

**BEFORE THE  
FEDERAL MARITIME COMMISSION**

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**Docket No. 09 -01**

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**MITSUMI 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.  
MISCHIANTI, DAVID CARDENAS, KEITH HEFFERNAN, CJR WORLD  
ENTERPRISES, INC. AND CHAD J. ROSENBERG**

**RESPONDENTS**

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**OLYMPUS RESPONDENTS' REPLY BRIEF IN OPPOSITION TO  
COMPLAINANT'S REQUEST FOR RELIEF**

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Pursuant to the October 16, 2012 Order of the Administrative Law Judge, as amended, and Rule 221 of the Commission's Rules of Practice and Procedure, Respondents Olympus Growth Fund III, L.P. ("OGF"), Olympus Executive Fund, L.P. ("OEF"), Louis J. Mischianti, L. David Cardenas and Keith Heffernan (hereinafter collectively referred to as "Olympus Respondents") respectfully file their reply ("Reply") to the opening submission ("Opening Submission") of Complainant Mitsui O.S.K. Lines, Ltd. ("Complainant" or "MOL").

## INTRODUCTION

### **I. Nature Of The Case As It Relates To The Olympus Respondents**

The Olympus Respondents are not now, nor have they ever been, entities subject to regulation by the Federal Maritime Commission. For a brief period of time, the Olympus Respondents were beneficial owners of Respondent Global Link Logistics, Inc. ("GLL" or "Global Link"), an NVOCC regulated by the Federal Maritime Commission. OEF and OGF purchased shares in the parent company of GLL in May 2003 and sold their shares in June 2006.<sup>1</sup> Prior to, during and after OEF's and OGF's ownership, GLL engaged in certain activities that MOL now alleges violate the Shipping Act.

The activities at issue in this proceeding became an immediate concern to the Olympus Respondents only as the result of arbitration proceedings commenced by the purchasers of GLL. These activities first came to the attention of the Commission when those purchasers, in an effort to influence the arbitration, instructed GLL to pursue a voluntary disclosure with the Commission's enforcement staff.<sup>2</sup> The Olympus Respondents then filed a petition for a declaratory order with the Commission, seeking relief with respect to GLL's disclosure. That petition was denied on the grounds that the Commission had no jurisdiction over the Olympus Respondents. Despite this procedural

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<sup>1</sup> As the Olympus Respondents have emphasized repeatedly in this proceeding, the majority of the time period during which the Olympus Respondents had ownership interests in GLL Holdings falls outside of the three-year statute of limitations.

<sup>2</sup> This disclosure occurred on May 21, 2008. To date, the Bureau of Enforcement has taken no action with respect to the voluntary disclosure.

history, this proceeding inappropriately seeks reparations from entities that are not subject to the Commission's jurisdiction and have no proper place in the case. The Olympus Respondents are respondents in this proceeding solely because of their perceived "deep pockets."

The Olympus Respondents file this reply to MOL's Opening Submission by compulsion only and without waiver of their objections to having to file this reply at all. The Federal Maritime Commission does not have jurisdiction over the Olympus Respondents. *See* Order Denying Petition of Olympus Growth Fund III, L.P. and Olympus Executive Fund, L.P. for Declaratory Order, Rulemaking or Other Relief, Dkt. No. 08-07 ("Order in 08-07"), at p. 10, attached hereto as Exhibit 4 (O.R. App. 24). The Olympus Respondents did not participate in any of the transactions underlying MOL's Shipping Act violation allegations. *See* Argument, Point I.A below. Because they did not participate in any way in the challenged transactions, the Olympus Respondents have no direct knowledge of the challenged transactions.<sup>3</sup> Despite their lack of knowledge of the transactions, the Olympus Respondents have been forced, and continue to be forced, to defend themselves in a proceeding that has nothing to do with the Olympus Respondents' actions and everything to do with the actions of third parties as to whom the Olympus Respondents were not responsible. The Olympus Respondents did not deal with MOL and MOL had, and has, no basis for including the Olympus Respondents in

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<sup>3</sup> The Olympus Respondents only obtained information about the transactions through their involvement in a prior arbitration concerning OGF, OEF and the CJR Respondents' sale of Global Link.

this proceeding. To require the Olympus Respondents to participate in the determination of other matters at issue in conjunction with the consideration and determination of the Olympus Respondents' purported participation in the alleged transactions denies the Olympus Respondents their rights to due process. *See* Order Denying Appeal of Olympus Respondents, Granting in Part Appeal of Global Link, and Vacating Dismissal of Alleged Violations of Section 10(d)(1) in June 22, 2010 Memorandum and Order on Motions to Dismiss (Aug. 1, 2011) ("FMC Order") at p. 34, 36 (MOL App. 1063-1065).

## **II. Olympus Respondents' Statement Of Objections**

On November 21, 2012, the Olympus Respondents asserted four separate objections to the Presiding Judge's Procedural Order issued October 16, 2012, as it related to the presentation of evidence and consideration of issues in this proceeding. The Olympus Respondents incorporate their objections herein and do not waive their objections by the filing of this Reply. *See* Olympus Respondents' Statement of Objections Regarding October 16, 2012 Procedural Order, attached hereto as Exhibit 1 (O.R. App. 1-7).

## **III. Global Link's and CJR Respondents' Filings**

Without prejudice to the jurisdictional and other objections to this proceeding, the Olympus Respondents adopt, and expressly incorporated by reference herein, the proposed findings of fact and arguments of Global Link and CJR Respondents to the extent that such proposed findings of fact and arguments are consistent with or supportive

of the legal arguments and factual positions advanced by the Olympus Respondents herein and in this proceeding.

**PROPOSED FINDINGS OF FACT**

In addition to the proposed findings of fact submitted by Global Link and the CJR Respondents, which the Olympus Respondents expressly incorporate as noted above, the Olympus Respondents propose the following findings of fact:

The Olympus Respondents:

1. Respondent OGF is a private equity investment fund organized as a Delaware limited partnership. (Affidavit of L. David Cardenas ("Cardenas Aff.") at ¶ 3, attached hereto as Exhibit 2 (O.R. App. 8); Verified Answer of Olympus Respondents, filed July 9, 2010 ("Verified Answer of Olympus Respondents") at p. 2 (MOL App. 1503)).
2. OGF's general partner is OGP III, LLC, a Delaware limited liability company. (Cardenas Aff. at ¶ 3 (O.R. App. 8)).
3. OGF operates out of its office in Stamford, Connecticut. (Cardenas Aff. at ¶ 3 (O.R. App. 8)).
4. In May 2003, OGF purchased 74.51 percent of the shares in GLL Holdings, Inc., the parent company of and holding company for Global Link ("Holdings"). (Cardenas Aff. at ¶ 4 (O.R. App. 8)).
5. OGF also held ownership interests in several entities other than Holdings. (Cardenas Aff. at ¶ 4 (O.R. App. 8)).

6. On June 7, 2006, OGF sold its interest in Holdings to Global Link's current owners pursuant to a stock purchase agreement dated May 20, 2006 (hereinafter "SPA"). (Cardenas Aff. at ¶ 5 (O.R. App. 9)).

7. Respondent OEF also is a private equity investment fund organized as a Delaware limited partnership. (Affidavit of Louis J. Mischianti ("Mischianti Aff.") at ¶ 3, attached hereto as Exhibit 3 (O.R. App. 12); Verified Answer of Olympus Respondents at p. 2 (MOL App. 1503)).

8. OEF operates out of its office in Stamford, Connecticut. (Mischianti Aff. at ¶ 3 (O.R. App. 12)).

9. In May 2003, OEF purchased 0.49 percent of the shares in Holdings. (Mischianti Aff. at ¶ 4 (O.R. App. 12)).

10. Holdings was one of several entities in which OEF held ownership interests. (Mischianti Aff. at ¶ 4 (O.R. App. 12)).

11. On June 7, 2006, OEF sold its minority interest in Holdings to GLL Sub Acquisition, Inc. under the May 20, 2006 SPA. (Mischianti Aff. at ¶ 5 (O.R. App. 12)).

12. OEF and OGF are "private equity funds that are not subject to the Commission's jurisdiction, are not entities regulated by the Commission, and are not in a position to take action that places them in peril insofar as the Commission is concerned." (Order in 08-07, at p. 10 (O.R. App. 24)).

13. Respondent Cardenas is a member of OPG III, LLC, a Delaware limited liability company that serves as the general partner of Respondent OGF. (Cardenas Aff. at ¶ 2 (O.R. App. 8)).

