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August 13, 2010					
FEDERAL MARITIME COMMISSION					

**FEDERAL MARITIME COMMISSION**

**WASHINGTON, D.C.**

**DOCKET NO. 09-01**

**MITSUMI O.S.K. LINES LTD.**

**v.**

**GLOBAL LINK LOGISTICS, INC., OLYMPUS PARTNERS,  
OLYMPUS GROWTH FUND III, L.P., OLYMPUS EXECUTIVE FUND, L.P.,  
LOUIS J. MISCHIANTI, DAVID CARDENAS, KEITH HEFFERNAN,  
CJR WORLD ENTERPRISES, INC., AND CHAD J. ROSENBERG**

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**MEMORANDUM AND ORDER ON MOTIONS FOR RECONSIDERATION,  
LEAVE TO APPEAL ORDER DENYING MOTIONS TO DISMISS, AND  
STAY PENDING APPEAL**

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On May 5, 2009, the Secretary received the Complaint that commenced this proceeding from Mitsui O.S.K. Lines Ltd. (Mitsui). Respondents Olympus Growth Fund III, L.P., Olympus Executive Fund, L.P., Louis J. Mischianti, David Cardenas, and Keith Heffernan (Olympus Respondents) and CJR World Enterprises, Inc., and Chad J. Rosenberg (CJR Respondents) filed motions to dismiss Mitsui's Complaint. On June 22, 2010, I denied the motions to dismiss in most respects. *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, FMC No. 09-01 (ALJ June 22, 2010) (Memorandum and Order on Motions to Dismiss) (*Mitsui*, June 22 Order). On July 23, 2010, Olympus Respondents filed Olympus Respondents' Motion for Reconsideration or Alternative Motion for Leave to File Appeal and Stay of Proceedings (Olympus Respondents' Motion) and CJR Respondents filed Respondents CJR World Enterprises, Inc. and Chad J. Rosenberg's Motion for Leave to Appeal the Administrative Law Judge's Order Partially Denying Their Motion to Dismiss Mitsui O.S.K. Lines Ltd.'s Complaint (CJR Respondents' Motion). On August 9, 2010, Mitsui filed Complainant's Combined Reply to Motions for Reconsideration and Leave to Appeal.

Olympus Respondents' motion for leave to appeal the portion of the June 22 Order holding that the Commission has jurisdiction under the Shipping Act of the inland portion of multimodal through transportation is granted. In all other respects, the motions are denied.

## BACKGROUND

### I. FACTS.<sup>1</sup>

Complainant Mitsui is a vessel-operating common carrier (VOCC) registered with the Commission as Organization No. 001729. Respondent Global Link, a corporation, is a licensed non-vessel-operating common carrier (NVOCC), FMC License No. 018415. Mitsui alleges that between 2004 and 2006, Global Link engaged in split routing on Mitsui shipments in violation of the Shipping Act. Briefly stated, split routing occurs when an NVOCC books transportation with a VOCC from a foreign port to an inland destination, then, without notice to the VOCC, arranges to have the shipment delivered to another inland destination for which the freight rate in its service contract with the VOCC would be higher. *See Mitsui*, June 22 Order at 4-5. *See also Petition of Olympus Growth Fund III, L.P. and Olympus Executive Fund, L.P. for Declaratory Order, Rulemaking or Other Relief*, FMC No. 08-07, Order at 3-4 (June 15, 2009) (Order Denying Petition). In its Answer, Global Link acknowledges that it engaged in split routing on Mitsui shipments.

Mitsui alleges that Global Link's split routing practice functioned as a scheme to defraud Mitsui and to obtain ocean transportation at rates lower than the applicable service contract or tariff rates. Mitsui claims that it did not learn of the split routing practice until 2008 when it was contacted to provide evidence in an arbitration between the sellers of Global Link and the buyers of Global Link. (Amended Complaint at 6.)<sup>2</sup> Mitsui contends that split routing violates sections 10(a)(1) (46 U.S.C. § 41102(a)) and 10(d)(1) (46 U.S.C. § 41102(c)) of the Shipping Act and of the Commission's regulations governing the activities of ocean transportation intermediaries licensed by the Commission. 46 C.F.R. § 515.31(e). Mitsui contends that by using split routing, Respondents:

engaged in a willful and deliberate fraudulent scheme to obtain ocean transportation for property for less than the rates and/or charges that would otherwise apply in violation of Section 10(a)(1) . . . ;

- B. The Respondents' fraudulent actions and willful efforts to conceal information from [Mitsui] in an effort to obtain better rates constituted a failure to establish, observe and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, and delivering property in violation of Section 10(d)(1) . . . ;

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<sup>1</sup> A more extensive discussion of the facts and Mitsui's allegations is set out in the June 22, 2010, Memorandum and Order.

<sup>2</sup> On June 22, 2010, I granted Mitsui's motion for leave to file an amended complaint. *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, FMC No. 09-01 (ALJ June 22, 2010) (Memorandum and Order Granting Motion to Amend Complaint).

- C. Respondents' fraudulent practices, including the provision of false information and documents to [Mitsui], violated 46 C.F.R. § 515.31(e).

(Amended Complaint at 7.) Mitsui alleges that it suffered an actual injury on each shipment measured by the difference between the rates or charges Global Link paid and the rates or charges it should have paid for a shipment to Destination A set forth in the applicable service contract. Mitsui seeks reparations plus interest, costs, and attorney's fees. (*Id.*)

Between May 2003 and June 2006, the period in which Mitsui alleges Global Link engaged in split routing, respondents Olympus Growth Fund III, L.P. (OGF), Olympus Executive Fund, L.P. (OEF), and CJR World Enterprises, Inc. (CJR) owned Global Link. Respondents Louis J. Mischianti, David Cardenas, and Keith Heffernan are general partners of OGF and OEF and were officers and directors of Global Link. Respondent Chad J. Rosenberg owns CJR and was an officer and director of Global Link. Rosenberg is alleged to be the "alter ego" of CJR. Mitsui alleges that the former owners and/or officers of Global Link are also liable to Mitsui for reparations for Mitsui's injury caused by Global Link's split routing practice. OGF, OEF, Mischianti, Cardenas, and Heffernan are represented by the same counsel and I refer to them jointly as the Olympus Respondents.<sup>3</sup> CJR and Rosenberg are represented by the same counsel and I refer to them jointly as CJR Respondents.

On May 20, 2006, OGF, OEF, CJR, and Rosenberg (collectively Sellers) entered into a Stock Purchase Agreement with Golden Gate Logistics, Inc. (Golden Gate) to sell Global Link to GLL Holdings, Inc. (GLL Holdings). Golden Gate owns 100% of the stock of GLL Holdings which, as a result of the sale, now owns 100% of Global Link. Neither Golden Gate nor GLL Holdings is a party to this proceeding.

