

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
BRIEF IN SUPPORT OF ITS OPPOSITION TO MITSUI O.S.K. LINES LTD.'S
REQUEST FOR RELIEF**

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
SUMMARY OF ISSUES PRESENTED	1
MOL Was Fully Aware of and Encouraged Split Routing by Global Link	1
MOL's Claims Are Substantially Time Barred	4
FINDINGS OF FACT	4
ARGUMENT	5
I. In Order to State a Claim Under 10(a)(1) of the Shipping Act, A Complainant Must Establish that Respondent Relied Upon the Deception or Fraud and That It Was Not a Party to the Deception	5
II. The Facts Establish that MOL Was Not Only Aware of but Complicit in the Split Routing at Issue	6
A. MOL Employees' Testimony as to Benefits to MOL Associated with Global Link Doing Door Moves which Permitted Split Routing	7
B. Global Link Employees' Deposition Testimony and Sworn Declarations ..	8
C. MOL Employees' Testimony as to Knowledge of Split Routing	8
D. Arbitration Panel	9
E. MOL's Instructions to Truckers in Regard to Split Routing	10
F. MOL's Consultation with its General Counsel and with Senior Personnel in Regard to Split Routing	10
G. MOL's Agreement to Pay Trucking Costs Associated with Split Routing	12
H. MOL's Issuance of a Fraudulent Transportation Order in Connection with a Split Routing	12
I. MOL Charged Global Link Rates That Were Contrary to those Set Forth in its Service Contract	13
J. Global Link Shipline Delivery Orders Provided to MOL Reflecting Split Routing	13

K.	MOL Correspondence in Regard to Split Routing from Martinsville, Virginia to Hancock, Maryland	15
L.	MOL's Receipt of Invoices from Truckers Showing the Delivery of Goods to Locations Different Than Those on its Bills of Lading.....	16
M.	Global Link's Change of Ownership and Efforts to Terminate Split Routing	17
N.	Nintendo Split Routing Scheme	21
O.	MOL Continued to Assert It Was Unaware of Split Routing Even Years After This Lawsuit Was Filed.....	22
III.	MOL's Assertions of Lack of Knowledge and Participation in Split Routing Are Belied by the Evidence in the Record.....	22
IV.	The Statute of Limitations Is Not Tolled.....	25
A.	Statutes and Limitations Must Be Enforced Pursuant to Their Terms	26
B.	MOL Was Fully Aware of its Claim As of 2004.....	31
C.	Knowledge of MOL Employees is Attributable to MOL.....	33
1.	The Adverse Interest Exception Does Not	36
D.	MOL's Proof is Defective	38
V.	MOL Fails to Establish the Basis for Claims Against the Current Owners of Global Link.....	39
	CONCLUSION	40

TABLE OF AUTHORITIES

Cases

<i>Baldwin County Welcome Center v. Brown</i> , 466 U.S. 147, 152 (1984).....	26
<i>California Sansome Co. v. U.S. Gypsum</i> , 55 F.3d 1402, 1409 (9 th Cir. 1995).....	30, 31
<i>Cascone v. United States</i> , 370 F.3d 95, 104 (1 st Cir. 2004).....	27
<i>Cobalt Multifamily Investors, I, LLC v. Shapiro</i> , 857 F. Supp. 2d 419, 425 (S.D.N.Y. 2012)	37
<i>Cole v. Kelly</i> , 438 F.Supp. 129, 139 (C.D.Cal. 1977)	30
<i>Continental Oil Co. v. Bonanza Corp.</i> , 706 F.2d 1365, 1376 (5 th Cir. 1983).....	34
<i>Coryell v. Phipps</i> , 317 U.S. 406, 410 (1943).....	34
<i>Dayco Corp v. Goodyear Tire & Rubber Co.</i> , 523 F.2d 389, 394 (6 th Cir. 1975).....	28
<i>Diaz v. United States</i> , 165 F.3d 1337, 1339 (11 th Cir. 1999).....	28
<i>Fisher v. Samuels</i> , 691 F. Supp. 63 (N.D. Ill. 1988)	28, 29
<i>Fitzgerald v. Seamans Jr.</i> , 384 F. Supp. 688, 693 (D.D.C. 1974),.....	29
<i>Hercules Carriers, Inc. v. Claimant State of Florida</i> , 768 F.2d 1558, 1574 (11 th Cir. 1985).....	33
<i>Hobson v. Wilson</i> , 737 F.2d 1, 35 (D.C. Cir. 1984)	30
<i>In re Tysons Foods</i> , 919 A.2d 563, 585 (Del. Ch. 2007).....	31
<i>Inlet Fish Producers, Inc. v. Sea-Land Service, Inc.</i> , 29 S.R.R. 306, 313 (F.M.C. 2001).....	27, 30
<i>International Designer Transitions Inc. v. Faus Group, Inc.</i> , 663 F. Supp.2d 432, 442 (M.D.N.C. 2009).....	5
<i>Maher Terminal LLC v. The Port Authority of New York and New Jersey</i> , 32 S.R.R. 1, 16 (ALJ 2011).....	26, 27, 29
<i>McIntyre</i> , 367 F.3d at 38, 52 (1 st Cir. 2004)	28
<i>Mitsui O.S.K. Lines Ltd. v. Global Link Logistics Inc.</i> , Docket No. 09-01, 2011 WL 714008 (FMC 2011) at *46	6
<i>Mohasco Corp v. Silver</i> , 447 U.S. 807, 826 (1980).....	26, 27
<i>Pacific Far East Lines—Alleged Rebates</i> , 11 F.M.C 357, 364 (1968).....	5

<i>Parmalat v. Bank of America</i> , 383 F.Supp.2d 587, 598 n. 54 (S.D.N.Y.2005).....	37
<i>Prince Line v. American Paper Exports</i> , 55 F.2d 1053, 1055 (2d Cir. 1952).....	5
<i>Revenue Protection Services, Inc. v. International Resources and Sunshine Loading Service, Inc.</i> , Docket No. 92-44, 1993 WL 113705 (FMC March 8, 1993) at * 1	5
<i>Sawyer v. Mid-Continental Petrol. Corp.</i> , 236 F.2d 518, 520 (10 th Cir. 1956).....	33
<i>Skwira v. United States</i> , 344 F.3d 64, 77 (1 st Cir. 2003)	27, 33
<i>Skwira</i> , 344 F.3d at 78 (1 st Cir. 2003);	28
<i>Steele Tank Lines, Inc. v. United States</i> , 330 F.2d 719, 723 n. 3 (5 th Cir. 1964).	34
<i>Su v. Aster</i> , 978 F.2d 462, 473 (9 th Cir. 1992).....	6
<i>Tetrev v. Pride International, Inc.</i> , 444 F.Supp.2d 524, 530, n. 4 (D.S.C. 2006)	5
<i>United States v. Bill Harbert Int'l Construction Inc.</i> , 505 F. Supp. 2d 1, 7 (D.D.C. 2007) ...	27, 28, 29, 30, 31, 33
<i>United States v. Intradot/Int'l Mgmt. Group</i> , 265 F. Supp. 2d 1, 12 (D.D.C. 2002)	28
<i>United States v. Joselyn</i> , 206 F.3d 144, 159 (1st Cir. 2000).....	34
<i>United States v. Kubrick</i> , 444 U.S. 111, 117 (1979)	26
<i>United States v. Sun-Diamond Growers of California</i> , 964 F. Supp. 486, 490 (D.D.C. 1997).....	34
<i>Unpaid Freight Charges</i> , 22 S.R.R. 735, 737 (1993).....	5
<i>Vessels v. City of Philadelphia</i> , 2011 WL 4018137 (E.D. Pa. 2011) at *7	29
<i>W. Overseas Trade & Dev. Corp v. Asian N. American Eastbound Rate Agreement</i> , 26 S.R.R. 651, 659 (ALJ 1992).....	26
<i>Western Diversified Services, Inc. v. Hyundai Motor America, Inc.</i> , 427 F.3d 1269, 1276 (10 th Cir. 2005).....	33
<i>Williams v. P.O. Baird</i> , 1997 WL 438495 (E.D. Pa. 1997).....	29, 33
<i>Winters v. Diamond Shamrock Chem. Co.</i> , 149 F.3d 387, 403 (5 th Cir. 1998).....	29
<i>Zelevnik v. United States</i> , 770 F.2d 20, 23 (3d Cir. 1985).....	28
<i>Zenith Radio Corp v. Hazeltine Research Inc.</i> , 401 U.S. 321, 338 (1971).	27

Statutes

46 U.S.C. § 41101(a)4, 5, 6
46 U.S.C. § 41104(5).....5
46 U.S.C. § 41104(9).....5
46 U.S.C. § 41109(d).....5
46 U.S.C. § 41301(a)25
Ocean Shipping Reform Act of 19985

Other Materials

19 C.J.S., *Corporations*, § 1081, p. 61833

Treatises

Prosser and Keaton on Torts, Section 70 (5th ed.) 50636

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Summary of Issues Presented

**MOL Was Fully Aware
of and Encouraged Split Routing by Global Link**

In its Complaint, Mitsui O.S.K. Lines, Ltd. ("MOL") asserts that Global Link "fraudulently" obtained ocean transportation from MOL, by deceiving MOL as to the true destination where goods were being delivered. MOL further represents that it was not until August of 2008, when it received a subpoena from Global Link seeking testimony about split routing practices in connection with Global Link's arbitration with the Co-Respondents that MOL learned of Global Link's split routing practice. Amended Complaint at Paragraph M. Similarly, in its Opening Submission, MOL flatly asserts that it did not know about and could

not have known about Global Link's split routing until 2008. *See* Opening Submission at page 64. Because the overwhelming evidence is flatly to the contrary, MOL's claim must be denied.

