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FEDERAL MARITIME COMM

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June 17, 2009

Via Hand Delivery

Karen V. Gregory, Secretary
Federal Maritime Commission
800 North Capitol Street, N.W.
Room 1046
Washington, D.C. 20573

Re: FMC Docket No. 09-01

Dear Ms. Gregory:

On behalf of Olympus Growth Fund III, L.P.; Olympus Executive Fund, L.P.; Louis J. Mischianti; David Cardenas; and Keith Heffernan (hereinafter referred to as "Olympus" or "Olympus Respondents"), enclosed please find one (1) original and fifteen (15) copies of the Motion to Dismiss Improperly Filed Complaint for Lack of Subject Matter Jurisdiction and Failure to State a Claim, and for Other Appropriate Relief.

Kindly date stamp the extra copy of this letter and the Motion to Dismiss and return the same to our courier. Thank you.

Very truly yours,

Warren L. Dean Jr.

Enclosures

cc: Hon. Clay G. Guthridge (via Hand Delivery)
Service List (via overnight courier)

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BEFORE THE
FEDERAL MARITIME COMMISSION

Mitsui O.S.K. Lines, Ltd., Complainant, v. Global Link Logistics, Inc. et al., Respondents.	Docket No. 09-01

MOTION TO DISMISS IMPROPERLY FILED COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION AND FOR FAILURE TO STATE A CLAIM AND FOR OTHER APPROPRIATE RELIEF

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June 17, 2009

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BEFORE THE
FEDERAL MARITIME COMMISSION

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MOTION TO DISMISS IMPROPERLY FILED COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION AND FOR FAILURE TO STATE A CLAIM, AND FOR OTHER APPROPRIATE RELIEF

Pursuant to Rules 12 and 73 of the Commission's Rules of Practice and Procedure, 46 C.F.R. §§ 502.12, 502.73, and Fed. R. Civ. P. 12(b), Respondents Olympus Growth Fund III, L.P. ("OGF"), Olympus Executive Fund, L.P. ("OEF"), Louis J. Mischianti, David Cardenas and Keith Heffernan (hereinafter collectively referred to as "Olympus Respondents"), respectfully move the presiding Judge to dismiss the Complaint.[1]

INTRODUCTORY SUMMARY

The Commission should dismiss this Complaint for at least three reasons.

[1] In its Complaint, Mitsui named "Olympus Partners, L.P." as a Respondent, but there is no such legal entity associated with the Olympus Respondents. On June 16, 2009, Mitsui moved to amend its Complaint to name "Olympus Partners" rather than "Olympus Partners, L.P.," but there is no legal entity named "Olympus Partners" associated with the Olympus Respondents either.

First, the Commission lacks jurisdiction to hear the claims in the Complaint. Mitsui's claims are based on a business practice called split-routing that exclusively concerns domestic inland transportation. Split-routing is, therefore, outside the Commission's jurisdiction to regulate only the common carriage of goods **by water**. Additionally, the Shipping Act makes clear that the Commission lacks jurisdiction to adjudicate private disputes over the interpretation of service contracts. Because Mitsui's claims concern alleged violations of the terms of certain service contracts between Mitsui and Respondent Global Link Logistics, Inc. ("Global Link"), the Commission has no jurisdiction to hear these claims or award reparations in these circumstances.

Second, Mitsui has come before the Commission in bad faith. Notwithstanding the allegations in its Complaint, Mitsui willingly engaged in split-routing with Global Link for years. Mitsui cannot now claim that it was damaged because of a business practice that it consented to and even encouraged.

Third, Mitsui has failed to state a claim against the Olympus Respondents for which relief can be granted. Mitsui has failed to satisfy its basic obligations under Federal Rule of Civil Procedure 8(a)(2) to allege non-conclusory facts from which it can plausibly be inferred that it is entitled to relief from the Olympus Respondents. Instead, Mitsui's claims rest on the single, conclusory allegation that the Olympus Respondents knew of and participated in Global Link's practice of split-routing. As the Supreme Court has made clear, this type of conclusory pleading is not sufficient to state a claim under Rule 8(a)(2). Moreover, because Mitsui's claims against the Olympus Respondents consist of the conclusory assertion that they participated in a scheme with

Global Link to defraud Mitsui, Mitsui's claims are subject to the heightened pleading standard of Federal Rule of Civil Procedure 9(b). Mitsui has completely failed to satisfy Rule 9(b) and its claims must be dismissed.

Moreover, even if Mitsui had properly alleged wrongdoing by the Olympus Respondents, the alleged statutory and regulatory violations identified by Mitsui — Sections 10(a)(1) and 10(d)(1) of the Shipping Act (46 U.S.C. §§ 41102(a), 41104(1)) and 46 CFR 515.31(e) — simply do not apply to the Olympus Respondents. Mitsui has not, and cannot, allege any instance in which any of the Olympus Respondents have attempted to obtain ocean transportation for less than the rates or charges that would otherwise apply, as is required for a violation of Section 10(a)(1). Section 10(d)(1) applies only to common carriers, ocean transportation intermediaries ("OTIs"), and marine terminal operators; none of the Olympus Respondents fall into any of these categories. Similarly, 46 CFR 515.31(e) applies to licensees of the Commission only; again none of the Olympus Respondents are such licensees. Lastly, Mitsui is time barred from seeking reparations for the vast majority of the split-routing that Global Link engaged in.

The Olympus Respondents request oral argument before the presiding Judge on the issues presented herein. Further, the Olympus Respondents request that its discovery obligations be stayed pending the resolution of this Motion.

For the foregoing reasons, Olympus Respondents respectfully submit that the presiding Judge issue an order dismissing Mitsui's complaint.

BACKGROUND

This action arises from the June 7, 2006 sale of GLL Holdings, Inc., the parent company of Respondent Global Link Logistics, Inc. ("Global Link"), to Golden Gate Logistics by, among other parties, Respondents OGF, OEF, and CJR World Enterprises, Inc. ("CJR"). Global Link is a Non-Vessel Operating Common Carrier ("NVOCC") that specializes in obtaining transportation to the United States for furniture manufactured in Asia.

Following the sale, Golden Gate learned that Global Link regularly engaged in a practice called split-routing whereby, for shipments to door destinations covered by an ocean carrier's Master Bill of Lading ("MBL"), Global Link would direct truckers to deliver cargo to destinations other than the destinations specified on MBL. Golden Gate reviewed the practice with counsel in July 2006 and decided that Global Link would continue split-routing until it renegotiated its ocean carrier service contracts in May and June 2007.

Although Global Link continued to engage in split-routing, its performance did not meet expectations. To recoup its losses, on June 6, 2007, Global Link, along with Holdings and Golden Gate (together "Buyers") initiated an arbitration against the former owners of Global Link, including Respondents OGF, OEF, and CJR, and other parties, including Respondents Mischianti, Cardenas and Heffernan (together "Sellers"). Buyers claimed that split-routing was an illegal practice, that it constituted a fraud on Global Link's ocean carrier partners, that Sellers had concealed split-routing from them during due diligence, and that Buyers had misrepresented Global Link's compliance with relevant law at the time of the sale. As a result, Buyers contended that Global Link was worth more than $100,000,000.00 less than the purchase price, and demanded that Sellers pay them the difference between the purchase price and what they contended was Global Link's actual value. Buyers further demanded $300,000,000.00 in punitive damages and $300,000,000.00 in RICO treble damages.

Buyers' claims suffered from a significant problem: neither the Commission nor any court had ever determined that split-routing violated any laws, and no ocean carrier had ever brought a claim against Global Link based on split-routing. Global Link had hoped to use the Commission's informal and largely private voluntary disclosure proceeding to obtain from the Bureau of Enforcement ("BOE") an "expert" opinion for use in the arbitration that it was unable to obtain by other means. It, therefore, filed a self-disclosure with the Commission in which it took the position that split-routing violated Section 10(a)(1) of the Shipping Act and other laws, that it constituted a fraud on the ocean carriers, and that Global Link's ocean carrier partners, including Mitsui, had suffered damage as a result of split-routing. OGF and OEF, however, filed their own petition with the Commission to clarify the proper scope of Section 10(a)(1) of the Act. *See* Emergency Petition for Declaratory Order, Rulemaking or other Appropriate Relief in Voluntary Disclosure Investigation, FMC Docket No. 08-07.[2] Buyers were unable to obtain a decision from the Commission prior to the issuance

[2] OGF and OEF sought a declaratory order or rulemaking to confirm that the common industry practice involving domestic inland movements is not a violation of Section 10(a)(1). By Order dated June 15, 2009, the Commission denied the Petition on procedural grounds. In spite of the

of the Arbitration Panel's final ruling, in which they were awarded $12,000,000.00 out of the $700,000,000.00 they had sought.

Mitsui filed the instant action on May 5, 2009 seeking reparations against the beneficial owners of GLL for alleged violations of Sections 10(a)(1) and 10(d)(1) of the Shipping Act and 46 CFR § 515.31. The Complaint alleges that the Olympus Respondents knew of and participated in a scheme by GLL to obtain ocean transportation at rates lower than the applicable service contract or tariff rates by booking cargo to one inland destination while intending to deliver the cargo to a different inland destination. Cmplt. at ¶ IV.E.

ARGUMENT

I. Legal Authority to Dismiss the Complaint.

The Commission Rules of Practice and Procedure permit a respondent to file a motion to dismiss in lieu of an answer. *See* Rule 64; 46 CFR § 502.64. The Federal Rules of Civil Procedure are to be followed for situations not covered by a specific Commission Rule. Rule 12; 46 CFR § 502.12. Under the Federal Rules, a complaint must be dismissed if the court lacks subject matter jurisdiction or if the complaint fails to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(1) and (6).

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fact Petitioners raised fundamental questions concerning the jurisdiction of the Commission and the integrity of its procedures, the Commission did not address the merits of the Petition.

II. The Commission Lacks Jurisdiction Over Mitsui's Claims

The Commission lacks jurisdiction over Mitsui's claims for two reasons, both of which require dismissal of this action. First, Mitsui's claims concern split-routing, a practice which exclusively involves inland domestic transportation and, therefore, falls outside the scope of the Shipping Act. Because split-routing is not governed by the Shipping Act, the Commission lacks jurisdiction to regulate it or adjudicate claims based on the practice.

Second, even if the Commission has jurisdiction over split-routing in general, Mitsui's claims that the practice violates terms of certain service contracts between it and Global Link are private issues of contract interpretation, which, according to the Shipping Act, belong before an appropriate court, not the Commission. The Act precludes the Commission from awarding the difference between the amount Global Link paid for ocean transportation and the amount set forth in Mitsui's service contract or tariff.

A. The FMC Lacks Jurisdiction Over Domestic Inland Transportation Services and Split-routing of the U.S. Inland Destination.

1. The Practice of Split-routing.

Mitsui's claims arise from a widespread practice in the international shipping industry called split-routing. Split-routing occurs when a shipper, including an NVOCC such as Global Link, contracts with an ocean carrier for the transportation of cargo from a foreign point to a final destination in the United States, the ocean carrier arranges for a trucker to transport the cargo from a port or container yard to the final destination, and the shipper directs the trucker to deliver the cargo to a destination that is different from the final destination specified by the ocean carrier. Split-routing is part of the broader concept of merchant haulage, which is discussed further below. Crucially, split-routing does not deprive ocean carriers of any revenue or impose any costs upon them: ocean carriers are fully compensated for the services they have contracted to provide under the master bills of lading and the terms of the applicable service contracts.

Split-routing is a common and well-understood practice in the international shipping industry. The Report of Working Group III (Transport Law) on the Work of the Twenty-First Session of the United Nations Commission on International Trade Law, which produced the Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea ("Draft Convention"), and which the United States participated in, considered the practice, which it described generally as "merchant haulage," in detail.[3] Like Global Link's practice of split-routing, merchant haulage occurs when the shipper/consignee arranges the final leg of the transport to an inland destination, not withstanding the fact that the cargo may be entered under a single transport document which lists a different destination.[4] While a draft article 13 to the Convention specifically addressing that practice was not agreed to, it was made clear by

[3] United Nations Commission on International Trade Law, 41st Sess., Report of Working Group III (Transport Law) on the Work of its Twenty-first Session (Vienna, 14-25 January 2008), U.N. Doc. A/CN.9/645 (June 16 through July 11, 2008), distributed by U.N. General Assembly (January 30, 2008), available at
http://daccessdds.un.org/doc/UNDOC/GEN/V08/507/44/PDF/V0850744.pdf?OpenElement.

[4] *Id.*

the *travaux preparatoires* that nothing in the Convention was intended to prohibit this "long-established commercial practice."[5]

The practice of merchant haulage, or split-routing as it is described here, is a reflection of the well-recognized right of the shipper/consignee to control the disposition and final destination of its cargo.[6] The shipper/consignee is the customer, the carrier is the service provider. As such, the customer has the right to purchase whatever services it deems necessary, appropriate or commercially advantageous from an ocean common carrier, and purchase such additional services as it deems appropriate from other sources, including domestic motor carriers. Nothing in the Shipping Act alters that fundamental relationship, or allows the ocean common carrier to prohibit such arrangements between U.S. shippers and U.S. motor carriers.

