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. MISCHIANTI; DAVID CARDENAS; KEITH HEFFERNAN; CJR WORLD ENTERPRISES, INC.; and CHAD J. ROSENBERG,

RESPONDENTS.

RESPONDENT AND CROSS COMPLAINANT GLOBAL LINK LOGISTICS, INC.'S SUPPLEMENTAL PROPOSED FINDINGS OF FACT IN SUPPORT OF CONTRIBUTION CLAIM AGAINST ROSENBERG AND OLYMPUS RESPONDENTS

Arbitration Panel Findings

131. In the arbitration proceeding, the Arbitration Panel determined that Global Link's claim for damages arising out of potential lawsuit brought by steamship carriers were unripe. Specifically, the Panel held 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, Supplemental Contribution App. 189.

Respectfully Submitted,

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DATE: May 31, 2013

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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Supplemental Appendix

In Support of

Contribution Claim

Against

Rosenberg and Olympus Respondents

CONFIDENTIAL

AMERICAN ARBITRATION ASSOCIATION

Global Link Logistics, Inc., Golden Gate Logistics, GLL Holdings, Inc., Claimants, v. Olympus Growth Fund III, L.P., Olympus Executive Fund, L.P., Keith Heffernan, L. David Cardenas, Louis J. Mischianti, and CBW Key Employee Capital II, LLC, Gerald Benjamin, Jewish Federation of Greater Atlanta for Gerald R. and Vicki S. Benjamin Philanthropic Fund, and Edward A. Casas M.D., and CJR World Enterprises, Inc. and Chad J. Rosenberg, Defendant.	Case No. 14 125 Y 01447 07

PARTIAL AWARD AND DECISION
ON RESPONDENTS' MOTION TO DISMISS

Introduction

On or about May 20, 2006, Golden Gate Logistics, Inc., through a subsidiary, entered into a Stock Purchase Agreement ("SPA") to acquire all of the issued and outstanding capital stock of GLL Holdings, Inc. for $128.5 million (subject to adjustment). Through a subsidiary also named Global Link Logistics, Inc., GLL Holdings, Inc. was engaged in business as a non-vessel-operating common carrier providing ocean and inland transportation for its customers.

Contemporaneously with the execution of the Stock Purchase Agreement, the parties entered into two Release, Confidentiality, Non-Compete and Non-Solicitation Agreements ("Shareholder/Officer Agreements"), which released certain claims against, and imposed confidentiality, non-compete and non-solicitation obligations upon, the officers, directors, employees and agents of the Sellers.

Approximately fifteen months later, on or about August 31, 2007, Claimants, the successor by merger to the Purchaser under the SPA and two of its affiliates, commenced this arbitration against the Respondent Sellers and certain related individuals seeking indemnification under the SPA. After subsequently submitting a Statement of Claim and then an Amended State of Claim, Claimants now allege that the Respondents (i) committed breaches of the representations and warranties in the SPA, entitling Claimants to recover $6,425,000 by way of contractual indemnification, (ii) engaged in common law fraud, for which Claimants seek $100 million in damages, and (iii)injured Claimants in their business and property by violating the Racketeer Influenced and Corrupt Organizations Act ("RICO"), entitling Claimants to recover $300,000,000. That amount represents roughly a trebling of the difference between the $128.5 million purchase price and the $25 million alleged actual value of the acquired business. Claimants also seek punitive damages of $300 million, although it is not clear whether that amount is duplicative (in part or in whole) of the non-compensatory RICO damages sought.

Certain Respondents have moved to dismiss one or more claims. All of the moving Respondents seek dismissal of the RICO claim on various grounds. The individual moving Respondents also move to dismiss the fraud and contract indemnification claims as barred by a provision of the SPA and as released by a provision of the Shareholder/Officer Agreements.

The Parties[1]

Claimant Global Link Logistics, Inc. ("Global Link Logistics") is the surviving entity formed by the merger of the pre-existing corporation of that name (whose shares were acquired in the transaction at issue) and GLL Sub Acquisition, Inc., a special purpose vehicle created to make the acquisition. Claimant GLL Holdings, Inc., ("GLL Holdings"), which owns 100% of the stock of Global Link Logistics, is the surviving entity of a related merger. Claimant Golden Gate Logistics, Inc. ("Golden Gate") owns 100% of the stock of GLL Holdings and thus indirectly 100% of the stock of Global Link

[1] The following identification of the parties to this proceeding is based on paragraphs 6 through 19 of the Amended Statement of Claim, dated October 17, 2007.

Logistics. All three will be referred to collectively as "Claimants". For convenience, we will refer to the entity that operated the acquired business as "GLL."

The Respondents are all either Sellers (so identified in the SPA) of GLL Holdings stock or individuals affiliated with one or more of the Sellers. Respondent Olympus Growth Fund III, L.P. is an affiliate of Olympus Partners, a private equity firm based in Stamford, Connecticut. Respondent Olympus Executive Fund, L.P., also a Seller, is similarly affiliated with Olympus Partners. Respondents Louis J. Mischianti, Keith Heffernan and L. David Cardenas are all principals of Olympus Partners and were officers or directors (or both) of GLL. Collectively, the foregoing entities and individuals will be referred to as the "Olympus Respondents."

Respondent Chad J. Rosenberg was a director and officer of GLL and a director, officer and sole shareholder of Respondent CJR World Enterprises, which owned "about 20%" of the stock of the former GLL Holdings (Amended Statement of Claim ("Am. St. Cl.") ¶ 25). Respondents Rosenberg and CJR World Enterprises will be referred to as the "Rosenberg Respondents."

Respondent CBW Key Employee Capital II, a Seller, is an affiliate of Casas, Benjamin & White, LLC, an investment firm based in Atlanta, Georgia, of which Respondents Edward A. Casas, M.D., and Gerald R. Benjamin are principals (the latter was also a director of GLL). The final Respondent, also a Seller, is the Jewish Federation of Greater Atlanta for Gerald R. Benjamin and Vicki S. Benjamin Philanthropic Fund. This last group will be referred to as the "CBW Respondents." As noted above, the CBW Respondents have not joined in the pending motions.

The Tribunal's Jurisdiction

The parties to the SPA agreed that the arbitration procedures set forth in Section 10.08 thereof would be "the sole and exclusive method for resolving and remedying claims for money damages arising out of this Agreement. The venue of the arbitration was laid in Delaware,[2] and it was agreed that the proceedings would be

2 By agreement, the only hearing to date was held, and future hearings are scheduled to be held, in New York City.

conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association (*see id*. § 10.08(b).[3] Delaware law governs. *See id.* § 14.14.

