

**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No. 09-01

mitsui o.s.k. lines, ltd.,

COMPLAINANT,

v.

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

RESPONDENTS.

**RESPONDENT AND CROSS COMPLAINANT GLOBAL LINK LOGISTICS, INC.'S
OPENING BRIEF IN SUPPORT OF ITS CLAIMS FOR CONTRIBUTION AGAINST THE
ROSENBERG AND OLYMPUS RESPONDENTS**

**David P. Street
Brendan Collins
GKG LAW, PC
1054 Thirty-First Street, NW
Washington, DC 20007
Telephone: 202/342-5200
Facsimile: 202/342-5219
Email: dstreet@gkglaw.com
bcollins@gkglaw.com**

**Attorneys for Respondent
GLOBAL LINK LOGISTICS, INC.**

Dated: March 1, 2013

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
FINDINGS OF FACT	4
Procedural History	4
The Commission Previously Determined that the Rosenberg and Olympus Respondents Could Be Held Liable for Shipping Act Violations of Which They Had Knowledge and in Which They Participated	4
Commission Decision Holding that Contribution Claims Can Be Asserted Under the Shipping Act	5
ARGUMENT	6
I. Congress Delegated Broad Authority to the Commission to Award Reparations for Violations of the Shipping Act	6
A. The Commission’s Decision Recognizes the Broad Delegation of Authority to the Commission Under the Shipping Act and the Right to Assert a Claim for Contribution Under the Appropriate Circumstances	9
B. The Commission is Entitled to Impose Liability Against Individuals and Entities that Violate the Shipping Act	10
II. The Rosenberg and Olympus Respondents Are Liable for the Violations Alleged by MOL	11
A. Rosenberg Respondents	11
B. Olympus Respondents	12
C. The Rosenberg and Olympus Respondents Committed the Shipping Act Violations Alleged	14
1. The Rosenberg and Olympus Respondents Are Collaterally Estopped from Asserting That They Played No Role in the Shipping Act Violations Alleged	15
2. The Panel Found That the Rosenberg and Olympus Respondents Were Aware of and Participated in Split Routing	16

III. No Liability Should Be Imposed Upon Global Link.....18

CONCLUSION19

TABLE OF AUTHORITIES

Cases

Agreement 9597, 12 F.M.C. 83, 101-102 (FMC 1968)10

Ariel Maritime Group, Inc., 24 S.R.R. 517, 530 (FMC 1987)10, 14

Brokerage on Ocean Freight, 5 F.M.B. 435, 440 (FMC 1958)10

California v. United States, 320 U.S. 577, 584 (1944).....8

Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-844 (1984)6

Disposition of Container Marine Lines, 11 F.M.C. 476, 489 (1968).....8

Greenblatt v. Drexel Burnham Lambert, Inc., 763 F.2d 1352, 1360 (11th Cir. 1985).....16

INS v. Cardoza-Fonseca, 480 U.S. 421, 431 n.12. (1987)6

International Ass'n of NVOCCs v. Atlantic Container Line, 25 S.R.R. 167, 175 (ALJ 1989) ...7, 9

International Ass'n of NVOCCs v. Atlantic Container Line, 25 S.R.R. 734, 742 (FMC 1990).....7

Isthmian S.S. Co. v. United States, 53 F.2d 251, 253 (S.D.N.Y. 1931).....9

Kroeger v. United States Postal Service, 865 F.2d 235, 238 (Fed. Cir. 1988).....15, 16

Montana v. United States, 440 U.S. 147, 153 (1979).....15

Nepera Chemical, Inc. v. FMC, 662 F.2d 18 (D.C. Cir. 1981).8

Oakland Motor Car Co. v. Great Lakes Transit Corp., 1 U.S.S.B. 308, 311-12 (1934)8

Parkland Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979)15

Plaquemines Port Harbor and Terminal District v. FMC, 838 F.2d 536, 542-43 (D.C. Cir. 1968)
.....8

Tariff Filing Practices of Containerships, Inc., 9 F.M.C. 56, 69 (1965).....8

United States v. Hohri, 482 U.S. 64, 69 (1987).....6

United States v. James, 478 U.S. 597, 604 (1986)6

Volkswagenwerk Aktiengesellschaft v. FMC, 390 U.S. 261, 273-75 (1968).....8

Statutes

46 U.S.C. § 40101.....8
46 U.S.C. § 41101(a).....4
46 U.S.C. § 41102.....6
46 U.S.C. § 41102(c).....4, 5
46 U.S.C. § 41301.....12
46 U.S.C. § 41301(a).....6
46 U.S.C. § 41301-4130620
46 U.S.C. § 41305(b).....5, 6

Other Materials

Norman J. Singer, *Statute and Statutory Construction*, Section 60:1 (6th Ed. 2001).3, 8

**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No. 09-01

MITSUMI O.S.K. LINES, LTD.,

COMPLAINANT,

v.

