

**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No. 09-01

MITSUI O.S.K. LINES LTD.

COMPLAINANT

v.

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

RESPONDENTS

**EXCEPTIONS OF
COMPLAINANT MITSUI O.S.K. LINES, LTD.
TO THE INITIAL DECISION**

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**EXCEPTIONS OF
COMPLAINANT MITSUI O.S.K. LINES, LTD.
TO THE INITIAL DECISION**

Pursuant to Rule 227 of the Commission’s rules of practice and procedure, Complainant Mitsui O.S.K. Lines, Ltd. (“Mitsui” or “MOL”) hereby submits its exceptions to the initial decision (“ID”) of the administrative law judge (“ALJ”) in this proceeding.

I. INTRODUCTION

A. Summary of Case

Global Link Logistics, Inc. (“Global Link” or “GLL”) is an FMC-licensed non-vessel operating common carrier (“NVOCC”) that entered into a series of service contracts with MOL in the 2004-2008 timeframe. GLL uses an innocuous-sounding name—“split routing”—to describe the manner in which it conducted its business under those contracts. However, GLL’s business practices were far from innocuous. Secretly working with co-conspirators here and abroad, GLL committed widespread fraud resulting in thousands upon thousands of wanton and willful violations of the Shipping Act, thereby enabling it and its owners to realize an extraordinary financial gain in excess of \$148 million, to MOL’s detriment.

GLL was established by Respondent Rosenberg in the late 1990s. MOL App. 0109, ¶2. From the start, Rosenberg and Jerry Huang, Managing Director at Hecny Shipping Limited, worked closely together. Until 2004, GLL relied entirely on Hecny service contracts. *Id.* at ¶¶3-4. Rosenberg sold a majority interest in GLL to the Olympus Respondents in 2003 for \$20 million in cash, plus stock, but for a number of years thereafter he continued to hold an ownership stake while he managed GLL’s business. MOL App. 0003, note 1; *see* Reply Brief of Complainant Mitsui O.S.K. Lines, Ltd. In Further Support of Its Claims Against Respondents

(“MOL Reply Brief”) at 15-16. GLL began entering into its own service contracts with MOL in 2004. *Id.* at ¶4.

GLL’s unlawful practice of split routing was well-described by ALJ Guthridge in an earlier ruling in this proceeding:

A shipper in a foreign country would contact Global Link to perform NVOCC services on a shipment to an inland destination in the United States. For the purposes of this memorandum, I will call this Destination A. Global Link would then contact Mitsui to provide the ocean transportation to the United States.

On some shipments, Mitsui and Global Link had negotiated a rate to Destination A as part of a service contract. Although Global Link knew the shipment was to be transported to Destination A, Global Link would tell Mitsui that the shipment was to be transported to Destination B, another inland point for which Mitsui and Global Link had agreed upon a lower rate as part of the service contract. Mitsui would issue a through bill of lading identifying Destination B as the place of delivery and Mitsui would be paid at the Destination B rate set forth in the service contract. When the cargo arrived in the United States, however, Global Link would issue a separate bill of lading to the carrier for the inland leg of the transportation identifying Destination A as the place of the delivery and tell the inland carrier to ignore Destination B set forth in the Mitsui through bill of lading. Global Link did not notify Mitsui that the shipment was going to Destination A, request in writing diversion of the shipment from Destination B as required by the service contract, or pay Mitsui the diversion charge and difference in price between Destination B...and Destination A, the place where delivery had been intended all along.

Mitsui O.S.K. Lines, Ltd. v. Global Link Logistics, Inc., et al., 31 S.R.R. 1369, 1373-74 (ALJ 2010). There is no dispute that during the several-year period when GLL had five separate service contracts with MOL, thousands of shipments were booked by it to destinations in the manner described in this paragraph. This fraudulent practice was so well camouflaged that the current owners of GLL did not detect it in the course of the due diligence they conducted in 2006 (which included the use of expert consultants) prior to purchasing the company. MOL App. 0013-0014. To this day, even with the benefit of GLL’s corporate records, they are unable to quantify the extent of the practice. MOL App. 0118-0120. Similarly, MOL was unaware of the

practice until August 2008, when one of its employees (Paul McClintock) was subpoenaed to testify in an arbitration proceeding instituted by the current owners. Upon learning of the scheme, MOL acted quickly to commence this proceeding.

To carry out this fraud, GLL's agents at origin locations in Asia repeatedly booked shipments with MOL to numerous false destinations.¹ For each shipment, GLL prepared and disseminated fraudulent documents showing the false destination. As noted, Global Link would issue its house bill of lading showing a destination different than that shown on MOL's ocean bill of lading. Global Link also would create two different delivery orders for each shipment: one showing the destination in the MOL service contract to which the cargo was booked (this first delivery order was given to and used in dealing with MOL and was identified by GLL as the "shipline" document). A second delivery order showing the actual destination was given to and used in dealing with the trucker (identified by GLL as the "truckline" document). Compare MOL App. 1286 (given to MOL) to MOL App. 1287 (given to trucker). Literally many thousands of such documents were created and disseminated in furtherance of this massive fraud. Using this device, GLL arranged for the cargo to be delivered to destinations that were not disclosed to MOL.²

Moreover, GLL employees were instructed not to discuss the scheme with MOL, were given guidance on how to provide false information to MOL, and were told to lie to MOL if questioned about the actual destination of the cargo. MOL App. 1207 and 1484-1485. GLL and the other Respondents admit to these facts. See, e.g., FOF #17. This fraudulent scheme resulted

¹ Hecny Shipping Limited, which was run by Jerry Huang, was the origin agent for Global Link. Hecny and Huang were involved in the false routing scheme. MOL App. 0110, ¶ 5; MOL App. 0116, ¶ 15.

² The officers and directors of the new owner of GLL confirmed that two sets of shipping documents were used for each shipment (see e.g., Deposition of David Donnini, MOL App. 1673, p. 17:9-20) and that GLL was lying to its ocean carriers. Deposition of John Williford, MOL App. 1650, p. 59:10-20.

in significant harm to MOL because in most cases (i) it would have been paid more had the cargo been rated in accordance with its actual destination, and (ii) it was repeatedly deceived into paying fraudulent invoices covering inland trucking services that never took place.

Although GLL conducted split routing over a period of years, by its own admission the use of the practice increased in 2005, when the CJR Respondents and Olympus Respondents were planning to sell Global Link (MOL App. 0116, ¶14), which they eventually did for \$128.5 million. As noted, the new owners were not able to detect the use of split routing by GLL until after they owned the company and a “whistle-blower” came forward. Donnini Dep. , MOL App. 1673-1674, p. 17:9-24, p. 18:01-10. Incredibly, the new owners elected to continue the illegal operations. Eventually they initiated litigation against the CJR Respondents and Olympus Respondents asserting that the actual value of the company they purchased for \$128.5 million did not exceed its liquidation value of \$11.9 million. MOL App. 0004-0005. Perhaps in part due to the new owners continuing the fraudulent practices, they were awarded only about \$12 million in damages by a panel of arbitrators. Thus, Rosenberg and the Olympus Respondents benefitted from their illegal scheme not only by reducing GLL’s transportation costs, but by inflating profits, thereby enabling them to sell their interests in GLL at greatly inflated prices.

Thereafter, many former GLL employees began working for a company named American Global Logistics, LLC (Rosenberg became its CEO in 2009). AGL established a working relationship with Seamaster Logistics, Inc., an NVOCC that formed part of the organization originally known as Summit Global Logistics (“Summit”). Summit was created around the same time as the sale of GLL. Jerry Huang, the former Managing Director of Hecny, was appointed Managing Director for the Asia Pacific region of Summit in 2007. MOL App. 0120, ¶19. Earlier this year, MOL won a judgment against Seamaster Logistics, Inc. and the affiliated

Summit Logistics International, Inc. (two NVOCCs organized from Summit) in connection with a fraudulent trucking scheme in Asia. The NVOCCs misrepresented the origin location for cargo they booked with MOL, causing MOL to pay millions of dollars for trucking services that never took place. See discussion of *Mitsui O.S.K. Lines, Ltd. v. Seamaster Logistics, Inc.*, 2013 U.S. Dist. LEXUS 40466 (N.D. Cal.) (“*Seamaster*”), *infra*. AGL was originally named as a defendant in MOL’s court action. See *Seamaster*, Slip Op. at 4, MOL App. 2033. The parallels between this case and *Seamaster* are striking. According to public news reports, the Summit organization, which carried out a truck fraud costing MOL millions of dollars, was sold in 2010 for \$70 million. In other words, subsequent to the conduct at issue in this case, newly formed NVOCCs have been found liable for a remarkably similar fraud against MOL in Asia. And, in both cases, the perpetrators of the fraud suborned MOL employees (Yip, as discussed in *Seamaster*, and, as discussed below, McClintock and Yang here)³.

In short, the instant case is about an NVOCC and its greedy owners who lied to MOL about where cargo was going, lied to cover up their unlawful conduct, and harmed MOL as a result.⁴ MOL alleges that by engaging in the foregoing conduct Respondents violated sections 10(d)(1) and 10(a)(1) of the Shipping Act and 46 C.F.R. § 515.31(e).

³ Only after it commenced these proceedings against GLL and the later proceedings against *Seamaster* was MOL able to learn through discovery how these trucking schemes were carried out. These schemes may very well have been related. Not surprisingly, MOL’s recourse has been limited to pursuing the responsible enterprises in civil proceedings. The truck scheme in this case and the truck scheme in *Seamaster* were unlawfully carried out not only to enrich the NVOCCs on each shipment, but also to create a false appearance of lawful profitability. That appearance allowed the two enterprises in question to be sold in the aggregate for an amount in excess of \$200 million. Respectfully, if the ALJ’s decision is allowed to stand, the bad actors in this case will go free. Such a result will send the wrong message to the industry.

⁴ MOL has set forth in great detail why Respondents Chad J. Rosenberg and CJR World Enterprises (together, the “CJR Respondents”) and Olympus Growth Fund II, L.P., Olympus Executives Fund, L.P., Louis J. Mischianti, David Cardenas and Keith Heffernan (collectively, the “Olympus Respondents”), all of whom were owners, officers and/or directors of GLL, are jointly and severally liable for GLL’s conduct. MOL May 1, 2013 Reply Brief (“MOL Reply Brief”), pp. 10-33. Since the ALJ did not address any of these arguments in the ID, they are not addressed in these Exceptions.

After rejecting MOL's request for a partial oral hearing, and after rulings by the ALJ on various dispositive motions and by the Commission on appeals from same, the ALJ issued the ID on July 9, 2013 based on the written submissions of the parties.

B. Summary of Initial Decision

The ALJ made 69 findings of fact based on a record involving several thousand pages of exhibits evidencing a course of conduct which lasted several years, involved tens of thousands of shipments, and numerous Respondents. He then found that two employees of MOL had apparent authority to act on behalf of MOL in consenting to and encouraging the unlawful practice of split routing by GLL, which, according to the ALJ, benefitted MOL. On the basis of these findings, MOL was denied relief.

II. STANDARD OF REVIEW

In reviewing the ID, the Commission may exercise "all powers which it would have in making the initial decision." 46 C.F.R. §502.227(6). Thus, the Commission reviews the ALJ's initial decision *de novo*. *Yakov Kobel and Victor Berkovich v. Hapag-Lloyd, A.G., et al.*, FMC Docket No. 10-06 (FMC, July 12, 2013), p. 10.

