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OFFICE OF THE SECRETARY  
FEDERAL MARITIME COMM

May 1, 2013

**VIA HAND DELIVERY**

Karen V. Gregory, Secretary  
Federal Maritime Commission  
800 North Capitol Street, N.W.  
Room 1046  
Washington, D.C. 20573

Re: Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc., *et al.*  
FMC Docket No. 09-01

Dear Ms. Gregory:

Enclosed please find one (1) original and five (5) copies of each of (i) Olympus Respondents' Reply Brief in Opposition to Global Link Logistics, Inc.'s Claim for Contribution, (ii) Olympus Respondents' Responses to Global Link Logistics, Inc.'s Proposed Findings of Fact, and (iii) Olympus Respondents' Statement in Support of Global Link Logistics, Inc.'s Motion to be Permitted to Introduce an Expert Witness Report and Testimony Should There be a Need for Evidence on Reparations, for filing in the above-referenced proceeding.

Enclosed please also find a CD containing electronic (PDF) versions of the papers in accordance with Commission Rule 2(e), 46 C.F.R. § 502.2(e), as well as Microsoft Word versions of Olympus Respondents' Reply Brief and Responses to Global Link's Proposed Findings of Fact, as required by the procedural order issued in this proceeding.

Kindly date stamp the extra copies of the papers and return the same to our courier.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Warren L. Dean'.

Warren L. Dean

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 ORIGINAL

**BEFORE THE  
FEDERAL MARITIME COMMISSION**

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**Docket No. 09 -01**

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**MITSUI O.S.K. LINES LTD.**

**COMPLAINANT**

**v.**

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

**RESPONDENTS**

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**OLYMPUS RESPONDENTS' REPLY BRIEF IN OPPOSITION TO  
GLOBAL LINK LOGISTICS, INC.'S CLAIM FOR CONTRIBUTION**

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Pursuant to the October 16, 2012 Order of the Administrative Law Judge, as amended, and Rule 221 of the Commission's Rules of Practice and Procedure, Respondents Olympus Growth Fund III, L.P. ("OGF"), Olympus Executive Fund, L.P. ("OEF"), Louis J. Mischianti ("Mischianti"), L. David Cardenas ("Cardenas") and Keith Heffernan ("Heffernan") (hereinafter collectively referred to as the "Olympus Respondents") respectfully file their reply ("Reply to Contribution Claim") to the opening brief ("Brief on Contribution Claims") of Respondent and Cross Complainant Global Link Logistics, Inc. ("Global Link") for contribution against OEF and OGF.<sup>1</sup>

### **INTRODUCTION**

Respondents OEF and OGF are not now, nor have they ever been, entities subject to regulation by the Federal Maritime Commission. For a brief period of time, the Olympus Respondents were beneficial owners of Global Link, an NVOCC regulated by the Federal Maritime Commission. OEF and OGF purchased shares in the parent company of Global Link (GLL Holdings, Inc.) in May 2003 and sold their shares in June 2006.<sup>2</sup> Prior to, during and after OEF's and OGF's ownership, Global Link engaged in

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<sup>1</sup> Global Link named only Respondents OEF and OGF as cross-respondents to its cross-claim. See Global Link Logistics, Inc.'s Verified Answer and Affirmative Defenses to Mitsui O.S.K. Lines Ltd.'s Complaint, Counterclaim and Cross Claims, Dkt. No. 09-01 (June 17, 2009) (MOL App. 1144-1165). Global Link never sought leave to amend its cross-claim to include a claim for contribution against Respondents Cardenas, Mischianti and Heffernan. The Olympus Respondents reply to Global Link's Opening Brief on behalf of OGF and OEF and treat Global Link's references to the Olympus Respondents as references to OEF and OGF only.

<sup>2</sup> The majority of the time period during which OEF and OGF had ownership interests in GLL Holdings falls outside of the Shipping Act's three-year statute of limitations. None of the sample transactions

certain activities that Complainant Mitsui O.S.K. Lines, Ltd. ("MOL") alleges violate the Shipping Act. Global Link, in turn, alleges that OEF and OGF are liable in contribution to Global Link if MOL prevails and obtains a reparations award.

The activities at issue in this proceeding became a concern to the Olympus Respondents only because of arbitration proceedings commenced by the purchasers of Global Link (the "Arbitration"). In an effort to influence the Arbitration, the purchasers instructed Global Link to pursue a voluntary disclosure with the Commission's enforcement staff without disclosing the purpose of that effort.<sup>3</sup> The Olympus Respondents then filed a petition for a declaratory order with the Commission, seeking relief with respect to Global Link's disclosure. That petition was denied by the Commission on the grounds that it lacked jurisdiction over the Olympus Respondents. The Olympus Respondents file this reply to Global Link's Brief on Contribution Claims without waiver of their jurisdictional objections to having to file this reply at all.