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

RESPONDENTS.

**RESPONDENT AND CROSS COMPLAINANT GLOBAL LINK LOGISTICS, INC.'S
OPENING BRIEF IN SUPPORT OF ITS CLAIMS FOR CONTRIBUTION AGAINST THE
ROSENBERG AND OLYMPUS RESPONDENTS**

To the extent Global Link Logistics Inc. ("Global Link") is held liable for the Shipping Act violations alleged by Mitsui O.S.K. Lines, Ltd. ("MOL"), Global Link is entitled to contribution from CJR World Enterprises, Inc. and Chad J. Rosenberg (collectively the "Rosenberg Respondents") and Olympus Growth Fund, LLP Olympus Executive Fund L.P., Louis Mischianti, L. David Cardenas and Keith Heffernan, (collectively the "Olympus Respondents") because those Respondents instituted and/or directly participated in the Shipping Act violations asserted and caused the alleged damages. MOL's Complaint seeks reparations for damages that it purportedly suffered as a result of Shipping Act violations that occurred in 2004 through 2006. The current owner of Global Link, Golden Gate Logistics LLC ("Golden Gate"), did not even acquire the company until June of 2006, however, and only first received a report from a former employee as to questionable routing practices thereafter. Although Global Link

acted promptly to investigate the allegations of split routing, it did not determine the scope of the practice until 2007. It then acted promptly to terminate the split routing practices, despite the stubborn resistance of MOL. Under these circumstances, any damages incurred by MOL as result of split routing should be imposed upon the parties who implemented and conducted the split routing rather than upon Global Link.

The overwhelming weight of evidence establishes that the Rosenberg and Olympus Respondents are responsible for split routing procedures developed, implemented and utilized by Global Link when they were acting as officers and directors of the company. As such, they should pay any cognizable damages that Global Link incurred as a result of the Rosenberg and Olympus Respondents' actions taken in violation of the Shipping Act.

In prior litigation involving these same parties, an Arbitration Panel determined that the Rosenberg and Olympus Respondents could be held "directly liable for fraud attributable to Global Link." The Arbitration Panel explicitly held that it was not affixing direct liability on the Rosenberg and Olympus Respondents as shareholders based upon piercing Global Link's corporate veil but instead based upon their direct actions. Although the liability in that case was predicated upon the failure of the Rosenberg and Olympus Respondents to disclose their knowledge of the ongoing split routing and their misrepresentation as to being in compliance with Commission rules and regulations and the Shipping Act, rather than based upon the Shipping Act violations themselves, the Panel's findings, in a proceeding in which the Rosenberg and Olympus Respondents were parties, collaterally estops them from now contending that they were mere shareholders of Global Link without knowledge of the split routing practices at issue. The Panel's finding that the current owner of Global Link took a

reasonable course in terminating split routing under the circumstances and did not voluntarily engage in split routing is also binding.

Further, under traditional jurisprudence governing piercing the corporate veil, liability may be imposed against the Rosenberg and Olympus Respondents based upon their having used Global Link as an instrument to perpetrate a fraud. In addition, under well-established Commission precedent, the corporate entity may be disregarded in order to achieve a statutory or regulatory purpose, *i.e.*, preventing violations of the Shipping Act. Under either approach, imposition of liability is warranted.

Imposing liability against Global Link, which unwittingly inherited the split routing practices at issue and then acted promptly to stop them, rather than against the parties who actually engaged in the Shipping Act violations and gained a windfall of more than a \$100,000,000.00 dollars as a result, runs afoul of the remedial purposes of the Shipping Act. When Global Link's current owner, Golden Gate, learned of the practice of split routing in July of 2006, through an email from a former employee, it conducted an investigation and contacted maritime counsel. It took Global Link until early 2007 to ascertain the extent of the practice. At that time, Global Link sought to renegotiate upcoming service contracts, which ran from May 1 to April 30th, so as to eliminate split routing. Although MOL resisted efforts to terminate split routing, Global Link ultimately terminated the practice with MOL. The Arbitration Panel determined it would have been impractical for Global Link's current owners to have tried to terminate split routing sooner than it did. To impose penalties upon Global Link, rather than upon the Rosenberg and Olympus Respondents, under these circumstances would be flatly contrary to the Shipping Act's remedial goal of "suppress[ing] the evil and advance[ing] the remedy." Norman J. Singer, *Statute and Statutory Construction*, Section 60:1 (6th Ed. 2001).

Accordingly, any damages that occurred as a result of split routing should be imposed on the Rosenberg and Olympus Respondents rather than upon Global Link.