The sworn testimony confirms not only that MOL was aware of the split routing but that it encouraged it as a business practice because it benefited MOL. MOL's own employee testified that split routing was a common occurrence that was not a surprise to her or anyone else at MOL. In addition, documents produced by MOL show that MOL explicitly agreed to pay truckers to carry goods to destinations not listed on its bills of lading or in the applicable service contracts. Moreover, when Global Link, under its current ownership, sought to discontinue the split routing practices, MOL strenuously resisted such efforts.

The evidence of MOL's knowledge, and encouragement, of split routing is not limited to the sworn testimony of parties, including MOL's own employees, it is corroborated and confirmed by contemporaneous email communications and hundreds of shipping records reflecting that MOL was fully aware that cargo was being diverted to locations different than what was reflected in their applicable service contracts and to locations different than what was shown on the MOL bills of lading under which the goods moved.

The evidence firmly establishes that, not only were MOL operational personnel aware of the split routing, but that MOL's knowledge and encouragement of split routing occurred at senior levels of management. Indeed, the evidence shows that senior MOL personnel directed the split routing. The evidence that MOL's Vice President and General Manager of MOL's Southeastern Region -- with oversight of all regional sales, customer services and operations personnel -- knew of Global Link's split routing is overwhelming. MOL produced emails from him personally approving payments to truckers engaged in split routing. Further, documents produced by MOL show that in 2005 MOL's Vice President and General Manager engaged in

discussions with a MOL Operations Manager as to split routing and discussed whether MOL should seek to recover diversion charges against Global Link based upon such split routing. MOL's Vice President and General Manager unequivocally testified that he communicated with MOL's General Counsel as to such split routing in 2005.

The evidence further establishes that MOL's participation in split routing was not limited to Global Link. Nintendo was also one of MOL's largest customers. Senior MOL personnel admitted under oath that MOL not only allowed split routing to occur with its Nintendo shipments but that it *actually handled the split routing deliveries*. It was *standard operating procedure* for MOL to engage in split routing on behalf of Nintendo. Sample documents produced by MOL itself show that over 80% of the shipments handled by MOL on behalf of Nintendo were split routings, *i.e.*, were delivered to locations different than the locations designated on the MOL bills of lading and to points not reflected in the MOL-Nintendo service contracts.¹

MOL ignores this overwhelming evidence and makes the bald-faced assertion that it was unaware of the split routing. MOL attempts to focus attention on the fact that Global Link's prior ownership and management had set up elaborate procedures to ensure that shipping lines were unaware of its split routing procedures. However, while Global Link did have procedures in place to prevent most shopping lines from finding out where cargo was being delivered, the evidence definitively establishes that such procedures were not necessary in regard to MOL because MOL was fully aware of, and complicit in, the practice.

¹ Global Link's ability to present evidence in this regard was substantially hindered by MOL's failure to produce documents responsive to its discovery requests and the Presiding Judge's refusal to order such production. Nonetheless, the sworn testimony of MOL's Vice President of Sales and the documents produced establish that MOL itself, acting on behalf of Nintendo, routinely delivered goods to locations not reflected in MOL's Service Contracts with Nintendo, and to locations not reflected on the MOL bills of lading under which the goods moved. Further, the undisputed evidence reflects that MOL did not re-rate the charges or charge diversion fees for such split moves.

Whatever limited credibility there is to MOL's argument that it was unaware of the split routing at issue is further belied by the fact that in other lawsuits it has brought around the country against truckers, MOL asserts that it was unaware of Global Link's split routing practices until years after this Complaint was filed. Such representations evidence a continued casual disregard for the truth that should not be countenanced. Because the sworn testimony, the email correspondence and the shipping documents definitively establish that MOL was aware of, and complicit in, the split routing at issue in this case, MOL's claims must be denied.

MOL's Claims Are Substantially Time Barred

In addition to MOL's inability to establish a claim for fraud or deceit under Section 10(a)(1), given that it was fully aware of and complicit in the split routing at issue, MOL's claim is substantially time barred on its face. Parties seeking reparation pursuant to the Shipping Act must file suit within three years after the claim accrues. 46 U.S.C. § 41301. MOL's Complaint was filed on May 5, 2009. Thus, MOL's claim for reparations for shipments that occurred in 2004, 2005 and much of the first half of 2006 are time barred unless MOL can establish fraudulent concealment as a means of resurrecting stale claims. Here, for the same reason that MOL cannot state a claim that it was defrauded, it cannot meet its burden of showing that its claims were fraudulently concealed. The contemporaneous documents establish beyond cavil that MOL and its senior personnel knew about split routing during the time at issue. Accordingly, the statute of limitations cannot be tolled.

FINDINGS OF FACT

Global Link's Proposed Findings of Fact in Opposition to MOL's Request for Relief and in Support of Global Link's Counterclaim, which are being filed separately, are incorporated herein.

ARGUMENT

I. In Order to State a Claim Under Section 10(a)(1) of the Shipping Act, A Complainant Must Establish that Respondent Relied Upon the Deception or Fraud and That It Was Not a Party to the Deception.

To state a claim under Section 10(a)(1) of the Shipping Act, a carrier must establish some element of “falsification, deception, fraud or concealment.” *Revenue Protection Services, Inc. v. International Resources and Sunshine Loading Service, Inc.*, Docket No. 92-44, 1993 WL 113705 (FMC March 8, 1993) at * 1; *see also Pacific Far East Lines—Alleged Rebates*, 11 F.M.C 357, 364 (1968); *Unpaid Freight Charges*, 22 S.R.R. 735, 737 (1993). Given that deception is a necessary element for finding a violation of Section 10(a)(1) dismissal of such a claim is required absent evidence that a complainant was actually deceived. *Revenue Protection Services, Inc.* at 1.²

Federal courts construing claims alleging fraud, such as is alleged here, recognize that among the elements necessary to support such a claim are the plaintiff’s ignorance as to the truth of the fraudulent representation, and proximate injury as result of such reliance. *See, e.g., Tetrev v. Pride International, Inc.*, 444 F.Supp.2d 524, 530, n. 4 (D.S.C. 2006); *see also International Designer Transitions Inc. v. Faus Group, Inc.*, 663 F. Supp.2d 432, 442 (M.D.N.C. 2009) (fraud

² Although in *Pacific Far East Lines, supra*, 11 FMC 359 and other cases under Section 10(a)(1) and its predecessor, Section 16 of the First Shipping Act, 1916, the Commission recognized that there could be a showing of fraud even if the carrier itself was complicit in the Shipping Act violation because the Act is also designed to protect competing shippers, the Commission did not suggest that a carrier could recover reparations for violations of Section 10(a)(1) when it collaborated in those violations. Moreover, because MOL was aware of and complicit in the split routing practices and acquiesced in Global Link’s payment of its written invoices for the transportation, MOL cannot collect its claimed damages. 46 U.S.C. §41109(d). Further, it is clear that, since the amendments to the Shipping Act added by the Ocean Shipping Reform Act of 1998 (“OSRA”), the concealment of a potential 10(a)(1) violation from competing shippers is no longer relevant when service contracts are involved because competing shippers are no longer guaranteed “equality of treatment” under service contracts. *See* 46 U.S.C. §§41104(5), (9) (unfair or unjust discrimination or undue or unreasonable preferences unlawful *only* with respect to ports); *Prince Line v. American Paper Exports*, 55 F.2d 1053, 1055 (2d Cir. 1952) (“It is conceded that the billing was to conceal the contents from the company’s competitors, and it thus facilitated the preference which has been conceded. This was an “unfair device or means,” for it destroyed that equality of treatment between shipper, *which it was the primary purpose of the section, and for that matter, the whole statute to maintain.*”) (Emphasis supplied.)

requires showing of false representation or concealment of a material fact, “which does in fact deceive . . . resulting in damage to the injured party.”); *Su v. Aster*, 978 F.2d 462, 473 (9th Cir. 1992) (failure to show reliance upon misrepresentation defeats fraud claim.); *see also Mitsui O.S.K. Lines Ltd. v. Global Link Logistics Inc.*, Docket No. 09-01, 2011 WL 714008 (FMC 2011) at *46 (Khouri concurring part and dissenting in part) (elements of fraud require reliance upon misrepresentation or concealment; fact that split routing was “open, known, acknowledged, endorsed and encouraged by Mitsui” defeats 10(a)(1)).

II. The Facts Establish that MOL Was Not Only Aware of but Complicit in the Split Routing at Issue

Recognizing its burden of establishing that it was deceived by Global Link’s split routing, MOL’s Complaint asserts that the Respondents “fraudulently” obtained ocean transportation from MOL, *i.e.* that it deceived MOL as to the true destination where goods were being delivered. *See* MOL Amended Complaint at Section III, page 3; *see also* Amended Complaint at Section IV (Statement of Facts) Paragraph H (Global Link acted “without MOL’s knowledge”), Paragraph I (MOL would have no information regarding the actual destination of the cargo); Paragraph J (true destinations were hidden from MOL); Section V, Paragraph B (Global Link’s fraudulent actions and willful efforts to conceal information as to where goods were being delivered). The facts in the record, however, belie these assertions.