III. NUMEROUS FINDINGS OF FACT AND STATEMENTS BY THE ALJ ARE CONTRARY TO THE WEIGHT OF THE EVIDENCE, UNSUPPORTED BY THE RECORD, OR ARE OTHERWISE ERRONEOUS

Numerous findings of fact and statements in the ID are contrary to the weight of the evidence, unsupported by the record, or are otherwise erroneous. These factual errors contribute to the erroneous conclusions of law reached by the ALJ. As explained in greater detail below, the Commission should overturn these erroneous factual findings and statements, and make new findings consistent with the record.

A. The Initial Decision Reflects Fundamental Misunderstandings Of The Practice Of Split Routing That Are Fatal To The Validity Of The Decision

Many of the findings of fact and statements to which MOL takes exception reflect a misunderstanding of the practice of split routing so profound as to render the ID invalid. In many cases, the findings of fact are inconsistent with one another. In virtually all cases, the findings are unsupported by the factual record. Accordingly, the Commission should overturn the ID and make findings of fact consistent with the weight of the evidence in the record, as outlined below.

1. Finding of Fact #6: *At all times pertinent to this proceeding the service contracts between Mitsui and Global Link contained a number of 'regional door points' or destinations. There were no specific provisions in the service contracts to other destinations, although the contracts allowed Mitsui to assess diversion charges (Mitsui Ex. BV-BS)[sic].*

The MOL service contracts set forth at Mitsui Ex. BV-BZ contain rates to U.S. ports and points, the latter being specific inland destinations, but they do not designate any such destinations as “regional door points” or otherwise use that term. The finding that the MOL contracts contained “regional door points” reflects a serious misunderstanding of the split routing scheme.

A “regional” rate might be one that a service contract or tariff specifically applies to cargo transported to any particular location within a given region (such as a rate that covers all locations in a particular state or zip code). However, MOL’s service contracts and tariffs contained no such rates. More importantly, in GLL’s vernacular, a “regional door point” has a different and nefarious meaning which pertains to a critical element of its fraudulent split routing practice. Chad Rosenberg, the former owner and president of GLL, explained the concept in his deposition:

Q: Can you explain to us what a regional door point was when you were at Global Link?

A: Yes, it's when we just pick one point in a region and book to that point; typically, the lowest cost point.

Q: When you say "book to that point," do you tell the ocean carrier, either directly or through Hecny, that the container is going to that point on the contract, correct?

A: Correct.

Q: But you never intend for it to go there, correct?

A: Typically not.

Rosenberg Dep., MOL App. 1177-1178, p. 37:7-38:1.

Thus, for GLL, a "regional door point" is a real point to which a specific rate applies and to which GLL falsely tells the ocean carrier cargo is destined. In reality, unbeknownst to the ocean carrier, GLL arranges for the trucker to redirect the cargo to another location for GLL's own financial benefit. That benefit would take one or both of two forms -- the rate paid to MOL for carriage to the so-called "regional door point" was often lower than the rate that should have been applied to the actual destination, and/or the amount paid to the trucker by MOL for service to the declared door point was higher than the actual cost of trucking to the real but hidden destination, enabling GLL to benefit from the excess payment to the trucker. See also, Rosenberg Dep, MOL App. 1972, p. 50:2-23 (discussion of points with low rates being used to service multiple customer locations).

There are many reasons why the rate to one inland location might be lower than the rate to another, even when the lower-rated location involves a longer, more expensive trucking move. In some cases, the rate differential may be due to the carrier's need to position equipment in that area for use in another trade. In other cases, the rate differential may be based on the volume of cargo moving to that location, or because the customer had asked for a favorable rate on one of many routes. NVOCCs frequently request special rates to certain locations to enable them to compete for a specific piece of business. Regardless of why the differential exists, GLL exploited the lower rates through the use of its split routing scheme.

The excess trucking payments are clearly demonstrated by examining a particular set of door points GLL used repeatedly to carry out its scheme -- Johnson City, TN and Braselton, GA. The declaration of Warrin Minck (MOL App. 2077-2083) analyzes this example (which was discussed at p. 48 of MOL's Reply Brief, but which, inexplicably, was not discussed by the ALJ).

The service contracts between MOL and GLL during 2004-2006 contained rates to both Johnson City, TN and Braselton, GA. Both locations were served by the same route. As described by Mr. Minck, the routing of the GLL cargo in question was via ocean vessel from Asia to the U.S. West Coast, then by rail to Atlanta, and finally by truck to the door delivery points requested by GLL.

Mr. Minck summarized the activity under the 2005 contract. GLL booked 1,350 shipments to Johnson City that year, but redirected (without MOL's knowledge) 824 of them to Braselton. The service contract rate to Johnson City for a 40-ft. container was \$65 higher than the rate to Braselton, which means in 2005 GLL paid MOL more than \$50,000 to book these containers to the false door point of Johnson City. Why would GLL do so? The answer becomes apparent from MOL's cost of trucking.

Braselton is 217 miles closer to the Atlanta rail ramp than Johnson City. MOL paid truckers an average of \$657. per container to take containers to Johnson City and an average of \$249 to take containers to Braselton. Although GLL booked many shipments to Johnson City, it secretly worked with the truckers to redirect those shipments to Braselton, causing MOL to overpay on average \$408 for trucking each shipment. In other words, for the 824 containers in this example, GLL paid MOL an extra \$53,560 in freight charges (824 x \$65) to induce MOL to pay an extra \$336,192 for trucking that never took place (824 x \$408). This same fraud took

place repeatedly with a multitude of other points throughout the service contract years in question. MOL has been unable to get GLL and/or the truckers to explain what they did with the extra money.⁵

In the world of GLL, Johnson City was a “regional door point.” The ALJ appears to have accepted the concept. However, the finding is clearly erroneous in that the service contracts had actual rates to Braselton. There is no conceivable justification for the ALJ to have found that the contracts allowed GLL to book cargo to the false destination of Johnson City when GLL knew the cargo was going to Braselton. Under the Shipping Act, the rates to Johnson City and the rates to all other specifically named door point in MOL’s service contracts are applicable solely to the delivery of cargo to those specific destinations. MOL objects to this FOF because it did not agree to the use of its service contract rates as regional door points, either in the contracts or elsewhere.

2. Finding of Fact #16 -- *Global Link would attempt to locate truckers who would cooperate with the split moves by reducing their charges to conform to the actual delivery points rather than assessing the charges to the destinations shown on the Mitsui bills of lading. (Mitsui PFF 45).*

FOF #16 reaches a conclusion wholly unsupported by MOL PFF#45 which, based on an internal GLL e-mail exchange, stated that: “‘Split routing’ required locating a ‘preferred trucker’ with the lowest or best cost in transporting the last leg of the transit.” Neither the GLL e-mail nor the MOL PFF makes any references to truckers reducing their charges. Accordingly, the ALJ’s conclusion regarding reductions of charges by truckers is without support in the record. Indeed, as the discussion in the exception to FOF #39 below makes clear, GLL selected

⁵ 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 for transportation to the actual destination, GLL shared in some portion of the excess payment. See, August 11, 2003 e-mail of Eric Joiner, MOL App. 1624 (“However, we can’t short stop the container and get paid the difference...”). Although GLL was advised by counsel to stop the practice, based on the Johnson City-Braselton example and similar instances of GLL’s split routing, it does not appear to have ceased the practice. In any event, MOL should not have the burden of proving how these co-conspirators shared their ill-gotten gains.

truckers on the basis of their willingness to participate in the scheme – the truckers GLL selected secretly took cargo to locations undisclosed to MOL and fraudulently charged MOL as if the cargo had been taken to the originally declared door points.

Moreover, this FOF reflects a misunderstanding of trucking arrangements on the part of the ALJ. As the ocean carrier providing transportation to a U.S. inland destination, MOL contracts with an inland carrier to provide the final leg of such an intermodal move.⁶ The amount to be paid to the trucker for that service was negotiated between MOL and the trucker. GLL's fraudulent practices did not alter the arrangement between MOL and the trucker: MOL paid the trucker for delivery to the false destination provided to it by GLL. See, February 8, 2006 e-mail from Eileen Cakmur of Global Link, explaining split routing to a trucker:

You will be delivering to Norcross, GA...we booked this with P&O as if they were going to Chattanooga, TN, but they are not going there. They will be delivered to Norcross, GA. P&O is not supposed to know about Norcross, GA. Please do not mention anything to them. When you receive the work order or freight release from them, it will show Chattanooga, TN as a delivery destination but you will be delivering to Norcross, GA. They will be paying you as if they are going to from Austell to Chattanooga, TN. That's where you make your money. We call this 'split delivery.'

MOL App. 1498-1499. See also, MOL App 1316, a transportation purchase order showing that MOL paid truckers a flat, fixed rate of \$270 to move cargo from the Charlotte, NC rail ramp to Lenoir, NC (which cargo was unlawfully re-routed to Statesville, NC by Global Link, MOL App. 1312); and discussion of Johnson City/Braselton at pp. 9-10 above (fixed rates paid for trucking of cargo to each booked location).

The record repeatedly shows MOL paid truckers to take cargo to the proper bill of lading delivery points. Without MOL's knowledge, GLL instructed those same truckers to redirect the

⁶ The rates set forth in Mitsui's service contracts were single factor rates, which means they did not break out separate elements for the ocean and inland portions of the intermodal transportation, as permitted by 46 U.S.C. §40501(a).

shipments to other undisclosed locations chosen by GLL. MOL received no credits or refunds for these secret changes, and there is nothing in the record to suggest otherwise.

3. Finding of Fact #32 (including footnote #48): *Because the service contracts between Mitsui and Global Link did not have rates for all of the destinations to which shipments were to be delivered, the shipments would be diverted to the actual destinations. Mitsui could not charge diversion fees because the contracts did not include the actual destinations. They would charge for the contractual door points listed on their bills of lading. Yang assumed that Jim Briles of Global Link would have complained to her if Mitsui had attempted to impose diversion charges. (Yang deposition. Global Link Ex. D1, pp.40, 41, 62, App. 35, 39.)*

Footnote 48: Presumably Yang meant that Mitsui could not charge diversion fees as a practical matter rather than because of the language of the contract. Mitsui would have alienated its customer Global Link if it charged diversion fees for having shipments delivered to actual door points after Mitsui had resisted adding those door points to its service contracts. A different situation might have prevailed if the diversions were the result of new instructions from Global Link's customers. In such cases, Global Link might have been in a position to pass the additional charges on to the customers.

This finding of fact (“FOF”) contains a number of incorrect assumptions and errors. However, before enumerating the specific deficiencies, MOL notes that the FOF is based solely on the testimony of Rebecca Yang. As explained below, that testimony is wholly unreliable.

In the same testimony relied upon by the ALJ as the basis for this FOF, Ms. Yang testified that had MOL known that cargo was moving to places other than the bill of lading destination, it would have charged the diversion fees. Yang Dep., GLL Ex. D, App. 0035, p. 39:12-25. Ms. Yang also testified that she was unaware that cargo was moving to locations not covered by the service contracts between MOL and GLL. Yang Dep., MOL App. 2025, p. 71:21-p. 72:20. The record also reflects that Ms. Yang told Kevin Hartmann, Vice President, Law & Insurance of MOL’s U.S. agent, in 2008 and again in early 2009 that she was unaware of split routing. FOF ## 52 and 53; MOL App. 1944. However, the weight of the evidence in the

record indicates that Ms. Yang was aware of split routing. FOF #35. Accordingly, her testimony is not credible and the ALJ erred in relying upon her testimony as the basis for this FOF.⁷

Having said this, more reliable evidence in the record demonstrates that the FOF is flawed in other ways. As an initial matter, the first sentence of the FOF indicates cargo was diverted because the actual destination was not in the service contract.⁸ This is incorrect for two reasons.