Mitsui alleges that it suffered actual injury as a result of Global Link's split routing practice and is entitled to reparations. Mitsui alleges that Global Link, OGF, OEF, Mischianti, Cardenas, Heffernan, CJR, and Rosenberg are each liable for Global Link's violations of the Act and should be required to pay the reparations.

As Global Link's current owners, Golden Gate and GLL Holdings will incur the monetary loss if their subsidiary Global Link is required to pay reparations to Mitsui. Global Link filed crossclaims against Mitsui respondents OGF, OEF, CJR, and Rosenberg asserting claims belonging to Golden Gate and GLL Holdings seeking indemnity under the Stock Purchase Agreement that effectuated the sale or contribution for their share of any reparations Global Link is required to pay to Mitsui.

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<sup>3</sup> In a related matter, OGF and OEF were the petitioners in FMC Docket Number 08-07 seeking a declaration that Global Link's split routing practice did not violate the Act. The Commission denied the petition. *Petition of Olympus Growth Fund III, L.P. and Olympus Executive Fund, L.P. for Declaratory Order, Rulemaking or Other Relief*, FMC No. 08-07 (June 15, 2009) (Order Denying Petition).

## **II. MOTIONS TO DISMISS FILED BY OLYMPUS RESPONDENTS AND CJR RESPONDENTS AND RESULTING ORDER.**

Olympus Respondents and CJR Respondents set forth a number of procedural and substantive arguments in support of their motions to dismiss Mitsui's Complaint. I denied the motions in most respects. *Mitsui*, June 22 Order at 15-27. Olympus Respondents and CJR Respondents seek Commission review of the denial of the motion to dismiss. I granted the motion to dismiss Mitsui's allegation that Olympus Respondents and CJR Respondents violated section 10(d)(1) of the Act (46 U.S.C. § 41102(c)) and 46 C.F.R. § 515.31(e). *Id.*, at 22-23. On July 22, 2010, the Commission served notice that it would review this dismissal. *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, FMC No. 09-01 (FMC July 22, 2010) (Notice of Commission Determination to Review).

Olympus Respondents and CJR Respondents also filed motions to dismiss Global Link's crossclaims. I dismissed the crossclaims in the June 22 Order. *Mitsui*, June 22 Order at 27-43. On July 14, 2010, Global Link filed exceptions to the dismissal pursuant to Commission Rule 227. 46 C.F.R. § 502.227.

### **DISCUSSION**

#### **I. OLYMPUS RESPONDENTS' MOTION FOR RECONSIDERATION.**

Olympus Respondents argues that two grounds support reconsideration of the June 22 Order. First, they contend that the Commission's Order in *Petition of Olympus Growth Fund III, L.P. and Olympus Executive Fund, L.P. for Declaratory Order, Rulemaking or Other Relief*, FMC No. 08-07 (FMC June 15, 2009) (Order Denying Petition) requires a finding in this proceeding that the Commission does not have personal jurisdiction over the Olympus Respondents on a complaint alleging that they violated the Act while they owned Global Link. (Olympus Respondents' Motion at 6-7.) Second, they contend that the June 22 Order reaches the erroneous conclusion that Olympus Respondents are "shippers." (*Id.* at 7-9.)

In its Reply, Mitsui first argues that

Commission Rules do not provide a mechanism for reconsideration of presiding officer decisions. As such, there is no basis for this portion of the motion and it should be treated as a "repetitious motion," which is prohibited under Commission Rule 73. *Holt Cargo Systems, Inc. v. Delaware River Port Authority*, 28 S.R.R. 1268, 1272 (ALJ 1999). Moreover, even though Commission Rule 261 on its face is applicable only to Commission final decisions or orders, if that standard is applied, the motion must still be denied.

(Mitsui Reply at 2-3.) Commission Rule 261 provides that "[w]ithin thirty (30) days after issuance of a final decision or order by the Commission, any party may file a petition for reconsideration."

46 C.F.R. § 502.261(a). Rule 261 is comparable to Federal Rule of Civil Procedure 60(b), which governs grounds for relief from a final judgment, order, or proceeding.

Under the civil rules, reconsideration of an interlocutory order is governed by Rule 54(b), not Rule 60(b).

[A]ny order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

Fed. R. Civ. P. 54(b). “[A]bsent a particularly egregious abuse of discretion, district courts are free to reconsider their interlocutory orders.” *Sanchez v. Triple-S Management, Corp.*, 492 F.3d 1, 12 n.12 (1st Cir. 2007) (internal quotation marks omitted) (citing *Harlow v. Children’s Hosp.*, 432 F.3d 50, 55-56 (1st Cir. 2005)).

Motions to reconsider interlocutory orders – in contrast to motions for reconsideration of final judgments – are within the discretion of the trial court, subject to appellate review under the abuse of discretion standard. *See United Mine Workers v. Pittston Co.*, 793 F. Supp. 339, 344-45 (D.D.C. 1992), *aff’d*, 984 F.2d 469 (D.C. Cir.), *cert. den.*, 509 U.S. 924, 113 S. Ct. 3040, 125 L. Ed. 2d 726 (1993). The Advisory Committee Notes to Rule 60(b) of the Federal Rules of Civil Procedure are consistent with this standard. As the Notes explain, “interlocutory judgments are not brought within the restrictions of [Rule 60(b)], but rather they are left subject to the complete power of the court rendering them to afford such relief from them as justice requires.” Fed. R. Civ. P. 60(b) Advisory Comm. Notes; *see also Schoen v. Washington Post*, 246 F.2d 670, 673 (D.C. Cir. 1957) (Burger, J.) (so long as district court has jurisdiction over an action, it has complete power over interlocutory orders therein and may revise them when consonant with equity).

*Childers v. Slater*, 197 F.R.D. 185, 190 (D.D.C. 2000).

Commission Rule 12 provides that “[i]n proceedings under this part, for situations which are not covered by a specific Commission rule, the Federal Rules of Civil Procedure will be followed to the extent that they are consistent with sound administrative practice.” 46 C.F.R. § 502.12. There is no Commission Rule comparable to Civil Rule 54(b). Furthermore, the Commission has held that “[a] presiding officer may properly reconsider and reverse interlocutory rulings made prior to the initial decision, whether those rulings are made by him or her or by a previously assigned administrative law judge.” *Tractors and Farm Equipment Ltd. v. Waterman Steamship Corp.*, 21 S.R.R. 1293, 1295 n.9 (FMC 1982) (citing *Knight v. Lane*, 228 U.S. 6 (1912); *Bookman v. United States*, 435 F.2d 1263 (Ct. Cl. 1972); *Faircrest Site Opposition v. Levi*, 418 F. Supp. 1099 (N.D. Ohio 1976)). Therefore, it is consistent with sound administrative practice to follow Civil Rule

54(b) in Commission proceedings. A presiding officer has discretion to entertain a motion for reconsideration of an interlocutory order.

