

**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No. 09 -01

mitsui o.s.k. lines ltd.

COMPLAINANT

v.

**GLOBAL LINK LOGISTICS, INC., OLYMPUS PARTNERS, OLYMPUS GROWTH
FUND III, L.P., OLYMPUS EXECUTIVE FUND, L.P., LOUIS J. MISCHIANI, DAVID
CARDENAS, KEITH HEFFERNAN, CJR WORLD ENTERPRISES, INC. AND CHAD J.
ROSENBERG**

RESPONDENTS

**RESPONDENTS CJR WORLD ENTERPRISES, INC. AND CHAD J. ROSENBERG'S
BRIEF IN RESPONSE TO THE OPENING SUBMISSION OF COMPLAINANT MITSUI
O.S.K. LINES, LTD.**

Pursuant to the October 16, 2012 Order of the Administrative Law Judge and Rule 221 of the Commission's rules of practice and procedure, Respondents CJR World Enterprises, Inc. ("CJRWE") and Chad J. Rosenberg (collectively, "CJR Respondents") hereby submit their Brief in Response to Mitsui O.S.K. Lines, Ltd.'s ("MOL") Opening Submission:

INTRODUCTION

This case arises out of a practice that Global Link Logistics, Inc. ("GLL") engaged in with the knowledge, approval, and endorsement of MOL. According to MOL's own employee who serviced the GLL account, this practice benefitted rather than damaged MOL. MOL's knowledge and approval of this practice render its claims meritless. As a result of MOL's

knowledge and approval of the practice, MOL's claims are also time-barred. MOL's claims also fail because it has not been damaged.

Setting aside these reasons why MOL's claims are without merit, there is no basis for the CJR Respondents to be held liable because there is no evidence that they participated in any of the shipments at issue in this proceeding, including the sample shipments. There is also no evidence that the CJR Respondents acted as a non-vessel operating common carrier ("NVOCC") with respect to any of the shipments at issue. Based on the record, there is no basis to find the CJR Respondents liable. Furthermore, as the Commission has expressly stated, the CJR Respondents cannot be held liable as a shareholder and officer of GLL.

The Administrative Law Judge ("ALJ") should thus find in favor of the CJR Respondents.

STATEMENT OF FACTS

Mr. Rosenberg Learns the Practice of "Split Routing" from Other Carriers in the Logistics Industry

1. Mr. Rosenberg began working in the shipping and logistics industry in 1994.
(Declaration of Chad Rosenberg, dated February 26, 2013 ("Rosenberg Dec."), at ¶ 2, annexed hereto as Exhibit A) (CJR Respondents' Appendix ("CJR App."), at p. 2).
2. Between 1994 and 1997, Mr. Rosenberg worked for two NVOCC's, Scanwell Freight Express ("Scanwell") and Worldlink Logistics ("Worldlink"). (Rosenberg Dec., at ¶ 3) (CJR Exh. A) (CJR App., at p. 2).

3. At both Scanwell and Worldlink Mr. Rosenberg was exposed to and learned of the practice of split routing. (Rosenberg Dec., at ¶ 4) (CJR Exh. A) (CJR App., at p. 2).
4. Based on Mr. Rosenberg's experiences at Scanwell and Worldlink, he believed that split routing was commonplace in the shipping industry, that many NVOCC's used split routing, and that steamship lines were aware that many NVOCC's used split routing. (Rosenberg Dec., at ¶ 5) (CJR Exh. A) (CJR App., at p. 2); (*see also* MOL's Exh. BP) (MOL's Appendix ("MOL's App."), at p. 1662) ("... We need to get more clarity as it's very difficult to get all the points in our contract, especially since Hecny is the contract signer. ***It seems all or most of hecny's agents book to the closest point and all the companies I've ever worked for did same the same practice***") (emphasis added).
5. Mr. Rosenberg did not believe that the practice was in any way illegal. (Rosenberg Dec., at ¶ 6) (CJR Exh. A) (CJR App., at p. 2).

Mr. Rosenberg Founds GLL

6. Mr. Rosenberg founded GLL in 1997. (Rosenberg Dec., at ¶ 7) (CJR Exh. A) (CJR App., at p. 2).
7. Mr. Rosenberg introduced the practice of split routing at GLL. (Rosenberg Dec., at ¶ 8) (CJR Exh. A) (CJR App., at p. 2).

Mr. Rosenberg Sells a Majority Interest in GLL to Olympus and GLL Seeks and Obtains Legal Advice Regarding the Practice of Split Routing

8. In 2003, Mr. Rosenberg sold approximately 80% of the shares of GLL to private equity funds owned and managed by Olympus. (Rosenberg Dec., at ¶ 9) (CJR Exh. A) (CJR App., at p. 2).
9. Shortly after the 2003 sale, the company sought and obtained legal advice from its maritime counsel related to the practice of split routing. (Rosenberg Dec., at ¶ 10) (CJR Exh. A) (CJR App., at p. 3); (*see also* MOL's Exh. BP) (MOL's App., at p. 1663-1664).
10. In providing advice regarding the practice of split routing, GLL's maritime counsel acknowledged that the practice of split routing was common in the industry: "This is not an easy issue as I understand that the practice is common . . .". (MOL's Exh. BP) (MOL's App., at p. 1662).
11. The maritime counsel's legal advice regarding the practice was primarily focused on potential liability for damaged goods in connection with GLL's practice of changing the final destinations, rather than any possible FMC violations: "While I do not discount the FMC aspect, I actually have more concern on the liability side." (MOL's Exh. BP) (MOL's App., at p. 1662).
12. When the managers of GLL, including Mr. Rosenberg, received the legal advice from GLL's maritime counsel, they understood it to mean that the practice of split routing was

legal but the practice of shortstopping may be illegal. Based on this advice, they instructed GLL to stop the practice of shortstopping, to the extent it was occurring. (Rosenberg Dec., at ¶ 11) (CJR Exh. A) (CJR App., at p. 3); (*see also* MOL’s Exh. BL (August 10, 2003 E-mail from Mr. Rosenberg to Eric Joiner, Gary Meyer, and Gene Winters)) (MOL’s App., at p. 1624) (“It now sounds to me like having the o b/l and h b/l destination different is ok, just not debits and credits.”).¹

CJR World Enterprises, Inc.

13. After the 2003 sale, CJRWE owned the remaining shares of GLL that Mr. Rosenberg had previously owned. (Rosenberg Dec., at ¶ 12) (CJR Exh. A) (CJR App., at p. 3).
14. CJRWE was thus a shareholder of GLL. CJRWE was never involved in the business or management of GLL. (Rosenberg Dec., at ¶ 13) (CJR Exh. A) (CJR App., at p. 3).
15. CJRWE never entered into any service contracts with any ocean carriers, including MOL. (Rosenberg Dec., at ¶ 14) (CJR Exh. A) (CJR App., at p. 3).

¹ While statements by the Panel in the arbitration styled *Global Link Logistics, Inc. et al. v. Olympus Growth Fund III, L.P. et al.*, American Arbitration Association, Case No. 14 125 Y 01447 07 (the “Arbitration”), are not admissible evidence in this proceeding, the Panel’s conclusion regarding the advice received by GLL is telling. *See* Partial Final Award in the Arbitration, (MOL’s Exh. A) (MOL’s App., at p. 20) (“The advice on legality provided by Coleman and Mayer was explicit on only one subject: the illegality of accepting a rebate or discount from a tracker in the case of ‘short-stopping.’ As noted above, Global Link ended that practice upon receipt of the advice.”); *see also Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc., et al.*, FMC No. 09-01, at 76 (FMC Aug. 1, 2011) (Order Denying Appeal Of Olympus Respondents, Granting in Part Appeal of Global Link, and Vacating Dismissal of Alleged Violations of Section 10(d)(1) in June 22, 2010 Memorandum and Order on Motion to Dismiss) (the “August 1, 2011 Commission Order”) (Commissioner Khouri, dissenting) (“It is worth noting that Global Link consulted an attorney about the practice and modified its own usage to conform to counsel’s advice.”).

16. Mr. Rosenberg is the President of CJRWE and has been since 2003. Mr. Rosenberg never communicated with or had contact with MOL regarding GLL on behalf of CJRWE. (Rosenberg Dec., at ¶ 15) (CJR Exh. A) (CJR App., at p. 3).
17. CJRWE never contracted for the ocean transportation of property with any ocean carriers, including with MOL. (Rosenberg Dec., at ¶ 16) (CJR Exh. A) (CJR App., at p. 4).
18. CJRWE never obtained or attempted to obtain ocean transportation for property, at any price. (Rosenberg Dec., at ¶ 17) (CJR Exh. A) (CJR App., at p. 4).
19. CJRWE never obtained or attempted to obtain ocean transportation of property for less than the rates that would otherwise apply. (Rosenberg Dec., at ¶ 18) (CJR Exh. A) (CJR App., at p. 4).
20. CJRWE never paid MOL for the ocean transportation of property. (Rosenberg Dec., at ¶ 19) (CJR Exh. A) (CJR App., at p. 4).
21. CJRWE never acted as an NVOCC with respect to any GLL shipments. (Rosenberg Dec., at ¶ 20) (CJR Exh. A) (CJR App., at p. 4).

Mr. Rosenberg's Involvement with GLL Following the 2003 Sale

22. Mr. Rosenberg became a director of GLL after the 2003 sale. (Rosenberg Dec., at ¶ 21) (CJR Exh. A) (CJR App., at p. 4).

23. After the sale, Mr. Rosenberg was a director, as well as an officer of the company in title. However, he became less and less active and involved in running GLL. (Rosenberg Dec., at ¶¶ 22, 23, 39) (CJR Exh. A) (CJR App., at pp. 4-5, 7).
24. While Mr. Rosenberg still played some role following the sale in maintaining GLL's relationships with its customers, with the steamship lines and with vendors, Mr. Rosenberg was not directly or actively involved in the day-to-day operations of GLL or in decision-making with respect to the routing of shipments. (Rosenberg Dec., at ¶¶ 23, 39) (CJR Exh. A) (CJR App., at pp. 4-5, 7); (*see also* Declaration of Jim Briles (“Briles Dec.”), at ¶ 48, dated February, 26, 2013, annexed hereto as Exhibit B) (CJR App., at p. 20).²
25. Mr. Rosenberg never personally entered into any service contracts with any ocean carriers, including with MOL, before or after the 2003 sale. (Rosenberg Dec., at ¶ 24) (CJR Exh. A) (CJR App., at p. 5).
26. Mr. Rosenberg never personally contracted for the ocean transportation of property with any ocean carriers, including with MOL. (Rosenberg Dec., at ¶ 25) (CJR Exh. A) (CJR App., at p. 5).

² While statements by the Panel in the Arbitration are not admissible, the Panel concluded that “by 2005 Rosenberg was becoming less and less active in running Global Link.” (MOL's Exh. A) (MOL's App., at p. 33).

27. Mr. Rosenberg never personally obtained or attempted to obtain ocean transportation for property, at any price. (Rosenberg Dec., at ¶ 26) (CJR Exh. A) (CJR App., at p. 5).

28. Mr. Rosenberg never personally obtained or attempted to obtain ocean transportation of property for less than the rates that would otherwise apply. (Rosenberg Dec., at ¶ 27) (CJR Exh. A) (CJR App., at p. 5).

29. Mr. Rosenberg never personally paid MOL for the ocean transportation of property. (Rosenberg Dec., at ¶ 28) (CJR Exh. A) (CJR App., at p. 5).

