

**BEFORE THE  
FEDERAL MARITIME COMMISSION**

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**Petition of United Parcel Service, Inc.**  
Petition No. P3-03

**Petition of C.H. Robinson Worldwide, Inc.**  
Petition No. P9-03

**Petition of the National Customs Brokers and  
Forwarders Association of American, Inc.**  
Petition No. P5-03

**Petition of Danzas Corporation d/b/a Danmar  
Lines Ltd., Danzas AEI Ocean Services, and  
DHL Danzas Air and Ocean**  
Petition No. P1-04

**Petition of Ocean World Lines, Inc.**  
Petition No. P7-03

**Petition of BDP International, Inc.**  
Petition No. P2-04

**Petition of Bax Global Inc. for Rulemaking**  
Petition No. P8-03

**Petition of FedEx Trade Networks Transport &  
Brokerage, Inc.**  
Petition No. P4-04

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**JOINT SUPPLEMENTAL COMMENTS REQUESTING EXPEDITED  
ADOPTION OF A CONDITIONAL EXEMPTION FROM TARIFF PUBLICATION**

**Submitted By**

**THE NATIONAL INDUSTRIAL  
TRANSPORTATION LEAGUE  
UNITED PARCEL SERVICE, INC.  
BAX GLOBAL INC.  
FEDEX TRADE NETWORKS TRANSPORT  
& BROKERAGE, INC.**

**TRANSPORTATION  
INTERMEDIARIES ASSOCIATION  
C.H. ROBINSON WORLDWIDE, INC.  
BDP INTERNATIONAL, INC.**

Nicholas J. DiMichael, Esq.  
Karyn A. Booth, Esq.  
THOMPSON HINE LLP  
1920 N Street, NW, Suite 800  
Washington, DC 20036

J. Michael Cavanaugh, Esq.  
HOLLAND & KNIGHT LLP  
2099 Pennsylvania Avenue, NW  
Suite 100  
Washington, DC 20006

Therese G. Groff, Esq.  
Vice President, General  
Counsel & Secretary  
BAX Global Inc.  
440 Exchange Drive  
Irvine, CA 92602

*Counsel for The National Industrial  
Transportation League*

*Counsel for United Parcel Service, Inc.*

Penelope W. Register, Esq.  
Senior Vice President and  
General Counsel  
FedEx Trade Networks Transport  
& Brokerage, Inc.  
6075 Poplar Avenue, Suite 422  
Memphis, TN 38119

Richard D. Gluck, Esq.  
GARVEY SCHUBERT BARER  
1000 Potomac Street, NW  
5<sup>th</sup> Floor  
Washington, DC 20007

Edward J. Sheppard, Esq.  
Richard K. Bank, Esq.  
Ashley W. Craig, Esq.  
THOMPSON COBURN LLP  
1909 K Street, NW, Suite 600  
Washington, DC 20006

*Counsel for BAX Global Inc.*

Warren L. Dean, Jr., Esq.  
THOMPSON COBURN LLP  
1909 K Street, NW, Suite 600  
Washington, DC 20006

*Counsel for Transportation  
Intermediaries Association*

Carlos Rodriguez, Esq.  
RODRIGUEZ O'DONNELL ROSS  
FUERST GONZALEZ & WILLIAMS  
1211 Connecticut Avenue, NW  
Suite 800  
Washington, DC 20036

*Counsel for FedEx Trade Networks  
Transport & Brokerage, Inc.*

*Counsel for C.H. Robinson  
Worldwide, Inc.  
BDP International, Inc.*

Dated: August 2, 2004

## **JOINT SUPPLEMENTAL COMMENTS REQUESTING EXPEDITED ADOPTION OF A CONDITIONAL EXEMPTION FROM TARIFF PUBLICATION**

The foregoing petitioners and national trade associations representing non-vessel operating common carriers (“NVOCCs”) and their customers (“Joint Commenters”) hereby submit these Joint Supplemental Comments to the Federal Maritime Commission (“FMC”). In these comments, the Joint Commenters urge the agency to: (1) exercise its authority under Section 16 of the Shipping Act of 1984, as amended, to grant NVOCCs an exemption from the tariff publication and enforcement provisions in the Shipping Act, and the corresponding regulations of the FMC set forth in 46 C.F.R. Part 520, subject to the conditions described below (hereafter “conditional tariff exemption”); (2) find that the conditional tariff exemption is justified based on the extensive record that has been developed in the docketed proceedings referenced above; and (3) act to adopt the conditional tariff exemption as expeditiously as possible.<sup>1</sup>

