

## FEDERAL MARITIME COMMISSION

MITSUI 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.  
MISCHIANI, DAVID  
CARDENAS, KEITH  
HEFFERNAN, CJR WORLD  
ENTERPRISES, INC., AND  
CHAD J. ROSENBERG

Docket No. 09-01

Served: August 1, 2011

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A majority of the Commission affirms that the Commission has jurisdiction over the inland segment of intermodal through transportation; affirms the dismissal of Global Link's first cross-claim claim seeking indemnification based on the Stock Purchase Agreement and Delaware law; vacates, pending further determinations, the dismissal of Global Link's second cross-claim claim seeking contribution; vacates the dismissal of allegations that Olympus Respondents and CJR Respondents violated section 10(d)(1) of the Act, on grounds that these respondents operated as shippers in relation to Mitsui; and remands to the ALJ the issue of whether these Respondents violated section 10(d)(1). Commissioners DYE and KHOURI concur (separately) with the majority holding regarding the inland segment of intermodal through transportation and indemnification based on a stock purchase agreement. Commissioners DYE and KHOURI dissent

(separately) with the majority holding vacating the dismissals of the cross-claim for contribution and section 10(d)(1) claims against Olympus and CJR Respondents.

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**BY THE COMMISSION:** Richard A. LIDINSKY, Jr., *Chairman*; Joseph E. BRENNAN, Mario CORDERO, *Commissioners*. *Commissioner* Rebecca F. DYE, concurring in part and dissenting in part; *Commissioner* Michael A. KHOURI, concurring in part and dissenting in part.

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**Order Denying Appeal of Olympus Respondents, Granting in Part Appeal of Global Link, and Vacating Dismissal of Alleged Violations of Section 10(d)(1) in June 22, 2010**  
**Memorandum and Order on Motions to Dismiss**

I. PROCEEDING

This complaint proceeding, which is currently before an Administrative Law Judge (ALJ), was initiated by Mitsui O.S.K. Lines Ltd. (Mitsui) on May 5, 2009. In its complaint, Mitsui alleges that respondents Global Link Logistics, Inc. (Global Link); 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 Rosenberg violated sections 10(a)(1) and 10(d)(1)<sup>1</sup> of the Shipping Act of 1984 (the Shipping Act or the Act), and Commission regulation 46

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<sup>1</sup> Section 10(a)(1) provides that “[a] person may not 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). Section 10(d)(1) provides that “[a] common carrier, marine terminal operator, or ocean transportation intermediary may not fail 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).

C.F.R. § 515.31(e), by engaging in a practice referred to as “split routing,” “mis-booking,” or “re-routing.” One of the respondents, Global Link, is a licensed non-vessel-operating common carrier (NVOCC), and the remaining respondents were owners, officers, and/or directors of Global Link during the period when the alleged violations occurred.

Mitsui alleges that between 2004 and 2006, Global Link engaged in “split routing” on Mitsui shipments in violation of the Act. “Split routing” occurs when an NVOCC books cargo with a vessel-operating-common carrier (VOCC) for shipment to one inland destination in the United States, while intending to deliver the cargo to a different inland destination. Mitsui alleges that it suffered injury as a result of respondents’ split routing practice and is entitled to reparations.

Global Link filed a counterclaim against Mitsui, and cross-claim claims against four of its co-respondents: Olympus Growth Fund III, L.P.; Olympus Executive Fund, L.P.; CJR World Enterprises, Inc.; and Chad Rosenberg (Cross Respondents). Respondents other than Global Link filed motions to dismiss Mitsui’s complaint. Cross Respondents filed motions to dismiss Global Link’s cross-claim claims.

Three main issues involved in this ongoing proceeding are currently before the Commission, and all three issues relate to determinations made by the ALJ in a Memorandum and Order on Motions to Dismiss served June 22, 2010, *Mitsui O.S.K. Lines, Ltd. v. Global Link Logistics, Inc.*, 31 S.R.R. 1369 (ALJ 2010) (June 22, 2010 Memorandum and Order). The issues are as follows: 1) does the Commission have jurisdiction over the inland segment of ocean transportation on a through bill of lading issued by a common carrier; 2) does the Commission have jurisdiction over claims based on indemnity and/or contribution; and 3) is section 10(d)(1) of the Act applicable to NVOCCs operating as shippers in relation to an ocean common carrier.

II. BACKGROUND OF COMPLAINT

During the period in which Mitsui alleges that Global Link engaged in split routing, Global Link was owned by respondents Olympus Growth Fund III, L.P. (OGF), Olympus Executive Fund, L.P. (OEF), and CJR World Enterprises, Inc. (CJR). Respondents Louis J. Mischianti, David Cardenas, and Keith Heffernan are general partners of OGF and OEF and were officers and directors of Global Link. OGF, OEF, Mischianti, Cardenas, and Heffernan will be referred to as the Olympus Respondents. Respondent Chad J. Rosenberg owns CJR and was an officer and director of Global Link. CJR and Rosenberg will be referred to as CJR Respondents. Mitsui alleges that the former owners and/or officers of Global Link are also liable to it for injuries caused by Global Link's split routing practice.

On May 20, 2006, OGF, OEF, CJR, and Rosenberg entered into a Stock Purchase Agreement with Golden Gate Logistics, Inc. (Golden Gate) and GLL Holdings, Inc. (GLL). Golden Gate and GLL are the current owners of Global Link; neither entity is a party to this proceeding. However, because Golden Gate and GLL (as current owners of Global Link) will incur monetary loss if their subsidiary Global Link is required to pay reparations to Mitsui, Global Link has filed cross-claims against Olympus Respondents and CJR Respondents seeking 1) indemnity under the Stock Purchase Agreement, or 2) entry of a judgment awarding contribution in the amount of any payment that Global Link is required to make in excess of its share of liability to Mitsui for reparations.

III. ISSUES BEFORE THE COMMISSION

A. The Commission's Jurisdiction Over the Inland Portion of Through Transportation

Several respondents involved in this proceeding contended before the ALJ that the practice of split routing does not violate section 10(a)(1) of the Act because the practice does not involve ocean transportation. They argued that the ocean portion of through

transportation is separate from the domestic inland portion of through transportation, and the FMC has no authority over “the rate for the inland domestic inland movement.” 31 S.R.R. at 1380. In the June 22, 2010 Memorandum and Order, the ALJ concluded as follows:

Mitsui issued through bills of lading to Global Link for transportation from a foreign country to inland destinations in the United States . . . . The [Supreme] Court’s holdings in *Kirby* and “*K*” *Line* 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. Otherwise,

two different bill of lading regimes would be applied to the same through shipment.

31 S.R.R. at 1381-82.

Olympus Respondents filed a Motion for Reconsideration or alternative Motion for Leave to file Appeal and Stay of Proceedings,<sup>2</sup> seeking among other things, reconsideration or leave to appeal the ALJ’s determination that the Commission has jurisdiction over the activities alleged in Mitsui’s complaint. In a Memorandum and Order served August 13, 2010, the ALJ granted the Olympus Respondents’ motion for leave to appeal his determination that the Commission has jurisdiction over the inland segment of multimodal through transportation. *Mitsui O.S.K. Lines*,

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<sup>2</sup> Olympus Respondents attached their appeal to their Motion for Reconsideration or Alternative Motion for Leave to File Appeal and Stay of Proceedings. See Attachment A, Olympus Respondents’ Appeal of Presiding Judge’s Denial in Part of Motion to Dismiss. Mitsui filed Complainant’s Combined Reply to Motions for Reconsideration and Leave to Appeal, stating that while it addressed in its Reply much of the substance of Olympus Respondents’ Appeal, it nonetheless sought leave to submit a formal response to Olympus’ brief on appeal if the motion for leave to appeal was granted. Mitsui was granted leave to file a reply by order served September 23, 2010. *Mitsui O.S.K. Lines, Ltd. v. Global Link Logistics, Inc.*, 31 S.R.R. 1577 (FMC 2010).

*Ltd. v. Global Link Logistics, Inc.*, 31 S.R.R. 1432 (ALJ 2010).

The ALJ noted that 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 *Norfolk Southern R. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14 (2004) (*Kirby*), and *Kawasaki Kisen Kaisha, Ltd. v. Regal-Beloit Corp.*, 130 S. Ct. 2433 (2010) (“*K*” *Line*). Therefore, the ALJ stated that “[i]t 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.” 31 S.R.R. at 1443.

#### 1. Olympus Respondents’ Arguments on Appeal

In their appeal related to the Commission’s jurisdiction over the inland segment of intermodal through transportation, the Olympus Respondents make several arguments: 1) the ALJ erred in relying on the Supreme Court’s opinion in “*K*”*Line* to find that the Commission has jurisdiction over split routing; and 2) the Commission lacks jurisdiction over domestic inland transportation and split routing for the following reasons: a) split routing reflects the well-recognized right of the shipper to control the final destination of its cargo, and nothing in the Shipping Act allows the ocean common carrier to prohibit arrangements between shippers and motor carriers; b) section 10(a) of the Act is limited to ocean transportation, and the practice of split routing does not involve ocean transportation; c) the Act is a regulatory regime that extends antitrust immunity to ocean transportation and must be narrowly construed to apply only to international services within the scope of the Act; and d) the Commission has never investigated or brought enforcement action against an NVOCC or any other shipper for altering the U.S. inland portion of the through rate, confirming that the Commission lacks regulatory authority over the practice of split routing. Olympus Respondents’ Appeal of Presiding Judge’s Denial in Part of Motion to Dismiss at 20-44.

## 2. Mitsui's Reply to Olympus Respondents' Appeal

In its Reply, Mitsui argues 1) that it was not error for the ALJ to rely upon the Supreme Court's decision in "*K*" *Line*, and 2) that the Commission possesses jurisdiction over the inland segment of multimodal through transportation. Mitsui states that while the underlying facts and issues in "*K*" *Line* may be different from those involved here, this does not alter the Supreme Court's holding that transportation under a through bill of lading cannot be divided into two separate and distinct (ocean and inland) moves, or that the FMC has jurisdiction over the entire move. Mitsui Reply at 4-5. Mitsui also states that there is no basis for Olympus' contention that the Commission's jurisdiction over the entire through move is somehow superseded by Mitsui's tariff, as Mitsui does not have the ability to deprive the Commission of Shipping Act jurisdiction through its tariff terms. *Id.* at 5-6.

Mitsui argues that split routing falls squarely within the prohibition in section 10(a)(1), as all of the transportation in question involved a through bill of lading and a single through rate covering both the ocean and inland segments of the move, and the through rate constitutes a rate for ocean transportation for purposes of section 10(a)(1). *Id.* at 8-9. Mitsui states that while "ocean transportation" is not specifically defined in the Act, it is clear that the statute was intended to apply to intermodal moves and through transportation, as well as to port-to-port transportation, citing the statement of Rep. Biaggi in the Congressional Record that "[a] feature of the bill that is worthy of note is its recognition of the intermodal movement of cargo as a common form of ocean transportation service." *Id.* at 9.

Mitsui notes that the Commission has recognized that its jurisdiction extends to the inland segment of through transportation, citing *Pacific Westbound Conference*, 22 S.R.R. 1290, 1296 (ALJ 1984, Admin. Final 1984) (*Pacific Westbound Conference*). Mitsui argues that the concept of dividing through transportation or through rates into two parts is directly at odds with section 8(a) of the Act, which explicitly states that a common carrier "is not required to state separately or otherwise reveal in tariffs the inland

divisions of a through rate.” *Id.* at 10.

Mitsui argues that the meaning of “ocean transportation” and the scope of section 10(a)(1) must be construed in a manner that is consistent with the scope of the Commission’s jurisdiction, as it would be illogical to restrict the scope of section 10(a)(1) to a limited portion of an ocean carrier’s single through rate, when the Commission clearly has jurisdiction over the entire through rate. Mitsui states that such a limitation would create a significant loophole which would allow the types of unjust practices that section 10(a)(1) is intended to prohibit, as long as they relate to inland aspects of through transportation. *Id.*

Mitsui states that the scope of antitrust immunity is not relevant in this case, and in any event, the Act and antitrust immunity explicitly apply to the entire through rate, as carriers are permitted to discuss and agree upon the inland portion of the through rate, pursuant to sections 4(a) and 7(b). *Id.* at 11-12. Finally, in answering Olympus’ claim that the Commission has never investigated or brought enforcement action for altering the U.S. inland portion of a through rate, Mitsui argues that there is nothing in the cases cited by Olympus to suggest that either the practices or investigations in those cases were limited to manipulation of the ocean portion of through rates. Mitsui states that to the contrary, in at least one case cited by Olympus, *Banfi Products Corp. – Possible Violations of Section 16*, 26 S.R.R. 308 (ALJ 1992), rebates of inland rates were directly at issue. *Id.* at 13-14.

### 3. Discussion

#### a. *Reliance on the “K” Line Decision*

Olympus Respondents argue that the ALJ erred in relying on the “K” Line decision because in “K” Line, “the shipper entered into an intermodal transportation agreement with the ocean carrier,” and in that case, unlike the case here, “the shipper had no privity of contract of contract with the inland carrier.” Olympus Appeal at 21. Olympus respondents further argue that the Court’s reasoning in

*“K” Line*, that applying two different bills of lading regimes (COGSA and the Carmack Amendment) would undermine through intermodal transportation, has “nothing to do with whether the Commission — under the Shipping Act — is authorized to exercise jurisdiction over practices that concern only the U.S. domestic inland transportation.” *Id.* at 22.

The Supreme Court’s decision in *“K” Line* did not turn on lack of privity of contract between the shipper and the railroad. The Court in *“K” Line* was concerned with the coverage of both ocean and inland transportation under a single through bill of lading issued by an ocean common carrier, as is the case here. In addition, the circumstances surrounding the through movements are the same in *“K” Line* and this proceeding: the transportation (ocean and inland) was purchased by the shipper from the ocean carrier at a single through rate, and the ocean carrier booked the inland portion of the transportation with an inland carrier. The Court in *“K” Line* concluded that transportation under a through bill of lading cannot be divided into two separate moves (ocean and inland), with two different bill of lading regimes applicable. The Court stated that “[a]pplying two different bill of lading regimes to the same through shipment would undermine COGSA and international, container-based multimodal transport.” 130 S. Ct. at 2447. The Court noted that its conclusion that the Carmack Amendment does not apply to through bills of lading issued by an ocean carrier does not leave the transportation under through bills unregulated, because “[o]cean-based through bills are governed by COGSA, and ocean vessels like those operated by ‘K’ Line are overseen by the Federal Maritime Commission.” *Id.* at 2448.

As stated by the ALJ, the decision in *“K” Line* compels a finding that “the Commission has jurisdiction to consider complaints alleging violations of the Shipping Act occurring on . . . shipments [involved in this proceeding] irrespective of the point in the transportation the violations are alleged to have taken place.” 31 S.R.R. at 1382. Otherwise, two different bill of lading regimes would be applied to the same through shipment, a result rejected by the Court in *“K” Line*. Olympus Respondents’ argument that the ALJ erred in relying on the Court’s decision in *“K” Line*, and their

efforts to distinguish that decision from the facts involved here, are not persuasive.

b. *The Application of Section 10(a)(1) to Split Routing*

Section 10(a)(1) of the Act, currently codified at 46 U.S.C. § 41102(a), provides that “a person may not 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 that would otherwise apply.” The language of this section, with minor non-substantive modifications, has been in place since the Shipping Act of 1984 was enacted.

In the legislative history of the Shipping Act of 1984, intermodalism was specifically recognized as an important component of ocean transportation, and the implications of intermodalism for ocean transportation were addressed. The Report of the Committee on Merchant Marine and Fisheries on H.R. 1878 recognized that an ocean carrier’s use of a single intermodal tariff could save shippers time and allow them to avoid having to arrange the transfer of cargo from one transportation mode to another:

when an ocean carrier offers an intermodal service, that carrier has the single responsibility for assuring the delivery of cargo from *point to point*, and only that carrier needs to be concerned with the arrangements for transferring the cargo between modes. Furthermore, this process involves a single bill-of-lading rather than multiple bills of lading.

H.R. REP. NO. 98-53, pt. 1, at 13 (1983) (emphasis added). The intermodal nature of ocean transportation was reflected in the Act’s inclusion of definitions of “through rate” and “through transportation”: “The terms ‘through rate’ and ‘through transportation’ are in recognition of the need to permit the employment of modern intermodalism concepts and practices in our foreign trade. These terms are used in sections 3, 8, and 10 of the

bill.” *Id.* at 29.

