

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

**RESPONDENTS**

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**RESPONDENTS CJR WORLD ENTERPRISES, INC. AND CHAD J. ROSENBERG'S  
REPLY TO COMPLAINANT MITSUI O.S.K. LINES LTD.'S EXCEPTIONS TO THE  
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COME NOW Respondents CJR World Enterprises, Inc. ("CJRWE") and Chad J. Rosenberg (collectively, "CJR Respondents"), and submit this their Reply to the Exceptions of Complainant Mitsui O.S.K. Lines, Ltd. ("MOL") to the Initial Decision, and respectfully show the Commission as follows:<sup>1</sup>

**INTRODUCTION**

This case arises out of a practice that Global Link Logistics, Inc. ("GLL") engaged in with the knowledge, approval, and endorsement of MOL. The Administrative Law Judge

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<sup>1</sup> The CJR Respondents join and adopt any responses to MOL's Exceptions filed by Respondents Global Link Logistics, Inc. ("GLL") or by Olympus Growth Fund III, L.P., Olympus Executive Fund, L.P., Louis J. Mischianti, L. David Cardenas and Keith Heffernan (collectively, "Olympus Respondents"), to the extent they are not inconsistent with the CJR Respondents' response.

(“ALJ”) correctly concluded that MOL’s knowledge of and participation in GLL’s practice of split routing bars its Shipping Act claims. The ALJ’s ruling is also correct with respect to the CJR Respondents because the CJR Respondents did not participate in any alleged Shipping Act violations. The FMC should thus overrule MOL’s exceptions and affirm the Initial Decision.

### **SUMMARY OF THE RECORD**

#### **A. MOL**

This case follows an investigation by the Commission into improper shipping practices by MOL. Following that investigation, the Commission levied \$1.2 million in civil penalties on MOL. (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, at p. 2) (CJR App., at p. 40).

According to an article in a trade magazine discussing the penalties, Peter J. King, the director of the Commission’s Bureau of Enforcement, who participated in every meeting and telephone call between MOL and the Commission, “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) (CJR App., at p. 81); (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) (CJR App., at pp. 83-86).

#### **B. The CJR Respondents**

##### **1. Mr. Rosenberg’s Experience in the Industry with Split Routing.**

Mr. Rosenberg began working in the shipping and logistics industry in 1994.

(Declaration of Chad Rosenberg, dated February 26, 2013 (“Rosenberg Dec.”), at ¶ 2) (CJR

Respondents' Appendix ("CJR App."), at p. 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 App., at p. 2). At both Scanwell and Worldlink Mr. Rosenberg was exposed to and learned of the practice of split routing. (Rosenberg Dec., at ¶ 4) (CJR App., at p. 2). 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 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). Mr. Rosenberg did not believe that the practice was in any way illegal. (Rosenberg Dec., at ¶ 6) (CJR App., at p. 2).

**2. Mr. Rosenberg Founds GLL and GLL Subsequently Obtains Legal Advice Regarding Split Routing.**

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

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 App., at p. 2). 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 App., at p. 3); (*see also* MOL's App., at p. 1663-1664). 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 App., at p. 1662). 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 App., at p. 1662). 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 App., at p. 3); (see also 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.”).<sup>2</sup>

### **3. CJRWE.**

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

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 App., at p. 3). CJRWE never contracted for the ocean transportation of property with any ocean carriers, including with MOL. (Rosenberg Dec., at ¶

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<sup>2</sup> MOL’s completely misguided arguments regarding the cessation of what MOL characterizes as “shortstopping” are discussed below in footnote six.

16) (CJR App., at p. 4). CJRWE never obtained or attempted to obtain ocean transportation for property, at any price. (Rosenberg Dec., at ¶ 17) (CJR App., at p. 4). 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 App., at p. 4). CJRWE never paid MOL for the ocean transportation of property. (Rosenberg Dec., at ¶ 19) (CJR App., at p. 4). CJRWE never acted as an NVOCC with respect to any GLL shipments. (Rosenberg Dec., at ¶ 20) (CJR App., at p. 4).

Mr. Rosenberg became a director of GLL after the 2003 sale. (Rosenberg Dec., at ¶ 21) (CJR App., at p. 4). 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 App., at pp. 4-5, 7). 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 App., at pp. 4-5, 7); (*see also* Declaration of Jim Briles ("Briles Dec."), at ¶ 48, dated February, 26, 2013 (CJR App., at p. 20); Partial Final Award in the Arbitration relating to the 2006 sale ("Arbitration"), (MOL's App., at p. 33) ("by 2005 Rosenberg was becoming less and less active in running Global Link")). 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 App., at p. 5). Mr. Rosenberg never personally contracted for the ocean transportation of property with any ocean carriers, including with MOL. (Rosenberg Dec., at ¶ 25) (CJR App., at p. 5). Mr. Rosenberg never personally obtained or attempted to obtain ocean transportation for property, at any price. (Rosenberg Dec., at ¶ 26) (CJR App., at p. 5). 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 App., at p. 5). Mr. Rosenberg never personally paid MOL for the ocean transportation of property. (Rosenberg Dec., at ¶ 28) (CJR App., at p. 5). Mr. Rosenberg never acted as an NVOCC with respect to any GLL shipments. (Rosenberg Dec., at ¶ 29) (CJR App., at p. 5).

**4. GLL is Sold in June of 2006.**

GLL was sold to its current owners in June of 2006. (Rosenberg Dec., at ¶ 30) (CJR App., at p. 6). This sale closed on June 7, 2006. (Rosenberg Dec., at ¶ 31) (CJR App., at p. 6). Mr. Rosenberg resigned as an employee and as a director of GLL prior to the sale. (Rosenberg Dec., at ¶ 32) (CJR App., at p. 6). CJRWE sold all of its shares of GLL in the 2006 sale. (Rosenberg Dec., at ¶ 33) (CJR App., at p. 6). Mr. Rosenberg was not in any way involved with GLL following the 2006 sale. (Rosenberg Dec., at ¶ 34) (CJR App., at p. 6). 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 App., at p. 6).

