

BEFORE THE
FEDERAL MARITIME COMMISSION

DOCKET NO. 22-30

SAMSUNG ELECTRONICS
AMERICA, INC.,

COMPLAINANT,

v.

ZIM INTEGRATED SHIPPING SERVICES LTD.,

RESPONDENT.

**COMPLAINANT'S OPPOSITION TO
RESPONDENT'S MOTION TO STRIKE
EXPERT REPORT OF JOHN D. MCCOWN**

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Pursuant to the Order dated October 6, 2023 (Dkt. No. 48)¹, Samsung Electronics America, Inc. (“Complainant” or “SEA”), by and through its undersigned counsel, submits this Opposition to the Motion to Strike the Expert Report of John D. McCown (“Motion”) filed by Respondent Zim Integrated Shipping Services Ltd. (“ZIM” or “Respondent”) on September 26, 2023.

I. INTRODUCTION

In support of its Initial Brief (Dkt. No. 37), SEA proffered the expert opinion of John D. McCown, who chiefly opines on (i) the existence of industry standard practices for store-door delivery from a shipowner’s perspective as a former CEO of Trailer Bridge, Inc. (“Trailer Bridge”); (ii) ZIM’s revenue-driven tactics to deviate from those practices following the pandemic, from the perspective of the leading authority in assessing financial data released by ocean carriers; (iii) the substantial profit ZIM derived from the demurrage and detention (“D&D”) charges based on ZIM’s own disclosures in their financial statements, indicative of ZIM’s practice of shifting costs of inland transportation to consignees; and (iv) how ZIM’s exponential growth in revenues coincided with its increased D&D collections, which are untethered to the cost of equipment or incentivizing the movement of cargo. ZIM argues that Mr. McCown’s report (“Report”) fails to meet any of the three *Daubert* requirements. All of ZIM’s challenges are unavailing, and to the extent they raise any concerns, they go solely to the weight of the evidence that the Presiding Officer, as both a judge and a finder of fact, is fully capable of evaluating.

First, ZIM contends that Mr. McCown is not qualified, relying exclusively on its pejorative attack of Mr. McCown as a “deskbound accountant,” who allegedly lacks any shipping company operational experience. (Mot. at 4-5). To the contrary, Mr. McCown is an industry expert with “four decades of operating and investment experience in the container shipping industry,”

¹ SEA is grateful for the additional two days to respond to ZIM’s separate motion to strike and counsel appreciates the Presiding Officer’s Initial Order reminder on submitting letter motions.

including two decades at “McLean Industries, Inc. [“McLean”] where [he] worked closely with Malcom McLean, the inventor of the intermodal shipping container shipping.” (CX_08519, McCown Report, ¶¶ 2, 3), and cofounder of Trailer Bridge, a U.S. flag container carrier that provided door-to-door service, where Mr. McCown served as its Chief Executive Officer for approximately sixteen years. (CX_08635-36, McCown Dep. Tr. Pg. 43:21-44:16). Mr. McCown also publishes “a monthly report analyzing U.S. container volume and a quarterly report analyzing the actual results of the container shipping industry” which are widely and “actively read by a distribution list of approximately two thousand decision-makers involved in the container shipping industry along with policymakers in business and government.” (*Id.* ¶ 6) Mr. McCown has also written on the subject, authoring *Giants of the Sea*, a book chronicling the history and development of the modern cargo shipping industry. (CX_08584). ZIM’s baseless invitation to disregard Mr. McCown’s multi-decade career as an active participant in the shipping and transportation industry that eminently qualifies him as a shipping industry expert should be rejected.

Second, ZIM contends that Mr. McCown’s data and methodology are unreliable. But ZIM ignores that an industry, as opposed to scientific, expert may rely on his experience, and that in any event, in instances where Mr. McCown relied on materials outside the evidence, he relied on publicly available data and employed sound methodology, which are clearly articulated in his Report and during his deposition. Further, ZIM’s own expert considered the same facts and data and largely attempted to perform the same methodology based on his own industry experience, of which he had a limited amount. ZIM’s supposed examples of Mr. McCown’s opinions lacking evidence or citing to insufficient evidence are nothing more than anecdotal attempts to argue about the substance of the opinions. Worse yet, ZIM’s arguments repeatedly attack the substance of

opinions with misleading, if not inapposite, citations.² ZIM’s piecemeal, anecdotal, and misleading attempts to invalidate Mr. McCown’s approach and grounds are enough to reject ZIM’s attack on the reliability of his opinion.

Third, ZIM contends that the financial analysis section of Mr. McCown’s Report – the very section ZIM concedes for which Mr. McCown has requisite expertise – is not relevant and should be stricken. In making this argument, ZIM misses the central tenet of Mr. McCown’s financial analysis: ZIM’s demurrage net income as a percent of the overall revenue was out of line with the industry average and was indicative of ZIM’s practice of shifting inland transportation costs to consignees as a revenue source. Instead, ZIM attacks a straw man argument that Mr. McCown’s opinion that making a profit is unreasonable. But that is not Mr. McCown’s opinion. (Mot. at 19).³ Mr. McCown’s *actual* analysis is that ZIM’s net income from demurrage was so significantly higher than the rest of the industry results that it is indicative of the alleged unreasonable conduct, and this expert opinion remains un rebutted.

