

FEDERAL MARITIME COMMISSION

DOCKET NO. 12 - 01

**OC INTERNATIONAL FREIGHT, INC.,
OMJ INTERNATIONAL FREIGHT, INC.
AND OMAR COLLADO**

BUREAU OF ENFORCEMENT

OPENING BRIEF

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I. Introduction

This proceeding was instituted by an Order For Hearing on Appeal of Denial of License and Order of Investigation and Hearing of the Federal Maritime Commission (Commission or FMC) served April 2, 2012, pursuant to sections 11 and 19 of the Shipping Act of 1984, 46 U.S.C. §§ 40901, 40902, 41302 and 41304. The Order directed that an adjudicatory proceeding be instituted to determine:

(1) whether to affirm Bureau of Certification and Licensing's (BCL) November 17, 2011 denial of the Ocean Transportation Intermediary (OTI) application of OC International Freight, Inc. (OC) and Omar Collado;

(2) whether OC, OMJ International Freight, Inc. (OMJ) and/or Omar Collado violated Section 10(a)(1) of the Shipping Act of 1984 (Act), 46 U.S.C. § 41102, by knowingly and willfully allowing other persons to obtain ocean transportation for property at less than the rates and charges that would otherwise be applicable through the device of permitting such persons to unlawfully access OMJ's service contracts;

(3) whether OC, OMJ and/or Omar Collado violated Section 19 (a) and (b) of the Shipping Act, 46 U.S.C. §§40901 and 40902, by acting as an ocean

transportation intermediary without a license or evidence of financial responsibility;

(4) whether, in the event violations of sections 10 or 19 of the Shipping Act are found, civil penalties should be assessed against OC International Freight, Inc., OMJ International Freight, Inc. and/or Omar Collado, and, if so, the amount of penalties to be assessed; and

(5) whether, in the event violations are found, appropriate cease and desist orders should be issued.

The Order named OC, OMJ and Omar Collado as Respondents. (hereinafter referred to collectively as Respondents, and sometimes individually by name as appropriate). The Commission directed that the Bureau of Enforcement (BOE) be made a party to this proceeding.

A. Procedural History

On December 2, 2010, OC and Mr. Collado filed an application for an OTI License. BOE No. 110.¹ Mr. Collado was identified as the proposed qualifying individual on the application, as well as the president and sole proprietor of OC. Following its standard verification and investigation procedures with respect to

¹ "BOE No. ___" refers to the Bates number appearing in the lower right hand corner of each page contained in the BOE's Appendix submitted herewith.

OTI applicants , on November 17, 2011, BCL issued a Notice of Intent to Deny OC's license application, alleging violations of section 10(a)(1) and section 19 of the Act revealed by an investigation conducted by a Commission Area Representative. BOE No. 101. Based on the asserted violations, BCL determined that OC and Mr. Collado lacked the requisite character to be licensed as an OTI pursuant to the standards set forth in 46 C.F.R. § 515.14. By letter dated December 2, 2011, OC requested a hearing on BCL's license determination. BOE No.106.

On April 2, 2012, the Commission issued the above referenced Order assigning the matter for hearing before an Administrative Law Judge (ALJ). The ALJ issued an initial order on April 12, 2012. BOE commenced discovery on April 18, 2012, by serving Respondents with its First Interrogatories and Request for Production of Documents as well as its First Request for Admissions (RFAs). BOE No.157. BOE served a second set of Interrogatories and Request for Production of Documents on June 12, 2012. Mr. Collado served responses to BOE's First and Second Requests for Interrogatories and Productions of Documents. BOE No.1062. Mr. Collado did not respond to any of BOE's RFAs. In addition to the above discovery, BOE deposed Mr. Collado in Miami, Florida on July 18, 2012. A transcript of his deposition testimony and related exhibits are submitted in the Appendix filed with this brief. BOE No. _____. BOE's Rule

95 Statement was submitted on August 13, 2012. Respondent's statement was submitted on August 28, 2012, pursuant to an extension granted by the ALJ.

B. Summary of the Case

This case requires a determination whether to affirm BCL's denial of OC's license application due to apparent violations of the Shipping Act; whether Respondents violated sections 10 and 19 of the Shipping Act; whether, in the event violations are found, civil penalties should be assessed against Respondents and, if so, the amount of civil penalties to be assessed; and whether appropriate cease and desist orders should be issued. Due to the fact that the licensing determination rests on a finding of the violations of the Shipping Act, the violations are addressed first.

The evidence demonstrates that Mr. Collado, through the companies that he solely owned and controlled, OMJ and OC, allowed their foreign-based counterpart, Island Cargo Services, Inc. (Island Cargo), an unlicensed and unbonded NVOCC, to utilize OMJ's service contracts in order to obtain ocean transportation of property at less than the rates or charges that would otherwise apply.² Although Mr. Collado certified OMJ as an NVOCC on the underlying

² The record shows that Mr. Collado operated both OMJ which, although now defunct, was licensed until January 15, 2010, as well as OC, which is not and has never been licensed. While

service contract, OMJ did not assume responsibility for the ocean transportation, bill for ocean freight, or otherwise act as an NVOCC. Rather, OMJ, through Mr. Collado, improperly permitted Island Cargo to utilize service contracts between Seaboard Marine, Ltd. and OMJ, as if Island Cargo was the signatory. As a result, Mr. Collado and OMJ falsely obtained transportation at less than the otherwise applicable rate, and permitted Island Cargo to obtain transportation at less than the applicable rate. On the basis of those facts, OMJ and OC violated section 10(a)(1) of the Shipping Act by knowingly and willfully obtaining ocean transportation for property at less than the rates and charges through the device of permitting such persons to unlawfully access OMJ's service contracts. These facts have been admitted by Mr. Collado, and are further evidenced by the affidavit of Miami AR Andrew Margolis.

Following revocation of OMJ's license for failure to maintain a bond on January 15, 2010, OMJ and OC, under the direct supervision and control of Mr. Collado, continued to provide ocean freight forwarder services without an OTI license or evidence of required financial responsibility. OMJ and OC, through the actions of Mr. Collado, violated section 19 by acting as an unlicensed and

Mr. Collado entered into service contracts and booked cargo under the name OMJ, he corresponded with shippers, including sending invoices, in the name OC for the same shipments. Because of Mr. Collado's propensity to freely use the two corporate names on the same shipment, BOE submits both OMJ and OC are the alter ego of Mr. Collado.

unbonded OTI. These facts have been admitted by Mr. Collado, and are further evidenced by the affidavit of Miami AR Andrew Margolis.

BOE submits that penalties should be assessed for violations of the Shipping Act. Consideration of the factors required under section 13 of the Shipping Act, 46 U.S.C. 41109(b), warrants assessment of substantial penalties against all Respondents. The evidence amply justifies imposing liability on Mr. Collado for his individual acts and by piercing the corporate veil of his companies.

BOE also submits that BCL's licensing determination reflected in its November 17, 2011, letter, based on the admitted violations of the Shipping Act. Significantly, evidence and testimony show that Mr. Collado's application for an OTI license on behalf of OC furnished a negative response to question 7 asking whether applicant or any of its principles had been involved in bankruptcy proceedings or subject to judgments or tax liens. Mr. Collado, in fact, failed to disclose numerous federal and state tax liens, final adverse judgments, and a chapter 7 bankruptcy filing on behalf of OMJ. Such information was required to be disclosed under the specific terms of the FMC-18 application, and the failure or omission to disclose these facts constitutes a materially false or misleading statement justifying denial of the application. 46 C.F.R. 515.15(c). Mr. Collado's

deposition, together with exhibits reviewed in the course of that deposition, establish the materially false or misleading nature of OC's application.

Finally, the evidence establishes that Mr. Collado has continued to provide freight forwarding services as defined in 46 C.F.R. 515.2 (i) without a license or evidence of financial responsibility. BOE submits that the issuance of a cease and desist order is necessary to bring a halt to Mr. Collado's continued unlawful activities.

Accordingly, based on Respondents' violations, BCL's determination should be upheld, civil penalties should be assessed for the demonstrated violations, and a cease and desist order should be issued.

II. Proposed Findings of Fact

PFF 1. Mr. Collado received BOE's request for admissions and was advised that if they were not answered within 30 days, that they would be deemed to be admitted. Collado Dep. Tr. at pp. 6-8, BOE No. 766; and Collado Dep. Exh. No. 1, BOE No. 797.

A. Proposed Findings of Fact Relating to OMJ

PFF 2. OMJ was organized under the laws of Florida as a corporation on March 15, 1999 and became inactive on September 26, 2008. BOE No. 159; Request for Admissions (RFA) No. 1.

PFF 3. Omar Collado was the sole officer and was listed as President, Vice-President, Secretary and Director on reports filed with the Florida Division of Corporations. BOE No. 159; RFA No. 2.

PFF 4. In September 2008, and at all times relevant hereto, OMJ's address of record was 4458 74th Avenue, Miami, FL 33165. BOE No. 159; RFA No. 3.

PFF 5. OMJ filed an FMC-18 application with the Commission in August, 2006 to operate as both an NVOCC and a FF. BOE No. 159; RFA No. 4.

PFF 6. OMJ was issued an OTI license on September 13, 2006. Omar Collado was the Qualifying Individual of OMJ. BOE No. 160; RFA No. 5.

