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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**WEST POINT RELOCATION, INC. :  
and ELI COHEN – PETITION FOR : Docket No. 35290  
DECLARATORY ORDER :**

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**OPENING STATEMENT IN SUPPORT  
OF PETITION FOR DECLARATORY ORDER**

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and ELI COHEN**

**DATE: December 28, 2009**

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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**WEST POINT RELOCATION, INC. :**  
**and ELI COHEN – PETITION FOR :**       **Docket No. 35290**  
**DECLARATORY ORDER :**

**OPENING STATEMENT IN SUPPORT  
OF PETITION FOR DECLARATORY ORDER**

WEST POINT RELOCATION, INC. (“West Point”) and ELI COHEN (“Cohen”), submit their Opening Statement in support of their Petition for an order declaring that it is an unreasonable practice contrary to 49 U.S.C. § 13701(a) for the tariff rules of HORIZON LINES LLC (“Horizon”) to disregard the existence of corporate structures and to seek to hold undefined “principals” of corporations, including presumably officers and directors, personally liable for the actions of the corporation.<sup>1</sup>

In an order entered on July 20, 2009, in *Horizon Lines LLC v. West Point Relocation a/k/a West Point Relocation Inc. and Eli Cohen*, U.S.D.C. C.D. Cal., CV 08-6362 RSWL (JTL), United States District Court Judge Ronald S.W. Lew referred the issue of the reasonableness of the challenged Horizon tariff rules to the Surface Transportation Board (the “Board”) under the primary jurisdiction doctrine. On October 26, 2009, the Board entered an Order granting the request for institution of a declaratory order proceeding.

**RELEVANT FACTS**

Horizon sued West Point and Cohen in the United States District Court for the Central District of California, Case No. CV 08-6362 (RSW), pursuant to the ICC Termination Act of 1995, 49 U.S.C. § 13521, *et seq.* (the “Act”), alleging that the West Point failed to pay certain transportation charges provided on its behalf pursuant to the

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<sup>1</sup> West Point filed a chapter 7 bankruptcy petition on December 14, 2009.

terms of Horizon's tariff. See Plaintiff's First Amended Complaint, Count I. Horizon also seeks recovery from Cohen, however, based upon the fact that "[p]ursuant to the terms and conditions of Horizon Lines tariff, as a principal of West Point, Cohen is jointly and severally responsible for the payment of all amounts prayed for herein." *Id.*

Horizon never submitted bills of lading to West Point or to Cohen. Instead it simply submitted invoices and freight bills. See Affidavit of Eli Cohen ("Cohen Aff."), attached as Exhibit A at ¶ 4. These documents contained no terms and condition but instead had a small print notation at the bottom of the invoice referring to Horizon's tariffs. See sample invoice attached as Exhibit B; Cohen Aff. at ¶ 6. The individual tariff at issue is not identified in the notation, nor was Cohen or West Point informed what tariff governed the shipment at issue. *Id.* at ¶ 6. The actual tariff reference which Horizon contends governs the shipments at issue were only provided to West Point and Cohen after the lawsuit was filed. Until that time, the tariff rule on which Horizon relies was never provided to West Point or Cohen. *Id.* at ¶ 7.

The tariff, which Horizon now contends governs the transportation at issue, is attached as Exhibit C. The tariff states in relevant part that "the shipper, consignee, holder of the bill of lading, bill to party, owner of the goods and *principals of said liable parties* shall be jointly and severally liable" to Carrier for the payment of all freight charges. Tariff at ¶ 3 (emphasis supplied). The tariff does not define the term "principal."

The transportation at issue involved shipment of goods via water from Hawaii to the United States. Thus it falls within the scope of Section 13701 of the Act governing the movement of goods by a water carrier in noncontiguous domestic trade.

**I. The Board Has Primary Jurisdiction Over the Reasonableness of Horizon's Tariff and the Terms and Conditions Set Forth Therein.**

Section 13701(a) of the Act provides in relevant part that a “rate classification, rule or practice related to transportation or service provided by a carrier . . . involving . . . (1)(B) a rate for a movement by or with a water carrier in noncontiguous domestic trade . . . must be reasonable.” Subsection (b) of Section 13701 provides that when the Board finds it necessary to stop or prevent a violation of subsection (a), the Board shall prescribe the rate, classification, rule, practice, through rate, or division of joint rates to be applied for such transportation or service. Subsection (c) provides that “a complaint that a rate, classification, rule or practice in noncontiguous domestic trade violates subsection (a) may be filed with the Board.”