Last, the Presiding Officer, as the sole factfinder, is more than capable of determining the probative weight to be given to Mr. McCown’s opinion. Traditional concerns that expert opinion would unduly bias a jury are not present here. The Presiding Officer knows the law and understands its ultimate role in both deciding what the law is and applying it to the facts in

² For example, in ZIM’s very first purported example, ZIM attacks ¶ 16 of the Report addressing the point that ZIM’s headquarters pressured ZIM in the U.S. to collect improper and disputed D&D invoices. (Mot. at 12). ZIM argues that ¶ 16 is not supported by evidence because it lacks a citation to evidence, even though ¶ 16 is a summary opinion in Section III of the Report which need not cite to evidence cited elsewhere, and even though ZIM does not challenge Section III in the Motion. ZIM then argues that Mr. McCown’s summary of his opinion on ZIM’s pressure to collect improper invoices is contradicted by his wholly unremarkable, and unrelated, testimony that a company should generally collect outstanding receivables. (*Id.*) Mr. McCown’s testimony about receivables generally was obviously not referring to ZIM’s collection of improper D&D invoices.

³ As to ZIM’s argument that Mr. McCown “agreed” that “the profitability or unprofitability” of ZIM has no relevance to specific D&D charges being “reasonable,” ZIM contorts the cited testimony beyond recognition. Mr. McCown testified in response to questions about whether the validity or invalidity of an *individual* demurrage claim would matter to *annual* profitability. (*see* citations to testimony on Mot. at 19). Of course it would not, and Mr. McCown testified accordingly, unlike the truly unsubstantiated and conclusory “rebuttal” assertions ZIM relies on from Mr. Clair claiming that ZIM’s financial performance during the pandemic was not relevant at all. (Mot. at 20).

evidence. Against this backdrop, the Presiding Officer should allow Mr. McCown's Report to stand and consider his opinion in accordance with the weight the Presiding Officer deems appropriate in the decision-making process.

II. LEGAL STANDARD

Under Federal Rule of Evidence 702, the Court serves as the “gatekeeper” of expert testimony by “ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.” *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 597 (1993); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999). “As gatekeeper, a trial judge has three duties: (1) confirm the witness is a qualified expert; (2) check the proposed testimony is reliable and relates to matters requiring scientific, technical, or specialized knowledge; and (3) ensure the expert’s testimony is sufficiently tied to the facts of the case, so that it fits the dispute and will assist the trier of fact.” *UGI Sunbury LLC v. A Permanent Easement*, 949 F.3d 825, 832 (3d Cir. 2020).

To be qualified as an expert, the witness must have “specialized knowledge.” *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 741 (3d Cir. 1994). But the specialized-knowledge requirement is applied “liberally,” and courts have “eschewed imposing overly rigorous requirements of expertise” so long as the expert has sufficient “generalized qualifications.” *Id.* “The basis of [the expert’s] specialized knowledge can be practical experience as well as academic training and credentials.” *Elcock v. Kmart Corp.*, 233 F.3d 734, 741 (3d Cir. 2000) (citation omitted). Further, the expert does not need “to be the best qualified or...have the specialization that the court considers most appropriate.” *Pineda v. Ford Motor Co.*, 520 F.3d 237, 244 (3d Cir. 2008). Instead, the proffered expert witness need only possess some “skill or knowledge greater than the average layman” that is relevant to the issue at hand. *Elcock*, 233 F.3d at 741; *see also Auto Konnect, LLC v. BMW of N. Am., LLC*, 590 F.Supp.3d 977, 984 (E.D. Mich. 2022) (finding an industry expert to

be qualified to testify regarding automotive industry customs and practices, as well as the market for external service providers based on the expert's more than 40 years of experience working in the automotive industry, with 30 of those years working at a major automotive company as a senior executive of the Customer Satisfaction Division).

After determining an expert is qualified, the “trial judge must ensure that any and all [expert] testimony...[is] reliable.” *Daubert*, 509 U.S. at 589; *see also Kumho Tire Co.*, 526 U.S. at 141. To be sufficiently reliable, the expert's testimony need not have “the best foundation, or even ... [be] supported by the best methodology or unassailable research.” *UGI Sunbury*, 949 F.3d at 834 (citation omitted). For testimony from an industry expert about the customs and business practices in that industry, reliability is determined by whether the expert has acquired enough knowledge and experience in the industry to understand and draw conclusions about the topic based on his experience with the kind of practice at issue. *Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 761-62 (7th Cir. 2010); *Chi. Painters & Decorators Pension, Health & Welfare, & Deferred Sav. Plan Tr. Funds v. Royal Int'l Drywall & Decorating, Inc.*, 493 F.3d 782, 787-88 (7th Cir. 2007).

