

BEFORE THE
FEDERAL MARITIME COMMISSION

DOCKET NO. 22-30

SAMSUNG ELECTRONICS

AMERICA, INC.,

COMPLAINANT,

v.

ZIM INTEGRATED SHIPPING SERVICES LTD.,

RESPONDENT.

EXPEDITED MOTION TO COMPEL AND FOR SANCTIONS

Samsung Electronics America, Inc. (“Complainant” or “SEA”) hereby moves pursuant to 46 C.F.R. § 502.147(a)(6) and 502.150 to compel Zim Integrated Shipping Services Ltd. (“Respondent” or “Zim”) to (1) complete its document production, which Zim failed to complete on March 20, 2023 as required by the Scheduling Order of January 12, 2023 in this proceeding (the “Scheduling Order”) and (2) direct Zim to abide by the Scheduling Order with appropriate protections requested herein to mitigate the prejudicial impact of Zim’s conduct on Complainant’s prosecution of its case. Further, given that the deadline for completion of document production has ended and Complainant plans to commence depositions *in only 11 days* on April 3, 2023, Complainant requests that the Presiding Officer address and rule on this matter expeditiously pursuant to Rules 502.10 and/or 502.102, 46 C.F.R. §§ 502.10 and 502.102, so that Zim can be

compelled to complete its document production no later than seventy hours (72) hours after a ruling on this motion. Finally, Complainant requests that the Presiding Officer order that Zim pay Complainant's attorneys' fees and costs associated with preparing this motion, 46 C.F.R. § 502.150(b), and in the event the Presiding Officer grants SEA's requests, SEA be permitted to submit an interim petition for reasonable attorney fees in connection with Zim's actions prior to the prevailing party petition timing set forth in 46 C.F.R. § 502.254(c)(1).

INTRODUCTION

The Scheduling Order in this proceeding set clear deadlines for discovery, including service of requests for production and fact interrogatories on January 20, 2023, completion of document production on March 20, 2023, and completion of fact depositions on April 21, 2023. 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 before the deadline passed.

Despite having timely served discovery requests on Zim on January 20, 2023, Zim produced nothing more than a token production of 1,638 documents before the Scheduling Order deadline and said documents were an almost entirely meaningless set of responses to interrogatories largely relying on promised documents that Zim failed to produce. With Complainant's first deposition originally noticed to commence *in only 7 days* on March 29, 2023, SEA is already compelled to delay commencement of depositions until April 3, 2023 which itself is only *11 days away*, Zim's blatant disregard of the Scheduling Order and its discovery obligations are prejudicing Complainant's case.

The Scheduling Order reminds the parties to "proceed expeditiously." On Tuesday, March 21, 2023, SEA sought to meet and confer with Zim to address Zim's failure to complete its

production on Monday, March 20, 2023. Zim responded that it was not able to meet and confer until the following Thursday afternoon, March 23, 2023. In lieu of waiting until Thursday, SEA counsel sought to proceed to meet and confer in good faith by written communications. However, the parties were not able resolve the issues.

In light of the Scheduling Order violation, the uncertainty of Zim's production, and the prejudice to SEA's case, SEA is compelled to seek the assistance of the Presiding Officer. SEA seeks immediate action to protect the integrity of the ordered schedule, seeks an order directing Zim to complete its overdue production by a date certain, and an order mitigating of some of the prejudicial effects of Zim's conduct. SEA also requests an expedited ruling on the motion. Zim should have alerted the Presiding Officer when it first knew it was not likely to meet the production deadline, Zim should be in a position to respond expeditiously given recent exchanges, and in light of the imminent commencement of depositions for which we need Zim documents to meaningfully prepare, an expedited ruling is warranted. Finally, SEA requests that Zim be ordered to pay costs to compensate SEA for Zim's misconduct, including to prepare this motion that SEA would not have had to undertake but for Zim's misconduct.