- PFF 7. OMJ's bond was terminated on December 15, 2009. BOE No. 160; RFA No.6.
- PFF 8. OMJ's license was revoked on January 15, 2010 for failure to maintain a bond. BOE No. 160; RFA No.7.
- PFF 9. OMJ received notice of its license revocation. BOE No. 160; RFA No.8.
- PFF 10. OMJ has not had an FMC license to act as an ocean transportation intermediary at any time since January 15, 2010. BOE No. 160; RFA No. 9.
- PFF 11. OMJ entered into Service Contract No. 2008-00682 with Seaboard Marine, Ltd. (Seaboard Marine) on April 28, 2008. Service Contract No. 2008-00682 had a minimum volume commitment of 100 forty foot equivalent containers and was set to terminate on May 1, 2009. BOE No. 160; RFA No. 10.
- PFF 12. Service Contract No. 2008-00682 was signed by Omar Collado on behalf of OMJ. OMJ certified that the signatory was acting as an NVOCC. BOE No. 160; RFA No.11.
- PFF 13. The shipments identified in RFA Exh. B 1-24 were dispatched by OMJ between May 2008 and March 2009. BOE No. 160; RFA No.12.
- PFF 14. The shipments identified in RFA Exh. B 1-24 were booked by OMJ with Seaboard pursuant to Service Contract No. 2008-00682. BOE No. 160; RFA No.13.

- PFF 15. OMJ did not issue a house bill of lading, or invoice or collect ocean freight for any of the shipments listed in RFA Exh. B 1-24. BOE No. 160; RFA No.14.
- PFF 16. Island Cargo Services, Inc. (Island Cargo) issued a house bill of lading and collected ocean freight for the shipments identified in RFA Exh. B 1-24. BOE No. 160; RFA No.15.
- PFF 17. OMJ did not act as a NVOCC for any of the shipments listed in RFA Exh. B 1-24. BOE No. 160; RFA No.16.
- PFF 18. Island Cargo acted as a NVOCC for the shipments listed in RFA Exh. B 1-24. BOE No. 160; RFA No.17.
- PFF 19. For the shipments identified in RFA Exh. B 1-24, OMJ provided freight forwarding services such as booking, arranging or confirming cargo space; preparing and/or processing delivery orders and bills of lading; arranging for warehouse space and clearing shipments in accordance with export regulations. BOE No. 160-164; RFA Nos. 18-41.
- PFF 20. For the shipments identified in Exh. B 1-24, OMJ had knowledge of, and directly assisted Island Cargo to gain access to the rates and terms of Seaboard's Service Contract No. 2008-00682. BOE No. 165; RFA No. 42.
- PFF 21. For the shipments identified in Exh. B 1-24, OMJ knew, or had reason to know, that Island Cargo's access to Seaboard Service Contract No. 2008-

00682 was unlawful under the Shipping Act of 1984. BOE No. 165; RFA No. 43.

- PFF 22. OMJ entered into Service Contract No. 2009-01518 with Seaboard Marine Ltd. which was set to commence on January 20, 2010 and terminate on May 31, 2010. BOE No. 165; RFA No. 44.
- PFF 23. Omar Callado signed Seaboard Service Contract No. 2009-01518 on behalf of OMJ. OMJ certified that the signatory was acting as an NVOCC. BOE No. 165; RFA No. 45.
- PFF 24. OMJ booked and shipped cargo pursuant to Service Contract No. 2009-01518. BOE No. 165; RFA No. 46.
- PFF 25. Each of the 15 shipments identified in RFA Exh. C were booked by OMJ with Crowley. BOE No. 165; RFA No.47.
- PFF 26. The shipments identified in RFA Exh. C 1-15 were booked by OMJ with Crowley pursuant to a service contract. BOE No. 165; RFA No. 48.
- PFF 27. The shipments identified in RFA Exh. C 1-15 were dispatched by OMJ between January 5, 2010 and June 8, 2010. BOE No. 165; RFA No. 49
- PFF 28. OMJ did not issue a house bill of lading or invoice or collect ocean freight for any of the shipments listed in RFA Exh. C 1-15. BOE No. 165; RFA No. 50
- PFF 29. Island Cargo issued a house bill of lading and collected ocean freight for the shipments identified in RFA Exh. C 1-15. BOE No. 165; RFA No. 51.

- PFF 30. OMJ did not act as a NVOCC for any of the shipments listed in RFA Exh. C 1-15. BOE No. 165; RFA No. 52.
- PFF 31. Island Cargo acted as a NVOCC for the shipments listed in RFA Exh. C 1-15. BOE No. 165; RFA No. 53.
- PFF 32. For the shipments identified in RFA Exh. C 1-15, OMJ provided freight forwarding services such as booking, arranging or confirming cargo space; preparing and/or processing delivery orders and bills of lading; arranging for warehouse space and clearing shipments in accordance with export regulations. BOE No. 165-68; RFA No. 54-68.
- PFF 33. For the shipments identified in RFA Exh. C 1-15, OMJ had knowledge of, and directly assisted Island Cargo to gain access to the rates and terms of a Crowley Service Contract. BOE No. 168; RFA No.69.
- PFF 34. For the shipments identified in RFA Exh. C 1-15, OMJ knew, or had reason to know, that Island Cargo's access to a Crowley Service Contract was unlawful under the Shipping Act of 1984. BOE No. 168; RFA No. 70.
- PFF 35. Mr. Collado, acting through OMJ, booked 137 shipments with Crowley between January 1, 2010 and October 31, 2010, of which 120 shipments were booked subsequent to the revocation of OMJ's license on January 15, 2010. RFA No. 71; RFA Exh. D; BOE No. 168.

B. Proposed Findings of Fact Relating to OC

- PFF 36. OC International Freight, Inc. (OC) was organized under the laws of Florida as a corporation on February 26, 2007. BOE No. 168; RFA No. 72.
- PFF 37. Omar Collado is the sole officer, President and Director of OC. BOE No. 168; RFA No. 73.
- PFF 38. OC's address is 4458 74th Avenue, Miami, FL 33165. BOE No. 168; RFA No. 74.
- PFF 39. OC filed an FMC-18 application with the Commission on December 10, 2010 to operate as both an NVOCC and a FF. BOE No. 169; RFA No. 75.
- PFF 40. Omar Collado is identified on the application as the Owner and President of OC and is the proposed Qualifying Individual of OC. BOE No. 169; RFA No. 76.
- PFF 41. OC has not had an FMC license to act as an Ocean Transportation Intermediary at any time since February 2007. BOE No. 169; RFA No. 77.
- PFF 42. OC did not issue a house bill of lading, or invoice or collect ocean freight for any of the shipments listed in RFA Exh. B 1-24. BOE No. 169; RFA No. 78.
- PFF 43. OC did not act as a NVOCC for any of the shipments listed in Exh. B 1-24. BOE No. 169; RFA No. 79.

- PFF 44. For the shipments identified in RFA Exh. B 1-24, OC had knowledge of, and directly assisted Island Cargo to gain access to the rates and terms of Seaboard's Service Contract No. 2008-00682. BOE No. 173; RFA No. 104.
- PFF 45. For the shipments identified in RFA Exh. B 1-24, OC knew, or had reason to know, that Island Cargo's access to Seaboard Service Contract No. 2008-00682 was unlawful under the Shipping Act of 1984. BOE No. 173; RFA No. 105.
- PFF 46. The shipments identified in RFA Exh. C 1-15 were dispatched by OC between January 5, 2010 and June 8, 2010. BOE No. 173; RFA No. 106.
- PFF 47. OC did not issue a house bill of lading, or invoice or collect ocean freight for any of the shipments listed in RFA Exh. C 1-15. BOE No. 173; RFA No. 107.
- PFF 48. OC did not act as a NVOCC for any of the shipments listed in RFA Exh. C 1-15. BOE No. 178; RFA No. 108.
- PFF 49. For the shipment identified in RFA Exh. C 1-15, OC provided freight forwarding services such as booking, arranging or confirming cargo space; preparing and/or processing delivery orders and bills of lading; arranging for warehouse space and clearing shipments in accordance with export regulations. BOE No. 173-76; RFA No. 109-123.

- PFF 50. For the shipments identified in RFA Exh. C 1-15, OC had knowledge of, and directly assisted Island Cargo to gain access to the rates and terms of a Crowley Service Contract. BOE No. 176; RFA No. 124.
- PFF 51. For the shipments identified in Exh. C 1-15, OC knew, or had reason to know, that Island Cargo's access to a Crowley Service Contract was unlawful under the Shipping Act of 1984. BOE No. 176; RFA No. 125.
- PFF 52. OC received a letter dated November 17, 2011, from the Commission's Bureau of Certification and Licensing advising OC of the Commission's intent to deny its license application and advising that the Shipping Act of 1984 forbids performing or holding out to perform ocean transportation intermediary services, including providing freight forwarding services such as booking, arranging or confirming cargo space; preparing and/or processing delivery orders and bills of lading; arranging for warehouse space and clearing shipments in accordance with export regulations unless and until a license is issued. BOE No. 176; RFA No. 126.
- PFF 53. OC sent a letter to the FMC on December 2, 2011 requesting a hearing on the notice of intent to deny OC's license. BOE No. 176; RFA No. 127.