14. Mr. Cardenas served as a board director and officer of Holdings and Global Link from May 2003 to June 2006. (Cardenas Aff. at ¶ 6 (O.R. App. 9)).

15. Respondent Mischianti is president of LJM Corporation, a Delaware corporation that serves as a general partner of Respondent OEF. (Mischianti Aff. at ¶ 2 (O.R. App. 12)).

16. Mr. Mischianti served as a board director of Holdings and Global Link from May 2003 to June 2006. (Mischianti Aff. at ¶ 6 (O.R. App. 13)).

17. Mr. Mischianti did not serve as an officer of either Holdings or Global Link. (Mischianti Aff. at ¶ 6 (O.R. App. 13)).

18. Respondent Heffernan served as a board director and officer of Holdings and Global Link from May 2003 to June 2006. (Affidavit of Keith Heffernan ("Heffernan Aff.") at ¶ 2, attached hereto as Exhibit 5 (O.R. App. 33)).

19. None of the Olympus Respondents are or ever have been shippers, NVOCCs, freight forwarders or ocean transportation intermediaries, marine terminal operators, ocean common carriers, or any other person subject to the requirements of the Shipping Act. (Verified Answer of Olympus Respondents at p. 2 (MOL App. 1503)).

20. The Olympus Respondents did not negotiate, execute or otherwise participate in any way in any contract with MOL for ocean transportation of property on

behalf of themselves or any third party, including Global Link. (Complainant's Responses to Respondent Olympus Growth Fund III, L.P.'s First Set of Requests for Admission, Interrogatories, and Requests for Production of Documents at Requests for Admission 1 through 6, attached hereto as Exhibit 6 (O.R. App. 37-38); Complainant's Responses to Respondent Olympus Executive Fund, L.P.'s First Set of Requests for Admission, Interrogatories, and Requests for Production of Documents at Requests for Admission 1 through 6, attached hereto as Exhibit 7 (O.R. App. 64-65); Complainant's Responses to Respondent David Cardenas's First Set of Requests for Admission, Interrogatories, and Requests for Production of Documents at Requests for Admission 1 through 6, attached hereto as Exhibit 8 (O.R. App. 91-92); Complainant's Responses to Respondent Keith Heffernan's First Set of Requests for Admission, Interrogatories, and Requests for Production of Documents at Requests for Admission 1 through 6, attached hereto as Exhibit 9 (O.R. App. 118-119); Complainant's Responses to Respondent Louis J. Mischianti's First Set of Requests for Admission, Interrogatories, and Requests for Production of Documents at Requests for Admission 1 through 6, attached hereto as Exhibit 10 (O.R. App. 145-146)).

21. The Olympus Respondents did not communicate with MOL or participate in communications with MOL in connection with Global Link's business or the ocean transportation of property in general. (Complainant's Responses to Respondent Olympus Growth Fund III, L.P.'s First Set of Requests for Admission, Interrogatories, and Requests for Production of Documents at Requests for Admission 1 through 6 (O.R. App.

37-38); Complainant's Responses to Respondent Olympus Executive Fund, L.P.'s First Set of Requests for Admission, Interrogatories, and Requests for Production of Documents at Requests for Admission 1 through 6 (O.R. App. 64-65); Complainant's Responses to Respondent David Cardenas's First Set of Requests for Admission, Interrogatories, and Requests for Production of Documents at Requests for Admission 1 through 6 (O.R. App. 91-92); Complainant's Responses to Respondent Keith Heffernan's First Set of Requests for Admission, Interrogatories, and Requests for Production of Documents at Requests for Admission 1 through 6 (O.R. App. 118-119); Complainant's Responses to Respondent Louis J. Mischianti's First Set of Requests for Admission, Interrogatories, and Requests for Production of Documents at Requests for Admission 1 through 6 (O.R. App. 145-146)).

22. The Olympus Respondents did not pay MOL for the ocean transportation of property. (Complainant's Responses to Respondent Olympus Growth Fund III, L.P.'s First Set of Requests for Admission, Interrogatories, and Requests for Production of Documents at Request for Admission 5 (O.R. App. 38); Complainant's Responses to Respondent Olympus Executive Fund, L.P.'s First Set of Requests for Admission, Interrogatories, and Requests for Production of Documents at Request for Admission 5 (O.R. App. 65); Complainant's Responses to Respondent David Cardenas's First Set of Requests for Admission, Interrogatories, and Requests for Production of Documents at Request for Admission 5 (O.R. App. 92); Complainant's Responses to Respondent Keith Heffernan's First Set of Requests for Admission, Interrogatories, and Requests for

Production of Documents at Request for Admission 5 (O.R. App. 119); Complainant's Responses to Respondent Louis J. Mischianti's First Set of Requests for Admission, Interrogatories, and Requests for Production of Documents at Request for Admission 5 (O.R. App. 146)).

23. The Olympus Respondents did not book ocean transportation with MOL. (Complainant's Responses to Respondent Olympus Growth Fund III, L.P.'s First Set of Requests for Admission, Interrogatories, and Requests for Production of Documents at Requests for Admission 1 through 6 (O.R. App. 37-38); Complainant's Responses to Respondent Olympus Executive Fund, L.P.'s First Set of Requests for Admission, Interrogatories, and Requests for Production of Documents at Requests for Admission 1 through 6 (O.R. App. 64-65); Complainant's Responses to Respondent David Cardenas's First Set of Requests for Admission, Interrogatories, and Requests for Production of Documents at Requests for Admission 1 through 6 (O.R. App. 91-92); Complainant's Responses to Respondent Keith Heffernan's First Set of Requests for Admission, Interrogatories, and Requests for Production of Documents at Requests for Admission 1 through 6 (O.R. App. 118-119); Complainant's Responses to Respondent Louis J. Mischianti's First Set of Requests for Admission, Interrogatories, and Requests for Production of Documents at Requests for Admission 1 through 6 (O.R. App. 145-146)).

24. The Olympus Respondents never obtained or attempted to obtain ocean transportation for any property, at any price. (Complainant's Responses to Respondent Olympus Growth Fund III, L.P.'s First Set of Requests for Admission, Interrogatories,

and Requests for Production of Documents at Requests for Admission 1 through 6 (O.R. App. 37-38); Complainant's Responses to Respondent Olympus Executive Fund, L.P.'s First Set of Requests for Admission, Interrogatories, and Requests for Production of Documents at Requests for Admission 1 through 6 (O.R. App. 64-65); Complainant's Responses to Respondent David Cardenas's First Set of Requests for Admission, Interrogatories, and Requests for Production of Documents at Requests for Admission 1 through 6 (O.R. App. 91-92); Complainant's Responses to Respondent Keith Heffernan's First Set of Requests for Admission, Interrogatories, and Requests for Production of Documents at Requests for Admission 1 through 6 (O.R. App. 118-119); Complainant's Responses to Respondent Louis J. Mischianti's First Set of Requests for Admission, Interrogatories, and Requests for Production of Documents at Requests for Admission 1 through 6 (O.R. App. 145-146)).

Olympus Respondents Did Not Participate In The Transactions Underlying MOL's Claims Of Shipping Act Violations:

25. The practice of split routing existed before OGF and OEF ever invested in Global Link and it continued well after OGF and OEF sold its shares in Holdings in 2006. (Cardenas Aff. at ¶ 12 (O.R. App. 10); Mischianti Aff. at ¶ 8 (O.R. App. 13); Heffernan Aff. at ¶ 8 (O.R. App. 34); American Arbitration Association, Commercial Arbitration Tribunal Partial Final Award (Case No. 14 125 Y 01447 07, Feb. 2, 2009) (the "Partial Final Award") at pp. 15, 33 (MOL App. 15, 33)).

26. The Olympus Respondents did not know of Global Link's formulation of the practice of split routing. (Cardenas Aff. at ¶ 12 (O.R. App. 10); Mischianti Aff. at ¶ 8 (O.R. App. 13); Heffernan Aff. at ¶ 8 (O.R. App. 34)).

27. The Olympus Respondents did not participate in Global Link's formulation of the practice of split routing. (Cardenas Aff. at ¶ 12 (O.R. App. 10); Mischianti Aff. at ¶ 8 (O.R. App. 13); Heffernan Aff. at ¶ 8 (O.R. App. 34)).

28. The Olympus Respondents did not know of Global Link's implementation of the practice of split routing. (Cardenas Aff. at ¶ 12 (O.R. App. 10); Mischianti Aff. at ¶ 8 (O.R. App. 13); Heffernan Aff. at ¶ 8 (O.R. App. 34)).

