FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

SAMSUNG ELECTRONICS AMERICA, INC., *Complainant* v. SM LINE CORPORATION, *Respondent*.	**DKT. NO. 23-01**

Served: May 28, 2025

ORDER OF: Mary A. HERVEY, *Administrative Law Judge*.

INITIAL DECISION[1]

I. INTRODUCTION

A. Overview

This proceeding began on April 19, 2023, when the Federal Maritime Commission ("Commission" or "FMC") issued a notice of filing of complaint and assignment. Complainant Samsung Electronics America, Inc. ("SEA") alleges that Respondent SM Line Corporation ("SM Line") violated 46 U.S.C. §§ 41102(c), 41104(a)(15), 41104(a)(14), and 46 C.F.R. §§ 545.4 and 545.5 regarding its practices and the billing and payment of costs and charges on shipments of cargo, including demurrage, detention, rail storage, and other inland transportation charges. For the reasons set forth below, SM Line: (1) is found to have violated 46 U.S.C. §§ 41102(c), §§ 545.4 and 545.5, and is liable for reparations; (2) is found to have violated 46 C.F.R. 41104(a)(15), but is not liable for reparations; and (3) is found to have violated 46 C.F.R. 41104(a)(14), but is not liable for reparations.

B. Procedural History

On June 2, 2023, the Scheduling Order was served. On August 17, 2023, Respondent's Motion for Extension of Scheduling Order was filed. On August 28, 2023, Respondent's Amended Motion for Extension of Scheduling Order was filed. On August 30, 2023, Complainant's Opposition to Respondent's Amended Motion for Extension of Scheduling Order was filed. On September 7, 2023, the Order Partially Granting Amended Motion for Extension of Scheduling Order was served.

[1] This initial decision will become the decision of the Commission in the absence of review by the Commission. Any party may file exceptions to this decision within twenty-two days of the date of service. 46 C.F.R. § 502.227.

On October 10, 2023, Respondent's Motion for Confidential Treatment of Portions of its Motion for Leave to File Third Party Complaint and Exhibits was filed. On October 12, 2023, Respondent's Motion for Leave to File Third Party Complaint was filed. On October 16, 2023, Complainant's Opposition to Respondent's Motion for Leave to File Third-Party Complaint was filed. On October 25, 2023, Complainant's Motion for Extension of Scheduling Order, or, in the Alternative, Motion for Status Conference was filed. On October 25, 2023, Respondent's Response to Complainant's Motion for Extension of Scheduling Order, or, in the Alternative, Motion for Status Conference was filed. On October 30, 2023, the Order Granting Motion for Confidential Treatment was served. On October 30, 2023, the Order denying Motion for Leave to File Third-Party Complaint was served. On October 30, 2023, the Order Granting Complainant's Consent Motion for Extension of Scheduling Order was served.

On November 14, 2023, Respondent's Motion for Confidential Treatment of Portions of its Renewed Motion for Leave to File Third Party Complaint and Exhibits was filed. On November 17, 2023, Respondent's Renewed Motion for Leave to File Third Party Complaint was filed. On November 18, 2023, Complainant's Notice of Letter of Request was filed. On November 21, 2023, the Order Granting Request for Letter of Request Under Hague Convention was served. On November 22, 2023, Complainant's Opposition to Respondent's Renewed Motion for Leave to File Third Party Complaint was filed. On November 22, 2023, Complainant Samsung Electronics America, Inc's Motion for Confidential Treatment was filed.

On January 5, 2023, Non-Party Samsung SDS America, Inc.'s Motion to Quash or Modify Subpoena, or Alternatively for a Protective Order was filed. On January 12, 2024, Complainant's Motion to Quash Notice of Deposition or, in the Alternative, for a Protective Order was filed. On January 12, 2024, Complainant's Motion for Confidential Treatment was filed. On January 12, 2024, Respondent's Second Motion for Extension of Scheduling Order was filed. On January 12, 2024, Respondent's Motion for Confidential Treatment of Portions of its Response to Non-Party SDSA's Motion to Quash or Modify Subpoena, or Alternatively for a Protective Order was filed. On January 12, 2024, Respondent's Response to Non-Party SDSA America's Motion to Quash was filed. On January 16, 2024, Complainant's Response in Opposition to Respondent's Second Motion for Extension of Scheduling Order was filed.

On January 16, 2024, SM Line's Request for International Judicial Assistance Pursuant to the Hague Convention of 18 March 1970 on the taking of Evidence Abroad in Civil or Commercial Matters (Samsung Electronics Logitech) was filed. On January 16, 2024, SM Line's Request for International Judicial Assistance Pursuant to the Hague Convention of 18 March 1970 on the taking of Evidence Abroad in Civil or Commercial Matters (Samsung SDS Asia) was filed. On January 19, 2024, Respondent's Motion for Confidential Treatment of Portions of Its Response to Samsung Electronics America, Inc.'s Motion to Quash was filed. On January 22, 2024, Respondent's Motion for Confidential Treatment of Portions of Its Response to Samsung Electronics America, Inc.'s Motion to Quash (Amended) was filed. On January 22, 2024, SM Line Corporation's Amended Response in Opposition to Samsung Electronics America's Motion to Quash was filed.

On January 24, 2024, the Order Regarding Discovery Motions [Dkt. Nos. 40, 41, 42, 43, 44, and 51] was served. On January 26, 2024, the Order Granting Request for Letters of Request Under Hague Convention was served. On January 29, 2024, Complainant's Motion for

Determination of Claim of Privilege and Waiver of Same Concerning Single Document Produced by Respondent was filed. On January 29, 2024, SEA's Motion for Leave to Continue Rule 143(b)(6) Deposition was filed. On January 29, 2024, Complainant Samsung Electronics America, Inc.'s Motion for Confidential Treatment was filed. On January 31, 2024, the Order Denying Motion for Leave to File Third-Party Complaint was served. On January 31, 2024, the Order Granting Complainant's and Respondent's Motion for Confidential Treatment was served. On January 31, 2024, Respondent's Motion for Confidential Treatment was filed. On January 31, 2024, Respondent's Motion for Confidential Treatment of the Exhibits attached to SM Line Corporation's Response to Complainant's Motion for Determination of Claim of Privilege and Waiver of Same Concerning a Single Document Produced was filed. On January 31, 2024, Respondent's Motion to Quash Additional Notices of Deposition of Ki-Up Kim, Sung Hyun Kim, Gi-Yong, Kim, and Hyun Yong Jung (confidential version) was filed.

On February 5, 2024, the Memorandum Order Regarding Discovery Motions (Dkt. Nos. 55, 57, 61, 62, 68, and 69) was served. On February 22, 2024, the Memorandum Order Regarding Confidential Treatment was served. On February 23, 2024, Respondent's Motion to Compel Production of Documents was filed. On February 29, 2024, Non-Party Samsung SDS America, Inc.'s Opposition to Motion to Compel Production of Documents was filed. On March 8, 2024, the Memorandum Order Extending Schedule was served. On March 11, 2024, the Order on Respondent's Motion to Compel was served. On March 29, 2024, Complainant Samsung Electronics America, Inc.'s Motion for Confidential Treatment was filed. On March 29, 2024, Complainant's Motion to Compel and for Sanctions for Spoliation of Evidence was filed.

On April 4, 2024, the Stipulation and Order on motion to Compel was filed. On April 5, 2024, the Stipulation and Order on Motion to Compel was served. On April 12, 2024, the Notice of Extension of time was served, which extended the deadline for the initial decision to October 21, 2024, and the final decision to May 5, 2025. On April 12, 2024, Respondent's Motion for Confidential Treatment of Portions of Its Response to Samsung Electronics America, Inc's Motion to Compel and for Sanctions for Spoliation of Evidence was filed. On April 16, 2024, SM Line Corporation's Response in Opposition to Samsung Electronics America's Motion to Compel and for Sanctions for Spoliation of Evidence was filed.

On April 18, 2024, Samsung Electronics America, Inc.'s Initial Brief in Support of its Claims against SM Line Corporation and Appendix were filed. On April 18, 2024, Complainant Samsung Electronics America, Inc.'s Proposed Finding of Fact were filed. On April 22, 2024, Complainant's Reply in Further Support of its Motion to Compel and for Sanctions for Spoliation of Evidence was filed. On April 23, 2024, the Joint Motion for Leave to File Reply and Sur-Reply was filed. On April 23, 2023, the Order on Joint Motion for Leave to File Reply and Sur-Reply was served. On April 29, 2024, SM Line Corporation's Sur-Reply in Opposition to Samsung Electronics America Motion to Compel and for Sanctions for Spoliation of Evidence was filed. On May 16, 2024, Respondent's Motion for Confidential Treatment was filed. On May 16, 2024, Respondent SM Line Corporation's Reply Brief and Appendix were filed. On May 16, 2024, Respondent SM Line Corporation's Proposed Findings of Fact were filed. On May 16, 2024, SM Line Corporation's Reply to Complainant Samsung Electronics America, Inc.'s Proposed Findings of Fact were filed. On May 20, 2024, SM Line Corporation's Reply Brief and Appendix were filed. On May 20, 2024, Respondent SM Line Corporation's Proposed Findings of Fact were filed.

On May 23, 2024, the Memorandum Order Requiring Corrected Opposition was served. On May 29, 2024, the corrected version of Respondent SM Line Corporation's Reply Brief and Appendix were filed. On May 29, 2024, the corrected version of Respondent SM Line Corporation's Proposed Findings of Fact was filed. On June 6, 2024, the Notice of Filing of Response of Supreme Court of Singapore to January 26, 2024, Request for Assistance Pursuant to the Hague Convention was served. On June 21, 2024, Complainant Samsung Electronics America, Inc's Motion for Confidential Treatment was filed. On June 21, 2024, Complainant Samsung Electronics America, Inc.'s Response to Respondent's Proposed Findings of Fact was filed. On August 28, 2024, Complainant Samsung Electronics America, Inc.'s Notice of Filing the Response of the Seoul Central District Court was filed.

On September 12, 2024, SEA's Motion Requesting the Presiding Officer Issue a Subpoena After the Discovery Cutoff was filed. On September 23, 2024, the Order Granting Complainant's Motion Requesting the Presiding Officer Issue a Subpoena After the Discovery Cutoff was served. On October 10, 2024, the Notice of Extension of Time was Served, which extended the initial decision deadline to February 21, 2025, and the final decision deadline to September 5, 2025. On October 11, 2024, SEA's Motion Requesting the Presiding Officer Issue a Third-Party subpoena to SeaLead Shipping USA, Inc. for the Limited Purposed of Locating Mr. Yoon-Jai "Mark" Lee was filed. On October 16, 2024, the Order Granting Complainant's Motion Requesting a Subpoena to SeaLead Shipping USA, Inc. was granted. On October 31, 2024, the Notice of Filing of Response of Supreme Court of Korea to November 21, 2023, Request for Assistance Pursuant to Hague Convention was served.

On November 13, 2024, Complainant's Motion to Amend the Yoon-Jai Lee Subpoena was filed. On November 25, 2024, the Order Granting Complainant's Motion to Conform Subpoena was served. On December 6, 2024, the Supplemental Briefing Order was served. On December 17, 2024, the proceeding was reassigned to the undersigned ALJ. On December 20, 2024, Respondent's Motion for Confidential Treatment was served. On December 20, 2024, Respondent's Supplemental Brief was served. On December 20, 2024, Respondent's Supplemental Proposed Findings of Fact was filed. On December 20, 2024, Respondent's Supplemental Appendix was filed.

On January 7, 2025, Complainant Samsung Electronics America, Inc's Motion for Confidential Treatment was filed. On January 7, 2025, Complainant Samsung Electronics America, Inc.'s Supplemental Brief to Address the Testimony of Mr. Yoon-Jai Mark Lee was filed. On January 7, 2025, Complainant Samsung Electronics America Inc.'s Response to Respondent SM Line Corporation's Supplemental Proposed Findings of Fact was filed. On January 9, 2025, Complainant Samsung Electronics America, Inc's Supplemental Brief to address the Testimony of Mr. Yoon-Jai Mark Lee was filed. On January 9, 2025, Complainant Samsung electronics America, Inc's Response to Respondent SM Line Corporation's Supplemental Proposed Findings of Fact was filed. On January 27, 2025, the Notice of Extension of Time was served, which extended the initial decision deadline to June 22, 2025, and the final decision deadline to January 6, 2026. On March 12, 2025, the Order for Supplemental Information was served.

On April 3, 2025, Complainant Samsung Electronics America, Inc's Responses to the ALJ's March 12, 2025, Order for Supplemental Information was filed along with Attachment A.[2] On the same date, Complainant's Supplemental Appendix and Complainant Samsung Electronics America, Inc's Motion for Confidential Treatment were filed. On April 3, 2025, Respondent's Response to the Federal Maritime Commission's Order for Supplemental Information, Respondent SM Line Corporation's Second Supplemental Appendix, and Respondent's Motion for Confidential Treatment were filed. On April 7, 2025, Respondent SM Line Corporation's Second Supplemental Appendix was filed. On April 28, 2025, SM Line filed a Notice of Supplemental Authority.[3] On May 2, 2025, SEA filed its Response to Notice of Supplemental Authority. On May, 22, 2025, SEA filed its Second Response to Notice of Supplemental Authority.[4]

C. Arguments of the Parties

SEA's Complaint

SEA alleges that SM Line violated 46 U.S.C. § 41102(c), 46 C.F.R. §§ 545.4, and 545.5 by failing to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivery of property. Specifically, SEA alleges that the following practices and procedures related to the assessment of demurrage and detention are unjust and unreasonable: (1) assessing demurrage and detention charges on SEA for costs and charges in the inland intermodal transportation of SEA containers moving under store door terms for reasons that are not within SEA's control; (2) assessing demurrage and detention charges on SEA for costs and charges in the inland intermodal transportation of SEA containers when SM Line is responsible for pickup from the port, movement to the inland place of delivery, and return of SEA containers; (3) continuing to book new SEA containers under store door terms without taking adequate steps to address increasing delays and costs incurred in securing timely intermodal movement of SEA containers; (4) assessing demurrage and detention charges on SEA for costs and charges in the inland intermodal transportation of SEA containers without meaningful practice or procedure to first determine responsibility for such charges (under store door terms or otherwise); (5) assessing demurrage charges on SEA for costs and charges in the inland intermodal transportation of SEA containers accrued during periods that SEA containers were not available for pickup from marine terminals and inland terminals (under store door terms or otherwise); (6) failing to provide SEA with adequately detailed billing

[2] In its response to the undersigned ALJ's March 12, 2025, order directing the parties to submit supplemental information in order to ensure a fully developed record, SEA objected to the admission of new evidence after the close of discovery without the opportunity to conduct a reasonable inquiry into, *inter alia*, the authenticity of documents or conduct cross examination of witnesses. Based on a finding that the admission of new evidence without reopening discovery would be prejudicial to SEA and that the decision deadlines in this proceeding make extending the discovery impractical, SEA's objection is sustained and no new evidence submitted pursuant to the order shall be admitted into the record.

[3] The notice provided copies of the March 25, 2025, decision of the Federal Maritime Commission in *TZ SSE Buyer, LLC v. Yang Ming Marine Transport Corp*, No. 24-10 and notice not to review dated April 24, 2025, in *Samsung Electronics America, Inc. v. ZIM Integrated Shipping Services Ltd.*, No. 22-30.

[4] SEA updated its prior response by noting that both parties filed exceptions to the initial decision dated April 22, 2025, in *Samsung Electronics America, Inc. v. ZIM Integrated Shipping Services Ltd.*, FMC Dkt. No. 22-30, which was cited by SM Line in its Notice of Supplemental Authority. SEA argues that the decision has been rendered inoperative by the timely filed exceptions pending a final decision by the Commission.

information and/or invoices related to demurrage and detention charges to permit SEA to meaningfully understand and/or contest the charges; (7) refusing to extend free time and/or mitigate, waive, or reduce demurrage or detention charges that were not SEA's responsibility; (8) failing to have or employ an adequate dispute resolution policy or practice with regard to demurrage and detention charges; (9) assessing demurrage and detention charges on SEA as consignee for costs and charges of delays in the inland intermodal transportation of SEA containers moving under store door terms that serve no incentivizing principle and do not promote freight fluidity because SEA is not responsible for the inland portion of the transportation; (10) assessing detention charges for equipment return delays that were SM Line's responsibility and for delays arising because SM Line did not provide adequate opportunity to return containers; and (11) refusing release of SEA containers without payment of charges that were not SEA's responsibility. (Complaint ¶¶ 51, 53.)

SEA alleges that SM Line violated 46 U.S.C. § 41104(a)(15) after the effective date of the Ocean Reform Shipping Act of 2022 ("OSRA 2022") by seeking to invoice and charge SEA for demurrage and detention charges without including the information on the invoices that is necessary to comply with 46 U.S.C. § 41104(d). In addition, SEA alleges that pursuant to 46 U.S.C. § 41104(f) the failure to include the required information on an invoice with a demurrage or detention charge shall eliminate any obligation of the charged party to pay the applicable charge. (Complaint ¶¶ 56, 57, 58.)

SEA alleges that pursuant to 46 U.S.C. § 41104(a)(14), after the effective date of OSRA 2022 SM Line was not permitted to assess charges against SEA commencing the second quarter of 2022 because its practices in connection with the assessment of demurrage and detention charges were not in compliance with 46 U.S.C. § 41102(c) and 46 C.F.R. § 545. (Complaint ¶¶ 60, 61.)

SEA alleges that it unsuccessfully attempted to resolve this matter with SM Line prior to filing the complaint, but admits that it did not pursue alternate dispute resolution in accordance with 46 C.F.R. § 502.64.[5] (Complaint ¶¶ 63, 64.)

SEA requests that the proceeding be scheduled for oral hearing. (Complaint ¶ 65.)

SEA's Initial Brief

SEA argues that SM Line's policies and practices violated the Shipping Act and OSRA during the period it was in effect on more than 18,000 demurrage and detention charges incurred between 2020 and 2022. SEA argues that SM Line departed from standard industry practices for shipments moving under through bills of lading it refers to as "store door" shipments. SEA contends that the ocean carrier in store door shipments is responsible for arranging and paying for both the ocean and inland movement of cargo, and, as such, was responsible for all detention and demurrage charges for the inland transportation of SEA shipments, except in very limited circumstance where SEA's actions caused such charges. SEA contends that it incurred direct damages in the amount of $14,534,787 and additional damages of more than $2.6 million for

[5] The parties' Joint Status Report and Proposed Discovery Schedule filed May 25, 2023, states that CADRS had been contacted and a mediator had been assigned to handle the mediation conference. (Dkt. 13.)

additional costs (including hiring staff to handle charges and leasing space for containers) and lost profits (calculated as the difference between contracted price of goods and discounted price for which they were sold) as a result of SM Line's unreasonable practices with respect to the store door shipments of its cargo, as well as some container yard ("CY") cargo where the carrier's responsibility ends when the container is delivered to the container yard at the port of discharge. (Complainant's Brief[6] at 1-5.)

SEA contends that SM Line was responsible for demurrage, detention, and rail storage incurred in connection with rail moves because its obligations in store door moves extended from the marine terminal to the inland terminal yard. SEA argues that SEA cargo was not actually available for pick up at the rail terminal because the railroad began stacking containers on top of one another at the yard due to lack of chassis, making them inaccessible to truckers. (Complainant's Brief at 45.) SEA contends that SM Line failed to designate adequate return locations or implement appropriate policy to handle empty returns. (Complainant's Brief at 46.)

SEA argues that SM Line shifted its responsibility for inland transportation charges to SEA in order to maximize profits rather than incentivize the movement of cargo. (Complainant's Brief at 26-28.) SEA argues that SM Line made no changes to its policy to address supply chain issues during the COVID-19 pandemic. (Complainant's Brief at 38.) SEA argues that SM Line's contention that SEA was responsible for charges for shipments in which SEA utilized a Customer Nominated Trucker ("CNT") is specious, and is an improper attempt by SM Line to unilaterally convert a store door shipment to a CY move. (Complainant's Brief at 39.)

SEA argues that a document prepared by an SM Line employee in October of 2022 shows that its true intent was to use demurrage and detention charges to maximize revenue and profit rather than to incentivize the movement of cargo, while at the same time its public position was that charges were the price of the lost sales opportunity imposed to induce the quick return of equipment. SEA argues that SM Line's actual intent is also evidenced by the significant escalation of charges assessed over the period from 4th quarter of 2019 to 2022. (Complainant's Brief at 32.) SEA contends that SM Line's written policy directed the collection of all assessed charges regardless of the claim. (Complainant's Brief at 31.)

SEA argues that SM Line's own internal analysis conducted shortly after the complaint was filed showed that it was responsible for millions of dollars of the charges at issue. SEA contends that SM Line took advantage of the supply chain disruption caused by the COVID-19 pandemic and began shifting its responsibilities under store door shipments to SEA, and forced SEA to pay the charges in order for SM Line to move SEA's cargo.