Prior Proceedings

As required by the SPA (§§ 10.07, 10.08(b)), Claimants gave notice, by letter dated June 6, 2007 from its counsel, that they were seeking indemnification under Section 10.02(a) of the SPA for breach of the warranties and representations contained in the SPA, "including "Sections 4.05, 4.15 and 4.22." Claimants sought indemnification in the amount of $6,425,000, the maximum (or "Cap") established by Section 10.02(b). In accordance with the procedure provided in the SPA, the Sellers responded by letter dated June 14, 2007. After a meeting failed to yield an agreement, Claimants submitted a Demand for Arbitration on or about August 31, 2007, formally presenting the indemnification claim. On or about September 21, 2007, Claimants submitted a Statement of Claim, which added for the first time a claim for common-law fraud and a RICO claim. The Statement of Claim was superseded by an Amended Statement of Claim submitted on or about October 17, 2007, which added a sentence to paragraph ¶ 83 of the RICO claim and renumbered the balance of that paragraph as paragraph 84.

After filing a Response to the Amended Statement of Claim and in accordance with the schedule established by the Tribunal in Order No. 1, the moving Respondents (hereinafter "Respondents") filed the motions referred in the introduction to this decision. Following the submission of opposing and reply memoranda, a hearing on the motions was held on February 19, 2008. At the Tribunal's invitation, both Claimant and Respondents made written post-hearing submissions.

The Claims Asserted and Grounds of the Motions

The claims asserted in the Amended Statement of Claim are based on two separate sets of factual allegations. According to the first set, Respondent Rosenberg, who owned "about 20%" of GLL, and an associate named Mark Kwan "were

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3 *See also* § 10.08(a) ("E]xcept as otherwise provided in this Section 10.08 or in the Commercial Arbitration Rules of the American Arbitration Association . . ., the arbitration procedures and any Final Determination hereunder shall be governed by, and shall be enforced pursuant to[,] the Uniform Arbitration Act of the State of Delaware.").

systematically misrepresenting the final destinations for container shipments in order to deceive the ocean carriers into billing CJR Corp. and [GLL] lower shipping rates that applied to the false destinations rather than the higher rates that applied to the true destinations" (Am. St. Cl. ¶ 29). The practice was continued "from May 9, 2003, through June 6, 2006 [the Closing date]" (*id.* ¶ 83). The financial statement impact of the "fraudulently obtained cost savings" was to overstate the EBITDA of GLL by "about $3.7 million" ($10.4 million instead of "lawful" EBITDA of $6.7) for the fiscal year ending December 31, 2005, and $1.3 million ($3.2 million instead of $1.9 million) for the three months ending March 31, 2006 (*see id.* ¶¶ 45-46).[4]

According to the second (and apparently unrelated) set of allegations, GLL's "supplier relationship with Hecny and Maersk suffered a material adverse change outside of the ordinary course of business when, in late May 2006, Maersk imposed — and Hecny accepted — an unprecedented new tariff providing for the inland-freight 'IPI' portion of Maersk's 'door' rates to float at Maersk's discretion, thus eliminating [GLL's] longstanding, customary, contractual access to fixed, 'top' rates for approximately one-half of its business" (*id.* ¶ 69).

The "false destination" practices of GLL under the management of Respondent Rosenberg are alleged to have breached GLL's "service agreements with ocean carriers, and violated the Shipping Act of 1984 and related rules and regulations of the FMC . . ." (*see id.* at ¶ 68) and thereby violated representations and warranties in the SPA regarding GLL's compliance with applicable laws and regulations (§ 4.15), the fairness of the presentation of its financial statements (§ 4.05), its performance of contracts with ocean carriers (§ 4.09(b)) and the non-existence of liabilities above stated amounts (§ 4.21) (*see* Am. St. Cl. ¶¶ 60-63). The revision of the Maersk-Hecny relationship is alleged to have been a "material adverse change . . . other than in the ordinary course of business" within the meaning of the representation in Section 4.22 of the SPA (*see id.* at ¶ 64, 70-71).[5]

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[4] EBITDA, the acronym for "earnings before interest, taxes, depreciation and amortization," is a common measure of the operating earnings of a business enterprise.

[5] This representation is alleged to have been false, not when the SPA was executed, but at the Closing date, when Respondent Heffernan is alleged to have given a certificate

Claimants allege that they "actually, reasonably, and justifiably relied "on the foregoing representations and warranties when they entered into the SPA and on Respondent Heffernan's certificate when they consummated the transaction (*see id.* at ¶ 79). The effect of the alleged false-destination practice was to reduce the value of GLL from the agreed-upon purchase price of $128.5 million to $35 million (*see id.* at ¶ 77), and the undisclosed revision of the Maersk-Hecny contractual relationship reduced that diminished value by a further "at least 10 million" (*see id.* at ¶ 78).

As noted earlier, Claimants seek compensatory damages of $100 million and punitive damages of $300 million on their fraud claim and $300 million on their RICO claim, together with reasonable costs and expenses of the arbitration and attorneys' fees. On their contractual indemnification claim, Claimants seek damages of $6,425,000, with pre-judgment interest, and a declaration that they are entitled to receive payment of the foregoing amount, plus accrued interest, from funds held pursuant to an Escrow Agreement (Am. St. Cl. ¶¶ 86, 80 and 92, respectively).

Respondents have moved to dismiss the RICO claim on four grounds: (i) lack of required notice, (ii) lack of proximate causation, (iii) lack of a cognizable injury, and (iv) lack of continuity. In a post-hearing letter brief invited by the Tribunal, Respondents additionally contend that the RICO claim is foreclosed by the exception added to 18 U.SC. §1964(c) by the Private Securities Litigation Reform Act of 1995 ("PLSRA"). The individual Respondents contend that all claims asserted against them are barred by Section 10.10 of the SPA and Section 1.1.2(a) of the Shareholder/Officer Agreements. Finally, the moving Respondents seek dismissal of all claims asserted by Claimant Golden Gate on the ground that it lacks standing as an indirect shareholder of the Purchaser to assert those claims.