C. Proposed Findings of Fact Relating to Mr. Collado

1. Proposed Findings of Fact Relating to Mr. Collado's Role with OMJ

- PFF 54. Mr. Collado caused OMJ to be organized under the laws of Florida as a corporation on March 15, 1999. BOE No. 177; RFA No.128.
- PFF 55. Mr. Collado caused OMJ to become inactive as a Florida corporation on September 26, 2008. BOE No. 176; RFA No. 129.
- PFF 56. Mr. Collado was the sole officer and was listed as President, Vice-President, Secretary and Director of OMJ in reports filed with the Florida Division of Corporations. BOE No. 177; RFA No. 130.
- PFF 57. Mr. Collado received notice at the time when OMJ's bond was terminated on December 15, 2009. BOE No. 177; RFA No. 131.
- PFF 58. Mr. Collado received notice from the Commission that OMJ's license was revoked on January 15, 2010 for failure to maintain a bond. BOE No. 177; RFA No. 132.
- PFF 59. Mr. Collado was solely responsible for the day-to-day management of OMJ. BOE No. 177; RFA No. 133.
- PFF 60. Mr. Collado controlled the bank accounts of OMJ. BOE No. 177; RFA No. 134.
- PFF 61. Mr. Collado authorized business expenditures on behalf of OMJ. BOE No. 177; RFA No. 135.

- PFF 62. Mr. Collado made all business decisions on behalf OMJ, including for those shipments identified in RFA Exh. B 1-24 and C 1-15. BOE No. 177; RFA No. 136.
- PFF 63. Mr. Collado exercised control over the operations of OMJ, including for those shipments identified in RFA Exh. B 1-24 and C 1-15. BOE No. 177; RFA No. 137.
- PFF 64. Mr. Collado signed service contracts with Seaboard and Crowley, among other carriers, on behalf of OMJ. BOE No. 177; RFA No. 138.
- PFF 65. Mr. Collado certified on service contracts with Seaboard and Crowley that OMJ was acting as an NVOCC. BOE No. 177; RFA No. 139.
- PFF 66. Mr. Collado knew that OMJ was not acting as an NVOCC for those shipments identified in RFA Exh. B since OMJ was not issuing a bill of lading or collecting ocean freight. BOE No. 178; RFA No. 140.
- PFF 67. Mr. Collado knew that OMJ was not acting as an NVOCC for those shipments identified in RFA Exh. C since OMJ was not issuing a bill of lading or collecting ocean freight. BOE No. 178; RFA No. 141.
- PFF 68. Mr. Collado solicited business on behalf of OMJ to provide ocean freight forwarding services during some or all of the period between May 9, 2008 and November 17, 2011, including the shipments identified in RFA Exh. B 1-24 and C 1-15. BOE No. 178; RFA No. 142.

- PFF 69. Mr. Collado booked, arranged for or confirmed cargo space on behalf of OMJ during some or all of the period between May 9, 2008 and November 17, 2011, including the shipments identified in RFA Exh. B 1-24 and C 1-15. BOE No. 178; RFA No. 143.
- PFF 70. Mr. Collado prepared and/or processed delivery orders and bills of lading on behalf of OMJ during some or all of the period between May 9, 2008 and November 17, 2011, including the shipments identified in RFA Exh. B 1-24 and C 1-15. BOE No. 178; RFA No. 144.
- PFF 71. Mr. Collado arranged for warehouse space on behalf of OMJ during some or all of the period between May 9, 2008 and November 17, 2011, including the shipments identified in RFA Exh. B 1-24 and C 1-15. BOE No. 178; RFA No. 145.
- PFF 72. Mr. Collado cleared shipments in accordance with export regulations on behalf of OMJ during some or all of the period between May 9, 2008 and November 17, 2011, including the shipments identified in RFA Exh. B 1-24 and C 1-15. BOE No. 178; RFA No. 146.
- PFF 73. Mr. Collado arranged for the delivery of ocean shipping containers to final destination on behalf of OMJ during some or all of the period between May 9, 2008 and November 17, 2011, including the shipments identified in RFA Exh. B 1-24 and C 1-15. BOE No. 178; RFA No. 147.

- PFF 74. For the shipments identified in RFA Exh. B 1-24, Mr. Collado, acting as OMJ, had knowledge of, and directly assisted Island Cargo to gain access to the rates and terms of Seaboard's Service Contract No. 2008-00682. BOE No. 179; RFA No. 148.
- PFF 75. For the shipments identified in RFA Exh. B 1-24, Mr. Collado, acting as OMJ, knew, or had reason to know, that Island Cargo's access to Seaboard Service Contract No. 2008-00682 was unlawful under the Shipping Act of 1984. BOE No. 179; RFA No. 149.
- PFF 76. For the shipments identified in RFA Exh. C 1-15, Mr. Collado, acting as OMJ, had knowledge of, and directly assisted Island Cargo to gain access to the rates and terms of a Crowley Service Contract. BOE No. 179; RFA No. 150.
- PFF 77. For the shipments identified in RFA Exh. C 1-15, Mr. Collado, acting as OMJ, knew, or had reason to know, that Island Cargo's access to a Crowley Service Contract was unlawful under the Shipping Act of 1984. BOE No. 179; RFA No. 151.

2. Proposed Findings of Fact Relating to Mr. Collado's Role with OC

- PFF 78. Omar Collado (Mr. Collado) is the sole Owner and President of OC, a company organized under the laws of Florida as a corporation on February 26, 2007. BOE No. 179; RFA No. 152.
- PFF 79. Mr. Collado filed an FMC-18 application with the Commission on December 10, 2010 on behalf of OC so that OC could be licensed as both an NVOCC and a FF. BOE No. 179; RFA No.153.
- PFF 80. Mr. Collado is identified on the application as the President/Secretary and is the proposed Qualified Individual of OC. BOE No. 179; RFA No. 154.
- PFF 81. Mr. Collado was solely responsible for the day-to-day management of OC during some or all of the period between May 9, 2008 and April 2, 2012. BOE No. 179; RFA No. 155.
- PFF 82. Mr. Collado made all business decisions on behalf OC during some or all of the period between May 9, 2008 and April 2, 2012. BOE No. 179; RFA No. 156.
- PFF 83. Mr. Collado controlled the bank accounts of OC during some or all of the period between May 9, 2008 and April 2, 2012. BOE No. 180; RFA No.157.
- PFF 84. Mr. Collado exercised control over the operations of OC during some or all of the period between May 9, 2008 and April 2, 2012. BOE No. 180; RFA No.158.

- PFF 85. Mr. Collado authorized business expenditures on behalf of OC during some or all of the period between May 9, 2008 and April 2, 2012. BOE No. 180; RFA No.159.
- PFF 86. Mr. Collado received a copy of the Commission's Order of Investigation and Hearing. BOE No. 180; RFA No. 160.
- PFF 87. In response to question 7, Part B, of the above mentioned FMC-18 application, Mr. Collado, on behalf of OC, stated that OC had not filed or been involved in a bankruptcy proceeding, other than as a claimant; had not been declared bankrupt; had not been subject to a tax lien; and had not had a legal judgment rendered for a debt. BOE No. 180; RFA No. 161.
- PFF 88. Mr. Collado certified under penalty of perjury that the information furnished in his OTI application was true and correct to the best of his knowledge and belief. BOE No. 180; RFA No.162.
- PFF 89. Mr. Collado solicited business on behalf of OC to provide ocean freight forwarding services during some or all of the period between May 9, 2008 and April 2, 2012. BOE No. 180; RFA No. 163.
- PFF 90. Mr. Collado made all of the business decisions relating to the shipments identified in RFA Exh. B 1-24 and C 1-15 on behalf of OC. BOE No. 180; RFA No. 164.

- PFF 91. Mr. Collado booked, arranged for or confirmed cargo space on behalf of OC during some or all of the period between May 9, 2008 and November 17, 2011, including the shipments identified in RFA Exh. B 1-24 and C 1-15. BOE No. 180; RFA No. 165.
- PFF 92. Mr. Collado prepared and/or processed delivery orders and bills of lading on behalf of OC during some or all of the period between May 9, 2008 and November 17, 2011, including the shipments identified in RFA Exh. B 1-24 and C 1-15. BOE No. 180; RFA No. 166.
- PFF 93. Mr. Collado arranged for warehouse space on behalf of OC during some or all of the period between May 9, 2008 and November 17, 2011, including the shipments identified in RFA Exh. B 1-24 and C 1-15. BOE No. 181; RFA No. 167.
- PFF 94. Mr. Collado cleared shipments in accordance with export regulations on behalf of OC during some or all of the period between May 9, 2008 and November 17, 2011, including the shipments identified in RFA Exh. B 1-24 and C 1-15. BOE No. 181; RFA No. 168.
- PFF 95. Mr. Collado arranged for the delivery of ocean shipping containers to final destination on behalf of OC during some or all of the period between May 9, 2008 and November 17, 2011, including the shipments identified in RFA Exh. B 1-24 and C 1-15. BOE No. 181; RFA No. 169.