Split-routing allows NVOCCs to take advantage of their rights as shippers/consignees on the master bill of lading to shop for the best available intermodal rates from the ocean common carrier (especially in consideration of the collective rate setting enjoyed by the ocean common carriers as discussed below), and then re-route the cargo, if necessary, to another destination by making a separate arrangement with the trucker. The practice also prevents ocean common carriers from becoming a bottleneck, or clearing house, through which NVOCCs must pass before they can obtain access to those competitive rates. It also prevents ocean common carriers from using their antitrust

[5] *Id.* at 11.

[6] *See* FMC Docket 08-07, Petition of Olympus Growth Fund III, L.P. and Olympus Executive Fund, L.P. for Declaratory Order, Rulemaking or Other Relief, Exhibit A at 4-5.

immunity and discussion authority in a manner that would substantially reduce competition among domestic motor carriers.

2. Section 10(a) of the 1984 Act is limited to ocean transportation.

The practice of split-routing does not violate Section 10(a)(1) of the 1984 Act because the practice does not involve ocean transportation. The 1984 Act only restricts the means that shippers can use to obtain lower rates for **ocean transportation**.

By the express language of the statute, any means used to lower a shipper's inland portion of the through rate, but which does not impact the **ocean transportation** portion, does not violate Section 10(a)(1). Section 10(a)(1) of the 1984 Shipping Act prohibits any person from "knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or any other unjust or unfair device or means, 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(a) (emphasis added). The plain meaning of the text is supported by relevant rules of statutory construction - proscriptive laws, such as Section 10(a)(1), must be construed narrowly to prevent any uncertainty as to what conduct is unlawful. *See, e.g.*, SUTHERLAND STATUTORY CONSTRUCTION, at § 57:959:1, 59:3.

The geographic limitation on the Section 10(a)(1) prohibition to the ocean transportation portion originated in the Section 16 of the Shipping Act of 1916 Act, as amended in 1936,[7] long before the advent of intermodal services. There is no question that Section 16 of the 1916 Act did not prohibit any actions that related to the domestic inland portions of international shipping movements. Carrying this language through to Section 10(a) of the 1984 Act without significant amendment, Congress did not intend to include, within the scope of prohibited conduct, conduct relating solely to domestic inland transportation. Indeed, Congress implemented the 1984 Act in recognition of the development of intermodal movements. *See* H.R. Rep. No. 98-53, pt. 1, 98th Cong., at *13 (1983). If Congress had deemed it appropriate to expand this prohibition and apply it to any portion other than the ocean portion, it could have used the term "through rate" (a defined term in the 1984 Act) in section 10(a)(1) of the Shipping Act. It did not do that. In fact, Congress sought to minimize Government intervention in the shipping industry, not expand its reach. *See id.* ("The entire method of regulation is changed to minimize government involvement in shipping operations. The Primary role of the FMC would be

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[7] In 1936, Congress amended the prohibitory acts of the 1916 Act to add the following introductory paragraph:

> That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt **to obtain transportation by water** for property at less than the rates or charges which would otherwise be applicable. ...

See Pub. L. No. 74-685, 49 Stat. 1919-1936 (1936) (emphasis added). Under the 1984 Act, this language now reads:

> A person may not knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or any other unjust or unfair device or means, 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(a) (emphasis added).

to review conduct in order to protect carriers, shippers, and ports from unfair or discriminatory shipping practices....").

As long as the ocean carrier receives full compensation for the ocean portion of a through rate—and there is no claim here that Mitsui did not receive full compensation for the *ocean* portion—the practice of split-routing does not violate section 10(a)(1). The direction of a shipment to a different inland point after the ocean carrier discharges it at the designated destination port cannot, by definition, be unlawful under the 1984 Act. To find otherwise would subject shippers, carriers and ocean transportation intermediaries to regulatory liability in those instances where competitive developments, business needs, emergencies, or other foreseen or unforeseen circumstances require goods to be re-routed after arrival at the U.S. destination port. *See* 46 CFR § 530.12. Bills of lading (the contracts of carriage) are, and are intended to be, fully negotiable instruments. They may be instruments of title that permit the transfer of the listed goods from one party to another. Accordingly, the holder of the bill of lading must have the right to direct the goods to a different destination. Any restriction on that flexibility could adversely affect their negotiability and would impact not only transportation but general commerce – the ability to buy and sell goods.

3. The 1984 Act is a Regulatory Regime that Extends Antitrust Immunity to Ocean Transportation and Must be Narrowly Construed to Apply Only to International Services Within the Scope of the Act.

Ocean common carriers have antitrust immunity under the Shipping Act of 1984, and they use their immunized discussion authority to share information on service contracts they offer to NVOCCs. 46 U.S.C. § 40307. They also compete with NVOCCs, who have no antitrust immunity, for those cargoes. If the FMC finds that the practice of split-routing is illegal, it will allow foreigners ocean common carriers to deny U.S.-based NVOCCs access to competitive rates from U.S.-based motor carriers for domestic inland movements. That is not what Congress intended.

Congress' purpose in enacting the 1984 Act demonstrates why split-routing domestic inland movements is not subject to the jurisdiction of the Commission and does not violate Section 10(a)(1). Ocean common carriers have enjoyed immunity from antitrust laws to collectively discuss and set rates for ocean transportation since the enactment of the 1916 Act. The 1916 Act attached a regulatory regime to oversee this grant of antitrust immunity in order to prevent abuse by the maritime transportation industry. *See Puerto Rico Ports Authority v. FMC*, 919 F.2d 799, 807 (1st Cir. 1990); *Plaquemines Port, Harbor and Terminal Dist. v. FMC*, 838 F.2d 536, 542-43 (D.C. Cir. 1988).

By the early 1980s, consolidation and containerization of cargo had permitted goods to be shipped by sea from one inland point to another inland point without the need for the goods to be loaded or unloaded from the container. This technology resulted in the revolutionary development of integrated, intermodal transportation systems that provided, from the shipper's standpoint, seamless international transportation services under "through" bills of lading from point of pick-up to point of destination. "Through" rates permitted carriers to charge for all aspects of such movements including foreign inland transportation, foreign terminal services, ocean transportation, U.S. terminal services, and U.S. inland transportation services, regardless of the party actually performing the services.

The 1984 Act responded to these important changes in international ocean transportation services. The 1984 Act replaced the 1916 Act, as it applied to U.S. foreign commerce, in order to alleviate uncertainty regarding antitrust enforcement against ocean common carriers and others involved in international ocean transportation, reconcile U.S. shipping policy with foreign transportation practices, and restrict the application of U.S. law abroad to the changing industry.[8] The remainder of the 1916 Act, as will be explained below, was later repealed, leaving the 1984 Act as the only regulatory regime administered by the FMC. Consequently, the 1984 Act was structured to harmonize U.S. regulation of international ocean shipping with the policies of our major trading partners and to facilitate the intermodal movements favored by both carriers and shippers. As such, it continued and confirmed the historical policy of the 1916 Act to immunize

[8] H.R. Rep. No. 97-611, pt. 2, 97th Cong., at 22 (1982); S. Rep. No. 97-414, 97th Cong., at 7-8 (1982); S. Rep. No. 98-3, 98th Cong., at 7 (1983).

common carriers engaged in ocean transportation from antitrust liability. Ocean common carriers have used this immunity to discuss and set rates under service contracts with NVOCCs, as discussed further below.

Recognizing the new and beneficial realities of intermodal transportation, Congress took a more comprehensive approach to antitrust immunities in the 1984 Act, addressing the application of the antitrust laws to all of these activities: foreign inland transportation services were exempted by section 7(a)(4); foreign terminal services by section 7(a)(5); ocean carriage by sections 7(a)(1) and (a)(2); and U.S. marine terminal services under sections 7(a)(1) and (a)(2). 46 U.S.C. § 40307(a). However, Congress and the Reagan Administration were careful to avoid any extension of these policies to domestic inland transportation services, which were in the process of being deregulated subject to the operation of the antitrust laws. Accordingly, Congress specifically withheld antitrust immunity for domestic inland services under section 7(b). 46 U.S.C. § 40307(b).

The 1984 Act was written so that only those U.S. activities that were subject to the regulatory oversight of the FMC were exempted from the antitrust laws. *See United States v. Gosselin Worldwide Moving*, 411 F.3d 502 (4th Cir. 2005) (reviewing Shipping Act history and purpose); *Puerto Rico Ports Authority* 919 F.2d at 799, (same); *A & E Pacific Constr. Co. v. Saipan Stevedore Co.*, 888 F.2d 68 (9th Cir. 1989) (same). Congress drafted the 1984 Act to ensure that U.S. conduct that was immunized from the antitrust laws by the new legislation would be subject to Commission regulation. H.R. Rep. No. 98-53 pt. 1, at 3 (1983), reprinted in 1984

U.S.C.C.A.N. 167, 168 (noting primary purpose of antitrust immunity is "to exempt from the antitrust laws those agreements and activities subject to regulation by the Federal Maritime Commission"); H.R. Conf. Rep. 98-600, at 37 (1984), reprinted in 1984 U.S.C.C.A.N. 283, 293; *see also* S. Rep. No. 98-53, at 29 (1983) (Act extends immunity "to agreements of ocean common carriers . . . and to other activities regulated under provisions of the bill"). In consideration of this, Congress did not extend the 1984 Act and its antitrust immunity to the U.S. inland portion of through rates. 46 U.S.C. § 40307(b). Congress did not do so because any extensions of the antitrust protection provided by the 1984 Act to inland transportation services would have interfered with the U.S. policy of deregulating those services.[9] Since the enactment of the 1984 Act, courts and the Department of Justice have recognized that the FMC's jurisdiction is coextensive with and limited to the activities excepted from the antitrust laws by the Act.

Because the 1984 Act is an antitrust immunity regime, it must be interpreted narrowly. Beginning with the 1916 Act, and carrying through to the 1984 Act and its subsequent amendment by the Ocean Shipping Reform Act of 1998 ("OSRA"), Pub. Law 105-258, 112 Stat. 1902 (1998), it has been well-established that the 1984 Act and its exemptions from the antitrust laws are to be strictly construed. *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973); *Carnation Co. v. Pacific Westbound Conf.*, 383 U.S. 213, 216-17 (1966); *Puerto Rico Ports Auth.*, 919 F.2d at 806-807; *Gosselin*

[9] Congress took a similar approach to the deregulation of air transportation services eliminating anti-trust immunity and economic regulation of domestic air services while preserving it for international air services. *See generally* Civil Aeronautics Board Sunset Act of 1984, Pub. L. 98-443, 98 Stat. 1703.

Worldwide Moving, 411 F.3d at 509).[10] Indeed, the Department of Justice has prosecuted NVOCCs for antitrust law violations by construing the immunities of the 1984 Act narrowly. *See generally Brief for the United States as Appellant*, at 12-13, *United States v. Gosselin Worldwide Moving*, 411 F.3d 502 (4th Cir. 2005) (Nos. 04-4752, 04-4876, 04-4877).[11]

In part for this reason, courts have interpreted the scope of the prohibited acts in Section 10 of the 1984 Act to be coextensive with the scope of the activities exempted from the antitrust laws by the Act. *See Gosselin Worldwide Moving*, 411 F.3d, at 509. In this regard, the prohibited acts set forth in Section 10 were designed to police the carriers' use of the antitrust immunity. The legislative history of the 1984 Act makes clear that Congress intended for the Act to be so interpreted. The Senate Commerce Committee, in considering S. 1593, a precursor bill to the 1984 Act, was aware that the antitrust exemption it proposed was subject to potential abuse, including even predatory conduct, and insisted that the 1984 Act's remedies would be substituted for the antitrust remedies displaced by its "blanket" immunity. The Committee explicitly stated its intent to ensure "that the prohibited acts and the sanctions for violation were sufficiently drawn

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[10] Even where a statute confers immunity for certain regulated activities, any activities that go beyond the scope of the regulated exemption lose immunity. *Carnation v. Pacific Westbound Conf.*, 383 U.S. 213, 216-17 (1966) (actions taken pursuant to agreement filed with FMC were immune, but activities implementing unfiled conference agreements were not); IA P. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶ 244f (2d ed. 2000) (activities beyond scope of explicit antitrust exemptions remain subject to antitrust law enforcement); *see also Ass'n of Cruise Passengers v. Cunard Line*, 31 F.3d 1184, 1185-86 (D.C. Cir. 1994).

[11] The Department of Justice's briefs in U.S. v. Gosselin World Wide Moving N.V. and the Pasha Group are available at http://www.usdoj.gov/atr/public/appellate/appellate.htm#2003.

to assure adequate protection against abuses" and not "to relieve any class of agreement from complying with section 12 [Prohibited Acts]." S. Rep. No. 97-414, 97th Cong., at 28-29 (1982). Thus, the prohibited acts were designed primarily to police the carriers that enjoy antitrust immunities.

While NVOCCs are not themselves afforded immunity from the antitrust laws, their conduct is covered by the prohibited acts to the extent they deal with common carriers for services that are afforded immunity. However, the prohibited acts do not extend to services that are not otherwise protected from the antitrust laws, such as the U.S. inland portion of through transportation. There is no need to regulate these activities as a substitute for the protections provided by the antitrust laws, and Congress specifically intended that those services remain subject to the antirust laws.