III. ARGUMENT

A. Mr. McCown is Qualified to Offer Opinions on Global Container Shipping, Including a Carrier's Policies, Practices and Procedures in Handling Cargo

Mr. McCown offers the Presiding Officer a valued perspective into issues pertaining to this lawsuit. It should come as no surprise that obtaining an industry knowledge expert working at a *current* container shipowner would be highly unlikely, if not impossible given the consolidated ocean carrier industry and the inherent positional conflicts of interest. Mr. McCown's experience as a container shipowning CEO, grounded in the U.S. market, and the perspectives that come with it in regard to customer service and the avoidance of gouging is the type of experience recognized

by the Federal Rules of Evidence as a useful tool in ultimately determining the adjudication of SEA's allegations now supported with substantial evidence against ZIM practices.

A witness may be qualified as an expert by knowledge, skill, experience, training, or education. Fed. R. Evid. 702. Mr. McCown's industry knowledge is extensive. For nearly thirty years, Mr. McCown has worked in container shipping, holding executive positions at McLean and Trailer Bridge. After receiving his MBA from Harvard Business School, he joined McLean where he worked closely with Malcom McLean, the inventor of intermodal container shipping. McLean was the parent company of U.S. Lines, Inc., one of the largest container shipping companies in the world.⁴

At McLean, Mr. McCown was involved in all major projects involving U.S. Lines, where among other things, he became knowledgeable of all its detailed operating numbers.⁵ Mr. McCown was instrumental in expanding U.S. Lines, which included all of the financial analysis and financial planning efforts as well as growing involvement with people in the sales and operating side at U.S. Lines.⁶ Messrs. McCown and McLean co-founded Trailer Bridge, a U.S. flag container carrier that provided door-to-door service, where Mr. McCown served as its Chief Executive Officer for approximately sixteen years.⁷ Trailer Bridge owned and operated seven vessels, and operated hundreds of over-the-road tractors.⁸ The majority of cargo handled by Trailer Bridge moved under door-to-door service either by rail or truck.⁹ Trailer Bridge was the first container carrier to move 48' and 53' containers on its vessels and built the first vessels in the world configured for 53'

⁴ CX_08534.

⁵ CX_08534.

⁶ CX_08606-07, CX_08609, McCown Dep. Tr. 14:22-15:16, 17:11-21.

⁷ CX_08584-85; CX_08635, McCown Dep. Tr. Pg. 43:7-10.

⁸ CX_08635-36, McCown Dep. Tr. Pg. 43:21-44:16.

⁹ CX_08534-34.

containers.¹⁰ In 2006, Trailer Bridge was ranked first in terms of operating income as a percent of revenue in a comparison that ranked over fifty container shipping companies worldwide.¹¹

After leaving Trailer Bridge, Mr. McCown continued to be heavily involved in the shipping industry, managing a \$20 billion hedge fund where he managed up to \$700 million of investments in global shipping companies, which required him to maintain relationships with industry stakeholders and analyze the financial data for global shipping companies. Currently, Mr. McCown is a non-resident senior fellow for the Center for Maritime Strategy, a non-profit, non-partisan think tank and research institution dedicated to studying maritime issues and their context within wider American national security policy.¹²

Since 2016, he has published a quarterly report¹³ on inbound container volume and a quarterly analysis on the financial results of the global container shipping industry, and also authored the book “*Giants Of The Sea: Ships & Men Who Changed The World,*” a book on the modern cargo shipping industry and how it developed. Mr. McCown is regularly cited by maritime and mainstream publications including *Bloomberg*, the *Wall Street Journal*, the *Financial Times*, and the *Economist*, and regularly advises, lectures and writes about maritime issues and consults with policymakers on marine matters.¹⁴

Extensive experience in a trade or business qualifies one as an expert on industry practices. *See Goldberg v. 401 N. Wabash Venture LLC*, 755 F.3d 456, 462 (7th Cir. 2014) (president of a condominium hotel company was qualified as an expert on the problems that developers of this type of project are likely to encounter); *Chi. Painters*, 493 F.3d at 787-88 (experienced drywall

¹⁰ *Id.*

¹¹ *Id.*

¹² CX_08534; CX_08584; *see also* <https://centerformaritimestrategy.org/experts/john-d-mccown/>

¹³ CX_08588; <https://capitallinkshipping.com/category/contributors/john-mccown-container-report/>

¹⁴ CX_08536; <https://www.bloomberg.com/news/newsletters/2023-09-26/supply-chain-latest-global-trade-is-hitting-the-real-economy>; <https://www.wsj.com/articles/jones-act-protects-shipping-for-future-war-11573500562>; <https://gcaptain.com/u-s-ports-see-another-month-of-gains-in-july-but-pandemic-fueled-growth-is-fading/>

installer and project manager were qualified to give opinions on customary rates for drywall installation); *United States v. Ramsey*, 165 F.3d 980, 984 (D.C. Cir. 1999) (admission of opinion testimony, given by Drug Enforcement Administration agent regarding drug trade was not plainly erroneous; while agent was not formally qualified as expert, agent described his qualifications, including his specialized knowledge, education, skill and experience, before giving testimony); *Robinson v. Dist. of Columbia*, 75 F. Supp. 3d 190, 197 (D.D.C. 2014) (experts can be qualified based on their experience).