The Court has broad discretion to hear a motion for reconsideration brought under Rule 54(b): Unlike Rule 60(b) which contains a reasonableness provision, Rule 54(b) allows a court to reconsider its interlocutory decisions at any time prior to a final judgment. The standard for determining whether or not to grant a motion to reconsider brought under Rule 54(b) is the “as justice requires” standard . . . , which requires determining, within the Court's discretion, whether reconsideration is necessary under the relevant circumstances. Considerations a court may take into account under the “as justice requires” standard include whether the court patently misunderstood the parties, made a decision beyond the adversarial issues presented, made an error in failing to consider controlling decisions or data, or whether a controlling or significant change in the law has occurred. Furthermore, the party moving to reconsider carries the burden of proving that some harm would accompany a denial of the motion to reconsider: In order for justice to require reconsideration, logically, it must be the case that, some sort of injustice will result if reconsideration is refused. That is, the movant must demonstrate that some harm, legal or at least tangible, would flow from a denial of reconsideration.

*In Defense of Animals v. National Institutes of Health*, 543 F. Supp. 2d 70, 75-76 (D.D.C. 2008) (citations and most internal quotation marks omitted). See also 46 C.F.R. § 502.155 (“In all cases, as prescribed by the Administrative Procedure Act, 5 U.S.C. 556(d), the burden of proof shall be on the proponent of the rule or order.”).

The June 22 Order for which Olympus Respondents seek reconsideration is an interlocutory order, not a final order. Therefore, I have discretion to entertain Olympus Respondents’ motion seeking reconsideration of the Order denying Olympus Respondents’ motion to dismiss and will exercise that discretion.

As their first ground supporting reconsideration, Olympus Respondents argue that in its ruling on their Petition in FMC No. 08-07, the Commission held that OEF and OGF “are private equity funds **that are not subject to the Commission’s jurisdiction**, are not entities regulated by the Commission, and are not in a position to take action that places them in peril insofar as the Commission is concerned.” (Olympus Respondents’ Motion at 6 (quoting *Petition of Olympus Growth Fund III, L.P. and Olympus Executive Fund, L.P. for Declaratory Order, Rulemaking or Other Relief*, FMC No. 08-07, Order at 10 (FMC June 15, 2009) (Order Denying Petition) (emphasis in Motion).)

It follows from this finding that the Commission also lacks jurisdiction over the individual defendants Messrs. Mischianti, Cardenas, Heffernan. Like OGF and OEF, these individuals are not alleged to be shippers, to have obtained or attempted to obtain ocean transportation, or to have engaged in any conduct regulated by [the]

Commission. Just as OEF and OGF are not subject to the Commission's jurisdiction merely by virtue of their status as former shareholders of Global Link's parent company, Messrs. Mischianti, Cardenas, Heffernan cannot be subject to such jurisdiction simply because they are former officers and/or directors of Global Link.

(Olympus Respondents' Motion at 6-7.)

Mitsui argues that when the Commission's holding quoted above is placed in context, it is clear that the Commission merely held that it did not have jurisdiction over the Olympus respondents for purposes of the declaratory order proceeding under Rule 68 because the activities at issue had already occurred and because OEF and OGF had divested their interest in Global Link meaning that the activities were unlikely to recur.

(Mitsui Reply at 4.)

In their petition in FMC No. 08-07, OGF and OEF sought to have the Commission determine whether split routing violates section 10(a)(1) of the Act.

[T]heir petition arises out of the sale of their ownership stake in Global Link and a subsequent attempt by the purchasers and their successors, including Global Link, to now undo the transaction through arbitration. According to Petitioners, the purchasers' claims in the arbitration are based, in part, on their assertion that Global Link's practice of re-routing the domestic inland transportation leg of a through shipment violates the proscription in section 10(a)(1) of the Shipping Act against obtaining ocean transportation at less than the rates or charges that would otherwise be applicable.

Petitioners assert that the Commission has never brought an enforcement action against a shipper for re-routing the domestic inland portion of a through shipment, and that Global Link has sought to establish the precedent that it needs to prevail in the commercial arbitration by voluntarily disclosing the practice to BOE. According to Petitioners, Global Link hopes to use the informal disclosure proceeding to obtain from BOE an "expert opinion" for use in the arbitration. Petitioners state that the Commission must clarify its views as to the proper scope of section 10(a)(1) of the Act, and they assert that the use of an informal proceeding between Global Link and BOE to declare a practice unlawful raises serious questions when the illegality of the practice is not clear from the language of the statute or regulations.

Petitioners assert that BOE appears poised to find that the practice of re-routing the domestic inland portion of through transportation violates section

10(a)(1) of the Act, despite what Petitioners contend is plain language of the statute to the contrary. Petitioners argue that fundamental notions of fairness and administrative due process require that the Commission provide an opportunity for notice and comment on what they describe as a significant change in the administration and application of the Shipping Act. Alternatively, Petitioners argue that Global Link's voluntary disclosure to BOE should be the subject of a formal docketed proceeding with notice, opportunity for hearing, and opportunity to intervene. Petitioners assert that their "intervention rights" should not be bypassed through the use of informal proceedings by BOE. Petitioners state that they have a significant interest in the proceeding because the challenged conduct occurred while Petitioners owned Global Link, and Global Link's intent to use the voluntary disclosure proceeding in the commercial arbitration demonstrates that the proceeding will have a material effect on Petitioners' interests.

*Petition of Olympus Growth Fund III, L.P. and Olympus Executive Fund, L.P. for Declaratory Order, Rulemaking or Other Relief, FMC No. 08-07, Order at 2-3 (FMC June 15, 2009) (Order Denying Petition).*

In its ruling dismissing the Petition, a portion of which Olympus Respondents rely upon to support their argument, the Commission stated:

Petitioners are private equity funds that are not subject to the Commission's jurisdiction, are not entities regulated by the Commission, and are not in a position to take action that places them in peril insofar as the Commission is concerned. In addition, Petitioners are not seeking a legal ruling on a proposed future course of action, as contemplated in Rule 68, as the activities at issue have already occurred. Taking these factors into consideration, it appears that Petitioners' request for a declaratory order does not meet the requirements of Rule 68 that such request is to be filed "solely" for the purpose of allowing Petitioners to act without peril upon their own view. As the request does not meet the requirements of Rule 68, there is no basis for granting it.

