Nos. 17-4061, 17-4062

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

OCEANIC ILLSABE LIMITED and OCEANFLEET SHIPPING LIMITED,

Defendants-Appellants.

On Appeal from the U.S. District Court, Eastern District of North Carolina
No. 7:15-cr-108-H, Honorable Malcolm J. Howard, Senior District Judge

RESPONSE BRIEF FOR THE UNITED STATES

JEFFREY H. WOOD
Acting Assistant Attorney General

JOHN STUART BRUCE
United States Attorney

JENNIFER MAY-PARKER
First Assistant United States Attorney
Eastern District of North Carolina

ERIC GRANT
Deputy Assistant Attorney General

ALLEN M. BRABENDER
KENNETH E. NELSON
BRENDAN C. SELBY
EMILY A. POLACHEK
Attorneys, U.S. Department of Justice
Environment & Natural Resources Division
P.O. Box 7415
Washington, DC 20044
(202) 514-5442
emily.polachek@usdoj.gov

Of Counsel:

BRENDAN T. GAVIN, LCDR
United States Coast Guard
Deputy Staff Judge Advocate
Fifth Coast Guard District

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APPS	Act to Prevent Pollution from Ships
Defendants	Oceanic Ilsabe, Ltd., and Oceanfleet Shipping, Ltd.
ECF No.	District court electronic case file number
JA	Appellants' Joint Appendix
GA	Government's Supplemental Appendix
m^3	Cubic meters
MARPOL	International Convention for the Prevention of Pollution from Ships
M/V	Marine Vehicle
ppm	Parts per million
PSR	Presentencing report
SA	Appellants' Sealed Appendix
SMS	Safety Management System
USCG	United States Coast Guard

INTRODUCTION

"The intentional discharge of oil from vessels is the largest anthropogenic source of petroleum oil pollution in the oceans." SA4. The United States is party to a treaty designed to reduce vessel pollution. The statute implementing the treaty, the Act to Prevent Pollution from Ships (APPS), imposes treatment and recordkeeping requirements and imposes criminal sanctions for certain violations.

The United States prosecuted Defendants-Appellants Oceanic Ilsabe, Ltd. and Oceanfleet Shipping, Ltd. (collectively "Defendants) for APPS violations, the falsification of records, and obstruction of justice in relation to events aboard the cargo vessel *M/V Ocean Hope* owned by Oceanic and managed by Oceanfleet. Also prosecuted were individual defendants Chief Engineer Rustico Ignacio and Second Engineer Cassius Samson, neither of whom have appealed their convictions.

On or about June 14, 2015, as the *Ocean Hope* sailed across the Pacific Ocean to the United States, engine-room personnel discharged oily bilge water and oil sludge into the ocean through a "magic pipe" designed to bypass the vessel's pollution-control equipment. Second Engineer Samson ordered these illegal discharges with the knowledge of Chief Engineer Ignacio. To conceal these discharges, Ignacio and Samson falsified the ship's oil-record-book, which the ship's Master was required to maintain per APPS regulations. When the U.S. Coast Guard conducted an inspection of the ship in the Port of Wilmington on July 15, 2015, a whistleblower informed the inspectors of the illegal discharges. Ignacio and Samson further obstructed the Coast

Guard's investigation by lying to investigators and instructing their subordinates to do the same.

On appeal, Defendants do not dispute that these violations occurred. Rather, they argue that the Government presented insufficient evidence to convict them as vicariously liable for the acts of their agents. Defendants also challenge the fine and probation conditions imposed at sentencing. For the reasons set forth below, this Court should affirm Defendants' convictions and sentences.

STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. The district court entered final judgment against Defendants on January 11, 2017. JA526, 532. Defendants filed timely notices of appeal on January 31, 2017. JA538, 544. This Court has jurisdiction to review Defendants' convictions pursuant to 28 U.S.C. § 1291. The Court has jurisdiction to review Defendants' sentences pursuant to 18 U.S.C. § 3742

STATEMENT OF ISSUES

Defendants challenge the sufficiency of the Government's evidence and the district court's sentences. Specifically, the following questions are presented for review:

1. Viewed in the light most favorable to the Government, was there sufficient evidence presented at trial to show that Defendants were vicariously liable for the charged offenses because the handling of oily

substances, maintenance of the oil-record-book, and management of engine room personnel was within the scope of the Chief Engineer's and Second Engineer's employment and they intended for their illegal act to benefit Defendants?

2. Did the district court, after adopting the recommendations of the presentence report, properly apply the U.S. Sentencing Guidelines and properly exercise its wide discretion in sentencing Defendants to pay reasonable fines and comply with conditions of probation?

STATEMENT OF THE CASE

I. LEGAL BACKGROUND

The United States is a party to the International Convention for the Prevention of Pollution from Ships, 1340 U.N.T.S. 61 (1983), commonly referred to as MARPOL (short for "marine pollution"). MARPOL aims to eliminate marine pollution by specifying how oceangoing vessels should dispose of oil and other harmful substances. *See Angelex Ltd. v. United States*, 723 F.3d 500, 502 (4th Cir. 2013); *United States v. Ionia Mgmt. S.A.*, 555 F.3d 303, 306 (2d Cir. 2009). MARPOL is not a self-executing treaty; its signatories must enact implementing legislation "to prohibit violations of the treaty . . . and to provide penalties adequate in severity to discourage violations of [the treaty]." *Angelex Ltd.*, 723 F.3d at 502 (internal quotation marks omitted). Congress therefore enacted the Act to Prevent Pollution from Ships (APPS), 33 U.S.C. §§ 1901–1915. APPS authorizes the Coast Guard to promulgate

regulations that implement MARPOL's provisions, enforce APPS, and provide for the investigation of potential violations. *Id.* §§ 1903(a), 1907(a)-(b).

MARPOL and APPS include provisions addressing marine pollution from the two types of oily substances involved in this case—bilge water and oil sludge. Bilge water is the mixture of oil and water that accumulates in the bilge (or bottom) of a ship; it includes "the oil, fuel and other liquids that drip or leak from machinery during the ship's normal operation, and any seawater that leaks into the ship." *United States v. Pena*, 684 F.3d 1137, 1142 n.2 (11th Cir. 2012); *see also* GA9. During a voyage, a significant amount of oily water can accumulate in the bilges, engine rooms, and mechanical spaces of a large commercial vessel like the *Ocean Hope*. Periodically, accumulated bilge water is pumped into a bilge-water holding-tank, which must be regularly emptied. The disposal of bilge water poses significant environmental risks, as it may be polluted with harmful substances, including oil, oil residue, lubrication fluids, and other liquids.

MARPOL and APPS prohibit vessels from discharging bilge water into the sea unless it is first processed through filtration equipment. MARPOL, Regs. 4(c) & 9, 1340 U.N.T.S. at 67,202; 33 C.F.R. § 151.10(a). The equipment used for this purpose is called an "oily-water-separator." As its name implies, the oily-water-separator filters bilge water to separate the water from any oily contents. GA22. When the separated water contains 15 ppm (parts per million) or less of oil, the machine allows the water to be discharged overboard. GA22–23. Any bilge water that is not filtered through

the ship's oily-water-separator must "be collected and retained in tanks on the ship and discharged at a proper facility once the ship arrives in port." *Pena*, 684 F.3d at 1142.

The oily substance contained in bilge water (and subsequently separated out again during the filtration process) is known as oil sludge. GA23. Oil sludge is a thick, black, viscous oil that collects in a ship's bilges due to the purification of diesel fuel and lubrication on the ship. GA1. Sludge accumulates at a rate around 1% or greater of the diesel fuel that a ship consumes. JA77. When sludge is separated out from bilge water, it is pumped from the oily-water-separator to a holding tank called the "sludge tank." GA23. There are two approved methods for disposing of sludge: (1) burning it in the ship's incinerator, or (2) offloading it to an onshore disposal facility. *See* MARPOL, Annex VI, Reg. 16.1; GA2, 10; JA77–78.

In addition to proscriptions regarding the filtration of dirty bilge water, MARPOL and APPS also require vessels to document their discharges and transfers of oily substances. *United States v. Abrogar*, 459 F.3d 430, 432 (3d Cir. 2006); *see also* MARPOL, Annex 1, Reg. 17; 33 C.F.R. §151.25. "[T]he person or persons in charge of the operations concerned" must sign each "completed operation" that is recorded in the book and "the master or other person having charge of the ship" must sign each "completed page." 33 C.F.R. § 151.25(h). More generally, "[t]he master or other person having charge of a ship required to keep an Oil Record Book shall be responsible for the maintenance of such record." *Id.* § 151.25(j). "[T]he Coast Guard

typically relies on a ship's oil record book and statements of the crew to determine whether the crew is properly handling oil-contaminated water and its disposal." *Abrogar*, 459 F.3d at 432. Consequently, the book must be available for inspection onboard the ship. 33 C.F.R. § 151.25(*i*).

APPS includes criminal enforcement provisions that make it a felony to knowingly violate the MARPOL protocol, APPS, or the APPS regulations. 33 U.S.C. § 1908(a). Criminal liability for foreign vessels and personnel is limited to violations of MARPOL that occur in U.S. ports or waters. *See id.* § 1902(a). Therefore, the duty of a foreign vessel like the *Ocean Hope* to maintain an oil-record-book requires that the book is "accurate (or at least not knowingly inaccurate) upon entering the ports [or] navigable waters of the United States." *United States v. Jho*, 534 F.3d 398, 403 (5th Cir. 2008); *see also Ionia Mgmt.*, 555 F.3d at 306. In other words, although the United States may lack jurisdiction to prosecute illegal discharges made in international waters, responsible parties who enter U.S. ports may be prosecuted for failing to record such discharges in the oil-record-book. *See United States v. Fafalios*, 817 F.3d 155, 158 (5th Cir. 2016).