SEA argues that the charges are unreasonable because: 1) SEA is not responsible for inland movement and the charges therefore cannot serve its primary function to incentivize movement; 2) SM Line required SEA to pay the charges without first evaluating whether SM Line or SEA was responsible for payment of the charges; 3) SM Line cannot satisfy its obligation to certify that its performance did not cause or contribute to the underlying invoice

[6] Samsung Electronics America, Inc's Initial Brief in Support of its Claims Against SM Line Corporation is referred to herein as "Complainant's Brief."

charges both pre and post OSRA; and 4) SM Line had the sole responsibility under a through bill of lading to arrange terminal cargo release.

SEA also contends that SM Line's invoicing and collection practices were unreasonable because: 1) SM Line automatically considered all detention and demurrage charges to be SEA's responsibility and had no procedures to determine whether the charges were valid; 2) SM Line had no meaningful dispute resolution process with specific criteria, lacked sufficient authority for SM Line's US office to resolve disputes because SM Line's Korean headquarters had final authority, and failed to establish policy in accordance with FMC's Interpretive Rule on Demurrage and Detention; and 3) SM Line's invoices issued between July 17 and December 31, 2022, failed to include the minimum information required by OSRA 2022, specifically at 46 U.S.C. § 41104(a)(15), and included unreasonable charges in violation of 46 U.S.C. § 41104(a)(14). (Complainant's Brief at 50.) SEA argues that SM Line's invoices failed to contain the information required under 46 U.S.C. § 41104(a)(15). (Complainant's Brief at 49.) SEA contends that SM Line's invoices included unreasonable charges in violation of 46 U.S.C. § 41104(a)(14). (Complainant's Brief at 50.)

SM Line's Reply Brief

SM Line argues that SEA has failed to meet its burden of proof to establish a violation of the Shipping Act. SM Line argues that SEA utilized CNTs and was obligated to promptly instruct the CNTs as their agents on how to move the cargo, but failed to do so within the time limits agreed upon by the parties. SM Line argues that SEA did not dispute the charges paid to SM Line via SM Line's dispute resolution system, but rather waited years to dispute each and every paid charge. SM Line argues that SEA has failed to meet its burden of proof to establish that it suffered damages that were proximately caused by SM Line's unreasonable conduct. SM Line argues that SEA's damages expert Gregory Smith did not properly quantify the damages alleged by SEA because neither he nor SEA engaged in the container-by-container analysis required by ALJ precedent to establish both liability and the extent of damages. (Respondent's Reply Brief[7] at 1-2.)

SM Line argues that the vast majority of the land leg of SEA's shipments were performed by SEA's agents, and that as consignee it can be subject to demurrage and detention charges when those charges are issued due to reasons that are not entirely beyond its control. SM Line argues that it was contractually obligated to use SEA's CNTs, and that SEA as the party instructing the truckers was the party primarily responsible for the actions and omissions that led to the charges assessed against SEA (Respondent's Reply Brief at 3-4.).

SM Line argues that cargo moves by CNTs are different from standard door terms in which SM Line selected the motor carrier, and that such distinction is acknowledged by an SEA internal document. (Respondent's Reply Brief at 5.) SM Line argues that SEA was in control of the CNTs and SM Line was acting as an agent for SEA in dealing with the CNT's pursuant to a written agreement that SEA contends is not legally binding. (Respondent's Reply Brief at 6-8.) SM Line argues that the fact that it acted as an agent for SEA is expressly stated in SM Line's

[7]Respondent SM Line Corporation's Reply Brief is referred to herein as "Respondent's Reply Brief."

governing tariff. (Respondent's Reply Brief at 8.) SM Line argues that SEA was understaffed and failed to provide timely instructions to the CNTs. (Respondent's Reply Brief at 8.)

SM Line argues that SEA has failed to meet its burden of proof to establish that each and every charge was unreasonable. (Respondent's Reply Brief at 8-10.) SM Line argues that this failure of proof was acknowledged by SEA's own liability expert who testified that he did not review any of the shipment on a case-by-case basis. (Respondent's Reply Brief at 10.)

SM Line argues that the report relied upon by SEA as proof that SM Line's own analysis shows that it is liable for damages was prepared shortly after the complaint was filed, was based on limited information, and is an insufficient basis to argue that all of the charges paid by SEA were unreasonable. It argues that the report was only a "stress test" prepared in anticipation of litigation, that it was based only on emails without confirming the underlying details, and shows that the bulk of the charges arose from either SEA operational issues or other issues unrelated to SM Line. (Respondent's Reply Brief at 10-13.) SM Line also argues that the October 2022 written proposal by an SM Line employee to use demurrage and detention to maximize profits was rejected by management and dated two months before the end of the relevant time frame. SM Line argues that its actual goal in assessing charges was to ensure that containers were returned quickly and to maintain equipment flow. (Respondent's Reply Brief at 11, 13-15.)

In reiterating its opposition to SEA's motion filed March 29, 2025, seeking the imposition of sanctions arising from SM Line's failure to preserve electronically stored information ("ESI"), SM Line argues in its brief that SEA failed to meet its burden to establish spoliation of evidence because it failed to show that such evidence existed, failed to show evidence was intentionally destroyed, and failed to show that if such evidence existed it would have been favorable to SEA. (Dkt. 78 and 84). SM Line argues that its emails were destroyed in connection with its long-standing document retention policy, and that it was under no duty to preserve evidence prior to the filing of the complaint on April 19, 2023. SM Line argues that its headquarters in Korea only becomes involved with demurrage and detention charges if a request for a discount, waiver or inactivation is advanced by a customer, and that otherwise, charges were issued and handled by SM Line's U.S. office. (Respondent's Reply Brief at 11, 15.) SM Line argues that SEA has failed to meet its burden to show that SM Line had an insufficient dispute resolution process because it has not demonstrated a single instance in which it disputed a charge that SM Line did not waive. (*Id.*) SM Line argues that SEA's reliance on six invoices with incomplete information is insufficient to prove that the hundreds of others sent were deficient. (*Id*.)

SM Line argues that it had a reasonable dispute resolution process in which it handled detention and demurrage charges on a case-by-case basis, that the invoices included a link to SM Line's website and an office email address where disputes were to be communicated, but that SEA did not take advantage of the dispute process and paid the invoices. It argues that its policy was to waive or refund demurrage and detention charges when incurred due to an act or omission of SM Line, and that its practices were reasonable. (Respondent's Reply Brief at 16.) SM Line argues that it unilaterally waived approximately two million dollars' worth of detention and demurrage during the relevant time period, and issued a "stop clock" pursuant to which it did not

bill demurrage and detention charges for 523 days at any port or terminal, including containers shipped by SEA. (Respondent's Reply Brief at 17.)

SM Line argues that its invoices were substantially compliant with the mandatory minimum information required by 46 U.S.C. § 41104(a)(15). It argues that the six invoices that SEA alleges do not conform to the mandatory requirements were issued during the transition period, were not paid by SEA, and that SM Line ultimately wrote them off. (Respondent's Reply Brief at 17.) SM Line argues that although SEA contends that SM Line billed approximately 18,000 demurrage and detention charges, the actual number collected by SM Line was closer to 1,300. (Respondent's Reply Brief at 17.)

SEA's Reply Brief

SEA argues that SM Line erroneously conflates the burden of proof for establishing liability with the burden of proof for establishing damages, that the spoliation of key evidence warrants mandatory adverse inference sanctions because SM Line blatantly ignored its duty to preserve evidence, and that there is evidence that Korea office detention and demurrage decision makers had relevant documents that were not preserved. It also argues that SEA failed to challenge all but two of the elements necessary to establish a claim under 46 U.S.C. § 41102(c), namely unjust and reasonable practices and proximate cause. (Complainant's Reply Brief [8] at 7-11.)

SEA argues that SM Line attempts to minimize the policy set forth in its internal document evidencing an intent to maximize income through demurrage and detention charges that was intentionally inconsistent with its outward messaging. (Complainant's Reply Brief at 11-12.) SEA argues that SM Line's detention and demurrage practice did not comply with the incentive principal, was not consistent, and lacked an external practice for disputing charges. SEA also claims that SM Line's claims that it waived charges and issued stop clocks are unsubstantiated and do not render its conduct reasonable. SEA reiterates that SM Line made no changes to its policy to address supply chain issues during the pandemic. (Complainant's Reply Brief at 14-28.)

SEA argues SM Line was responsible for the acts and omissions of all truckers on through bills of lading regardless of whether they were a CNT. SEA argues that the applicable RFQs,[9] service contracts, tariffs, and CNT forms did not mandate use of CNTs, that the use of CNTs did not shift the responsibility of SM Line to pay for demurrage and detention on store door moves, and that there is no evidence that SM Line was acting as SEA's agent, or that SEA was in control of the CNTs. (Complainant's Reply Brief at 29-43.) SEA argues that the record establishes that SM Line's Shipping Act violations are the proximate cause of SEA's damages. (Complainant's Reply Brief at 58.) SEA argues that SM Line violated OSRA 2022's invoicing requirements in violation of 46 U.S.C. § 41104(A)(15) and included unreasonable charges pursuant to 46 U.S.C. § 41104(A)(14). (Complainant's Reply Brief at 61-62.) SEA argues that the payment data, witness testimony, and expert report satisfy its burden of proof to establish the

[8] Samsung Electronics America, Inc's Reply Brief to SM Line Corporation's Opposition Brief is referred to herein as "Complainant's Reply Brief."

[9] RFQ stands for Request for Quotation.

amount of damages it sustained including direct damages in the amount of $14,534,787 and additional damages in the amount of $2.6 million, and that the legal precedent relied on by SM Line to argue otherwise is inapposite. (Complainant's Reply Brief at 63-79.)

Supplemental Briefs by the Parties

On November 26, 2024, SEA deposed Mr. Yoon-Jai "Mark" Lee via Zoom pursuant to the order authorizing the issuance of a subpoena after the close of discovery. (Dkt. 115.) Pursuant to the Supplemental Briefing Order served December 6, 2024, the parties were granted authority to file supplemental briefs and appendices limited to the new evidence offered at Mr. Lee's deposition. (Dkt. 127.)

SEA's Supplemental Brief

SEA filed a supplemental brief addressing the testimony of SM Line managing director and vice president Yoon-Jai "Mark" Lee taken at deposition late in the proceeding. In the brief, SEA argues that Mr. Lee made statements against interest, admitting that SM Line's Demurrage and Detention Management Improvement Plan dated October 26, 2022 ("D&D Improvement Plan") reflected the actual internal objective to maximize profits through demurrage and detention while at the same time publicly advancing an objective to promote cargo movement. SEA argues that his testimony does not support SM Line's assertion that the plan was never implemented because Mr. Lee lacked personal knowledge of key topics. SEA opines that Mr. Lee's sudden vague recollection following a deposition break that the plan had been rejected as too aggressive is unreliable because it appeared that Mr. Lee had been coached. SEA argues that SM Line's supplemental proposed findings of fact largely exceed the Briefing Order, and are not based on or supplemented by Mr. Lee's deposition testimony. SEA also argues that whether or not it was implemented the D&D Improvement Plan reflects SM Line's then-existing policy to maximize profits, and moreover, that SM Line's contention that the plan was never implemented is inconsistent with its prior admission that the plan increased the discount authority of the U.S. office, and its admission that the plan was implemented is binding. SEA also argues that all three of the recommendations in the plan were followed and implemented in the November 18, 2022, update to the policy. SEA reasserts its request for sanctions for spoliation of ESI and argues that the third highest ranking person in SM Lines' Korea headquarters admitted that relevant emails between 2020 and 2022 were destroyed (CX_000567.) It argues that SM Line's argument that the D&D Improvement Plan is inadmissible under Fed. R. Evid. 407 is untimely because it was not raised in its initial brief, and therefore waived. It also argues that the relaxed standards of the Administrative Procedure Act, not the Federal Rules of Evidence, govern admissibility in this proceeding, citing 81 Fed. Reg 9383 (December 22, 2016.) SEA argues that the D&D Improvement Plan establishes that at all relevant times SM Line Korea headquarters office had an internal practice of using demurrage and detention to maximize revenue and profit. (Complainant Samsung Electronics America, Inc.'s Supplemental Brief to Address the Testimony of Mr. Yoon-Jai "Mark" Lee.)

SM Line's Supplemental Brief

SM Line argues that the deposition testimony of Mr. Yoon-Jai "Mark" Lee establishes that SM Line did not consider the collection of demurrage and detention as revenue, that Mr. Lee

rejected the draft of the D&D Improvement Plan when it was presented to him by another employee, and that Mr. Lee instructed other SM Line employees to review SM Line policies in light of OSRA 2022. SM Line argues that SEA seeks to transform the isolated proposal by an overzealous employee into a companywide policy and ignores evidence that SM Line attempted to abide by the requirements of OSRA 2022. SM Line contends that the D&D Improvement Plan was never implemented. SM Line argues that Mr. Lee was head of the U.S. branch office of SM Line from January 2017, through November 2021, and head of the sales division in Seoul from 2021 through November of 2022, during which time the operations department primarily responsible for developing demurrage and detention policies reported to him. SM Line argues that Mr. Lee would offer guidance on the overall policy for all regions including the U.S., and it was then up to the leader of operations team to present policy proposals to Mr. Lee for review. SM Line argues that Mr. Sung-Hyun Kim was the leader of operations in 2022 and would submit proposals to Mr. Lee, who would review the proposal and determine whether or not to approve it and then submit it to SM Line's CEO, who had ultimate authority for enacting policies. SM Line argues that Mr. Sung-Hyung Kim instructed Mr. Lee to come up with a proposal to alleviate the inefficiencies in the process of moving cargo caused by COVID-19, that Mr. Sung-Hyun Kim developed the D&D Improvement Plan on his own, but that Mr. Lee summarily rejected it because it was too aggressive. SM Line argues that the D&D Improvement Plan is inadmissible pursuant to FRE 407. (Respondent SM Line Corporation's Supplemental Brief.)

D. Evidence

Under the Administrative Procedure Act, an administrative law judge may not issue an order "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d); *see also Steadman v. SEC*, 450 U.S. 91, 98-102 (1981). This initial decision is based on the pleadings, exhibits, briefs, proposed findings of fact and conclusions of law, and replies thereto filed by the parties.

This initial decision addresses only material issues of fact and law. Proposed findings of fact not included in this decision were rejected, either because they were not supported by the evidence or because they were not dispositive or material to the determination of the allegations in the complaint or the defenses thereto. Administrative adjudicators are "not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are 'material.'" *Minneapolis & St. Louis R.R. Co. v. United States*, 361 U.S. 173, 193-94 (1959). To the extent that individual findings of fact may be deemed conclusions of law, they shall also be considered conclusions of law. Similarly, to the extent individual conclusions of law may be deemed findings of fact, they shall also be considered findings of fact.

II. FINDINGS OF FACT[10]

BACKGROUND

1. Complainant Samsung Electronics America, Inc. ("SEA") is a corporation organized and existing under the laws of the State of New York, with a principal place of business in Ridgefield Park, New Jersey. (Complaint ¶ 1; Answer ¶ 1.)

2. SEA is a consumer electronic product company that provides its consumer goods to the American public online through a variety of retailers. (Answer ¶ 9; SEAPFF ¶ 15 SMLRPFF ¶ 15.)

3. Respondent SM Line Corporation ("SM Line") is an ocean carrier with its corporate office in, Seoul, Korea, conducting business in the United States as SM Line Corporation, with its principal corporate office in Chandler, Arizona. (Complaint ¶ 2; Answer ¶ 2.)

4. The FMC has personal jurisdiction over SM Line as a "common carrier" and a vessel operating "ocean common carrier" as defined in 46 U.S.C. § 40102(7) and (18). (Complaint ¶ 5; Answer ¶ 5).

5. SEA seeks damages from SM Line for more than 18,186 transportation charges incurred between January 1, 2020, and December 31, 2022 ("Relevant Time Period"). (CX_004469, Smith Report ¶ 47; CX_005012-435, CX_5436, Smith Report Ex. 1 and 1.1.)

SEA WITNESSES

6. Jeung Choi testified at deposition as a witness on behalf of SEA pursuant to 46 C.F.R. § 502.143(b)(6), commonly referred to as a 143(b)(6) witness. (CX_002261-62, SEA 143(b)(6) Dep. Tr. 14:12-15:2.)

7. Maria Fernando is a former SEA employee who left the position of assistant manager of direct ship operations on June 30, 2023. Direct ship handles shipments coming from Asia. Her responsibility was to ensure that SEA could pick up the load and deliver it to

[10] Complainant's exhibits are designated "CX" followed by the Bates Stamp number. Respondent's exhibits are designated "RX" followed by the Bates Stamp number. When helpful to the reader, a description of the exhibit follows the CX or RX Bates stamp number. Deposition references are to page numbers with line numbers following the colon. Complainant's Proposed Findings of Fact are designated "SEAPFF" followed by the paragraph number. Complainant's responses to Respondent's Proposed Findings of Fact are designated "SEARPFF" followed by the paragraph number. Respondent's Proposed Findings of Fact are designated "SMLPFF" followed by the paragraph number. Respondent's Responses to Complainant's Proposed Findings of Fact are designated "SMLRPFF" followed by the paragraph number. References to the Findings of Fact within the body of this decision are designated "F of F" followed by paragraph number.

customers. (CX_002939, CX_002940, CX_002954-56, Fernando Dep. Tr. 10:11-13, 11:7-9, 25:19-27:9.)

8. Philip Goedinghaus was employed by SEA as an inbound coordinator from June 2017 until November of 2023, when he was promoted. As inbound coordinator his job was to trace shipping containers from origin, usually a factory, to United States ports and Samsung hub locations. (CX_002784-85, CX_002787, Goedinghaus Dep. Tr. 10:7-11:23, 13:16-23.)

9. Peter Kim was employed by SEA in 2004, as a staff member under the TV group in San Diego. He was supply chain manager from 2014 to 2016. In 2016, he became the manager of the direct ship department in Dallas, which is the department that manages shipment. In 2018, his reporting manager became Mike Rapske and Maria Fernando was in his department. (CX_ 003140-3141, CX_003145, CX_003146-3147, CX_003150, Kim Dep. Tr. 14:12-15:14, 19:3-25, 20:13-21:10, 24:10-25.)

10. Michael Rapske is the Vice President of Logistics for SEA. (CX_002622, Rapske Dep. Tr. 10:6-9.)

SM LINE WITNESSES

11. Andrea Askins formerly worked as an operations specialist and equipment specialist at SM Line. She was responsible for detention invoice processing until she left in September of 2023 for a new job. (CX_001319, CX_001321-23, Askins Dep. Tr. 24:18-24, 26:14-28-15.)

12. Kwang Kuk Choi, Managing Director at SM Line Corporation for sales and operation HQ in the United States office in Chandler, Arizona, testified at deposition as a witness on behalf of SM Line pursuant to 46 § C.F.R. 502.143(b)(6). (CX_000036, SM Line 143(b)(6) (Session I) Dep. Tr. 8:3-18; CX_000379-380, K.K. Choi Dep. Tr. 26:15-27:13.)

13. Joan Gaston is the import customer service manager at SM Line. (CX_001671, Gaston Dep. Tr. 18:12-13.)

14. Hyung-Yong Jung is currently the head of the division for SM Line that deals with sales and logistics, and previously served as transpacific-bound team lead, where he was charged with pricing and vessel storage. (CX_000578-579, Jung Dep. Tr. 12:15-13:4.)

15. Sung-Hyun Kim is the team manager of SM Line's network operations team. (CX_000664, S.H. Kim Dep. Tr. 11:9-17.)

16. Sarah Lee is the manager of finance and HR at SM Line. (CX_000884, Lee Dep. Tr. 20:20-23.)

17. Tianjin Li was a traffic associate specialist at SM Line. (CX_001982, Li Dep. Tr. 16:4-9.)

18. Chian Ma is the operations manager for SM Line, and handles detention disputes. (CX_001528, CX_001583; Ma Dep. Tr. 18:21-25; 73:1-11.)

19. Kwangsoo Oh is a general manager on SM Line's Container Marketing America team and was previously general manager on its sales and planning team. (CX_00735-736, Oh Dep. Tr. 22:9-23:13.)

20. Christopher Solarez is an equipment control manager for SM Line, and served as operations manager for SM Line from 2017 to 2022. (CX_001088-89, Solarez Dep. Tr. 19:3-20:16.)

21. YeonHui Yi is a Senior Manager in SM Line's U.S. office. (CX_001886-1889, Yi Dep. Tr. 68:19-71:2; SMLRPFF ¶ 216.)

OCEAN TRANSPORTATION SERVICES

22. SM Line markets its full range of shipping services to shippers like SEA in personal meetings, at conferences, and publicly on its website. (Complaint ¶ 12; Answer ¶ 12.)