29. The Olympus Respondents did not participate in Global Link's implementation of the practice of split routing. (Cardenas Aff. at ¶ 12 (O.R. App. 10); Mischianti Aff. at ¶ 8 (O.R. App. 13); Heffernan Aff. at ¶ 8 (O.R. App. 34)).

30. The Olympus Respondents did not take any action or participate in any action to implement Global Link's practice of split routing. (Cardenas Aff. at ¶¶ 7, 9, 11 (O.R. App. 9-10); Mischianti Aff. at ¶¶ 7-8 (O.R. App. 13); Heffernan Dep. at ¶ 8 (O.R. App. 34)).

31. As is customary for OGF and OEF when investing in an enterprise, OGF and OEF appointed several of its members as directors and/or officers of Holdings and/or Global Link, but left the operational decisions to Global Link's management. (Cardenas Aff. at ¶¶ 6-7 (O.R. App. 9); Mischianti Aff. at ¶¶ 6-7 (O.R. App. 13)).

32. As directors and officers, OGF and OEF members served the limited role of representing the shareholders in protecting the value of their investment by helping the company to improve its infrastructure and challenging management to grow the company. (Heffernan Aff. at ¶ 3 (O.R. App. 33)).

33. Mr. Mischianti had no involvement in the day-to-day operations of Global Link. (Mischianti Aff. at ¶ 7 (O.R. App. 13)).

34. Mr. Mischianti only participated in board meetings. (Mischianti Aff. at ¶ 6 (O.R. App. 13)).

35. Split-routing was never addressed during the Global Link board meetings in which Mr. Mischianti participated. (Mischianti Aff. at ¶¶ 6, 8 (O.R. App. 13)).

36. Mr. Mischianti had no knowledge of Global Link's business relationship with MOL and never communicated with MOL personally. (Mischianti Aff. at ¶ 7 (O.R. App. 13)).

37. Mr. Mischianti never arranged for the transportation of property on behalf of Global Link and was not involved in setting or negotiating routes of transportation or any other transportation practices. (Mischianti Aff. at ¶ 7 (O.R. App. 13)).

38. Like Mr. Mischianti, Mr. Cardenas had no involvement in the day-to-day operations of Global Link. Global Link's management continued to make the day-to-day operational decisions. (Cardenas Aff. at ¶ 7 (O.R. App. 9)).

39. The primary reason Mr. Cardenas served as an officer of Global Link was to sign documents on behalf of the company. (Cardenas Aff. at ¶ 7 (O.R. App. 9)).

40. Although Mr. Cardenas was aware that Global Link used MOL as a carrier, he never personally communicated with MOL regarding Global Link. (Cardenas Aff. at ¶ 8 (O.R. App. 9)).

41. While Mr. Cardenas held calls/meetings with Global Link management during his tenure as a board member and officer, Mr. Cardenas did not discuss specific routing practices, including with respect to MOL, with Global Link management. (Cardenas Aff. at ¶ 8 (O.R. App. 9)).

42. Mr. Cardenas never arranged for the transportation of property on behalf of Global Link and was not involved in setting or negotiating routes of transportation or any other transportation practices. (Cardenas Aff. at ¶ 7 (O.R. App. 9)).

43. Like Mr. Cardenas and Mr. Mischianti, Mr. Heffernan also had no involvement in the day-to-day operations of Global Link. (Heffernan Aff. at ¶ 2 (O.R. App. 33)).

44. Although Mr. Heffernan was aware that Global Link used MOL as a carrier, he also never personally communicated with MOL regarding Global Link. (Heffernan Aff. at ¶ 5 (O.R. App. 34)).

45. While Mr. Heffernan also participated in calls/meetings with Global Link management, Mr. Heffernan did not discuss specific routing practices regarding MOL with Global Link management. (Heffernan Aff. at ¶ 5 (O.R. App. 34)).

46. Mr. Heffernan never arranged for the transportation of property on behalf of Global Link and was not involved in setting or negotiating routes of transportation or any other transportation practices. (Heffernan Aff. at ¶ 4 (O.R. App. 33-34)).

47. Global Link regularly engaged in split-routing well before OGF and OEF acquired ownership interests in Holdings. (Partial Final Award at p. 33 (MOL App. 33))

48. Mr. Rosenberg brought the practice of split-routing with him from the freight forwarders at which he had previously been employed. (Partial Final Award at pp. 9-10 (MOL App. 9-10)).

49. Messrs. Cardenas and Heffernan did not learn about Global Link's split-routing practice until after OGF and OEF acquired their interests in Holdings. (Cardenas Aff. at ¶ 9 (O.R. App. 9); Heffernan Aff. at ¶ 6 (O.R. App. 34)).

50. The extent of their knowledge of the practice consisted of a general explanation from Mr. Rosenberg, Global Link's founder and then-president. (Cardenas Aff. at ¶¶ 9-11 (O.R. App. 9-10); Heffernan Aff. at ¶ 7 (O.R. App. 34)).

51. Mr. Mischianti was not involved in this discussion. (Cardenas Aff. at ¶ 9 (O.R. App. 9)).

52. Mr. Cardenas was first advised about Global Link's split-routing practice in a brief telephone conversation with Global Link management in the summer of 2003. (Cardenas Aff. at ¶ 9 (O.R. App. 9)).

53. Mr. Heffernan generally recalls that Global Link management raised split-routing after OGF acquired its interest in Holdings. (Heffernan Aff. at ¶ 6 (O.R. App. 34)).

54. Mr. Rosenberg generally explained to Mr. Cardenas that sometimes a shipment is delivered to a location other than where it has been booked with the steamship line. (Cardenas Aff. at ¶ 10 (O.R. App. 9-10)).

55. Mr. Rosenberg advised that he had received legal advice on the practice and that he thought it was legal. (Cardenas Aff. at ¶ 10 (O.R. App. 9-10)).

56. Global Link management never gave Messrs. Cardenas or Heffernan any details about the communications Global Link had with the ocean carriers or with the trucking firms used to complete the split moves.<sup>4</sup> (Cardenas Aff. at ¶ 11 (O.R. App. 10); Heffernan Aff. at ¶ 7 (O.R. App. 34)).

57. Messrs. Cardenas and Heffernan were not informed by Global Link management and did not know that different destinations were written on master bills of lading and house bills of lading. (Cardenas Aff. at ¶ 11 (O.R. App. 10); Heffernan Aff. at ¶ 7 (O.R. App. 34)).

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<sup>4</sup> The Arbitration Panel also found that split-routing may have been discussed during a board meeting held in November 2005 in which Mr. Cardenas attended. (Partial Final Award at p. 35 (MOL App. 35)). However, no attendee, including Mr. Cardenas, recalls any such discussion concerning split-routing. (Partial Final Award at p. 35 (MOL App. 35)).

58. On June 7, 2006, Respondents OGF, OEF, and CJR World Enterprises, Inc. ("CJR") sold Holdings, and its subsidiary Global Link, to Golden Gate Logistics, Inc. ("GGL").<sup>5</sup> (Cardenas Aff. at ¶ 5 (O.R. App. 9)).

59. The Olympus Respondents have not held any interest in any NVOCC since that sale. (Cardenas Aff. at ¶ 14 (O.R. App. 10); Heffernan Aff. at ¶ 9 (O.R. App. 35)).

60. Global Link's utilization of the split-routing practice did not end when OEF and OGF sold their interests in Holdings. (Partial Final Award at p. 15 (MOL App. 15)).

61. Global Link continued the practice until at least June 2007, when its current owners initiated an arbitration, styled *Global Link Logistics, Inc., et al. v. Olympus Growth Fund III, L.P., et al.*, Case No. 14 125 Y 01447 07, against the Olympus Respondents and other former owners of Global Link in an effort to recoup a portion of the sale proceeds (the "Global Link Arbitration"). (Partial Final Award at p. 14 (MOL App. 14)).

62. The evidence demonstrates that the Olympus Respondents did not participate in the transactions underlying MOL's claims of alleged Shipping Act violations, the routing practices in place at Global Link that resulted in shipments being

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<sup>5</sup> GGL, nor any of its shareholders or officers, are respondents in this proceeding. (Amended Complaint (MOL App. 999-1008)).

delivered to destinations other than those listed in the master bills of lading, or any other conduct at issue in these proceedings.

