In the Matter of the Arbitration between CHEVRON MARINE LIMITED and CHEVRON PRODUCTS COMPANY, a Division of Chevron USA, jointly as Claimants/Charterers and STENA BULK AB, as Disponent Owners of the **STENA CONQUEST**	**DECISION AND FINAL AWARD**

Before: Thomas F. Fox
Manfred W. Arnold
James J. Warfield, Chairman

Appearances: Bell, Ryniker & Letourneau
for and on behalf of Chevron Marine Limited and
Chevron Products Company
by Michael K. Bell, Esq. and Robert J. Ryniker, Esq.

Cichanowicz, Callan, Keane, Vengrow & Textor, LLP
for and on behalf of Stena Bulk AB
by James M. Textor, Esq.

INTRODUCTION

On January 18, 2008, Stena Bulk LLC USA (hereinafter "Owners" or "Stena") fixed the STENA CONQUEST with Chevron Marine Ltd. (hereinafter "Charterers" or "Chevron") for the carriage of a cargo of Ultra Low Sulfur Diesel (ULSD) from

California to Chile.[1] The fixture was based upon the ASBATANKFOY Form with Chevron Charter Party Clauses (as revised May 2004) 1 through 43. The laycan were January 21-23, 2008.

Charterers instructed the vessel to proceed to the Plains All American Terminal at Martinez (California)[2] to load 100,000 bbls of ULSD and then proceed to Chevron's refinery at Richmond (California) to load an additional parcel of 200,000 bbls of ULSD for ultimate discharge at in Chile.

Certain disputes arose after vessel's arrival at Martinez with respect to the cleanliness and suitability of vessel's tanks to carry this cargo which ultimately led Chevron to call for arbitration pursuant to Clause 41 of the Chevron terms, which provided for arbitration in New York under the rules of the Society of Maritime Arbitrators (SMA).

PROCEEDINGS

On December 30, 2008, Chevron demanded arbitration under the STENA CONQUEST charter party with a claim of cargo contamination on behalf of Chevron Products Corporation, as owners of the cargo. Owners responded with a demurrage claim arising from the delays at the loading port and Charterers' steps to resolve the contamination encountered at loadport. Charterers appointed Thomas F. Fox as arbitrator, Owners responded by appointing Manfred W. Arnold, and the two selected

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[1] At the request of the panel for clarification, counsel stipulated and agreed to the above caption.
[2] An independent storage facility, not owned or controlled by Chevron.

James J. Warfield as the third arbitrator and panel chairman for procedural matters on January 9, 2009. Written disclosures were provided to the parties, the panel was accepted and hearings were held on June 10 and 11 and December 1, 2009. The panel heard the testimony of six witnesses; at the first hearing, two Chevron employees testified, *i.e.* Barry Paul Dixon[3] and Darko Micic;[4] at the second hearing, Andrew David Lott of Woodbridge Marine testified on behalf of Charterers; at the third hearing, Jeffrey R. Kay of Nalco Company testified at the request of the panel. The arbitrators also heard the cross-examination of two Stena witnesses (Jeremiah W. Walcik[5] and Gerbert Sproet, as an expert)[6], whose direct statements had previously been submitted to opposing counsel and the arbitrators. The parties filed main and reply briefs; the evidentiary phase of this arbitration was completed on February 12, 2010 with the submissions of the parties' claims for attorneys' fees and expenses.

BACKGROUND

Based upon the record before the panel, it appears that after discharge of her prior gasoline cargo at Long Beach (California) on January 20, while at sea en route to San Francisco, the vessel performed the required/programmed cold and hot water cargo tank cleaning operations. On January 21, the vessel reported on the existing tank

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[3] Identifying himself for the record: *I am the team leader for the operations crew for the marine organization in San Ramon. I work for the global supply and trading organization, which is part of Chevron Products, and the operations group manager, the commercial scheduling activity for marine shipments in the West Coast.* (TR p. 18)
[4] Expediter for Chevron in the Richmond Refinery since March 17, 2008 (TR p. 122). Micic worked for Inspectorate from 2007 until he joined Chevron, and he was the Inspectorate surveyor in attendance for the loading of the STENA CONQUEST at the Plains Terminal. (TR p. 126)
[5] From Stena's Commercial Operation Department.
[6] A chemist employed in Stolt-Nielsen's Houston office.

conditions and the tank cleaning procedure. On January 22, the vessel purged all cargo tanks to acceptable levels.

