22-1029

United States Court of Appeals

for the

Second Circuit

AMERICAN CRUISE LINES,

Petitioner,

– v. –

UNITED STATES OF AMERICA, UNITED STATES MARITIME ADMINISTRATION, UNITED STATES DEPARTMENT OF TRANSPORTATION, PETE BUTTIGIEG, in his official capacity as the Secretary of Transportation, LUCINDA LESSLEY, in her official capacity as the Acting Maritime Administrator,

Respondents,

VIKING USA LLC, RIVER 1, LLC,

Intervenors.

ON PETITION FOR REVIEW FROM
THE UNITED STATES MARITIME ADMINISTRATION

BRIEF FOR PETITIONER
(REDACTED)

JONATHAN D. BRIGHTBILL
CONSTANTINE G. PAPAVIZAS
SPENCER W. CHURCHILL
WINSTON & STRAWN LLP
Attorneys for Petitioner
1901 L Street, NW
Washington, DC 20036
(202) 282-5855

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Petitioner American Cruise Lines, Inc. (ACL) hereby makes the following corporate disclosure statement: ACL is a privately held, family-owned company without any parent corporation. No publicly traded corporation holds more than 10% of ACL's stock.

Dated: December 8, 2022

Respectfully submitted,

/s/ Jonathan D. Brightbill
JONATHAN D. BRIGHTBILL

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT....................1
STATEMENT OF JURISDICTION....................3
STATEMENT OF THE ISSUES....................4
STATEMENT OF THE CASE....................4
A. U.S. Maritime Citizenship Framework....................4
B. U.S. River and Cruise Market....................10
C. MARAD's Standard for Impermissible Control....................10
D. The Viking Charter Reviewed....................13
1. Construction of the Vessel....................15
2. Operation of the Vessel....................17
E. Administrative Proceedings....................22
SUMMARY OF ARGUMENT....................25
STANDARD OF REVIEW....................26
ARGUMENT....................27
I. ACL Has Standing to Challenge the Final Action Because ACL Is Harmed by the Unlawful Competition That MARAD Authorized.....27
II. The Final Action Is Arbitrary and Capricious Because MARAD Failed to Rationally Apply the Standard It Invoked....................30
A. Viking Failed Three Tests Evidencing Impermissible Control.31
1. Viking Absorbs All of River 1's Costs and Business Risks....................32
2. Viking Controls the Operation and Manning of the Vessel by Controlling the Vessel Manager....................37
3. Viking's Pre-Paid Charter Hire Was an Impermissible Advance of Funds....................39
B. Viking Also Failed Several Discretionary Tests for Impermissible Control....................48
1. River 1 Is Precluded from Owning Competing Passenger Vessels....................48

2. Viking Can Inspect River 1's Books and Records. 49

C. MARAD's Findings Are Either Wrong, Irrelevant, or Unsubstantiated. 51

III. The Final Action Is Contrary to Law Because MARAD Failed to Comply With the Notice and Comment Provisions of NDAA Section 3502(b). 53

CONCLUSION 59

ADDENDUM A: Declaration of Charles B. Robertson

ADDENDUM B: *Argent Marine I-III Sales of LNG Vessels*

CERTIFICATE OF COMPLIANCE

TABLE OF AUTHORITIES

Page(s)

Cases

Alaska Excursion Cruises, Inc. v. United States,
608 F. Supp. 1084 (D.D.C. 1985) 6

Aleutian Cap. Partners, LLC v. Scalia,
975 F.3d 220 (2d Cir. 2020) 27

Am. Mar. Ass'n v. Blumenthal,
590 F.2d 1156 (D.C. Cir. 1978) 5

Am. Petroleum & Transp., Inc. v. City of N.Y.,
737 F.3d 185 (2d Cir. 2013) 8

Brodsky v. NRC,
704 F.3d 113 (2d Cir. 2013) 54, 55

Brotherhood of Locomotive Eng'rs & Trainmen v. Fed. R.R. Admin.,
972 F.3d 83 (D.C. Cir. 2020) 26

Cent. Vt. Transp. Co. v. Durning,
294 U.S. 33 (1935) 4

Cf. Ass'n of Data Processing Serv. Orgs., Inc. v. Camp,
397 U.S. 150, 152 (1970) 29

Conoco, Inc. v. Skinner,
970 F.2d 1206 (3d Cir. 1992) 5

Dep't of Homeland Sec. v. Regents of Univ. of Cal,
140 S. Ct. 1891 (2020) 3, 27, 32, 57

District No. 1, Pacific Coast District, Marine Engineers' Beneficial Association v. Maritime Administration,
215 F.3d 37 (D.C. Cir. 2000) 30

Dorsey v. United States,
567 U.S. 260 (2012) 58

Fed. Defs. of N.Y., Inc. v. Fed. Bureau of Prisons,
954 F.3d 118 (2d Cir. 2020) 27

Friends of Ompompanoosuc v. FERC,
968 F.2d 1549 (2d Cir. 1992) 55

Garland v. Ming Dai,
141 S. Ct. 1669 (2021) 27, 30

Guzman v. Pichirilo,
369 U.S. 698 (1962) 8

Islander E. Pipeline Co. v. Conn. Dep't of Env't Prot.,
482 F.3d 79 (2d Cir. 2006) 26

Lujan v. Defs. of Wildlife,
504 U.S. 555 (1992) 28

Marine Carriers Corp. v. Fowler,
429 F.2d 702 (2d Cir. 1970) 5

Meacham Corp. v. United States,
207 F.2d 535 (4th Cir. 1953) .... *passim*

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.,
463 U.S. 29 (1983) 26, 58

Ojo v. Garland,
25 F.4th 152 (2d Cir. 2022) 27

Pa. R.R. Co. v. Dillon,
335 F.2d 292 (D.C. Cir. 1964) 5

Schulz v. Williams,
44 F.3d 48 (2d Cir. 1994) 28

Sherley v. Sebelius,
610 F.3d 69 (D.C. Cir. 2010) 28

Singh v. DOJ,
461 F.3d 290 (2d Cir. 2006) 27

XY Planning Network, LLC v. SEC,
963 F.3d 244 (2d Cir. 2020) 28

Statutes

5 U.S.C. § 552 .... 57, 58

5 U.S.C. § 706 26

28 U.S.C. § 2342 3

42 U.S.C. § 4332 54

46 U.S.C. § 8103 5

46 U.S.C. § 50101 5

46 U.S.C. § 50501 42

46 U.S.C. § 55103 .... 6, 7

46 U.S.C. § 55109 6

46 U.S.C. § 55111 6

46 U.S.C. § 55118 6

46 U.S.C. § 56101 .... *passim*

Act of Feb. 17, 1898, Ch. 26, 30 Stat. 248 4

Act of July 4, 1789, Ch. 2, § 5, 1 Stat. 24, 27 4

Act of March 1, 1817, Ch. 31, § 31, 3 Stat. 351 4

Dredging Act of 1906, ch. 2566, 34 Stat. 204 (1906) 6

Merchant Marine Act, 1920 Section 27 6

National Defense Authorization Act Section 3502(b) 9, 23, 53

Passenger Vessel Services Act, ch. 421, § 8, 24 Stat. 79, 81 (1886) 6

Shipping Act, 1916 7

39 Stat. 728 (1916) 7

39 Stat. 729 (1916) 7

39 Stat. 730 (1916) 7

39 Stat. 731 (1916) 7

40 Stat. 900 (1918) 7

40 Stat. 901 (1918) 7

41 Stat. 988 (1920) 6

41 Stat. 999 (1920) 6

Towing Statute, ch. 324, 54 Stat. 304 (1940) 6

Regulations

46 C.F.R. § 15.812 (2020) 33

46 C.F.R. § 67.35 (2020) 42

46 C.F.R. § 298.13 (2020) 36

46 C.F.R. § 298.20 (2020) 19

Other Authorities

56 CONG. REC. 8029 (June 19, 1918) 11

40 Fed. Reg. 28,832 (July 9, 1975) 8

55 Fed. Reg. 14,040 (Apr. 13, 1990) 9, 10

56 Fed. Reg. at 30656 .... 11, 12, 43

Argent Marine I-III Sales of LNG Vessels, 25 S.R.R. 789 (MARAD 1990) 11

Ben Hillyer, *Steamboat company touts economic impact*, THE NATCHEZ DEMOCRAT (Sept. 2, 2016) 14

Constantine G. Papavizas & Bryant E. Gardner, *Is the Jones Act Redundant?*, 21 U. OF SAN. FRAN. MAR. L. J. 95 (2008-2009)............... 6

Elaine Glusac, *More Mississippi Cruises*, N.Y. TIMES (Nov. 27, 2016) .. 14

Frank Herbert *Dune*, ACE: New York, Kindle ed.)................................ 38

James Walsh, *Viking Cruises puts St. Paul plan on hold,* STAR TRIBUNE (Minneapolis, Minnesota) 1B (Dec. 17, 2016) 14

National Transportation Safety Board, "Sinking of U.S. Fish Processing Vessel *Alaska Ranger* Bering Sea, March 23, 2008," Accident Report (NTSB/MAR-09/05)... 18

Pending Applications, U.S. Dep't of Transp., Mar. Admin. (updated Nov. 22, 2022), https://www.maritime.dot.gov/grants/title-xi/pending-applications
.... 19, 45

U.S. Customs and Border Protection, *What Every Member of the Trade Community Should Know About: The Passenger Vessel Services Act* 11-14 (Apr. 2010)
.... 6

Viking Cruises, "Viking Mississippi," https://www.vikingrivercruises.com/ships/mississippi/viking-mississippi.html.. 18

PRELIMINARY STATEMENT

The United States Maritime Administration (MARAD) is an agency of the Department of Transportation charged by Congress with advancing both national defense and the nation's commerce. One task is to prevent "a person not a citizen of the United States" from securing unauthorized "interest in or control of" vessels engaged in domestic, waterborne commerce between points within the United States. 46 U.S.C. § 56101(a)(1)(A). This "coastwise" trade is reserved to U.S. citizens. MARAD therefore reviews vessel leases (i.e., charters) to noncitizens to confirm that they are not "bareboat" charters. 46 C.F.R. § 221.13(a)(1)(iii) (2020). Such charters convey excessive interests or control to noncitizens.

In 2019, MARAD was asked to review a complex, Rube-Goldberg transaction that would permit the Viking® cruise company from Europe to enter the U.S. citizen-reserved coastwise trade. A-7–19. Viking, a non-U.S. citizen, would thereby control a luxury river-cruise vessel on the Mississippi "reflective of Viking 'branding.'" A-8. The vessel would be built by the Edison Chouest Offshore (ECO) family of companies and be nominally "owned" by a new ECO subsidiary, purpose-created subsidiary for this: River 1. A-9.

Based on analyses and a decision in December 2019 (that MARAD then kept secret for years), MARAD confirmed Viking and River 1's "advanced charterhire" transaction was not an impermissible transfer of interest or control. A-243, A-293.

On March 18, 2022, after an extensive campaign of FOIA requests, and a new statute mandating enhanced transparency and public participation, MARAD issued a public "Final Action" relating to the same Viking transaction. A-381–88. In eight pages of *post hoc* 2022 rationalization, MARAD purported to explain why its 2019 confirmation—for Viking's now-already-built-and-about-to-operate, luxury river-cruise vessel—was correct all along. MARAD thus reaffirmed that 2019 determination. This petition followed.

Only through this case has petitioner American Cruise Lines, Inc. (ACL) finally seen the Viking/River 1 charter and its economic realities. The charter contains numerous attributes of foreign control, including some that are *per se* impermissible under the standards that MARAD itself invoked:

- Viking absorbs all costs and normal business risks associated with vessel ownership and operation;
- Viking effectively controls the operation and manning of the vessel through an unlimited veto right over the vessel manager; and
- Viking impermissibly advanced funds disguised as "pre-paid charter hire" with [redacted] equity contribution by River 1.

When evaluating foreign control of vessels, courts are "compelled to observe the substance rather than the form of the transaction." *Meacham Corp. v. United States*, 207 F.2d 535, 543 (4th Cir. 1953). And "[i]t is a 'foundational principle of

administrative law' that judicial review of agency action is limited to 'the grounds that the agency invoked when it took the action.'" *Dep't of Homeland Sec. v. Regents of Univ. of Cal*, 140 S. Ct. 1891, 1907 (2020). Viewed in this light, MARAD's 2022 *post-hoc* rationalization of its December 2019 confirmation was arbitrary and capricious, without evidence to support key findings, and contrary to law. That secret determination to allow a noncitizen to effectively control a vessel that competes in the U.S. domestic passenger cruise trade was unprecedented. It should be vacated.

STATEMENT OF JURISDICTION

The Hobbs Act grants the courts of appeals jurisdiction "to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" "all rules, regulations, or final orders of" "the Secretary of Transportation issued pursuant to section . . . 56101–56104." 28 U.S.C. § 2342(3)(A).

MARAD issued a "final action" pursuant to Section 3502(b) of the National Defense Authorization Act for Fiscal Year 2021, or NDAA. A-381. The "final action" is a confirmation that the proposed charter between Viking, River 1, and ECO is covered by MARAD's general approval regulation of 46 C.F.R. § 221.13(a). This "general approval" allows a U.S. citizen to transfer (via a charter) limited control of a U.S. vessel to a foreign citizen under 46 U.S.C. § 56101.

STATEMENT OF THE ISSUES

1. Whether the Final Action is arbitrary and capricious because MARAD failed to apply the standards MARAD invoked and made substantial errors of law and fact.

2. Whether the Final Action is contrary to law because MARAD failed to comply with the Notice and Comment provisions of NDAA Section 3502(b).

STATEMENT OF THE CASE

A. U.S. Maritime Citizenship Framework

Since its founding in 1789, the United States has maintained a closed market for domestic maritime commerce—long referred to as the "coastwise" trade or "cabotage." Act of July 4, 1789, Ch. 2, § 5, 1 Stat. 24, 27; Act of March 1, 1817, Ch. 31, § 31, 3 Stat. 351. Coastwise trade is the transportation by water (or land and water) of merchandise or passengers between U.S. "points." This trade reservation policy "has found expression in the enactment of a series of statutes, beginning with the first year of the government, which have imposed restrictions of steadily increasing rigor on the transportation of freight in coastwise traffic by vessels not owned by citizens of the United States." *Cent. Vt. Transp. Co. v. Durning*, 294 U.S. 33, 38 (1935).

The coastwise market was always restricted to U.S.-built vessels owned by U.S. citizens. Starting in 1898, Congress further restricted this market to "U.S.-flag vessels" documented with the U.S. Coast Guard in a process akin to state vehicle registration. Act of Feb. 17, 1898, Ch. 26, 30 Stat. 248. "Vessel documentation is

a type of national registration which is evidence of a vessel's nationality and its qualification to be employed in a specified trade." *Conoco, Inc. v. Skinner*, 970 F.2d 1206, 1210 n.2 (3d Cir. 1992). Documentation subjects the vessel to U.S. law, including a requirement that the crew be U.S. citizens. *See* 46 U.S.C. § 8103.

The domestic maritime trade reservation has national security and economic purposes, both long recognized by statute: "It is necessary for the national defense ***and the development of the domestic and foreign commerce*** of the United States that the United States have a merchant marine . . . owned and operated as vessels of the United States by citizens of the United States." 46 U.S.C. § 50101(a) (emphasis added).

Courts have long recognized these purposes of the domestic maritime trade reservation. "From the earliest days of the Republic, Congress has been concerned with stimulating and protecting the growth of an American-built and controlled coastwise Merchant Marine." *Pa. R.R. Co. v. Dillon*, 335 F.2d 292, 295 n.5 (D.C. Cir. 1964), *cert. denied sub nom. American-Hawaiian S.S. Co. v. Dillon*, 379 U.S. 945 (1964) (Cir. J. Burger). "Like all maritime nations of the world, the United States treats its coastwise shipping trade as a jealously guarded preserve. In order to participate in this trade, a vessel's credentials must be thoroughly American." *Marine Carriers Corp. v. Fowler*, 429 F.2d 702, 703 (2d Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971); *see also Am. Mar. Ass'n v. Blumenthal*, 590 F.2d 1156, 1158–

59 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 943 (1979); *Alaska Excursion Cruises, Inc. v. United States*, 608 F. Supp. 1084, 1087 (D.D.C. 1985).

The reservation of the domestic maritime market to qualified U.S.-flag vessels is often associated with Section 27 of the Merchant Marine Act, 1920. 41 Stat. 988, 999 (1920). Section 27 restated prior, long-standing law regarding the domestic transportation of "merchandise."[1] Other laws encompass "dredging," "towing," and the transportation of "passengers" between U.S. points.[2] These laws as a whole are popularly referred to as the Jones Act.

The "passenger" restrictions permit foreign vessels to pick up passengers in the U.S., take them on foreign voyages, then return them to ***the same*** U.S. port under certain conditions.[3] 46 U.S.C. § 55103. This is the business of companies like Carnival Cruise Line and Royal Caribbean. By contrast, the river and coastal trades are restricted to qualified, U.S.-flag vessels. Only these are permitted to pick up and let off passengers at multiple U.S. destinations. The citizenship requirements for

---

[1] See Constantine G. Papavizas & Bryant E. Gardner, *Is the Jones Act Redundant?*, 21 U. OF SAN. FRAN. MAR. L. J. 95, 96–107 (2008–2009).

[2] Dredging Act of 1906, ch. 2566, 34 Stat. 204 (1906) (codified as amended at 46 U.S.C. § 55109); Towing Statute, ch. 324, 54 Stat. 304 (1940) (codified as amended at 46 U.S.C. §§ 55111, 55118); and Passenger Vessel Services Act, ch. 421, § 8, 24 Stat. 79, 81 (1886) (codified as amended at 46 U.S.C. § 55103).

[3] U.S. Customs and Border Protection, *What Every Member of the Trade Community Should Know About: The Passenger Vessel Services Act* 11–14 (Apr. 2010). There is also an exception based on short stays in a foreign intervening port. *Id.*

passenger vessels are the same as for cargo vessels in U.S. domestic maritime trade. *Id.*

Since 1916, the U.S. has had stringent citizenship control requirements for entities seeking to engage in U.S. domestic maritime commerce. 39 Stat. 728, 729–31 (1916); 40 Stat. 900, 900–01 (1918). To prevent evasion, U.S. law also proscribes the transfer of "an interest in or control of" a U.S.-flag vessel to a noncitizen without Department of Transportation approval (through MARAD). *See* 46 C.F.R. § 221.1(b) (2020).

Specifically, "[A] person may not, without the approval of the Secretary of Transportation . . . sell, lease, charter, deliver, ***or in any manner transfer***, or agree to sell, lease, charter, deliver, ***or in any other manner transfer***, to a person not a citizen of the United States, an interest in or control of . . . a documented vessel owned by a citizen of the United States . . . ." 46 U.S.C. § 56101(a)(1) (emphases added). This law is often referred to as "Section 9," which is a reference to the original section in the Shipping Act, 1916. 39 Stat. 728, 730–31. The Section 9 implementing regulations are nearly identical to the statute in their description of which transfers are proscribed. *See* 46 C.F.R. § 221.11(a) (2020).

Those regulations also create a general approval of charters (leases) to noncitizens, provided they are not "[b]areboat or demise Charters of vessels operating in the coastwise trade." 46 C.F.R. § 221.13(a) (2020). Such charters

transfer excessive control to noncitizens. Since at least 1975, as MARAD noted in its Final Action, MARAD has had a policy against approving bareboat or demise charters to noncitizens in the U.S. coastwise trade. A-385. Maritime Administration Approval of Certain Charters, 40 Fed. Reg. 28,832 (July 9, 1975).

Under MARAD regulations, a "charter" is "any agreement or commitment by which the possession or services of a vessel are secured for a period of time, or for one or more voyages, whether or not a demise of the vessel." 46 C.F.R. § 221.3(b) (2020). But those regulations do not define "bareboat" or "demise." Under general maritime case law, a "demise charter is 'tantamount to, though just short of, an outright transfer of ownership.'" *Am. Petroleum & Transp., Inc. v. City of N.Y.*, 737 F.3d 185, 187 n.1 (2d Cir. 2013) (quoting *Guzman v. Pichirilo*, 369 U.S. 698, 700 (1962)). MARAD defined a "bareboat" charter as a "charter under which the shipowner provides the ship, and the charterer provides the personnel, insurance, and other materials necessary to operate it." A-386.

Strictly speaking, any person chartering a U.S.-flag vessel to a noncitizen is not required to seek MARAD's approval unless the charter is a bareboat or demise charter. *See* 46 C.F.R. § 221.13. Section 9, however, provides that any "charter, sale or transfer of a vessel, or of an interest in or control of a vessel, in violation of this section is void," and provides for criminal, civil, and forfeiture penalties for noncompliance. 46 U.S.C. §§ 56101(d)–(e). Thus, MARAD will review charters

submitted voluntarily to determine whether a charter gives noncitizens impermissible control.

Until recently, MARAD did not make any of its charter determinations public. But in 2021, Congress required MARAD to make such disclosures retroactively with respect to large passenger vessels. National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 3502(b) (2021).

MARAD has stated its rationale for not approving bareboat or demise charters of coastwise vessels to noncitizens. Specifically:

> Reservation of this nation's cabotage trade to vessels built in the United States and owned and operated by United States citizens is a principle almost as old as this nation itself.
>
> Absent specific legislative relief for particular vessels or in extraordinary circumstances, that policy principle has been uniformly adhered to. The fact that a demise or bareboat charter of a vessel to a noncitizen would carry with it many of the indicia of ownership such as ***possession, operational control and the direct benefits of its employment in domestic commerce***, renders the rationale for not approving such charters to noncitizens for use in the coastwise trade readily apparent.

Regulated Transactions Involving Documented Vessels and Other Maritime Interests, 55 Fed. Reg. 14,040, 14,046 (Apr. 13, 1990) (emphasis added). MARAD wrote, "To the extent a noncitizen may exercise operational control over a citizen-owned documented vessel in the coastwise trade tantamount to that of an owner or bareboat charterer, there is cause for concern about the integrity of the Jones Act . . . ." *Id.* 14,043.

B. U.S. River and Cruise Market

The domestic passenger river cruise market has a number of participants. Prior to Viking's entry into the market in 2022, ACL had four primary competitors. Decl. ¶ 6. ACL is a family-owned business headquartered in Guilford, Connecticut. *Id.* ¶ 4. ACL currently owns or operates 14 overnight U.S.-flag passenger vessels and operates about 170 cruises on the Mississippi River each year. *Id.* ¶¶ 4, 8.

The ECO family of companies has operated in the coastwise trade, but not the passenger river-cruise market. The U.S. river and cruise market is distinct from the foreign cruise market operating from Miami and other U.S. ports allowing unrestricted foreign voyages.

C. MARAD's Standard for Impermissible Control

When reviewing whether River 1/Viking's lease represented an impermissible "bareboat" charter transferring excessive control to noncitizens, 46 C.F.R. § 221.13(a)(iii), MARAD invoked "the principles outlined in our discussion of the Final Rule promulgating our foreign transfer regulations" and the "factors in our American Fisheries Act (AFA) citizenship regulation at 46 CFR § 356.11 to determine indicia of impermissible non-citizen control." A-382. MARAD concluded "our foreign transfer regulations at 46 CFR Part 221, which govern this matter, do not provide similar noncitizen control standards"; thus, the "AFA indicia

of control factors" were adopted "in part, from its experience in making foreign transfer and citizenship determinations." *Id.*

In promulgating the foreign transfer regulations (Regulated Transactions Involving Documented Vessels and Other Maritime Interests, 56 Fed. Reg. 30654, 30656 (July 3, 1991)), MARAD highlighted its decision in *Argent Marine I-III Sales of LNG Vessels,* 25 S.R.R. 789, 793 (MARAD 1990) (*see* Addendum B), and *Meacham Corp. v. United States*, 207 F.2d 535 (4th Cir. 1953), *cert. granted*, 347 U.S. 732, *appeal dismissed*, 348 U.S. 801 (1954). From *Argent*, MARAD quoted:

> all manner of imposition of foreign control, by voting power or otherwise, was intended to be prohibited; that both passive and active control ("any arrangement") were intended to be prohibited; that prohibited "control" extended beyond physical operation of the vessel to also include "control the management," "controlling factors," and "real control;" and that the agency was given broad discretion to implement the statute.

56 Fed. Reg. at 30656.

In *Argent*, MARAD recognized that Congress long intended to make U.S. citizen control of U.S.-flag vessels airtight: "We have sought to make the language so sweeping and comprehensive that no lawyer, however ingenious, would be able to work out any device under this section to keep the letter, while breaking the spirit of the law." 25 S.R.R. 789 at 793 (quoting 56 CONG. REC. 8029 (June 19, 1918)).

From *Meacham*, MARAD derived several factors:

Substance rather than form of the transaction is determinative.

> In an enterprise where non-citizens put up $6,000,000 and Americans put up $6, the non-citizen dominated the enterprise.
>
> When titular control was given to the Americans with the expectation they would exercise their power in the interest of non-citizens, and they acted accordingly, non-citizens were in control.
>
> It is significant that non-citizens rather than Americans took the lead when important steps were to be taken in the prosecution of the business.

56 Fed. Reg. at 30656 (quoting 207 F.2d at 543–44 (internal citations omitted)).

The AFA citizenship regulation § 356.11, relied upon by MARAD, is entitled "Impermissible control by a Non-Citizen." It lists both "absolute indicia of control" where an impermissible transfer of control "will be deemed to exist" and contributing factors where such a transfer "may be deemed to exist." Two "absolute" factors of control are:

- "[a]bsorbs all of the costs and normal business risks associated with ownership and operation" of the vessel"; and
- "[h]as the right to direct the . . . operation, or manning" of the vessel.

46 C.F.R. §§ 356.11(a)(3), (8) (2020).

Section 356.11 includes other factors to be considered, including whether the noncitizen:

- "provides the start up capital for the owner . . . on less than an arm's length basis";

- "has the right to preclude the owner . . . from engaging in other business activities";
- "has the general right to inspect the books and records of the owner"; and
- "absorbs considerable costs and normal business risks associated with ownership and operation" of the vessel.

46 C.F.R. §§ 356.11(b)(2), (5)–(7) (2020).

MARAD ignored the rest of its Part 356 regulations on impermissible transfers of control. Under Section 356.45, a noncitizen advancing funds indicates an impermissible transfer of control unless several conditions are met, including that the advanced funds are in exchange for future delivered goods and the funds advanced are commensurate with the goods received by the noncitizen. 46 C.F.R. § 356.45(a) (2020).

D. The Viking Charter Reviewed

Viking spent years attempting to access the restricted U.S. river cruise market. For example, in February 2015, Viking and the Governor of Louisiana announced plans for Viking to commence U.S. operations by 2017.[4] For reasons not made public, those plans collapsed. One reason cited in the press was "a federal law that

[4] *E.g.*, Press Release, "Governor Jindal and Viking Cruises Chairman Torstein Hagen Announce Selection of New Orleans for Launch of Mississippi River Cruise Service" (Feb. 24, 2015); Robin Shannon, *Viking to launch North American cruises in New Orleans*, NEW ORLEANS CITY BUSINESS (Feb. 24, 2015).

requires ships sailing between U.S. ports to be built in the U.S. and operated by American crews" and the need to "work with [the] Maritime Administration."[5]

Viking subsequently found a machination MARAD would approve. On September 17, 2019, River 1 applied for confirmation that a charter of a river cruise vessel to Viking did not constitute an impermissible transfer of an interest or control to a noncitizen. A-7. River 1 presented a series of intertwined transactions involving other River 1 affiliates. These would construct a new river vessel and provide limited guarantees of the obligations of the constructing entity (LaShip, LLC) and of River 1. A-22, 24–25.

River 1, LaShip, and all their affiliates are owned by the Chouest family. Their family group of companies are referred to in the record as "ECO" for Edison Chouest Offshore. A-381 n.1. In its Final Action, MARAD did not materially distinguish between River 1 and the other ECO entities. A-381. ECO is an established U.S. maritime company building and operating vessels. Yet ECO did not represent to MARAD that ECO had ever owned or operated a luxury passenger cruise vessel, or that LaShip had ever constructed such a vessel. *See* A-7–19.

---

[5] James Walsh, *Viking Cruises puts St. Paul plan on hold,* STAR TRIBUNE (Minneapolis, Minnesota) 1B (Dec. 17, 2016); Ben Hillyer, *Steamboat company touts economic impact*, THE NATCHEZ DEMOCRAT (Sept. 2, 2016) (citing "complications with building a new fleet" in connection with "[f]ederal law requires U.S. river cruise vessels be built in American shipyards); Elaine Glusac, *More Mississippi Cruises*, N.Y. TIMES (Nov. 27, 2016), Sec. TR, 2 (Decl. Ex. A).