First, the ALJ found that GLL historically engaged in a practice known as “split routing”, “misbooking”, or “rerouting,” which consisted of booking cargo to false inland destinations while intending to redirect the cargo to other inland destinations. See FOF #13. Having found that GLL engaged in the practice of lying to carriers about the destination of cargo, he nonetheless concludes, solely on the basis of Ms. Yang’s discredited testimony, that the reason for split routing was that the destination wasn’t covered in the contract. This conclusion is clearly erroneous. The reason for the split routing was to defraud MOL and benefit GLL by permitting GLL to access lower rates than those otherwise applicable and/or by duping MOL into paying for trucking services that were not actually provided. Indeed, Respondent Rosenberg instructed GLL employees not to worry about getting contract rates for destinations in areas where the contract already contained a good rate to one location. MOL App. 1472.

The conclusion that split routing was necessitated by the lack of contract points is also wrong in that GLL often used split routing when both the false destination and actual destination

⁷ The court in *Seamaster* found that Yang was fired by MOL for passing confidential information to customers, and that she had spoken to Jerry Huang about the illegal truck arrangement used against MOL in Asia, *Seamaster*, p. 51, n. 10, and p. 52, line 15 (MOL App. 2048). Huang, while at Hecny, and later while at American Global Logistics, had a relationship with Respondent Rosenberg.

⁸ Once again, a clarification in the use of terminology is required. MOL uses the term “diversion” to mean a situation in which a shipper asks it to deliver cargo to a destination other than the one to which it was originally booked, in accordance with the terms of MOL’s tariff rule governing such requests. MOL uses the term “split routing” to mean a situation in which the shipper secretly arranges with the trucker for the cargo to be delivered to a place other than the named destination, without informing MOL.

were included in the service contract. See, footnote #49 of the ID; and the discussion of Johnson City/Braselton at pp. 9-10. In other words, GLL didn't care whether a point to which cargo was moving was covered by the contract -- it would lie about where the cargo was going in order to obtain the greatest financial gain even when both points were covered by the contract.⁹

The second sentence is also contrary to the evidence in the record. All of MOL's service contracts with GLL were subject to the rules in MOL's tariffs. See, paragraph 2 of MOL Ex. BV-BZ, App. 1695, 1735, 1774, 1818 and 1877. These tariffs included a rule on diversion of cargo. See, MOL's response to February 3, 2012 "Order for Mitsui to File Service Contract Provisions and Tariff Rules Regarding Diversion of Shipments," MOL App. 1907-1936. That rule states that if cargo is diverted, it is to be rated in accordance with MOL's tariff. MOL App. 1909. Thus, the factual finding that diversion fees could not be assessed because the new destination was not included in the contract is simply wrong. The real reason that the diversion fee was not charged on GLL's split routing shipments is that GLL did not request the cargo to be diverted -- it secretly arranged for the cargo to be delivered to a location other than the named destination without telling MOL. Similarly, for the same reasons as set forth above -- i.e., no diversion fees were charged because GLL did not disclose to MOL that the cargo was not moving to the destination to which it had been booked -- footnote #48 is clearly incorrect.

Moreover, the entire argument with respect to the inclusion of additional door points to the service contracts is a red herring because the record reflects that MOL routinely amended these and other service contracts and that the addition of door points was not a burden for MOL (MOL PFF of Fact #14; Declaration of Warrin Minck, ¶6, MOL App. 2079). The ALJ, rather than weighing the evidence as to the burden involved in amending the service contracts, simply

⁹ See also 31 S.R.R. at 1373-74 (earlier decision of ALJ Guthridge finding split routing occurred with respect to destinations covered by MOL service contracts).

adopts GLL's distorted version of facts. In so doing, he disregards the uncontroverted evidence that these contracts were frequently amended. The ALJ's conclusion that MOL would have alienated GLL if it charged diversion fees is pure speculation, as are his observations about what situation "might have prevailed" under different circumstances.

The bottom line is that the presence or absence of given destinations in the service contracts is irrelevant. GLL historically engaged in the practice of split routing and did so regardless of whether the actual destination was covered by its contracts with MOL.

4. Finding of Fact #47 (including footnote #51): *Subsequently, on August 11, 2005, Nicole Angellillo of Evans Trucking sent an e-mail message to So with a copy to Luci Bass of Mitsui. The message stated that Angellillo was on a conference call with Lacey from Mitsui and Kathy at Global Link and that Evans would reduce its trucking charge to \$440, thereby contributing \$ 100 (presumably the reduction in the trucking charge) to the "diversion fee for Global Link." Mitsui would apply the \$ 100 to the next instance in which Global Link needed a diversion fee so that Global Link would not be "out of pocket." (Global Link Ex. J1, App. 127)*

Footnote 51-- It is unclear what position Lacey held at Mitsui, but there is no evidence that Mitsui made an oral or written objection to this arrangement. In the absence of evidence to the contrary and in the context of other evidence concerning the practice of split routing, I construe the term "diversion charge," as used in this message, to mean any expense that Global Link might incur for a future shipment in which the rate for the actual destination exceeded the rate for the contractual door point.

FOF #47 and Footnote #51 deal with the documents set forth at GLL App. 127, which pertain to a situation in which the MOL Norfolk office actually discovered that GLL was improperly redirecting cargo booked for Martinsville, VA to other locations including, but not limited to, Beltsville, MD. In FOF #47, the ALJ misreads the e-mail from Evans Trucking. The conference call described therein does not reflect an agreement by MOL to participate in split routing, but rather reflects a situation in which an employee at MOL (Laci Bass) caught GLL unlawfully redirecting cargo and tried to force it to comply with MOL's diversion rules.

The MOL tariff rule on diversion applies a \$100 charge to diversion requests. What this e-mail shows an effort by MOL to assess the \$100 diversion fee. In this example, the trucking

company is agreeing to pay the diversion fee to MOL on behalf of GLL. Thus, GLL and the trucker are admitting to the applicability of a diversion fee after MOL caught them redirecting the shipment. The ALJ completely misconstrues this admission by GLL and its trucker. If MOL had allowed split routing why would GLL and the trucker agree to pay a diversion fee after they were caught redirecting the shipment? And why would the trucker return a portion of the rate it charged MOL? The answer is simple: MOL did not agree to the scheme.

That the ALJ misunderstood this evidence is readily apparent from the comments GLL made about the incident, a mere four days later. On August 15, 2005, in a memorandum from Jim Briles to GLL staff, bearing the subject line “mol mlb to Martinsville, VA,” he states:

If anybody has a shipment on the above mentioned routing, please be informed that the MOL Norfolk office is carefully scrutinizing the final destination and will not release the dispatch to your preferred truckers if they find out that container is not going to martinsville, va. Please check with Joanne asap for a list of truckers we can use for this trade lane. If anyone from MOL (especially Laci) contacts and/or harasses you for a correct final destination, please do not mention not routing to the correct door and simply tell them the container is going to Martinsville, VA.

MOL App. 1484. If there had been some arrangement in which MOL was complicit, why would Mr. Briles be telling his employees to lie to MOL if questioned? If Laci Bass allegedly agreed to a split routing scheme, why is she raising questions and why is Mr. Briles singling her out as someone who must not be told the truth?

FOF #47 and footnote 51 are incorrect and irrelevant. They should be replaced with findings that when MOL uncovered an instance of cargo being redirected, its employees tried to put an end to the practice, but GLL refused to comply.

5. Footnote #50: *The record contains evidence of other instances in which Global Link did split routing with the knowledge and consent of Mitsui's representatives.*

This conclusory statement is made without any reference to the record to support it. Moreover, given that it is made in the context of a split routing arrangement to which MOL objected and about which GLL directed its employees to lie to MOL (see discussion of FOF #47 above), the statement that there are “other instances in which Global Link did split routing with the knowledge and consent of “Mitsui’s representatives” is both inaccurate and without record support. The overwhelming evidence is that only Paul McClintock and Rebecca Yang of MOL knew about split routing. See, ID at p. 58.

This is further supported by the ALJ’s own statement in footnote #52 of the ID, in which he states, “It has not been alleged that either McClintock or anyone else informed McClintock’s superiors of the split routing scheme prior to the commencement of the arbitration by Global Link’s current owner.” ID at p. 52. Thus, as explained in the discussion of FOF #36 below, “upper level management” of Mitsui for purposes of split routing means only McClintock and Yang, who the ALJ also found “set the policy (whether or not official) as well as the tone.” ID, p. 59.¹⁰

6. Statement, bottom of p. 57 of ID to top of p. 58 of ID: *Global Link used split routing for Mitsui's shipments whenever it was necessary to deliver goods to door points not named in the service contracts between Global Link and Mitsui (FF 32).*

This statement is incorrect. See discussion of FOF #32 above. GLL used split routing to move cargo to destinations named in its service contracts with MOL, as well as destinations not named in the contracts. The point of “split routing” was to defraud MOL and obtain financial benefits in the form of lower rates and/or the additional sums MOL would be tricked into paying

¹⁰ See, e.g., ID at p. 59 (“it was McClintock and Yang who set the policy”); ID at p. 59 (“no evidence that McClintock or any other Mitsui employee informed more senior managers or executives of the split routing scheme with Global Link, or that anyone at Global Link communicated with more senior representatives of Mitsui with regard to split routing.”).

the trucker for services not performed. The purpose certainly was not administrative convenience.

7. Statement, bottom of p. 58 to top of p. 59 of ID: *Simple logic dictates that rank and file operations employees performed the actual functions of preparing the house bills of lading and of dealing with truckers if necessary. Nevertheless, it was McClintock and Yang who set the policy (whether or not official) as well as the tone.*

The reference to “house bills of lading” in the first sentence of this statement is either an error or reflects a fundamental misunderstanding of the practice of split routing on the part of the ALJ. The bill of lading issued by the ocean carrier (MOL) to its NVOCC customer (GLL) is commonly referred to in the industry as the “master” bill of lading, while the bill of lading the NVOCC (GLL) issues to its underlying customer is referred to as the “house” bill of lading. Briles Deposition, MOL App. 1221. There is absolutely no evidence to support a finding that MOL employees prepared GLL house bills of lading. This distinction is crucial. Unbeknownst to MOL, GLL booked cargo to fake door points that appear on MOL’s master bills of lading. By contrast, GLL prepared house bills of lading that contained the actual door points to which GLL diverted the truckers.

8. Footnote #60 -- *The provisions for diversion fees in the service contracts indicate that the parties anticipated instances in which shipments were to be delivered to door points not contained in the contracts.*

This statement is incorrect in several respects. First, the MOL contracts with GLL contain no express provisions relating to diversion. As noted, they incorporate MOL’s tariff rules on diversion by reference. Virtually all ocean common carriers have rules relating to diversion of cargo in their tariffs, since customers occasionally have a legitimate commercial need to change the destination of a shipment, and carriers have rules in place detailing how such shipments are to be rated, regardless of whether the new destination is named in a contract. This

footnote seeks to use the existence of such rules to bolster the ALJ's erroneous conclusion that MOL had knowledge of split routing. This implication is unsupported by the record.

9. Statement in Footnote #21: *Although none of the parties has fully explained the implementation of the trucking allowance, it would appear that, in negotiating rates for various inland destinations, Mitsui would allocate a portion of each rate to the cost of moving the cargo from the port of discharge to the inland destination. The fact that Mitsui allowed a trucking allowance indicates that Global Link and Mitsui anticipated that Global Link would pay the trucker and then pay the remainder of the negotiated rate to Mitsui. A trucking allowance would not have been necessary if Mitsui paid the trucker.*

The only accurate portion of this statement is the phrase which states that a portion of each service contract rate covering an intermodal movement is used to pay the trucker that performs the inland leg of the move. Obviously, if a shipping line charges a customer \$2,000 to move a container from China to an inland location in the United States, some portion of that \$2,000 rate relates to the shipping line's cost to move the container from the port of discharge in the U.S. to the U.S. inland destination. Everything else in this statement is completely wrong and contrary to the evidence.