- PFF 96. Mr. Collado has provided ocean freight forwarding services such as booking, arranging or confirming cargo space; preparing and/or processing delivery orders and bills of lading; arranging for warehouse space and clearing shipments in accordance with export regulations for shipments booked with Crowley during some or all of the period between November 18, 2011 and April 2, 2012. BOE No. 181; RFA No. 170.
- PFF 97. For the shipments identified in RFA Exh. B 1-24, Mr. Collado, acting as OC, had knowledge of, and directly assisted Island Cargo to gain access to the rates and terms of Seaboard's Service Contract No. 2008-00682. BOE No. 181; RFA No. 171.
- PFF 98. For the shipments identified in RFA Exh. B 1-24, Mr. Collado, acting as OC, knew, or had reason to know, that Island Cargo's access to Seaboard Service Contract No. 2008-00682 was unlawful under the Shipping Act of 1984. BOE No. 181; RFA No. 172.
- PFF 99. For the shipments identified in RFA Exh. C 1-15, Mr. Collado, acting as OC, had knowledge of, and directly assisted Island Cargo to gain access to the rates and terms of a Crowley Service Contract. BOE No. 181; RFA No. 173.

PFF 100. For the shipments identified in RFA Exh. C-1-15, Mr. Collado, acting as OC, knew, or had reason to know, that Island Cargo's access to a Crowley Service Contract was unlawful under the Shipping Act of 1984. BOE No. 182; RFA No. 174.

3. Proposed Findings of Fact Relating to Mr. Collado's Role with Source Consulting

PFF 101. Mr. Collado has provided ocean freight forwarding services such as booking, arranging or confirming cargo space; preparing and/or processing delivery orders and bills of lading; arranging for warehouse space and clearing shipments in accordance with export regulations, including preparation of shippers export declarations, for shipments booked in the name of Source Consulting located at 4458 NW 74th Avenue, Miami FL 33166 during some or all of the period between March 11, 2011 and April 2, 2012. BOE No. 182, RFA No. 175; Collado Dep. Tr. at pp. 48-83, 121-22, BOE Nos. 776-85, 794-95; and Collado Dep. Exh. Nos. 22-30, BOE Nos. 851-937.

PFF 102. Mr. Collado prepared Electronic Export Information (EEI) Letters of Authorization on behalf of Source Consulting between November 2011 and April 2012, and submitted said letters to Crowley Logistics. Collado Dep. Tr. at pp. 88-91, BOE Nos. 786-87; and Collado Dep. Exh. No. 34, BOE Nos. 949-981.

PFF 103. Mr. Collado was not an agent or employee of Source Consulting, nor received any compensation from Source Consulting at any time prior to July 18, 2012. Collado Dep. Tr. at pp. 122, BOE No. 795.

D. Findings of Fact Relating to FMC-18 Application

PFF 104. OC was issued Notices of Federal Tax Liens on March 2, 2012 for \$9,689.74; on February 19, 2010 for \$817.42; on April 20, 2010 for \$782.11; on May 5, 2010 for \$3,374.07; on May 5, 2010, again, for an additional \$765.24; on February 4, 2009 for \$3,252.11; on October 14, 2009 for \$873.87; on November 18, 2008 for \$8,331.17. Collado Dep. Tr. at pp. 8-15, BOE Nos. 766-68; and Collado Dep. Exh. Nos. 2-9, BOE Nos. 799-806.

PFF 105. OMJ was issued a Notice of Federal Tax Lien on August 27, 2004 for \$18,177.02. Collado Dep. Tr. at pp. 15-17, BOE No. 766; and Collado Dep. Exh. No. 10, BOE No. 807.

PFF 106. OC was issued a Notice of Tax Lien by the State of Florida on September 27, 2011 in the amount of \$1,932.00. Collado Dep. Tr. at pp. 22, BOE No. 770; and Collado Dep. Exh. No. 11, BOE No. 814.

PFF 107. An Electronic Judgment Lien Certificate was issued by the Miami-Dade County Court against OC as the debtor and Schenker, Inc. as the Creditor on

January 24, 2012 in the amount of \$9,258.51. Collado Dep. Tr. at pp. 23, BOE No. 770; and Collado Dep. Exh. No. 12, BOE No. 815.

PFF 108. An Electronic Judgment Lien Certificate was issued by the Miami-Dade County Court against OC as the debtor and the State of Florida, Department of Revenue as the Creditor on November 2, 2011, in the amount of \$1,305.35. Collado Dep. Tr. at pp. 24, BOE No. 770; and Collado Dep. Exh. No. 13, BOE No. 816.

PFF 109. A Final Judgment was entered by the Circuit Court of the Eleventh Judicial Circuit for Miami-Dade County, Florida on February 14, 2007, against OMJ and Mr. Collado as Defendant/Debtor and Colonial Bank, N.A. as Plaintiff/Creditor in the total amount of \$220,587.48. Collado Dep. Tr. at pp. 26-28, BOE No. 771; and Collado Dep. Exh. No. 14, BOE Nos. 817-18.

PFF 110. A Final Judgment was entered by the County Court for Dade County, Florida on May 12, 2009, against Mr. Collado as Defendant/Debtor and Ocean Bank as Plaintiff/Creditor in the total amount of \$1,761.62. Collado Dep. Tr. at pp. 28-29, BOE No. 771; and Collado Dep. Exh. No. 15, BOE No. 819.

PFF 111. A Final Judgment was entered by the County Court for Dade County, Florida on June 9, 2009, against OC and Mr. Collado as Defendants/Debtors and Ocean Bank as Plaintiff/Creditor in the total amount of \$25,261.38. Collado

Dep. Tr. at pp. 30, BOE No. 772; and Collado Dep. Exh. No. 16, BOE No. 821.

PFF 112. A Final Judgment was entered by the Country Court in the Eleventh Judicial Circuit for Miami-Dade County, Florida on June 18, 2008, against Mr. Collado as Defendant/Debtor and Wachovia Bank, National Association, as Plaintiff/Creditor in the total amount of \$4,905.67. Collado Dep. Tr. at pp. 31-32, BOE No. 772; and Collado Dep. Exh. No. 17, BOE No. 824.

PFF 113. A Motion for Default and Final Judgment was granted by the County Court for Miami-Dade County, Florida on February 10, 2010, against OC and Mr. Collado as Defendant/Debtor and Claudia Porras, Mark Dojak and Carolyn A. Berg as Plaintiff/Creditor in the total amount of \$5,350.00. Collado Dep. Tr. at pp. 32-33, BOE No. 772; and Collado Dep. Exh. No. 18, BOE No. 825.

PFF 114. A Notice of Bankruptcy was filed by OMJ in Country Court in the Eleventh Judicial Circuit for Miami-Dade County, Florida on November 28, 2007. Collado Dep. Tr. at pp. 34-36, BOE No. 773; and Collado Dep. Exh. No. 19, BOE No. 826.

PFF 115. A Voluntary Petition for Chapter 7 bankruptcy was filed on behalf of OMJ with the U.S. Bankruptcy Court for the Southern District of Florida on November 28, 2007 in Case. No. 07-20437-RAM. This document

was electronically signed by Omar Collado, as President of OMJ. Collado Dep. Tr. at pp. 36-40, BOE No. 773-74; and Collado Dep. Exh. No. 20, BOE No. 827.

PFF 116. A Declaration Under Penalty of Perjury was signed personally by Mr. Collado, as President of OMJ stating that he had signed the Voluntary Petition, Schedules and Statement of Financial Affairs and submitted to the U.S. Bankruptcy Court for the Southern District of Florida in Case No. 07-2043-RAM on November 28, 2007. Collado Dep. Tr. at pp. 40-42, BOE No. 774-75; and Collado Dep. Exh. No. 20-A, BOE No. 848.

PFF 117. OMJ's Chapter 7 Bankruptcy, Case No. 07-20437-RAM in the U.S. Bankruptcy Court for the Southern District of Florida was dismissed for OMJ's failure to appear at the §341 Meeting of Creditors. Collado Dep. Tr. at p. 43, BOE No. 775; and Collado Dep. Exh. No. 21, BOE No. 849.

E. Proposed Findings of Fact Relating to Mr. Margolis' Affidavit

PFF 118. For each of the nineteen shipments identified in Margolis Affidavit Exhibit 1, BOE No. 145, OMJ allowed Island Cargo to access its service contract which resulted in obtaining ocean transportation for property at rates and charges less than would otherwise be applicable. The total amount of the undercharge for these nineteen shipments was \$3,541.00.

Margolis Aff. at. 6-7, BOE No. 139-40; Margolis Aff. Exh. 1, BOE No. 145.

PFF 119. Mr. Collado knew that OMJ was not in compliance with the law regarding allowing Island Cargo to utilize his service contract. Margolis Aff. at. 7, BOE No. 140.

PFF 120. For the nineteen shipments identified in Margolis Affidavit Exhibit 1, BOE No. 145, Mr. Collado, through the companies that he created and controlled, OMJ and OC, allowed Island Cargo, an unlicensed and unbonded NVOCC, to utilize OMJ's service contracts in order to obtain ocean transportation of property at less than the rates or charges that would otherwise apply. Although identified as the NVO on the underlying service contract, Mr. Collado, acting through either OMJ or OC, did not assume responsibility for the ocean transportation, bill for ocean freight, or otherwise act as an NVOCC in those transactions. Rather, Mr. Collado, acting through OMJ permitted its foreign-based unregistered counterpart, Island Cargo, to act in the capacity of an NVOCC. As a result, OMJ falsely obtained transportation at less than the otherwise applicable rate, and permitted Island Cargo to obtain transportation at less than the applicable rate. Margolis Aff. at. 10, BOE No. 139; Margolis Aff. Exh. 1, BOE No. 145.