FINDINGS OF FACT

Global Link's Proposed Findings of Fact In Support of Its Contribution Claims Against the Rosenberg and Olympus Respondents, which are being filed separately, are incorporated herein.

Procedural History

The Commission Previously Determined that the Rosenberg and Olympus Respondents Could Be Held Liable for Shipping Act Violations of Which They Had Knowledge and in Which They Participated

MOL's Complaint asserts claims for violations of Sections 10(a)(1) and 10(d)(1) of the Shipping Act, 46 U.S.C. §§ 41101(a), 41102(c). *See* Amended Complaint, Docket No. 09-01 (8) at 3. The Rosenberg and Olympus Respondents previously sought to dismiss the Section 10(a)(1) and 10(d)(1) claims on the grounds that they could not be held liable as mere shareholders of Global Link under the Shipping Act. *See* Motion to Dismiss, Docket No. 09-01(10). They also asserted that MOL could not assert a 10(d)(1) claim against them because they acted as shippers rather than NVOCCs in relation to MOL. The ALJ granted their motion to dismiss the section 10(d)(1) claim but rejected their motion to dismiss the section 10(a)(1) claim. *See* ALJ Decision, Docket No. 09-01 (42). In affirming the ALJ's decision in regard to the Section 10(a)(1) claim, the Commission held that the Rosenberg and Olympus Respondents could be held liable if the split routing was done with their knowledge and participation. *See* Commission's August 1, 2011 Decision Granting in Part and Denying in Part ALJ's Decision, Docket No. 09-01 (91) at 34 ("Commission Decision.") The Commission reversed the ALJ's decision dismissing the Section 10(d)(1) claims, holding that the Rosenberg and Olympus

Respondents could be held liable under section 10(d)(1) regardless of whether they acted as shippers in relation to MOL, if they participated in the split routing. *Id.* at 36.

Commission Decision Holding that Contribution Claims Can Be Asserted Under the Shipping Act

The Commission Decision held that Global Link's allegations as to institution and direction of split routing practices by the Rosenberg and Olympus Respondents, and the injuries suffered by Global Link as a result of those practices, state a plausible claim for contribution. *Id.* at 23. Although recognizing that a final determination as to whether a contribution claim could be asserted would be premature unless and until there is a finding of liability against Global Link, the Commission held that the doctrine of contribution was consistent with the plain language of the Shipping Act that "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, 46 U.S.C. § 41305(b)." *Id.* at 24. The Commission further held that "[t]here is nothing in the Shipping Act provisions concerning reparations, or in the legislative history, which suggests that Congress intended to preclude proportional liability for reparations, if the Commission determines it to be appropriate in a particular case." *Id.* at 25. Thus, under appropriate circumstances, such as are presented here, contribution claims are valid under the Shipping Act.

ARGUMENT

I. Congress Delegated Broad Authority to the Commission to Award Reparations for Violations of the Shipping Act

In granting the Commission broad authority pursuant to the Shipping Act, Congress expressly mandated that the Commission award reparations to parties injured by violations of the Act. Specifically, Section 11 of the Shipping Act (46 U.S.C. §§ 41301(a) and 41305(b) provides that:

A person may file with the Federal Maritime Commission a sworn complaint alleging a violation of this part, except section 41307(b)(1) . If the complaint is filed within 3 years after the claim accrues, the complainant may seek reparations for an injury to the complainant caused by the violation. . . . 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 added.) Section 10(a) of the Shipping Act provides that a “person may not knowingly and willfully . . . obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise apply.” 46 U.S.C. § 41102.

The Supreme Court provides explicit guidance to courts and agencies in determining their appropriate role in interpreting statutory language. In the seminal case of *Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-844 (1984), the Supreme Court recognized that its analysis must begin with the plain language of the statute. “*First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter*” *Id.* at 842-43 (emphasis added). *See also, United States v. Hohri*, 482 U.S. 64, 69 (1987) (“[a]s always, the ‘starting point in every case involving construction of a statute is the language itself’”); *United States v. James*, 478 U.S. 597, 604 (1986). Thus, when a court finds the terms of a statute unambiguous, judicial inquiry is complete. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 n.12. (1987).

Here, Congress has broadly drafted the relevant provision of the Shipping Act to allow suit by any person, and, in the case of Section 10(a), against any person, alleging a violation of the Act. "Obviously there is virtually no limitation on the entity that may file a complaint because 'person' as defined in Section 3(20) of the 1984 Act ... is defined to include 'individuals, corporations, partnerships, and associations existing under or authorized by the laws of the United States or of a foreign country.'" *International Ass'n of NVOCCs v. Atlantic Container Line*, 25 S.R.R. 167, 175 (ALJ 1989). Similarly, section 10(a) of the Act may be asserted against any person. "As section 10(a) shows, Congress did make all 'persons' liable for some Shipping Act violations In enforcing section 10(a), the Commission may reach any U.S. or foreign individual or enterprise." *International Ass'n of NVOCCs v. Atlantic Container Line*, 25 S.R.R. 734, 742 (FMC 1990).

