

United States District Court
For the Northern District of California

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

MITSUI O.S.K. LINES, LTD.,)	Case Nos. 10-cv-5591-SC
)	11-cv-2861-SC
Plaintiff,)	
)	ORDER RE: MOTION FOR
v.)	<u>PARTIAL SUMMARY JUDGMENT</u>
)	
SEAMASTER LOGISTICS, INC., SUMMIT)	
LOGISTICS INTERNATIONAL, INC.,)	
AMERICAN GLOBAL LOGISTICS, LLC,)	
KESCO CONTAINER LINE, INC., KESCO)	
SHIPPING, INC., and DOES 1 through)	
20,)	
)	
Defendants.)	
)	

I. INTRODUCTION

Now pending before the Court is the motion of Defendant American Global Logistics, LLC ("Defendant" or "AGL") for partial summary judgment against Plaintiff Mitsui O.S.K. Lines, Ltd. ("Plaintiff" or "MOL"). ECF No. 123 ("Mot.").¹ The motion is fully briefed and, pursuant to Civil Local Rule 7-1(b), suitable for decision without oral argument. ECF Nos. 133 ("Opp'n"), 144 ("Reply"). As set forth below, AGL's motion is GRANTED IN PART and DENIED IN PART.

¹ On December 7, 2012, the Court consolidated Case Nos. 10-cv-5591-SC and 11-cv-2861-SC for trial. This Order cites to the latter case's docket.

1 **II. BACKGROUND**

2 The following background facts are undisputed. The Shipping
3 Act of 1984, 46 U.S.C. §§ 40101 et seq. ("Shipping Act"), regulates
4 both vessel-operating common carriers ("VOCC") and non-vessel-
5 operating common carriers ("NVOCC"). VOCCs operate ships that
6 carry cargo over water between the United States and foreign
7 countries for pay. See 46 U.S.C. §§ 40102(6), (17). NVOCCs hold
8 themselves out as common carriers but do not themselves operate
9 vessels; they use VOCCs to carry cargo over water and hence are
10 shippers in their relationships to VOCCs. See id. § 40102(16).
11 VOCCs and NVOCCs may enter into service contracts whereby the
12 NVOCC, as shipper, commits to shipping a certain amount of cargo
13 over a period of time and the VOCC, as carrier, commits to giving
14 the shipper a certain rate and service level. See id. § 40102(20).
15 NVOCCs can also enter into service-contract-style arrangements
16 between themselves. See 46 C.F.R. §§ 531.1 et seq.

17 In addition to ocean shipping, both VOCCs and NVOCCs sometimes
18 contract to carry cargo overland. Carriage by truck or other means
19 either to or from a port -- that is, for the non-ocean portion of
20 the carriage -- is referred to as "inland carriage" or "drayage."
21 Carriage that includes both an inland and an ocean move is called
22 "through carriage" or "through transport." See 46 U.S.C. §
23 40102(25). Because VOCCs and NVOCCs can carry cargo over both land
24 and water, they may offer carriage from port to port, from "door to
25 door" (that is, from a shipment's inland point of origin to its
26 inland destination), or in combinations thereof.

27 Plaintiff MOL is a VOCC. All the named Defendants are NVOCCs.
28 The claims and allegations pertinent to the motion at bar relate to

1 shipments MOL undertook from southern China to the United States on
2 behalf of AGL, as well as Defendants SeaMaster Logistics, Inc.
3 ("SeaMaster") and Summit Logistics International, Inc. ("Summit").
4 See generally SAC ¶¶ 20-44.² MOL alleges that Defendants,
5 individually and in conspiracy with each other, misrepresented the
6 points of origin and/or delivery for thousands of shipments, that
7 MOL was obliged to pay for the inland carriage for these shipments,
8 and that the inaccurate representations caused MOL to overpay for
9 trucking moves that either never occurred or were shorter than
10 represented. See id. ¶¶ 24-25.

11 MOL alleges wrongdoing in both China and the United States.
12 In China, numerous shipments allegedly were represented to have
13 originated in Shenzhen when they actually originated, for
14 contractual purposes, at the port of egress.³ Id. ¶ 24. The
15 parties refer to this as the "Shenzhen trucking" scheme or
16 arrangement, as will the Court. In the United States, numerous
17 shipments allegedly were represented to require delivery further
18 away than the actual delivery address. Id. ¶ 25. MOL alleges that
19 AGL used a company called Expedited to make these deliveries. Id.
20 ¶ 27. AGL denies wrongdoing.

21 It is undisputed that, for at least 600 of the challenged
22 shipments, AGL was the consignee or "notify party," while SeaMaster
23

24 ² On December 7, 2012, the Court denied MOL's motion to file a
25 Third Amended Complaint. ECF No. 160. Hence, Plaintiff's
26 operative pleading is the Second Amended Complaint. ECF No. 72
27 ("SAC"). The SAC names additional defendants and asserts other
claims against non-AGL parties, but those claims and allegations do
not bear on AGL's motion.

28 ³ The parties sometimes refer to a port as the "container yard" or
"CY."