30. Mr. Rosenberg never acted as an NVOCC with respect to any GLL shipments. (Rosenberg Dec., at ¶ 29) (CJR Exh. A) (CJR App., at p. 5).

The 2006 Sale

31. GLL was sold to its current owners in June of 2006. (Rosenberg Dec., at ¶ 30) (CJR Exh. A) (CJR App., at p. 6).

32. This sale closed on June 7, 2006. (Rosenberg Dec., at ¶ 31) (CJR Exh. A) (CJR App., at p. 6).

33. Mr. Rosenberg resigned as an employee and as a director of GLL prior to the sale. (Rosenberg Dec., at ¶ 32) (CJR Exh. A) (CJR App., at p. 6).

34. CJRWE sold all of its shares of GLL in the 2006 sale. (Rosenberg Dec., at ¶ 33) (CJR Exh. A) (CJR App., at p. 6).

35. Mr. Rosenberg was not in any way involved with GLL following the 2006 sale. (Rosenberg Dec., at ¶ 34) (CJR Exh. A) (CJR App., at p. 6).

36. Mr. Rosenberg did not have any knowledge of or participation in any GLL shipments at issue in this proceeding which occurred after the date of the 2006 sale. (Rosenberg Dec., at ¶ 35) (CJR Exh. A) (CJR App., at p. 6).

GLL's Relationship with MOL and Paul McClintock and Rebecca Yang's Familiarity with Split Routing at GLL

37. GLL entered into its first service contract with MOL in May of 2004. (Rosenberg Dec., at ¶ 36) (CJR Exh. A) (CJR App., at p. 6); (Briles Dec., ¶ 8) (CJR Exh. B) (CJR App., at p. 14).

38. Paul McClintock, who was MOL's Vice President of Sales, was GLL's primary contact at MOL. Rebecca Yang, who worked for Mr. McClintock as a sales representative, was also a primary contact. (Rosenberg Dec., at ¶ 37) (CJR Exh. A) (CJR App., at p. 6); (Briles Dec., ¶ 10) (CJR Exh. B) (CJR App., at p. 14).

39. GLL was a sizable customer for MOL and for Mr. McClintock and Ms. Yang. (Rosenberg Dec., at ¶ 38) (CJR Exh. A) (CJR App., at p. 6); (Briles Dec., ¶ 11) (CJR Exh. B) (CJR App., at p. 14).

40. After MOL and GLL entered into the service contract, Mr. McClintock and Ms. Yang quickly grew familiar with GLL's business. (Rosenberg Dec., at ¶ 40) (CJR Exh. A) (CJR App., at p. 7); (Briles Dec., ¶ 12) (CJR Exh. B) (CJR App., at p. 14).
41. Mr. McClintock and Ms. Yang thus became aware of GLL's practice of using split routing on door moves. (Rosenberg Dec., at ¶¶ 41-43) (CJR Exh. A) (CJR App., at p. 7); (Briles Dec., ¶¶ 13-17) (CJR Exh. B) (CJR App., at pp. 14-15).
42. Mr. Briles spoke to Mr. McClintock and Ms. Yang regularly between 2004 and 2007. (Briles Dec., ¶¶ 14-15) (CJR Exh. B) (CJR App., at pp. 14-15).
43. Mr. Briles spoke to one or both of them approximately two times a month during that period. (Briles Dec., ¶ 15) (CJR Exh. B) (CJR App., at p. 15).
44. As a significant percentage of GLL's shipments with MOL involved "splits", the practice of split routing was discussed in many of the conversations Mr. Briles had with Mr. McClintock and Ms. Yang. (Briles Dec., ¶ 16) (CJR Exh. B) (CJR App., at p. 15).
45. Mr. Rosenberg also discussed the practice of split routing at GLL with Mr. McClintock and Ms. Yang on occasion. (Rosenberg Dec., at ¶ 42) (CJR Exh. A) (CJR App., at p. 7).

46. Mr. McClintock and Ms. Yang were thus aware of GLL's practice of split routing. (Rosenberg Dec., at ¶¶ 41-43) (CJR Exh. A) (CJR App., at p. 7); (Briles Dec., ¶¶ 13-17) (CJR Exh. B) (CJR App., at pp. 14-15).

47. Mr. McClintock and Ms. Yang encouraged the practice. (Rosenberg Dec., at ¶ 44) (CJR Exh. A) (CJR App., at p. 7); (Briles Dec., ¶ 18) (CJR Exh. B) (CJR App., at p. 15).

GLL's Service Contract with MOL and Mr. McClintock and Ms. Yang's Encouragement of Split Routing

48. Mr. McClintock and Ms. Yang's encouragement of re-routing had a lot to do with the structure of GLL's service contract with MOL. (Rosenberg Dec., at ¶ 45) (CJR Exh. A) (CJR App., at p. 7); (Briles Dec., ¶ 19) (CJR Exh. B) (CJR App., at p. 15).

49. The service contract included only a limited number of door points. (Rosenberg Dec., at ¶ 46) (CJR Exh. A) (CJR App., at p. 8); (Briles Dec., ¶ 20) (CJR Exh. B) (CJR App., at p. 15).

50. Mr. Briles would often ask Mr. McClintock and Ms. Yang if MOL would add additional door points to the service contract for the locations of specific GLL customers. (Briles Dec., ¶ 21) (CJR Exh. B) (CJR App., at p. 15).

51. Mr. Rosenberg would also on occasion ask Mr. McClintock and Ms. Yang if MOL would add additional door points to the service contract for the locations of specific GLL

customers or for the locations of new GLL customers. (Rosenberg Dec., at ¶ 47) (CJR Exh. A) (CJR App., at p. 8).

52. Mr. McClintock and Ms. Yang were always reluctant to negotiate new door points for GLL's customers. (Rosenberg Dec., at ¶ 48) (Exh. A) (CJR App., at p. 8); (Briles Dec., ¶ 22) (CJR Exh. B) (CJR App., at p. 16).

53. Mr. McClintock and Ms. Yang could not unilaterally agree to provide GLL rates for additional points, and they told Mr. Rosenberg and Mr. Briles that negotiating numerous additional door points was time consuming, administratively burdensome and inconvenient for them. (Rosenberg Dec., at ¶ 49) (CJR Exh. A) (CJR App., at p. 8); (Briles Dec., ¶ 23) (CJR Exh. B) (CJR App., at p. 16).

54. On one specific occasion Mr. McClintock said to Mr. Briles that he was not interested in contracting for "thousands of door points". (Briles Dec., ¶ 24) (CJR Exh. B) (CJR App., at p. 16).

55. Ms. Yang on several occasions advised Mr. Briles to book shipments to the regional points that had already been negotiated in the service contract, rather than to request additional points. That is, she expressly encouraged GLL to engage in split moves. (Briles Dec., ¶ 25) (CJR Exh. B) (CJR App., at p. 16).

56. Mr. McClintock and Ms. Yang told Mr. Rosenberg that MOL preferred that GLL engage in split routing because the use of regional points saved MOL from the inconvenience and burden of having to negotiate numerous additional door points. (Rosenberg Dec., at ¶ 50) (CJR Exh. A) (CJR App., at p. 8).

57. Ms. Yang expressed her appreciation to Mr. Rosenberg that GLL engaged in split routing. She told Mr. Rosenberg that it was more convenient for her and MOL if GLL engaged in split routing. Ms. Yang thus unequivocally encouraged GLL to do split moves. (Rosenberg Dec., at ¶ 51) (CJR Exh. A) (CJR App., at p. 8).

Mr. McClintock and Ms. Yang Encouraged GLL to Hide Split Routing from MOL's Operations Staff

58. Mr. McClintock and Ms. Yang knew of and blessed GLL's practice of split routing. (Rosenberg Dec., at ¶ 52) (CJR Exh. A) (CJR App., at p. 9); (Briles Dec., ¶ 26) (CJR Exh. B) (CJR App., at p. 16).

59. Mr. McClintock and Ms. Yang also encouraged GLL to keep inter-company discussions regarding split routing limited to management-level employees at GLL and MOL. (Rosenberg Dec., at ¶ 53) (CJR Exh. A) (CJR App., at p. 9); (Briles Dec., ¶ 27) (CJR Exh. B) (CJR App., at p. 16).

60. Mr. McClintock and Ms. Yang said they did not want MOL's operations staff to know of GLL's split routing. (Rosenberg Dec., at ¶ 54) (CJR Exh. A) (CJR App., at p. 9); (Briles Dec., ¶ 28) (CJR Exh. B) (CJR App., at p. 17).

61. Mr. McClintock and Ms. Yang said they were specifically concerned about logistical issues and issues with shipping paperwork if MOL's operations staff learned GLL was split routing shipments. (Rosenberg Dec., at ¶ 55) (CJR Exh. A) (CJR App., at p. 9); (Briles Dec., ¶ 29) (CJR Exh. B) (CJR App., at p. 17).

Mr. Briles's Emails to GLL Employees

62. While Mr. Briles was employed with GLL he sent e-mails which could be interpreted to suggest that GLL was trying to hide the practice of split routing from MOL. MOL interprets the e-mails this way in MOL's Opening Submission. However, MOL's interpretation is not accurate.

63. While GLL was attempting to conceal split routing *from MOL's operations staff at Mr. McClintock and Ms. Yang's encouragement*, GLL was not attempting to conceal the practice of split routing *from MOL's management and sales representatives (i.e., Mr. McClintock and Ms. Yang)*. (Briles Dec., ¶ 31) (CJR Exh. B) (CJR App., at p. 17).

64. Mr. McClintock and Ms. Yang were aware of the practice and they encouraged GLL to keep it hidden from MOL's operations staff. (Briles Dec., ¶¶ 8 - 32) (CJR Exh. B) (CJR App., at pp. 14-17).

65. When Mr. Briles sent the e-mails, he did not believe that the practice of split routing was improper or illegal. (Briles Dec., ¶ 33) (CJR Exh. B) (CJR App., at p. 18).

66. Mr. Briles also did not believe that MOL disapproved of the practice of split routing. (Briles Dec., ¶ 34) (CJR Exh. B) (CJR App., at p. 18).

67. To the contrary, MOL, via Mr. McClintock and Ms. Yang, knew of the practice and encouraged it. (Briles Dec., ¶¶ 8 - 35) (CJR Exh. B) (CJR App., at pp. 14-18).

68. Mr. Briles's e-mail to Ms. Yang on July 27, 2005 demonstrates Ms. Yang's knowledge of the practice. (Briles Dec., ¶ 36) (CJR Exh. B) (CJR App., at p. 18); (MOL's Exh. AR) (MOL's App., at p. 1494).

69. In this e-mail string, Shayne Kemp, an employee of GLL, had emailed Ms. Yang about a Johnson City door move. Ms. Kemp's e-mail to Ms. Yang discusses the truckers to be used for such moves. Ms. Kemp suggested MOL should choose the trucker. Mr. Briles responded to Ms. Kemp to let her know that if this e-mail had been sent to MOL's

operations manager for Johnson City moves, the manager likely would have selected a trucker for all Johnson City door moves. That decision would have restricted GLL's ability to use a preferred trucker, which would have limited GLL's ability to engage in split moves. (Briles Dec., ¶ 37) (CJR Exh. B) (CJR App., at p. 18); (MOL's Exh. AR) (MOL's App., at p. 1494).