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selected by MOL implicate the Olympus Respondents. The last sample transaction occurred after the Olympus Respondents sold their interests in GLL Holdings, the parent company of Global Link. The remaining sample transactions all fall outside the statute of limitations period. As all the Respondents have shown, MOL knew, consented to, encouraged and participated in Global Link's split-routing practices. See Global Link's Proposed Findings of Fact in Opposition to Mitsui O.S.K. Lines, Ltd.'s Request for Relief and in Support of Global Link's Counterclaim, at ¶¶ 10-150; Respondents CJR World Enterprises, Inc. and Chad J. Rosenberg's Proposed Findings of Fact, at ¶¶ 37-80, 96-110. MOL admitted that it knew that containers booked through Global Link were being re-routed. See, e.g., MOL's Proposed Findings of Fact Nos. 98, 108. This knowledge gave MOL reason to investigate Global Link's shipment practices as early as August 2005. Because MOL had reason to investigate Global Link's practices earlier than it did, the discovery rule cannot toll the statute of limitations. *Mitsui O.S.K. Lines, Ltd. v. Seamaster Logistics, Inc.*, Nos. 11-cv-02861-SC, 10-cv-05591-SC, 2013 WL 1191213, at \*33 (N D Cal. Mar. 21, 2013).

<sup>3</sup> This disclosure occurred on May 21, 2008. To date, the Bureau of Enforcement has taken no action with respect to the voluntary disclosure.

**PROPOSED FINDINGS OF FACT**

OEF and OGF incorporate by reference the Olympus Respondents' Proposed Findings of Fact filed as part of the Olympus Respondents' Reply Brief In Opposition To Complainant's Request For Relief (filed Mar. 1, 2013) (the "O.R. Reply Brief").

**ARGUMENT**

**I. There Is No Right To Contribution Against OEF And OGF**

**A. The Commission Lacks Jurisdiction Over OEF And OGF**

The Commission has already determined that it lacks jurisdiction over OEF and OGF **with respect to the very transactions at issue in this case** and are not "in a position to take action that places them in peril insofar as the Commission is concerned." Order Denying Petition of Olympus Growth Fund III, L.P. and Olympus Executive Fund, L.P. for Declaratory Order, Rulemaking or Other Relief, Dkt. No. 08-07 ("Order in 08-07"), at p. 10 (emphasis added) (O.R. App. 24). OEF and OGF did not participate in any of the transactions underlying the alleged Shipping Act violations in this case. Of the thousands of bills of lading produced in this case, not one bears the name of OEF or OGF. *See* O.R. Reply Brief, Argument Point I. Because OEF and OGF did not participate in any way in activities or transactions regulated by the Shipping Act, and therefore are not joint participants in the alleged violations, the Presiding Judge cannot impose liability on OEF and OGF either under a theory of contribution or on any other basis. In other words, there is no basis for a finding of liability against OEF and OGF in this proceeding. Their only connection to this case is that OEF and OGF sold voting

securities of Global Link. The Shipping Act does not apply to such transactions. *See* 46 U.S.C. § 40301(c).

The presence of jointly liable parties is the essence of a claim for contribution. *Stratton Grp., Ltd. v. Sprayregen*, 466 F. Supp. 1180, 1185 n.4, 1886 (S.D.N.Y. 1979) (“A precondition of contribution between two parties is that they be joint tortfeasors, the absence of which precludes any claim for contribution.”); *see In re Bank of Am. Corp. Sec., Derivative, & Employee Ret. Income Sec. Act (ERISA) Litig.*, 757 F. Supp. 2d 260, 342-43 (S.D.N.Y. 2010), citing *Builders & Managers, Inc. v. Dryvit Sys., Inc.*, No. Civ. A. 00C11111JEB, 2004 WL 304357, at \*2 (Del. Super. Ct. Feb. 13, 2004) (“Under Delaware law, the right of contribution is governed by the Uniform Contribution Among Tort-feasors Law, 10 Del. Code Ann. § 6301, *et seq.* The ‘inherent requirement’ of a claim for contribution ‘is that the parties are joint tortfeasors who share a ‘common liability.’”). Under the common law, joint tortfeasors are

two or more persons [that] are the joint participants or joint actors in the wrongful production of an injury to a third person. There the act of each is his own act but the acts are concurrent in, or contribute to, the production of the wrongful injury, so that each actor is, on his own account, liable for the resulting damages.

*Stratton Grp., Ltd.*, 466 F. Supp. at 1185 n.4 (citing *Alabama Great S. R.R. Co. v. Allied Chem. Corp.*, 501 F.2d 94, 98 n.4 (5th Cir. 1974)).