PFF 121. For the shipments identified in RFA exhibits C 1-15, OMJ acting in concert with OC and under the direct supervision and control of Omar Collado, acted as an unlicensed ocean freight forwarder between on or about January 16, 2010 and continuing through at least October 26, 2010. Margolis Aff. at. 10, BOE No. 143; Margolis Aff. Exh. 1, BOE No. 145.

III. Discussion

A. Violations of Sections 10(a)(1) of the Shipping Act

Section 10(a)(1) of the Act, 46 U.S.C. §§ 41102(a), provides that no person may knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or by 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 be applicable. BOE submits that the evidence of record as reflected in the Appendix submitted herewith establishes that Respondents have knowingly and willfully by means of an unfair device obtained ocean transportation of property at less than the rates or charges that would otherwise be applicable.

BOE served Requests for Admissions (RFAs) with respect to 24 potential violations of section 10 (a)(1) on April 18th, 2012, to which Mr. Collado failed to respond. In his deposition, and while advised by counsel, Mr. Collado

acknowledged receipt of the RFAs, and that he had been advised that if unanswered within 30 days, the RFAs would be deemed to be admitted.³ PFF 1. Accordingly, pursuant to 46 C.F.R. §§502.207(a)(2)(ii) and (b), the facts related to these shipments are conclusively established. Respondents also conceded these facts in their Rule 95 Statement in which they state that “the facts are not in dispute as to OC and OMJ permitting Island Cargo Services to issue the applicable house bill,” and thereby affording Island Cargo access to its service contracts.⁴ Respondent Rule 95 Statement at 3. These facts are further supported by the affidavit of Andrew Margolis. BOE No. 134.

The facts demonstrate that OMJ entered into Service Contract No. 2008-00682 with Seaboard Marine Ltd. on April 28, 2008, which was set to expire on May 1, 2009. PFF 10. Service Contract No. 2008-00682 was signed by Omar Collado on behalf of OMJ, who certified that the signatory was acting as an NVOCC. PFF 11. The shipments identified in RFA Exhibits B 1-24 were booked by OMJ with Seaboard pursuant to Service Contract No. 2008-00682. PFF 13, BOE No. 190-762. OMJ did not issue a house bill of lading, or invoice or collect ocean freight for any of these shipments. PFF

³ Mr. Collado appeared at the deposition with counsel, but has not been formally represented by counsel throughout this proceeding.

⁴ While OMJ entered into the underlying service contract with Seaboard Marine and was identified on all of the master bills of lading issued by Seaboard Marine appearing in RFA Exhibits B1-24, OC invoiced Island Cargo for services rendered with respect to each shipment. PFFs 41-44. BOE submits that this is a distinction without a difference for the purpose of establishing the admitted violations as Mr. Collado solely owned, operated and controlled both corporations, PFF 2, 36, 58-62, 80-84, and was responsible for both OMJ’s and OC’s actions with respect to the shipments. PFF 65, 67-76, 88-94.

14. Island Cargo issued the house bill of lading and acted as an NVOCC on each of the shipments. PFF 15, 17, 120. OMJ did not act as a NVOCC for any of the shipments. PFF 16, 120. OMJ provided only freight forwarding services such as booking, arranging or confirming cargo space; preparing and/or processing delivery orders and bills of lading; arranging for warehouse space and clearing shipments in accordance with export regulations. PFF 18. OMJ had knowledge of, and directly assisted Island Cargo in gaining access to the rates and terms of Seaboard's Service Contract No. 2008-00682, PFF 19, 120, and OMJ knew that Island Cargo's access to Seaboard Service Contract No. 2008-00682 was unlawful under the Shipping Act of 1984. PFF 20, 65, 119. See also Margolis Aff. at 6-7, BOE No. 143.

Mr. Margolis examined the 24 shipments records identified in RFA Shipments B 1-24, the service contract, Seaboard's rated bills, and Seaboard's tariffs and concluded that for nineteen of the shipments, a lower rate was obtained than would otherwise have been applicable. PFF 118, 120. Margolis Aff. Exh. 1, BOE 145. The total amount of the undercharge for these nineteen shipments amounted to \$3,541.00. Mr. Margolis concluded that by allowing Island Cargo to access its contract, OMJ engaged in a device to obtain ocean transportation for less than the rate or charge that would otherwise be applicable . PFF 120.

The Commission has found that the device employed by Respondents of allowing others to access service contracts falls squarely within the prohibition of

section 10(a)(1). In *Hudson Shipping (Hong Kong) Ltd. d/b/a Hudson Express Lines – Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 29 SRR 1381 (ALJ 2003), respondent Hudson was found to have violated section 10(a)(1) by allowing other transportation entities to access to Hudson’s service contracts with vessel operating common carriers, thereby enabling NVOCCs to obtain ocean transportation at less than the applicable rates. In so finding, the ALJ also observed that by allowing access to others tendering shipments under the contract, Hudson was able to avoid the deadfreight penalty imposed in the contract. Likewise here, the service contract provided a minimum quantity commitment and deadfreight penalty (PFF 11) which OMJ was also able to avoid. See also *Universal Logistic Forwarding Co., Ltd. - Possible Violations of Sections 10 (a)(1) and 10(b)(1) of the Shipping Act of 1984*, 29 S.R.R. 325 (ALJ 2002), where the Commission found that unlawful access to service contracts amounts to an unfair device under section 10(a)(1).

Respondents’ actions allowing unlawful access to OMJ’s service contract were knowing and willfull. Knowing and willful has been defined by the U.S. Supreme Court as meaning “purposely or obstinately” and is designed to describe the attitude of a person “who, having free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements.” *United States v. Illinois Central Railroad Co.*, 303 U.S. 239, 242-243 (1938), citing *St. Louis &*

S.F.R. Co. v. United States, 169 F. 69, 71 (8th Cir. 1909). Moreover, “a ‘pattern of indifference’ to the requirements of regulatory law, a ‘persistent failure to inform’ oneself, ‘intentional disregard,’ ‘wanton disregard,’ and, of course, purposeful and obstinate behavior or something akin to ‘gross negligence’ have all been held to constitute ‘knowing and willful’ behavior in violation of regulatory statutes.” *Ever Freight Int’l Ltd., et al. – Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984*, 28 S.R.R. 329, 333 (ALJ 1998).

The Commission, in its analysis of the definition of “knowingly and willfully” within the context of the 1984 Act and its predecessors has rejected the concept that the phrase entails “actual or constructive knowledge that the requirements of the statute were being disregarded. Such a construction would make ignorance of the law a valid defense and substitute some subjective standard whereby actual knowledge of statutory language by a shipper would have to be established before a violation under this section could be found. Congress did not intend to impose such a novel evidentiary requirement.” *Pacific Far East Lines – Alleged Rebates to Foremost Dairies, Inc., et al.*, 11 F.M.C. 357, 363-364 (1968). *See also Union Petroleum Corp. v. United States*, 376 F.2d 569, 573 (10th Cir. 1967) (“[T]he term ‘knowingly’ imports merely perception of the facts necessary to bring the questioned activity within the prohibition of the statute. The term does not require as part of its meaning that there necessarily be knowledge or awareness

that such activity is in fact prohibited.”).

The Commission has determined that the “term ‘willfully’ means that respondent purposely or obstinately intended to perform the unlawful act not necessarily that it did so with the intent of maliciously breaking the law.” *Shipman Int’l (Taiwan) Ltd. – Possible Violations of Sections 8, 10(a)(1) and 10(b)(1) of the Shipping Act of 1984 and 46 C.F.R. Part 514, 28 S.R.R. 100, 109 (ALJ 1998)*. Moreover, an NVOCC is obligated to “educate itself through normal business resources, and repeated failure to do so may indicate that it is acting ‘willfully and knowingly’ within the meaning of the statute.” *Stallion Cargo, Inc. - Possible Violations of Sections 10(a)(1) and 10 (b) (1) of the Shipping Act of 1984, 29 S.R.R. 665, 683-84 (FMC 2001)*

Mr. Collado admitted to AR Margolis that he knew that allowing Island Cargo to access OMJ service contracts was unlawful. PFF 119. Respondents were well aware of the requirements of law. OMJ had been licensed since 2006 and Mr. Collado was its QI. The service contract was signed by Mr. Collado on behalf of OMJ certified as an NVOCC. They knew by the terms of the contract that shipments tendered by the named NVOCC and transported under that contract would receive the benefit of the rates contained in that contract. Respondents were likewise well aware that Island Cargo, and not OMJ, was assuming the role of the shipper/NVOCC under the contract. Respondents simply chose to disregard the

law. Their actions readily meet the requisites for acting knowingly and willfully as those terms are understood by the courts and the Commission.

On the basis of these facts, Respondents violated section 10(a)(1) of the Shipping Act on 19 shipments by obtaining ocean transportation for property at less than the rates and charges that would otherwise be applicable through the device of permitting such persons to unlawfully access OMJ's service contracts.