**C. GLL's Relationship with MOL**

**1. MOL's Familiarity with and Encouragement of Split Routing**

GLL entered into its first service contract with MOL in May of 2004. (Rosenberg Dec., at ¶ 36) (CJR App., at p. 6); (Briles Dec., ¶ 8) (CJR App., at p. 14). 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 App., at p. 6); (Briles Dec., ¶ 10) (CJR App., at p. 14). GLL was a sizable customer for MOL and for Mr. McClintock and Ms. Yang. (Rosenberg Dec., at ¶ 38) (CJR App., at p. 6); (Briles Dec., ¶ 11) (CJR App., at p. 14).

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 App., at p. 7); (Briles Dec., ¶ 12) (CJR App., at p. 14). 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 App., at p. 7); (Briles Dec., ¶¶ 13-17) (CJR App., at pp. 14-15). Mr. Briles spoke to Mr. McClintock and Ms. Yang regularly between 2004 and 2007. (Briles Dec., ¶¶ 14-15) (CJR App., at pp. 14-15). 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 App., at p. 15). Mr. Rosenberg also discussed the practice of split routing at GLL with Mr. McClintock and Ms. Yang on occasion. (Rosenberg Dec., at ¶ 42) (CJR App., at p. 7). Mr. McClintock and Ms. Yang were thus aware of GLL's practice of split routing. (Rosenberg Dec., at ¶¶ 41-43) (CJR App., at p. 7); (Briles Dec., ¶¶ 13-17) (CJR App., at pp. 14-15). Mr. McClintock and Ms. Yang encouraged the practice. (Rosenberg Dec., at ¶ 44) (CJR App., at p. 7); (Briles Dec., ¶ 18) (CJR App., at p. 15).

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 App., at p. 7); (Briles Dec., ¶ 19) (CJR App., at p. 15). The service contract included only a limited number of door points. (Rosenberg Dec., at ¶ 46) (CJR App., at p. 8); (Briles Dec., ¶ 20) (CJR App., at p. 15). 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 App., at p. 15). 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 App., at p. 8). Mr. McClintock and Ms. Yang were always reluctant to negotiate new door points for GLL's customers. (Rosenberg Dec., at ¶ 48) (CJR App., at p. 8); (Briles Dec., ¶ 22) (CJR App., at p. 16). 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 App., at p. 8); (Briles Dec., ¶ 23) (CJR App., at p. 16). 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 App., at p. 16). 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 App., at p. 16). 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 App., at p. 8). 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 App., at p. 8). Particularly given that it had received legal advice which it understood to mean that the practice of split routing was legal, GLL had no reason to question Mr. McClintock and Ms. Yang's authority to encourage GLL to engage in rerouting or their unwillingness to negotiate additional door points.<sup>3</sup>

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<sup>3</sup> MOL's reliance on pages fourteen and fifteen of the Exceptions on the fact that there were some amendments to the service contracts and on Mr. Minck's *post hoc* testimony that the service contracts could have been amended misses the mark. The ALJ correctly concluded that the evidence shows GLL reasonably believed at the time based

## 2. MOL Encourages GLL to Hide Split Routing from MOL's Operations Staff

Mr. McClintock and Ms. Yang knew of and blessed GLL's practice of split routing. (Rosenberg Dec., at ¶ 52) (CJR App., at p. 9); (Briles Dec., ¶ 26) (CJR App., at p. 16). 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 App., at p. 9); (Briles Dec., ¶ 27) (CJR App., at p. 16). 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 App., at p. 9); (Briles Dec., ¶ 28) (CJR App., at p. 17). 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 App., at p. 9); (Briles Dec., ¶ 29) (CJR App., at p. 17). There is no evidence demonstrating that Mr. McClintock or Ms. Yang expressed any objection to GLL discussing split routing with other management-level employees at MOL or that they instructed Mr. Briles or Mr. Rosenberg not to discuss split routing with other management-level employees.<sup>4</sup>

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on Mr. McClintock and Ms. Yang's communications with GLL that MOL was unwilling to regularly amend the service contracts and that GLL should therefore use regional door points.

<sup>4</sup> On page twenty-two of the Exceptions, in addressing MOL's exception to Finding of Fact #36, MOL argues that "the overwhelming weight of credible evidence is that 'upper-level management' in this context means McClintock and Yang. In this regard the ALJ, without any explanation, disregards other testimony, in particularly the testimony of Edward Feitzinger. . . . Simply put, McClintock was in collusion with Jim Briles of GLL and GLL understood that split routing was not to be discussed with senior MOL management in Oakland, i.e., with anyone other than McClintock." MOL's use of hyperbole cannot alter the record. Other than pointing to Feitzinger's testimony, MOL identifies no other evidence to support its completely speculative argument that GLL understood it was not to discuss split routing with any other management-level employees of MOL. Further, like MOL's own speculative arguments, Mr. Feitzinger's opinions are not evidence of anything. Notably, Mr. Feitzinger was testifying in a proceeding in which he adverse to the former owners and directors of GLL, including the CJR Respondents.

MOL's arguments on pages twenty-four and twenty-five are similarly unavailing. Mr. McClintock and Ms. Yang were GLL's contact persons with MOL's management, and they had instructed GLL to keep split routing hidden from MOL's operations staff. Mr. Briles did not have any reason to seek input from other members of MOL's management, particularly when GLL had obtained legal advice in 2003 that led GLL to believe that the practice of split routing was legal. There is thus no evidence supporting MOL's conclusory arguments that Mr. Briles and/or Mr. Rosenberg were colluding with Mr. McClintock and Ms. Yang.

### **3. Mr. Briles's Emails to GLL Employees**

MOL has relied heavily on e-mails Mr. Briles sent while employed with GLL which could be interpreted to suggest that GLL was trying to hide the practice of split routing from MOL. However, this interpretation is not accurate. 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, who were GLL's contact persons with MOL management). (Briles Dec., ¶ 31) (CJR App., at p. 17). 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 App., at pp. 14-17). 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 App., at p. 18). Mr. Briles also did not believe that MOL disapproved of the practice of split routing. (Briles Dec., ¶ 34) (CJR App., at p. 18). To the contrary, MOL, via Mr. McClintock and Ms. Yang, knew of the practice and encouraged it. (Briles Dec., ¶¶ 8 - 35) (CJR App., at pp. 14-18).