70. Mr. Briles forwarded his e-mail to Ms. Kemp to Ms. Yang and wrote "confidential..." in the body of his e-mail. The reason Mr. Briles forwarded this e-mail to Ms. Yang was to keep her in the loop and to make sure she was aware that Mr. Briles was doing his part to keep GLL's split routing practice hidden from MOL's operations staff as she had requested. (Briles Dec., ¶ 38) (CJR Exh. B) (CJR App., at pp. 18-19); (MOL's Exh. AR) (MOL's App., at p. 1494).

71. Mr. Briles's e-mail to Ms. Yang which forwarded his e-mail to Ms. Kemp plainly shows that Ms. Yang knew about GLL's split routing, given that his e-mail to Ms. Kemp discussed the use of preferred truckers and also that final destinations on GLL's house and master bills of lading did not always match. (Briles Dec., ¶ 39) (CJR Exh. B) (CJR App., at p. 19); (MOL's Exh. AR) (MOL's App., at p. 1494).

MOL's Operations Staff Learns of GLL's Split Routing

72. Notwithstanding Mr. Briles's efforts at the encouragement of Mr. McClintock and Ms. Yang to keep GLL's split routing hidden from MOL's operations staff, there were multiple instances where MOL's operations staff learned that GLL was "split routing" shipments. (Briles Dec., ¶ 40) (CJR Exh. B) (CJR App., at p. 19); (*see also* Declaration of Kevin Hartmann) (MOL's Exh. BM) (MOL's App., at p. 1638) ("[Mr. McClintock] said there were perhaps a half-dozen instances in which MOLAM learned of equipment being turned into wrong locations, or cargo being taken to the wrong locations...").

73. Some of these instances are reflected in e-mails that MOL attached to its Proposed Findings of Fact.

74. For example, the June 24, 2005 and August 15, 2005 e-mails attached to MOL's filing as Exhibits "AJ" and "AM" were sent because MOL's Norfolk office had learned of instances in which GLL had re-routed. (Briles Dec., ¶ 42) (CJR Exh. B) (CJR App., at p. 19).

75. Mr. McClintock learned of at least one of the instances in Norfolk from MOL's operations staff in the Norfolk office. (Briles Dec., ¶ 43) (CJR Exh. B) (CJR App., at p. 20).

76. After one of these instances, Mr. McClintock called Mr. Briles and told him that if MOL operations staff continued to become aware of instances in which GLL was re-routing, it

would jeopardize GLL's ability to use its preferred truckers. (Briles Dec., ¶ 44) (CJR Exh. B) (CJR App., at p. 20).

77. The March 9, 2006 e-mail attached to MOL's filing as Exhibit "AN" was sent because MOL's Chicago office had learned of an instance in which GLL had re-routed a shipment using the Fishers door point in the service contract. (Briles Dec., ¶ 45) (CJR Exh. B) (CJR App., at p. 20).

78. Thus, in addition to Mr. McClintock and Ms. Yang's knowledge of split routing, members of MOL's operations staff were aware of GLL's practice of split routing. (Briles Dec., ¶¶ 8-46) (CJR Exh. B) (CJR App., at pp. 14-20).

79. MOL does not dispute that its operations staff were aware of GLL's practice of split routing. (*See, e.g.*, MOL's Proposed Findings of Fact, at ¶¶ 98, 108).

GLL's Discussions with MOL Regarding the Termination of the Split Routing Practice at GLL

80. In June of 2006, new owners purchased GLL. (Briles Dec., ¶ 47) (CJR Exh. B) (CJR App., at p. 20).

81. After the sale, the new owners of GLL decided to end the practice of split routing of GLL. (Briles Dec., ¶ 50) (CJR Exh. B) (CJR App., at p. 21).
82. In or around March of 2007, GLL's Chief Operating Office, Christine Callahan, asked Mr. Briles to inform MOL that GLL wanted to change its service contract from having only a limited number of door points to adding more door points and using container yard and port rates. (Briles Dec., ¶ 51) (CJR Exh. B) (CJR App., at p. 21).
83. Mr. Briles discussed GLL's request with Ms. Yang. (Briles Dec., ¶ 52) (CJR Exh. B) (CJR App., at p. 21).
84. Mr. Briles and Ms. Callahan also met with Ms. Yang and Mr. McClintock to discuss GLL's request and the upcoming 2007 contract season. (Briles Dec., ¶ 52) (CJR Exh. B) (CJR App., at p. 21).
85. GLL's desire to transition from its historical practice of split routing was discussed in this meeting. (Briles Dec., ¶ 52) (CJR Exh. B) (CJR App., at p. 21).
86. Mr. McClintock and Ms. Yang were reluctant to negotiate individual door points because of the time and effort involved, just as they had been previously when GLL had requested

additional door points. (Briles Dec., ¶¶ 21-22, 52) (CJR Exh. B) (CJR App., at pp. 15-16, 21).

87. On June 20, 2007, Ms. Callahan sent an e-mail to Mr. McClintock following up on these discussions and following up on an e-mail she had previously sent Mr. McClintock about obtaining the new rates that GLL had requested. Her follow-up e-mail referenced the “split door service MOL has historically provided [GLL]” and informed MOL that GLL “must discontinue supporting MOL on the split moves.” (Briles Dec., ¶ 53; Exhibit 1 to Briles Dec.) (CJR Exh. B) (CJR App., at pp. 21, 24).³

88. The June 20, 2007 e-mail refers to GLL’s practice of split routing. (Briles Dec., ¶ 54; Exhibit 1 to Briles Dec.) (CJR Exh. B) (CJR App., at pp. 22, 24).

89. Mr. McClintock would have undoubtedly known what Ms. Callahan was referring to when she used these terms. (Briles Dec., ¶ 54; Exhibit 1 to Briles Dec.) (CJR Exh. B) (CJR App., at pp. 22, 24).

90. Mr. McClintock forwarded the e-mail to Ms. Yang. (Briles Dec., ¶ 55; Exhibit 1 to Briles Dec.) (CJR Exh. B) (CJR App., at pp. 22, 24).

³ Exhibit 1 to the Declaration of James Briles was previously marked as “Confidential” under the parties’ Protective Order. However, no parties have identified a basis for continuing to treat this document as confidential.

91. Ms. Yang would have undoubtedly known what Ms. Callahan was referring to when she used these terms as well. (Briles Dec., ¶ 55; Exhibit 1 to Briles Dec.) (CJR Exh. B) (CJR App., at pp. 22, 24).

92. Despite the fact that Ms. Callahan and Mr. Briles had informed Mr. McClintock and Ms. Yang that GLL would no longer be engaging in split moves, in an email string between Ms. Yang and Ms. Briles on July 17-18, 2007, Ms. Yang proposed that GLL do a split move for a delivery to Bentonville, Arkansas. (Briles Dec., ¶56; Exhibit 2 to Briles Dec.) (CJR Exh. B) (CJR App., at pp. 22, 25-26).

93. Mr. Briles responded by reminding Ms. Yang that GLL was no longer engaging in split routing. Ms. Yang's email in response said: "SIGH". Ms. Yang's response demonstrates she was frustrated or disappointed that GLL was no longer willing to perform split routings. (Briles Dec., ¶ 56; Exhibit 2 to Briles Dec.) (CJR Exh. B) (CJR App., at pp. 22, 25-26).

94. Mr. Briles again had to remind Ms. Yang that GLL was no longer engaging in split moves a few days later. (Briles Dec., ¶ 57; Exhibit 3 to Briles Dec.) (CJR Exh. B) (CJR App., at pp. 22, 27).

The Evidence Overwhelmingly Confirms MOL's Knowledge of Split Routing

95. There is overwhelming evidence, including the contemporaneous documentary evidence discussed above as well as the contemporaneous documentary evidence discussed in GLL and the Olympus Respondents' Proposed Findings of Fact, indicating that Mr. McClintock, Ms. Yang and others at MOL encouraged or at least knew of GLL's practice of split routing.⁴

96. MOL's operations staff was aware of GLL's practice of split routing in multiple instances.

97. While statements by the Panel in the Arbitration are not admissible, the Panel concluded that MOL knew of and approved the practice of split routing: "As for the carriers' knowledge, 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." (MOL's Exh. A) (MOL's App., at p. 10).

98. MOL's contention that it did not discover or know about split routing until July of 2008 is not supported by the evidence.

⁴ The CJR Respondents adopt GLL and the Olympus Respondents' Briefs to the extent they are not inconsistent with the CJR Respondents'.

99. To the extent Mr. McClintock and Ms. Yang testified that they did not know the extent of the practice of split rerouting at GLL, their testimony is not credible.

100. The fact that Mr. McClintock and Ms. Yang's former employer is now claiming that a practice that they approved and encouraged is illegal is likely motivating them not to be truthful regarding the extent of their knowledge of the practice of split routing at GLL. The fact that GLL was a key account that they were incentivized to maintain and please motivated them to look the other way at the time of the relationship if indeed they had questions or concerns about the propriety of the practice (which there is no indication they did). (Deposition of Paul McClintock ("McClintock Dep."), at pp. 38:15-20, annexed hereto as Exhibit I) (CJR App., at p. 96). Whatever their reasons, it is abundantly clear from the evidence that Mr. McClintock and Ms. Yang knew about the practice of split routing.

101. There are also business reasons why Mr. McClintock and Ms. Yang must have known about GLL's practice of split routing. Given GLL's size and the number of customers it had, Mr. McClintock, Ms. Yang and others at MOL had to be aware that GLL had customers in more locations than just the locations which were used as final destinations in the master bills of lading for door moves. It is illogical to conclude otherwise.

102. MOL contends it did not discover or know about split routing until July of 2008 when Mr. McClintock received a subpoena and disclosed it to Kevin Hartmann, MOL's General Counsel. However, Mr. Rosenberg's counsel in the Arbitration conducted an interview with Mr. McClintock on January 11, 2008. (Declaration of William Latham, dated February 26, 2013 ("Latham Dec."), at ¶ 4, annexed hereto as Exhibit C) (CJR App., at p. 29). During that interview, Mr. Latham and Mr. McClintock discussed a number of the issues involved in the Arbitration, including the practice of split routing at GLL and the extent of MOL's knowledge of GLL's practice. (Latham Dec., at ¶ 5) (CJR Exh. C) (CJR App., at p. 29). Putting aside that the CJR Respondents contend that Mr. McClintock was always aware of the practice of split routing, Mr. McClintock was indisputably aware of the practice after this interview. If Mr. Hartmann's testimony that he and MOL did not learn about split routing at GLL until Mr. McClintock received a subpoena in connection with the Arbitration in July of 2008 is credited, then Mr. McClintock hid from MOL and from his supervisors that he had been interviewed in connection with a legal proceeding regarding the practice of split routing – and he continued to hide that fact until he was served with a formal subpoena six months later. The most reasonable conclusion from Mr. McClintock's conduct in hiding the fact that he was interviewed is that he did not want the fact that he had for years approved and endorsed GLL's practice of split routing to come to light. These facts cast further doubt on testimony by Mr. McClintock about the extent of what he knew about the practice of split rerouting at GLL.

103. MOL has gone to great lengths in this proceeding to deny that it had any knowledge regarding the practice of split routing. However, as discussed in GLL's Proposed Findings of Fact, on August 15, 2005, Ted Holt, an Operations Manager for MOL, wrote to Mr. McClintock and Laci Bass regarding instances of split routing. The e-mail exchange between Mr. Holt and Mr. McClintock, as well as Mr. McClintock's testimony, indicates that this matter was brought to the attention of Mr. Hartmann, MOL's General Counsel.