The doctrine of primary jurisdiction permits a court to refer an issue to an agency for determination when it would affect the uniformity of the regulated field and involve the agency's special expertise. *See DeBruce Grain, Inc. v. Union Pac. R.R.*, 149 F.3d 787, 790 (8<sup>th</sup> Cir. 1998); *see also, Pejepsco Industrial Park, Inc. v. Maine Central R.R. Co.*, 215 F.3d 195, 206 (1<sup>st</sup> Cir. 2000) (primary jurisdiction doctrine is intended to serve as a means of coordinating administrative and judicial machinery, to promote uniformity, and take advantage of agencies' special expertise). Among the factors the court considers in determining whether to refer an issue to an agency under the primary jurisdiction doctrine are whether the agency determination lies at the heart of the task assigned to the agency by Congress and whether referral to the agency will promote uniformity in the regulated field. *Id.*; *see also Atlantis Exp. Inc. v. Standard Transp. Services, Inc.*, 955 F.2d 529, 532 (8<sup>th</sup> Cir.1992) (primary jurisdiction should be invoked when referral will

promote uniformity in statutory and regulatory construction and involves policy considerations).

As reflected in the language of the Act, the determination of the reasonableness of a tariff provision lies within the exclusive jurisdiction of the Board. 49 U.S.C. § 13701; *see also Hargrave v. Freight Distrib. Serv. Inc.*, 53 F.3d 1019, 1021 (9<sup>th</sup> Cir. 1995) (the determination of tariff's reasonableness is matter within the jurisdiction of the ICC); *RTC Transp. Inc. v. Conagra Poultry Co.*, 971 F.2d 368, 372 (9<sup>th</sup> Cir. 1992) (the ICC has exclusive primary jurisdiction to determine the reasonableness of a filed rate); *U.S. v. Western Pac. R.R Co.*, 352 U.S. 59, 63 (1956) (reasonableness of tariff and question of tariff construction within exclusive primary jurisdiction of the ICC); *Baltimore & O.R Co. v. Brady*, 288 U.S. 448, 456 (1933) (questions as to reasonableness of rules and regulations governing tariff are for the ICC); *Union Pacific R.R. Co. v. FMC Corp.*, 2000 WL 134010 (E.D. Pa. 2000) (issue of reasonability of transportation provider's tariff falls squarely within the primary jurisdiction of the Board). Thus, under the primary jurisdiction doctrine, the issue of reasonableness of the rates and the terms of a tariff require determination by the Board. *Hargrave*, 53 F.3d 1021; *see also Sea-Land Service, Inc. v. Atlanta Pacific Internat'l, Inc.*, 61 F. Supp. 2d 1102, 1112-13 (D. Ha. 1999); *Advance United Expressways, Inc. v. Eastman Kodak, Co.*, 965 F.2d 1347, 1352-53 (5<sup>th</sup> Cir. 1992) (district court if confronted with issue within primary jurisdiction of ICC *must* stay its proceedings and refer the issue to the ICC). The reasonableness of the terms of a tariff is an area where uniformity and agency expertise are essential to a proper result. *Hargrave*, 53 F.3d at 1021. Accordingly, courts must refrain from deciding issues related to the reasonableness of a filed rate when the Board has primary jurisdiction to do so.

*Sea-Land Service*, 61 F. Supp. 2d at 1113; *see also Hargrave*, 53 F.3d at 1021-22 (district court erred in deciding whether filed tariff was unreasonable); *Pejepscot*, 215 F.3d at 205-06 (court must defer to Board on question of reasonableness of transportation practice); *Advance United Expressways, Inc. v. Eastman Kodak, Co.*, 965 F.2d at 1353 (where reasonableness of tariff at issue, there must be preliminary resort to the ICC).

## **II. The Terms and Conditions of Horizon's Tariff Are Not Reasonable**

The issue presented here is the reasonableness of terms and conditions contained in Horizon's tariff and specifically whether it is a reasonable practice to impose personal liability upon principals of corporate entities without providing actual notice that they are assuming such liability.

### **A. Well-Established Corporate Law Insulates Principals, Officers and Directors of a Corporation from Liability for Actions of the Corporation Absent Unusual Circumstances.**

A lynchpin of corporate law is that the corporate entity, as opposed to the corporation's principals, officers, directors or shareholders, assumes liability for the corporation's actions. In construing corporate liability, the fundamental premise is that the corporate entity should be recognized and upheld unless extraordinary circumstances call for an exception.

One of the fundamental characteristics of the corporation is that it is a legal entity distinct from that of the persons who compose it or act for it in exercising its functions. *See* 1 Fletcher, *Cyclopedia of the Law of Private Corporations* Section 1 (Permanent Edition 1999). Although public municipal corporations can be traced back to Roman times, the modern corporation has been in existence for well over a century. *Id.* While some have referred to the corporate entity as a "fiction," as Justice Oliver Wendell

Holmes recognized, “[i]f it is a fiction, it is a fiction created by law with intent that it should be acted on as true.” *Klein v. Board of Tax Sup’rs of Jefferson County, Ky.*, 282 U.S. 19, 23 (1930). Thus, a duly organized corporation enjoys a legal identity separate and apart from its shareholders, directors and officers and this distinction cannot be disregarded without disregarding the law. 1 *Fletcher* at Section 25. Indeed, the law permits the incorporation of a business for the very purpose of insulating an individual from personal liability. *Yoder v. Honeywell, Inc.*, 104 F.3d 1215, 1220 (10<sup>th</sup> Cir. 1997); *NLRB v. Greater Kansas City Roofing*, 2 F.3d 1047, 1053 (10<sup>th</sup> Cir. 1992) (corporate form of doing business is typically selected precisely so that the individual shareholder will not be liable). Observing the separate and distinct nature of the corporation is fundamental and pervades the law of corporations. 1 *Fletcher* at section 25.

