

No. 08-1234

IN THE SUPREME COURT OF THE UNITED STATES
October Term 2008

Ionia Management S.A.,

Petitioner,

v.

United States of America,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT

Team 23
Counsel for Respondent

QUESTIONS PRESENTED

1. WAS THE DISTRICT COURT'S INSTRUCTION ON CORPORATE CRIMINAL LIABILITY AUTHORIZED BY SUPREME COURT PRECEDENT AND FEDERAL STATUTORY LAW?
2. WAS THE DISTRICT COURT'S INSTRUCTION ON CORPORATE CRIMINAL LIABILITY CONSISTENT WITH GENERAL PRINCIPLES OF CRIMINAL LAW AND SHOULD THE COURT REVISIT ITS HOLDING IN NEW YORK CENTRAL & HUDSON RIVER RAILROAD V. UNITED STATES?

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STATUTORY PROVISIONS

The Act to Prevent Pollution from Ships, 33 U.S.C. § 1908.

Destruction, alteration, or falsification of records in Federal investigations, 18 U.S.C. § 1519.

The Sherman Act, 15 U.S.C. § 1.

STATEMENT OF THE CASE

The M/T Kriton (“Kriton”) is a large commercial oil tanker owned by defendant Ionia Management S.A. (“Ionia”). Ships such as the Kriton generate large quantities oil sludge and oil-contaminated bilge waste created when water mixes in the bottom of the vessel, known as the bilges, with oil leaked and dripped from the machinery and engines' lubrication and fuel systems. Ionia Management S.A. v. United States, 526 F. Supp. 2d 319 (D. Conn. 2007), *aff’d*, 999 F.3d 999 (2d Cir. 2008). Under the Act to Prevent Pollution from Ships, it is illegal to discharge into the ocean sludge or bilge waste unless the waste does not exceed fifteen ppm of oil and the ship had in operation pollution prevention equipment, to include oil filtering equipment to prevent the discharge of a mixture containing more than the legally-permitted concentration of oil. Id. at 325. The Act also requires oil tankers of 150 gross tons or more to maintain an Oil Record Book, in which the disposal or discharge overboard of sludge and bilge waste must be recorded. Id. at 326. This record book is to be made available for inspection at all times. Id.

On March 20, 2007, the Kriton arrived in the port of New Haven, Connecticut, where it was inspected by the United States Coast Guard, who immediately began a criminal investigation. Id at 327. During this investigation the Coast Guard discovered that between January 1, 2006 and March 20, 2007 the crew had been dumping sludge and bilge waste directly into the ocean, bypassing the use of required filtration equipment. Id. The Coast Guard found that the crew had concealed the bypass hose, used to dump sludge and bilge waste into the ocean, among the piping under the deck plates of the Kriton, attaching it to a portion of the ship to make it appear that the hose was a normal part of the vessel. Id at 328. In addition, the Coast Guard discovered that the crew had failed to maintain an accurate oil record book. Id. After further investigation, Ionia was charged with violating both 33 U.S.C. § 1908 (The Act to Prevent Pollution from Ships) and 18 U.S.C. § 1519 (falsification of records in connection with a government investigation). Id at 326. The case then proceeded to trial at the Federal Court for the District of Connecticut. Id at 319.

At trial the government contended that by neglecting to maintain an accurate oil record book and failing to use required oil filtration equipment, the crew of the Kriton intended to save their employer, Ionia, both time and money in the operation of the ship. Id at 325. The government introduced evidence that indicated that the crewmen who dumped the sludge and bilge waste into the ocean had done so at the behest of their superiors. Id at 325. The government also showed that false entries had been made in the ship's oil record book, namely that the required pollution preventing equipment was functioning and in use by the crew. Id at 326. To counter this evidence, Ionia called four crewmen as witnesses, and each testified that Ionia had a strict policy against the dumping of sludge and bilge waste into the ocean. Id at 322.

Ionia contends that the crew's behavior conferred no actual benefit to the corporation, and that as a result vicarious liability is inappropriate. Id at 323.

After trial, the judge considered both parties proposed jury instructions. The judge ultimately gave the following instructions to the jury:

A corporation can only act vicariously through its agents; that is, through its directors, officers, and employees or other persons authorized to act for it. 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 at 324. The judge further explained that to convict Ionia of violating the Act to Prevent Pollution from Ships, the government has the burden of proving beyond a reasonable doubt that the acts or omissions of Ionia's agents were committed in the scope of employment. Id at 325. The judge went on to define "in the scope of employment" as an act or omission specifically authorized by the corporation, or if not specifically authorized, then the agent must have acted for the benefit of the corporation, and been within the agent's authority. Id. The instruction further stated that no actual benefit needed to be attributed to Ionia, that the mere intent of the agents to benefit the corporation was sufficient, and that the government did not need to prove that the intent to benefit Ionia was the agents' sole motivation for their acts. Id. Finally the judge instructed that the existence of corporate policy contrary to the actions of the crew is not a defense to criminal liability. Id. The jury was told that this is merely a factor to be considered in determining whether or not to impose vicarious liability. Id.

