# FEDERAL MARITIME COMMISSION

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| NGOBROS AND COMPANY NIGERIA LIMITED<br><br>v.<br><br>OCEANE CARGO LINK, LLC, and KINGSTON ANSAH, individually | Docket No. 14-15 |

**Served/Reissued: June 21, 2016**

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**BY THE COMMISSION:** Mario CORDERO, *Chairman*, Richard A. LIDINSKY, Jr. and William P. DOYLE, *Commissioners*; Michael A. KHOURI, *Commissioner*, dissenting, in which *Commissioner* Rebecca F. DYE joins.

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**Order Staying Proceeding**

On November 10, 2015, the Administrative Law Judge (ALJ) issued an Initial Decision determining that Respondents Oceane Cargo Link, LLC (OCL) and Mr. Kingston Ansah violated section 10(d)(1) of the Shipping Act, 46 U.S.C. § 41102(c), and awarding reparations to Complainant. Pursuant to a Commissioner's request, the Federal Maritime Commission (Commission) determined, on November 24, 2015, to review the Initial Decision.

## I. Respondent Kingston Ansah

While the Commission was reviewing the Initial Decision, Respondent Kingston Ansah filed a Chapter 13 Bankruptcy Petition with the United States Bankruptcy Court, Northern District of Georgia, Case No. 16-51822-a998. Complainant's Status Report, Feb. 16, 2016.

Therefore, pursuant to the Bankruptcy Code, 11 U.S.C. § 362(a)(1),[1] this proceeding is stayed with respect to Respondent Kingston Ansah, including the Commission's review of the ALJ's decision that Mr. Kingston Ansah and OCL are jointly and severally liable for reparations.

## II. Respondent Oceane Cargo Link, LLC

In his Bankruptcy Petition, Mr. Ansah identified Respondent OCL as a codebter. Because § 362(a)(1) only refers to the debtor, the "stays are generally limited to debtors and do not encompass non-bankrupt co-defendants." *Lisa Ng v. Adler (In re Adler)*, 494 B.R. 43, 57 (Bankr. E.D.N.Y. 2013) (internal quotation marks omitted). However, "if certain unusual circumstances arise during the pendency of a debtor's bankruptcy case, a bankruptcy court may enjoin actions against third-parties." *Id.* (citing *A.H. Robins Co., Inc. v. Piccinin*, 788 F.2d 994, 999 (4th Cir. 1986)).

One example of such unusual circumstances is "when a claim against the non-debtor will have an immediate adverse economic consequence for the debtor's estate." *Id.* (quoting *Queenie, Ltd. v. Nygard Int'l*, 321 F.3d 282, 287 (2d Cir. 2003)). "[C]ourts have found the requisite economic harm to an individual debtor when the veil of a non-debtor corporation is pierced based on the alter ego doctrine, as the individual debtor has thereby been rendered personally liable for the relevant corporate debts." *Id.* at 57–58 (citing *S.I. Acquisition, Inc. v. Eastway Delivery Serv. (In re S.I. Acquisition, Inc.)*, 817 F.2d 1142, 1147 (5th Cir. 1987)); *In re Kuecker Equip. Co.*, 338 B.R. 52, 60–61 (Bankr. W.D. Mo. 2006)).

In this proceeding, the ALJ concluded in the Initial Decision that "Mr. Ansah did not appear to separate his personal interests from that of Ocean[e] Cargo Link. The evidence supports the Complainant's allegation that Mr. Ansah established and controlled Oceane Cargo Link. Accordingly, the evidence is sufficient to pierce the corporate veil and hold Kingston Ansah personally liable for the acts of Oceane Cargo Link." Initial Decision at 13. Considering the possibility that the Commission may affirm the ALJ's determination that Mr. Ansah was an alter ego of

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[1] Section 362 of the Bankruptcy Code, 11 U.S.C. § 362(a)(1), provides that:

> (a) . . . a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of—
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

OCL, we believe that the proceeding against OCL must also be stayed under § 362(a)(1).

## III. Conclusion

THEREFORE, IT IS ORDERED, That this proceeding is stayed with respect to both Kingston Ansah and Oceane Cargo Link, LLC.

IT IS FURTHER ORDERED, That Complainant is directed to inform the Commission if and when the Bankruptcy Court lifts the stay.

By the Commission.

Rachel E. Dickon
Assistant Secretary

*Commissioner Khouri, dissenting, with whom Commissioner Dye joins.*

I disagree with the majority's decision to stay the proceeding based on the ALJ's conclusion in the Initial Decision that "Mr. Ansah did not appear to separate his personal interests from that of Ocean[e] Cargo Link. The evidence supports the Complainant's allegation that Mr. Ansah established and controlled Oceane Cargo Link. Accordingly, the evidence is sufficient to pierce the corporate veil and hold Kingston Ansah personally liable for the acts of Oceane Cargo Link."[1] The ALJ's conclusion on which the majority's decision relies misstates the law regarding piercing the corporate veil as found in *Rose International, Inc. v. Overseas Moving Network International, Ltd., et al.*, 29 SRR 119 [FMC,2001], and misapplies that decision's proper legal context and construction. I do not believe the evidence or the law supports piercing the corporate veil in this case and would rule accordingly.

To begin with the record of the case, the original complaint, dated November 14, 2014, states,

> Complainant avers that Mr. KINGGSTON ANSAH has utilized OCL as his alter egos [sic] and alter egos [sic] for one another. As such Complainants seeks to pierce the corporate veils [sic] of OCL as KINGSTON ANSAH's alter ego."

Complaint at 2.

Note such statement is a pure legal conclusion. Then, in the complaint's "STATEMENT OF FACTS AND MATTERS COMPLAINED OF", the Complainant does not allege a single fact or matter to support its averment that the Respondent Ansah has utilized Respondent OCL as his alter ego.

