

**MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF JOINT MOTION FOR APPROVAL
OF SETTLEMENT AGREEMENT AND DISMISSAL WITH PREJUDICE**

Complainant Draft Cargoways (India) Pvt. Ltd. ("DRAFT") and Respondent Glencore Ltd. ("GLENCORE") hereby submit this Memorandum of Points and Authorities in support of their Joint Motion for Approval of Settlement Agreement and Dismissal with Prejudice. The parties believe that the proposed settlement meets the Federal Maritime Commission's ("FMC" or "Commission") criteria for approval of settlement agreement and therefore should be approved.

I. BACKGROUND

On October 29, 2010, Complainant DRAFT filed a complaint with the Commission against Respondents DAMCO USA, Inc. ("DAMCO US"), DAMCO A/S and A.P. Moller-Maersk A/S ("Maersk") alleging that the Damco/Maersk Parties had violated Sections 8(a)(1), 10(b)(2)(A), 10(b)(11), 10(b)(13) and 10(d)(1) of the Shipping Act of 1984, 46 U.S.C. §§ 40501(a)(1), 41104(2) and (11), 41103(a) and 41102(c), by collecting and attempting to collect demurrage and detention charges from Draft Cargoways through a civil action originally filed by Damco US, Inc. in the U.S. District Court for the Eastern District of Virginia ("Docket No. 1:10-cv-0929").¹

On November 22, 2010, DRAFT filed a Motion for Leave to File an Amended Complaint and an Amended Complaint with the FMC. The Amended Complaint names two additional Respondents GLENCORE and Allegheny Alloys Trading LP ("ALLEGHENY"), i.e. the alleged consignees of subject shipments.

With respect to the two additional Respondents, the Amended Complaint alleges:

¹ Damco A/S was substituted for Damco US, Inc. as plaintiff in this action, which was transferred to and is currently pending before the U.S. District Court for the Southern District of New York, Docket No. 1:10-cv-9117.

35. During the period from approximately December 2007 through November 2008, DRAFT provided NVOCC transportation services to Respondents GLENCORE and ALLEGHENY to transport cargo subject of this proceeding from India to U.S. and issued DRAFT's bills of lading to Respondents GLENCORE or ALLEGHENY as Consignee for each shipment...
36. Upon information and belief, Respondents MAERSK, DAMCO A/S, or DAMCO US attempted to collect demurrage for subject shipments directly from Respondents GLENCORE AND ALLEGHENY pursuant to MAERSK's tariff provision.
37. However, upon information and belief, neither Respondent GLENCORE nor Respondent ALLEGHENY has paid demurrage/detention to MAERSK.
38. DRAFT maintains that DAMCO A/S, since it does not directly maintain any provisions for the collection of demurrage and detention charges, is not entitled to any demurrage/detention for the shipments subject of this proceeding. Nevertheless, if the Commission finds that DAMCO A/S is entitled to demurrage/detention, Respondents GLENCORE AND ALLEGHENY are in turn liable to DRAFT for demurrage/detention which is allegedly paid and/or owed by DRAFT to DAMCO A/S/MAERSK.

.....

46. If the Commission finds that DAMCO A/S is entitled to demurrage/detention, Respondents GLENCORE's and ALLEGHENY's failure to pay demurrage/detention in turn constitutes a violation of Section 10 (a) (1) of the Shipping Act, 46 U.S.C. § 41102 (a), which prohibits a person knowingly and willfully, directly or indirectly, by any unjust or unfair device or means, obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise apply.

Amended Complaint ¶¶ 35, 36, 37, 38, 46.

On January 24, 2011, DRAFT filed a Notice of Dismissal of Respondent ALLEGHENY.

On January 27, 2011, Respondent GLENCORE filed a motion to dismiss asserting that the Amended Complaint fails to give rise to a violation of Section 10(a)(1) of the Shipping Act of 1984 and must be dismissed. No response was filed by DRAFT as a result of an agreement in principle reached between DRAFT and GLENCORE.

On February 9, 2011, the parties filed a joint status report advising the Administrative Law Judge ("ALJ") that the parties had reached their respective settlement agreements in principle.

On March 7, 2011, Administrative Law Judge Wirth issued an Order granted DRAFT's request, in its Notice of Dismissal, to voluntarily dismiss Respondent ALLEGHENY from this proceeding.

II. AUTHORITY FOR SETTLEMENT

The Administrative Procedure Act ("APA"), 5 U.S.C. § 554 (c) (1), requires agencies to give interested parties an opportunity, *inter alia*, to submit offers of settlement "when time, the nature of the proceeding, and the public interest permit." As the legislative history of the APA makes clear, Congress intended this particular provision to be read broadly so as to encourage the use of settlement in proceedings such as the present one:

...even where formal hearing and decision procedures are available to parties, the agencies and the parties are authorized to undertake the informal settlement of cases in whole or in part before undertaking the more formal hearing procedure. Even courts through pretrial proceedings dispose of much of their business in that fashion. There is much more reason to do so in the administrative process, for informal procedures constitute the vast bulk of administrative adjudication. The statutory recognition of such informal methods should strengthen the administrative an-n and serve to advise private parties that they may legitimately attempt to dispose of cases at least in party through conferences, agreements, or stipulations.

