
Docket No. 08-1234

**IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2008**

IONIA MANAGEMENT S.A.,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI FROM
THE COURT OF APPEALS FOR THE SECOND
CIRCUIT

BRIEF FOR THE RESPONDENT

TEAM 16

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QUESTIONS PRESENTED:

- (1) WHETHER THE DISTRICT COURT'S INSTRUCTION ON CORPORATE CRIMINAL LIABILITY WAS AUTHORIZED BY SUPREME COURT PRECEDENT AND FEDERAL STATUTORY LAW?

- (2) WHETHER THE DISTRICT COURT'S INSTRUCTION ON CORPORATE CRIMINAL LIABILITY WAS CONSISTENT WITH GENERAL PRINCIPLES OF CRIMINAL LAW AND SHOULD THE COURT REVISIT ITS HOLDING IN *NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO. v. UNITED STATES*?

STATEMENT OF FACTS

On October 27, 2004, Ionia Management S.A. (hereinafter “Ionia”) was sentenced to a three-year term of probation. *United States v. Ionia Management S.A.*, 526 F.Supp.2d 319, 327 (D. Conn. 2007). The trial court imposed special conditions on Ionia, specifically a compliance program that was intended to enhance the requirements of existing law. *Id.* The program required, in part, that Ionia undertake an internal review of corporate safety measures; establish an ‘effective planned maintenance system;’ comply with all governing maritime and environmental laws and regulations, including the Act to Prevent Pollution from Ships, 33 U.S.C. §§ 1901, 1908 (hereinafter “APPS”); make all relevant documentation and records available for inspection; notify proper authorities of any instances of non-compliance; and accurately complete a ‘Compliance Checklist for the Proper Care and Disposal of Oily Waste.’ *Id.* This compliance program formed the basis of four separate criminal investigations, leading to indictments that included violations of APPS.

At trial, the Government introduced evidence that Ionia’s employees were acting under direct orders from their superiors. *Id.* at 325. According to Second Engineer Mercurio, Chief Engineer Tsigonakis specifically instructed him not to use the oily water separator and to pump the oily waste overboard without utilizing the oil pollution prevention equipment; Tsigonakis and Mercurio then directed the engine room crew to connect the bypass hose and dispose of the waste directly into the ocean. *Id.* Mercurio testified that he spoke with subsequent Chief Engineer Renieris about these instructions, and was told to continue. *Id.* The chief engineer’s specific duties included maintaining the oil record books and recording entries. *Id.* at 325. In the entries he falsely indicated that the pollution prevention equipment was functioning normally and

was being utilized. *Id.* at 326. The District Court held that this evidence provided a sufficient basis for the jury to “hold Ionia liable under a specific-authorization theory of agency.” *Id.*

There was additional evidence that the crew acted within their authority, and with an intent to benefit their employer, when they committed the acts for which Ionia was ultimately held liable. *Id.* Each agent who participated in the events giving rise to liability was both following instructions and carrying out the type of work for which he was employed, *i.e.* the chief engineers of the Kriton had authority to manage the engine room crew and to maintain the oil record books, and the engine room crew had authority to operate the pollution prevention equipment as well as the pumps and valves used to connect the bypass hose. *Id.*

On September 6, 2007, after a jury trial, Ionia was convicted of thirteen counts for violating APPS; three counts of falsifying records in connection with a federal investigation; one count of obstructing justice; and one count of conspiring to commit these offenses. *Id.* at 321. The jury found that the crew participated in the pump-outs and falsifying records with the intention of (1) following orders and maintaining the chain of command aboard the Kriton; (2) saving Ionia the time and expense of properly maintaining and using the oil pollution prevention equipment; and (3) enabling the Kriton to continue to dock at ports located within the United States, despite having false records. *Id.* at 326. Furthermore, despite Ionia’s official company policy, the jury found Ionia liable for the actions of its agents because the agents were acting within the scope of their employment. *Id.*

Following the guilty verdict, the defendant appealed to the Court of Appeals for the Second Circuit, which affirmed and adopted the District Court’s opinion in its entirety. The defendant-appellant now appeals to this court.

