

BEFORE THE  
FEDERAL MARITIME COMMISSION

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DOCKET NO. 22-30  
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SAMSUNG ELECTRONICS  
AMERICA, INC.,

COMPLAINANT,

v.

ZIM INTEGRATED SHIPPING SERVICES LTD.,

RESPONDENT.

**RESPONDENT ZIM INTEGRATED SHIPPING SERVICES LTD.’S  
RESPONSE TO COMPLAINANT SAMSUNG ELECTRONICS AMERICA, INC.’S  
SEPTEMBER 29, 2023, MOTION TO HOLD MOTION TO STRIKE IN ABEYANCE**

Respondent ZIM Integrated Shipping Services Ltd. (“ZIM”), through counsel, hereby responds to the September 29, 2023, motion from counsel for Complainant Samsung Electronics America, Inc.’s (“SEA”) to the Presiding Officer regarding ZIM’s Motion to Strike the Expert Report of John D. McCown (“SEA Motion”).<sup>1</sup>

ZIM filed the Motion to Strike the Expert Report of John D. McCown (“ZIM Motion”) as part of its response to the Brief and Proposed Findings of Fact filed by SEA on August 23, 2023. The SEA Motion asks the Presiding Officer to hold the ZIM Motion in abeyance on two grounds, each of which is addressed separately below.

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<sup>1</sup> Although SEA’s September 29, 2023 submission is a letter, under 46 C.F.R. §502.69, a request for an order or ruling must be made by motion. Accordingly, ZIM treats the letter as a motion and responds accordingly.

## 1. The ZIM Motion Was Timely Filed

SEA first argues that the August 21, 2023, scheduling order calling for ZIM to file its opposition brief, responses to proposed findings of fact, proposed findings of fact, and appendix somehow prohibits ZIM from seeking any other relief via motion. This is an absurd reading of the scheduling order, one that would preclude any party from filing any motion at any time unless that motion was expressly authorized by the scheduling order. Under this rationale, the SEA Motion too would be improper.

The scheduling order is more appropriately read as establishing a deadline for the submission of the pleadings identified therein than as an exclusion of any pleadings not identified therein.

Moreover, the ZIM Motion was filed at the proper time. The proper time to object to evidence is at the point in time at which the opposing party attempts to introduce the evidence into the record. In this case, that occurred when the McCown Report was included in SEA's Appendix and cited numerous times in support of its proposed findings of fact. Had ZIM moved to exclude the McCown report prior to its introduction, that motion would likely have been considered premature, since there was not yet an indication as to the extent that SEA would rely on that report as part of its case.

Thus, the Motion is not precluded by the scheduling order and is timely.

## 2. The ZIM Motion Is Consistent With The Obligation To Meet And Confer

The obligation to meet and confer prior to the filing of a non-dispositive motion set forth in 46 C.F.R. §502.71 is intended to "narrow the areas of disagreement" between the parties. This duty to meet and confer appears to be based on a similar requirement found in Rule 37 of narrowing of such disputes before they are presented to the presiding judge. Although the

FMC's rule is not expressly limited to discovery issues, it appears to have been drafted primarily with discovery issues in mind, or at least to be most applicable to discovery-related disputes.

The ZIM Motion does not deal with a discovery issue on which there might be potential room for discussion, compromise, and resolution. Either Mr. McCown will be qualified as an expert or he will not. There is no potential compromise under which he might be recognized as an expert with respect to certain issues but not to others. Moreover, as the SEA Motion indicates, there was never any possibility of narrowing the disagreement of the parties over Mr. McCown's qualifications and the propriety of admitting his report. Under these circumstances, the fact that ZIM did not "meet and confer" with SEA prior to filing the ZIM Motion should not result in any adverse consequences for ZIM.

### 3. Conclusion

For the foregoing reasons, ZIM's Motion is both timely and proper.

Respectfully submitted,

COZEN O'CONNOR

By: s/ Christopher Raleigh

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Dated: October 5, 2023

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5<sup>th</sup> day of October, 2023, a true and correct copy of the foregoing Respondent's Response to Complainant Samsung Electronics America, Inc.'s September 29, 2023, Motion to Hold Motion to Strike in Abeyance was served via email on all counsel for Samsung Electronics America, Inc. in FMC Docket No. 22-30.

s/ Christopher Raleigh