23. Regarding its inland transportation services, SM Line states on its website that "SM Line focuses on establishing a comprehensive logistics transportation network worldwide to create value-added logistics services." Further, "[w]ith the need to deliver value-added logistics services, SM LINE operates a comprehensive network of logistics and intermodal services around the globe." (Complaint ¶ 13; Answer ¶ 13.)

24. SM Line markets its ability to arrange and coordinate multiple inland transportation providers as part of its store door services, stating: "[e]ach shipment is tracked and monitored by our branch office in Phoenix, Arizona. Also, transportation to inland is based on usage of modernized rail terminals run by top-class rail companies. Particularly, UP-Global IV, the most advanced rail terminal handles cargoes with first-rate service by integrating rail and truck transportation, distribution and warehousing in one place." (Complaint ¶ 14; Answer ¶ 14.)

25. SEA used SM Line to transport its goods. (Complaint ¶ 10; Answer ¶ 10.)

26. SM Line transported SEA Containers under through bills of lading, or sea waybills, from the overseas locations through U.S. ports and on to designated U.S. inland locations. (Complaint ¶ 28; Answer ¶ 28.)

27. Arrangements in which a carrier is responsible for arranging the transport of the container from the terminal to another location is known as "carrier haulage," also referred to as "store door," "store move," or "door-to-door." It is in contrast with "merchant haulage," also referred to as CY (container yard) or port-to-port transportation in which the shipper makes the trucking arrangements. (Interpretive Rule of Demurrage and Detention under Shipping Act. 85 Fed. Reg. 29638, 29664 (May 18, 2020.))[11]

28. SEA does not negotiate service contracts with ocean carriers. (CX_002293-95, SEA 143(b)(6) Dep. Tr. 46:3-48:9; SMLPFF ¶4; SEARPFF ¶ 4.)

29. SEA is the consignee of home goods shipped to the U.S. in ocean shipping containers by SM Line, and is named as such on the applicable bill of lading. (SEARPFF ¶¶ 5, 25; SMLRPFF ¶¶ 5, 25.)

30. For the shipments at issue in 2020, 2021, and 2022, SEA cargo was shipped by affiliates of SEA, which contracted with and paid the freight to SM Line for the transportation services provided under SM Line Service Contracts filed with the FMC. (CX_002293-95, SEA 143(b)(6) Dep. Tr. 46:3-48:9; SEAPFF ¶ 19; SMLRPFF ¶ 19; RX_0004485-4501 (2020); RX_0004506-4518 (2021); RX_0004519-4541 (2020); RX_0004542-4562 (2021); RX_0004563-4583 (2022.))[12]

31. SEA preferred CNT carriers over house carriers because they know how to deliver to SEA customers and provide the advantages of a single carrier. (CX_002705-06, Rapske Dep. Tr. 93:6-23.)

32. Between 2019 and 2021, SEA's freight was shipped by SM Line with SEA listed as consignee under door-to-door terms made by SM Line with either a local dray carrier, also known as a house carrier, or a Customer Nominated Trucker ("CNT"), but in 2022

[11] Pursuant to 46 C.F.R. § 502.226, Official Notice is taken of the fact that carrier haulage arrangements in which the carrier transports cargo to another location are also known as "store door" arrangements.

[12] Unsigned copies of the service contracts were produced by SM Line in discovery. Each contract referenced herein identifies SEA as an affiliate of the Samsung entity that executed the agreement with SM Line. (RX_0004495, 0004511, 0004574, 0004531, 0004553, and 0004574.) Although SEA complains that the contracts were not authenticated during discovery and that executed copies were not produced, it does not deny that they are the applicable service contracts and has not offered any evidence to rebut SM Line's assertion that they are the applicable agreements or that they were not executed. Because the Federal Rules of Evidence serve merely as guidance in this proceeding, and in the absence of credible evidence to support a finding that they are not what they purport to be, the undersigned finds that they have been sufficiently authenticated and are admissible under the relaxed standards applicable to an administrative proceeding. 46 U.S.C. § 502.204(a).

SEA transitioned to CY movement. (CX_002637-38, Rapske Dep. Tr. 25:8-26:7; SMLPFF ¶ 8; SEARPFF ¶ 8.)

33. A house trucker is hired by the steamship line. A CNT is similar in that it is contracted, paid, and receives work orders from the steamship line but is recommended by SEA because it has familiarity with SEA's warehouse and customer requirements. (CX_0002637-2638, Rapske Dep. Tr. 25:8-26:10.)

34. A CNT is nominated by SEA and accepted by SM Line as long as they meet the requirements necessary for inland transportation such as insurance coverage and interchange agreement. (CX_000225-227, SM Line 143(b)(6) Dep. Tr. (Session II) Dep. Tr. 176:6-178:6; CX_000413-414, K.K. Choi Dep. Tr. 60:21-6:25.)

DETENTION AND DEMURRAGE FOR STORE DOOR DELIVERY WITH CNT

35. SM Line Tariff Rule 700, CUSTOMER NOMINATED TRUCKER FOR STORE DOOR DELIVERY, published January 6, 2017, and effective March 1, 2017, to March 29, 2023, provides in pertinent part:

> When Customer (including but not limited to shipper, consignee, or any other interest [sic] party (e.g. owner of the cargo) nominates its own trucker(s) (hereinafter "CNT") or prefers to use particular trucker(s) (hereinafter "PT") instead of trucker(s) appointed by Carrier (hereinafter "house trucker") for certain door delivery(s) to a cargo receiver, the following terms and conditions shall apply:
>
> 1. Carrier will only act as the agent for the customer for purposes of arranging the trucking, and the trucking service is between the trucker and Customer.
>
> 2. Even though Carrier's base rates may be inclusive of inland services (e.g. SDD (store door delivery rates)), if CNT or PT imposes a drayage or fuel rate increase, or other charges or fees, any such new or additional amounts shall solely be with Customer.
>
> […]
>
> 6. If CNT or PT does not or refuses to pick up nor take possession of the applicable containers within the given freetime for any reason (including but not limited to change(s) in rates or lack of drivers, any risks or costs (including but not limited to DEM/DET) that occur during this time of the trucker's non-performance shall solely be with Customer.
>
> 7. Customer, with thirty (30) day prior written notice, may opt out of CNT or PT arrangement and request for Carrier to use Carrier's house-trucker(s). Carrier, at its exclusive discretion and availability of trucking service provider, may agree to such request. Any cost (including but not limited to increased rates, and any

DEM/DET during the time) of hiring and utilizing different truckers shall solely be with Customer.

8. This term shall not be subject to any amendment or modification except by clearly agreed upon and executed agreement by Carrier and Customer.

(RX_0004483–84, SM Line Tariff Rule SMLine_700.)

36. SM Line's internal guidance for years 2020 through year 2022 show that it understood that detention and demurrage charges were not part of the all-in rate freight rate. (RX_0002949; RX_0002973; RX_0002994.)

USE OF CARRIER EQUPMENT AT DESTINATION

37. SM Line's tariff rule "Use of Carrier Equipment at Destination" dated June 2, 2018, states:

Definition

Detention is the daily charge assessed to the shipper/consignee, against the ocean carrier's equipment, for the use of the equipment beyond allowed freetime, as stipulated per tariff or contract, and moving under carrier arranged haulage on a store door (sd) bill of lading. Working days are used to calculate freetime, whereas calendar days are used to calculate detention charges beyond freetime.

Per diem is the daily charge assessed to the drayman, or at the carrier's option to the shipper or consignee, against the ocean carrier's equipment, for the use of the equipment beyond allowed freetime, as stipulated per tariff or contract, and moving under merchant arranged haulage on a container yard (cy) bill of lading. Working days are used to calculate freetime, whereas calendar days are used to calculate per-diem charges beyond freetime.

[...]

RX_0001445; SMLPFF ¶ 40; SEARPFF ¶ 40.

ADVANTAGES OF CNT

38. The benefits of using a CNT include being familiar with the warehouse and customer. SEAPFF ¶ 60; SMLRPFF ¶ 60.

39. An internal SEA document shows that it understood that one advantage of using a CNT over a house trucker was the avoidance of port/rail demurrage charge by pre-pulling[13] and storing loads at yards. (RX_001199; SEARPFF ¶ 8.)

D&D[14] AND OTHER TRANSPORTATION CHARGES

40. The ocean freight with respect to the shipments at issue is not in dispute. (SEAPFF ¶ 29; SMLRPFF ¶ 29.)

41. In a standard store door situation a carrier is generally responsible for handling both ocean and inland transportation. (SEAPFF ¶ 22; SMLRPFF ¶ 22.)

42. Generally an "all-in" rate for a door delivery includes the trucker and railroad delivery fees. (SEAPFF ¶ 30; SMLRPFF ¶ 30.)

43. Pursuant to the agreements between SEA's affiliates and SM Line, demurrage and detention charges arising after the exhaustion of the applicable free time are subject to SM Line's governing public tariff. The customer signature agreeing to the applicability of the tariff is placed on the CNT agreement that is separately entered into with the customer. (CX_ 000214-215, K.K. Choi Dep. Tr. 165:19-166:3; CX_004732, K.K. Choi Dep. Ex. 8 at 4.)

44. SEA's view is that whether a charge billed to SEA is acceptable or not is based on who was at fault for the cause of that charge. (CX_002248, SEA 142(b)(6) Dep. Tr. 133:12-19.)

45. SEA admits that determining responsibility for charges depends on the individual circumstances. (CX_002641, Rapske Dep. Tr. 29:19-22.)

46. SEA did not investigate accessorial charges, demurrage charges, and detention charges to determine cause of delay and allocate charges based on fault, but rather paid all charges and looked back at the data after the fact. (CX_002643-2645, Rapske Dep. Tr. 31:11-33:1.)

PANDEMIC AND TRANSITION TO CY SHIPMENTS

47. On March 11, 2020, the World Health Organization declared that COVID-19 was officially characterized as a pandemic. (CX_005609, https://www.who.int/director-

[13] In the context of shipping, pre-pull means picking up a container from a port or terminal and storing it in a trucker's yard or other location before its scheduled delivery. (F of F 107.)

[14] "D&D" stands for demurrage and detention.

general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020; SEAPFF ¶ 92; SMLRPFF ¶ 92.)

48. During the COVID-19 pandemic, port congestion, shortage of truck drivers and truck chassis affected the movement of cargo, elevating dwell times, causing landside bottlenecks, and continued chassis shortages. (CX_004455, Smith Report ¶ 22; SEAPFF ¶ 352; SMLRPFF ¶ 352.)

49. During the Relevant Time Period, there were driver shortage issues. (SEAPFF ¶ 101; SMLRPFF ¶ 101.)

50. During the COVID-19 pandemic, SEA was subjected to additional costs and started to manage drayage themselves. (CX_002706, Rapske Dep. Tr. 94:2-25.)

51. On or about August 1, 2022, SEA started using CY shipments in lieu of door movements and stopped CNT shipments. (CX_002539-40, J. Choi Dep. Tr. 39:23 -40:15.)

52. When it transitioned to CY shipments in 2022 due to demurrage and detention issues, SEA commenced using a third party vendor to overlook bills from inbound shipments. In this capacity, the vendor appointed truckers or CY movements, released work orders to pick up from CY and deliver to final destination, communicated with truckers, paid invoices from truckers, and then invoiced SEA on a monthly basis. (CX_002360-62, SEA 143(b)(6) Dep. Tr. 113:5-115:14.)

SEA's ROLE IN TRANSPORTATION

53. SEA issued detailed delivery instructions directly to its CNTs that included instructions regarding the RDD (requested date of delivery) with limitation that delivery cannot be earlier or later than one day earlier or later in order to avoid vendor compliance penalty, instructions to pre-pull before the LFD (last free day), instructions regarding unloading (including directives to communicate with customer regarding status of unloading), instructions regarding empty container return (including directive to monitor and return empty prior to expiration of free time), and instructions regarding bobtail request (CNT must obtain approval from SEA for bobtail move). (RX_0004125-29.)

54. SEA provided the same instructions to all truckers on how they are to deliver to SEA's customers. (CX_003007-08, Fernando Dep. Tr. 78:20-79:8.)

55. SEA's delivery instructions to its CNTs emphasized that the CNT's KPI (key performance indicators) would be scored based upon the CNT's compliance with these instructions. (RX_0004129.)

56. SEA requested that CNT truckers provide SEA with a daily report. (SEARPFF ¶ 50.)

57. For shipments under CY terms, the consignee was responsible for dispatching the trucker to pick up the container from the terminal at which it was discharged and transported inland on the final leg of carriage. (CX_003170-71, P. Kim Dep. Tr. 44:17-45:5; SEAPFF ¶ 41; SMLRPFF ¶ 41.)

58. If demurrage was due on a shipment because free days had been exceeded and it had to be paid before the container could be removed, the trucker emailed SEA with the container and information on it in order to get approval before making a payment. If the CNT was able to cover the charges then SEA guaranteed it. Otherwise, payment was made by SEA credit card or other method. (CX_002680-81, Rapske Dep. Tr. 68:22-69:4.)

59. SEA does not own or lease chassis. (SEAPFF ¶ 156; SMLRPFF ¶ 156).

60. SEA's delivery instructions for Lowe's sent by email dated February 18, 2020, from Maria Fernando to CNT PBI Industries and SM Lines included a chart outlining important notes regarding Lowe's new RDD starting in February, including the following provision regarding accrued demurrage: "due to late WO dispatched, Chassis Shortage, SAMSUNG will not [be] responsible for demurrage. SSL will cover it." (RX_0004126, RX_0004128.)

SM LINE'S ROLE IN TRANSPORTATION

61. SM Line managed inland transportation of the cargo through its equipment team ("Equipment Team"). (SEAPFF ¶ 36; SMLRPFF ¶ 36.)

62. The trucker on a store door move may be either a house trucker or a customer nominated (or customer preferred) trucker. (CX_002313-14, SEA 143(b)(6) Dep. Tr. 66:22-67:3; CX_001134, Solarez Dep. Tr. 65:6-10; SEAPFF ¶ 43; SMLRPFF ¶ 43.)

63. Both CNTs and house truckers must meet SM Line's requirements to be approved, which includes insurance coverage, interchange agreements, and rates. (CX_000225-27, SM Line 143(b)(6) (Session II) Dep. Tr. 176:6-178:6; CX_413-414, K.K. Choi Dep. Tr. 60:21-61:6.)

64. SM Line may reject a CNT if the CNT is not a signatory to the Uniform Intermodal Interchange and Facilities Access Agreement ("UIIA"). (CX_002017, Li Dep. Tr. 51:13-16; CX_001206, Solarez Dep. Tr. 137:12-18; SEAPFF ¶ 54; SMLRPFF ¶ 54.)

65. When a store door container arrives at the port, SM Line issues a work order to the trucker and directs the trucker to take the container from the port or the terminal and deliver it to the customers' inland destinations. (CX_003173-75, P. Kim Dep. Tr. 47:23-48:10, 48:23-49:4.)

66. SM Line issues work orders to both house truckers and CNTs. (CX_002016, Li Dep. Tr. 50:1-8; SEAPFF ¶ 61; SMLRPFF ¶ 61.)

67. SM Line communicated with both house trucker and CNTs to assist with any problems or issues they may have. (CX_001350, Askins Dep. Tr. 55:9-20.)

68. SM Line had to register the CNTs to SM Line's system in order for CNTs to receive the work orders and get paid for their services. (SEAPFF ¶ 50; SMLRPFF ¶ 50.)

69. In a "CY/CY term," the responsibility of SM Line ended when a container was delivered to the port or the rail ramp, and once a container arrived at these locations SEA assumed responsibility for further inland moves for the containers. (CX_002367-68, SEA 143(b)(6) Dep. Tr. 120:13-121:10; CX_000410, SM Line 143(b)(6) Dep. Tr. 57:4-14.)

70. For both CNTs and house truckers, SM Line employees regularly sent notices of arrival to customers and truckers as well as last free day notices. (SEAPFF ¶ 63; SMLRPFF ¶ 63.)

71. If a work order could not be completed timely, SM Line was one but not the only contact for the trucker. (SEAPFF ¶ 65; SMLRPFF ¶ 65.)

72. For all store door moves, SM Line was responsible for paying the CNT or house trucker the trucking service rate. (SEAPFF ¶ 66; SMLRPFF ¶ 66.)

73. SM Line designates the location where consignees and truckers can return an empty container. (CX_001127-28, Solarez Dep. Tr. 58:16-59:7; SEAPFF ¶ 118; SMLRPFF ¶ 118.)

74. SM Line is responsible for ensuring that chassis are available to truckers. (CX_000097-98; CX_000169, SM Line 143(b)(6) (Session I) Dep. Tr. 69:25-70:2; 141:9-11; CX_001092, Solarez Dep. Tr. 23:9-25; SEAPFF ¶ 136; SMLRPFF ¶ 136.)

75. SM Line was responsible for making chassis available to truckers in door moves. (SM Line 143(b) (Session I) Dep. Tr., 69:25-70:2, 141:9-11, CX_000097-98, CX_000169.)

76. During the relevant time frame, SM Line was responsible for providing chassis to truckers in door moves. (SEAPFF ¶ 72; SMLRPFF ¶ 72.)

77. SM Line does not own chassis. (SEAPFF ¶ 155; SMLRPFF ¶ 155.)

78. SM Line has a chassis provider and offers chassis for CNT door, non-CNT door, and CY authorized truckers. (Askins Dep. Tr. 80:3-23, CX_1375.)

79. There are no separate contractual arrangements for transportation between any CNT and SEA with respect to trucking companies. (CX_002308-09, SEA 143(b)(6) Dep. Tr. 61:21-62:14.)

CNT FORMS

80. Two SM Line "Request to Use a Customer Nominated Trucker" forms ("CNT Form") were signed by an SEA employee in 2017. (CX_003181, P. Kim Dep. Tr. 55:13-23; CX_002334-36, SEA 143(b)(6) Dep. Tr. 87:6-89:8; CX_004545-46, SM Line 143(b)(6) (Session II) Dep. Ex. 2; SEAPFF ¶83; SMLRPFF ¶ 83; SMLPFF ¶ 19; SEARPFF ¶ 19.)

81. No CNT Forms for the Relevant Time Period (i.e., 2020-2022) were produced by SM Line. (CX_000215-17; CX_000235-38, SM Line 143(b)(6) (Session II) Dep. Tr. 166:5-168:14; 186:6-189:4; SEAPFF ¶91; SMLRPFF ¶ 91.)

82. The CNT Forms were not countersigned by anyone at SM Line. (CX_004545-46, SM Line 143(b)(6) (Session II) Dep. Ex. 2; SEAPFF ¶88; SMLRPFF ¶ 88.)

83. Both of the CNT Forms were signed by Peter Kim in 2017 as Senior Manager on behalf of SEA. One form nominated PBI Industries as CNT and the other nominated Gold Point as CNT. Both included the following provision: "The carrier will act as the agent for the shipper for purposes of arranging the trucking. The contract of carriage for inland transportation shall be deemed to be between the trucker and the shipper, or the trucker and the owner of the cargo. The shipper of the owner of the cargo, not the carrier, will employ the CNT even if the carrier's rates are inclusive of door delivery. The carrier shall pay the CNT only as the agent of the shipper." (CX_004545-46, SM Line 143(b)(6) (Session II) Dep. Ex. 2; SMLPFF ¶ 20; SEARPFF ¶ 20.)

84. Peter Kim was a Senior Manager for SEA in 2017. (CX_003148-49, P. Kim Dep. Tr. 22:21-23:14; SEAPFF ¶ 86; SMLRPFF ¶ 86.)

85. Peter Kim did not have authority to execute contracts on SEA's behalf. (CX_002337-38, SEA 143(b)(6) Dep. Tr. 90:22-91:11; SMLPFF ¶ 20; SEARPFF ¶ 20.)

86. From SEA's perspective, if the CNT Form was intended to have binding, legal effect, the multi-step internal processes for SEA required the legal team to approve first, and then it

would have to have been signed by either an executive of SEA, meaning VP level and above. (CX_002338, SEA 143(b)(6) Dep. Tr. 91:2-11.)

87. To the extent it was valid, SEA never affirmatively terminated the CNT agreement. (RX_0004591, Goedinghaus Dep. Tr. 78:3-8; SMLPFF ¶ 23; SEARPFF ¶ 23.)

STOP CLOCK

88. SM Line admits it could issue a "stop clock" when terminals were not accepting empty equipment and were shutting SM Line out of the terminals. (CX_001216, Solarez Dep. Tr. 147:1-8; CX_001596-600, Ma Dep. Tr. 86:12-87:12, 87:17-88:6, 89:10-15, 89:21-90:3; CX_001343, Askins Dep. Tr. 48:14-25; SMLRPFF ¶ 121.)

