

BEFORE THE  
FEDERAL MARITIME COMMISSION

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DOCKET NO. 22-30

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SAMSUNG ELECTRONICS

AMERICA, INC.,

COMPLAINANT,

v.

ZIM INTEGRATED SHIPPING SERVICES LTD.,

RESPONDENT.

**RESPONDENT’S MOTION TO STRIKE EXPERT REPORT OF JOHN D. MCCOWN**

ZIM Integrated Shipping Services Ltd. (“ZIM” or “Respondent”) by and through its undersigned counsel, hereby moves for an Order striking the June 19, 2023 report of John D. McCown, the liability expert appointed by Samsung Electronics America, Inc. (“SEA” or “Complainant”).

**PRELIMINARY STATEMENT**

Mr. McCown has issued a report which can be broken into two sections: a lengthy comparison of the revenues and profits realized by ZIM from freight, demurrage and “non-container” activities for the period 2016 through the second quarter of 2023; and a general criticism of ZIM’s practices for the assessment and collection of demurrage and detention charges.

Despite his claims to the contrary, Mr. McCown does not possess the necessary experience to qualify as an expert in this proceeding, a deficiency which undoubtedly played a role in the other defects in his report; specifically, his proffer of opinions that are not supported by citations to deposition testimony, exhibits or admissible evidence; reliance upon phrases and snippets of testimony which, when read in their entirety, do not support the assertions he has made; and improper attributions of a “state of mind” to ZIM employees without any citation to supporting evidence.

For the reasons discussed below, Mr. McCown’s report should be stricken, and his statements and opinions upon which SEA’s counsel have relied in support of their Proposed Findings of Fact and the arguments in their Brief, should be rejected.

### **LEGAL STANDARD**

*Daubert* requires three separate inquiries: (1) whether the proposed expert is qualified to offer the opinions proffered; (2) whether the opinion is based on reliable data and methodology; and (3) whether the testimony is relevant and within the proper scope of testimony. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993).

In the typical *Daubert* motion, an expert is challenged because of a failure to meet one of these requirements. Mr. McCown, however, does not meet any of them. For the reasons discussed below, ZIM moves to strike his entire report.

#### **I. Mr. McCown Is Not Qualified to Offer the Opinions Proffered In Sections IV, V, VI And VIII Of His Report**

Mr. McCown’s report touts “decades of experience in the global shipping industry”. This characterization of his experience is not simply an exaggeration – it is unsupported and a misrepresentation of his experience and expertise.

### **A. Mr. McCown's Education and Work Experience**

Mr. McCown's college and post-graduate degrees were in Business administration, the latter involving a concentration in finance. (McCown resume, "Education"; Tr, p. 10:23-12:1<sup>1</sup>) After working as a bank loan officer for three years, Mr. McCown joined McLean Industries, Inc. where he played a "key role" in over \$1 billion in financings (1980-1983); managed \$250 million in cash investments and assisted with the IPO of McLean Industries, Inc. and \$500 million in public debt offerings (1983-1987); and conceived a plan to monetize \$1 billion of NOLs (net operating losses) and managed finances during the reorganization period which followed the bankruptcy filing of McLean Industries and its subsidiary, United States Lines, Inc. ("U.S. Lines") from 1987 to 1988.

Mr. McCown left McLean Industries in 1988 and joined Kadampanattu Corp. ("K Corp."), whose only business involved the bareboat charter of two "ro-ro" barges purchased by Malcom McLean for the Jones Act trade. Tr, p. 38:17-39:17. In 1991, Mr. McCown transitioned to Trailer Bridge, Inc., a subsidiary of K Corp. in which he claims to have shared an equity position with Malcolm McLean, and served as its Chairman and CEO. Trailer Bridge owned seven barges (Tr, p. 43:16-21) which serviced San Juan, Puerto Rico primarily from Jacksonville, Florida. Tr, p. 45:25-46:20. These barges were "ro-ro" vessels which transported 53' containers on chassis, and "some" 40' containers. Tr, p. 46:21-47:6; 48:12-23. In total, Trailer Bridge's container fleet consisted of approximately 5,000 containers. Tr, p. 164:8-12.