II. FACTUAL BACKGROUND

A. The Corporate Defendants and the *M/V Ocean Hope*

Defendant Oceanfleet is a Greek shipping company owned by the Ioannou family that has, in recent years, operated more than 10 vessels owned by shell companies like Oceanic. Defendant Oceanic was incorporated in 2007 in Liberia.

SA13. Shortly after its incorporation, Oceanic purchased the *Ocean Hope*, a general cargo carrier built in 1996, for $31.9 million. SA13. The ship was sold for scrap in May 2016. *Id.*

It is common within the industry for shipping companies like Oceanfleet to establish a separate, single-purpose entity like Oceanic to serve as the registered owner of each vessel in the fleet to immunize the shipping company from certain financial liability.[1] Evidence presented at sentencing shows that Oceanic was a shell company created by Oceanfleet to serve only as the registered owner of the *Ocean Hope*. Indeed, Oceanic is managed out of Oceanfleet's offices in Athens, SA13 n.13, 24, and its registered address in Liberia is the Liberian International Ship & Corporate Registry, which investigative journalists have revealed to be a registry for thousands of single-entity ship owners, *see* ECF No. 138 at 12. According to a report from a respected maritime credit reporting agency Oceanic "acts as a single ship-owning company that is understood to belong to the wider Oceanfleet group," and it is "controlled by the same principals behind Oceanfleet." GA374, 376. Oceanic "is a brass-plate entity and therefore employs no staff of its own." *Id.* at 3. Nicola Ioannou, a member of the Ioannou family and an Oceanfleet employee, serves as Oceanic's corporate

[1] *See* Richard Coles & Edward Watt, *Ship Registration Law and Practice* 56 (2d ed. 2009); George M. Chalos, Director, Chalos & Co. P.C., "Innocent Until Proven Guilty—Or Not?" Presentation at 2014 Safety4Sea Forum ("Every owner here has a single-purpose entity for each ship in the fleet."), *available at* https://www.youtube.com/watch?v=XVGWxGmApF4&t=26s (discussion starting around 15:30) (last visited June 16, 2017).

representative. There is also significant overlap between the boards of directors for both Defendants. SA4. Under this corporate scheme, Oceanfleet's stakeholders are the beneficial owners of the *Ocean Hope* and other vessels, but revenues from the fleet are first filtered through single-purpose entities like Oceanic.

Around the time of the charged offenses, the *Ocean Hope* and its 21 crewmembers (JA484) sailed from Bangladesh to Wilmington, North Carolina. SA 6. Dumitru Tabacaru was the Master (also referred to as the Captain) of the *Ocean Hope* and was responsible for the ship. JA154; GA169. The remaining crewmembers were divided between the deck department and the engine department. GA291, 335. Chief Engineer Ignacio was the head of the engine department and was assisted by Second Engineer Samson. *Id.* Together, Ignacio and Samson "supervised several lower-level engineering crewmembers, including a Third Engineer, [a] Fourth Engineer, [a Welder,] two Oilers, and an assistant oiler known as the 'Wiper.'" SA5; *see also* GA335; GA128.

Defendants had hired the engine department crew using a staffing agency in the Philippines. *See* JA332 (explaining that both Oceanic and Oceanfleet paid the staffing agency). Most of the Filipino crew spoke Tagalog and had a limited understanding of English. The crew was provided with Oceanfleet's Safety Management System Manual ("the Manual"), which outlined (in English) the company's policies and procedures, including crewmembers' responsibilities. GA327–44. The Manual includes "charts signify[ing] hierarchical seniority,"

"definition[s] of responsibilities, and "job descriptions of … all seagoing personnel." GA334a. As set forth in the Manual, the Chief Engineer's responsibilities included "[e]nsuring complete compliance with the various environmental requirements, policies and procedures addressed in the [Safety Management System]"; "[p]roperly maintaining of [sic] the Oil Record Book"; and monitoring, managing, and resolving issues associated with the proper handling of oily wastes and "any equipment having oil to sea interfaces." GA339–40. The Second Engineer was responsible for reporting to and carrying out the orders of the Chief Engineer and for supervising engine department personnel on a day-to-day basis. GA342; *see also* GA255, 268–70.

B. Unlawful Discharges from the *Ocean Hope*

The *Ocean Hope* had five tanks for storing oil sludge and two tanks that were supposed to be used to store bilge water. SA5. Under the supervision of Chief Engineer Ignacio and Second Engineer Samson, the engine crew was tasked with monitoring the levels of sludge and bilge water in the tanks by "sounding" the tanks. GA131, 143, 157, 191, 194, 261. Sounding is "a way to measure the liquid level in a tank" by lowering a weighted tape measure into a tank and recording the liquid level. GA21. When the tanks were nearly full, the crew would inform Second Engineer Samson. GA81, 155.

The bilge-water tanks should have been emptied by processing the bilge water through the oily-water-separator and then discharging the filtered water. GA59. Crewmembers testified, however, that "the oily water separator was not used" aboard

the *Ocean Hope*. GA78, 192. Second Engineer Samson admitted at trial that the oily-water-separator was used only twice during the six months that he served on the *Ocean Hope*. GA286. Instead, Samson ordered the engine crew to pump bilge water directly into the sea two or three times every week. GA80, 144–45. When subordinate crewmembers asked Samson why they were not using the oily-water-separator, he replied that bypassing the machine was easier and that the crew should reserve operation of the oily-water-separator for port-state-control examinations to ensure the equipment was in good working order when inspected. GA83, 85, 294.

Only one of the ship's two bilge-water holding-tanks was available for storing oily water from the bilge well. GA113, 147. The other bilge-water holding-tank contained diesel fuel. JA203; GA113, 186, 209. It is undisputed that when the *Ocean Hope* refueled in Korea, the ship received more diesel fuel than could be stored in the ship's diesel tank. GA209, 211, 262–63. Second Engineer Samson and Oiler Villar used a rubber hose (referred to as a "magic pipe") to transfer the excess fuel from the diesel tank to one the ship's bilge-water holding-tanks (Tank 2) while Wiper Reyes monitored the diesel tank to ensure it did not overflow during refueling (called "bunkering"). JA203; GA211. Tank 2 was not meant to hold anything other than bilge water. GA198, 251. The Government presented testimony from crewmembers that the Chief Engineer and Second Engineer hid the fuel in Tank 2 so they could later sell it on the black market. JA204–06; GA142, 210, 213, 220. The defense countered that, because the fuel was already paid for, the Master and engineers

reasonably decided to store it in Tank 2 for later use onboard the ship, GA152–53, 212, 258–65.

Proper disposal of sludge aboard the *Ocean Hope* required the engineers to transfer the sludge to the waste oil incinerator tank to be heated for a day and then move the heated sludge to the incinerator where it was burned. GA256. Incinerating all of a ship's sludge is "an onerous, time-consuming process." JA78. Alternatively, the crew could wait until the ship could offload the stored sludge to a shoreside disposal facility. GA31–32. The last time the *Ocean Hope* had offloaded sludge was in September 2014. GA272. The jury heard evidence that the crew was struggling to incinerate all of the sludge the ship had accumulated since that time, and that a "significant deficiency" with the incinerator could have contributed to the build-up. GA31; *see also* GA249–50, 252 (Coast Guard officer testifying that almost-daily use of the incinerator was unusual and likely "put a lot of undue stress onto the machinery"); GA31, 33 (Coast Guard officer testifying that "several cracks in the [incinerator's] refractory" could prevent it from "get[ting] hot enough [to] burn the sludge properly").

On or about June 14, 2015, Oiler Villar reported to Second Engineer Samson that the sludge tank was approximately two-thirds full. *See* GA135, 137. That night, Samson directed Villar, Fourth Engineer Charlie Sarduma, and Wiper Anthony Reyes to connect a magic pipe between the *Ocean Hope*'s sludge pump and an overboard discharge valve. *See* GA129–31, 138–39, 174–82, 200–05. The crew then pumped the

contents of the sludge tank overboard until the tank was almost empty. *See* GA136–41. When Third Engineer Vincent Menente and Oiler Reynaldo Villegas began their shift in the engine room around midnight, they saw the magic-pipe connection. GA87–112, 187–91. Menente began taking pictures and videos of the connection with his phone, and he cut off a piece of the hose when he later saw it in a rubbish pile. GA87–112. A day or two later, Samson asked Wiper Reyes to assist in throwing the hose overboard. GA206–08.

C. Oil-Record-Book Falsification

With respect to the oil-record-book on the *Ocean Hope*, the Master was responsible only for signing each completed page of entries in the book. GA158; *see, e.g.*, GA304. Oceanfleet's Safety Management System Manual made clear that Chief Engineer Ignacio was responsible for making entries into the oil-record-book on a weekly basis. GA339; *see also* GA159, 281. The engine crew, under Ignacio's supervision, was responsible for sounding the tanks and accurately recording those measurements. GA157, 170. Specifically, Oiler Clark Villar would sound all of the tanks aboard the *Ocean Hope* every day before noon. GA131, 345–48. Oiler Villar recorded the measurements of each tank on a sounding slip, which he gave to Chief Engineer Ignacio. GA132. The Master checked only that the entries used the appropriate vessel codes and that the tanks were not more than 50% full; he knew little about engine-room operations and was not required to independently verify the accuracy or completeness of the entries. GA156–57, 170. The Master scanned and

sent copies of the weekly oil-record-book entries to Defendants' shoreside managers. GA159. Defendants reviewed the entries and, on occasion, sent emails directing that certain entries be made in the oil-record-book. GA351; *see also* GA162–63.