Respondents did not answer the complaint. On March 20, 2015, the ALJ issued a Notice of Default and Order to Show Cause. Therein, the ALJ held that in the event the Respondents failed to respond, the Complainant should file a supplement to the motion seeking default and ". . . explain the basis for finding Kingston Ansah personally liable for any damages awarded."[2]

Complainant's Response to the Order to Supplement Record cited *Worldwide Relocations*, 32 SRR 495 (FMC 2012), as legal support for piercing the corporate veil. Absent from the Complainant's discussion is the context of *Worldwide*, wherein the Commission found those Respondents were the subject of over 250 consumer complaints and the

[1] Initial Decision at 13.
[2] Order at 2.

Commission found 649 violations of the Shipping Act, assessed a fine totaling $2.8 million, and then addressed a question of whether an individual officer/director/ shareholder of the offending corporation could be subject to a Commission cease and desist order for some period of time into the future.[3] The purpose was to prevent the officer/director/ shareholder of the offending corporation from establishing a new corporation and, then, continuing the offensive acts and behavior.

Complainant further cited *Casanova Guns, Inc. v. Connally*, 454 F. 2d 1320 (7th Cir. 1972) for the legal proposition,

> [I]t is well settled that the fiction of a corporate entity must be disregarded whenever it has been adopted or used to circumvent the provision of a statute.

Complainant's Response to Order to Supplement Record at 8.

The facts of the *Casanova* case (summarized below together with two other cases cited by Complainant) support the naked point of law presented therein; however, the full context of *Casanova* renders Complainant's argument not merely distinguishable from the matter *sub juice*, but inapt and contrary to the Complainant's desired point of law. Moreover, *Casanova* in fact provides a perfect example of the correct use of piercing the corporate veil in the context of a federal agency that regulates a segment of commerce pursuant to a federal statute.

A brief summary: Casanova's Inc. was incorporated in 1959 by Clarence Casanova as president and seventy per cent shareholder. Other members of his immediate family held the remaining shares and were officers of the company. The business was gun sales and related sporting goods. In 1966, Casanova's Inc. was indicted for illegal possession of unregistered firearms. In 1968, Casanova's Inc. pleaded guilty. As a convicted felon, Casanova's Inc. lost its federal license to sell firearms. However; in 1967, following the indictment but prior to the admission of guilt, Casanova Guns was incorporated by John Casanova, Clarence's son and shareholder in Casanova's Inc. Other of Clarence's family members became officers and directors of Casanova Guns. Casanova Guns applied for and received a federal firearms license. Casanova Guns then took over Casanova's Inc.'s entire gun business and operated out of the Casanova's Inc. same store building. Clarence sold his entire gun inventory to Casanova Guns in exchange for an unsecured $424,000 promissory note payable on demand – but not stock ownership. In 1969, Casanova Guns applied for a renewal of its federal license. That application was refused.

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[3] By contrast, in the case *sub judice*, we are dealing with a single incident of a single container where the common carrier, by inadvertence or negligence, caused the deviation of the container to an incorrect port.

The license was denied because of Casanova Guns' relationship with Casanova's Inc. a convicted felon. The federal Gun Control Act, 18 U.S.C. section 923 (d)(1)(B), prohibits the issuance of a federal firearms license to a convicted felon *and* to companies directed or controlled by convicted felons. "It is apparent from the record that a substantial purpose for the incorporation of Casanova Guns was the circumvention of the statute restricting issuance of firearms licenses to convicted felons. Casanova Guns was formed after Casanova's Inc. was under federal indictment." *Id.* at 1323. Thus the federal Treasury Department's Alcohol, Tobacco and Firearms Division pierced the corporate veil of Casanova Guns and determined that it was directed and controlled by Casanova's Inc., a convicted felon.

The facts of the matter *sub judice* and the law under the Shipping Act are oceans apart from the facts of the *Casanova* matter and the law under the federal Gun Control Act.

Complainant also cited *Kavanaugh v. Ford Motor Co*., 353 F. 2d 710 (7th Cir. 1965). The court found that Ford Motor, through its control and manipulation of a sequence of contracts, beginning with the initial application for a dealer franchise, then leading to the award of an auto dealer franchise and the subsequent termination of the franchise had improperly denied Kavanaugh standing to bring action under the federal Dealers' Day in Court Act. Ford had argued that, while Mr. Kavanaugh was the initial franchise applicant, the final contract was between Ford and Dan Kavanaugh Ford, Inc., a company with Kavanaugh's name but effectively controlled by Ford through a structure of tiered preferred and common stock. The court held,

> It is settled doctrine that the fiction of corporate entity will be disregarded whenever it has been adopted or used to evade the provisions of a statute. (citations omitted) For the reasons we have demonstrated, the Dealers' Day in Court Act would be subverted in the instant case if the corporate format adopted by the parties were given recognition. Hence, we must "pierce the corporate veil" of the corporate entity and look to the substance and reality of the situation. In the interest of justice, the corporate fiction must be ignored.

*Id.* at 717.

In *Capital Telephone v. FCC*, 498 F. 2d 734 (D. C. Cir. 1974), cited in *Rose, supra*, two separate corporations owned/controlled by one person applied for two different frequencies in a geographic market. Such award of the two frequencies would have resulted in the two commonly controlled companies owning one hundred per cent of the high quality frequency in the geographic market. The Federal Communications Commission (FCC) policy was to foster fair competition. The court upheld the FCC's denial of the license. The court held:

> The broad equitable standards of the statute (Communications Act of 1934), enacted to further public convenience, clearly support the Commission's decision to look beyond the corporate entity to serve the interests of fairness, justice and equity.

*Id.* at 737.

As further discussed below, these cases looked to the policy foundation and purpose of the statute at issue and addressed the question of whether the corporate form was being used to frustrate or avoid such statutory purpose.