1 was the shipper with respect to MOL. Minck Decl. ¶ 5.⁴ For these
2 shipments, a U.S. buyer would hire AGL to move goods (for example,
3 furniture) from their place of manufacture in China to the buyer's
4 facility in the United States. See Briles Dep. 23:10-23. AGL, in
5 turn, had a Sales Agency and Destination Agent Agreement with
6 SeaMaster, under which AGL, as "sales" or "destination agent,"
7 would secure shipments for SeaMaster and SeaMaster would arrange
8 carriage for those shipments from China to the United States under
9 its (that is, SeaMaster's) service contract with MOL or another
10 VOCC. See Briles Dep. 30:2-4; Rosenberg Dep. 65:10-16; Pl.'s Ex.
11 143 (Sales Agency and Destination Agent Agreement ("Agr.")).
12 SeaMaster and AGL's Agreement identifies SeaMaster as the principal
13 in their relationship, see Agr., but the parties sometimes refer to
14 SeaMaster as the "overseas agent," see, e.g., Briles Dep. 44:13-24,
15 apparently in contrast to AGL's role as destination (that is,
16 domestic) agent. Nearly all of AGL's customers -- 99 percent --
17 ordered "FOB port" service, meaning that the Chinese seller was
18 responsible for delivery of the goods to the Chinese port, and
19 AGL's customer (hence, AGL) only took possession of the goods once
20 they were loaded on the ship in China. See Briles Dep. 23:10-11;
21 Rosenberg Dep. 32:12-14.

22 _____
23 ⁴ Warrin Minck (a senior internal auditor for MOL's American
24 division), Benjamin I. Fink (counsel for AGL), and Conte C. Cicala
25 (counsel for MOL) submitted declarations in connection with the
26 motion at bar. ECF Nos. 123-1 ("Fink Decl."), 134 ("Minck Decl."),
27 135 ("Cicala Decl."). Among other materials, Fink and Cicala both
28 included excerpts of transcripts of the depositions of Chad
Rosenberg (AGL's chief executive officer) and James Joseph Briles
III (AGL's chief operating officer). Fink Decl. Ex. A-1, Cicala
Decl. Ex. B ("Rosenberg Dep."); Fink Decl. Ex. A-2, Cicala Decl.
Ex. A ("Briles Dep."). Cicala included as part of the Rosenberg
Deposition excerpt various exhibits referenced in that deposition,
labeled as "Plaintiff's Exhibits."

1 AGL's booking of a shipment under the foregoing arrangement
2 would commence when the Chinese seller notified SeaMaster -- not
3 AGL -- that goods ordered by AGL's customer, the U.S. buyer, were
4 ready for shipment. See Briles Dep. 44:13-45:20. Every day,
5 SeaMaster's offices in China would prepare and send to AGL via
6 email a spreadsheet showing new bookings, called the "daily routing
7 guide." Id. The daily routing guide contained information
8 pertaining to the shipment's contents, destination, and port of
9 departure, as well as a recommended routing method and, usually,
10 applicable rates. Id. 43:15-18, 44:13-24, 46:11-47:7. However,
11 with one exception not relevant here, it did not contain
12 information about the shipment's inland point of origin, i.e., the
13 location of the Chinese manufacturer. Id. 47:8-20, 65:20-66:-8.

14 Inland origin information was contained, however, in bills of
15 lading for the shipments. Two sets of bills of lading were created
16 for each shipment. As VOCC, MOL issued a "master" bill of lading
17 which would be provided to MOL's customers, the NVOCCs -- that is,
18 SeaMaster and AGL. See Rosenberg Dep. 102:3-103:5. SeaMaster
19 issued a "house" bill of lading which MOL would not receive. See
20 id.; Minck Decl. ¶ 8. Both sets of bills of lading refer to the
21 shipment's point of origin as the "place of receipt" and the
22 shipment's final destination as the "place of delivery." E.g.,
23 Pl.'s Ex. 145. For the shipments involved in the alleged Shenzhen
24 trucking arrangement, the master bill of lading would indicate a
25 place of receipt of "Shenzhen - Door," while the house bill of
26 lading would show the place of receipt to be the Chinese port (for
27 instance, Yantian). See Briles Dep. 67:1-7, 68:16-69:17; Rosenberg
28 Dep. 102:3-103:5; see also, e.g., Pl.'s Exs. 145-48 (examples of

1 MOL's master and SeaMaster's house bills of lading). As stated
2 above, MOL declares that its records list AGL as consignee on at
3 least 600 such shipments. Minck Decl. ¶ 5. AGL received copies of
4 both sets of bills of lading by Federal Express or a similar
5 delivery service. Briles Dep. 53:11-54:4.

6 The SAC asserts the following five claims against AGL (as well
7 as SeaMaster and Summit): (1) intentional misrepresentation and (2)
8 conspiracy to intentionally misrepresent, or, in the alternative,
9 (3) negligent misrepresentation; and civil RICO violations under
10 (4) 18 U.S.C. § 1962(c) and (5) 18 U.S.C. § 1962(d). AGL's motion
11 for partial summary judgment seeks judgment in its favor on three
12 different grounds. First, AGL seeks dismissal of all claims to the
13 extent they are premised on AGL's alleged misrepresentations made
14 in the course of the alleged Shenzhen trucking scheme. Second, AGL
15 seeks dismissal of all claims premised on AGL's alleged
16 participation in a conspiracy. Third, AGL seeks dismissal of
17 Plaintiff's RICO claims. See Mot. at 3. AGL does not move for
18 summary judgment with respect to allegedly misrouted U.S. inland
19 carriage.

