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10 GLOBAL MARKETING SYSTEMS, INC.

11
12 BEFORE THE
13 UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
14 REGION IX
15 75 HAWTHORNE STREET
16 SAN FRANCISCO, CALIFORNIA 94105

17 IN THE MATTER OF:) Docket No. TSCA-09-2008-0003
18 Global Shipping LLC and)
19 Global Marketing Systems, Inc.) **ANSWER TO ADMINISTRATIVE**
20) **COMPLAINT**
21) **AND**
22 Respondents.) **REQUEST FOR HEARING**

23 **SERVING PARTY: UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

24 **RESPONDING PARTY: GLOBAL SHIPPING LLC**

25 Respondent Global Marketing Systems, Inc. ("GMS") answers the United States
26 Environmental Protection Agency's ("EPA") civil administrative complaint as follows:

27 **APPLICABLE STATUTORY AND REGULATORY SECTIONS**

28 1 GMS admits that EPA has promulgated regulations at 40 C.F.R. Part 761;
GMS lacks knowledge or information sufficient to form a belief as to the truth of the
remaining allegations of Paragraph 1.

2-14. The allegations of Paragraphs 2 through 14 state legal conclusions that do
not require a response.

GENERAL ALLEGATIONS

15. GMS incorporates by reference its responses to the allegations contained in

1 Paragraphs 1-14.

2 16. GMS admits that it is a corporation; GMS lacks knowledge or information
3 sufficient to form a belief as to the truth of the allegations of Paragraph 16 insofar as they
4 relate to the status of the other respondent. The remaining allegations of Paragraph 16 state
5 legal conclusions that do not require a response.

6 17. GMS denies that it is classified in Standard Industrial Classification (“SIC”)
7 code 5088. GMS lacks knowledge or information sufficient to form a belief as to the truth
8 of the allegations of Paragraph 17 insofar as they relate to the other respondent. GMS
9 denies that SIC code 5088 is the SIC code for Whole Ships for Scrap or that a code for
10 “Whole Ships for Scrap” would necessarily be the correct SIC code for GMS.

11 18. GMS admits that the M/V OCEANIC (“OCEANIC”) was formerly known
12 as the SS INDEPENDENCE, however lacks knowledge or information sufficient to form a
13 belief as to exactly when the OCEANIC was constructed, and denies the remaining
14 allegations of Paragraph 18.

15 19. GMS lacks knowledge or information sufficient to form a belief as to the
16 truth of the allegations of Paragraph 19.

17 20. GMS lacks knowledge or information sufficient to form a belief as to the
18 truth of the allegations of Paragraph 20.

19 21. GMS lacks knowledge or information sufficient to form a belief as to the
20 truth of the allegations of Paragraph 21.

21 22. GMS lacks knowledge or information sufficient to form a belief as to the
22 truth of the allegations of Paragraph 22.

23 23. GMS admits that at least from July 13, 2007 through February 8, 2008 the
24 OCEANIC was berthed in San Francisco Bay at or in the vicinity of Pier 70, San Francisco,
25 California; GMS lacks knowledge or information to form a belief as to the truth of the
26 remaining allegations of Paragraph 23.

27 24. GMS denies the allegations of Paragraph 24.

28 25. The allegations of Paragraph 25 state legal conclusions that do not require a

1 response; to the extent the paragraph alleges facts, GMS denies such facts.

2 26. GMS denies that it purchased the OCEANIC but admits that in or around
3 January or February 2008, GSL hired the tugboat PACIFIC HICKORY to tow the
4 OCEANIC from California to a location outside of the jurisdiction of the United States.
5 GMS denies the remaining allegations of Paragraph 26.

6 27. GMS admits that on February 8, 2008, the PACIFIC HICKORY began
7 towing the OCEANIC to a location outside the United States. GMS denies the remaining
8 allegations of Paragraph 27.

9 28. GMS admits the allegations of Paragraph 28.

10 29. GMS lacks knowledge or information sufficient to form a belief as to the
11 truth of the allegations of Paragraph 29.

12 30. The allegations of Paragraph 30 state legal conclusions that do not require a
13 response; to the extent the paragraph alleges facts, GMS denies such facts.

14 **COUNT I: Distribution of PCBs in Commerce**

15 31. GMS incorporates by reference its responses to the allegations contained in
16 Paragraphs 1-30.

17 32. GMS denies the allegations of Paragraph 32.

18 33. GMS denies the allegations of Paragraph 33.