I. Claimants gave adequate notice of the RICO claim.

As a threshold matter, the Tribunal will address Respondents' argument that Claimants' RICO claim should be dismissed for lack of notice because it was not asserted

that the SPA representations and warranties continued to be accurate (*see id.* at ¶¶ 67; 69-74).

within one year after the Closing, as (Respondents argue) was required by Section 10.01 of the SPA. If the RICO claim was not timely asserted, we need not reach the standing or release arguments raised by Respondents. But before addressing Respondents' lack-of-notice argument, the Tribunal must address Claimants' contention that Delaware law forecloses that argument because it was not made within twenty days after the June 6, 2007 Notice of Claim (Cl. Opp. Mem. at 4, citing 10 Del. C. § 5703(c)). That contention lacks merit. The twenty-day limitation imposed by Section 5703(c) is not relevant here because Respondents are not "seeking to enjoin [the] arbitration . . . ." They do not contend that the RICO claim is not arbitrable, but rather that it is time-barred because it was not asserted on or before "the first anniversary of the Closing Date . . ." (Resp. Mem. 27, citing SPA § 10.01).

Turning to Respondents' lack-of-notice argument, the Tribunal concludes that it must be rejected on two grounds. First, the Notice of Arbitration dated August 9, 2007, which was itself served within the period prescribed in Section 10.08(b) of the SPA, charged the Respondents with a "widespread and ongoing pattern of fraud that unlawfully inflated [GLL] earnings by cheating its most crucial suppliers — Ocean Carriers — out of millions of dollars annually," and sought damages of $60 million, far in excess of the $6,425,000 cap on Respondents' indemnification obligations (*see* Resp. RICO Mem. Ex. 5). The addition of a claim invoking a different legal theory (RICO), the increase in the *ad damnum* from $60 million to $100 million and the elaboration of the claims with additional specificity do not, individually or in combination, change the fact that Respondents were given clear and sufficiently specific notice of the conduct of which Claimants were complaining within the time provided in the SPA. We do not construe Section 10.01 of the SPA as requiring more.

Second, Claimants' RICO claim alleges as predicate acts a "pattern and practice of wire fraud" (Am. St. Cl. ¶¶ 83, 95). That core element of the RICO claim brings it within the exception created by Section 10.02(h) for fraud claims.[6]

6 In relevant part, Section 10.02(h) provides: "None of the provisions set forth in this Agreement . . . shall . . . limit . . . the time period during which a claim for fraud may be brought . . . ."

II. The RICO claim is barred by the proviso in Section 1964(c).

At the hearing on the motions to dismiss, a member of the Tribunal noted (Tr. 22-23) that Section 1964(c), which creates a treble damage cause of action for "[a]ny person injured in his business or property by a violation of section 1962 of this chapter," carves out the following exception: "... except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962." Asked why the RICO claim is not "statutorily barred," counsel for the Olympus Respondents replied: "It may be ... [W]e hadn't argued that, but I can't disagree ..." (Tr. 23). Both sides were invited to address the question in post-hearing submissions.

The Tribunal does not look with favor on moving parties making an argument for the first time during oral argument (or for that matter, in reply papers), but as the issue was raised by a member of the Tribunal and both sides have had an opportunity to brief the issue, we will address it on the merits.

Prior to 1995, a private plaintiff could assert fraud in the sale of securities as a predicate offense under RICO, *see Sedima S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 504-05 (1985) (Marshall, J. dissenting). "[P]laintiffs regularly elevated fraud to RICO violations because RICO offered the potential bonanza of recovering treble damages." *Bald Eagle Area School District v. Keystone Financial, Inc.*, 189 F.3d 321, 327 (3d Cir. 1999). Congress eliminated that potential bonanza when it enacted the Private Securities Law Reform Act of 1995, which added the quoted exception to Section 1964(c). As stated by Congressman Cox, who offered the amendment containing this exception or proviso, "the civil RICO statute has been abused in securities fraud legislation [sic] to distort the incentives and remedies that the Federal securities laws are supposed to provide." 141 Cong. Rec.H2771 (March 7, 1995). *See also Mathews v. Kidder, Peabody & Co. Inc.*, 161 F.3d 156, 157 (3d Cir. 1998); *ABF Capital Management v. Askin Capital Management*, 937 F. Supp. 1308, 1319 (S.D.N.Y. 1997) ("Congress made clear its intent to prevent the invocation of RICO in ordinary fraud cases, which were beyond the original purpose of the law.").

As a facial matter, the Amended Statement of Claim falls within the statutory exception foreclosing a RICO claim "rely[ing] on any conduct that would have been actionable as fraud in the purchase or sale of securities." The subject of the acquisition was securities, to wit, "all of the issued and outstanding capital stock" of GLL Holdings, Inc.[7] GLL's "status as a closely-held corporation in no way interdicts the applicability of § 10(b) and Rule 10b-5." *Overton v. Todman & Co.* 478 F.3d 479, 488 (2d Cir. 2007) (citing cases). Finally, essential to the claim — indeed, the sole addition made by the Amended Statement of Claim — is the allegation of "numerous predicate acts of wire fraud directed to the Purchasers, including dozens of email messages and other electronic communications through which Cardenas, Heffernan, Mischianti and Rosenberg made . . . [or caused others to make] material misrepresentations and omissions intended to induce the purchasers to buy" the GLL Holdings stock (¶ 83) (emphasis added).[8] We think it inarguable that the Amended Statement of Claim charges the Respondents with "securities fraud" within the meaning of Section 1964(c).

The fact that Claimants have specifically charged the Respondents with wire fraud, and have not invoked the federal securities laws, is without significance. "The Conference Committee accompanying Section 107 [of the PSLRA] states that the amendment was intended not simply 'to eliminate securities fraud as a predicate offense in a civil RICO action,' but also to prevent a plaintiff from 'plead[ing] other specified offenses, such as mail or wire fraud, as predicate civil acts under RICO if such offenses are based on conduct that would have been actionable as securities fraud.' H.R. Conf. Rep. No. 104-369, at 47 (1995)." *Bald Eagle Area School District*, 189 F.3d at 327.

Claimants' principal response on this issue is that "<u>Respondents have not demonstrated and cannot demonstrate that the conduct of each Respondent is 'necessarily actionable under the securities laws,' which they must do to prevail on the defense.</u>"

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7 Claimants do not dispute, for purpose of the pending motions, that "the shares at issue in the SPA are 'securities' that may be subject to federal law." Cl. Supp. Mem at 7 n.8.

