

S E R V E D

July 9, 2013

FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

DOCKET NO. 09-01

MITSUMI O.S.K. LINES LTD.

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**

INITIAL DECISION¹

I. PROCEDURAL HISTORY, SUMMARY OF DECISION, AND OVERVIEW

A. COMPLAINT AND AMENDED COMPLAINT

On May 5, 2009, Complainant Mitsui O.S.K. Lines, Ltd. (“Mitsui” or “MOL”) filed a Complaint against Respondents Global Link Logistics, Inc. (“Global Link”); Olympus Partners; Olympus Growth Fund III, L.P.; Olympus Executive Fund, L.P.; Louis J. Mischianti; David Cardenas; Keith Hefernan (collectively “Olympus Respondents”); CJR World Enterprises, Inc.; and Chad J. Rosenberg (collectively “CJR Respondents”). On June 16, 2009, Mitsui filed a Motion to File Amended Complaint and Amended Complaint; that motion was granted by Order of June 22, 2010. The purpose of the Amended Complaint was to more accurately identify the Respondents. There were no changes to the allegations of the original Complaint, nor did the Complainant raise additional legal issues.

¹This decision will become the decision of the Commission in the absence of review by the Commission, Rule 227, 46 C.F.R. § 502.227.

Each of the Respondents filed Answers denying liability and raising affirmative defenses. In addition, Global Link filed a counterclaim against Mitsui and crossclaims against the Olympus Respondents and the CJR Respondents. The allegations in each of those pleadings are summarized below. After full consideration of the evidence, the positions of the parties, and the applicable law, I have determined that the Amended Complaint is to be dismissed because of Mitsui's knowledge of and consent to the allegedly illegal actions by the Respondents. I have also determined that Global Link's counterclaim is to be dismissed, and that Global Link's crossclaims are to be dismissed as moot. The rationale for this decision is fully set forth herein.

In the Amended Complaint, Mitsui alleges that the Respondents engaged in a fraudulent scheme in violation of Sections 10(a)(1) and 10(d)(1) of the Shipping Act of 1984 ("Shipping Act"), 46 U.S.C. §§ 41102(a) and (c)², by knowingly and wilfully engaging in a scheme to fraudulently obtain ocean transportation for less than the rates and/or charges that would otherwise apply. Mitsui further alleges that, by preparing false documents and providing false information to Mitsui in violation of Commission regulations, 46 C.F.R. § 515.31(e), the Respondents failed to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, and delivering property. As relief, Mitsui seeks the issuance of a cease and desist order directing that the Respondents cease their allegedly unlawful practices and put into effect practices that the Commission deems just and reasonable. Mitsui also seeks reparations for its monetary losses arising out of the Respondents' allegedly unlawful conduct.

The violations alleged in the Amended Complaint arose out of a practice known as "split routing." Under this practice, an ocean transportation intermediary ("OTI") (in this case Global Link) would contract with an ocean carrier (in this case Mitsui) to facilitate the shipment of goods from an overseas location to the United States and then by overland carrier (in this case trucking companies) to the ultimate inland destination. In reliance on this arrangement, the ocean carrier would issue a through bill of lading specifying the ultimate destination. When the goods were discharged from the ocean-going vessel, the OTI, without the knowledge or consent of the ocean carrier, would instruct the trucking company to deliver the goods to an inland destination other than that specified in the through bill of lading issued by the carrier. The cost of shipping the goods to the revised or actual destination would usually be less than for the original destination, thereby resulting in lower freight payments to the ocean carrier. If the cost of shipping the goods to the actual destination were greater than the cost of shipping to the fictitious destination, the OTI would pay the difference to the trucker or, more likely, would offset the cost savings on other split routing shipments against the additional cost on the OTI's "open account" with the trucker.

On August 16, 2012, after the expiration of the discovery deadline, I issued an Order to Submit Status Reports. In that Order I directed the parties to propose schedules for the presentation

²Subsequent citations to sections of the Shipping Act will only state the section number.

of evidence of shipments, bearing in mind the provisions of Rule 251, Rules of Practice and Procedure, 46 C.F.R. § 502.251.³

On August 30, 2012, Mitsui filed its response to the Order of August 16 in which it proposed to submit documents related to eight sample shipments in order to prove its entitlement to reparations. None of the other Respondents proposed the use of other samples, but have since challenged Mitsui's entitlement to reparations based upon those samples.

On October 3, 2012, I issued an Order Regarding Oral Hearing in which I directed any party maintaining that it was necessary to hold an oral hearing to submit a statement on or before October 10, 2012, showing that there are genuine issues of material fact that cannot be resolved on the basis of sworn statements, affidavits, depositions, or other documents or that the nature of the matter in issue is such that an oral hearing and cross-examination are necessary for the development of an adequate record.

Mitsui filed a responsive statement in which it advocated the necessity for an oral hearing on the sole issue of its prior knowledge of split routing. In support of its position, Mitsui stated, without elaboration, that sworn statements, depositions and other documents would be inadequate to allow for the resolution of factual disputes, and that I should have the benefit of observing the demeanor of witnesses. Mitsui also raised issues involving the determination of its entitlement to reparations and the calculation of such reparations.

The Olympus Respondents filed their responsive statement in which they maintained that an oral hearing is required on all issues, including their participation in the split routing scheme, and on each shipment for which Mitsui claims reparations. The Olympus Respondents further maintained that, according to the provisions of the Shipping Act and Commission regulations, they are entitled to an oral hearing as a matter of law.

Global Link stated that it did not believe that an oral hearing was necessary.

On October 16, 2012, I issued a Procedural Order and Briefing Schedule ("Procedural Order") in which I indicated that:

³Rule 251 provides that, in proceedings in which reparations are sought for many shipments, points of origin, or destinations, exhibits related to each shipment need not be produced prior to the original hearing. The complainant will be given an opportunity to submit proof of the amount of reparations after the Commission issues an order awarding reparations. Documents related to individual shipments need only be submitted prior to the original hearing if called for or needed to prove other pertinent facts.

1. An oral hearing is not necessary and is not required either by the Shipping Act or by Commission regulations.⁴

2. The parties were reminded that, pursuant to Rule 251, 46 C.F.R. §502.251, they were not to submit evidence as to the amount of reparations, if any, to which Mitsui is entitled. References to specific shipments were to be limited to the eight sample shipments identified by Mitsui in its Response to August 16, 2012, Order to Submit Status Reports which was filed on September 7, 2012.

3. The Respondents would be permitted to submit expert testimony only upon a showing as to why that testimony was not identified during discovery.

4. If it is determined that Mitsui is entitled to reparations, I will entertain motions for discovery as to the amount of such reparations. Such discovery, if allowed, may include the submission of expert testimony and the opportunity to depose the experts.

The Procedural Order also included a schedule for the submission of documents. That schedule was subsequently extended upon the request of the parties.

Mitsui has included among its exhibits master bills of lading describing the eight sample shipments (Mitsui Ex. X-AD) and spreadsheets purporting to summarize the contents of those bills of lading (Mitsui Ex. AE, AF).

On March 1, 2013, Global Link filed a Motion to be Permitted to Introduce an Expert Witness Report and Testimony Should There Be a Need for Evidence on Reparations. In its motion Global Link also requests permission to depose Mitsui's expert on reparations should the need arise.

B. COUNTERCLAIM AND CROSSCLAIMS

On June 17, 2009, Global Link filed an Answer to the original Complaint along with a counterclaim against Mitsui and crossclaims against Olympus Growth Fund III, L.P. ("OGF"), Olympus Executive Fund, L.P. ("OEF"), and the CJR Respondents (collectively "Cross Respondents"). In its counterclaim Global Link seeks reparations and indemnification for injuries caused by Mitsui in violation of Sections 10(b)(1) and (2)(A), 10(d)(1), and 10(b)(4) and (8), 46 U.S.C. §§ 41104(1) and (2)(A), 41102(c), and 41104(4) and (8). Global Link's counterclaim against Mitsui is based on the proposition that Mitsui knew of and encouraged the continuation of Global Link's practice of split routing, and that Mitsui failed to have suitable rates in its tariff. As a result, Mitsui's NOS (not otherwise specified) rates may be applied to the shipments at issue if Global Link is found to be liable to Mitsui for reparations.

⁴The authority of an Administrative Law Judge to regulate the form in which evidence is to be submitted is established in Rules 154, 46 C.F.R. § 502.154, and 157(a), 46 C.F.R. § 502.157(a).

In its crossclaims, Global Link alleges that the Cross Respondents are liable to Global Link for indemnity or contribution in the event that Mitsui is found to be entitled to reparations. Global Link's crossclaims are based upon allegations of breach of warranty and fraud arising out of the sale by the Cross Respondents of their ownership interest in Global Link to Global Link's current owner.

In its Answer to Global Link's counterclaim, Mitsui generally denies liability and raises affirmative defenses that the counterclaim is time-barred, that it fails to state a claim upon which relief may be granted, and that it is barred by estoppel.

C. MOTIONS TO DISMISS

On June 17, 2009, the Olympus Respondents filed a motion to dismiss the Complaint on the following grounds:

- a. That the Commission lacks jurisdiction over inland transportation and of split routing related to an inland destination.
- b. That the Commission lacks jurisdiction over alleged violations of service contracts and lacks authority to award reparations for such violations.
- c. That Mitsui actively participated in split routing by Global Link and is thereby precluded from receiving reparations.
- d. That Mitsui failed to state a claim upon which relief may be granted under Section 10(a)(1), 46 U.S.C. § 41102(a), in that it has not and cannot allege that the Olympus Respondents have attempted to obtain ocean transportation for less than the rates that would otherwise apply. Section 10(d)(1), 46 U.S.C. § 41102(c), does not apply to the Olympus Respondents in that they are neither OTIs, marine terminal operators ("MTOs"), nor ocean carriers. In addition, 46 C.F.R. § 515.31(e) applies only to entities that are licensed by the Commission.
- e. That Mitsui is time-barred from seeking reparations for the vast majority of the instances of split routing by Global Link.

As an exhibit to their motion, the Olympus Respondents attached a copy of a Partial Final Award ("Arbitration Award") which was issued by a Commercial Arbitration Panel of the American Arbitration Association on February 2, 2009, in a proceeding initiated by Global Link; Golden Gate Logistics, Inc.; and GLL Holdings, Inc. (collectively "Claimants") against the Olympus Respondents; the CJR Respondents; CBW Key Employee Capital II, LLC; Gerald Benjamin; and Edward A. Casas, M.D. The arbitration proceeding, which concerned claims arising out of Global Link's practice of split routing, resulted in damage awards in favor of the Claimants and against each of the other parties to the arbitration proceeding.⁵

⁵See Findings of Fact ("FF") 55 through 69.

On June 18, 2009, the CJR Respondents filed a motion to dismiss the Complaint on the following grounds:

- a. That Mitsui failed to allege fraud with sufficient particularity.
- b. That Mitsui failed to state a claim upon which relief may be granted in that Mitsui failed to allege that, during any part of the relevant period, CJR World Enterprises, Inc. dominated and controlled Global Link to the extent necessary to pierce the corporate veil in a claim based upon fraud.
- c. That Mitsui failed to state a claim upon which relief may be granted in that Mitsui failed to allege with particularity that Chad J. Rosenberg dominated and controlled Global Link to the extent that Global Link became an alter ego of Rosenberg to the degree necessary to sustain a claim for fraud.
- d. That the Commission has neither personal nor subject matter jurisdiction over the CJR Respondents under 46 U.S.C. § 41102(c) or 46 C.F.R. § 515.31(e) since they are neither marine terminal operators, ocean common carriers, nor OTIs. In addition, Mitsui has failed to make jurisdictional allegations with sufficient particularity.
- e. That the Commission lacks subject matter jurisdiction over the alleged violations of 46 U.S.C. § 41102(a) since those allegations describe a breach of service contracts. Under Section 8(c), 46 U.S.C. § 40502(f), unless the parties agree otherwise, the exclusive remedy for such breaches is an action in an appropriate court.

On July 7, 2009, the CJR Respondents filed a motion to dismiss Global Link's crossclaims on the following grounds:

- a. That the Commission lacks subject matter jurisdiction over both the Complaint and the crossclaim. The allegations of the crossclaim are based solely on purported common law rights rather than on violations of the Shipping Act.
- b. That, even if it is determined that the Commission has subject matter jurisdiction, the crossclaim fails to state a claim upon which relief may be granted. The crossclaim is barred by principles of *res judicata* and/or collateral estoppel in view of the Arbitration Award.

On July 7, 2009, the Olympus Respondents filed a motion to dismiss Global Link's crossclaims on the following grounds:

- a. That the Commission lacks jurisdiction to award Global Link reparations because the Stock Purchase Agreement ("SPA") upon which the crossclaim is based includes

a provision that arbitration is the sole remedy for alleged breaches. In addition, the Shipping Act prohibits the Commission from entertaining claims for alleged breach of contract.

b. That, even if the Commission had jurisdiction over the crossclaim, Global Link would be barred from proceeding in view of the Arbitration Award because of *res judicata*.

c. That Global Link is not entitled to indemnification under either the SPA or Delaware law. The language of the SPA established a one year limit for claims; that limit expired on June 6, 2007. Furthermore, Global Link cannot meet the requirements for common law indemnification as required by Delaware law.

d. The Commission lacks authority under the Shipping Act to award reparations for contribution or indemnity.

On June 22, 2010, Administrative Law Judge Clay G. Guthridge, who was then the presiding officer,⁶ issued a Memorandum and Order on Motions to Dismiss after full consideration of pleadings filed in support and in opposition. The Order stated that:

1. The allegations in the Amended Complaint that the Olympus Respondents and the CJR Respondents violated Section 10(d)(1), 46 U.S.C. § 41102(c) and 46 C.F.R. § 515.31(e) were dismissed. In all other respects, the motions to dismiss were denied.

2. Global Link's crossclaims against the Olympus Respondents and the CJR Respondents were dismissed. (Memorandum and Order, p44.)

Judge Guthridge subsequently granted the parties leave to file interlocutory appeals. On August 1, 2011, the Commission made the following ruling in response to the appeals of Global Link and the Olympus Respondents.⁷

1. Affirmed the finding that the Commission has jurisdiction over the inland segment of intermodal through transportation.

2. Affirmed the dismissal of Global Link's first crossclaim seeking indemnification based on the SPA and Delaware law.

⁶This proceeding was reassigned to me by the Notice of Reassignment of August 10, 2012.

⁷These rulings are binding on me. I will not revisit issues already resolved by the Commission.

3. Vacated, pending further determinations by the presiding officer, the dismissal of Global Link's second crossclaim seeking contribution. The Commission declined to rule on whether contribution and indemnity are available remedies under the Shipping Act since it had not yet been determined whether Global Link is liable to Mitsui.

4. Vacated the dismissal of allegations that the Respondents violated Section 10(d)(1), 46 U.S.C. § 41102(c).

5. Remanded to the presiding officer the issue of whether the Respondents were acting in the capacity of non-vessel-operating common carriers ("NVOCCs") and whether, acting in that capacity, they violated Section 10(d)(1). (Commission Order, pp.36, 37.)

D. ANSWERS TO THE AMENDED COMPLAINT AND CROSSCLAIMS

1. GLOBAL LINK

In its Answer,⁸ Global Link admitted to the truth of the following allegations:

1. That historically it engaged in a practice variously described as "split routing", "mis-booking", and "rerouting"⁹ by booking cargo to false inland destinations while intending to deliver the cargo to different inland destinations (Global Link Answer, p.5).

2. That the CJR Respondents and the Olympus Respondents each had knowledge of Global Link's practice of split routing. Global Link alleged that it did not have knowledge or information sufficient to form a belief as to whether the CJR Respondents or the Olympus Respondents participated in the practice of split routing (Global Link Answer, pp.5, 6).

3. That historically Global Link would divert cargo without submitting a formal request to Mitsui and without paying a difference in rates. However, Global Link denies that it carried out this practice without Mitsui's knowledge (Global Link Answer, p.6).

4. That, in some instances, the historical rates paid to Mitsui for transportation to disclosed locations were less than the rates to the actual location. One of the reasons for the split routing practice was to reduce Global Link's costs (Global Link Answer, pp.6, 7).

5. That historically certain of Global Link's employees created or facilitated false invoices, addresses, and bills of lading as part of the split routing practice. At one time, Global Link employees were taught to locate real addresses in the false destination cities in an effort to avoid communicating

⁸Although Global Link filed its Answer to the original Complaint, its Answer is equivalent to an Answer to the substantive portions of the Amended Complaint.

⁹These terms will be used interchangeably.

to certain ocean carriers that the destinations provided were false. Global Link denied that its employees were trained not to tell representatives of Mitsui the true destinations of diverted goods, and to lie if they were asked (Global Link Answer, p.7).

Global Link raised the following affirmative defenses:

1. That the Amended Complaint is barred by limitations.
2. That Mitsui is estopped from obtaining relief in that it knowingly participated in and failed to object to the practice of split routing.
3. That Mitsui has waived its right to relief because of its knowledge of, participation in, and failure to object to the practice of split routing.
4. That Mitsui has “unclean hands” inasmuch as it knew of, approved, and benefitted from the split routing. In addition, Mitsui sought to continue the practice of split routing after the sale of Global Link in 2006 because Mitsui preferred not to be bothered with negotiating a multiplicity of door points.
5. That Mitsui is barred from relief because of the doctrine of *in pari delicto* inasmuch as it knew, failed to object to, approved of, and benefitted from the practice of split routing.

Global Link also listed as an affirmative defense its entitlement to indemnification or contribution from the CJR Respondents and the Olympus Respondents if it is found to be liable to Mitsui. This is not an affirmative defense to Mitsui’s allegations against Global Link. Rather, it is pertinent to Global Link’s crossclaims.

Global Link’s first crossclaim¹⁰ is based upon the following allegations:

1. That the practice of split routing upon which the Amended Complaint is based was concealed from the current owner of Global Link by the Cross Respondents. Each of the Cross Respondents, with the exception of Rosenberg, sold their ownership interests in Global Link to the current owner. Rosenberg is the alter-ego and guarantor of CJR World Enterprises, Inc. (“CJRWE”), and was the director and CEO of Global Link prior to the sale of Global Link to its current owner in 2006.
2. That, according to the Arbitration Award, the Cross Respondents, with the exception of Rosenberg, as well as the other respondents to the arbitration proceeding, were found to be liable to Global Link for fraud and concealment of the practice of split routing. Global Link and its current owner were found not to be at fault for the split routing and were awarded damages in the total amount

¹⁰As stated above, the Commission has affirmed the dismissal of the first crossclaim. I have included it in this Initial Decision only for the purpose of setting forth a complete overview of this proceeding.

of \$16,202,126.47 including prejudgment interest, costs, and expenses. The Arbitration Award is a final adjudication and is binding on the Cross Respondents as a matter of law.

