IN THE COMPETITION APPEAL TRIBUNAL **Case no. 1339/7/7/20**

B E T W E E N : -

MARK MCLAREN CLASS REPRESENTATIVE LIMITED

Joint Applicant and Class Representative

-and-

(1) MOL (EUROPE AFRICA) LTD
(2) MITSUI O.S.K. LINES LIMITED
(3) NISSAN MOTOR CAR CARRIER CO. LTD
(4) KAWASAKI KISEN KAISHA LTD
(5) NIPPON YUSEN KABUSHIKI KAISHA
(6) WALLENIUS WILHELMSEN OCEAN AS
(7) EUKOR CAR CARRIERS INC
(8) WALLENIUS LOGISTICS AB
(9) WILHELMSEN SHIPS HOLDING MALTA LIMITED
(10) WALLENIUS LINES AB
(11) WALLENIUS WILHELMSEN ASA

Non-Settling Defendants

(12) COMPANIA SUDAMERICANA DE VAPORES S.A.

Joint Applicant and Defendant

JOINT APPLICATION FOR A COLLECTIVE SETTLEMENT APPROVAL ORDER

PROPOSED SETTLEMENT BETWEEN THE CLASS REPRESENTATIVE AND THE TWELFTH DEFENDANT

For the Class Representative:		**For CSAV:**	
Signature:		Signature:	
Name:	Belinda Hollway	Name:	Cormac Gerard O'Daly
Position:	Partner	Position:	Solicitor of CSAV
Dated:	5 October 2023	Dated:	5 October 2023

A INTRODUCTION AND SUMMARY

1. This is a joint application for a collective settlement approval order ("**CSAO**"), pursuant to rule 94 of the Competition Appeal Tribunal Rules 2015 No. 1648 (the "**Rules**") (the "**CSAO Application**"), which is made by the Class Representative ("**CR**") and the Twelfth Defendant, Compañía Sud Americana de Vapores S.A. ("**CSAV**"), regarding the proposed settlement between them.

2. For the reasons set out more fully below and in the evidence in support of this CSAO Application, both the CR and CSAV believe that the terms of their proposed settlement are just and reasonable, and they therefore respectfully invite the Tribunal to make a CSAO in the terms set out in the draft CSAO annexed to this CSAO Application at Annex 1.

3. This CSAO Application has been duly signed by the firms of solicitors acting, respectively, for the CR and for CSAV. By telephone call between the solicitors for the CR and the Tribunal Registry at approximately 16:30 on 25 September 2023, the Tribunal confirmed that only an electronic copy of the CSAO Application required to be filed: cf. rule 94(5); the Tribunal's 'Guide to Proceedings' 2015 (the "**Guide**") § 6.99.

4. The CSAO Application is supported by the following documents:

   (a) the second witness statement of Mr Mark McLaren ("**McLaren 2**"), the sole director and sole member of Mark McLaren Class Representative Limited, the CR, together with exhibit MM2.1 (a copy of the settlement agreement between the CR and CSAV);

   (b) the fourth expert report of Mr Tom Robinson ("**Robinson 4**"), of BDO LLP, the CR's economic expert, together with Appendix 1 to that report, setting out his calculations of figures relevant to the assessment of whether the proposed settlement is just and reasonable;

   (c) the first witness statement of Ms Clare Ducksbury ("**Ducksbury 1**"), founder and CEO of Case Pilots Limited, the firm engaged by the CR to assist with noticing and distribution to the class;

(d) the fourth witness statement of Ms Belinda Hollway ("**Hollway 4**"), the partner at Scott+Scott UK LLP ("**SSUK**") with conduct of these proceedings for the CR, together with exhibits BAH4.1 and BAH4.2;

(e) the first witness statement of Mr Edmundo Eluchans ("**Eluchans 1**"), the Legal Compliance Officer of CSAV;

(f) the first witness statement of Mr Cormac O'Daly ("**O'Daly 1**"), the partner at Wilmer Hale with conduct of these proceedings for CSAV, together with exhibit CGOD1;

(g) the first expert report of Mr Jon Lawrence ("**Lawrence 1**"), an independent expert with over 20 years' experience in litigating and settling competition damages claims;

(h) the draft CSAO; and

(i) two draft notices to publicise to the represented persons: (i) the filing of this CSAO Application and the hearing listed for 6 December 2023; and (ii) the making of the CSAO, if granted by the Tribunal pursuant to this CSAO Application.

