CASE NO. 17-4061

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA

Prosecution - Appellee
v.

OCEANIC ILLSABE LIMITED and
OCEANFLEET SHIPPING LIMITED

Defendants - Appellants

On Appeal from the United States District Court
for the Eastern District of North Carolina
Criminal Action No. 15-CR-108-H, Honorable Malcom J. Howard

APPELLANTS' OPENING BRIEF

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Corporate Disclosure Statement

Defendant-Appellants OCEANIC ILLSABE LIMITED and OCEANFLEET SHIPPING LIMITED confirm that each Defendant filed a Corporate Disclosure Statement in accordance with Fed. R. App. P. 26.1 and Local Rule 26.1 and that there are no corporate parents that are publicly traded which own 10% or more of Defendant-Appellants' stock. *See* 17-4061, Doc. 20; 17-4062, Doc. 20.

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STATEMENT OF JURISDICTION

The United States District Court for the Eastern District of North Carolina had jurisdiction over this case pursuant to 18 U.S.C. §3231, which generally gives the District Court original jurisdiction over all offenses against the law of the United States. This Court has appellate jurisdiction over this case pursuant to 28 U.S.C. § 1291, as this appeal is from a final judgment of the trial court entered on January 19, 2017. [JA526 - JA537].[1] The notice of appeal, filed on January 31, 2017, was timely pursuant to Rule 4(b)(1)(A) of the Federal Rules of Appellate Procedure. [JA538 – JA549].

[1] The Joint Appendix is referred to as ["JA__"]. The Sealed Appendix, which contains the Presentence Report for each defendant and is filed under seal is referred to as ["SA__"].

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Whether the District Court erred in failing to grant Organizational Defendants' Rule 29 Motion for Judgment of Acquittal due to the insufficiency of the evidence adduced at trial to support vicarious convictions on Counts One through Nine of the Indictment.

2. Whether the District Court erred in failing to grant Organizational Defendants' Rule 29 Motions for Judgment of Acquittal as to Count Two of the Indictment (aiding and abetting).

3. Whether the District Court erred in imposing sentences against Organizational Defendants which failed to group the multiplicitous Counts 2 and 3 and mutliplicitous Counts 5 – 9 under U.S.S.G. § 3D1.2.

4. Whether the District Court erred in imposing sentences against Organizational Defendants which failed to consider their respective, independent financial conditions and ability to pay the fine imposed as required by 18 U.S.C. § 3572.

5. Whether the District Court erred in imposing a sentence which was disparate with other similarly situated organizational defendants in nearly identical matters and with similar records as required by 18 U.S.C. §3553(a)(6) and 28 U.S.C. § 991(b)(1)(B).

6. Whether the District Court erred in imposing a sentence on third parties that were not before the District Court.

STATEMENT OF THE CASE

A. Trial Proceedings and Disposition

Oceanic Illsabe Limited ("Oceanic"), as the owner of the M/V OCEAN HOPE, and Oceanfleet Shipping Limited ("Oceanfleet"), as the manager of the M/V OCEAN HOPE ("the Vessel") were charged vicariously in the Eastern District of North Carolina in with a total of nine (9) felony counts for the unknown and unwanted misconduct of two (2) individual defendants, Rustico Ignacio and Cassius Samson. [JA27 – JA47]. Ignacio, a citizen of the Philippines, was an employee of Oceanic, and worked as Chief Engineer onboard the M/V OCEAN HOPE. [JA27]. Samson was similarly a Filipino citizen employed by Oceanic and worked onboard the Vessel as its Second Engineer. [JA28]. Ignacio and Samson were arraigned on March 7, 2016 and pled not guilty to all charges. [JA10]. Oceanic and Oceanfleet were arraigned on May 25, 2016 and pled not guilty to all charges. [JA13].

The eight (8) day jury trial proceeded before U.S. District Judge Malcolm Howard beginning on August 22, 2016. [JA16]. At the close of the government's evidence on August 30, 2016, Oceanic and Oceanfleet moved for a judgment of acquittal on all counts pursuant to Fed. R. Crim. P. 29. [JA17; JA 278 – JA283]. Following Oceanic and Oceanfleet's Rule 29 motions, District Judge Howard held:

> There are some concerns that I have about the issues as relates to Oceanic and Oceanfleet. I'm having difficulty with the -- even the jury charge on their responsibilities, but we're still working on that. I'm going to take the motion under advisement. I'm going to take it under

> advisement, but order that the case go ahead. And I will make a final decision after hearing the defendants' evidence. I recognize at this time the weight is against the defendant. It's on behalf of the government to take everything in the light most favorable to the government; but still, I have problems about the aiding and abetting and the definition of the responsibility of these people as compared to the evidence in this case. So, the ruling of the Court is no ruling, at the moment; taken under advisement.

[JA282 – JA283].

At the close of trial, Oceanic and Oceanfleet renewed their Rule 29 motions for judgment of acquittal which were, once again, taken under advisement by the Court. [JA352]. The two (2) individual defendants were convicted by the jury of conspiracy (18 U.S.C. § 371), violation of the Act to Prevent Pollution from Ships ("APPS") (33 U.S.C. § 1908(a)), obstruction of justice – false record (18 U.S.C. §1519), false statement (18 U.S.C. § 1001), obstruction of justice (18 U.S.C. § 1505), and four (4) counts of witness tampering (18 U.S.C. § 1512). [JA18]. By extension, the Organizational Defendants were vicariously convicted of all counts without any specific findings of fact supporting the conviction. *Id*.

Following the jury verdict on September 1, 2016, Judge Howard denied Oceanic and Oceanfleet's Rule 29 motions for judgment of acquittal. *Id*. At sentencing on January 11, 2017, Oceanic was sentenced to pay a fine of $900,000, and was placed on probation for five (5) years which includes a five (5) year ban from U.S. ports unless and until the fine is paid in full. [JA526 – JA531]. Oceanfleet was sentenced to pay a fine of $1,800,000 and was also placed on probation for five

(5) years with a five (5) year ban from U.S. ports unless and until the fine is paid in full. [JA532 – JA537].[2]

B. Statement of Relevant Facts

i. *Organizational Defendants' Factual Background*

Oceanic is a ship-owning company duly incorporated in Liberia. [SA13]. Oceanic was the registered owner of the M/V OCEAN HOPE and was the holder of the vessel's Certificate of Financial Responsibility. *Id.* Between 2014 and May 2016; the Vessel completed twenty-seven (27) port calls, carrying a variety of cargo and products around the world for various unrelated third-party charterers and cargo consignees. *Id.* At all relevant times, Oceanic employed a contractually-employed shipboard crew of approximately twenty-one (21) seafarers. *Id.*

Oceanfleet is a corporation incorporated in the Marshall Islands, which conducts business from its principal office located at 17-19 Agiou Konstantinou & Agion Anargyron Street, 151 24, Maroussi, Athens, Greece. [SA37]. Oceanfleet provides commercial and technical ship management services to various clients which own ocean-going cargo vessels for a monthly flat fee charge; one of which being Oceanic and its Vessel, the M/V OCEAN HOPE. *Id.*; [*see also* JA404 – JA411]. In exchange for the services it provided to Oceanic (*i.e.* the Owner of the

[2] Both Organizational Defendants were assessed penalty assessments of $400 per count, or $3,600 per defendant. [JA526 – JA537].

OCEAN HOPE), Oceanfleet earned a modest, fixed management fee of USD 180,000 per year. [SA37 – SA40]. Oceanfleet's management fees were not contingent on the earnings of the vessel and remained a static flat-fee amount during the course of the management agreement. [JA404 – JA411]. Oceanfleet employs a dedicated shore-side staff with considerable international shipping experience across several departments including, *inter alia*, Safety; Supply; Technical; Crew; Operations; and Marine. [SA37 – SA40].

The M/V OCEAN HOPE was a 19,354 gross ton bulk carrier built in 1996. [SA13]; [JA433 – JA435]. The vessel was owned by Oceanic and had been managed by Oceanfleet since October 2009. [SA13, SA37]. The vessel was registered and operated under the sovereign or Flag State authority of the Liberian Maritime Authority. [SA13].[3] At all relevant times, the vessel was "in Class" or otherwise certified by the classification society Nippon Kaiji Kyokai.[4] [JA418 – JA432].

[3] The flag state of a commercial vessel is the state under whose laws the vessel is registered or licensed. Pursuant to the International Convention on the Law of the Sea every state is responsible for the ships flying its flag. *See, e.g.*, *European-Am. Banking Corp. v. M/S Rosaria*, 486 F. Supp. 245, 254 (S.D. Miss. 1978).

