

FEDERAL MARITIME COMMISSION

DOCKET NO. 12-01

OC INTERNATIONAL FREIGHT, INC.;
OMJ INTERNATIONAL FREIGHT, INC.; and OMAR COLLADO

INITIAL DECISION¹

I. INTRODUCTION

A. Overview and Summary of Decision

This proceeding presents three issues regarding respondents OC International Freight, Inc. (“OC”), OMJ International Freight, Inc. (“OMJ”), and Omar Collado. The first issue is whether respondents knowingly and willfully obtained ocean transportation at less than the rates and charges that would otherwise be applicable by permitting unrelated entities to unlawfully access OMJ’s service contracts. The second issue is whether respondents operated as an ocean transportation intermediary (“OTI”) without a license and bond. The third issue is whether to affirm the denial of the application of OC and Mr. Collado for an OTI license. Respondents, who are *pro se*, focus on mitigation and equitable factors to establish their qualification for an OTI license.

Mr. Collado, on behalf of OMJ, signed service contracts to obtain reduced rates for shipments that respondents dispatched as a non-vessel-operating common carrier (“NVOCC”). The Bureau of Enforcement (“BOE”) alleges, however, that respondents operated as an ocean freight forwarder (“OFF”), and not as an NVOCC, on the shipments at issue, so that the shipments should not have received the lower service contract rates. BOE also alleges that respondents operated without an OTI license for shipments after OMJ’s license was revoked on January 15, 2010. Third, BOE alleges that the decision to deny OC and Mr. Collado an OTI license should be affirmed.

¹ This initial decision will become the decision of the Commission in the absence of review by the Commission. 46 C.F.R. § 502.227. An appeal by a party must be filed with the Commission’s Office of the Secretary within twenty-two days from the date of service of the decision. 46 C.F.R. § 502.227.

As discussed more fully below, the evidence does not support a finding that respondents violated section 41102(a) (formerly 10(a)(1)) of the Shipping Act of 1984 (“Shipping Act”) by utilizing unjust or unfair means to obtain ocean transportation at less than the rates that otherwise would be applicable. The facts do not support a violation of this section because there is not sufficient evidence that the respondents utilized unjust or unfair means, that respondents were the shippers who received a benefit from the lower rates, or that respondents willfully and knowingly violated the Shipping Act.

The evidence does demonstrate, however, that respondents violated sections 40901 and 40902 (formerly 19(a) and 19(b)) of the Shipping Act and are not qualified to obtain an OTI license. As explained in detail below, the evidence shows that respondents operated without a license and bond in violation of sections 40901 and 40902 after January 15, 2010, and that the Commission properly denied their application for an OTI license. 46 U.S.C. §§ 41102(a), 40901, 40902. Accordingly, a civil penalty is assessed, a cease and desist order is imposed, and the denial of the OTI license application is affirmed.

B. Procedural Background

On December 2, 2010, Mr. Collado and OC filed an application seeking an OTI license from the Commission’s Bureau of Certification and Licensing (“BCL”). BOE 110-122.² Mr. Collado was identified as the proposed qualifying individual on the application and as the president and sole proprietor of OC. BOE 110. On November 17, 2011, BCL issued a letter indicating its intent to deny OC’s license application, alleging violations of sections 10(a)(1) and 19(a) of the Shipping Act. BOE 101. Based on the asserted Shipping Act violations, BCL determined that OC and Mr. Collado lacked the requisite character to be licensed as an OTI pursuant to 46 C.F.R. § 515.14. BOE 101. By letter dated December 2, 2011, OC requested a hearing on BCL’s license determination. BOE 106.

On April 2, 2012, the Commission issued an order initiating this proceeding to determine:

(1) whether to affirm BCL’s November 17, 2011 denial of the OTI application of OC International Freight, Inc. and Omar Collado;

(2) whether OC International Freight, Inc., OMJ International Freight, Inc. and/or Omar Collado violated Section 10(a)(1) of the Shipping Act, 46 U.S.C. § 41102(a), 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;

² The “BOE” number indicates pages in BOE’s appendix, submitted with their initial brief.

(3) whether OC International Freight, Inc., OMJ International Freight, Inc. 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.

Order for Hearing on Appeal of Denial of License and Order of Investigation and Hearing Possible Violations of Sections 10(a)(1) and 19 of the Shipping Act of 1984 at 4-5. Because the denial of the OTI license application is predicated on the Shipping Act violations, the alleged Shipping Act violations are discussed first.

The Commission named BOE as a party to this proceeding. BOE commenced discovery on April 18, 2012. Mr. Collado responded to interrogatories but did not respond to any of BOE's requests for admission. BOE Brief at 3. BOE conducted a deposition of Mr. Collado in Miami, Florida, on July 18, 2012.

Pursuant to the schedule in this proceeding, BOE filed its initial brief on October 12, 2012. Mr. Collado filed his opposition brief on November 12, 2012. BOE filed its reply brief on December 11, 2012. Pursuant to the Order for Hearing on Appeal of Denial of License and Order of Investigation and Hearing Possible Violations of Sections 10(a)(1) and 19 of the Shipping Act of 1984, the initial decision is due by April 2, 2013. The case is now ripe for decision.

C. Pending Motions

1. Complainant's Motion to Supplement the Record

On February 7, 2013, BOE filed a motion to supplement the record. BOE states that it inadvertently omitted submitting the underlying 2009 service contract between OMJ and Seaboard Marine, Ltd. ("Seaboard Marine"). BOE notes that while the service contract is unsigned, it was obtained from the Commission's Servcon database, where it was filed by the parties to the contract. Respondents did not respond to the motion. The 2009 Seaboard Marine service contract is not only relevant but central to the proceedings. Indeed, all relevant service contracts should have been produced with the initial brief. Accordingly, it is hereby ordered that BOE's motion to supplement the record with the 2009 Seaboard Marine service contract be **GRANTED**.

2. Respondents' Motion for Sur-Reply

On December 20, 2012, respondents filed a motion requesting permission to respond to BOE's reply brief. Respondents object to exhibit A, an email, in BOE's reply because the identity of the sender has been redacted, and because it was not part of the opening brief, respondents had not had an opportunity to review or respond to it. Respondents contend that the allegations in the email are defamatory and scandalous. Although respondents do not specifically object to a second email, it is presumed that they object to both exhibits.

On December 21, 2012, BOE filed its response. BOE responds that it does not object to the reply as long as it is strictly limited to addressing only the exhibit discussed.

These exhibits were submitted by BOE as rebuttal to respondents' claim that no complaints were ever given to the FMC regarding the respondents. BOE Reply at 2-3; *see also* Respondents Opposition at 4. The exhibits indicate that BOE did receive complaints from, as BOE describes them, industry stakeholders. However, the exhibits were not produced in the case in chief and are not presented to prove the allegations in the complaint. It is not clear whether the complaints were received from the same or different people. It does not appear that the complaints are from consumers with personal knowledge of any problems. The exhibits have limited probative value beyond demonstrating that BOE received complaints. In addition, because the identity of the industry stakeholders are not disclosed, the allegations within these exhibits cannot be given significant weight. This is not, however, grounds to exclude the exhibits, which are relevant to the proceeding. However, because of the limited weight to be given to these exhibits, respondents do not need to respond to the allegations in the emails and will not be permitted to file another brief.

Accordingly, it is hereby ordered that respondents' motion to respond to BOE's reply brief be **DENIED**. Exhibit A is admitted over respondents' objection and is given its due weight.

D. Evidence

Under the Administrative Procedure Act, an Administrative Law Judge may not issue an order "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d); *see also Steadman v. SEC*, 450 U.S. 91, 102 (1981). All documents provided in BOE's appendix are hereby admitted as evidence. This initial decision is based on the pleadings, exhibits, testimony, briefs, proposed findings of fact and conclusions of law, and replies thereto filed by the parties.

This initial decision addresses only material issues of fact and law. Proposed findings of fact not included in this initial decision were rejected, either because they were not supported by the evidence or because they were not dispositive or material to the determination of the allegations of the complaint or the defenses thereto. Administrative adjudicators are "not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law,

or discretion which are ‘material.’” *Minneapolis & St. Louis R.R. Co. v. United States*, 361 U.S. 173, 193-94 (1959); *In re Amrep Corp.*, 102 F.T.C. 1362, 1670 (1983). To the extent individual findings of fact may be deemed conclusions of law, they shall also be considered conclusions of law. Similarly, to the extent individual conclusions of law may be deemed findings of fact, they shall also be considered findings of fact.

Part two provides specific findings of fact. Part three provides analysis and conclusions of law and includes preliminary issues, a discussion of each alleged violation in turn, and remedies. Part four provides the Order.

