.
- SEA is not named or identified in either document. RX-0030-RX-0049; RX-1789-RX-1905.
- As reflected below, ZIM has failed to authenticate the RFQ, and establish its foundation and relevance.

Thus, the RFQ and service contracts are otherwise inapplicable to the SEA-ZIM relationship. And to the extent that they arguably are relevant at all, the service contract language fundamentally undermines ZIM’s position.

a. The Presiding Officer Should Not Afford Evidentiary Weight To The RFQ Or ZIM’s Arguments Based Thereon

As a threshold matter, there are significant evidentiary concerns regarding the cited RFQ as it is not a document: (i) authored or issued by SEA; and (ii) about which any SEA witnesses testified that it is something that they are familiar with. To the contrary, ZIM only asked about the RFQ to Ms. Maria Kristina Fernando in her individual capacity, but chose not to ask about it to either of SEA’s two corporate designee witnesses, *i.e.*, Messrs. Mike Rapske or Jeung Choi. Further, Ms. Fernando testified that she does not recall seeing, and is not familiar with, the RFQ. (CX_02365, Fernando (SEA) Dep. Tr. 45:5-14). Worse yet, Ms. Carrie Ramage (ZIM’s sole witness who testified about the RFQ) testified that she has seen the type of the document before, but did not know its author or purpose, but that it is *not* a document that’s “normally included in a service contract.” (CX_04487-88, 109:24-110:9) If ZIM was going to rely on the alleged RFQ,

it should have sought to authenticate the document,³⁵ and establish its foundation and relevance, but it elected not to do so.

Against this backdrop, the Presiding Officer should not afford evidentiary weight to the RFQ or ZIM's arguments based thereon. *See* 46 C.F.R. 502.202 ("The presiding officer, however, has the right and duty to limit the introduction of evidence and the examination and cross-examination of witnesses when, in his or her judgment, such evidence or examination is irrelevant, immaterial, or unduly repetitious."). On this evidentiary foundation, for ZIM to claim that "by any objective measure ZIM was required to use the CNTs designated by Samsung" is neither "objective" nor an appropriate conclusion to draw. (Opp. at 16).

b. The RFQ Does Not Require ZIM To Use CNTs

Even if the RFQ were to be given any evidentiary weight by the Presiding Officer, the RFQ does not support ZIM's contention that it contractually required ZIM to use CNTs.

First, the RFQ, by definition, is not a legally binding contract, much less a ZIM-specific document. Instead, it was expressly issued on its face to ocean carriers "solely for the purpose of enabling [Logistics Service Provider ("LSP")] to prepare the requested business proposal and process quotation." (RX-0031). Moreover, the RFQ process was to be "conducted in 3 stages" from the last week of October 2021 to the end of December 2021. (RX-0035). There is no evidence in the record of whether this process occurred or what the final outcome was. The specific copy of the RFQ ZIM attaches to its Opposition has no indicia of reliability. Among other things, it is undated, it is unclear as to when it was issued, it is unclear what stage ZIM would have

³⁵ *See* Fed. R. Evid. 901(b)(1); *Carmona v. Toledo*, 215 F.3d 124, 131 (1st Cir. 2000) (each document submitted in support of summary ruling must either be properly authenticated or must be self-authenticating under the Federal Rules); *Goguen ex rel. Estate of Goguen v. Textron, Inc.*, 234 F.R.D. 13, 16 (D. Mass. 2006) ("Generally, authentication requires competent testimony concerning the document.").

been in terms of the RFQ process, and it does not even reference the routes covered by the RFQ. Therefore, the language ZIM randomly quoted from the RFQ – “Carriers are required to provide local delivery service with consignees’s preferred trucker if any” – has no application to the current dispute and is not itself legally binding.

Second, RFQ does not, and cannot, bind SEA. The RFQ was issued by Samsung SDS Co., Ltd. (“SDS”) (RX-0033) and does not once mention SEA anywhere. Indeed, the RFQ discloses those Samsung entities for which SDS is requesting a proposal from the ocean carriers, and that list does not include SEA. (RX_0033)

Third, even if the RFQ were found to apply to the SEA-ZIM relationship, it would have also required additional responsibilities of ZIM that it has abdicated or failed to perform, such as:

- Provid[ing] optimal service for door delivery and [being] responsible for providing efficient and integrated inland transportation service in order to optimize/minimize transit time and cost (RX-0041);
- Provid[ing] optimal service with Cargo Visibility from origins to the place of delivery without failure (RX-0039);
- Provid[ing] information on container tracking and vessel voyage that [the] customer requires (RX-0040);
- Supply[ing] container and chassis for immediate pick-up and delivery upon shipper’s request (RX-0040);
- Empty Container Pick-up/Return should be available at where requested without extra cost (RX-0040);
- Required to set up a dedicated organization or staff for Samsung cargo operation (RX-0041);
- Provid[ing] prompt feedback to Samsung’s requests (RX-0041).

To the contrary, the record evidence establishes that:

- ZIM failed to provide optimal service for door delivery and abdicated its inland transportation service (*see, e.g.*, CX_07308-CX_07312, SEA0051129-133; RX-

0686-694, ZIM0031916-ZIM0031924; RX-0973-RX-1003, SEA0000150-180; RX-1252-55, SEA0026423-426);

- Instead of minimizing, ZIM maximally transferred an astronomical amount of D&D to SEA (CX_05931, Smith Report Ex. 2; CX_05802, Smith Report ¶ 30; PFF at ¶ 269);
- ZIM frequently did not provide Cargo Visibility, unless requested by SEA on multiple occasions (*see, e.g.*, CX_07127-CX_07133, Clair (ZIM) Dep. Ex. 10; CX_07168-CX_07173, SEA0066477-482; RX-0686-694, ZIM0031916-ZIM0031924; RX-0973-RX-1003, SEA0000150-180);
- ZIM did not ensure constant supply of containers and chassis for immediate pick-up and delivery (CX_02729, Frigo (ZIM) Dep. Ex. 7);
- Empty container pick-up and return were not available even where requested multiple times, for which ZIM charged SEA enormous detention charges (*see, e.g.*, CX_07186-CX_07189, SEA0062920-923; CX_07190-CX_07191, SEA0015506-507; CX_07235, SEA0136021; PFF at ¶ 63);
- ZIM did not set up a dedicated organization or staff only for Samsung cargo operations (CX_04550-CX_04555, Cleva (ZIM) Dep. Tr. 21:11-26:8; CX_04606-07, Cleva (ZIM) Dep. Tr. 77:24-78:13; PFF at ¶ 262); and
- ZIM, including ZIM's U.S. CFO, cared more about being left off email chains and intentionally avoided having to provide prompt feedback to Samsung's requests, even when they came from the Executive Vice President of SDS (CX_05747, Rosenberg Dep. Ex. 28 at 1; CX_05762, Rosenberg Dep. Ex. 29 at 1; CX_05779, Rosenberg Dep. Ex. 30 at 1).

c. The Service Contracts Proffered by ZIM Do Not Require ZIM To Use CNTs, But In Fact Put On ZIM The Responsibility To Nominate Truckers If It Claims CNTs Did Not Perform

Facing these fatal defects of the RFQ language in relation to the SEA-ZIM relationship, ZIM tries to make the RFQ legally binding upon the parties by arguing that “two” service

contracts³⁶ “incorporated” the provision in question from the RFQ and, as such, ZIM must use CNTs recommended by SEA.³⁷ (Opp. at 16). ZIM’s argument fails for multiple reasons.

First, none of the service contracts ZIM contends are at play in this dispute are executed. Indeed, Mr. Zayas (ZIM’s damages expert), who heavily relied on the service contracts for his analysis, had to admit as much. (CX_06580-CX_06581, Zayas (ZIM) Dep. Tr. 58:20-59:5). The service contracts, by all objective measures, appear to be drafts that still required some forms to be added and several areas to be cleaned up. For instance, RX-1870 and RX-1939 noted instructions to “[EMBED AcroExch.Document11]” and “[EMBED Word.Document.12 \s]” with respect to the 2021 RFQ. Without the actual documents attached to these pages, it is unclear even as to what they refer, much less establishing that they were final or legally binding.