1. Construction of the Vessel

River 1's request to MARAD claimed that the vessel's purchase price from LaShip to River 1 was , but that the "total delivered cost to River 1" of the vessel was estimated to be . A-9. River 1 further represented that the difference in price between what River 1 would pay to LaShip and the "total delivered cost" "reflects a contribution by the ECO parties of the value of a shipbuilder's usual profit margin to River 1." A-22. In other words, the request implied to MARAD that ECO would provide approximately in equity to River 1 by giving River 1 a ship worth —even though some accounting between River 1 and LaShip would say the price of the ship had been just .

The reality was that the "total delivered cost" of the new vessel was instead covered with expenditure by LaShip or the nominal owner River 1. Instead, the River 1 entity borrowed up to from third-party JP Morgan Chase Bank, N.A. (JP Morgan) and received a "prepaid time charter hire" (i.e., cash) from Viking. Critically, the loan term sheet between River 1 and JP Morgan provides that "[a]ll of Shipyards' profit component shall be included in the final [vessel construction] milestone payment." A-48. In other words, JP Morgan confirmed it was loaning on the basis of a vessel worth once completed and delivered.

LaShip was fully compensated for building the vessel, and River 1 paid nothing to acquire the vessel. The loan terms provided that "prepaid hire" (i.e., Viking's [redacted] of upfront cash) must be paid into a bank account controlled by the lender, and that this cash must be exhausted before any borrowings are utilized. A-47–48. Then the borrowings were available for the remainder of the delivered cost. Even the lender's fee of [redacted] was paid from the prepaid charter hire (i.e., Viking), as was the bank's monthly commitment fee prior to vessel delivery. A-48.

Security was ostensibly provided to JP Morgan in the form of a "Capital Support and Guaranty Agreement" from another River 1 affiliate that was limited to [redacted], and limited guarantees of loan repayment by River 1's two owning companies. A-24, A-56. The loan terms between JP Morgan and River 1 do not, however, contain a net-worth requirement for these two parent companies to maintain any capital minimums. Moreover, River 1 assigned the charter with Viking to the lender, Viking's obligations under that charter were guaranteed by Viking, and all charter hire is payable into an account controlled by lender. A-55–57. In other words, the real financial security for the loan was the Viking cash and the Viking-assigned charter, not ECO. Once the vessel was delivered, the lender became the mortgagee under a first-preferred-vessel mortgage. A-56.

The JP Morgan loan maturity was [redacted] years, equal to the [redacted] estimated vessel construction time and the [redacted]-year initial charter period. A-46, A-172. The loan was fully amortizing unless the vessel was delivered such that fewer than eight years were left in the loan term. A-46. The loan bears [redacted] interest. *Id.*

In sum, JP Morgan financed construction of a vessel priced at [redacted]. Viking provided [redacted] of the [redacted] collateral for securing that loan through the "prepaid" hire. And the supposed paper contribution of ECO subsidiary LaShip to ECO subsidiary River 1 was nothing of the kind. In real economic terms, ECO and River 1 *contributed* nothing.

2. Operation of the Vessel

Under the charter, Viking obtains the economic upside of vessel operation by exclusively developing, marketing, and selling the trips to the public. *See* A-185–86. The roughly [redacted]-person hospitality staff are employed by, and under the direction of, Viking. A-11, 27. Another ECO affiliate (Galliano Marine Service, LLC or GMS) provides undefined vessel management services. To technically meet U.S. regulations, GMS employs the vessel's navigating crew of about [redacted] persons. A-10–11 (roles specified at A-183–84). But Viking places a "Brand Manager" on the vessel "who shall be the Charterer's representative on board the Ship and who shall be responsible for monitoring on the Charterer's behalf ***every aspect*** of the Passenger-experience." A-186 (emphasis added). In similar circumstances in the

fishing industry, the National Transportation Safety Board has determined that a "fishmaster" employed by the noncitizen company which has purchased the vessel's catch was actually in control of the vessel rather than the vessel's listed master.[6] From reception onshore, to the gang plank, to provision of linens and towels, to the operation of the bars, to tours onshore and service at the restaurants, Viking is the face the public sees—its employees and contractors managing it all. A-14. In fact, the Viking's web page for the *Viking Mississippi* does not refer to ECO being in control of the vessel.[7]

River 1 represented that "commercial management of the Ship is carried out by River 1," but the record does not delineate what that entails since River 1 has only one customer (Viking) for at least ███ years and potentially for ███ years. A-10, 19. And nothing in the record shows that "River 1" is anything more than a paper entity, without employees or any other business. There is no proof it has any overhead costs at all and no provision is made for River 1's profit in charter hire. River 1's status as a mere paper entity can also be inferred from a government

---

[6] National Transportation Safety Board, "Sinking of U.S. Fish Processing Vessel *Alaska Ranger* Bering Sea, March 23, 2008," Accident Report (NTSB/MAR-09/05), 31-32. The listed master is also sometimes referred to as a "paper captain."

[7] Viking Cruises, "Viking Mississippi," https://www.vikingrivercruises.com/ships/mississippi/viking-mississippi.html.

financing application filed with MARAD. This reflects that subsequent Viking vessels would be owned by "River 2, LLC" and "River 3, LLC."[8]

The charter has an initial term of [redacted] years and allows Viking to extend up to an aggregate of [redacted] years. A-172–73. MARAD at one point mistakenly evaluated this as only half, not [redacted], of the vessel's supposed [redacted]-year life. A-249. Yet there is no evidence in the administrative record that supports River 1's assertion that the vessel will have a [redacted]-year commercial life. MARAD accepted the allegation without investigation or confirmation, even though it is familiar with commercial-life assessments through its vessel-financing program. *See* 46 C.F.R. § 298.20(a)(3) (2020) (establishing accepted useful life of such vessels at twenty-five years or "as we determine").

The JP Morgan loan was conditioned on "the Maritime Administration" confirming "the Time Charter structure" for "operating in the U.S. coastwise trade." A-53. It was also conditioned on Viking paying the [redacted] "advance charterhire" immediately following execution of the charter. A-51, A-177. Viking then "pays" a daily charter hire rate following vessel delivery for the duration of the charter. The advance payment is "earned daily" by River 1 over the course of the initial [redacted]-year charter period. A-177. As previously noted, ECO's LaShip already

---

[8] *Pending Applications*, U.S. Dep't of Transp., Mar. Admin. (updated Nov. 22, 2022), https://www.maritime.dot.gov/grants/title-xi/pending-applications.

received cash associated with this "advance charter hire" (through River 1 from Viking/JP Morgan).

The daily charter hire consists of three components: (a) "**Base Rate**," (b) "**Management Fee**," and (c) "**OPEX**." A-173–74. No component is affected by the vessel's profitability.

The **Base Rate** is for "all fees and expenses associated with" "the construction and financing of the Ship." A-173. The charter also provides that "[f]or the avoidance of doubt all of the Owner's and/or the Shipyard's costs in constructing and delivering the Ship are included in the construction price upon which the Base Rate is based." A-179.

The initial **Management Fee** of [redacted] per day is a fixed amount escalating over time at the rate of [redacted] per year. A-176. River 1 also receives a [redacted] commission on any third-party purchases it makes for Viking USA. *Id.* The record does not indicate whether River 1 retains this Management Fee or pays it over to GMS, the vessel manager. Notably, River 1 receives no profit share in the charter hire.

The **operating expense** component—referred to as "OPEX"—is budgeted by agreement of the parties. A-175–76. The amount is adjusted over time pursuant to that budget. It is required to account for "***all*** of the Owner's [River 1's] costs and expenses from time to time of operating, maintaining, and repairing the Ship." A-

173. Should actual operating expenses exceed the budget, Viking must reimburse "the increased amounts, as justified by market costs and applicable invoices." A-175.

The charter further provides that if the vessel fails a government inspection, Viking must pay to fix the problem, without regard to whether River 1 or its vessel manager were at fault. A-184. Similarly, if the vessel is somehow not satisfactory to Viking, River 1 is obligated to address the issue—and yet Viking must pay all expenses incurred. A-184.

River 1 *automatically* "earns" this charter hire following delivery of the vessel, and Viking has no right to terminate the charter during the initial ███-year period unless the vessel is a total loss. A-191–92. Only in the case of a total loss, River 1 must repay Viking any unearned "advance charterhire"—and, even then, River 1 has 48 months to repay that amount at zero interest. A-177. This, once again, reflects economic risk for Viking, not River 1.

During "extension periods" after the initial charter period Viking cannot terminate for economic reasons, but only if River 1 defaults as defined in the charter. A-191–92 (§ 20.5(b)(iii)–(iv)).

E. Administrative Proceedings

The first public notice of the Viking transaction at issue was the U.S. Coast Guard posting of a December 27, 2019 letter. *See* A-256–58.[9] River 1 had simultaneously applied to both MARAD and the Coast Guard for approvals in September 2019 and revised its MARAD request in October 2019. A-7, 20. River 1 sought confirmation from the Coast Guard that River 1 would remain eligible to document a coastwise-eligible vessel following the transactions set forth. The Coast Guard confirmed this when it published its December 27, 2019 letter. A-258.

MARAD, however, did not publicly disclose its December 20, 2019 confirmation that the Viking charter was a permissible transfer of interest or control. When MARAD first disclosed its approval letter (much later), MARAD redacted the document even though it was a form letter devoid of confidential commercial information. *Compare* A-293–94 *with* A-296–97. Thus, ACL did not obtain an unredacted MARAD letter approving the Viking charter until April 28, 2020—after submitting Freedom of Information Act requests and an appeal of the initial redactions by MARAD. A-277.

Although members of Congress (AR 248–49, 293) requested that MARAD provide its reasons for the Viking charter confirmation, MARAD first refused to

[9] The letter is still available at https://www.dco.uscg.mil/Portals/9/DCO%20Documents/NVDC/NVDC_Determination_Letter_for_River_1_LLC_12-27-2019.pdf and at A-256–58.

provide any justification. Then, MARAD only partly disclosed (A-301–07) because it was forced to do so by Congress. Congress then included in the National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 3502(b) (enacted Jan. 1, 2021), a provision entitled "Foreign Vessel Charters for Passenger Vessels." This required MARAD to retroactively "make publicly available on an appropriate website of the Maritime Administration . . . a detailed summary of each" time charter confirmation request for a passenger vessel and "the final action of the Administration with respect to such request, after the provision of notice and opportunity for public comment." *Id.*

From January 25, 2021, to April 14, 2021, several U.S. cruise vessel companies and the Passenger Vessel Association requested that MARAD comply with Section 3502(b). A-277–78. MARAD neither responded to the communications nor complied. A-277. On July 21, 2021, ACL counsel wrote to MARAD, demanding that MARAD implement Section 3502(b) or face a mandamus action. A-354.

Days later, on July 30, 2021, MARAD finally posted a barely-two-page document titled "Passenger vessel charter." A-260–61. MARAD did not post the charter itself (redacted or otherwise). And its notice did not disclose the standards MARAD claimed to apply when reviewing the charter in 2019 or inform the public what standards MARAD would apply going forward. ACL specifically objected

that MARAD failed to disclose the standards for reviewing the charter. A-263. ACL requested on August 6, 2021, that MARAD supplement the document because it was so summary that no meaningful public comment could be provided. A-262–64. On August 24 (five days before comments were due), MARAD responded by refusing to provide further detail, claiming compliance with Section 3502(b). A-265–66.

Substantially all the overnight U.S. cruise vessel industry companies submitted a joint comment on August 26. A-267–70. They continued to object that MARAD had not disclosed its standard or complied with Section 3502(b). Based on the limited information disclosed, they also noted that MARAD's confirmation of the Viking/River 1 charter appeared arbitrary and capricious. A-269. Yet none of River 1's 2019 request letters to MARAD, the time charter, the loan terms, or the secret MARAD analysis was yet made available to the public.

On March 18, 2022, MARAD issued its "Response to Comments and Final Action Under Section 3502(b)," referred to herein as the "Final Action." A-381. The administrative record does not reflect that MARAD requested or received any factual updates or supplements from River 1 and Viking after the original December 2019 confirmation. Thus, the 2022 Final Action is a *post-hoc* rationalization of the original 2019 confirmation decision. At no point has MARAD ever indicated that the payment of substantial "prepaid charter hire" by a noncitizen is precedented.

On page 3 of the Final Action, MARAD revealed for the first time the existence of the secret internal "written analysis" to justify the 2019 confirmation. This ostensibly provided the reasons Congress and U.S. cruise vessel companies had been searching for in vain since late 2019. Yet the elements of this analysis had not been fully detailed in the "Passenger vessel charter" notice for public comment. Moreover, the confirming letter reflected that MARAD's review was solely "[b]ased on [River 1's] representations and [MARAD's] review of the foregoing." A-293.

ACL immediately filed another FOIA request on May 10, 2022. MARAD finally provided ACL a redacted version of the Memorandum dated December 18, 2019. ACL filed its petition with this Court on May 9, 2022. Only after the filing of the administrative record in July 2022 for purposes of this case did ACL finally obtain an unredacted version of the justification (A-243–51), as well as the unredacted application, time charter, and loan agreement needed to fully assess how much control the Viking/River 1 charter granted to Viking.

SUMMARY OF ARGUMENT

MARAD's Final Action should be vacated. MARAD failed to apply the principles and standards it invoked when reviewing whether the Viking charter is a "bareboat" charter. The charter contains numerous grants of foreign control over the River 1 vessel, including several that are *per se* impermissible. And numerous factual findings by MARAD were wrong, unsupported, or irrelevant. MARAD's

Final Action was arbitrary and capricious, without substantial evidence, and contrary to law.

MARAD's Final Action should also be vacated because MARAD failed to comply with the NDAA's notice-and-comment requirements.

STANDARD OF REVIEW

MARAD's findings of fact and application of 46 C.F.R. § 221.13(a) must be set aside as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See* 5 U.S.C. § 706(2)(A); *see also Brotherhood of Locomotive Eng'rs & Trainmen v. Fed. R.R. Admin.*, 972 F.3d 83, 115 (D.C. Cir. 2020) (noting that, while Hobbs Act grants jurisdiction, Administrative Procedure Act provides standard of review in Hobbs Act cases).

An agency's findings may be arbitrary and capricious in a variety of ways—for example, "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Islander E. Pipeline Co. v. Conn. Dep't of Env't Prot.*, 482 F.3d 79, 94 (2d Cir. 2006) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 42–43 (1983)). An agency's determinations on

"all relevant questions of law" are reviewed de novo. *Aleutian Cap. Partners, LLC v. Scalia*, 975 F.3d 220, 229 (2d Cir. 2020).

"At least since [1954], the Supreme Court has held that an administrative agency must adhere to its own regulations." *Singh v. DOJ*, 461 F.3d 290, 296 (2d Cir. 2006) (vacating and remanding agency decision because it treated as irrelevant factors subject to consideration under agency regulations); *see also Fed. Defs. of N.Y., Inc. v. Fed. Bureau of Prisons*, 954 F.3d 118, 130 (2d Cir. 2020) ("Under deeply rooted principles of administrative law, not to mention common sense, government agencies are generally required to follow their own regulations."). Moreover, "judicial review of an agency action is limited to 'the grounds that the agency invoked when it took the action.'" *Regents of Univ. of Cal*, 140 S. Ct. at 1907; *see also Ojo v. Garland*, 25 F.4th 152, 175 (2d Cir. 2022) ("[R]eviewing courts remain bound by traditional administrative law principles, including the rule that judges generally must assess the lawfulness of an agency's action in light of the explanations the agency offered for it rather than any *ex post* rationales a court can devise." (quoting *Garland v. Ming Dai*, 141 S. Ct. 1669, 1679 (2021))).

ARGUMENT

I. ACL Has Standing to Challenge the Final Action Because ACL Is Harmed by the Unlawful Competition That MARAD Authorized.

Article III standing has three elements: (1) "an injury in fact," (2) "fairly traceable to the challenged action of the defendant," that (3) "will be redressed by a

favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (cleaned up). Each is satisfied here.

Injury-in-fact is satisfied under "[t]he well-established concept of competitors' standing." *See Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994). The doctrine recognizes "that economic actors 'suffer an injury in fact when agencies . . . allow increased competition' against them." *XY Planning Network, LLC v. SEC*, 963 F.3d 244, 251 (2d Cir. 2020) (quoting *Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010)). Here, MARAD's decision allows increased competition.

The Final Action has permitted Viking to enter the U.S. coastwise trade in competition with ACL despite inappropriate control by a noncitizen. Well prior to MARAD's Final Action, Viking had announced the intent to enter the U.S. coastwise trade and provide luxury passenger service on the Mississippi. Decl. ¶¶ 10–13. Not until River 1 and Viking received MARAD's secret (and unlawful) confirmation of time charter did Viking subsequently have the legal authorizations (required by the lenders, *see* A-53) to enter the U.S. domestic market. This "allow[ed] increased competition" and constitutes an injury in fact. *See XY Planning*, 963 F.3d at 251.

ACL is harmed by the "actual or imminent increase in competition." *See id.* at 251–52 (noting variety of ways increased competition can result in economic harm, rejecting any requirement to identify lost customers, and requiring only that

the allegedly unlawful agency action "increases competition or aids the plaintiff's competitors"). Viking now markets the largest cruise vessel on the Mississippi River (the *Viking Mississippi*), which directly competes with ACL's cruise vessels. Decl. ¶¶ 14–15, 17–20. Moreover, Viking itself has acknowledged that it now competes in the same arena as ACL, soliciting travel agents to offer Viking as an alternative to ACL (and other citizen operators') cruises on the Mississippi. *Id.* ¶¶ 21–23.

Since the *Viking Mississippi* went into service, ACL's business on the Mississippi River has declined, despite discount rates, in ways that are inconsistent with ACL's performance in other parts of the U.S. *Id.* ¶¶ 27–32. ACL is aware of no explanation for the relative decline in business on the Mississippi River compared to other parts of the U.S. except for the entry of the *Viking Mississippi*. *Id.* ¶ 33. Additional harm is imminent as Viking has pending applications to build and operate two more vessels of similar size in the U.S. coastwise trade. *Id.* ¶ 16.

ACL's competitive injury is traceable to the Final Action and redressable by this Court. MARAD's confirmation of the charter was a "condition to closing" the financing for Viking's venture. A-53. The competition ACL now faces was contributed to—if not entirely permitted—by MARAD's Final Action, which authorized Viking to enter the U.S. cruise vessel market. *Cf. Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152 (1970) (recognizing bank's competition with plaintiff that provided data-processing services as injury caused by

regulator's authorization for banks to offer such services). A determination by this Court that Viking's charter is unlawful or remanding for further proceedings could halt Viking's participation in the U.S. cruise vessel market. "A charter, sale, or transfer of a vessel, or of an interest in or control of a vessel, in violation of [the Jones Act] is void." 46 U.S.C. § 56101(d). At a minimum, it would halt expansion, including by River 2 and River 3.

II. The Final Action Is Arbitrary and Capricious Because MARAD Failed to Rationally Apply the Standard It Invoked.

Reviewing "judges generally must assess the lawfulness of an agency's action in light of the explanations the agency offered for it rather than any *ex post* rationales a court can devise." *Garland v. Ming Dai*, 141 S. Ct. 1669, 1679 (2021). In its Final Action, MARAD claimed to apply the principles expressed in its 1992 regulatory preamble and the factors in its American Fisheries Act regulations to judge whether the Viking charter conveyed "impermissible non-citizen control." A-382. Although MARAD has not adopted an express *regulation* pursuant to its Section 9 authority to determine what constitutes a sale, lease, charter, or other transfer of an interest in a U.S.-flagged vessel to a noncitizen, *see* 46 U.S.C. § 56101(a), the Final Action asserts a standard that MARAD then applied arbitrarily and capriciously.[10]

---

[10] *District No. 1, Pacific Coast District, Marine Engineers' Beneficial Association v. Maritime Administration* is not to the contrary. 215 F.3d 37 (D.C. Cir. 2000). There, MARAD was found to have unreviewable discretion because "considerations of national security, foreign policy, and national interest were clearly at the center of the MarAd's decision." *Id.* at 42. Here, MARAD invoked a list of control factors not involving such considerations.

MARAD started with an inadequate record. MARAD reviewed only "the information and documents [River 1] provided" and approved the charter "[b]ased on [River 1's] representations and [MARAD's] review of the foregoing." A-293. MARAD, for example, did not review the vessel management agreement or the loan agreement as neither is in the record.

Then MARAD ignored, missed, and misanalyzed the very criteria MARAD said were controlling. In short, MARAD presented a test that MARAD had inadequate information to evaluate and, based on what it did have, River 1 and Viking failed. But when they failed, MARAD's *post hoc* rationalizations whitewashed the failing characteristics and concluded that Viking had passed anyway.

MARAD may have thought confirmation would encourage competition or help create shipyard jobs. Laudable or not, none of that counterbalances Congress's longstanding maritime-citizenship requirements or satisfies the standard MARAD itself invoked. Having set forth the standard "we applied" "[i]n reviewing the ECO charter" (A-382), MARAD is bound by those standards. And MARAD fails them.

A. Viking Failed Three Tests Evidencing Impermissible Control.

MARAD relied on "the indicia of impermissible non-citizen control found in our AFA regulations" because those "regulations represent the most recent regulatory expression of MARAD's foreign control analysis." A-382. The Viking

charter failed several tests contained in those regulations. First, Viking "absorbs all of the costs and normal business risks associated with ownership and operation of the vessel." *See* 46 C.F.R. § 356.11(a)(8) (2020). Second, Viking "[h]as the right to direct the . . . operation, or manning" of the vessel by exercising its unlimited veto authority over vessel-manager employment. *See* 46 C.F.R. § 356.11(a)(3). Third, Viking improperly advanced funds for the construction and operations of the *Viking Mississippi* disguised as a "prepaid charter hire" that was not in fact for value. *See* 46 C.F.R. § 356.45. Held "to 'the grounds that the agency invoked when it took the action,'" *Regents of Univ. of Cal.*, 140 S. Ct. at 1907, MARAD should have denied confirmation of the Viking charter. Its failure to do so was arbitrary and capricious.

1. Viking Absorbs All of River 1's Costs and Business Risks.

"An impermissible transfer of control *will be deemed to exist* where a Non-Citizen . . . [a]bsorbs all of the costs and normal business risks associated with ownership and operation" of the vessel. 46 C.F.R. § 356.11(a)(8) (emphasis added). Numerous provisions shield River 1 from all costs and normal business risks by shifting them to Viking, establishing a *per se* impermissible level of Viking control.

First, Viking bears "all of the Owner's costs and expenses from time to time of operating, maintaining, and repairing the" vessel, together with the risk of cost increases. A-173. To leave no doubt that "all" means "all," the charter redundantly provides that Viking pays for each significant, individual operating cost item. For

example, River 1 is obligated under the charter to provide a "crew complement," "pilotage,"[11] and "additional crew." A-183–84. Yet, Viking's operational hire then "always cover[s] the cost of the Owner providing the complement," and pilots are "for the account of the Charterer," with Viking paying the "actual cost to the Owner of such additional crew," if any. *Id.* Even if River 1's vessel manager performs poorly, with "negative effects on Passenger experience," the costs of corrective action by River 1 "are to be included in OPEX" and paid by Viking. A-184.

These contractual provisions contradict MARAD's finding that River 1 bears risk associated with the operational activities for which River 1 is ostensibly "responsible." *See* A-386. MARAD ignored that Viking pays for everything on River 1's list: the crew, the maintenance and repair, provisions, and insurance—all of it. In fact, Viking pays River 1's operating expenses ***in advance*** as part of its monthly budget, giving River 1 funds before any anticipated bills are due. A-173, 177. Viking's Base Rate payments also obligated it to bear all construction and financing costs, including "all of the Owner's and/or the Shipyard's costs in constructing and delivering the Ship." A-179. River 1 is merely a money conduit between persons providing services to the vessel and Viking. Viking ultimately pays for everything the vessel needs.

---

[11] Vessel "pilots" board vessels near shore and provide to the vessel master knowledge of local conditions for safe navigation. *See* 46 C.F.R. § 15.812 (2020).

Second, River 1 is shielded from economic risk by contractual limits on Viking's recourse. In the event of a disagreement over operational budgets, Viking can only seek arbitration under a "prudent owner" standard and must reimburse any cost increases "justified by market costs and applicable invoices." A-175–76. If River 1's purported vessel manager does a terrible job, Viking can only demand that River 1 replace the manager and must continue paying River 1's Management Fee as long as the crew is retained and only shoreside management is replaced. A-184–85. Even in the event of default by River 1 during the charter's initial ███-year term—for example, if River 1 becomes insolvent or ceases to be a U.S. citizen—Viking can withhold River 1's Management Fee and force the appointment of a new vessel manager but cannot terminate the charter. A-190–91. And even this limited right to suspend payment of River 1's Management Fee does not arise if the vessel is damaged and therefore unavailable to Viking, because a casualty is not a listed event of default.

Third, the Viking/River 1 charter immunizes River 1 from the normal business risk of vessels going "off hire." A-192. In an arms-length commercial time charter, the charterer pays a fixed amount per day, with a provision for the vessel to go "off hire" when charter hire is not payable. A vessel "off hire" is not available to the charterer, so the charterer doesn't pay. The most widely used commercial time charter forms, for example, are published and regularly updated by the Baltic and

International Maritime Council, or BIMCO. *See* A-275. These all contain "off-hire" provisions.[12] But the Viking/River 1 charter guarantees payment to River 1 even when Viking is not using the vessel.

When the public drew MARAD's attention to the charter's lack of an "off hire" provision by comparison to one of the BIMCO forms (called "ROPAXTIME" for combo passenger/car and truck ferries), MARAD wrongly claimed that form supported MARAD's decision. A-384. MARAD noted Clause 14(b) of that form provides that charter hire will be paid "without discount." A-324. This is true enough. But MARAD missed that this requirement applies only when charter hire is due. A-384. In other words, payment is "without discount" when the vessel is on hire; but payment "without discount" doesn't apply when the vessel ***is*** "off hire." When the vessel is "off hire," charter hire is not due under Clause 15 of the form charter. A-325–26.

The Viking charter is nothing like a customary commercial time charter on "off hire," particularly during the first ███-year charter period. The charter expressly provides that "except as expressly provided in this Charter, [Viking] shall have ***no basis for putting the Ship offhire*** and/or ceasing payment of [sic] Day Rate." A-192 (emphasis added). That "expressly provided" exception only pertains

---

[12] *Available at* https://www.bimco.org/contracts-and-clauses/bimco-contracts. The ROPAXTIME form is in the administrative record at A-317–46 (ASVTIME, GENTIME, INTERTANKTIME 80, LINERTIME 2015, and ROPAXTIME are other time charter forms).

to charter option periods after the initial ███-year charter term and works based on a generous (to River 1) formula where River 1 gets a day maintenance credit for each month it operated the vessel without incident. A-191, 193. Even then, Viking's only recourse for vessel non-availability is not to pay the "Base Rate" component of charter hire. *Id.* Even that right does not apply if River 1 and its affiliate are not managing the vessel—in which case "the Ship may not be regarded as Out of Service," and both the Base Rate and Management Fee must be paid in full. *Id.* Moreover, it is not clear at all what that "Base Rate" would be after the loan matures at the end of the ███-year period since it is the charter hire capital (i.e., loan) cost component and the loan is scheduled to be paid by that time.

MARAD responded to public criticism of the pay-no-matter-what charter by cherry-picking certain time charters that purportedly have similar "hell or high water" payment terms. A-384. That misses the point. Regardless of whether some time charters have contained such provisions, MARAD's impermissible control regulations certainly do not sanction a "hell or high water" charter to a noncitizen. Such generous payments terms for River 1 shield it from "normal business risks" and therefore are not a positive control attribute. 46 C.F.R. § 356.11(a)(8).

In fact, MARAD itself recognizes in its federal financing regulations that a "hell or high water" charter such as the Viking/River 1 charter is the equivalent of a parent guarantee. *See* 46 C.F.R. § 298.13(e) (2020). In effect, Viking acted as River

1's corporate parent guarantor. The owner/River 1 does not bear the risk of nonpayment even if it fails to perform where there is no possibility of offset or off-hire.

In sum, MARAD's decision arbitrarily fails to reconcile the incongruity between a charter hire that is payable under all circumstances and covers all expenses, with MARAD's conclusion that River 1 has "normal business risks." *See* 46 C.F.R. § 356.11(a)(8). Having incorporated and relied on the AFA's § 356.11 impermissible-control factors to make its decision (A-382), MARAD had no lawful, rational basis to approve the Viking charter. MARAD should have taken seriously the admonition from the *Meacham* case, which it cited approvingly, that the "substance rather than the form of the transaction" is determinative. 207 F.2d at 543.

2. Viking Controls the Operation and Manning of the Vessel by Controlling the Vessel Manager.

It is also *per se* impermissible for a noncitizen to enjoy "the right to direct the . . . operation, or manning" of the vessel. 46 C.F.R. § 356.11(a)(3). As MARAD acknowledged in its December 2019 decision memorandum, "[a]bsent mitigating factors, the right to remove a vessel's operator is an incident of ownership consistent with a bareboat charter." A-250.

