

Glencore Ltd. v Freepoint Commodities LLC

2021 NY Slip Op 32552(U)

December 3, 2021

Supreme Court, New York County

Docket Number: Index No. 653431/2019

Judge: Joel M. Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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<p>GLENCORE LTD.</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p style="text-align: center;">FREEPOINT COMMODITIES LLC,</p> <p style="text-align: center;">Defendant.</p>	<p>INDEX NO. <u>653431/2019</u></p> <p>MOTION DATE <u>07/16/2021</u></p> <p>MOTION SEQ. NO. <u>004</u></p> <p style="text-align: center;">DECISION + ORDER ON MOTION</p>
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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 82, 83, 84, 85, 86

were read on this motion to COMPEL.

On this motion, Plaintiff Glencore Ltd. (“Glencore”) seeks an order compelling Defendant Freepoint Commodities LLC (“Freepoint”) to authorize the release of certain low sulphur fuel oil (“LSFO”) samples for testing in discovery.¹ For the reasons set forth below, Glencore’s motion is granted.

Under CPLR 3101, parties are entitled to “full disclosure of all matter material and necessary in the prosecution or defense of an action,” where “[t]he words, ‘material and necessary’, are . . . to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity” (*Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 [1968]). “The test,” simply put, “is one of usefulness and reason” (*id.*; *see Norddeutsche Landesbank*

¹ The background facts of this case are discussed in the Court’s Decisions and Orders dated April 15, 2020 (NYSCEF 34) and June 24, 2021 (NYSCEF 68). Familiarity with those facts is presumed here.

Girozentrale v Tilton, 165 AD3d 447, 448 [1st Dept 2018] [denying motion for protective order because sought-after “discovery satisfie[d] the liberally interpreted standard for disclosure”]).

The LSFO samples sought by Glencore are material and necessary to the case. Glencore is alleging, among other things, that Freepoint negligently supplied it with contaminated LSFO (see FAC ¶¶29-36 [NYSCEF 54]). Freepoint denies that the LSFO it delivered was contaminated (see Answer to FAC ¶¶23 [NYSCEF 81]). Whether the LSFO was contaminated – and, if it was, whether Freepoint knew or should have known so – cuts to the core of Glencore’s contractual indemnification claim.

Glencore alleges that Freepoint’s negligence resulted in the fuel oil damaging the cargo tanks of a Vessel owned by a third party, which in turn triggered Freepoint’s contractual duty to indemnify Glencore against the Vessel owner’s claims (see FAC ¶¶29-36). Indeed, in granting Glencore leave to add the indemnification claim, this Court recognized that the parties’ competing narratives about the “chemical makeup and acid concentrations” of the LSFO “highlight the fact disputes underlying the indemnification claim” (NYSCEF 68 at 6-7). Now, Glencore intends to test the LSFO samples to provide the raw data for its experts to opine on the presence and amounts of chemicals or contaminants in the LSFO while it was in Freepoint’s shore tanks prior to delivery, and as-delivered onto the Vessel. The sought-after samples, therefore, bear on a key fact dispute in this case.

Freepoint’s arguments for blocking access to the LSFO samples are unavailing. Many of Freepoint’s objections go to admissibility of the evidence at trial, not to whether it is a proper subject of discovery (see *Burgel v Burgel*, 141 AD2d 215, 218 [2d Dept 1988] [questions over reliability of test “is relevant to admissibility, not to discovery”]; *Perez v Fleischer*, 122 AD3d 1157, 1160 [3d Dept 2014] [finding that request for hearing on reliability of scientific evidence

was premature as the “matter is only at the disclosure stage and information need not be admissible at trial to be discoverable”). At this stage, Freepoint’s purported concerns about the integrity of the LSFO samples amount to speculation. Freepoint argues that “the chain of custody and integrity of these samples *may* have been compromised,” and the “samples *may* no longer be representative of the fuel oil on the day those samples were taken,” which “*could* lead to unreliable results” (NYSCEF 79 at 11-12 [Freepoint’s opp. br.] [emphasis added]). But Freepoint does not submit evidence conclusively establishing that the LSFO samples *are* compromised.² While Freepoint will have the opportunity, at summary judgment or at trial, to challenge the sample’s testing, these arguments do not justify suppressing the samples themselves in discovery. Finally, Freepoint’s arguments about the language of the contract rehash arguments it already made in its motion to dismiss (*see Glencore Ltd. v Freepoint Commodities LLC*, 198 AD3d 413 [1st Dept 2021]), or rehearse arguments it can make at summary judgment or at trial.

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Therefore, it is

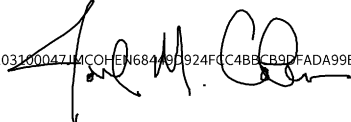
ORDERED that Glencore’s motion to compel is GRANTED; and it is further

ORDERED that, within 7 days of the date of this Decision and Order, Freepoint authorize the release and testing of the LSFO samples held by Camin Cargo Control, Inc. and

² Freepoint’s reliance on *Williams v Halpern*, 12 Misc 3d 1156(A) [Sup Ct, New York County 2006], is misplaced. In *Williams*, the court denied a plaintiff’s motion for further testing of blood samples following a four-day “framed issue hearing” concerning the samples’ chain of custody, which featured numerous fact and expert witnesses (*id.*). What’s more, in that case the presiding judge took the step of visiting the blood laboratory personally, “clad in white gown and purple gloves,” to inspect the sample vials and conditions of storage (*id.*). By contrast, the evidence Freepoint submits here consists of a three-paragraph affidavit from one of its executives, Eugene Hughes, which states only that “[t]he composition of fuel oil samples may change and degrade” for various reasons (NYSCEF 80).

Inspectorate America Corp. to be submitted to an independent laboratory for quality testing as set forth in Glencore’s Notice of Motion (NYSCEF 70).

This constitutes the Decision and Order of the Court.

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JOEL M. COHEN, J.S.C.

12/3/2021
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
		<input type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE