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FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

DOCKET NO. 06 - 01

**WORLDWIDE RELOCATIONS, INC.; MOVING SERVICES, L.L.C.;
INTERNATIONAL SHIPPING SOLUTIONS, INC.; DOLPHIN INTERNATIONAL
SHIPPING, INC.; BOSTON LOGISTICS CORP.; TRADEWIND CONSULTING, INC.;
GLOBAL DIRECT SHIPPING; MEGAN K. KARPICK (A/K/A/ CATHERINE KAISER,
KATHRYN KAISER, CATHERINE KERPICK, MEGAN KAISER AND ALEXANDRIA
HUDSON); MARTIN J. MCKENZIE; PATRICK JOHN COSTADONI; LUCY NORRY;
BARUCH KARPICK; AND SHARON FACHLER - 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**

BUREAU OF ENFORCEMENT REPLY BRIEF

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| 2. The Commission is not equitably estopped from enforcing the Shipping Act against Respondents International Shipping Solutions, Inc., Dolphin International Shipping, Inc., Megan Karpick or Martin McKenzie nor is it equitably stopped from finding knowing and willful violations of the Shipping Act by those respondents. | 5 |
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Recent Procedural History

On June 19, 2009, BOE filed its Proposed Findings of Fact, Brief and Supporting Evidence. (June 19, 2009 filing). On August 25, 2009, the Administrative Law Judge (“ALJ”) issued an order setting September 30, 2009, as the filing date for Respondents’ replies to BOE’s Proposed Findings of Fact and Respondents’ Proposed Finding of Fact, Appendix and Brief and setting November 16, 2009, as the filing date for BOE’s Reply to Respondents’ Proposed Findings of Fact and BOE’s Reply Brief. On September 29, 2009, BOE filed a motion seeking an order from the ALJ compelling Moving Services L.L.C., International Shipping Solutions, Inc., Dolphin International Shipping, Inc., Global Direct Shipping, Baruch Karpick and Sharon Fachler to respond to the discovery demands contained in BOE’s First Interrogatories and Requests for Production of Documents to Respondents and seeking sanctions should the respondents fail to respond to any order issued by the ALJ. (“Motion to Compel and Motion for Sanctions”). On September 30, 2009, Respondents Patrick Costadoni, Megan Karpick and Martin McKenzie filed responses to BOE’s Proposed Findings of Fact, their Proposed Findings of Fact and their Briefs. (“Costadoni response, Karpick response and McKenzie response, respectively”). By separate combined motions filed October 2, 2009, Respondents Martin McKenzie and Megan McKenzie moved to strike the sworn statements of Ronald D. Murphy and Andrew Margolis contained in BOE’s Appendix of Supporting Evidence. (“Motion to Strike”).

On October 23, 2009, the ALJ granted BOE’s Motion to Compel and Motion for Sanctions in part. (October 23, 2009 Order). The ALJ ordered BOE to serve and file a certificate on November 10, 2009, stating with regard to each Respondent whether the Bureau of

Enforcement received the responses required by the order. On October 26, 2009, BOE filed a Motion for Reconsideration of the ALJ's October 23, 2009 order, requesting that the ALJ order Moving Services, L.L.C. and Global Direct Shipping to respond to certain Interrogatories and Requests for Production of Documents contained in BOE's March 23, 2006 request directed, in part, to Moving Services, L.L.C., and Global Direct Shipping. ("Motion for Reconsideration"). On October 29, 2009, the ALJ granted BOE's Motion for Reconsideration in part. (October 29, 2009 Order).

On November 9, 2009, Respondent Megan Karpick filed a certificate with the Office of the Secretary certifying that her responses to the Bureau of Enforcement's First Discovery Request to Megan Karpick and Dolphin International Shipping, Inc. ("Dolphin") and to Megan Karpick and International Shipping Solutions, Inc. ("ISS") were complete to date, subject to the limitations of access to Dolphin and ISS corporate documents as set forth in her responses to BOE's discovery requests.¹ On November 10, 2009, BOE filed a certificate stating that it had not received responses from any of the respondents subject to the ALJ's October 23 and 29, 2009 orders. By order dated November 13, 2009 (November 13, 2009 Order), the ALJ extended the time for Global Direct Shipping and Sharon Fachler to respond to the ALJ's October 23 and 29, 2009 orders to December 4, 2009, extended the time for Global Direct Shipping and Sharon Fachler to respond to BOE's June 19, 2009 filing to December 4, 2009 and extended the time for BOE to file its responses to Respondents' Proposed Findings of Fact and BOE's Reply Brief

1. In her general responses to BOE's Interrogatories, as justification for her failure to provide any of the requested information and documentation, Megan Karpick stated that all ISS and Dolphin office records and computers remained in Florida in 2004 when she relocated to Chicago and those office records and computers were subsequently shipped to Israel by Baruch Karpick. Megan Karpick also stated that she experienced a catastrophic hard drive failure to her laptop in March 2005 and was unable to retrieve any data. She also stated that she did not have a back-up copy of the information on her laptop including all e-mails and therefore lost historic e-mails and financial information. (BOE Supp. App., Exhibit 6, P.003295).

until December 11, 2009. Global Direct Shipping and Sharon Fachler have not complied with the ALJ's November 13, 2009 Order.

ARGUMENT

- 1. None of the evidence submitted by BOE should be deemed inadmissible, as under the Administrative Procedure Act, the standard of proof in an administrative proceeding is to show by a preponderance of the evidence that something occurred and all evidence which is relevant, reliable and probative and not unduly repetitious or cumulative should be admitted and considered.**

Enforcement proceedings are governed by the Administrative Procedure Act ("APA"). 5 U.S.C. §551, *et. seq.* The standard of proof in an administrative proceeding is to show by a preponderance of the evidence that something in fact occurred. Portman Square Ltd. – Possible Violations of Section 10(a)(1) of the Shipping Act of 1984, 28 S.R.R. 80, 84 (1998).² The proponent of a rule or order has the burden of proof. 46 C.F.R. § 502.155; Sea-Land Service, Inc. – Possible Violations of Section 10(b)(1), 10(b)(4) and 19(d) of the Shipping Act of 1984, 30 S.R.R. 872, 889 (2006); Exclusive Tug Franchises – Marine Terminal Operators Serving the Lower Mississippi River, 29 S.R.R. 718, 718-719 (ALJ 2001).

Respondents Karpick and McKenzie have moved to strike certain of BOE's evidence arguing they constitute or are based on various forms of hearsay and are therefore excluded by

2. This is the standard that the Commission has consistently applied in its decisions. See Petition of South Carolina State Ports Authority for Declaratory Order, 27 S.R.R. 1137, 1161 (FMC 1997), *citing* Sea Island Broadcasting Corp. v. F.C.C., 627 F.2d 240 (D.C. Cir.), *cert. denied*, 448 U.S. 834 (1980); Adair v. Penn-Nordic Lines Inc., 26 S.R.R. 11, 15 (I.D. 1991); Sanrio Co. Ltd v. Maersk Line, 19 S.R.R. 1627, 1632 (I.D.) *adopted* 20 S.R.R. 21 (FMC 1980); Port Authority of New York v. New York Shipping Ass'n, 22 S.R.R. 1329, 1353 (I.D. 1984) *adopted* 23 S.R.R. 21 (FMC 1985). The courts have described "preponderance of the evidence" as the least demanding of the three standards of proof. Steadman v. S.E.C., 450 U.S. 91, 101-102 (1981), *reh. denied*, 451 U.S. 933 (1981). Preponderance of the evidence means the greater weight of the evidence, evidence which is more convincing than the evidence which is offered in opposition to it. Hale v. Department of Transportation, 772 F.2d 882, 885 (Fed Cir 1985). See also Concrete Pipe & Products of Cal. Inc v. Construction Laborers Pension Trust for Southern Cal., 508 U.S. 602, 622 (1993). ("The burden of showing something by a preponderance of the evidence... simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the part who has the burden to persuade...") In holding that the APA explicitly authorized the "preponderance of the evidence" test of administrative agency proceedings, the Supreme Court found that Congress did not chose a more burdensome standard. Steadman at 102. ("Nor is there any suggestion in the legislative history that a standard of proof higher than a preponderance of the evidence was ever contemplated, much less intended.").

the Federal Rules of Evidence. (“Motion to Strike”). They make similar claims in their responses, arguing that BOE evidence is inadmissible under the Federal Rules of Evidence because it contains hearsay, was created for the purposes of litigation or lacks an evidentiary foundation. (See paragraphs 19, 20, 21, 22 and 27 of the Karpick response and paragraphs 22 and 23 of the McKenzie response).

As BOE noted in its response to Respondents’ Motion to Strike, these arguments are misplaced and overlook the fact that this proceeding is governed by the Administrative Procedure Act, and the Commission’s Rules of Practice and Procedure, 46 C.F.R. Part 502. Both the APA and the Commission’s rules allow for the admission of hearsay evidence and any other evidence so long as it is not irrelevant, immaterial, or unduly repetitious.³ The APA provides that any evidence may be received, but that the agency shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. 5 U.S.C. § 556(d)(emphasis added). Pursuant to that directive, the Commission’s rules allow the admission of “all evidence which is relevant, reliable and probative and not unduly repetitious or cumulative”. 46 C.F.R. § 502.156. The APA evidentiary standard is a statutory adaptation of the Supreme Court’s long held view that administrative agencies are not bound by the formal rules of evidence, and that hearsay is admissible in agency proceedings. ICC v. Louisville & Nashville R. Co., 227 U.S. 88 (1913); Spiller v. Atchison, T. & S.F.R. Co., 253 U.S. 117 (1920); Opp Cotton Mills v. Administrator, 312 U.S. 126 (1941); FTC v. Cement Institute, 333 U.S. 683 (1948); and Richardson v. Perales, 402 U.S. 389 (1971).

The Commission has adhered to the liberal standards of admissibility of evidence in administrative proceedings. See Sea Land Service, Inc.-Possible Violations of the Shipping Act,

3. Because hearsay evidence is admissible in administrative law, it is not necessary to address whether the subject statements in fact constitute or contain hearsay evidence.

28 S.R.R. 1549, 1551 (ALJ 2000); Pacific Champion Express Co., Ltd. – Possible Violations of Section 10(b)(1) of the Shipping Act of 1984, 28 S.R.R. 1105 (ALJ 1999); Matson Navigation Co., Inc. – Proposed Rate Increase, 25 S.R.R. 943 (ALJ 1990); EuroUSA Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc. – Possible Violations of Section 10 of the Shipping Act of 1984 and the Commission’s Regulations at 46 CFR § 515.27, 31 S.R.R. 540, 547 (2008).

Respondents’ contentions that BOE’s evidence is inadmissible under the Federal Rules of Evidence and therefore should not be considered by the ALJ are misplaced and should be summarily rejected. The test of admissibility under the Commission’s rules requires only that the evidence be relevant, material, reliable, and probative, and not unduly repetitious or cumulative. The evidence to which Respondents Karpick and McKenzie object is relevant, material, reliable and probative, is not repetitious or cumulative and therefore should be considered by the ALJ.

2. The Commission is not equitably estopped from enforcing the Shipping Act against Respondents International Shipping Solutions, Inc., Dolphin International Shipping, Inc., Megan Karpick or Martin McKenzie nor is it equitably estopped from finding knowing and willful violations of the Shipping Act by those respondents.

Respondents Karpick and McKenzie argue that the Commission is equitably estopped from enforcing the Shipping Act because the Commission was aware of the business model being utilized by International Shipping Solutions, Inc. and Dolphin International Shipping Solutions, Inc. and never objected to its form or substance. As evidence to support their contention, they rely on Megan Karpick’s affidavit. However, the statement of Andrew Margolis (BOE Supp. App., Exhibit 1, Statement of Andrew Margolis, Paragraphs 2-6) and the statement of Joseph Farrell (BOE Supp. App., Exhibit 2, Statement of Joseph Farrell, Paragraph 2) show that Respondents International Shipping Solutions, Inc. and Dolphin International Shipping, Inc. did not request that their operations be evaluated to determine compliance with the Shipping Act

nor were their operations ever evaluated. According to his statement, Mr. Margolis went to the offices of Globe Movers, not International Shipping Solutions, Inc. or Dolphin International Shipping, Inc., in order to resolve a specific complaint, did not review other Globe Movers' shipment files and did not conduct an audit, evaluation or inspection of ISS' business model or operations. When Mr. Margolis attempted to discuss the need for a Commission license with Ms. Karpick, he was referred to Marvin Moss, an attorney. He left several messages requesting that Mr. Moss contact him regarding Globe Movers but Mr. Moss never did so. (BOE Supp. App., Exhibit 1, Statement of Andrew Margolis, Paragraphs 2-6). According to the statement of Joseph Farrell, the focus of his contact with Ms. Karpick was the resolution of shippers' complaints and he never evaluated ISS' business operations. (BOE Supp. App., Exhibit 1, Statement of Joseph Farrell, Paragraphs 2-6).