Mr. McCown left Trailer Bridge in 2008, approximately two years before the company filed for bankruptcy which, he admitted, was partly due to Trailer Bridge's inability to pay an \$85 million debt offering established by Mr. McCown while he was the company's CEO. Tr, p.

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<sup>1</sup> "Tr" refers to the transcript of the deposition of John D. McCown, dated July 14, 2023.

53:18-55:14; 57:13-16. Mr. McCown's equity position in Trailer Bridge became valueless, a development which he characterized as a "reverse lotto". Tr, p. 59:10-60:1.

His subsequent employment activities have involved working with hedge funds, a lobbying firm and writing articles. Tr, p. 63:6-67:3.

### **B. Mr. McCown's Limited and Outdated Experience**

A qualified expert witness must possess "specialized knowledge" obtained through experience, training or education; and for a witness who is "not qualified as an expert" in the field governing the "topics covered in his testimony, that testimony cannot possibly meet the requirements mandated by *Daubert*." See *In re Omeprazole Patent Litig.*, 490 F. Supp. 2d 381, 402 & n.9 (S.D.N.Y. 2007) (citing *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 741 (3d Cir. 1994)). The courts have "not pursued a policy of qualifying *any* proffered witness as an expert." *Waldorf v. Shuta*, 142 F.3d 601, 625 (3d Cir. 1998). Further, a witness may not be qualified as an expert in the area of his proffered testimony based on his expertise in other areas. See *Carnegie Mellon Univ. v. Marvell Tech. Group, Ltd.*, 286 F.R.D. 266, (W.D. Pa. 2012) (admitting patent expert's opinion on general market matters but excluding his opinion on technical aspects); see also, *Soldo v. Sandoz Pharm. Corp.*, 244 F. Supp. 2d 434, 568 (W.D. Pa. 2003) (excluding doctor from testifying outside his specialty).

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

- Vessel operations – Tr, p. 19:19-21
- Container and chassis operations – Tr., p. 21:19-22; 29:6-30:4
- Establishing demurrage, detention or other accessorial rates - Tr., p. 23:6-24:15
- Invoicing freight, demurrage or detention charges - Tr., p. 25:20-24; 30:12-19

- Collecting receivables - Tr., p. 30:12-19

Notably, a critical factor which militates against his competence as an expert on the subjects for which he has proffered opinions is Mr. McCown's admission that he has never analyzed a demurrage claim in his entire career. Tr, p. 231:1-3.

Mr. McCown's report makes numerous statements in support of his opinions by referring to his "experience" at McLean Industries and Trailer Bridge and contrasting these companies' operations and ways of doing business against those employed by ZIM. His limited experience at McLean, the substantial difference between Trailer Bridge's size, trade routes and operations in comparison to ZIM's, and the time which has passed since he worked at those companies (35 years as to McLean/U.S. Lines and 15 years as to Trailer Bridge) do not render him competent to testify as an expert in this proceeding.

With respect to his experience at McLean Industries, Mr. McCown's role was limited to financial matters, initially obtaining financing for U.S. Lines' expanding fleet (Tr, p. 17:7-19:11); then finding ways to "monetize" the net operating losses which resulted from those transactions and the bankruptcy which followed. (Tr, p. 35:13-37:8). Mr. McCown had no role in vessel or equipment operations, although he claims that he learned about these topics by talking to employees and reading reports so that he could convince bankers to finance the expansion of U.S. Lines' fleet.<sup>2</sup> Tr, pp. 19:19-21:5, 22:9-21.