8 The quoted language was emphasized by italics and bold type face in Claimant's Opposing Memorandum (at 14).

citing *OSRecovery* v. *One Groupe Int'l, Inc.* 354 F. Supp.2d 357, 369 (S.DN.Y. 1999) (Cl. Supp. Mem. at 7) (emphasis added by Claimants). Claimants have distorted the meaning of the quoted language by wrenching it from context. The decision in *OSRecovery* was rendered on a motion to dismiss by one of several defendants, a Latvian bank, which was not alleged to have "had any communications with the plaintiffs." 354 F. Supp.2d at 370. The absence of such an allegation was critical, the Court observed, because "[a]lthough a scheme may have involved securities fraud, the conduct of each participant in the fraud is not necessarily actionable under the securities laws [citation omitted]. The relevant question, thus, is whether [the Latvian Bank's] conduct is actionable under those laws."

In contrast to the complaint in *OSRecovery*, the Amended Statement of Claim here specifically alleges (at ¶ 83) that Respondents Cardenas, Heffernan, Mischianti and Rosenberg "induced the Purchasers to buy" GLL Holdings Stock. We believe that the allegation that the four named individuals "made" or "caused" others to make misrepresentations and the further allegation that each of the four "signed several fraudulent representations, warranties and certifications to induce the Purchasers to enter and close the SPA" (¶¶ 10, 13-15) are sufficient to establish primary liability under the federal securities laws and thereby invoke the exception in Section 1964(c). The corporations and partnerships with which the four individuals were respectively affiliated have controlling-person liability under the federal securities laws and may, therefore, also invoke the statutory exception to RICO liability. *See Suez Equity Investors* v. *Toronto-Dominion Bank*, 250 F.2d 87, 101-02 (2d Cir. 2001).

Claimants' further suggestion that Section 1964(c) provides a cause of action "where the defendant has been convicted of a crime related to the fraud" and that the RICO claim is, therefore, "at most premature" (Cl. Supp. Mem. at 8) — presumably because one or more of the defendants may yet be indicted and convicted of a crime of which the essential elements would not constitute "securities fraud" within the meaning of Section 1964(c) — invites the Tribunal to speculate as to future events. We decline to do so.

In its post-hearing supplemental memorandum, Claimant cites (at 9-11) four district court decisions as "instructive" for the proposition that a civil RICO claim may be "based on the fraudulent inducement of a business purchase." All involved the sale of a controlling share interest, and all were decided before the 1995 PSLRA amendment to Section 1964(c).

In sum, all of the Respondents other than the CBW Respondents are charged with "fraud in the purchase or sale of securities" and for that reason are exempted from RICO liability by the exception added to Section 1964(c) by the PSLRA. As there are no factual allegations in the Amended Statement of Claim relating to the CBW Respondents other than that they were Sellers of approximately 4% (in the aggregate) of the stock of GLL Holdings (Am St. Cl. ¶¶ 16-19, 26), the RICO claim against them will be dismissed as well.

III. The RICO Claim Does Not Satisfy the Requirements of Proximate Causation and Continuity.

(i) **Proximate causation**—The Supreme Court has held that, like Section 4 of the Clayton Act upon which it was based, Section 1964(c) require[s] a showing that the defendant's violation not only was a 'but for' cause of [the plaintiff's] injury, but was the proximate cause as well." *Holmes* v. *Securities* Investor *Protection Corp.*, 503 U.S. 258, 268 (1992), citing *Associated General Contractors of Cal., Inc* v. *Carpenters*, 459 U.S. 519, 534 (1983). "[A]mong the many shapes" the concept of proximate causation has taken, the Supreme Court explained, has been "a demand for some direct relation between the injury asserted and the injurious conduct alleged." *Holmes*, 547 U.S. at 268. "Thus," the Court continued, "a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover." *Id.* at 268-69, citing, "*e.g.*" 1 J. Sutherland, *Law of Damages* 55-56 (1882).

Here, the harm claimed — the payment of an artificially inflated price for all outstanding shares of GLL Holdings stock — was allegedly caused ultimately by defendants' "re-routing" of shipments, that is, "obtaining transportation of shipping containers for rates that were less than those the ocean shippers would have rightfully charged . . . if Rosenberg had not caused or condoned employees . . . to conceal the true destination of those containers" (Am. St. Cl. ¶ 84). The effect of that practice, according to Claimants, was to "fraudulently suppress[] [GLL's] costs of doing business in the short term, (b) "fraudulently inflate[d]" its "earnings in the short term," and "fraudulently increase[d] the profits" that the Respondents "could achieve through their intended sale of GLL" (*id.*).

The injury so alleged by Claimant is clearly derivative, rather than direct, because it is dependent upon, and most importantly would *not* have occurred absent, the re-routing practice directed by Respondents at third parties, to wit, ocean shippers. In this respect, the case is analogous to the fact pattern of *Steamfitters Local Union No. 420 Welfare Fund* v. *Philip Morris, Inc.*, 171 F.3d 912 (1999), where health care funds asserted a RICO claim against tobacco companies, contending that the companies had conspired in violation of the antitrust laws to withhold information from the funds about smoking. The District Court dismissed the complaint, concluding that the injury alleged by the funds failed the test of proximate causation. The Court of Appeals affirmed. The Court observed that the tobacco companies "would have had ample reason to engage in a conspiracy to prevent safer products from coming on the market, regardless of the relationship between the Funds and smokers," which was "not a necessary step in effecting the ends of the alleged conspiracy." 171 F.3d at 923.

So too, the Respondents would have had "ample reason" to re-route, lowering their costs and increasing their earnings, whether they reaped the benefits of the practice through increased dividend distributions or a sale of the Company for a higher price. A sale was not "necessary" to achieve Respondents' asserted objective to profit by falsifying the destination of shipments.

The greater distance analytically between Claimants and Respondents, than between Respondents and the allegedly defrauded ocean shippers, is also demonstrated by the fact that Claimants' claim to have been injured requires a showing that the ocean shippers were defrauded, but the ocean shippers would not have to prove a fraud upon Claimants in order to recover shipping undercharges.

The RICO claim is not only dependent on proof of an injury sustained by third parties (the shippers); it also has a necessarily speculative element. If GLL had abandoned its practice of re-routing and increased its payments to the ocean shippers, would GLL have been able to pass on some or all of those increased costs to its customers? If GLL had been able to pass on all of the increase, then its earnings would not have been inflated, and (at least to the extent the purchase price was based on a future projection of historic earnings) the purchase price would have reflected the "actual value" of the business. To determine in 2008 what the effect *would have been* if GLL had increased its payments to ocean shippers five years ago is inherently a speculative endeavor to a significant extent.