Complainant's Response to Order to Supplement Record next proffered a list of factual assertions as support for piercing OCL's corporate veil. These assertions include: 1. Complainant directly communicated with Ansah; 2. OCL's business filings with the Georgia Secretary of State show Ansah as sole member/ manager; 3. Ansah, on behalf of OCL, admitted the container misdelivery; 4. Ansah agreed to pay damages; 5. Ansah issued and signed two checks; 6. One check bounced because account was closed; 7. Ansah should be personally liable by reason that he knowingly committed fraud by issuing a bounced check; 8. Ansah should be personally liable by reason of his uttering bad checks; 9. Ansah's actions of allowing the container to be shipped to the wrong destination, demands for additional freight, and disregard for the FMC proceeding support a finding that Ansah personally violated section 10(d)(1) by utilizing his company to circumvent the Shipping Act; and 10. Finding Ansah personally liable would achieve an equitable result.

Following a pre-hearing conference where Respondents were represented *pro se* by Mr. Ansah, the Presiding Officer entered an Order Scheduling Additional Briefing, dated August 28, 2015. Therein, the Respondents were directed to "provide all documents and arguments regarding personal liability, including bank statements, corporate filings (articles of incorporation, by laws, minutes) and other documents regarding the status of Oceane Cargo Link, LLC." In response, Mr. Ansah provided OCL's Certificate of Organization, Articles of Organization, Statement of Sole Incorporator, and Bye [sic] Laws of OCL, all dated in November and December, 2008. Also provided were various bank statements.

The final document in the record is Complainant's Reply to Respondents' Filings Pursuant to an Order Scheduling Additional

Briefing, dated September 25, 2015. Therein Complainant argues that Respondents did not provide "all" corporate filings. In particular, Complainant asserts that Respondent did not produce any annual reports or filings as required by Georgia law and cites to a Georgia provision that requires all relevant business entities file annual registrations with the Secretary of State and pay an annual fee. Business entities that fail to file such annual renewal were subject to being administratively dissolved. Complainant further points to Respondent's failure to produce corporate minutes. Last, Complainant repeats the issues concerning the bounced checks.

Such is the record from the Complainant's perspective.

Mr. Ansah first engaged in the docket proceeding with a response dated April 17, 2015. Respondent went straight to the issue stating, "[t]his problem occurred when an employee of my company mistakenly switched and shipped two containers to the wrong destinations at the time of loading when I was traveling overseas."[4] Respondent goes on to explain that the container that went to Nigeria instead of Ghana was correctly reshipped. The Complainant's container that went to Ghana instead of Nigeria was caught up in Ghana Customs bureaucracy, the cargo was confiscated, and presumably sold. In short, Mr. Ansah admitted that an OCL employee had made a paperwork error resulting in the container deviation to the wrong destination resulting in the loss of the cargo. In terms of OCL's liability for the deviation and loss of cargo, there are no facts in dispute.[5]

An initial subject in any corporate veil piercing analysis is the provenance of the doctrine concerning the legal separation of shareholders from directors, directors from officers, officers from employee/agents, and each of such individuals being afforded immunity from liability arising from the operations of the corporation each individual may be involved with. Further is the question of the relative strength or fragility of the legal walls that restrain the transfer of corporate entity liability over to these natural persons.[6]

"The doctrine of limited liability is a basic and fundamental rule of corporate law, and it has served society well by encouraging corporate enterprise without risk of personal liability for the corporation's debts. (citations omitted) . . . Shareholder protection through the corporate form is 'ingrained in our economic and legal systems' and indeed, 'no one

[4] Response at 1.

[5] Such liability would flow from a civil law basis of breach of contract and the Carriage of Goods by Sea Act.

[6] While a "shareholder" may be a natural person or a corporation, for the purposes of the matter *sub judice*, Mr. Ansah is the ultimate shareholder of Respondent OCL.

would claim that the availability of limited liability [has] played an insignificant part in the expansion of industry and in the growth of trade and commerce.'"[7] "Limited liability is a fundamental principal of corporate law."[8] From this solid legal foundation flows the robust presumption that courts, and reviewing federal agencies, should exercise full caution and deference whenever they consider the invitation to ignore the corporate form. "Because of the bedrock nature of the principal of limited shareholder liability, the burden on a party seeking to 'pierce the corporate veil' is *severe*."[9] "Because a principal purpose for organizing a corporation is to permit its owners to limit their liability, there is a presumption of separateness between a corporation and its owners (citation omitted) which is entitled to *substantial weight*."[10] "It is elemental jurisprudence that a corporation is a creature of the law, endowed with a personality separate and distinct from that of its owners, and that one of the principal purposes for legal sanctioning of a separate corporate personality is to accord stockholders an opportunity to limit their personal liability. . . .[T]he dual personality of parent and subsidiary is not lightly disregarded, since application of the instrumentality rule operates to defeat one of the principal purposes for which the law has created the corporation."[11] Thus, the legal wall that restrains the transfer of corporate entity liability over to the corporate shareholder is well aged, stout, and high.

*Rose International, Inc. v. Overseas Moving Network International, Ltd., et al., 29 SRR 119 [FMC, 2001]* is frequently cited as Commission precedent for when it is appropriate to pierce the corporate veil. *Rose* was a complex fact scenario where a group of international household goods moving companies created a shippers association so they could enter into a collective service contract with a vessel carrier conference. They then also created a "sham corporation"[12] to act as an