In the context of the federal securities law, courts have held that to be held liable for contribution, the proposed contributor must have been a joint participant in the alleged fraud. *Stratton Grp., Ltd.*, 466 F. Supp. at 1185:

It is now settled that contribution is a remedy which is available to defendants guilty of violations of the federal securities laws.<sup>11</sup> See, e.g., *Rice v. McDonnell & Co., Inc.*, 442 F. Supp. 952, 954 (S.D.N.Y. 1977). It is equally as clear, however, that the right of contribution in such cases has been limited solely to recovery among Joint tortfeasors.<sup>11</sup> See *Index Fund, Inc. v. Hogopian*, 417 F. Supp. 738, 746 n.6 (S.D.N.Y. 1976) (emphasis added). Thus, a necessary predicate for contribution in the instant action is an allegation that Marshall Bratter was a joint participant in the fraud alleged in the main action. *De Haas v. Empire Petroleum Co.*, 286 F.Supp. 309, 815-16 nn.9-10 (D. Colo. 1968), modified in 435 F.2d 1223 (10th Cir. [1970]).

The party claiming contribution must demonstrate that the potential contributing party itself violated the federal securities laws. *Steed Fin. LDC v. Laser Advisers, Inc.*, 258 F. Supp. 2d 272, 277 (S.D.N.Y. 2003) (internal citation omitted). The party seeking contribution must allege and prove "each and every element of a primary securities fraud violation." *Id.* (internal citation omitted); see also *Ades v. Deloitte & Touche*, Nos. 90 Civ. 4959 (RWS), 90 Civ. 5056 (RWS), 1993 WL 362364, at \*10 (S.D.N.Y. Sept. 17, 1993) ("A claim for contribution under the federal securities laws, like a claim for contribution under the common law, requires a third-party plaintiff to allege all the elements of the offense against a third-party defendant in order to prevail. In this action, D & T must allege all the elements of a 10(b) action against the Third-Party Defendants, namely that the Third-Party Defendants either knowingly or reckless made material misrepresentations to the Plaintiffs on which the Plaintiffs relied in the purchase of the Notes and which proximately caused loss to the Plaintiffs."); *Sanoma, Inc. v/a Tarnopol Furs v. Interested Underwriters Concerned Via Ewing Int'l Marine Corp.*, No. CIV.A. 00-3880, 2001 WL 767602, at \*6 (E.D. Pa. 2001) (where there was no evidence upon

which a trier of fact could find co-defendant liable, court dismissed plaintiff's claims against co-defendant as well as all cross-claims brought against it by the other defendants).

Like claims of securities law violations, claims under Section 10(a)(1) of the Shipping Act are statutory claims that contain elements of fraud. *Rose Int'l, Inc. v. Overseas Moving Network Int'l, Ltd.*, 28 S.R.R. 837, 896 (F.M.C. 1999) (fraud or concealment is a necessary ingredient in the proof of an unjust or unfair device or means for a Section 10(a)(1) claim).<sup>4</sup> Global Link's contribution claim against OEF and OGF has as its basis the allegation that OEF and OGF violated Section 10(A)(1) of the Shipping Act, and as such, alleges a fraud. *See* Memorandum and Order on Motions to Dismiss, Dkt. No. 09-01, at p. 30 (June 22, 2010) (MOL App. 93):

Through its second counterclaim [crossclaim], Global Link would then seek contribution from Cross Respondents based on their alleged violations of the Act.

\* \* \*

[Global Link] argues that since its second crossclaim alleges Cross Respondents violated the Act, the Commission has jurisdiction to decide it and that Global Link may seek reparations from Cross Respondents for injuries cause[d] by their engagement in split routing practices; that is, "indemnification and contribution for the same Shipping Act violations for which [Mitsui] seeks reparations." (Global Link Opp. to Olympus Motion to Dismiss at 12.)[:]<sup>5</sup>

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<sup>4</sup> As it must, MOL's complaint alleges a fraud. Amended Complaint, Dkt. No. 09-01 (June 16, 2009) at V.A. ("Respondents engaged in a willful and deliberate fraudulent scheme...") (MOL App. 1005).

<sup>5</sup> Judge Guthridge dismissed Global Link's claim for indemnification. The Commission affirmed Judge's Guthridge's dismissal. Global Link did not appeal the Commission's decision. Therefore, Global Link's claim for 100 percent contribution (in reality, an indemnity claim) also fails. As noted by the CJR Respondents, GLL's claim for full contribution is a mere rebranding of their already-rejected indemnity

Brief on Contribution Claims at p. 7 (“Here, Global Link seeks contribution for the same Shipping Act violations for which MOL seeks reparations. In particular, MOL claims that the Rosenberg and Olympus Respondents violated the Shipping Act by engaging in fraudulent and willful efforts to obtain ocean transportation for property for less than the rates or charges that would otherwise apply...It is upon this factual basis that Global Link seeks a remedy.”). Thus, to recover on its claim for contribution, Global Link must prove that OEF and OGF were joint participants in the alleged Shipping Act violations, *i.e.*, that OEF and OGF each violated Section 10(a)(1) of the Shipping Act. This Global Link cannot do.

