

BEFORE THE
FEDERAL MARITIME COMMISSION

DOCKET NO. 22-30

SAMSUNG ELECTRONICS

AMERICA, INC.,

COMPLAINANT,

v.

ZIM INTEGRATED SHIPPING SERVICES LTD.,

RESPONDENT.

**RESPONDENT’S OPPOSITION TO COMPLAINANT’S MOTION TO COMPEL
AND CROSS MOTION FOR EXTENSION OF SCHEDULING ORDER**

ZIM Integrated Shipping Services Ltd. (“ZIM” or “Respondent”) by and through its undersigned counsel, submits this response in opposition to the Motion to Compel Discovery and for Sanctions (the “Motion”) filed by Samsung Electronics America, Inc. (“SEA” or “Complainant”). ZIM also cross moves for an amendment extending the current Scheduling Order dated January 12, 2023 (“Scheduling Order”) for thirty days.

I. STATEMENT OF FACTS

SEA has moved for an order compelling ZIM to produce documents “within 72 hours after a ruling...” However, ZIM has not refused to produce documents that are responsive to SEA’s broad discovery requests. It simply needs additional time to comply. For the reasons set

forth in the accompanying Declarations of Mark Newcomb and Christopher Raleigh, the Motion therefore was unnecessary and should be denied.

A. Status of ZIM's Document Review and Production

As explained in the accompanying Declaration of Christopher Raleigh dated March 30, 2023 ("Raleigh Declaration"), ZIM readily provided documents to its counsel which were available on servers located within the mainland United States. These documents, totaling 10,928 pages, were timely produced to SEA's counsel on February 27, 2023. This production was by no means complete; however, there was a delay in ZIM's transmittal of data contained in the email mailboxes of the ten custodians who had potentially responsive documents. This data was maintained and controlled within jurisdictions where ZIM was subject to foreign privacy laws which required it to employ rigorous security procedures and authorizations prior to its release. Declaration of Mark Newcomb dated March 30, 2023 ("Newcomb Declaration").¹ The data set ZIM had marshaled after applying the search terms requested by counsel exceeded 500 Gigabytes ("GB"),² and its transfer had to be conducted in accordance with privacy and security protocols described in the Newcomb Declaration. Due to its size, this data was transmitted to ZIM's counsel in sections, after which it was processed into an electronic discovery platform; reviewed by counsel; and prepared for production. (Raleigh Declaration).

The first 142 GB of data was processed and, after review by counsel was completed, was produced to SEA's counsel on March 22, 2023. The second batch of data, consisting of 250 GB, was being processed at the time SEA's counsel filed the Motion. Since that time, the processing

¹ Mr. Newcomb is the Vice President and General Counsel of ZIM American Integrated Shipping Services Co. LLC, the Agent of ZIM Integrated Shipping Services, Ltd.

² The number of pages in a GB will vary depending on the type of document involved, but the range would be between 50,000 – 70,000 pages per GB. The data ZIM had marshaled would accordingly "translate" into a range of 25 – 37.5 million pages.

of that data has been completed and the documents generated are currently being searched and reviewed by counsel. Responsive documents from this data set were produced to SEA's counsel on March 28 and 29, 2023. To date, the productions to SEA totals 72,042 pages. (Raleigh Declaration) The review and production from the second batch of data set is expected to be completed by the week of April 3, 2023. The processing of the third batch of data, consisting of approximately 102 GB, is currently underway. It is estimated that production of documents from that data set will be completed during the week of April 10, 2023. (Raleigh Declaration).

B. SEA's Motion Was Unnecessary

ZIM's counsel was transparent with SEA's counsel regarding the circumstances giving rise to the delay in completing ZIM's document production, and had intended to propose a modest adjustment to the present schedule, which is now the subject of ZIM's cross-motion. However, SEA's counsel has refused to consent to any extension of the Scheduling Order and, instead, has filed the Motion seeking an unnecessary order compelling ZIM to produce documents. (Raleigh Declaration).