104. Mr. Hartmann denies that the issue of GLL's split routing was communicated to him in this instance or any other, in the face of evidence to the contrary. However, there is no evidence in the record indicating that MOL investigated Mr. Holt's "side of the story".⁵ More specifically, MOL produced a privilege log of eighty-eight e-mails, most of which purport to relate to MOL's investigation into the facts of this case. (MOL's Privilege Log, annexed hereto as Exhibit D) (CJR App., at pp. 30-37). Mr. Holt's name does not appear on the privilege log. The absence of Mr. Holt's name is curious given the importance of the August 15, 2005 e-mail exchange to MOL's internal investigation regarding the extent of MOL's knowledge of the practice of split routing at GLL.

105. Furthermore, MOL presented no evidence from Mr. Holt with its Opening Submission. Had MOL spoken with Mr. Holt and discovered that his knowledge corroborated Mr. Hartmann's testimony and contradicted Mr. McClintock's testimony, surely MOL would have submitted evidence from Mr. Holt on this point with its Opening

⁵ To the best of the CJR Respondents' knowledge, Mr. Holt is still employed by MOL.

Submission. In light of the fact that MOL's Opening Submission did not include evidence from Mr. Holt, the ALJ should presume that Mr. Holt's testimony would have corroborated Mr. McClintock's testimony. *See generally Graves v. U.S.*, 150 U.S. 118, 121, 14 S. Ct. 40, 37 L.Ed. 1021 (1893) (“[I]f a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable”); *see also* O.C.G.A. § 24-14-22 (“If a party has evidence in such party's power and within such party's reach by which he or she may repel a claim or charge against him or her but omits to produce it or if such party has more certain and satisfactory evidence in his or her power but relies on that which is of a weaker and inferior nature, a presumption arises that the charge or claim against such party is well founded . . .”).

106. These facts suggest that Mr. Hartmann, who appears to have been leading and coordinating MOL's investigation, may have known that Mr. Holt's testimony would corroborate Mr. McClintock's and would contradict his own. Mr. Hartmann may have therefore deliberately not interviewed Mr. Holt to avoid discovering that Mr. Holt's testimony would be consistent with Mr. McClintock's. Regardless of whether Mr. Hartmann interviewed Mr. Holt, why MOL did not submit evidence from Mr. Holt in its Opening Submission, or why Mr. Holt's name does not appear on MOL's privilege log, the evidence in the record mandates a finding that Mr. Hartmann was made aware of the practice of split routing in 2005.

107. Other entries on MOL's privilege log call into question MOL's assertion that it did not know about the practice of split routing until July of 2008. Specifically, there are three e-mails on MOL's log dated May 17, 2007. (CJR Exh. D) (CJR App., at p. 34). The senders and recipients of these e-mails are Mr. Hartmann, Lisa Thornburg, and Nicole Hensley. (CJR Exh. D) (CJR App., at p. 34). Ms. Hensley is an MOL Operations Manager who in 2004 encouraged GLL to engage in split routing using the Lenoir, North Carolina door point. (December 3 and 8, 2004 e-mail exchange between Nicole Hensley, Eric McColloch, and GLL Staff, annexed hereto as Exhibit E) (CJR App., at p. 38). MOL's inclusion of these e-mails on its privilege log indicates their relevance to this case, i.e., the e-mails relate to the practice of split routing. The fact that these e-mails are from 2007 is another reason that Mr. Hartmann's testimony that MOL was not aware of the practice of split routing prior to July of 2008 is false and cannot be credited.

108. The Federal Maritime Commission investigated MOL and levied \$1.2 million in civil penalties on MOL following its investigation. (*Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc. et al.*, FMC No. 09-01 (ALJ Oct. 20, 2011) (Memorandum and Order Granting in Part and Denying in Part Olympus Respondents' Motion to Compel Compliance with Outstanding Discovery) ("October 20, 2011 Order"), annexed hereto as Exhibit F, at p. 2) (CJR App., at p. 40). An article in a trade magazine discussing the penalties states that "Peter J. King, director of the FMC's Bureau of Enforcement, said his office became convinced MOL knew about some of the abuses it uncovered by non-vessel-operating common carriers or shippers." (Chris Dupin, *FMC Fines MOL \$1.2*

Million, AM. SHIPPER, May 20, 2011, a copy of which is annexed hereto as Exhibit G) (CJR App., at p. 81).

109. The Respondents served discovery requests in this case regarding the FMC's investigation into MOL. MOL objected to providing the information requested by the Respondents. After the Respondents moved to compel, the ALJ required MOL to identify all of its communications with the FMC in connection with the FMC's investigation. (October 20, 2011 Order) (CJR Exh. F) (CJR App., at pp. 39-80). MOL's responses reveal that Mr. King had participated in every meeting and telephone call between MOL and the FMC. (MOL's November 23, 2011 Response to Memorandum and Order Granting in Part and Denying in Part Olympus Respondents' Motion to Compel Compliance with Outstanding Discovery, MOL's responses to Interrogatory numbers 1 and 6, annexed hereto as Exhibit H) (CJR App., at pp. 83-86). Mr. King's statement regarding the FMC's investigation into MOL, taken together with the fact that he participated in every meeting and call with MOL in connection with the FMC's investigation into MOL, is consistent with all of the other evidence indicating that MOL knew about the practice of split routing at GLL.

GLL's Practice of Split Routing Did Not Cause MOL any Damages and In Fact Benefitted MOL

110. Setting aside the fact that MOL knew of and encouraged split routing, MOL did not suffer any actual damages as a result of any split shipments. (Rosenberg Dec., at ¶¶

56-66) (CJR Exh. A) (CJR App., at pp. 9-11); (McClintock Dep., at pp. 13:22-14:6, 264:15-265:10) (Exh. I) (CJR App., at pp. 88-89, 100-101).

111. The cost of trucking a shipment in a door move from the port to the door is a pass-through for the ocean carrier. (McClintock Dep., at pp. 65:15-18, 88:10-14, 264:15-265:10) (CJR Exh. I) (CJR App., at pp. 98-101); (*see also* Rosenberg Dec., at ¶ 57) (CJR Exh. A) (CJR App., at p. 9).

112. That is, ocean carriers like MOL do not mark up the amount that they pay to a trucker in the rate that they provide a customer like GLL for a particular point. (McClintock Dep., at pp. 65:15-18, 88:10-14, 264:15-265:10) (CJR Exh. I) (CJR App., at pp. 98-101); (*see also* Rosenberg Dec., at ¶ 58) (CJR Exh. A) (CJR App., at p. 10).

113. Stated otherwise, MOL does not profit or attempt to profit from the inland trucking portion of a shipment. (McClintock Dep., at pp. 65:15-18, 88:10-14, 264:15-265:10) (CJR Exh. I) (CJR App., at pp. 98-101); (*see also* Rosenberg Dec., at ¶ 59) (CJR Exh. A) (CJR App., at p. 10).

114. MOL does not dispute or attempt to refute this testimony by Mr. McClintock.

115. Additionally, the practice of split routing was beneficial to MOL because it shifted substantial operational burdens to NVOCC's, such as GLL. (McClintock Dep., at pp. 14:7-20:9) (CJR Exh. I) (CJR App., at pp. 89-95).

116. It was a “happy day” for MOL when GLL took over the handling of the inland transportation. (McClintock Dep., at pp. 16:15-18) (CJR Exh. I) (CJR App., at p. 91).
117. MOL was “relieved” by GLL’s willingness to do this. (McClintock Dep., at pp. 20:5-9) (CJR Exh. I) (CJR App., at p. 95).
118. Furthermore, if there are “damages” when a container is “split routed”, it is the shipper (i.e., the NVOCC) who suffers damages. (McClintock Dep., at pp. 14:7-16:22) (CJR Exh. I) (CJR App., at pp. 89-91); (Rosenberg Dec., at ¶ 60) (CJR Exh. A) (CJR App., at p. 10).
119. More specifically, for each shipment moved with MOL, GLL paid MOL to have the goods delivered to a particular destination. (Rosenberg Dec., at ¶ 61) (CJR Exh. A) (CJR App., at p. 10).
120. The amount paid by GLL to MOL included the ocean portion of the shipment and the inland trucking portion of the shipment. (Rosenberg Dec., at ¶ 62) (CJR Exh. A) (CJR App., at p. 10).
121. As noted the inland trucking portion of the shipment is a pass-through. (McClintock Dep., at pp. 65:15-18, 88:10-14, 264:15-265:10) (CJR Exh. I) (CJR App., at

pp. 98-101); (*see also* Rosenberg Dec., at ¶¶ 57, 63) (CJR Exh. A) (CJR App., at pp. 9, 10).

122. Thus, if the goods were delivered to a destination that was closer than the final destination in the master bill of lading, then GLL overpaid MOL for the trucking. (Rosenberg Dec., at ¶ 64) (CJR Exh. A) (CJR App., at p. 10).

123. If the goods were delivered to a destination that was farther than the final destination in the master bill of lading, then the trucker was underpaid by MOL. However, GLL would pay the trucker the difference. (Rosenberg Dec., at ¶ 65) (CJR Exh. A) (CJR App., at p. 11).

124. In short, the practice of split routing at GLL had no financial impact whatsoever on MOL's bottom line, and MOL has not suffered any loss of profits from the practice. (McClintock Dep., at pp. 13:22-14:6) (CJR Exh. I) (CJR App., at pp. 88-89); (*see also* Rosenberg Dec., at ¶ 66) (CJR Exh. A) (CJR App., at p. 11).

125. If anything, *GLL* overpaid MOL for shipments where the actual destination that the goods were delivered to was closer than the final destination in the master bill of lading. (Rosenberg Dec., at ¶¶ 64, 66) (CJR Exh. A) (CJR App., at pp. 10, 11).

126. Furthermore, for any shipments for which MOL is claiming that GLL should have paid the tariff rate, MOL's argument ignores the practical realities of the business. Mr.

McClintock and Ms. Yang encouraged GLL to book shipments to regional door points in the service contract and to then engage in the practice of split routing to move the shipments to their final destination. Mr. McClintock and Ms. Yang were also reluctant to add and negotiate new points to GLL's service contracts. If Mr. McClintock and Ms. Yang had expected these shipments to be booked to their final destination and not the regional door points – and if they had still refused to add points for such final destinations and instead expected GLL to pay the tariff rate – MOL would never have been paid tariff rates or diversion fees by GLL even if GLL did not reroute. Rather, GLL would have negotiated reasonable, market rates with MOL for GLL's customers' door points. If MOL was unwilling to negotiate such rates, GLL would have worked with other carriers to service its customers at those door points. It would never have paid tariff rates or diversion charges for every shipment. Thus, putting aside that MOL is not entitled to any reparations, it is completely illogical for MOL to claim reparations for shipments that were split routed based on its tariff rates.

ARGUMENT AND CITATIONS OF AUTHORITY

Executive Summary

MOL is not entitled to any reparations from the CJR Respondents for a multitude of reasons:

- There is no evidence that the CJR Respondents actively participated in any shipments at issue as required by Section 10(a)(1).
- The CJR Respondents cannot be held liable merely as a shareholder and officer of GLL.

