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September 29, 2023

Via Email

Chief Administrative Law Judge Erin Wirth
800 North Capitol Street, N.W
Washington, D.C. 20573

Re: *Samsung Electronics America, Inc. v. Zim Integrated Shipping Services Ltd.*,
(Docket No. 22-30); Zim’s Motion to Strike the Expert Report of John D. McCown

Dear Judge Wirth,

We are writing on behalf of Samsung Electronics America, Inc. (“SEA”) regarding Zim Integrated Shipping Services Ltd.’s (“Zim”) (collectively, the “Parties”) Motion to Strike the Expert Report of John D. McCown (the “Motion”), improvidently filed by Zim counsel on September 26, 2023. SEA requests that in the event the Presiding Officer allows such a filing to stand procedurally, that SEA be permitted to submit its opposition after the October 10, 2023 date when SEA’s reply to Zim’s opposition brief is due.

SEA submits the Motion is in violation of the August 21, 2023 Scheduling Order (the “Order”), which provided that the Parties must abide by the schedule and only permitted Zim to file its “Respondent’s opposition brief, responses to proposed findings of fact, proposed findings of fact, and appendix.” The expert report was filed by Mr. McCown on June 20, 2023, and he was deposed by Zim on July 14, 2023. To file a motion to exclude Mr. McCown’s informative analysis during the final briefing process, when SEA would be required to respond within one week and pull its efforts from responding to Zim’s 40-page opposition brief and 99 proposed findings of fact with authority, is gamesmanship.

Zim’s motion to exclude is also regrettably the practice of law by ambush. Zim’s Motion does not comply with Federal Maritime Commission (“FMC”) Rules of Practice and Procedure, requiring that prior to filing a motion, “the parties must attempt to discuss the anticipated motion with each other in a good faith effort to determine whether there is any opposition to the relief sought and, if there is opposition, to narrow the areas of disagreement. The moving party must state within the body of the motion what attempt was made or that the discussion occurred and

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whether the motion is opposed.” FMC Rule 71, 46 C.F.R. § 502.71(a). Zim’s able and very experienced FMC counsel is well aware of the rule, so much so that counsel sought to litigate the issue just last year. *See OJ Commerce, LLC v. Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft A/S 7 Co., et al.*, 2022 WL 3910368, *2, Docket No. 20-11 (FMC Aug. 22, 2022) (in an unrelated matter, counsel sought dismissal of a motion for failure to properly comply with meet and confer requirements as required by FMC regulations. Notably, Zim counsel state that any argument that a meet and confer occurred could not be considered in good faith and emphasized this in light of it being “*via email*”) (emphasis added). As compared to the *Hamburg* case, Zim counsel did not even email SEA counsel prior to filing the Motion. As evidenced in the Motion, Zim has made no such certification of a meet and confer nor did it seek to discuss the Motion with SEA counsel.

On September 29, 2023, SEA counsel emailed Zim counsel requesting its consent to stay the Motion until after SEA’s October 10, 2023 deadline to file a reply brief and responses to proposed findings of fact. SEA also raised the issue of Zim’s failure to comply with FMC Rules of Practice and Procedure and conduct a meet and confer. In response, Zim denied SEA’s request to stay the Motion and failed to concede that there has been any violation of the duty to confer. Although it cited to no meeting, call or email addressing the topic, it claimed that conferring on a motion to strike would have been “futile.”

SEA submits that Zim’s motion is impermissible under both the Order and FMC Rules of Practice and Procedure. And Zim’s new proffered futility standard for disregarding the meet and confer requirement be soundly rejected. SEA requests the Presiding Officer hold SEA’s response to the motion to strike in abeyance until it can consider the propriety of Zim’s actions in the event it does not strike the motion on procedural grounds altogether.

Sincerely yours,

HOLLAND & KNIGHT LLP



Christopher R. Nolan