Second, the service contracts do not encompass, and cannot bind, SEA. Even the specific two service contracts ZIM relies upon make it clear that their reach is limited to “affiliates . . . controlled by, controlling, or under common control with” Logitech; such entities are then specifically and expressly listed, and they do not include SEA (RX-1939-41; RX-1871-72).³⁸

Third, contrary to ZIM’s position, the contracts actually require that “[f]or shipments designated for pick up or delivery at any U.S. location or facility located outside the Port or

³⁶ The first contract (No. 7100102863), effective January 26, 2022, is among ZIM, another ZIM-related entity, and Samsung Electronics Logitech Co., Ltd. (“Logitech”) (RX-1918). The second contract (No. 7100171730), effective July 2, 2021, is between ZIM and Logitech (RX-1852).

³⁷ ZIM proffers that the SEA-ZIM relationship is governed by, at least, five (5) service contracts. (Opp. at 10). By definition, ZIM must, at a minimum, concede that it did not need to use CNTs recommended by SEA for those cargos shipped under the “three” other service contracts that did not incorporate the language from the RFQ that purportedly required ZIM to use CNTs.

³⁸ This is consistent with the RFQ’s qualifier that a given service contract “covers [the] whole Export and Import overseas transportation process owned by SDS on behalf of Samsung and its affiliates.” (RX-0039).

Container Yard (i.e., “Door” pick up or delivery, also referred to as “Carrier Haulage”), *Carrier shall normally nominate* the Vendor to provide services.” (RX-1857; RX-1925) (emphasis added).

Fourth, to the extent that language from the RFQ was incorporated into the two service contracts, they only refer to the rates for CNTs, as opposed to a carrier’s duty or requirement to use CNTs. RX-1939 (“Notes – **Rates** herein are subject to the following notes: [...] Note 2: 2021 RFQ”); RX-1870 (same) (emphasis added). In other words, the RFQ is being incorporated, if at all, into these contracts only to the extent that it may affect or concern the rates for CNTs.

Fifth, the CNT provisions in ZIM’s service contracts would not on their terms (1) allow ZIM to shift any inland carriage responsibility to SEA (absent terminating a bill of lading to CY), or (2) allow ZIM to shift any inland shipping costs to SEA, even for alleged “CNT non-performance,” unless and until (a) ZIM *first* nominated an alternative trucker, and (b) even then, could only shift the *excess costs* of the alternative trucker to SEA (RX-1794):

For shipments designated for pick up or delivery at any U.S. location or facility located outside the Port or Container Yard (i.e., “Door” pick up or delivery, also referred to as “Carrier Haulage”), Carrier shall normally nominate the Vendor to provide such services. If, upon Contract of the parties, the Merchant is to nominate the Vendor (“Preferred Trucker”), the following shall apply:

Compensation rates shall be as set forth at Appendix G, and shall be subject to review and / or change in accordance with subparagraph 12b (below).

Should Merchant’s Preferred Trucker fail to accept a Transport Order within twenty-four (24) hours of issue, or fail to perform as ordered, Carrier shall nominate and provide instruction to an alternate Vendor; and

Any expense or charge in excess of the Compensation rate set forth at Appendix G, including demurrage, detention, or other storage fees, which accrue or are assessed as a result of the Merchant’s nomination of a new or alternate Preferred Trucker, or as a result of the Preferred Trucker’s failure to accept or perform a Transport Order, shall be to the account of the Merchant.

Sixth, even if the service contracts to which ZIM refers were binding on SEA and can be considered to have any evidentiary value, well-established canons of contract interpretation do not favor the interpretation that ZIM gives them. ZIM’s argument that it was required to use the CNTs

that SEA recommended, which, in turn, shifted responsibility for managing the inland transportation of cargo from ZIM to SEA, is neither commercially reasonable nor in accordance with the reasonable expectations of the parties. *See* 28 N.Y. PRAC., CONTRACT LAW § 10:5 (contract must be construed in a commercially reasonable manner and in accordance with the parties' reasonable expectations). Moreover, ZIM's interpretation of the service contracts as shifting responsibility for inland transportation to SEA where a CNT is used would have the absurd result of absolving ZIM of the very obligations to manage inland transportation that it, and any other ocean carrier, agrees to assume under store door moves. 28 N.Y. PRAC., CONTRACT LAW § 10:5 (a contract should be construed so as to avoid absurd consequences).

The reason that ZIM does not cite the CNT language from its services contracts, but instead pushes its defective RFQ argument, is because ZIM did not follow the service contract CNT provisions. ZIM pushed its inland transportation costs on SEA without first, and in many cases without ever, appointing an alternative trucker. ZIM's newly minted litigation assertion that that the RFQ tied its hands is not just made up, it is contradicted by the contemporaneous evidence. In a documented instance when SEA pleaded with ZIM to appoint a house trucker, ZIM refused to do so because ZIM did not want exposure to the demurrage and detention that it was pushing on SEA. RX-0679-RX-0697.

The evidence shows that ZIM's actual practice with regard to SEA and CNTs was not based on any RFP, nor was it based on the actual language of ZIM's service contracts proffered herein. In the sworn testimony of ZIM's sole 143(b)(3) witness designated to testify on ZIM's behalf concerning ZIM's agreements with the shippers of SEA containers, Moshe Shpitzer testified at length about CNTs and ZIM's service contracts. Notably, despite the notice, and his corporate

designation by ZIM, Mr. Shpitzer was not able to testify about any specifics of ZIM's service contracts with the shippers of SEA cargo. CX_05159, Shpitzer (ZIM) Dep. Tr. 73:9-15.

Q. Okay. When you say we had a service contract, this would be a service contract that the ocean carrier, ZIM, has with a shipper entity; is that correct?

A. I'm not sure with whom the agreement is exactly, if it's with the shipper or with the consignee, but I'm aware there is a contract between ZIM -- there was a contract between ZIM and Samsung.

Mr. Shpitzer, however, did testify that CNT terms were reflected in service agreements, and testified in detail about what was in effect ZIM's template service agreement, and the CNT provisions therein. CX_05168-CX_05172, Shpitzer (ZIM) Dep. Tr. 82:24-86:13 The exhibit ZIM testified about is materially the same in form as the Samsung affiliate service contracts with CNT provisions. In direct contrast to the obvious and plain reading of the text of the standard CNT provisions, ZIM testified that its practice was to treat the nomination of a CNT as automatically shifting responsibility for inland trucking demurrage and detention charges to the shipper or consignee, testifying that with respect to demurrage and detention liability, ZIM treated a CNT move similarly to a CY move." (CX_05211, 125-2:12).

ZIM's attempts to rely on service contract contractual defenses fail not only because contracts rights are not defenses to Shipping Act violations³⁹, but more fundamentally because ZIM's conduct is at odds with the provisions of its service contracts. ZIM is responsible as the common carrier for the integrated inland movement of the cargo, and even with the CNT provisions in its service contracts, ZIM was obligated to appoint an alternative trucker in the event

³⁹ *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 *47 (ALJ June 7, 2023) ("Many of the points made by Hamburg may be relevant were this a breach of contract claim, but this is not. This proceeding addresses violations of the Shipping Act.").

of CNT trucker non-performance, and only then could SEA seek to shift excess costs to SEA. ZIM's conduct was not reasonable under its contract, nor under the Shipping Act.

d. ZIM's "Subjective" Belief That It Was Required To Use CNTs Recommended By SEA Is Objectively Incorrect

Lacking any evidentiary support from the record, ZIM tries to justify its defenseless position that ZIM was contractually obligated to use CNTs because ZIM's two witnesses (Messrs. Michalski and Frigo) "subjective[ly] underst[ood]" that to be the case. (Opp. at 16). Not only is the subjective belief of two ZIM employees not record evidence that warrants a finding of ZIM's "contractual obligation" to use CNTs, both witnesses testified that ZIM does have to vet and approve CNTs before agreeing to use them, i.e., SEA's recommendation of CNTs does not mean that ZIM must use them. For instance, Mr. Michalski testified:

Q. Whenever a customer requests a CNT, do they always have to be approved by ZIM?

A. Yes.

Q. So there's instances where a trucker could be rejected?

A. There could be. Whether -- maybe they're not following the UIIA. They have a -- they have a bad safety record. So the trucker gets vetted through the procurement team to ensure that, you know, they're in good standing. They have a safety record. The UIIA -- they're party to the UIIA. If they weren't, that would be an example where we could reject it.

Q. So it's fair to say before you go and agree to utilize a CNT, they have a -- you have an approval process at ZIM --

A. Yes.

(CX_03841-CX_03842, Michalski (ZIM) Dep. Tr. 45:15-46:5) (emphasis added).

Likewise, Mr. Frigo also testified:

Q. So we've touched a little bit on CNTs, but it would be great if you can tell me just a definition of what that means to ZIM.