### **4. MOL's Operations Staff Learns of GLL's Split Routing**

Notwithstanding Mr. Briles' efforts at MOL's encouragement 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 App., at p. 19); (see also Declaration of Kevin Hartmann) (MOL's App., at p. 1638) ("[Mr. McClintock] said

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Further, e-mails in the record show that upper-level management at MOL were indisputably involved with and knowledgeable of the GLL account, and that Mr. McClintock and Ms. Yang were not "keeping MOL in the dark" and acting adversely to MOL as MOL argues. For example, an e-mail exchange between MOL management, including Mr. McClintock, describes GLL as an important account. (November 2, 2006 e-mail exchange between Paul McClintock, Richard Hiller, and other MOL employees) (CJR App. at p. 311). Another e-mail exchange reflects that GLL paid MOL more than \$45 million during 2006 alone. (November 20 and 21, 2006 e-mail exchange between Steve Ryan, Tsuyoshi Toshida, Paul McClintock, Jim Briles, and other MOL employees) (CJR App. at p. 318). In addition to evidencing that MOL was familiar with the GLL account, these e-mails evidence that MOL knowingly accepted the benefits of GLL maintaining its business with MOL.

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...”). For example, the June 24, 2005 and August 15, 2005 e-mails attached to MOL’s Opening Submission 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 App., at p. 19). In addition, notwithstanding the efforts to conceal split routing from MOL’s operations staff at Mr. McClintock and Ms. Yang’s encouragement, there were instances in which GLL submitted shipline delivery orders to MOL which reflected the actual location where goods were being delivered. (GLL App., at pp. 205-296, 297-360). These documents clearly put MOL’s operations staff on notice about split routing. 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 App., at pp. 14-20); *see also* MOL’s Proposed Findings of Fact, at ¶¶ 98, 108).

**5. GLL’s Discussions with MOL Regarding the Termination of the Split Routing Practice at GLL**

In June of 2006, new owners purchased GLL. (Briles Dec., ¶ 47) (CJR App., at p. 20). After the sale, the new owners of GLL decided to end the practice of split routing of GLL. (Briles Dec., ¶ 50) (CJR App., at p. 21). 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 App., at p. 21). Mr. Briles discussed GLL’s request with Ms. Yang. (Briles Dec., ¶ 52) (CJR App., at p. 21). 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 App., at p. 21). GLL’s desire to transition from its historical practice of split routing was discussed in this meeting. (Briles Dec.,

¶ 52) (CJR App., at p. 21). 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 App., at pp. 15-16, 21). 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 App., at pp. 21, 24). The June 20, 2007 e-mail refers to GLL’s practice of split routing. (Briles Dec., ¶ 54; Exhibit 1 to Briles Dec.) (CJR App., at pp. 22, 24). GLL’s efforts to terminate the practice of split routing and its requests that MOL adapt the parties’ service contracts to reflect this shift from what had historically been the parties’ mutual business model completely belie MOL’s arguments that Mr. McClintock and Ms. Yang had colluded with GLL.

**D. The Evidence Supports the ALJ’s Conclusion that MOL is Charged with Knowledge of Split Routing.**

The record in this case is replete with evidence MOL knew of and encouraged split routing. Nevertheless, until MOL filed its Reply Brief before the ALJ, MOL vigorously denied that Mr. McClintock and Ms. Yang knew of the practice of split routing. Rather, MOL had always taken the position that they were loyal employees, arguing vehemently that they knew of only limited instances in which GLL had engaged in split routing. After the Respondents’ submissions demonstrated Mr. McClintock, Ms. Yang, and others at MOL had knowledge regarding GLL’s practice of split-routing, MOL completely reversed course and conceded that Mr. McClintock and Ms. Yang had more than just limited knowledge of split routing. In an attempt to disingenuously disavow itself of responsibility of their knowledge, MOL argues that

they not only had knowledge of split routing but that they also were in collusion with GLL, Mr. Rosenberg and Mr. Briles against MOL. The evidence does not support MOL's contention that GLL, Mr. Rosenberg and Mr. Briles conspired with Mr. McClintock and Ms. Yang. Mr. Rosenberg understood that the practice of split routing was common in the industry and was legal. (Rosenberg Dec., at ¶ 5) (CJR App., at p. 2). GLL engaged in the practice of split routing with MOL at Mr. McClintock and Ms. Yang's encouragement and believing it to be legal. (Rosenberg Dec., at ¶¶ 5-6, 10-11, 36-52) (CJR App. at pp. 2-9); (Briles Dec., at ¶¶ 6-26) (CJR App., at pp. 13-16). GLL was not engaged in a conspiracy with Mr. McClintock and Ms. Yang. Rather, GLL was in a business relationship with MOL, and its representatives were aware of and encouraged a practice which GLL engaged in with shippers other than MOL. The ALJ correctly found that the evidence does not support the far-fetched conclusion MOL asked the ALJ to draw in order to avoid the repercussions of Mr. McClintock and Ms. Yang's knowledge of split routing – i.e., that Mr. McClintock, Ms. Yang, Mr. Rosenberg and Mr. Briles were colluding with each other to defraud MOL.

Setting aside that MOL admits Mr. McClintock and Ms. Yang were aware of and encouraged the practice of split routing, the evidence shows others at MOL were aware the practice. It is undisputed that MOL's operations staff was aware of GLL's practice of split routing in multiple instances. Documentary evidence shows that at least the following other individuals at MOL were aware of instances of split routing: Ted Holt, Nicole Hensley, Laci Bass, Kelly Johnson, Amy Sinclair, Diane Chick, Jane Martin, and Jeffrey Bumgardner. The Panel in the Arbitration 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 App., at p. 10). Aside from the documentary evidence and the Arbitration Panel’s findings, logic and basic common sense dictate that, given GLL’s size and the number of customers it had, others at MOL had to be aware or reasonably would have assumed 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. (*See generally*, e-mails referenced in footnote four reflecting management’s knowledge of GLL account).

**E. The Record Demonstrates that MOL Suffered No Damages from Split Routing and in fact Benefitted from it.**

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 App., at pp. 9-11); (McClintock Dep., at pp. 13:22-14:6, 264:15-265:10) (CJR App., at pp. 88-89, 100-101). 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 App., at pp. 98-101); (see also Rosenberg Dec., at ¶ 57) (CJR App., at p. 9). 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 App., at pp. 98-101); (see also Rosenberg Dec., at ¶ 58) (CJR App., at p. 10). Stated otherwise, it was undisputed that 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 App., at pp. 98-101); (see also Rosenberg Dec., at ¶ 59) (CJR App., at p. 10).