3. That the Cross Respondents are liable to indemnify Global Link in the amount of any reparations awarded to Mitsui, including attorney fees and costs, pursuant to the SPA as established by the Arbitration Award, and according to Delaware law.

In its second crossclaim, Global Link restates all of the above allegations and further alleges that, if it is found to be liable to Mitsui, then the Cross Respondents are jointly liable and should be found to be obligated to contribute to the payment of reparations according to their respective shares of fault.

2. OLYMPUS RESPONDENTS

In their Answer to the Amended Complaint, which preceded the Commission's Order of August 1, 2011, the Olympus Respondents generally deny liability and restate all of the allegations of their Motion to Dismiss. In further support of their contention that Mitsui's claims are time-barred, the Olympus Respondents maintain that they sold their interest in Global Link on June 7, 2006, and cannot be held liable for any of Global Link's activities after that date. The Olympus Respondents further allege as follows;

1. That it was not until the commencement of the Arbitration Proceeding that they first became aware that Global Link was carrying on the practice of split routing with the knowledge and consent of Mitsui.

2. That split routing is not a "false booking practice."

3. They admit that Mischianti, Cardenas, and Heffernan were officers and/or directors of GLL Holdings and/or Global Link between May 2003 and June 2006.

3. That Mitsui fails to allege and will be unable to show that it entered into service contracts with any of the Olympus Respondents, or that any of the Olympus Respondents dealt with Mitsui in any capacity.

4. That the Shipping Act provides no basis for the Commission to set aside the corporate form and to hold the corporate Olympus Respondents liable, as former shareholders of GLL Holdings, for the actions of its subsidiary Global Link.

5. That the Shipping Act provides no basis for the Commission to hold officers and directors personally liable for corporate misconduct, especially when, as in this proceeding, the overwhelming weight of the evidence is to the effect that the officers and directors took no part in the corporation's purported misconduct.

3. CJR RESPONDENTS

The CJR Respondents generally deny liability to Mitsui and raise the following affirmative defenses:

1. That the Amended Complaint fails to state a claim upon which relief can be granted in that Mitsui has failed to allege violations of the Shipping Act and fraud with particularity.

2. That the Amended Complaint fails to state a claim upon which relief can be granted in that Mitsui has failed to allege with particularity how CJRWE or Rosenberg dominated and controlled Global Link during all or part of the relevant period so as to justify piercing the corporate veil.

3. That split routing is a common practice in the NVOCC industry and is not a violation of Section 10(a)(1).

4. That, even if it were to be found that any of the Respondents have violated the Shipping Act, Mitsui is barred from recovery because of its knowledge of and participation in the allegedly illegal conduct. In addition, Mitsui's knowledge of, participation in, and encouragement of the aforesaid conduct would be a violation of Sections 10(b)(1) and (2)(A), 46 U.S.C. §§ 41104(1) and (2)(A), and would constitute an unjust and unreasonable practice in violation of Section 10(d)(1).

5. That the Amended Complaint is barred by illegality in that Mitsui's failure to have suitable tariff rates on file for Global Link's shipments is an unfair and unjust discriminatory practice in violation of Section 10(b)(4), 46 U.S.C. § 41104(4), and an undue and unreasonable prejudice or disadvantage under Section 10(b)(8), 46 U.S.C. § 41104(8).

6. That Mitsui has suffered no damages as a result of the conduct alleged against any of the Respondents. Accordingly, Mitsui's claims are in violation of Section 10(d)(1), 46 U.S.C. § 41102(c).

7. That the Amended Complaint is barred by limitations and/or laches.

8. That the Amended Complaint is barred by estoppel and/or waiver in that Mitsui knowingly participated in, approved of, failed to object to, and encouraged the practice of split routing by Global Link. For the same reasons, the Amended Complaint is barred by Mitsui's unclean hands and the doctrine of *in pari delicto*.

II. POSITIONS OF THE PARTIES¹¹

A. MITSUI

1. INITIAL BRIEF

Mitsui is seeking reparations from the Respondents for violations of Sections 10(a)(1) and 10(d)(1), 46 U.S.C. §§ 41102(a) and (c). The Respondents violated the Shipping Act by knowingly and wilfully engaging in a scheme to fraudulently obtain ocean transportation of property for less than the rates and/or charges that would otherwise apply. As part of the scheme, the Respondents prepared false documents and provided false information to Mitsui in violation of Commission regulations, 46 C.F.R. §515.31(e). Accordingly, the Respondents failed to establish, observe, and enforce just and reasonable regulations and practices related to or connected with receiving, delivering, and handling property.

Mitsui observes that Global Link has admitted engaging in fraudulent practices for the purpose of obtaining lower freight rates from Mitsui and other ocean carriers. The current owner of Global Link was, by its own admission, advised as early as July of 2006 that split routing was illegal. Nevertheless, Global Link continued the practice through May of 2007. Each of the other Respondents was also involved in the unlawful acts, and benefitted from those acts to the detriment of Mitsui. The Respondents' illegal activities first came to Mitsui's attention in 2008; its Complaint was filed with the Commission on May 5, 2009, which is within the three-year limitations period.

Mitsui maintains that, by virtue of its Proposed Findings of Fact ("PFF") and evidentiary submissions, it has met its burden of proof that each of the Respondents violated Section 10(a)(1). Mitsui relies upon the following points in support of its position:

1. Global Link admitted its illegal acts by a voluntary disclosure to the Commission.
2. The split routing scheme was knowingly and wilfully carried out by all of the Respondents.
3. The Respondents selected "preferred truckers" who would help them to conceal the split routing from ocean carriers.
4. The Respondents made great efforts to conceal the split routing scheme.
5. Global Link had no intention of paying the proper charges in accordance with its service contracts.

¹¹In summarizing the positions of the parties I will use phrases such as "According to _____" and "_____ contends" only insofar as necessary to avoid confusion.

6. By engaging in split routing, Global Link used fraud and deception to obtain ocean transportation of property at less than the proper rates.

7. All of the Respondents were aware that split routing violated the Shipping Act.

8. Respondents Rosenberg, Mischianti, Cardenas, and Heffernan, as officers, agents, and/or employees of Global Link, actively participated in the split routing scheme.

9. All of the Respondents benefitted from the split routing scheme.

10. The new owner of Global Link continued the scheme.

Mitsui's rationale for recovery as against the Respondents other than Global Link is based upon its contention that, from 2003 through 2006, OGF, OEF, and the CJR Respondents had ownership interests in Global Link Holdings, which is the parent company of Global Link.¹² Furthermore, as officers and directors of Global Link, Mischianti, Cardenas, Heffernan, and Rosenberg had the responsibility of ensuring that Global Link, as a licensed NVOCC, complied with rules and regulations pertinent to the Shipping Act. While all Respondents are equally culpable, Rosenberg, as the qualifying individual for Global Link, and Global Link itself had a higher duty to comply with the requirements of the Shipping Act in view of the provisions of Section 19(a), 46 U.S.C. § 40901(a), and with Commission regulations, 46 C.F.R. § 515.11.¹³

Although Section 10(d)(1) imposes duties only on common carriers, MTOs, and OTIs, Mitsui maintains that all of the Respondents violated that section. Global Link is a licensed NVOCC; the other Respondents acted as NVOCCs because of their active participation in the split routing scheme. The Respondents' actions to obtain ocean transportation at less than the applicable rates were neither just nor reasonable.

Mitsui further maintains that, by the above actions, the Respondents also violated 46 C.F.R. § 515.31. That regulation prohibits NVOCCs from preparing or filing false and fraudulent documents.

¹²Mitsui has incorporated this and many other of its arguments in its proposed findings of fact. I will address, to the extent necessary, the factual contentions of all of the parties in my own Findings of Fact.

¹³The Shipping Act, at 46 U.S.C. § 40901(a), authorizes the Commission to issue a license to a person that it determines to be "qualified by experience and character to act as an ocean transportation intermediary." In 46 C.F.R. § 515.11(a)(1) the Commission requires that an applicant for an OTI license demonstrate, among other things, that "its qualifying individual has a minimum of three (3) years experience in ocean transportation intermediary activities in the United States, and the necessary character to render ocean transportation intermediary services."

According to Mitsui, its Complaint was filed within the three year limitations period established in Section 11(a), 46 U.S.C. § 41301(a).¹⁴ Mitsui cites Commission precedent in support of the “discovery rule” according to which its claim accrued when it first knew or should have known of the split routing scheme. It commenced this action on May 5, 2009, which was within the three year limitations period of the time when it first learned of the split routing scheme by virtue of a subpoena in the arbitration proceedings instituted by Global Link and its owner.

According to Mitsui, it could not have learned of the split routing scheme any earlier because of the elaborate efforts by the Respondents to conceal the practice. Such efforts included the falsification of documents, including the insertion of real addresses for the fictitious destinations, and instructions to employees to lie to Mitsui if they were asked about inland delivery points. The Respondents would not have gone to such elaborate lengths to conceal the split routing if they thought that Mitsui knew about it.

2. REPLY BRIEF IN FURTHER SUPPORT OF CLAIMS AGAINST RESPONDENTS

a. BURDEN OF PROOF AND ADMISSIBILITY OF EVIDENCE

Mitsui concurs with the allegations of the CJR Respondents that it must prove its case by a preponderance of the evidence. However, the CJR Respondents incorrectly maintain that Mitsui must prove every element of Shipping Act violations with regard to each shipment. Commission precedent cited by the CJR Respondents does not support their position and, in fact, refutes it. According to Mitsui, the Commission, in reliance upon a holding by the Supreme Court, has recognized that, once the Respondents have been found to have violated the Shipping Act by their engagement in split routing as to some shipments, it may apply that finding to other shipments by reasonable inference in the absence of direct evidence.

Mitsui argues that, in attempting to denigrate its evidence as hearsay, both the Olympus Respondents and the CJR Respondents have ignored the fact that Commission proceedings are governed by the Administrative Procedure Act and Commission regulations rather than by the Federal Rules of Evidence. Commission regulations, at 46 C.F.R. § 502.156, allow for the admission of evidence that is “relevant, material, reliable and probative, and not unduly repetitious or cumulative.” The Commission has repeatedly construed the regulation as allowing for the admission of hearsay evidence. Since Mitsui’s evidence is relevant, material, reliable, and probative, it is admissible.

¹⁴The cited portion of the Shipping Act provides that, if a complaint is filed within 3 years after the claim accrues, the complainant may seek reparations for an injury caused by the alleged violation.

Mitsui maintains that, in accordance with 46 C.F.R. § 502.209(a)(5),¹⁵ deposition testimony from the Arbitration Proceeding is admissible as against any party that was also a party to the Arbitration Proceeding. All of the deposition testimony offered by Mitsui was by directors, officers, or authorized agents of parties to this proceeding. Each of the parties had the opportunity to attend the depositions and to cross examine the witnesses. Global Link itself has offered portions of depositions taken during the Arbitration Proceeding. Unsworn pleadings are also admissible to the extent that they are relevant and material. Courts have admitted admissions by parties in prior litigation, especially when the position taken by parties in prior proceedings are inconsistent with their positions in the current proceeding.

According to Mitsui, the findings by the arbitrators with regard to the actions of the Respondents are also admissible since, like this proceeding, the Arbitration Proceeding was concerned with the actions of the Respondents with regard to split routing. Both the Commission and courts have admitted evidence of awards by arbitrators. The findings of the arbitrators were derived from their factual findings which are relevant, material, reliable, and probative. The affirmation of the award by a Delaware court is a strong indicator of substantive and procedural fairness.

According to Mitsui, the fact that it was not a party to the Arbitration Proceeding does not detract from the relevance of the arbitrators' findings as to the Respondents. Each of the Respondents were parties to the Arbitration Proceeding; they had the opportunity to address all of the allegations and will not be prejudiced by the admission of the arbitrators' findings which concern them. The admissibility of the award is further established by the fact that Global Link has also offered it in evidence.¹⁶

Mitsui maintains that Global Link's Voluntary Disclosure¹⁷ is admissible. Global Link submitted it to the Commission in the knowledge that it might lead to criminal penalties and therefore had the incentive to make the Voluntary Disclosure as accurate as possible. The subject matter of the Voluntary Disclosure is directly applicable to the issues in this proceeding; the objections to its admissibility by the Olympus Respondents and the CJR Respondents go to weight rather than to admissibility.

¹⁵Presumably, Mitsui means 46 C.F.R. § 502.209(a)(7) which allows for the use of depositions taken in earlier actions so long as both actions involve the same parties, their representatives, or successors in interest.

¹⁶Obviously, Mitsui and Global Link differ as to the admissibility of the arbitrators' findings as to Mitsui's knowledge of and consent to split routing by Global Link. Each of the parties have selectively cited portions of the Arbitration Award while challenging the admissibility of other portions.

¹⁷See FF 26 and footnote 42.

Finally, Mitsui argues that the e-mail messages between Global Link employees and Global Link's outside counsel are admissible under the general standards applicable to administrative proceedings. Arguments by the Olympus Respondents that the messages are not admissible as against them also go to weight rather than to admissibility.

b. LIABILITY OF THE RESPONDENTS¹⁸

Mitsui again maintains that split routing is a violation of the Shipping Act and of Commission regulations and that each of the Respondents is liable to Mitsui for reparations on account of the monetary losses it sustained. In its Order of August 1, 2011, the Commission held that each of the Respondents besides Global Link could be held liable upon proof that they were "engaged in the necessary participation" in the split routing scheme. The evidence shows that each of the Respondents evinced the bad faith and deceit which, as stated in 46 C.F.R. § 545.2, are essential elements of violations of Section 10(a)(1). When a natural person, rather than a business entity, is charged with such violations, it must be shown that he or she personally engaged in the requisite bad faith and deceit.¹⁹

According to Mitsui, Commission precedent establishes that a corporate officer may be held personally liable for a violation of Section 10(a)(1) even though he or she was not involved in the day-to-day operations of the corporation or the individual transactions which constituted the violations. There is ample evidence to justify findings of liability by the individual Respondents.

Mitsui maintains that Rosenberg was the architect of split routing by Global Link and introduced the practice when he founded Global Link in 1997. He was principally responsible for training Global Link personnel in executing split routing. It is of no consequence that, as Rosenberg maintains, his participation in the affairs of Global Link gradually diminished until his resignation as an employee and director prior to the sale of the corporation to its current owner in 2006. The fact remains that Rosenberg signed three of the service contracts between Global Link and Mitsui. Furthermore, according to Commission records, he remained as the qualifying individual for Global Link until 2007 and maintained some involvement with the corporation at least until that time.

Mitsui further maintains that CJRWE is liable to Mitsui under the principle of *respondeat superior*. Since Rosenberg was the sole shareholder, officer, and director of CJRWE, it is responsible for the actions of Rosenberg. Although split routing is a violation of the Shipping Act, Rosenberg was acting within the scope of his authority from CJRWE by attempting to maximize its profits, thereby seeking a benefit both for the corporation and himself.

¹⁸I will not present a detailed summary of arguments previously submitted in Mitsui's Initial Brief. The same will apply to the Reply Briefs of the other parties.

¹⁹This is essentially the position taken by the Olympus Respondents and the CJR Respondents.

Alternatively, Mitsui argues that CJRWE was the alter ego of Rosenberg. There is no real distinction between Rosenberg and CJRWE. Just as Rosenberg created Global Link for the purpose of engaging in split routing, he used CJRWE to maintain his ownership and control over Global Link. Accordingly, Rosenberg and CJRWE are jointly liable to Mitsui.

According to Mitsui, the Olympus Respondents have espoused an overly narrow definition of “participation” in an attempt to avoid liability for the split routing by Global Link. Even under that definition, the individual Olympus Respondents (Mischianti, Cardenas, and Heffernan) are liable because they participated in the split routing scheme, or, at the very least, knew or should have known of its existence while taking no action to stop it. Their failure to act is a breach of their fiduciary duty to the shareholders and is a basis for holding them personally liable.²⁰

The Olympus business entities are responsible for the actions of the individual Olympus Respondents under the principle of *respondeat superior*. Cardenas and Heffernan were officers and directors of Global Link from May of 2003 to June of 2006 and, as such, regularly communicated with senior management at Global Link. Cardenas knew of the nature and extent of split routing by Global Link, and was advised that it was illegal. Rosenberg explained split routing to Cardenas in July of 2003, and, on November 10, 2005, Cardenas attended a meeting of Global Link’s board of directors at which split routing was discussed.

Like Cardenas, Heffernan was an officer and director of Global Link from May of 2003 to June of 2006. Heffernan also communicated with senior Global Link management on a regular basis and learned of the existence of split routing during the summer of 2003, at which time he became aware of questions as to its legality. In 2005 Heffernan attended a meeting of the Global Link board of directors at which split routing was discussed.

Mischianti was a director of Global Link during the same period of time as was Cardenas and Heffernan. He communicated with Global Link management and was a director when split routing was discussed by the Global Link board of directors in 2005.

Each of the individual Olympus Respondents had extensive experience and expertise in transportation and logistics. Their positions in the management structure of Global Link and their failure to act to prevent split routing charges them with personal liability to Mitsui. Because each of the individual Olympus Respondents were principals of the OGF and OEF, their actions should be imputed to the funds, thereby rendering them liable to Mitsui.

Mitsui maintains that it is entitled to reparations from Global Link in view of Global Link’s Voluntary Disclosure to the Commission. In its disclosure, Global Link described a complex scheme to defraud ocean carriers, including Mitsui, by obtaining freight rates that were lower than Mitsui would have charged if the shipments had been properly booked in the first place. Global Link submitted the

²⁰Mitsui has not alleged that Mischianti, Cardenas, or Heffernan were shareholders of any of the corporate Respondents.

disclosure because it knew that split routing is a violation of the Shipping Act and it hoped to mitigate whatever penalties the Commission might assess.

c. MITSUI'S LACK OF KNOWLEDGE OF THE SPLIT ROUTING

Mitsui cites its sample shipments as evidence of the deception that Global Link employed in furtherance of its scheme of split routing. The contention of Global Link and the other Respondents that Mitsui knew of the scheme is belied by the efforts to which Global Link went to falsify shipping documents and to conceal the split routing from Mitsui's personnel. Global Link personnel were specifically instructed not to inform ocean carriers of the actual inland destinations of shipments.

Mitsui acknowledges that Global Link and the other Respondents "appear to have collaborated" with McClintock and Yang to carry out the split routing scheme. McClintock and Yang never informed anyone else at Mitsui of the scheme and when questioned by Mitsui representatives, including Hartmann, in 2008, continued to deny its existence other than in isolated cases. Mitsui further acknowledges that subsequently obtained evidence contradicts McClintock's and Yang's denials of their knowledge of split routing. Such evidence shows that Global Link and the other Respondents colluded with McClintock and Yang against Mitsui's interest. Global Link has admitted that the practice of split routing was widespread and that it is a violation of the Shipping Act. Therefore, Mitsui is entitled to relief even if it is found that it should have known of the split routing scheme.

