

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 CROSS MOTION FOR
EXTENSION OF SCHEDULING ORDER**

Samsung Electronics America, Inc. (“Complainant” or “SEA”), by and through its undersigned counsel, submits this Opposition to Respondent’s Cross Motion for Extension of Scheduling Order (the “Motion”) filed by Zim Integrated Shipping Services Ltd. (“Zim” or “Respondent”), on the evening of Thursday, March 30, 2023. SEA submits this Motion on Monday morning, April 3, in light of fact depositions commencing twenty-four hours from now on April 4, and that the parties will benefit from the ruling of the Presiding Officer in due course.

INTRODUCTION

SEA is mindful that the Commission does not permit replies to responses to non-dispositive motions (46 C.F.R. §502.71(c)), and therefore this response is limited to responding to Zim’s three-

page motion seeking an extension of its discovery deadlines and the Scheduling Order.¹ The issue for decision in this Motion is whether Zim has established good cause for the requested extension of the Scheduling Order, including *all deadlines* in the Scheduling order, in each instance by over a month. Zim represents generally that this is a more complex case than some (Mot. at 8), and notes that extensions are “not unusual” and references dockets of other cases in the last handful of years (*Id.*) Zim then highlights policy considerations generally favoring discovery, which Zim argues should outweigh adherence to scheduling orders (*Id.* at 9). Based on these reasons—and additionally because Zim claims that its request is “reasonable and necessary” and because it is only Zim’s “first request for an extension”—Zim asserts that “good cause has been demonstrated to extend the deadlines in the Scheduling Order....” (*Id.* at 9-10).

Yet, aside from a *single* reference to “good cause” in the conclusion of its Motion, Zim does not even attempt to explain what good cause Zim has in seeking an extension.² And nowhere does Zim adequately explain why it should be permitted to unilaterally set aside the deadlines in a Scheduling Order, deadlines SEA relied upon when meeting its document discovery obligations and in preparation for the tight deposition discovery phase of March 21-April 20, 2023. Instead, the thrust of Zim’s Motion is that while it failed to meet the deadline set in the Scheduling Order, because it is not refusing to complete document production eventually, an extension is therefore reasonable and necessary. Zim’s position would set a dangerous precedent. Whatever the belatedly-explained *reasons* that Zim failed to meet the March 20 deadline to complete its document production, it is axiomatic that failing to meet a deadline is not good cause for seeking

¹ Accordingly, this Opposition does not address nor accede to Zim’s assertions in its Response to SEA’s Motion to Compel and for Sanctions, and per force, Zim’s Response and its assertions, which Zim elected to not include in its Motion, are not part of its Motion and are not the subject of this response.

² *See, e.g.*, Scheduling Order, at 1 (“All requests for extension of time will be reviewed for good cause, even if the parties agree on the requested extension.”).

a retroactive extension of the same deadline. That would turn the notion of good cause and the Presiding Officer's authority to manage the docket on its head.

Nor does Zim's conduct make the extension it seeks the only "necessary" outcome. Absent good cause for the extension, the Presiding Officer has ample authority to make any *actually* necessary and appropriate modifications to the Scheduling Order deemed warranted under the circumstances, for example modifications that do not reward knowing violations of the Scheduling Order, are tailored to avoid unnecessary prejudice to Complainant, and designed to enforce the Presiding Officer's management of the docket.³

Zim's extension request is little more than an attempt to avoid responsibility for violating the Scheduling Order. It fails to meet the applicable good cause standard and it is too little too late to address concerns it should have raised long ago. And it would have the perverse result of rewarding Zim's misconduct, prejudicing SEA (which met its discovery obligations without an extension), and delaying SEA's right to seek reparations on the agreed-upon timeline. The Presiding Officer can craft appropriate rulings without granting Zim's allegedly "necessary" extension demand. The motion is untimely, unreasonable and should be rejected.

FACTS

The Scheduling Order [Dkt. 14] issued on January 12, 2023 made it crystal clear what scheduling expectations were and even stated that "[t]he parties are reminded that a scheduling order 'is not a frivolous piece of paper, idly entered, *which can be cavalierly disregarded by counsel without peril.*'" (internal citation omitted) (emphasis added).

³ Just as Zim sought the benefit of the doubt for its "first request for an extension," the Presiding Officer can take into consideration that this is Zim's first knowing violation of a Scheduling Order. Though mindful that the violation will continue for nearly a month with the representation that Zim's document production will be completed during the week of April 10. If by the end of that week, its nearly one month after the March 20 deadline. When assessing the degree of knowingly violating a Scheduling Order deadline, there is a considerable difference between a self-help violation of one or two days and nearly a month.

SEA took seriously the Scheduling Order’s reminder that the parties to “proceed expeditiously” and made four substantial productions before the March 20, 2023 fact discovery deadline. In contrast, Zim failed to complete its document production by the March 20, 2023 deadline, and indeed, Zim did not make any effort to even seek an extension or other modifications *until after* the deadline passed.

Despite the ample notice and clear timing given by the Scheduling Order, Zim failed to (1) communicate proactively with either SEA or this Court that it was not going to complete its document production by the deadline on March 20, 2023; and (2) even after the deadline, when SEA sought to meet and confer, Zim said it was not available to meet and confer until the end of the week, and when SEA sought to meet and confer in writing, it was only after Zim rejected SEA’s specific requests to compromise that Zim said that it would rather file a motion to extend.

