

BEFORE THE
FEDERAL MARITIME COMMISSION

DOCKET NO. 22-30

SAMSUNG ELECTRONICS

AMERICA, INC.,

COMPLAINANT,

v.

ZIM INTEGRATED SHIPPING SERVICES LTD.,

RESPONDENT.

JOINT STATUS REPORT

Pursuant to the April 3, 2023, Order On Motion To Compel And Cross-Motion To Amend Scheduling Order (“Order”), Complainant, Samsung Electronics America, Inc. (“SEA”) and Respondent, Zim Integrated Shipping Services Ltd. (“Zim”) (each a “Party” and collectively the “Parties”), submit this Joint Status Report. The Parties, by their respective undersigned counsel, have conferred and have endeavored to resolve any disagreements related to discovery. However, as discussed more fully below, there is one current dispute that the Parties have been unable to reach an agreement despite conferring on the issue. That issue, concerning SEA's May 5, 2023 notice of deposition of Zim witness Xavier Destriau, is addressed in the "Disputed Issue" Section III. B, *infra*.

I. Documents Produced by the Parties

1. Since the extension of the January 12, 2023 discovery schedule pursuant to the Order, the parties have continued to engage in discovery as follows:

2. With respect to the production of documents, the Order provided Respondent an additional 30 days to complete its document production, from March 20, 2023 to April 20, 2023.

Beginning on March 22, 2023, Zim's production of documents is as follows:

- March 22, 2023, Zim produced 3,710 documents (10,929 pages)
- March 28, 2023, Zim produced 9,021 documents (40,728 pages)
- March 29, 2023, Zim produced 2,752 documents (9,009 pages)
- April 7, 2023, Zim produced 5,174 documents (11,752 pages)
- April 14, 2023, Zim produced 424 documents (1,867 pages)
- May 12, 2023, Zim produced 10 documents (46 pages)

Including Zim's initial production on February 27, 2023 where Zim produced 1,638 documents (11,376 pages), Zim has produced a total of 22,729 documents, comprising of 86,007 pages.

From February 18, 2023 to the initial March 20, 2023 document production cut-off date, SEA produced a total 30,700 documents, comprising of 155,105 pages.

II. Depositions Taken by the Parties

3. With respect to depositions, at the time of the Order, SEA had noticed 10 depositions, which were scheduled to commence on April 4, 2023. Pursuant to the Order, SEA postponed the noticed depositions and rescheduled the depositions pursuant to the new schedule. On April 21, 2023, Zim noticed two depositions. Fact depositions were scheduled to commence on May 1, 2023 and per the Order were to conclude on May 22, 2023.

4. In response to SEA's 143(b)(6) deposition notice, Zim originally designated eight (8) individuals to testify on behalf of Zim (and a ninth (9th) designee was subsequently added as noted below). Depositions taken by SEA to date are as follows:

- May 1, 2023, the deposition of Zim witness Matthew Frigo was taken in both his individual capacity and as a 143(b)(6) designee.
- May 2, 2023, the deposition of Zim witness Barbara Speight was taken in both her individual capacity and as a 143(b)(6) designee.
- May 3, 2023, the deposition of Zim witness Yaacoub Yaacoub was taken in both his individual capacity and as a 143(b)(6) designee.
- May 4, 2023, the deposition of Zim witness James Michalski was taken in both his individual capacity and as a 143(b)(6) designee.
- May 8, 2023, the deposition of Zim witness Tera Haynie was taken in both her individual capacity and as a 143(b)(6) designee.
- May 9, 2023, the deposition of Zim witness Carrie Ramage was taken in her individual capacity.
- May 12, 2023, the deposition of Zim witness Johnathan Cleva was taken in both his individual capacity and as a 143(b)(6) designee.
- May 15, 2023, the deposition of Zim witness Thomas Weingartner was taken in both his individual capacity and as a 143(b)(6) designee.
- May 19, 2023, the deposition of Zim witness Moshe Shpitzer was taken as a 143(b)(6) designee.

Depositions taken by Zim to date are as follows:

- May 17, 2023, the deposition of SEA 143(b)(6) designee Jeung Choi was taken.