While the Owners were focusing on getting vessel's cargo tanks ready while enroute to the designated loading port, Charterers were similarly engaged in making the necessary arrangements to prepare the cargo for export shipment, which included Nalco treatment of the ULSD cargo.[7]

The Nalco Treat Pre-Job Checklist[8] for job order #3334681 reflects the following:

- location: Plains Martinez
- quantity: 3000 bbl treat actual 100,000 bbl
- date/ETA of cargo to be treated: 1/22/08
- product: ULSD
- Nalco product: EC5711A
- Inspection Company: Caleb Brett
- Shore tanks: 3227 Martinez - Richmond 3215, 3217, 3195
- Untreated Cargo Spec: 3227 - 525/3215 - 572, 3217 - 595, 3195 - ?
- Desired Cargo Spec: ASTM D-6079 wear scar below 420 (mid 300's)
- Injection Point Location: Landside Post TK pump

Treated at 170 ppm 2145 gallons of EC5711A
We will treat at Plains Martinez facility. 100,000 BBls will be loaded onto vessel of ULSD. We will over-treat for an additional 200,000 BBLS Loaded on top at Richmond Refinery of Chevron. Richmond load is untreated. Highest wear scar # for lubricity is at Richmond (Chevron).

The STENA CONQUEST arrived at San Francisco (end of sea passage) on January 23, 2008 at 19.00 hours. The following chronology was provided by Chevron to Owners on March 26, 2008:[9]

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[7] ULSD, as a result of the sulphur reduction process, modifies the lubricity property of the diesel and thus requires the Nalco additive. According to Captain Lott's report (Chevron Exhibit 6), the Nalco additive has a flashpoint of 184°F.

[8] Chevron Exhibit 13.

[9] Exhibit 32 to the direct examination folder of Jeremiah W. Walcik.

1/23/08 1900 Arrived San Francisco anchorage
1900 Notice of Readiness tendered
1906 Pilot onboard
2348 First line

1/24/08 0300 All fast
0042 Gangway secured
0045 Inspector onboard
0124 Commenced on-deck inspection
0130 Commenced connecting chicksan
0154 Chicksan connected 1x16"
0200 Completed on-deck inspection
0200 Commenced calculations
0206 Commenced pre-transfer conference
0218 Completed calculations and documentation
0300 Notice of Readiness accepted
0300 Completed pre-transfer conference
0318 Commenced loading ULSD
0325 Line sample pulled
0332 Manifold sample pulled
0400 Suspended loading ULSD (line verification)
0430 Resumed loading ULSD
0515 Commenced sampling first foots
0700 Completed sampling first foots
0710 Inspector departed
0740 Samples delivered to inspectorate laboratory
0750 First foot samples failed flash
0754 Suspended loading ULSD
0850 Inspector onboard
0900 Commenced re-sampling first foots
1002 Completed re-sampling first foots
1010 Inspector departed
1030 Samples delivered to inspectorate laboratory
1100 Inspector onboard
1130 Commenced sampling vessel tanks
1312 Completed sampling vessel tanks
1330 Completed sealing samples / witnessed by vessel and terminal representatives
1340 Inspector departed
1406 Samples delivered to inspectorate laboratory
1415 Line sample pulled
1545 Commenced meeting with Chevron and vessel representatives
1615 Commenced sampling vessel tanks (per vessel representative)

1715 Completed sampling vessel tanks
1730 Inspector departed
1900 Commenced transferring off-spec cargo to 4 port and starboard
2306 Completed transferring off-spec cargo to 4 port and starboard (approx. 27,540 bbls)
2306 Resumed loading ULSD

1/25/08 0132 Suspended loading ULSD (first foots) (per shore request) (approx. 14,000 bbls)
0132 Commenced sampling first foots
0300 Completed sampling first foots
0330 Samples delivered to inspectorate laboratory
0400 First foot samples failed flash
0440 Inspector onboard
0445 Commenced re-sampling first foots
0545 Completed re-sampling first foots
0550 Inspector departed
0605 Samples delivered to inspectorate laboratory
0625 First foot re-sample failed flash
1300 Commenced transferring 2, 3, and 5 port and starboard to 1 port and starboard
1400 Key meeting (Chevron rep / Stena Bulk rep / terminal rep)
1455 Inspector onboard
1630 Completed transferring 2, 3, and 5 port and starboard to 1 port and starboard
1636 Commenced on-deck inspection
1745 Completed on-deck inspection
1836 Resumed loading ULSD (pulling shore line samples at three locations and at vessel's manifold)
1900 Suspended loading ULSD
1930 Commenced flash testing 3P and 3S on terminal flash machine
2100 Completed flash testing 3P and 3S on terminal flash machine (terminal flash machine not working properly)
2130 Commenced flash testing 3P and 3S at inspectorate laboratory
2145 Samples taken from 1 port and starboard / slop port

