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**BEFORE THE
FEDERAL MARITIME COMMISSION**

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OFFICE OF THE SECRETARY
FEDERAL MARITIME COMM

Docket No. 09-01

mitsui O.S.K. LINES LTD.

COMPLAINANT

v.

**GLL 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**

RESPONDENTS

**REPLY BRIEF OF
COMPLAINANT MITSUI O.S.K. LINES, LTD. IN FURTHER
SUPPORT OF ITS CLAIMS AGAINST RESPONDENTS**

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May 1, 2013

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RESPONDENTS

**REPLY BRIEF OF
COMPLAINANT MITSUI O.S.K. LINES, LTD. IN FURTHER
SUPPORT OF ITS CLAIMS AGAINST RESPONDENTS**

Pursuant to the October 16, 2012 Order of the Administrative Law Judge and Rule 221 of the Commission's rules of practice and procedure. Complainant Mitsui O.S.K. Lines, Ltd. ("Complainant" or "MOL") hereby submits its Reply Brief, Response to Respondents' respective Proposed Findings of Fact and supplements to its Appendix in this case.

I. INTRODUCTION

MOL has responded separately to each of Respondent's respective Proposed Findings of Fact. However, to avoid unnecessary duplication, it is filing this single brief in reply to the responses of Respondents to MOL's initial submission. The materials attached hereto are incorporated into MOL's Appendix ("MOL App.") and are labeled and numbered sequentially,

beginning where the materials in the initial Appendix ended. To assist the Presiding Officer, set forth in Attachment 1 are rebuttal proposed findings of fact that are in response to contentions made by Respondents.

This brief first addresses the preliminary issues of the burden of proof and admissibility of evidence. It then addresses the liability of each of the Respondents for violations of the Shipping Act, with a particular emphasis on each Respondent's participation in those violations. It then addresses the primary defense of all Respondents -- MOL's alleged knowledge of the split routing practice -- and concludes with a discussion of the statute of limitations and damages.

II. RESPONDENTS' ARGUMENTS WITH RESPECT TO BURDEN OF PROOF AND ADMISSIBILITY OF EVIDENCE ARE WITHOUT MERIT

For the reasons set forth below, Respondents' arguments with respect to the burden of proof and the admissibility of evidence are without merit.

A. CJR Respondents Have Misstated The Burden of Proof

While the CJR Respondents (Chad J. Rosenberg and CJR World Enterprises) are correct that MOL, as Complainant, bears the burden of proving its case by a preponderance of the evidence,¹ they incorrectly allege that MOL must prove each element of a Shipping Act violation with respect to each shipment.

First, the cases cited by the CJR Respondents do not support their argument. *Anderson International Transport & Owen Anderson -- Possible Violations of Section 8(a) and 19 of the Shipping Act of 1984*, 30 S.R.R. 1349 (FMC 2007) is an order of investigation and hearing, rather than a decision of the Commission on the merits. The order of investigation takes the position that each shipment is a separate violation of the Shipping Act, but does not elaborate on the burden of proof which must be met to sustain a finding of a violation. See 30 S.R.R. at 1350.

¹ See 46 C.F.R. §502.155 (proponent of rule or order has burden of proof).

Similarly, the statement from the Commission's decision in *Sea-Land Service, Inc. -- Possible Violations of Section 10(b)(1), 10(b)(4) and 19(d) of the Shipping Act of 1984*, 30 S.R.R. 872 (2006) is taken out of context. The quote is accurate, but merely states that 149 shipments have been found to violate the Shipping Act -- it has nothing to do with the burden of proof. 30 S.R.R. at 887. Indeed, the burden of proof is discussed elsewhere in the Commission's decision in that case, and the discussion indicates that the burden is a preponderance of the evidence and that the Commission may rely upon reasonable inferences based upon circumstantial evidence in the absence of direct evidence. See, 30 S.R.R. at 882. Thus, neither of the cases cited by the CJR Respondents support their position with respect to the burden of proof applicable in this proceeding.

Second, as noted above, the argument of CJR Respondents that MOL is required to prove each element of an offense with respect to each occurrence of that offense is without merit. Relying on the Supreme Court's decision in *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 249 (1968), the Commission has held that it is permissible to draw inferences as to conduct in some situations based on evidence of conduct in other situations. Thus, the Commission has said:

A party in a Shipping Act case has several different methods of proving violations of the Act. In some cases, such as the case here, where the ALJ reviews conduct on a number of shipments that satisfies a preponderance of evidence on an element, such as 'holding out,' the ALJ may draw reasonable inferences that a person or entity acted similarly in handling another shipment when evidence is not available on that element for that shipment. This type of inference may be negated or rebutted when an entity provides countervailing evidence.

Worldwide Relocations, Inc. et al. -- Possible Violations of Sections 8, 10 and 19 of the Shipping Act of 1984, 32 S.R.R. 495, 504 (FMC 2012). See also, *Parks International Shipping, Inc.* 32 S.R.R. 570 (FMC 2012); *EuroUSA Shipping, Inc., et al.*, 31 S.R.R. 540 (FMC 2008).²

In light of the foregoing, when MOL has established by a preponderance of the evidence that one or more of the Respondents in this proceeding engaged in a course of conduct with respect to certain shipments, the Presiding Officer may reasonably infer that the relevant Respondent(s) engaged in the same conduct with respect to similar shipments, with the burden then shifting to said Respondents to present countervailing evidence.

The other cases cited by the CJR Respondents with respect to MOL's burden of proof, *James J. Flanagan Shipping Corp. v. Lake Charles Harbor and Terminal District*, 30 S.R.R. 8 (FMC 2003) and *Rose International, Inc. v. Overseas Moving Network International, Ltd., et al.*, 29 S.R.R. 119 (FMC 2001), actually deal with damages, rather than burden of proof. The argument of the CJR Respondents regarding damages is addressed in the final section of this brief.

B. The Evidence Offered by MOL is Relevant, Material, Reliable and Probative And Is Therefore Admissible under Commission Regulations and Precedent

The evidentiary arguments made by the CJR Respondents (CJR Brief at pp. 41 to 46) and the Olympus Respondents (Olympus Brief at pp. 32-37) are without merit. The evidence offered by MOL is relevant, material, reliable and probative and is therefore admissible under Commission regulations and precedent.

² To the extent the December 31, 2012 initial decision on remand in *Anderson International* suggests otherwise, MOL notes that said initial decision is legally inoperative due to the filing of exceptions. See 46 C.F.R. § 502.227(a)(5).

(1) *Evidentiary Issues In This Proceeding Are Governed by the APA and Commission Regulations, Not The Federal Rules of Evidence*

As an initial matter, the efforts of CJR Respondents and Olympus Respondents to categorize MOL's evidence as "hearsay" and to evaluate the admissibility of the evidence under the Federal Rules of Evidence ("FRE") are misguided. The U.S. Supreme Court has held that the FRE do not apply to proceedings before federal administrative agencies in the absence of a statutory requirement that such rules are to be observed. *Opp Cotton Mills v. Administrator*, 312 U.S. 126, 155 (1941). Federal courts recognize that administrative proceedings are governed by the Administrative Procedure Act, not the Federal Rules of Evidence. *Anderson v. U.S.*, 799 F. Supp. 1198, 1202 (CIT 1992). See also, *Maier Terminals, LLC v. The Port Authority of New York and New Jersey*, FMC Docket 08-03, pp. 8-9 (January 31, 2013).

Consistent with the foregoing, the Commission's regulations provide:

In any proceeding under the rules in this part, all evidence which is relevant, material, reliable and probative, and not unduly repetitious or cumulative, shall be admissible.

46 C.F.R. §502.156. The Commission has repeatedly interpreted the foregoing regulation to permit the admission of hearsay evidence which is otherwise relevant, material, reliable and probative. See, e.g., *Euroussa Shipping, Inc., Tober Group, Inc. -- Possible Violations of Shipping Act*, 31 S.R.R. 540, 547 (FMC 2008)("the APA provides that hearsay need not be excluded unless irrelevant, immaterial or unduly repetitious..."; "Agencies thus consider hearsay evidence in light of its 'truthfulness, reasonableness and credibility.'"). See also *Honeywell International, Inc. v. E.P.A.*, 372 F.3d 441 (D.C. Cir. 2004)(federal administrative agencies may consider hearsay evidence as long as it bears satisfactory indicia of reliability).

(2) *The Evidence Offered By MOL Is Admissible*

As noted above, evidence is admissible in a proceeding before the FMC if it is relevant, material, reliable and probative. Evidence is relevant if it has a tendency to make a fact more or less probable than it would be without the evidence and is material if that fact is of consequence in determining the action. *U.S. v. Williams*, 900 F.2d 823 (5th Cir. 1990). The reliability and probative value of evidence refer to the quality of the evidence, rather than the nature of the evidence. Analyzing each of the five categories of MOL's evidence challenged by Respondents demonstrates that in all instances the evidence is admissible under Rule 156 of the Commission's regulations and the standards applicable in this proceeding.

(a) *Deposition Testimony From the Arbitration* -- Under 46 C.F.R. §502.209(a), any part or all of a deposition, so far as admissible under the rules of evidence,³ may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof for purposes of (i) impeaching the testimony of the deponent; or (ii) for any purpose if the deponent was an officer, director or duly authorized agent of a public or private corporation, partnership or association which is a party. Moreover, under 46 C.F.R. §502.209(a)(5), depositions taken in one proceeding may be used in a subsequent proceeding involving the same subject matter and parties.

Here, all deposition testimony offered by MOL was of an officer, director or duly authorized agent of an entity which is a party to this proceeding (or owner thereof), and all such entities were parties to an arbitration proceeding pertaining to "split routing" -- the same matter at issue herein -- and were either present or had the opportunity to be present at the deposition

³ This is a reference to the rules of evidence applicable in Commission proceedings, not to the Federal Rules of Evidence.

and to cross-examine the witnesses being deposed.⁴ Even though MOL was not a party to the arbitration, the Commission's rules afford great latitude in submitting deposition testimony, and the admission of such evidence here will not prejudice Respondents who had the opportunity to cross-examine the witnesses during their depositions, and who can introduce and have introduced that cross-examination (or other evidence) in response to the deposition evidence.⁵ Moreover, the deposition testimony is relevant, material, reliable and probative and hence admissible.

(b) *Unsworn Pleadings* – Respondents' arguments regarding the admissibility of prior pleadings are without merit. Here, the facts asserted in prior unsworn pleadings are directly relevant to the evaluation and determination of issues in this action and thus are material. What a party has said in prior pleadings tends to make that fact more or less probable than it would be in the absence of that statement, and hence the pleadings are relevant. There is no reason to believe these statements are unreliable, unless one is prepared to believe that the parties submitting them were misleading the arbitrators.

Moreover, many courts permit admission of the pleadings of a party in prior litigation, particularly where the prior pleadings are inconsistent with the position now being taken by the party against whom the pleadings are to be admitted. See, e.g., *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 734 (D.C. Cir. 2003); *Kassel v. Gannett Co., Inc.*, 875 F.2d 935, 952 (1st Cir. 1989); *Hardy v. Johns-Manville Sales Corp.*, 851 F.2d 742, 745 (5th Cir. 1988); *Williams v. Union Carbide Corp.*, 790 F.2d 552 (6th Cir. 1986); *Higgins v. Mississippi*, 217 F.3d 951, 954 (7th Cir. 1999); *County of Hennepin v. AFG Industries, Inc.*, 726 F.2d 149, 153 (8th Cir. 1984);

⁴ The arbitration is the arbitration between the current owners of GLL and Respondents, who sold GLL to the current owners. See MOL App. 001.

⁵ This is particularly true given that Respondent GLL has introduced depositions taken during the arbitration proceeding. See, e.g., GLL Exhibits B, E and F, GLL App. 0004, 0052, and 0057.

Dugan v. EMS Helicopters, Inc., 915 F.2d 1428, 1431-1432 (10th Cir. 1990). Accordingly, the prior pleadings should be admitted.

(c) *Partial Final Award in Arbitration* -- The findings of the partial final arbitral award with regard to the conduct of the Respondents are relevant, material, reliable and probative. The Respondents in this proceeding arbitrated their dispute and, contrary to Respondents' arguments, in so doing focused on the same conduct at issue in this proceeding -- split routing. All of the Respondents participated in the arbitration and were represented by counsel in that proceeding. The arbitral award was issued by arbitrators agreed to and/or appointed by Respondents. It represents the factual findings of those arbitrators, and those findings are thus relevant, material, reliable and probative.

Moreover, both the Commission and courts have permitted the introduction of arbitration awards as evidence in subsequent proceedings. See, e.g., *A/S Ivarans Rederi v Companhia de Navegacao Lloyd Brasileiro, et al.*, 23 S.R.R. 1543, 1547(ALJ 1986) (arbitration award can be admitted and given weight after consideration of procedural fairness, adequacy of the record, competence of the arbitrators, and other factors) citing *McDonald v. City of West Branch, Michigan*, 466 U.S. 284, 292, n. 13 (1984)(arbitration award did not preclude suit under §1983, but was admissible as evidence in action brought under that statute). Here, confirmation of the award by the Court of Chancery of the State of Delaware is a strong indicator of fairness, adequacy and reliability. MOL App. 0995.

While it is true that MOL was not involved in the arbitration, that does not render the findings contained in the arbitration award inadmissible as against Respondents under the standards applicable to this proceeding. Given their opportunity to address the allegations made in the arbitration proceeding, Respondents will not be prejudiced by admission here of the

findings set forth in the final partial arbitration award. This is particularly true since Respondent Global Link Logistics, Inc. ("GLL") is also introducing the award. See, GLL Exhibit G.

(d) GLL's Voluntary Disclosure to FMC -- This document is relevant, material, probative and reliable and hence admissible. Respondents' objections to the admission of this document are two-fold, based on its reliability and its admissibility against other parties.

With respect to reliability, the document was prepared at the direction of the new owners of GLL, using the corporate records of the entity involved in the activity. Even if it was prepared to bolster the position of those persons in the arbitration, it is still reliable.

The document was submitted to the Federal Maritime Commission in the knowledge that the information contained therein could result in the imposition of civil penalties. In addition, GLL knew that submission of this information could also result in additional questions and/or investigations by the FMC. Hence, it was in their interest to make the disclosure as complete and as accurate as possible.

Finally, the fact that the submission of inaccurate information could result in the imposition of criminal penalties under 18 U.S.C. §1001 means that GLL had yet another powerful incentive to make the document as complete and accurate as possible. Accordingly, the document is reliable.

The voluntary disclosure is also relevant and material, in that it goes directly to the heart of the issues in this case, namely GLL's use of split routing. Accordingly, it is admissible under the standards herein applicable. The arguments of the CJR and Olympus Respondents regarding use of the voluntary disclosure against them go to the weight to be afforded this evidence, not its admissibility.

(e) E-Mail and Other Written Exchanges -- The Olympus Respondents argue that certain communications between GLL employees and GLL's outside counsel are not admissible because there is no evidence that they were sent to any of the Olympus Respondents and because they do not mention the involvement of the Olympus Respondents in split-routing.

The foregoing arguments go to the probative value of this evidence, not its admissibility. The fact that the communications may not have been sent to and do not mention the Olympus Respondents does not make them inadmissible, particularly under the evidentiary standards applicable in an administrative proceeding. Moreover, this advice was sought and obtained by Mr. Joiner, who was part of the new management team brought in by the Olympus Respondents after they purchased their interests in GLL (Heffernan Dep. 89:7-12, MOL App. 1524) and had become officers and directors thereof. Mr. Joiner discussed the need for legal guidance with at least some of the Olympus Respondents prior to obtaining same (Joiner Dep. 192:4-23; 199:16-200:-4, MOL App. 1542 and 1544). In addition, the record reflects that Mr. Rosenberg discussed this correspondence with at least some of the Olympus Respondents (Cardenas Dep. 116:1-8, MOL App. 1611).

In light of the foregoing, the e-mail exchanges between GLL and its counsel are admissible.

III. LIABILITY OF RESPONDENTS FOR UNLAWFUL PRACTICE OF SPLIT ROUTING

GLL's "split routing" scheme was an unjust or unfair device or means by which MOL was led to believe thousands of shipments were being delivered to various inland destinations (and were rated accordingly), when in fact they were delivered elsewhere (e.g., to destinations subject to a rate higher than that which was charged). This deception was created by Respondents' use of false transportation documents and extensive efforts to keep the fraudulent

practice a secret from MOL. MOL Proposed Findings of Fact (“PFF”) 19-21 and 26 to 30. Respondents’ “split routing” practice resulted in financial harm to MOL by enabling GLL to obtain transportation at rates lower than those that would have applied had the cargo movement been accurately described and/or by causing MOL to pay for trucking services that were never provided.

After a brief summary of the applicable legal standards, MOL will demonstrate how each of the Respondents is liable to MOL for the damage it suffered as a result of Respondents’ unlawful conduct.

A. The Relevant Statutory Provisions⁶

Former Section 10(a)(1) of the Shipping Act (now 46 U.S.C. 41102(a)) states:

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.

Former Section 10(d)(1)(now 46 U.S.C. 41102(c)) states:

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.

Section 515.31(e) of the Commission’s regulations (46 C.F.R. 515.31(e)) states:

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.

⁶ The discussion in this Reply Brief focuses on Section 10(a)(1), as that is the statutory provision primarily addressed by Respondents in their responses to MOL’s Opening Submission. MOL hereby incorporates by reference and reiterates the arguments made with respect to Section 10(d)(1) at pp. 61-63 of its Opening Submission. In particular, MOL reiterates that a violation of Section 10(a)(1) can also constitute a violation of Section 10(d)(1). *Transworld Shipping (USA), Inc. v. FMI Forwarding (San Francisco), Inc.*, 29 S.R.R. 418, 421 (ALJ 2001). MOL also reiterates its arguments made with respect to 46 C.F.R. §515.31(e).

