07-5801-CR

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES,

Appellee,

v.

IONIA MANAGEMENT S.A.,

Appellant.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT (New Haven)

The Honorable Janet Bond Arterton
District Judge
No. 3:07-cr-00134-JBA

APPELLANT'S OPENING BRIEF

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Corporate Disclosure Statement

Ionia Management S.A. ("Ionia") is a closely held Liberian corporation headquartered in Greece. It has no parent company and no public company owns any of its stock.

Preliminary Statement

Ionia appeals from a conviction and sentence after jury trial. The case was heard by Hon. Janet Bond Arterton, District of Connecticut. Judge Arterton issued several published orders on pretrial motions: 498 F. Supp. 2d 477 (CR:75;A:46-79)[1], 499 F. Supp. 2d 166 (CR:116: A:82-87), and 499 F. Supp. 2d 170 (CR:117; A:88-92). She also published two orders post-trial: 526 F. Supp. 2d 319 (CR:224; SPA:112-123), and 537 F. Supp. 2d 321 (CR:265;A:180-83).

[1] References to the record are as follows:

TR:#	Trial transcript page
CT:#	Charge conference transcript (Sept. 4) page
ST:#	Sentencing transcript page
A:#	Appendix page
SPA:#	Special Appendix page

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Jurisdictional Statement

The district court's jurisdiction rested on 18 U.S.C. §3231. A final judgment was entered on December 18, 2007 (CR:226, SPA:124-7). The notice of appeal, filed on December 26, 2007, was timely. (CR:229; A:178-9). This Court has jurisdiction under 18 U.S.C. §3731.

Issues Presented

1. Where an indictment charges a violation of 33 U.S.C. §1908(a), for "fail[ure] to maintain an oil record book," what is the meaning of "maintain?" Did the government state and prove an offense under that statute?

2. Was the evidence insufficient to establish vicarious criminal liability for a corporate defendant under *respondeat superior*?

3. Were the trial court's instructions on corporate liability in error and did they constructively amend the indictment?

4. Were the trial court's instructions on 18 U.S.C. §1519 in error and did they constructively amend the indictment?

5. Did the trial court err, under U.S.S.G. §3D1.2, in not grouping conspiracy, obstruction, and falsification crimes?

6. Did the trial court err in failing to resolve disputed sentencing issues, under Rule 32(i)(3), Fed. R. Crim. P., and in considering disputed issues under 18 U.S.C. §3553(a)?

Statement of the Case

Ionia is a ship management company headquartered in Piraeus, Greece. At all relevant times it managed but did not own several tanker vessels, including the M/T KRITON. KRITON is registered in and flies the flag of the Bahamas.

Ionia was charged in four indictments (CR:1, 15-6, 15-7, 15-7; A:1-45), in four districts, in a total of eighteen counts. All were consolidated for trial before Judge Arterton. CR:82; A:80-1. After a ten-day jury trial, Ionia was convicted of conspiracy, violations of the Act to Prevent Pollution from Ships (APPS, 33 U.S.C. §1908(a)), and obstruction of justice (18 U.S.C. §§1519 and 1505.) Ionia was sentenced to pay a fine of $4.9 million, penalty assessments of $7,200, and was placed on probation for four years. .CR:226; SPA:124-7.

To our knowledge this is the first case to come before this Court based on alleged APPS violations. We are aware of one APPS case resolved by the Third Circuit[2] and another pending in the Fifth Circuit.[3]

[2] *United States v. Abrogar*, 459 F.3d 430 (3d Cir. 2006), involving a sentencing issue after a guilty plea.

International and Domestic Laws Applicable

International conventions, generally referred to as MARPOL,[4] address how oceangoing vessels[5] dispose of wastes generated on board. Annex I is relevant here; it addresses "oily wastes" and bilge water. The United States is a party. *Abrogar*, 459 F.3d 430, 431. MARPOL is not a self-executing treaty.[6] Rather, under Article 1(1), the parties agreed to "give effect" to it.

MARPOL (including Annex I) (SPA:28-77) sets an international standard for the maximum amount of oil ships on the high seas may discharge. It requires ships to have equipment aboard to process and dispose of "sludge" and "bilge water." If wastes are not processed, they must be retained aboard for disposal at port. Annex I, Regulation 20 requires use of a log called an oil record book (ORB).

MARPOL establishes a preference for flag state regulation and enforcement of high seas pollution. Each party agreed to set rules for a ship that flies its flag, and each is responsible for certifying its ships comply with MARPOL. The flag state must

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[3] *United States v. Jho*, Fifth Circuit Docket No. 06-41749.

[4] The International Convention for the Prevention of Pollution from Ships (1973), as modified by a supplemental Protocol of 1978 and amendments are referred to as MARPOL. 26 UST 2403; TIAS 8165.

[5] Not all vessels are regulated, but the exceptions have no relevance here.

[6] *Medellin v. Texas*, ___ U.S.___, 128 S. Ct. 1346, 1356 (2008).

survey each ship at intervals and issue certificates of compliance. (Regulations 4-5; SPA:46-47.)

Each party also agreed to set sanctions for violations by ships of its flag "wherever the violation occurs." (Article 4(1); SPA:33.) The penalties under flag state law "shall be adequate in severity to discourage violations . . . and shall be equally severe irrespective of where the violations occur." (Article 4(4).) Article 6(2), SPA:33, requires a port state to send a flag state a report of possible violations "for any appropriate action." If a flag state receives information, it "shall cause" proceedings to be initiated "in accordance with its law." (Article 4(1).) These provisions promote cooperation in the "detection of violations and enforcement" of the Convention. (Article 6(1).)

U.S. law executing MARPOL is found at 33 U.S.C. §1901, *et seq.*, APPS. APPS contains two relevant limitations. Under 33 U.S.C. §1902(a)(2), foreign vessels are subject to APPS "while in" United States waters. Second, 33 U.S.C. §1912 requires, "Any action taken under this chapter shall be taken in accordance with international law."

The Charges

The Connecticut indictment (CR:1, A:1-15) alleged a multiple-object conspiracy (Count 1), a violation of APPS (Count 2), a "falsification" violation, 18

U.S.C. §1519 (Count 3), and obstruction of justice, 18 U.S.C. §1505 (Count 5). Other indictments, returned in Florida, New York and the Virgin Islands, charged substantive offenses within the time frame of the Connecticut conspiracy count. All acts charged in those districts were charged as overt acts in the Connecticut conspiracy count. The Florida and New York indictments each alleged three violations of APPS and falsification of a record in violation of §1519. The Virgin Islands indictment charged six APPS violations.

All four indictments contained the same factual allegations:

1. Ionia was a ship management company, incorporated in Liberia and headquartered in Greece. The KRITON was flagged in the Bahamas and managed by Ionia.

2. During the alleged conspiracy period, crewmen aboard KRITON discharged wastes to the sea, in violation of MARPOL. The discharges occurred, "at various times and places" during "international voyages," through a hose that "bypassed" the ship's waste handling equipment. At trial Ionia questioned whether improper discharges occurred, but the jury apparently found that they did.

3. The indictments did not allege any discharge occurred in or affected U.S. waters, and the prosecutor at trial acknowledged that the alleged discharges occurred

"far out into the sea." TR:30.[7] Hence, the government could not prosecute for illegal discharges;[8] instead, it returned indictments based on the crew's failure to record the alleged discharges in the ORB. Each APPS count alleged a U.S. crime in the crew's failure "to maintain an Oil Record Book . . ." [9]

Each count alleged that the criminal actors were Ionia's employees, acting "within the scope" of their employment "and for the benefit of" the company.

Summary of Argument

1. The government presented evidence that there were "exceptional discharges of oil-contaminated waste," at "various times" while KRITON was "far out into the sea." It also offered evidence that the crew did not record the discharges in the ORB. That conduct was subject to sanction under Bahamian law but did not

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[7] Crewmen testified the alleged misconduct occurred on the high seas, *e.g.*, TR:638. One discharge was observed by Dutch authorities in international waters in the North Sea. TR:734. No witness said a discharge occurred "while in" U.S. waters.

[8] ". . . it was early held that, as a general rule, Federal criminal jurisdiction does not attach to offenses committed by and against foreigners on foreign vessels. *See United States v. Holmes*, 18 U.S. (5 Wheat.) 412 (1890); *United States v. Palmer*, 16 U.S. (3 Wheat.) 281, 288 (1818). *See*, however, 18 U.S.C. §7(8). The Convention on the High Seas to which the United States is a party, purports to give the flag state exclusive jurisdiction over its vessels on the high seas." USDOJ, Criminal Resource Manual, §670. http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00670.htm (last visited 5-11-08).

[9] Connecticut indictment, Count 2 (CR:1; A:11); New York indictment, Counts 2 and 3 (CR:15-7; A:33-5); Virgin Islands indictment, Counts 1 – 6 (CR:15-8; A:44-

violate U.S. law, because Congress limited APPS' territorial reach to "the navigable waters of the United States." 33 U.S.C. §1902(a)(2). The government asserted that U.S. could punish the high seas conduct on a theory that omissions from the ORB became criminal when the ship crossed into U.S. waters, *i.e.*, KRITON "failed . . . to maintain" an ORB while in our waters. We argue the government failed to state or establish a crime and has overextended APPS' reach. (Section I.)

2. For all counts, we argue that the evidence was insufficient to prove the elements of *respondeat superior* liability. Alternatively, we argue a new trial is required because the court's instructions were incorrect, omitting this required element and constructively amending the indictment. (Section II.)

3. A new trial is in order on two of the §1519 counts because the court's "to convict" instruction omitted an element of the offenses as charged, and the instructions constructively amended the indictment.

4. Alternatively, we seek remand for resentencing because of errors in the trial court's guidelines calculations and its failure to resolve disputed, material issues of fact at sentencing.

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5); Florida indictment, Counts 2 and 3 (CR:15-6; A:20-1).

I. THE APPS COUNTS SHOULD BE REVERSED FOR THERE WERE NO VIOLATIONS OF U.S. LAW

A. APPS Charges

The indictments alleged thirteen violations of APPS and Coast Guard regulations.[10] Eleven used substantially the same language:

> [On a date and at a place] Ionia Management S.A. . . . did knowingly fail and cause the failure to maintain an Oil Record Book for the M/T KRITON . . . by failing to disclose in the Oil Record Book exceptional discharges of oil-contaminated waste . . . in violation of Title 33, Code of Federal Regulations, Sections 151.25 et seq.

New York indictment at count 3, ¶ 17 (A:34). The remaining two APPS counts added that the "fail[ure] . . . to maintain" occurred "during a U.S. Coast Guard inspection to determine the compliance of the M/T KRITON with United States law . . ."[11]

B. Standard of Review

The issues of APPS' reach were raised with the trial court before (CR:15), during (TR:1895-1906), and after the trial. (CR:176). Review is *de novo. United States v. Naiman*, 211 F.3d 40, 46 (2d Cir. 2000).

[10] Connecticut indictment, Count 2 (A:11); New York indictment, Counts 1-3 (A:32-5); Florida indictment, Counts 1-3 (A:20-1); Virgin Islands indictment, Counts 1-6 (A:44-5).