- Because there is no evidence that the CJR Respondents acted as a non-vessel operating common carrier, MOL's Section 10(d)(1) claim fails.
- MOL's claims are barred by the statute of limitations since MOL knew of and encouraged the practice of split routing.
- MOL's knowledge, acquiescence and encouragement of the practice of split routing precludes MOL from showing the fraud required to recover under Section 10(a)(1).
- MOL is not entitled to reparations because it has not suffered any actual damages.
- The CJR Respondents cannot be held liable for any shipments occurring after the sale of GLL on June 7, 2006.

A. MOL's Burden of Proof

To prevail in this proceeding, MOL has the burden of proving by a preponderance of the evidence that the CJR Respondents violated the Act. 5 U.S.C. § 556(d) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."); 46 C.F.R. § 502.155. MOL must prove such elements for each shipment in which the CJR Respondents are alleged to have violated the Shipping Act. *See Anderson Int'l Transport & Owen Anderson – Possible Violations of Sections 8(A) and 19 of the Shipping Act of 1984*, No. 07-02, 30 S.R.R. 1349, 2007 WL 5067621, at *1 (F.M.C. March 22, 2007) ("Each shipment is a separate violation."); *see also Sea-Land Service Inc. – Possible Violations of Sections 10(b)(1), 10(b)(4) and 19(d) of the Shipping Act of 1984*, No. 98-06, 30 S.R.R. 872, 2006 WL 2007809, at *16 (F.M.C. Feb. 8, 2006) ("Accordingly, the Commission affirms the ALJ's finding that Sea-Land violated . . . the Shipping Act of 1984 with respect to 149 shipments and that *these violations* were knowing and willful. " (emphasis added)).

In addition to proving that the CJR Respondents *participated* in each of the shipments that allegedly violated the Shipping Act, MOL has the burden of proving that it is entitled to reparations for each such violation. *See Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc., et al.*, FMC No. 09-01, at 3 (ALJ June 22, 2010) (June 22, 2010 Procedural Order) (the “June 22, 2010 Procedural Order”) (*citing James J. Flanagan Shipping Corp. v. Lake Charles Harbor and Terminal Dist.*, 30 S.R.R. 8, 13 (2003) (“As the Federal Maritime Board explained long ago: ‘(a) damages must be the proximate result of violations of the statute in question; (b) there is no presumption of damage; and (c) the violation in and of itself without proof of pecuniary loss resulting from the unlawful act does not afford a basis for reparation.”)). Specifically, to obtain any monetary compensation from the CJR Respondents, MOL must prove that it sustained actual loss and that the CJR Respondents’ violations of the law were the proximate cause of that loss or injury. *See Rose Int’l, Inc. v. Overseas Moving Network Int’l, Ltd., et al.*, No. 96-05, 29 S.R.R. 119, 2001 WL 865708, at *76 (F.M.C. June 7, 2001) (“The awarding of reparations in a complaint case is governed by section 11(g) of the Shipping Act, which requires the Commission to ‘direct payment of reparations to the complainant for actual injury . . . caused by a violation of this act.’” (*citing* 46 U.S.C. app. § 1710(g)).

B. MOL’s Claims

1. MOL’s Section 10(a)(1) Claim

Section 10(a)(1) of the Shipping Act of 1984 provides, “A person may not knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or any other unjust or unfair device or means, obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise apply.” 46 U.S.C. § 41102(a). “To prove violation of section 10(a)(1), Complainant

has burden of proving that (a) a person, (b) knowingly and willfully, (c) by an unjust device or means, (d) obtained or attempted to obtain ocean transportation rates for property at less than the rates or charges that would otherwise be applicable.” *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc. et al.*, FMC No. 09-01, at 22 (ALJ June 22, 2010) (Memorandum and Order on Motions to Dismiss) (citing *Rose Int’l, Inv v. Overseas Moving Network Int’l Ltd.*, 29 S.R.R. 119, 158 (F.M.C. 2001)).

2. MOL’s Section 10(d)(1) and 46 C.F.R. § 515.31(e) Claims⁶

Section 10(d)(1) of the Shipping Act provides: “A *common carrier, marine terminal operator, or ocean transportation intermediary* may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.” 46 U.S.C. § 41102(c) (emphasis added).

Under 46 C.F.R. § 515.31(e), “[n]o licensee shall prepare or file or assist in the preparation or filing of any claim, affidavit, letter of indemnity, or other paper or document concerning an ocean transportation intermediary transaction which it has reason to believe is false or fraudulent, nor shall any such licensee knowingly impart to a principal, shipper, common carrier or other person, false information relative to any ocean transportation intermediary transaction.”

⁶ MOL’s claim under 46 C.F.R. § 515.31(e) was dismissed as to the CJR and Olympus Respondents per the Administrative Law Judge’s June 22, 2010 Order. *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc. et al.*, FMC No. 09-01, at 23 (ALJ June 22, 2010) (Memorandum and Order on Motions to Dismiss) (“Accepting as true the facts alleged in Mitsui’s Complaint, . . . CJR Respondents operated as a shipper in relationship to Mitsui on each shipment and engaged in a fraudulent scheme to ‘obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise apply,’ . . . not an NVOCC that ‘fail[ed] to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.’ [. . .] Therefore, the allegations that . . . CJR Respondents violated section 10(d)(1) . . . and 46 C.F.R. § 515.31(e) are dismissed.”). As MOL did not appeal this ruling and the Commission did not consider it, MOL’s claim under 46 C.F.R. § 515.31(e) is no longer part of the case. However, given that MOL addressed this claim in its Opening Submission, the CJR Respondents address the claim herein without prejudice to their position that the claim has been dismissed and is not part of the case.

Thus, by their terms, Section 10(d)(1) and 46 C.F.R. § 515.31(e) only apply to transportation entities.

C. MOL's Section 10(a)(1) Claim Fails Against the CJR Respondents

1. MOL Has Failed to Prove that the CJR Respondents *Participated* in Any Alleged Shipping Act Violations.

The Commission has unanimously and unambiguously stated that to prevail on its Section 10(a)(1) claim, MOL must prove the CJR Respondents participated in any shipments allegedly giving rise to Shipping Act violations: “[The] ALJ must determine whether . . . CJR Respondents engaged in the requisite participation – as individuals or entities rather than mere shareholders of Global Link – in Shipping Act violations to warrant holding them separately liable for violating section 10(a)(1) and/or section 10(d)(1), or whether claims against one or both of these parties should be rejected.” August 1, 2011 Commission Order, at 34. Thus, MOL bears the burden of establishing that the CJR Respondents *actively participated* in the alleged Shipping Act violations such that they knowingly and willfully violated the Shipping Act or such that they acted as an NVOCC. *Id.* at 36 (“An initial issue to be determined by the ALJ is whether the evidence produced provides that ... CJR Respondents *participated* in the Shipping Act violations alleged.”) (emphasis added).

Given that according to the Commission a violation *requires* participation, evidence of knowledge is a consideration only in connection with those transactions in which the individual or entity actually “participated”. *Id.* at 34, 36. Furthermore, evidence of knowledge is not a substitute for the required finding that the individual or entity participated in the challenged transactions. *Id.*

Here, there is no evidence that either of the CJR Respondents *participated* in any of the sample shipments MOL has proffered – or any other shipments at issue. There is no evidence

that the CJR Respondents entered into any service contracts with MOL. (Rosenberg Dec., at ¶¶ 14, 24) (CJR Exh. A) (CJR App., at pp. 3, 5). There is no evidence that the CJR Respondents contracted for the ocean transportation of property with MOL. (Rosenberg Dec., at ¶¶ 16, 25) (CJR Exh. A) (CJR App., at pp. 4, 5). There is no evidence that the CJR Respondents obtained or attempted to obtain ocean transportation for property from MOL. (Rosenberg Dec., at ¶¶ 17, 26) (CJR Exh. A) (CJR App., at pp. 4, 5). Rather, GLL did. *See generally* August 1, 2011 Commission Order, at 75 (Commissioner Khouri, dissenting) (“In this case, Global Link was the licensed NVOCC who *obtained* the ocean transportation pursuant to its service contracts with Mitsui”).

There is thus no evidence in the record that either of the CJR Respondents: 1) decided how any shipments should be routed and whether they should be split routed; 2) participated in the creation of any shipping documents for any shipments which were split routed; or 3) otherwise participated in GLL’s shipments with MOL. This is not surprising given that CJRWE was merely a shareholder of GLL and Mr. Rosenberg was not actively involved in the day-to-day operations of GLL during the relevant period. (Rosenberg Dec., at ¶¶ 13, 22, 23) (CJR Exh. A) (CJR App., at pp. 3, 4); (Briles Dec., at ¶ 48) (CJR Exh. B) (CJR App., at p. 20). It is also not surprising given that the CJR Respondents had nothing to do with GLL following the sale on June 7, 2006, and thus did not participate in any shipments following that date. (Rosenberg Dec., at ¶¶ 30-35) (CJR Exh. A) (CJR App., at p. 6). In sum, MOL has presented no evidence that either of the CJR Respondents *participated* in any shipment or transaction at issue in this proceeding.

In denying the Olympus Respondents’ Motion for Summary Judgment, the ALJ found that “there remains a question as to whether either Mischianti, Cardenas, or Heffernan knew or

suspected that Global Link []engaged in split routing and whether they made inquiries based on such knowledge or suspicion.” *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc. et al.*, FMC No. 09-01, at 3 (ALJ Sept. 5, 2012) (Order Denying Motion of Olympus Respondents for Summary Judgment). This ruling applied an incorrect standard in assessing whether a “knowing and willful” violation of 10(a)(1) occurred. Rather, to establish a violation, MOL must show the Respondents had knowledge of the conduct *and participated* in the conduct. August 1, 2011 Commission Order, at 34, 36; *see also Rose Int’l Inc. v. Overseas Moving Network*, No. 96-05, 29 S.R.R. 119, 2001 WL 865708, at *47 (F.M.C. June 1, 2001) (“In order to prove that a person acted ‘knowingly and willfully,’ it must be shown that the person *has knowledge of the facts of the violation and intentionally violates or acts* with reckless disregard or plain indifference to the Shipping Act, or purposeful or obstinate behavior akin to gross negligence.” (emphasis added) (citing *Portman Square Ltd. – Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 28 S.R.R. 80, 84-85 (I.D.), finalized March 16, 1998; *Ever Freight Int’l – Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984*, 28 S.R.R. 329, 333 (I.D.), finalized June 26, 1998)). Knowledge of the violations, let alone mere suspicion of such violations, is insufficient to prove a knowing and willing violation of the Shipping Act. *Id.*⁷

⁷ To the extent the August 1, 2011 Commission Order was ambiguous as to what constitutes “participation,” the ALJ should apply the ordinary meaning of the term. *See Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) (“When terms in a statute are undefined, we give them their ordinary meaning.”). “Participation” requires affirmative acts. *See, e.g., Black’s Law Dictionary* 1229 (9th ed. 2009) (defining “participation” as “[t]he act of taking part in something, such as a partnership, a crime, or a trial”); *New Webster’s Dictionary and Thesaurus* 732 (1991) (“to be active or have a share in some activity, enterprise”); *Merriam-Webster’s Collegiate Dictionary* 903 (11th ed. 2003) (“to take part”); *The American Heritage College Dictionary* 1014 (4th ed. 2002) (same); *The Oxford American Dictionary and Language Guide* 724 (1999) (“take a part or share (in)”). Indeed, courts interpreting the term “participation” have held that one must affirmatively act to have participated. *See, e.g., United States v. Papagno*, 639 F.3d 1093, 1098 (D.C. Cir. 2011) (“The dictionary definition of ‘participation’ is the ‘act of taking part or sharing in something.’”); *United States v. Pando Franco*, 503 F.3d 389, 394 (5th Cir. 2007) (“‘Participate’ means that the defendant engages in some *affirmative conduct* designed to aid the venture or assist the perpetrator of the crime.” (emphasis added)); *Mut. Ben. Health & Accident Ass’n v. Bowman*, 99 F.2d 856, 859 (8th Cir. 1938) (concluding that “the definition of the word ‘participating’ implies activity” for purposes of interpreting an insurance policy); *Buchman v. S.E.C.*, 553 F.2d 816, 823 (2d Cir. 1977) (explaining that the SEC’s action against an individual

MOL tries to pin liability on the CJR Respondents by labeling Mr. Rosenberg as the “architect” of split routing at GLL. As a threshold matter, Mr. Rosenberg did not believe that the practice of split routing was illegal when he brought it to GLL. (Rosenberg Dec., at ¶¶ 5-8) (CJR Exh. A) (CJR App., at p. 2). Regardless of Mr. Rosenberg’s intentions, the fact that Mr. Rosenberg may have introduced split routing to GLL in 1997 when he started the company is not evidence that he *participated* in any shipments at issue in the case, and a violation of Section 10(a)(1) requires a showing that he or CJRWE actually participated in the shipments. MOL has failed to make such a showing.⁸

In sum, MOL’s characterization of Mr. Rosenberg as the “architect” of split routing is not sufficient to establish any liability as to the CJR Respondents in this case. As there is no evidence that the CJR Respondents actually participated in *any* shipments at issue, MOL’s Section 10(a)(1) claim against the CJR Respondents fails as a matter of law.