Given this legislative history, it appears that Congress intended to extend the Commission’s jurisdiction to encompass through rates and through transportation. Congress specifically noted the use by ocean carriers of single intermodal bills of lading, such as those involved in this case, to cover shipments going to inland destinations or points. In addition, Congress included definitions for the terms “through rate” and “through transportation,” in order to allow the use of “modern intermodalism concepts and practices in our foreign trade,” and said that these terms were applicable to section 10 of the Act, the section involved in this case. There is no indication that Congress intended to limit the activities prohibited in section 10 to only the port-to-port segment of intermodal through movements.

The Commission has affirmed its jurisdiction over through intermodal movements that include inland transportation. In *Pacific Westbound Conference*, the ALJ stated as follows:

It would appear that the general provisions of the 1984 Act which give jurisdiction over “through transportation” between both the United States and foreign “points and ports” have removed any doubt about the extent of the Commission’s jurisdiction. Clearly, the Commission now has jurisdiction over transportation from “port or point of receipt” to “port or point of destination” if the “common carrier” “utilizes” a “vessel operating on the high seas” for “all or part of that transportation” and if the common carrier “assumes responsibility” for transportation between those ports or points.

22 S.R.R. at 1296.

The Commission also recognized its jurisdiction over through intermodal transportation in *Effective Date of Tariff Changes*, 25 S.R.R. 37 (FMC 1989), in which it stated that “[t]he Commission’s jurisdictional authority over the provision of through

transportation . . . begins at the port or point of receipt, whether the cargo is tendered directly to the ocean carrier or to another carrier under arrangement for through transport to destination.” *Id.* at 39. In the Ocean Shipping Reform Act of 1998, Congress did not override the Commission’s assertion of comprehensive intermodal jurisdiction.

In decisions involving section 10(a)(1), the Commission has generally not distinguished between the ocean and inland segments of through transportation. Nonetheless, the Commission specifically referenced practices relating to inland transportation in *Banfi Products Corp.*, 24 S.R.R. 1152 (FMC 1988), and *Banfi Products Corp. – Possible Violations*, 26 S.R.R. 308 (ALJ 1992), wherein it was noted that, among other practices, rebates involving the inland portions of through rates were involved. Olympus has presented no grounds to support its argument that findings of section 10(a)(1) violations have been limited to the ocean segment of through transportation movements.

Given congressional intent that the Commission have jurisdiction over through intermodal transportation, including the inland segment of the through transportation, and the Commission’s acknowledgment of this jurisdiction, Olympus’ argument that section 10(a)(1) of the Act proscribes certain activities with respect to ocean transportation only, and therefore does not apply to the practice of re-routing the domestic inland segment of a through movement, is not persuasive.

*c. Scope of Antitrust Immunity*

Olympus Respondents are similarly unpersuasive in their argument that neither antitrust immunity nor the Commission’s jurisdiction apply to the entire through movement. The Act confers antitrust immunity to through rates, and carriers are permitted to discuss and agree on the inland portion of the through rate. Section 4(a) provides that the Act applies to agreements among ocean carriers to discuss, fix or regulate transportation rates, including through rates. 46 U.S.C. § 40301(a)(1). Section 7(b) (46 U.S.C. § 40307(b)(2)) provides that antitrust immunity does not apply to

“inland divisions,” but does apply to “inland portions.” “Inland divisions” are the amounts a common carrier pays to an inland carrier for the inland segment of through transportation. 46 U.S.C. § 40102(11). “Inland portions” are the charges by a common carrier for the non-ocean segment of through transportation. 46 U.S.C. § 40102(12). The purpose of section 7(b) is to make it clear that while antitrust immunity does not extend to agreements between ocean carriers to discuss and agree on rates they will pay to inland carriers (inland divisions), such immunity does apply to agreements among carriers as to charges for the inland portion of a through rate.

#### 4. Conclusion

Olympus Respondents have presented no grounds for reversing the ALJ’s conclusion that the Commission has jurisdiction over the split routing practice involved in Mitsui’s Complaint, and the ALJ’s holding is affirmed.

#### B. The Commission’s Jurisdiction Over Claims Based on Indemnity and/or Contribution

In the June 22, 2010 Memorandum and Order on Motions to Dismiss, the ALJ granted motions to dismiss Global Link’s cross-claims against Cross Respondents OGF, OEF, CJR, and Chad Rosenberg. In its first cross-claim, Global Link seeks indemnification for breaches of warranty and fraud:

[i]f the Commission finds that Global Link is liable to Mitsui, Cross Respondents are in turn liable to Global Link for complete indemnification for any liability suffered by Global Link, including attorney fees and costs, pursuant to: (i) the terms of the May 20, 2006 Stock Purchase Agreement, and (ii) Delaware law, based on the Cross Respondents’ and their agents’ fraudulent concealment of the split routing practice, as established in the binding AAA arbitration among the Cross Respondents and Global Link.

Global Link Logistics, Inc.'s Verified Answer and Affirmative Defenses to Mitsui O.S.K Lines Ltd.'s Complaint, Counterclaim and Cross Claims (Global Link Cross Claims) at 19.

In its second cross-claim, Global Link seeks contribution in the amount of any payment by Global Link in excess of its share of liability to Mitsui:

If the Commission does find Global Link liable [to Mitsui] . . . Global Link and Cross Respondents are jointly liable and Cross Respondents should be obligated to contribute payment for their respective shares of fault. Global Link will suffer damages if required to pay more than its proportionate share of liability.

Global Link Cross Claims at 19-20.

The ALJ dismissed Global Link's first cross-claim on the grounds that it alleges violations of the terms of the Stock Purchase Agreement and Delaware law, rather than violations of the Shipping Act. Therefore, the ALJ concluded that the Commission does not have subject matter jurisdiction to decide Global Link's first cross-claim, and he granted the motions to dismiss it. 31 S.R.R. at 1397.

With regard to Global Link's second cross-claim, the ALJ concluded that the Act does not provide that one respondent may seek contribution from another respondent when they are found jointly and severally liable for Shipping Act violations:

To create a right of contribution, the Commission would be required to weigh a range of factors, "[a]scertaining what is 'fair,'" to decide the policy questions presented by the conflicting arguments for and against contribution, the very questions that the Court was unwilling to reach and held "is a matter for Congress, not the courts, to resolve." *Texas Industries*, 451 U.S. [630, 646-647 (1981)]. Therefore, the Commission does not have

jurisdiction to entertain a counterclaim by one respondent against another seeking contribution for reparations it is required to pay to a complainant.

31 S.R.R. at 1396. The ALJ therefore granted the motions to dismiss Global Link's second cross-claim.

### 1. Global Link's Appeal

In its appeal, Global Link argues that pursuant to sections 10(a) and 11 of the Shipping Act, it may seek reparations for injury caused to it by Cross Respondents as a result of split routing practices. Global Link Appeal at 6.

Global Link states that it seeks indemnification and contribution for the same Shipping Act violations for which Mitsui seeks reparations, and argues that just as the Commission has jurisdiction and authority to award reparations for damages to Mitsui for violations of the Act, it has the same authority to award reparations to Global Link for damages resulting from such violations. *Id.* at 8. Therefore, Global Link argues that notwithstanding any consideration of the availability of indemnity or contribution, Global Link has stated a claim for reparations against Cross-Respondents under section 10(a)(1) of the Act. *Id.* at 9. Global Link states that the Shipping Act's broad language provides that any person may bring an action against any other person for violations and may seek reparations for injury. *Id.* at 10-11.

Global Link argues that the ALJ's failure to recognize the fundamental difference between the role of the federal courts and that of the Commission is evident in its argument as to why the Commission should not attempt to determine whether contribution is appropriate. Global Link takes issue with the ALJ's position that "the Commission, like courts, should not create a right of contribution because it would require weighing a range of facts, deciding policy questions presented by the conflicting arguments for and against contribution and 'ascertaining what is fair.'" *Id.* According to Global Link, this is exactly what the Commission, as

opposed to federal courts, is authorized to do: make policy determinations and decide what is fair within the area of its specialized expertise.

Global Link also disputes the ALJ's suggestion that although contribution and indemnity may be appropriate in statutes involving negligence, such remedies are unfounded in connection with the Shipping Act, which is predicated on intentional wrongdoing. Global Link argues that where, as is alleged in the case here, the parties who actually violated the Shipping Act seek to avoid liability and impose it on others by selling the company before their fraudulent activities are discovered, the Commission is authorized to fashion flexible and equitable remedies.

Finally, Global Link argues that while the ALJ concludes that Global Link's cross-claims do not arise out of any alleged violations of the Shipping Act, this conclusion ignores the explicit language in Mitsui's Complaint and Global Link's Cross Complaint, which assert violations of sections 10(a)(1) and 10(d)(1) of the Act. Global Link argues that there are no legitimate grounds for concluding that the Commission lacks jurisdiction over Global Link's cross-claims, as a complaint asserting violations particular to the Shipping Act cannot be dismissed. *See id.* at 18 (citing *Anchor Shipping v. Alianca Navegacao e Logistica Ltd.*, 30 S.R.R. 991 (FMC 2006)).

## 2. Olympus Respondents' Reply to Global Link's Appeal

Cross Respondents Olympus Growth Fund III, L.P. and Olympus Executive Fund, L.P. argue that the Commission should affirm the ALJ's dismissal of Global Link's cross-claims on several grounds. First, they argue that the ALJ committed error when he assumed that the Olympus Respondents are shippers and imposed Commission jurisdiction over them, as the Commission concluded in Docket No. 08-07, *Petition of Olympus Growth Fund III, L.P. for Declaratory Order*, 31 S.R.R. 718 (FMC 2009), that it did not have jurisdiction over them. 31 S.R.R. at 724. Olympus Respondents argue that the status of OGF and OEF as former shareholders of GLL Holdings is not sufficient to confer jurisdiction on the

Commission. *Id.* at 24.

Olympus Respondents' second argument is that the ALJ correctly found that the Shipping Act does not allow claims for contribution or indemnity. Olympus Respondents state that Global Link fails to cite any instance in which the Commission has awarded reparations in the form of contribution or indemnity, and the ALJ correctly relied on Supreme Court precedent to find that the Shipping Act does not authorize indemnity or contribution claims. *Id.* at 28.

Third, Olympus Respondents argue that the ALJ correctly found that Global Link failed to state a Shipping Act violation, and that Global Link's cross-claims allege nothing but a breach of contract claim. *Id.* at 34. To address Global Link's claims, Olympus Respondents argue that the Commission would be required to interpret the Stock Purchase Agreement and the parties' rights and obligations under it, as well as issues of Delaware law. Olympus respondents state that the Commission lacks authority to do either of these things.

Fourth, Olympus Respondents argue that the doctrine of *res judicata* bars Global Link's cross-claims, as such claims have already been adjudicated in the parties' Arbitration. Olympus Respondents state that Global Link's allegations make it clear that its cross-claims are exactly the same cause of action it raised in the Arbitration. *Id.* at 39. Olympus Respondents argue that in the Arbitration, Global Link obtained recovery for the risk of future liability, and that Global Link's cross-claim for contribution therefore cannot be rescued because Mitsui had not brought suit prior to the completion of the Arbitration.

Fifth, Olympus Respondents argue that in addition to the fact that Global Link's cross-claim for indemnification does not allege a Shipping Act violation, Global Link cannot recover for contractual indemnification, as the warranties and representations in the Stock Purchase Agreement expired long before Global Link brought its cross-claims. Olympus Respondents state that pursuant to the Stock Purchase Agreement, claims for contractual

indemnification had to be brought by June 7, 2007, more than two years before Global Link brought its cross-claim for indemnification.

Finally, Olympus Respondents argue that Global Link cannot recover under its cross-claim for common law indemnification, as under Delaware law, implied indemnification is only available if the indemnitee is liable solely for passive negligence. Olympus Respondents argue that in this case, Mitsui is alleging that Global Link defrauded it through the practice of split routing, and therefore, Global Link cannot show that it will be held liable only for passive negligence. *Id.* at 43.

### 3. CJR Respondents' Reply to Global Link's Appeal

In their Reply, CJR Respondents first argue that section 11 of the Shipping Act permits reparations only for violations of the Shipping Act, and that Global Link failed to allege that Cross Respondents violated section 10(a)(1). CJR Respondents contend that Global Link's purported claims against cross respondents sound in contract and perhaps tort, but are not Shipping Act violations. CJR Respondents' Reply at 9.

CJR Respondents' second argument is that the Shipping Act does not provide for contribution as a remedy, and the Commission has no authority to fashion a remedy without Congress' positive delegation of that authority. CJR Respondents assert that the ALJ correctly relied on Supreme Court decisions in *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77 (1981), and *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981) to find that Congress created an enforcement scheme that does not include a right for one respondent to seek contribution from another respondent, given that the Shipping Act provides a detailed remedial scheme for complainants. *Id.* at 12.

Finally, CJR Respondents argue that the ALJ correctly ruled that Global Link's cross-claims do not arise out of alleged violations of the Shipping Act, given that the first cross-claim is for breach of warranty and fraud, and the second cross-claim is for

contribution, and the Commission therefore lacks subject matter jurisdiction. CJR Respondents state that allegations that Global Link violated the Shipping Act cannot serve as predicate to confer Commission jurisdiction over the cross-claims against CJR Respondents. *Id.* at 16.

#### 4. Discussion

In its cross-claims, to the extent the Commission may find Global Link liable for the violations alleged, “Global Link seeks reparation and indemnification, or at a minimum contribution, for the injuries caused it by Cross Respondents as a result of their violations of the Shipping Act or 46 C.F.R. § 515.31(e).” Global Link Cross Claims at 16. The ALJ granted motions to dismiss both of Global Link’s cross-claims.

##### a. *Standards for Considering Motions to Dismiss*

Rule 12 of the Commission’s Rules of Practice and Procedure (the Rules) states that the Federal Rules of Civil Procedure will be followed in instances that are not covered by the Commission’s Rules, to the extent that application of the Federal Rules is consistent with sound administrative practice. 46 C.F.R. § 502.12. As the Commission’s Rules do not address motions to dismiss for lack of subject matter jurisdiction or failure to state a claim, Federal Rules 12(b)(1) and 12(b)(6) apply in this case. *See, e.g., The Lake Charles Harbor and Terminal District v. West Cameron Port, Harbor and Terminal District*, 2007 WL 2468431 (F.M.C.).

Rule 12(b)(1) permits a party to raise by motion lack of subject matter jurisdiction, and Rule 12(b)(6) permits a party to raise by motion failure to state a claim. With regard to motions to dismiss a complaint for lack of subject matter jurisdiction under Rule 12(b)(1), such motions may assert either a factual attack or a facial attack to jurisdiction. . . . A factual attack challenges “the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and

matters outside the pleadings, such as testimony and affidavits, are considered.” . . . In a facial attack, on the other hand, the court examines whether the complaint has sufficiently alleged subject matter jurisdiction. As it does when considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court construes the complaint in the light most favorable to the plaintiff and accepts all well-pled facts alleged . . . in the complaint as true.

*Sinaltrainal v. Coca-Cola Company*, 578 F.3d 1252, 1260 (11th Cir. 2009).

To survive motions to dismiss for failure to state a claim under Rule 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim “has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). The complaint must be sufficient to “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Bell Atlantic*, 550 U.S. at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)); see also 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure Civ.* § 1215 (3d ed. 2010) (“[T]he test of a complaint’s sufficiency simply is whether the document’s allegations are detailed and informative enough to enable the defendant to respond.”).

#### b. *First Cross-Claim*

In its Appeal of the dismissal of its cross-claims, Global Link presents no grounds upon which to reverse the ALJ’s dismissal of its first cross-claim. Global Link argues that pursuant to sections 10(a) and 11 of the Shipping Act, it may “seek reparations for injury caused to it by the Cross Respondents as a result of its engagement in split routing practices in violation of the Shipping Act.” (Appeal at 8). But Global Link’s first cross-claim

seeks indemnification for breaches of warranty and fraud pursuant to the parties' Stock Purchase Agreement and Delaware law, rather than reparations for violations of the Shipping Act.

In its first cross-claim, Global Link seeks indemnification for any liability it may suffer, pursuant to 1) the terms of the May 20, 2006 Stock Purchase Agreement, and 2) Delaware law, based on Cross Respondents' fraudulent concealment of the split routing practice. Global Link Cross Claims at 19. In effect, Global Link seeks to have the Commission enforce terms of the Stock Purchase Agreement and interpret Delaware law. Global Link has not provided a persuasive argument, however, that the Commission has authority to act on either of these grounds. As stated by the ALJ in his June 22, 2010 Memorandum and Order,

Global Link's first cross claim does not allege violations of the Shipping Act within the jurisdiction of the Commission, but violations of the terms of the Stock Purchase Agreement and Delaware law. Therefore, the Commission does not have subject matter jurisdiction to decide Global Link's first crossclaim and it must be dismissed.