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 App., at pp. 89-95). It was a “happy day” for MOL when GLL took over the handling of the inland transportation, and MOL was “relieved” by GLL’s willingness to do this.

(McClintock Dep., at pp. 16:15-18, 20:5-9) (CJR App., at pp. 91, 95).<sup>5</sup>

Furthermore, MOL’s claims are based on a false premise: 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 App., at pp. 89-91); (Rosenberg Dec., at ¶ 60) (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 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 App., at p. 10). 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 App., at pp. 98-101); (see also Rosenberg Dec., at ¶¶ 57, 63)

(CJR App., at pp. 9, 10). 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 App., at p. 10). 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

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<sup>5</sup> On page thirty-two of the Exceptions, MOL states that it “has extensive staff whose function is to arrange for inland transportation of shipments destined to inland locations” and argues that allowing GLL to communicate with the truckers did not constitute a benefit to MOL. Notably, MOL cites no evidence in support of these factual statements because there is none in the record.

Similarly, MOL argues there is no evidence other than Mr. McClintock’s allegedly unreliable testimony that MOL incurred detention charges prior to GLL becoming involved in the trucking arrangements or that such charges were meaningful. However, MOL presented no evidence contradicting Mr. McClintock’s testimony. In addition to the fact his testimony is uncontroverted, because MOL controls any records which MOL might contend controvert Mr. McClintock’s testimony but MOL failed to produce any such records, it is presumed no such records exist. *See Int’l Union, United Auto., Aerospace & Agr. Implement Workers of Am. (UAW) v. N. L. R. B.*, 459 F.2d 1329, 1336-38 (D.C. Cir. 1972) (“Simply stated, the rule provides that when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him . . . . If evidence within the party’s control would in fact strengthen his case, he can be expected to introduce it even if it is not subpoenaed.”).

App., at p. 11). 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 App., at p. 11). 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 App., at pp. 10, 11).<sup>6</sup>

Furthermore, MOL's arguments before the ALJ and now the Commission completely ignore 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

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<sup>6</sup> The Johnson City shipments that MOL relies heavily on in its Exceptions illustrate how the evidence shows split routing resulted in GLL over-paying MOL. Separately, MOL also relies on these shipments to argue that GLL did not end the practice of shortstopping. MOL's argument is incorrect and misstates the record. GLL's counsel did not advise GLL in 2003 that having its trucker deliver a shipment to a final destination closer than the actual destination was illegal; rather, he advised GLL that it was illegal to receive rebates from the trucker for such a shipment. (MOL App., at p. 1587 ("This is an ... illegal rebate to the shipper because any return of compensation to the shipper without being allowed by the ocean carrier's tariff or service contract is a violation of section 10(a)(1) of the Shipping Act"), at p. 1625 ("If the trucker performs free of charge, that is not illegal. But if the trucker, because the Hecny point is a shorter trip tha[n] the Ocean Carrier point, wants to discount the charge, I would have problems with Hecny accepting any refund or discount because the shipment was short-stopped"). GLL understood this advice to mean that the practice of split routing was legal (i.e., the house and master bills of lading having different final destinations, regardless of whether the destination listed in the house bill of lading was closer to the part), but that GLL should stop the use of "debits and credits" with truckers, which it did to the extent it was occurring. (MOL App., at p. 1624). MOL's arguments on page twenty are thus completely without merit, and its attempts to discredit Mr. Rosenberg's testimony fail. Similarly, on page ten and in footnote five of the Exceptions, MOL argues that MOL overpaid the truckers in these instances and states that "MOL has been unable to get GLL and/or the truckers to explain what they did with the extra money." MOL also argues it "should not have the burden of proving how these co-conspirators shared their ill-gotten gains." MOL's plea that it should be excused from its proof requirements should be taken for what it truly is: a concession that there is no evidence in the record to support MOL's speculative and unsupported theory there was a kickback scheme between GLL and the truckers. The only evidence that MOL points to support its argument that "the record indicates that when the amount MOL paid the trucker for the transportation booked by GLL exceeded the amount that would have been paid to the trucker to the actual destination, GLL shared in some portion of the excess payment" is an August 2003 e-mail by Eric Joiner. However, this e-mail in no way supports MOL's argument as it only shows Mr. Joiner interpreted the legal advice GLL received to mean that GLL cannot do what MOL accuses GLL of doing, i.e., accepting payments or rebates from truckers. This is the only evidence MOL cites to support its unfounded accusations that there was a kickback scheme between GLL and the truckers it used.

Simply put, there was no "extra money" or "ill-gotten gains." Further, these labels that MOL uses to make allegations that are supported by phantom evidence are misnomers. GLL paid MOL a full rate for these shipments which included the inland trucking portion. MOL then paid the trucker the inland trucking portion. If anybody overpaid the trucker in the shipments MOL complains about, it was GLL.

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 as doing so would have made absolutely no business sense. This is another reason the ALJ correctly found that MOL is not entitled to any reparations.

#### **ARGUMENT AND CITATIONS OF AUTHORITY**

**A. The ALJ Correctly Concluded that MOL's Knowledge of and Participation in the Practice of Split Routing Bars its Shipping Act Claims Against the Respondents.**

As set forth above, throughout this case and notwithstanding evidence to the contrary, MOL asserted that it did not know that GLL engaged in the practice of split routing. At the eleventh hour when the merits of this case were being presented before the ALJ, MOL finally acknowledged what all of the evidence which had been available to MOL for years, including when MOL filed its Complaint, demonstrated: that the two employees who are the central witnesses in this case knew about and encouraged the practice of split routing. Notwithstanding its admission, MOL argued that it should not be bound by its employees' knowledge. The ALJ correctly found that MOL's arguments lack merit.

**1. The Adverse Interest Exception to the Imputation Rule Does Not Apply.**

MOL asked the ALJ and now asks the Commission to find MOL not accountable for the actions of its employees. The basis for MOL's request is the adverse interest exception rule.

This rule is an exception to the normal rule that an agent’s knowledge is imputed to its principal. To keep its claims alive, MOL urges the Commission to apply the broadest possible view of the adverse interest exception. MOL’s arguments are diametrically at odds with almost all jurisprudence on this issue.