A. To me, CNT -- forgive me. I tend to refer to it as preferred -- is a trucker that our customers effectively advise, in order to handle my business, this is the vendor that needs to be used.

Q. And is that a contractual term that they need to be used?

A. I am not familiar with the customer contract side.

(CX_02613-CX_02614, Frigo (ZIM) Dep. Tr. 140:20-141:4) (emphasis added).

In short, Messrs. Michalski and Frigo admitted on the record that (i) ZIM always went through its own vetting process to approve the use of a CNT before actually using it; (ii) ZIM's customers merely "advise" ZIM to use their CNTs; and (iii) neither witness is aware of any contractual obligation that the CNTs recommended by SEA must be used. ZIM's witness testimony is logical, too. With ZIM contracting with truckers and paying truckers directly, it surely would need to conduct its own due diligence and quality assurance. When a trucker gets in an accident carrying a ZIM-painted box, ZIM is going to be sued as well. As such, it is going to vet its contractors. The unfounded theory that it would be forced to accept a consignee trucker under any circumstances is not supported by any agreement or common business sense. Moreover, ZIM in fact rejected nominated truckers proffered by SEA, generally because it did not like the rate the trucker was requesting from ZIM, *See, e.g.*, RX-0915 (rejecting CNT on the basis that the rate was too high); RX-1071 (rejecting CNT due to rate increase); *see also* CX_06778-CX_06779. As discussed above, the CNT provision obligated ZIM to nominate alternative truckers if ZIM had nonperformance concerns. *See, e.g.*, RX-1794, ¶ 12a; CX_02121, Choi (SEA) Dep. Tr. 72:12-25.

e. **SEA's Sporadic Inquiries As To ZIM's Utilization Of Certain Truckers Do Not Establish ZIM's Contractual Requirement To Employ Them**

ZIM next contends that it was required to use SEA's CNTs because "on occasions when CNTs were designated by Samsung but not used by ZIM, Samsung protested and called for use of the CNT" and cites "RX-0805; RPF #51" in support. (Opp. at 16). But neither document supports ZIM's characterization of SEA's customer-specific inquiries as "protests" or "pressures" to use CNTs; nor do they have any relation to ZIM's alleged contractual obligation to use CNTs.

First, RX-0805 is an email exchange between ZIM's Ms. Stacie Payton and SEA's Ms. Fernando. There, Ms. Payton informed that "World Logistics will be the trucker for the below [loads]" and asked for Ms. Fernando's assistance as the World Logistics truckers were not receiving responses when trying to schedule appointments. RX-0806. Ms. Fernando replied: "Stacie, We have a CNT for Shippensburg which is Harvest. I need these loads to be dispatched to Harvest. Please cancel the house trucker and send it to Harvest *because this is Lowe's (drop and hook).*" RX-0805. ZIM omits the customer-specific reasons for using a CNT in this case.

Second, ZIM's proposed fact No. 51 contends that "[i]f a CNT was rejected by ZIM, Samsung raised questions and pressured ZIM to use the CNT" and cites RX_0914-17, RX-0957-62, RX-0967-71, and RX-1069-70 in support. But a review of these "supporting" emails reveals that SEA was, in fact, amenable to using a house trucker, provided the house trucker could effectively complete the deliveries, or that there were specific, customer-related reasons why SEA requested that a CNT be used instead of a house trucker. *See* RX-0914-17 (Samsung accepting use of house trucker after ZIM acknowledged that it had assigned house trucker instead of CNT due to oversight on its part); RX-1069-71 (accepting use of house trucker provided that trucker had necessary customer portal setup to complete deliveries on time); RX-0967-71 (requesting use

of CNT due to specific delivery requirements of customer). And in one email exchange that ZIM cites as evidence that SEA “pressured” ZIM to use its CNT, ZIM voluntarily offered to switch from its house trucker to a CNT after information was requested as to why ZIM had assigned a house trucker. *See* RX-0958-60 (ZIM writing “We can still assign to XPO [the CNT]. Urgently advise if you wish to reassign.”). At most, these emails only show that SEA was attentive to its goods to ensure that they found their way to the right places and customers, alerted ZIM of certain customer-specific reasons for using CNTs, and raised some related inquiries when appropriate.

Of course, none of these emails changes the fact that it is ZIM who ultimately approves the use of certain CNTs and is responsible for managing CNTs’ performance (or lack thereof).

f. SEA Critically Relied Upon ZIM To Manage Cargo Delivery On A Through Basis, And No Evidence Exists To Show That SEA “Actively Supervised” CNTs

ZIM also contends that SEA was not “entirely reliant” upon ZIM to manage its cargo delivery because it “actively supervised the CNTs it required ZIM to use.” (Opp. at 16-17). In support, ZIM cites a *single* email, which tells a completely different story. ZIM characterizes that email dated February 8, 2022 (RX-1208) as SEA’s BK Choi “instructing” a CNT to prioritize CMA CGM containers over others, including ZIM containers. One obvious explanation for this instruction was because February 8, 2022 happens to fall right in the middle of the Finance Hold No. 4 instated by ZIM on SEA cargo (from January 11 to March 17, 2022). ZIM cannot possibly fault SEA for wanting to have its CNT prioritize delivery of non-ZIM containers because, had the CNT tried to deliver the ZIM containers, ZIM *would not have allowed* it under the Finance Hold.

Without any evidentiary support,⁴⁰ ZIM's argument that SEA somehow "actively supervised" or managed CNTs simply fails.

The record evidence establishes, and remains uncontradicted by ZIM, that SEA was completely reliant on ZIM to handle the inland movement of its containers on store-door moves and that SEA did not have operations capabilities for the handling of inland moves. (CX_02123, Choi (SEA) Dep. Tr. 74:16-24) SEA did not have a trucking dispatch operation to arrange for pick-ups or drop offs of containers from marine or rail terminals. (Id.) Likewise, SEA did not have any agreements with rail or trucking companies to handle inland transportation. (CX_02115, Choi (SEA) Dep. Tr. 66:18-23) And SEA does not have written transportation contracts with CNTs for the inland moves from the ZIM ports of discharge to SEA's customers or SEA's warehouses. (CX_02111, CX_02115, CX_02118, Choi (SEA) Dep. Tr. 62:15-23; 66:18-23; 69:20-70:3).

2. Responsibility To Manage, And Liability Flowing From, Certain CNTs Who Failed To Perform Rested With ZIM For Store-Door Moves

The service contracts ZIM references provide that a "preferred trucker" or CNT could be nominated. (RX-1794, RX-1821, RX-1857, RX-1885, RX-1922). A CNT is a trucker that a shipper may recommend to an ocean carrier to handle the inland transportation of cargo, which recommendation the ocean carrier was not required to honor. (SEA PFF at ¶ 30) In other words, ZIM is not required to use a CNT. (SEA PFF at ¶ 35). Every CNT nominated by SEA and ultimately hired by ZIM for SEA's store door moves was vetted and approved by ZIM. (SEA PFF

⁴⁰ Similarly, ZIM's colloquy regarding SEA's alleged "instructions to its CNTs regarding the required delivery date ("RDD") of its customers" is based on nothing more than ZIM's misunderstanding of the record evidence (RX-1025 and RX-0814). While it is the case that the two emails ZIM cites show instances where the RDD occurred after the expiration of free time, multiple emails to ZIM, including RX-1025, reflect that this occurrence was anticipated by the parties and that instructions were routinely given on how to handle such a situation. *See, e.g.*, RX-1033; RX-1712 (instructing ZIM to advise SEA if an appointment was scheduled after the expiration of free time).

at ¶ 36). ZIM reviewed the trucker's safety records and its good standing, and if a CNT had been approved by ZIM, ZIM and the CNT would then enter into an agreement for transportation services. (*Id.*) As such, the CNT approval process was driven by ZIM, and the agreements were solely between ZIM and the CNT. (SEA PFF at ¶ 37).