Mitsui agrees that a principal is charged with knowledge by its employees and agents who are acting within the scope of their authority. However, the knowledge of employees and agents is not imputed to the principal when the agent is not acting within the scope of his or her authority or is obviously acting adversely to the interests of the principal. This concept, which is known as the "adverse interest exception," has been adopted by the Commission.

Mitsui maintains that the adverse interest exception applies in this case because the Respondents knew that McClintock and Yang were acting in furtherance of their own interests and would not inform Mitsui management of the split routing scheme. In view of McClintock's instructions to Global Link not to discuss split routing with anyone else at Mitsui, the Respondents knew that McClintock and Yang had not done so. The CJR Respondents have admitted that, since Global Link was an important customer of Mitsui, McClintock and Yang wanted to avoid actions which might jeopardize their relationship. Responsible Global Link personnel did not inform other Mitsui personnel in spite of their having contacts with Mitsui's upper management. Accordingly, the Respondents were not entitled to rely on the authority of McClintock and Yang.

According to Mitsui, the fact that McClintock and Yang were acting adversely to Mitsui's interests is shown by the proposition that split routing is in violation of the Shipping Act, thereby exposing Mitsui to the possibility of substantial civil penalties. In addition, Mitsui lost large amounts of revenue because of Global Link's failure to pay the proper charges for inland transportation. In illustration of the fact that McClintock's actions were adverse to Mitsui's interests, Mitsui cites instances

in 2006 when Mitsui's yield management personnel recommended that shipments between the rail ramp in Fort Worth, Texas and West Monroe or Monroe, Louisiana be moved by rail rather than by truck in order to reduce cost. In spite of that recommendation, McClintock approved a procedure whereby fifty percent of those shipments would be moved by Global Link's preferred trucker even though the preferred trucker charged considerably more than did Mitsui's trucker. McClintock's action was designed to please Global Link rather than to further the best interests of Mitsui. If Mitsui had known of this arrangement, it could have taken steps to "cease carrying this cargo and to replace it with lawful cargo." (Mitsui Reply Brief, pp.45, 46.)

Mitsui also describes the diversion of goods to Winnsboro, Louisiana as an illustration of how McClintock acted against its best interests. McClintock, without the knowledge of anyone else at Mitsui, authorized increases in payments to Global Link's preferred trucker in spite of the fact that Winnsboro was not named as a destination in the service contract.

According to Mitsui, there is no merit to the Respondents' allegations that it benefitted from split routing by avoiding the necessity of adding door points to its service contracts. The contracts contained many door points and were amended numerous times. It would have been a small matter to add additional door points.

The alleged benefit of relieving Mitsui of the burden of arranging for inland transportation and eliminating exposure to railroad detention charges is similarly without merit. This is illustrated by numerous instances in which Global Link carried out split routing in spite of the fact that both the fictitious and actual destinations were contained in the service contracts. In such instances Global Link informed Mitsui that a shipment was going to a farther and more expensive destination than its actual destination. This allowed Global Link to split the larger trucking allowance with the trucker.²¹ Such instances show that Global Link carried out split routing for its own benefit rather than for the benefit of Mitsui.

According to Mitsui, neither McClintock nor Yang had the authority to approve split routing. In the first place, they could not have had authority to commit Mitsui to an illegal act. Secondly, the Respondents knew that McClintock and Yang lacked such authority because McClintock advised Global Link to keep it a secret from others at Mitsui. While certain of Mitsui's employees might have known of some aspect of Global Link's conduct, none of them had sufficient knowledge to have informed Mitsui that split routing was being carried on or to have caused Mitsui to suspect that this was the case. Finally, the Respondents knew that neither McClintock nor Yang had the authority to change or depart from the rates in the service contracts.

²¹Although 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.

Mitsui argues that, while the knowledge of Rosenberg and the individual Olympus Respondents is properly imputed to CJRWE and the Respondent funds, the opposite is true as to the imputation of McClintock's and Yang's knowledge to Mitsui. Unlike Rosenberg, McClintock and Yang acted adversely to the interests of their principal.

Mitsui maintains that its relationship with Nintendo has no bearing on the issues in this proceeding. Mitsui cites Judge Guthridge's Order of April 12, 2012, in which he denied a request for the issuance of a subpoena *duces tecum* to Nintendo. More specifically, Judge Guthridge ruled that Mitsui's relationship with Nintendo, or with any other shipper, makes it neither more nor less likely that Mitsui knew about the split routing by Global Link (Order, p.8).

Mitsui denies that it obtained knowledge of the split routing because of alleged invoices from Spirit Trucking and "Shipline" documents which showed the actual inland destinations of certain shipments. There is no evidence that Mitsui actually received the so-called invoices. Furthermore, the documents reflected only a small portion of the affected shipments and did not show the pervasive pattern of split routing by Global Link, especially since the documents would have been reviewed by Mitsui's accounts receivable personnel. Those personnel would have had no responsibility for or knowledge of the arrangements between Mitsui and Global Link.

Finally, Mitsui denies that e-mail messages dated August 15, 2005, between McClintock and Ted Holt of Mitsui show that Kevin Hartmann, Mitsui's Vice-President, Law & Insurance, was informed of the split routing. McClintock could not definitively testify that he had informed Hartmann; there are no documents relating to McClintock's alleged communication with Hartmann, and Hartmann has denied receipt of such communications or knowledge of the split routing scheme.

d. LIMITATIONS

Mitsui argues that, because it may not be charged with the knowledge of McClintock and Yang, its claims for reparations are not barred by limitations. The Commission has adopted the "discovery rule" whereby a party is not charged with knowledge of a claim until it knew or should have known that it had a cause of action. Mitsui's failure to learn of the split routing scheme until 2008 is the result of the fraud and deception carried out by the Respondents with the connivance of McClintock and Yang. Therefore, its claims against the Respondents should be held to have accrued in 2008 rather than when the split routing began.

Mitsui further argues that the Commission has adopted a flexible policy with regard to the accrual of claims. The cases cited by the Respondents are unduly restrictive and are not in keeping with the remedial nature of the Shipping Act. Mitsui's lack of prior knowledge of the split routing scheme was not the result of its lack of due diligence, but solely the result of the Respondents' fraudulent conduct.

In support of its position as to due diligence, Mitsui maintains that, even if it had conducted an investigation prior to 2008, it would not have learned of the split routing. In order to effectuate the split

routing scheme, Global Link had produced two sets of documents for each affected shipment and had only provided Mitsui with documents that reflected the fictitious destinations. Most Mitsui personnel were ignorant of split routing because of the efforts of McClintock, Yang, and Global Link personnel to conceal the scheme.

As an alternative position, Mitsui maintains that, even if I were to find that it should have known of the split routing scheme before 2008, its claims are not barred by limitations. Mitsui presents the following arguments in support of this position:

1. Under California law, limitations on a claim of civil conspiracy does not start to run until the last overt act in implementing the conspiracy. As Global Link has stated in its Voluntary Disclosure, that act did not occur until 2007. The service contracts between Mitsui and Global Link were governed by California law.²²

2. The Respondents' conduct is a continuing violation of the Shipping Act. Accordingly, Mitsui is entitled to pursue its claims even though some of the claims fall outside of the limitations period.

e. REPARATIONS

Mitsui disputes the Respondents' arguments that it is not entitled to reparations because it has not suffered a monetary loss. The Respondents have placed misguided reliance on *James J. Flanagan Shipping Corp. v. Lake Charles Harbor and Terminal District*, 30 S.R.R. 8, 13 (2003) ("*Flanagan*"). The decision in *Flanagan* deals only with Section 10(d)(1) of the Shipping Act, while the principal thrust of this proceeding concerns the Respondents' violations of Section 10(a)(1).

Mitsui cites *American President Lines, Ltd. v. Cyprus Mines Corporation*, 26 S.R.R. 1227 (1994) ("*APL*") in support of the proposition that a different standard prevails for the award of reparations under Section 10(a)(1) than under other portions of the Shipping Act. In *APL* the Commission held that the "filed rate doctrine" supersedes the "actual injury" language of Section 11(g), 46 U.S.C. § 41305(b). According to the filed rate doctrine, Mitsui is entitled to recover reparations for the difference between its filed rates and the lesser amounts paid to it by the Respondents as a result of split routing. Mitsui's entitlement to this recovery does not depend upon proof of actual monetary loss.

Mitsui further maintains that the factual basis of the Respondents' argument as to reparations is flawed. The Respondents have based their argument on McClintock's testimony that Mitsui treated the cost of the inland phase of transportation as a "pass through" from which it derived no profit. Not only is McClintock's testimony contradictory, but the language of the service contracts shows that the rates for moving goods from the point of loading aboard ship to the point of inland delivery are listed as single

²²Because Mitsui's claims against the Respondents are not based upon alleged breaches of the service contracts, California law is not controlling. Even if that were not so, the Shipping Act, 46 U.S.C. § 40502(f), provides that, in the absence of agreement by the parties, the exclusive remedy for such breach is in an appropriate court.

figures with no breakout for the inland phase. Therefore, it cannot be assumed that Mitsui suffered no loss from each shipment in which the Respondents engaged in split routing.

According to Mitsui, the argument that NVOCCs, rather than Mitsui, bore any losses resulting from split routing is invalid on its face. To accept that argument would be to assume that Rosenberg adopted a procedure that would cause his own company, Global Link, to lose money.

3. REPLY BRIEF TO GLOBAL LINK'S BRIEF IN SUPPORT OF COUNTERCLAIM

Mitsui maintains that, since Global Link's counterclaim is based on the proposition that Mitsui knew of the split routing, the counterclaim lacks merit for the reasons stated above. Even if that were not so, the filing of a claim cannot be a violation of Section 10(d)(1) because it is not a practice related to or connected with receiving, handling, storing, or delivering property.

Mitsui argues that, since Global Link's sole claim for reparations is for attorney fees, it is directly contrary to the plain language of the Shipping Act. Section 11(g), 46 U.S.C. § 41305(b), allows for the recovery of reasonable attorney fees by successful complainants; there is no provision for an award of attorney fees to respondents.

Mitsui further argues that an award of attorney fees to Global Link would be contrary to the intent of the Shipping Act, which is to encourage potential claimants to initiate proceedings before the Commission; the allowance of attorney fees to such complainants is in furtherance of this intent. Awards of attorney fees to respondents would have a chilling effect on efforts by private parties to enforce the provisions of the Shipping Act.

Finally, Mitsui maintains that the filing of the counterclaim is a thinly-veiled attempt by Global Link to style itself as a complainant in order to circumvent its lack of entitlement to attorney fees when it has not sought reparations.

B. GLOBAL LINK

1. INITIAL BRIEF

Global Link maintains that the overwhelming weight of the evidence shows that Mitsui knew that Global Link engaged in the split routing of shipments for which Mitsui had issued master bills of lading and that Mitsui encouraged the practice for its own benefit. The evidence also shows that Mitsui agreed to pay truckers to deliver goods to destinations not listed on its bills of lading or in the applicable service contracts. In addition, Mitsui strongly resisted efforts to discontinue split routing by the current owner of Global Link. The evidence shows that knowledge of split routing extended to Mitsui's operations personnel and to its senior managers as early as 2005 or before. Specifically, Mitsui's Vice President and General Manager testified that in 2005 he communicated with Mitsui's General Counsel

with regard to split routing and that Mitsui's senior managers were made aware of his communication. In spite of Mitsui's knowledge of the split routing, it took no action to prevent its continuance.

Mitsui's participation in split routing was not limited to transactions involving Global Link. Senior Mitsui personnel have admitted under oath that Mitsui allowed split routing to occur with shipments by Nintendo; Nintendo, like Global Link, was one of Mitsui's biggest customers. In fact, Mitsui actually handled the split routing deliveries for Nintendo. Sample documents produced by Mitsui show that over 80% of the Nintendo shipments were split routings.

Global Link also maintains that Mitsui has placed unwarranted reliance on the fact that the prior owners and managers of Global Link established elaborate procedures to conceal split routing from ocean carriers. Such procedures did not apply to Mitsui which was fully aware of, and complicit in, the practice of split routing. Because Mitsui was aware of and encouraged split routing, it cannot show the existence of fraud and deceit which are essential elements of claims under Section 10(a).

In view of Mitsui's knowledge and encouragement of split routing, its claims are substantially time barred. Under Section 11(g), 46 U.S.C. § 41301(a), reparations may only be recovered for shipments which occurred within three years of the filing of the Complaint, *i.e.*, May 5, 2009. Thus, Mitsui's claims arising out of shipments occurring in 2004, 2005, and the first part of 2006 are time barred unless Mitsui can show fraudulent concealment by Global Link. In view of Mitsui's knowledge of split routing, it is not entitled to a tolling of the limitations period.

Global Link alleges that Mitsui benefitted from the practice of split routing inasmuch as Global Link assumed the major portion of the obligation to deliver goods from the Mitsui container yard to the actual place of delivery or door point. This relieved Mitsui of the burden of providing staff to coordinate the door moves. At that time, the railroads were imposing substantial detention charges for containers that were not removed from the rail yards in a timely manner. Global Link's assumption of responsibility for the door moves relieved Mitsui of responsibility for the detention charges. Another advantage to Mitsui was that split routing eliminated the necessity of renegotiating its service contracts so as to add multiple new door points. Instead, Mitsui could continue to issue master bills of lading with regional door points, while relying on Global Link to arrange for good to be delivered to their actual destinations in accordance with the wishes of customers. Global Link cites the award in the Arbitration Proceeding (to which Mitsui was not a party) to the effect that a senior sales representative of Mitsui knew that Global Link was engaged in split routing and that Mitsui not only did not object to the practice but encouraged its continuation.

Global Link cites evidence that, as of December of 2005, Mitsui agreed to pay an increased trucking allowance to cover costs associated with split routing from its regional door point in West Monroe, Louisiana to actual delivery points in Winnsboro and Baskon, Louisiana. On December 1, 2005, a Mitsui employee expressed concern to her supervisor over a delivery order for Winnsboro rather than to West Monroe as shown on the Mitsui bill of lading. A Mitsui supervisor gave written instructions to five employees that they should cut transportation orders for West Monroe and that, if the movement was to be made by Vineyard Trucking, they could "work out the difference internally."

Global Link also cites evidence of other instances in 2005, 2006, and 2007 in which it engaged in split routing to various destinations in Virginia, Texas, Georgia, Oklahoma, and Illinois. All of those transactions occurred with the knowledge of Mitsui personnel.

In June of 2006, Global Link was acquired by Golden Gate Logistics, LLC (“Golden Gate”) which is its current owner. Global Link’s new owner subsequently learned of split routing from a former employee who was fired because of her refusal to engage in the practice. Early in 2007 Global Link hired a new Chief Operations Officer, Christine Callahan, who was instructed to ensure that Global Link complied with Commission regulations and to put an end to split routing. Over time, Global Link (or its new owner) learned of the extent to which the corporation had engaged in split routing and that split routing was a violation of the Shipping Act and of Commission regulations.

Global Link claims that it was unable to immediately terminate the practice of split routing because most of its service contracts with Global Link customers belonged to the Hecny Group, which was a Hong Kong-based logistics company. Since service contracts between carriers and NVOCCs run from May 1 to April 30, Global Link determined that it would be impossible to make significant amendments in mid-term. After consulting with counsel, Global Link decided to negotiate new contracts in May of 2007 so as to eliminate incentives to engage in split routing.

In March of 2007, Jim Briles of Global Link, upon instructions from Callahan, informed Mitsui that it wished to change its service contract by adding more door points and using container yard and port rates. Callahan commenced negotiations with steamship lines, including Mitsui, with regard to service contracts for the upcoming year. Her primary contact with Mitsui was McClintock who was responsible for the southeastern region of the United States; this region was the focus of much of Global Link’s business with Mitsui. Some time in 2007 McClintock became responsible for all of Mitsui’s sales activity in the United States.

Global Link alleges that McClintock and Rebecca Yang, the sales representative of Mitsui who was responsible for the Global Link account, subsequently came to Global Link’s offices to discuss the new service contract as well as Global Link’s desire to cease split routing. The Mitsui representatives told Global Link that Mitsui would not cease split routing because it was too time-consuming to negotiate individual door points. When Global Link requested that a new door point be added to the service contract for a particular shipment, McClintock and Yang requested that Global Link move the shipment by split routing.

By June of 2007 Mitsui had not provided Global Link with information for the new contract so as to eliminate split routing. At that point Callahan wrote to McClintock to inform him that Global Link could not continue to use the existing methodology (split routing) and that the parties needed to get the container yard (“CY”) rates in place as quickly as possible.²³ When Mitsui had not responded after about

²³The inclusion of CY rates would allow Mitsui to issue master bills of lading providing for delivery of cargo to container yards in the ports where the cargo was discharged from its vessels.

three weeks, Callahan again wrote to McClintock informing him that Global Link would immediately cease “supporting” Mitsui on the split moves because Mitsui had not provided CY rates which would allow Global Link to arrange for its own trucking. Hessel Verhage, the President of Global Link, met with McClintock and Yang to again inform them that Global Link would no longer engage in split routing. Mitsui expressed disappointment over Global Link’s decision.

Global Link cites two instances in July of 2007 in which Yang suggested to Briles that Global Link use split routing for the delivery of shipments to Bentonville, Arkansas and Winnsboro, Louisiana. (McClintock had increased the fuel allowance for truckers so as to make the move to Winnsboro more attractive.) In both cases, Briles informed Mitsui that Global Link would not engage in split routing. Finally, in or after August of 2007, Mitsui provided Global Link with CY rates, after which Global Link’s business with Mitsui was reduced.²⁴

Global Link describes an arrangement between Mitsui and Nintendo which allegedly involved extensive split routing. Nintendo had only one door point in its contract which was shown on every master bill of lading issued by Mitsui. Mitsui would thereupon arrange for the delivery of shipments to various other destinations; the primary duties of three of its employees was to arrange for such deliveries. According to sample documents submitted to the Commission by Mitsui, eighty-two percent of Nintendo’s shipments went to destinations other than those shown on Mitsui’s bills of lading. Despite the fact that Mitsui’s standard operating procedure was to engage in split routing, and that this practice lasted for an extended period of time, Mitsui did not attempt to add door points to the actual destinations. Mitsui took the position that diversion charges should not be assessed unless the shipper requested the diversion. Freight charges would not need to be re-calculated if the actual delivery points were “not far” from the destination shown on the bill of lading, *i.e.*, North Bend, Washington. Actual deliveries were to Yakima, Washington which is over 110 miles away from North Bend.