II. FINDINGS OF FACT

A. Respondents

1. OMJ

1. OMJ International Freight, Inc. was organized under the laws of Florida as a corporation on March 15, 1999. BOE 135, 159 (Requests for Admissions (“RFA”) 1).
2. 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 16, 135, 159 (RFA 2).
3. In September 2008, OMJ’s address was 4458 74th Avenue, Miami, FL 33165. BOE 159 (RFA 3).
4. OMJ filed an FMC-18 application with the Commission in August 2006 to operate as both an NVOCC and a Freight Forwarder. BOE 159 (RFA 4).
5. OMJ was licensed as an OFF and an NVOCC on September 13, 2006, with Mr. Collado listed as the qualifying individual. BOE 107-08, 131, 135-136.
6. OMJ became inactive as a Florida corporation on September 26, 2008, for failing to file its annual report. BOE 135, 177 (RFA 129).
7. OMJ’s OTI bond was terminated on December 15, 2009. BOE 160 (RFA 6).
8. Mr. Collado received notice when OMJ’s bond was terminated on December 15, 2009. BOE 177 (RFA 131).
9. The Commission revoked OMJ’s license on January 15, 2010, for failure to maintain a bond. BOE 160 (RFA 7).

10. OMJ and Mr. Collado received notice of the license revocation. BOE 160 (RFA 8), 177 (RFA 132).
11. OMJ has not had an FMC license to act as an OTI at any time since January 15, 2010. BOE 160 (RFA 9).

2. OC

12. OC International Freight, Inc. was organized under the laws of Florida as a corporation on February 26, 2007. BOE 123-126, 136.
13. Omar Collado was the sole officer, President, and Director of OC. BOE 125, 136, 168.
14. Mr. Collado was solely responsible for the day-to-day management of OC during the period between May 9, 2008, and April 2, 2012. BOE 179 (RFA 155).
15. OC's address is 4458 74th Avenue, Miami, FL 33165. BOE 110, 168 (RFA 74).
16. OC filed an FMC-18 OTI license application with the Commission on December 10, 2010, to operate as both an NVOCC and a Freight Forwarder. BOE 110-133.
17. Omar Collado is identified on the OTI license application as the Owner and President of OC and is the proposed qualifying individual of OC. BOE 115.
18. OC has not had an FMC license to act as an OTI at any point. BOE 169 (RFA 77).

3. Mr. Collado

19. On behalf of OMJ, Mr. Collado arranged for warehouse space; cleared shipments in accordance with export regulations; arranged for the delivery of ocean shipping containers to final destination; and, solicited business, including the shipments identified in the record. BOE 178 (RFA 145-147), 180 (RFA 163).
20. On behalf of OC, Mr. Collado made all of the business decisions; booked, arranged for, or confirmed cargo space; prepared and/or processed delivery orders and bills of lading; arranged for warehouse space; cleared shipments in accordance with export regulations; and, arranged for the delivery of ocean shipping containers to final destination, including the shipments identified in the record. BOE 180-181 (RFA 164-168).
21. Mr. Collado has continued to provide 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 since November 18, 2011. BOE 181 (RFA 170).

B. Service Contracts

1. Seaboard Marine Service Contracts

22. OMJ entered into Service Contract 2008-00682 with Seaboard Marine on April 28, 2008. BOE 137, 185-189.
23. Service Contract 2008-00682 was signed by Omar Collado on behalf of OMJ. OMJ certified that the signatory was acting as an NVOCC. BOE 177 (RFA 138-139), 185.
24. Island Cargo Services, Inc. ("Island Cargo") is an unlicensed, unbonded NVOCC in Nassau, Bahamas. BOE 135.
25. BOE provided shipping documents from twenty-four shipments which were booked and dispatched by OMJ with Seaboard pursuant to Service Contract 2008-00682 between May 2008 and March 2009 (the "Seaboard shipments"). BOE 160 (RFA 12-13), 191-434.
26. For the Seaboard shipments, OMJ provided 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 160-164 (RFA 18-41).
27. OMJ did not issue a house bill of lading, or invoice, or collect ocean freight for any of the Seaboard shipments. BOE 160 (RFA 14), 191-434.
28. Island Cargo issued a house bill of lading and collected ocean freight for the Seaboard shipments. BOE 160 (RFA 15), 191-434.
29. Andrew Margolis ("AR Margolis") is a Federal Maritime Commission Area Representative who has been assigned to the South Florida field office for over fifteen years. BOE 134.
30. The content of the shipment files that AR Margolis reviewed is illustrated by BOE 192 to 201, which consists of the following:
 - a. Seaboard Marine Bill of Lading No. SMLU NAS 031A11014, dated May 9, 2008. In the shipper box, the bill of lading identifies OMJ International Freight Inc. as agents. Island Cargo Services is identified as the consignee. OMJ is named in the forwarding agent box. The shipment is rated freight collect. BOE 137-138 (RFA 9), 192.

- b. An OC invoice dated May 7, 2008, is addressed to Island Cargo, Nassau, Bahamas, for \$1,180,³ with the following charges: loading (\$750), drayage (\$350), shrink wrapping and palletizing (total of \$80). BOE 138 (RFA 9), 193.
 - c. Draft Master Bill of Lading, prepared by OMJ, listing OMJ International Freight as agents for Island Cargo Services. BOE 138 (RFA 9), 194.
 - d. Island Cargo container manifest showing the actual consignees and listing various shippers. BOE 138 (RFA 9), 195.
 - e. Loading guide. BOE 138 (RFA 9), 196-198.
 - f. Dock receipt/warehouse receipt prepared by Mr. Collado. In the forwarding agent box, OC International Freight, Inc. is shown as forwarder. BOE 138 (RFA 9), 199.
31. For the remaining Seaboard shipments, the bill of lading was provided by Seaboard Marine, while all supporting documentation was provided by Mr. Collado. Mr. Collado stated that he did not receive a copy of a house bill of lading from Seaboard or the consignee. BOE 138 (RFA 9), 202-434.
32. While respondents submitted the draft master bill of lading to Seaboard Marine, they issued no house bill of lading, assessed no ocean freight charges, and did not undertake to assume common carrier responsibility for this shipment. OMJ did not bill or collect ocean freight, was compensated for its services by Island Cargo, and was listed as agent for Island Cargo on the master bill of lading. BOE 139 (RFA 9).
33. AR Margolis stated that the tariff rate which should have been applied to the nineteen shipments was higher than the actual service contract rate assessed. BOE 139 (RFA 11).
34. Additional charges such as THC (terminal handling) and BLPC (bill of lading processing charge) were the same whether rated under the contract or the tariff, with only several minor exceptions that resulted in no decrease to the overall freight savings. BOE 140 (RFA 11).
35. For each of these nineteen shipments, OMJ allowed Island Cargo to access its service contract which resulted in Island Cargo receiving ocean transportation for property at rates and charges less than would otherwise be applicable. BOE 140 (RFA 12), 145 (chart).
36. According to AR Margolis, the total amount of the underpayment for these nineteen shipments amounted to \$3,541.00. BOE 139-140 (RFA 11), 145 (chart).

³ AR Margolis' affidavit says \$1,150, however, the underlying exhibit establishes a slightly higher amount.

37. During AR Magnois's meeting on March 9, 2009, Mr. Collado stated that he understood that OMJ was not in compliance regarding allowing Island Cargo to utilize his service contract. He made assurances that he would amend his operations so as to comply with the Shipping Act and Commission regulations. BOE 140.
38. Service Contract 2008-00682 had a minimum volume commitment of 100 forty-foot equivalent containers and was set to terminate on May 1, 2009. BOE 185-186.
39. OMJ entered into Service Contract 2009-01518 with Seaboard Marine Ltd. which was set to commence on January 20, 2010, and terminate on May 31, 2010. BOE 165 (RFA 44), 1515-1522.
40. Omar Collado signed Service Contract 2009-01518 on behalf of OMJ. OMJ certified that the signatory was acting as an NVOCC. BOE 165 (RFA 45, 1515).
41. OMJ booked and shipped cargo pursuant to Service Contract 2009-01518 with Seaboard Marine. BOE 165 (RFA 46).

2. Crowley Service Contract

42. It appears that OMJ booked at least 137⁴ shipments with Crowley between January 1, 2010, and October 31, 2010, of which at least 120 shipments were booked subsequent to the revocation of OMJ's license on January 15, 2010. BOE 168 (RFA 71), 759-762 (chart).
43. AR Margolis interviewed Mr. Collado again in May, 2010, in order to determine if Mr. Collado's company continued to offer OTI services subsequent to the revocation of OMJ's OTI license in January, 2010. BOE 140-141.
44. During the May, 2010, interview, AR Margolis asked Mr. Collado if he had provided OTI services subsequent to the January, 2010, revocation of OMJ's license. Mr. Collado stated that he was only acting as a purchasing agent. BOE 140-141.
45. AR Margolis interviewed Mr. Collado again in July, 2010. Mr. Collado advised that he was aware that OMJ was no longer licensed, and was therefore primarily providing domestic trucking services, along with occasionally acting as an ocean freight forwarder. BOE 140-141.

