

BEFORE THE
FEDERAL MARITIME COMMISSION

DOCKET NO. 22-30

SAMSUNG ELECTRONICS AMERICA, INC.,

COMPLAINANT,

v.

ZIM INTEGRATED SHIPPING SERVICES LTD.,

RESPONDENT.

**COMPLAINANT’S RESPONSE TO RESPONDENT’S MOTION FOR EXTENSION OF
SCHEDULING ORDER**

Samsung Electronics America, Inc. (“Complainant” or “SEA”), by and through its undersigned counsel, pursuant to Federal Maritime Commission Rule of Practice and Procedure (“FMC Rule”) 502.71(b), submits its response to Respondent’s Motion for Extension of Scheduling Order (the “Motion”) filed by Zim Integrated Shipping Services Ltd. (“Zim” or “Respondent”) on Tuesday, June 27, 2023.

Zim’s third request to extend the schedule in this proceeding should be rejected for several reasons. First, Zim’s proposed extension would take the schedule well beyond the initial decision date. Second, Zim’s late extension request disregards the gravity of the schedule set by the Presiding Officer and this tribunal should exercise its discretion in rejecting the excessive request. Third, Zim did not comply with the meet-and-confer requirement set forth in FMC Rule 502.71(a) before the filing its motion.

RELEVANT FACTS

When the initial scheduling order in this proceeding was issued on January 12, 2023, document production was to end March 20, 2023, fact depositions were to end April 21, 2023, and the deadline for close of all discovery was to end May 18, 2023. SEA complied with each and every deadline in the initial scheduling order, but Zim failed to complete its document production by March 20, 2023 and did not seek an extension or other modification of the initial scheduling order until *after* the deadline passed.

On March 23, 2023, SEA filed an Expedited Motion to Compel and for Sanctions, requesting that the Presiding Officer compel Zim to complete its document production and direct Zim to abide by the scheduling order. On March 30, 2023, Zim filed its Opposition to Complainant's Motion to Compel and Cross Motion for Extension of Scheduling Order. At that time, Zim requested a thirty day extension on all deadlines to accommodate its failure to meet the document production deadline. Dkt. 20 at 2. On April 3, 2023, the Presiding Officer granted Zim's cross-motion seeking an extension of time and dismissed SEA's motion to compel as moot. Dkt. 21. While the Presiding Officer noted that granting additional time was reasonable under the circumstances and "would allow the case to conclude within the timeframe set by the Commission," the Presiding Officer found that "Respondent should have requested an extension of time prior to the deadline," noting that it was Zim's second request for an extension of time, and ordered that "Respondent must provide the discovery requested and may not be permitted additional extension requests." *Id.* at 1.

Pursuant to the April 3 Scheduling Order, discovery deadlines were extended by thirty days: Zim was to complete its late document production by April 20, 2023, rescheduled fact depositions by May 22, 2023, and all discovery ending by June 19, 2023. On May 22, 2023, the

parties filed a joint status report noting that fact discovery was largely concluded, except for one witness that Zim refused to produce on May 22, 2023, and one deposition that was taken for witness availability reasons on May 25, 2023. Dkt. 22. at 4.

The parties jointly stated that they would meet to discuss expert discovery, which the schedule allocated from May 23, 2023 to June 19, 2023, Dkt. 22. at 11 ¶ 8, and that the parties expected to meet the July 19, 2023 date for commencement of briefing:

At present the parties expect to meet the July 19, 2023 date for commencement of briefing as set out in the Order.[fn4¹] Subject to the Presiding Officer’s consent to the deposition of Ilana Rosenberg on May 25, and if resolved by the Parties the deposition of Mr. Destriau after May 22, 2023, the parties do not anticipate requesting an extension of the deadlines set forth in the Order.” Dkt. 22. at 11 ¶ 9.

The Ilana Rosenberg deposition was concluded on May 25, 2023, and pursuant to the June 9, 2023 Order Denying Motion to Compel Deposition, Mr. Destriau’s deposition was not taken. Accordingly, those matters did not ultimately create scheduling concerns.