Respondents Karpick and McKenzie have not met the test for the assertion of estoppel against the Commission. A party asserting estoppel must establish the following: "(1) 'words, acts, conduct or acquiescence causing another to believe in the existence of a certain state of things' (2) 'willfulness or negligence with regard to the acts, conduct or acquiescence' and (3) 'detrimental reliance by the other party upon the state of things so indicated.'" Tefel v. Reno, 180 F.3d 1286, 1302, (11th Cir. 1999), *citing* Federal Deposit Ins. Corp. v. Harrison, 735 F.2d 408, 413 (11th Cir.1984). When the party to be estopped is the government, the burden is different, and in fact, equitable estoppel is rarely applied against the federal government and never in the absence of affirmative misconduct. As discussed in the Tefel case,

The [Supreme] Court has intimated that estoppel against the government may not be available at all. Office of Personnel Management v. Richmond, 496 U.S. 414, 110 S.Ct. 2465, 110 L.Ed.2d 387 (1990) ("In sum, Courts of Appeals have taken our statements as an invitation to search for an appropriate case in which to apply estoppel against the Government, yet we have reversed every finding of estoppel that we have reviewed."). Although the Court has not adopted a per se rule

prohibiting the application of estoppel against the government, the Court has clarified on numerous occasions that “the government may not be estopped on the same terms as any other litigant.” Heckler v. Community Health Serv. of Crawford, 467 U.S. 51, 60, 104 S.Ct. 2218, 81 L.Ed.2d 42 (1984); Richmond, 496 U.S. at 423-24, 110 S.Ct. 2465 (declining to adopt a rule prohibiting estoppel against the government). Moreover, in its decisions declining to adopt a prohibition on estoppel against the government, the Court has consistently suggested that, if available at all, estoppel against the government depends on a showing of affirmative misconduct. Richmond, 496 U.S. at 421, 110 S.Ct. 2465 (“Our own opinions have continued to mention the possibility, in the course of rejecting estoppel arguments, that some type of ‘affirmative misconduct’ might give rise to estoppel against the Government.”); Tefel at 1302.

The Commission has also addressed this question:

In short, the Commission’s staff is not the Commission and regulated parties must be careful not to rely totally on informal staff advice, if such occurred, or even staff inaction, which in the last analysis cannot invalidate statutory requirements. See, e.g., United States v. American Union Transport, 327 U.S. 437 (1946) (almost 30 years of staff inactivity does not mean that the Commission has no statutory jurisdiction over independent ocean freight forwarders); Rejection of Tariff Filings of Sea-Land Service, Inc., 13 F.M.C. 200 (1970) (staff rejection of tariff filing found to be improper and reversed by the Commission on appeal)[.] Possible Unfiled Agreement among A.P. Moller-Maersk Line, P & O Nedlloyd Limited and Sea Land Service, Inc., 28 S.R.R. 389, 401 (FMC 1998).

See also Investigation of Tariff Filing Practices, where the Commission stated, “We take occasion to point out, primarily for the future, that failure of Commission personnel to advise that an organization which has furnished full operation details *is* a common carrier, and required to file tariffs, in no way militates against Commission decision that the organization is a common carrier, and required to file. Neither would a direct statement by our staff that the organization is *not* a common carrier. It is unnecessary to cite cases to support a principle so well established.” 7 FMC 305, 330 (FMC 1962).

Respondents Karpick and McKenzie have not satisfied the test for assertion of equitable estoppel applicable to private litigants, let alone the higher burden necessary to assert equitable estoppel against the federal government. Respondents International Shipping Solutions, Inc. and

Dolphin International Shipping, Inc. did not request that their operations be evaluated to determine compliance with the Shipping Act nor were their operations ever evaluated. Megan Karpick was notified by a Commission representative of his concern regarding the operations of Globe Movers, Inc. (BOE Supp. App., Exhibit 1, Statement of Andrew Margolis, Paragraph 5). Respondents have not presented any evidence of affirmative misconduct on the part of the Commission or its employees nor have they even argued that any affirmative misconduct occurred. Respondents' argument should be rejected. The Commission should not be estopped from enforcing the Shipping Act against Respondents International Shipping Solutions, Inc., Dolphin International Shipping, Inc., Megan Karpick and Martin McKenzie.

- 3. Respondents Moving Services, L.L.C., Global Direct Shipping, Sharon Fachler, International Shipping Solutions, Inc., Dolphin International Shipping, Inc. and Baruch Karpick should be sanctioned for failing to comply with the ALJ's orders directing them to respond to BOE's discovery requests and all inferences should be drawn against them for failing to comply with those orders.**

Sanctions should be imposed against Respondents Moving Services, L.L.C., Global Direct Shipping, Sharon Fachler, International Shipping Solutions, Inc., Dolphin International Shipping, Inc. and Baruch Karpick ("non-compliant respondents") for failure to comply with the ALJ's October 23, October 29, and November 13, 2009 orders. As BOE argued in its Motion to Compel and Motion for Sanctions, under Rule 210, if a party "refuses to obey an order requiring such party to answer designated questions or to produce any document or other thing", the presiding officer may "make such orders in regard to the refusal as are just" including an order "refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party from introducing designated matters in evidence". 46 C.F.R. § 502.210(a)(2). See Shipman Int'l (Taiwan) Ltd. – Possible Violations of Section 8, 10(a) and 10(b)(1) of the Shipping Act of 1984 and 46 CFR Part 514, 28 S.R.R. 98 (1998) and 28 S.R.R.

100 (I.D. 1998). The non-compliant respondents should be barred from presenting evidence as to whether they knowingly and willfully operated as an NVOCC without a license, tariff or bond as required by sections 8 and 19 of the Shipping Act of 1984.

Rule 210 also provides that as a sanction for violation of a discovery order, the presiding officer can enter “an order that with respect to matters regarding which the order was made or any other designated fact, inferences will be drawn adverse to the person or party refusing to obey such order.” 46 C.F.R. § 502.210(a)(2). The Commission has applied Rule 210, holding in Adair that:

A failure to respond to specific charges by default or otherwise can mean that adverse inferences may be drawn against the defaulting or non-replying party. It is an elementary principle of law that when a party refuses or declines to come forward with information peculiarly within its possession and its adversary, who is not privy to such information, introduces only circumstantial evidence, such circumstantial evidence can carry the burden of persuasion and every reasonable inference may be drawn against the non-furnishing party. Id. at 15.

See Mateo Shipping Corp. and Julio Mateo-Possible Violations of Sections 8(a) and 19 of the Shipping Act of 1984 and the Commission’s Regulations at 46 C.F.R. Parts 515 and 520, (Memorandum and Order on BOE’s Motion for Sanctions, August 28, 2009); Ever Freight Int’l Ltd., et al.-Possible Violations of Section 10(a)(1) and 10(b)(1) of the Shipping Act of 1984, 28 S.R.R. 329, 335, n.4 (ALJ 1998). Federal case law also holds that when the absence of positive proof results from the actions of the respondent, negative inferences may be drawn. In Alabama Power Co. v. F.P.C., the Court of Appeals for the D. C. Circuit stated,

It is a familiar rule of evidence that a party having control of information bearing upon a disputed issue may be given the burden of bringing it forward and suffering an adverse inference from failure to do so....In regulatory proceedings, placing such a burden on the regulated firm, where the relevant information concerns its operations and management, has become part of the ‘common law’ of regulations.” 511 F.2d 383, 391, n.14 (D.C. Cir. 1974). See also Societe Internationale v. Rogers, 357 US 197, 213 (1958); United States v. Federal Maritime Commission at 253-54; Dazzio v. F.D.I.C., 970 F.2d 71 (5th Cir.

1992); Int'l Union, United Automobile, Aerospace and Agric. Implement Workers of Am. (U.A.W.) v. N.L.R.B., 459 F.2d 1329 (D.C. Cir. 1972).

Although BOE was able to obtain certain information pertinent to the Shipping Act violations at issue in this proceeding from other sources, the non-compliant respondents' failure to comply with the ALJ's orders has deprived BOE of complete information relevant to the non-compliant respondents' activities and their respective ability to pay civil penalties.

For example, the ALJ ordered Baruch Karpick and International Shipping Solutions, Inc. to respond to the following requests contained in BOE's First Interrogatories and Requests for Production of Documents directed to International Shipping Solutions, Inc. and Baruch Karpick dated October 20, 2006:

- a) Identify the company or entity that served as the host for International Shipping Solutions, Inc.'s website, including its internet address, mailing address, e-mail address and phone number. (BOE First Interrogatories and Requests for Production of Documents directed to International Shipping Solutions, Inc. and Baruch Karpick, Section B.11).
- b) Identify all newspapers, magazines, websites and other publications in which Respondents advertised their services from September 8, 2003 until the present. (BOE First Interrogatories and Requests for Production of Documents directed to International Shipping Solutions, Inc. and Baruch Karpick, Section B.12).
- c) Identify all non-vessel-operating common carriers and all ocean common carriers with which Respondents booked and/or moved shipments between September 8, 2003 and the present. (BOE First Interrogatories and Requests for Production of Documents directed to International Shipping Solutions, Inc. and Baruch Karpick, Section B.18).
- d) Produce all documents related to the establishment, maintenance and operation of International Shipping Solutions, Inc.'s website. (BOE First Interrogatories and Requests for Production of Documents directed to International Shipping Solutions, Inc. and Baruch Karpick, Section C.7).
- e) With respect to all shipments transported by water in the foreign commerce of the United States at any time between September 8, 2003 and the present, produce copies of any and all documents issued, prepared, processed or received by International Shipping Solutions, Inc., including, but not limited to ocean bills of lading (including house and master bills of lading), correspondence, purchase orders, invoices, packing lists, dock receipt, shipping orders or instructions, booking notices, arrival notices, shipper export declarations, freight bills, records reflecting payment of freight charges by

and/or to any ocean common carrier and/or non-vessel-operating common carrier, as well as any other documentation relating to shipments transported by water in the foreign commerce of the United States during the aforementioned period wherein International Shipping Solutions, Inc. is shown as freight forwarder, shipper, agent for the shipper or the shipper in c/o another entity. (BOE First Interrogatories and Requests for Production of Documents directed to International Shipping Solutions, Inc. and Baruch Karpick, Section C.6).

The ALJ also ordered International Shipping Solutions, Inc. and Baruch Karpick to respond to Sections C.1 through C.6 of BOE's First Interrogatories and Requests for Production of Documents directed to International Shipping Solutions, Inc. and Baruch Karpick. In those sections, BOE requested extensive financial information including all financial records of International Shipping Solutions, Inc. and copies of International Shipping Solutions, Inc. and Baruch Karpick's federal and state tax returns. Respondents International Shipping Solutions, Inc. and Baruch Karpick have not complied with the ALJ's order.

Similarly, the ALJ ordered Dolphin International Shipping, Inc. to respond to the following requests contained in BOE's First Interrogatories and Requests for Production of Documents directed to Dolphin International Shipping Inc. and Megan Karpick dated March 23, 2006:

- a) Identify the company or entity that served as the host for Dolphin International Shipping, Inc.'s website, including its internet address, mailing address, e-mail address and phone number. (BOE First Interrogatories and Requests for Production of Documents directed to Dolphin International Shipping Inc. and Megan Karpick, Section B.11).
- b) Identify all newspapers, magazines, websites and other publications in which Respondents advertised their services from February 2, 2004 until the present. (BOE First Interrogatories and Requests for Production of Documents directed to Dolphin International Shipping, Inc. and Megan Karpick, Section B.12).
- c) Identify all non-vessel-operating common carriers and all ocean common carriers with which Respondents booked and/or moved shipments between February 2, 2004 and the present. (BOE First Interrogatories and Requests for Production of Documents directed to Dolphin International Shipping, Inc. and Megan Karpick, Section B.17).

- d) Produce all documents related to the establishment, maintenance and operation of Dolphin International Shipping, Inc.'s website. (BOE First Interrogatories and Requests for Production of Documents directed to Dolphin International Shipping, Inc. and Megan Karpick, Section C.6).
- e) With respect to all shipments transported by water in the foreign commerce of the United States at any time between February 2, 2004, 2003 and the present, produce copies of any and all documents issued, prepared, processed or received by Dolphin International Shipping, Inc., including, but not limited to ocean bills of lading (including house and master bills of lading), correspondence, purchase orders, invoices, packing lists, dock receipt, shipping orders or instructions, booking notices, arrival notices, shipper export declarations, freight bills, records reflecting payment of freight charges by and/or to any ocean common carrier and/or non-vessel-operating common carrier, as well as any other documentation relating to shipments transported by water in the foreign commerce of the United States during the aforementioned period wherein Dolphin International Shipping, Inc. is shown as freight forwarder, shipper, agent for the shipper or the shipper in c/o another entity. (BOE First Interrogatories and Requests for Production of Documents directed to Dolphin International Shipping, Inc. and Megan Karpick, Section C.6).

The ALJ also ordered Dolphin International Shipping, Inc. to respond to Sections C.1 through C.5 of BOE's First Interrogatories and Requests for Production of Documents directed to Dolphin International Shipping, Inc. and Megan Karpick, which requested extensive financial information, including all financial records of Dolphin International Shipping, Inc. and copies of Dolphin International Shipping, Inc.'s federal and state tax returns. Dolphin International Shipping, Inc. has not complied with the ALJ's order.