The difficulties appear to begin with the use of the phrase "trucking allowance," which was used in Global Link's voluntary disclosure to the FMC. MOL App. 0114. The ALJ inexplicably concludes that an "allowance" means that "Global Link would pay the trucker and then pay the remainder of the negotiated rate to Mitsui." This is totally inaccurate. As noted above in the discussion of FOF #16, MOL agreed with truckers on an amount to be paid for trucking services on a particular route, and it paid that amount when GLL booked shipments on that route. In light of this, the statement that a trucking allowance would not have been necessary if Mitsui paid the trucker makes no sense -- Mitsui *did* pay the trucker and in thousands of cases paid more than it should have because of the unlawful conduct and deceit of Respondents. Moreover, there is not one scintilla of evidence to support the conclusion that

GLL would pay “the remainder of the negotiated rate to Mitsui.” Simply put, this statement reflects the ALJ’s failure to understand the intermodal arrangement.

10. Statement in Footnote #40: *It is unclear whether Global Link’s alleged cessation of shortstopping included its dealings with Mitsui as well as with other ocean carriers.*

This statement too is incorrect and reflects a gross misunderstanding of “shortstopping” on the part of the ALJ. The ALJ found that that the advice GLL received from its attorney regarding shortstopping in 2003 stated unequivocally that shortstopping was a fraud on the carrier. ID at p. 61. He also found that GLL understood the advice to mean that shortstopping may be illegal and that GLL instructed its personnel to stop the practice. FOF #22. GLL’s attorney, in that 2003 advice, defined “shortstopping” as a situation in which cargo goes to a destination short of its original destination and in which the motor carrier has collected more or a different amount from the ocean carrier than it is entitled to collect. MOL App. 1587. In other words, in 2003 GLL received unequivocal legal advice that it would be illegal to book cargo to one destination and have it delivered to a different destination closer to the location where the trucker picked up the cargo. GLL’s former owner and president swore in a written declaration he understood the advice and instructed GLL personnel to stop the practice. FOF #22.

In light of the foregoing, Mr. Rosenberg and the ALJ would be hard-pressed to explain why more than 800 shipments booked by GLL for transport to Johnson City, TN during 2005 were redirected by GLL without MOL’s knowledge to Braselton, GA, which is 217 miles closer to the origin rail ramp. This represents just one of many examples of “shortstopping” in the record. In other words, contrary to what the ALJ states in footnote #40, and contrary to Mr. Rosenberg’s written declaration, the record is absolutely clear that GLL continued to engage in shortstopping with MOL after 2003.

This statement is telling because it shows that the ALJ either disregarded the evidence supplied with MOL's Reply Brief or did not understand it. It is also important because it shows that GLL was not the least bit interested in complying with the Shipping Act, even after it received advice that it understood to mean that its conduct was unlawful. GLL was going to and did engage in unlawful split routing, regardless of the lawfulness of the conduct.

11. Footnote #43: *In order to avoid redundancy, I will omit citations to cumulative and largely duplicative evidence submitted by other Respondents concerning Mitsui's knowledge of split routing and the benefits of split routing to Mitsui. I have also omitted citations to evidence concerning Mitsui's business practices with regard to Nintendo. While Nintendo's shipments were frequently sent to inland destinations not listed on Mitsui's bills of lading, the practice was evidently initiated by Nintendo itself inasmuch as Nintendo insisted on naming its own preferred truckers for the inland portions of its shipments. At the most, Nintendo's practices show that Mitsui was generally aware of the existence of split routing, by whatever name, and consented to the practice by Nintendo.*

This statement contains several inaccuracies with respect to Nintendo, a beneficial cargo owner. As an initial matter, MOL merely notes that it cannot reply to citations that have been omitted. Thus, it must assume that the exceptions set forth herein address the unspecified "cumulative and duplicative" evidence on which the ALJ appears to have relied at least in part in reaching the ID.

Having said this, there are three fundamental problems with the statements regarding Nintendo. First, in an order dated April 12, 2012, and again in an order dated August 3, 2012, ALJ Guthridge found that the issue of Nintendo was irrelevant to this case. Accordingly, this footnote is improper and has no merit. Second, in his April 12, 2012 order, Judge Guthridge distinguished between GLL and Nintendo on the grounds that Nintendo was not issuing false documents like GLL. MOL App. 1129. Third, the record is clear that MOL did not engage in split routing with Nintendo. See MOL Reply Brief, pp. 54-55. Thus, contrary to the ALJ's

assertion, and consistent with the findings of the original ALJ, MOL's relationship with Nintendo is irrelevant to this proceeding.

B. The ALJ's Findings of Fact and Statements Regarding MOL's Knowledge Of Split Routing Are Incorrect

1. Finding of Fact #33: *While Yang was with Mitsui she would not have been surprised to learn that goods were being delivered to destinations other than those contained in Mitsui bills of lading. She did not think that this practice would have been a surprise to anyone else at Mitsui. (Yang deposition, Global Link Ex. Dl, p.36, App. 34.)*

As noted above in the discussion of FOF #32, Yang's testimony is unreliable. Moreover, in reading the deposition, it is unclear if Yang is talking about legitimate diversions notified to the carrier and addressed under a tariff rule, or split routing in which the actual mis-routing of the cargo is kept hidden from the carrier. Even if Yang was referring to split routing, what may or may not have surprised her does not prove that anyone at MOL other than McClintock and Yang knew about GLL's practice of split routing. As noted below in the discussion of FOF #36, the record supports the conclusion that only McClintock and Yang were aware of GLL's practice.¹¹

2. Finding of Fact #36: *McClintock told Briles that he wanted knowledge of split routing to be confined to upper-level management of Global Link and Mitsui. (Briles deposition. Global Link Ex. El, pp.133, 134, App. 55, 56.)*

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 particular the testimony of Edward Feitzinger, the Senior Vice President of Golden Gate Logistics (the entity that purchased Global Link from the Respondents). Mr. Feitzinger testified as follows:

Q. Did you ever ask anyone [at GLL] why Mitsui was willing to engage in split shipments if split shipments were not proper?

A. Yes.

Q. Who did you ask?

¹¹ The ALJ held that "If Mitsui is to be charged with knowledge of the split routing scheme, it must be through the knowledge and actions of McClintock and, to a lesser extent, of Yang." ID at p. 58.

A. I – somebody on the GLL management team.

.....

A. And so we had dialogues with the team, saying, you know, what is MOL's -- does MOL, you know, know ["split routing"] is going on and -- Jim [Briles] or Gary [Meyer], again, that was two of the likely suspects, was that we had helped make Paul [McClintock] a success in MOL and that because Paul had been successful and, you know, it was -- this was something that was sort of kept on the quiet and that Paul [McClintock] -- that the people [at MOL] in Oakland who were[with] MOL Americas didn't know about ["split routing"] and that we at Golden Gate shouldn't talk to MOL.

It was a big discourse, because we were right next to MOL here, and we thought it would be good to develop a relationship with them since we're 15 minutes away. And Jim [Briles] was just adamant that we not develop a relationship with [MOL in] Oakland.

Mr. Feitzinger further described the relationship between McClintock and GLL as follows:

Q. Are split shipments, in your view – as a business person engaged in the logistics business – or at least had been engaged in the logistics business, is it a fraud on ocean carriers?

A. So I would say – I would not use that word.

Q. Okay.

A. . . . Again, I'm shying away from the word "fraud" because I'm not comfortable with this bigger meaning, and I don't mean to be evasive. I'm just saying I don't -- that we were cheating -- we were cheating Maersk, I would use the word "cheating," because I'm more comfortable with that, and we were certainly doing things that I don't think the Oakland office or the Singapore office of MOL would think would be appropriate in a sense, and that if they were to know about ["split routing"] at that point, I think that they would have not looked kindly on [Paul McClintock] who was in the -- you know, in my opinion, in collusion with Jim [Briles] on [hiding "split routing" from MOL].

Feitzinger Dep. 205:10-206:23 and 210:6-211:5 (MOL App. 1995-1998). 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.

In this same regard, the March 9, 2006 e-mail from Jim Briles to GLL Operations staff (MOL App. 1485) speaks volumes about the relationship between GLL, McClintock/Yang and MOL.¹² In that e-mail, Briles stresses that GLL can never tell the steamship line that it is not delivering to the master bill of lading destination. He then says he is “working with Rebecca” on the particular routing in question (Fishers, IN). It is telling indeed that while Briles can’t tell the steamship line (MOL) what is going on, he can tell Rebecca Yang. Obviously, GLL did not consider Rebecca Yang and MOL to be one and the same, and Briles could discuss with Rebecca things he couldn’t tell MOL. Finally, the ALJ himself found that the practice of split routing was not disclosed to or discussed with management above McClintock by McClintock, other MOL employees, or GLL. See footnote #7, *supra*.

In light of the Feitzinger testimony and the Briles e-mail, as well as his other findings described in footnote #2 hereof, the ALJ erred in finding that discussions of split routing were to be limited to upper-level management. What the record shows, and what the Commission should find, is that discussions about and knowledge of split routing were limited to McClintock and Yang.

3. Finding of Fact #37: *No Mitsui representative at McClintock's and Yang's level refused to do a split move. Although certain lower level Mitsui employees raised objections, McClintock and Yang encouraged the practice. (Briles deposition. Global Link Ex. El, p. 126, App. 54.)*

This FOF is flawed because it takes the testimony out of context. The full testimony of Mr. Briles was as follows:

Q: Did you deal with other people at MOL that recommended that you conduct a split move?

A: They were our contacts in the company.

Q: Did you ever hear of or have contact with anyone at MOL who refused to do a split move?

¹² In its voluntary disclosure to the FMC, GLL cited this same e-mail as evidence that it “actively took steps to conceal the false routing scheme from the ocean carriers.” MOL App. 0117.

A: At that level, no.

Q: At a different level?

A: I know situations came up with operations, which was below it. But at that level, and those were our key contacts, and they were in charge of sales and operations, no, there was no issue. They actually encouraged it.

Q: Who encouraged it?

A: Paul and Rebecca.

GLL App. 0054. Reading this testimony in context, it is clear that the reason no employee at the level of McClintock and Yang refused to do a split move is because those two individuals were GLL's contacts at MOL and no other employees at that level were asked to do split moves. Indeed, great effort was made to keep split routing a secret from other MOL employees.¹³

Mr. Briles' testimony also highlights one of the fundamental weaknesses in Respondents' arguments and the ALJ's ID: Paul McClintock was in charge of the individuals in sales and operations who caught an occasional incidence of GLL redirecting a container and raised questions about it. If McClintock had authority to engage in split routing, why didn't he instruct his subordinates to permit the practice when they raised objections about split routing? Why instead did he tell GLL to deal only with himself and Rebecca Yang? If GLL thought that McClintock and Yang had apparent authority to engage in split routing, why did GLL tell its operations people not to disclose split routing to the steamship line? Why did GLL continue to prepare and disseminate thousands of fraudulent documents? The answer to these questions is simple: McClintock and Yang had aligned themselves with GLL against the interests of MOL, and GLL knew it.