20

21 **III. LEGAL STANDARD**

22 Entry of summary judgment is proper "if the movant shows that
23 there is no genuine dispute as to any material fact and the movant
24 is entitled to judgment as a matter of law." Fed. R. Civ. P.
25 56(a). Summary judgment should be granted if the evidence would
26 require a directed verdict for the moving party. Anderson v.
27 Liberty Lobby, Inc., 477 U.S. 242, 251 (1986). "A moving party
28 without the ultimate burden of persuasion at trial -- usually, but

1 not always, a defendant -- has both the initial burden of
2 production and the ultimate burden of persuasion on a motion for
3 summary judgment." Nissan Fire & Marine Ins. Co., Ltd. v. Fritz
4 Companies, Inc., 210 F.3d 1099, 1102 (9th Cir. 2000). "In order to
5 carry its burden of production, the moving party must either
6 produce evidence negating an essential element of the nonmoving
7 party's claim or defense or show that the nonmoving party does not
8 have enough evidence of an essential element to carry its ultimate
9 burden of persuasion at trial." Id. "In order to carry its
10 ultimate burden of persuasion on the motion, the moving party must
11 persuade the court that there is no genuine issue of material
12 fact." Id. Summary judgment, however, is inappropriate "for
13 resolving claims that depend on credibility determinations." Earp
14 v. Ornoski, 431 F.3d 1158, 1170 (9th Cir. 2005).

15
16 **IV. DISCUSSION**

17 **A. Misrepresentation**

18 **1. Intentional Misrepresentation**

19 Under California law,⁵ the elements of intentional
20 misrepresentation (that is, fraud) are: "(1) a misrepresentation
21 (false representation, concealment, or nondisclosure); (2)
22 knowledge of falsity (or scienter); (3) intent to defraud, i.e., to
23 induce reliance; (4) justifiable reliance; and (5) resulting
24 damage." Robinson Helicopter Co., Inc. v. Dana Corp., 34 Cal. 4th
25

26 ⁵ AGL acknowledges in a footnote that the parties have not briefed
27 choice-of-law issues. Mot. at 11 n.7. Both sides then proceed to
28 argue MOL's non-federal claims using California law without further
discussion of choice of law. The parties have thus acquiesced to
the application of California law for the non-federal claims. See
Hatfield v. Halifax PLC, 564 F.3d 1177, 1184 (9th Cir. 2009).

1 979, 990 (Cal. 2004) (quoting Lazar v. Superior Court, 12 Cal. 4th
2 631, 638 (Cal. 1996)).

3 AGL argues that there is no evidence that it ever made false
4 representations to MOL about inland trucking movements, concealed
5 any facts about them, or even knew about such movements, and that
6 therefore MOL cannot prove the element of scienter. AGL emphasizes
7 the testimony of its executives Rosenberg and Briles, both of whom
8 claim to have learned of the Shenzhen trucking arrangement only
9 when this lawsuit was filed. Rosenberg Dep. 50:1-8, 104:4-7;
10 Briles Dep. 67:14-19. AGL also offers the declaration of Jerry
11 Huang, a SeaMaster executive, who asserts that he never discussed
12 the Shenzhen trucking arrangement with anyone at AGL and that he
13 "ha[s] no information that AGL learned of the [a]rrangement through
14 AGL's business relationship with SeaMaster." Huang Decl. ¶¶ 3-4.
15 AGL also points to Rosenberg and Briles's testimony to the effect
16 that no one at AGL noticed the discrepancy between the master and
17 house bills of lading or that MOL's master bill of lading stated
18 the place of receipt to be an inland "door" rather than, as one
19 would expect for FOB port service, the outgoing port. Rosenberg
20 Dep. 102:11-103:5, 103:17-104:3; Briles Dep. 67:1-12.⁶

21 The Court concludes that it cannot enter summary judgment for
22 AGL on the basis of the denials of Briles, Huang, and Rosenberg

23 _____
24 ⁶ AGL also emphasizes deposition testimony by MOL's chief executive
25 officer, Masaru Satose. Fink Decl. Ex. C ("Satose Dep."). AGL
26 characterizes Satose as having "confirmed" that AGL was unaware of
27 the Shenzhen trucking arrangement. Mot. at 8. Satose's testimony,
28 however, merely evinces Satose's unfamiliarity with AGL. See
Satose Dep. 170:4-7 (Satose stating "No" when asked if he is
"familiar with AGL" or "know[s] anything about AGL"). As Satose
concedes, he did not know whether AGL participated in trucking
movements in China. Id. 172:16-19. That hardly "confirms" AGL's
lack of participation. Satose's testimony neither implicates nor
exonerates AGL.