B. The Law On Individual Liability

In its August 1, 2011 Order, the Commission held that the CJR Respondents and Olympus Respondents would be held liable for a violation of section 10(a)(1) if there is a showing that these persons and entities “engaged in the requisite participation” in some capacity other than merely that of shareholder. 32 S.R.R. at 142. As explained further below, the requisite participation exists with respect to the CJR Respondents and the Olympus Respondents.

Under Section 10(a)(1), in order for an unjust or unfair device or means to exist, there must typically be a showing of bad faith or deceit. 46 C.F.R. §545.2. Where an individual rather than a business entity is alleged to have violated Section 10(a)(1), there must be some showing of personal, not merely institutional, bad faith or deceit. *AAEL America Africa Europe Line GmbH v. Virginia International Trade & Investment Group LLC and William M. Joyce III*, 27 S.R.R. 825, 825-27 (FMC 1996).

The Commission has on numerous occasions pursued individuals for violations of Section 10(a)(1).⁷ Similarly, private litigants have sought to recover reparations from individuals under Section 10(a)(1).⁸ In such cases, the individuals are typically held responsible where they direct and control the corporate entities involved (*Martyn Merritt*) and/or are actively involved in the bad faith or deceit (*Eastern Mediterranean*)

⁷ See, e.g., *Cari-Cargo International, Inc. Jorge Villena and Sea Trade Shipping*, 23 S.R.R. 1007 (1986); *Martyn Merritt, et al -- Possible Violations of Section 10(a)(1) and 10(b)(1) of the Shipping Act of 1984*, 25 S.R.R. 1295 (1990); *Eastern Mediterranean Shipping Corp. d/b/a Atlantic Ocean Line and Anil K. Sharma -- Possible Violations of the Sections 10(a)(1), 10(b)(1) and 10(d)(1) of the Shipping Act of 1984*, 28 S.R.R. 463 (1998); *Direct Container Line Inc and Owen Glenn -- Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 28 S.R.R. 783 (1999); *David P. Kelly and West Indies Shipping & Trading, Inc. -- Possible Violations of the Shipping Act of 1984*, 28 S.R.R. 1057 (1999); *FSL International Inc. and Hiu-Leung Yeung and Full Service Logistics Inc. and Mei Fung Tsang -- Possible Violations of Sections 10(a)(1), 10(b)(2), 10(b)(11) and Sections 19(a) and (b) of the Shipping Act of 1984 and 46 C.F.R. Part 515*, 29 S.R.R. 1332 (2003).

⁸ See, e.g., *AAEL America Africa Europe Line GmbH, supra.*; *CTM International, Inc. v. Medtech Enterprise, Inc., Mr. Xin Liu and Mrs. Yunhong Liu*, 28 S.R.R. 1091 (ALJ 1999).

A corporate officer may be personally liable for a violation of Section 10(a)(1) even though the officer was not involved in the day-to-day activities or individual transactions that carry out the deceit. In *Direct Container Line, supra*, the Chairman and Chief Executive Officer of that company was named as a respondent in the Commission's investigation based on the allegation that he "arranged the scheme" that constituted the violation. 28 S.R.R. at 784. While the case was settled by the company and the liability of the Chairman and Chief Executive Officer was not litigated on the merits, the order approving the settlement makes clear that the individual could have been held liable for Shipping Act violations because he "suggested the method" by which the unlawful rebates that violated the Shipping Act would be paid. 28 S.R.R. at 965. In other words, in *Direct Container Line*, the Commission took the position that designing or arranging a scheme, without involvement in the specific transactions which carry out that scheme, constituted sufficient "participation" to impose individual liability for violation of section 10(a)(1).

Applying the foregoing criteria to the CJR and Olympus Respondents, there is more than sufficient participation on their part to hold them personally liable for violations of Section 10(a)(1).

C. Liability of CJR Respondents

(1) *Chad J. Rosenberg* -- The record demonstrates beyond any doubt that Rosenberg was the architect of GLL's split routing practices. He implemented these practices after forming the company, made them the focus of the company, and trained others in their use. He was also an active corporate officer and the qualifying individual of GLL throughout the entire period herein at issue. Accordingly, under applicable precedent, he can and should be held

personally liable for violations of Section 10(a)(1), even if he was not personally involved in booking and routing specific containers.

Rosenberg founded GLL in 1997 and introduced the practice of split routing at GLL. Rosenberg Declaration, ¶¶ 7 and 8 (CJR App. 002). He was the creator, architect and trainer-in-chief with respect to split routing. Joiner Dep. (Exh. BA) at 197:2-9 (MOL App. 1543); Briles Dep. (Exh. T) at 52:5-53:11 (MOL App. 1217-18) and GLL Voluntary Disclosure (Exh. C) at ¶ 14 (“The false routing scheme was used by GLL from its beginning in 199[7].”) (MOL App. 116). Rosenberg personally trained Jim Briles on split routing. Briles Dep., 53:3-18 (MOL App. 1218) and 114:19-115:1 (MOL App. 1222). Thus, much like the Chairman and CEO in *Direct Container Line*, Respondent Rosenberg established the method by which GLL was to defraud carriers and violate the Shipping Act.

Despite being the architect of the split routing scheme (which is in and of itself sufficient to hold him personally liable), Respondent Rosenberg argues that he should not be held personally liable for any violations of the Shipping Act by GLL because he was “less and less active” in GLL after the 2003 sale. Rosenberg Declaration, ¶ 22 (CJR App. 004). While that would not absolve him from liability even if true, the record demonstrates that Rosenberg continued to be actively involved in GLL’s split routing activities well beyond 2003.⁹

As an initial matter, according to the records of the FMC’s Bureau of Certification and Licensing, Respondent Rosenberg was the qualifying individual of GLL from April 21, 2003 to March 5, 2007.¹⁰ Under the Commission’s regulations, the qualifying individual of a corporation

⁹ Rosenberg does not deny being involved or participating, but merely makes the vague claim that he was “less and less active.”

¹⁰ The Presiding Officer may take official notice of the Commission’s records. 46 C.F.R. §502.226(a). See also, *Bimsha International v. Chief Cargo Services, Inc. and Kaiser Apparel, Inc.*, 32 S.R.R. 352, 353 (ALJ 2011). The fact that Rosenberg was the qualifying individual of GLL until early 2007 also contradicts his claims that he

licensed as an ocean transportation intermediary (“OTI”) must be an active corporate officer. 46 C.F.R. §515.11(b)(3). Thus, in April of 2003, the point at which Respondent Rosenberg now claims he was becoming less active, and continuing until March of 2007, it was represented to the Federal Maritime Commission under penalty of perjury (See Part G of Form FMC-18) that Respondent Rosenberg was an active corporate officer of GLL.

An entity licensed by the Commission as an OTI is required to report any changes to the information contained in its license application within thirty days after those changes occur. 46 C.F.R. §515.12(d). Certain changes, including a change in the qualifying individual, require prior approval of the Commission. 46 C.F.R. §515.18. Thus, if Respondent Rosenberg ceased to be an active corporate officer of GLL before March of 2007, GLL should have filed an application to replace him as qualifying individual. Since it did not, and he was represented under penalty of perjury to be an active corporate officer of GLL, he should not now be permitted to minimize his role in the company during the period he served as qualifying individual (April, 2003 - March, 2007) with a vague statement to the effect that he was “less active.”

Respondent Rosenberg’s statement with respect to his level of involvement is also inconsistent with the factual record. In this regard, the record contains e-mails to/from Respondent Rosenberg relating to the practice of split routing and operational issues during the period he claims to have been “less and less active.” For example:

- Rosenberg was one of the recipients of the July 15-21, 2003 advice of counsel and related correspondence regarding the lawfulness of split routing. Exhibit BP (MOL App. 1663)
- Rosenberg was included on an e-mail string dated May 25, 2004 from Tommy Chan to Emily So regarding split routing, which e-mail included the sentence

resigned as an employee and director of GLL prior to the June 7, 2006 sale to the current owners, and that he was not involved with GLL in any way following that sale. Rosenberg Declaration, ¶¶32 and 34 (CJR App. 006).

“You may refer to Chad the reason for this kind of special arrangement.” Exhibit AH (MOL App. 1466).

- In July of 2005, Rosenberg was directing Mr. Briles to “mis-book” shipments and explaining the need to use split routing. Exhibit AI (MOL App. 1472).
- In January 2006, Rosenberg corresponded with Wayne Martin regarding the vetting of truckers in connection with split routing. Exhibit AS (MOL App. 1495).
- In March of 2006, Jim Briles wrote Rosenberg about split routing. Exhibit R (MOL App. 1210).

The frequent inclusion of Respondent Rosenberg in correspondence such as that outlined above belies both his claim that he was “less active” and his claim that he did not participate in split routing.

In addition, Respondent Rosenberg signed three of the service contracts that GLL entered into with MOL, all of which were signed after the time at which Respondent Rosenberg claims he was becoming “less active.” These contracts are dated May 11, 2004 (MOL App. 1694), May 1, 2005 (MOL App. 1734) and February 20, 2006 (MOL App. 1773).

Thus, the factual record shows that Respondent Rosenberg introduced split routing at GLL, trained others in its use, and continued to explain, train and assist in its implementation well beyond the 2003 date after which he says he was “less active.” He continued to serve as the qualifying individual for GLL’s OTI license and he also continued to sign contracts pursuant to which GLL obtained ocean transportation service until at least 2006. All of these facts, none of which are or can be disputed by the CJR Respondents, demonstrate that Respondent Rosenberg was an active corporate officer actively participating in split routing at least through March of 2007.

In light of the foregoing, Respondent Rosenberg had more than sufficient participation in split routing to be held liable for Shipping Act violations arising from that conduct.¹¹

(2) *CJR World Enterprises, Inc.* -- CJR World Enterprises, Inc. ("CJRWE") is a Florida corporation. It was the owner of those shares of GLL not owned by some of the Olympus Respondents. Chad J. Rosenberg was and is the sole shareholder, director and officer of CJRWE. Partial Final Arbitration Award, p. 3 (MOL App. 3). Under the doctrine of respondent superior, CJRWE is liable for Rosenberg's actions. Alternatively, it is appropriate to hold the corporation liable because there is no distinction between Chad J. Rosenberg and CJRWE.¹²

It is well-established that corporations are liable for the acts and omissions of their employees and agents. Indeed, as a legal fiction, a corporation can only act through its agents. *Tompkins v. Cyr*, 995 F. Supp 664, 683 (N.D. TX. 1998). The legal doctrine of *respondent superior* is the principal vehicle for holding principals liable for the actions of their agents or, put another way, imposing vicarious liability on the corporation for the actions of its employees or agents. *Restatement (Second) of Agency*, 1958, §§2, 219, 220, 229. The Commission implicitly recognizes this principle each time it imposes civil penalties on a company for a violation of the Shipping Act, which violations actually result from the conduct of the employees and/or agents of the company.

¹¹ Indeed, if Rosenberg is not held liable, then anyone could establish and operate an NVOCC that engages in conduct prohibited by the Shipping Act (e.g., mis-describing cargo and/or its routing), and avoid liability by saying "I didn't book the cargo or prepare the bill of lading." To allow an individual that designed, implemented and carried out a scheme such as the split routing scheme herein at issue to escape personal liability sends the wrong message to the industry.

¹² CJRWE did not file the annual reports required by Florida law between April 20, 2003 and September 12, 2010. Under Florida law, failure to file an annual report results in the administrative revocation of the company's status. Fla. Stat §§617.1420 and 617.1421 (2012). Thus, although CJRWE filed for reinstatement of its status on November 1, 2004, May 17, 2006, September 21, 2007 and November 6, 2009, the fact that it failed to file reports in all of those years and needed to apply for reinstatement demonstrate that it was not in good standing for much of that period. This supports treating Rosenberg and the company as being one and the same. MOL Ex. CC, MOL App. 1945.

Generally, an employer is liable for an employee's acts if the employee was acting within the scope of his employment, his act or acts were of the kind the employee was employed to perform, the act(s) occurred substantially within the time and space limits of employment and the acts served the master's interests. *Morrison Motor Co. v. Manheim Services Corp.*, 346 So.2d 102, 104 (Fla. 2d DCA 1977).

Here, Respondent Rosenberg was the only person that could act on behalf of CJRWE, as he was the sole shareholder, director and officer of CJRWE. The purpose of his participation in GLL's split routing scheme was to maximize the profitability of GLL and the value of the shares of that company owned by CJRWE. As the sole director of CJRWE, Respondent Rosenberg owed a duty to the shareholder (in this case, himself) to maximize the return of his investment in CRJWE, which was done by improving the profitability of GLL through the use of split routing. While split routing was a violation of the Shipping Act, there is no question that Respondent Rosenberg was acting for the benefit of CJRWE in pursuing this practice. Therefore, as a matter of law, CJRWE is liable for Respondent Rosenberg's active, knowing and willful participation in GLL's split routing scheme.¹³

Alternatively, CJRWE should be held liable because there is no distinction between it and Respondent Rosenberg. Each is the alter ego of the other, and they should be held jointly and severally liable to MOI.. The Commission has held an individual liable for civil penalties when that individual controlled a series of companies and used those companies to engage in conduct in violation of the Shipping Act and to hide that conduct. *Ariel Maritime Group, Inc.*, 24 S.R.R. 517 (FMC 1987). In that case, Martyn Merritt was found to control a number of different

¹³ Respondent Rosenberg's knowledge of the unlawful conduct must be imputed to CJRWE, since Rosenberg was the sole officer and director of that company. See, *Western Diversified Services, Inc v. Hyundai Motor America, Inc.*, 427 F.3d 1269, 1276 (10th Cir. 2005); *Hercules Carriers, Inc. v. Claimant State of Florida*, 768 F.2d 1558 (11th Cir 1985), *infra.* at p. 27.

companies. One of these companies acted as an NVOCC, issuing an accurate house bill of lading to its customer, but providing false information regarding the type and quantity of cargo being carried to the ocean common carrier transporting the cargo. In addition to finding the respondent corporation liable, the Commission held Merritt personally liable.

The situation in this case is similar to that in *Ariel*. Respondent Rosenberg founded GLL largely based on the practice of split routing. He then sold a large share of the company to the Olympus Respondents, and used CJRWE as a vehicle to hold his remaining ownership interest in GLL, a company in which he continued to be active and which continued, with his assistance and advice, to engage in unlawful split routing. Respondent Rosenberg and CJRWE (which, as noted above, was frequently not in good standing) should be considered one and same and both should be held liable for violations of the Shipping Act, just as both Merritt and his companies were held liable. Any other result would allow Rosenberg to hide assets in CJRWE and use its corporate form to avoid or minimize his personal liability for violations of the Shipping Act, and thus frustrate the statutory purpose of the Shipping Act.

D. Liability of Olympus Respondents

As noted above, the Commission indicated that one of the initial issues to be resolved in this proceeding is whether the Olympus Respondents engaged in the requisite participation in Shipping Act Violations. 32 S.R.R. at 142. The Olympus Respondents have advocated an inappropriately narrow definition of "participation" for purposes of analyzing this issue. However, even under the Olympus Respondents' overly narrow definition of "participation," it is appropriate to hold the three individual Olympus Respondents liable for Shipping Act violations because, as shown below, each actively participated in the split routing scheme. It is also appropriate to hold them liable because they knew or should have known of the unlawful

conduct, but took no action to stop it. Such a failure to act is a clear breach of their fiduciary duty to their shareholders, constitutes participation as that term is properly defined, and is thus a basis upon which to hold them personally liable.

The two Respondent funds are liable under the principle of *respondent superior*, and because the knowledge of their principals with respect to split routing must be imputed to them.

(1) *Liability of the Individual Olympus Respondents Based On Active Participation*

(a) *David Cardenas* -- Respondent Cardenas was an officer and director of GLL from May, 2003 to June, 2006. *Cardenas Aff.*, ¶ 6, *Olympus App.* 009.¹⁴ He had developed expertise in logistics and the transportation industry at Olympus. *Cardenas Dep.* 66:4-67:5, *MOL Exh. CD*, *MOL App.* 1951-1951-A.

Respondent Cardenas had weekly phone calls with GLL management. *Id.* at 165:12-17 (*MOL App.* 1954). Cardenas had a practice of communicating with GLL management on a regular basis, via both phone and e-mail. *Id.* at 54:17-55:6 (*MOL App.* 1950). Cardenas travelled to Asia with the GLL management team to meet the company's customers and vendors, and was actively involved in identifying and recruiting GLL's management team. *Id.* at 188:17-23; 94:10-95:22 (*MOL App.* 1955).

Respondent Cardenas was aware that GLL engaged in split routing on a regular basis. *MOL PFF* 132 and 133. He spoke with Eric Joiner about the legality of the split routing practice, and was advised by Joiner that the practice was illegal and presented serious regulatory concerns. *MOL PFF* 137 and 138. The nature and extent of GLL's split routing scheme was explained to Cardenas in extensive detail. *MOL PFF* 141. He also had the split routing practice explained to him by Respondent Rosenberg in July of 2003. *MOL PFF* 142. Respondent Cardenas attended a

¹⁴ Cardenas did not know his title with the company, which demonstrates the cavalier attitude he took with respect to his fiduciary obligations to his shareholders. *Cardenas Dep.* 44:16-23 (*MOL App.* 1604).

November 10, 2005 meeting of the Board of Directors of GLL at which split routing was discussed. Rosenberg Dep. 53:12-18 (MOL Exh. CE, MOL App. 1975).

(b) *Keith Heffernan* -- Respondent Heffernan was an officer and director of GLL from May, 2003 to June, 2006. Heffernan Aff., ¶2 (Olympus App. 0033). He had developed expertise in logistics and the transportation industry at Olympus. Cardenas Dep. 66:4-67:5 (MOL App. 1951-1951-A).

Respondent Heffernan had weekly phone calls with GLL management. *Id.* at 165:12-17 (MOL App. 1981). Heffernan regularly communicated with all members of GLL's senior management team. Heffernan Dep. 135:18-136:11 (MOL Exh. CF, MOL App. 1979). He received weekly reports from management, as well as monthly financial statements. *Id.* at 138:5-25 (MOL App. 1980).