63. The evidence also demonstrates that the Commission has no jurisdiction over the Olympus Respondents because the Olympus Respondents did not participate in the transactions underlying MOL's claims of alleged Shipping Act violations.

### ARGUMENT

#### **I. MOL's Section 10(a)(1) Claims**

To establish a violation of section 10(a)(1) of the Shipping Act, MOL must prove that (1) a person, (2) knowingly and willfully, (3) by an unjust device or means, (4) obtained or attempted to obtain ocean transportation rates for property at less than the rates or charges that would otherwise be applicable.<sup>6</sup> See 46 U.S.C. § 41102(a); *Rose Int'l, Inc. v. Overseas Moving Network Int'l, Ltd.*, 28 S.R.R. 837, 896 (F.M.C. 1999). The plain language of Section 10(a)(1) requires MOL to show, by a preponderance of the evidence,<sup>7</sup> that the Olympus Respondents "obtained" or "attempted to obtain ocean

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<sup>6</sup> MOL must prove such elements for each shipment in which the Olympus Respondents are alleged to have violated the Shipping Act. See *Anderson Int'l Transport and Owen Anderson – Possible Violations of Sections 8(A) and 19 of the Shipping Act of 1984*, No. 07-02, 2007 WL 5067621, at \*1 (F.M.C. Mar. 2, 2007) ("Each shipment is a separate violation.").

<sup>7</sup> MOL, as the complainant, has the initial burden of proof to establish a violation of the Shipping Act. *DSW Int'l, Inc. v. Commonwealth Shipping, Inc.*, No. 1898(F), 2011 WL 7144019, at \*4 (F.M.C. Mar. 29, 2011). The applicable standard of proof is:

"one of substantial evidence, an amount of information that would persuade a reasonable person that the necessary premise is more likely to be true than to be not true." *AHL Shipping Company v. Kinder Morgan Liquids Terminals, LLC*, FMC No. 04-05, 2005 WL 1596715, at \*3 (ALJ June 13, 2005). See 5 U.S.C. § 556(d) ("Except as otherwise provided by statute, the proponent of a rule or order

transportation" -- *i.e.*, **participated** in the act of requesting, booking or arranging for the ocean transportation (or attempted to do these things). See FMC Order at p. 34 (MOL App. 1063) (emphasis added):

An initial issue to be determined by the ALJ is whether the evidence produced proves that Olympus Respondents and/or CJR Respondents participated in the Shipping Act violations alleged... In order to prevent delay or undue inconvenience in this proceeding, the ALJ should direct the parties to focus discovery first on the issue of whether Olympus Respondents and 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...

Therefore, to satisfy its burden in its case against the Olympus Respondents, MOL must show, by a preponderance of the evidence, that the Olympus Respondents participated in the alleged Shipping Act violations by engaging in specific proscribed transactions identified in the statute. See 46 U.S.C. § 41102(a); FMC Order at pp. 34, 36 (MOL App. 1063, 1065). The Olympus Respondents can be held liable only for those specific transactions in which they actually participated.<sup>8</sup> MOL's proffered evidence does not

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has the burden of proof."); 46 C.F.R. § 502.155. "[A]s of 1946 the ordinary meaning of burden of proof [in section 556(d)] was burden of persuasion, and we understand the APA's unadorned reference to 'burden of proof' to refer to the burden of persuasion." *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 276 (1994).

*Id.* In administrative proceedings, the party with the burden of persuasion -- again, MOL -- must prove its case by a preponderance of the evidence. *Id.*; see also *Rose Int'l, Inc. v. Overseas Moving Network, Int'l Ltd.*, 28 S.R.R. 837 (F.M.C. 1999) ("The evidence must show by a preponderance of the evidence that something in fact occurred, *i.e.*, more probably than not.").

<sup>8</sup> There is no claim for vicarious liability for two reasons. First, the Commission correctly noted that "no party ... pled any basis for keeping Olympus Respondents ... in the proceeding based on

demonstrate, by a preponderance of the evidence or otherwise, that the Olympus Respondents themselves participated in any transactions to obtain or attempt to obtain ocean transportation. Moreover, as the Olympus Respondents show in their proposed findings of fact, above, and Argument Point I.A below, the Olympus Respondents did not participate in any transactions underlying the alleged Shipping Act violations. Therefore, the Olympus Respondents cannot be held liable for the alleged violations under the plain language of Section 10(a)(1).

Even if MOL could show that the Olympus Respondents actually and directly participated in the specific transactions at issue in this proceeding, which MOL cannot, MOL has the burden of showing also, by a preponderance of the evidence, that the Olympus Respondents' actions involved an "unjust or unfair device or means." 46 U.S.C. § 41102(a). Fraud or concealment is a necessary ingredient in the proof of an unjust or unfair device or means. *Rose Int'l, Inc. v. Overseas Moving Network Int'l, Ltd.*, 28 S.R.R. 837, 896 (F.M.C. 1999). As the Respondents show in their proposed findings of fact, and as the Olympus Respondents explain in Argument, Point I.B below, MOL knew of, encouraged and willingly participated in GLL's split-routing practices. Because it is impossible for any of the Respondents to have defrauded MOL with MOL's full knowledge, consent, encouragement and participation, MOL cannot establish that the

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a theory of piercing the corporate veil." See FMC Order at p. 34 (MOL App. 1063). Second, vicarious liability is irreconcilable with the Commission's determination that the Olympus Respondents in their individual capacities must have participated in a violation in order to remain parties in this proceeding. This point is addressed more fully at Argument, Point I.A.3 below.

split-routing practices resulted in any Respondent obtaining ocean transportation by an "unjust or unfair device or means" as required by Section 10(a)(1).

Moreover, MOL's knowledge, consent, encouragement and participation of the split-routing practices triggered the running of the statute of limitations on MOL's claims as early as December 2004. As the Respondents show in their proposed findings of fact, and as the Olympus Respondents explain in Argument, Point I.B below, MOL is barred from recovering on any transactions occurring prior to three years before the filing of MOL's complaint. For purposes of MOL's claim against the Olympus Respondents (again assuming that MOL could meet its burden of showing participation on the part of the Olympus Respondents, which it has not and cannot), MOL is barred from recovering against the Olympus Respondents for any transactions occurring after June 7, 2006, the date that the Olympus Respondents sold their interests in Holdings.<sup>9</sup>

**A. The Olympus Respondents Did Not Participate In The Transactions Underlying The Alleged Shipping Act Violations.**

As noted, the Commission has unanimously and unambiguously stated that to prevail on its Section 10(a)(1) claim, MOL bears the burden of establishing that the Olympus Respondents participated in any shipments allegedly giving rise to Shipping Act violations. As we discuss below, MOL has completely failed to meet that burden.

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<sup>9</sup> Because MOL knew of the split-routing practice as early as December 2004, MOL cannot recover for any transactions occurring prior to May 5, 2006. And as against the Olympus Respondents, MOL cannot recover for any transactions after June 7, 2006. Therefore, there is only a thirty-three day period during which the Olympus Respondents potentially could be held liable for the alleged Shipping Act violations.

1. "Participation" Requires Active, Affirmative Conduct

Despite the Commission's unambiguous directive that, following remand, the parties focus on whether the Olympus Respondents personally participated in split routing, nowhere in MOL's 66-page brief is there even a mention of what conduct could amount to "participation" in either this or any other context. MOL's total silence on this critical point speaks volumes. For liability purposes, "participation" has a consistent and definitive meaning. When that meaning is applied here, there can be no dispute that none of the Olympus Respondents participated in the alleged conduct underpinning MOL's allegations.

The Commission did not define "participation" in the FMC Order. The ordinary meaning of that word must be identified and applied here. *Cf. Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) ("When terms in a statute are undefined, we give them their ordinary meaning."). To identify a word's ordinary definition, courts look to dictionaries for guidance. *E.g., Kouichi Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2002-03 (U.S. 2012); *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91-92 (2006). According to legal and non-legal dictionaries alike, affirmative conduct, not silence or inaction, is the hallmark of "participation." *See 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)”). That there is no conflict among these various dictionaries about the definition of “participation” is strong, if not conclusive, evidence that there is no other ordinary meaning of the word. *Cf. Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1331 (2011) (noting that differing definitions of the word “file” among different dictionaries was “significant” because of the possibility of other, non-dictionary meanings). Indeed, both federal and state courts have consistently recognized this definition as the prevailing definition of “participation.” *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.’”); *Watts v. Butte Sch. Dist. No. 5*, 939 F. Supp. 1418, 1426 (D. Neb. 1996); *State v. Riles*, 957 P.2d 655, 667 (Wash. 1998).