The fact pattern linking the alleged unlawful conduct and the injury allegedly sustained may take a different form here than it did in *Holmes* or *Steamfitters*, but the reasoning underlying those decisions is nevertheless applicable.

In *Holmes* the Court observed that "the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation as distinct from other, independent facts." 503 U.S. at 269. If the actual value of GLL's business is less than the purchase price paid by Claimants, the difference may be due to the alleged artificial increase in GLL's EDBITA resulting from the shipping "undercharges," but it may also be due, as Respondents contend, to other factors such as "the economy, competition and Respondents' [asserted] mismanagement of GLL." (Olympus Resp. Mem. at 18-19). The Tribunal, of course, expresses no view on this question; it is sufficient to point out that the "undercharges" alleged by Claimants did not necessarily by their nature have the effect of inflating the purchase price to the level at which the acquisition was made.

The burden of assessing what, if any, impact the foregoing factors had on the purchase price paid by Claimants is "unjustified", as it was in *Holmes*, "by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely." 503 U.S. at 269-70; *see also Anza* v. *Ideal Steel Supply Corp.*547 U.S. 451,___, 126 S.Ct. 1991, 1998 (2006); *see also*

Callahan v. *A.E.V., Inc.*, 182 F.3d 237, 265 (3d Cir. 1999) ("Where a more directly affected party is available to vindicate the public interest in enforcing the law, we have less need to stretch the limits of proximate causation in RICO cases.").

If, as alleged by Claimants, GLL was systematically and pervasively cheating ocean carriers by misrepresenting the destination of shipments, the carriers have adequate incentive to sue to recover the undercharges.[9] Moreover, the measurement of damages would be simple — and in fact has already been calculated by Claimants (*see* ¶¶ 45-46). The adjudication of the shippers' claims "would be relatively straightforward" and "considerably easier to make" than a determination of the amount that Claimants overpaid for GLL Holdings Inc.'s stock. *Anza* v. *Ideal Steel Supply Corp*, 541 U.S. 451, 126 S. Ct. 1991, 1998.[10]

(ii) **Continuity** — In their opposing memorandum (at 14-15), Claimants accuse Respondents of having engaged in a "two-pronged pattern of racketeering," "commit[ting] a direct fraud on the Purchasers through predicate acts of wire fraud that concealed their fraud on others." The difficult with this characterization of the claim is that each prong of the argument suffers from a fatal flaw, although they differ.

The prong aimed at Respondents' undercharging of ocean shippers fails the test of proximate causation for the reasons noted above. The prong aimed at Respondents' misrepresentations to Claimants in the SPA and the antecedent negotiations fails to satisfy the element of continuity that has been infused into the statutory requirement of a "pattern of racketeering activity" 18. U.S.C.§1961(5).

In *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989), the Supreme Court, after reviewing the legislative history of RICO, stated that "to prove a

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9 The significance of the fact that no ocean carries are alleged to have sued is discussed further below.

10 We have discussed two of the three reasons identified in Justice Souter's opinion for the Court in *Holmes* for focusing on the directness of the relationship between a plaintiff and defendant (or claimant and respondent). The third reason — the avoidance of complicating rules apportioning damages . . . to obviate the risk of multiple recoveries" (503 U.S. at 269) does not apply here, as it does where the predicate conduct is price-fixing.

pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity." 492 U.S. at 239. The Court went on to explain that continuity was "both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." 492 U.S. at 241-42.

Claimants cannot establish closed-end continuity, because doing so requires proof of "a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement." *H.J. Inc.*, 492 U.S. at 242. The series of misrepresentations enumerated in Claimant's opposing memorandum (at 18-19) extended from March 23 to May 20, 2006, a period of just under two months. A period of that duration falls far short of the time the courts have required to establish closed-end continuity. *See, e.g., Tabas* v. *Tabas*, 47 F.3d 1280, 1293 (3d Cir. 1995) ("[C]onduct lasting no more than twelve months [does] not meet the standard for closed-end continuity.")[11]

Nor can Claimants satisfy the requirement of open-ended continuity because the racketeering activity charged by Claimants was "intended" to facilitate the sale of GLL at an inflated price (Am. St. Cl ¶ 84) — and allegedly achieved that objective. By definition, that conduct by its nature could not "project[] into the future with a threat of repetition." *H.J. Inc.*, 492 U.S. at 241; *see also Hughes* v. *Consol-Pennsylvania Coal Co.*, 945 F.2d 594, 610-11 (3d Cir. 1991) (a "one-time racket to obtain a specific bounty" fails the test of open-ended continuity).

[11] Because Claimant cannot satisfy the temporal requirement to establish continuity even if one considers the entire period of the pre-acquisition negotiations, the Tribunal need not decide whether the inclusion of that period is permissible in view of the integration provision in Section 14.10 of the SPA ("This Agreement and the documents referred to herein . . . supersede any prior . . . representations by . . . the parties, written or oral, which may have related to the subject matter hereof in any way."), although we note that one of the Delaware Chancery Court decisions cited by Claimants "[r]ecogniz[es] that the case law of this court gives effect to non-reliance provisions that disclaim reliance on extra-contractual representations." *Abry Partners V L.P.* v. *F&W Acquisition LLC*, 891 A.2d 1032, 1035 (Del Ch. 2006).

(iii) Present Injury — 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 . . .," and that GLL's "NVOCC license and its relationships with its most important suppliers" had been "jeopardized" (Am. St. Cl. ¶¶ 55, 77). Yet Claimants do *not* allege that they have compensated any carrier for prior undercharges, that any carrier has requested such compensation, that Claimants have been fined by the Federal Maritime Commission or that action has been taken — or even threatened — by the Commission to revoke or suspend their NVOCC license. 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.[12] The Amended Statement of Claim's silence on this score is striking.

"It is not enough that a plaintiff might suffer recoverable injuries in the future. In order to be able to maintain a RICO action, the plaintiff must show that his damages are not contingent upon the happening of uncertain events in the future." Hon. Jed S. Rakoff & Howard W. Goldstein, RICO: Civil and Criminal Law and Strategy § 4.03[5] (2007) (citations omitted). Though uttered in a different factual setting, the statement of the Third Circuit in *Maio* v. *Aetna, Inc.*, 221 F.3d 472, 494-95 (3d Cir. 2000) seems equally applicable here: "[W]hat appellants fail to realize is that the present economic harm they allege to have suffered is contingent upon the effect of events in the future which have not yet occurred." *See also, e.g., Motorola Credit Corp.* v. *Uzan*, 322 F.3d 130, 135-37 (2d Cir. 2003) (plaintiff lenders to a cell-phone network lacked standing to assert a RICO claim based on non-payment of the loans because plaintiffs did not allege that the loans had been foreclosed).