*Id.*, at 10.

Placed in its context, the quote on which Olympus Respondents rely does not support their argument that the Commission does not have personal jurisdiction over Olympus Respondents. The fact that Olympus Respondents were no longer owners of Global Link at the time they filed their petition in FMC No. 08-07 and therefore were not seeking a legal ruling on a proposed future course of action does not mean that the Commission does not have personal jurisdiction over them for complaints alleging violations of section 10(a)(1) during the period they owned Global Link. The motion for reconsideration on Olympus Respondents' first ground is denied.

As their second ground supporting reconsideration, Olympus Respondents argue that the June 22 Order must be reconsidered because the presiding judge

incorrectly declared that the Olympus Respondents operated as shippers on each shipment at issue in this proceeding. [*Mitsui*, June 22 Order at 11-12, 23]. There is simply in [*sic*] no basis in the Complaint, or in any of the facts that have been presented to the Presiding Judge, to support this conclusion.

(Olympus Respondents' Motion at 7.)

Mitsui responds that mere disagreement with the Presiding Officer's conclusion is not grounds for reconsideration. "In any event, while the Presiding Officer did correctly conclude that by participating in the split routing scheme, the Olympus Respondents were acting as shippers for purposes of Section 10(a)(1), this conclusion was not necessary for the result." (Mitsui Reply at 5.) Mitsui concludes that "[b]y virtue of their participation in the activities giving rise to the complaint, the Olympus Respondents are 'persons' under Section 10(a)(1) . . . and are accordingly subject to the jurisdiction of the Commission." (*Id.* at 6.)

The portions of the June 22 Order on which Olympus Respondents rely state as follows:

This proceeding presents an entirely different factual and legal situation [from that presented in *Landstar Express America, Inc. v. Federal Maritime Commission*, 569 F.3d 493 (D.C. Cir. 2009)]. Mitsui alleges that Olympus Respondents, who are not licensed as an NVOCC but were the owners and operators of Global Link, a corporation licensed as an NVOCC, participated with Global Link in a scheme "to fraudulently obtain ocean transportation for property for less than the rates and/or charges that would otherwise apply." (Complaint at 3.) Olympus Respondents are "persons" under the Shipping Act, *Rose Int'l, Inc. v. Overseas Moving Network Int'l Ltd.*, 29 S.R.R. 119, 158 (F.M.C. 2001), and alleged to be shippers who obtained transportation for less than the rates and/or charges that would otherwise apply. See 46 U.S.C. § 40102(22) ("The term 'shipper' means – (A) a cargo owner; (B) the person for whose account the ocean transportation of cargo is provided; (C) the person to whom delivery is to be made; (D) a shippers' association; or (E) a non-vessel-operating common carrier that accepts responsibility for payment of all charges applicable under the tariff or service contract."). The conduct of shippers is regulated by the Act.

The Commission has exclusive jurisdiction to administer and enforce the 1984 Act. Violations of the 1984 Act can be rectified only by the sanctions and remedies provided for in that Act. If failure by a shipper to pay a freight bill violates section 10(a)(1), . . . then the affected carrier *must* seek to recover through a reparations complaint before the Commission and may not seek relief from a court.

*Unpaid Freight Charges*, 26 S.R.R. 735, 739 (1993) (emphasis in original). “The D.C. Circuit, in referring to section 16, initial paragraph, of the 1916 Act, the predecessor of section 10(a)(1), recognized that ‘Congress was concerned both with protection of carriers against unscrupulous shippers, and of honest shippers against unscrupulous competitors, acting independently, or in collusion with a carrier.’” *Rose Int’l*, 29 S.R.R. at 164, quoting *Hohenberg Brothers Co. v. Federal Maritime Comm’n*, 316 F.2d 381, 384 (D.C. Cir. 1963). See also *Rose Int’l*, 29 S.R.R. at 159 (“Commission has subject matter jurisdiction over the matter because the Complaint alleges violations of the Shipping Act”).

The principles articulated in *Landstar* do not lead to a conclusion that the Commission does not have jurisdiction to enforce the Act against Olympus Respondents who, assuming the truth of the allegations in Mitsui’s complaint, were shippers “engaged in a willful and deliberate fraudulent scheme to obtain ocean transportation for property for less than the rates and/or charges that would otherwise apply in violation of Section 10(a)(1)” and other sections of the Act. (Complaint at 7.) Olympus Respondents’ motion to establish a briefing schedule followed by oral argument regarding the effect of the *Landstar* decision on the motions to dismiss is denied.

*Mitsui*, June 22 Order at 11-12 (footnote omitted).

Accepting as true the facts alleged in Mitsui’s Complaint, Olympus Respondents and CJR Respondents operated as a shipper in relationship to Matsui on each shipment and engaged in a fraudulent scheme to “obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise apply,” 46 U.S.C. § 41102(a), not an NVOCC that “fail[ed] to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.” 46 U.S.C. § 41102(c). Therefore, the allegations that Olympus Respondents and CJR Respondents violated section 10(d)(1) (46 U.S.C. § 41102(c)) and 46 C.F.R. § 515.31(e) are dismissed.

*Id.* at 23.

Olympus Respondents’ argument that the quoted text constitutes a declaration “that the Olympus Respondents operated as shippers on each shipment at issue in this proceeding” does not accurately reflect the Order. As set forth above, the Order states: “Olympus Respondents who, assuming the truth of the allegations in Mitsui’s complaint, were shippers” and “[a]ccepting as true the facts alleged in Mitsui’s Complaint, Olympus Respondents and CJR Respondents operated as a shipper in relationship to Matsui.” If Mitsui is able to prove the allegations in its Amended Complaint, it may lead to a conclusion that Olympus Respondents were shippers, but at this stage

in the proceeding, no “declaration” or conclusion has been made. The motion for reconsideration on Olympus Respondents’ second ground is denied.

Olympus Respondents have not met their burden of establishing that the June 22 Order should be altered or revised. Therefore, the motion for reconsideration is denied.

## II. MOTIONS FOR LEAVE TO APPEAL.

### A. Controlling Law.

In the federal court system, the United States courts of appeal have jurisdiction of appeals “from all final decisions of the district courts . . . except where a direct review may be had in the Supreme Court.” 28 U.S.C. § 1291. “A party generally may not take an appeal under § 1291 until there has been a decision by the district court that ‘ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.’” *Van Cauwenberghe v. Biard*, 486 U.S. 517, 521 (1988) (footnote omitted), quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945). This rule that a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits:

emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of trial. Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system. In addition, the rule is in accordance with the sensible policy of “avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment.”

*Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981), quoting *Cobbledick v. United States*, 309 U.S. 323, 325 (1940).

It is abundantly clear that denial of the motions to dismiss Mitsui’s Complaint does not end the litigation on the merits and is not appealable as a final decision in this proceeding.

[A]s the Supreme Court noted in *Catlin v. United States*, 324 U.S. [at 236], “denial of a motion to dismiss, even when the motion is based upon jurisdictional grounds, is not immediately reviewable.” See also *Almonte v. City of Long Beach*, 478 F.3d 100, 105 (2d Cir. 2007) (“The denial of a motion to dismiss is ordinarily considered non-final, and therefore not immediately appealable.” (internal quotation marks and citation omitted)). The district court’s denial of Wabtec’s motion to dismiss for lack of jurisdiction does not constitute a final order that is appealable to this court because “it allows the litigation to continue,” *Lawson v. Abrams*, 863 F.2d 260, 262 (2d Cir.

1988), leaving for the district court the adjudication of the merits of Faiveley's request for a preliminary injunction.

*Wabtec Corp. v. Faiveley Transport Malmo AB*, 525 F.3d 135, 137-138 (2d Cir. 2008).

The Supreme Court has recognized that there is a "small class" of decisions that are immediately appealable under section 1291 even though the decision has not terminated the proceedings in the district court. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). A decision is final and appealable for purposes of section 1291 if it "finally determine[s] claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* To come within the collateral order doctrine of *Cohen*, the order must satisfy each of three conditions: It must (1) "conclusively determine the disputed question," (2) "resolve an important issue completely separate from the merits of the action," and (3) "be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) (footnote omitted).

The conditions are "stringent," and unless they are kept so, the underlying doctrine will overpower the substantial finality interests § 1291 is meant to further: judicial efficiency, for example, and the "sensible policy 'of avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise.'"

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Prior cases mark the line between rulings within the class and those outside. On the immediately appealable side are orders rejecting absolute immunity and qualified immunity. A State has the benefit of the doctrine to appeal a decision denying its claim to Eleventh Amendment immunity and a criminal defendant may collaterally appeal an adverse ruling on a defense of double jeopardy.

*Will v. Hallock*, 546 U.S. 345, 349-350 (2006) (citations omitted).

Courts have recognized that an order denying a motion to dismiss for lack of jurisdiction is not immediately appealable under the *Cohen* doctrine. *See, e.g., United States v. Brakke*, 813 F.2d 912, 913 (8th Cir. 1987) (no jurisdiction to review denial of motion to dismiss for lack of subject matter jurisdiction) (*quoting Catlin v. United States, supra*); *Rux v. Republic of Sudan*, 461 F.3d 461, 474-475 (4th Cir. 2006) ("There is nothing that would prevent effective review of the denial of a motion to dismiss for lack of personal jurisdiction following final judgment in the district court.") (citations and footnote omitted), *cert. denied*, 127 S. Ct. 1325 (2007); *Byrd v. Corporacion Forestal Y Industrial De Olancho S.A.*, 182 F.3d 380, 381 n.1 (5th Cir. 1999) (court of appeals does not have jurisdiction over interlocutory appeal of order denying motion to dismiss for lack of personal jurisdiction).

Commission Rule 153 provides that a presiding officer may allow an interlocutory appeal if he or she finds it necessary “to prevent substantial delay, expense, or detriment to the public interest, or undue prejudice to a party.” 46 C.F.R. § 502.153(a). The Commission has recognized that it is an “extraordinary step” to grant leave to petition the Commission “to overturn the ALJ’s jurisdictional ruling denying [a] motion to dismiss.” *Inlet Fish Producers, Inc. v. Sea-Land Service, Inc.*, 29 S.R.R. 306, 315 (2001) (*Inlet Fish III*). The Commission has also held that it is appropriate to look to the procedures established for the district courts for guidance in determining whether an interlocutory appeal is appropriate. See *Amzone International, Inc. v. Hyundai Merchant Marine Co.*, 27 S.R.R. 386, 389 (1995) (“[I]nterlocutory appeals are permissible if a district judge certifies that an otherwise unappealable order ‘. . . involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . . .’ 28 U.S.C. § 1292(b).”).

The moving party bears the burden of demonstrating that interlocutory appeal is appropriate. *United States ex rel. Branch Consultants, L.L.C. v. Allstate Ins. Co.*, 668 F. Supp. 2d 780, 813 (E.D. La. 2009); 46 C.F.R. § 502.155.

#### **B. Olympus Respondents’ Motion for Leave to Appeal.**

Olympus Respondents contend that its proposed appeal “presents two controlling questions of law for which immediate review by the Commission is appropriate and necessary.” (Olympus Respondents’ Motion at 11.)

Here, the controlling questions of law to be addressed on appeal require the Commission to determine the extent of its jurisdiction is limited by the Shipping Act, namely: (1) can the Commission exercise jurisdiction over entities that are not alleged to be shippers, NVOCCs, ocean common carriers, or other parties otherwise subject to the Act, particularly when the Commission has already ruled that it cannot? and (2) can the Commission exercise jurisdiction over activities that do not concern rates for ocean transportation?

(*Id.* at 12.)

The first issue that Olympus Respondents claim supports their motion for leave to appeal, an argument that the Commission does not have personal jurisdiction over Olympus Respondents, echoes the first argument in their motion for reconsideration. It is first noted that this argument is based on an incorrect premise. As discussed above, the Commission held that through their petition, OGF and OEF were “not seeking a legal ruling on a proposed future course of action, as contemplated in Rule 68, as the activities at issue have already occurred.” *Petition of Olympus Growth Fund III, L.P. and Olympus Executive Fund, L.P. for Declaratory Order, Rulemaking or Other Relief*, FMC No. 08-07, Order at 10 (FMC June 15, 2009) (Order Denying Petition). The Commission has not “already ruled” that it does not have personal jurisdiction over Olympus

Respondents on a complaint alleging violations of the Act during the period in which they owned Global Link.

Olympus Respondents' first argument does not meet any of the elements of the *Cohen* doctrine. Mitsui's Amended Complaint alleges that Olympus Respondents and the other Respondents

knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or any other unjust or unfair device or means, obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise apply.