The Joint Commenters are filing this submission to advise the agency that they have agreed on a common approach to provide NVOCCs with the greater pricing flexibility and to resolve many of the issues presented by the pending petitions. Specifically, the Joint Commenters are united in their support for the conditional tariff exemption described herein and attached hereto as Appendix 1. These comments and the exemption proposal are intended to assist the FMC by providing clear direction and a widely supported, unified approach to be followed in its decision-making on the petitions.<sup>2</sup>

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<sup>1</sup> This tariff exemption proposal, if adopted by the Commission, should not and is not intended to affect in any way the position of the United States with respect to the “freedom of contract” issue or related issues in the current UNCITRAL Working Group III deliberations regarding COGSA reform, and similarly, any position of the United States on the UNCITRAL Instrument should not affect the Commission's actions in regard to the pending petitions. The Joint Commenters believe the two matters involve separate issues and should be addressed independently.

<sup>2</sup> None of the Joint Commenters intends or desires to withdraw its existing petition. Furthermore, any action by the Commission on the proposed tariff exemption should not preempt efforts to obtain exemptions from the tariff publication requirements as proposed by the National Customs Brokers and Forwarders Association of America or preempt other proposals to simplify tariff publication. The FMC should continue to move forward with

## THE TARIFF EXEMPTION PROPOSAL

The attached tariff exemption that is supported by the Joint Commenters includes the following elements:

- Using its authority under Section 16 of the Shipping Act, the FMC would grant exemptions for certain NVOCC agreements with shippers, described below, from—
  - (i) the tariff publication requirements set forth in Section 8(a), (b), (d) and (e) of the Shipping Act,
  - (ii) the FMC regulations relating to tariff publication included in 46 C.F.R. Part 520, and
  - (iii) the Prohibited Acts set forth in Section 10(b)(1), (2), (4) and (8) to the extent that those provisions relate to tariff requirements.
  
- The exemption would be available to an NVOCC that moves cargo under a written agreement (“NVOCC Agreement”) other than a bill of lading, receipt or similar transport document, with one or more shippers under which the shipper(s) commits to provide a volume or portion of cargo over a fixed time and the NVOCC commits to a certain rate and defined service level.
  
- The NVOCC Agreement would be filed confidentially with the FMC and would be required to include the following essential terms: origin and destination port ranges, origin and destination geographic areas in the case of through intermodal shipments, commodity or commodities, minimum volume or portion, the line-haul rate, the duration of the agreement, service commitments, and liquidated damages or indemnity provision for non-performance. Some of the essential terms, *i.e.*, origin and destination port ranges, commodity or commodities, minimum volume or portion, and the duration of the agreement, would be required to be published in tariff format.
  
- The FMC would retain jurisdiction over the NVOCC Agreement to the same extent that it maintains jurisdiction over service contracts regulated under the Shipping Act.

The elements of the proposed tariff exemption are not novel. In fact, they have already been presented to the FMC in a number of the filings previously submitted. Thus, the Joint Commenters strongly submit that it is unnecessary for the FMC to institute a new proceeding with respect to the tariff exemption proposal or to solicit further input on the proposal, since extensive commentary on these same concepts already exists in the record.

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consideration of those proposals. In the meantime, however, the Joint Commenters urge immediate action by the Commission to approve the conditional tariff exemption described herein.

Adoption of the conditional tariff exemption is justified by the substantial evidence in the record demonstrating that the agency has the authority to grant an exemption from tariff publication and enforcement requirements and that the exemption is necessary to meet the current needs of the industry. The tariff exemption outlined by the Joint Commentors plainly satisfies the statutory requirements of Section 16 of the 1984 Act because it would both promote competition among NVOCCs and ocean carriers and benefit international commerce.<sup>3</sup>

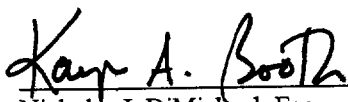
The Joint Commenters strongly believe that it is unnecessary for the FMC to engage in any time-consuming further inquiry, fact-finding or study of the issues involved in the petitions or in these joint comments in order for the agency to grant the conditional tariff exemption. Since the first petition was filed over one year ago, the agency has solicited comments on multiple occasions, collected submissions from hundreds of parties involved in all aspects of the maritime industry and from government interests, and meetings have been held between the individual Commissioners and interested parties. The agency has a complete record justifying a grant of the conditional tariff exemption, and the proceedings have afforded ample time to analyze that record thoroughly. The time has come for the Commission to act.

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<sup>3</sup> It is appropriate for the Commission to use its exemption authority to revisit the Shipping Act to address changed circumstances in the industry. Innovation is a critical component of a competitive industry, and regulatory frameworks must be flexible enough to accommodate change. For example, the Commission recently used its Section 16 exemption authority to grant three Chinese controlled carriers relief from the 30-day waiting requirement for reduction of tariff rates subject to the Controlled Carrier Act. See Petition Nos. P3-99, P4-03 and P6-03.

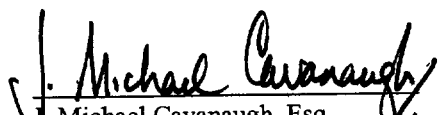
The Joint Commenters are hopeful that the FMC will act expeditiously to grant this narrowly-drawn conditional tariff exemption, which would avoid any need to address the industry's concerns through legislation.

Respectfully submitted,



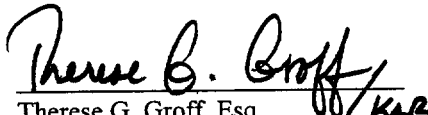
Nicholas J. DiMichael, Esq.  
Karyn A. Booth, Esq.  
THOMPSON HINE LLP  
1920 N Street, NW, Suite 800  
Washington, DC 20036

*Counsel for The National Industrial  
Transportation League*



J. Michael Cavanaugh, Esq.  
HOLLAND & KNIGHT LLP  
2099 Pennsylvania Avenue, NW  
Suite 100  
Washington, DC 20006

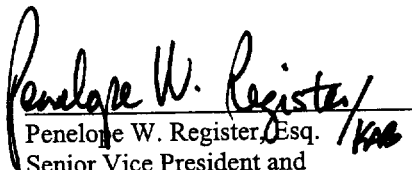
*Counsel for United Parcel Service,  
Inc.*



Therese G. Groff, Esq.  
Vice President, General  
Counsel & Secretary  
BAX Global Inc.  
440 Exchange Drive  
Irvine, CA 92602

Edward J. Sheppard, Esq.  
Richard K. Bank, Esq.  
Ashley W. Craig, Esq.  
THOMPSON COBURN LLP  
1909 K Street, NW, Suite 600  
Washington, DC 20006

*Counsel for BAX Global Inc.*

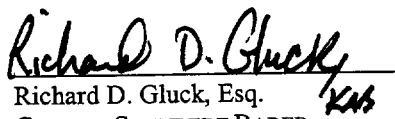


Penelope W. Register, Esq.  
Senior Vice President and  
General Counsel  
FedEx Trade Networks Transport  
& Brokerage, Inc.  
6075 Poplar Avenue, Suite 422  
Memphis, TN 38119

Warren L. Dean, Jr., Esq.  
THOMPSON COBURN LLP  
1909 K Street, NW, Suite 600  
Washington, DC 20006

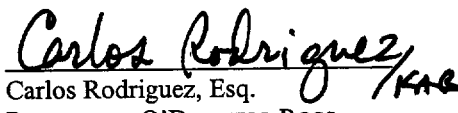
*Counsel for FedEx Trade Networks  
Transport & Brokerage, Inc.*

Dated: August 2, 2004



Richard D. Gluck, Esq.  
GARVEY SCHUBERT BARER  
1000 Potomac Street, NW  
5<sup>th</sup> Floor  
Washington, DC 20007

*Counsel for Transportation  
Intermediaries Association*



Carlos Rodriguez, Esq.  
RODRIGUEZ O'DONNELL ROSS  
FUERST GONZALEZ & WILLIAMS  
1211 Connecticut Avenue, NW  
Suite 800  
Washington, DC 20036

