

FEDERAL MARITIME COMMISSION

DOCKET NO. 11-06

Indigo Logistics, LLC; Liliya Ivanenko; and Leonid Ivanenko –
Possible Violations of Section 19 of the Shipping Act of 1984
and the Commission's Regulations at 46 C.F.R. Part 515

**JOINT MEMORANDUM IN SUPPORT OF
PROPOSED SETTLEMENT**

Indigo Logistics, LLC, Liliya Ivanenko and Leonid Ivanenko (Respondents) and the Bureau of Enforcement (BOE) hereby submit this joint memorandum in support of the proposed settlement agreement appended hereto. The parties believe that the proposed agreement meets the Federal Maritime Commission's (Commission) criteria for approval of agreements resolving administrative enforcement claims and, therefore, should be approved.

INTRODUCTION

By Order of Investigation and Hearing served April 7, 2011, the Commission commenced an investigation to determine: 1) whether Respondents violated section 19 of the Shipping Act, 46 U.S.C. §§ 40901, 40902, and the Commission's regulations at 46 C.F.R. Part 515, by acting as an ocean transportation intermediary (OTI) without a license or evidence of financial responsibility; 2) whether, in the event violations of the Shipping Act are found, civil penalties should be assessed against Respondents and, if so, the amount of penalties to be

assessed; and 3) whether, in the event violations are found, appropriate cease and desist orders should be issued.

The Order of Investigation and Hearing designated BOE as a party to the proceeding. Following commencement of this proceeding, BOE and Respondents engaged in the process of discovery and conducted frequent settlement discussions. In conjunction with this proceeding, the Commission sought and obtained a preliminary injunction against Respondents prohibiting them from acting as an ocean transportation intermediary without a license and evidence of financial responsibility. The injunction, which is still in effect, was issued on April 15, 2011, by the U.S. District Court for the Northern District of Georgia in Case No. 1:11 – Civ. 1134 TCB - *Federal Maritime Commission v. Indigo Logistics, LLC, Liliya Ivanenko and Leonid Ivanenko*.

The settlement agreement accompanying this memorandum is the result of good faith negotiations between the parties. Absent approval of settlement, various procedural steps remain in this proceeding, including: several outstanding responses to BOE's discovery requests, the submission of pre-hearing statements, as well as the briefing and submission of the parties' respective cases. The settlement agreement admits the violations which formed the basis of the Commission's investigation and the Court's preliminary injunction and reflects what the parties believe to be an appropriate resolution of the matter. The Agreement includes Respondents' consent to entry of a cease and desist order that will bar Respondents from acting as an OTI or as an agent of an OTI for a period of five (5) years. The ban effectively continues the court injunction.¹ Respondents have also agreed to dissolve Indigo Logistics, LLC, close all websites maintained by the company or affiliated entities, remove any links to such websites, and relinquish all domain names associated with that company.

¹ The injunction will remain in effect only until the conclusion of the Commission's proceeding. 46 U.S.C. §41307.

The Agreement also includes payment of a significant civil penalty. The parties have agreed to a mechanism whereby payment of the penalty shall be made to an escrow account and, subsequently, payment from the escrow agent to the Commission within 5 days of final approval of the settlement agreement. Payment of the penalty into escrow by November 14, 2011, is a condition precedent to the effectiveness of all other provisions in the Agreement. Upon receiving notice of compliance with this condition, BOE would immediately advise the Administrative Law Judge (ALJ) that the condition has been met. In the event that Respondents fail to deposit the funds into the escrow account by the prescribed deadline, BOE would immediately notify the ALJ, and the Agreement would be without force or effect and deemed withdrawn.²

Respondents and BOE believe it is in the best interests of the parties and the shipping public to resolve this proceeding rather than engage in further litigation. Upon approval of the proposed settlement by the Presiding Officer and the Commission, Respondents and BOE seek dismissal of Docket 11-06.

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:

[E]ven 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

² The parties do not contemplate such an occurrence. Nevertheless, in the event of such a default, BOE believes that it could readily present its case-in-chief pursuant to an expedited schedule.

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 arm and serve to advise private parties that they may legitimately attempt to dispose of cases at least in part through conferences, agreements, or stipulations.