The language of the 1984 Act confirms that it is expressly limited to the activity exempted from the antitrust laws: ocean transportation. Section 2 of the 1984 Act states that the purpose of the Act is to regulate "the common carriage of goods *by water* with a minimum of government intervention and regulatory costs." 46 U.S.C. § 40101 (emphasis added). It further states that the purpose is to "provide an efficient and economic transportation system in the *ocean commerce* of the United States that is, insofar as possible, in harmony with, and responsive to, international shipping practices." *Id.* (emphasis added). With this purpose, the 1984 Act regulates international ocean transportation by requiring certain agreements between or among ocean common carriers and agreements between or among marine terminal operators or ocean common carriers to be published or filed with the FMC. 46 U.S.C. at § 40302.

The FMC's jurisdiction over ocean transportation, including through transportation, does not give it regulatory authority over the domestic inland movement, which is not exempt from the antitrust laws. The 1984 Act specifically excludes the ocean portion from the defined term "inland portion." *See* 46 U.S.C. § 40102(12) (defining inland portion as "the charge to the public by a common carrier for the non-ocean portion of through transportation"). "Through transportation" is defined as "continuous transportation between origin and destination for which a through rate is assessed and which is offered or performed by one or more carriers, at least one of which is a (ocean) common carrier, between a United States port or point and a foreign port or point." 46 U.S.C. § 40102(25). The term "through rate" means "the single amount charged by a common carrier in connection with through transportation." 46 U.S.C. § 40102(24). The ocean portion is separate from the domestic inland portion in through transportation. The FMC has limited regulatory authority over through rates and the ocean portion thereof.[12] It has no authority over the rate for the domestic inland movement.

Other provisions of the 1984 Act also confirm that the U.S. inland transportation is excluded from the Act's reach. With limited exceptions, each common carrier is required to publish tariffs that show all of its "rates, charges, classifications, rules, and practices between all points or ports on its own route and on any through

[12] Congress did not give the FMC what is often described as traditional "rate authority" in the 1984 Act, whereby a regulatory agency has the authority either to disapprove or establish specific rates. The Commission's authority under the 1984 Act is generally limited to policing adherence to rates properly established by the carriers themselves.

transportation route that has been established." 46 U.S.C. § 40501(a). The 1984 Act does not require the common carrier to publish the inland divisions of the applicable through rate. *Id.*

The 1984 Act's treatment of service contracts reinforces the point that U.S. inland transportation falls outside the reach of the Act. Congress made substantial changes to the 1984 Act under the OSRA by emphasizing a shift in the regulatory scheme from the tariff-based common carriage to a more contract-based system. Under OSRA, the 1984 Act permits a more flexible use of service contracts between shippers and ocean common carriers as an alternative to transportation under filed tariff terms. As amended, the 1984 Act allows ocean common carriers, either individually or collectively through agreements or conferences, to negotiate and execute service contracts with one or more shippers or shippers' associations. 46 U.S.C. § 40502(a); 46 CFR § 530.2.[13] The ocean common carrier or conference must file the service contract with the FMC, but the contract remains confidential. 46 U.S.C. § 40502(b); 46 CFR § 530.4. The carrier or conference, however, must publish a concise statement of certain contract terms, i.e., commodity or commodities involved, minimum volume or portion, duration, and origin and destination port ranges. 46 U.S.C. § 40502(d); 46 CFR § 530.12. The required publication of these terms are limited to the focus of the FMC's regulatory

[13] Under these service contracts, shippers make a commitment to provide a certain volume or portion of cargo over a fixed period of time, and the carriers commit to a specified rate and a defined service level. 46 U.S.C. § 40102(20); 46 CFR § 530.3(q).

responsibility—ocean transportation. Notably, the service contract's essential terms, that are made public, do not include the inland destinations. *See id.*

4. The FMC Does Not Have Jurisdiction Over Domestic Inland Transportation Services and Split-Routing of the U.S. Inland Destination.

Consistent with the history of the Shipping Act, the 1984 Act regulates ocean transportation and does not purport to regulate inland U.S. transportation. Any assertion of jurisdiction by the FMC in a matter that relates solely to the inland domestic U.S. portion of a "through" shipment would be beyond the scope of its authority under the 1984 Act.

Congress specifically repealed two statutes that gave the FMC authority over domestic transportation. Under the 1916 Act, the FMC held concurrent jurisdiction with the Interstate Commerce Commission ("ICC") over intermodal transportation. With the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 ("ICC Termination Act"), Congress repealed the remaining provisions of the 1916 Act, and the Intercoastal Shipping Act, 1933, formerly 46 U.S.C. §§ 843-848, both of which granted the FMC concurrent jurisdiction with the ICC over domestic transportation. In abolishing the ICC, Congress transferred exclusive jurisdiction over operations in the domestic trade to the Surface Transportation Board (the successor to the ICC), thus ending the joint jurisdiction between the ICC and the FMC. *See* 49 U.S.C. §§ 13501, 13521. The ICC Termination Act furthered the deregulation of the domestic transportation industry by removing federal economic regulatory oversight from the domestic railroad, trucking and bus industries. Put simply, it was Congress's intent to leave domestic transportation alone. The 1984 Act offers no exception to this policy.

The practice of split-routing falls outside the FMC's jurisdiction because it concerns only U.S. domestic transportation. Indeed, an NVOCC's split-routing of the U.S. inland destination does not alter the ocean portion of the through transportation in any way. As long as the ocean carriers are fully compensated for the ocean transportation services they provide under the master bills of lading and the ocean transportation services fall within the terms of the applicable service contracts, this practice falls outside the FMC's jurisdiction. This is so because the only modification to the through transportation in a re-route involves the final U.S. inland destination. As noted above, Congress did not intend to prevent U.S. shippers (including NVOCCs) from obtaining timely access to competitive rates from U.S. rail and motor carriers. Indeed, this would subject U.S. shippers to the discretion of a tariff clerk in Singapore rather than allow shippers to obtain the benefit of competitive and constantly changing rates and services for the domestic inland movement of through intermodal services.

Further, the Commission has never investigated (outside of GLL's self-serving voluntary disclosure) or brought an enforcement action against an NVOCC, or any other shipper for that matter, for a violation of the 1984 Act for altering the U.S. **inland portion** of the through rate, let alone a violation for split-routing the final U.S. inland destination. This is true, even though the practice is common in the industry. On the other hand, the FMC has found that an NVOCC violated Section 10(a)(1) of the 1984

Act for a variety of acts that involve the ocean portion of intermodal transportation.[14] The lack of enforcement actions against shippers or NVOCCs for activities relating solely to domestic inland transportation confirms the FMC is without regulatory authority over this practice.

B. The Commission Lacks Jurisdiction Over Claims for Violations of Service Contracts and Lacks Authority to Award Reparations in These Circumstances

It is well-established that the Commission lacks jurisdiction over claims for breaches of service contracts. *See Transportation Services, Inc. v. Coex Coffee Int'l, Inc.*, 26 SRR 646 (ALJ, 1992) (Section 8(c) precludes FMC jurisdiction because complainants were seeking a private remedy for breach of contract, even if respondents' conduct also amounted to a violation of Section 10(a)). *See also Universal Fixture Manufacturing Co., Inc. v. Asia North America Eastbound Rate Agreement*, 26 SRR 1162 (ALJ, 1991). Instead, the Shipping Act mandates that the exclusive remedy for such breaches is an action filed in an "appropriate court." Shipping Act, § 8(c). As explained

[14] For example, the FMC has investigated or brought enforcement actions against NVOCCs for activities such as (1) intentional misdescription of cargo carried on the vessel to obtain lower rate from ocean common carrier, see *Ariel Maritime*, FMC Docket 84-38, *Olympic Int'l Freight Forwarders, Inc.*, Docket 94-27, *Ever Freight Int'l, Ltd.*, FMC Docket 97-04; (2) acceptance of rebates from the ocean common carrier, see *Banfi Products Corp.*, FMC Docket 87-14, *I Chen "Jenny" Chiang*, FMC Docket 99-03, *Imex Shipping, Inc.*, FMC Docket 99-17; (3) equipment substitution by using a larger container than reported to obtain lower rate from ocean common carrier, see *Sea-Land Service, Inc.*, FMC Docket 98-06, *Direct Container Line*, FMC Docket 99-06; and (4) unlawful access to service contracts for the entire through rate offered by ocean common carrier, see *California Shipping Line*, FMC Docket 88-15, *Owens Refrigerated Freight Ltd.*, FMC Docket 98-19, *Gstaad, Inc.*, FMC Docket 99-20, *Hudson Shipping (Hong Kong) Ltd.*, FMC Docket 02-06. It is not difficult to see that these practices concern the NVOCC's attempt to manipulate the ocean portion of the through transportation.

herein, Mitsui's claims that the Olympus Respondents violated the Shipping Act are meritless. Whether the practice of split-routing is consistent with the terms of the applicable service contract between GLL and Mitsui is nothing more than a question of contract interpretation. The Commission lacks jurisdiction to hear this dispute.

Moreover, the Commission cannot award reparations for the alleged violations. Mitsui asks the Commission for reparations equal to the difference between the amounts that GLL paid Mitsui for ocean transportation and an amount that Mitsui contends GLL should have paid under Mitsui's service contract or tariff rates if Global Link had not engaged in split-routing. *See* Cmplt. at ¶¶ IV.E, VII.B. Such an award, however, is not permitted under the terms of the Shipping Act. Section 13(f) prohibits the FMC, or any court, from "order[ing] any person to pay the difference between the amount billed and agreed upon in writing with a common carrier and the amount set forth in any tariff or service contract by that common carrier for the transportation service provided." Act, § 13(f); 46 U.S.C. § 41109(d).

OSRA revised section 13(f) of the 1984 Act to limit the Commission's authority. The revision followed the uncertainty created by the U.S. Supreme Court's strict adherence to the filed-rate doctrine with respect to rates filed with the Interstate Commerce Commission ("ICC"). *See Maislin Industries, U.S. Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 126 (1990) (finding that the ICC's policy of creating an exemption to relieve shippers' obligations to pay the filed rate when a shipper and carrier have privately negotiated a lower rate was inconsistent with the Interstate Commerce Act, and that the ICC did not have the authority to release a shipper from liability for undercharges). This ruling had a profound effect on undercharge litigation, resulting in Congress taking action at the request of the shipper industry to overrule *Maislin* in part and repeal the filed-rate doctrine with the Negotiated Rates Act of 1993 and the Trucking Industry Regulatory Reform Act of 1994. *See* Wayne Johnson, *The Negotiated Rates Act of 1993: Congress Curtails Undercharge Litigation in Bankruptcy by Amending the Filed Rate Doctrine*, 68 AM. BANK. L. J. 319, 355-56 (1994); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749 (1995) (recognizing profound impact Maislin had on undercharge litigation). Congress effectively repealed the filed rate doctrine in the interstate trucking industry in the ICC Termination Act of 1995. *See* Jennifer J. Long, *Imports, Etc., Ltd. v. ABF Freight System, Inc., the Eighth Circuit Confuses Rather than Clarifies the Deregulation of the Trucking Industry by Applying the Filed Rate Doctrine*, 33 CREIGHTON L. REV. 305 (2000); 4 *Goods In Transit*, (Matthew Bender & Co., Inc.), 20.03[4], at 53-54 (1999) (stating that the filed rate doctrine did not apply to motor common carriers after the enactment of the ICCTA).

In drafting OSRA, Congress explicitly sought to prevent this chaos from occurring at the FMC by revising section 13(f) of the 1984 Act. The legislative history of OSRA confirms that the purpose of the amendment was:

> to make clear that, while a common carrier may be penalized for charging shippers less than its tariff or service contract rates, a carrier should not be able to collect from the shipper the difference between the tariff or contract rate and the rate actually charged and agreed upon in writing. The collection of these so-called "undercharges" was a major problem for shippers when the trucking industry was deregulated. We want to avoid any recurrence of that problem in connection with ocean shipping reform.

114 Cong Rec S 1067, * 1068 (Feb. 26, 1998) (Sen. Hutchinson). In a later rulemaking petition concerning granting NVOCCs an exemption to enter into service arrangements, the Commission emphasized that the prohibition in section 13(f) showed that "OSRA's elimination of the absolutist 'filed rate doctrine' for more 'market based principles' appears to define the Commission's new role as more market-based than the statutes at issue in *Maislin*...." *See* Non-Vessel-Operating Common Carrier Service Arrangements, Notice of Proposed Rulemaking, 69 Fed. Reg. 63981, *63985 (Nov. 3, 2004).

The Commission invites the same parade of horribles experienced after *Maislin* if it permits Mitsui to pursue its claim under the guise that the practice of re-routing violates the Act. **It will create a windfall for foreign ocean carriers at the expense of the U.S. shipper community.** Mitsui's attempt to collect for an alleged undercharge from the amount GLL paid and an amount under Mitsui's tariffs or service contract is not permitted under section 13(f) and, moreover, contradicts the express purpose for which that section was enacted. The practice of merchant haulage or of shippers split-routing of cargo by domestic inland carriers does not in any way make the service contract meaningless, particularly where a complicit ocean common carrier continues to move cargoes under the service contract. Mitsui's claims for reparations, must, therefore, be dismissed.