*Counsel for C.H. Robinson  
Worldwide, Inc.  
BDP International, Inc.*

## APPENDIX 1

### **PROPOSED CONDITIONAL EXEMPTION FROM TARIFF PUBLICATION AND ENFORCEMENT**

1. The FMC shall exercise its authority under Section 16 of the Shipping Act of 1984, as amended ("Shipping Act"), to grant to NVOCCs an exemption from (i) the tariff publication requirements set forth in Section 8(a), (b), (d) and (e) of the Shipping Act; (ii) the regulations of the FMC relating to tariff publication set forth at 46 C.F.R. Part 520; and (iii) the Prohibited Acts provisions set forth in Section 10(b)(1), (2), (4) and (8) of the Shipping Act only to the extent that those provisions relate to tariff requirements.
2. The exemption shall be available with respect to cargo moving under any written agreement between a NVOCC and one or more shippers, other than a bill of lading, receipt or similar transport document, under which the shipper(s) make a commitment to provide a certain volume or portion of cargo over a fixed time period, and the NVOCC commits to a certain rate and defined service level.
3. The exemption shall be subject to the conditions that (i) the agreement must be filed confidentially with FMC; (ii) the agreement shall include the following essential terms: (A) origin and destination port ranges, (B) origin and destination geographic areas in the case of through intermodal movements, (C) the commodity or commodities involved, (D) the minimum volume or portion, (E) the line-haul rate, (F) the duration, (G) service commitments; and (H) the liquidated damages for non-performance, if any; (iii) the NVOCC shall publish in a tariff the origin and destination port ranges, commodity or commodities involved, minimum volume or portion, and duration included in the agreement; and (iv) the FMC will retain jurisdiction over such agreements to the same extent that it maintains jurisdiction over service contracts regulated under the Shipping Act.

**CERTIFICATE OF SERVICE**

I hereby certify that I have on this 2<sup>nd</sup> day of August, 2004, served a copy of the foregoing Joint Supplemental Comments Requesting Expedited Adoption of a Conditional Exemption from Tariff Publication on the following persons listed below via first-class mail, postage pre-paid:

Edward D. Greenberg, Esq.  
GALLAND KHARASCH GREENBERG  
FELLMAN & SWIRSKY, P.C.  
1054 Thirty-First Street, NW  
Washington, DC 20037-4492

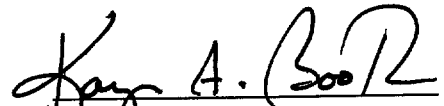
*Counsel for The National Customs Brokers  
and Forwarders Association of America, Inc.*

Leonard L. Fleisig, Esq.  
TROUTMAN SANDERS LLP  
401 Ninth Street, NW, Suite 1000  
Washington, DC 20004-2134

*Counsel for Ocean World Lines, Inc.*

Stanley O. Sher, Esq.  
SHER & BLACKWELL LLP  
1850 M Street, NW, Suite 900  
Washington, DC 20036-5820

*Counsel for World Shipping Council*

  
Karyn A. Booth

**BEFORE THE  
FEDERAL MARITIME COMMISSION**

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**MOTION FOR LEAVE TO FILE  
JOINT SUPPLEMENTAL COMMENTS REQUESTING EXPEDITED  
ADOPTION OF A CONDITIONAL EXEMPTION FROM TARIFF PUBLICATION**

**Submitted By**

**THE NATIONAL INDUSTRIAL  
TRANSPORTATION LEAGUE  
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BAX GLOBAL INC.  
FEDEX TRADE NETWORKS TRANSPORT  
& BROKERAGE, INC.**

**TRANSPORTATION  
INTERMEDIARIES ASSOCIATION  
C.H. ROBINSON WORLDWIDE, INC.  
BDP INTERNATIONAL, INC.**

Nicholas J. DiMichael, Esq.  
Karyn A. Booth, Esq.  
THOMPSON HINE LLP  
1920 N Street, NW, Suite 800  
Washington, DC 20036

*Counsel for The National Industrial  
Transportation League*

Penelope W. Register, Esq.  
Senior Vice President and  
General Counsel  
FedEx Trade Networks Transport  
& Brokerage, Inc.  
6075 Poplar Avenue, Suite 422  
Memphis, TN 38119