2. The CJR Respondents Cannot Be Held Liable Under Section 10(a)(1) Merely By Virtue of Being Shareholders or Officers.

The Commission has unequivocally held that the shareholder status of the Respondents is not a basis for imposing liability on them under section 10(a)(1). August 1, 2011 Commission Order, at 33 n.4, 34 (“Respondents’ status as shareholders would appear to be relevant only in connection with section (10)(d)(1) and 46 C.F.R. § 515.31(e), as section 10(a)(1) is directed to persons, which includes corporations and partnerships as well as individuals. . . .In this proceeding, no party has pled any basis for keeping . . . CJR Respondents in the proceeding based on a theory of piercing the corporate veil.”); *see also id.* at 68-69 (Commissioner Khouri,

was based not on his “failure to act” but rather his “affirmative conduct,” that is, “his participation in the decision to purchase shares”).

⁸ MOL attached several e-mails to its Opening Submission which were received or sent by Mr. Rosenberg. However, none of these e-mails evidence that Mr. Rosenberg participated in any decisions to re-route cargo for any particular shipments, or that he created allegedly false shipping documents for any particular shipments which MOL alleges constitute a Shipping Act violation.

dissenting) (“The allegation in the complaint that the . . . CJR Respondents ‘operated as a shipper in relationship to Mitsui’ is first, a conclusion thinly disguised as a fact. Second, the allegation is not plausible. There is nothing in the complaint or record to suggest that any [of] these respondents appear on any bill of lading or shipping document in the capacity of ‘shipper’. . . . Perhaps, the reason that Mitsui did not make any true factual allegation in this regard is that there is none to be found.”); *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc. et al.*, FMC No. 09-01, at 10-11 (FMC Jan. 31, 2013) (Order Dismissing Petition for Commission Action) (Commissioner Khouri, dissenting) (there is no prior Commission decision “concerning a respondent corporation which was in continual good standing in the state of its incorporation, and that holds a valid FMC license as an OTI, and such OTI, in fact, obtained ocean transportation for property, and such OTI’s name is properly reflected on all relevant shipment documents; where the Commission has asserted subject matter jurisdiction or personal jurisdiction over a party respondent who was (i) an owner in equity in the respondent OTI corporation, or (ii) a member of the Board of Directors of the OTI corporation, or (iii) a duly qualified officer of the OTI corporation without additional allegations, pleadings, averments and proffered evidence of further legal entanglements and deficiencies that thereby legally ensnarl such party(s) within the Commission’s purview. Most relevant in the instance case is the complete absence of any plausible allegation that would, at a minimum, point towards a piercing of the OTI corporation’s corporate veil. I have not been advised of even one such allegation – plausible or otherwise.”).⁹

⁹ MOL’s reliance on the legislative history of Section 10(a)(1) is a veiled attempt to persuade the ALJ to inject words which are not included the statute. (MOL’s Opening Submission, at pp. 57-59). The Commission has made clear that MOL must prove that the CJR Respondents *participated* in any shipments allegedly giving rise to Shipping Act violations.

There is absolutely no evidence in the record showing that either of the CJR Respondents ever operated as a shipper in relationship to MOL. There is also absolutely no evidence in the record showing that either of the CJR Respondents ever appears on any bill of lading or any shipping documents in the capacity of a shipper. There is also absolutely no evidence in the record to support piercing the veil of GLL and holding CJRWE liable as a shareholder, or holding Mr. Rosenberg personally liable as an officer or director.

In sum, the CJR Respondents cannot be held vicariously liable for any of GLL's alleged violations of the Shipping Act. Because MOL has failed to prove that the CJR Respondents *participated* in any alleged Shipping Act violations, MOL's claims against the CJR Respondents fail.¹⁰

D. MOL's Claims Fail Because MOL's Purported "Evidence" Is Inadmissible Hearsay that is Unreliable, Irrelevant, or Both.

MOL's failure to prove the CJR Respondents' participation in transactions underlying the alleged Shipping Act violations is reason enough to deny relief to MOL. But MOL's claims fail for yet another reason. Despite having been afforded ample opportunity following remand from the Commission to develop a factual record relating to the CJR Respondents' alleged participation, MOL chose not to pursue any additional discovery whatsoever. Instead, MOL has elected to rely for the most part on evidence cherry-picked from the Arbitration—which involved distinct legal and factual issues—to make its case.

It is well established that evidence in FMC proceedings must be "relevant, material, reliable and probative;" "irrelevant" or "immaterial" evidence should be excluded. *EuroUSA Shipping, Inc., Tober Group, Inc., & Container Innovations, Inc. — Possible Violations of*

¹⁰ The fact that Mr. Rosenberg was a qualifying individual for GLL does not relieve or lessen MOL's burden to prove Section 10(a)(1) violations against the CJR Respondents, contrary to MOL's unsupported argument in footnote twenty of its Opening Submission.

Section 10 of the Shipping Act of 1984 and the Commission's Regulations at 46 C.F.R. § 515.27, 31 S.R.R. 540, 547 (F.M.C. 2008) (citing 46 C.F.R. § 502.156 and 5 U.S.C. § 556(d)). It is just as well established that fact finders should “take account of the *lesser probative value of hearsay* or other questionable evidence in making their findings.” *Id.* (emphasis added).

Under these standards, and for the following reasons, all of the evidence MOL has submitted here is classic inadmissible hearsay that is either irrelevant or unreliable, or both, and therefore should be disregarded.

1. Unsworn Pleadings.

MOL relies repeatedly on GLL's unverified amended statement of claim from the Arbitration. (*See, e.g.*, MOL's Opening Submission, at pp. 42, 45.) It is longstanding law, however, that pleadings are not evidence. *See Olson v. Miller*, 263 F.2d 738, 740 (D.C. Cir. 1959). That principle is enforced with even greater rigor where, as here, the pleading is unsworn. *See VFB LLC v. Campbell Soup Co.*, 482 F.3d 624, 636 (3d Cir. 2007) (noting that an unverified complaint was not evidence); *Williams v. McCallin*, 439 F. Appx. 707, 710 (10th Cir. 2011) (same); *cf. Gulf Coast Bank & Trust Co. v. Reder*, 355 F.3d 35, 39 (1st Cir. 2004) (disregarding an unverified complaint at summary judgment). As such, any findings of fact MOL offers in reliance on GLL's statement of claim—even assuming they are relevant—should be give no weight in this proceeding.

2. Deposition Testimony from the Arbitration.

MOL also relies heavily on the deposition testimony from the Arbitration. (*See, e.g.*, MOL's Opening Submission at ¶¶ 6, 21, 25). Prior sworn testimony may be admissible as an exception to the hearsay rule but *only* when the declarant is unavailable. *See Fed. R. Evid.* 804(b)(1); *see also Walker v. Pepsi-Cola Bottling Co.*, Nos. Civ. A. 98-225-SLR, 99-748-JJF,

2000 WL 1251906, at *5 (D. Del. August 10, 2000) (holding that transcript of “prior sworn testimony in an arbitration hearing” was “hearsay and not admissible . . .”).¹¹

To establish unavailability under 804(b)(1), the proponent of the hearsay statement must demonstrate that the declarant is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance, by process or other reasonable means. *See* Fed. R. Evid. 804(a)(5); *Williams v. United Dairy Farmers*, 188 F.R.D. 266 (S.D. Ohio 1999). Thus, the mere absence of the declarant from the hearing, alone, does not establish unavailability. *See id.*; Fed. R. Evid. 804(a)(5) Advisory Committee Notes. Rather, the proponent must also establish unavailability. *See id.* Reasonable efforts include service of a subpoena on the declarant to testify at the hearing, attempts to depose the declarant, or some other showing of a good faith effort to secure the declarant’s attendance, such as witnesses explaining why the declarant is unavailable to testify. *See id.* (rule designed primarily to require that an attempt be made to depose a witness, as well as to seek his attendance as a precondition to the witness being deemed unavailable); *Simulnet East Ass’n v. Ramada Hotel Operating, Co.*, Nos. 95-16339, 95-16340, 1997 WL 429153, at *6 (9th Cir. July 31, 1997) (“Where no attempt has been made to depose a witness, that witness cannot be said to be unavailable.”); *Carlisle v. Frisbie Memorial Hosp.*, 888 A.2d 405 (N.H. 2005) (rejecting admissibility of deposition testimony because defendants did not adequately show that they could not procure the witness to testify). Notwithstanding MOL’s ability to request a subpoena from the Commission, MOL has not made any efforts to depose any of the individuals whose prior testimony it now attempts to use. As such, all excerpts from such depositions are inadmissible in this proceeding.

¹¹ As parties to this proceeding, Louis J. Mischianti, David Cardenas, Keith Heffernan, and Chad J. Rosenberg were certainly “available.” Thus, prior deposition testimony from these individuals is inadmissible hearsay.

Moreover, MOL relies on the deposition testimony of Eric Joiner from the Arbitration. In fact, no fewer than six of MOL's proposed findings of fact are based at least in part on Mr. Joiner's testimony. Mr. Joiner's statements are inadmissible against the CJR Respondents for the reasons discussed above. Additionally, while evidence from the Arbitration is inadmissible, it bears noting that the Panel in the Arbitration voiced serious doubts about Mr. Joiner's credibility. (Arbitration Partial Final Award) (MOL's Exh. A, at p. 35) (MOL's App., at p. 35) ("...the Panel does not credit Mr. Joiner, who was fired after less than a year and who appears to have offered himself as a consultant to both sides for compensation"). Given that the Panel observed Mr. Joiner testify in person, its assessment of Mr. Joiner's credibility merits deference.

3. Other Documents.

MOL relies on two additional documents in its attempt to prove the CJR Respondents' participation: (i) the Partial Final Award in the Arbitration ("Award") and (ii) GLL's Voluntary Disclosure to the Commission in May 2008 ("Voluntary Disclosure").