To prove that OEF and OGF violated Section 10(a)(1) of the Shipping Act,<sup>6</sup> Global Link must show that OEF and OGF “obtained” or “attempted to obtain ocean

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claim. “Contribution is the method by which a tortfeasor sues a joint tortfeasor for its share of a joint liability to an injured plaintiff. Indemnity is the device by which a tortfeasor ‘passes through’ his **entire** liability to a third party whom the tortfeasor alleges is the real party responsible for the injury.” *Milai v. Tradewind Indus., Inc.*, 556 F. Supp. 36, 37 (E.D. Mich. 1982) (emphasis added). GLL cannot seek contribution for *all* its liability; contribution presumes the presence of joint tortfeasors and apportions liability accordingly.

<sup>6</sup> To establish a violation of Section 10(a)(1) of the Shipping Act, the complaining party must prove that (1) a person, (2) knowingly and willfully, (3) by an unjust device or means, (4) obtained or attempted to obtain ocean transportation rates for property at less than the rates or charges that would otherwise be applicable. *See* 46 U.S.C. § 41102(a); *Rose Int'l, Inc. v. Overseas Moving Network Int'l, Ltd.*, 28 S.R.R. at 896. Each shipment is a separate violation, and the elements of a Section 10(a)(1) claim must be proven for each shipment at issue. *See Anderson Int'l Transp. and Owen Anderson - Possible Violations of Sections 8(A) and 19 of the Shipping Act of 1984*, No. 07-02, 2007 WL 5067621, at \*1 (F.M.C. Mar. 2, 2007). The applicable standard of proof is.

“one of substantial evidence, an amount of information that would persuade a reasonable person that the necessary premise is more likely to be true than to be not true.” *AHL Shipping Company v. Kinder Morgan Liquids Terminals, LLC*, FMC No. 04-05, 2005

transportation” -- *i.e.*, **participated** in the act of requesting, booking or arranging for the ocean transportation (or attempted to do these things). See 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 (Aug. 1, 2011) (“FMC Order”) at p. 34 (MOL App. 1063) (emphasis added):

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... 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...

In other words, Global Link must show, by a preponderance of the evidence, that OEF and OGF participated in the alleged Shipping Act violations by engaging in specific proscribed transactions identified in the statute. See 46 U.S.C. § 41102(a); FMC Order at

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WL 1596715, at \*3 (ALJ June 13, 2005). See 5 U.S.C. § 556(d) (“Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.”); 46 C.F.R. § 502.155. “[A]s of 1946 the ordinary meaning of burden of proof [in section 556(d)] was burden of persuasion, and we understand the APA’s unadorned reference to ‘burden of proof’ to refer to the burden of persuasion.” *Dir., Office of Workers’ Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 276 (1994).

*Id.* In administrative proceedings, the party with the burden of persuasion (the complaining party) must prove its case by a preponderance of the evidence. *Id.*; see also *Rose Int’l, Inc. v. Overseas Moving Network, Int’l Ltd.*, 28 S.R.R. 837 (F.M.C. 1999) (“The evidence must show by a preponderance of the evidence that something in fact occurred, *i.e.*, more probably than not.”).

pp. 34, 36 (MOL App. 1063, 1065).<sup>7</sup> OEF and OGF can be held liable only for those specific transactions in which they actually participated.

Despite the Commission's clear directive that the CJR Respondents and Olympus Respondents can be held liable only for those transactions in which they actually participated, Global Link fails to show that OEF and OGF actually participated in any transactions at issue in this proceeding,<sup>8</sup> and instead relies on the theory of vicarious liability ("piercing the corporate veil") to impute knowledge and liability onto OEF and OGF. *See* Brief on Contribution Claims at pp. 3, 10, 14. There is, however, no claim for vicarious liability in this proceeding. No party, including Global Link, "has pled any basis for keeping Olympus Respondents ... in the proceeding based on a theory of piercing the corporate veil." FMC Order at p. 34 (MOL App. 1063). In the FMC Order, the Commission made clear that the shareholder status of OEF and OFG is not a basis for imposing liability on them under Section 10(a)(1). FMC Order at pp. 33 n.4, 34 (emphasis added) (MOL App. 1062-1063):

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<sup>7</sup> Global Link distorts the emphasis of the Commission's directive in the FMC Order. Rather than finding that the Olympus Respondents could be held liable if the split routing was done with their knowledge and participation, as Global Link states at page 4 of its Brief on Contribution Claims, the Commission mandated that no liability can attach to the Olympus Respondents, including OEF and OGF, unless they actually participated in the transactions underlying the Shipping Act violations. Knowledge of the alleged violations is not enough.