B. Violations of Section 19 (a) and (b) of the Shipping Act

Section 19 of the Shipping Act, 46 U.S.C. § 40901-40904, prohibits any person from providing OTI⁵ services unless that person holds a license issued by the Commission and furnishes "a bond, proof of insurance, or other surety in a form and amount determined by the Commission to insure financial responsibility". The Commission's regulations at 46 C.F.R. § 515.21 implement this obligation by requiring any person operating as an ocean freight forwarder in the U.S. to provide evidence of financial responsibility in the amount of \$50,000.

Respondents admit to providing ocean freight forwarding services during a period in which they did not have a license or evidence of financial responsibility

⁵ Section 3(17) of the 1984 Act, 46 U.S.C. § 40102, defines an ocean transportation intermediary as either a freight forwarder or a non-vessel-operating common carrier.

on file with the Commission for the shipments identified in RFA Exhibits C 1-15 in violation of section 19 of the Act. PFF 49. BOE Nos.165. OMJ's bond had been terminated on December 15, 2009 and its license was revoked on January 15, 2009.⁶ PFF 45. OC has never had an OTI license at any time. PFF 40. Respondents provided ocean freight forwarding services by booking cargo, preparing and/or processing delivery orders and bills of lading, arranging for warehouse space and clearing shipments in accordance with export regulations. PFF 25-26, 31, 45, 49, 89-95, 121. These are activities which the Commission's regulations define as ocean freight forwarder services for which a license is required. 46 CFR 515.2(i), (o), and 515.3. It is noteworthy that Mr. Collado has never disputed having provided freight forwarding services after OMJ's license was revoked. In fact, Respondents stated that "[i]t is undisputed that following revocation of OMJ's OTI license as a result of its no longer maintaining as a bond as required[,] OMJ did provide ocean freight forwarding[.]" Respondent's Rule 95 Statement at 3.

While the Crowley master bills of lading identify OMJ as the forwarding agent on each of these shipments, each of the shipments files document that OC invoiced Island Cargo for services rendered with respect to shipment. RFA Exh. C 1-15, BOE No. 436-757. It is not clear why Respondents chose to document these

⁶ It was also admitted that OMJ booked 120 shipments with Crowley after its license was revoked and an additional 17 shipments after its bond was terminated and immediately preceding formal revocation of its license. PFF 35.

transactions in this manner. Nonetheless, this documentation serves to demonstrate that the two companies operated in concert with one another and under the direct supervision, control and ownership by Mr. Collado. PFF 2, 36, 58-62, 80-84, Mr. Collado was ultimately responsible, as a matter of law and fact, for both OMJ's and OC's actions with respect to the shipments identified in the RFA Exhibits. PFF 65, 67-76, 88-94.

Accordingly, based on Mr. Collado's admissions and further substantiated by the Margolis Affidavit, Respondents violated section 19 (a) and (b) for each of the shipments identified in RFA Exhibits C 1-15. Further, based on the facts that OMJ was licensed since 2006, that Mr. Collado served as its QI, that OC applied for a license and proposed Mr. Collado as the QI, it is clear that Respondents were well aware of the licensing and financial responsibility requirements of the Shipping Act and the Commission's regulations. OC and Mr. Collado were also advised of the prohibition against operating without a license when BCL issued its intent to deny OC's application. BOE No. 101. Respondents again simply elected to disregard the requirements of law. Consequently, their violations of section 19 were knowingly and willfully committed. *United States v. Illinois Central, supra*.

The standard of proof in an administrative proceeding is to demonstrate "by a preponderance of evidence that something in fact occurred." *Portman Square Ltd. – Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 28

S.R.R. 80, 84 (ALJ 1998). BOE submits that the evidence of record amply meets this standard in determining that Respondents violated sections 10(a)(1) and 19 of the Shipping Act.

C. Civil Penalties Should be Assessed for Respondents' Violations of Sections 10(a)(1) and 19 of the Shipping Act.

Pursuant to section 13 of the Shipping Act, 46 U.S.C. § 41107(a), a party is subject to a civil penalty of not more than \$40,000⁷ for each violation knowingly and willfully committed. Each day of a continuing violation constitutes a separate offense.

Section 13(c) of the Shipping Act, 46 U.S.C. § 41109, requires that in assessing civil penalties, the Commission take into account the nature, circumstances, extent and gravity of a violation, as well as the degree of culpability, history of prior offenses, ability to pay, and such other matters as justice may require. In taking the foregoing into account, the Commission must make specific findings with regard to each factor. However, the Commission may use its discretion to determine how much weight to place on each factor. *Merritt v. United States*, 960 F.2d 15, 17 (2nd Cir. 1992). “In determining a civil penalty, the

⁷ This amount reflects an adjustment for inflation pursuant to the Commission's regulations at 46 C.F.R. Part 506.

ability to pay is only one of several factors set forth in the statute and care must be taken not to over-emphasize its importance to the detriment of the other factors, particularly to the detriment of the *main Congressional purpose* of deterring violations.” *Stallion Cargo, Inc.*, 29 S.R.R. at 681 (*emphasis added*).

The Commission has previously explained that, “the fixing of a particular amount of civil penalty is a most difficult thing to do. The Commission must consider and weigh numerous factors set forth in section 13(a) of the 1984 Act and then quantify them into a precise number. The process is not scientifically accurate and involves judgment that is subject to criticism and second guessing. . . . Nevertheless, the finding is committed to the sound discretion of the agency and must be made.” *Alex Parsinia d/b/a Pacific International Shipping and Cargo Express*, 27 S.R.R. 1335, 1340 (ALJ 1997). As discussed in greater detail below, consideration of the factors outlined in section 13 of the 1984 Act supports a conclusion that imposition of the maximum civil penalties on OMJ, OC and Mr. Collado is justified and appropriate.

1. Nature, Circumstances, Extent and Gravity of the Violations

The violations committed by Respondents are serious and undermine the basic structure of the Shipping Act. By allowing unlawful access to a service contract with Seaboard Marine, Respondents engaged in a course of action to

defeat both the tariff and service contract provisions of the statute and Commission regulations. Their actions allowed an unregulated entity, Island Cargo, to obtain the benefits of a service contract to which it was not entitled. At the same time, Respondents' scheme deprived an ocean common carrier, Seaboard Marine, of its applicable ocean freight tariff charges to which it was entitled and which it was required to assess absent the device employed by Respondents. In addition, Mr. Collado and OMJ misrepresented their undertaking to Seaboard Marine in signing the service contract and then avoiding their obligation by permitting another entity to serve in their place.

Similarly, Respondents' continued unlicensed and unbonded operations undermined the fundamental purposes of the licensing requirements of the Act and therefore constitute serious violations of law. Respondents' operations exposed the shipping public to an entity holding itself out and providing service, for which a license is required, yet not establishing that it is qualified to do so and failing to provide any protection to the public in the form of a bond or other financial security. This history of effectively leaving the shipping public without recourse and a demonstrated unwillingness to cease unlicensed operation is a significant aggravating factor in this proceeding.

2. Respondents' Culpability

Respondents engaged in a concerted effort to deceive in allowing Island

Cargo to access the service contract between OMJ and Seaboard Marine. OMJ, through Mr. Collado, misrepresented to Seaboard that OMJ would be operating as an NVOCC for ocean transportation of shipments under the contract, representations which Seaboard obviously relied upon in entering the contract. Mr. Collado carried out this scheme through both of his companies, OMJ and OC, by booking shipments, preparing documents, and billing and collecting their charges. Significantly, Mr. Collado admitted to AR Margolis during the investigation that he knew these arrangements with Island Cargo were not in compliance with the law, but took no steps to terminate or correct his operations. PFF 119.

Respondents are similarly culpable in their continued unlicensed operations without a bond or other financial security for the protection of the public. Mr. Collado operated OMJ as a licensed OTI until revocation of its license. As the QI and proposed QI for OC, he was well aware of the licensing and financial responsibility requirements and simply elected to ignore them. Respondents' culpability is manifest.

3. History of Prior Offenses

There is no history of formal Commission proceedings against Mr. Collado, OMJ or OC. Nevertheless, this fact should not be viewed in isolation inasmuch as Mr. Collado has been operating unlawfully since at least May of 2008, and, as

discussed below, continued to operate unlawfully even after having received multiple notices that his operations were unlawful. Further, since initiation of this proceeding, Mr. Collado has continued to operate unlawfully, and has even devised an alternate method of conducting his operations under a shell NVOCC. PFF 101-103; Collado Dep. at 79-80, 120-123.

Consideration of a respondent's history of unlawful conduct is not novel to the discussion of a respondent's history of prior offenses. The Commission has recognized that an absence of a history of prior offenses only means "that there is no history of any formal Commission proceeding regarding" a Respondent or its principals. *Pacific Champion Express Co., Ltd. – Possible Violations of Section 10(b)(1) of the Shipping Act of 1984*, 28 S.R.R. 1185, 1192 (ALJ 1999). The Commission, however, may "draw reasonable inferences from the evidence and reach conclusions in the absence of a 'smoking gun'." *Id.* See also *Pacific Champion Express Co., Ltd. – Possible Violations of Section 10(b)(1) of the Shipping Act of 1984*, 28 S.R.R. 1397, 1404, n.11 (FMC 2000) ("The ALJ correctly found, in addition to violations of section 10(b)(1) on 35 shipments in 1997 and 1998, a 'history of prior offenses' dating back to 1993, when Respondent first filed its tariff."). Notwithstanding the absence of prior formal proceedings against Respondents, their history of unlawful conduct weighs in favor of a substantial civil penalty.