- May 17, 2023, the deposition of SEA 143(b)(6) designee Michael Rapske was taken.
- May 18, 2023, the deposition of SEA witness Maria Kristina Fernando was taken in her individual capacity.

III. Depositions Noticed by SEA But Not Taken To Date

A. Zim Witness Ilana Rosenberg; Joint Request to Presiding Officer to Consent to Testimony on May 25, 2023

5. As a result of the testimony provided on May 3, 2023 by Zim witness Yaacoub Yaacoub, taken in both his individual capacity and as a 143(b)(6) designee, on May 5, 2023 SEA promptly noticed two additional witnesses for deposition, Ilana Rosenberg for May 18, 2023 and Xavier Destriau for May 22, 2023, and thereafter also requested that Zim reproduce a 143(b)(6) witness prepared to give testimony on two of the May 3, 2023 topics. The parties held multiple meet and confer rounds to address these witnesses, along with clarifying and narrowing the scope of 143(b)(6) topics in regard to SEA and Zim witnesses. The meetings also confirmed the parties were not looking to extend all fact discovery past the May 22, 2023 deadline; the only exceptions would be the two depositions noticed on May 5, 2023, but for which the deponents were not available to testify before the May 22, 2023 deadline.

6. With respect to two 143(b)(6) topics, Zim agreed to redesignate Ilana Rosenberg to testify on behalf of Zim and for her to testify in her individual capacity as noticed by SEA, but was not able to confirm Ms. Rosenberg's testimony as noticed on May 19, 2023.

Subject to the Presiding Officer's consent, Complainant has agreed to Respondent's request to make the witness available on May 25, 2023.

B. Zim Witness Xavier Destriau; Disputed Issue

7. With respect to Mr. Destriau, Respondent initially stated that he was not available during the week of May 15 or on the date Complainant noticed his deposition, May 22, and requested SEA reconsider taking his deposition for reasons addressed more fully below. SEA declined the request and advised it would proceed with taking its noticed deposition. In communications with Zim counsel today, in preparation of this Joint Status Report, Respondent now advised it does not intend to make the witness available and the parties would need to address their respective positions to the Presiding Officer. The position of the respective Parties on the noticed deposition of Mr. Destriau are addressed separately below:

i. **SEA's Position:** Today, on May 22, at 4:44 PM Eastern Time, SEA was informed for the first time, that Zim does not intend to produce Mr. Destriau to testify in his individual capacity. SEA's notice of deposition for Mr. Destriau was dated for today, the last day of fact discovery. Zim's belated refusal to produce the witness, and to make this declaration in email exchanges in connection with the drafting of this Joint Report, is improper. Zim has waived the opportunity to challenge SEA's timely notice of deposition when it did not move to quash the notice in a timely manner and instead used the back-door approach of bringing the issue to a head in this Joint Report.

The timing of this issue is relevant. In email communications to SEA counsel, Zim counsel asserted that the deposition of Mr. Destriau would be duplicative/cumulative and unnecessary, and for the first time today, raised that the location of Mr. Destriau, in Haifa, Israel (Zim's headquarters) would be an issue.

Zim's relevance arguments and contention that Mr. Destriau's testimony would be duplicative are without merit, and in the two rounds of meet and confer, Zim did not raise

the location of the witness being in Israel as an issue. First, the location of the witness has little relevance in light of the notice advising it would be taken remotely by Zoom, like all other depositions in the matter. Second, even if location and timing were an issue, Zim could have suggested a substitute accommodation, like the arrangement for an in-person deposition in Israel, England, or another venue, with costs to be addressed. Zim attempted to such compromise, and instead SEA had to raise the issue of alternative means to obtain this relevant testimony it is permitted to obtain in proceeding of industry significance.