1/26/08 0018 Commenced sampling 3P and 3S (bottle sampler / open hatch)
0040 Completed sampling 3P and 3S (bottle sampler / open hatch)
0050 Caleb Brett pulled samples from 3P and 3S
0215 Chevron decides to discharge off-spec cargo
0436 Commenced discharging ULSD (off-spec cargo)
0500 Inspector departed
0948 Suspended discharging ULSD (ship's request)

1015 Inspector onboard
1300 Caleb Brett inspector onboard
1315 Caleb Brett commenced sampling 4P and 4S
1330 Caleb Brett completed sampling 4P and 4S
1342 Resumed discharging ULSD (off-spec cargo)
1342 Commenced pulling drip sample on dock line
1620 Completed pulling drip sample on dock line
1630 Completed discharging ULSD (off-spec cargo)
1630 Commenced on-deck inspection
1640 Commenced disconnecting chicksan
1650 Completed on-deck inspection
1650 Commenced calculations
1700 Chicksan disconnected
1705 Completed calculations and documentation
1710 Inspector departed

The vessel departed from Martinez on January 26 at 17.42 hours and to "outside California waters for tank cleaning/gas free operations as per Terminal request."[10]

On January 29, Chevron issued revised voyage orders directing the vessel to proceed to the Richmond Refinery to load 300,000 bbls of ULSD for discharge in Chile. From the record before us, it appears that the Richmond/Quintero-Coronel (Chile) voyage was uneventful.

CLAIMS

In this proceeding, Charterers are claiming the amount of $180,374.94,[11] representing the direct (out-of-pocket) expenses incurred at Martinez; Chevron is not claiming for the product used and the contaminated foot-samples or any other

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[10] Vessel's "Harbour Report."

[11] Charterers' Exhibit 5 itemizes the claim as follows: Woodbridge report and fee - $6,750.00; Nalco invoice for lubricity additive - $93,000.00; Shifting expenses, pilots, launch, etc. - $13,299.76; Bunkers consumed during gas freeing - $24,296.11; Tug expenses - $30,557.07; Inspectorate invoice for testing and sampling - $12,472.00.

monetary losses they may have incurred. According to the Dixon testimony, a significant portion of the contaminated cargo was shipped to Hawaii and, after blending with higher flashpoint material, "commercially marketed." [12]

Owners counterclaimed for the delay of the vessel in the form of demurrage for the sum of $218,072.83. Prior to the commencement of this arbitration, Charterers paid the amount of $39,895.83 in undisputed demurrage, thus reducing Owners' counterclaim to $178,675.70.

Both parties are seeking interest on their respective claims as well as an award of costs and fees.

DISCUSSION AND DECISION

Neither party refutes that the foot samples of ULSD loaded at the Plains Terminal on board the STENA CONQUEST were off specification with respect to the flashpoint, this being a critical commercial criterion for this type of diesel cargoes .[13] The issue to be determined in this arbitration is whether the fault is attributable to the vessel or the shore facility.

It is admitted that the last cargo carried on board the vessel was Eurograde Mogas, a low flashpoint product. Likewise, the last cargo pumped through the line system at the Plains Terminal was Reformate, a gasoline blend stock, also with a low flashpoint.

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[12] TR pp. 86-87.

[13] The sale to the Chilean receivers provided for a flashpoint of minimum 142°F (see Dixon testimony TR pp. 27-28).

Upon arrival, a pre-transfer conference took place, which was attended by vessel's personnel, a terminal representative and Inspectorate's Micic,[14] and included a discussion of vessel's tank cleaning procedure, particularly in view of the prior gasoline cargo. The witness stated that "he [the Chief Mate] properly washed all tanks and stripped and dried all tanks and lines and pumps with hot saltwater."[15] The witness also testified to a similar conversation between the terminal representative and the Chief Mate:[16]

> *Q If you can recall, did the terminal representative at the preload meeting ask questions of the chief mater about the preload cargo tank cleaning operation?*
> *A Yes.*
> *Q Do you remember what he asked?*
> *A He asked basically the same questions that I did.*
> *Q Based on your recollection, was the terminal representative satisfied with those answers?*
> *A Yes.*

These details are also reflected in the Inspectorate Report, however, are not consistent with vessel's oil Record Book and the Master's emails concerning the temperatures of the final rinse.[17] The vessel before-loading Slop Report at Martinez, as co-signed by Inspectorate, reflects 230 cubic meters of slops, which, based upon the Walcik testimony, is a typical volume created by a three-hour washing on a tanker of the STENA CONQUEST's size.