Respondent Heffernan was informed of the practice of split routing in the summer of 2003, and knew that it was brought to his attention because of questions about its legality. MOL PFF 136 and 139. He was aware that GLL engaged in split routing on a regular basis. MOL PFF 132 and 133. The nature and extent of GLL's split routing scheme was explained to Heffernan in extensive detail. MOL PFF 141. He also had the split routing practice explained to him by Respondent Rosenberg in July of 2003. MOL PFF 142. He attended a 2005 Board of Directors meeting at which split routing was discussed. *Id.* at 50:24-51:24 (MOL App. 1977-1978).

Heffernan also deleted the phrase "highly efficient routing" from the Confidential Information Memorandum prepared in advance of the 2006 sale of GLL, saying:

I don't think we should get too deep into routing. I don't think we want too much diligence around this, and we don't want to give away too much either."

Partial Final Arbitration Award, pp. 23-24 (MOL App. 23-24). This indicates his familiarity with routing issues in the context of GLL's business and the sensitivity of same.¹⁵

(c) *Louis Mischianti* -- Mr. Mischianti was a director of GLL, and had developed expertise in logistics and transportation at Olympus. Cardenas Dep. 66:4-67:5 (MOL App. 1951-1951-A). He participated in meetings or phone calls with GLL management. Mischianti Aff., ¶6. Split routing was discussed at a Board of Directors meeting in 2005. Rosenberg Dep. 53:12-18 (MOL Exh. CE, MOL App. 1975).

As demonstrated by the facts set forth above, each of these individual respondents had experience in the transportation and logistics industry. Each of them was actively involved in the management of GLL and/or knew (or should have known) about the practice of split routing. Accordingly, it is appropriate to hold them personally liable for the violations of the Shipping Act and damages resulting from that practice based on their active participation in that scheme.

(2) *Liability of Individual Respondents Based On Failure To Act*

The individual Olympus Respondents participated in the Shipping Act violations not only through the affirmative acts set forth above, but also by failing to act.

In this regard, the term "participation" means not just an overt affirmative act, but also includes a failure to act. See, e.g., *Banks.com, Inc. v. Keery*, 2010 U.S. Dist LEXIS 17850 (N.D. Cal. 2010)(defendant liable for tortious conduct if defendant authorized, directed or participated in same, or knew or reasonably should have known that activity under his control could cause injury but negligently failed to take or order appropriate action to avoid harm); *PMC Inc. v.*

¹⁵ Similarly, a senior employee of GLL warned Respondent Rosenberg that the due diligence information requested by certain potential purchasers in the industry (which he called "strategics") "will lead the strategics right to the mbl/bbl tactic." Mr. Meyer went on to say: "Hopefully the financials won't figure it out" (meaning private equity firms and potential purchasers with a purely financial interest in acquiring GLL). (MOL App. 25). Thus, both Rosenberg and the Olympus Respondents were eager to keep potential buyers from learning about split routing, since the use of that unlawful practice was the reason for its high value.

Kadisha, 78 Cal. App. 4th 1368 (2000)(“A corporate director or officer’s participation in tortious conduct may be shown not solely by direct action but also by knowing consent to or approval of unlawful acts.”); *Rivera v. Bank One*, 145 F.R.D. 614 (D. Puerto Rico 1993)(bank participated in tortious activity when it failed to correct credit report it knew to be wrong). Accordingly, participation can exist even in the absence of an affirmative act, and a failure to act can and does constitute participation.

Consistent with the foregoing, courts have found that a director can be held personally liable for the acts or omissions of a corporation when he/she breaches his or her duty of care. In order to show that a director has breached the duty of care, a plaintiff must show that (a) the director knew or should have known that violations of law were occurring; (b) took no steps in a good faith effort to prevent or remedy the situation, and (c) that such failure proximately resulted in the losses complained of. *In re Caremark International*, 689 A.2d 959, 971 (Del. 1996).¹⁶

Although GLL was a Florida corporation, Florida courts rely on Delaware corporate law to establish their own corporate doctrines. *International Ins. Co. v Johnson*, 874 F.2d 1447, 1459 n. 22 (11th Cir. 1989). Accordingly, the foregoing standard applies to the officers and directors of GLL. *Gantler v. Stephens*, 965 A.2d 695,708-709 (Del. 2009)(“In the past, we have implied that officers of Delaware corporations, like directors, owe fiduciary duties of care and loyalty, and that the fiduciary duties of officers are the same as those of directors. We now explicitly so hold.”) Frequently, officers are held to a higher standard because they are considered to be more involved in the day-to-day operation and to have greater access to information. *Bates v. Dresser*, 251 U.S. 524, 530-531 (1920).

¹⁶ Delaware law also prohibits a corporation from eliminating or limiting the personal liability of a director for acts or omissions not in good faith or which involve intentional misconduct or knowing violation of law. Delaware General Corporation Law, §102(b)(7).

A leading case on the duty of care owed by directors (and hence by officers as well) has summarized the obligations of persons occupying these corporate roles as follows:

As a general rule, a director should acquire at least a rudimentary understanding of the business of the corporation. Accordingly, a director should become familiar with the fundamentals of the business in which the corporation is engaged. Because directors are bound to exercise ordinary care, they cannot set up as a defense a lack of the knowledge needed to exercise the requisite degree of care. If 'one feels that he has not had sufficient business experience to qualify him to perform the duties of a director, he should either acquire the knowledge by inquiry, or refuse to act.'

Directors are under a continuing obligation to keep informed about the activities of the corporation. Otherwise, they may not be able to participate in the overall management of corporate affairs. Directors may not shut their eyes to corporate misconduct and then claim that because they did not see the misconduct, they did not have a duty to look. The sentinel asleep at his post contributes nothing to the enterprise he is charged to protect.

Francis v. United New Jersey Bank, 432 A.2d 814, 821-822 (NJ 1981)(citations omitted). The court in *Francis* went on to say:

Upon discovery of an illegal course of action, a director has a duty to object and, if the corporation does not correct the conduct, to resign.

Id. at 823. Here, the three individual Olympus Respondents failed to act, thereby participating in the Shipping Act violations and breaching their fiduciary obligations as directors and officers of GLL. Accordingly, it is appropriate to hold them personally liable.

Respondents Cardenas and Heffernan were both directors and officers of GLL, and Respondent Mischianti was a director of GLL. Therefore, these three individuals all owed at least the standard duty of care to GLL and, as officers, Cardenas and Heffernan owed an even higher standard. Each of these individuals, with experience in the transportation and logistics industry, was made aware of the practice of split routing. Cardenas and Heffernan were told by Eric Joiner, an individual that Olympus added to GLL's management team, that the practice was unlawful. Thus, all three of the individuals knew or should have known that this practice

constituted a violation of the Shipping Act. They should have taken steps to put a stop to the practice. At a minimum, they should have exercised the same duty of care that a reasonable person would have, and made a definitive determination as to the lawfulness of split routing and stopped it.

Instead, these three Respondents acted in a manner so cavalier that it can only be described as intentional ignorance. Indeed, the record is replete with indications of the degree to which Cardenas and Heffernan were sentinels asleep at their posts. Cardenas did not even know what title he held within the GLL organization (see note 14, *supra.*) and seeks to establish self-imposed limits on his fiduciary obligations by saying his only role within GLL was to sign documents. Cardenas Aff., ¶7. Cardenas admittedly made no effort to find out how important or prevalent split routing was. Cardenas Dep. 162:17-163:7 (MOL App. 1617).

Respondent Heffernan testimony indicates he was at best ambivalent about determining the lawfulness of split routing, and couldn't say whether the lawfulness of GLL's activity would have been important to him. Heffernan Dep. 171:18-172:2 (MOL App. 1531-1532). Heffernan was and remained unfamiliar with the Shipping Act. *Id.* at 172:14-20 (MOL App. 1532). Respondent Heffernan testified that neither he nor Cardenas and Heffernan did anything upon learning of the practice of split routing. Heffernan Dep. 92:6-9 (MOL App. 1526).

Thus, at minimum, these two respondents failed to exercise an ordinary duty of care to ascertain the legal obligations of the company of which they were officers and directors, to ascertain whether the company was in compliance with those obligations, or to take any action to try to put an end to the unlawful activity. The conduct was "at minimum" a failure to act because the record indicates that Cardenas and Heffernan were aware of the advice that GLL

received from counsel and chose not to act to change the company's behavior. MOL PFF 147 and 151.

Similarly, Mischianti either knew or should have known about the split routing practice. He had regular calls with GLL management, experience in the logistics and transportation industry, and split routing was discussed at a board of directors meeting. Accordingly, he too, at a minimum, failed to exercise the ordinary duty of care which requires a director to ascertain the legal obligations of the company, to ascertain whether the company was in compliance with those obligations, or to take any action to try to put an end to the unlawful activity.

In either case, all three respondents knew or should have known that GLL was involved in unlawful conduct, but took no steps in good faith to put an end to the conduct. This failure to act constitutes participation in the conduct under *Banks.com*, *PMC Inc.* and *Rivera*. It also constitutes a breach of the fiduciary obligations of these three individuals to their shareholders. Since this failure to act and breach of fiduciary duty resulted in the losses suffered by MOL for which it now seeks reparations, and direct economic benefits to these respondents (MOL PFF 153), it is appropriate to hold Cardenas, Heffernan and Mischianti individually liable for those losses which resulted from their violations of Section 10(a)(1) of the Shipping Act under the standards set forth in *Caremark*, *Gantler and Francis*, *infra*.¹⁷

(3) *Olympus Growth Fund and Olympus Executive Fund* -- Because Cardenas, Heffernan and Mischianti were principals of these funds, their knowledge of and participation in the split routing practice must be imputed to these respondents, and the corporate respondents must also be held liable for violations of the Shipping Act.

¹⁷ The CJR Respondents and Olympus Respondents sold GLL to its current owner for \$128.5 million. MOL App. 110-111. Thus, there is no question that these respondents, both individuals and entities, received a direct and substantial financial benefit from the practice of split routing.

It is well-established that a corporation is chargeable with the knowledge of its agents and employees acting within the scope of their authority. *Western Diversified Services, Inc. v. Hyundai Motor America, Inc.*, 427 F.3d 1269, 1276 (10th Cir. 2005), citing *U.D. Sawyer v. Mid-Continent Petroleum Corp.*, 236 F.2d 518, 520 (10th Cir. 1956). In *Hercules Carriers, Inc. v. Claimant State of Florida*, 768 F.2d 1558 (11th Cir 1985), the Court of Appeals cited with approval the statement of the trial court that:

Petitioner admits that in the context of a corporation, “privity and knowledge” means the privity and knowledge of a managing agent, officer, or supervising employee...

768 F.2d at 1574. Cardenas, Heffernan and Mischianti were principals of the funds, and thus clearly all within the categories of “managing agent, officer or supervising employee.”

Accordingly, the knowledge that these three individuals had or should have had with respect to GLL’s use of split routing and the unlawfulness of that practice must be imputed to the funds of which they were principals and which benefitted from the practice, and the funds therefore are liable for the violations of Section 10(a)(1) of the Shipping Act to the same extent as the individuals.

E. GLL Liability

It bears repeating that on May 21, 2008, GLL voluntarily disclosed to the Commission that since at least 2004 it had engaged in the illegal practice known as “split routing,” which was based on falsely booking shipments to fictitious destinations and then surreptitiously arranging to route the shipments to entirely different destinations. MOL PFF 18; GLL Voluntary Disclosure (MOL Exh. C, MOL App. 108).¹⁸ As admitted by GLL, “split routing” depended on booking a shipment to a door point with the lowest cost regardless of the shipment’s actual destination.

¹⁸ Given this voluntary disclosure, there can be no doubt that MOL has met its burden of proof with respect to the conduct of GLL.

MOL PFF 120. Throughout its Voluntary Disclosure, GLL repeatedly admitted to engaging in a complex scheme to defraud ocean carriers, including MOL, by improperly obtaining lower freight rates than GLL would have otherwise been entitled to if GLL had properly booked the shipments in the first place. MOL PFF 19-25 and 30. GLL submitted its disclosure because it understood that “split routing” was an improper practice which violates the Shipping Act, and hoped that its confession would earn a reduction in the punishment that could be assessed by the Commission as well as help it in the arbitration.

At the request of the ALJ, MOL submitted sample shipments to explain and highlight the various steps undertaken as part of the “split routing” scheme. As demonstrated by these sample shipments, GLL would book shipments with MOL to fictitious final destinations, often using either entirely fictitious addresses or real addresses of companies other than the consignee of the shipment (MOL Exh. W-AD; MOL App. at 1260, 1278, 1298, 1322, 1342, 1364, 1394, 1413). GLL would later confirm the booking to false destinations by transmitting “Shipline” delivery orders to MOL. GLL Voluntary Disclosure, ¶10. MOL App. 0114. However, GLL had no intention for the cargo to be delivered to these destinations. Thus, while booking with MOL for a shipment to go to one point, GLL issued its house bill of lading to its customer showing delivery to an entirely different point. (MOL Exh. W-AD, MOL App. at 1268, 1284, 1308, 1331, 1353-54, 1371, 1402, 1420. In fact, two entirely separate sets of documents were prepared for cargo moving under split routing -- one being the Shipline document for MOL showing the destination to which the cargo was booked and one being the Truckline document for GLL, its trucker and its customer, showing the actual destination. MOL App. 114. In other words, at the time of initial booking, GLL already knew it was booking the shipment to a false final destination while simultaneously arranging for transportation of the same shipment to the true

final destination. (MOL Exh. W-AD, MOL App. at 1268, 1284, 1308, 1331, 1353-54, 1371, 1402, 1420).

In response to GLL's booking, MOL prepared and issued a master bill of lading with the destination provided to it by GLL listed in the box "Place of Delivery" (MOL Exh. W-AD; MOL App. at 1260, 1278, 1298, 1322, 1342, 1364, 1394, 1413). MOL, in turn, prepared and issued an Import Transportation Order, referred to as a "TPO," which authorized payment to GLL's "preferred" trucker to the booked final destination (MOL Exh. W-AD; MOL App. at 1274-77, 1289-97, 1316-21, 1336-41, 1360-63, 1387-93, 1407-12, 1425-28). As admitted by GLL, its "split routing" scheme depended on the use of its designated "preferred" truckers because "it was necessary to find motor carriers who would be willing to deliver ocean containers to a different destination than the one shown on master bill of lading and carrier's freight release" MOL PFF 20.

While MOL was preparing its transportation documentation, GLL would, as noted, prepare its own documents (including the house bill of lading issued to GLL's customer) which reflected the true place of delivery. GLL also would prepare a "Truckline" delivery order and send it to a preferred trucker. The "Truckline" delivery order, which was not sent to MOL, would contain the true final destination information. GLL's "preferred" trucker agreed to ignore the MOL TPO and deliver the cargo in accordance with the "Truckline" document. *See* Arbitration Partial Final Award; MOL Exh. A; MOL App. at 8 and MOL Exh. W-AD, App. at 1269-72, 1285-88, 1309-12, 1332-35, 1356-59, 1378-81, 1403-06, 1421-24. Jason Denton of Spirit Trucking, for example, testified that it was a standard order in his company to always follow the destination information on the Truckline document. Denton Dep. at 66:11-67:9 (MOL Exh. CG. App. 1985).

GLL further admitted to actively concealing its "split routing" practice from ocean carriers (MOL PFF 26) which contradicts any assertion by Respondents that carriers such as MOL were aware of this scheme, much less condoned the practice (MOL PFF 27). If MOL expressed any suspicion about the destination of a shipment, GLL employees were instructed to lie about or conceal the actual final destination of its shipments. MOL PFF 99-109 (MOL Exh. AM-AQ and BR). GLL also took other extraordinary measures to ensure that MOL would not learn of the true destinations of shipments moving under split routing. GLL employees were provided instructions on how to better disguise the fake address while booking shipments with steamship lines like MOL. MOL PFF 92-94 (MOL Exh. AJ) ("When dispatching split moves to MOL Norfolk be sure you use and (sic) actual address for the manifested city and use our phone number."). MOL PFF 93. The purpose of this instruction was to make sure that if MOL called about the destination, MOL would call someone at GLL who could run interference. If MOL attempted to verify the booked destination address, MOL would see an actual address in the destination city. MOL PFF 94. GLL employees were also told to be careful to not allow MOL's Norfolk office to learn about a shipment's true final destination. MOL PFF 99-101 (MOL Exh. AM). Mr. Briles, in particular, wrote: "If anyone from MOL (especially Laci) contacts and/or harasses you for a correct final destination, please do not mention not routing to the correct door and simply tell them the container is going to Martinsville, VA." MOL PFF 100 (MOL Exh. AM).

The significance of the foregoing is that GLL considered it critical that it hide from and not let MOL learn that GLL was deliberately mis-routing containers. To maintain this fallacy it was necessary for GLL to misrepresent to MOL where the containers were in fact being

delivered. *Id.* Mr. Briles would later write, in connection with another destination involving another MOL office:

Please let me stress again, we can never tell the SSL that we are not delivering to the master bill final destination. An operator in our office told MOL Chicago that a container routed to Fishers, IN was not going there *not [sic] times goes* somewhere else and MOL Chicago decided they were over paying allowances and now all cntrs on this routing MUST be returned to Indianapolis, IN. I am working with Rebecca to get this to 10-15 F's per week (that is their export amount from Indianapolis each week). Please note that for the 10-15 cntrs a week that will have to be returned to Indianapolis will cost us \$500-600 each (\$5k to \$6k per week). This is, needless to say, very costly for GLL and inexcusable. Going forward I now will not book on MOL to Fishers and we must use Maersk to service this area.

Pls distribute to your team and pls take the time to make sure everyone understands split shipments and the importance of keeping this info private.

MOL App. 1485. GLL employees followed Briles' instructions about concealing the true destination on these shipments by lying to MOL. All consistently testified that they understood "not to tell the ssl where shipments are really going" MOL PFF 104-09 (MOL Exh. AP).

