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OFFICE OF THE SECRETARY
FEDERAL MARITIME COMM

May 24, 2013

VIA HAND DELIVERY

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

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

Dear Ms. Gregory:

Enclosed please find one (1) original and five (5) copies of Olympus Respondents' Motion to Strike False Statements in Complainant's Reply Brief in Further Support of Its Claims Against Respondents, for filing in the above-referenced proceeding.

In accordance with Commission Rule 2(e), 46 C.F.R. § 502.2(e), we will send an electronic PDF copy of the Motion to the Commission after filing.

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

Very truly yours,

A handwritten signature in black ink that reads 'Warren L. Dean'.

Warren L. Dean

Enclosures

cc: Service List



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BEFORE THE FEDERAL MARITIME COMMISSION ²⁰¹³ MAY 24 AM 11:03

OFFICE OF THE SECRETARY
FEDERAL MARITIME COMM

MITSUI O.S.K. LINES LTD.,
Complainant

v.

**GLOBAL LINK LOGISTICS,
INC., et al.,**
Respondents.

Docket No. 09 -01

**OLYMPUS RESPONDENTS' MOTION TO STRIKE
FALSE STATEMENTS IN COMPLAINANT'S REPLY BRIEF IN FURTHER
SUPPORT OF ITS CLAIMS AGAINST RESPONDENTS**

Pursuant to Rules 69 and 71 of the Commission's Rules of Practice and Procedure, Respondents Olympus Growth Fund III, L.P. ("OGF"), Olympus Executive Fund, L.P. ("OEF"), Louis J. Mischianti ("Mischianti"), L. David Cardenas ("Cardenas") and Keith Heffernan ("Heffernan") (hereinafter collectively referred to as the "Olympus Respondents"), for the reasons set forth below, request that the Presiding Judge strike the false statements made in the Reply Brief filed by Complaint Mitsui O.S.K. Lines, Ltd. ("MOL") on May 1, 2013 (the "Reply Brief"). This motion to strike is necessary to rid the record of MOL's false statements and other matters discussed herein, and avoid the Presiding Judge's waste of time and judicial resources. *See Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), overruled on other grounds, 510 U.S. 517 (1994) (The function of a motion to strike is "to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial..."). In support, the Olympus Respondents state as follows:

False Statements Regarding Olympus Respondents' Position on Split Routing

The Olympus Respondents move to strike the following false statements:

1. "They [Respondents] do not deny that split routing is a violation of the Shipping Act." MOL's Reply Brief at p. 33.
2. "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 the 'split routing' was illegal. MOL PFF 145 (MOL Exh. BP)." MOL Reply Brief at p. 43, n. 27.

These statements lack record support and knowingly and willfully misstate the Olympus Respondents' position in the record of this proceeding.

The Olympus Respondents have never believed, stated, agreed or conceded that the practice of split-routing is a violation of Section 10(a)(1) of the Shipping Act. Rather, at every opportunity, the Olympus Respondents consistently have opposed, and continue to oppose, MOL's contention that split-routing is a violation of the Shipping Act and have described MOL's allegations of violations of the Shipping Act as just that -- allegations.¹ *See, e.g.,* Motion to Dismiss Improperly Filed Complaint for Lack of Subject

¹ The Olympus Respondents' focus on the issue of the Olympus Respondents' alleged participation in the purported Shipping Act violations was not intended to be, and cannot operate as, a waiver of the Olympus Respondents' strenuous objection to any finding or conclusion that the split-routing practice violates Section 10(a)(1) or any other provision of the Shipping Act. The Commission mandated this focus when it directed the Presiding Judge to determine whether the Olympus Respondents participated in the alleged Shipping Act violations as *individuals and entities rather than shareholders as an initial matter*. Order Denying Appeal of Olympus Respondents, Granting in Part Appeal of Global Link, and Vacating Dismissal of Alleged Violations of Section 10(d)(1) in June 22, 2010 Memorandum and Order on Motions to Dismiss at pp. 34, 36 (Aug. 1, 2011) ("FMC Order").