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[14] TR pp. 193-194.
[15] TR p. 200.
[16] TR pp. 210-211.
[17] Neither the BP Guide for Tank Cleaning nor the Dr. Verwey Tank Cleaning Guide specify final rinse temperatures (Walcik Direct Statement at p. 12).

Charterers submitted a schematic of the dock line and manifold area at the dock,[18] which, in conjunction with Micic's testimony, established that the line sample spigot, approximately one foot from the bottom of the Chicksan, is the last sampling point in the terminal before the cargo goes on board the ship.

The events relating to the loading and sampling of the "first foots" are contained in the preceding chronology.[19]

For a complete record, the panel supplements the Nalco Treat Pre-Job Checklist[20] with details from Ray's testimony, starting with what the instructions were for the Martinez loading:[21]

> *A. At Martinez, well, first of all, we had to determine what type of dose rate we were going to treat for lubricity. In order to do that, we had to get a sample from the cargo . . . From the shore tanks. And utilize a laboratory, and then take our chemical, and additize it at different ppm ranges and dose rates to achieve a desirable, you know, lubricity result. . . .*
>
> *Q. Okay. How was the additive actually injected into the cargo?*
>
> *A. Though a manifold line, dockside manifold line. It depends on the application, too.*
>
> *You know, this particular one, through a manifold line. A dockside manifold line. . . . During loading, correct.*
>
> *Q. And who did that?*
>
> *A. A Nalco representative who's a subcontractor for us who works with all our treatments.*
>
> *Q. So you didn't do it?*
>
> *A. I was there. But he's – he was the particular guy who did it.*
>
> *Q. Now, the treatment, does the additive come in drums?*
>
> *A. It could come in numerous things. It can come in drums, it can come in ISO containers.*
>
> *Q. For this?*
>
> *A. What we call Porta-Feeds, which are, you know, like a bulk chemical container. And we also had, I believe, a few drums with it as well.*

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[18] Charterers' Exhibit 12.
[19] At pp. 5-6 of this award.
[20] See p. 4 of this award.
[21] TR pp. 428, 430-434.

Q. But for this particular doping operation –

A. Right.

Q. – it came in drums?

A. Porta-Feeds and drums.

Q. Okay. And then how was the additive injected from the drums into the manifold line?

A. Though a pump, a pneumatic air pump. And it's done based on a ppm and a pump rate from the shore to the ship. We determine the rate of the pump rate from the shore to the ship.

Q. So the cargo line in the terminal was active?

A. It's an active line, correct.

Q. Then your line is active?

A. We do not interject until the terminal starts sending product to the vessel. Correct. . . .

Q. If you can recall, what were your instructions for this additive program?

A. From what I recollect, we had a hundred thousand barrel cargo that was going to need to be treated from shore tank to ship at this facility.

Q. Not from the manifold line?

A. What do you mean not from the manifold?

Q. Not from the manifold line. You were going to treat it from the shore tank?

A. No, no, from the manifold line. I meant from that facility's manifold to the ship. Okay.

And that cargo would be a hundred thousand barrels. And then after the hundred thousand, 200,000 was going to be loaded elsewhere, at Richmond, I believe it was.

But we had to overtreat to compensate for the 300.

Q. Is that a typical instruction to over treat?

A. It depends on the situation. I mean, this was untypical to – not untypical, but it was different to treat a hundred thousand barrels when you had 300,000. But since it was multiple ports and we were doing it there, it made on deference [sic] *because they were top loading the other product on top of the over treat product.*

The Nalco witness also testified as to the cost of the additive for which Chevron is claiming reimbursement. He stated that 2,145 gallons of product were needed to treat the whole cargo of 300,000 bbls of ULSD. Since the Richmond 200,000 bbls were to be loaded on top of the Plains partial load, it was decided to "over-dope" the Plains parcel sufficiently for the total cargo. Nalco charged Chevron 31¢ per barrel of treated ULSD,

or $93,000.[22] Although the total quantity of ULSD loaded in the three "first foot" stages was only approximately 42,000 bbls, the witness stated that the whole of 2,145 gallons of additive was injected into the "first foots." Ray also affirmed that even though Nalco was aware of the flash problems, the treatment continued as the vessel was taking on additional cargo.