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[7] *Hambleton Bros. Lumber co. v. Balkin Enterprises*, 397 F. 3d 1217 (9th Cir. 2005) at 1227, citing (then Professor) William O. Douglas & Carrol M. Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 Yale L.J. 193, 193 (1929).
[8] Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 University of Chicago Law Review 89, at 89 (1985).
[9] *Escobedo v. BHM Health Assoc. Inc.*, 818 N.E.2d 930, 933 (Ind. 2004)(emphasis added).
[10] *American Protein Corp. v. Ab Volvo*, 844 F.2d 56, 60 (2d Cir. 1988)(emphasis added).
[11] *Berger v. Columbia Broadcasting System*, 453 F.2d 991, 996 (5th Cir. 1972).
[12] The *Rose* decision intermingles the term "shell" corporation and "sham" corporation as though such terms have identical meaning. A "shell" corporation is an entity that has nothing other than its formal legal existence with no true business operations, minimal initial capital (often set by state law), no active employees, no tangible operating assets or liabilities on its balance sheet and no operating income or expenses on its income statement. A "shell" corporation may be a legitimate entity, and many exist for various finance, tax and business reasons. A "sham" corporation is an entity that is established to disguise the nature of its true operations, to disguise its true ownership structure, or to otherwise avoid legal requirements or proscriptions. It may have business operations with assets employed, income and business expenses and employees. Depending upon its

NVOCC, all of which was designed to circumvent Shipping Act requirements for bonding, tariff filing, and prohibitions on receipt of unlawful carrier compensation. *Rose* is not easily summarized. The Commission held that,

> When analyzing whether the Commission should disregard OSSI's corporate form and pierce the corporate veil, the first inquiry is what law should be applied. It has been held that when a substantive federal interest is at issue, federal common law, rather than state law governs. (citations omitted) Complainant (Rose) is alleging a violation of section 10(a)(1), whereby it claims that Respondents created a corporation, OSSI, to operate as a *sham* NVOCC *in order to violate the Shipping Act*. . . The federal common law. . . generally recognizes a two-prong test to determine whether to disregard corporate form: the evidence must show (1) control and domination over the *shell* corporation, and (2) a federal violation (citation omitted). . . The first prong of the test will be addressed in the course of our analysis of whether OSSI, as an allegedly *sham* corporation, is an unfair devise or means, which is one of the factors of a section 10(a)(1) claim. The second prong will be determined by analyzing whether Respondents violated section 10(a)(1) as a whole. . . There are several elements that must be found in order to support a conclusion that OSSI was used by Respondents as an unfair device or means to allow entities acting as NVOCCs without tariffs and bonds to access the . . . [service] contracts. It must be determined that OSSI was not in fact operating as an NVOCC, but was merely a *shell* corporation whereby OSSI agents were able to act as NVOCCs without having to file individual tariffs and bonds. As part of determining that OSSI was a *"shell"* corporation, the Commission has to find that OSSI was the alter ego of OMNI, Ltd. And as such the Commission should ignore OSSI's corporate form. In addition, the Commission must find that OSSI's shareholder agents were not acting on behalf of OSSI, but rather as NVOCCs in their own right. Finally, the Commission must determine that *Respondents acted fraudulently in arranging the scheme*. [emphasis added].

*Id*. at 166.

The first emphasized section states the requirement that the corporation was created for the purpose of serving as the instrument to violate the Shipping Act and the final sentence of this section of the *Rose*

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purpose and use, a "shell" corporation may also be a "sham" corporation (with minimal initial capital, no separate business telephone or address or other indicia of true corporate operation). *See* "Shell Corporation." *Investopedia*, 18 April 2016. This article is a definition located on the main website4's "Dictionary" section.

decision brings the focus onto the "scheme" of using a corporate shell to obscure the identity and true function of the individual members of the shipper's group who were also shareholders in the sham NVOCC and were claiming to act as "agents" for the sham NVOCC. To bring the legal analysis fully into a proper perspective, the *Rose* decision then calls upon two federal District of Columbia Circuit opinions.

> [T]he Commission has found that "[i]t is appropriate to pierce the corporate veil in order to prevent such use of the corporate device to commit . . . statutory violations" and when "failure to do so would enable the corporate device to be used to circumvent a statute." *Ariel Maritime Group, Inc*., 24 SRR 517 (1987) at 530 (quoting *Joseph A. Kaplan & Sons v. Federal Trade Comm'n*, 347 F2nd 785, 787 n. 4 (DC Cir 1974) "Where the statutory purpose could be easily frustrated through the use of separate corporate entities a regulatory commission is entitled to look through corporate entities and treat the separate entities as one for purposes of regulation." *Capital Tel. Co., Inc. v. Federal Communication Comm'n*, 498 F2d 734, 738 n. 10 (DC Cir 1974).

*Id*. at 168.

These cases stand for the rule that use of the corporate form was the instrumentality by which the statutory letter and purpose of the law was violated, avoided, or otherwise circumvented. The convicted felon was attempting to avoid the prohibition in the Federal Gun Control Act.[13] The FCC license applicant was attempting to avoid the policy requirements in the Communications Act of 1934 that prescribe competition in frequency allocation[14]. Ford was attempting to avoid the remedial provisions of the federal Dealer's Day in Court Act.[15] In *Rose*, the Respondents engaged in a "scheme" that utilized the corporate form in their attempt to legitimize NVOCC status on scores of household moving companies and thereby avoid the Shipping Act requirement that each NVOCC must file tariffs and provide evidence of financial responsibility.

There is not one allegation in the complaint or elsewhere in the record of the case or in Mr. Ansah's license application file in the Commission's Bureau of Certification and Licensing that remotely suggests that Mr. Ansah established OCL for any purpose other than to operate a lawful and legitimate business as a licensed NVOCC and Freight Forwarder.

The inquiry does not end here, however. Applying the various

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[13] *Casanova, supra*.
[14] *Capital Telephone, supra.*
[15] *Kavanaugh. supra.*

elements that the Commission's decision in *Rose* as well as federal common law employs to analyze and determine the domination and control aspect of the veil piercing process, here then is an analysis of the ten items, referenced *supra*, as offered in Complainant's Response to Order to Supplement Record.

1. Allegation: Complainant directly communicated with Ansah, the Member-Manager of OCL.

   Response: OCL was a small company. Based upon material and documents Mr. Ansah provided to the Commission in his 2011 application for an NVOCC/FF license, it appears that OCL had five employees other than Mr. Ansah.[16] Complainant's assertion supports nothing other than Mr. Ansah's involvement and efforts to correct a commercial problem that was caused by one of his five employees. If one were inclined to rhetorical response – would Complainant have preferred to communicate with a lower level employee rather that the president of the company?