FACTS

On October 25, 2022, the Federal Maritime Commission ("FMC" or "Commission") published a public Notice of Filing of Complaint and Assignment ("Notice") that a complaint against Respondent Zim had been filed by SEA, alleging violations of Sections 41102(c), 41102(d), 41104(a)(3), 41104(a)(10), 41104(a)(14), and 41104(a)(15) of the Shipping Act of 1984, 46 U.S.C. § 40101, *et seq.* (the "Shipping Act"). Pursuant to the Notice, Zim was required to file an answer to the complaint within twenty-five (25) days from the date of service (thus due on November 21, 2022). On November 18, 2022, Respondent filed a Motion of Extension of Time To File Answer "to enable the parties to pursue settlement discussions without simultaneously

expending resources on this litigation.”¹ Zim indicated that “Senior representatives of the parties met in person” and that there was “a realistic possibility of reaching agreement on a resolution of this matter by year's end.”²

The parties were unable to come to a settlement, and on December 19, 2022, Zim filed its Answer to SEA’s complaint.³ Pursuant to the Presiding Officer’s Initial Order and FMC Rule 141, discovery was required to be completed within one hundred fifty (150) days. On January 4, 2023, the parties conferred and agreed on a proposed discovery schedule.

On January 12, 2023, the proposed discovery schedule was approved by the Presiding Officer, which was materially the same as the proposed schedule agreed by the parties. The Presiding Officer instructed the parties that the Scheduling Order was “not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril” nor could the parties “control an agency’s docket or procedures through agreement among themselves.”⁴ Counsel for the parties agreed to rolling production of documents between February 20 and the deadline on March 20, 2023.

On January 20, 2023, each party served their First Set of Interrogatories and Request for Production (“Discovery Requests”) and pursuant to the instructions of both parties, responses were to be provided in thirty (30) days. On February 16, 2023, SEA counsel requested a call with Zim counsel to discuss discovery exchanges, but was informed that a call would not be possible until February 20th, the date discovery responses were due. During a call with Zim counsel on the morning of February 21, Zim advised that it would not be able to exchange any documents on the

¹ Samsung Electronics America, Inc. v. Zim Integrated Shipping Services Ltd., Docket No. 22-30, Document No. 9.

² Document No. 10.

³ Document No. 11.

⁴ Document No. 14.

initial rolling production date. At that time, Zim's counsel claimed that some responsive documents were located at Zim's headquarters in Israel, which they further advised had difficult document security measures. Zim also requested that the parties exchange written discovery responses the following day. While SEA acceded to Zim's position that it was not able to commence rolling production immediately, SEA informed Zim's counsel that SEA would commence production of documents and exchange written responses to Zim's Discovery Requests as planned. Later in the day, Zim's counsel provided an update:

Following up on our call, we spoke with [Zim] this afternoon. We confirm that we will be able to exchange written discovery responses tomorrow and propose that the parties do so at 2:00 p.m. Regarding a date for beginning the production of documents, [Zim] confirmed that he has marshaled a significant number of documents but needs another day to obtain an estimate for delivery because ZIM's IT people are not working today in observance of the Presidents' Day holiday.

On February 21, 2023, the parties respectively served their objections and responses to the respective discovery requests ("Discovery Responses"). SEA also produced an initial rolling production of approximately 12,539 documents, comprising over 50,000 pages (SEA0000001 – SEA0052151). Zim did not produce any documents with its written responses, although Zim's responses to SEA's interrogatories heavily relied on representations that Zim would produce responsive documents. On February 22, 2023, Zim's counsel emailed the following:

I wanted to update you on the status of the document production on our end. ZIM is transmitting documents today directly to our eDiscovery team – the transmittal is proceeding at this time. Once the transmission is completed, I have asked our eDiscovery manager to give us an idea as to how large the data base is and how long he estimates it will take to process the documents and make them available for us to review. I will update you when the transmission is complete and I receive his advices.⁵

To which SEA counsel responded that the amorphous timing was unacceptable and noted that:

⁵ SEA v. Zim Feb. 22, 2023 Email, Discovery Deadlines.

In light of the Scheduling Order's firm deadlines as to document production completion and fact deposition completions, we request that Zim commit to beginning the production of documents by this Monday, February 27. That's one week after the Responses to the Request for Documents and interrogatories due date. SEA is very concerned about undue delay prejudicing our ability to assess the documents for depositions, let alone consider them in connection with Zim's Interrogatory and Document Responses and objections therein which rely heavily on the production of actual documents.⁶

On February 27, 2023, SEA received the first and only production of Zim documents before the March 20, 2023 deadline. Zim produced 1,638 documents, which was then and remains wholly insufficient (as outlined in SEA counsel's letter of March 14, 2023, discussed below).⁷ Despite the insufficient nature of Zim's production, and mindful of the discovery schedule and the need to provide reasonable notice in advance of depositions, on March 2, 2023 SEA served ten (10) deposition notices for Zim witnesses to be deposed starting in the first week of the scheduled fact deposition period. In the absence of documents from Zim to review, SEA only noticed witnesses identified in Zim's initial disclosures.