C. APPS Criminal Jurisdiction is Limited to Violations that Occur "While" a Foreign Vessel is in U.S. Waters or Aboard U.S. Flagged Vessels Elsewhere

A foreign flagged ship in international waters is considered the territory of the nation whose flag it flies, and questions about the U.S. government's reach to prosecute crimes aboard one are almost as old as Congress' first statutes. *United States v. Palmer,* 16 U.S. 610 (1818) (federal statute did not reach robbery aboard foreign vessel). In APPS, Congress made its intent clear.

> Congress made §1908(a)'s criminalization of MARPOL violations applicable only to U.S. ships, wherever located, and foreign ships in three specific circumstances: (1) "while" the ship is within "the navigable waters of the United States"; (2) "while" in the "exclusive economic zone of the United States"; and (3) when at a port or terminal in the United States.

Abrogar, 459 F.3d 430, 434. As *Abrogar* recognized, a foreign ship cannot violate APPS except "while" it is in U.S. waters.[12]

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[11] Count 2 in the New York and Connecticut indictments. A:33-4, 11.

[12] *Abrogar* presented a sentencing issue under APPS. The government sought to enhance defendant's sentence for conduct on the high seas. In rejecting the government's argument, the court said:

> Indeed, we believe that the reading of the relevant provisions [of APPS] urged by the Government is so broad as to contravene the very meaning of those provisions. As discussed above, the United States has no jurisdiction to prosecute a foreign vessel or its personnel for "failure to maintain an accurate oil record book" outside of U.S. waters. Furthermore, no provision of the APPS or its accompanying regulations

D. The Issue Turns on the Meaning of "Maintain"

While on the high seas, a ship must comply with its flag state laws. While in U.S. waters it must obey flag state and U.S. law. Only the Bahamas could prosecute failures to record discharges or discharges that occurred on the high seas. The U.S. or the Bahamas could prosecute failures to record discharges or for discharges that occurred "while" in U.S. waters. And the U.S. may prosecute a crewperson for violating 18 U.S.C. §1001 if he or she "presents" a false ORB.[13]

> indicates that "failure to maintain an accurate oil record book" by a foreign ship outside U.S. waters is a crime.[3] Stated differently, the terms of the Act and its regulations exclude from criminal liability the "failure to maintain an accurate oil record book" by foreign vessels outside U.S. waters.
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> > [3] We find this latter point particularly significant analytically. The APPS provisions and regulations cited above do not merely implicate jurisdiction. They are worded in such a way as to define, for purposes of U.S. law, the scope within which MARPOL violations constitute crimes at all, irrespective of implications for jurisdiction proper. . . .

Abrogar, 459 F.3d 430, 435 (emphasis added).

[13] *United States v. Overseas Shipholding Group, Inc*., 2008 U.S. Dist. LEXIS 32728 (D. Mass. 2008); *United States v. Kassian Mar. Navigation Agency*, 2007 U.S. Dist. LEXIS 56747 (M.D. Fla. 2007); *United States v. Royal Caribbean Cruises*, 11 F. Supp.2d 1358 (S.D. Fla. 1998), all are cases in which a §1001 charge was brought on that basis.

But here the government claimed the conduct of KRITON's crew outside our waters became an APPS violation "when the ship entered the internal waters of the United States without correcting the omissions and false entries" in the ORB. CR:42, at 8 (emphasis added). This is so, the government asserted, because 33 C.F.R. §151.25(a) commands that vessels while in U.S. waters "shall maintain an oil record book." The viability of the APPS convictions turns on the meaning of "shall maintain." It does not mean, as the government asserted, that a crime was committed because the crew did not correct the ORB before entering U.S. waters.

1. MARPOL Does Not Use the Word "Maintain;" It Speaks of Keeping the ORB Readily Available for Inspection and Preserving it for Three Years After the Last Entry.

We begin with MARPOL, for APPS and Coast Guard regulations are intended to give effect to it. 33 C.F.R. §151.01. MARPOL Regulation 20 (SPA:59) requires each flag state to provide its ships with an ORB. The Regulation details what is to be recorded, and when, by whom and in what language entries are to be made. In addition to identifying the required content and entry methodology, Regulation 20 requires an ORB "shall be kept in such a place as to be readily available for inspection at all reasonable times," and "shall be preserved for a period of three years after the last entry has been made." The word "maintain" is not used in Regulation 20.

The Bahamas Merchant Shipping (Oil Pollution) Act is Bahamas' APPS counterpart.[14] The Bahamas Maritime Authority, BMA Bulletin No. 84 Rev.1 contains its counterpart to our regulations.[15] Bahamas' rule tracks Regulation 20; it details what is to be recorded, and when, by whom and how entries are to be made in its ORB. It also tracks Regulation 20 in requiring, "It is to be kept on board at all times, readily available for inspection . . ." and that "Completed Oil Record Books shall be retained on board for a period of not less than three years." The word "maintain" is not used in the Bahamas rule.

2. In Context the U.S. Requirement that an ORB be "Maintained" Means the Same Thing; It Means the ORB Must be Kept or Preserved for the Standard Three-Year Period

33 C.F.R. §151.25 (SPA:92) also parallels Regulation 20. Subsections (d) through (h) detail what is to be recorded, and when, by whom and how entries are to be made. Subsection (k) requires, "The Oil Record Book for a U.S. ship shall be maintained on board for not less than three years." Subsection (i) contains the requirement that an ORB be "kept in such a place as to be readily available for inspection at all reasonable times and shall be kept on board the ship."

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[14] http://laws.bahamas.gov.bs/statutes/statute_CHAPTER_275.html (last visited 5-11-08). SPA:96-100.

The only difference in the three rules is in the verb used to convey the preservation requirement. Regulation 20 uses the phrase "shall be preserved for a period of three years," while the Bahamas uses the phrase "retained on board for a period of not less than three years" and our regulation uses the phrase "maintained on board for not less than three years." They mean the same thing and ours means nothing more.

"Maintain" is not among more than four dozen terms defined in §151.05 but it is synonymous with Regulation 20's "preserved" and Bahamas "kept." The preservation requirements in all three are separate from their parallel requirements on ORB content and procedures for making ORB entries. The U.S. requirement to "maintain" the ORB means no more and no less than its common dictionary meaning "to continue to have; to keep in existence, or not allow to become less."[16]

For proof of our construction that "maintain" means to "keep" or "preserve," we offer the Coast Guard's official ORB.[17] SPA:94-95. Immediately beneath boxes

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[15] http://www.bahamasmaritime.com/ (last visited 5-11-08).

[16] http://dictionary.cambridge.org/define.asp?key=48202&dict=CALD (Last visited 5-10-08).

[17] 33 C.F.R. §151.25: "(b) An Oil Record Book printed by the U.S. Government is available to the masters or operators of all U.S. ships subject to this section, from any Coast Guard Sector Office, Marine Inspection Office, or Captain of the Port Office." "(c) The ownership of the Oil Record Book of all U.S. ships remains

for the ship to fill in the first and last dates of entry in the book, it says:

> THIS BOOK MUST BE MAINTAINED ABOARD THE SHIP FOR AT LEAST THREE YEARS FOLLOWING THE "TO" DATE LISTED ABOVE.

http://www.sname.org/committees/tech_ops/oilywater/NEW%20ORB.pdf (last visited 5-11-08). Capitalization in original.

If, "while in" America, KRITON's crew tore pages from its ORB, or substituted pages into the ORB, or changed entries or threw the book overboard, it would be in violation of the international and U.S. requirement to "keep," "preserve" or "maintain" the book. Here, however, the government claims a crime occurred because the crew kept, preserved and maintained its ORB in its original condition.

E. The Jury and the Trial Court Recognized that the Meaning of "Maintained" Controlled the Outcome on the APPS Counts.

During deliberations, the jury asked a single question. "If the oil record book was inaccurate when it came into U.S. waters . . . does that constitute failure to maintain the oil record book, or would there have to be a false or omitted entry while in U.S. waters?" TR:1985. Judge Arterton noted, "So the question is by definition what does "maintain" mean." TR:1903. The government argued, TR:1901, as it had before trial, CR:42 at 10, "It's the state of the maintenance of the book when the ship

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with the U.S. Government."

enters the port." Judge Arterton accepted the government's argument, over objection TR:1905, and instructed the jury, TR:1907, that APPS

> . . . does not require proof that the false or omitted entries were made only once defendant's vessel was in navigable U.S. waters or its ports and terminals if the government proves beyond a reasonable doubt that the defendant knowingly continued to possess an oil record book in navigable U.S. waters which did not accurately reflect its disposals were ever made.

The government's view, reflected in the supplemental instruction above, stands MARPOL on its head. MARPOL's mandate is "to continue to have; to keep in existence, or not allow to become less." That is what KRITON's crew did. And in preserving the ORB in its original form, it preserved important evidence of possible MARPOL violations on the high seas. The preservation rule served its purpose. Rather than stretch the meaning of "maintain" to a breaking point, the government should have referred its findings to the Bahamas, as MARPOL Article 6 and 33 U.S.C. §1908(f) provide.

F. Since "Maintained" Means "Keep," and the Crew Did So, There Was No Violation of APPS

1. The Connecticut APPS Charge and Count 2 of the New York Indictment

When the KRITON was in port in Connecticut, Coast Guard personnel examined the ship's ORB. Crew members gave it to them. TR:200-201; 206-207. There was no evidence that the crew failed to keep or preserve the document aboard and in a place

readily available for inspection. The same was true when KRITON was inspected in New York, at the time alleged in Count 2 of that indictment. TR:1311; 1317-1318. The government's evidence conclusively demonstrated that the ORB was "preserved" and "kept readily available for inspection" and therefore was "maintained" as the Coast Guard uses the term in its official oil record book.

Crewmembers may have broken other laws in presenting the ORB to the Coast Guard in New York and Connecticut, such as 18 U.S.C. §1001 or obstructing an official proceeding. But they did not fail to "maintain" the ORB and therefore there was no APPS violation.

2. The Remaining APPS Charges

Unlike the two counts above, there was no evidence that KRITON was inspected at the times or places of the other eleven APPS counts in Florida, New York and the Virgin Islands. No evidence suggested that at the times and places alleged, that the ORB was not kept aboard, not preserved or not readily available for inspection. To the contrary, when a legal issue arose about count 1 of the Florida indictment, government counsel argued that the ORB must have been aboard the ship.

> So they would have had that oil record book on board, which they were required to do, and would have maintained it when coming into port at Port Everglades, Florida on January 20, 2006.

TR:684. There is no evidence of a failure to "maintain" as that term should be read.

G. The Government's Effort to Penalize Conduct on the High Seas is Contrary to APPS and International Law.

Evidence showed that the discharges occurred outside U.S. waters. If the government's view that the word "maintain" imposed a requirement to "correct" the ORB entries before entering American waters prevails, the result would violate APPS and international law. 33 U.S.C. §1912 mandates, "Any action taken under this chapter shall be taken in accordance with international law." International law gives the flag state alone the right to set rules for its ships.