The jury returned a verdict of guilty against defendant Ionia Management S.A. Id. Ionia appealed, and the Second Circuit issued an opinion affirming the decision of the district court. The Supreme Court of the United States has granted certiorari to address the issues raised in the Court of Appeals.

SUMMARY OF ARGUMENT

First, the district court's instruction on corporate criminal liability was consistent with the Supreme Court's holding in New York Central & Hudson River Railroad Company v. United States, and subsequent circuit courts' interpretations of that holding. New York Central created a three pronged analysis to determine if a corporation should be held liable for acts of its employees. New York Central & Hudson River Railroad Company v. United States, 212 U.S. 481 (1909). In order to be subject to vicarious criminal liability, the agent who committed the criminal act must have done so within the scope of his employment and with an intent to benefit the employer. The district court's instructions appropriately advised the jury of these requirements, including advising them that while not dispositive, they were permitted to consider evidence of Ionia's compliance program as evidence concerning whether the acts were within the scope of employment and for the benefit of Ionia. The district court also properly instructed the jury that no actual benefit need be accrued the corporation to result in liability; it is the subjective intent of the agent that is the relevant inquiry.

Second, the district court's jury instructions were also consistent with federal statutory law. While no statute exists for the sole purpose of defining standards of corporate criminal liability, substantive criminal laws contain provisions which evince a congressional intent to preserve the common law standards, and while congress has had ample time and opportunity to amend this standard, they have not done so.

Third, the district court's jury instructions were consistent with general retributive and utilitarian principles of criminal law. Holding corporations responsible for the conduct of agents acting within the scope of their employment serves to deter future illegal conduct by the corporation and effectively punishes the corporation for an act it committed through its agent.

The stigma of criminal liability also serves to deter other corporations from violating the law because they stand to lose money from fines and reputational losses associated with criminal conviction.

Finally, the court should not revisit its holding in New York Central and Hudson River Railroad because a century of precedent across each circuit supports the decision, and revisiting the holding at this point would be an ineffective attempt to solve problems that are generally prevalent throughout federal criminal law.

ARGUMENT

I. THE DISTRICT COURT'S INSTRUCTION ON CORPORATE CRIMINAL LIABILITY WAS CONSISTENT WITH THE SUPREME COURT'S HOLDING IN NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY v. UNITED STATES, AND THE VARIOUS CIRCUIT COURTS' INTERPRETATIONS OF THAT HOLDING.

The Supreme Court has set forth a three part test to determine if a corporation may be held criminally liable for the acts of an individual. New York Central & Hudson River Railroad Company v. United States, 212 U.S. 481 (1909). In order to be subject to vicarious criminal liability, the agent who committed the criminal act must have done so within the scope of his employment and with some intent of benefiting the corporation. Id. See also Corporate Counsel Guidelines, §5:5[C].

A. The instruction on the definition of agency was supported by precedent defining agent to include all employees of the corporation.

The lower court's jury instruction regarding agency was as follows: "A corporation can only act vicariously through its agents; that is, through its directors, officers, and employees or other persons authorized to act for it." Ionia Management S.A. v. United States, 526 F. Supp. 2d 319, 324 (D. Conn. 2007), aff'd, 999 F.3d 999 (2d Cir. 2008), citing Jury Instructions [Doc. # 164] at 10. The first question for a court to consider is whether the individual who committed the

criminal act was an agent of the corporation. The court in New York Central held a general freight traffic manager and his assistant to be agents, and generally upheld provisions of the Elkins Act which provided corporate liability for acts “done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent or person acting for or employed by such corporation....” New York Central, 212 U.S. at 492. Likewise, federal courts continued to broadly interpret agency, consistently holding that the term agent can apply to those persons through whom the corporation acts. “[N]o distinctions are made in these cases between officers and agents, or between persons holding positions involving varying degrees of responsibility.” United States v. George F. Fish Inc., 154 F.2d 798, 801 (2d Cir 1946). Indeed, a “corporation may be criminally bound by the acts of subordinate, even menial, employees.” Standard Oil Co. v. United States, 307 F.2d 120, 127 (5th Cir. 1962). See also U.S. v. Dye Const. Co., 510 F.2d 78, 82 (10th Cir. 1975); Apex Oil Co. v. U.S., 530 F.2d 1291, 1295 (8th Cir. 1976); Zito v. United States, 64 F.2d 772 (7th Cir. 1933); C.I.T. Corp. v. United States, 150 F.2d 85 (9th Cir. 1945); Mininsohn v. United States, 101 F.2d 477 (3d Cir., 1939). Thus, the district court’s jury charge defining agent to include “directors, officers, and employees or other persons authorized to act” was within the scope of common law precedent.

B. The jury instruction concerning the definition of scope of employment and the agent’s intent to benefit the corporation was proper.

The lower court’s instruction regarding scope of employment was as follows:

As a legal entity, a corporation can only act vicariously through its agents; that is, through its directors, officers, and employees or other persons authorized to act for it. 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.