1 because doing so would require the Court to make a determination of
2 their credibility. "[S]ummary judgment is singularly inappropriate
3 where credibility is at issue." S.E.C. v. M & A W., Inc., 538 F.3d
4 1043, 1055 (9th Cir. 2008) (quoting S.E.C. v. Koracorp Indus.,
5 Inc., 575 F.2d 692, 699 (9th Cir. 1978)). Such issues are
6 appropriately resolved only after a trial or evidentiary hearing.
7 Id. Here, the Court has no reason to doubt the credibility of
8 Briles, Huang, or Rosenberg, but neither has the Court had an
9 opportunity to examine them and gauge their veracity.

10 AGL also argues that it is entitled to summary judgment on
11 MOL's fraud claim because AGL never made any affirmative
12 representation to MOL regarding the place of receipt for shipments
13 implicated in the Shenzhen trucking arrangement; thus, AGL argues,
14 MOL cannot establish the element of misrepresentation. MOL
15 indicates, however, that it rests its fraud claim on a theory of
16 nondisclosure and concealment, specifically, AGL's nondisclosure
17 and alleged concealment of the discrepancy in the two sets of bills
18 of lading. Opp'n at 8-9.

19 Ordinarily, nondisclosures are not actionable under California
20 law unless a confidential or fiduciary relationship between the
21 parties gives rise to an affirmative duty to disclose. See Goodman
22 v. Kennedy, 18 Cal. 3d 335, 346-47 (Cal. 1976); 5 Witkin, Summary
23 10th (2005) Torts § 794. However, even in the absence of such a
24 relationship, a duty to disclose can arise "when the defendant
25 ha[s] exclusive knowledge of material facts not known to the
26 plaintiff" or "when the defendant actively conceals a material fact
27 from the plaintiff." Jones v. ConocoPhillips, 198 Cal. App. 4th
28 1187, 1199 (2011), review denied (Nov. 30, 2011) (alteration in

1 original) (internal quotation marks omitted). Neither party
2 disputes that AGL had both sets of bills of lading, that MOL had
3 only one, and that AGL did not affirmatively notify MOL of the
4 discrepancy between the two. MOL frames this nondisclosure as an
5 act of concealment or suppression. SAC ¶ 64; Opp'n at 8, 8 n.6.
6 Under California law, the elements of fraudulent concealment are:

- 7 (1) the defendant concealed a material fact;
8 (2) the defendant was under a duty to disclose
9 the fact to the plaintiff; (3) the defendant
10 concealed or suppressed the fact with an intent
11 to defraud; (4) the plaintiff was unaware of
the fact and would have acted if he or she had
known about it; and (5) the concealment caused
the plaintiff to sustain damage.

12 Williamson v. Gen. Dynamics Corp., 208 F.3d 1144, 1156 n.3 (9th
13 Cir. 2000).

14 MOL identifies AGL's false positive assertion as an assertion
15 that the shipments originated from "Shenzhen - Door" when in fact
16 they did not, and AGL's concealment as its failure to disclose that
17 the drayage in China consisted of container yard moves rather than
18 shipments from inland factories. Uncontroverted evidence strongly
19 suggests that the daily routing guide received by AGL from
20 SeaMaster does not identify the shipment's point of origin. Briles
21 Dep. 47:8-20, 65:20-66:-8. Thus, the claim of nondisclosure and
22 concealment must be premised on the mismatched bills of lading.

23 The Court observes that the fact that the bills of lading
24 contained a mismatch may not be enough to establish AGL's actual
25 knowledge of the mismatch. AGL, after all, denies having read the
26 bills of lading and offers testimony that it had no reason to do
27 so. Briles Dep. 68:16-69:7; Rosenberg Dep. 103:17-104:3. MOL
28 suggests that constructive knowledge of the bills of ladings'

1 contents may be imputed to AGL.⁷ However, the leading California
2 cases addressing the "exclusive knowledge" species of nondisclosure
3 appear to involve actual knowledge of the undisclosed facts, as
4 opposed to merely constructive knowledge.⁸ MOL has not cited any
5 case standing for the proposition that a party has a duty to
6 disclose facts of which it has only constructive knowledge.
7 Neither does MOL say how constructive knowledge could satisfy
8 California law's requirement that the defendant know the
9 materiality of the omitted fact. See Goodman, 18 Cal. 3d at 347.

10 MOL comes closer to the mark when it cites regulations
11 promulgated by the Federal Maritime Commission to implement
12 provisions of the Shipping Act. See Opp'n at 5-6. As MOL notes,
13 these regulations provide, in pertinent part:

14 (e) False or fraudulent claims, false
15 information. No licensee shall prepare or file
16 or assist in the preparation or filing of any
17 claim, affidavit, letter of indemnity, or other
18 paper or document concerning an ocean
19 transportation intermediary transaction which
20 it has reason to believe is false or
fraudulent, nor shall any such licensee
21 knowingly impart to a principal, shipper,
22 common carrier or other person, false
23 information relative to any ocean
24 transportation intermediary transaction.