Thus, pursuant to the plain terms of these sections, Global Link may seek reparations for injury caused to it by the Rosenberg and Olympus Respondents as a result of their engagement in split routing practices in violation of the Shipping Act. Here, Global Link seeks contribution for the same Shipping Act violations for which MOL seeks reparations. In particular, MOL claims that the Rosenberg and Olympus Respondents violated the Shipping Act by engaging in fraudulent and willful efforts to obtain ocean transportation for property for less than the rates or charges that would otherwise apply. MOL Complaint at 7. It is upon this factual basis that Global Link seeks a remedy. Just as the Commission has jurisdiction and the authority to award reparations for damages to MOL resulting from violations of the Shipping Act, it has the same authority to award reparations to Global Link for damages resulting from such violations.

Even if the language of the Shipping Act were not so plain, it must be construed so as to effectuate its remedial goals. Liberal, purpose driven readings of the Shipping Act are justified

and desirable where a particular provision is broadly written, thus signifying an intent by Congress that Commission jurisdiction should not be narrowly construed. *Volkswagenwerk Aktiengesellschaft v. FMC*, 390 U.S. 261, 273-75 (1968); *Plaquemines Port Harbor and Terminal District v. FMC*, 838 F.2d 536, 542-43 (D.C. Cir. 1968). The Shipping Acts of 1916 and 1984 have long been recognized as remedial statutes. *Oakland Motor Car Co. v. Great Lakes Transit Corp.*, 1 U.S.S.B. 308, 311-12 (1934); *Tariff Filing Practices of Containerships, Inc.*, 9 F.M.C. 56, 69 (1965). When a statute is recognized as remedial, it is to be broadly construed so as to “suppress the evil and advance the remedy.” Norman J. Singer, *Statute and Statutory Construction*, Section 60:1 (6th Ed. 2001). The policy that a remedial statute should be construed so as to effectuate its intended remedial purpose is firmly established. *California v. United States*, 320 U.S. 577, 584 (1944); *Nepera Chemical, Inc. v. FMC*, 662 F.2d 18 (D.C. Cir. 1981). Thus, even where there is ambiguity in a remedial statute, it should be construed to address the problems that are within the purpose of the law. *Nepera Chemical*, 662 F.2d. at 22. The goal of the Shipping Act is to establish a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States. See 46 U.S.C. § 40101. It has long been recognized that the Commission may, within the framework of the Shipping Act, fashion the tools for remedying violations of the Act. *California v. United States*, 320 U.S. 577, 584 (1944); *Disposition of Container Marine Lines*, 11 F.M.C. 476, 489 (1968) (“It is indisputable, therefore, that the Federal Maritime Commission must assume a flexible posture and must view broadly, when necessary, its regulatory purposes and governing laws and rules”). This includes the ability to adopt and use “traditional principles under the law of damages” including possibly “principles of contribution or market-sharing of liability among respondents” even if there is “nothing specific in the Shipping Act showing a Congressional

intent that the Commission apply such doctrine in reparations cases.” *Int’l Association of NVOCCs v. Atlantic Container Line*, 25 S.R.R. 675, 686-688 (ALJ 1990). Thus, there is “no reason for giving the statutory remedy a procedural narrowness” that would preclude its enforcement. *See Isthmian S.S. Co. v. United States*, 53 F.2d 251, 253 (S.D.N.Y. 1931).

A. The Commission’s Decision Recognizes the Broad Delegation of Authority to the Commission Under the Shipping Act and the Right to Assert a Claim for Contribution Under the Appropriate Circumstances

Here, the Presiding Judge must follow the Commission’s Decision of August 1, 2011, as well as established principles requiring that the Shipping Act be construed so as to effectuate its goals, by imposing liability against the parties actually responsible for Shipping Act violations. In its previous ruling in this case, the Commission recognized that it may exercise flexibility in determining remedies for Shipping Act violations, particular given the broad language of the Act dictating that the Commission shall direct the payment of reparations for actual injury caused by violations of the Act. Commission Decision at 24-27. Such a conclusion is further bolstered by the fact that “[t]here is nothing in the Shipping Act provision concerning reparations, or in the legislative history, which suggest that Congress intended to preclude proportional liability for reparations” *Id.* at 25.