First, contrary to MOL’s arguments, the majority of courts narrowly construe the adverse interest exception and require an agent to have totally abandoned his or her principal’s interests in order for the exception to apply. *See, e.g., Long Island Sav. Bank, FSB v. United States*, 503 F.3d 1234, 1250 (Fed. Cir. 2007) (“The mere fact that the agent’s primary interests are not coincident with those of the principal, however, is not sufficient to invoke the adverse interest exception. Rather, both federal common law and New York state law require that the agent act *entirely for his own or another’s purposes.*” (emphasis added)); 3 Fletcher Cyclopedia of Private Corp. § 789 (explaining that for the adverse exception to apply, “the agent’s relations to the subject matter must be ‘so adverse as practically to destroy the relation of agency’”); Restatement (Second) of Agency § 282 (1958) (“[A] principal is not affected by the knowledge of an agent in a transaction in which the agent secretly is acting adversely to the principal *and entirely for his own or another’s purposes.*”); Restatement (Third) Of Agency § 5.04 (2006) (“[N]otice of a fact that an agent knows or has reason to know is not imputed to the principal if the agent acts adversely to the principal in a transaction or matter, intending to act solely for the agent’s own purposes or those of another person. Nevertheless, notice is imputed . . . when the *principal has ratified or knowingly retained a benefit from the agent’s action.*”) (emphasis added)<sup>7</sup>; *see also USACM Liquidating Trust v. Deloitte & Touche*, No. 11-15626, 2013 WL 1715532 (9th Cir. Apr. 22, 2013) (“[T]he adverse interest exception . . . precludes the general

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<sup>7</sup> MOL relies on the Restatement (Third) of Agency, § 5.04, but fails to point out the part of it which renders its argument that the adverse interest exception applies completely without merit.

imputation of an agent's acts to the principal corporation under agency law when the agent's actions are 'completely and totally adverse to the corporation.'"); *USACM Liquidating Trust v. Deloitte & Touche LLP*, 764 F. Supp. 2d 1210, 1218-19 (D. Nev. 2011) *aff'd sub nom. USACM Liquidating Trust v. Deloitte & Touche*, No. 11-15626, 2013 WL 1715532 (9th Cir. Apr. 22, 2013) (determining, as a federal court, that Nevada would adopt the law promulgated by other jurisdictions that the adverse interest exception requires "an agent to completely abandon the principal's interests and act entirely for his own purposes" and further stating, "Courts generally require total abandonment to invoke the adverse interest exception because '[t]his rule avoids ambiguity where there is a benefit to both the insider and the corporation, and reserves this most narrow of exceptions for those cases-outright theft or looting or embezzlement-where the insider's misconduct benefits only himself or a third party . . .'" (emphasis added)); *Tobacco Tech., Inc. v. Taiga Int'l N.V.*, 388 F. App'x 362, 373 (4th Cir. 2010) (overruling district court, which held that the interests were "sufficiently adverse" for adverse exception to apply; reasoning that plaintiff was not able to establish that the interests were "completely adverse"; and stating that "under the 'adverse interest exception' to this rule, a principal may 'avoid imputation when the agent's interests are sufficiently adverse' to its own. To make out this 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.'" (emphasis added) (citations omitted)); *Collins & Aikman Corp. v. Stockman*, No. CIV. 07-265-SLR-LPS, 2010 WL 184074 (D. Del. Jan. 19, 2010) *report and recommendation*

*adopted*, No. CIV07-265-SLR/LPS, 2010 WL 1687795 (D. Del. Apr. 26, 2010) (“This imputation rule has an ‘adverse interest’ exception: imputation does not apply where the corporate officer's actions are undertaken solely for the officer's benefit. Michigan law is clear that this ‘adverse interest’ exception is inapplicable if the officer's actions benefit or are motivated to benefit, at least in part, the corporation.” (citation omitted)); *Grede v. Bank Of N.Y.*, No. 08 C 2582, 2009 WL 1657578 (N.D. Ill. June 12, 2009) (“This is known as the adverse interest exception. In order for it to apply, ‘the guilty manager must have totally abandoned his corporation's interests [.]” (emphasis added) (alteration in original) (citations omitted)); *In re Sunpoint Sec., Inc.*, 377 B.R. 513, 564 (Bankr. E.D. Tex. 2007) (“The adverse interest exception is a narrow one; for it to apply, the agent must have totally abandoned his principal's interests and be acting entirely for his own or another's purposes.”); *Great Divide Ins. Co. v. AOAO Maluna Kai Estates*, No. CIV 05-00608 JMS/LEK, 2006 WL 2830885 (D. Haw. Sept. 28, 2006) (“The adverse interest exception ‘recognizes that when the interests of the agent and the principal are adverse, the agent's knowledge cannot be imputed to his principal.’ To come within this exception, ‘the agent must have totally abandoned the principal's interest and be 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.’ (citations omitted)); *Brandt v. Lazard Freres & Co., LLC*, No. 96-2653-CIV-DAVIS, 1997 WL 469325 (S.D. Fla. Aug. 1, 1997) (“To invoke the adverse interest exception, however, the Trustee must show that the acts did not benefit Southeast. Thus, knowledge would be imputed if the bank received any benefit from the fraud.” (citation omitted)); *Multi-Transp. Corp. v. Gulf States Toyota, Inc.*, No. CIV. A. 93-448, 1994 WL 676445 (E.D. La. Dec. 5, 1994) (“However, if the corporate agent was not acting solely for his own benefit, but also with the interest of the corporation in mind, the ‘adverse interest’ exception

is not applicable.”); *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)).

Equally importantly, the Commission has spoken to this very issue and has taken a stricter view than even the courts – a fact which MOL ignored before the ALJ and continues to ignore in its Exceptions. In *Sea-Land Service, Inc. - - Possible Violations of the Shipping Act of 1984*, 29 S.R.R. 492 (ALJ 2002), the ocean carrier, Sea-Land, argued that the knowledge of its employees should not be attributed to it. The Administrative Law Judge rejected this argument:

Since Sea-Land sales representative and other Sea-Land employees enabled the NVOCCs to access the equipment substitution rule in an unlawful manner, the record establishes that Sea-Land through its agents and employees has permitted shippers to obtain ocean transportation at less than the applicable rates and charges by means of an unfair device or means in violation of Section 10(b)(4).