As part of the "split routing" scheme, GLL also engaged in a credit/debit practice with its preferred truckers. If a preferred trucker received a payment from MOL that was greater than what the trucker would have been paid by MOL if the cargo had been booked to the actual destination, GLL would issue a credit to the trucker which would be applied against any "debit" or additional amount GLL owed to the trucker for shipments to actual destinations for which the compensation paid by MOL was lower than it would have been if the cargo had been booked to the actual destination. MOL PFF 47 (MOL Exh. A at 9; MOL PFF 25). This practice of co-opting truckers to help maintain the "split routing" scheme continued throughout GLL's relationship with MOL. MOL PFF 114 (MOL Exh. AV).¹⁹

¹⁹ MOL suspects that in addition to or lieu of a credit/debit system, GLL's preferred truckers may have been sharing the overpayments made to them by MOL for shipments moving to actual destinations with lower trucking costs than the false destinations provided to MOL with GLL. In cases where trucking costs to the actual destination were

GLL and the other Respondents also appear to have collaborated with two MOL employees, Paul McClintock (“McClintock”) and Rebecca Yang (“Yang”), to keep “split routing” a secret from MOL. (Briles Dep. at 125:20 and 134:3-17; MOL Exh. “U” (MOL App. at 1225-6); Rosenberg Declaration at ¶¶ 52-55 (CJR Exh. A) (CJR App. at 9); Briles Declaration at ¶¶ 27-28, 38-39, 44 (CJR Exh. B) (CJR App. at 16, 18-19, 20); and Latham Declaration at ¶ 5 (CJR Exh. C) (CJR App. at 29)). By their own admission, Respondent Rosenberg and Briles—an owner and senior employee of GLL—conspired with McClintock and Yang to hide the “split routing” scheme from the rest of MOL. Rosenberg Dec. at ¶¶ 52-54 (CJR Exh. A) (CJR App. 9); Briles Dec. at ¶¶ 26-28 (CJR Exh. B) (CJR App. 16-17). *See also* Feitzinger Dep. at 210:6-211:5 (MOL Exh. CH, MOL App. 1997-1998) (McClintock “colluded” with Briles to hide “split routing” from MOL). McClintock and Yang never informed anyone else at MOL about split routing; to the contrary, when asked about the existence of this scheme in 2008, they both denied any knowledge of it (Hartmann Dec., ¶¶ 17 and 18, MOL App. 1632) and have continued to do so to the present. Yang Dep. at 84:2-21 and 84:22-85:21 (GLL App. 0043) and McClintock Dep. at 104:22-105:2; 234:3-11; 305:19-306:6 and 235:9-237:19 (MOL Exh. CI, MOL App. 2008, 2009 and 2014-2015).

In summary, there is no dispute that thousands of shipment were booked by GLL to fictitious destinations and, at GLL’s direction, transported by preferred truckers elsewhere. Fraudulent documents were prepared and disseminated to further the scheme. GLL and the other Respondents admit to these facts. Now, to avoid liability for this fraudulent conduct, Respondents concoct an argument that MOL knew of and participated in the scheme. Of course,

higher than those to the false destination. GLL appears to have relied on the credit/debit system or the savings in overall transport costs to compensate the truckers. Of course, MOL does not have access to information about how GLL and its co-conspirator truckers shared the proceeds of their split routing scheme and, in any event, do not need to prove how those proceeds were divided in order to prevail on its Shipping Act claims against Respondents. As Respondents have noted, MOL is pursuing legal action against truckers it believes have defrauded it.

if MOL knew of and consented to split routing there would have been no need to create and disseminate fraudulent documents. That such fraudulent documents continued to be used until 2007 demonstrates clearly that the “knowledge” argument has no substance.

In Part IV of this reply brief, we deal with each of Respondent’s specific contentions in this regard. As shown, all fly in the face of common sense and must be rejected.

IV. MOL HAD NO KNOWLEDGE OF THE SPLIT ROUTING PRACTICE

As noted, Respondents do not deny that GLL engaged in split routing when dealing with MOL. They do not deny that split routing is a violation of the Shipping Act. Rather, all of their arguments are reasons why they should not be held liable for the fraudulent and unlawful activity in which they admittedly participated. Their basic argument in this regard is that they should not be held liable for violations of Section 10(a)(1) because MOL knew about the practice of split routing. As explained below, this is not the case.²⁰

While fraud is an element of a Section 10(a)(1) violation, it is not necessary that the fraud be perpetrated on the carrier. The U.S. Court of Appeals has held that “while Section 16 covers the situation in which the carrier is deceived or defrauded, it is not so limited.” *Hohenberg Brothers Company v. Federal Maritime Commission*, 316 F.2d 381 (D.C. Cir. 1964). See *United States v. Open Bulk Carriers*, 727 F.2d 1061 (11th Cir. 1984)(lower rates achieved by means of fraud are unlawful, even if carrier is not one defrauded); *Dampskibsselskabet Torm A/S v. P.L. Thomas Paper Co, Inc.*, 262 N.Y.S.2d 575, 1966 A.M.C. 396 (1965)(carrier could recover freight due from shipper for a violation of Section 16 where its agent agreed to an unfiled

²⁰ When a party is asserting an affirmative defense, that party bears the standard burden of proof with respect to that defense. See *Maher Terminals LLC v. Port Authority of New York and New Jersey*, 32 S.R.R. 1, 16 (ALJ 2011). Accordingly, to the extent MOL’s “knowledge” is asserted as a defense to Respondents’ conduct in violation of Section 10(a)(1), Respondents must prove by a preponderance of evidence that MOL had knowledge of split routing. For the reasons set forth in Section IV of this Reply Brief, Respondents have not met that burden.

discount from a tariff rate). Thus, even in the unlikely event the Presiding Officer concludes that MOL should have known about split routing, such knowledge does not adversely impact the merits of MOL's claim. *See also Mitsui O.S.K. Lines, Ltd. v. Seamaster Logistics, Inc.*, 2013 U.S. Dist. LEXIS 40466, *75 (N.D.Cal. 2013), Slip Op. at 59 (fact that MOL potentially could have discovered practice earlier does not bar its right to recovery)(MOL Exh. CK, MOL App. 2048), citing *Linden Partners v. Wilshire Linden Assocs.*, 62 Cal.App.4th 508, 529 (Cal. Ct. App. 1998).

A. The Applicable Law on Imputation

As noted in the preceding section of this brief, the general rule is that is that a corporation is chargeable with the knowledge of its agents and employees acting within the scope of their authority. This principle:

reflects a judgment that there is a mutuality of interest between the principal and the agent in respect of matters within the scope of the agency, that the agent has a duty to communicate to the principal whatever the agent knows that is pertinent to the agency, and that the principal therefore should be charged with the knowledge or actions of the agent gained or undertaken in service of the principal's interest.

Columbia Pictures Corp v. DeToth, 87 Cal. App.2d 620, 630, 197 P.2d 580 (Cal. Ct. App.

1948).²¹ However, as the foregoing quotation indicates, the knowledge of the agent is not imputed to the principal if the agent is acting outside the scope of its authorities or is not acting in the service of the principal's interest.²²

As explained in *SeaMaster*:

²¹ MOL's analysis of this issue focuses on California law because each of the service contracts between GLL and MOL provided that "This Contract is subject to the U.S. Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998, and shall otherwise be construed and governed by the laws of the State of California, except for its choice of law rules." See MOL Exh. BV (MOL App. 1699); MOL Exh. BW (MOL App. 1739); MOL Exh. BX (MOL App. 1778); MOL Exh. BY (MOL App. 1822) and MOL Exh. BZ (MOL App. 1881).

²² The FMC has recognized the adverse interest exception. *See, e.g., Pacific Champion Express Co., Ltd.—Possible Violations of Section 10(b)(1) of the Shipping Act of 1984*, 28 S.R.R. 1397, 1403 (FMC 2000)(principle recognized, but not applied to facts of case).

California courts have enunciated at least three exceptions to the general rule of imputation: (1) where an agent and a third party act in collusion against the principal, (2) where the third party knows or has reason to know that the agent will not advise the principal, and (3) where the agent's action is adverse to the principal.

(citations omitted). *Seamaster* merits extended discussion because it applies the principles of imputation and the adverse interest exception to facts virtually identical to those at issue in this proceeding.

In *Seamaster*, MOL sought to recover from defendants who had engaged in a scheme under which shipments from Asia to the United States were falsely described to MOL as originating in inland locations, when in fact they were being tendered to MOL at the port. MOL paid a customer-nominated trucker, Rainbow, for inland drayage that was never performed. An employee of MOL, Michael Yip, was involved in the scheme, together with Cheng (an employee of KESCO, an NVOCC customer of MOL) and Jerry Huang (an employee of SeaMaster HK, another customer).²³ The scheme enabled shippers to secure space on vessels when such space was in tight supply as well as lower rates. The scheme was kept hidden from MOL through the use of duplicate sets of documents similar to those used by GLL. Thus, the scheme at issue in *Seamaster* was virtually identical to that herein at issue, except that it took place at origin rather than at destination.

²³ Before working for SeaMaster HK, Jerry Huang worked for Hecny Shipping Limited. Slip Op. at 13. Hecny and Jerry Huang had a close relationship with Chad Rosenberg and GLL, and Hecny acted as GLL's agent. MOL App. 0006 and 0109. The court in *SeaMaster* found that while at SeaMaster HK, Huang worked only with Yip and Rebecca Yang at MOL. Slip Op. at 25. Rebecca Yang was terminated by MOL for sharing confidential information with customers. Slip Op. at 30 and 51, n. 10. Moreover, prior to selling GLL to the current owners, Respondents had been in discussions with a prospective buyer, Great Hill. Great Hill reduced its proposed purchase price after meeting with Jerry Huang of Hecny, and expressed concern over several Hecny-related issues. Cardenas Dep. 271:4 - 274:12 (MOL App. 1956-1959). It would not be unreasonable to conclude that Huang and Yang, having defrauded MOL in SeaMaster have, in cooperation with GLL, done the same thing with respect to split routing. This is particularly likely given Hecny's active and admitted involvement in GLL shipments. GLL Voluntary Self Disclosure, ¶¶ 4 and 5, MOL App. 0109-0110.

In considering whether MOL “knew” about the scheme, the federal district court judge wrote:

The parties vigorously dispute whether MOL sanctioned this arrangement and whether Cheng believed that Yip was acting on MOL’s behalf or for his own purposes. The Court finds that Yip was acting adversely to MOL’s interest, and that Cheng knew it. The arrangement was obviously designed to avoid detection at MOL. It required Kesco to misrepresent the place of receipt of its cargo and to pay MOL for non-existent trucking to maintain the illusion that Rainbow was actually providing trucking. If, as Defendants suggest, MOL had wanted to provide Kesco with lower rates and free space protection in order to keep its business, then MOL presumably could have done so without funneling money through a fake trucking company and asking Kesco to declare false places of receipt.

...Throughout his testimony, Cheng could not offer a coherent explanation as to why the arrangement required Kesco to make false representations to MOL if Yip had the authority to offer such a deal. There is no evidence that Cheng ever discussed the arrangement with anyone else at MOL or that there was a written contract between MOL and Kesco documenting the agreement.

Slip Op. at 19. See also *Slip Op.* at 24 (“For many of the same reasons discussed above, the Court finds that Yip lacked the authority and Huang knew it. As in the arrangement with Cheng, Yip’s arrangement with Huang was clearly structured to avoid detection by other MOL personnel.”) and *Slip Op.* at 70 (“Yip orchestrated and managed an arrangement that provided MOL’s customers with unauthorized discounts and services and induced MOL to pay Rainbow for non-existent truck moves. These facts strongly suggest that Yip totally abandoned MOL’s interests.”)

In other words, when confronted with a fraudulent trucking scheme involving the issuance of false documents and lies to MOL about the actual cargo movement, the federal district court found that the MOL employee involved in the scheme was acting adversely to MOL and that the MOL employee had no authority to engage in the scheme. Given these facts, and the fact that the scheme was structured to avoid detection by others at MOL, the court held

that the employee's knowledge could not be imputed to MOL. As explained below, the same result should be reached in this case, for very much the same reasons.²⁴

B. Application Of The Law To McClintock And Yang

Applying the three forms of the adverse interest principle articulated in *Seamaster* to the case at bar, the record is clear that McClintock's and Yang's conduct prevents the imputation of their knowledge or actions to MOL under each of the three exceptions described above, as well as on the basis that McClintock and Yang were acting outside the scope of their authority.

(1) Collusion of McClintock and Yang with Respondents

It is undisputed that McClintock and Yang were MOL's primary points of contact with GLL. Rosenberg, for example, admitted to having discussed GLL's operations with McClintock and Yang (Rosenberg Dec. at ¶¶ 40-43; CJR App. 7). Briles admitted to being in regular contact with McClintock and Yang throughout 2004 thru 2007, speaking with them roughly two times a month (Briles Dec. at 14-15; CJR App. 14-15).

McClintock and Yang denied any knowledge of or involvement in split routing prior to 2008. (Yang Dep. at 84:2-21 and 84:22-85:21 (GLL App. 0043) and McClintock Dep. at 104:22-105:2; 234:3-11; 305:19-306:6 and 235:9-237:19)(MOL App. 2008, 2009 and 2014-2015). Previously, as part of MOL's investigation of split routing in 2008, after McClintock was served with the subpoena, McClintock advised Kevin Hartmann, General Counsel for MOLAM,²⁵ that he knew nothing about split routing. At most, he told Mr. Hartmann that there

²⁴ As explained in greater detail in Section IV.C of this brief, *infra.*, whereas imputation of the knowledge of Rosenberg and the individual Olympus Respondents to CJRWE and the Olympus Fund Respondents is appropriate because those individuals were purporting to act in the interest of those entities, imputation of the knowledge of McClintock and Yang to MOL is not appropriate because, among other things, they were acting contrary to the interests of MOL.

²⁵ Although McClintock referred to Hartmann as General Counsel, Mr. Hartmann's actual title is Vice-President, Law & Insurance. MOL App. 1628.

may have been a few times in which GLL was found to have improperly routed or diverted shipments and each time GLL was advised not to do it. MOL App. 1637.

In retrospect, with the benefit of evidence now available, McClintock and Yang's denials of their involvement do not hold up and are contradicted by the testimony of others. *See* Briles Dep. at 125:20 and 134:3-17, MOL Exh. "U" (MOL App. at 1225-6); Rosenberg Declaration at ¶¶ 52-55 (CJR Exh. A) (CJR App. at 9); Briles Declaration at ¶¶ 27-28, 38-39, 44 (CJR Exh. B) (CJR App. at 16, 18-19, 20); and Latham Declaration at ¶ 5 (CJR Exh. C) (CJR App. at 29). It appears that McClintock and Yang regularly discussed "split routing" with Rosenberg and Briles. *See* Declaration of Chad Rosenberg dated February 26, 2013 (CJR Exh. A; CJR App. at 007) and Declaration of Jim Briles dated February 26, 2013 (CJR Exh. B; CJR App. at 015). Although McClintock and Yang owed their allegiance to MOL, their actions in connection with GLL were made in furtherance of the "split routing" scheme. Briles Dep. at 125:20 and 134:3-17; MOL Exh. "U" (MOL App. at 1225-6); Rosenberg Declaration at ¶¶ 52-55 (CJR Exh. A) (CJR App. at 9); and Briles Declaration at ¶¶ 27-28, 38-39, 44 (CJR Exh. B) (CJR App. at 16, 18-19, 20).

Respondents knew that McClintock and Yang had no authority to approve of split routing and that they were acting directly contrary to the interest of MOL. Edward Feitzinger, Senior Vice President of Golden Gate Logistics (the entity that purchased GLL from Respondents), testified that GLL knew that McClintock was colluding with them to cheat MOL and that this had to be kept a secret from everyone else at MOL. In particular, Mr. Feitzinger testified as follows:

Q. Did you ever ask anyone [at GLL] why Mitsui was willing to engage in split shipments if split shipments were not proper?

A. Yes.

Q. Who did you ask?

A. I – somebody on the GLL management team.

....

A. And so we had dialogues with the team, saying, you know, what is MOL's -- does MOL, you know, know ["split routing"] is going on and -- Jim [Briles] or Gary [Meyer], again, that was two of the likely suspects, was that we had helped make Paul [McClintock] a success in MOL and that because Paul had been successful and, you know, it was -- this was something that was sort of kept on the quiet and that Paul [McClintock] -- that the people [at MOL] in Oakland who were[with] MOL Americas didn't know about ["split routing"] and that we at Golden Gate shouldn't talk to MOL.

It was a big discourse, because we were right next to MOL here, and we thought it would be good to develop a relationship with them since we're 15 minutes away. And Jim [Briles] was just adamant that we not develop a relationship with [MOL in] Oakland.

Feitzinger Dep. at 205:10-206:23 (MOL App. 1995-1996). Mr. Feitzinger further described the relationship between McClintock and GLL as follows:

Q. Are split shipments, in your view – as a business person engaged in the logistics business – or at least had been engaged in the logistics business, is it a fraud on ocean carriers?

A. So I would say – I would not use that word.

Q. Okay.

A. . . . Again, I'm shying away from the word "fraud" because I'm not comfortable with this bigger meaning, and I don't mean to be evasive. I'm just saying I don't -- that we were cheating -- we were cheating Maersk. I would use the word "cheating," because I'm more comfortable with that, and we were certainly doing things that I don't think the Oakland office or the Singapore office of MOL would think would be appropriate in a sense, and that if they were to know about ["split routing"] at that point, I think that they would have not looked kindly on [Paul McClintock] who was in the -- you know, in my opinion, in collusion with Jim [Briles] on [hiding "split routing" from MOL].

Feitzinger Dep. at 210:6-211:5 (MOL App. 1997-1998).