SUMMARY OF THE ARGUMENTS

The District Court's instruction on corporate criminal liability was authorized by Supreme Court precedent and federal statutory law. An instruction on corporate criminal liability is applicable because the wrongdoer was an agent of Ionia, acting within the scope of his authority, and with the intention of benefiting the corporation. The District Court's jury instructions contained all the necessary elements of corporate criminal liability. The District Court used pattern jury instructions taken from previous federal cases, including language which has been recognized and approved by several Circuit Courts, and did not taint the trial in a way that would violate due process. In fact, the jury instructions were not objected to at trial. Furthermore, the Act to Prevent Pollution from Ships would not be effective unless Congress intended corporations to be held criminally liable for the acts of their agents or employees. The District Court's instructions and the holding of *New York Central & Hudson Railroad Co. v. United States* were consistent with general principles of criminal law.

The Court should not revisit its holding in *New York Central & Hudson River Railroad Co. v. United States* due to principles of *stare decisis* and demands of public policy. The holding has been steadfast precedent for 100 years and its principles have been sound public policy in protecting society's safety and welfare. A corporation, whose agents knowingly violate regulatory laws, should not be allowed to benefit without being held accountable for those violations.

Therefore, the judgment of the Second Circuit Court of Appeals should be affirmed.

ARGUMENT

I. THE DISTRICT COURT’S INSTRUCTION ON CORPORATE CRIMINAL LIABILITY WAS AUTHORIZED BY SUPREME COURT PRECEDENT AND FEDERAL STATUTORY LAW

A corporation is liable for the criminal acts of its employees and agents, done within the scope of their employment, with the intent to benefit the corporation. *New York Central & Hudson Railroad Co.*, 212 U.S. 481 (1909) (hereinafter “*New York Central*”); see *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656 (2d Cir. 1989). A corporation may be held responsible, even though its employees or agents acted contrary to express instructions when they violated the law, so long as they were acting for the benefit of the corporation and within the scope of their authority. *United States v. Park*, 421 U.S. 658 (1975); see *United States v. Basic Construction Co.*, 711 F.2d 570 (4th Cir. 1983); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1973). A corporation is accountable for its employees’ conduct if it is motivated, at least in part, by a desire to serve the corporation. *Hilton Hotels*, 467 F.2d 1000. Further, an agent need not have conferred any actual benefit to the employer; it is sufficient if there was an intent, at least in part, to benefit the employer. *J.C.B. Super Markets, Inc., v. United States*, 530 F.2d 1119 (2d Cir. 1976); see *United States v. Potter*, 463 F.3d 9 (1st Cir. 2006).

A. PROPER STANDARD OF REVIEW

The standard of review for jury instructions is “whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.” *Cupp v. Naughten*, 414 U.S. 141, 147 (1973); *Henderson v. Kibbe*, 431 U.S. 145 (1977); *Estelle v. McGuire*, 502 U.S. 62 (1991). It is well established that a single instruction to a jury “may not be judged in

artificial isolation, but must be viewed in the context of the overall charge.” *Estelle*, 502 U.S. at 72; *see Boyd v. United States*, 271 U.S. 104, 107 (1926). A judgment of conviction is “commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence and the instructions of the jury by the judge.” *Kibbe*, 431 U.S. at 154. Thus, “not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several components of the trial which may result in the judgment of conviction.” *Id.*; *see also Cupp*, 414 U.S. 141. It is the rare case where an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court. *Kibbe*, 431 U.S. at 154.

B. APPLYING CRIMINAL LIABILITY TO CORPORATIONS

The United States Supreme Court first sanctioned imputing individual guilt to corporations through corporate criminal liability (hereinafter “CCL”) in *New York Central*. The Court was unable and unwilling to accept that a corporation could go free of punishment when it profits by an illegal transaction. Courts thereafter made the ‘next logical step’ by applying *New York Central*’s holding to others acts and regulations.