2. Allegation: OCL's Business Annual Report . . . shows Mr. Ansah as the only "Member/Manager."

   Response: Complainant's assertion can be viewed and discredited from two perspectives. In general, it is routine for a company to establish a 100% wholly owned subsidiary to conduct a discrete line of business. Similarly, it is equally routine for the members of the subsidiary's board of directors to be employees of the parent company.

   In *American Protein Corp. v. Ab Volvo*, 844 F.2d 56 (2d Cir. 1988), the court ruled,

   > [t]he strongest piece of evidence to support control was the existence of interlocking directorates. This commonplace circumstance of modern business does not furnish such proof of control as will permit a court to pierce the corporate veil. *See Berger v. Columbia Broadcasting Sys*., 453 F.2d 991,995 (5th Cir. 1972)(subsidiary's board's being completely comprised of employees of parent is insufficient basis to pierce corporate veil), cert. denied, 409 U.S. 848 (1972).

*Id.* at 60.

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[16] A copy of OCL's web page is a part of the official FMC OTI license application file. The Commission is considering this mater *de novo*. Pursuant to 46 C.F.R. section 502.226, I will take official notice of documents submitted by Mr. Ansah to the Commission's Bureau of Certification and Licensing as part of his application process for a NVOCC / Freight Forwarder license. Information in an FMC OTI license application file may be available through a Freedom of Information Act (FOIA) request.

The analogy to our case *sub judice* is clear. Mr. Ansah owned all of the equity interests in OCL and he was the sole member of the limited liability company's equivalent of a board of directors. Such fact is likewise insufficient to justify the Commission to disregard the corporate form.

A separate perspective should be considered for Commission policy reasons. The vast majority of all commerce in the United States and in developed trading partner countries is conducted through businesses organized with limited liability attributes – corporations, limited liability companies, limited liability partnerships and similar business entities. Limited liability companies ("LLC's") are a very common form of incorporation. Small companies will most frequently employ a single "Member/Manager" in the LLC format. Upon inquiry, the Commission's Bureau of Certification and Licensing (BCL) reviewed a large sample of the OTIs that currently hold a FMC license.[17] The review study concludes that just over 1,940 OTIs are wholly, 100% owned by the Qualified Individual. Of this group of OTIs, only 21 are "sole proprietorship". All others are organized in a business entity with limited liability. The Respondent OCL's FMC OTI license application openly stated that it was a limited liability company and that Mr. Ansah was the 100% Owner/ Manager. Over 40% of all OTIs licensed with the FMC are similarly wholly owned by the Qualified Individual manager and organized to conduct business in a limited liability entity. Under Complainant's theory, all such OTIs are subject to a piercing of their corporate veil. The Complainant's assertion has no logical or legal relevance to the legal question.

3. Allegation: Ansah, on behalf of OCL, admitted that OCL failed to deliver Complainant's container to designated port.

   Response: First, a corporation is an inanimate legal person that acts and speaks by and through its designated officers, employees, and authorized agents. Mr. Ansah, as an officer of OCL, admitted "on behalf of OCL" the fact that the container had been mis-delivered. This assertion has no logical or legal relevance to the legal question.

4. Allegation: Ansah . . . agreed to pay Complainant for certain damages.

   Response: As with # 3, *supra*, this assertion has no logical or legal relevance to the legal question.

[17] According to the Commission's Bureau of Certification and Licensing, there are currently 4,833 licensed OTIs. BCL reviewed 1,575 OTI files, over 32% of the total. Of the reviewed OTI files, just over 40% of the OTIs were fully owned, 100%, by the Qualified Individual.

5. Allegation: Ansah issued two checks, which checks were signed by Mr. Ansah.

   Response: Both checks were drawn on the OCL company account. Indeed, both are signed by Ansah.[18] Again, as with # 3, *supra*, a company "acts" by and through its company officers and it is fully customary and normal business practice for a corporate officer to sign a company check. This assertion has no logical or legal relevance to the legal question. As further demonstrated in items, *infra*, Complainant's proposed rule of law would hold that the company officer who signs a check drawn on a company checking account that does not have sufficient funds in such account is personally liable for that check. Upon inquiry and review, I have not found any support for such rule of law.

6. Allegation: One of the checks bounced because OCL's bank account was closed.

   Response: There is no allegation or evidence in the record as to who "closed" the OCL bank account. It is very common for a bank to suspend or "close" an account when more than one or two checks are tendered and there are insufficient funds. This can happen when a business finds itself in financial trouble and suddenly has a cash flow crisis – sometimes over a period of a few days. The bank may suspend the account without first notifying the holder of the account. There is no evidence in the record as to the factual circumstances concerning the closure of the bank account. It is a violation of the Uniform Commercial Code in every state to issue a check to be drawn on insufficient funds. It is also a violation of most, if not all, state penal codes to knowingly issue or "utter" a worthless check. While these checks may be a concern for Georgia state law, they have no bearing on the Shipping Act issues. At this point in time, the container had already been mistakenly diverted to the wrong port and the cargo had been lost. Therefore, Complainant's assertion has no logical or legal relevance to the legal question.

7. Allegation: Ansah should be held personally liable because he knowingly committed fraud by issuing a bounced check.

   Response: This is a repetition of items # 5 and #6, *infra*. Further, there is no evidence in the record as to Ansah's state of mind or state of knowledge when he issued the check in question. Even assuming foreknowledge and thereby being in violation of Georgia state law,

[18] *See* Exibit J, Complainant's March 16, 2016, Motion for a Decision on Default Against Oceane Cargo Link, LLC, and Kingston Ansah, Individually.

this is not the type of "fraud" or "scheme" that is relevant to the analysis discussed in the *Casanova, Capital Telephone, Kavanaugh,* or *Rose* cases, *supra*, wherein the use of the corporate form itself was the instrumentality utilized to effect the violation of the statute at issue. The bounced checks have no bearing upon the mistaken diversion of the cargo to the wrong port and the resulting loss of the cargo. Therefore, Complainants assertion has no logical or legal relevance to the legal question.