In orders dated October 23, October 29, and November 13, 2009, the ALJ directed that Moving Services L.L.C., Global Direct Shipping, and Sharon Fachler respond to various BOE requests contained in Bureau of Enforcement First Interrogatories and Requests for Production of Documents Directed to Moving Services, L.L.C., Global Direct Shipping and Sharon Fachler dated October 31, 2007 and Bureau of Enforcement First Interrogatories and Requests for Production of Documents Directed to Moving Services, L.L.C., Global Direct Shipping and Oren Fachler dated March 23, 2006. Those requests included the following:

- a) Identify the company or entity that serves or served as the host for Moving Services, L.L.C. and Global Direct Shipping's websites, including its internet address, mailing address, e-mail address and phone number. (BOE First Interrogatories and Requests for Production of Documents directed to Moving Services, L.L.C., Global Direct Shipping and Sharon Fachler, Section B.11).
- b) Identify all newspapers, magazines, websites and other publications in which Respondents advertised their services from September 18, 2001 until the present. (BOE First Interrogatories and Requests for Production of Documents directed to Moving Services, L.L.C., Global Direct Shipping and Sharon Fachler, Section B.12).
- c) Identify all non-vessel-operating common carriers and all ocean common carriers with which Respondents booked and/or moved shipments between September 18, 2001 and the present. (BOE First Interrogatories and Requests for Production of Documents directed to Moving Services, L.L.C., Global Direct Shipping and Sharon Fachler, Section B.16.)
- d) Identify any real property anywhere in the world owned by Sharon Fachler. (BOE First Interrogatories and Requests for Production of Documents directed to Moving Services, L.L.C., Global Direct Shipping and Sharon Fachler, Section B.17).
- e) With respect to all shipments transported by water in the foreign commerce of the United States at any time between September 18, 2001 and the present, produce copies of any and all documents issued, prepared, processed or received by Moving Services, L.L.C. and Global Direct Shipping including, but not limited to ocean bills of lading (including house and master bills of lading), correspondence, purchase orders, invoices, packing lists, dock receipts, shipping orders or instructions, booking notices, arrival notices, shipper export declarations, freight bills, records reflecting payment of freight charges by and/or to any ocean common carrier and/or non-vessel-operating common carrier, as well as any other documentation relating to shipments transported by water in the foreign commerce of the United States during the aforementioned period wherein Moving Services, L.L.C. or Global Direct Shipping is shown as freight forwarder, shipper, agent for the shipper or the shipper in c/o another entity. (BOE First Interrogatories and Requests for Production of Documents directed to Moving Services, L.L.C., Global Direct Shipping and Sharon Fachler, Section C.10).

The ALJ also directed that Moving Services, L.L.C., Global Direct Shipping and Sharon Fachler respond to Sections C.1 through C.4 of BOE's First Interrogatories and Requests for Production of Documents directed to Moving Services, L.L.C., Global Direct Shipping and Sharon Fachler dated October 31, 2007, which requested extensive financial information including all financial records of Moving Services, L.L.C. and Global Direct Shipping and copies of the federal and state tax returns of Moving Services, L.L.C., Global Direct Shipping and Sharon Fachler for

selected years. Moving Services, L.L.C., Global Direct Shipping and Sharon Fachler have not complied with the ALJ's orders.

The refusal of the non-compliant respondents to comply with the ALJ's orders and answer BOE's discovery requests prevented BOE from obtaining complete information pertinent to Shipping Act violations and the imposition of civil penalties. Because of their failure to respond to discovery, the investigation into their unlawful conduct was hindered and BOE was unable to obtain relevant and necessary evidence. The Commission's rules provide penalties for those who fail to abide by orders concerning discovery. The non-compliant respondents should not be allowed to flout the orders of the ALJ or ignore their discovery obligations without consequences. They should be barred from contesting whether they violated sections 8, 19(a) and 19(b) of the Shipping Act and the Commission's corresponding regulations.

The non-compliant respondents should be barred from contesting whether they have the ability to pay a civil penalty and an inference should be drawn that the financial information requested by BOE would demonstrate that the non-compliant respondents have the ability to pay a civil penalty up to and including the maximum amount that could be imposed for any violation or violations of the Shipping Act that they are found to have committed. As discussed in greater detail below, every reasonable inference should be drawn against the non-compliant respondents. Failing to draw reasonable inferences against them would encourage future respondents to operate with limited or no documentation, withhold or destroy compromising documentation and information and refuse to cooperate with Commission investigations, thereby stymieing enforcement actions under the Shipping Act.

- 4. The corporate respondents⁴ violated Sections 8 and 19 of the Shipping Act by operating as non-vessel-operating common carriers (“NVOCCs”) in the U.S. trades without obtaining licenses from the Commission, without providing proof of financial responsibility and without publishing an electronic tariff.**

On January 11, 2006, the Commission issued the Order of Investigation and Hearing (“Order”) in this matter. The Order directed that the investigation determine whether the Respondents violated section 8,⁵ section 10,⁶ and section 19⁷ of the Shipping Act and the Commission’s regulations at 46 C.F.R. Parts 515 and 520 by operating as non-vessel-operating common carriers (“NVOCCs”) in the U.S. trades without obtaining licenses from the Commission, without providing proof of financial responsibility and without publishing an electronic tariff, and by failing to establish, observe and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing or delivering property.

Section 8(a) of the Shipping Act, 46 U.S.C. §40501, requires an NVOCC to maintain open to public inspection in an automated tariff system, tariffs showing its “rates, charges, classifications, rule, and practices.” Section 19(a) of the Shipping Act states that no person in the United States may act as an ocean transportation intermediary unless that person holds a license issued by the Commission. 46 U.S.C. § 40901. Section 19(b)(1) of the Shipping Act further requires all persons acting as ocean transportation intermediaries to furnish a bond, proof

4. BOE uses the term “corporate respondents to refer to the seven companies (Worldwide Relocations, Inc., Moving Services, L.L.C., Global Direct Shipping, Boston Logistics, Inc., Tradewind Consulting, Inc., International Shipping Solutions, Inc. and Dolphin International Shipping, Inc.). However, as discussed further below, Global Direct Shipping has no corporate identity and its activities are those of Sharon Fachler, the individual who controlled Global Direct Shipping, (See PFF 23)

5. 46 U.S.C. § 40901(a).

6. 46 U.S.C. § 41102(c). Respondents Karpick and McKenzie’s responses contain extensive discussion of a lack of BOE evidence of shippers’ complaints. (See paragraphs 5, 6, 7, 8, 9 of their respective responses). BOE noted in Footnote 2 of its Proposed Findings of Fact and Brief filed on June 19, 2009, that the investigation had not developed sufficient evidence to support Section 10(d)(1) violations and BOE did not intend to present evidence directed at such violations by individual Respondents. A showing of shipper harm is not necessary to prove violations of sections 8 and 19 of the Shipping Act and Respondents Karpick and McKenzie’s objections on that point are without foundation.

7. 46 U.S.C. § 40902(a).

of insurance, or other surety in a form and amount determined by the Commission to insure financial responsibility. 46 U.S.C. § 40902. Since none of the Respondents has ever complied with the requirements of Sections 8 and 19(a) and (b) of the Shipping Act (PFF 1), Respondents are in violation of the Shipping Act if they operated as an NVOCC.

An NVOCC, as defined in 46 U.S.C. § 40102(6), holds itself out to the general public to provide transportation of cargo by water between the United States and a foreign country and assumes responsibility for the transportation from port or point of receipt to the port or point of destination, but does not own or operate the vessel on which the cargo is carried. As discussed below, the record shows that Respondents operated as NVOCCs, holding themselves out to the general public to provide transportation of cargo by water between the United States and a foreign country and assuming responsibility for the transportation from the port or point of receipt to the port or point of destination. While the Commission has held that a carrier's entire operation must be considered in determining its status as a common carrier and that no one factor is controlling, holding out to the public and assuming responsibility for the transportation are statutory requirements of any common carrier. *See* Rose Int'l, Inc. v. Overseas Moving Network Int'l, Ltd., et al., 29 S.R.R. 119, 162 (FMC 2001); Tariff Filing Practices, Etc., of Container Ships, Inc., 9 F.M.C. 56, 65 (1965); Puget Sound Tug and Barge v. Foss Launch and Tug Co., 7 F.M.C. 43, 48 (1962).

- a. **The seven corporate respondents held out to the general public to provide transportation of cargo by water between the United States and a foreign country.**

With regard to the "holding out" portion of the definition of NVOCC, it has long been recognized that "a common carrier by a course of conduct holds himself out to

accept goods from whomever offered to the extent of his ability to carry..." (emphasis added). Containerships, Inc. at 62. In the Interim Rule proposing the bonding of NVOCCs, the Commission stated: "As common carriers, NVOCCs hold themselves out to the public to provide transportation by water between the United States and foreign countries, utilizing vessels operating on the high seas. NVOCCs normally enter into affreightment agreements with their underlying shippers, issue bills of lading or equivalent documents, and assume full responsibility for the shipments they handle, from point of origin to point of destination. Ultimately, an NVOCC's conduct rather than what it calls itself determines its status." Bonding of Non-Vessel-Operating Common Carriers: Interim Rule, 56 Fed. Reg. 1493, 1493-94 (Jan. 15, 1991); see also Investigation of Tariff Filing Practices, 7 F.M.C. 305, 321 (FMC 1962), where the Commission stated, "Common carrier status and obligations are results of a carrier's *operations*, not its desires."

The way in which a company holds itself out is not confined to its advertisements. Holding out is measured by the nature of the undertaking by the one hiring himself out. Bernhard Ulmann Co., Inc. v. Porto Rican Express Co., 3 F.M.B. 771, 775 (1952). It is demonstrated by a course of conduct. Tariff Filing Practices of Containerships, Inc., 9 F.M.C. 56, 62 (1965). In fact, the absence of solicitation or advertising does not determine that a carrier is not a common carrier. It is sufficient that the entity is generally known throughout the trade to be ready and willing to transport for all. Transp. By Mendez & Co., Inc., Between U.S. and Puerto Rico, 2 U.S.M.C. 717, 720 (1944). The carrier's course of conduct in holding itself out may also be demonstrated by the service it actually renders to shippers. Transportation By Southeastern Terminal & S.S. Co., 2 U.S.M.C. 795, 796-797 (1946). See also Charging Higher

Rates Than Tariff, 19 F.M.C. 44, 53 (1975) (Respondent's provision of transportation service for an indefinite multitude of shippers utilizing the underlying services of water carriers was an indication of common carrier status).

The seven corporate respondents in this proceeding all held out to the general public to provide transportation of cargo by water between the United States and a foreign country. Worldwide Relocations, Inc.'s website advertised itself as an international moving company offering port to port and door to door services through its international agents. (PFF 3). Patrick Costadoni, the president of Worldwide Relocations, Inc., admitted in his response to BOE's Proposed Findings of Fact that the company maintained an internet website and solicited business through its website and other internet portal sites. (Respondent, Patrick John Costadoni, Response to Bureau of Enforcement proposed Findings of Fact and Respondent's Proposed Findings of Fact, Supporting Evidence and Brief, Paragraph 5). In a related proceeding, the ALJ determined that Worldwide Relocations, Inc. held itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation. (Docket No. 06-06, EuroUsa Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc. - - Possible Violations of Section 10 of the Shipping Act of 1984 and the Commission's Regulations at 46 C.F.R. § 515.27, Initial Decision of Clay G. Guthridge, Administrative Law Judge on Investigation of Tober Group, Inc., Page 28). Patrick Costadoni also admitted in his response to BOE's Proposed Findings of Fact that Worldwide Relocations, Inc. operated as an NVOCC for at least 280 shipments of household goods between February 2004 and May 2005. (Respondent, Patrick John Costadoni, Response to Bureau of Enforcement Proposed Findings of Fact and Respondent's Proposed Findings of Fact, Supporting Evidence and Brief, Paragraph 10). The website of Worldwide Relocations, Inc., along with the services it

actually rendered to shippers, shows that Worldwide Relocations, Inc. held itself out to the public to provide transportation of cargo by water for compensation.

As discussed earlier, Moving Services, L.L.C. and Sharon Fachler did not comply with the ALJ's orders regarding discovery and never responded to BOE's discovery requests. In its discovery requests, BOE sought information regarding the company that served as the host for Moving Services, L.L.C.'s website and information regarding newspapers, magazines, websites and other publications in which Moving Services, L.L.C. advertised its services. (BOE First Interrogatories and Requests for Production of Documents directed to Moving Services, L.L.C., Global Direct Shipping and Sharon Fachler, Section B.11; BOE First Interrogatories and Requests for Production of Documents directed to Moving Services, L.L.C., Global Direct Shipping and Sharon Fachler, Section B.12). BOE was unable to obtain evidence that would have shown how Moving Services, L.L.C. held itself out to the public because of the refusal of Moving Services, L.L.C. and Sharon Fachler to participate in the discovery process.⁸ An inference should be drawn that the evidence requested by BOE would have shown that Moving Services, L.L.C. held itself out to the general public to provide transportation by water between the United States and a foreign country for compensation.

The record establishes that Moving Services, L.L.C. completed 125 international shipments of household goods from individual shippers, dealing directly with the shipping public in accepting shipments for transportation to foreign destinations. (PFF 16). The services Moving

8. BOE notes that in a related proceeding, the ALJ found that BOE had not presented evidence that Moving Services, L.L.C. held themselves out to the general public to provide transportation by water between the United States and a foreign country for compensation. (Docket No. 06-06, EuroUSA Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc. - - Possible Violations of Section 10 of the Shipping Act of 1984 and the Commission's Regulations at 46 C.F.R. § 515.27, Initial Decision of Clay G. Guthridge, Administrative Law Judge on Investigation of Tober Group, Inc., Page 29). BOE was unable to obtain evidence due to the refusal of Moving Services, L.L.C. and Sharon Fachler to respond to BOE's discovery requests in this proceeding.

Services, L.L.C. actually rendered to shippers also supports a finding that it held itself out to the public to provide transportation of cargo by water for compensation.

As discussed earlier, Global Direct Shipping and Sharon Fachler did not comply with the ALJ's orders regarding discovery and never responded to BOE's discovery requests. In its discovery requests, BOE sought information regarding the company that served as the host for Global Direct Shipping's website and information regarding newspapers, magazines, websites and other publications in which Global Direct Shipping advertised its services. (BOE First Interrogatories and Requests for Production of Documents directed to Moving Services, L.L.C., Global Direct Shipping and Sharon Fachler, Section B.11; BOE First Interrogatories and Requests for Production of Documents directed to Moving Services, L.L.C., Global Direct Shipping and Sharon Fachler, Section B.12). Because of the refusal of Global Direct Shipping and Sharon Fachler to participate in the discovery process, BOE was unable to obtain additional evidence⁹ that would have shown how Global Direct Shipping held itself out to the public. An inference should be drawn that the evidence requested by BOE would have shown that Global Direct Shipping held itself out to the general public to provide transportation by water between the United States and a foreign country for compensation.

A review of the website of Global Direct Shipping shows that they too were holding themselves out to the general public to provide transportation of cargo by water for compensation. Global Direct Shipping stated on their website that they provide "shipment internationally from origin to destination." (BOE App. 18, Website printout of Global Direct Shipping, P. 001192; PFF 37). They also advertised their door to door, door to port, port to door and port to port services and stated they offered "safe and reliable and timely shipment to any

9. BOE was able to review and document Global Direct Shipping's website via the internet while it was still available to the public.

city in the World.”. (BOE App. 18, Website printout of Global Direct Shipping, P. 001192, P. 001189; PFF 37). The record establishes that Global Direct Shipping completed 154 international shipments, dealing directly with the shipping public in accepting shipments for transportation to foreign destinations. (PFF 42). It routinely issued written and email rate quotations to its customers identifying the services it would provide from origin to foreign destination described as door-to-door service, and including packing, loading, pickup, ocean transportation, delivery at destination, unloading and unpacking. (PFF 38). It also issued invoices for its services directly to its customers. (PFF 39). The services Global Direct Shipping actually rendered to shippers, also shows that it held itself out to the public to provide transportation of cargo by water for compensation.

Boston Logistics, Inc. maintained a website and solicited business through its website and other internet portal sites and also paid third parties for sales leads. It offered services in its own name and did not hold itself out as an agent for any other entity. (PFF 49). On its website, Boston Logistics, Inc. offered a variety of shipping services including door to door and door to port. (BOE App. 24, P. 001973-001974).

Boston Logistics, Inc. did not respond to BOE’s Proposed Findings of Fact stating that Boston Logistics, Inc. operated as an NVOCC for twelve shipments of household goods from the United States to foreign countries between June, 2005 and October, 2005. Documentation for the shipments completed by Boston Logistics, Inc. shows that it was dealing directly with the shipping public in accepting shipments for transportation to foreign destinations. (PFF 49, 50). It routinely issued written and email rate quotations to its customers identifying the services it would provide from origin to foreign destination described as door-to-door service, and including packing, loading, pickup, ocean transportation, delivery at destination, unloading and

unpacking. (PFF 50). It also issued invoices for its services directly to its customers. (PFF 51). The website of Boston Logistics, Inc. along with the services it actually rendered to shippers, supports a finding that Boston Logistics, Inc. held itself out to the public to provide transportation of cargo by water for compensation.

In a related proceeding, the ALJ concluded that Tradewind Consulting Inc.'s website did not hold out NVOCC services because it referred to Tradewind Consulting Inc. as a "consulting firm" and not a shipping company. (Docket No. 06-06, EuroUSA Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc. - - Possible Violations of Section 10 of the Shipping Act of 1984 and the Commission's Regulations at 46 C.F.R. § 515.27, Initial Decision of Clay G. Guthridge, Administrative Law Judge on Investigation of Tober Group, Inc., Page 27). The ALJ held that the website description that Tradewind Consulting, Inc. "organizes your services" is the equivalent of "arranging space for shipments on behalf of shippers" and concluded that the website reflected the statutory definition of an ocean freight forwarder and not an NVOCC. (Id.).

Tradewind Consulting, Inc.'s description of itself on its website as a consulting firm and not a shipping company should not alone determine its status. Whether a transportation agency is a common carrier depends not upon its own declaration, but upon what it does. Bernhard Ulmann, supra, 3 F.M.B. at 776-777; and Bonding of Non-Vessel Operating Common Carriers, 25 S.R.R. at 1684. Moreover, Tradewind Consulting Inc.'s website describes services that it provides – not simply arranged. According to the website, Tradewind Consulting, Inc. maintains several consolidation warehouses throughout the United States, provides pickup services at the home and transportation to its warehouse for consolidation, provides transportation to the departure port, offers marine insurance, handles ocean freight shipments, provides full packing and loading, door delivery, storage, and full destination services in the United States. (BOE

App. 27). A fair reading of the website reflects an extensive role in the provision of international transportation services and supports a finding that Tradewind Consulting, Inc. was holding out to the public to provide common carrier service.

The record also establishes that Tradewind Consulting, Inc. was dealing directly with the shipping public in accepting 45 shipments for transportation to foreign destinations. (PFF 62). It routinely issued written and e-mail rate quotations to its customers identifying the services it would provide from origin to foreign destination described as door-to-door service, and including packing, loading, pickup, ocean transportation, delivery at destination, unloading and unpacking. (PFF 54). It also issued invoices for its services directly to its customers. (PFF 60). Tradewind Consulting Inc.'s website and its dealings with its shipper customers reflect a course of conduct that supports a finding that Tradewind Consulting Inc. was holding out as a common carrier.

As discussed earlier, International Shipping Solutions, Inc. and Baruch Karpick did not comply with the ALJ's orders regarding discovery and never responded to BOE's discovery requests. In its discovery requests, BOE sought information regarding the company that served as the host for International Shipping Solutions, Inc.'s website and information regarding newspapers, magazines, websites and other publications in which International Shipping Solutions, Inc advertised its services. (BOE First Interrogatories and Requests for Production of Documents directed to International Shipping Solutions, Inc. and Baruch Karpick, Section B.11; BOE First Interrogatories and Requests for Production of Documents directed to International Shipping Solutions, Inc. and Baruch Karpick, Section B.12). BOE was unable to obtain evidence that would have shown how International Shipping Solutions, Inc. held itself out to the public because of the refusal of International Shipping Solutions, Inc. and Baruch Karpick to

participate in the discovery process. An inference should be drawn that the evidence requested by BOE would have shown that International Shipping Solutions, Inc. held itself out to the general public and was known to provide transportation by water between the United States and a foreign country for compensation.

The record establishes that International Shipping Solutions, Inc. completed 42 international shipments, dealing directly with the shipping public in accepting shipments for transportation to foreign destinations. (PFF 67). The services International Shipping Solutions, Inc. actually rendered to shippers supports a finding that it held itself out to the public to provide transportation of cargo by water for compensation.

As discussed earlier, Dolphin International Shipping, Inc. did not comply with the ALJ's orders regarding discovery and never responded to BOE's discovery requests. In its discovery requests, BOE sought information regarding the company that served as the host for Dolphin International Shipping, Inc.'s website and information regarding newspapers, magazines, websites and other publications in which Dolphin International Shipping, Inc. advertised its services. (BOE First Interrogatories and Requests for Production of Documents directed to Dolphin International Shipping Inc. and Megan Karpick, Section B.11; BOE First Interrogatories and Requests for Production of Documents directed to Dolphin International Shipping, Inc. and Megan Karpick, Section B.12). BOE was unable to obtain evidence that would have shown how Dolphin International Shipping, Inc. held itself out to the public because of the refusal of Dolphin International Shipping, Inc. to participate in the discovery process. An inference should be drawn that the evidence requested by BOE would have shown that Dolphin International Shipping, Inc. held itself out to the general public to provide transportation by water between the United States and a foreign country for compensation.

The record establishes that Dolphin International Shipping, Inc. completed 10 international shipments, dealing directly with the shipping public in accepting shipments for transportation to foreign destinations. (PFF 72). It issued written and email rate quotations to its customers identifying the services it would provide from origin to foreign destination described as door-to-door service, and including packing, loading, pickup, ocean transportation, delivery at destination, unloading and unpacking. (PFF 70). The services Dolphin International Shipping, Inc. actually rendered to shippers supports a finding that it held itself out to the public to provide transportation of cargo by water for compensation.

The Commission has emphasized that “ ‘common carrier’ . . . is not a rigid and unyielding dictionary definition, but a regulatory concept sufficiently flexible to accommodate itself to efforts to secure the benefits of common carrier status while remaining free to operate independent of common carriers’ burdens.” Puget Sound at 48. In considering the common carrier status of an entity, the Commission has stated that it is important to do so in light of the purposes of the statute and the Commission’s responsibility for regulation to effectuate the remedies intended by the enactment of the regulatory statute. Containerships, supra, pp. 68, 69.

The record in this proceeding contains evidence of actual holding out via website. Inferences should also be drawn against the non-compliant respondents that the documents requested by BOE would have shown that the non-compliant respondents held themselves out to the general public to provide transportation by water between the United States and a foreign country for compensation. Additionally, the course of conduct reflected by the services the corporate respondents actually provided supports findings that each corporate respondent held out as an NVOCC to the general public and were known to the public to provide transportation of cargo by water between the United States and a foreign country for compensation.

b. The seven corporate respondents assumed responsibility for the transportation of cargo.

The record in this proceeding supports a finding that the seven corporate respondents in this proceeding assumed responsibility for the transportation of their customers' cargo from port or point of receipt to the port or point of destination. Because four of the seven corporate respondents (Moving Services, L.L.C., Global Direct Shipping, International Shipping Solutions, Inc., and Dolphin International Shipping, Inc.) did not comply with the ALJ's orders concerning discovery, an inference should be drawn that information requested would have shown that those respondents did assume responsibility for the transportation of their customer's cargo. As discussed further below, the documentation issued by the corporate respondents and the documentation issued by the NVOCCs to whom the corporate respondents tendered their customers' cargo supports a finding that the corporate respondents assumed responsibility for transportation of the cargo. Case law also provides that liability should be imposed as a matter of law if the seven corporate respondents held out to the general public to provide transportation of cargo by water and actually provided those services.

As detailed earlier, BOE was unable to obtain evidence relating to the assumption of liability from Moving Services, L.L.C., Global Direct Shipping, International Shipping Solutions, Inc., and Dolphin International Shipping, Inc. With regard to those four respondents, BOE requested, with respect to shipments transported by water in the foreign commerce during the time each respondent was operational, copies of any and all documents issued, prepared, processed or received including, but not limited to ocean bills of lading (including house and master bills of lading), correspondence, purchase orders, invoices, packing lists, dock receipts, shipping orders or instructions, booking notices, arrival notices, shipper export declarations, freight bills, records reflecting payment of freight charges by and/or to any ocean common

carrier and/or non-vessel-operating common carrier, as well as any other documentation relating to shipments transported by water in the foreign commerce of the United States. The failure of these four respondents to respond to BOE's discovery requests meant BOE was unable to develop complete information relevant to their assumption of responsibility. An inference should be drawn against these four respondents that the information requested would have shown that they did assume responsibility for the transportation of their customer's cargo.

There is evidence in the record showing that five of the seven corporate respondents provided documentation to their customers detailing the services contracted for; the point or port of receipt and the point or port of destination of the shipment; the goods being transported and the charges for the services rendered. (See pages 000446; 000457; 000473-000476; 000526-000527; 000621 for examples of Worldwide Relocations, Inc. documentation; See pages 001311-001314; 001365; 001388-001389 for examples of Global Direct Shipping documentation; See pages 002011; 002024; 002030; 002061 for examples of Boston Logistics, Inc documentation; See pages 002413; 002420; 002436; 002442; 002573; 002659 for examples of Tradewind Consulting, Inc. documentation; See pages 003208-003211; 003231-32 for examples of Dolphin International Shipping, Inc. documentation.) BOE notes that it was unable to obtain documentation from Moving Services, L.L.C. or International Shipping Solutions, Inc and an inference should be drawn that the information requested would have shown that these two respondents were providing documentation to their customers detailing the services contracted for; the point or port of receipt and the point or port of destination of the shipment; the goods being transported and the charges for the services rendered. The Commission has held that the issuance of a bill of lading is not required in order to find that an entity has assumed

responsibility for the transportation and is a common carrier.¹⁰ The complaints filed with CADRS against each of the seven corporate respondents also supports findings that each corporate respondent assumed responsibility for the transportation of their customers' cargo. As noted in the statement of Ronald Murphy, the director of CADRS, complaining shippers looked only to the corporate respondent for resolution of their complaints and in many instances, were not aware of the involvement of other companies in the transportation of their shipment. (BOE App. 2, Statement of Ronald D. Murphy, Paragraphs 6-10). The documentation that was provided by the corporate respondents to their customers, inferences drawn against the two corporate respondents who did not respond to BOE's discovery requests and the complaints received by CADRS supports findings that each of the seven corporate respondents assumed responsibility for the transportation.