Matter Jurisdiction and For Failure to State a Claim and For Other Appropriate Relief at pp. 7-21 (Dkt. Entry 10; filed June 17, 2009); Verified Answer of Respondents Olympus Growth Fund III, L.P., Olympus Executive Fund, L.P., Louis J. Mischianti, L. David Cardenas, and Keith Heffernan to the Amended Complaint of Mitsui O.S.K. Lines, Ltd. at p. 1 (discussing "purported" violations) (Dkt. Entry 48; filed July 9, 2010) ("Verified Answer"); Olympus Respondents' Motion for Summary Judgment (Dkt. Entry 98; filed Sept. 28, 2011) ("alleged Shipping Act violations"). The Olympus Respondents sought a declaratory order from the Commission on the proper scope of Section 10(a)(1). *See* Emergency Petition for Declaratory Order, Rulemaking or Other Appropriate Relief in Voluntary Disclosure Investigation (FMC Docket No. 08-07; filed Nov. 13, 2008). The Commission denied the petition on jurisdictional and procedural grounds.

Without revisiting the arguments (that will be for the Court of Appeals), split routing does not involve "ocean transportation," and Congress never intended that the Shipping Act reach transactions between American shippers and American truckers. One does not need a lawyer to tell him that trucks do not float. *See Landstar Exp. Am., Inc v. Federal Maritime Comm'n*, 569 F.3d 493 (D.C. Cir. 2009). The record shows that the Olympus Respondents consistently and unequivocally contested MOL's contention that split routing violates any provision of the Shipping Act. For MOL to assert that the Olympus Respondents have conceded the point is a deliberate and overt attempt to mislead the Presiding Judge as to the state of the record and the positions of the parties on key issues.

Regarding MOL's second statement, the Olympus Respondents did not receive legal advice that split-routing violated Section 10(a)(1) of the Shipping Act.² GLL management advised Mr. Heffernan that the practice was legal. Affidavit of Keith Heffernan at ¶ 6 (O.R. App. 34).

No one had any reason to suspect that the practice was illegal, given that the Commission had not ruled it illegal. The authority that the Commission relied upon in this case, *Kawasaki Kaisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S. Ct. 2433 (2010), was not decided until 2010 – years after GLL had ended the practice. That decision involved the Carriage of Goods by Sea Act, not the Shipping Act.

Furthermore, if the practice were illegal, it is only illegal because MOL's tariff does not provide for it. Other carriers do permit the practice. *See* APL's Tariff authorizing split routing, as referenced in Olympus Respondents' Motion for Briefing, Oral Argument and Investigation at pp. 6-7 (Dkt. Entry 31; filed Oct. 9, 2009).

None of the Olympus Respondents participated in any of these transactions. None of them read, or had any reason to know, the content of MOL's tariff. MOL has not introduced any evidence whatsoever that the Olympus Respondents had any such knowledge. The proposition that the Olympus Respondents, who had no reason to know the content of MOL's tariff, might be charged with knowledge that a practice might

² MOL cites to an email from Paul Coleman (MOL Exhibit BP) as evidence that the Olympus Respondents received definitive legal advice that split routing violated the Shipping Act. This assertion is belied by the content of the email itself. Mr. Coleman advised Gary Meyer that "shortstopping" (which involves the payment of a rebate to the trucker) violated Section 10(a)(1) of the Shipping Act. MOL has not alleged or proved that GLL paid rebates to truckers.

violate that tariff is absurd on its face and directly contradicts MOL's own position with respect to the knowledge of its employees.

These false statements must not be allowed to stand as part of the briefing record in this proceeding.³ Therefore, the Olympus Respondents request that the Presiding Judge strike the above-identified statements and not consider them in his deliberations.

MOL's Knowledge

Since the beginning of this proceeding, MOL has argued that it did not know, and could not have known, of GLL's split routing practice before 2008. In its sworn amended complaint, MOL alleged that it did not know of the split routing practice. Amended Complaint at ¶¶ III, IV.H. (MOL App. 1001, 1003). This entire proceeding has been litigated on the basis of MOL's assertion that it did not know and could not have known of GLL's split routing practice. Now this entire proceeding has collapsed under MOL's admission that its own employees knew about the split routing. *See* Reply Brief at p. 38:

In retrospect, with the benefit of evidence now available, McClintock and Yang's denials of their involvement [in the split-routing practice] do not hold up and are contradicted by the testimony of others....

It appears that McClintock and Yang regularly discussed 'split routing' with Rosenberg and Briles.

MOL's admission removes the legitimacy of MOL's complaint and obliterates the very foundation on which MOL's claims against the Respondents rests.