In light of the foregoing, it can only be concluded that McClintock and Yang were collaborating with Respondents against MOL in connection with split routing, and deliberately concealing their participation from MOL, both at the time split routing was taking place and thereafter. Accordingly, just as the knowledge of Michael Yip could not be imputed to MOL in the *Seamaster* case because of his collaboration with the defendants, so the knowledge of McClintock and Yang cannot be imputed to MOL in this case because of their collaboration with Respondents.²⁶

(2) *Respondents Knew McClintock and Yang Would Not Advise MOL*

The knowledge of McClintock and Yang cannot be imputed to MOL under the second exception set forth in *Seamaster*, i.e., because the Respondents knew McClintock and Yang would not advise MOL of the split routing scheme. Numerous facts in the record strongly support this conclusion.

As an initial matter, the testimony of Edward Feitzinger quoted above demonstrates that Respondents understood that split routing was not to be discussed with others at MOL. In addition, McClintock and Yang told GLL not to discuss “split routing” with anyone else at MOL. Rosenberg Dec. at ¶¶ 54-55, GLL Exh. A, GLL App. at 009; Briles Dec. at ¶¶ 27-28, 31-32, GLL Exh. B, GLL App. at 016-17; and Briles Dep. at 134:3-17, MOL Exh. “U” (MOL App. at 1226). Rosenberg and Briles state in their respective declarations that McClintock and Yang did not want MOL operations personnel to know about “split routing.” Rosenberg Dec. at ¶ 54; CJR App. 9 and Briles Dec. at ¶ 28; App. 17). CJR Respondents admit “The fact that GLL was a key account that they [McClintock and Yang] were incentivized to maintain and please likely motivated them to look the other way . . .” (CJR PFF 101).

²⁶ See also *Ash v. Georgia-Pacific Corp.*, 957 F.2d 432, 436 (7th Cir. 1992) (where third party knew that the agent was acting adversely to his employer or third party participates in the fraud, there is no imputation to the principal because to do would be to protect fraudulent schemes).

The record is also replete with evidence of the lengths to which Respondents went to keep split routing secret from MOL employees other than McClintock and Yang. In one instance, Wayne Martin, a GLL supervisor, provided instructions to his fellow GLL employees on how to better disguise the fake address while booking shipments with steamship lines, like MOL. MOL PFF 92-94 (MOL Exh. AJ). Mr. Martin wrote: "When dispatching split moves to MOL Norfolk be sure you use and (sic) actual address for the manifested city and use our phone number." MOL PFF 93. The purpose of this instruction was to make sure that if MOL called about the destination, MOL would call someone at GLL who could run interference. If MOL bothered to check the booked destination address, MOL would see an actual address in the destination city. MOL PFF 94.

In another instance, Jim Briles advised his GLL team to be careful to not allow MOL's Norfolk office to learn about a shipment's true final destination. MOL PFF 99-101 (MOL Exh. AM). Mr. Briles, in particular, wrote: "If anyone from MOL (especially Laci) contacts and/or harasses you for a correct final destination, please do not mention not routing to the correct door and simply tell them the container is going to Martinsville, VA." MOL PFF 100 (MOL Exh. AM). The significance of this statement is that GLL considered it important to not let on to MOL that GLL was deliberately mis-routing containers without the knowledge of MOL and to maintain this fallacy it was necessary for GLL to misrepresent to MOL where the containers were in fact being delivered. *Id.* Mr. Briles went on to write: "Please let me stress again, we can never tell the SSL that we [are] not delivering to the master bill of lading destination." MOL PFF 102 (MOL Exh. AN). GLL employees followed Briles' instructions about concealing the true destination on these shipments by lying to MOL. All consistently testified that they

understood “not to tell the ssl where shipments are really going” MOL PFF 104-09 (MOL Exh. AP).

It also was clear to Mr. Feitzinger that even though his company had excellent MOL management contacts above Paul McClintock’s level, it was understood that no one at GLL was supposed to ever discuss “split routing” with anyone at MOL. Mr. Feitzinger testified as follows:

Q. Were you lying at GLL to ocean carriers when you did split shipments up until 2007?

A. We weren’t telling them the truth about where the product was going.

Q. Well, were you lying to them?

A. We were – we were giving them a false address. We talked about that before.

Q. Knowingly, right? In other words, you were knowingly telling a falsehood, right?

A. Yes.

Feitzinger Dep. at 214:8-215:23 (MOL App. 1999-2000).

It served the interest of all participants in the scheme not to disclose split routing to MOL because of its illegality. Eileen Cakmur, a former employee of GLL, wrote: “GLL has been practicing these illegal activities for years. If any of the SSL kn[ew] that they have been [de]fraud[ed] all these years, GLL will close its doors.” MOL PFF 84-85 (MOL Exh. Q). Dee Ivy, another GLL employee, expressed frustration and guilt from having to continue to lie to steamship lines, like MOL. MOL PFF 90 (MOL Exh. AK). In particular, Ms. Ivy wrote: “I don’t like to having to constantly lie and make up excuses as to why/where these containers are

going, or not going.” David Donnini and John Williford of GLL knew that “split routing” was illegal. Donnini Dep. at 17:13-18:10 (MOL Exh. BS; Ap. 1674-74).²⁷

Because they were going to such great lengths to keep split routing secret from MOL, because they knew it was illegal, and because McClintock and Yang had told them not to discuss split routing with MOL, it is clear that Respondents knew McClintock and Yang were not going to disclose the practice to MOL. This is the same situation found in *Seamaster*, in which the knowledge of the MOL employee Yip of the scheme that was kept a secret from the rest of MOL was not imputed to the company. Accordingly, the knowledge of these two MOL employees cannot be imputed to MOL. *See Bancinsure, Inc. v. U.K. Bancorporation, Inc.*, 830 F.Supp.2d 294, 302 (E.D.Ky. 2011)(where the communication of a fact would necessarily prevent the consummation of a fraudulent scheme which the agent was engaged in perpetrating, the agent's knowledge is not imputed to the principal); *Lohmuller Bldg. Co. v. Gamble*, 160 Md. 534, 154 A. 41, 43-44 (1931) (“it will not be imputed to the principal in any transaction between the principal and the agent or between the principal and a third party, in which the interest of the agent is of such a character that it may be rationally and naturally inferred that he will conceal his knowledge.”). *See also Restatement (Third) of Agency* § 5.04.²⁸

²⁷ Respondents’ argument that they did not know “split routing” was illegal is simply not credible. Eric Joiner testified that he told Rosenberg that “split routing” was illegal, and that he did not need an attorney to tell him that. MOL PFF 126 (MOL Exh. BA). When GLL hired outside counsel, the legal advice was that “split routing” was illegal. MOL PFF 145 (MOL Exh. BP).

²⁸ *Restatement (Third) of Agency*, § 5.04 (2006)(“[a] principal should not be held to assume the risk that an agent may act wrongfully in dealing with a third party who colludes with the agent in action that is adverse to the principal.” *Restatement (Third) of Agency* § 5.04 cmt. c (2006). Accordingly, imputation of knowledge to the principal does not protect third parties who know or have reason to know that the agent acts adversely to the principal, and have not acted in good faith. *Id.* § 5.04 cmt. b; see also *Penn Mutual Life Ins. Co v. Norma Espinosa* 2007—1 Ins. Trust, 2010 WL 3023402, *3 (D.Del. 2010).

(3) McClintock and Yang Acted Adversely to MOL

As an initial matter, “split routing” is unlawful under the Shipping Act and, in condoning the practice, McClintock and Yang exposed MOL to civil penalties under the Act. Quite clearly, they were acting adversely to MOL.²⁹

Split routing was also adverse to MOL in that Respondents’ misrepresentations through false transportation documents issued by GLL resulted in financial loss to MOL as a result of receiving less money for intermodal shipments and paying for portions of inland truck movements which never occurred. GLL, in turn, pocketed more money from its customers since its cost of transportation was significantly less through this “split routing” scheme. Earning a lower rate of return, aided by McClintock and Yang, is the functional equivalent of “theft or looting or embezzlement,” which is the classic example of the adverse interest exception. *See, e.g., Krys v. Sugrue (In re Refco Secs. Litig., 779 F.Supp.2d 372, 376 (S.D.N.Y. 2011) (citing Kirschner v. KPMG LLP, 15 N.Y.3d 44, 938 N.E.2d 941, 952 (N.Y. 2010)) (“Miscreants’ corruptly-induced transfer of . . . monies from funds earning a higher rate of interest into funds earning a lower rate of interest was no different from taking money out of the . . . customers’ pockets and putting it in the pockets of [the Miscreants]—the functional equivalent of the “theft or looting or embezzlement” that . . . is the classic example of the adverse interest exception.”).*

McClintock and Yang also demonstrated their loyalty to GLL at the expense of MOL in other contexts. Examples of how their conduct was adverse and harmful to MOL are contained in the declarations of Richard J. Craig (MOL Exh. CU, MOL App. 2152)(“Craig Declaration”)

²⁹ Allowing GLL to obtain transportation at rates other than those applicable under its filed service contracts or published tariffs would subject MOL to penalties of \$8,000 per shipment, or even \$40,000 per shipment if the violation was knowing and willful. Here, given that thousands of shipments are at issue, the potential penalties are enormous. *See, 46 U.S.C. 41104(2)(A).*

and Warrin Minck (MOL Exh. CS, MOL App. 2077)(“Minck Declaration”).³⁰ Those declarations describe, among other things, how in 2006 MOL’s yield management personnel discovered that a considerable quantity of GLL cargo had supposedly been trucked from the rail ramp in Fort Worth, TX to Monroe and/or West Monroe, LA. Craig Declaration, ¶5 (MOL App. 2153. McClintock claimed that the cargo was moving by train, but yield management determined that this was not true. *Id.* Yield management recommended that trucking be stopped, and that cargo moving to Monroe/West Monroe be moved by rail because it was not profitable to move it by truck. *Id.* at ¶6.

Although yield management personnel wanted the cargo to move to Monroe by train (which was more economical), GLL wanted its cargo trucked to Monroe (which was more expensive). Minck Declaration, ¶ 17 (MOL App. 2082). It has been discovered that notwithstanding the recommendations of yield management, Rebecca Yang told McClintock that she had advised Jim Briles of GLL that McClintock had agreed that 50% of the cargo would be moved by rail and 50% by truck. *Id.* at ¶17. To make matters worse, McClintock not only permitted a sizeable portion of GLL’s cargo to move by truck, he also approved a payment of \$1012 per load to GLL’s preferred trucker, when the cost of using MOL’s trucker to perform the move was \$851 to \$880. *Id.* at. ¶¶18 and 19; Craig Declaration, ¶8 (MOI App. 2154). By not informing yield management of the trucking payments he had authorized, McClintock was misleading MOL with respect to the profitability (or lack thereof) of these cargo movements. Craig Declaration, ¶¶8 and 9 (MOL App. 2154-2155). Clearly, McClintock and Yang had ceased looking out for the best interests of MOL and were interested only in satisfying GLL, even if that meant harming MOL financially. Had MOL been aware of what was going on, it

³⁰ The declarations of Messrs. Minck and Craig, and the exhibits attached thereto, are in rebuttal to the Respondents’ arguments that split routing was beneficial to MOL and not otherwise harmful to MOL.

could have taken the steps necessary to cease carrying this cargo and to replace it with lawful cargo. Craig Declaration, ¶9.

Based upon information now available, it has also been discovered that 168 shipments supposedly being trucked to Monroe were actually being delivered to Shreveport, LA, which is approximately 100 miles closer to Fort Worth than Monroe. Minck Declaration, ¶16 (MOL App. 2082). Thus, in addition to the losses described above, MOL also was tricked into paying additional sums for trips to Monroe when in fact the trucking was only being provided to Shreveport. *Id.*

Perhaps an even more telling example of the extent to which McClintock placed the interests of GLL above those of MOL involve cargo diversions to Winnsboro, LA. Winnsboro was not covered by the service contract between MOL and GLL in either 2005 or 2006. GLL PFF 66 and response thereto; Minck Declaration at ¶8 (MOL App. 2079).

In 2005, MOL paid GLL's preferred trucker \$150 per container to deliver four containers booked to West Monroe, LA to local destinations. In fact, all four containers were delivered to Winnsboro. Minck Declaration, ¶10, MOL App. 2080. In 2006, McClintock agreed to GLL's request to increase the "payout"³¹ from \$75 to \$150 for cargo moving to Winnsboro, despite the fact that Winnsboro was not covered by the service contract or any MOL transport document. *Id.* at ¶¶10, 11, 13 and 14. After McClintock agreed to GLL's request to increase the payout, MOL paid GLL's preferred trucker \$200 per container to deliver 534 containers in West Monroe. All of these containers were actually delivered to Winnsboro. *Id.*, ¶15. In other words McClintock, who claimed in his deposition that he had never heard of Winnsboro (see note 37, *infra.*), appears to having knowingly and willfully approved payments by MOL to truckers for

³¹ Since Winnsboro was not covered by the service contract, the term "payout" necessarily refers to an amount to be paid by MOL to GLL and/or its preferred trucker to deliver cargo to Winnsboro.

split routing movements. All of this was done without the knowledge or approval of anyone else at MOL. *Id.* at ¶14; Craig Declaration, ¶8. This payout further exacerbated MOL losses on this cargo. Craig Declaration, ¶8.

Thus, this case is again virtually identical to the *Seamaster* case, where Yip's actions caused financial harm to MOL. In that case, as a result of the harm suffered by MOL, it was held that Yip was acting adversely to MOL and that his knowledge could not be imputed to MOL. For the same reason, the same conclusion should be reached here.³²

Respondents' arguments that split routing benefitted MOL because (i) MOL was able to avoid the burden of negotiating individual door points in its service contracts with GLL; and (ii) GLL would assume the administrative burden of arranging for inland transportation and any responsibility for inland detention charges are without merit. Indeed, the evidence shows these alleged benefits were illusory and split routing inured to no one's advantage other than the Respondents.

³² Numerous court cases from a variety of jurisdictions apply the adverse interest exception in a manner consistent with the foregoing. See *In re Blackburn*, 209 B.R. 4, 11 (M.D.Fla. 1997) and *FDIC v Shrader & York*, 991 F.2d 216, 223 (5th Cir.) ("courts will generally not impute a bank officer or director's knowledge to the bank if the officer or director acts with an interest adverse to the bank"), *reh'g denied*, 999 F.2d 1581 (1993), cert. denied, 512 U.S. 1219 (1994); *FDIC v. Ernst & Young*, 967 F.2d 166, 170 (5th Cir.), *reh'g denied*, 976 F.2d 732 (1992) ("Generally, courts impute a bank officer or director's knowledge to the bank unless the officer or director acts with an interest adverse to the bank."); *Martin Marietta Corp v Gould, Inc.*, 70 F.3d 768, (4th Cir. 1995) (if agent holds interests sufficiently adverse to the principal's interests, the knowledge of the agent will not be imputed to the principal); *Tobacco Technology v Taiga Int'l, N.V.*, 2010 WL 2836259, *8 (4th Cir. 2010) ("under the 'adverse interest exception' to this rule, a principal may 'avoid imputation when the agent's interests are sufficiently adverse' to its own"); *Miller v. Holzmann*, 563 F.Supp.2d 54, 100 (D.D.C. 2008) (citing *BCCI Holdings (Luxembourg), S.A. v Clifford*, 964 F.Supp. 468, 478 (D.D.C. 1997) (where "it is to the agent's own interest not to impart knowledge to the principal" the knowledge of the officer or agent cannot be imputed to the company. . .)); *Center v Hampton Affiliates, Inc.*, 66 N.Y.2d 782, 829, 497 N.Y.S.2d 898, 899-900 (1985) ("This exception provides that when an agent is engaged in a scheme to defraud his principal, either for his own benefit or that of a third person, the presumption that knowledge held by the agent was disclosed to the principal fails because he cannot be presumed to have disclosed that which would expose and defeat his fraudulent purpose."); *Liquidation Commission of Banco Intercontinental, S.A. v. Renta*, 530 F.3d 1339, 1355 (11th Cir. 2008) ("... imputation of [the president's] wrongdoing to the bank would be inappropriate [as it] would be perverse, indeed, if the [plaintiff] was unable to pursue a claim on behalf of [the bank's] other stakeholders solely because some of the people who stole from it were insiders in a position to carry out the fraud!"). This precedent shows that the narrow interpretation of the adverse interest exception adopted by New York State courts and relied upon by Respondents is a minority position and should not be adopted by the Commission. In any event, the case law of California should be controlling. See footnote 21, *supra*.

In this regard, it is noteworthy that the service contracts between MOL and GLL contained a sizeable number of door points. Exh. BV, MOL App 1694-1733; Exhb. BW, App. MOL 1734-1772; Exh. BX, MOL App. 1773-1816; Exh. BY, App. 1817-1875) and Exh. BZ, MOL App. 1876-1900. These contracts were amended numerous times. PFF 14. The burden on MOL of negotiating an additional door point in a contract is minimal. Minck Declaration, ¶6 (MOL App. 2078).

Moreover, Respondents' argument that split routing was carried out to ease MOL's administrative burden is contradicted by the facts. During the course of its relationship with MOL, GLL moved thousands of shipments to destinations that were covered by their service contracts with MOL by means of split routing. The implications of this are demonstrated by an illustrative example of shipments which GLL booked to Johnson City, TN.

Each of these shipments actually went to Braselton, GA. Minck Declaration, ¶3 (MOL App. 2078). The service contracts between MOL and GLL in effect during 2005 contained rates to both Johnson City and Braselton, as did the 2004 and 2006 service contracts. *Id.* at ¶6. In 2005, the contract rate to Johnson City for a 40-ft. container was \$65 higher than the rate to Braselton, GA, and the same difference in the rates to these two locations can be found in the 2004 and 2006 service contracts. *Id.* at ¶¶7-9. Johnson City and Braselton are served via the same rail Atlanta rail ramp, and MOL was paying truckers an average of \$657 per container to take a container to Johnson City and an average of \$249 to take a container to Braselton, which is 217 miles much closer to the ramp than Johnson City. *Id.* at ¶4-5.³³

³³ The fact that the Johnson City rate was only \$65 higher than the Braselton rate when MOL's trucking cost to Johnson City trucking was approximately \$400 higher than to Braselton conclusively demonstrates that MOL did not pass through the cost of trucking as claimed by Respondents and McClintock. See discussion in Section VI of this Reply Brief.