5. The remainder of this application is structured as follows:

(a) **Section 0** sets out salient elements of the factual background to this CSAO Application; and

(b) **Section C** addresses the terms of the proposed collective settlement by reference to the requirements of rule 94 of the Rules and related provisions of the Guide.

B FACTUAL BACKGROUND

6. This CSAO Application is made in the context of collective proceedings combining follow-on claims under section 47A of the Competition Act 1998 for damages for losses caused by the Defendants' breach of statutory duty in infringing Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the Agreement on the European Economic Area. The Defendants' liability was determined by the European Commission in an infringement decision adopted on 21 February 2018, in Case AT.40009 – *Maritime Car Carriers* (the "**Decision**"). The Decision was addressed to all of the Defendants and found that the cartel operated between 18 October 2006 and 6 September 2012. However, CSAV was found not to have participated in certain aspects of the infringing conduct.

7. In its Re-Amended Claim Form, the CR alleges that vehicle shipping costs were unlawfully inflated as a result of the Defendants' anticompetitive conduct, and that these inflated charges were passed on through the supply chain as part of the delivery charges which are ultimately paid by the first person to purchase or finance a vehicle.

8. On 20 February 2020, the CR filed its application for a collective proceedings order ("**CPO**"). CSAV did not oppose certification, but the other Defendants did. On 20 May 2022, the Tribunal certified the claims as eligible for inclusion in opt-out collective proceedings and made the CPO accordingly. Pursuant to §§ 5-6 of the CPO, the notice period for persons domiciled within the United Kingdom ("**UK**") wishing to opt out, and persons domiciled outside of the UK wishing to opt in, was set to expire after 12 August 2022.

9. Meanwhile, on 8 and 9 November 2022, the Court of Appeal heard an appeal by the First to Eleventh Defendants (i.e., all Defendants except CSAV) against the Tribunal's certification decision. On 21 December 2022, the Court of Appeal handed down its judgment dismissing all of the Defendants' grounds of appeal to the Tribunal's certification judgment, subject only to a matter of case management which was remitted to the Tribunal. On 17 July 2023, permission to appeal to the Supreme Court was refused.

C THE PROPOSED COLLECTIVE SETTLEMENT

10. The CR and CSAV address below each of the matters specified under rule 94(4) as being required for inclusion in the CSAO Application.

(1) Details of claims to be settled by the proposed collective settlement: rule 94(4)(a)

11. As set out in **Section 0** above and discussed more fully in Section B of Hollway 4 and Section A of O'Daly 1, the claims to be settled by the proposed collective settlement between the CR and CSAV are CSAV's share of the liability in respect of follow-on damages claims arising from the *Maritime Car Carriers* Decision which are the subject of the present collective proceedings. The collective proceedings will continue in respect of the share of the liability attributable to the non-settling Defendants.

12. At the time of filing the CPO application, the CR's economic expert, Mr Tom Robinson of BDO LLP, estimated the overall quantum of the claims against all of the Defendants to the collective proceedings at £147,191,601. His estimate was based on an estimated shipping charge of USD 375, 20% overcharge and interest at the Bank of England base rate plus 2%, on a compound basis for consumers who purchased their vehicle on finance for a period of four years from the date of purchase, and on a simple basis for all businesses, consumers who purchased vehicles outright, and consumers for the period after four years from the date of purchase.

13. As set out in more detail below, the CR seeks the Tribunal's approval to settle the CR's claim against CSAV in these proceedings for 1.7% of the overall value of the claim against all of the Defendants together: Hollway 4 § 52 and O'Daly § 29. This 1.7% figure represents CSAV's market share based on the number of vessels, as a proportion of the Defendants' total market share: Robinson 4 § 3.2.