The issue before this Court does not involve a recalcitrant party which has unreasonably opposed discovery. It simply arises from circumstances in which a party needs additional time to complete its production of documents from a large data base that is controlled overseas and subject to stringent security requirements.

In short, the Motion could have and should have been avoided. For the reasons discussed below and in the accompanying Declarations, ZIM requests that SEA's motion be denied and that ZIM's cross motion for a brief extension of the discovery schedule be granted.

II. THE MOTION SHOULD BE DENIED

A. The Motion to Compel Was Unnecessary and Should Therefore Be Denied

46 CFR §502.150 (a)(1) states that “A party may file a motion pursuant to §502.69 for an order compelling compliance...with its discovery requests as provided in this subpart, if...a party fails to respond that inspection will be permitted, or fails to permit inspection, as requested under §502.146 of this subpart.” Of equal importance, §502.150 (a)(2)(i) requires “(a) certification that the moving party has conferred in good faith or attempted to confer with the party failing to...respond to discovery requests as provided in this subpart in an effort to obtain compliance without the necessity of a motion” (emphasis supplied).

In this case, ZIM has timely (1) provided Initial Disclosures; (2) served written Responses to Complainant’s First Request for Production of Documents, (3) served Answers to Complainant’s Interrogatories and (4) has made substantial progress in its production of documents. Consistent with its discovery obligations in this case, ZIM notified SEA’s counsel in its March 16, 2023 letter and its March 22, 2023 emails that ZIM would produce the balance of documents responsive to SEA’s Requests but needed additional time to do so. In response, SEA filed this Motion. (Raleigh Declaration)

The Motion was not necessary because ZIM confirmed that it would complete the balance of its substantial production – it simply needed more time to do so. This is not behavior which warrants a motion to compel.

Further, §502.150 (a)(2)(i) requires that the moving party “has conferred in good faith...to obtain compliance without the necessity of a motion.” The email exchange on March 22, 2023 (Raleigh Declaration, Exhibit C), contrary to SEA’s implied assertion in the Motion, was not conducted in conformity with the Rules because it was not conducted in good faith.

The very behavior which the Complainant has engaged in has been rejected by the Courts: “When the parties are unable to resolve a discovery dispute, a party may file a motion to compel the opposing party to produce evidence or respond to interrogatories.” United States v. Kellogg Brown & Root Servs., Inc., 284 F.R.D. 22, 27 (D.D.C. 2012). However, “[u]nder Federal Rule 37, a party may move for an order compelling disclosure or discovery only after the movant has in good faith conferred or attempted to confer with the person or party. *Id.* (quoting Fed. R. Civ. P. 37(a)(1) (internal quotation marks omitted)).

More importantly, U.S. ex rel. Pogue v. Diabetes Treatment Centers of America, Inc., 235 F.R.D. 521, 529-30 (D.D.C. 2006) (which was cited in *Kellogg*) clarifies that the “meet and confer” obligation must constitute a sincere effort to resolve the dispute and be conducted in good faith: “The obligation to confer may not be satisfied by perfunctory action, but requires a good faith effort to resolve the non-dispositive disputes that occur in the course of litigation. As such, failure to comply with the conference requirement is a sufficient basis to deny a motion to compel.” *Id.* at p. 529.

The March 22-23 email exchange, to the extent SEA relies upon it to constitute a “meet and confer” requirement, was perfunctory within the meaning of *Pogue, supra* and was patently calculated to enable SEA’s counsel to simply “check the box” before filing the Motion. “The purposes of the rules—to encourage informal resolution to such disputes, or at least to reduce or narrow the issues the Court will consider—are not well-served by (a party’s) making no effort to confer in the period reasonably prior to filing the motion. It is a waste of this Court’s time and resources to adjudicate a dispute that could have been resolved by the parties themselves.” *Pogue, supra*.

The Motion was not necessary because ZIM expressed its willingness to conclude its remaining discovery obligations – it simply needed more time to do so. The Motion should be denied.