In regard to relevance, the overall significance of the Haifa headquarters involvement in decision making and policy was expressed in deposition testimony, which is supported by documents in the production. SEA first pursued Mr. Yaacoub because Zim identified him as a knowledgeable witness (per the initial discourses), and Zim elected Mr. Yaacoub as a 143(b)(6) designee. However, the testimony provided was inadequate for a number of reasons SEA addressed in a letter to Zim dated May 8, 2023, where SEA noted at the end of the letter that Zim should confirm the availability of Ms. Rosenberg and Mr. Destriau on the dates noticed for their deposition. A copy of the May 8, 2023 letter is enclosed with this Joint Status Report. In the deposition of Mr. Yaacoub, he testified that he did not have access to certain Zim financials and could not testify to specifics¹, which

¹ Deposition Testimony of Yaacoub Yaacoub, Pg. 106:7-12, see below:

Q. Okay. Can you tell me about that trend?

A. It's 2020, 2021, '22. That the demurrage and detention increased from '20 -- '20, '21, '22.

Q. Do you know how much in terms of a dollar figure or percentage?

A. Not companywide, no. I cannot put specifics.

would need to be obtained through Zim Headquarters.² See below excerpt from the deposition of Mr. Yaacoub:³

Q. Okay. Are you aware of any financials for this year? I know it's only May 3rd, but the first quarter data; is that available within ZIM?

A. I don't think so. I don't know. I don't know, actually. It's -- they are working on it. We need to -- we need to deliver it sometime, but I don't know specific dates.

Q. As director of finance at U.S. agency of ZIM, do you have access to those numbers, if you wanted to find them?

A. No. No.

Q. Who has access to those data?

A. ZIM Integrated Shipping data?

Q. Yes. The first quarter 2023 financial data.

A. On ZIM Integrated?

Q. Yes.

Mr. Destriau executes the financial disclosures for Zim and is fully familiar with the financial issues that are directly relevant to SEA's claims in regard to Zim's unreasonable practices concerning demurrage and detention charges, including their being improperly used as a revenue growth source as opposed to "... serving their intended primary purposes as financial incentives to promote freight fluidity." 46 C.F.R. § 545.5(c)(1).

Moreover, SEA is entitled to take his deposition, and pursuant to 143(a) of the Federal Maritime Commission's Rules of Practice and Procedure, SEA is well within the 20 depositions allotted before it would need to seek leave.

Finally, procedurally, Zim did not seek to quash the notice of deposition which was sent on May 5, well before the May 22 date (the last date for fact deposition). Indeed, the last message received from Zim regarding Mr. Destriau's deposition was on May 15, and

² Deposition Testimony of Yaacoub Yaacoub, Pg. 103:4-104:1.

³ Deposition Testimony of Yaacoub Yaacoub, Pgs. 90:1-16; 217:3-25.

SEA responded promptly on May 16, reiterating that SEA will be taking Mr. Destriau's deposition and offered to do so on May 30 or 31, subject to the consent of the Presiding Officer in the same manner the Parties are seeking consent with respect to Ms. Rosenberg's deposition.

SEA respectfully requests the consent of the Presiding Officer to proceed with the deposition of Mr. Destriau on May 30 or 31, as originally noticed by remote means, unless the parties agree otherwise. In the event the Presiding Officer is not initially inclined to grant the request, SEA requests Zim be ordered to file a motion to quash the deposition notice so the issue can be fully explored.

ii. **Zim's Position:** ZIM maintains that Xavier Destriau is not a material witness and that his recently noticed deposition is neither necessary nor efficient. The facts surrounding this dispute are set forth below.

The last two notices of deposition served by Complainant called for the deposition of Ilana Rosenberg, the Senior Vice President and Chief Financial Officer of Zim American Integrated Shipping Services Co. Ltd. (Zim America) and Xavier Destriau, the Chief Financial Officer of Zim Integrated Shipping Services, Ltd., the Israeli parent of Zim America. Notably, Ms. Rosenberg is located in the United States, whereas Mr. Destriau is located in Haifa, Israel.

Respondents have objected to the production of Mr. Destriau, on the grounds that he is not a material witness in this case, and that any testimony which would be sought from him is not relevant and would be duplicative of testimony that has been, or will be, adduced from other witnesses such as Ms. Rosenberg. Respondent has offered to insure that Ms. Rosenberg can address any evidence which Complainant might wish to adduce

through a deposition of Mr. Destriau or, alternatively, to stipulate to the facts they wish to establish. Complainant's counsel has declined to do so.