III. Mitsui Actively Participated in Global Link's Split-Routing and is Precluded from Recovering Reparations

Even if the Commission had jurisdiction to adjudicate Mitsui's claims, it should dismiss them because Mitsui has sought the Commission's assistance in bad faith by filing a verified complaint that is false in key particulars.

Mitsui willingly participated in split-routing with Global Link. *See* 2/2/09 Partial Final Award at 10, attached as Ex. A. Its assertion that it first learned of split-routing in August 2008 is false. Cmplt., § III. In the Arbitration, the Arbitration Panel found that certain ocean carriers, including Mitsui, had knowingly participated with Global Link in split-routing cargo. Indeed, the Arbitration Panel concluded that Mitsui had structured its relationship with Global Link around the practice of split-routing:

> [T]here is clear evidence that a senior sales representative of Mitsui knew that Global Link engaged in split-routing, and Mitsui did not object – indeed Mitsui encouraged continuation of the practice – because Mitsui preferred not to be bothered with negotiating a multiplicity of door points.

Ex. A at 10.

The Arbitration Panel was shown a number of documents during the arbitration that supported this conclusion. The Panel expressly relied upon a December 8, 2004 email from Global Link employee Eric McCulloch:

> From: Eric McCulloch
>
> Sent: Wednesday, December 08, 2004
> To: GLL Staff
> Subject: FW:Emailing: oireport_truckrpt
>
> Mitsui wants us to use [the trucking company] All Coast out of Savannah for some of our shipments booked to Lenoir, NC – *they advised they do not care if it is really delivering to the correct address* (we would just

> have to send All Coast the correct address) – please try and use them if possible.

12/8/04 Email from Eric McCulloch to GLL Staff, attached as Ex.B (emphasis added).

The Arbitration Panel was also shown correspondence between Christine Callahan, Global Link's then Chief Operating Officer, and Mitsui regarding Mitsui's preference that Global Link continue split-routing even though Global Link wished to halt the practice. On June 20, 2007, Callahan wrote to Paul McClintock of Mitsui:

> Paul: although you explained to us the challenges you have internally at MOL regarding the change in methodology to CY moves vs. *the split door service MOL has historically provided*, we haven't been advised of any change.
>
> We've waited as long as we possibly can. Therefore I have advised both [Global Link employee Jim Briles] and [Global Link employee Molly Jaworski] that *we must discontinue supporting MOL on the split moves* as we do not have MOL CY rates in place that will allow us to arrange our own trucking. This instruction has been given with immediate effect.
>
> If MOL can offer the CY rate at a level that will allow us to use your services (i.e., the CY rates plus our trucking costs results in our being market competitive) we will continue to support MOL on a CY basis. Please call if you have any questions.

6/20/07 Email from Christine Callahan to Paul McClintock, attached as Ex. C (emphasis added). McClintock responded the same day, copying Mitsui employee Rebecca Yang:

> Understood Christine.
>
> I spoke to Jim and we are following up to provide CY rates. I should have them next week.
>
> Thanks.

Id.

Having willingly engaged in split-routing with Global Link, Mitsui should not be permitted to proceed before this Commission under the false pretense that it was unaware of the practice.

Because Mitsui chose to engage in split-routing with Global Link, it cannot now claim that the practice caused it any compensable injury. Even if the Commission could find that split-routing violates Section 10(a)(1), which the Olympus Respondents contends that it cannot, Mitsui would not be entitled to an award of reparations because Mitsui would itself be in violation of Section 10(b)(1) of the Act. 46 U.S.C. § 41104 ("No common carrier, either alone or in conjunction with any other person, directly or indirectly, may – (1) allow any 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 by any other unjust or unfair device or means"); *see Conterm Consolidation Services (USA), Inc. v. Garcia*, 26 SRR 1212 (Settlement Off. 1994).

IV. Mitsui Has Failed to State a Claim Against the Olympus Respondents

A. Mitsui's Complaint Fails to Satisfy Federal Rule 8(a)(2)

Mitsui's complaint fails to satisfy the basic pleading requirements of Federal Rule of Civil Procedure 8(a)(2) and must, therefore, be dismissed. Rule 8(a)(2) requires a plaintiff to allege "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft* v. *Iqbal*, __U.S.__, 129 S. Ct. 1937, 1949 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Where a plaintiff makes only conclusory allegations that the elements of a cause of action have been satisfied, it fails to satisfy Rule 8(a)(2). *Id.* at 1940 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."); *Bell Atlantic Corp.* v. *Twombley*, 550 U.S. 544, 555 (2007) ("[A] plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.").

The Supreme Court's analysis of Rule 8(a)(2) in *Ashcroft v. Iqbal* is instructive. In *Iqbal*, the Supreme Court considered whether the allegations that certain government officials "knew of, condoned, and willfully and maliciously agreed to subject [the plaintiff] to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest'" were entitled to the presumption of truth. *Iqbal*, 129 S. Ct. at 1951. The Court concluded that they were not entitled to the presumption of truth because they "amount[ed] to nothing more than a 'formulaic recitation of the elements' of the cause of action." *Id.* Having determined that these allegations were not entitled to the presumption of truth, the Court analyzed whether other factual allegations in the complaint, which were entitled to the presumption of truth, plausibly entitled the plaintiff to relief, and concluded that they did not. *Id.*

Mitsui's allegations against the Olympus Respondents, which are contained in a single paragraph in its Complaint, are even less adequate than the allegations in *Iqbal*. The entirety of Mitsui's allegations against the Olympus Respondents consists of the following:

> This scheme was carried out with the full knowledge and participation of

> Respondents Olympus Partners,[15] OEF, OGF, Mischianti, Cardenas, Heffernan, CJR, and Rosenberg.

Cmplt., § III.F. Rather than allege any facts from which it could be inferred that the Olympus Respondents knew of and participated in split-routing (which it cannot do), Mitsui simply alleges that they did so. This is plainly the type of conclusory allegation that the Supreme Court held in *Iqbal* was not entitled to the presumption of truth and which cannot satisfy Rule 8(a)(2).

Mitsui has not alleged a single fact concerning the conduct of any of the Olympus Respondents. Its Complaint makes allegations *only* about the conduct of Global Link. The conclusory allegation cited above is the *only* allegation anywhere in the Complaint about the Olympus Respondents. It has not alleged (because it cannot) any other facts regarding their conduct. The Presiding Judge should, therefore, follow *Iqbal* and *Twombley* and dismiss Mitsui's claims against the Olympus Respondents.[16]

[15] As discussed above, no entity named "Olympus Partners, L.P." is associated with the Olympus Respondents. Nor does any entity associated with the Olympus Respondents resemble the description of "Olympus Partners, L.P." provided by Mitsui in its Complaint. Moreover, there is no legal entity named "Olympus Partners" that is associated with the Olympus Respondents.

[16] Mitsui has failed to allege any facts that even hint that it is seeking to pierce the corporate veil and hold OGF and OEF — former shareholders of Global Link's parent GLL Holdings, Inc. ("Holdings") — liable as shareholders. Similarly, it has failed to allege any facts that indicate that any of the individual Olympus Respondents, who are former directors and officers of Global Link and Holdings, personally participated in any wrongdoing.

B. Mitsui's Complaint Fails to Allege the Circumstances of Fraud with Particularity

Even if Mitsui had alleged facts sufficient to satisfy Rule 8(a)(2), its claims against the Olympus Respondents must be dismissed because they do not satisfy the heightened pleading standard for fraud claims set out in Rule 9(b) of the Federal Rules of Civil Procedure. Rule 9(b) requires that a plaintiff alleging fraud state with particularity the circumstances constituting the alleged fraud. Rule 9(b)'s particularity requirement serves several purposes. It "discourage[s] the initiation of suits brought solely for their nuisance value, and safeguards potential defendants from frivolous accusations of moral turpitude.... And because 'fraud' encompasses a wide variety of activities, the requirements of Rule 9(b) guarantee all defendants sufficient information to allow for preparation of a response." *U.S.* ex rel *Williams* v. *Martin Baker Aircraft Co., Ltd.*, 389 F.3d 1251, 1256 (D.C. Cir. 2004). Mitsui's baseless allegations against the Olympus Respondents are precisely the types of claims that Rule 9(b) is designed to bar.

To satisfy Rule 9(b), Mitsui must "state the time, place and content of the false misrepresentations, the fact misrepresented and what was retained or given up as a consequence of the fraud." *Id.* There can be no doubt that Mitsui's complaint fails to satisfy these requirements. Mitsui has not (and cannot) allege that any of the Olympus Respondents had any communications with Mitsui, much less that any of the Olympus Respondents made any misrepresentations to Mitsui. Not being able to allege the existence of any misrepresentations by the Olympus Respondents, Mitsui is likewise unable to allege when any such misrepresentations were made, who made them, anything about their contents, or how Mitsui allegedly relied upon them.

Moreover, Mitsui has not cured these defects by making the conclusory allegation that the Olympus Respondents participated in Global Link's alleged scheme to defraud Mitsui. Where there are multiple defendants, as there are in this action, "Rule 9(b) requires that the plaintiff allege facts specifying each defendant's contribution to the fraud." *Kottler* v. *Deutsche Bank AG*, 607 F.Supp.2d 447, 462 (S.D.N.Y. 2009). Here, Mitsui has not alleged a single fact concerning how any of the Olympus Respondents contributed to Global Link's alleged scheme.

Because Mitsui has not (and cannot) satisfy Rule 9(b)'s requirements, this action should be dismissed in its entirety.

C. Mitsui Has Failed to State a Claim Against the Olympus Respondents Based on Section 10(a)(1)

To violate Section 10(a)(1) of the Shipping Act, a person must "knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or any other unjust or unfair device or means, 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(a).

Thus, in order to state a claim under Section 10(a)(1), Mitsui must allege facts from which it can be plausibly inferred that the Olympus Respondents used an "unfair or unjust means" to obtain or to attempt to obtain transportation for property at less than the rates that would otherwise apply. Mitsui has failed to carry this burden. Their Complaint contains no allegations whatsoever that any of the Olympus Respondents ever had any contact with Mitsui, much less that any of them employed any unfair or unjust means to obtain transportation for lower rates than would otherwise apply. This claim must be dismissed.

D. No Set of Facts Could Entitle Mitsui to Relief Based on Violations of Section 10(d)(1) of the Shipping Act and 46 CFR 515.31(e).

1. Section 10(d)(1) cannot apply to the Olympus Respondents

Mitsui's claim for relief based on alleged violations of Section 10(d)(1) of the Shipping Act must be dismissed because this provision cannot apply to the Olympus Respondents. The plain language of Section 10(d)(1) limits its application to common carriers, ocean transportation intermediaries, and marine terminal operators. Section 10(d)(1) provides that:

> [N]o common carrier, ocean transportation intermediary, or marine terminal operator may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

None of the Olympus Respondents are common carriers, OTIs or marine terminal operators, and Mitsui does not allege otherwise. Cmplt., § II.B-E. Consequently, Mitsui cannot state a claim against any of the Olympus Respondents for violations of Section 10(d)(1).

Furthermore, Section 10(d)(1) does not even apply to Global Link's alleged conduct. The purpose of Section 10(d)(1) is to prevent carriers from unjust and unreasonable practices against shippers – not to protect carriers from shippers. An

NVOCC is a shipper in its contractual relationship with the ocean common carrier. The Act defines an NVOCC as "a common carrier that does not operate the vessels by which the ocean transportation is carried, ***and is a shipper in its relationship with an ocean common carrier.***" Act, § 3(17)(B), 46 U.S.C. § 40102(16) (emphasis added). For this precise reason, the Commission has rejected claims asserted by a common carrier against NVOCCs under Section 10(d)(1). *See Conterm Consolidation Services (USA), Inc. v. Garcia*, 26 SRR 1212 (Settlement Off., 1994) ("While the NVOCC's fraudulent scheme, involving repeated misrepresentations and obfuscations, violated Section 10(a)(1) of the Shipping Act of 1984, the NVOCC stood in the position of a shipper with respect to the common carrier. Thus, the common carrier is not entitled to recover under Section 10(d)(1), which applies to common carriers, freight forwarders, and marine terminal operators.").

2. 46 CFR 515.31(e) cannot apply to the Olympus Respondents

Mitsui's allegation that the Olympus Respondents violated 46 CFR 515.31(e) must be dismissed because this regulation only applies to persons licensed by the Commission. 46 CFR 515.31(e) provides:

> No *licensee* shall prepare or file or assist in the preparation or filing of any claim, affidavit, letter of indemnity, or other paper or document concerning an ocean transportation intermediary transaction which it has reason to believe is false or fraudulent, nor shall any such licensee knowingly impart to a principal, shipper, common carrier or other person, false information relative to any ocean transportation intermediary transaction.

46 CFR 515.31(e) (emphasis added). None of the Olympus Respondents are licensed, in any way, by the Commission, and Mitsui does not allege otherwise. Cmplt., § II.B-E.

Even if Mitsui could state a claim that the Olympus Respondents violated this provision, which it cannot, Mitsui would not be entitled to an award of reparations. The Act does not permit reparations for violations of regulations. It only allows reparations for violations of "the Act." Act, § 11(g). Indeed, the Commission is limited to two options to remedy alleged violations of these regulations. First, the Commission could assert a claim against the OTI's bond, insurance, or other surety. 46 CFR § 515.23. Second, the Commission could revoke or suspend the OTI license. 46 CFR § 515.26. The Shipping Act does not afford a separate right to reparations for alleged violations of the regulations.