Warren L. Dean, Jr., Esq.  
THOMPSON COBURN LLP  
1909 K Street, NW, Suite 600  
Washington, DC 20006

*Counsel for FedEx Trade Networks  
Transport & Brokerage, Inc.*

Dated: August 2, 2004

J. Michael Cavanaugh, Esq.  
HOLLAND & KNIGHT LLP  
2099 Pennsylvania Avenue, NW  
Suite 100  
Washington, DC 20006

*Counsel for United Parcel Service,  
Inc.*

Richard D. Gluck, Esq.  
GARVEY SCHUBERT BARER  
1000 Potomac Street, NW  
5<sup>th</sup> Floor  
Washington, DC 20007

*Counsel for Transportation  
Intermediaries Association*

Therese G. Groff, Esq.  
Vice President, General  
Counsel & Secretary  
BAX Global Inc.  
440 Exchange Drive  
Irvine, CA 92602

Edward J. Sheppard, Esq.  
Richard K. Bank, Esq.  
Ashley W. Craig, Esq.  
THOMPSON COBURN LLP  
1909 K Street, NW, Suite 600  
Washington, DC 20006

*Counsel for BAX Global Inc.*

Carlos Rodriguez, Esq.  
RODRIGUEZ O'DONNELL ROSS  
FUERST GONZALEZ & WILLIAMS  
1211 Connecticut Avenue, NW  
Suite 800  
Washington, DC 20036

*Counsel for C.H. Robinson  
Worldwide, Inc.  
BDP International, Inc.*

**MOTION FOR LEAVE TO FILE  
JOINT SUPPLEMENTAL COMMENTS REQUESTING EXPEDITED  
ADOPTION OF A CONDITIONAL EXEMPTION FROM TARIFF PUBLICATION**

The foregoing NVOCC petitioners and national trade associations representing a broad cross section of logistics providers and their customers, through their undersigned counsel, respectfully move the Federal Maritime Commission (“FMC”) for leave to file Joint Supplemental Comments Requesting Expedited Adoption of a Conditional Exemption from Tariff Publication in each of the above referenced dockets. Although the comment period in these proceedings has closed, the parties to this motion believe that it is critically important for the FMC to be informed of a significant development affecting the pending NVOCC exemption and related proceedings.

Specifically, over the past several months the parties to this motion have had substantial discussions and are now united in their belief that the Commission should adopt, without further delay, a conditional exemption from tariff publication for NVOCCs. Furthermore, the parties have agreed on the text of such exemption as described in the Joint Supplemental Comments accompanying this motion. The unified approach and clear direction presented to the FMC in the Joint Supplemental Comments thus represent agreement of a substantial segment of the maritime industry that have been actively engaged in the pending proceedings. The moving parties believe that it is essential for the Commission to be informed of the exemption relief now desired by this broad segment of logistics providers and users of such services to address their commercial needs to engage in confidential ocean transportation agreements.

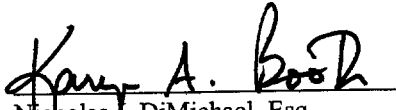
The proposed exemption would place NVOCCs and vessel operating carriers on equal footing vis-à-vis their shipper customers by applying only to NVOCC cargo that moves under written agreements that contain certain essential terms and that are filed confidentially with the FMC. The FMC would also retain jurisdiction over such NVOCC agreements to the same extent that it has jurisdiction over VOCC service contracts.

It is the hope and intent of the parties that this widely-supported proposal for a conditional tariff exemption will assist the FMC in its decision-making process. The proposal is designed to streamline rather than complicate these proceedings. As evidenced by the joint submission, the elements of the conditional tariff exemption set forth in the Joint Supplemental Comments do not present new concepts to the Commission that will require further review or study. To the contrary, the proposal is designed to provide a single and straightforward approach to resolving the issues and concerns already presented to the Commission in the proceedings. Given that it is now been over one year since the first NVOCC petition was filed, and months have passed since input on any of the petitions was received by the agency, the moving parties believe that the Commission should act as expeditiously as possible to resolve many of the pending petitions by adopting the parties' exemption proposal.

