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BEFORE THE
FEDERAL MARITIME COMMISSION

DOCKET NO. 22-30

SAMSUNG ELECTRONICS

AMERICA, INC.,

COMPLAINANT,

v.

ZIM INTEGRATED SHIPPING SERVICES LTD.,

RESPONDENT.

COMPLAINANT’S MOTION TO COMPEL DEPOSITION OF XAVIER DESTRIAU

Pursuant to 46 C.F.R. §§ 502.142, 502.143 and 502.150, Complainant Samsung Electronics America, Inc. (“SEA”) moves to compel deposition of Mr. Xavier Destriau to testify concerning important financial matters at issue in this matter.¹ Mr. Destriau is the Chief Financial Officer of the Respondent, Zim Integrated Shipping Services Ltd. (“Zim”). Mr. Destriau’s testimony is requested to be taken at a mutually agreed-upon time, place, and manner, not later than June 14, which is five (5) weeks before July 19, when the parties’ opening briefs are due under the current Amended Scheduling Order.²

¹ Mr. Destriau, an Executive Vice President at Zim, has been serving as its CFO since June 15, 2018, and as such, SEA expects his testimony, whether individually or as a corporate representative, would be indistinguishable. *See* ZIM Appoints Xavier Destriau As Chief Financial Officer, *available at* <https://www.zim.com/news/press-releases/zim-appoints-xavier-destriau-as-chief-financial-officer> (last accessed May 30, 2023).

² Unless otherwise specified, the dates referenced herein are in year 2023.

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For reasons more fully described below, if Zim persists in refusing to make Mr. Destriau available for deposition in a timely manner, or otherwise persists in denying SEA meaningful discovery regarding Zim’s practice and policy of using demurrage and detention (“D&D”) as a profit center, SEA seeks the following adverse inferences in this proceeding: (1) that it was the policy and practice of ZIM Integrated Shipping Services Ltd. (the Israel-based FMC regulated ocean carrier) to use D&D charges assessed against cargo and consignees in the United States as a revenue source and profit center, and (2) that such policy and practice was inconsistent with the primary purposes of D&D charges to serve “as financial incentives to promote freight fluidity.” 46 C.F.R. § 545.5(c)(1).

I. PRELIMINARY STATEMENT

Central to SEA’s claims in this matter is Zim’s unjust and unreasonable levying and collection of D&D charges on various shipments of SEA’s cargo since 2020 to present. During discovery, SEA has consistently sought to develop evidence of Zim’s practices, policies, and procedures and decision making with respect to, for example, (i) collection of unpaid invoices, cargo (or credit) holds; (ii) assessment, invoicing, and collection of D&D charges on containers shipped to the U.S., including SEA shipments; and (iii) waiver or discount requests of D&D charges.³ But several U.S. based corporate witnesses, testifying on behalf of Zim pursuant to 46 C.F.R. § 502.143(b)(6), either lacked requisite knowledge or came unprepared. They repeatedly referred or deferred to Zim’s finance department in its “HQ,” or in “Haifa,” or “Israel.”

Following the deposition on May 3 of Mr. Yaacoub Yaacoub⁴, { [REDACTED] } on May 5, SEA noticed two additional witnesses for deposition, Ms. Ilana Rosenberg for May 18 and Mr. Xavier

³ See **Exhibit 1** (Zim’s designation of 143(b)(6) witnesses on SEA noticed topics).

⁴ Director of Finance, Zim American Integrated Shipping Services Co. Ltd. (“Zim U.S.”).