According to Global Link, Matsui’s only basis for denial of its knowledge of split routing is the evidence that Global Link took elaborate steps to conceal the practice. Those efforts by Global Link were designed to conceal split routing from carriers other than Mitsui, and, at the request of Mitsui, from its operations personnel. Such evidence from Mitsui does not detract from all of the evidence submitted by Global Link showing that McClintock and Yang, and possibly other Mitsui representatives, were aware of split routing by Global Link and condoned, encouraged, and participated in the practice.

Global Link maintains that Mitsui was fully aware of the ongoing practice of split routing in 2004 and could have pursued its legal remedies at that time. Mitsui’s claim that it did not know how widespread the practice was until 2008 is not only belied by the evidence, but is insufficient to justify the tolling of the three-year limitations period. Mitsui may attempt to counter the evidence of its

Global Link could then issue house bills of lading from the CYs to the actual destinations, thereby avoiding discrepancies between the bills of lading issued by each company.

²⁴It is unclear whether Mitsui or Global Link initiated the reduction in business between the two companies.

knowledge of split routing by asserting that only a limited number of its employees knew about it and that those employees were not on a sufficient level so as to have their knowledge attributable to Mitsui. Such contentions by Mitsui run counter to testimony by McClintock that he knew that split routing was a repeated occurrence. There is no basis for Mitsui's claim that split routing was limited to isolated incidents which involved only a few of its employees. Since a corporation can only act through its officers, agents and employees, it is bound by their collective knowledge. Since at least fifteen Mitsui employees were aware of split routing during the relevant time period, Mitsui may not insulate itself from their knowledge. This is true even if those employees were acting in violation of specific instructions from Mitsui.

Global Link emphasizes the fact that, from 2003 or before until 2007, McClintock was the Vice President and General Manager of Mitsui's Southeastern Region of the United States, during which time up to 100 regional sales, customer service, and operations personnel reported to him. In 2007 McClintock assumed responsibility for Mitsui sales throughout the entire United States. McClintock had primary oversight responsibility for the Global Link account while Yang was Mitsui's primary contact with Global Link. Yang's duties included primary responsibility for the negotiation of amendments and revisions to the service contract. However, because of the importance to Mitsui of the Global Link account, McClintock was personally involved with substantive changes to the contract. Among the Mitsui employees with knowledge of the split routing were Ted Holt, with whom McClintock communicated concerning whether Mitsui should seek to recover diversion charges from Global Link, and Kevin Hartmann who was Mitsui's General Counsel.

When junior level Mitsui employees raised concerns about split routing they were told by a more senior employee to cut fraudulent transportation orders showing that goods were being sent to the regional door point of West Monroe, Louisiana rather than to their actual destination.

Global Link maintains that all of the evidence cited above leaves no doubt that a number of Mitsui employees knew of and participated in split routing since at least 2005. The knowledge of those employees is fully attributable to Mitsui since each of them was acting within the scope of his or her authority. The so-called "adverse interest" exception does not apply since there is no evidence that the employees were acting from purely personal motives and contrary to Mitsui's interests. Mitsui directly benefitted from the practice of split routing by avoiding administrative burdens and expenses, and by avoiding punitive railroad demurrage charges. In addition, Mitsui benefitted by retaining Global Link as one of its biggest customers.

Even if Mitsui could state any claim for fraudulent deception, its claims for reparations for shipments prior to May 5, 2006, would be time-barred. Mitsui's evidence of sample shipments includes only one shipment that is not time-barred. According to Mitsui, it is entitled to reparations of \$452.00. Even that sample shows that Mitsui knew of the actual destination of the goods. Even if none of the sample shipments were time-barred, they have no evidentiary basis. Mitsui has submitted only spreadsheets, but no sworn statements.

Finally, Global Link maintains that Mitsui has submitted no basis for claims against the current owner of Global Link. The practice of split routing began long before Global Link was acquired by its current owner. The current owner only learned of the split routing after they had acquired Global Link and discontinued the practice as soon as possible.

2. BRIEF IN SUPPORT OF COUNTERCLAIM

Global Link's counterclaim is based on the proposition that Mitsui and Global Link's prior owners had a longstanding practice of engaging in split routing and that Mitsui was fully aware of and complicit in the practice. Now, after Global Link's current owner terminated the practice, Mitsui is attempting to recover a windfall resulting from its own illegal actions. In initiating this proceeding, Mitsui is engaging in an unjust and unreasonable practice which entitles Global Link to reparations for having to defend against Mitsui's baseless action.

3. BRIEF IN SUPPORT OF CROSSCLAIMS

Global Link's crossclaims are based on the proposition that, if it is held liable to Mitsui, it is entitled to contribution from the CJR Respondents and the Olympus Respondents. This is so because each of those respondents instituted and/or directly participated in the alleged Shipping Act violations, thereby causing the damages alleged by Mitsui.

According to Global Link, its current owner acquired the company in June of 2006 and only later learned of the split routing. Global Link acted promptly to investigate the allegations of split routing, but did not determine the scope of the practice until 2007. Accordingly, any damages to which Mitsui is entitled should be imposed on the CJR and Olympus Respondents.

Global Link maintains that, in the Arbitration Proceeding, the arbitrators found that the CJR and Olympus Respondents could be held liable for fraud attributable to Global Link. Such liability was based upon the direct actions of those Respondents rather than upon their status as shareholders and did not require a piercing of Global Link's corporate veil. Because the Respondents were parties to the Arbitration Proceeding they are collaterally estopped from contending that they were mere shareholders of Global Link and had no knowledge of the split routing.

Global Link also maintains that, under "traditional jurisprudence" and Commission precedent, liability may be imposed against the CJR and Olympus Respondents because they used Global Link as an instrument to perpetrate a fraud. To impose liability on Global Link, whose current owner took action to terminate the practice of split routing as soon as was reasonably possible after discovering the practice, rather than on the CJR and Olympus Respondents would be contrary to the remedial goal of the Shipping Act.

According to Global Link, the Commission, presumably in its Order of August 1, 2011, held that claims for contribution can be asserted under the Shipping Act.²⁵ Therefore, under appropriate circumstances such as exist in this case, contribution claims are valid.

Global Link argues that Congress delegated broad authority to the Commission to award reparations for violation of the Shipping Act. That authority encompasses the assessment of reparations against the parties who actually violated the Shipping Act, *i.e.*, the CJR and Olympus Respondents, rather than against innocent parties such as the current owner of Global Link. Accordingly, any reparations to which Mitsui is found to be entitled should be assessed solely against the CJR and Olympus Respondents. To impose liability on Global Link would be tantamount to imposing liability on Golden Gate, its current owner. Golden Gate played no part in the implementation or practice of split routing and should not be held liable for reparations.

4. REPLY BRIEF IN SUPPORT OF COUNTERCLAIM

Since most of Global Link's Reply Brief is devoted to a restatement of its arguments in opposition to Mitsui's claim for relief I will not summarize them. Global Link maintains that Mitsui has mischaracterized its counterclaim as no more than a claim for reparations because of Mitsui's commencement of this proceeding. In actuality, Mitsui has violated the following portions of the Shipping Act so as to cause Global Link to incur damages for which it is entitled to reparations:

1. Section 10(b)(1), 46 U.S.C. § 41104(1), by allowing a shipper (*i.e.*, Global Link itself) to obtain transportation at less than the rates set forth in its service contract by unfair device or means. Accordingly, Global Link would be entitled to reparations in the same amount as any reparations which Mitsui is awarded against Global Link for a violation of Section 10(a)(1), 46 U.S.C. § 41102(a), which prohibits shippers from obtaining transportation for less than service contract rates by unfair device or means.

2. Section 10(b)(2)(A), 46 U.S.C. § 41104(2)(A), which prohibits carriers from charging shippers rates that are not contained in service contracts. Global Link is entitled to reparations for overcharges by Mitsui on a number of shipments.

3. Section 10(d)(1), 46 U.S.C. § 41102(c), by engaging in unjust and unreasonable practices. Mitsui violated this section by refusing to amend its service contracts to include the door points that Global Link serviced through split routing. Global Link cites precedent to the effect that the failure of a carrier to have a suitable rate on file is an unjust and unreasonable practice and constitutes unreasonable discrimination.

²⁵Global Link later modifies that contention by recognizing that the Commission actually held that there is nothing in the Shipping Act to preclude or specifically authorize the imposition of proportional liability among the Respondents. In vacating Judge Guthridge's dismissal of this crossclaim, the Commission held that the issue of contribution will not be ripe for determination unless Global Link is found liable to Mitsui for more than its proportional share of reparations.

4. Section 10(d)(1) in instituting this proceeding. This is an unjust and unreasonable practice in view of Mitsui's participation in and encouragement of split routing. Mitsui now seeks to obtain a windfall from its illegal acts by seeking to obtain reparations from its "former collaborators." In view of such action by Mitsui, Global Link is entitled to reparations for having to defend against Mitsui's "meretricious collection action."

5. REPLY BRIEF IN SUPPORT OF CONTRIBUTION CLAIMS AGAINST OLYMPUS RESPONDENTS

Global Link maintains that the evidence in the record and the findings by the arbitration panel establish that, as former owners and managers of Global Link, the Olympus Respondents were active participants in the split routing scheme. In view of the findings by the arbitrators, the Olympus Respondents are collaterally estopped from denying their participation.

Global Link further maintains that, as a result of their participation, the Olympus Respondents are within the jurisdiction of the Commission. The jurisdictional argument of the Olympus Respondents is unduly restrictive and, if successful, would deprive the Commission of the ability to meaningfully enforce the Shipping Act.

According to Global Link, all of the evidence upon which it relies is admissible under the Federal Rules of Evidence ("Fed. R. Evid.")²⁶ and the more relaxed evidentiary standards of the Administrative Procedure Act. Fed. R. Evid. 801(d)(2)(A) provides that admissions by an opposing party are exempt from the hearsay rule. Furthermore, such evidence is within the scope of Rule 156, 46 C.F.R. § 502.156, since it is relevant, material, reliable, and probative. The arbitrators' findings as to the Olympus Respondents' participation in the split routing scheme precludes them from denying their participation inasmuch as they were parties to the arbitration proceeding and were afforded the opportunity to fully litigate all issues which were before the arbitrators.

Global Link argues that there is no merit to the contention of the Olympus Respondents that, because the arbitrators did not reach the issue of whether split routing was a violation of Section 10(a)(1), the Arbitration Award has no preclusive effect. The arbitrators found that both the Olympus and the Rosenberg Respondents, as principals, officers, and directors of Global Link, were fully aware of the split routing practice and failed to prevent or disclose it. The arbitrators thereby resolved the issue of whether the Olympus Respondents are named in this proceeding as individuals rather than as mere shareholders.

There is similarly no merit to the argument that the Olympus Respondents cannot be held liable because they did not personally book the shipments. Such a restrictive reading of the Shipping Act would render it meaningless since it would limit liability for violations to low level employees and

²⁶The Federal Rules of Evidence are applicable to contested proceedings before the Commission unless inconsistent with the requirements of the Administrative Procedure Act, Rule 156, 46 C.F.R. § 502.156.

would exonerate executives who permitted and ordered the unlawful practices. It is settled law that corporations are responsible for the acts and omissions of their employees and agents.

It is not necessary for the Commission to pierce the corporate veil in order to find that both the Olympus and the CJR Respondents are liable as “persons” under the Shipping Act. Even if that were not so, the Commission has long recognized its authority to disregard corporate entities in order to effectuate the purposes of the Shipping Act.

According to Global Link, the Commission, in its Order of August 1, 2011, ruled that contribution is consistent with the remedial goals of the Shipping Act under appropriate circumstances. The Commission’s ruling is the law of this case and may not be revisited.²⁷ An award of contribution would not amount to double recovery for Global Link. The arbitration proceeding was based upon the breach of the Stock Purchase Agreement (“SPA”) by which the claimants acquired ownership of Global Link. The arbitrators ruled that contingent liabilities to third parties were not yet ripe for determination. Thus, they did not address potential claims for contribution. Rather, the arbitrators based their award on the cost of eliminating the split routing practice and the inflation of the purchase price of Global Link by the inclusion of the revenue which was derived from split routing.

Global Link disputes the contention that, in view of the Arbitration Award, the allowance of its contribution claims would constitute a double recovery. Global Link instituted the arbitration proceeding to recover damages for the breach of representations in the SPA. Since Global Link is now seeking contribution for any reparations awarded to Mitsui, its crossclaims are not precluded by the Arbitration Award.

Global Link maintains that its contribution claims are not premature. Rule 14(a), Federal Rules of Civil Procedure (“FRCP”) allows for a defendant to pursue contribution and indemnity even though the claims against that defendant have not yet matured. The provisions of that rule are based upon the common-sense proposition that it is preferable to have all claims arising out of the same occurrence heard and determined in the same action.

Finally, Global Link asserts that its claims for indemnity are not precluded by the Arbitration Award.

6. REPLY BRIEF IN SUPPORT OF CONTRIBUTION CLAIMS AGAINST CJR RESPONDENTS

According to Global Link, evidence in the record clearly indicates that Rosenberg was personally and directly involved in the split routing by Global Link. Furthermore, the arbitrators found that the CJR and Olympus Respondents were liable for failing to disclose the split routing practices to the current owner of Global Link. All of those facts validate Global Link’s claims for contribution by the CJR Respondents.

²⁷See footnotes 7 and 25.

Global Link repeats the argument in its Reply Brief for Contribution Against Olympus Respondents that all of the evidence upon which it relies is admissible. Global Link also repeats its contention that the contribution claims are not premature.

Global Link maintains that, contrary to the assertion of the CJR Respondents, its claims for contribution are not precluded by the Order of August 1, 2011, in which the Commission dismissed its claims for indemnity. The Commission reversed the dismissal of Global Link's claims for contribution and held that imposing liability based upon the actual injury caused by a party is consistent with the language of the Shipping Act.

The CJR and Olympus Respondents are estopped from re-litigating their responsibility for the split routing upon which this proceeding is based. The Arbitration Award, as well as the evidence in the record, establishes that the current owner of Global Link unknowingly inherited the split routing practices and terminated them as soon as was feasible. The arbitrators also found that the current owner of Global Link never voluntarily engaged in split routing.

According to Global Link, the law of contribution recognizes that a party should pay only its fair share of damages to a third party. Since Global Link's current owner caused none of the damages alleged by Mitsui, the CJR and Olympus Respondents should pay all of the reparations to which Mitsui may be entitled. At the very least, the CJR and Olympus Respondents should be responsible for reparations arising out of transactions occurring prior to the purchase of Global Link by its current owner.

Global Link also argues that, while its identity as a corporate entity was not changed by the sale of its stock to the current owner, its prior owners and executives remain liable for their own fraudulent acts. The CJR and Olympus Respondents are bound by the arbitrators' findings that they are liable for failing to disclose the split routing scheme to the current owner, and that they made a material misrepresentation to the current owner in asserting that Global Link was in compliance with the rules and regulations of the Commission and the Shipping Act. The arbitrators further found that the CJR and Olympus Respondents fraudulently failed to disclose Global Link's reliance on split routing and made a deliberate effort to conceal the existence, extent, and significance of split routing from the current owner during the due diligence process prior to the sale of Global Link stock.

Global Link restates its position, as set forth in its Reply Brief in Support of Contribution Claims Against Olympus Respondents, that the allowance of contribution would not amount to a double recovery.

Global Link maintains that it is not estopped from seeking contribution from the CJR Respondents because of the Arbitration Award and makes the following points in support of that position:

1. The arbitrators did not reach the issue of whether those Respondents had violated the Shipping Act. Even if that were not so, the arbitrators could not usurp the exclusive jurisdiction of the Commission to adjudicate disputes arising out of alleged violations of the Shipping Act.

2. The SPA does not bar Global Link's contribution claims. On the contrary, the SPA specifically excludes claims for fraud. Global Link's crossclaims against the Rosenberg Respondents are predicated on their fraudulent activities which are violations of the Shipping Act.

Finally, Global Link maintains that the CJR Respondents have placed unwarranted reliance on Delaware law in support of their argument that the arbitration provision in the SPA divests the Commission of jurisdiction over the crossclaims. The position of the CJR Respondents is directly contrary to Commission precedent that a mandatory arbitration clause does not negate a federal agency's independent regulatory duty.

C. OLYMPUS RESPONDENTS²⁸

1. INITIAL BRIEF

The Olympus Respondents deny that they now are or have ever been entities subject to regulation by the Commission. OEF and OGF acquired shares in Global Link in May of 2003; they sold their shares in June of 2006. It therefore follows that the major portion of the period of their ownership interest in Global Link falls outside of the applicable limitations period.

The allegedly unlawful activities of Global Link first came to the attention of the Olympus Respondents through their involvement in the arbitration proceeding initiated by Global Link with regard to the sale of Global Link by the CJR Respondents. On May 21, 2008, Global Link filed a Voluntary Disclosure with the Commission in which it disclosed the details of the practice of split routing. The Voluntary Disclosure was filed in an attempt to improve Global Link's position with regard to the arbitration proceedings. The Olympus Respondents thereupon filed a petition for relief with regard to the Voluntary Disclosure; their petition was denied on the grounds that the Commission did not have jurisdiction over the Olympus Respondents. The Commission's Bureau of Enforcement has yet to take action against Global Link based on its Voluntary Disclosure.

The Olympus Respondents did not participate in the allegedly unlawful transactions and had no dealings with Mitsui. They have been denied the benefits of due process of law by virtue of their forced participation in this proceeding which is based upon those transactions. The Olympus Respondents

²⁸The Olympus Respondents have adopted and incorporated by reference each of the proposed findings of fact by Global Link and the CJR Respondents that support their position.

emphasize that the filing of their brief, exhibits, and associated documents does not constitute a waiver of their previously stated objections to the Procedural Order and Briefing Schedule.²⁹

The Olympus Respondents raise the following additional issues:

1. That they did not participate in the split routing transactions upon which this proceeding is based. Participation in the context of this case requires proof of active and affirmative conduct. In its brief Mitsui has made no mention of any conduct by the Olympus Respondents that could amount to participation. The mere fact that certain of the Olympus Respondents invested in Global Link, and that the individual respondents were officers and/or directors of Global Link is insufficient to constitute such participation as to make them liable for any unlawful conduct by Global Link.