MOL's reliance on the Award is improper, as the Award is an out of court statement by the Arbitration Panel and is thus inadmissible. MOL may argue that CJR Respondents are collaterally estopped by the Award. However, collateral estoppel does not apply. "For a court to apply nonmutual collateral estoppel the issue at stake (1) must be identical to the one alleged in the prior litigation; (2) the issue must have been actually litigated; and (3) the determination in the prior proceeding must have been a crucial and necessary part of the judgment in the earlier action." *Johnson v. F.B.I.*, No. CIV.A. 2:06CV463-MHT, 2006 WL 2190711 (M.D. Ala. Aug. 2, 2006) (citing *A.G. Taft Coal Co. v. Connors*, 829 F.2d 1577, 1580 (11th Cir. 1987); *Hart v. Yamaha-Parts Distributors, Inc.*, 787 F.2d 1468, 1473 (11th Cir.1986)).

MOL was not a party or related to a party in the Arbitration. Further, the Arbitration concerned factual and legal issues that are not at issue in or applicable to this proceeding. Specifically, the Arbitration concerned whether GLL was damaged as a result of alleged “fraudulent conduct by certain of the Respondents and breaches of contractual representations in connection with Claimants’ acquisition of Global Link . . . pursuant to a Stock Purchase Agreement” (Arbitration Partial Final Award) (MOL’s Ex. A, at p. 1) (MOL’s Appendix (“MOL’s App.”), at p. 1). Claims arising from the sale of GLL are in no way at issue in this proceeding.

MOL’s reliance on the Voluntary Disclosure is also improper. First, the Voluntary Disclosure is an out-of-court statement being offered for its purported truth and is thus inadmissible hearsay. To the extent MOL contends the Voluntary Disclosure is admissible as an admission by GLL, the Voluntary Disclosure is still not admissible against the CJR Respondents because one Respondent’s admission cannot bind another Respondent. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Dyer*, 19 F.2d 514, 519 n.9 (10th Cir. 1994) (*citing Leeds v. Marine Ins. Co. of Alexandria*, 15 U.S. (2 Wheat.) 380, 381, 4 L. Ed 266 (1817) (“[T]he answer of one defendant cannot be used as evidence against his co-defendant”)); *Riberglass, Inc. v. Techni-Glass Industries, Inc.*, 811 F.2d 565, 566-67 (11th Cir. 1987) (“[T]he deemed admissions of his codefendants cannot bind Morris where he actually responded to Plaintiff’s requests in a timely and legally sufficient manner” (internal citations omitted)); 4 *Wigmore Evidence*, § 1076 at 156 (Chadbourn rev. 1972) (“[T]he admissions of one co-plaintiff or codefendant are not receivable against another, merely by virtue of his position as a coparty in the litigation” (emphasis omitted)); 31 *C.J.S. Evidence*, § 318 at 812 (“An admission of one party is not binding on, or evidence against, a coparty”). Second, the Voluntary Disclosure is unreliable, as it was filed by

GLL's current owners in an effort to manufacture favorable evidence for the Claimants in the Arbitration.

In short, all of the evidence MOL has proffered is classic hearsay, and is either irrelevant or unreliable, or both. As such, it merits no consideration.

E. MOL's Section 10(d)(1) Claim Fails Because the CJR Respondents Did Not Act as an NVOCC.¹²

To prevail on its Section 10(d)(1) claim against the CJR Respondents, MOL must prove the CJR Respondents "acted as an NVOCC through their participation in the alleged split routing scheme." August 1, 2011 Commission Order, at 32; *see also id.*, at 36 ("The issue remains as to whether these Respondents may be found to have violated section 10(d)(1) by acting as an NVOCC through their participation in the alleged split routing scheme"). The statutory definition of NVOCC is "a common carrier that – (A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its relationship with an ocean common carrier." 46 U.S.C. § 40102(16).

There is no evidence that either of the CJR Respondents ever acted as an NVOCC in connection with any of MOL's sample shipments – or any of the shipments at issue. MOL's conclusory statements on pages sixty-one and sixty-three of its Opening Submission that the CJR Respondents acted as a non-vessel operating common carrier through their participation in the split routing scheme are unsupported by any facts or law. MOL's Section 10(d)(1) claim against the CJR Respondents thus fails.

¹² As discussed in footnote five, MOL's 46 C.F.R. § 515.31(e) claims have been dismissed. To the extent the ALJ considers MOL's 46 C.F.R. § 515.31(e) claims, they fail for the same reasons that MOL's Section 10(d)(1) claims fail.

F. MOL's Claims are Barred by the Statute of Limitations.

46 U.S.C. § 41301(a) provides: "A person may file with the . . . Commission a sworn complaint alleging a violation of this part If the complaint is filed within 3 years after the claim accrues, the complainant may seek reparations for an injury to the complainant caused by the violation." *See also* FMC Rules of Practice and Procedure § 502.63. The three year limitations period begins to run at the time of the discovery of the illegal practice. *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc. et al.*, FMC No. 09-01, at 24 (ALJ June 22, 2010) (Memorandum and Order on Motions to Dismiss). Specifically,

[I]f the injury is such that it should reasonably be discovered *at the time it occurs*, then the plaintiff should be charged with discovery of the injury, and the limitations period should commence at that time. But if, on the other hand, the injury is not of the sort that can readily be discovered when it occurs, then the action will accrue, and the limitations period commence, only when the plaintiff has discovered, or with due diligence should have discovered, the injury.

Id. at 24 (emphasis added) (*citing Inlet Fish Producers, Inc. v. Sea-Land Service, Inc.*, 29 S.R.R. 306, 314 (2001) (*quoting Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336, 342 (D.C. Cir. 1991))).

The evidence demonstrates that multiple people at MOL knew about the practice of split routing at GLL, some as early as 2004. The individuals who knew about the practice include a Vice President of MOL and MOL's General Counsel. The knowledge of the individuals who knew about split routing is imputed to MOL. *See* Restatement (Third) of Agency § 5.03 (2006) ("For purposes of determining a principal's legal relations with a third party, notice of a fact that an agent knows or has reason to know is

imputed to the principal if knowledge of the fact is material to the agent's duties to the principal").¹³

MOL filed the Complaint on May 5, 2009. Because MOL knew about the practice of split routing in 2004, MOL's claims based on transactions prior to May 6, 2006 are barred by the statute of limitations. Furthermore, as discussed herein, CJRWE sold its shares of GLL on June 7, 2006. After the sale, Mr. Rosenberg was not employed with GLL and CJRWE did not own stock of CJRWE. There is thus no basis in law or fact for the CJR Respondents to have any liability for any shipments prior to May 6, 2006, or after June 7, 2006.

In a Declaration submitted by MOL, Thomas Kelly, MOL's former Executive Vice President and Chief Operating Officer, testifies: "No person at MOLAM had the authority to permit the unlawful Global Link practice of re-routing cargo in containers to locations different than the place of delivery set forth in MOL's bills of lading. To the extent Global Link engaged in unlawful diversions, including those described in Mr.

¹³ See also *USACM Liquidating Trust v. Deloitte & Touche LLP*, 764 F. Supp. 2d 1210, 1217-1218 (D. Nev. 2011) ("[T]he knowledge of an officer or agent is imputed to the corporation when the agent obtains the knowledge 'while acting in the course of his employment and within the scope of his authority, and the corporation is charged with such knowledge even though the officer or agent does not in fact communicate his knowledge to the corporation . . . this is so because a corporation can acquire knowledge or receive notice only through its officers and agents, and the law presumes that an agent will disclose all information to its principal."); *In re NM Holdings Co.*, 622 F.3d 613, 620 (6th Cir. 2010) ("A corporation can only act through its employees and, consequently, the acts of its employees, within the scope of their employment, constitute the acts of the corporation. Likewise, knowledge acquired by employees within the scope of their employment is imputed to the corporation."); *In re Color Tile*, 475 F.3d 508, 512 -13 (3d Cir. 2007) (citing several cases); *In re Hellenic Inc.*, 252 F.3d 391, 395 (5th Cir. 2001) ("An agent's knowledge is imputed to the corporation where the agent is acting within the scope of his authority and where the knowledge relates to matters within the scope of that authority."); *United States v. Josleyn*, 206 F.3d 144, 159 (1st Cir. 2000) ("[T]here 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. The person whose knowledge is to be imputed must have some relationship to the company-whether director, officer, agent, or employee-which 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." (footnote omitted)); *Sawyer v. Mid-Continent Petroleum Corp.*, 236 F.2d 518, 520 (10th Cir. 1956) ("Since a corporation can act only through its officers, agents and employees, it is necessarily chargeable with the composite knowledge of its officers and agents acting within the scope of their authority." (citing several cases)).

Hartmann’s reports noted above, it was done without my knowledge and was not authorized or approved by MOLAM.” Based on this testimony, it appears MOL intends to argue in its Reply Brief that the “adverse interest exception” to the rule by which Mr. McClintock and Ms. Yang’s knowledge would normally be imputed to MOL applies. (MOL’s Exh. CB, at ¶¶ 7-8) (MOL’s App., at p. 1938-1939).

The adverse interest exception is an exception to the normal rule that an agent’s knowledge is imputed to its principal. However, the adverse interest exception only applies where the agent “completely abandon[s] the principal’s interests and act[s] entirely for his own purposes.” *USACM Liquidating Trust*, 764 F. Supp. 2d at 1218 (citing *In re CBI Holding Co.*, 529 F.3d 432, 448 (2d Cir. 2008)); *In re Bennet Funding Grp., Inc.*, 336 F.3d 94, 100 (2d Cir. 2003); *In re Crazy Eddie Secs. Litig.*, 802 F. Supp. 804, 817 (E.D.N.Y. 1992) (stating that when the agent acts both for himself and for the principal, the agent’s knowledge is imputed to the principal even if the agent’s primary interest is inimical to the principal)).¹⁴ Furthermore, even if an agent is acting solely for his or her own purposes, knowledge will be still be imputed “when the principal ratified or knowingly retained a benefit from the agent’s action.” Restatement (Third) of Agency § 5.04(b) (2006).

¹⁴ See also *Tobacco Tech., Inc. v. Taiga Int’l N.V.*, 388 F. App’x 362, 373 (4th Cir. 2010) (“To make out [the adverse interest] exception, the principal bears the burden of showing that ‘the agent [has] totally abandoned the principal’s interest and [is] acting for his own purposes or those of another. In other words, the interests of the agent must be completely adverse to those of his principal.’ This is because if the agent is acting both for himself and the principal, ‘the agent is acting within the scope of the agency relationship, and it is reasonable to assume that the agent will communicate the knowledge to his principal.’(citations omitted) (second alteration in original)); *United States v. Pan Pac. Textile Grp., Inc.*, 29 C.I.T. 1013, 1023 (2005) (“Th[e adverse interest] exception absolves a principal of liability ‘when an agent abandons his principal’s interests and acts entirely for his or another’s purposes.’ The exception does not apply, however, when ‘the unfaithful agent’s ... conduct, while motivated by improper self-serving reasons, also benefit [sic] the ... principal.’(internal quotation marks and citations omitted)); *Brandt v. Lazard Freres & Co.*, No. 96-2653-CIV-DAVIS, 1997 WL 469325, at *3 (S.D. Fla. Aug. 1, 1997) (“[K]nowledge would be imputed if the [principal] received *any benefit* from the fraud.” (emphasis added)).