The corporate respondents tendered their customer's goods to NVOCCs with whom they contracted for transportation of the cargo. For a substantial number of the shipments at issue in this proceeding, the corporate respondent tendered the goods in their name and they were listed in the shipper's block of the NVOCC's bill of lading as the shipper.¹¹ However, even where the

10. "[A] common carrier [does not] lose that status if he uses shipping contracts other than bills of lading or even if he attempts to disclaim liability for the cargo by express exemptions in the bills of lading or other contracts of affreightment." Containerships at 64, citing Transportation-U.S. Pacific Coast to Hawaii, 3 U.S.M.C. 190, 196 (1950); *see also* Docket No. 06-06, EuroUSA Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc. - - Possible Violations of Section 10 of the Shipping Act of 1984 and the Commission's Regulations at 46 C.F.R. § 515.27, Initial Decision of Clay G. Guthridge, Administrative Law Judge on Investigation of Tober Group, Inc., Page 17). Neither the Carriage of Goods by Sea Act, 46 U.S.C. §30701 et seq., nor the Federal Bill of Lading Act, better known as the Pomerene Act, 49 U.S.C. § 80102 et seq., require issuance of a bill of lading unless requested to do so by the shipper. Where a bill of lading is, in fact, issued, there is no specific form that must be followed, nor is there a need for the document to be titled "bill of lading."

11. Of the 280 bills of lading issued by NVOCCs involving Worldwide Relocations, Inc.'s shipments, 72 were issued with Worldwide Relocations, Inc. as the shipper. See Bates pages 000304, 000305, 000319, 0003330, 000353, 000362, 000391, 000395, 000429, 000442, 000465, 000489, 000507, 000523, 000532, 000536, 000537, 000565, 000611, 000648, 000664, 000671, 000707, 000717, 000726, 000759, 000765, 000769, 000772, 000775, 000803, 000804, 000824, 000829, 000839, 000847, 000848, 000849, 000872, 000878, 000881, 000898, 000905, 000921, 000966, 000969, 001003, 001026, 001505, 001063, 001071, 001085, 024803, 024806, 024807, 024821, 024824, 024831, 024844, 024846, 024895, 024901, 024911, 024943, 024985, 024986, 024991, 024999, 025034, 025035, 025074, 025089, 025117, 025129, 025137, 025138, 025175, 025214, 025221. Of the 125 bills of lading

NVOCC's bill of lading named the shipper c/o the corporate respondent in the shipper block or named the shipper alone, the underlying structure of the transaction was the substantially the same¹² and supports a finding that the corporate respondents were acting as NVOCCs even on shipments where they were not listed as the shipper on the bill of lading by the NVOCC with whom they contracted. The seven corporate respondents were not listed in the freight forwarder block of the NVOCC's bill of lading and the corporate respondents were invoiced for the ocean freight. (PFF 8, PFF 19, PFF 40, PFF 53, PFF 61, PFF 66, PFF 71).

Assuming responsibility means not only the assumption or attempted assumption of liability, but also the imposition of liability by law. In Determination of Common Carrier Status, 6 F.M.B. 245, 256 (1961), the Commission's predecessor stated:

. . . the assumption or attempted assumption of liability should not be the sole test of common carrier by water status. Rather, the actual existence or imposition of liability is also a significant factor.

issued by NVOCCs involving Moving Services, L.L.C.'s shipments, 61 were issued with Moving Services, L.L.C as the shipper. See Bates pages 003000, 003004, 003009, 003010, 003016, 003017, 003021, 003026, 003032, 003041, 003045, 003049, 003051, 003055, 003061, 003062, 003068, 003070, 003071, 003073, 003074, 003075, 003076, 003077, 003083, 003084, 003088, 003095, 003103, 003108, 003110, 003112, 003116, 003117, 003118, 003122, 003123, 003125, 003129, 003130, 003132, 003133, 003150, 003155, 003156, 003157, 003161, 003167, 003168, 003178, 003186, 003196, 003199, 003204, 003208, 003212, 003213, 003214, 003215, 003217, 003219. Of the 164 bills of lading issued by NVOCCs involving Global Direct Shipping's shipments, 31 were issued with Global Direct Shipping as the shipper. See Bates pages 001197, 001205, 001212, 001224, 001279, 001283, 001329, 001333, 001345, 001354, 001372, 001380, 001401, 001457, 001468, 001471, 001494, 001508, 001509, 001527, 001550, 001554, 001557, 001572, 001589, 001620, 001653, 001671, 001675, 001711, 001719, 001765. Of the 12 bills of lading issued by NVOCCs involving Boston Logistics, Inc. 3 were issued with Boston Logistics, Inc. as shipper. See Bates pages 001994, 002005, 002036. Of the 45 bills of lading issued by NVOCCs involving Tradewind Consulting Inc.'s shipments, 6 were issued with Tradewind Consulting Inc. as the shipper. See Bates pages 002530, 002542, 002561, 002574, 002669, 002693. Of the 42 bills of lading issued by NVOCCs involving International Shipping Solutions, Inc.'s shipments, 7 were issued with International Shipping Solutions, Inc. c/o the proprietary shipper as the shipper. See Bates pages 002885, 002895, 002899, 002906, 002913, 002925, 002933. Of the 10 shipments issued by NVOCCs involving Dolphin International Shipping, Inc.'s shipments, one was issued with Dolphin International Shipping, Inc. as the shipper. See Bates page 003204.

12. Compare the bills of lading provided to Worldwide Relocations, Inc. at Bates pages 000443, 000453 and 000523 to the documentation issued by Worldwide Relocations, Inc. at Bates pages 000446, 000457 and 000526-000527; Compare the bill of lading provided to Boston Logistics, Inc. at Bates pages 001994, 002005 and 002025 to the documentation issued by Boston Logistics, Inc. at Bates pages 001996, 002009 and 002024; Compare the bills of lading provided to Tradewind Consulting, Inc. at Bates pages 002542, 002574 and 002581 to the documentation issued by Tradewind Consulting, Inc. at Bates pages 002541, 002573 and 002582.

The assumption of liability by imposition of law often arises in cases where the entity disclaims common carrier status and was discussed by the Supreme Court in Chicago, Milwaukee, St. Paul & Pac. R. Co. v. Acme Fact Freight, Inc., 336 U. S. 465 (1949), in the context of surface freight forwarders regulated by the Interstate Commerce Commission (“ICC”), which, as the Commission has noted, are “the most closely analogous” to NVOCCs under the Shipping Act. See Charging Higher Rates Than Tariff, *supra*, 19 F.M.C. at 53. In determining whether the entity had met the statutory requirement that it had assumed responsibility, the ICC held that where the party holds out and performs the services identified in the definition (i.e., assembling, consolidating, distribution), he will be held to have assumed the burdens incident thereto, among which is responsibility to the shipper for the safe transportation of property. Judson-Sheldon Corp. Application, 260 I.C.C. 473 (1945); Universal Transcontinental Corp. Freight Forwarder Application, 260 I.C.C. 521 (1945); Vendors Consolidating Co., Inc. Freight Forwarder Application, 265 I.C.C. 719 (1950).¹³

The Commission has adopted the ICC’s rationale in the above cases. Charging Higher Rates Than Tariff, *supra*, 19 F.M.C. 53-54, citing the above cases and Yankee Shippers Agent, Inc., Investigation, 326 I.C.C. 328 (1966); Barre Granite Assn., Inc. Freight Forwarder Application, 265 I.C.C. 637 (1949); Hopke Freight Forwarder Application, 285 I.C.C. 61 (1951); R.T.C. Term. Corp. Freight Forwarder Application, 265 I.C.C. 641 (1949); and Modern Intermodal Traf. Corp. – Investigation, 344 I.C.C. 557 (1973). This rationale ties the assumption of responsibility to the entity’s holding out and is consistent with the Commission’s insistence that holding out is an essential factor in considering common carrier status. As the Commission has emphasized, common carrier status is a regulatory concept that is sufficiently flexible to

13. The Interstate Commerce Act and the Shipping Act should be interpreted in a similar manner. United States Navigation Co., Inc. v. Cunard S.S. Co., 284 U.S. 474 (1932).

accommodate itself to efforts to secure the benefits of such status while remaining free to operate without such burdens. Containerships, supra.

The record in this proceeding supports findings that each of the seven corporate respondents assumed responsibility for the transportation of cargo. The documentation they issued to their customers, the complaints filed against them by their shipper customers who held them responsible for the transportation of their cargo as well as the documentation of the NVOCCs with whom they contracted to transport their customer's cargo supports this conclusion. As discussed in paragraph 4.a above, they held themselves out to the public to provide transportation of cargo and then actually provided those services. By imposition of law, the seven corporate respondents should be held to have assumed responsibility for the transportation of that cargo.

The seven corporate respondents held themselves out to the public to provide transportation of cargo and assumed responsibility for the transportation of that cargo. The operations of the seven corporate respondents were those of NVOCCs. Since each was operating as an NVOCC and never complied with the requirements of Sections 8 and 19(a) and (b) of the Shipping Act, each operated in violation of the Shipping Act.

5. International Shipping Solutions, Inc. and Dolphin International Shipping, Inc., under the control of Respondents Megan Karpick and Martin McKenzie, acted knowingly and willfully.

Megan Karpick and Martin McKenzie argue in paragraph 10 of their responses that there is no evidence that they “intentionally violated or recklessly disregarded” the Shipping Act.

BOE contends that the conduct of International Shipping Solutions, Inc. and Dolphin International Shipping, Inc., under the control of Respondents Megan Karpick and Martin McKenzie was knowing and willful. The Commission has defined the phrase “knowingly and

willfully” to mean “purposely or obstinately and is designed to describe the attitude of a carrier, who having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements.” Trans-Pacific Forwarding, Inc. – Possible Violations of Section 10(b)(1) of the Shipping Act of 1984, 27 S.R.R. 409, 412 (1995), *citing* United States v. Illinois Central R. Co., 303 U.S. 239 (1938). The Commission addressed the meaning of “knowingly and willfully” in Pacific Champion Express Co., Ltd. – Possible Violations of §10(b)(1) of the Shipping Act of 1984, 28 S.R.R. 1397, (FMC 2000). In that case, the Commission stated:

In determining whether a person has violated the 1984 Act “knowingly and willfully,” the evidence must show that the person has knowledge of the facts of the violation and intentionally violates or acts with reckless disregard or plain indifference to the 1984 Act. Portman Square Ltd.-Possible Violations of 10(a)(1) of the Shipping Act of 1984, 28 S.R.R. 80, 84-85 (I.D.), finalized March 16, 1998. The Commission has further held that “persistent failure to inform or even to attempt to inform himself by means of normal business resources might mean that a [person] is acting knowingly and willfully in violation of the Act. Diligent inquiry must be exercised by [persons] in order to measure up to the standards set by the Act. Indifference on the part of such persons is tantamount to outright and active violation.” *Id.* at 84 (quoting Misclassification of Tissue Paper as Newsprint Paper, 4 FMB 483, 486 (1954)); Pacific Champion at 1403.

Similarly, in the case of Stallion Cargo, Inc.—Possible Violations of Section 10(a)(1) and 10(b)(1) of the Shipping Act of 1984, 29 S.R.R. 665 (2001), the Commission stated, “An NVOCC must educate itself through normal business resources, and repeated failure to do so may indicate that it is acting ‘willfully and knowingly’ within the meaning of the statute.” 29 S.R.R. at 677. In Trans-Pacific Forwarding, Inc., the Commission stated:

The phrase “knowingly and willfully” means purposely or obstinately and is designed to describe the attitude of a carrier, who having free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements. (Case citations omitted.) A violation of section 10(b)(1) could be termed “willful” if the carrier knew or showed “reckless disregard” for the matter of whether its conduct was prohibited by the 1984 Act. The conduct could also be described as willful if it was “marked by careless disregard for whether or not one has the right so to act.” The Supreme Court cited with approval this “reckless or

careless disregard” standard in Trans World Airlines, Inc. v. Thurston, 469 US 111, 125-129 (1985). *Id.* at 412.

As discussed above, under the “knowingly and willfully” standard followed by the Commission, an entity or individual need not have knowledge of the law to be found to be acting “knowingly” but must have knowledge of the facts of the violation. An entity or individual can be held to be acting “willfully” if their conduct is marked by reckless or careless disregard for the matter of whether their conduct is prohibited; they act with plain indifference; they do not use diligent inquiry or they persistently fail to inform themselves by means of normal business resources as to whether their conduct is a violation of the Act.

International Shipping Solutions, Inc. and Dolphin International Shipping, Inc. , controlled by Respondents Megan Karpick and Martin McKenzie, acted with plain indifference to the Act and did not use any normal business resources to determine whether their operations of were in violation of the Act. A previous company operated by Megan Karpick had been refused service by a licensed NVOCC because of the company’s unlicensed status. (PFF 64). Mr. Margolis, the Commission’s South Florida Area Representative, went to the offices of Globe Movers in October 2003 to resolve a complaint and attempted to discuss the need for a Commission license with Ms. Karpick. He was referred to Marvin Moss, an attorney. He left several messages requesting that Mr. Moss contact him regarding Globe Movers but Mr. Moss never did so. (BOE Supp. App., Exhibit 1, Statement of Andrew Margolis, Paragraphs 2-6). Martin McKenzie acknowledged that he read portions of the Shipping Act in 2004. (BOE App. 33, Page 13, Lines 3-8). Even after being warned that the operations of Globe Movers, Inc. may be violating the Act, Megan Karpick went on to operate International Shipping Solutions, Inc. and Dolphin International Shipping, Inc. in a similar manner. Martin McKenzie continued operating Dolphin International Shipping, Inc. after reading of the licensing, bonding and tariff

requirements of the Shipping Act. The evidence in this proceeding supports a finding that International Shipping Solutions, Inc. and Dolphin International Shipping, Inc., under the control of Respondents Megan Karpick and Martin McKenzie, acted knowingly and willfully.

6. The corporate veil should be pierced and Patrick Costadoni, Megan Karpick and Martin McKenzie should be held personally liable.