⁴ BOE's proposed finding of fact (BOE Brief at 12) lists these number of shipments, citing the RFA. The RFA, however, does not provide any numbers, although it does refer to an exhibit. BOE 168 (RFA 71). The exhibit was located in the record and suggests that the actual numbers may be slightly higher. The record only includes detailed information regarding fifteen of these shipments.

46. Based on the shipment files provided by Mr. Collado, and additional information provided by Crowley Liner Services, it appears that OMJ and/or OC provided services as an ocean freight forwarder on at least fourteen shipments between January 15, 2010, and June 8, 2010. BOE 141, 470-757.
47. BOE included in the record evidence of a January 5, 2010, shipment. Although this shipment is after the bond revocation, it is prior to the license revocation. BOE 437-469.
48. As a representative example of these shipments, the Crowley shipment records consist of the following:
 - a. Crowley Caribbean Services Bill of Lading No. JAXS9M218489, dated January 26, 2010. The shipper box on the bill of lading identifies OMJ International Freight Inc. as agent for Island Cargo Services. Island Cargo Services is named as the consignee. The bill of lading describes the shipment as one 45 foot container of office supplies from Port Everglades, Fl, to Nassau, Bahamas. OMJ is identified in the forwarding agent box. The shipment is rated ocean freight collect. BOE 141, 437-438.
 - b. An OC invoice dated January 27, 2010, addressed to Island Cargo, Nassau, Bahamas for \$750.00 for a handling charge. BOE 141, 439.
 - c. Draft Master Bill of Lading prepared by OMJ identifying OMJ as agent for Island Cargo Services in the shipper box, Island Cargo Services in the consignee box, and OMJ International Freight in the forwarding agent box (and reciting OMJ's FMC license number as 17198F, which was revoked on January 15, 2010). BOE 142, 440.
 - d. Dock Receipt/Cargo Manifest prepared by OMJ/OC. BOE 142, 441.
 - e. Loading guide. BOE 142, 442-443.
 - f. Dock receipt/warehouse receipt prepared by Mr. Collado. In the forwarding agent box, OC International Freight, Inc. is shown as forwarder. BOE 142, 444.
 - g. OMJ Warehouse Receipts. BOE 142, 445.
49. For the remaining Crowley shipments, the bill of lading was provided by Crowley, while all supporting documentation was provided by Mr. Collado. Mr. Collado stated that he did not receive a copy of the house bill of lading from Crowley or the consignee. This exhibit confirms Mr. Collado's statements that OMJ/OC/Collado submitted the draft master bill of lading to Crowley, and 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. The master bill of lading states that OMJ acted as agents for Island Cargo and the shipment files indicate that

OMJ was compensated for its services by Island Cargo. All of the remaining Crowley shipment files contain similar documents. BOE 142-143.

50. Each of the Crowley shipments were booked with Crowley and dispatched by OMJ between January 15, 2010, and June 8, 2010, pursuant to a service contract. BOE 165 (RFA 47-49).
51. For the Crowley shipments, OMJ provided freight forwarding services such as booking, arranging, or confirming cargo space; preparing and/or processing delivery orders and bills of lading; and arranging for warehouse space and clearing shipments in accordance with export regulations. BOE 165-168 (RFA 54-68).
52. Respondents did not issue a house bill of lading or invoice or collect ocean freight for any of the Crowley shipments. BOE 165 (RFA 50), 173 (RFA 107).
53. Island Cargo issued a house bill of lading and collected ocean freight for the Crowley shipments. BOE 165 (RFA 51).
54. For the Crowley shipments, OC provided freight forwarding services such as booking, arranging, or confirming cargo space; preparing and/or processing delivery orders and bills of lading; and arranging for warehouse space and clearing shipments in accordance with export regulations. BOE 173-176 (RFA 109-123).
55. Island Cargo acted as an NVOCC for the Crowley shipments. BOE 165 (RFA 53).

3. Source Consulting's Service Contract

56. The evidence shows that respondents utilized the service contract of Source Consulting, an unrelated entity, to make shipments from March 11, 2011, to April 2, 2012. BOE 182 (RFA 175).
57. Mr. Collado was not an agent or employee of Source Consulting, nor did he receive any compensation from Source Consulting at any time prior to July 18, 2012. BOE 795.
58. Mr. Collado testified that OC performs booking, receiving, consolidation, warehousing, documentation, submitting draft bills of lading, preparing export documents, shrink wrapping, palletizing, and loading for Source Consulting. BOE 775-776, 795, 1063.
59. Mr. Collado testified that he has a "verbal agreement to handle cargo and shipments to Nassau, Bahama under their license." BOE 778.
60. Mr. Collado testified that Source Consulting was "simply assisting with their license so that the cargo can continue to move." BOE 775.
61. Mr. Collado testified that Source Consulting is the shipper. BOE 779.

62. Some of the bills of lading list Source Consulting's name with OC's address. BOE 785, 795.
63. 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 between March 11, 2011, and April 2, 2012. BOE 121-122, 182 (RFA 175), 776-785, 794-795, 851-937.
64. 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. BOE 786-787, 949-981.
65. Mr. Collado gave himself the title of Operations for Source Consulting on the EEI letters. BOE 786.
66. Mr. Collado has continued to provide, and bill for, freight forwarding services through OC, according to his testimony:

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

A. Correct, sir.

Q. Were those all activities which OC International Freight performed?

A. Correct, sir.

...

Q. And that EEI letter was prepared by whom?

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

...

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

A. It's a verbal agreement, Cory.

Q. So is there a verbal agency agreement?

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

BOE 778.

67. Mr. Collado further testified about the services he provides for Source Consulting.

Q. And those were the same functions that you performed when you were licensed as an NVO and a freight forwarder?

A. Pretty much the same, sir.

Q. And you understood that your license was necessary to perform those functions?

A. That is correct, sir.

Q. And that those are not just warehousing functions, those are NVO and freight forwarder functions?

A. To a limited capacity, sir. I wasn't fully operating as an NVO or do everything an NVO could do.

Q. But you do understand that preparing export documentation is a freight forwarder role?

A. Absolutely, sir.

BOE 784.

C. OTI License Application

68. OC filed an FMC-18 OTI license application on December 2, 2010, listing Omar Collado as the qualifying individual. BOE 110-133.

69. In response to question 7, Part B, of the FMC-18 application, Mr. Collado, on behalf of OC, checked "no" indicating 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 114, 180 (RFA 161).

70. Mr. Collado certified under penalty of perjury that the information furnished in his OTI license application was true, correct, and complete to the best of his knowledge and belief. BOE 130, 180 (RFA 162).

71. Mr. Collado certified that he would not act as an OTI or perform OTI services without a valid OTI license issued by the Federal Maritime Commission. BOE 130.
72. 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 \$4139.31; on February 4, 2009, for \$3,252.11; on October 14, 2009, for \$873.87; and, on November 18, 2008, for \$8,331.17. BOE 766-768, 799-806.
73. OC entered into an Installment Agreement with the Department of Treasury, Internal Revenue Service. BOE 1030.
74. OMJ was issued a Notice of Federal Tax Lien on August 27, 2004, for \$18,177.02. BOE 766, 807.
75. OC was issued a Notice of Tax Lien by the State of Florida on September 27, 2011, in the amount of \$1,932.76. BOE 770, 814.
76. Default Final Judgment was issued by the Miami-Dade County Court against OC as the debtor and Schenker, Inc. as the Creditor on December 19, 2011, in the amount of \$9,258.51. BOE 770, 815, 1033.
77. OC contacted Schenker Inc.'s attorney on January 11, 2012, to make payment arrangements. BOE 1031.
78. 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. This lien may be related to the September 27, 2011, lien. BOE 770, 816.
79. 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. BOE 771, 817-818.
80. 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 with a payment plan of \$400/week. BOE 771, 819.
81. 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. BOE 772, 821.
82. A Final Judgment was entered by the County 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 excess of \$4,365.⁵ BOE 772, 824.

83. 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. BOE 772, 825.
84. A Notice of Bankruptcy was filed by OMJ in County Court in the Eleventh Judicial Circuit for Miami-Dade County, Florida, on November 28, 2007. BOE 773, 826.
85. 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. 07-20437-RAM. This document was electronically signed by Omar Collado, as President of OMJ. BOE 773-774, 827-848.
86. 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 on November 28, 2007, in Case 07-20437-RAM on November 28, 2007. BOE 774-775, 848.
87. OMJ's Chapter 7 Bankruptcy, Case 07-20437-RAM in the U.S. Bankruptcy Court for the Southern District of Florida was dismissed on January 10, 2008, for OMJ's failure to appear at the § 341 Meeting of Creditors. BOE 775, 849.