<sup>8</sup> Global Link offers no evidence of participation. Global Link's evidence only goes to the purported knowledge of the Olympus Respondents and consists primarily of irrelevant hearsay evidence given in the Arbitration. In particular, Global Link relies on the arbitration depositions of Cardenas, Heffernan, Rosenberg and Eric Joiner to support its argument for recovery against OEF and OGF. For all the reasons set forth in Argument Point I.A.4 of the O.R. Reply Brief, Global Link cannot rely on this irrelevant hearsay evidence to prove its claims against OEF and OGF.

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 ... In this proceeding, **no party has pled any basis for keeping ... Respondents in the proceeding based on a theory of piercing the corporate veil.**

Commissioner Khouri reiterated this conclusion in the recent Order Dismissing Petition for Commission Action. *See* Order Dismissing Petition for Commission Action, Dkt. No. 09-01, at pp. 10-11 (Jan. 31, 2013) (Commissioner Khouri, dissenting) (emphasis added) (O.R. App. 227-228):

[T]here is no prior Commission decision “concerning a respondent corporation which was in continual good standing in the state of its incorporation, and that holds a valid FMC license as an OTI, and such OTI, in fact, obtained ocean transportation for property, and such OTI’s name is properly reflected on all relevant shipment documents; where the Commission has asserted subject matter jurisdiction or personal jurisdiction over a party respondent who was (i) an owner in equity in the respondent OTI corporation, or (ii) a member of the Board of Directors of the OTI corporation, or (iii) a duly qualified officer of the OTI corporation without additional allegations, pleadings, averments and proffered evidence of further legal entanglements and deficiencies that thereby legally ensnarl such party(s) within the Commission’s purview. **Most relevant in the instance case is the complete absence of any plausible allegation that would, at a minimum, point towards a piercing of the OTI corporation’s corporate veil. I have not been advised of even one such allegation – plausible or otherwise.**

The Olympus Respondents addressed the use of vicarious liability in depth at Argument Point I.A.3 in the O.R. Reply Brief and incorporate that discussion herein by reference.<sup>9</sup>

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<sup>9</sup> Global Link never sought leave to amend its cross claim to plead facts supporting a vicarious liability claim. Given that over a year has passed since the Commission’s decision, it is too late for Global Link to assert a claim for vicarious liability against OEF and OGF.

OEF and OGF did not participate in any transactions underlying the alleged Shipping Act violations and there is no evidence whatsoever that they did. *See* O.R. Reply Brief at Proposed Findings of Fact ¶¶ 19-57 and Argument, Point I.A., both incorporated by reference herein. The Commission has no jurisdiction over OEF and OGF and cannot impose liability on them for contribution as joint participants with Global Link in the alleged violations of Section 10(a)(1).

Despite their lack of involvement in the transactions at issue, the Olympus Respondents have been forced, and continue to be forced, to defend themselves in a proceeding that has nothing to do with the Olympus Respondents' actions and everything to do with the actions of third parties for whom the Olympus Respondents were not responsible.<sup>10</sup> To require the Olympus Respondents to participate in the determination of other matters at issue, including Global Link's claim for contribution, in conjunction with the consideration and determination of the Olympus Respondents' purported participation in the alleged transactions denies the Olympus Respondents their constitutionally guaranteed due process rights. *See* FMC Order at p. 34, 36 (MOL App. 1063-1065).

#### **B. The Commission Has Not Found A Right To Contribution**

In the FMC Order, the Commission vacated Judge Guthridge's dismissal of Global Link's crossclaim for contribution, but did not decide whether the Commission

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<sup>10</sup> The Commission's handling of this proceeding also violates the general rule that an "adjudicatory body must first find that it has jurisdiction over the parties and the subject matter of the case before it reaches the merits." *Government of the Territory of Guam v. Sea-Land Serv., Inc.*, 28 S.R.R. 252, 265 (F.M.C. 1998).

would adopt the principle of contribution among respondents as an alternative theory of liability under the Shipping Act. FMC Order at pp. 26-27 (MOL App. 1055-1056). Rather, the Commission left open the possibility for the Presiding Judge to consider the application of alternative theories of liability, so long as those theories are consistent with the Shipping Act.

1. Judge Guthridge Properly Ruled That No Right Of Contribution Exists Under The Shipping Act

Earlier in this proceeding, Judge Guthridge carefully and correctly concluded that no right of contribution exists under the Shipping Act. Judge Guthridge's analysis is persuasive. The Commission's grant of regulatory and enforcement authority under the Act is not broad enough to impose liability based on a contribution mechanism, much less impose such liability on beneficial owners of a regulated entity. Congress did not explicitly or implicitly give the Commission the power to allow the right of contribution. In the presence of clear congressional intent to exclude equitable remedies from the Commission's purview, the Presiding Judge must not apply the equitable remedy of contribution here.