The jury heard evidence that Chief Engineer Ignacio and Second Engineer Samson falsified the oil-record-book during most if not all of the time the vessel traveled from Bangladesh to Wilmington. First, the oil-record-book contains no entries documenting the numerous instances in which Samson, with Ignacio's knowledge, directed the engine crew to discharge bilge water directly into the ocean, bypassing the oily-water-separator. *See* GA250.

Second, the oil-record-book contains inaccurate and missing information regarding the disposal of sludge aboard the *Ocean Hope*. Samson ordered Oiler Villar to record inaccurate soundings for the sludge tank during the voyage from Panama to the United States. JA201. Before the crew pumped the contents of the sludge tank directly overboard, the level of sludge in the tank was approximately 10.75 m^3 (cubic meters). GA135, 137. During the following day's sounding, the sludge tank measured around 0.314 m^3. GA141. The oil-record-book contains no entry documenting the illegal discharge of more than 10 m^3 of sludge on June 14, 2015. GA323; *see also* GA250. Nor do the entries surrounding that date reflect the measurements from Oiler Villar's sludge-tank soundings. GA321–26. In fact, Villar testified that he, at the direction of Igancio and Samson, underreported the amount of

sludge in the sludge tank beginning from the time the *Ocean Hope* left Korea. GA154, 155.

Third, Chief Engineer Ignacio was not accurately recording the information provided to him on the sounding slips. During the port-state-control examination, Coast Guard inspectors asked for records showing the tank soundings that Oiler Villar had taken. GA69, 225. Ignacio explained that the *Ocean Hope* used only sounding slips, which Ignacio threw away after recording them in the oil-record-book. GA69–70, 225. Ignacio could provide only four recent sounding slips, GA347–48, and the measurements on these slips did not match the entries that he made in the oil-record-book. For example, the book states or purports to show that the volume retained in the sludge tank on July 13, 2015 (4.9 m^3), was significantly lower than what Villar recorded on that day's sounding slip (7.09 m^3).[2] *Compare* GA347 *with* GA309. And the sounding slip for July 13, 2015, contains no measurement for bilge-water holding-tank 2, GA347; however, Ignacio entered a measurement of 8.8 m^3 of bilge water in the oil-record-book, GA311.

Finally, unrelated to the illegal discharges, Chief Engineer Ignacio failed to record certain events that must, under APPS and MARPOL, be included in the oil-record-book. It is undisputed that, regardless of the underlying reason, the transfer of

[2] Given that Oiler Villar was recording artificially low numbers on the sounding slips pursuant to orders from Second Engineer Samson, *see* GA154–55, the jury could reasonably infer that amount of sludge Chief Engineer Ignacio reported in the oil-record-book was well below the amount actually present in the sludge tank.

diesel fuel from the diesel tank to the bilge-water holding-tank should have been recorded in the oil-record-book but was not. GA171. Similarly, APPS requires vessels to record any malfunction of the oily-water-separator. 33 C.F.R. § 151.25(d)(6). Although the Chief Engineer informed Defendants that the oily-water-separator was not functioning normally, GA371, he did not record that fact in the oil-record-book, GA253.

D. Obstruction of the Coast Guard Inspection in Wilmington, NC

APPS provides that "[u]pon receipt of evidence that a violation has occurred," the Coast Guard "shall cause the matter to be investigated." 33 U.S.C. § 1907(b). APPS gives the Coast Guard express authority to inspect any seagoing ship, while at a U.S. port or terminal, to "verify whether or not the ship has discharged a harmful substance in violation of . . . MARPOL." *Id.* § 1907(c)(2). These inspections are called "port-state-control examinations," and they ensure that foreign vessels coming into U.S. waters meet all international standards for safety and pollution prevention. GA3. For the Port of Wilmington, port-state-control begins when the port receives advanced notification that a foreign-flagged vessel like the *Ocean Hope* will be entering the port. GA4. Coast Guard inspection personnel then review records related to the incoming vessel, including to determine whether it has been found in past inspections to have deficiencies. GA4–5. If the initial screening does not suggest that there are any safety or security risks, the Coast Guard waits until the ship has reached a pier before sending marine inspectors and vessel examiners on board. GA5. Inspectors

conduct a general examination of ship's operations and ask the crew to run certain safety drills. GA6–8. If anything observed by the inspectors suggests a violation of MARPOL, the Coast Guard expands the scope of its examination as necessary to ensure MARPOL compliance. JA65. If the Coast Guard discovers a deficiency, the vessel may be held in port until the problems are resolved. GA165.

Defendants made clear to the *Ocean Hope*'s crew that it should not allow the ship to be detained at port for a deficiency. Master Tabacaru testified that Oceanfleet was concerned about its vessels being detained at port and sent the Master "statistics of deficiencies for which ships were arrested in control ports" during the prior year. GA165–66, 352–53. Master Tabacaru reported that the crew met before arriving in Wilmington and "discussed how [they] could avoid these deficiencies on board" the *Ocean Hope*. GA167a. Defendants sent crew members a checklists of tasks "to ensure the [vessel]'s proper preparation for a USCG inspection." GA354. The checklist included removing oil traces, repairing any oil leakages "permanently (if possible)," "[e]nsur[ing] that Oil-record-book entries are in order," removing "oily plastic pipes" to avoid accusations that "these pipes ha[d] been used in the past to overboard oily wastes," and ensuring that the overboard line is "kept clean (free of oil)." GA358–63. Defendants also provided Chief Engineer Ignacio with an example of the proper form for oil-record-book entries "in order to avoid any kind of problems, from any kind of inspection Through (PSC-MARPOL) [sic]." GA349. Defendants also informed

Ignacio that he "should enter … on a weekly basis" in the oil-record-book that the oily-water-separator was "tested and found satisfactory." GA351.

Defendant Oceanfleet also sent a port captain and vessel superintendent to board the *Ocean Hope* in Panama and remain onboard to supervise the crew's preparations for port-state-control in Wilmington. GA114–15, 222. These corporate officers directed the crew to clean and repaint the *Ocean Hope*. GA116–17. But the shoreside officers did not speak to lower-level crewmembers beyond exchanging pleasantries (GA118, 183, 194, 210), look into or sound any of the holding tanks (GA119, 194), or otherwise verify that the ship had not polluted in the past (GA289–90, 292).

Before the *Ocean Hope* arrived in port on July 15, 2015, Third Engineer Menente's wife, at Menente's urging, contacted the Coast Guard to inform them that he had evidence of illegal discharges aboard the *Ocean Hope*. GA215. As a result, the Coast Guard began its port-state-control examination as soon as the *Ocean Hope* arrived. GA216–17. During the initial exam, the Coast Guard found four deficiencies, including cracks in the incinerator's refractory insulation. GA31, 219. The officers decided to return later to conduct the requisite safety drills and to give the crew time to repair the discovered deficiencies, which they did. GA219. When the Coast Guard returned, Third Engineer Menente quietly identified himself when an officer checked Menente's life jacket during a drill. GA46–47. Menente arranged to meet with the inspectors, at which time he presented the pictures and videos on his

phone, produced the pieces he cut from the magic pipe, and showed the inspectors where the flanges from the magic-pipe connection were located. GA49–55, 231. Coast Guard officers then sounded bilge-water holding-tank 2 and verified Menente's claim that the tank contained diesel fuel. GA233.

The Coast Guard informed the Master and vessel superintendent that it was expanding the scope of the port-state-control examination. GA237. During the expanded exam, the Coast Guard found an extra connection on the sludge pump and an extra flange on the oily-water-separator, both of which would accommodate a magic pipe leading to the ship's overboard valve. GA56, 58, 240. When the Coast Guard showed these items to the vessel superintendent, he responded: "F-ing Filipinos." GA254. The following morning, the superintendent and port captain "caught a flight out of Wilmington and went back home to Europe," leaving the ship behind without any further involvement. *Id.*

The Coast Guard interviewed several crewmembers as part of its investigation. GA243. In that process, Second Engineer Samson stated that he did not know why the piping on the discharge side of the oily-water-separator had oil in it, that there had been no bypass of the oily-water-separator to discharge sludge, and that he did not know why the sludge pump had an extra flange on the discharge side. GA244–45. Initially all other crewmembers, except for Third Engineer Menente, similarly denied any knowledge of or participation in the illegal discharges that Menente had photographed. GA243. Crewmembers testified that before they were interviewed,

they were gathered with Chief Engineer Ingnacio in his office and that Samson had instructed them to lie to the Coast Guard about the illegal discharges from the *Ocean Hope*. GA151 (Oiler Villar); GA185 (Fourth Engineer Sarduma); GA210 (Wiper Reyes); *see also* GA195 (Oiler Villegas testifying that Samson came to his room and asked him to lie).