29 S.R.R. 492.

The full Commission later affirmed the Administrative Law Judge’s decision:

The evidence demonstrates that Sea-Land had the requisite knowledge of the equipment substitution scheme at the sales representative level (e.g., Mr. Favor) and at the export sales manager and regional general manager levels (e.g., Messrs. Wing and Spargo, respectively). In addition, Sea-Land’s rate auditing and booking departments contributed, directly and indirectly, to the scheme. Accordingly, the Commission affirms the ALJ’s finding that Sea-Land violated Section 10(b)(4) of the Shipping Act of 1984 with respect to 149 shipments and that these violations were knowing and willful. These violations were achieved by unjust and unfair means . . .

*Sea-Land Service, Inc. – Possible Violations of the Shipping Act of 1984*, 30 S.R.R. 872, 887 (Final Decision, served Feb. 8, 2006).

The Commission also addressed this issue in *Pacific Champion Express Co. Ltd. - Possible Violation of Section 10(b)(1) of the Shipping Act of 1984*, 28 S.R.R. 1397, 1403 (FMC 2000). In *Pacific*, the Commission rejected the corporation's defense based on the adverse interest exception and instead held the corporation responsible for the knowledge and acts of its employees. In doing so, the Commission held that the corporation's attempted reliance upon the adverse interest exception provision in the Restatement of Agency was unfounded because insulating corporations from the actions of their agents ran contrary to the carriers duties to shippers and to the general public. *Id.* at 1403. The Commission reached this conclusion based in part on the fact that the corporation had broadly delegated authority to its agent and then failed to properly monitor the agent's action. *Id.* The respondent's lack of diligence in monitoring its agents' actions precluded it from disclaiming those actions. *Id.* at 1404.

In addition to *Sea-Land* and *Pacific*, which are directly on point with respect to the legal doctrine at issue in this case, the Commission has also previously addressed the question of a carrier's responsibility for the acts of its agents. In doing so, the Commission has adopted a standard of strict liability for principals based on the acts of their agents. *Hellenic Lines Ltd. – Violations of Sections 16(First) and 17*, 7 F.M.C. 673, 676 (1964); *Unapproved FCC. 15 Agreements - - Spanish/Portuguese Trade*, 8 F.M.C. 596, 609 (1965); *Malpractices - - Brazil / United States Trade*, 15 F.M.C. 55, 59 (1971) ("Shipping Act cannot be circumvented through the medium of an agent"); *Pickup and Delivery – Puerto Rico*, 16 F.M.C. 344, 350 (F.M.C. 1973) ("Respondents cannot insulate themselves from the responsibility for the proper performance of

the service by attempting to relieve themselves of accountability for their agents' acts.”). As the Commission stated in *Spanish / Portuguese Trade, supra*:

Sound enforcement of the Shipping Act of necessity demands that those subject to its terms be held to a strict standard of accountability for the acts of agents representing them. As we make clear in *Hellenic Lines Ltd. – Violations of Sections 16(First) and 17*, 7 F.M.C. 673, 676 (1964), we cannot allow a carrier to “immunize itself from the common carrier responsibilities placed upon it by the Act by disassociating itself from any of its agent’s activities which are bought into question.”

*Id.* at 576-577 (citations omitted).

Thus, under Commission law, the adverse interest exception rule has narrow application. In order that MOL may recover reparations, MOL argues the Commission should depart from its own law as well as from the majority rule adopted by courts. By doing so, MOL is asking the Commission to adopt a formulation of the adverse interest exception would not hold corporations accountable for their employees’ actions and which would allow corporations to disavow their employees’ actions while at the same time retaining the benefits of those employees’ actions. MOL’s arguments are thus without merit.

While the CJR Respondents respectfully submit that the law on the adverse interest exception which has been previously adopted by the Commission should apply, under whatever formulation of the rule the Commission applies, the exception does not apply and Mr. McClintock and Ms. Yang’s knowledge is attributable to MOL. Most significantly, there is no evidence whatsoever 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. There is also no evidence 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 App., at p. 97). Rather, the only benefit realized by Mr. McClintock’s and Ms. Yang’s

encouragement of split routing was realized by MOL in the form of increased business. Importantly, the record is undisputed that MOL retained the benefit of Mr. McClintock and Ms. Yang's actions, namely, the business secured from GLL. MOL fully acknowledges that it benefited and profited from having GLL's business, and MOL has never once suggested it *lost* money on the GLL account by virtue of the practice of split routing – rather, MOL only incorrectly argues that GLL paid MOL less than it should have (i.e., MOL alleges it should have made even more money on GLL than it did). [*See, e.g.*, MOL's Reply Brief, at p. 44 (MOL claims that it made a "lower rate of return" based on Mr. McClintock and Ms. Yang's alleged conduct. A "lower rate of return" necessarily still implies a positive return)]. MOL has also never disgorged itself of any of the benefits it obtained from having the GLL account. In short, the record is clear that all benefits of Mr. McClintock and Ms. Yang's actions inured to MOL.<sup>8</sup> There is also no evidence that Mr. McClintock or Ms. Yang abandoned MOL's interests, let alone *completely* abandoned MOL's interests. Simply put, MOL 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 App., at p. 96).

MOL argues in its Exceptions that California law on the adverse interest exception should be considered based on a choice of law provision in MOL's service contracts. However, the ALJ correctly rejected this argument. MOL's claims arise out of the Shipping Act, and as set forth above and contrary to MOL's suggestion in footnote twenty of the Exceptions, the Commission has spoken to the adverse interest exception rule in Shipping Act cases. MOL pushes for the application of California law only because MOL knows the Commission's law as

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<sup>8</sup> The e-mails discussed in footnote four further evidence that MOL knowingly accepted the benefits of GLL maintaining its business with MOL. These e-mails also show that other high-level management at MOL were indisputably involved with and knowledgeable of the GLL account, and that Mr. McClintock and Ms. Yang were not "keeping MOL in the dark" and acting adversely to MOL as MOL argues.

well as the law of most jurisdictions is fatal to MOL's claims. Further, while MOL points to the choice of law provision in the service contracts to try to gain the benefit of California's unusually broad interpretation of the adverse interest exception rule, notably the precise language in the choice of law provision in the service contracts in no way supports MOL's position that California law applies: "This Contract is subject to the U.S. Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998, and shall otherwise be construed and governed by the laws of the State of California, except for its choice of law rules." This language thus refers to the contract being governed first by the Shipping Act and then secondarily by California law.