An act or omission that was specifically authorized by the corporation would be within the scope of the agent's employment. Even if the act or omission was not specifically authorized, it may still be within the scope of an agent's employment if (1) the agent acted for the benefit of the corporation and (2) the agent was acting within his authority.

It is not necessary that the Government prove that the corporation was actually benefitted, only that the agent intended it would be.

If you find that the agent was acting within the scope of his employment, the fact that the agent's act was illegal, contrary to his employer's instructions, or against the corporation's policies will not necessarily relieve the corporation of responsibility for the agent's act. You 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.

In determining whether an agent was acting for the benefit of the corporation, you are instructed that the Government need not prove that the agent was only concerned with benefitting the corporation. It is sufficient if one of the agent's purposes was to benefit the corporation.

Ionia, 526 F. Supp. 2d at 324, citing Jury Instructions [Doc. # 164] at 10.

New York Central and its progeny require that for the corporation to be held liable, the agent must have been acting within the scope of his employment when he was committing the criminal act. New York Central, 212 U.S. at 493-494. The agent's scope of employment does not include only those acts specifically authorized by the corporation, but also includes acts which the agent can be "assumed to perform for the corporation" in the performance of those duties specifically authorized. Id. at 494. See United States v. Automated Medical Laboratories, Inc., 770 F.2d 399, 407 (4th Cir. 1985); United States v. Hilton Hotels Corporation, 467 F.2d 1000, 1004 (9th Cir. 1972). Thus, the district court's charge that the corporation could be held liable for those acts "directly related to the performance of the duties the employee has authority to perform" was supported by precedent.

The final requirement for corporate criminal liability is that the agent was acting with some intent to benefit the corporation. This was traditionally a requirement of vicarious liability in tort actions. See Lake Shore & M.S. R. Co. v. Prentice, 147 U.S. 101 (1893) (quoted in New York Central, 212 U.S. at 493). The court in New York Central effectively extended this requirement to criminal matters. "[L]iability is not imputed because the principal actually

participates... but because the act is done for the benefit of the principal... and justice requires that the latter shall be held responsible for damages... suffered by such conduct.” New York Central, 212 U.S. at 493 citing Lothrop v. Adams, 133 Mass. 471 (1882). Just as the principal is held responsible for damages suffered by individuals resulting in tort actions, it should be held responsible for damages suffered by society or the government which result in criminal actions.

The benefit requirement has been interpreted to mean that the agent must have been acting with at least some intent to benefit the corporation. United States v. Cincotta, 689 F.2d 238, 241-242 (1st Cir. 1982). The corporation need not have received any actual benefit. United States v. Empire Packing Co., 174 F.2d 16 (7th Cir. 1949); Old Monastery Company v. United States, 147 F.2d 905 (4th Cir. 1945); Standard Oil Co. of Texas v. United States, 307 F.2d 120, 128 (C.A. Tex. 1962). The existence of an actual benefit can be useful in determining the intent of the agent, Standard Oil 307 F.2d at 128, however, the lack of actual benefit received need not be considered evidence of a lack of intent. United States v. Cadillac Overall Supply Company, 568 F.2d 1078, 1090 (5th Cir. 1978). Actions potentially or actually detrimental to the corporation may result in vicarious liability based on the subjective intent of the agent. Id. “[T]he expectation or hope of a benefit... makes the act that of the principal. The act is no less the principal’s if... no benefit accrues... or... the result turns out to be adverse.” Standard Oil, 307 F.2d at 128-129. Therefore, the district court’s charge that “It is not necessary that the Government prove that the corporation was actually benefitted, only that the agent intended it would be.” was authorized by federal precedent.

The purpose of the benefit requirement is not to insulate the corporation from liability from actions that do not actually confer a benefit, but rather, from those performed with hostility towards the interest of the corporation or “undertaken *solely* to advance the interests of that agent

or of a party other than the corporation.” Automated Medical Laboratories, 770 F.2d at 407. (emphasis added.) See also United States v. Ridglea State Bank, 357 F.2d 495 (5th Cir. 1966). Examples of acts that would fall outside of this scope include those performed in exchange for bribes paid to the agent personally. Cincotta, 689 F.2d at 242. Further, it is possible for an agent to act for multiple purposes, including those in his personal interests and for the benefit of the corporation. Id. The requirement for vicarious liability is that the agent’s motivation came in some part from an intent to benefit the corporation. Id. See also United States v. DeMauro, 581 F.2d 50 (2d Cir. 1978); United States v. Beusch, 596 F.2d 871 (9th Cir. 1979).

The intent to benefit the corporation can even be secondary to a personal interest. United States v. Gold, 743 F.2d 800, 823(11th Cir. 1984). See also DeMauro, 581 F.2d 50 (2d Cir. 1978); Beusch, 596 F.2d 871 (9th Cir. 1979). Thus, the district court’s charge: “[T]he Government need not prove that the agent was only concerned with benefitting the corporation. It is sufficient if one of the agent's purposes was to benefit the corporation.” was authorized by precedent.