[4] A classification society's inspections are intended to systematically check the condition of the ship and to ensure that it is maintained by the owner according to the society's standards. *Carbotrade, S.P.A. v. Bureau Veritas*, 1999 U.S. Dist. LEXIS 13980 * 6 (S.D.N.Y. 1999). It is only after a vessel "passes" a Class inspection that it will be considered to be "in Class." This allows a shipowner to provide assurances to port states, cargo owners, charterers, and other third parties that the vessel is seaworthy and fit for its intended service. *Id.*, at * 7-8.

Vessels such as the M/V OCEAN HOPE operate pursuant to various international and local port state rules as they sail around the world for various charter customers and/or cargo consignees. [SA13]. The Vessel was sold for $2,397,020.08 on May 24, 2016 and broken up. [SA13].

ii. *The M/V OCEAN HOPE's Port Call at Wilmington, North Carolina*

The M/V OCEAN HOPE arrived at the Port of Wilmington, North Carolina on or about July 14, 2015, to discharge a cargo at the North Carolina State Port. [JA398 – JA403]. During the Vessel's call at Wilmington, United States Coast Guard inspectors boarded the vessel on July 15, 2015 in response to an advanced whistleblower tip[5] provided to the Coast Guard by Third Engineer Vincente Menente, through his wife Katherine, by way of a series of text messages, which were then passed to the Coast Guard Investigative Service through telephone calls and emails. [JA61 – JA65; JA440 – JA 460]. Sector Commander and Captain of the Port, Captain Patricia J. Hill testified that the Coast Guard had received information

[5] It is well known throughout the shipping industry that whistleblowers complaining of the use of a "magic pipe" to bypass shipboard pollution prevention equipment receive huge reward payments up to half the amount of any fine or penalty to be paid in the United States. *See e.g. United States v. OMI Corporation*, No. 04-cr-00060 (D. N.J. 2004) (one whistleblower received $2.1 million); *United States v. Wallenius Ship Management PTE. Ltd.*, No. 06-cr-00213 (D. N.J. 2006) (four whistleblowers shared an award of $2.5 million); *United States v. Overseas Shipholding Group, Inc.*, No. 06-cr-10408 (D. Mass 2007) (twelve whistleblowers each received $437,500). In this case, the United States has moved for an order awarding $150,000 to be split among six (6) former crewmembers. The motion was opposed by Organizational Defendants and remains *sub judice* before District Judge Howard.

that there was a crewmember allegation that a "magic pipe" had been installed and used onboard the vessel to bypass shipboard pollution prevention equipment. [JA64 – JA65]; [JA297 – JA299].

Upon the Vessel's arrival, Commander John Dittmar, Chief of Prevention for Sector North Carolina dispatched four (4) experienced Coast Guard Port State Control Inspectors at approximately 12:30 AM in order to investigate the whistleblower claim of a "magic pipe" onboard. [JA71 – JA73]. Following a four (4) hour plus examination, Commander Dittmar provided the following debrief report:

> Our team has completed the boarding for now. ***No evidence of MARPOL violations were found***. The team did not even have evidence of non-conformities to expand the MARPOL exam.[6] We did sound tanks, conduct a thorough review of the ORB and operate the incinerator.
>
> There were a couple opportunities for the 3rd Assistant Engineer to pass info to the team and nothing was passed . . .

[JA475 – JA476] (emphasis added). Again, capable Coast Guard marine inspectors, with the goal and intention of finding evidence of shipboard misconduct, tested and found shipboard pollution prevention equipment was in good working order and condition. [JA72 – JA74]. The Coast Guard returned the next day to conduct

[6] An expanded examination is a more in-depth review of the Vessel and records when there is a belief that there is evidence of non-conformities onboard. [JA140 – JA141].

additional drills as well as "issue final paperwork for the exam." [JA475 – JA476]. During the course of the drills, 3/E Menente approached a port state inspector, Lieutenant March, to provide 'evidence' of the "magic pipe."

In response, the Coast Guard converted the Port State Control exam into an expanded MARPOL exam and issued a Port State Control Report, which among other alleged technical deficiencies, identified an alleged deficiency with the accuracy of the Vessel's Oil Record Book ("ORB"). [JA461 – JA464]. Specifically, it was alleged that the Vessel's ORB was inaccurate because it failed to record at least one (1) discharge of sludge and/or bilge water which was not processed through the Vessel's pollution prevention equipment (*i.e.* - the Oily Water Separator ("OWS") and/or Incinerator). *Id*. The United States has jurisdiction only over suspected crimes which occurred in the port of Wilmington, *i.e.* the failure to maintain an accurate ORB while in U.S. waters and the attendant counts for obstruction of justice, false statements, and witness tampering.[7] All suspected deficiencies were inspected and cleared by the Vessel's Flag State Administration (Liberia) and the Coast Guard, prior to the Vessel's departure from Wilmington.

[7] There is no jurisdiction for the bypasses themselves, and the manner and means in which the bypasses are alleged to have occurred are not relevant for this Court's resolution of the appeal. *United States v. Abrogar*, 459 F.3d at 435 (3d Cir. 2006).

During the expanded MARPOL examination, numerous Coast Guard inspectors and the Coast Guard Investigative Services ("CGIS")[8] agents, attended onboard to seize documents and evidence from the vessel, as well as to conduct interviews of crewmembers. [JA169]. On July 17, 2015, the Coast Guard issued a letter stating, in pertinent part, that the U.S. Coast Guard was detaining the Vessel and her crew, by requesting that the United States Customs and Border Protection Agency withhold the Vessel's customs departure clearance based on the allegation that "the M/V OCEAN HOPE, IMO #9147617, its owner, operator, or person in charge, or crewmember(s) may be subject to a fine or civil penalty" for a suspected violation of MARPOL and the Act to Prevent Pollution from Ships ("APPS"), 33 U.S.C. § 1901, *et seq*.

The Coast Guard's letter further provided that the vessel would remain detained for the duration of the investigation into the suspected violations, unless clearance was granted "upon providing surety satisfactory to the Secretary." *See* 33 U.S.C. § 1908(e). In order to obtain the release of the Vessel and to continue to cooperate with the government's investigation, Organizational Defendants jointly and severally entered into a purported "Agreement on Security" with the United States and posted security in the form of a USD 500,000 surety bond to cover any

[8] CGIS is a federal law enforcement agency established to carry out the Coast Guard's criminal investigations. *See* www.uscg.mil/hq/cg2/cgis/.

penalty (administrative or civil) or criminal fine, plus many other non-financial[9] terms. [SA15]. The government identified and detained ten (10) crew members from the Vessel (to be held in the Eastern District of North Carolina for an indefinite period of time), specifically: Master Dumitru Tabacaru ("Master Tabacaru"), Chief Engineer Rustico Ignacio ("C/E Ignacio"), Second Engineer Cassius Samson ("2/E Samson"), Third Engineer Vincente Rey Menente ("3/E Menente"), Fourth Engineer Charlie Sarduma ("4/E Sarduma"), Wiper Anthony Reyes ("Wiper Reyes"), Bosun Reynaldo Punay ("Bosun Punay"), Fitter Ronald Belleza ("Fitter Belleza"), Oiler Clark Erwin Villar ("Oiler Villar"), and Oiler Reynaldo Villegas ("Oiler Villegas"). [JA1 – JA26]. Organizational Defendants honored all terms and conditions throughout the pendency of the matter.

Following a grand jury investigation, a Superseding Indictment was returned nine (9) months after the Vessel's initial detention against C/E Ignacio, 2/E Samson, Oceanic, and Oceanfleet on April 14, 2016, charging the Organizational Defendants on the basis of vicarious liability for the unknown and unwanted acts of C/E Ignacio and 2/E Samson onboard the M/V OCEAN HOPE. [JA27 – JA47]. As set forth above, the case proceeded to trial and ultimately a jury verdict which found all

[9] The propriety of the financial and non-financial terms and conditions imposed by the Coast Guard in these cases is not relevant for the present appeal, but is the subject of an unrelated legal challenge pending in the District of D.C. *See, e.g., Angelex Ltd. v. United States of America*, 15-cv-56 (D. D.C.).

defendants guilty of all nine (9) counts. The convictions of the Organizational Defendants were upheld by the District Court over the Defendants' motions and renewed motions for judgment of acquittal pursuant to Fed. R. Crim. P. Rule 29. Sentencing was held on January 11, 2017. [JA477 – JA525] Final judgments were entered by the Court on January 19, 2017. [JA22]. Defendants' timely appeal to the Fourth Circuit Court of Appeals followed on January 31, 2017. [JA538 – JA59].