The United Nations Convention On The Law Of The Sea (UNCLOS), 21 I.L.M. 1245 (1982) is a binding restatement of customary international law.[18] *United States v. Alaska*, 503 U.S. 569, 588 n.10 (1992) ("The United States . . . has recognized that [the UNCLOS] baseline provisions reflect customary international law."). UNCLOS contains specific rules regarding jurisdiction to address maritime pollution. Article 216 (SPA:101):

> Laws and regulations adopted in accordance with this convention and applicable international rules and standards established through competent international organizations or diplomatic conference for the

[18] The effect of UNCLOS on prosecutions under APPS is an issue in the *Jho* case, pending in the Fifth Circuit. District court opinions reached differing results. *United States v. Kassian Mar. Navigation Agency*, 2007 U.S. Dist. LEXIS 56747 (M.D.Fl. 2007); *United States v. Petraia Mar., Ltd.*, 483 F. Supp. 2d 34 (D. Me. 2007); *United States v. Kun Yun Jho*, 465 F. Supp. 2d 618 (E.D. Tex. 2006).

> prevention, reduction and control of pollution of the marine environment by dumping shall be enforced:
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> (a) by the coastal state with regard to dumping within its territorial sea or its exclusive economic zone or onto its continental shelf;
>
> (b) by the flag state with regard to vessels flying its flag or vessels or aircraft of its registry. . .

The same principle is more generally stated in the Convention on the High Seas, Article 6(1),13 UST 2312; SPA:106. "Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas."

If the word "maintain" means that a crew is required to "correct" its ORB before crossing into U.S. waters, the effect is to impose American rules while the ship is outside our waters and in international seas. That the United States may not require; under APPS and international law, American authority ends where U.S. waters end.

International law and by operation of APPS, American law, places the power to direct crews' high seas conduct and the power to sanction them, in the hands of the flag state. Where, as in two instances here, members of the crew "present" a false record to the government, it may prosecute them for that conduct. But the word "maintain" does not allow the government to reach acts and omissions in international waters.

H. If "Maintain" Means "Correct the ORB before Entering U.S. Waters," then Due Process and the Rule of Lenity Require Reversal.

The government argued that it was not enough for the crew to keep and preserve the existing document in its original form. The government read "maintain" to require that omissions or false entries made outside U.S. waters must be corrected before the ship crosses into U.S. waters. CR:42, at 10. If the word "maintain" means something other than its common definition and more than the "keep and preserve" obligations of Regulation 20, then there is a clear lack of notice in the regulations and therefore a violation of due process. The government has long been on notice that a lack of clarity in its Coast Guard-MARPOL regulations is grounds for dismissal of criminal charges.

> The line to be drawn in this complex and comprehensive area of environmental protection was supposed to be drawn by an agency with expertise in the subject: it was incumbent on that agency to draw the line "in language that the common world will understand." *McBoyle v. United States*, 283 U.S. 25, 27, 75 L. Ed. 816, 51 S. Ct. 340 (1931).
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> In the face of uncertainty as to the meaning of what is forbidden, the rule of lenity requires dismissal . . . [Citations omitted.]

United States v. Apex Oil Co., 132 F.3d 1287, 1291 (9th Cir.1997). Although *Apex Oil* addressed a different regulation, the legal conclusion is equally applicable.

II. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH *RESPONDEAT SUPERIOR* CRIMINAL LIABILITY TO CONVICT IONIA

Ionia was charged on a *respondeat superior* theory of corporate criminal liability. Before analyzing the issues that warrant relief, we review the applicable law.

A. The Common Law of *Respondeat Superior* Criminal Liability

Almost one hundred years ago, the Supreme Court extended "only a step farther" the common law torts rule of *respondeat superior*, and held that a corporation may be held vicariously criminally liable for acts of its agents. *New York Central and Hudson River R.R. Co. v. United States*, 212 U.S. 481, 494 (1909).[19] In the years since, relatively few decisions construed that broadly stated proposition. There has been increasing criticism of it, including the voices of two former Attorneys General of the United States.[20]

Here, the indictments alleged only a *respondeat superior* theory of liability, *i.e.*, that Ionia's committed six crimes " . . . by and through the acts of its agents and employees, who were acting in the scope of their employment and for the benefit of

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[19] In addition to vicarious liability, a corporation may be criminally liable if it authorized illegal conduct, *United States v. Demauro*, 581 F.2d 50, 54 (2d Cir. 1978), ratified illegal conduct. *See, e.g.*, Note 2 to Eighth Circuit Pattern Instruction 5.03, available at http://www.juryinstructions.ca8.uscourts.gov/crim_manual_2008_expanded.pdf (last visited 4-18-08).

[20] Dick Thornburgh, *The Dangers of Over-Criminalization and the Need for Real Reform: the Dilemma of Artificial Entities and Artificial Crimes*, 44 Am. Crim. L. Rev. 1279 (2007); Edwin Meese III, *Closing Commentary on Corporate Criminality: Legal, Ethical, and Managerial Implications*, 44 Am. Crim. L. Rev. 1545

their employer . . .” .[21] There are three elements of *respondeat superior* criminal liability. (1) That a crime was committed by a person who was a managerial employee or agent of a corporation. (2) That the employee or agent was acting within his or her authorized scope of employment. (3) That the employee or agent acted with intent to benefit the company.

1. The Offending Agent Must be a Managerial Agent

In *United States v. Koppers Co.*, 652 F.2d 290, 298 (2d Cir.), *cert. denied*, 454 U.S. 1083 (1981), this Court upheld an instruction that a company was vicariously liable for the acts of managerial employees, and rejected appellant's argument that liability attached only to acts of "high managerial" employees.[22] This Court adhered to the requirement of a "managerial" employee in *United States v. Twentieth Century*

(2007).

[21] The Virgin Islands indictment alleged Ionia committed six violations in that way. A:44-5. Identical charging language is found in each count in each indictment. None contain language alleging corporate liability on another theory.

[22] "The court charged that a corporation could be held criminally liable for the acts of its managerial agents done on behalf of and to the benefit of the corporation and directly related to the performance of the duties the employee has authority to perform. . . . By a managerial agent I mean an officer of the corporation or an agent of the corporation having duties of such responsibility that his conduct may fairly be assumed to represent the corporation. Koppers would have us find that liability can only be extended to the action of 'high managerial agents,' meaning those 'having duties of such responsibility that (their) conduct may fairly be assumed to represent the policy of the corporation' (emphasis supplied). We decline the invitation. The standard for imputation of liability given by the court below is amply supported."

Fox Film Corp., 882 F.2d 656, 659 (2d Cir. 1989), *cert. denied,* 493 U.S. 1021 (1990).[23] *Koppers* and *Twentieth Century Fox* remain the law of this Circuit.[24]

Limiting criminal liability to acts of managerial personnel is consistent with and reinforced by the *Restatement Second, Torts* §909 and the *Restatement Third, Agency* §703,[25] and with decisions on punitive damages. To obtain punitive damages against a corporation, proof of managerial involvement or corporate complicity is required. *Fort v. White,* 530 F.2d 1113, 1116 (2d Cir. 1976); *Lake Shore & Michigan Southern R.R. Co. v. Prentice*, 147 U.S. 101, 114 (1893); and *Kolstad v. American Dental Association,* 527 U.S. 526, 542 -543 (1999).

The law of corporate punitive damages and the law of criminal liability are limbs of the same common law tree. Our nation's law on punitive damages protects a

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[23] The Court upheld a criminal contempt conviction. "Relying on the principle that a corporation is criminally liable for the conduct of its managerial employees acting within the scope of their authority, *see United States v. Koppers Co.*, 652 F.2d 290, 298 (2d Cir.), *cert. denied*, 454 U.S. 1083, 70 L.Ed.2d 617, 102 S.Ct. 639 (1981), Judge Palmieri also found Fox guilty of criminal contempt . . ."

[24] As recently as 2002, however, a Southern District of New York case included the requirement of a high managerial agent in its jury instructions. *United States v. Coleman Commercial Carrier, Inc.*, 2002 U.S. Dist. LEXIS 23155 (SDNY 2002). On the other hand, a 1946 decision of this Court, seems to be at the other extreme. *United States v. George F. Fish, Inc*., 154 F.2d 798, 801 (2d Cir. 1946).

[25] Comment (e) to §703, reads in part: "Thus, a tortious act committed by a nonmanagerial agent subjects a principal to liability for punitive damages only when the principal is itself implicated in the act, either by approving it before or after its commission, or by recklessly selecting or retaining the tortfeasor as an agent."

corporation against punitive, quasi-criminal awards, *Cooper Indus. v. Leatherman Tool Group,* 532 U.S. 424, 432 (2001), where the malefactor is not a managerial employee. At least that measure of protection is due in a criminal context, as in *Koppers* and *Twentieth Century Fox.*

In maritime cases, a vessel operator is not liable for punitive damages for the conduct of its crew, even its captain. *The Amiable Nancy,* 16 U.S. 546 (1818). With the exception of the Ninth Circuit,[26] *The Amiable Nancy* consistently has been applied in federal courts. *United States Steel Corp. v. Fuhrman,* 407 F.2d 1143, 1148 (6th Cir. 1969); *In re P&E Boat Rentals,* 872 F.2d 642, 652 (5th Cir. 1989); *CEH, Inc. v. F/V Seafarer,* 70 F.3d 694, 705 (1st Cir. 1995).

2. The Agent Must Act with Intent to Benefit the Corporation

A corporation is not vicariously liable unless the employee(s) who violated the law acted with intent to benefit the corporation. *United States v. Koppers Co.*, 652 F.2d at 298; *United States v. International Brotherhood of Teamsters,* 141 F.3d 405, 409 (2d Cir. 1998); *United States v. Demauro*, 581 F.2d at 54, n3; *FMC Corp. v. Boesky (In re Boesky Sec. Litig*.), 36 F.3d 255, 265 (2d Cir. 1994). Conversely, an employee's act that is contrary to the interests of an employer and done for personal

[26] The Ninth Circuit upheld punitive damages in the oil spill from the EXXON VALDEZ. The Supreme Court granted *certiorari*, and the matter is pending decision.

reasons does not create employer criminal liability. *Compare*, for example, *J.C.B. Supermarkets, Inc. v. United States*, 530 F.2d 1119 (2d Cir. 1976), and *United States v. International Brotherhood of Teamsters*, 141 F.3d 405, 409 (2d Cir. 1998). In the former, this Court upheld corporate liability for employee acts that unlawfully generated additional income for the company, albeit in a manner that violated company policy. In the latter, this Court concluded that no liability could attach to the union, for the acts of its agents were "unauthorized acts" that "directly harmed" the union.

Where, as here, employees who broke the law appear as government witnesses, establishing their intent is as simple as asking them about it. In *United States v. Steiner Plastics Mfg. Co., Inc.*, 231 F.2d 149, 151-2 (2d Cir. 1956), an employee testified that he proposed "a scheme" to the company's owner and president and that it was intended to permit the company to ship military aircraft parts that could not pass inspection. In *Steere Tank Lines, Inc. v. United States*, 330 F.2d 719, 721 (8th Cir. 1963), a company was prosecuted because its truck drivers falsified entries in government-required log books. The government called six drivers as witnesses, who testified that they were motivated by a desire to earn extra money and that "the extra hours were necessary in order for appellant to handle the business on hand with the available equipment and manpower."

In the present case, the government asked none of the employee/witnesses whether he acted with intent to benefit Ionia on the APPS counts. When asked about the obstruction counts, no witness said he acted for Ionia's benefit.

3. A Claim of Vicarious Liability May be Undercut by Proof that the Employee Intentionally Violated Company Policy and Knew the Company Would Not Tolerate It if Known

A corporation's efforts, intended to prevent its agents from violating company policy and the law, "does not immunize the corporation from liability . . .", *Twentieth Century Fox Film Corp.*, 882 F.2d at 860, but is relevant to liability.[27] Analytically, the Courts of Appeals are divided on whether compliance efforts bear on an employee's intent to benefit his employer[28] or whether the employee acted in the scope of employment[29] or both.[30] Here the trial court instructed that it went to both. TR:1750.