The Tribunal has grave doubts whether the single allegation by Claimant that they paid an artificially inflated price for GLL Holdings stock is sufficient to satisfy the

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12 Because Respondents have moved to dismiss the RICO claim as defective on its face, the Tribunal gives no weight to the interrogatory answers annexed to and cited in Respondents' moving memorandum.

requirement of present injury in view of the factors mentioned and authorities cited above. However, it is not necessary that the Tribunal reach a definitive view on this question inasmuch as we have concluded that the RICO claim may not be maintained for other reasons.

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Civil RICO is a blunt and powerful instrument, and the ingenuity of lawyers in articulating RICO claims should not be underestimated. If Claimants were permitted to maintain a RICO claim under the superficially distinctive circumstances of this matter, it would be a relatively simple for the acquirer in another transaction to base a RICO claim on conduct of a different sort directed in the first instance to third parties, such as tax fraud (*see Anza, supra),* antitrust violations and violation of environmental laws. The teaching of *Holmes, H.J. Inc., Steamfitters* and the other cases cited above is that proximate causation should not be extended to that extent.

IV. Claimants Have Waived Their Demand for Punitive Damages Against the Olympus Funds and CJR World Enterprises.

Respondents seek dismissal of Claimants' demand for $300 million in punitive damage (Am. St. Cl. ¶¶ 5, 80), contending that the claim was expressly waived in the SPA, citing Section 10.02(c). Claimants counter that the waiver upon which Respondents rely "applies only to claims for indemnification of 'losses' defined in Section 10.02(a)" (Cl. Opp. Mem. 2) and that a waiver of punitive damages is negated by the second sentence of Section 10.02(h). Claimants further contend that if the SPA is constructed to waive a punitive damages claim based on intentionally false representations and warranties, the waiver is "unenforceable under controlling Delaware law" (Cl. Opp. Mem. 3), citing *Abry, supra.*

Respondents rely upon the first sentence of Section 10.02(c), which provides in pertinent part:

> "(c) Notwithstanding any other provision in this Agreement to the contrary, the Sellers shall not be liable to, or indemnify, the Buyers Indemnified parties for any Losses (i) that are punitive or exemplary (except to the extent constituting third party punitive or exemplary claims) . . . ."

Were it not for the language of Section 10.02(h), which is discussed below, the waiver of, or disclaimer of liability for, punitive damages would clearly be controlling and require dismissal of Claimants' demand against all "Sellers." Claimants read Section 10.02(c) too narrowly when they argue that that Section "applies only to claims to obtain indemnification," for the Section is explicit that the Sellers "shall not be liable to, *or* indemnify, the Buyer Indemnified Parties for any losses . . . that are punitive or exemplary . . . ." Further, "Losses" is a defined term that includes "damages" (SPA Section 10.02(a)).

Claimants are seemingly on stronger footing in relying upon Section 10.02(h), which provides as follows:

> "(h) Notwithstanding any provision herein contained to the contrary, the liability of each party under this Article X shall be in addition to, and not exclusive of, any other liability that such party may have at law or equity based on such party's fraudulent acts or fraudulent omissions. *None of the provisions set forth in this Agreement shall* be deemed a waiver by the Buyer Indemnified parties or Seller Indemnified Parties of any right or remedy which they may have at law or equity based on a Seller's or Buyer's respectively, fraudulent acts or fraudulent omissions, nor shall any such provisions limit, or be deemed to *limit*, (i) *the amounts of recovery sought or awarded in any such claim for fraud*, (ii) the time period during which a claim for fraud may be brought, *or (iii) the recourse which the Buyer Indemnified parties or Seller Indemnified Parties may seek against a Seller or buyer, respectively, with respect to a claim for fraud*; provided that the Buyer Indemnified Parties and Seller Indemnified Parties hereby waive to the fullest extent permitted under applicable law the remedy of rescission" (emphasis added).

In reconciling the apparent contradiction between the first sentence of Section 10.02(c) and Section 10.02(h), the Tribunal is guided by two rules of contract interpretation. First, "an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect . . . ." Restatement of Contracts § 203(a) (1981). Second, "[s]pecific language in a contract controls over general language, and where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one." *DCV Holdings, Inc.* v. *Conagra, Inc.*, 889 A.2d 954, 961 (Del. 2005).

If Section 10.02(h) is construed to include punitive damages in the "amounts of recovery sought or awarded in any . . . claim for fraud" that may not be "limit[ed]" — put differently, if Section 10.02(h) trumps the first sentence of Section 10.02(c) —, then the latter would be deprived of all meaning. Moreover, that construction would violate the second principle of contract interpretation set forth above, because it would be giving precedence to generalized language over language that specifically refers to punitive damages.

The two contractual provisions can be reconciled if Section 10.02(h) is read as proscribing a limitation on the *compensatory* damages recoverable for fraud. In the context of Article X read as an entirety, that construction is reasonable because it is consistent with Section 10.02(b), which places a cap of $6,425,000 on the Sellers' indemnification liability (with exceptions not relevant) for breach of representation or warranties, but then qualifies that limitation as being "subject to Section 10.02(h)".

The foregoing construction of Section 10.02(h) is fortified by the distinction drawn by Delaware law between compensatory damages and punitive damages, which "serve an entirely different function . . . and are calculated according to a different formula." *Grissom* v. *Nationwide Mutual Insurance Co.*, 599 A.2d 1086, 1089 (Del. Ch. 1991).

In their supplemental submission, Claimants argue (at 3) that "Section 10.02(c) recognizes that it and every other provision in Section 10.02 remain 'subject to' Section 10.02(h)." But Section 10.02(c) contains two sentences. While the second sentence does state that its "sole and exclusive remedy" language is subject to Section 10.02(h), the first sentence, which rules out liability for punitive or exemplary damages, contains no such qualification.[13]

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13 Thus, these provisions of the SPA do not pose a threat of "death by cross-reference."