C. Applicable Law and Jurisdiction of the United States

The present case arises from the interplay between international treaties and U.S. laws and regulations implementing same, which govern the conduct of foreign flagged vessels, such as the M/V OCEAN HOPE, which call at various United States ports and places.

i. *MARPOL*

The International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978, sets forth international standards for, among other things, regulating discharges from ocean going vessels. Together, these two (2) treaties are generally referred to as MARPOL 73/78 or MARPOL. MARPOL prescribes regulations aimed at preventing and minimizing pollution from ships – both accidental pollution and that from routine operations. However, "MARPOL is not a self-executing treaty; instead, each party agrees to 'give effect' to it." *United States v. Ionia Mgmt. S.A.*, 555 F.3d 303, at 307 (2d Cir. 2009) (citing MARPOL,

art. 1(1), 1340 U.N.T.S. at 63, 184); *United States v. Abrogar*, 459 F.3d 430, 434 (3d Cir. 2006) ("Congress did not make every violation of MARPOL by every person a crime under US law."); [JA54 – JA55]. As such, the United States was required to enact legislation or take other action to make the provisions of MARPOL enforceable.

ii. *The Act to Prevent Pollution from Ships*

To implement the substance of MARPOL as domestic law, Congress enacted APPS, 33 U.S.C. §§ 1901-1915. Section 1902 provides that APPS and any regulations promulgated pursuant to it shall apply to the following:

> (1) to a ship of United States registry or nationality, or one operated under the authority of the United States, wherever located; and
> (2) with respect to Annexes I[10] and II of the Convention, to a ship, other than a ship referred to in paragraph (1), while in the navigable waters of the United States . . .

33 U.S.C. § 1902(a).

Said another way, Congress made 33 U.S.C.§ 1908(a)'s criminalization of MARPOL violations through United States law and Coast Guard regulations limited only to U.S. ships, wherever located, and, as relevant to this appeal, to foreign ships

[10] MARPOL Annex I, Reg. 17 is the record keeping requirement for the maintenance of an Oil Record Book and makes it clear that the regulation applies to *inter alia*, "Every oil tanker of 150 gross tonnage and above and every ship of 400 gross tonnage and above other than an oil tanker shall be provided with an Oil Record Book Part I (Machinery space operations)." *See* Annex I, Reg. 17(1).

allegedly in violation of Annex I of MARPOL while in "the navigable waters of the United States" *Id.*[11] The only available criminal jurisdiction in the United States is for failure to maintain an accurate Oil Record Book while in the jurisdiction of the United States.

> [U]nder the APPS and accompanying regulations, Congress and the Coast Guard created criminal liability for foreign vessels and personnel only for those substantive violations of MARPOL that occur in U.S. ports or waters. Stated differently, a MARPOL violation by such a vessel or its personnel is only an "offense" under U.S. law if that violation occurs within the boundaries of U.S. waters or within a U.S. port.

Abrogar, 459 F.3d at 435 (3rd Cir., 2006).

> . . . [N]o provision of the APPS or its accompanying regulations indicates that "failure to maintain an accurate oil record book" by a foreign ship outside U.S. waters is a crime. Stated differently, the terms of the Act and its regulations exclude from criminal liability the "failure to maintain an accurate oil record book" by foreign vessels outside U.S. waters.

Id.; *see also United States v. Jho*, 534 F.3d 398, 404 (5th Cir. 2008). It is clear that, through its adoption of APPS, Congress intended to carefully prescribe and limit the

[11] The Flag State retains exclusive jurisdiction to prosecute any MARPOL violation by the vessel (or its crew) while in international waters. It is well established that the United States' jurisdiction over offenses is generally limited to the territory of the United States, its flagged vessels and/or conduct by its citizens. *Abrogar*, 459 F.3d 430 (3d Cir. 2006); *United States v. Smiley*, 27 F. Cas. 1132 (C.C.N.D. Cal. 1864); *Yenkichi Ito v. United States*, 64 F.2d 73 (9th Cir. 1933), *cert. denied*, 289 U.S. 762, 53 S.Ct. 796, 77 L.Ed. 1505 (1933).

criminal prosecutions of alleged violations of MARPOL consistent with the language set forth in the Coast Guard regulations created to enforce APPS.

iii. *Applicable United States' Code of Federal Regulations*

Consistent with MARPOL Annex I, Reg. 17(4), the applicable regulation 33 C.F.R. § 151.25(a) requires that a foreign-flagged vessel over 400 gross tons, such as the M/V OCEAN HOPE, "shall maintain an Oil Record Book Part I (Machinery Space Operations)." *Id*. The Coast Guard regulations go on to identify the specific types of transfers which require entries to be made into the Oil Record Book. *See* 33 C.F.R § 151.25(d).[12] Regulation 151.25(h) confirms that each operation described in sub-paragraph (d) must be recorded into the Oil Record Book without delay. The regulations continue at subsection (j) and specifically hold that "***The 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.***" 33 C.F.R. 151.25(j) (emphasis added); *see also United States v. Fafalios*, 817 F.3d 155, 159, 2016 AMC 669 (5th Cir. 2016).[13]

[12] Specifically, "(1) Ballasting or cleaning of fuel oil tanks; (2) Discharge of ballast containing an oily mixture or cleaning water from fuel oil tanks; (3) Disposal of oil residue; and (4) Discharge overboard or disposal otherwise of bilge water that has accumulated in machinery spaces." 33 C.F.R. § 151.25(d).

[13] By contrast, the language of the MARPOL Treaty Annex I, does not contain such specific language to identify the limited scope of specific personnel (*i.e.* – the Captain) required to "maintain" an accurate Oil Record Book while in U.S. waters.

SUMMARY OF THE ARGUMENT

Oceanic and Oceanfleet were charged vicariously and convicted for the unknown, unauthorized, and unwanted misconduct of the crew through convictions of C/E Ignacio and 2/E Samson. As set forth herein, the convictions should be reversed, as the government failed to offer any evidence to sustain the vicarious convictions. Members of the Vessel's engine room crew testified they carried out various acts of discharging bilge water and oily mixtures without utilizing the Vessel's pollution prevention equipment and without recording their actions in the Vessel's ORB (*i.e.* – the crime of conviction in Counts Two and Three). [JA39 – JA41].[14] The discharges were not recorded in the Vessel's ORB as required by MARPOL, APPS, and applicable Coast Guard regulations.

The misconduct of the individual crewmembers was carefully, purposefully, and strategically hidden from the Organizational Defendants by, among others, C/E Ignacio, 2/E Samson, 3/E Menente, 4/E Sarduma, Oiler Villegas, Oiler Villar, Wiper Reyes, and Fitter Belleza. Specifically, the crew misconduct was knowingly and purposefully hidden from the person in charge of the Vessel, Master Tabacaru, as

[14] The precise facts describing the manner and means of the discharges are not relevant for the purposes of this appeal as the individual defendants did not appeal their convictions for the underlying conduct. The issues on appeal relate to the insufficiency of evidence to support the convictions on the theory of vicarious liability and the improper sentences imposed by the District Court.

well as the Oceanfleet shore-side team who monitored the Vessel's operations and the superintendents who attended onboard and sailed with the ship from Panama to Wilmington, North Carolina.[15] [JA154]. The violation(s) of Organizational Defendants' environmental protection policy onboard the Vessel were **never** reported, and the conduct was specifically hidden from Oceanic, Oceanfleet, the Master, the Designated Person Ashore ("DPA"),[16] the superintendents onboard, third-party auditors and surveyors, and ultimately the U.S. Coast Guard. All of the crewmembers testified consistently that no one from Oceanic or Oceanfleet knew (or even could have known) of the misconduct. [JA154 – JA156; JA177].

The government failed to meet its burden to prove beyond a reasonable doubt that the Organizational Defendants could or should be held vicariously liable for the unknown and unwanted conduct of C/E Ignacio and 2/E Samson. Under applicable

[15] Port Captain Nicholaos Trousas and Superintendent Michael Prouzos joined the Vessel at Balboa, Panama on July 6, 2015 in order to sail with the Vessel to Wilmington and prepare for entry and inspection upon arrival at Wilmington, North Carolina. [JA403]. Despite being on the Vessel for nearly two (2) weeks, no reports of misconduct were made to these two (2) representatives from Oceanfleet. [JA159 – JA160]; [JA177].

[16] The DPA is a required position under the International Maritime Organization's International Safety Management Code, as follows: "To ensure the safe operation of each ship and to provide a link between the Company and those on board, every Company, as appropriate, should designate a person or persons ashore having direct access to the highest level of management. The responsibility and authority of the designated person or persons should include monitoring the safety and pollution prevention aspects of the operation of each ship and ensuring that adequate resources and shore-based support are applied, as required." ISM Code Article § 4.