On March 8, 2023, two weeks after its first production, SEA produced a second production of approximately 61,000 pages of documents (SEA0052152 – SEA0113528). On March 14, 2023, one week before the close of document production, and not having received any further production from Zim by that time, SEA sent Zim's counsel a detailed five-page deficiency letter highlighting the inadequacy of Zim's Discovery Responses, including the inadequacy of Zim's document production.⁸ On March 16, 2023, SEA produced a third production of 156 documents (SEA0113529 – SEA0114536). Also on March 16, Zim's counsel responded to SEA's Deficiency

⁶ *Id.*

⁷ Given the paucity of Zim's document production, SEA is not currently moving to compel production in response to any specific requests, which Zim's counsel admitted would be "premature" without Zim having completed its document production.

⁸ SEA Deficiency Letter (March 14, 2023) ("Deficiency Letter").

Letter with a perfunctory response and characterized the deficiencies as “premature” because Zim had not yet completed its document production, but that it was planning to produce documents the week of March 20, 2023.⁹ Despite the already short timeframe, Zim provided no indication that it would seek an extension of the deadline, nor did Zim’s counsel reach out thereafter to discuss any extension prior to the discovery deadline on March 20, 2023.

SEA continued to perform its discovery obligations, and on the March 20, 2023 deadline SEA made a fourth rolling production of 8,459 documents (SEA0114537 – SEA0155085). No documents were produced by Zim on March 20, 2023, nor did Zim’s counsel reach out to discuss the status of their discovery responses.

On March 21, 2023, the deadline having passed, SEA counsel emailed Zim counsel requesting to meet and confer concerning the status of Zim’s discovery, but was informed that Zim counsel would not be available until the afternoon of Thursday, March 23, 2023.¹⁰ Noting the tight deadlines of the Scheduling Order, SEA counsel did not want to wait two days to meet and confer and requested in writing that Zim’s counsel provide “more clarity concerning Zim’s discovery intentions. The deadline to ‘complete document production’ in the Scheduling Order was March 20. With no production by Zim on this date, please provide a detailed response concerning how Zim intends to proceed with its discovery obligations.”¹¹

Zim did not respond until early afternoon the next day, on March 22, 2023. Zim did not provide any confirmations on completing document production, but instead represented that it would soon *start* producing substantial volumes of new data on a rolling basis.¹² SEA provided a

⁹ Zim’s Response to SEA’s Deficiency Letter (March 16, 2023).

¹⁰ SEA v. Zim – SEA March 21, 2023 12:25 PM email; Zim March 21, 2023 2:27 PM email response.

¹¹ SEA v. Zim – SEA March 21, 2023 5:32 PM email regarding meet and confer request.

¹² SEA v. Zim – Zim March 22, 2023 12:30 PM.

detailed response that afternoon advising Zim that SEA was in no position to consent or to agree to Zim’s violations of the Scheduling Order; that Zim’s proposal to start rolling production after the deadline was prejudicial to SEA, in addition to violating the Scheduling Order; asking if Zim would provide a firm date to complete its late production; and after outlining specific impacts to SEA from Zim’s conduct, asking if Zim would agree to mitigate some of those impacts. Because Zim maintained that it was still not available to meet and confer in person before Thursday afternoon, SEA counsel specifically asked whether Zim would agree to these specific remedies, and if not, that “we will seek the assistance of the Presiding Officer and request costs for having to do so in a motion to compel and for sanctions which we are drafting” and requested a response by 8:00 PM.¹³

At 7:27 PM, instead of responding to SEA’s email, Zim emailed a link to a second, partial production of documents of what appeared to be 3,710 documents. However, the metadata file that was produced for the production was blank, rendering the production functionally unusable until Zim provides additional information. Then, at 8:58 PM, counsel for Zim responded to SEA’s last meet and confer email, this time citing its partial and incomplete production, and representing that it allegedly now had all potentially responsive documents from Zim, but that it was still not voluntarily committing to a date certain to complete to production. Instead, Zim represented that the second production—the “start” of the new “rolling productions”—was sourced from only “approximately 25% of the data” counsel obtained from Zim. Another 50% of the data may “become available for review within the next 1-2 days” but Zim stated that they cannot estimate when another production would occur from such documents because they have not even estimated the size of the documents for their internal review. As to the remaining 25%, Zim’s counsel did