4. FOF #48: *Briles informed representatives of Mitsui of situations in which shipments were not going as far as the destinations contained in the contract. The last time he did so was during the course of a conversation with McClintock in July or August of 2007. (Briles deposition. Global Link Ex. El, pp.123, 124, App. 53.)*

¹³ See ID at p. 59, where the ALJ finds that when Ted Holt, an MOL employee, raised concerns about a misdirected shipment with McClintock, McClintock told him he would follow up with MOL's in-house attorney, but then did not do so.

There is no evidence in the record to support the conclusion that Briles informed anyone at MOL other than McClintock and Yang about split routing. The deposition testimony cited as the basis for this FOF does not identify any representative of MOL other than McClintock.

Moreover, Briles testified that McClintock and Yang were his contacts at MOL. See discussion of FOF #37, *supra*. Accordingly, the implication that Briles discussed split routing with anyone at MOL other than McClintock and Yang is unfair and without a basis in fact.¹⁴

This FOF and the statement discussed immediately below both suggest that in some cases split routing deprived MOL of revenue but provided it with additional revenue or cost savings in other situations, and that these two scenarios balanced one another out such that MOL didn't suffer any harm as a result of split routing. This intimation is without any factual basis in the record. MOL did not realize any savings when cargo was trucked to actual destinations more distant than the false destination to which the cargo was booked -- as noted in the response to FOF #16, it paid the trucker for the booked routing. Moreover, in at least some instances, McClintock, without any legal authority to do so, secretly arranged for MOL to pay additional money to GLL's preferred trucker for trucking to more distant actual destination.

In this regard, the Declaration of Warrin Minck, ¶¶ 10-15 (MOL App. 2080-2081) details a portion of GLL's split routing scheme relating to Winnsboro, LA. As Mr. Minck explains, relying on documentary evidence, GLL booked more than 500 shipments to Monroe or West Monroe, LA but subsequently redirected them to Winnsboro, LA. Although there was no contract rate to Winnsboro and Winnsboro was not mentioned in any MOL bills of lading,

¹⁴ See also MOL App. 1485 ("We can never tell the SSL [steamship line] that we are not delivering to the master bill final destination."); and ID at p. 59 ("no evidence that McClintock or any other Mitsui employee informed more senior managers or executives of the split routing scheme with Global Link, or that anyone at Global Link communicated with more senior representatives of Mitsui with regard to split routing."). Interestingly, the ALJ's finding that Briles informed MOL of shipments not going as far as the destinations contained in the contract is a finding that GLL was engaged in shortstopping, a practice the ALJ found elsewhere may have been stopped.

McClintock authorized an increase in the payment to the trucker for transportation to Winnsboro. In other words, MOL wound up footing the bill for trucking to a location for which there was no contract rate, which was not named in its bill of lading, to which cargo was not booked, and which was farther away than the booked destination. Obviously, this practice had no perceptible benefit to anyone other than GLL.

5. Statement in last full paragraph, page 62: *For the reasons stated above, Mitsui is charged with contemporaneous knowledge that, in some cases, Global Link was not paying it for transportation to the actual inland destinations of shipments, although, in other cases, Global Link paid Mitsui for transportation to destinations that were farther than the actual door points where the goods were delivered. The salient point is that Mitsui went into the arrangement with its eyes open. McClintock and Yang, with at least apparent authority from Mitsui, accepted the benefits to Mitsui of the arrangement, which were not inconsequential, in return for the monetary loss, if any, that Mitsui suffered. Therefore, any monetary losses suffered by Mitsui, which were not offset by overpayments and by savings derived from Global Link's assumption of responsibility for the inland movement of shipments, were proximately caused by its own actions.*

The first portion of this statement is inconsistent with footnote #40 and evidences the ALJ's failure to understand the issues in this case. In footnote #40, the ALJ stated it was unclear if GLL engaged in shortstopping with MOL. As demonstrated in the discussion of footnote #40 above, that statement is incorrect. Here, the ALJ contradicts his earlier statement that it is unclear whether GLL engaged in shortstopping by acknowledging that cargo was delivered to locations less distant from the port or rail ramp than the locations to which GLL told MOL the cargo was destined. This is the definition of shortstopping. These internal inconsistencies in the ID demonstrate that there was an insufficient consideration of the record and understanding of the issues for the merits of the decision to withstand scrutiny.

As explained immediately below, the second portion of this statement is erroneous both factually and legally. Factually, there is no basis upon which the ALJ could reasonably conclude that MOL benefitted from the practice of split routing. Indeed, it defies logic to say that MOL benefitted by being tricked into paying for trucking services that were not performed. As also

explained below in section V.A of this brief, the ALJ's legal conclusions regarding apparent authority and the knowledge of MOL are contrary to law.

C. There Is No Factual Basis To Conclude MOL Benefitted From Split Routing

1. Finding of Fact #39: *It was a significant benefit to Mitsui for Global Link to assume the responsibility for delivery of goods to door points. Other customers of Mitsui also handled the inland phase of transportation. However, Global Link was unusual in that it used truckers that charged the market rate that Mitsui had agreed to. (McClintock deposition. Global Link Ex. CI, pp.63-65, App. 17.)*

Footnote #59: *Global Link's skill in identifying preferred truckers was shown by the fact that, unlike truckers named by other NVOCCs, Global Link's truckers were willing to accept the rates established in Global Link's service contracts with Mitsui (FF 39). This undoubtedly made split routing more attractive to Mitsui.*

FOF #39 is based on the deposition of Paul McClintock. In his decision, the ALJ found McClintock's testimony to be "self-serving" and refused to credit it (ID at p. 59). Despite having found McClintock's testimony to be unreliable, particularly with respect to whether or not he consulted MOL's in-house attorney, the ALJ inexplicably relies on McClintock's testimony with respect to other issues. This reliance is misplaced.

McClintock told Kevin Hartmann of MOL in 2008 and again in early 2009 that McClintock was unaware of split routing. FOF ## 52 and 53; MOL App. 1943-1944. McClintock repeatedly denied having knowledge of split routing in his deposition. MOL App. 2008, 2009 and 2014-2015. However, the weight of the evidence in the record indicates that Mr. McClintock was aware of split routing. FOF #35. Accordingly, his testimony cannot be considered credible and the ALJ erred in relying upon his testimony as the basis for this FOF.

Moreover, even if one gives some weight to McClintock's testimony, FOF #39 (and hence footnote 59) are not supported by that testimony. A careful reading of McClintock's testimony reveals that what he welcomed and said was "really unusual" about GLL's use of preferred truckers was the fact that GLL made all of the arrangements with the preferred

truckers. McClintock Dep., 64:13-6:14; GLL App. 0017. Most customers designate a preferred trucker to be used by the ocean carrier and then let the carrier make all necessary arrangements with that trucker. However GLL took over making those arrangements. *Id.* By doing so, GLL was able to collude with the truckers. Obviously, a customer not engaging in fraud would not need to control the trucking to that degree.

As the carrier responsible for delivering cargo to an inland location, MOL negotiates a rate with the trucker that will provide the trucking to the inland location. That negotiated rate is paid to the truckers by MOL in accordance with transportation purchase orders issued to the truckers. See, discussion of FOF #16, *supra*. However, contrary to the conclusion the ALJ reaches in FOF #39 and footnote #59, GLL's service contracts with MOL do not reflect the rates that MOL paid truckers performing the inland leg of through intermodal transportation. Thus, there is no connection whatsoever between the GLL/MOL service contracts and the selection of preferred truckers.

Moreover, McClintock's testimony indicates that whereas the preferred truckers of many customers were chosen for reasons of quality and hence charged a premium over what MOL would normally pay for trucking on a particular route, the record shows the preferred truckers chosen by GLL were selected because those truckers were willing to engage in split routing. In this regard, MOL PFF #44, which quotes from GLL's voluntary disclosure to the FMC, reads:

'Split routing' did not only involve locating favorable freight rates and charges on certain routings. It was also important for the false routing scheme that Global Link be able to designate its 'preferred truckers' to be used by ocean carriers. This is because it was necessary to find motor carriers who would be willing to deliver the ocean containers to a different destination than the one shown on the master bill of lading and carrier's freight release.

GLL admitted the foregoing PFF. Accordingly, the ALJ's conclusions, reflected in FOF #39 and footnote 59, that the selection of a preferred trucker was in some manner connected to rates, and

that such selection made split routing “more attractive” to MOL, are completely erroneous and are based on a misreading of the relevant testimony. GLL selected its preferred truckers based on their willingness to participate in the fraud against MOL.

Finally, the finding that there was a “significant benefit” to MOL of split routing is clearly erroneous. That finding, as noted above, is based solely on the unreliable testimony of McClintock and Yang. Moreover, the finding ignores reliable testimony of other MOL employees (Minck and Craig) based on documentary evidence and specific examples of the harm caused to MOL by split routing, evidence that the ALJ does not even mention, much less evaluate, in the ID.

GLL obtained very significant benefits by fraudulently inducing MOL to overpay for trucking and/or by obtaining transportation at rates lower than those lawfully applicable, and MOL was significantly harmed by these actions. While the precise amount of this unlawful benefit will only be shown in the damages phase of this proceeding, it is in the millions of dollars. The discussion of the Johnson City/Braselton example shows how GLL and its co-conspirator truckers derived benefit from the practice, and how MOL suffered harm as a result.

Additional evidence that the split routing scheme harmed, rather than benefitted, MOL is found in the declaration of Mr. Richard Craig (MOL App. 2152-2155). In that declaration, Mr. Craig explains how Paul McClintock had discretion whether to use GLL’s preferred truckers and authority to decide how much they were to be paid. Mr. Craig further explains how McClintock had reported to the Company’s Yield Management team that all of GLL’s cargo, in particular from Dallas to West Monroe, was moving via train. However, the Yield Management team subsequently found McClintock’s statement was untrue in that two-thirds of the cargo actually was moving by truck, not rail, which made it “way under water,” meaning it was not at all

profitable. To make matters worse, the Yield Management team also discovered McClintock had approved increased payments for the trucking from Dallas to West Monroe, from \$880 to \$1,012 per container.

Warrin Minck's declaration (MOL App. 2071) includes actual e-mails in which McClintock tells Yang he is authorizing 50% of Global Link's containers to move by truck from Dallas. It turns out 168 of those containers were secretly redirected to Shreveport, Louisiana, causing MOL to pay for 16,000 fictitious miles. Under the foregoing circumstances, it is clearly erroneous to find that GLL's "assumption of responsibility for the inland movement of shipments" provided any benefit, much less a "significant benefit," to MOL.

2. Finding of Fact #40: *When Global Link took over the inland phase of the shipments, it relieved Mitsui of the necessity of performing the work associated with delivering the goods to the customers' door points. This resulted in Global Link paying Mitsui for a service that Global Link itself was performing. Mitsui was having trouble keeping up with the volume of Global Link shipments. (McClintock deposition, Global Link Ex. CI, pp.15, 16, App. 9.)*

This FOF is again based solely on the discredited testimony of Paul McClintock. There is absolutely no evidence in the record, other than McClintock's testimony, that MOL benefitted from GLL "taking over" the inland phase of shipments, either as a result of a reduction in the amount of work MOL was required to perform or with respect to rail detention charges. Despite any lack of reliable evidence, the ALJ concludes that this arrangement was burdensome for GLL (paying for a service it was performing itself) and for the sole benefit of MOL. In reality, the arrangement was crucial to GLL's scheme. This conclusion, aside from not being based on any reliable evidence, defies common sense. See discussion above concerning FOF #39 and footnote 59.