Fourth Circuit precedent, a corporate defendant can only be found vicariously liable for criminal conduct where the following three (3) conditions are met: 1) the individual is an employee or agent of the company, 2) the conduct was done in the course and scope of the individual's authorized employment or agency, and 3) the conduct was done with the intent to benefit the corporation, at least in part. [JA362 – JA363]. The record is devoid of evidence that *any* crewmember was ever acting in the scope of his employment or agency and certainly no crewmember was acting with the intent to the benefit the Organizational Defendants. As such, the evidence was insufficient to sustain a conviction of the Organizational Defendants on Counts One through Nine.

The District Court erroneously failed to grant the Organizational Defendants' Rule 29 motions specifically with respect to Count Two (*i.e.* 33 U.S.C. § 1908(e), the failure to maintain an accurate ORB while in U.S. waters). It is clear that only the Master of the Vessel has the legal obligation to maintain the ORB while in U.S. waters under U.S. Coast Guard regulations and applicable legal precedent from the only Circuit Court to review the issue. *See Fafalios*, 817 F.3d at 159. Here, there was absolutely no evidence that the Master had any knowledge that the ORB was not accurate. In fact, the evidence was the exact opposite (*i.e.* – the Master had no knowledge of the underlying misconduct of the crew). The government charged 18 U.S.C. § 2, aiding and abetting, for the conduct of C/E Ignacio and 2/E Samson in

causing the Master to fail to maintain an accurate ORB, however the aiding and abetting theory of liability does not and cannot extend to the Oceanic and Oceanfleet, under the facts and circumstances of this matter. The misconduct by the individual defendants, C/E Ignacio and 2/E Samson, was not done within their authorized agency or employment, as Master Tabacaru is the only person in charge of the Vessel tasked with maintaining an accurate ORB while in U.S. waters. Accordingly, the individual defendants who were convicted as principals under 18 U.S.C. § 2, cannot provide the factual predicate for vicarious liability of the Organizational Defendants as a matter of law. To rule otherwise would permit the legal fiction of a corporate entity (which had no knowledge of the misconduct and was misled about the misconduct) aiding and abetting itself. Accordingly, the convictions for Count Two must be vacated.

Finally, Organizational Defendants challenge the sentences imposed by the District Court on the basis that the Court erred in failing to appropriately group the counts of conviction; the District Court erroneously imposed a criminal fine in excess of the financial ability of each Organizational Defendant's independent ability to pay; and, finally, the District Court erred in issuing incongruent sentences which were disparate between themselves and other sentences imposed in similar cases. To the extent that this Court does not vacate the counts of conviction on Organizational Defendants' sufficiency of the evidence challenges, it is respectfully

submitted that this Court must vacate the sentences imposed and remand for re-sentencing with instructions to the District Court.

ARGUMENT

I. THE DISTRICT COURT ERRED BY FAILING TO GRANT ORGANIZATIONAL DEFENDANTS' RULE 29 MOTIONS FOR JUDGMENT OF ACQUITTAL DUE TO THE INSUFFICIENCY OF THE EVIDENCE ADDUCED AT TRIAL TO SUPPORT VICARIOUS CONVICTION ON COUNTS ONE THROUGH NINE OF THE INDICTMENT.

A. Fed. R. Crim. P. Rule 29

Under Rule 29 of the Federal Rules of Criminal Procedure, a defendant is entitled to a judgment of acquittal following a guilty verdict from a jury when the evidence is "insufficient to sustain a conviction" of the offense charged. Fed. R. Crim. P. 29. A Rule 29 motion tests the sufficiency of evidence against the defendant and avoids the risk that the jury may have capriciously found the defendant guilty even though there was not legally sufficient evidence of guilt. 2A Charles Alan Wright & Peter J. Henning, Federal Practice and Procedure § 461 (4th ed. 2009). Here, the Organizational Defendants were improperly and capriciously convicted vicariously. On a Rule 29 application, a Court must guard against a conviction that is based on evidence "so scant that the jury could only speculate as to the defendant's guilt, and is such that a reasonably-minded jury must have a reasonable doubt as to the defendant's guilt." *United States v. Fearn*, 589 F.2d 1316, 1321 (7th Cir. 1978).

B. Standard of Review

Appellate courts review *de novo* denial of a defendant's Fed. R. Crim. P. 29 motion for judgment of acquittal. *United States v. Hull*, 369 Fed. Appx. 432, 433-434 (4th Cir. 2010) (internal citation omitted). In assessing a sufficiency of the evidence challenge, a reviewing court must uphold a jury's verdict "if there is ***substantial evidence***, taking the view most favorable to the government, to support it." *United States v. Burgos*, 94 F.3d 849, 862 (4th Cir. 1996)(*en banc*)(emphasis added). "[S]ubstantial evidence is evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *Id*. Reversal for insufficient evidence is reserved for cases "where the prosecution's failure is clear," as is the case here. *United States v. Beidler*, 110 F.3d 1064, 1067 (4th Cir. 1997) (citation and internal quotation marks omitted).

C. The District Court Erred in Denying Organizational Defendants Motions for Judgements of Acquittal as the Government Failed to Introduce Sufficient Evidence to Obtain and Sustain Vicarious Convictions of Oceanic and/or Oceanfleet.

It is well-settled law that "Congress has the power to 'personify the company' and thereby charge a partnership entity with criminal liability . . . 'through the doctrine of respondeat superior' . . . [and that] the rationale [for this doctrine] is couched in the familiar concepts of civil tort law of (1) a purpose to benefit the corporation and (2) an act by an agent in line of his duties." *Standard Oil Co. of*

Texas v. United States, 307 F.2d 120, 127-28 (5th Cir. 1962) (quoting *United States v. A. & P. Trucking Co.*, 358 U.S. 121 (1958)); *see also United States v. Automated Medical Laboratories, Inc.*, 770 F.2d 399, 407 (4th Cir. 1985); *New York Central and Hudson River R.R. Co. v. United States*, 212 U.S. 481, 494 (1909).

All nine (9) of the counts against each of the Organizational Defendants in this case were based solely on a theory of vicarious liability. [JA27 – JA47] (where each count of the Indictment contained the following language, "defendants Rustico Yabut Ignacio and Cassius Flores Samson, acting within the scope of their agency and employment by Oceanic and Oceanfleet . . ."). [JA39]. In order to convict Oceanic and/or Oceanfleet, the government had to prove not only that each of the underlying acts were committed by either Ignacio or Samson, but also had to prove beyond a reasonable doubt that:

1) The offense charged was committed by an agent or employee of the organization;
2) In committing the offense, the agent[s] or employee[s] intended, at least in part, to benefit the organization; and
3) The agent[s] or employee[s] acted within his or their authority.

[*See* JA368].

The three (3) elements are conjunctive and a failure to prove any one (1) of them beyond a reasonable doubt means the conviction(s) are properly to be vacated.

See, e.g., United States v. Automated Medical Laboratories, Inc., 770 F.2d 399, 407 (4th Cir. 1985) (A corporation "may be held criminally liable for the unlawful practices . . . if its agents were acting within the scope of their employment, which includes a determination of whether the agents were acting for the benefit of the corporation.") (citing *United States v. Cincotta*, 689 F.2d 238, 242 (1st Cir.), *cert. denied*, 459 U.S. 991, 103 S. Ct. 347, 74 L. Ed. 2d 387 (1982)); *see also United States v. Singh*, 518 F.3d 236 (4th Cir. 2008) (citing same). To be acting within the scope of his employment, an agent must be "performing acts of the kind which he is authorized to perform, and those acts must be motivated -- at least in part -- by an intent to benefit the corporation." *Automated Medical Laboratories, Inc.*, 770 F.2d at 407 (citing *Cincotta*, *supra* at 241-42.).

D. The Evidence at Trial was Insufficient to Prove Beyond a Reasonable Doubt that the Crewmembers were Acting with the Intent to Benefit the Organizational Defendants and/or were Acting Pursuant to their Authority, and Accordingly the Convictions Must be Overturned.

Oceanic (as owner) and Oceanfleet (as manager) were charged and vicariously convicted for the unknown, unauthorized, and unwanted misconduct of Oceanic's employees Chief Engineer Ignacio and Second Engineer Samson. [JA27 – JA47]. Neither worked for and/or could properly be considered either an employee or agent of Oceanfleet. The offense conduct at issue is limited to the recordkeeping associated with the movement and processing of engine room liquids and the crew's efforts to conceal their conduct. *Id*.

The evidence at trial was consistent from every one of the nine (9) crewmembers who testified, that breaking the law, breaking the rules, and discharging waste overboard was strictly prohibited, was clearly and undisputedly not within their authorized duties, and in fact, imparted ***no*** benefit to the Organizational Defendants. [JA161 – JA162]. All of the crewmembers received extensive training and were repeatedly familiarized on this point. [JA311 – JA313]. In fact, the indisputable evidence at trial was that all of the crewmembers had agreed (as part of their Philippines Overseas Employment Administration ("POEA")[17] approved employment agreements with Oceanic permitting them to work aboard on the OCEAN HOPE) that they would follow only lawful orders, would protect the environment, and would immediately report any shipboard misconduct. [JA150; JA291 – JA292]. During his cross-examination, 3/E Menente admitted (as did all other witnesses) that he had agreed to obey international laws, the Organizational Defendants' "zero-tolerance" pollution policy, and to immediately report any misconduct (even if the order came from a superior officer) before joining the Vessel. [JA150; JA159 – JA160]; [JA436 – JA439](shipboard notices and clear instructions that all discharge of oil overboard prohibited).