Counsel for the parties jointly discussed expert discovery as reported to the Presiding Officer in the June 16, 2023, Supplemental Joint Status Report. Dkt. 27. As stated therein, “Counsel for Complainant advised that they would be serving two expert reports, one on liability issues and one on damages issues. Counsel for Respondent advised that they had retained experts but did not intend to submit any initial expert reports and that Respondent’s expert reports would be limited to rebuttal evidence. The parties agreed that after Complainant’s reports are served, the parties would again promptly confer as to the schedule for submission of Respondent’s rebuttal expert reports and to discuss the need for and scheduling of any expert depositions.” *Id.* at 2.

¹ Footnote 4 to paragraph 9 contained a general disclaimer that “the parties were not in a position to raise or confirm the absence of potential fact discovery concerns or disputes that could arise or be identified as we continue to process the large volume of fact discovery and testimony received and taken since the Order.”

Zim did not object to SEA's intention to exchange expert reports on June 19, 2023, and in an effort to accommodate Zim's desire to only file rebuttal expert reports, SEA agreed to confer with Zim about a reasonable period of time for rebuttal. Zim agreed that "[o]nce Complainant's reports have been served, Respondent will promptly consult with its experts as to the time needed to issue rebuttal reports. The parties will then endeavor to agree on a schedule for submission of the rebuttal reports. The parties will also give consideration to the possibility of foregoing expert depositions in order to minimize the length of any extension, although such depositions may be necessary in light of the content of the expert reports." *Id.* at 2-3. The parties agreed that "[o]nce the parties have agreed on a proposed schedule, they will promptly submit a joint motion for an amendment to the scheduling order." *Id.* at 3.

SEA served its experts reports on June 19, 2023. After SEA prompted Zim's counsel for its position on June 26, Zim responded later that day proposing a revised schedule that would extend discovery not only for rebuttal reports by three (3) weeks, but would extend all deadlines, including the briefing schedule, by more than *six (6) weeks*. SEA responded the following morning of June 27, 2023, with a detailed counterproposal with a more reasonable two (2) week extension of time for the rebuttals (which by then would in effect be a three (3) week extension), but limiting the overall schedule impact to a net extension of two (2) weeks. SEA also asked Zim to indicate the number of expert rebuttal reports Zim intended, and sought to expeditiously proceed with preparation of the agreed upon joint motion: "With the shortness of time, it is in both parties interest in submitting the draft to the ALJ. Please send your proposed draft and we'll submit edits as to our proposed timeline."²

² See Exhibit No. 1, Email Communication between SEA and Zim regarding a expert rebuttals and a schedule extension.

But two hours later, Zim’s counsel responded that it did not agree to our proposal. Zim did not provide a counter proposal or substantive response, did not disclose the number of its rebuttal expert reports, and did not provide a draft joint submission. Instead, Zim’s counsel unilaterally cut off discussion and advised it would be filing its extension motion. SEA received Zim’s motion for extension of the scheduling order less than two (2) hours later.

ARGUMENT

A. Zim’s Proposed Schedule Extension is Excessive and Without Good Cause

While SEA agrees that policy considerations should be taken into account when determining whether good cause exist to grant an extension, Zim’s proposed schedule expansion is excessive and would have the Presiding Officer extend all deadlines by more than six (6) weeks. Moreover, Zim’s extension request would prevent the Presiding Officer from meeting its initial decision deadline. As noted, in the Presiding Officer’s initial scheduling order a “scheduling order ‘is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril.’” *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 610 (9th Cir. 1992) (quoting *Gestetner Corp. v. Case Equipment Co.*, 108 F.R.D. 138, 141 (D. Me. 1985)). In Zim’s motion for an extension, it acknowledges that “scheduling orders are an important part of this process and are not taken lightly.” Motion at 4.

Yet, this is Respondent’s *third* request for an extension of the schedule. While SEA was amenable to a *reasonable* accommodation of Zim’s decision to file only rebuttal reports outside of the imposed expert discovery phase, it does not agree to abandoning the schedule wholesale to accommodate Zim, yet again, not taking the discovery and scheduling order seriously. Zim elected to only provide rebuttal expert witnesses. And given that the entire expert discovery period was only 27 days, Zim’s request for *52 days* to prepare rebuttal reports is not only unnecessary and

excessive, but also fundamentally unfair. Zim’s further request to extend all deadlines is similarly unnecessary and excessive.

Zim’s third request to further extend the case schedule flouts the underlying premise of the Commission’s rules: “secur[ing] the just, speedy, and inexpensive determination of every proceeding.” FMC Rule 502.1. Zim’s proposed extension exceeds the entire time originally allotted by the Scheduling Order for expert discovery, and would necessitate extending the overall case schedule beyond the statutory deadline for the initial decision, all without good cause.

B. Zim’s Motion Should Be Denied Because Zim Flouted the FMC’s Pre-Motion Meet-and-Confer Requirement

Zim’s motion should also be denied based on Zim’s failure to meet and confer as *required* by FMC Rule 502.71(a). Zim makes the conclusory assertion in its Motion that “the parties have been unable to agree on a schedule for the submission of rebuttal reports and subsequent briefing.” Motion at 2. This does not satisfy Zim’s duty to confer for two reasons.

First, the parties were conferring about the joint motion that the parties agreed to discuss as set forth in the June 16, 2023, Supplemental Joint Status Report. Zim did not attempt at all to meet and confer on its unilateral motion for an extension, which SEA did not know about until Zim abruptly cut off discussion on the joint motion and filed its motion two (2) hours later.

Second, there were clearly areas of disagreement to be discussed per FMC Rule 502.71(a), which Zim ignored. Zim did not offer any counter proposals, and Zim still has not identified the number of expert rebuttal reports it intends to serve. Zim even complains in its motion about mutual depositions, suggesting a dispute about depositions that Zim did not raise with SEA, and that SEA does not know about. FMC Rule 502.71(a) is in place for reasons just like this—to avoid wasting the Presiding Officer’s time with unnecessary issues.

C. The Presiding Officer Should Enter a Reasonable Expert Discovery Schedule Extension

It is not SEA’s intention to prevent Zim from providing rebuttal expert witnesses or the development of a full evidentiary record. SEA attempted to reach an agreement with Zim regarding the proposed deadlines, but instead Zim cut off discussion and filed its own motion seeking the same unreasonable extensions it originally proffered to SEA. In light of the above and taking into consideration the two (2) weeks that have already passed since Zim received SEA’s expert reports, SEA proposes a reasonable modification of the Scheduling Order as follows:

Event	Current Deadline	SEA Requested Deadline
Submit Expert Rebuttal Reports	No set deadline	July 10, 2023
Expert Depositions	No set deadline	July 14, 2023
Complainant’s brief, proposed findings of fact, and appendix	July 19, 2023	August 2, 2023
Respondent’s opposition brief, responses to proposed findings of fact, proposed findings of fact and appendix	August 18, 2023	September 1, 2023
Complainant’s reply brief and responses to proposed findings of fact	September 5, 2023	September 19, 2023

With respect to expert depositions, if Zim serves rebuttal reports, SEA is entitled to conduct depositions of Zim’s experts (although after review of the rebuttal reports it may decline to do so), and if SEA deposes Zim’s experts, SEA is amenable to Zim deposing SEA’s experts.

The Presiding Officer has ample authority to make any necessary and appropriate modifications to the Scheduling Order deemed warranted under the circumstances. That authority includes modifications that do not reward knowing violations of the Scheduling Order, are tailored to avoid unnecessary prejudice to Complainant, and are designed to enforce the Presiding Officer’s

management of the docket. SEA believes that the above proposed schedule provides Zim with sufficient time to prepare its rebuttal reports, is reasonable and fair in the context of the schedule SEA has complied with, and involves only a modest overall extension of the schedule.

CONCLUSION

For the reasons set forth above, SEA respectfully requests that Zim's Motion for Extension of Scheduling Order be denied and that the Presiding Officer enter an Order on the schedule that is reasonable and consistent with the expeditious resolution of this matter.