46 U.S.C. § 41102(a). This is in the first instance a question of fact: Can Mitsui prove by a preponderance of the evidence that Olympus Respondents and the other Respondents violated section 10(a)(1)? The answer to this question depends on the factual evidence presented by Mitsui. The June 22 Order does not conclusively determine this disputed question, as it is dependent on the evidence presented by Mitsui. The June 22 Order does not resolve an important issue completely separate from the merits of the action, but only that Mitsui can present evidence to try to prove its case against Olympus Respondents. The June 22 Order is reviewable on appeal from a final judgment: In the event that when it dismissed OGF and OEF's Petition, the Commission also intended to preclude jurisdiction over complaints alleging that Olympus Respondents violated the Shipping Act when they owned Global Link, the Commission could reverse a decision that holds Olympus Respondents liable and dismiss the complaint.

Furthermore, Olympus Respondents' argument is based on their contention that the Order incorrectly declared that the Olympus Respondents operated as a shipper on each shipment at issue in this proceeding. Olympus Respondents claim this to be an error of law and contend that the presiding officer erred in accepting Mitsui's conclusory allegations and compounded the error by failing to cite authority or alleged facts to show how Olympus Respondents can be held vicariously liable for Global Links' alleged misconduct. (Olympus Respondents' Motion at 13.).

[I]nterlocutory orders are not appealable "on the mere ground that they may be erroneous." *Will v. United States*, 389 U.S. 90, 98, n.6 (1967). Permitting wholesale appeals on that ground not only would constitute an unjustified waste of scarce judicial resources, but also would transform the limited exception carved out in *Cohen* into a license for broad disregard of the finality rule imposed by Congress in § 1291.

*Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. at 375-376.

Olympus Respondents have not met their burden of establishing that interlocutory appeal on this issue is appropriate under the *Cohen* doctrine or necessary "to prevent substantial delay, expense, or detriment to the public interest, or undue prejudice to a party." 46 C.F.R. § 502.153(a).

Therefore, Olympus Respondents have not met their burden of demonstrating that they should be permitted to take an interlocutory appeal of this issue.

Olympus Respondents' second issue – can the Commission exercise jurisdiction over activities that do not concern rates for ocean transportation? – is a purely legal dispute regarding the reach of the Shipping Act and the subject matter jurisdiction of the Commission. There appears to be no dispute as to the factual pattern. Global Link engaged in split routing on the shipments to receive a better rate under its service contract by telling falsely Mitsui that the shipment was destined for Destination A when it was actually going to Destination B. *See Mitsui*, June 22 Order at 3-4. *See also Petition of Olympus Growth Fund III, L.P. and Olympus Executive Fund, L.P. for Declaratory Order, Rulemaking or Other Relief*, FMC No. 08-07, Order at 3-4 (FMC June 15, 2009) (Order Denying Petition).

As noted above, the Commission has held that it is appropriate to look to section 1292(b) as authority to appeal an interlocutory order. *Amzone International, Inc. v. Hyundai Merchant Marine Co.*, 27 S.R.R. at 389. Section 1292 permits appeal when an order “involves a controlling question of law as to which there is substantial ground for difference of opinion.” 28 U.S.C. § 1292(b). For the reasons set forth in the June 22 Order at 15-18, I found that the Supreme Court’s decisions in *Kawasaki Kisen Kaisha, Ltd. v. Regal-Beloit Corp.*, 561 U.S. \_\_\_\_, 130 S. Ct. 2433 (2010) and *Norfolk Southern R. Co. v. James N. Kirby*, 543 U.S. 14, 18-19 (2004) “compel a finding that the Commission has jurisdiction to consider complaints alleging violations of the Shipping Act occurring on those shipments irrespective of the point in the transportation the violations are alleged to have taken place.” *Mitsui*, June 22 Order at 18.

The question of the Commission’s jurisdiction over the inland portion of through transportation is a controlling question of law. While I have some question as to how substantial Olympus Respondents’ argument may be, the grounds for difference of opinion are not insubstantial. The public interest may be considered in determining whether to permit an interlocutory appeal. *In re Microsoft Corp. Antitrust Litigation*, 274 F. Supp. 2d 741, 743 (D. Md. 2003) (“In sum, I find that the three prerequisites for certifying an interlocutory appeal under 28 U.S.C. § 1292(b) are satisfied and that it is in the public interest for the Fourth Circuit to be given the opportunity to decide whether now to review my collateral estoppel ruling.”). The Commission has not had the opportunity to express its views on this subject in a formal proceeding since the Supreme Court issued its decisions in *Kirby* and “*K*” *Line*.<sup>4</sup> It may be in the public interest for the Commission to provide its views over the important question of its jurisdiction over the inland portion of ocean transportation on a through bill of lading issued by a common carrier. Therefore, I will grant Olympus Respondents’ motion for leave to appeal the holding in the June 22 Order that the Commission has jurisdiction under the Shipping Act of the inland portion of multimodal through transportation. *Mitsui*, June 22 Order at 15-18.

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<sup>4</sup> The issue was present in OGF and OEF’s petition. Since the petition did not meet the requirements of Rule 68, the Commission did not address the merits.

### C. CJR Respondents' Motion for Leave to Appeal.

In their motion to dismiss, CJR Respondents argued that Mitsui's Complaint should be dismissed for failure to state a claim. (CJR Respondents' Motion to Dismiss Mitsui Complaint at 4.) In their motion for leave to appeal, they raise five arguments that they contend justify interlocutory appeal of the June 22 Order: (1) The ALJ's Order is inconsistent with Commission Rule 62(b) which sets forth the pleading requirements for claims for reparations; (2) the Order is in error in that Mitsui failed to allege the elements of section 10(a)(1) of the Act as to the CJR Respondents and Mitsui does not plead any facts relating to the CJR Respondents to state a cause of action as required by Commission Rule 62(a); (3) the ALJ erred in refusing to apply Civil Rule 9(b); (4) the Order misinterprets the Commission's decision not to adopt proposed changes to Rule 62 and erroneously rules that Commission Rule 62 precludes the application of Rule 9(b) when fraud is an element of the alleged violations; and (5) the Order failed to consider that the Complaint does not allege any facts to support piercing the corporate veil.

In denying the motion to dismiss, I held that "Mitsui's Complaint provides the information required by Commission Rule 62." *Mitsui*, June 22 Order at 21. *Compare Houben v. World Services Moving, Inc.*, FMC Informal Docket No. 1887(I), Order at 7 (FMC July 6, 2010) (Order Vacating the Decision of the Settlement Officer and Finding a Violation of the Shipping Act by Respondent Cross Country Van Lines, LLC) ("Pleadings are to be construed liberally and courts have not limited claims to those specifically described in the pleadings as long as a pleading gives another party fair notice of the claim or defense."). All five of CJR Respondents' arguments concern the adequacy of Mitsui's Amended Complaint, in essence claiming that the Amended Complaint fails to state a claim against CJR Respondents.