As reflected in Global Link’s Proposed Findings of Fact (“FoF”), the evidence of MOL’s knowledge and encouragement of split routing is overwhelming. This evidence consists of the sworn testimony not only of Global Link employees but also of MOL employees, the findings of a neutral Arbitration Panel, contemporaneous email communications, MOL’s instructions to truckers, MOL’s communications with its General Counsel and other Senior Personnel in regard to split routing, MOL’s agreement to pay truckers engaged in split routing, MOL’s issuance of

fraudulent Transportation Orders in connection with split routings, MOL's charging rates contrary to those set forth on the bills of lading under which goods and contrary to its service contract with Global Link, MOL's receipt of hundreds of Shipline Orders reflecting split routing to various locations around the country, MOL's continued refusal to terminate split routing despite Global Link's current ownership's request that it do so, and sworn testimony and documentation establishing that it was MOL's routine practice to conduct split routing on behalf its largest customer, Nintendo. Indeed, even years after filing its Complaint before the Commission, MOL continues to file lawsuits seeking to recover for split routing alleging that it was unaware of ongoing split routing in 2011, two years after this suit was filed.

A. MOL Employees' Testimony as to Benefits to MOL Associated with Global Link Doing Door Moves which Permitted Split Routing

Most of the shipments handled by MOL for Global Link during 2004 through 2006 were to door points, as opposed to container yards. FoF 18. One of the significant benefits to MOL of its relationship with Global Link was that Global Link took on most of the obligations in terms of actually delivering the goods from the MOL container yard to the door point. FoF 19.

The willingness of Global Link to handle the inland transportation of the goods to the door point was a significant benefit to MOL because MOL did not have to do the work involved in handling such moves and MOL no longer had the burden of providing staff to coordinate the door moves. FoF 20. During this time period, the railroads were imposing significant penalties for not timely removing containers from the rail yard. FoF 21. By having Global Link take over responsibility for the door moves, however, such detention charges were no longer MOL's responsibility. FoF 21.

B. Global Link Employees' Deposition Testimony and Sworn Declarations

Jim Briles, who was Global Link's primary contact with MOL during the relevant time period, routinely communicated with Paul McClintock and Rebecca Yang about split routing during the time period from 2004 through 2006. FoF 10.

Chad Rosenberg, Global Link's founder and former owner, testified that MOL was aware of and encouraged Global Link's split routing because it saved MOL from the inconvenience and administrative burden of having to negotiate numerous additional door points in the service contracts rather than simply shipping to regional points. FoF 23. Rebecca Yang of MOL expressed appreciation to Chad Rosenberg for Global Link performing split routing. FoF 23. She told him that she preferred that Global Link do split routing because it was more convenient for her. *Id.*³

C. MOL Employees' Testimony as to Knowledge of Split Routing

One of Global Link's customers was Vineyard Furniture in Winnsboro, Louisiana. FoF 24. There was no door point in the applicable MOL service contract for Winnsboro, Louisiana. *Id.* There was also no door point in the applicable MOL service contract for Bassett, Virginia, where another Global Link customer, Bassett Furniture, was located. FoF 73.

When Rebecca Yang asked Jim Briles at Global Link why certain door points were in the service contract with MOL, he told her that Global Link used the Martinsville door point for deliveries to Bassett Furniture, which is located in Bassett, Virginia. FoF 25. He also told her that Global Link had another door point for delivery of goods to Vineyard Furniture, which is in Winnsboro, Louisiana. *Id.*

³ The testimony of Chad Rosenberg and Jim Briles that MOL, unlike some other carriers, encouraged split routing was given long before this suit was initiated by MOL; thus Messrs. Rosenberg and Briles would have had no reason to differentiate between MOL and other carriers in regard to its willingness to engage in and encourage split routing.

Rebecca Yang testified that because the door points in a service contract do not cover all the destinations where goods are being shipped, goods would often be diverted to another destination for the convenience of the customer. FoF 26. Under those circumstances, MOL would not charge a diversion fee and would charge the customer for the destination listed on the bill of lading. *Id.*

It was a “common occurrence” at MOL that although a bill of lading might say goods were going to one destination, such as West Monroe, Louisiana, they would actually be delivered to another location such as Winnsboro, Louisiana. FoF 27. *That would not be a surprise to her or to anyone else at MOL. Id.*

To Rebecca Yang’s knowledge MOL never sought to rerate shipments or billed for diversion charges in cases of split routing where goods were delivered to a different location than what was listed on the bill of lading. FoF 28. If such diversion charges had been billed to Global Link, she would have known about it because Global Link would have complained. *Id.*

D. Arbitration Panel

The Rosenberg Respondents and Olympus Respondents were defendants in an arbitration proceeding (the “Arbitration”) initiated by Global Link’s current ownership. The Arbitration was predicated upon the Rosenberg and Olympus Respondents having fraudulently failed to disclose the split routing practices that were ongoing at Global Link prior to the current ownership’s purchase of the company. FoF 30.

The Arbitration Panel determined that “there is clear evidence that a senior sales representative of Mitsui knew that Global Link was engaged in split-routing, and Mitsui did not object – indeed Mitsui encouraged continuation of the practice -- because Mitsui preferred not to be bothered with negotiating a multiplicity of door points.” FoF 31.

E. MOL's Instructions to Truckers in Regard to Split Routing

In 2004, MOL informed Global Link that it wanted Global Link to use a specific trucker (All Coast) out of Savannah, Georgia for some shipments booked to Lenoir, N.C. FoF 33. In that email, Eric McColloch of Global Link wrote that MOL had advised Global Link that "they do not care if [All Coast] is really delivering to the correct destination (we would just have to send [All Coast] the correct address)." FoF 34.

In July of 2005, four years before this action was brought, Jim Briles sent an email to Rebecca Yang in which he explicitly referenced Global Link's practice of using house bills of lading (HBLs) which had different delivery points than did the master bills of lading (MBLs). FoF 35. Rebecca Yang admits that this email was discussing split routing. FoF 36.

In discovery, MOL produced an email dated August 11, 2005 which initially reflects that Global Link coordinated with a trucker for the delivery of a split routing in which the bill of lading and the delivery order showed Martinsville, Virginia, "but the actual del[ivery] is Beltsville, Md." FoF 37.

Subsequently, on that same date, there was an email from the trucker summarizing a conference call in which Laci Bass from MOL and a Global Link employee participated. The email summarizes an agreement whereby MOL, Global Link and the trucker (Evans Delivery) agreed to accommodate each other's concerns in regard to such split routings "on a case-by-case basis." FoF 38-39.

F. MOL'S Consultation with its General Counsel and with Senior Personnel in Regard to Split Routing

On August 15, 2005 -- almost four years before this Complaint was filed -- Ted Holt, a MOL Operations Manager, wrote to Paul McClintock, MOL Vice President, and Laci Bass in MOL Operations, in regard to instances where the bill of lading said the goods are going to one

location but the containers were actually going to a different place and asked whether MOL should be billing diversion charges associated with such split routing. FoF 40.

In that email, Mr. Holt, wrote that: "Basically, the b/l [bill of lading] says one thing and the container goes to a different place." FoF 41.

In his written response to the email, Mr. McClintock indicated that he would discuss the matter with Kevin Hartmann, MOL's General Counsel. FoF 42.

Mr. McClintock was questioned extensively in his deposition about this email and stated that this email was forwarded to General Counsel and discussed and reviewed. FoF 43. He testified that the email was not only sent to MOL's General Counsel but to other senior MOL personnel as well, including Ted Holt's boss. FoF 43, 51. He further testified that follow-up discussions in regard to the matter occurred internally at MOL. FoF 43-53.

Despite this review, and the fact that split routing was a regular occurrence, nothing was done to prevent further split routings by Global Link. FoF 47, 56.

Mr. McClintock is absolutely certain that the August 15, 2005 email discussing whether to bill for split routing was sent up the chain of command and to MOL's General Counsel. FoF 48-49. He testified that "*I can assure you there was follow-up taken on that particular case.*" FoF 50.

The fact that MOL failed to produce in discovery email communications reflecting such communications in no way indicates that such communications did not occur. FoF 51-53.

Rebecca Yang testified that as of August 2005, Paul McClintock, Laci Bass, Ted Holt and MOL's General Counsel, Kevin Hartmann, knew about split routing and considered billing for diversion charges but decided not to do so. FoF 55. Rebecca Yang further confirmed that no investigation in regard to split routing was taken as a result of these communications. "At

least nobody instructed [her] to investigate or anything like that,” despite the fact that she was MOL’s primary contact person with Global Link. FoF 56.

An accident occurred during a separate split routing of a Global Link shipment in 2007. FoF 89. Mr. McClintock testified that “just about everybody in the company [MOL] was copied on that one. *Id.* Despite the fact that “there were messages after messages flying all over about that overturned container,” FoF 89, and despite the fact that Paul McClintock, again, had a conversation with MOL’s General Counsel in regard to split routing, no steps were taken by MOL to prevent split routing. FoF 90.

G. MOL’s Agreement to Pay Trucking Costs Associated with Split Routing

West Monroe, Louisiana was a door point in the service contracts between MOL and Global Link, but Winnsboro, and Baskon, Louisiana were not. FoF 57.

