# 07-5801-cr

*To Be Argued By:*
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# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 07-5801-cr**

UNITED STATES OF AMERICA,
*Appellee,*

-vs-

IONIA MANAGEMENT SYSTEMS, S.A.,
*Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

## BRIEF FOR THE UNITED STATES OF AMERICA


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## Statement of Jurisdiction

The district court (Janet B. Arterton, J.) had subject matter jurisdiction over this criminal case under 18 U.S.C. § 3231. The district court entered judgment on December 19, 2007. A210.[1] The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on December 26, 2007. A210; A178-79. This Court has appellate jurisdiction under 18 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

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[1] Citations herein are to "A" (Joint Appendix), "SA" (Ionia's Special Appendix); and "GA" (Government's Appendix).

## Issues Presented for Review

1. Whether the operator of a foreign-flagged vessel can be prosecuted for the failure to "maintain" an Oil Record Book ("ORB") under the Act to Prevent Pollution from Ships ("APPS") and 33 C.F.R. § 151.25, based on evidence that the vessel entered and operated in United States' waters while possessing an ORB that omitted and failed to disclose discharges of oil-contaminated wastes on the high seas;

2. Whether there was sufficient evidence to support the jury's verdict holding the corporate defendant Ionia Management S.A. ("Ionia") liable for the criminal conduct of its agents;

3. Whether the district court plainly erred when instructing the jury on the standards for corporate criminal liability;

4. Whether the district court plainly erred when instructing the jury on the elements of an offense under 18 U.S.C. § 1519;

5. Whether the $4.9 million fine is reasonable under 18 U.S.C. § 3553(a), and whether the district court complied with Fed. R. Crim. P. 32(i)(3)(B) in imposing that fine.

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### Preliminary Statement

This is a criminal prosecution against Ionia Management S.A. ("Ionia") for violations of the Act to Prevent Pollution from Ships ("APPS"), the falsification of records in federal proceedings, and obstruction of justice, in relation to events aboard the M/T *Kriton* ("*Kriton*"), a vessel managed by Ionia. Ionia is incorporated in Liberia and headquartered in Greece; the

*Kriton* is a 600-foot oil tanker registered in the Bahamas. During the period named in the indictments (January 2006 to April 2007), the *Kriton* delivered oil and petroleum products to ports up and down the east coast of the United States. During the same period, the Chief Engineers, Second Engineer, and engine room crew aboard the *Kriton* – all Ionia employees – directed or participated in the routine discharge of oily waste water to the high seas, through a "magic hose" designed to bypass the vessel's Oily Water Separator. To conceal such discharges, the crew made false entries in the vessel's oil record book ("ORB") which the ship was required to maintain per APPS regulations, and false reports in checklists required by the United States Coast Guard as part of a corporate environmental compliance plan ("ECP"). Members of the crew also hid the "magic hose" from Coast Guard inspectors during a March 20, 2007 inspection in the Port of New Haven, and otherwise obstructed the Coast Guard's investigation.

In this appeal, Ionia does not dispute that these violations occurred. Rather, Ionia contends: (1) that the APPS violations cannot be prosecuted in the United States because there was no evidence that the false ORB entries and omissions, and the discharges they concealed, were made in U.S. waters; (2) that there was insufficient evidence to hold Ionia liable for the criminal conduct of its employees; (3) that the district court erred in charging the offenses under 18 U.S.C. § 1519; and (4) that the district court erred in calculating the $4.9 million criminal fine. Ionia's objections are without merit.

## Statement of the Case

### A. Indictments

In June 2007, four separate indictments against Ionia were returned in the District of Connecticut, the Eastern District of New York, the Southern District of Florida, and the District of the United States Virgin Islands. A1-45. All four cases were consolidated for trial in the District of Connecticut. A80-81. Altogether, the indictments charged Ionia with one count of conspiracy (18 U.S.C. § 371); thirteen counts under APPS (33 U.S.C. § 1908(a)); three counts of falsifying records in a federal investigation (18 U.S.C. § 1519); and one count of obstruction of justice (18 U.S.C. § 1505).

Each of the APPS counts charged that Ionia

> did knowingly fail to maintain an [ORB] for the *M/T Kriton* in which all disposals of [oily wastes] . . . aboard the *M/T Kriton* were fully recorded, by failing to disclose exceptional discharges of oil-contaminated waste made through a bypass hose and without the use of a properly functioning oily water separator and oil content monitor.