8. Allegation: Ansah should be found personally liable because of . . . uttering bad checks he knew or should have known was closed and . . . issuing a check he knew could not be deposited because of insufficient funds.

   Response: This is a repetition and rehash of items # 5, 6, and 7. This assertion has no logical or legal relevance to the legal question and for which there is no evidentiary support in the record.

9. Allegation: His actions . . . allowing Complainant's vehicles to be shipped to the wrong destination, his demands for unreasonable freight, his total disregard for this proceeding support a finding that he personally violated section 10(d)(1) by utilizing his company to circumvent the Shipping Act.

   Response: The circularity of Complainant's legal conclusion, proffered with the diaphanous veil of a factual assertion, is most politely dismissed as a *non sequitur*. Ansah admits that an employee made a clerical mistake when he was out of the country. A result of that mistake was that two containers were diverted to the wrong ports.[19] The demand for additional freight in such circumstance may further

[19] In *G. W. Sheldon & Co. v. Hamburg Amerikanische Packetfahrt A.G.*, 28 F.2d 249, (3d Cir. 1928), the court found that to deviate, "lexicographically, means to stray, to wander. As applied in admiralty law, the term deviation was originally and generally employed to express the wandering or straying of a vessel from the customary course of the voyage, but in the course of time it has come to mean any variation in the conduct of a ship in the carriage of goods whereby the risk incident to the shipment will be increased, such as carrying the cargo on the deck of the ship contrary to custom and without the consent of the shipper, delay in carrying the goods, *failure to deliver the goods at the port named in the bill of lading and carrying them farther to another port,* or bringing them back to the port of original shipment and reshipping them. Such conduct has been held to be a departure from the course of agreed transit and to constitute a deviation whereby the goods have been subjected to greater risks, and, when lost or damaged in consequence thereof, clauses of exceptions in bills of lading limiting liability cease to apply." *Id.* at 251 (emphasis added) (citations omitted). This case is a case that should have been filed as a deviation case under the Carriage of Goods by Sea Act. *See Dow Chem. Pac. Ltd. v. Rascator Mar. S.A.*, 782 F.2d 329, 338-39 (2d Cir. 1986) (noting that the deposit of goods at an unscheduled port is a deviation).

accrue to COGSA damage provisions, but not necessarily violate the Shipping Act. Next, no Commission case law supports the proposition that failure to timely respond to a complaint filed with the FMC thereby subjects the shareholder of the OTI to personal liability. Last, there is not a single fact alleged in the record, much less proven in the record to support a finding that Ansah ". . .utiliz[ed] his company to circumvent the Shipping Act." There is every indication in the record that Ansah operated OCL as a normal OTI business, just like the other 1,900 plus FMC licensed OTIs that are 100% owned by their Qualified Individual manager. Other than the naked assertion, Complainant offers no fact, no argument, and no theory of the case that would bring the matter *sub judice* within a plausible penumbra of *Casanova*, *Capital Telephone*, *Kavanagh*, or *Rose*.

10. Allegation: A finding of personal liability should be imposed on Ansah to achieve an equitable result.

    Response: The facts are rather simple. An employee of OCL made a clerical error when he transposed the destination ports for two containers. One container was eventually delivered to the correct destination; however, Complainant's container was not. As discussed, *supra*, Respondent OCL would be liable to Complainant under applicable provisions of COGSA for resulting loss of cargo. The majority holds that these facts also result in a violation of the Shipping Act by OCL, the FMC licensed OTI that held itself out as a common carrier and arranged for the cargo movement.

By reason of the ALJ's Initial Decision's decision, Complainant is a judgement creditor of OCL. To any extent that Complainant cannot recover the full amount of the judgement debt from OCL or the surety company, and, failing in their first nine averments, they ask the Commission – in the name of "equity" – to disregard the corporate form of OCL, pierce the corporate veil, and thereby make Mr. Ansah's personal assets available for judgement lien proceedings. Case law presents a different view.

> [I]t is not sufficient to merely show that a creditor will remain unsatisfied if the corporate veil is not pierced, and thus set up such an unhappy circumstance as proof of an 'inequitable result'. In almost every instance where a plaintiff has attempted to invoke the doctrine he is an unsatisfied creditor."

*Associated Vendors, Inc*. v. *Oakland Meat Co,* 210 Cal.App.2d 825, 842.

Complainant's appeal for an "equitable result" would require the Commission to ignore the long history and well established policy and law concerning corporations and the separations of legal liability from owner/shareholders and the corporate entity. *In essence, the Complainant would have the Commission impose personal liability on the shareholder/owner of any OTI when there is a violation of the Shipping Act and the damages exceed both the amount of the OTI's surety bond and other available corporate assets*.[20] If the policy foundation of the Shipping Act was implicated, as with the case of *Capital Telephone, supra*, then an "equity" argument might have some bearing on the matter. No such analogous policy considerations exist in the case *sub judice*.

The Complainant's Reply to Respondents' Filings Pursuant to the ALJ's Order Scheduling Additional Briefing, dated September 15, 2015, offered one new allegation and then recycles its assertions regarding the checks issued on a OCL bank account that were dishonored. The new issue was OCL's observance of "corporate formalities". Mr. Ansah produced some records including organizational documents and corporate by laws. Ansah did not produce copies of minutes of director meetings. Complainant points to a State of Georgia provision that requires all regulated business entities to file annual registrations with the Secretary of State and pay an annual fee. While Respondent's failure to produce some internal company documents could result in a negative inference, the Complainant and the ALJ ignore a record document, discussed below, that provides a conclusive presumption that Mr. Ansah had, in fact, filed all of OCL's required annual registrations, annual fees, and related corporate documents with the Georgia Secretary of State from date of incorporation through the date of the matter *sub judice*.