D. Piercing the Corporate Veil

1. OMJ

88. Mr. Collado was solely responsible for the day-to-day management of OMJ. BOE 177 (RFA 133).
89. Mr. Collado controlled the bank accounts of OMJ. BOE 177 (RFA 134).
90. Mr. Collado authorized business expenditures on behalf of OMJ. BOE 177 (RFA 135).
91. Mr. Collado made all business decisions on behalf of OMJ, including for those shipments in the record. BOE 177 (RFA 136).

⁵ The exhibit in the record shows this amount although there may be an additional page with additional amounts, as the signature page is not included. BOE 824.

92. Mr. Collado exercised control over the operations of OMJ, including for those shipments in the record. BOE 177 (RFA 137).

93. Although OMJ was listed as the shipper on bills of lading, invoices for those shipments were issued by OC. *See, e.g.*, BOE 192-193, 437-439.

2. OC

94. Mr. Collado made all business decisions on behalf of OC. BOE 179 (RFA 156).

95. Mr. Collado controlled the bank accounts of OC. BOE 180 (RFA 157).

96. Mr. Collado exercised control over the operations of OC. BOE 180 (RFA 158).

97. Mr. Collado authorized business expenditures on behalf of OC. BOE 180 (RFA 159).

98. OC funds were used for Mr. Collado's household expenses, his child's school, and his child's vehicle down payment. BOE 790, 792-794, 1044 (chart).

99. Mr. Collado testified that checks were written to his personal account to be transferred to his wife's account or used for household expenses as a habit. BOE 792-793.

100. Because these bank records do not include cancelled checks with a stated purpose for the payment, it is not possible to determine the purpose for the transaction, or the amount of the funds dedicated to OC expenses. However, during these time periods, funds were routinely transferred from OC's corporate accounts to Mr. Collado's personal account in excess of the wages identified on OC's tax returns. BOE 1046.

101. OC's letterhead included an email address that began "omjintl" giving the impression that it was associated with OMJ. *See, e.g.*, BOE 193, 439.

102. 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 tax returns. BOE 793-794, 111, 1044-1045.

103. For the fourth quarter of 2009, OC claims to have paid a single employee, Mr. Collado, a total of \$2,884.56. BOE 792, 1045.

104. 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. BOE 787-791, 982, 1044-45.

105. 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. BOE 790-792.

106. The total amount of funds transferred from OC's accounts to Mr. Collado's personal possession or accounts amount to \$16,930.00. BOE 1044.
107. OC's corporate tax returns for at least the fourth quarter of 2009 do not accurately reflect the wages paid by OC to Mr. Collado. BOE 1046.

III. ANALYSIS AND CONCLUSIONS OF LAW

A. Preliminary Issues

1. Burden of Proof

To prevail in a proceeding brought to enforce the Shipping Act, a complainant has the burden of proving by a preponderance of the evidence that the respondents violated the Act. 5 U.S.C. § 556(d) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."); 46 C.F.R. § 502.155; *Exclusive Tug Franchises*, 29 S.R.R. 718, 718-719 (ALJ 2001). "[A]s of 1946 the ordinary meaning of burden of proof was burden of persuasion, and we understand the APA's unadorned reference to 'burden of proof' to refer to the burden of persuasion." *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 276 (1994). The party with the burden of persuasion must prove its case by a preponderance of the evidence. *Steadman v. SEC*, 450 U.S. 91, 102 (1981). "[W]hen the evidence is evenly balanced, the [party with the burden of persuasion] must lose." *Greenwich Collieries*, 512 U.S. at 281. It is appropriate to draw inferences from certain facts when direct evidence is not available, and circumstantial evidence alone may even be sufficient; however, such findings may not be drawn from mere speculation. *Waterman S.S. Corp. v. General Foundries Inc.*, 26 S.R.R. 1173, 1180 (ALJ 1993), adopted in relevant part, 26 S.R.R. 1424 (FMC 1994).

2. Weighing the evidence

BOE primarily cites requests for admissions to support their case, although they also provide the supporting documents. While these requests for admission are certainly admissible and relevant, the supporting documents are the strongest evidence in the proceeding. So, for example, the actual service contract is stronger evidence than the requests for admission about what the service contract says. The supporting documents are preferred because they are contemporaneous and speak for themselves. Moreover, where the respondents are acting *pro se*, as here, relying on the party's admissions is not particularly persuasive where it is not clear that the party understands the legal terms of art or appreciates the implications of the requests for admissions. Therefore, the undersigned relied on all of the evidence and included citations to the supporting documents, where possible.

The requests for admissions routinely use the phrase "during some or all of the time" to describe time periods. This language is problematic because if an action was only being taken for some of the time, then the action was not being taken for part of the time. It appears that this phrase

was used as a matter of routine. The evidence demonstrates that for the findings of fact included in this decision, the facts existed for the entire time period covered, and the phrase has been removed.

B. Discussion

1. Section 41102(a)

BOE alleges that respondents violated section 41102(a) (formerly section 10(a)(1)) of the Shipping Act, which states:

Obtaining Transportation at Less Than Applicable Rates.—A person may not knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or any other unjust or unfair device or means, obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise apply.

46 U.S.C. § 41102(a).

The evidence demonstrates that OMJ's service contract with Seaboard Marine was in effect from April 28, 2008, to May 1, 2009. BOE 185. This 2008 service contract, signed by Omar Collado on behalf of OMJ, states that "[t]his contract applies to cargoes tendered by the Shipper." BOE 185-186. Twenty-four shipments were booked by OMJ with Seaboard pursuant to this 2008 service contract. BOE 160 (RFA 12-13). OMJ did not issue a house bill of lading or invoice or collect ocean freight for any of these shipments. BOE 160 (RFA 14). Island Cargo issued the house bill of lading and acted as an NVOCC on each of these shipments. BOE 160 (RFA 15). OMJ provided freight forwarding services such as booking, arranging, or confirming cargo space; preparing and processing delivery orders and bills of lading; and arranging for warehouse space and clearing shipments in accordance with export regulations. BOE 160-161 (RFA 18).

OMJ also entered into Service Contract 2009-01518 with Seaboard Marine Ltd. which was set to commence on January 20, 2010, and terminate on May 31, 2010. BOE 165 (RFA 44), 1515-1522. Omar Collado signed Service Contract 2009-01518 on behalf of OMJ. OMJ certified that the signatory was acting as an NVOCC. BOE 165 (RFA 45, 1515). OMJ booked and shipped cargo pursuant to Service Contract 2009-01518 with Seaboard Marine. BOE 165 (RFA 46).

BOE's Area Representative Margolis testified that he examined twenty-four shipment records, the Seaboard service contracts, Seaboard's rated bills, and Seaboard's tariffs and concluded that for nineteen of the twenty-four shipments, a lower rate was obtained than would otherwise have been applicable. BOE 145. The total amount of the alleged undercharge for these nineteen shipments amounted to \$3,541.00. BOE 139-140 (RFA 11), 145 (chart).

The Seaboard service contracts included a minimum quantity commitment and deadfreight penalty. BOE 186, 1515-1516. BOE did not present evidence regarding whether respondents met

their minimum quantity commitment or whether they paid a deadfreight penalty. So, while this provides a possible motivation, it is not clear whether respondents so benefitted.

As discussed in more detail below, the evidence does not support findings that respondents used unjust or unfair means, that respondents benefitted from obtaining transportation at less than the rates that otherwise would be applicable, or that respondents knowingly and willfully violated the Shipping Act.

a. Unjust or Unfair Means

To establish a violation of section 41102(a), “fraud or concealment is a necessary ingredient in the proof of an unjust or unfair device or means.” *United States v. Open Bulk Containers*, 727 F.2d 1061, 1064 (11th Cir. 1984); *see also Rose Int’l, Inc. v. Overseas Moving Network Int’l, Ltd.*, 29 S.R.R. 119, 163 (FMC 2001); *Waterman S.S. Corp. v. General Foundries, Inc.*, 26 S.R.R. 1424, 1429 (FMC 1994). “It is such fraud or concealment that in fact makes the practice unjust or unfair.” *Open Bulk Containers*, 727 F.2d at 1064.

BOE cites *Universal Logistic Forwarding Co., Ltd.*, 29 S.R.R. 325 (ALJ 2001), *adopted in relevant part*, 29 S.R.R. 474 (2002), for the proposition that “the Commission found that unlawful access to service contracts amounts to an unfair device under section 10(a)(1).” BOE Brief at 33. BOE does not expound further on what practices of the respondents were unjust or unfair. The *pro se* respondents do not address this issue.