Only three of the individual respondents have chosen to respond to BOE's proposed findings of fact and conclusions of law, viz., Patrick Costadoni, Martin McKenzie and Megan Karpick. Not surprisingly, each contends that the corporate veil cannot be pierced to hold him/her personally liable because the factors necessary to establish individual control over the corporate entity do not exist. Based on the arguments advanced by these respondents in their responses to BOE's Proposed Findings of Fact, it is necessary to address a misperception that BOE is attempting to prove that individual respondents operated as NVOCCs in their individual capacities and are liable for violations of the Act on that basis.¹⁴ That is not the case at all. BOE seeks to impose liability on individual respondents by holding them responsible for the acts of their respective companies under the doctrine of piercing the corporate veil. With the exception of Sharon Fachler, who operated via Global Direct Shipping, (an entity with no corporate identity not entitled to any corporate protections (PFF 12)), the individuals were named as respondents in this proceeding only in order that liability could be imposed on them under this doctrine by attributing the acts of the corporations to those individuals. Accordingly, all of BOE's filings in this proceeding should be read in that context.

As discussed below, BOE submits that the evidence establishes sufficient control by these individuals over their respective corporations to warrant piercing the corporate veil.

Beyond this, imposition of personal liability is not dependent solely on the exercise of control.

¹⁴ See Responses to Bureau of Enforcement's Proposed Findings of Fact and Conclusions of Law filed on behalf of Patrick John Costadoni at pages 5-6; Martin McKenzie at page 14 and Megan Karpick at page 15.

The corporate entity may be disregarded in the interests of public convenience, fairness, and equity. Capital Telephone Company v. F.C.C., 498 F.2d 734, 738 (D.C. Cir. 1974) (the doctrinal bar of the corporate veil loses much of its “sancrosanctity when urged in the context of regulatory industries.”). When the notion of a legal entity is used to defeat public convenience, justify wrong, or protect fraud, the law will regard the corporation as an association of persons. Quinn v. Butz, 510 F.2d 743, 758 (D.C. Cir. 1975). The corporate fiction will be disregarded when it has been used to violate a statute, circumvent or evade a statutory purpose, or defeat legislative policies. Anderson v. Abbott, 321 U.S. 349, 362-363 (1944). The Commission likewise adheres to the view that the fiction of the corporate entity is to be disregarded when the failure to do so would enable the actors to circumvent the statute that regulates the conduct in question. Ariel Maritime Group, Inc. — Order Adopting in Part, Reversing in Part, and Supplementing Initial Decision, 24 S.R.R. 517, 530 (FMC, 1987).

This proceeding involves the licensing, bonding and tariff publication requirements of the Shipping Act. Those provisions exist to protect the shipping public and others in the maritime industry from unqualified and potentially unscrupulous service providers. The statutory licensing and bonding requirements, initially applicable to freight forwarders, were enacted by the Freight Forwarder Act in 1961, Pub. L. No. 87-254. They were designed to address widespread malpractices and discrimination in the industry, and to ensure that “every person, firm or corporation who holds himself out as a freight forwarder to be fully competent and qualified to act in the fiduciary relationship which such business necessitates.” See S. Rep. No. 87-691, reprinted in 1961 U.S.C.C.A.A.N. 2699 and Licensing of Independent Ocean Freight Forwarders, 13 S.R.R. 241, 242-243 (FMC, 1972), citing H. Rep. No. 1096, 87th Congress, 1st Session (1961). Bonding and licensing requirements were subsequently extended and made

applicable to NVOCCs by amendments to the Shipping Act of 1984, i.e., the Non-Vessel Operating Common Carrier Amendments of 1990, Pub. L. No. 101-595, Sec. 710, and the Ocean Shipping Reform Act of 1998, (“OSRA”), Pub. L. No. 105-258. As explained in the Committee Report to S. 414, which became OSRA, licensing and bonding provisions for ocean transportation intermediaries are necessary to ensure their fitness and financial responsibility to shippers, ocean carriers, and others arising from activities authorized or required by the 1984 Act, including those of ocean freight forwarders and NVOCCs. See S. Rep. No. 105-61, at 30-32 (1997).¹⁵

The individual respondents engaged in unlicensed, unbonded activities over a substantial period of time under the auspices and in the names of their respective corporate respondents. However, the corporate respondents are no longer in business and the individual respondents now seek to disavow any personal liability by relying on the shield provided by the corporate status of their companies. Allowing individual respondents to escape liability by invoking the corporate shield would undermine the purpose and policy of the statutory licensing and bonding requirements.

The conduct that is the subject of this proceeding goes to the core purpose of the licensing and bonding requirements of the Act to ensure that qualified operators are providing service to the public. Respecting the corporate form in this case would contravene the legislative purpose of those provisions of the Shipping Act. Such a result would encourage individuals to set up corporate shells to engage in unlicensed operations knowing that they can shut the operation down and walk away from it with impunity. Failure to hold accountable the individuals responsible for this activity would emasculate the statutory licensing requirements.

15. The legislative purpose is also described in Lawfulness of Unlicensed Persons Acting As Agents For Licensed Ocean Transportation Intermediaries—Petition For Declaratory Order, 31 S.R.R. 185 (2008), order vacated on other grounds in Landstar Express America, Inc. v. FMC, 569 F.3d 493 (D.C. Cir. 2009).

Imposition of individual liability is not inconsistent with the statute. The regulatory purpose of the Act does not place any particular importance on the legal form of the entity subject to its licensing and bonding requirements. The prohibition against acting as an ocean transportation intermediary without a license or evidence of financial responsibility broadly applies to “persons”, a term that includes individuals, corporations, partnerships, and associations.¹⁶ Whether the individual respondents formed the corporations to avoid the licensing requirements or for other reasons is not important. Anderson v. Abbott, *supra*, 321 U.S. at 363 (“... the interposition of a corporation will not be allowed to defeat a legislative policy, whether that was the aim or only the result of the arrangement.”).

In each instance, Respondent corporations are mere fictional extensions of the respondent individuals running the operation. Other than the initial filing of documents to create the corporation, corporate formalities were not observed, shares of stock were not issued, operations were conducted out of individual residences, and corporate officers were freely nominated by lending use of their names. BOE does not seek imposition of vicarious liability on individuals because of their capacities as officers or owners of the companies, but rather on their personal involvement in the firms’ activities. In such circumstances, personal liability is appropriate. United States v. Pollution Abatement Services of Oswego, Inc., 763 F.2d 133, 135 (2nd Cir. 1985) (the liability imposed on the individuals was not premised on their corporate offices or ownership, but was bottomed on their personal involvement in the firm’s activities).

We now turn to the responses offered by each respondent as they relate to the issue of piercing the corporate veil.

16. The codification of the Act, P.L. 109-304, Oct. 6, 2006, removed the definition of persons from Title 46. The term is now found at 1 U.S.C §1, which applies to all titles of the U.S. Code, and, in addition to the above terms includes companies, firms, societies, and joint stock companies.

a. **Patrick Costadoni**

Respondent Costadoni's proposed findings of fact assert that his company, Worldwide Relocations, Inc. ("WWR"), was established in compliance with Florida law, that the company retained a bookkeeper and an accounting firm to handle bill payments and corporate filings, that he took corporate distributions as an owner and later a salary as an employee, and that corporate charge cards were issued and only utilized for corporate expenses. (Costadoni Proposed Findings of Fact 1, 2, and 3). Based on this description of his role with WWR, Respondent Costadoni claims that he "did not exercise the control necessary to pierce the corporate veil". (Response, p. 7).

The evidence depicts a more involved role. Respondent Costadoni's control over WWR was extensive. He established the company, using his mother, Lucy Norry, as a figurehead and naming her as President, without her knowledge. (BOE App. 5, Deposition of Patrick Costadoni, Page 50, Lines 5-25; Page 51, Lines 15-17). He subsequently assumed the title of President in July, 2004. (BOE PFF 2). He controlled the company's bank account and he also performed all of the bookkeeping and took care of all the finances prior to retaining a bookkeeper and accounting firm in the summer of 2004. (BOE App. 5, Deposition of Patrick Costadoni, Page 90, Lines 22-24; BOE App. 6, Deposition of Lucy Norry, Page 33, lines 22-24). The majority of the company's operations, which he actively supervised and controlled, were conducted out of his residences. (BOE PFF 10; BOE App. 5, Deposition of Patrick Costadoni, Page 55, Lines 1-7; Page 64, Lines 21-23; Page 65, Lines 1-25; Page 66, Lines 1-6).

Certainly, there is sufficient evidence demonstrating his control over all the operations of WWR. There is no set rule as to which elements of control or a minimum number that must exist in order to pierce the corporate veil. Budisukma Permai v. N.M.K. Products & Agencies,

606 F. Supp. 2d 391, 399 (S.D.N.Y. 2009). Personal liability may be imposed when doing so would achieve an equitable result. Id. Moreover, when dealing with an industry subject to a regulatory statute, the legislative purpose and policy of the statute play a significant part in piercing the corporate veil. Capital Telephone Company, supra.

Several factors support a finding that allowing Respondent Costadoni to hide behind the corporate shield would undermine the legislative purpose of the Shipping Act's licensing and bonding provisions. Respondent Costadoni admits that he was aware of the licensing requirements of the Act, that WWR needed a license from the Commission, and that he initiated steps to apply for a license. (BOE PFF 2; BOE App. 5, Deposition of Patrick Costadoni, Page 91, Lines 14-23; Page 92, Lines 1-24; Page 93, Lines 1-22). He also admits that WWR, under his direction and control, handled at least 280 shipments without a license, bond, or tariff between February, 2003 and May, 2005, and that the company, under his direction and control, was the subject of 154 complaints submitted to the Commission arising out of its unlicensed activities. (Response, p. 4, ¶ 10). These admitted violations under Respondent Costadoni's supervision, control, and personal involvement warrant disregarding the corporate entity and holding him liable. Royal Venture Cruise Line, Inc.—Possible Violations, 27 S.R.R. 1069, 1074 (ALJ, 1997) (the corporate structure through which individual respondent did business provides no basis to shield him from personal responsibility for violations that occurred with his knowledge and committed by him or company employees under his authorization).

b. Martin McKenzie

Respondent McKenzie argues that liability should not be imposed on him personally under a piercing the corporate veil theory. (Response, p. 13, ¶36). However, he fails to allege any facts to support this argument or even address this issue in his Proposed Findings of Fact.

(See Response, pages 6-7). In his Legal Argument, Respondent contends that he was an independent contractor and not an employee of Dolphin International Shipping, Inc.; that he was never issued any stock in Dolphin; and that he was an outside investor and guarantor of a limited subset of the company's obligations. (Response, p. 8, ¶¶20 and 21). However, the uncontested evidence demonstrates that Respondent McKenzie was much more than a mere investor and was deeply involved in operating Dolphin.

Respondent McKenzie became involved with Dolphin in March, 2004, shortly after its incorporation in February, 2004. (BOE PFF 68; BOE App. 33, Deposition of Martin McKenzie, Page 7, Lines 22-24). He was not simply an outside investor. From the outset, it was intended that he would be a trainee, commute from Chicago to Florida to learn all aspects of the business, and then eventually return to Chicago to establish and run an office for Dolphin at that location. (BOE App. 33, Deposition of Martin McKenzie, Page 12, Lines 1-13). Initially he was to be compensated on a monthly salary of \$3,500, and then after training, on a commission basis of the sales he generated. (BOE App. 33, Deposition of Martin McKenzie, Page 14, Lines 16-24). He was introduced to the staff as the future Chicago office manager and actively performed regular company functions including sales, dispatch, analysis of sales leads, and issuing shipping instructions. (BOE Supp. App. 4, Deposition of Martin McKenzie, Page 18, Lines 2-5; Page 19, Lines 15-16; Page 20, Lines 7-24; Page 21, Lines 1-24; Page 22, Lines 1-19; Page 28, Lines 1-6). He also provided quotations to customers, prepared invoices, and took an active role in resolving shipment problems. (BOE Supp. App. 4, Deposition of Martin McKenzie, Page 28, Lines 13-24; Page 40, Lines 16-20; Page 41, Lines 15-18).

He made an initial investment of \$25,000, but no ownership shares were ever issued to him. (BOE App. 33, Deposition of Martin McKenzie, Page 13, Lines 21-24; Page 15, Lines 10-

13). It was intended that he become a director of the company, but no appointment, nomination or election was ever recorded and documents were never executed. (BOE App. 33, Deposition of Martin McKenzie, Page 15, Lines 6-9; Page 17, Lines 16-21). Respondent McKenzie also made subsequent contributions of \$21,000 and \$15,000 from his 401(k), and used his personal lines of credit for additional payments on behalf of the company in the amounts of \$15,000 and between \$15,000 and \$20,000. (BOE App. 33, Deposition of Martin McKenzie, Page 13, Line 24; Page 14, Lines 1-7). These contributions subsequent to his initial \$25,000 investment were “infusions” to give the company some stability to get back on its feet. (BOE Supp. App. 4, Page 41, Lines 19-22). Funds that Respondent McKenzie contributed were use to pay storage and demurrage charges as well as customer refunds. (BOE Supp. App. 4, Page 41, Lines 23-24; Page 42, Lines 1-24; Page 43, Lines 1-24, Page 44, Lines 1-5). Respondent McKenzie also personally guaranteed an obligation of Dolphin in buying out the interest of Baruch Karpick, a former owner of the company. (BOE PFF 69).