In its prayer for relief, Mitsui also asks the presiding Judge to command the Respondents to cease and desist from the alleged violations of the Shipping Act and Commission regulations and to establish and put in force such practices as the Commission determines to be lawful and reasonable. Cmplt. at ¶ VII. As noted, the Olympus Respondents are not licensed NVOCCs. The Commission has no jurisdiction to enter the proscriptive relief sought by Mitsui against the Olympus Respondents.

Accordingly, Mitsui's request for reparations and other relief against the Olympus Respondents for alleged violations of 46 CFR § 515.31 must be dismissed.

E. The Shipping Act's Statute of Limitations Bars the Vast Majority of Claims Alleged Against Olympus Respondents.

The vast majority of Mitsui's potential claims are barred by the Shipping Act's three-year statute of limitations for reparations claims. Act, § 11, 46 U.S.C. § 41305; *see also* FMC Rule 63, 46 CFR 502.63 ("Complaints seeking reparation pursuant to section 11 of the Shipping Act of 1984 shall be filed within three years after the cause of action accrues.").

A cause of action for reparations accrues when the complainant knew or had reason to know of the harm alleged. *See Inlet Fish Prod., Inc. v. Sea-Land Service, Inc.*, 29 SRR 3056, 311-13 (FMC, Sept. 19, 2001). As noted above, Mitsui knew of, consented to, and even encouraged Global Link's split-routing practice. Therefore, Mitsui's cause of action accrued when the shipments were made. Yet, it did not file its Complaint until May 5, 2009. Thus, any alleged violations that occurred before May 5, 2006 are barred by the statute of limitations.

Moreover, the Olympus Respondents sold their interest in GLL on June 7, 2006, and cannot conceivably be held liable for any of GLL's activities after that date. Therefore, the only potential time period in which Mitsui could look to the Olympus Respondents for alleged violations of the Shipping Act is during the 33-day period between May 5, and June 7, 2006.

MOTION TO STAY DISCOVERY

On May 14, 2009, the Olympus Respondents were served with a copy of the Complaint and a copy of Complainant Mitsui O.S.K. Lines Ltd.'s First Request for Admissions, First Set of Interrogatories and First Request for Production of Documents to Respondents (hereinafter, "First Set of Discovery Requests"). By order dated May 28, 2009, the presiding Judge granted the Olympus Respondents' Stipulated Motion to Extend Time to Respond to Complaint and Discovery and extended the time for all Respondents to respond to the First Set of Discovery Requests to June 29, 2009. Because this Motion to Dismiss challenges the Commission's jurisdiction to hear the Complaint, the Olympus Respondents request the presiding Judge to stay discovery pending resolution of this Motion to Dismiss.

REQUEST FOR ORAL ARGUMENT

The Olympus Respondents request oral argument before the presiding Judge.

CONCLUSION

Accordingly, Olympus Respondents respectfully request the presiding Judge to dismiss the Complaint on the grounds that the Commission lacks jurisdiction over the claims asserted therein, or otherwise dismiss the Olympus Respondents from this proceeding, and for such other and further relief that may be just and proper under the circumstances.

Respectfully submitted,

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Dated: June 17, 2009

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2009, I served the foregoing Motion to Dismiss Improperly Filed Complaint for Lack of Subject Matter Jurisdiction, for Failure to State a Claim and For Other Reasons on the following individual(s) by overnight courier:

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EXHIBIT A

CONFIDENTIAL

AMERICAN ARBITRATION ASSOCIATION

Commercial Arbitration Tribunal

Global Link Logistics, Inc., Golden Gate Logistics, Inc., GLL Holdings, Inc.,	
Claimants,	
v.	**Case No. 14 125 Y 01447 07**
Olympus Growth Fund III, L.P., Olympus Executive Fund, L.P., Keith Heffernan, L. David Cardenas, Louis J. Mischianti, and CBW Key Employee Capital II, LLC, Gerald Benjamin, and Edward A. Casas, M.D., and CJR World Enterprises, Inc. and Chad J. Rosenberg,	
Respondents.	

PARTIAL FINAL AWARD

Claimants initiated this arbitration proceeding to recover damages for a loss sustained allegedly as the result of fraudulent conduct by certain of the Respondents and breaches of contractual representations in connection with Claimants' acquisition of Global Link Logistics, Inc. ("Global Link"), a privately owned freight-forwarding company, pursuant to a Stock Purchase Agreement dated as of May 20, 2006 ("SPA"). Following seven days of hearings and pre- and post-hearing written submissions and oral argument, the Panel hereby renders its partial final award deciding all issues other than calculation of prejudgment interest and allocation of the costs and expenses of this arbitration.

The Panel's jurisdiction

The SPA provides that the arbitration procedures set forth in Section 10.08 thereof are "the sole and exclusive method for resolving and remedying claims for money damages arising out of this Agreement" (§ 10.08(a)) and that the arbitration shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association (*see id.* § 10.08(b)). The parties have further agreed that Delaware law governs (*see id.* §14.14). Although venue was laid in Delaware (*see id.* § 10.08(e)), by subsequent agreement all hearings have been held in New York City (*see* Order No. 3 ¶13).

The proceeding was initiated by a Demand for Arbitration submitted by Claimants and received by the American Arbitration Association on or about August 31, 2007.

The Parties

Claimant Global Link Logistics, Inc. ("Global Link Logistics") is the surviving entity formed by the merger of the pre-existing corporation having the same name and GLL Sub Acquisition, Inc., a special purpose vehicle created to make the acquisition. Claimant GLL Holdings, Inc. ("GLL Holdings"), which owns 100% of the stock of Global Link Logistics, is the surviving entity of a related merger. Claimant Golden Gate Logistics, Inc. ("Golden Gate") owns 100% of the stock of GLL Holdings, and thus indirectly 100% of the stock of the first-named claimant. All three will be referred to collectively as "Claimants".

Although not named as a claimant, the principally affected party in this matter is GTCR Fund VIII, L.P. (and ultimately its investors and lenders), an investment fund created by GTCR, a Chicago-based private equity investment firm, which identified Global Link as an acquisition candidate, conducted due diligence, negotiated the SPA, provided (through GTCR Fund VIII, L.P.) the equity component of the purchase price, and arranged the debt financing for the acquisition.

The Respondents are all either sellers (so identified 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. Respondent Olympus Growth Fund III, L.P. is an affiliate of Olympus Partners, a private equity investment firm based in Stamford, Connecticut. Respondent Olympus Executive Fund, L.P., also a Seller, is similarly affiliated with Olympus Partners. Respondents Louis J. Mischianti, Keith Heffernan and L. David Cardenas are all principals of Olympus Partners and were officers or directors (or both) of Global Link. Collectively, the foregoing entities and individuals will be referred to as the "Olympus Respondents."

Respondent Chad J. Rosenberg, the founder and CEO of Global Link and a member of its Board of Directors, was also a director, officer and sole shareholder of Respondent CJR World Enterprises, through which he held an approximately 20% interest in Global Link.[1] Rosenberg and his wholly owned corporation will be referred to as the "Rosenberg Respondents."

Respondent CBW Key Employee Capital II, a Seller, is an affiliate of Casas, Benjamin & White, LLC, an investment firm based in Atlanta, Georgia, of which Respondents Edward A. Casas, M.D., and Gerald R. Benjamin are principals. Benjamin was also a director of Global Link.[2] This last group, which collectively owned approximately 3% of Global Link, will be referred to as the "CBW Respondents." The CBW Respondents are the subject only of the indemnification claim; Claimants have disavowed charging them with fraud.

Proceedings to date

The contractually mandated steps taken prior to the commencement of this arbitration and the initial proceedings herein are described in the Partial Final Award and Decision on Respondents' Motion to Dismiss ("Partial Award") issued by the Panel in

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1 According to the undenied allegations of the Second Amended Statement of Claim (¶¶ 9, 24), CJR World Enterprises, Inc. was incorporated as Global Link Logistics, Inc. in 1997 and assumed its present name when the Olympus Respondents acquired substantially all the assets of the Global Link business in 2003 in exchange for approximately $20 million in cash paid to Chad Rosenberg and approximately 20% of the stock of GLL Holdings.

2 Claimants initially named the Jewish Federation of Greater Atlanta for Gerald R. Benjamin and Vicki S. Benjamin Philanthropic Fund (the "Fund"), also a Seller, as a Respondent, but withdrew their claims against the Fund during the pendency of this arbitration.

March 2008, familiarity with which is assumed. Following the Partial Award, the parties conducted documentary and deposition discovery, and submitted pre-hearing briefs and a Joint Statement of Undisputed Facts.

Hearings were held on October 20 through October 24, 2008, resumed on November 5 and concluded on November 6. Claimants called nine witnesses (including Respondent Chad Rosenberg); Respondents called three witnesses. Additionally, Claimants and Respondents submitted excerpts from 14 depositions, including videotapes of eight depositions. After the hearings concluded, the Panel requested certain documentary and other information, including proposed findings of fact and conclusions of law, as well as answers to certain legal questions. The final written submissions were received on November 24 and 25, 2008; oral argument was held on December 12; and the record was thereupon closed.

The Claims

After two amendments to the Statement of Claim, issuance of the Partial Award and the withdrawal by Claimants' counsel (at the outset of the hearings) of a claim relating to the relationship between Maersk (an ocean carrier) and Hecny (Global Link's shipping agent in the Far East), the claims to be decided by the Panel have been winnowed down to two. Both claims revolve around a practice called "split-routing" and occasionally "mis-routing" or "re-routing" (for convenience and consistency, we will use only the first of these names), a practice by which cargo containers were delivered to a destination recorded on a "house" bill of lading that differed from the destination recorded on the "master" bill of lading issued by the ocean carrier.

Claimants allege that split-routing was illegal and thereby violated two representations in the SPA: (i) that Global Link was in "compliance with all applicable laws and regulations..., including the rules and regulations of the Federal Maritime Commission, the Shipping Act of 1984..." (§ 4.15), and (ii) that the Company's financial statements "present fairly in all material respects the financial condition and results of operations of the Company and its Subsidiaries (taken as a whole) as of the times and for the periods referred to therein in accordance with GAAP...." (§ 4.05).[3]

Claimants additionally allege that they were fraudulently induced to execute the SPA and consummate the acquisition of Global Link by the intentional concealment of the split-routing practice, which (they contend) Respondents knew to be illegal and which generated fraudulently obtained cost savings, thereby substantially overstating Global Link's gross profit per container and EBITDA.[4] Instead of being worth the acquisition price of $128.5 million, on June 7, 2006, when the acquisition closed, Claimants contend that Global Link had an actual value no greater than its liquidation value of $11.9 million. In sum, Claimants contend that they are entitled to recover fraud damages of $116.6 million and indemnification damages of $6,425,000 (capped at that amount by the SPA--§10.02(b)), together with pre-judgment interest and costs.[5]

Global Link's Business and History—An Overview

Global Link was founded by Chad Rosenberg in 1997 to engage in the business of international freight forwarding from factory shipment points in Asia to destinations in the United States.[6] Global Link was licensed as a Non-Vessel Operating Common Carrier ("NVOCC") by the Federal Maritime Commission ("FMC"). Global Link

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3 In the Second Amended Statement of Claim, Claimants also invoked contractual representations regarding compliance with Global Link's contracts with the ocean carriers with which it dealt (§4.09(b)) and the non-existence of liabilities above stated amounts (§4.21). These representations are not mentioned in Claimants' Pre-Hearing Brief or Proposed Findings of Fact and Conclusions of Law, and we will not further address them.

4 EBITDA is the acronym for earnings before interest, taxes, depreciation and amortization. EBITDA is a commonly used measure of the operating earnings of a business enterprise and indicator of a company's valuation in an acquisition context.

5 As the measure of damages for breach of representation is the same as the measure of damages for fraud (*see infra*, p. 46), Claimants acknowledge that they may not recover compensatory damages of more than $116.6 million (Claimants' Proposed Findings of Fact and Conclusions of Law ¶230).

6 "A freight-forwarding company arranges for, coordinates, and facilitates cargo transport, but does not itself transport cargo." *Norfolk S. Rwy. Co. v. Kirby,* 543 U.S. 14, 18 (2004)

focused from its early years upon the furniture industry (CX 11 at 6903-04)[7]. It would contract with its customers in that industry to transport to their "door" (warehouse, store or other delivery point) furniture that Global Link's customers had contracted to purchase from factories in China.

The furniture would be placed in one or more containers and transported by truck or rail from the Chinese factory to a port, where it would be loaded onto a ship and transported across the Pacific Ocean pursuant to a contract entered into between Global Link or, in many cases, its agent, the Hecny Group, and the ocean carrier (*id.* at 6969). When the cargo arrived at a port in the United States, it would be transported by rail to a container yard, where the cargo would be off-loaded and placed on a truck for carriage to the delivery destination or "door." (In some instances, the cargo would be trucked rather than transported by rail from the port.)