In a default decision, the Administrative Law Judge in *Universal Logistics* noted that “Universal substituted the name of another NVOCC, Translink Shipping Inc., on the relevant bills of lading in order to enjoy the lower rates that Senator would charge under Translink’s service contract.” *Universal Logistics*, 29 S.R.R. at 330. The other case primarily relied upon by BOE, *Hudson Shipping*, does not discuss the issue of unjust or unfair means, although in that case the “bills of lading denoted their service contracts with Hudson and specified that Hudson was the shipper, when in fact either Green Master or Transglobal acted as the shipper in each instance.” *Hudson Shipping (Hong Kong) Ltd. d/b/a Hudson Express Lines*, 29 S.R.R. 1381, 1383 (ALJ 2003). It appears that in both of these cases, the bills of lading concealed the identity of the true shipper.

In *Open Bulk Containers*, the Eleventh Circuit found that Union Camp did not violate the Shipping Act of 1916 by consolidating cargoes with other shippers to avoid the payment of deadfreight penalties because there was no concealment. *Open Bulk Containers*, 727 F.2d at 1066. The evidence showed that Union Camp made no attempt to conceal the combined shipments for the purpose of receiving lower rates. *Open Bulk Containers*, 727 F.2d at 1065. In addition, Union Camp made no profit on the arrangement other than avoiding deadfreight penalties. *Open Bulk Containers*, 727 F.2d at 1063. Although the bills of lading did not mention Union Camp, “whatever concealment that did occur was not used as a means to achieve lower rates, which, as discussed above, is necessary to qualify as an unjust or unfair device or means.” *Open Bulk Containers*, 727 F.2d at 1066.

In the case *sub judice*, Seaboard Marine's bills of lading list the shipper as "OMJ International Freight as agents," the Consignee as "Island Cargo Services," and states that "Charges, Including Freight Payable at: Destination by Island Cargo Services." *See, e.g.*, BOE 192, 203 (capitalization edited). The Crowley bills of lading list the shipper as "OMJ International as agents for Island Cargo Services," list the consignee as "Island Cargo Services," and list the forwarding agent as "OMJ International Freight." *See, e.g.*, BOE 437, 438, 474 (capitalization edited). It appears that respondents made no attempt to conceal Island Cargo's role in the shipments. Indeed, respondents cooperated with BOE and did not deny or attempt to hide Island Cargo's role throughout this proceeding. Rather, respondents defend themselves by contending that they thought their actions were permissible. The evidence demonstrates that there was no fraud or concealment, as required by the Shipping Act to establish a section 41102(a) violation.

The evidence does not establish by a preponderance of the evidence that respondents obtained transportation by "means of false billing, false classification, false weighing, false report of weight, false measurement, or any other unjust or unfair device or means" as required by the Shipping Act for a violation of this section. Accordingly, BOE has not established an essential element of a violation of section 41102(a) of the Shipping Act.

b. Obtaining Transportation

The Commission issued an order initiating this proceeding to determine whether the respondents violated the Shipping Act by "*allowing other persons to obtain* ocean transportation for property at less than the rates and charges that would otherwise be applicable." Order for Hearing on Appeal of Denial of License and Order of Investigation and Hearing Possible Violations of Sections 10(a)(1) and 19 of the Shipping Act of 1984 at 4-5 (FMC April 2, 2012) (emphasis added).

Pursuant to the Shipping Act, a shipper may not "obtain or attempt to obtain" transportation for less than applicable charges. BOE contends that a shipper may not "allow other persons to obtain" transportation for less than applicable charges. BOE relies on *Hudson Shipping*, 29 S.R.R. 1381, stating:

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*], respondent Hudson was found to have violated section 10(a)(1) by allowing other transportation entities to access . . . 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 . . . which OMJ was also able to avoid.

BOE Brief at 33.

In this case, however, there is no evidence that the respondents benefitted from the arrangement. Although respondents had a deadfreight penalty clause in the service contracts, it is not clear whether OMJ was able to avoid deadfreight penalties, whether respondents transported the required number of shipments, whether deadfreight penalties were incurred or paid by respondents, and whether the shipments identified by BOE would have made any difference with regard to any deadfreight penalties. Moreover, the charges billed appear to merely compensate the respondents for their freight forwarding services.

Respondents would have been permitted to obtain a benefit from accessing reduced rates if the respondents were the shippers. If respondents were NVOCCs for these shipments, then respondents would have been the shippers. If respondents were the shippers, they would be handling the shipment in their capacity as an NVOCC and would be entitled to access the service contract. BOE alleges, however, that respondents were OFFs, not NVOCCs, for these shipments. It is because respondents were not acting as shippers, and therefore not entitled to receive a benefit, that their access of the service contracts is at issue. Based on Mr. Collado's statements, it appears that respondents' subsequent utilization of Source Consulting's service contract may violate this section because respondents are the shippers receiving the benefit by utilizing another NVOCC's name, although there is limited evidence regarding these shipments.

BOE has not established that respondents obtained any benefit from their arrangement with Island Cargo. Moreover, it is not clear that the section 41102(a) prohibition against obtaining transportation for less than applicable charges includes permitting others to obtain transportation for less than applicable charges. Accordingly, it appears that respondents did not obtain transportation at lower rates but rather permitted another entity to obtain such transportation.

c. Knowingly and Willfully

Section 41102(a) of the Shipping Act prohibits any person from "knowingly and willfully" obtaining or attempting to obtain ocean transportation of property by various false activities, including false billing or classification, or by "any unjust or unfair device or means." A person is considered to have "knowingly and willfully" violated the Shipping Act if the person had knowledge of the facts of the violation and intentionally violated or acted with reckless disregard, plain indifference, or purposeful, obstinate behavior akin to gross negligence. *Rose Int'l*, 29 S.R.R. at 164-165; *Portman Square Ltd.*, 28 S.R.R. 80, 84-85 (ALJ 1998); *Ever Freight Int'l*, 28 S.R.R. 329, 333 (ALJ 1998).

BOE alleges that respondents 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 Brief at 31. Specifically, BOE contends that OMJ entered into the Seaboard service contracts and permitted Island Cargo, an unrelated, unbonded, unlicensed foreign entity, to make twenty-four shipments under the service contracts.

Respondents assert that they "did not 'knowingly and willfully' allow 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." Respondents' Brief at 5. Respondents explain:

OMJ's interpretation of the Shipping Act was incorrect. It is undisputed that Island Cargo Services was provided access to OMJ's service contract with Seaboard Marine. However, OMJ innocently and without intent to deceive or defraud any person or entity, allowed Island Cargo, a foreign company, this access with the understanding that this was permissible behavior so long as OMJ was licensed as an OTI.

Respondents' Brief at 5 (*see also* Respondents' Rule 95 Statement, August 28, 2012, at 3-4). Respondents claim that "these practices were done in good faith, acting upon the belief that its license as an OTI allowed it to carry on this practice with a foreign entity without violating any law or regulation." Respondents' Brief at 5.

BOE asserts in its reply brief that respondents "willfully neglected their responsibilities as a regulated entity. Despite their claim of good faith ignorance, it is well established that Mr. Collado and OMJ, as previously licensed NVOCCs, were obligated to educate themselves as to the requirements of the Shipping Act, and their failure to do so amounts to acting knowingly and willfully within the meaning of the statute." Reply Brief at 3-4.

Although Mr. Collado knew he should not permit Island Cargo to access his service contracts, it is not clear that he understood that this was a violation of the Shipping Act. Indeed, if Mr. Collado had so known, he may have attempted to hide his role in the transaction. Instead, the contemporaneous documents as well as his testimony reflect no intent to deceive or defraud. While permitting Island Cargo to access the service contracts may have violated the terms of the contracts, the evidence does not rise to the level of willful and knowing violation of the Shipping Act.

The evidence is not sufficient to find that the respondents engaged in fraud or concealment as required to establish use of an unjust or unfair device. In addition, although not necessary to the resolution of this issue, the evidence also does not establish that the respondents obtained transportation or benefitted from allowing Island Cargo access to lower rates or that respondents knowingly and willfully violated the Shipping Act. Accordingly, BOE has not established by a preponderance of the evidence that respondents violated section 41102(a) of the Shipping Act when it allowed Island Cargo to access its service contracts.

2. Sections 40901 and 40902

Sections 40901 and 40902 (formerly sections 19(a) and 19(b)) prohibit a person from acting as an OTI without a license or evidence of financial responsibility.

§ 40901. License requirement

(a) In General.—A person in the United States may not act as an ocean transportation intermediary unless the person holds an ocean transportation intermediary's license issued by the Federal Maritime Commission. The Commission shall issue a license to a person that the Commission determines to be qualified by experience and character to act as an ocean transportation intermediary.

(b) Exception.—A person whose primary business is the sale of merchandise may forward shipments of the merchandise for its own account without an ocean transportation intermediary's license.

§ 40902. Financial responsibility

(a) In General.—A person may not act as an ocean transportation intermediary unless the person furnishes a bond, proof of insurance, or other surety—(1) in a form and amount determined by the Federal Maritime Commission to insure financial responsibility; and (2) issued by a surety company found acceptable by the Secretary of the Treasury.