Senate Committee on the Judiciary, Administrative Procedure Act-Legislative History, S. Doc. No. 248-79, at 24 (2d Sess. 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 also 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 Services, Inc., 18 S.R.R. 1085, 1092 (1978) (citation omitted). See also *Del Monte Corp. v. Matson Navigation Co.*, 19 S.R.R. 1037, 1039 (1979); *Behring International, Inc. - Independent Ocean Freight Forwarder License No. 910*, 20 S.R.R. 1025, 1032-33 (Initial Decision; administratively final June 30, 1981).

The Commission’s regulations reflect its policy of encouraging settlements. 46 C.F.R. § 502.91. 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 the provisions of Rule 91 and its policy favoring settlements, the Commission has frequently approved settlements of administrative and investigative proceedings.³ They also recognize the designated role of BOE in formal proceedings and, necessarily, in the settlement of those proceedings. 46 C.F.R. §§ 502.42 and 502.61. The regulations also require that the Presiding Officer approve all such settlement agreements in formal proceedings. 46 C.F.R. § 502.603(a).

CRITERIA FOR APPROVAL OF SETTLEMENT

To discharge the duty imposed by 46 C.F.R. § 502.603(a), the Presiding Officer must decide whether the proposed settlement satisfies the appropriate criteria for approval. In so deciding, the Presiding Officer generally "reviews a settlement agreement to ensure that it does not contravene law or public policy. Such review typically includes evaluating factors to determine that the settlement agreement was not a product of fraud, duress, undue influence, or mistake." *World Chance Logistics (Hong Kong), Ltd. and Yu, Chi Shing (a.k.a. Johnny Yu) – Possible Violations of Section 10 of the Shipping Act of 1984 (World Chance)*, 31 S.R.R. 1346, 1350 (FMC 2010) (citations omitted). The Presiding Officer will also review the terms of a settlement agreement, "to ensure that the terms are fair, reasonable, and adequate. The review process frequently involves a balancing of the likelihood of success on the merits against the cost and complexity of proceeding to final judgment." *Id.*

³ See *Eastern Forwarding International, Inc. - Independent Ocean Freight Forwarding Application - Possible Violations, Section 44, Shipping Act, 1916, (Eastern Forwarding)*, 20 S.R.R. 283, 286 (Initial Decision; administratively final Sept. 8, 1980); *Far Eastern Shipping Co. - Possible Violations of Sections 16, Second Paragraph, 18(b)(3) and 18(c), Shipping Act, 1916, (FESCO)*, 21 S.R.R. 743, 764 (Initial Decision; administratively final, May 7, 1982); *Armada Great Lakes/East Africa Service, Ltd.; Great Lakes Transcaribbean Line, (Armada)* 23 S.R.R. 946, 949 (Initial Decision; administratively final Apr. 25, 1986); *Member Lines of the Transpacific Westbound Rate Agreement - Possible Violations of the Shipping Act of 1984, (TWRA)*, 23 S.R.R. 1329, 1340 (Initial Decision; administratively final Oct. 9, 1986); *Royal Caribbean Cruises Ltd. Possible Violations of Certification Requirements, (Royal Caribbean)*, 26 S.R.R. 64 (Order Approving Settlement and Discontinuing Proceeding, Dec. 4, 1991).

In Commission-initiated proceedings such as the instant one, the Presiding Officer must also decide whether the proposed settlement agreement satisfies the appropriate criteria for approval with regard to the issue of penalty assessment. A summary of the Commission's view of the relationship between the criteria for assessment of penalties and the criteria for approving settlements appears in the initial decision in *Armada, supra*:

As seen, Section 13(c) of the Act and § 505.3 of the Commission's regulations, which implements both Section 13 of the Act and Section 32 of the 1916 Act, explicitly set forth criteria for assessment of penalties, and while they do not directly address the criteria for settlement of penalties, I believe the latter are subsumed by the former. This is manifest from the history of the settlement process at the Commission. Section 32(e) of the 1916 Act was enacted in 1977. The rules and regulations implementing Section 32(e) were promulgated and published by the Commission in a predecessor version of 46 C.F.R. § 505, in 1979. Under those rules the 'criteria for compromise, settlement or assessment' might 'include but need not be limited to those which are set forth in 4 C.F.R. Parts 101-105.' . . . Those standards, particularly, the standards enumerated in 4 C.F.R. § 103, were a part of the Commission's program for settlement and collection of civil penalties even before the authority to assess penalties was given the Commission pursuant to Section 32(e). More to the point, it was held that those standards provided criteria for both settlements and assessments. 'They continue to provide valuable assistance to the Commission as an aid in determining the amount of penalty in assessment proceedings and in determining whether to approve proposed settlements in assessment proceedings.'