It is not a defense that the corporation maintained policies or procedures forbidding the criminal act in question, or that the agent received contrary instructions from his superiors. “A corporation is not insulated from criminal liability merely because it published instructions and policies which are violated by its employee; the corporation must place the acts outside the scope of an employee's employment by adequately enforcing its rules.” State v. Smokey’s Steakhouse, Inc., 478 N.W.2d 361, 361 (N.D. 1991).

The court in New York Central pointed out the circular nature to such an argument by explaining that because it is impossible for a board of directors to legally authorize a criminal act, allowing such a defense would effectively immunize corporations from being held liable for

crimes like those charged in that case, and in *Ionia*. *New York Central* at 492. Such a policy would thus let many crimes go unpunished, effectively encouraging their commission.

Public policy and precedent have fueled the circuit courts to consistently hold that a corporation may be subject to vicarious criminal liability despite corporate policy contrary to the agent's acts. See *Automated Medical Laboratories* 770 F.2d at 407; *United States v. Basic Construction Company*, 711 F.2d 570, 573 (4th Cir. 1983); *United States v. United States v. Koppers, Inc.*, 652 F.2d 290, 298 (2d Cir. 1981); *Cadillac Overall Supply Company* at 568 F.2d 1078 (5th Cir. 1978); *Hilton Hotels*, 467 F.2d at 1004-7; *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 184, 204-5 (3d Cir. 1970). Corporate criminal liability is necessary to ensure that fair prosecution occurs in cases where the corporation profits from a transaction that could only be performed through act of its agents. When the corporation entrusts an agent with authority to act in a certain regard, it is only fair that the corporation be held accountable for the knowledge and intent of those agents. *New York Central*, 212 U.S. at 495.

Some courts have allowed the admission of evidence of corporate compliance policies or specific instructions to aid in the determination of the agent's intent. *Basic Construction Company*, 711 F.2d at 573. See also *John Gund Brewing Co. v. United States*, 204 F. 17, 24 (8th Cir. 1913). Other courts have declined to admit such evidence on the grounds that it is legally irrelevant or of little weight. *Twentieth Century Fox Film Corporation v. United States*, 882 F.2d 656, 660 (2d Cir. 1989); *American Radiator*, 433 F.2d at 204. Evidence of a compliance program or contrary supervisory instructions may be more relevant in some cases than in others. A defendant corporation can argue that their program illustrates that the employee was acting out of the scope of his employment and/or not for the benefit of the corporation. On the flip-side, no matter how thorough or longstanding a program, its validity is undermined by the fact that it

failed to prevent the undesired behavior, at least in the instance of the crime charged. See Corporate Counsel Guidelines, §5:5[C].

In the instant case, Ionia argued in its application for acquittal that their strict policies against improper disposal of bilge water and oil waste were evidence that the employees were acting outside of their scope of employment and not for the benefit of Ionia. Ionia, 526 F. Supp. 2d at 322. As discussed above, the proper inquiry for scope of employment is if the employee was acting “with authority and with an intent to benefit the employer.” Ionia, 526 F. Supp. 2d at 323, citing United States v. Koppers, Inc., 652 F.2d at 298. The district court in Ionia struck a safe balance by allowing admission of the evidence concerning Ionia’s compliance policies and charging the jury that “You 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.” As such, the district court’s instruction was authorized by precedent.

II. THE DISTRICT COURT’S JURY INSTRUCTION ON CORPORATE CRIMINAL LIABILITY WAS CONSISTENT WITH SUBSTANTIVE FEDERAL CRIMINAL STATUTES, ACADEMIC SUMMATIONS OF THE LAW AND CONGRESSIONAL DECLINATION TO ADOPT THE MODEL PENAL CODE.

With no federal statute directly on point, the thrust of law on corporate criminal liability stems from common law precedent, and, as discussed above, the district court’s jury instructions were authorized by that precedent. The legislature’s intent to support common law standards of corporate criminal liability can be gleaned from substantive criminal statutes and the legislature’s declination to adopt the Model Penal Code. In addition, academic support for the current model can be found in the Restatement (Third) of Agency and other summations of the law.

- A. The jury instructions were consistent with the Restatement (Third) of Agency and other non-statutory summations of the law.

While not binding, the Restatement (Third) of Agency is particularly instructive as the new restatement, “responds to almost 50 years of legal evolution with clear and progressive statements of doctrine that express modern social norms.” The American Law Institute, Publications Catalog, Restatement of the Law Third, Agency, Volumes 1 & 2, http://www.ali.org/index.cfm?fuseaction=publications.fpage&node_id=25&product_code=1R3A (last visited February 16, 2009). According to the Restatement, a corporation is subject to vicarious liability for acts committed by employees acting within the scope of employment. Restatement (Third) of Agency, §7.07(1). An employee is acting within the scope of employment when “performing work assigned by the employer or engaging in a course of conduct subject to the employer’s control.” Restatement (Third) of Agency, §7.07(12). An agent’s conduct is not within the scope of employment when it “occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer.” *Id.* Thus, the Restatement’s definition notably lacks any mention of an actual benefit to the corporation, and is consistent with federal precedent and the jury instructions presented by the district court.