B. Sanctions Should Not Be Imposed

ZIM's confirmation of its willingness to produce documents, and the Complainant's manifestly perfunctory behavior in the application of the "meet and confer" obligation of §502.150 (a)(2)(i), should provide a sufficient basis to deny Complainant's request for sanctions. Putting that argument aside, the Rule does not permit the imposition of sanctions as requested by Complainant.

1. Sanctions Are Not Available

§502.150 (a) lays out the criteria and requirements for a motion to compel. The provision for an award of sanctions is found under §502.150 (b), captioned "Failure to comply with order compelling disclosures or discovery." The Rule goes on to state: "If a party...fails or refuses to obey an order requiring it to make disclosure or to respond to discovery requests, the presiding officer 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."

Sanctions should not be imposed in this case because no order has been issued directing ZIM to "make disclosure or to respond to discovery requests..." For this reason alone, the Complainant's demand for sanctions is defective because it has "skipped" the step of obtaining an order directing ZIM to comply (which, as explained above, was not necessary in any event).³

³ This reading of the Commission's regulations is consistent with past Commission practice. See, e.g., *Universal Logistic Forwarding Co., Ltd – Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984*, 29 S.R.R. 35 and 29 S.R.R. 36 (ALJ 2000). In the first decision, issued on November 21, 2000, the ALJ granted the Bureau of Enforcement's motion to compel discovery and ordered respondent to produce discovery by December 21, 2000. In the second decision, issued on February 6, 2001, the ALJ imposed sanctions based on respondent's failure to comply with the earlier order. This indicates that sanctions are imposed only after a party fails to comply with an order granting a motion to compel, not after the initial failure. See also, *Shipman International (Taiwan)*

2. Attorneys' Fees Are Not Available Under §502.150 (b)

The sanctions which are available to a moving party are specified in §502.150 (b)(1), (2) and (3). The award of attorneys' fees, which is the only sanction that the Complainant has sought, are plainly not available under this Rule.

Decisions interpreting the predecessor of the current rule confirm that monetary sanctions are not available under Commission regulations. In *Odyssea Stevedoring of Puerto Rico, Inc. v. Puerto Rico Ports Authority*, 29 S.R.R. 1401 (ALJ 2003), the ALJ denied respondent's request for attorneys' fees incurred in connection with preparation for a motion for reconsideration that respondent alleged was necessary due to purported false statements and misrepresentations on the part of complainant's counsel. The ALJ stated:

The Commission has enacted Rule 210, which authorizes the assessment of sanctions where a party fails to comply with an order to provide discovery. It does not provide for monetary sanctions, but rather, for the striking of pleadings or the preclusion of evidence in certain instances. In that respect, it differs from Fed. R. Civ. P. 37(b)(2), which includes the assessment of monetary sanctions in federal court proceedings.

29 S.R.R. at 1407. What was Rule 210(a) in 2003 can now be found in Rule 150(b) of the Commission's regulations. The current regulation is virtually identical in substance to Rule 210(a), and still does not contemplate the imposition of monetary sanctions in connection with a motion to compel discovery.

Finally, a more recent pronouncement of this principle was stated by this Court in *OJ Commerce, LLC v. Hamburg Sudamerikanische Dampfschiffahrts-Sesellschaft-A/S & Co. KG, et al.* Dkt No. 21-11 (June 29, 2022, Dkt # 31): "Pursuant to the Howard Coble Coast Guard and Maritime Transportation Act of 2014, 46 U.S.C. § 41305(e), and Commission Docket No. 15-06, under certain circumstances, attorney fees may be awarded to the prevailing party in a

Ltd. – Possible Violations of Sections 8, 10(a)(1) and 10(b)(1) of the Shipping Act of 1094 and Part 514, 28 S.R.R. 100 (ALJ 1998).

complaint proceeding. However, there is no mechanism for the presiding officer to award fees prior to the resolution of a proceeding.” Id. at p. 4

In light of the foregoing, SEA’s request for sanctions and attorneys’ fees must be denied.