ZIM now pleads that the Presiding Officer set aside these facts and find that SEA should be responsible for a CNT's failure to perform, negating reparations. To the contrary, ZIM remained liable for acts and omissions of CNTs with respect to delivery of SEA containers under store door terms. Further, even in cases where CNTs failed to perform, ZIM cannot shift that responsibility to manage delivery of SEA cargo to SEA and must find alternative truckers to "get the job done" – the very promise that led SEA to hire and rely on ZIM. (RX-1794, "Should Merchant's Preferred Trucker...fail to perform as ordered, *Carrier shall nominate and provide instruction to an alternate Vendor....*"; accord RX-1821; RX-1857; RX-1885; RX-1925).

a. When CNTs Failed To Perform, The Service Contracts Require ZIM To Find Alternate Truckers Before Seeking Costs For Higher Priced Truckers

ZIM contends that on occasion, CNTs failed to perform and as such, SEA is responsible for such failures by CNTs. (Opp. at 18). But the fact that CNTs occasionally fell short of their cargo carriage responsibilities has no legal significance or impact on ZIM's continued obligation under a through bill of lading to (i) manage all truckers, including CNTs, to complete delivery of SEA containers on a through basis; and also (ii) find alternative truckers, when CNTs failed to

perform, to complete delivery before being able to charge the difference in costs for a higher priced trucker to SEA. As one of the service contracts ZIM relies on provides (RX-1857):⁴¹

12a – DESIGNATION OF TRUCKING VENDOR

For shipments designated for pick up or delivery at any U.S. location or facility located outside the Port or Container Yard (i.e., “Door” pick up or delivery, also referred to as “Carrier Haulage”), Carrier shall normally nominate the Vendor to provide such services. If, upon Contract of the parties, the Merchant is to nominate the Vendor (“Preferred Trucker”), the following shall apply:

Compensation rates shall be as set forth at Appendix G, and shall be subject to review and / or change in accordance with subparagraph 12b (below).

Should Merchant’s Preferred Trucker fail to accept a Transport Order within twenty-four (24) hours of issue, or fail to perform as ordered, Carrier shall nominate and provide instruction to an alternate Vendor; and

Any expense or charge in excess of the Compensation rate set forth at Appendix G, including demurrage, detention, or other storage fees, which accrue or are assessed as a result of the Merchant’s nomination of a new or alternate Preferred Trucker, or as a result of the Preferred Trucker’s failure to accept or perform a Transport Order, shall be to the account of the Merchant.

For SEA containers in dispute, there is no record evidence that ZIM arranged alternative truckers, (per paragraph 3, above), even when a CNT allegedly did not perform, nor evidence that ZIM accommodated SEA’s request to do so. With ZIM not having taken the required steps in the contracts that it relies on, it cannot shift cost and legal responsibility to SEA for CNT moves.

b. ZIM’s Circular Logic – It Did Not Abdicate Its Responsibilities For Store Door Delivery Because None Exists When CNTs Are Involved, and SEA Is Responsible For CNTs’ Failure To Perform – Has No Evidentiary Support And Fails

As shown above, the responsibility to select, contract with, and manage CNTs for delivery of SEA cargo through bills of lading rested with ZIM at all times and did not shift to SEA under the service contracts. Facing this inescapable conclusion, ZIM amazingly proclaims that in regard

⁴¹ Identical language in other service contracts that ZIM contends are applicable to the SEA-ZIM relationship can also be found in RX-1794; RX-1821-22; RX-1925; and RX-1885.

to CNTs it “was not exercising control over [them] or supervising their activities,” but in the same breath, also claiming that it “did not abdicate its common carrier responsibilities for store door delivery.” (Opp. at 19). ZIM’s circular logic, in essence, is that “ZIM cannot be faulted for jobs ZIM chose not to perform.” Yet, that is precisely SEA’s argument: when ZIM abdicated its responsibilities to manage CNTs or house truckers when facing supply chain challenges, it should be held accountable for its unreasonable conduct, not rewarded with D&D charges.

ZIM attempts to justify its position by meandering discussions of “tort principles,” which provide that general contractors should not be held accountable for the negligence of subcontractors, except in limited circumstances. (Opp. at 19). ZIM appears to argue that, because CNTs were involved, ZIM was not (but SEA was) the general contractor, and CNTs were subcontractors, whose failure to perform should be attributable to SEA because SEA was “exercising a much greater degree of control over the CNTs than was ZIM.” (Opp. at 19). That SEA paid attention to the progress of CNTs or the performance of their tasks (as it has an interest in seeing a specific delivery being made in accordance with the service contracts and customer requirements) does not change the fact that ZIM is the one that vetted the truckers, approved the truckers, contracted with the truckers, paid the truckers, and issued the work orders to the truckers, all under store door terms. CX_02123, Choi (SEA) Dep. Tr. 74:16-24.

Worse yet, ZIM offers a *single* email (RX-1208), which it contends is an example of a situation where the underlying delivery issue was caused by the CNT under SEA’s purported direct supervision, such that “the consequences thereof are lawfully and properly the responsibility of [SEA].” (Opp. at 19). But that email, as discussed above, is the February 8, 2022 email from SEA, requesting a CNT to prioritize delivery of non-ZIM containers because *ZIM containers were frozen under a Finance Hold*. See *supra* at pp. 44.

ZIM's position – it cannot abdicate its common carrier responsibilities under store door terms by choosing not to observe them in the first place – lacks legal or factual support.

C. ZIM's Policies And Procedures Were Unreasonable

1. ZIM Has No Meaningful Dispute Resolution Process

ZIM argues that it has “meaningful” dispute resolution policies and procedures because: (i) it has a single-paragraph rule in its tariff that ZIM will not charge demurrage if it fails to deliver cargo due to a carrier fault; (ii) its dispute webpage of about 260 words provides sufficient information on dispute requirements and timeline; and (iii) ZIM has uniform procedures and regulations concerning D&D disputes. These points fail for multiple reasons. (Opp. at 20-22).

First, the quoted Tariff language proffered by ZIM, with its admission at footnote 13, is regrettable. What credible reason can ZIM proffer for citing Tariff language that was not in effect for the overwhelming majority or detention charges incurred as the quoted language did not go into effect until June 2, 2022? ZIM claims that its “policy regarding the implementation of demurrage practices and regulations is clear and readily accessible in its tariff.” (Opp. at 20). Yet, it somehow failed to provide the applicable tariff language for 2019-most of 2022 in its brief and it took effort on the part of SEA to locate the correct applicable Tariff rule. CX_08927-CX_08928. ZIM then proffers “that Rule 4.G of ZIMU-136 is ZIM's current rule. The rule in effect during the period from late 2019 to mid-2022 was Rule 23.F of ZIM-480. The latter is *slightly less* detailed than, but consistent with, the current rule.” (Opp. at 21, fn. 13) (emphasis added). The applicable Tariff language for 2019-2022, the bulk of SEA's shipments was as follows:

F) FOR CARRIER CONTROLLED INLAND DOOR OR RAIL SERVICE, DEMURRAGE OR STORAGE CHARGES ASSESSED BY THE RAIL UNDER CIRCUMSTANCES BEYOND THE CONTROL OF THE CARRIER AT THE POINT OF INTERCHANGE (INCLUDING, BUT NOT LIMITED TO, STRIKES,

LOCKOUTS, FRUSTRATED APPOINTMENTS AND/OR INABILITY OF THE CONSIGNEE TO RECEIVE THE CONTAINERS FOR WHATEVER REASON) SHALL BE FOR THE ACCOUNT OF THE CARGO.

ZIM Historical Tariff, ZIM-480 23.2(F), CX_08927. Regardless of ZIM's misstatements, the current and historical Tariff language does not in any way address how a customer like SEA would initiate a dispute and appeal an adverse decision, if necessary; as such, it does not provide any meaningful direction on how to dispute ZIM's demurrage charges. ZIM knows this plain as day. It intentionally chose not to cite it, forcing the Presiding Officer and SEA to scour around and find ZIM's own Tariff language to see if it actually supported its argument which it does not.

Second, ZIM boasts that its dispute webpage – containing approximately 260 words in total – has “three separate dispute email addresses,” none of which lists any actual person(s) or phone number(s). (Opp. at 21; SEA PFF at ¶ 122). ZIM's barebone “dispute checklist” is equally unhelpful, for instance, by asking customers to provide all “relevant contractual terms” for “incorrect free time and/or rate dispute(s).” (Dispute Required Checklist).⁴² As to the “timeline,” all ZIM provides in its website is as follows: “All disputes must be received by ZIM within 30 days from date of invoice; any disputes received thereafter will be rejected as Time Barred.” (*Id.*) Worse yet, though ZIM does not independently verify the D&D charges that it seeks from customers (CX_04603, Cleva (ZIM) Dep. Tr. 74:6-11), it does put the onus back on the customers to submit all affirmative evidence that they do not owe the disputed charges for ZIM to recognize their disputes: “[u]ntil all required documents are submitted to ZIM, your Dispute will not be considered ‘received’ and no action will be taken.” (<https://www.ZIM.com/tools/detention->

⁴² Available at <https://www.ZIM.com/tools/detention-demurrage-and-freight-disputes> (last accessed Sept. 30, 2023).

demurrage-and-freight-disputes; *see also* SEA PFF at ¶ 127; CX_04598, Cleva (ZIM) Dep. Tr. 69:3-13). Against this backdrop, it comes as no surprise that ZIM admits that it does not have a company-wide uniform document or policy entitled or pertaining to “Criteria To Be Used In Evaluating Demurrage Disputes.” (Opp. at 22).