III. PROCEDURAL BACKGROUND

A. Indictment and Conviction

The grand jury returned an indictment against Chief Engineer Ignacio and Second Engineer Samson on December 9, 2015. ECF No. 1. On April 14, 2016, a superseding indictment added Oceanic and Oceanfleet as Defendants. *See* JA11. Oceanic and Oceanfleet were charged as vicariously liable for each of the nine counts against the two engineers. Count One charged the engineers with conspiring to commit the other charged acts in violation of 18 U.S.C. § 371. JA27–38. Count Two, the substantive pollution count, charged the engineers with violating APPS by aiding and abetting the failure to maintain an accurate record book in violation of 18 U.S.C. § 2, 33 U.S.C. § 1908(a), and 33 C.F.R. § 151.25. JA39–40. Count Three charged the engineers with obstructing justice and with aiding and abetting the obstruction of justice by falsifying and omitting entries in the oil-record-book in violation of 18 U.S.C. §§ 2, 1519. JA40–41. Count Four charged Samson with making false statements to the Coast Guard during an interview with investigators in violation of 18 U.S.C. § 1001(a)(2), JA41–42, and Count Five charged the same conduct as

obstruction of justice in violation of 18 U.S.C. § 1505, JA42–43. Counts Six through Nine charged Ignacio and Samson with witness tampering for encouraging Oiler Villegas (Counts Six and Seven), Fourth Engineer Sarduma (Count Eight), and Oiler Villar and Wiper Reyes (Count Nine) to lie to the Coast Guard about the overboard discharges in violation of 18 U.S.C. § 1512(b)(3). JA43–47.

All four defendants were tried together in a nine-day jury trial. After the Government rested its case on August 30, 2016, each of the four defendants moved under Fed. R. Crim. P. 29 for judgments of acquittal on various grounds. Oceanfleet and Oceanic argued that the Government had not presented sufficient evidence to show they were vicariously liable for the charged conduct and that they could not, as a matter of law, be held vicariously liable under 33 C.F.R. § 151.25 for the engineers' aiding and abetting the failure to maintain an accurate record book. JA278–81. The district court reserved ruling on Defendants' motion at that time. JA282.

After considering the parties' briefing on the issue (ECF Nos. 94, 95), the court instructed the jury that vicarious liability required the Government to prove beyond a reasonable doubt: "One, that the offense charged was committed by an agent or employee of the organization; [s]econd, in committing the offense, the agent or employee intended, at least in part, to benefit the corporation; [a]nd, third, the agent or employee acted within his or their authority." JA362. The court further clarified that an agent's authorization extends to "matter[s] the organization generally entrusted to that agent," that an agent "may act for his own benefit while also acting for the

benefit of an organization," and that an "organization is not relieved of its responsibility just because the act was illegal or was contrary to the organization's instructions or was against the organization's general policies." JA363.

Before jury deliberations commenced, all four defendants renewed their Rule 29 motions, and the court continued to take the corporate Defendants' motion under advisement. JA352. On September 1, 2016, the jury returned a guilty verdict on all counts for all defendants. After the verdict was announced, the court denied the corporate Defendants' motion for an acquittal.

B. Sentencing of Corporate Defendants

The district court held separate sentencing hearings for the individual and corporate defendants. Before Defendants' sentencing hearing, a probation officer prepared presentence investigation reports (PSRs) for both Defendants. SA1–49. The PSRs included findings on the statutory and regulatory background, Defendants' offenses, Defendants' organizational data and financial condition, and other factors relevant to sentencing. *Id.* The PSRs found that neither Defendant "had an effective program to prevent or detect violations," nor had they "self-reported the violation or cooperate[d] with the investigation." SA11, 14, 35, 38. After reviewing self-reported, unaudited financial information, the PSR found that the Oceanic was "profitable until the instant offense," and that Oceanfleet was profitable until 2013. SA15, 39. The PSR also noted that Defendants had jointly posted a surety bond of $500,000 in July 2016, which was to be paid towards any penalty imposed in the event of conviction.

SA15. The PSR concluded that Oceanic was "capable of paying a *significant* fine in installments if the corporate defendant is placed on probation."[3] SA24 (emphasis added). The probation officer found that Oceanfleet was also "capable of paying a fine in installments." SA40, 48.

Pursuant to U.S. Sentencing Guidelines § 3D1.2, the PSRs grouped all nine counts together to calculate the appropriate fine. SA16, 40. The probation officer noted that the Guideline for obstruction of justice, U.S.S.G. § 2J1.2(a), was not listed in U.S.S.G. § 8C2.1 as an offense category subject to the Guidelines' provisions on imposing fines on corporations (U.S.S.G. §§ 8C2.2–8C2.9). SA16, 40. Rather, the fine was to be determined "by applying the provisions of 18 U.S.C. §§ 3553 and 3572," which set forth specific factors that the court must consider when imposing a sentence or fine on a defendant. *Id.* The applicable statutory maximum fine was $500,000 per count. SA17, 41 (citing 18 U.S.C. § 3571(b)).

Defendants and the Government submitted written objections to the PSR. Although Defendants submitted a number of factual objections, neither objected to the conclusions about its ability to pay a fine. SA18–22, SA42–44. The probation officer concluded that none of Defendants' objections warranted any changes to the reports. *Id.* The Government objected only to the depiction of Defendants' financial

[3] The probation officer initially concluded that Oceanic was capable of paying a "limited" fine in installments over a period of probation, SA15, but revised his conclusion after considering the Government's objections. SA18–24.

resources, contending that "the financial information provided by Oceanic and Oceanfleet likely vastly understates the true financial resources of these companies" due to the Oceanfleet's use of shell corporations like Oceanic. SA23, 47. The probation officer responded that he "was unable to independently verify financial information related to the corporate defendant[s]," and he reiterated that both Defendants were capable of paying fines in installments. *Id.*

At sentencing, the district court entertained oral argument and gave Defendants multiple opportunities to raise additional objections to the PSRs, but they rested on their written objections. JA480, 487, 506. Concluding that the PSRs' factual findings were "credible and reliable," the court adopted the PSRs and also "considered the statutory issues as well as the factors set in 18 U.S.C. 3553(a)." JA517, 520. The court further noted that there were "no [sentencing] guidelines for this particular set of offenses even for a corporation" and that the statutory maximum fine was $500,000 per offense. JA479. The court also stated that "punishment, deterrence, and recidivism" were important sentencing factors in this case. JA515.

The court sentenced Oceanic to five years of probation, a fine of $675,000, and a community service payment of $225,000 to Grey's Reef National Marine Sanctuary Foundation. JA517–19. This total financial penalty of $900,000 is payable in installments of $180,000 per year during the term of probation. JA519. The court sentenced Oceanfleet to five years of probation, a fine of $1,350,000, and a community service payment of $450,000. JA520–22. Oceanfleet's total financial

penalty of $1.8 million is payable in installments of $360,000 per year during the term of probation. JA522.[4] As a condition of each Defendant's probation, all vessels "managed by the defendant or any successor, assignee, subcontractor, acquirer, affiliate, or other entity related to either defendant by reason of shared or common ownership, management or control" are "banned from any port in the United States until they have fully satisfied all financial sanctions." JA518, 521. The court also noted that Defendants should inform the probation office of "any material change in the defendant[s'] economic circumstance that might affect the defendant[s'] ability to pay fines or any other financial obligations as set forth in this judgment." *Id.*

SUMMARY OF ARGUMENT

Defendants concede that the *Ocean Hope*'s engine crew discharged oily mixtures into the ocean without utilizing the ship's pollution control equipment and failed to record those discharges in the oil-record-book. Aplt.Br. 17 & n.14. But Defendants argue that they should not be held vicariously liable for those acts. It is well-settled that a corporation may be held criminally responsible for violations committed by its agents or employees acting within the scope of their authority. *United States v. Singh*, 518 F.3d 236, 249 (4th Cir. 2008). Contrary to Defendants' arguments, the Government presented ample evidence supporting a finding of vicarious corporate liability. Chief Engineer Ignacio and Second Engineer Samson were Defendants'

[4] Defendants applied their surety bond of $500,000, *see* SA15, 39, towards their combined total penalty.

agents aboard the *Ocean Hope*. Defendants entrusted Ignacio and Samson with the duties underlying their convictions—disposal of oily wastes, monitoring and recording in the oil-record-book data related to onboard oily substances, maintaining engine-room machinery, and supervising engine-room crewmembers. These acts clearly fall within the engineers' scope of employment. And the engineers acted, at least in part, for the benefit of Defendants by disposing of accumulated oil and covering up illegal acts to prevent the *Ocean Hope* from being detained in port.

Defendants also challenge the sentenced imposed on them, but Defendants' PSRs and the district court's statements at sentencing show that Defendants' arguments are meritless. First, the district court did not commit plain error (the applicable standard here) with respect to grouping Defendants' convictions because grouping was not required in the first place. The PSRs, in any event, did group Defendants' conduct for purposes of applying the U.S. Sentencing Guidelines and grouping Defendants' convictions would not affect the sentences the court imposed. Second, the court did not plainly err in finding that Defendants were able to satisfy the financial penalties imposed because the court properly adopted the factual findings in the PSRs and considered the factors set out in 18 U.S.C. §§ 3553 and 3572. Third, the district court did not abuse its discretion in imposing distinct sentences on each Defendant based on individualized assessments of the companies. Finally, the court's imposition of a probation condition that extended to entities related to

Defendants was reasonable in light of substantial evidence suggesting that Oceanfleet used shell corporations and hid assets to avoid liability.

For these reasons, the Court should affirm Defendants' convictions and sentences.