Respondent McKenzie’s own testimony contradicts the contention that he was merely an outside investor. He was in fact actively engaged in its daily operations. He was pouring his own funds into the company to stabilize it and to pay its obligations, but receiving nothing in return. (BOE Supp. App. 4, Page 57, Lines 4-14). From the outset of his relationship with the company, it was never intended that he was just an outside investor, but rather that he learn the business so that he could run an office in Chicago for the company. His testimony further indicates that Dolphin was no more than a corporate shell. Based on his substantial personal cash outlays and payment of company debt, it is evident that the company was inadequately capitalized. It also appears that corporate formalities were not followed. He never received company shares evidencing any ownership interest for his “investment”, and there were no

formal steps to follow through on the intent to nominate him as a director. These factors weigh in favor of piercing the corporate veil. Holborn Oil v. Interpetrol, 774 F. Supp. 840 (S.D. N.Y., 1992).

Respondent McKenzie acknowledged that he read portions of the Shipping Act in 2004 and also that Dolphin was communicating with Commission personnel with respect to the licensing requirements of the Act. (BOE App. 33, Page 13, Lines 3-8; McKenzie Response, Page 6, ¶ 14). Respondent McKenzie was personally and substantially involved in Dolphin's unlicensed, unbonded activities, and provided the financial basis for its continuing operations. To permit him to escape responsibility by reliance on the corporate fiction would seriously undermine the legislative purpose of the Shipping Act's licensing and bonding provisions.

c. Megan Karpick

The proposed findings of fact submitted on behalf of Respondent Karpick do not assert any facts disputing her control and supervision of International Shipping Solutions, Inc. or Dolphin. Nor do her proposed findings of fact even address the issue of piercing the corporate veil of either or both companies to hold her liable for her personal involvement in the unlawful activities of those companies. Nonetheless, Respondent Karpick argues that the corporate entity should not be ignored because there is no evidence of intermingled funds, or an overlap in ownership, officers, directors, or personnel, or a failure to observe corporate formalities. (Response, p.14, ¶s 38-41). As discussed below, the un rebutted evidence contradicts this contention. Beyond this, however, disregarding the corporate form is also warranted because failure to do so would undermine the purpose and policy of the licensing and bonding provisions of the Shipping Act.

Contrary to Respondent Karpick's contention, there was an overlap in the ownership, officers, directors, and employees of the companies. Megan Karpick was President and sole director of Dolphin and she was Vice President of ISS. Her husband, Baruch Karpick was President and sole director of ISS and owner of Dolphin. (BOE PFF 63, 64, 68, 69). Megan Karpick and her husband, Baruch Karpick were the sole owners of the companies and both companies shared the same office space. (BOE Supp. App. 5, Response to Interrogatories directed to Dolphin International Shipping, Inc., Answer to Interrogatory No. 8 and 9, Page 3). In addition, Karpick testified that the same employees who worked for ISS also worked for Dolphin. (BOE App. 32, Deposition of Megan Karpick, Page 58, Lines 22-23).

Other than the initial filing to incorporate the company, there is no evidence that corporate formalities were observed, such as regular or special meetings or the recording and keeping minutes or resolutions. For example, there is no corporate documentation or evidence of approval of the two promissory notes signed by Respondent Karpick for the company for \$75,000 in corporate funds to buy out the interest of Baruch Karpick. (BOE App. 31).

Respondent Karpick operated ISS from September, 2003, when it was incorporated until the fall of 2004, when it ceased operating. (BOE PFF 64). She was an owner and officer of the company and her role with that company included sales management, dispatching, and control over finances. (BOE PFF 64). She was also extensively involved in running Dolphin. She was an owner, director and President of the company. She did everything at Dolphin, was responsible for operating the company, and controlled its finances through control of its bank accounts. (BOE PFF 69). She was also responsible for the decision to shut down the company. (BOE Supp. App. 3, Deposition of Megan Karpick, Page 104, Lines 20-24; Page 105, Lines 1-4). In buying out her former husband's interest in the company, she, together with Martin

McKenzie, personally guaranteed the company's obligation to pay for her former husband's ownership interest. (BOE PFF 69).

Respondent Karpick's control of both companies is uncontroverted, notwithstanding her unsupported legal argument to the contrary. Nor is there any evidence that ISS or Dolphin were operated as corporate entities, held meetings, kept minutes, elected officers and directors, or issued stock. Rather, the evidence suggests that the companies were operated as extensions of the individuals actually running them. These companies were unlicensed and unbonded and engaged in activities subject to the Act's requirements. During this period of time, shippers were complaining to the Commission about problems with ISS and Dolphin involving failure to deliver cargo, refusal to return prepaid freight, failure to pay carriers, and payment of additional funds to other carriers and warehouses to secure release of cargo. (BOE PFF 67, 72). One of the purposes of licensing and bonding is to avoid these problems by licensing qualified operators and ensuring their financial responsibility in the event that problems do arise. The failure of these companies to comply with these requirements contravenes those purposes. Respondent Karpick was personally and substantially involved in Dolphin's unlicensed, unbonded activities. To permit her to escape responsibility by reliance on the corporate fiction would seriously undermine the legislative purpose of the Shipping Act's licensing and bonding provisions.

All three respondents engaged in activities through and in the names of their respective companies, none of which were licensed or bonded or published tariffs. Based on their industry experience, the individual respondents knew or should have known of the requirements of the Shipping Act. They chose to disregard the law and avoid the statutory obligations and responsibilities imposed on entities engaged in the same activities. Their personal involvement clearly justifies piercing the corporate fiction. Failure to do so will permit and encourage this

cycle to continue to the detriment of the shipping public and the lawful operators in the maritime industry.

7. Imposition of Civil Penalties against Corporate Respondents¹⁷

A person is subject to a civil penalty of up to \$30,000 for each violation knowingly and willfully committed and not more than \$6,000 for other violations. 46 U.S.C. § 41107(a). As discussed above and in BOE's brief, all of the Respondents in this proceeding engaged in conduct that was knowing and willful and therefore all are subject to the higher penalty. Section 13(c) of the Shipping Act requires that in assessing civil penalties, the Commission take into account the nature, circumstances, extent and gravity of a violation, as well as the degree of culpability, history of prior offenses, ability to pay, and such other matters as justice may require. 46 U.S.C. § 41109. In taking the foregoing into account, the Commission must make specific findings with regard to each factor. However, the Commission may use its discretion to determine how much weight to place on each factor. Merritt v. United States, 960 F.2d 15, 17 (2d Cir. 1992).¹⁸ No one statutory factor is to be over-emphasized. Refrigerated Container Carriers Pty. Ltd. – Possible Violations, 28 S.R.R. 799, 805 (I.D. 1999).

a. Establishing the Appropriate Civil Penalty

There is no single correct answer to the question of what level of civil penalty is appropriate to impose upon Respondents. As noted by the Commission,

To determine a specific amount of civil penalty is a most challenging responsibility. The matter is one for the exercise of sound discretion, essentially requires the weighing and balancing of eight factors set forth in law, and is

17. Imposition of civil penalties is discussed primarily in connection with the corporate respondents. As discussed previously, with the exception of Sharon Fachler, BOE seeks to impose liability on individual respondents by holding them responsible for the acts of their respective companies under the doctrine of piercing the corporate veil. The individuals were named as respondents in this proceeding only in order that liability could be imposed on them under this doctrine by attributing the acts of the corporations to those individuals.

18. To the extent that BOE may have stated otherwise in its Proposed Findings of Fact and Conclusions of Law at page 51, BOE acknowledges that under Merritt, it bears the burden of proof in assessing a civil penalty under Section 13(c).

ultimately subjective and not one governed by science. As was stated in Cari-Cargo, Int., Inc., 23 S.R.R. 1007, 1018 (I.D., F.M.C. administratively final, 1984):

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

Universal Logistic Forwarding Co., Ltd – Possible Violations of Sections 10(a)(1) and 10(b)(1)

of the Shipping Act of 1984, 29 S.R.R. 323, 333 (ALJ 2001), *adopted in relevant part*, 29 S.R.R.

474 (2002). As previously explained by the Commission,

the fixing of a particular amount of civil penalty is a most difficult thing to do. The Commission must consider and weigh numerous factors set forth in section 13(a) of the 1984 Act and then quantify them into a precise number. The process is not scientifically accurate and involves judgment that is subject to criticism and second guessing....Nevertheless, the finding is committed to the sound discretion of the agency and must be made. Alex Parsinia d/b/a Pacific International Shipping and Cargo Express, 27 S.R.R. 1335, 1340 (ALJ 1997).

The application of the factors set forth in section 13 to each corporate respondent’s conduct, detailed further below, supports a conclusion that imposition of a sizeable civil penalty against each Respondent is appropriate.

b. Nature, circumstances, extent and gravity of the violations

As discussed above and in BOE’s Opening Brief, each corporate respondent acted in a manner that was knowing and willful. Each knew or should have known that its conduct was in violation of the Shipping Act - a fact that makes its violations more egregious. The shippers involved were inexperienced and vulnerable. The sheer number of violations – 650 – and the prolonged time periods during which the violations were ongoing, occurring over periods of

months and in some cases, years, adds to the gravity of the violations. (PFF 10, 16, 42, 54, 62, 67, 72). Not only were the corporate respondents each operating in violation of the Shipping Act but, with the exception of Boston Logistics, Inc., they were each the subject of multiple complaints. (BOE App. 1, Statement of Ronald D. Murphy, Paragraph 3). A quarter of the shipments of Moving Services, Inc. and Global Direct Shipping resulted in complaints to the Commission. (PFF 20, 43). More than half of Worldwide Relocation Inc.'s shipments resulted in complaints to the Commission. (PFF 10). Dolphin International Shipping, Inc. had more complaints than completed shipments. (PFF 72). Respondents provided no bonding protections to their customers nor were their customers protected by the licensing and tariff requirements of the Act. Nor did any of the 280 shippers who complained to the Commission have access to the protections of an NVOCC bond covering the seven corporate respondents' ocean transportation activities. (PFF 1). The nature, circumstances, extent and gravity of the violations justify imposition of a substantial civil penalty against each of the Respondents.

c. Degree of Culpability

All of the Respondents have a high degree of culpability. The level of culpability of respondents in this case is particularly high due to the number of violations they committed. Worldwide Relocations, Inc. violated the Shipping Act on 280 occasions. (PFF 10). Similarly, Moving Services, L.L.C. and Global Direct Shipping, operated by Sharon Fachler, violated the Shipping Act on 279 occasions. (PFF 16, 42). The shippers who entrusted their household goods had no real recourse against the seven corporate respondents when shipments were lost or damaged, as the 280 complaints filed with the Commission demonstrate. Respondents provided no bonding protections to any of their customers nor were any of their customers protected by the licensing and tariff requirements of the Act. (PFF 1). Nor did any of the 280 shippers who

complained to the Commission have access to the protections of an NVOCC bond covering the seven corporate respondents' ocean transportation activities. (PFF 1). The degree of culpability of each Respondent supports imposition of a sizeable civil penalty.

d. History of Prior Offenses

None of the Respondents have a history of prior Shipping Act violations.

e. Ability to Pay

The ALJ should grant BOE's motion for sanctions against Moving Services, L.L.C., Global Direct Shipping, Sharon Fachler, International Shipping Solutions, Inc., Dolphin International Shipping, Inc. and Baruch Karpick, and find that these Respondents have failed to comply with the ALJ's order compelling them to respond to discovery seeking financial information and draw an inference that these Respondents have the ability to pay a civil penalty up to and including the maximum amount that could be imposed for violations of the Act.

Worldwide Relocations, Inc., Boston Logistics, Inc., and Tradewind Consulting, Inc. are no longer in business and therefore no longer generating income. BOE has been unable to develop evidence that the three companies have any assets with which to pay a civil penalty. With regard to the remaining individual respondents (Patrick Costadoni, Lucy Norry, Megan Karpick and Martin McKenzie), during the discovery process in 2006, BOE obtained limited information regarding their financial status, including previous years' tax returns. (BOE Supp. App., Exhibit 8). The information that was obtained indicates that Respondents (corporate and individual) have little ability to pay significant civil penalties.

A lack of ability to pay, however, does not preclude imposition of a civil penalty based on the other factors enumerated in section 13. Ability to pay is only one factor in determining the appropriate amount of a civil penalty. *See Portman Square Ltd.*, 28 S.R.R. 80, 86 (1998, ALJ);

Ever Freight Int'l Ltd. et al., 28 S.R.R. 329, 335 (1998, ALJ); Refrigerated Container Carriers Pty. Limited – Possible Violations of Section 10(a)(1) of the Shipping Act of 1984, 28 S.R.R. 799, 805 (Footnote 5) (1999, ALJ). See also Pacific Champion Express Co., Ltd., 28 S.R.R. 1185, 1191 (1999, ALJ) (“[N]o one statutory factor has to be elevated above any other, especially the ability-to-pay factor, and recognition must be taken of Congress’ efforts to augment the Commission’s authority to assess penalties so as to deter future violations.”)

f. Such Other Matters as Justice May Require

The policies for deterrence and future compliance with the Commission’s regulations are substantial factors to be considered with the other factors in assessing the amount of a civil penalty. 46 C.F.R. § 502.603(b). Indeed, the Commission has held that the main Congressional purpose of imposing civil penalties is to deter future violations of the Act. Stallion at 681. The deterrent effect on others who, as Respondents did, might be inclined to establish a company and a website in order to operate as an NVOCC without obtaining a license, providing proof of financial responsibility and publishing a tariff, justifies assessment of substantial civil penalties. Additionally, imposition of the civil penalties sends a message to the regulated community that enforcement action cannot be avoided by refusing to participate in formal proceedings. In Refrigerated Containers Carriers Pty Ltd., the ALJ noted

Should the Commission fail to exercise its discretion to assess meaningful civil penalties, including the maximum allowed by law when there are few or no mitigating factors, on account of limited ability to obtain evidence on one of the factors set forth in section 13(c) of the Act, the message would go out to the regulated industry that it need not cooperate with BOE in the pre-docketed “compromise” discussions because no significant civil penalty would likely result if the matter moved into formal Commission proceedings and respondents decided to boycott the formal proceedings. 28 S.R.R. at 805.

