



FEDERAL MARITIME COMMISSION

DOCKET NO. 06-01

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Worldwide Relocations, Inc., Boston Logistics Corp., Tradewind Consulting, Inc., Global Direct Shipping, Megan K. Karpick (a.k.a. Catherine Kaiser, Kathryn Kaiser, Catherine Karpick, Megan Kaiser and Alexandria Hudson), Martin J. McKenzie, Patrick John Costadoni, Sharon Fachler, and Oren Fachler, et al. -- Possible Violations of Sections 8, 10 and 19 of the Shipping Act of 1984 and the Commission's Regulations at 46 C.F.R. §§ 515.3, 515.21 and 520.3

To: Secretary,
Federal Maritime Commission
Washington, D.C. 20573-0001

RESPONDENT MARTIN MCKENZIE'S
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
AND
RESPONSE TO BUREAU OF ENFORCEMENT
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respondent, MARTIN MCKENZIE by and through his Attorneys, Law Firm of R. M. Dreger, P.C. and pursuant to the Order of the Administrative Law Judge ("ALJ") dated March 23, 2009 and subsequently modified by orders dated, April 23, 2009, May 29, 2009, July 17, 2009 and August 25, 2009, hereby presents his Proposed Findings Of Fact And Conclusions Of Law And Response To Bureau Of Enforcement ("BOE") Proposed Findings Of Fact And Conclusions Of Law, and in support thereof, states as follows:

INTRODUCTION

Response To BOE Proposed Findings Of Fact

1. On January 11, 2006, The Federal Maritime Commission (“Commission”) issued an Order of Investigation and Hearing to determine whether “a core group of individuals began to form a series of corporations for the purpose of providing ocean transportation services.”¹ At the heart of this investigation were two core issues: (1) whether said named individuals, acting through nine corporations, had violated the Shipping Act of 1984, 46 App.U.S.C. § 1718 (“Shipping Act”) and the Commission’s Regulations at 46 C.F.R. Parts 512 and 520 by operating in the role of unlicensed, unbonded and untariffed non-vessel-operating-common-carriers (“NVOCC”) in the U.S. trades; and (2) whether civil penalties should be assessed against these individuals in the event that violations of the Shipping Act were confirmed.

2. On March 23, 2009, after more than three years of exhaustive investigation, and after considering the Motion To Dismiss of Respondent Martin McKenzie, which assailed the BOE allegations as groundless, the ALJ ordered the BOE to stand and deliver. Specifically, the ALJ required that before proceeding any further in this case, including giving any consideration to whether to allow/require Respondent McKenzie to proceed with discovery², the BOE was to produce all documents, deposition testimony, affidavits, discovery responses, Responses To Admissions of Fact and other admissible evidence to substantiate its allegations of unlawful NVOCC actions.

¹ Order of Investigation and Hearing, at Page 1.

² Respondent Martin McKenzie’s Motion to Dismiss was not ruled upon by the ALJ until March 23, 2009, at which time Respondent Martin McKenzie was officially at issue on the pleadings and entitled for the first time, to proceed with discovery.

3. On June 17, 2009, the BOE finally filed its long-awaited Proposed Findings of Fact, consisting of a 54 page Brief and over 3000 pages of documents. The BOE also provided a recitation of legal authority designed to highlight the discretionary powers of the Commission to draw inferences from the available evidence as necessary to avoid injustice and penalize violators of the Shipping Act.

4. But a careful analysis of the BOE Brief reveals that it contains only 72 Purported Findings of Fact, most of which are inadmissible conclusions of law or bald improper opinion testimony. Equally lacking are the purported supporting documents, which in reality, are essentially only comprised of a collection of non-descript shipping documents and two self-serving Commission Affidavits. Each Affidavit is, however, virtually worthless, since each is heavily laced with classic hearsay, improper legal conclusions and wholly inadmissible opinion testimony. When all of this inadmissible testimony is stripped from these Affidavits, they are rendered innocuous and their factual impotence is obvious.³

5. Glaringly absent from this BOE's "proffer of proof" is any evidence of the alleged 280 shipper complaints that were the original impetus of the BOE investigation. Not a single affidavit or deposition of any such aggrieved shipper, is produced. Similarly, not a single document evidencing any damages sustained by any such shipper, common carrier or any third party, is presented. In addition, the BOE fails to produce even a shred of evidence to support its shrill claims that the Respondents received financial gains from their alleged misconduct.

6. The hollowness of the BOE case resounds even louder when the Proposed Findings of Fact and Brief are isolated as to Respondent Martin McKenzie and Dolphin

³ Respondent Martin McKenzie has independently challenged the admissibility of the Affidavit of Ronald D. Murphy (BOE App.1) and the Affidavit of Andrew Margolis (BOE App.2), in corresponding Motions To Strike filed contemporaneously with this Response To the BOE Findings of Fact and conclusions of Law.

International Shipping (“Dolphin”). Indeed, under such magnification, the BOE evidence pales.

7. Only five (5) of the Proposed Findings of Fact even apply to McKenzie or Dolphin. (See BOE PFF # 68-72). Moreover, of these 5 BOE Proposed Findings of Fact, it is only Proposed Finding of Fact # 72 which proclaims that 40 shipper complaints existed concerning the ten (10) Dolphin shipments.