2. That Mitsui has cited no evidence to prove participation by the Olympus Respondents. Specifically, there is no evidence that the Olympus Respondents:

a. Had any knowledge of, or role in, the formulation of the policy of split routing at Global Link. On the contrary, the practice was in place before OEF and OGF invested in Global Link's parent company. The policy continued after OEF and OGF sold their interests.

b. Negotiated, executed, or otherwise participated in any service contract with Mitsui.

c. Communicated, either directly or indirectly, with Mitsui with regard to Global Link's business or with regard to ocean transportation in general.

d. Either communicated directly with Mitsui for the ocean transportation of property or paid Mitsui directly for such transportation.

e. Booked ocean transportation directly with Mitsui.

f. Had any contact with the truckers used by Global Link.

g. Obtained, or attempted to obtain, ocean transportation of property at any price.

3. The Olympus Respondents cannot be held liable to Mitsui under Section 10(a) merely because they are shareholders and officers.

²⁹The Olympus Respondents have objected to my decision not to hold an oral hearing and have, on numerous occasions, raised the issue of their entitlement to a separate hearing as to their liability based on their alleged lack of participation in the transactions upon which this proceeding is based. I have already ruled on both issues and, in its Order Dismissing Petition for Commission Action of January 31, 2013, the Commission has denied the petition of the Olympus Respondents for a separate hearing. The Commission's ruling is the law of the case.

4. Mitsui's evidence is either unreliable or irrelevant hearsay. Rather than pursuing additional discovery, Mitsui is relying on selective portions of the Global Link Arbitration Proceeding. The Arbitration Proceeding involved separate factual and legal issues.

Specifically, the Olympus Respondents argue that Mitsui has placed unwarranted reliance on Global Link's unsworn statement of claim in the Arbitration Proceeding, the deposition testimony of various witnesses, and e-mails. The most that this evidence shows is that certain of the Olympus Respondents knew about split routing or that they failed to act to prevent the practice. Such evidence is legally insufficient to establish that they participated in the practice of split routing.

5. Mitsui's knowledge of the split routing precludes it from recovery. Seven of the eight sample shipments upon which Mitsui relies occurred prior to May 5, 2006. The remaining shipment occurred after June 7, 2006. In view of the absence of evidence that Mitsui did not know about split routing prior to its purported discovery of the practice in 2008, none of the sample transactions would justify my granting relief to Mitsui. Furthermore, Mitsui's knowledge and active encouragement of the practice of split routing preclude it from relying upon the equitable doctrine of the tolling of the limitations period. Mitsui is also precluded from recovery on its Section 10(a)(1) claim since such recovery requires a showing of fraud and concealment.

Even if Mitsui could show that it first learned of the split routing in 2008, it is not entitled to the tolling of the limitations period since such relief is only available to parties who could not have discovered the allegedly unlawful practice through the exercise of reasonable diligence.

The Olympus Respondents maintain that Mitsui's knowledge of and participation in the practice of split routing also preclude it from recovery under Section 10(d)(1) and 46 C.F.R. § 515.31(c).³⁰ In the first place, Mitsui has failed to prove that they assisted in the preparation of documents which they believed to be false or fraudulent. In addition, the aforesaid statute and regulation apply only to entities regulated by the Commission.

The Olympus Respondent's Brief includes proposed findings of fact, some of which are actually conclusory statements of law. Legal and factual findings will be set forth in separate portions of this Initial Decision.

³⁰The Olympus Respondents maintain that these claims are no longer part of this proceeding since Mitsui did not appeal from Judge Guthridge's ruling dismissing the claims against the Olympus Respondents and the CJR Respondents: the Commission did not disturb that ruling (Olympus Brief, footnote 17, p.44). The Olympus Respondents state that they are only addressing the claims because Mitsui has included them in its Initial Brief. That assertion is patently incorrect; the Commission actually vacated the dismissal of those claims by its Order of August 1, 2011 (Commission Order, p.32.)

2. REPLY BRIEF IN OPPOSITION TO GLOBAL LINK'S CLAIM FOR CONTRIBUTION

The Olympus Respondents restate the arguments in their Reply Brief in Opposition to Complainant's Request for Relief. They further argue that, since they are not liable to Mitsui, they cannot be liable to Global Link for contribution arising out of Mitsui's claims. Under the law, contribution is only available among parties who are jointly liable to a third party or parties. Among the authorities cited by the Olympus Respondents is the Uniform Contribution Among Tort-feasors Law which has been adopted by Delaware. It is undisputed that Global Link is a Delaware Corporation and that OEF and OGF are Delaware limited partnerships (FF 2, 3, 4). While not specifically alleging that Mitsui's claims sound in tort, the Olympus Respondents maintain that the essence of Mitsui's claims is that, by engaging in split routing, the Respondents perpetrated a fraud.

The Olympus Respondents assert that, just as Mitsui cannot prove that they participated in the split routing scheme, neither can Global Link. The Commission has made it clear that the status of OEF and OGF as shareholders of Global Link is not a basis for holding them liable under Section 10(a)(1). In its Order of August 1, 2011, the Commission has recognized that no party has sought to impose liability on either the Olympus Respondents or the CJR Respondents based on a theory of piercing the corporate veil.³¹ The Commission has recognized that the Respondents' status as shareholders would, in the words of the Commission, "appear to be relevant only in connection with section 10(d)(1) and 46 C.F.R. § 515.31(e)."

As a more general argument, the Olympus Respondents maintain that the Commission has not found a right to contribution. In vacating Judge Guthridge's dismissal of Global Link's crossclaim for contribution, the Commission reserved judgment on the right of contribution unless and until the ALJ found that the Respondents were liable to Mitsui and that Global Link was forced to bear more than its proportional share of liability.

According to the Olympus Respondents, Judge Guthridge correctly ruled that there is no right to contribution under the Shipping Act. The regulatory and enforcement authority of the Commission does not extend to equitable remedies such as contribution. Congress addressed the subject of equitable relief in Section 11(h)(2), 46 U.S.C. § 41306(a), which allows a complainant to seek an injunction against violations of the Shipping Act in an appropriate United States District Court. Since the Shipping

³¹The Olympus Respondents equate piercing the corporate veil with vicarious liability (Reply Brief, p.9). They offer no legal basis for this assertion and there is nothing in the Order of August 1, 2011, to suggest that the Commission considers the theories to be synonymous. On the contrary, the Commission held that the Olympus Respondents and the CJR Respondents can only be held liable to Mitsui if they are found to have participated in the split routing scheme as individuals or entities (Order, p.34). Limited partnerships, like corporations, can only act through their representatives. If OEF or OGF are to be held liable to Mitsui (and, if so, to Global Link), it can only be through findings of vicarious liability.

Act makes no mention of contribution, it follows that Congress did not intend to grant the Commission the authority to award an additional equitable remedy.

The power of the Commission to award reparations arose out of the intent of Congress to control the potential abuse of the broad antitrust immunity granted to regulated entities. Accordingly, the Commission has been empowered to award reparations, attorney fees, and double damages. Contribution in claims of Shipping Act violations is not necessary to achieve the desired deterrent effect. This is shown by the fact that antitrust statutes do not allow for contribution.

The Olympus Respondents further maintain that, even if Congressional intent were not clear, the issue of contribution should be addressed by the legislative process rather by an administrative decision. Congress is in a position to conduct the kind of investigation, examination, and study that the Commission cannot.

The Olympus Respondents cite the Commission's Order of August 1, 2011, stating that there is nothing in either the language or legislative history of the Shipping Act to suggest that the Commission is precluded from awarding proportional liability in appropriate cases. The ability of the Commission to assess proportional reparations among several respondents allows it to assign each respondent its "fair share" of reparations, thereby rendering the issue of contribution irrelevant.

The Olympus Respondents also argue that Global Link's claim for contribution is premature inasmuch as Global Link has not paid or had a judgment entered against it for more than its fair share of a joint obligation. Global Link has not been held to have violated the Shipping Act, has not been the subject of an award of reparations, and has not paid reparations.

Finally, the Olympus Respondents argue that the Arbitration Award precludes Global Link's entitlement to contribution. Global Link has already been compensated by the arbitrators for any loss that it would suffer if it were held liable to Mitsui.³² An award of contribution in this proceeding would amount to double recovery.

The Olympus Respondents raise two additional issues with regard to the effect of the Arbitration Award. The first is that Global Link cannot rely on collateral estoppel to show that OEF and OGF participated in the transactions upon which the alleged violations of the Shipping Act are based. The arbitrators did not consider the issue of the participation by OEF and OGF, but were solely concerned with whether Global Link had been damaged due to fraudulent conduct and breaches of the SPA by which they acquired their interests in Global Link. The arbitration claimants did not allege that OEF or OGF, as shareholders, actively participated in Global Link's split routing scheme. The arbitrators' findings were based on the proposition that the Olympus Respondents learned of the split routing scheme in their capacity as shareholders and had a duty as sellers to disclose their knowledge in their financial statements. The obligations of the Olympus Respondents as shareholders and sellers of securities are

³²None of the parties have alleged or offered evidence as to whether the arbitration claimants have recovered any portion of the damages awarded by the arbitrators.

not covered by the Shipping Act. Furthermore, at the time of the events considered by the arbitrators, the Commission had not ruled that split routing was a violation of the Shipping Act inasmuch as the practice does not involve ocean transportation.

In their second argument, the Olympus Respondents maintain that collateral estoppel precludes a finding that OEF or OGF participated in an unfair or unjust device or means within the meaning of Section 10(a)(1). The arbitrators found that there was “clear evidence” that Mitsui knew of, condoned, and encouraged Global Link’s split routing. Therefore, there could have been no active concealment which, as shown in 46 C.F.R. § 545.2, is an essential element of a claim based upon fraudulent conduct. Since Global Link initiated the Arbitration Proceeding, it is bound by the arbitrators’ factual findings. Those findings are fatal to its claims for contribution.

3. STATEMENT CONFIRMING THE RECORD OF THIS PROCEEDING

On June 5, 2013, the Olympus Respondents filed the above statement in an ostensible effort to correct mischaracterizations of its position by Mitsui. Such a filing is in direct contravention of the Procedural Order and Briefing Schedule and amounts to an attempt by the Olympus Respondents to get the last word. This has prompted yet another filing by Mitsui in opposition to the statement. I will ignore both of these unauthorized documents as well as any further repetitious filings by other parties.

D. CJR RESPONDENTS

1. INITIAL BRIEF

The CJR Respondents maintain that Mitsui’s claim lacks merit because:

1. Mitsui’s knowledge, endorsement, and approval of the practice of split routing. The Mitsui employee who serviced the Global Link account stated that split routing worked to the benefit of Mitsui in that it shifted the operational burden of inland movements from Mitsui to Global Link. Furthermore, Mitsui did not want to go to the trouble of negotiating a multiplicity of destinations or “door points.”

Mitsui has submitted a declaration by Thomas Kelly, its former Executive Vice President and Chief Operating Officer, to the effect that he had no knowledge of split routing and that no one at Mitsui had the authority to approve the practice by Global Link. This suggests that Mitsui intends to rely on the “adverse interest” exception to show that the Respondents were not entitled to rely on the apparent authority of Paul McClintock and Rebecca Yang.

This defense lacks merit since there is no evidence that either McClintock or Yang were acting for their own purposes, let alone solely for their own purposes. There is no evidence that either McClintock or Yang personally benefitted from the practice of split routing. On the other hand, Mitsui benefitted from the continuation of split routing in that it retained Global Link as a key customer.

2. Mitsui has not been damaged by split routing. This is so because ocean carriers such as Mitsui consider the cost of trucking cargo from the vessel's port of entry to the ultimate inland destination to be a "pass through" inasmuch as they do not seek to earn profits from such movements. When the actual destination of a shipment was farther from the port of entry than the regional door point contained in the master bill of lading issued by Mitsui, Global Link paid Mitsui for the actual movement. When the actual destination was closer than the regional door point, Global Link overpaid Mitsui for the movement to the regional door point. Therefore, Mitsui has not sustained any monetary loss from the practice of split routing.

Even if Mitsui could show that the CJR Respondents violated the Shipping Act, it does not automatically follow that it suffered pecuniary damages. In order to establish its entitlement to reparations, Mitsui must show that it suffered losses that were proximately caused by the alleged violations. Mitsui cannot make such a showing since the inland portion of the movement of the cargo was a "pass through" on which Mitsui made no profit.

3. Mitsui's claims are time-barred inasmuch as the CJR Respondents cannot be held liable for any transactions which occurred after they sold Global Link on June, 7, 2006. Furthermore, the evidence shows that numerous employees of Mitsui knew of the practice of split routing as early as 2004. Those employees include a vice president and the general counsel; Mitsui is bound by their knowledge. Since Mitsui's Complaint was filed with the Commission on May 5, 2009, it is legally barred from recovering on shipments that occurred prior to May 6, 2006.

4. They cannot be held to have participated in the practice of split routing merely because of their status as shareholders of Global Link or Rosenberg's status as an officer of Global Link. Thus, they cannot be held liable to Mitsui under Section 10(a)(1).

5. In view of Mitsui's knowledge of the practice of split routing, it cannot establish the elements of fraud and concealment that are essential to a claim under Section 10(a)(1).

6. In view of the lack of evidence that the CJR Respondents acted as NVOCCs, they cannot be held liable under Section 10(d)(1).³³

³³Like the Olympus Respondents, the CJR Respondents maintain that Mitsui's claims under Section 10(d)(1) and 46 C.F.R. § 515.31(e) were dismissed by Judge Guthridge and that the ruling was affirmed by the Commission in its Order of August 1, 2011. Both of these Respondents state that they have addressed the claims under Section 10(d)(1) only because they were advanced by Mitsui in its opening submission. Yet, the Order of August 1, 2011, did not dismiss the claims under Section 10(d)(1), but remanded them to the ALJ (Commission Order, p.37). While the Commission's order of remand did not include the claims under 46 C.F.R. § 515.31(e), the purpose of the remand was to allow for a determination as to whether the Respondents were acting as NVOCCs in addition to their roles as shippers (Commission Order, p.32). If I determine that any or all of the Respondents acted as NVOCCs, they are subject to the provisions of 46 C.F.R. § 515.31(e) which sets forth the duties and responsibilities of all OTIs.

The CJR Respondents argue that, in order to prevail, Mitsui must prove by a preponderance of evidence for each shipment that the CJR Respondents participated in the shipment and that Mitsui suffered a pecuniary loss.

2. REPLY BRIEF IN RESPONSE TO GLOBAL LINK'S CLAIM FOR CONTRIBUTION

In order to avoid redundancy I will not summarize in detail the arguments presented by the CJR Respondents which are duplicative of those of the Olympus Respondents.³⁴ Briefly stated, those arguments are:

1. That Global Link's claim for contribution fails because Mitsui's claims against the Respondents fail. Global Link has acknowledged that Mitsui's claims lack merit; accordingly there is no liability for which Global link may seek contribution.

2. That Global Link's claim for contribution is premature inasmuch as it has not been held liable to Mitsui.

3. That Global Link was fully compensated for its alleged losses by the Arbitration Award. The award encompassed compensation for any potential liability to ocean carriers arising out of the sale of Global Link. The allowance of contribution to Global Link would amount to double recovery.

4. That findings by the arbitrators preclude Global Link's claim for contribution. In addition to the arguments by the Olympus respondents, the CJR Respondents maintain that Global Link is estopped from arguing that the CJR Respondents participated in violations of the Shipping Act. The CJR Respondents also maintain that the arbitrators' findings preclude Global Link from characterizing itself as an innocent party. Global Link is not entitled to shift blame for split routing which occurred after it was acquired by its current owner.

The CJR Respondents also argue that, in seeking to have its entire liability, if any, to Mitsui shifted to the other Respondents, Global Link has shown a fundamental misunderstanding of the law of contribution. A valid claim for contribution must be based upon the proposition that two or more parties are jointly liable to a third party and that one of the parties has paid more than its fair share of damages. In this case, Global Link is alleging that the other Respondents should absorb all of the reparations to which Mitsui may be entitled.³⁵

³⁴The CJR Respondents have adopted the brief of the Olympus Respondents in opposition to the crossclaims to the extent that it is not inconsistent with the arguments contained in its own brief.

³⁵In its Order of August 1, 2011, the Commission affirmed Judge Guthridge's dismissal of Global Link's crossclaim for indemnity (Order, p.35).

The CJR Respondents maintain that the attempt by Global Link to shift liability to its former owners is contrary to fundamental corporate law and to the agreements between Global Link's former and current owners. The current owner of Global Link acquired its ownership through the purchase of stock. Therefore, the status of Global Link as a corporate entity was unchanged and any liabilities that Global Link had prior to the transfer of ownership remained with the corporation, whether or not those liabilities were known by the current owner. The SPA governs the rights and obligations of the parties with regard to the sale.

According to the CJR Respondents, there is no merit to Global Link's contention that the arbitrators did not include potential liability to third parties in their calculation of damages. In granting the motion to dismiss the RICO claims, the arbitrators found that the claimants had not suffered present injuries as required by RICO and that, therefore, those claims were premature. The issue of the RICO claims is totally distinct from the issue of potential liability under other theories of law. The language of the award shows that the arbitrators believed that any other claims based on liability to third parties could be and had been presented, and that Global Link had elected to abandon such claims prior to the arbitration hearing.

Finally, the CJR Respondents maintain that Global Link's claim for contribution is barred by agreements executed in connection with the 2006 sale of the Global Link stock. Those agreements limit Global Link's recourse against the CJR Respondents and include a release of Rosenberg.

III. OLYMPUS RESPONDENTS' MOTION TO STRIKE FALSE STATEMENTS IN COMPLAINANT'S REPLY BRIEF IN FURTHER SUPPORT OF ITS CLAIMS AGAINST RESPONDENTS

A. POSITIONS OF THE PARTIES

The Olympus Respondents³⁶ raise the following points in their motion:

1. Mitsui's characterization of their position with regard to split routing is unsupported by the record and is a knowing and willful misstatement. The Olympus Respondents have never conceded that split routing is a violation of the Shipping Act and did not know or suspect that it was illegal since the Commission has never issued a ruling to that effect.

2. Mitsui's contention that it did not know and could not have known of the split routing by Global Link is contrary to the evidence. Mitsui has subsequently acknowledged that McClintock's and Yang's previous denials that they knew of the split routing "do not hold up" in light of subsequently available evidence. This admission by Mitsui removes the basis for its claims against the Respondents.

³⁶The CJR Respondents and Global Link have joined in the motion and have presented the same arguments. Mitsui has filed objections to the joinder by those parties in which it repeats its previous arguments against the granting of the motion. Since Mitsui has not shown how it is prejudiced by the joinder, I will allow it.

3. Mitsui's argument based on *Mitsui O.S.K. Lines, Ltd. v. Seamaster Logistics, Inc.*, 2013 WL 1191213, ___ F.3d ___, (N.D. Cal. 2013) ("*Seamaster*") should be stricken for three reasons:

- a. The argument based on *Seamaster* contradicts the argument in the Complaint³⁷ and "deprives [Mitsui's] complaint of its legitimacy."
- b. The *Seamaster* argument introduces an entirely new theory to this case. If this theory is to be considered, I should reconsider the need for an oral hearing on the issue of Mitsui's knowledge of the split routing scheme.
- c. By relying on McClintock's deposition testimony in the arbitration proceedings, Mitsui has admitted that it was unjustly enriched and not damaged by the split routing scheme.