The broad language of the relevant provisions of the Shipping Act provides that any person may bring an action against any other person for violations of the Act and may seek reparations for an injury caused to the complainant. Clearly, to the extent Global Link is found liable for actions taken by the Rosenberg and Olympus Respondents, it falls squarely within the plain language of the Act. Under these circumstances, where Congress has delegated such broad authority to the Commission, imposition of liability against the Rosenberg and Olympus Respondents for the Shipping Act violations they orchestrated is warranted.

B. The Commission is Entitled to Impose Liability Against Individuals and Entities that Violate the Shipping Act

As set forth below, the Olympus and Rosenberg Respondents are bound by the Arbitration Panel's prior holding that that they were knowing participants in the split routing practices at issue rather than mere shareholders of Global Link. Accordingly, the Presiding Judge need not apply traditional piercing the corporate veil analysis in order to impose liability against the Rosenberg and Olympus Respondents. Instead, the Presiding Judge need only determine whether the Rosenberg and Olympus Respondents were willing participants in the ongoing split routing scheme.

To the extent the Presiding Judge does engage in a piercing the corporate veil analysis, however, it is clear that liability properly may be found against the Rosenberg and Olympus Respondents. The Commission and its predecessors have made clear that the corporate entity may be disregarded if necessary to achieve a statutory or regulatory purpose. *Agreement 9597*, 12 F.M.C. 83, 101-102 (FMC 1968); *Ariel Maritime Group, Inc.*, 24 S.R.R. 517, 530 (FMC 1987); *Brokerage on Ocean Freight*, 5 F.M.B. 435, 440 (FMC 1958). In *Ariel Maritime Group*, the Commission held that it is appropriate to pierce the corporate veil in order to prevent the use of a corporate device to commit a statutory violation. *Id.* at 530. In so holding, the Commission recognized that the corporate entity may not be used to shield the individual from liability or to evade a statutory purpose. *Id.* Thus, even absent a showing that a corporation is a sham entity in an absolute sense, the "corporate entity may be disregarded when the failure to do so would enable the corporate device to be used to circumvent a statute." *Id.*

II. The Rosenberg and Olympus Respondents Are Liable for the Violations Alleged by MOL

A. Rosenberg Respondents

The indisputable facts establish that Chad Rosenberg, the founder and owner of Global Link and its Chief Executive Officer from 1997 through 2006, brought the practice of split routing with him to Global Link and subsequently taught the practice to Jim Briles. *See* Contribution Proposed Findings of Fact (“CFOF”) 15, 18, 21 and 27. Rosenberg personally conducted split routings at Global Link. CFOF 15. Rosenberg provided incorrect information to steamship lines for their bills of lading and in Global Link’s delivery orders when he was doing routing of shipments. CFOF 20.

Split routing was an important part of Global Link’s operations when Rosenberg was the Chief Executive Officer. CFOF 17. During the time period when Chad Rosenberg was at Global Link, approximately 60 percent of Global Link’s moves were split routings. CFOF 16.

During his tenure at Global Link, Rosenberg was the Qualifying Individual registered with the FMC. CFOF 25. In his capacity as the Qualifying Individual for Global Link, Rosenberg never reviewed Commission rules and regulations. *Id.* Rosenberg was unaware that the FMC has regulations prohibiting licensees from knowingly imparting false information relative to an ocean transportation transaction. CFOF 26.

The Arbitration Panel, after reviewing extensive documentation and following seven days of hearings, concluded that Rosenberg founded Global Link and brought with him from former employment the practice of split routing, which he refined and supervised before turning over the responsibility to subordinates. CFOF 27.

Rosenberg was a director, officer and sole shareholder of CJR World Enterprises, through which he held an ownership interest in Global Link. CFOF 11. Rosenberg and CJR World Enterprises were paid more than \$40 million when they sold Global Link. CFOF 10, 13.

The facts set forth above definitively establish that Chad Rosenberg and the Rosenberg Respondents were primarily responsible for the Shipping Act violations alleged. Having implemented, refined and supervised Global Link's split routing -- and been amply compensated through the receipt of more than \$40 million when they sold their share of the company -- the Rosenberg Respondents should bear the cost of paying any damages allegedly suffered by MOL as a result of such practices. This conclusion is particularly warranted given that MOL's Complaint seeks recovery for split routing which occurred in 2004 through 2006. *See* MOL Amended Complaint at IV (E). Global Link's current owners did not purchase Global Link until June of 2006, CFOF 105, and did not learn the scope of the split routing at issue until 2007. CFOF 94.¹ Under these circumstances, there is no legal or equitable basis for imposing reparations upon Global Link as opposed to the parties who engaged in the Shipping Act violations at issue.

B. Olympus Respondents

The Olympus Respondents purchased an 80% ownership in Global Link in 2003 and sold their shares in June of 2006. CFOF 9, 37. The Olympus Respondents not only owned the majority shares of Global Link during the time period when the split routing at issue occurred, the Olympus Respondents were willing participants in Global Link's split routing.