21 ⁷ See Opp'n at 9-10 (stating that "accurate information reflecting
22 both the origin and destination of each shipment was contained in
23 the NVOCC house bill of lading" and concluding that "AGL clearly
24 knew that the 'Shenzhen door' place of receipt reflected in MOL's
bill of lading was false"); see also id. at 16-18 (arguing, in the
context of MOL's negligent misrepresentation claim, that AGL had
constructive knowledge of the contents of the bills of lading).

25 ⁸ See De Spirito v. Andrews, 151 Cal. App. 2d 126, 130-31 (Cal. Ct.
26 App. 1957); Lingsch v. Savage, 213 Cal. App. 2d 729, 735-37 (Cal.
27 Ct. App. 1963); Massei v. Lettunich, 248 Cal. App. 2d 68, 72-73
28 (Cal. Ct. App. 1967); Goodman v. Kennedy, 18 Cal. 3d 335, 347-48
(Cal. 1976); Wells v. John Hancock Mut. Life Ins. Co., 85 Cal. App.
3d 66, 70-73 (Cal. Ct. App. 1978); Magpali v. Farmers Group, Inc.,
47 Cal. App. 4th 1024, 482 (Cal. Ct. App. 1996); see also 5 Witkin,
Summary 10th (2005) Torts § 796.

1 (f) Errors and omissions of the principal or
2 shipper. A licensee who has reason to believe
3 that its principal or shipper has not, with
4 respect to a shipment to be handled by such
5 licensee, complied with the laws of the United
6 States, or has made any error or
7 misrepresentation in, or omission from, any
8 export declaration, bill of lading, affidavit,
9 or other document which the principal or
shipper executes in connection with such
shipment, shall advise its principal or shipper
promptly of the suspected noncompliance, error,
misrepresentation or omission, and shall
decline to participate in any transaction
involving such document until the matter is
properly and lawfully resolved.

10 46 C.F.R. § 515.31(e)-(f) (emphases added). These regulations put
11 licensees like AGL under an affirmative obligation to refrain from
12 preparing documents containing false information (provided the
13 licensee has reason to believe it is false) and refrain from
14 imparting false information (provided that is done knowingly), as
15 well as to point out errors, misrepresentations, or omissions in,
16 inter alia, bills of lading (provided the licensee has reason to
17 believe the document contains such inaccuracies). AGL's response
18 appears to be that it did not know, and had no reason to know, of
19 any falsities or omissions in the bills of lading. However, that
20 position rests on Briles and Rosenberg's denials that AGL read or
21 knew the contents of the bills of lading. As explained above, the
22 Court cannot credit those denials without impermissibly making a
23 credibility determination.

24 The parties raise a number of other, ancillary arguments and
25 matters in connection with this claim, but the Court need not
26 address them.⁹ AGL's motion for summary judgment on this claim is

27 ⁹ Among the ancillary matters raised by the parties is an
28 arbitration award first discussed by MOL in its opposition, and
further discussed by AGL in its reply. MOL objected to AGL's

1 ultimately premised on the credibility of Briles and Rosenberg's
2 denials and, because the Court cannot rely on credibility
3 determinations to enter summary judgment, the Court DENIES AGL's
4 motion for partial summary judgment as to MOL's claim for
5 intentional misrepresentation in connection with the Shenzhen
6 trucking arrangement.

7 **2. Negligent Misrepresentation**

8 Negligent misrepresentation differs from fraud in that it
9 "does not require scienter or intent to defraud." See Small v.
10 Fritz Companies, Inc., 30 Cal. 4th 167, 173-74 (Cal. 2003) (quoting
11 Gagne v. Bertran, 43 Cal. 2d 481, 487-488 (Cal. 1954)). Negligent
12 misrepresentation

13 encompasses "[t]he assertion, as a fact, of
14 that which is not true, by one who has no
15 reasonable ground for believing it to be true"
16 and "[t]he positive assertion, in a manner not
warranted by the information of the person
making it, of that which is not true, though he
believes it to be true."

17 Id. at 174 (quoting Cal. Civ. Code §§ 1710(2), 1572(2))
18 (alterations in original; citations omitted). In California,
19 negligent misrepresentation further differs from intentional
20 misrepresentation in that, while certain nondisclosures may support
21 a claim for intentional misrepresentation, a negligent
22 misrepresentation claim requires a "positive assertion," and hence
23 "omissions" -- that is, nondisclosures -- cannot give rise to
24 liability for negligent misrepresentation. Lopez v. Nissan N. Am.,

25 discussion of the arbitration award on the ground that AGL should
26 not be permitted to raise new arguments on reply. ECF No. 151.
27 AGL filed a response to the objection. ECF No. 162. Because the
28 Court disposes of the instant motion without needing to refer to
the matters that are subject of MOL's objection (matters that the
Court finds largely irrelevant), the objection is moot and hence
OVERRULED.