Inspectorate was contracted by Chevron to sample the cargo at different locations at the Martinez terminal and aboard the ship prior to and during the loading. These samples were then delivered to Inspectorate's lab for testing to determine the quality of the cargo. Both parties are in agreement that the subject ULSD, when sampled on January 23 in the shore side tanks prior to the commencement of loading and analyzed at the lab, was "on spec" with a flashpoint of 67°C (150.2°F). Captain Lott's report reflects that tanks 58 and 55 had a 152.6°F flashpoint.[23]

Micic of Inspectorate also drew the line sample at the loading arm approximately seven minutes after loading had commenced,[24] which produced a flashpoint of 51°C (124°F).[25] He then proceeded to take a ship's sample (at the manifold), which tested at 63°C.

From the record, it appears that the Terminal Chicksan was connected to the vessel's portside No. 2 manifold. The pipeline displacement cargo of approximately 2,000 bbls was loaded into the No. 1 wing tanks.[26] For the first foot sample, a total of

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[22] TR p. 448.
[23] TR pp. 135-136.
[24] TR p. 133.
[25] Subsequently referred to as the "Rogue Test" (Chevron's Post Hearing Reply Brief at p. 5) and described as a sampling mistake by Micic at TR p. 188.
[26] TR pp. 138-139 Micic testimony.

27,000 bbls was pumped on board, which, upon analysis by Inspectorate, were shown off spec with values ranging from 35°C to 55°C. Chevron then directed the vessel to transfer the contaminated cargo into the No. 4 wing tanks.

Chevron retained a surveying company, Woodbridge Marine, to attend on board the STENA CONQUEST "to conduct an investigation into the circumstances of the alleged off spec cargo being loaded." Captain Lott attended the vessel in the afternoon of January 24 and 25 (and subsequently at the San Francisco anchorage and Richmond). His report also indicates that shortly after his arrival on board, the vessel's P&I Club surveyor joined the meeting with the Master.

Without any cleaning, a second foot sample of 14,000 bbls was pumped on board into wing tanks Nos. 1, 2, 3 and 5. Micic testified that he drew samples in the morning of January 25 from all tanks, including from the No. 4 wing tanks.[27] Approximately one hour later, he was advised that all samples were off spec and requested to take another set of samples from the Nos. 1, 2, 3 and 5 wing tanks. The lab reconfirmed in the morning of the same day that the samples were off spec and Chevron instructed that the second foot sample be consolidated and pumped into the No. 1 wing tanks. At that time, Micic drew samples from the No. 1 wings for lab analysis. He also gauged all tanks which had been used for the second foot sample to ensure that they were empty. The lab results once again showed the cargo to be off spec.

In the afternoon of January 25, a meeting was held at the Terminal with the following in attendance: Plains All American District Manager, Plains All American

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[27] TR pp. 148.

Terminal Manager, a surveyor representing the Terminal, Cullen Maritime representing vessel's P&I Club and Captain Lott. The purpose of the meeting was to discuss the piping arrangements within the Terminal and the fact that the foot samples had all originated from tank 58, which had a dedicated line from the tank to the Terminal manifold/pump area. Prior to the meeting, Inspectorate had been instructed to resample tanks 55 and 58, with the following results: Tank 55 - upper 67°C, middle 68°C and lower 68°C; Tank 58 - upper 66°C, middle 66°C and lower 67°C.

While the second foot samples were consolidated into the No. 1 wings, another meeting took place with the Master and those who attended the Terminal meeting (except Plains' District Manager). All present witnessed the gauging of all cargo and slop tanks, and they inspected the pipelines. The Lott report states that "No. 3 and 5 manifolds valves were opened on both sides and the drain valves opened. A small amount of liquid was obtained from these drains which consisted of a water/gasoline mix which was collected in sample bottles. . . ." During his testimony, Captain Lott stated that the Nos. 3 and 5 port and starboard manifolds were not used for the loading.[28]

After these meetings and inspections, it was decided to load an additional 2,000 bbls of ULSD into the No. 3 wing tanks. Upon completion, two samples were taken from the two tanks, one using the Inspectorate sampler and one with the ship's sampler. These samples and the line drip samples were submitted to the Inspectorate lab for testing. The results were: for the Inspectorate sample, 86°F port and 75.2°F starboard;

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[28] TR p. 286.

the ship's samples were 122°F port and 120.2°F starboard; the manifold sample was 153.2°F and the sample from the base of the Chicksan was 67°C (152.6°F).[29]

Since the third foot sample continued to show a flashpoint below the required sale contract specification, Chevron ordered the vessel to discharge ashore all ULSD material, then proceed to sea, clean the tanks and lines, and gasfree the tanks for inspection.

On January 29, 2008, an inspection was conducted at the anchorage by Captain Lott, Darko Micic and representatives of the vessel's P&I Club, as well as Stenabulk's P&I Club.[30] All tanks were inspected internally with all deck valves in the open position, and wallwash samples were taken. The tanks were found clean, dry and with no noticeable odor; also, the tank coating was inspected, found intact and eliminated as a potential source of contamination.[31] Upon completion of the inspection, the tanks were re-inerted in preparation for the upcoming loading.