31 S.R.R. at 1397. We agree and, accordingly, Global Link's Appeal with regard to this cross-claim is denied.

*c. Second Cross-Claim*

In its second cross-claim, Global Link seeks contribution from Cross Respondents in the event that it is found liable to Mitsui and required to pay more than its proportionate share of liability. Global Link's claim for contribution is therefore dependent on a finding that it is liable to Mitsui, and is required to pay more than its proportionate share of liability.

The ALJ granted the motions to dismiss Global Link's second cross claim on two grounds: failure to state a claim and lack of jurisdiction. With regard to failure to state a claim, the ALJ concluded that Global Link could prove no set of facts that would

establish that it would suffer actual injury within the meaning of the Shipping Act, “if it is required to pay the full rates and charges lawfully required by the Act as reparations to Mitsui.” 31 S.R.R. at 1389. The ALJ based this conclusion on the following reasoning:

If Mitsui proves its claims, it will demonstrate that Global Link enjoyed a *benefit* (at least in the short term) from its Shipping Act violations by paying less than the rates or charges lawfully required by the Act. If Global Link is required to pay the undercharges as reparations, Mitsui will be made whole and Global Link would then have paid in full the rates and charges lawfully required by the Act and be in the position it would have been if it had . . . not violated the Act in the first place.

*Id.* (emphasis in original).

With regard to lack of jurisdiction, the ALJ stated that the Shipping Act does not provide that one respondent may seek contribution from another respondent when they are found jointly and severally liable for Shipping Act violations. He concluded that the Commission does not have jurisdiction to entertain a cross-claim seeking contribution because the Commission would be required to weigh a range of factors and decide policy, in contravention of the Court’s decision in *Texas Industries*. *Id.* at 1396.

(1) *Dismissal for Failure to State a Claim*

As set out above, the ALJ based his dismissal of the second cross-claim for failure to state a claim on the conclusion that Global Link could not prove that it would suffer actual injury under the Shipping Act if it is required to pay the full rates and charges as reparations to Mitsui. *Id.* at 1389. The ALJ stated that if Mitsui proves its claims, it will demonstrate that Global Link enjoyed a benefit from its Shipping Act violations by paying less than the rates or charges lawfully required by the Act.

The Commission does not agree with the ALJ's conclusion that the fact that Global Link enjoyed a benefit from Shipping Act violations that allegedly occurred under prior owners forecloses any possibility that it may suffer some injury if required to pay the full rates and charges as reparations to Mitsui. There appears to be sufficient factual matter in Global Link's second cross-claim to state a claim that is "plausible on its face." *Bell Atlantic Corp.*, 550 U.S. at 570. In its cross-claims, Global Link includes allegations regarding Cross Respondents' institution and direction of the "split routing" practice, and Global Link's injuries caused by Cross Respondents as a result of their violations of the Shipping Act or 46 C.F.R. § 515.31(e). The facts alleged in Global Link's cross-claims appear sufficient to allow the Commission "to draw the reasonable inference that the . . . [Cross Respondents] are liable for the misconduct alleged." *Ashcroft*, 129 S. Ct at 1949. Therefore, it appears that Global Link has stated a claim sufficient to survive a motion to dismiss under Rule 12(b)(6).

(2) *Dismissal for Lack of Jurisdiction*

The ALJ dismissed Global Link's second cross-claim for lack of jurisdiction, concluding that the Commission does not have jurisdiction to entertain a cross-claim by one respondent against another, seeking contribution for reparations it is required to pay to a complainant. 31 S.R.R. at 1396. The ALJ based this conclusion primarily on his interpretation of Supreme Court decisions in *Northwest Airlines* and *Texas Industries*. The ALJ concluded that to create a right of contribution, the Commission would be required to weigh a range of factors and decide policy questions, matters which he determined the Commission could not do, based on *Texas Industries*. 31 S.R.R. at 1396.

Contrary to the ALJ's conclusion, it would appear that the Commission has jurisdiction over the second claim, as it is based on injuries to Global Link "caused it by Cross Respondents as a result of their violations of the Shipping Act or 46 C.F.R. § 515.31(e)." Global Link Cross Claims at 16. Whether the Commission wishes to allow a cause of action for contribution appears to be the issue,

and this issue does not need to be decided at this point as Global Link seeks contribution *only if* it is found liable to Mitsui and is required to pay more than its proportionate share, determinations that have not been made by the ALJ at this stage of the proceeding.

Based on the conclusions that in its second cross-claim, Global Link has stated a claim that is plausible on its face, and that the Commission has jurisdiction over the claim, the ALJ's dismissal of this cross-claim is vacated. Any cause of action for contribution by Global Link against Olympus Respondents and CJR Respondents is dependent on a determination by the Commission that Global Link is liable to Mitsui and required to pay more than its proportionate share of liability.

(3) *Contribution as a Remedy*

While the Commission does not need to address whether contribution is an appropriate remedy at this point, as any cause of action for contribution has not yet accrued, it may be useful to review the Court's decision in *Texas Industries*, as well as alternative theories of liability that may be available to the Commission. In *Texas Industries*, the Court considered whether federal antitrust laws allow a defendant, against whom civil damages, costs, and attorney's fees have been assessed, a right to contribution from other participants in the unlawful conspiracy on which recovery was based. 451 U.S. at 632. The Court was concerned with "whether sharing of damages liability will advance or impair the objectives of the antitrust laws." *Id.* at 635. The Court noted that "the remedial provisions defined in the antitrust laws are detailed and specific," and concluded that "[t]here is nothing in the statute itself, in its legislative history, or in the overall regulatory scheme to suggest that Congress intended courts to have the power to alter or supplement the remedies enacted." *Id.* at 644-45. In contrast to the situation in *Texas Industries*, the provisions of the Shipping Act relating to reparations are more general, and provide that "the Federal Maritime Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part, plus reasonable attorney fees." 46 U.S.C. § 41305(b). In this case, it appears that Global Link is seeking

proportional liability for reparations, with each respondent bearing a proportional share of liability. There is nothing in the Shipping Act provisions concerning reparations, or in the legislative history, which suggests that Congress intended to preclude proportional liability for reparations, if the Commission determines it to be appropriate in a particular case.

In a prior Commission proceeding, *International Ass'n of NVOCCs v. Atlantic Container Line*, 25 S.R.R. 675 (ALJ 1990) (*IAN*), the ALJ noted that the Commission has followed the traditional doctrine of joint-and-several liability when finding multiple respondents in violation of shipping law and awarding reparations. According to the ALJ, under joint-and-several liability, "any joint tortfeasor or party to a conspiracy is liable for the full amount of damages caused by the tort or conspiracy even if the particular respondent or defendant did not in fact commit the particular act that caused the particular injury." 25 S.R.R. at 686. However, the ALJ noted that courts have sometimes allowed apportionments of damages among joint tortfeasors, citing *Presidio Valley Farmers Ass'n v. Brock*, 765 F.2d 1353, 1358 (5th Cir. 1985). Other authorities have also noted the apportionment of liability among joint tortfeasors: "In some jurisdictions the apportionment of liability effected by contribution is on the basis that 'equality is equity,' which means that each tortfeasor is required ultimately to pay a pro rata share, arrived at by dividing the damages by the number of tortfeasors." Prosser and Keeton on the Law of Torts 340 (W. Page Keeton ed., 5th ed., West Publishing Co. 1984).

While the Commission may have traditionally used joint and several liability, the possibility of using other liability theories was raised by parties and contemplated by the ALJ in *IAN*. In that case, the ALJ addressed the award of reparations, noting that the Commission had over time "followed a number of traditional principles under the law of damages, e.g., proximate cause, actual damage, proof of pecuniary loss, etc." 25 S.R.R. at 787. The ALJ stated that the Commission's previous decisions to apply traditional doctrines under the law of damages or torts, "does not mean that the agency is precluded from introducing new doctrines or variations of

the old doctrines as the need arises.” *Id.* The ALJ noted the decision in *American Airlines, Inc. v. Civil Aeronautics Board*, 359 F. 2d 624, 633 (D.C. Cir. 1966), in which the court said that “[i]t is part of the genius of the administrative process that its flexibility permits adoption of approaches subject to expeditious adjustment in the light of experience.” The Commission has also noted that it may exercise some flexibility in carrying out the responsibilities delegated to it by Congress: “[t]he administration of the Commission’s duties requires flexibility of action and purpose when necessary and possible.” *Disposition of Container Marine Lines*, 11 F.M.C. 476, 482-3 (FMC 1968).

While the ALJ concluded in *IAN* that it was premature to decide whether some alternative theory of liability would be more equitable in the cases involved in that proceeding, he suggested that the Commission could consider alternative theories in the future:

It is far too early to try to determine to what extent, if at all, principles of contribution or market-sharing of liability among respondents should be appointed by the Commission. Contribution among joint tortfeasors is permitted, a departure from the common law, but is not allowed in antitrust cases or under other statutes. See *Northwest Airlines, Inc. v. Transport Workers Union of America*, 451 US 77, 86-88 (1981); *Texas Industries, Inc. v. Radcliff Materials, Inc. et al.*, 451 US 630 (1981) . . . .

25 S.R.R. at 687 n.9.

As was the case in *IAN*, there is no need for the Commission to reach a determination at this time as to whether it wishes to adopt the principle of contribution among respondents. Global Link’s request for contribution is conditioned on two events that have not occurred: it has not been found liable to Mitsui for reparations, and it has not been required to pay more than its proportionate share of liability. If the ALJ determines that Global Link is liable to Mitsui for reparations and requires Global Link to pay more than its proportionate share, the Commission may consider at that time

whether it wishes to adopt the principle of contribution.

As suggested in *IAN*, nothing in the Shipping Act or its legislative history indicates that the Commission may not adopt alternative theories of liability when appropriate. In addition, courts have taken the position that an administrative agency may exercise some flexibility in determining remedies for violations. In reviewing an order of the FMC imposing a fine for violations of the Act, the Second Circuit Court of Appeals stated that

[w]here an agency finds a violation, the choice of a sanction is largely within the agency's discretion. *See American Power Co. v. SEC*, 329 U.S. 90, 112, 67 S.Ct. 133, 1145, 91 L.Ed. 103 (1946) (“[T]he relation of remedy to policy is peculiarly a matter for administrative competence.”) (citation omitted). A reviewing court may overturn an agency-imposed sanction only if it is unwarranted in law or unjustified in fact.

*Merritt v. U. S.*, 960 F. 2d 15, 17 (2nd Cir. 1992).

##### 5. Conclusion

The ALJ correctly dismissed Global Link's first cross-claim on the grounds that the Commission does not have subject matter jurisdiction to decide it. Therefore, Global Link's appeal with regard to this cross-claim is denied and the ALJ's dismissal of this claim is affirmed.

With regard to Global Link's second cross-claim, we conclude that Global Link has stated a claim that is plausible on its face and that the Commission has jurisdiction over it. Therefore, the ALJ's dismissal of this claim is vacated, noting that any cause of action for contribution by Global Link against Olympus Respondents and CJR Respondents is dependent on a determination by the ALJ that Global Link is liable to Mitsui and required to pay more than its proportional share of reparations.

C. The Application of Section 10(d)(1)

In the June 22, 2010 Memorandum and Order, the ALJ granted that part of Olympus Respondents and CJR Respondents' Motions to Dismiss which sought dismissal of Mitsui's allegations that these Respondents violated section 10(d)(1), 46 U.S.C. § 41102(c), and 46 C.F.R. § 515.31(e). The ALJ dismissed this allegation on the grounds that the Respondents operated as a shipper in relationship to Mitsui on each shipment involved and therefore could not be considered an NVOCC to which section 10(d)(1) applies. 31 S.R.R. at 1385. On July 22, 2010, the Commission issued a Notice of Commission Determination to Review this portion of the ALJ's June 22, 2010 Memorandum and Order. Notice of Commission Determination to Review, served July 22, 2010.

In their Motions to Dismiss Mitsui's Complaint, Olympus Respondents and CJR Respondents contended that the Commission does not have jurisdiction over them with regard to the section 10(d)(1) and 46 C.F.R. § 515.31(e) claims, because those provisions are directed to marine terminal operators, ocean common carriers, or ocean transportation intermediaries, and Respondents do not come within any of these categories. Respondents quoted language from a Settlement Officer's decision in a Commission informal docket case as support for their position. *See Conterm Consolidation Services (USA), Inc. v. Wilfredo Garcia*, 26 S.R.R. 1212 (Settlement Off. 1994) (*Conterm*). In *Conterm*, the Settlement Officer determined that an ocean common carrier could not recover under section 10(d)(1) against an NVOCC engaged in a fraudulent scheme, based on the fact that the NVOCC stood in the position of a shipper with respect to the common carrier.

The ALJ in the instant proceeding was persuaded by the Settlement Officer's reasoning in *Conterm*, and concluded that

[a]ccepting as true the facts alleged in Mitsui's complaint, Olympus Respondents and CJR Respondents operated as a shipper in relationship to

Matsui [sic] 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).

31 S.R.R. at 1385. Based on his conclusion that that Olympus Respondents and CJR Respondents were acting as shippers in relation to Mitsui, the ALJ dismissed allegations that they violated section 10(d)(1).

#### 1. Discussion

Prior to the Settlement Officer’s decision in *Conterm*, there had been earlier Commission determinations that NVOCCs retain their common carrier status even when assuming the role of shipper vis-à-vis an ocean common carrier. In *Maritime Service Corp. v. Acme Fast Freight*, 13 S.R.R. 1025 (FMC 1973), the Commission considered the question of “whether the status of the NVOCC as a ‘shipper’, vis-à-vis the underlying water carrier ousts the Commission of jurisdiction over the NVOCC in his dealings with the water carrier.” *Id.* at 1027. The factual situation in *Maritime Service Corp.* was similar to that involved in this proceeding. In *Maritime Service Corp.*, the agent for a number of ocean carriers had filed a complaint against a number of NVOCCs, alleging violations of the Act. Several of the NVOCCs filed motions to dismiss the complaint on the ground that the Commission lacked jurisdiction to order a shipper to pay reparation to a carrier. The ALJ denied the motions to dismiss, finding that the Commission had jurisdiction to order an NVOCC, even if purportedly acting solely in its capacity as a shipper, to pay reparation to carriers. The NVOCCs appealed the ALJ’s denial of the motions to dismiss to the Commission, and the Commission upheld the ALJ’s conclusion that NVOCCs do not lose their NVOCC status when acting as shippers in relation to ocean carriers, and remain subject to the

Commission's jurisdiction.

The Commission noted that the completion of NVOCC transportation movements requires that NVOCCs assume dual status of carrier and shipper. Therefore, the Commission concluded that

the circumstances surrounding an NVOCC's activities require that one role be dependent upon the other if the NVOCC is to remain in fact an NVOCC. While as to the underlying carrier the NVOCC is technically a shipper, it has no proprietary or beneficial interest in the cargo, and the NVOCC's primary business is the furnishing of transportation facilities. The NVOCC's entire operation should be subject, and is, to Commission jurisdiction.

Unless the Commission, pursuant to Section 22 First, has jurisdiction in all respects over respondents, it may not be able, effectively, to carry out the policies of the Shipping Act. To allow an NVOCC to do indirectly what it could not do directly is not effective regulation, and is not what the Act contemplates.

*Id.*

Subsequently, in the same proceeding, the ALJ confirmed the determination that a complaint could be filed against NVOCCs, as they were common carriers subject to the Shipping Act:

[t]he fact that the NVOCC was technically a shipper in relation to the vessel operating water carrier did not take away the jurisdiction of the Commission over the NVOCC, because in relation to the real shipper of the goods the NVOCC retained its status as a common carrier. The NVOCC had no proprietary or beneficial interest in the cargo, and the NVOCC's primary business was the furnishing of transportation facilities, and the NVOCC's entire operation was subject to the Commission's

jurisdiction.

*Maritime Service Corp. v. Acme Fast Freight*, 17 S.R.R. 1655, 1660 (ALJ 1978).