Even if the Commission considered the adverse interest exception rule applied by some California courts (which it should not), the exception still does not apply. As the ALJ correctly concluded, the evidence does not support MOL's speculative argument that GLL, Mr. Rosenberg, and Mr. Briles colluded with Mr. McClintock and Ms. Yang against MOL. MOL also has not shown that GLL, Mr. Rosenberg, and Mr. Briles knew or had reason to know that Mr. McClintock or Ms. Yang would not advise other management-level staff at MOL that GLL was engaging in split routing. MOL also has not shown that Mr. McClintock and Mr. Yang were acting adversely to MOL, their principal. To the contrary, Mr. McClintock and Ms. Yang's actions on behalf of MOL secured business for MOL that MOL would not have gotten but for their conduct. MOL thus did not even meet the adverse interest exception even under the test adopted by some California courts, which appears to be the broadest formulation of the adverse interest exception.

MOL is trying to have its cake and eat it too. MOL wants the benefits of the business secured by Mr. McClintock and Ms. Yang but also wants to disavow responsibility for their actions. Because MOL accepted GLL's business as well as the cost and efficiency benefits of

the split shipments facilitated by its own agents, MOL cannot now try to disavow itself of Mr. McClintock and Ms. Yang's knowledge via the adverse interest exception rule. This rule thus does not apply, and the ALJ properly imputed Mr. McClintock and Ms. Yang's knowledge (and the knowledge of others at MOL) to MOL.<sup>9</sup>

**2. The ALJ Correctly Concluded that Because MOL Knew of Split Routing Its Claims Fail.**

a. MOL's Claims are Barred by the Applicable 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.

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<sup>9</sup> MOL appears to argue the ALJ erred by analyzing whether Mr. McClintock and Ms. Yang had apparent authority. This argument is a red herring since the ALJ also analyzed whether the adverse interest exception applies. MOL admits that Mr. McClintock and Ms. Yang were its agents and concedes that "[a]s a general matter, the knowledge of an agent is imputed to its principal." MOL's quibble is thus with the ALJ's application of the exception to the rule. However, the ALJ's conclusions as to why the exception does not apply are correct and fully supported by the record: "there were also advantages to Mitsui [], and the evidence does not support the proposition that Global Link had reason to believe McClintock and Yang were acting outside of the scope of their authority. Furthermore, Global Link had sought legal advice concerning split routing about ten months before the start of its relationship with Mitsui []. The gist of this advice was not that split routing was illegal, but that there was some risk in the practice. While attorney Coleman unequivocally stated that shortstopping was a fraud on the carrier, there would have been no fraud if the carrier knew what was going on... As shown above, however, Mitsui also benefitted from the arrangement. More to the point, the benefits to Mitsui (at least as professed to Global Link and Yang) were not so insubstantial or incredible as to impose a duty on the Respondents to question their authority to act on behalf of Mitsui." (Initial Decision, at pp. 60-61).

*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. It is undisputed that Mr. McClintock and Ms. Yang knew about the practice and as set forth above, their knowledge is attributable 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”).<sup>10</sup> MOL’s claims are thus barred by the applicable statute of limitations.

- b. MOL’s Acquiescence to and Encouragement of Split Routing Precludes MOL’s Claims Sounding in Fraud.
  - i. The ALJ Correctly Concluded that GLL Did Not Use an Unfair Device or Means to Obtain Lower Rates.

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<sup>10</sup> 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)).

“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)). Further, as the ALJ correctly noted in relying on 46 C.F.R. § 545.2, “[i]n the absence of evidence of bad faith or deceit, the Federal Maritime Commission will not infer and ‘unjust or unfair device or means’ from the failure of a shipper to pay ocean freight.” (Initial Decision, at p. 63).

The ALJ correctly concluded that because MOL was knowledgeable of and consented to the practice of split routing, MOL did not and cannot carry its burden of proof to show bad faith or deceit by any of the Respondents, including the CJR Respondents. MOL’s knowledge and encouragement of the practice thus bar MOL’s claims sounding in fraud.

ii. MOL Failed to Establish the Requisite Intent.

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’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 “debits and credits” associated with shortstopping, to the extent that was occurring. 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 was thus properly dismissed as to the CJR Respondents.

**3. *SeaMaster* is inapplicable.**

MOL continues to rely heavily on *Mitsui O.S.K. Lines, Ltd. v. SeaMaster Logistics, Inc.*, Nos. 11-cv-02861-SC, 10-cv-05591-SC, 2013 WL 1191213, at \*4 (N.D. Cal. Mar. 21, 2013).

The ALJ properly found *SeaMaster* distinguishable and inapplicable. As a threshold matter, the ALJ aptly pointed out that the Judge in *SeaMaster* applied California law to determine whether the adverse interest exception applied. As set forth above, California law does not apply in this case. The ALJ also correctly distinguished *SeaMaster* on the grounds that the defendants in *SeaMaster* would have known from previous conversations with MOL that their trucking arrangement with Mr. Yip would not have been approved by MOL. In contrast, the ALJ correctly concluded that GLL did not have reason to believe Mr. McClintock and Ms. Yang’s approval of and encouragement of split routing would not have been approved by MOL.

The ALJ also distinguished *SeaMaster* on the grounds that any benefit to MOL from Mr. Yip’s arrangement in that case was inconsequential and would not have justified the loss of revenue by MOL. The ALJ correctly concluded that in this case MOL benefitted substantially from maintaining GLL’s business and from reduced operational burdens by virtue of GLL handling the trucking.

Finally, the ALJ also distinguished *SeaMaster* on the grounds that Mr. Yip had totally abandoned MOL's interests. In contrast, Mr. McClintock and Ms. Yang retained and supported GLL's business by encouraging GLL to engage in a practice that GLL believed was legal. This was in MOL's *best* interests and was not an abandonment of MOL's interests. There also is no evidence that Mr. McClintock or Ms. Yang were acting for their own interests.