1 Inc., 201 Cal. App. 4th 572, 596 (Cal. Ct. App. 2011), reh'g denied
2 (Dec. 30, 2011), review withdrawn (Mar. 14, 2012); Wilson v.
3 Century 21 Great W. Realty, 15 Cal. App. 4th 298, 306 (Cal. Ct.
4 App. 1993). This difference makes an admittedly counterintuitive
5 result possible under California law: The same failure to disclose
6 may support a claim for intentional misrepresentation but not
7 negligent misrepresentation.¹⁰

8 In the case at bar, MOL argues that language in MOL's bill of
9 lading and waybills resulted in AGL's being liable in tort for the
10 truth of the information contained in those bills of lading. The
11 argument relies on three provisions in MOL's combined transport
12 bill of lading. First, the bill of lading defines "Merchant" to
13 include the "Consignee" of goods shipped under that bill. Minck
14 Decl. ¶ 9, Ex. A at 1. There is no dispute that AGL was listed as
15 the consignee and notify party on many of the shipments implicated
16 in the Shenzhen trucking arrangement. Second, the bill of lading
17 states that that "[a]ll of the [p]ersons coming within the
18 definition of Merchant . . . shall be jointly and severally liable
19 to the Carrier for the due fulfillment of all obligations of the
20 Merchant in this Bill of Lading." Minck Decl. ¶ 9, Ex. A at 6.
21 Third, the bill of lading states that the "Merchant warrants to the
22 Carrier [i.e., to MOL] that the particulars relating to the Goods
23 as set out overleaf have been checked by the Merchant on this Bill
24 of Lading and that such particulars and any other particulars

25 _____
26 ¹⁰ Cf. Lopez, 201 Cal. App. 4th at 596 (noting that claim for
27 negligent misrepresentation cannot be based on an omission, but
28 claim for intentional misrepresentation can); Oakland Raiders v.
Oakland-Alameda Cnty. Coliseum, Inc., 144 Cal. App. 4th 1175, 1184
(Cal. Ct. App. 2006) (torts of intentional and negligent
misrepresentation are "separate and distinct").

1 furnished by or on behalf of the Shipper are accurate and correct."
2 Minck Decl. ¶ 9, Ex. A at 6-7. In summary, the bill of lading
3 purports to impose joint and several liability on non-shippers like
4 AGL for representations made by shippers like SeaMaster. MOL asks
5 the Court to conclude that this language makes AGL responsible for
6 the false "positive assertions" of fact that made their way into
7 the master bills of lading.

8 MOL cites a number of cases addressing the binding effect of
9 bills of lading on consignees like AGL, Opp'n at 5 n.4, but the
10 Court finds them inapplicable to the matter of tort liability. The
11 cases speak to different legal issues than the one presented here,
12 for instance, whether language like that contained in MOL's
13 waybills can support joint and several liability for unpaid freight
14 charges, whether the shipping rates set forth in tariffs are
15 enforceable in contract, or whether the terms in a short-form bill
16 of lading may incorporate the terms of a long-form bill of lading.
17 That is, all of the cases address points of contract law. The
18 Court finds no support in those cases, however, for the proposition
19 that the language in MOL's bill of lading can result in joint and
20 several liability in tort. Neither has MOL marshaled any authority
21 to demonstrate that a failure to comply with the Federal Maritime
22 Commission regulations discussed in the previous section can
23 support liability in tort (assuming for the sake of argument that
24 AGL did so fail).

25 In the absence of any evidence that AGL itself positively but
26 inaccurately asserted the place of receipt for the shipments
27 implicated in the Shenzhen trucking arrangement, California law
28

1 entitles AGL to summary judgment on MOL's negligent
2 misrepresentation claim.¹¹

3 Accordingly, AGL's motion for summary judgment is GRANTED with
4 respect to the negligent misrepresentation claim.¹²

5 **B. Conspiracy**

6 In addition to its misrepresentation claims against AGL, MOL
7 also asserts a claim for conspiring to commit fraud. SAC ¶¶ 68-73.
8 MOL names Seamaster and Summit in this claim, in addition to AGL.
9 Id. Under California law, civil "[c]onspiracy is not a cause of
10 action, but a legal doctrine that imposes liability on persons who,
11 although not actually committing a tort themselves, share with the
12 immediate tortfeasors a common plan or design in its perpetration."
13 Applied Equip. Corp. v. Litton Saudi Arabia Ltd., 7 Cal. 4th 503,
14 510-11 (Cal. 1994). Thus, a claim for civil conspiracy rests on
15 the "commission of an actual tort." Id. at 511. Assuming such a
16 tort occurs, the elements of civil conspiracy under California law
17 are: "[1] formation and operation of the conspiracy, [2] wrongful
18 act or acts done pursuant thereto, and [3] damage." Cnty. of Marin
19 v. Deloitte Consulting LLP, 836 F. Supp. 2d 1030, 1045 (N.D. Cal.
20 2011) (citing Mosier v. S. California Physicians Ins. Exch., 63
21 Cal. App. 4th 1022, 1048 (Cal. Ct. App. 1998)).

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24 ¹¹ The Court held to the contrary in Mitsui O.S.K. Lines, Ltd. v.
25 Allied Transp. Sys. (USA), Inc., 10-5586 SC, 2011 WL 5861642, at
*5-6 (N.D. Cal. Nov. 22, 2011). In that case, however, the moving
party did not distinguish between intentional and negligent
misrepresentation.