³ In other filings, the Olympus Respondents brought MOL's misstatements of the record and controlling authority in this proceeding to the Presiding Judge's attention. *See, e.g.*, Olympus Respondents' Reply to Motion to Strike (Dkt. Entry 34; filed Oct. 30, 2009).

MOL's admission as to the knowledge, participation and involvement of its employees is not based on new evidence. Recognizing that the weight of the evidence is against it, MOL tries to use its admission as a sword by drawing attenuated connections to *Mitsui O.S.K. Lines, Ltd. v. Seamaster Logistics, Inc.*, Case Nos. 11-cv-02861-SC, 10-cv-05591-SC, 2013 U.S. Dist. LEXIS 40466, 2013 WL 1191213 (N.D. Cal. Mar. 21, 2013) ("*Seamaster*")⁴, and arguing that those connections absolve MOL of any imputed knowledge of GLL's activities. *See* Reply Brief at pp. 35-51;

The Olympus Respondents move to strike MOL's reliance⁵ on *Seamaster* on three grounds. First, MOL's *Seamaster* argument contradicts the allegations in MOL's complaint and deprives MOL's complaint of its legitimacy. MOL's entire case is based on the fundamental precept that MOL did not know, and MOL could not have known, of

⁴ MOL included the LEXIS version of the *Seamaster* opinion in its Supplemental Appendix. For ease of reference, the Olympus Respondents will cite to the LEXIS version in this motion.

⁵ MOL devotes "extended discussion" to the *Seamaster* case because, in MOL's words, the case "applies the principles of imputation and the adverse interest exception to facts *virtually identical* to those at issue in this proceeding." Reply Brief at p. 35 (emphasis added). The Olympus Respondents disagree that the *Seamaster* case presents facts "virtually identical" to those at issue in this proceeding. *Seamaster* is factually distinct on a number of grounds, including, but not limited to, the differences in the practices at issue, the benefits inuring to MOL because of the practices, and the determined (in *Seamaster*) and alleged (in this case) "adverse interests" of the knowledgeable and participating MOL employees.⁵ However, the Olympus Respondents did not have the opportunity to distinguish *Seamaster* because the case was decided on March 21, 2013, twenty days after the Olympus Respondents filed their reply brief to MOL's Opening Submission. If the Presiding Judge believes that *Seamaster* has any application to the record facts in this proceeding, he should permit the parties to brief the matter.

The Olympus Respondents were aware of and did reference the *Seamaster* case in their reply to GLL's opening brief on its contribution claim against OEF and OGF. *See* Olympus Respondents' Reply Brief in Opposition to Global Link Logistics, Inc.'s Claim for Contribution at p. 2, n. 2 (filed May 1, 2013). However, the Olympus Respondents were not replying to MOL's claims in the May 1, 2013 reply, did not have notice of MOL's new theory, and therefore did not address the inapplicability of the exceptions to imputation discussed in *Seamaster*.

the split-routing before 2008. Respondents have argued, and now MOL has admitted, that this precept is false.

Second, MOL's *Seamaster* argument inserts a completely new theory into this case and shows that its complaint was groundless from the start. If this new theory is considered, it requires the Presiding Judge's revisitation of the need for an oral, evidentiary hearing. MOL requested an oral hearing with live testimony on the issue of its prior knowledge of GLL's split routing. *See Complainant's Statement in Response to October 3, 2012 Order Regarding Requests for Oral Hearing* (filed Oct. 10, 2012). The Presiding Judge disagreed that an oral hearing was necessary to address the issue of MOL's knowledge because the issue had "been fully addressed through discovery and [could] be adequately litigated by the introduction of documentary evidence." Procedural Order and Briefing Schedule (served Oct. 16, 2012). At that time however, neither the Presiding Judge nor the parties had before them MOL's admission of its employees' knowledge. If any weight is to be given to this last minute change in position by MOL, an oral, evidentiary hearing is necessary to build an informed record.