STANDARD OF REVIEW

Defendants appeal from the district court's denial of their motion for judgment of acquittal under Fed. R. Crim. P. 29. This Court reviews such a denial de novo. *United States v. Cone*, 714 F.3d 197, 213 (4th Cir. 2013). When considering a defendant's Rule 29 motion, the court must enter a judgment of acquittal only if the evidence is insufficient to sustain the conviction. Fed. R. Crim. P. 29(a). When, as here, the defendant the court reserves ruling on a Rule 29 motion and the defendant introduces evidence on its own behalf before renewing the motion, "the case comes before the appellate court for review upon all the evidence and the entire record." *United States v. Heller*, 527 F.2d 1173, 1173 (4th Cir. 1975) (citation omitted).

Defendants assert both procedural and substantive challenges to their sentences. The Court generally reviews procedural challenges to the application of the Sentencing Guidelines de novo and reviews factual findings for clear error. *United States v. Harvey*, 532 F.3d 326, 336–37 (4th Cir. 2008). If a sentence is procedurally sound, this Court reviews the sentence's substantive reasonableness under a "deferential abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 41, 51 (2007). If, however, the defendant failed to preserve an argument before the district

court by objecting to the PSR, this Court applies the more rigorous plain-error standard-of-review. Fed. R. Crim. P. 52(b); *United States v. Olano*, 507 U.S. 725, 731–32 (1993). Under plain-error review, the Court "may notice an error that was not preserved by timely objection only if the defendant can demonstrate (1) that an error occurred, (2) that it was plain error, and (3) that the error was material or affected the defendant's substantial rights." *United States v. Martinez*, 277 F.3d 517, 524 (4th Cir. 2002). Once these three conditions are met, this Court may exercise its discretion to correct an error that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* (citation omitted).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DENIED DEFENDANTS' MOTION FOR JUDGMENT OF ACQUITTAL.

Defendants contend that the district court erred in allowing their convictions to stand on a theory of vicarious corporate liability. Under this Court's precedent, a corporation is liable for the criminal acts of its agents and employees acting within the scope of their employment for the benefit of the corporation. *Singh*, 518 F.3d at 250. Such liability accrues even if the employee or agent has acted for his own benefit as well as that of his employer. *Id.* Other courts of appeals have applied these precepts with respect to violations of MARPOL and APPS. *See, e.g.*, *Ionia Mgmt.*, 555 F.3d at 309–10 (Second Circuit finding a shipping company vicariously liable for violating APPS, falsifying records, and obstructing justice); *see also Jho*, 534 3d. at 401, 410 (Fifth

Circuit reinstating charges against both a chief engineer and shipping company for falsifying an oil-record-book); *see also United States v. Sanford*, 859 F. Supp. 2d 102, 123 (D.D.C. 2012) (noting that a shipping company could be charged for the actions of each of its engineers). The Government presented sufficient evidence that Defendants were liable under this standard.

A. The Government presented sufficient evidence to sustain the vicarious convictions against Defendants.

Defendants contend that the district court should have entered judgment of acquittal on all charges because the Government presented insufficient evidence to show that the Defendants were vicariously liable for the charged offenses. Aplt.Br. 21–36. "A defendant challenging the sufficiency of the evidence faces a heavy burden." *United States v. Foster*, 507 F.3d 233, 245 (4th Cir. 2007). When reviewing the sufficiency of the evidence, this Court "do[es] not review the credibility of the witnesses and assume[s] that the jury resolved all contradictions in testimony in favor of the government." *Id.* The Court views the evidence in the light most favorable to the Government, and "accord[s] the government all reasonable inferences from the facts shown to those sought to be established." *Cone*, 714 F.3d at 212. The Court "will uphold the jury's verdict if substantial evidence supports it and will reverse only in those rare cases of clear failure by the prosecution." *Id.* Here, Defendants have failed to meet their heavy burden.

1. As Defendants' agents, the acts of the Chief Engineer and Second Engineer can be imputed to Defendants.

Defendants' contention that the Government presented insufficient evidence of corporate liability is premised on the inaccurate notion that Chief Engineer Ignacio and Second Engineer Samson were not Defendants' agents. Defendants first argue (in a single sentence) that the *Ocean Hope*'s crew was employed only by Oceanic and did not "work[] for and/or could properly be considered either an employee or agent of Oceanfleet." Aplt.Br. 24.[5] As explained in the Factual Background, however, Oceanic was a shell corporation operated by Oceanfleet. Evidence presented at trial showed that the *Ocean Hope*'s crew—from the Master to the Oiler—understood that either Oceanfleet or both Oceanic *and* Oceanfleet were their employers. GA160 (Master); GA267 (Second Engineer); GA72 (Third Engineer); GA173 (Fourth Engineer); GA126, JA194 (Welder); GA128 (Oiler). Crewmembers wore uniforms bearing Oceanfleet's name. GA75, 127, 267. It was Oceanfleet's Safety Management System Manual that the crew was trained to follow. GA327–44; JA471. And placards with the contact information for the *Ocean Hope*'s designated person ashore bore the heading "OCEANFLEET SHIPPING LTD." JA474. Viewed in the light most favorable to the Government, the jury heard substantial evidence that Chief Engineer

[5] Defendants asked the district court to "direct the jury that, as a matter of law" the crewmembers' "employer was Oceanic." GA71a. The district court denied Defendants' request after defense counsel could not answer this question from the court: "Who is my boss, the chief judge of this district, the chief judge of the Fourth Circuit or the chief judge of the United States?" *Id.*

Ignacio and Second Engineer Samson were employees of both Oceanic and Oceanfleet.

Second, Defendants claim innocence because the *Ocean Hope*'s engine crew failed to report illegal conduct to (and allegedly hid such conduct from) the ship's Master or corporate officials at Oceanfleet and Oceanic. Aplt.Br. 25–26, 28–35. Lack of direct knowledge by Defendants' corporate directors and managers, however, does not absolve Defendants of liability. This Court has consistently held that the knowledge and intent of high level corporate officers, separate from other agents and employees, is irrelevant for purposes of determining vicarious liability. *United States v. Automated Med. Labs., Inc.*, 770 F.2d 399, 406 (4th Cir. 1985) (citing *United States v. Basic Construction Co.*, 711 F.2d 570, 573 (4th Cir. 1983)); *Carolene Prod. Co. v. United States*, 140 F.2d 61, 66 (4th Cir. 1944).

In *Automated Medical Laboratories*, for example, the corporation, one of its subsidiaries, and three individual employees were charged with conspiring to falsify logbooks and records in an effort to conceal violations of healthcare regulations from the Food and Drug Administration. 770 F.2d at 400. The corporation argued that the district court should have granted judgment of acquittal because the Government presented "no evidence that any officer or director at AML knowingly and willfully participated in or authorized the unauthorized practices." *Id.* at 406. This Court rejected that argument, holding that the corporation may be held criminally liable for unlawful practices so long as its agents were acting within the scope of their

employment. *Id.* Here, too, the Chief Engineer and the Second Engineer are Defendants' agents and employees for purposes of determining vicarious liability, regardless of whether Defendants' corporate officers knew of the engineers' conduct aboard the *Ocean Hope* or shared their intent to omit required entries from the ship's oil-record-book.

Moreover, Defendants' shoreside personnel were apprised of activities onboard the *Ocean Hope*. They received weekly copies of the oil-record-book and made recommendations regarding how to pass inspections. *See* GA349–51. They communicated information to crewmembers through the Master and the Chief Engineer and received feedback in the form of minutes and attendance records from meetings. GA167.[6] Defendants were aware, via the oil-record-book, that the oily-water-separator had not been used since February 19, 2015. GA286–87. They were also informed that the oily-water-separator was broken at one point, GA371, and that this malfunction was not reported in the oil-record-book, GA253. And Defendants knew that the *Ocean Hope* had not offloaded any sludge since September 2014. GA65–66, 293. The oil-record-book further showed that the crew was burning sludge in the incinerator on a daily basis even though such frequent use was abnormal and "would put a lot of undue stress onto the machinery." GA252. There is no

[6] The jury also received evidence that these meetings either never occurred or were of little value to crewmembers. Though Defendants made sure to have crewmembers sign that they were present at these meetings, the corresponding minutes are pro forma, repeating the same limited information. *See* GA364–70.

evidence that Defendants inquired about these events, even when corporate representatives boarded the ship in Panama for the two-week journey to Wilmington. JA403. Further, several crewmembers testified that they were afraid of reporting misconduct to company supervisors for fear of repercussions. GA125, 173a, 199. It is therefore untenable for Defendants to claim that they could not have known that the crew was discharging bilge water and sludge without using the ship's pollution-control equipment. *See* Aplt.Br. 18.

2. The Chief Engineer and the Second Engineer acted within the scope of their employment when committing the charged acts.

Because the Chief Engineer and the Second Engineer were Defendants' agents, Defendants are vicariously liable for any acts that fall within the scope of their employment. *See Singh*, 518 F.3d at 250. An employee's scope of employment is "broadly defined" to include acts within "the agent's general line of work" and within responsibilities specifically assigned to the agent by the employer. *Automated Med. Labs.*, 770 F.2d at 407. There is no question that the responsibilities Defendants assigned to Chief Engineer Ignacio and Second Engineer Samson included disposing bilge water and sludge when the tanks become too full, GA339–40; monitoring the contents of the *Ocean Hope*'s holding tanks and reporting relevant information in the oil-record-book, GA158, 339, 343; maintaining and using the ship's equipment properly, GA339, 342; and ensuring that subordinate crew members complied with all laws and regulations, GA128, 255, 268–70, 335, 339–40, 342. The conduct charged in

the indictment falls directly within those responsibilities. *See Ionia Mgmt.*, 555 F.3d at 309 ("The crew members acted within their authority to maintain the engine room, discharge waste, and record relevant information when they used the 'magic hose.'").