26 ¹² In the absence of evidence of any positive assertion by AGL, the
27 Court need not, and does not, reach MOL's argument that the rate
28 AGL received on the shipments implicated in the Shenzhen trucking
arrangement should have alerted it that it was getting a deal "too
good to be true." See Opp'n at 18.

1 Here, AGL seeks summary judgment as to MOL's claim that it
2 conspired in the Shenzhen trucking fraud on the ground that MOL has
3 produced no evidence that AGL knew of or participated in such a
4 conspiracy. MOL responds by citing to excerpts of the deposition
5 testimony of Jerry Huang, the SeaMaster executive. Cicala Decl.
6 Ex. C. ("Huang Dep.") 226:4-237:11. In his deposition, Huang
7 appeared to admit to knowledge of the Shenzhen trucking
8 arrangement. However, although Huang discussed in his deposition
9 various interactions between Summit, Seamaster, an MOL employee
10 named Michael Yip (whom MOL claims participated in the fraudulent
11 scheme), and a trucking company called Rainbow, Huang never
12 mentioned AGL. MOL asks the Court to read Huang's deposition
13 testimony as an admission of the existence of a conspiracy to
14 defraud MOL and then to infer from AGL's identification on bills of
15 lading as consignee and notify party that AGL knew of and
16 participated in the conspiracy. MOL is entitled to favorable
17 reasonable inferences, but that is a leap too far. Essentially,
18 AGL carried its initial burden of production by showing that MOL
19 lacks sufficient evidence to establish the "knowledge and
20 participation" element of its conspiracy claim. See Nissan Fire &
21 Marine, 210 F.3d at 1102. MOL therefore must "produce enough
22 evidence to create a genuine issue of material fact." Id. at 1103.
23 The only evidence MOL has produced as to AGL's awareness of the
24 conspiracy is evidence which does not mention AGL at all. At best,
25 MOL produces evidence of a conspiracy involving similarly situated,
26 but different, parties. This mere "scintilla" of evidence is not
27 enough to avoid summary judgment. See Anderson, 477 U.S. at 252.

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1 Accordingly, the Court GRANTS AGL's motion for summary
2 judgment as to MOL's claim for conspiracy to commit fraud in
3 connection with the Shenzhen trucking scheme.

4 **C. RICO**

5 The civil RICO statute provides:

6 It shall be unlawful for any person employed by
7 or associated with any enterprise engaged in,
8 or the activities of which affect, interstate
9 or foreign commerce, to conduct or participate,
10 directly or indirectly, in the conduct of such
 enterprise's affairs through a pattern of
 racketeering activity or collection of unlawful
 debt.

11 18 U.S.C. § 1962(c). "To state a claim under § 1962(c), a
12 plaintiff must allege '(1) conduct (2) of an enterprise (3) through
13 a pattern (4) of racketeering activity.'" Odom v. Microsoft Corp.,
14 486 F.3d 541, 547 (9th Cir. 2007) (quoting Sedima, S.P.R.L. v.
15 Imrex Co., Inc., 473 U.S. 479, 496 (1985)).

16 Though the parties submit arguments pertaining to each element
17 of MOL's § 1962(c) claim, the Court concludes that it need proceed
18 no further than the first element, "conduct." "The conduct
19 requirement under § 1962(c) means that '[i]n order to "participate,
20 directly or indirectly, in the conduct of such enterprise's
21 affairs," one must have some part in directing those affairs."
22 Eclectic Properties E., LLC v. The Marcus & Millichap Co., C-09-
23 00511 RMW, 2012 WL 713289, at *6 (N.D. Cal. Mar. 5, 2012)
24 (alteration in original) (quoting Reves v. Ernst & Young, 507 U.S.
25 170, 179 (1993)). Under this "operation and management" test,
26 first articulated in Reves, "[s]imply performing services for the
27 enterprise does not rise to the level of direction, whether one is
28 'inside' or 'outside,'" that is, part or not part of the

1 enterprise. Walter v. Drayson, 538 F.3d 1244, 1249 (9th Cir.
2 2008).

3 Here, MOL offers insufficient evidence to raise a triable
4 issue of material fact as to whether AGL had "some part in
5 directing" the enterprise. MOL points to "the historical
6 relationship of the participants in the [alleged] fraudulent
7 activity," and submits evidence that Huang and Rosenberg, now
8 executives of SeaMaster and AGL, respectively, had business
9 dealings from 1998 to 2006, as executives of companies called Hecny
10 and Global Link, respectively. Opp'n at 20 (citing Rosenberg Dep.
11 12:11-13:19, 14:4-8). MOL describes AGL as having hired SeaMaster
12 in 2008 to perform substantially the same role that Hecny performed
13 for Global Link. Id. at 20-21 (citing Rosenberg Dep. 43:25-44:12;
14 Pl.'s Ex. 143).¹³ MOL then describes a "parallel" enterprise
15 involving Defendants Kesco and Summit, but not AGL. Id. at 21.
16 MOL notes that SeaMaster is part of the Summit group of companies.
17 Id.

