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BEFORE THE
FEDERAL MARITIME COMMISSION

Docket No. 09-01

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

COMPLAINANT,

v.

GLOBAL LINK LOGISTICS, INC.; OLYMPUS PARTNERS, L.P.;
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.

**RESPONDENT AND CROSS COMPLAINANT GLOBAL LINK LOGISTICS, INC.'S
REPLY BRIEF IN SUPPORT OF CONTRIBUTION CLAIMS
AGAINST ROSENBERG RESPONDENTS**

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Dated: May 31, 2013

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RESPONDENT AND CROSS COMPLAINANT GLOBAL LINK LOGISTICS, INC.'S
REPLY BRIEF IN SUPPORT OF CONTRIBUTION CLAIMS
AGAINST ROSENBERG RESPONDENTS

The Rosenberg Respondents take a broad brush approach in their opposition to Global Link's contribution claim, asserting a multitude of defenses. Because none of them have merit, Global Link is entitled to contribution from the Rosenberg Respondents to the extent that the fact finder determines that MOL can state a valid claim for reparations against Global Link.

**The Rosenberg Respondents Implemented and Oversaw
Global Link's Split Routing Operations**

The evidence in the record clearly establishes that: 1) Chad Rosenberg served as President and Chief Executive Officer of Global Link from 1997 through 2006; 2) the majority of the moves when Rosenberg was at Global Link were split routings; 3) Rosenberg personally conducted split routings at Global Link; 4) Rosenberg provided incorrect information to steamship lines for their bills of lading and in Global Link's delivery orders when he was doing

routing of shipments; 5) Rosenberg taught Jim Briles how to conduct split routings; 6) Rosenberg was copied on most of Global Link's communications in regard to routings; 7) through 2006, up until the time the company was sold to current ownership, Rosenberg still received email related to routing issues and still communicated regularly with Gary Meyer, Global Link's Chief Financial Officer, and other staff at Global Link; 8) Rosenberg was the Qualifying Individual for the company's FMC license; 9) the Arbitration Panel made findings holding the Rosenberg and Olympus Respondents liable for their failure to disclose split routing practices to current ownership of Global Link; 10) Rosenberg made material misrepresentations to Global Link's current owner in asserting that Global Link was in compliance with the rules and regulations of the Federal Maritime Commission and the Shipping Act. *See* Contribution Proposed Findings of Fact ("CFOF") 7, 15, 16, 20, 21, 23, 24, 25, 102, 103. All of these facts, none of which are in legitimate dispute, validate Global Link's contribution claim against the Rosenberg Respondents.

The Evidence Relied upon by Global Link is Admissible

In its Reply Brief in Support of its Contribution Claim against the Olympus Respondents, Global Link addresses the fact that the evidence relied upon to support its contribution claims is not hearsay and is admissible pursuant to the Federal Rules of Evidence, the Administrative Procedures Act and Commission regulation, 46 C.F. R. § 502.126. Global Link also addresses the fact that the Arbitration Panel's findings are binding upon both the Rosenberg and Olympus Respondents. Global Link's arguments in that regard are incorporated herein.

The Rosenberg Respondents Contribution Obligations Are Dependent Upon a Finding of Liability Against Global Link

Rosenberg's first defense is that pursuant to Global Link's cross claim, the Rosenberg Respondents are only liable if there is a finding that MOL is entitled to reparations from Global

Link. Global Link does not dispute that fact. Unless the fact finder determines that MOL is entitled to reparations -- which it should not -- Global Link's contribution claim is moot. That, however, does not preclude Global Link from establishing that it is entitled to contribution from the Rosenberg and Olympus Respondents -- if the Commission determines that Global Link is liable to MOL for reparations.