River 1's 2019 request represented to MARAD that the "operation, navigation and management (on-board and ashore) of the Ship will be exclusively within the scope of River 1 (and GMS, through the Management Agreement)." A-13. GMS

was to act as the "Ship's manager." A-10. The division of responsibilities between the entities is vague, however, because the vessel management agreement is not in the record. This implies that MARAD did not bother to review this important document.[13]

However, the charter itself allows Viking to demand that the "Owner's ship management team" and the "Ship's manager" be replaced "in the event that the performance by the Owner of its obligations under this Charter is not satisfactory to the Charterer." A-185. MARAD dismissed the significance of this. MARAD reasoned that "River 1 would appoint a third party of its choosing [] to oversee or replace [River 1's] ship management team and to become the Ship's manager instead of [River 1]." A-250. Similarly, MARAD indicated in its Final Action that River 1 "will retain the ***exclusive authority*** to appoint an independent, substitute vessel manager for the vessel." A-387 (emphasis added). Once again, MARAD's *post-hoc* rationalization turned on "the form of the transaction," rather than "the substance." *Meacham*, 207 F.2d at 543.

MARAD's analysis ignored Viking's real power. To paraphrase Frank Herbert's *Dune*, "He who can deny a thing has control of a thing." (ACE: New York, Kindle ed.), 724. Viking has the unconditional right to request that the

[13] Nothing in the record indicates that MARAD required River 1 to verify that it submitted everything material to the transaction, nor verify that there are no undisclosed side or other agreements impacting potential Viking control.

manager be changed *ad infinitum*. *See* A-185. Specifically, the charter provides that if the original Ship's manager (GMS) resumes its duties (which must be to Viking's reasonable satisfaction), such resumption "shall be without prejudice to the Charterer's [Viking's] rights to exercise its option to require the Owner to appoint a new manager . . . ***as many times as it deems fit***." A-185 (emphasis added).

This remarkable clause confirms that River 1 does not, in fact, have "exclusive authority" to appoint a new vessel manager. *See* A-387. Viking can, as a practical matter, reject such a manager and continuously force appointment of a new manager until one that Viking desires is selected. It thus buggers reality to suppose in a commercial arrangement such as this that the supposed "charterer" will not, as a practical matter, control the selection of the management by the paper "owner." This independently trips another of MARAD's own *per se* impermissible control factors requiring vacatur of MARAD's decision. 46 C.F.R. § 356.11(a)(3).

3. Viking's Pre-Paid Charter Hire Was an Impermissible Advance of Funds.

MARAD regulations on "Advance of funds" also only permit such prepayments when they are equivalent to "annual value" received. 46 C.F.R. § 356.45(a)(2)(i) (2020). For example, a "Non-Citizen may advance funds to the owner or bareboat charterer" of a vessel "[a]s provisional payment for products delivered for consignment sales" or "[w]here the basis of the advancement is an agreement . . . to sell all or a portion of the vessel's catch." 46 C.F.R.

§§ 356.45(a)(1)–(2). The necessary inference is that when funds are instead advanced without expectation of a tangible return over a discrete period, such an "advance of funds" reflects impermissible control. *Id.* Moreover, an advance of funds is not permissible as part of any charter arrangement that simultaneously grants "***any rights whatsoever to control*** the operation [or] management" of the vessel. 46 C.F.R. § 356.45(a)(2)(ii).

Viking's [redacted] advance of funds and pre-paid operational budget for the vessel—based on no identifiable return to Viking, while granting Viking control over the vessel manager—constitutes another *per se* violation of the AFA regulations MARAD claimed to apply to River 1. Viking funded the venture for the parties—and ECO's stake—through the alleged advance "charter hire." A-177–78. The monies then went straight to the banks, and never touched River 1's hands. MARAD attempted to explain away Viking's completely unprecedented pre-paid charter hire as benign. [redacted] [redacted] [redacted] [redacted] This should have torpedoed any determination that the Viking/River 1 arrangements represented something other than a bareboat charter—rather than a Rube-Goldberg artifice for a noncitizen to construct a new luxury cruise ship and then enter and compete in the citizen-reserved U.S. coastwise trade.

When MARAD first reviewed the charter in December 2019, MARAD noted the unusual nature of Viking funding about [redacted] of the contracted delivered cost of the vessel. A-250–51. River 1 had mischaracterized this payment to MARAD as the "Advance Charter Hire Payment." *See* A-15.[14] But Viking would not receive any vessel days of service for this payment in the future or otherwise. At the initial daily charter hire rate of about [redacted], Viking should have received [redacted] of the use of the vessel without further payment, not even considering a typical discount accorded an advance payment. *See* A-205. The charter doesn't reflect Viking receives extra days for this payment, *see id.*, which means this payment must represent something other than *bona fide* "advance charter hire" for tangible performance over a discrete period. *Cf.* 46 C.F.R. § 356.45(a)(2)(i).

MARAD's determination did not indicate what it thought of the mislabeling as a "prepaid charter" or "advance." But MARAD did recognize that "the pre-paid charter ***is not characteristic of arm's length financing*** found in commercial lending for vessel construction." A-250 (emphasis added). This is an understatement. In fact, MARAD cited no precedent for a noncitizen ever pre-paying time charter hire, *see id.*, not from BIMCO time charter forms or anywhere else.

MARAD also observed that its large-fishing-vessel regulations provide that the payment by a noncitizen of a citizen's startup capital is evidence of an

[14] The lenders' term sheet referred to the payment as "Prepaid Time Charter Hire." A-45.

impermissible transfer of control. A-250; 46 C.F.R. § 356.11(b)(6). Yet MARAD waived away the concern about the problematic pre-paid charter hire for three reasons. A-251, 387. None withstands scrutiny.

First, MARAD mistakenly reasoned that Viking's contribution could be overlooked because Viking could legally fund ███ of the vessel cost. 46 U.S.C. § 50501(d) permits noncitizens to own up to 25% of the ***equity*** of a company owning a coastwise eligible vessel. A-251. MARAD further argued that this "'capital contribution'" "will be paid back by River 1 over the initial ███-year charter term," and so Viking's "actual contribution is the interest that Viking will forego." A-251 n.10.

But MARAD committed clear error when concluding that Viking's contribution was merely ███. The proper statutory denominator is the noncitizen's relative contribution of the ***equity***—not the equity plus the debt. Debt is disregarded in the capital structure because the statute speaks in terms of "interest," "stock," and "voting power." 46 U.S.C. § 50501(d). "[A]t least 75 percent of the equity interest in the partnership" must be owned by U.S. citizens for that partnership to qualify to own and operate a U.S.-flag vessel with a coastwise endorsement. 46 C.F.R. § 67.35(c) (2020).[15]

---

[15] River 1 is a limited liability company. The relevant U.S. Coast Guard regulations governing establishment of an entity as a "citizen of the United States" do not expressly address limited liability companies, but speak to the analogous limited partnership.

[redacted] Viking completely blew through the 25% equity limit. Critically, the loan amount of [redacted] and the prepaid charter hire of [redacted] add up exactly to [redacted]. These values were obviously a reverse-engineered way to ensure that the loan would not exceed [redacted] of the vessel's delivered cost—and thus to ensure the proper collateralization of JP Morgan's loan. Moreover, River 1 did not even fund its "own" supposed loan transaction expenses. Viking's prepaid charter hire paid the lenders' [redacted] "Arrangement Fee" and the lenders' transaction expenses. A-47–48.

This situation harkens back to *Meacham*, 207 F.2d at 543. *Meacham* is the leading noncitizen control case, and one whose "principles [MARAD] outlined" in its "foreign transfer regulations at 46 CFR Part 221. *See* 56 Fed. Reg. 30654, 30656 (Jul. 3, 1991)." A-382. So MARAD purportedly "applied" *Meacham*'s principles "[i]n reviewing the ECO charter." *See id.*[16] In *Meacham*, Chinese interests raised six million dollars and U.S. interests invested six dollars to acquire a World War II surplus war vessel that could only be sold to "citizens of the United States." The respondents pointed to contracts that indicated the vessel was—on paper—majority-

[16] The citizenship standard at issue in the *Meacham* case only required a controlling interest by U.S. citizens, versus the higher 75% interest required here.

owned by U.S. citizens. Yet *Meacham* concluded that "only one reasonable answer can be made" to the factual question of who was in control. 207 F.2d at 543. "One has only to be told that the Chinese raised six million dollars and the Americans six dollars in order to conclude, at least tentatively, that the Chinese dominated the enterprise; and when the details of the picture are filled in the conclusion becomes irresistible." *Id.* Here too, and notwithstanding any discretion that might be owed to MARAD, the only "reasonable" conclusion is equally "irresistible" here that where the owners of River 1 put in [redacted] and Viking put in [redacted], the noncitizen is dominating and controlling the enterprise.

MARAD is even further from the mark regarding the capital contribution as being "paid back" by River 1 at some point in time. *See* A-251 n.10. There is nothing in the record that indicates that River 1 really is paying anything to acquire ***the vessel***. The "Advance Charter Hire Payment" is "earned" by River 1 over the initial [redacted]-year charter period, day by day, after the vessel is delivered in a charter that Viking cannot terminate except for a total loss of the vessel. A-177. A true "advance" payment would be for a good or service to be eventually provided by the payee to the payor. With Viking/River 1, the payments are instead "earned" just by the passage of time.

The only way the "Advance Charter Hire Payment" is not fully earned after the vessel is delivered is if the vessel is a "total loss." A-177. Even then, the third-

party indebtedness must be paid back first, and River 1 has 48 months to pay any "unearned" amount without interest. *Id.* If River 1 defaults and there is no total loss, River 1 keeps "earning" the Advance Charter Hire Payment for the service of providing paper-domestic cover for noncitizen Viking's unlawful entry into the U.S. coastwise trade—but the capital contribution is never "paid back" to Viking.

The concept of the Advance Charter Hire Payment being a capital contribution is also inconsistent with the lenders' loan documentation. Payment of that amount is a condition to lending, as one would logically expect with equity contributions. And as noted, the amount of ███ of the vessel purchase price accords perfectly with typical vessel finance practice of requiring at least ███ owner equity.[17] *See* A-48.

Second, MARAD's confirmation wished away Viking's contribution of ██ ██ equity because "the financial risk River 1 will bear is substantial and typical of a vessel owner." A-251. MARAD stated that—"River 1 and its affiliates, and not Viking, will be responsible for repayment of those loans," and "Viking will not guaranty River 1's repayment of its vessel construction debt obligations." *Id.* That is simply wrong. ████████████████████████████████ ████████████████████ ████ ████—which is a deal no vessel owner gets in an above-board arm's-length transaction to construct and own a new

[17] River 1 affiliates requested 85% U.S. Government financing for two additional river cruise vessels. https://www.maritime.dot.gov/grants/title-xi/pending-applications (last visited Dec. 7, 2022).

vessel—but as previously explained, *supra* at 32–33, Viking in fact pays practically ***all*** of River 1's expenses. *See* A-173–77.

MARAD's observation that "Viking will not guaranty River 1's repayment" is a distinction without a difference. A-251. MARAD apparently missed that [redacted] guaranteed the payment of time charter hire in favor of the lenders. A-44. The charter includes a component to pay back the loan (the Base Rate) via the Earnings Account controlled by the lenders. A-46–47, 56, 79. And Viking has no right to set off or discount the Base Rate under any conditions. Moreover, neither River 1 nor its two parent entities obligated themselves under the loan to any level of net worth. The administrative record does not reflect that any of these particular ECO entities have material assets. In other words, MARAD has no evidence that ECO or its affiliates really put any assets at risk, even if Viking USA and [redacted] defaulted on their obligation to pay for the loan. Instead, the record shows that Viking guaranteed River 1's repayment in every meaningful way, and MARAD's reasoning that River 1 had "normal" obligation and risk is unfounded.

Third, MARAD disregarded Viking's [redacted] contribution of the venture's equity because Viking did not own an express interest in River 1, the vessel manager, or any ECO affiliate. A-251. This argument about Viking's express ownership "interest" is a makeweight and adds nothing to the "control" analysis. *See* 46 U.S.C.

§ 56101(a)(1)(A) (prohibiting without approval "charter" to "a person not a citizen of the United States, and interest in ***or control of***" a "documented vessel owned by a citizen of the United States" (emphasis added)). Indeed, the elements of impermissible control reflected in MARAD's large-fishing-vessel regulations give no positive weight if the noncitizen is a minority owner of the purported U.S. citizen vessel owner. *See* 46 C.F.R. § 356.11. MARAD's correct diagnosis of the Viking/River 1 "pre-paid charter [a]s not characteristic of arm's length financing" that could "be viewed as a capital contribution indicative of vessel ownership ***and control*** by Viking" (AR 244 (emphasis added)) cannot be whitewashed by the absence of a direct noncitizen ownership. *See* 46 C.F.R. § 356.45.

In sum, MARAD committed clear error and ignored its own record evidence regarding the so-called "Advanced Charter Hire Payment." It was a blatant, non-commercial mechanism for Viking to [redacted] fund construction of a new luxury passenger vessel that Viking could not own and operate under U.S. law—and which River 1 had no experience with and so would not (and obviously did not) order on its own. Viking seeded [redacted] equity. Viking shielded River 1 from normal financial risk. And in the bargain, ECO actually got ***to withdraw*** (not contribute) [redacted] for vessel construction and thereafter receive daily payments. Those payments are not earned for value—like quality service or passenger counts (as ECO

gets paid even in the event of poor service). This, too, represented a *per se* violation of MARAD's § 356.45 limits for noncitizen advance of funds.

B. Viking Also Failed Several Discretionary Tests for Impermissible Control.

While the charter fails several *per se* tests for impermissible control—each alone sufficient to invalidate MARAD's action—the regulations MARAD relied upon to analyze the Viking charter also contain nine factors that "in combination" "may be deemed impermissible control." 46 C.F.R. § 356.11(b). MARAD either erroneously misanalyzed or wished away four of these factors, as well. The evidence establishing the first two overlap with *per se* factors already reviewed—namely, absorption of costs by the noncitizen and provision by the noncitizen of start-up capital. 46 C.F.R. §§ 356.11(b)(5) & (6). Two other factors—preclusion by River 1 from other business activities and inspection of books and records—are also present. These further demonstrate Viking's improper control.

1. River 1 Is Precluded from Owning Competing Passenger Vessels.

An indicator of impermissible noncitizen control is "the right to preclude the owner of a . . . [vessel] from engaging in other business activities." 46 C.F.R. § 356.11(b)(2). The Viking charter does exactly that. Section 29.3 of the charter provides that "[f]ollowing the Actual Delivery Date, the Owner for itself and its Affiliates . . . undertakes that, for so long as the Ship is chartered to the Charterer

hereunder, it will not operate any other vessels for use in the United States river cruise market." A-198. That means that neither River 1 ***nor any other ECO affiliate*** will compete with Viking going forward.

MARAD whistled past this glaring issue by asserting without citation to any provision of the Charter that the cruise vessel restriction ***only*** applies "until River 1 delivers the vessel under the charter or the termination thereof, if earlier." A-247. The Final Action then compounded this error by expressly finding that "the time charter expressly provides that ECO may operate cruise vessels in the same market upon delivery of the vessel." A-387. As Section 29.3 of the Charter unambiguously shows, the truth is the exact opposite of MARAD's finding. A-198. MARAD thus committed clear error.

2. Viking Can Inspect River 1's Books and Records.

Another indicator of impermissible control is whether the noncitizen "has the general right to inspect the books and records of the owner." 46 C.F.R. § 356.11(b)(7). And, with Viking, "The Charterer shall have the right to audit all information, rates, and costs and expenses related to OPEX in connection with this Charter at any time during and within five (5) years after termination of this Charter." A-201.

A true time charterer usually pays a fixed (rather than, as here, a variable) charter hire rate, other than certain expenses such as the cost of fuel. Therefore, it

has no need to audit the vessel owner's books. Here, the right to audit logically goes hand in hand with this unlawful bareboat charter. Viking is unusually paying every cost passed through by River 1 through the OPEX component. Unsurprisingly, the charterer (Viking) thus insisted on the right to verify expenditures.

MARAD noted this audit right in its December 2019 decision memorandum. A-249–50. Yet MARAD again failed to follow the issue to its only reasonable conclusion. "Given," MARAD wrote, the unusual fact "that operating costs are recovered by River 1 through Viking's payment of charter hire, it is not unreasonable for Viking to seek assurance that this aspect of the charter hire is consistent with market rates." A-249. True. But MARAD thus side-stepped the fact that this unusual audit provision is present because of other ***unusual*** provisions indicating noncitizen control.

MARAD also was persuaded to ignore this problem because MARAD reasoned the audit right did not apply to "River 1's fixed or other costs." A-249. This is totally illogical. True, the Management Fee Viking pays is fixed, and the Base Rate is effectively fixed in the charter and loan agreement. *See* A-28, 176, 205. But there is no reason or basis for the charterer to audit the owner because of ***fixed*** costs. They are, by definition, fixed. So, the inability to audit the fixed expenses is irrelevant to an application of 46 C.F.R. § 356.11(b)(7).

MARAD's Final Action similarly failed to heed the problematic audit right. *See* A-381–88. MARAD did not even cite its own regulation at 46 C.F.R. § 356.11(b)(7). These regulations do not say an audit right is unobjectionable if the charterer pays for all operating costs. On the contrary, the audit right should have led MARAD back to the regulations providing that noncitizen payment for all costs indicates impermissible noncitizen control. *See* 46 C.F.R. §§ 356.11(a)(8) & (b)(5).

C. MARAD's Findings Are Either Wrong, Irrelevant, or Unsubstantiated.

The Final Action ultimately contains 12 findings upon which MARAD's decision is based. A-387. Those findings are either wrong, irrelevant, or unsubstantiated as follows.

MARAD Findings	Analysis
1. "Based on its representations to MARAD, ECO and its affiliate, River 1, LLC" are "U.S. citizens within the meaning of 46 U.S.C. § 50501."	**Irrelevant**. Citizen ownership and operation does not equate to the absence of impermissible noncitizen "control" under 46 U.S.C. § 56101(a)(1)(A).
2. Coast Guard passed ECO's and River 1's citizenship.	**Irrelevant** for the same reason.
3. Viking does not have a purchase option and cannot force the sale of the vessel.	**Immaterial**, since the noncitizen Viking controls the entire useful life of the vessel, *infra*.
4. Charter term does not cover vessel's entire expected useful life.	**Unsupported**. MARAD blindly accepted—without evidence, other substantiation, or analysis—that the vessel would have an extraordinary useful life of

	[redacted], which is only by this artifice then 10 years longer than the charter with all Viking options exercised.
5. Viking has no control over negotiation of labor agreements.	**Unsupported**. There is nothing in the record reflecting that there are labor agreements, and any such costs are merely passed on to Viking regardless.
6. Viking does not indemnify River 1 for vessel owner/operator risks.	**Wrong**. Viking does cover River 1's liabilities by reimbursing River 1 via OPEX. This includes all expenses arising from accidents not caused by the gross negligence or intentional wrongful acts of the crew employed by River 1, and not covered by insurance. A-194.
7. ECO is not sheltered from normal business risks.	**Wrong**. ECO is sheltered from all normal business risks via the clockwork payment by Viking of the charter hire and otherwise. *Supra* at 32–37.
8. ECO not precluded from taking on other business.	**Wrong**. River 1 and ECO as a whole actually are precluded from competing in the river cruise business. A-198.
9. ECO retains ultimate authority in establishing the budget.	**Wrong**. Where agreement might not be reached, arbitration with Viking sets the budget, not ECO itself. A-176.
10. ECO affiliate will serve as vessel manager.	**Wrong**. Though technically expressed on paper, Viking controls whether ECO's vessel manager is fired and prevents replacement by any person Viking deems unfit forever. *Supra* at 37–39.
11. ECO retains exclusive authority to appoint a new vessel manager.	**Wrong** for the same reasons at 10.

12. Advance charter hire is acceptable as an equity contribution, with ECO bearing the vessel ownership risk, and ECO is not owned by Viking.	**Wrong**, as previously explained. *Supra* at 40–48.

MARAD's reliance on so many erroneous findings to support the confirmation independently warrants vacatur.

III. The Final Action Is Contrary to Law Because MARAD Failed to Comply With the Notice and Comment Provisions of NDAA Section 3502(b).

MARAD's many substantive errors reviewing Viking's Rube-Goldberg transaction might have been identified and avoided, *if* MARAD had heeded Congress in its procedures. But MARAD did not. In the 2021 NDAA, Congress made "improvements to [the] process for . . . approving foreign vessel charters for passenger vessels." NDAA, Pub. L. No. 116-283, § 3502(b). Congress specified:

> For fiscal year 2020 and each subsequent fiscal year, the Maritime Administrator ***shall make publicly available*** on an appropriate website of the Maritime Administration—
>
> (1) ***a detailed summary of each request for a determination***, approval, or confirmation that a vessel charter for a passenger vessel is encompassed by the general approval of time charters issued pursuant to section 56101 of title 46, United States Code, or regulations prescribed pursuant to such section; and
>
> (2) the final action of the Administration with respect to such request, ***after the provision of notice and opportunity for public comment***.

Id. (emphases added). Yet rather than subject its already-completed analysis to real public review, MARAD's vague July 30, 2021 notice (AR 254) failed to provide the public the requisite "detailed summary" necessary to allow meaningful public comment. Until ACL petitioned to review MARAD's Final Action—and later obtained access to the confidential administrative record after July 2022—ACL (and the public) lacked sufficiently detailed information to meaningfully assess and comment on Viking's charter. For this reason, too, the final action must be vacated and remanded to the agency.

One source of legal guidance for reviewing MARAD's failing in public participation is the case law applying the National Environmental Policy Act of 1969 ("NEPA"). NEPA, too, requires a "detailed statement" from agencies. *See* 42 U.S.C. § 4332 ("[T]he Federal Government shall . . . include . . . a ***detailed statement*** by the responsible official on . . .") (emphasis added). And NEPA's implementing regulations grant the public rights to review and comment. Like NDAA Section 3502(b), NEPA unquestionably grants certain agency "discretion" when soliciting "public involvement." *See Brodsky v. NRC*, 704 F.3d 113, 121 (2d Cir. 2013) (remanding to the agency for further explanation regarding public input). But that discretion has limits. *See id.*

With Section 3502(b), there similarly must be limits to MARAD's discretion when soliciting and responding to public comment. Logically, as with NEPA,

"[w]hen the exercise of that discretion is challenged on appeal, the reviewing court properly considers whether the lack of public input prevented the agency 'from weighing all the factors essential to exercising its judgment [under NEPA] in a reasonable manner.'" *See id.* (quoting *Friends of Ompompanoosuc v. FERC*, 968 F.2d 1549, 1557 (2d Cir. 1992). Here, application of such a standard confirms the inadequacy of MARAD's process.

When soliciting public comment on the Viking charter, MARAD failed to provide a requisitely detailed summary, sufficient to allow the public to address "***all the factors*** essential to exercising [MARAD's] judgment." *See Brodsky*, 704 F.3d at 121 (emphasis added). The entire public notice—which was not published in the Federal Register but posted several layers deep on MARAD's website—was just over one page. A-260–61. The notice did not tell the public the standards MARAD would apply (in fact, had already applied) to review the charter. *Id.* Neither the River 1 application letter, the charter, nor the loan terms were provided—redacted or not redacted. And the only control factors MARAD presented the public were the (wrong) findings ostensibly supporting MARAD's decision. The public was not provided accurate information relevant to the other control factors weighing against the determination. And MARAD did not tell the public other information that—if properly analyzed in light of public comment and concern—weighed in favor of a

finding of impermissible control. In other words, MARAD hid the ball. And much of what it did tell the public was wrong.

As set forth above, the detailed discussion of MARAD's Final Action now confirms the inadequacy of the July 30, 2021 "Passenger vessel charter" posted for public comment. *See* A-260–61. Indeed, only when rendering the "final action" did MARAD first tell the public (again, ***after*** the public comment period) the standard MARAD applied; specifically, the principles of MARAD's 1991 foreign transfer regulations and the control standards of the American Fisheries Act. A-382.

Moreover, MARAD's Final Action essentially conceded the inadequacy of the public notice. MARAD concedes that notice only "described terms of the proposed charter that ***we considered important*** in making our determination" when issuing the final action. A-381 (emphasis added). It thus rejected a public comment that "MARAD ha[d] not released sufficient information about the time charter." *Id.*

As detailed above, there were many factors and terms not provided to the public for comment that are also important to the analysis (and which ACL did not receive until the administrative record in this case). These included:

- [redacted]
- Viking in fact pays *all* of River 1's expenses. A-173–77.

- There is no off-hire provision in the Viking charter during the initial [redacted]-year term. *See* A-192.
- Viking has no right to terminate the charter in the initial [redacted]-year period. A-191.
- Viking has "rights to exercise its option to require the Owner to appoint a new manager . . . *as many times as it deems fit*." A-185 (emphasis added).
- And ECO agreed "that, for so long as the Ship is chartered to the Charterer hereunder, it will not operate any other vessels for use in the United States river cruise market." A-198.

MARAD's reliance on FOIA to withhold this information required by the NDAA is an independent cause to invalidate the Final Action and remand for further proceeding. Preliminarily, as the redacted public record MARAD disclosed in July 2022 reflects, almost all MARAD's objections to disclosure of "confidential" information during years of FOIA litigation suddenly disappeared—except for a small number of targeted redactions in the administrative record. More importantly, MARAD's decision admits to withholding information under the mistaken belief that this was required by FOIA. A-381. That renders MARAD's Final Action per se arbitrary and capricious. *Regents of Univ. of Cal.*, 140 S. Ct. at 1911 (vacating agency decision that "did not appear to appreciate the full scope of [its] discretion").

MARAD claimed that its limited disclosure of the charter's terms "complied with FOIA exemption 4 (5 U.S.C. § 552(b)(4)), which exempts from disclosure privileged and confidential commercial or financial information submitted to the Government." A-381. But MARAD's obligation to summarize and disclose the proposed time charter for public comment did not come in response to a FOIA request. 5 U.S.C. § 552(b)(4) is not generalized agency authority to withhold information from the public. That authority to withhold documents only applies in response to requests pursuant to "[t]his section," i.e., for FOIA requests.

Moreover, "statutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute, to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified." *Dorsey v. United States*, 567 U.S. 260, 274 (2012). NDAA Section 3502(b) was enacted after FOIA. It requires a "detailed summary" sufficient for meaningful "provision of notice and opportunity for public comment." *Id.* And Congress made no provision for withholding from the public allegedly confidential business information necessary for the public to comment meaningfully on a potential transfer of passenger vessel interest or control to a noncitizen. *Id.*

MARAD failed to provide meaningful notice and comment and thus "failed to consider . . . important aspect[s] of the problem." *State Farm*, 463 U.S. at 43. It

did so based on an erroneous interpretation of FOIA. For both these reasons, MARAD's Final Action should be vacated.

CONCLUSION

MARAD's 2022 Final Action contained nothing but *post hoc* rationalization of its 2019 confirmation that the Viking charter is not a prohibited bareboat charter. Both the substance and procedure were arbitrary and capricious, riddled with clear error or unsupported findings, and contrary to law. The Final Action should be reversed or, at a minimum, vacated and remanded for further proceedings.

Respectfully submitted,

/s/ *Jonathan D. Brightbill*
Jonathan D. Brightbill
Constantine G. Papavizas
Spencer W. Churchill
WINSTON & STRAWN LLP
1901 L Street NW
Washington, DC 20036
(202) 282-5855
JBrightbill@winston.com

December 8, 2022

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This document complies with the type-volume limit of Local Rule 32.1(a)(4)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 13,853 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced type-face using Microsoft Word in 14-point font.

/s/ Jonathan D. Brightbill
JONATHAN D. BRIGHTBILL

ADDENDUM A

ADD-1

ORAL ARGUMENT NOT YET SCHEDULED
No. 22-1029

United States Court of Appeals for the Second Circuit

AMERICAN CRUISE LINES, INC.,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

DECLARATION OF CHARLES B. ROBERTSON

JONATHAN D. BRIGHTBILL
CONSTANTINE G. PAPAVIZAS
SPENCER W. CHURCHILL
Winston & Strawn LLP
1901 L Street N.W.
Washington, DC 20036
(202) 282-5855
jbrightbill@winston.com

Counsel for Petitioner

DECLARATION OF CHARLES B. ROBERTSON

I, Charles B. Robertson, hereby declare as follows:

1. I am the President and Chief Executive Officer of American Cruise Lines, Inc. ("ACL"), the Petitioner in the above-captioned case.

2. I have been the President and CEO of ACL since February 2020, and before that I was Vice President of ACL for six years.

3. As the President and CEO of ACL, I have primary responsibility for leading the company and making the ultimate business decisions for ACL. To fulfill my responsibilities, I have direct and detailed knowledge of financial affairs of ACL, its marketing objectives, and its competitive position in the American cruise vessel market.