The first question that comes to mind is "why would GLL pay for a service it was performing itself?" The only answer is that it was in the financial interest of GLL to control the

inland trucking arrangements. Indeed, split routing could not work unless GLL was able to insert itself between the ocean carrier and the trucker and instruct the trucker to take the cargo to places other than the named destination. Thus, GLL had to retain tight control over trucking in order to be able to continue engaging in the split routing practice from which it derived so much financial benefit. Assuming responsibility for the trucking was done solely to benefit GLL, not MOL.¹⁵

Secondly, MOL is in the business of providing intermodal transport for its customers. It has extensive staff whose function is to arrange for inland transportation of shipments destined to inland locations. Such arrangements are a normal part of its everyday business. There is no basis whatsoever to conclude that allowing GLL to communicate with the truckers constituted a benefit to MOL.

Finally, in the last sentence of this finding, the ALJ seizes upon a casual comment of McClintock regarding an incident early in the MOL-GLL relationship and attempts to make it appear as though GLL was doing a favor for MOL by “taking over” the trucking arrangements, since MOL was “unable” to handle them. This off-hand comment by McClintock (whose testimony is unreliable in any event) relates to a temporary situation early in the relationship (McClintock Dep., 15:23-16:22; GLL App. 0009) and does not support a finding that MOL benefitted from GLL involving itself in the trucking arrangements. Indeed, as noted above, the beneficiary of this was GLL, which had to control aspects of those arrangements in order to be able to carry out split routing.

3. Finding of Fact #41: *Global Link’s assumption of responsibility for the inland phase of the shipments also relieved Mitsui of its exposure to ever-increasing detention charges by the*

¹⁵ Of course, GLL did not perform any trucking. It was MOL that (a) continued to negotiate for the trucking services, (b) issued TPOs instructing the truckers to take the shipments to the declared door points, and (c) processed and paid the trucker’s (false) invoices. What GLL “performed” was the unlawful act of conspiring with the truckers to redirect the cargo.

railroads for goods that were not removed from railroad premises before the expiration of "free time." (McClintock deposition, Global Link Ex. Cl, pp. 17-20, App. 9, 10.)

There is no evidence in the record, other than the unreliable testimony of McClintock, that MOL incurred detention charges before GLL become involved in the trucking arrangements, that such charges (if incurred) were meaningful, or that MOL benefitted in any way from GLL asserting control over trucking. In fact, there was no evidence of the amount of any detention charges before or after the so-called takeover. In the discussion of FOF #39 above, MOL demonstrates how it was harmed by split routing.

4. Finding of Fact #42: Yang expressed appreciation to Rosenberg for Global Link's split routing. According to Yang, it was easier for Mitsui to continue to book shipments to regional door points rather than to add a number of additional door points. (Rosenberg deposition. Global Link Ex. Bl, pp.204, 205, App. 6.)

This FOF is flawed in several respects. First, the record clearly shows that the service contracts between GLL and MOL were amended frequently (Mitsui PFF #14) and that MOL regularly files thousands of amendment in the regular course of its business (Declaration of Warrin Minck, ¶ 6, MOL App. 2079). Thus, the premise of the self-serving and unreliable testimony of McClintock and Yang -- that MOL wanted to avoid the burden of filing contract amendments -- is contradicted by the actual facts. Second, Yang's own testimony indicates that adding a point to the contract is simply a matter of getting the rate approved and filed in the contract. Yang Dep., p. 16, GLL App. 0031. Finally, this finding of fact contradicts the actual fact that GLL relied on the split routing scheme when the actual delivery points were in the contract.

5. Statement in Second Paragraph, p. 58: As a consequence of the split routing, and probably as an incentive to Mitsui to allow the practice, Global Link took over the arrangements for the inland phase of Mitsui shipments, or at least those shipments which did not go to door points contained in the service contracts. This relieved Mitsui of the necessity of dealing with truckers and with handling other details of the inland moves. It also relieved Mitsui

of exposure to penalties assessed by railroads for goods remaining at railroad facilities beyond the free time (FF 39, 41, 42).

The foregoing statement is a summary of the erroneous findings of fact made by the ALJ.

For the reasons set forth above in the discussion of FOF ## 39, 41 and 42, it is incorrect.

6. Statement in last paragraph of page 60: *The term "good faith" does not immediately come to mind in describing Global Link's actions. Global Link considered Mitsui's refusal to negotiate additional door points to be illogical and did not hesitate to take advantage of the situation (e-mail message from Rosenberg to Briles dated July 14, 2005, Mitsui Ex. AI, App. 1472). Nevertheless, there were also advantages to Mitsui (FF 39-42), and the evidence does not support the proposition that Global Link had reason to believe that 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 (FF 18-22). The gist of the 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.*

The first sentence of this statement can only be categorized as a colossal understatement.

Moreover, it follows a quotation from a decision which holds that an agent has apparent authority and that his acts bind his principal with respect to third parties that have reasonable grounds to believe that the agent has such authority and deal with the agent in good faith. In other words, having just set forth this test of reasonable grounds and good faith dealing, the ALJ immediately concedes that GLL did not act in good faith. He then goes on to find that McClintock and Yang had apparent authority, thus disregarding the test he has just found applicable. This clearly erroneous conclusion is addressed in the discussion of apparent authority in section V.A of this brief.

MOL has already addressed the alleged benefits supposedly conferred upon it by split routing in the discussion of FOF ## 39-41, *supra*.

What bears further scrutiny is the statement that the evidence does not support the proposition that GLL had reason to believe that McClintock and Yang were acting outside of the

scope of their authority. This statement is overwhelming contradicted by extensive evidence, all of which is ignored by the ALJ. To wit:

- GLL received legal advice in 2003 that split routing was illegal, or at least highly questionable. MOL App. 1587-1588. Although the ALJ seems to believe that this advice supports a finding that GLL was acting reasonably, the opposite is true.
- GLL created two sets of fraudulent documents for every transaction -- a massive undertaking. MOL App. 0114, ¶ 10.
- GLL told employees to lie to steamship lines (including MOL) and taught them how to provide false information about shipments. MOL App. 1207 and 1484-1485.
- GLL told its employees not to discuss split routing with anyone at MOL other than McClintock and Yang. MOL App. 1484-1485.
- GLL recruited preferred truckers who were willing to carry out the split routing scheme. MOL App. 1498-1499.

The foregoing actions, which are demonstrated by an uncontroverted record, cannot be reconciled with a finding that it was “reasonable” for GLL to believe that McClintock and Yang had authority to engage in split routing. Finally, as discussed in the final section of the portion of this brief dealing with exceptions to conclusions of law, the final sentence that there can be no fraud if the carrier knew what was going on is incorrect as a matter of law.

7. Statement in first full paragraph, page 61: *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 by McClintock 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. This is true even though Mitsui may, in hindsight, consider those advantages to have been an inadequate quid pro quo for its alleged loss of revenue.*

MOL has already demonstrated in this brief that it did not benefit from the practice of split routing or by GLL injecting itself into the trucking arrangements. In the second sentence, the ALJ recognizes that the only basis for a finding of any benefit to MOL from the practice of split routing is the testimony of McClintock and Yang which, as noted above, is not credible. In the second and third sentences, the ALJ also recognizes that whatever benefit MOL may have received was not substantial or credible, and was outweighed by the loss of revenue it suffered as a result of split routing.

V. NUMEROUS CONCLUSIONS OF LAW ARE ERRONEOUS

A. The ALJ Erred In Relying On Apparent Authority

The ALJ erred in applying the concept of apparent authority to this case. As explained below, use of the principle of apparent authority was legally improper. Even assuming *arguendo* that apparent authority is the correct test, the ALJ erred in applying the test, both as a matter of fact and a matter of law.

1. Apparent Authority Is Not The Correct Test

As the case cited by the ALJ makes clear, apparent authority is an equitable doctrine which prohibits a principal (Mitsui) from denying responsibility for the acts of an agent (e.g., McClintock and Yang) that have caused harm to a third party (Global Link). *Schaffart v. ONEOK, Inc.*, 686 F.3d 461, 473 (8th Cir. 2012). In this case, there is no evidence of harm to the third party, GLL or other Respondents, as a result of the acts of the agents McClintock and Yang.¹⁶ To the contrary, Respondents benefitted from the practice of split routing. Otherwise, GLL would not have created two sets of documents for every transaction with MOL, trained its employees to provide false information and lie, and otherwise concealed the practice from MOL.

That the concept of apparent authority is not the correct legal principle to be applied to this case is confirmed by examining the two cases cited by the ALJ in support of his use of this legal principle. In *William R. Adair v. Penn-Nordic Lines, Inc.*, 26 S.R.R. 11 (ALJ, 1991), the administrative law judge discussed the concept of apparent authority when considering the reasonableness of the respondent NVOCC's decision not to honor a commitment made to the complainant by the NVOCC's attorney (i.e., agent). 26 S.R.R. at 21-22. The issue was not, as it

¹⁶ Consistent with this, MOL notes that none of the Respondents have argued that McClintock and Yang had apparent authority. It appears to be a doctrine the ALJ has introduced into the case.

is here, whether the knowledge of the agent should be imputed to the principal. Thus, the analysis in *Adair* is inapposite.¹⁷

The other case cited by the ALJ is *In The Matter Of The Lawfulness Of Unlicensed Persons Acting As Agents For Licensed Ocean Transportation Intermediaries -- Petition For Declaratory Order*, 31 S.R.R. 185 (FMC 2008). In that case, the FMC declined to permit licensed ocean transportation intermediaries to utilize unlicensed entities as agents (a decision later overturned by the U.S. Court of Appeals). In discussing the potential drawbacks of allowing OTIs to utilize unlicensed agents, the Commission noted that:

a principal *may* be liable for the acts of its agents if the agent is acting within the scope of employment or when acting with apparent authority. However, there are actions by an agent for which a principal would not be held liable. Such a determination is necessarily fact-specific and imposes an additional burden on a shipper to attempt to make that determination...

31 S.R.R. at 197 (emphasis in original). Thus, in that case, the Commission was merely noting that the doctrine of apparent authority could be an issue when third parties are harmed by the acts of an agent, which is the context in which the principle is applicable. The Commission's discussion did not relate to any specific factual case, and certainly did not occur in the context of whether the knowledge of an agent should be imputed to its principal.

In light of the foregoing, whether McClintock and Yang had apparent authority is not the appropriate legal test to apply in this case. Instead, the ALJ should have focused on the imputation of knowledge and the adverse interest exception, which are discussed below in section V.B. of this brief.

¹⁷ The ALJ's application of the adverse interest exception to the doctrine of apparent authority is also incorrect (ID at p. 61). The adverse interest exception applies to the imputation of knowledge, not to apparent authority.

2. The ALJ Erred In Finding McClintock And Yang Had Apparent Authority

Before turning to MOL's exception to the ALJ's treatment of the adverse interest exception, assuming *arguendo* that the apparent authority inquiry is appropriate, the ALJ erred in concluding that McClintock and Yang had apparent authority. The ALJ found, relying on the decision of another ALJ, that a principal is bound by the acts of his agent vis-à-vis a third party if that third party has reasonable grounds to believe that the agent has such authority, and deals with the agent in good faith. ID at p. 60. As noted above in the exceptions to the statement in the last paragraph of page 60, the ALJ recognized that Global Link did not deal with MOL in good faith ("The term 'good faith' does not immediately come to mind in describing GLL's actions.")

The lack of good faith on the part of GLL is manifest in the record. GLL never had any intention of covering all of its destinations in a service contract or of asking for points to be added to service contracts. As long as it had a favorable rate to one destination, it preferred to lie about where its cargo was going and exploit that favorable rate for its own benefit. July 14, 2005 e-mail from Rosenberg to Briles, MOL App. 1472. This was its *modus operandi*. ("how does a group manager not understand splits...its ALL we do!!!!" March 1, 2006 e-mail from Jim Briles to Chad Rosenberg, MOL App. 1210).