Here, there is no evidence that Mr. McClintock or Ms. Yang were acting for their own purposes, let alone *solely* for their own purposes, in encouraging GLL to engage in the practice of split routing. Indeed there is no evidence that Mr. McClintock or Ms. Yang in any way *personally* benefitted from encouraging the practice of split routing. (McClintock Dep., at pp. 52:10-16) (CJR Exh. I) (CJR App., at p. 97).

There is also no evidence that Mr. McClintock or Ms. Yang had abandoned MOL's interests in any way, let alone *completely* abandoned MOL's interests. MOL also ratified and benefitted from Mr. McClintock and Ms. Yang's conduct by continuing to retain GLL as a key customer. (McClintock Dep., at pp. 38:15-20) (CJR Exh. I) (CJR App., at p. 96).

There is thus no basis for the adverse interest exception to apply. Mr. McClintock and Ms. Yang were MOL's agents and their knowledge is imputed to MOL. As MOL was aware of the practice of split routing, MOL's claims based on shipments prior to May 6, 2006 are barred by the statute of limitations.

G. MOL's Acquiescence to and Encouragement of Split Routing Precludes MOL's Claims Sounding in Fraud.

To prevail on its Section 10(a)(1) claim, MOL must show that CJR Respondents not only actively *participated* in each alleged violation, but also did so with some type of fraud or concealment. "It is well established that in order to prove that a party used an unfair device or means to obtain lower rates than would have otherwise been applicable, a showing of some kind of fraud or concealment is required.'" *Rose Int'l, Inc. v. Overseas Moving Network*, No. 06-05, 2001 WL 865708, at *46 (FMC June 7, 2001) (citing *United States v. Open Bulk Carriers*, 727 F.2d 1061, 1064 (11th Cir. 1984); *Pacific Far East Lines – Alleged Rebates to Foremost Dairies, Inc., Connell Brothers Co., Ltd., & Advance Mill Supply Corp.*, 10 S.R.R. 1 (1968), aff'd 410

F.2d 257 (D.C. Cir. 1969)); *China Ocean Shipping Company v. DMV Ridgeview, Inc.*, No. 91-37, 26 S.R.R. 50, 1991 WL 383093, at *10 (F.M.C. Nov. 19, 1991) (“[T]he Commission and the courts have uniformly held that the act forbidden must be similar to those specifically proscribed in order to be an unjust or unfair device or means. In other words, the unjust or unfair device or means must partake of some element of falsification, deception, fraud, or concealment”); *Open Bulk Carriers*, 727 F.2d at 1064 (“It is undisputed that fraud or concealment is a necessary ingredient in the proof of an unjust or unfair device or means.” (citing *Capitol Transp., Inc. v. United States*, 612 F.2d 1312 (1st Cir. 1979))).

One element to establishing fraud is justifiable or reasonable reliance. *See, e.g., Crigger v. Fahnestock & Co.*, 443 F.3d 230, 234 (2d. Cir. 2006) (“[T]he five elements of a fraud claim must be shown by clear and convincing evidence: (1) a material misrepresentation or omission of fact (2) made by defendant with knowledge of its falsity (3) and intent to defraud; (4) reasonable reliance on the part of the plaintiff; and (5) resulting damage to the plaintiff.”) However, when the plaintiff is aware of the alleged fraud, it is unable to establish the justifiable reliance element of a fraud claim and thus cannot recover under any theory sounding in fraud. *See, e.g., Gochnauer v. A.G. Edwards & Sons, Inc.*, 810 F.2d 1042, 1047 (11th Cir. 1987) (“Not only must an individual actually rely on the information provided, this reliance must be justifiable, i.e., with the exercise or reasonable diligence one still could not have discovered the truth behind the [alleged] fraudulent omission or misrepresentation.”); *Suntrust Mortg., Inc. v. Busby*, 651 F. Supp. 2d 472, 485 (W.D.N.C. 2009) (“Thus, a claim for . . . fraud . . . is not cognizable where the pleader . . . knows the true facts.”).

In addition to proving justifiable reliance, to establish a “knowing and willful” violation of Section 10(a)(1), the person alleged to have violated the Shipping Act must not only have

knowledge of the unlawful conduct, but must also affirmatively act with the requisite intent or indifference of violating the Act. *See Pacific Champion Express Co., Ltd. – Possible Violations of Section 10(b)(1) of the Shipping Act of 1984*, No. 99-02, 2000 WL 534633, at *10 (F.M.C. Apr. 21, 2000) (“In determining whether a person has violated the 1984 Act ‘knowingly and willfully,’ the evidence must show that the person has knowledge of the facts of the violation *and intentionally violates or acts* with reckless disregard or plain indifference to the 1984 Act.” (citing *Portman Square Ltd. - Possible Violations of § 10(a)(1) of the Shipping Act of 1984*, 28 S.R.R. 80, 84-85 (I.D.), finalized March 16, 1998) (emphasis added)). Accordingly, proof of intentional conduct or reckless indifference is required to establish a violation of section 10(a)(1) of the Shipping Act. *See Hudson Shipping (Hong Kong) Ltd. D/B/A Hudson Express Lines – Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, No. 02-06, 2003 WL 21677927, at *3 (F.M.C. July 10, 2003) (“A person is considered to have ‘knowingly and willfully’ violated the Act if the person *had knowledge of the facts of the violation and intentionally violated or acted* with reckless disregard, plain indifference or purposeful, obstinate behavior akin to gross negligence.” (emphasis added) (citing *Rose Int’, Inc. v. Overseas Moving Network International, Ltd.*, 21 S.R.R. 119 (2001); *Ever Freight Int’l - Possible Violations*, 28 S.R.R. 329, 333 (I.D.), finalized June 26, 1998)).

MOL cannot prove it justifiably relied on any alleged representations by GLL (or the other Respondents) since the evidence demonstrates that GLL engaged in the practice of split routing with the consent and encouragement of MOL’s senior sales personnel. MOL’s knowledge and encouragement of the practice thus bar MOL’s claims sounding in fraud. MOL’s Section 10(a)(1) claim fails for this reason in addition to the reasons discussed above.¹⁵

¹⁵ Mr. McClintock and Ms. Yang’s knowledge and encouragement of the practice of split routing is imputed to MOL for the reasons discussed above.

MOL's Section 10(a)(1) claim also fails because the evidence demonstrates that the Respondents did not have the requisite scienter for a violation of Section 10(a)(1). The managers of GLL believed the practice of split routing was legal based upon the advice provided by maritime counsel in 2003. The managers of GLL relied on this advice in good faith. Based on their understanding of the advice, they terminated the practice of shortstopping. Because they believed based on the advice that the practice of split routing was legal, GLL (and the CJR Respondents) did not intentionally violate or act with reckless regard for the Shipping Act during the period of time prior to the June 7, 2006 sale when the CJR Respondents were still an owner and director of GLL. MOL's Section 10(a)(1) claim thus fails against the CJR Respondents because MOL has not carried its burden of showing the intent required to establish a violation.

H. MOL's Claims Fail Because It Has Not Been Damaged.

Setting aside that MOL is not entitled to reparations for the reasons discussed above, MOL is also not entitled to reparations because it has not been damaged. Under 46 U.S.C. § 41305(b), "[i]f the complaint was filed within the [3 year limitations period], the . . . Commission shall direct the payment of reparations to the complainant for *actual injury* caused by a violation of this part, plus reasonable attorney fees." (emphasis added). Accordingly, in addition to proving that each of the Respondents *participated* in each of the shipments that allegedly violated the Shipping Act, MOL must prove it suffered actual injuries. *See Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc. et al.*, FMC No. 09-01, at 3 (June 22, 2010) (June 22, 2010 Procedural Order) (citing *James J. Flanagan Shipping Corp. v. Lake Charles Harbor and Terminal Dist.*, 30 S.R.R. 8, 13 (2003) ("As the Federal Maritime Board explained long ago: '(a) damages must be the proximate result of violations of the statute in question; (b) there is no

presumption of damage; and (c) *the violation in and of itself without proof of pecuniary loss resulting from the unlawful act does not afford a basis for reparation.*”) (emphasis added).

MOL’s own employee, Mr. McClintock, testified that the cost of the inland transportation leg is a pass-through cost. (McClintock Dep., at pp. 65:15-18, 88:10-14, 264:15-265:10) (Exh. I) (CJR App., at pp. 98-101); (see also Rosenberg Dec., at ¶¶ 57, 63) (CJR Exh. A) (CJR App., at pp. 9-10). Mr. McClintock further testified that MOL does not seek to profit on the inland transportation leg. (McClintock Dep., at pp. 65:15-18, 88:10-14, 264:15-265:10) (CJR Exh. I) (CJR App., at pp. 98-101); (see also Rosenberg Dec., at ¶ 59) (CJR Exh. A) (CJR App., at p. 10). Mr. McClintock also testified that MOL did not suffer any damages as a result of the practice of split routing and that the practice was in fact beneficial to MOL in many ways. (McClintock Dep., at pp. 13:22-14:6, 16:15-20:9) (CJR Exh. I) (CJR App., at pp. 88-89, 91-95); (see also Rosenberg Dec., at ¶¶ 56-66) (CJR Exh. A) (CJR App., at pp. 9-11).

MOL has not rebutted Mr. McClintock’s testimony or presented evidence to the contrary. Mr. McClintock’s testimony thus demonstrates that MOL did not suffer any damages as a result of any conduct by the Respondents. MOL should therefore be denied any reparations.¹⁶

¹⁶ Furthermore, if there are “damages” when a container is “split routed”, it is the NVOCC who suffers them. (Rosenberg Dec., at ¶ 60) (CJR Exh. A) (CJR App., at p. 10). More specifically, for each shipment moved with MOL, GLL paid MOL to have the goods delivered to a particular destination. (Rosenberg Dec., at ¶ 61) (CJR Exh. A) (CJR App., at p. 10). The amount paid by GLL to MOL included the ocean portion of the shipment and the inland trucking portion of the shipment. (Rosenberg Dec., at ¶ 62) (CJR Exh. A) (CJR App., at p. 10). Thus, if the goods were actually delivered to a destination that was closer than the final destination in the master bill of lading, then GLL overpaid MOL for the trucking. (Rosenberg Dec., at ¶ 64) (CJR Exh. A) (CJR App., at p. 10). If the goods were actually delivered to a destination that was farther than the final destination in the master bill of lading, then the trucker was underpaid by MOL. However, GLL would pay the trucker the difference. (Rosenberg Dec., at ¶ 65) (CJR Exh. A) (CJR App., at p. 11). Thus, if anything, GLL overpaid MOL in shipments where the actual destination that the goods were delivered to was closer than the final destination in the master bill of lading. (Rosenberg Dec., at ¶ 66) (CJR Exh. A) (CJR App., at p. 66).

I. There is No Basis for Any Claims Against the CJR Respondents Arising from Shipments After the 2006 Sale.

Setting aside the various other reasons why all of MOL's claims against the CJR Respondents lack merit, MOL's claim that the CJR Respondents are liable for any shipments occurring after the sale of GLL on June 7, 2006, should be rejected with little analysis. After the sale, Mr. Rosenberg was not employed with GLL and CJRWE did not own stock of CJRWE. There is thus no basis in law or fact for the CJR Respondents to have any liability for any shipments after the 2006 sale.

CONCLUSION

For the reasons discussed herein, the ALJ should find in favor of the CJR Respondents on all of MOL's claims.

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Dated: March ____, 2013

CERTIFICATE OF SERVICE

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