[17] Working at sea is a highly controlled and highly lucrative profession for Filipino nationals. [JA309 – JA312]. As Fitter Bellaza testified at trial, jobs working on the OCEAN HOPE at sea were much more preferable and better paying than any job which they could get in the Philippines. [JA190-191].

3/E Menente testified:

> Q. All right. In addition, sir, more specifically, you promised that you would immediately report any use or suspicion of a magic pipe to the DPA and senior management. And you didn't do that, did you?
>
> A. Yes, sir, I did not report, sir.
>
> Q. And you promised that you would do it even if someone superior to you or senior to you on the ship was involved; right?
>
> A. Correct, sir.
>
> Q. And it was promised to you by the company, your employer, Oceanic, and the ship manager, OceanFleet, that you wouldn't be risking your career or jeopardizing your employment by doing the right thing and coming forward, did you?
>
> A. Yes, sir.
>
> Q. Okay. And you understood that there was an anti-retaliation policy in place, that you would got protection from anyone that tried to take adverse action against you for reporting a violation; right?
>
> A. Yes, sir, I signed this.
>
> Q. Okay. But you understood that, that there was a policy and procedure in place to protect you if someone tried to take some adverse action against you; right?
>
> A. Yes, sir.

[JA159 – JA160].

He then continued:

> Q. Well, why don't you take a look at this next promise you made to the company. That you are aware that there is no bonuses for reducing operational maintenance and repairs for machinery space, and there's no reason to sacrifice environmental compliance; right?

> A. Okay. Okay, sir.
>
> Q. You agree with me, sir, there was no incentive from either Oceanic or OceanFleet for you or anyone else to take a shortcut and cheat, was there?
>
> A. None, sir.

[JA161 – JA162]. The evidence at trial was consistent and uniform. That it was clearly understood by all shipboard actors – both objectively and subjectively - that it was not within the scope of their agency or employment to break the law or the environmental rules; disobey regulations onboard the Vessel; or fail to report any suspected misconduct. *Id*.

Oiler Villar testified that diesel fuel was placed into tanks in the engine room which were actually designated by the Vessel onboard for the storage of bilge water. [JA203 – JA204]. It was clear at trial that the motive offered to the jury by the prosecutors was that the bypass of the pollution prevention equipment was predicated in large part on a theory that because the proper storage tanks were secretly used by crew to store fuel which would be sold on the black market in Bangledesh. [JA204]. Even if the fuel scheme were true (which the testimony was unclear as to exactly when, how, and where fuel was allegedly stored and then sold in Bangladesh) [JA218 – JA219], all of the crewmembers testified that they knew that such actions were against the law and against the Organizational Defendants' rules and onboard policies and something for which the crewmembers would lose

their jobs if caught by the Master and/or Oceanfleet, and/or the Vessel owner, Oceanic.

The evidence was clear that there was absolutely no benefit intended to the Organizational Defendants through the misconduct, as the sale of diesel was absolutely prohibited. [JA286]; [JA328]. To the contrary, the government's principal evidence, far from imputing guilt in this case, actually proved the opposite, that there was no possible way that the actions taken by C/E Ignacio or 2/E Samson were in the course of their agency or employment authority and certainly had absolutely no intent to benefit Oceanic or Oceanfleet. [JA205 – JA206, the diesel led to crewmembers illegally obtaining sums of money including $1,000 for the Oiler Villar]. *See, e.g.*, *United States v. International Brotherhood of Teamsters*, 141 F.3d 405, 409 (2d Cir. 1998) (Second Circuit Court of Appeals concluded that no liability could attach to the union, for the acts of its agents were "unauthorized acts" that "directly harmed" the union and only benefited the individuals.).

In addition, Master Tabacaru testified that ***no*** crewmembers ever made a report to him (or to the Port Captain and/or Superintendent who joined the Vessel in Panama) about a black hose used to discharge sludge; the improper discharge of bilge water; and/or using a bilge water holding tank to steal and store diesel gas. [JA225 – JA226]. Contemporaneously, 3/E Menente was texting his wife specifically confirming that he purposefully was not going to inform any

representatives of Oceanic or Oceanfleet, despite knowing that reporting of the misconduct was required and that the Organizational Defendants would have taken immediate remedial measures to put an end to the misconduct. [JA440 – JA460]. Instead, all of the crewmembers testified repeatedly that the crew kept the information deeply hidden. [JA236 – JA237].

The Vessel's Fourth Engineer, Charlie Sarduma testified:

> Q. Now, you didn't tell the captain of the ship about any misconduct in the engine room; right?
>
> A. No, sir. That's right.
>
> Q. You kept the secret from the captain?
>
> A. Yes, sir.
>
> Q. And you kept the secret from the superintendents that came from the company?
>
> …
>
> A. That was -- I don't know, what was your last question? The last.
>
> Q. Yeah. You kept the secret from the captain, the company, the superintendents, the DPA, everybody?
>
> A. Yes, sir.

[JA243 – JA244]. The engine room crew hid the misconduct so well, that even the experienced, well trained Coast Guard inspection team was unable to uncover any evidence of misconduct, despite having been told what to look for prior to the Vessel's arrival in Wilmington. [JA475 – JA476].

The engineers were hired by Oceanic and understandably expected to do their jobs properly, professionally, and legally.[18] [JA309 – JA313]; [JA215]. They were further expected to promptly report any conditions which affected their ability to do so. [JA150]. Master Tabacaru testified that neither he, nor anybody from Oceanfleet nor Oceanic, would permit any of the engineers to cheat, lie, take a shortcut or otherwise omit any required entries from the vessel's ORB. [JA225 – JA226].[19]

> Q. At anywhere along that voyage had anyone brought to your attention that there was a black hose being used to illegally discharge sludge?
>
> A. No. No.
>
> Q. At any time during that voyage did anyone bring to your attention that there was bilgewater being discharged illegally to the sea?
>
> A. No.
>
> Q. Now, had someone brought either of those two issues to your attention, what would you do?

---

[18] CWO4 Libbert even agreed based on his sea service that it was a fair and reasonable expectation that engineers should do their jobs honestly and lawfully. [JA101].

[19] Parenthetically, even if an improper discharge was performed, simply writing the information in the ORB would have served as a bar to any criminal prosecution in the Eastern District of North Carolina. *See, e.g., Abrogar*, *supra*; *see also USDOJ, Criminal Resource Manual*, §670 ". . . it was early held that, as a general rule, Federal criminal jurisdiction does not attach to offenses committed by and against foreigners on foreign vessels. *See United States v. Holmes*, 18 U.S. (5 Wheat.) 412 (1890); *United States v. Palmer*, 16 U.S. (3 Wheat.) 281, 288 (1818). *See*, however, 18 U.S.C. §7(8). The Convention on the High Seas to which the United States is a party, purports to give the flag state exclusive jurisdiction over its vessels on the high seas." http://www.usdoj.gov/usao/eousa/foia_reading_room/ usam/ title9/crm00670.htm.

> A. If I had known?
>
> Q. Yes, sir.
>
> A. Normally, if I know about something like that, I would inform all the parties, like the owner, the operator, the charterer. If I am in the territorial waters of a state, I would inform the authorities of that country. And for the United States, the company has a contract with a depollution company which would be informed exactly when something like this happens.
>
> Q. Okay. And what about the offending crew member? Would you recommend some sort of discipline or disciplinary action?
>
> A. No. Not me. I cannot recommend disciplinary action. If it is proven that it is just a mistake, the owner and the operator will make a decision. If it is a deliberate action, the owner will certainly take -- I don't know what to call it -- some measures.

[JA225 – JA226].