A20-21, A34-35, A44; *see also* A11 (substantially same). These counts referenced the APPS regulations at 33 C.F.R. § 151.25, and charged dates when the *Kriton* was in port – *viz.*, the Port of New Haven, the port in New York Harbor, Port Everglades, or the port of St. Croix – "within the internal waters of the United States." *Id.*

The § 1519 counts referred to false records in two separate proceedings. The Connecticut indictment (count 3) charged that Ionia knowingly presented falsified ORBs to the Coast Guard with the intent to impede and obstruct an inspection in the Port of New Haven on or about March 20, 2007. A12. The New York indictment (count 4) and Florida indictment (count 4) charged that Ionia falsified "Compliance Program Checklist[s]" with intent to impede and obstruct the ongoing ECP within the jurisdiction of the Coast Guard and the Department of Justice. A22, A35-36. The ECP was imposed as a condition of probation, following Ionia's 2004 conviction in the Eastern District of New York for presenting false ORBs to the Coast Guard in violation of 18 U.S.C. § 1001. A22.

The obstruction-of-justice count (Connecticut count 5) charged that Ionia, through the *Kriton*'s Chief Engineer and Second Engineer, obstructed the Coast Guard investigation that began on March 20, 2007, by concealing and destroying the "magic hose," and directing subordinates to provide false information to the Coast Guard. A14. The conspiracy count (Connecticut count 1) charged a multi-object conspiracy to violate APPS and commit the other alleged Title 18 offenses. A4-10. The indictments named Second Engineer Edgardo Mercurio as co-defendant on most counts. Under a plea agreement with the United States, Mercurio pleaded guilty to one count from each indictment and testified against Ionia at trial.

### B. Trial and Sentencing

Trial was held between August 28 and September 6, 2007. At the close of the Government's evidence, Ionia moved for judgment of acquittal. GA146; GA149. The court denied the motion without prejudice and the case was submitted. GA150-52. The jury found Ionia guilty on all counts. A214. On September 13, 2007, Ionia moved for acquittal or new trial, arguing that the evidence was insufficient to establish Ionia's liability for the actions of its employees. *Id.* The district court denied the motion on December 12, 2007. *United States v. Ionia Management, SA*, 526 F. Supp.2d 319 (D. Conn. 2007).

The district court held sentencing on December 14, 2007. The court imposed a $4.9 million fine and ordered Ionia to serve four years of probation, with conditions requiring Ionia to install additional monitoring equipment on ships operating in U.S. waters, and monitor and record waste generation and management. GA345-53.

## Statement of Facts

### A. APPS and MARPOL

#### 1. Treaty background

Congress enacted APPS (33 U.S.C. §§ 1901, *et seq.*) to implement two related treaties: the 1973 International Convention for the Prevention of Pollution from Ships (1340 U.N.T.S. 184) and the Protocol of 1978 Relating to the International Convention for the Prevention of

Pollution from Ships (1340 U.N.T.S. 61, 62). *See generally* 33 U.S.C. § 1901(a)(4) & (5). The treaties came into force on October 2, 1983 and are jointly referred to as "MARPOL 73/78" or "MARPOL." *See* 33 C.F.R. § 151.05 (definitions); *see also United States v. Jho*, — F.3d —, 2008 WL 2579240, *2 (5th Cir. June 30, 2008). MARPOL aims "to achieve the complete elimination of intentional pollution of the marine environment by oil and other harmful substances and minimization of accidental discharge of such substances." International Maritime Organization ("IMO"), MARPOL Consolidated Edition 3 (2006).[2]

MARPOL Annex I contains regulations for the prevention of pollution by oil. *Id.* at 45-206. The United States is a party to MARPOL and Annex I, as are the Bahamas (the *Kriton*'s flag state) and Liberia and Greece (Ionia's countries of incorporation and headquarters). Overall, 146 countries – whose vessels represent 99 percent of the world's shipping tonnage – are signatories to Annex 1. *See* www.imo.org ("Summary of Status of Conventions as of 31 May 2008"); *see also United States v. Abrogar*, 459 F.3d 430, 431-32 (3rd Cir. 2006) (earlier data).

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[2] Ionia's Special Appendix includes the 1973 Convention (without the 1978 Protocol) and the original Annex I (SA28-77). Annex I has been amended several times since. *See* IMO, MARPOL Consolidated Edition iv-v (2006) (introduction). Citations herein are to the current (2006) IMO edition.