David Cardenas, one of the senior Olympus management, who was a director and officer of Global Link during the relevant time period, admitted under oath that he was told of split

¹ Further, MOL filed its suit on May 5, 2009. 46 U.S.C. § 41301, provides for a three year time bar for actions alleging Shipping Act violations. Thus, on its face, the Shipping Act violations that occurred prior to May of 2006 are time-barred.

routing in the summer of 2003, shortly after Olympus purchased its ownership interest in Global Link and that he was also told at or around that time that significant questions existed as to the legality of the practice. CFOF 47, 54, 57-59. Despite that knowledge, Cardenas never followed up on the issue or sought to have Global Link discontinue split routing. CFOF 58-60.

Keith Heffernan, who was also a director of Global Link and an officer of both Olympus and Global Link, also learned of split routing in the summer of 2003. CFOF 45, 46, 67. He was aware Global Link management had consulted with an attorney in regard to the practice. CFOF 68. Although the attorney advised Global Link management that “a practice of changing destinations without notice to the ocean carrier exposes Global Link to possible Shipping Act violations,” neither Cardenas nor Olympus sought to have Global Link discontinue split routing. CFOF 58-60, 85.

Heffernan admitted that as a board member of Global Link, he was not sure if really wanted to know if there was a practice that was exposing Global Link to possible Shipping Act violations. CFOF 69. He was not sure it was something that would have been important to him. *Id.*

Chad Rosenberg, testified that he not only discussed split routing with both Heffernan and Cardenas in the summer of 2003, he walked them through a specific example of how it was performed. CFOF 72.

Eric Joiner, Global Link’s Chief Operating Officer, who Cardenas hired, testified that he told Olympus management, including David Cardenas, that the ongoing split routing practice was illegal. CFOF 81. Despite this explicit warning, the split routing practice continued. CFOF 85.²

² Cardenas also traveled to Hong Kong and to south China to meet with customers and vendors of Global Link and engaged in discussions as to obtaining container space on shipping lines and having Global Link treated as a

C. The Rosenberg and Olympus Respondents Committed the Shipping Act Violations Alleged

The facts in evidence warrant that any liability arising out of this action should be imposed against the Olympus Respondents rather than against Global Link. Such a conclusion need not be predicated upon piercing Global Link's corporate veil during the relevant time period or upon the mere fact that the Respondents were shareholders of Global Link, but instead due to the fact that the Rosenberg and Olympus Respondents were directly involved in implementing, maintaining and overseeing the Shipping Act violations alleged by MOL. Accordingly, to the extent the Presiding Judge determines that MOL suffered any cognizable injury, the Olympus Respondents should be held liable for such injuries, rather than Global Link's current owners, who did not even own the company during the vast majority of the time period for which MOL is seeking reparations.

If the Presiding Judge finds it necessary to engage in a piercing the corporate veil analysis, however, the same result would apply. Here, the facts clearly establish that the Rosenberg and Olympus Respondents used Global Link as a device to engage in split routing in violation of the Shipping Act. Their acts fall squarely within Commission precedent holding that the corporate entities should be disregarded if necessary to achieve the remedial goals of the Shipping Act. *See, Ariel Maritime Group, Inc.*, 24 S.R.R. at 530.

preferential customer during peak shipping season. CFOF 50. In addition, Cardenas was actively involved in identifying and recruiting Global Link's management team. CFOF 53. Keith Heffernan regularly communicated with Global Link's senior management team, and helped develop a "track and trace system" in regard to shipments which helped Global Link keep track of where containers were in the course of their shipment. CFOF 66.

1. The Rosenberg and Olympus Respondents Are Collaterally Estopped from Asserting That They Played No Role in the Shipping Act Violations Alleged

It is a fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and *res judicata*, that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction cannot be disputed in a subsequent suit between the same parties. *Montana v. United States*, 440 U.S. 147, 153 (1979) (citations omitted). “Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. *Id.* (citing *Parkland Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979)). The Supreme Court in *Montana* recognized that this doctrine is necessary to preclude parties from contesting matters that they had a full and fair opportunity to litigate, so as to protect their adversaries from the expense and vexation attendant to multiple lawsuits. *Id.* The Court further recognized that the doctrines of *res judicata* and collateral estoppel conserve judicial resources and foster reliance on judicial action by minimizing the possibility of inconsistent decisions. *Id.* Collateral estoppel therefore precludes parties from contesting matters that they have had a full and fair opportunity to litigate.” *Id.* at 153-54; *see also, Parkland Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979) (collateral estoppel, like the related doctrine of *res judicata*, has the dual purpose of protecting litigants from the burden or relitigating an identical issue with the same party or his proxy and of promoting judicial economy by preventing needless litigation).