GLL's lack of good faith is also demonstrated by other factual evidence, all of which is disregarded by the ALJ. For example, GLL created two sets of documents for every transaction. MOL App. 0114, ¶ 10. Preparing one document showing a false destination and another showing the actual destination cannot be considered to be dealing in "good faith." In addition, GLL told employees to lie to steamship lines (including MOL) and taught them how to provide false information about shipments. MOL App. 1207 and 1484-1485. GLL told its employees

not to discuss split routing with anyone at MOL other than McClintock and Yang. MOL App. 1484-1485. These are not the actions of an entity dealing in “good faith.”

In addition, it was not reasonable for GLL to believe that McClintock and Yang had authority to engage in split routing. The fact that GLL went through the trouble of creating thousands of sets of fraudulent documents demonstrates it did not believe McClintock and Yang had such authority, reasonably or otherwise. GLL’s instructions to its employees on how to provide false information and directing them to lie to subordinates of McClintock and Yang if questioned about the destination of cargo also make it impossible to conclude that GLL reasonably believed McClintock and Yang had authority to engage in split routing.

Moreover, GLL knew that McClintock and Yang did not have authority to approve the rates contained in their service contracts. McClintock Dep., 58:21-59:3, MOL App. 2006). Since McClintock and Yang could not approve the rates charged, GLL could not reasonably conclude they had authority to offer service at rates other than those set forth in the service contract.

In addition to the foregoing factual impediments to any finding that GLL could reasonably believe McClintock and Yang had authority to engage in split routing, any such belief was not reasonable as a matter of law. As a licensed ocean transportation intermediary subject to the Shipping Act, GLL is charged with knowledge of the Shipping Act, including the prohibitions of section 10(a)(1) and 10(d)(1) herein at issue, as well as 46 C.F.R. § 515.31(e). GLL knew that split routing was unlawful, and thus could not reasonably believe that McClintock and Yang were authorized to engage in such conduct.¹⁸

¹⁸ An agent never has apparent authority to engage in unlawful acts on behalf of his principal, as it is never reasonable to believe he is authorized to act unlawfully. Moreover, a general agent has no implied authority to bind the principal by acts unusual to agencies of like character, or beyond the usual scope of such agencies. Accordingly, when a general agent attempts to bind the principal by extraordinary acts, the one dealing with the agent is put on

The record shows that GLL was aware that split routing was illegal. In addition to the 2003 legal advice to that effect (MOL App. 1587-1588), Eileen Cakmur, a former employee of GLL, wrote: “GLL has been practicing these illegal activities for years. If any of the SSL kn[ew] that they have been [de]fraud[ed] all these years, GLL will close its doors.” MOL App. 1206. David Donnini and John Williford of GLL knew that “split routing” was illegal. Donnini Dep. at 17:13-18:10 (MOL App. 1674-74).

In light of the foregoing, Global Link did not have a reasonable belief that McClintock and Yang had authority to engage in split routing, and did not deal in good faith with MOL. Accordingly, even if the test articulated by the ALJ is applied, the ALJ’s conclusion that McClintock and Yang had apparent authority is incorrect and must be reversed.

B. The ALJ Erred In Imputing The Knowledge of McClintock And Yang To MOL

The ALJ erred in his analysis of the adverse interest exception.

1. Imputation Of Knowledge And The Adverse Interest Exception

As a general matter, the knowledge of an agent is imputed to its principal. This legal doctrine is intended to protect innocent third parties by preventing principals from disclaiming the acts of their agents, and not to serve “as a shield for unfair dealing.” *BCCI Holdings (Luxembourg), S.A. v. Clifford*, 964 F. Supp. 468, 478 (D.D.C. 1997). The adverse interest exception is, as the name suggests, an exception to the general rule on imputation. It prevents the imputation of knowledge from shielding unfair dealing by blocking the imputation of the agent’s knowledge to the principal when the agent is acting adversely to the principal, or is engaged in a fraud against the principal.

notice and required to ascertain from some authoritative source whether the agent had the power to bind the principal. 3 Am. Jr. 2d Agency § 83 (2013). Given its knowledge of the law, GLL had a duty to inquire if McClintock and Yang were authorized to engage in split routing. Instead, GLL went to extraordinary lengths to make sure no one at MOL other than McClintock and Yang learned of the practice.

The FMC should bear the foregoing in mind when considering whether to impute knowledge in Shipping Act cases. Too narrow an imputation standard would enable principals to disclaim all knowledge of their agents. At the same time, a standard too broad would permit bad actors to escape liability, simply by alleging that the knowledge of their co-conspirators should be imputed to unsuspecting principals.

The ALJ's consideration of the adverse interest exception was based entirely on one case decided by the Second Circuit Court of Appeals. In that one case, the Second Circuit applied an extremely narrow interpretation of the adverse interest exception. That decision is contrary to those of other Circuit Courts of Appeal. Focusing entirely on one Second Circuit decision was improper. The FMC has held that as an agency with nationwide regulatory authority it cannot routinely apply the legal standards of a particular circuit in its decisionmaking. *Ceres Marine Terminals, Inc. v. Maryland Port Administration*, 30 S.R.R. 358, 366, note 4 (FMC 2004). Accordingly, the ALJ erred in adopting the Second Circuit's standard without considering the standards applied in other circuits. The FMC should do so before adopting a standard to be applied in its jurisprudence.

2. *The ALJ Interpreted The Adverse Interest Exception Too Narrowly*

The ALJ erred in finding that the adverse interest exception is a narrow one and that in order to avoid imputation of the knowledge of McClintock and Yang, MOL would have to show that it was obvious to Respondents that McClintock and Yang were acting solely for their own benefit and had abandoned Mitsui's interests. ID at p. 61. As explained below, this conclusion is erroneous as a matter of law. By focusing only on whether McClintock and Yang acted in a manner adverse to the interests of MOL and whether they entirely abandoned MOL's interest, the ALJ erred by overlooking other formulations of the adverse interest exception which apply in

this case, and which prevent the knowledge of McClintock and Yang from being imputed to MOL.

In its commentary discussing the adverse interest exception, the *Restatement (Third) of Agency* states:

However, this section does not protect a third party who knows or has reason to know that an agent acts adversely to the principal. If the third party colludes with the agent against the principal or otherwise knows or has reason to know that the agent is acting adversely to the principal, the third party should not expect that the agent will fulfill duties of disclosure owed to the principal.

Restatement (Third) of Agency, § 5.04, comment b. The *Restatement* goes on to caution that:

That is, the third party should not benefit from imputing the agent's knowledge to the principal when the third party itself acted wrongfully or otherwise in bad faith.

Id., comment c. In other words, the knowledge of the agent should not be imputed to the principal if the agent is colluding with the third party against the principal, if the third party knows that the agent will not disclose its conduct to the principal, or if the third party acted in bad faith. In its Reply Brief, MOL cited considerable case law consistent with the Third Restatement.¹⁹ For example, the Fifth Circuit does not impute the knowledge of the agent to the

¹⁹ *In re Blackburn*, 209 B.R. 4, 11 (M.D.Fla. 1997) and *FDIC v. Shrader & York*, 991 F.2d 216, 223 (5th Cir.) (“courts will generally not impute a bank officer or director’s knowledge to the bank if the officer or director acts with an interest adverse to the bank”), *reh’g denied*, 999 F.2d 1581 (1993), *cert. denied*, 512 U.S. 1219 (1994); *FDIC v. Ernst & Young*, 967 F.2d 166, 170 (5th Cir.), *reh’g denied*, 976 F.2d 732 (1992) (“Generally, courts impute a bank officer or director’s knowledge to the bank unless the officer or director acts with an interest adverse to the bank.”); *Martin Marietta Corp. v. Gould, Inc.*, 70 F.3d 768, (4th Cir. 1995)(if agent holds interests sufficiently adverse to the principal’s interests, the knowledge of the agent will not be imputed to the principal); *Tobacco Technology v. Taiga Int’l. N.V.*, 2010 WL 2836259, *8 (4th Cir. 2010) (“under the ‘adverse interest exception’ to this rule, a principal may ‘avoid imputation when the agent’s interests are sufficiently adverse’ to its own.”); *Miller v. Holzmann*, 563 F.Supp.2d 54, 100 (D.D.C. 2008) (citing (where “it is to the agent’s own interest not to impart knowledge to the principal” the knowledge of the officer or agent cannot be imputed to the company. . . .”); *Center v. Hampton Affiliates, Inc.*, 66 N.Y.2d 782, 829, 497 N.Y.S.2d 898, 899-900 (1985) (“This exception provides that when an agent is engaged in a scheme to defraud his principal, either for his own benefit or that of a third person, the presumption that knowledge held by the agent was disclosed to the principal fails because he cannot be presumed to have disclosed that which would expose and defeat his fraudulent purpose.”); *Liquidation Commission of Banco Intercontinental, S.A. v. Renta*, 530 F.3d 1339, 1355 (11th Cir. 2008) (“... imputation of [the president’s] wrongdoing to the bank would be inappropriate [as it] would be perverse, indeed, if the [plaintiff] was unable to pursue a claim on behalf of [the bank’s] other stakeholders solely because some of the people who stole from it were insiders in a position to carry out the fraud!”).

principal if the agent “acted adversely to or committed fraud against” the principal. *Federal Deposit Insurance Corporation v. Shrader & York*, 991 F.2d 216, 224 (5th Cir. 1993). The Eleventh Circuit has held that imputation is “inappropriate where a jury could permissibly conclude that an agent...was engaged in fraud or self-dealing adverse to a corporate principal.” *Liquidation Commission of Banco Intercontinental, S.A. v. Alvarez Renta, et al.*, 530 F.3d 1339, 1354 (11th Cir. 2008).

In *Ash v. Georgia-Pacific Corp.*, 957 F.2d 432, 436 (7th Cir. 1992), the Seventh Circuit held that where the third party shipper knew that an employee of the trucking company was participating in the fraud against the principal, there was no imputation to the principal because to do so would be to protect fraudulent schemes. In a very recent decision in a case strikingly similar to the one at bar, a federal district court summarized the exceptions to the general rule of imputation as follows:

California courts have enunciated at least three exceptions to the general rule of imputation: (1) where an agent and a third party act in collusion against the principal, (2) where the third party knows or has reason to know that the agent will not advise the principal, and (3) where the agent’s action is adverse to the principal.

Mitsui O.S. K. Lines, Ltd. v. Seamaster Logistics, Inc., 2013 U.S. Dist. LEXIS 40466 (N.D. Cal. 2013)(“*Seamaster*”), Slip. Op. at p. 53. (citations omitted).²⁰

²⁰ While the ALJ is of course correct that this is a Shipping Act case and not a service contract case (see note 63 at p. 61 of the ID), the conduct at issue arose under service contracts between the parties. The Shipping Act does not address imputation of knowledge or the adverse interest exception. Thus, the FMC must necessarily look to other bodies of law for guidance on these issues. As noted above, in so doing, it should examine the laws of more than one jurisdiction. Since the parties chose to have their contractual relationship governed by the law of California, it is only logical and reasonable that the Commission take California law into consideration in this case.

In light of the foregoing, the ALJ erred in focusing only on the adversity of the actions of McClintock and Yang to the interest of MOL.²¹ He should have also considered whether the imputation of the knowledge of McClintock and Yang was precluded by their collusion with GLL and/or GLL's knowledge that McClintock and Yang would not advise MOL of split routing.

The FMC should reverse the ID, establish a rule that the knowledge of an agent will not be imputed to a principal for Shipping Act persons when one of the three tests articulated in both the *Restatement* and *Seamaster* has been met and, for the reasons set forth below, find that the knowledge of McClintock and Yang may not be imputed to MOL.