Department of Justice policies also support the current model of corporate criminal liability. The Department of Justice “insists that prosecutors seek indictments against companies guilty of corporate wrongdoing.” Melissa Ku, Lee Pepper, Corporate Criminal Liability, 44 Am. Crim. L. Rev. 275, 276 (2008), *citing* Practising Law Institute, U.S. Department of Justice Memorandum: Principles of Federal Prosecution of Business Organizations, 1411 PLI/Corp 1371, 1374, (Feb. 2004). The Department of Justice policies also provide that “... [a] corporate compliance program, even one specifically prohibiting the very conduct in question, does not absolve the corporation from criminal liability...” Melissa Ku, Lee Pepper, Corporate Criminal Liability, 44 Am. Crim. L. Rev. at 279, *citing* Practising Law Institute, U.S. Department of

Justice Memorandum: Principles of Federal Prosecution of Business Organizations, 1411
PLI/Corp at 1382.

Likewise, the Federal Jury Practice and Instructions are in-line with the jury charge given in this case, providing that in order for a jury to hold a corporation vicariously liable, the government must prove beyond a reasonable doubt that the act was committed by an agent, within the scope of employment, and with the intent to benefit the defendant corporation. 1A Fed. Jury Prac. & Instr. § 18:05 (6th ed.).

This model of corporate criminal liability is also supported by encyclopedias of the law such as American Jurisprudence, as well as criminal law treatises. See 18B Am. Jur. 2d Corporations § 1841 (a corporation can be held liable for acts performed by employees “so long as they were acting for the benefit of the corporation and within the scope of their actual or apparent authority”); Wayne R. LaFare, Jerold H. Israel, Nancy J. King, Orin S. Kerr, Criminal Procedure, 4 Crim. Proc. §15.1(b) (3d ed.) (person can be read to include corporations).

- B. Congressional approval of common law standards of corporate criminal liability can be gleaned from Congress’s declination to adopt the more restrictive approach supported by the Model Penal Code.

The Model Penal Code proposes an approach more restrictive than the one currently used in the federal system. Under the MPC, corporate liability, “only applies if the corporation violates a specific duty imposed by law or if the commission of the offense was at least recklessly tolerated by a senior officer.” Roland Hefendehl, Corporate Criminal Liability: Model Penal Code Section 2.07 and the Development in Western Legal Systems, 4 Buff. Crim. L. Rev. 283, 290-291 (2000). Specifically, the Model Penal Code creates three distinct types of corporate offenses and imposes a different liability system for each type. *Id.*, citing Anne Ehrhardt, Unternehmensdelinquenz und Unternehmensstrafe 99, 111-113 (1994). See Model Penal Code § 207.

The Model Penal Code is not alone in its attempt to revise federal standards of corporate criminal liability. In 1971 a commission created by congress presented its proposal for a new federal criminal code. Paul H. Robinson, Reforming the Federal Criminal Code: A Top Ten List, 1 Buff. Crim. L. Rev. 225 (1997). The proposed new federal code included §402, Corporate Criminal Liability. This section echoed the reckless tolerance standard of the Model Penal Code. Final Report of the National Commission on Reform of Federal Criminal Laws (1971), §402, (available at <http://wings.buffalo.edu/law/bclc/codein.htm>). Despite many attempts, and despite many states adopting similar statutes, these provisions were not passed by Congress. Paul H. Robinson, Reforming the Federal Criminal Code: A Top Ten List, 1 Buff. Crim. L. Rev. 225 (1997). It is also notable that very few states have adopted this Model Penal Code provision in its entirety. Amy Foerschler, Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct, 78 Ca. L. rev. 1287, 1295 (1990). Most states that have adopted some portion of the code have expanded the scope of § 2.07(1)(a) to apply to violations of statutes which the legislature intended to inflict liability on corporations, and have extended 207(1)(c) to cover those acts authorized by all managers and supervisors. Id.

“[T]he power of congress to change the common law rule is not to be doubted.” United States v. A.P. Trucking Company, 358 U.S. 121, 124 (1958), citing United States v. Adams Express Co., 229 U.S. 381 (1913). Congress has had ample opportunity to change the common law rule, and that they have not done so is evidence of an intent to maintain the status quo.

C. Federal substantive criminal statutes evince a congressional intent to sustain corporate criminal liability.

1 U.S.C. § 1 provides: “In determining the meaning of any Act of Congress, unless the context indicates otherwise... the words “person” and “whoever” include corporations,

companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals....”

Congress has chosen to specifically provide for corporate liability in some statutes. For example The Act to Prevent Pollution from Ships (“APPS”), at issue in Ionia, provides that any “person who knowingly violates the MARPOL Protocol, Annex IV to the Antarctic Protocol, this chapter, or the regulations issued thereunder commits a class D felony.” 33 U.S.C. § 1908(a). APPS defines “person” as “an individual, firm, public or private corporation, partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body...” 33 U.S.C. § 1901 (a)(10). Similarly, federal anti-trust law specifically provides for corporate liability and fines up to \$100,000,000. 15 U.S.C. §1.