23 S.R.R. at 956 (footnote omitted) (emphasis in original) (quoting *Eastern Forwarding and Behring International, supra*). See also, *Marcella Shipping Co. Ltd.*, 23 S.R.R. 857, 866 (Initial Decision; administratively final Mar. 26, 1986).

In *FESCO*, the Commission summarized the appropriate criteria for approving proposed settlements where a penalty assessment is present as follows:

[S]ettlement may be based upon a determination that the agency's 'enforcement policy in terms of deterrence and securing compliance, both present and future, will be adequately served by acceptance of the sum to be agreed upon'; that 'the amount accepted in compromise. . . may reflect an appropriate discount for the administrative and litigative costs of collection having regard for the time it will take to effect collection'; the value of settling claims on the basis of pragmatic litigative probabilities, i.e., the ability to prove a case for the full amount claimed

either because of legal issues involved or a bona fide dispute as to facts; and that penalties may be settled 'for one or for more than one of the reasons authorized in this part.'

FESCO, supra, 21 S.R.R. at 759 (footnotes omitted). Subsequent to *FESCO*, the Commission reaffirmed that potential costs and uncertainties of success are valid factors to be considered both in the negotiation of a settlement, and in view of a settlement agreement. *Investigation of Unfiled Agreements - Yangming Marine Transport, Evergreen Marine Corporation and Orient Overseas Container Line, Inc., (Yangming)* 24 S.R.R. 910 (Order Adopting Initial Decision, Mar. 30, 1988). See also, *Royal Caribbean, supra*.

In accordance with the Commission's analysis as enunciated in *World Chance, FESCO, Eastern, Armada, Yangming, and Royal Caribbean, supra*, proposed settlements are to be evaluated on the basis of balancing agency enforcement policy of deterrence by respondents, the industry, and the shipping public⁴ with the litigative probabilities, litigative and administrative costs, and such other matters as justice may require. That balance favors approval of this proposed settlement.

As stated in the Introduction, several procedural steps remain in this proceeding, including: additional responses to BOE's discovery requests, the submission of pre-hearing statements, as well as the briefing and submission of the parties' respective cases. The potential litigative and administrative costs of this proceeding thus weigh heavily in favor of approval of this proposed settlement agreement. In this respect, under the terms of the Agreement, Respondents have admitted the violations alleged, whereas a proceeding would entail submission

⁴ The parties note that third-party shipper complaints were not a basis for the allegations in the Order of Investigation and Hearing, and were not part of the settlement discussions between the parties. No third party has come forward to contest the approval of the proposed settlement. Accordingly, the parties submit that the shipping public will not now be harmed by the approval of this settlement agreement. See *World Chance*, 31 S.R.R. at 1351-52.

of voluminous documentation and the resulting expenditure of resources in addressing that evidentiary presentation. In addition to such unnecessary costs, the proposed settlement avoids the uncertainties involved in any litigation and in particular the penal phase of the proceeding. In contrast, the proposed agreement brings the matter to conclusion, ensures the termination of the company's operations, and provides certainty to individual respondents with respect to the penalty thereby allowing them to plan their future.