Captain Lott testified on the cleaning methods applied by the vessel's crew while at the anchorage (for this second cleaning) and stated that principally the same procedures were followed, except "the records show they were slightly less the second time."[32] Micic approved the tanks and Captain Lott advised Chevron about vessel's readiness to load the ULSD cargo.

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[29] Chevron Exhibit 6 (the Woodbridge Marine Report).
[30] Woodbridge Marine Report at p. 7
[31] TR p. 362.
[32] TR p. 323.

On January 31, the vessel berthed at the Chevron Richmond Terminal. All "first ins" were tested and the flashpoints were found to be in excess of the specifications and comparable to the shore tank readings. The full cargo was loaded and the STENA CONQUEST performed her voyage to Chile.

Also on January 31, the samples taken from the No 3 wings with the Inspectorate sampler and the ship's sampler cup, and tested by Inspectorate,[33] were split for retesting with ITS Caleb Brett. They showed for the portside wing 74°F for the Inspectorate sample and 121°F for the ship's sample; the starboard wing results were 74°F for the Inspectorate sample and 115°F for the vessel's sample. Caleb Brett also took independent samples which, when tested by them, produced flashpoint readings of 125°F for the port wing and 119°F for the starboard tank. According to Captain Lott, the Caleb Brett tests were run "in an attempt to remove any concern about the Inspectorate lab."[34] It is interesting to note that Captain Lott reports on these events and results even though he did not attend.[35]

In making its claim, Charterer points to the simple fact that their cargo, as sampled in the shore tank prior to loading, had an on spec flashpoint of 67°C and when subsequently sampled aboard the vessel was off spec.

Chevron states that "the issue is whether and to what extent Stena exercised that degree of care that would be expected from a reasonable ship owner or operator to clean its vessel from a prior gasoline cargo with the expectation that ULSD, a higher

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[33] See p. 15 of this award.
[34] Woodbridge Marine Report at p. 6.
[35] TR pp. 351-352.

flashpoint cargo, would be loaded"[36] and state that "Stena must prove . . . the exercise of due diligence to make the vessel seaworthy. . . ."

The panel is satisfied that, based upon the documentary evidence and the testimony of Walcik, Owners exercised the necessary care expected from a reasonable ship owner. Indeed, Micic's testimony, as to his impression and direct experience from the pre-transfer conference as well as from the Chief Mate/Terminal representative tank cleaning discussion, expresses acceptance and implied approval of the cleaning procedures applied by the vessel. Walcik testified that "the STENA CONQUEST had loaded at least thirty high flash cargoes (such as USLD), after carrying low flash cargo (such as gasoline)."[37] In support of this statement, Walcik also supplied the vessel's cargo tank history from 2003 through the date of the voyage in question.[38]

Before dealing with the legal arguments, the panel finds it to be in order to comment on certain arguments and observations.

The Rogue Test – The argument has been made that Owners' counsel did not even attempt to refute Micic's explanation of the rogue first test.[39] Micic testified that he was in a hurry to get on board the vessel for the manifold sampling and in the rush may have failed to flush the sampling spigot on the loading arm of any remaining reformate from the previous cargo. In fact, he stated, "I don't remember if I flash [sic] that part of the spigot."[40] The purpose of presenting testimony is to relay to the trier of fact the

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[36] Chevron's Post-Hearing Brief at p. 9.
[37] Walcik Statement at p. 6.
[38] Exhibit 5 to the Walcik Statement.
[39] Chevron's Post Hearing Reply Brief at p. 5.
[40] TR pp. 137-138.

witness' recollection of the events. It does not get enhanced by "a contemporaneous conversation" between Micic and Captain Lott, particularly since Captain Lott was not yet on the scene when Micic's omission took place. The testimony is what it is.