(2) Terms of the proposed collective settlement: rule 94(4)(b)

14. The proposed settlement agreement is exhibited to McLaren 2 at MM2.1 and its terms, and particularly the overall settlement sum, are discussed in McLaren 2, Hollway 4, O'Daly 1 and Eluchans 1.

15. In summary:

(a) As set out in clause 2 of the proposed settlement agreement, the CR and CSAV agree that, in full and final settlement of the collective proceedings against CSAV, and subject to the Tribunal making a CSAO, CSAV shall pay the CR (on behalf of the class) a total of GBP 1,500,000. That settlement sum comprises three elements: (i) £1,120,000 in damages (the "**Damages Sum**"); (ii) £100,000 by way of contribution to the CR's costs of this CSAO Application (or, if such costs are less than £100,000, an additional sum towards settlement of CSAV's share of the costs of the collective proceedings); and (iii) £280,000 in full and final settlement of CSAV's share of the costs of the collective proceedings (excluding any costs awards already made and settled). The amount of the settlement is discussed further in Robinson 4, McLaren 2 at §§ 10-14, Hollway 4 at §§ 44-46, O'Daly 1 at §§ 25 and 29-30, and at paragraphs 19 to 20 below.

(b) At clause 3, the parties have included a 'barring provision', as contemplated in the Guide §§ 6.130-6.131 where a partial collective settlement is reached with one or more, but not all, of the defendants to collective proceedings. This provision, and the CR's application for an equivalent protection for represented persons, is discussed further in McLaren 2 at §§ 15-22, Hollway 4 §§ 74-80, O'Daly 1 at § 26, and at paragraphs 45 to 46 below.

(c) Clause 4 provides that the Damages Sum shall be held in escrow until the conclusion of the collective proceedings or such other time as the CR considers it economic, proportionate and in the interests of the class to seek to distribute it, and the Tribunal approves the CR doing so. This provision is discussed further in McLaren 2 at §§ 24-27, generally in Ducksbury 1, and at paragraphs 40 to 42 below.

(d) At clause 4, the parties have also made provision for a 'reverter', i.e., for the reversion of unclaimed settlement sums to one or more settling defendants as a means of incentivising settlement, which is a possible mechanism discussed in the Guide at the final bullet point of § 6.125. This provision is discussed further in McLaren 2 at §§ 28-39, Hollway 4 §§ 91-97, O'Daly 1 at § 26, and at paragraphs 35 to 37 below.

(e) Clause 5 makes provision for the parties to apply jointly to the Tribunal for a CSAO, as they now do by this CSAO Application.

(f) Clause 6 states that the CR shall file a separate application relating to stakeholder costs, fees and disbursements (the "**Stakeholder Costs Application**"). While *inter partes* costs, fees and disbursements are dealt with in this CSAO Application, the CR's separate Stakeholder Costs Application shall deal with additional costs, fees and disbursements to be sought to enable the CR to pay stakeholders with a contingent interest in the litigation. For the avoidance of doubt, these are separate applications and the success of the CSAO Application is not contingent on or related to the success of the Stakeholder Costs Application.

(g) Subject to the Tribunal's approval, clauses 7, 8 and 9 make provision for a stay of the collective proceedings against CSAV, release and waiver, and agreements not to sue. Clause 10 is a standard non-admission clause, and clause 11 makes provision as to the immediate effect of the agreement once concluded.

(h) Clauses 12 to 19 set out 'boilerplate' provisions.

(3) The applicants' belief that the terms are just and reasonable: rule 94(4)(c) (and rule 94(9))

16. For the reasons set out in the applicants' evidence in support of this application, and taking account of all relevant circumstances (including the matters set out in rule 94(9)(a)-(g), and discussed at Guide §§ 6.125 to 6.128), the CR and CSAV believe that the terms of the proposed settlement are just and reasonable: see McLaren 2, Eluchans 1 at §§ 7-9, and O'Daly 1, Section C.