The Complainant's Motion for a Decision on Default Against Oceane Cargo Link, LLC and Kingston Ansah, Individually, dated March 6, 2015, included for the record an "Exhibit 1", namely, a copy of OCL's corporate status as maintained by the Georgia Secretary of State. The corporate status document is dated January 12, 2015. It states that OCL was registered with the Secretary of State on November 24, 2008, that the last status date was October 7, 2014 and that the entity's status was "Active/Compliance". This last notation by the Secretary of State means that OCL had filed all of the annual reports and paid all annual fees as required by Georgia law from the date of incorporation through the latest status date and that OCL was thereby compliant and in good standing. This record evidence stands as direct refutation to assertions in

[20] The Complainant negotiated directly with, Avalon Risk Management, the surety company for OCL, and settled its claim for $37,681.14. This amount is far less than the $180,628.66 claimed as damages pursuant to the alleged violation of section 41102(c) and far less than the $75,000 amount of the required surety bond for an NVOCC. The reason that Avalon did not tender the full amount of the surety bond is not reflected anywhere in the record. Avalon would have a fiduciary duty to deal with its principal in good faith and to tender the full amount of the bond for a valid claim, even if it had reason to know thatits principal was having financial difficulties.

Complainant's Reply to Respondent's Filings, dated September 25, 2015.[21]

The issue of corporate formalities is often raised in the context of one corporation controlling another corporation, normally a wholly owned or majority owned subsidiary. The element of corporate formalities is not normally a persuasive factor in the veil piercing analytical process and has been criticized as being generally irrelevant. "The failure to follow corporate formalities has been questioned as a basis for piercing in corporations generally and does not seem to have a direct effect on a large percentage of piercing cases."[22] For stronger criticism, Professor J. Macey of Yale Law School suggests

> [I]t seems nothing short of bizarre to impose liability on a shareholder on the grounds that the corporation has not been scrupulous about keeping minutes or other records unless there is some connection between the sloppy or non-existent record-keeping and the harm to the plaintiff, which generally there is not . . . [P]iercing the corporate veil for failing to observe corporate formalities such as holding director's meetings or keeping minutes makes no sense. It is like imposing liability on a person because he did not wear a tie or keep a napkin in her lap while eating. On the other hand, where the failure to keep records is so profound that one cannot utilize such records to determine which assets legitimately belong to its shareholders, then piercing is appropriate to prevent the unfair and strategic abuse of creditors. . . .[23]

There is no allegation and no record evidence that even remotely suggests such profound lack of records that leads to any such abuse of creditors in the case *sub judice*.

Given the Complainant's own submitted evidence showing that Mr. Ansah had filed all annual registrations, reports and fees with the Georgia Secretary of State and the lack of any nexus between board minutes and the alleged Shipping Act violation and resulting damage, I find that the alleged minor lapse in corporate formalities as insufficient to justify piercing OCL's corporate veil.

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[21] Complainant alleged, "Respondent did not produce any annual reports or filings as required by Georgia law. Note 2. Georgia law requires all . . . limited liability companies . . . to file annual registrations with the Secretary of State and pay a renewal fee. See Ga. Code Ann. Section 14-2-1622(c). Business entities that fail to renew by the deadline will be charged a $25 late filing fee and risk being administratively dissolved. See Ga. Code Ann. Section 14-2-1422."

[22] Robert B. Thomson, *Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts of the Enterprise*, 47 Vand. L. Rev. 1, note 1, at 18.

[23] Jonathan Macey and Joshua Mitts, *Finding Order in the Morass: The Three* Real *Justifications for Piercing the Corporate Veil*, 100 Cornell L. Rev. 99, 108-109 (2014).

Any allegation that OCL's corporate form should be pierced by reason of its inability to pay the Complainant for the lost cargo, thus establishing the element of "inadequate capitalization" as recited in *Rose* at 167, would also be in error.

First, the recognized rule of law is that adequacy of a corporation's capitalization is to be judged at the time of its incorporation – not at the time immediately preceding its financial distress. ". . . [u]ndercapitalization, when considered at all, is evaluated with emphasis on the time of incorporation rather than thereafter."[24] "The adequacy of capital is to be measured as of the time of formation of the corporation. A corporation that was adequately capitalized when formed, but which subsequently suffers financial reverses is not undercapitalized."[25] "When a business goes sour for whatever reason, its capitalization will necessarily suffer. Perhaps every firm that slips into insolvency can be termed undercapitalized. . . Owners owe no duty to recapitalize a failing firm, and courts should not introduce one through the back door by retrospectively finding undercapitalization by proof of 'eventual failure.'"[26]

While the law concerning adequacy of corporate capitalization appears well settled, the record of the case has no allegations and no proffers of proof on the subject by any party. As noted, *supra*, I will take official notice of documents in the possession of the Commission and obtained in the normal due course of an OTI license application. Upon review of the 2011 OTI license application file for OCL, there is a document titled "Limited Liability Company Operating Agreement for Ocean Cargo Link, LLC", and dated November 30, 2008. Article II of such agreement, titled "Capital Contribution" states that the total value of the property and cash initially contributed by the Member, Mr. Ansah, to the company is $225,000. Reference is therein made to Exhibit 2, attached to the agreement. Such Exhibit lists the capital contributions by the Member, Mr. Ansah, as $125,000 in cash and $100,000 in property.[27]