Third, ZIM claims that SEA misstates Ms. Speight’s testimony as if to suggest that there are company-wide training materials provided on D&D collection practices. (Opp. at 22). ZIM is wrong. Ms. Speight made it clear that ZIM’s Dedicated Service Group (“DSG”) has “self-created,” not company-created and provided, “documents” on D&D practices, which Ms. Speight admitted are, at best, “ad hoc” and not based on “a practice, policy, and procedure where ZIM is evaluating in the first instance whether [D&D] should be charged.” (CX_02895-CX_02896, Speight (ZIM) Dep. Tr. 96:11-97:16). This is consistent with ZIM’s Mr. Weingartner’s testimony that “he,” in his individual capacity, provided his team some materials on compliance with the Shipping Act and the OSRA, but that he was not aware of any company-wide training materials that were provided. (CX_04867-CX_04868, Weingartner (ZIM) Dep. Tr. 61:7-62:20).

Nothing in ZIM’s opposition rebuts the conclusion that ZIM has not established clear, company-wide dispute resolution processes and procedures, and its current billing practices do not provide transparency or sufficient information to determine the validity of D&D charges.

2. ZIM Did Not Provide Company-Wide, Uniform Training On Critical FMC Regulated Matters

ZIM’s Opposition does not rebut SEA’s argument regarding ZIM’s lack of training on the FMC regulations, the Incentive Principle, the Shipping Act or the OSRA. Indeed, ZIM admits that several ZIM employees “did not receive such training”; instead, ZIM boasts that at least “one” person (Mr. Yaacoub) did receive unidentified “compliance” training. (Opp. at 22).

Because the facts above are not helpful to its cause, ZIM then accuses SEA of “grossly mischaracterizing the testimony of ZIM witnesses” in this regard. (Opp. at 23). ZIM also complains that SEA did not acknowledge “very formal” training Ms. Haynie received on the 2022 Shipping Act. (Opp. at 23). Yet, in the very testimony ZIM relies upon, Ms. Haynie made a direct comparison to ZIM’s pre-OSRA training, which, in her own words, was “not as formal.” (CX_04135, Haynie (ZIM) Dep. Tr. 129:8-15). For the overwhelming majority of the relevant time period in this litigation, Ms. Haynie had received, at best, “not formal” Shipping Act training.

Likewise, ZIM wishes to emphasize that Ms. Ramage has a copy of the Code of Federal Regulation on her desk and that she receives emails on compliance subjects. (Opp. at 23). Upon a closer look at Ms. Ramage’s testimony, however, it is not at all clear how often, if at all, she consults the C.F.R. Indeed, Ms. Ramage could not identify any specific regulations that she reviews or works with frequently. (CX_04401, Ramage (ZIM) Dep. Tr. 23:14-16). With respect to the compliance emails, Ms. Ramage testified that she does not know (i) who in the company sends out those emails or (ii) even whether the emails generally summarize what is happening in the maritime space. (CX_04403, Ramage (ZIM) Dep. Tr. 25:4-8). Therefore, it is clear even from the testimony that ZIM purports to rely on that ZIM’s employees do not receive uniform or regular training on FMC regulations, the Shipping Act or the OSRA.

ZIM’s contention that “the most egregious example of [SEA’s] distortion of the factual record” is SEA’s alleged citation of ZIM’s Mr. Weingartner’s testimony for the proposition that “there was no Shipping Act compliance training,” likewise collapses under scrutiny. (Opp. at 23). ZIM cites CX_0486[8], 62:10-1[3]⁴³ asserting “Mr. Weingartner testified that there are elements

⁴³ This appears to be a typo.

of Shipping Act compliance training in ZIM corporate training.” (*Id.*) The quoted section, at best, is vague, where Mr. Weingartner was trying to remember facts, but could not be “100%” sure:

A. I’m trying to think if there’s anything that comes through our corporate training process that’s specific. There are elements of that that come through corporate training. I’m not sure if it’s -- **I would not be 100 percent sure** if it’s specifically noted as Shipping Act compliance training.

CX_04868, Weingartner (ZIM) Dep. Tr. 62:8-13. However, Mr. Weingartner made it clear that “he,” in his individual capacity, provided his team some materials on compliance with the Shipping Act and the OSRA, but that he was not aware of any company-wide training materials provided:

Q. Do you recall a, you know, specific Shipping Act compliance training module or materials being, you know, part of what your team gets in the normal course of your work?

A. I've provided that to my team through tariff review in context of the Shipping Act, **but from a corporate perspective, not that I've seen.**

(CX_04868, Weingartner (ZIM) Dep. Tr. 62:14-20) (emphasis added). ZIM contends, incorrectly, that it had a robust company-wide training program for employees on the FMC regulations, the Shipping Act, the Incentive Principle, and OSRA. But ZIM’s training, at best, was informal, sporadic, inconsistently held, incomplete and not centrally administered.

3. ZIM’s “Publicly Available” Dispute Resolution Website Lacked Necessary Details, And “The Demurrage Committee” – Not Publicly Available Or Accessible By Customers – Is Merely A Business Unit

As shown above, ZIM’s 260-word, dispute resolution webpage lacks any meaningful detail as to how ZIM’s dispute resolution process works such that customers could actually understand and utilize it. Therefore, it comes as no surprise that Ms. Fernando, though she exchanged many emails with ZIM personnel, was not “familiar with the ZIM portal for disputing invoices” or that

she “never submitted a dispute of an invoice to the ZIM portal.”⁴⁴ (CX_02392-CX_02393, Fernando (SEA) Dep. Tr. 72:22-73:5). Instead, ZIM continues to elevate form over substance, to the extent where even “if a customer disputes [and] makes it known repeatedly to [ZIM] via email or call that [the customer] dispute[s]” a charge, ZIM does not consider that charge disputed, “as long as it did not come through that formal [] website.” (CX_03199-CX_03200, Yaacoub (ZIM) Dep. Tr. 142:14-143:14).

Indeed, ZIM’s efforts to comply with the FMC regulations has amounted to little more than window dressing. ZIM admits that it had no intention or plan to provide a “detailed roadmap of ZIM’s internal processes made available to the public” because “nothing in the Commission’s regulations requires a carrier” to do so. (Opp. at 24). Nevertheless, ZIM wishes to persuade the Presiding Officer to find that ZIM’s dispute resolution policies and procedures are just and reasonable because its deficient website was complemented by “the Demurrage Committee” that is neither publicly available nor accessible by the customers directly. Rather, a group of ZIM’s senior business executives decides, without any “written guidelines” or “written policy,” whether to waive certain disputed D&D charges entirely based on commercial considerations. (CX_03090-CX_03094, Yaacoub (ZIM) Dep. Tr. 33:10-37:16). To the extent that ZIM’s demurrage policy was consulted, the Demurrage Committee decided to ignore it as well as the applicable contract and tried to, for instance, collect D&D charges that were conclusively time-barred because ZIM forgot to issue them timely. (SEA PFF at ¶ 104). Indeed, the Demurrage Committee was aware

⁴⁴ Based on Ms. Fernando’s deposition testimony, ZIM contends that “Samsung” claims it was not aware of the ZIM dispute resolution email addresses. (Opp. at 24). This is incorrect. *First*, Ms. Fernando was deposed in her individual capacity, not as an officer of SEA, and therefore was not testifying on behalf of SEA. *Second*, Ms. Fernando did not testify that she was unaware of the “ZIM dispute resolution email addresses,” but only that she was not familiar with the portal on ZIM’s website. (CX_02392-CX_02393, Fernando (SEA) Dep. Tr. 72:22-73:2).

that such an effort was, in essence, an effort to have the customer “agree to paying Z[IM] a ‘**profit**’ for an error we/Z[IM] did to ourselves.” (*Id.*; CX_04767, Cleva (ZIM) Dep. Ex. 9) (emphasis added). Still, ZIM still tried to “explore a **deal** based on actual cost.” (*Id.*) (emphasis added).