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[27] In *Twentieth* Century *Fox*, at 860, with little discussion, upheld exclusion of evidence of the company's compliance policies. On the other hand, in *Fort v. White*, 530 F.3d at 1117, this Court discussed the defendant's compliance efforts and relied upon it in concluding that the company was not liable for punitive damages.

[28] *United States v. Basic Constr. Co.*, 711 F.2d 570, 573 (4th Cir. 1983); *United States v. Beusch*, 596 F.2d 871, 878 (9th Cir. 1979).

[29] *United States v. Potter*, 463 F.3d 9, 42 (1st Cir. 2006).

[30] Eighth Circuit Pattern Instruction 5.03.

B. The Evidence was Insufficient to Convict Ionia on a *Respondeat Superior* Theory

1. Standard of Review

This Court views the evidence in the light most favorable to the government, to determine whether the jury might fairly have concluded guilt beyond a reasonable doubt. *United States v. Wexler,* ___ F.3d ___, 2008 U.S. APP: LEXIS 7065 (2d Cir. Apr. 3, 2008). Ionia moved for a judgment of acquittal at the end of the government's case. TR:1621, 1719. The Court reserved ruling until after the verdict and therefore only the evidence received during the government's case is weighed. Fed. R. Crim. P. 29(b). Defendant's written motion for judgment of acquittal or alternatively a new trial on all counts was timely made.[31] CR:176. The Court denied the motion. CR. 224; SPA:112-123. In its order, the court addressed the sufficiency of vicarious liability evidence on the APPS counts but did not address the remaining counts.

2. The Obstruction of Justice Count - Connecticut, Count 5

Five acts of obstruction were combined in Count 5 of the Connecticut indictment. Three of the acts were alleged to have been committed by second

[31] It argued, "a judgment of acquittal should be entered on all eighteen (18) counts as there was no evidence presented which established that the employees and/or agents of Ionia were specifically authorized to engage in the underlying conduct, nor were they acting for the benefit of Ionia or within the scope of their authority when they committed the crime upon which Ionia was charged and found guilty."

engineer Mercurio (items C-E) and two by chief engineer Renieris (items A-B). A:14.

a. Mercurio's Conduct was Intended for his Own Benefit and not Ionia

Mercurio plead guilty and testified for the government as part of his plea agreement. TR:1002-1004. Count 5 alleged that he told cadet Calubag, to make a false statement if questioned by the Coast Guard (allegation C), that he told three other crewmen, to do the same (allegation D), and he personally made a false statement (allegation E). On direct examination, Mercurio testified that he spoke with the other men, "For them not to tell the truth,"[32] TR:1089, and that he lied to the Coast Guard. TR:1101-1102. But did not do so for Ionia's benefit; rather he acted to keep the company from firing him.

> Q. And why did you tell oilers, Balena, Matugas and Lalu, not to tell the Coast Guard about the hose?
>
> A. Because I was afraid.
>
> * * *
>
> A. Yes, I was afraid. I was afraid that I was going to lose my job, that I was going to lose my license, I will not be able to support my family anymore, and I don't have a job.

[32] He also claimed that a few days later, Renieris asked him to silence Oiler Lalu, but Mercurio "didn't tell them anymore because I had already told them." TR:1096.

Any doubt that Mercurio acted solely for his own self-interest was put to rest on cross-examination. TR:1126:

> A. Yes, because I was afraid. I was afraid to lose my job, I was afraid to lose my license. I don't have any way to support my family anymore, I don't have a job.
>
> Q. So you lied to protect yourself; is that what you are saying?
>
> A. Yes, I lied to the Coast Guard, but at this time I am telling the truth.

Mercurio had good reason to be afraid; he knew Ionia would fire him immediately if it learned of his conduct. TR:1093.

> Q. And, in fact, Mr. Mercurio, if you or any other crewmember were caught breaking Ionia's rules, based on your training, you knew that you would be fired immediately on the spot, didn't you?
>
> A. Yes.
>
> Q. In fact, they would put you ashore wherever you were and you would be on your own to figure out how to get home, wouldn't they?
>
> A. Yes.

The record affirmatively demonstrates that Mercurio acted to conceal his earlier misconduct, to avoid being fired by Ionia. There is nothing in his testimony to suggest that he lied to the Coast Guard, or urged others to lie, for Ionia's benefit. He lied to Ionia's representatives as readily as he lied to the Coast Guard,[33] and for the

[33] Mercurio acknowledged that he lied to Ionia's superintendent (TR:1182) and Ionia's counsel (TR:1218) when they arrived at the ship. TR:1218.

same reason. The evidence cannot be read to support the "intent to benefit" element. While this Court must defer to the jury's choice of competing inferences that could be drawn from conflicting testimony, "specious inferences are not indulged." *United States v. Jones*, 393 F.3d 107, 111 (2d Cir. 2004).

b. No Evidence was Offered that Renieris Acted with Intent to Benefit Ionia in Cutting the "Magic Hose."

Two acts of obstruction were attributed to Renieris: destroying part of a hose used for discharging waste and instructing cadet Calubag to lie to the Coast Guard. The evidence on the former came only from Mercurio. It was confused at best, contrived at worst. Mercurio first claimed that he gave Renieris the hose at a time when Reinieris was accompanied by the fourth engineer. At some later time, Mercurio claimed, the fourth engineer made hand signs that Mercurio interpreted as meaning the hose had been cut up. TR:1083-1084. When asked a second time, Mercurio's story changed. This time he did not say the fourth engineer was present, and this time he said Renieris cut the hose in two in front of Merurio. Mercurio hid one half. TR:1085 -1086. Although Mercurio eventually "told all" to the Coast Guard, his "half" hose was not recovered. Neither Reinieris nor the fourth engineer testified. No one else gave testimony about the alleged cutting of the "magic hose."

If Renieris did cut the hose, there is no evidence that he acted to benefit Ionia. If he cut the hose, he likely acted to obstruct the investigation, but it is speculation to suggest that he acted to benefit Ionia rather than acting purely to protect himself, as Mercurio had acted.

c. No Evidence Suggested that Renieris Acted with Intent to Benefit Ionia in Allegedly Telling Calubag to Lie

The indictment alleged that Renieris "directed" cadet Calubag to lie to the Coast Guard. The evidence of whether there was any conversation between Renieris and Calubag was disputed by two witnesses.[34] If there was a conversation, Calubag's equivocal claim of what was said does not rise to obstruction, and there was no evidence that Renieris intended to benefit Ionia.

Calubag's native language was Visayan (TR:881), a Filipino dialect. At trial he testified through an interpreter. TR:851. Renieris was a native Greek, for whom English was not a first language. TR:880. The single, brief conversation at issue,

[34] According to Calubag, three people were present at the time of the asserted conversation, Reinieris, himself and the fitter. TR:884. The fitter, Romeo Arquio, testified that he did not see Renieris and Calubag at the place where Calubag said they talked, and did not hear any conversation of the sort claimed by Calubag. He said he had never seen Renieris in the crew's quarters where Calubag said they spoke. TR:1626-1627.

however, was in English. After acknowledging the language barriers, Calubag was asked to repeat to the jury in English exactly what was said by Renieris.

> Q. Can you please tell the jury in English exactly how this discussion happened. Tell them the words the chief engineer said and tell them what you said in response in English.
>
> A. (English) Oily water separator.
>
> Q. That's the whole discussion?
>
> A. Yes, sir, because I just peeked into the TV room, when I got in there, he was there. That's what he told me.

TR:862. On redirect, Calubag offered that from the cryptic comment, "I understood it, he wanted me -- for me to say that the separator is the only thing that is used for pumping the bilges." TR:964. The witness' understanding of a cryptic comment tells us nothing about what the speaker intended, and less about a possible intent to benefit Ionia.

3. The Sarbanes-Oxley Fabrication Counts

Ships managed by Ionia were required, by an earlier court order, to send an environmental checklist to its outside auditor when entering a U.S. port. The auditor forwarded it to the Coast Guard. The checklist included an affirmation that the oil record book was accurate. Government Exhibit 12. The Coast Guard's receipt of the form was charged as a violation of 18 U.S.C. §1519 in the New York and Florida inictments. Two witnesses testified about those counts.

Lt. Kevin McDonald testified that, among numerous other duties, he was a "steward for the environmental compliance program." TR:163. "We receive environmental compliance things" including checklists. *Id.* On receipt they were examined cursorily and filed away. ". . . it's an extremely simple collateral duty. We receive in this case these checklists, look at them, and then put them into a file that we maintain in our office." TR:169. "I mean I put stuff in them, in there, but the only time I've ever taken it out and brought it anywhere is because of being called here." TR:170. Government Exhibit 13A was a checklist received before the ship arrived in New York in March 2006. TR:167. The witness found it in a file, although it arrived before he became a "steward." TR:169. Exhibit 13B was the same form for the ship's Florida arrival, in January 2006. The witness did not see it when it arrived. TR:171-172. Nor did the witness rely on the forms or use the forms. TR:178. He did not testify that anyone else used them or relied upon them.

A second witness was the president of the auditing company. He said that Ionia was a client, and that when his company received checklists from a ship, they were forwarded to the Coast Guard. TR:181-190. The government argued to the jury that if the oil record book aboard the KRITON contained false entries, then perforce the checklist was false, and §1519 was violated by Ionia <u>without more</u>.

> Here is where it's false. Under oil record book, question two. Question: With respect to the oil record book, all entries completed correctly and

> truthfully? Circled, yes, and signed by Chief Engineer Katsaneris. Correct, signed by Chief Engineer Katsaneris. Right here. Who does he work for? The defendant. He is an agent of the company, and that's what makes the company liable. And he submitted this at a time when he well knew that these entries had not been completed truthfully or accurately.

TR:1816-1817. The government did not argue that an employee acted to benefit Ionia; it could not because it offered no testimony to support an argument. It argued, "That's false, and he knew it. That's the offense." TR:1817. It overlooked the requirement of proving "intent to benefit".

4. The APPS Counts

The evidence was sufficient for the jury to conclude that crewmen engaged in "exceptional discharges" while "far out into the sea" and failed to record them in the KRITON's oil record book. But the evidence was insufficient to show that in failing to record a discharge, the crewmen intended to benefit Ionia. To the contrary, crew witnesses acknowledged that they knew their conduct was improper, that they received training, before and after going aboard from Ionia on its policies forbidding such conduct, that Ionia had a "zero tolerance policy," and that if Ionia learned of their conduct, it would result in their immediate discharge.

Before trial the government said that the intended benefit to Ionia was in "avoiding equipment maintenance" and in avoiding "collecting, storing, and processing oily wastes and then properly off-loading and disposing of these wastes . . .

in port." CR:44, at 10. No crewman said he intended either benefit (or any other), and the government's expert witness on waste management proved the negative.

Eleven men worked in the engine room: a chief, second, third and fourth engineers, three oilers, a wiper, a fitter, an electrician and a cadet. TR:1003-4. Of them four were government witnesses.