### 2. Annex I

During ordinary operation, ships accumulate large volumes of oily waste water in their bilges, engine rooms, and mechanical spaces. Annex I prohibits oil tankers and other vessels from discharging such wastes to sea except under certain conditions. *See* IMO, MARPOL Consolidated Edition 68-69 (2006) (Regulation 15). The ship may only discharge *en route* more than 12 nautical miles from land; the discharged material must be processed through specified oil filtration equipment (*e.g.*, an oily water separator that traps most of the oil); and the residual oil content of the effluent must not exceed 15 parts per million. *Id.* at 66-69 (Regulations 14 & 15); *see also* SA48-49 (former regulation). Annex I also requires subject vessels to record all oil transfer operations – including the overboard discharge of bilge water from machinery spaces – in an ORB to be retained on board and available for inspection by the "competent authority" of any party government. IMO, MARPOL Consolidated Edition 71-72 (2006) (Regulation 17); *see also* SA59-60 (former Regulation 20).

### 3. APPS regulations

APPS authorizes the Coast Guard to "prescribe any necessary or desired regulations to carry out the provisions of . . . MARPOL." 33 U.S.C. § 1903(c)(1). Pursuant to this authority, the Coast Guard has issued regulations that generally track the requirements of MARPOL Annex I. *See* 33 C.F.R., Parts 151, 155, and 157. Like Annex I, the APPS regulations prohibit oil tankers from discharging

oily bilge water unless the oil in the discharge is less than 15 parts per million and the vessel has an approved discharge monitoring and control system. 33 C.F.R. §§ 157.29 & 157.39. Like Annex I, the APPS regulations also require ships to keep records of oil transfer operations in ORBs. 33 C.F.R. § 151.25.

**4. Enforcement**

"Upon receipt of evidence that a violation has occurred," APPS provides that "the [Coast Guard] shall cause the matter to be investigated." 33 U.S.C. § 1907(b). APPS also gives the Coast Guard express authority to inspect any seagoing ship, while at a U.S. port or terminal, to "verify whether or not the ship has discharged a harmful substance in violation of . . . MARPOL." *Id.*, § 1907(c)(2)(A). When an inspection indicates that a violation has occurred, the inspecting officer must forward a report for "appropriate action" by the Secretary. *Id.*, § 1907(c).

Under APPS, it is a felony violation for any person to "knowingly violate[]" APPS, the APPS regulations, or MARPOL. *Id.*, § 1908(a). In addition, APPS gives the Secretary administrative authority to impose civil penalties for any such violation, *id.*, § 1908(b), the authority to proceed *in rem* against a ship operated in violation of MARPOL, *id.*, § 1908(d); and the authority to revoke clearance (necessary to enter and leave port) if reasonable cause exists to believe an owner or operator is liable for a fine or civil penalty. *Id.*, § 1908(e); *see also* 33 C.F.R. § 151.23(b) (authority to detain ships based on

noncomplying "conditions[s] or equipment."). APPS also provides that – "[n]otwithstanding" these enforcement tools – when a violation is committed by a foreign-flagged ship "registered in or of the nationality of [another] country party to MARPOL," the Secretary "may refer the matter to the . . . country of the ship's registry or nationality . . . rather than taking the actions [otherwise] required or authorized." *Id*, § 1908(f).

**B. Offense Conduct**

**1. Ionia and its agents**

Ionia is a ship management company that operates a fleet of tanker vessels, including the *Kriton*. Ionia employed all personnel in charge of the *Kriton* during the period in the indictments, including the Captain, the Chief Engineer, the Second Engineer, and the "unlicensed" crew members; *viz.*, the oilers, the wiper, the cadet engineer, the electrician, and the fitter. GA38-39. The engine room operated under a strict chain of command beginning with the Chief Engineer, who was ultimately in charge of all engine room operations. GA83-84. The unlicensed crew took their orders primarily from the Second Engineer, but also at times from the Chief Engineer. GA25, GA35, GA39. Crew members testified that they were trained to follow the instructions of their superior officers and that if they did not follow those instructions, they would be sent home. GA39,GA40,GA75-76,GA78-79.