4. ACL, which has been in business since 1998, is family owned, headquartered in Guilford, Connecticut, and currently owns and/or operates 14 overnight U.S.-flag passenger vessels. ACL is currently having 4 additional ships built for the overnight U.S. passenger market.

5. ACL operates vessels, among other places, in Alaska, the Columbia and Snake Rivers, the Mississippi River, New England, the Ohio River, the Southeast U.S. and the Tennessee River. Further information is available at americancruiselines.com.

6. ACL historically has at least four direct competitors that own and operate similar U.S.-flag overnight passenger vessels. To the best of ACL's knowledge, each of these competitors comply with the citizenship requirements of the coastwise trade.

7. ACL and its competitors have realized growth over the past ten years and are capable of satisfying the demand for domestic overnight cruises.

8. ACL has operated cruise vessels on the Mississippi River since 2012 and in a typical year operates about 170 cruises from February through December on the Mississippi River. ACL operates cruises from New Orleans to St. Paul, Minnesota, and many intermediate points.

9. ACL's vessels are built and flagged in the United States.

10. When ACL first learned of the plans of Viking Cruises, Ltd. ("Viking") to operate vessels in the United States, ACL was concerned about the integrity of U.S. citizenship requirements applicable to U.S.-flag vessels.

11. Viking, not being a U.S. citizen company under U.S. maritime citizenship laws, could not simply own and operate cruise vessels in the U.S. market.

12. We first became aware that Viking was attempting to gain access to the U.S. cruise market restricted to U.S. citizens in approximately 2014.

13. We later became aware that the U.S. Maritime Administration had issues with these early efforts by Viking to gain access to the U.S. cruise market. There were numerous accounts in the public press implying that Viking had issues complying with U.S. Maritime Administration requirements (several of those reports are attached as Exhibit A).

14. Although Viking has contracted to have one vessel built for the U.S. cruise vessel market, that vessel is the largest cruise vessel operating on the Mississippi River.

15. The *Viking Mississippi* is configured to transport up to 386 passengers which is a passenger capacity 103 percent larger than any vessel owned and operated by ACL. ACL's largest vessel carries 190 passengers.

16. Moreover, based on the U.S. Maritime Administration web site listing application for U.S. Government vessel financing, Viking intended to build two more similar vessels with the actual cost to the application in the amount of about $167 million and $174 million, respectively.[1] The MARAD web site indicates that the two applications are on hold as of December 2021 but have not been withdrawn.

[1] https://www maritime.dot.gov/grants/title-xi/pending-applications.

17. The cruise vessel *Viking Mississippi* entered service on the Mississippi River on or about September 3, 2022.

18. Based on information and belief, the *Viking Mississippi* has undertaken to date approximately 10 voyages.

19. According to Viking's web site, Viking intends that the *Viking Mississippi* will undertake approximately 40 voyages in 2023 on the Mississippi River.

20. Assuming average Mississippi River conditions, the *Viking Mississippi* is capable of undertaking approximately 40 voyages a year on the Mississippi River, but this number can vary depending on the length of cruises.

21. Viking published and distributed a "Travel Advisory Guide" entitled "Modernizing Mississippi River Cruising" dated 2022 which claims "to bring modern river cruising to the Mississippi in 2022." Exhibit B at 1.

22. This brochure was intended for travel agents. It takes direct, competitive aim at ACL and other U.S. cruise companies, including by purporting to compare the ACL vessels unfavorably with the *Viking Mississippi*. Exhibit B at 7.

23. Although ACL believes that many of the so called "Competitive Advantages" in the "Travel Advisory Guide" are false or misleading, the comparison chart nevertheless shows Viking's head-to-head competition with ACL and other U.S. cruise companies.

24. The "Travel Advisory Guide" scarcely mentions "Edison Chouest Offshore" as Viking's "American partner" (Page 2) and as the "Owner and Nautical Operator" of the *Viking Mississippi* (Page 10).

25. Instead, the "Travel Advisory Guide" highlights the "Viking Family," and the Viking "dedicated staff." (Page 21.) Viking states, "Our knowledgeable and highly experienced Swiss management oversees your entire journey and handpicks each member of our onboard team." (Page 21).

26. The "Travel Advisory Guide" also refers to "Mississippi Ships" (Page 3).

27. ACL sells tickets as much as two years in advance of the cruise, with most tickets sold between 12 and 3 months in advance of the cruise. ACL believes this is typical in the small ship segment of the industry.

28. Even though the *Viking Mississippi* has operated for only a portion of the calendar year 2022, Viking began promoting the 2022 season for the Viking Mississippi in 2021.

29. ACL has sustained a negative economic impact in 2022. Advance booking data suggests that this negative trend will continue into 2023.

30. In markets other than the Mississippi River, ACL experienced a 14% drop in occupancy in 2022 compared to the pre-pandemic calendar year 2019.

31. On the Mississippi River ACL experienced a 27% drop in occupancy in 2022 compared to 2019. On the Mississippi River, ACL is performing with materially lower occupancy, less than any other market in calendar year 2022.

32. As of December 2, 2022, ACL has 19% fewer tickets sold for the 2023 season on the Mississippi River than it did at the same time last year for the 2022 season. This is compared to a drop of only 9% in markets other than the Mississippi River.

33. There are no other factors of which we are aware to account for the differences in both past and future performance on the Mississippi River versus other U.S. markets other than the entry on the river of the *Viking Mississippi*.

I declare under penalty of perjury that the foregoing is true and correct. Signed this 7___ day of December, 2022 at Guilford, Connecticut.

By:

Charles B. Robertson

EXHIBIT A

Viking Cruises puts St. Paul plan on hold

Star Tribune (Minneapolis, MN)

December 17, 2016 Saturday

METRO EDITION

Copyright 2016 Star Tribune All Rights Reserved

Section: NEWS; Pg. 1B

Length: 914 words

Byline: JAMES WALSH; STAFF WRITER, STAR TRIBUNE (Mpls.-St. Paul)
Highlight: Announced in 2015, Viking River Cruises' arrival on the Mississippi is not yet known.

Body

A previously heralded move up the Mississippi River by European cruise giant Viking now appears uncertain.

The cruise line with ships gliding down rivers in Europe, China and Egypt announced plans last year to launch a fleet of cruise ships on the Mississippi, traveling from New Orleans to St. Louis and occasionally St. Paul, by 2017.

But earlier this year, Viking said it was pushing its move to Ol' Man River to 2018. And a recent statement by Viking regarding the project is even more vague, providing no details and no date.

While the company has said nothing about the reasons for delay, local officials and industry experts say that factors appear to be cost and a federal law that requires ships

sailing between U.S. ports to be built in the U.S.and operated by American crews.

Responding this week to an inquiry about when they might begin offering Mississippi cruises, Viking River Cruises issued this statement:

"We are actively working with our partners to launch on the Mississippi River, but at this point in time we do not have any details to share regarding product specifics or a launch timeline."

That's a marked departure from the buzz in February 2015, when Viking announced it was adding New Orleans, St. Louis and St. Paul to a cruise lineup of exotic cities such as Paris, Budapest, Cairo and Shanghai.

The announcement left St. Paul officials positively giddy that, starting in 2017, 300 well-heeled river cruise passengers would regularly disembark or board ship in their city.

"I think this is going to be huge," St. Paul Mayor Chris Coleman said at the time. "It was ships coming up the river that started the city. It is only fitting that ships coming upriver now are a piece of its excitement."

But early this year, Viking officials said they were postponing the move. In a statement released in February, company officials said that the cruise line's "projected maiden season" on the Mississippi "has been adjusted to 2018 to accommodate an updated timeline."

Viking had said it would put six riverboats on the Mississippi over three years and that they would be docked near New Orleans' French Quarter. The estimated cost to build each vessel: $90 million to $100 million.

Issues with federal law

But industry officials said that Viking's challenge is in building the ships. According to the federal Jones Act, ships that travel between U.S. ports must be built in the U.S. and crewed, registered and owned by U.S. companies.

Viking's existing ships were either built in Viking shipyards in Europe or are refurbished boats from previous owners. At the time of Viking's 2015 announcement, former Louisiana Gov. Bobby Jindal said construction of new ships would take place in Louisiana. That has not happened.

While Viking officials would not comment on reasons for the delay, Andrea Novak, senior vice president of marketing for the St. Paul Port Authority, said the pause is connected to the Jones Act.

"My understanding is that they are continuing to work with Maritime Administration," part of the U.S. Department of Transportation, she said.

Monty Mathisen, managing editor of Cruise Industry News, said it may just be a matter of a company that has dramatically expanded its operations in a short period of time taking a pause on U.S. plans.

"Viking is expanding on rivers in Europe, expanding oceanside ... they might be a little bit overextended," Mathisen said.

'The potential is amazing'

Another issue could simply be the higher cost of building in the United States. Industry experts say that American shipbuilders are often union-represented and that vessels cost significantly more to build here than in European shipyards.

"Probably by a lot," said Rich Miller, editor of Professional Mariner magazine, a trade journal for the maritime industry in North America. In addition, he said, U.S. environmental regulations may also add to Viking's potential costs to build here.

That's too bad, Miller said. Shipbuilders in the Gulf of Mexico could use the business.

"It's a buyers' market, let me tell you. A lot of shipyards around the Gulf Coast build offshore supply vessels, crew boats for the drilling industry, and since the price of oil has collapsed, that has collapsed," he said. "I would think that if Viking is looking to build down in the Gulf, they would have their pick."

Viking had said that its new fleet of Mississippi cruise ships would need to be specifically designed to navigate the Mississippi and safely pass through locks and under bridges from New Orleans to St. Paul. The delay has put into question hundreds of U.S. shipbuilding jobs, as well as the expected bounty of tourists by the thousands making stops up and down the river.

For St. Paul to become one of those stops, work will need to be done to plan and construct a river landing for cruise ships. That won't happen unless Viking moves ahead.

Two other companies, American Queen Steamboat Co. and American Cruise Lines, currently offer Mississippi cruises, although Novak said neither comes to St. Paul.

In 2015, St. Paul officials were optimistic about their chances to add a new dimension to the city's river identity and said they were certain that Viking was "committed" to the project.

But for now it's wait and see.

"The company is highly respected in the travel market and very serious about St. Paul," said Terry Mattson, head of Visit St. Paul, at the time. "We are on the banks of one of the world's most storied rivers, and the potential here is amazing."

James Walsh · 651-925-5041

Load-Date: December 19, 2016

End of Document

Steamboat company touts economic impact

The Natchez Democrat (Mississippi)

September 2, 2016 Friday

Copyright 2016 The Natchez Democrat

Distributed by Tribune Content Agency

Section: STATE AND REGIONAL NEWS

Length: 470 words

Byline: Ben Hillyer, The Natchez Democrat, Miss.

Body

Sept. 02--NATCHEZ -- Representatives of the company that brought the steamboat era back to the Mississippi River met with local leaders Thursday to remind them of the millions of dollars in economic impact the steamboats carry.

The American Queen Steamboat Company invited Natchez mayor Darryl Grennell, Natchez Inc. officials and area tourism leaders for a discussion of the American Queen's effect on the local economy.

Bringing the boat out of retirement in 2011, the American Queen Steamboat Company has operated cruises up and down the Mississippi and Tennessee rivers since.

"We support local economies across the United States," said Shore Excursions of America Principal Robert Buesing. "We touch America's river town ports with populations less than 50,000."

Natchez is one of the 37 ports the company partners with to help create and sustain local jobs, Buesing said.

Using industry data for American cruise lines, Buesing and American Queen Steamboat Vice President Gary Seabrook said the boat had an economic impact equivalent of $8.8 million to the Natchez economy in the five years of the company's existence. The impact for 2015 was equivalent to $2.3 million, Buesing said.

American Queen Steamboat Company data indicates the American Queen brought an average of 351 guests per visit in 2015. Nearly 9,000 visitors came to Natchez during the boat's 25 stops at the Under-the-Hill boat ramp.

As the cruise line market continues to grow, Seabrook said his company wants to be viewed as the first choice of riverboats for their partners.

In recent years, American Cruise Lines has introduced two riverboats, the American Eagle and The America. French America Lines plans to debut the Louisiane steamboat this year.

European cruise company Viking Cruises previously announced its intentions to operate Mississippi River cruises in 2017, but complications with building a new fleet appear to have postponed the company's plans. Federal law requires U.S. river cruise vessels be built in American shipyards.

Seabrook said American Queen Steamboat Company would unveil plans for a new boat on later this month.

Seabrook said unlike other steamboat companies that want communities to build new dock facilities, American Queen Steamboat Company doesn't need anything from their community partners.

"We don't need much of anything from your community," Seabrook said. "We don't need you to build anything for us."

"We are here. We come to your port. We want to bring more business to your port," Seabrook said.

After the presentation, Mayor Grennell said the riverboat is important to the city.

"We are appreciative for what you do for the community," Grennell said.

___ (c)2016 The Natchez Democrat (Natchez, Miss.) Visit The Natchez Democrat (Natchez, Miss.) at www.natchezdemocrat.com Distributed by Tribune Content Agency, LLC.

Load-Date: September 2, 2016

End of Document

More Mississippi Cruises

The New York Times

November 27, 2016 Sunday

Late Edition - Final

Copyright 2016 The New York Times Company

Section: Section TR; Column 0; Travel Desk; Pg. 2; TRENDING

Length: 296 words

Byline: By ELAINE GLUSAC

Body

Three new ships launching within one year on the Mississippi River will more than double the market for cruises in Mark Twain territory.

In October, the new French America Line launched its first ship, the 150-passenger Louisiane. Based in New Orleans, it features French cuisine and a French Quarter Lounge devoted to jazz.

Last spring, American Cruise Lines, which already operates the Queen of the Mississippi, launched the paddle wheel ship America, offering 185 passengers free shore excursions, nightly musical entertainment and an onboard historian.

Next spring, the American Queen Steamboat Company will introduce the 166-passenger American Duchess on the river. It will incorporate two-story "loft suites" and two restaurants serving regional fare.

"We were starved for capacity," said Ted Sykes, president of the American Queen Steamboat Company, citing 95 percent occupancy on its present Mississippi paddle-wheeler, the American Queen.

With the new launches, operators aim to attract new travelers. The American Duchess will offer shorter itineraries out of Nashville and New Orleans designed to appeal to working professionals, and introduce journeys in and out of the Chicago area.

"We're seeing a transition in travel styles of people who are starting to be interested in the Mississippi," said Carolyn Spencer Brown, editor in chief of CruiseCritic.com.

The Mississippi could roil again when and if Viking Cruises, the biggest European river operator, enters the market. In 2015, it announced its intention to begin Mississippi cruises, only to retract its launch date. Viking wouldn't comment on its delay, though observers tie it to domestic construction capacity. By law, operators on American rivers must build their boats in the United States.

http://www.nytimes.com/2016/11/22/travel/new-cruises-on-the-mississippi-river.html

Graphic

PHOTO: A loft suite on the American Duchess. (PHOTOGRAPH BY AMERICAN QUEEN STEAMBOAT COMPANY)

Load-Date: November 27, 2016

End of Document

EXHIBIT B

ADD-17

VIKING MISSISSIPPI EXPLORERS' LOUNGE

Visit: ***MyVikingJourney.com/advisor***

Call Reservations: **1-800-2-VIKING (1-800-284-5464)**
Reservation Hours (Pacific time): **Sun-Sat 5:00 AM-7:00 PM**

Call Groups: **1-888-505-7984**
Reservation Hours (Pacific time): **Mon-Fri 7:00 AM-5:30 PM | Sat-Sun Closed**

VIKING.COM

220401 Mississip
CST# 2052644-40

MODERNIZING MISSISSIPPI RIVER CRUISING

TRAVEL ADVISOR GUIDE

2022

Dear Valued Travel Advisor,

Twenty-five years ago, we founded Viking with a vision that travel could be more destination-focused and culturally immersive. We wanted to offer experiences designed for the thinking person—for curious travelers. What happened from there was historic—not just for Viking, but for the industry as a whole. River cruising became the fastest-growing segment of the travel market—and Viking has become a household name.

LEADING THE INDUSTRY

Through constant innovation, Viking became The World's Leading River Cruise Line®, with an impressive 50% of the market share. Then we took to the sea, re-inventing ocean cruising and earning the "World's Best Ocean Cruise Line" accolade in our very first year of operation from readers of *Travel + Leisure*. We are also proud that Viking has been named the #1 River Cruise Line and the #1 Ocean Cruise Line by *Condé Nast Traveler* in the publication's 2021 Readers' Choice Awards. Many of these voters and readers are your clients. We know they appreciate our elegant ships, wide-ranging itineraries and inclusive cruise fares—which cover everything they need and nothing they do not. For these reasons, your clients return as Viking guests again and again.

PERFECTING MISSISSIPPI RIVER VOYAGES

Now, we are leveraging our experience in destination-focused travel and innovative ship design to bring modern river cruising to the Mississippi in 2022. From its headwaters in Minnesota to its delta in the Gulf of Mexico, the Mississippi River stretches for more than 2,000 miles and winds through America's heartland. A full sailing is a different kind of cross-country journey for the curious explorer—one that allows our guests to be immersed in American history and culture. Viking Inclusive Value means that a shore excursion is included in every port—and only The Viking Way of exploration will bring Privileged Access®, Local Life and Working World experiences along the way.

THE ONLY TRULY MODERN SHIP ON THE MISSISSIPPI

Working with our American partner, Edison Chouest Offshore, we are bringing together Viking's long history in destination-focused travel and itinerary operations, with their strong experience in shipbuilding and nautical operations. The new ship, *Viking Mississippi*, hosts 386 guests in 193 staterooms and is inspired by our award-winning Viking Longships® and ocean vessels. The vessel is purpose-built for the Mississippi and features the clean Scandinavian design for which we are known. Your clients can explore in comfort, with spacious all outside staterooms, expansive viewing areas and al fresco dining.

EARN MORE WITH VIKING

In addition to repeat business, you can look forward to higher earnings because Viking is the first—and only—cruise line to *always* offer no NCFs. We pay commission on every aspect of your booking—cruise, airfare, port charges, optional shore excursions, beverage packages, extensions and more when booked prior to sailing. We also help you maximize profits through our enhanced Travel Advisor Portal and dedicated Directors of Business Development throughout the US and Canada.

Detailed in the following pages, you will see how Viking and valued travel partners like you are poised for continued growth and success—together. For details or to make a booking, call 1-800-2-VIKING or visit *MyVikingJourney.com/advisor*.

Thank you for your support; we look forward to a bright future and Viking Mississippi's inaugural year in 2022.

Sincerely,

Torstein Hagen
Chairman

THE VIKING DIFFERENCE

FOR THE THINKING PERSON℠
Experiences created for curious travelers.

PURPOSE-BUILT SHIPS
Viking ships are right-sized for wherever you are in the world.

SERENE SCANDINAVIAN SPACES
Elegant, innovative, light-filled spaces where comfort meets discovery.

UNPARALLELED STATEROOMS & SUITES
Designed for maximum comfort and views.

DESTINATION-FOCUSED DINING
Regional cuisine, always available classics and the most al fresco dining on any waterway.

ONBOARD ENRICHMENT
Onboard experiences designed to bring history and culture to life.

OUR VIKING FAMILY
Thoughtful attention from our dedicated staff.

ONSHORE EXPERIENCES
Designed to take you closer, The Viking Way®.

CULTURAL & SCIENTIFIC PARTNERS
Viking has partnered with world-leading cultural & scientific institutions.

VIKING INCLUSIVE VALUE
Pricing that covers everything you need—and nothing you do not.

WHAT VIKING IS NOT
We do not try to be all things to all people. Instead, we focus on delivering meaningful experiences to you.

VIKING.TV
Continue exploring the world from home through our award-winning online enrichment channel, Viking.TV.

ACTIVATE THE QR CODE IN THIS BROCHURE
1) Scan QR code with your camera
2) Tap to open website
3) Learn more

DUBUQUE, IOWA

CONTENTS

For the Thinking Person	5
Competitive Advantage	7
Built to be Environmentally Considerate	9
Mississippi Ships	10
Serene Scandinavian Spaces	13
Unparalleled Staterooms & Suites	14
Destination-Focused Dining	18
Our Viking Family	21
Enrichment & Cultural Partners	22
Itineraries	26
Benefits & Inclusive Value	30

LEFT: FRENCH QUARTER BUILDING WROUGHT IRON BALCONIES, NEW ORLEANS, LOUISIANA; RIGHT: SNAKE ALLEY, BURLINGTON, IOWA.

FOR THE THINKING PERSON

Experiences created for curious travelers.

WE ALL TRAVEL TO EXPLORE, TO LEARN, TO UNDERSTAND. At Viking, we believe travel should be more than just a trip—it should be a gateway to insight and discoveries. We design our itineraries so our guests can explore and engage with the nature, culture, science and history of their destination.

BEFORE YOU TRAVEL, we provide a variety of materials to help you get the most out of your journey, from filmographies that inspire wanderlust to recommended reading that informs and enlightens.

ONBOARD activities are designed for enrichment and renewal. We offer lectures on history and art, cooking demonstrations of regional favorites, menus offering regional cuisine and more.

ON SHORE, you might step behind the scenes at a family-run working farm; attend a jazz concert in a historic venue; or immerse yourself in Cajun culture through music, folktales and food.

EVEN THE SHIP INTERIOR is designed to inform, with original Nordic and American artwork and a library stocked with books specially selected by London bookshop Heywood Hill. Combined with public spaces that enable learning opportunities, our aim is to help guests feel more connected—to newfound friends and the world.

NATIONAL MISSISSIPPI RIVER MUSEUM & AQUARIUM, DUBUQUE, IOWA

ADD-21

VIKING MISSISSIPPI

MODERNIZING MISSISSIPPI EXPLORATION

From rivers and oceans to expeditions—now Viking brings modern, destination-focused journeys to the Mississippi River.

WHILE LEADING THE RIVER CRUISE INDUSTRY for more than two decades, we also reinvented ocean cruising with our small ship experience. Our fleet of elegant ocean ships now sails around the world, with itineraries visiting six continents. In 2022, we are perfecting expedition cruising with the launch of Viking Expeditions and two new purpose-built vessels that will sail voyages to the Arctic, Antarctica and North America's Great Lakes.

AND NOW, WE WILL BRING MODERN EXPLORATION TO THE MISSISSIPPI with destination-focused journeys along the full length of the river. With the introduction of *Viking Mississippi*, we set out to create a new kind of ship for the region—one that is streamlined and more modern. A sleek, sophisticated ship for 386 guests, every stateroom features a private veranda or French balcony, allowing guests to get closer to their destination. In true Viking style, the ship will offer clean Scandinavian design, light-filled rooms, unique public spaces, fresh regional fare and personalized service.

TRAVEL WITH EASE. Just like on our other voyages, guests will unpack once and relax amid an ever-changing canvas of breathtaking landscapes. In many destinations, we will dock in the center of town, allowing guests to stroll off and begin exploring.

COMPETITIVE ADVANTAGES

Viking offers a wealth of onboard amenities, inclusive value and brand benefits that other cruise lines on the Mississippi do not.

From all outside staterooms—nearly all of which feature a private veranda—to included guided shore excursions in every port, our guests will enjoy so much more on a *Viking Mississippi* voyage.

		VIKING	AMERICAN QUEEN VOYAGES	AMERICAN CRUISE LINES
BRAND	Most awards	✓	✗	✗
	Service guarantee	✓	✗	✗
	Highest brand recognition	✓	✗	✗
VALUE	Included port charges, fees & taxes	✓	✗	✗
	1 included guided excursion in every port	✓	✗	✗
	Meet & Greet Staff (free transport between airport and ship/hotel with air purchase)	✓	✗	✗
FLEET & SHIPS	Average fleet age (yrs.)	<1	12	2.5
	24-hr room service	✓	✓	✗
	Infinity Plunge Pool	✓	✗	✗
	Modern, elegant and spacious Scandinavian design	✓	✗	✗
	Aquavit Terrace® for indoor/outdoor viewing & al fresco dining	✓	✗	✗
	Complimentary self-service launderettes on all ships	✓	✗	✗
	Largest staterooms on the Mississippi (in sq. ft.)	1,024–268	550–170	800–203
	All-outside staterooms with private verandas or French balconies	✓	✗	✗
	Elegantly appointed bathroom with generous shower, anti-fog mirror & heated floors	✓	✗	✗
	True two-room suites	✓	✓	✗
	No paddle wheel	✓	✗	✗
ONBOARD EXPERIENCE & ENRICHMENT	No children under 18	✓	✗	✗
	Early boarding on embarkation day	✓	✗	✗
	Optional tours (avg.)	24	12	15
	Tour guide & QuietVox on all excursions, plus Privileged Access choices	✓	✗	✗
	Curated, museum-quality onboard art	✓	✗	✗
	Internationally trained culinary team	✓	✗	✗
	Beer, wine & soft drinks with onboard lunch & dinner	✓	✓	✓
CUSTOMER SERVICE	Centralized, convenient pre-booking for shore excursions	✓	✗	✗
	Book guest air	✓	✗	✓
	Extensive call center hours	✓	✗	✗
TRADE RELATIONS	Dedicated sales staff of 30+ to assist you	✓	✗	✗
	No NCFs, earn commissions on all aspects of client's booking	✓	✗	✗
	Broadest product offering for future bookings	✓	✗	✗

BUILT TO BE ENVIRONMENTALLY CONSIDERATE

Viking Mississippi has been designed as an innovative and environmentally considerate vessel and is equipped with a variety of measures to maximize energy efficiency and minimize emissions—including a diesel-electric propulsion system comprised of eight CAT C32 EPA Tier 4 diesel engines, each powering a 940 eKw water cooled generator; each engine/generator unit is individually mounted on a specially designed double raft isolation system that produces a remarkably quiet and smooth ride. Propulsion power is provided by Voith 6 blade propulsion thrusters driven by permanent magnet electric motors; pump jet bow thrusters are powered by permanent magnet motors; and a highly advanced exhaust scrubbing system significantly reduces sound and emissions.

Key benefits of state-of-the-art electric propulsion system installed on *Viking Mississippi*:

- INCREASES FUEL EFFICIENCY: Voith Schneider Propulsion System consumes 10% less fuel than competitive solutions
- REDUCES VIBRATION AND NOISE POLLUTION: electric units are very quiet with no engine noise
- INCREASES SAFETY: installed propulsion system enables extremely fast response to steering commands allowing for fast and precise maneuvering and positioning even under the most adverse conditions, which is of high importance on the fast-moving waters of the Mississippi River

VOITH SCHNEIDER PROPELLER (VSP)

ADD-23

VIKING MISSISSIPPI®

Modernizing Mississippi River Voyages

GUESTS: 386 LENGTH: 450 FT. BEAM: 75 FT.

Inspired by our award-winning river and ocean ships, this new state-of-the-art vessel will feature elegant Scandinavian design and public spaces that are familiar to our guests but have been reimagined for Mississippi River voyages.

Sun Terrace with Infinity Plunge Pool
Relax in this unique glass-backed pool experience with ultimate views from the aft.

Aquavit Terrace®
Unwind by the pool, enjoy al fresco dining or an American barbecue experience and admire the passing scenery from this outdoor lounge area at the top of the ship.

River Café
From American classics to Mamsen's® Norwegian specialties, this indoor/outdoor dining venue offers alternative restaurant dining in a casual, al fresco setting.

All Outside Staterooms
Choose from 7 categories of spacious rooms, all with king-size beds, large showers, heated bathroom floors, LCD TVs, a private veranda or French balcony and 24-hour room service.

Complimentary Wi-Fi
Stay connected with the world around you.

Explorer Suites
In premium locations with wraparound verandas, these two-room suites offer maximum views.

The Bow
A quiet lounge area at the front of the ship to capture ever-changing views as you sail along the Mississippi.

Environmentally Considerate
Intelligent energy-efficient propulsion system (Voith Schneider) reduces vibrations for a remarkably smooth and comfortable sailing.

Eight CAT C32 EPA Tier 4 diesel engines

The Restaurant
This main dining venue serves daily-changing menus featuring delicious regional cuisine and always available classics prepared with fresh, local ingredients.

Full 360° Promenade Deck
Stroll the entire ship on this deck, stretching your legs while viewing scenic landscapes and regional wildlife.

The Living Room
Clean Scandinavian design coupled with American influences; the perfect place to relax, connect with newfound friends or play a game of cards.

Paps, the Explorers' Bar
Enjoy a cocktail and mingle with fellow travelers in this bar with the best views on the river.

Explorers' Lounge
With two-story panoramic views, this is the perfect place to relax and take in the scenery.

STATISTICS:
Type: River Ship
Decks: 5
Crew: 148
Registry: United States
Owner and Nautical Operator: Edison Chouest Offshore
Built in: Louisiana, United States
Maiden Season: Viking Mississippi 2022

ADD-24

SERENE SCANDINAVIAN SPACES

Elegant, innovative, light-filled spaces where comfort meets discovery.