The dictionary definition of “participation” dovetails with the meaning of that word as interpreted by the courts in a variety of common law and statutory contexts. For instance, to convict a defendant of aiding and abetting a crime, the government must prove that the defendant “had a purposeful attitude, defined as affirmative participation *which at least encourages the perpetrator.*” *United States v. Dixon*, 650 F.3d 1080, 1082 (8th Cir. 2011) (emphasis added); *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)). The same goes for conspiracy liability. *See United States v. Pedrick*, 181 F.3d 1264,

1272 (11th Cir. 1999) (“[A] conspirator . . . may be convicted as a co-conspirator . . . if she participates in some affirmative conduct designed to aid the success of the venture.”). There are numerous other federal and state court decisions, arising in a wide range of contexts, that confirm the interpretation of “participation” as requiring active, affirmative conduct. *See Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993) (interpreting “the word ‘participate’ [in the context of the federal RICO statute] to require some part in th[e] direction” of the conduct at issue); *Papagno*, 639 F.3d at 1098-99 (interpreting “participation” in the context of the Mandatory Victims Restitution Act to mean “taking part in,” not mere “assistance”); *Buchman v. S.E.C.*, 553 F.2d 816, 823 (2d Cir. 1977) (explaining that the SEC’s action against an individual was based not on his “failure to act” but rather his “affirmative conduct,” that is, “his participation in the decision to purchase shares”); *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); *Gregory Vill. Partners, L.P. v. Chevron U.S.A., Inc.*, No. C 11-1597 PJH, 2012 U.S. Dist. LEXIS 32644, at \*25-26 (N.D. Cal. Mar. 12, 2012) (equating “participation” with “affirmative conduct” in the context of the Resource Conservation and Recovery Act); *State v. Parker*, 230 P.3d 55, 58 (Or. Ct. App. 2010) (noting the “understanding of ‘participate in’ as connoting at least some degree of interactive involvement”).

Of particular note in the context of this proceeding, the settled definition of “participation” is deeply embedded in the jurisprudence concerning the personal liability

of corporate officers. Most jurisdictions, in fact, recognize personal liability for corporate officers under what is often referred to as the "participation theory." *E.g.*, *Saltiel v. GSI Consultants, Inc.*, 788 A.2d 268, 272 (N.J. 2002); *Central Benefits Mut. Ins. Co. v. RIS Adm'rs Agency*, 638 N.E.2d 1049, 1053 (Ohio Ct. App. 1994).<sup>10</sup> But the circumstances under which corporate officers may incur personal liability under this theory is highly circumscribed. Indeed, the law is clear that mere inaction is insufficient for a corporate officer to incur personal liability for a wrong committed by the corporation. *See Johnson v. Harrigan-Peach Land Dev. Co.*, 489 P.2d 923, 928 (Wash. 1971) ("[A]n officer of a corporation who takes no part whatever in a tort committed by the corporation is not personally liable to third persons for such tort . . . ."); *Saltiel*, 788 A.2d at 272 ("[A]n officer who takes no part in the commission of the tort is not personally liable to third persons for the torts of other agents, officers or employees of the corporation." (quotation omitted)).<sup>11</sup> "Mere nonfeasance" is simply not enough. *Wicks v. Milzoco Builders, Inc.*, 470 A.2d 86, 90 (Pa. 1983). To the contrary, the law requires that

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<sup>10</sup> *See also Territory of the U.S.V.I. v. Goldman, Sachs & Co.*, 937 A.2d 760, 794 & n.153 (Del. Ch. 2007); *Armed Forces Ins. Exch. v. Harrison*, 70 P.3d 35, 41 (Utah 2003); *Miller v. Keyser*, 90 S.W.3d 712, 717 (Tex. 2002); *Francis J. Bernhardt, III, P.C. v. Needleman*, 705 A.2d 875, 878 (Pa. Super. Ct. 1997); *Johnson v. Harrigan-Peach Land Dev. Co.*, 489 P.2d 923, 927-28 (Wash. 1971).

<sup>11</sup> *See also Haupt v. Miller*, 514 N.W.2d 905, 909 (Iowa 1994) ("Liability against a corporate officer normally will not be imposed merely because of performing some general administrative responsibility."); *Drummond Co. v. St. Louis Coke & Foundry Supply Co.*, 181 S.W.3d 99, 103 (Mo. Ct. App. 2005) ("Mere nonfeasance is not sufficient to impose individual liability upon corporate directors and officers; rather, active malfeasance or a specific statutory liability creating an individual cause of action for creditors is necessary to create such individual liability."); *Michaels v. Lispenard Holding Corp.*, 11 A.D.2d 12, 14 (1st Dep't 1960) ("[C]orporate officers are not liable for nonfeasance . . . ." (internal quotation marks omitted)).

a corporate officer “knowingly participate[] in, cooperate[] in the doing of, or direct[] that the acts be done” in order for personal liability to attach. *Johnson*, 489 P.2d at 928; *see Salties*, 788 A.2d at 272 (“An officer of a corporation *who takes part in the commission of a tort* by the corporation is personally liable for resulting injuries ....” (emphasis added)).<sup>12</sup> These principles are the majority rule across jurisdictions. *See, e.g.*, Restatement (Third) of Agency § 7.01 cmt. d (2006).

These cases all leave no room for doubt that “participation” in all instances connotes active, affirmative conduct. *See Riles*, 957 P.2d at 667 (“In common usage, the word ‘participate’ means more than merely being present. It requires active involvement.”). It is this standard against which MOL’s evidence must be measured. For the reasons discussed below, MOL’s evidence falls far short of the mark.

## 2. MOL’s Purported Evidence Does Not Show “Participation” By The Olympus Respondents

Here, there is no evidence that any of the Olympus Respondents, as individuals or entities, actively participated in any of the sample shipments MOL has proffered – or any other shipments at issue. Indeed, as an initial matter, MOL’s proposed findings of fact relating to the Olympus Respondents’ purported participation do not even specifically mention three of the Olympus Respondents: Olympus Growth Fund III, L.P., Olympus Executive Fund, L.P., and Louis J. Mischianti. In any event, it is uncontroverted that:

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<sup>12</sup> *See also Frances T. v. Vill. Green Owners Ass’n*, 723 P.2d 573 583-84 (Cal. 1986) (“To maintain a tort claim against a director in his or her personal capacity, a plaintiff must first show that the director specifically authorized, directed or participated in the allegedly tortious conduct . . .”).

- a. The Olympus Respondents had no knowledge of or role in formulating or implementing the split-routing practice at Global Link. The practice was firmly entrenched in the day-to-day operations of Global Link before OEF and OGF invested in Holdings (Global Link's parent company) and it continued after OEF and OGF sold their interests in Holdings.
- b. The Olympus Respondents did not negotiate, execute or otherwise in any way participate in any service contract with MOL.
- c. The Olympus Respondents did not negotiate, execute or otherwise in any way participate in any service contract with MOL for ocean transportation of property on behalf of themselves or any third party, including Global Link.
- d. The Olympus Respondents did not communicate, directly or indirectly, with Mitsui or participate in communications with MOL in connection with Global Link's business or the ocean transportation of property in general.
- e. The Olympus Respondents did not pay MOL directly for the ocean transportation of property.
- f. The Olympus Respondents did not book ocean transportation directly with MOL.
- g. The Olympus Respondents had no contact whatsoever with any of the U.S. inland truckers used by Global Link.
- h. The Olympus Respondents never obtained or attempted to obtain ocean transportation for any property, at any price.

Rather, Global Link did all of these things. *See generally* FMC Order at p. 75 (MOL App. 1104) (Commissioner Khouri, dissenting) (“In this case, Global Link was the licensed NVOCC who obtained the ocean transportation pursuant to its service contracts with Mitsui”).