Finally, following up on the ALJ's conclusion, the Commission again affirmed its earlier conclusion that the NVOCCs in question were not merely shippers, but NVOCCs subject to the Act, stating that

In its Order of July 23, 1973, denying motions to dismiss Puerto Rico Forwarding Co., Inc. and Twin Express, the Commission refused to accept the proposition that because an NVOCC is a "shipper" vis-à-vis the underlying ocean carrier, the Commission has no jurisdiction, at least under Section 22 of the Act, over the NVOCC's dealings with the underlying water carrier. The Commission reaffirmed that when handling transportation of property subject to regulation under the Act, the NVOCC retains its common carrier status even when it assumes the role of a shipper vis-à-vis the underlying ocean carrier.

*Sea-Land Service v. Acme Fast Freight*, 18 S.R.R. 853, 855 n. 3 (FMC 1978).<sup>3</sup>

The Settlement Officer's decision in *Conterm* and the ALJ's decision in the June 22, 2010 Memorandum and Order appear to be inconsistent with the position taken by the Commission in the *Maritime Service Corp.* decisions set out above, as well as with subsequent decisions. For example, in *Eastern Mediterranean Shipping Corp. – Possible Violations of the 1984 Act*, 28 S.R.R. 791 (ALJ 1999, administratively final March 9, 1999), the respondent NVOCC was found to have violated section 10(d)(1) for, among other grounds, failing to remit payments to vessel-operating common carriers. *Id.* at 795. As the ALJ stated in an earlier decision

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<sup>3</sup> Maritime Service Corporation, which had originally filed the complaint, was dissolved and certain named carriers were substituted as complainants. *Sea-Land Service v. Acme Fast Freight*, 18 S.R.R. 853, 853 n.\* (FMC 1978).

in which he found that the same respondent NVOCC violated section 10(d)(1), “section 10(d)(1) of the 1984 Act . . . requires carriers like respondents to establish, observe, and enforce just and reasonable regulations and practices, relating to or connected with receiving, handling, storing, or delivering property.” *Go/Dan Industries, Inc. v. Eastern Mediterranean Shipping Corp.*, 28 S.R.R. 788, 789 (ALJ 1998, administratively final January 27, 1999).

## 2. Conclusion

Based on Commission precedent, there appears to be no basis for dismissing allegations that Olympus Respondents and CJR Respondents violated section 10(d)(1) on the grounds that these Respondents acted as shippers rather than NVOCCs in relation to Mitsui. Allegations that an NVOCC violated section 10(d)(1) may not be dismissed on the grounds that the NVOCC stood in the position of a shipper in relation to the common carrier. Therefore, the ALJ’s dismissal of allegations that Olympus Respondents and CJR Respondents violated section 10(d)(1), on the grounds that they acted as shippers in relation to Mitsui, is vacated. In vacating the dismissal, we note that in considering the section 10(d)(1) allegations against Olympus Respondents and CJR Respondents, it must be determined whether these Respondents can be found to have acted as an NVOCC through their participation in the alleged split routing scheme.

### D. Status of Olympus Respondents and CJR Respondents Based on Their Alleged Participation in Violations of the Shipping Act

The ALJ found that Olympus Respondents and CJR Respondents are proper parties in connection with the section 10(a)(1) allegations in this proceeding when he denied their respective Motions to Dismiss in the June 22, 2010 Memorandum and Order. 31 S.R.R. at 1397. He subsequently confirmed this finding with regard to Olympus Respondents: “The motion to dismiss has been resolved and Olympus Respondents have been found to be proper parties.” Memorandum and Order on

Complainant's Motion for Sanctions served November 16, 2010, at 5. The issue of whether these Respondents are liable for violations of the Shipping Act depends on the factual evidence presented by Mitsui and Global Link, including considerations of Respondents' status as shareholders.<sup>4</sup>

In most statutory settings, "there are at least three avenues that can be pursued to impose liability on a corporation's shareholders: (1) by raising traditional veil-piercing arguments; (2) by arguing that expanding liability to owners is consistent with legislative intent; and (3) by establishing that the controlling stockholder's act of authorizing or approving the illegal activity itself is proscribed by the statute." Cox & Hazen § 7.17 at 312. With regard to the first avenue, the corporate form is to be respected and shareholders protected from liability, unless grounds to pierce the corporate veil have been shown. *See, e.g., United States v. Bestfoods*, 524 U.S. 51, 69 (1998). Courts are more likely to pierce the veil in a statutory context, as opposed to a contract claim context, in order to effectuate federal policy. *See* 1 James D. Cox & Thomas Lee Hazen, *Cox and Hazen on Corporations* § 7.17 at 308 (2d ed. 2003) (Cox & Hazen); *Pearson v. Component Technology Corp.*, 247 F.3d 471, 484 n. 2 (3d Cir. 2001). In the statutory context, "the question that drives veil-piercing . . . is whether the statutory purpose would be furthered or frustrated if the individual controlling stockholder or parent corporation is not swept within the

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<sup>4</sup> Respondents' status as shareholders would appear to be relevant only in connection with section 10(d)(1) and 46 C.F.R. § 515.31(e), as section 10(a)(1) is directed to persons, which includes corporations and partnerships as well as individuals. *See* 1 U.S.C. § 1. In 2006, GLL Holdings was sold by Olympus Respondents and CJR Respondents, among other parties, to Golden Gate Logistics. Olympus Respondents Motion to Dismiss Improperly Filed Complaint at 4. According to Global Link, between May 2003 and June 2006, the time period in which the alleged split routing occurred, OGF owned 74.9% of the shares of GLL Holdings, Global Link's parent. During the same time period, OEF owned .49% of the shares of GLL Holdings, and CJR Respondents owned 20.64% of GLL Holdings' shares. Global Link's Verified Answer and Affirmative Defenses to Mitsui O.S.K. Lines Ltd.'s Complaint, Counterclaim and Cross Claims at 14-15. Taken together, it appears that Olympus Respondents and CJR Respondents owned approximately 96% of the shares of GLL Holdings, Global Link's parent company, during the period that the alleged split routing occurred.

scope of the statute.” Cox & Hazen §7.17 at 309. In this proceeding, no party has pled any basis for keeping Olympus Respondents or CJR Respondents in the proceeding based on a theory of piercing the corporate veil.

An initial issue to be determined by the ALJ is whether the evidence produced proves that Olympus Respondents and/or CJR Respondents participated in the Shipping Act violations alleged. Mitsui alleges in its complaint that the split-routing scheme was carried out “with the full knowledge and participation of Respondents Olympus Partners, OEF, OGF, Mischianti, Cardenas, Heffernan, CJR, and Rosenberg.” Mitsui Complaint at 5. Global Link has stated that “Respondents, Rosenberg, CJR, Cardenas, Heffernan, OEF, OGF and Olympus each possessed knowledge of Global Link’s ‘split routing.’” Global Link’s Verified Answer at 5. In order to prevent delay or undue inconvenience in this proceeding, the ALJ should direct the parties to focus discovery first on the issue of whether Olympus Respondents and CJR Respondents engaged in the requisite participation — as individuals or entities rather than mere shareholders of Global Link — in Shipping Act violations to warrant holding them separately liable for violating section 10(a)(1) and/or section 10(d)(1), or whether claims against one or both of these parties should be rejected. *See* 46 C.F.R. § 502.201(f) (“[T]he presiding officer . . . may make such orders as may be necessary . . . to prevent delay or undue inconvenience.”).

#### IV. SUMMARY OF CONCLUSIONS

##### A. The Commission’s Jurisdiction Over the Inland Segment of Through Transportation

As discussed above, we conclude that the ALJ did not err in relying on the Supreme Court’s decision in “*K*” *Line* and the Commission has jurisdiction to consider complaints alleging violations of the Shipping Act in connection with intermodal through transportation, irrespective of the point in the transportation the violations are alleged to have taken place. The Court in “*K*” *Line* concluded that transportation under a through bill of lading cannot be divided into two separate moves (ocean and inland), with

two different bills of lading applicable. With regard to the application of section 10(a)(1), legislative history demonstrates that Congress intended that the Commission have jurisdiction over through transportation, including the inland segment of such transportation. In addition, the Commission has affirmed its jurisdiction over through intermodal movements that include inland transportation. Olympus has presented no grounds in its appeal to overturn the ALJ's conclusion that the Commission has jurisdiction over the complaint filed in this proceeding. Therefore, Olympus Respondents' appeal of the ALJ's conclusion on this issue is denied and the ALJ's holding that the Commission has jurisdiction over the inland segment of intermodal through transportation is affirmed.

B. The Commission's Jurisdiction Over Claims Based on Indemnity and/or Contribution

Global Link seeks reversal of the ALJ's conclusion to grant Olympus and CJR Respondents' motions to dismiss Global Link's cross-claims for indemnification and contribution. We deny the appeal with regard to Global Link's cross-claim for indemnification, and affirm the ALJ's decision to grant the motions to dismiss that claim. Global Link's cross-claim for indemnification seeks to have the Commission make an award based on the parties' Stock Purchase Agreement and Delaware law, and it does not appear to present a claim for relief cognizable under the Shipping Act.

In its second cross-claim, Global Link seeks contribution from Cross Respondents, in the event that it is found liable to Mitsui and required to pay more than its proportional share of liability. It does not appear from the Shipping Act or its legislative history that the Commission is precluded from finding that respondents may bear proportional shares of liability for any reparations that may be awarded to Mitsui. The issue of whether the Commission should entertain an action for contribution is not before the Commission at this point, as Global Link has not been found liable to Mitsui and has not been required to pay more than its proportional share of liability to Mitsui. Therefore, the Commission vacates the ALJ's dismissal of this cross-claim,

pending determination by the ALJ that Global Link is liable to Mitsui for the alleged violations of the Shipping Act, and is required to bear more than its proportional share of liability.

C. Application of Section 10(d)(1) to Respondents

The ALJ granted motions to dismiss Mitsui's allegations that Olympus Respondents and CJR Respondents violated section 10(d)(1), on the grounds that respondents acted as a shipper in relation to Mitsui on the shipments involved and therefore could not be considered an NVOCC to which section 10(d)(1) applies. Contrary to the Settlement Officer's decision relied on in the ALJ's June 22, 2010 Memorandum and Order, the Commission has determined in prior rulings that NVOCCs are subject to the Shipping Act and the Commission's jurisdiction regardless of whether they are acting as shippers in relation to underlying water carriers. Therefore, the ALJ's dismissal of these allegations on this basis is vacated. The issue remains as to whether these Respondents may be found to have violated section 10(d)(1) by acting as an NVOCC through their participation in the alleged split routing scheme.

D. Status of Olympus Respondents and CJR Respondents Based on their Alleged Participation in Shipping Act Violations

An initial issue to be determined by the ALJ is whether the evidence produced proves that Olympus and/or CJR Respondents participated in the Shipping Act violations alleged. In order to prevent delay or undue inconvenience, the ALJ should direct the parties to focus their initial discovery on the issue of the nature of these Respondents' alleged participation in the alleged Shipping Act violations, so that the ALJ can make an initial determination whether their continuation in the proceeding is warranted.

THEREFORE, IT IS ORDERED, That the ALJ's holding that the Commission has jurisdiction over the inland segment of intermodal through transportation is affirmed.

IT IS FURTHER ORDERED, That the ALJ's dismissal of Global Link's first cross-claim seeking indemnification based on the Stock Purchase Agreement and Delaware law is affirmed.

IT IS FURTHER ORDERED, That the ALJ's dismissal of Global Link's second cross-claim seeking contribution is vacated, pending determination by the ALJ that Global Link is liable for violations of the Shipping Act, and is required to pay more than its proportionate share of liability.

IT IS FINALLY ORDERED, That the ALJ's dismissal of allegations that Olympus Respondents and CJR Respondents violated section 10(d)(1) of the Act, on grounds that these respondents operated as shippers in relation to Mitsui, is vacated, and the issue of whether these Respondents violated section 10(d)(1) is remanded to the ALJ.

By the Commission.

  
Karen V. Gregory  
Secretary

**Commissioner Rebecca F. Dye Concurring in Part and  
Dissenting in Part**

For the reasons discussed below, I concur with the majority and would affirm the Administrative Law Judge's (ALJ's) denial of the Olympus Respondents' motion to dismiss Mitsui O.S. K. Lines' claims concerning the practice of split routing. I also concur with the majority and would affirm the ALJ's dismissal of Global Link Logistics' cross-claim seeking indemnification for liability.

I dissent, however, from the majority's decision to vacate the ALJ's dismissal of Mitsui's claims against the Olympus Respondents and CJR Respondents for violations of section 10(d)(1) of the Shipping Act of 1984, 46 U.S.C. 41102(c), and 46 C.F.R. 515.31(e), and would affirm the ALJ's dismissal, for the reasons stated below. I also dissent from the majority's decision to vacate the ALJ's dismissal of Global Link's cross-claim seeking contribution in the amount of any payment by Global Link in excess of its share of liability to Mitsui, and would affirm the ALJ's dismissal, for the reasons stated below.

**Concurrence**

- **Olympus Respondents' appeal of the ALJ's denial of the motion to dismiss Mitsui O.S.D. Lines' claims concerning the practice of split routing.** I concur with the majority that the Olympus Respondents presented no grounds for reversing the ALJ's conclusion that the Commission has jurisdiction over the practice of split routing involved in Mitsui's complaint, and would affirm the ALJ's denial of the motion to dismiss.
  
- **Global Link's appeal of the ALJ's dismissal of its cross-claim seeking indemnification for liability.** I concur with the majority that the ALJ correctly dismissed Global Link's cross-claim for indemnification on the grounds that it fails to state a claim under the Shipping Act of 1984, 46 U.S.C. 40101 et seq., and would affirm the ALJ's dismissal of the cross-claim.

### Dissent

- **Mitsui's appeal of the ALJ's dismissal of its claim against the Olympus Respondents and the CJR Respondents for violations of section 10(d)(1) of the Shipping Act of 1984, 46 U.S.C. 41102(c), and 46 C.F.R. 515.31(e).** I dissent from the majority and would affirm the ALJ's dismissal of Mitsui's claims against the Olympus Respondents and CJR Respondents for violations of section 10(d)(1) of the Shipping Act of 1984, 46 U.S.C. 41102(c), and 46 C.F.R. 515.31(e), on grounds stated below.

### Parties

Mitsui O.S.K. Lines, Ltd., is a corporation organized and existing under the laws of Japan. Mitsui is a vessel operating common carrier operating in the U.S. foreign trades.

Between May 2003 and June 2006, the time period involved in this matter, respondent Global Link Logistics, Inc., was a corporation organized under the laws of Delaware and licensed by the Federal Maritime Commission as a non-vessel-operating-common carrier. During that time, Olympus Growth Fund III, L.P. (a Delaware limited partnership), Olympus Executive Fund, L.P. (a Delaware limited partnership), and CJR World Enterprises, Inc. (a Florida corporation) owned Global Link Logistics, Inc. Respondent Chad J. Rosenberg was owner and sole shareholder of CJR World Enterprises and was an officer and director of Global Link Logistics. In this decision, the ALJ refers to Olympus Growth Fund and Olympus Executive Fund as Olympus Respondents and Chad Rosenberg and CJR World Enterprises as the CJR Respondents.

On May 20, 2006, Olympus Growth Fund, Olympus Executive Fund, CJR World Enterprises, and Chad J. Rosenberg entered into a Stock Purchase Agreement with Golden Gate Logistics, Inc. to sell Global Link Logistics to GLL Holdings, Inc.

### **Motions to Dismiss Mitsui's Complaint**

Mitsui contends that Olympus Respondents and CJR Respondents violated section 10(d)(1) of the Shipping Act of 1984, 46 U.S.C. 41102(c) and also violated 46 C.F.R. 515.31(e). They allege that Olympus Respondents and CJR Respondents were owners of Global Link Logistics, Inc., during the time periods relevant to this complaint. They also allege that Chad J. Rosenberg was an officer and director of Global Link during the time period relevant to this complaint. In addition, Mitsui alleges that the [split routing] "scheme" was carried out with the knowledge and participation of the Olympus Respondents and the CJR Respondents.

Among the arguments made by Olympus Respondents and CJR Respondents in their motions to dismiss Mitsui's complaint is that they are not common carriers, marine terminal operators, or ocean transportation intermediaries, and are not subject to the jurisdiction of the Commission for purposes of 46 U.S.C. 41102(c) and 46 C.F.R. 515.31(e).

Mitsui did not reply to the respondents' arguments in their motions to dismiss concerning section 46 U.S.C. 41102(c).

The ALJ dismissed the complaint for lack of subject matter jurisdiction under 10(d)(1) of the Shipping Act and Mitsui appealed. The majority vacates the ALJ's dismissal and remands the matter to the ALJ.