WE DESIGNED *VIKING MISSISSIPPI* from the inside out with your comfort in mind. Starting with our signature Scandinavian style of clean lines, neutral tones and natural materials, even the smallest details take their inspiration from the exploratory spirit of the original Vikings. As this is the first purpose-built ship for the United States, we have also paid tribute to American history and culture with subtle elements throughout the interior decor.

OPEN AND SERENE ROOMS greet you throughout. Public areas will be familiar to our river and ocean cruise guests but have been reimagined for Mississippi River voyages. From the comfortable and welcoming Living Room, designed for socializing, relaxing and entertainment, to the quiet corner of The Library, a perfect place to discover a new book. The sun-filled, two-story Explorers' Lounge has floor-to-ceiling windows that open to The Bow, a unique outdoor seating area at the front of the ship where guests can relax and enjoy ever-changing riverside views. And the Aquavit Terrace, an outdoor seating area at the top of the ship, combined with the River Café, provides the most al fresco dining on the Mississippi.

THE RESTAURANT LOBBY

THE LIVING ROOM

PENTHOUSE JR. SUITE

UNPARALLELED STATEROOMS & SUITES

Designed for comfort, bringing your destination as close as possible.

THE PERFECT RETREAT to relax and begin the day refreshed. Guests can enjoy a morning cup of coffee on their private veranda. More than just a place to sleep, each stateroom is an *open and airy sanctuary* with a *sweeping view* of the river and landscape beyond. From Veranda Staterooms and French Balcony Staterooms to our spacious two-room Explorer Suites, guests find a beautifully designed, *streamlined Scandinavian interior*, well-appointed in the understated elegance and contemporary comfort for which Viking is known.

Each of our spacious Viking staterooms offers a King-size Viking Explorer Bed with luxury linens. And you will feel pampered by bathrooms equipped with heated floors and premium Freyja bath products.

STATEROOM FEATURES:

- All outside staterooms with river views
- King-size Viking Explorer Bed with luxury linens
- 42" flat-screen TV featuring CNN, CBC, ESPN Sport
- Private bathroom with spacious glass-enclosed shower, heated floor, anti-fog mirror & hair dryer
- Premium Freyja® toiletries
- Private viewing veranda or French Balcony
- Telephone, safe, refrigerator & hair dryer
- 110/120 volt outlets with USB ports
- Free Wi-Fi (connection speed may vary)
- 24-hour room service

TOP LEFT: TERRACE SUITE; TOP RIGHT: EXPLORER SUITE BEDROOM
BOTTOM: EXPLORER SUITE LIVING ROOM

ADD-26

STATEROOM FEATURES

VERANDA (V) 268 SQ. FT.

- 3 PM stateroom access
- Mini-bar with soft drinks, water & snacks
- Premium Freyja toiletries; plush robes & slippers

FRENCH BALCONY (FB) 301 SQ. FT.

- 2 PM stateroom access
- Mini-bar with soft drinks, water & snacks (replenished once daily)
- Binoculars
- Traditional Norwegian Marius-weave blanket
- Personal coffee machine with premium coffee & tea selections
- Premium Freyja toiletries; plush robes & slippers
- Welcome ADA accessible cabin category

DELUXE VERANDA (DV) 268 SQ. FT.

- 2 PM stateroom access
- Mini-bar with soft drinks, water & snacks (replenished once daily)
- Binoculars
- Traditional Norwegian Marius-weave blanket
- Personal coffee machine with premium coffee & tea selections
- Premium Freyja toiletries; plush robes & slippers

PENTHOUSE VERANDA (PV) 336 SQ. FT.

- 1 PM stateroom access
- Mini-bar with alcoholic beverages, soft drinks, water & snacks, replenished once daily
- Binoculars
- Traditional Norwegian Marius-weave blanket
- Personal coffee machine with premium coffee & tea selections
- Premium Freyja toiletries; plush robes & slippers
- Complimentary pressing & shoe shine services
- Welcome bottle of champagne

SUITE FEATURES

GRACIOUS AND ELEGANT SURROUNDINGS for destinations that are closer to home, but still full of discovery. Penthouse Junior Suites boast a veranda, additional storage and seating, plus an expanded bathroom with extended shower and double sinks. Terrace Suites feature an expanded private veranda, two separate rooms and a spacious bathroom. Explorer Suites are the largest suites available on the Mississippi River—plus, with a dining area and wraparound private veranda, they are an expansive home away from home. All suites include a welcome bottle of champagne, binoculars, a fully stocked mini-bar and complimentary laundry services.

PENTHOUSE JR. SUITE (PS) 400 SQ. FT.

- 12 PM priority stateroom access
- Mini-bar with alcoholic beverages, soft drinks, water & snacks, replenished once daily
- Binoculars
- Traditional Norwegian Marius-weave blanket
- Personal coffee machine with premium coffee & tea selections
- Premium Freyja toiletries, plush robes & slippers
- Complimentary laundry & shoe shine services
- Welcome bottle of champagne

TERRACE SUITE (TS) 425 SQ. FT.

- 12 PM priority stateroom access
- Expansive veranda
- Two rooms with separate sleeping & sitting areas with two 42" flat-screen TVs
- Mini-bar with alcoholic beverages, soft drinks, water & snacks, replenished daily
- Binoculars
- Traditional Norwegian Marius-weave blanket
- Personal coffee machine with premium coffee & tea selections
- Premium Freyja toiletries, plush robes & slippers
- Complimentary laundry & shoe shine services
- Welcome bottle of champagne

EXPLORER SUITE (ES) 657–1,024 SQ. FT.

- 12 PM priority stateroom access
- Wraparound veranda
- Separate sleeping & sitting areas with two 42" flat-screen TVs
- Mini-bar with alcoholic beverages, soft drinks, water & snacks, replenished once daily
- Binoculars
- Traditional Norwegian Marius-weave blanket
- Personal coffee machine with premium coffee & tea selections
- Premium Freyja toiletries; plush robes & slippers
- Complimentary laundry & shoe shine services
- Welcome bottle of champagne
- Silver Spirits beverage package included

RIVER CAFÉ

DESTINATION-FOCUSED DINING

Regional cuisine, always available classics
and the most al fresco dining on the Mississippi.

FEW THINGS SAY AS MUCH ABOUT A CULTURE AS ITS CUISINE. At Viking, we celebrate dining and believe that good food is more than just sustenance—*it is part of the journey of discovery.* Sample spicy jambalaya while taking in the rich, colorful streets of New Orleans. Or indulge in toasted ravioli and hearty bread pudding as you glide through the scenic landscapes of the Upper Mississippi. From regional dishes refined over generations and sophisticated chef selections with wine pairings, to authentic Memphis barbecue and global fare, our onboard dining venues offer the finest cuisine on the river.

IMPECCABLE SERVICE AMID CASUAL ELEGANCE. Guests can indulge in the highest onboard dining experience in The Restaurant. Enjoy a casual meal al fresco at the River Café. *Open seating allows guests to dine with the same companions or meet new guests each day.* Greet the morning with a sumptuous breakfast buffet. Sample a fresh-made soup and salad midday. And in the evening, settle in for a relaxed, multi-course fine-dining experience.

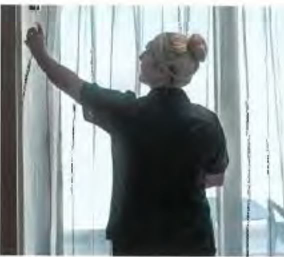
RIVER CAFÉ
A casual, indoor/outdoor dining venue serving pastries and coffee for early risers as well as breakfast, lunch and dinner. Here guests can dine on a range of dishes, from American favorites and Southern barbecue to Mamsen's Norwegian specialties.

AQUAVIT TERRACE
A revolutionary indoor/outdoor viewing area for al fresco dining or an American barbecue experience. Admire the passing scenery from this outdoor lounge area at the top of the ship.

THE RESTAURANT
The main dining venue, which serves daily-changing menus featuring delicious regional cuisine and always available classics with fresh, local ingredients.

TOP RIGHT: RED BEANS & RICE
MIDDLE RIGHT: AQUAVIT TERRACE
BOTTOM RIGHT: SHRIMP ÉTOUFFÉE

DEDICATED STAFF


GRACIOUS SERVICE

OUR VIKING FAMILY

Thoughtful attention from our dedicated staff.

ONLY THE VERY BEST.
Our knowledgeable and highly experienced Swiss management oversees your entire journey and handpicks each member of our onboard team. Rigorous training and inspiring leadership have also made Viking the employer of choice.

A WARM WELCOME.
We are dedicated to ensuring everyone feels at home on board our ships. We have the most loyal staff in the industry—with more than 90% returning year after year—so you can expect familiar faces and the same quality service every time you travel with us.

VIKING SERVICE GUARANTEE.
We are so confident we will exceed expectations, that we are the only cruise line to guarantee its award-winning service. Should a guest be dissatisfied with our service upon first check-in of their voyage—and they notify us within 24 hours—we then have 24 hours to correct the situation. In the unlikely event a solution cannot be reached, the guest can depart as soon as possible, and we will refund 100% of their cruise price. Please see our website for more details.

"Personalized attention is a service hallmark."

– Lena Katz, Yahoo! Travel

ADD-29

CLOCKWISE FROM TOP LEFT: LOUISIANA JAMBALAYA; JAZZ MUSICIANS; CLASSICAL MUSICIANS

ONBOARD ENRICHMENT

Onboard experiences designed to optimize onshore discovery.

- GUEST LECTURERS
are experts in their fields who shed light on the destination's art, architecture, music, geopolitics, natural world and more.
- PORT TALKS
provide an overview of the next day's port of call through informative multimedia presentations.
- COOKING DEMONSTRATIONS
present recipes of regional treats and drinks—Pecan Pralines, Kringles and Kolaches, Daube Glace, the legendary Sazerac and more—so that you can take the flavors of the Mississippi home with you.
- WINE TASTINGS
introduce you to a wide selection of regional wines and vintages.
- DESTINATION PERFORMANCES
represent the most iconic cultural performing arts of the region—New Orleans Jazz, Delta Blues, Memphis Rockabilly or Wisconsin Polka.
- CRAFT DEMONSTRATIONS
reveal centuries-old traditions of local artisans, from lace making to screen printing and wooden shoemaking.
- CLASSICAL AND REGIONAL MUSIC
provided by superior musicians in our own Viking House Quartet and a premier lounge pianist/vocalist. Our entertainment roster includes national and regional artists with performance credentials ranging from New Orleans legendary Preservation Hall to television's American Idol and Hollywood's silver screen.

ONSHORE EXPERIENCES

Designed to take you closer, The Viking Way®.

THE VIKING WAY® OF EXPLORATION offers behind-the-scenes insights and opportunities that set us apart from other travel companies. While we feature the expected and iconic—such as visits to renowned museums and notable landmarks—we also work hard to offer our guests LOCAL LIFE, WORKING WORLD and optional PRIVILEGED ACCESS® experiences, opening doors to places otherwise difficult to visit.

CULTURAL PARTNERS

Our premier partnerships build on our continued commitment to supporting enriching cultural programming and events.

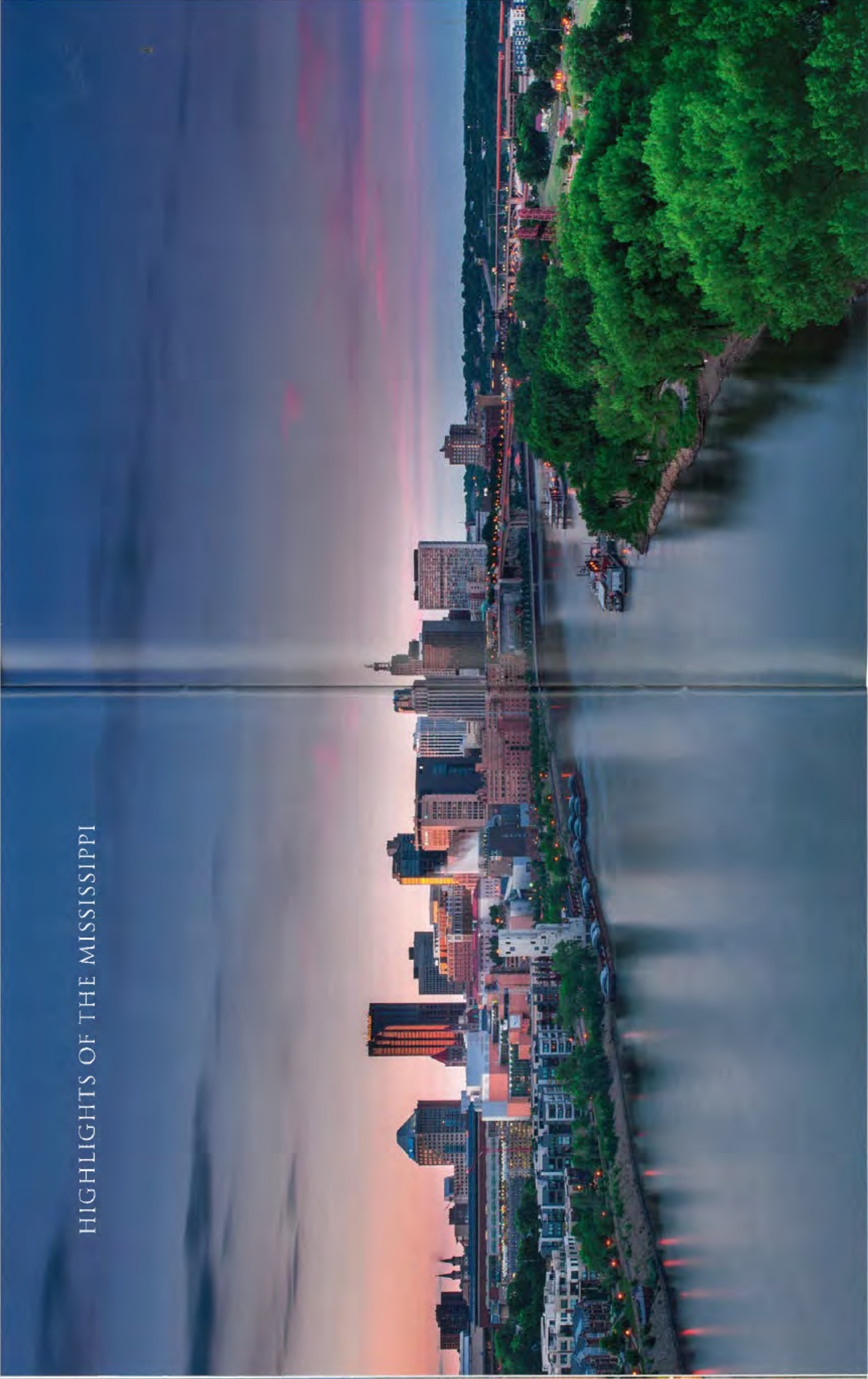
Viking is proud to be a loyal and longtime sponsor of the award-winning series *MASTERPIECE*, which remains steadfast in its commitment to bringing the best in drama to American public TV audiences.

The BBC is the world's leading public service broadcaster, providing educational and stimulating television, radio and digital content to people in the UK and around the globe. From their onboard staterooms, Viking guests can view BBC HD live and watch their favorite shows and documentaries, many of which feature places they can visit while sailing our itineraries.

Viking is proud to support Vesterheim, the National Norwegian-American Museum and Folk Art School based in scenic Decorah, Iowa. The museum houses over 33,000 artifacts throughout 12 historic buildings, including a library, archives and Heritage Park. Guests on board select Mississippi river voyages can enjoy a guided tour of the museum and Privileged Access to their educational center, where they can admire items not available to the public. Additionally, *Viking Mississippi* features a one-of-a-kind art collection exclusively commissioned through Vesterheim's children's program. The collection also includes artwork from the children's program at the Nordic Museum in Seattle and American Swedish Institute in Minneapolis. Crafted by children from local communities of various ages, the art was inspired by iconic destinations along the Mississippi River—New Orleans, Memphis, St. Louis and St. Paul. These unique and endearing designs are featured in the ship's 193 staterooms.

Since 2013, Viking has been the official cruise line of the Hollywood Bowl, the historic summer home of the Los Angeles Philharmonic. Viking has sponsored the LA Phil's casual yet elegant outdoor summer concert series featuring music of renowned composers and outstanding performances.

Viking is a proud partner of the Royal Academy of Arts, one of the most prestigious art institutions in the UK, founded in 1768. Based in Burlington House on Piccadilly in London, it is an independent, privately funded institution led by eminent artists and architects.


HIGHLIGHTS OF THE MISSISSIPPI

LOWER MISSISSIPPI

Discover the best of local culture, nature & history.

EXPERIENCE THE DIVERSITY OF THE SOUTH as you discover vibrant urban centers, historic battlefields, acclaimed museums, charming small towns and more. Here, you will celebrate the literature, music, cuisine and hospitality of the varied peoples whose contributions have become part of America's national identity.

CUISINE
Tastes of Europe, Africa and the Caribbean meet country cooking in Creole jambalaya, Cajun crawfish and Memphis barbecue.

MUSIC
From Dixieland jazz to Delta blues, the Lower Mississippi provides the backdrop to America's most identifiable music.

HISTORIC HOMES
See the shotgun houses and Creole town houses that line New Orleans's streets, and visit historic Greek Revival estates.

THE FRENCH MARKET
Founded in 1791, the French Market in New Orleans is the oldest public market in the United States.

ECOLOGY
Countless pockets of natural life call threads of the Lower Mississippi home.

CIVIL WAR HISTORY
Walk in the footsteps of Civil War soldiers and learn why the Lower Mississippi River was a key theater of the war.

UPPER MISSISSIPPI

Journey through the heartland of America.

THE UPPER MISSISSIPPI WAS ONCE AMERICA'S **GREAT FRONTIER**, a water boundary whose fertile banks supported Native Americans, westward pioneers, immigrant farmers, visionary entrepreneurs and many others. See the scenic landscape that served as the backdrop for trade and innovation for thousands of years.

MAIN STREET, USA
Discover charming small towns with picturesque streets and welcoming Midwestern hospitality that will make you feel at home.

HEART OF AGRICULTURE
Learn how the nation is fed at family farms where your hosts demonstrate their daily work and share the fruits of their labor.

MUSIC
Listen to America's soundtrack—be it Scott Joplin ragtime, Albert King blues, the rock of Chuck Berry or a Wisconsin polka.

SCANDINAVIAN HERITAGE
Enjoy Nordic cuisine and crafts from descendants of the Scandinavian immigrants who chose the Midwest as their home.

MARK TWAIN
Visit Twain's hometown, Hannibal, Missouri, a real-life journey through the pages of *Adventures of Huckleberry Finn*.

WILDLIFE
From your stateroom and on nature walks and other activities, watch for bald or golden eagles, river otters and Canada geese.

Case 22-1029, Document 81, 12/15/2022, 3437847, Page102 of 128

ADD-32

Stretching for 2,350 miles down the United States, from Minnesota's Lake Itasca to the Gulf of Mexico, our new cruises on the "Mighty Mississippi" offer a different type of cross-country journey for the curious explorer—one that allows you to be immersed in American history and culture.

AMERICA'S GREAT RIVER

15 DAYS · ST. PAUL TO NEW ORLEANS

JUL–OCT 2022; JUN–JUL, SEP–OCT 2023 & 2024

History and culture unfold as you cross the country from north to south on this enriching voyage. Enjoy relaxing scenic sailing and unparalleled bird-watching as the landscape changes from the bluffs of the North to the bayous of the South. Learn about the American civil rights movement and the Civil War. Along the way, tap your feet to the rhythm of American folk, soul and jazz music—and taste a delicious array of regional cuisine.

LOUISIANA BAYOU

HEART OF THE DELTA

8 DAYS · NEW ORLEANS TO MEMPHIS
JUN, OCT & NOV 2022; JAN–JUN,
OCT–DEC 2023; JAN–JUN 2024

Immerse yourself in history and heritage on this journey from New Orleans to Memphis. Soak up the rich French and Acadian cultures that infuse the Lower Mississippi, and be inspired by the stories of famed musicians and civil rights heroes. Savor delicious Cajun and Creole cuisine, as well as Memphis's famous BBQ. And stir your soul with the rhythms of Dixieland jazz, Delta blues and gospel.

MIDWEST FARMLAND

AMERICA'S HEARTLAND

8 DAYS · ST. LOUIS TO ST. PAUL
AUG–SEP 2022, 2023 & 2024

On this enlightening journey on the Upper Mississippi, you will hear stories of pioneers and the Lewis and Clark Expedition; walk in the footsteps of Mark Twain; and learn about the Norwegian migration. Enjoy the view as your ship navigates through the river's intricate lock system. And experience the region's many cultural treasures—from ragtime, polka and Norwegian folk music to Wisconsin cheese, craft beer and hearty stews.

NEW ORLEANS, LOUISIANA

NEW ORLEANS & SOUTHERN CHARMS

8 DAYS · ROUNDTRIP NEW ORLEANS
NOV–DEC 2022; JAN & DEC 2023; JAN 2024

The Lower Mississippi overflows with charm, history and hospitality. Explore historic estates, and visit notable Civil War sites. Sample the bustling French-flavored port cities of New Orleans and Baton Rouge. Sway to the tempos of Dixieland jazz, gospel and blues. Savor gourmet Cajun and Creole cuisine, as well as traditional Southern fare. Join us, and see why local Cajuns say, "Laissez les bons temps rouler" (Let the good times roll).

VIKING OFFERS THE BEST

EVERYTHING YOU NEED TO SELL

Our award-winning sales team provides everything you need to help grow your business.

- Co-op and marketing support
- Dedicated sales staff ready to assist you
- Comprehensive Travel Advisor Portal with personalized marketing tools
- Your very own co-branded Viking website
- Industry-leading video library of itineraries & experiences
- Cruise nights
- Training & webinars
- *Travel Virtually with Viking* series

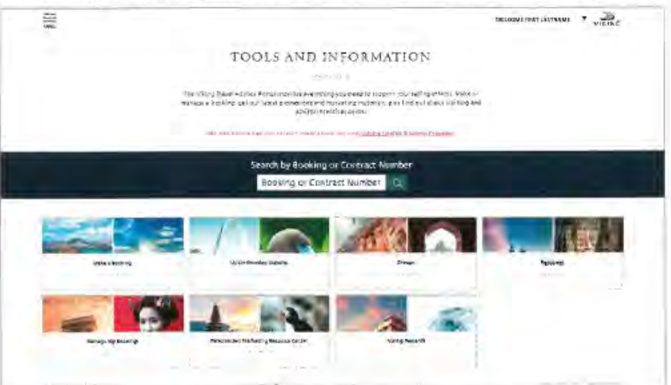
ENHANCED TRAVEL ADVISOR PORTAL

Customize your clients' cruise experience through the Travel Advisor Portal

MyVikingJourney.com/advisor

- Book and earn commission on optional shore excursions and Silver Spirits beverage packages
- Make easy online payments with a credit card or eCheck
- Access customizable marketing, collateral and group promotional materials
- Complete client information forms
- Get answers to FAQs
- Access and print visa applications and travel itineraries
- View flight details (75 days prior to departure)
- Manage your clients' schedules
- Schedule shore excursions, onboard dining and spa appointments
- Offer additional peace of mind with the Viking Travel Protection Plan

Visit ***MyVikingJourney.com/advisor*** or the Travel Advisors section of our website to get started



TRAVEL ADVISOR BENEFITS

WE ARE THE FIRST—AND ONLY—CRUISE LINE TO *ALWAYS* OFFER NO NCFs

Earn commission on all aspects of your clients' bookings including:

- Cruise fare
- Airfare
- Optional shore excursions and Silver Spirits beverage packages*
- Pre- and post-cruise extension packages
- Port charges
- Taxes and fees
- Travel Protection Plans
- Gift orders
- Shipboard credits
- Upsell items
- And more

Commissions are paid 29 days prior to sailing.

*When booked by Travel Advisor prior to sailing.

	VIKING		
DAYS	8		
CABIN TYPE/SQ. FT.	Veranda (V) 268 sq. ft.		
		Commission per guest	
	Price	Rate	Amount
COMMISSIONABLE CRUISE FARE	$3,999	16.0%	$640
AIR PACKAGE	$299	5.0%	$15
PORT FEES	Included	Included	Included
SUBTOTAL	$4,298	15.2%	$655
GROUND TRANSFERS	Included	Included	Included
ONE EXCURSION IN EACH PORT, BEVERAGES, WI-FI, ETC.	Included	Included	Included
TOTAL PRICE PER PERSON	$4,298	15.2%	$655
PRICE PER PERSON, PER DAY	$537		
TOTAL COMMISSION*	$1,310 PER BOOKING		

*Represents *Hearts of the Delta*, 2023

VIKING INCLUSIVE VALUE

Pricing that covers everything you need—and nothing you do not.

MORE FEATURES, SERVICES AND EXCURSIONS INCLUDED

- One complimentary shore excursion in every port of call
- Free Wi-Fi (connection speed may vary)
- Beer, wine & soft drinks with onboard lunch & dinner
- 24-hour specialty coffees, teas & bottled water
- Port taxes & fees
- Ground transfers with Viking Air purchase
- Visits to UNESCO Sites
- Enrichment lectures & destination performances
- Self-service launderettes
- Alternative restaurant dining at no extra charge
- 24-hour room service

EVEN MORE WAYS TO SAVE

- SAVE WHEN YOU PAY VIA eCheck, an electronic debit to your checking account. It is quick, convenient and as easy as providing a credit card number.
- OUR ALL-INCLUSIVE INTERNATIONAL AIRFARE includes flights, taxes, fees and airport transfers. Plus, save even more with our competitively priced upgrades on Premium Economy or Business Class.
- EARLY BOOKING DISCOUNTS let you plan ahead and save.

WHAT VIKING IS NOT

We do not try to be all things to all people.
Instead, we focus on delivering meaningful experiences to you.

- **No** children under 18
- **No** casinos
- **No** nickel and diming
- **No** charge for Wi-Fi*
- **No** charge for beer & wine at lunch & dinner
- **No** charge for alternative restaurants
- **No** umbrella drinks
- **No** photography sales
- **No** art auctions
- **No** inside staterooms
- **No** entrance fee for the spa
- **No** spa sales pressure
- **No** charge for use of launderette
- **No** smoking
- **No** waiting in lines
- **No** formal nights, butlers, or white gloves

*Connection speed may vary.

NEW ORLEANS, LOUISIANA

ADDENDUM B

WINSTON & STRAWN LLP
RECEIVED
JUN 3 2008
LIBRARY

SHIPPING REGULATION REPORTS

Editor-in-Chief
John W. Willis

Associate Editor
Robert E. Emeritz

Managing Editor
David B. Fialkoff

Contributing Editor
U. Joseph Hecker

25 SRR

PIKE & FISCHER, INC. 4600 East-West Highway, Suite 200, Bethesda, Maryland 20814-1438

Copyright © 1989, 1990, 1991, by Pike & Fischer, Inc.

All rights reserved.

No copyrighted part of this work may be reproduced or copied in any form or by any means without prior written permission from Pike & Fischer, Inc.

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting or other professional service.

reading of the Agreement. In approving the amendments, the FMC emphasized "the guarantee of service through minimum sailing requirements." *Order, Conditional Approval of Agreement No. 10027-10* (Dec. 30, 1980) at 4. The Commission, moreover, reminded the parties that "[t]he minimum sailing/calls requirements bears heavily on the regularity of service and any change should be approved by the governmental authorities." *Id.* at 5. Thus, the Commission regarded the sailing obligations, and the amendments delineating each ocean carrier's individual responsibility, as essential to its acceptance of the new agreement. This suggests that the FMC understood and approved the severe suspension remedy for the sailing deficiencies of a major party. But perhaps the best indicator we possess of the FMC's understanding in 1980 is the text of the Agreement itself. The Commission thoroughly analyzed the proposed Agreement, requiring modifications in some provisions and leaving others intact. That the FMC chose to leave unchanged the suspension language of Article 6(e) also suggests to us that the Commission approved suspension in these circumstances.

The sailing requirements were also undoubtedly important to the parties themselves in order to prevent some carriers from exploiting the pool payments of others. Not surprisingly, the parties agreed to harsh consequences in the event a large party failed to live up to its obligations. Rather than undermine our reading of the Agreement, the severity of these penalties only indicates to us the premium the parties placed on their mutual performance.[10]

IV.

We conclude that the FMC properly asserted its right to hear what was a live dispute between Ivarans and the intervenors. But since we also decide that the FMC's reading of the Agreement was unreasonable because it conflicted with the clear language of the contract, we grant the petition for review and reverse the judgment against petitioner.

It is so ordered.