19 34. GMS states that the allegations of this paragraph are so vague and
20 ambiguous that GMS cannot understand what EPA is alleging, that the allegations appear to
21 assume that there are PCBs and PCB Items in commerce in relation to the OCEANIC,
22 which GMS denies, and that, to the extent Paragraph 34 makes other allegations of fact,
23 GMS denies such facts.

24 35. The allegations of Paragraph 35 state legal conclusions that do not require a
25 response; to the extent the paragraph alleges facts, GMS denies such facts.

26 36. The allegations of Paragraph 36 state legal conclusions that do not require a
27 response; to the extent the paragraph alleges facts, GMS denies such facts.

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1 **COUNT II: Export of PCBs and PCB Items for Disposal**

2 37. GMS incorporates by reference its responses to the allegations contained in
3 Paragraphs 1-36.

4 38. GMS denies the allegations of Paragraph 38.

5 39. GMS admits that as of this date, GSL has not returned the OCEANIC to the
6 United States. GMS denies that, as agent for GSL, GMS has the ability to return, or direct
7 the return, of the vessel. GMS denies the remaining allegations of Paragraph 39.

8 40. The allegations of Paragraph 40 state legal conclusions that do not require a
9 response; to the extent the paragraph alleges facts, GMS denies such facts.

10 41. The allegations of Paragraph 41 state legal conclusions that do not require a
11 response; to the extent the paragraph alleges facts, GMS denies such facts.

12 **DEFENSES AND OTHER GROUNDS FOR DISMISSAL**

13 **FIRST DEFENSE**

14 1. The Civil Administrative Complaint fails to state facts sufficient to warrant the
15 assessment of civil penalties against GMS.

16 **SECOND DEFENSE**

17 2. The Civil Administrative Complaint is fatally flawed in that it fails to adequately
18 describe the relief sought against GMS, including a description of the number of alleged violations
19 for which a penalty is sought and a brief explanation of the severity of each violation, as required
20 by 40 C.F.R. § 22.14(a)(4).

21 **THIRD DEFENSE**

22 3. The assessment of civil penalties against GMS is barred by the doctrines of
23 waiver and estoppel, in that, among other things, the EPA has never before sought to
24 impose such penalties in connection with the sale and holding of the OCEANIC, including
25 the sale of the vessel to California Manufacturing Corporation in or around 2003, and the
26 holding of that vessel by that company from 2003 through 2007.

27 **FOURTH DEFENSE**

28 4. The assessment of civil penalties against GMS is barred by the doctrine of

1 laches.

2 **FIFTH DEFENSE**

3 5. GMS is exempt from the assessment of civil penalties under 40 C.F.R.
4 § 761.20(c)(1), in that the OCEANIC was sold for purposes other than resale prior to July 1,
5 1979, and, on information and belief, if there are any PCBs or PCB Items on the ship with
6 PCB concentrations of 50 ppm or greater, such PCBs or PCB Items are maintained in a
7 totally enclosed manner.

8 **SIXTH DEFENSE**

9 6. GMS's purchase and holding of the OCEANIC from July 2007 through
10 February 2008 does not constitute "distribution in commerce," as that term is defined by
11 TSCA § 3, 15 U.S.C. § 2602(4), and 40 C.F.R. § 761.3, in that such purchase and holding
12 neither involved nor affected trade, traffic, transportation, or other commerce between a
13 place in a State and a place outside of such State, as required by TSCA § 3, 15 U.S.C.
14 § 2602(3), and 40 C.F.R. § 761.3.

15 **SEVENTH DEFENSE**

16 7. GMS's purported export of the OCEANIC for delivery and/or alleged
17 disposal outside the United States is outside the reach of the TSCA "distribution in
18 commerce" regulations in that such a transaction does not present an unreasonable risk of
19 injury to health within the United States or to the environment within the United States, as
20 required by TSCA § 12, 15 U.S.C. § 2611.

21 **EIGHTH DEFENSE**

22 8. EPA is selectively enforcing TSCA "export for disposal" and "distribution in
23 commerce" regulations for PCBs and PCB Items against GMS, given that, since the
24 enactment of TSCA and its implementing regulations, on information and belief, numerous
25 ships containing PCBs and PCB Items have been bought, sold, and held by numerous
26 entities, and EPA has not initiated comparable enforcement actions against the other entities
27 who have bought, sold, and held such ships.

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1 **NINTH DEFENSE**

2 9. GMS did not export the OCEANIC or any PCBs or PCB Items contained on
3 the vessel when it removed the OCEANIC from San Francisco harbor.