¹³ SEA v. Zim – SEA March 22, 2023 6:03 PM.

not provide any estimate at all. Moreover, for the first time Zim’s counsel claimed that it “had intended” to inform the Presiding Officer by asserting it had intended to ask SEA to consent to a 30 day extension of the discovery schedule, which Zim claims is “both modest and reasonable.” As to the motion to compel, counsel stated that the motion would be “unwarranted and unnecessary” on the basis of Zim’s new assertion that it now wants to ask SEA to consent to a 30 day extension of the discovery schedule, which Zim would then present to the Presiding Officer. Zim then stated that if SEA filed the motion to compel that it would “cross move for an extension and explain the circumstances that have given rise to our request – a request which is both modest and appropriate under the circumstances.”¹⁴ With this wholly insufficient response, SEA continued drafting this motion and submitted it first thing in the morning on March 23, 2023, so as to act as expeditiously as possible in light of the circumstances.

It is apparent from Zim’s responses that it has declined to agree to a date certain to complete its document production, despite allegedly now having the documents from which to produce, and that it is not willing to agree to mitigate prejudice to SEA from Zim’s uncontested violations of the Scheduling Order. These were the issues that SEA sought to meet and confer with Zim about, and Zim’s responses are unequivocal rejections. Zim’s last minute assertion that it “had intended” to ask SEA to consent to an extension, as perplexing and as obviously objectionable as that is, simply reiterates that SEA had exhausted its attempts to meet and confer as to Zim’s misconduct.

Finally, after having been informed that SEA was preparing a motion to bring Zim’s violations of the Scheduling Order to the attention of the Presiding Officer, Zim’s assertion that this motion is not necessary because Zim “had intended” to file a motion for an extension, is not a valid reason to decline to file this motion now. Zim concedes that the issue will need to be

¹⁴ SEA v. Zim – Zim March 22, 2023 8:58 PM.

presented before the Presiding Officer one way or the other—either Zim files its future motion for an extension after the fact, which SEA will vigorously contest, or SEA proceeds to file this motion in which case Zim states that it will cross move the same after the fact extension. Zim’s position makes clear that there is no motion practice to be avoided either way and Zim provides no basis to delay resolution. SEA therefore filed the instant motion.

ARGUMENT

FMC Rule 150 authorizes the Presiding Officer to compel the production of documents when a party fails to respond to a party’s discovery requests, has provided insufficient or inadequate responses, or hides behind spurious objections. 46 C.F.R. § 502.150. The parties are also required to abide by the Presiding Officer’s discovery orders, in this instance the deadline for completion of document production as set forth in the Scheduling Order. Here, Zim flagrantly failed to comply with its discovery obligations and the Scheduling Order not only by providing late initial responses that were woefully insufficient, but also by failing to provide any additional responses after its first and only production before the Scheduling Order deadline.¹⁵ Further, Zim allowed the deadline to pass without requesting an extension or discussing a potential request with SEA. Zim’s action to date suggest that it knew for some time that it would not comply with the Scheduling Order, was not forthright about that with SEA or the Presiding Officers, and disregarded the Scheduling Order anyway. Further, despite SEA’s best efforts to obtain Zim’s production of documents on the rolling basis before March 20 as promised, Zim has offered only excuses of difficulties of which it was long aware and yet more vague promises of partial productions on undisclosed future dates. It is clear that Zim is in violation of the Scheduling Order,

¹⁵ As discussed herein, Zim’s unilateral proposal to “start” new rolling productions after the deadline had passed and without a firm date to complete production is also inadequate under the circumnstances.

that its violation is material and prejudicial, and that Zim’s unilateral plan for post-deadline rolling production is too little, too late and fails to address the core issue of when Zim will complete its production, and further jeopardizes the schedule and the Scheduling Order.