The record evidence establishes, and ZIM’s Opposition does not, and cannot, rebut, a clear conclusion: ZIM’s publicly available dispute resolution system was just bare-bones, designed to minimally comply with the FMC regulations, and the Demurrage Committee was not interested in resolving customer disputes, but rather in reaching a “**deal**” that would make ZIM “**profit**.”

4. ZIM Admits That It Made No Changes To Its Policy To Address Supply Chain Issues During The Pandemic – But Applied Them Most Indiscriminately To Extract More D&D Charges

ZIM admits, as SEA argued in its initial brief, that its “policies and procedures” did not change at all and “remained the same.” (Opp. at 27). ZIM tries to explain the exponential increase in its D&D charges extracted from SEA based on SEA’s “increased cargo volumes throughout the pandemic” (Opp. at 27). Quite the contrary. Mr. Rapske testified that from January 2019 to January 2022, there was only a modest increase (approximately 10% to 15%) in SEA’s volume of goods being shipped to the U.S. market. (CX_02211, Rapske (SEA) Dep. Tr. 39:7-15). The modest growth of SEA’s volume of goods shipped to the U.S. cannot justify or explain away the staggering demurrage revenues that ZIM has enjoyed during the pandemic, such as “\$242.9 million in income from demurrage” between 2021 and 2022. (SEA PFF at ¶¶ 84-93). Instead, as established in SEA’s Initial Brief and PFF, ZIM’s “charge first and ignore later” D&D policies and its punitive collections strategy, including the indiscriminate use of finance holds, are the only adequate explanations for such an explosive increase in ZIM’s income from D&D charges.

5. ZIM's Invoicing Shortfalls Contributed to Spiraling D&D

ZIM chose *not* to rebut most of SEA's carefully chronicled multi-year-long invoicing shortfalls, but instead (1) openly admitted ZIM's "failure . . . to follow the most efficient possible [invoicing] policies and procedures"; and (2) quibbles that two documents that show ZIM's HQ-level directive to ZIM U.S. to collect overdues do not specifically discuss SEA's D&D charges.

SEA does not dispute ZIM's first admission above, but simply adds that not only were ZIM's invoicing practices not the most efficient, they effectively put the heavy onus on SEA to explain why ZIM's own mistakes could not be resolved by SEA internally by forwarding the information to the right people at SEA or non-SEA foreign and domestic entities. (SEA PFF at ¶ 224). ZIM is, in essence, indignant that SEA dare to ask ZIM to fix its own mistakes.

Next, ZIM's criticizes SEA's characterization of two documents. First, while CX_05629-CX_05630 (a February 14, 2021 email from Mr. Dotan to ZIM's U.S. CFO, noting that "82% of the 90+ days overdue for the entire company was from U.S." and that he "need[s] to have more information and action on it") does not specifically discuss overdues for SEA, it does make clear that ZIM HQ set a non-negotiable tone with ZIM U.S. to aggressively collect them. ZIM admits this *did* include D&D charges. (Opp. at 28). Second, CX_04761 (a February 2020 email from ZIM U.S.'s then-President to collect uncollectible, time-barred charges despite internal warnings of "heavy pushback") is not in relation to only shippers such as SEA, but it shows a pattern and practice of ZIM's rampant campaign to collect as many D&D charges as it possible could during the pandemic. This campaign extended to shippers like SEA as evident from the significant increase in D&D invoicing of SEA during the pandemic. (CX_05931, SEA Smith Report Ex. 2).

ZIM's decision to ignore, and failure to rebut, its practices and pattern of charging the wrong parties and of untimely invoicing do not make them disappear. (SEA PFF at ¶¶ 85-118).

6. ZIM's Practices And Regulations Regarding Empty Returns Are Unjust Or Unreasonable

When neither law nor facts are on ZIM's side, ZIM resorts to *ad hominem* attacks on Mr. Choi of SEA for "lack[ing] even the most basic understanding of the return of empty containers and the billing of detentions charges." (Opp. at 29). ZIM's basis for such a personal insult is nothing more than "ZIM disagrees with Mr. Choi's understanding." On one hand, Mr. Choi, a seasoned logistics supply person with a leadership role at SEA, testified that under store-door moves, it is ZIM's responsibility to check whether a container is empty and to return the container to the terminal. (Opp. at 29; CX_02125, Choi (SEA) Dep. Tr. 76:14-21). On the other hand, ZIM, without citation to any record evidence or case law, disclaims such a responsibility. ZIM's *ipse dixit* disclaimer of its responsibility for arranging and directing the trucker, including checking the status of empty containers and ensuring their return, is a mere opinion or complaint at best, not a well-reasoned position supported by law or facts.

ZIM's analysis of detention charges from quarter to quarter and its conclusion that there is "no correlation between ZIM's alleged conduct and the amount of detention being paid by [SEA]" is unfounded. (Opp. at 30). ZIM's mathematical analysis is confusing and lacks any basis or clear methodology. The fact that ZIM's detention charges (for equipment and drivers) exponentially increased during the pandemic, when compared to the amounts in 2019, is incontrovertible and remains unrebutted by ZIM. Indeed, this is reflected specifically as to SEA's detention payments to ZIM in CX_05391, and for ZIM generally in its legally-mandated filings as a publicly-traded company with the U.S. Securities and Exchange Commission (SEA PFF at ¶ 246).

D. SEA has Established its Damages/Losses with Reasonable Certainty, and demonstrated that ZIM's Conduct was the Proximate Cause of its Losses⁴⁵

1. SEA has Proved its Damages/Losses with Reasonable Certainty

ZIM's argument that "Samsung has failed to prove damages with reasonable certainty" is meritless. (Opp. at 36). SEA provided a highly detailed and well-supported recitation of its losses in connection with ZIM containers. The extensive factual information on SEA losses, including bill of landing numbers, container numbers, dates, amounts paid, locations, charge type, and on and on, was both produced in detailed records in the document production and was the principal subject of the expert report of Dr. Greg Smith, a Certified Public Accountant and specialist in forensic accounting and damages analysis.

ZIM is able to reference that SEA's harm arises in part from over 10,000 charges on 2,800 containers because SEA produced detailed records in support of those charges. (Opp. at 33). No evidentiary challenge has been made in this proceeding to the sufficiency and certainty of the basis or calculation of the harm SEA alleges in this proceeding—not in Respondent's Opposition Brief, not in the rebuttal report of ZIM's Mr Zayas, nor during the deposition of Dr. Smith. Indeed, ZIM admits that "it is correct that ZIM and its expert witness Ricaro Zayas did not and do not challenge the amounts Samsung claims to have paid." *Id.* With respect to proving with reasonable certainty that (i) SEA was invoiced and incurred inland charges in connection with inland movement of ZIM containers, and (ii) that ZIM paid for such charges, the evidence is not only more than sufficient, it is not contested. Finally, ZIM's contention regarding the scant examples of warehouse/customs issues does not mean SEA is not entitled to damages.⁴⁶

⁴⁵ Because ZIM's arguments as to proximate cause and damages are intertwined (Opp. at Sections D & E), SEA addresses them in this one Section "D".

⁴⁶ These issues as to damages is opposed in SEA's Response to ZIM's PFFs Nos. 61, 62, and 71.

2. SEA has Demonstrated that ZIM's Violations are the Proximate Cause of its Damages/Losses

In a section 41102(c) causes of action the complainant must prove its case by a preponderance of the evidence. 5 U.S.C. § 556(d); 46 C.F.R. § 502.155; *Maier Terminals, LLC v. Port Auth. of N.Y. & N.J.*, FMC Docket No. 08-03 (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*, Docket No. 15-04 (FMC Aug. 18, 2021).

The crux of ZIM's opposition on damages (both damages calculation and proximate cause), is that the possibility that ZIM might bear some responsibility for some losses should result in ZIM having no liability for any losses. ZIM's expert, Mr. Zayas, does not credibly challenge *all* of the damages, instead, he argues that *some* of the damages may be suspect. Even in ZIM's brief, it challenges SEA's damages because SEA seeks recovery of all of its documented losses, without discount for any responsibility of SEA for some of the charges. Opp at 36. ZIM's position is faulty because the possibility that SEA could bear responsibility for some losses is not evidence or a sufficient argument that ZIM does not bear responsibility for the majority of the losses.