MA

ARGENT MARINE I-III, INC. -- Sale of LNG Vessels

Stephen P. Gottlieb
President and Chief Executive Officer
Argent Marine I, Inc.; Argent Marine II, Inc.;
Argent Marine III, Inc.; Argent Marine Services, Inc.
San Francisco, California

Stephen P. Gottlieb, Managing Director
Argent Group, Ltd., New York, New York

Dated: March 5, 1990

[1:2, 2:214] Sale of LNG vessels; citizenship requirement.

Holders of options to purchase three CDS-built LNG vessels, which were financed under Title XI and repossessed by MarAd upon the default of the obligors, were not U.S.-citizens under Section 2 of the 1916 Act at the time the option agreements were executed and thus the agreements would be terminated by their own terms. MarAd need not decide whether U.S. citizenship is a requirement to the purchase of CDS-built, Title XI vessels since such citizenship was clearly a prerequisite to the acceptance of bids in this instance. Although the option holders satisfied the shareholder, director, officer, and incorporation requirements of Section 2, they were indirectly controlled by the non-citizen company who had originally expressed interest in the vessels, had submitted the bid on the holders' behalf and who would have been entitled to charter the vessels under the terms of the purchase agreement. Letter agreements between the option holders and the non-citizen clearly established that the non-citizen influenced the holders to negotiate bareboat and time charter provisions that would be in the best interest of the non-citizen charterer, not the option holders and paid the option holders to work on the non-citizens' behalf during a critical time period. To permit the option holders to "cure" their citizenship problem would unfairly compromise the bid procedure which specified U.S. citizenship as a critical element from the outset. **Argent Marine I-III, Inc. – Sale of LNG Vessels, 25 SRR 789 [MA, 1990].**

---

10. The FMC contends that this reading of Article 6(e) would ignore the language that reinstates the pool "only when adequate service is again restored." The Commission claims that this phrase means that the pool may not be suspended in the first place if service is "adequate." Since the national flag carriers as a group exceeded the 80 minimum sailings, the FMC believes that suspension was not warranted. This interpretation, however, would give a strained meaning to the words "only" and "again" in the text. The "only" indicates that "adequate service" – whatever that might mean – is the exclusive test for the resumption of the pool. But if "adequate service" meant anything other than one party or combination with 33% pool share not meeting their minimum sailings, it would render the rest of Article 6(e) meaningless. Moreover, the word "again" indicates that adequate service is referring back to minimum sailings, which returns us to the question of who must perform such minimum sailings.

Robert J. Patton, Jr., Acting Chief Counsel:

The Maritime Administration ("MarAd") has reviewed your filings since Nov. 12, 1989, in response to an investigation of the citizenship of Argent Marine I, Inc.; Argent Marine II, Inc.; and Argent Marine III, Inc. (collectively "Argents I-III"); and Argent Marine Service, Inc. ("AMS").[1] The investigation was initiated on Oct. 31, 1989, pursuant to Section 214 of the Merchant Marine Act, 1936, as amended, 46 USC App §1124 ("Act"). It is related to three purchase options held by Argents I-III for the purchase of the ARZEW, SOUTHERN and GAMMA ("Vessels"), respectively. Argents I-III had back-to-back charter options with subsidiaries of Shell International Marine Ltd.[2] Detailed findings of fact pertinent to this decision are enclosed and are incorporated as an integral part of this decision *[see Appendix, page 801 et seq.- Ed.]*. It is found that Argents I-III and AMS were not citizens of the United States pursuant to Section 2 of the Shipping Act, 1916, as amended (46 USC App §802) ("1916 Act"), as of Oct. 19, 1988, and failed to maintain U.S. citizenship through Dec. 15, 1988.

I. Necessity of Citizenship for Purchase Option Holders

Argents I-III's counsel ("Counsel") argues that Argents I-III, as option holders, do not have to be U.S. citizens as defined in Section 2 of the 1916 Act, due to any law, any bidding requirement or by any mandatory contractual provision. Instead, it is contended that Argents I-III had to be U.S. citizens solely as a matter of discretionary contractual provisions.

A. Requirement by Law

The applicable statutory law is found in several sections of the Act. Since the Vessels were built with the aid of construction-differential subsidy ("CDS") pursuant to Title V of the Act, MarAd determined that the original contractors were each a "citizen of the United States." Section 905(c) of the Act (46 USC App §1244(c)) defines the phrase "citizen of the United States" as having the same meaning for CDS purposes as under Section 2 of the 1916 Act. Section 504 of the Act (46 USC App §1154) provides that the Secretary may impose appropriate provisions in the CDS contract to protect the interests of the United States. Article 14 of each pertinent CDS contract (Contract Nos. MA/MSB-170, 173 and 176) states that each succeeding purchaser of the CDS-built vessel must be a citizen of the United States during the economic life of the vessel. Section 503 of the Act (46 USC App §1153) requires the CDS-built Vessels to be documented under the laws of the United States for 25 years.

The Vessels were also originally financed with the aid of Title XI assistance under the Act. Section 1103(a) (46 USC App §1273(a)) provides that only a citizen of the United States may obtain Title XI assistance. When the Title XI obligors on these Vessels defaulted, MarAd paid off bondholders and eventually took possession. Under Section 1105(c) of the Act (46 USC App §1275(c)) MarAd may, among other things, "maintain operate, charter or sell" defaulted Title XI Vessels. MarAd offers Title XI repossessed CDS-built vessels only to citizens of the United States.

Section 9 of the 1916 Act (46 USC App §808) provides in pertinent part that "[a]ny vessel purchased . . . from the Secretary of Transportation, by persons who are citizens of the United States may be . . . registered and enrolled and licensed, as a vessel of the United States and entitled to the benefits and privileges appertaining thereto."

These statutory provisions expressly address treatment of owners of CDS-built vessels and owners of vessels having Title XI assistance. The applicability of Section 2 citizenship requirements to purchase option holders of CDS-built, Title XI defaulted vessels is apparently a novel issue. MarAd is not aware of any precedent and Counsel has cited none. Because MarAd finds that such citizenship was required in the bidding process for these Vessels, MarAd does not have to reach the issue of whether, as a matter of law, the holder of an option identical to that in this matter, has to be a U.S. citizen within the meaning of Section 2 of the 1916 Act.

B. Requirement by Bidding

On or about Sept. 15, 1987, MarAd issued an advertisement for purchase of the Vessels. Bids had to be submitted by Oct. 12, 1987. The advertisement stated, "Bidders must qualify as U.S. citizens under 46 USC §1244." The relevant requirements of 46 USC §1244 are the same as those in Section 2 of the 1916 Act. That was the controlling published advertisement for the Vessels.

On Oct. 16, 1987, MarAd wrote to interested parties stating, in relevant part:

> We are prepared to accept one of the offers submitted [in response to MarAd's solicitation]. However, before making a final decision, we are permitting all parties who have indicated an interest in the Vessels to make a best and final offer by Oct. 30, 1987. These offers must indicate,

1. Argents I-III are wholly owned subsidiaries of AMS. Argent Group, Ltd. is a Subchapter S corporation owned by the same stockholders as own AMS. Subchapter S corporations cannot have subsidiaries. The same shareholders also own the separate corporations of Argent Chartering I, Inc.; Argent Chartering II, Inc.; and Argent Chartering III, Inc., proposed bareboat charterers. Since all these Argent companies have identical shareholders, they are treated as related companies.

2. Royal Dutch/Shell group of companies and affiliates include, Shell International Marine Ltd., Shell Bermuda (Overseas) Ltd., Shell International Petroleum Co. Ltd., Shell Gas Nigeria B.V., Shell SEATEX, London, Shell International's Petroleum Maatschappi B.V. and Shell Overseas Trading Ltd. All these companies are included in the term "Shell" as used herein.

at a minimum, the sale price or option, the terms of purchase or option, the anticipated closing date for the transaction and the name and citizenship of the purchaser.

This advice did not purport to narrow the September solicitation.

Counsel has argued, in effect, that by the October 16 letter purchasers had to be U.S. citizens, while option holders did not. There is no evidence to support any such contemporaneous understanding of the MarAd bid requirements. MarAd considered options to be subsumed within purchases, and had considered options within a prior solicitation that made no specific reference to "options." (*See* Findings of Fact III.2 -- The Methane Cos.). Thus, reference to "citizenship of the purchaser" encompassed citizenship of the option holder. Further, the Oct. 16, 1987 MarAd communication is a subset of the earlier advertisement. The offer that MarAd stated it was prepared to accept in the Oct. 16, 1987 communication was that of Shell on behalf of a U.S. citizen, which offer was submitted pursuant to the September solicitation. Finally, there is no basis for the premise that MarAd was allowing two separate types of bidding requirements -- one for purchasers with a citizenship requirement, and another for option holders with no such requirement. The requirement that the option holders be citizens is supported by sound logic. Since option holders were intended to be eligible to exercise the options and become the purchasers, they therefore had to be Section 2 citizens as option holders. Further, if the option holder did not have to be a citizen, it is likely that Shell would have held the options in its own name.

The final relevant MarAd communication during the bidding process was a Jan. 14, 1988 letter to all interested parties in which MarAd advised that it had reached agreement with one party (namely Shell on behalf of a U.S. citizen) who had "met all the necessary requirements." Unless other respondents fully met the requirements of the October 16 letter by Jan. 22, 1988, MarAd stated, the agency could likely accept an offer shortly thereafter. Subsequently, MarAd did accept Shell's offer on behalf of a U.S. citizen. Again, the import of the bidding process is that Shell's to-be-named U.S. citizen as option holder would be a Section 2 citizen ("met all necessary requirements"). Only by that means could MarAd assure itself that the option holder could take title to the Vessels.

From the foregoing, MarAd concludes that one of the bidding requirements was that the bidder, as purchaser or option holder, had to be a U.S. citizen. Shell met that requirement by bidding on behalf of U.S. citizen option holder(s) to-be-named. Shell named Argents I-III as those citizen(s).

C. *Requirement by Contract*

Following the bidding process, MarAd on Oct. 19, 1988, entered into three purchase option agreements with Argents I-III. Under those agreements, MarAd gave Argents I-III exclusive options to purchase the Vessels, at specified prices, until Aug. 14, 1991, in exchange for option fees.

Prior to signing those agreements, Argents I-III submitted to MarAd sworn representations that they were U.S. citizens. Under these purchase option agreements, Argents I-III had to be Section 2 citizens of the United States on Oct. 19, 1988, and had to maintain that citizenship continuously. MarAd and Argents I-III also agreed that it would be a material breach of those agreements for Argents I-III to fail to maintain that U.S. citizenship.

These contractual provisions are the culmination of the bidding process. Whether required as a matter of law or solely as a matter of the bidding process, Argents I-III had to be Section 2 citizens on and after Oct. 19, 1988. It is necessary therefore to consider the statutory requirements for such citizenship and whether Argents I-III met those requirements.

II. Statutory Requirements for Citizenship.

To be citizens of the United States under Section 2 of the 1916 Act, Argents I-III had to satisfy the shareholder, director, officer, and incorporation requirements.[3] All stockholders, directors, and officers of Argents I-III are and have been U.S. citizens as has been true for all Argent companies. Each of the companies was incorporated in the state of Delaware.

In addition, Argents I-III, and AMS as their parent, must meet the requirement in Section 2(a) and (b) of the 1916 Act that the controlling interest of the subject corporation be owned by citizens of the United States as follows:

> (a) That within the meaning of this Act, no corporation . . . shall be deemed a citizen of the United states unless the controlling interest therein is owned by citizens of the United States. . . .
>
> (b) The controlling interest in a corporation shall not be deemed to be owned by citizens of the United States (a) if the title to a majority of the stock thereof is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States;

3. Section 2(a) of the 1916 Act provides in relevant part:
"That within the meaning of this Act no corporation . . . shall be deemed a citizen of the United States . . . unless its president or other chief executive officer and chairman of its board of directors are citizens of the United States and unless no more of its directors than a minority of the number necessary to constitute a quorum are non-citizens and the corporation itself is organized under the laws of . . . a State . . . thereof. . . ."

> or (b) if the majority of the voting power in such corporation is not vested in citizens of the United States; or (c) if through any contract or understanding it is so arranged that the majority of the voting power may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (d) if by any other means whatsoever control of the corporation is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.

The requirements of Section 2 are not any different for ship option holders than ship purchasers.[4] Thus, it is critical to understand the term "control of the corporation" in deciding the legal standards to be applied in this matter.

III. Control of the Corporation

A. Statutory Language

In interpreting a statute, one must begin with the statutory language.[5] The express wording of the pertinent Section 2 language leads to three conclusions: (1) Congress intended to prohibit control of citizens by non-citizens not only by means of voting shares but also by means of non-voting power since it used the words: "if by any means whatsoever"; (2) Congress intended an expansive reading of the section to avoid ingenious efforts to circumvent the citizenship requirement since it used the terms: "directly or indirectly" and "if by any means whatsoever"; and (3) Congress intended to preclude a U.S. corporation from either conferring control on or permitting control to be exercised by non-citizens since it referred to control "conferred upon or permitted to be exercised."[6] In addition, Congress gave the agency broad discretion, along with the responsibility for determining whether, under specific factual circumstances, "control" has been conferred or exercised.

B. Legislative History

The statutory language is unusually clear in its prohibition of direct or indirect control, exercised by any means whatsoever, whether that control is conferred upon or permitted to be exercised by a non-citizen. Review of the legislative history of Section 2 confirms those conclusions.

Section 2 was enacted on Sept. 7, 1916. The 1916 Act, when originally introduced as H.R. 15455, required "controlling interest" of a corporation, partnership or association to be owned by U.S. citizens; in case of appropriately incorporated corporations, the president and managing directors had to be U.S. citizens. No further elaboration of "controlling interest" appears in the 1916 legislative history.

On July 15, 1918, Congress added the present Section 2(b) setting forth the parameters of the term "controlling interest." This amendment was originally proposed by the Administration with wording identical to that of the current Section 2(b).

Edward N. Hurley, Chairman, United States Shipping Board, stated in a letter dated June 11, 1918, to the Honorable J.W. Alexander, Chairman, Committee on Merchant Marine and Fisheries, that the purpose of the Administration-proposed legislation was to preserve "the American merchant marine from foreign control." (56 Cong. Rec. 8025, June 19, 1918).

The bill was debated in the House on June 19, 1918. Congressman Alexander referred to the bill as undertaking "to confine ownership in American citizens so as to prevent any possible ownership by foreigners through a trust or in any other form," and echoed Edward Hurley's explanation:

> Section 2 of the Shipping Act is amended by adding at the end of the first paragraph a provision the purpose of which is to further safeguard our Government and insure the control of ships being built in American shipyards, to prevent foreign interests under any sort of device or contract or trust agreement to get control of our shipping. . . . (56 Cong. Rec., 8026, June 19, 1918).

Mr. Green of Massachusetts further elaborated on the Congressional concern over foreign control:

> During the hearings testimony was presented showing that attempts had been made to interfere with the work of upbuilding an American merchant marine and it was forcibly intimated to the committee that there was danger that some of the representatives of foreign governments that are engaged against us in war would not hesitate to make some attempt to control our shipbuilding interests, and also, by purchase or other acts, obtain stock in the various vessels that the Shipping Board and private enterprise might construct, such alien enemies might *control the management* of

4. Counsel states that the correct standard for deciding citizenship of an option holder is whether the option holder may reasonably be expected to meet, at the time of transfer of title, the citizenship requirements applicable to an owner, including the necessary incidents of ownership (Opinion Letter, p. 9). This standard, which as a practical matter eliminates any citizenship requirements for an option holder, is unsupported and is rejected. Section 2 does *not* establish different citizenship standards, depending on the relationship to vessels.

5. Sutherland on Statutory Construction SANDS revision, 4th Ed., Vol. 2A, Sec. 45.05, p. 15.

6. While the statute contains no specific definition of "control," its use indicates Congress relied on the ordinary dictionary definition of the verb "control," namely, to "exercise restraining or directing influence over." *Webster's New International Dictionary*, 2d ed. 1949 at 580; *Black's Law Dictionary DeLuxe*, 4th ed. 1951 at 399.

> the vessels *or* in the event of corporations being formed they might become *controlling factors* in such corporations. The committee has given these features careful consideration and has endeavored in this bill to amply protect *every interest* against the machinations of all our enemies, foreign and domestic. (56 Cong. Rec. 8027, June 19, 1918. Emphasis added).

Congressman Saunders of Virginia left no doubt that the intent of the amendment was to cover all arrangements:

> The amendment [to Section 2] intends to make it impossible for *any arrangement* to be effected by which such a corporation, partnership or association shall be a citizen of the United States when the *real control* of same is in the hands of aliens. We have sought to make the language *so sweeping and comprehensive* that no lawyer, however ingenious, would be able to work out any device under this section to keep the letter, while breaking the spirit of the law. (56 Cong. Rec. 8029, June 19, 1918. Emphasis added).

The legislative history of Section 2 both confirms and amplifies the conclusions drawn from the plain meaning of the language of the statute that all manner of imposition of foreign control, by voting power or otherwise, was intended to be prohibited; that both passive and actual control ("any arrangement") were intended to be prohibited; that prohibited "control" extended beyond physical operation of the Vessel to also include "control the management," "controlling factors," and "real control"; and that the agency was given broad discretion to implement the statute.

C. Judicial Construction

The leading case with respect to the meaning of the term "control" in Section 2(b) of the 1916 Act is *Meacham Corp. v. United States*, 207 F2d 535 (4th Cir 1953), *cert. granted*, 747 US 732 (1954), *appeal dismissed*, 348 US 801 (1954) ("*Meacham*").

Meacham held that where title to a vessel was taken in the name of an "American" corporation while, based on several factors, the beneficial interest and actual control were passed to non-citizens, the purported American corporation was not one in which the controlling interest was owned by U.S. citizens; accordingly such transfer to non-citizens without approval of the Maritime Commission violated the 1916 Act.[7] In finding that impermissible control was lodged in non-citizens, the Fourth Circuit made a number of rulings relevant to the present matter:

> Substance rather than form of the transaction is determinative. 207 F2d at 543.
>
> In an enterprise where non-citizens put up $6,000,000 and Americans put up $6, the non-citizen dominated the enterprise. 207 F2d. at 543.
>
> When titular control was given to the Americans with the expectation they would exercise their power in the interest of non-citizens, and they acted accordingly, non-citizens were in control. 207 F2d at 543.
>
> It is significant that non-citizens rather than Americans took the lead when important steps were to be taken in the prosecution of the business. 207 F2d at 544.
>
> The Americans were men of substance and long experience in the shipping business, but they, "however correct in the performance of their duties, necessarily wielded that stock power under a trust obligation to the aliens." 207 F2d at 545, quoting 107 F Supp 997, 1005.

Counsel stresses to MarAd the relevance of another case, *Alaska Excursion Cruises, Inc. v. United States*, 608 F Supp 1084 (D DC 1985) *[23 SRR 439]* ("*Alaska Excursion*"). In determining that a non-citizen bareboat charterer did not exercise sufficient incidents of ownership of a vessel engaged in domestic trade to be deemed the owner (non-citizens cannot own or have more than a 25% interest in vessels engaging in domestic trade), the Court considered the following factors:

> The owner had the right to reversion of vessel after no more than 17 years. 608 F Supp at 1089.
>
> The owner retained all tax benefits of ownership. 608 F Supp at 1089.
>
> The owner's charterer had no right to terminate or assign charter without that owner's consent. 608 F Supp at 1089.
>
> The owner's charter was an "arm's-length transaction" in which the bank obtained what the court assumed to be a reasonable profit. 608 F Supp at 1089.

---

7. Counsel argues that *Meacham* is not controlling because the citizenship deficiencies found therein are not present herein, *viz.*, *Meacham* found that parties did not obtain agency approval prior to transfer of control to a non-citizen whereas here MarAd was among the parties seeking to assure the citizenship of Argents I-III, *Meacham* found that 90% of profits went to non-citizens whereas here all profits go to U.S citizens; *Meacham* found the corporation that purchased the ship was a sham whereas here Argents I-III will make a significant equity investment. *Meacham* is not identical in facts to this matter but the legal issue presented of "controlling interest" is the same and, as found hereinafter, the facts here have many similarities to the *Meacham* case, *e.g.*, the non-citizen had the leading role in the project, Americans were at no risk, the American corporations were minimally capitalized, the non-citizen controlled the scope of functioning of the purported citizens.

The court concluded that the Coast Guard's determination that the non-citizen bareboat charterer did not hold title to the vessel under the facts was not arbitrary and capricious. *Alaska Excursion* is not considered dispositive law in the instant case because: (1) the principal issue in *Alaska Excursion* was whether a bareboat charterer had such incidents of ownership so as to be considered the owner, not whether the legal owner was a non-citizen; (2) unlike the legal title holder in *Alaska Excursion* who had bareboat chartered the vessel to a non-citizen, Argents I-III had not executed any bareboat charters in 1988 and none exist today; and (3) the facts of the two cases are dissimilar in significant respects.

In conclusion, the term control is given an expansive interpretation in Section 2 of the 1916 Act. Both the conferring of control upon a non-citizen and exercise of control by a non-citizen are separately prohibited. Establishing control requires a factual determination based on a review of the substance and not merely the form of a transaction. Control can be either restraining or directing by any means whatsoever over the voting power of the corporation or the direction of the management and policies of the corporation. The relative dollar investment, the role of citizens and non-citizens in pivotal business decisions, the independence of even seasoned American shipping business persons, the prior shipping business experience of the American participants, and the existence of arm's-length relationships or conflicting relationships are all factors in determining whether control of a U.S. corporation has been conferred on or exercised by a non-U.S. citizen.

IV. Analysis

MarAd discusses the following: the initiation of this proceeding; Argent Group's role as "contract development support" under a July 1, 1988 letter agreement; Shell's restraint and direction of Argents I-III by virtue of Sept. 15, 1988 letter agreements and other acts; and the contemplated charter agreements with Shell.

A. *MarAd's Initiation of Investigation*

Each of the three purchase option agreements, dated Oct. 19, 1988, recites that each of the Argents I-III was a citizen of the United States and would maintain that citizenship. MarAd entered into those agreements based on citizenship affidavits dated Oct. 18, 1988, filed by Argents I-III and AMS. Unless MarAd has information to the contrary, the established practice is to rely on the assertions made in a citizenship affidavit; MarAd does not "go behind" the affidavit, since the affidavit is sworn under penalty of perjury. However, MarAd cannot waive the statutory standard for U.S. citizenship.

About a year after the purchase option agreements were executed, top decisionmakers in MarAd became aware of the Sept. 15, 1988 agreements between Argent Group and Shell.[8] MarAd then initiated this citizenship investigation. From the information obtained, MarAd learned further critical new facts about Argents I-III's relationship to Shell. In light of these previously unknown facts, coupled with information already known, the relationship between Argents I-III and Shell took on a new shape and meaning.

B. *Argent Group's Role as Contract Development Support -- July 1, 1988 Agreement.*

As disclosed on Nov. 12, 1989, in this investigation, Shell retained Argent Group on July 1, 1988 "for contract development support and financial advisory services to structure leveraged leases for the three Vessels." The agreement expired by its terms on Dec. 15, 1988. Argent Group was in the business of rendering financial advisory services (such as structuring leveraged leases). However, Argent Group not only provided that service but also provided services for what is vaguely described as "contract development support." MarAd did not know that Argent Group was providing advice on contracts or negotiating on behalf of Shell. Argent Group was also selected to cause the operative U.S. shipowning entity to be organized. The disclosure of the July 1, 1988 letter agreement raises the following problems pertinent to the question of Argents I-III's citizenship.

First, the July 1 letter agreement establishes that Argent Group assisted Shell in drafting and negotiating the necessary purchase option agreements. Under the letter agreement, Argent's role from July 1, 1988, to Dec. 15, 1988, was:

(1) To provide *advice* related to terms and conditions to be incorporated into each of the Documents;

(2) To provide *assistance* in drafting specific provisions of the Documents;

(3) To review and comment on documents *drafted by Shell;*

---

8. Counsel implies that MarAd is estopped from reconsidering Argents I-III's citizenship based on the Sept. 15, 1988 agreements and other documents since they were submitted to some individuals in the agency. As a general rule, estoppel against the Government is disfavored. *Federal Crop Ins. Corp. v. Merrill*, 332 US 380, 68 S Ct 1 (1947). It is not applied where a sovereign function is involved (here, a citizenship determination); it also does not apply where the party asserting estoppel failed to disclose on a timely basis critical facts and the party to be estopped did not know critical facts. Here Argents I-III did not disclose to MarAd the July 1, 1988 letter agreement which indicated Argent Group negotiated on behalf of Shell, or the extent to which Argents I-III were not at any financial risk (putting aside the issue of MarAd knowledge of the Sept. 15, 1988 letter agreements). *Portmann v. United States*, 674 F2d 1155 (7th Cir 1982). *Meacham* at 207 F2d at 545-46.

(4) To describe various alternative financing structures available in the U.S. which will achieve fiscal benefits and to provide *advice* relating to allowing flexibility in the Documents for such structures;

(5) *To assist in contract negotiations with MarAd*; and

(6) To *assist* in *setting up* or otherwise securing the services of a "Special Purpose" U.S. Company or Companies to *hold* the options. (Emphasis added.)

The "Documents" referred to were the purchase option agreements with MarAd, the charter option agreements between the acquisition companies and Shell, any leases between the acquisition companies and a U.S.-registered company, any charter between the U.S. registered company and Shell, and collateral understandings with MarAd or Shell.

The words employed in this letter agreement make it unmistakable that Argent Group's role was to provide "advice," "assistance," and "review and comment," all *to Shell*, with Shell retaining the leading role in contract drafting and negotiation. The agreement draws no distinction among the various documents. The agreement states that the documents were to be drafted by Shell, with Argent Group's "assistance." Under the explicit language of the July 1 agreement, Argent Group agreed to Shell's principal role in formulation and negotiation of the purchase option agreements and related Documents, and also agreed to keep confidential any information Shell disclosed to Argent Group. Hence, Argent Group agreed to work actively with and for Shell, to be on Shell's side of negotiations, and not at arm's length to Shell.[9]

Second, the July 1 agreement provides that Argent Group shall be reimbursed by Shell for the cost of financial services and "assistance," including travel, overtime, telephone, and other expenses. Argent Group received a total of $117,465 under that letter agreement. Of that sum, 40% of the total was billed for work and costs for the month of October 1988.

Third, by the letter agreement, Shell paid Argent Group to assist in "setting up" a qualified U.S citizen to "hold" the options. Although the terms "setting up" and "hold" may be inartful, they certainly imply a non-active, restrained type of relationship vis-a-vis Shell.

C. Shell Restraint On and Direction of Argents I-III -- September 15, 1988 Agreements and Other Acts

On Sept. 15, 1988, Argent Group, Ltd. entered into an agreement with Shell under which Shell paid Argent Group, among other things, to "cause three special purpose subsidiaries to be organized and to act as the acquisition companies under the various operative documents." Argent Group agreed to perform the following "basic" services for Shell for a fee:

organize a separate Acquisition Company with respect to each of the Vessels;

act as the sole record and beneficial owner of all of the outstanding capital stock of each Acquisition Company;

handle all internal corporate matters with respect to each Acquisition Company (*e.g.*, appointing officers and directors, holding meetings of the sole shareholder and directors and providing all required administrative staff for routine matters);

keep the books, records (including, without limitation, the records relating to the loans under the Acquisition Company Agreement) and bank accounts on behalf of each Acquisition Company;

cause each Acquisition Company to file United States federal, state and local tax returns;

retain all necessary accounting and legal support after consultation with Shell;

cause each Acquisition Company to execute the Option Agreement and the Acquisition Company Agreement;

cause each Acquisition Company to make all required payments to MarAd under the Option Agreement, to the extent and only to the extent that funds therefore have been advanced by the Charterer;

cause each Acquisition Company to repay to the Charterer the amount of any loans made under the Acquisition Company Agreement, to the extent and only to the extent that sufficient funds have been provided from MarAd and/or sale or other transfer of the Vessels;

---

9. MarAd need not go so far as to find that by law a "fiduciary" relationship was created, but the facts would support the conclusion that the duties Argent Group owed to Shell under the July 1, 1988 agreement established a "fiduciary" relationship in which Shell reposed trust and confidence in Argent Group. *Cf. e.g., Dirks v. SEC*, 463 US 646, 655 n. 14 (1983) ("Under certain circumstances, such as where corporate information is revealed legitimately to an underwriter, accountant, lawyer, or consultant working for the corporation, these outsiders may become fiduciaries of the shareholders. The basis for recognizing this fiduciary duty is not simply that such persons acquired nonpublic corporate information, but rather that they have entered into a special confidential relationship in the conduct of the business of the enterprise and are given access to information solely for corporate purposes.")

cause each Acquisition Company promptly to copy to the Charterer any notices and written communications (including without limitation invoices) it receives from MarAd under the Option Agreement;

notify MarAd whenever Shell wishes to inspect the Vessels;

if the Charterer gives notice of its intent to proceed with the Charter, promptly cause the Acquisition Company to give the notice of election to exercise and acquire the Vessel under the Option Agreement and the related Contract of Sale;

if the Vessel is acquired pursuant to the Option Agreement, cause the Acquisition Company to assign the Acquisition Company's rights under the Acquisition Company Agreement, the Option Agreement and, if applicable, the Bareboat Charter to a U.S. citizen that is acceptable to Shell or the joint venture participants, as appropriate; and

if the Charterer gives notice of its intent not to proceed with the Charter, promptly give the notice of election to terminate the Option Agreement.