**2. Inspection**

On March 20, 2007, the Coast Guard received a report from the *Kriton*'s electrician that the *Kriton* – then berthed at the Magellan Terminal in the Port of New Haven – had been discharging oily bilge water directly overboard through a bypass hose. GA4. Shortly thereafter, a team of Coast Guard investigators responded to the vessel for an inspection. GA12-13. The investigators were met by Captain Mamas Chritis, who presented relevant documents, including the vessel's ORBs. GA13-15. A Coast Guard investigator testified that the ORB entries seemed odd as they were consistent throughout, indicating the same amount of oil transferred to the same location each day. GA15.

While the documents were being reviewed, other Coast Guard personnel proceeded to the engine room to inspect equipment and interview crew members. GA15-16. The Coast Guard conducted further interviews on March 21, 2007, GA8-9, and ultimately detained the *Kriton* for further investigation, which resulted in the charges in this case. GA10.

**3. Unlawful discharges**

At trial, four crew members testified that they personally participated in the unlawful overboard discharge of oily wastes from the *Kriton*. Elmer Senolay served as the *Kriton*'s cadet engineer from July 2005 until November 2005, GA24-25, and rejoined the vessel as a wiper in February 2007. GA35. Senolay testified that, on

multiple occasions during both periods, he assisted with connecting a rubber hose from a pipe between the bilge pump and bilge holding tank to an overboard discharge valve, thus permitting the discharge of oily bilge water to the sea, bypassing the Oily Water Separator. GA26-32. Senolay testified that he was first directed to assist with the hose by Second Engineer Cantillio, GA26-032, but that the practice continued upon the arrival of a new Second Engineer named Galupin. GA25, GA32-33. Senolay's second stint aboard the *Kriton* was under the direction of Second Engineer Edgardo Mercurio. GA35.

Dario Calubag replaced Senolay as the *Kriton*'s cadet engineer in November 2005 and remained aboard through the March 20, 2007 inspection. GA57. Calubag testified that Second Engineer Galupin ordered him to assist in connecting the bypass hose during each of the *Kriton*'s voyages. GA59-60, GA64. Calubag testified that the crew would remove the bypass hose prior to arriving at port and reconnect the boiler blow-down line; and that he was ordered to repaint the part of the boiler blow-down pipe that had been removed. GA61-63. According to Calubag, these procedures continued after Mercurio replaced Galupin as Second Engineer. GA58-59, GA71-72.

Ricky Lalu joined the *Kriton* as an oiler in December 2006. GA18. He testified that he was instructed by the Second Engineer to perform "pump outs" to the sea through the bypass hose, and that the oiler whom he replaced taught him how to use the hose. GA18-19.

Mercurio joined the *Kriton* while it was in dry dock in Greece in May of 2006. GA82. Mercurio testified that when he joined the vessel, the outgoing Second Engineer told him about the "magic hose" and the engine crew showed him how to connect it. GA85-86. At the time, the Chief Engineer was Efstratios Tsigonakis. Mercuiro testified that he and Tsigonakis tested the Oily Water Separator after the ship sailed from drydock and discovered a crack. According to Mercurio, Tsigonakis had the separator repaired, but directed the crew to continue using the "magic hose" after the repair. Mercurio testified that Tsigonakis personally directed the oiler to perform the "pump outs" during each voyage. GA87-88. During an October 2006 voyage from Tunisia to New York, Tsigonakis instructed Mercurio to hide the hose after it was removed (before arriving in port). GA92-93.

In December 2006, Petros Renieris replaced Tsigonakas as Chief Engineer. Mercurio testified that he asked Renieris, the day after Renieris arrived onboard, whether they should continue to use the bypass hose and Renieris said "yes." GA94-96. Mercurio testified that Renieris specifically directed him to attach and use the hose on the *Kriton*'s trip from Florida to Estonia in January 2007. GA98. Mercurio testified that Renieris directed him to run the Oily Water Separator on just two occasions (one only a test) and that the separator was not otherwise used. GA96-97.

Mercurio also testified that the ship's incinerator – for the disposal of oil sludge – was not used during his tenure with the exception of two test runs. Three other employees

– Senolay, Calubag, and Lalu – confirmed that the incinerator was not used. GA65, GA37, GA34-35, GA89, GA91.

In addition to testimony from the *Kriton*'s crew, the Government presented testimony from Dutch officials who detected a discharge from the *Kriton*. A former commander of the Dutch Coast Guard surveillance aircraft testified that, on January 30, 2007, he used side-looking airborne radar ("SLAR") to capture an image of the *Kriton* trailing an 11.7 kilometer stream of discharge. GA42-43, GA44-48, GA49. An official with the Netherlands Coast Guard Operation Center testified that he identified the ship as the *Kriton* by using the Automated Identification System and position information relayed from the surveillance aircraft. GA51, GA52-54, GA55. An expert in interpreting SLAR images opined that the January 30, 2007, image of the *Kriton* showed that the *Kriton* was discharging oil into the water outside the ship. GA123.