17. In the CR's case, this belief is based on the matters set out in the supporting evidence, including his privileged discussions with the CR's Advisory Committee at a meeting on 18 September 2023 attended by Sir Richard Aikens, Nick Stace and Kate Wellington. Steve Fowler was unable to attend but has been briefed and consulted separately. None of the Advisory Committee raised any concerns that the terms of the proposed settlement were not just and reasonable or in the best interest of the class: see McLaren 2, Section C.

18. This belief is also supported by the independent expert report of Mr Lawrence, as discussed further at paragraphs 32 to 33 below.

(a) The amount and terms of the settlement

19. The CR and CSAV note that the Guide § 6.98 (third indent) suggests that the evidence filed in support of the settling parties' belief that the terms of the settlement are just and reasonable may include a report from an independent expert (such as an economist) or an opinion by counsel as to the merits of the settlement.

20. The CR and CSAV rely on the opinion of independent counsel, Mr Lawrence, as to the merits of the settlement as a whole. Mr Lawrence's expert opinion is addressed at paragraphs 32 to 33 below. CSAV notes the report of the CR's expert economist, Mr Robinson of BDO, on which the CR relies, and agrees with the analysis it sets out based on the market share figures used and the amounts claimed in the proceedings.

21. As to the Damages Sum under the settlement, the CR and CSAV refer to the expert report of Mr Robinson, who explains the market share percentage for CSAV; the estimated damages figure for CSAV's share of the total damages; and the total damages figure for the entire class if the proposed CSAV settlement was grossed up based on CSAV's market share percentage: see Robinson 4. Mr Robinson estimates that CSAV's market share, as a proportion of the Defendants' total market share, was 1.7% based on the number of vessels, or 1.5% based on the capacity of the vessels. On that basis, Mr Robinson estimates that CSAV's share of the damages would be between £1.048m and £2.494m: see, e.g., Robinson 4 §§ 3.2-3.4. The Damages Sum is therefore between 106% and 45% of CSAV's share of the damages, as estimated by Mr Robinson: see McLaren 2 § 12 (and Hollway 4 §§ 47-53). Indeed, the Damages Sum is many times greater than the amount which CSAV considers it would have to pay (if anything) following trial: Eluchans 1 § 7; O'Daly 1 §§ 29-30.

22. As to the costs payments agreed under the settlement, the CR refers to the analysis by Ms Hollway at Hollway 4 §§ 54-66 and §§ 67-68, which demonstrates that the level of costs recovery is just and reasonable.

(b) The number or estimated number of persons likely to be entitled to a share of the settlement

23. The CR refers to its best estimate of the size of the class in the Collective Proceedings Claim Form § 50, i.e., that the class will certainly number in the millions. The CR does not see any reason why the number of persons entitled to a share of the settlement would be any smaller than the number of persons falling within the class defined in the CPO, i.e., a class numbering in the millions (albeit with deceased persons and defunct companies excluded): see Hollway 4 § 101.

(c) The likelihood of judgment being obtained in collective proceedings for an amount significantly in excess of the amount of the settlement

24. While it remains possible that, were the matter to proceed to trial, the CR would obtain judgment in the collective proceedings for an amount significantly in excess of the amount of the proposed settlement, the amount agreed does not fall below the bottom end of Mr Robinson's preliminary damages estimate: see the analysis in Robinson 4, including the points set out at paragraph 21 above and the further analysis at §§ 3.5-3.6 and Table 11 of Robinson 4.

25. Mr Lawrence considers that a decision to settle for a sum which falls somewhere within the range of figures calculated by Mr Robinson can be regarded as reasonable from the perspective of the class in these proceedings: see Lawrence 1 § 4.9(d). In concluding that there is considerable merit in the proposed settlement from the perspective of the class, Mr Lawrence identifies the risk factors that may impact on the chances of success at trial: see Lawrence 1 Sections 3 and 4.