The Olympus Respondents maintain that, if I do not strike Mitsui's argument in reliance on *Seamaster*, I should afford the Respondents the opportunity to submit counter-arguments. Alternatively, if I do not either strike the *Seamaster* argument or allow for counter-argument, I should give Mitsui's *Seamaster* argument "no weight".

Mitsui has submitted its opposition to the Motion to Strike in which it maintains that, because the Commission's Rules of Practice and Procedure make no mention of motions to strike, I am to be guided by Rule 12(f), FRCP,³⁸ and that such motions are not favored. Mitsui also maintains that the arguments contained in its Reply Brief are supported by the evidence and law.

According to Mitsui, its reliance on *Seamaster* and the adverse inference exception described therein is not a new theory of the case. Each of the parties have known from the commencement of this proceeding that Mitsui denied knowledge of the split routing scheme. Its reliance on the *Seamaster* precedent is entirely consistent with that position.

B. DISCUSSION AND ANALYSIS

Mitsui has correctly cited *Matson Navigation Company, Inc. Proposed General Rate Increase of 3.6 Percent Between United States Pacific Coast Ports and Hawaii Ports*, 1990 WL 481951, 25 S.R.R. 1069, 1129 (ALJ 1990) as standing for the proposition that motions to strike are:

... frowned upon because they cause unnecessary delay, and it is considered drastic to strike portions of pleadings unless the matter has no possible relation to the controversy and is prejudicial to the moving party.

³⁷I will assume that this contention includes the Amended Complaint.

³⁸Rule 12, 46 C.F.R. § 502.12, provides that, when a matter is not provided for under Commission Rules, FRCP will be followed "to the extent that they are consistent with sound administrative practice."

The Respondents have failed to set forth sufficient grounds to justify striking any portion of Mitsui's Reply Brief. Whatever the merits of the arguments contained in the Reply Brief, they are logically related to the issues.

Mitsui's citation to *Seamaster* does not amount to the introduction of a new theory of recovery such as to subject the moving parties to unfair prejudice. Rather, it is a logical extension of Mitsui's contention that it had no knowledge of the split routing by Global Link and, through Global Link, by the other Respondents. Mitsui's *Seamaster* argument, whatever its merits, is part of its argument that, even if McClintock and Yang knew of the split routing, their knowledge is not attributable to Mitsui because the Respondents knew that McClintock and Yang were acting adversely to Mitsui's interests. The Respondents cannot legitimately claim to be surprised by Mitsui's position which is a natural response to their defenses based upon Mitsui's purported knowledge of the split routing scheme. Indeed, Global Link anticipated the adverse interest issue in its Initial Brief.

The Procedural Order and Briefing Schedule of October 16, 2012, sets forth a schedule (subsequently modified as to dates only) for the submission of evidence and briefs by the parties. There is no provision in the Order for additional briefs, no matter how they are titled. The effort by the moving parties to get the "last word" is directly counter to the Procedural Order. Accordingly, I will not consider the arguments in the Motion to Strike which pertain to the merits of Mitsui's position and the weight of the evidence. Neither will I consider Mitsui's counter-arguments in support of its position that are restated in its opposition to the Motion to Strike.

For the reasons stated above, it is **ORDERED** that the Motion to Strike be **DENIED**.

IV. FINDINGS OF FACT

A. THE PARTIES

1. Complainant Mitsui O.S.K. Lines, Ltd. ("Mitsui" or "MOL") is a corporation organized and existing under the laws of Japan. Mitsui is a vessel-operating common carrier whose vessels call at ports in the United States. (Amended Complaint, ¶ I.A.)
2. Respondent Global Link Logistics, Inc. ("Global Link") is a corporation organized and existing under the laws of Delaware. Global Link is a licensed ocean transportation intermediary ("OTI") that operates as a non-vessel-operating common carrier ("NVOCC"). (Amended Complaint ¶ II.A., Answer by Global Link.)
3. Respondent Olympus Growth Fund III, L.P. ("OGF") is a Delaware limited partnership. (Amended Complaint ¶ II.B., Answer by Olympus Respondents.)
4. Respondent Olympus Executive Fund, L.P. ("OEF") is a Delaware Limited Partnership. (Amended Complaint ¶ II.C., Answer by Olympus Respondents.)

5. Rosenberg founded Global Link in 1997. (Global Link Ex. B, p.99. App. 5; CJR Respondents' Proposed Finding of Fact ("PFF") 6.)
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 for delivery to other destinations, although the contracts allowed Mitsui to assess diversion charges (Mitsui Ex. BV-BS).³⁹
7. As of September 26, 2011, (the date of his affidavit) David Cardenas was a member of OGP III, LLC, which is the general partner of Olympus Growth Fund III ("OGF"). (Cardenas affidavit, ¶ 2, Olympus Respondents Ex. 2, App. 8.)
8. In May of 2003 OGF purchased 74.51 percent of the shares of GLL Holdings, Inc. ("Holdings"). Holdings was the parent company and sole owner of Global Link. (Cardenas affidavit, ¶ 4, Olympus Respondents Ex. 2, App. 8.)
9. OGF sold its interest in Holdings to the current owner of Global Link pursuant to a stock purchase agreement ("SPA") dated May 20, 2006. The sale was completed on June 7, 2006. (Cardenas affidavit, ¶ 5, Olympus Respondents Ex. 2, App. 9.)
10. Respondents Mischianti, Cardenas, and Heffernan were officers and/or directors of Holdings and Global Link between May of 2003 and June of 2006. (Amended Complaint ¶ II.E., Answer by Olympus Respondents.)
11. CJR World Enterprises, Inc. ("CJRWE") was an owner of Global Link from May 9, 2003, through June 7, 2006. (Amended Complaint ¶ II.F., Answer of CJR Respondents.)
12. Chad J. Rosenberg is the owner of CJRWE. Rosenberg was an officer and director of Global Link during the period of time in which CJRWE was an owner of Global Link. (Amended Complaint ¶ II.G., Answer of CJR Respondents.)

B. THE PRACTICE OF SPLIT ROUTING

13. Global Link historically engaged in a practice known as "split routing", "misbooking", or "rerouting." This practice consisted of booking cargo to false inland destinations while intending to deliver the cargo to other inland destinations. (Amended Complaint ¶ IV.E., Answer by Global Link.)
14. Rosenberg introduced the practice of split routing at Global Link. (CJR Respondents PFF 7.)

³⁹There is no evidence that Mitsui actually assessed diversion charges against Global Link.

15. In order to carry out the split routing scheme, Global Link would provide Mitsui with false information regarding the ultimate destination of the cargo. Mitsui would issue a through bill of lading reflecting the false destination provided by Global Link, and Mitsui would arrange inland transportation of the cargo by truck from the port of entry of its vessel, or from the rail container yard at the port of entry, to the false inland destination. Mitsui would bill Global Link for transportation to the false destination; the bill would be paid by Global Link. (Amended Complaint ¶ IV.G., Answer by Global Link.)
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.)
17. Global Link employees created or facilitated false invoices, addresses, and bills of lading as part of the practice of split routing. At one time, Global Link employees were taught to locate actual addresses in the false destination cities in an effort to avoid communicating to certain ocean carriers that the destinations were false. (Amended Complaint ¶ IV.K., Answer by Global Link.)

C. INQUIRIES BY GLOBAL LINK AS TO THE LEGALITY OF SPLIT ROUTING

18. On July 10, 2003, Gary A. Meyer, the Chief Financial Officer of Global Link, sought advice from Paul D. Coleman, an attorney for Global Link, regarding the practice of split routing. (Mitsui Ex. BP, App. 1664.)
19. Coleman responded to the request by e-mail message of July 15, 2003, in which he stated that changing the destinations of shipments without notice to the ocean carrier exposes Global Link to possible violations of the Shipping Act, but, “just as importantly, to an uncertain claims procedure in case of loss or damage to the cargo.” He warned Meyer against “shortstopping,” which occurs when the motor carrier collects more from the ocean carrier than it is entitled. In such cases the shipper often receives all or part of the excess amount, or obtains a credit against future shipments. Coleman characterized shortstopping as a fraud on the ocean carrier, and an illegal rebate to the shipper in violation of Section 10(a)(1). Coleman further stated that, if Global Link is concerned with whether the ocean carrier will learn the identity of the beneficial owner of the cargo, it would be better to have the ocean carrier issue a port-to-port bill of lading. Global Link could then issue an intermodal bill of lading (*i.e.*, from the port at which the cargo was discharged to the inland destination) and arrange for the trucking of the cargo. (Mitsui Ex. BP, App. 1663.)
20. Meyer forwarded Coleman’s message to Eric Joiner of Global Link, and Joiner forwarded it to Rosenberg. By e-mail message of July 15, 2003, Rosenberg asked Coleman if the Commission had ever fined a NVOCC for diverting cargo to a destination other than what was shown on the original bill of lading. Rosenberg further

stated that he needed “more clarity” because of the difficulty of getting all of the necessary door points in the contracts. (Mitsui Ex. BP, App. 1662.)

21. Coleman responded to Rosenberg’s inquiry by e-mail message of July 16, 2003. He described two instances in which the Commission had sought penalties from shippers and an ocean carrier for shipments that were delivered to destinations other than those indicated on ocean bills of lading. After suggesting possible changes to Global Link’s arrangements with ocean carriers, Coleman stated that he was more concerned with the question of liability for lost or damaged cargo. (Mitsui Ex. BP, App. 1661, 1662.)
22. Rosenberg stated that he and other managers at Global Link understood Coleman’s advice to mean that split routing was legal, but that shortstopping “may be illegal.” They thereupon instructed Global Link personnel to stop the practice of shortstopping “to the extent it was occurring.” (Rosenberg declaration, ¶ 11, CJR Ex. A, App. 3.)⁴⁰
23. On July 19, 2006, after Global Link was acquired by its current owner, Meyer, and possibly other representatives of Global Link, discussed issues related to split routing with Coleman. By e-mail message from Meyer to Coleman dated July 20, 2006, Global Link requested a formal legal opinion on the following points:
 - a. Whether split routing is a violation of the Shipping Act.
 - b. If so, the extent of Global Link’s financial liability for freight charges, penalties, and other items.
 - c. Whether Global Link’s license as a NVOCC is in jeopardy.
 - d. Personal liability of officers and directors of Global Link or the Qualifying Individual.

In his message, Meyer referred to an attachment describing fact patterns for the three major ocean carriers, including Mitsui, with whom Global Link dealt (the attachment is not in evidence). Meyer stated that there were “slightly different” fact patterns for each carrier and questioned whether there were differences in the legal issues and exposure in each case. (Mitsui Ex. BP, App. 1660.)

24. By e-mail message of July 20, 2006, to Meyer, Coleman stated that he had attempted to respond to his questions in an attachment (which is not in evidence). Coleman advised Meyer to review the attachment carefully and to advise him if he had not

⁴⁰It is unclear whether Global Link’s alleged cessation of shortstopping included its dealings with Mitsui as well as with other ocean carriers.

correctly understood Global Link's practices and if there were additional questions. (Mitsui Ex. BP, App. 1659.)

25. On July 21, 2006, Coleman responded to additional questions from Meyer. Coleman further stated:

I am not sure what else we could have done in 2003 as we provided the same advice and Neal[,] when he gave the training[,] stated that certain activities were illegal. The problem in 2003 may have been that the advice and training went only to the top level of executives[,] and we find with other clients that it needs to be disseminated to all levels to be effective.⁴¹

Coleman also advised Global Link not to "self-confess" either to ocean carriers or to the Commission,

. . . as there is considerable difficulty in quantifying the possible damages and violations as each shipment would have to be examined. From our experience in many other enforcement matters over the years what the FMC is really concerned about is that a company is in compliance, and if GLL can show that it took affirmative action once it knew that its practices were potentially unlawful and has put in place programs that achieve compliance, the past will not have great importance.

(Mitsui Ex. BP, App.1657-59.)

26. On May 21, 2008, Global Link submitted a Voluntary Self-Disclosure ("Disclosure") to the Commission's Bureau of Enforcement. The Disclosure contains a description of the split routing scheme as well as statements and exhibits in which Global Link sought to exonerate its current owner from liability for split routing. (Mitsui Ex. C, App. 109, *et. seq.*)⁴²

⁴¹There is no evidence as to whether Global Link conducted such training in 2006.

⁴²The Respondents other than Global Link have challenged the admissibility of the Disclosure as being no more than a self-serving statement designed to enhance its position in an arbitration proceeding brought by Global Link and its corporate affiliates against its former owners. The disclosure is undoubtedly self-serving to the benefit of Global Link's current owner. Furthermore, it is redundant inasmuch as Global Link has admitted its role in the split routing scheme in this proceeding (Findings of Fact ("FF") 14-18). Nevertheless, I will admit it into evidence inasmuch as it corroborates some of the other evidence as to the relations between the Respondents (FF 2-12) and could legitimately be used in an attempt to impeach other evidence submitted by Global Link.

D. MITSUI'S KNOWLEDGE OF SPLIT ROUTING BY GLOBAL LINK AND ITS EFFECT ON MITSUI⁴³

27. From 1995 to 2006 or 2007 Paul McClintock was the Vice President and General Manager of Mitsui's operations in the South Atlantic and Gulf of Mexico. As such, he was responsible for sales, local customer service, and local operations; between 55 and 100 people reported to him while he was in that position. (McClintock deposition, Global Link Ex. C1, pp.31-34, App. 11, 12.)⁴⁴
28. In 2006 or 2007 McClintock became Mitsui's Vice President of Sales and Sales Support. In that position he was responsible for all of Mitsui's sales people in the United States, but still interacted with major customers. Global Link was considered to be a major customer. McClintock held the position until April of 2009 when he left the company. (McClintock deposition, Global Link Ex. C1, pp32, 37, 38, App. 11-13.)⁴⁵
29. Rebecca Yang began working for Mitsui on or about 1993. She eventually became Mitsui's primary contact with Global Link and would handle issues involving contract negotiations and rates along with McClintock. (McClintock deposition, Global Link

⁴³In 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.

⁴⁴Global Link has inexplicably chosen to submit two separate appendices with duplicate and nonconforming exhibit numbers and page numbers. One appendix is related to Global Link's opposition to Mitsui's request for relief and to its counterclaim against Mitsui ("first appendix"). The other appendix is related to Global Link's crossclaims ("second appendix"). Thus, for example, in one appendix a portion of the deposition of Chad Rosenberg is identified as Exhibit C, while in the other appendix, a different portion of the same deposition is identified as Exhibit B. Rather than add to this confusion, and to avoid further delay in the disposition of this case, I will identify the exhibits in the first appendix by designations such as A1 and B1. I will identify exhibits in the second appendix by designations such as A2 and B2.

⁴⁵The circumstances of McClintock's departure from Mitsui are unclear. I note that his departure occurred about a month before Mitsui filed its original Complaint.

Ex. C1, p.43, 51 App. 12, 15.)⁴⁶

30. Although Yang was primarily responsible for contract issues with Global Link, she would consult McClintock with regard to substantive changes to the service contracts. McClintock stayed involved with the Global Link account because Global Link was an important customer. (McClintock deposition, Global Link Ex. C1, pp.60, 61, App. 16; Yang deposition, Global Link Ex. D1, pp.16, 17, App. 31.)
31. Before coming to Mitsui, Yang had worked for several NVOCCs over a period of twelve years. Her impression was that “everyone” had situations in which their customers wanted goods delivered to destinations other than those listed in bills of lading. When she worked for NVOCCs such situations “happened a lot” so as to conform to the needs of the customers.⁴⁷ (Yang deposition, Global Link Ex. D1, pp.35, 36, App. 34.)
32. 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.⁴⁸ 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.)
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

⁴⁶Yang was fired by Mitsui in February of 2011. She testified that she was made a scapegoat for “shenanigans” in Asia and was fired after Mitsui was “fined” by the Commission. There is no evidence that Yang’s termination was related to split routing by Global Link, although she described instances in Asia in which truckers received “refunds” for deliveries of goods to destinations other than those which were originally booked. (Yang deposition, Global Link Ex. D1, pp.23-25, App. 33.)

⁴⁷Yang did not state whether, when she worked for NVOCCs, carriers charged diversion fees in such cases.

⁴⁸Presumably 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.

did not think that this practice would have been a surprise to anyone else at Mitsui. (Yang deposition, Global Link Ex. D1, p.36, App. 34.)

34. Briles spoke with McClintock and Yang several times a month beginning in 2004, when Global Link began dealing with Mitsui, until some time in July or August of 2007. Briles left Global Link in September of 2007. (Briles deposition, Global Link Ex. E1, pp.123, 124, 132, 133, App. 53, 55.)
35. Split routing was a “common practice” between Global Link and Mitsui. McClintock and Yang encouraged the split moves. (Briles deposition, Global Link Ex. E1, pp.125, 126, App. 53, 54.)
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. E1, pp.133, 134, App. 55, 56.)
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. E1, p.126, App. 54.)
38. From 2004 until 2006 or 2007 most of Mitsui’s shipments for Global Link were to door points, *i.e.*, to specific inland addresses where the goods were to be unloaded from the trucks, rather than to container yards. (McClintock deposition, Global Link Ex. C1, pp.62, 63, App. 17.)
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. C1, pp.63-65, App. 17.)
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. C1, pp.15, 16, App. 9.)
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 railroads for goods that were not removed from railroad premises before the expiration of “free time.” (McClintock deposition, Global Link Ex. C1, pp.17-20, App. 9, 10.)

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. B1, pp.204, 205, App. 6.)⁴⁹
43. In carrying out the practice of split routing, Global Link would divert the cargo without submitting a request to Mitsui and without paying the difference, if any, in freight rates. (Amended Complaint ¶ IV.I., Answer by Global Link.)
44. In some instances the rates paid by Global Link to Mitsui for transportation to the false destinations were less than the rates to the actual destination. One of the reasons for the split routing practice was to reduce Global Link's costs. (Amended Complaint ¶ IV.J., Answer by Global Link.)
45. In cases in which the actual delivery point was closer than the delivery point in the contract, the trucker would be paid the trucking allowance provided by Mitsui for the contract destination named in the bill of lading. (Briles deposition, Global Link Ex. E1, pp.122, 123, App. 53.)
46. By e-mail message of August 11, 2005, Emily So of Global Link informed Evans Trucking that a shipment was arriving in Norfolk the following week. The Mitsui "door move" was listed as Martinsville, Virginia, but the actual destination was Beltsville, Maryland. Global Link inquired as to whether there was a rate difference. (Global Link Ex. J1, App. 127.)⁵⁰
47. 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

⁴⁹Apparently Global Link also used split routing for destinations included in the service contracts. According to Yang, Global Link used split routing for actual deliveries to Bassett, Virginia while the Mitsui bill of lading named Martinsville, Virginia as the destination. (Yang deposition, p.72, Global Link Ex. D, App. 41.) Bassett, Virginia was named as a destination in the service contract.