Mr. McCown stated that, while employed by McLean Industries, he could not recall U.S. Lines' D&D rates "being more than \$3 per day." Report, p. 7, ¶19. And, "I believe U.S. Lines was not unique in this regard and container shipping companies charged similar rates." *Id.*

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<sup>2</sup> If speaking to other experts and reading reports were the sole criteria for determining the competence of an expert to testify, then the signatory to this brief is qualified as an expert in naval architecture, container stowage systems, ship handling, marine engineering, meteorology and a myriad of other disciplines that were at issue during the course of a forty year career in maritime law.

However, Mr. McCown was not competent to make those statements because he readily admitted that he was not involved in the fixing, invoicing or collection of D&D for U.S. Lines (Tr, pp. 25:20-24; 30:12-19); he did not review, study or analyze the D&D practices of other ocean carriers (Tr, pp. 77:3-78:16, 79:6-80:24); and, he could not comment on other ocean carriers' practices. (Tr, p. 85:6-10). In light of Mr. McCown's failure to conduct the latter analyses, his reliance upon the "practices" of U.S. Lines, a company at which he had no operational role and that went bankrupt more than 35 years ago, does not qualify him to act as an expert. Mr. McCown's shortcoming in this regard were succinctly summarized by ZIM's expert, Lee Clair:

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

Mr. McCown's reliance upon his experience at Trailer Bridge to strengthen his veneer of expertise is also greatly exaggerated.

Mr. McCown left the employ of Trailer Bridge in 2008, more than fifteen years ago. In addition to the fact that any knowledge he acquired at Trailer Bridge is also outdated, his experience at Trailer Bridge does not render him competent to opine on demurrage and detention issues in this case due to the substantial difference between the trade lanes served by Trailer Bridge and those served by ZIM; the size and diverse nature of their respective vessels and equipment pools; and Trailer Bridge's limited scope of operations, dictated by the unique nature of its specialized and miniscule fleet.

Trailer Bridge's fleet consisted of seven chartered barges, all which were ro-ro vessels designed to carry 53' containers and chassis. Trailer Bridge's 53' container fleet consisted of 5,000 units, plus "some" 40' containers. Tr, pp. 48:12-20; 164:8-12. In contrast, ZIM operates

139 ocean going vessels with a total container carrying capacity of approximately 600,000 TEU.<sup>3</sup> ZIM's container fleet consists of containers of multiple sizes and types, with a total capacity of approximately 547,000 TEU.<sup>4</sup> The size and diversity of ZIM's vessels and container fleet compared to Trailer Bridge's small barge operation, renders him incompetent to opine on the demurrage and detention issues affecting ZIM and its customers.

Trailer Bridge was a "Jones Act" carrier which served Puerto Rico, with a single trade lane between Jacksonville, Florida, and San Juan. This trade route was later expanded to include the Dominican Republic and a service between the port of New York and San Juan. In contrast, ZIM's trade routes serve 100 countries and 350 ports located in North America, Asia, Africa, Europe, South America and the Caribbean. ZIM, *Investor Relations: Overview*, WWW.ZIM.COM, <https://investors.zim.com/overview/default.aspx> (last visited Aug. 21, 2023).

As noted by Mr. Clair:

Trailer Bridge's fleet is barges rather than ships with holds, and Trailer Bridge's container fleet is composed of domestic containers, rather than international (ISO) containers. Trailer Bridge has no service transporting containers from Asia to the U.S. that compete with the type of service that ZIM provided to SEA. Clair Report, p. 6, ¶22.

Even Mr. McCown agreed that the routes served by ZIM are broader than those served by Trailer Bridge. Tr, p. 53:15-17.

Mr. McCown's employment by McLean Industries focused on high-level financial issues, initially relating to the expansion of U.S. Lines, and then dealing with the fallout from that expansion and the bankruptcy which followed. This experience was not relevant to the

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<sup>3</sup> These numbers were accurate as of May, 2023. Martin Placek, ZIM Integrated Shipping Services – Statistics & Facts, WWW.STATISTA.COM, (June 27, 2023) <https://www.statista.com/topics/10007/zim-integrated-shipping-services/#topicOverview>.