89. SM Line admits that when a terminal is closed and container pickup is not possible, SM Line should stop the D&D clock. (CX_001124-25, Solarez Dep. Tr. 55:7-19, 56:14-22; CX_001579, Ma Dep. Tr. 69:5-12; CX_001343, Askins Dep. Tr. 48:14-25; SEAPFF ¶ 111; SMLRPFF ¶ 111.)

90. SM Line admits that when a terminal is congested and a container is not available for pick up, SM Line should waive or cancel the charge as long as attempts for pickup were undertaken. (CX_001576-78, Ma Dep. Tr. 66:19-68:19; CX_001714-15, Gaston Dep. Tr. 61:20-62:6; CX_001124-25, CX_001128, Solarez Dep. Tr. 55:7-56:25, 59:8-14; SEAPFF ¶ 110; SMLRPFF ¶ 110.)

91. SM Line admits that only the Network Operations Team (known as SELCON) in SM Line's Korea HQ could approve a stop clock. (CX_1597-98, Ma Dep. Tr 87:17-88:2; CX_1391, Askins Dep. Tr. 96:14-25; SEAPFF ¶ 126; SMLRPFF ¶ 126.)

92. SM Line admits that it would issue a stop clock if the terminal was not accepting equipment, but if a trucker was stuck in a long line and could not get to the terminal no stop clock would be issued because that was beyond SM Line's control. (CX_001128, Solarez Dep. Tr. 59:8-24.)

DETENTION

93. If a container accrued detention before it was returned, the detention invoice would be issued automatically a day after the empty container was returned to the terminal. (CX_001529-30, Ma Dep. Tr. 19:10-20:2; SEAPFF ¶ 123; SMLRPFF ¶ 123.).

94. SM Line does not review detention invoices unless they are disputed by the customer by email to the detention group, and in that event, they are reviewed on a case-by-case basis. (CX_1582, Ma Dep. Tr. 72:7-25.)

RAIL SERVICES

95. SM Line subcontracts with rail carriers in the U.S. to provide inland rail service for its through bills of lading. (CX_000493-95, K.K. Choi Dep. Tr. 140:7-142:25; SEAPFF ¶ 129; SMLRPFF ¶ 129.)

96. Union Pacific Railroad ("UPRR") is a subcontractor of SM Line. (CX_000493-95, K.K. Choi Dep. Tr. 140:7-142:25; SEAPFF ¶ 130; SMLRPFF ¶ 130.)

97. The rail carriers issue bills of lading to SM Line for rail carriage, which list SM Line as the shipper. (CX_000171-72, CX_000173, SM Line 143(b)(6) (Session I) Dep. Tr. 143:24-144:5, 145:1-6; SEAPFF ¶ 133; SMLRPFF ¶ 133.)

98. SM Line was aware of the last free days of all containers at rail terminals and would send reminders to the truckers on containers exceeding free time at rail ramps. (CX_001094-95, Solarez Dep. Tr. 25:5-10, 25:22-26:5; CX_001349-50, Askins Dep. Tr. 54:11-55:5; CX_002134, Han Dep. Tr. 31:4-22; SEAPFF ¶ 134; SMLRPFF ¶ 134.)

99. If there was a chassis shortage and containers could not be placed directly on a chassis at rail terminals, containers would be stacked at the rail terminal and would not be available for pickup. (CX_000496-97, K.K. Choi Dep. Tr. 143:21-144:15; CX_001131-32, Solarez Dep. Tr. 62:17-63:12; SEAPFF ¶ 137; SMLRPFF ¶ 137.)

100. The term "rail storage" refers to the daily charge that railheads charge for containers which remain at their facilities past their allotted free days (which free period typically is 48 hours). (CX_001145-46; Solarez Dep. Tr. 76:25-77:9; SEAPFF ¶ 139; SMLRPFF ¶ 139.)

101. Rail storage charges are paid directly by the customer and governed by the rail company. (CX_000493-94, K.K. Choi Dep. Tr. 140:22-141:15.)

102. SM Line does not charge demurrage at rail stations. (CX_001145, Solarez Dep. Tr. 76:10-11.)

103. SM Line ultimately negotiated with its subcontractor Union Pacific Railroad to cap storage charges to no more than $2,450 per container. (SEAPFF ¶ 145; SMLRPFF ¶ 145.)

104. When the shipper or trucker made a fair attempt to pick up the container, SM Line expected but did not confirm that the railroad would extend the container's last free day

and not charge storage. (CX_001130-31, Solarez Dep. Tr. 61:21-62:11; SEAPFF ¶ 146; SMLRPFF ¶ 146.)

105. SM Line frequently rejected requests to clear rail storage and extend the last free day ("LFD") when there was congestion or chassis shortages at the rail terminal, because SM Line claimed that it "can't absorb any rail storage." (CX_004834-40, Solarez Dep. Ex. 17.)

106. During the third and fourth quarters of 2021, SEA paid rail storage charges in the amount of $1,885,016. (CX_005437, Smith Report Ex. 2.)

Pre-Pulls

107. Pre-Pull is a situation where the container is moved from the terminal to a container yard, typically the trucker's container yard, so that it stops accruing terminal demurrage charges. The trucker will charge for this service, but it is typically less than the daily charge for port terminal demurrage. (CX_004309, Lee A. Clair Expert Report ¶ 76.)

108. SEA used pre-pulls with CNTs to avoid the demurrage charges. (CX_003048-3049, Fernando Dep. Tr. 119:5-15, 120:5-11.)

109. SEA made requests for pre-pulls to stock the containers outside to stop demurrage that was often running due to chassis unavailability. (CX_002670, Rapske Dep. Tr. 58:16-23.)

110. When the customer 's warehouse was full and could not receive a shipment, SEA would pre-pull the container to avoid paying demurrage and store it in their own yard, and SEA would pay for the storage for that. (CX_003016-3027; Fernando Dep. Tr. 97:19 – 98:5.)

111. SEA admits that the costs of diversion to a new customer caused by the fault of SEA was the responsibility of SEA. (CX_003091; Fernando Dep. Tr. 162:11– 24.)

Free Days

112. Under the agreement between SM Line and SEA, there were five free days at port before demurrage started to accrue. SM Line could not dispatch CNTs as with a house trucker, but would send a courtesy notification to CNT and SEA if a container was still at port on the last free day. (CX_004314, Lee A. Clair Expert Report ¶ 101).

113. In 2022, SM Line decreased the number of detention free days from the 20 available in 2020 and 2021 to 14. (CX004312, Lee A. Clair Expert Report ¶ 92.)

SM LINE'S D&D PRACTICES

114. SM Line adopted its initial Demurrage and Detention Management Procedure ("D&D Management Procedure") at the formation of the company in 2017. (CX_004549-77, SM Line 143(b)(6) (Session III) Dep. Ex. 1; SEAPFF ¶ 167; SMLRPFF ¶ 167.)

115. The stated purpose of the D&D Management Procedure was to "establish efficient working procedure for billing and collection of [D&D] charges, intending to improve equipment turn-time and generate additional revenue." (CX_000107-08, SM Line 143(b)(6) (Session I) Dep. Tr. 79:21-80:3; CX_004693, SM Line 143(b)(6) (Session III) Dep. Ex. 6 at 4; SEAPFF ¶ 168; SMLRPFF ¶ 168.)

116. Charge "inactivation" is the term used by SM Line referring to the cancellation of D&D charges that should not have been charged. (CX_000148, SM Line 143(b)(6) (Session I) Dep. Tr. 120:5-6; CX_001123, Solarez Dep. Tr. 54:11-23; SEAPFF ¶ 169; SMLRPFF ¶ 169.)

117. A charge discount is a reduction in the amount of a D&D charged after the invoice has been issued. (CX_004694, SM Line 143(b)(6) (Session III) Dep. Ex. 6 at 5; SEAPFF ¶ 171; SMLRPFF ¶ 171.)

118. The D&D Management Procedure has been updated five (5) times between 2017 to 2022. (CX_004549-77, SM Line 143(b)(6) (Session III) Dep. Ex. 1; CX_004578-606, SM Line 143(b)(6) (Session III) Dep. Ex. 2; CX_004607-35, SM Line 143(b)(6) (Session III) Dep. Ex. 3; CX_004636-64, SM Line 143(b)(6) (Session III) Dep. Ex. 4; CX_004690, SM Line 143(b)(6) (Session III) Dep. Ex. 6; SEAPFF ¶ 172; SMLRPFF ¶ 172.)

119. In the original 2017 version of the D&D Management Procedure, requests for charge or inactivation were first considered by the regional office. (CX_000270-71, SM Line 143(b)(6) (Session III) Dep. Tr. 213:12-16, 213:23-214:4; CX_004570-73, SM Line 143(b)(6) (Session III) Dep. Ex. 1; SEAPFF ¶ 173; SMLRPFF ¶ 173.)

120. Prior to November 2022, the U.S. regional office had approval authority to discount charges only up to a limited dollar amount per bill of lading, and approval for all charge discount requests over that amount per bill of lading had to come from SM Line's Korea HQ. (CX_000271-73, SM Line 143(b)(6) (Session III) Dep. Tr. 214:14-216:7; CX_004570-72, SM Line 143(b)(6) (Session III) Dep. Ex. 1; SEAPFF ¶ 174; SMLRPFF ¶ 174.)

121. The D&D Management Procedure was updated to its current version (version 5) in November 2022, and because of OSRA 2022, it provided that the head of the U.S. office had approval authority for discount requests up to an increased dollar amount per

container. (CX_000303; CX_000304, SM Line 143(b)(6) (Session III) Dep. Tr. 246:11-24, 247:8-15; CX_004690, SM Line 143(b)(6) (Session III) Dep. Ex. 6 at 1.)

122. After the November 2022 D&D Management Procedure revision, approval for any discounts of D&D charges above the increased dollar amount per bill of lading required approval from SM Line's Korea HQ, and all decisions to stop clock or waive/inactivate D&D of any value required approval from SM Line's Korea HQ. (CX_004607, SM Line 143(b)(6) (Session III) Dep. Ex. 3 at 1; CX_000438-39, K.K. Choi Dep. Tr. 85:23-86:20.)

123. When a container has an unable to locate ("UTL") status or where there are no available appointments, if the D&D Management Procedure was properly followed, charges of that type would be covered by the list of reasons to inactivate charges and the charges would be cancelled. (CX_000167-68, SM Line 143(b)(6) (Session I) Dep. Tr. 139:18-140:4; CX_004541-44, SM Line 143(b)(6) (Session I) Dep. Ex. 11 (email communication dated October 21, 2020); CX_004711, SM Line 143(b)(6) (Session III) Dep. Ex. 6 at 22; SEAPFF ¶ 186; SMLRPFF ¶ 186.)

124. Within SM Line, SELCON in Korea HQ was responsible for setting and managing SM Line's D&D policy per the Management Plan. (CX_001122-23, Solarez Dep. Tr. 53:21-54:1; CX_000456, K.K. Choi Dep. Tr. 103:5-19; SEAPFF ¶ 187; SMLRPFF ¶ 187.)

125. SM Line's SELCON team created guidelines for managing D&D using SM Line's ALPS system ("ALPS D&D Guidelines"). (CX_000279-80, SM Line 143(b)(6) (Session III) Dep. Tr. 222:20-223:9; CX_004665-89, SM Line 143(b)(6) (Session III) Dep. Ex. 5; SEAPFF ¶ 188; SMLRPFF ¶ 188.)

126. SM Line' detention charges are calculated by an automated system in accordance with the service contract and tariff, with any stop clocks deducted, and an invoice is sent to the customer based on those calculations. (CX_001157-58, Solarez Dep. Tr. 88:22-89:23.)

127. During the period 2020 to 2022, Hyung-Yong Jung approved demurrage and detention discounts for transmittal to SELCON's team leader, Sung-Hyun Kim. A determination on whether to approve a discount was based on the circumstances of the organization where the demurrage and detention occurred, and fault was not a consideration. (CX_621-22, Jung Dep. Tr. 55:11-56:17.)

128. The top three circumstances where SM Line inactivated, i.e., waived, D&D charges were: (1) delay caused by congestion at the terminal, (2) unable to locate containers, and (3) differences existed in the calculation of the last free date between the terminal and SM

Line's system. (CX_000149-50, SM Line 143(b)(6) (Session I) Dep. Tr. 121:9-122:4; SEAPFF ¶ 195; SMLRPFF ¶ 195.)

2022 SM LINE DEM/DET MANAGEMENT IMPROVEMENT PLAN REPORT[15]

129. SELCON is the group at SM Line responsible for demurrage and detention management procedures. (CX_000112, CX_000136, SM Line 143(b)(6) (Session I) Dep. Tr. 84:16-19; 108:22-24.)

130. In mid-2022, Mark Yoon-Jae Lee was the managing director and vice president of SM Line HQ. (CX_000893-94, Lee Dep. Tr. 29:20-30:10; CX_000674-76, S.H. Kim Dep. Tr. 21:5-23:6; CX_000618-19, Jung Dep. Tr. 52:15-53:5; SEAPFF ¶ 196; SMLRPFF ¶ 196.)

131. In August of 2022, Mark Yoon-Jae Lee indicated that the terminals were not doing an effective job of collecting demurrage and detention in the United States and SM Line considered collecting it directly, but ultimately decided it would not be effective and decided instead to give authority to the field office to resolve complaint issues from the shippers. (CX_00674-5, S.H. Kim Dep. Tr. 21:5-22:24.)

132. Sung-Hyun Kim created the D&D Improvement Plan dated October 26, 2022, at the request of Mark Yoon-Jae Lee, but Mr. Lee did not like the plan and rejected it. (CX_000673, CX_000676, CX_000682, S.H. Kim Dep. Tr. 20:2-19, 23:3-8, 29:11-25; CX_004742-51, S.H. Kim Dep. Ex. 2.)

133. When creating the 2022 D&D Improvement Plan, Sung-Hyun Kim understood that SM Line had already recognized that demurrage and detention was a means to increase income and acted to collect the maximum amount. (CX_004743, S.H. Kim Dep. Ex. 2 at 2; SEAPFF ¶ 202; SMLRPFF ¶ 202.)

134. SM Line's D&D Management Procedure was updated on November 18, 2022, increasing authority of the U.S. headquarters to discount D&D charges per bill of lading and increasing the threshold requiring CEO approval for discount requests. (SEAPFF ¶ 209;

[15] In its supplemental brief to address the testimony of Mr. Yoon-Jai Mark Lee (Dkt. 134), SM Line objects to the admission of the D&D Improvement Plan dated October 26, 2022, on the ground that it is inadmissible pursuant to Fed. R. Evid. 407. (CX_0004742-4751.) Fed. R. Evid. 407 provides that evidence of subsequent remedial measures is not admissible to prove negligence, culpable conduct, a defect in product or design, or a need for a warning or instruction, but may be admitted for another purpose. As an initial matter, the Federal Rules of Evidence are not binding in this proceeding, but rather only serve as guidance. 46 C.F.R. § 502.204(a). Additionally, the undersigned finds that Fed. R. Evid. 407 is not applicable in this instance because there is no evidence that the report was prepared in connection with any subsequent remedial action undertaken by SM Line. Rather, the report was a proposal by a SM Line employee that SM Line contends was not implemented and was created to address management's concern that the terminals were not effectively collecting D&D. (F of F ¶¶ 131 and 133.) Accordingly, SM Line's objection is overruled.

SMLRPFF ¶ 209.) The increased authority to discount D&D charges was given to U.S. headquarters because SM Line anticipated that there would be more charge related complaints from its customers under the newly revised OSRA 2022. (CX_000303-304, SM Line 143(b)(6) (Session III) Dep. Tr. 246:25-247:15.)

135. Sung Hyun Kim, the principal SELCON team author of the 2022 D&D Improvement Plan, was promoted to team leader in January 2023, after he wrote the report. (CX_000684, S.H. Kim Dep. Tr. 31:5-10; SEAPFF ¶ 207; SMLRFF ¶ 207.)

BILLING AND INVOICING PROCEDURES

136. SM Line's internal data management operating system known as ALPS is used to create demurrage and detention invoices. Within ALPS there are various modules related to the container business, including terminals, demurrage and detention, and pricing, each of which addresses a different aspect of the container business. (CX_000777-78, Oh Dep. Tr. 64:21- 65:16; CX_001003-04, Lee Dep. Tr. 139:17-140:5; CX_000230-31, SM Line 143(b)(6) (Session II) Dep. Tr. 181:8-182:3; CX_001867-68, Yi Dep. Tr. 49:10-50:4; SEAPFF ¶ 213; SMLRPFF ¶ 213.)

137. The ALPS system generates company invoices, including D&D invoices, and tracks the movement histories of containers. (CX_001003-04, Lee Dep. Tr. 139:17-140:5; CX_001531-32; CX_001532-33; CX_001532-33, Ma Dep. Tr. 21:10-22:6; 22:23-23:2; SEAPFF ¶ 214; SMLRPFF ¶ 214.)

138. The ALPS system is programmed to detect when containers have been returned. (CX_001529-30, Ma Dep. Tr. 19:10-20:2; SEAPFF ¶ 215; SMLRPFF ¶ 215.)

139. Yeonhui Yi troubleshoots issues in the ALPS system when SM Line employees in the U.S. office encounter simple errors, such as improper date entry unrelated to detention that impacts functionality. (CX_001895-88, Yi Dep. Tr. 77:13-80:4; SEAPFF ¶ 217; SMLRPFF ¶ 217.)

140. Larger system errors in the ALPS system requiring assistance in the U.S. are submitted to SM Line HQ. (CX_001895-96, Yi Dep. Tr. 77:23-78:25; SEAPFF ¶ 219; SMLRPFF ¶ 219.)

141. In preparing a demurrage invoice, the person who works on an invoice sends a reminder regarding the last free day to the customer before the customer picks up the cargo. (CX_000405-406, K.K. Choi Dep. Tr. 52:17-53:5.)

142. The demurrage invoice is issued when the cargo is picked up by the shipper at the port and a detention invoice is issued after the container is returned. (CX_000407-408, K.K. Choi Dep. Tr. 54:5-55:11.)

143. SM Line's form invoices state "[b]ased on the information available to SM Line as of the date of this invoice: SM Line's performance did not cause or contribute to the underlying invoiced charges." (CX_005574, SM Line_0022480; SEAPFF ¶ 211; SMLRPFF ¶ 211.)

144. Billing and collection of D&D at SM Line occurred initially at the field level, in the Arizona office. (CX_000602, CX_000630-31, Jung Dep. Tr. 36:3-14, 64:25-65:6; SEAPFF ¶ 221; SMLRPFF ¶ 221.)

145. SM Line had an inbound demurrage customer service team led by Joan Gaston. (CX_000400, K.K. Choi Dep. Tr. 47:8-13; SEAPFF ¶ 222; SMLRPFF ¶ 222.)

146. SM Line's system would automatically calculate detention based on customers service contract, tariff terms, and if a stop clock has been applied. (CX_001157-58, Solarez Dep. Tr. 88:22-89:23; SEAPFF ¶ 225; SMLRPFF ¶ 225.)

147. Invoices are not monitored for free time "because it's all done through the ALPS system." (CX_001541, Ma Dep. Tr. 31:19-21.)

INVOICES MISSING MANDATORY INFORMATION

148. The following six SM Line invoices did not include the mandatory minimum information required by OSRA 2022: LGT045268 (CX_005597); LGT045273 (CX_005598); LGT045283 (CX_005599); PHT000309 (CX_004862/CX_005600)[16]; LGT044593 (CX_005595); and LGT045081 (CX_005596). (SEAPFF ¶ 227; SMLRPFF ¶ 227.)

149. Invoice PHT000309 dated September 2, 2022, did not include any information on how to dispute the charges. (CX_004862/CX_005600; RX_0003621, SEA_SMLine_0021148.)

DISPUTE PROCEURE AND POLICY

150. SM Line provided hands on training on the demurrage and detention dispute procedures, which disputes were decided on a case-by-case basis. (CX_001154, Solarez Dep. Tr. 85:4-16; CX_002082, Li Dep. Tr. 116:20-25.)

[16] SEAPFF ¶ 227 and SMLRPFF ¶ 227 list CX_004862 and CX_00560 as separate entries, but each refers to the same invoice PHT00309. Thus, there are six invoices despite that citations for seven are provided in the cited proposed findings of fact and response thereto.

151. Demurrage and detention disputes are reviewed by separate departments. (CX_001097, CX_001098-99, CX_001153, Solarez Dep. Tr. 28:20-24; 29:25-30:20; 84:4-15; CX_001704-05, Gaston Dep. Tr. 51:21-52:18; SEAPFF ¶ 238; SMLRPFF ¶ 238.)

152. To initiate a dispute, a customer or trucker was required to send an email to the detention group at detgrpnj@smlines.com or the demurrage group at phximport@smlines.com. (CX_001582, CX_001583, Ma Dep. Tr. 72:7-25; 73:9-11; CX_001694, CX_001699, Gaston Dep. Tr. 41:8-21, 46:8-20; SEAPFF ¶ 239; SMLRPFF ¶ 239.)