In short, there is absolutely no evidence that any of the Olympus 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 Global Link's shipments with MOL. Instead, all that MOL can say is that the Olympus Respondents were somehow “*aware* that Global Link engaged in ‘split routing’ on a regular basis.” But, as noted above, even if true (and there is, in fact, no evidence supporting MOL's statement), knowledge alone is no substitute for active, affirmative involvement under the law. *Cf. United States v. Troop*, 890 F.2d 1393, 1397 (7th Cir. 1989) (“[P]articipation cannot be shown by mere knowledge or approval of, association with, or presence at a conspiracy ....”); *accord United States v. D'Angelo*, 598 F.2d 1002, 1003 (5th Cir. 1979); *United States v. Bostic*, 480 F.2d 965, 968 (6th Cir. 1973).<sup>13</sup>

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<sup>13</sup> MOL also argues that the Olympus Respondents “took no action” to end Global Link's split-routing practices and did not “ensure[] that the activities of . . . Global Link . . . conformed to the Shipping Act.” (Claimant's Op. Br. at 46.) Put another way, MOL seeks to impose liability on the Olympus Respondents for their alleged failure to act. The law, however, precludes the imposition of liability on that basis as well. *See U.S. Liab. Ins. Co. v. Haidinger-Hayes, Inc.*, 463 P.2d 770, 775 (Cal. 1970); *Brindley v. Woodland Vill. Rest.*, 652 A.2d 865, 868 (Pa. Super. Ct. 1995); *Mathis v. Yondata Corp.*, 1480 N.Y.S.2d 173, 176-77 (N.Y. Sup. Ct. 1984).

In light of MOL's failure to prove that any of the Olympus Respondents actually participated in any Shipping Act violations consistent with the standards set forth above, MOL cannot recover against the Olympus Respondents on its Section 10(a) claim.

3. The Olympus Respondents Cannot Be Held Liable Under Section 10(a) Merely Because They Are 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). FMC Order at pp. 33 n.4, 34 (MOL App. 1062-1063):

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 ... Respondents in the proceeding based on a theory of piercing the corporate veil[;]

*see also* FMC Order at pp. 68-69 (MOL App. 1097-1098) (Commissioner Khouri, dissenting):

The allegation in the complaint that the ... 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. (Order Dismissing Petition for Commission Action), Dkt. No. 09-01, pp. 10-11, attached hereto as Exhibit 12 (F.M.C. Jan. 31, 2013) (O.R. App. 227-228) (Commissioner Khouri, dissenting):

[T]here 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.

Indeed, a stockholder like OGF or OEF is “not automatically liable for the actions of the company whose stock [he or she] owns.” *See Alki Partners, L.P. v. Vatas Holding GmbH*, 769 F. Supp. 2d 478, 490-91 (S.D.N.Y. 2011). Shareholders, in execution of their stewardship responsibilities, frequently acquire knowledge of company practices because of their role as investors. It is well-established under U.S. law that shareholder knowledge alone is not sufficient to impose individual or shareholder-owner liability for the acts of a corporation. *See, e.g., U.S. v. Sumpolec*, 811 F. Supp. 2d 1349, 1353 (M.D. Fla. 2011) (“Under the Federal Trade Commission Act, an individual defendant can be held liable for the acts of a corporation if the individual participated directly in the practices or acts or had authority to control them and the individual had some knowledge of the practices.”) (internal quotation marks omitted); *Hard Rock Café Intern., (USA), Inc. v. Hard Rock Hotel Holdings, LLC*, 808 F. Supp. 2d 552, 560-61 (S.D.N.Y. 2011) (“Mere knowledge of a tortious act by a subsidiary is insufficient to state a claim against a corporate parent...Rather, a joint tortfeasor must participate in the alleged

misconduct.”); *Bangkok Broadcasting & T.V. Co., Ltd. V. IPTV Corp.*, 742 F. Supp. 2d 1101, 1115 (C.D. Cal. 2010) (stating that individual owner or officer may be held liable for company's violations of California business law only if the owner or officer actively and directly participates in the unfair business practices).

Thus, absent actual evidence that these shareholders actually participated in the split-routing practices, of which there is absolutely none, OGF and OEF, as former shareholders of Global Link, cannot be held directly liable for any fraudulent conduct of Global Link's managers or directors unless, as the Commission has already recognized, grounds exist to set aside the corporate form. *See* FMC Order at pp. 33-34 (MOL App. 1062-1063). In order to establish such grounds, MOL needs to prove facts showing that either OGF or OEF completely dominated and controlled Global Link to the point that Global Link no longer had any legal or independent significance of its own. *Wallace ex rel. Cencom Cable Income Partners II, Inc., LLP v. Wood*, 752 A.2d 1175, 1183-84 (Del. Ch. 1999). Because, as the Commission has also already recognized, MOL never alleged such facts, much less offered any such proof, there is no basis for disregarding the corporate form here, or for holding OGF or OEF directly liable for any conduct of Global Link's former managers and directors. *See* FMC Order at pp. 33-34 (MOL App. 1062-1063).

Clearly, the Olympus Respondents cannot be held vicariously liable for any of Global Link's alleged violations of the Shipping Act. Because MOL has no evidence that

the Olympus Respondents participated in any alleged Shipping Act violations, MOL's claims against the Olympus Respondents must fail.

4. MOL's Purported "Evidence" Is Unreliable Or Irrelevant Hearsay

MOL's failure to prove the Olympus 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 Olympus 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 Global Link Arbitration, a separate adversary proceeding involving 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 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 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 hearsay that is either irrelevant or unreliable, or both, and therefore should be disregarded.

a. Unsworn Pleadings. MOL relies repeatedly on Global Link's unverified amended statement of claim from the Global Link Arbitration. (*E.g.*, Claimant's Op. Br. at 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 Global Link's statement of claim—even assuming they are relevant—should be give no weight in this proceeding.

b. Deposition Testimony from the Arbitration. MOL also relies on the deposition testimony from the Global Link Arbitration of individuals unaffiliated with the Olympus Respondents. (*E.g.*, Claimant's Op. Br. at 47 (deposition of Constantine Mihas); *id.* ¶ 156 (deposition of Eugene Winters)). Even putting aside the fact that the issues in the Global Link Arbitration did not bear on the central issue in this proceeding, a close look at the testimony MOL has spotlighted confirms that there is no proof with respect to the Olympus Respondents' participation.

MOL relies on the deposition testimony of Constantine Mihas, for instance, but Mihas said nothing during his deposition about the Olympus Respondents' participation in split-routing decision-making. Rather, he said only that it was his "understanding ... that the former management and owners of the company were deliberately breaking the law ...." (MOL App. 1684). When asked what the basis for that understanding was, Mihas replied, "Same basis why as soon as we investigated it we realized it was illegal. They're smart guys. Olympus is a private equity firm, it's been around. There's no reason why their analysis and judgment would be any different from our own." (*Id.*). Mihas' testimony improperly groups the Olympus Respondents with Global Link management and therefore fails to identify how any of the Olympus Respondents in particular participated in split-routing practices. It is also highly speculative on its face. As such, it is both irrelevant and unreliable.

Winters' deposition testimony from the Global Link Arbitration deserves even less mention. During the segment of the deposition that MOL highlights, when asked whether he ever spoke "to anybody from Olympus about rerouting," Winters answered, "No, I didn't personally." (MOL App. 1598). Winters then went on to say, "I mean, I guess really the only time that there was an inference to the rerouting was maybe during—during the preparation for the sale." (*Id.*). Put another way, Winters testified that he did *not* speak to any of the Olympus Respondents about split-routing but speculated that there *might have been* knowledge on the part of Mr. Cardenas right before the sale of Global Link—not during most of the Olympus Respondents' ownership of

Global Link. Furthermore, Winters could not recall who made the alleged comment about not wanting to discuss the practice of split-routing or who—if anyone—from the Olympus Respondents was present when that comment was made. (*Id.*). Furthermore, Winters admitted that the phrases “split billing,” “misrouting,” and “rerouting” were not used. (*Id.* at 001599). At most, then, Winters’ testimony suggests only knowledge on the part of one of the Olympus Respondents and is therefore not at all relevant to the question of participation. Given the highly qualified terms in which Winters spoke, his testimony is unreliable in any event.

MOL also relies on the deposition testimony from the Global Link Arbitration of Eric Joiner. In fact, no fewer than six of MOL’s proposed findings of fact are based at least in part on Mr. Joiner’s testimony. MOL declines to mention, however, that the Global Link Arbitration panel voiced serious doubts about Mr. Joiner’s credibility. (*See* MOL App. 35 (noting that the “Panel does not credit Joiner, who was fired after less than a year and who appears to have offered himself as a witness/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. But even assuming Mr. Joiner’s testimony is credited, it is not relevant here, as it, like so much of the rest of MOL’s evidence, indicates only that Mr. Cardenas may have known about split-routing, not that he had any part in implementing or directing it as a business practice of Global Link. Simply by way of example, MOL cites Mr. Joiner’s testimony about a single, five-minute conversation with Mr. Cardenas, the purpose of which was to obtain expense approval for

compliance training. (*See* MOL App. 1542-1544). That conversation, however, has no bearing whatsoever on any of the Olympus Respondent's active participation in the split-routing practices.