⁵⁰Both this message and the response cited in the next Finding of Fact were produced by Mitsui during discovery with the designation "Attorney's Eyes Only." The record contains evidence of other instances in which Global Link did split routing with the knowledge and consent of Mitsui's representatives.

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)⁵¹

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. E1, pp.123, 124, App. 53.)
49. In July or August of 2007 Global Link asked Mitsui to put another door point in the contract. Yang suggested that they move the shipment as a “split.” Briles informed her that Global Link was a “new company” which was no longer doing split routing. Briles later had a similar conversation with McClintock. (Briles deposition, Global Link Ex. E1, pp.124, 125, App. 53.)
50. In 2008 McClintock was served with a subpoena in an arbitration proceeding which was commenced by the current owner of Global Link against its former owners. During the course of subsequent communications with an attorney for the arbitration claimants, Kevin Hartmann, Mitsui’s Vice President, Law & Insurance (and its only in-house attorney at the time), learned that certain employees of Global Link were alleging that McClintock knew of the split routing. Hartmann reported that he had told McClintock of those allegations and that McClintock had “agreed they seemed ridiculous.” (Hartmann declaration, Mitsui Ex. BM, App. 1634.)
51. On October 16, 2008, Hartmann conducted separate interviews of McClintock and Yang at Mitsui’s Atlanta office. According to Hartmann, McClintock denied that he knew of the split routing scheme by Global Link and would not have allowed it. McClintock further stated that he was aware of isolated incidents in which shipments were delivered to destinations other than those in Mitsui’s bills of lading; Global Link was informed that this was not permitted. McClintock told Hartmann that he did not understand how Global Link would save money by split routing since Global Link was paying Mitsui through rates to the delivery points in the service contract. When Hartmann asked McClintock if he was aware of “kickbacks” that the truckers had made to Global Link, McClintock told Hartmann that he had no idea. (Hartmann declaration, Mitsui Ex. BM, App. 1637.)

⁵¹It 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.

52. According to Hartmann, Yang's responses were "similar" and she stated that she only knew of isolated cases of misrouting. (Hartmann declaration, Mitsui Ex. BM, App. 1637.)
53. By e-mail message of January 21, 2009, Hartmann reported to Thomas Kelly, Mitsui's then Executive Vice President and Chief Operating Officer, that he had informed McClintock and Yang that Mitsui was considering filing an action against Global Link to recover "amounts due." Both McClintock and Yang told Hartmann that they had no problem with such an action and would testify that Mitsui did not condone split routing by Global Link. (Hartmann declaration, Mitsui Ex. BM, App. 1638.)
54. Kelly confirmed the receipt of Hartmann's reports. Kelly further stated that:
- a. "To the best of my knowledge" he had no knowledge of split routing by Global Link prior to his receipt of Hartmann's e-mail message of August 1, 2008.
 - b. "To the best of my knowledge" no one at Mitsui discussed split routing by Global Link with him or anyone else in Mitsui's management.
 - c. No one at Mitsui had the authority to permit split routing by Global Link.
 - d. Any split routing by Global Link was carried out without his knowledge and was neither authorized nor approved by Mitsui.

(Kelly declaration, Mitsui Ex. CB, App. 1937-44.)⁵²

E. THE PARTIAL FINAL ARBITRATION AWARD⁵³

55. On February 2, 2009, a Commercial Arbitration Tribunal of the American Arbitration Association issued a Partial Final Arbitration Award ("Arbitration Award" or "Award") in an arbitration proceeding initiated by Global Link, Golden Gate Logistics, Inc., and GLL Holdings, Inc. (collectively "Claimants") against OGF, OEF, Keith Heffernan, L. David Cardenas, Louis J. Michianti, CBW Key Employee Capital II, LLC, Gerald

⁵²It 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.

⁵³The citations to the Partial Final Arbitration Award are taken from Mitsui's Exhibit A. This exhibit has been marked "Confidential;" I will not cite any portion of the award containing proprietary information.

Benjamin, Edward A. Casas, M.D., CJR, and Chad J. Rosenberg (collectively "Arbitration Respondents").⁵⁴

56. The Claimants initiated the arbitration proceeding to recover damages for losses sustained as the result of allegedly fraudulent conduct by certain of the Arbitration Respondents and for breaches of contractual representations in connection with the Claimants' acquisition of Global Link pursuant to a Stock Purchase Agreement dated May 20, 2006 ("SPA"). The Award was designated as "partial" because it did not include prejudgment interest and the allocation of the costs and expenses of the arbitration proceeding. (Award, p.1.)
57. The Arbitration Respondents were found to be either sellers, as defined in the SPA, of all of the stock of GLL Holdings, Inc. (the parent of Global Link) or individuals affiliated with one of the sellers. (Award, p.2.)
58. The arbitrators found that the following relationships existed between the Arbitration Respondents:⁵⁵
 - a. OGF and OEF were affiliates of Olympus Partners.
 - b. Mischianti, Heffernan, and Cardenas were principals of Olympus Partners and were officers and/or directors of Global Link.
 - c. Rosenberg was the founder and CEO of Global Link and a director of Global Link. Rosenberg was also a director, officer, and the sole

⁵⁴The CJR Respondents maintain that the Arbitration Award is not admissible. I disagree. The Award is at least relevant to the issue of the relationship between the Respondents. The relevance of certain of the arbitrators' specific findings is another issue which I will address as it arises. I will give the Award no weight in support of Global Link's counterclaim against Mitsui, nor will I give the Award any weight in support of the defenses of any of the Respondents to Mitsui's claims. Mitsui was not a party to the arbitration proceeding and, accordingly, is not bound by the Arbitration Award since it did not have a full and fair opportunity to litigate any of the issues before the arbitrators, *Allen v. McCurry*, 449 U.S. 90, 95 (1980). I will not seek guidance on this issue from the Award. The Award may also be relevant to show a lack of consistency between positions taken by parties to both the Arbitration Proceedings and this proceeding.

⁵⁵I will not cite the arbitrators' findings as to relationships involving the Arbitration Respondents which are not parties to this proceeding.

shareholder of CJR, through which he held an approximately twenty percent interest in Global Link.⁵⁶ (Award, pp.2, 3.)

59. The arbitrators were called upon to adjudicate two claims, both of which involved split routing. In their first claim the Claimants alleged that split routing was illegal and thereby violated two representations in the SPA: that Global Link was in compliance with all applicable laws and regulations, and that Global Link's financial statements fairly and materially represented the financial condition of Global Link and its subsidiaries. (Award, pp.4, 5.)
60. In their second claim the Claimants alleged that they were fraudulently induced to execute the SPA and to consummate their acquisition of Global Link by the intentional concealment of the practice of split routing. The Claimants further alleged that the Arbitration Respondents knew that split routing was illegal and that the practice of split routing generated fraudulently obtained cost savings, thereby substantially overstating Global Link's gross profit per container and earnings before interest, taxes, depreciation, and amortization. (Award, p.5.)
61. The arbitrators found that the evidence was inconclusive as to how prevalent split routing was in the freight forwarding industry. (Award, p.9.)
62. The arbitrators found that a senior sales representative of Mitsui knew that Global Link was engaged in split routing, and that Mitsui condoned and encouraged the practice because it preferred "not to be bothered" with negotiating a multiplicity of door points (rates for delivery to specific locations). However, at least one Mitsui office would only release shipments to the addresses shown on the master bills of lading issued by Mitsui. (Award, p.10, footnote 15.)⁵⁷
63. The arbitrators found that the evidence was not sufficient to support a finding that the management of Global Link continued the practice of split routing in spite of its knowledge that the practice was illegal. (Award, p.20.)
64. The arbitrators found that, in view of the insufficiency of evidence of the knowledge of Global Link's management as set forth in their Finding of Fact 22, there was insufficient

⁵⁶According to footnote 1 of the Award, the Arbitration Respondents did not deny the allegation that CJR was originally incorporated as Global Link in 1997. CJR assumed its current name when the Olympus Respondents acquired substantially all of the assets of Global Link in 2003 in exchange for about \$20 million in cash paid to Rosenberg and approximately twenty percent of the stock of GLL Holdings.

⁵⁷I have included this finding by the arbitrators for the sole purpose of presenting an accurate summary of the Award.

evidence to show that Global Link fraudulently misrepresented either its financial condition or the results of its operations for the three months ending on March 31, 2006. (Award, pp.21-23.)

65. In determining whether the Claimants should prevail in their first claim (FF 59) the arbitrators found that:
- a. The Arbitration Respondents violated 46 C.F.R. § 515.31(e). (Award, pp.39-42.)
 - b. In view of the Arbitration Respondents' violation of 46 C.F.R. § 515.31(e), the arbitrators need not decide whether they violated 46 U.S.C. § 41102(a)(1). (Award, p.43.)
 - c. The Arbitration Respondents did not violate the Federal Bill of Lading Act, 49 U.S.C. § 80101, *et seq.* (Award, pp.43, 44.)
 - d. The Arbitration Respondents materially misrepresented the financial condition of Global Link. (Award, pp.44, 45.)
66. The doctrine of *in pari delicto* was inapplicable and did not bar the Claimants from recovery. (Award, pp.45, 46.)
67. The Arbitrators found liability for damages as follows:⁵⁸
- a. OGF was liable to Golden Gate Logistics, Inc. ("Golden Gate") in the amount of \$4,812,774.86 as indemnification damages for breach of the contractual duty of fair representation of its financial condition.
 - b. OEF was liable to Golden Gate in the amount of \$31,482.50 as indemnification damages for breach of the contractual duty of fair representation of its financial condition.
 - c. CJR was liable to Golden Gate in the amount of \$1,325,798.70 as indemnification damages for breach of the contractual duty of fair representation of its financial condition.
 - d. OGF, OEF, and CJR were jointly and severally liable to the Claimants in the amount of \$5,605,583.00 (total damages of \$12 million less \$6,394,417.00 in indemnification damages). (Award, pp58, 59.)

⁵⁸I will not restate damage awards against entities which are not parties to this proceeding.

68. The Award was in full settlement of all claims asserted and submitted to the arbitrators other than for pre-judgment interest and the allocation of costs as provided in the arbitration agreement. (Award, p59.)
69. By order of October 8, 2009, the Court of Chancery of the State of Delaware confirmed the Partial Final Arbitration Award of February 2, 2009, and the Final Award dated March 16, 2009. The court also entered judgments in favor of the Claimants and against the Arbitration Respondents for unpaid indemnification interest and costs. Interest on the judgments would accrue from March 17, 2009, until the judgments were paid in full with interest at five percent over the Federal Reserve discount rate. (Mitsui Exhibit E.)

V. DISCUSSION AND ANALYSIS

A. BURDEN OF PROOF

Rule 155, 46 C.F.R. § 502.155, provides that:

In all cases, as prescribed by the Administrative Procedure Act, 5 U.S. C. 556(d), the burden of proof shall be on the proponent of the rule or order.

The above-cited portion of the Administrative Procedure Act (“APA”) states, in pertinent part:

Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

The term “burden of proof” in the context of the APA is synonymous with “burden of persuasion,” *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 281, (1994) (“*Greenwich Collieries*”). The nature of the burden is by the preponderance of the evidence, *Steadman v. SEC*, 450 U.S. 91, 102 (1981). In order to meet its burden of proof or persuasion, a party must show that the overall weight of the evidence in support of its position is greater than the weight of the evidence in opposition; “[W]hen the evidence is evenly balanced, the [party with the burden of persuasion] must lose.” *Greenwich Collieries*, 512 U.S. at 281. See also *DSW International, Inc. v. Commonwealth Shipping, Inc., Abou Merhi Lines, LLC, and Abou Merhi Lines, SAL*, 2011 WL 7144019, 31 S.R.R. 1850 (ALJ, 2011).

In the context of this proceeding, Mitsui has the burden of proof that split routing is a violation of the Shipping Act, and if so, that each of the Respondents were responsible for the violations. Mitsui also has the burden of proving that its damages were proximately caused by the actions of the Respondents so as to render them liable to Mitsui for reparations. Global Link has the burden of proof

as to its counterclaim and crossclaims. Each of the Respondents have the burden of persuasion as to their affirmative defenses, whether or not designated as such, *Carolina Marine Handling, Inc. v. South Carolina State Ports Authority, Charleston Naval Complex Redevelopment Authority, Charleston International Projects, Inc. and Charleston International Ports, LLC*, 2006 WL 1910113, 30 S.R.R. 1017, 1023, 1038 (2006). The Respondents' threshold affirmative defenses are that Mitsui is barred from recovery because of its knowledge and encouragement of split routing by Global Link, and that all or part of Mitsui's claims are barred by limitations.

Mitsui has responded to the affirmative defenses by arguing that the knowledge of McClintock and Yang should not be imputed to Mitsui because Global Link, and through it the other Respondents, knew that McClintock and Yang were acting contrary to the interests of Mitsui. Mitsui has the burden of persuasion as to this defense.

Mitsui acknowledges that it has the burden of proving its entitlement to reparations. However, it disputes the position of the CJR Respondents that it is required to show that each shipment represented a violation of the Shipping Act and that the CJR Respondents participated in such violations for each of the shipments.

I find that the position of the CJR Respondents as to Mitsui's burden of proof is somewhat simplistic. As stated in the Commission's Order of August 1, 2011, p.23, a finder of fact may rely on reasonable inferences in evaluating evidence, *see also, Bimshaw International v. Chief Cargo Services, Inc. and Kaiser Apparel, Inc.*, 2011 WL 7144011, 32 S.R.R. 363, 380 (ALJ, 2011). If I find that any or all of the Respondents have violated the Shipping Act, I will then consider the arguments of the parties as to the validity of the evidence of sample shipments submitted by Mitsui pursuant to Rule 251, 46 C.F.R. § 502.251, and the extent to which I may reasonably infer that Mitsui is entitled to reparations from individual Respondents. As stated in the Procedural Order and Briefing Schedule of October 16, 2012, if it is eventually determined that Mitsui is entitled to reparations, I will entertain motions for discovery as to the amount of reparations. Such additional discovery, if allowed, may include the identification of expert witnesses and an opportunity to depose those witnesses. After the completion of additional discovery, if any, I will determine the amount of reparations, if any, to which Mitsui is entitled. That determination will be based on the evidence as well as any reasonable inferences that I may draw from such evidence.

B. MITSUI'S KNOWLEDGE OF SPLIT ROUTING BY GLOBAL LINK

While there are a number of threshold issues regarding the liability of individual Respondents, the overriding threshold issue is whether Mitsui knew of and at least acquiesced in the split routing by Global Link. It is undisputed that Global Link engaged in split routing prior to the commencement of its relations with Mitsui in 2004, and that it continued the practice with regard to Mitsui's shipments until some time in 2007 (FF 13-17, 26). Between 2004 and 2006 or 2007 most of Mitsui's shipments for Global Link were to inland destinations, or door points, rather than to container yards in the ports where the containers were discharged from Mitsui's vessels (FF 38). 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).

At all times pertinent to this proceeding, Paul McClintock and Rebecca Yang were Mitsui's most senior contacts with Global Link (FF 27-30). On numerous occasions, McClintock and Yang resisted efforts by Global Link to add more door points to their service contracts. Instead, they encouraged Global Link to use split routing to deliver shipments to door points not contained in the service contracts (FF 37, 42). According to McClintock and Yang, they wished to avoid the effort of negotiating additional door points and preferred that Global Link handle the inland portions of its shipments (FF 42).

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).

In order for split routing to work, it was necessary for Global Link to identify "preferred truckers" who would deliver goods to destinations other than those in Mitsui's master bills of lading (FF 16). Possibly because of its wide experience in executing split routing, Global Link was able to identify such truckers. Apparently the truckers were motivated by the prospect of continuing business from Global Link since they were willing to accept the "trucking allowance" provided by Mitsui for the door points listed in its service contracts.⁵⁹ Mitsui would bill Global Link for transportation to the contractual door points in the master bills of lading, even when the cost of the shipment to the actual destination would have been greater (FF 45). Global Link established "open accounts" with at least some of the preferred truckers whereby excess payments from Mitsui were credited against trucking charges for deliveries to destinations beyond the contractual door points in Mitsui's bills of lading (FF 46, 47). Although there is no evidence as to the frequency of shipments to destinations beyond the contractual door points, it is reasonable to assume that Global Link would not have accepted a situation in which the additional charges in such cases were not at least offset by the savings for shipments to destinations closer than the contractual door points. This would have been contrary to Global Link's goal of reducing costs through split routing.

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. There is evidence that lower-level Mitsui employees knew of the split routing in spite of Mitsui's request that Global Link employees not discuss the matter with such employees (FF 37, 47). Simple logic dictates that rank and

⁵⁹Global 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.

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.

McClintock's attempt to confine knowledge of split routing to upper level management of Mitsui and Global Link suggests that he suspected that, whether or not split routing was illegal, it was at least questionable (FF 36).⁶⁰ I do not credit McClintock's self-serving testimony that he is certain that Mitsui's general counsel was consulted with regard to split routing in August of 2005. This consultation was allegedly triggered by an e-mail message to McClintock from Ted Holt of Mitsui in which he describes split routing with regard to shipments to Martinsville, Virginia. According to Holt's message, he was concerned about liability if "there is an accident" on the way to the actual destination rather than the legality of split routing. McClintock responded that, "Per our discussion, I will follow up with Kevin Hartman[n] [Global Link's Vice-President, Law and Insurance] and advise." (Global Link Ex. J1, App. 128.) There is no evidence as to the nature of the discussion between McClintock and Holt or whether McClintock was merely referring to Holt's e-mail. Significantly, there is no paper trail showing that Holt's e-mail was actually forwarded to Hartmann as McClintock claimed, nor is there any evidence of either a response from Hartmann or of communications between Mitsui employees concerning Hartmann's alleged legal opinion. Indeed, McClintock only stated that he was sure that Holt (not McClintock himself as stated in his message to Holt) would have consulted Hartmann (McClintock deposition, Global Link Ex. C1, pp. 240-243, App. 26, 27). There is no evidence that Holt actually consulted Hartmann, nor is it likely that he would have done so in view of McClintock's assurance that he would communicate with Hartmann. Hartmann has denied that he knew about split routing until he became involved in Mitsui's decision to institute this proceeding after the commencement of the Arbitration Proceeding in 2008 (Hartmann declaration, Mitsui Ex. BM, App. 1626, *et seq.*) and there is no credible evidence to refute that assertion. As will be shown, Hartmann's knowledge of the split routing scheme is not crucial to a determination of Mitsui's knowledge.