Claimant's citation of *Abry Partners* as authority that a waiver of punitive damages would be contrary to public policy overstates the Court's actual decision, which invalidated a contractual provision that limited the liability of the Seller of a business for misrepresentation to a capped claim for damages. The provision was found to violate public policy because it was inconsistent with the principle that "when a seller intentionally misrepresents a fact embodied in a contract . . . the buyer is free to press a claim for rescission or for full *compensatory* damages." 891 A.2d at 1036 (emphasis added). The SPA is entirely consistent with that principle in providing that the Sellers' liability for fraud shall not be limited.

For the foregoing reasons, the waiver of punitive damages in Section 10.02(c) is consistent with public policy and will be enforced. The punitive damages claim is dismissed against all "Sellers," to wit, Olympus Growth Fund III, Olympus Equity Olympus Executive Fund, L.P. and CJR World Enterprises, Inc.

The contractual indemnification, fraud and punitive damages claims of Global Link Logistics and GLL Holdings against the individual moving Respondents have been released and will be dismissed.

The individual Respondents argue that all claims against them are foreclosed by Section 10.10 of the SPA, which is captioned "Limitation on Recourse" and additionally that they have all been individually released under Section1.1.2(a) of the Shareholder/ Officer Agreement. We will consider these arguments separately.

Section 10.10 provides in pertinent part:

> "No claim shall be brought or maintained by Buyer . . . against any officer, director [or] employee . . . of any party hereto which is not otherwise expressly identified as a party hereto, and no recourse shall be brought or granted against any of them, by virtue of or based upon any misrepresentation or inaccuracy in or breach of any of the representations, warranties or covenants . . . set forth or contained in this Agreement . . . ."

Each of the individual Respondents was an officer or director of one or more parties to the SPA, and none was a party individually to the SPA. Therefore, they contend, no claim can be brought against them based on any misrepresentation in the

SPA, whether the theory underlying the claim is contractual indemnification, fraud or civil RICO.

Claimants counter with three arguments: First, Claimants contend that Section 10.10 is limited to indemnification claims and that the limitation is made clear by the proviso at the end of the section, which renders the limitation inoperative if a Seller entity makes a distribution or other transfer rendering it incapable of performing its indemnification obligations under the SPA.[14] The argument is strengthened by the facts that Article X is captioned "Indemnification" and that the "limitation on recourse" provided in Section 10.10 refers specifically and solely to "any alleged misrepresentation or inaccuracy in or breach of any of the representations, warranties and covenants of any party" to the SPA, language arguably more suitable to a contractual indemnification claim than a fraud claim. Reading Article X as an entirety, we find Claimants' argument persuasive.

Second, Claimants point to the reservation in Section 10.02(h) of "any right or remedy which [Buyer Indemnified Parties] may have at law or equity based on a Seller's . . . fraudulent acts or fraudulent omissions . . . ." The difficulty with this argument, as the individual moving Respondents note (Reply at 3-4) is that Section 10.02(h) preserves a right to sue for fraud based on a "Seller's" acts or omissions, and none of the four individual moving Respondents (Messrs. Rosenberg, Mischianti, Heffernan and Cardenas) was a "Seller."

Finally, Claimants contend that it would be contrary to public policy to interpret Section 10.10 to absolve the individual Respondents of the consequences of their fraudulent conduct. We will address this contention after discussing arguments specific to Section 1.1.2 of the Shareholder/Officer Agreements, the second basis on which the individual moving Respondents seek a dismissal of all claims.

Section 1.1.2(a) of the Shareholder/Officer Agreements entered into separately by the Olympus Respondents and by the Rosenberg and CWE Respondents is reproduced in

14 Claimants appear not to dispute that Section 10.10 bars their indemnification claims against the individual Respondents.

an appendix to this decision. The Shareholder/Officer Agreements were "executed and delivered concurrently with the execution of the" SPA. In consideration of the release upon which the individual Respondents rely on this motion, those Respondents gave a reciprocal release to Claims Global Link Logistics and GLL Holdings and additionally assumed a defined confidentiality obligation and an obligation not to engage in a competing business, not to solicit customers and not to engage in certain other conduct.

Respondents focus upon the language in Section 1.1.2(a) that releases each Seller and its officers, directors, employees and agents from "any and all claims . . . of any kind, character or nature whatsoever . . . ." This language is broad enough, the individual moving Respondents contend, to embrace all of the claims asserted against them inasmuch as their complained-of conduct was undertaken in their capacities as "officers, directors, employees and agents" of Global Link Logistics. The claims asserted in the Amended Statement of Claims also satisfy the requirement of Section 1.1.2(a) that the released claims "relat[e] to . . . the Company Releasee's direct or indirect ownership of any debt or equity securities issued by an Acquired Company . . . ."

Claimants' principal argument is that the release in Section 1.1.2(a) of the Shareholder/Officer Agreement and the limitation on recourse provided in Section 10.10 of the SPA are invalid if sought to be applied to fraud claims, because it is against the public policy of Delaware to relieve a person who engages in fraudulent conduct of the obligation to compensate the victim of that conduct. *See Abry Partners V*, 891 A.2d at 1064. Consistently with that policy, Claimants argue, the Delaware Supreme Court has held that "if one party is to be held to release a claim for fraud in the execution of the release itself, the release should include a specific statement of exculpatory language referencing the fraud." *E.I. DuPont de Nemours & Co.* v. *Florida Evergreen Foliage*, 744 A.2d 457, 461.

There are persuasive reasons not to apply that broad statement indiscriminately to this matter. For one thing, *Florida Evergreen* was a product liability suit, not litigation arising out of a complex, carefully wordsmithed set of agreements between two private equity investors for the acquisition of a substantial business organization. Second, *Florida Evergreen* involved the validity of a release given in a litigation settlement. The specific issue was whether the release "should be held to 'release a claim for fraud in the execution of the release itself'." *Comrie v. Enterasys Networks, Inc.* 2004 WL 293337 (Del. Ch.), *quoting Florida Evergreen*, 744 A.2d at 461. That is not the issue here. Third, the release in *Florida* Evergreen was a customary general release, unlike the release here, which was drafted to extend expressly to "those Claims that [any Acquired Company] may not know or suspect to exist which, if known, may have materially affected the decision to provide the Company Release, and each Acquired Company expressly waives any rights under applicable law that provide to the contrary." That language is apt to encompass fraud claims; indeed, it is difficult to conceive of language more apt that did not expressly use the word "fraud."