Ricky Lalu was an "oiler" in the engine room, TR:448, and described his duty as measuring fluids in various holding tanks aboard the ship. TR:450. He wrote these "soundings" on a piece of paper and gave them to the chief engineer. He did not know what was done with the paper. TR:476. When he came aboard, the man he replaced showed him how to use the "magic hose," and thereafter he used it "many times" when asked by the second engineer. TR:452-454, 501, 525. He identified a number of voyages on which he was not asked to discharge waste improperly, TR:507-510, others where he was asked, TR:510, and some where he had no personal knowledge but believed other crewmen discharged waste. *Id.* He heard the second engineer tell others to hook up the hose. TR:479.

Most of his direct examination focused on when, where and how discharges were accomplished. The government did not ask the purpose served or who benefited from the activity.

During cross examination Lalu acknowledged that the waste processing

equipment was in proper working order and that it was the second engineer's responsibility to run it. TR:531-535, 556. He knew that even if the equipment broke down, the ship was designed with abundant space for waste storage. TR:549. And when asked on cross why the discharges occurred, he said he did not know. TR:556.

The Coast Guard confirmed that the ship's equipment was in order, that it met international standards, had abundant waste storage capacity and that the engine room's "overall condition was very clean for the age of the ship, very neat and orderly." TR:270, 291, 297, 379-383, 1651. And the government's expert confirmed, "The oily water separator would have been capable of handling any amount of water generated on the ship as oily waste, provided there was no chemical contamination." TR:1556. (There was no evidence of chemical contamination.)

Lalu gave the chief engineer false "soundings," knowing the chief would rely on what he received. TR:536-537. He never told the chief engineer about improper discharges (TR:540) or about the "magic" hose. TR:547. Lalu knew his conduct violated both law and company rules. He studied MARPOL in college and gave him an additional week's training on MARPOL and company policies before he sailed. TR:543, 560-561. He knew Ionia had "a zero tolerance policy for discharges directly to the sea." TR:547. Ionia required, and he signed a written promise to follow its policies. TR:561, Defense Exhibit 33. He knew, if Ionia became aware of his conduct,

he would be fired. TR:546, 554. He knew too that Ionia policy required him to report violations, TR:573, yet when questioned, he lied to authorities, to an Ionia superintendent and to Ionia's lawyer. TR:564-565, 573.

Elmer Senolay was a "wiper" and earlier served as a cadet aboard KRITON. TR:601-602. He participated in improper discharges to the sea. TR:607-611, 617, 637-8. On direct examination, he was not asked why that happened and he offered nothing that bore on intent to benefit. During cross examination, Senolay acknowledged that he had MARPOL training before he applied to work for Ionia, TR:648, Defense Exhibit 19, an additional week of MARPOL training ashore from Ionia, TR:649, Defense Exhibit 20, and training on Ionia's environmental policies TR:651-2. Aboard ship there was weekly MARPOL training. TR:661. He too signed a written commitment to follow policy, TR:658 -60, Defense Exhibit 24, and knew Ionia required him to report any MARPOL violation. TR:653-4, 660.

Senolay said he acted at Mercurio's direction, and that Mercurio was "sometimes" lazy. Although Senolay realized what was done was against company policy, he did not report the misconduct because he was afraid of Mercurio. TR:669. Later he said that Mercurio could have sent him home, but he also acknowledged that the company provided ways in which he could report and be protected. TR:708, 719. When the Coast Guard began asking questions, Senolay lied to them, for he feared

losing his job. TR:679. He also lied in his appearance before the grand jury. TR:713.

Dario Calubag's testimony was similar in all respects. TR:851-942, 945-982. He was trained in MARPOL's requirements and the company's environmental policies, TR:852, 904, 909, 911-3, and signed the same promise to comply with them. TR:908. Calubag participated in the discharges because Mercurio told him to do so. TR:927. During the investigation, he lied to the Coast Guard, TR:947, and to the grand jury. TR:892. The only questions he was asked about his intent related to the lies he told. He said that he lied to protect other crewmen. TR:894, 973. He mentioned nothing about trying to protect or help the company.

The final crewman called by the government was codefendant-turned-witness Edgardo Mercurio. From the time the Coast Guard came aboard the ship in New Haven to the time of trial, he told "many, many different stories." TR:1210. Mercurio claimed at trial that it was not he who ordered improper discharges (as Senolay and Lalu testified) but the chief engineer. TR:1021-2, 1038, 1045.

He knew he acted contrary to company policies, TR:1128, and he knew the penalty for that was immediate termination. TR:1193. Mercurio's only comment regarding a benefit of improperly discharging bilge water, rather than using the ship's pollution control equipment, was that his job would be a "little bit easier" if he did not have to clean or maintain the equipment. TR:1227-8. If there is any inference to be

drawn, coupling that statement and Senolay's statement that Mercuio was "sometimes" lazy, an inference can be drawn that Mercurio found it easier to violate policy than follow it, but that does not support an inference of intent to benefit Ionia.

No crewman was asked directly if he intended to benefit Ionia, or if he perceived any benefit to Ionia. None testified to intending to benefit Ionia or of any benefit to Ionia that he perceived. Each was trained on and agreed to follow Ionia's policies, prohibiting what he did, and each acknowledged knowing the penalty for breaching Ionia's trust was termination.

In the government's rebuttal closing argument, TR:1874, it addressed the element for the only time, by a metaphor:

> Well, when you think about it, it's clear. The equipment, if it's never used, is always inspection ready. It's like a pair of new shoes that you buy and you put on and you place in your closet. And any time if you have a special occasion, like an inspection, you break them out and everything is good to go.

The difficulty is that not one of the crewmen said that was why he did it.

In denying Ionia's post-trial motion, the Court addressed sufficiency of intent to benefit on the APPS counts:

> The Government also presented evidence from which one could infer that these employees were acting, with an intent to benefit Ionia. The jury could reasonably have concluded that the crew participated in the pumpouts and records falsification with the intention of, for example, (1) following orders and maintaining the chain of command aboard the KRITON; (2) saving Ionia the time and expense of properly maintaining

> and using the oil pollution prevention equipment; and (3) enabling the KRITON to continue to dock at U.S. ports despite having false records.

CR:264 at 11; SPA:117. As in *United States v. Temple*, 447 F.3d 130, 140 (2d Cir.), *cert. denied*, 127 S.Ct. 495 (2006), we submit the trial court's finding was "founded largely in speculation."

First, the Court's three "could be" examples were speculation, for no witness said, intimated or was asked if he acted to save Ionia time or money by not using the ship's equipment for waste disposal. Second, nothing in the record suggests that there would have been additional cost to the company from using the equipment or a cost savings from not using it. The government's expert said that the oil water separator required routine maintenance at three month intervals, TR:1427, and the incinerator at weekly intervals. TR:1434-1435. When asked about retaining wastes for proper disposal in port, the expert said that doing so would not delay the ship and that he did not know what cost there might be. TR:1556. Third, the crew was paid by the month (including a fixed amount for overtime), not by the hour worked. TR:448. So whether the crew spent time maintaining the equipment or watching movies, Ionia's costs were the same. Only Mercurio stood to benefit, by taking a prohibited shortcut, he made his job "a little easier." Fourth, as the court observed, in reviewing proposed government exhibits, Ionia was paid a fixed management fee of $8,000 per month plus reimbursements by the ship's owner. TR:1347. So how would Ionia save or lose

money on maintenance? If an inference of cost savings to Ionia is to support the weight of thirteen felony convictions, there must be something in the record to bear the load. It isn't there.

Nor is there evidence to infer that the crew acted with "the intention of . . . enabling the KRITON to continue to dock at U.S. ports despite having false records." No one said that or suggested that was his intent. No one suggested that the crew was aware that keeping a true record would keep the ship from docking or conversely that the ORB was false that would have prevented the ship from docking.[35] The same is true of the hypothetical possibility that the crew acted with intent to benefit Ionia by "following orders and maintaining the chain of command aboard the KRITON." At the top of the chain was Ionia. Each crewman/witness said that he knew what company orders were, that he signed a commitment to follow them and disobeyed them knowing that the penalty was immediate termination. If anything, the crew's actions were contrary to maintaining a chain of command.

No crewman said he acted for any of the purposes the trial court hypothesized. The record shows each acted contrary to orders and in a manner that directly harmed

[35] On the government's theory, if the crew recorded "exceptional discharges" in the oil record book, there would have been nothing the government could do but send a report to the flag state. Similarly, if the crew reported discharges to the company, as company policy required, the Bahamas allows an internal audit to effectively correct any false entries made. BMA Information Bulletin No. 84 Rev.1, ¶ 14; SPA:100.

Ionia. The evidence is insufficient for the same reasons as in *United States v. International Brotherhood of Teamsters,* 141 F.3d 405, 409. Ionia was, as the union was, a victim of its employees, who intentionally acted in a manner that they knew their employer prohibited on pain of dismissal, and in a manner that they knew was harmful to their employer.

C. The Evidence was Insufficient on all Counts, for under the Rule of *Amiable Nancy*, Ionia is Not Liable to Punishment for the Misconduct of the Crew

Vicarious criminal and civil liability stem from the same common law base, discussed in Section II.A.1., above. Based upon the rule of *Amiable Nancy,* Ionia should not be held liable. Where as here, the penalties to a vessel operator are more severe than puntive damages, the same protection should be afforded Ionia.

D. If there was Sufficient Evidence for Any Count, a New Trial Should be Ordered because of Jury Instruction Plain Errors on Vicarious Liability

There were errors in the court's instructions on corporate liability, each of which and in combination, require a new trial. Review of this issue is for plain error.

1. The Instructions Allowed the Jury to Convict without Finding that the Employees Acted with "Intent to Benefit"

As noted in Section II.A., corporate vicarious liability requires proof that the employee was acting within the scope of his employment and acted with "intent to benefit." The government acknowledged that these are separate and required

elements.[36] But an instruction combined them, allowing the jury to convict if an employee acted within the scope but without intent to benefit. TR:1749:

> You must find that the government has proven beyond a reasonable doubt that acts attributable to Ionia were acts or omissions of its agents performed "within the scope of their employment" with Ionia as I will now define that term.
>
> [1]An act or omission that was specifically authorized by the corporation would be within the scope of an agent's employment. [2]Even if the act or omission was not specifically authorized, it may still be within the scope of an agent's employment if, one, the agent acted for the benefit of the corporation, and two, the agent was acting within his authority. (Emphasis added.)

This instruction permitted the jury to convict if it agreed a violation was (1) "specifically authorized" or (2) was within the scope of employment and was done with intent to benefit. That instruction was erroneous as the case was charged, and constructively amended the indictments.

The first alternative basis "to convict, *i.e.*, that Ionia "specifically authorized" illegal conduct, permitted conviction on a liability theory not charged in any of the four indictments and allowed the jury to convict without finding "intent to benefit." The government's argument invited the jury to convict on the first alternative. TR:1797.

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[36] "Defendant is correct in noting that there is a two part test for determining the criminal responsibility of a corporation for the actions of its employees. First, the employee must be acting within the scope of his authority. Second, the employee must

> Part of the burden of the government's proof is to show you that these defendants were acting within the scope of their employment. And as the Judge instructed you, and you can go back and read on page 19 of your instruction, any act that is committed by these agents that is specifically authorized by the company is, as a matter of law, within the scope of their employment.
>
> * * *
>
> . . . the engine room crewmembers were following the orders of their superiors, and if you were to find that, as a matter of law you must find that they were acting in the scope of their employment.