Finally, MOL relies on the deposition testimony from the Global Link Arbitration of one of the CJR Respondents, Chad Rosenberg. Mr. Rosenberg's testimony is not relevant here because it suggests, at most, that Messrs. Cardenas and Heffernan knew of Global Link's split-routing practices. But even on this point, his testimony is unreliable, at least as presented by MOL. MOL highlights a selective portion of Mr. Rosenberg's testimony about a July 2003 telephone conversation with Messrs. Cardenas and Heffernan, (*see* Claimant's Op. Br. at 42-43), but neglects to mention that Mr. Rosenberg could not remember several details concerning what he told them and that he had, at best, an incomplete recollection or understanding of what they understood (MOL App. 1176-78).

c. Email Communications. MOL also relies on email communications between and among Global Link employees and Global Link's outside counsel. (Claimant's Op. Br. at 43-44, 46). Significantly, there is no evidence whatsoever that any of these emails was sent to or from any of the Olympus Respondents. Nor do any of those emails even mention the involvement of the Olympus Respondents in split-routing practices. MOL's reliance on these emails is therefore of no utility.

d. Other Documents. Finally, MOL relies on two additional documents in its attempt to prove the Olympus Respondents' participation: (i) the Partial Final Award in

the Global Link Arbitration and (ii) Global Link's "voluntary disclosure" to the Commission in May 2008. Nothing of the text from those two documents, carefully excised by MOL, establishes the Olympus Respondents' involvement in split-routing practices. To the extent the documents prove anything at all, it is that the Olympus Respondents may have known about the split-routing practices at some point in time. As a result, these documents are simply irrelevant and therefore should not be considered here. Moreover, inasmuch as Global Link's voluntary disclosure is, by its very nature, entirely self-serving—and indeed, was prepared at the direction of Global Link's subsequent owners—it is unreliable and should be given no weight. *Cf. Perks ex. Rel. Bonhomme v. Apfel*, No. 99-3512, 2000 U.S. App. LEXIS 21051, at \*3 (8th Cir. Aug. 18, 2000) (per curiam) (affirming ALJ ruling where the ALJ "discredited" the petitioner's "self-serving testimony as contradictory and unreliable").

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.

#### **B. MOL's Knowledge Precludes Recovery**

MOL relies on eight "sample" shipments (transactions) in its case against the Respondents. Seven of the eight "sample" shipments occurred prior to May 5, 2006. The remaining "sample" shipment occurred after June 7, 2006. On this evidence, without separate evidence demonstrating that MOL did not know of Global Link's routing practices prior MOL's alleged discovery of such practices in 2008, there are no transactions on which the Presiding Judge can assess the alleged liability of the Olympus

Respondents. MOL's knowledge of, encouragement of and participation in the claimed violations of the Shipping Act deny MOL any benefits of the equitable doctrine of tolling. *See* Argument, Point I.B.1 below. Therefore, even if MOL could prove all other elements of its claim against the Olympus Respondents, there is no evidence of any transactions in the record upon which the Olympus Respondents can be held liable.

Moreover, MOL's knowledge of Global Link's routing practices renders MOL's Section 10(a)(1) claim an impossibility. As stated below in Argument, Point I.B.2, a Section 10(a)(1) claim requires evidence of fraud or concealment. Fraud and concealment do not exist as to one who knows of the fraud or of the activity allegedly concealed.

1. MOL's Knowledge Of And Reason To Know Of GLL's Split-Routing Precludes Tolling Of The Statute Of Limitations And Relevance Of The Sample Transactions

The Shipping Act imposes a three-year statute of limitations period for reparations. *See* 46 U.S.C. § 41301(a); 46 C.F.R. § 502.63. A cause of action for reparations accrues when the complainant knew or had reason to know of the harm alleged. *See Inlet Fish Prod., Inc. v. Sea-Land Service, Inc.*, 29 SRR 3056, 311-13 (FMC, Sept. 19, 2001). When applied in the context of a fraud claim, like MOL's claims in this proceeding, "[f]raud is deemed to be discovered ... when, in the exercise of reasonable diligence, it could have been discovered." *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 130 S. Ct. 1784, 1794 (2010) (internal citations & quotations omitted); *see also*

*Maher Terminals, LLC v. Port Auth. of New York & New Jersey*, No. 08-03, 2011 WL 7144003 (F.M.C. May 16, 2011) (discussing the discovery rule).

The evidence put forth by Respondents prevents MOL's from succeeding on its argument that the three-year statute of limitations was tolled until MOL's alleged "discovery" of the split routing practices in 2008. There is no question that high-ranking employees of MOL knew of, encouraged and participated in the split-routing practice before 2008. See relevant proposed findings of fact of Global Link and CJR Respondents, incorporated by reference herein. Clearly, MOL knew of, consented to, and even encouraged GLL's split-routing practice.<sup>14</sup> Therefore, MOL's cause of action accrued when the transactions occurred. Yet, MOL did not file its Complaint until May 5, 2009. Thus, any alleged violations that occurred before May 5, 2006 are barred by the statute of limitations.

Even if MOL could show that it did not know of the split-routing practices prior to 2008, there would be no basis to toll the statute of limitations. Tolling is available only to a complainant that did not know or could not have discovered the alleged harm in the exercise of reasonable diligence. *Application of OOCL (USA) Inc. for the Benefit of Connell Bros. Co., Ltd.*, No. 18261990 WL 454991, at \*14 n.12 (F.M.C. Apr. 16, 1990) ("Even in the case of statutes of limitation that are not considered to be jurisdictional, and

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<sup>14</sup> MOL's counsel is well-aware that MOL's knowledge of Global Link's alleged practices ("what MOL knew and when it knew it") is the core issue in this proceeding. See Sept. 16, 2010 Hearing Tr. at pp. 32-34: "The core issue I think that is presented in the litigation is: to what extent did Mitsui have knowledge and participate in it [split-routing]?"

therefore are subject to tolling for equitable reasons or for fraud, the courts will not extend the time period if the plaintiff had not been diligent, and a person is held to know what he or she ought to know. (see 54 Corpus Juris Secundum, *Limitations of Actions*, sec. 89; see also *Hobson v. Wilson*, 737 F.2d 1, 33 (D.C. Cir. 1984) (equitable tolling of a statute of limitations has two elements, successful concealment by defendant and diligence by plaintiff.)). The evidence demonstrates that MOL, if it did not know of the split-routing, could have discovered the split-routing with the application of a modicum of managerial oversight. See relevant proposed findings of fact of Global Link and CJR Respondents, incorporated by reference herein.

MOL's failure to establish that it is entitled to a tolling of the statute of limitations precludes MOL's reliance on, and the Presiding Judge's consideration of, all but one of MOL's "sample" shipping transactions for the following reasons: First, evidence outside the statute of limitations is not actionable and cannot be the basis for any recovery by MOL.<sup>15</sup> See *Dovberg v. Dow Chemical Co.*, 195 F. Supp. 337 (E.D. Pa. 1961); *Alexander v. Local 496, Laborers' Int'l Union of N. Amer.*, 655 F. Supp. 1446 (N.D. Ohio 1987). And second, evidence falling outside the statute of limitations cannot be used to establish a substantive violation where there otherwise would be none. *Lettis v. U.S. Postal Serv.*, 39 F. Supp. 2d 181 (E.D.N.Y. 1998). Without the tolling of the statute of limitations, MOL has no sample transactions on which to argue for any liability on the

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<sup>15</sup> The Olympus Respondents presume that the Presiding Judge's order accepting MOL's "sample" transactions does not constitute a waiver or predetermination of the statute of limitations issue in this proceeding.

part of the Olympus Respondents. The one transactions falling within the three-year limitations period occurred on August 9, 2006, *after* the Olympus Respondents sold their interests in GLL's holding company. *See* MOL App. 1364-93.

According to MOL's allegations, Global Link engaged in a pervasive pattern of split-routing for at least two years. *See, e.g.*, MOL's Proposed Finding of Fact No. 16. MOL has admitted in this proceeding that it knew that containers booked through Global Link were being re-routed. *See, e.g.*, MOL's Proposed Findings of Fact Nos. 98, 108. Therefore, MOL's assertion that it discovered Global Link's practices in 2008 is false. The record cannot support a finding that MOL did not know and did not have a reason to know of Global Link's routing practices long before that date.<sup>16</sup>

## 2. MOL's Knowledge Precludes Recovery

MOL has the burden of showing, by a preponderance of the evidence, that the Olympus Respondents obtained or attempted to obtain ocean transportation at lower rates by an "unjust or unfair device or means." 46 U.S.C. § 41102(a).