Global Link Is Entitled to Assert a Contribution Claim Prior to Entry of Judgment Against it and Prior to Payment of a Reparations Claim

The Rosenberg Respondents next argue that Global Link's cross claim must be dismissed because Global Link's contribution claim does not become ripe until Global Link is obligated to pay more than its fair share of any reparations to which MOL is entitled. The Rosenberg Respondents argument ignores well-established law that a defendant may bring in as a third-party defendant a party "who is or who may be liable to it for all or part of the claim against it." *See* Fed. R. Civ. P 14(a).¹ Thus, Rule 14(a) permits a defendant "to pursue contribution and indemnity claims even though the defendant's claim is purely inchoate, *i.e.*, has not yet accrued under the governing substantive law- so long as the third party defendant may become liable for all or part of the plaintiff's judgment." *Hillbroom v. Israel*, 2012 WL 2168303 * 2 (D.N. Mariana Isl. 2012); *see also, Andrulonis v. United States*, 26 F.3d 1224, 1233 (party may implead a joint tortfeasor for contribution before right to contribution accrues because this party may be liable to the defendant for a share of the plaintiff's primary judgment."); *American Contractors Indemnity Co. v. Bigelow*, 2010 WL 5638732 * 2 (D. Ariz. 2010) (recognizing that circuit courts have uniformly recognized that defendants may pursue contribution and indemnity claims even though the claim is inchoate). Rule 14 is predicated upon the common sense recognition that it is preferable to permit all claims arising out of the same transaction or

¹ Pursuant to 46 C.F.R § 502.12, the Federal Rules of Civil Procedure apply unless there is a Commission Rule specifically addressing the issue.

occurrence to be heard and determined in the same action. *See* Commentary to Fed. R. Civ. P. 14 (1946 Amendments). Accordingly, the Rosenberg Respondents ripeness defense lacks merit.

Global Link Only Has to Pay Its Fair Share for Any Damages Caused to MOL

The Rosenberg Respondents next argue that Global Link cannot seek to impose all of the damages allegedly suffered by MOL upon the Rosenberg and Olympus Respondents pursuant to its contribution claim. In so arguing, they rely upon the Commission's dismissal of Global Link's indemnity claim. *See Mitsui O.S.K. Lines Ltd. v. Global Link, Logistics, Inc.*, 32 S.R.R. 126, 136 (FMC 2011). Such reliance is misplaced. In dismissing Global Link's contractual indemnity claim, the Commission held that it lacked jurisdiction because the claim was not based upon a violation of the Shipping Act but instead was based upon the terms of the May 20, 2006 Stock Purchase Agreement between the parties and Delaware law. *Id.* In contrast, the Commission reversed the dismissal of Global Link's contribution claim, holding that Global Link's contribution claim is plausible on its face. *Id.* at 138. In so holding, the Commission recognized there is nothing in the Shipping Act, or in its legislative history, which suggests Congress intended to preclude proportional liability for reparations. *Id.* Indeed, the Commission suggested that imposing liability based upon the actual injury caused by a party is consistent with the language of the Act. *Id.*

Here, the evidence in the record, as well as the Arbitration Decision which the Rosenberg and Olympus Respondents are collaterally estopped from relitigating, establish that the Rosenberg and Olympus Respondents are culpable for the split routing that occurred. CFoF 23. In contrast, the facts in the record, as well as the Arbitration Decision, confirm that Global Link's current ownership unknowingly inherited the split routing practices, and then terminated them as soon as it was feasible. *Id.* The Panel also recognized that the current owner of Global Link never voluntarily engaged in split routing. *Id.*

The law of contribution recognizes that a party should pay only its fair share of any damages caused to a third party. Here, where Global Link's current owner and management caused none of the damages alleged by MOL, the Olympus and Rosenberg Respondents should pay the entire reparations to which MOL is entitled.²

The Fact that Global Link's Current Owners Purchased the Company Via a Stock Purchase Does not Insulate the Olympus and Rosenberg Respondents From Liability for Their Own Fraudulent Acts

The Rosenberg Respondents suggest that because a corporation that buys a company via a stock purchase, as opposed to a sale of assets, may be held liable for the corporation's prior acts, they are insulated from liability. The law is clear, however, that regardless of how a transfer of ownership occurs, prior ownership and its executives are not given *carte blanche* to engage in wrongful acts, lie about having done so, gain an economic windfall, and then wash their hands of the mess they have created. The Rosenberg Respondents' argument is shocking in its audacity.

The Arbitration Panel, in a decision that is binding on the Rosenberg and Olympus Respondents, has already made findings holding the Rosenberg and Olympus Respondents liable for their failure to disclose split routing practices to current ownership of Global Link. Arbitration Award at 38 (GLL Contribution App. 41). The Panel also found that they made a material misrepresentation to Global Link's current owner in asserting that Global Link was in compliance with the rules and regulations of the Federal Maritime Commission and the Shipping Act. *Id.* at 39, 42 (GLL Contribution App. 42, 45). The Panel further found that the Rosenberg and Olympus Respondents fraudulently omitted to disclose the Company's reliance on split-

² Conversely, if the fact finder were to conclude that the Olympus and Rosenberg Respondents only caused harm during the time period prior to when Global Link's current owner purchased Global Link, Global Link would be liable for that limited portion of any reparations.

routing, and made a deliberate effort to keep the purchasers of Global Link from learning of the existence, extent and significance of the split-routing practices during the due diligence process. *Id.* at 23 (GLL Contribution App. 26). Finally, the Panel affixed direct liability on the Olympus Respondents and CJR as shareholders. Arbitration Award at 38 (GLL Contribution App. 41). This finding of direct liability against the Rosenberg and Olympus Respondents was not predicated upon piercing the corporate veil; instead the Panel found the two Olympus and Rosenberg Respondents liable “under established agency law as principals on whose behalf and whose request Global Link management made fraudulently inadequate disclosures that were found to have been fraudulently inadequate.” *Id.*

The Commission has long recognized that an individual can be held liable for Shipping Act violations when he directs and controls the corporate entities involved. *See e.g., Martyn Merritt et al Possible Violation of Section 10(a)(1) and 10(b)(1) of the Shipping Act of 1984*, 25 S.R.R. 1295 (FMC 1990). It is also well established that corporations are liable for the acts and omission of their employees and agents. Thus, the knowledge and actions of Rosenberg are attributable not only to him but also to CJR World Enterprises, Inc.³

Moreover, the law is clear that “[i]n cases of fraud, whether actual or constructive, the courts regard the real parties responsible and grant relief against them or deny their claims and defenses based on principles of equity.” *Fletcher’s Cyc. Law of Private Corporations*, (1999 ed.) Vol. 1, section 41.32; *see also, United States v. Del Campo Baking Mfg. Co.*, 345 F. Supp. 1371, 1378 (D. Del. 1972) (well settled law that court may appropriately disregard separate corporate

³ The Commission authority addressing the liability of individuals for overseeing Shipping Act violations, even when not directly involved in the day to day activities or individual transactions, is fully addressed by the MOL in its Reply Brief at pages 12-27 and need not be repeated here. MOL’s Reply Brief also addresses the precedent establishing that corporations are liable for the acts and omission of their employees and agents and will not be repeated here. (Ironically, however, MOL ignores that well-established precedent in seeking to insulate itself from its own employees’ actions.)

entity in order to prevent fraud, illegality or injustice, or when recognition of the corporate entity would defeat public policy or shield someone from liability for a crime); *Hystro Prods. Inc. v. MNP Corp.*, 18 F.3d 1385, 1390 (7th Cir. 1994) (disregard corporate entity where element of fraud or deception and where failure to do so would unfairly enrich one of the parties); *Fillipo v. Bonaccorso & Sons, Inc.*, 466 F.Supp. 1008, 1018 (E.D. Pa. 1978) (individual may not escape liability based acted on behalf of a corporation if his or her acts fall within the scope of a regulated activity).

The Commission has adopted these same principles. Thus, the Commission has long recognized its authority to disregard the corporate entity when necessary to effectuate the goals of the Shipping Act. “It is settled law that the corporate entity may be disregarded if failure to do so would aid in the perpetration of a fraud or the circumvention of an applicable statute.” *In the Matter of Agreement 9597 Between Flota Mercante Gran Centroamericana et al.*, 12 F.M.C. 83, 101-02 (1968); *Agreement of Nicholson Universal Steamship Co*, 2 U.S.M.C. 414, 420-21 (1940) (corporate veil pierced when used to protect fraud); *Brokerage on Ocean Freight – Max LePack*, 5 F.M.B. 435, 440 (1958) (“If the corporate form is used to evade a statute then the corporate entity must be disregarded while we look to the substance and reality of the matter.”)

Reduced to its nub, the Rosenberg Respondents’ argument is that you should not have trusted us, and having done so, you are now out of luck. That simply is not the law. Global Link is entitled to recover from the Rosenberg and Olympus Respondents based to the extent that their actions caused legally cognizable harm to MOL.

Contribution Would Not Result in Double Recovery for Global Link

The Rosenberg respondents contend that forcing it to pay its proportional share of the damages it allegedly caused MOL would be unfair because it would constitute a double recovery for Global Link. This is simply incorrect.