A. Zim has Failed to Complete Production of Responsive Documents

There is no dispute that Zim failed to complete its document production by the March 20, 2023 deadline. There is no dispute that Zim did not seek an extension or modification from the Presiding Officer as also required by the Scheduling Order. There is therefore no occasion to evaluate whether Zim had or has good cause for its conduct. In this situation, Zim should be summarily ordered to comply with its discovery obligations that the Presiding Officer has previously ordered, or fail to do so at its peril. Nevertheless, should Zim attempt to argue that its conduct somehow has “good cause,” the facts strongly suggest otherwise.

The only reason Zim has proffered to explain the delay is that it was collecting documents from Israel, and had been delayed as a result. That explanation is not good cause. First, Zim’s counsel did not disclose that the relevant documents were in Israel when it was required to do so in initial disclosures.¹⁶ Zim’s Initial Disclosures indicated that both responsive information and custodians were all located in *Virginia*, and on servers “accessible in Virginia” and Zim’s responses to relevant requests for the location of custodians and responsive information in SEA’s Interrogatories did not identify any additional locations and/or custodians. Despite Zim’s

¹⁶ Zim was required to identify custodians and the location of responsive information and/or other items. FMC Rules permit parties to seek discovery of any non-privileged matter that is relevant to any party’s claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter.” 46 C.F.R. § 502.141(e)(1). Further, when responding to interrogatories a responding party may answer by producing business records but must “specify[] the records that must be reviewed” and give the “interrogating party a reasonable opportunity to examine and audit the records.” 46 C.F.R. § 502.145(d).

affirmative obligation to supplement interrogatory responses, it did not do so even though virtually all responsive documents are now represented to be located in Israel and/or on servers that must be accessed in or via Israel. Regardless of the issues and excuses with accessing documents from Israel, claiming difficulty obtaining documents from an FMC regulated ocean carrier in Israel is not good cause for Zim's conduct when it represented in verified discovery, signed by counsel and a representative of the company, that the responsive documents were in Virginia and accessible in Virginia.

Assuming *arguendo* that the vast majority of responsive documents were located in Israel, that excuse would still fail to constitute good case. Zim was aware in *January* that obtaining information from Zim Headquarters (whether they were obtaining it for their own investigation or for potential production) could take time. Zim should have taken additional measures to ensure it could provide responsive documents within the discovery deadline, especially given the fact that the bulk of Zim's responses to SEA's Interrogatories relied on producing promised documents. To the extent that obtaining documents from Israel was a concern that might have constituted good cause for a delay in the Scheduling Order back when Zim first learned about it, is not good cause far later when Zim knew it would not meet the discovery deadline and certainly not after the deadline passed and Zim's counsel still did nothing about it.

In a good faith effort to resolve Zim's production deficiencies, SEA sent Zim a detailed letter a week before the close of document discovery. Zim rebuffed the deficiency letter out of hand, asserting that "any resolution of disputes over the propriety of objections should await production and review of Zim's further document production." Zim's response reiterates that SEA is not even in a position to rely on Zim's interrogatory responses that rely on missing documents.

And SEA fails to see how essentially telling SEA to ignore the Scheduling Order and wait for documents not produced before the deadline would constitute good cause.

Zim very likely knew that it would not meet the deadline, but it made no effort to seek an extension as required by the Scheduling Order. Indeed, in the response to our Deficiency Letter, Zim's counsel vaguely referred to a promised production the "week of March 20" and by its "premature" response expressly implied that production would be forthcoming; not that completion of document production was not going to meet the deadline, nor that it has no end in sight. In retrospect, the facts strongly suggest that Zim knew or should have known in January (or in any event long ago) of the issues it now claims are delaying its compliance with the Scheduling Order, and yet Zim failed to act. This is precisely the type of "cavalier disregard[]" the Scheduling Order warns against.

B. SEA Is Prejudiced by Zim's Failure to Comply with its Discovery Obligations

Compliance with the dates set for completion of document production requires that the parties serve discovery requests well in advance of the discovery cutoff so that all responses and objections will be due on or before the discovery date. SEA has expended significant time and expense to comply with the Scheduling Order: it has produced to Zim on a rolling basis by the document production deadline 30,682 documents, comprising over 155,000 pages of responsive information, as agreed. SEA complied in good faith with its obligations, and Zim received SEA's document production before the deadline, enabling Zim to prepare for fact depositions in the agreed and ordered schedule. But even assuming Zim completes its late document production anytime soon, which Zim has indicated may ultimately be very large, SEA will at best have very little time to meaningfully review the materials in a timeframe useful for preparation of further discovery and preparation of its case, let alone to evaluate the sufficiency of either the documents

produced or of Zim's responses to interrogatories that relied on reference to documents to be produced.