For some shipments, called "port moves," the ocean carrier was responsible for arranging transportation to the U.S. port, and Global Link or its customer was responsible for independently arranging the inland transportation to the final destination. For container yard or "CY moves", the ocean carrier was responsible for transportation to the rail/container yard, from which the container(s) would be transported by truck arranged by Global Link or its customer to the final destination. Finally, there were "door moves," which were the most prevalent during the periods material to this disputeand as to which the ocean carrier was responsible for all of the transportation segments (ocean, rail and trucking).

The freight-forwarding business was highly competitive (Rosenberg Tr. 394; 436-37).[8] So too was the trucking industry, which handled the final land segment of an intermodal shipment from Asia (Mihas Tr. 1580; Gompers Tr. 1894). Global Link

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7 Claimants' exhibits are cited as "CX" followed by the exhibit number; Respondents' exhibits are cited as "RX" followed by the exhibit number. Internal citations are to the Bates stamp number appearing at the lower right-hand corner of the cited page (omitting any zeroes at the beginning of the number) or, where there is no Bates stamp number, to the number of the page cited.

8 "Tr." Citations are to the transcript of the merits hearing preceded by the name of the testifying witness.

attributed its success principally to two factors: first, delivering cargo containers at the "lowest landed cost," and, second, being able to respond quickly, flexibly and efficiently to customer orders, particularly those requiring delivery on short notice (CX 11 at 6909). Global Link's business grew, measured both by the number of containers carried and by its sales revenues. Initially, Global Link's EBITDA and gross profits per container grew as well. The Company experienced a slight downturn in 2003 and a further and more substantial reduction in profitability in 2004, which Global Link attributed to underestimating the peak season surcharges imposed by carriers, insufficient carrier capacity and an inability to negotiate "bullet rates," that is, discounted rates that could be negotiated for particular shipments when carriers had spare capacity (CX 11 at 6978-79).

In 2005 Global Link's fortunes turned around. It shipped more than 40,000 containers (an increase of 40.4% over 2004 container volume); gross profit per container increased from $295 in 2004 to $453 in 2005, and EBITDA increased 176.6% to $12.4 million (*see id.* at 6979-80). The Confidential Information Memorandum prepared for the auction of Global Link culminating in the acquisition that is the subject of this proceeding attributed this dramatic improvement to an addition in carrier capacity, the increased availability of bullet rates, and an ability to pass on to customers the peak season surcharge imposed by carriers (*id.*). Claimants, in contrast, attribute the increase in profitability to a dramatic increase in the number of split shipments assertedly as the result of a program described in Global Link's internal memoranda as "Operation Margin Enhancement," which is discussed below.

Split-Routing

Global Link's contracts with its ocean carriers were negotiated annually and took effect in May (Briles Dep. 20).[9] The contracts contained multiple door points with a separate through rate quoted for each such point.[10] While the rate would usually remain in effect for 12 months, Global Link was often successful in obtaining "bullet rates" for

[9] "Dep." Citations are to the transcripts of depositions preceded by the name of the deponent.

[10] Until 2005, the P&O Nedlloyd ("P&O") contract set forth state rates, that is, rates for shipments to any location within a state.

individual transactions during the intervening period, where, for example, a carrier had temporary excess capacity on the shipping lane for the delivery in question (Rosenberg Tr. 125; Donnini Tr. 565-68). At least some carriers were unwilling to add door points during the year or were slow to do so (Meyer Dep. 185), and the rate for a given door point might remain in effect for more than a year without being adjusted to reflect competitive realities. When carriers did not have spare capacity, "bullet rates" could not be negotiated. To lower its costs and thereby increase its profits where competitive and attractive ocean carrier rates were not available to a particular destination, Global Link developed and, over time, expanded its use of the split-routing practice referred to earlier.

Where either there was no carrier-quoted door rate to an intended destination or there was a door rate that was viewed by Global Link as outdated or otherwise non-competitive, Global Link would select another destination for which there was a door rate quoted by the ocean carrier and include that destination on the master bill of lading issued by the carrier ("MBL") even though the cargo was never intended to go to that destination. Global Link or its agent, Hecny, would then issue a separate "house" bill of lading ("HBL") with the actual destination, and Global Link would make its own trucking arrangement, usually with a trucker of its or its customer's choice.[11] In an illustrative example cited by Claimants' counsel in opening statement (Tr. 13-14), and not challenged for its illustrative quality by Respondents' counsel, Global Link might issue a delivery order showing that a shipment was going to Fishers, Indiana, a Maersk door point, when the shipment was in fact picked up by a Global Link "preferred" trucker at the Chicago container yard and trucked in the opposite direction and at a further distance to Dubuque, Iowa.[12]

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[11] Just as there were two bills of lading, there were separate delivery orders: a "truck line" delivery order showing the actual destination, and a "shipline" delivery order showing the false destination used in the master bill of lading.

[12] The description of the mechanics of split-routing in the text is taken from the McDermott Will & Emery November 12, 2008 letter responding to the Panel's October 31 memorandum setting forth the Panel members' then understanding of those mechanics.

When the actual destination was more distant from the port or container yard ("CY") than the destination on the ocean carrier-issued MBL, the carrier would have given the trucker an allowance for trucking from the port or CY to the MBL destination, and Global Link would pay the trucker an additional amount to compensate the trucker for driving the additional distance to the actual destination.[13] Where the actual destination was nearer than the MBL destination to the port or CY, a situation colloquially referred to as "short-stopping," prior to the summer of 2003 Global Link would book a credit for the "savings" realized by the trucker, having traveled a shorter distance than that for which it had received an allowance from the ocean carrier, and GLL would offset that "credit" against the amount ("debit") owed to a trucker when it took containers on a different shipment to a destination further than the one for which the trucker had received an allowance from the ocean carrier.[14]

In July 2003 Global Link was advised by its maritime counsel, Paul Coleman, that "a practice of changing destinations without notice to the ocean carrier exposes Global Link to possible Shipping Act violations..."(RX 18 at 152). Coleman was particularly critical of short-stopping, which he described as "a fraud on the ocean carrier who has paid the trucker more than the trucker was entitled" to and also an "illegal rebate" violating Section 10(a)(1) of the Shipping Act if the shipper has received part of the trucker's "savings" or received "a credit on a later shipment" (*id.*). After Coleman's partner, Neil Mayer, similarly advised that if Global Link (or Hecny) received a refund or discount from a trucker where a shipment was "short-stopped," Mayer "would have problems..." (CX 55), Global Link ceased using the "credits" and "debits" practice (*see* Rosenberg Tr. 389-90).

The evidence is inconclusive as to how prevalent split-routing was in the freight-forwarding industry. Chad Rosenberg testified that the practice had been utilized at freight forwarders for which he had worked before starting Global Link (Tr. 347-49).

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13 Global Link's shipment records referred to these situations as "split shipments-not covered" or "splits-n/c."

14 These transactions were referred to in the shipping records as "split shipments-covered" or "splits/c."

Jim Briles, who was for a time in charge of routing shipments at Global Link, also testified that other NVOCCs engaged in split-routing (Briles Dep. 199-200). Mark Kwan, Vice-President of Operations, who arranged more container shipments than any other Global Link employee, identified three freight-forwarders –Scanwell (for which he and Chad Rosenberg had worked), Top Ocean and Apex—as freight-forwarders who had engaged in split-routing (Kwan Dep. 59-60, 134). On the other hand, Christine Callahan, who was hired by Golden Gate in early 2007 as Chief Operating Officer and who had worked in the freight-forwarding business for 28 years, claimed never to have heard of the practice (Callahan Dep. 127).

As for the carriers' knowledge, there is clear evidence that a senior sales representative of Mitsui knew that Global Link was engaged in split-routing, and Mitsui did not object—indeed, Mitsui encouraged continuation of the practice —because Mitsui preferred not to be bothered with negotiating a multiplicity of door points (*see, e.g.*, RX 38).[15] Global Link also historically engaged in split-routing on shipments for which P&O Nedlloyd ("P&O") was the ocean carrier (Meyer Dep. 133-35), although it is unclear whether senior P&O representatives knew of the extent of split-routing. However, P&O informed Global Link through Jerry Huang of Hecny in the Spring of 2005 that beginning with the new contract year, P&O "does not allow any diverting" (CX 101).[16] Huang added that other carriers "who offer us door rates...express their concern and problems in controlling our containers (*id.).*

Maersk, the third of the ocean carriers principally used by Global Link in 2005-06, clearly disapproved of the practice (CX 101, CX 115 ("Maersk will not do splits with us.")). Maersk went so far as to eliminate the Atoka, Oklahoma door point which Global Link had been using as the master destination for shipments to a location in Texas.

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15 However, at least one Mitsui office would release shipments only to the address on the MBL (CX 132).

16 Gary Meyer warned Keith Heffernan of Olympus in January 2006 that "[w]hen Maersk takes over P&O operations, we will have service issues which will wind up having some ramifications for our business" (CX 182). This oblique remark appears to have been referring to Maersk's disapproval of split-routing.

Moreover, Maersk insisted on using, or at least had a strong preference to use, its own trucking companies, which refused to do split shipments (CX 117).[17]

Because the freight-forwarding business was highly competitive, it is not difficult to appreciate that Global Link's success depended on arranging transportation at the lowest cost and with the greatest efficiency (so that, for example, Global Link did not have to pay demurrage on containers that were awaiting return to the ocean carrier). There seems little question that split-routing was widely engaged in by Global Link and accounted for a significant portion of the Company's gross profit per container, particularly where a carrier had a door point to the intended destination with a rate significantly higher than a nearby door point which Global Link used instead.

On the first point, Claimants' expert Edward McDonough estimated, based on a statistical sampling, that 60% of the containers shipped by Global Link between January 1, 2005 and March 31, 2006 were split-routings (described by McDonough as "mis-routing")(*see* CX 304 at 9). At his deposition, Mark Kwan gave the same percentage estimate (Kwan Dep. 124).[18] McDonough's sampling also disclosed that the incidence of split-routing spiked sharply in May 2005, citing a dramatic increase in the split shipments to Riverside Furniture in Fort Smith, Arkansas (CX 22). Claimants attribute this dramatic increase to Operation Margin Enhancement (*see* CX 96), which was presented by management to Global Link's Board at its May 2005 Board meeting. We find that causal attribution suspect for two reasons. First, the program of action called Operation Margin Enhancement makes no reference to split-routing, referring instead to adjustment of selling rates, passing on peak season surcharges, and other matters. Second, it is difficult to believe that Global Link split-routed so many more

17 Global Link's staff was under instructions not to discuss split shipments with Maersk or its truckers (CX 117).

18 In one e-mail, Briles hyperbolically described split shipments as "ALL WE DO" (emphasis in the original) (CX 209 at 537220). In addition to Briles' statement and the estimates provided by McDonough and Kwan, the record contains a statement on the extent of split-routing by Chad Rosenberg to Gary Meyer in early April 2006: "I believe that booking after may first will have 80+% matches and continue to work up from there until we have all the points in or contracts."(CX 233).

shipments in May (or June) than in the preceding month or quarter. We believe it is more likely that a change by P&O—from quoting state rates (with unlimited door points within each state) to quoting specific door points—explains the increase, as Respondents' counsel has argued (*see* Dec. 12, 2008 Tr. 168-72).[19]

As to the importance of gross profit per container, the Confidential Information Memorandum prepared by Harris, Williams & Co. to solicit interest in Global Link, in discussing the Company's financial outlook, contained a separate section discussing the subject and stated that "[b]ased on the higher levels of gross profit per container being comfortably sustained by Global Link during the latter half of 2005, management expects to maintain a targeted gross profit per container of $452 for the foreseeable future." (CX 11 at 6983). Claimants' witnesses testified that gross profit per container was a very important metric in evaluating Global Link as an acquisition candidate (Rocheleau Tr. 1003-04).

The parties sharply disagree as to whether, and if so the extent to which, Global Link's profitability depended upon the split-routing practice, on the one had, or could be maintained, largely if not entirely, by substituting rail or container yard destinations for false door-point destinations.

Events Leading to Claimants' Acquisition of Global Link

The Olympus Respondents acquired approximately 80% of Global Link from Respondent Chad Rosenberg in 2003 (*see supra* p.3 n.1). Their plan was to improve the Company's operations and profitability and then resell it within the next few years (CX 13 at 17006). They installed a new management team at Global Link, including Gary Meyer (initially as Chief Financial Officer and then promoted to Chief Operating Officer), Clark Christensen (CFO following Meyer), Gene Winters (in charge of Sales)

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[19] In response to a request by the Panel, Mr. McDonough's firm, Alvarez & Marsal, calculated the number of door points made available by P&O, Maersk and Mitsui quarterly from June 2004 through March 31, 2006. At the May/June 2005 contract reset, P&O went from offering 72 doors points plus unlimited destinations in 40 states and the District of Columbia to 781 door points and no state rates.

and a little later Jim Briles (head of the Trade Group, which was responsible for routing shipments).