<sup>4</sup> ZIM, *ZIM Shipping Containers*, WWW.ZIM.COM, <https://www.zim.com/help/zim-shipping-containers> (last visited Aug. 21, 2023).

demurrage and detention issues that are before this court and does not qualify Mr. McCown to opine upon them.

Mr. McCown's reliance upon his experience with Trailer Bridge is also misplaced because operating seven ro-ro barges in a Jones Act trade between Jacksonville and San Juan is not sufficient to enable Mr. McCown to competently opine on the reasonableness of the demurrage and detention policies of an international container fleet consisting of 139 vessels, serving 350 ports in approximately 100 countries.<sup>5</sup>

Finally, Mr. McCown has never testified as an expert at a trial, arbitration or a deposition (Tr, p. 67:7-11) and has never been recognized by any court or tribunal as an expert. Tr., p. 68:8-10. Being recognized as an expert by other tribunals is a factor which courts look to when deciding whether to qualify a witness as an expert. This is yet another criterion which is absent from Mr. McCown's resume and another reason why he is not competent to opine on the issues before the Commission in this proceeding.

## **II. Mr. McCown's Opinions Are Not Based Upon Reliable Evidence**

Given his lack of competence to qualify as an expert in this proceeding, it is not surprising that sections IV, V, VI and VIII<sup>6</sup> of Mr. McCown's report are replete with:

- Statements that do not cite to evidence but are founded upon his inadequate "experience."
- Citations to evidence which do not support the statement, assertion or opinion advanced by Mr. McCown.

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<sup>5</sup> ZIM, *Investor Relations: Overview*, WWW.ZIM.COM, <https://investors.zim.com/overview/default.aspx> (last visited Aug. 21, 2023).

<sup>6</sup> Sections I, II and III of Mr. McCown's report are respectively, a discussion of his experience, description of his assignment and summary of his opinions so they need not be discussed for purposes of this motion. Section VII was the subject of Point II, *supra*.

- Attributions of a “state of mind” to ZIM and its employees, without any evidentiary support.
- References to practices that Mr. McCown claims to be unreasonable but which did not affect SEA.

#### **A. Mr. McCown’s State of Mind Opinions Are Improper**

The courts routinely exclude expert testimony regarding a party’s intent, motive, or state of mind. *See Pritchett v. I-Flow Corp.*, 09-CV-02433-WJM-KLM, 2012 WL 1059948, at \*6 (D. Colo. Mar. 28, 2012) (excluding expert testimony regarding state of mind and intent); *Ebonie S. ex rel. Mary S. v. Pueblo Sch. Dist. 60*, 09-CV-00858-WJM-MEH, 2011 WL 1755208, at \*13 (D. Colo. May 5, 2011) (excluding expert opinion that speculated on a party’s intent) ; *McGill v. Corr. Healthcare Companies, Inc.*, No. 13-CV-01080-RBJ-BNB, 2014 WL 6513185, at \*4 (D. Colo. Nov. 20, 2014) (finding expert’s opinion on state of mind and intent was “inappropriate for expert testimony.”); *DePaepe v. Gen. Motors Corp.*, 141 F.3d 715, 720 (7th Cir. 1998); and *In re Rezulin*, 309 F.Supp.2d 531, 546 (S.D.N.Y.2004) (finding “the opinions of [expert] witnesses on the intent, motives, or states of mind of corporations, regulatory agencies and others have no basis in any relevant body of knowledge or expertise”).