1. Defining Agents or Employees

Since *New York Central*, federal case law has evolved to further define and shape the elements of CCL. The terms ‘employee’ and ‘agent’ have been used interchangeably in the context of CCL. *United States v. Automated Medical Labs. Inc.*, 770 F.2d 399 (4th Cir. 1985). It has however been consistently recognized that an important aspect of CCL is whether the employer or agent was acting within the scope of his duties. *United States v. Singh*, 518 F.3d

236, 250 (4th Cir. 2008). The theory of *respondeat superior* literally holds “let the superior make answer.” *Black’s Law Dictionary* (3d pocket ed. 2006). *Respondeat superior* is a well-established doctrine of tort law “holding an employer or principle liable for the employee’s or agent’s wrongful acts committed within the scope of the employment or agency.” *Id.* *New York Central* established CCL for intent crimes, concluding that through the motives and intents of its human agents, a corporation could harbor criminal intent. Charles J. Walsh & Alissa Pyrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save Its Soul?*, 47 Rutgers L. Rev. 605, 616 (1995). *New York Central* applied the *respondeat superior* principle governing civil liability to CCL when it concluded, “we go only a step farther in holding that the act of the agent, while exercising the authority delegated to him to make rates for transportation, may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation.” *New York Central*, 212 U.S. at 494.

The term agent or employee is not limited to upper management only. *United States v. Fish*, 154 F.2d 798 (2d Cir. 1946). In *J.C.B. Super Markets*, 530 F.2d 1119, the Court held that since a supermarket clerk was clearly acting within the scope of her authority, receiving food stamps for the benefit of her employer, and since she derived no personal benefit from the transaction, there was no reason to depart from traditional agency principles. The suggestion that the employee's wrongful act did not advance the interests of the employer overlooked the concept of *respondeat superior*. *Id.* The court held that because the corporate entity could only act through its agents, and the clerks acted within their authority (to make sales), the corporation could be held criminally liable. *Id.* at 1122.

2. Defining the Scope of Employment and the Intent to Benefit the Corporation

Once an actor is established to have the criminal intent necessary to commit a crime and is an employee or agent of a corporation, the next step in establishing CCL is to prove the agent or employee was acting within the scope of his or her employment with the intent, at least in part, to benefit the corporation. *United States v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO*, 141 F.3d 405, 409 (2d Cir. 1998) (hereinafter “*IBT*”). The intent to benefit does not have to be solely for the corporation, but there must be at least a partial intent to benefit the corporation. *Potter*, 463 F.3d at 25. Acting within the scope of employment requires that the agent be performing acts of the kind which he is authorized to perform. *United States v. Cincotta*, 689 F.2d 238, 240 (1st Cir. 1982). Actual benefit is not a touchstone of CCL; at best it is evidential, but it is not an operative fact. *Automated*, 770 F.2d at 407.

A corporation is criminally liable even though no benefit has in fact been received. *Potter*, 463 F.3d 9. While benefit is not dispositive, the purpose to benefit the corporation is decisive in equating the agent’s action to that of the corporation. *Standard Oil Co. of Texas v. United States*, 307 F.2d 120 (5th Cir. 1962); *see also Cincotta*, 689 F.2d 238. It is an elementary principle of agency that “an act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which he is employed.” Restatement (Second) of the Law of Agency §235 (1957). In *Standard Oil*, 307 F.2d at 128, the Court opined that the state of the servant’s mind is material and external manifestations are important only as evidence. *See IBT*, 141 F.3d at 409 (benefit is evidential in determining the purpose and motive for which the agent does the act in question). The act is no

less the principal's if from such intended conduct either no benefit accrues, a benefit is indiscernible, or the result turns out to be adverse. *Standard Oil*, 307 F.2d 120.

