

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MITSUI O.S.K. LINES, LTD.,	)	Case No. 10-5586 SC
	)	
Plaintiff,	)	ORDER RE DEFENDANT UNION
	)	LOGISTICS, INC.'S MOTION
v.	)	<u>FOR SUMMARY JUDGMENT</u>
	)	
ALLIED TRANSPORT SYSTEM (USA),	)	
INC.; CENTURION LOGISTICS	)	
MANAGEMENT; CENTURION LOGISTICS	)	
SERVICES, LTD.; UNION LOGISTICS,	)	
INC.; and DOES 1 through 20,	)	
	)	
Defendants.	)	

---

**I. INTRODUCTION**

In this action, Plaintiff Mitsui O.S.K. Lines, LTD. ("Plaintiff" or "Mitsui") sues Defendants Allied Transport System (USA), Inc., ("Allied"), Centurion Logistics Services, LTD., Centurion Logistics Management, and Union Logistics, Inc. ("Union"), seeking to recover allegedly unpaid ocean freight charges and fraudulent trucking charges. ECF No. 35 ("SAC") ¶ 1.

Now before the Court is a Motion for Summary Judgment brought by Union. ECF No. 41 ("Mot."). The Motion is fully briefed. ECF Nos. 46 ("Opp'n"), 48 ("Reply"). For the following reasons, the Court DENIES Union's Motion with regard to Plaintiff's claims for breach of contract, intentional misrepresentation, and negligent

1 misrepresentation and DEFERS ruling on Plaintiff's claim for  
2 accounting.

3

4 **II. BACKGROUND**

5 This case is still in its very early stages. Mitsui first  
6 named Union as a Defendant in its SAC, filed on July 21, 2011.  
7 Union filed the instant Motion less than two months later on  
8 September 9, 2011. Other than initial disclosures, no discovery  
9 has yet taken place between Union and Mitsui.

10 **A. Undisputed Facts**

11 Mitsui, a Japanese corporation, is an ocean common carrier  
12 that operates container ships moving cargo between the United  
13 States and foreign ports. SAC ¶ 3; ECF No. 44 ("Union Ans.") ¶ 3.  
14 Mitsui transports cargo across oceans from port to port, and  
15 sometimes also arranges for the cargo's transport to and from  
16 inland locations on either end of the ocean voyage. Mot. at 1.

17 Union is a non-vessel-operating common carrier ("NVOCC").  
18 Union Ans. ¶ 4. Allied is also a NVOCC and does business under the  
19 trade name Centurion Logistics Management ("Centurion"). ECF No.  
20 37 ("Allied Ans.") ¶ 4.<sup>1</sup> A NVOCC is a company that customers hire  
21 to ship cargo, but the NVOCC itself does not actually operate the  
22 cargo-carrying vessels. Instead, NVOCCs hire ocean common carriers  
23 such as Mitsui to physically transport the cargo for their  
24 customers. Thus, a NVOCC is a "shipper" in its relationship with

25

---

26 <sup>1</sup> Plaintiff alleges that Centurion Logistics Services, LTD. is an  
27 affiliate of Allied based in Hong Kong. SAC ¶ 4. Allied denies  
28 this allegation. Allied Ans. ¶ 4. Centurion Logistics Services,  
LTD. has not entered an appearance in the case. All references to  
"Centurion" in this Order refer to Allied operating under its trade  
name Centurion Logistics Management.

1 an ocean common carrier. See 46 U.S.C. § 40102(16) (defining  
2 NVOCC).