ZIM's objections that Mr. McCown lacks relevant academic credentials or industry experience in the shipping industry or that the size and scale of Trailer Bridge's operations somehow disqualify him as an expert is contradicted by Mr. McCown's decades-long relevant experience. Were it otherwise, his public analyses would not be regularly cited by maritime and mainstream publications including *Bloomberg*, the *Wall Street Journal*, the *Financial Times*, and the *Economist*. Mr. McCown is not offered as an expert in the D&D dispute resolution specialist and has not drawn any of the numbers-crunching kinds of conclusions that scientific or technical experts in these fields would draw. To the contrary, he is testifying as an expert on the shipping industry based on his knowledge and experience gained from 40+ years in that industry.

ZIM attempts to devalue Mr. McCown's experience fail, especially when their own rebuttal expert, Mr. Lee Clair, does not have the requisite experience ZIM argues is necessary for this proceeding. As reflected in Mr. Clair's CV, the bulk of Mr. Clair's 40 years of experience has been as a consultant. The only non-consulting experience Mr. Clair has had was two years working for a trucking company and a few years at a railroad. (CX_06938, Lee Clair Dep. 149:11-150:18.) Moreover, Mr. Clair has not actually worked with an ocean carrier on issues pertaining to the Shipping Act or demurrage and detention policies. (CX_06923, Lee Clair Dep. 134:15-20.) ZIM

cannot have it both ways; it cannot argue that Mr. McCown does not meet its stringent “industry expert” standard but then choose to ignore its own rebuttal expert’s shortcomings.¹⁵

Finally, ZIM tries to deride Mr. McCown’s knowledge and expertise because he did not previously serve as an expert. Whether Mr. McCown has served as an expert before is irrelevant to whether he is qualified to do so in this case. *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 550–51 (C.D. Cal. Aug. 1, 2014) (“The threshold for qualification is low for purposes of admissibility; minimal foundation of knowledge, skill, and experience suffices. *Prior experience need not consist of prior expert witness testimony on the same issue.*”) (internal quotation marks and citations omitted; emphasis added). If every expert were disqualified because it was his or her first time testifying as an expert on a particular topic, deciders of fact would have no experts with which to draw important context and observations from. *See Matuez v. Lewis*, No. CV 11-7411-JVS JPR, 2012 WL 3582122, at *8 (C.D. Cal. May 9, 2012), *report and recommendation adopted*, No. CV 11-7411-JVS JPR, 2012 WL 3582629 (C.D. Cal. Aug. 20, 2012) (noting that “[i]f witnesses could not testify for the first time as experts, we would have no experts”) (citation omitted).

Mr. McCown has first-hand experience and knowledge of the industry, and has otherwise been a member of the shipping community for decades, and is qualified to opine as an expert on shipping industry issues. *See Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1015 (9th Cir. 2004) (“Rule 702 contemplates a broad conception of expert qualifications” and “[i]n certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony.”) (quoting Advisory Committee Notes to Fed. Rule Evid. 702).

¹⁵ ZIM’s assertions about Mr. McCown’s “operational” experience are inapposite. (Mot. at 4-5). ZIM mischaracterizes Mr. McCown’s testimony that he was not involved in operations “directly” or “on a day-to-day basis,” but ZIM omits his testimony in response to direct questions about his operational experience that he in fact had operational experience, for example, testifying that “I had to know a lot about that operating side and the sales side, which I got through reviewing reports and dealing directly with those folks.” (CX_08611, McCown Dep. Tr., 19:20-20:8)); *see also* testimony cited in Section B.2. below.

B. Mr. McCown’s Opinions Are Firmly Based on His Extensive Knowledge of the Industry and the Evidence Established in the Record and, Therefore, Reliable

Testimony concerning the standards and practices of an industry are considered reliable if the witness has substantial experience with the type of business activities at issue. *Metavante*, 619 F.3d at 761-62 (banker could testify about banking practices based on experience); *Chi. Painters*, 493 F.3d at 787-88 (drywall installer could testify about typical drywall costs based on experience). The question is whether they have the experience, not how they acquired it. *See, e.g.,* ; *U.S. v. Cruz-Velasco*, 224 F.3d 654, 660 (7th Cir. 2000) (DEA agent could testify about the way drug dealers run their operations based on experience).

SEA has already addressed Mr. McCown’s extensive experience, the supports for which are ample in the record. (CX_08534-CX_08536, McCown Report at 1-4). In addition to his extensive experience, Mr. McCown also relied upon a number of documents, including deposition transcripts, discovery documents, texts and treatises, and legal pleadings in this action to form the basis of his opinion. (CX_08587-CX_08592, McCown Report at 52-57).