C. THE DISTRICT COURT'S JURY INSTRUCTIONS ABOUT CORPORATE CRIMINAL LIABILITY WERE PROPER

The jury instructions adequately applied the elements and application of CCL to Ionia. The instructions fairly advised the jury that to find guilt, it must find all the elements of the underlying crime beyond a reasonable doubt and in order to impute the intent of the agent or employee to the corporation through CCL, the jury must find all of the elements of CCL present. The jury instructions tracked those of the pattern instruction and of instructions accepted by Courts of Appeals in previous cases involving CCL. There was no error given in the jury instructions, but even, assuming *arguendo*, there was, it was harmless error and did not give rise to the *Cupp* standard of "infecting the entire trial to the point of a violation of due process." *Cupp*, 414 U.S. at 147. An appraisal of the significance of error, "if in the instructions to the jury, requires a comparison of the instructions that were actually given with those that should have been given." *Kibbe*, 431 U.S. at 154.

According to the generally accepted federal jury pattern instruction, a judge must charge the jury:

A corporation is a legal entity that may act only through its agents. The agents of a corporation are its officers, directors, employees, and certain others who are authorized by the corporation to act for it...A corporate defendant is entitled to the same individual and impartial consideration of the evidence that the jury gives to a personal defendant...A corporation may be found guilty of the offense charged or be found not guilty of the offense charged under the same instructions that apply to a personal defendant.

Kevin F. O'Malley, et al., *Federal Jury Practice and Instructions* §18:05 (6th ed. Supp. 2008).

In *Basic*, the seminal case on proper jury instructions for CCL, the Court instructed the jury that a corporation is legally bound by the acts or statements of its agents “done or made within the scope of their employment, and within their apparent authority, and acts done on behalf of or to the benefit of the corporation and directly related to the performance of the type of duties the employee has general authority to perform.” *Basic*, 711 F.2d at 572. The Court further required a jury to find that the acts of a corporation’s agents were done or made within the scope of their authority, “even though the conduct of the agents may be contrary to the corporation’s actual instructions, or contrary to the corporation’s stated positions...However the existence of such instructions and policies, if any be shown, may be considered...in determining whether the agents, in fact, were acting to benefit the corporation.” *Id.*

Despite the pattern and *Basic*’s jury instructions, there are still differences between the Circuits, leading to a wider standard of acceptable jury instructions. All the Circuits require that the Court instruct the jury about burden of proof and the essential elements of CCL, specifically what is required to impute the intent of agents to the corporation. The Second Circuit adopted *Basic*’s instruction, but put greater emphasis on the actor’s position as agent, manager, or employee within the corporation. *Twentieth Century*, 882 F.2d 656. In *United States v. Koppers Co. Inc.*, 652 F.2d 290 (2d Cir. 1981) the Court held that a corporation could be criminally liable under the Sherman Act, for acts of managerial agents having duties of such responsibility that their conduct might fairly have been assumed to represent the corporation. The Court found no merit in the claim that the District Court supplied the jury with the wrong standard for deciding when a company can be held criminally liable for the acts of its employees when it charged that a corporation could be held criminally liable for the acts of its managerial agents. *Id.* at 218.

Unlike other Circuits, the Seventh Circuit adopts a split instruction for a CCL jury charge. The first instruction concerns whether or not the agent was acting within the scope of his authority and intended, at least in part, to benefit the corporation. The second instruction, which is applied when the jury negatively answers the first instruction, concerns corporation adoption, which indicates that the corporation's officers or management had knowledge of violations of law and allowed them to continue (*i.e.* the officer's knowledge of wrongdoing may be imputed to the corporation, which in turn adopts the wrongdoing as its own). This jury charge directly incorporates the existence of policies and instructions of a corporation as well as the efforts a corporation has made in enforcing its policies in determining whether or not the agent or employee acted with intent to benefit or was acting within the scope of employment. Other Circuit Courts, that include the corporate compliancy policy/instruction charge, only allow it to be used as either a mitigation defense or in determining whether the agent acted with the intent to benefit the employee and was within the scope of employment. *United States v. Beusch*, 596 F.2d 871 (9th Cir. 1979).