153. When emails disputing detention invoices were sent to the dispute resolution group, the customer or trucker would be asked for the reason for the dispute that the group would then investigate by going back to the terminal or reviewing EDI (Electric Data Interchange) data and then present the findings and recommendation to management. The recommendation would first be made to Mr. Solarez who would present his recommendation to his superior, K.K. Choi for final approval. (CX_001335-36, Askins Dep. Tr. 40:6-41:16; CX_001582-83, CX_1590-91, Ma Dep. Tr. 72:7-73:11, 80:2-81:3.)

154. In order to inactivate or reverse any charges after review by K.K. Choi, SELCON in Korea headquarters would have to review it as well and would ask for additional information. (CX_001110-12, Solarez Dep. Tr. 41:21-43:5.)

155. SM Line had no written policies or procedures regarding detention dispute resolution but rather dispute team members received oral instruction. SM Line did however have written demurrage and detention management procedures. (CX_001336-37, Askins Dep. Tr. 41:21-42:6.)

156. If a detention dispute is determined to be valid, it is escalated to the head of the regional office to approve inactivation of the charge. (CX_001590-91, Ma Dep. Tr. 80:2-81:13; SEAPFF ¶ 244; SMLRPFF ¶ 244.)

157. For demurrage disputes, after the head of the import team reviewed the dispute, it would have to be submitted to upper management in Korea for approval. (CX_001098, Solarez Dep. Tr. 29:21-24; SEAPFF ¶ 247; SMLRPFF ¶ 247.)

158. Detention invoices dated July 15, 2022, and August 19, 2022, included the following information on how to dispute the charges: "Disputes for this invoice should be sent to: detgrpnj@smlines.com." (RX_0004097; RX_0004098; RX_0004099.)

159. SM Line has the discretion to waive D&D charges. (CX_004298, Lee A. Clair Expert Report dated Feb. 21, 2024, ¶ 24; CX_001608, Ma Dep. Tr. 98:2-24; CX_001706-07, CX_001792-93, Gaston Dep. Tr. 53:21-54:3, 139:25-140:18; CX_001097-98, Solarez Dep. Tr. 28:24-29:20; SEAPFF ¶ 234; SMLRPFF 234.)

160. Pursuant to the revised rules in OSRA 2022, if a container is not available for pick up, SM Line does not charge for those containers. (CX_474-75, K.K. Choi Dep. Tr. 121:3-122:17.)

D&D COLLECTION

161. If a customer did not pay a D&D charge by the due date on the invoice, it was considered late and thirty days after the due date the charge would be escalated to SM Line's manager of finance and human resources at SM Line, Sarah Lee. (CX_000884; CX_000885; CX_000888-89, Lee Dep. Tr. 20:20-25, 21:3-11, 24:22-25:19; SEAPFF ¶ 248; SMLRPFF ¶ 248.)

162. The escalation would occur regardless of the amount owed or the status of the customer. (CX_000888-89, Lee Dep. Tr. 24:22-25:19; SEAPFF ¶ 249; SMLRPFF ¶ 249.)

163. The SM Line AR (accounts receivable) team is responsible for collecting D&D charges. SM Line considers D&D charges as miscellaneous revenue for accounting purposes. (CX_000887-88, CX_000890, Lee Dep. Tr. 23:24-24:18, 26:1-4; RX_0004671; SEAPFF ¶ 250; SMLRPFF ¶ 250.)

164. The terminal generally collects SM Line's demurrage and terminal storage charges in addition to other applicable charges. (CX_000899, Lee Dep. Tr. 35:8-18; SEAPFF ¶ 251; SMLRPFF ¶ 251.)

165. SM Line offered credit terms to its customers. Sarah Lee handled SM Line's credit business, set credit rating criteria, and made decisions on credits for U.S. contracts, which did not include SEA because it was Korea's contract. (CX_000890-91, Lee Dep. Tr. 26:5-14, 26:25-27:20; SEAPFF ¶ 252; SMLRPFF ¶ 252.)

166. SM Line's Korea Headquarters made decisions about SEA's credit worthiness. (CX_000891, Lee Dep. Tr. 27:2-21.)

167. SM Line generally did not agree to waive charges or extend free time in advance in a door move involving a CNT because those charges would have to be settled between SEA and the CNT and they would not know what the issues would be for the day. (CX_001258, Solarez Dep. Tr. 189:2-24.)

168. At some point, SEA issued a blanket approval for D&D charges to keep their goods moving. (CX_002651, Rapske Dep. Tr. 39:2-23; SEAPFF ¶ 259; SMLRPFF ¶ 259.)

169. During the COVID-19 pandemic, SEA was charged demurrage for a variety of reasons including congestion, no available appointment at the port, closure of the terminals, and other issues, which generated many emails. SEA granted a blanket approval to its CNT Gold Point to pay demurrage on its behalf because SEA was dealing with a lot of issues and did not want to cause delay anymore. The blanket approval was not an agreement as to the validity of the charge but rather done out of desperation to move their loads and deliver to their customers. (CX_003080-81, Fernando Dep. Tr. 151:5-152:8.)

170. During the COVID-19 pandemic, SEA experienced similar levels of detention and demurrage charges among 19 carriers. (CX_002635-36, Rapske Dep. Tr. 23:18-24:4.)

171. SEA's detention and demurrage charges were markedly lower in 2019 than in 2020-2022. (RX_0004704-05; SEAPFF ¶ 280; SMLRPFF ¶ 280.)

172. Starting in 2020, SEA paid millions of dollars of inland transportation charges on SM Line shipments. (CX_005437, Smith Report, Ex. 2; SEAPFF ¶ 354; SMLRPFF ¶ 354.)

D&D SUMMARY REPORT

173. The document referred to by SEA as the "D&D Responsibility Report" is an untitled Excel spreadsheet produced in native format that SM Line describes as a "Summary Spreadsheet." (CX_004714, SM Line 143(b)(6) (Session III) Dep. Tr. Ex. 7; CX_005601-03, Decl. of K.K. Choi dated Jan. 31, 2024, ¶ 6 (Dkt. No. 64)).

174. After this proceeding was instituted and SM Line retained legal counsel in April of 2023, legal counsel Wook Chung, Esquire met with SM Line Managing Director and VP, K.K. Choi, and in-house counsel, Woo-Cheol Shin, and suggested that SM Line conduct an early internal risk analysis of SEA's monetary claims seeking refunds of demurrage and detention charges. Thereafter, K.K. Choi instructed employee, YeonHui Yi, to review SM Line's internal data and create a spreadsheet to perform a summary report of every charge that SM Line received from SEA or its agents, treating all such charges as refundable claims of transactions. The resulting Summary Spreadsheet was completed on or about April 27, 2023, and was based on emails available on containers for charges actually collected without confirming the details. In creating the spreadsheet, an effort was made to match the information with the container numbers. The emails used to create the spread sheet were stored by employees in the Phoenix office and were produced in discovery. The report was prepared in anticipation of litigation, and K.K. Choi did not share the report with anyone outside of SM Line. On or about May 31, 2023, YeonHui Yi shared the report with in-house counsel, Woo Cheol Shin, at the instruction of K.K. Choi, but Woo Cheo Shin did not share it with anyone else. After the report was produced, legal counsel discovered that the privileged document had been inadvertently disclosed

and requested its return and the destruction of all copies, but the parties were unable to resolve the dispute regarding whether the document should be returned.[17] (CX_004714, SM Line 143(b)(6) (Session III) Dep. Ex. 7; CX_000309-10, CX_000312-15, SM Line 143(b)(6) (Session III) Dep. Tr. 252:19-253:16, 257:21-258:8; CX_005601-03, Decl. of K.K. Choi dated Jan. 31, 2024 (Dkt. No. 64); CX_005604-06, Decl. of Woo Cheol Shin dated Jan. 31, 2024 (Dkt. No. 65); CX_005607-08, Decl. of Wook Chung dated Jan. 31, 2024 (Dkt. No. 63)).

175. The SM Line D&D Summary Report contains information on a number of the shipments at issue, including relevant dates, detention/demurrage charges, the reasons for the charges, and the amounts billed and collected. (CX_000326-31, SM Line 143(b)(6) (Session III) Dep. Tr. 269:20-274:14; SMLRPFF ¶ 266; Memorandum Order Regarding Confidential Document at 2 (Dkt. 72)).

176. The SM Line D&D Summary Report includes a factual basis for 62% of the charges and no factual basis for 38% of the charges. (CX_004714, SM Line 143(b)(6) (Session III) Dep. Ex. 7; SEAPFF ¶ 268; SMLRPFF ¶ 268.)

177. The SM Line D&D Summary Report shows "No Reply" for 63% of the demurrage charges, which signifies that SEA did not respond to SM Line's request for information. (CX_004714, SM Line 143(b)(6) (Session III) Dep. Ex. 7; SEAPFF ¶ 269; SMLRPFF ¶ 269.)

178. Port Congestion was listed as the reason for 63 charges in the total amount of $644,972.9. Chassis shortage was listed as the reason for 52 charges in the total amount of $1,268,382.9. (CX004714.)

179. A total of $3,310 in D&D charges are identified as a "Samsung Operation Issue" and $4,405 are identified as "Warehouse Issues." (CX_004714, SM Line 143(b)(6) (Session III) Dep. Ex. 7; SEAPFF ¶ 270; SMLRPFF ¶ 270.)

INCENTIVE PRINCIPAL

180. Joan Gaston and Christopher Solarize are not familiar with the incentive principle. (CX_001755, Gaston Dep. Tr. 102:13-18; CX_001170, Solarez Dep. Tr. 101:14-18.)

181. SM Line provided training to employees regarding OSRA and the interpretive rules in 2020 and 2022 by various methods that included transmission of bulletins and links via

[17] By order dated February 5, 2024, Judge Chintella ruled that the document was a privileged work product, but that the privilege had been waived. (Memorandum Order Regarding Discovery Motions [DKT. 55, 57, 61, 62, 68, and 69] at 2 (Dkt. 70.)

email, in person, and online, although no in-person training was provided during the COVID-19 pandemic. (CX_001690, Gaston Dep. Tr. 37:16-23; CX_000808–809, Oh Dep. Tr. 95:12-96:14; CX_000920, Lee Dep. Tr. 56:10-24; CX_454-55, K.K. Choi Dep. Tr. 101:7-102:3; CX_1172-73, Solarez Dep. Tr. 103:14-104:7; CX_1417, Askins Dep. Tr. 122:20-23; CX_637-38, Jung Dep. Tr. 71:23-72:11.)

182. SM line's policy was to waive demurrage and detention charges due to port congestion. (CX_001706-001707, Gaston Dep. Tr. 53:23-54-3.)

CHARGES

183. SEA's reparations claim includes approximately $3.2 million that SEA paid to two truckers, namely PB Industries and Gold Point. (CX_004385; CX_004466-67, Smith Report, ¶¶ 39-41; SMLPFF ¶ 101; SEARPFF ¶ 101.)

184. SEA's reparations claim includes approximately $1.7 million that SEA paid to Samsung SDS or Samsung SDS America that are "pass through" reimbursement claims in which SEA is seeking reimbursement for cost outlays fronted by the other Samsung entities for expenses related to the shipments at issue. (CX_004385; CX_004467, 004474, Smith Report, ¶¶ 41, 58; CX_002464-2470, SEA 143(b)(6) Dep. Tr. 217:15-223:11; SMLPFF ¶ 102; SEARPFF ¶ 102.)

185. SEA's reparations claim includes approximately $1.7 million that SEA paid for pre-pull and yard/storage arranged for off-dock container yard facilities to store containers rather than leaving them on terminal grounds in order to avoid excessive demurrage charges accruing at the terminals. (CX_004382; CX_004474, Smith Report, ¶ 58; SMLPFF ¶ 103; SEARPFF ¶ 103.)

186. SEA's reparations claim includes approximately $1 million that SEA paid for rehandling issues. (CX_004385; SMLPFF ¶104; SEARPFF ¶ 104.)

187. SEA's reparations claim includes $573,435 in chassis use charges that SM Line covered for all SEA store door moves. (CX_005436, Smith Report Ex. 1.1; CX_005437, Smith Report Ex. 2; CX_004461-63, Smith Report, ¶ 34(g); CX_001201, Solarez Dep. Tr. 132:9-14; SMLPFF ¶ 105; SEARPFF ¶ 105.)

188. SEA's reparations claim includes approximately $16,400 that SEA paid for chassis flip, chassis, reposition, and chassis split. (CX_004385; CX_004461-63, Smith Report, ¶¶ 34(k), 34(l) & 34(m); CX_001201, Solarez Dep. Tr. 132:9-14; SMLPFF ¶ 106; SEARPFF ¶ 106.)

189. SEA did not pay the invoices that it claims SM Line billed in violation of OSRA 2022. (CX_005597, CX_005598, CX_005599, CX_005600, CX_005595, CX_005596; SMLPFF ¶ 107; SEARPFF ¶ 107; CX_005012-5435, Smith Report Ex. 1.)

III. ANALYSIS AND CONCLUSIONS OF LAW

A. Preliminary Issues

1. Jurisdiction

The Shipping Act provides that a "person may file with the Federal Maritime Commission a sworn complaint alleging a violation of this part." 46 U.S.C. § 41301(a). Pursuant to this provision, the Commission has jurisdiction over a complaint alleging that a respondent committed an act prohibited by the Shipping Act. *See Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, Dkt. No. 02-04, 30 S.R.R. 991, 2006 WL 2007808, at *10-11 (FMC May 10, 2006) (the Commission was obligated to hear allegations particular to the Shipping Act, even where the complainant has already obtained an arbitration award for related breach of contract claims); *see also Cargo One, Inc. v. COSCO Container Lines Co.*, Dkt. No. 99-24, 28 S.R.R. 1635, 1645, 2000 WL 1648961, at *15 (FMC Oct. 31, 2000) (the Commission must address allegations of violations of the Shipping Act, which are within its exclusive jurisdiction; no common law remedy exists for such violations).

The Commission has an obligation to address Shipping Act claims, even if the relevant facts may also give rise to other claims between the parties. *MCS Industries, Inc. v. Mediterranean Shipping Company S.A.*, Dkt. No. 21-05, 2024 WL 95383, at *7 (FMC Jan. 3, 2024). The Commission has jurisdiction over Shipping Act claims even if a related proceeding is underway. *Id*. Shipping Act claims are distinct from breach of contract claims, entailing a different analysis of statutory standards that includes review of the carrier's broader practices beyond those directly affecting the complainant. *Id*. While breach of contract claims are resolved in court or as otherwise agreed by the parties, a claim for violation of the Shipping Act may only be resolved by the Commission.

2. Burden of Proof

To prevail in a proceeding to enforce the Shipping Act, a complainant bears the burden of proving their allegations by a preponderance of the evidence. 5 U.S.C. § 556(d); 46 C.F.R. § 502.203; *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, Dkt. No. 08-03, 2014 WL 9966245, at *14 (FMC Dec. 17, 2014). Under the preponderance standard, a complainant must show that their allegations are more probable than not. *Crocus Investments, LLC v. Marine Transport Logistics, Inc.,* Dkt. No. 15-04, 2021 WL 3732849, at *3-4 (FMC Aug. 18, 2021). It is appropriate to draw inferences from certain facts when direct evidence is not available, and circumstantial evidence alone may even be sufficient; however, such findings may not be drawn from mere speculation. *Waterman Steamship Corp. v. General Foundries, Inc.*, Dkt. No. 93-15, 26 S.R.R. 1173, 1180 (ALJ Dec. 9, 1993), adopted in relevant part, 26 S.R.R. 1424, 1994 WL 279898 (FMC June 13, 1994).

3. SEA's Motion to Compel and for Sanctions for Spoliation of Evidence

As a preliminary matter, the undersigned shall address SEA's pending motion to compel and for sanctions against SM Line for its alleged failure to produce and spoliation of ESI. (Complainant's Motion to Compel and for Sanctions for Spoliation of Evidence at Dkt. 78.) In this proceeding, SEA seeks reparations against SM Line for unreasonable practices related to detention and demurrage charges it contends were the responsibility of SM Line under through bills of lading that were subject to policies set by SM Line's headquarters office in Korea. In the pending motion, SEA alleges, *inter alia*, that SM Line intentionally failed to preserve ESI from SM Line's Korea office that deprived SEA of evidence vital to its case and without which it has been irreparably prejudiced. Although the first paragraph of the motion states that SEA seeks an order compelling SM Line to produce "allegedly destroyed" ESI in addition to sanctions for spoliation, SM Line concedes in the body of the motion that all ESI from key custodians in the Korea office dated prior to April of 2023 has been destroyed. Additionally, the request for relief does not seek an order compelling production of documents. Rather, SEA seeks the imposition of two types of sanctions: 1) an adverse inference against SM Line; and 2) attorney's fees and costs. In the absence of adequate legal briefing supporting the imposition of an order compelling discovery, the undersigned deems SEA's motion to compel discovery to have been abandoned and hereby denies the motion to compel on that basis. (Motion at 4, 19-20). For this reason, only the motion for sanctions remains for disposition.

SEA's Argument

SEA alleges that despite serving timely discovery to obtain information related to SM Line's demurrage and detention policy and dispute resolution with respect to the charges at issue, SM Line failed to identify key custodians in Korea with ultimate decision making authority regarding demurrage and detention charges, attempted unsuccessfully to thwart discovery, never implemented a litigation hold with respect to ESI, and did not advise SEA until March of 2024 that its emails older than 90 days had been automatically deleted pursuant to SM Line's document retention policy. SEA alleges that it has incurred unnecessary fees and costs as a result of SM Line's improper conduct, including but not limited to costs incurred in filing discovery motions. SEA contends that SM Line was under a duty to impose a litigation hold on ESI as of SEA's demand letter dated September 23, 2022. SEA alleges that SM Line intentionally withheld ESI, and that it has been prejudiced by SM Line's failure to do so. SEA requests that sanctions be imposed against SM Line, including the imposition of an adverse inference and attorney's fees. (Complainant's Motion to Compel and for Sanctions for Spoliation of Evidence at Dkt. 78; Complainant's Motion Ex. 1-28; Complainant's Reply in Further Support of its Motion to Compel and for Sanctions for Spoliation of Evidence at Dkt. 86.)

SM Line's Opposition

SM Line argues that sanctions are not warranted. Although it does not deny that it failed to institute a litigation hold with respect to ESI, it argues that a comprehensive effort was undertaken on a weekly basis to identify, locate, and produce all documents relevant to SEA's claims from the U.S. office of SM Line that handled the shipments at issue, and submitted sworn declarations attesting to the efforts undertaken in that regard. It argues that all responsive documents in its possession were produced to SEA, and that more than 53,000 documents were

produced including emails from 120 current and former employees. SM Line asserts that since its inception in 2017 it has automatically deleted emails older than 90 days in accordance with its document retention policy, and supported its claim with the sworn declaration of the information technology employee responsible for managing the automatic email deletions in Korea.[18] SM Line argues that the Korea headquarters office was not involved with the demurrage and detention charges at issue, which it states were handled by the U.S. office located in Chandler, Arizona. SM Line asserts that the Korea office only handles discount requests above a certain dollar amount and that SEA made no such requests.

SM Line argues that SEA has failed to prove: 1) that SM Line was under a duty to preserve ESI at a time it remained in its possession and control; 2) that any ESI relevant to the subject claims existed and was destroyed while SM Line had a duty to preserve it; 3) that ESI was destroyed due to SM Line's failure to take reasonable steps to preserve it; 4) that SM Line destroyed any evidence with a culpable state of mind; and 5) that the destruction of any ESI caused prejudice to SEA by destroying evidence that would have supported SEA's claims.

SM Line argues that it was not under a duty to preserve ESI until the complaint was served on April 19, 2023, and that by that time the vast majority of email communications occurring during the relevant time frame from 2020 through 2022 had been deleted. SM Line contends that it produced responsive emails from the relevant time frame because its automatic email deletion policy was not strictly enforced in the U.S. office as was the case in Korea. SM Line argues that sanctions are not appropriate where, as it alleges occurred here, ESI was destroyed pursuant to a standard practice and without a culpable state of mind. SM Line argues that negligent conduct does not support the imposition of an adverse inference. (SM Line Corporation's Response in Opposition to Samsung Electronic America's Motion to Compel and for Sanctions for Spoliation of Evidence at Dkt. 84; Respondent Ex. A – X; SM Line Corporation's Sur-Reply in Opposition to Samsung Electronics America's Motion to Compel and for Sanctions for Spoliation of Evidence at Dkt. 89.)

Spoliation

Spoliation is defined as the destruction of evidence or the significant and meaningful alteration of a document or instrument. *Tesoriero v. Carnival Corp.*, 965 F.3d 1170, 1184 (11th Cir. 2020). Fed. R. Civ. P. 37(e), applicable to this proceeding pursuant to 46 C.F.R. § 502.12, governs the procedures and sanctions available for spoliation of ESI. It provides:

> (e) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
>
> (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

[18] Declaration of Won-Mo Lee. (SM Line Corporation's Response in Opposition to Samsung Electronics America's Motion to Compel and for Sanctions for Spoliation of Evidence, Respondent's Ex. O.)