On December 21, 2005, Blake Shumate, the Regional Manager for Global Link, wrote Paul McClintock noting that MOL was paying Vineyard Express, a trucking company, only \$75 for taking goods from the ramp in Monroe, to Baskon and Winnsboro locations despite the fact that it is a 95 mile round trip. FoF 58. Although delivery to such locations clearly constituted split routing, Global Link requested that MOL pay \$150 for round trips from Monroe to Vineyard Furniture. *Id.*

On the next day, MOL agreed to the \$150 adjustment. FoF 59. Thus, as of December of 2005, MOL agreed to increase the amount it paid truckers for draying goods for split routings from West Monroe to Baskon and Winnsboro, Louisiana. *Id.*

H. MOL’s Issuance of a Fraudulent Transportation Order in Connection with a Split Routing

On December 1, 2005, three and a half years before this Complaint was filed, one of MOL’s employees, Diane Chick, wrote to her supervisor, Jane Martin, noting that the “b/l[s] [bills

of lading] are showing West Monroe DOOR moves, but the delivery order I have for b/l #481637003 reads Winnsboro, LA, which is at least 30 miles south of West Monroe. We can only deliver to where the b/l reads unless the customer wants to pay the additional drayage.” FoF 60.

Although another MOL employee noted that “you are not supposed to do this,” a MOL supervisor wrote to five different MOL employees instructing them that they should “just cut the TPO [Transportation Order] for West Monroe and if this is to Vineyard Trucking they can work out the difference internally.” FoF 61-64.

I. MOL Charged Global Link Rates That Were Contrary to Those Set Forth in its Service Contract

On October 13, 2006, Jane Martin of MOL and Glenn Nowakowski of Global Link corresponded in regard to diverting a container from Lenoir, North Carolina to Sugarland, Texas and diverting a container from Braselton, Georgia to Phoenix, Arizona. FoF 65. Although Global Link did not have door points for Sugarland or Phoenix in its service contract with MOL, Rebecca Yang of MOL informed Global Link that it should engage in split routing by using the Forney, Texas rate that was in the service contract between MOL and Global Link. *Id.*

J. Global Link Shipline Delivery Orders Provided to MOL Reflecting Split Routing

Split Routing to Winnsboro, Louisiana

On November 14, 2006, Blake Shumate of Global Link sent a Shipline Transportation Order to nine (9) different MOL employees reflecting that although the MOL bill of lading showed the destination as West Monroe, the goods were actually being delivered to Vineyard Furniture in Winnsboro, Louisiana. FoF 67-68. Global Link sent scores of Shipline Delivery

Orders (DOs) to MOL reflecting split routings to Vineyard Furniture in Winnsboro, Louisiana. FoF 69.

Split Routing to Ridgeway, Virginia

In 2005 and early 2006, Global Link sent MOL over eighty (80) Delivery Orders reflecting that, although the destination shown on the MOL bills of lading was Martinsville, Virginia, the goods were actually being delivered to Bassett Furniture in Ridgeway, Virginia. FoF 71-72.

Split Routing to Bassett, Virginia

In 2005 and January of 2006 Global Link sent MOL more than 50 Delivery Orders reflecting that, although the destination shown on the MOL bills of lading was Martinsville, Virginia, the goods were actually being delivered to Bassett Furniture in Bassett, Virginia. FoF 73-75. MOL's Operations staff normally used the used the Delivery Orders in preparing MOL's Transportation Orders and thus would have been aware that the goods were going to a location that was no a door point in the applicable MOL service contract. FoF 76.

Split Routing to Lynchburg, Virginia

On November 13, 2005, Global Link sent a Delivery Order to MOL reflecting that, although the destination shown on the MOL bill of lading was Martinsville, Virginia, the goods were actually being delivered to Lynchburg, Virginia. FoF 78-79.

Split Routing to Fort Worth, Texas

On October 30, 2006, Blake Shumate wrote an email to Barbara Perry, Jean Flaherty, Kelly Johnson, and Lauren Estrada of MOL transmitting a Shipline Delivery Order reflecting that, although the destination shown on the MOL bill of lading was Forney, Texas, the goods were actually being delivered to Fort Worth, Texas. FoF 80-81.

Split Routing to Tucker, Georgia

On August 14, 2006, Glenn Nowakowski of Global Logistics sent MOL, attention Laci Bass, four separate Delivery Orders reflecting that, although the destination shown on the MOL bills of lading was Martinsburg, Pennsylvania, the goods were actually being delivered to Cort Furniture Rental in Tucker, Georgia. FoF 82-83.

Split Routing to Atoka, Oklahoma

On January 4, 2007, Blake Shumate of Global Link sent an email to Barbara Perry, Jean Flaherty, Kelly Johnson and Lauren Estrada of MOL with a Delivery Order attached reflecting that, although the destination shown on the MOL bill of lading was Monroe, Louisiana, the goods were actually being delivered to Atoka, Oklahoma. FoF 84-85.

Split Routing to Itasca, Illinois

On November 19, 2005, Blake Shumate of Global Link sent a Shipline Delivery Order to MOL reflecting that, although the destination shown on the bill of lading was Aurora, Illinois, the goods were actually being delivered to Itasca, Illinois. FoF 86-87.

K. MOL Correspondence in Regard to Split Routing from Martinsville, Virginia to Hancock, Maryland

On March 2, 2007, Laci Bass wrote to Paul McClintock and Rebecca Yang, and cc'ed Ted Holt, in regard to a split routing of Global Link cargo that was booked for Martinsville, Virginia but was actually going to Hancock, Md. FoF 88 Just about everybody in MOL was copied on that email and Paul McClintock discussed the split routing with MOL's General Counsel, Kevin Hartmann, but no steps were taken by MOL to prevent split routing. FoF 89-90.

L. MOL's Receipt of Invoices from Truckers Showing the Delivery of Goods to Locations Different Than Those on its Bills of Lading

Although Global Link issued Shipline and Truckline Delivery Orders to Spirit Trucking with different delivery addresses, Global Link never told anyone from Spirit Trucking not to disclose to MOL where the goods were actually being delivered. FoF 91. If Global Link had not wanted MOL not to know where the goods actually were being delivered, they would have instructed Spirit trucking not to disclose it to MOL. FoF 92.

Spirit Trucking sent invoices to MOL showing the actual locations where the cargo was delivered. FoF 93.

Although a Shipline Delivery Order was sent to MOL showing a destination of Aurora, Illinois, Shipline billed MOL for delivery of the cargo to its actual destination in South Holland, Illinois. FoF 94.

MOL was fully aware of where the goods were being delivered. FoF 96.

Spirit Trucking billed MOL for a shipment that was going to South Holland, Illinois, despite the fact that the Shipline Order reflected Aurora, Illinois. FoF 97. Based upon Spirit Trucking's billing, MOL was fully aware of where the shipment was sent. FoF 98.

Spirit Trucking sent an invoice showing that three different containers were delivered to South Holland, Illinois, despite Shipline Delivery Orders showing a destination of Aurora, Illinois. FoF 100.

Although Global Link issued Shipline Delivery Orders to Kentlands, Indiana, Spirit Trucking billed for delivery to the actual locations where the goods were delivered in Dubuque, Iowa and Noblesville, Indiana. FoF 102-103.

In numerous instances, Spirit Trucking issued invoices to MOL for delivery of cargo to locations not reflected on MOL's bill of lading. FoF 105. MOL never objected to Spirit Trucking billing to destinations different than what was indicated on its bill of lading. FoF 106.

M. Global Link's Change of Ownership and Efforts to Terminate Split Routing

In June, 2006, Global Link was acquired by its current owner, Golden Gate Logistics, LLC ("Golden Gate"). FoF 107.

Subsequently, the company was informed by a former employee that she had been fired due to her refusal to engage in split routing. *Id.* Early in the year 2007, Christine Callahan was hired by Global Link as the new Chief Operations Officer and instructed to ensure that Global Link complied with FMC regulations and to put an end to Global Link's split routing practices. FoF 116.

After Golden Gate acquired the company, a former employee made a complaint alleging questionable routing practices. *Id.* As a result, Golden Gate investigated the issue. FoF 108.

Although initially the allegations of questionable routing practices were not viewed as significant, Global Link was unable to quantify the extent of the split routing practice until early 2007. FoF 109. Over the course of time, however, Global Link learned of the seriousness of the split routing practices at issue and the fact that they constituted violations of the Shipping Act and Federal Maritime Commission regulations. *Id.*

Most of the service contracts being used for Global Link's customers belonged to the Hecny Group, a Hong Kong-based logistics company, and Global Link could not amend them. FoF 110. In addition, service contracts between carriers and NVOCCs run from May 1st to April 30th and Global Link determined that it would be impossible to accomplish significant amendments to the contracts in mid-term. *Id.* Ultimately, after consulting with its then legal

counsel, it was determined that Global Link would negotiate new service contracts in the May, 2007 negotiating season, which would eliminate any incentive to engage in split routing in the future. *Id.*

After Christine Callahan was hired by Global Link, she was instructed to ensure that it complied with the Shipping Act and FMC regulations and to put an end to Global Link's split routing practices. FoF 112. Consistent with that directive, Global Link informed MOL that the split routing practices needed to be terminated. FoF 113.

Global Link's current owners, Golden Gate, took every reasonable step to terminate split routing with MOL in a timely fashion. FoF 114.