Defendants claim that the engineers were not engaged in official duties because the engine crew acted illegally and contrary to written corporate policies. Aplt.Br. 24–35. But it is well-established that "[t]he fact that many of [the agents'] actions were unlawful and contrary to corporate policy does not absolve [the corporation] of legal responsibility for their acts." *Automated Med. Labs.*, 770 F.2d at 407. Regardless of the illegality of the agent's act, the relevant question is whether that act fell within the agent's general line of work. *See Singh*, 518 F.3d at 250–51 (finding that a corporation could be held vicariously liable for its agent's unlawful involvement in a prostitution scheme); *Ionia Mgmt.*, 555 F.3d at 309 (finding that subordinate crewmembers' illegal discharges of oily water were within the scope of their employment). Additionally, as the district court instructed in this case, the jury may consider corporate plans and policies and Defendants' diligence (or lack thereof) in enforcing them, in determining "whether the organization's agents or employees acted with the intent to benefit the organization or acted with his or their authority." JA363.

Here, there was ample evidence to support the jury's finding of corporate liability, notwithstanding Defendants' corporate compliance program. To begin with, Defendants' evidence of the existence of a compliance program was perfunctory and limited to lower-level crewmembers. Defendants introduced certificates of training

and "policy acceptance and acknowledgment forms"—all in English—indicating that the Government's witnesses "understood and accepted" certain environmental policies. *See, e.g.*, JA470–73 (Third Engineer Menente's certificates and forms). And Defendants emphasize testimony from the staffing-agency representative who testified that his company was "available to address any and all concerns on a 24/7 basis." Aplt.Br. 32. But Defendants fail to acknowledge the relationship between the lower-level crewmembers' conduct and the orders that those crewmembers received from their superior officers, Chief Engineer Ignacio and Second Engineer Samson.

The Government presented substantial evidence that the subordinate crewmembers' training included information about shipboard personnel hierarchy, *see* GA335, requiring that "orders are given and expected to be obeyed down the chain of command without hesitation or question." GA344 (exempting a ship's bridge team from this practice); *see also* GA124 ("[I]f the chief engineer and the second engineer were strict on us . . . we would follow that because it was ordered."); GA122 (Third Engineer Menente testifying that Ignacio became "really mad" when Menente waited 30 minutes before following an order); GA123 (Menente testifying, "Whatever I order, [my oiler] will follow."). Not only were crewmembers following orders by discharging bilge water and sludge, but at least one crewmember testified that Samson also ordered him to hide this conduct from other employees. GA205. Consequently, the jury could have reasonably concluded that Defendants' written policies did not absolve them of liability when the employees that Defendants hired to supervise and

enforce those policies (Ignacio and Samson) ordered crewmembers to violate the policies over a period of several months.

3. The Chief Engineer and the Second Engineer acted, at least in part, for Defendants' benefit when discharging oily substances and attempting to hide evidence of these discharges from the U.S. Coast Guard.

Defendants contend that Chief Engineer Ignacio and Second Engineer Samson intended "no benefit to the Organizational Defendants." Aplt.Br. 25, 28. But this Court has held that so long as an agent intends, at least in part, to benefit his employer, the corporation may be liable even if the agent is also acting for his own benefit." *Singh*, 518 F.3d at 249; *Automated Med. Labs.*, 770 F.2d at 407; *see also* JA363 (jury instruction stating same).

The Government presented sufficient evidence for the jury to reasonably infer that some benefit was intended for all Defendants. *See Cone*, 714 F.3d at 212 (noting that all reasonable inferences must be construed in favor of the Government when reviewing the sufficiency of the evidence). Ignacio and Samson intended to benefit the *Ocean Hope*—and Defendants by necessary extension—when they disposed of accumulated oily wastes. Bilge water and sludge must be periodically discharged to ensure safe and continued shipboard operations. *Pena*, 684 F.3d at 1142 n.2; *see also* GA71 (the court noting that sludge can clog up the oily-water-separator).

Moreover, the Government presented extensive evidence showing that Defendants clearly articulated to the crew the importance of passing the port-state-control examination in the United States in order to avoid any detention or delay in

the *Ocean Hope*'s voyage. If, during the exam, the Coast Guard had found a significant deficiency, the *Ocean Hope* may well have been detained until the issue was resolved. JA51. At trial, the Master agreed that Defendants were "concerned with not having the vessel detained." GA165. Defendants sent the Master "statistics of deficiencies for which ships were arrested in control ports," and the Master then had a meeting with the crew to "discuss[] how [they] could avoid th[o]se deficiencies." GA165–66, 167a; GA352–53. Defendants e-mailed the Master and the Chief Engineer a checklist of items to complete before arriving at the Port of Wilmington. GA358–63. Defendants had a port captain and vessel superintendent board the *Ocean Hope* in Panama to oversee the crew's preparation for the port-state-control exam in North Carolina. GA114–15, 222.

The jury could infer that, consistent with the cues from Defendants, Chief Engineer Ignacio and Second Engineer Samson acted with the intent to prevent the Coast Guard from finding any deficiencies on board during port-state-control. First, evidence supported the inference that the crew bypassed the oily-water-separator when discharging bilge water to make sure the oily-water-separator was in good working order when the Coast Guard tested it. Evidence showed that the crew had experienced a problem with the oily-water-separator before arriving in Panama. GA280; GA371 (informing Defendants that the crew was "doing [its] best to restore the normal function" to the oily-water-separator). And Samson told subordinate

crewmembers that they should limit their use of the oily-water-separator to testing before and during port-state-control. GA83, 85.

Similarly, evidence implied that the *Ocean Hope*'s incinerator was not reaching the necessary temperature to burn off the ship's accumulated sludge due to cracks in the incinerator's refractory. A ship's sludge tank is one of the last areas to hold sludge, and Oiler Villar testified that the tank was almost two-thirds full before the sludge was pumped overboard, even with the incinerator running almost every day. GA135, 137. The crew's only other option for disposing of the sludge was to offload the sludge to a shoreside facility. GA31–32. Discharging the sludge directly overboard saved the *Ocean Hope* from having to arrange to offload the sludge and any corresponding delay.

Additionally, the Chief and Second Engineers' acts in falsifying the record book,[7] instructing crewmembers to lie to the Coast Guard, and making their own false statements were an attempt to hide or minimize the illegal discharges to help the ship pass the port-state-control examination. *See Automated Med. Labs.*, 770 F.2d at 407 (finding that an agent was acting in part to benefit his employer when the employer's

[7] Defendants suggest that the Chief Engineer could not have intended to benefit Defendants when he failed to record the illegal discharges of bilge water and sludge because "even if an improper discharge was performed, simply writing the information in the [oil-record-book] would have served as a bar to any criminal prosecution in the Eastern District of North Carolina." Aplt.Br. 30 n.19. But a record of a blatant MARPOL violation aboard one of their ships could result in adverse consequences to Defendants' vessels, *i.e.*, being denied entry into ports. *See* GA3.

"well-being" rested on "its lack of difficulties with the FDA"). To be sure, Ignacio and Samson also had personal motives to conceal their involvement (*e.g.*, to avoid personal criminal liability and to protect their employment). But this is true whenever employees commit criminal offenses on behalf of a corporate employer. That the individual defendants had a personal motive to obstruct the Coast Guard investigation or otherwise conceal unlawful acts does not preclude their being motivated as well by an overlapping desire to benefit the company. *See id.*; *Singh*, 518 F.3d at 249.

For these reasons, the Government presented ample evidence for the jury to have reasonably found that the disposal of oily wastes and the recording of that disposal was within the scope of the Chief and Second Engineers' employment and that they intended, at least in part, to benefit Defendants.

B. As a matter of law, Defendants may be held vicariously liable for the Chief Engineer and Second Engineer's acts in aiding and abetting the Master's failure to maintain an accurate oil-record-book.

Defendants contend (Aplt.Br. 36–39) that the district court should, as a matter of law, have entered a judgment of acquittal on Count Two, which charged all defendants with "knowingly fail[ing] to maintain, caus[ing] the failure to maintain, and aid[ing] and abett[ing] the failure to maintain" the oil-record-book, JA39. Defendants argue that they cannot be held vicariously liable on Count Two because only a ship's master is required to maintain the oil-record-book and liability for aiding and abetting that violation does not extend to Defendants.

Defendants undermine their own argument, however, by admitting that "[t]here is no dispute that C/E Ignacio and 2/E Samson were permissibly prosecuted and convicted under the aiding and abetting theory of liability for causing the Master to fail to maintain an accurate" oil-record-book. Aplt.Br. 38; *see also United States v. Fafalios*, 817 F.3d 155, 162 (5th Cir. 2016) (holding that only the master of a ship may be convicted as a principal under 33 C.F.R. § 151.25). While Defendants are correct that "aiding and abetting liability ends" with the Chief Engineer and the Second Engineer, they fail to recognize that vicarious liability is distinct from aiding and abetting. *See* Wayne R. LaFave, *Substantive Criminal Law* § 13.4 (2d ed. 2003). Defendants were not charged as aiders and abettors, but as vicariously liable to the same degree as their agents—the Chief Engineer and the Second Engineer. *See* JA39.