26. Further, this conclusion accords with Ms Hollway's assessment of the risks to the CR of pursuing its claim against CSAV to trial (instead of concluding the proposed settlement): see Hollway 4 §§ 15, 102. In identifying those risks, Ms Hollway sets out the key issues in dispute between the CR and CSAV, including the main defences advanced by CSAV, and the CR's intended counter-arguments to those defences: Hollway 4 §§ 14-43. This summary includes reference to a possible preliminary issues hearing on whether CSAV can be held jointly and severally liable for loss caused by the conduct in which the Decision finds that the other Defendants engaged: Hollway 4, §§ 36-42.

27. Ms Hollway observes that there are various issues in dispute with CSAV, it is inherent in litigation that every issue carries litigation risk, and it is in the context of these issues and the litigation risk that they carry that the CR, and the Tribunal, must consider whether the proposed settlement is just and reasonable: Hollway 4, § 46.

28. Consistent with that observation, Mr O'Daly's evidence for CSAV is that "*it is highly unlikely that CSAV would be held liable for an award higher than the Settlement Sum*": O'Daly 1 § 30. However, like the CR, CSAV recognises the inherent risks of litigation and the uncertainty regarding evidence to be finally adduced at trial; and CSAV also makes reference to the very substantial costs risk and cost in terms of time and human resources associated with pursuing such litigation to its conclusion: Eluchans 1 §§ 7-9; O'Daly 1 at §§ 31-32.

(d) The likely duration and costs of the collective proceedings if they proceed to trial

29. The Tribunal has ordered the trial of these collective proceedings to be listed in the Hilary Term 2025 with a provisional time estimate of 10 weeks. The case budget which appears at Appendix 5 of Mr McLaren's first witness statement sets out the costs (both time cost and disbursements) between CPO and trial as £11,862,600 (including VAT): see Hollway 4 § 103. CSAV estimates that its costs of fighting the case to trial on the basis of the current time estimate (and even excluding the costs of fighting the preliminary issue) would "*likely be around four times*" the amount of the Settlement Sum; Eluchans 1 § 7; O'Daly 1 § 32.

30. While settlement with CSAV will not obviate the need for a trial of the claims against the other eleven Defendants, the CR anticipates that the settlement will decrease costs and possibly shorten the duration of the trial. It will also mean that CSAV's application for the determination of a preliminary issue will not need to be deal with, which is a clear saving of costs and resources: see Hollway 4 §§ 36-42, 104; O'Daly 1 at § 23.

(e) Any opinion by an independent expert

31. The independent expert opinion of Mr Robinson, an economist, is addressed at paragraphs 20 to 21 above.

32. The CR and CSAV also rely upon the expert opinion of Mr Lawrence. As he explains in his report, Mr Lawrence has over 20 years' experience of litigating and settling

competition damages and other complex commercial claims, formerly as a partner at Freshfields Bruckhaus Deringer LLP and now as a barrister at Brick Court Chambers: see Lawrence 1, Section 2 and Appendix 3.

33. Having reviewed the documents relating to the proposed settlement between the CR and CSAV, and based on his extensive experience of settling such claims, Mr Lawrence reaches the clear and unequivocal view that he "*can see considerable merit in the terms agreed from the perspective of the Class*": see Lawrence 1, Sections 3 to 5 and § 5.1 in particular.

(f) The views of any represented person (or other appropriate category of person)

34. The CR and CSAV will make submissions, if so advised, in advance of and at the hearing of the CSAO Application in respect of any views expressed by represented persons following the publication of this CSAO Application.

(g) The provisions relating to the disposition of any unclaimed balance

35. As noted above, subject to the approval of the Tribunal, the parties have made provision in the proposed settlement agreement for the disposition, after distributions and payment of costs, fees and disbursements, of any unclaimed balance of the settlement sums to revert to CSAV on the basis set out at clause 4.5 to 4.8. To the extent that any of those sums remain after distribution, and after any other payments directed by the Tribunal, then the CR will seek a direction from the Tribunal that the Damages Sum (or the remainder, whichever is lower) will revert back to CSAV by way of the process envisaged in the final sub-paragraph of § 6.125 of the Guide (the "**Reverter**"): see clause 4.5.