Critical to understanding just how insufficient the government's evidence was in this case, the credible and unrebutted testimony from the representative of the crewmember's own "manning agency", Interorient Maritime Enterprises Inc. ("Interorient"),[20] Captain Spencer Jara. Captain Jara explained that environmental protection was the highest priority for the M/V OCEAN HOPE. [JA321 – JA322]. Captain Jara testified that ***all*** crewmembers were provided with bilingual training by expert educators who were available to each crew member to answer any questions

[20] Interorient is a third-party manning agent with offices in Manilla, Philippines hired by Oceanic in order to source, recruit, hire, and train the crewmembers who were employed by Oceanic to work onboard the M/V OCEAN HOPE. [JA305]; [JA310].

about the Vessel's Safety Management System, Environmental Protection policies and procedures, and other orientation requirements prior to working on the OCEAN HOPE. *Id*. These same people at Interorient were available to address any and all concerns on a 24/7 basis. [JA324]. Prior to being permitted to work aboard the OCEAN HOPE, every crewmember presented certificates and licenses confirming that they had: 1) training on MARPOL 73/78, Annex I & II (which deals specifically with oil waste); 2) had working knowledge of shipboard English proficiency; and 3) understood how to use and access the vessel's SMS and were familiar with the pollution prevention policies and procedures onboard. [JA314 – JA316]; [JA320 – JA321].

Each crewmember was trained how to contact Oceanfleet's DPA[21] and/or Captain Jara directly to report any problem, incident, or issue onboard. [JA 323 – JA324]. Despite this clear and direct training, with each crewmember being given contact cards for how to make reports, no such report of any of the alleged activity was ever presented to Master Tabacaru, Captain Jara (or anyone else at Interorient), the vessel superintendents and port captains, the DPA, and/or anyone else at Oceanfleet. [JA225 – JA226]; [JA329 – JA330].

[21] The DPA Ms. Pasimakopoulou's 24/7 contact details were posted on signs throughout the Vessel. [JA474].

The crewmembers who testified at trial and blamed C/E Ignacio and 2/E Samson for the misconduct onboard the Vessel stated that they never made ***any*** reports to Master Tabacaru, Captain Jara and Interorient, or anyone at Oceanfleet. [JA159 – JA160]; [JA225 – JA 226]; [JA243 – JA244].[22] The only explanation provided by the crewmembers was the repeated misguided belief that they were permitted to lie to Master Tabacaru, Oceanic, Oceanfleet, and Interorient, because the individual defendants instructed them to do so.[23] However, there was absolutely no evidence in this case that such instructions were provided by C/E Ignacio and/or 2/E Samson in order to benefit the Organizational Defendants. [JA290 – JA292]. In fact, these lies were a detriment, as they prevented Oceanic and Oceanfleet from

[22] 3/E Menente and the other crewmembers allowed the wrongdoing to continue and hid their actions for their own benefit. [JA150 – JA152]. All crewmembers testified that they *knew* their actions were illegal and wrong, but they permitted the misconduct to continue all the way to the United States in an attempt to benefit themselves through obtaining a whistleblower reward and other benefits from the United States. If their intent was to benefit the company, at all, they would not have taken such robust steps and precautions to hide their misconduct and barratry of the ship from Oceanic and Oceanfleet.

[23] 4/E Sarduma testified that he believed that the instructions he received to lie from the individual defendants meant that he was to also lie and hide the conduct from the vessel's owner and manager. [JA241 – JA242]. He testified that he kept his knowledge of the misconduct secret from the DPA, Captain, and superintendents about what was going on. [JA243 – JA244]. Wiper Anthony Reyes also passed the blame to 2/E Samson, testifying that he never reported the alleged improper discharge of bilge water to the Chief Engineer or Master (or anyone else). [JA 271 – JA274]. He similarly testified that he never made a report to the Chief Engineer, Master, superintendents, or the Panamanian authorities about the diesel in the bilge water holding tank. [JA275].

taking any corrective measures to put an end to any improper discharges, to report the misconduct to Flag State and licensing authorities, and to put corrective entries into the ORB so that it would not be false upon arrival into the United States. [JA88 – JA89] (CWO4 Jeffrey Libbert confirmed that the crime was the failure to maintain the ORB in U.S. waters and that a simple fix would have been to simply write the misconduct or discharge in the record.).

The most compelling testimony for how the conduct was hidden from Oceanic and Oceanfleet however came from the whistleblower, himself, 3/E Vincente Menente. 3/E Menente is a licensed engineer[24] who testified at trial that he specifically hid the conduct and the evidence of the conduct (including photos, videos, and physical evidence) from everyone except the U.S. Coast Guard. [JA173 – JA176]. In furtherance of his deception, he had his wife text, email, and call the U.S. Coast Guard to report the alleged violations, with strict, express instructions to not tell the organizational defendants and/or Master about the alleged discharges or the diesel. [JA177 – JA178].

3/E Menente testified at trial that he had indeed sent texts to his wife debating whether he should report the allegations to Oceanfleet and/or the superintendents onboard, but recognized that the violation of company policies would lead to the immediate punishment of the Chief Engineer and the Second Engineer and

[24] *See* 3/E Menente's Licenses and Certificates at JA466 – 473.

potentially they would not face repercussions from the U.S. Coast Guard. [JA176 – JA177]; [JA440 – JA460]. 3/E Menente testified that he knew that there was both the ability to report misconduct to Oceanic and Oceanfleet anonymously and without fear of retaliation, but he chose not to do so. [JA160]. In addition, 3/E Menente confirmed at trial that he had knowledge of and believed that he would be in line to recover a reward from U.S. authorities as a result of the reporting of the violation(s) only to U.S. Coast Guard. [JA178 – JA179].

All crewmembers were clear and unequivocal in their testimony that they knew the rules onboard the OCEAN HOPE, were aware of the strict pollution prevention policies and procedures in place, that their bad actions were not what they were hired to do, and were not intended to benefit either Organizational Defendant. No crewmember believed that what they were doing by bypassing the pollution prevention equipment and by lying to the U.S. Coast Guard to cover up the activity was in the course and scope of their employment and/or for the benefit of Oceanfleet or Oceanic. [JA161 – JA162].

Accordingly, the convictions of Counts One through Nine must be vacated as the evidence was insufficient to support the convictions returned by the jury.

II. THE DISTRICT COURT ERRED AS A MATTER OF LAW AND FACT IN FAILING TO GRANT ORGANIZATIONAL DEFENDANTS' RULE 29 MOTIONS FOR JUDGMENT OF ACQUITTAL AS TO COUNT TWO OF THE INDICTMENT UNDER 33 U.S.C. § 1908(A) AND 18 U.S.C. § 2.

Under Count Two, both individual defendants were convicted for a violation of APPS on the basis that the defendants aided and abetted the unwitting principal, *i.e*. the Master, by causing him to fail to maintain an accurate ORB while in United States waters. Organizational Defendants were convicted vicariously for the acts of C/E Ignacio and 2/E Samson. However, "under the plain language of the regulations, only the 'master or other person having charge of the ship' is responsible for maintenance of the oil record book. Section 151.25 asserts that each ship is required to maintain an oil record book, and then immediately thereafter explicitly and exclusively designates the "master" of the ship as the individual "responsible" for maintaining such a record book. *See* 33 C.F.R. §§ 151.25(a), (j). The regulations mention only the "master" when assigning responsibility for maintaining the oil record book, ***which plainly indicates that the responsibility does not extend to others on the vessel***." *United States v. Fafalios*, 817 F.3d 155, 159, 2016 AMC 669, (5th Cir. 2016) (emphasis added).

Captain Tabacaru (*i.e*. the Master of the OCEAN HOPE), testified at trial clearly, credibly, and undoubtedly, that he would not have knowingly permitted any crewmembers to falsify the oil record book, nor would he have provided the oil

record book to the Coast Guard if he suspected that any required entry was purposefully omitted. [JA223 – JA224]. It was the policy of Oceanic, Oceanfleet, and the M/V OCEAN HOPE to protect the environment, a duty which Master Tabacaru carried out with diligence. Master Tabacaru testified,

> Q. [B]etween the environment and the crew. But between the environment and saving a few dollars, the environment comes first; right?
>
> A. Yes.
>
> Q. Okay. And that was made clear to you that that was the company's policies and expectations of you, as the captain of the ship; right?
>
> A. Correct.

[JA222].

There was absolutely no evidence presented during the trial to support an allegation that Master Tabacaru knowingly failed to maintain an accurate ORB. As such, the government sought to prosecute and convict the defendants under 18 U.S.C. § 2, for 'aiding and abetting' and further pursued vicarious prosecutions of the Organizational Defendants. [JA39 – JA40]. The general aiding and abetting statute provides, in relevant part, that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C. § 2. "Aiding and abetting is not itself a federal offense, but merely 'describes the way in which a defendant's conduct resulted in the violation of a particular law.'" *United States v. Barefoot*, 754 F.3d

226, 239 (4th Cir. 2014) (quoting *United States v. Ashley*, 606 F.3d 135, 143 (4th Cir. 2010)). However, "[A] person is liable under § 2 for aiding and abetting a crime if (and only if) he (1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission." *Rosemond v. United States*, 134 S. Ct. 1240, 1245 (2014) (citations omitted). The intent requirement is "satisfied when a person actively participates in a criminal venture with **full knowledge of the circumstances constituting the charged offense.**" *Id*. at 1248-49; *see also United States v. Winstead*, 708 F.2d 925, 927 (4th Cir. 1983) (emphasis added).