ZIM then asserts that SEA cannot prove entitlement to reparations ZIM knows exist because SEA does not subject each of the 9,984 charges to individual analysis to test its proximate cause. Opp. at 31-33. ZIM argues this under the guise of necessary "charge-by-charge" or "shipment-by-shipment" analysis. *Id.* ZIM obfuscates. What the Commission requires is amply establishing violations and damages, which in many cases where details of specific shipments are relevant to damages or liability, *could* benefit from a "shipment-by-shipment" analysis.

Here, there are no issues with the ability to calculate the damages on a shipment by shipments basis, since the losses were calculated on that basis. The only issue is whether the

liability requires a shipment be shipment analysis. But in this case, ZIM's conduct did not differ on a shipment by shipment basis, rather, ZIM's conduct and practices applied to categories of shipments. For example, as discussed above, ZIM categorically treated store door moves with CNT truckers as similar to CY moves, and as a result charged all demurrage and detention costs to the consignee by default.⁴⁷ There is no evidence that ZIM's conduct with respect to demurrage or detention was applied differently in similar situations. To the contrary, ZIM's wrongful conduct was rather consistent. As a result, SEA's treatment of groups of charge types that were accorded similarly wrongful treatment as a matter of ZIM's practices, achieves the same purpose of a "shipment-by-shipment" analysis. As to ZIM's generalized assertion of SEA potential responsibility, if it has justifications for its conduct, ZIM should show them.

Further, the cases that ZIM cites are either not relevant or are misstated. First, *Euroussa* is not applicable because it involved an enforcement action where the Bureau of Enforcement alleged that three intermediaries had violated section 10(b)(11) of the Shipping Act by "knowingly and willfully accepting cargo from or transporting cargo for the account of an OTI that did not have a tariff and a bond as required by sections 8 and 19 of the Act," and that respondent Tober Group, Inc. "violated section 10(b)(2)(A) of the Act by providing service in the liner trade that was not in accordance with the rates and charges contained in a published tariff." *Euroussa Shipping Inc., Tober Group, Inc., and Container Innovations Inc. – Possible Violations of Shipping Act*, FMC Docket No. 06-06, 2009 FMC LEXIS 38, *1 (ALJ October 9, 2009). The presiding officer found that due to the nature of a 10(b)(11) violation, a shipment-by-shipment analysis was required.

Although BOE may be correct in its assertion that "utilizing a shipment-by-shipment analysis ... is not an approach[] that is

⁴⁷ See *supra* Section (B)(1)(c).

required in all situations.”...The elements of proof of a violation of section 10(b)(11) do not change from the first violation to the 278th violation. The fact that Tober operated as a common carrier on one shipment does not mean that it operated as a common carrier on another shipment. While evidence of how Tober operated on some shipments may provide circumstantial evidence of how Tober operated on other shipments, the evidence for each shipment must prove that Tober assumed responsibility for the transportation of the shipment from the port or point of receipt to the port or point of destination, and used, for all or part of the transportation of the shipment, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

Euroussa, 2009 FMC LEXIS at *33. *Euroussa* did not involve a damages consideration under section 10(d)(1). When determining violations under section 10(d)(1), the question at issue is whether a carrier’s policies, practices, and procedures were unreasonable. Unlike a section 10(b)(11) case, when determining the reasonableness of a carrier’s practices under section 10(d)(1) it looks to the practices as a whole, not on an individual basis. The shipment-by-shipment considerations under *Euroussa* are inapplicable here. ZIM is reductively creating an “all or nothing” approach citing *Euroussa* without explaining its requirements. *Euroussa*, 2009 FMC LEXIS at *38.

Second, in the *Hapag-Lloyd* decision cited by SEA, the Commission criticized the parties for dealing in generalities but was not saying that literally every shipment needed to be analyzed. Rather, the Commission appeared to ask the parties to put greater focus on the specific shipments, which SEA has done. 4 F.M.C.2d 53, 82. Any discussion acknowledging the difference in scale of a case like this one as compared to *Hapag* is necessary; ZIM fails to acknowledge that the *Hapag* decision related to “conduct [that occurred] at least 11 times.” *Id.* at *2. There are thousands of D&D charges here, but the conduct that applied was applied uniformly, time and time again, including the Finance Holds which, for example, swept up over 600 SEA containers during a three months long Finance Hold. *See* CX_05350-CX_05351, Rosenberg (ZIM) Dep. Tr. 47:11-48:3.

3. Shipment-by-Shipment Calculations of Losses Are Not Warranted

SEA is not arguing in generalities; SEA's position is that liability is established by a preponderance of the evidence with the materials SEA has provided and that ZIM's chronically unreasonable and unlawful conduct categorically to the shipments under store door terms.

The determination of Shipping Act liability for SEA's claims does not turn on the facts of individual shipments, because the violations applied to scopes of similarly situated shipments, and there is no dispute as to the measure of the charges and losses. If, however, the parties were compelled to consider a "shipment by shipment" analysis, while wasteful and burdensome, it is certainly possible. For example, pursuant to FMC Rule 251, the Presiding Officer can rule on ZIM's Shipping Act violations, and later determine the damages on a shipment by shipment basis.

Commission Rule 251 is as follows:

If many shipments or points of origin or destination are involved in a proceeding in which reparation is sought (See § 502.63), the Commission will determine in its decision the issues as to violations, injury to complainant, and right to reparation. **If complainant is found entitled to reparation, the parties thereafter will be given an opportunity to agree or make proof respecting the shipments and pecuniary amount of reparation due before the order of the Commission awarding reparation is entered. In such cases, freight bills and other exhibits bearing on the details of all shipments, and the amount of reparation on each, need not be produced at the original hearing unless called for or needed to develop other pertinent facts.** [Rule 251.]

46 C.F.R. § 502.25 (emphasis added). If ZIM insists on a shipment-by-shipment review of the quantum of damages after the Presiding Officer has found liability, and it is ready to pay the attorney fees and costs with the undertaking, that option is available under the FMC's Rules. But ZIM's attempt to avoid damages altogether based on the argument that a shipment-by-shipment analysis is essential, is not a defense to ZIM's liability.

Further, it is notable that ZIM does not even acknowledge, let alone rebut, the precedent in *OJ Commerce, LLC v. Hamburg Sudamerikanische Dampfschiffahrts Gesellschaft A/S & Co. KG & Hamburg Sud North America, Inc.*, FMC Docket No. 21-11, 2023 WL 3969857, at *20 (ALJ June 7, 2023) (addressing the scope of causation satisfied by the complainant in case where the Presiding Officer issued a penalty of nearly \$10 million to Hamburg Sud for violations of the Shipping Act). Counsel should be well aware of the authority as it was counsel of record for the ocean carrier therein. Nonetheless, ZIM focuses most of its attention on seeking to discredit the analysis of SEA’s expert Greg Smith as well as attack his professional standards on confusing grounds. Mr. Smith’s report demonstrates independent analysis beyond SEA’s allegations. Mr. Smith’s report and exhibits demonstrate the detailed analysis that provided the foundation for calculating SEA’s damages. *See* Smith Report Exhibit Nos. 2 & 10; *see also OJ Commerce* 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)).” SEA has established that ZIM is at fault and reparations are appropriate.

There is, in fact, no material dispute of fact as to BRG’s calculation of the charges and payments. And ZIM has admitted that “Samsung is correct that ZIM and its expert witness Ricardo Zayas did not and do not challenge the amounts Samsung claims to have paid.” (Opp. at 33). While ZIM accused SEA of not providing enough details regarding damages, it performed no analysis on the charges. ZIM argues that SEA is not in alignment with FMC precedent, admittedly performed no analysis related to charges, but then turns around and states that SEA has not gone beyond a generalized assessment despite the level of detail Mr. Smith’s report. Expert Smith’s report has an entire section on damages which breaks down charges by “inland transportation

charges, additional costs incurred, and lost revenue.” Mr. Smith even breaks down inland transportation charges into thirteen specific types and defines each one. Then, at Exhibit 2, these thirteen charge types are then broken down by financial quarter beginning Q3 2019.

The damages assessment as set forth in the Smith expert report is reliable. Just as in *OJ Commerce*, where the Presiding Officer credited the work of the complainant’s expert while not affording much weight if any to the *same* damages expert that has been employed here by ZIM, SEA’s damages position should be adopted.

E. The Evidence Supports SEA’s remaining Causes of Action

1. ZIM Retaliated Against SEA

As reflected in the record, ZIM retaliated against SEA through the utilization of Finance Holds. ZIM’s argument that no retaliation can be found is based on its contention that the exercise of its liens were lawful. As noted above, when analyzing lien rights through the lens of the Shipping Act, reasonableness, not lawfulness, is at issue. The record supports 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. *See OJ Commerce*, 2023 WL 3969857, at *33, citing Statement on Retaliation by the Commission, 3 F.M.C.2d at 201 (“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.’”).