The Woodbridge Marine Report - Two versions of this report were presented to the panel. Chevron's Cargo Claim Calculation[41] contains, as Appendix A, an eight-page report dated January 27, 2008 and Woodbridge Marine's Investigation Report,[42] which consists of nine pages and is dated February 2, 2008. Owners' Exhibit 35 is a version of the January 27, 2008 report, which shows a redaction/highlight on page 4 of the sentence, "The sample taken at the loading arm on the dock gave a flashpoint of 51°C/124°F." The exhibit was introduced by Owners' counsel as follows: "Exhibit 35 are the Woodbridge reports which we are not offering as owner documents. They're charterer documents. They were only offered to explain to the panel the report as received with the claim by my client both with the redaction and the unredacted copy, so I put that in."[43]

Chevron's documentary submission also included Captain Lott's affidavit[44] dated February 20, 2009, which included the following statements:

> 6. *. . . I checked my notes and discovered that in originally preparing the Report, I had inadvertently transposed two lines of text on p. 4. . . .*
> 7. *Those lines of text should properly read as follows:*
>
> *"The sample taken at the loading arm on the dock gave a flashpoint of 63C/145F.*
>
> *"The manifold sample taken at the ships* [sic] *manifold gave a flashpoint of 51C/124F"*

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[41] Chevron Exhibit 5.
[42] Chevron Exhibit 6.
[43] TR p. 13
[44] Chevron Exhibit 7.

On cross-examination, Captain Lott stated that he did not know who or why this redaction/highlighting had been made. He agreed that if the highlight was done by Chevron, after he had submitted the report to them, they must have considered the entry to be important.[45] The facts that the Chicksan sample was pulled on January 24 at 03.25 (seven minutes after loading had commenced),[46] the manifold sample at 03.32,[47] the Inspectorate lab test results were relayed to Micic at 07.50[48] and Captain Lott only attended the vessel at approximately 14.30 on January 24,[49] gave rise to questions about Captain Lott's first hand knowledge of the events and for the justification of the changes to the sample results. This is even more puzzling considering the test result of 49°C as determined by Dixie Laboratories.[50]

Nalco Lubricity Additive - Owners' expert opined that "Lubricity by an additive can affect the flash point test result by 'masking' the flash point resulting in higher values" and that "For the first foot of 27,000 bbls, if Nalco personnel did in fact perform a blend operation (addition of a lubricity additive), this would result in a higher reported flash point. Therefore, the reported first foot flash points dated January 24th would be significantly less than the actual flash point."[51] Viewing the foregoing

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[45] TR p. 327.
[46] TR p. 133; also chronology at p. 5.
[47] TR p. 134; also chronology at p. 5.
[48] TR. p. 184; also chronology at p. 5.
[49] Woodbridge Report at p. 2.
[50] On May 6-7, 2008, a joint witnessed lab testing program was conducted at the Dixie facility, attended by G. Gonzalez and A. Hobbs on behalf of Inspectorate, B. Sproet on behalf of Stena and M. Renz on behalf of Dixie (see Owners' Exhibit 32 – Inspectorate letter for joint testing); see also TR p. 332 and Exhibit 8 to the Direct Examination of B. Sproet.
[51] Par 26 and 27 of the Direct Examination of B. Sproet.

statements in the context of Sproet's cross-examination[52] does not permit us to draw a distinct conclusion on this matter. Considering the scrutiny which has been applied to the first foots of the ULSD, one could wonder about the purity and integrity of the Nalco addition to the cargo coming from Porta-Feeds and drums.[53]

Assumption of Risk for the "Second and Third Foots Loading" - Stena has made the point that Chevron was aware, after the testing of the first in, that the cargo was off spec. Rather than requesting remedial action in the form of tank and/or line cleaning, after the first failing load, Chevron directed that the vessel load second and third "foots." When questioned whether at any time before loading the second foots he had recommended to re-clean the vessel, Captain Lott answered in the negative, stating that it was the consensus within Chevron that all the contaminated material had been flushed[54] even though he admitted that some contaminants might remain behind, in particular vapors which could become a cause of contamination.[55]

The panel finds the case of *Federal Insurance Co. v. MT Sabine*,[56] to be persuasive where it was held, ". . . that the ship was not liable for further damages that would have been avoided if the shipper . . . had not followed an unreasonable course of conduct."

In the Post-Hearing Brief,[57] Charterers cite Thomas J. Shoenbaum with respect to cargo claims under charter parties.[58] Professor Shoenbaum has also stated that, "At

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[52] TR pp. 596-597.
[53] See p. 11.
[54] TR pp. 339.
[55] TR pp. 341-342.
[56] 587 F.Supp. 518 (S.D.N.Y. 1984) aff'd 783 F.2d 347 (2nd Cir. 1985).
[57] At p. 7.
[58] Thomas J. Shoenbaum, Admiralty and Maritime Law § 11-13, p. 227 (3s ed. 2001).

common law, distinctly different legal consequences attached to common and private carriage," [59] which confirms that indeed a different standard must apply with these concepts.