### **Limits of Statutory Jurisdiction Under 46 U.S.C. 41102(c)**

Section 10(d)(1) of the Shipping Act, 46 U.S.C. 41102(c), requires that a common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

The definitions of common carrier (which includes a non-vessel-operating common carrier), marine terminal operator, and ocean transportation intermediary are contained in section 40102 of title 46, United States Code.

The Commission's regulations regarding the general duties and responsibilities of ocean transportation intermediaries are contained in 46 C.F.R. 515.31. Subsection (e) of that section provides: "(e) False or fraudulent claims, false information. No licensee shall prepare or file or assist in the preparation or filing of any claim, affidavit, letter of indemnity, or other paper or document concerning an ocean transportation intermediary transaction which it has reason to believe is false or fraudulent, nor shall any such licensee knowingly impart to a principal, shipper, common carrier or other person, false information relative to any ocean transportation intermediary transaction."

In 2009, the United States Court of Appeals for the District of Columbia decided *Landstar Express America Inc. v. FMC*, 569 F.3d 493 (D.C. Cir. 2009). In *Landstar*, the Court determined that the Commission does not possess statutory authority to require agents of Ocean Transportation Intermediaries who are not themselves Ocean Transportation Intermediaries to obtain licenses.

The Court stated, "We have previously held that where the Shipping Act includes a precise definition, 'the limits of the Commission's jurisdiction to regulate carriers under [the Act] must necessarily depend upon the meaning and interpretation of the [statutory] definition.'" *Landstar*, 569 F.3d at 496 (quoting *Austasia Intermodal Lines, Ltd. v. FMC*, 580 F.2d 642, 644 (D.C. Cir. 1978)). In *Austasia*, the relevant Shipping Act provision required "every common carrier" to file certain tariffs with the Commission. *Id.* Because the Commission had imposed tariff filing requirements on a carrier that did not meet that statutory definition, we explained that the Commission had exceeded its authority. *Id.* at 646. That basic principle of statutory interpretation also governs this case. Because the Shipping Act defines the term "ocean transportation intermediary" and because the Commission imposed a licensing

requirement on agents that do not meet the statutory definition, the Commission exceeded its authority.” *Landstar*, 569 F.3d at 496, 497.

### Piercing the Corporate Veil

Courts treat a corporation as an entity separate from its shareholders, but they will disregard the corporate “veil” if it is abused. Note, *Piercing the Corporate Law Veil: The Alter Ego Doctrine under Federal Common law*, 95 Harv. L. Rev. 853 (1982).

In *Williamson v. Recovery Ltd. P’ship*, 542 F. 3d 43, 52-54 (2d Cir. 2008), the United States Court of Appeals for the Second Circuit considered a theory of “piercing the corporate veil” in a maritime contract dispute. The Court, citing *Kirno Hill Corp. v Holt*, 618 F.2d 982, 985 (2d Cir. 1980), stated:

The prerequisites for piercing a corporate veil are as clear in federal maritime law as in shoreside law: [The individual] must have used [the corporate entity] to perpetrate a fraud or have so dominated and disregarded [the corporate entity]’s corporate form that [the corporate entity] primarily transacted [the individual]’s personal business rather than its own corporate business.

*Id.*

To determine whether an individual so dominated and disregarded a corporate entity’s corporate form, a court may consider several factors, including “(1) the intermingling of corporate and personal funds, (2) undercapitalization of the corporation, and (3) failure to maintain separate books and records or other formal legal requirements for the corporation.” *William Wrigley Jr. Co. v Waters*, 890 F2d 594, 600 (2d Cr. 1989) (citations omitted). There is no set rule as to how many of these factors must be present to warrant piercing the corporate veil and courts have considered additional factors as well. Instead of a firm rule, the general principle guiding courts in determining whether to pierce

the corporate veil “has been that liability is imposed when doing so would achieve an equitable result.” *Id.* at 601.

The Court added in *Kirno Hill* that sole ownership of a corporation “does not alone justify piercing the corporate veil.” 618 F.2d at 985. See also, *Piercing the Corporate Veil in Maritime Cases*, *Journal of Maritime Law and Commerce* (April, 1987).

In *Budisukma Permai SN BHD v. N.M.K. Products & Agencies Lanka (Private) Limited*, 606 F. Supp 2d 391 (S.D.N.Y. 2009), the Court found that the vessel owner satisfied its prima facie burden in pleading that related entities were alter egos of vessel charterer. The Court listed several relevant factors in evaluating the sufficiency of “alter ego” claims:

- (1) disregard of corporate formalities;
- (2) inadequate capitalization;
- (3) intermingling of funds;
- (4) overlap in ownership, officers, directors, and personnel;
- (5) common office space, address and telephone numbers of corporate entities;
- (6) the degree of discretion shown by the allegedly dominated corporation;
- (7) whether the dealings between the entities are at arms length;
- (8) whether the corporations are treated as independent profit centers;
- (9) payment or guarantee of the corporation’s debts by the dominating entity; and
- (10) intermingling of property between the entities.

*Id.* at 398.

The Commission has used several factors in determining whether to pierce the corporate veil, including the nature or corporate ownership and control, the failure to maintain adequate corporate records and minutes, and the failure to follow corporate formalities, including the approval of stock issues by an independent board of directors. *Ariel Mar. Group, Inc.*, 24 S.R.R. 517, (FMC, 1987). In *Rose International, Inc. v Overseas Moving Network International, Ltd.*, 29 S.R.R. 119, (FMC, 2001), the Commission noted that although the factual tests for piercing the

corporate veil vary among circuits, the Commission listed eight factors to be used by the Commission to determine domination and control.

**ALJ's Dismissal of Section 10(d)(1) Claims  
Should Be Affirmed**

12(b)(1) Standard

Rule 12 of the Commission's Rules provides for the application of the Federal Rules of Civil Procedure where the Commission's procedural rules do not contain a specific rule, subject to the limitation that the application is consistent with sound administrative practice. 46 C.F.R. 502.12. The Commission's Rules do not address motions to dismiss for lack of subject matter jurisdiction. Accordingly, the Federal Rule of Civil Procedure 12(b)(1) applies to Olympus Respondents' and CJR Respondents' motions to dismiss. *The Lake Charles Harbor and Terminal District v. West Cameron Port, Harbor and Terminal District*, 2007 WL 2468431 (F.M.C.).

On a motion to dismiss under Rule 12(b)(1) for lack of subject-matter jurisdiction, "[a] plaintiff bears the burden of establishing by a preponderance of the evidence that the Court possesses jurisdiction." *Citizens for Responsibility & Ethics in Wash. v. United States Dep't of Homeland Security*, 527 F. Supp.2d 101, 104 (D.D.C. 2007). Accordingly, "federal courts are courts of limited jurisdiction and the law presumes that a cause lies outside this limited jurisdiction." *Larsen v. United States Navy*, 486 F. Supp.2d 11, 18 (D.D.C. 2007) (internal quotations omitted). A court may resolve a motion to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1) based solely on the complaint, see *Herbert v. Nat'l Academy of Science*, 974 F.2d 192, 197 (D.C. Cir. 1992). Because "subject-matter jurisdiction is an 'Art. III as well as a statutory requirement [,] no action of the parties can confer subject-matter jurisdiction upon a federal court.'" *Akinseye v. Dist. of Columbia*, 339 F.3d 970, 971 (D.C. Cir. 2003) (quoting *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, 102 S.Ct. 2099, 72 L.Ed.2d 492, (1982)).

The Commission must presume that it lacks subject-matter jurisdiction until Plaintiff, as the party seeking to invoke the jurisdiction, establishes otherwise. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 1675 (1994); see also Fed. R. Civ. P. 8(a)(1). Indeed, “[t]he court has an affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority[.]” *Judicial Watch, Inc. v. U.S. Food & Drug Admin.*, 514 F. Supp. 2d 84, 86 (D.D.C. 2007).

### Conclusion

Mitsui has failed to carry its burden to establish that the Olympus Respondents or CJR Respondents undertook actions that are within the Commission’s statutory jurisdiction under sections 3 and 10(d)(1) of the Shipping Act of 1984, 46 U.S.C. 40102 and 41102(c), as a common carrier, marine terminal operator, or ocean transportation intermediary. In this matter, Mitsui has pleaded only generalized conclusions concerning Olympus Respondents and CJR Respondents related to ownership, knowledge, participation, and violations of the Shipping Act surrounding the practice of “split routing”.

Mitsui also failed to allege any facts in support of the contention that Olympus Respondents and CJR Respondents were subject to Commission regulations 46 C.F.R. 515.31(e) as non-vessel-operating common carriers or ocean freight forwarders required to be licensed by the Commission.

Rule 70 of the Commission’s Rules of Practice and Procedure, 46 C.F.R.502.70, provides ample opportunity and flexibility for a complainant to amend a complaint in regard to any matter. Mitsui took the opportunity to amend its complaint in this matter, but still failed to include any facts related to subject matter jurisdiction over the Olympus Respondents or the CJR Respondents under 46 U.S.C. 41102(c) or to the theory of piercing the corporate veil. In this situation, it is reasonable to dismiss the complaint without further discovery.

An additional argument in favor of dismissal without further discovery is that Mitsui failed to respond to Respondents' 10(d)(1) arguments in their motions to dismiss. This alone may be sufficient to deem the motion conceded. As the Court of Appeals for the District of Columbia recently noted, "as we have often observed, [w]here the district court relies on the absence of a response as a basis for treating the motion as conceded, we honor its enforcement of the rule." *Fox v. American Airlines, Inc.*, 389 F.3d 1291, 1295 (D.C. Cir. 2004), quoting *Twelve John Does v. Dist. Of Columbia*, 117 F.3d 571,577 (D.C. Cir. 1997)).

Finally, despite the abundance of case law explaining the legal theory of "piercing the corporate veil", Mitsui did not allege relevant facts which would justify proceeding to discovery for the purpose of undertaking a "piercing the corporate veil" analysis.

For these reasons, I would affirm the ALJ's dismissal of Mitsui's claims against Olympus Respondents and CJR Respondents for violations of section 10(d)(1) of the Shipping Act of 1984, 46 U.S.C. 41102(c) and 46 C.F.R. 515.31(e) for lack of subject matter jurisdiction.

- **Global Link's appeal of the ALJ's dismissal of its cross-claim against the Olympus Respondents and the CJR Respondents seeking contribution in the amount of any payment by Global Link in excess of its share of liability to Mitsui.** I dissent from the majority and would affirm the ALJ's dismissal of Global Link's cross-claim against the Olympus Respondents and the CJR Respondents seeking contribution in the amount of any payment by Global Link in excess of its share of liability to Mitsui, on the grounds stated below.

### Parties

Global Link, Logistics, Inc. is a corporation organized under the laws of Delaware. Global Link is a licensed ocean transportation intermediary that operates as a non-vessel-operating common carrier.

Between May 2003 and June 2006, the time period involved in this matter, respondent Global Link Logistics, Inc., was a corporation organized under the laws of Delaware and licensed by the Federal Maritime Commission as a non-vessel-operating-common carrier. During that time, Olympus Growth Fund III, L.P. (a Delaware limited partnership), Olympus Executive Fund, L.P. (a Delaware limited partnership), and CJR World Enterprises, Inc. (a Florida corporation) owned Global Link Logistics, Inc. Respondent Chad J. Rosenberg was owner and sole shareholder of CJR World Enterprises and was an officer and director of Global Link Logistics. In this decision, the ALJ refers to Olympus Growth Fund and Olympus Executive Fund as Olympus Respondents and Chad Rosenberg and CJR World Enterprises as the CJR Respondents.

On May 20, 2006, Olympus Growth Fund, Olympus Executive Fund, CJR World Enterprises, and Chad J. Rosenberg entered into a Stock Purchase Agreement with Golden Gate Logistics, Inc. to sell Global Link Logistics to GLL Holdings, Inc.

#### **Motions to Dismiss Global Link's Cross-Claim for Contribution**

Global Link contends that the Olympus Respondents and the CJR Respondents should be obligated to contribute payment for their proportionate shares of liability if the Commission finds Global Link liable to Mitsui.

Among the arguments made by the Olympus Respondents and the CJR Respondents in their motions to dismiss Global Link's cross-claim for contribution is that the Commission lacks jurisdiction under the Shipping Act of 1984 over claims for contribution.

The ALJ dismissed Global Link Logistic's cross-claim against the Olympus Respondents and the CJR Respondents on two grounds, one of which is that the Commission does not have subject matter jurisdiction under the Shipping Act over a cause of action for contribution by one respondent against another respondent when

they are found jointly and severally liable. Global Link Logistics appealed his decision. The majority vacates the ALJ's dismissal and remands to the ALJ.

### **Right of Contribution Under the Shipping Act of 1984**

#### *Texas Industries*

The United States Supreme Court has held that courts may not impose new rights or claims upon comprehensive remedial regimes. In *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 101 S. Ct. 2061 (1981) the Court considered the issue of whether the federal antitrust laws allow a defendant, against whom civil damages, costs, and attorney's fees have been assessed, to pursue a right to contribution from other participants in the unlawful conspiracy on which recovery was based. The Court held that there is no basis in federal statutory or common law for allowing federal courts to fashion the right to contribution for recovery based on section 1 of the Sherman Act. *Id.* at 2063-2070.

In *Texas Industries*, the Court explained that there was nothing in the Sherman or Clayton Acts or their legislative histories, expressly or implicitly, to indicate that Congress intended to create a right to contribution, or to soften the blow on joint wrongdoers. *Id.* at 2066. The Court considered the positions of parties and *amici* who were proponents of a right to contribution in antitrust proceedings that the interest of fairness, equity, and deterrence further the objectives of the antitrust laws. The Court also considered the arguments of respondents and *amici* opposing contribution that an even stronger deterrent effect may exist in the antitrust laws if a single participant could be held fully liable for a judgment. *Id.* at 2064. In addition, the Court considered the complexity and problems with fashioning a right to contribution among wrongdoers. *Id.* at 2065.

Finally, the Court determined,

In this vigorous debate over the advantages and disadvantages of contribution and various

contribution schemes, the parties, amici, and commentators have paid less attention to a very significant and perhaps dispositive threshold question: whether courts have the power to create such a cause of action absent legislation and, if so, whether that authority should be exercised in this context.

*Id.* at 2065, 2066.

The Court found that regardless of the merits of the arguments on the complicated policy question presented on the claim of right to contribution, this is a matter for Congress, not the courts, to resolve. *Id.* at 2070.

*Northwest Airlines*

In *Northwest Airlines, Inc. v Transport Workers*, 101 S.Ct. 1571 (1981), the Court decided a similar question of a right to contribution under the Equal Pay Act of 1963, 29 U.S.C. 206(d), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. The *Texas Industries* Court stated that in *Northwest Airlines*,

We concluded that a right to contribution may arise in either of two ways: First through the affirmative creation of a right of action by Congress, either expressly or by clear implication; or second, through the power of federal courts to fashion a federal common law of contribution.

*Texas Industries, supra* at 2066.

In *Northwest Airlines*, the Court considered the case in which Northwest Airlines had been found liable to female cabin attendants for back pay because wage differentials contained in a collective bargaining agreement were found to violate the Equal Pay Act and Title VII of the Civil Rights Act. Northwest Airline brought action for contribution against the union named in the bargaining agreement. *supra* at 1573.

The Supreme Court in *Northwest Airlines* assumed that all the elements of a contribution claim were established in the litigation that established liability on the part of Northwest Airlines: the plaintiff could have recovered from the union or the employer, and that it is unfair to require airline petitioner to pay the entire judgement. The Court also assumed, despite conflicting arguments, that policy considerations favor allowing a right to contribution. Finally, the Supreme Court assumed that respondent unions bear substantial responsibility for the discrimination proscribed by the statutes, and that, under certain conditions, an employer may be a “person aggrieved” under relevant provisions of Title VII of the Civil Rights Act of 1964. *Id.* at 1580.

Regardless of these assumptions, the Supreme Court found that none of them provided a sufficient basis for recognizing the right to contribution in this context. The Court next turned to the statutory construction analysis of whether a private right of contribution exists implicitly in a federal statute that does not expressly provide for it. *Id.*

In determining whether a federal statute that does not expressly provide for a particular private right of action nonetheless implicitly created that right, our task is one of statutory construction. The ultimate question in cases such as this is whether Congress intended to create the private remedy—for example, a right to contribution—that the plaintiff seeks to invoke. Factors relevant to this inquiry are the language of the statute itself, its legislative history, the underlying purpose and structure of the statutory scheme, and the likelihood that Congress intended to supersede or to supplement existing state remedies.