The moving parties uniformly agree that America's competitiveness and American jobs depend upon the ability of importers and exporters to manage their supply chains with maximum efficiency. However, the current regulatory obstacles in the 1984 Shipping Act, as amended, which prohibit contracting between NVOCCs and their customers, severely undermine the competitiveness of U.S. companies in the global marketplace. Accordingly, the moving parties unequivocally believe that time is of the essence and action by the Commission on the pending petitions is required now to protect American businesses. Moreover, because the parties believe that any decisions rendered by the Commission should be based on the most accurate and up-to-date information, they are submitting the tariff exemption proposal to the agency in the accompanying Joint Supplemental Comments.

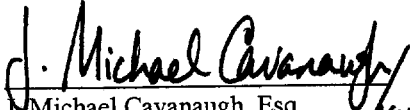
Therefore, the parties respectfully request that the Commission grant this motion and accept into the record the Joint Supplemental Comments Requesting Expedited Adoption of a Conditional Exemption from Tariff Publication.

Respectfully submitted,



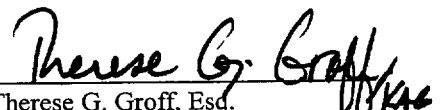
Nicholas J. DiMichael, Esq.  
Karyn A. Booth, Esq.  
THOMPSON HINE LLP  
1920 N Street, NW, Suite 800  
Washington, DC 20036

*Counsel for The National Industrial  
Transportation League*



J. Michael Cavanaugh, Esq.  
HOLLAND & KNIGHT LLP  
2099 Pennsylvania Avenue, NW  
Suite 100  
Washington, DC 20006

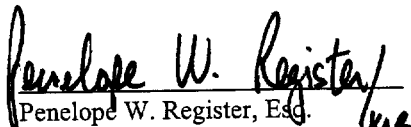
*Counsel for United Parcel Service,  
Inc.*



Therese G. Groff, Esq.  
Vice President, General  
Counsel & Secretary  
BAX Global Inc.  
440 Exchange Drive  
Irvine, CA 92602

Edward J. Sheppard, Esq.  
Richard K. Bank, Esq.  
Ashley W. Craig, Esq.  
THOMPSON COBURN LLP  
1909 K Street, NW, Suite 600  
Washington, DC 20006

*Counsel for BAX Global Inc.*

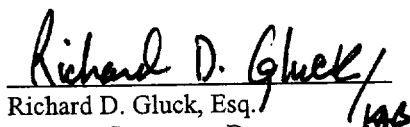


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Senior Vice President and  
General Counsel  
FedEx Trade Networks Transport  
& Brokerage, Inc.  
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1909 K Street, NW, Suite 600  
Washington, DC 20006

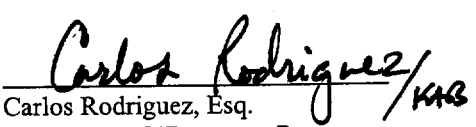
*Counsel for FedEx Trade Networks  
Transport & Brokerage, Inc.*

Dated: August 2, 2004



Richard D. Gluck, Esq.  
GARVEY SCHUBERT BARER  
1000 Potomac Street, NW  
5<sup>th</sup> Floor  
Washington, DC 20007

*Counsel for Transportation  
Intermediaries Association*



Carlos Rodriguez, Esq.  
RODRIGUEZ O'DONNELL ROSS  
FUERST GONZALEZ & WILLIAMS  
1211 Connecticut Avenue, NW  
Suite 800  
Washington, DC 20036

*Counsel for C.H. Robinson  
Worldwide, Inc.  
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Edward D. Greenberg, Esq.  
GALLAND KHARASCH GREENBERG  
FELLMAN & SWIRSKY, P.C.  
1054 Thirty-First Street, NW  
Washington, DC 20037-4492

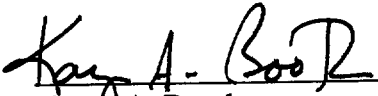
*Counsel for The National Customs Brokers  
and Forwarders Association of America, Inc.*

Leonard L. Fleisig, Esq.  
TROUTMAN SANDERS LLP  
401 Ninth Street, NW, Suite 1000  
Washington, DC 20004-2134

*Counsel for Ocean World Lines, Inc.*

Stanley O. Sher, Esq.  
SHER & BLACKWELL LLP  
1850 M Street, NW, Suite 900  
Washington, DC 20036-5820

*Counsel for World Shipping Council*

  
Karyn A. Booth