3 At all times relevant to this case, Centurion and Mitsui were  
4 parties to a series of "service contracts" in which Centurion  
5 promised to provide a certain volume of cargo over a fixed time  
6 period and Mitsui agreed to transport the cargo for a certain rate.  
7 SAC ¶ 7; Allied Ans. ¶ 7; see also 46 U.S.C. § 40102(20) (defining  
8 "service contracts" between shippers and ocean common carriers).  
9 Pursuant to these contracts, Mitsui transported hundreds of  
10 shipments from Centurion. Minck Decl. ¶ 11.<sup>2</sup> The bills of lading  
11 for many of these shipments list Union as the "consignee" and  
12 "notify party." Union submitted seven examples of bills of lading  
13 issued by Mitsui where Centurion is identified as the "shipper" and  
14 Union is identified as the "consignee" and "notify party." Kam  
15 Decl.<sup>3</sup> Exs. A-G.<sup>4</sup>

16 **B. Mitsui's Allegations**

17 Mitsui alleges that Defendants are jointly and severally  
18 liable for unpaid freight charges for shipments dating from about  
19 December 2008 to June 2010, in the amount of at least \$918,348.60.  
20

---

21 <sup>2</sup> Warrin Minck ("Minck"), Senior Internal Auditor for Mitsui's  
22 general agent in the United States, submitted a declaration in  
support of the Opposition. ECF No. 47 ("Minck Decl.").

23 <sup>3</sup> Joseph Kam ("Kam"), President of Union, filed a declaration in  
24 support of the Motion. ECF No. 42. ("Kam Decl."). The original  
25 declaration submitted was not signed. John Daley ("Daley"),  
counsel for Union, submitted a declaration explaining that he filed  
an unsigned version of the Kam Declaration in error and attaching  
the signed version. ECF No. 49.

26 <sup>4</sup> Union declares that it was named as the consignee and notify  
27 party on "several" bills of lading, while Mitsui declares that  
Union was so named on at least 970 bills of lading. Kam Decl. ¶ 3;  
28 Minck Decl. ¶ 11. Union does not dispute Mitsui's contention.

1 SAC ¶ 10. Mitsui further alleges that Defendants wrongfully  
2 deprived Mitsui of revenue by participating in a scheme whereby  
3 Mitsui was charged for trucking services that were not actually  
4 rendered. Id. ¶¶ 13-16. Mitsui alleges that this scheme worked as  
5 follows. Defendants booked shipments with Mitsui for "door" pick-  
6 up of cargo to be carried from inland areas of Guangdong Province  
7 in South China to destinations in the United States. Id. ¶ 13.  
8 For each shipment so booked, Mitsui was required by its contracts  
9 to pay the cost of trucking the shipments from the places of origin  
10 -- thought to be factories or warehouses -- to the ports of  
11 loading. Id. In auditing shipments booked by Defendants, Mitsui  
12 allegedly discovered that the contracts of carriage between  
13 Defendants and their cargo customers provided for the receipt of  
14 the cargo directly at the ports of loading in China. Id. ¶ 15.  
15 Thus, Defendants' customers had to arrange and pay for trucking the  
16 shipments from their point of origin to the port of loading. Id.  
17 No trucking services were actually provided on Mitsui's behalf, and  
18 the shipments were delivered directly to the ports of loading at no  
19 cost to Defendants. Id. Nevertheless, because Defendants booked  
20 the shipments for "door" pickup, Mitsui was caused to pay for  
21 trucking services that were never rendered on thousands of such  
22 shipments. Id. ¶ 16.

23 Mitsui's SAC, filed on July 21, 2011, asserts the following  
24 claims: (1) breach of maritime contract, based on the allegedly  
25 unpaid freight charges; (2) accounting, seeking an audit of  
26 Defendants' records to determine the total amount of unpaid  
27 charges; and both (3) intentional and (4) negligent  
28 misrepresentation, based on the allegations that Defendants

1 misrepresented that shipments would be picked up at inland points  
2 of origin.