Why would a customer (GLL) with rates to both Johnson City and Braselton lie to the carrier (MOL) and book Braselton cargo to Johnson City, particularly since the Johnson City rate was higher? It is clearly not for the administrative convenience of MOL, since rates for both locations were already in the contract. Rather, the only reason to do this was that even after paying the higher Johnson City contract rate to MOL, GLL and its co-conspirator trucker were able to share an average net gain of \$343 per container (the \$408 difference between the amount the trucker was paid for a move to Johnson City and what it would have been paid for a Braselton move, less the \$65 difference in the contract rate).

In the 2005 contract year, GLL booked 824 containers to Johnson City with MOL, all of which actually went to Braselton. *Id.* at ¶3³⁴. This means that GLL and its preferred truckers were able to share over \$280,000 in overpayments made by MOL for trucking services that were never performed ($\$343 \times 824 \text{ containers} = \$282,632$) solely in connection with cargo booked to Johnson City but moved to Braselton.³⁵ In light of the foregoing, GLL's claim that split routing was done to ease the administrative burden on MOL is laughable.³⁶

Common sense and the other evidence in the record exposes these arguments for what they are: failed attempts at post hoc justification. If the purpose of split routing was to save MOL the burden of filing amendments and arranging inland shipments, why was it necessary for Respondents to create an entirely separate set of documents that moved via split routing? If split routing was for the benefit of MOL, why was it necessary for Respondents to keep their munificence secret? The answers to these questions reveal the true purpose of split routing: to

³⁴ Given this volume, GLL's practice of booking cargo to Johnson City and moving it to Braselton was not an aberration or an inadvertent mistake.

³⁵ As noted earlier in this brief, MOL is not certain exactly how these ill-gotten proceeds were shared. This information appears to be available only to those who carried out the fraud.

³⁶ GLL also engaged in split routing in other situations in which both the fictitious and actual destinations were covered by its contract with MOL. See MOL's response to GLL PFF 25.

keep the ultimate destination of the cargo secret from MOL so that Respondents could obtain, through the unjust and unfair device of split routing, ocean transportation at rates and charges lower than those that were otherwise applicable and/or reap the benefits of trucking overpayments as described above.

(4) McClintock And Yang Had No Authority to Approve Split Routing

For a number of reasons, GLL knew McClintock and Yang did not have authority to permit split routing. As an initial matter, no employee -- including McClintock or Yang -- has the authority to commit to an illegal corporate activity. *See Etefia v. E. Baltimore Cmty. Corp.*, 2 F.Supp.2d 751, 759 (D.Md. 1998) (under general agency principals, illegal harassment of employees is an illegitimate corporate activity, beyond the scope of a supervisor's employment and cannot be directly imputed to employer).

Second, because McClintock and Yang advised GLL to keep the scheme among themselves (Rosenberg Dec. at ¶¶ 53-55 (CJR App. 009); Briles Dec. at ¶¶ 27-29 (CJR App. 016-17), Respondents knew that McClintock and Yang had no authority to allow split routing. If McClintock and Yang had the authority to grant split routing, there would have been no need to keep it a secret from the rest of MOL.

Third, Respondents knew that McClintock and Yang did not have the authority to approve changes to rates in their service contract with MOL (McClintock Dep., 58:21 - 59:3)(MOL App. 2006). Accordingly, they also had to know that these individuals would not have authority to depart from those rates.

In *Seamaster*, the judge found that when Yip lacked authority to engage in the fraudulent scheme and the defendants knew it, knowledge of the scheme could not be imputed to MOL. The same conclusion should be reached here.

In sum, because McClintock and Yang collaborated with Respondents, because Respondents knew that McClintock and Yang would not disclose split routing to MOL and did not have authority to approve split routing, and because McClintock and Yang acted adversely to MOL in condoning an unlawful scheme that was kept secret from the rest of MOL, the imputation doctrine does not apply to the knowledge and bad acts of McClintock and Yang, which cannot be imputed to MOL.

C. Imputing Knowledge To Respondents But Not To MOL Is Consistent With Applicable Law And The Facts of This Case

It is appropriate to impute the knowledge of the Respondent Rosenberg and the individual Olympus Respondents to CJRWE and the Respondent funds respectively, while not imputing the knowledge of McClintock and Yang to MOL. Under the general rule of imputation, the knowledge of Respondents should be imputed to CJRWE and the Respondent funds because the individual Respondents were purporting to act in the interests of their respective corporate and partnership entities.

The situation with McClintock and Yang is different because, as explained in detail above, they were acting contrary to the interest of MOL. Stated another way:

Fraud on behalf of a corporation is not the same theory as fraud against it. Fraud against the corporation usually hurts just the corporation: the stockholders are the principal if not only victims... But the stockholders of a corporation whose officers commit fraud for the benefit of the corporation are beneficiaries of the fraud.

Schacht v Brown, 711 F.2d 1343, 1347 (7th Cir. 1983), *cert. denied*, 464 U.S. 1002 (1983).

D. MOL Did Not Otherwise Have Knowledge Of Split Routing

In addition to arguing that MOL knew about split routing because of McClintock and Yang, Respondents (particularly GLL) throw a number of other arguments about why MOL should be deemed to have knowledge against the wall in the hopes that something will stick.

However, combining multiple arguments devoid of merit into a single argument cannot and does not create a meritorious argument. In essence, Respondents point to a few disparate pieces of a large jigsaw puzzle and argue that, based on the possession of those pieces, MOL knew what the puzzle depicted. As shown below, although different personnel within MOL may have gotten a brief glimpse of some part of what GLL was doing, MOL never received sufficient information to enable it to know of, or even suspect or investigate, the scope of GLL's split routing practice.³⁷ Accordingly, the other arguments advanced by Respondents with respect to knowledge must be rejected.

(1) MOL's Relationship With Nintendo Is Irrelevant

GLL's argument that the alleged arrangement between MOL and Nintendo demonstrates that MOL knew of and was complicit in split routing has already been ruled to be irrelevant on two separate occasions, and is without merit.

On April 12, 2012, the ALJ denied a request for the issuance of a subpoena *duces tecum* to Nintendo, writing:

. . . the existence or non-existence of the assumed Mitsui/Nintendo "standard operating procedure" does not have a tendency to make it more probable or less probable that Global Link engaged in this practice as alleged in Mitsui's Amended Complaint: that is, Global Link told Mitsui that a shipment was going to Destination B, which would then be stated in Mitsui's bill of lading, when Global Link knew that it was going to Destination A, then, without Mitsui's knowledge, Global Link would then issue a bill of lading directing the inland carrier to deliver the shipment to Destination A. **Whatever the Mitsui/Nintendo "standard operating procedure" may have been, it proves nothing about the Global Link practice of "split routing." The same is true of any similar relationship between Mitsui and other shippers.**

³⁷ As a general matter, one to whom a representation is made does not have a duty to pursue an avenue of investigation which could potentially reveal the falsity of that representation. *Linden Partners, supra*.

(emphasis added). MOL Exh. J (MOL App. 1122). The ALJ went on to conclude that not only was the MOL/Nintendo relationship irrelevant to GLL's conduct, but that it was also irrelevant to the issue of MOL's knowledge of GLL's split routing practice:

The existence or non-existence of the assumed Mitsui/Nintendo "standard operating procedure" does not have a tendency to make more probable or less probable Respondents' allegations that Mitsui knew that Global Link engaged in the practice of "split routing." Furthermore, whether or not the assumed Mitsui/Nintendo "standard operating procedure" violates the Shipping Act, **the fact that at the request of Nintendo, Mitsui would deliver a shipment to a destination other than the destination on the Mitsui bill of lading does not tend to prove or disprove that Mitsui knew that after Mitsui issued a bill of lading for a Global Link shipment to one inland destination, "Global Link would issue a second bill of lading showing the true inland destination. Global Link would provide this bill of lading to the trucking company and tell the trucking company to disregard the instructions received from MOL."** (Amended Complaint ¶ IV.H.) The same is true of any similar relationships between Mitsui and other shippers. . . .

Id. at 8 (MOL App. 1129) (emphasis added). In other words, the MOL/Nintendo relationship was determined to be totally irrelevant to this proceeding.

The ALJ reaffirmed the foregoing conclusions in an August 3, 2012 Order denying Respondents' motion for reconsideration of the second conclusion in the April 12, 2012 Order, saying:

The April 12 Order found that whatever the Mitsui/Nintendo relationship may have been, information about that relationship does not have a tendency to make it more probable or less probable that Mitsui knew that Global Link engaged in the practice of "split routing." In the above example, **information about the Mitsui/Nintendo relationship would not have a tendency to make it more probable or less probable that Mitsui knew that when Global Link faxed a "shipline" document for container number FSCU 6351260 to Mitsui identifying the place of delivery as "6195 Purdue Drive, Johnson City, Tennessee 37601," Global Link instructed the trucker to take container number FSCU6351260 to 6195 Purdue Drive, Atlanta, Georgia 30336.**

MOL Exh. CL (App. 2059) (emphasis added). The ALJ thus understood and made it abundantly clear that the split routing scheme perpetrated by GLL, which involved the creation of admittedly

falsified documents, was in no way related to the handling of Nintendo's cargo. Despite having been told twice that the line of argument was irrelevant, GLL continues to whip a dead horse by *bringing it up yet again.*

In actuality, the ALJ's two rulings on the irrelevance of MOL's relationship with Nintendo are grounded solidly in the testimony of all witnesses with personal knowledge of MOL's relationship with Nintendo. In this regard, Solange Yang, Lyn Symms and Roderick Wagoner of MOL's Seattle Office all had personal knowledge of the manner in which MOL handled the Nintendo account, including the inland delivery of Nintendo containers to their final inland destination. All of them have stated in declarations previously filed that MOL was not involved in diverting containers to a destination other than the destination booked by Nintendo.

Solange Young testified: "The MOLAM operations group issued and paid for transportation orders to the locations set forth on the bill of lading, which were primarily to NOA's main distribution facility in North Bend, Washington. The MOLAM operations group otherwise took no part in the actual container drayage or delivery arrangements, nor did it receive the details of NOA's delivery instructions to the motor carriers." MOL Exh. CM, MOL App. 2061. Lyn Syms testified that: "At no time did MOLAM personnel instruct any of NOA's motor carriers to delivery Nintendo cargo someplace other than the delivery locations set forth in MOLAM's transportation orders, nor was MOLAM aware that any delivery instructions the motor carriers were receiving from NOA." MOL Exh. CN, MOL App. 2066.

Roderick Wagoner confirmed this by stating that: "MOLAM issued transportation orders to the motor carriers to locations that were the same as the places of delivery on the bills of lading. It was NOA's practice to liaise directly with its customer-nominated truckers when making the delivery arrangements, and I know of no MOLAM employees who participated in

the actual coordination or arrangement of the deliveries with NOA's motor carriers." MOL Exh. CO, MOL App. 2069. Thus, all three MOL witnesses with personal knowledge of the Nintendo business contradicted the September 21, 2011 deposition testimony of Paul McClintock, who admittedly was never personally involved with the Nintendo account.³⁸

In light of the previous rulings on this issue and the uncontroverted testimony of the three MOL employees, any arguments by GLL with respect to Nintendo are irrelevant to this proceeding and should be disregarded in their entirety.

(2) The Spirit Trucking "Invoices" Do Not Constitute Knowledge

GLL argues that "invoices" allegedly sent to MOL by Spirit Trucking necessarily mean that MOL had knowledge of the split routing practice. As discussed, this argument suffers from several fatal flaws.

GLL has attached eight documents which it characterizes as "invoices" from Spirit to MOL. However, as is apparent from the Bates stamp numbers on these documents, these document were produced by Spirit in discovery. *See, e.g.*, GLL App. 0378. There is no evidence whatsoever that these so-called "invoices" were ever sent to MOL. Declaration of Felicita Camacho, ¶ 4 MOL Exh. CT, MOL App. 2150. Moreover, these documents appear to be internal reconciliations rather than invoices.³⁹ This is apparent from the fact that they reflect a "date paid" that is subsequent to the date of the invoice, reflect an amount paid, and reflect an amount due of \$0.00. *Id.* Hence, it is hardly appropriate to call them "invoices."

Even if these documents were sent to MOL (which MOL denies), they would have been sent to MOL personnel in accounting whose job was to compare MOL's TPO number, the

³⁸ These three employees each deny that they were spending most of their time dealing with Nintendo's operational needs.

³⁹ GLL also attaches other documents produced by Spirit which relate to the same shipments as the so-called Spirit "invoices," but once again there is no evidence whatsoever that any of these documents were sent to MOL.

container number, the invoiced amount and the identity of the billing party with the TPO. Camacho Dec., ¶3, MOL App. 2151. If this information matched, the trucker was paid. It has never been the practice or procedure of MOL's Accounts Payable personnel to verify any other information, including shipment delivery locations. *Id.* Thus, the documents would not have provided MOL with "knowledge" of the destination of the cargo.⁴⁰

Moreover, GLL's argument that it did not tell Spirit to keep split routing secret from MOL and that Spirit would not have given MOL the invoices if there was a conspiracy to engage in split routing, is *post hoc* justification. While there may not be a "smoking gun" with which to prove that GLL told its preferred truckers not to disclose the actual destinations to MOL, the evidence indicates that the truckers understood that they should disregard MOL's TPOs in favor of GLL's "Truckline" documents.

In this regard, Jason Denton of Spirit Trucking testified that Spirit Trucking delivered GLL's shipments to the destination set forth on the "Truckline" delivery order it received from GLL, even if that destination was different than the one shown on the MOL TPO. Denton Dep. at 62:1-23 (MOL Exh. CG, MOL App. 1984). In particular, Denton testified as follows:

Q: But I am asking about the Global Link account, okay, the Global Link account as it relates to Mitsui deliveries. Was there a custom and practice wherein Global Link would have instructed Spirit to follow the final destination information set forth in the ship – in the truckline as opposed to the truck line?

A: I would assume that we were told to always follow the truckline, and that is an assumption.

Q: All right. And now why do you assume that to be the case?

A: Because we're the trucker.

Q: Okay. But do you know if there would have been any discussions between Global Link and Spirit to that effect?

⁴⁰ A mere hunch, hint, suspicion, or rumor does not constitute knowledge. *McIntyre v. U.S.*, 367 F.3d 38, 52 (1st Cir. 2004), citing *Kronisch v. U.S.*, 150 F.3d 112, 121 (2nd Cir. 1998).

A. I would say that there would have had to have been conversations.

Q. And that's because there's clearly a different –

A. There is, correct.

Q. -- clearly a difference in the delivery location?

A. Correct.

Id. Based on Mr. Denton's testimony, it is obvious Spirit Trucking—like GLL's other preferred truckers—was instructed by GLL to follow the final destination information set forth on the Truckline delivery orders prepared by GLL and disregard the destination information set forth on the MOL TPOs. Mr. Denton's testimony, therefore, confirms that GLL obtained the cooperation of its preferred truckers to ensure they did not comply with MOL's TPOs, and refutes GLL's argument that the Spirit invoices constitute knowledge on the part of MOL.

In addition, it must be noted that Spirit is the only trucker alleged by GLL to have submitted documents of this type to MOL. If, as GLL claims, there was nothing secret about split routing, why didn't more truckers submit invoices showing the actual destination of the cargo to MOL? The only possible conclusion that can be drawn from the conduct of truckers other than Spirit is that they were instructed not to do so by GLL.

(3) MOL's receipt of "Shipline" Delivery Orders Does Not Constitute Knowledge

Respondents argue that MOL's receipt of a number of unexplained "Shipline" documents from GLL constitutes knowledge of "split routing" on the part of MOL. For many of the same reasons set forth above with respect to the Spirit Trucking invoices, this argument fails.

As an initial matter, the number of "Shipline" documents that GLL has submitted as evidence (209 covering some 815 containers) represent a miniscule fraction of the approximately 75,000 containers that were shipped under its "split routing" scheme. See GLL PFF 69, 72 and 75. These "Shipline" documents refer to only a small number of door points, with the vast

majority of them referring to one of three locations (Winnsboro, GLL PFF 69; Ridgeway, GLL PFF 72; and Bassett, GLL PFF 75). *Id.* The “Shipline” documents for each of these three locations are dated within no more than six months of each other, meaning that MOL received them for only a fraction of the time it did business with GLL. Thus, in terms of both volume and duration, these documents at best represent an extremely limited and fleeting picture of GLL’s operations. This picture is not sufficient to constitute knowledge on the part of MOL, particularly when one considers these documents in context.

Moreover, GLL has not offered the testimony of any individual in connection with these or any other Shipline documents. However, the GLL Voluntary Disclosure clearly and unambiguously describes the split routing practice and the use of multiple sets of documents and fraudulent delivery orders. As GLL explained, it would book cargo with MOL and other carriers and in the booking misrepresent the destination of the shipment. GLL would follow up by sending MOL and other carriers fraudulent delivery orders (the so-called “Shipline” documents). The actual destinations would be contained in “Truckline” delivery orders which were sent to GLL’s preferred truckers, not the MOL or the other ocean carriers. In GLL’s Voluntary Disclosure, there are eight examples of the implementation of this fraudulent practice with regard to cargoes booked with MOL. *GL App. 0073.*

Apparently, through some inadvertence, during a period of time, a relatively small number of Shipline documents with correct destinations were allegedly sent to some MOL personnel. There is no testimony or evidence about these documents, in particular why they were sent, whether there was any discussion about them, how, if at all they were used, etc. What is clear is that any Shipline delivery orders with the correct destinations were isolated and the

exception from the standard practice. See Voluntary Disclosure, ¶¶ 11-14 and Exhibit F (MOL App. 0114-0116 and 0179).