There 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 ORB while in U.S. Waters. 18 U.S.C. § 2(b); *see Jho*, 534 F.3d at 403; *United States v. Fafalios*, 817 F.3d at 162. However, that is where the 'aiding and abetting' liability ends.

As the Master, an employee of Oceanic, is the only person with the legal obligation to "maintain" the ORB as a matter of U.S. regulation and law, he is the only crewmember onboard the M/V OCEAN HOPE who was acting within his legal authority and scope of agency and employment by maintaining the ORB on the Vessel. Since Master Tabacaru did not knowingly fail to maintain an accurate ORB while in U.S. waters (in fact he believed that the record was accurate), the Organizational Defendants cannot be found vicariously liable for the failure to

maintain an accurate ORB in U.S. waters. Moreover, as the individual defendants were clearly not acting within their authority or with the intent to benefit either Oceanic or Oceanfleet by causing the Master to maintain a false ORB through aiding and abetting, Organizational Defendants cannot be vicariously liable for the actions of C/E Ignacio and 2/E Samson. Here, the facts and law do not support criminal vicarious liability for Organizational Defendants and the conviction for Count Two of the indictment must be vacated.

III. THE DISTRICT COURT ERRED IN ENTERING DISPARATE AND UNREASONABLE SENTENCES AGAINST OCEANIC AND OCEANFLEET UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE WHICH SHOULD BE SET ASIDE.

A. Standard of Review

Federal appellate courts set aside any criminal sentence from a district court which is unreasonable. *Rita v. United States*, 551 U.S. 338, 341 (2007). A trial court's reasonableness is reviewed under an abuse of discretion standard. *United States v. Howard*, 773 F.3d 519, 527-528 (4th Cir. 2014). A review of procedural reasonableness is the first step in determining whether a Court has abused its discretion in imposing a sentence and must be undertaken before examination of other matters. *United States v. Sumpter*, 422 Fed. Appx. 235, 237-238 (4th Cir. 2011). When reviewing procedural reasonableness, this Court has previously held:

> "[i]n our determination of whether the district court committed any significant procedural error, we look to any failure in the calculation (or the improper calculation) of

> the Guidelines range, the treatment of the Guidelines as mandatory, **any failure to consider the § 3553(a) factors**, any selection of a sentence using clearly erroneous facts, and any failure to adequately explain the chosen sentence and any deviation from the advisory Guidelines range. The district court "must make an individualized assessment based on the facts presented" when rendering a sentence, applying the relevant § 3553(a) factors to the specific circumstances of the case and the defendant, and must "state in open court" the particular reasons supporting its chosen sentence."

Id. (internal citations omitted) (emphasis added). In order for a sentence imposed by the District Court to be sustained, there must be no failure in the review of 18 U.S.C.S § 3553(a) sentencing factors. It is the government that bears the burden of "persuad[ing] the court of appeals that the district court would have imposed the same sentence absent the erroneous factor." *Williams v. United States*, 503 U.S. 193, 203 (1992).

B. The District Court Erred in Imposing a Sentence Against Organizational Defendants Which Failed to Group the Multiplicitous Counts 2 and 3 Together as well as the Mutliplicitous Counts 6 – 9 Together.

In determining an appropriate fine, the District Court must adhere to the enumerated statutory objectives and requirements of 18 U.S.C. §3553 and 18 U.S.C. §3572 and the Court's "overarching" duty to "impose a sentence sufficient, but not greater than necessary' to accomplish the goals of sentencing." *See Kimbrough v. United States*, 552 U.S. 85, 101 (2007); *Pepper v. United States*, 131 S. Ct. 1229, 1242-43 (2011). "The Sentencing Commission wrote its grouping provisions 'with

an eye toward eliminating unfair treatment that might result from count manipulation.' U.S.S.G. Ch. 1, Pt. A, § 4(a)." *United States v. Calozza*, 125 F.3d 687 (9th Cir. 1997).

When a defendant is convicted of multiple counts, Courts are required to determine whether the counts arise from the same act or transactions and, therefore, are "grouped" for the purposes of sentencing. *See* U.S.S.G. §§ 1B1.1(d), 3D1.1(a), 3D1.2; *see also United States v. Wessells*, 936 F.2d 165, 168 (4th Cir. 1991); *United States v. Patterson*, 962 F.2d 409, 417 (5th Cir. 1992). For counts involving the same acts, or which involve the same harm, grouping ensures convictions for such acts will not result in the imposition of an inappropriately harsh sentence. *See* U.S.S.G. § 3D1.2(b); *see also Calozza*, 125 F.3d at 692; *United States v. Toler*, 901 F.2d 399, 402 (4th Cir. 1990) ("These two grouping rules require a determination of whether the two offenses are sufficiently interrelated that, in essence, they are but alternative means of punishing "substantially the same harm." U.S.S.G. § 3D1.2. If the offenses are closely interrelated, they will be grouped under subsection (a) or (b) and treated as if they were one offense for purposes of sentencing."). Accordingly, grouping seeks to ensure that convictions on multiple counts do not result in a sentence enhancement unless the multiple counts represent additional conduct that is not otherwise accounted for by the guidelines. *Id*.

For Counts Two and Three, the Organizational Defendants were held vicariously liable for ostensibly the same conduct, namely that the Oil Record Book was falsified by omission by shipboard staff. [JA39 – JA41]. For Counts Six through Nine, the Organizational Defendants were held vicariously liable for the same conduct, specifically the witness tampering caused by the conduct by the Chief Engineer and Second Engineer that hindered the Coast Guard's investigation into the Oil Record Book falsification. [JA43 – JA47].

With the exception of the distinction-less differences in the statutory language of each count, the *same type of underlying offense conduct* was alleged in both sets of counts and specifically are a result of maintenance and presentation of the inaccurate Oil Record Book to the Coast Guard during the Port State Control Inspection in Wilmington, North Carolina, on or about July 15, 2015 and the associated acts of obstruction during the inspection. As set forth above in detail, neither individual defendant (nor any of the other crewmembers), reported any of the conduct to either the Master and failed to report to the organizational defendants as they were obliged to do. It is respectfully submitted that it was improper for the District Court to fail to group the offense conduct for two (2) counts of the same record book violation and four (4) counts of the same 'witness tampering' into two groups based on the conduct being, ostensibly, the same. The District Court should

have grouped the multiplicitous Counts for the false ORB and witness tampering prior to imposing any sentence.

C. The District Court Erred in Imposing Sentences Against Each Organizational Defendant Which Failed to Consider Their Independent Financial Condition and Ability to Pay the Fine Imposed as Required by 18 U.S.C. § 3572.

A defendant's financial condition must be considered in determining the amount of a fine. *See* 18 U.S.C. § 3572(a) ("In determining whether to impose a fine, ..., the court shall consider, ... the defendant's income, earning capacity, and financial resources"); *see also* U.S.S.G. § 8C3.3 (providing that the amount of a fine may be reduced if an organization is unable to pay a guidelines-range fine). A District Court should impose a fine in an amount less than otherwise would be required where "the court finds that the organization is not able, and even with the use of a reasonable installment schedule, is not likely to become able to pay the maximum fine." *See* U.S.S.G. § 8C3.3(b). For the purposes of the guidelines, an organization is not able to pay the minimum fine, where, even with an installment schedule, "the payment of that fine would substantially jeopardize the continued existence of the organization." *See* U.S.S.G. § 8C3.3, Application Note 1.

Here, the District Court entered a fine which was beyond the financial capabilities of either Oceanic or Oceanfleet to meet. [SA14 - SA15]; [SA38 – SA39]. At sentencing, the Organizational Defendants objected to the imposition of

a fine which was beyond the financial ability of either defendant to pay.[25] Oceanic had a negative balance sheet of approximately $1,500,000 and had sold the OCEAN HOPE in May 2016, leaving it with absolutely no ability to pay [SA14 – SA15]. Oceanfleet has a negative balance sheet, and has a modest ability to pay a modest fine, but certainly not the disparate $1,800,000 fine imposed by the District Court. [SA38 – SA40]. When reviewing a district court's decision to impose a fine, appellate courts use a "clearly erroneous" standard of review. *United States v. Aramony*, 166 F.3d 655, 665 (4th Cir. 1999); 18 U.S.C.S. § 3742(e). As part of its review, this Court must determine whether (or not) the district court sufficiently considered the defendant's "income, financial resources, and earning potential". *United States v. Sumpter*, 422 Fed. Appx. 235, 238 (4th Cir. 2011).