*Id.*

In holding that no implied right to contribution exists under the Equal Pay Act of 1963 or Title VII of the Civil Rights Act of 1964, the *Northwest Airlines* Court concluded that: (1) neither the Equal Pay Act nor Title VII expressly creates a right to contribution

in favor of employers; (2) the purpose of the Equal Pay Act and Title VII are not for the benefit of the petitioner in this case, inasmuch as petitioner was found guilty of discrimination in violation of these statutes, and is a member of the *precise* class Congress intended to regulate; (3) the structure of the statutes argues against an implied right of contribution, because the statutes establish comprehensive programs designed to eliminate discrimination and they include express provisions for private enforcement and Federal government enforcement in different situations; and (4) the legislative histories of the Equal Pay Act and Title VII provide no support for creation of a right to contribution. *Id.* at 1580-1582.

The Court stated,

The comprehensive character of the remedial scheme expressly fashioned by Congress strongly evidences an intent not to authorize additional remedies. It is, of course, not within our competence as federal judges to amend these comprehensive enforcement regimes by adding to them another private remedy not authorized by Congress.

*Id.* at 1582.

The Court concluded,

In this case, we have been unable to discover any manifestation of an intent on the part of Congress to create a right to contribution in favor of employers under the Equal Pay Act and Title VII. Accordingly, we hold that there is no implied right to contribution under those statutes.

*Id.*

Musick

In another Supreme Court decision, *Musick, Peeler & Garrett v. Employers Insurance of Wausau*, 508 U.S. 286 (1993), the Court determined that there was an implied right to contribution under section 10(b) of the Securities Exchange Act, 15 U.S.C. 78j(b), and Rule 10b-5 of the Security and Exchange Commission. *Musick* involved respondents, insurers of defendants who settled a securities fraud class action, who brought an action seeking contribution from petitioners, attorneys and accountants involved in the stock offering and prompted the 10b-5 action.

The Court distinguished the decisions in *Northwest Airlines* and *Texas Industries* and found that “the private right of action under Rule 10b was implied by the Judiciary on the theory that courts should recognize private remedies to supplement federal statutory duties, not on the theory that Congress had given an unequivocal direction to the courts to do so.” *Id.* at 291.

The Court explained,

There are, however, two sections of the 1934 Securities Act, sections 9 and 18 (sections 78i and 78r) that, as we have noted, are close in structure, purpose, and intent to the 10b-5 action. Each confers an explicit right of action in favor of private parties and, in so doing, discloses a congressional intent regarding the definition and apportionment of liability among private parties.

*Id.* at 295.

The Court discussed the strong similarities to section 10(b) held by sections 9 and 18 of the Securities Act, in contrast to the other 6 express liability provisions of the Act. The Court notes that sections 9 and 18 contain nearly identical express provisions for a right to contribution, each allowing a defendant to “recover contribution as in cases of contract from any person who, if joined

in the original suit, would have been liable to make the same payment.” 15 U.S.C. 78i(e) and 78r(b), *Id.* at 297.

The Court concluded,

We think that these explicit provisions for contribution are an important, not an inconsequential, feature of the federal securities laws and that consistency requires us to adopt a like contribution rule for the right of action existing under Rule 10b-5. Given the identity of purpose behind sections 9, 10b, and 18, and similarity in their operation, we find no ground for ruling that allowing contribution in 10b-5 actions will frustrate the purposes of the statutory section from which it is derived.

*Id.* at 297.

Finally, the Court added that their ruling is consistent with the rulings of Courts of Appeals and District Courts that have considered this issue under the Securities Exchange Act of 1934 for over 20 years. *Id.* at 298.

#### Shipping Act of 1984

The Shipping Act of 1984, 46 U.S.C. 40101 et seq., is a comprehensive Federal regime to regulate international ocean shipping. Chapter 413 of the Act provides the statutory system to govern Commission enforcement of Shipping Act requirements, rights, and remedies and contains provisions related to complaints (section 41301), investigations (section 41302), discovery and subpoenas (section 41303), hearings and orders (section 41304), awards of reparations (section 41305), injunctive relief sought by claimants (section 41306), injunctive relief sought by the Commission (section 41307), enforcement of subpoenas and orders (section 41308), and enforcement of reparation orders (section 41309).

The Shipping Act does not contain statutory provisions authorizing claims for contribution. Only two cases considered by the Commission involved the issue of right to contribution, and both were decided without reaching the merits of the argument. *Western Overseas Trade and Development Corp. v. ANERA*, 26 S.R.R. 1239 (FMC 1994); *International Association of NVOCC's v. Atlantic Container Line*, 25 S.R.R. 675 (ALJ 1990).

**ALJ's Dismissal of Global Link's Cross-Claims for  
Contribution Should Be Affirmed**

12(b)(1) Standard

Rule 12 of the Commission's Rules provides for the application of the Federal Rules of Civil Procedure where the Commission's procedural rules do not contain a specific rule, subject to the limitation that the application is consistent with sound administrative practice. 46 C.F.R. 502.12. The Commission's Rules do not address motions to dismiss for lack of subject matter jurisdiction. Accordingly, the Federal Rule of Civil Procedure 12(b)(1) applies to Olympus Respondents' and CJR Respondents' motions to dismiss. *The Lake Charles Harbor and Terminal District v. West Cameron Port, Harbor and Terminal District*, 2007 WL 2468431 (F.M.C.).

On a motion to dismiss under Rule 12(b)(1) for lack of subject-matter jurisdiction, "[a] plaintiff bears the burden of establishing by a preponderance of the evidence that the Court possesses jurisdiction." *Citizens for Responsibility & Ethics in Wash. v. United States Dep't of Homeland Security*, 527 F. Supp.2d 101, 104 (D.D.C. 2007). Accordingly, "federal courts are courts of limited jurisdiction and the law presumes that a cause lies outside this limited jurisdiction." *Larsen v. United States Navy*, 486 F. Supp.2d 11, 18 (D.D.C. 2007) (internal quotations omitted). A court may resolve a motion to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1) based solely on the complaint, see *Herbert v. Nat'l Academy of Science*, 974 F.2d 192, 197 (D.C. Cir. 1992). Because "subject-matter jurisdiction is an 'Art. III as well as a statutory requirement [,] no action of the parties can confer

subject-matter jurisdiction upon a federal court.” *Akinseye v. Dist. of Columbia*, 339 F.3d 970, 971 (D.C. Cir. 2003) (quoting *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, 102 S.Ct. 2099, 72 L.Ed.2d 492, (1982)).

The Commission must presume that it lacks subject-matter jurisdiction until Plaintiff, as the party seeking to invoke the jurisdiction, establishes otherwise. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 1675 (1994); see also Fed. R. Civ. P. 8(a)(1). Indeed, “[t]he court has an affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority[.]” *Judicial Watch, Inc. v. U.S. Food & Drug Admin.*, 514 F. Supp. 2d 84, 86 (D.D.C. 2007).

### Conclusion

The majority states that “There is nothing in the Shipping Act provisions concerning reparations, or in the legislative history, which suggests that Congress intended to preclude proportional liability for reparations, if the Commission determines it to be appropriate in a particular case.” *majority*, at 25. The majority also determined that the matter does not need to be decided at this point in the proceeding because an action for contribution has not accrued. *majority*, at 24.

I disagree with the majority and would grant the motion to dismiss for lack of subject matter jurisdiction. The Shipping Act is a comprehensive remedial regime for regulation of international ocean shipping, containing express statutory provisions for private enforcement and Federal government enforcement. Using the analysis of the Court in *Texas Industries* and *Northwest Airlines*, regardless of the policy arguments in favor of allowing a cause of action for contribution under the Shipping Act, there is nothing in the Shipping Act itself or its legislative history, expressly or implicitly, to indicate that Congress intended to create a right to contribution. In addition, the purpose of the Shipping Act is not to protect the respondent in this case, Global Link, but to regulate its activities.

Unlike the 1934 Securities Exchange Act considered in *Musick*, the Shipping Act contains no statutory provisions that allow contribution as a remedy and which would justify an extension of that remedy to other sections of the Act. Also unlike the Securities Exchange Act, the Shipping Act does not have a 20-year history in the courts of rights of contribution.

The majority's conclusion that there is nothing in the Shipping Act of 1984 to preclude a right of contribution is insufficient to create a right of action for contribution under the Shipping Act. For the reasons stated above, I would affirm the ALJ's dismissal of Global Link's cross-claim for contribution against Olympus Respondents and CJR Respondents for lack of subject matter jurisdiction.

**Commissioner Khouri, Concurring in Part and  
Dissenting in Part**

For the reasons discussed below, I concur with parts of the majority's opinion, join the majority in the result but not the reasoning of one section and, finally, dissent from the majority on other parts of the Order.

Further, though not before the Commission by standard procedural rule at this time, there are several important issues raised by the ALJ's June 22, 2010, Memorandum and Order, *Mitsui O.S.K. Lines, Ltd. v. Global Link Logistics, Inc., Olympus Partners L.P., 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*, 31 S.R.R. 1369 [ALJ 2010] ("ALJ Memorandum and Order") which I believe should be addressed and either modified or corrected. Therefore, I have added a discussion of these matters to this concurrence and dissent.

**DISCUSSION**

A. **ISSUES BEFORE THE COMMISSION**

1. **The Commission's Jurisdiction Over the Inland Portion of Through Transportation**

Regarding the Commission's jurisdiction over the inland portion of through transportation, I agree that the "*K*" Line decision compels a finding that an intermodal transportation agreement for the carriage of goods by ocean container, including the inland portion of such transportation, falls within the purview of the Shipping Act. I further agree that Olympus' arguments concerning antitrust immunity are not persuasive. Therefore, I concur with the majority's determination that the Commission has jurisdiction over the inland segment of intermodal through transportation.

2. The Commission's Jurisdiction Over Claims Based on Indemnity and/or Contribution
  - a. Standards for Considering Motions to Dismiss

A threshold issue for consideration of these claims is whether the ALJ applied the proper standard in his consideration of motions to dismiss filed by the parties. My views concerning interpretation of Commission Rule 12 and the proper application of U.S. Supreme Court precedent to Commission adjudicatory proceedings are sufficiently at variance from the majority opinion that I will address this issue first and then apply that analysis to the ALJ Memorandum and Order and the majority's Order.

- i. Rule 12 of the Commission's Rules of Practice and Procedures

Rule 12 of the Commission's Rules of Practice and Procedure, *Applicability of Federal Rules of Civil Procedure*, states, "In 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 (2011).

The majority Order summarizes Rule 12 without due acknowledgement to the "*specific* Commission rule" language and adds the gloss that, "[a]s the Commission Rules do not address motions to dismiss ... Federal Rules 12(b)(1) and 12(b)(6) apply *in this case*." Collectively, the majority Order together with the ALJ Memorandum and Order effectively amend Rule 12 to mean that, for situations which are not touched upon in any manner by a Commission rule, the FRCP may apply on a case-by-case basis in the discretion of the presiding officer in proceedings under this part, provided that he or she makes a particular affirmative finding that such FRCP will be consistent with sound administrative practice. This is not the only case in which the application of the FRCP has been viewed as selective or permissive rather than mandatory. This interpretation is clearly at odds with the requirement in Rule 12 that

the FRCP will apply to Commission proceedings in “situations which are not covered *by a specific Commission rule*,” and that the FRCP “*will* be followed to the extent that they are consistent with sound administrative practice.” 46 C.F.R. 502.12 (2011) (emphasis added).

In my judgment, the proper interpretation and application of Rule 12 requires the following:

First, “a *specific* Commission rule,” means that a FRCP may be either amended or nullified only by clear and specific language of a Commission rule. 46 C.F.R. §502.12 (2011) (emphasis added). A general reference or the use of broad language on the general subject that is functionally indistinguishable from the language of the parallel Federal Rule will not preempt the application of the rule or extinguish all federal jurisprudence on such rule. For example, Commission Rule 62(a) requires “...a concise statement of the cause of action, and a request for the relief or other affirmative action sought.” 46 C.F.R. §502.62 (2011). While the Commission rule adds modest requirements concerning identification of the parties and counsel, the substance of Rule 62(a) is functionally indistinguishable from the basic pleading rules of FRCP 8(a)(2) and (3).<sup>5</sup> Therefore, under Rule 12, Rule 62(a) in no way completely supplants FRCP 8(a)(2) and (3) and all jurisprudence interpreting

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<sup>5</sup> Compare 46 C.F.R. § 502.62 (2011), with Fed. R. Civ. P. 8.

§ 502.62 Complaints and fee.

(a) The complaint must be verified and shall contain the name and address of each complainant, the name and address of each complainant's attorney or agent, the name and address of each person against whom complaint is made, a concise statement of the cause of action, and a request for the relief or other affirmative action sought.

Rule 8. General Rules of Pleading

(a) Claims for Relief.

A pleading that states a claim for relief must contain:

- (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
- (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

those provisions.

The purpose of Rule 12 is to allow the Commission to tailor specific requirements to agency practice. For example, in its experience the Commission may have found that 30 days for a response is more appropriate to Commission practice than the 20 days provided for in the FRCP. A specific Commission requirement of 30 days will prevail. In the same vein, if a Commission rule allows for rebuttal memorandums without need of permission of the presiding officer, while the Federal Rules prohibit such motion practice, then that specific Commission Rule will prevail.

The fact that the Commission may have at some time considered but taken no affirmative action on a proposal to adopt or amend a rule - for example the Commission's past consideration of a specific Commission rule to modify the requirements of FRCP 9(b) to meet Commission needs as discussed by the ALJ in his Memorandum and Order, 31 S.R.R. at 1384 - does not effectively repeal application of such FRCP under Commission Rule 12.

Second, for the situation not covered by the preceding specific situation, the middle clause, "...the Federal Rules of Civil Procedure *will* be followed (emphasis added)," is a clear, declaratory and mandatory statement with no room for reformulation or interpretation. 46 C.F.R. § 502.12 (2011) Any view that the Federal Rules "may" or the Commission is "permitted" to follow the Federal rule pursuant to Commission Rule 12 is simply incorrect.

Finally, the FRCP replaced the Field Code and its technical pleading requirements in 1938 and these Federal Rules have been honed and refined over the ensuing seventy-three years. These Rules are used in hundreds of thousands of civil legal disputes of all descriptions every year throughout the United States. I find that "...to the extent that they [the Federal Rule(s)] are consistent with sound administrative practice" in Rule 12 means that the Commission must use as much of each Federal Rule and its sub-parts as possible. Inherent in Rule 12 is the presumption that the Federal Rules are consistent with our agency's legal proceedings

and practices unless there is a specific negative finding by the Commission that application of a specific Federal Rule or specific part thereof would not be consistent with sound administrative practice.

ii. Federal Rule of Civil Procedure 8 and 12(b)(6)

The majority next addresses the standards the Commission should apply in considering a motion to dismiss under FRCP 12(b)(6). A brief review of the recent U.S. Supreme Court cases of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), addressing pleading standards under FRCP 8 and standards for motions to dismiss under FRCP 12(b)(6), might be helpful.

*Conley v. Gibson* is the source of the often quoted language that, "...a complaint should not be dismissed for failure to state a claim unless it appears *beyond doubt* that the plaintiff can prove *no set of facts* in support of his claim which would *entitle him to relief*." 355 U.S. 41, 45-46 (1957) (emphasis added). The majority makes reference on page 20 to *Conley* by incorporating an internal quote in the *Bell Atlantic* decision, where the later Court cites the standard rule for FRCP 8, "The complaint must be sufficient to 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'" *Bell Atlantic*, 550 U.S. at 555 (quoting *Conley*, 355 U.S. at 47 (1957)).

By referencing the initial FRCP 8 analysis and not focusing on the standards for dismissal addressed in the Court's review of *Conley*, the majority missed the primary point of *Bell Atlantic*. Mr. Justice Souter continued the *Conley* analysis:

On such a focused and literal reading of *Conley*'s "no set of facts," a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the *possibility* that a plaintiff might later establish some "set of [undisclosed] facts" to support recovery.

*Id.* at 561 (emphasis added).

The *Bell Atlantic* Court then cites several prior cases before finding,

We could go on, but there is no need to pile up further citations to show that *Conley's* "no set of facts" language has been questioned, criticized and explained away long enough...after puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard...*Conley*, then described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival.

*Id.* at 562-63 (emphasis added).

The *Bell Atlantic* decision, addressing the antitrust conspiracy allegation in that case, begins the analysis of the term and application of "plausibility" with,

An allegation of parallel conduct is thus much like a naked assertion of conspiracy in a Section 1 complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of "entitle[ment] to relief."

*Id.* at 557.