In 2005 the Olympus Respondents entered into negotiations to sell Global Link to a company called Great Hill, but those negotiations ended unsuccessfully (*see* Cardenas Tr. 1846-49). In October 2005, the Olympus Respondents retained Harris Williams & Co. ("Harris Williams") as lead advisor for the potential sale of Global Link (Joint Statement, Summary Timetable). In January 2006, Harris Williams began to assemble a list of prospective purchasers, including both "strategic" investors (including NVOCCs and ocean carriers) and "financial" investors (private equity firms). On January 27, Harris Williams began distributing a Confidential Information Memorandum (CX 11), a lengthy and detailed discussion of Global Link's business, history, financial performance and prospects, to roughly 90 companies, which had executed a confidentiality agreement. In February, 11 prospective purchasers were invited to meet with Global Link management. Those management presentations were conducted in March; the presentation to Claimants was on March 22. In preparation for the management presentations, the "presenters" conducted two or three dry runs (Cardenas Tr. 2088-90). That same month prospective purchasers were granted access to an on-line "data room" (*see* Joint Statement, Summary Timetable).

One of those prospective purchasers was GTCR Fund VIII. David A. Donnini, Constantine ("Dean") Mihas, Sean Cunningham and Chris Herndon of GTCR acted for GTCR Fund VIII in conducting due diligence. They were joined for this purpose by John Williford, John Rocheleau and Edward Feitzinger of Claimant Golden Gate, which had been funded by GTCR. To assist in due diligence, GTCR also retained the consulting firm Bain & Co., the accounting firm PricewaterhouseCoopers LLP ("PwC"), the law firms Vinson & Elkins and Thompson Hine (the latter as maritime law specialists), and an individual with experience in logistics businesses named Jon Monroe (Donnini Tr. 562, 562-63, 568). Bain, PwC and Monroe all submitted written reports on their respective investigations to GTCR (Williford Dep. Ex. 5, Janson Dep. Ex. 1, and CX 100, respectively).

As noted above, Global Link management made a presentation to GTCR and Golden Gate representatives on March 22. Thereafter, as discussed more fully at pp. 24-25, *infra*, there was a series of telephone conferences and at least one meeting, in which GTCR and Golden Gate representatives pursued a number of specific inquiries regarding Global Link's business.

In April and May 2006, four potential purchasers submitted bids. Respondents chose to negotiate with Claimant Golden Gate, which ultimately offered to pay to $128.5 million for all shares of the Company. On or about May 20, 2006, the parties executed the SPA, and the acquisition closed on June 7, 2006 (*see* Joint Statement ¶19). The Sellers received net proceeds of $108,439,961.15, of which the two Olympus Funds received $83.1 million and CJR World Enterprises (that is to say, Chad Rosenberg) received $20.9 million (*see id.*)

Post-closing events

On July 16, a little more than one month after the Closing, Williford, Rocheleau and Feitzinger received a "whistleblower" e-mail from Eileen Cakmur, one of the Global Link customer account managers ("CAMs"), informing them of the practice of split-routing and calling it "illegal" (Williford Dep. Ex. 2; *see* Rocheleau Tr. 1110-12). After first contacting a lawyer at Kirkland & Ellis, which frequently represented GTCR, Rocheleau called Paul Coleman, who had previously advised Global Link on split-routing in 2003.[20] Rocheleau testified that Coleman told him that split-routing was illegal and that Coleman had so advised Global Link management in 2003 (Rocheleau Tr. 1112-14). Coleman's written advice in 2006 does not appear to be in the record. However, it is referred to in Meyer Deposition Exhibits 16 and 17 (Exhibit 17 includes at 110 8197 an e-mail transmitting the advice). In the absence of a record of the 2006 advice itself, we cannot say whether Coleman was correct when he stated in 2006 that "in 2003...we provided the same advice...."[21]

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20 We discuss in detail *infra* at pp. 16-19 the advice given in 2003 by Coleman and his partner, Neil Mayer.

21 If Coleman in fact advised in 2006 that split-routing was illegal in all circumstances, then we find puzzling the following statement by him in a follow-up e-

Global Link's new owners faced a predicament. To have attempted to end split-routing all at once was impractical, apart from the fact that it took "some time"—until "probably early 2007"—to quantify the extent of the practice (Rocheleau Tr. 1120-21), so with Coleman's blessing, they decided to continue the practice and then eliminate it at the next ocean carrier reset in May 2007. And they did so.

In assessing Claimants' position in this matter, a few points bear noting. First, not only did Meyer, Briles and the other members of the Global Link management team who had assertedly deceived GTCR in the negotiations remain in the employ of the new Company; there is no evidence in the record that they were disciplined or chastised. Second, there is no mention of split-routing as being illegal or otherwise in the post-acquisition Board minutes of Global Link Logistics or GTCR's periodic reports to its investors or bank lenders (RX 206, 211A, 220). Finally, Claimants did not self-report to the FMC until May 21,2008 (CX 310)—nearly two years after learning of the split-routing practice. Rocheleau testified that it took "some time" to quantify the extent of split-routing, but that fact does not explain the delay of a further year or more in notifying the FMC, nor does it explain why Claimants self-reported to the FMC at all when Coleman had advised that they should "not 'self-confess' to the ocean carriers or the FMC..." (Meyer Dep. Ex. 17 at 1108196).

Discussion

Fraud-Liability

The essential elements of a fraud claim are well known. A plaintiff must show that the defendant (i) misrepresented or actively concealed a (ii) material (iii) fact, (iv) intending that the plaintiff rely on the misrepresentation or the non-existence of the concealed fact, that (iv) the plaintiff did in fact rely thereon, that (v) such reliance was reasonable, and that (vi) as a proximate result of the fraudulent conduct the plaintiff has

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mail on July 21, 2006: "If GLL is paying the trucker for the movement from the point named in the ocean bill of lading to the point of actual destination, the FMC would not consider that a violation. The FMC would not care that the cargo did not move physically to the point in the ocean carrier bill of lading before moving to the ultimate destination" (Meyer Dep. Ex. 17 at 1108196).

suffered damages. *See, e.g., Gaffin v. Teledyne, Inc.*, 611 A. 2d 467, 472 (Del. 1992). In the case of an affirmative misrepresentation, the plaintiff must prove that the defendant knew of the falsity of the representation or made the representation with reckless indifference as to its truth. *Id.* In the case of concealment, *scienter* may be inferred from the very act of concealment if the surrounding circumstances warrant.

As noted above (p.4), Claimants charge the Olympus and Rosenberg Respondents with fraud on three distinct (though related) bases. We will discuss them separately.

1. Illegality

Claimants assert that the representation in the SPA that Global Link was "in compliance with all applicable laws [and] regulations...including the rules and regulations of the Federal Maritime Commission [and] the Shipping Act of 1984" (§4.15) was not only false, but known to be false. The proof of that asserted knowledge in relation to the split-routing practice, Claimants contend, can be found in communications in 2003 between Global Link's management and maritime law counsel and the instructions given within Global Link not to discuss the practice with ocean carrier representatives or even their colleagues within the Company.

Gary Meyer and Eric Joiner both testified that shortly after Meyer joined Global Link in June 2003, he learned of the split-routing practice, had questions concerning its legality, and, with Joiner's approval, called Paul Coleman, an attorney who provided maritime law advice to Global Link (Meyer Dep. 123-24). After an initial conversation, which Meyer did not recount during his deposition, he sent Coleman an e-mail on July 10, 2003, describing the practice and expressing the view that "[t]his is something we should probably discuss further to understand the reasons why it is done and the potential ramifications to our business."[22]

Five days later, Coleman responded in an e-mail, which is sufficiently important to warrant describing in some detail. Coleman began by stating that split-routing created "several problems which Global Link needs to consider." First, Coleman cautioned, if

[22] The e-mail string of communications among Meyer, Coleman and Rosenberg discussed in the text is contained in its entirety in CX 279.

the cargo were damaged or lost, "Global Link would have no right to go after the ocean carrier for the loss." "Second," Coleman stated, if the cargo was delivered "to a destination short of its original destination and, the shipper [i.e., Global Link] received "from the trucker part or all of the amount saved or...[received] a credit on a later shipment," this practice, which Coleman called "shortstopping," would be

> "a fraud on the ocean carrier who has paid the trucker more than the trucker was entitled, and an illegal rebate to the shipper because any return of compensation to the shipper without being allowed by the ocean carrier's tariff or service contract is a violation of section 10(a)(1) of the Shipping Act."

"Third," Coleman continued, even if Global Link paid the trucker more money to take the cargo to a destination further than the one in the ocean bill of lading, the practice "still may be unlawful under the Shipping Act if this allows Global Link to be charged less by the ocean carrier than it would have charged to that destination." "In sum," Coleman concluded, "a practice of changing destinations without notice to the ocean carrier exposes Global Link to *possible* Shipping Act violations" (emphasis added).

Meyer forwarded Coleman's reply to Joiner, who in turn sent it to Chad Rosenberg with the succinct comment that Coleman's advice "warrants some discussion I think."

Rosenberg was prompted by Coleman's advice to send an immediate follow-up e-mail to Coleman asking "if the FMC has ever fined any novcc's [sic] for this practice..." and, if the answer was yes, to provide examples, including the "fine amounts." Rosenberg sought "more clarity" because it was "very difficult to get all the points in our contract" and "[i]t seems all or most of hecny's agents book to the closest point and all the companies I've ever worked for did the same practice." Rosenberg wanted to "understand the real-life risks, etc." Coleman replied by citing two examples, in one of which a company named Shoe City was fined $50,000. He then offered three "alternatives":

> "(a) enter into only port-to-port service contracts with the ocean carrier and arrange our own trucking, (b) obtain from the ocean carrier multi-factor rates, where you have the basic port-to-port rate and add to it from a zip code tariff or attachment to the s.c. the inland portion, or (c) find some

formula, stated in the service contract, that allows you to add points to the single factor rate expressed in the contract."

Coleman then returned to the concern he had first expressed regarding split-routing, namely, insurance coverage, which he referred to as "the liability side." Coleman concluded that "this is not an easy issue as I understand that the practice is common, but at least Global Link knows and has a chance to evaluate the issues and risks involved." Rosenberg ended the chain of communication by expressing "thanks" to Coleman for his "helpful" advice and promising to discuss the subject "internally and further with neil"—Neil Mayer, Coleman's partner—"when he comes down."

By "comes down," Rosenberg appears to have been referring to a presentation to the Global Link staff that Eric Joiner arranged, with the approval of David Cardenas of Olympus Partners, for Neil Mayer to make on the regulatory framework within which an NVOCC such as Global Link operated (Joiner Tr. 219-20). Mayer made such a presentation in early August 2003. Gary Meyer testified that he could not recall Neil Mayer referring to split routing during his presentation, and the slides used by Mayer on that occasion (RX 21) and a rough transcript of the presentation make no reference to the practice.

Following Mayer's presentation, Rosenberg sent him an e-mail, thanking him and posing a "quick question" because he was "a little confused as to what is ok by the fmc" (CX 55). Rosenberg gave as an example a shipment going to Mobile with a New Orleans door point in the ocean bill of lading. Would it be "legal," Rosenberg asked, for Global Link to ship "to New Orleans-door and handle the trucking ourselves to [M]obile." Rosenberg expressed puzzlement as to whether it was "ok" "[i]f we book to port or cy and handle the trucking" but "not ok to book to door and truck to a nearby location." He professed to be "a little confused about the legality if this is the case" inasmuch as "[i]n both cases the o b/l [presumably referring to the ocean bill of lading] destination is different that [sic] the h b/l [house bill of lading] destination." Rosenberg asked that Mayer "advise and clarify."

Mayer promptly replied (*see id.*). He advised that it was Hecny's "responsibility to get the container to Mobile as per the Hecny house bill of lading." Global Link, however, "may lawfully arrange the trucking."[23] Where, as "sometimes will be the case...the ocean carrier's service will not match up to the Hecny bill of lading"—an apt description of a split-routing—"it is Hecny's obligation (or Global Link as agent for Hecny) to perform the service under the Hecny bill of lading." Mayer continued:

> "Hecny is certainly free to request the motor carrier providing the trucking for the ocean carrier to perform the carriage to the point [i.e., the Hecny bill of lading destination] six miles away [from the ocean carrier door point] and to negotiate and pay the charges for such service."

Mayer then reiterated the admonition earlier provided by his partner, Coleman, that Hecny could not accept a refund or discount from the trucker if the shipment were "short-stopped." In conclusion, Mayer suggested that Global Link "may want to pay the ocean carrier solely for a port move and then arrange trucking yourself" or—"maybe the best approach"—amend the service contract "so that the ocean carrier offers a point rate to the point in the Hecny house bill of lading."

Rosenberg forwarded Mayer's e-mail to Meyer, Joiner and Winter, commenting: "It now sounds to me like having the o b/l and h b/l destination different is ok, just not debits and credits" (RX 24 at 487753). Rosenberg continued: "I think we really need to get this clarified further if this is ok or not-since this will dictate how we route and points we need in our contract or hecny's contract" (*id.*) Joiner responded to Rosenberg's e-mail:

> "My read of this is that it's OK to have a trucker carry goods beyond termination of the ocean carrier BL, either inland or at a port and to compensate the trucker for the additional carriage. However we can't short stop the container and get paid the difference...This seems like a good balance and a correct way to do what we want" (*id.*).

Despite Rosenberg's desire for further clarification, no evidence was adduced by either Claimants or Respondents that further advice about the legality of split shipments was in fact sought by Global Link (or Olympus) between August 2003 and the sale of Global Link to Claimant nearly three years later. There was, however, testimony that

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23 Oddly, Mayer seems not to have understood the relationship between Global Link and Hecny. His e-mail refers twice to Global Link as "agent for Hecny," whereas in fact Hecny was Global Link's agent.

after Coleman and Mayer rendered their advice in 2003, Global Link stopped the practice of using offsetting debits and credits to balance its accounts (as it were) with truckers, who sometimes delivered to a destination nearer, and at other times to a destination further from, the door point in the ocean bill of lading (*see* Rosenberg Tr. 389-90).