Third, by relying on deposition testimony from the GLL arbitration regarding Mr. McClintock's supposed adverse interest⁶ in allowing the split routing practice, **MOL now**

⁶ In *Seamaster*, Michael Yip was the "mastermind behind the Shenzhen door arrangement" and may have derived personal financial benefit from the arrangement. *Seamaster*, 2013 U.S. Dist. LEXIS 40466, at *11 and 25-26 ("Rainbow received more from MOL than it paid to Defendants. It is unclear what Rainbow did with the difference. At trial, MOL suggested that Yip owned Rainbow, though it did not present any direct evidence to support such a finding"). There is no evidence in this proceeding that Mr. McClintock was either the "mastermind" of GLL's split routing practice or that he derived a personal financial benefit from the arrangement. If anything, MOL argues that by permitting GLL's split routing, Mr. McClintock became

admits that it was unjustly enriched (and therefore, not damaged) by GLL's split routing practice. Mr. McClintock was a salesman for MOL. Mr. McClintock started out in sales at MOL and the last position he held at MOL was MOL's Vice President of Sales and Sales Support for the United States. Deposition of Paul McClintock at 31:19-32:11 (GLL App. 11). Mr. McClintock was in the business of selling MOL's services. His success at the company depended on increasing MOL's sales. MOL reaped the benefit of Mr. McClintock's success in the form of increased business for MOL. In other words, MOL has now conceded it would not have had GLL's business but for the practice.

The Presiding Judge cannot allow MOL's change in tactics at the eleventh hour. Thus, the Presiding Judge at least should strike MOL's references to and discussion of *Seamaster* or, alternatively, afford the Respondents an opportunity to respond to MOL's *Seamaster* argument.⁷ Even with this relief, however, the Presiding Judge will be left to

more successful in his position at MOL. It is difficult to see how this was adverse to MOL's interest. Mr. McClintock's professional success at MOL would have been directly tied to his ability to increase sales and lower costs for MOL. Mr. McClintock's actions could only have benefitted MOL and there is no record evidence to indicate that his interests, at least as they are relevant to this proceeding, were not at all times congruent with those of his employer.

⁷ Even if the Presiding Judge does not strike MOL's argument or afford the Olympus Respondents an opportunity to respond, there are good reasons for the Presiding Judge to give no weight to MOL's argument. First, MOL's argument relies on purported facts that do not appear anywhere in the parties' proposed findings of fact, and thus, no party has had the opportunity to admit or deny those purported facts. Second, MOL's argument represents a sea change in MOL's position on its knowledge of the split routing practice. A year ago, when MOL sought to redepose Mr. McClintock after the discovery deadline passed, the Olympus Respondents opposed the request on the grounds that it only furthered MOL's elaborate theory of its own non-culpability for the alleged Shipping Act violations, *i.e.*, that MOL knew nothing about, and was not responsible for, the purported conduct of its own employees. The Presiding Judge subsequently held a hearing on discovery matters, including MOL's motion to redepose Mr. McClintock. At that hearing, MOL retreated from its pursuit of a redeposition of Mr. McClintock. The record is thus closed on this point.

preside over a complaint and a proceeding built on the false premise that is critical to both.

Compliance with Rule 71

On May 23, 2013, counsel for the Olympus Respondents contacted counsel for MOL by electronic mail and advised of the Olympus Respondents' intent to file this motion on or before May 24, 2013. Counsel for MOL responded on May 23, 2013 and advised that MOL would oppose the Olympus Respondents' motion.

CONCLUSION

For all the foregoing reasons, the Olympus Respondents respectfully request that the Presiding Judge strike and give no consideration to (i) the statement at page 33, line 8 of MOL's Reply Brief and (ii) the statements in footnote 27 on page 43 of MOL's Reply Brief. The Olympus Respondents further request, at a minimum, that the Presiding Judge strike and give no consideration to MOL's discussion and analysis of the *Seamaster* case at pages 35 through 51 of MOL's Reply Brief or, alternatively, grant the Respondents an opportunity to reply to MOL's reliance on *Seamaster*. Finally, the Olympus Respondents request that the Presiding Judge grant such other and further relief as is appropriate under the circumstances. It is unfair and contrary to the Commission's rules to put the Olympus Respondents at risk based on a complaint that has lost its foundation and legitimacy.

No party will be prejudiced by granting this Motion. Any reliance on MOL's false statements about the position of the Olympus Respondents and its misstatements about

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the *Seamaster* case would deprive the Olympus Respondents of due process, constitute reversible error, and waste the resources of the Commission.

Dated: May 24, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

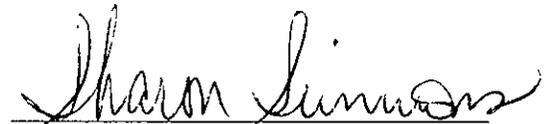
I hereby certify that on May 24, 2013, I served the foregoing document on the following individual(s) by electronic mail and regular mail:

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