The Court then cites favorably Judge Posner's holding in *Asahi Glass Co. v. Pentech Pharmaceuticals, Inc.*,

Some threshold of plausibility must be crossed at the outset before a patent antitrust case should be permitted to go into its inevitably costly and protracted discovery phase.

*Id.* at 558 (citing *Asahi Glass Co. v. Pentech Pharmaceuticals, Inc.*, 289 F. Supp.2<sup>d</sup> 986, 995 (N.D.Ill. 2003)).

As the *Bell Atlantic* Court approaches its conclusion to dismiss the disputed complaint, it notes,

Here, our concern is not that the allegations were insufficiently “particularized”; rather, the complaint warranted dismissal because it failed in toto to render plaintiff’s entitlement to relief plausible.

*Id.* at 569 n. 14.

And, in its summation, the Court in *Bell Atlantic* holds that,

[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.

*Id.* at 570.

Two years later, in the *Ashcroft* decision, Mr. Justice Kennedy discusses the parameters and dimensions of the “*Bell Atlantic* line”, stating,

A claim has *facial plausibility* when the plaintiff *pleads factual content* that allows the court to *draw the reasonable inference* that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a “probability requirement,” but it asks for *more than a sheer possibility* that a defendant has acted unlawfully. When a complaint pleads facts that are “merely consistent with” a defendant’s liability, it “stops short of the line between possibility and *plausibility of ‘entitlement to relief’*.”

*Ashcroft*, 129 S. Ct. at 1949 (citations omitted)(emphasis added).

The Court then settled the question of the scope of the *Bell Atlantic* decision by holding,

“Our decision in [*Bell Atlantic v.*] *Twombly* expounded the pleading standard for all civil actions.”

*Id.* at 1953.

The *Bell Atlantic/Ashcroft* decisions are the formulation that the Commission should apply in this case and all cases. Any reference in the ALJ’s Memorandum and Order that pre-date these cases should be reexamined for their applicability. See 31. S.R.R. 1379-80. Further, the ALJ’s analysis of FRCP 8 in the Memorandum and Order is flawed and needs to be brought into the post *Bell Atlantic/Ashcroft* era. Finally, I specifically reject the ALJ’s view that,

Pleadings in administrative proceedings are easily amendable, even more so than in federal courts, *and are not considered to be critically important*. Rather they are general notice-giving instruments that allow respondents to prepare their defenses. (emphasis in original) (citations omitted).

*Mitsui*, 31 S.R.R. at 1383.

The standard articulated above has the clear effect of totally nullifying, if not making a mockery of the *Bell Atlantic/Ashcroft* decisions. Stated in a different fashion – if pleadings are of such little importance – why does the ALJ and the Commission devote so much time and verbiage to the discussion and analysis of *Bell Atlantic/Ashcroft*. If pleadings do not really matter all that much, why does Rule 62 require a complaint to be *verified*? Under the ALJ’s formulation, how could any respondent ever bring a

successful FRCP 11(b)<sup>6</sup> action based on frivolous or meritless pleadings? In *Bell Atlantic*, the Court specifically raised its concern about the cost borne by respondents who must go through the discovery process when they should have been relieved of that burden by early dismissal from the proceeding. Are these administrative proceedings before the Commission, where \$4,500,000 is claimed to be at stake and the current record of preliminary motions, exhibits, memorandums and decisions is approaching a foot in height and over two years in the making, in any measure less deserving of the same concern? Allowing parties liberal leeway to more easily amend their pleadings as compared to the pleading practice permitted in a Federal civil matter is many leagues removed from the proposition that the pleadings under review here are of little importance and thereby immune to otherwise established rules of Federal pleading practices as determined by the United States Supreme Court. The *Conley* standard cited first above should be given a prompt retirement from this and future Commission proceedings.

b. First Cross-Claim: Indemnification for Breaches of Warranty and Fraud Under the Stock Purchase Agreement and Pursuant to Delaware Law

Concerning Global Link's first cross-claim based on breaches of warranty and fraud under the stock purchase agreement

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<sup>6</sup> Fed. R. Civ. P. 11(b) Representations to the Court.

By presenting to the court a pleading, written motion, or other paper - whether by signing, filing, submitting, or later advocating it - an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

- (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
- (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
- (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

and pursuant to Delaware law, I concur with the majority that the Shipping Act does not apply to acquisitions of voting securities or assets and that the ALJ correctly dismissed Global Links first cross-claim.

c. Second Cross-Claim: Contribution Based on Global Link's Liability to Mitsui for Violations of the Shipping Act

Concerning Global Link's second cross-claim, while the majority initially references the "plausible on its face" language of *Bell Atlantic* and *Ashcroft* for motions to dismiss under Rule 12(b)(1) and (6), the majority on pages 20-21 then goes on to quote language from *Conley* that, "[t]he complaint must be sufficient to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.' *Bell Atlantic*, 550 U.S. at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)); see also 5 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure Civ. § 1215 (3d ed. 2010) ('[T]he test of a complaint's sufficiency simply is whether the document's allegations are detailed and informative enough to enable the defendant to respond.')." In my view, the majority has collapsed the pleading standards of FRCP 8(a)<sup>7</sup> in terms of the short and plain statement of the claim and the *showing* that the pleader is *entitled to relief* as against each named respondent, and confused the standards for a motion to dismiss under Rule 12(b), both as articulated in *Bell Atlantic* and *Ashcroft*.

While I do not agree with his reasoning, I agree with the ALJ with respect to dismissing Olympus Partners L.P., Olympus

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<sup>7</sup> Fed. R. Civ. P. 8(a) Claims for Relief.

A pleading that states a claim for relief must contain:

- (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
- (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
- (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

Growth Fund III, L.P., Olympus Executive Fund, L.P., and CJR World Enterprises, Inc. (“Corporate Respondents”). I disagree with the majority’s opinion that Global Link has stated a claim that is plausible on its face with respect to these respondents. I disagree with the application of the outdated *Conley* standard in light of the Supreme Court’s guidance on FRCP 8(a) and 12(b)(6) in the *Bell Atlantic* and *Ashcroft* decisions. Under the *Bell Atlantic* and *Ashcroft* standards, I find that it is not plausible on its face that Global Link, as a corporate person of continuing existence from a point in time prior to the acts alleged in this proceeding up to today, would suffer an actual injury within the meaning of the Shipping Act if it is required to pay higher rates by reason of the split routing activity, as alleged by Mitsui. Nor can I follow the majority’s broad jump from “no set of facts”, past mere possibility to the new goal line of “plausibility”.

Going beyond the correct formulation of FRCP 8(a) pleading standards as discussed above, I further find that where Section 10(a)(1) requires a showing of “fraud or concealment”, as expressly required by *Rose International, Inc. v. Overseas Moving Network International, Ltd., et al.*, 29 S.R.R. 119 (FMC, 2001), such matter must be plead with sufficient particularity in conformity with FRCP 9(b). *Id.* at 163. I find this to be a matter of fundamental fairness and due process. The Mitsui complaint and the cross complaint may, without deciding the matter, be sufficient to survive a motion to dismiss on the single ground of FRCP 9(b) at this point as regards the individual respondents. However, I find that, in this alternative line of discussion, that the cross complaint does not come close to the “plausible” line concerning any of the Corporate Respondents, and the main complaint and the cross-claims against those Corporate Respondents should be dismissed.

Finally, I find that all of the ALJ’s dicta discussion regarding *Northwest Airlines, Texas Industries*, and contribution and indemnity, *Mitsui*, 31 S.R.R. 1389-1396, should be simply dismissed and of no effect in any future proceeding. I agree with the majority that as Global Link has not as of yet been required to pay reparations to Mitsui, it is unnecessary at this time for the Commission to address whether contribution is an appropriate

remedy under the Shipping Act. In the event that all facts, issues and rules of law align such that Global Link is found liable to Mitsui for reparations, the question of contribution and indemnity may be ripe for consideration. Until that time, however, I decline to opine on the availability of this remedy under the Shipping Act.

### 3. The Application of Section 10(d)(1)

Concerning the majority's discussion and holdings in the application of Section 10(d)(1), I have a mix of agreement and dissent with the ALJ's order and the Commission order in this case.

The ALJ followed the Settlement Officer's reasoning and decision in *Conterm Consolidation Services (USA), Inc. v. Wilfredo Garcia*, 26 S.R.R. 1212 (Settlement Off. February 16, 1994), and found that "accepting as true the facts alleged in Mitsui's complaint, Olympus Respondents and CJR Respondents operated as a shipper in relationship to Mitsui on each shipment..." Mitsui, 31 S.R.R. at 1385. I find error with this holding for two reasons.

First, the ALJ fails to apply both requirements of the *Bell Atlantic* case, as further clarified in *Ashcroft*:

Two working principles underlie our decision in [*Bell Atlantic v.] Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. ... Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss.

*Ashcroft*, 129 S. Ct. at 1949-50.

The allegation in the complaint that the Olympus Respondents and CJR Respondents "operated as a shipper in

relationship to Mitsui” is first, a conclusion thinly disguised as a fact. Second, the allegation is not plausible. There is nothing in the complaint or record to suggest that any these respondents appear on any bill of lading or shipping document in the capacity of “shipper”. Both the Mitsui complaint and the Global Link cross complaint make conclusory allegations that lack essential “factual content.” Perhaps, the reason that Mitsui did not make any true factual allegation in this regard is that there is none to be found. However, our jurisprudence has moved past the “no set of facts” *Conley* dogma and we must apply the *Bell Atlantic/Ashcroft* rule. On this initial basis, the complaint fails to show entitlement to relief as to these respondents, does not cross the plausibility line, and should be dismissed.

Further, as noted above, the ALJ decision relies on *Conterm*, a Settlement Officer’s decision. *Mitsui*, 31 S.R.R. at 1385. Settlement Officer’s decisions are often very narrow, fact and circumstance based and, further, do not receive a sufficient vetting and review by either, the General Counsel’s office or the various Commissioners’ offices to accord them the status of precedent for all future Commission decisions. Similar to the uniform Federal rule that all unpublished U.S. District Court decisions should be confined to that particular case and shall not be cited by any party in any court proceedings as precedent; I find that the Settlement Officer decisions should be confined to their particular facts and circumstances and not be allowed to be cited or used in Commission proceedings.

The majority addresses the *Conterm* decision and correctly concludes that an NVOCC does not lose its status of common carrier when it is serving in the commercial role of shipper in relation to the VOCC. However, the majority misses the mark when they rehabilitate the Section 10(d)(1) claim against the individual and Corporate Respondents and *sua sponte* frame the issue in terms of whether the respondents are NVOCCs in relation to Mitsui. The majority does not sufficiently bring attention to a third alternative - namely that the Corporate Respondents are neither shippers or acting as “common carrier, ocean transportation intermediary or marine terminal operator” as required for Section 10(d)(1) to apply.

The single party respondent that acted as an NVOCC in a manner that plausibly falls within the penumbra of the Section 10(d)(1) allegations is Global Link. For this reason, I find that the Mitsui complaint, as amended, and the Global Link cross-claim concerning alleged violations of Section 10(d)(1) by the individual respondents and the Corporate Respondents should be dismissed because the allegations in the complaint and cross-claim fail to plausibly suggest an entitlement to relief from these respondents.

a. Piercing the Corporate Veil

The majority next takes up a discussion of piercing the corporate veil. It is important to understand the different types of respondents involved in this case.

Respondent Global Link is a corporation organized under the laws of Delaware and, absent any allegation to the contrary, must be considered in good standing under the laws of Delaware at all times relevant to this proceeding. Global Link held itself out and operated as an NVOCC and was, at all times relevant to this proceeding, licensed by the Federal Maritime Commission and, absent any allegation to the contrary, must be considered in good standing under the laws, rules and regulations of the Commission. Global Link was a sizable corporation which handled significant volumes of international container business. It was sold to the current owners through a Stock Purchase Agreement in 2006.

Respondent Olympus Growth Fund III, L.P. (“OGF”) was a Delaware limited partnership and owner of Global Link. Respondent Olympus Executive Fund, L.P. (“OEF”) was a Delaware Corporation and prior owner of Global Link. Respondent Olympus Partner, a Connecticut general partnership, is a private equity firm affiliated with OGF and OEF. Respondents Louis J. Mischianti, David Cardenas, and Keith Heffernan were partners in Olympus Partners and were officers and directors of Global Link during periods relevant to the complaint. Respondent CJR World Enterprises, Inc. (“CJR”) was a Florida corporations and a prior owner of Global Link. Respondent Chad Rosenberg was the sole shareholder of CJR and an officer and director of Global Link.

In *Rose*, the Commission set forth its understanding of factors to apply when considering whether to disregard an entity's corporate form and pierce a corporate veil. 29 S.R.R. at 169-170. These include:

- (1) the nature of the ownership and control;
- (2) failure to maintain corporate minutes or adequate corporate records and failure to follow corporate formalities;
- (3) commingling of funds and other assets;
- (4) inadequate capitalization;
- (5) diversion of the corporation's funds or assets to non-corporate uses;
- (6) use of the same office or business location by the corporation and its shareholders;
- (7) the amount of business discretion displayed by the allegedly dominated corporation; and
- (8) whether the corporations are treated as independent profit centers.

*Id.*

There are three distinct types of respondents in this case: 1) a corporation that is a licensed NVOCC; 2) corporate entities that owned some common equity securities issued by the corporation / licensed NVOCC; and 3) individuals who owned some common equity securities issued by the corporation / licensed NVOCC and who also served as officers and directors of the corporation / NVOCC - Global Link. It deserves particular mention that the ALJ's memorandum and Order of June 22, 2010, appears to treat the three tiers of respondents with little, if any, regard for differences in organization, corporate form, status or established legal entitlements.

While, as noted by the majority, Mitsui alleges in its complaint that the split-routing scheme was carried out "with the full knowledge and *participation* of Respondents Olympus Partners, OEF, OGF, Mischianti, Cardenas, Heffernan, CJR, and Rosenberg" and Global Link has stated that "Respondents, Rosenberg, CJR,

Cardenas, Heffernan, OEF, OGF and Olympus each *possessed knowledge* of Global Link's 'split routing.' However, the ALJ did not engage in any analysis required by the *Rose* decision when determining whether to disregard any of the Corporate Respondents corporate forms and pierce one or all corporate veils.

Furthermore, there are no specific facts alleged as to what and how each respondent knew and/or *participated* in split routing. As to the Corporate Respondents, the conclusory allegations of knowledge and participation do not plausibly get the complaint to a showing of entitlement to relief in the absence of a piercing of the corporate veil. The complaint and cross-complaints contain mere conclusory allegations about the "knowledge and participation" of the Corporate Respondents and, as the majority correctly noted on page 35, "[i]n this proceeding, no party has pled any basis for keeping Olympus Respondents or CJR Respondents in the proceeding based on a theory of piercing the corporate veil." Therefore, the ALJ should revisit the motions to dismiss these Corporate Respondents and focus discovery on the issue of whether Corporate Respondents should remain in the case.<sup>8</sup> This is necessary in order to prevent further delay or undue inconvenience in this proceeding.<sup>9</sup>

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<sup>8</sup> See 46 C.F.R. § 502.201(f) ("[T]he presiding officer . . . may make such orders as may be necessary . . . to prevent delay or undue inconvenience.").

<sup>9</sup> The majority also notes that, "the Commission has found that '[i]t is appropriate to pierce the corporate veil in order to prevent such use of the corporate device to commit . . . statutory violations' and when 'failure to do so would enable the corporate device to be used to circumvent a statute. *Ariel*, 24 SRR at 530 (quoting *Joseph A. Kaplan & Sons v. Federal Trade Comm'n*, 347 F2d 785, 787 n. 4 (DC Cir 1965)); See also *Capital Tel. Co., Inc. v. Federal Communications Comm'n*, 498 F2d 734, 738 n. 10 (DC Cir 1974) ("Where the statutory purpose could be easily frustrated through the use of separate corporate entities a regulatory commission is entitled to look through corporate entities and treat the separate entities as one for purposes of regulation.") Unfortunately, *Capital Telephone* is a case where an individual set up two sham corporations and then one bid for one pager frequency while the other company bid on a second pager frequency – both in the same New York market. The FCC looked through the corporate form to conclude that one individual would control both frequencies. "This decision is merely an application of the Mobil Radio doctrine which directs that where one applicant desires both of two available frequencies and another qualified applicant is available, the [FCC] will grant one frequency to each applicant as a

B. OTHER ISSUES

1. Section 10(a)(1) of the Shipping Act of 1984

I am concerned about the potential unintended consequences of an overly broad reading of Section 10(a)(1)<sup>10</sup> as suggested by the ALJ and the majority in this case. It is overly simplistic to apply the prohibition of Section 10(a)(1) to corporations as well as individuals without careful inclusion and meaningful incorporation of all the other elements of 10(a)(1) as well as proper recognition of corporate structure. Without these important limitations, Section 10, as applied here, would subject any individual or any entity employed by or connected to an Ocean Transportation Intermediary (“OTI”), or any holder of common equity securities in an OTI

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matter of sound policy.” *CapitalTel. Co., Inc. v. Federal Communications Comm’n*, 498 F2d 734, 737-38 (DC Cir 1974). “In the present case, Capital is wholly owned by one individual...This same individual operates and controls from the same office another business that is substantially identical to Capital’s. We find that substantial evidence supports the [FCC’S] decision to pierce Capital’s corporate veil in order to carry out the statutory mandate ‘to provide a fair, efficient, and equitable distribution of radio service.’” *Id.* at 739.