8. Yet, once again the BOE fails to deliver. While its Purported Finding of Fact # 72 sets forth many detailed allegations regarding the nature and extent of these 40 shipper complaints, the BOE ultimately only references two Appendixes to document these allegations. But neither of these Appendixes substantiates the BOE’s claims for which they are cited. The first of these Appendixes, App. Number 1, is merely one of the laced Commission Affidavits and is totally devoid of any description whatsoever of the content of any shipper complaint. The second Appendix, Number 38, equally disappoints, for it is merely a global exhibit that is comprised of 62 standard shipping documents and a single e-mail from a disgruntled shipper. Hardly a compelling showing.

9. Nowhere are there any documents of any kind that evidence the forty (40) shipper complaints for lost or delayed shipments, undelivered cargo, non-payment of carriers, addition payment requirements or any refusals to return pre-paid freight. Similarly, the BOE is a no show concerning any evidence of shipper damages. No affidavits, no sworn deposition testimony, no claims and no Proofs of Loss. Absolutely nothing. Forty (40) shipper complaints are alleged, yet the BOE presents not a single document that could be admitted into evidence to support the bald “findings” of “fact” against Dolphin.

10. Even more egregious is the blatant failure of the BOE to produce any evidence to support the imposition of civil penalties against Dolphin, a defunct corporation or Martin McKenzie, individually. While railing of “willful” violations of the Shipping Act by Respondents Dolphin and McKenzie, the BOE comes up empty as to any factor evidence which the Commission may consider concerning the appropriateness of assessing civil penalties. There are no BOE Proposed Findings of Fact nor any documents that relate to any such civil penalty assessment factors. Noticeably absent is any evidence that Respondent McKenzie “intentionally violated or recklessly disregarded”⁴ the Shipping Act or ever received any benefit whatsoever from his or Dolphin’s acts.

11. Thus, after more than three years of presumably intense investigation, the BOE presents the Commission with: (a) a cache of generic shipping documents; (b) two pontificating Commission affidavits of limited admissibility; (c) a request for the Commission to disregard the dearth of admissible evidence of any willful violations or shipper damages; and (d) a prayer for the Commission to blindly exercise its judicial discretion to levy staggering civil penalties against Respondent Dolphin and Martin McKenzie in excess of \$ 300,000.

12. Clearly, such action is wholly unsupported by the evidence presented and is absolutely unwarranted and inequitable.

13. Accordingly, the BOE Brief and Proposed Findings of Fact must be recognized as mere boilerplate allegations and standard legal authority, which is, in the end, not applicable to Respondent Martin McKenzie. Indeed, in the final analysis, the Commission must recognize that despite being given every opportunity to do so, the BOE has presented no

⁴ Pacific Champion Express Co. .Ltd.-Possible Violations of § 10(b)(1) of the Shipping Act of 1984, 28 SRR 1397, (FMC 2000)

factual evidence to support its suppositions, theories, or conclusions concerning Respondents Dolphin or Martin McKenzie.

Martin McKenzie Findings of Fact

13. Even assuming, *arguendo*, that the Proposed Findings of Fact and Brief presented by the BOE were deemed to be sufficient to establish that Respondent Martin McKenzie, through Dolphin, violated the Shipping Act and the Commission's Regulations, the Commission will be equitably estopped from imposing any adverse ruling or civil penalty against Dolphin and/or Martin McKenzie.

14. As the Proposed Findings of Fact presented by Respondent Martin McKenzie establish: (1) in 2004, Respondent Dolphin expressly requested that its operations be evaluated by the Commission to determine if Dolphin was in strict compliance with the Shipping Act and the Commission Regulations; and (2) the Commission did conduct such an evaluation of the Dolphin business model on several occasions in 2004 and thereafter never advised any officer, director and/or shareholder of Dolphin that Dolphin's business model violated the Shipping Act and/or the Commission's Regulations.

15. Given that the Commission is entrusted with enforcing the Shipping Act to protect the public in strict accordance with the salutary effect of the statute, Dolphin and its officers, directors, shareholders and investors had an absolute right to rely on the Commission to advise it as to whether the Dolphin business model was in compliance with the Shipping Act. The subsequent silence of the Commission following its informal audit of Dolphin, created an implicit assent to the Dolphin business practices and Dolphin was entitled to infer that the Commission had approved, or at a minimum had no objection to as presented, the Dolphin business model.

16. Therefore, based on the evidence presented in the Proposed Findings of Fact of Respondent Martin McKenzie, the ALJ can confidently conclude that: (1) the Commission had full knowledge in 2004 as to the nature and extent of the business model of Dolphin; and (2) the Commission made no affirmative statements to any officer, director shareholder or investor of Dolphin indicating that Dolphin's business model violated the Shipping Act and Commissioner's regulations. Accordingly, the ALJ must conclude that the Commission is barred by equity from taking any adverse action against Dolphin and/or Martin McKenzie, including the imposition of any civil penalty based on an alleged knowing and willful disregard for the Shipping Act.