Contrary to the Complainant's assertion, Respondent's objection to the production of Mr. Destriau has not been raised at the eleventh hour.

After notices of deposition for Ms. Rosenberg and Mr. Destriau were served, Respondent sent an email to Complainant's counsel requesting a conference call to discuss the need for this testimony in addition to other discovery issues. Specifically, the email stated: "We would like to request a meet and confer on the morning of Wednesday, May 10. The purpose is to discuss two topics: (a) SEA's objections to our 143(b)(6) topics; and (b) the notice for the deposition of Xavier Destriau." This email preceded a letter that Complainant's counsel sent on the same day, which asserted that Mr. Yaacoub Yaacoub, a 143(b)(6) witness Respondent had produced, identified "Ilana Rosenberg and Xavier Destriau as knowledgeable factual witnesses" and that "they should also be made available for deposition as they have been identified as persons with knowledge regarding certain financial matters." The subject of this letter was also discussed at the "meet and confer" which took place on May 10. As a result of that conference, we agreed to produce Ms. Rosenberg; however, we did not agree to produce Mr. Destriau and proposed what was subsequently confirmed in an email dated May 15, 2023, which advised Complainant's counsel as follows: "We believe his (Mr. Destriau's) testimony would be duplicative of Ms. Rosenberg's and is therefore not necessary. Having said this, we propose 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."

Complainant's counsel responded to this email on May 16, 2023, requesting confirmation that Mr. Destriau would be produced on May 30 or 31; however, Respondent never agreed to produce Mr. Destriau, a position we confirmed to Complainant's counsel earlier today in an email that accompanied Respondent's revision to the draft JSR.

Respondent maintains that the deposition of Mr. Destriau is not necessary because he, contrary to the assertion of Complainant's counsel, is not a material witness to this case. The parties recently received and reviewed the transcript of the testimony taken of Mr. Yaacoub, upon which Complainant bases its purported need to depose Mr. Destriau, Mr. Destriau's name is not mentioned at all in the deposition and nothing in that testimony remotely suggests that Mr. Destriau would have any useful or probative information about the issues in this proceeding.

Further, we 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. These facts confirm that Mr. Destriau's testimony is neither necessary nor relevant.

After reviewing the transcript of Mr. Yaacoub's testimony and searching the documents it produced, Respondent maintains that it does not have to make Mr. Destriau available for a deposition in this matter. Further, the overall financial results of ZIM are not relevant to the issue of the reasonableness of the demurrage and detention charges that are at issue in this case, particularly since the latter are a miniscule percentage of ZIM's annual financial results and are available to Complainant since ZIM is a publicly traded corporation.

Complainant has already deposed Messrs. Yaccoub and Weingartner, the Director of Finance and Director of Financial Control, respectively, of Zim America. It will be deposing Ms. Rosenberg, the CFO of Zim America. In light of this, and the facts set forth above, the deposition of Mr. Destriau appears to be unnecessary, duplicative, and harassing. Respondent stands by its proposal that Complainant identify the evidence it would seek to adduce from Mr. Destriau so that it could be determined whether same can be accomplished either through a stipulation or deposition testimony of Ms. Rosenberg.

IV. Remaining Discovery Matters

8. Pursuant to the Order, Expert Discovery is set to commence on May 23, 2023. Counsel for the parties are planning to meet during the week of May 29, 2023 to discuss expert discovery matters (subject to the resolution of the issues related to the deposition of Mr. Destriau, and subject to the Presiding Officer's consent on the proposed date of the deposition occurring after May 22, 2023).

9. At present the parties expect to meet the July 19, 2023 date for commencement of briefing as set out in the Order.⁴ 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.

⁴ Due to the tight discovery schedule in this case, including the large volume and timing of document productions and depositions, five of which just occurred on Monday, Wednesday, Thursday and Friday last week, the parties are not in a position at the time of this Joint Status Report 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.

Dated: May 22, 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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