Denial of a motion to dismiss for failure to state a claim presents few difficulties in applying finality doctrine. Ordinarily the denial is not appealable. Appeal is available in a few special circumstances to protect rights that are defined as rights intended to protect against the burden of trial rather than simply to protect against the entry of judgment, but such appeals are likely to be confined to clearly defined situations. The best illustration, so long as it stands, is provided by appeals based on claims of official immunity.

15A Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d*, § 3914.1 (2d ed. 1992). CJR Respondents' motion does not present any of the "few special circumstances" that would justify interlocutory appeal of the denial of its motion to dismiss. CJR Respondents have not met their burden of establishing that they should be permitted to appeal the June 22 Order; therefore, their motion for leave to appeal is denied.

Furthermore, in their motion to dismiss, CJR Respondents did not argue the first ground stated in their motion for leave to appeal: "The ALJ's Order is inconsistent with Commission Rule 62(b) which sets forth the pleading requirements for claims for reparations."

“To preserve a claim of error on appeal, a party typically must raise the issue before the trial court. . . . ‘No procedural principle is more familiar . . . than that a . . . right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.’” *In re Sealed Case*, 552 F.3d 841, 851-52 (D.C. Cir. 2009) (quoting *Yakus v. United States*, 321 U.S. 414, 444, 64 S. Ct. 660, 88 L. Ed. 834 (1944)). . . . Generally, an argument not made in the trial court is forfeited and will not be considered absent “exceptional circumstances.” *Nemariam v. Fed. Democratic Republic of Ethiopia*, 491 F.3d 470, 483 (D.C. Cir. 2007) (internal quotation marks and citations omitted). “[C]ourts of appeals have discretion to address issues raised for the first time on appeal,” but exercise such discretion “only in exceptional circumstances, as, for example, in cases involving uncertainty in the law; novel, important, and recurring questions of federal law; intervening change in the law; and extraordinary situations with the potential for miscarriages of justice.” [*Flynn v. Comm’r*, 269 F.3d 1064, 1069 (D.C. Cir. 2001)].

*Salazar ex rel. Salazar v. District of Columbia*, 602 F.3d 431, 436-437 (D.C. Cir. 2010). There are no exceptional circumstances that would justify granting leave to take an interlocutory appeal of the denial of a motion to dismiss to argue a claim that CJR Respondents did not raise in the motion to dismiss.

Even if CJR Respondents had raised this claim in its motion to dismiss, the motion would have been denied, as would leave to appeal on that ground. Rule 62(b) provides that the elements CJR Respondents argue are missing from the Amended Complaint are necessary “[w]here reparation is sought *and the nature of the proceeding so requires.*” 46 C.F.R. § 502.62(b). Mitsui’s Amended Complaint sets forth a detailed description of the split routing practice that it alleges occurred without its knowledge. (Mitsui Amended Complaint at 3-6.) Mitsui claims that it demanded an accounting from Global Link so it could determine which shipments were affected by split routing, but “Global Link has not provided such an accounting and has not compensated [Mitsui] for its damages.” (*Id.* ¶ IV.M.) “The full extent of damages can only be determined after obtaining discovery and thereby securing information about the container, destinations, and rates involved.” (*Id.* ¶ VI.A.)

The nature of this proceeding does not require all of the information set out in Rule 62(b). Therefore, even if CJR Respondents had raised this claim in their motion to dismiss, the motion would have been denied and leave to appeal denied.

### III. OLYMPUS RESPONDENTS’ MOTION FOR STAY.<sup>5</sup>

“Unless otherwise provided, the certification of the appeal shall not operate as a stay of the proceeding before the presiding officer.” 46 C.F.R. § 502.153(d). Since I have granted in part Olympus Respondents’ motion for leave to appeal its claim that the Commission does not have

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<sup>5</sup> CJR Respondents did not move for a stay pending appeal.

jurisdiction over the inland portion of an multimodal shipment, I must determine whether this proceeding should be stayed while the Commission considers the appeal.

The factors to be considered in determining whether a stay is warranted are: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.

*Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 673-674 (D.C. Cir. 1985), citing *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir.1958). The consideration of the factors on a motion for stay is left to the sound discretion of the administrative law judge. *Permian Basin Area Rate Cases*, 390 U.S. 747, 773 (1968); *Landis v. North American Co.*, 299 U.S. 248, 254 (1936); *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844-845 (D.C. Cir. 1977). The applicant for a stay has the burden of demonstrating that a stay should be imposed. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1985). See *Odyssey Stevedoring of Puerto Rico, Inc. v. Puerto Rico Ports Authority*, 30 S.R.R. 1324, 1328-1334 (2007).

The Commission has articulated the test for a stay as follows:

[I]t is necessary to look to case law for guidance. In [*Virginia Petroleum Jobbers*] the Court of Appeals for the District of Columbia Circuit set out four standards to be applied in determining whether a stay should be granted. The four standards are as follows: (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? Without such a substantial indication of probable success, there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review. (2) Has the petitioner shown that without such relief, it will be irreparably injured? . . . (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? . . . (4) Where lies the public interest? [*Virginia Petroleum Jobbers*, 259 F.2d at 925.]

Although *Virginia Petroleum Jobbers* involved a petition for judicial stay pending review on the merits, the "irreparable harm" and "public interest" factors can be considered to have application where an administrative agency is being petitioned to stay one of its own orders pending an appeal.

*Western Overseas Trade and Dev. Corp. v. Asia North America Eastbound Rate Agreement*, 26 S.R.R. 1382, 1383-1384 (May 11, 1994).

Olympus Respondents only address these factors in a superficial manner:

A stay of the proceedings is necessary to ensure that the Olympus Respondents will not be prejudiced. The Commission has already ruled that the Olympus Respondents are not subject to the Commission's jurisdiction. The Olympus Respondents are

entitled to rely on that ruling and not participate in discovery pending appeal and avoid any suggestion that they may have waived their jurisdiction objections. Moreover, absent a stay, the time to complete discovery could expire before the Commission can rule on the appeal. Should the Olympus Respondents be required to participate in the hearing after their appeal, they will be deprived of the benefit of seeking discovery on Mitsui's highly suspect claims.

If the Commission agrees with the Olympus Respondents that it cannot exercise jurisdiction over split-routing, this proceeding could be dismissed and any efforts by the parties and the presiding Judge in the interim would be wasted. Even if the Commission directs the presiding Judge to dismiss only the Olympus Respondents, the remaining parties will not be unduly prejudice or delayed. As the Presiding Judge is aware, Mitsui and Respondent [Global Link] have already conducted discovery between themselves. Accordingly, the Olympus Respondents respectfully request that this proceeding be stayed while the Olympus Respondents pursue their appeal before the Commission.