ZIM’s characterization of Mr. McCown’s testimony as improper because, in addition to the documents relied upon,¹⁶ it is based on his knowledge and experience within the industry is without merit. An expert’s testimony is “not unreliable simply because it is founded on his experience rather than on data; indeed, Rule 702 allows a witness to be “qualified as an expert by knowledge, skill, experience, training, or education.” *Metavante*, 619 F.3d at 761. Mr. McCown’s testimony cannot be characterized as mere *ipse dixit*. Moreover, an expert’s experience in the relevant industry, in conjunction with the expert’s consideration of evidentiary documents, is sufficient to establish that the expert’s proffered testimony is reliable. *See Matzkow v. United New York Sandy Hook Pilots Ass’n*, No. 18-XC-2200 (RER), 2022 WL 79725, at * (E.D.N.Y. Jan.

¹⁶ CX_08587-CX_08592, McCown Report at 52-57.

7, 2022) (deeming expert’s testimony regarding safety conditions on ocean vessels reliable where expert had 35 years of experience working on maritime vessels and relied on several documents to inform expert report); *In re M&M Wireline & Offshore Servs.*, LLC, No. 15-4999, 2016 WL 4681196, at *6 (E.D. La. Sept. 7, 2016) (finding maritime safety expert’s testimony reliable where testimony was founded on expert’s “extensive maritime and maritime safety experience and knowledge” and consideration of evidentiary documents, including depositions and accident reports).

Mr. McCown did not simply testify that ZIM’s shipping practices were unreasonable because he said so. Rather, he explained standard industry practices, including the assessment of D&D charges and goods moving under store door terms. Mr. McCown then provided a detailed assessment of how ZIM practices and procedures compared pre- and post-pandemic, and the resulting departure from standard industry practice.¹⁷ Mr. McCown’s analysis in Sections IV, V, VI and VIII of his Report is firmly rooted in his experience in the industry, including supporting documentation. Therefore, Mr. McCown’s testimony is reliable.

1. Mr. McCown Does Not Offer Any Impermissible “State of Mind” Opinions

Given Mr. McCown’s indisputable qualification as an industry expert in the shipping container business, ZIM resorts to mischaracterizing Mr. McCown’s opinions to recast them as improper “state of mind” opinions. But upon closer examination of ZIM’s “examples,” they are nothing of the sort; rather they are Mr. McCown’s proper expert commentaries on the shipping

¹⁷ ZIM also attempts to claim that Mr. McCown’s testimony is improper because he addresses practices, policies, and procedures that did not specifically impact SEA. This assertion is baseless, as the crux of the issue when determining whether an ocean carrier has violated the Shipping Act of 1984, 46 U.S.C. § 40101, *et seq.* (2019), is whether the ocean carrier’s handling of cargo is reasonable. Therefore, an analysis of their overall practices and procedures is warranted.

industry customs and practices firmly rooted in his four-decades of professional experience in that industry and his meticulous review of the record evidence. For example:

- ZIM complains that Mr. McCown asserts in ¶ 22 of his Report¹⁸ certain state of mind or awareness of shippers, based on his commentary that “accessorial charges were buried in tariffs and as such their level and trend were not always as obvious to shippers as the shipment rates per container.” (Mot. at 9.) To the contrary, Mr. McCown was merely commenting on, and providing his observation about, the container shipping industry’s “creative revenue enhancement practices” following the 2008 financial crisis, including “accessorial charge increases.” (CX_08541, McCown Report, ¶ 22) Mr. McCown’s professional experience as CEO and Chairman at Trailer Bridge until December 2008 and his subsequent industry involvement more than adequately provide the competent bases for Mr. McCown’s opinions in ¶ 22 of his Report.¹⁹
- ZIM also quibbles that in ¶ 48 of his Report²⁰, based on a January 2020 interview, Mr. McCown improperly “divine[s] [ZIM’s global CFO] Mr. [Xavier] Destriau’s state of mind” concerning financial factors and consideration that may affect ZIM’s D&D practices. Far from it. Contrary to ZIM’s insinuation that Mr. McCown was wearing a pseudo-psychoanalyst hat, Mr. McCown was basing his expert opinion on the fact that he has “been in that position [himself],” *i.e.*, CFO experience at McLean and CEO experience at Trailer Bridge. Further, Mr. McCown also provided his opinion with clear qualifiers such as “Mr. Destriau had to know...” or “[i]t is hard not to believe that Mr. Destriau would do anything...” Based on Mr. McCown’s similar, if not same, C-Suite level experience with Mr. Destriau’s, reliability of his opinion in ¶ 48 of his Report can hardly be disputed.²¹
- ZIM contends that in ¶ 51 of his Report²², Mr. McCown improperly assumed “the state of mind of ZIM’s finance department.” (Mot. at 11) ZIM is wrong for multiple reasons. *First*, while faulting Mr. McCown to “not bas[ing] [his opinion] upon any admissible evidence, ZIM itself fails to point to any record evidence that supports its contention. *Second*, Mr. McCown, based on his thorough review of the deposition transcript of Mr. Jonathan Cleva (Head of Strategic Accounts (“SA”) at ZIM U.S.), discusses Mr. Cleva’s changing position on the propriety of the use of finance holds on account of allegedly overdue D&D charges. Specifically, concerning one SA customer of ZIM, Mr. Cleva on or about December 8, 2021 initially raised the concern that ZIM should not hold that SA’s shipments because there were no D&D charges outstanding. When asked during his deposition, however, Mr. Cleva testified that “I believe I was corrected.” (McCown Report at 26) Precisely based on the foregoing, Mr. McCown provided an expert opinion that “[p]resumably Mr. Cleva was corrected by someone on the finance staff...” (Mot. at