Soon after her arrival at Global Link, Ms. Callahan entered into negotiations with steamship lines in regard to service contracts for the upcoming year (May 1st to April 30th). FoF 117. One of the steamship lines with which she negotiated with was MOL. *Id.*

Ms. Callahan's primary contact at MOL for these negotiations was Paul McClintock, who was the Vice President/General Manager of the Southeastern Region of the United States for MOL, a region that was the focus of much of Global Link's business with MOL. FoF 118-119.

Pursuant to instruction from Ms. Callahan, in March of 2007, Jim Briles of Global Link informed MOL that Global Link wanted to change its service contract from having only a limited number of door points to adding more door points and using container yard [CY] and port rates. FoF 120.

Subsequently, Paul McClintock and Rebecca Yang of MOL came to Global Link's offices to discuss the new contract and Global Link's desire to get away from the split routing practices, which involved only a handful of door points. FoF 121.

MOL told Global Link it would not cease split routing because it was too time-consuming to negotiate individual delivery points. FoF 122. When Global Link requested that a different door point be added to the MOL-Global Link Service Contract for a particular shipment, Rebecca Yang and Paul McClintock requested that Global Link instead move the shipment as a split. *Id.*

In June of 2007, when MOL still had not provided the information for the new contract necessary to eliminate the split routings, Christine Callahan, wrote Paul McClintock that Global Link could not continue to use the existing methodology in the contract and the parties needed to get the CY rates in place as quickly as possible. FoF 124.

When almost three weeks later, MOL still had not responded, Ms. Callahan wrote again:

“Although you explained to us the challenges you have internally at MOL regarding the change in methodology to CY moves vs. *the split door service MOL has historically provided*, we haven’t been advised of any change.

We’ve waited as long as we possibly can. Therefore, I have advised both Jim and Molly that *we must discontinue supporting MOL on the split moves* as we do not have MOL CY rates in place that will allow us to arrange our own trucking. This instruction has been given with immediate effect.”

FoF 125.

Although Paul McClintock suggested in his deposition testimony that he did not know what was meant by the term “split door service,” at no point did he ever ask Ms. Callahan what was meant by the term or indicate any uncertainty as to its meaning. FoF 126.

Hessel Verhage, the President of Global Link, met with Paul McClintock and Rebecca Yang for lunch and informed them that Global Link could no longer engage in split routing with MOL. FoF 123. Paul McClintock and Rebecca Yang fully understood what split routing was. *Id.* MOL expressed disappointment that Global Link was no longer willing to engage in split routing. *Id.*

On July 17 and 18, 2007, Rebecca Yang of MOL and Jim Briles of Global Link corresponded in regard to the shipment of cargo to Bentonville, Arkansas. FoF 125. In the correspondence, despite having been told on numerous occasions that Global Link was no longer willing to engage in split routing, Rebecca Yang suggested a split routing whereby Global Link would use a Fort Smith, Arkansas address rather than a Bentonville, Arkansas address because Bentonville rates were higher. *Id.*

Jim Briles responded that Global Link could no longer engage in split routing, *i.e.*, “cannot use alternative doors.” FoF 128. Rebecca Yang’s response of “SIGH” reflected MOL’s disappointment that Global Link was no longer willing to engage in split routing. *Id.*

On July 26, 2007, less than ten days later, MOL again corresponded with Global Link in regard to a split routing proposal in which goods would move under a Monroe, Louisiana door rate but actually go to Winnsboro, Louisiana with MOL contributing to the extra trucking costs from the service contracts point to the final destination. FoF 129. Although Paul McClintock had increased the fuel allowance for truckers so as to make the split routing more enticing, Global Link informed MOL that split routing was no longer allowed. *Id.*

Despite Global Link’s continued insistence that it would not engage in split routing, months later, on August 6, 2007, Jim Briles wrote to Rebecca Yang and Paul McClintock requesting a meeting about getting Global Link’s rates changed to CY rates because “we have not had any movement on this as of yet.” FoF 131.

While MOL ultimately did provide Global Link with CY rates, Global Link’s business with MOL was reduced as compared to the volume of business it did with them when the parties were engaging in split routing. FoF 132.

N. Nintendo Split Routing Scheme

As the Vice President/General Manager for the Southeastern Region of the United States, the regional sales, customer services and operations personnel at MOL all reported to Paul McClintock. FoF 135.

Subsequently, in 2007, Mr. McClintock assumed responsibility for MOL sales throughout the entire United States. FoF 136.

Although Nintendo had only one door point in its contract, which would be shown as the destination on all of MOL's bills of lading, MOL's practice was to actually deliver Nintendo's goods to locations different than the location identified in the service contract and the bills of lading. FoF 137. Deliveries to such locations were contrary to the terms of the service contract and constituted split routings. *Id.*

The primary function of three MOL employees was to deliver goods to points different than those in the Nintendo service contract and different than the location shown on MOL's bills of lading. FoF 138. It was "*standard operating procedure*" for MOL to engage in split routing on behalf of Nintendo. *Id.*

MOL submitted documents to the Commission reflecting that out of a sample of 119 containers handed by MOL on behalf of Nintendo, 82% (98 of 119) were delivered to locations different than the destinations shown on the MOL bills of lading. FoF 141.

Despite the fact that it was MOL's standard operating procedure to engage in split routing on behalf of Nintendo and despite the fact that this practice lasted for an extended period of time, MOL did not seek to re-rate the ocean freight rates to the new destinations. FoF 145.

MOL asserted that diversion charges should not be assessed unless the shipper requested such a diversion, and that ocean freight charges do not have to be re-rated if the location where goods are diverted is not far from the location reflected in the bill of lading, *e.g.*, from North Bend, Washington to over 110 miles away in Yakima, Washington. *Id.*

O. MOL Continued to Assert It Was Unaware of Split Routing Even Years After This Lawsuit Was Filed

On June 27, 2012, MOL filed suit against Evans Delivery Company, Inc. and numerous other truckers, in Superior Court in New Jersey, alleging that the truckers engaged in fraud by issuing fraudulent invoices in regard to split routing practices in the time period from January of 2004 until December 2007. FoF 146.

MOL contends that it did not learn of the allegedly fraudulent split routing until February of 2011, almost two years after the Complaint in this proceeding was filed with the Commission. FoF 147.

One of the truckers named as a defendant in that action is All Coast Intermodal Service, Inc., despite the fact that MOL said in 2004 that “they do not care if [All Coast] is really delivering to the correct destination” FoF 149.

Another defendant in the New Jersey suit is Evans Delivery Company, the same company with whom MOL coordinated in 2005 in regard to how to handle split routings involving Global Link. FoF 150.

III. MOL’s Assertions of Lack of Knowledge and Participation in Split Routing Are Belied by the Evidence in the Record

In its Amended Complaint and in its Opening Submission, MOL concedes that in order to establish a claim it must prove deception, fraud or concealment. See Amended Complaint at V

(A), (B), and (C); Opening Submission at 59. Here, however, MOL cannot make any such showing in regard to its claims.

As reflected above, contemporaneous documents show not only that MOL received hundreds of Shipline Delivery Orders from Global Link reflecting that goods were being transported to locations different than what was reflected in the MOL bills of lading under which the goods moved, *see* FoF 66-87, but that MOL had a policy of paying truckers to engage in such split routing. MOL knowingly paid truckers to transport goods from West Monroe, Louisiana to Baskon and Winnsboro Louisiana locations, which was a 95 mile round trip, despite the fact that the bills of lading for the cargo showed West Monroe and despite the fact Baskon and Winnsboro were not door points in the applicable service contracts between MOL and Global Link. *See* FoF 57-59. Further, contemporaneous emails reflect that when MOL operations staff at a junior level pointed out that goods were being transported to Winnsboro, which was not reflected on the bills of lading, and that they were “not supposed to do this,” more senior MOL management instructed them to simply issue fraudulent Transportation Orders for West Monroe, Louisiana. *See* FoF 61-63. In addition, contemporaneous documents clearly establish that when Global Link’s current ownership sought to put an end to split routing, MOL bitterly resisted it. *See* FoF 107-132. Finally, the incontrovertible evidence establishes that MOL itself performed split routing on behalf of one of its largest customers, Nintendo, as part of its standard operating procedures. *See* FoF 133-145.

The most MOL can offer in response to this overwhelming evidence is the fact that Global Link had procedures in place to prevent disclosure of split routing to shipping lines. While this is correct, the evidence is plain that no such deception was needed as to MOL because MOL was fully aware and complicit in the split routing.

In the face of this overwhelming evidence, MOL offers the self-serving Declaration of its General Counsel that MOL was unaware of Global Link's split routing. This is the same General Counsel of whom Mr. McClintock testified that he forwarded correspondence in August 15, 2005, informing him that bills of lading stated that goods were going to one location but the containers were actually going to a different location and asking whether MOL should be billing diversion charges associated with such split routing. FoF 43-53. In the face of extensive hostile questioning, Mr. McClintock steadfastly maintained that the email was forwarded to General Counsel and discussed and reviewed, and that follow-up discussions in regard to the matter occurred internally at MOL. *Id.* Mr. McClintock was absolutely certain that the August 15, 2005 email discussing whether to bill for split routing was sent up the chain of command and to MOL's General Counsel. FoF 48. He testified that "*I can assure you there was follow-up taken on that particular case.*" FoF 49.