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[24] *Seacon Service Sys., Inc. v. St. Joseph Bank & Trust Co*., 855 F.2d 406, 416 (7th Cir. 1988) (citing *Consumer's Co-op*, 419 N.W.2d at 218-219; *DeWitt Truck Brokers v. W. Ray Fleming Fruit Co*., 540 F.2d 681 (4th Cir. 1976).
[25] Fletcher Cyclopedia of Private Corp., note 5, section 41.33 (Nov. 2004).
[26] *In re Matter of Lifschultz Fast Freight*, 132 F.3d 339, 351-352(7th Cir. 1997)(citing *In re Matter of Mobile Steel*, 563 F.2d 692,703(5th Cir. 1977); *Seacon Service*, *supra*, at 416).
[27] A copy of the "Limited Liability Company Operating Agreement for Oceane Cargo Link, LLC," dated November 30, 2008, is a part of the official FMC OTI license application file. As noted above, the Commission is considering this mater *de novo*. Pursuant to 46 C.F.R. section 502.226, I will take official notice of documents submitted by Mr. Ansah to the Commission's Bureau of Certification and Licensing as part of his application process for a NVOCC / Freight Forwarder license. Information in an FMC OTI license application file may be available through a Freedom of Information Act (FOIA) request.

Commission regulations require an NVOCC to obtain and maintain a surety bond in the amount of $75,000.[28] The amount of OCL's paid in Capital Contribution would appear on its face to be adequate as it represents three times the amount of the required NVOCC surety bond. If adequate capitalization was an issue at the time of issuance of the OTI license, then the Commission's Bureau of Certification and Licensing (BCL) had opportunity during the OTI license application process to so notify Mr. Ansah. However, the Commission's regulations do not provide any authority or legal process to question an OTI's capitalization other than the requirement of the referenced surety bond.

While the Commission is directed by the Shipping Act to determine the form and the amount of the bond, insurance or surety instrument so as to "insure financial responsibility"[29] of the OTI, there is no legal reason that more financial reserves should be required above the surety bonding amount set forth in the Code of Federal Regulations as promulgated by the Commission.

Judge Frank H. Easterbrook[30] is both a respected jurist and widely read author of legal articles concerning business and competition legal issues. In a thoughtful article on limited liability, the corporation and "piercing", he observes that "Piercing the corporate veil is one of several methods for decreasing the incentive created by limited liability to engage in overly risky activity".[31] He then discusses four methods, as alternatives to veil piercing, to decrease such incentive of businesses to engage in excessive risk. One such method is ". . . legislatively imposed minimum-capitalization requirements. . . "[32] He then discusses relevant problems with such government imposed capitalization requirements.

> . . . [S]uch regulations have problems of their own. One is the obvious administrative cost associated with determining what amount of capital firms should raise. Another is the cost of error. If capital requirements are set too high, this will impede new entry and permit the existing firms to charge monopoly prices. Still another is the question of how firms must satisfy their capitalization requirements. For such requirements to be effective, the corporation must post a bond equal to its highest expected

[28] *See* 46 C.F.R. § 515.21 Financial Responsibility Requirements.
[29] Section 19(b)(1) Financial Responsibility. No person may act as an ocean transportation intermediary unless that person furnishes a bond, proof of insurance or other surety in a form and amount determined by the Commission to insure financial responsibility that is issued by a surety company found acceptable by the Secretary of the Treasury.
[30] Judge, United States Court of Appeals for the Seventh Circuit.
[31] Easterbrook and Feischel, *supra,* at 114.
[32] *Id.*

> liability or hold sufficient funds in the corporate treasury and invest them in risk-free assets. The total held in this way will far exceed the expected risk created by firms as a group (because not all firms go bankrupt or incur the maximum possible loss). Under either alternative, the rate of return on equity investments will decrease.

*Id.* at 114.

The Commission has considered all of these problems as it has promulgated and revised its regulations concerning OTI financial responsibility over many years. The public notice and comments on each regulatory proposal have developed all points of view on these subjects. It is interesting that in the most recent revisions to OTI financial responsibility regulations, the Commission reduced the overall surety bond level for OTIs that operate branch offices beyond their respective home office. The Commission has determined that a surety bond in the amount of $75,000 is the minimum amount of initial capitalization for an OTI to obtain an FMC license and commence business operations. The Commission does not require the OTI to maintain such surety bond and also maintain additional liquid and risk-free assets on its balance sheet to be held in the event there is a business loss related to the transportation of cargo that exceeds such surety bond amount. Absent unique and compelling evidence concerning the issue of the adequacy of the firm's initial capitalization, an OTI with an initial surety bond as required by Commission regulation should not later be subject to a claim of having its corporate veil pierced by reason of inadequate initial capitalization.

As a closing policy consideration, first consider the initial position of this dissent that the legal presumption is to observe the corporate form and the complainant's burden to pierce that corporate form is heavy. Second, consider the number of FMC licensed OTIs that are organized as limited liability companies and are wholly 100% owned by the OTI's member/manager just like the individual Respondent in this case.[33] Given the paucity, to the point of nonexistence, of any probative and relevant record evidence concerning elements germane to corporate veil piercing analysis, the ALJ's Initial Decision stands for the proposition that each and every one of these member/manager owned OTIs are one Shipping Act violation away from having their homes, their savings, their retirement funds and their children's college funds subject to judgement lien proceedings. With the Commission's wide and expansive interpretation of section 41102(c), such Shipping Act violation is no further away than an incident of a single paperwork error that diverts a container to an incorrect

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[33] An estimated 40% of all FMC licensed OTIs are organized as limited liability companies and are wholly 100% owned by the OTI's member/manager. *See* Bureau of Certification and Licensing study, *supra*.

port controlled by uncooperative bureaucrats.

It is my view that the ALJ's ruling that the "… evidence is sufficient to pierce the corporate veil and hold Kingston Ansah personally liable for the acts of Oceane Cargo Link"[34] is in error. Mr. Ansah should be dismissed as a party in these proceedings. The matter should proceed with Complainant and Oceane Cargo Link as the sole Respondent.

I respectfully dissent from the majority decision.

[34] Initial Decision at 13.