The government tracked the instruction and expressly said if the jury found "authorization," as a matter of law that the conduct was imputed to Ionia. If the jury, based on the instruction and argument, agreed that alternative one was proven, the intent to benefit would be pretermitted. As "intent to benefit" was an element charged in each count, it could not be removed from the jury's consideration by constructive amendment.

Whether there was a constructive amendment is reviewed *de novo* by this Court. *United States v. Wallace*, 59 F.3d 333, 336 (2d Cir. 1995). Where a constructive amendment occurs, it "broadens the basis of conviction beyond that charged in the indictment" and is "a *per se* violation of the grand jury clause of the Fifth Amendment." *United States v. Patino*, 962 F.2d 263, 265 (2d Cir.) *cert. denied*, 506 U.S. 927 (1992); *United States v. Weiss*, 752 F.2d 777, 787 (2d Cir.), *cert. denied*, 474

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be acting, at least in part, to benefit the corporation." CR:188, at 10.

U.S. 944 (1985) ("A defendant is deprived of his right to be tried only on the charges returned by a grand jury if the prosecution's proof or theory constitute a modification at trial of an essential element of the offense charged."); *United States v. Helmsley*, 941 F.2d 71, 89 (2d Cir. 1991). It requires reversal if it affects an element of the offense. *United States v. Roshko*, 969 F.2d 1, 5 (2d Cir. 1992).

"If the court, through its instructions and facts it permits in evidence, allows proof of an essential element of a crime on an alternative basis permitted by the statute but not charged in the indictment, per se reversal is required. *Stirone v. United States*, 361 U.S. 212, 215-219 (1960)." *United States v. Slovacek*, 867 F.2d 842, 847 (5th Cir.1989). In *United States v. Milstein*, 401 F.3d 53, 65 (2d Cir. 2005), the Court noted that there were twenty-one ways in which the relevant statute could be violated but only one was charged. It found a constructive amendment in instructions and evidence that permitted a second manner of violation to be considered by the jury, and it vacated the conviction on the count.

The government was entitled to charge and could have charged Ionia with alternative bases for corporate liability. It charged only one, and having made that choice, it was plain error to permit the jury an alternate basis to convict, particularly a basis that did not require proof of an element the government asckowledged was

necessary. Adding the alternative theory and allowing conviction without proof of intent to benefit is clear and substantial error and should be viewed as plain error.

2. The Instructions Omitted the Requirement that the Employee Must be Managerial

This Court has ruled that vicarious criminal liability attaches to acts of managerial employees. The jury instructions, however, did not contain that element; they told the jury it need only find a criminal actor was a corporate agent. TR: 1742, 1747-50. This Court's earlier decisions make the error clear and prejudice is found in the government's express argument that <u>every</u> crewman's conduct made Ionia criminally liable. TR:1795:

> So when we refer to the term "agents" in this case, it's the entire crew of the engine room during the entire period of time that's relevant to the indictments in this case. So it's all the chief engineers, all the second engineers, third engineers, fourth engineers. And the rest of the engine room crew were the unlicensed members of the crew, that is, the oilers, the wipers, the fitters and the cadets. All of those gentlemen are agents of the defendant, and all of their actions can bind the defendant in this case and make the defendant criminally liable based upon their actions.

The instructions allowed, and the government's argument invited, the jury to convict for acts of non-managerial employees. That is plainly contrary to this Circuit's law.

III. THE TRIAL COURT'S INSTRUCTIONS ON THE §1519 COUNTS CONSTRUCTIVELY AMENDED THE INDICTMENT BY BROADENING THE BASES UPON WHICH THE DEFENDANT COULD BE CONVICTED

A. <u>The Instructions Constructively Amended the Indictment</u>

Three of the indictments contained charges brought under 18 U.S.C. §1519. Count 4 of the New York and Florida indictments alleged "falsification" of an environmental checklist. Both alleged that the checklist " . . .was falsified and contained materially false assertions and entries . . ." (Emphasis added.) Although the trial court recognized that those two indictments (unlike the Connecticut indictment, count 3), alleged materiality, TR:1752, its "to convict" instruction omitted that requirement.[37] In consequence, the jury was permitted to convict upon an omission in the ORB that may have been less than material. Second, the instructions permitted the jury to convict on alternative ways of violating the statute that were not charged in the indictments. Review is for plain error.

B. Eliminating Materiality from the Elements was Prejudicial Error

The only testimony about the government's use or consideration of the

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[37] TR:1753:

> In order for you to convict the defendant on these counts, the government must prove beyond a reasonable doubt two elements:
>
> First, that Ionia, through its agents, knowingly altered, destroyed, mutilated, concealed, covered up, falsified, or made false entries in records, documents and tangible objects;
>
> And second, that Ionia, through its agents, acted with the intent to impede, obstruct or influence the investigation or proper administration of any matter within the jurisdiction of a department or agency of the United States.

checklists was Lt. Kevin McDonald's, discussed at page 32. Given that all he did was cursorily examine and file the form, and given the absence of testimony showing how it may have affected the Coast Guard, a jury well may have viewed the alleged false statements as less than material. "Materiality" when used in false statements cases means the statement must have "a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed." *Kungys v. United States*, 485 U.S. 759, 770 (1988); *United States v. Whab*, 355 F.3d 155, 163 (2d Cir. 2004). "To be 'material' means to have probative weight, *i.e*., reasonably likely to influence the tribunal in making a determination required to be made." *United States v. Rigas*, 490 F.3d 208, 234 (2d Cir. 2007). No witness was asked how this allegedly false checklist might have influenced the U.S. Coast Guard.

As in *United States v. Gaudin*, 515 U.S. 506, 522-523 (1995), the Constitution gave Ionia "the right to have a jury determine, beyond a reasonable doubt, [its] guilt of every element of the crime with which [it was] charged." Omitting materiality from the "to convict" charge broadened the indictment, allowing conviction for "false assertions and entries" that the jury may not have considered material. For the same reason, the flawed instruction violated the Sixth Amendment right to have a jury determine all of the charged elements of an offense. *Id.*

The error was plain because the trial court recognized that the Florida and New

York indictments alleged materiality, yet failed to instruct that its proof was required. After *Gaudin* and *Johnson v. United States*, 520 U.S. 461. 467 (1991), omitting materiality in jury instructions, where the element is charged in the indictment, is plain error. And, unlike *Johnson,* 520 U.S. at 470, the evidence of materiality here was not "overwhelming." These two §1519 counts should be remanded for a new trial.

IV. ALL COUNTS INVOLVED CONCEALMENT OF IMPROPER DISCHARGES, FROM THE SAME SHIP, IN THE SAME MANNER AND THROUGH THE TIME CHARGED IN THE CONSPIRACY; THE DISTRICT COURT ERRED IN FAILING TO "GROUP" THEM UNDER §3D1.2(b)-(d).

A. The District Court's Decision About the Guidelines' Limited Role; the Finding of 7 "Groups" and Defense Objections

Under the organizational Guidelines, a district court determines a fine by calculating an adjusted offense level and applying grouping rules to the crimes, U.S.S.G. §8C2.3. That result is a second, and often higher, calculated offense level. The second offense level is used to find a corresponding amount from the fine table in §8C2.4. That amount is multiplied by a culpability "multiplier" from §§8C2.5-2.6, producing the guidelines fine. That is the last step. There is no additional multiplication by the number of counts or "groups" of crimes; that is accounted for in the first step, when the offense level is determined and §3D.1.2's "grouping" rules are applied.

Here, the parties, the Probation Office, and the court took differing positions on whether the eighteen counts "grouped" under §3D1.2 and whether, after grouping produced the total offense level, the fine could be multiplied *again* by the number of counts or groups. Probation initially urged that §§8C2.2-2.9 applied, and that all counts grouped.

The government argued that §8C2.10's cross-reference to 18 U.S.C. §§3553 and 3572 alone applied, and the rest of the Guidelines, including grouping (§3D1.2) and the fine table (§8C.2.4), did not. CR:199, at 26-27; A:147-48. The defense argued that §§8C2.2-2.9 applied and that under §3D1.2 all counts belonged in one group. CR:198, at 16, 18-22; A:108, 110-14. The defense noted that the sentencing statute, §3553, required the court to give the Guidelines "due regard." CR:198, at 16: A:108 (citing §3553(b)(1)).

Without objection, the court calculated an offense level of 16. The presumptive fine for level 16 was $175,000 (per §8C2.4's fine table), and the court chose a culpability multiplier of 4 (from a range of 2-4) (per §§8C2.5-2.6). That brought the calculated fine to $700,000. ST:73; A:192. That too was without objection.

Thereafter, the court concluded that there were seven groups – one for each of the four statues of conviction in the Connecticut indictment and one for each of the other three indictments (without regard to the number of different statutes of

conviction in each). ST:72; A:191. Instead of using its grouping calculation to increase the calculated offense level, per §§3D1.3-1.4, the court multiplied the calculated fine by the number of groups. The effect was to increase the fine from $700,000 to $4.9 million. ST:72-73; A:191-2.

The district court did not resolve objections to its grouping calculations or resolve the Guidelines issues upon which the objections rested, because the guidelines have only "an advisory role." ST:50.

B. Standard of Review

This Court reviews a trial court's interpretation of the Sentencing Guidelines *de novo*, and reviews its findings of fact for clear error. *United States v. Rubenstein*, 403 F.3d 93, 99 (2d Cir.), *cert. denied*, 546 U.S. 876 (2005). The grouping decisions therefore should be reviewed *de novo*. Given the additional rule, "if a sentencing judge committed a procedural error by selecting a sentence in violation of applicable law, and that error is not harmless and is properly preserved . . . for review . . . , the sentence will not be found reasonable," the grouping errors here render Ionia's sentence procedurally unreasonable. *United States v. Juwa*, 508 F.3d 694, 698 (2d Cir. 2007).

C. The District Court Erred in Rejecting the Grouping Guidelines

The district court said §8C2.10 made the Guidelines advisory. That was

essentially correct,[38] giving them the same force as any other post-*Booker*[39] Guideline.[40] But the district court erred in rejecting challenges to its "grouping" decision on that ground. Even under advisory Guidelines a district court must calculate the Guidelines range correctly, as a first step in deciding a sentence. *Rita v. United States*, ___ U.S. ___, 127 S.Ct. 2456 (2007).[41] Its error in failing to start there renders the sentence procedurally unreasonable. *Juwa*, 508 F.3d at 698.

D. The District Court Erred in Failing to Group All Crimes Which Involved Concealment From and Deception of the Same Agency, Which Concerned the Same Sort of Waste Discharges, from the Same Ship, Over the Same Time Period

The district court arrived at the wrong number, in counting seven 7 groups: "four distinct offenses in the Connecticut indictment, and one category from [each of]

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[38] §8C2.1 says that §§8C2.2-2.9 apply to offenses with Guidelines listed in §8C2.1(a)-(b), and the offenses of conviction are not listed there. But §8C2.10 then states that in this circumstance, 18 U.S.C. §§3553 and 3572 apply directly. §3553(b)(1) in turn requires a court to give "due regard" to sentences the Guidelines would provide for like offenses.

[39] *United States v. Booker*, 543 U.S. 220 (2005).