Finally, Congress continues to pass legislation such as the Sarbanes-Oxley Act of 2002, which purposefully subject corporations to increased criminal liability. See Melissa Ku, Lee Pepper, Corporate Criminal Liability, 44 Am. Crim. L. Rev. 275, 276 (2008). This very recent congressional reaction to scandalous corporate wrongdoing is evidence that the legislature continues to support corporate criminal liability in many contexts.

III. THE DISTRICT COURT’S INSTRUCTION ON CORPORATE CRIMINAL LIABILITY WAS CONSISTENT WITH GENERAL PRINCIPLES OF CRIMINAL LAW BECAUSE IMPUTING AN AGENT’S INTENT AND ACTIONS TO THE CORPORATION IS THE ONLY EFFECTIVE WAY TO DETER AND PUNISH CORPORATE MISCONDUCT.

A. The district court’s instruction that a corporation may be held criminally liable for the acts of its agents which occur in the scope of their employment was consistent with longstanding principles of criminal law.

The concept of vicarious corporate criminal liability serves to both punish and deter corporate misconduct while not running afoul of the presumption of innocence. Two of the most basic rationales for our system of justice are the retributive and utilitarian theories. These sometimes competing theories essentially state that the underlying justification of criminal law is

to punish the guilty and to deter future criminal offenders, respectively. Taken together, they can be viewed as goals of the criminal law itself. Kent Greenwalt, Encyclopedia of Crime and Justice 1282 (Joshua Dressler ed., 2002). These goals must be balanced against the rights of the accused, including the idea that the accused is innocent until proven guilty. The court's instruction, (see section I.B.) above, is consistent with both retributive and utilitarian principles, and does not run afoul of the presumption of innocence. Without vicarious liability in this situation, corporations would not be deterred from tacitly supporting misconduct while retaining the profits made from an agent's misdeeds. Furthermore if enforcement of statutes were left in the hands of civil litigation alone, many corporate misdeeds would go unpunished because few people would be willing to pay litigation expenses to correct wrongs committed against the general public- such as dumping oily bilge water into the ocean. V.S. Khanna, Corporate Criminal Liability: What Purpose Does it Serve?, 109 Harv. L. Rev. 1477, 1521 (1996). Finally if the court were to require proof of that an actual benefit was conferred on the corporation, situations in which bad fortune causes the corporation to receive no benefit from its agent's violations of the law would not be covered. The mere attempt to benefit the corporation is sufficient to hold the corporation liable for its agent's actions. J.C.B. Supermarkets Inc. v. United States, 530 F. 2d 1119, 1122 (2d Cir. 1976). This criminal punishment of an attempt to benefit the corporation is necessary because civil remedies alone will not accomplish the requisite deterrence and punishment of corporate misconduct.

1. A corporation can act only through its agents who receive the full benefit of the presumption of innocence, thus imputing the presumption to the corporation.

Two of the criticisms leveled at the concept of vicarious corporate liability are that it upsets the presumption of innocence vital to American law, and that the requisite intent to commit a crime charged is lacking in such prosecutions. As stated by Justice White in Coffin v.

United States, “The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.” Coffin v. United States, 156 U.S. 432, 453 (1895).

Vicarious corporate criminal liability does not infringe upon this sacred right. Though a corporation is a distinct legal entity, it has no physical persona. This does not mean that it cannot act upon the physical world though, nor does it mean that it cannot intend to do so. As Justice Day stated in New York Central, “If, for example, the invisible, intangible essence or air which we term a corporation can level mountains, fill up valleys, lay down iron tracks, and run railroad cars upon them, it can intend to do it, and can act therein as well viciously as virtuously.” New York Central, 212 U.S. at 493. A corporation though, can act upon the physical world only through its agents, who are extensions of the corporate entity itself. In essence, “since a corporation acts by its officers and agents, their purposes, motives, and intent are just as much those of the corporation as are the things done.” Joel Prentiss Bishop, New Criminal Law 417 (1892). Agents of the corporation are presumed innocent until proven guilty of the act for which the corporation is charged. New York Central, 212 U.S. at 493. Only upon proof beyond a reasonable doubt that a corporate agent violated the law while acting within the scope of his employment can the agent’s intent and guilt be transferred to the corporation. *Id.* Just as the agent’s actions belong to the corporation, so does the benefit he receives under the law. *Id.* Thus vicarious corporate criminal liability does not threaten the traditional presumption of innocence under the law.

2. The stigma that attaches to criminal conviction is not present in civil or regulatory enforcement and is necessary to effectively punish and rehabilitate a corporation after misconduct by its agents.

Criminal punishment provides greater incentives for change than either civil or administrative regulation, effectively deterring further corporate misconduct. The societal

stigma that attaches to a criminal conviction is a powerful catalyst for change that can be used to eliminate unlawful corporate behavior, and is in fact the most powerful sanction society can level against a corporation. V.S. Khanna, Corporate Criminal Liability: What Purpose Does it Serve? 109 Harv. L. Rev. 1477, 1499 (1996). The publicity hit a corporation takes when it is convicted of criminal activity can have a negative effect on stock price, and also impact business relationships. Id. at 1500. (Corporations that do business with the offender may be reluctant to continue to do so for fear of a backlash from their own shareholders). Id. This negative public relations effect can thus spur industry-wide change and deter corporate law breaking.