It is axiomatic that a corporation such as Mitsui is a legal entity that can only act through its authorized representatives. In order to prove that McClintock and Yang were authorized to act for Mitsui, the Respondents must present evidence of actions and statements by Mitsui itself, rather than merely of its purported agents. There is 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. It may well be that McClintock and his subordinates either knowingly acted counter to Mitsui's policies or that they decided not to ask questions to which they did not want answers. Nevertheless, senior Mitsui management placed McClintock and Yang in positions which justified

⁶⁰The 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.

Global Link's reliance on their authority to act on behalf of Mitsui.⁶¹ Stated otherwise, McClintock and Yang had at least apparent authority to act on behalf of Mitsui in consenting to and encouraging the practice of split routing by Global Link.

The controlling principle of law is set forth in *William R. Adair v. Penn-Nordic Lines, Inc.*, 1991 WL 383091, 26 S.R.R. 11, 21 (ALJ, 1991).⁶²

The liability of the principal for the acts and contracts of his agent is not limited to such acts and contracts of the agent as are expressly authorized, necessarily implied from express authority, or otherwise actually conferred by implication from the acts and conduct of the principal. So far as concerns a third person dealing with an agent, the agent's "scope of authority" includes not only the actual authorization conferred upon the agent by the principal, but also that which has apparently been delegated to him.... In effect, therefore, an agent's apparent authority is, as to third persons dealing in good faith with the subject of his agency and entitled to rely upon such an appearance, his real authority, and it may apply to a single transaction, or to a series of transactions. (Footnote citations omitted.)

Stated inclusively, then, the rule is that if a principal acts or conducts his business, either intentionally or through negligence, or fails to disapprove of the agent's act or course of action so as to lead the public to believe that his agent possesses authority to act or contract in the name of the principal, such principal is bound by the acts of the agent within the scope of his apparent authority as to any person who, upon the faith of such holding out, believes, and has reasonable ground to believe, that the agent has such authority, and in good faith deals with him. (Footnote citations omitted.)

See also, *In The Matter of The Lawfulness of Unlicensed Persons Acting as Agents for Licensed Ocean Transportation Intermediaries - Petition for Declaratory Order*, 2008 WL 1840502, 31 S.R.R. 185, 197 (2008); *Schaffart v. ONEOK, Inc.*, 686 F.3d 461, 472-73 (8th Cir. 2012).

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

⁶¹It is possible that McClintock was involved either in hiring Yang or in placing her in the position of primary responsibility for the Global Link account. If so, it has not been alleged that McClintock lacked the authority to do so.

⁶²The Administrative Law Judge took this language from 3 Am Jur 2d, Agency, §§ 78, 79.

(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 so-called “adverse interest” exception to the doctrine of apparent authority is a narrow one. In order to prevail on this issue, Mitsui must show that it was obvious to the Respondents that McClintock and Yang were acting solely for their own benefit and had abandoned Mitsui’s interests, *In re Bennett Funding Group, Inc.*, 336 F.3d 94, 100 (2d Cir. 2003). There can be no doubt that McClintock and Yang were acting in their own interests by seeking to avoid the necessity of arranging for the inland movement of Mitsui’s shipments while satisfying Global Link, which was an important customer. McClintock especially benefitted from the arrangement; it may well be that the preservation of the Global Link account was a deciding factor in Mitsui’s decision to promote him. 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.

In further support of its adverse interest argument, Mitsui contends that McClintock’s desire to restrict knowledge of split routing eliminated the right of the Respondents to rely on his and Yang’s authority. I disagree. The evidence indicates that McClintock expressed the desire to confine knowledge of split routing to upper level management rather than that such information be withheld from his superiors (FF 36). If, as alleged by Mitsui, Global Link had “excellent” contacts with Mitsui’s upper-level management, McClintock would have cautioned Global Link to withhold knowledge of split routing from all Mitsui representatives.

Mitsui has placed special reliance on *Seamaster, supra*,⁶³ as precedent for a conclusion that the Respondents were not entitled to rely on the authority of McClintock and Yang. In *Seamaster* the court found that the defendant was not entitled to rely on the apparent authority of Michael Yip on behalf of Mitsui. However, *Seamaster* is factually distinguishable from the instant case on the following findings by the court:

1. The defendant knew from previous conversations with Mitsui representatives that their arrangement with Yip would not have been approved by Mitsui.

⁶³The opinion in *Seamaster* is included in Mitsui’s Supplemental Appendix as Ex. CK, App. 2032, *et seq.* The court based its conclusions, at least in part, on California precedent. Mitsui maintains that such precedent is especially significant because its service contracts with Global Link are governed by California law. It need hardly be said that Mitsui’s claims for relief are based upon alleged violations of the Shipping Act rather than upon breach of contract.

2. Any benefit to Mitsui from the arrangement with Yip was inconsequential and would not have justified the loss of revenue by Mitsui. The defendant was aware that Mitsui would be taking the loss. In the words of the court, "Yip's deal was obviously too good to be true."

3. Yip had totally abandoned Mitsui's interests.

The facts in the instant case differ widely from those in *Seamaster*. It is significant to note that the *Seamaster* court cited cases holding that the adverse interest exception is a narrow one and that, "the adverse interest exception is not triggered if the agent is acting at least in part to further the principal's interest (citations omitted)."

For the reasons stated above, I have concluded that the knowledge of McClintock and Yang is attributable to Mitsui, and that, consequently, Mitsui knew of and encouraged the split routing by Global Link.

C. THE LEGAL EFFECT OF MITSUI'S KNOWLEDGE OF SPLIT ROUTING BY GLOBAL LINK

The Shipping Act, in Section 11(g), 46 U.S.C. § 41305(b), provides, in pertinent part:

If the complaint was filed within the period specified in section 41301 (a) of this title, the Federal Maritime Commission shall direct the payment of reparations to the complainant *for actual injury caused by a violation of this part*, plus reasonable attorney fees. (Emphasis supplied.)

The Commission has construed this language to mean that, in order to recover reparations, the complainant must prove that it suffered monetary loss that was proximately caused by the actions of the respondents, *William J. Brewer v. Saeid B. Maralan (aka Sam Bustani) and World Line Shipping, Inc.*, 2000 WL 126793, 28 S.R.R. 1331, 1335 (ALJ, 2000); *California Shipping Line, Inc. v. Yangming Marine Transport Corp.*, 25 S.R.R. 1213, 1230-1231 (1990).

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.

In reaching this conclusion, I am guided by 46 C.F.R. § 545.2, entitled "Interpretation of Shipping Act of 1984-Unpaid ocean freight charges." That regulation states, in pertinent part:

Section 10(a)(1) of the Shipping Act of 1984 (46 U.S.C. 41102(a)) states that it is unlawful for any person to obtain or attempt to obtain transportation for property at less than the properly applicable rates, by any "unjust or unfair device or means." An essential element of the offense is use of an "unjust or unfair device or means." *In the absence of evidence of bad faith or deceit, the Federal Maritime Commission will not infer an "unjust or unfair device or means" from the failure of a shipper to pay ocean freight.* (Emphasis supplied.)

In view of Mitsui's knowledge of and consent to the split routing scheme, it has not carried its burden of proof as to bad faith or deceit by the Respondents.

Mitsui maintains that, in view of the "filed rate doctrine," its entitlement to reparations, at least under Section 10(a)(1), is not dependent on whether it suffered an actual injury within the meaning of Section 11(g) and cites *American President Lines, Ltd. v. Cyprus Mines Corporation*, 1994 WL 33488, 26 S.R.R. 1227 (1994) ("*Cyprus*") in support of its contention. In *Cyprus*, the Commission affirmed the finding of the Administrative Law Judge that the filed rate doctrine had not been eliminated by the passage of the Shipping Act of 1984 and that the complainant was entitled to reparations without consideration of its actual monetary loss.⁶⁴

The filed rate doctrine was described in the decision of the Administrative Law Judge in *Cyprus*, 1993 WL 228724, 26 S.R.R. 969, 973 (ALJ 1993), as follows:

Once filed with the FMC, the *published tariff rate* is the only lawful rate that can be charged. The filed rate doctrine embodies the principle that a shipper cannot avoid payment by invoking common law claims and defenses, such as ignorance, estoppel, or prior agreement to a *rate different from the tariff rate* (citation omitted). (Emphasis supplied.)

While the Commission has never addressed the applicability of the filed rate doctrine to a case involving departures from rates in service contracts, the differences between tariffs and service contracts is such that the doctrine should not be extended as Mitsui contends.

A tariff is a generally applicable schedule of rates by a carrier which, pursuant to Section 8(a) and (b), 46 U.S.C. § 40501(a)(1), must be kept open to public inspection. A service contract is between a carrier and specified shippers, and is to be filed confidentially with the Commission pursuant to Section 8(c), 46 U.S.C. § 40502. While certain provisions of service contracts are required to be published concisely in tariff form, the rates are not included in this requirement.

The rationale behind the filed rate doctrine is set forth in *Cari-Cargo International, Inc., et al.*, 1986 WL 170057, 23 S.R.R. 1007, 1016 (ALJ 1986):

⁶⁴The Commission remanded the case to the Administrative Law Judge for determination of attorney fees and the resolution of issues related to the calculation of reparations.

The requirement of the act that all rates should be published is perhaps the chief feature of the scheme provided for the effective outlawing of all discriminations. If this portion of the act is not strictly enforced, the entire basis of effective regulation will be lost. Secret rates will inevitably become discriminating rates.

Congress subsequently amended the Shipping Act by passage of the Ocean Shipping Reform Act of 1998, 1998 Pub. L. 105-258., 112 Stat. 1902 ("OSRA"). For the first time carriers were allowed to negotiate confidential service contracts with rates other than those set forth in published tariffs. While, as the Commission has stated in *Cyprus*, the filed rate doctrine is still in effect, since the enactment of OSRA not all carriers' rates need be made public. Stated simply, "secret," or at least nonpublic, rates are now permitted. It therefore follows that the filed rate doctrine does not apply in the case of service contracts for the simple reason that there are no publicly filed rates.

This is not to say that carriers may allow departures from service contract rates with impunity. Section 10(b)(1), 46 U.S.C. § 41104(1), prohibits carriers from:

allow[ing] a person to obtain transportation for property at less than the rates or charges established by the carrier in its tariff or service contract by means of false billing, false classification, false weighing, false measurement, *or any other unjust or unfair device or means* (Emphasis supplied.)

Although 46 C.F.R. § 545.2 deals with Section 10(a)(1), the Commission's interpretation of "unjust or unfair device or means" is clearly applicable to Section 10(b)(1). Accordingly, reparations are only to be awarded under Section 10(b)(1) upon a showing of actual injury.

The issuance of a cease and desist order is only appropriate when necessary to deter future violations, *Precious Metals Assoc. v. Commodity Futures Trading Commission*, 620 F.2d 900, 912 (1st Cir. 1980). Since Global Link ceased split routing some time after its acquisition by its current owner (FF 49), a cease and desist order would be inappropriate even if I were to find that there had been a violation of the Shipping Act.

For the reasons set forth above, it is **ORDERED** that the Amended Complaint be **DISMISSED**.

D. GLOBAL LINK'S CROSSCLAIMS

The stated theory behind Global Link's crossclaims is that, if it is held liable to Mitsui, it is entitled to indemnity or contribution from the Cross Respondents. In view of my finding that Mitsui is not entitled to reparations from any of the Respondents, it is **ORDERED** that the crossclaims be **DISMISSED AS MOOT**.

E. GLOBAL LINK'S COUNTERCLAIM

Global Link's theories of recovery under Section 10 (b)(1) and (b)(2) fail because of Global Link's knowledge and instigation of the split routing scheme.⁶⁵ The same evidence put forth by Global Link and the other Respondents with regard to Mitsui's knowledge firmly establishes the knowledge of Global Link (FF 13-26, 34-46, 48, 49). Indeed, the evidence of Global Link's knowledge is even stronger than the evidence establishing the knowledge of Mitsui. It has not and could not be legitimately alleged that the cognizant representatives of Global Link lacked actual authority to approve, direct, and perform split routing.

Global Link has repeatedly asserted that the real victim of the split routing scheme is its current owner. The simple answer to that assertion is that Global Link's owner is not a party to this proceeding. I will not needlessly swell this Initial Decision with a recitation of elementary corporate law which establishes that a corporation, as a legal entity, is distinct from its owners or stockholders. Presumably Global Link does not maintain that it is the alter-ego of its owner or that the Commission should pierce its own corporate veil. Global Link and its owner successfully pursued their remedies in the Arbitration Proceeding. Golden Gate, either directly or indirectly, is not entitled to seek further relief in this proceeding.

In view of Global Link's knowledge, any monetary loss which it would have sustained (a highly doubtful supposition) would have been proximately caused by its own actions. The same legal principles which bar Mitsui from recovery apply to Global Link.

The above principles also apply to Global Link's allegation that, in refusing to add door points to its service contracts, Mitsui acted unjustly and unreasonably in violation of Section 10(d)(1). The problem with that theory is that the absence of contractual door points was an essential element in the split routing scheme of which Global Link was fully aware. In addition, Global Link has not explained why, as a highly important customer of Mitsui, it was not in a position to insist that Mitsui add the door points. Global Link has attempted to justify its current owner's delay in terminating split routing by alleging that, because of the involvement of the Hecny Group, the service contracts could not be easily amended in mid-term. If this is so, it explains Mitsui's reluctance to make the requested amendments.

Global Link has also based its counterclaim on the proposition that, in instituting this proceeding, Mitsui has committed an unjust and unreasonable practice in violation of Section 10(d)(1), 46 U.S.C. § 41102(c). The cited section, which is entitled "Practices in Handling Property", states:

A common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

⁶⁵Global Link's theory of recovery under Section 10(b)(1) would also be moot since Mitsui is not entitled to reparations. However, I have chosen to address all of Global Link's theories on their merits so as to eliminate any uncertainty as to their status.

Global Link's theory is that, in view of Mitsui's knowledge and encouragement of split routing, its pursuit of reparations against its "former collaborators" is no more than an attempt to "recover a windfall as a result of its illegal actions." (Global Link Brief in Support of Counterclaim, p.18.) Accordingly, Global Link seeks reparations from Mitsui in the form of attorney fees and costs which it incurred in defending against Mitsui's claims.

Global Link's novel theory of recovery is not supported by the language of Section 10(d)(1). To be sure, this proceeding arises out of the practice of split routing, and split routing involves the receiving, handling, and delivery of property. Nevertheless, Global Link has cited neither legal authority nor legislative history to remotely suggest that the commencement of a proceeding before the Commission falls within even the broadest definition of a practice in handling, storing, or delivering property. Therefore, even if Global Link's characterization of Mitsui's motives is correct, the institution of this proceeding is not a violation of any portion of the Shipping Act

Section 11(g), 46 U.S.C. § 41305(b), provides for an award of reasonable attorney fees to complainants along with reparations for statutory violations; there is nothing in the Shipping Act regarding the award of attorney fees to respondents. Yet, Global Link is seeking an award of attorney fees as a respondent when there has been no statutory violation by Mitsui which is the proximate cause of Global Link's alleged loss. Even if Mitsui were found to be in violation of Section 10(b)(1), 46 U.S.C. § 41104(1), by allowing Global Link to obtain transportation at less than the rates set forth in the service contracts, such violation would be no basis for the allowance of Global Link's counterclaim because Global Link was a beneficiary rather than a victim of any such violation.

In *AAEL America Africa Europe Line GmbH v. Virginia International Trade & Investment Group, LLC, et al.*, 1996 WL 67026, 27 S.R.R. 825, 827 (1996), the Commission indicated that it might award attorney fees to a respondent who had prevailed in an action that was either frivolous or designed to harass him. Neither of those factors apply here. The overall weight of the evidence indicates that Mitsui instituted this proceeding in the good faith belief that McClintock and Yang had colluded with the Respondents to defraud it (FF 50-54). This was far from an open and shut case. Mitsui's failure to sustain its burden of proof does not justify the imposition of attorney fees.

In view of the foregoing, it is **ORDERED** that Global Link's counterclaim be **DISMISSED**.

F. GLOBAL LINK'S MOTION TO INTRODUCE AN EXPERT WITNESS REPORT AND TESTIMONY REGARDING REPARATIONS

Global Link has characterized its motion as anticipatory and only applicable in the event that I would need to consider the amount of reparations to which Mitsui is entitled. Since I have determined that Mitsui is not entitled to reparations in any amount, it is **ORDERED** that Global Link's motion regarding an expert's report and testimony be **DISMISSED AS MOOT**.

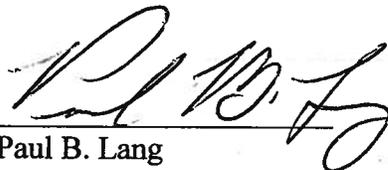
In view of my finding that Mitsui is not entitled to reparations I have not reached issues with regard to the computation of reparations and Global Link's crossclaims. I will make additional factual

findings and legal analysis as necessary if the Commission should remand this matter for further proceedings. If this should occur, it will not be necessary for Global Link to reintroduce its crossclaims or its motion to introduce an expert witness and report regarding reparations.

VI. ORDER

For the reasons set forth herein, it is **ORDERED**:

1. That the Amended Complaint by Mitsui O.S.K. Lines, Ltd. against Global Link Logistics, Inc., Olympus Partners, Olympus Growth Fund III, L.P., Olympus Executive Fund, L.P., Louis J. Mischianti, David Cardenas, Keith Heffernan, CJR World Enterprises, Inc. and Chad J. Rosenberg be **DISMISSED**.
2. That the crossclaims by Global Link Logistics, Inc. against Olympus Growth Fund III, L.P., Olympus Executive Fund, L.P., CJR World Enterprises, Inc. and Chad J. Rosenberg be **DISMISSED AS MOOT**.
3. That the motion of the Respondents to Strike False Statements in Complainant's Reply Brief in Further Support of Its Claims Against Respondents be **DENIED**.
4. That the counterclaim by Global Link Logistics, Inc. against Mitsui O.S.K. Lines, Ltd. be **DISMISSED**.
5. That the motion by Global Link Logistics, Inc. to Be Permitted to Introduce an Expert Witness Report and Testimony Should There Be A Need for Evidence on Reparations be **DENIED AS MOOT**.
6. That all other requests for relief submitted after the close of pleadings, as set forth in the Procedural Order and Briefing Schedule of October, 16, 2012, as amended, be **DENIED**.



Paul B. Lang
Administrative Law Judge