In light of this well-established jurisprudence, it is not surprising that courts uniformly recognize, absent exigent circumstances, that the contract of a corporation is the contract of the legal entity and not of the shareholders individually or its corporate officers or directors. *Id.* at section 29; *see also Le Boeuf, Lamb, Greene & MacRae, L.L.P. v. Worsham*, 185 F.3d 61, 66 (2d Cir. 1999) (New York law, like that of other states, recognizes that officers and directors are not liable for the debts of the corporation); *Official Committee of Unsecured Creditors v. R.F. Lafferty & Co. Inc.*, 267 F.3d 340, 353 (3d Cir. 2001) (care should be taken on all occasions to avoid making entire theory of the corporate entity useless); *Sonora Diamond Corp. v. Superior Court*, 83 Cal. App. 4<sup>th</sup> 523, 538-39 (Cal. Ct. App. 2000) (corporation is a legal entity, separate and distinct from its stockholders, officers and directors with separate and distinct liabilities and obligations.)

Although the “corporate veil” may be pierced, disregarding the corporate entity and deeming the corporation’s acts and liabilities to be those of the individual acting on behalf of the corporation is only justified when the corporate form is used to perpetrate a fraud, circumvent a statute or accomplish some other wrongful purposes. 1 *Fletcher* at section 25; *see also, In re Cambridge Biotech Corp.*, 186 F.3d 1356, 1376 (Fed. Cir. 1999) (corporate veil should only rarely be pierced to prevent “gross inequity”); *Taylor v. Newton*, 117 Cal App. 2d, 752 (Cal. Ct. App. 1953) (corporate form ignored only when necessary to redress fraud or prevent palpable injustice).

Courts caution that the concept of palpable injustice sufficient to justify imposing personal liability on an individual acting on behalf of a corporation should not be stretched too far. Thus, even if there were evidence of fraud or gross injustice (and Horizon makes no such allegations), it is not enough to show that a creditor will remain unsatisfied if the corporate veil is not pierced. *NLRB v. Greater Kansas City Roofing*, 2 F.3d at 1053; *Mid-Century Ins. Co. v. Gardner*, 9 Cal. App. 4<sup>th</sup> 1205, 1213 (Cal. Ct. App. 1992). The purpose of the doctrine is not to protect every unsatisfied creditor, but rather to afford protection where conduct amounting to bad faith makes it inequitable for the corporation to hide behind its corporate form. *Id.* Therefore, courts must engage in a stringent inquiry and take care “on all occasions to avoid making the entire theory of the corporate entity useless.” *R.F. Lafferty & Co. Inc.*, 267 F.3d 340, 353.

Here, Horizon seeks to discard a fundamental precept of Anglo-American jurisprudence and impose personal liability upon directors and officers acting on behalf of a corporate entity for the corporation’s obligations without regard to any showing of fraud or inequitable conduct. It also seeks to do so without providing any meaningful

notice to “principals” and presumably corporate officers and directors, that they are assuming such personal obligations. The Petitioners challenge the reasonableness and the legality of Horizon’s tariff in this regard. Because a determination as to the reasonableness of Horizon’s tariff is within the exclusive jurisdiction of the Board, pursuant to 49 U.S.C § 13701, the Petitioners seek redress in the only venue available for such relief.

**B. Carrier Must Provide Actual Notice of Tariff Provisions That Are Not Mandated by Law.**

Although valid tariffs have the force of law, the Board has refused to enforce tariff provisions that are designed to “trip up” shippers and impose unreasonable obligations. *See Shintech, Inc. v. Union Pacific R.R.*, 1987 WL 99779 (Oct 29, 1987, I.C.C.) At a minimum, shippers and their “principals” must be provided specific notice of such provisions before they can be enforced.