Senate Committee on the Judiciary, Administrative Procedure Act-Legislative History, S Doc. No. 248, 79th Cong., 2d Sess. 24 (1946).

Courts have endorsed the use of the APA settlement provision "to eliminate the need for often costly and lengthy formal hearings in those cases where the parties are able to reach a result of their own which the appropriate agency finds compatible with the public interest." *Pennsylvania Gas and Water v. Federal Power Commission*, 463 F.2d 1242, 1247 (D.C. Cir.1972).

The Commission itself has long recognized that the law strongly favors settlements:

...the law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy ... The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts and it is thus advantageous

to judicial administration, and, in turn, to government as a whole.

Old Ben Coal Company v. Sea-Land Service, Inc., 21 F.M.C. 506, 512 (1978). See also *Del Monte Corp. v. Matson Navigation Co.*, 22 F.M.C. 365 (1979); *United Van Lines, Inc. and United Van Lines International, Inc. v. United Shipping USA, Inc.*, 27 S.R.R. 769 (ALJ 1996) (administratively final May 29, 1996).

Rule 91 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.91, codifies the *Old Ben Coal* holding in language borrowed in part from the APA, 5 U.S.C. § 554(c)(1). In accordance with Rule 91 and its policy favoring settlements, the Commission has approved settlement of disputes between private parties. See, e.g., *United Van Lines*, supra; *Delhi Petroleum Pty. Limited v. U.S. Atlantic & Gulf/Australia-New Zealand Conference and Columbus Line, Inc.*, 24 S.R.R. 1129 (ALI 1988) (administratively final September 19, 1988).

III. CRITERIA FOR APPROVAL OF SETTLEMENT

The Commission may approve a settlement when it does not contravene any law or public policy, is fair, adequate and reasonable, and is not the product of collusion or coercion. *Delhi Petroleum* at 1134. The Commission also considers whether there is a reasonable basis for the settlement and whether the settlement reflects the careful consideration of the parties with respect to factors such as the relative strengths of their positions weighed against the risks and costs of continued litigation. *Id.*

The settlement agreement in this proceeding meets the foregoing criteria. The Amended Complaint alleges Complainant DRAFT provided NVOCC transportation services to Respondent GLENCORE during the period from approximately December 2007 through November 2008; that Respondents MAERSK, DAMCO A/S, or DAMCO US attempted to collect demurrage and detention for subject shipments directly from Respondent GLENCORE pursuant to

MAERSK's tariff; and, that Respondent GLENCORE failed to pay demurrage/detention to MAERSK. GLENCORE filed a Motion to Dismiss January 27, 2011, for failure to state a claim, as indicated herein, and generally has denied through counsel that GLENCORE is obligated to pay any demurrage and detention charges as alleged by DRAFT.

The liability of Respondent GLENCORE for its conduct is a question of fact. See, e.g., *International Freight Forwarders & Customs Brokers Association of New Orleans, Inc. v. Latin America Shippers Service Association*, 27 S.R.R. 392, 395 (ALT 1996) and cases cited therein. Since the amounts which Complaint DRAFT allegedly paid to Respondent Damco A/S/Masersk for Respondent GLENCORE's account are detention charges totaling only \$14,000, it would be necessary for the parties to engage in extensive discovery for DRAFT to demonstrate the liability of GLENCORE, and for GLENCORE to defend against this claim. Discovery would be time-consuming and costly for both Parties. Thus, the cost of litigation could be substantial and would significantly exceed the disputed amount. In addition, this proceeding also raises complex legal issues related to elements of violations of Section 10(a)(1) of the Shipping Act of 1984. Therefore, the parties have agreed to compromise and settle this matter based upon the terms and conditions set forth herein.

In light of the foregoing, the settlement is fair, adequate and reasonable, particularly given the costs and risks of litigation and the amount of damages claimed. Moreover, as both parties have entered into this settlement willingly, the settlement is not the product of collusion or coercion, and is not inconsistent with public policy issues that the Commission is obliged to consider.

For the foregoing reasons, the parties submit that the proposed settlement meets all of the criteria for the Commission approval of the settlement.

CONCLUSION

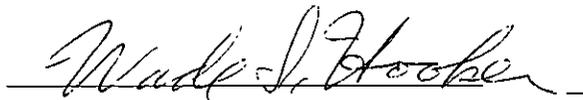
The Commission should accept the Settlement Agreement of Complainant and Respondent GLENCORE, and to make the following findings: (1) that the settlement is fair and reasonable under the circumstances; (2) that the settlement is consistent with the intent of 46 CFR §503.91; and, (3) that the settlement will not conflict with or contravene the purposes or principles of the Shipping Act, 46 USC App. §3000, *et seq.* The Commission should further discontinue the proceedings with prejudice and without costs to either party.

Respectfully submitted,

By:



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Dated in Washington, D.C. this *11th* day of March, 2011.