LEGAL ARGUMENT

BOE'S PURPORTED FINDINGS OF FACT FAIL TO CONTAIN ADMISSIBLE EVIDENCE OF A WILFUL VIOLATION OF THE SHIPPING ACT BY DOLPHIN OR MARTIN MCKENZIE

17. The BOE Proposed Findings of Fact relating to Dolphin and Martin McKenzie are confined to Numbered Paragraphs 68-72. It is here that the BOE presumably presents its best case against these Respondents and it is these Paragraphs upon which the BOE relies to support its legal arguments that Dolphin and McKenzie acted as unlicensed, unbonded and untariffed NVOCCs in willful violation and knowing disregard of Section 8 and 19 of the Shipping Act.

18. But the statements contained in these BOE Proposed Findings of Fact paragraphs and the Appendixes cited in support thereof, do not contain admissible evidence of unlawful NVOCC conduct or sanctionable violations of the Shipping Act by Dolphin or Martin McKenzie. Indeed, these Paragraphs 68-72 contain very little admissible evidence, thereby

rendering the BOE legal arguments nothing more than bald allegations and improper conclusions of law.

19. To start, BOE Proposed Finding of Fact # 68 simply states that Megan McKenzie is the sole director of Dolphin and that Baruch Karpick had an ownership interest in Dolphin. The Articles of Incorporation of Dolphin (BOE App. 31) are cited as supporting evidence. No mention is made of Martin McKenzie. Accordingly, this Proposed Finding Of Fact # 68 and corresponding Appendix 31 cannot be deemed to be any incriminating evidence against Martin McKenzie.

20. BOE Proposed Finding of Fact # 69 is comprised of six sentences, only two of which even reference Martin McKenzie. One sentence asserts that Martin McKenzie invested in Dolphin. This sentence is supported by deposition testimony of Martin McKenzie (BOE App. 33) and Megan Karpick (BOE App. 32). While not specifically referenced by the BOE, the cited lines of deposition testimony also clearly establish that: (a) Martin McKenzie was an independent contractor and never an employee of Dolphin (BOE App 33 , Page 14, Lines 18-21; BOE APP. 32, Page 66, Lines 1-3); and (b) Martin McKenzie was never issued any stock in Dolphin (BOE App. 33 Page 15, Lines 10-13; BOE App. 32, Page 66, Lines 21-24).

21. The second sentence related to Martin McKenzie asserts that he “assumed personal obligations on behalf of Dolphin” and references BOE App. 31 which contains a personal guarantee signed by Martin McKenzie. Taken in their totality, these two sentences of BOE Proposed Finding Of Fact # 69 only serve to establish that Martin McKenzie was an outside investor and a guarantor of a limited subset of Dolphin obligations. Once again,

nothing contained in this BOE Proposed Finding of Fact # 69 establishes any unlawful NVOCC conduct or sanctionable violations of the Shipping Act by Martin McKenzie.

22. BOE Proposed Finding of Fact # 70 asserts that “Dolphin provided door to port and door to door services to their customers”. This allegation is supposedly supported by BOE App. 37, but a careful examination of this document reveals that it is NOT a Dolphin business record but is instead, a BOE self-titled “Evidence Summary. Clearly barred from admission into evidence as a classic hearsay document, this BOE App. 37 document must be totally disregarded as admissible evidence against Martin McKenzie or any other party.⁵

23. BOE Proposed Finding of Fact # 70 is also supported by BOE App. 38, comprised of a series of standard shipping documents. But the BOE offers no evidentiary foundation for the admission of these documents nor does the BOE offer any explanation as to how these documents were acquired. Accordingly, under federal evidentiary rules, these documents are inadmissible.⁶ In addition, even if these documents can be properly introduced into evidence, these documents are not compelling as to Martin McKenzie. None of these documents make any reference whatsoever to Martin McKenzie nor do they serve to establish any unlawful NVOCC conduct by Martin McKenzie or any sanctionable violations of the Shipping Act by Martin McKenzie. So, BOE Proposed Finding of Fact # 70, even if ultimately admitted into

⁵ Documents prepared for purposes of litigation are hearsay under Rule 803(6), notwithstanding that party may maintain other records that are maintained for other purposes. SEE such as *United States v Grossman*, 614 F2d 295, 5 Fed Rules Evid Serv 1121 (1st Circ. 1980). SEE also *United States v Bohrer* 807 F2d 159, 87-1 USTC P 9141, 22 Fed Rules Evid Serv 295, 59 AFTR 2d 350 (10th Circ. 1986) (Business records exception of Rule 803(6) is not applicable to documents prepared for ultimate purposes of litigation when offered by party maintaining documents, and thus trial court erred in admitting IRS contact card which was maintained, at least in part, for purpose of prosecuting defendant for willfully refusing to file federal income tax returns).

⁶ Under Rule 803(6) testimony of custodian or other qualified witness who can explain record-keeping procedure is essential, and if witness cannot vouch that requirements of rule have been met, entry must be excluded. *Liner v J. B. Talley & Co.* 618 F2d 327, 6 Fed Rules Evid Serv 117, (5th Circ. 1980); reh. den., 623 F2d 711 (5th Circ. 1980).

evidence, must be held to be utterly devoid of any incriminating evidence against Martin McKenzie.