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

A party seeking sanctions based on the spoliation of evidence must establish three elements:

(1) the party having control over the evidence had an obligation to preserve it when it was destroyed or altered;

(2) the destruction or loss was accompanied by a "culpable state of mind;" and

(3) the evidence that was destroyed or altered was "relevant" to the claims or defenses of the party that sought the discovery of the spoliated evidence, to the extent that a reasonable factfinder could conclude that the lost evidence would have supported the claims or defenses of the party that sought it.

Thompson v. United States Dep't of Hous. & Urban Dev., 219 F.R.D. 93, 101 (D. Md. 2003) (citing *Zubulake v. UBS Warburg LLC,* 220 F.R.D. 212, 220 (S.D.N.Y. 2003).

Duty to Preserve

Because Fed. R. Civ. P. 37(e) refers to ESI "that should have been preserved in anticipation or conduct of litigation," a party cannot be sanctioned for spoliation of ESI unless there is a duty to preserve. The Advisory Committee's notes make clear that Rule 37 does not create a new duty to preserve, but rather operates in conjunction with the "common-law obligation to preserve." *See* Fed R. Civ. P. 37(e) Advisory Committee Notes to 2015 amendment. Courts have interpreted the obligation to preserve ESI to arise when litigation is pending or reasonably foreseeable. *Oil Equipment Co. v. Modern Welding Co.*, 661 F. App'x 646, 652 (11th Cir. 2016.) Thus, "a party to civil litigation has a duty to preserve relevant information, including ESI, when that party has notice that evidence is relevant to litigation or …. should have known that evidence may be relevant to future litigation." *John B. v. Goetz*, 531 F.3d 448, 459 (6th Cir. 2008.)

The duty to preserve can be triggered much earlier than a discovery request or the filing of a complaint. The relevant inquiry is based on the specific facts and circumstances and whether those facts give rise to a reasonable foreseeability that litigation will ensue. *Does v. City of Chicago*, 2019 WL 2994532, at *2 (N.D. Ill. September 9, 2019). "Often these events provide only limited information about that prospective litigation, however, so that the scope of information that should be preserved may remain uncertain. It is important not to be blinded to

this reality by hindsight arising from familiarity with an action that is actually filed." *See* Fed R. Civ. P. 37(e) Advisory Committee Notes to 2015 amendment. Moreover, before sanctions can be considered there must be a finding that the destroyed material cannot be replaced or restored through additional discovery. Fed. R. Civ. P. 37(e).

Intent

The Advisory Committee notes make clear that the destruction of evidence due to "negligence or gross negligence" does not warrant an adverse inference. *See* Fed R. Civ. P. 37(e) Advisory Committee Notes to 2015 amendment. As such, evidence of bad faith is necessary to support the imposition of an adverse inference. *Tesoriero*, 965 F.3d at 1184 (stating that bad faith is the standard for spoliation sanctions); *Rimkus Consulting Group, Inc. v. Cammarata,* 688 F. Supp. 2d 598, 614 (S.D. Tex. 2010.) Bad faith in the context of spoliation generally means destruction for the purpose of hiding adverse evidence, that is purposeful conduct. *Id*.

Relevance

Courts recognize that a showing that the lost information is relevant and prejudicial is an important check on spoliation allegations and sanctions motions. Courts have held that speculative or generalized assertions that the missing evidence would have been favorable to the party seeking sanctions are insufficient. By contrast, when the evidence in the case as a whole would allow a reasonable fact finder to conclude that the missing evidence would have helped the requesting party support its claims or defenses, that may be a sufficient showing of both relevance and prejudice to make an adverse inference instruction appropriate. *Rimkus Consulting Group, Inc. v. Cammarata,* 688 F. Supp. 2d 598, 616-17 (S.D. Tex. 2010); *Zubulake*, 220 F.R.D. at 220.

A party's duty to preserve specific types of evidence does not arise unless the party controlling the documents has notice of those documents' relevance. *In re Old Banc One Shareholders Securities Litigation*, 2005 WL 3372783, at *3 (N.D. Ill. December 8, 2005.) Instead, a party is required to keep relevant evidence over which it had control and reasonably knew or could foresee was material to the litigation. *Id.* In this regard, the prospect of litigation may only provide a limited set of information about prospective litigation such that the scope of information that should be preserved may remain uncertain. *See* Fed R. Civ. P. 37(e) Advisory Committee Notes to 2015 amendment. Usually, notice of relevance arises either from the discovery requests or from the complaint. *Cohn v. Taco Bell Corp.*, 1995 WL 519968, at *5 (N.D. Ill. August 30, 1995.)

Analysis

As an initial matter, the parties dispute the date upon which the duty to preserve ESI first arose. SEA contends the duty first arose when SM Line received its demand letter dated September 23, 2022. SM Line argues that the duty to preserve did not arise until the complaint was served on April 19, 2023.

SEA's September 23, 2022, demand letter states, *inter alia*, that SM Line had charged unjust and unreasonable fees of more than $10,000,000 under threat of holding the release of containers in violation the Shipping Act, including 46 U.S.C. § 41102(c). (SEA Motion for

Sanctions Ex. 2.) It also states that SEA "intends to seek reparations before the Federal Maritime Commission" for the entire amount of fees, attorney's fees, and interest. (*Id*.) At the same time, the demand letter also states: "Notwithstanding the foregoing, Samsung prefers to reach a private and amicable resolution on mutually-acceptable terms. Please provide written confirmation within two weeks from the date of this letter to indicate SM Line's interest in reaching a confidential settlement." (*Id*.) An internal SM Line email dated September 26, 2022, shows that it determined that it had only collected $3,600,706.20 from Samsung U.S. and Canada during the period addressed in the demand letter, that is approximately one-third of the refund claim made in SEA's demand letter. (SEA Motion for Sanctions Ex. 3.) By letter dated October 4, 2022, SM Line acknowledged receipt of SEA's demand letter, stated a willingness to review the issue, stated that specific invoices and supporting documents were needed to support the refund claim, and provided contact information for disputing detention and demurrage as set forth on its invoices and website. (SEA Motion for Sanctions Ex. 4.) It is unclear from the record whether the parties engaged in settlement discussions thereafter or whether they determined on a date prior to the filing of the complaint that a negotiated settlement could not be reached.

Although the issuance of a demand letter has been held to be sufficient to trigger the duty to preserve ESI, the question of spoliation is based on specific facts and circumstances. *Does*, 2019 WL 2994532, at *2. The seminal question is when the party in question should have reasonably anticipated litigation. *In re Ethicon, Inc. Pelvic Repair Systems Product Liability Litigation*, 299 F.R.D. 502, 512 (S.D. W.Va. 2014.) In this case, SEA's statement in its demand letter that it intended to seek reparations under the Shipping Act is equivocal because SEA also explicitly preserved the possibility of a non-suit resolution by simultaneously asserting a preference to reach "a private and amicable resolution." SEA's stated preference to reach a negotiated settlement is inconsistent with a finding that litigation was reasonably anticipated. *See Steves and Sons, Inc. v. JELD-WEN*, Inc., 327 F.R.D. 96, 106 (E.D. Va. 2018). Moreover, SM Line's reply to SEA's demand letter was also consistent with a desire to reach a negotiated settlement in that it stated that it was willing to review and respond to the refund claim, stated that it needed to obtain SEA's supporting documentation in light of the discrepancy between the refund claim amount and its own record of the amount collected, and referenced the availability of SM Line's established dispute resolution process. Thus, the parties' conduct suggests that at the time of the demand letter both sought to resolve the dispute without the need for litigation.

Under these circumstances, and in the absence of a statement by SEA in its demand letter that it expected SM Line to institute a litigation hold despite its preference to negotiate a settlement, the undersigned finds that the demand letter was insufficient to create a reasonable likelihood that litigation would ensue. Rather, it is more likely that SM Line understood that the parties would negotiate a settlement. There is no evidence of record to suggest that any other event would have put SM Line on notice that litigation was reasonably anticipated prior to the filing of the complaint. For this reason, the undersigned finds that SM Line's duty to preserve ESI arose when the complaint was filed on April 19, 2023, and it was clear that SEA would proceed with litigation.

Turning to the question of intent, the record establishes that since its inception in 2017 SM Line operated under a document retention policy strictly enforced in the Korea office in which emails older than 90 days were automatically deleted unless manually saved and that the policy existed to promote efficiency and control costs. (Declaration of Won-Mo Lee, SM Line

Motion Response Ex. O.) A finding that documents were destroyed in bad faith is not appropriate where documents are routinely destroyed pursuant to a long-standing document retention policy. *See Micron Tech., Inc. v. Rambus, Inc.*, 645 F.3d 1311, 1322 (Fed. Cir. 2011.) For this reason, the undersigned finds that any emails deleted by SM Line under its document retention policy prior to 90 days before the filing of the complaint on April 19, 2023, that is prior to January 19, 2023, were not deleted in bad faith. Because the charges at issue occurred from 2020 through 2022 and all Korea emails during this period were deleted pursuant SM Line's document retention policy prior to the first date upon which SM Line had a duty to preserve ESI, the undersigned finds that no emails were deleted in bad faith.

Turning to the question of relevance, there is no evidence that SM Line ever instituted a litigation hold to preserve ESI at any point after the complaint was filed as it was required to do in accordance with Fed. R. Civ. P 37(e) once it was served with the complaint and initial order reminding parties of the preservation duty at paragraph 8. (Dkt. 1 and 10.) At the same time, there is no evidence that any documents relevant to SEA's claims and defenses were destroyed as a result of the failure to institute a litigation hold. SEA contends that records from key custodians in Korea were destroyed, but the record establishes the SM Line's Korea office was only involved with charge disputes in which SM Line clients requested a discount or inactivation of a demurrage or detention charge above a certain amount. (K.K. Choi 143(b) (6) Dep. Tr. Vol. III 214:19-215:14, 218:2-22 at SM Line Motion Response Ex. Q.)

There is no evidence that SEA disputed any of the charges at issue during the relevant time frame that required approval by SM Lines' Korea headquarters office. Moreover, the record does not contain competent evidence that SEA disputed the charges at issue at any time prior to advising SM Line in writing that it intended to file a complaint with the FMC. SEA repeatedly failed at deposition to answer a direct question as to whether it disputed charges prior to filing the present proceeding, but rather responded multiple times that it never agreed to the charges despite paying them before indicating that unspecified charges were disputed on at least one occasion. (CX_002323-33, CX_002442-44, SEA 143(b)(6) Dep. Tr. 76:13-86:7, 195:16-197:24.) As such, there is no evidence that relevant Korea office emails ever existed or were destroyed. Additionally, SM Line contends that the only documents it destroyed under its document retention policy were emails, and SEA has presented no competent evidence that any other relevant documents existed that were later destroyed. Although SEA argues that SM Line's Korea office was responsible for demurrage and detention policy, there is no competent evidence establishing that additional relevant policy documents existed beyond those produced in discovery.

The undersigned rejects SEA's contention that SM Line's course of conduct in discovery warrants a finding of bad faith. When viewed as a whole, the record demonstrates that extensive and fulsome discovery was conducted during which the parties deposed nineteen fact witnesses and four expert witnesses, exchanged two expert reports on damages and four expert reports on liability, and produced thousands of pages of documents. At the same time, the record also establishes that both parties failed to work with one another to narrow the issues for hearing as evidenced by the fact that the vast majority of the more than 500 proposed findings of fact were disputed. SEA also challenged the admissibility of the applicable service contracts on the grounds of authenticity without identifying or producing any other contracts supporting its claim that the containers were shipped under store door terms. Thus, the record shows that neither

party was particularly cooperative with one another during the discovery phase of the proceeding. Under the totality of circumstances, the undersigned declines to find that SM Line acted in bad faith.

SEA's mere speculation that SM Line policy documents may have been destroyed because SM Line key custodians communicated via email does not establish that such evidence existed in the first place or was later destroyed. In the absence of evidence of the bad faith destruction of documents, the undersigned finds that the imposition of an adverse inference is not appropriate.

SEA also seeks an award of attorney's fees against SM Line due to its failure to preserve ESI by suspending its email retention policy after the complaint was filed and it became clear that SEA was seeking emails and policy documents from the Korea office. Fed. R. Civ. P. 37(e)(1) permits a court to "order measures no greater than necessary to cure the prejudice" from the loss of ESI when ESI "that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it." SEA cannot recover attorney's fees in this instance because it has failed to meet its burden of proof to show that relevant ESI was destroyed due to SM Line's negligent failure to preserve ESI.

4. Motions for Confidential Treatment

The parties filed multiple motions for confidential treatment with their briefings. No objections to the motions for confidential treatment were filed. A number of the motions were filed and decided prior to the issuance of this initial decision.[19] The outstanding motions requiring disposition are discussed below.

On March 29, 2024, SEA filed a motion under 46 C.F.R. § 502.5(b), seeking confidential treatment of portions of Complainant's Motion to Compel and for Sanctions for Spoliation of Evidence. (Complainant Samsung Electronics America, Inc's Motion for Confidential Treatment at Dkt. 77.) In support of the motion, SEA states that the motion references confidential information related to both parties, including SM Line's Management Procedure Improvement Plan. The exhibits to the motion also reveal the identities and contact information for certain third parties. SEA states that both confidential and public versions of the motions will be filed and requests confidential treatment for the materials and exhibits designated as confidential in the motion.

On April 12, 2024, SM Line filed a motion under 46 C.F.R. §§ 502.69 and 502.5(b) seeking confidential treatment of portions of Respondent's Response to Samsung Electronics America, Inc's ("SEA") Motion to Compel and for Sanctions for Spoliation of Evidence ("Response to Motion to Compel") and Ex. T, U, W, and X as well as Ex. 1 to the Declaration of Won-Mo Lee. (Respondent's Motion for Confidential Treatment of Portions of its Response to Samsung Electronics America, Inc's Motion to Compel and for Sanctions and for Spoliation of Evidence at Dkt. 83.) In support of the motion, SM Line states that certain SM Line policies have been exchanged between the parties during discovery subject to a confidentiality agreement and

[19] The motion filed at Dkt. 22 was granted at Dkt. 29. The motions filed at Dkt. 32 and 37 were granted at Dkt. 60. The motions filed at Dkt. 44 and 51 were granted at Dkt. 53. The motion filed at Dkt. 49 was denied as moot at Dkt. 53. The motions filed at Dkt. 61, 62, and 68 were granted at Dkt. 70.

therefore cannot be disclosed. SM Line requests that it be allowed to submit a public redacted version pursuant to 46 C.F.R § 502.5(a)(2).

On May 16, 2024, SM Line filed a motion under 46 C.F.R. § 502.5(b) seeking confidential treatment of portions of SM Line's Brief, Proposed Findings of Fact, Responses to Complainant's Proposed Findings of Fact, and Appendix. (Respondent's Motion for Confidential Treatment at Dkt. 90.) In support of the motion, SM Line states that under the parties' Confidentiality Order, documents produced in discovery marked as either "CONFIDENTIAL" and/or "CONFIDENTIAL – ATTORNEYS' EYES ONLY" and filed in this proceeding must be designated as Confidential Information. SM Line requests that the materials and exhibits designated as confidential in its Appendix be kept confidential.

On June 21, 2024, SEA filed a motion under 46 C.F.R. § 502.5(b), seeking confidential treatment of portions of its Reply Brief, Response to SM Line Corporation's Proposed Findings of Fact, and Appendix. (Complainant Samsung Electronics America, Inc.'s Motion for Confidential Treatment at Dkt. 107.) In support of the motion, SEA states that these filings contain and reference confidential business information, including financial information related to both parties, related SEA entities, and third parties. SEA requests that the materials and documents designated as confidential be kept confidential.

On December 29, 2024, SM Line filed a motion under 46 C.F.R. § 502.5(b), seeking confidential treatment of portions of SM Line's Supplemental Brief, Supplemental Proposed Findings of Fact, and Supplemental Appendix. (Respondent's Motion for Confidential Treatment at Dkt. 129.) In support of the motion, SM Line states that under the parties' Confidentiality Order, documents produced in discovery marked as either "CONFIDENTIAL" and/or "CONFIDENTIAL – ATTORNEYS' EYES ONLY" and filed in this proceeding must be designated as Confidential Information. SM Line requests that the information designated as confidential in SM Line's Supplemental Brief, Supplemental Proposed Findings of Fact, and Supplemental Appendix be kept confidential.

On January 7, 2025, SEA filed a motion under 46 C.F.R. § 502.5(b), seeking confidential treatment of portions of SEA's Supplemental Brief and Response to SM Line's Supplemental Proposed Findings of Fact. (Complainant's Samsung Electronics America, Inc.'s Motion for Confidential Treatment at Dkt. 133.) In support of the motion, SEA states that these filings contain confidential information related to both parties. SEA requests that the materials and exhibits designated as confidential in these filings be kept confidential.

On April 2, 2025, SEA filed a motion under 46 C.F.R. § 502.5(b), seeking confidential treatment of portions of SEA's response and appendix submitted in response to the Order for Supplemental Information served March 12, 2025. (Complainant's Samsung Electronics America, Inc.'s Motion for Confidential Treatment at Dkt. 140.) In support of the motion, SEA states that these filings contain confidential information, including to commercially sensitive operations related to both parties and the identities of third parties. SEA requests that the materials and exhibits designated as confidential in these filings be kept confidential.

On April 2, 2025, SM Line filed a motion under 46 C.F.R. § 502.5(b), seeking confidential treatment of portions SM Line's Responses to the Order for Supplemental

Information and SM Line's Second Supplemental Appendix. (Respondent's Motion for Confidential Treatment at Dkt. 142.) In support of the motion, SM Line states that under the parties' Confidentiality Order, documents produced in discovery marked as either "CONFIDENTIAL" and/or "CONFIDENTIAL – ATTORNEYS' EYES ONLY" and filed in this proceeding must be designated as Confidential Information. SM Line requests that the materials and exhibits designated as confidential in SM Line's Responses to the Order for Supplemental Information and SM Line's Second Supplemental Appendix be kept confidential.

Upon review of the confidential versions of each of the above-referenced filings, I find the parties have shown good cause for confidential treatment pursuant to 46 C.F.R. § 502.141(j)(1) by demonstrating that the filings contain commercial information or would subject certain persons to annoyance and undue burden. For the foregoing reasons, the above-referenced motions for confidential treatment are **GRANTED**. The Office of the Secretary is requested to treat the designated information as confidential.

5. Request for Oral Hearing

SEA requested in its complaint that an oral hearing be scheduled. (Dkt. 1.) SM Line requested in its answer that an oral hearing be scheduled. (Dkt. 11.) Judge Chintella denied the requests for oral hearing without prejudice in the Scheduling Order served June 23, 2023. Neither party subsequently filed a motion renewing their requests for oral hearing. Additionally, a review of the record suggests that there are no material factual disputes for which a hearing is required. Accordingly, no oral hearing has been scheduled.

B. Relevant Law

1. Demurrage and Detention

a. Section 41102(c)

Section 41102(c) of the Shipping Act, states that a "common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c).

The elements for establishing a section 41102(c) claim are specified at section 545.4, which states:

> 46 U.S.C. 41102(c) is interpreted to require the following elements in order to establish a successful claim for reparations:
>
> (a) The respondent is an ocean common carrier, marine terminal operator, or ocean transportation intermediary;
>
> (b) The claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis;

(c) The practice or regulation relates to or is connected with receiving, handling, storing, or delivering property;

(d) The practice or regulation is unjust or unreasonable; and

(e) The practice or regulation is the proximate cause of the claimed loss.

46 C.F.R. § 545.4.

b. Demurrage and Detention Rule

On April 28, 2020, the Commission issued an Interpretive Rule on Demurrage and Detention Under the Shipping Act, effective May 18, 2020, with minor changes from the proposed rule. 85 Fed. Reg. 29638 (May 18, 2020) ("Demurrage and Detention Rule"). "The rule followed years of complaints from U.S. importers, exporters, transportation intermediaries, and drayage truckers that ocean carrier and marine terminal operator demurrage and detention practices unfairly penalized shippers, intermediaries, and truckers for circumstances outside their control." 85 Fed. Reg. at 29638. The demurrage and detention rule provides "guidance as to what [the Commission] may consider in assessing whether a demurrage or detention practice is unjust or unreasonable" under section 41102(c). 85 Fed. Reg. 29638.

Section 545.5 provides in pertinent part:

(a) *Purpose.* The purpose of this rule is to provide guidance about how the Commission will interpret 46 U.S.C. 41102(c) and § 545.4(d) in the context of demurrage and detention.