The doctrine of collateral estoppel applies equally to arbitration proceedings as to rulings of a court or other tribunal. *See, e.g., Kroeger v. United States Postal Service*, 865 F.2d 235, 238 (Fed. Cir. 1988) (arbitration decision that meets the appropriate standards for collateral estoppel

has the same preclusive effect as any other decision); *Greenblatt v. Drexel Burnham Lambert, Inc.*, 763 F.2d 1352, 1360 (11th Cir. 1985) (arbitrator's decision has *res judicata* or collateral estoppel effect, even if underlying claim involves federal securities laws). As the Federal Circuit recognized in *Kroeger*, “[w]e see no reason why an arbitrator's decision should not be given collateral estoppel effect before the board in the appropriate case, and no reason, in such cases, to force witnesses . . . to return for a repeat performance of their testimony.” 865 F.2d at 238.

2. The Panel Found That the Rosenberg and Olympus Respondents Were Aware of and Participated in Split Routing

The Arbitration Panel determined that the Rosenberg and Olympus Respondents, as principals, officers and directors of Global Link, were fully aware of the split routing practices at issue and failed to prevent or disclose the ongoing practice. CFOF 23. Such a holding, in a proceeding in which the Rosenberg and Olympus Respondents fully participated and vigorously defended against the allegations asserted, collaterally estops them from now contending that they were mere shareholders and not involved “as individuals or entities” in the split routing practices at issue. *Id.*

The Arbitration Panel also found that the Rosenberg and Olympus Respondents, rather than the current owner of Global Link, were culpable for the split routing that occurred. CFOF 104. The Panel determined that having unknowingly inherited the split routing practices, the current owner of Global Link terminated them as soon as it was feasible. *Id.* The Panel also recognized that the current owner of Global Link never voluntarily engaged in split routing. *Id.*

Here, as reflected in the Arbitration Order, the Rosenberg and Olympus Respondents had the motivation to, and did, vigorously defend against the allegations asserted by Global Link. Not only was there extensive briefing on the split routing issues raised in the arbitration, the Arbitration Panel directly addressed, during the course of seven days of hearings, the role of

Rosenberg and Olympus, and two of Olympus's senior personnel, David Cardenas and Keith Heffernan, in the split routing at issue. The Panel expressly found not only that Rosenberg implemented and directed the split routing, but that Olympus personnel were also fully aware of the split routing and did nothing to prevent the ongoing practice. Thus, the Arbitration Panel considered and answered the question posed by the Commission at page 38 of its Order, *i.e.*, are the Olympus Respondents named "as individual [respondents] or entities rather than mere shareholders of Global Link."

Respondents' argument that the Seller Respondents cannot be held "directly liable for fraud attributable to Global Link, citing two Delaware Chancery Court decisions, misses the mark. We are not affixing direct liability on the Olympus respondents and CJR Enterprises as shareholders . . . by piercing Global Link's corporate veil. *Rather the panel finds the two Olympus and CJR World Enterprises Seller Respondents liable under established agency law as principals* on whose behalf and at whose request Global Link management made disclosures that we find to have been fraudulently inadequate during the due diligence process.

Arbitration Order at 38 (emphasis supplied).

The remainder of the Panel's Order confirms the validity of that conclusion and dictates that the Presiding Judge find the Rosenberg and Olympus Respondents liable for the Shipping Act violations at issue, rather than the current owners of Global Link, who had no ownership interest during most of the time period at issue (2004-2006), no real knowledge of the split routing during any of the time period at issue and who subsequently acted as quickly as was feasible to end the split routing.

The Arbitration Panel's decision that the Rosenberg and Olympus Respondents were not mere shareholders of Global Link but instead played an active and integral role in promoting the split routing at issue is binding upon the parties. Accordingly, liability should be imposed upon the Rosenberg and Olympus Respondents rather than upon Global Link, whose current owners took no part in the split routing at issue.

III. No Liability Should Be Imposed Upon Global Link

Global Link's current owner, Golden Gate, would bear the cost of any reparations imposed against Global Link. Because imposition against an innocent party who did not engage in the Shipping Act violations alleged would be inequitable and contrary to the Commission's goal of promoting compliance with the Shipping Act, no damages should be imposed upon Global Link. If there is a finding of liability in favor of MOL, under any fair apportionment, the Rosenberg and Olympus Respondents should assume 100% of the liability given that they implemented and conducted the split routing at issue and received the benefits accrued from the split routing in the form of a multi-million dollar payment from Global Link's current owners.