Mr. McCown’s report improperly contains statements which impute a state of mind to ZIM and the shipping public in an improper attempt to bolster his inadmissible opinions and statements. A few examples of these improper statements and opinions are described below:

- Paragraph 22: Mr. McCown asserts, without any citation to evidence, that shippers are not aware of demurrage and detention charges because “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.” This unsupported characterization of

shippers' collective state of mind regarding demurrage and detention rates was confirmed when Mr. McCown admitted the exact opposite during his testimony, i.e., that shippers are savvy enough to negotiate lower demurrage and detention rates and free time in their service contracts:

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

A. Yes.

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

A. Yes. Yes.

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

A. Yes. Tr. p. 171:4-12

- Paragraph 48 refers to an online interview of Xavier Destriau, ZIM's Chief Financial Officer in January, 2020, in which Mr. Destriau spoke about challenges confronting ZIM in the upcoming year, specifically the paucity of truck drivers, chassis shortages and terminal productivity. Mr. McCown goes on to improperly assert that this provided an opportunity for ZIM to increase demurrage and detention income by divining Mr. Destriau's state of mind: "Mr. Destriau had to know that those U.S. issues were all positive catalysts for Zim increasing its D&D income...It is hard not to believe that Mr. Destriau would do anything other than implement policies to maximize what was collected in D&D charges because he recognized the importance investment banks and sell side analysts placed on current earnings." There is no evidence to support this statement – it is simply Mr. McCown attempting to divine

- Mr. Destriau's motivation and thereby advance "state of mind" evidence which the Courts routinely bar an expert from proffering.
- Paragraph 51 discusses an internal email exchange between finance personnel and Jonathan Cleva, who was head of ZIM's Strategic Accounts, in which the compromise of another customer's demurrage claim was under consideration. Mr. McCown opines "Mr. Cleva was unable to recall whether his compromise was accepted and I suspect the finance side and its focus on maximizing current profit prevailed." Mr. McCown made an improper assumption regarding the state of mind of ZIM's finance department, which was not based upon any admissible evidence. However, Mr. McCown's musings on this topic do not stop there and go on to conclude this paragraph with the assertion: "Presumably, Mr. Cleva was corrected by someone on the finance staff who schooled him towards the view that the only role of potential situations involving D&D charges is that current income streams be maximized." This is yet another opinion which is not based upon evidence but is instead the result of Mr. McCown's imputing a state of mind to ZIM's finance department and to Mr. Cleva – this tactic is improper and should accordingly be stricken. Further, the opinions in this paragraph relate to an issue that affected a different customer, and that did not involve SEA, so it should also be barred based upon the principle discussed *infra* in sub-point D.
  - Paragraph 53 discusses a PowerPoint presentation which discusses monthly demurrage results in July, 2021. During his discussion of the document, Mr. McCown improperly concludes "Going through the deck, you can almost hear the celebratory comments that finance staff are making in terms of demurrage

performance.” And from that improper statement, Mr. McCown makes another assumption about ZIM’s collective state of mind: that demurrage should be viewed “as a source of income that should be maximized.” This is precisely the type of “state of mind” conclusions which the cases cited above have held should be barred.

The above statements were advanced without any citation to supporting evidence and are based entirely upon Mr. McCown’s assumption or imputation about the state of mind of ZIM, its employees and the shipping public. This tactic infects his entire report and is another reason why it should be stricken.

**B. Mr. McCown’s Statements Are Not Supported by Evidence**

In his report, Mr. McCown routinely makes statements and assertions that are not supported by citations to evidence; or which cite to abbreviated testimony that, when read in its entirety, do not support the opinion he attempts to articulate. These statements and assertions are found throughout Sections IV, V, VI and VIII of his report and are another reason they should be stricken. A few of examples are discussed below:

- Paragraph 16: Mr. McCown asserts “Zim headquarters pressured Zim in the U.S. to collect demurrage and detention from consignees, including, as shown in Zim’s own communications and testimony, in situations where Zim knew invoicing was improper; charges and invoices were disputed...” There is no citation to evidence in support of this statement, a significant omission. Tellingly, when challenged about whether or not Mr. McCown agreed that a company should collect its receivables, he quickly agreed:

Q. You agree a business should collect outstanding receivables?

A. Definitely. Tr, p. 124:3-5

- Paragraph 19: In support of his assertion that demurrage and detention rates should be “cost based,” Mr. McCown relies upon his experience at McLean more than 35 years earlier when U.S. Lines charged \$3 per day, stating further: “I believe U.S. Lines was not unique in this regard and container shipping companies charged similar rates.” This latter statement had no evidentiary basis, because as demonstrated in Point I *supra*, Mr. McCown had no role in fixing demurrage and detention rates at U.S. Lines, nor was he involved in invoicing these charges or collecting them. Tr, p. 147:3-6. And, he did not conduct an analysis of the practices of other ocean carriers while he was at McLean admitting “I don’t really have direct knowledge of what the others charged.” Tr, p. 153:4-18.
- Paragraph 27: Mr. McCown asserted that “(t)he widely held industry view that carrier responsibility in door-to-door moves extends to the inland delivery point, and as such no D&D charge is applicable unless caused by the consignee, was confirmed in depositions of relevant Zim employees.” In support of this statement he cited to the following testimony:
  - Abbreviated testimony from Barbara Speight, ZIM’s Dedicated Service Group Customer Services Manager; however, when confronted with Ms. Speight’s entire testimony, Mr. McCown admitted that she had distinguished between ZIM’s responsibility when a preferred trucker appointed by the consignee was used as opposed to a house trucker which was selected by ZIM:

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

(Objection by counsel)

A. She's making that distinction. I see that. Tr. p. 179:7-15.

- Testimony from Tera Haynie, a ZIM container equipment manager was cited in support of Mr. McCown's opinion that ZIM would remain responsible for demurrage if a container were not available for pick-up at a terminal; but, when shown the entirety of her testimony, Mr. McCown admitted that ZIM would only be responsible for demurrage if a container was not available for pick-up and it was ZIM's fault:

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

A. Yes, it seems like it. Tr, p. 183:19-23

- Testimony from Matthew Frigo, ZIM's U.S. Intermodal Manager, was cited in support of Mr. McCown's assertion that ZIM remained responsible for a non-performing preferred motor carrier. Again, when confronted with Mr. Frigo's entire testimony, Mr. McCown admitted that the abbreviated testimony he relied upon in his report only applied to a house trucker:

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

A. Agreed. Yes.

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

A. That's correct. Tr, p. 186:4-11

- Paragraph 45 opines that “Zim effectively had no dispute resolution process in place.”

When this assertion was challenged at his deposition, Mr. McCown admitted that ZIM provided an online portal where disputes could be submitted to ZIM for consideration. Tr, p. 221:19-24. He also acknowledged that ZIM had a Demurrage Committee to which customers, especially a Strategic Account like SEA, could have disputes submitted but was “unaware” that SEA had never submitted a dispute to the Demurrage Committee:

- Q. You understand that SEA never submitted any type of – never made a submission to the demurrage committee asking that its claims be evaluated?

Do you agree with that?

- A. I'm not aware. I take – I accept that. Tr, p. 223:18-22

When questioned further about SEA's complete failure to take advantage of the dispute resolution mechanisms that ZIM made available, Mr. McCown admitted: “I'm guessing that Samsung just thought that everybody was aware of their request for data, was the biggest thing that seemed to be ignored.” This is yet another reason why his report must be stricken because professional certainty and not “guessing” is the criterion for admissibility of an expert's opinion.

**C. Mr. McCown Improperly “Defaults” to Reliance Upon His Outdated and Inadequate Experience When Evidence Does Not Support His Opinions**

When evidence is lacking, Mr. McCown falls back upon his “experience” in support of the statements and opinions he has proffered. But, as demonstrated in Point I *supra*, Mr. McCown's experience is wanting so his reliance on this inadequate foundation is another reason why his statements and opinions are unreliable, and his report should therefore be stricken under

*Daubert*. Some examples of statements where Mr. McCown has relied upon his inadequate “experience” to bolster statements and opinions that are not supported by evidence in the record are set forth below:

- Paragraph 15: Mr. McCown relies upon “my decades of experience in the global shipping industry” in support of his general assertion that ZIM has “unilaterally” determined that “store-door terms became inapplicable if a consignee nominated a preferred trucker.” He does not cite to any objective evidence which supports this opinion; and, given that he had no experience in vessel operations or container and chassis operations or in international container shipping (as compared to the Jones Act trades), his “experience” is insufficient to support this opinion. Mr. McCown also fails to address the practices of other industry participants in this regard.
- Since the testimony of ZIM’s witness does not provide support, in paragraph 28 of his report, Mr. McCown again falls upon his experience to bolster his opinion that an ocean carrier remains responsible when the consignee’s designated trucker fails to perform: “In my decades of experience, I have not encountered a carrier that reneged on its inland move responsibility under door move terms when the shipper or a consignee nominated a preferred trucker.” (emphasis supplied) Again, as discussed in Point I, Mr. McCown does not have decades of experience, and the little experience he did have was in finance - not container and chassis operations, the fixing of demurrage/detention rates, or the invoicing and collection of these charges. It 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.” Tr, p. 186:12-21.

- In Paragraph 30, Mr. McCown asserts that SEA “did not get anywhere near the service it was due.” In support of this statement, he states: “I base that observation on decades of operating experience in the container shipping sector including commentary by shippers on factors important to them and various information disclosed in the depositions and related exhibits.” However, he does not cite to any deposition testimony or exhibits and, therefore, is reliant upon his “operating experience in the container shipping sector...”, experience which he admitted that he does not have. Tr, p. 19:19-21; 21:19-22; 23:6-24:15; 25:20-24; 29:6-30:4; 30:12-19.

**D. Mr. McCown Criticizes Activities Which Do Not Affect SEA**

Another tactic used to bolster his opinions involved criticism of actions by ZIM which he considers to be unreasonable but which did not affect or involve SEA.

Paragraph 34 asserts that invoices for demurrage “were often sent out late.” As there was no citation to evidence supporting this statement, Mr. McCown was asked about it at his deposition:

Q. ...first of all, did you see evidence that invoices were sent out late to SEA?

A. Yes. In the depositions, there was reference to that. We.. I’m sorry. Late in – no, I did not see it to SEA. Tr, p. 192:21-193:1.

Paragraph 51, which was referenced above in Sub-Point A, also involved reliance by Mr. McCown on “evidence” which did not involve SEA. When asked about the basis for his unfounded opinion that Mr. Cleva was “schooled,” Mr. McCown readily admitted that the email he was referring to did not concern SEA:

Q. ...you say, presumably, Mr. Cleva was corrected by someone on the finance staff who schooled him towards the view that the only role of potential situations involving D&D charges is that current income streams be maximized.

You didn't read any testimony which supported that statement; is that correct?

A. Well, that, and the entire paragraph was really – I know it didn't relate directly to Samsung, but it was really more foundational, and I thought it was kind of interesting comments or quotes from somebody that was involved.

Mr. McCown's use of the phrase "foundational" does not change the fact that these criticisms did not involve SEA and are not relevant to its claims. These statements and opinions are accordingly not reliable and should not be admitted under *Daubert*.

### III. **Opinions Set Forth in Section VII of Mr. McCown's Report Are Not Relevant**

Mr. McCown's post-graduate education concentrated in finance and his financial experience with McLean Industries and Trailer Bridge may qualify him to opine with respect to the matters described in section VII of his report, which discuss ZIM's financial results from 2016 through early 2023. Section VII of his opinion should nevertheless be stricken because the profitability or non-profitability of an ocean carrier is not relevant to whether a demurrage and/or detention practice is reasonable.

Irrelevant information should be precluded because of its "inability to assist in factual determinations, its potential to create confusion, and its lack of probative value." *Allison v. McGhan Medical Corp.*, 184 F.3d 1300, 1311-12 (11th Cir. 1999). Indeed, since the purpose of an expert is to assist the trier of fact, allowing an expert to advance irrelevant opinions undermines this crucial role. "The rule imposes a duty on the district court to ensure expert testimony is relevant and reliable prior to admitting it." *Hoffman v. Ford Motor Co.*, 493 Fed. Appx. 962, 973 (10<sup>th</sup> Cir. 2012).