**4. ORB falsification**

The ORBs from the *Kriton* during the relevant period were introduced as evidence at trial. Government's Exhibit ("G.E.") 2A-2D. The entries in the ORBs were made by the three Chief Engineers – Nikolaos Katsenaris, Tsigonakis, and Renieris – who served aboard the *Kriton* (in succession) during the charged conspiracy. G.E. 2A-2D. The ORBs indicate that *Kriton* discharged through the Oily Water Separator on numerous occasions and used the incinerator regularly. The ORBs do not report bypass discharges. G.E. 2A-2D.

Port Chief Engineer James Shirley, of the Military Sea Lift Command, reviewed the *Kriton*'s ORBs and other documents. GA129. Based on the documents, his training, and his experience on similarly equipped ships, Shirley estimated that for the period from January 1, 2006 to March 20, 2007, approximately 968 tons of oily waste were unaccounted for in the *Kriton*'s ORBs. GA141-43. Shirley further opined that "[t]he entries in the oil record book, from the sheer replication of incinerator identical consumption quantities over identical periods of times, day in and day out, the irregular operational patters of the Oily Water Separator, even though the ship was operational, the extended intervals, all clearly said to me, as an experienced seagoing engineer, that there is a definite problem with the credibility of the oil record book." GA144.

Shirley also testified about common operational problems that can occur with Oily Water Separators and shipboard incinerators. GA130-40. Shirley testified that the equipment requires substantial maintenance, and that proper use of the equipment and shore-side disposal wastes entails manpower and out-of-pocket costs. GA130-40.

**5. ECP**

During the period charged in the indictment, Ionia was subject to an ECP, the purpose of which was:

> to augment the requirements of existing law by increasing inspections and audits of all IONIA

> *vessels* that call upon any Port in the United States or sails into any waters under the jurisdiction of the United States . . . [3]

G.E. 12. As part of the ECP, Ionia was required to submit to the Coast Guard a "Compliance Checklist" for each vessel destined for a U.S. port, as a precondition for entry. G.E. 12. Chief Engineer Katsenaris submitted Compliance Checklists in January and March 2006, in advance of the *Kriton*'s visit to ports in Florida and New York. G.E. 13A. Both Checklists certified, *inter alia*, that all ORB entries for the *Kriton* had been completed "correctly and truthfully." G.E. 13A, 13B.

The Ionia employees who testified to participating in unlawful discharges from the *Kriton* acknowledged that Ionia had a compliance program and that they received training in MARPOL compliance. They also testified, however, that they were trained to follow instructions of their supervisors, GA38, and that one of the employees to whom they were instructed to report MARPOL incidents was the Chief Engineer. GA38-40. Mercurio testified that he engaged in the unlawful dumping, despite written

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[3] The ECP was a condition of Ionia's probation arising from its 2004 conviction in the Eastern District of New York. Ionia pleaded guilty, under 18 U.S.C. § 1001, to falsely stating, in ORBs, that oily wastes were processed through an oily water separator, when in fact such wastes had been directly discharge to sea. A133. At trial, the parties stipulated to the terms of the ECP; the jury was not advised of the prior conviction. GA147.

corporate policy, because Chief Engineers Tsigonakis and Renieris had directed him to do so. GA87, GA95.

**6. Obstruction**

According to Mercurio, on March 20, 2007, after the Coast Guard boarded the *Kriton*, but outside of the Coast Guard's presence, Chief Engineer Renieris asked Mercurio, on at least three occasions, including once in front of Captain Chritis, where the bypass hose was. GA99. Mercurio retrieved the hose and flanges from their hiding places and gave them to Renieris, who cut the hose in half with a hacksaw. GA100. Mercurio hid one half in a box with other hoses; Renieris kept the other half and the flange connections. GA101-103. Mercurio testified that his half of the hose disappeared and that he never again saw the other parts. GA101-103.

Mercurio also testified that, at the time of the Coast Guard investigation, Renieris told him not to tell the Coast Guard about the bypass hose, and to give the same instruction to the engine room crew. GA104. Calubag similarly testified that Renieris told him that "if the Coast Guard asks any questions that [he] should say only oily water separator," meaning that "the separator is the only thing that is used for pumping the bilges," even though the "magic hose" was what was actually used. GA66-67, GA68-69, GA74-75, GA79-80.