D. THE DISTRICT COURT COMPLIED WITH CORPORATE CRIMINAL LIABILITY INSTRUCTION PRECEDENT

The trial court did not err in its jury instructions, of which Ionia did not challenge at trial. It is the “rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.” *Kibbe*, 431 U.S. at 154. The trial court's charges to the jury regarding CCL, taken together, were within the parameters set in the general pattern instruction and of those adhered to by the Second Circuit.

At trial, the judge read the following instruction to the jury, “[t]he defendant, Ionia Management, is a corporation. A corporation is a legal entity and is considered a person under

law. A corporate defendant is entitled to the same fair consideration as you would give any individual defendant or any other party.” Ionia Jury Instructions, 2007 WL 4998564 (D. Conn. Sept. 6, 2007). This tracks the general jury pattern prescribed concerning fair consideration and the legal definition of a corporation. The judge then charged “[a]s a legal entity, a corporation can only act through its agents; that is, through its directors, officers, and employees or other persons authorized to act for it.” *Id.* The court further instructed that “[a] corporation may be held criminally liable for the acts of its agent done on behalf of and for the benefit of the corporation, and directly related to the performance of the duties the employee has authority to perform.” *Id.* This too was proper because the Court incorporated the *Basic* and *Twentieth Century* language of an authorized person acting for the benefit of the corporation and relating within the scope of the authority, adhering to the requirements of CCL.

The charge also followed the Second Circuit’s holding that CCL is not limited to upper management. *See Fish*, 154 F.2d 798. However, even if CCL was limited to such managers, the persons who violated APPS in *Ionia* were either managers, or employees or agents at a managerial level. The Court further instructed the jury as to mitigating evidence in favor of the defendant corporation in that it may consider whether the agent disobeyed instructions or violated company policy in determining whether the agent intended to benefit the corporation, and/or was acting within his authority. Ionia Jury Instructions, 2007 WL 4998564.

The trial court then properly instructed the jury as to specific actions they must find beyond a reasonable doubt in order to find the corporation criminally liable. “The second element that the Government must prove beyond a reasonable doubt is that Ionia, through its agents, was in charge of operating the oil pollution prevention and discharge equipment for [Ionia’s ship, the] Kriton.” *Id.* The instruction continued, the jury “must find that the

Government has proven beyond a reasonable doubt that acts attributable to Ionia were acts or omissions of its agents performed within the scope of their employment.” *Id.* The judge then properly defined “within the scope of employment,” directly tracking the *Basic* and *Twentieth Century* language.

The jury charge was complete in that it contained all the requisite elements, including the burden of proof, the elements of CCL, complete with specific definitions of “within scope of employment,” and a charge considering the corporation’s instructions and policies, which were applied to both scope and benefit. The jury charge was never challenged, and regardless, it did not violate due process.

E. CONGRESS INTENDED TO MAKE CORPORATIONS CRIMINALLY LIABLE UNDER THE ACT TO PREVENT POLLUTION FROM SHIPS

The word "person" in a statute unquestionably may include a corporation, *see United States v. Union Supply Co.*, 215 U.S. 50 (1909). Title 1, Section 1 of the United States Code provides that in determining the meaning of any Act of Congress, unless the context indicates otherwise, the words ‘person’ and ‘whoever’ “includes corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.” Corporations are considered persons when the circumstances in which they are placed are identical with those of natural persons expressly included in a statute. *Union Supply*, 215 U.S. 50; *see Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

The construction of the word ‘person’ in a statute or a constitutional provision may embrace a corporation whenever it is necessary to give effect to the purpose and spirit of the provision. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936); *see Isaacson v. Dow Chemical Co.*, 517 F.3d 129 (2d Cir. 2008) (the statutory presumption that the term “person” includes

corporations is not irrebuttable; it can be overcome where the legislative history of the statute under consideration shows that the normal rule of construction would run contrary to the statutory intent). Words, which in their ordinary sense apply to natural persons, may also apply to corporations, even though unaccompanied by the word ‘person’ in its more extensive sense. *Grosjean*, 297 U.S. 233.