The regulatory and enforcement authority of the Commission is strictly limited to the powers granted to it by the Shipping Act. *See Landstar Express Am., Inc. v. Fed. Mar. Comm'n*, 569 F.3d 493 (D.C. Cir. 2009). The Commission is not a court. It can exercise only those powers conferred on it by Congress. *See Int'l Assoc. of NVOCCs v. ACL*, 25 S.R.R. 734 (F.M.C. 1990). It cannot bend the Shipping Act to create federal

rights not intended by Congress. *See Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001); *see also Save Our Valley v. Sound Transit*, 335 F.3d 932, 938 (9th Cir. 2003).

Congress did not give the Commission authority to award contribution. This is clear for three reasons. First, Congress knows how to provide for equitable remedies, like contribution. *See Furrer v. Brown*, 62 F.3d 1092, 1096 (8th Cir. 1995) (contrasting the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) with the Resource Conservation and Recovery Act (RCRA) to show that Congress purposely provided for contribution claims in the former, but not the latter). Yet Congress did not provide for a contribution remedy in the Shipping Act.

Second, Congress knew how to, and did, make available other equitable remedies to Shipping Act complainants. In Section 11(h), Congress specifically authorizes complainants to seek an injunction restraining conduct that violates the Shipping Act. 46 U.S.C. § 41306. A complainant, however, must seek its injunction in federal district court, a forum with full equity powers. *See id.* Congress's grant of power exclusively to the district courts to fashion injunctive relief for complainants seeking reparations before the Commission is strong evidence of Congress's intention to provide for only specified equitable remedies (*i.e.*, injunctive relief) and to ensure that those remedies remain in the province of Article III courts, and outside the province of the Commission. *Cf. U.S. v. Rx Depot, Inc.*, 438 F.3d 1052, 1054-55 (10th Cir. 2006) ("when Congress invokes the equity jurisdiction of courts in a statute, 'all the inherent equitable powers of the [courts] are available for the proper and complete exercise of that jurisdiction,' unless the statute,

by 'clear and valid legislative command' or 'necessary and inescapable inference,' restricts the forms of equitable relief authorized") (citing *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)).

Third, the Commission's power to award reparations, as currently structured, arose out of Congress's desire to moderate potential abuse of broad antitrust immunity. *See* H.R. Rep. No. 98-53, pt. 1, at 4, 19, reprinted at 1984 U.S.C.C.A.N. 167, 169, 184 (1983). Congress's intent to replicate the deterrent effect of the antitrust laws in the Shipping Act, through authorization of reparations, attorneys' fees, and double damages, informs any inquiry into Congress's intent with regard to contribution. Contribution for Shipping Act violations is not necessary to achieve the antitrust-like "deterrent effect" sought by lawmakers.<sup>11</sup> *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981) (Federal antitrust laws do not allow a defendant a right to contribution). The remedies that Congress did provide for -- double damages -- "reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers." *Id.* at 640.

Even if Congress's intentions were not so clear, whether to provide for a right of contribution is "a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and

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<sup>11</sup> *See* H.R. Rep. No. 98-53, pt. 1, at 4, reprinted at 1984 U.S.C.C.A.N. 167, 169 (1983) ("H.R. 1878 expands these civil penalties to provide a deterrent effect which has previously been available only by invoking the antitrust laws.").

courts [and administrative agencies] cannot.”” *Travelers Cas. & Sur. Co. of Am. v. IADA Servs., Inc.*, 497 F.3d 862, 867 (8th Cir. 2007) (quoting *Texas Indus.*, 451 U.S. at 647; additional internal citations omitted).

Congress could have provided for a right to contribution in the Shipping Act. Congress did not do so. Nor did Congress evince its intent to allow respondents the remedy of contribution. Absent these things, it is not within the Commission’s jurisdiction or authority to imply contribution rights into the Shipping Act. *See Alexander*, 532 U.S. at 286-87 (“No matter how desirable contribution might be as a policy matter, that policy choice must be left to Congress.”).

2. The Commission’s Ability To Award Proportional Liability Forecloses Any Right To Contribution

In the FMC Order, the Commission specifically addressed the Presiding Judge’s ability to award proportional liability for reparations.

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.

FMC Order at pp. 24-25 (MOL App. 1053-1054). The Commission’s potential ability to award proportional liability for reparations forecloses any right to contribution under the Act. Proportional liability, by its very nature, requires the allocation of liability between multiple responsible parties according to the “fair share” attributable to each such party.

Where each responsible party bears only its "fair share" of liability, no party can pay more than its fair share – and contribution is irrelevant.