4. Ability to Pay a Civil Penalty

As addressed above, Mr. Collado solely owned, operated and controlled the operations of both OMJ and OC. Consequently, BOE evaluated the financial situation of Mr. Collado's current business, OC, in determining ability to pay. To that end, BOE requested production of tax returns and bank statements of OC and Mr. Collado through its discovery requests. The best evidence available to assess the ability to pay a civil penalty is the tax returns of OC and Mr. Collado. However, these tax returns proved unreliable as to the true income levels of either OC or Mr. Collado. Carey Aff. at 5, BOE No. 1046.

For the fourth quarter of 2009, OC claims to have paid a single employee, Mr. Collado, a total of \$2,884.56. Collado Dep. at 111-12 and Exhibit No. 37, BOE No.1019. Carey Aff. at 4, BOE No. 1045. During the same time period, however, Mr. Collado's cancelled checks demonstrate that funds were routinely transferred from OC's corporate account to either Mr. Collado's possession or his personal account. Collado Dep. at 93-111, and Exhibit No. 35, BOE No. 982. Carey Aff. at 3-4, BOE No. 1044-45. Mr. Collado identified a wide range of uses for these funds, including household expenses and payment of family expenses such as school and car payments. Collado Dep. at 104-5, 111. According to Mr. Carey, the total amount of

funds transferred from OC's accounts to Mr. Collado's personal possession or accounts amount to \$16,930.00. Carey Aff. at 3, BOE No. 1044. Accordingly, OC International's corporate tax returns for at least the fourth quarter of 2009 do not accurately reflect the wages paid by OC International to Mr. Collado.

Mr. Collado's practice of randomly transferring funds without regard to declared income tax continued well past 2009. OC's corporate bank statements identify numerous transfers of funds to Mr. Collado's personal accounts in May of 2012 for significantly higher amounts than reflected in the companies' form 941 tax returns. Collado Dep. at 116-19, and Exhibit 36, BOE No. 1011, Carey Aff. at 4-5, BOE No. 1044-45.

While it is impossible to account for the specific purpose of funds transferred from OC to Mr. Collado, it is clear that OC's tax returns do not accurately reflect the earnings of either OC or Mr. Collado. Carey Aff. at 5. BOE No. 1046. Nonetheless, OC continues to operate and thereby generates revenues which are freely used by Mr. Collado for both personal and business expenses. Given the limited and inaccurate information made available by Respondents - that OC is deriving income from its operations, and that Mr. Collado appears to regularly rely on such income for personal use - BOE submits that Respondents have an ability to pay a civil penalty.

Assuming, *arguendo*, that Respondents' ability to pay is limited, the lack of ability to pay does not preclude imposition of a civil penalty based on other factors enumerated in section 13. Ability to pay is only one factor in determining the appropriate amount of a civil penalty. *Portman Square, Ltd.*, 28 S.R.R. 80, 86 (1998, ALJ); *Ever Freight Int'l. Ltd. et al.*, 28 S.R.R. 329, 335 (1998, ALJ); *Refrigerated Container Carriers Pty. Limited – Possible Violations of Section 10(a)(1) of the Shipping Act*, 28 S.R.R. 799, 805, n. 5 (1999, ALJ). See also *Pacific Champion Express Co., Ltd.*, 28 S.R.R. 1185, 1191 (1999, ALJ) (“[N]o one statutory factor has to be elevated above any other, especially the ability-to-pay factor, and recognition must be taken of Congress' efforts to augment the Commission's authority to assess penalties so as to deter future violations.”).

5. Commission's Policies for Deterrence and Future Compliance

In determining the appropriate amount of civil penalties, the Commission's regulations add to the above factors for consideration its policies for deterrence and future compliance with the 1984 Act and the regulations. 46 C.F.R. § 502.603(b). In enacting the 1984 Act, Congress intended to increase the deterrent effect of penalties for violations so that they are not merely written off by companies as a cost doing business. In

this case, the deterrent effect on other companies who might be inclined to violate the 1984 Act by allowing unlawful access to service contracts and operating as OTIs without obtaining licenses from the Commission and providing proof of financial responsibility justifies assessment of the maximum civil penalty.

6. Calculation of Penalty to be Assessed to Respondents

Based on the foregoing analysis of the statutory factors, BOE submits that an assessment of the maximum \$40,000 per violation is justified.

However, because Mr. Collado solely owns, operates and controls OMJ and OC, BOE submits that any penalty should be assessed jointly and severally among the three respondents. *Worldwide Relocation, Inc., et al. – Possible Violations of Section 8, 10, and 19 of the Shipping Act of 1984 and the Commission’s Regulations at 46 C.F.R. §§ 515.3, 515.21, and 520.3*, 31 SRR 1471, 1543 (ALJ 2010). In doing so, BOE submits that it no longer becomes necessary to determine whether Mr. Collado, OMJ, OC or all three committed a violation on each and every shipment. At the outset, Mr. Collado participated as an individual in permitting Island Cargo to access the service contract between OMJ and Seaboard Marine in violation of section 10(a)(1). Consequently, he is liable as an individual. He may also be held

liable for the acts of his companies by piercing the corporate veil. The circumstances present here reflect the classic conditions justifying holding Mr. Collado accountable under this doctrine. He was the sole owner of the companies, operated them under his personal supervision and control, participated in their activities, controlled their bank accounts, and commingled funds in company and personal accounts. Mr. Collado's use of these companies plainly shows that they were simply an extension of himself. Imposition of liability on him and/or his companies will achieve an equitable result. *Williamson v. Recovery Ltd. P'ship*, 542 F.3d 43, 53 (2nd Cir. 2008); *Ariel Mar. Group. Inc.*, 24 S.R.R. 517, 530 (1987).

BOE maintains that a single penalty should be assessed for each of the 19 shipments identified as violations in PFFs 118-120, among the RFA shipments B 1-24, and for each of the 15 shipments in RFA C 1-15, for a total of 34 violations, resulting in a total maximum civil penalty in the amount of \$1,360,000.00. However, notwithstanding the aggravating factors discussed above, BOE submits that a penalty of no less than \$500,000.00 would accomplish the Commission's objectives in assessing a civil penalty, while also giving due consideration to other factors such as ability to pay and history of prior offenses.

D. Cease and Desist Orders Should be Issued Against Respondents OMJ, OC and Mr. Collado.

Cease and desist orders are appropriate “when there is a reasonable likelihood that a respondent will continue or resume its unlawful activity. . . .

One reason to issue such an order is to alert the shipping industry so as to forestall future violations and to enhance enforcement ability by adding another tool, namely, enforcement of a Commission cease and desist order, if necessary.” *Ever Freight Int’l Ltd., et al. – Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984*, 28 S.R.R. 329, 333 (ALJ 1998). In this case, a cease and desist order is appropriate given Mr. Collado’s continued operations as a freight forwarder despite repeated warnings that such activities were unlawful and in violation of Section 19 of the Shipping Act.

Mr. Collado has been warned repeatedly that it was unlawful to operate as an ocean freight forwarder without a license. These warnings include those issued by Mr. Margolis in a personal meeting, PFF 119, Margolis Aft. at 6-7. BOE No. 134, and by BCL’s letter providing notice of intent to deny OC’s license application. BOE No.101. As discussed below, despite these warning, and even during the pendency of this proceeding, Mr. Collado has contrived a new scheme to provide the same freight forwarding services as he admitted in RFA Exhibits C 1-15.

Mr. Collado is now continuing to provide freight forwarding services through a shell NVOCC, Source Consulting, Inc. Mr. Collado testified on deposition that he provides ocean freight forwarding services, including booking, arranging or confirming cargo space; preparing and/or processing delivery orders and bills of lading; arranging for warehouse space and clearing shipments in accordance with export regulations, including preparation of shippers export declarations, for shipments booked in the name of Source Consulting located at 4458 NW 74th Avenue, Miami FL 33166 during some or all of the period between March 11, 2011 and April 2, 2012. PFF 101. Further, Mr. Collado prepared Electronic Export Information (EEI) Letters of Authorization on behalf of Source Consulting between November 2011 and April 2012, and submitted said letters to Crowley Logistics. PFF 102. The following testimony makes clear that Mr. Collado has continued to provide, and bill for, freight forwarding services through OC:

Okay. Let's go to BOE Exhibit 23?

6 Q. And on this one you are charging \$1,510 to
7 First Class Freight for ocean freight and charges to
8 Nassau, Bahamas, transportation of vehicle to Port
9 Everglades, Customs validation, preparation of export
10 documents, i.e., letter of intent, SED preparation,
11 power of attorney and documents overnighted?

12 A. Correct, sir.

13 Q. Were those all activities which OC

14 International Freight performed?

15 A. Correct, sir.

...

10 Q. And that EEI letter was prepared by whom?

11 A. That was prepared by myself, sir, on behalf
12 of Source Consulting.

...

8 Q. I'm wondering again what is the authority on
9 which you can bind Source Consulting bring signing a
10 document on their behalf.