(b) Scope of Financial Responsibility.—A bond, insurance, or other surety obtained under this section—(1) shall be available to pay any penalty assessed under section 41109 of this title or any order for reparation issued under section 41305 of this title; (2) may be available to pay any claim against an ocean transportation intermediary arising from its transportation-related activities—(A) with the consent of the insured ocean transportation intermediary and subject to review by the surety company; or (B) when the claim is deemed valid by the surety company after the ocean transportation intermediary has failed to respond to adequate notice to address the validity of the claim; and (3) shall be available to pay any judgment for damages against an ocean transportation intermediary arising from its transportation-related activities, if the claimant has first attempted to resolve the claim under paragraph (2) and the claim has not been resolved within a reasonable period of time.

(c) Regulations on Court Judgments.—The Commission shall prescribe regulations for the purpose of protecting the interests of claimants, ocean transportation intermediaries, and surety companies with respect to the process of pursuing claims against ocean transportation intermediary bonds, insurance, or sureties through court judgments. The regulations shall provide that a judgment for monetary damages may not be enforced except to the extent that the damages claimed arise from the transportation-related activities of the insured ocean transportation intermediary, as defined by the Commission.

(d) Resident Agent.—An ocean transportation intermediary not domiciled in the United States shall designate a resident agent in the United States for receipt of service of judicial and administrative process, including subpoenas.

46 U.S.C. §§ 40901, 40902. In addition, Commission regulations 515.21 and 515.22 specify the financial responsibility requirements and required proof of financial responsibility. 46 C.F.R. §§ 515.21, 515.22.

BOE contends that respondents admit to providing ocean freight forwarding services during a period in which they did not have a license or bond. BOE Initial Brief at 36. BOE provides evidence of shipments booked with Crowley between January 16, 2010, and October 26, 2010, after OMJ's license was revoked. BOE Initial Brief at 37-38.

BOE provides an explanation of documents supporting its claim that respondents provided OTI services after losing their license on January 15, 2010. AR Margolis provides a representative example of the Crowley shipment records consists of the following:

- Crowley Carriibbean Services Bill of Lading No. JAXS9M218489, dated January 26, 2010. The shipper box on the bill of lading identifies OMJ International Freight Inc. as agent for Island Cargo Services. Island Cargo Services is named as the consignee. The bill of lading describes the shipment as one 45 foot container of office supplies from Port Everglades, FL, to Nassau, Bahamas. OMJ is identified in the forwarding agent box. The shipment is rated ocean freight collect.
- An OC invoice dated January 27, 2010, addressed to Island Cargo, Nassau, Bahamas, for \$750.00 for a handling charge.
- Draft Master Bill of Lading prepared by OMJ identifying OMJ as agent for Island Cargo Services in the shipper box; Island Cargo Services in the consignee box, and OMJ International Freight in the forwarding agent box (and reciting OMJ's FMC license number as 17198F, which was revoked on January 15, 2010).
- Dock Receipt/Cargo Manifest prepared by OMJ/OC.
- Loading guide.
- Dock receipt/warehouse receipt prepared by Mr. Collado. In the forwarding agent box, OC International Freight, Inc. is shown as forwarder.
- OMJ Warehouse Receipts.

BOE 141-142, 438-445.

AR Margolis states that:

This exhibit confirms Mr. Collado's statements that OMJ/OC/Collado submitted the draft master B/L to Crowley, and 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. Each of these activities constitute freight forwarding services enumerated under 46 C.F.R. § 515.2(i). The master B/L states that OMJ acted as agents for Island Cargo and the shipment files indicate that OMJ was compensated for its services by Island Cargo. All of the remaining shipment files identified in Exhibits C 2-15 contain the same documents.

BOE 142-143 (footnote omitted). BOE notes that "there are inherent discrepancies in the shipment files with respect to whether OMJ or OC handled the shipment since the master B/L identifies OMJ, yet the dock receipt identifies, and the invoice is issued by, OC." BOE 142 n.2.

Respondents, in their Rule 95 Statement, indicate that:

It 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[.] OMJ's revocation of its license was based on its failure to make payment to the surety company on a timely basis. OMJ's revocation of its license was based on its own economic hardship not based on any intent to deceive or defraud.

Respondent's Rule 95 Statement, August 28, 2012, at 4.

BOE contends that Mr. Collado was 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, BOE 134, and by BCL's letter providing notice of intent to deny OC's license application, BOE 101. Despite these warnings, and even during the pendency of this proceeding, Mr. Collado has contrived a new scheme with Seaboard Consulting to continue to provide the same freight forwarding services as he admitted in the Crowley shipments. BOE Brief at 49.

It appears that OMJ booked at least 137⁶ shipments with Crowley between January 1, 2010, and October 31, 2010, of which at least 120 shipments were booked subsequent to the revocation of OMJ's license on January 15, 2010. BOE 168 (RFA 71), 759-762 (chart). These shipments presumably include the fifteen shipments that BOE alleges respondents handled for Island Cargo

⁶ BOE's proposed finding of fact (BOE Brief at 12) lists these number of shipments, citing the RFA. The RFA, however, does not provide any numbers, although it does refer to an exhibit. BOE 168 (RFA 71). The exhibit was located in the record and suggests that the actual numbers may be slightly higher. The record only includes detailed information regarding fifteen of these shipments.

as well as shipments for which respondents were the NVOCC. The record only includes a list with very limited information about these shipments and there is no request that a penalty be based upon all of these shipments. Compare BOE Brief at 37 n.6 (mentioning 120 shipments) with BOE Brief 38 (alleging violations for fifteen exhibits provided in the record). BOE also establishes, relevant to the penalty phase, that Mr. Collado continued to provide freight forwarding services through a shell NVOCC, Source Consulting, Inc., even after this proceeding began.

The evidence demonstrates that OMJ's bond was terminated on December 15, 2009, and its OTI license was revoked on January 15, 2010. OC never obtained an OTI license. After losing OMJ's license, respondents continued to provide 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. The Crowley bills of lading in the record list the shipper as "OMJ International as agents for Island Cargo Services," and the forwarding agent as "OMJ International Freight." *See, e.g.*, BOE 437. OC billed Island Cargo for the cost of the freight.

Given the totality of the circumstances, the evidence demonstrates that respondents acted as ocean transportation intermediaries after losing their license. One of the fifteen shipments documented by BOE occurred prior to OMJ's license being revoked and therefore is only a violation of section 40902. The other fourteen shipments occurred after the license revocation and constitute violations of both sections 40901 and 40902. The evidence demonstrates that respondents provided freight forwarding services after having their bond and license revoked. Accordingly, the evidence shows that respondents operated without a license and financial responsibility as required by sections 40901 and 40902 of the Shipping Act.

3. OTI License

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

46 C.F.R. § 515.15

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. Based on a finding that the applicant did not possess the necessary character, BCL issued its determination letter on November 17, 2011, advising Mr. Collado of the intention to deny OC's OTI license application.

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 re Ocean Transportation License in the Name of Apparel Logistics, Inc.*, 30 S.R.R. 567, 570 (FMC 2004), citing *Stallion Cargo, Inc.*, 29 S.R.R. 665, 683-684 (FMC 2001); *AAA NordStar Line Inc.*, 29 S.R.R. 663, 663-664 (FMC 2002); *Commonwealth Shipping Ltd., Cargo Carriers Ltd., Martyn C. Merritt and Mary Anne Merritt*, 29 S.R.R. 1408, 1412-1414 (FMC 2003).

BCL's November 17th notice of intent to deny the license of OC was based on the investigatory findings of Mr. Margolis. BOE 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 101.

BOE contends that in addition to the Shipping Act violations, Mr. Collado's application for an OTI license on behalf of OC failed to disclose numerous tax liens and judgments as well as respondent OMJ's bankruptcy filing. 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 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; and (9) August 27, 2004, for \$18,177.02. BOE 766-68, 799-806. The first five of these tax liens were issued after Mr. Collado submitted the license application, although their existence should have been disclosed to BCL upon issuance as a change in fact pursuant to 46 C.F.R. § 515.12(d). The last four of these tax liens were issued prior to the filing of OC's license application, and should have been disclosed

in response to question 7 on the OTI license application. In addition, OC was issued at least one state tax lien in 2011. BOE 771-772, 817-825.

Final judgments were 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 \$4,500.00; and (5) February 10, 2010, for \$5,350.00. BOE 771-772, 817-825.

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. BOE 773, 826. 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. OMJ's Chapter 7 Bankruptcy was ultimately dismissed for OMJ's failure to appear at the court ordered meeting of the creditors.