36. In the event that the CR agrees similar provisions in future with any of the other Defendants, the CR has agreed with CSAV that CSAV will receive the benefit of the Reverter on a 'first in, last out' basis, meaning that, as the first Defendant to contribute to the 'distribution sum', CSAV's contribution will be treated as the last to be distributed and therefore the most likely to form part of any unclaimed balance which would be available for any reversion approved by the Tribunal: see clauses 4.6-4.7.

37. As Mr McLaren, Ms Hollway and Mr O'Daly explain in their respective statements, this Reverter mechanism has been included as a means of incentivising settlement,

maximising the total funds available for distribution, and borrowing from the principles which underpin the incentives of the successful leniency regimes which now form part of public competition law enforcement regimes in many jurisdictions around the world. The Reverter mechanism in this case is just and reasonable for the reasons set out in Mr McLaren's, Ms Hollway's and Mr O'Daly's statements, including any such payment being subject to the further approval of the Tribunal, and the Reverter applying only to the Damages Sum (and not the settlement sum in respect of costs): see McLaren 2 at §§ 28-39; Hollway 4 §§ 91-97; and O'Daly 1 § 26.

(h) Other matters

38. The Guide § 6.127 notes that the Tribunal will wish to be satisfied that the CR and its lawyers had sufficient information to assess the reasonableness of the settlement to represented persons. As set out in the supporting evidence and in this CSAO Application, the CR and its lawyers have carefully considered all of the information available to them in reaching the view that the proposed settlement is just and reasonable.

39. For completeness, the CR notes that, at the time of the in-principle settlement agreed on 19 July 2023, CSAV had provided initial disclosure to the CR but neither the CR nor its expert, Mr Robinson, had access to the information which would have allowed the CR to conduct the proposed regression analysis: see Hollway 4 §§ 23-24. However, Mr Robinson explains in detail in Robinson 4 (referring back to his previous reports) the publicly available information on which his estimates are based. The CR submits that this information, along with other information including that in the first expert report of Mr Andrew Goss and Mr Anthony Whitehorn, is sufficient to determine whether the proposed settlement is just and reasonable: see McLaren 2 §§ 8-9 and Hollway 4 § 25.

(4) How any sums received are to be paid and distributed: rule 94(4)(d)

40. Rather than distributing the Damages Sum now, the CR proposes to hold the Damages Sum in escrow until a later stage at the proceedings. The CR's proposal as to when the sums received should be paid and distributed is informed by: the evidence of Ms Ducksbury, who has considerable experience of distributing sums to large groups of class members, claimants and individuals; and that of Ms Hollway, who provides an explanation of how the escrow arrangements would work in practice: see Hollway 4 §§ 89-90.

41. In her statement, Ms Ducksbury addresses distribution and explains the challenges of distributing a relatively small amount and why it would not be proportionate to distribute the Damages Sum to class members at this stage. Rather, she suggests that the best approach would be to hold the Damages Sum in escrow until a later stage in the proceedings, when the CR will have greater certainty as to the total sum available for distribution: see Ducksbury 1 § 39.

42. Having considered Ms Ducksbury's views, and the explanation provided by Ms Hollway, and the interests of class members carefully, the CR has concluded that holding the Damages Sum in escrow would be appropriate and in the best interests of the class. In particular, the CR notes the potential issues with proportionality and the potential disincentive for class members to claim a share of aggregated damages if they were required to engage more than once for a relatively modest total claim value: see McLaren 2 §§ 24-27. The CR shall seek to obtain as favourable an interest rate as possible to ensure that Class members are not prejudiced by the delayed distribution: see McLaren 2 § 27.

(5) The draft CSAO: rule 94(4)(e) (and rule 94(10))

43. The draft CSAO is annexed to this CSAO Application at Annex 1.

(a) Deferring specification of a time and manner for opt-out / opt-in

44. For the reasons set out at McLaren 2 §§ 45-47, the draft CSAO does <u>not</u> specify a time and manner by which a represented person must opt out (for UK-domiciled persons) or opt in (for non-UK-domiciled persons): cf. rule 94(10) (and Guide § 6.132). The CR does not believe it would be fair and reasonable to set a deadline by which represented persons must opt out or be bound by the CSAO at this stage, principally because (i) the present settlement only relates to a modest proportion of the overall damages sought by the collective proceedings and (ii), if the proposed settlement is approved, the collective proceedings against the other Defendants will be ongoing. As such, the represented persons cannot yet make a properly informed decision as to whether or not they should opt out which should properly be based on their likely <u>overall</u> recovery (i.e., including potential recovery against the other Defendants). Instead, the CR proposes to set an opt-out deadline in due course after any distribution proposal is later approved by the Tribunal (as to which, see paragraphs 41 to 42 above).