¹⁹ That some “shippers are savvy enough to negotiate lower [D&D] rates” hardly suggests that all shippers are indeed so and, further, does not change or dispute Mr. McCown’s industry expert observation that accessorial charges in tariff are unclear to many shippers. (Mot. at 10)

²⁰ CX_08556.

²¹ SEA is confident that the Presiding Officer would, in any event, appropriately give the credibility determination to Mr. McCown’s observations in this paragraph as others in his Report.

²² CX_08558.

27 (emphasis added)) Viewed with the benefit of the full context, there is nothing improper or unreliable about Mr. McCown’s opinion in ¶ 51 of his Report.

- ZIM also distorts Mr. McCown’s actual opinion in ¶ 53 of his Report²³ and argues that he is offering “state of mind” conclusions about ZIM’s corporate view of demurrage as a source of income. (Mot. at 12) In so arguing, ZIM relies on Mr. McCown’s passing remark that in reviewing a presentation entitled “Monthly Results discussion – Demurrage July 2021,” one “can almost hear the celebratory comments that finance staff are making in terms of demurrage performance.” (CX_08560, McCown Report, ¶ 53) ZIM conveniently leaves out Mr. McCown’s meticulous observations concerning the presentation, such as: by July 2021, ZIM’s demurrage “was ramping up and considerable, with just U.S. demurrage at \$113 million year to date through July, more than four times the budget amount of \$28 million”; “the actual experience compared to the budget was also trending up, as July itself was the highest month with \$21 million of demurrage”; or that the finance department made a comment that “trucking capacity continue to drive increases in billable demurrage.” (*Id.*) It is based on the foregoing, not “the celebratory comments,” that Mr. McCown concludes that “[i]n [his] opinion, it is abundantly clear that demurrage at Z[IM] is viewed as a source of income that should be maximized.” (*Id.*)

Mr. McCown’s expert opinions, even ZIM’s supposed examples of “state of mind” conclusion, are well-buttressed by his four-decades-long industry experience, review of deposition transcripts, and relevant ZIM and SEA documents and emails in connection therewith. Thus, the reliability requirements are established beyond doubt. The Presiding Officer should reject ZIM’s unfounded invitation to read Mr. McCown’s expert opinions out of context.

2. Mr. McCown’s Opinions are Based on his Extensive Knowledge and Experience in the Shipping Industry

ZIM posits that Mr. McCown’s reliance on his decades of experience in the global shipping industry is inadequate and not supported by the evidence. ZIM again misconstrues the record.

- ZIM attempts to diminish Mr. McCown experience by arguing that he had “no role in vessel or equipment operations,” (Mot. at 5). However, as reflected in Mr. McCown’s testimony his knowledge and understanding of U.S. Lines operations was not merely surface level. Instead, he had to have a “granular understanding” of U.S. Lines’ business operations and plans in order to explain the operations to banks. CX_08612, McCown Dep. Tr. 20:6-21:5. His involvement was more than “talking to employees and reading reports”²⁴ it involved

²³ CX_08560.

²⁴ Mot. at 5.

having an in-depth knowledge of operations on a “per-shipper basis.” (CX_08614, McCown Dep. Tr. 22:12-18)