24. BOE Proposed Finding of Fact # 71 recites a series of statements about NVOCC's issuing bills of lading to Dolphin and looking to Dolphin for payment of invoices. While clearly establishing that entities other than Dolphin were the NVOCCs in certain transactions, these documents and allegations fail to qualify as evidence of any unlawful NVOCC conduct by Martin McKenzie or any sanctionable violations of the Shipping Act by Martin McKenzie.

25. BOE Proposed Finding of Fact # 72 sets forth four (4) sentences that appear to specify the nature and extent of 40 shipper complaints leveled against Dolphin, stemming from ten (10) shipments of household goods. These statements are supposedly supported by BOE App. 38 and App. 1. But when scrutinized, BOE Appendixes 1 and 38 are found to be completely devoid of any specificity whatsoever concerning said shipper complaints. While Appendix 1 is the Affidavit of the Director of the FMC's Office of Consumer Affairs and Dispute Resolution Services and it does state that 40 complaints were received, the affidavit is otherwise silent as to the details of such shipper complaints. Nowhere in this Affidavit is there any reference to any failed cargo deliveries or any refusals to return pre-paid freight or any failures to pay a common carrier. Nor could such statements be present, given that the Affidavit fails to establish that the affiant had any involvement in the investigation of the alleged complaints or that the affiant has any personal knowledge of said shipper complaints or investigations.

26. Therefore, given the absence of any valid evidentiary foundation upon which to base testimony concerning the nature and extent of said shipper complaints and

investigations, this BOE Appendix #1 must be disregarded as a source of support for the BOE claims in Purported Finding of Fact # 72. Similarly, a careful review of each of the 63 shipping documents contained in BOE App. 38, reveals an equally glaring absence of specificity concerning any of the failed cargo deliveries, refusals to return pre-paid freight or failures to pay a common carrier, that are alleged in BOE Purported Finding of Fact # 72.

27. So, in the end, the grandiose statements of the BOE regarding supposed details of 40 shipper grievances against Dolphin, are confirmed as being wholly unsupported by any sworn testimony and entirely undocumented by any of the BOE exhibits presented. In short, the crucial BOE Proposed Finding of Fact # 72 that is touted by the BOE as the apparent keystone for its claims against Martin McKenzie and Dolphin, turns out to be just empty unsubstantiated rhetoric.

**THE FAILURE OF THE BOE TO ARTICULATE
ANY SALIENT FINDINGS OF FACT
RENDERS ITS BRIEF MEANINGLESS**

28. Having conclusively determined that the BOE Proposed Findings of Fact are merely inadmissible allegations, rather than actual facts, it is axiomatic that the BOE Brief relying on these Proposed Findings of Fact, must be found to be equally non-persuasive.

29. Simply stated, the absence of any articulated Findings of Fact, reduces the BOE Brief to simply a glorified recitation of federal authority.

30. But throughout its Brief, the BOE repeatedly follows this same flawed practice of presenting standards of judicial review and factors to be considered in the application of the law, followed by a series of unsupported allegations to which the BOE then applies the law.

Missing in this analysis, of course, are the facts which would presumably support the otherwise bald BOE allegations.

31. Setting forth case authority in Section C(1) of the BOE Brief concerning a preponderance of evidence standard of proof and the right of the Commission to “draw inferences based on the evidence available” is only meaningful if admissible evidence is presented for consideration. Similarly, providing a series of legal opinions in Section C (3) defining an NVOCC is meaningless if no facts are presented to which a factor balancing test may be systematically applied.

32. In Section C(4), the BOE trots out its five (5) Proposed Findings of Fact (# 68-72) against Dolphin and then proclaims that these five statements constitute “substantial evidence demonstrating that the Respondents operated as NVOCCs in violation of Sections 8 & 19 of the Shipping Act (See BOE Proposed Findings Of Fact and Conclusions of Law, at Page 40, Lines 9-10).

33. But as established earlier, BOE Proposed Findings of Fact # 68-72 do not conclusively confirm an NVOCC status of Dolphin. Similarly, BOE Proposed Finding of Fact # 72 does not contain any language whatsoever that substantiates the BOE misquote that many of the complaints it received “were complaints that goods had been stranded in the United States.” (See BOE Proposed Findings of Fact and Conclusions of Law, at Page 40, Lines 7-8).

34. Section C (5) is equally lacking and in essence, constitutes simply a risky invitation by the BOE for the Commission to adopt a “kangaroo court “ approach to justice by blatantly disregarding all corporate formalities, regardless of the facts, so as to ensure that the individual Respondents are each ultimately found to be culpable.

35. While it is clear that the federal courts do look closely at the purpose of a statute in question, it is equally clear that any ultimate piercing of a corporate veil must still turn on the individual facts.

36. According to the BOE, Dolphins' corporate veil should be wholly disregarded so that the Commission can hold Martin McKenzie personally liable. But in urging such an outcome, the BOE looks past the very legal analysis that it cites. Specifically, applying the factors presented in the Williamson v. Recovery Limited Partnership case⁷ presented by the BOE, yields a decisive determination that no such piercing of the Dolphin corporate shield is warranted. Specifically, the BOE has presented no factual evidence of any "intermingling of funds, failure to follow formal legal requirements for the corporation, overlap in ownership, officers, directors or personnel".