ARGUMENT

Having failed to establish good cause, Zim’s motion should be summarily denied. Its remaining assertions are largely irrelevant generalizations. In the first paragraph of Zim's Motion, it notes discovery is to be completed within 150 days of Zim's answer. But in complex cases, and ones with hundreds of thousands of documents, over a dozen witnesses, and tens of thousands of shipments, Zim contends additional time is necessary. Zim acts as if there is some unfair surprise it is suffering from. The record shows otherwise when considering the origins of this dispute.

It is public record that the principals for the parties entered into immediate, heightened settlement negotiations following the filing of SEA's Complaint. When Zim filed an extension of time to file an answer, its first extension request in this dispute, the Presiding Officer granted it while noting that it was a “longer extension that is typically permitted at this stage.” Dkt. 10 at 1. When the parties could not reach settlement, they were mindful it would impact the remainder of

the case. The Presiding Officer's Initial Order [Dkt. 7], served October 27, 2022, two days after the Commission issued a Notice of Filing of Complaint and Assignment for this proceeding, reminded the parties that, “[t]he Commission’s Notice requires the initial decision in this case to be issued within one year.” That “longer extension” than usual at the initial phase, which did not result in settlement, had repercussions for the parties. The parties were forced to work harder. Do more with less time when a ruling would be issued by October 25, 2023. The parties knew this when submitting a joint status report on January 9, 2023, copied below in its entirety:

Discovery Schedule. The Parties submit the following proposed discovery schedule.

| Event | Deadline |
|---|-------------------------------|
| Service of Requests for Production and Fact Interrogatories | January 20, 2023 |
| Complete Document Production | March 20, 2023 |
| Complete Fact Depositions | April 21, 2023 |
| Expert Discovery Phase and Cut-off | April 22, 2023 - May 18, 2023 |
| Completion of All Discovery | May 18, 2023 |

See Dkt. 13. A reference to the joint status report on January 9, 2023, important context, is wholly missing in Zim's extension request. An aggressive schedule was not foisted on Zim. It was agreed upon when acknowledging the parties used a good deal of rope with unsuccessful settlement negotiations. The first paragraph of the Presiding Officer's Scheduling Order notes the January 9, 2023, joint submission and found the “discovery schedule proposed by the parties is reasonable and adopted.”

At the time of the January 9 joint submission, adopted by the Presiding Officer, Zim would have necessarily known all of the issues concerning the location of certain data in Israel. While

SEA will not address the details of the Declarations of Zim outside counsel⁴ and in-house counsel in this extension motion as they were proffered in connection of the opposition to SEA's motion to compel, Zim cannot explain why it did not account for this location of data issue when agreeing to the adopted completion of document production by March 20, 2023. Zim cannot explain why it “anticipates noticing the depositions of at least three SEA witnesses” and yet it has not noticed a single SEA deposition yet. The parties exchanged Initial Disclosures on January 3, 2023. In those disclosures, SEA referenced three SEA employees likely to have discoverable information while Zim noticed nine Zim employees. Allowing an extension of the Scheduling Order deadlines would bail out Zim for its cavalier pace in meeting the expectations of the Presiding Officer, as set in the Scheduling Order.

Zim also supports its extension request by noting that scheduling orders are revised on occasion when needed and that “it is likely more common for decisions on the merits to require more time than allotted under the regulations than not.” (Motion at 9). This is wrong. This issue here is whether there is good cause for the extension Zim seeks, when Zim did not seek the agreement of SEA for mutual extensions of time for discovery obligations before March 20, 2023, let alone seek relief before the Presiding Officer. It should not have taken SEA’s meet and confer request on March 21, 2023, the day after the deadline to complete *all* document discovery, for Zim to make a belated request addressing its discovery challenges. Zim is not a stranger to proceedings before the Commission. It knows the rules it must abide by. As does its counsel, and that extensions

⁴ SEA must address one statement in Zim’s opposition to the motion to compel as its impacts scheduling. Zim had many opportunities to communicate that it would not be able to meet its obligations under the Scheduling Order and Zim’s delay has greatly prejudiced SEA’s ability to prepare for upcoming depositions, which are now noticed to begin on April 4 to keep the case moving expediently. In fact, in the Opposition to the Motion to Compel, Respondent states that “it is estimated that production of documents . . . will be completed during the week of April 10, 2023” (Opposition at p. 3)– well over halfway through when SEA’s noticed depositions are scheduled to take place and for which Respondents received notices for, originally on March 3, 2023. Raleigh Decl. ¶ 8.

are not freely granted. *See MSRF, Inc. v. HMM Co. Ltd.* (Docket No. 22-20, No. 18)(counsel for Zim “moved for a 30-day extension of the deadline to complete the deposition of fact witnesses,” which was denied for lack of good cause and parties were instructed to submit a “revised proposed amendment to the scheduling order.”)

CONCLUSION

Zim’s conclusion to its cross-motion notes that the parties “in good faith, should have been able to resolve these issues before the filing of the Motion and cross-motion became necessary.” SEA respectfully submits the record shows otherwise. Zim agreed to joint schedule, adopted by the Presiding Officer, and knew of its perceived discovery challenges then. SEA acted responsibly in meeting its obligations and sought immediate explanation from Zim when the March 20, 2023, deadline came and passed. When Zim responded that it would not agree to SEA’s effort to compromise with SEA, it worked through the night to prepare a motion to compel and for sanctions so that this issue could be raised with the Presiding Officer promptly that next morning in light of the very tight fact deposition phase. Under these circumstances, Zim should not benefit from the granting of the cross-motion for an extension. SEA respectfully request that the Presiding Officer issue an order denying the Motion and grant such other remedies and relief that are just and proper.

Dated: April 3, 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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