With respect to the policy of enforcement, the Bureau of Enforcement stresses the importance of ensuring compliance with the Shipping Act of 1984. Respondents support the Commission's objectives, acknowledge BOE's case against them, will dismantle the company and discontinue holding out to provide OTI services (whether as principal or agent), and have agreed to remain out of the OTI business for a period of 5 years. The Commission has recognized that its enforcement policy is furthered in approving settlement agreements in which individual respondents agree to refrain from doing business in trades regulated by the Commission. Docket No. 99-03, *I Chen "Jenny" Chiang d/b/a/ Prestige Forwarding Co. – Possible Violations*, 28 S.R.R. 1080, 1083 (I.D., Administratively Final August 12, 1999); Docket No. 98-03, *Sea Dragon Navigation Ltd., et al. – Possible Violations*, 28 S.R.R. 527, 529 (I.D., Administratively Final Nov. 27, 1998); and Docket No. 03-07, *FSL International, Inc., et al. – Possible Violations of the 1984 Act and 46 C.F.R. 502.515*, 30 S.R.R. 255, 258 (I.D., Administratively Final April 14, 2004).

In addition, Respondents have agreed to pay a significant civil penalty which, when coupled with the ban, will have a deterrent effect upon these respondents, and on the industry as a whole. The settlement amount, the dissolution of the company, and the bar against the individuals from operating as an OTI or as an agent of an OTI for a prescribed period "will have

the desired effect on Respondent and others because it would serve as a disincentive to future unlawful activity." *World Chance*, 31 S.R.R. at 1352, (quoting *FESCO*, 21 S.R.R. at 759) (internal quotations omitted). Accordingly, the parties submit that the proposed settlement agreement will further the Commission's enforcement policy.

CONCLUSION

The proposed settlement agreement comprehensively addresses the issues relating to the above-referenced proceeding and meets the Commission's well established criteria for approval of agreements settling administrative enforcement claims and, therefore, should be approved and certified to the Commission. Upon approval of the settlement, Docket No. 11-06 should be discontinued in its entirety.

Respectfully submitted,


Peter J. King, Director
Brian L. Troiano, Deputy Director
Bureau of Enforcement


Henry P. Gonzalez, LL.M.
Carlos Rodriguez, Esq.
Rodriguez O'Donnell Gonzalez
& Williams, P.C.

Counsel for Respondents

Dated: October 14, 2011

form of a bond in Case No. 1:11-Civ. 1134-TCB, *Federal Maritime Commission v. Indigo Logistics, LLC, Liliya Ivanenko, and Leonid Ivanenko*, and said injunction remains in effect;

WHEREAS, BOE and Respondents agree that the Commission has jurisdiction over Respondents and over the violations as alleged;

WHEREAS, Respondents admit the violations described in the Commission's Order of Investigation in Docket No. 11-06, served April 7, 2011, and desire to finally resolve all issues in this proceeding by entering this Agreement;

WHEREAS, BOE and Respondents believe it is in the best interests of the parties and the shipping public to resolve this proceeding under the conditions stated herein rather than engage in continued litigation;

NOW, THEREFORE, in consideration of the premises herein, and in compromise of all civil penalties arising from the violations set forth and described herein, Respondents and the Commission's Bureau of Enforcement hereby agree upon the following terms:

- 1) On or before November 14, 2011, Respondents shall make monetary payment to an escrow account, in the total amount of \$50,000.00 (Fifty thousand Dollars) for the benefit of the Federal Maritime Commission. No later than November 15, 2011, Respondents shall provide written verification to the Commission that the total monetary payment of \$50,000 was placed in the escrow account. Compliance with the requirements of this paragraph is a condition precedent to the effectiveness of all other provisions of this Agreement. Should Respondents fail to comply with the requirements of this paragraph in its entirety as of November 15, 2011, the Agreement shall be deemed withdrawn by Respondents as of that date.
- 2) BOE and Respondents shall jointly submit to the Administrative Law Judge a motion seeking approval of this Agreement.