37. Thus, no amount of BOE urging to impose liability to "achieve an equitable result", should be considered when evaluating Dolphin's outside investor, Martin McKenzie.

**THE BOE HAS PROVIDED NO FACTS TO WARRANT
THE ASSESSMENT OF CIVIL PENALTIES
AGAINST MARTIN MCKENZIE**

38. In Section D of its Brief, the BOE alleges that the "Respondents' violations of the Shipping Act should be found to be knowingly and willfully committed and therefore warrant a higher penalty." (See BOE Proposed Findings of Fact and Conclusions of Law, Page 49). The BOE then accurately defers to Section 13 (c) of the Shipping Act to identify those factors that the Commission must take into consideration in assessing civil penalties.

39. Among the matters to be taken into account when considering the assessment of civil penalties, are the nature, circumstances, extent and gravity of a violation, as well as the

⁷ 542 F.3d 43,53 (2nd Cir.2008)

degree of culpability, history of prior offenses, ability to pay and such other matters as justice may require. 46 U.S.C. § 41109.

40. But having set out the factors to be considered, the BOE then elects to disregard these factors and instead, to revert back to asserting improper conclusions of law and mischaracterizing its own Proposed Findings of Fact.

41. To start, nowhere in this Section D, does the BOE present any facts whatsoever concerning: (a) any history of prior violations by Dolphin or Martin McKenzie; or (b) the gravity of any alleged violation by Dolphin or Martin McKenzie.

42. Moreover, in an apparent effort to discuss the “nature” and “circumstances” of the alleged Dolphin violations, the BOE again takes great liberty with its own Proposed Findings of Fact. Blatantly embellishing on PPF # 67 and 72, the BOE mischaracterizes these PPFs as evidence of “complaints that shippers’ goods had been abandoned in the United States, leaving shippers to start from scratch in shipping their goods.” But no such language describing any abandonment or other circumstances exists in either BOE Proposed Finding of Fact # 67 or 72.

43. In discussing the “extent” of Dolphin’s alleged violations, the BOE readily acknowledges that Dolphin engaged in only 10 shipments - a stark contrast to the 1000 shipments of Worldwide Relocations, Inc. or the 279 shipments of Moving Services and Global Direct Shipping). But then, the BOE inexplicably dismisses this fact and instead, claims that the maximum penalty should still be imposed on Dolphin.

44. Given the absence of any factual evidence of prior violations, egregious circumstances or extensive violations, it is crystal clear that the BOE has failed to set forth

any compelling evidence whatsoever that would warrant the Commission's imposition of civil penalties on Dolphin or Martin McKenzie.

COMMISSION IS EQUITABLY ESTOPPED FROM ENFORCING THE SHIPPING ACT BECAUSE THE COMMISSION WAS FULLY AWARE OF DOLPHIN INTERNATIONAL SHIPPING MODEL AND NEVER OBJECTED TO ITS USE

45. Even assuming arguendo that the BOE could produce sufficient facts to establish that during the period from May-November 2004, Dolphin was operating in violation of the Shipping Act and the Commission's Regulations, the Commission would still be barred from enforcing the Shipping Act against Dolphin, and its officers, directors, shareholders, investors and employees.

46. The sworn testimony of Megan Karpick, the former Vice President of Dolphin unequivocally establishes that as of April 2004, the Commission was completely aware of the business model being utilized by Dolphin and ISS and the Commission never objected to the form or substance of the same. (The Affidavit of Megan Karpick is attached hereto and made a part hereof as Exhibit "A").

47. Specifically, the testimony of Ms. Karpick confirms the following:

- (a) Between October, 2003 and December 2003, Ms. Karpick conducted approximately 10 telephonic conversations with Mr. Joseph Farrell of the Federal Maritime Commission regarding (a) shipment status and (b) the formation of International Shipping Solutions ("ISS") (See Exhibit A at Numbered Paragraph 9);
- (b) In addition to telephonic conversations, Ms. Karpick conducted on-going e-mail communication with Joseph Farrell between October 2003 and December 2003 (See Exhibit A at Numbered Paragraph 10);

- (c) In October 2003, Andrew Margolis from the Miami office of the Federal Maritime Commission met with Ms. Karpick, at the offices of ISS, at which time Ms. Karpick showed Mr. Margolis the consultancy business model which Ms. Karpick intended to use for ISS (See Exhibit A at Numbered Paragraph 11);
- (d) In approximately February 2004, Ms Karpick advised Joseph Farrell of the formation of Dolphin International Shipping (“Dolphin”) (See Exhibit A at Numbered Paragraph 12);
- (e) During continued telephonic and e-mail communication with Joseph Farrell, between February 2004 and April 2004, Ms Karpick discussed: (i) the ongoing resolution of open issues with the FMC; and (ii) the continuation of both ISS and Dolphin including discussions regarding the consultancy model for Dolphin (See Exhibit A at Numbered Paragraph 13);
- (f) During said telephone conversations, Joseph Farrell made reference to both websites for ISS and Dolphin International Shipping (See Exhibit A at Numbered Paragraph 14);
- (g) Mr. Farrell was aware of the language contained within the Dolphin website which stated (See Exhibit A at Numbered Paragraph 15);

“Dolphin International Shipping is acting to coordinate your international relocation. Dolphin is not the carrier. Your ocean freight is booked with an NVOCC licensed with the Federal Maritime Commission.”