The Tribunal considers this perhaps the most difficult issue of all those raised by the pending motion. In the end, two members of the Tribunal are persuaded that, as Vice Chancellor Strine noted in *Abry Partners*, "the common law ought to be especially chary about relieving sophisticated business entities of the burden of freely negotiated contracts." 891 A.2d at 1061-62. Those two Tribunal members conclude that the release provided in Section 1.1.2(a) of the Shareholder/Officer Agreement embraces claims for fraud, in view of the expansive and somewhat unusual language in the last sentence of that provision, and that in the sophisticated commercial setting of this matter, enforcing the release as so construed does not violate public policy. It follows *a fortiori* that upholding a release of contractual indemnification claims is consistent with public policy.

VI. The claims of Golden Gate Logistics, Inc. may be maintained.

Respondents argue (Resp. Release Mem. at 2) that because Golden Gate is not a party to either the SPA or the Shareholder/Officer Agreements, it has no standing to assert any claims against Respondents and, therefore, all of Golden Gate's claims should be dismissed with prejudice.

It is true that "injury arising solely out of harm done to a subsidiary corporation is generally insufficient to confer standing . . . on a parent corporation. *American Towers, Inc. v. Town of Falmouth, Maine*, 217 F. Supp. 154, 157 (D. Me. 2002), citing *Classic Communications, Inc. v. Rural Tel. Serv. Co.*956, F.2d 896, 916 (D. Kan. 1997); *see also Mason v. Stacescu* 11 F.3d 1127, 1131 (2d. Cir. 1993) (even sole shareholder of

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corporation does not have standing to assert civil RICO claim). However, Golden Gate is not simply a direct controlling shareholder of another claimant, GLL Holdings, and an indirect controlling shareholder of the third claimant, Golden Gate Logistics. Golden Gate appears to have been itself a significant participant in the acquisition transaction and is alleged to have contributed the entire $61 million equity portion of the purchase price (Am. St. Cl. ¶¶ 20, 22).

Additionally, Golden Gate as a "Parent Affiliate" (*see* SPA § 13.01 ("Definitions") is included within the definition of a "Buyer Indemnified Party" under Section 10.02(a) of the SPA, but Golden Gate has not itself released any claim because the release in Section 1.1.2 of the Shareholder/Officer Agreement is given only by "[e]ach Acquired Company," and that term is defined as including "the Buyer [that is, GLL Sub Acquisition], the Company [that is, the initial GLL Holdings] and its subsidiaries [including the original Global Link Logistics]."

Conclusion

The foregoing rulings may be summarized as follows:

1. The indemnification, fraud and punitive damages claims of Claimants Global Link Logistics and GLL Holdings against the individual Respondents have been released and are dismissed.

2. Section 10.02(c) of the SPA forecloses Claimants' punitive damages claim against the two Olympus entities and CJR World Enterprises, but not the individual Respondents.

3. The RICO claims of all three Claimants have been timely asserted but (i) are foreclosed by the securities fraud exception in 18 U.S.C.S. §1964(c) (LexisNexis 2002), and (ii) fail to satisfy the requirements of proximate causation and continuity.

4. The indemnification, fraud and punitive damages claims of Claimant Golden Gate may be maintained.

This Partial Award and Decision may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

Mark A. Aronchick, dissenting in part:

I join in all parts of the opinion except the portion in Section V that concludes that fraud claims against the Individual Respondents (Messrs. Rosenberg, Mischianti, Heffernan and Cardenas) are released under Section 1.1.2(a) of the Shareholder/Officer Agreement.

I agree that this is the most difficult issue of all of those raised by the pending motion. I disagree that, under Delaware law, the language in the release is specific enough for us to conclude, as a matter of law and on the face of the Agreement, that the parties intended for fraud claims to be released against the Individual Respondents.

The majority of this tribunal concludes that fraud claims are released because (1) these were carefully wordsmithed agreements and (2) the language in Section 1.1.2(a) of the Shareholder/Officer Agreement should be construed to cover claims for fraud, even in the absence of a specific mention of the word fraud or the legal definition of fraud, because it is difficult for the majority to conceive of what else that language might cover. I believe that these reasons should lead to the opposite of the majority's conclusion, namely that Delaware law requires that fraud claims must be released with specificity and sophisticated parties, more than others, know precisely the words that would be necessary to achieve such specificity. The language of Section 1.1.2(a) does not say, in clear and specific terms, that fraud claims are released. Further, the language quoted by the majority is not even the legal definition of fraud. The language exempting "claims" that "may have materially affected the decision" to provide the release could include "claims" arising from negligent misrepresentations, for example, rather than fraud. The point is that, at this stage, we do not know with specificity what this language was meant to cover.

The majority properly recognizes that under *E.I. du Pont de Nemours & Company* v. *Florida Evergreen Foliage*, 744 A.2d, 457; and *Abry Partners VLP* v. *P&W Acquisition LLC*, 891 A2d, 1032 (Del Ch. 2006), Delaware law contains a strong public policy against the release of fraud claims and that any such release must be specific, clear and, as I read the opinions, unequivocal. Earlier in the opinion of this tribunal we applied these rather exacting standards, I believe properly, in analyzing whether claims for punitive damages were waived. See Section IV of the opinion. The Tribunal dissected the language of Sections 10.02(c) and 10.02(h) to reach the conclusion that the drafters of these documents clearly intended punitive damages to be waived and that such a waiver was consistent with public policy. Applying that same exacting analysis, it is not clear on the face of this document, at least to me, that Section 1.1.2(a) was intended unequivocally to release fraud claims. At a minimum, I would have deferred ruling pending the receipt of evidence further analyzing the intentions of the parties regarding the release language at issue. Thus, I dissent from the portion of Section V of the opinion concerning the release of fraud claims against the Individual Respondents under Section 1.1.2(a).

Dated: March 25, 2008

Michael A. Cooper

Michael A. Cooper, Chair

Mark A. Aronchick (dissenting in part)

David J. Bederman

punitive damages were waived. See Section IV of the opinion. The Tribunal dissected the language of Sections 10.02(c) and 10.02(h) to reach the conclusion that the drafters of these documents clearly intended punitive damages to be waived and that such a waiver was consistent with public policy. Applying that same exacting analysis, it is not clear on the face of this document, at least to me, that Section 1.1.2(a) was intended unequivocally to release fraud claims. At a minimum, I would have deferred ruling pending the receipt of evidence further analyzing the intentions of the parties regarding the release language at issue. Thus, I dissent from the portion of Section V of the opinion concerning the release of fraud claims against the Individual Respondents under Section 1.1.2(a).

Dated: 3/27/08

Michael A. Cooper, Chair

Mark A. Aronchick (dissenting in part)

David J. Bederman

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