In construing the enforceability of a particular tariff provision, courts and regulators recognize that “a tariff should be interpreted to avoid unjust, absurd or improbable results” and the “the practical application of tariffs by interested persons should also be considered in determining the meaning of the tariffs.” *National Van Lines, Inc. v. U.S.*, 355 F.2d 326, 332-33 (7<sup>th</sup> Cir. 1966). Consistent with the rule that written instrument will be construed strictly against their drafter, any ambiguity in tariffs must be resolved in favor of the shippers. *Id.* at 333; *see also Encyclopaedia Britannica, Inc. v. SS Hong Kong Producer*, 422 F.2d 7, 14 (2<sup>nd</sup> Cir. 1969) (bills of lading are contracts of adhesion that must be narrowly and strictly construed against the carrier); *La Salle Machine Tool, Inc. v. Maher Terminal, Inc.* 452 F. Supp. 217, 221 (D. Md. 1978), *aff’d*, 611 F.2d 56 (4<sup>th</sup> Cir. 1979) (bills of lading contracts of adhesion strongly construed

against drafters); *Cross Equipment, Ltd. v. Hyundai Merchant Marine (America), Inc.*, 1999 WL 169433 (E.D. La. 1999) (bills of lading are contracts of adhesion requiring ambiguities to be resolved against the carrier); *Atlantic Mutual Insur. Co. v. Companhia de Navegacao Maritima Netumar*, 113 Misc. 2d 516, 449 N.Y.S. 2d 588 (Civ. Ct. N.Y. 1982) (exculpatory terms of tariffs should be narrowly construed).

Carriers have a long history of drafting tariff rules and bills of lading incorporating such tariff rules that impose onerous liabilities on shippers and exonerate themselves from liability even for their own negligence. *See, e.g., Grace Line, Inc. v. Todd Shipyard Corp.*, 500 F.2d 361, 372 (9<sup>th</sup> Cir. 1974) (terms of tariffs, and the bills of lading which often incorporate such tariffs, are “for all practical purposes completely within the carrier’s power . . .”). Indeed, it was because of the gross disparity of bargaining power between carriers and shippers, who were “shorn lamb[s] wholly untempered to the wind,”<sup>2</sup> that Congress enacted the Carriages of Goods by Sea Act, 46 U.S.C., Section 1300, *et seq.* (COGSA). “The purpose of Congress in enacting COGSA was to counterbalance attempt by carriers, as the drafter of bills of lading, to exonerate themselves from liability for lost or damaged cargo.” *Atlantic Mutual Insur. Co. v. Companhia de Navegacao Maritima Netumar*, 113 Misc. 2d 516, 449 N.Y.S. 2d 588 (Civ. Ct. N.Y. 1982), *citing General Electric Co. v. M/V Lady Sophie*, 458 F. Supp. 620 (S.D.N.Y. 1980). Specifically, Congress recognized carrier’s persistent efforts to impose undue obligations on shippers and to limit their own duties “by inserting into [bills of lading] foot long, double columns of well nigh indecipherable fine print.” *Encyclopaedia Britannica*, 422 F.2d at 12. Thus, COGSA was enacted to obviate the necessity for the

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<sup>2</sup> *Encyclopaedia Britannica, Inc. v. SS Hong Kong Producer*, 422 F.2d 7, 14 (2<sup>nd</sup> Cir. 1969).

shipper to make “a detailed study of all of the fine print clauses of a carrier’s regular bill [of lading] on each occasion before it ships out a packages.” *Id.* at 14.

In construing whether the terms of a tariff or bill of lading incorporating such a tariff are enforceable against a shipper, courts seek to ascertain whether the shipper has been provided with actual notice of the term to be enforced. This notice requirement is particularly strict when the terms or conditions to be enforced are contrary to established law or the practice in the industry.

The Ninth Circuit in *Comsource Independent FoodService Comp. Inc v. Union Pac. R.R. Co*, 102 F.3d 438 (9<sup>th</sup> Cir. 1996) analyzed whether a carrier could rely upon the terms in its tariff to insulate itself from liability. The court noted that historically, a tariff on file with the ICC was construed to have the effect of a statute and to give the shipper constructive notice of its terms. *Id.* at 443. This, however, “prompted carriers to bury various limitations of liability provisions and other burdensome non-mandatory provisions in the tariff and to incorporate those provisions into the bill of lading by referring to the entire tariff, knowing that shippers rarely scrutinize all the terms in the tariff.” *Id.* at 443. As a result, the Ninth Circuit recognizes that the filing of a tariff gives constructive notice of “only those matters that are required by law to be filed.” *Id.*

Among the factors the Ninth Circuit considers in determining if a term or condition in a tariff is enforceable are whether: (1) the provision was specifically brought to the shipper’s attention; (2) the shipper drafted the contract and directly negotiated its terms; and (3) the tariff provision was specifically reproduced in the bill of lading. *Id.* at 444; *see also Hughes Aircraft Co v. North Am. Van Lines, Inc.* 970 F.2d 609, 612 (9<sup>th</sup> Cir. 1992) (filing of a tariff alone does not limit the carrier’s liability, the shipper must

also be given “reasonable notice of the liability limitation and the opportunity to obtain information necessary to make a deliberate and well-informed choice”).

The Ninth Circuit’s decision in *Comsource* is consistent with holdings of the Eleventh Circuit.

The Eleventh Circuit has made the distinction between mandatory and non-mandatory provisions.<sup>3</sup> It held that mandatory provisions have the force of law while non-mandatory provisions do not bind the shipper if they conflict with typical provisions associated with the governing federal statutes and the shipper had no actual notice of the non-mandatory provisions. . . .