After the initial boarding by the Coast Guard, Ionia superintendent Dionysis Apostolatos, arrived at the *Kriton* to consult with the crew. GA104-112. Mercurio first

concealed the truth from Apostolatos, but then admitted that the crew had been using the bypass hose and had lied to the Coast Guard. GA108. According to Mercurio, Apostolatos told him that they would speak to the company lawyer and then "tell the truth about the hose." GA108. Mercurio was then summoned to the engine room. When he returned, Apostolatos said, "forget" and made a gesture with his hands that indicated to Mercurio that he should stick with his first statement. GA108.

Mercurio also testified that Captain Chritis approached Mercurio while the crew was staying in a local hotel after the Coast Guard boarding. Mercurio stated that "[Captain Chritis] mentioned to me this problem we have, that if I told the truth, the company will have a big problem." GA121.

## Summary of Argument

### I. APPS

Ionia argues that the APPS regulation requiring Ionia to "maintain" an ORB (33 C.F.R. § 151.25) merely required Ionia to have the *Kriton*'s ORBs while in U.S. waters, notwithstanding the deliberate falsifications and material omissions therein. This is contrary to the plain meaning of "maintain," the purpose of APPS, and the Fifth Circuit's recent well-reasoned decision in *United States v. Jho*. The APPS duty to "maintain" an ORB is a continuing obligation to keep oil discharge and transfer records in good order, for inspection by the Coast Guard, at any time an inspection might occur in U.S. ports or waters.

Although the falsifications in this case involved discharges that occurred beyond U.S. waters, the purpose of the APPS ORB regulation is to further MARPOL's objective of preventing pollution on the high seas. By knowingly preserving false ORBs while in U.S. waters, the *Kriton*'s crew plainly failed to "maintain" the ORB for its regulatory purpose. Further, as *Jho* held, to impose and enforce ORB requirements upon foreign-flagged vessels operating in U.S. waters – even though the required records relate to activities outside U.S. waters – is not contrary to international law.

**II. Vicarious liability**

In an effort to escape liability for the offenses in this case, Ionia attempts to scapegoat Second Engineer Mercurio, arguing that Mercurio ordered use of the "magic hose" out of his own laziness and that the crew followed Mercurio's orders out of fear of Mercurio. Contrary to Ionia's assertions, the jury properly rejected this theory as inconsistent with the bulk of the trial evidence. The testimony of crew members demonstrated that the *Kriton*'s crew began using the magic hose well before Mercurio arrived as Second Engineer. Mercurio testified that he continued the practice upon the directives of the two Chief Engineers who served, in succession, above him. It is undisputed that the Chief Engineers completed all entries in the ORBs, which the Coast Guard determined to be suspicious on their face and which, upon thorough review, were found not to account for nearly 1,000 tons of oily waste (which had to have been discharged somewhere). The jury also heard evidence of the general costs of

maintaining Oily Water Separators and disposing of the waste generated in their operation. Viewed as a whole and in a light most favorable to the Government, the trial evidence was more than sufficient for the jury to find that the *Kriton*'s crew was involved, from top to bottom, in a longstanding pattern and practice of unlawful discharges and false reporting to conceal those discharges for the benefit of Ionia.

Ionia also argues that the company had an ECP and that the crew knew the magic-hose discharges were in violation of the ECP and knew that they could be terminated for such conduct. However, the evidence also showed that Ionia placed the Chief Engineers in charge of MARPOL compliance and trained its employees to report MARPOL incidents to the Chief Engineers, among others. Further, the unlawful discharges and false reporting occurred for more than 15 months (the period of the conspiracy) without any employee being disciplined for participation. From this, the jury could readily infer that the verbal commands of the Chief Engineers and Second Engineers Ionia stationed on the *Kriton* constituted corporate policy and practice for the *Kriton*, despite written edicts to the contrary.