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Destriau for May 22. The notices were (i) timely – well in advance of the May 22 discovery cut-off; and (ii) procedurally proper – well within the 20 depositions allowed to SEA. Since then, counsel for the parties met and conferred multiple times, but never once did SEA withdraw its notice or intent to depose Mr. Destriau. This was, in part, because SEA was concerned Ms. Rosenberg (Zim U.S. CFO) would defer to someone above her, i.e., Zim’s global CFO.⁵

SEA’s premonition was proven true. During Ms. Rosenberg’s deposition on May 25, she admitted that { [REDACTED] }

Nonetheless, Ms. Rosenberg testified that { [REDACTED] }

SEA is entitled to such basic discovery, and Zim must provide it. Indeed, while SEA cooperated with Zim in taking the deposition of Zim’s corporate designated financial witness

⁵ See Exhibit 2 (SEA’s counsel’s May 16 email to Zim’s counsel):

“We are certain Destriau’s testimony will not be duplicative. But we will review our notes and information from the Rosenberg deposition and can withdraw the notice in the unlikely event our position changes. Please confirm Rosenberg for May 25 and Destriau for May 30 or 31 and we’ll update the notices.”

⁶ { [REDACTED] }

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employed by *the U.S. agent* of Zim, Mr. Destriau is the CFO of *the actual party to this proceeding*. And with respect to corporate witnesses, Zim elected to designate multiple witnesses to testify as corporate representatives, in most cases 2 or 3 witnesses per topic, and in one case 5 different witnesses for a single topic. The resulting testimony was a dizzying array of finger pointing and profound lack of preparation.

The Presiding Officer should not countenance Zim's evasive gamesmanship and should issue an Order compelling Mr. Destriau to appear for deposition at a mutually agreed-upon time, place, and manner, but no later than June 14, and failing that or in the event of further obstruction of SEA's efforts to obtain financial discovery and evidence, entering the adverse inferences noted above.

II. FACTS

On October 25, 2022, SEA filed its Verified Complaint. Dkt. 1. SEA contends that: (i) Zim imposed unjust and unreasonable D&D charges on containers shipped by SEA to the U.S. under through bills of lading where Zim was the common carrier for both the ocean and inland transportation; and (ii) Zim acted unreasonably in levying these inland transportation related D&D charges where Zim was responsible for the inland transportation, where shifting such charges to the consignee in store door moves was not consistent with the incentive principle, and by engaging in other acts and omissions in violation of the Shipping Act, *inter alia*, repeatedly imposing "cargo holds" on SEA containers on the basis of disputed invoices, during which time Zim prevented the release and movement of SEA containers, and during which time Zim assessed yet more D&D charges on containers that could not be picked up within free time because Zim refused to move

them. Dkt. 1 at ¶¶ 38, 41. Discovery to date has confirmed that { [REDACTED] }⁷

Pursuant to an April 3 Order, the parties were to commence depositions of fact witnesses on May 1, and to complete all such depositions by May 22. Dkt. 21. On March 30, pursuant to 46 C.F.R. § 502.143(b)(6), Zim designated several corporate representatives, including Mr. Yaacoub, to address Zim’s financial position in connection with SEA’s claims. By consent, the parties agreed to take previously noticed individual testimony and Zim’s designated 143(b)(6) testimony on the same dates for each witness. On April 10, SEA issued amended deposition notices, including for Mr. Yaacoub on May 3.

Notably, Mr. Yaacoub testified that { [REDACTED] }⁹

Belying his job title as the Director of Finance at Zim U.S., Mr. Yaacoub { [REDACTED] }¹⁰ Based on the inadequate testimony of

Mr. Yaacoub:

- On May 5, SEA promptly noticed depositions for two additional fact witnesses, Ms. Rosenberg and Mr. Destriau (17 days before the May 22 fact discovery cut-off date);¹¹
- On May 8, Zim’s counsel requested, and on May 11, the parties conducted a meet and confer to discuss, among other things, the deposition of Mr. Destriau;

⁷ See, e.g., **Exhibit 4** { [REDACTED] }

⁸ See **Exhibit 5** (Deposition Transcript of Mr. Yaacoub, Pg. 106:7-12):
{ [REDACTED] }

⁹ See **Exhibit 6** (Yaacoub Trx, Pg. 103:4-104:1).

¹⁰ See **Exhibit 7** (Yaacoub Trx, Pg. 90:1-16; 217:3-25).