- ZIM then attacks Mr. McCown’s opinion by arguing that he “had no role in fixing demurrage and detention rates at U.S. Lines, nor was he involved in invoicing these charges or collecting them.” (Mot. at 13) ZIM again chooses to ignore the record and contends that knowledge and experience on demurrage and detention rates can only be gained by directly billing customers. Mr. McCown worked for two decades at McLean, the parent company of U.S. Lines, during which he was “integrally involved in all major projects involving U.S. Lines and became conversant with all of its detailed internal operating numbers.” (CX_08534, McCown Report ¶ 3) D&D rates were well within Mr. McCown’s knowledge and purview. Mr. McCown also testified that, as CEO of Trailer Bridge, he was aware of the D&D rates charged by multiple competing ocean carriers and that Trailer Bridge based its rate on its direct costs. (CX_08749-CX_08751, McCown Dep. Tr. 157:22-159:13) Mr. McCown bases for his testimony drew on his experience and in-depth knowledge of the shipping industry.
- Next, ZIM attempts to undermine Mr. McCown by mischaracterizing his testimony related to ZIM’s distinction between house truckers versus customer nominated truckers (“CNT”). ZIM states that “[i]t is therefore no surprise that, when asked about his industry knowledge on the topic, all he said was: ‘I don’t see that distinction. I’ve never heard of it.’ CX_08778, McCown Dep. Tr. 186:12-21.” (Mot. at 16) ZIM uses this testimony to support its argument Mr. McCown lacked experience in inland trucking operations. However, Mr. McCown’s testimony establishes the opposite. Mr. McCown testified that he had never heard of “a distinction between preferred versus house trucker” with respect to an ocean carrier’s inland move responsibilities under store door moves because, in all his decades of experience in the maritime shipping industry, he had never observed or heard of another ocean carrier renegeing on its inland transportation obligations under store door moves utilizing a preferred trucker in the way that ZIM did. (CX_08778, McCown Dep. Tr. 186:12-21)
- Finally, ZIM claims that Mr. McCown’s testimony on store-door moves is “outdated and inadequate” arguing that he had no experience in vessel operations or container and chassis operations or in international container shipping.” (Mot. at 16). As noted above, Mr. McCown’s testimony on store door moves, is based on among other things, his decades of experience in the shipping industry, including his experience at Trailer Bridge. The majority of cargo moving handled by Trailer Bridge were contracted on store door terms under full through rates. Accordingly, Mr. McCown’s findings that ZIM had abandoned industry standard practices is based on Mr. McCown’s direct experience and knowledge of store door terms. *See* CX_08752, McCown Dep. Tr. 160:22-161:2 (“Trailer Bridge contracted on door-to-door terms that primarily involved company-owned tractors on the mainland, charges for demurrage and detention should have and were rare”).

Here, Mr. McCown is an expert in the shipping industry, and the reliability of evidence about business practices is determined by whether the witness has extensive experience and

knowledge about the matter at issue. *Chi. Painters*, 493 F.3d at 787-88. That experience constitutes the underlying factual basis and no additional data or methodology is required. *Metavante*, 619 F.3d at 761-62. Indeed, it is well established that “draw[ing] upon [] experience and specialized knowledge of [an] industry” is sufficient to meet the reliability standards under the *Daubert* Factors. *See Wellman v. Norfolk & W. Ry. Co.*, 98 F. Supp. 2d 919, 925 (S.D. Ohio 2000) (holding experience and specialized knowledge in a relevant industry is sufficient to render expert opinions in such industry). Further, the application of extensive, relevant experience contributes to the reliability of an expert’s methodology. *See, e.g., Adams v. Lab’y Corp. of Am.*, 760 F.3d 1322, 1330 (11th Cir. 2014) (“Dr. Rosenthal’s application of her extensive, relevant experience contributed to the reliability of her methodology.”); *see Dickenson v. Cardiac & Thoracic Surgery of E. Tenn.*, 388 F.3d 976, 982 (6th Cir. 2004) (holding that the district court abused its discretion in excluding a doctor’s standard-of-care testimony that was “supported by extensive relevant experience”); *see also Kilpatrick v. Breg, Inc.*, 613 F.3d 1329, 1336 (11th Cir. 2010) (“[T]here are instances in which a district court may determine the reliability prong under *Daubert* based primarily upon an expert’s experience and general knowledge in the field.”) (emphasis supplied); *Evanston Ins. Co. v. Xytex Tissue Servs., LLC*, 378 F. Supp. 3d 1267, 1283 (S.D. Ga. 2019) (holding that explaining how an expert’s experience leads to his conclusions, why that experience is a sufficient basis for the opinions, and how the experience is reliably applied to the facts is a sufficient methodology under *Daubert*).²⁵

²⁵ To the extent that ZIM argues that the specific *Daubert* factors (testing, peer review and scientific acceptance) were not established, and no foundation laid that McCown’s theories and methods are *scientifically* reliable, is irrelevant. *See Marine Repair Servs. of Maryland, Inc. v. Ports Am. Chesapeake, LLC*, Docket No. 11-11, 2013 WL 9808672, at *23 (ALJ Jan. 10, 2013), admin. final Mar. 20, 2013 (finding reliance on *Daubert* to be misplaced). The *Daubert* factors apply to scientific testimony, and Mr. McCown is not giving scientific evidence. Moreover, the applicability of the *Daubert* factors depends on the particular facts and circumstances of each case. *Cruz-Velasco*, 224 F.3d at 660.

Against this backdrop, the Presiding Officer should reject ZIM's unfounded efforts to discredit the reliability of Mr. McCown's expert report, which is firmly rooted in his decades-long, relevant industry experience and his review of relevant deposition transcripts and record evidence.