In exercising its responsibility to assess civil penalties under the Shipping Act, the Commission has often determined the amount of the penalty based upon the number of violations

found. Often, the Commission has applied the maximum penalty permitted on each violation found. See, e.g., Mateo Shipping Corp. and Julio Mateo, (Initial Decision, August 28, 2009, Administratively final, September 28, 2009.); Comm-Sino, Ltd., 27 SRR 1201, 1207 (1997). In other cases, the Commission has assessed an amount less than the statutory maximum for each violation. Hudson Shipping Hong Kong, 29 SRR 1381, 1387 (2003) (\$22,500 assessed per violation); Stallion, *supra*, p. 682 (\$10,000 assessed per violation). Basing the level of a civil penalty on the number of violations, however, is only one of several methodologies available to the Commission.

The Commission may, for example, base the amount of a civil penalty on the length of time a violation continued, relying on the language of section 13(a) of the Shipping Act: "Each day of a continuing violation is a separate offence." A daily assessment is most appropriate for continuing violations, including, *inter alia*, operating under an unfiled agreement required to be filed under section 5, or operating as an ocean common carrier without a tariff or an NVOCC without a license, bond or tariff. In other cases, after considering the factors set out in section 13 of the Act, the Commission has established a penalty that satisfies the requirement of a reasoned and reasonable assessment while ensuring the policies of deterrence and future compliance are protected. Sea-Land Service, Inc., *supra*, p. 895 (2006); Ever Freight, Int'l., *supra*, p. 336 (1998); Venture Cruises, Inc., 27 SRR 1069, 1075 (1998). As the Commission stated in Sea-Land Service, *supra* at 893, "The amount of penalty is largely within the agency's discretion where a violation has been found because 'the relation of remedy to policy is peculiarly a matter for administrative competency.'" American Power Co. v. Securities and Exchange Commission, 329 U.S. 90, 146 (1946).

Each of the corporate respondents has been shown to be responsible for violations of the Shipping Act, which violations put at risk numerous shippers in U.S. foreign commerce.

Moreover, many of these shippers were among the least experienced and most vulnerable. As has been noted in several related proceedings,¹⁹ the customers of international household goods shippers are generally first time shippers with little knowledge of their rights or what they can expect of transportation providers. Moreover, in many cases they have delivered almost everything they own into the hands of these unlicensed, unbonded and untariffed entities.

In its Opening Brief, BOE described the impact and gravity of each Respondent's violations and discussed the eight factors set out in section 13. At the time that brief was filed on June 19, 2009, BOE sought "substantial," and "significant," and "appropriate" penalties against each Respondent that were "appropriate" under the Act. On August 28, 2009, the ALJ's decision in Anderson International Transport and Owen Anderson Possible Violations of Sections 8(a) and 19 of the Shipping Act of 1984, 31 SRR 864 (2009), was issued. At page 81 of that decision (31 SRR 923), the ALJ objected to BOE's use of such terms, without more, stating that BOE "does not attempt to define "significant" or "substantial" or suggest a dollar amount for the civil penalty, either a total amount or an amount for each violation. In the context of this proceeding, maximum penalties do not appear to be necessary to prevent further violations by corporate respondents or to deter future similar conduct by others. At this point, the corporate Respondents and nearly all of the individual respondents are no longer active in the international household goods moving industry. To the extent there may be an individual or individuals

19. In the Initial Decisions in Anderson International Transport and Owen Anderson Possible Violations of Sections 8(a) and 19 of the Shipping Act of 1984, 31 SRR 864, 873 (2009) and Mateo Shipping Corp. and Julio Mateo Possible Violations of the Shipping Act of 1984 and the Commission's Regulations at 46 C.F.R. Parts 515 and 520, 31 SRR 830, 836 n.3 (2009), the ALJ referenced BOE's earlier statement that "Most of the individuals hiring entities to ship their household goods to a foreign destination are inexperienced shippers. In a majority of cases, it is the first time they have shipped any property overseas," finding that it applied to the facts in both cases.

contemplating future operations in the industry, BOE seeks a cease and desist order prohibiting each individual from “serving as an investor, owner, shareholder, officer, director, manager or administrator” in any company providing OTI services in the foreign commerce of the United States for a period of years to be determined by the Commission. Accordingly, BOE’s recommendations for specific penalty amounts for each Respondent, taking into account the section 13 factors, appear below.

g. Worldwide Relocations, Inc.

Over a twenty-five month period, Worldwide accepted and moved 280 shipments of household goods resulting in a like number of violations of the Shipping Act. (PFF 10). The total violations and the time period during which Worldwide operated unlawfully exceeded that of any other corporate respondent. Additionally, more than half of Worldwide Relocation’s shipments resulted in complaints being filed with the Commission’s Office of Consumer Affairs and Dispute Resolution. (PFF 10). In mitigation, Worldwide Relocations, Inc., through Mr. Costadoni, cooperated with BOE and the Commission’s staff during the informal investigation preceding the docketed proceeding, providing information and some documentation. Mr. Costadoni, as an individual, has participated through counsel in the docketed proceeding. A civil penalty of \$900,000.00 is appropriate for Worldwide Relocations.

h. Global Direct Shipping and Moving Services, L.L.C.

Both Global Direct Shipping, with 154 violations, and Moving Services, L.L.C., with 125, were operated by Sharon Fachler. Global Direct Shipping has no corporate identity and its activities are those of Sharon Fachler, the individual who controlled Global Direct Shipping. (PFF 23). One quarter of the shipments made by these companies resulted in complaints being filed with the Commission. (PFF 20, 43). These three respondents refused all contact with

Commission representatives during the preliminary investigation and have not responded to the Order of Investigation or any other orders or filings in the proceeding. Mr. Fachler is believed to be resident outside of the country. (PFF 25). A motion for sanctions is outstanding against both companies and Mr. Fachler. A civil penalty of \$600,000.00 is appropriate for Global Direct Shipping/Sharon Fachler and a civil penalty of \$550,000.00 is appropriate for Moving Services, L.L.C.

i. Tradewind Consulting, Inc. and Boston Logistics, Inc.

Tradewind Consulting, Inc., with 45 violations, and Boston Logistics, Inc. with 12, were owned and operated by Lucy Norry. Of the 45 shipments provide by Trade Wind, 6 complaints were received by the Commission, while no complaints were received in connection with the 12 shipments by Boston Logistics. Both companies, through Ms. Norry, were cooperative with BOE and the Commission's investigators and Ms. Norry initially participated in the docketed proceeding. Neither company is currently doing business. An appropriate civil penalty for Tradewind Consulting is \$350,000.00 and, based on fewer violations, \$250,000.00 for Boston Logistics.

j. International Shipping Solutions, Inc. and Dolphin Shipping International, Inc.

International Shipping Solutions, Inc., with 42 violations, was owned and operated by Baruch and Megan Karpick, while Dolphin Shipping International, Inc., with 10 violations, was owned and operated Mr. and Ms. Karpick and Martin McKenzie. International Shipping Solutions had 6 complaints on 42 shipments, while Dolphin had more complaints than completed shipments. (PFF 72). Both companies, through Ms. Karpick and Mr. McKenzie were cooperative with investigators, but provided little documentary evidence. Megan Karpick and Martin McKenzie have appeared as individuals through counsel in the docketed proceeding.

Neither company has responded to process in the docketed proceeding and BOE has filed motions for sanctions against each. Mr. Karpick participated briefly in the docketed proceeding but did not respond to process and is also the subject of a motion for sanctions. An appropriate civil penalty for International Shipping Solutions, Inc. is \$350,000.00 and for Dolphin Shipping International, Inc. based on fewer violations, is \$200,000.00

8. Other Relief against Respondents

A cease and desist order is justified if there is likelihood that offenses will continue. See Marcella Shipping Co., Ltd., 23 S.R.R. 857 (I.D.), FMC notice of finality, June 5, 1986; Parsinia, 27 S.R.R. at 1335. “The general rule is that such orders are appropriate when there is a reasonable likelihood that respondents will resume their unlawful activities....” Portman Square Ltd., 28 S.R.R. at 86. One reason to issue cease and desist orders “is to alert the shipping industry so as to forestall future violations and to enhance enforcement ability by adding another tool, namely enforcement of a Commission cease and desist order, if necessary.” Ever Freight Int’l Ltd., 28 S.R.R. at 336.²⁰

BOE requested in its Brief that Respondents be ordered to cease and desist from violating sections 8(a) and 19 of the Shipping Act and asked for the issuance of a cease and desist order: 1) directing all the Respondents to cease and desist from holding out or operating as an OTI in the United States foreign trades until and unless a license is issued by the Commission and Respondents publish a tariff and obtain a bond pursuant to Commission regulations and 2) prohibiting Sharon Fachler, Patrick Costadoni, Lucy Norry, Baruch Karpick, Megan Karpick and Martin McKenzie from serving as an investor, owner, shareholder, officer, director, manager or administrator in any company engaged in providing ocean transportation services in the foreign

20. Pursuant to the Shipping Act, Commission orders are enforceable in federal district court having jurisdiction over the parties by appropriate injunction or other process. 46 U.S.C. § 41308.

commerce of the United States except as a bona fide employee of such an entity for a period of years. No Respondent objected to BOE's request.

Cease and desist orders are necessary against Patrick Costadoni, Lucy Norry, Megan Karpick, Martin McKenzie, Sharon Fachler, and Baruch Karpick. As described by Ronald Murphy, the Director of CADRS, in his statement, the ability to solicit business via the Internet has contributed to an increase in the number of unlicensed, unbonded and untariffed companies offering NVOCC services. (BOE App. 1, Statement of Ronald D. Murphy, Paragraph 5). These NVOCCs primarily solicit business from individual consumers by means of sophisticated websites advertising themselves as international moving companies and describing the services they provide. As evidenced by the behavior of the individual respondents in this proceeding, it is not difficult for an individual to form a company, establish a website, solicit business, generate revenue by contracting with shippers to provide service, close the website and business without performing the contracted services and subsequently continue operations by establishing a new company with a new name and a new website.

Patrick Costadoni and Lucy Norry were involved in the establishment, operation and subsequent shuttering of Worldwide Relocations, Inc, Boston Logistics, Inc. and Tradewind Consulting. (PFF 2, PFF 46 -47, PFF 56). Worldwide Relocations, Inc. and Tradewind Consulting, Inc. left 160 complaining shippers behind when they closed. (PFF 10, PFF 62). Baruch Karpick and Megan Karpick similarly established and operated International Shipping Solutions, Inc. and Dolphin International Shipping, Inc, generating 46 shipper complaints. Martin McKenzie was instrumental in the continuing operation of Dolphin International Shipping, Inc. (PFF 63, PFF 64, PFF 67, PFF 68, PFF 69, PFF 72). Finally, Sharon Fachler established two companies which provided international shipping: Moving Services, L.L.C., the

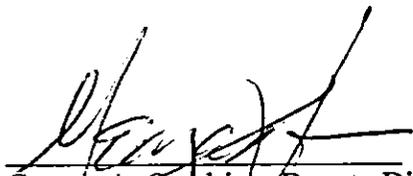
subject of 34 complaints, and Global Direct Shipping, the subject of 40 complaints with no legitimate U.S. presence, and also established Billing and Payment Systems, Inc. to facilitate the illegal operation of Global Direct Shipping. (PFF 11, PFF 20, PFF 23-25, PFF 43). Sharon Fachler has gone on to establish two other companies which briefly provided NVOCC services as well as a company to facilitate their operations. (PFF 30-35). Based on their previous behavior, the imposition of cease and desist orders against these respondents is necessary to protect the shipping public.

An order to cease and desist was issued in at least one previous Commission case involving concerns such as respondents' blatant disregard for the Shipping Act, failure to participate in the proceeding and harm to the shipping public. See Parsinia, 27 S.R.R. at 1342. ("The record shows that for three years respondent disregarded the 1984 Act, harmed shippers, failed to take the instant proceeding seriously, and formed companies under new names controlled by himself to conceal his responsibility. Consequently, there is sufficient reason and basis to protect the shipping public further even though respondent has ceased his transportation business.") The evidence in this proceeding similarly supports protecting the shipping public by issuing the requested cease and desist orders.

9. Conclusion

BOE respectfully requests that the Administrative Law Judge: 1) issue an initial decision finding that Respondents violated Sections 8 and 19 of the Shipping Act; 2) assess appropriate civil penalties against Respondents; and 3) issue appropriate cease and desist orders directed to Respondents.

Respectfully submitted,

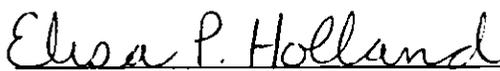


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Dated: December 11, 2009

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of December, 2009, a copy of the foregoing document has been served upon all the parties of record by Fedex or e-mail.


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