¹¹ See **Exhibit 8** (the May 5 deposition notices for Ms. Rosenberg and Mr. Destriau).

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- On May 15, following the teleconference, Zim represented that “Mr. Destriau is not available this week or on May 22, the date for which he has been noticed.” Zim also argued that “his testimony would be duplicative of Ms. Rosenberg’s and is therefore not necessary” and proposed that “a decision about whether Mr. Destriau will be deposed (and if so, when) be postponed *until* SEA has taken the deposition of Ms. Rosenberg.”;
- On May 16, SEA responded and noted clearly that it “*will*” depose Mr. Destriau on “May 30 or 31” as an accommodation to Mr. Destriau’s unavailability for any date before the May 22 cut-off, as SEA is certain that his testimony “will not be duplicative.” SEA, however, noted that it will “review [the] notes and information from the Rosenberg deposition and can withdraw the notice in the unlikely event our position changes.” SEA requested that Zim “*confirm* [Mr.] Destriau for May 30 or 31.”

Other than the duplicativeness conjecture, Zim did not raise any objections based on relevance or undue burden prior to May 22; it did not move for any protective order; and it did not once claim that it was *refusing* to produce Mr. Destriau to testify.¹² Then, at 4:44 PM Eastern on May 22 (when the Joint Status Report was due), Zim for the first time declared that it did not intend to produce Mr. Destriau at all. This necessitated the bifurcation of the parties’ position statements with respect to Mr. Destriau’s deposition in the Joint Status Report. *See* Dkt. 22. This Motion, therefore, follows.

III. ARGUMENT

1. The Deposition Testimony of Mr. Destriau is Plainly Relevant, and Moreover is Necessary to the Prosecution of SEA’s Claims

Discovery to date has confirmed SEA’s contention that { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }¹³ In so doing, Zim treated D&D as a revenue stream and enjoyed massive, unprecedented

¹² Had Zim refused to produce Mr. Destriau at that time, Zim could have moved for a protective order at any time over the next two weeks, or at the very least it might have given SEA cause to move to compel before the discovery cut-off.

¹³ *See, e.g., Exhibit 4* { [REDACTED]
[REDACTED] }

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level of profits during the pandemic years. Indeed, on or about August 19, 2021, Mr. Destriau himself appeared on CNBC International TV, discussing “ZIM Q2 REVENUE” which was “UP 200% TO \$2.38BN,” which Zim claimed was “DRIVEN BY RISE IN CONTAINERIZED CARGO,” and how “ZIM RAISE[D] FY GUIDANCE AND EXPECT[ED] EBITDA OF UP TO \$5.2BN.”¹⁴ Among other things, Zim is attempting to conceal the evidence linking its U.S. D&D revenue growth and its global profits.

Accordingly, SEA is entitled to such relevant information about the Zim HQ decisions and policies affecting and directing Zim U.S. regarding D&D charges, the profits/net income Zim enjoyed off those D&D charges, as well as the general practices, policies, and procedures Zim HQ follows in evaluating financial information on U.S. customers such as SEA. The Commission will be keenly interested in this information, too, in light of its policy oversight. SEA has sought this information from earlier deponents to no avail. For instance, Mr. Yaacoub testified that { [REDACTED]

[REDACTED] }¹⁵ { [REDACTED] }¹⁶

SEA next sought to obtain information from Ms. Rosenberg in her capacity as CFO of Zim U.S. However, like Mr. Yaacoub, Ms. Rosenberg { [REDACTED]

[REDACTED] } Ms. Rosenberg testified that {

[REDACTED]

¹⁴ See LNG is the ‘greenest possible solution’ today, says shipping company CFO, available at https://www.youtube.com/watch?v=AfddTbDhX9E&ab_channel=CNBCInternationalTV (last accessed May 30, 2023).

¹⁵ See **Exhibit 5** (Yaacoub Trx. Pg. 106:7-12):

[REDACTED]

¹⁶ See **Exhibit 6** (Yaacoub Trx, Pg. 103:4-104:1).