The agreement expressly stated that the basic services would be "ministerial and routine in nature." The agreement also provided for certain additional services for implementing the transactions contemplated by the documents, which the Argent companies have stated were never rendered. Compensation for the basic services was to be "a base annual fee of $7,500 per vessel, which covers the Basic Services prior to the acquisition of the Vessel; after the acquisition of the Vessel, the parties will negotiate in good faith with respect to the fee for similar services."

In addition, the September 15th agreement provides that Shell is to reimburse Argent Group for out-of-pocket expenses, whether incurred for basic services or additional services. By a separate letter on the same September 15 date, Argent Group agreed not to incur over $1,000 in out-of-pocket expenses without Shell's prior consent. These agreements were operative during the time that Argent Group had an "assistance" relationship with Shell under the July 1, 1988, letter agreement.

The Argent companies state that the parties considered the September 15 letters to be "preliminary" agreements, not operative "for some time," "ignored" and formally terminated as of Nov. 3, 1989. They also state that Argents I-III received $7,500 each for execution of the purchase option agreements; and that Argents I-III incurred in addition $1,625 as out of pocket expenses, of which $1,300 was for income tax return preparation fees, as eligible for reimbursement, but did not bill them to Shell. Argents I-III maintain that they did not request Shell's approval for out-of-pocket expenses, nor did they have to do so for any expenses that were not to be reimbursed; and that they did not consult with Shell before hiring legal and accounting support. It appears from the documents that Argent's I-III did not incur over $1,000 in out-of-pocket expenses, other than the tax return preparation fees, until the month of June 1989.[10]

Argents I-III do not dispute that the September 15 letter agreements were in effect on Oct. 19, 1988, or that they continued in effect for some time period afterwards, and were followed by Argent Group and Shell while they were in effect. This conclusion is supported by evidence, such as the invoices of $7,500 fee per Vessel, dated Oct. 19, 1988. The invoices state that the fees covered "Basic Services prior to the acquisition of the Vessel." By billing Shell for the services, Argent Group perforce represented to Shell that it had satisfactorily fulfilled the agreement as to Basic Services; by paying these invoices, Shell perforce agreed that Argent Group met the requirements of those agreements.[11]

The September 15 letter agreements and other facts uncovered in this investigation pose critical problems in assessing Argents I-III's citizenship. These are discussed under the headings (1) conflicting Argent roles, (2) actual restraint/direction by Shell, and (3) leading role of Shell.

1. Conflicting Argent Roles

MarAd construes Argent Group's and its affiliates' obligations to Shell and to themselves under the July 1 and September 15 agreements as irreconcilably conflicting for citizenship purposes.[12] Two examples demonstrate the irreconcilability of the conflict in the citizenship control context.

10. Counsel also argues that because the September 15 agreement stated that the Argent companies would act in accordance with U.S. citizenship laws and because the companies informed Shell that it would not act at the behest of Shell, that no control was conferred on Shell. However, it is the substance of the documents and the parties' actions that are determinative, not the form of isolated, self-serving statements. *See Meacham*, 207 F2d at 543.

11. It is also noted that in February 1989, Argents I-III stated to Shell that $1,300 of fees estimated for tax return preparation were reimbursable expenses under the September 15 letter agreements. Shell agreed. This is evidence that as of February 1989, Shell and Argents I-III considered the September 15 letter agreements to be operative.

12. MarAd emphasizes that the conclusion of impermissible conflict in roles for citizenship purposes is made solely for purposes of determining citizenship. No other statute or regulation is before MarAd. Each statute must be reviewed in its own context. Further, MarAd is not suggesting that any untoward business practice took place.

As option holders, Argents I-III's most significant role was negotiating the purchase option agreements.[13] In negotiating those documents, Argent Group (paid by Shell) was to advise Shell of the contractual provisions in Shell's interest and was to advocate for those provisions. (It strains credibility to believe that Shell was paying Argent Group to advise and advocate contractual provisions against Shell's interest.) Shell's interest was to obtain the best terms possible in the charter option agreements and time charter. Argents I-III's interest was to negotiate the best terms they could with Shell in the same agreements and in the purchase option agreements with MarAd. Since the same individuals comprised "Argent Group" and "Argents I-III," they had to represent simultaneously Shell's interest and Argents I-III's interests. That was not possible; Shell's interest and Argents I-III's interest were conflicting, not identical. While there were some items over which Argents I-III prevailed in negotiation with Shell, the dominant objectives of Shell were realized in the key charter option agreements: (1) Argents I-III could do nothing with the purchase option agreements without Shell's approval; and (2) expenses of Argents I-III were curtailed, first by the Sept. 15, 1988 letter agreement and then by incorporation of the agreement in the charter option agreements.

The second example is similar. Under Argent Group's July 1, 1988 letter agreement, it was reimbursed for advising Shell on appropriate contractual provisions and for negotiating their incorporation in final documentation. Argents I-III had no similar agreement with Shell; any expenses they incurred in negotiations were not reimbursed by Shell. When the same individuals who were Argent Group/Argents I-III incurred expenses in negotiating final documentations, a decision had to be made whether the services were reimbursable by Shell or not. All such expenses were booked for Argent Group and reimbursed by Shell. The Argent companies' partial explanation is that Argents I-III incurred no expenses to outside consultants or advisors and relied on "internal financial and legal support provided by Argent Group." (Jan. 26, 1990 Response, II.7.) (There is no explanation of any salary allocation for Stephen P. Gottlieb.) The multiple roles of Argent Group and its affiliates under the July and September letter agreements established an untenable conflict on booking expenses.

The Argent companies appear to make several arguments rebutting the existence of such conflict: (1) that the July 1, 1988, letter agreement ended substantively on Oct. 19, 1988, and the September 15 letter agreements substantively began Oct. 19, 1988, presumably obviating any conflict; (2) that Argent Group and its affiliates' roles as "financial advisor, owner and bareboat charter" did not prevent Argents from maintaining arm's-length negotiations with Shell; (3) that MarAd took no exception to these multiple roles; and (4) that with these roles Argent Group and its affiliates negotiated documents satisfactory to MarAd.

Argents I-III's explanation of the letter agreements defy the terms of those agreements. The July 1, 1988 letter agreement was in effect by its terms until Dec. 15, 1988, and some expenses were incurred after Oct. 19 1988, albeit minor. The Sept. 15, 1988, letter agreements do not state they are not effective until Oct. 19, 1988. Instead, one service Argent Group was to provide was to cause the establishment of the acquisition companies, which occurred Oct. 12, 1988. Another service Argent was to provide was to cause the acquisition companies to execute the purchase option agreements, which occurred on Oct. 19, 1988. In short, this argument is unpersuasive.

Argents I-III neglect to mention among the multiple roles of Argent Group and its affiliates, the role of Argent Group as contract advisor under the July 1, 1988 letter agreement. MarAd was unaware of that role.

Finally, the documents satisfactory to MarAd were the purchase option agreements, which it signed. MarAd participated in the negotiation of those agreements and to some extent the charter option agreements, and insisted on a number of changes.[14] In addition, the documents not agreed to by MarAd in any final sense were the summary terms of bareboat and time charters. Those charters, although not yet finally negotiated, have undergone considerable changes at the insistance of MarAd in the direction of limiting the role of Shell.

---

13. The option holders had only the following responsibilities before, during and immediately after execution of the purchase option agreements:

1. Negotiate the purchase option agreements.
2. Be U.S. citizens
3. Execute the Option Agreements
4. Pay the option fee.
5. Conduct vessel inspections.
6. Be prepared to be ship purchasers.

MarAd had agreed that Shell could loan Argents I-III the option fees they were to pay to MarAd, that Shell could be part of the team inspecting the Vessels, and that Shell could restrict exercise of the options. At the same time, MarAd presumed that Argents I-III had been established at their own risk, certainly without any funding from Shell, and that Argents I-III had been negotiating the purchase option agreements and negotiated other agreements at arm's length to Shell. MarAd believed that the main task of those companies in and around Oct. 19, 1988, was to negotiate agreements and not to become the owner/operator of the Vessels.

14. Counsel emphasizes that Argents I-III negotiated for themselves the right to exercise the purchase options independently if Shell declines to proceed with its charter options. This argument is to convince MarAd that Argents I-III did not completely restrain themselves from control of their own options with MarAd. Even this limited right negotiated by Argents I-III requires an affirmative act of declination by Shell. It is argued that, for commercial reasons, Shell would not fail to give notice that it did not wish to proceed. However, it may also be argued that for other commercial reasons (e.g., avoidance of competition) Shell might incur the necessary expense and not give such a notice.

2. Actual Restraint/Direction

The July 1 and Sept. 15, 1988 letter agreements and Oct. 19, 1988 charter option agreements between Argents I-III and Shell reflect substantial restraint and direction by Shell of Argents I-III for the time period Oct. 19 to Dec. 15, 1988, summarized as follows:

(i) Argent Group was retained as contract support consultant to Shell, a role carrying an irreconcilable conflict with the role of independent Argents I-III;

(ii) Argent companies were fully reimbursed for all expenses of the project and indemnified for future losses on the project by Shell;[15]

(iii) At Shell's expense and direction, Argents I-III were organized;

(iv) Shell retained control over the exercise of the options;

(v) Argents I-III were kept by Shell at a ministerial and routine functioning level with *de minimis* capitalization;

(vi) Shell's consent was necessary for any out-of-pocket expense above $1,000, and, even if Shell did not intend thereby to prohibit Argents I-III from incurring significant expenses that Shell would not reimburse, the restriction was effective long after Dec. 15, 1988, in holding down any significant expenditures by Argents I-III; and

(vii) Argents I-III substantially followed Shell's September 15 contract direction except for the requirement for retention of accounting and legal support without Shell's consultation. The record indicates no objection by Shell to such independent action, which occurred long after Dec. 15, 1988.

Counsel seems to contend that there was no impermissible control since in almost all instances, the interests of Shell and those of Argents I-III coincided, and because the actions Argents I-III took during negotiations reflected an arm's-length relationship to Shell. As already discussed, MarAd disagrees as to whether the roles of Argent Group and Argents I-III were conflicting through Dec. 15, 1988. Further, applying the court's analysis in *Meacham*, it can be discerned that here, as there, it was the objective of the non-citizen (Shell) to have the U.S. citizen nominees march in step with its interests as much as possible. Nonetheless, their interests did differ. MarAd discussed previously Argents I-III's contention that a finding of "control" is rebutted by the documents negotiated by Argents I-III in October 1988, *supra*, at 28-30.

3. Leading Role of Shell

Shell, rather than any Argent company, took the lead in implementing the project to acquire the Vessels after Argent Group and Argents I-III appeared, specifically:

(i) Shell drafted and sent to MarAd the documentation to obtain the Vessels, then met with MarAd to discuss perfecting the documents;

(ii) Shell led in the development of the final drafts of documentation, including the purchase option agreements with MarAd; Argent Group's role was to assist Shell in the drafting, and Argents I-III acknowledge that they relied on internal financial and legal support provided by Argent Group;

(iii) Shell negotiated directly with MarAd as to all final documentation. Argent Group negotiated with MarAd, on behalf of Shell. Argents I-III negotiated with MarAd and Shell with advice from Argent Group's counsel. Mr. Gottlieb was "Argent Group" and "Argents I-III" at the negotiations;

(iv) While Argent Group proposed to Shell setting up the U.S. citizen option holders, it failed to drop its conflicting role as contract advisor to Shell, for which it continued to receive from Shell a significant sum of money;

(v) Argents I-III were, by Shell's design and Argents I-III's agreement, limited to ministerial and routine functions; no expenses were booked by Argents I-III/AMS, and substantial expenses booked by Argent Group were reimbursed by Shell during actual negotiations; and

(vi) Shell paid all monies for the project under the July 1, 1988 and Sept. 15, 1988 letter agreements, including the funds for the option fees as loans to Argents I-III, the loans only being repayable from any proceeds from assignment of the options, sale or lease of the Vessels or from certain penalty payments.

---

15. Argents I-III imply that Shell did not control Argent Group because the money paid by Shell amounted only to a small portion of Argent Group's annual revenues (2.6% of total revenue for calendar year 1988). On a factual level, this contention ignores the large sums of money Shell incurred in the project so that Argent Group or an Argent company would not have to bear such expenses, (at least initially), principally the bid deposit and loan of the option fees. Furthermore, the contention ignores the significance of the dollar sums ($117,465) vis-a-vis Argents I-III and AMS who collectively were capitalized at $7,000.

The Argent companies respond, in effect, that they subsequently took a number of principal actions as leader of the project, that: (i) they applied for and obtained an interim credit facility; (ii) they became the lead negotiators for the time charters and bareboat charters with MarAd; (iii) they applied to MarAd for the approvals required under U.S. maritime laws; (iv) they set about establishing operating companies; (v) they defended the *Cabot* lawsuit;[16] and (vi) they selected MEBA/NMU as unions for the prospective manning of the Vessels. Even accepting, without argument, these contentions, these acts occurred long after expiration of the July 1, 1988 letter agreement. During the time period at issue -- the months before Oct. 19, 1988 through Dec. 15, 1988 -- the record establishes that Shell, rather than any Argent company, led the project. That fact is a significant factor in determining whether Shell had control, and whether Shell exercised control of Argents I-III for citizenship purposes. *See, e.g., Meacham*, 207 F2d at 544.

D. Later Time Charter and Bareboat Charter Negotiations

Argents I-III contend that their citizenship in October 1988 necessarily must be reviewed in light of the time charters and bareboat charters negotiated to date. On the other hand, Argent's I-III contend that at the time of the purchase option agreements, MarAd was not required to agree to the terms of the charters attached to those agreements.

Neither MarAd nor Argents I-III has treated the purchase option agreements as locking MarAd into the specific terms of the charters (as contained in the Summary of Principal Terms and Conditions appended to the option agreements). Since the terms were and continue to be subject to further negotiation with MarAd, the present terms cannot be viewed as having any bearing on the question of control on and about Oct. 19, 1988.

V. Possibility of Cure

Argents I-III's counsel asserts that since there is nothing in law that requires an option holder to be a U.S. citizen, MarAd presumably could enable Argents I-III to cure any supposed failure to be Section 2 citizens. MarAd has recounted above that the bid notice required the bidder to be a U.S. citizen, and that, accordingly, Argents I-III had to be U.S. citizens on Oct. 19, 1988. If Argents I-III were not citizens at that time, Shell's bid on behalf of a U.S. citizen could not be deemed a responsive bid. A "cure" would amount to a waiver of the bid requirement, which as discussed hereinafter, is beyond MarAd's discretionary authority.

Even assuming for purposes of argument that the citizenship requirements for Argents I-III as option holders were discretionary and not mandatory, which MarAd has not decided, MarAd's broad discretion must be exercised fairly. Once MarAd exercises its discretion as to disposal of Title XI vessels (46 USC App §1105(c)), *i.e.*, in this instance announced to the public that bidders had to be U.S. citizens, the agency could not declare that the bid condition was inapplicable, after awarding the bid to a non-citizen. The Supreme Court has held that "regulations validly prescribed by a Government administrator are binding upon him as well as the citizen, and that this principle holds even when the administrative action under review is discretionary in nature." *Service v. Dulles*, 354 US 363, 372, 77 S Ct 1152, 1157 (1957). Although the bid notice is not a regulation, the Courts have applied this principle to agency pronouncements that were not formal regulations. *See e.g., United States v. Heffner*, 420 F2d 809 (4th Cir 1969) (IRS instructions to special agents) and *Smith v. Resor*, 406 F2d 141 (2d Cir 1969) (an Army bulletin regarding wearing of a beard, long hair or a moustache by reservists).

In addition, in a decision involving the disposal by the Government of surplus rice, the U.S. Claims Court has espoused several crucial principles relating to competitive bidding. Recognizing that disposal of surplus property was not governed by the Federal Procurement Regulations, the Court nevertheless looked to them as reflecting fundamental policies likewise applicable when Government property is sold by competitive bid sale after advertising. Some of the policies relied upon by the Claims Court further the principle that agencies are bound to follow their own procedures. The Claims Court in *Toyo Menka Kaisha, Ltd. v. United States*, 597 F2d 1371, 1377 (Ct Cl 1979), held, thus:

> [R]ejection of irresponsive bids is necessary if the purposes of formal advertising are to be attained, that is, to give everyone an equal right to compete for Government business, to secure fair prices, and to prevent fraud. [Citation omitted.] The requirement that a bid be responsive is designed to avoid unfairness to other contractors who submitted sealed bids on the understanding that they must comply with all of the specifications and conditions in the invitation for bids, and who could have made a better proposal if they imposed conditions upon or variances from the contractual terms the Government had specified.

The Court also found that

> [r]esponsiveness is determined by reference to the bids when they are opened and not by reference to subsequent changes in a bid. [Citation omitted.] Allowing a bidder to modify a nonresponsive bid when, upon opening the bids, it appears that the variations will preclude an award, would permit the very kind of bid manipulation and negotiation that the rule is designed to prevent. (*Id.* at 1377.)

---

16. *Cabot LNG Corp. v. Skinner*, Civil Action No. 89-2711 (TFH), U.S. District Court for the District of Columbia.

Accordingly, MarAd concludes that where, as here, a critical element of a bid notice is not met at the time of award, the deficiency may not be cured subsequent to the bid closing date. To effect such a cure an agency would have to abandon adherence to its own procedures. Even more important, it would negate the policies behind open and competitive bidding.

VI. Future Citizenship of Argents I-III

The citizenship determinations herein are limited to the period Oct. 19, 1988 to Dec. 15, 1988. Much has happened since that time: (1) the July 1, 1988 letter agreement has expired, and with it the conflict between different roles of Argent Group and its affiliates; (2) the Sept. 15, 1988 letter agreements, including the incorporation of the agreements into the charter option agreements, were terminated as of Nov. 3, 1989;[17] (3) Argents I-III have repaid Shell for loan of option fees and are paying MarAd option fees from funds not controlled by Shell; (4) Argent Group and Argents I-III have apparently terminated all reimbursable agreements with Shell; (5) Argents I-III have obtained interim financing from a non-Shell source for future payment of purchase price and related necessary funding for the project; (6) Argents I-III have incurred substantial expenses in furthering the project of acquiring the Vessels; (7) Argent Chartering companies have selected the union for manning the Vessels and staffing of the operating companies is being pursued; and (8) Argents I-III appear to have taken the lead in negotiating charter terms with MarAd. In short, based on the documents produced in this proceeding the relationship of Argent Group and its affiliates with Shell appears to have changed since the end of 1988.

MarAd also wishes to note that Argents I-III fully cooperated in the Section 214 investigation. Nevertheless, substantial questions were raised as to whether, as a matter of law (Section 2 of the 1916 Act), Argents I-III were citizens and thereby entitled to hold the purchase option agreements for the Vessels.

Finally, the conclusions herein are reached only after very serious consideration. MarAd entered into the purchase option agreements in good faith, based on representations made by Argents I-III. In making the decision herein, MarAd does not find or suggest the need to review any other contract.

VI. Conclusion

In conclusion, MarAd finds and concludes: (1) that as of Oct. 19, 1988, and continuing until Dec. 15, 1988, Shell held and exercised control of Argents I-III, and, by extension, AMS; (2) that Argents I-III and AMS were not citizens of the United States under Section 2 of the 1916 Act during that time period; (3) that such failure cannot be cured under the circumstances; and (4) that the Section 214 investigation of Argents I-III's and AMS's citizenship is terminated.

This is a final administrative action by the Maritime Administration, under Section 2 of the 1916 Act and Section 214 of the Act.

[The findings of fact referred to in the first paragraph of the Report (page 789, supra) are attached as an Appendix beginning on page 801. - Ed.]

17. It is not crystal clear that the Sept. 15, 1988 letter agreements were terminated. Argent Group, and not Argents I-III, was the Argent party to the Sept. 15, 1988 letter agreements and hence had the power to terminate the agreements. Argent Group was not a signatory of the Agreements to Charter purporting to terminate the September 15 agreements. MarAd knows of no document by Argent Group assigning the September 15 agreements to Argents I-III.

The Argent companies claim Argent Group signed the Sept. 15, 1988 letter agreements on behalf of its affiliates but such affiliates did not exist until Oct. 12, 1988 and compensation is paid to "We," which on its face is Argent Group. MarAd has similar difficulty in understanding how compensation under the agreements was paid to Argents I-III when the agreements called for payment to "We," namely Argent Group.

APPENDIX

U.S. Citizenship of
Argent Marine I, Inc.
Argent Marine II, Inc.
Argent Marine III, Inc.
Argent Marine Services, Inc.

On Oct. 31, 1989, the Maritime Administration (MarAd) initiated a proceeding under Section 214 of the Merchant Marine Act, 1936, as amended (Act), on the U.S. citizenship status of Argent Marine I, Inc., Argent Marine II, Inc. and Argent Marine III, Inc. (Argents I-III) and Argent Marine Services, Inc. (AMS) commencing Oct. 19, 1988. The following are MarAd's Findings of Fact in this investigation.

Findings of Fact

I. Administrative Matters

1. MarAd received the following principal filings from the Argent companies in this proceeding, their references herein being indicated in parentheses:

a. "Responses of the Argent Cos. to Questions Posed in MarAd's Letter of Oct. 31, 1989" -- dated Nov. 12, 1989 ("Nov. 12 Responses").

b. Letter of Nov. 13, 1989, from Stephen P. Gottlieb of AMS and Argents I-III to MarAd Acting Chief Counsel (Nov. 13 Letter).

c. "Letter of Nov. 13, 1989, from counsel for Argent to Robert Patton with Supporting Exhibits."

d. Agreements to charter for ARZEW, SOUTHERN and GAMMA, dated Nov. 3, 1989, between Argents I-III and Argents Chartering I-III on one hand, and Shell Bermuda (Overseas) Ltd., on the other (Agreements to Charter).

e. Letter of Dec. 12, 1989, from counsel for the Argent Cos. to MarAd Acting Chief Counsel.

f. Financial Statements of Argents I-III, AMS and Argent Group for 1988 and 1989, delivered Jan. 4, 1990 (Argent Financial Statements).

g. Letter of Jan. 5, 1990, from counsel for Argent Cos. to MarAd Acting Chief Counsel (Counsel January 5 Letter).

h. Credit Agreement for Argents I-III with HongkongBank London Ltd. and side letter agreements (Credit Agreements).

i. "Response of the Argent Cos. to Questions Posed by MarAd's Second Letter Received Jan. 19, 1988" -- dated Jan. 26, 1990 (January 26 Response).

j. Confidential submission of Argent Cos. of financial statements, drawdowns under Credit Agreements, income tax returns, and papers in selecting interim financing facility, filed Jan. 26, 1990.

k. Lease cost analysis filed by the Argent Cos. Jan. 30, 1990.

l. Letter of Feb. 2, 1990, from counsel for the Argent Cos. to Acting Chief Counsel.

m. "Proposed Findings of Fact and Conclusion of Law," filed by counsel for the Argent Cos. Feb. 2, 1990.

n. Opinion Letter of Feb. 2, 1990 of counsel for Argent Cos. to MarAd Chief Counsel (Opinion Letter).

o. Letter of Feb. 20, 1990, from the Argent Cos. transmitting correspondence from Shell. (Shell Correspondence.)

2. MarAd received the following submissions from counsel for Cabot LNG Corp. in the Section 214 proceeding:

a. Letter of Dec. 5, 1989, from counsel for Cabot.

b. Letter of Jan. 10, 1990, from counsel for Cabot to MarAd Acting Chief Counsel.

II. Vessels

1. On Sept. 30, 1972, MarAd entered into contracts to pay construction-differential subsidy (CDS) to aid in the construction of three 125,000 cubic meter Gaz Transport membrane type LNG vessels (Vessels) at Newport

News Shipbuilding & Dry Dock Co. (at 25.74% CDS rate). The contracts numbers, companies, Vessels and CDS amounts were:

Contract	Company	Vessel	Amount of CDS
MA/MSB-170	Methane Alpha Co.	SOUTHERN	$28,739,922
MA/MSB-173	Methane Beta Co.	ARZEW	26,031,492
MA/MSB-176	Methane Gamma Co.	GAMMA	25,376,469

Each company was a wholly-owned subsidiary of El Paso Natural Gas Co.

The Maritime Subsidy Board found under Section 501(a) that each of the companies was a U.S. citizen under the Act. Article 14 of each contract provided for sale or transfer of the Vessels and stated in relevant part: "The findings under Sections 501(a), 502 and 504 of the Act with respect to a ship purchaser's ability, experience, financial resources and other qualifications necessary to enable it to operate and maintain the Vessel shall be the basis for the Board's approval or disapproval." (MSB Actions of Sept. 28, 1972, p. 5239).

2. On Sept. 28, 1972, MarAd issued under Title XI of the Act a commitment to guarantee the construction financing of the Vessels. On April 9, 1975, the Title XI transaction closed. Each obligor was found to be a U.S. citizen. The Title XI guaranteed amounts were:

Vessel	Amount Guaranteed
ARZEW	$67,074,000
GAMMA	65,974,000
SOUTHERN	73,994,000

3. The SOUTHERN and ARZEW were delivered from Newport News in 1978; the GAMMA was delivered in 1979.

4. The Vessels operated in the LNG trade for 10 to 19 voyages from Arzew, Algeria, to, at or near Cove Point, MD and Elba Island, GA, until some time in 1980/1981. Since April 1981, the Vessels have been laid up at Quonset Point and Middletown, RI.

5. On April 22, 1983, MarAd consented to a settlement agreement with El Paso Natural Gas whereby, for a sum, El Paso's guarantee was terminated in return for relinquishing the stock of the shipowners. Company names were changed to Southern Tanker Co., Arzew Tanker Co. and Gamma Tanker Co.

6. On June 28, 1983, MarAd consented to transfer of the stock of the shipowners to GEN Marine Co., Inc., a U.S. citizen. MarAd acted as managing agent and all decisions of GEN required MarAd's prior approval.

7. In May 1986, MarAd paid off the remaining Title XI debt on the Vessels of approximately $154,000,000, dissolved the shipowners, and authorized payment of GEN's debts and eventual dissolution. Title to the Vessels was transferred to MarAd.

III. Biddings

1. *Round 1.* The first public advertisement for the Vessels was authorized by MarAd on March 18, 1986, for publication in the *Journal of Commerce*, a Baltimore paper and West Coast papers. The announcement was brief; it requested offers and/or proposals for purchase of the Vessels. The bid closing date was April 18, 1986. There was no mention of citizenship requirement or other terms.

2. Responses to the advertisement were as follows:

Jacq. Pierot -- submitted bids for scrapping on behalf of five companies.

A.L. Burbank -- submitted bids for scrapping on behalf of two companies.

Citicorp International Trading Co., Inc. -- submitted bid as agent on behalf of one company that involved scrapping.

W.P. Sauer Co. -- submitted bids for scrapping on behalf of three companies.

Transworld Marine Lines, Inc. -- submitted bid of $13.1 million in cash to convert Vessels to large passenger vessels.

Seaborne Incineration, Inc. -- submitted expression of interest to convert one or more of the Vessels to mid-ocean incinerator vessels. No price was indicated.

Maclean Ship Management Ltd. -- submitted bid on behalf of company that was interested if Vessels were not sold in the immediate future.

EndevEx Corp. -- submitted bid to assume Title XI debt on one of the Vessels with option to assume Title XI debt on the other two Vessels.

The Methane Cos., Inc. -- submitted two proposals, one involving the assumption of Title XI debt on all three Vessels, the other involving lease (15 years)/purchase based on the currently existing Title XI debt on the Vessels. The latter offer was in essence an option to purchase the vessels by April 18, 1988, with Methane paying for lay-up costs directly or indirectly until that date.

MarAd decided that it was not interested in the Vessels being scrapped or in their conversion to passenger ships. Seaborne and Maclean did not have defined proposals. EndevEx was only interested if the Title XI debt were not paid off; that debt was paid in May 1988. MarAd pursued negotiations with Methane; on Sept. 19, 1986, it accepted Methane's offer, on condition that down payments were received by Dec. 31, 1986. MarAd terminated its acceptance of the Methane offer on Jan. 23, 1987, after Methane failed to meet the condition.

3. MarAd continued to receive inquiries on disposition of the Vessels. For instance, on Jan. 19, 1987, Shell International Marine Ltd. wrote asking about the Vessels and, among other things, MarAd's position on firm options to acquire the Vessels at a specified future date. No MarAd response is in the record.