Even setting aside this testimony, however, the contemporaneous documents confirm that senior personnel at MOL were fully aware of and complicit in the split routing.⁴ Thus, while Kevin Hartmann may have performed an "internal investigation" into whether MOL participated in split routing as he declares, it was far from "thorough" as MOL asserts. *See* MOL SoF 56. Rebecca Yang testified unequivocally that during the relevant time period there was no investigation into the extent of split routing that MOL and Global Link were conducting. *Id.* To the extent any investigation occurred it must have been extremely perfunctory not to have

⁴ Indeed, it appears that the only people who may not have been aware of the split routing were junior level personnel in MOL's Operations department. *See, e.g.,* Paul McClintock's suggestion that they should keep the conversations about split routing to the high-level management of Global Link and MOL. FoF 13. Rebecca Yang further testified that instances of, for example, bills of lading saying West Monroe, Louisiana but the goods actually being delivered to Winnsboro, Louisiana, were such a common occurrence that it could not have been a surprise to anyone at MOL. FoF 27.

uncovered the mountains of evidence now presented here. Indeed, a simple review of company emails would have revealed the documents presented showing that going back to 2004 and 2005, emails existed expressly referencing split routing and that a policy was in place at MOL permitting payment of truckers engaged in split routing.

Given the overwhelming weight of evidence establishing that MOL was a willing participant in the split routing practices at issue, MOL cannot state a claim for fraudulent deception under the Shipping Act. Because deception is a *sine qua non* for finding a violation of the Act, dismissal of its claim is required.

IV. The Statute of Limitations Is Not Tolled

In addition to failing to satisfy the substantive requirements for stating a valid claim, MOL's claim is also substantially time barred. A Complaint with the Commission must be filed within three years after the claim accrues. *See* 46 U.S.C. § 41301(a). Here, MOL's suit, which was filed on May 5, 2009, seeks recovery for split routing that occurred in 2004, 2005 and 2006.⁵ Even if MOL could assert a valid claim of deception or concealment, which it cannot, MOL's claims would be untimely for all claims except for those arising after May 5, 2006.

MOL seeks to overcome this time bar by asserting that it did not and could not have known about the split routing until 2008. As reflected in Global Link's Proposed Findings of Fact, the indisputable facts are plainly to the contrary. Indeed, as discussed in Section II above, the evidence to the contrary is overwhelming. The depositions and sworn testimony establish that MOL was fully aware of, and encouraged, Global Link's split routing practices from 2004 onward. The fact that in 2005 senior MOL personnel explicitly discussed whether MOL should charge Global Link for diversion charges associated with split routing and decided not to do so precludes MOL from now relying upon a fraudulent concealment theory to toll the statute of

⁵ *See* MOL Amended Complaint at 4 ¶ E.

limitations. Indeed, under these circumstances, for MOL to assert that it was unaware of split routing or its potential claim until 2008 is preposterous.

A. Statutes of Limitations Must Be Enforced Pursuant to Their Terms

“Statutes of limitations, which ‘are found and approved in all systems of enlightened jurisprudence,’ represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that ‘the right to be free of stale claims in time comes to prevail over the right to prosecute them.’” *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (citations omitted); *see also, Maher Terminal LLC v. The Port Authority of New York and New Jersey*, 32 S.R.R. 1, 16 (ALJ 2011). These constitute statutes of repose and protect defendant and factfinders from having to deal with cases in which the “search for truth may be seriously impaired by the loss of evidence whether by death or disappearance of witnesses, fading memories, disappearance of documents or otherwise.” *Kubrick*, 444 U.S. at 117; *see also, W. Overseas Trade & Dev. Corp v. Asian N. American Eastbound Rate Agreement*, 26 S.R.R. 651, 659 (ALJ 1992) (“[t]he objective of statutes of limitations is to prevent stale claims of which the defendant had no prior notice and the facts and merits of which become less susceptible of determination due to the failing of memories and loss of records and evidence.”); *Maher Terminal*, 32 S.R.R. at 16.

Such statutes represent a balance struck by the legislature and courts are not free to construe them so as to defeat their obvious purpose which is encouraging the prompt presentation of claims. *Id.* Thus, statutes of limitation are not to be disregarded “out of a vague sympathy for particular litigants.” *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152 (1984). On the contrary, conscientious adherence to statutes of limitations “is the best guarantee of evenhanded administration of the law.” *Mohasco Corp v. Silver*, 447 U.S. 807,

826 (1980). The plea of limitations constitutes a “meritorious defense, in itself serving a public interest.” *Id.*

Generally, a cause of action accrues and the statute of limitations begins to run when a defendant commits an act that injures a plaintiff’s business. *Zenith Radio Corp v. Hazeltine Research Inc.*, 401 U.S. 321, 338 (1971). The Commission has adopted a “discovery rule”, however, pursuant to which the statute of limitations period may be tolled but only until “a party knew or with reasonable diligence could have known that it had a claim.” *Inlet Fish Producers, Inc. v. Sea-Land Service, Inc.*, 29 S.R.R. 306, 313 (F.M.C. 2001). The discovery rule is an exception to the otherwise applicable statute of limitations. *Maher Terminals, LLC v. The Port Authority of New York and New Jersey*, 32 S.R.R. at 19. The party seeking the protection of the discovery rule has the burden of showing that it falls within the exception by demonstrating that even with the exercise of reasonable diligence it could not have known of its purported injury. *Id.*

Federal courts have emphasized that the standard for accrual under the discovery rule is an objective one. *Cascone v. United States*, 370 F.3d 95, 104 (1st Cir. 2004). The knowledge necessary to trigger accrual need not be conclusive or absolute; instead it merely consists of sufficient facts to prompt a reasonable person to inquire and seek advice preliminary to deciding if there is a basis for filing an action. *Skwira v. United States*, 344 F.3d 64, 77 (1st Cir. 2003). Thus, under the “discovery-due diligence” standard, the running of the statute of limitations does not begin at the point the plaintiff has sufficient information to prevail at trial, or even when a plaintiff is aware the conduct at issue is actionable under the law. *United States v. Bill Harbert Int’l Construction Inc.*, 505 F. Supp. 2d 1, 7 (D.D.C. 2007). “Rather, courts have consistently found that a limitations period begins to run under the ‘should have known’

standard at the point in time that [the plaintiff] ‘discovers, or by reasonable diligence, could have discovered, the basis of the lawsuit.’” *Id.* (citations omitted). “That is, the limitation period starts to run on ‘the first date that the injured party possesses sufficient critical facts to put him on notice that a wrong has been committed and that he need investigate to determine whether he is entitled to redress.’” *Id.*

A plaintiff cannot defeat the due diligence requirement “by burying its head in the sand.” *Skwira*, 344 F.3d at 77, quoting *Diaz v. United States*, 165 F.3d 1337, 1339 (11th Cir. 1999). Once a duty to inquire is established, the plaintiff is charged with the knowledge of what it would have uncovered through a reasonably diligent investigation. *McIntyre*, 367 F.3d at 38, 52 (1st Cir. 2004). Thus, the statute of limitations begins to run where the plaintiff has “some indication” that it might have a claim. *Skwira*, 344 F.3d at 78 (1st Cir. 2003); see also *Dayco Corp v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975) (“any fact that should excite [the plaintiff’s] suspicion is the same as actual knowledge of his entire claim.”) The equitable tolling doctrine “assumes the party charged with uncovering fraud will do so with due diligence.” *United States v. Intradocs/Int’l Mgmt. Group*, 265 F. Supp. 2d 1, 12 (D.D.C. 2002); *Zelevnik v. United States*, 770 F.2d 20, 23 (3d Cir. 1985) (crucial question in determining the accrual date for statute of limitations purposes was whether the injured party had sufficient notice of invasion of legal rights to require that he investigate and make a timely claim or risk its loss).

In cases alleging fraud or fraudulent concealment, where the plaintiff seeks to toll the statute of limitations, the same rule applies. Thus, the plaintiff must have remained ignorant of the fraud, without any failure or want of diligence of care on his part. *Fisher v. Samuels*, 691 F. Supp. 63 (N.D. Ill. 1988). “The plaintiff cannot ignore obvious danger signals . . . and there is

no license to ignore events giving rise to strong suspicion.” *Id.* at 72. Thus, the statute of limitations begins to run immediately when the plaintiff is aware of facts supporting a claim that it does not reasonably investigate.” *Id.*

The discovery rule only tolls the running of the statute of limitations until the plaintiff knows there is a potential basis for a claim, not until he or she knows all the facts underlying their claim. *See, e.g., Williams v. P.O. Baird*, 1997 WL 438495 (E.D. Pa. 1997). The discovery rule only delays the initial running of the statute until the complainant discovers that he or she has been injured and the injury is caused by another’s conduct. *Maher Terminals*, 32 S.R.R. at 19. Thus, the fact that the plaintiff may not have known the extent or scope of wrongdoing is irrelevant for determining whether the statute of limitations has run “because the limitation period will begin to run even if plaintiff does not know all of the facts necessary to assert a claim” *Williams v. P.O. Baird*, 1997 WL 438495 at *1, n. 2. Indeed, in *Fitzgerald v. Seamans Jr.*, 384 F. Supp. 688, 693 (D.D.C. 1974), the United States District Court for the District of Columbia emphasized that a plaintiff cannot toll a statute of limitations merely by alleging that the depth and scope of the actions at issue remained hidden; *see also United States v. Bill Harbert Int’l Construction Inc*, 505 F. Supp.2d at 8 (D.D.C. 2007) (lack of knowledge of specific pattern of fraudulent activity does not toll the statute of limitations); *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 403 (5th Cir. 1998) (tolling may expire and statute of limitations begins to run before plaintiff subjectively learns details of evidence by which to establish case of action); *Fisher v. Samuels*, 691 F.Supp. 63, 72 (statute not tolled where plaintiff has sufficient knowledge to pique suspicions); *Vessels v. City of Philadelphia*, 2011 WL 4018137 (E.D. Pa. 2011) at *7 (plaintiff need not know all of the facts necessary to assert a

claim before statute of limitations begins to run); *Cole v. Kelly*, 438 F.Supp. 129, 139 (C.D.Cal. 1977) (knowledge of evidence or details of case not necessary to stop tolling).