In the arbitration proceeding, Global Link sought damages based on the Sellers' breach of representations in the Stock purchase Agreement. Global Link also initially sought damages for potential third-party claims or other contingent liabilities. The Arbitration Panel, however, quickly concluded that such contingent and uncertain damages were not ripe. In so doing, the Panel observed that:

Claimants allege that when they acquired the stock of GLL Holdings, they assumed "millions of dollars in concealed contingent liabilities for potential fines and/or damages under the Shipping Act and other laws" . . . yet Claimants do not allege that they have compensated any carrier for prior undercharges [or] that any carrier has requested such compensation . . . None of these consequences has been visited upon Claimants in the nine months since they ceased the practice of re-routing, nor have Claimants alleged any factual basis for believing that any of these "concealed contingent liabilities" will ripen into actual liabilities.

Partial Award and Decision on Respondents' Motion to Dismiss (March 25, 2008) at 16, CFOF 131, Supplemental Contribution Appendix 190. Thus, the Arbitration Panel clearly did not address such damages, nor could it have done so.⁴

In issuing its Final Award, the Panel also clearly stated that its damages calculation was designed to address the costs associated with phasing out the split-routing practice, citing the following variables: "how quickly split-routing could have been eliminated, what it would have cost the Company to do so, what increase in risk premium a buyer would have demanded, and what effect eliminating split-routing would have had on revenues." Partial Final Award at 53-54, GLL Contribution App. 56-57. The Panel continued by noting that its calculation was "guided by the principle that a buyer which had been properly informed of the split-routing practice would have prudently reduced an expected purchase price of Global Link to reflect a discount for the structural adjustments necessary for the company to phase out that practice and secure a sustainable cost structure for a period of time after acquisition." *Id.* The Panel properly made no

⁴ The Arbitration Panel's ruling was well grounded as at that time it was uncertain whether MOL or any other carrier might assert such a claim, and, if it did, what liability Global Link might have in that regard.

reference to any third-party complaint or related damages, because there was no foundation for such damages.

In light of this holding, the Rosenberg Respondents argument that Global Link was awarded damages for potential suits by carriers or that it still should have presented evidence in this regard to the Arbitration Panel is baseless. Once the Arbitration Panel determined that such a claim was not ripe, Global Link was not free to simply ignore the Panel's decision and attempt to put on evidence in that regard. To the extent the Rosenberg Respondents argue to the contrary, their argument is specious.

Global Link Is Not Estopped From Pursuing its Contribution Claims

The Rosenberg Respondents assert a number of additional defenses to Global Link's contribution claims. These are make-weight arguments which require little consideration. First, the Rosenberg Respondents argue that Global Link is bound by the Panel's finding that MOL was aware of the practice of split routing. That, of course is the position that Global Link has espoused and continues to espouse in this case. To the extent the fact finder agrees, Global Link's contribution claim is moot. If, however, the fact finder disagrees, Global Link is entitled to contribution.

The Rosenberg Respondents also argue that Global Link is bound by the purported finding of the Arbitration Panel that they did not violate the Shipping Act because Mr. Rosenberg became less active in running Global Link by 2005. CJR Brief at 23. This argument is preposterous. In fact, the Panel found that the Rosenberg and Olympus Respondents violated 46 C.F.R. § 515.31 but did not reach the issue of whether they also violated 46 U.S.C. §

41102(a)(1). *See* Panel Award at 39-43. GLL Contribution App. 42-26.⁵ Thus, in fact it is the Rosenberg and Olympus Respondents who are now precluded from arguing that they did not violate 46 C.F.R. § 515.31. Further, while at one point the Arbitration Award states that Mr. Rosenberg was less active in running Global Link in 2005, in the next sentence it pointedly observes: “Yet even though he was no longer frequently in the office Rosenberg continued to be consulted regularly by Gary Meyer and Jim Briles on such subjects as disclosing information on split-routing to ocean carriers and truckers.” Arbitration Award at 33-34, GLL Contribution App. 36-37.