4. *Round 2.* MarAd decided to readvertise the Vessels for sale after acceptance of Methane's offer was terminated. In March 1987, MarAd authorized publication of another notice of sale in the *Lloyd's List, Journal of Commerce, Commerce Business Daily*, the *Straits Times* (a Singapore Publication), and the *Wall Street Journal* domestic and international editions. The closing date was April 15, 1987. The notice included a statement that the Vessels would be reemployed in the LNG trades, that a non-refundable cash down payment of $200,000 per Vessel had to be made within 7 days of acceptance. MarAd reserved the right to reject any and all offers. The notice continued to be very summary; there was no requirement stated for U.S. citizenship.

5. Responses to the March 1987 advertisement were as follows:

Mastpure Ltd. -- Bid for scrap in Taiwan.

A.L. Burbank as broker for Reweller Marine Ltd. -- Bid for $9,504,000 net for all three Vessels.

Directorate of Production and Procurement Holding Co. -- Castle Alymmia Merit, Hercules G. Cladalkis (born USA) -- Bid for scrap -- $30,750,000, 10% upfront, rest 2 years later.

Transworld Marine Lines -- Bid of $20,250,000 for GAMMA to convert to passenger ship, payment terms to be negotiated.

MarAd redetermined that it did not want to scrap the Vessels. It determined the remaining bids were not sound financially.

6. Apparently thereafter, MarAd was contacted by a number of energy companies about interest in the Vessels.

7. *Round 3.* On or about Sept. 15, 1987, MarAd issued another advertisement for purchase of the Vessels. It was more extensive than previous notices, based on experience from the prior bidding rounds. It stated that offers to purchase for scrapping would not be considered; successful bidders had to make a non-refundable deposit of $600,000 within seven days of acceptance; there would be a standard purchase contract, bids were to be submitted by Oct. 12, 1987; no bids would be accepted from any purchaser which had a director or significant shareholder of El Paso or its affiliates; and "Bidders must qualify as U.S. citizens under 46 USC §1244." MarAd promised to contact responding parties by the end of the calendar year.

8. Substantive responses to the September 1987 advertisement were as follows:

U.S. YuBex -- bid $45 million each backed by Indonesian interests; financial backing never materialized.

Shell International Marine -- "expression of interest" proposal of Oct. 9, 1987, of 3 year exclusive option with purchase price of $36 to $41 million, depending on time of exercise of option; alternatively cash offer with right to change flag. It indicted U.S. citizenship requirement was highly significant and that it was researching "what vehicle might be used to satisfy your requirement."

The Methane Cos. -- bid to pay lay-up costs through April 30, 1988, sale price of $51 million each to be paid over 10 years.

Grupo Epsilon Inc. -- bid of $10.5 million each payable within 10 banking days after award.

Haines Fairbanks Pipeline Inc. --- bid of $30 million after a three-month option.

Pac America Pte. Ltd. (Singapore) -- bid $30 million for GAMMA and possibly $30 million each for the other two Vessels to operate foreign.

Transworld Marine Lines Inc. -- bid $29.1 million, payment to be negotiated.

Tioga Wells Corp. -- interested but needed more time.

Mastpure Ltd. -- bid $4,350,000 for each Vessel.

Cabot Corp. -- interested but no firm offer.

Central View Co. Ltd. -- bid $1.5 million for each Vessel.

Mr. Cheng, Peoples Republic of China -- interested.

Constantine Stamatiou -- bid $2.5 million for one Vessel.

9. On Oct. 16, 1987 (Shell was telexed on October 23), MarAd wrote interested parties and advised in part:

> We are prepared to accept one of the offers submitted [in response to MarAd's solicitation]. However, before making a final decision we are permitting all parties who have indicated an interest in the Vessels to make a best and final offer by Oct. 30, 1987. These offers must indicate *at a minimum* the sales price or option, the terms of purchase or option, the anticipated closing date for the transaction and the name and citizenship of the purchaser. (Emphasis added.)

The offer referred to was that of Shell, who was deemed responsive to the solicitation for offers to purchase. In other words, MarAd considered an offer for option with a later purchase to be within the request for offers to purchase. The October 16 advice did not purport to narrow the prior solicitation but rather to amplify the agency's intentions in some respects; it clearly stated what offerors had to include at a minimum.

10. Responses to the Oct. 16, 1987 letter are not relevant with two exceptions. Cabot LNG Corp. indicated an interest but no firm offer and recommended a two or three month delay on final disposition of the Vessels. Ralph C. Petty requested a seven-day delay on behalf of Haines Fairbanks Pipeline Co.

11. Shell faxed MarAd stating that Shell's interest in the Vessels remained undiminished, and that it awaited written clarification from MarAd on Shell's expression of interest. Shell proceeded to plan for inspection of the remaining two LNG Vessels, the ARZEW and SOUTHERN.

12. Shell met with MarAd in Washington, DC on Jan. 13, and 14, 1988. Shell's notes of the meeting establish that Shell was advised that the bidder had to be a U.S. citizen within the meaning of Section 2 of the Shipping Act, 1916, as amended (1916 Act); that while Shell could bid in the name of a U.S. citizen to be nominated later, the U.S. citizen could not be acting "for and on behalf of a foreigner."

13. On Jan. 14, 1988, MarAd issued a letter to all interested parties advising that it had reached tentative agreement with one party who had met all necessary requirements and unless other respondents fully met the requirements of the October 16 letter by January 22, 1988, MarAd could likely accept an offer shortly thereafter. The party with whom MarAd had reached tentative agreement was Shell.

14. On Feb. 2, 1988, Shell advised MarAd that while Shell wished to continue "maintaining their expression of interest" (which expression included a cancellation fee if unable to resolve potential U.S.-flag and ownership problems), in view of uncertainties, including inspection of the other two vessels, Shell reserved their position.

15. On Feb. 17, 1988, MarAd took the following action: "Award the Vessels to a U.S. citizen qualified under Section 2 of the Shipping Act, 1916, as amended, which citizenship must be shown pursuant to Shell's option offer. . . ." The action was conditioned on Shell's consent to the action no later than May 31, 1988. MarAd advised other parties that it had accepted an offer and the Vessels were no longer available.

16. On March 24, 1988, Shell's legal advisor informed MarAd that Citibank's attorney advised that a structure based on the Burmah transaction without leverage lease financing would not pass U.S. Coast Guard approval for registry because "Citibank is in a no risk position." On March 29, 1988, Shell requested a written statement from MarAd on acceptable structure and USCG concurrence.

17. On April 13, 1988, MarAd stated in response, among other things, that, "The shipowner must be a Section 2 citizen (46 USC App §802)." It further stated: "We believe that it was made quite clear to you that the financing arrangement, including vessel ownership and chartering, must be on an arm's-length basis. If this is not the case, there potentially could be documentation and citizenship problems." It finally concluded: "We want to again clarify for you that the U.S. 'Citizen Bidder' cannot be a bidder acting as 'nominee' for a non-U.S. citizen, and that the U.S. Citizen Bidder is the 'Shipowner,' and not the bareboat charterer."

18. On May 27, 1988, Shell met with MarAd. The meeting was preceded by circulation of Shell's draft of a MarAd/Shell option agreement, including draft bareboat and time charter terms.

19. On May 31, 1988, MarAd took the following action, which amended its Feb. 17, 1988 actions: "Award the Vessels to a U.S. citizen qualified under Section 2 of the Shipping Act, 1916, as amended, (which citizenship must be shown) pursuant to Shell's option offer which has been amended. . . ." Shell was required to make a

non-refundable payment to MarAd of $600,000 by June 3, 1988, which would not be credited to any other payments due MarAd.

20. On June 3, 1988, Shell essentially accepted MarAd's actions. In its fax, Shell described the U.S. entity as "our nominated representative" and a "company nominated by us." MarAd accepted Shell's offer. Shell made the $600,000 payment on the same day.

21. On June 16, 1988, Cabot offered to purchase the Vessels for $15 million each, stating that it understood Shell had not made a definitive agreement by May 31. MarAd advised Cabot that the Vessels were no longer available for sale.

IV. Documentation of Purchase Options

1. In March 1988, Argent Group Ltd. contacted Shell International Marine Ltd., and offered to assist Shell in connection with acquiring the Vessels. (Shell Correspondence, Argent Group's letter to Shell of March 5, 1988.) Thereafter, Argent Group proceeded to negotiate with Shell an appropriate service agreement. (*E.g.*, Shell Correspondence, Argent Group April 15, 1988 document on services in regard to ARZEW, GAMMA and SOUTHERN.) Shell viewed Argent Group's role as a Specialist Advisor, entailing close liaison with this Office in reviewing draft contracts and inputting specialist advice and guidance at every stage." The option holder may be a "Special Purpose U.S. company of little substance, whose obligations to pay option fees were funded by the Project, who later assigns the Agreement for a more substantial Company selected by the Project to exercise the option(s) and own the ship(s)." (*Id.*, Shell Correspondence, Shell letter to Argent Group dated June 7, 1988.)

2. In May 1988, Shell provided to MarAd drafts of option contracts, and MarAd in a meeting on May 27 gave comments on those draft documents. In July 1988, Shell gave copies of those documents to Argent Group. (Shell Correspondence, Shell letter to Argent Group, dated July 1, 1988.)

3. On July 1, 1988, Argent Group and Shell International Petroleum Co. Ltd. entered into an agreement for the term June 15, 1988, to Dec. 15, 1988, recognizing that "the majority of services will be rendered from June 15, 1988-Aug. 30, 1988 to complete the Option Agreement."

4. MarAd did not know of the July 1 agreement before Nov. 12, 1989. Argent Group had previously indicated to MarAd that it was a financial adviser to Shell. It had not revealed its contract advisory role to Shell and there is no evidence for the contention (Counsel January 5 letter, p. 10) that Argent Group revealed to MarAd before Oct. 20, 1988, that Argent Group was negotiating on behalf of itself and Shell.

5. The July 1 agreement stated that Argent Group was to be a "consultant" and not an agent of Shell. Argent Group's role was:

> (1) To provide advice related to terms and conditions to be incorporated into each of the Documents;
>
> (2) To provide assistance in drafting specific provisions of the Documents;
>
> (3) To review and comment on Documents drafted by Shell;
>
> (4) To describe various alternative financing structures available in the U.S. which will achieve fiscal benefits and to provide advice relating to allowing flexibility in the Documents for such structures;
>
> (5) To assist in contract negotiations with MarAd; and
>
> (6) To assist in setting up or otherwise securing the services of a "Special Purpose" U.S. Company or Companies to hold the options.

The "Documents" were the Purchase Option Agreements between MarAd and the U.S. citizen, Purchase Option Agreements between the U.S. citizen and Shell, Leases and Collateral Understandings.

6. Argent Group performed under the July 1 agreement. It advised Shell on documentation and prepared summaries of bareboat charters and time charters. Shell was in charge, as demonstrated by a Shell letter to Argent Group, dated Aug. 5, 1988:

> I attach revised drafts all dated 29th July for all the Agreements. You will note the changes marked up from previous drafts. These are the drafts that Shell will be discussing in-house on Monday and Tuesday, and it may be that further minor changes will be made. You will note in particular that the indemnity claims suggested by you has been square bracketed pending Shell management approval. (Shell Correspondence.)

7. Argent Group was paid $117,465 under the July 1 agreement, with 40% paid for services rendered in October 1988. The revenue Argent Group received from Shell in 1988 constituted 2.6% of Argent's total revenue. Billings after Oct. 19, 1988, consisted of "clean up" work. (November 12 Response, para. 6; January 26 Response, II.4, Exhibit B.)

8. In August 1988, Argent Group proposed to Shell that it cause its four U.S. citizen stockholders to establish the U.S. citizen shipowners to be holders of the purchase options. (November 13, Letter 13, para. 7; Shell Correspondence, Argent Group Letter to Shell, dated Aug. 31, 1988.)

9. In August and early September 1988, "Shell Marine and Argent Group developed" drafts of the Purchase Option Agreements and Charter Option Agreements. (November 12 Response, para. 9.)

10. On Sept. 7, 1988, a representative of Shell submitted to MarAd proposed documentation for the SOUTHERN and ARZEW, namely a Purchase Option Contract between MarAd and the Acquisition Company, an Agreement between the Acquisition Company and Shell, and a Collateral Agreement between Shell and MarAd. The documents reflected arrangements negotiated between Argents I-III and Shell and were reviewed by the General Counsel of Argent Group. (January 26 Response, II.8.)

11. On Sept. 15, 1988, Argent Group and Shell International Marine Ltd. entered into an agreement to "cause these special purpose subsidiaries to be organized and to act as the acquisition companies under the various operative documents. . . ." The terms of the Purchase Option Agreements and Purchase Option Agreements were summarized as incorporated in a Sept. 7, 1988 draft. Likewise, a draft of principal terms and conditions of the Bareboat Charter existed on Aug. 17, 1988 and similarly for the time charter as of Sept. 6, 1988.

12. Under the September 15 Agreement, an affiliate of Argent Group was to provide basic services including organizing a separate Acquisition Company for each vessel, act as record and beneficial owner of stock thereof, handle all internal corporate matters with respect to each company, keep the books and records and bank account, cause filing of tax returns, retain legal and accounting support after consultation with Shell, cause each company to execute the purchase and Purchase Option Agreements, cause each company to make necessary payments to MarAd to the extent of funds loaned from Shell and then to repay Shell; and give notice of exercise to MarAd if Shell gave the companies notice. It was contemplated that such services would be "ministerial and routine in nature," and would not require significant expenditure of time for preparation and negotiation of documentation of discussion of transaction implementation.

13. The September 15 Agreement was not intended to be short term. It provided that compensation would be reviewed at least annually.

14. In a side letter of the same date between the same parties, Argent Group agreed not to "incur out-of-pocket expenses above U.S. $1000 in aggregate per vessel" without Shell's prior consent.

15. Argents I-III dispute the extent to which MarAd knew of and reviewed the September 15 agreements before execution of the Purchase Option Agreements. It was referenced in Charter Option Agreements, Art. 3.1, 3.5, 3.6, 3.7, 3.9, 3.10, and 8, and Appendix I thereto, which were dated Oct. 19, 1988. The Argent Cos. allege that it was given to certain individuals in MarAd on Oct. 14, 1988. (Counsel January 5 letter, p. 9.) However, the agency finds that copies of the September 15 Agreements were first delivered to certain agency staff at their homes on the weekend preceding the closing of Oct. 19, 1988. It was not a document requiring MarAd approval. Top decision makers at MarAd were not aware of the September 15 agreements until about a year after the closing.

16. The stockholders of Argent Group, a Subchapter-S Delaware corporation, consist of four U.S. citizens: J.F. Brandin, M.E. Gottlieb, S.P. Gottlieb and N.J. Mattson. The stockholders of AMS, the parent of Argents I-III, as well as Argent Chartering I, Inc.; Argent Chartering II, Inc.; and Argent Chartering III, Inc., were identical. (November 12 Responses, Attachment C.)

17. Argent Group is a specialized investment banking firm with expertise in ship financing transactions. It did have consulting business with Shell in 1985 and 1986. The revenues from Shell in fiscal years 1985 and 1986 did not constitute over 3% of Argent Group's total revenues. In 1988 and 1989 Argent Group's annual revenue was in the $4,000,000 to $5,000,000 range and the revenue from the project was its largest revenue in the month of November 1989. (Argent Financial Statements.) It had not previously owned or operated ships. It had no previous experience in LNG vessel operations. It, however, provided services to the Military Sealift Command.

18. Under the September 15 agreement, Argents I-III each received $7,500 for basic services on Oct. 19, 1988. However, Argent Group and Argents I-III did not consider themselves bound to obtain Shell's consent for out-of-pocket expenses exceeding $1,000 if they did not seek Shell's reimbursement, and they likewise did not consider themselves bound to obtain Shell's consent to retain legal and accounting support. The agreement was appended to the Charter Option Agreements. Article 3.1. (January 26 Response 1990, I.4. Charter Option Agreements, Appendix 1.) In February 1989, Argents I-III stated to Shell that $1,300 of fees estimated for tax return preparation for Argents I-III were reimbursable expenses under the Sept. 15, 1988, agreement. Shell advised that they were. (Exhibit B to January 26 Response.)

19. On Sept. 27, 1988, MarAd responded to Shell International Marine with preliminary comments on the draft documentation.

20. On Oct. 12, 1988, Argents I-III were incorporated in the State of Delaware with U.S. citizen stockholders, directors and officers each with $1,000 worth of capital stock paid by AMS. That company was established on

the same day by the same four shareholders as for Argent Group with $4,000 worth of capital stock. (January 26 Response, I.18, I.19.)

21. From Oct. 12, 1988 to Oct. 18, 1988, Shell and Argent Group and Argents I-III met with MarAd in Washington, DC to negotiate the final terms of the option documentation. Stephen P. Gottlieb represented Argent Group and Argents I-III. (November 12 Response, para. 12). The presence of Argents I-III at those meetings informed MarAd that they were Shell's designated U.S. citizen shipowners. Argents I-III booked no expense attributable to these negotiations.

22. On Oct. 18, 1988, affidavits of U.S. citizenship were submitted by Argents I-III and AMS to MarAd for the purpose of closing on the Purchase Option Agreements. The affidavits included the representations "that by no means whatsoever is control of either corporation conferred upon or permitted to be exercised by any person who is not a citizen of the United States."

23. The three Purchase Option Agreements between MarAd and Argents I-III are dated Oct. 19, 1988. They state that Argents I-III are U.S. citizens and acknowledge Argents I-III are entering into the agreements for the purpose of chartering the Vessels to Shell if Shell exercises its options to charter the Vessels.

24. Under the Purchase Option Agreements, Argents I-III had options to purchase the Vessels for $12 million each, if exercised before Aug. 14, 1989; for $12,700,000 each, if exercised before Aug. 14, 1990 and for $13,500,000 each, if exercised before Aug. 14, 1991. Contracts of sale were attached. In return for the option rights, Argents I-III agreed to pay MarAd $1,300,000 per year per Vessel, payable in quarterly installments in advance on 15 February, 15 May, 15 August, and 15 November of each year.

25. Under Article 5.5 of the Purchase Option Agreements, if MarAd entered into a contract with a third party during the option period precluding performance under the Purchase Option Agreements, then Argents I-III could terminate, sue MarAd in the Claims Court and if they got a final order that MarAd intentionally breached the Agreements by selling the Vessels to another party, MarAd would be liable for all option fees and the total receipts received by MarAd from the other party.

26. Under Article 14 of the Purchase Option Agreements, Argents I-III agreed they would maintain their U.S. citizenship under Section 2 of the 1916 Act, and generally that they would not borrow any money or sell any stock to Shell or any affiliate of Shell or accept any capital contributions or any payments outside the ordinary course of business from Shell or any affiliate of Shell. Failure of Argents I-III to so comply is a material breach. In the case of an apparent violation, MarAd was to follow its normal custom and practice in considering the continuing U.S. citizenship of Argents I-III. Under Articles 7.2 and 15, termination on this basis entitled MarAd to $500,000 per vessel and the right to sell the Vessels free from any obligations under the agreements.

27. The Purchase Option Agreements between Argents I-III and Shell Bermuda (Overseas) Ltd. were also dated Oct. 19, 1988. They provided that Argents I-III would enter into Purchase Option Agreements with MarAd and agree not to amend those agreements or waive any term thereof without Shell's consent. Argents I-III were required to give Notice of Exercise to MarAd if Shell gave Argents I-III notice of exercise and to carry out directed charter terms. Argents I-III agreed not to do or allow to be done anything that would cause them to lose the status of U.S. citizenship. Argents I-III could not transfer their interest in purchase options without MarAd's approval (Article 6.1).

Argents I-III were compelled to assign, transfer or novate their purchase options to Shell if waiver of the U.S. documentation requirement for the Vessels became permissible before Notice of Exercise, subject only to MarAd approval under 46 USC §808 (Article 2.3(c)). Argents I-III also agreed, to the extent permitted by law, that the pricing reflected in the Purchase Option Agreements would be passed on to Shell (Article 2.3(e)).

28. Shell agreed under the Purchase Option Agreements to pay Argents I-III for signing the Purchase Option Agreements the remuneration in the September 15 letter agreement made by "an affiliate of the acquisition company acting for the Acquisition Company" and Shell. (Article 32.1.) Further, Shell agreed to loan Argents I-III the money for the MarAd option fees. The loan was unsecured and repayable solely from any proceeds from the assignment of the MarAd Purchase Option Agreements, sale or lease of the Vessels, or from certain penalty payments. (Article 3.2.) If Argents I-III recovered in penalty payments more than the loans, 98% of the excess would go to Shell. (Article 2.5.) If Shell decided not to proceed with the charter option, it agreed to pay Argents I-III at least $500,000 each unless Argents I-III pursued the purchase options. (Article 3.6.)

29. Further, under the Purchase Option Agreements, Shell agreed to indemnify, save and keep harmless Argents I-III from and against any and all liabilities of any nature imposed on an Indemnified Person in any way relating to the Purchase Option Agreements, Purchase Option Agreements or the charters or the ownership, acquisition or disposition of the Vessels, excepting only "willful misconduct or gross negligence by the Indemnified Person." (Article 3.5.)

30. Argents I-III were permitted to borrow funds from Shell for option fees to be paid to MarAd (Article 3.2) so as (a) to address a tax problem associated with back-to-back option fees and (b) to enable Argents I-III to have sufficient time to put in place interim financing. (November 12 Response, para. 13, n. 7.) The monies

borrowed were repaid with interest ($2,007,898.39 per Vessel) on or about Nov. 8, 1989 (*ibid*, para. 18), including $600,000 repaid to Shell for its prior nonrefundable payment to MarAd of bid deposit. (Exhibit F to January 26 Response.)

31. A separate letter of Oct. 19, 1988, from Argents I-III to MarAd stated that Argents I-III recognized and agreed that a breach of Clause 14 of the Purchase Option Agreements might constitute a violation of Section 2 of the 1916 Act, resulting in sufficient grounds for forfeiture of the ownership of the vessels which are subject to the option agreements.

32. Contracts of sale dated Oct. 19, 1988, for the three Vessels were also signed by MarAd and Argents I-III as Appendix 1 to the Purchase Option Agreements. They provided, among other things, that the Seller may, at its sole option, extend the closing date if the Buyer is not prepared to close by such date. If the closing date is so extended the Buyer must pay $48,000 each week for the delay. Art. XVII. The closing date is to occur within 30 days of the date of Notice of Exercise. On the date of Notice the Buyer is to pay 10% of the purchase price. Art. II.

33. The ARZEW and SOUTHERN are expected to operate under a 20-year time charter with Shell Bermuda (Overseas) Ltd. to transport LNG from Algeria to Cove Point, MD, as part of a program initiated by Cove Point Trading Co. partnership, which is being organized by subsidiaries of the Columbia Gas System Inc. and Shell Oil, Houston. The GAMMA is expected to operate under a 20-year time charter with Nigeria LNG Ltd. Until 1995, or after that time, until the Nigerian project commences, the Vessel will be subchartered to transport LNG to U.S. East Coast terminals (with two other non-U.S. flag vessels under option to Nigeria LNG Ltd.). Beginning in 1995 or, after that time, when the Nigerian project commences, the Vessel will be one of five or six carrying LNG to Europe and the United States from Nigeria. (November 12 Response, paras. 31, 32.)

V. Performance Under Option Agreements

1. Argents I-III incurred no expenses for the Vessels through Oct. 31, 1988 and incurred only about $980 for the year as of Dec. 31, 1988. Likewise, AMS incurred no expenses concerning the Vessels through Oct. 31, 1988, and incurred only about $327 as of Dec. 31, 1988. During the same time period Argent Group had no expenses for this project not compensated by Shell. (Exhibit A to January 26 Response; Argent Financial Statements.) It was not until about June 1989 that any Argent company incurred unreimbursed expenses concerning the Vessels. (Argent Financial Statements.)

2. Argents I-III designated Shell Bermuda (Overseas) Ltd. as their "nominated representative" to perform a baseline inspection of the Vessels within two months of the agreements. Shell conducted such inspection.

3. Option fees under the Purchase Option Agreements were timely paid by Argents I-III.

4. In March 1989, Shell determined informally to exercise the options within four to six months and directed Argents I-III to prepare accordingly. (November 13 Letter, para. 16.)

5. In May and July 1989, Argent Group entered into agreements with Argents I-III to assist in interim financing. Shell acquiesced in the agreements and was to reimburse any such financing or expense incurred by Argent Group in connection with it. Argent Group also agreed not to incur costs and reimbursements above $35,000 per Vessel without Shell's and Argents I-III's prior consent. Those agreements were terminated by the Nov. 3, 1989, (Agreement to Charter, para. 9.) Argent Group received no reimbursement from Shell under those agreements. (November 12 Response, para. 35; January 26 Response, Exhibit B.)

6. On July 29, 1989, Cabot LNG Corp. filed suit in the United States District Court for District of Columbia challenging, among other things, the award of the Purchase Option Agreements to Argents I-III.

7. On Aug. 3, 1989, the Maritime Subsidy Board approved the transfer of the construction-differential subsidy contracts to Argents I-III as prospective shipowners, subject establishment of U.S. citizenship. (November 12 Response 1989, para. 20; Exhibit K to November 13 Letter). The Secretary of Transportation did not take review of that action. Cabot LNG Corp. and Sonat Inc. had requested such review.

8. On Oct. 31, 1989, MarAd initiated an investigation into the U.S. citizenship of Argents I-III.

9. On Nov. 3, 1989, after several months of negotiation, Argents I-III entered into a Credit Agreement with HongkongBank London Ltd., under which they can drawdown a total of $96,600,000 to buy the Vessels, refurbish them and cover transaction costs. The loan is secured by the future charter and mortgage agreements and Shell's promise to make any payments in the interim. (Credit Agreement and para. 4 of Agreement to Charter.) Final payment is due in one installment on Nov. 3, 1994. No principal payment, only interest is due during the term of the interim financing; such interest is to be paid by drawdowns until the earlier of May 3, 1991 or the date the Vessels are redelivered from a shipyard for refurbishing work. (January 26 Responses, I.23).

10. Argents I-III also entered into an Agreement to Charter with Shell on the same day, under which Argents I-III agreed to charter out and Shell agreed to charter in the three Vessels once the purchase options were exercised. (January 26 Response, I.23. Exhibit D to November 13 Letter.)

11. On Dec. 14, 1989, Argents I-III gave MarAd notice of exercise of the purchase options, effective as soon as legally possible.

12. On Dec. 21, 1989, MarAd advised Argents that a legal impediment to responding to the Notices of Exercise was that matter posed by Argents I-III's U.S. citizenship, and until that could be resolved in the pending Section 214 investigation, no action could be taken in response to the notices.

FMC
Dkt. Nos. 81-5, 88-14,
88-18, 88-27, 89-12

INTERNATIONAL ASS'N OF NVOCCs

v.

ATLANTIC CONTAINER LINE

DIRECT CONTAINER LINE, INC.

v.

ATLANTIC CONTAINER LINE

VOTAINER BV

v.

ATLANTIC CONTAINER LINE

ARIEL MARITIME GROUP, INC.

v.

NEW YORK SHIPPING ASS'N, INC.

FLEET SHIPPING LINES, INC.

v.

NEW YORK SHIPPING ASS'N, INC.

Served: February 16, 1990

[1:22[7], 10:11, 141:12[1]] Container rule proceedings; discovery.

Complainant NVOCCs, in consolidated proceedings brought against carriers who allegedly implemented the Rules on Containers, are entitled to discovery relating to implementation of the Rules against NVOCCs other than themselves. Respondents showed neither that the requested information is irrelevant to the subject matter of the proceedings nor that it is not "reasonably calculated to lead to the discovery of admissible evidence." The information sought is clearly relevant with regard to complainants' request under Section 11(g) of the 1984 Act to reparations in excess of actual injury. A finding of discrimination in respondents' enforcement of the Rules might influence the Commission to exercise its discretion to augment damages. The information sought could also lead to evidence bolstering complainants' lost-profits theory which is based on the claim that respondents diverted business to NVOs who were not subject to the Rules. Complainants will be required ultimately, but not at the discovery stage, to show that respondents' actions proximately caused the alleged damages and to link respondents' operations in a given trade area with harm to particular NVOs. **International Ass'n of NVOCCs v. Atlantic Container Line, 25 SRR 809 [ALJ, 1990].**

[1:22[7], 10:11, 141:12[1]] Container rule proceedings; discovery.

Complainant NVOCCs, in consolidated proceedings brought against carriers who allegedly implemented the Rules on Containers, will not be permitted to engage in discovery seeking information regarding an alleged agreement among respondents to share litigation costs and liability. There is no merit to the contention that complainants need this information to prove conspiracy since they have already been granted a rebuttable presumption of collective enforcement of the Rules by respondents who were listed in the applicable tariffs. Complainants also may not use discovery as a means of ascertaining whether certain large respondents have agreed to fund a large share of any possible liability and to target those respondents at trial. The