3. *The ALJ Erred In Imputing The Knowledge Of McClintock And Yang To MOL*

The knowledge of McClintock and Yang may not be imputed to MOL under any of the three tests discussed in the preceding section of this brief.

Insofar as adversity of interest is concerned, MOL has demonstrated in its Reply Brief and in these exceptions that it received no benefit from the split routing practice (see Reply Brief at pp. 44-49 and discussion of FOF#39, *supra*).²² The record also shows that McClintock and Yang abandoned the interests of MOL and were furthering only their own interests and/or those of GLL. See MOL App. 1485 (Briles indicates that Yang has abandoned the interests of MOL); pp. 46-47 of MOL's Reply Brief and pages 26 and 27 herein (McClintock abandons interest of MOL as evidenced by additional payments authorized in connection with West

²¹ As noted, even under that test, no imputation is proper.

²² When a party is asserting an affirmative defense, that party bears the standard burden of proof with respect to that defense. See *Maher Terminals LLC v. Port Authority of New York and New Jersey*, 32 S.R.R. 1, 16 (ALJ 2011). Other than generalized allegations of benefits based on the unreliable testimony of McClintock and Yang, Respondents have offered no proof that MOL received any benefit from the practice of split routing. This contrasts markedly with the specific and detailed examples of harm set forth in MOL's Reply Brief and these exceptions. Accordingly, to the extent Respondents are attempting to defend themselves based on MOL's "knowledge," their inability to show actual benefit to MOL means they have failed to meet their burden of proof with respect to that defense.

Monroe/Winnsboro split routing); Feitzinger Dep., MOL App. 1998 (McClintock in collusion with Global Link). The ALJ also found that there was “no doubt that McClintock and Yang were acting in their own interests” (ID at p. 61). Accordingly, even under the narrow test relied by the ALJ, the knowledge of McClintock and Yang cannot be imputed to MOL as a matter of law.

The same result is reached under the two other formulations of the exception of the general rule on imputation of knowledge. More specifically, the knowledge of McClintock and Yang should not be imputed to MOL because their conduct constituted a fraud on MOL rather than a fraud on behalf of MOL. At pages 37 to 51 of its Reply Brief, MOL set forth in detail the factual evidence in the record which supports a conclusion that McClintock and Yang colluded with Respondents to keep split routing a secret from MOL.

Moreover, it is clear that GLL knew McClintock and Yang would not disclose split routing to MOL. McClintock and Yang warned GLL not to speak with other personnel at MOL, and GLL went to great lengths to hide the practice from others. See, e.g., MOL App. 1484-1485; MOL App. 0114, ¶ 010; and MOL App. 1207.

The ALJ incorrectly disregarded all of this evidence and the exceptions to the imputation rule described in the *Restatement* and *Seamaster* and, with no meaningful explanation, relied on apparent authority and the most narrow reading of the adverse interest exception to impute the knowledge of McClintock and Yang to MOL. The Commission should reverse the ID and adopt standards governing the imputation of knowledge and the adverse interest exception that will prevent an NVOCC that engaged in thousands of fraudulent transactions over a period of several years from immunizing itself against recovery by the injured ocean common carrier by suborning an employee of the carrier to collude in its unlawful activity.

4. Seamaster Is Not Distinguishable

The ALJ also erred in distinguishing *Seamaster* from this case on three separate factual grounds. As explained below, this case is on all fours with *Seamaster*.

In *Seamaster*, MOL is seeking to recover from defendants who had engaged in a scheme under which shipments from Asia to the United States were falsely described to MOL as originating at inland locations, when in fact they were being tendered to MOL at the port. MOL paid a customer-nominated trucker, Rainbow, for inland drayage that was never performed. An employee of MOL, Michael Yip, was involved in the scheme, together with Cheng (an employee of KESCO, an NVOCC customer of MOL) and Jerry Huang (an employee of Seamaster HK, another customer, who was previously employed by Hecny, with whom Global Link had a relationship). The scheme enabled shippers to secure space on vessels when such space was in tight supply, as well as lower rates, and resulted in MOL paying for trucking that was not performed. The scheme was kept hidden from MOL through the use of duplicate sets of documents similar to those used by GLL. Thus, the scheme at issue in *Seamaster* was virtually identical to that at issue here, except that it took place at origin rather than at destination.

The ALJ attempted to draw three distinctions between this case and *Seamaster*. First, he found that the defendants in *Seamaster* knew from prior conversations with MOL that their arrangement with Yip would not have been approved by MOL. It appears the ALJ bases this alleged distinction on the fact that the record contains no evidence that such conversation occurred between GLL and representatives of MOL other than McClintock and Yang. However, this is a distinction without a difference. GLL knew the practice of split routing was illegal and thus knew it would not be approved by MOL. There was no need for a conversation in this case -- in both cases, the defendant knew its conduct would not be approved by MOL. *See, e.g.,*

Feitzinger Dep. 210:23-211:5, MOL App. 1997-1998 (MOL would not look kindly on employee colluding with Global Link); MOL Reply Brief at 42-43.

The second purported distinction is that any benefit to MOL of the practice at issue in *Seamaster* was incidental, and the defendant was aware MOL would be taking a loss. However, the same is true in this case. As noted above, MOL has provided evidence of the losses caused by split routing. Respondents, while alleging benefit to MOL based solely on the testimony of McClintock and Yang, have not proven or quantified any benefit. This is apparent from the vague manner in which the ALJ characterizes the alleged benefit to MOL of split routing (e.g., “not inconsequential” ID at p. 62). Moreover, MOL has demonstrated that the Respondents knew that split routing harmed MOL. Otherwise, they would not have gone to great lengths to keep it secret. Respondents try to avoid responsibility for their own conduct by focusing attention on what MOL allegedly knew, but at the end of the day they cannot distract from or explain the creation of thousands of sets of fraudulent documents and the ways they kept split routing secret from MOL.²³

The third and final purported distinction is that Yip (the MOL employee involved in the scheme in *Seamaster*) had totally abandoned MOL’s interest. Similarly, MOL has demonstrated

²³ In *Seamaster*, the federal district court, in addressing the issue of false documents, lies and secrecy, said:

...Throughout his testimony, Cheng could not offer a coherent explanation as to why the arrangement required Kesco to make false representations to MOL if Yip had the authority to offer such a deal. There is no evidence that Cheng ever discussed the arrangement with anyone else at MOL or that there was a written contract between MOL and Kesco documenting the agreement.

Slip Op. at 19. Similarly, Respondents in this case cannot provide a coherent explanation of why their behavior of lying and creating two sets of documents for every shipment was necessary if McClintock and Yang had authority to engage in split routing.

herein that McClintock and Yang had abandoned MOL's interest by colluding with GLL in a scheme that deprived MOL of revenue and resulted in MOL paying additional trucking costs.²⁴

In light of the foregoing, the ALJ erred in distinguishing *Seamaster* from this case. The FMC should reverse that error and be guided by *Seamaster*.

C. The ALJ Erred In Applying The Shipping Act And FMC Regulations

The ALJ found that if a carrier knew about fraudulent behavior, there is no fraud and hence no violation of the Shipping Act ("...there would have been no fraud if the carrier knew what was going on." ID at p. 61). MOL has presented overwhelming evidence in its Reply Brief and in this brief that it did not know "what was going on," either factually or as a matter of law. MOL excepts to the ALJ's interpretation of the Shipping Act and FMC regulations with respect to this issue.

As MOL noted in its Reply Brief (p. 33), while fraud is an element of a Section 10(a)(1) violation, it is not necessary that the fraud be perpetrated on the carrier. The U.S. Court of Appeals has held that "while Section 16 covers the situation in which the carrier is deceived or defrauded, it is not so limited." *Hohenberg Brothers Company v. Federal Maritime Commission*, 316 F.2d 381 (D.C. Cir. 1964). See *United States v. Open Bulk Carriers*, 727 F.2d 1061 (11th Cir. 1984)(lower rates achieved by means of fraud are unlawful, even if carrier is not one defrauded); *Dampskibsselskabet Torm A/S v. P.L Thomas Paper Co, Inc.*, 262 N.Y.S.2d 575, 1966 A.M.C. 396 (1965)(carrier could recover freight due from shipper for a violation of Section 16 where its agent agreed to an unfiled discount from a tariff rate). Thus, after incorrectly concluding that MOL knew about split routing (a finding the Commission should reverse), the

²⁴ See MOL App. 1485, in which Briles indicates that Yang has abandoned the interests of MOL. See also the discussion of West Monroe/Winnsboro split routing at pp. 46-47 of MOL's Reply Brief and McClintock's abandonment of the interests of MOL in that context.

ALJ compounds this error by finding that such knowledge precludes MOL's claim. As the foregoing cases show, this is an incorrect reading of the Shipping Act.

Moreover, the ALJ misreads 46 C.F.R. §545.2. That statement of policy was adopted to put an end to use of the Commission as a mere collection agent by making clear that the Commission does not have jurisdiction over a claim against a shipper based on a failure by a shipper to pay freight unless that claim involved an allegation of an unjust or unfair device or means. See, *Unpaid Freight Charges*, 26 S.R.R. 735 (FMC 1993). Accordingly, this very limited statement of policy cannot and does not support the broader conclusion with respect to fraud that the ALJ attempts to draw based upon it.

D. The ALJ Erred In Applying The Filed Rate Doctrine

MOL excepts to the ALJ's finding that the filed rate doctrine does not apply to service contracts. As an initial matter, it is unclear why the ALJ addressed this argument regarding proof of damages, since he found there could be no recovery. Accordingly, the discussion would appear to be superfluous. However, MOL takes exception to the ALJ's conclusions regarding the filed rate doctrine because such conclusion is a gross misstatement of the law.

The ALJ concludes that the filed rate doctrine does not apply to service contracts because service contract rates are not publicly available. This conclusion misses the point. Regardless of whether or not the rates are public, the Shipping Act prohibits carriers from providing service other than in accordance with the terms of their service contracts. This is the essence of the filed rate doctrine, which is not dependent on the public availability of the rate in question. Thus, MOL is legally obligated to collect the rates in its service contracts with Global Link (see *Universal Fixture Manufacturing, Co. v. ANERA*, 26 S.R.R. 1461, 1466 (FMC 1994)(section 10(b)(1) requires conference to collect rates set forth in service contract) and the measure of its

damages in this case is the difference between what it collected and what it should have collected, just as MOL argued in its Reply Brief.

VI. REQUEST FOR ORAL ARGUMENT

MOL respectfully requests that the Commission hear oral argument on these exceptions. It believes that such argument would help avoid many of the misunderstandings that seem to have contributed to the erroneous conclusions reached in the ID.

VII. CONCLUSION

Under the Shipping Act, a carrier is obligated to charge and a shipper to pay the rates set forth in the service contract between them. Here, GLL, with the knowledge, consent and participation of the other Respondents, lied to MOL, in part to avoid doing just that, and in part to induce MOL to pay for trucking services that were not provided. Such conduct violates sections 10(a)(1) and 10(d)(1) of the Shipping Act, as well as 46 C.F.R. § 515.31(e). Accordingly, the Commission should reverse the ID, issue new findings of fact and conclusions of law, and hold that MOL is entitled to recover reparations (including interest and attorney fees) for the unlawful conduct of Respondents. The amount of such reparations should be determined by the ALJ on remand.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I do hereby certify that I have delivered a true and correct copy of the foregoing document to the following addressees at the addresses stated by depositing same in the United States mail, first class postage prepaid, and/or via email transmission, this 31st day of July, 2013:

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