The Rosenberg Respondents suggestion that the Arbitration Panel found Global Link’s current ownership culpable for the split routing at issue is belied by the plain language of the Panel’s holding. It expressly rejected the Rosenberg and Olympus Respondents argument that, under the doctrine of *in pari delicto*, Global Link should be precluded from asserting a claim against them due to the failure to immediately terminate split routing when it purchased the company in June of 2006. *Id.* at 45-46 (GLL Contribution App. 48-49). Instead, in rejecting that defense, the Panel recognized that Global Link’s current owner:

unknowingly inherited a practice, which they continued until it was feasible to end the practice across the board, as they were advised by counsel would be a reasonable course. It is a stretch to call Claimants’ continuation of split-routing until the next ocean carrier contract reset “voluntary,” and to the extent Claimants may be considered culpable, their culpability does not rise to that of the Respondents who defrauded them.

Id. at 46 (GLL Contribution App. 49), citation omitted.

Finally, the Rosenberg Respondents argue that the language of the Stock Purchase Agreement (SPA) and a Release executed between Global Link and the Rosenberg Respondents bars Global Link’s contribution claim. This argument ignores the fact that Section 10.02(h) of

⁵ Given that the Arbitration Panel expressly decided not to reach the issue of whether the Rosenberg and Olympus Respondents violated 46 U.S.C. § 41102(a)(1), there simply is no basis for concluding that the Arbitration Panel somehow precludes Global Link’s contribution claim.

the SPA explicitly carves out any limitations to remedies or procedures based on a Seller's fraudulent acts or omissions. *Id.* at § 10.02(h) (stating that no provision in the SPA shall "limit or be deemed to limit . . . (iii) the recourse which the Buyer Indemnified Parties . . . may seek against a Seller . . . with respect to a claim for fraud.") Accordingly, Global Link's cross claim predicated upon the Rosenberg Respondents fraudulent activities is not subject to the arbitration provision.

Further, the argument fails because the claims at issue arise out of violations of the Shipping Act, not out of the SPA. Thus, even if the arbitration provision in the SPA sought to divest the Commission of jurisdiction here, it would not be enforceable because the Commission retains exclusive jurisdiction to resolve disputes arising from violations of the Shipping Act.

While purporting to rely upon Delaware law as justifying its argument that the arbitration provision in the SPA divests the Commission of jurisdiction over Global Link's cross claims, the Rosenberg Respondents ignore the Shipping Act, which dictates a contrary result. In *Anchor Shipping v. Alianca Navegacao E Logistica Ltd.*, 30 S.R.R. 991 (FMC 2006) the FMC considered and rejected the very argument the Rosenberg Respondents now assert. There, the ALJ originally dismissed a complaint on the grounds that the complainant had initiated an arbitration proceeding as required by the terms of its service agreement with the respondent. The ALJ concluded that it would be unjust and unfair to allow the complainant to litigate a claim already settled in arbitration. In reversing the ALJ's dismissal, the Commission recognized that a mandatory arbitration clause in a contract does not negate a federal agency's independent regulatory duty. *Id.* at 997, citing, *Duke Power Co. v. FERC*, 864 F.2d 823, 830 (D.C. Cir. 1989). Thus, the Commission held that an arbitration clause in the parties' service contract did not outweigh the Commission's duty under the Shipping Act. "To preclude Anchor from proceeding

with its complaint solely because a private arbitrator previously issued a ruling would be inconsistent with our statutory mandate to hear such complaints.” *Id.* at 998. Moreover, “[w]hile section 8(c) provides that parties to a service contract may agree to arbitrate breach of contract issue, it was not Congress’ intent that the Commission be barred from adjudicating whether the parties’ conduct violates the Shipping Act and Commission regulations. *Id.* at 999, citing *A/S Ivarans Rederi v. United States and FMC*, 895 F.2d 1441, 1445 (D.C. Cir. 1990). Thus, while the arbitration might be binding on the parties as to breach of contract claims, it could not preclude the Commission from exercising its statutory obligations to hear those allegations particular to the Shipping Act. *Id.*

Conclusion

The Rosenberg Respondents cannot legitimately dispute that Chad Rosenberg implemented, oversaw, and carried out Global Link’s split routing procedures during most of the time period at issue. Accordingly, the Rosenberg Respondents, rather than Global Link’s unwitting current owner, should be held responsible for any legally recognizable damages suffered by MOL.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I do hereby certify that I have delivered a true and correct copy of the foregoing document to the following addressees at the addresses stated by depositing same in the United States mail, first class postage prepaid, and/or via email transmission, this 31st day of May, 2013:

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