As reported to the Department of Probation and incorporated into the Presentence Report, Oceanfleet is a modest business with just over thirty (30) employees, who assist in the management of vessels belonging to five (5) different ship-owning clients. [SA37 – SA40]. Oceanic had on average twenty-one (21) crewmember contract employees at any specific time that served onboard the M/V

[25] Although the fines for both defendants were due immediately, the District Court imposed an installment plan for equal annual payments of $180,000 for Oceanic and $360,000 for Oceanfleet. [JA531; JA536]. The first $500,000 of the $540,000 installment which was paid to the Eastern District of North Carolina came from the surety funds which had been posted jointly and severally by Oceanic and Oceanfleet in July 2015 in accordance with 33 U.S.C. § 1908(e).

OCEAN HOPE. [SA14 – SA15]. Both Organizational Defendants operated for the past two (2) years at a loss due to market conditions. [SA 15; SA39]. As set forth in the PSR and the financial documents disclosed to the Probation Department, the OCEAN HOPE, Oceanic's only fee earning asset has been sold and scrapped (meaning broken up and destroyed by the buyer for its scrap metal value) and as a result Oceanic has no capability to pay any fine. [SA14 – SA15]. Oceanfleet has a very limited capability to pay any fine. As the Probation Office concluded in the Oceanic PSR, "The M/V Ocean Hope was sold in May 2016 for scrap for $2,300,000; therefore, OCEANIC is unable to generate revenue. The corporate defendant does not appear to be capable of satisfying a fine at this time. The corporate defendant may pay a limited fine if allowed to do so in installments over a period of probation." [SA15]. In actuality, as the financial records demonstrated to the probation department and the District Court, Oceanic has absolutely ***no ability*** to satisfy a fine and has obligations and debts which far outweigh its assets. *Id.*

In the Oceanfleet PSR, the Probation Office found: "The company's assets have also declined sharply over the last four years suggesting that the company could have some difficulty meeting short-term and long-term obligations. … The corporate defendant does not appear to be capable of satisfying a fine immediately; however, it appears that based on the continued receipt of revenues, the corporate defendant

has the ability to pay a fine if allowed to do so in installment over a period of probation." [SA39 – SA40].

When a court imposes a fine and determines "the amount, time for payment and method of payment," the court must consider, *inter alia*, "the defendant's income, ensuring capacity and financial resources." 18 U.S.C. § 3572(a)(1). Indeed, U.S.S.G. § 8C3.3 permits "a court to reduce a fine upon a finding that a defendant organization is not, and is not likely to become, able to pay it." *United States v. Eureka Labs., Inc.*, 103 F.3d 908, 912 (9th Cir. 1996); *United States v. Hicks*, No. 92-5429, 1995 U.S. App. LEXIS 1215 (4th Cir. 1995) ("Before imposing a fine, the sentencing court *must* consider and make findings on the factors listed in 18 U.S.C.A. § 3572 concerning the defendant's ability to pay.") (citing *United States v. Arnoldt*, 947 F.2d 1120, 1127 (4th Cir. 1991))(emphasis added). The imposition of a fine so substantial that it wipes out a business organization would itself be a clearly erroneous sentence and abuse of the Court's sentencing authority and discretion. S*ee Standard Oil Co. of Indiana v. United States*, 164 F. 376, 386-89 (7th Cir. 1908) ("[T]his is not the punishment of an unlawful business, but the punishment of unlawful practices connected with a lawful business . . .").

Here, the District Court's imposition of fines of $900,000 for Oceanic and $1,800,000 for Oceanfleet, which completely disregarded the recommendations of the PSR and the financial records provided to the Court, violates the requirements of

18 U.S.C. § 3572(a) to adequately assess the ability to pay and should be vacated. *United States v. Hill*, 472 Fed. Appx. 238 (4th Cir. 2012).

D. The District Court Erred in Imposing a Sentence Which Was Disparate with Other Similarly Situated Organizational Defendants in Nearly-Identical Matters and with Similar Records as Required by 18 U.S.C. §3553(a)(6) and 28 U.S.C. § 991(b)(1)(B).

While a sentencing court need not issue a comprehensive, detailed opinion on its consideration of each § 3553(a) factor, it must provide an explanation sufficient to "satisfy the appellate court that he has considered the parties' arguments." *Rita*, 551 U.S. at 356. When looking at the form judgments issued by the court and the transcript of the sentencing hearing, there is nothing more than a minimal acknowledgement by the District Court that the § 3553(a) factors were considered at all. [JA517] ("I've considered the statutory issues as well as the factors set in 18 United States Code Section 3553(a).").

A critical sentencing factor under 18 U.S.C.S § 3553(a) which a district court must consider when imposing its sentence is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C.S. § 3553(a)(6). Courts are required to review sentences given to other similarly-situated defendants and attempt to bring its sentence into line with those of the prior defendants. In fact, other circuits have found that "identifying a case in which a similarly-situated defendant received a lesser sentence is one way that a defendant can establish the existence an unwarranted

disparity" warranting a vacatur of the sentence imposed. *United States v. Armstrong*, 550 F.3d 382, 406 (5th Cir. 2008) (internal quotations omitted). It is axiomatic that defendants with similar backgrounds which have been found guilty of the same offenses should receive similar sentences. *See Dorsey v. United States*, 132 S. Ct. 2321, 2334 (2012); *see also United States v. Amaya*, 2013 U.S. App. LEXIS 6223 (4th Cir. 2013); 28 U.S.C. § 991(b)(1)(B) (stressing the need to avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct").

In issuing the sentence against Oceanic and Oceanfleet, District Judge Howard provided no reasoning in relation to any of the factors, but specifically no reasoning was provided with respect to the disparate difference in the fine imposed against Oceanic at $100,000 per count (for a total of $900,000) and Oceanfleet at $200,000 (for a total of $1,800,000). This despite the fact that the organizational defendants were convicted vicariously for the exact same unwanted and unknown conduct by C/E Ignacio and 2/E Samson. Even more troubling, in the most similar recent vessel MARPOL/APPS case to be sentenced by a District Court sitting in the Fourth Circuit, *United States v. Diana Shipping Services S.A.*, 2:13-cr-40 (E.D. Va. 2013), a first-time offending ship manager was found vicariously criminally liable on eleven (11) counts in the Eastern District of Virginia. *Id.* That matter involved a Chief Engineer, a Second Engineer, and a vessel operator, Diana Shipping, all of

which went to trial and were found guilty of all eleven (11) counts charged, including three (3) APPS counts. In weighing all of the sentencing factors and applicable guidance, District Judge Davis, imposed a sentence of USD 100,000 per count for a total, aggregate fine of USD 1,100,000 (*i.e.* – USD 100,000 per count).

It is respectfully submitted that the District Court's failure to address 18 U.S.C.S. § 3553(a)(6) and enter the same sentence for defendant Oceanfleet, which was in the exact same position as co-defendant Oceanic and Diana Shipping, was unreasonable in this case and the sentence against Oceanfleet should be overturned.

E. The District Court Improperly Expanded the Term of Probation and Five (5) Year Ban to Innocent Third Parties Not Before the Court

As part of the imposition of its sentence, the District Court imposed the following requirements on each corporate defendant:

1. "[Oceanic] is hereby banned from any port in the United States until they have fully satisfied all financial sanctions including fines, interests and special assessments. The denial of entry to any port of the United States shall apply to 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."

[JA518]

2. "[T]he corporate defendant, Oceanfleet Shipping Limited, is hereby banned from any port of the United States until they have fully satisfied all financial

sanctions including fines, interests and special assessment. The denial of entry to any port of the United States shall apply to all vessels managed by this defendant and/or successor, assignee, subcontractor, acquirer, affiliate or entity related to either defendant by reason of shared or common ownership and management or control." [JA521].

There has been no allegation or evidence presented in the record that there is any alter-ego and/or successor company to Oceanic or Oceanfleet. Nevertheless, the District Court sought to improperly expand the scope of its sentence imposing probation and a five (5) year ban to potential third-party Owners and Managers who are not subject to the jurisdiction of the Court, the Indictment, or the convictions. As neither the government nor the District Court provided any legal authority for the imposition of an expanded sentence on entities which are neither alter-egos nor successor corporations, it is respectfully submitted that the imposition of probation and five (5) year ban on third parties not subject to the jurisdiction of the Court must be vacated as a matter of law.

CONCLUSION

For the reasons more fully set forth above, it is just and proper under the facts and circumstances of this matter that the Judgment below should be reversed and Organizational Defendants should be acquitted of Counts One through Nine of the Indictment. Alternatively, the Sentence of the Court should be set aside as the District Court imposed sentences which were erroneous and failed to consider the applicable sentencing factors as required under the facts and applicable law in this case.

Dated: May 12, 2017

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Effective 12/01/2016

No. 17-4061 **Caption:** Oceanic Illsabe Limited, et al. v. USA

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