3

4 **III. LEGAL STANDARD**

5 Entry of summary judgment is proper "if the movant shows that  
6 there is no genuine dispute as to any material fact and the movant  
7 is entitled to judgment as a matter of law." Fed. R. Civ. P.  
8 56(a). Summary judgment should be granted if the evidence would  
9 require a directed verdict for the moving party. Anderson v.  
10 Liberty Lobby, Inc., 477 U.S. 242, 251 (1986). Thus, "Rule 56[]  
11 mandates the entry of summary judgment . . . against a party who  
12 fails to make a showing sufficient to establish the existence of an  
13 element essential to that party's case, and on which that party  
14 will bear the burden of proof at trial." Celotex Corp. v. Catrett,  
15 477 U.S. 317, 322 (1986). "The evidence of the nonmovant is to be  
16 believed, and all justifiable inferences are to be drawn in his  
17 favor." Anderson, 477 U.S. at 255. However, "[t]he mere existence  
18 of a scintilla of evidence in support of the plaintiff's position  
19 will be insufficient; there must be evidence on which the jury  
20 could reasonably find for the plaintiff." Id. at 252. "When  
21 opposing parties tell two different stories, one of which is  
22 blatantly contradicted by the record, so that no reasonable jury  
23 could believe it, a court should not adopt that version of the  
24 facts for purposes of ruling on a motion for summary judgment."  
25 Scott v. Harris, 550 U.S. 372, 380 (2007).

26

27 **IV. DISCUSSION**

28 In its Motion, Union argues that there is no evidence that it

1 ever agreed, either expressly or impliedly, to accept liability for  
2 freight charges owed on any of the shipments at issue. Mot. at 2.  
3 It further argues that there is no evidence that it had any role in  
4 billing Mitsui for inland trucking services or made any  
5 representations to Mitsui about the charges for these shipments.  
6 Id. Union argues that it acted solely as a "releasing/receiving  
7 agent" for Centurion with respect to every shipment at issue. Id.  
8 at 1.

9 In response, Mitsui argues that Union accepted the express  
10 terms of the bills of lading, which provide that a consignee is  
11 jointly liable for freight charges. Alternatively, Mitsui argues  
12 that Union impliedly agreed through its conduct to accept joint  
13 responsibility for freight charges. Mitsui further argues that  
14 inconsistencies in the bills of lading submitted by Union show that  
15 Union had knowledge that Mitsui was being charged for non-existent  
16 trucking services and create a triable issue as to whether Union is  
17 liable for misrepresentations as to the charges.

18 **A. Breach of Contract Claim**

19 1. Express Agreement to Pay Freight

20 To determine whether a consignee is contractually liable for  
21 freight charges, courts first examine the bills of lading, which  
22 "serve both as a receipt and as a contract." States Marine Int'l,  
23 Inc. v. Seattle-First Nat'l Bank, 524 F.2d 245, 248 (9th Cir. 1975)  
24 (citation omitted).

25 Every bill of lading issued by Mitsui contained the following  
26 terms:

27 In accepting this Bill of Lading the Merchant  
28 expressly accepts and agrees to all its terms  
whether printed, stamped or written, or

1 otherwise incorporated, notwithstanding the  
2 non-signing of this Bill of Lading by the  
Merchant.

3 Minck Decl. ¶ 9 Ex. H.

4 The term "Merchant" is defined to include: "the Shipper,  
5 Holder of this Bill of Lading, Consignee, Receiver of the Goods,  
6 any Person owning or entitled to the possession of the Goods or of  
7 this Bill of Lading and anyone acting on behalf of such persons."  
8 Id. § 1. The bill of lading further provides that "[a]ll of the  
9 Persons coming within the definition of Merchant . . . shall be  
10 jointly and severally liable to [Mitsui] for the due fulfillment of  
11 all obligations of the Merchant in this Bill of Lading," and "[t]he  
12 Merchant shall be liable to [Mitsui] for the payment of all Freight  
13 . . . ." Id. §§ 10(1), 11(5).