(b) *Applicability and scope.* This rule applies to practices and regulations relating to demurrage and detention for containerized cargo. For purposes of this rule, the terms demurrage and detention encompass any charges, including "per diem," assessed by ocean common carriers, marine terminal operators, or ocean transportation intermediaries ("regulated entities") related to the use of marine terminal space (*e.g.,* land) or shipping containers, not including freight charges.

(c) *Incentive principle*—(1) *General.* In assessing the reasonableness of demurrage and detention practices and regulations, the Commission will consider the extent to which demurrage and detention are serving their intended primary purposes as financial incentives to promote freight fluidity.

(2) *Particular applications of incentive principle*—(i) *Cargo availability.* The Commission may consider in the reasonableness analysis the extent to which demurrage practices and regulations relate demurrage or free time to cargo availability for retrieval.

(ii) *Empty container return.* Absent extenuating circumstances, practices and regulations that provide for imposition of detention when it does not serve its incentivizing purposes, such as when empty containers cannot be returned, are likely to be found unreasonable.

(iii) Notice of cargo availability. In assessing the reasonableness of demurrage practices and regulations, the Commission may consider whether and how regulated entities provide notice to cargo interests that cargo is available for retrieval. The Commission may consider the type of notice, to whom notice is provided, the format of notice, method of distribution of notice, the timing of notice, and the effect of the notice.

(iv) Government inspections. In assessing the reasonableness of demurrage and detention practices in the context of government inspections, the Commission may consider the extent to which demurrage and detention are serving their intended purposes and may also consider any extenuating circumstances.

46 C.F.R. § 545.5.

c. Discussion

As set forth above, to establish a violation of § 41102(c), a complainant must demonstrate that: (1) the respondent is a regulated entity; (2) the claimed acts or omissions occurred on a normal, customary, and continuous basis; (3) the practice or regulation is connected with receiving, handling, storing, or delivering property; (4) the practice or regulation is unjust or unreasonable; and (5) the practice or regulation is the proximate cause of the claimed loss. 46 C.F.R. § 545.4.

i. Regulated Entity

Section 41102(c) governs the activities of common carriers, marine terminal operators, and ocean transportation intermediaries. Respondent SM Line is an ocean common carrier. Complaint ¶ 5; Answer ¶ 5. Accordingly, the first element is met.

ii. Normal, Customary, and Continuous Practice

With the enactment of the rule codified at 46 C.F.R. § 545.4, the Commission restored its interpretation of Section 41102(d) to its pre-2010 understanding and returned the Commission's focus and priority to the activities of maritime regulated entities that generally affect the broader shipping public, 83 Fed. Reg. at 64,479, including that a party is liable only for acts or omissions occurring on a normal, customary, and continuous basis. *See Crocus Investments, LLC v. FMC*, 2022 WL 3012275, at *1 (D. D.C. 2022).

SEA alleges that SM Line engaged in unreasonable practices resulting in more than 18,000 charges on store door moves of more than 7,000 containers of SEA cargo between 2020 and 2022. (Complainant Brief at 1; Complainant Reply Brief at 67.) Accordingly, the second element is met.

iii. Connected with Receiving, Handling, Storing, or Delivering Property

The disputed charges were imposed as part of invoicing demurrage, detention, and storage charges related to the delivery of SEA's cargo. Thus, the third element is met.

iv. Unjust and Unreasonable

The Commission has stated that "'[t]he test of reasonableness" for practices is that "the practice must be otherwise lawful, not excessive, and reasonably related, fit and appropriate to the ends in view." *Kawasaki Kisen Kaisha, Ltd v. The Port Authority of New York and New Jersey*, 2014 WL 73284575, at *9 (FMC 2014) (quoting *W. Gulf Mar. Ass'n v. Port of Hous. Autk*, 21 F.M.C. 244, 248, 18 S.R.R. 783, 790 (FMC 1978), *aff'd without opinion sub nom. W. Gulf Mar. Ass'n. v. FMC*, 610 F.2d 1001 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 822 (1980)).

SEA's principal argument is that SM Line acted unreasonably by imposing demurrage and detention charges against the shipments at issue because it was responsible for inland transportation on store door moves and therefore responsible for all demurrage, detention, and accessorial charges absent a prior determination that SEA's performance was responsible for the charges. Thus, SEA argues that SM Line is responsible for all charges imposed on store door moves absent a determination in advance that SEA is at fault. This premise forms the basis of SEA's corollary arguments that the charges at issue did not serve the primary purpose to incentivize the movement of cargo; that SM Line was first required to evaluate which party was responsible for the charges before imposing the charges; that SM Line failed its obligation to certify that its performance did not cause or contribute to the underlying invoiced charges; and that SM Line had responsibility under a through bill of lading to arrange terminal cargo release.

SEA contends that all shipments occurring before it transitioned to CY moves on or about August 1, 2022, were under store door terms negotiated between SM Line and third parties, but it introduced no agreement providing for shipment under store door terms. This fact notwithstanding, the parties agree that SEA was the consignee on through bills of lading issued by SM Line from 2020 through August of 2022 when SEA transitioned to CY moves. Both parties also agree that an ocean common carrier is responsible for inland transportation on a through bill of lading.

The crux of the parties' dispute involves a disagreement as to how liability is determined for the demurrage, detention, and accessorial charges on the through bills of lading at issue. Although SM Line concedes that ocean common carriers are responsible for demurrage and detention charges in what it refers to as "pure" store door moves, it contends that this general rule does not apply to shipments involving CNTs because a consignee's nomination of a preferred trucker shifts responsibility for the charges from the ocean common carrier to the consignee under the applicable tariff pursuant to the service contract under which the shipments moved. Specifically, SM Line relies on the provision on its tariff stating that the carrier acts only as an agent for a customer, including a consignee, when the customer prefers a CNT over a house trucker, and provides that the customer is liable for charges and fees even when the carrier's rates include inland services at store door delivery rates. SEA counters that the existence of a CNT does not alter SM Line's obligation for inland transportation under store door terms. Thus, both parties essentially argue that the applicable contractual agreements establish what constitutes reasonable conduct. SEA relies on SM Line's contractual duty to provide inland transportation under store door terms. SM Line relies on its service contract and tariff provision stating that customers are responsible for charges for CNT shipments under store door terms.

The undersigned rejects both parties' arguments on the ground that the fundamental question under the Shipping Act is whether SM Line's practices are reasonable. Although the parties' contractual obligations and course of conduct may be relevant to determining whether or not SM Line's practices are reasonable, they are not determinative because the terms of a contract, tariff, or course of conduct may constitute an unreasonable practice. In this regard, "Ocean carriers and marine terminal operators and ocean transportation intermediaries do not have an unbound right to contract for whatever they want. They are limited by prohibition of the Shipping Act, one of which is section 41102(c)." *See Final Rule: Interpretive Rule of D&D Under Shipping Act*, 85 Fed. Reg. 29638, 29648 (May 18, 2020). For this reason, the Commission has recognized that it needs to carefully scrutinize arguments that shippers, intermediaries, and truckers have the ability to meaningfully negotiate contractual terms related to demurrage and detention. *Id*.

The Commission's requirement that the reasonableness of demurrage and detention charges be determined on a container-by-container basis suggests that the question of reasonableness turns on the specific facts and circumstances of each shipment at issue. This conclusion also follows logically from the fact that there are a myriad of circumstances that may be responsible for a container remaining in port beyond its last free day, including: port congestion; chassis shortage, warehouse issue, diversion, Samsung operational issue; "peel off"; "CNT arranged late." (CX_004714.) Thus, the question of who is liable for the charges turns on which party is at fault, that is which party is responsible for the container remaining in port beyond the last free day. For this reason, the positions of both SEA and SM Line are incorrect because each contends that the other party is responsible for the charges at issue by virtue of their respective contractual rights and obligations regardless of fault. That the party at fault is responsible for the charge is also consistent with the requirement that demurrage and detention serve their primary intended purpose under the incentive principal of promoting freight fluidity in accordance with Commission Rule 545.5 as of its effective date on May 18, 2020. This result is dictated by the fact that the party at fault is likely able to take action to remedy the situation and is incentivized to do so by virtue of accruing detention and demurrage charges. Where no party is at fault and neither party can be incentivized to act, the imposition of detention and demurrage is likely unreasonable. 85 Fed. Reg. at 29655. Thus, in the absence of a container-by-container analysis with information as to why each shipment remained in port beyond the last free day, as is the case here, there will generally be insufficient information in the record to determine whether or not the demurrage and detention charges at issue serve their primary intended purpose under the incentive principal of promoting freight fluidity, in accordance with section 545.5.

SEA's argument that an ocean common carrier is responsible for detention and demurrage on store door moves is not supported by the applicable guidance. Despite that commentators argued that ocean carriers should not be able to charge shippers demurrage and detention on carrier haulage/store door moves, the Demurrage and Detention Final Rule does not contain such a provision. Rather, the Commission expressed that it had concerns about charging shippers demurrage on carrier haulage moves under section 41102(c) and would closely scrutinize them in an appropriate case. 85 Fed. Reg. at 29664-29665. Thus, it is clear that the Commission has not determined that demurrage and detention cannot be charged on store door moves, but rather may be closely scrutinized when appropriate to do so.

SEA's argument that an ocean common carrier is responsible for detention and demurrage on store door moves is also undermined by the fact that it admits that it is appropriate to assess demurrage and detention charges against a consignee in store door moves when it is responsible for the delay, such as when inland transportation is impossible due to the inability of the warehouse to receive cargo or diversion to a new customer due to the fault of SEA. (F of F 45, 110, 111.) It is also undermined by the fact that SEA's own document shows that it preferred CNTs over house truckers in part due to their ability to perform pre-pulls in order to avoid demurrage charges. (F of F 39.)

Both parties argue in their briefs that the record supports a finding that the other party was communicating, managing, and instructing the CNTs and therefore responsible for the resulting charges. The undersigned finds these facts to be irrelevant under a fault analysis absent evidence that action or inaction by one party or the other resulted in a particular container remaining beyond the last free day. Because no container-by-container analysis was offered to illuminate the facts and circumstances underlying the imposition of the charges at issue for each shipment, the undersigned finds the evidence concerning the parties' general course of conduct in managing and instructing the CNTs is not persuasive.

Expert Witness Testimony

Both parties also rely on expert witnesses on the issue of liability. SEA relies on the expert report of John D. McCown, who holds an MBA, is a non-resident senior fellow at the Center for Maritime Strategy, and is the holder of two patents on maritime processing related to cargo handling and vessel propulsion. Mr. McCown contends that prior to the COVID-19 pandemic SM Line followed the industry practice for store-door terms on SEA shipments in which SM Line was responsible for charges except in limited circumstances in which the delay was caused by the consignee, but that in 2020 SM Line started charging demurrage and detention and other accessorial charges despite there being no change in inland common carriage under store door terms. Mr. McCown contends that SM Line's aggressive detention and demurrage practices resulted in exponential net income growth unrelated to costs and that the practices were inconsistent with the incentive principle. (CX_004326-4371.)

SM Line relies on the expert report of Lee A. Claire, who holds an MBA and JD and has 40 years of management and consulting experience in the transportation industry. Mr. Claire contends that detention, demurrage and other accessorial charges are standard in the industry, that COVID-19 resulted in unprecedented congestion, labor and equipment shortages, and supply chain issues resulting in increased demurrage and detention charges industry wide, that SM Line's charges were below the industry average, that SEA's CNT model placed significant responsibilities on SEA for container operations, that SEA's actions were responsible for or a major contributing factor to most detention an demurrage charges when most customers used house carriers, and that SEA has not proved damages. (CX_004291-4135.)

The undersigned finds Mr. McCown's report to be unpersuasive due to his failure to perform a container-by-container analysis. Mr. McCown's review of industry practices, contractual obligations, and income growth data does not shed light on the underlying facts and circumstances necessary to make a reasonableness determination under a fault analysis. In support of this conclusion, the undersigned finds persuasive the argument of SM Line's expert

Mr. Gauthier that one must look at each container, container-by-container, to understand the demurrage and detention charges and their respective reasons, and that SEA's expert report is deficient because it did not take important factors to consideration, including the actions/inactions of SEA. (CX_003615, CX_003632, SM Line Expert Clair Dep. Tr. 243:8-24, 260:7:17; CX_004385-88, SM Line Expert Gauthier Report (referencing Ex. IV); CX_004481-83, SM Line Expert Clair Rebuttal Report.)

SEA also argues that SM Line's demurrage and detention policies are unreasonable because they fail to comply with the Incentive Principle, which requires a consideration "of the extent to which demurrage and detention are serving their intended primary purposes as financial incentives to promote freight fluidity" when assessing the reasonableness of demurrage and detention practices and regulations. The undersigned finds that this argument is supported by the record. The most telling evidence that SM Line's demurrage and detention policies do not serve the purpose of incentivizing freight fluidity comes from the 2022 DEM/DET Management Improvement Plan Report dated October 26, 2022 (CX_0004742-4751.) Although SM Line argues that the report was drafted by a rogue employee at the end of the relevant time frame and never adopted as policy, this argument is not persuasive because SM Line had already recognized that demurrage and detention was a means to increase income and was maximizing the amounts collected from shippers – facts that are directly at odds with the incentive principle. (F of F 133.) SM Line's dismissal of the significance of the report on the ground that it was authored by a "rogue employee" is further undermined by the fact that Sung Hyun Kim, the so-called rogue employee, was promoted to team leader in January 2023, after he wrote the report. (F of F 129-135; CX_000684, S.H. Kim Dep. Tr. 31:5-10; SMLRFF ¶ 207.)

That SM Line maximized the collection of demurrage and detention in order to maximize profits is also evidenced by the fact that it invoiced charges based on its service contract and tariff regardless of whether SEA was at fault. (F of F 126, 146.). This practice is at odds with the incentive principle. This practice is also at odds with the provisions of 46 U.S.C. § 41104(d)(2), which require invoices for demurrage and detention to contain a "statement that the charges are consistent with any of Federal Maritime Commission rules with respect to detention and demurrage" (§ 41104(d)(2)(L)), and a "statement that the common carrier's performance did not cause or contribute to the underlying invoiced charges" (§ 41104(d)(2)(M)).

Additionally, SEA's expert determined that SM Line's collection of demurrage and detention was recognized as a means to increase income, unrelated to its costs. (Expert Report of John D. McCown, CX_004326-004379 at ¶ 79.) Finally, both Christopher Solarez, operations manager for SM Line from 2017 to 2022, and Joan Gaston, the import customer service manager at SM Line, testified at deposition that they were not familiar with the Incentive Principle, which suggests that it was not a focus of SM Line's demurrage and detention policy despite the enactment of OSRA in 2022. (F of F 180.) Their lack of knowledge of the principle is at odds with the testimony of SM Line witnesses at deposition that training occurred after the enactment of OSRA in 2022. Thus, the record as a whole supports a finding that SM Line's demurrage and detention policy did not incentivize the movement of cargo but rather was a tool to maximize profits, did not comply with the incentive principle set forth in 46 C.F.R. § 545.5, and constituted an unreasonable practice to the extent it assessed charges regardless of which party was at fault.

SEA also argues that SM Line's invoicing and collection practices were unreasonable for the following reasons: 1) all detention and demurrage charges were automatically determined to be SEA's responsibility and there were no procedures to determine in advance whether the charges were valid; 2) there was no meaningful dispute resolution process with specific criteria, SM Line's US office lacked sufficient authority to resolve disputes because SM Line's Korea headquarters had final authority, and SM Line failed to establish policy in accordance with FMC's Interpretive Rule on Demurrage and Detention; and 3) SM Line's invoices issued between July 17, 2022, and December 31, 2022, failed to include the minimum information required by OSRA. (*Id*.)

With respect to SEA's allegation that SM Line engaged in an unreasonable practice by automatically considering all detention and demurrage to be SEA's responsibility, the record shows that SM Line automatically charged SEA for demurrage and detention on all store door moves in accordance with its applicable service contract and tariff. To the extent that charges were assessed regardless of which party was at fault, the undersigned finds that SM Line engaged in an unreasonable practice.

With respect to SEA's allegation that SM Line's dispute resolution process was deficient, the record does not include competent evidence that SEA disputed any of the charges at issue. The record shows that SM Line had no written policy regarding the facts to consider in determining whether a dispute was valid, but rather evaluated disputed charges utilizing a case-by-case basis. (F of F 150.) The record shows that the Chandler, Arizona office had authority to resolve disputes up to a certain dollar amount and that the office in Korea had authority to resolve disputes above that amount. (F of F 121 and 122.) The record shows the top three circumstances where SM Line inactivated, i.e., waived, D&D charges were: (1) delay caused by congestion at the terminal, (2) unable to locate containers, and (3) differences existed in the calculation of the last free date between the terminal and SM Line's system. (F of F 128.) The record also shows SM Line provided contact email addresses to dispute detention and demurrage charges. (F of F 152 and 158.)

The Commission does not require carriers to utilize specific dispute resolution policies. 85 Fed. Reg. 29661. When determining the reasonableness of a carrier's demurrage and detention practices, the Commission may consider in the reasonableness analysis the existence, accessibility, content, and clarity of policies implementing demurrage and detention practice and regulations, including dispute resolution policies and practices and regulations regarding demurrage and detention billing. In assessing dispute resolution policies, the Commission may further consider the extent to which they contain information about points of contact, timeframes, and corroboration requirements. 46 C.F.R. § 545.5(d). Although SM Line's dispute resolution process could benefit from the addition of written guidance on the factors to consider in granting or denying a dispute, the undersigned finds that the record does not support a finding that the dispute resolution system in place was ineffective. For this reason, the undersigned finds that SEA has failed to meet its burden to establish that SM Lines dispute resolution process is unreasonable.

With respect to the allegation that SM Line's invoices issued between July 17 and December 31, 2022, failed to contain the minimum information required by OSRA, for the reasons set forth below at III.B.2 the undersigned finds that SM Line violated 46 U.S.C.

§§ 41104(a)(15) and 41104(d)(2) after the effective date of OSRA 2022 by seeking to invoice and charge SM Line for demurrage and detention charges without including the information on the invoices that is required by 46 U.S.C. § 41104(d)(2). In this regard, the following six SM Line invoices did not include the mandatory minimum information required by OSRA: LGT045268 (CX_005597); LGT045273 (CX_005598); LGT045283 (CX_005599); PHT000309 (CX_004862/CX_005600)[20]; LGT044593 (CX_005595); and LGT045081 (CX_005596). (SMLRPFF ¶ 227.) SM Line's failure to properly invoice these charges in accordance with the requirements of OSRA 2022 constitutes an unreasonable practice.

v. Proximate Cause of Claimed Loss

In order to prove a claim for reparations, a party must show that it is entitled to receive reparations by showing that it sustained actual loss or injury and that the violation of law was the proximate cause of that loss or injury with "reasonable certainty." *Adair v. Penn-Nordic Lines, Inc.*, 26 S.R.R. 11, 25 (1991); *California Shipping Line, Inc. v. Yangming Marine Transport Corp.*, 25 S.R.R. 1213, 1230 (1990). Speculative damages are not allowed, and there must be reasonable certainty regarding a claim for lost profits. *OJ Commerce, LLC v. Hamburg Sudamerikanische Dampfschifffahrts-Gesellschaft A/S & Co. KG, et al.*, 2023 WL 3969857, at *40 (FMC June 7, 2023.)

As previously stated, SEA did not provide a container-by-container analysis that includes the factual basis for which each demurrage and detention charge was assessed. Rather, SEA's expert, Gregory Smith, provided an analysis of all charges incurred by SEA during the time frame at issue without identifying the cause of each charge, that is whether each charge resulted from chassis unavailability, trucker unavailability, warehouse issues, a port closure, or another reason. (CX_004444-4477, Expert Report of Gregory Smith, ¶¶ 36, 37; CX_005012-5435, Expert Report of Gregory Smith, Ex. 1.) Reasonableness "must be assessed alongside all other considerations and the specific factual circumstances of the case." *TCW. Inc. v. Evergreen Shipping Agency (America) Corp. & Evergreen Line Joint Service Agreement, 2025 WL 516256, at *8 (FMC February 13, 2025); Hapag-Lloyd, A.G.,* 2022 WL 1239377, at *2 (ALJ April 22, 2022) *(*no violation was found where there was no evidence regarding the availability of appointments.) In the absence of a container-by-container analysis specifying the cause of each charge in dispute, a complainant generally fails to meet its burden to establish that the damages sought proximately resulted from the unreasonable practices alleged.

Despite SEA's failure of proof with respect to the bulk of charges at issue due to the lack of a container-by-container analysis, SM Line's D&D Summary Report establishes with reasonable certainty that some of the charges were the proximate result of SM Line's unreasonable practice of assessing charges against SEA when it was not at fault. (CX004714.) SM Line's internal analysis is based primarily on e-mail communications it reviewed shortly after the complaint was filed. (F of F 174.) In the analysis, port congestion is listed as the reason for 63 charges in the amount of $644,972.9, and chassis shortage is listed as the reason for 52 charges in the amount of $1,268,382.9. (F of F 178.)