Defendants appear to argue that the Fifth Circuit's decision in *Fafalios*, 817 F.3d at 162, means that maintaining the oil-record-book cannot fall within the scope of the Chief and Second Engineers' employment. As previously described, however, the engineers' acts that *aided and abetted* the Master's failure to maintain an accurate oil-record-book *were* performed within the scope of their employment and *were* intended to benefit Defendants.[8] Moreover, to adopt Defendants' reasoning would mean that

[8] Defendants' repeated claims (Aplt.Br. 36–39) that the Master's lack of knowledge exempts them from responsibility also ring hollow because evidence presented at trial showed that the Master knew or, at the very least, remained deliberately ignorant of the false entries in the oil-record-book. During its case-in-chief, the defense presented evidence that when the *Ocean Hope* received more diesel fuel than the ship's

employees have only those responsibilities imposed by statute or regulation. While regulations may establish what constitutes lawful conduct, it is Defendants that prescribe the scope of their employees' duties. Here, Defendants placed responsibility for "properly maintaining of [sic] the Oil Record Book" with the Chief Engineer. GA339. Therefore, even if *Fafalios* were binding precedent in this Court and the United States could not prosecute the engineers as principals for violating 33 C.F.R. § 151.25, they were properly charged and convicted as aiders and abettors for acts taken within the scope of their employment. As such, Defendants are vicariously liable for the engineers' illegal conduct.

II. THE DISTRICT COURT DID NOT ERR IN SENTENCING DEFENDANTS.

A. The PSRs and the district court grouped Defendants' convictions to the extent required under the U.S. Sentencing Guidelines.

In challenging their sentences, Defendants first contend that the district court committed a procedural error by failing to group Defendants' convictions based on the underlying offense conduct. Aplt.Br. 40–43. Because Defendants did not raise this objection to the PSRs in district court, this aspect of the sentence is reviewed for

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fuel tanks could hold, the Master approved the Chief Engineer's plan to put the excess fuel in a bilge-water tank. GA264. The oil-record-book, however, contained no entry showing that diesel fuel was placed in the bilge-water tank and the jury heard no evidence that the Master investigated this or any other omission. Master Tabacaru was reminded that he "should not just rest on the young officers' reporting" and that he and the Chief Engineer "should personally monitor and supervise/verify all items of the [port-state-control] pre arrival checklist as they have the [vessel]'s overall responsibility." GA354. Master Tabacaru testified that he did not do so. GA157, 170.

plain error. *United States v. Boykin*, 669 F.3d 467, 470 (4th Cir. 2012). As explained below, the court did not commit any error in grouping Defendants' convictions, let alone plain error affecting Defendants' substantial rights.

First, the Sentencing Guidelines' grouping provisions are meant to ensure that a defendant's sentence is based on the defendant's underlying conduct rather than on the length of the charging document. *See United States v. Toler*, 901 F.2d 399, 402 n.3 (4th Cir. 1990). To that end, the grouping provisions apply to when a defendant is sentenced *under the Guidelines*. *See* U.S. Sentencing Guidelines Manual ch. 3, pt. D, intro. cmt. (2016). Here, as Defendants acknowledged in their sentencing memorandum, ECF No. 139 at 10, the Guidelines do not apply to Defendants' convictions for purposes of imposing a fine. *See* SA16, SA40 (explaining that obstruction of justice is not listed under U.S.S.G. § 8C2.1). Therefore, the district court was simply not required to group any of Defendants' convictions under U.S.S.G. § 3D1.2. *See Ionia Mgmt.*, 555 F.3d at 310 (rejecting the same argument from another shipping company represented at trial by Defendants' counsel "because there were no guidelines applicable to the organizational offense at issue").

Second, and in any event, Defendants' convictions *were* grouped together. The PSRs stated that "Counts 1, 2, 3, 4, 5, 6, 7, 8 and 9 are grouped for guideline calculation purposes" and named that group "Count Group 1: Obstruction of Justice and Aiding and Abetting." SA16, 40 (citing U.S.S.G. § 3D1.2(c)). In adopting the PSRs (JA517, 520), the district court therefore grouped together *all* counts in

sentencing Defendants. Moreover, in announcing Defendants' fines, the court did not proceed count-by-count, but rather announced a total fine and community service payment for each Defendant. JA519, 521. The only support for Defendants' assertion (Aplt.Br.48) that the district court sentenced Defendants "per count"—$100,000 per count for Oceanic and $200,000 per count for Oceanfleet—is the fact that the district court noted how each company's total financial penalty broke down per count. JA519, 522. But this exercise is readily explained as a demonstration for the record that the fines were well below the statutory maximum of $500,000 per count.

Third and finally, even if the district court did erroneously fail to group Defendants' convictions, there was no miscarriage of justice. *See Boykin*, 669 F.3d at 471. On remand for resentencing, the court would not be restricted to the allegedly "per count" fines currently imposed, but to the statutory maximum of $500,000 per count, 18 U.S.C. § 3571(b), which would yield a total statutory maximum fine of $4.5 million per Defendant given the nine counts of conviction. Grouping Defendants' convictions in the manner they advocate would not change the total statutory maximum sentence that the district court could have imposed. Defendants' sentences fall well under that amount.

B. The district court did not plainly err in adopting the PSRs' findings regarding Defendants' ability to pay fines.

Defendants next allege the district court erred in concluding that they were able to pay the imposed fines. Again, Defendants failed to object to the PSRs' conclusions regarding their ability to pay. SA18–22, 42–47 (raising no objections to PSR ¶ 67). The Court therefore reviews the district court's conclusions for plain error. *Boykin*, 669 F.3d at 471. Again, there was no error here, let alone a plain error.

Defendants' conduct fell within U.S.S.G. § 8C2.10,[9] which directs the court to "determine the appropriate fine by applying the provisions of 18 U.S.C. §§ 3553 and 3572." Section 3553 lists the factors that courts should always consider to ensure that a sentence is "sufficient, but not greater than necessary." 18 U.S.C. § 3553(a). Section 3572 sets forth factors to consider when imposing a fine on either an individual or corporate defendant, including "the defendant's income, earning capacity, and financial resources" and "the burden that the fine will impose upon the defendant." 18 U.S.C. § 3572(a). A district court need not make factual findings on the record under § 3572 if the court "adopts a defendant's presentence investigation report (PSR) that contains adequate factual findings to allow effective appellate review of the fine."

[9] Defendants cite to U.S.S.G. § 8C3.3, which requires the reduction of fines when a defendant's ability to make restitution would be impaired, *id.* § 8C3.3(a), and allows a court to reduce fines when the defendant organization is unable to satisfy a minimum required fine, *id.* § 8C3.3(b). Aplt.Br. 43, 46. But U.S.S.G. § 8C3.3 does not apply to fines imposed under U.S.S.G. § 8C2.10.

United States v. Castner, 50 F.3d 1267, 1277 (4th Cir. 1995). In assessing a corporation's ability to pay, negative net monthly cash flow at the time of sentencing "does not necessarily indicate an inability to pay, particularly when [the defendants'] PSRs reflect past success in business and above average earning capacities." *Id.* at 1278; *see also United States v. Gresham,* 964 F.2d 1426, 1431 (4th Cir. 1992) (taking future earning capacity and employment prospects into account in affirming the imposition of a fine on an individual defendant lacking liquid assets).

Defendants' PSRs contained detailed descriptions of each company's history and organization, including sections devoted to their "Financial Condition: Ability to Pay." SA13–15, 37–40. For Oceanic, the PSR acknowledged that the company had sold off its last asset (the *Ocean Hope*) in 2016, but also noted that it had reported gross profits of over $23 million and operating profits of more than $12 million from 2012 to 2015. SA15. The PSR concluded that Oceanic "is capable of paying a *significant* fine." SA24. Oceanfleet's PSR similarly notes that although the company's revenues have been declining and it has recently operated at a substantial loss, Oceanfleet has "10.8 vessels under management and []is generating significant revenue." SA40. "[B]ased on the continued receipt of revenues, the corporate defendant has the ability to pay a fine if allowed to do so in installments over a period of time." *Id.* The probation officer did not make any specific recommendations with respect to an appropriate fine amount. SA15, 40; *cf.* Aplt.Br. 46 (alleging, without explanation, that the district court "completely disregarded the recommendations of the PSR").

In addition to the PSRs and further briefing, the district court heard more than an hour of argument from the parties at Defendants' sentencing hearing. After hearing both sides, the court adopted the PSR's factual findings, finding them to be "credible and reliable." JA517, 520. The court then imposed a fines well below both the statutory maximum ($9 million combined between Defendants) and the Government's requested amount ($3.6 million combined between Defendants). The court exercised its discretion to impose a sentence that reflected the need for both "deterrence and punishment," JA509, 515, while also noting that Defendants could alert the probation office if circumstances changed in a way that affected their ability to pay the imposed penalties, JA518, 521.

On appeal, Defendants offer no new facts of their financial circumstances, nor do they attempt to rebut the strong inferences supported at sentencing regarding the true scope of Defendants' financial resources. *See* SA22–24, 47–48. The financial information in the PSRs was both self-reported and unaudited, and the probation officer was "unable to independently verify" the information submitted. *See id.* The Government presented substantial evidence that Defendants are underreporting their assets as the result of a complicated structure of shell corporations that is commonly used in the maritime industry. As previously discussed, Oceanic was a single-purpose entity created to serve as the *Ocean Hope*'s registered owner while in fact operating out of the same offices and with the same corporate officers as Oceanfleet. SA22–24, 47–48. The Government also presented evidence connecting Oceanfleet and another

vessel management company called Centurian Maritime Company. *See* SA23, 47 (noting that emails sent to the *Ocean Hope* were signed by both Oceanfleet and Centurian). Defendants presented no evidence of Centurian's relationship with Defendants, let alone its assets. Additionally, if Oceanfleet manages an additional 10.8 vessels, there are likely another 10 single-purpose entities like Oceanic funneling money to Oceanfleet. *Id.* "[P]rofits to Oceanfleet's beneficial owners are likely at least ten times what is reported on the balance sheet for Oceanic, which represents only one ship." SA23, 48. In light of this evidence, the district court's conclusion that Defendants were able to pay the combined $2.7 million fine was reasonable.