(Olympus Respondents Motion to Dismiss at 20-21.) Their arguments clearly do not meet the burden of demonstrating that a stay should be imposed. *Hilton v. Braunskill*, 481 U.S. at 776. Nevertheless, I will address their arguments where appropriate.

**A. Have Olympus Respondents Made a Strong Showing That They Are Likely to Prevail on the Merits of Their Appeal?**

As set forth above and in the June 22 Order, I found that the Supreme Court's decisions in *Kirby* and "*K*" *Line* compel a finding that the Commission has jurisdiction over the inland portion of multimodal transportation. While their arguments may not be insubstantial, Olympus Respondents have not made a strong showing that they are likely to prevail on the merits of their appeal.

**B. Have Olympus Respondents Shown That Without Such Relief, They Will Be Irreparably Injured?**

Olympus Respondents argue that if they participate in discovery before the Commission decides their appeal, they will risk a "suggestion that they may have waived their jurisdiction objections." They do not cite authority holding that participating in discovery and litigating a proceeding waives jurisdictional arguments. Their argument contests the Commission's subject matter jurisdiction over the inland portions of multimodal transportation. "The objection that a federal court lacks subject-matter jurisdiction . . . may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 507 (2006). Olympus Respondents need not fear that participation in this litigation will be construed to waive their objection to jurisdiction. To the extent Olympus Respondents may be arguing that it would cost them money to participate in this proceeding, "[i]t is well-established that economic loss alone is not irreparable harm." *Wisconsin Gas Co. v. FERC*,

758 F.2d at 674. Therefore, Olympus Respondents have not demonstrated that they will be irreparably injured if the proceeding is not stayed.<sup>6</sup>

**C. Would the Issuance of a Stay Substantially Harm Other Parties Interested in the Proceedings?**

The events about which Mitsui complained occurred between 2004 and 2006. It filed its original complaint on May 5, 2009. It would cause Mitsui substantial harm to delay this proceeding further while the Commission considers Olympus Respondents' contention that the Commission does not have jurisdiction.

**D. Where Lies the Public Interest?**

Olympus Respondents have not established that the public interest would be served by a stay of this proceeding.

**E. Additional Factor Considered.**

As noted above, the Commission has determined on its own motion to review the dismissal of the section 10(d)(1) and 46 C.F.R. § 515.31(e) claims and Global Link has filed exceptions to the dismissal of its crossclaims against Olympus Respondents and CJR Respondents. The fact that the Commission already has part of this proceeding under consideration does not mean that the rest of the proceeding should be stayed while it considers those issues and Olympus Respondents' appeal on the jurisdictional issue permitted by this Order.

With regard to Global Link's exceptions to the dismissal of its crossclaims, it first must be noted that Global Link's crossclaims are contingent upon Global Link being found liable to Mitsui. If Mitsui does not prevail on its claims against Global Link, the crossclaims are moot as Global Link would not be liable to Mitsui for any reparations. The Commission could reverse the June 22 Order and hold that it does have jurisdiction over Global Link's crossclaims. If this were to occur prior to a decision on Mitsui's claim against Respondents, the crossclaims could easily be incorporated into the proceeding as they would be based on essentially the same body of evidence. If Mitsui prevails on its claims against Global Link and the Commission subsequently decides it does have jurisdiction over one or both crossclaims, Global Link could then prosecute the crossclaims. Global Link would not be prejudiced by occurrence of either sequence of events.

With regard to the Commission's review of the dismissal of the section 10(d)(1) and regulatory claims, those claims would be based on the same body of evidence as the section 10(a)(1) claims that remain live. If, prior to a decision on Mitsui's section 10(a)(1) claims, the Commission

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<sup>6</sup> With regard to the discovery already conducted by Mitsui and Global Link, Mitsui and Global Link have already been ordered to provide copies of that discovery to Olympus Respondents and CJR Respondents. *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, FMC No. 09-01 (ALJ June 22, 2010) (June 22, 2010 Procedural Order).

were to determine that the section 10(d)(1) and regulatory claims should not have been dismissed, those claims could easily be incorporated into the proceeding. If the Commission does not issue its decision before a decision on Mitsui's claims and Mitsui prevails, the Commission could base a conclusion that Respondents violated section 10(d)(1) on the facts found on the section 10(a)(1) claims. *See Houben v. World Services Moving, Inc.*, FMC Informal Docket No. 1887(I), Order at 6-11 (FMC July 6, 2010) (Order Vacating the Decision of the Settlement Officer and Finding a Violation of the Shipping Act by Respondent Cross Country Van Lines, LLC).

Therefore, the fact that the Commission has portions of this proceeding under advisement does not mandate a stay pending the Commission's decision on those issues.

### O R D E R

Upon consideration of Olympus Respondents' Motion for Reconsideration or Alternative Motion for Leave to File Appeal and Stay of Proceedings, Respondents CJR World Enterprises, Inc. and Chad J. Rosenberg's Motion for Leave to Appeal the Administrative Law Judge's Order Partially Denying Their Motion to Dismiss Mitsui O.S.K. Lines Ltd.'s Complaint, the opposition to the motions, the record herein, and for the reasons stated above, it is hereby

**ORDERED** that Olympus Respondents' Motion for Reconsideration be **DENIED**. It is

**FURTHER ORDERED** that Olympus Respondents' Motion for Leave to File Appeal be **GRANTED IN PART** and **DENIED IN PART**. Leave is granted for Olympus Respondents to appeal the holding in the June 22 Order that the Commission has jurisdiction under the Shipping Act of the inland portion of multimodal through transportation. *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, FMC No. 09-01, Memorandum and Order at 15-18 (ALJ June 22, 2010) (Memorandum and Order on Motions to Dismiss). On all other issues, the motion for leave to appeal is denied. It is

**FURTHER ORDERED** that Respondents CJR World Enterprises, Inc. and Chad J. Rosenberg's Motion for Leave to Appeal the Administrative Law Judge's Order Partially Denying Their Motion to Dismiss Mitsui O.S.K. Lines Ltd.'s Complaint be **DENIED**. It is

**FURTHER ORDERED** that Olympus Respondents' Motion for Stay of Proceedings be **DENIED**.

**THE LEAVE TO APPEAL GRANTED BY THIS ORDER DOES NOT ALTER THE SCHEDULE SET FORTH IN THE JUNE 22, 2010 PROCEDURAL ORDER.**

  
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Clay G. Guthridge  
Administrative Law Judge