[20] SEAPFF ¶ 227 and SMLRPFF ¶ 227 list CX_004862 and CX_00560 as separate entries, but each refers to the same invoice PHT00309. Thus, there are six invoices despite that citations for seven are provided.

The record shows that SM Line waived or discounted demurrage and detention charges caused by port congestion. (F of F 128, 182.) SM Line's actions in this regard support a finding that port congestion is a circumstance beyond the control of the shipper for which the assessment of demurrage and detention is inappropriate. This finding is also consistent with the Incentive Principle because the assessment of charges due to port congestion would not incentivize the movement of cargo since there is nothing the shipper can do to remedy the situation. Moreover, SM Line stated in its brief that SEA can be charged for inland transportation charges imposed for reasons not entirely beyond its control. (SM Line Reply Brief at 3-4.) Logic dictates that port congestion caused by the COVID-19 pandemic was a reason entirely beyond SEA's control for which the imposition of charges was not reasonable. For these reasons, the undesigned finds that SM Line's assessment of charges due to port congestion was unreasonable.

The record also shows that SM Line was responsible for providing chassis to SEA in store door moves and also provided chassis in CY moves. (F of F 74 to 77.) For this reason, the imposition of demurrage against SEA when chassis were not available would not incentivize the movement of cargo. Because SM Line was responsible for the provision of chassis, the undersigned finds that the assessment of charges against SEA due to chassis shortage was unreasonable.

SM Line's D&D Summary Report constitutes an admission against interest and is admissible evidence pursuant to Fed. R. Evid. 801(d). Although SM Line contends that its analysis was preliminary and based solely on emails, the undersigned finds that it constitutes sufficient proof that these charges were not caused by SEA and were in fact caused either by facts beyond SEA's control in the case of port congestion or by SM Line in the case of chassis unavailability because it was responsible for supplying chassis. The undersigned finds that the D&D Summary Report constitutes prima facie evidence that SEA was not at fault for these charges, which shifts the burden to SM Line to produce evidence to rebut this presumption. By failing to do so, it cannot reasonably challenge its internal analysis of the charges at issue on the ground that it was only preliminary. Moreover, the record shows that when the report was created an effort was made to match the available information with the container. (F of F 174.) Under these unique circumstances, the undersigned finds that SEA has met its burden to establish with reasonable certainty that specified charges shown on the D&D Summary Report were caused by chassis shortage and port congestion despite the lack of a container-by-container analysis. SM Line's computation of damages based on its internal fault analysis of emails combined with its effort to link the charges to a particular container warrants an exception to the general rule that a container-by-container analysis is required. Thus, the evidence establishes that SEA has suffered damages in the total amount of $1,913,355.80 as a proximate result of SM Line's unreasonable practices.

2. 41104(a)(15)

Section 41104(a)(15) applies to invoices issued after the effective date of OSRA on June 16, 2022. Section 41104(a)(15) makes it unlawful for a regulated entity to invoice any party for demurrage or detention charges unless the invoice includes required information. It provides:

> (a) In General. A common carrier, either alone or in conjunction with any other person, directly or indirectly, shall not --

> (15) invoice any party for demurrage or detention charges unless the invoice includes information as described in subsection (d) showing that such charges comply with--
>
> > (A) all provisions of part 545 of title 46, Code of Federal Regulations (or successor regulations); and
> >
> > (B) applicable provisions and regulations, including the principles of the final rule published on May 18, 2020, entitled "Interpretive Rule on Demurrage and Detention Under the Shipping Act" (or successor rule).

46 U.S.C. § 41104(a)(15).

Section 41104(d)(2) requires that an invoice for detention and demurrage charges must contain the following information:

> a. Date that the container is made available.
> b. The port of discharge.
> c. The container number or numbers.
> d. For exported shipments, the earliest return date.
> e. The allowed free time in days.
> f. The start date of free time.
> g. The end date of free time.
> h. The applicable detention or demurrage rule on which the daily rate is based.
> i. The applicable rate or rates per the applicable rule.
> j. The total amount due.
> k. The email, telephone number, or other appropriate contact information for questions or requests for mitigation of fees.
> l. A statement that the charges are consistent with any of Federal Maritime Commission rules with respect to detention and demurrage.
> m. A statement that the common carrier's performance did not cause or contribute to the underlying invoice charges.

46 U.S.C. § 41104(d)(2).

The issuance of invoices lacking the requisite information triggers 46 U.S.C. § 41104(f), which provides that "[f]ailure to include the information required under subsection (d) of an invoice with any demurrage or detention charge shall eliminate any obligation of the charged party to pay the applicable charge."

SEA argues that the following six SM Line invoices did not include the mandatory minimum information required by OSRA: LGT045268 (CX_005597); LGT045273 (CX_005598); LGT045283 (CX_005599); PHT000309 (CX_004862/CX_005600)[21]; LGT044593 (CX_005595); and LGT045081 (CX_005596). (SEA Brief at 49, SEAPFF ¶ 227;

[21] SEAPFF ¶ 227 and SMLRPFF ¶ 227 list CX_004862 and CX_00560 as separate entries, but each refers to the same invoice PHT00309. Thus, there are six invoices despite that citations for seven are provided.

SMLRPFF ¶ 227.) As set forth in detail below, the record supports a finding that each of the invoices fails to contain all of the information required by 46 U.S.C. § 41104(d)(2).

Invoice LGT045268 is a detention invoice dated July 15, 2022, for BL SEL2H1706404, Container No. SMCU1023721 for 11 days after free time expired on June 8, 2022. The invoice does not contain: 1) A statement that the charges are consistent with any of Federal Maritime Commission rules with respect to detention and demurrage; or 2) A statement that the common carrier's performance did not cause or contribute to the underlying invoice charges. (CX_005597.)

Invoice LGT045273 is a detention invoice dated July 15, 2022, for BL SEL2H1706402, Container No. SMCU134670 for 8 days after free time expired on June 8, 2022. The invoice does not contain: 1) A statement that the charges are consistent with any of Federal Maritime Commission rules with respect to detention and demurrage; or 2) A statement that the common carrier's performance did not cause or contribute to the underlying invoice charges. (CX_005598.)

Invoice LGT045283 is a detention invoice dated July 15, 2022, for BL SEL2G6861342, Container No. SMCU1292037 for eight days after free time expired on June 8, 2022. The invoice does not contain: 1) A statement that the charges are consistent with any of Federal Maritime Commission rules with respect to detention and demurrage; or 2) A statement that the common carrier's performance did not cause or contribute to the underlying invoice charges. (CX_005599.)

Invoice PHT000309 is a detention invoice dated September 2, 2022, for 26 days after free time expired on July 27, 2022. The invoice does not contain: 1) A statement that the charges are consistent with any of Federal Maritime Commission rules with respect to detention and demurrage; or 2) A statement that the common carrier's performance did not cause or contribute to the underlying invoice charges. (CX_004862/CX_005600.)

Invoice LGT044593 is a detention invoice dated July 1, 2022, for BL SEL2G3409507, Container No. BEAU6288519 for 13 days after free time expired on May 12, 2022. The invoice does not contain: 1) A statement that the charges are consistent with any of Federal Maritime Commission rules with respect to detention and demurrage; or 2) A statement that the common carrier's performance did not cause or contribute to the underlying invoice charges. (CX_005595.)

Invoice LGT045081 is a detention invoice dated July 8, 2022, for BL SEL2G9025529, Container No. DFSU6574782 for 3 days after free time expired on June 20, 2022. The invoice does not contain: 1) A statement that the charges are consistent with any of Federal Maritime Commission rules with respect to detention and demurrage; or 2) A statement that the common carrier's performance did not cause or contribute to the underlying invoice charges. (CX_005596)

SM Line argues that these invoices substantially complied with the mandatory minimum information requirements set forth in 46 U.S.C. § 41104(a)(15). It also argues that the invoices that SEA alleges do not conform to the mandatory requirements were issued during the transition

period, were not paid by SEA, and that SM Line ultimately wrote them off. (Respondent's Final Brief at 17.) SM Line's substantial compliance argument is not persuasive because the information missing from the invoices at issue relates directly to the question of whether or not the assessed charges are being imposed against the party at fault. For this reason, the undersigned finds that the invoices are not in substantial compliance with the requirements set forth in OSRA.

Because the invoices are deficient, SEA is not required to pay them. The record supports a finding that SEA did not pay these invoices because the following invoices do not appear as a paid charge on SEA's expert report computation of damages: LGT045268 (CX_005597); LGT045273 (CX_005598); LGT045283 (CX_005599); PHT000309 (CX_004862/CX_005600); LGT044593 (CX_005595); and LGT045081 (CX_005596). (CX_005012- CX_005436, Smith Report Ex. 1.) The absence of these charges on the report is consistent with SM Line's argument that these invoices were not paid and ultimately written off. (Respondent's Reply Brief at 17.) Accordingly, the undersigned finds that SEA suffered no monetary damages as a result of the deficient invoices.

3. 41104(a)(14)

As amended by OSRA, 46 U.S.C. § 41104(a)(14) provides that a "common carrier, either alone or in conjunction with any other person, directly or indirectly, shall not ... assess any party for a charge that is inconsistent or does not comply with all applicable provisions and regulations, including subsection (c) of section 41102 or part 545 of title 46, Code of Federal Regulations (or successor regulations)."

SEA argues that SM Line's practice of assessing demurrage and detention for store door moves regardless of actual liability violated § 41104(a)(14) under OSRA 2022 because it did not satisfy the requirement in 46 U.S.C. § 41104(d)(2)(M) that it certify that "the common carrier's performance did not cause or contribute to the underlying invoiced charges." (SEA Brief at 50.) Section 41104(d)(2)(M) requires this certification on detention and demurrage invoices. As set forth above in section III.B.2, SEA has identified six deficient invoices lacking the required information. Because the required certification is missing on each of the invoices, all six violate 46 U.S.C. § 41104(a)(14). However, as Mr. Smith's expert report shows that none of these invoices were paid, there is no basis to award a refund under 46 U.S.C. § 41310(c). (CX_005012- CX_005436, Smith Report Ex. 1.)

SEA argues that SM Line violated § 41104(a)(14) through its practice of invoicing charges on a consignee without first evaluating the potential responsibility of the charged party is an unjust and unreasonable practice pursuant to 46 U.S.C. § 41102(c). (SEA Brief at 50.) For the reasons set forth above at section III.B.1.c.v, the undersigned finds that SM Line's assessment of detention and demurrage charges against a party not at fault constitutes an unreasonable practice, but in the absence of a container-by-container analysis does not constitute a violation of 41102(c) because the proximate cause element has not been satisfied with the limited exception of the chassis and port congestion charges listed in SM Line's D&D Summary Report. For this reason, SM Line violated § 41104(a)(14) to the extent it assessed SEA for the chassis and port congestion charges listed in SM Line's D&D Summary Report. As damages for these charges have been awarded under § 41102(c), no further damages award based on these charges is appropriate. But in the absence of a container-by-container analysis, any other charges that SM

Line assessed against SEA after the effective date of OSRA on June 16, 2022, do not violate 46 U.S.C. § 41104(a)(14) because SEA has failed to sustain its burden on proof to establish a violation of § 41102(c).

4. Reparations

SEA argues that SM Line's policies and practices violated the Shipping Act and OSRA during the period it was in effect on more than 18,000 demurrage and detention charges incurred between 2020 and 2022. (Complainant's Brief at 1.)

The Shipping Act requires that the "Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation" of the Act. 46 U.S.C. § 41305(b). Complainants bear the burden of proving that they are entitled to reparations. *MAVL Capital Inc. v. Marine Transport Logistics, Inc.*, Dkt. No. 16-16, 2022 WL 2209421, at *3 (FMC June 10, 2022). "As the Commission has explained: '(a) damages must be the proximate result of violations of the statute in question; (b) there is no presumption of damage; and (c) the violation in and of itself without proof of pecuniary loss resulting from the unlawful act does not afford a basis for reparation.'" Id. (citations omitted). Reparations will only be awarded based on actual damages. "Actual damages means 'compensation for the actual loss or injuries sustained by reason of the wrongdoing' which complainants must show to a reasonable degree of certainty." *Id*. (quoting *Cal. Shipping Line, Inc. v. Yangming Marine Transport Corp.*, Dkt. No. 88-15, 1990 WL 427466, at *23 (FMC Oct. 19, 1990)). "That does not require absolute precision but does require evidence sufficient to reasonably infer the actual loss sustained." *Id*.

The statements of the Commission in *California Shipping Line Inc*. and the other cited cases are in the mainstream of the law of damages as followed by the courts, for example, regarding the principle that the fact of injury must be shown with reasonable certainty, that the amount can be based on something less than precision but something based on a reasonable approximation supported by evidence and by reasonable inferences, the principle that the damages must be foreseeable or proximate or, in contract law, within the contemplation of the parties at the time they entered into the contract, the fact that speculative damages are not allowed, and that regarding claims for lost profits, there must be reasonable certainty so that the court can be satisfied that the wrongful act caused the loss of profits. *Tractors & Farm Equipment Ltd. v. Cosmos Shipping Co.*, Dkt. No. 81-57, 26 S.R.R. 788, 798-99 (ALJ Nov. 23, 1992), admin. final, Dec. 31, 1992.

SEA argues that its damages claim is supported by the expert report of Gregory Smith, who calculated the amount of damages and excluded charges incurred prior to the applicable three-year statute of limitations. SEA notes that Mr. Smith states in his report that SM Line had a duty to pay all charges unless they were caused by SEA but that it routinely assessed them without determining if SEA was responsible, and that SML Line had no meaningful process to contest charges because its Arizona office lacked the dispute resolution authority that rested with its headquarters in Korea. SEA further notes that Mr. Smith's report states that an SM Line internal 2022 document shows that SM Line headquarters in Korea had an internal policy to maximize demurrage and detention despite its public stance that charges were assessed to promote freight fluidity. SEA argues that Ex. 1 of Mr. Smith's report shows, *inter alia*, the charges paid for each container moved by SM Line from the second half of 2019 through the end

of 2022. SEA argues that Mr. Smith calculated the charges in a reliable fashion after a thorough examination of SEA's financial data. SEA contends that Ex. 2 of Mr. Smith's expert report shows that SEA incurred no demurrage or rail storage charges whatsoever prior to the third quarter of 2020. SEA contends that Ex. 2 also shows that from 2019 to the third quarter of 2020, SEA was not assessed any rail storage charges, but that beginning in 2021, SM Line began shifting its common carrier obligations and required SEA to pay rail charges directly to railroads. SEA also notes that Mr. Smith states that the report of SM Line's expert Mark Gauthier should be given little to no weight because he is not qualified, did not review any documents other than Smith's expert report, did not talk to anyone at SM Line, copied the report in large from a report in another case, did not assume liability, and rather than contesting Smith's damages analysis, largely challenges SM Line's liability despite that he is not offered or qualified as a liability expert. SEA argues that certain SM Line invoices violated OSRA § 41104(a)(15) and that the charges assessed were unreasonable under OSRA § 41104(a)(14). (Complainant's Brief at 53-77; CX_004444-4477, Expert Report of Gregory E. Smith; CX-004985-005573, Appendices to Expert Report of Gregory E. Smith.)

SEA alleges it incurred direct damages under Shipping Act and OSRA 2022 in the amount of $14,534,787 for inland transportation charges and additional damages of over $2.6 million for other costs and lost profits as a result of SM Line's unreasonable practices with respect to shipments of its cargo. SEA's damages claim is supported by the expert report of Gregory Smith, who did not include in his calculation any damages falling outside the statute of limitations, that is any charges more than three years before the complaint was filed were excluded. Mr. Smith's $14.5 million damages calculation included all inland transportation charges posted and recorded to SEA's internal accounting system called SAP during the period from January 1, 2020, through December 31, 2022, but accounted for the three-year statute of limitations by excluding all charges prior to April 20, 2020. By including all charges not barred by the statute of limitations, Mr. Smith's damages calculation is based on the assumption that SM Line was responsible for all inland transportation charges during the period at issue. These charges include demurrage, rail storage, equipment detention, rehandling, yard storage, pre-pull, chassis usage, expedite, diversion, driver detention, chassis flip, chassis preposition and chassis split. Mr. Smith's $2.6 million additional damages calculation includes: (1) $2,507,813 in costs that SEA incurred due to the additional personnel costs in the amount of $45,939 to handle the dramatic increase of land transportation charges SM Line assessed in 2021 and 2022, and $1,853,758 for the cost of the short-term leases for off-dock container yard storage that SEA used to remove containers from the port terminal to mitigate demurrage and storage charges assessed by port terminals, ocean carriers, and rail carriers; (2) additional charges in the amount of $654,055 for trucking, fuel, gating charges, and lift charges; and (3) $418,840 in lost sales due to customer demands for discounts due to delays. (Complainant's Brief at 51-63; CX_004444-4477, Gregory Smith Expert Report.)

SM Line argues that SEA's damages expert Gregory Smith did not properly quantify the damages alleged by SEA because neither he nor SEA engaged in the container-by-container analysis required by ALJ precedent to establish both liability and the extent of damages. (Respondent's Reply Brief at 1-2.) In reliance on *Hapag-Lloyd, A.G.,* 2022 WL 1239377, at *27 (ALJ April 22, 2022), SM Line argues that SEA failed to meet its burden of proof to show with specific evidence that each charge is unreasonable. (SM Line Reply Brief at 9.) SM Line also relies on opinion in the expert report of Mark Gauthier that Mr. Smith's report is not sufficiently

detailed, made unreasonable assumptions, disregarded relevant facts, and oversimplified a complex situation resulting in an overstated damages calculation. (CX004372-4443, Mark Gauthier Expert Report.)

SEA alleges that SM Line's damages expert report is entitled to little weight because Mr. Gauthier is not qualified, did not review any documents other than Smith's report, did not talk to anyone at SM Line, copied the report in large from a report in another case, did not assume liability, and rather than contesting Mr. Smith's damages analysis, largely challenges SM Line's liability despite that he is not offered or qualified as a liability expert. (Complainant's Brief at 63-77.)

For the reasons set forth above at section III.B.1.c.v., the record supports a finding that SEA suffered damages in the amount of $1,913,355.80 for charges imposed due to the fault of SM Line in the case of chassis unavailability or for which the imposition of charges would not incentivize the movement of cargo in the case of port congestion. The record does not support the additional damages asserted by SEA, including additional personnel costs, additional facilities/terminal costs, and lost profits such as sales cancellations because they are not supported by sufficient evidence and are speculative. There is no competent evidence linking these additional costs and lost profits to the unreasonable practices found to have violated section 41102(c). Accordingly, they are not compensable.

5. Interest

The Shipping Act requires the Commission to award the loss of interest at commercial rates compounded from the date of injury. *See* 46 U.S.C. § 41305(a). Commission regulations establish that "interest granted on awards of reparation in complaint proceedings instituted under the Shipping Act of 1984 will accrue from the date of injury to the date specified in the Commission order awarding reparation." 46 C.F.R. § 502.253.

The Commission has stated that "with respect to multiple shipments, the ALJ should be able to determine the reasonable date or dates of injury," and concluded that: [I]t would not appear to be unreasonable to determine that the mid-point date of the period of all eligible shipments was the date of injury for the claim, because such a date may award the complainant approximately the same amount of interest as being calculated using each shipment date, by evening out the earlier and later dates of injury. *Color Brands, LLC, v. AAF Logistics, Inc.*, 2024 WL 4034609, at *5-6 (ALJ August 27, 2024).

The damages calculation in this proceeding involves multiple shipments from April 20, 2020, to December 31, 2022. The midway point between these dates is August 25, 2021. Accordingly, the undersigned finds that the applicable date of injury is August 25, 2021.

IV. ORDER

Upon consideration of the record herein, the arguments of the parties, and the findings and conclusions set forth above, it is hereby

ORDERED that SEA's complaint alleging that SM Line violated the Shipping Act is **GRANTED**. It is

FURTHER ORDERED that SM Line pay SEA reparations in the amount of $1,913,355.80, with interest on the reparations award running from August 25, 2021. It is

FURTHER ORDERED that SEA's Motion to Compel and for Sanctions for Spoliation of Evidence (Dkt. 78.) is **DENIED**. It is

FURTHER ORDERED that SEA's motions for confidential treatment filed at Dkt. 77, 107, 133, and 140 are **GRANTED.** It is

FURTHER ORDERED that SM Line's motions for confidential treatment filed at Dkt. 83, 90, 129, and 142 are **GRANTED.** It is

FURTHER ORDERED that any other pending motions or requests be **DISMISSED AS MOOT**. It is

FURTHER ORDERED that this proceeding be **DISCONTINUED.**

Mary A. Hervey -S Digitally signed by Mary A. Hervey -S
Date: 2025.05.28 11:14:37 -04'00'

Mary Apostolakos Hervey
Administrative Law Judge