This public shaming also has the power to change an individual corporation's culture from the top down. No board of directors wants to explain to the shareholders that they have lost the company millions in criminal fines and reputational losses because the corporation lacked any effective internal mechanism to ensure compliance with state and federal statutes. In fact in a 1998 survey, as many as 75% of corporate executives stated that the fear of criminal liability had prompted the creation of compliance programs to reduce exposure to criminal liability. Joseph S. Hall, Corporate Criminal Liability, 35 Am. Crim. L. Rev. 549, 550 (1998). Since corporations will usually create policy with the goal of maximizing profits, this incremental deterrence is important. Undoubtedly it is more expensive for a corporation to have a compliance program than none at all. Without the specter of vicarious criminal liability, corporations would be encouraged to spend less on compliance programs, increasing external costs to the public. Jennifer Arlen & Reinier Kraakman, Controlling Corporate Misconduct: An Analysis Of Corporate Liability Regimes, 72 N.Y.U. L. Rev. 687, 693 (1997). Thus vicarious criminal liability encourages internal corporate compliance programs and confers a net benefit on society.

Some will argue that holding a corporation vicariously liable for the acts of its agents unduly harms the stockholders, who never approved or authorized the agent's conduct. This argument ignores the fact that the stockholders and corporate officers cannot possibly authorize an agent to commit an illegal act. New York Central, 212 U.S. at 492. As such, a corporation would never be subject to criminal prosecution for acts that it commits through its agents. Id. Allowing a corporation to escape liability for its criminal acts merely because of its form or organization would be unfair to the public at large, who would suffer from corporate misconduct and often see no adequate redress for the wrong. V.S. Khanna, Corporate Liability Standards: When Should Corporations be Held Criminally Liable? 37 Am. Crim. L. Rev 1239, 1244 (2000). Thus, the stockholders are not unduly wronged because vicarious corporate liability serves to aid the public at large- including the stockholders themselves.

3. Public policy requires vicarious corporate criminal liability to deter tacit corporate support for illegal action by agents.

The creation of compliance programs is a good step in the process of cleaning up corporate illegality. Such programs alone are not enough to eliminate corporate misconduct and solve the root problem. Corporate illegality can often be so pervasive as to amount to tacit executive support of agents who circumvent compliance programs. As a 1999 Justice Department memo states, the presence of a corporate compliance program does not eliminate the need for criminal prosecution:

The existence of a compliance program is not sufficient, in and of itself, to justify not charging a corporation for criminal conduct undertaken by its officers, directors, employees, or agents. Indeed, the commission of such crimes in the face of a compliance program may suggest that the corporate management is not adequately enforcing its program.

Deputy Attorney General, Federal Prosecution of Corporations, 7 (1999). Implementing an ineffective compliance system does nothing to deter corporate misconduct. Vicarious liability

promotes the use of rigorous, effective compliance programs by aligning the interests of the public with those of the corporation. Arlen & Kraakman, Supra at 694. Failure to effectively monitor and control agent misconduct will result in not merely a fine, but a significant blow to the corporation's reputation in the public markets. This can result in stock price drops and loss of business that a corporation will desperately seek to avoid- by ensuring that it and its agents fully comply with federal statutes. Jennifer Arlen, The Potentially Perverse Effects of Corporate Criminal Liability, 23 J. Legal Stud. 833, 835 (1994). Thus, vicarious corporate criminal liability can be used to great effect to deter corporate illegality.

4. Certain crimes will go unpunished without vicarious corporate criminal liability because private enforcement of statutes is unlikely.

Criminal prosecution of the corporation for the illegal acts of its agents is necessary to ensure effective punishment of corporate misconduct. While civil remedies may be effective when corporate crimes have identifiable victims who are aware of the illegal act and by whom it was committed, when this criteria is not met government enforcement is more appropriate. V.S. Khanna, Corporate Criminal Liability: What Purpose Does it Serve?, 109 Harv. L. Rev. 1477, 1521 (1996). In such situations, only criminal prosecution of corporate agents combined with civil and administrative regulation will result in adequate punishment and deterrence of corporate crime. This is particularly true for public wrongs, such as those against the environment or ones that fall into the tort category of nuisance. In these cases private enforcement is unlikely to occur. Id. The substantial cost incurred in litigating a nuisance claim or a claim that a corporation is violating environmental statutes deters individuals from bringing suit. Id. This effect is only worsened by the fact that individual plaintiffs will reap only a small part of the benefit of any settlement. Id. As a result, the public must rely on the government to prosecute

corporations and impose criminal sanctions and fines to ensure that the corporation is punished for the wrongs it commits.