11 A. It's a verbal agreement, Cory.

12 Q. So is there a verbal agency agreement?

13 A. There's a verbal agreement that I handle
14 their cargo and I ship to Nassau, Bahamas under their
15 license.

Collado Dep. Tr. at 54-57; BOE No. 778. Both Collado's deposition and the attached exhibits identify that for each shipment identified, Mr. Collado provided unlicensed freight forwarding services. Collado Dep. Exhibits 22-33.

Mr. Collado's operations with respect to the Source Consulting shipments, by his own words, amount to the provision of freight forwarding services - he is preparing the export paperwork, preparing draft bills of lading, making the analysis and determination as to the need to file Shipper's Export Declarations (SEDs), and signing and submitting Electronic Export Information letters of authorization to the vessel operating common carrier. Collado Dep. Tr. at 121-22; BOE No. 795.

The shipments identified in the deposition exhibits 23-34, along with his own testimony regarding the services rendered by OC, provide ample evidence showing that Mr. Collado has continued to operate as an

unlicensed ocean freight forwarder. Coupled with multiple prior warnings to cease unlicensed and unbounded OTI activity, the evidence demonstrates a complete unwillingness on his part to cease his operations without a formal cease and desist order. In addition to protecting the shipping public, a cease and desist order will alert the shipping industry, forestall future violations and facilitate injunctions against possible unlawful activity in the future. *Pacific Champion*, 28 S.R.R. at 1185.

F. BCL Correctly Denied OC's License Application

Section 19 of the Shipping Act, 46 U.S.C. § 40901, provides that the Commission shall issue an OTI license only to persons that the Commission first determines to be qualified by experience and character. The Commission's regulations at 46 C.F.R. § 515.15 implement the standards for licensing under section 19, and state that:

If the Commission determines, as a result of its investigation, that the applicant: (a) Does not possess the necessary experience or character to render intermediary services; (b) Has failed to respond to any lawful inquiry of the Commission; or (c) Has made any materially false or misleading statement to the Commission; then a letter of intent to deny the application shall be sent to the applicant....

The Commission's regulations thus require denial of an application for an OTI license if the applicant does not possess the necessary character to render OTI services. Consistent with that standard, BCL issued its determination on November 17, 2011 advising Mr. Collado and OC of the agency's intention to deny the OTI license application.

BCL's November 17th notice of intent to deny the license of OC was based on the investigatory findings of Mr. Margolis. Margolis Affidavit, BOE No.134. Specifically, BCL denied the license application because:

[An] investigation conducted by the Miami Area Representative revealed that you have violated sections 10(a)(1) of the Shipping Act by knowingly and willfully obtaining ocean transportation for property at less than the rates and charges that would otherwise be applicable by allowing unlawful access to service contracts while licensed as an NVOCC. Further, after having your license revoked for failure to maintain a bond on January 15, 2010, you appear to have violated section 19 (a) by acting as an ocean freight forwarder without a valid OTI license.

BOE No. 100. These violations have now been well-documented by Mr. Margolis through shipment files in the record and admitted by Mr. Collado. PFFs 21, 34, 45, 49, 51, 75, 77, 98, 100, 118-121; Margolis Aff at 10, BOE No. 143-144.

In addition to the Shipping Act violations, Mr. Collado's application for an OTI license on behalf of OC International failed to disclose numerous

federal tax liens and judgments as well as the fact that Respondent OMJ filed for bankruptcy. PFFs 104-117. Question 7 of the FMC-18 license application asks: Has applicant or any of the applicant's partners, officers, directors, or stockholders ever: (2) filed or been involved in a bankruptcy proceeding, other than as a claimant, been declared bankrupt, been subject to a tax lien, or had legal judgment rendered for a debt. BOE No. 114. Mr Collado, as the applicant's qualified individual and sole owner, officer and director, stated that he had not.

With regard to tax liens, OC was issued Notices of Federal Tax Liens on: (1) March 2, 2012 for \$9,689.74; (2) February 19, 2010 for \$817.42; (3) April 20, 2010 for \$782.11; (4) May 5, 2010 for \$3,374.07; (5) May 5, 2010, again, for an additional \$765.24; (6) February 4, 2009 for \$3,252.11; (7) October 14, 2009 for \$873.87; (8) November 18, 2008 for \$8,331.17; (9) August 27, 2004 for \$18,177.02. PFF 104, 105. The last four of these tax liens were issued prior to the filings of OC's license application, and should have been disclosed in response to question 7. Failure to disclose this information is a violation of 46 C.F.R. 515.15(c), and grounds for rejection. The first five of these tax liens, however, were issued after Mr. Collado submitted the license application, though their existence should still have been disclosed to BCL upon issuance as a change in fact pursuant to 46

C.F.R. § 515.12(d). OC was further issued Notices of Tax Lien by the State of Florida on September 27, 2011 in the amount of \$1,932.00 and on January 24, 2012 in the amount of \$9,258.51; on November 2, 2011 in the amount of \$1,305.35. PFF 106-8. Both of these should have been disclosed pursuant to 46 C.F.R. § 515.12(d).

With regard to legal judgments rendered for a debt, final judgments have been entered against OMJ, OC and/or Mr. Collado by the Circuit Court of the Eleventh Judicial Circuit for Miami-Dade County, Florida on: (1) February 14, 2007 for \$220,587.48; (2) May 12, 2009 for \$1,761.62; (3) June 9, 2009 for \$25,261.38; (4) June 18, 2008 for \$4,905.67; and (5) February 10, 2010 for \$5,350.00. PFFs 109-113.

With regard to OMJ's bankruptcy, a Voluntary Petition for Chapter 7 bankruptcy was filed on behalf of OMJ with the U.S. Bankruptcy Court for the Southern District of Florida on November 28, 2007 in Case. No. 07-20437-RAM. This document was electronically signed by Omar Collado, as President of OMJ, and a Declaration Under Penalty of Perjury was signed personally by Mr. Collado, as President of OMJ stating that he had signed the Voluntary Petition, Schedules and Statement of Financial Affairs. PFF

115-16. OMJ's Chapter 7 Bankruptcy was ultimately dismissed for OMJ's failure to appear at the court ordered meeting of the creditors. PFF 117.

All of these facts were required to be disclosed under the specific terms of the application form, and the failure or omission to disclose such facts would have been material to BCL's consideration of the OTI application. Such a materially false and misleading statement is alone is grounds for denial of a license application. 46 C.F.R. 515.15(c).

The Commission has found on numerous occasions that revoking or suspending an OTI license should be limited to the most egregious circumstances, such as OTIs violating the Shipping Act or Commission regulations, committing other federal offenses, or materially misrepresenting information regarding their qualifications. *In the Matter of Ocean Transportation License in the Name of Apparel Logistics, Inc., Petition for Appeal from Staff Action or in the Alternative for Initiation of an Investigation*, 30 S.R.R. 567, 570 (FMC 2004), *citing Stallion Cargo, Inc. - Possible Violations of Sections 10(a)(1) and 10 (b) (1) of the Shipping Act of 1984*, 29 S.R.R. 665, 683-84 (FMC 2001); *AAA NordStar Line Inc.-- Revocation of License No. 12234*, 29 S.R.R. 663, 663-64 (FMC 2002); *Commonwealth Shipping Ltd., Cargo Carriers Ltd., Martyn C. Merritt and*

Mary Anne Merritt—Submission of Materially False or Misleading Statements to the Federal Maritime Commission And False Representation of Common Carrier Vessel Operations, 29 S.R.R. 1408, 1412-1414 (FMC 2003). The standards for revocation or suspension of an existing license are understandably high. Certainly, a higher standard is not warranted in the case of an applicant seeking to obtain a license. In any event, Mr. Collado meets two out of the three *egregious* standards for justifying denial of a license. *Apparel Logistics, Inc*, 30 S.R.R. at 570.

Mr. Collado's admitted violations of the Shipping Act necessitate upholding BCL's determination to deny OC's license application. The discovery of material misrepresentations on the application, along with evidence that Mr. Collado and OC have continued to provide unlicensed OTI services further crystallize that BCL made the right decision. In sum, not only did the applicant not possess the necessary character to render intermediary services when BCL made its initial assessment; but now it is abundantly evident that the applicant fails to meet that standard for multiple reasons.

IV. CONCLUSION

BOE respectfully requests that the ALJ (1) affirm BCL's denial of the license application of Mr. Omar Collado and OC International, Inc., (2) assess a total civil penalty in an amount no less than \$500,000.00, against Mr. Collado, OMJ and OC jointly and severally for violating sections 10(a) of the Shipping Act, 46 U.S.C. §§ 41102, on at least 19 occasions; and for knowingly and willfully violating Section 19 (a) and (b), 46 U.S.C. § 40901 and 46 U.S.C. §40902, on at least 15 occasions, and (3) issue orders requiring Mr. Omar Collado, OMJ and OC to cease and desist from violating 19 of the Shipping Act by operating as ocean transportation intermediaries without a license and evidence of financial responsibility.

Respectfully submitted,



Peter J. King, Director
Brian L. Troiano, Deputy Director
Cory R. Cinque, Trial Attorney
Bureau of Enforcement
Federal Maritime Commission
800 North Capitol St., N.W.
Washington, DC 20573
(202) 523-5783

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of October, 2012, the foregoing Bureau of Enforcement's Opening Brief has been served upon the Respondents by electronic mail.

Signed in Washington D.C. on October 12, 2012.


Cory R. Cinque