C. Financial Analysis Revealing ZIM's D&D Practices Being Grossly Out of Line with the Industry Average is Relevant

SEA's chief complaint is, and its Initial Brief focus on, ZIM's D&D practices being unreasonable and unjust, *i.e.*, charging and collecting from SEA, with the threat of Finance Holds, D&D charges that ZIM should have been responsible for under store-door terms. In support of SEA's contention, Mr. McCown (i) reviewed "financial reports issued by the ten other carriers that report their results"; (ii) constructed estimates for "**demurrage income as a percent of revenue** at those carriers." (CX_08564, McCown Report, ¶ 58) (emphasis added). The results showed that while, before the pandemic, ZIM "performed worse than the cumulative industry based on **net income as a percent of revenue**," between 2020 and 2022, ZIM "performed better than the entire industry." (*Id.*, ¶ 56) And "a key factor that contributed to [ZIM]'s relative over performance in 2020, 2021 and 2022 is the relatively high level of demurrage revenue it achieved." (*Id.*, ¶ 58) Mr. McCown's Section VII, while detailed, makes the clear case that ZIM's demurrage practices were different from the other carriers, and that difference widened sharply during the pandemic.

Against this backdrop, and having conceded that Mr. McCown is qualified to proffer his financial analysis in Section VII, ZIM yet again resorts to making a straw man argument that the profitability or unprofitability of an ocean carrier has no relevance to whether or not specific charges for detention or demurrage are reasonable." (Mot. at 19.) But Mr. McCown's financial analysis is *not* that ZIM's profit during the pandemic in an absolute sense is enough to find its D&D practices unreasonable, *but* that ZIM's net income and revenue from demurrage, when viewed *as a percent of revenue*, make comparisons to other carriers' results meaningful and

relevant, among other things, that it was consistent with ZIM's practice of shifting charges to consignees and pursuing D&D as a revenue source.²⁶ Of course, those comparisons make it clear that ZIM's demurrage practices were fundamentally different and grossly deviated from the industry and, therefore, unreasonable. (CX_08568, CX_08572, McCown Report, ¶¶ 69, 76).

Mr. McCown's opinions in Section VII are based on a rigorous analysis of actual data focused on determining the impact of demurrage income on ZIM's financial results between 2020 and 2022 and how it measures against the industry average or practice. ZIM's gross deviation from the rest of the industry average remains unrebutted and unchallenged. The Presiding Officer should reject ZIM's re-casting of Mr. McCown's financial analysis as the reductionist formula "profit = unreasonable."

D. There is No Danger that the Court, As the Sole Trier of Fact, Will Be Misled or Unduly Influenced by McCown's Opinions in his Report

Throughout its Motion, ZIM neglects to observe the critical point that this proceeding is, in essence, akin to a bench trial. Here, traditional concerns regarding the undue influence on jury decision-making are absent. *See Fiat Chrysler Auto. NV, FCA US LLC, & FCA Italy S.p.A v. Wallenius Wilhelmsen Logis. AS & Wallenius Wilhelmsen Logis. Am. LLC*, FMC Docket No. 17-09, 2019 WL 473434, at *4 (ALJ May 8, 2019) (finding that "the risk of prejudice from giving undue weight to marginally relevant evidence is minimal in a bench trial such as this where the judge is capable of assigning appropriate weight to evidence."); *MJ Harbor Hotel v. McCormick & Schmick Rest. Corp.*, 599 F. Supp. 2d 612, 623 (D. Md. 2009); *see also, e.g., United States v. Hall*, 969 F.2d 1102, 1109-10 (D.C. Cir. 1992) (noting that in a bench trial the judge is unlikely to be swayed by the "aura" of an expert's testimony).

²⁶ In this vein, ZIM's insinuation that McCown's analysis at the "macro" level must be supplemented by a granular, charge-by-charge "micro" analysis or that McCown did not analyze a demurrage claim widely misses the point. (Mot. at 21)

The Presiding Officer is fully capable of analyzing and weighing McCown’s opinion in his Report, and then, based on her own expertise, assigning that opinion whatever probative weight, if any, it deserved. *See OJ Commerce v. Hamburg Sudamerikanische Dampfschiffahrts Gesellschaft A/S & Co. KG & Hamburg Sud N. Am., Inc.*, FMC Docket No. 21-11, 2023 WL 3969857 at *41 (ALJ June 7, 2023), citing *Marine Repair Services of Maryland, Inc. v. Ports Am. Chesapeake, LLC*, Docket No. 11-11, 2013 WL 9808672, at *23 (ALJ Jan. 10, 2013), admin. final Mar. 20, 2013 (“[the expert] performing certain analyses does not disqualify the analyses; however, the source of calculations will be taken into account in terms of weight.”).

Like *OJ Commerce*, the Presiding Officer knows the law and understands the ultimate role in both deciding what the law is and applying it to the facts in evidence. Because the Presiding Officer necessarily possesses substantial knowledge and expertise on D&D issues, there is no danger that the Presiding Officer will somehow be unduly swayed by Mr. McCown’s expert opinions. Given the Presiding Officer’s control of the issues and the inherent ability to weigh the evidence and Mr. McCown’s opinions, ZIM has not established a legitimate basis for its extreme request that Mr. McCown’s report be stricken in its entirety.

IV. CONCLUSION

For the foregoing reasons, the requirements of Rule 702 with respect to Mr. McCown’s expert report are readily met, and the Court should deny the instant Motion.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

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