14 The foregoing terms are routine in the industry. Minck Decl.  
15 ¶ 9. Union accepted bills of lading containing these terms on  
16 numerous, perhaps hundreds, of occasions, and there is no evidence  
17 that Union ever objected to the terms. Kam Decl. Exs. A-G; Minck  
18 Decl. ¶ 11. On the contrary, Union frequently paid the freight  
19 charges. Minck Decl. Exs. A-E (Mitsui records showing receipt of  
20 payment for freight from Union); Kam Decl. ¶ 9 (Union "collected  
21 payments from [Centurion's customers] to be passed on to Mitsui. .  
22 . ").

23 Union argues that the "boilerplate" terms of the bills of  
24 lading are insufficient to create liability on the part of a  
25 consignee. Mot. at 6. As support, Union relies primarily on  
26 Mitsui O.S.K. Lines, Ltd. v. Dynasea Corp., 72 Cal. App. 4th 208  
27 (Cal. Ct. App. 1999). In Dynasea, the court held that Mitsui could  
28 not recover freight charges from a consignee despite terms to the

1 contrary in the bills of lading. The Court noted that "a party  
2 cannot bind another to a contract simply by so reciting in a piece  
3 of paper. It is rudimentary contract law that the party to be  
4 bound must first accept the obligation." Id. (emphasis in  
5 original). The court found that there was no evidence that the  
6 consignee accepted the bills of lading for the shipments at issue;  
7 rather, the consignee declined to accept the shipments because the  
8 cargo did not conform to its order. Id.

9 Here, unlike in Dynasea, the evidence shows that Union  
10 accepted the bills of lading at issue without ever objecting to  
11 their terms and routinely paid the freight charges. Viewed in the  
12 light most favorable to Mitsui, this evidence is enough to create a  
13 triable issue of fact as to whether Union accepted the terms of the  
14 bills of lading and thereby assumed joint responsibility for  
15 freight charges.

16 2. Implied Agreement to Pay Freight

17 Additionally, there is enough evidence to create a triable  
18 issue of fact as to whether Union impliedly agreed to be jointly  
19 responsible for the freight charges. Where a named consignee is  
20 not the actual owner of the cargo, the consignee impliedly accepts  
21 responsibility for freight charges if it exercises "dominion and  
22 control over the shipment" and thereby gives rise to presumptive  
23 ownership. States Marine Int'l, Inc. v. Seattle-First Nat'l Bank,  
24 524 F.2d 245, 248 (9th Cir. 1975).

25 Kam declares that, when cargo consigned to Union arrived,  
26 Union "passed on information to [Centurion's] customers and  
27 collected payments from them to be passed on to Mitsui and  
28 [Centurion]." Kam Decl. ¶ 9. Mitsui argues that, from Kam's

1 statement, it can reasonably be inferred that Mitsui accepted the  
2 cargo as consignee and then released the cargo to or arranged for  
3 forward delivery to Centurion's customers: "[w]hat the [Kam]  
4 declaration does not explain is how cargo in [Mitsui's] custody  
5 somehow came to be released to [Centurion's] customers -- unknown  
6 to [Mitsui] -- even though Union was the Consignee entitled to take  
7 delivery of the shipment per the [Mitsui bill of lading]." Opp'n  
8 at 8. According to Mitsui, the simple explanation is that Mitsui  
9 released the cargo to Union, who in turn exercised dominion and  
10 control over it by releasing it to Centurion's customers. Id.  
11 Mitsui declares that this practice would be consistent with the  
12 ordinary course of business. Minck Decl. ¶ 7. Viewing this  
13 evidence in the light most favorable to Mitsui and drawing all  
14 justifiable inferences in its favor, the Court finds that a triable  
15 issue of fact exists as to whether Union accepted the cargo or  
16 otherwise exercised dominion and control over the cargo consistent  
17 with presumptive ownership.

18 Because triable issues exist as to whether Union is expressly  
19 or impliedly liable for the alleged unpaid freight charges,  
20 Union's Motion is DENIED with regard to Mitsui's first claim for  
21 breach of contract.