Dated: June 30, 2023

Respectfully Submitted,

HOLLAND & KNIGHT LLP

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*Counsel to Samsung Electronics America,
Inc.*

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:

Wayne R. Rohde
Christopher Raleigh
Kathryn Sobotta
Cozen O'Connor
1200 19th Street NW
Washington, D.C. 20036

wrohde@cozen.com
craleigh@cozen.com
ksobotta@cozen.com

Executed: June 30, 2023

/s/ Kristine O. Little

Kristine O. Little

EXHIBIT NO. 1

From: [Rohde, Wayne](#)
To: [Nolan, Christopher R \(NYC - X73307, CHI - X66515\)](#); [Shen, Qian \(Sheila\) \(NYC - X73521, LAX - X52563\)](#); [Raleigh, Christopher](#); [Sobotta, Kathryn](#)
Cc: [Morrissey, Gerald A \(WAS - X75497\)](#); [Yoon, Eric \(PHL - X49537\)](#); [Little, Kristine O \(WAS - X75549\)](#); [Skopec, Allison N \(NYC - X73463\)](#)
Subject: RE: SEA v. ZIM - SEA Expert Reports
Date: Tuesday, June 27, 2023 2:10:43 PM

[External email]

Counsel: Thank you for your email. While we understand the desire to work within the ALJ's existing deadline, we do not believe that is feasible. We believe that the parties, the ALJ, and the Commission itself need to recognize that the unreasonably truncated FMC procedural schedule must give way to reality (as it has so many times before in larger and more complex cases, such as ours).

Our experts will not be able to complete their reports by July 10. Moreover, we believe that either both parties should take expert depositions, or neither party should. We proposed both parties forego depositions in response to your suggestion to that effect. It is disappointing to see that SEA has now changed its position on this issue.

Accordingly, in light of the fact that the parties are unable to agree on a schedule, we will be filing a motion for an extension in accordance with our proposal to you, and will leave it to you to file an opposition or cross-motion.

Sincerely,



Wayne R. Rohde
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From: Nolan, Christopher R (NYC - X73307, CHI - X66515) <chris.nolan@hkllaw.com>
Sent: Tuesday, June 27, 2023 10:00 AM
To: Rohde, Wayne <WRohde@cozen.com>; Shen, Qian (Sheila) (NYC - X73521, LAX - X52563) <Qian.Shen@hkllaw.com>; Raleigh, Christopher <CRaleigh@cozen.com>; Sobotta, Kathryn <KSobotta@cozen.com>
Cc: Morrissey, Gerald A (WAS - X75497) <Gerald.Morrissey@hkllaw.com>; Yoon, Eric (PHL - X49537) <Eric.Yoon@hkllaw.com>; Little, Kristine O (WAS - X75549) <Kristine.Little@hkllaw.com>; Skopec, Allison N (NYC - X73463) <Allison.Skopec@hkllaw.com>
Subject: RE: SEA v. ZIM - SEA Expert Reports

****EXTERNAL SENDER****

Dear Wayne,

The proposal is way too much time and means the ALJ would have to abandon her initial decision date. We have authority to propose the following:

Service of Expert Rebuttal Reports: August 11 [SEA PROPOSES July 10]

- SEA will take expert depositions the week of July 10 on Thursday July 13

and Friday July 14

SEA files Brief, FOF & Appendix: September 8 (instead of July 19) [**SEA PROPOSES two week extension from Wednesday July 19 to Wednesday August 2**]

ZIM files Brief, FOF & Appendix: October 6 (instead of August 18) [**SEA PROPOSES two week extension from Friday August 18 to Friday September 1**]

SEA files Reply Brief: October 20 (instead of September 5) [**SEA PROPOSES two week extension from Tuesday September 5 to Tuesday September 19**]

SEA's plan is still very tight but meets the ALJ's warnings concerning her schedule. On the depositions, we note your proposal to forego on both sides. We've reflected on the deposition position and as we are flying blind before having to go into briefing we need to account for the possibility of depositions. We will expedite and take the week of receiving the rebuttals with the assumption Zim will have two experts. If it is more or less we will look at the dates. Please confirm how many expert rebuttal reports you intend to issue. The depositions are the only way SEA would have an opportunity to probe the rebuttals (a feature Zim added when it declined to provide affirmative reports by the expert discovery deadline).

With the shortness of time, it is in both parties interest in submitting the draft to the ALJ. Please send your proposed draft and we'll submit edits as to our proposed timeline.