Further, the Commission and courts uniformly recognize that fraudulent concealment of a claim tolls the statute of limitations only for so long as the concealment is successful. In *Inlet Fish Producers, Inc. v. Sea-Land Service, Inc.*, 29 S.R.R. at 313, the Commission recognized that the statute of limitations is not tolled if “a complainant is aware of a cause of action but merely fails to act on that knowledge.” Thus, regardless of whether a respondent has attempted to conceal a potential claim, the statute begins to run when the complainant becomes aware of its potential existence.

In *Fitzgerald v. Seamans Jr.*, 384 F. Supp. 688, 693 (D.D.C. 1974), the district court explicitly recognized that in order to toll the statute of limitations, the concealment “must actually succeed in precluding the plaintiff from acquiring knowledge of the material facts. Where the plaintiff knew, or by the exercise of due diligence, could have known that he may have had a cause of action, the claim that the statute of limitations has been tolled by defendants’ fraudulent concealment of the facts must fail.” *Id* at 693-94; *see also Cole v. Kelley*, 438 F.Supp.129 E.D.Ca. 1977 (to toll the running of limitations, the concealment must be successful). Tolling “does not come into play whatever the lengths to which a defendant has gone to conceal the wrongs, if plaintiff is on notice of a potential claim.” *Hobson v. Wilson*, 737 F.2d 1, 35 (D.C. Cir. 1984); *California Sansome Co. v. U.S. Gypsum*, 55 F.3d 1402, 1409 (9th Cir. 1995); *United States v. Bill Harbert Int’l Constr., Inc.*, 505 F. Supp.2d 1, 8-9 (D.D.C. 2007). Accordingly, even where a “defendant uses every fraudulent device at its disposal to mislead a victim or obfuscate the truth, no sanctuary from the statute will be offered to the dilatory plaintiff who was not or should not have been fooled.” *In re Tysons Foods*, 919 A.2d 563, 585 (Del. Ch.

2007). Instead, a “plaintiff bears the burden of showing that the statute was tolled,” and “no theory will toll the statute beyond the point where the plaintiff was objectively aware, or should have been aware, of facts giving rise to the wrong.” *Id.*; see also *Bill Harbert Int’l Constr.*, 505 F. Supp.2d at 9 (concealment of a potential claim by a defendant will toll a statute of limitations only insofar as the injury to the plaintiff and its cause is concealed); *California Sansome, Co.*, 555 F.3d at 1409 (in fraud case, statute is tolled only for as long as plaintiff remains justifiably ignorant of the facts upon which the case depends; discovery or inquiry notice of the facts terminates the tolling). Once a plaintiff becomes aware of a potential claim, “the clock begins to run for statute of limitation purposes,” and a lack of knowledge of the specific pattern of fraudulent activity does not change the result.” *Id.*

B. MOL Was Fully Aware of its Claim As of 2004

As discussed above, the testimony, and even more significantly, the contemporaneous documentation, reflects that MOL had actual knowledge of the ongoing split routing in 2004, 2005 and 2006. Thus, it was fully aware of all of the facts necessary to pursue such a claim. While its failure to do so is understandable, given that MOL itself was the party who encouraged split routing as a business practice, that does not provide a legitimate basis for tolling the three-year statute of limitations.

Although it fails to squarely address the issue in its Opening Brief, presumably MOL will attempt to overcome the time bar to its claim by arguing that it did not know the full extent of the ongoing split routing.⁶ Alternatively, it may either argue that only a limited number of MOL

⁶ MOL hedges its bet by stating that until it received the subpoena from Global Link in 2008 it had not been aware of how “widespread” the split routing was. MOL SoF 32. The facts belie this assertion but even if it was true, MOL need not have known how widespread the split routing was to trigger the running of the statute of limitations. See *California Sansome, Co.*, 55 F.3d at 1409 (once

employees were aware of the split routing or that the employees who did know about the split routing were not sufficiently senior to provide a basis for attributing that knowledge to MOL. None of these assertions can withstand scrutiny.

First, as reflected above, the evidence reveals that MOL knew there was widespread split routing ongoing. *See* FoF 10 - 150. MOL received hundreds of Delivery Orders showing that goods were being split routed to various locations around the country. FoF 66-87.

In addition, the undisputed testimony confirms that when MOL considered and rejected the idea of pursuing claims for diversion charges associated with split routing in 2005 it knew the practice was widespread. When specifically asked about the email addressing split routing and whether MOL should seek to recover diversion charges arising therefrom, Mr. McClintock testified that he believed it was referring to a regular occurrence. FoF 45. Indeed, in deposition questioning, it was noted that Mr. Holt wrote that “[w]e are having trouble getting actual delivery locations for containers being diverted from Martinsville.”

Q He’s not talking about one issue, is he. So that’s obviously a repeat issue? Is that correct?

A Based on what he’s saying there, I would say yes.

FoF 46.

In light of the above, there is no evidentiary basis for MOL to assert that its knowledge of split routing was limited to isolated instances.

Moreover, even if MOL was not fully aware of the extent of the practice, the statute of limitations would not be tolled because such knowledge is not required to toll the statute. Courts uniformly recognize that the fact that a plaintiff may not know the extent or scope of wrongdoing

plaintiff becomes aware of a potential claim, “the clock begins to run for statute of limitation purposes,” and “lack of knowledge of the specific pattern of fraudulent activity does not change the result.”)

is irrelevant or determining whether the statute of limitations has run. *Williams v. P.O. Baird*, 1997 WL 438495 at *1, n. 2.; *see also Fitzgerald v. Seamans Jr*, 384 F.Supp. 688, 693 (D.D.C. 1974) (plaintiff cannot toll a statute of limitations merely by alleging that the depth and scope of the actions at issue remained hidden); *United States v. Bill Harbert Int'l Construction Inc*, 505 F. Supp.2d at 8 (D.D.C. 2007) (lack of knowledge of specific pattern of fraudulent activity does not toll the statute of limitations). For MOL to now contend that although it explicitly considered in 2005 whether it should seek to recover diversion charges for split routing n from Global Link, it did not have “some indication”⁷ that it had a potential claim, defies credulity.

C. Knowledge of MOL Employees is Attributable to MOL

MOL's anticipated argument that knowledge of the ongoing split routing should not be attributable to MOL because only certain employees or only junior level employees knew about it is equally specious. Further, any purported reliance upon the adverse interest exception to insulate MOL from the knowledge of its employees is baseless.

It is well established that a corporation is charged with the knowledge of its agents and employees acting within the scope of their authority. *Western Diversified Services, Inc. v. Hyundai Motor America, Inc.*, 427 F.3d 1269, 1276 (10th Cir. 2005) *see also, Hercules Carriers, Inc. v. Claimant State of Florida*, 768 F.2d 1558, 1574 (11th Cir. 1985) (knowledge of a managing agent, officer, or supervising employee, is attributable to the corporation). Indeed, because a corporation can act only through its officers, agents and employees, it is necessarily chargeable with the composite knowledge of such individuals. *Sawyer v. Mid-Continental Petrol. Corp.*, 236 F.2d 518, 520 (10th Cir. 1956); *citing*, 19 C.J.S., *Corporations*, § 1081, p. 618. Any other approach would allow a corporation to always insulate itself from knowledge and

⁷ *Skiwra v. United States*, 344 F.2d 64, 77 (1st Cir. 2003)

avoid culpability for its actions. *See, e.g., Continental Oil Co. v. Bonanza Corp.*, 706 F.2d 1365, 1376 (5th Cir. 1983).

In this regard, there is no requirement that a person be a "central figure" at a company in order for that person's knowledge to be imputed to the company. *United States v. Joselyn*, 206 F.3d 144, 159 (1st Cir. 2000). Instead, the person whose knowledge is to be imputed must merely have some relationship with the company that allows the person to obtain the knowledge in the course of the engagement with the company and within the scope of his or her authority. *Id.* Indeed, the law is well established that as a practical necessity, the knowledge and actions of a corporation's managers, agents, or "any of [its] lesser rank of employees" are attributable to it. *Steere Tank Lines, Inc. v. United States*, 330 F.2d 719, 723 n. 3 (5th Cir. 1964). This is the case even if the employee is not a high level one and the action were purportedly contrary to the company's policies. "Knowledge affecting the corporation, which has been gained by any officer, agent or employees thereof, in the course of his work for the company is attributed to the corporation, and this includes subordinate employees, such as truck drivers. The corporation cannot be shielded from such imputed knowledge on the grounds that an employee in doing his regular work for the company committed a violation of some instruction by the company." *Id.*

In *Coryell v. Phipps*, 317 U.S. 406, 410 (1943), the Supreme Court stated that knowledge would be imputed to the corporation where the employee is an "executive officer, manager or superintendent whose scope of authority included supervision over the phase of the business out of which the loss or injury occurred." Indeed, this is the case even if the corporate agent or employee is purportedly acting against corporate policy or the corporation's express instructions. *United States v. Sun-Diamond Growers of California*, 964 F. Supp. 486, 490 (D.D.C. 1997).