Corporations are to be constructively included in statutes if they are within the spirit and purpose of the statute. *Standard Oil Co. of New Jersey*, 221 U.S. 1. The purpose of APPS, 33 U.S.C. §§ 1901, 1908 is to domestically enforce the 1973 International Convention for the Prevention of Pollution from Ships (referred to as MARPOL). One of the objectives of MARPOL is to achieve “the complete elimination of international pollution.” 33 C.F.R. §151.05 (2008). In *United States v. Royal Caribbean Cruise, Ltd.*, 11 F.Supp. 2d 1358 (S.D. Fla. 1998) (hereinafter “*Royal II*”), the Court held that MARPOL/APPS established a comprehensive, well balanced international regulatory scheme for limiting discharges of pollutants on the high seas. See Andrew W. Homer, *Red Sky at Morning: The Horizon for Corporations, Crew Members, and Corporate Officers as the United States Continues Aggressive Criminal Prosecution of Intentional Pollution from Ships*, 32 Tul. Mar. L.J. 149 (2007). Further, “it is reasonable to assume that Congress intended to impose liability upon business entities for the acts of those to whom they choose to delegate to conduct their affairs, thus stimulating a maximum effort by owners and managers to assure adherence by such agents to the requirements of the Act.” *Hilton Hotels*, 467 F.2d at 1005. This cannot be accomplished unless corporations are included in the general term ‘persons’ because it is corporations that are primarily involved in MARPOL violations.

II. GENERAL PRINCIPLES OF CRIMINAL LAW REQUIRE NEW YORK CENTRAL'S HOLDING BE AFFIRMED AS THE PROPER STANDARD IN THE CONTEXT OF CORPORATE CRIMINAL LIABILITY

New York Central has been the cornerstone of CCL for 100 years. As such, corporations are aware of the consequences in violating regulatory laws because of the precedent which defines what their duties and responsibilities are to society. Due to *stare decisis* and the holding in *New York Central*, corporations are cognizant that the criminal actions of their employees, managers, and agents can be imputed to the corporation as a separate legal entity.

A. STARE DECISIS MANDATES THE PRINCIPLES OF NEW YORK CENTRAL CONTINUE TO BE APPLIED

Not only was the District Court's decision legally correct, but the doctrine of *stare decisis* compels the Court to affirm the holding. "*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). *Stare decisis* also has "special force in the area of statutory interpretations, for here...the legislative power is implicated, and Congress remains free to alter what we have done." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989). After 100 years of well-established law regarding CCL, and with Congress not even attempting to change such law, it would be imprudent and irresponsible for such a long-standing holding to be reversed. *Stare decisis* is an honored and sacred pillar of American jurisprudence, and 100 years of law regarding CCL has established that the criminal acts of agents working within the scope of their employment can impute liability to the corporation.

B. THE CRIMINAL LAW PRINCIPLE OF INTENT IS PROPERLY REPRESENTED

Courts must determine whether the corporate defendant had the requisite intent and whether the evidence shows beyond a reasonable doubt that the required elements of the offense were committed. *Standard Oil*, 307 F.2d 120. In determining the requisite intent, the agent must have the proper *mens rea* to commit the acts. *Mens rea*, or the “guilty mind,” is the “state of mind that the prosecution, in order to secure a conviction, must prove that a defendant had when committing a crime.” *Black’s Law Dictionary*. In cases of corporate liability, the *mens rea* of the agent or employee is imputed to the corporation because the corporation receives a benefit from the agent or employee’s intentions to violate the law.

The *Ionia* jury instructions were clear and consistent as to the general principles regarding criminal liability. Each charge was read, and the jury was instructed to find every element of the charge proven beyond a reasonable doubt. The three substantive charges (violating APPS, falsifying records in connection with a federal investigation, and obstruction of justice) all required the element of intent. In *Ionia*, the jury was instructed to determine whether the defendant was “knowingly” aware of what they were doing, or failing to do. “Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury.” *Morissette v. United States*, 342 U.S. 246, 255 (1952). In *Ionia*, intent was an element of the crime charged, the charge was properly given to the jury, and the jury (the ultimate fact-finder) determined *Ionia* exhibited the required intent.