In Section VII of his report, Mr. McCown devoted eighteen pages to a discussion which compares ZIM's total revenue and net income from 2016 – 2022 to "industry" revenue. (pp. 28-46). This analysis discusses ZIM's total revenue from freight and other sources, an analysis which is not relevant to any issue in this case.

Section VII goes on to discuss ZIM's revenue from "Container" and "Other" sources during the period 2017 – 2022 which, after a tortuous analysis, concludes that ZIM's demurrage and detention revenue was higher in 2021 and 2022. pp. 33-39. Mr. McCown then spends the next six pages (pp. 40-46) explaining that ZIM's revenue from demurrage and detention increased in 2021 and 2022, concluding "charges related to demurrage and detention are managed to maximize the revenue and related income from those items." (p. 44, ¶84)

This lengthy analysis and Mr. McCown's resulting opinion are simply not relevant to the issues before the Commission because the profitability or unprofitability of an ocean carrier has no relevance to whether or not specific charges for detention or demurrage are reasonable. After some prodding, Mr. McCown reluctantly agreed:

Q. ... is the profitability of an ocean carrier, is that probative of the issue of whether a specific charge for demurrage or detention is correct or not?

A. I don't really know the – could you explain what probative – I think I know what it means, but I don't mean to be difficult, but I –

Q. All right. Let me try again.

Have you ever analyzed a demurrage claim to determine whether or not it's valid?

A. No.

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

year?

(Objection by counsel)

A. No.

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

(Objection by counsel)

A. No. (Tr, p. 230:18-231:19)

The irrelevance of Section VII of Mr. McCown's report was also succinctly confirmed by ZIM's expert: "ZIM's financial performance pre and during the Covid-19 period is not relevant." Clair Report, p. 4, ¶9.

Finally, the relevance of the type of financial analyses contained in Section VII of Mr. McCown's report has also been rejected by the Presiding Officer in this proceeding: "Making a profit or increasing income, without more, would not violate the Shipping Act." (Dkt #27, Order Denying Motion to Compel Discovery dated June 9, 2023).

The "without more" which is missing from Mr. McCown's report is (1) an identification of specific demurrage/detention charges which are contested; and (2) evidence that the claimed charges were unreasonable. Mr. McCown's report fails to comply with guidance provided by the *Interpretive Rule on Demurrage and Detention Under the Shipping Act*, 46 CFR Part 545 ("*Interpretive Rule*") because, as the Commission explained in the Notice of Proposed Rule Making which preceded the promulgation of the *Interpretive Rule*, each 41102(c) claim "would continue to be decided on the particular facts of the case" (84 FR at 48851), and the application of the incentive principle "would vary depending on the facts of a given case." 84 FR

at 48852 Mr. McCown's report falls short of this guidance because of his failure to identify the specific shipments for which demurrage charges were assessed and offer an opinion as to why demurrage charges for those shipments were allegedly unreasonable or a violation of the Shipping Act. This omission is not surprising given Mr. McCown's admission that he has never analyzed a demurrage claim. (Tr, p. 231:1-3).

Section VII of Mr. McCown's report, which spends 18 pages "slicing and dicing" ZIM's revenue and net income from 2016 through the first two quarters of 2023 should be stricken on the grounds that ZIM's revenue and profitability are not relevant to the determination of whether demurrage and detention charges that may be at issue in this case are reasonable.

### **CONCLUSION**

The report of John D. McCown should be stricken and his opinions given no weight in the determination of the issues before the Commission.

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Dated: September 26, 2023

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of September, 2023, a true and correct copy of the foregoing Motion was served via email on counsel for the Complainant in FMC Docket No. 22-30.

*s/ Kathryn Sobotta*

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