- (h) During April, 2004, Ms. Karpick advised Mr. Farrell during telephonic communication that on-going efforts were underway to bring in outside investors

and professional management for Dolphin (See Exhibit A at Numbered Paragraph 16);

- (i) On May 5, 2004, Ms. Karpick advised Mr. Farrell via an e-mail communication, of the current status of internal management issues for both ISS and Dolphin (See Exhibit A at Numbered Paragraph 17; also See Exhibit "B" attached hereto and made a part hereof);
- (j) On May 6, 2004, Mr. Farrell acknowledged receipt of the aforesaid communication (See Exhibit A at Numbered Paragraph 18; also See Exhibit B);
- (k) Following Mr. Farrell's retirement from the FMC, during the months of June – August, 2004, Ms. Karpick continued both telephonic and electronic communication with members of the FMC staff (See Exhibit A at Numbered Paragraph 19);
- (l) There were no material changes to the consultancy model of ISS and Dolphin during the period from September 2003 – November 2004 (See Exhibit A at Numbered Paragraph 20);
- (m) At no time during September 2003 – November 2004 was Ms. Karpick advised by any member of the FMC staff that ISS or Dolphin was in violation of the Shipping Act, or the Commissioner's Regulations. (See Exhibit A at Numbered Paragraph 21, 26-27);

48. At no time during September 2003 – August 2004, despite repeated conversations and personal visits with both the President of American Steamship Line, and the President of Troy Container Line, was Ms. Karpick advised that the consultancy model utilized by ISS and Dolphin was in violation of the Shipping Act (See Exhibit A at Numbered Paragraph 22);

49. At no time during September 2003 – August 2004, despite repeated telephonic and electronic communication with the President of Euro-America Shipping was Megan Karpick advised that the consultancy model utilized by ISS and Dolphin was in violation of the Shipping Act. (See Exhibit A at Numbered Paragraph 23);

50. At no time during September 2003 - July 2004 was Megan Karpick asked for any OTI or NVOCC number from any NVOCC accepting shipments from ISS and Dolphin International Shipping (See Exhibit A at Numbered Paragraph 24);

51. At no time during September 2003 – August 2004, was ISS or Dolphin refused bookings from any NVOCC licensed by the Federal Maritime Commission. (See Exhibit A at Numbered Paragraph 25);

52. Megan Karpick relied upon the knowledge of the FMC regarding the consultancy model for ISS and Dolphin to continue doing business in the United States.

53. The reliance of Megan Karpick, ISS, and thereafter Dolphin and Martin McKenzie, on the conduct and implicit assent to the consultancy business model of Dolphin, was reasonable and fully justifiable, as Megan Karpick, Dolphin, ISS and Martin McKenzie had no knowledge or access to any facts that could have revealed that the Commission had objections to the consultancy business model of ISS and Dolphin based on that model's non-compliance with the Shipping Act or the Commissions regulations. (See Exhibit A, at Numbered Paragraph 28).

54. Given that the Commission was expressly requested throughout the period from September 2003 - November 2004 to evaluate the consultancy business model of ISS and Dolphin to determine its compliance with the Shipping Act, and given that the Commission

never advised Dolphin or Martin prior to January, 2006 that said consultancy model was non-compliant, the Commission must now be barred in equity from seeking to retroactively assess penalties against Dolphin and Martin McKenzie for purported willful violations of the Shipping Act and the Commission's Regulations.

55. The Commission did not merely remain silent: its investigator, Margolis, personally visited the offices of ISS and inspected files of his own choosing. Joseph Farrell was kept fully apprised of the ISS and Dolphin models.

56. These contacts and communications were understood by Megan McKenzie and ISS to be neither social visits nor mere administrative functions, but as affirmative, direct exercises of the FMC's enforcement authority to evaluate the ISS business model, based on the FMC's experience and knowledge of international shipping regulations.

57. If, after taking the affirmative steps of an in-person inspection of the proposed ISS consultancy model, the FMC objected to that model on the grounds that it may violate the Shipping Act or FMC regulations, it was incumbent upon the FMC to advise ISS of that objection.⁸

58. Instead, no objection to the ISS consultancy model was ever communicated by the FMC to Megan Karpick, ISS, Dolphin or Martin McKenzie until January, 2006, long after these Respondents had relied to their detriment on the .

59. Indeed, the FMC's continued silence under the circumstances means that until the FMC issued its Order of Investigation in January, 2006, the FMC was estopped from any assertion that ISS, Megan Karpick, Dolphin, or Martin McKenzie, knowingly and willfully violated the Shipping Act or FMC Regulations.

⁸ *SEE*, such as *Tefel v. Reno*, 180 F. 3d 1286, 1303 (11th Cir. 1999); *Trw, Inc., and Horace A. Shepard, Petitioners, v. the Federal Trade Commission, Respondent.*, 647 F.2d 942 (9th Cir. 1981)

60. As the Order of Investigation has never alleged any conduct by Martin McKenzie, or Dolphin, that took place after January, 2009, it is axiomatic that neither Martin McKenzie nor Dolphin could ever be found to have knowingly and willfully violated the Shipping Act or Commission regulations.