Does the foregoing evidence establish that Global Link management (specifically Rosenberg, Joiner and Meyer) knew that split-routing was illegal but continued the practice nevertheless (presumably in the hope that the practice would generate additional illegal profits that would facilitate a sale of the Company)?[24] Although the issue is close, the Panel concludes, principally for the following reasons, that the evidence is not sufficient to carry Claimants' burden of persuasion on this issue.

When asked for advice regarding split-routing, Coleman "first" addressed the risk of losing insurance coverage. Coleman concluded his communications on the subject in July 2003 by returning to the subject of insurance coverage: "While I do not discount the FMC aspect, I actually have more concern on the liability side. Are ocean carriers accepting liability if cargo is damaged and the destination is altered?" If the issue of illegality were as clear and serious as Claimants contend, why would Global Link's lawyer have "more concern" about insurance coverage issues?

The advice on legality provided by Coleman and Mayer was explicit on only one subject: the illegality of accepting a rebate or discount from a trucker in the case of "short-stopping." As noted above, Global Link ended that practice upon receipt of the advice. When it came to the legality or illegality of "changing destinations without notice to the ocean carrier," Coleman was less definitive: that practice "exposes Global Link to *possible* Shipping Act violations' (emphasis added). A prudent businessman might be expected to avoid a practice that entailed a "possible" legal violation, but it is quite another matter to charge a businessman with knowledge of illegality on the basis of that advice. And when Mayer failed to address the subject during his legal seminar for

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24 Rosenberg's repeated queries to Coleman and Mayer are plainly inconsistent with the alternative hypothesis that Global Link was recklessly indifferent to the legality of split-routing.

Global Link personnel,[25] Rosenberg sought clarification and gave an example of split-routing: a shipment destined for Mobile with an ocean carrier door point of New Orleans. Not only did Mayer not advise that such a routing was illegal; he can be read as having advised to the contrary in the first indented quotation on page 19, *supra*.

Claimants ask that we infer from Rosenberg's inquiry about "real life risks" that Rosenberg was prepared to violate the law if there was no or little risk that Global Link would be caught or that, if it were caught, any adverse consequences would be bearable. While that is a permissible inference, it is not the only reasonable inference, nor do we find it more reasonable than the inference that Rosenberg was making an inquiry which any sensible businessman would make in similar circumstances: What are the "real life risks" of pursuing a certain course of conduct?

We recognize that the communications between Rosenberg, on the one hand, and Coleman and Mayer, on the other, are open to differing interpretations. In the end, the burden of proving knowledge and scienter falls on Claimants, and whether that burden is preponderance of the evidence, as most of the Delaware cases seem to say, *see, e.g., Cobalt Operating LLC v. James Crystal Enter.*, C.A. No. 714-VCS, 2007 WL 2142926, at *2 (Del. Ch. July 20, 2007), or clear and convincing evidence, *see Johnson v. TMSI*, C.A. No. 07A-09-002 WCC, 2008 Del Super. LEXIS 263, at *4-5 (Del Super. July 30, 2008), Claimants have not carried the burden to the satisfaction of the Panel.

2. Financial Statement Presentation

Claimants' allegation that Respondents fraudulently misrepresented the financial position and results of operation of Global Link as of and for the three months ended March 31, 2006, and for the three preceding fiscal (and calendar) years is derivative of Claimants' charge that Respondents knew that split-routing was illegal. Starting with the latter premise, Claimants argue that their expert, Edward McDonough, determined the portion of Global Link's profit per container derived from split-routing by comparing the cost Global Link incurred in split-routed shipments with the cost Global Link would have

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25 During his legal seminar for Global Link personnel, Mayer discussed the difference between ocean and house bills of lading and also discussed Section 10(a)(1) of the Shipping Act (RX 22 at 968543 and 968559), but made no mention of split-routing.

incurred had it used either the least expensive legally conforming route or a legally conforming route using the same carrier on which the container was originally booked. The average savings during the twelve months ending May 31, 2006 was calculated to be $199 per container using the former method of comparison and $359 using the latter (*see* CX 313 at 11, 14). The corresponding impacts on EBITDA were $5,874,592 and $9,743,146, respectively (*see id.* at 15). Needless to say, these numbers more than satisfy any standard of materiality.

The difficulty with this argument is that it is not only derivative of, but also dependent upon, the premise, which we have just held not proven, that one or more Respondents knew that split-routing was illegal but continued the practice nevertheless. Respondents doubtless wanted to maximize Global Link's gross profit per container, EBITDA and net income so as to improve the prospects of a profitable sale of the Company, and (putting aside for the moment the Olympus and CBW Respondents), Rosenberg and such members of Global Link's active management as Gary Meyer and Clark Christensen undoubtedly appreciated the beneficial financial impact of split-routing. But they have not been shown to know, much less appreciate, that the Company was thriving on a diet of illegal conduct.

Furthermore, there is no evidence of which we are aware that any ocean carriers ever sued or threatened to sue Global Link to recover the additional sums the carriers would have received if Global Link had used actual destination door points that were in the carriers' service contracts rather than nearby—or not so nearby—door points that saved Global Link money. Indeed, Claimants answered an interrogatory by affirming that there had been no such suits or threats (*see* RX 288-Answers to Interrogatories 8, 9).

If Claimants were in a position to base a claim on the financial *projections* (as contrasted with the *historical* financial information) in the Confidential Information Memorandum—particularly the confident statement that "[m]anagement believes that a gross profit of $452 per container is a highly achievable target for the foreseeable future (CX 11 at 6983)—Claimants would have a good chance of prevailing. However, that possibility is foreclosed both by the disclaimer in the front of that document (id. at 6898) and by the integration clause in the SPA.[26]

Fraudulent Omission and Concealment

Our conclusions to this point—that Claimants have failed to carry their burdens of establishing that Respondents misrepresented either Global Link's compliance with laws and regulations or the fairness of presentation of its financial statements—do not end the fraud inquiry, for there still remains to be determined whether Chad Rosenberg, the other members of Global Link management and/or the Olympus Respondents (specifically David Cardenas and Keith Heffernan) fraudulently omitted to disclose the Company's reliance on split-routing to lower its costs and raise gross profits per container and EBITDA. Our examination of the record leads us to conclude that (i) a deliberate effort was made to keep GTCR from learning of the existence, extent and significance of the split-routing practice during the due diligence process, and (ii) during the due diligence process questions were asked by representatives of GTCR and Golden Gate to which accurate and complete answers would have included disclosure and a description of split-routing and its contribution to Global Link's profitability. We turn to a discussion of the evidence underlying those conclusions.

During preparation of the Confidential Information Memorandum, Keith Heffernan, who was responsible for gathering and passing along to Harris Williams comments from Olympus Partners and Global Link management on the most recent draft, deleted a reference to "highly efficient routing." Inserted in place of that phrase was the following comment explaining the deletion:

> "I don't think we should get too deep into routing. I don't think we want too much diligence around this, and we don't want to give away too much

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26 "This Agreement and the documents referred to herein (including the Confidentiality Agreement) contain the complete agreement between the parties hereto and supersede any prior understandings, agreements or representations by or between the parties, written or oral, which may have related to the subject matter hereof in any way" (§14.10).

either. I would stick to high-skilled contract negotiations" (CX 3 at 12043)[27]

In anticipation of the management presentation on March 22, 2006, John Rocheleau of Golden Gate sent to Hunter Powell of Harris Williams "a list of questions we will be interested to discuss at our meeting on Wednesday" (CX 217). Among those questions were the following:

> "Please describe how your inland process works today, from port to customer site...."
>
> "How did you get to your low cost position mentioned in the CIM?" and "How do you expect to maintain this advantage?"
>
> "What is your competitive advantage against other forwarders?"

We find it highly likely that during the management presentation, the foregoing inquiries or others were made that, if fairly answered, would have called for a disclosure and description of split-routing. Yet Mihas of GTCR and Rocheleau both testified that split-routing was not mentioned by the Global Link management team making the presentation. (Mihas Tr. 1563-64, 1620-21, Rocheleau Tr. 1017-19). That testimony was not contradicted.

Following the March 22 presentation, Claimants continued to ask questions in conference calls, including perhaps most pointedly: "How does GL control its purchased transportation costs"(CX 40 at 322132)? In a log of communications between GTCR and Global Link, that question is recorded as having been discussed on April 11 (CX 259). Rocheleau testified that he recalled the conversation, which had been with Meyer, Christensen and Winters; and that they had made no mention of split-routing (Rocheleau Tr. 1061, 1063). GTCR also requested in an all-day meeting on April 21 that management "[w]alk us through a few end-to-end transactions from customer 'demand'

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27 It is unclear whether the "I" in that comment was Heffernan himself or someone else who had sent the editorial suggestion and comment for forwarding. Heffernan denied that the comment was his, but acknowledged that Global Link management "didn't want to get too deep into routing at this stage of the process, where we had a book going out to I think almost a hundred buyers" (Heffernan Tr. 2289; *see also id.* at 2357).

signal to invoice payment" (CX 248). Again, during the entirety of what Mihas testified was a lengthy discussion of the routing process, no mention was made by Global Link management of split-routing (Mihas Tr. 1563-66, 1620-21).

Other prospective purchasers were also asking questions that threatened to reveal split-routing. Schenker, a large freight-forwarder participating in the auction process, requested job cost samples, prompting Meyer to comment in an e-mail to Rosenberg: "It's info like this that will lead the strategics right to the mbl/hbl tactic. Hopefully the financials won't figure it out" (CX 233). Olympus was viewed as a "hybrid" (Meyer Dep. 100); as a private equity firm, it was a "financial," but it had plans to become a "strategic" through Golden Gate Logistics by buying Global Link and either acquiring or creating a group of companies that could take products from a factory door in China to a buyer's door in the United States, handling all aspects of the transportation and all logistics, thereby providing "end-to-end solutions" (Williford Dep. 20).

There are no memoranda purporting to summarize or otherwise referring to the discussions during the dry runs Global Link Management conducted in preparation for the March 22 management presentation, during the presentation itself or during the ensuing conference calls and April 21 meeting of GTCR representatives and Global Link management, but the absence of such a record does not diminish our conviction that split-routing was responsive to several of Claimants' pointed inquiries, but (for whatever reason) was not disclosed, and our equally strong conviction that the disclosures that were made, taken as a whole, were misleading in the absence of a disclosure and description of split-routing and its significance to the operations and profitability of Global Link.

The motivation to conceal Global Link's reliance on split-routing is not difficult to identify. The Olympus Respondents were eager to turn a profit on their three-year-old investment in Global Link by reselling the Company. Chad Rosenberg, having sold an 80% interest in the Company for $20 million three years earlier, stood to reap another $20 million by selling his remaining 20% interest, and Company management was willing, if not eager, to assist the process, for certain members of management stood to benefit personally and substantially from a sale.[28] Disclosure of split-routing would almost certainly have generated questions about the legality, business prudence and/or sustainability of the practice, and responding to those questions to GTCR's satisfaction might well have delayed (and conceivably might have scuttled) the transaction or altered its terms to the Sellers' and management's detriment.

Delay posed risks to consummating a sale, because, as Gary Meyer stated in an e-mail to Keith Heffernan in January 2006, achieving the 2006 projections in the Confidential Information Memorandum would require Company personnel "to work very hard and smart..."(CX 182). Meyer warned Olympus in January 2006: "Our volume plan spikes in April and May and at this point it is not clear at all to me how we get there" (*id.*). And Meyer thought it "not accurate to suggest our 2006 plan is conservative" (*id.*)[29] Cardenas shared Meyer's interest in keeping the sales process moving. He told Gerald Benjamin in April that he (Cardenas) had "had a couple of conversations with Chad re : margin challenges for June and July numbers" (CX 237). "I think the main answer," Cardenas wrote, "is to keep the process running crisply and competitively so we can get to a reasonably quick closing" (*id.*).

There is other circumstantial, but persuasive, evidence that Global Link management was not eager to disclose information about the details of its routing practices. Those practices, including "split moves," were described in detail in a draft Standard Operating Procedure manual, which Gary Meyer had asked Wayne Martin to prepare in 2005 in anticipation of a sale of the Company (CX 87 at 384559). The Manual

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28 Cardenas and Heffernan received handsome bonuses from Olympus Partners for their role in effectuating the sale (Cardenas Tr. 2117; Heffernan Tr. 2317). Meyer, Christensen, Winters and two other key employees of Global Link received in the aggregate $7,676,768 in payment for stock options they held at the closing of the acquisition. Of that amount, $7,263,247 was paid to them in cash—Meyer alone received nearly $2.4 million—and the balance was "reinvested" in the Buyer (CX 276 at 10 and Ex. B)

29 Notwithstanding this warning by Meyer, the Confidential Information Memorandum expresses the belief of "management" (in which Meyer was the Chief Operating Officer) that "a gross profit of $452 per container is a *highly achievable* target for the foreseeable future" (CX 11 at 6983) (emphasis added).