III. THE SCHEDULING ORDER SHOULD BE EXTENDED

The Commission’s regulations require that discovery be completed within 150 days of the service of a respondent’s answer. 46 C.F.R. §502.141(g). While that may be a reasonable time to complete discovery in a less complex case, here the documentary discovery discussed above involves tens of thousands of shipments. The unusually large document productions by both parties, which are expected to exceed 200,000 pages and coupled with the number of witnesses who will be deposed (SEA has noticed the depositions of ten individuals and a 143(b)(6) witness, and ZIM anticipates noticing the depositions of at least three SEA witnesses) warrant flexibility.

ZIM acknowledges that prompt resolution of claims and disputes arising under the statutes administered by the Commission is a laudable goal, one which the deadlines for issuance of initial and final decisions are intended to achieve. Scheduling orders are an important part of this process and are not taken lightly. However, at the same time, it must be noted that it is not unusual for the deadlines for completion of discovery and/or for the issuance of initial and final decisions to be extended by administrative law judges and the Commission, and for scheduling orders to be revised accordingly. Indeed, ZIM believes that absent resolution via settlement or dispositive motion, it is likely more common for decisions on the merits to require more time than allotted under the regulations than not.⁴

⁴ Some recent examples of this include FMC Docket No. 15-11 (complaint filed November 16, 2015, FMC decision now due October 18, 2021); FMC Docket No. 17-05 (complaint filed May 23, 2017, initial decision issued May 24, 2019, Commission decision issued July 26, 2021); FMC Docket No. 19-02 (complaint filed December 20, 2018, initial decision issues March 30, 2021, case stayed from June to November of 2020).

There are also policy considerations which favor allowing sufficient time for a full development of the evidentiary record before an agency over strict adherence to a particular schedule. *Hudson Shipping (Hong Kong) Ltd. d/b/a Hudson Express Lines – Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 29 S.R.R. 1376, 1377 (ALJ 2002)(policy and responsibility of Commission and, by delegation of authority, presiding judge, to inquire into and consider all relevant facts; of even greater importance than the concept of fairness between the parties, as they maneuver to develop a record which fits their positions, is the need to ensure that justice is served and all relevant facts are considered by the Commission). Adherence to a schedule should not override these policy considerations. See also, *Anderson International Transport and Own Anderson – Possible Violations of Sections 8(a) and 19 of the Shipping Act of 1984*, 31 S.R.R. 1091 (FMC 2009)(citing policy considerations discussed in *Hudson* as basis for reopening the record).

This is the first request for an extension, which ZIM submits is modest, reasonable and necessary under the circumstances, and further that good cause has been demonstrated to extend the deadlines in the Scheduling Order dated January 12, 2023 (“Scheduling Order”) for thirty days. ZIM accordingly proposes the following revisions to the Scheduling Order:

<u>Event</u>	<u>Current Deadline</u>	<u>Requested Deadline</u>
Complete document production:	March 20, 2023	April 20, 2023
Complete fact depositions:	April 21, 2023	May 22, 2023
Expert discovery begins:	April 22, 2023	May 23, 2023
Close of all discovery:	May 18, 2023	June 19, 2023
Complainant’s brief, proposed findings of fact, and appendix	June 16, 2023	July 19, 2023
Respondent’s opposition brief,		

responses to proposed findings of fact, proposed findings of fact and appendix

July 17, 2023

August 18, 2023

Complainant's reply brief and responses to proposed findings of fact

August 1, 2023

September 5, 2023

IV. CONCLUSION

For the reasons explained above, additional time is needed by ZIM to complete its review and production of documents responsive to SEA's broad discovery requests. The parties, in good faith, should have been able to resolve these issues before the filing of the Motion and cross-motion became necessary. This is not the manner in which practice should be conducted before the FMC. ZIM accordingly requests that SEA's Motion be denied and the cross-motion extending the Scheduling Order be granted.

COZEN O'CONNOR, P.C.

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Dated: March 30, 2023

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of March, 2023, a true and correct copy of the foregoing Opposition to Complainant's Motion to Compel Discovery and for Sanctions and Cross Motion for Extension of Scheduling Order was served via email on counsel for the Complainant in FMC Docket No. 22-30.

s/ Wayne R. Rohde

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