There is simply not one allegation in the record, however, that even remotely suggest that Global Link was set up by any respondents to avoid, evade or circumvent in any manner any law or regulation of the Commission or any branch of U.S. local, state or federal government. Where the Commission is acting in its regulatory and investigative capacity and considering sanctions that might include civil fines, cease and desist orders and temporary or permanent injunctions as to future participation in the Vessel Operating Common Carrier, NVOCC or Freight Forwarder business, then some broader and more flexible use of the pierce the corporate veil rules might, together with the proper factual context, have some room for consideration. We do not have any of those elements in this case.

<sup>10</sup> Section 10(a)(1) of the Shipping Act provides in relevant part as follows:

“(a) In General. No person may:

(1) knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or by 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 be applicable . . . .

organized as a corporation, to liability for violations of the Shipping Act. I am confident that Section 10(a)(1) was never meant to apply without more, for example, to a shareholder who attends a shareholder meeting, asks questions of the officers and directors and thereby acquires “knowledge” of a business practice that is later called into question in a proceeding before the Commission.

While more expansive in its application than other prohibited acts under the Shipping Act that are limited to common carriers, conferences or groups of common carriers, “common carriers ocean transportation intermediaries, and marine terminal operators”, or “joint ventures;” Section 10(a)(1) requires that any violation be done “knowingly and willfully.” As the Commission specifically found in *Rose*,

It is well established that in order to prove that a party used an unfair device or means to obtain lower rates than would otherwise been applicable, a showing of some kind of fraud or concealment is required.

29 S.R.R. at page 163 (citing *Open Bulk Carriers*, 727 F. 2d 1061, 1064 (11<sup>th</sup> Cir. 1984) and *PFEL*, 10 S.R.R. 1, 8 (FMC 1968)).

Further, the Commission’s own regulation in 46 CFR Section 545.2 provides that bad faith or deceit is required in a Section 10(a)(1) case.<sup>11</sup> In addition to the reasons discussed in previous sections, I find that the Commission must apply FRCP 9(b), which provides the standards alleging fraud or a mistake and

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<sup>11</sup> Section 10(a)(1) of the Shipping Act of 1984 (46 U.S.C. 41102(a)) states that it is unlawful for any person to obtain or attempt to obtain transportation for property at less than the properly applicable rates, by any “unjust or unfair device or means.” An essential element of the offense is use of an “unjust or unfair device or means.” In the absence of evidence of bad faith or deceit, the Federal Maritime Commission will not infer an “unjust or unfair device or means” from the failure of a shipper to pay ocean freight. An “unjust or unfair device or means” could be inferred where a shipper, in bad faith, induced the carrier to relinquish its possessory lien on the cargo and to transport the cargo without prepayment by the shipper of the applicable freight charges. 46 CFR § 545.2 (2009)(emphasis added).

further states that a party must plead "with particularity" the circumstances which would constitute the fraud or mistake. Fed. R. Civ. P. 9(b).

In my view, neither Mitsui's complaint, as amended, nor the Global Link cross-claims against any of the Corporate Respondents comply with this pleading standard. It is a fundamental denial of procedural due process as to the aggrieved respondents who must finance a defense in a Commission proceeding to fail to require a complainant to plead such necessary elements in an easily amendable complaint, especially in the face of a well reasoned Commission precedent and a long standing regulation that hold that fraud/bad faith/concealment are necessary elements of a 10(a)(1) case.

Finally, to effect a violation of the Shipping Act, 10(a)(1) requires that the *person* "obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise be applicable." 46 App. U.S.C.A. §1709 (2002) (current version 46 U.S.C. §41102(a)(2006). In this case, Global Link was the licensed NVOCC who obtained the ocean transportation pursuant to its service contracts with Mitsui. Mitsui and Global Link have alleged in the complaint, as liberally amended, and cross complaints that the individual or Corporate Respondents obtained or tried to obtain ocean transportation at less than the rates or charges that would otherwise be applicable.

Assuming for the sake of argument that the allegations against the individual respondents could be sufficient in terms of particularity to withstand a motion to dismiss under the *Bell Atlantic* and *Ashcroft* standards, it is very difficult for me to find any plausible set of facts by which either Mitsui or Global Link has shown entitlement to relief from the Corporate Respondents under 10(a)(1). Notwithstanding the views of the majority noted above in footnote 4 on page 34 that the status of the respondents as shareholders is "not relevant" to Section 10(a)(1), corporate entities only act through employees or agents. Beyond the mere conclusory allegations that the Corporate Respondents "knew or participated," the pleadings are silent as to the particulars of how the Corporate

Respondents *obtained* or *attempted to obtain* ocean transportation in their own name or their own personal capacity pursuant to the Mitsui/Global Link service agreements. The complaint, as liberally amended, and the cross complaints clearly do not measure up to the specificity requirements demanded by FRCP 9(b) or Commission rules and precedent.

2. Section 8(c) of the Shipping Act of 1984

The ALJ should also promptly address the question of whether the practice of “split routing” as used by Global Link in this case is a violation of the Shipping Act or merely a breach of the terms of its service contracts with Mitsui. It is by no means clear to me at this point that the practice of split routing is always a violation of the Shipping Act. It is worth noting that Global Link consulted an attorney about the practice and modified its own usage to conform to counsel’s advice. During the arbitration proceeding, the Commission was approached by OGF and OEF for a determination of whether or not the practice violated the Shipping Act. In denying this request, the Commission noted that, [p]etitioners are private equity funds that are not subject to the Commission’s jurisdiction, are not entities regulated by the Commission, and are not in position to take action that places them in peril insofar as the Commission is concerned.” *Petition of Olympus Growth Fund III, L.P. and Olympus Executive Fund, L.P. for Declaratory Order, Rulemaking or Other Relief*, 31 S.R.R. 718, 724 (FMC 2009). However, the result of the Commission’s Order is a finding that OGF and OEF are, in fact, entities subject to the Shipping Act.

As discussed below, a Commercial Arbitration Tribunal of the American Arbitration Association was convened under the terms of the Stock Purchase Agreement. Global Link initiated and asked for the arbitration and voluntarily participated in those proceedings. The arbitration panel’s decision was included as an exhibit in this case and is therefore a part of the record. The arbitration panel found that Mitsui knew of, condoned and encouraged Global Link’s practice of split-routing.

As for the carriers' knowledge, there is *clear evidence* that a senior sales representative of Mitsui knew that Global Link was engaged in split-routing, and Mitsui did not object – indeed, Mitsui encouraged continuation of the practice – because Mitsui preferred not to be bothered with negotiating a multiplicity of door points (emphasis added).

*American Arbitration Association, Case No. 14 125 Y 01447 07, Page 10, February 2, 2009.*

This finding could suggest that, by past pattern and practice, the five service agreements were effectively amended to allow for changes to the destination “door” points. If the ALJ determines that, under the specific allegations and particular references to the Mitsui/Global Link service agreements and the particular circumstances and facts of this case, the “split routing” was more a matter of contractual obligation as opposed to a Shipping Act violation, then the “exclusive remedy” provision in Section 8(c)<sup>12</sup> of the Shipping Act and proper application of *Cargo One, Inc. v. COSCO Container Lines Co., Ltd.*, 28 SRR 1635 (FMC 2000), and *Anchor Shipping Co. v. Alianca Navegacao e Logistica Ltd.*, 30 S.R.R. 991 (FMC 2006), would divest the Commission of jurisdiction in this case. Subject matter jurisdiction is a threshold issue. Further, fairness to the litigants and judicial efficiency requires that this question be addressed and resolved in the opening act of this production that has now run some two years rather than at the closing curtain, which may be some time in the future. In that effort, I offer the following process.

The application of the *Cargo One/Anchor* line of cases continues to vex many who try to reasonably apply the sequence of findings and countervailing presumptions. A related problem is timing - when, in the various stages of a Commission proceeding, does the presiding officer make a ruling on application of Section 8(c)? Is a FRCP 12(b)(6) motion on the pleadings, premature? Must

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<sup>12</sup> The relevant part of the current version of Section 8(c) provides that, “Unless the parties agree otherwise, the exclusive remedy for a breach of a service contract is an action in an appropriate court.” 46 USC §4052(f)(2006).

some discovery first occur? Must the protesting party wait until all discovery and fact finding is complete before the presiding officer may properly consider a motion to dismiss pursuant to Section 8(c)?

I find that once a party has asserted the application of Section 8(c) by timely motion, then the presiding officer should first complete all normal pre-discovery motions. Following that process and before the commencement of broad discovery between the parties, the presiding officer should hold a “Section 8(c) Hearing”. The issues and discovery should be precisely limited to the formula of the *Cargo One* test as it is so concisely summarized in *Anchor Shipping*. That holding is dissected as follows:

1. Are the complainant’s allegations *inherently* a breach of contract claim, or
2. Do they involve elements *peculiar to* the Shipping Act.

*Anchor Shipping*, 30 S.R.R. at 998.

Therefore, evidence, discovery and arguments should, at this point, be confined to those two competing propositions. *Cargo One* gives some guidance on elements peculiar to the Shipping Act, finding that alleged violations of Section 10 involving unfair or unjustly discriminatory practices, undue or unreasonable preferences, undue or unreasonable prejudice or disadvantage, and just and reasonable regulations and practices should be brought to the Commission for adjudication. 28 S.R.R. at 1645. Other Section 10 proscribed activity could include, but not limited to, retaliation against shippers, attempts to drive a competitor out of business, unreasonable refusal to deal, concerted boycotts, allocating shippers, disclosure of information.

*Cargo One*, in its original formulation, spoke to “allegations *essentially* comprising contract law claims.” And later, in its factual findings, enumerated some claims that were “[s]*ubstantially* contract law claims...[and these claims] are *premised* on the *obligation to meet one’s contract commitments*”. *Cargo One*, 28 S.R.R. at 1645. In all likelihood, there will not be a pure, clean “simple contract claim” and there will need to be a process of

weighing and balancing the facts and elements as alleged in the complaint. As further developed in the Section 8(c) Hearing, there will need to be an initial choice between [1] contract claim and [2] Shipping Act.

Then, “[a]s a general matter, allegations *essentially* comprising contract law claims should be dismissed...”. *Anchor Shipping*, 30 S.R.R. at 998.

Assuming an initial determination of allegations essentially comprising “contract claims,” the respondent has the benefit of a presumption for dismissal. At this point in the proceeding, the party opposing dismissal now has the burden to come forward with additional sufficient proof to overcome the initial presumption of dismissal.

The test does not; however, end here. The *Anchor Shipping* decision went on, in somewhat circular navigation, to direct:

In contrast, where the alleged violation raises *issues* beyond contractual *obligations*, the Commission will likely presume, *unless* the facts as proven do not support a claim, that the matter is appropriately before the agency.

*Id.*

Assuming an initial determination of “Shipping Act”, the complainant now has the benefit of the presumption and the respondent must come forward with proof that the facts do not support the claim that the matter is peculiar to and thus appropriately before the Commission.

In order to clear up any confusion that this second countervailing presumption might insert into the clean linear analysis, the Commission in *Anchor Shipping* then interjected:

However, the Commission [in *Cargo One*] reemphasized that the presumption that *certain*

*inherently* Shipping Act violations belong at the Commission “[i]s a rebuttable one, subject to the assessment by the ALJ of the facts alleged.”

*Id.* (quoting *Cargo One*, 28 S.R.R. at 1645 n. 17).

To avoid the invitation to continue this circumnavigation and, instead, arrive at a final port of debarkation, we should review this *Cargo One* language in a slightly enhanced perspective. Addressing *Vinmar, Inc. v. China Ocean Shipping Co.*, 26 S.R.R. 420 (FMC 1992, the Commission in *Cargo One* provided:

While we establish here that a Section 10(b)(12) complaint case may lie with the Commission, the Commission in *Vinmar* dismissed a Section 10(b)(12) allegation. As discussed...the administrative law judge explicitly questioned *Vinmar*'s ability to prove that violation, based on the facts presented. The presumption that a Section 10(b)(6)(E), (11), (12) or (d)(1) violation complaint is appropriately before the Commission is a rebuttable one, subject to the assessment by the administrative law judge of the facts alleged.

*Cargo One*, 28 S.R.R. at 1645 n. 17).

This closing guidance is both a caution and acknowledgement. Notwithstanding the artful pleading of an allegation of violation of some subpart of the prohibited acts in Section 10 that might appear to be unique or peculiar to the Shipping Act, the presiding officer must still return to the basic formulation above. As *Cargo One* expressly holds, even a Section 10(d)(1) complaint can be dismissed under Section 8(c) if the sum assessment of the facts lead to that final port of call.

3. The Arbitration, Res Judicata and Collateral Estoppel

As noted above, the matter of liability of respondents to Global Link under the Stock Purchase Agreement was the subject of formal binding arbitration that was mutually agreed to by all parties thereto. Also note that the arbitration was initiated by Global Link. The party respondents in that proceeding are the cross-claim respondents in this proceeding. The arbitration explored in depth and resolved many of the same factual matters at issue in this case. Indeed, the arbitration resulted in an award to Global Link. An arbitration award generally has *res judicata* effect as to all claims heard by the arbitrators. See *Apparel Art Intern., Inc. v. Amertex Enterprises Ltd.*, 48 F.3d 576, 585 (1st Cir. 1995). The general rule suggested by §§ 83 and 84 of the Restatement (Second) of Judgments (1982) is that a valid and final award of arbitration should be given the same *res judicata* effect as a judgment of a court if the procedure leading to the arbitration award embraced elements of adjudicatory procedure consistent with established principles of due process, and if according preclusive effect would not be incompatible with a legal policy or contractual requirement that the second tribunal be free to make an independent determination. See *Ewing v. Koppers Co., Inc.*, 537 A.2d 1173, 1178 (Md. 1988). Global Link is bound by the direct findings made by the arbitrators.

The elements of fraud include a misrepresentation or active concealment of a material fact with the intention that there is reliance on the misrepresentation or concealment, that there was reliance and the reliance was reasonable, and that the misrepresentation or concealment was a proximate cause of any damages. See *Gaffin v. Teledyne*, 611 A.2d 467 (Del. 1992). As noted above, the Commercial Arbitration Tribunal found “clear evidence” that Mitsui knew of, condoned, endorsed, and encouraged Global Link’s practice of split-routing. Under collateral estoppel, Global Link may not relitigate this issue of fact.

As a result of Global Link’s voluntary initiation and participation in the arbitration, Global Link is now bound by this factual finding. The fact that the practice was open, known,

acknowledged, endorsed and encouraged by Mitsui defeats Global Link's cross-claims under 10(a)(1) given, that as noted above, that bad faith or deceit/concealment are essential elements of an 'unjust or unfair device or means' pursuant to Commission regulation, 46 C.F.R. § 545.2.

The United States Supreme Court articulated the sound reasons for adherence to these judicial doctrines in *Allen v. McCurry*, 449 U.S. 90, 94 (1980), noting that,

The federal courts have traditionally adhered to the related doctrines of *res judicata* and collateral estoppel. Under *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action (citations omitted). Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case (citations omitted). As this Court and other courts have often recognized, *res judicata* and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication (citations omitted).

*Id.*

### C. CONCLUSION

A final visit to J. Kennedy's language in *Ashcroft* – I think it is, above others - the best single summation,

A claim has *facial plausibility* when the plaintiff *pleads factual content* that allows a court to *draw the reasonable inference* that the defendant is liable for the misconduct alleged.

*Ashcroft*, 129 S. Ct. at 1949.

The factual CONTENT of Mitsui's complaint and the Global Link cross complaint do not permit me to draw a reasonable inference that the respondents, as fully discussed in each particular situation above, are liable to Mitsui or Global Link for the misconduct alleged in the respective complaints.