Best Regards, Chris

Christopher Nolan | Holland & Knight

Partner

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From: Rohde, Wayne <WRohde@cozen.com>

Sent: Monday, June 26, 2023 12:11 PM

To: Shen, Qian (Sheila) (NYC - X73521, LAX - X52563) <Qian.Shen@hklaw.com>; Raleigh, Christopher <CRaleigh@cozen.com>; Sobotta, Kathryn <KSobotta@cozen.com>

Cc: Morrissey, Gerald A (WAS - X75497) <Gerald.Morrissey@hklaw.com>; Yoon, Eric (PHL - X49537) <Eric.Yoon@hklaw.com>; Little, Kristine O (WAS - X75549) <Kristine.Little@hklaw.com>; Skopec, Allison N (NYC - X73463) <Allison.Skopec@hklaw.com>; Nolan, Christopher R (NYC - X73307, CHI - X66515) <chris.nolan@hklaw.com>

Subject: RE: SEA v. ZIM - SEA Expert Reports

[External email]

Counsel:

Our experts have now had an opportunity to review the expert reports we received on June 20. Based on their assessment of the time they need to complete their rebuttal reports (which take into account pre-existing work and summer holiday schedules), we propose the following schedule:

Service of Expert Rebuttal Reports: August 11

SEA files Brief, FOF & Appendix: September 8 (instead of July 19)
ZIM files Brief, FOF & Appendix: October 6 (instead of August 18)
SEA files Reply Brief: October 20 (instead of September 5)

We propose both sides forego depositions of expert witnesses.

Upon hearing your thoughts on this proposal, we will draft a motion requesting an extension of the schedule.

Regards,



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From: Shen, Qian (Sheila) (NYC - X73521, LAX - X52563) <Qian.Shen@hklaw.com>

Sent: Monday, June 26, 2023 9:50 AM

To: Rohde, Wayne <WRohde@cozen.com>; Raleigh, Christopher <CRaleigh@cozen.com>; Sobotta, Kathryn <KSobotta@cozen.com>

Cc: Morrissey, Gerald A (WAS - X75497) <Gerald.Morrissey@hklaw.com>; Yoon, Eric (PHL - X49537) <Eric.Yoon@hklaw.com>; Little, Kristine O (WAS - X75549) <Kristine.Little@hklaw.com>; Skopec, Allison N (NYC - X73463) <Allison.Skopec@hklaw.com>; Nolan, Christopher R (NYC - X73307, CHI - X66515) <chris.nolan@hklaw.com>

Subject: RE: SEA v. ZIM - SEA Expert Reports

****EXTERNAL SENDER****

Wayne, Chris, and Katie,

With SEA's expert reports served a week ago, we write to follow up on Zim's proposed schedule for any rebuttal reports and depositions. Please let us know what dates you propose, or if you'd like to schedule a short call to discuss.

Thanks,

Qian (Sheila) Shen | Holland & Knight

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From: Nolan, Christopher R (NYC - X73307, CHI - X66515) <chris.nolan@hklaw.com>
Sent: Monday, June 19, 2023 11:58 PM
To: WRohde <WRohde@cozen.com>; Raleigh, Christopher <CRaleigh@cozen.com>; Sobotta, Kathryn <KSobotta@cozen.com>
Cc: Morrissey, Gerald A (WAS - X75497) <Gerald.Morrissey@hklaw.com>; Yoon, Eric (PHL - X49537) <Eric.Yoon@hklaw.com>; Shen, Qian (Sheila) (NYC - X73521, LAX - X52563) <Qian.Shen@hklaw.com>; Little, Kristine O (WAS - X75549) <Kristine.Little@hklaw.com>; Skopec, Allison N (NYC - X73463) <Allison.Skopec@hklaw.com>
Subject: SEA v. ZIM - SEA Expert Reports

Dear Wayne, Chris and Katie,

SEA encloses the expert reports of: (i) Greg Smith, and related appendices/exhibits; and (ii) John McCown, and related appendices/exhibits. For size of file purposes, you will receive the McCown report separately by email from Sheila Shen. The contents of both the report and appendices are designated confidential per the stipulation of confidentiality between the parties.

Best Regards, Chris

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