2. ZIM Unreasonably Refused to Deal with SEA

As noted in SEA’s reply brief herein, unreasonable refusal to deal is determined on a case-by-case basis. To establish a refusal to deal is to fail to engage in good faith discussions. The

evidence in the record establishes that ZIM repeatedly refused to engage in discussion related to the amounts allegedly owed and instead utilized Finance Holds to induce payments. SEA PFF at ¶¶ 145-203. ZIM solely focused at collecting D&D charges at all costs, ZIM frequently and repeatedly put a Finance Hold on containers belonging to other Samsung entities that were otherwise unrelated to SEA. SEA PFF at ¶ 211.

ZIM cites to a number of documents in support of its contention that it did in fact waive/refund D&D charges. However, the documentation only further supports ZIM's inability to establish reasonable practices and procedures:

- RX-0838-44: SEA raised the issue that ZIM had incorrectly assessed demurrage not in accordance with the contracted free time. ZIM agreed with the findings and cancelled the invoices.
- RX-0914-17: ZIM rejected SEA's CNT and used its house trucker. The shipment was delayed and ZIM covered the storage charges as it was a store door move.
- RX-0005-00014: contains a list of a number of ZIM customers and a number of charges that ZIM has agreed to waive. ZIM does not provide support that the charges waiver were due to negotiations between ZIM and SEA or because of errors in ZIM's billing.

ZIM fails to provide any supporting evidence that establishes that it reasonably negotiated with SEA regarding the disputed charges. Instead, ZIM cites to charges that it waived due to errors in ZIM's own billing or that should have been covered under store door terms.

3. ZIM's Invoices Did not Comply with OSRA Requirements

The invoices provided is a representative example of a ZIM invoice. The invoice lists six containers with a free time start date of either May 22, 2022 or May 23, 2022. As noted by ZIM, the "container available" listed is a Sunday, which was not the actual "container available" date

for the containers. Instead, containers were actually available on May 23, 2022. Accordingly, the information provided by ZIM is not accurate and cannot be relied on by a shipper.

Moreover, ZIM's contention that OSRA is not applicable because the invoice requirements did not apply until after June 16, 2022, ignores that the invoice date is "July 12, 2022" after OSRA went into effect. CX_07492.

V. CONCLUSION

"Hold their cargo!!! 😊 😊". SEA PFF at ¶ 207. SEA concludes where it began its Initial Brief because it is telling ZIM did not address the revealing email chain in its opposition brief and only a few of the exchanges in its PFF. SEA submits the entire email chain should be reviewed because it is a microcosm of the entire dispute between the parties and has revealing internal communications as to ZIM's practices. We address each email within the chain:

- The email chain begins on July 8, 2020, with an email from ZIM's Elizabeth Harris to SEA with a form dunning email noting amounts due in arrears, claiming backup was provided, and that "all dispute(s) requests should be forwarded directly to ZIM Dispute Request Desk (dispute-request.us@zim.com).” CX_07228.
- The next email, on July 28, 2020, from ZIM's collections manager, Adrienne Martin, to SEA notes "we have been advised to expect payment of \$145k by this Friday, July 21" though no support for this advice as to who said this. CX_07227.
- On July 28, 2020, in a response email SEA's logistics finance manager, Blair Ji, replies to ZIM and challenges that there had been approvals for this purported \$145,000 outstanding amount. SEA does not have any record of it and says, "please provide approvals of email threads for the invoices." She also notes the proper SEA divisions with which to be sending invoices which correlate with the specific SEA cargo that was shipped. CX_07226.
- On July 29, 2020, ZIM responds questioning whether SEA meant to send this email to ZIM because ZIM provided "all invoices and documents according to our *standard process* and have sent invoice copies to the relative parties at Samsung." (emphasis added). If payment was not made, the threat of a "credit suspension" was issued. CX_07226.

- On July 29, 2020, SEA’s logistics finance manager responds again and confirms the email was indeed meant for ZIM. She provides support for SEA’s issue and attached an email to ZIM on said issue. She reemphasizes the issue lies with the manner in which ZIM sent invoices, which caused confusion within SEA as they were being sent indiscriminately to the wrong departments. CX_07225.
- On July 29, 2020, the email chain now turns to *internal* discussions between ZIM personnel. US collections manager Adrienne Martin is asking if there is any agreement as to this invoice process SEA states and is asking the “DSG”, the Dedicated Service Group at ZIM for SEA’s account (as a purported important client), if ZIM actually sent the invoices in this SEA format. ZIM’s collections manager, sending these ever-increasingly threatening hold messages, does not even know the basic questions as to how ZIM handles SEA invoicing. CX_07225.
- On July 29, 2020, ZIM’s Barbara Speight, the DSG manager, again internally, states the DSG only addresses invoices for “prepulls and rail storage” and confirms the ADCInvoice@sea.samsung.com email for approvals that Ms. Ji referenced in her July 28, 2020 email to ZIM. She then notes the DSG for SEA does not even handle “port demurrage invoices” and offers no further support. CX_07224.
- On August 4, 2020, ZIM’s account collections specialist, Elizabeth Harris, again internally, notes “payment was not received as requested.” It make no reference to the internal questions that were asked as to SEA invoicing and practices or that anyone had been addressing this issue in the previous six days. CX_07224.
- On August 4, 2020, again internally, ZIM collections manager Ms. Martin realizes nothing has been done on the SEA invoicing issue in the intervening days and asks a Giles Lu for “feedback” as to the SEA invoice process in the contract. CX_07223.
- On August 4, 2020, again internally, Mr. Lu replies by sharing comments in italics from “Samsung US and Korean” [sic] that the manner in which the demurrage charges were being submitted was not correct and they were just sending invoice after invoice without correcting the issue. Mr. Lu says “can we know this is solved? Anyway I think what Yael told is to hold their shipment until they pay. Pls also help coordinate with them the format of the demurrage in the future as anyway its an argument.” CX_07223. So Mr. Lu’s advice, which was sought by other ZIM personnel, was to work with SEA on its request because they have a fair argument on the invoicing issues being raised.
- On August 5, 2020, again internally, ZIM’s Ms. Martin shows the collections team has no interest in following the advice it had solicited from Mr. Lu. Her email simply notes “Giles, your response is noted.” Disregarding the advice, she

immediately notes, “[w]e will start holding cargo effective today for Samsung Electronics only” and then notes the 268 containers that will not be subject to a Finance Hold. CX_07222.

- On August 5, 2020, again internally, in the last of the email chain, Ms. Harris claims she was never informed previously of SEA’s approval process emails request for invoices. As such, the infamous “Hold their cargo!!! 😊 😊” concluded her email and this email chain. CX_07222.

SEA respectfully submits this is not the way business should be conducted, especially when ZIM had a purported dedicated service team to assist SEA as it was a major client. July 29, 2020 was the last email exchange with SEA on the issue. After days of further internal ZIM emails, with questions as to the processes with SEA, the overly aggressive ZIM collections manager and specialists took charge and imposed Finance Holds wrongfully. As a company, when the DC Circuit and the Commission had found its overzealous lien rights invocation leading to the use of Finance Holds in *Adebisi A. Adenariwo v. BDP International, ZIM Integrated Shipping, Ltd. et al.* was improper, it should have acted more cautiously. It did not.

In a recent supply chain podcast, in regard to the FMC’s responsibility to carefully consider the evidence proffered as to D&D charges during the pandemic, chairman Maffei noted “[d]etention and demurrage, until we adjudicate it we don’t whether it was fair or unfair, reasonable or unreasonable. **Certainly during the pandemic I’m comfortable saying a lot of those charges were unreasonable and maybe more than normal because there were several reasons why the ocean shippers simply couldn’t get it.** We talk about the Incentive Principle -- a charge is reasonable if it can incentive picking up that container or not...”⁴⁸ (emphasis added).

For the foregoing reasons, and those submitted in its initial brief, SEA respectfully submits

⁴⁸ See Mike King audio podcast episode, September 27, 2023, *supra*, fn. 9, Part 2 at minutes 30-34.

that it has proffered ample evidence to support a finding that ZIM's behavior violated the Shipping Act. And as a result of ZIM's unreasonable practices and procedures, SEA should be awarded \$10.8 million dollars 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.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

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

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