As to depositions, SEA previously issued ten (10) deposition notices, providing reasonable notice to Zim's witnesses. But in order to do so without meaningful documents from Zim, SEA was forced to rely only on individuals identified in Zim's Initial Disclosures. While that is a presumably reasonable start, it hardly reflects the purpose and expectations of the discovery process. Zim's failure to complete its document production should not be allowed to hinder SEA's ability to identify witnesses and conduct appropriate fact depositions.

Zim's misconduct is already impacting SEA's noticed depositions. Although SEA originally noticed depositions starting on March 29, 30 and 31, even if Zim completes its document production forthwith, SEA will not have adequate time to process the documents, analyze them, and prepare for the depositions that would have started next week. In any event, Zim has not responded to any of the notices, nor confirmed the availability of any witnesses. Indeed, Zim's first reference to the depositions was in an email response on March 22 wherein Zim offered to "discuss the effect of this development on the depositions you have scheduled" and advised that one of the witnesses it identified was now a former employee and asking if we wish to subpoena him. We presume that "this development" refers to Zim's failure to complete its document production before the deadline, and that "the effect" refers to preparing for depositions without documents and/or delaying the schedule, a proposal we would reject.

Thus, as it stands today, at least three depositions will need to be worked in later in the already tight deposition schedule, into the week of April 17th and before the deadline to complete fact depositions on April 21, 2023. SEA's preparations are hindered not only because it does not have the full benefit of Zim's production, but also that any late productions received would require

SEA to simultaneously prepare to take depositions and to review late produced documents in the tight fact deposition period.

Furthermore, Zim has not issued any deposition notices, and the deadline for completion of fact depositions ends on April 21, 2023. FMC Rule 149 requires a party to provide reasonable notice of the taking of an oral deposition. At this point the time period for reasonable notice is marginal. Yet, despite having the benefit of SEA's documents, Zim has not noticed any depositions. Given that Zim has had much more time to review the extensive documents produced by SEA in accordance with the schedule, and given that that Zim's conduct is needlessly burdening SEA's ability to prepare for its timely noticed depositions through April 14th, Zim should not be permitted to make matters worse by noticing depositions before the week of April 17.

C. SEA Has a Right to Discovery from Zim and to Prosecute Its Case Against Zim Without Delay

Despite Zim's failure to sufficiently or timely respond to SEA's Discovery Requests, SEA is not seeking an extension or amendment of the discovery schedule to ensure that the Scheduling Order is complied with and not treated as "a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril." Moreover, SEA has very substantial injury and claims for wrongfully-issued demurrage and detention charges and unreasonable and unlawful practices and is entitled to pursue relief and reparations without delay. Therefore, SEA intends to continue to move forward with its own analysis of Zim's conduct based on evidence that it produced to Zim, including SEA/Zim emails over the last few years showing unreasonable conduct by Zim, and to make its best efforts to evaluate documents from Zim when and if Zim is compelled to complete its production.

SEA's review of its own internal and external communications has found substantial evidence of unreasonable conduct by Zim in violation of the Shipping Act. These include abusive and systemic unreasonable billing and collection practices that compelled SEA to pay clearly disputed and in many instances obviously erroneous charges and invoices, during which time Zim held other loaded cargo hostage nationwide under the guise of "credit holds" that resulted in Zim assessing yet more demurrage charges amounting to far, far more than the amounts that were the reason allegedly past due that Zim coerced SEA to pay to release its cargo. There is almost no analog to this conduct, but ransom is a close concept. SEA realizes Zim may desire to keep more evidence of this and other wrongful conduct and practices from SEA, the Presiding Officer, and other shippers who may well be questioning similar conduct suffered at the hands of Zim's operations personnel and management. But that is not a legitimate reason to withhold discovery.