C. PUBLIC POLICY DEMANDS THE PRINCIPLES OF *NEW YORK CENTRAL* REMAIN

The legal concept of ‘public policy’ refers to the principles and standards regarded by the legislature or the Courts as being a fundamental concern to the state polity and society at large. More narrowly, public policy can be defined as “the principle that a person should not be allowed to do anything that would tend to injury the public at large.” *Black’s Law Dictionary*. Public policy is the driving force behind the enactment of federal statutes and Courts will often refer to public policy as a reason for a particular holding. *United States v. Parfait Powder Puff Co.*, 163 F.2d 1008 (7th Cir. 1947).

1. Safety and Welfare of the Public

Since *New York Central*, Courts have consistently held that not only can criminal acts of agents be imputed to the corporation, but as rooted in public policy, the corporation ought to be punished for its illegal undertakings. Corporations owe a certain duty to the public, whether it is regarding food, drugs, or environmental issues. *See generally Parfait*, 163 F.2d 1008. Congress has weighed the costs and benefits of CCL and has preferred to place criminal liability “upon those who have had at least the opportunity of informing themselves of the existence of conditions...rather than to throw the hazard on the innocent public who are wholly helpless.” *Id.* (quoting *United States v. Dotterwiech*, 320 U.S. 277 (1943)).

There are certain things that the ‘innocent public’ does not have the power to protect themselves against. The *Park* Court reiterated the importance of the duty a corporation, through its agents, owes to the public. *Park*, 421 U.S. 658. Courts have continuously reaffirmed the proposition that “the public interest...is so great as to warrant the imposition of the *highest standard of care...*” *Id.* at 671 (quoting *Smith v. California*, 361 U.S. 147 (1959) (emphasis

added)). In a factual context similar to *Ionia*, but still in line with the central holding of *New York Central*, the Court in *Hilton Hotels* held that the Sherman Act protected the “breadth and critical character of the public interests.” *Hilton Hotels*, 467 F.2d at 1005. In *Parfait*, the regulatory violation was adulterated cosmetics; in *Park*, it was adulterated food; in *Ionia*, it was unsafe dumping of pollutants into the waterways. Whatever the regulatory offense, the Courts’ interpretation of Congress’ intention has been aptly applied because of the need to protect the public from the corporations who benefit from the illegality of their agent’s conduct.

In cases where there is a danger to the public welfare, the Supreme Court has held corporate officers *and* the corporation itself (as a separate legal ‘person’) can be held criminally liable. See *Dotterweich*, 320 U.S. 277; *Park*, 421 U.S. 658. Environmental protection statutes have routinely been held to meet the ‘public welfare requirement.’ The Court in *Royal Caribbean II* acknowledged the MARPOL/APPS policy goal of eliminating shipborne pollution and suggested to achieve this goal, domestic and international law must work together in a way that would maximize enforcement. APPS is an environmental protection statute intended to protect the public health by keeping contaminations from the ocean and coastal regions, therefore corporations must be included because the purpose of the statute and the spirit of its provisions cannot be executed without applying to corporations.

2. Punishment as a Means of Protecting Society

Criminal law is reserved for conduct that society finds “so repugnant as to warrant the severest sanction.” Andrew Weissmann, *A New Approach to Corporate Criminal Liability*, 44 Am. Crim. L. Rev. 1319, 1324 (2007); see *Developments in the Law—Corporate Crime; Regulating Corporate Behavior Through Criminal Sanction*, 92 Harv. L. Rev. 1229 (1979)

(hereinafter “*Developments*”). A preeminent principle guiding criminal law is creating a punishment that is acceptable to society. CCL satisfies this in the form of both retribution and deterrence.