(b) Directions for the incorporation of a 'barring' provision in the CSAO: Guide § 6.131

45. As noted above, clause 3 of the proposed settlement agreement includes an agreement to seek a 'barring provision', i.e., a provision in the CSAO which prevents the other (non-settling) Defendants from claiming a contribution from CSAV. The CR and CSAV recognise that the object of the settlement for CSAV is to achieve finality in relation to this litigation, and that will not be achieved absent a barring order: see Hollway 4 §§ 74-80 and O'Daly 1 § 26, which provide a fuller explanation of the rationale for the inclusion of this provision in the CSAO. The CR and CSAV note that the Guide specifically contemplates the inclusion of a 'barring provision' within a CSAO in a case where a partial collective settlement is reached with one or more, but not all, of the defendants to collective proceedings: Guide §§ 6.130-6.131.

46. Further, the CR seeks directions for an equivalent protection for the CR itself in the interest of the represented persons: see Hollway 4 §§ 79-80. Provided the Tribunal is satisfied that the basis of apportionment of liability as between CSAV and the other Defendants by reference to CSAV's 1.7% market share is just and reasonable, the effect of the proposed provision would be to preclude the other (non-settling) Defendants from later seeking to suggest that the CR has in fact settled a greater proportion of the total liability than intended. Absent such protection, there would be a material risk in a class representative entering into a settlement with one of a number of defendants if the settling defendant's share of liability could be re-opened at a later date.

(c) Other matters

47. The collective settlement agreement is exhibited to McLaren 2, and the CSAO includes the statements recommended at Guide § 6.133, save the statement at the third indent (since that statement will only become appropriate once the represented persons have had an opportunity to decide whether to opt out in due course: see paragraph 44 above).

(6) Form and manner by which the class representative proposes to give notice to represented persons: rule 94(4)(f)(i) (and rules 94(11) and 94(13))

48. Mr McLaren sets out details of the form and manner by which the CR proposes to give notice to represented persons: see McLaren 2, Section D.

49. In particular, once the CSAO Application is filed, a notice will be published on the claim website in a form approved by the Tribunal, the CR's social media pages will be updated, and an email update will be sent to all those who have registered their interest on the claim website or by other means, including represented persons who have done so: see McLaren 2 § 43.

50. The CR proposes to undertake rigorous further noticing of represented persons in due course once the CR applies to make, and the Tribunal approves, distribution at a later stage: see McLaren 2 § 43.

SARAH FORD KC **SARAH ABRAM KC**

NICHOLAS GIBSON **HANNAH BERNSTEIN**

SARAH O'KEEFFE

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1339/7/7/20

B E T W E E N : -

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Joint Applicant and Class Representative

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Non-Settling Defendants

(12) COMPANIA SUD AMERICANA DE VAPORES S.A.

Joint Applicant and Defendant

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draft COLLECTIVE SETTLEMENT APPROVAL ORDER

UPON the making of an order dated 20 May 2022, pursuant to section 47B of the Competition Act 1998 (the "**1998 Act**") and Rules 77 and 80 of the Tribunal Rules, that Mark McLaren Class Representative Limited (the "**Class Representative**") be authorised to act as class representative to continue collective proceedings on an opt-out basis (the "**CPO**")

AND UPON the CPO specifying a deadline of 12 August 2022 by when (i) persons satisfying the class definition who are domiciled within the UK on 20 May 2022 must notify an intention to opt out and (ii) persons satisfying the class definition who are domiciled outside the UK must notify an intention to opt in