As reflected in SEA's Complaint, Zim was responsible for the ocean and the inland transportation of SEA's shipments. Based on SEA's own production, there are numerous instances of inland transportation failures by Zim, some egregious, and many resulting in very large per-container charges. SEA also has evidence of many unreasonable practices by Zim related to improperly and unreasonably shifting costs and charges incurred in inland transportation for which Zim, not SEA, should have been responsible. SEA is entitled to discovery from Zim, we have no doubt that fulsome discovery from Zim will further establish myriad violations that are alleged, and SEA has good reason to assert that Zim is delaying the production of evidence that will further demonstrate serious and systemic unreasonable practices and other violations of the Shipping Act.

REMEDIES

While SEA is not seeking an extension of the deadlines contained in the Scheduling Order, SEA is seeking an order for Zim to complete document production by a date certain, and to address

prejudice to SEA resulting from Zim's discovery misconduct. SEA requests that Zim be required to produce documents within 72 hours of the Presiding Officer's ruling. That Zim may be now planning further rolling productions well past the deadline with no end date in sight does not address the need for Zim to be held to a date certain to complete its document production, nor does it address the prejudice to SEA. Moreover, Zim's blatant violations of the Scheduling Order should not be rewarded by permitting the self-help extension that Zim wants, or allowing Zim's misconduct to prejudice SEA without reasonable mitigation.

A. SEA and Zim Depositions

As indicated above, the deadline to complete the deposition of fact witnesses is April 21, 2023. SEA's deposition of fact witnesses was scheduled to begin in seven days, on March 29, 2023, a significant challenge given the status of Zim's document production and that as a consequence SEA cannot rely on Zim's responses to interrogatories that were answered with promises of producing documents. For depositions moving forward, which SEA submits will now likely begin on April 3, 2023, SEA requests that the Presiding Officer issue an order providing that: (a) SEA may reserve a portion of deposition time of any witnesses in the event that SEA determines that adjourning is appropriate to address or evaluate Zim documents either not previously produced or produced but with respect to which SEA was not adequately prepared to examine the witness. If exercised, Zim would consent to continuation of such deposition on another day and cooperate to make such witness(es) available for continuation. The cost for the deposition continuation will be borne by Zim; (b) If additional witnesses are identified by SEA as a result of review of the completion of the late produced documents, Zim will cooperate to produce such witness or witnesses in the available discovery window through April 21, without regard to any specific period of reasonable notice, so long as reasonably possible to make witnesses

available; (c) Zim’s ability to notice depositions is waived, or, if Zim is permitted to notice depositions, that Zim be required to notice any depositions not later than March 29, 2023 for depositions commencing during the week of April 17, with the last deposition by the Scheduling Order deadline of April 21, 2023, and either not more than one Zim deposition per day or two Zim depositions per day up to an aggregate of 7 total hours of deposition time per day (with priority given to any additional witnesses SEA needs to notice as a consequence of Zim’s tardy document production).

B. Attorney’s Fees

The parties have been instructed by the Presiding Officer that a “scheduling order ‘is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril.’”¹⁷ Moreover, the Scheduling Order warned counsel that “pursuant to the Howard Coble Coast Guard and Maritime Transportation Act of 2014 and Commission Docket No. 15-06, attorney fees may be awarded to any prevailing party in a complaint proceeding. It is therefore in the best interest of the parties to *proceed expeditiously*.”¹⁸ SEA took this to heart and acted expeditiously, whereas Zim failed to act.

SEA spent considerable time and money to meet the document production deadline, took the warning in the Scheduling Order seriously, and has made four good faith document productions on February 21, March 8, March 16, and March 20, 2023. SEA conducted a targeted review of 137,599 documents from 21 custodians, 30,523 documents of which were internal SEA communications and 64,863 were communications between SEA and Zim. In contrast, Zim provided one small document production before the Scheduling Order deadline, which was not

¹⁷ Scheduling Order (Emphasis Added).

¹⁸ *Id.*

only woefully insufficient, but primarily consisted of non-relevant documents. It followed this production with a second production on the evening of March 22, 2023 at 7:27 PM, with what appears to be 3,710 documents. While SEA cannot immediately determine what these new documents represent, as the metadata file provided with the production was blank, in a subsequent email at 8:58 PM counsel for Zim represented that the production was sourced from only “approximately 25% of the data” counsel obtained from Zim. Zim’s counsel proceeded to represent that another 50% of the data may “become available for review within the next 1-2 days” but that they cannot estimate when another production would occur because they have not even estimated the size of the documents for their internal review. As to the remaining 25% (assuming that is all the material that remains), Zim’s counsel does not provide any estimate at all. This is all too little, too late, and misses the point that Zim was obligated to *complete* its production of documents before the deadline, not *start* the bulk of the production after the deadline without any fixed date to complete it.