[40] *See United States v. Electrodyne Sys. Corp.*, 28 F. Supp.2d 213, 281 & nn.117, 122 (D.N.J. 1998) (applying § 8C2.10 by considering both its cross-reference to §§3553 and 3557, and also to Guideline §8C2.8), *rev'd in part on other grounds*, 188 F.3d 190 (3d Cir. 1999).

[41] *United States v. Cutler*, 520 F.3d136,155 (2d Cir. 2008). ("Because '3553(a) explicitly directs sentencing courts to consider the Guidelines,' district courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process") (quoting *United States v. Gall*, ___ U.S. ___, 128 S.Ct. 586, 597

the other three districts." ST:72. It multiplied the fine amount by both a culpability factor of 4 and then by 7 for the number of "groups." ST:73.

In the Connecticut indictment, there were crimes of conspiracy, APPS, falsification of records and obstruction. Although each offense was part of an effort to conceal the crew's improper discharges, by failing to make log entries, submitting false records and lying about conduct at issue, the court made each of the four statues violated in Connecticut a separate "group." The other three indictments charged the same violations, except conspiracy and §1505 obstruction, yet the court grouped them by district, instead.

1. Under §3D1.2(b) there was One Group

Under §3D1.2(b), counts "group" when they "involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part or a common scheme or plan." During trial, the court ruled that all of KRITON's ORB deficiencies within the conspiracy period, and some up to two years before it, formed part of the same scheme. On that basis it ruled that acts earlier than the conspiracy period were "inextricably intertwined" with the charged crimes and a continuing pattern of illegal activity (and hence admissible over a Rule 404(b)

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n.6 (2007)).

challenge).[42] In contrast, in connection with its grouping calculations, the court did not state any findings about common criminal objectives or schemes.

The court's mid-trial finding that prior acts were inextricably intertwined in a single, continuing pattern of illegal activity is consistent with the Guidelines rule that conspiracy to commit substantive offenses must generally be "grouped" with the substantive offenses. §3D1.2 Commentary app. n.4. [43]

Indeed, the conclusion that all counts "involve substantially the same harm" – §3D1.2's first prerequisite to grouping – follows inescapably from the district court's acknowledgment (at the charge conference) that the APPS and §1519 counts were virtually identical. CT:6-8.

The only other prerequisite to grouping under §3D1.2(b) is involvement of the

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[42] The government offered proof of similar conduct from as early as 2004. The defense objected, because the conspiracy was charged from January 2006 to April 2007 and because the earlier acts were not admissible under Fed. R. Evid 404(b). The court admitted evidence of prior acts as an "intrinsic" part of all the charged crimes in all the different indictments or "inextricably intertwined" with them. TR:942-943 (citing *United States v. Barnes*, 49 F.3d 1144, 1149 (6th Cir. 1995) ("When the other crimes or wrongs occurred at different times and under different circumstances from the offense charged, the deeds are termed 'extrinsic.' 'Intrinsic' acts, on the other hand, are those that are part of a *single criminal episode*. Rule 404(b) is not implicated when the other crimes or wrongs evidence is part of a *continuing pattern of illegal activity*.") (emphasis added). TR:1064.

[43] "When one count charges a conspiracy or solicitation and the other charges a substantive offense that was the sole object of the conspiracy or solicitation, the counts will be grouped together under subsection (b)." §3D1.2 app. n. 4.

same victim. Whether the victim of these recordkeeping crimes is considered the public or the Coast Guard, the victim is the same for all counts. *E.g.*, §3D1.2 Commentary app. n.2 (for offenses with no identifiable victim, the victim is the societal interest harmed); *United States v. Stephenson*, 921 F.2d 438, 441-42 (2d Cir. 1990) (false statements, §1001, count, groups with extortion and bribery counts about which the false statements were made); *United States v. Bradach*, 949 F.2d 1461, 1464-65 (7th Cir. 1991) (proper to group subornation of perjury, conspiracy to commit same, and make false declarations under oath).

2. Obstruction Groups With the Other Counts Under §3D1.2(c)

Even if for some reason obstruction does not group with the other charges under §3D1.2(b), it certainly groups with them under §3D1.2(c). Under that Guideline, "When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the count," it "groups" with that other count under §3D1.2(c). The application notes explicitly provide the example of "obstruction offense . . . and an underlying offense" grouping under this rule. Section 3C1.1 cmt. n. 8.[44]

In fact, the district court increased by two points its calculated offense level on

[44] *See United States v. Fiore*, 381 F.3d 89, 92-93 (2d Cir. 2004); *United States v. Jones*, 900 F.2d 512, 518 (2d Cir.), *cert. denied*, 498 U.S. 846 (1990).

the §1505 count for the large number of documents involved.[45] The only way the number of documents could be characterized as large is if documents from other counts and other indictments were included. Again, this implicates the §3D1.2(c) rule that when one count can increase the score on another count, then those counts group.

3. All Counts Group Under §3D1.2(d)

Another grouping rule, §3D1.2(d), provides for treating all counts as one group ". . . when the offense level is determined largely on the basis of the total amount of harm or loss . . . or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior." Its application note 6 provides this example: "The defendant is convicted of three counts of discharging toxic substances from a single facility. The courts are to be grouped together." §3D1.2(d) app. n.6, Example 7. While the analogy is not perfect because the crimes here involved concealment concerning discharges rather than actual discharges, the principle that counts group if their conduct is related and continuous still applies. *See United States v. Mizrachi*, 48 F.3d 651 (2d Cir. 1995) (grouping arson, mail fraud and

[45] The court ruled that the base offense level for the §1505 count, per §2J1.2, was 14, and added two levels for altering a substantial number of records, per §2J1.2(b)(3), for a total offense level of 16. The defense timely objected – on the grounds that it was incorrect factually and represented double counting. ST:16. The court overruled the objection. ST:19.

money laundering offenses involving same plan to buy building, destroy it, conceal destruction, and profit from it); *United States v. Buenrostro-Torres,* 24 F.3d 1173 (9th Cir. 1994) (district court should have grouped possession of false immigration documents and equipment with possession of other counterfeit cards under this continuity Guideline).

4. The Only Way to Make the District Court's Findings Consistent is to Group Together All Counts

The district court did group together all offenses in the indictments from the other three districts. It treated the Florida counts as one group (three APPS counts and a §1519 count). It treated New York counts as one group (three APPS counts and a §1519 count). And it grouped all six APPS counts from the Virgin Islands indictment. Those violations occurred on six different days spanning seven months, so we know that the fact that these related crimes occurred at irregular intervals over many months did not cause the court to believe they were dissimilar. There is no logical or legal reason to treat grouping of the New York and Florida indictments differently than the Connecticut indictment. And if the multiple concealment crimes group within each indictment, then the indictments should be grouped together, for grouping applies to

crimes charged in separate indictments, if they are related.[46]

E. The Error Cannot Be Deemed Harmless, Despite the Government's Argument that the Guidelines Do Not Apply at All

The Guidelines errors mattered. If the crimes were treated as a single group, as we believe, the Guidelines calculated fine would have been $700,000 rather than $4.9 million. The errors in grouping and remultiplying by the number of groups made a huge difference. Absent some indication that the district court would have imposed the same sentence if its Guidelines calculations were correct, the error cannot be harmless.[47]

V. THE DISTRICT COURT'S CONSIDERATION OF DISPUTED ALLEGATIONS, WITHOUT RULE 32(i)(3) FACTFINDING, REQUIRES RESENTENCING

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[46] *United States v. Griggs*, 47 F.3d 827, 832 (6th Cir. 1995) (§3D1.4 grouping can apply to multiple counts in separate indictments).

[47] *United States v. Selioutsky*, 409 F.3d 114, 118 n.7 (2d Cir. 2005) (sentencing error would be harmless if there was "a sufficient basis for believing that the same sentence would have been imposed as a non-Guidelines sentence"). *See also United States v. Elefant*, 999 F.2d 674, 678 (2d Cir. 1993) (district court applied enhancement over defendant's objection and then departed below the range that would have applied absent the enhancement; even "a [downward] departure does not insulate an error in the calculation of the guideline range from which the departure is made, unless the District Court specifically states that it would have departed to the same level regardless of whether it had accepted the defendant's guideline arguments," hence remand for resentencing required) (citations omitted).

Further, it is the government that bears the burden of "persuad[ing] the court of appeals that the district court would have imposed the same sentence absent the erroneous factor." *Williams v. United States*, 503 U.S. 193, 203 (1992).

A. The Allegations, the Defense Objection, and the District Court's Decisions

At sentencing, there were several material factual disputes about alleged extra-territorial wrongdoing. The district court neither resolved the disputes nor eschewed reliance on the disputed allegations.

First, the government and Probation Office alleged that Ionia caused extensive pollution on the high seas. CR:199, p. 3; A:124 (North Sea oil slick); *id.*, (re missing 968 tons of oily waste); *id.*, pp. 6-7 (describing large-scaled extra-territorial pollution). The government's appendices on this topic were extensive, and asserted that Ionia's conduct "jeopardize[s] the safety of U.S. waters and ports," *id.*, p. 9; A:130 "cause[s] eight times the amount of pollution as that caused by catastrophic spills such as the EXXON VALDEZ …," *id.*, p. 10; A:131 and comprise "a significant cause of seabird mortality" in other countries, notably Canada, *id.*, p. 10. The government made the same arguments at the sentencing hearing, especially about extraterritorial oil pollution. ST:40-42.

Second, the government alleged that Ionia bore responsibility for instability in Liberia, crimes by former President Charles Taylor, and arms traffic in Africa. For example, it argued that Ionia was responsible for Liberian problems because, "The Liberian corporate registry was documented to be a substantial source of funding for

former Liberian President Charles Taylor, who is now awaiting trial for crimes against humanity that he allegedly directed, aided, and funded in Sierra Leone, and who was a major source of instability in that part of the world." CR:199, pp. 18-19; A:139-40.

The government's proof of any link between Ionia and Liberia's problems consisted of uncorroborated hearsay. One item was an indictment. *Id.*, p. 19 & nn.9-12; A:140. Another item was CR:199's Attachment O, paperwork concerning the importation of arms into Nigeria.

The prosecutor blamed the government of the Bahamas for its apparent inability to back up assertions with evidence. ". . . the Bahamian ship registry does not require owners to disclose any details of their company when they register and guarantees owners that company details will not be accessible through public records." *Id.*, p. 19.

The government nevertheless asked the court to weigh these extra-territorial political matters against Ionia. "That these are the places and circumstances in which Defendant chooses to do its business is further evidence of Defendant's lack of concern for the consequences of its actions and emphasis on avoiding accountability." CR:199, pp. 19-20; A:140-41.

The defense objected to the court considering this irrelevant and "emotional" material. CR:222, p. 1; A:154. It objected to consideration of extraterritorial

information at sentencing.[48] It objected to the court considering at all the assertions of pollution impact for the non-pollution crimes of which Ionia was convicted (CR:222, p. 15; ST:4, 56-58; A:168; 185, 187-9). It objected to the sentencing court considering extraterritorial pollution. ST:56-57; A:187-8; CR:198, 2227. It specifically rejected the characterization of Liberia and the Bahamas as rogue states in the world maritime industry. CR:222, pp. 13-14; A:166-7 (explaining how they are premier open registry states.) It challenged "the government's claim that corporations registered in Liberia were actively supporting the administration of Charles Taylor." CR:222, p. 14; A:167.