Failure to disclose this information is a violation of 46 C.F.R. 515.15(c), and grounds for rejection. Even tax liens issued after Mr. Collado submitted the license application should have been disclosed to BCL upon issuance as a change in fact pursuant to 46 C.F.R. § 515.12(d).

The evidence establishes that the applicant: does not possess the necessary character to render intermediary services; has failed to respond accurately to any lawful inquiry of the Commission; and has made materially false or misleading statements to the Commission. 46 C.F.R. § 515.15. The lack of candor on the OTI license application, including failing to disclose bankruptcy proceedings, tax liens, and legal judgments rendered for a debt are sufficient to establish that the application should be denied. These financial issues were required to be disclosed under the specific terms of the application form, and the failure to disclose such facts would have been material to BCL's consideration of the OTI license application. Such materially false and misleading statements, alone, are grounds for denial of a license application. 46 C.F.R. 515.15(c). In addition, the evidence establishes that the respondents violated the Shipping Act and put innocent shippers at risk by failing to maintain a bond and operating without a license.

Mr. Collado's admitted violations of the Shipping Act and continued operation after losing its license and bond support upholding BCL's determination to deny OC's license application. In addition, the failure to disclose information on the OTI license application and the discovery of material misrepresentations on the OTI license application constitute independent grounds to affirm the denial of the OTI license.

C. Remedy

1. Piercing the Corporate Veil

BOE contends that Mr. Collado may be held liable for the acts of his companies by piercing the corporate veil, arguing:

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 Brief at 48. Respondents, who are *pro se*, do not directly address this issue in their brief.

The federal standard for when it is proper to pierce the corporate veil is notably imprecise and fact intensive. *Bd. of Locomotive Engineers v. Springfield Terminal Ry. Co.*, 210 F.3d 18, 26 (1st Cir. 2000); Note, *Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 Harv. L. Rev. 853 (1982). Federal courts are not bound by the "strict standards of the common law alter ego doctrine which would apply in a tort or contract action." *Capital Tel. Co. Inc. v. FCC*, 498 F.2d 734, 738 (D.C. Cir. 1974). Among the factors the Commission has considered in piercing the corporate veil are: "the nature of the corporate ownership and control, the failure to maintain adequate corporate records and minutes, and the failure to follow corporate formalities, including the approval of stock issues by an independent board of directors." *Rose Int'l*, 29 S.R.R. at 166; *Ariel Mar. Group, Inc.*, 24 S.R.R. 517, 530 (FMC 1987).

The evidence shows that Omar Collado controlled OMJ. Mr. Collado was the sole officer and was listed as President, Vice-President, Secretary, and Director of OMJ. BOE 16, 135, 159 (RFA 2). Mr. Collado was solely responsible for the day-to-day management of OMJ. BOE 177 (RFA 133). Mr. Collado controlled the bank accounts of OMJ. BOE 177 (RFA 134). Mr. Collado authorized business expenditures on behalf of OMJ. BOE 177 (RFA 135). Mr. Collado made all business decisions on behalf of OMJ, including for those shipments identified in the record. BOE 177 (RFA 136). Mr. Collado exercised control over the operations of OMJ, including for those shipments identified in the record. BOE 177 (RFA 137).

The evidence shows that Omar Collado also controlled OC. Mr. Collado was the sole officer, President, and Director of OC. BOE 125, 136, 168. Mr. Collado was solely responsible for the day-to-day management of OC. BOE 179 (RFA 155). Omar Collado is identified on the OTI license application as the Owner and President of OC and is the proposed qualifying individual of OC. BOE 115. Mr. Collado made all business decisions on behalf of OC. BOE 179 (RFA 156). Mr. Collado controlled the bank accounts of OC. BOE 180 (RFA 157). Mr. Collado exercised control over the operations of OC. BOE 180 (RFA 158). Mr. Collado authorized business expenditures on behalf of OC. BOE 180 (RFA 159).

At times, it is difficult to determine whether shipments were handled by OMJ, OC, or by both entities. For example, for the shipments provided in the record, OMJ was listed as the shipper on bills of lading, although invoices for those shipments were issued by OC. *See, e.g.*, BOE 192-193, 437-439. OC and OMJ shared the same address. BOE 159 (RFA 3), 110, 168 (RFA 74). In

addition, OC's letterhead included an email address that began "omjintl" giving the impression that it was associated with OMJ. *See, e.g.*, BOE 193, 439.

The evidence demonstrates commingling of funds. As discussed above, OC apparently billed for services performed by OMJ. In addition, OC funds were used for Mr. Collado's household expenses, his child's school, and his child's vehicle down payment. BOE 106, 790, 792-794, 1044 (chart). Mr. Collado testified that checks were written to his personal account to be transferred to his wife's account or used for household expenses as a "force of habit." BOE 792-793. Because the bank records include cancelled checks without a stated purpose for the payment, it is not possible to determine the purpose for the transaction, or the amount of the funds dedicated to OC expenses. However, funds were routinely transferred from OC's corporate accounts to Mr. Collado's personal account in excess of the wages identified on OC's tax returns. BOE 1046.

There are a number of factors which weigh in favor of piercing the corporate veil. There is strong evidence that Omar Collado exercised exclusive control over both OMJ and OC. Indeed it is difficult to determine whether actions were taken by OMJ, OC, or Omar Collado. In addition, there was significant commingling of funds, between corporate and personal accounts. Of particular concern is Mr. Collado's statement that he transferred corporate funds to personal accounts as a "force of habit." BOE 793. Although not highlighted by BOE, OMJ's corporate status became inactive on September 26, 2008, for failing to file its annual report, before these violations occurred. BOE 135, 177 (RFA 129). There is no additional evidence in the record regarding whether corporate formalities were followed and whether required corporate records were maintained. Considering all of the factors, there is sufficient evidence in the record to pierce the corporate veil.

2. Civil Penalties

a. Statutory and Regulatory Considerations.

Section 13(a) of the Shipping Act provides for civil penalties for violations of the Shipping Act, stating:

A person that violates this part or a regulation or order of the . . . Commission issued under this part is liable to the United States Government for a civil penalty. Unless otherwise provided in this part, the amount of the penalty may not exceed **[\$8,000]** for each violation or, if the violation was willfully and knowingly committed, **[\$40,000]** for each violation.

46 U.S.C. § 41107(a).⁷

⁷ The Act originally provided for maximums of \$5,000 and \$25,000. The Commission has increased these amounts to \$8,000 and \$40,000. 74 Fed. Reg. 38114, 38115 (July 31, 2009) (codified at 46 C.F.R. § 506.4(d) (Table) (2009)).

Section 13(c) of the Act provides that in “determining the amount of a civil penalty, the Commission shall take into account the nature, circumstances, extent, and gravity of the violation committed and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, and other matters justice may require.” 46 U.S.C. § 41109(b). These factors have been codified in the regulations which state:

In determining the amount of any penalties assessed, the Commission shall take into account the nature, circumstances, extent and gravity of the violation committed and the policies for deterrence and future compliance with the Commission’s rules and regulations and the applicable statutes. The Commission shall also consider the respondent’s degree of culpability, history of prior offenses, ability to pay and such other matters as justice requires.

46 C.F.R. § 502.603(b).

Civil penalties are punitive in nature. The main Congressional purpose of imposing civil penalties is to deter future violations of the Shipping Act. *Stallion Cargo*, 29 S.R.R. at 681; *Refrigerated Container Carriers Pty. Ltd.*, 28 S.R.R. 799, 805 (ALJ 1999).

To determine a specific amount of civil penalty is a most challenging responsibility. The matter is one for the exercise of sound discretion, essentially requires the weighing and balancing of eight factors set forth in law, and is ultimately subjective and not one governed by science. As was stated in *Cari-Cargo, Int., Inc.*, 23 SRR 1007, 1018 (I.D., F.M.C. administratively final, 1986):

... in fixing the exact amount of penalties, the Commission, which is vested with considerable discretion in such matters, is required to exercise great care to ensure that the penalty is tailored to the particular facts of the case, considers any factors in mitigation as well as in aggravation, and does not impose unduly harsh or extreme sanctions while at the same time deters violations and achieves the objectives of the law. (Case citation omitted.) Obviously, “[t]he prescription of fair penalty amounts is not an exact science,” and “[t]here is a relatively broad range within which a reasonable penalty might lie.” (Case citation omitted.)

Universal Logistic Forwarding, 29 S.R.R. at 333. No one statutory factor is to be weighed more heavily than any other. *Refrigerated Container Carriers*, 28 S.R.R. at 805-806.

BOE has the burden of establishing that a civil penalty should be imposed, and if so, the amount of the civil penalty that should be assessed.

b. Arguments of the Parties

BOE contends 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. 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.

BOE maintains that a single penalty should be assessed for each of the alleged thirty-four violations from the Seaboard and Crowley shipments, resulting in a total maximum civil penalty in the amount of \$1,360,000.00. However, notwithstanding the aggravating factors, 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. BOE does not suggest which portion of the penalty request would be appropriate for a violation of sections 40901 and 40902.