Zim’s blatant disregard of the Scheduling Order and its discovery obligations have prejudiced SEA’s case, whereas Zim has benefitted from SEA’s good faith efforts to comply with the discovery deadlines and has had more time to review extensive documents. Good cause exists to reimburse SEA for its attorneys’ fees and production costs in working days, nights, and weekends to meet the Scheduling Order deadline. As such, SEA respectfully requests that the Presiding Officer ultimately issue an order requiring Zim to make these payments as an acknowledgement that SEA did not take its obligations cavalierly while Zim disregarded them. Finally, SEA incurred attorneys’ fees and costs associated with this Motion due to Zim’s misconduct. SEA respectfully requests an Order ultimately requiring Respondents pay SEA’s attorneys’ fees and costs associated with this Motion.

SEA believes that ordering attorneys' fees is an appropriate and warranted. The Presiding Officer is authorized to "upon his or her own initiative or upon motion of a party may make such orders in regard to the failure or refusal as are just" when a party fails or refuses to respond to discovery requests. 46 C.F.R. § 502.150(b). Parties "appearing before the Commission are entitled to relevant evidence needed to prosecute their cases" and failure to provide discovery may result in sanctions. See *MCS Indus., Inc. v. COSCO Shipping Lines Co., Ltd. & MSC Mediterranean Shipping Co. SA*, Docket 22-29, 2023 FMC LEXIS 26, at *22; *Kawasaki Kisen Kaisha, Ltd v. The Port Auth. of NY & NJ*, Docket 11-12, 2014 FMC LEXIS 36, at *14-18.

Sanctions are warranted here. Zim has unilaterally violated the Presiding Officer's Scheduling Order, and has failed to timely request an extension or address its failure to respond with SEA. SEA is prejudiced by Zim's bad faith conduct, and Zim's failure to comply with the discovery deadlines prevent SEA from having the full benefit of Zim's production prior to the deposition period, which is further exacerbated by the fact that Zim has not indicated when responsive documents are forthcoming.

In connection with these requests, SEA submits that it is appropriate to be permitted to submit an interim fee petition on these costs so that Zim is mindful of the impact of not meeting its discovery obligations. This is why SEA used the term "ultimately" as the relief it seeks now is the opportunity to proffer an interim fee petition addressing the basis for relief and costs associated with these efforts. The Presiding Officer has broad authority to sanction discovery abuses independent of the prevailing party fee provisions of the Cobble Act, and even though SEA would be entitled to seek all of its reasonable attorneys' fees at the end of the case as a prevailing party, waiting until the end of the case would not be a proper deterrent for Zim's instant misconduct. By

being permitted to submit a petition now, Zim will realize the impact and it will assist the case moving forward expeditiously.

And just now, late in the evening of March 22, 2023, only after SEA advised Zim that it was preparing to file this motion, has Zim revealed for the first time that it was allegedly planning to inform the Presiding Officer of its discovery failures. But this new assertion rings hollow: Zim's asserted intent was apparently to ask SEA for consent to a 30 day extension of the discovery schedule and to then go to the Presiding Officer. But Zim never shared any such intention while SEA was steadfastly producing documents to meet the deadline, Zim never acted on any such intention before the deadline passed, and given that SEA met the deadline and pressed for Zim to complete its document production, it is not credible that Zim was expecting SEA to consent to Zim's violation of the Scheduling Order. SEA has no interest in or benefit from agreeing to Zim's request, nor to reward Zim's bad behavior or further prejudice SEA case. Zim's new assertion simply further reveals that Zim's intent was to use self-help to force an extension in violation of the Scheduling Order. Changing its position only after being told that this motion was being prepared—*i.e.*, when Zim knew its misconduct was about to be exposed—highlights the necessity of preparing this motion and the need to penalize Zim's misconduct.

CONCLUSION

SEA respectfully request that the Presiding Officer issue an order: (1) compelling Zim to cure any deficiencies and complete its production within seventy two (72) hours of notice of the order by email; (2) grant the Remedies in Sections A and B, above, and (3) grant such other remedies and relief that are just and proper.

Dated: March 23, 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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