**C. Application of the Principle of Contribution In This Case Is Precluded By The Partial Final Award In The Arbitration**

Contribution is an equitable remedy. It is intended to reduce the possibility that one joint tortfeasor pays more than his fair share of common liability and furthers the sound policy to "deter all wrongdoers by reducing the likelihood that any will entirely escape liability." *Nw. Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77, 86-88 (1981). Even if the Commission had equitable powers, which it does not, it could not apply contribution in *this* case because the question of the responsibilities of OEF and OGF was already addressed in the Arbitration. Global Link has been compensated through the arbitration process for any loss it may suffer if it is held liable for reparations to MOL. In the Arbitration, Global Link sought damages for potential future liability that Global Link might incur from ocean carriers as a result of the split-routing practice. Global Link's Amended Statement of Claim in Arbitration dated Oct. 17, 2007 ("Amended Statement of Claim") at p. 30 (MOL App. 1460) ("It was also a costly fraud ... As the direct and proximate result of Global Link 2003's undisclosed and fraudulent 'practice of diverting cargo to [destinations] other than what's on the original [ocean bill of lading],' which caused the financial statements furnished to the Purchasers under Section 4.05 of the SPA to overstate the lawful earnings of Holdings 2003, created potential liabilities for millions of dollars in fines and damages..."). Global Link did

not just seek compensation in the Arbitration for the risk of future liability; it obtained that relief. Global Link prevailed in the Arbitration against OEF and OGF and was thoroughly compensated, through an award of damages against OEF and OGF, for the risk of lawsuits and administrative proceedings (including the instant proceeding). Along with the other claimants in the Arbitration, Global Link was awarded the difference between the actual value of Global Link at the time of the closing date, in light of the split-routing practice, and the purchase price. Partial Final Award, *Global Link Logistics, Inc., et al. v. Olympus Growth Fund III, L.P., et al.*, Case No. 14 125 Y 01447 07 (AAA Feb. 2, 2009) (“Partial Final Award”) at pp. 46-47 (MOL App. 46-47). This award necessarily included an amount equal to the discount to the purchase price that resulted from the risk of potential liability to Global Link’s ocean carrier partners, including MOL, that resulted from split-routing. To further compensate Global Link for potential liability to MOL in this proceeding would be to award Global Link a duplicative recovery to which it is not entitled under any equitable theory. *See E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 297 (2002) (quoting *Gen. Tele. v. E.E.O.C.*, 446 U.S. 318, 333 (1980)) (“[I]t ‘goes without saying that the courts can and should preclude double recovery’”); *Barker Capital LLC v. Rebus LLC*, No. Civ. A. 04C-10-269 MMJ, 2006 WL 246572, at \*9 (Del. Super. Ct. Jan. 12, 2006) (granting summary judgment dismissing claim for tortious interference with contract where “recovery for [that claim] would amount to double recovery.”).

**C. Global Link’s Claim for Contribution Is Premature**

A claim for contribution accrues only after the party claiming contribution has paid, or has had a judgment entered against it for, more than its fair share of a joint obligation. *See Sea-Land Serv., Inc. v. U.S.*, 874 F.2d 169, 171-72 (3d Cir. 1989); *Leonard v. Dorsey & Whitney LLP*, 553 F.3d 609, 622 (8th Cir. 2009); *In re Bank of Am.*, 757 F. Supp. 2d at 342-43 (“[U]nder Delaware law, a ‘joint tort-feasor is not entitled to a money judgment for contribution until he or she has by payment discharged the common liability or has paid more than his or her pro rata share thereof.’ 10 Del.Code Ann. § 6302(b)”). Global Link (i) has not been held liable for violations of the Shipping Act, (ii) has not had a judgment for reparations entered against it, and (iii) has not paid reparations to MOL. Therefore, Global Link’s contribution claim is premature.

## **II. Global Link Cannot Rely On Collateral Estoppel To Show OEF’s and OGF’s Purported Participation In The Transactions Underlying The Alleged Shipping Act Violations**

Collateral estoppel, or issue preclusion as it is sometimes called, prohibits parties from relitigating an issue (i) that is identical to one involved in a prior litigation, (ii) that was actually litigated in the prior litigation, and (iii) the determination of which was a critical and necessary part of the judgment in the prior litigation. *Walker v. Kerr-McGee Chem. Corp.*, 793 F. Supp. 688, 694 (N.D. Miss. 1992). The panel in the Arbitration must have actually considered and decided the issue of OEF’s and OGF’s participation in the alleged violations of the Shipping Act for collateral estoppel to bar OEF and OGF from proving that they did not participate in the alleged violations. The Arbitration panel

did not do this. The Arbitration concerned whether Global Link was damaged as a result of “fraudulent conduct by certain of the Respondents and breaches of contractual representations in connection with Claimants’ acquisition of Global Link ... pursuant to a Stock Purchase Agreement....” Partial Final Award, at p. 1 (MOL App. 1). In this context, the panel only examined whether the Olympus Respondents, as owners and sellers, made inadequate disclosures regarding the split-routing practice to prospective purchasers during the due diligence process. The panel specifically declined to hold that split-routing was a violation of Section 10(a)(1) of the Shipping Act.<sup>12</sup> Partial Final Award, at p. 43 (MOL App. 43). On the narrow question of the adequacy of the sellers’ disclosures, the panel ruled that the seller respondents’ disclosures were fraudulently inadequate. *See* Partial Final Award, at p. 38 (MOL App. 38).<sup>13</sup>