Here, the evidence is overwhelming that countless numbers of MOL employees were aware of the split routing. Indeed, in addition to Paul McClintock and Rebecca Yang, Laci Bass, Ted Holt, Kevin Hartmann, Barbara Perry, Jean Flaherty, Kelly Johnson, Lauren Estrada, Diane Chick, JoAnn Gault, Lori Kyle, Jane Martin, Jeffrey Bumgardner, and Lauren Estrada of MOL received communications addressing or reflecting spit routing. *See* FoF 48, 67, 81. Thus, at least 15 MOL employees were on notice of split routing during the relevant time period. Knowledge on the part of such a widespread number of MOL employees clearly is attributable to MOL.

Further, the idea that the knowledge of split routing was limited to junior personnel at MOL whose scope of authority did not include interactions with Global Link is ludicrous. Indeed, the evidence reflects that perhaps the only people at MOL who were not aware of its split routing practices were junior employees in its operations division. Paul McClintock told Global Link that discussions of split routing should be limited to senior management. FoF 13. Further, MOL's own evidence, MOL Appendix 1494, shows that in a June 27, 2005 email from Jim Briles to Rebecca Yang discussing how to handle split routings, Mr. Briles suggested that the split routing should not be shared with Cindy who was in "ops" at MOL. The evidence is indisputable, however, that senior MOL with authority for handling the Global Link account were fully aware of the split routing practices.

As reflected above, from prior to 2003 until 2007, Paul McClintock was the Vice President/General Manger of the Southeastern Region of the United States. *See* FoF 5. In that capacity, the regional sales, customer services and operations people reported to him. *Id.* During the relevant time period up to 100 people reported to him. *Id.* Subsequently, in 2007,

Mr. McClintock assumed responsibility for MOL sales throughout the entire United States. FoF 6.

Mr. McClintock had primary oversight responsibility for the Global Link account while Rebecca Yang was the primary contact with Global Link. FoF 6-7. “[I]t was Rebecca’s account” and “she would handle issues with contract negotiations, rates and the like.” *Id.* Rebecca Yang primarily negotiated amendments and revisions to the services contract, in terms of prices and locations but because of the importance of Global Link as an account, Mr. McClintock would become personally involved in regard to substantive changes to the contracts. FoF 8.

In addition, Ted Holt, with whom Mr. McClintock directly communicated in regard to split routing and whether MOL should seek to recover diversion charges was the MOL Operations Manager. Further, the email communications in regard to such split routing was forwarded and internally reviewed with Kevin Hartmann, MOL’s General Counsel for 23 years. FoF 40-43.

Finally, when junior level employees in MOL operations department raised concerns about split routing and stated that “you are not supposed to do this,” a more senior employee told them just to cut fraudulent TPOs [Transportation Orders] showing the goods were moving to West Monroe, Louisiana, instead of their actual destination. FoF 61-64.

1. The Adverse Interest Exception Does Not Apply

As reflected above, knowledge of MOL employees is attributed to the corporate entity. While there is an “adverse interest” exception to that rule, it is a very narrow one and is limited to instances in which an employee acts “from purely personal motives . . . which is in no way connected with the employer’s interests.” *Prosser and Keaton on Torts*, Section 70 (5th ed.) 506;

see also, Cobalt Multifamily Investors, I, LLC v. Shapiro, 857 F. Supp. 2d 419, 425 (S.D.N.Y. 2012) (adverse interest exception only applies where individual has “*totally abandoned* the corporation’s interest and is acting *entirely* for his own or another’s purposes”)⁸; *Parmalat v. Bank of America*, 383 F.Supp.2d 587, 598 n. 54 (S.D.N.Y.2005) (adverse interest exception is a narrow one and applies only when the agent has totally abandoned the principal’s interests). In *Cobalt* the court further recognized that the exception only applies where the corporation did not benefit at all from the employees’ actions. *Id.* at 427. Thus, even if the corporate entity enjoys only short term benefits but suffers long term harm, the exception does not apply. *Id.*

Here, the evidence reflects that MOL received a significant benefit from split routing in the form of avoiding administrative burdens and expenses, FoF 19-20, and in the form of avoiding punitive railroad demurrage costs. FoF 21. In addition, MOL benefited by retaining Global Link as one of its largest customers. FoF 8. Further, there is simply no evidence that the MOL employees with knowledge of split routing were acting solely for their own purposes or that they personally benefited from the practice of split routing. Certainly, there is no evidence that Paul McClintock, Rebecca Yang, Laci Bass, Ted Holt, Kevin Hartmann, Barbara Perry, Jean Flaherty, Kelly Johnson, Lauren Estrada, Diane Chick, JoAnn Gault, Lori Kyle, Amy Sinclair and Jane Martin, *see e.g.*, FoF 43-57, 65 and 68 were all acting solely for their own purposes or personally benefited from split routing to the detriment of MOL. Accordingly, the adverse interest exception does not apply.

Under these circumstances for MOL to suggest that knowledge of the ongoing split routing is not attributable to MOL is baseless. The notion that a party could be aware of, and indeed promote, the practice of split routing, and wait until five years afterward to initiate suit on the actions not only is contrary to the fundamental equitable premise that a party should not be

⁸ Emphasis in original.

rewarded for its own wrongdoing, it would totally undermine the purpose of the statute of limitations, *i.e.*, repose and preventing the litigation of stale claims.

D. MOL's Proof Is Defective

As reflected above, even if MOL could state a claim for fraudulent deception, the claim would be time barred except for claims arising subsequent to May 5, 2006. Here, however, the documentary evidence MOL relies upon to establish split routing is substantially time barred.

MOL introduced eight (8) "sample" shipments in support of its split routing claims. Seven of these shipments, however, are for claims that are time barred on their face. Thus, MOL has produced only one shipment that is not explicitly time barred. *See* MOL Appendix 1364.

The sole shipment MOL submits that actually could substantiate its claim is at MOL Appendix 1364-1393. MOL contends that those documents show that it suffered damages of \$452. On the face of the MOL bill of lading, there is writing reflecting that "per Global Link final Dest. - Colonial Heights, VA Zip 238." It is unclear when this writing was placed on the bill of lading but it reflects knowledge on the part of MOL where the goods were destined. If so, any fraudulent deception claim would be unfounded. Further, while MOL apparently contends that cargo was listed as going to Martinsville, Virginia but actually went to Colonial Heights, Virginia, the supporting documentation attached thereto, at Appendix 1386 reflects MOL's final destination as Johnson City, Tennessee and Global Link's final destination as Atlanta, Georgia. It is unclear what this document references and how it supports MOL's claim but clearly the documents related to the single shipment at issue do not establish an evidentiary basis for claims asserted by MOL.

Even to the extent the evidence presented by MOL is not time barred, it lacks any evidentiary foundation. MOLs' evidence primarily consists of spreadsheets, *see* MOL Proposed

Findings of Fact Nos. 70 and 71. No sworn testimony is offered, however, as to how the spreadsheet was prepared or the evidentiary basis for admitting the data upon which it is purportedly based. MOL does not meet its evidentiary burden here by submitting spreadsheets and asking the factfinder to simply assume the data set forth therein is reliable and valid.

V. **MOL Fails to Establish the Basis for Claims Against the Current Owners of Global Link**

MOL's Opening Submission concedes the practice of split routing began long before the current ownership of Global Link acquired the company. Indeed, the evidence definitively establishes the practice of split routing did not end until Global Link's current owners insisted that it would no longer engage in the practice with MOL FoF 107-132. Incredibly, however, MOL asserts that Global Link should be held liable for not making MOL cease doing split routing sooner. MOL SoF 172-81. Neither the facts, the law, nor equity warrants such a finding.

The undisputed evidence shows that in June of 2006, Global Link was acquired by its current owner, Golden Gate. FoF 107. Although Global Link subsequently received a report as to questionable routing practices, it did not discover the extent of the split routing practices until 2007. FoF 109. In addition, as a practical matter, Global Link could not terminate the split routing practices sooner than May of 2007 because most of the applicable MOL service contracts belonged to the Hecny Group, and Global Link could not amend them. FoF 110. Further, service contracts between carriers and NVOCCs run from May 1st to April 30th, making it impossible to accomplish significant amendments to the contracts in mid-term. *Id.*

When early in 2007, Global Link informed MOL that it could no longer engage in split routing, MOL resisted Global Link's efforts, informing Global Link that it would not cease split routing because it was too time-consuming to negotiate individual delivery points. FoF 120-122. Although Global Link insisted that the practice cease, MOL refused to comply with Global

Link's efforts to end split routing. FoF 124-31. It was only after Global Link notified MOL that it could no longer do business with it, that MOL relented and reluctantly agreed to stop the practice of split routing. FoF 131.

Under the facts as alleged above, MOL cannot establish that the current owners of Global Link should be held liable for split routing which it took every reasonable step to terminate.

Conclusion

For almost four long and expensive years, MOL has continued to insist that Global Link deceived MOL as to the true location where goods were being delivered. The overwhelming evidence, however, confirms that MOL's position is a charade. A review of the facts in the record definitively establishes not only that MOL knew about split routing, but that it often engineered the split routing, insisting that the practice continue even when Global Link sought to terminate it. Under these circumstances, MOL's claims must be rejected in their entirety.



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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 1st day of March, 2013:

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