*Id.*

The Second Circuit in *Encyclopaedia Britannica*, 422 F.2d 7, similarly refused to enforce a provision in a carrier’s long-form bill of lading which allowed the carrier to store books that were being shipped on the deck of a vessel, rather than below deck. In so holding, the court recognized that the position espoused by the carrier placed “the burden of inquiry on the shipper, in circumstances in which it is highly unlikely that such an inquiry would be made to search out a copy of the carrier’s regular bill of lading to discover a clause which in effect authorizes a serious deviation from the standard provision” of a contract of carriage. *Id.* at 13. Given that it was impractical for a shipper to be compelled to make a detailed study of the fine print clauses of the carrier’s regular bill of lading, the court held that the absent an explicit warning on the face of the short form bill of lading that the shipper was assuming an abnormal risk, the provision was unenforceable. *Id.* at 14.

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<sup>3</sup> The Eleventh Circuit states that the term “non-mandatory” is a shorthand means of identifying insertions into tariffs and long form bills of lading of various burdensome provisions not required by law to be there. *Fine Foliage of Florida Inc v. Bowman Transp., Inc.*, 901 F.2d 1034, 1041(11<sup>th</sup> Cir. 1990).

In *La Salle Machine Tool, Inc. v. Maher Terminal, Inc.*, 452 F. Supp. 217 (D. Md. 1978), the court also rejected the defendant's argument that the filing of a tariff with the Federal Maritime Commission gave constructive notice of the provisions in that tariff. In so holding, the court followed century old law establishing that "when a company desires to impose special and most stringent terms upon its customers . . . there is nothing unreasonable in requiring that those terms shall be distinctly declared and deliberately accepted." *Id.* at 223; *see also, Fine Foliage of Florida Inc v. Bowman Transp., Inc.*, 901 F.2d 1034, 1041(11<sup>th</sup> Cir. 1990) (non-mandatory provisions in tariffs filed by carriers ineffective when actual notice is not given to carrier); *Toledo Ticket Co v. Roadway Express, Inc.*, 133 F.3d 439, 443 (6<sup>th</sup> Cir. 1998) (in order to provide shipper with reasonable notice, carrier must affirmatively bring provision to the shipper's attention and cannot satisfy its heavy burden "by simply alluding to language on file with the ICC as part of its tariff"); *Atlantic Mutual Insur. Co. v. Companhia de Navegacao Maritima Netumar*, 113 Misc. 2d 516, 499 N.Y.S. 2d 588 (Civ. Ct. N.Y. 1982) (absent actual notice of tariff provision, limitation of liability clause set out in tariffs is unenforceable); *Caribbean Produce Exchange Inc. v. Sea Land Service, Inc.*, 415 F. Supp. 88, 94 (D. P.R. 1976) (refusing to enforce provision only contained in tariff and long-form bill of lading because nothing to alert shipper to terms at issue).

**C. Horizon Was Under an Obligation to Provide Specific Notice That It Sought to Impose Liability on Principals.**

Here, because the term in Horizon's tariff seeking to impose liability on Mr. Cohen as a "principal" of West Point is a not a mandatory provision that was required to be included in the tariff, and because no actual notice was provided to Mr. Cohen that

Horizon sought to impose personal liability upon him for the obligations of the corporate entity, it is not enforceable.

As reflected in Section II A, *infra*, Anglo-American jurisprudence for well over a century has insulated officers and directors from personal liability for the obligations of corporate entities. Thus, the language in its tariff that that Horizon now seeks to enforce constitutes a radical departure from existing law. As set forth by the Ninth Circuit in *Comsource*, in determining whether the shipper had reasonable notice that the carrier was imposing such a radically different obligation upon it, courts and regulators consider whether: 1) the provision was specifically brought to the shipper's attention; 2) the shipper drafted the contract and directly negotiated its terms; and 3) the tariff provision was specifically reproduced in the bill of lading. 102 F.3d at 444. Here, none of these criteria are satisfied.

Rather than expressly informing shippers that it was seeking to impose personal liability upon undefined principals of the corporation, Horizon buried a cryptic reference to principals in its tariffs. It then sent invoices which contained small print generic references to Horizon's tariffs, but in no event specified which tariff was applicable, let alone the specific "rule" that purported to impose liability for freight charges on undefined principals. Further, the tariffs were form documents that neither West Point nor Cohen had any role in drafting or negotiating. Cohen Aff. at ¶ 8.

If Horizon had a legitimate desire to impose personal liability on Mr. Cohen or other corporate officers it easily could have done so by requiring them to sign a contract guaranteeing the obligations of the corporate entity. Indeed, the tariff upon which Horizon relies specifically provides that the carrier may extend credit upon the

completion of a credit application in which the signatory “unconditionally guarantees to Carrier payment of all ocean freight and related charges due. . .” Tariff at ¶ 7. Rather than take such an honest and straightforward approach, however, Horizon opted to surreptitiously slip the word “principals” into its tariff thereby seeking to impose personal liability upon unsuspecting individuals.