[REDACTED] }²⁰ As such, SEA was unable to fill in critical gaps in its knowledge with her testimony.

Discovery in this matter has already revealed that { [REDACTED] } But despite evidence developed thus far, it has become apparent that Zim is withholding relevant and critical information. In addition to all the testimony { [REDACTED] } counsel for Zim admitted in the Joint Status Report that they had not produced any emails from the CFO of the Respondent.²¹ Public records also demonstrate that Mr. Destriau executes the Zim financial disclosures and must be fully familiar with the financial issues that are central to this matter. Dkt. 22 at 7.²² Mr. Destriau has relevant information that should have been produced.

2. Any Burden on Mr. Destriau Is Proportional to, and Clearly Outweighed by, SEA’s Needs to Obtain Discovery Central to its Claims

Any claimed burden on Mr. Destriau²³ to sit for his deposition, which was noticed to be taken remotely by Zoom and has been properly served and pending for more than two weeks, is outweighed by the greater needs of SEA to obtain discovery regarding Zim’s overall, global-level

²⁰ See **Exhibit 14** (Rough Deposition Trx of Ms. Rosenberg, Pg. 59:14-17):

{ [REDACTED] }

See also **Exhibit 15** (Rough Deposition Trx of Ms. Rosenberg, Pg. 62:20-63:4):

{ [REDACTED] }

²¹ See Dkt. 22 at 9-10 (“Further, we [ZIM] conducted a search of the 22,729 documents which ZIM has produced in this case (86,007 pages). This search confirmed that Mr. Destriau did not generate a single email, that he was the direct recipient of ten emails and only copied on one.”).

²² See also Form F-1 Registration Statement under the Securities Act of 1933 for ZIM Integrated Shipping Services Ltd. (filed Dec. 30, 2020), available at https://www.sec.gov/Archives/edgar/data/1654126/000110465920140558/tm2031687-9_f1.htm, at 192.

²³ While costs should be taxed to Zim, SEA is prepared to take Mr. Destriau’s deposition in-person and in the same time zone (at a mutually agreeable location, whether London or even Haifa, Israel), so as to accommodate Mr. Destriau’s schedule.

financial information, including, for instance, “Zim’s practices, policies, procedures and decision making with respect to collection of unpaid invoices, cargo holds and credit holds in connection with Containers shipped to the U.S.”²⁴ This is especially the case, when, as here, Zim had multiple chances to provide adequately prepared corporate designees who could have competently testified on the subject matters, but failed to do so. After all, despite their positions as the Director of Finance and the CFO of Zim U.S. and despite Zim’s designating witnesses pursuant to 46 C.F.R. § 502.143, neither Mr. Yaacoub nor Ms. Rosenberg was able to provide adequate responses to SEA’s inquiries { [REDACTED] [REDACTED] }

Procedurally, SEA has every right to take Mr. Destriau’s deposition as a party witness. SEA noticed the deposition of Mr. Destriau on May 5, which was prompt and reasonable under the circumstances. Zim did not refuse to produce the witness nor seek a protective order. Dkt. 22 at 5. It was only three weeks later, on May 22, that Zim first informed SEA that it had no intention of making Mr. Destriau available. *Id.* Zim should not be allowed to thwart SEA’s discovery efforts by avoiding the production of Mr. Destriau as a witness. Additionally, SEA is well within the number of depositions it is permitted to take in this proceeding, having taken only twelve depositions out of the twenty that it is permitted under Rule 143(a), 46 C.F.R. § 143(a).

IV. CONCLUSION

For the foregoing reasons, SEA respectfully requests that the Presiding Officer issue an Order: (i) compelling Zim to produce Xavier Destriau as a party witness; or (ii) in the alternative, if Zim otherwise persists in denying SEA meaningful discovery on financial matters, grant any adverse inferences as outlined on pg. 1-2 herein.

²⁴ See Ex. 1 at pg. 1.

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Dated: May 31, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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