Criminal law functions as a tool of retribution by punishing the offender for “transgressing society’s starkest boundary between what it has determined to be ‘right and wrong’ or good and evil.” Weissmann, 44 Am. Crim. L. Rev. at 1326. Retribution however, has not always been viewed as the major component of punishment in the corporate sense. *Developments*, 92 Harv. L. Rev. 1229. More recently, retribution has become a core implement in the CCL context, in part, because of society’s growing intolerance with corporate greed and recognition of corporate malfeasance. Society’s interest in seeing corporations, who violate the very laws intended to protect its general welfare, safety, and health, receive their ‘just desserts’ is likely to exponentially increase, given the additional access to corporate policies and wrongdoing.

Criminal law also functions as a tool of deterrence in discouraging repugnant corporate behavior. As a concept, it can be divided into specific and general deterrence. Each of these sub-categories fosters the general principle of punishment for illegal acts. Specific deterrence refers to incapacitating an individual in order to prevent future misconduct. For an individual, specific deterrence often manifests itself in the form of incarceration. For a corporation, which legally speaking is an individual, incarceration is an impossibility. However, the dissolution of the corporation, levying of fines, and probative sentencing provisions, are examples of specific deterrence for corporations. 18 U.S.C. §3551(c) (2007); *see* Weissmann, 44 Am. Crim. L. Rev. at 1325. Ionia had previously been sentenced to a three-year term of probation. This apparently was not enough of a specific deterrent because Ionia was later found guilty of violating other

federal and maritime laws. If the probation requirements had been more stringent, perhaps Ionia would have been specifically deterred from committing those future criminal acts.

General deterrence, unlike specific deterrence, does not focus on the individual, but rather focuses on deterring others from committing similar criminal acts. The goal is that prosecuting the original wrongdoer will set the example that the laws and regulations will be enforced, and if corporations then choose to violate the law, they will be liable for criminal punishment. General deterrence is thought to work well in the corporate world because of the use of cost-benefit analysis and the attention paid to precedent in determining the consequences of contemplated action. Walsh & Pyrich, 47 Rutgers L. Rev. at 635.

A main holding that stemmed from *New York Central* was that a corporation that benefits from its agent's illegal act should not go unpunished. Criminal penalties exact a stricter punishment and even a social stigma on the corporation itself, which goes beyond mere civil penalties. *Id.* at 634. As a consequence, other corporations must become more aware of the actions of their personnel. It has been the subsequent Circuit Court holdings since *New York Central* that have shaped this concept of criminal law in the area of CCL. When "the purpose of the Act is a deterrent one...to deny the possibility of corporate responsibility for the acts of minor employees is to immunize the offender who really benefits, and open wide the door for evasion." *Fish*, 154 F.2d at 801.

Environmental sanctions seem especially keen on general deterrence. *Developments*, 92 Harv. L. Rev. at 1236. The "overriding general policy which the environmental prosecutor serves is to stop pollution where it presently exists and to prevent it from continuing or commencing in the future." *Id.* n. 25. With the prosecution of environmental charges, the Department of Justice, as well as the United States Environmental Protection Agency, has often

issued press releases documenting the importance of deterring other corporations and their employees from illegally polluting the waterways. *Homer*, 32 Tul. Mar. L. J. at 160. Goals of the criminal penalties include making pollution unprofitable and placing a public stain on the violating corporation. *Id.* In so doing, the hope is that other companies will avoid the penalties and public shame of being indicted.

In regulatory provisions, the Court has often reasoned that Congress had the intention “to ‘enlarge and stiffen the penal net’ and to discourage a view” that a regulation’s criminal penalties were nothing more than a “license fee for the conduct of illegitimate business.” *Park*, 421 U.S. at 669. Furthermore, the rules promulgated by both Congress and the Courts regarding CCL were “not formulated in a vacuum.” *Id.* at 670. Like *Park*, the public interest in regulatory statutes concerning society’s health, welfare, and safety have been considered to be at the highest level of importance and concern. So too is the public interest in environmental regulations.

CONCLUSION

For the aforementioned reasons, the judgment of the Court of Appeals for the Second Circuit should be affirmed.

Dated: February 20, 2009

Respectfully Submitted,

TEAM 16
Respondents