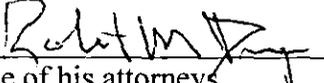
CONCLUSION

The BOE's purported findings of fact fail to contain admissible evidence of any willful violation of the Shipping Act by Dolphin or Martin McKenzie. The failure of the BOE to articulate any salient findings of fact renders its brief meaningless. The BOE has provided no facts to warrant the assessment of civil penalties against Martin McKenzie and or Dolphin. Commission is equitably estopped from enforcing the Shipping Act because the Commission was fully aware of Dolphin international shipping model and never objected to its use, under circumstances where the Commission was obliged to speak.

WHEREFORE, Respondent MARTIN MCKENZIE prays that his Response be deemed sufficient and that an order be entered that states as follows:

- a) Respondent Martin McKenzie is not in violation of the Shipping Act of 1984 or the Commissioner's Regulations; and
- b) In the event that the Commission determines that Martin McKenzie has technically violated the Shipping Act and/or the Commissioner's Regulations, the Commission determines that there exists no basis for assessing any civil penalties against Martin McKenzie;
- c) Such other and further relief is granted as the Court finds to be just and equitable.

Respectfully Submitted,


One of his attorneys

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EXHIBIT "A"

FEDERAL MARITIME COMMISSION

DOCKET NO. 06-01

Worldwide Relocations, Inc., Boston Logistics Corp., Tradewind Consulting, Inc., Global Direct Shipping, Megan K. Karpick (a.k.a. Catherine Kaiser, Kathryn Kaiser, Catherine Karpick, Megan Kaiser and Alexandria Hudson), Martin J. McKenzie, Patrick John Costadoni, Sharon Fachler, and Oren Fachler, et al. -- Possible Violations of Sections 8, 10 and 19 of the Shipping Act of 1984 and the Commission's Regulations at 46 C.F.R. §§ 515.3, 515.21 and 520.3

AFFIDAVIT

To: Secretary,
Federal Maritime Commission
Washington, D.C. 20573-0001

Respondent MEGAN KARPICK being first duly sworn under oath, deposes and states as follows:

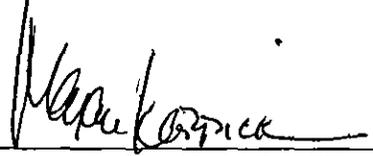
1. I am over the age of twenty-one (21), have personal knowledge of the matters set forth herein and am competent to testify if required to do so as a witness at trial.
2. I am providing this Affidavit in support of The Response To the BOE's Proposed Findings of Fact and Conclusions of Law.
3. From the period of about February 2, 2004 to about October 15, 2004, I was employed by Dolphin International Shipping, Inc. ("Dolphin").
4. From the period of February 2, 2004 to about October 15, 2004, I also served Dolphin in my capacity as its vice-president.
5. From the period of about June 1, 2004, until Dolphin ceased operations in or about October 15, 2004, I received no further compensation from Dolphin.
6. I thereafter continued to serve Dolphin, at its request, as an unpaid volunteer employee and nominal president until Dolphin ceased operations.
7. Dolphin was lawfully registered as a Florida Corporation.
8. In my capacities as an employee and vice-president of Dolphin, I was authorized to represent Dolphin's interests to various providers of business services to Dolphin, and to the public.
9. Between October, 2003 and December 2003, I conducted approximately 10 telephonic conversations with Mr. Joseph Farrell of the Federal Maritime Commission regarding (a) shipment status and (b) the formation of International Shipping Solutions ("ISS");

10. In addition to telephonic conversations, I conducted on-going e-mail communication with Joseph Farrell between October 2003 and December 2003;
11. In October 2003, Andrew Margolis from the Miami office of the Federal Maritime Commission met with me at the offices of ISS, at which time I showed Mr. Margolis the consultancy business model which I intended to use for ISS, discussed same, and permitted Mr. Margolis to select and inspect various files for his review;
12. In approximately February 2004, Ms Karpick advised Joseph Farrell of the formation of Dolphin International Shipping ("Dolphin");
13. During continued telephonic and e-mail communication with Joseph Farrell, between February 2004 and April 2004, Ms Karpick discussed: (i) the ongoing resolution of open issues with the FMC; and (ii) the continuation of both ISS and Dolphin including discussions regarding the consultancy model for Dolphin;
14. During said telephone conversations, Joseph Farrell made reference to both websites for ISS and Dolphin International Shipping;
15. Mr. Farrell was aware of the language contained within the Dolphin website which stated;

"Dolphin International Shipping is acting to coordinate your international relocation. Dolphin is not the carrier. Your ocean freight is booked with an NVOCC licensed with the Federal Maritime Commission."
16. During April, 2004, I advised Mr. Farrell during telephonic communication that on-going efforts were underway to bring in outside investors and professional management for Dolphin;
17. On May 5, 2004, I advised Mr. Farrell via an e-mail communication, of the current status of internal management issues for both ISS and Dolphin;
18. On May 6, 2004, Mr. Farrell acknowledged receipt of the aforesaid communication;
19. Following Mr. Farrell's retirement from the FMC, during the months of June – August, 2004, I continued both telephonic and electronic communication with members of the FMC staff;
20. There were no material changes to the consultancy model of ISS and Dolphin during the period from September 2003 – November 2004 and;
21. At no time during September 2003 – November 2004 was I advised by any member of the FMC staff that ISS or Dolphin was in violation of the Shipping Act. or the Commissioner's Regulations;