Horizon did not even identify in its invoices which of Horizon’s numerous tariffs it was relying upon to impose such an onerous obligation upon corporate “principals” as opposed to the corporate entity itself, as a result of the corporation having contracted with Horizon. Indeed, the lack of actual notice to Cohen of the obligation that Horizon now seeks to impose upon him in its tariffs is evidenced by the fact that Horizon’s own lawyer, who specializes in transportation law, was initially unable to determine which of Horizon’s many tariffs governed the issue. *See* Cohen Aff. at ¶ 7. Before Horizon is permitted to impose a legal obligation that flies in the face of centuries of Anglo-American jurisprudence, it must provide actual notice to the party assuming a legal obligation that it is doing so. “[W]hen a company desires to impose special and most stringent terms upon its customers . . . those terms [must] be distinctly declared and deliberately accepted.” *La Salle Machine Tool, Inc v. Maher Terminal, Inc.* 452 F. Supp. at 223. Here, having failed to do so, it is an unreasonable practice for Horizon to seek recovery against Cohen, as opposed to the corporate entity it contracted with, West Point.

**D. The Term Principal is Ambiguous and Must Be Construed Against Horizon**

Even if Cohen were provided notice of the terms and conditions in Horizon’s tariff, which he was not, the tariff should not be construed so as to apply to him because Horizon never clearly defines who is a principal that is obligated to pay corporate

obligations. As reflected above, the terms of conditions in tariffs and bills of lading are form documents unilaterally imposed by carriers without any input or negotiation from shippers. Indeed, as the Second Circuit observed in *Encyclopaedia Britannica*, the language inserted therein by carriers consists of “foot long, double columns of well nigh indecipherable fine print.” 422 F.2d at 14. As such, they are contracts of adhesion whose terms must be construed against the carrier.

Here, Horizon has surreptitiously slipped the phrase “and principals of said liable parties” into its tariff without any definition of the term principal or explanation of who is sought to be included within its broad net. Does the term apply to all corporate officers of a company? Does it apply to all directors of a company, *i.e.*, both inside directors and outside directors? Does it apply to all shareholders of a company or does it only apply to those with a significant ownership stake in the corporate entity? If it applies only to those with a significant ownership stake in the company, where is the line drawn as to such ownership. Is a 5, 10, 20 or 50% ownership stake required? Might any spokesman to a corporation, such as its counsel or accountant, be a “principal”? The term principals is unclear even to lawyers specializing in corporate and transportation law. It is certainly more ambiguous and uncertain for shippers untrained in the law straining with a magnifying glass to decipher foot long columns of fine print. Given these ambiguities, the term principal should not be construed to apply to Mr. Cohen here.

### **CONCLUSION**

The Petitioner challenges the reasonableness and the legality of Horizon’s tariff. The Board has exclusive jurisdiction to make such a determination. Because it is not a reasonable practice for Horizon to disregard the existence of the corporate entity with

which it contracts in order to assert personal liability against principals of West Point and to do so unilaterally by publishing an anomalous rule without proving any meaningful notice to the parties against whom the carrier ultimately may seek relief, the Board should declare Horizon's tariff rule unreasonable to the extent it purports to override well-established principles of corporate law. At a minimum, given that Horizon has not defined who is a principal subject to personal liability pursuant to its radical new approach to corporate law, Eli Cohen should not be construed to fall within the scope of Horizon's tariff rule.

Respectfully submitted,



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Attorneys for Petitioners  
*WEST POINT RELOCATION, INC.*  
and *ELI COHEN*

DATE: December 28, 2009

**CERTIFICATE OF SERVICE**

I do hereby certify that I have delivered a true and correct copy of the foregoing document to the following addressee by depositing same in the United States mail, first class postage prepaid, or by email transmission, this 28<sup>th</sup> day of December 2009:

Jonathan Benner  
REED SMITH  
1301 K Street, NW – Suite 1100  
Washington, DC 20006

Attorneys for  
*HORIZON LINES LLC*

Linda D. Thomas

# **EXHIBIT A**

**AFFIDAVIT OF ELI COHEN**

STATE OF CALIFORNIA:

COUNTY OF LOS ANGELES

Affiant, ELI COHEN, states as follows:

1. My name is Eli Cohen. I am the President of West Point Relocation, Inc. ("West Point"). This affidavit is based upon my personal knowledge.
2. Horizon Lines, Inc. ("Horizon") sued me personally in the United States District Court for the Central District of California, Case No. CV 08-6362 (RSW), based upon the fact that its tariff states that it can recover from me as a "principal" of West Point.
3. I never entered into a credit agreement or any other contract with Horizon in which I assumed personal liability for the obligations of West Point.
4. Horizon never submitted bills of lading to West Point (or to me.) It only submitted invoices and freight bills to West Point. These documents did not contain any terms and conditions.
5. The documents submitted by Horizon never reflected that I was assuming personal liability for the obligations of West Point.
6. The documents submitted by Horizon had a small notation indicating that shipments were subject to the terms and conditions of Horizon's tariffs. The individual tariff at issue was never identified nor was the tariff ever forwarded to West Point or to me.
7. After I was sued by Horizon, we requested that Horizon provide us with a copy of its tariff. Horizon's counsel initially provided my lawyer with a copy of a document which it said was the applicable tariff. Subsequently, Horizon gave my lawyer a different document which it said was the tariff that governed the shipments at issue.
8. I never reviewed Horizon's tariff and I was never instructed to do so by Horizon. Neither West Point nor I had any role in drafting or negotiating the terms of the tariff.