With respect to the issue of seaworthiness, the panel is not persuaded by Charterers' arguments. In the MARINE SULPHUR QUEEN, [60] it was held that the burden of proving breach of private carriage contract or of negligence by the carrier is on the shipper. In *Voyage Charters*,[61] the authors state:

> *The potential importance of who has the burden of proof is perhaps best illustrated by cases arising from the unexplained loss of the vessel. The leading case of this type is Commercial Molasses Corp. v. New York Tank Barge Corp., 314 U.S. 104 (1941). A barge loaded with molasses sank in New York harbor. After reviewing the evidence, the trial court found as a fact that "the cause of the accident has been left in doubt." Id., at p. 107. As a result of this finding, the outcome of the claim for cargo loss turned on whether the owner or charterer had the burden of proof as to the cause of the sinking. The Supreme Court noted that were the case on involving a claim under a bill of lading for common carriage, the burden would be on the carrier to show that the loss was due to an excepted cause and not a breach of his duty to exercise due care to make the vessel seaworthy. But as the claim arose under a contract of Affreightment for private carriage, the situation was quite different. As stated by the court: "In such a case the burden of proving the breach of duty or obligation rests upon him who must assert it as the ground of the recovery which he seeks. . . ." (314 U.S. at 110)*

In summary, under our interpretation of the burden of proof, as applicable to this case, it is not sufficient to show "that the product was on-spec prior to the loading operations and that the test, and Stena, confirm it was off-spec after loaded into the vessel," but Chevron must prove by a preponderance of credible evidence that the

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[59] Thomas J. Shoenbaum, Admiralty and Maritime Law § 9-6 Common Carriage and Private Carriage, p. 293.

[60] C.A .N.Y. 1972 460 F.2d 89, cert denied 93 S.Ct. 318, 409 U.S. 982, 34 L.Ed. 2d 246.

[61] Julian Cooke, John D. Kimball, Timothy Young, David Martowski, Andrew Taylor, LeRoy Lambert, Voyage Charters (London: Lloyd's of London Press Ltd., 2007), Sec. 11.143 at p. 246.

STENA CONQUEST and her tanks were the cause of the damage, which, in our opinion, they have not done. Therefore, since Chevron has stated that the exercise of due diligence is a determination to be made by the panel based upon the facts and circumstances of any particular case,[62] and the panel has concluded that, based upon the facts presented, Owners had exercised due diligence in preparation of the vessel for this voyage. Hence, Charterers' claim for the contamination and related expenses fails and Owners prevail with their claim for the balance of the demurrage and reimbursement of expenses.

In view of the panel's decision denying Chevron's contamination claim, there is no need to address the issue of whether or not Chevron benefited from the Nalco additive.

INTEREST

The panel awards interest at the weighted average Prime Lending Rate as published by the Federal Reserve for the periods due; i.e., 3.8454% p.a. for the period from February 27, 2008 to the date of this award.

FEES AND COSTS

Both parties have claimed for attorneys' fees and costs of this arbitration. Chevron is seeking an award of $150,701.80, representing $123,162.00 for fees and

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[62] Chevron's Post-Hearing Brief at p. 6.

$27,539.80 for expenses.[63] Stena has submitted a claim for $140,609.83, consisting of attorneys' fees of $123,973.04 and expert/consultancy charges of $16,636.79.[64]

In line with the prevailing custom and practice in New York and the agreement of the parties requesting reimbursement for attorneys' fees and costs, the panel makes an award to Stena of $123,973.04 for attorneys' fees and $16,636.79 for export/ consultancy charges.

The panel's fees and expenses are contained in the attached Appendix A, which forms an integral part of this award. Payment is to be made in accordance with the terms contained therein from the Escrow Account established with the SMA. Liability for the panel's fees is a joint and several obligation of both parties.

AWARD

Charterers are directed to pay Owners the amount of $347,927.48, which we arrived at as follows:

• Balance of demurrage	$178,675.70
Interest thereon	15,247.40
• Reimbursement for expert/consultancy fees	16,636.79
• Reimbursement for Owners' attorneys' fees	123,973.04
• Reimbursement for arbitrators' fees paid on Charterers' behalf	12,764.55
DUE STENA	$347,297.48

[63] As per Mr. Bell's Affidavit dated February 12, 2010

[64] As per Mr. Textor's Affidavit of February 2, 2010 supplemented with a further affidavit dated February 12, 2010.

If payment has not been made within 20 days from the date of this award, interest at the rate of 3.25% p.a. shall resume to accrue from the date of the award until payment in full has been made or the award has been reduced to judgment, whichever first occurs.

The Arbitration Clause provides that this award may be made a rule of the court.

Thomas F. Fox

Manfred W. Arnold

James J. Warfield, Chairman

New York, New York
May 17, 2010