AND UPON the Class Representative and the Twelfth Defendant, Compañía Sud Americana de Vapores S.A. ("**CSAV**"), reaching a settlement in principle on 19 July 2023

AND UPON the Class Representative and CSAV having finalised the terms of their proposed settlement agreement on 27 September 2023 (the "**Proposed Collective Settlement**")

AND UPON the Class Representative and CSAV making a joint application dated 6 October 2023, pursuant to Rule 94 of the Tribunal Rules, for a collective settlement approval order (the "**CSAO Application**")

AND UPON the Tribunal considering the joint CSAO Application, the terms of the Proposed Collective Settlement and the supporting evidence, written submissions for the Class Representative and CSAV [and the First to Eleventh Defendants (the "**Non-Settling Defendants**")], and oral submissions from Sarah Ford KC for the Class Representative, Sarah Abram KC for CSAV [and […] for the Non-Settling Defendants] at an in-person hearing on 6 December 2023

AND UPON the Tribunal being satisfied that the terms of the Proposed Collective Settlement are just and reasonable

IT IS ORDERED THAT:

Approval of the Proposed Collective Settlement

1. Pursuant to section 49A(5) of the 1998 Act, the Proposed Collective Settlement is approved in the terms of the settlement agreement between the Class Representative and CSAV which was exhibited to the second witness statement of Mr Mark McLaren and is annexed to this Order (the "**Collective Settlement**").

The Damages Sum

2. Pursuant to the Collective Settlement, and within 28 days of this Order, CSAV shall pay to the Class Representative £1,120,000 in full and final settlement of the claims for damages as against CSAV in these collective proceedings (the "**Damages Sum**").

3. The Damages Sum shall be held in an escrow account until further order in accordance with the arrangements described at paragraphs 89 and 90 of the fourth witness statement of Ms Belinda Hollway of Scott+Scott UK LLP, solicitors for the Class Representative.

Stay of collective proceedings against CSAV

4. These collective proceedings against CSAV shall be stayed upon the terms of the Collective Settlement, except for the purpose of enforcing those terms.

Opting out and opting in

5. The decision of the Tribunal as to the time and manner by when (i) represented persons domiciled in the UK on a domicile date to be specified may opt out of the Collective Settlement and (ii) represented persons not domiciled in the UK on that domicile date may opt into the Collective Settlement, shall be deferred until further order.

Barring orders

6. The Non-Settling Defendants shall be barred from claiming any contribution from CSAV, as the settling Defendant.

7. The Non-Settling Defendants shall be further barred from arguing that CSAV's proportionate liability for damages in relation to the claims in these collective proceedings is greater than 1.7% of the total damages, which is the basis on which the Damages Sum under the Collective Settlement has been calculated.

Notification

8. The Class Representative is to publicise this order using a notice approved by the Tribunal and in accordance with the proposal set out in the evidence in support of the CSAO Application.

Costs

9. Pursuant to the Collective Settlement, and within 28 days of this Order, CSAV shall pay the Class Representative:

   (a) £280,000 in respect of CSAV's share of the Class Representative's costs of these proceedings (excluding any costs awards already made and settled between the Class Representative and CSAV and/or the other Defendants); and

   (b) £100,000 by way of contribution to the Class Representative's costs of this CSAO Application or, in the event that such costs are less than £100,000, as an additional payment towards the Class Representative's costs falling within paragraph 9(a) above.

General

10. There be liberty for each party to the Collective Settlement to apply to the Tribunal for purpose of enforcing the terms of the Collective Settlement without the need to bring a new claim.

11. There be liberty for the Class Representative and the Non-Settling Defendants to apply in respect of paragraphs 3 and 5 of this Order.

<Name> Made: <Date>

[President/Chair] of the Competition Appeal Tribunal Drawn: <Date>

ANNEX

COLLECTIVE SETTLEMENT AGREEMENT

BETWEEN

MARK MCLAREN CLASS REPRESENTATIVE LIMITED

AND

COMPANIA SUD AMERICANA DE VAPORES S.A.

DATED

27 SEPTEMBER 2023