18 None of this explains how AGL has "some part in directing" the
19 enterprise's affairs. At most, it suggests that AGL may have been
20 part of an enterprise. But merely being part of the enterprise is
21 not enough. See Walter, 538 F.3d at 1249. Even providing services
22 that benefit the enterprise is not enough. See Univ. of Maryland
23 at Baltimore v. Peat, Marwick, Main & Co., 996 F.2d 1534, 1539 (3d
24 Cir. 1993); see also Baumer v. Pacht, 8 F.3d 1341, 1345 (9th Cir.

25 ¹³ Rosenberg himself, however, did not come to work for AGL until
26 2009 and thus was not employed by AGL at the time AGL hired
27 SeaMaster through Huang, as MOL itself notes. Opp'n at 14 (citing
28 Rosenberg Dep. 41:18-25). MOL asserts, without citing to evidence,
that "Global Link's former management team, now operating AGL,
clearly continued [Global Link's] fraudulent schemes relating to
MOL shipments." Id.

1 1993) (citing Univ. of Maryland with approval). In short, even if
2 the Court assumes that AGL participated in the asserted RICO
3 enterprise, MOL offers no evidence that AGL had any part in
4 operating or managing it. In considering what activities satisfy
5 Reves's "operation and management" test, the Ninth Circuit has
6 looked at whether a party: gives or takes direction in the
7 enterprise; "occup[ies] a position in the chain of command" of the
8 enterprise; "knowingly implements decisions" of the enterprise; or
9 is "indispensable to achievement of the enterprise's goal." See
10 Walter, 538 F.3d at 1249. MOL offers no evidence on these points.
11 MOL relies on evidence of the existence of a longstanding business
12 relationship between a principal of AGL and a principal of
13 SeaMaster. That is not enough to establish RICO "conduct." The
14 considerations raised in the Court's discussion of MOL's conspiracy
15 claim also apply here. See Section IV.B supra. MOL's evidence
16 suggests, at best, a parallel enterprise involving companies
17 similarly situated to, but different from, AGL.

18 MOL makes much of the conduct of Global Link, a now-defunct
19 entity formerly helmed by Rosenberg which is not a party to this
20 lawsuit. See Opp'n at 13-14. MOL asserts that evidence pertaining
21 to Global Link is admissible under Federal Rule of Evidence
22 404(b)(2) to show "motive, opportunity, intent, preparation, plan,
23 knowledge, identity, absence of mistake[,] or lack of accident."
24 Opp'n at 14 n.10. Assuming without deciding that (1) the evidence
25 would be admissible for that purpose and (2) that the evidence
26 establishes that Rosenberg used Global Link to commit RICO
27 violations against MOL, it still would not show that Rosenberg or
28 AGL directed any RICO enterprise in this case.

1 MOL cites two out-of-circuit cases for the proposition that
2 "[i]t is not necessary to prove that every member of the enterprise
3 participated in or knew about all of its activities." Opp'n at 20
4 (internal quotation marks omitted) (citing United States v.
5 Cagnina, 697 F.2d 915, 922 (11th Cir. 1983); United States v.
6 Rastelli, 870 F.2d 822, 827-28 (2d Cir. 1989)). That proposition
7 holds in the situations where it applies, but this is not one of
8 those situations. The cited discussions in Cagnina dealt with the
9 requirements for alleging the existence of an enterprise -- a
10 separate consideration from showing "conduct" under Reves's
11 "operation and management" test. Rastelli addressed what the
12 government must prove in a criminal RICO case to prove a RICO
13 conspiracy (as compared to the non-conspiracy civil claim arising
14 under § 1962(c)). Neither case addresses the issue of "conduct"
15 that is relevant here.

16 In conclusion, MOL has not carried its burden of showing a
17 triable issue of material fact as to the "conduct" requirement of
18 its § 1962(c) claim. Accordingly, the Court GRANTS AGL's motion
19 for partial summary judgment as to that claim.

20 MOL also asserts a § 1962(d) claim against, inter alia, AGL.
21 Section 1962(d) simply proscribes conspiring to commit RICO
22 violations and thus depends on the viability of an underlying RICO
23 claim. See Howard v. Am. Online Inc., 208 F.3d 741, 751 (9th Cir.
24 2000). None being present here, AGL is entitled to summary
25 judgment as to MOL's § 1962(d) claim. The absence of evidence of
26 conspiracy also supports entry of summary judgment on this claim.
27 See Section IV.B supra. Accordingly, the Court GRANTS AGL's motion
28 for partial summary judgment as to MOL's § 1962(d) claim.

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V. CONCLUSION

For the foregoing reasons, the Court PARTIALLY GRANTS and PARTIALLY DENIES the motion of Defendant American Global Logistics, LLC for partial summary judgment. Plaintiff Mitsui O.S.K. Lines, Ltd.'s claims for negligent misrepresentation, conspiracy to intentionally misrepresent, civil RICO violations, and civil RICO conspiracy are DISMISSED as to AGL. Plaintiff's claim for intentional misrepresentation remains undisturbed as to AGL.

IT IS SO ORDERED.

Dated: December 19, 2012


UNITED STATES DISTRICT JUDGE