There was no allegation in the Arbitration that OEF and OGF, as shareholders, actually participated in Global Link’s split routing practice, *i.e.*, booking ocean transportation, obtaining or attempting to obtain ocean transportation for property, or negotiating, participating in or executing any contract with MOL or any other ocean

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<sup>12</sup> The panel decided that the split-routing practice should have been disclosed to potential purchasers, noting that while the practice did not involve ocean transportation, the licensee, Global Link itself, may have violated the Commission’s regulations, specifically Section 515 31(e). The panel did not discuss, suggest or intimate that the Olympus Respondents participated in any activities that violated Section 10(a)(1) of the Shipping Act.

<sup>13</sup> Independently of the seller respondents’ knowledge and scienter, the panel concluded that the financial statements made available to prospective purchasers did not fairly present Global Link’s financial position and results of operations in the absence of a disclosure of the split-routing practice and the economic effects of the practice on the financial statements. *See* Partial Final Award, at p. 44 (MOL App. 44).

carrier.<sup>14</sup> The parties never litigated OEF's and OGF's purported participation in the transactions that were subject to Global Link's split routing practices. To the contrary, it was clear that the Olympus Respondents acquired knowledge of the split-routing practice in their capacity as shareholders and had a duty to disclose that practice in the company's financial statements in their capacity as sellers. Their knowledge as shareholders and responsibilities as sellers of securities are not subject to the requirements of the Shipping Act.<sup>15</sup> Thus, Global Link cannot rely on the Arbitration panel's findings and the doctrine of collateral estoppel to prove its claims against OEF and OGF.

### **III. Collateral Estoppel Precludes Any Finding That OEF or OGF Participated in an "Unfair or Unjust Device or Means" For Purposes of Global Link's Contribution Claim**

Conversely, the doctrine of collateral estoppel does bar Global Link's claims against OEF and OGF. As noted by Commissioner Khouri in the FMC Order,

[T]he 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

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<sup>14</sup> Global Link did not allege or argue that the Olympus Respondents participated in the split-routing practice, Global Link only alleged that Cardenas, Heffernan and Mischianti *knew* about the split routing practice and permitted the practice to continue. *See* Amended Statement of Claim at pp. 13, 15 (MOL App. 1443, 1445). The evidence before the Arbitration panel, however, led the panel to conclude that (1) the Olympus Respondents learned of the split-routing practice after acquiring their equity position in GLL Holdings, and (2) the Olympus Respondents, along with the other seller respondents, could not be charged with knowledge of the *illegality* of the split-routing practice. Partial Final Award, at pp. 20 (Claimants did not carry burden of proving knowledge and scienter for purposes of fraud allegations), 29 (Olympus's due diligence in 2003 did not unearth the split-routing practice) (MOL App. 20, 29).

<sup>15</sup> It must be emphasized that at the time of those activities, the Commission had never ruled that the practice of split-routing -- which does not involve "ocean transportation" -- was a violation of the Shipping Act.

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.**

FMC Order (Commissioner Khouri, dissenting) at pp. 81-82 (MOL App. 1110-1111) (emphasis added). The issue of MOL's knowledge is integral to Global Link's ability to make its case against OEF and OGF for contribution for the reasons stated by

Commissioner Khouri and by the Olympus Respondents above. Global Link must prove both (1) a Section 10(a)(1) claim against OEF and OGF, and (2) as part of that claim, show that OEF and OGF defrauded MOL. Global Link cannot meet the first test because OEF and OGF did not participate in any transactions covered by Section 10(a)(1). As for the second test, the issue of whether MOL could have been defrauded was actually litigated and decided as between Global Link, OEF and OGF in the Arbitration. The panel found that MOL knew about and encouraged the continuation of the split-routing practice. Partial Final Award, at p. 10 (MOL App. 10). MOL's knowledge and encouragement precludes any finding here that MOL was defrauded. Thus, Global Link cannot recover against OEF and OGF as joint tortfeasors for liability under Section 10(a)(1).

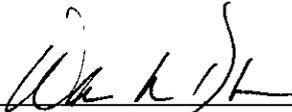
### **CONCLUSION**

For all the foregoing reasons, the Olympus Respondents respectfully request that the Presiding Judge deny relief to Global Link on its claim for contribution against OEF and OGF.

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

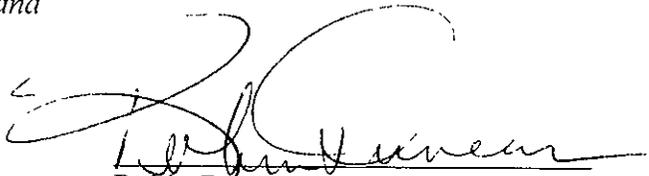
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