*SeaMaster* demonstrates why MOL's claims were properly rejected for other reasons. There is an old saying that "a rotten barrel yields bad apples." MOL had a rogue employee, Mr. Yip, whom it disclaimed responsibility for in the *SeaMaster* case. In this case, until the Respondents filed their submissions in response to MOL's opening brief, MOL considered Mr. McClintock and Ms. Yang to be loyal employees. But once MOL reviewed the evidence submitted by the Respondents (evidence which MOL had in its possession all along), MOL supposedly determined that Mr. McClintock and Ms. Yang were in fact rogue, disloyal employees. And MOL claims that that alleged fact absolves MOL of responsibility for Mr. McClintock and Ms. Yang's actions.<sup>11</sup>

A line must be drawn in the sand. MOL is apparently riddled with employees whom the company considers rogue agents and for whom the company asserts that it is not responsible for their actions. MOL should not be permitted to skirt responsibility by disavowing the actions and knowledge of these agents of the company. There is no evidence whatsoever in the record which demonstrates that MOL implemented any processes or procedures to identify any internal employee misconduct or any allegedly questionable shipping activities by its customers. During

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<sup>11</sup> MOL's suggestion in footnote three that the alleged scheme in *SeaMaster* and in this case "may very well have been related" is pure fantasy. Setting aside the fact that MOL appears to be relying on factual information contained in the *SeaMaster* opinion which is not in the record in this case, there is not a shred of evidence to tie the two alleged schemes together. MOL's argument that the "scheme at issue in *SeaMaster* was virtually identical to that at issue here" is similarly without merit. These types of arguments by MOL are nothing more than a transparent attempt to mask the lack of substantive merit to MOL's arguments.

the relevant period MOL thus appears to have been an organization where the “clowns run the circus”. The adverse interest exception rule should not be used to permit corrupt organizations who themselves have been fined for the misconduct at issue to absolve themselves of responsibility for their employees’ actions.<sup>12</sup>

**B. The ALJ’s Decision Should Be Affirmed with Respect to the CJR Respondents Because They Did Not Participate in any Alleged Shipping Act Violations.**

It is a “settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct ‘although the lower court relied upon a wrong ground or gave a wrong reason.’ The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate.” *Sec. & Exch. Comm’n v. Chenery Corp.*, 318 U.S. 80, 88, 63 S. Ct. 454, 459, 87 L. Ed. 626 (1943) (citation omitted); *see also Helvering v. Gowran*, 302 U.S. 238, 245, 58 S. Ct. 154, 158, 82 L. Ed. 224 (1937) (“If the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason.” (citing several Supreme Court cases)).

This Commission acknowledged at the pleadings stage that there were serious questions about whether the CJR Respondents and the Olympus Respondents belonged in this proceeding. *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”).

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<sup>12</sup> In its Exceptions, MOL asks the Commission to “send a message” to the industry. However, the appropriate message for the Commission to send is that the remedies for alleged violations of the Shipping Act are not available to a Complainant whose representatives are aware of and participate in the alleged violations and who themselves accept and retain the substantial benefits of the alleged violations.

Two of the Commissioners agreed that the original ALJ properly dismissed claims against the CJR Respondents and the Olympus Respondents at the pleadings stage. While the other three Commissioners did not think MOL's claims should be dismissed at the pleadings stage, they agreed that a threshold issue for the ALJ to determine was whether the CJR Respondents participated in any alleged Shipping Act violations. Now that there is a full record, it is abundantly clear that the CJR Respondents did not participate in any alleged Shipping Act violations such that they could be liable under Section 10(a)(1) or 10(d)(1) and that there is no basis to hold the CJR Respondents liable.

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

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

In one of the Commission's prior decisions in this case, the Commission 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 either of the CJR Respondents *participated* in any of the sample shipments MOL 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 from the Commission’s decision to reinstate MOL’s claims against the CJR Respondents and the Olympus Respondents) (“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 App., at

pp. 3, 4); (Briles Dec., at ¶ 48) (CJR App., at p. 20); *see also* Partial Final Award in the Arbitration, (MOL's App., at p. 33) ("by 2005 Rosenberg was becoming less and less active in running Global Link"). 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, setting aside the other reasons MOL's claims fail, MOL failed to establish against the CJR Respondents because it presented no evidence that either of the CJR Respondents *participated* in any shipment or transaction at issue in this proceeding. 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.*

MOL tried 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. 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 was properly dismissed.<sup>13</sup>

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

The Commission 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, 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

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<sup>13</sup> MOL put several e-mails into the record 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.

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.”).

MOL introduced no evidence showing either of the CJR Respondents ever operated as a shipper in relationship to MOL. MOL also introduced no evidence showing that either of the CJR Respondents appeared on any bill of lading or any shipping documents in the capacity of a shipper. MOL also introduced no evidence 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, setting aside that the ALJ correctly found that no violations occurred, there was also no basis that would have supported a finding by the ALJ that the CJR Respondents are vicariously liable for any of GLL's alleged violations of the Shipping Act. As such, MOL's claims against the CJR Respondents were properly dismissed.

**2. MOL's Section 10(d)(1) Claim Fails Because MOL Introduced No Evidence that the CJR Respondents Acted as an NVOCC.**

To prevail on its Section 10(d)(1) claim against the CJR Respondents, MOL was required to 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).

MOL introduced 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 in its Opening Submission and in footnote four of the Exceptions 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 was thus properly dismissed.

**3. 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 the ALJ's dismissal of MOL's claims against the CJR Respondents was proper, MOL's claim that the CJR Respondents are liable for any shipments occurring after the sale of GLL on June 7, 2006, clearly fails and was properly dismissed. 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.

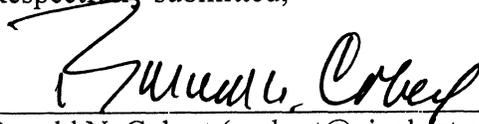
**RESPONSE TO MOL'S REQUEST FOR ORAL ARGUMENT**

Oral argument is unnecessary as it is clear from the record that MOL's exceptions are without merit and the Initial Decision should be affirmed.

**CONCLUSION**

For the reasons discussed herein, the Commission should overrule MOL's exceptions and affirm the Initial Decision.<sup>14</sup>

Respectfully submitted,



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Dated: August 22, 2013

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<sup>14</sup> Given that many of MOL's exceptions are not directly relevant to the ALJ's reasons for dismissing MOL's claims, the CJR Respondents have not endeavored to respond to every single argument raised by MOL in its Exceptions, many of which appear to be a desperate attempt to attack the ALJ. Contrary to MOL's arguments, the ALJ's findings of fact and conclusions are well thought-out and reflect the findings and conclusions demanded by the record.

**CERTIFICATE OF SERVICE**

**I hereby certify that on August 22, 2013, I have this day served the foregoing document upon the following individual(s):**

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