Even in cases where private civil enforcement does occur, there are benefits to maintaining criminal proceedings as well. Maintenance of both a private and public action at the same time forces a corporation to defend both actions at the same time. In doing so, the corporation may reveal its litigation strategy in the first action, making prosecution easier in the second. *Id.* at 1525. This decreases the chance that a guilty corporation will escape all liability due to good litigation strategy. Furthermore, it can also provide the public with a second chance at a corporate defendant should it escape liability due to a court error or poor strategy by the prosecution. *Id.* at 1526. Corporate criminal liability will therefore help to reduce the number of false acquittals of guilty corporations.

5. Vicarious Criminal Liability is appropriate because individual corporate agents are often “judgment proof,” and thus corporate misconduct will not be adequately deterred by punishing the agent.

When corporations violate the law, it imposes a cost on society that must be balanced by an appropriate fine. This balance will lead to the corporation internalizing the cost of its actions and ultimately result in optimal deterrence of the illegal corporate behavior. V. S. Khanna, Corporate Liability Standards: When Should Corporations be Held Criminally Liable? 37 Am. Crim. L. Rev 1239, 1244 (2000). However, this balance is upset if the subject of the fine is unable to pay. If the corporation could not be held liable for the acts of its agents, fines would be imposed upon the agents themselves. *Id.* This presents a problem because the social cost of corporate criminal conduct is often quite large, especially when environmental damage or large scale pollution is at issue. It is very unlikely that one corporate agent, or even a number of them, would have the resources to adequately compensate society for the damage done. *Id.* The result

is under-deterrence of corporate crime; it would become worthwhile to encourage employees to shirk the law armed with the knowledge that they will foot the bill if the authorities catch them.

IV. THE COURT SHOULD CONTINUE TO SUPPORT NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO. V. UNITED STATES AND ITS PROGENY SINCE FAILING TO DO SO WOULD OVERTURN NEARLY 100 YEARS OF WELL ESTABLISHED PRECEDENT.

A. New York Central & Hudson River Railroad Co. v. United States Is Still Well Principled, Well Founded Law, Is Supported By The Model Penal Code, And Should Not Be Overturned By The Court At This Time.

The court should decline to revisit its holding in New York Central & Hudson River Railroad Co. v. United States because nearly a century of precedent supports the decision, and the decision creates a legal framework which encourages corporate responsibility and effective law enforcement. See Twentieth Century Fox, 882 F .2d 656; Koppers, 652 F .2d 290); J.C.B. Supermarkets, Inc. v. United States, 530 F. 2d 1119 (2d Cir. 1976).

In New York Central, the Court stated that due process of law was not denied when violations of law committed by corporate agents in the scope of their employment were imputed to the corporation itself. New York Central, 212 U.S. at 494. Whether or not an agent is acting within the scope of employment can then be judged by whether he or she is acting with authority and with intent to benefit the employer. Koppers, 652 F .2d at 298. This has been the settled rule of law in the United States for nearly a century, supported by literally hundreds of cases, both state and federal. See Twentieth Century Fox, 882 F .2d 656; Basic Construction Co., 711 F .2d 570; Hilton Hotels Corp., 467 F .2d 1000. This doctrine has been so widely recognized and upheld not only in the interests of stare decisis, but because it furthers the most basic goals of criminal law: to punish the guilty and to deter future misconduct. (See point (A) above for a full discussion of the societal benefits of vicarious corporate criminal liability.)

B. The Court Should Decline To Revisit New York Central And Hudson River Railroad Co. Because More Broad Reforms Are Necessary To Eliminate The Problems Arising From Its Holding.

Even if the court were to disagree with the points made above and accept the argument that vicarious corporate criminal liability needs to be revised, revisiting New York Central would not solve the doctrine's problems. Some argue that the current model of vicarious corporate criminal liability is too broad, imposes penalties that are too harsh, or gives federal prosecutors too much power. If this is so, these are not issues specific to vicarious corporate criminal liability, but are endemic of federal criminal law as a whole. Many federal criminal statutes impose harsh penalties that many argue are disproportionate to the crime charged, and many federal statutes give prosecutors enforcement broad discretion. Sara Sun Beale, Is Corporate Criminal Liability Unique?, 44 Am. Crim. L. Rev. 1503, 1504 (2007). If the court were to attempt to remedy these broad issues, the result would at best benefit only a few defendants and would not address the root of the problem. Id at 1505. As Beale puts it, "there's little appeal to piecemeal solutions that benefit only a privileged few." Id. The court alone simply does not possess the power to remedy problems of statutory drafting and government policy with a single holding. The reform of federal criminal law must begin with Congress, who has the power to make top to bottom changes with the statutes themselves. Thus, even if the court believes change is needed, revisiting New York Central and Hudson River Railroad Co. cannot achieve that change. If a sea change is appropriate, it must come from Congress in order to address these issues in a comprehensive and effective manner.

CONCLUSION

For the aforementioned reasons, Respondent respectfully requests that the court affirm the decision of the United States Court of Appeals for the Second Circuit, and uphold the verdict of guilt rendered against Petitioner Ionia Management S.A.

Respectfully Submitted,

Team # 23
Counsel for Respondent