The district court ruled that it could consider extraterritorial allegations under §3553, even disputed ones, although it noted it could not consider them under the Guidelines as they did not rise to the level of "relevant conduct." ST:11; A:186. So the judge explicitly relied upon disputed allegations about extraterritorial environmental pollution and did not eschew reliance upon the other disputed extra-territorial allegations, ST:72-73; A:191-2, stating: "[T]he very substantial international issue of high seas dumping is attempted to be addressed with that record-

[48] "I think that's an improper enhancement of potential fine based on, if we look at *Abrogar, based on activities that took place outside the U.S.*, and I encourage the Court not to take the pollution, allegations of pollution *and the information that the government supplied in rendering the decision* as to what the fine should be." ST:56; A:187 (emphasis added). CR:222, p. 16 & nn.21-22; A:169.

keeping requirement." ST:67;A:190. "And that's why saying this is merely a record-keeping case, as has been said in this, in these proceedings, so understates the seriousness of the offense. *And it's an offense that affects every country in the world* . . ." *Id*. (emphasis added).

But the court did not resolve the factual disputes about any of those alleged extraterritorial crimes. It made no finding about whether Ionia was responsible for disputed extraterritorial pollution, Liberian instability, Charles Taylor's criminality, or arms trafficking.

B. Standard of Review

Whether the district court complied with the requirements of Rule 32(i)(3) is a legal question reviewed *de novo*. *United States v. Rattoballi*, 452 F.3d 127, 132 (2d Cir. 2006) ("We review a district court's interpretation of the Sentencing Guidelines *de novo* and evaluate its findings of fact for clear error."). *See United States v. Molina*, 356 F.3d 269, 274 (2d Cir. 2004) (district court's ruling on different aspect of Rule 32 reviewed *de novo* because it presented question of law); *United States v. Herrera-Rojas*, 243 F.3d 1139, 1142 (9th Cir. 2001) (*de novo* review of same Rule 32 error asserted here).

C. The District Court's Failure to Conduct Factfinding or Alternatively to Eschew Reliance on Disputed Allegations, Requires Resentencing Under Rule 32(i)(3)

Rule 32, Fed. R. Crim. P., provides:

> At the sentencing hearing, the court must . . . for any disputed portion of the presentence report or other controverted matter – *rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing*.

Fed. R. Crim. P. 32(i)(3) (emphasis added). This Rule requires a district court to make *findings* about material, disputed factual issues presented at sentencing unless it makes it clear that it will "disregard" the disputed allegations.[49] If the court finds facts, " . . . there is the additional requirement that it must declare its findings with sufficient clarity that an appellate court can review them." *United States v. Leiva-Deras*, 359 F.3d 183, 193 (2d Cir. 2004). If the Court disclaims reliance on disputed facts, its disclaimer must be "express[]" and on the record. *Dunston v. United States*, 878 F.2d 648, 650 (2d Cir. 1989) (citation omitted).

In this case, the court neither determined and found facts nor disclaimed reliance on the asserted connections between Ionia and foreign pollution or its extent, with Liberian political instability, with arms trafficking, and with Charles Taylor's

[49] *United States v. Charmer Indus., Inc*., 711 F.2d 1164, 1172 (2d Cir. 1983); *United States v. Williamsburg Check Cashing Corp*., 905 F.2d 25, 29 (2d Cir. 1990).

criminality.

This Court takes a strict view of Rule 32's requirement that a court resolve disputed issues on the record, and remands a case when the requirement is not satisfied, *e.g.*, *United States v. Feigenbaum*, 962 F.2d 230, 232 (2d Cir. 1992); *Williamsburg Check Cashing Corp.*, 905 F.2d 25, 29.[50] As this Court stated in *Feigenbaum*, 962 F.2d 230, 232, "If a court does not make findings with respect to factual disputes or does not state that it is not relying on those disputed factors in determining the sentence, pursuant to [former] Rule 32(c)(3)(D) . . ., the case must be remanded for resentencing, factual findings, or at least an opportunity for the judge to state whether or not any reliance was placed on the unresolved matters."[51] *Accord United States v. Kostakis*, 364 F.3d 45, 52-53 (2d Cir. 2004) (vacating and remanding for resentencing because district court failed to find facts on material disputed issues).

[50] Other circuits similarly hold that strict compliance with this portion of Rule 32 is required, and that the remedy is vacating and resentencing. *United States v. Herrera-Rojas*, 243 F.3d 1139, 1142; *United States v. Carter*, 219 F.3d 863 (9th Cir. 2000).

[51] This is true even if there was sufficient evidence to support the disputed fact. *Carter*, 219 F.3d at 867. *Cf. United States v. Margiotti*, 85 F.3d 100, 103 (2d Cir.), *cert. denied*, 519 U.S. 940 (1996) (resentencing not required where there is only a technical violation of Rule 32 that is promptly corrected and causes no harm).

VI. THE PRESUMPTION AGAINST EXTRA-TERRITORIAL APPLICATION OF U.S. SENTENCING LAWS BARS THE DISTRICT COURT FROM RELYING ON FOREIGN CRIMINAL ACTS ALLEGED BY THE GOVERNMENT

The district court said it was not bound by the Guidelines and was sentencing directly under the sentencing *statute*, §3553. But that makes the error of reliance on allegations of extraterritorial "bad acts" worse; "it is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991). *See also Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 173-75 (1993).

There is no provision in § 3553 permitting reliance upon foreign conviction data, much less foreign conduct that might or might not be criminal where it occurred. Nor is there any provision in any of the statutes of which Ionia was convicted for consideration of foreign conviction or non-conviction data. There is good reason that such information was excluded from courts' consideration by the Sentencing Commission.

As this Court explained in *United States v. Chunza-Plazas*, 45 F.3d 51 (2d Cir. 1995), the Guidelines give actual foreign criminal convictions a very limited role in Guidelines' sentencing. They cannot be used to increase the criminal history score at all. *Id.*, 45 F.3d at 56 (citing §4A1.2(h)). They can be used to impose a departure

above the criminal history score only in limited circumstances. *Id.* (citing §4A1.3). And the Guidelines make no provision at all for considering *uncharged* foreign criminal conduct of the unrelated sort – arms trafficking, political destabilization, pollution – offered here, at sentencing. *Chunza-Plazas*, 45 F.3d at 56.

Hence, the district court's consideration of the alleged extraterritorial effects violated the rule of *Arabian American Oil* by essentially construing the applicable statutes to permit consideration of extraterritorial non-conviction allegations, when those statutes do not do so either explicitly or by implication. This conclusion is consistent with this Court's decision in *United States v. Azeem*, 946 F.2d 13 (2d Cir. 1991), holding that a foreign (Egyptian) crime could not be included in the determination of the defendant's base offense level under the "relevant conduct" Guideline, §1B1.3, given the general silence of the Guidelines and Congress on this issue, except for the one limited area described above where foreign similar convictions are mentioned.

VII. THE DISTRICT COURT'S RELIANCE ON GOVERNMENT ASSERTIONS OF FOREIGN ACTS IS CONTRARY TO THE RULE AGAINST USING UNRELIABLE AND UNCORROBORATED HEARSAY

The district court's consideration of government allegations of extraterritorial misconduct was impermissible because no reliable evidence was put forward to support them. The government's assertions were based on articles and reports, but no sworn declarations, business records, testimony, or anything else that could be characterized as

evidence.

Although hearsay generally is admissible at sentencing, *Williams v. Oklahoma*, 358 U.S. 576, 584 (1959); *United States v. Martinez*, 413 F.3d 239, 242 (2d Cir. 2005), *cert. denied*, 546 U.S. 117 (2006); Fed. R. Evid. 1101(d)(3), there is a limit. Under both the Guidelines and the due process clause, a sentencing court may not rely on hearsay that is uncorroborated and unreliable. *Torres v. Berbary*, 340 F.3d 63 (2d Cir. 2003) (reliance upon unreliable reports at sentencing without corroboration violates due process clause); *Chunza-Plazas*, 45 F.3d 51, 58 (uncorroborated triple hearsay from undisclosed witness insufficient to support finding of criminal money collection activity); §6A1.3(a) (reliable hearsay admissible at sentencing).[52] Uncorroborated reports from outside the judicial system are particularly problematic. *Chunza-Plazas*, at 58 (due process clause violated by state court resentencing where trial court relied solely on facility report grounded in hearsay without evidentiary hearing; granting writ).[53]

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[52] *See Townsend v. Burke*, 334 U.S. 736, 741 (1948) (unconstitutional prior conviction is "materially untrue" information, "misinformation of a constitutional magnitude," and cannot be relied upon at subsequent sentencing); *United States v. Tucker*, 404 U.S. 443, 447 (1972) (same).

[53] *Accord United States v. Ponce*, 51 F.3d 820, 828 (9th Cir. 1995) ("While hearsay statements may be considered at sentencing, due process requires that such statements be *corroborated by extrinsic evidence"*); *United States v. Cammisano*, 917 F.2d 1057, 1062 (8th Cir. 1990) (FBI agent's hearsay testimony at sentencing concerning defendant's involvement with murders and organized crime not sufficiently corroborated to be reliable and hence could not support upward departure.)

The assertions about foreign matters, in the government's sentencing memorandum, fail under these standards. They came from sources as unreliable as charging document (without a conviction) and second-hand reports by non-governmental organizations. *See United States v. Fatico*, 579 F.2d 707, 713 (2d Cir. 1978) (emphasizing due process protection afforded by corroboration of hearsay). Even if a court could take judicial notice of those documents, it could notice only their existence, not the truth of the assertions they contained.[54]

There are exceptions. A sentencing court may rely on hearsay from an unidentified source when there is "good cause for not disclosing [the source's identity], and the information that he furnishes is subject to corroboration by other means." *United States v. Carmona*, 873 F.2d 569, 574 (2d Cir. 1989). That exception is inapplicable here. Instead, the default rule barring consideration of unreliable hearsay applies. This Court should remand for a new sentencing hearing.

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[54] *Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007); *Liberty Mutual Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388 (2d Cir. 1992) (under judicial notice rule, court can acknowledge the filing of charges in other cases but not the truth of the matters there asserted).

VIII. CONCLUSION

The thirteen APPS counts of conviction should be reversed, for there was no violation of that law. All counts of conviction, including the conspiracy count, should be reversed because a ship operator may not be punished for the acts of its crew and because the government failed to prove any crewman acted with intent to benefit Ionia. Alternatively, a new trial should be ordered on all counts because of errors in the jury instructions on corporate liability. The §1519 counts in the New York and Florida indictments should be tried anew, because the instructions constructively amended the indictment and did not submit the charged element of materiality for the jury's decision. Finally, if all of the challenges to the convictions are rejected, Ionia should be resentenced because of procedural errors.

Respectfully Submitted

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CERTIFICATE OF COMPLIANCE WITH

FED. R. APP. P. RULE 32(a)

FOR CASE NUMBER 07-5801-CR

I certify that:

Pursuant to Fed. R. App. P. 32(a)(7)(B), the attached Opening Brief is:

Proportionately spaced, has a Times Roman typeface of 14 points or more and contains _____ words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

_____ _____

Date Irwin H. Schwartz

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the ___ day of May, 2008, copies of the foregoing OPENING BRIEF, JOINT APPENDIX AND SPECIAL APPENDIX were served upon the following individuals via Federal Express:

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