9. I do not know what it means to be a "principal" of West Point or whether I am one.

FURTHER AFFIANT SAYETH NAUGHT.

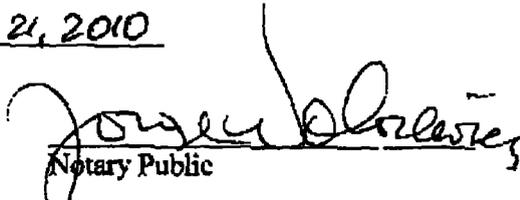
  
\_\_\_\_\_  
Eli Cohen

SUBSCRIBED AND SWORN TO before me by Eli Cohen, Affiant, this 28<sup>th</sup> day of December 2009.

WITNESS MY HAND AND OFFICIAL SEAL.

My commission expires: AUG. 21, 2010



  
\_\_\_\_\_  
Notary Public

## **EXHIBIT B**



Horizon Lines, LLC

INVOICE SUMMARY

Please include remittance copy with payment

Pier 51-A Sand Island Access Rd.  
Honolulu, HI 96819

Direct Inquires to :  
Domestic Rate Audit  
808-842-1515

**\$975.00 COLLECT**

WEST POINT RELOCATION  
10505 GLEN OAKS BLVD  
  
Pacoima, California 91331  
United States  
  
Reference Number : OWNER: RYAN ANDERTON



Freight Bill	Container	Booking Number	Shipper Reference	Vessel Voyage	Sail Date	Due Date	Charges
1. 300404434	HRZU433083	CA2022769	70523	EN232N	12/04/07	01/03/08	975.00

Total Invoice Charges : **\$975.00**

\*8207

1590066

Remit To:  
Horizon Lines  
P O BOX 730369  
Dallas, TX 75373-0369

Shipments invoiced herein are subject to the terms and conditions of Horizon Lines tariffs as filed with the Surface Transportation Board. Failure to pay charges herein on a timely basis may subject invoiced shipment(s) to penalty and may result in suspension of credit privileges.

## **EXHIBIT C**

TARIFF RULES LISTING  
HRZD - TARIFF # 468

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TARIFF HORIZON LINES, LLC- STB HRZD-468 (BETWEEN US, PR, CN& HT)

RULE# CYC# APP TITLE

-----  
720- PAYMENT OF FREIGHT AND CHARGES

Filed on: 14MAR2003 Effective: 17MAR2003 Thru: Expire:

-----  
RJLE TEXT

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A. Freight Payment

1. Full freight to the port or point of discharge named on the bill of lading and all advance charges against the goods shall be considered completely earned and due on receipt of the goods by Carrier, even though the vessel or goods are damaged or lost or the voyage is frustrated or abandoned.

2. All sums payable to the Carrier are due when incurred and shall be paid in full in United States Currency.

3. The shipper, consignee, holder of the bill of lading, bill to party, owner of the goods and principals of said liable parties shall be jointly and severally liable to Carrier for the payment of all freight, demurrage, General Average and other charges. Said parties are also jointly and severally liable for expenses incurred by Carrier in collecting sums due Carrier, including but not limited to collection agency fees, reasonable attorney's fees and costs, including all fees and costs of mediation, arbitration, trial appeals, and bankruptcy proceedings. Carrier may choose which of said parties to collect the sums owed from and by pursuing collection of the sums owed from one of the parties is not waiving its right to pursue collection of the sums owed from one of the other liable parties. Payment of ocean freight and related charges to a freight forwarder, broker or anyone other than Carrier or its authorized agent, shall not be deemed payment to Carrier and shall be made at payer's sole risk.

4. Carrier reserves the right not to forward, deliver or release shipments or payments in its possession until all outstanding freight and related charges on delivered/completed shipments is made to Carrier

5. Carrier may, at its option, accept approved credit card payment, viz: Mastercard or VISA, for movement of Personal Effects, Household Goods or Privately Owned Vehicles.

Payment by credit card will only be accepted at Carrier's Terminals where facilities for processing credit card payment have been installed. Payment via company check may be accepted subject to returned check fee of one hundred dollars (\$100) per check returned by the applicable financial institution as non-sufficient funds (NSF).