MOL seeks recovery for split routings that occurred in 2004 through 2006. *See* Amended Complaint at IV (E). As set forth above, Global Link's current owners did not purchase Global Link until June of 2006. CFOF 105. Thus, the vast majority of the violations for which MOL seeks recovery occurred before Golden Gate acquired Global Link. Further, Global Link's current owners did not receive any information as to questionable routing practices until July of 2006 and were unable to quantify the extent of the split routing practice until early 2007. CFOF 105, 107. Thus, no damages should be imposed upon Global Link, which was an unwittingly dupe to the Rosenberg and Olympus Respondents deceptive practices.

In weighing whether damages purportedly suffered by MOL should be assessed against the Rosenberg and Olympus Respondents or Global Link, consideration also must be given to the steps that Global Link's current management took to stop the split routing practice upon learning of it. The overwhelming weight of evidence establishes that upon learning of the ongoing split routing practices between MOL and Global Link in early 2007, Global Link sought

to stop the split routing, which efforts MOL vigorously resisted CFOF 105-129. The contemporaneous documentation confirms that, despite repeated communications from Global Link that the practice had to stop and that Global Link could no longer do business with MOL if MOL insisted upon continuing to do split routings, it was many months before MOL reluctantly acquiesced to Global Link's demands. CFOF 115-29. Under these circumstances, neither the law nor equity justifies the imposition of damages upon the innocent party who acted as quickly and as realistically as it could to end the split routing practices it unwittingly acquired, rather than against the parties who systematically and knowingly engaged in and benefited from Shipping Act violations over an extended period of time. Accordingly, any liability finding by the Presiding Judge should assess 100% of the blame upon the Rosenberg and Olympus Respondents rather than upon Global Link.

Conclusion

Global Link's current owner, who would bear the cost of any reparations imposed upon Global Link, is an innocent party who did not participate in the Shipping Act violations at issue but instead acted promptly to end them. In contrast, Global Link's former owners, shareholders and executives knowingly and willfully engaged in split routing over an extended period of time and received a windfall of in excess of \$100 million as a result of their actions. Under these circumstances -- consistent with the Commission's prior holding that parties who engage in violations of the Shipping Act should be held liable and that contribution is a viable remedy under the appropriate circumstances -- if liability is imposed, it should be imposed against the Rosenberg and Olympus Respondents, rather than Global Link's current owner, who did not engage in Shipping Act violations and who would suffer compensable "actual injury" within the

meaning of Section 11 of the Act by having to pay reparations to MOL for the alleged Shipping Act violations.

Respectfully Submitted,



David P. Street
Brendan Collins
GKG LAW, PC
1054 Thirty-First Street, NW
Washington, DC 20007
Telephone: 202/342-5200
Facsimile: 202/342-5219
Email: dstreet@gkglaw.com
bcollins@gkglaw.com

Attorneys for Respondent
GLOBAL LINK LOGISTICS, INC.

DATE: March 1, 2013

CERTIFICATE OF SERVICE

I do hereby certify that I have delivered a true and correct copy of the foregoing document to the following addressees at the addresses stated by depositing same in the United States mail, first class postage prepaid, and/or via email transmission, this 1st day of March, 2013:

Marc J. Fink
David Y. Loh
COZEN O'CONNOR
1627 I Street, NW – Suite 1100
Washington, DC 20006
Email: mfink@cozen.com
dloh@cozen.com

Attorneys for Mitsui O.S.K. Lines, Ltd.

Ronald N. Cobert
Andrew M. Danas
GROVE, JASKIEWICZ AND COBERT, LLP
1101 17th Street, N.W., Suite 609
Washington, DC 20036
Email: rcobert@gjacobert.com
adanas@gjacobert.com

Benjamin I. Fink
Neal F. Weinrich
BERMAN FINK VAN HORN, PC
3423 Piedmont Road, NE – Suite 200
Atlanta, GA 30305
Email: bfink@bfvlaw.com
nweinrich@bfvlaw.com

Attorneys for CJR World Enterprises, Inc. and Chad Rosenberg

Warren L. Dean
C. Jonathan Benner
Harvey Levin
Kathleen E. Kraft
THOMPSON COBURN, LLP
1909 K Street, NW – Suite 600
Washington, DC 20006
Email: wdean@thompsoncoburn.com
jbenner@thompsoncoburn.com
hlevin@thompsoncoburn.com
kkraft@thompsoncoburn.com

Andrew G. Gordon
PAUL WEISS RIFKIND WHARTON & GARFISON LLP
1285 Avenue of the Americas
New York, NY 10019
Email: agordon@paulweiss.com

*Attorneys for Olympus Growth Fund III, LP; Olympus Executive Fund, LP;
Louis J. Mischianti; David Cardenas; and Keith Heffernan*

Brendan Ellis