C. The district court adequately considered the § 3553(a) factors, and imposed a sentence consistent with those imposed on similarly situated defendants for similar offenses.

Defendants argue that the district court acted contrary to 18 U.S.C. § 3553(a)(6) and 28 U.S.C. § 991(b)(1)(B) by imposing a higher sentence on Oceanfleet than on Oceanic and by imposing on Oceanfleet a sentence slightly higher than that imposed on another vessel recently sentenced in a MARPOL/APPS case. This argument lacks merit because the sentences reflect the court's individualized assessment of each Defendant.

First, to the extent Defendants suggest that the district court was required to provide more explanation for the allegedly disparate sentences, relevant authority affords considerable discretion to the district court regarding how much explanation to give to each of § 3553(a) factors and how to weigh the factors. In imposing a

sentence, "the appropriateness of brevity or length, conciseness or detail, when to write, what to say, depends upon the circumstances" and is left "to the judge's own professional judgment." *Rita v. United States*, 551 U.S. 338, 356 (2007). "[A] court need not robotically tick through § 3553(a)'s every subsection." *United States v. Montes-Pineda*, 445 F.3d 376, 380 (4th Cir. 2006) (internal citations omitted); *see also United States v. Eura*, 440 F.3d 625, 632 (4th Cir. 2006).

Here, after adopting the lengthy discussions and factual findings in the PSRs, the district court stated that it had "considered the statutory issues as well as the factors set in 18 U.S.C. § 3553(a)." JA517, JA520. The court also stated that it was considering "punishment, deterrence, and recidivism" in calculating Defendants' fines. JA515. These statements satisfy the court's obligation to consider and apply the § 3553(a) factors.

Defendants' contention that the imposition of a higher sentence on Oceanfleet than on Oceanic is contrary to § 3553(a)(6) is unavailing because that provision does not apply to alleged sentencing disparities between co-defendants. Section 3553(a)(6) directs judges to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). But "the kind of disparity with which § 3553(a)(6) is concerned is an unjustified difference across judges (or districts) rather than among defendants to a single case." *United States v. Pyles*, 482 F.3d 282, 290 (4th Cir. 2007) (citations omitted). Thus, "[t]he extent of a variance will not be unreasonable under § 3553(a)(6) merely

because it creates a disparity with a co-defendant's sentence." *Id.*; *see also United States v. Jeffery*, 631 F.3d 669, 679 (4th Cir. 2011); *United States v. Withers*, 100 F.3d 1142 (4th Cir. 1996).

A disparity in sentences between co-defendants may be warranted if it is based on the "characteristics and circumstances" of the individual defendants. *United States v. Anthony*, 202 F. App'x 617, 620 (4th Cir. 2006). Here, although Oceanic and Oceanfleet were convicted of the same crimes, they differ in characteristics and circumstances. Chiefly, Oceanic is a shell company, and the evidence suggested that Oceanfleet played the lead role in hiring, training, and interacting with the *Ocean Hope*'s crewmembers. Additionally, Oceanic had sold its only asset while Oceanfleet managed at least 10 other vessels. It was reasonable for the district court to conclude that Oceanfleet bore a greater share of the responsibility, was more likely to commit future violations, and had ongoing operations that could support a greater fine. It was thus not an abuse of discretion for the district court to determine that deterrence and punishment would be served by imposing a higher fine on Oceanfleet than Oceanic.

Defendants also contend that Oceanfleet should not have been given a higher sentence than the company sentenced for violating APPS in *United States v. Diana Shipping Services S.A.*, 2:13-cr-40 (E.D. Va. 2013), because the two corporations were "in the exact same position." Aplt.Br. 48–49. While the offense conduct in the two cases may have been similar, the companies are readily distinguishable. First, Diana Shipping Services was a subsidiary of a larger publicly traded parent company rather

than the apparent head of numerous shell corporations. *See* Defs. Sentencing Mem. at 11, *United States v. Diana Shipping Servs. S.A.*, No. 2:13-CR-40 (E.D. Va. 2013), ECF No. 134. Additionally, the district court in *Dianna Shipping* considered at sentencing the fact that the company accepted responsibility for its employees' conduct and voluntarily strengthened its environmental compliance program after the incident but before conviction. *Id.* at 11–18; Sentencing Tr. at 43, *Diana Shipping Servs. S.A.*, No. 2:13-CR-40 (E.D. Va. 2013), ECF No. 151.

Here, the probation officer found that Oceanfleet never accepted no responsibility for what happened on the *Ocean Hope*. SA35. After the Coast Guard showed Oceanfleet's port captain and vessel superintendent evidence of the illegal discharges, their response was to disparage the Filipino crew and immediately fly back to Greece without conducting their own investigation or assisting the Coast Guard. SA35–36. The Government also provided evidence that, during the period in which illegal discharges were occurring, Oceanfleet had bribed Chinese officials to avoid detention of the *Ocean Hope* during a port-state-control examination. SA36. The probation officer observed that "it does not appear that the corporate defendant had an effective program to prevent or detect violations." SA38. Because of their different corporate structures and the variation in the degree to which they have accepted responsibility for their actions and sought to prevent future incidents,

Oceanfleet and Diana Shipping were not similarly situated for the purposes of 18 U.S.C. § 3553(a)(6).[10]

D. The scope of the district court's probation conditions was not an abuse of discretion.

Finally, Defendants take issue with the district court's decision to apply the conditions of Defendants' probation—which include the denial of entry into any port of the United States until all fines are paid—to "all vessels managed by defendant[s] or any successor, assignee, subcontractor, acquirer, affiliate or other entity related to either defendant by reason of shared or common ownership, management or control." Aplt.Br. 49 (quoting JA518, 521). Defendants claim the court cannot bind "innocent third parties" without offering "any legal authority." Aplt.Br. 49, 50. In fact, 18 U.S.C. § 3563(b)(22) states that a court may in its discretion require a defendant to "satisfy such other conditions as the court may impose," so long as those conditions are reasonably related to nature and circumstances of the offense and the defendant's history and characteristics. Here, the Government presented

[10] The sentence imposed on Oceanfleet is congruous with sentences imposed on other first-time APPS violators. *See, e.g.*, *United States v. Sanford Ltd.*, No. 11-cr-00352-1 (D.D.C. 2013), ECF No. 237 (defendant convicted of six counts of violating APPS, conspiracy, and obstruction of justice fined $1.9 million); *United States v. General Maritime Management (Portugal), L.D.A.*, No 2:08-CR-00393 (S.D. Tex 2009), ECF No. 332 (defendant convicted of violating APPS and making a false statement sentenced to statutory maximum of $500,000 on each count, for a total fine of $1 million); *United States v. Petraia Maritime Ltd.*, No. 2:06-cr-00091 (D. Maine 2007), ECF No. 148 (defendant convicted of three oil-record-book violations fined $175,000 per count, for a total fine of $525,000).

evidence at both trial and sentencing that Oceanic and Oceanfleet were, for all intents and purposes, the same organization and that Oceanfleet used single-purpose entities like Oceanic in an attempt to shield the larger company from liability. Moreover, neither corporation provided sufficient training and oversight to prevent future incidents of marine pollution. SA9, 33. Given Oceanfleet's lack of forthrightness concerning its corporate structure and concerns that other single-purpose entities reporting to Oceanfleet may be similarly mismanaged, it was reasonable for the district court to restrict all vessels for which Oceanfleet has either shared or de facto "ownership, management or control" from entering U.S. ports until Defendants' fines are paid.

CONCLUSION

For the foregoing reasons, Defendants' convictions and sentences should be affirmed.

Respectfully submitted,

s/ Emily A. Polachek

JEFFREY H. WOOD
Acting Assistant Attorney General

JOHN STUART BRUCE
United States Attorney

JENNIFER MAY-PARKER
First Assistant United States Attorney
Eastern District of North Carolina

ERIC GRANT
Deputy Assistant Attorney General

ALLEN M. BRABENDER
KENNETH E. NELSON
BRENDAN C. SELBY
EMILY A. POLACHEK
Attorneys, U.S. Department of Justice[11]
Environment & Natural Resources Division
P.O. Box 7415
Washington, DC 20044
(202) 514-5442
emily.polachek@usdoj.gov

Of Counsel:

BRENDAN T. GAVIN, LCDR
United States Coast Guard
Deputy Staff Judge Advocate
Fifth Coast Guard District

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[11] Law Student Intern Adeline S. Rolnick also assisted in preparing the Government's brief.

CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains **12,845 words**, excluding the parts of the brief exempted under Rule 32(f), according to the count of Microsoft Word.

s/ Emily A. Polachek

EMILY A. POLACHEK
U.S. Department of Justice
Env't & Natural Res. Div.
P.O. Box 7415
Washington, DC 20044
(202) 514-5442
emily.polachek@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

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s/ Emily A. Polachek
EMILY A. POLACHEK
U.S. Department of Justice
Env't & Natural Res. Div.
P.O. Box 7415
Washington, DC 20044
(202) 514-5442
emily.polachek@usdoj.gov