- 3) Upon the Commission's approval of the Agreement, the \$50,000 shall be paid to the Commission within five business days of the approval becoming administratively final.
- 4) Respondents Indigo Logistics, LLC, Liliya Ivanenko, and Leonid Ivanenko shall not engage in business as an OTI or as an agent of an OTI for a period of 5 years and hereby consent to entry of an Order prohibiting each of them from acting as an OTI as defined in Section 19 of the Act, 46 U.S.C. §§40901, 40902, and the Commission's regulations at 46 C.F.R. §515.2, or as an agent of an OTI for a period of five (5) years from the service date of an administratively final order discontinuing this proceeding.
- 5) Within 30 days of the date that an order approving this Agreement becomes administratively final, Respondents shall effect the dissolution of Indigo Logistics, LLC, pursuant to the applicable laws of Georgia;
- 6) Within 30 days of the date that an order approving this Agreement becomes administratively final, Respondents shall arrange for the closing of all websites maintained by Indigo Logistics, LLC or by any affiliated entity advertising Indigo's services; arrange for the removal of links on any other websites to such websites maintained by Indigo; and relinquish all domain names associated with or related to Indigo Logistics, LLC.
- 7) Respondents hereby waive any requirement that the Commission's decision or order contain a statement of findings of fact and conclusions of law.
- 8) Respondents hereby waive all rights to seek judicial review or otherwise challenge or contest the validity of the order entered pursuant to this Agreement.
- 9) BOE and Respondents agree that the order entered pursuant to this Agreement will have the same force and effect as Commission orders issued on a litigated or stipulated record;
- 10) Upon approval of the terms set forth in this Agreement by the Administrative Law Judge and the Commission, this instrument shall forever bar the commencement or

institution by the Commission of any civil penalty assessment proceeding or other claim for recovery of civil penalties against Respondents for alleged violations of the Shipping Act of 1984 and the Commission's regulations as set forth in FMC Docket No. 11-06, including the period from January 2008 through such date when this Agreement is executed by BOE and all Respondents.

11) Respondents are represented by counsel, have reviewed the terms of the Agreement with counsel, and understand the terms and conditions stated herein.

12) This Agreement is subject to approval by the Commission in accordance with 46 C.F.R. §502.603.

ON BEHALF OF RESPONDENT ~~Indigo Logistics, LLC~~

Signature: 

Printed Name: Leonid Ivanenko

Title: President

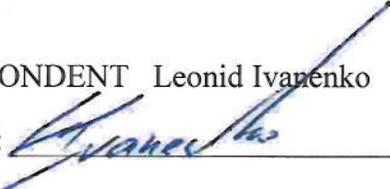
Date: 10/13/11

BY RESPONDENT Liliya Ivanenko

Signature: _____

Date: _____

BY RESPONDENT Leonid Ivanenko

Signature: 

Date: 10/13/11

ON BEHALF OF THE FEDERAL MARITIME COMMISSION

By: _____

Peter J. King, Director
Bureau of Enforcement

Date: _____

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- 11) Respondents are represented by counsel, have reviewed the terms of the Agreement with counsel, and understand the terms and conditions stated herein.
- 12) This Agreement is subject to approval by the Commission in accordance with 46 C.F.R. §502.603.

ON BEHALF OF RESPONDENT Indigo Logistics, LLC

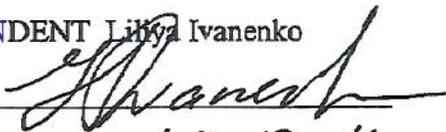
Signature: _____

Printed Name: _____

Title: _____

Date: _____

BY RESPONDENT *Liyya Ivanenko*

Signature: 

Date: 10-13-11

BY RESPONDENT Leonid Ivanenko

Signature: _____

Date: _____

ON BEHALF OF THE FEDERAL MARITIME COMMISSION

By: _____

Peter J. King, Director
Bureau of Enforcement

Date: _____

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- 11) Respondents are represented by counsel, have reviewed the terms of the Agreement with counsel, and understand the terms and conditions stated herein.
- 12) This Agreement is subject to approval by the Commission in accordance with 46 C.F.R. §502.603.

ON BEHALF OF RESPONDENT Indigo Logistics, LLC

Signature: _____

Printed Name: _____

Title: _____

Date: _____

BY RESPONDENT Liliya Ivanenko

Signature: _____

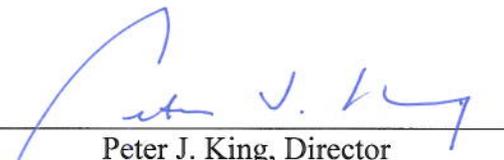
Date: _____

BY RESPONDENT Leonid Ivanenko

Signature: _____

Date: _____

ON BEHALF OF THE FEDERAL MARITIME COMMISSION

By: 
Peter J. King, Director
Bureau of Enforcement

Date: 10-14-2011