22 **B. Claim for Accounting**

23 Union argues that it is entitled to summary judgment on  
24 Mitsui's claim for accounting because Mitsui has not produced any  
25 evidence that there is a balance due from Union, which is an  
26 essential element of a claim for accounting. Reply at 5 (citing  
27 County of Santa Clara v. Astra USA, Inc., 401 F. Supp. 2d 1022,  
28 1026 (N.D. Cal. 2005)). In its Opposition, Mitsui does not

1 indicate what evidence, if any, it offers in support of its claim  
2 for accounting against Union. However, Mitsui argues in general,  
3 but not with specific regard to its claim for accounting, that it  
4 should be allowed to engage in discovery before its claims are  
5 summarily adjudicated. Opp'n at 9.

6 Under Federal Rule of Civil Procedure 56(d)(1), "[i]f a  
7 nonmovant shows by affidavit or declaration that, for specified  
8 reasons, it cannot present facts essential to justify its  
9 opposition," then the Court may defer ruling on the motion. The  
10 Ninth Circuit has made clear that Rule 56(d) requires the nonmovant  
11 to state "what information is sought and how it would preclude  
12 summary judgment." Margolis v. Ryan, 140 F.3d 850, 853 (9th Cir.  
13 1998).<sup>5</sup>

14 Here, in an attempt to comply with Rule 56(d), Mitsui filed a  
15 declaration stating that it cannot present facts essential to its  
16 Opposition because no discovery at all has taken place. Cicala  
17 Decl.<sup>6</sup> The declaration sets forth a list of information Mitsui  
18 hopes to obtain through discovery, but none of the information  
19 appears to pertain to Mitsui's accounting claim against Union, and  
20 Mitsui does not explain how the information it seeks would preclude

21  
22 <sup>5</sup> At the time Margolis was issued, Rule 56(d) was listed as Rule  
23 56(f). However, as the Advisory Committee Notes to the 2010  
24 Amendments to Rule 56 note, "Subdivision (d) carries forward  
25 without substantial change the provisions of former subdivision  
26 (f). A party who seeks relief under subdivision (d) may seek an  
27 order deferring the time to respond to the summary-judgment  
28 motion."

26 <sup>6</sup> Conte C. Cicala ("Cicala"), attorney for Plaintiff, filed a  
27 declaration regarding the need for additional discovery. ECF No.  
28 53. Union then filed an objection to the Cicala declaration,  
arguing that it was filed in violation of Civil Local Rule 7-3(d),  
which limits the papers that parties may file once a reply has been  
submitted. ECF No. 54. The Court OVERRULES Union's objection.

1 summary judgment as to this claim.

2 In light of the fact that absolutely no meaningful discovery  
3 has taken place between Union and Mitsui, the Court DEFERS ruling  
4 on Union's Motion with regard to Plaintiff's accounting claim and  
5 gives Plaintiff the opportunity to cure the deficiency in its  
6 declaration. The Court grants Plaintiff fifteen (15) days leave to  
7 file an amended declaration in compliance with Rule 56(d) stating  
8 whether it intends to seek discovery with regard to its claim for  
9 accounting against Union, and if so, what information it seeks and  
10 how that information would preclude summary judgment as to the  
11 accounting claim against Union. If Plaintiff chooses to file such  
12 a declaration, the Court will take it under consideration in  
13 deciding whether summary judgment is appropriate as to Plaintiff's  
14 accounting claim against Union.<sup>7</sup> If Plaintiff chooses not to file  
15 such a declaration, then the Court will grant summary judgment in  
16 favor of Union as to Plaintiff's claim for accounting.

17 **C. Claims for Misrepresentation**

18 Mitsui alleges that Defendants misrepresented that many  
19 shipments had to be picked up from inland points of origin when in  
20 fact their customers delivered the cargo to the ports of departure.  
21 Thus, Mitsui contends it was forced to pay for trucking services  
22 that were never rendered. SAC ¶¶ 13-16.