It is simply not reasonable to have expected MOL to understand, based on the receipt of a limited number of unexplained “Shipline” documents for a limited number of locations during a limited timeframe that GLL, a large customer, was engaged in a massive fraudulent scheme carried out by the creation of two sets of documents for each shipment moving by split routing and with the cooperation of preferred truckers that ignored MOL’s TPOs in favor of the “Truckline” documents issued by GLL.⁴¹

(4) *The August 15, 2005 Email from Paul McClintock to Ted Holt Does Not Prove MOL Had Knowledge of Split Routing*

Respondents argue that this August 15, 2005 email (GLL App. 128) is evidence that Paul McClintock discussed “split routing” with Kevin Hartmann, and that this constitutes knowledge of split routing on the part of MOL. This argument is pure supposition and is simply not supported by the facts.

As an initial matter, the conclusion reached by Respondents is contradicted by McClintock’s own testimony. McClintock testified that he had no specific recollection of having spoken with Hartmann about “split routing.” McClintock Dep. at 303:9-3-305:1 (MOL App. 2014). Indeed, McClintock maintained that he never even heard of “split routing.” McClintock Dep. at 104:16-105:2 (MOL App. 2008). McClintock also testified that if he had spoken with anyone—not just Hartmann—about this August 15, 2005 email, he would have discussed these movements as being a “very small percentage or one-off situations, as opposed to a common practice” McClintock Dep. 305:2-306:6 (MOL App. 2014-2015).

⁴¹ See footnote 40, *supra* and *Inlet Fish Producers, infra*.

Respondents' argument is also flatly and forcefully contradicted in the sworn statement submitted by Kevin Hartmann, MOLAM's Vice-President, Law & Insurance, in this proceeding. Hartmann Dec. ¶¶ 19-21 (MOL App. 1633). Moreover, had this email been forwarded to Mr. Hartmann, or had any discussion of this email taken place, one would expect to see further communications on the subject. However, a thorough search did not reveal evidence of this email having been forwarded to Mr. Hartmann, or any subsequent messages on this subject. *Id.* See also, Declaration of David S. Fernandez, ¶4 (MOL Exh. CW, MOL App. 2176). In addition, Mr. Ted Holt of MOLAM confirms that he never discussed this message with Mr. Hartmann, contrary to McClintock's testimony. Declaration of Edward Y. Holt, III, ¶¶ 4 and 5 (MOL Exh. CV, MOL App. 2171).

In short, this email at most proves that McClintock told Holt that McClintock would speak to Hartmann. The only evidence available demonstrates, however, that no such conversation took place.⁴² Hartmann Dec. ¶19 (MOL App. 1633). If anything, this email constitutes further evidence that McClintock sought to keep "split routing" a secret from the rest of MOL. See discussion at pp. 37 to 43, *supra*.

V. MOL'S CLAIMS ARE NOT BARRED BY THE STATUTE OF LIMITATIONS

Because the knowledge of Paul McClintock and Rebecca Yang may not be imputed to MOL, and because MOL did not otherwise have knowledge of the split routing practice herein at issue, MOL did not discover the existence of its claims based on split routing until mid-2008. MOL PFF 31. Accordingly, its claims are not barred by the statute of limitations.

⁴² As noted above, McClintock was acting contrary to the interests of MOL. Thus, McClintock's testimony about what he told MOL about GLL's practices is at best unreliable. For example, in his deposition McClintock testified that he didn't know where Winnsboro, LA is (McClintock Dep. 105:12-17, MOL App. 2008, but in December of 2005 he approved a trucking payment for movements to that location. GLL App. 0129.

A. The Applicable Legal Standard

The Commission has adopted the so-called “discovery rule,” under which a cause of action accrues when a plaintiff knew or should have known it had a cause of action. *Inlet Fish Producers, Inc. v. Sea-Land Service, Inc.*, 29 S.R.R. 306, 313 (FMC 2001); *Maher Terminals LLC v. Port Authority of New York & New Jersey*, 32 S.R.R. 1, 10 (ALJ 2011). In adopting the discovery rule, the Commission stated:

It would not be appropriate for Inlet Fish to lose its right to seek Commission adjudication of its dispute when it had no conclusive information about such a dispute for several years after the shipments took place.

There are compelling reasons suggesting that a flexible approach to the accrual of a cause of action is the better course of action. The Commission has an interest in the precedent established by its adjudication of alleged Shipping Act violations-- such adjudication is a form of private enforcement of the rights established by Congress in the statute. Based on this understanding of the Act, a flexible rule permitting the inclusion of complaints that would otherwise be dismissed under a more strict approach would allow the Commission to pass on the legality of allegedly injurious conduct. Also, application of a stricter rule would exonerate certain respondents even if their conduct were unlawful, simply because a potential complainant was unable to identify the existence of its cause of action.

29 S.R.R. at 313 (emphasis added). In other words, based on the remedial purposes of the Shipping Act, the Commission has adopted a flexible policy with respect to the accrual of a cause of action under the Act.

In light of the foregoing, much of the precedent relied upon by Respondents (particularly GLL) can be distinguished and is inapposite. The vast majority of the cases relied upon by Respondents in support of their arguments with respect to the statute of limitations (e.g., *Skvira v. U.S.*, 344 F.3d 64 (1st Cir. 2003), *McIntyre v. U.S.*, 367 F.3d 38 (1st Cir. 2004)) involve litigation against the U.S. government under the Federal Tort Claims Act (“FTCA”). The FTCA is a partial waiver of the sovereign immunity of the United States, and courts are therefore appropriately cautious about extending that waiver beyond what Congress intended through a

liberal interpretation of the statute of limitations. *United States v. Kubrick*, 444 U.S. 111, 118 (1979). Because the Shipping Act involves no such policy consideration, and because the Commission has indicated that it intends to have a flexible policy with respect to the accrual of a cause of action, the FTCA discovery rule standards advocated by Respondents are unduly restrictive and are not applicable to the Shipping Act.

Cases decided under statutes with remedial purposes similar to that of the Shipping Act provide more appropriate guidance for the Commission on the application of its discovery rule. In this regard, the U.S. Supreme Court has held that where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered. *TRW Inc. v. Andrews*, 534 U.S. 19, 27 (2001), citing *Holmberg v. Ambrecht*, 327 U.S. 392, 397 (1946).

TRW involved a claim under the Fair Credit Reporting Act, a statute with a remedial purpose similar to that of the Shipping Act. Similarly, in *Merck v. Reynolds*, 559 U.S. 633, 130 S.Ct. 1784 (2010), the Supreme Court considered application of the discovery rule in a private securities fraud action brought under federal statutes. It held that for purposes of the securities statute, the limitation period begins to run once the plaintiff discovers, or a reasonably diligent plaintiff would have discovered, the facts constituting the violation. 130 S.Ct. at 1798. It also held that in determining when discovery of the facts occurred, concepts such as “inquiry notice” and “storm warnings” (i.e., the concept that the statute of limitations begins to run when a plaintiff has facts which should prompt it to investigate) were useful in determining when investigation would be prudent, but that the statute of limitations would not begin to run until:

the plaintiff thereafter discovers or a reasonably diligent plaintiff would have discovered ‘the facts constituting the violation,’ including scienter -- irrespective of whether the actual plaintiff undertook a reasonably diligent investigation.

Id. See also, *New England Health Care Employees Pension Fund v. Ernst & Young, LLP*, 336 F.3d 495, 501 (6th Cir. 2003) (“The majority view, however, is that knowledge of suspicious facts -- “storm warnings,” they are frequently called -- merely triggers a duty to investigate, and that the limitation period begins to run only when a reasonably diligent investigation would have discovered the fraud.”)

The foregoing is consistent with the admonition of the court in *United States ex rel.*

Miller v. Bill Harbert International Construction, 505 F.Supp. 2d 1, 8 (D.C. Cir. 2007):

In cases where the defendant has engaged in fraudulent concealment, however, the defendant must prove that the plaintiff had a higher degree of knowledge than inquiry notice of the fraud in order to prevail on a statute of limitations defense. The defendant has the burden of ‘coming forward with any facts showing that the plaintiff could have discovered their involvement or the cause of action had the plaintiff exercised due diligence.’

(citations omitted). In other words, when fraud is involved, the statute of limitations begins to run when the plaintiff discovers or should have discovered the fraud. More than mere inquiry notice is required to find that a plaintiff “should have known,” and the burden is on the defendant to show the plaintiff could have discovered the cause of action.

Section 10(a)(1) of the Shipping Act involves fraud and an element of scienter.

Accordingly, the Commission should be guided by *TRW and Merck*, rather than the cases cited by Respondents and should find that with respect to Section 10(a)(1), the statute of limitations begins to run when the complainant discovers, or a reasonably diligent complainant should have discovered, the fraud or other deceptive conduct giving rise to the claim. It should also find that more than inquiry notice is required to begin the running of the statute of limitations, and that the

burden is on the Respondents to show more than inquiry notice to prevail on a statute of limitations defense.⁴³

Having said this, regardless of whether one applies the unduly restrictive standard advocated by Respondents or the more flexible and appropriate policy described above, under the facts of this case MOL did not discover the facts until July of 2008, and could not have discovered them prior to that time, even with the exercise of reasonable diligence. In other words, as explained further below, MOL had no reason to investigate the conduct of GLL prior to mid-2008 and, even if it had, an investigation would not have uncovered the split routing practice at that time.⁴⁴

B. The Knowledge of McClintock and Yang May Not Be Imputed To MOL For Purposes Of The Statute Of Limitations

Respondents allege that Paul McClintock and Rebecca Yang had knowledge of the split routing practice, that such knowledge should be imputed to MOL, and that as a result MOL had knowledge of split routing more than three years prior to the filing of the complaint. For the reasons set forth at pages 37 to 51 herein, the alleged knowledge of McClintock and Yang may not be imputed to MOL, and thus MOL had no knowledge of the split routing practice until late July of 2008, when McClintock was served with a subpoena in the arbitration between the current and former owners of GLL.

⁴³ The use of a fraud standard is appropriate because Section 10(a)(1) of the Shipping Act prohibits fraudulent conduct, and courts have held that the nature of a claim, rather than the statute under which it arises, determines when the claim accrues. See, *Aryeh v. Canon Business Solutions, Inc.*, 55 Cal.4th 11851196 (2013). The FMC recognized this concept in *Inlet Fish*, where it considered different accrual periods for claims under different provisions of the Shipping Act 29 S.R.R. at 312.

⁴⁴ In this regard, it should be noted that the current owners of GLL did not uncover the practice until after they purchased the company, and then only because of a whistleblower memorandum.

C. MOL Did Not Otherwise Have Knowledge Of The Relevant Facts Prior To July/August 2008

Aside from the alleged knowledge of McClintock and Yang (which cannot be imputed to MOL), the only information in the possession of MOL with respect to split routing were bits and pieces of isolated information relating to specific shipments which various low-level employees of MOL came across in the performance of their ordinary duties. GLL tries to weave these thin and disparate threads into a tapestry of “knowledge” (GLL brief at 35). However, this attempt fails for two reasons.

First, the information available to these low-level employees does not even rise to the level of suspicious facts and thus, under *New England Health Care, supra.*, did not constitute knowledge that started the clock on the statute of limitations. Put another way:

‘A claim does not accrue when a person has a mere hunch, hint, suspicion, or rumor of a claim...’

McIntyre v. U.S., 367 F.3d 38, 52 (1st Cir. 2004), citing *Kronisch v U.S.*, 150 F.3d 112, 121 (2nd Cir. 1998).

The proposed findings of fact that GLL cites in support of its argument that “countless numbers” of MOL employees were aware of split routing demonstrate that the information available to MOL did not reach the level of a hunch, hint, suspicion or rumor, much less the “conclusive information” that the Commission found necessary to support knowledge of a Shipping Act violation in *Inlet Fish Producers*. More specifically, GLL’s proposed finding of fact 48 deals with an alleged communication from Paul McClintock to Kevin Hartmann, which has already been more than adequately refuted. See Hartmann Dec., ¶¶20 and 21 (MOL App. 1633). GLL’s proposed findings of fact 67 and 81 each deal with a Shipline Delivery Order sent to certain MOL employees. GLL also refers to a limited number of other situations in which

GLL inadvertently provided actual destination information on a limited number of shipments to certain low level employees of MOL.

The foregoing facts put MOL in a situation that is virtually identical to the complainant in *Inlet Fish Producers*, the case in which the FMC adopted the discovery rule. In that case, the complainant's cargo was transported in mid-1996, but the complaint was not filed until early 2000. The ALJ and the Commission both found that the statute of limitations did not begin to run until the complainant learned of the allegedly unlawful conduct in 1998. This was in spite of the fact that in the fall of 1996 the complainant was told of the conduct by some of its customers, and had documents from that same time period that reflected the conduct. 29 S.R.R. at 314. However, the Commission found that this information did not constitute knowledge. The ALJ was even more emphatic, saying:

IFP did not have the requisite facts as to how the shippers were permitted to understate the freight weight and how the carrier was permitting this until 1998 when Mr. Goddard learned of the alleged practice from a former MSL employee. If IFP has filed suit in 1996 it would have been 'laughed out of court.' At that time IFP had only rumors from its Japanese customers but MSL vehemently denied any knowledge of such a practice. MSL argues that with reasonable diligence IFP could have located the vital Cook documents in 1996. But it must be realized that IFP shipped several million pounds of salmon a year and had thousands of shipping documents....At that point, the location of the Cook documents was essentially unknowable. It would have been like looking for the proverbial 'needle in a haystack.'

28 S.R.R. at 1631.

Here, MOL was moving thousands of shipments annually for GLL. Expecting MOL employees in operation or accounting to recognize that a sophisticated and complex scheme of split routing, involving thousands of shipments, was being conducted on the basis of some delivery orders or trucking invoices showing an apparently incorrect delivery location is the equivalent of locating a needle in a haystack. It is certainly not a sufficient basis for a reasonable

person to suspect, much less conclude, that GLL was intentionally deceiving MOL with respect to split routing.⁴⁵ *See, e.g.,* Camacho Declaration, MOL App. 2151. Indeed, it was not until MOL received Respondents' production in discovery and was able to determine where cargo was actually delivered that it understood how the split routing scheme operated.

Moreover, even if the knowledge held by these employees is imputed to MOL, just as in *Merck*, there was no indication of scienter and hence MOL was not put on notice inquiry. In other words, if MOL had filed a complaint alleging a violation of Section 10(a)(1) in 2004 or 2005, it would have lacked the facts necessary to allege the deceptive practice necessary to sustain an allegation of a Section 10(a)(1) violation and would have been "laughed out of court."⁴⁶ Courts have held that reassurances can dissipate apparent "storm warnings" if "an investor of ordinary intelligence would reasonably rely on them to allay the investor's concerns." *In re Merck & Co. Inc. Securities, Derivative and "ERISA" Litigation*, 543 F.3d 150, 168, n.14 (3rd Cir. 2008). Here, the employees of MOL who might have had an indication of a discrepancy on certain shipments were receiving such assurances from GLL on the one hand and McClintock and Yang on the other. Thus, McClintock and Yang, in a course of conduct that further confirms that they were acting adversely to the interests of MOL, were reassuring any MOL employees that raised questions about the destinations of containers that they would "take care of it," all the while doing nothing. *See*, Hartmann Dec., ¶¶ 19-21 (MOL App. 1633); Holt Declaration, ¶3 (MOL App. 2171).

⁴⁵ *See, e.g., Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336 (D.C. Cir. 1991). In that case, where the employer was legally obligated to make accurate pension fund contributions, a small underpayment for the period 1977 to 1979 did not put the trustees on notice of possible future underpayments.

⁴⁶ Finding that this knowledge should be imputed to MOL would be tantamount to rewarding GLL for conducting a less than 100% efficient campaign of deception, i.e., telling others tempted to engage in this conduct that they can get away with it if they let a few clues slip through to the carrier, because they can later use those clues to claim the carrier had knowledge of the activity.

D. MOL Could Not Have Learned Of The Fraud Perpetrated On It Any Sooner

Not only did MOL not know of the split routing practice prior to July of 2008, it could not have learned of the fraud sooner than that, even with the exercise of due diligence. As an initial matter, as noted above, the snippets of information received piecemeal by different MOL employees about a relatively small number of shipments out of thousands did not trigger an obligation to investigate, much less the running of the statute of limitations. Even if they did, as explained above, an investigation would not have uncovered the split routing practice.

There were two means by which MOL (or any other potential plaintiff) could have investigated suspicions of split routing. One would be to review the documents relating to shipments and the other would have been to interview the MOL employees most familiar with GLL and its operations. In fact, MOL pursued both avenues of inquiry.

Because GLL had been maintaining two sets of documents with respect to shipments that were the subject of split routing, the documentary information necessary to determine whether MOL might have a cause of action was in the sole possession, custody and control of GLL. Accordingly, MOL demanded that GLL provide an accounting of all its shipments with MOL, but GLL refused. MOL PFF 34 and 35. Thus, this line of inquiry, diligently pursued, produced no results due to GLL's intransigence.⁴⁷

MOLAM's Vice-President of Law & Insurance also pursued the other available line of inquiry, and interviewed the two MOL employees most familiar with GLL: McClintock and Yang. In those interviews, those employees denied having any knowledge of split routing (Hartmann Dec., ¶¶ 17 and 18, MOL App. 1632). Indeed, both of these individuals continued to

⁴⁷ Reviewing only those documents in the possession of MOL would have been fruitless, due to GLL's use of two separate sets of documents for shipments it carried out under its split routing scheme. To the extent that some documents reflecting split routing may have been in the possession of MOL prior to 2008, these documents were the "needle in the haystack" that the Commission found did not trigger the statute of limitations in *Inlet Fish Producers*.

maintain that position in their depositions in this proceeding, even after they had left MOL's employ.

Because the investigation carried out by MOLAM Vice-President of Law & Insurance after receipt of the subpoena in July of 2008 did not reveal the fraud being committed on MOL, there is absolutely no reason to conclude that such an investigation would have produced different results had it been conducted earlier. This conclusion is reinforced by the fact that the new owners of GLL, which conducted due diligence before purchasing the company, did not learn the extent of the split routing practice until long after the purchase had been completed. If a purchaser engaging in due diligence with access to corporate records failed to uncover a practice, how could a third-party such as MOL with no access to the records be expected to do so?