Respondents contend that if civil penalties are assessed, they should be nominal. Respondents contend that their admission of the violations and cooperation with the investigation weigh in their favor and that they have a limited ability to pay any penalty. In addition, respondents contend that "no person or entity has filed suit or made a claim with respect to the business practices alleged." Respondents' Brief at 6.

c. Factors

BOE asserts that respondents' continued unlicensed and unbonded operations undermined the fundamental purposes of the licensing requirements of the Shipping Act and therefore constitute serious violations of law, stating that 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." BOE Brief at 41.

BOE contends that respondents are culpable in their continued unlicensed operations without a bond or other financial security for the protection of the public, stating that "Mr. Collado operated OMJ as a licensed OTI until revocation of its license. As the qualifying individual and proposed qualifying individual for OC, he was well aware of the licensing and financial responsibility requirements and simply elected to ignore them." BOE Brief at 42.

BOE argues that although there is no history of formal Commission proceedings against Mr. Collado, OMJ, or OC, this fact should not be viewed in isolation inasmuch as Mr. Collado has been operating unlawfully since 2008 and continued to operate unlawfully even after receiving multiple notices that his operations were unlawful including devising an alternate method of conducting his operations under a shell NVOCC since this proceeding began. BOE Brief at 42.

BOE contends that 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. BOE 1046. Nonetheless, OC continues to operate and thereby generates revenues which are 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. BOE Brief at 45.

BOE asserts, however, that if 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*, 28 S.R.R. at 86; *Ever Freight Int'l*, 28 S.R.R. 329, 335; *Refrigerated Container Carriers*, 28 S.R.R. at 805, n. 5. See also *Pacific Champion Express Co., Ltd.*, 28 S.R.R. 1185, 1191 (ALJ 1999) ("[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.")" BOE Brief at 46.

Respondents state that they have provided BOE with adequate financial discovery to show that they can only sustain a minimal or nominal penalty. Respondents' Brief at 6. Respondents contend that they cooperated fully, that no members of the public had claimed to be harmed, and that the respondents lack the ability to pay any substantial penalty assessed. Respondents' Brief at 6.

BOE states in its reply brief that although respondents provided both personal and corporate tax returns as well as bank statements for the pertinent time period, that the financial records evidence a pattern of commingling between accounts. BOE Reply at 4. Therefore, BOE contends that respondents have not offered reliable evidence to rebut BOE's evidence addressing ability to pay a civil penalty.

Respondent has admitted liability and cooperated with the investigation. There is no evidence that any member of the shipping public has been harmed. However, the evidence suggests that respondents violated the Shipping Act on more than just the fifteen shipments documented by BOE and that respondents have continued to provide OTI services even after this proceeding began. Operating as an unlicensed and unbonded entity exposes the shipping public to risk and provides an unfair competitive advantage. Although respondents have no history of violations of the Shipping Act, respondents do not seem to appreciate the severity of the violations and have not altered their behavior in any significant fashion.

The evidence is not clear regarding respondents' ability to pay. It is likely, however, that respondents' income potential will be limited by the cease and desist order requested by BOE as well as the denial of an OTI license. It appears that Mr. Collado has primarily worked in the shipping industry and limitation of his ability to do so will hinder his ability to pay any civil penalty. Respondent appears to have a limited ability to pay a civil penalty.

Giving due consideration to all of the factors, respondents are ordered to pay a penalty of \$60,000 for violation of sections 40901 and 40902 of the Shipping Act.

3. Cease and Desist Orders

“[T]he general rule is that [cease and desist] orders are appropriate when there is a reasonable likelihood that respondents will resume their unlawful activities.” *Portman Square*, 28 S.R.R. at 86, citing *Alex Parsinia d/b/a Pac. Int’l Shipping and Cargo Express*, 27 S.R.R. 1335, 1342 (ALJ 1997). A cease and desist order must be tailored to the needs and facts of the particular case. *Marcella Shipping Co. Ltd.*, 23 S.R.R. 857, 871-872 (ALJ 1986). The Commission has stated that “[c]ourts have sustained the use of a cease and desist order directed to individuals to prevent avoidance of the legal consequences of the past violations by the creation of new business entities to be used in the same or similar patterns of activity in the future.” *Ariel Mar. Group*, 24 S.R.R. at 528.

BOE contends that coupled with multiple prior warnings to cease unlicensed and unbounded OTI activity, the evidence demonstrates a complete unwillingness on Mr. Collado’s 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.

A preponderance of the evidence demonstrates that Mr. Collado has a history of providing ocean transportation services in violation of the Shipping Act via multiple corporate forms, including a new scheme to operate without a license. Therefore, there is a reasonable likelihood that respondents will continue or resume their unlawful activities. Accordingly, entry of a cease and desist order prohibiting respondents from operating as an OTI is appropriate.

For the reasons stated above, respondents are enjoined from holding out or operating as an OTI in the United States foreign trades until and unless a license is issued by the Commission and respondents obtain a bond pursuant to Commission regulations.

In addition, respondents are enjoined from serving as investors, owners, shareholders, officers, directors, managers, or administrators in any company engaged in providing ocean transportation services in the foreign commerce of the United States or for working for, as an employee or in any other capacity, any company or any other entity engaged in providing ocean transportation services in the foreign commerce of the United States in a manner inconsistent with this initial decision for a period of one year, and from controlling or serving in any form of management role in such an entity for a period of five years.

Respondents are also enjoined from controlling in any way or serving as investors, owners, shareholders, officers, directors, managers, or administrators in any company or other entity engaged in providing ocean transportation services in the foreign commerce of the United States in a manner inconsistent with this initial decision for a period of five years. This initial decision, however, does not enjoin respondents from owning up to five percent of a class of shares of a publicly traded company.

4. OTI License

The decision to deny respondents an OTI license was predicated on violation of the Shipping Act. Respondents' violations of sections 40901 and 40902 are relevant to respondents' fitness to obtain an OTI license. Moreover, the respondents' continued violations suggest that the respondents do not appreciate the severity of the violation nor their obligations to the shipping public.

Discovery in this matter uncovered a disturbing lack of candor on the OTI license application, which specifically asks about bankruptcy proceedings, tax liens, or legal judgments rendered for a debt. BOE 114. Respondents failed to candidly answer these questions. Financial problems are relevant to whether or not to provide an OTI license because failure to maintain a bond puts the shipping public at risk. Significant financial problems only reinforce the need for a bond to protect innocent shippers. The record demonstrates numerous legal proceedings that should have been disclosed.

For the reasons stated above, BCL's letter of intent to deny OC International Freight, Inc. and Omar Collado an OTI license is affirmed.

IV. ORDER

Upon consideration of the findings and conclusions set forth above, and the determination that the respondents violated sections 40901 and 40902 of the Shipping Act (46 U.S.C. §§ 40901, and 40902) by operating as ocean transportation intermediaries in the United States trades without a license or bond, it is hereby

ORDERED that the claim that respondents violated section 41102(a) of the Shipping Act of 1984, 46 U.S.C. § 41102(a), be **DISMISSED**.

It is **FURTHER ORDERED** that the claims that respondents violated sections 40901 and 40902, 46 U.S.C. §§ 40901, 40902, be **GRANTED**.

It is **FURTHER ORDERED** that the respondents be jointly and severally liable for civil penalties of \$60,000 for willful and knowing violations of sections 40901 and 40902 of the Shipping Act of 1984, 46 U.S.C. §§ 40901, 40902.

It is **FURTHER ORDERED** respondents be enjoined from holding out or operating as an ocean transportation intermediary in the United States foreign trades until and unless a license is issued by the Commission and respondents provide evidence of financial responsibility pursuant to Commission regulations.

It is **FURTHER ORDERED** that respondents be enjoined from serving as investors, owners, shareholders, officers, directors, managers, or administrators in any company engaged in providing ocean transportation services in the foreign commerce of the United States or for working for, as an employee or in any other capacity, any company or any other entity engaged in providing

ocean transportation services in the foreign commerce of the United States in a manner inconsistent with this initial decision for a period of one year, and from controlling or serving in any form of management role in such an entity for a period of five years.

It is **FURTHER ORDERED** that respondents be enjoined from controlling in any way or serving as investors, owners, shareholders, officers, directors, managers, or administrators in any company or other entity engaged in providing ocean transportation services in the foreign commerce of the United States in a manner inconsistent with this initial decision for a period of five years. This initial decision, however, does not enjoin respondents from owning up to five percent of a class of shares of a publicly traded company.

It is **FURTHER ORDERED** that BCL's letter of intent to deny OC International Freight, Inc. and Omar Collado an ocean transportation intermediary license be **AFFIRMED**.



Erin M. Wirth
Administrative Law Judge