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<sup>16</sup> In fact, an ocean common carrier like MOL has an absolute and independent duty to comply with the requirements of the Shipping Act, exercise reasonable care with respect to every one of its shipping transactions, and ensure that persons are not allowed to "obtain transportation for property at less than the rates or charges established by [MOL] in its tariff or service contract by means of false billing, false classification, false weighing, false measurement, or any other unjust or unfair device or means." 46 U.S.C. § 41104(1). MOL's assertion that it is an innocent victim in Global Link's "secret routing scheme" is untenable, and MOL's knowledge and encouragement of the practices is itself a violation of the Shipping Act. This Commission knows of MOL's failure to comply with its obligations under the Shipping Act. *See* Federal Maritime Commission Newsroom, *Mitsui O.S.K. Lines Pays \$1.2 Million in Penalties* (May 19, 2011), at [http://www.fmc.gov/mitsui\\_o.s.k.\\_lines\\_pays\\_1.2\\_million\\_in\\_penalties/](http://www.fmc.gov/mitsui_o.s.k._lines_pays_1.2_million_in_penalties/) (last visited Mar. 1, 2013). When MOL comes to this proceeding with its assertions of innocence, it comes with unclean hands. Even its proposed remedy in this case constitutes a violation of the Shipping Act. *See* Olympus Respondents' Responses to Complainant's Proposed Findings of Fact (filed Mar. 1, 2013) at Response Nos. 72 and 82.

It is undisputed that fraud or concealment is a necessary ingredient in the proof of an unjust or unfair device or means. *Capitol Transportation, Inc. v. United States*, 612 F.2d 1312 (1<sup>st</sup> Cir. 1979) ("*Capitol Transportation*") ("... the requisite element of fraud or concealment was here established."). *Id.* at 1324. See also *United States v. Open Bulk Carriers*, 727 F.2d 1061 at 1065 (11<sup>th</sup> Cir. 1984) ("*Open Bulk*"). "The means through which lower rates are obtained must include fraud or concealment" since section 10(a)(1) prohibits a person from receiving the benefits of lower rates by any other unjust or unfair device or means.

*Rose Int'l, Inc. v. Overseas Moving Network Int'l, Ltd.*, 28 S.R.R. 837, 896 (F.M.C. 1999). Without proof of fraud or concealment, MOL's claim fails.

In the arbitration proceeding arising out of the sale of Global Link, the arbitrators found:

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.

Partial Final Award at p. 10 (MOL App. 10). The evidence produced in this proceeding supports the arbitration panel's conclusion and forecloses MOL's recovery. See relevant proposed findings of fact of Global Link and CJR Respondents, incorporated by reference herein. MOL cannot prove its case, and in particular, cannot prove that any of the Respondents used an "unjust or unfair device or means" as that phrase is interpreted under the Shipping Act, if MOL knew of, encouraged, and participated in the continuation of the split-routing practice. See *Rose Int'l, Inc. v. Overseas Moving Network Int'l, Ltd.*, 28 S.R.R. 837, 900 (F.M.C. 1999):

Thus, since TAA drafted the 1994 Contract and knew with whom it was contracting, there is no basis for concluding that TAA was deceived as to

the nature of the real parties to the contract. In the circumstances there are no grounds to conclude that Rose has carried its burden of proof to establish that any respondent member of the shippers' association practiced any deceit on TAA, and since that element is a sine qua non for finding a violation of section 10(a)(1), Rose's claim must be dismissed in this regard.

## II. MOL's Section 10(d)(1) and 46 C.F.R. § 515.31(e) Claims

Section 10(d)(1) 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). MOL must satisfy the same burden -- preponderance of the evidence -- with respect to its Section 10(d)(1) claims as it has on its Section 10(a)(1) claims. *See Tienshan, Inc. v. Tianjin Hua Feng Transport Agency Co., Ltd.*, No. 08-04, 2011 WL 7144007 (F.M.C. Mar. 9, 2011). Section 515.31(e) governs ocean transportation intermediaries and provides: "No 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." 49 C.F.R. § 515.31(e). Because the very same facts underlie MOL's Section 10(a)(1) claims as its

Section 10(d)(1) and Section 515.31(e) claims,<sup>17</sup> MOL's latter claims fail for the very same reasons set forth in Argument Point I above.

MOL's Section 10(d)(1) claim also fails against the Olympus Respondents because this provision, by its plain language, applies only to marine terminal operators, ocean common carriers, or ocean transportation intermediaries. The Olympus Respondents are not themselves, and have never been, marine terminal operators, ocean common carriers, or ocean transportation intermediaries.

Finally, MOL's claim under 46 C.F.R. § 515.31 against the Olympus Respondents fails for all the reasons that MOL's claims under Sections 10(a)(1) and 10(d)(1) fail. Section 515.31(e) provides: "No 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." By its plain language, this regulation applies only to licensees of the Commission. Because the Olympus Respondents are not now, and have never been, entities or individuals licensed by the Commission, the regulation

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<sup>17</sup> MOL's claim under 46 C.F.R. § 515.31(e) was dismissed as to the Olympus Respondents and the CJR Respondents. (Memorandum and Order on Motions to Dismiss at p. 23 (MOL App. 86)). MOL did not appeal and the Commission did not consider the ALJ's ruling on this issue. Therefore, this claim is no longer a part of this case. Because, however, MOL addressed this claim in its Opening Submission, the Olympus Respondents respond to it herein without prejudice to their position that the Section 515.31(e) claim was dismissed and is no longer a part of this case.

does not apply to, and cannot be the basis for a finding against, the Olympus Respondents.

**CONCLUSION**

For all the foregoing reasons, the Olympus Respondents respectfully request that the Presiding Judge deny relief to MOL and enter a decision in favor of the Olympus Respondents.

Dated: March 1, 2013

Respectfully submitted,



Lewis R. Clayton  
Andrew G. Gordon  
PAUL, WEISS, RIFKIND,  
WHARTON & GARRISON LLP  
1285 Avenue of the Americas  
New York, NY 10019-6064  
Telephone: 212-373-3543  
Facsimile: 212-492-0543

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Warren L. Dean, Jr.  
C. Jonathan Benner  
Harvey A. Levin  
Kathleen E. Kraft  
THOMPSON COBURN LLP  
1909 K Street, N.W., Suite 600  
Washington, D.C. 20006  
Telephone: 202-585-6900  
Facsimile: 202-585-6969

Attorneys for Respondents Olympus  
Growth Fund III, L.P., Olympus  
Executive Fund, L.P., Louis J.  
Mischianti, David Cardenas and Keith  
Heffernan

**CERTIFICATE OF SERVICE**

I hereby certify that on March 1, 2013, I served the foregoing document on the following individual(s) by electronic mail and regular mail:

Marc J. Fink  
David Y. Loh  
COZEN O'CONNOR  
45 Broadway Atrium, Suite 1600  
New York, NY 10006-3792  
Email: mfink@cozen.com  
      dloh@cozen.com  
*Attorneys for Mitsui O.S.K. Lines*

David Street  
Brendan Collins  
GKG Law, PC  
1054 31st Street, Suite 200  
Washington, DC 20007  
Email: dstreet@gkglaw.com  
      bcollins@gkglaw.com  
*Attorneys for Global Link Logistics, Inc.*

Carlos Rodriguez  
Zheng Xie  
Husch Blackwell  
750 17th Street, NW  
Suite 900  
Washington, D.C. 20006  
Email: carlos.rodriguez@huschblackwell.com  
      zheng.xie@huschblackwell.com

Ronald N. Cobert  
Andrew M. Danas  
Grove, Jaskiewicz and Cobert LLP  
1101 17th Street, N.W., Suite 609  
Washington, D.C. 20036  
Email: rcobert@gjacobert.com  
      adanas@gjacobert.com

Benjamin I. Fink  
Neal F. Weinrich  
Berman Fink Van Horn PC  
3423 Piedmont Rd., NE, Suite 200  
Atlanta, GA 30305  
Email: bfink@bfvlaw.com  
      nweinrich@bfvlaw.com  
*Attorneys for CJR World Enterprises, Inc. and  
Chad Rosenberg*

  
Sharon Simmons