6. Terms for all freight and related charges:

Parties without established credit with Carrier:

Due upon receipt of cargo or when service is rendered.

#### B. Credit Agreement

1. Carrier may extend credit privileges upon the completion of a Credit Application and Agreement, and approval by Carrier based on the applicant's creditworthiness. The complete Credit Application and Agreement may be obtained by contacting the contracting Carrier.

2. Carrier, in its sole discretion based on creditworthiness, reserves the right to modify or discontinue, in part or in whole, the availability of credit privileges, terms and agreements at any time, with or without notice.

3. The credit agreement constitutes the full understanding of Carrier or any successor, subsidiary or affiliate ("Carrier") and applicant, and the complete and exclusive statement of the terms of this credit agreement. The credit agreement shall replace and supersede any agreements between Carrier and applicant that deal with the same subject matter as referenced therein.

4. Receipts issued by Carrier for all documents received by Carrier will be signed by Carrier or on Carrier's behalf by the Agent Carrier may designate.

5. Full freight to the port or point of discharge named on the bill of lading or invoice and all advance charges against the goods shall be considered completely earned and due on receipt of the goods by Carrier, even though the vessel or goods are damaged or lost or the voyage is frustrated or abandoned. All sums payable by applicant to Carrier shall be paid in full in United States currency.

6. If the applicant engages or utilizes the services of an Ocean Freight Forwarder, Logistics Broker, Customs House Broker or other Agent in connection with the payment of ocean freight and/or other related charges to Carrier on applicant's behalf, applicant acknowledges and agrees that such party acts as applicant's agent and not as the agent of Carrier.

7. Applicant unconditionally guarantees to Carrier payment of all ocean freight and related charges due regardless of whether funds for payment have been advanced by applicant to applicant's Ocean Freight Forwarder, Logistics Broker, Customs House Broker or any other agent of applicant. Further, applicant remains absolutely responsible and unconditionally liable and guarantees payment if applicant's Ocean Freight Forwarder, Logistics Broker, Customs House Broker or any other of the applicant's agents fails for any reason to make such payments to Carrier.

8. Applicant agrees to remit payment on all invoices within credit terms specified in Carrier's tariff(s), service contracts, or, in absence of such rules, within thirty (30) days from the vessel sail date or invoice date, whichever occurs earlier.

9. Nothing contained herein shall preclude Carrier from exercising absolute discretion based on creditworthiness to refuse to extend credit or its right, where credit has been extended, to demand and collect payment of all freight and related charges prior to cargo's arrival at port or point of discharge.

10. If freight and related charges are not paid when due, Carrier reserves the right to collect such freight and related charges from the applicant or its agents, and any expenses incurred in collecting such freight and related charges due Carrier, including but not limited to collection agency fees, reasonable attorney's fees and costs, including all fees and costs of mediation, arbitration, trial, appeals, and bankruptcy proceedings.

11. The applicant agrees that all shipping documents will indicate the correct address to which freight invoices are to be mailed.

12. Carrier reserves the right not to forward, deliver or release shipments or payments in its possession until all outstanding freight and related charges on delivered/completed shipments is made to Carrier.

13. The terms of the applicable Carrier's tariff(s) or service contract are incorporated by reference and made a part of the credit agreement. If there is any conflict between the terms of the credit agreement and the terms of the Carrier's tariff(s) or service contract, the terms of the tariff(s) or service contract shall prevail over the terms of the credit agreement.

14. The credit agreement shall become effective on the date it is signed by both Carrier and applicant, and shall remain in full force and effect unless suspended or canceled pursuant to the terms of the agreement. Suspension or cancellation of the credit agreement shall not terminate or otherwise affect any accrued obligations of one party to the other under the agreement which have arisen prior to such suspension or cancellation. Notwithstanding any other provision of the agreement, either party may cancel the agreement on thirty (30) calendar days written notice to the other party; provided, however, that Carrier, in its sole discretion, may suspend or cancel the agreement and all credit privileges extended thereunder effective immediately for applicant's non-compliance with the terms of the agreement.

15. The credit agreement may not be assigned by applicant without the prior written consent of Carrier.

16. Carrier reserves the right, based upon a change in the applicant's credit history/performance, to adjust applicant's credit limit accordingly.

17. Applicant authorizes Carrier to check the provided references and credit reporting companies pertaining to applicant's credit responsibility, and authorizes said references and credit reporting companies to release appropriate credit information to Carrier.

18. As a condition to the re-establishment of credit once suspended, Carrier may require surety bond(s), irrevocable standby letter(s) of credit or any other form of security deemed necessary to help ensure future compliance with the credit terms.

19. Applicant's acceptance of credit privileges from Carrier constitutes applicant's assent to the terms and conditions governing such privileges that are published in this tariff.

20. Terms for all freight and related charges:

Parties with established credit with Carrier:

Thirty (30) days from vessel sail date or invoice date, whichever occurs earlier.

\*\*\*\*\* End of Report \*\*\*\*\*