In light of the foregoing MOL did not, could not and should not have known of the fraud being committed upon it prior to July/August of 2008. Since the complaint in this proceeding was filed within three years of MOL's learning of the fraud and its cause of action against the Respondents, the claim is not barred by the statute of limitations.

E. Even If It Is Determined That MOL Should Have Known About Split Routing, Its Claim Is Not Barred By The Statute Of Limitations

Because of other legal doctrines relating to the statute of limitations, even if the Presiding Officer determines that MOL should have known about the practice of split routing at a point in time that falls outside the statute of limitations (which, for the reasons set forth above he should not), MOL's claim is not time barred.

(1) *Because The Conduct of Respondents Constitutes A Civil Conspiracy, The Statute Of Limitations Did Not Begin To Run Until 2007*

Under California law, when a claim involves a civil conspiracy, the statute of limitations does not begin to run on any part of plaintiff's claims until the 'last overt act' pursuant to the conspiracy has been completed. *Wyatt v. Union Mortgage Co.*, 24 Cal.3d 773, 786 (1979). As noted, since the contracts between GLL and MOL were governed by California law application of this principle is appropriate in this case.

Liability for civil conspiracy requires three elements: (1) formation of a conspiracy (an agreement to commit wrongful acts); (2) operation of the conspiracy (commission of the wrongful acts); and (3) damage resulting from operation of the conspiracy. *People ex rel. Kennedy v. Beaumont Investment, Ltd.*, 111 Cal.App.4th 102, 137 (Cal. Ct. App. 2003). Knowledge that the conduct is wrongful is also required, but can be inferred from the surrounding circumstances. *Id.*

The facts of this case establish a conspiracy under the foregoing criteria. GLL, Rosenberg and the other Respondents agreed to and did engage in split routing, and continued to do so with the knowledge and approval of the Olympus Respondents. The Respondents also colluded with their preferred truckers. MOL can prove it was damaged by the practice. The Respondents were told, both by their own employees and maritime counsel, that the practice was unlawful. Such knowledge can also be inferred from the lengths to which Respondents went to keep the conduct hidden from MOL and the purchasers of GLL.

Because there was a civil conspiracy, the statute of limitations did not begin to run on any part of MOL's claim until GLL committed the last overt act pursuant to the conspiracy, i.e.,

engaged in split routing for the last time. That occurred in early 2007. GLL Voluntary Disclosure, ¶9, MOL App. 0113. Accordingly, the complaint was timely filed.⁴⁸

(2) *Because Respondents' Conduct Constitutes A Continuing Violation, MOL's Claim Is Not Barred By The Statute Of Limitations*

GLL's practice of split routing began in the earliest days of the company and continued without interruption until 2007. Under the continuing violation doctrine, MOL is entitled to recover for all harm suffered as a result of the continuing violation, even if some of the shipments otherwise fall outside of the statute of limitations.

Simply stated, the continuing violation doctrine permits recovery for:

actions that take place outside the limitations period if these actions are sufficiently linked to unlawful conduct within the limitations period. The key is whether the conduct complained of constitutes a continuing pattern and course of conduct as opposed to unrelated discreet acts. If there is a pattern, then the suit is timely if 'the action is filed within one year of the most recent violation' and the entire course of conduct is at issue.

Komarova v. National Credit Acceptance, Inc., 175 Cal. App.4th 324, 343 (Cal. Ct. App. 2009), citing *Richards v. CH2M Hill, Inc.*, 26 Cal.4th 798, 812 (2001) and *Joseph v. J.J. Mac Intyre Companies, L.L.C.*, 281 F. Supp.2d 1156 (N.D. Cal 2003).

The continuing violation doctrine has been applied by both federal and state courts in a wide variety of contexts. See., e.g., *AMTRAK v Morgan*, 536 U.S. 101 (2002)(when determining liability of employer for hostile work environment claim, courts may consider entire period environment existed, even if some component acts fall outside the statutory time period); *Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968)(where conduct in violation of antitrust laws began in 1912 and continued until suit was filed in 1955, claim filed in 1955 was not barred by statute of limitations); *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918 (9th Cir.

⁴⁸ Under civil conspiracy jurisprudence, the fact that MOL may have known about the conduct prior to filing the complaint is irrelevant. In *ex rel. Kennedy*, where the conduct complained of continued during trial, the court found that the statute of limitations had not yet accrued. 111 Cal.App.4th at 138.

1982)(systematic policy of discrimination actionable even if some or all of the events evidencing its inception occurred prior to limitations period); *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal.4th 1028 (2005)(continuing violation doctrine applicable to employee's retaliation claim against employer).

The Shipping Act also recognizes the concept of a continuing violation. 46 U.S.C. §41107(a). Application of the continuing violation doctrine is appropriate in this proceeding because the use of split routing by GLL constituted a continuing pattern and course of conduct as opposed to unrelated discreet acts. Indeed, the split routing scheme and the shipments made pursuant to that scheme constitute a single, indivisible unjust or unfair device or means. Because there is a pattern, and the complaint was filed within three years of the most recent shipments, the complaint is timely filed and the entire course of conduct is at issue.⁴⁹

In conclusion, if the Commission holds that MOL's claim is barred by the statute of limitations, it would in effect be declaring that one can violate the Shipping Act with impunity through any type of deceptive scheme whatsoever, as long as the scheme can be hidden for three years. If one is successful in hiding the scheme for a period of time, one would be held answerable only for those shipments under that scheme that fall within the 3-year statute of limitations. Such a result would be inconsistent with the remedial purposes of the Shipping Act, contrary to the purpose for which the Commission adopted the discovery rule in the first place, and manifestly unjust in that it would reward Respondents for their fraudulent conduct. Instead, the Commission should send a strong message that those who violate the Shipping Act by engaging in deceptive behavior will not be able to avoid liability by invoking the statute of limitations, and hold Respondents accountable for the full consequences of their unlawful split routing scheme.

⁴⁹ As with the civil conspiracy theory, MOL's knowledge is irrelevant under the continuing violation doctrine.

VI. CJR RESPONDENTS' ARGUMENT CONCERNING DAMAGES ARE WITHOUT MERIT, AND MOL IS ENTITLED TO REPARATIONS

The CJR Respondents alone argue that MOL is not entitled to damages because it has not suffered a pecuniary loss. As explained further below, this argument lacks both factual and legal merit.

The CJR Respondents' legal argument with respect to damages is misguided. They rely on *James J. Flanagan Shipping Corp. v. Lake Charles Harbor and Terminal District*, 30 S.R.R. 8, 13 (FMC 2003) for the proposition that absent proof of pecuniary loss, a complainant is not entitled to reparations. While this arguably may be true with respect to alleged violations of section 10(d)(1) of the Shipping Act (which was the only statutory provision at issue in the *Flanagan* case), a different standard applies with respect to violations of Section 10(a)(1), which is the statutory section primarily at issue in this proceeding.

The Commission considered and rejected the very arguments being made by the CJR Respondents in *American President Lines, Ltd. v. Cyprus Mines Corporation*, 26 S.R.R. 1227 (FMC 1994). In that case, the carrier sued the shipper under Section 10(a)(1) to collect the difference between the rate charged (which was for copper scrap) and the higher rate for copper cathodes, which it alleged was the lawfully applicable rate. The administrative law judge found that the shipments had been misdescribed by the shipper, that they were in fact copper cathodes and should have been rated as such, and granted summary judgment for APL in an amount equal to the difference between the rate that was initially charged and collected and the lawfully applicable higher rate that should have applied. In so doing, he found that the filed rate doctrine required collection of the lawfully applicable rate, and that the phrase "actual injury" in section 11(g) did not change application of the filed rate doctrine to Section 10(a)(1) cases. 26 S.R.R. 969 (ALJ 1993).

On appeal, the Commission affirmed the decision of the ALJ. In so doing, it held that a carrier is legally required to collect the applicable rate from the shipper, regardless of whether there was an agreement between the carrier and the shipper that a lower rate would be charged. 26 S.R.R. at 1232. With regard to the “actual injury” language of Section 11(g), the Commission rejected the respondent’s argument that this language precluded recovery of the difference between the rate charged and the properly applicable rate without a showing of actual injury, saying:

There is, however, no indication elsewhere in the statutory text or in the legislative history that Congress intended to repeal the filed rate doctrine for 1984 Act cases. If anything it appears that the construct ‘actual injury’ in fact expands rather than limits the application of the doctrine in private complaint cases before the Commission, in that it includes not only reparations as a remedy for violations but also interest and attorney’s fees.

26 S.R.R. at 1233. The Commission then affirmed the ALJ’s order awarding APL the difference between the rate collected and the rate that should have been collected, with no inquiry whatsoever into whether APL suffered actual monetary loss.

Accordingly, with respect to an alleged violation of Section 10(a)(1), the CJR Respondents’ argument that MOL must show monetary loss is without a basis in law. Under directly applicable Commission precedent, in order to recover reparations for a violation of Section 10(a)(1), all MOL need show is that the rate collected was not the lawful rate and that the proper, lawfully applicable rate is higher than the rate collected. See also, *ISS Express Lines, Inc. v. President Container Lines, Ltd.*, 26 S.R.R 1370 (S.O. 1994)(damages equal to difference between rate charged and lower tariff rate, not difference between rate charged and even lower rate allegedly agreed upon by the parties).

The factual argument of the CJR Respondents is also without merit. In this regard, they argue that because MOL typically passed through the cost of inland transportation and did not

profit from that portion of transport, it did not suffer any loss as a result of the practice of split routing.⁵⁰ This argument is based on the deposition of McClintock. However, the argument is incorrect and ignores both the nature of the GLL contracts with MOL and other testimony by McClintock.

More specifically, the rates in GLL's service contracts with MOL are expressed as single-factor, through intermodal rates, meaning that the price for moving the cargo from the port of origin to the point of destination was stated as a single number, without a separate price reflected for the inland leg of the move. See, MOL Exhibit BV, MOL App.1703-1714; MOL Exhibit BW, MOL App. 1743-1757; MOL Exhibit BX, MOL App. 1782-1795; MOL Exhibit BY, MOL App.1826-1855; MOL Exhibit BZ, MOL App. 1884-1890.

Moreover, McClintock's testimony is contradictory on the relationship between costs and inland rates (or that portion of a through intermodal rate that represents the inland portion of the cargo movement). Although McClintock, in his deposition, indicated that there was a close relationship between costs and inland rates, he also testified that there are many factors which determine the extent to which the actual cost of providing inland transportation may or may not be reflected in a through rate. McClintock Deposition, p. 87:5-19 (MOL App. 2007). Thus, the testimony cannot bear the weight which Respondents seek to place on it.⁵¹

In light of the foregoing, one cannot necessarily assume that each and every through rate contained an element of inland transportation cost equal to the actual cost of providing the inland service. Moreover, the manner in which the rates were calculated has nothing to do with and is

⁵⁰ In footnote 16 of the CJR Respondents' Brief, they argue that any losses associated with split routing would be borne by the NVOCC, in this case, GLL. If accepted as true, this argument means that Respondent Rosenberg intentionally adopted a loss-making strategy for his company. What footnote 16 and the argument contained therein prove is Respondent Rosenberg's total lack of credibility, rather than anything having to do with damages.

⁵¹ See footnote 42, *infra*

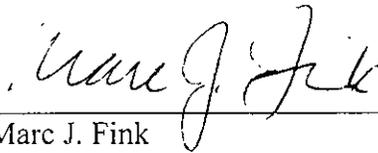
irrelevant as to whether MOL suffered a loss. One doesn't need to know how the number set forth in the contract was derived. As noted above, all one needs to know is that in the case of moves which were subject to split routing, the move performed was not the move reflected in the documentation, and should have been rated under the tariff or a different contract rate than was applied.

Accordingly, Respondents' argument with respect to damages is inapposite.

VII. CONCLUSION

In light of the foregoing, the Presiding Officer should find that Respondents have violated Sections 10(a)(1) and 10(d)(1) of the Shipping Act as well as 46 C.F.R. §515.31(e) of the Commission's regulations, and award MOL reparations plus interest and attorneys' fees.

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May 1, 2013

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**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No. 09 -01

MITSUMI 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, DAVID
CARDENAS, KEITH HEFFERNAN, CJR WORLD ENTERPRISES, INC. AND CHAD J.
ROSENBERG**

RESPONDENTS

**REBUTTAL PROPOSED FINDINGS OF FACT OF
COMPLAINANT MITSUI O.S.K. LINES, LTD.**

For the convenience of the Presiding Officer, Complainant Mitsui O.S.K. Lines, Ltd. hereby submits additional proposed findings of fact which are in rebuttal to arguments raised by Respondents. MOL's initial Proposed Findings of Fact, are incorporated by reference herein.¹

181. The MOL service contracts dated May 11, 2004 (MOL App. 1694), May 1, 2005 (MOL App. 1734) and February 20, 2006 (MOL App. 1773) previously entered into the record were signed by Rosenberg.

¹ Terms used herein and not otherwise defined have the meaning set forth in Complainant's Opening Submission filed on January 11, 2013.

182. CJR World Enterprises, Inc. (“CJRWE”) is a Florida corporation. It was the owner of those shares of GLL not owned by some of the Olympus Respondents. Chad J. Rosenberg was and is the sole shareholder, director and officer of CJRWE. Partial Final Arbitration Award, p. 3 (MOL App. 3).

183. CJRWE did not file the annual reports required by Florida law between April 20, 2003 and September 12, 2010. Under Florida law, failure to file an annual report results in the administrative revocation of the company’s status. Fla. Stat §§617.1420 and 617.1421 (2012). Thus, although CJRWE filed for reinstatement of its status on November 1, 2004, May 17, 2006, September 21, 2007 and November 6, 2009, the fact that it failed to file reports in all of those years and needed to apply for reinstatement demonstrate that it was not in good standing for much of that period. MOL Exh. CC, MOL App. 1945.

184. GLL and the other Respondents collaborated with two MOL employees, Paul McClintock (“McClintock”) and Rebecca Yang (“Yang”), to keep “split routing” a secret from MOL. (Briles Dep. at 125:20 and 134:3-17; MOL Exh. “U” (MOL App. at 1225-6); Rosenberg Declaration at ¶¶ 52-55 (CJR Exh. A) (CJR App. at 9); Briles Declaration at ¶¶ 27-28, 38-39, 44 (CJR Exh. B) (CJR App. at 16, 18-19, 20); and Latham Declaration at ¶ 5 (CJR Exh. C) (CJR App. at 29)).

185. By their own admission, Respondent Rosenberg and Briles—an owner and senior employee of GLL—conspired with McClintock and Yang to hide the “split routing” scheme from the rest of MOL. Rosenberg Dec. at ¶¶ 52-54 (CJR Exh. A) (CJR App. 9); Briles Dec. at ¶¶ 26-28 (CJR Exh. B) (CJR App. 16-17). *See also* Feitzinger Dep. at 210:6-211:5 (MOL Exh. CH, MOL App. 1997-98) (McClintock “colluded” with Briles to hide “split routing” from MOL).

186. McClintock and Yang's denials of their involvement in split routing are contradicted by the testimony of others. *See* Briles Dep. at 125:20 and 134:3-17, MOL Exh. "U" (MOL App. at 1225-6); Rosenberg Declaration at ¶¶ 52-55 (CJR Exh. A) (CJR App. at 9); Briles Declaration at ¶¶ 27-28, 38-39, 44 (CJR Exh. B) (CJR App. at 16, 18-19, 20); and Latham Declaration at ¶ 5 (CJR Exh. C) (CJR App. at 29).

187. McClintock and Yang told GLL not to discuss "split routing" with anyone else at MOL. Rosenberg Dec. at ¶¶ 54-55, GLL Exh. A, GLL App. at 009; Briles Dec. at ¶¶ 27-28, 31-32, GLL Exh. B, GLL App. at 016-17; and Briles Dep. at 134:3-17, MOL Exh. "U" (MOL App. at 1226).

188. Rosenberg and Briles state in their respective declarations that McClintock and Yang did not want MOL operations personnel to know about "split routing." Rosenberg Dec. at ¶ 54; CJR App. 9 and Briles Dec. at ¶ 28; App. 17).

189. There are numerous examples of McClintock and Yang acting contrary to the interests of MOL and in support of the interests of GLL. *See* Minck Declaration (MOL Exh. CS, MOL App. 2077-2149) and Declaration of Richard J. Craig (MOL Exh. CU, MOL App. 2152-2169).

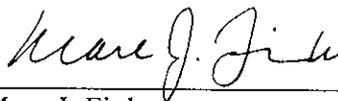
190. Respondents knew that McClintock and Yang had no authority to approve of split routing and that they were acting directly contrary to the interest of MOL. Feitzinger Dep. at 205:10-206:23 (MOL App. 1995-96) ;Feitzinger Dep. at 210:6-211:5 (MOL App. 1997-98).

191. Because McClintock and Yang advised GLL to keep the scheme among themselves (Rosenberg Dec. at ¶¶ 53-55 (CJR App. 009); Briles Dec. at ¶¶ 27-29 (CJR App. 016-17), Respondents knew that McClintock and Yang had no authority to allow split routing.

192. Split routing was not done for the administrative convenience of MOL. Rather, the practice was wholly for the benefit of GLL. *See* Declaration of Warren Minck (MOL Exh. CS, MOL App. 2077).

193. MOL did not have knowledge of GLL's split routing scheme. While there were isolated instances of MOL employees receiving documents that reflected the actual destination, instead of the fictitious destination booked by GLL (e.g., delivery orders), that cannot be found to be knowledge of the massive fraudulent practice utilized by GLL for thousands of shipments. *See* Declarations of Richard J. Craig, Felicita Camacho, Warren Minck and Edward Y. Holt III (MOL Exh. CU, CT, CS and CV; MOL App. 2152-69, 2150-51, 2077-2149 and 2170-74).

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Dated: May 1, 2013

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