4 **TENTH DEFENSE**

5 10. GMS did not export for disposal the OCEANIC or any PCBs or PCB Items
6 contained on the vessel when it removed the OCEANIC from San Francisco harbor.

7 **ELEVENTH DEFENSE**

8 11. EPA cannot permissibly impose a civil penalty on GMS, given that,
9 (a) TSCA and its implementing regulations do not expressly prohibit the purchase, sale,
10 holding, or recycling of ships that may contain PCBs in particular ship components; (b) as
11 of the time of EPA's initiation of this Administrative Complaint, there had not been a single
12 reported judicial decision holding that the activities of which EPA complains in the
13 Administrative Complaint are contrary to TSCA and its implementing regulations;
14 (c) because TSCA and its implementing regulations do not expressly prohibit such
15 activities, TSCA and its implementing regulations do not provide fair notice to entities
16 seeking to engage in such activities that such activities are prohibited by TSCA; and
17 (d) because TSCA and its implementing regulations do not expressly prohibit such
18 activities, TSCA and its implementing regulations do not provide fair notice such as would
19 justify commencement of an Administrative Complaint or the assessment of a civil penalty.

20 **TWELFTH DEFENSE**

21 12. GSL's purchase and holding of the OCEANIC from July 2007 through
22 February 2008 and its subsequent sale has not created an "unreasonable risk of injury to
23 health or the environment," 15 U.S.C. § 2601(a)(2), and therefore has not violated the
24 policy underlying TSCA.

25 **THIRTEENTH DEFENSE**

26 13. EPA's enforcement action violates the underlying congressional policy that
27 the act be carried out in a "reasonable and prudent manner" including consideration of "the
28 environmental, economic, and social impact of any action the Administrator takes or

1 proposes to take under this Chapter.” 15 U.S.C. §2601(c).

2 **FOURTEENTH DEFENSE**

3 14. EPA’s enforcement action is in violation of both the statutory requirements
4 and congressional policy set forth in 15 U.S.C. § 2605.

5 **FIFTEENTH DEFENSE**

6 15. The TSCA and regulations adopted thereunder are not directed at companies,
7 such as GMS, acting as agents.

8 **OPPOSITION TO PROPOSED CIVIL PENALTY**

9 EPA requests a civil penalty of up to \$32,500 per day for each violation of TSCA.
10 GMS opposes the imposition of such a penalty on several grounds. First, one or more of the
11 defenses outlined above precludes the imposition of any civil penalty on GMS. Second,
12 contrary to the implication of the Civil Administrative Complaint, the holding of a vessel
13 containing PCBs or PCB Items (although not proven by EPA) can, at most, constitute a
14 single one-day violation of TSCA, if such conduct is a violation of TSCA. Likewise, the
15 export for disposal of a vessel containing PCBs or PCB Items can at most constitute a single
16 one-day violation of TSCA, if such conduct is a violation of TSCA.

17 Accordingly, if EPA is able to show that GMS violated TSCA by virtue of its
18 alleged “distribution in commerce” of the OCEANIC and/or its alleged export for disposal
19 of the OCEANIC, EPA cannot assess multi-day penalties for each of those purported TSCA
20 violations. Third, assuming any penalty is imposed upon GMS, such penalty should be far
21 below the maximum allowed based on the lack of history of any prior such violations, the
22 lack of evidence that the OCEANIC actually contains PCBs or PCB items with PCB
23 concentrations of 50 ppm or greater, and the lack of evidence that the OCEANIC poses any
24 unreasonable risk of injury to health within the United States or the environment of the
25 United States, among other reasons. Fourth, the lack of fair notice that EPA would regard
26 the purchase, sale, and holding of the OCEANIC as the distribution in commerce and/or
27 export for disposal of PCBs or PCB Items mitigates against any substantial penalty.

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REQUEST FOR HEARING

GMS hereby requests an administrative hearing on the issues raised by the Civil Administrative Complaint and this Answer.

Dated April 30, 2008

Respectfully submitted for
GLOBAL MARKETING SYSTEMS, INC.
By its attorneys,



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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2008, the original and a true copy of the foregoing Answer and Request for Hearing was hand delivered to:

Regional Hearing Clerk
United States Environmental Protection Agency – Region 9
75 Hawthorne Street
San Francisco, California 94105

and that a true and correct copy of said document was hand delivered to the following:

Margaret Alkon, Esquire
United States Environmental Protection Agency – Region 9
75 Hawthorne Street
San Francisco, California 94105


Gregory W. Poulos