23  
24 <sup>7</sup> In response to Plaintiff's original Rule 56(d) declaration, Union  
25 submitted a brief containing a response and objections to the  
26 declaration. ECF No. 54. Plaintiff then submitted a response to  
27 Union's response. ECF 56. Union then filed a reply to Plaintiff's  
28 response. ECF No. 58. The parties are hereby notified that, if  
Plaintiff chooses to file an amended declaration as discussed  
above, the Court will not entertain any additional filings  
pertaining to said declaration or to the issue of whether the Court  
should refrain from granting Union's motion pending the outcome of  
discovery.

1 Union argues summary judgment should be granted on these  
2 claims because Mitsui presents no evidence that Union made any  
3 representations at all concerning the alleged improper freight  
4 charges. Reply at 6. Mitsui contends that the bills of lading  
5 submitted by Union constitute evidence that Union was "well aware"  
6 of the improper billing practice. Union submitted bills of lading  
7 for seven shipments. See Kam Decl. Exs. A-G. For each shipment,  
8 it submitted two bills of lading -- one "master" bill of lading  
9 issued by Mitsui and one "house" bill of lading issued by  
10 Centurion. Id. In each case, Mitsui's master bill of lading  
11 indicates the "Place of receipt" for the shipment as "Shenzen -  
12 Door" and further indicates that "inld orgn" (inland origin,  
13 according to Mitsui) constituted a portion of the carriage. Id.  
14 By contrast, each of Centurion's house bills of lading indicates  
15 that the place of receipt was the port of departure -- either Hong  
16 Kong or Yantian. Id.

17 The elements of a cause of action for misrepresentation under  
18 California law are: "1) a misrepresentation (false representation,  
19 concealment, or nondisclosure); 2) knowledge of falsity (or  
20 scienter); 3) intent to defraud, i.e., to induce reliance; 4)  
21 justifiable reliance; and 5) resulting damage." Robinson  
22 Helicopter Co., Inc. v. Dana Corp., 34 Cal. 4th 979, 990 (2004).

23 While Union is correct that Mitsui presents no evidence of an  
24 affirmative representation made by Union, concealment and  
25 nondisclosure also qualify as misrepresentations under California  
26 law. Kam declares that Union "collected the amounts owed by the  
27 actual consignees and passed along the freight charges collected to  
28 Mitsui (per the Centurion invoice) and Centurion." Kam Decl. ¶ 4.

1 Viewed in the light most favorable to Mitsui, and making all  
2 justifiable inferences in its favor, the evidence creates a genuine  
3 issue of fact as to whether Union knew about the trucking charges  
4 and, when "pass[ing] along the freight charges" to Mitsui,  
5 concealed from Mitsui that the freight charges paid reflected non-  
6 existent trucking charges.

7           Accordingly, the Court DENIES Union's Motion with regard to  
8 Mitsui's misrepresentation claims.

9 ///

10 ///

11 ///

12 ///

13 ///

14 ///

15 ///

16 ///

17 ///

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 **V. CONCLUSION**

2 For the foregoing reasons, the Court DENIES the Motion for  
3 Summary Judgment filed by Defendant Union Logistics, Inc. against  
4 Plaintiff Mitsui O.S.K. Lines, LTD with regard to Plaintiff's  
5 claims for breach of contract, intentional misrepresentation, and  
6 negligent misrepresentation.

7 The Court DEFERS ruling on the Motion with regard to  
8 Plaintiff's claim for accounting and grants Plaintiff fifteen (15)  
9 days leave to file an amended declaration in compliance with Rule  
10 56(d) stating whether it intends to seek discovery with regard to  
11 its claim for accounting against Union, and if so, what information  
12 it seeks and how that information would preclude summary judgment  
13 as to the accounting claim against Union. If Plaintiff does not  
14 timely file such a declaration, then the Court will grant summary  
15 judgment in favor of Union as to Plaintiff's claim for accounting.

16

17 IT IS SO ORDERED.

18

19 Dated: November 21, 2011

20

  
UNITED STATES DISTRICT JUDGE

21

22

23

24

25

26

27

28