

BEFORE THE
FEDERAL MARITIME COMMISSION

DOCKET NO. 22-30

SAMSUNG ELECTRONICS AMERICA, INC.,

COMPLAINANT,

v.

ZIM INTEGRATED SHIPPING SERVICES LTD.,

RESPONDENT.

**JOINT STATUS REPORT IN CONNECTION WITH THE
RENEWED SETTLEMENT DISCUSSIONS**

By Order of April 23, 2024, the Presiding Officer mandated that the parties submit a joint status report by June 24, 2024, “if they have not filed a motion seeking approval of a settlement agreement, with a copy of the settlement agreement, by that date.” The parties have not reached a settlement at this time and there is a good faith difference of opinion concerning the next steps. As such, the parties separately address the status of the matter and requested relief below.

Complainant SEA: SEA submits that the parties remain very close to settlement and the best way to achieve resolution of this substantial dispute seeking millions of dollars in reparations is to call upon an experienced mediator who can assist the parties in closing the final gap between them. Pursuant to 46 C.F.R. § 502.411(b), SEA requests the Presiding Officer exercise its discretion to appoint a mediator as soon as practicable. 46 C.F.R. § 502.411(b), provides in relevant part, “[a]ny party may request, at any time, that a mediator or other neutral be appointed to assist the parties in reaching a settlement. If such a request is made in a proceeding assigned to an Administrative Law Judge, the provisions of § 502.91 apply.” Section 502.411(a) further

provides that mediation services are “encouraged”: “[p]arties are encouraged to utilize mediation or other forms of alternative dispute resolution in all formal proceedings.” SEA submits the appointment of a mediator now is warranted for the following reasons:

- **Settlement negotiations are not new:** When ZIM filed its November 18, 2022 motion for an extension to file an answer, its basis was: “[s]enior representatives of the parties met in person on Wednesday, November 16 to discuss the possibility of an amicable resolution of the matters which are the subject of the complaint in this proceeding. Both parties are of the view, based on that meeting, that there is a realistic possibility of reaching agreement on a resolution of this matter by year's end.” Dkt. 9. The Presiding Officer granted Zim’s request based on these representations. While the parties did not settle the dispute before the discovery phase, the decision-makers addressed general parameters for resolution.

A full record for the mediator to call upon: Zim sought three extensions during 2023 in order produce documents that were located internationally, so that the parties would have additional time for fact and expert depositions, and so that the parties could complete the briefing in support of an initial decision. A mediator can review existing materials in the record if needed or appropriate. And while the parties were building a full record to address SEA’s allegations of Shipping Act and OSRA violations, informal settlement discussions were held. Senior party representatives met in person in May 2023 and March 2024.

- **Recent settlement discussions by commercial interests:** In March 2024, senior representatives of the Parties met in person at the 2024 Trans-Pacific Maritime Conference in Long Beach, California, and discussed resolution. These discussions catalyzed the renewed possibility of settlement and the ultimate agreement to submit a joint motion to stay the proceedings while these negotiations continued forward (Dkt.53).
- **The mediation consideration:** Following the stay, commercial discussions continued but with no resolution. Last month the General Counsel for SEA, Mr. Ken Murata, sought to discuss the settlement position with his new counterpart at Zim, Ms. Crystal Kennedy. Those discussions did not occur, though with Ms. Kennedy only starting her General Counsel position on May 1, 2024, there is a good deal of issues she was addressing. Mindful of the June 24 status report deadline, Mr. Murata wrote again to Ms. Kennedy last week to suggest a focused mediation with commercial interests, aided by their respective legal departments in an effort to bridge the final gaps. Ms. Kennedy indicated that it would be best for discussions to remain on the operations level, with the ZIM personnel having final authority over any settlement.

As the complainant, SEA has a right to have the complaint decided and seek efficient resolution, but our fundamental interest is recovery and resolution, if possible. SEA should be afforded reasonable latitude to prosecute its claims in a way that we believe is most efficient for

us, and happens to be more efficient for the ALJ and the Commission as well. In light of the multiple times these parties have written to the Presiding Officer to address the prospect of settlement between them, the voluminous record with significant resources that will be required to reach an initial decision, and that both parties have not met with the aid of an experienced mediator previously, this is the appropriate moment for a mediator to be appointed.

Although any successful *outcome* of mediation ultimately requires mutual agreement, the difference in positions here is certainly not a reason to not try to mediate. Parties virtually always go into mediation disagreeing on their respective positions. The core function of an experienced mediator, and mediation generally, is bridging such differences and guiding parties to facilitated resolutions. Here, the positions of the parties are not at all intractable; rather, they are largely commercial and reasonably achievable. Mediation is precisely suited for this situation and should reasonably be the next step to follow the progress made.

Moreover, the cost in resources and time to engage with a mediator are modest at best, especially considering that with over \$10+ million in dispute, an attorney fees application by SEA should it prevail, and the likely possibility of appeal to the Commission and then appellate court review, this dispute will unquestionably result in far more time, costs, and fees being expended for years to come. The amount expended on continued litigation may well cost more than the gap between the parties' settlement positions now.

SEA requests the Presiding Officer schedule a status conference to discuss this report and request under Section 502.411 as soon as practicable, with the inclusion of client representatives.

- **A comment on the ZIM status report statement on settlement below:** ZIM and SEA personnel have done their level best to get the parties to the precipice of settlement of this substantial dispute. It is not unusual to have posturing as to last and final offers over emails and

calls; a skilled mediator often cuts through posturing and aids parties overcoming final obstacles. Concerning ZIM's reading of applicable statutes, ZIM's footnote is telling; it reads in a reference to Section 502.75 which does not exist in Section 502.411. Section 502.411 is discretionary and the Presiding Officer can accept or reject the "request" made by a party to appoint a mediator, of course. SEA submits it has presented compelling reasons for exercising the discretion and is ready to address the matter further at the requested status conference.

Respondent ZIM: Respondent ZIM views the status of this matter somewhat differently than SEA.

ZIM has put forth its best and final settlement offer. If that offer is not acceptable to SEA, then mediation will not help in resolving this matter because ZIM does not intend to increase that offer. ZIM believes this has been made clear to SEA.

As ZIM reads the applicable regulations, the Presiding Officer can appoint a mediator only if both parties consent to mediation. *See*, 46 C.F.R. §§502.411 and 502.75.¹ ZIM does not consent to mediation or the appointment of a mediator. ZIM requests that the Presiding Officer proceed with the issuance of her initial decision.

Dated: June 24, 2024

Respectfully Submitted,

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¹ The reference to 46 C.F.R. §502.91 in current 46 C.F.R. §502.411 appears to be an old reference to matter formerly found in §502.91 but now found in §502.75.

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