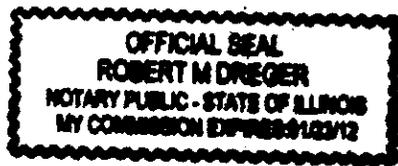
22. At no time during September 2003 – August 2004, despite repeated conversations and personal visits with both the President of American Steamship Line, and the President of Troy Container Line, was I advised that the consultancy model utilized by ISS and Dolphin was in violation of the Shipping Act;
23. At no time during September 2003 – August 2004, despite repeated telephonic and electronic communication with the President of Euro-America Shipping was I advised that the consultancy model utilized by ISS and Dolphin was in violation of the Shipping Act.;
24. At no time during September 2003-July 2004 was I asked for any OTI or NVOCC license number from any NVOCC accepting shipments from ISS and Dolphin International Shipping;
25. At no time during September 2003 – August 2004, was ISS or Dolphin refused bookings from any NVOCC licensed by the Federal Maritime Commission;
26. At no time prior to, throughout my employment at ISS, or at any time thereafter prior to being served with the Order of Investigation on or about January, 2006, was I ever personally advised by any representative of the Federal Maritime Commission (“FMC”) that ISS’s business practices violated or may be in violation of any provision of the Shipping Act of 1984 and/or the Commission’s Regulations at 46 C.F.R. §§ 515.3, 515.21 and 520.3, or any other statute or regulation.
27. At no time during the period prior to, throughout my employment at Dolphin, or thereafter until about January, 2006, was I ever advised by any representative of the FMC that Dolphin’s business practices violated any provision of the Shipping Act of 1984 and/or the Commission’s Regulations at 46 C.F.R. §§ 515.3, 515.21 and 520.3, or any other statute or regulation.
28. At all times, I acted in good faith and in a manner I reasonably believed to be in, or not opposed to, the best interests of Dolphin and had no reasonable cause to believe my conduct was unlawful.

FURTHER AFFIANT SAYETH NAUGHT.

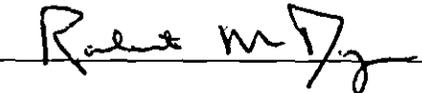


 MEGAN KARPICK

STATE OF ILLINOIS)
)
 COUNTY OF COOK) ss.



Subscribed and Sworn to Before Me This
29th Day of September, 2009.

By: 

[SEAL] NOTARY PUBLIC

EXHIBIT "B"

Martin McKenzie

From: Megan K [megank@dolphininternationalshipping.net]
Sent: Thursday, May 06, 2004 9:16 AM
To: Josephf@fmc.gov
Cc: richard@dolphininternationalshipping.net; marty@dolphininternationalshipping.net
Subject: Re: International Shipping Solutions/Dolphin InternationalShipping

Joseph I will keep you posted. And hopefully, the only contact we will need to share is on a positive note.

Have a wonderful day.

-----Original Message-----

From: Joseph Farrell
Date: Thursday, May 06, 2004 10:00:47 AM
To: megank@dolphininternationalshipping.net
Subject: Re: International Shipping Solutions/Dolphin InternationalShipping

Thank you for this information, Megan. I hope that everything develops as you describe. I am sure that we will both have a much easier life if I do not find it necessary to contact you on a regular basis with complaint inquiries.

>>> "Megan K" <megank@dolphininternationalshipping.net> 05/05/04 11:51AM >>>
 Dear Joseph:

I wanted to take an opportunity to bring you up to date regarding the internal management issues at the above captioned entities which have led to complaints being lodged with the FMC. After an extensive analysis of the process issues, the following changes have been made within the companies under my management responsibility:

2 new partners/investors have been brought into the company. The first investor, who has an MBA on management with a strong financial, and project management background, will be providing the professional oversight for all accounting functions within the company, as well as redefining processes to ensure that projects (bookings) will not overrun in time, nor budget, deliverables will be processed as expected, and all stake holders

satisfaction achieved. The second investor is a licensed attorney, as well as having extensive sales and consulting experience in the professional services sector, including training and management of telephonic customer support. He is responsible for dealing with regulatory and customer service related issues along with heading up our sales team. Remaining partners from the old corporate entity have been bought out which I believe will provide a smooth transition into a more professional management approach. The most significant problem within the company has been identified as customer service. This has resulted in complaints to your organization, as well as unhappy customers. For the next 90 days minimum, I will be dealing directly with all customer relationships which is the time period within which the new management team will need to implement process change. I

have already established protocols to provide information to our customers prior to their request. Joseph, I am personally and professionally committed to turning this company around, with the assistance of a professionally trained management team, so that customer service issues are no longer an issue. I appreciate your on-going support in facilitating resolution of our complaints and look forward, quite frankly, to never having to receive another inquiry from the FMC.

Best personal regards,

Megan Karpick

 *Incredimail* - Email has finally evolved - [Click Here](#)

8/22/2007