### III. Corporate liability jury instructions

The trial court did not err in its instructions on vicarious liability, which Ionia did not challenge at trial. Contrary to Ionia's present argument, there is no *per se* rule limiting corporate criminal liability to acts of "managerial" employees; and the Chief Engineers and

Second Engineers inculpated in the crimes in this case were clearly managers. Nor is there merit to Ionia's newfound claim that the court "constructively amended" the indictments by instructing the jury that a corporation may be held liable for criminal acts "specifically authorized." The indictments put Ionia on notice of its need to defend evidence that its Chief Engineers and Second Engineers directed unlawful acts. The court correctly instructed the jury that an agent's conduct (which would include any orders to subordinates) is attributable to the corporation only when he acts within his authority and for the benefit of the company.

**IV. 18 U.S.C. § 1519**

There is no merit to Ionia's claim (argued for the first time on appeal) that the trial court's § 1519 instruction constructively amended two of the three § 1519 charges. To prove a § 1519 offense, the Government must show falsifications made with intent to impede an investigation; the Government need not show that the falsifications were "material." Although two of the § 1519 charges in this case included an allegation of materiality, those allegations were merely surplusage. The indictments put Ionia on notice of the specific falsifications that were proven at trial; and the court properly instructed the jury on the elements of the offense. The court's failure to charge a non-element is irrelevant.

## V. Sentencing

The district court did not err or abuse its discretion at sentencing. The court sentenced Ionia as a repeat offender, correctly determining that a $4.9 million fine was necessary to reflect the seriousness of the offense and deter future violations. Ionia does not contend otherwise. Rather, Ionia argues that the district judge erred in applying the "advisory" corporate fine Guidelines. The alleged error identified by Ionia, however, was not a Guidelines calculation. After the district judge calculated the combined offense level and culpability score to determine the Guidelines fine range and maximum fine of $700,000 (calculations unchallenged on appeal), the judge multiplied this maximum by seven to reflect the seven different types of offenses at issue in this case. Although Ionia contends that this last "multiplication" was an error in the application of the grouping Guidelines, *see* U.S.S.G. § 3D1.2, the experienced district judge never described her analysis as a Guidelines grouping decision nor made any attempt to justify this analysis by reference to the grouping Guidelines. The district judge understood that the Guidelines were inapplicable to this case and thus her decision to multiply the calculated maximum fine by seven is best understood as an exercise of her discretion to sentence Ionia by reference to the factors outlined in § 3553.

Nor is Ionia correct in asserting the need for remand for findings under Crim. R. Fed. P. 32. Properly understood, the arguments raised by Ionia at sentencing were legal arguments, not arguments upon which findings

were required. Ionia never objected to "hearsay" presented by the Government and has shown no due process violation. Finally, contrary to Ionia's claim, the district court properly considered "extraterritorial" dumping as part of sentencing, given the extraterritorial focus of the APPS/MARPOL regulatory regime.

## ARGUMENT

### I. The APPS counts and jury charge were proper.

#### A. Relevant facts

Ionia concedes, for purposes of this appeal, that the *Kriton* improperly discharged oily water at sea during the period named in the indictments; that Ionia employees failed to record those discharges in the ship's ORBs when the discharges occurred; and that Ionia employees failed to correct the ORBs (to show the discharges) before entering United States' waters and ports on the dates charged in the indictments. Ionia contends that these facts are insufficient as a matter of law to establish a violation of the company's duty to "maintain" an ORB, per 33 C.F.R. § 151.25, and that the district court's instruction on the duty to maintain was consequently in error.

When charging the jury on the APPS counts, the district court stated, *inter alia*, that the United States had to prove that Ionia failed to "maintain" ORBs "while the *Kriton* was in the navigable waters of, or a port or terminal of, the United States." GA157. During deliberations, the jury passed out the following 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?

GA165. Ionia urged the court to instruct the jury that the jury could convict only if it determined that false entries were made while the *Kriton* was in United States' waters. GA166-68. The court declined, instructing the jury instead that:

> the offense in the indictment is the failure to maintain an accurate oil record book while in navigable waters of the U.S. or its ports and terminals. The term "maintain" means to continue or to continue in possession of, and, therefore the fourth element of the APPS charges to which your note appears to be directed 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.

GA169.

### B. Governing law and standard of review

The legal background for APPS and MARPOL is addressed *supra*, p.5-9. The particular APPS regulation at issue states that "[e]ach oil tanker of 150 gross tons and above . . . shall *maintain* an [ORB]," *id.*, § 151.25(a) (emphasis added) and comply with specific ORB requirements. Among other things: (1) "[e]ntries shall be made" in the ORB "on each occasion" that specified operations occur, including the "[d]ischarge overboard . . . of bilge water that has accumulated in machinery spaces," *id.*, § 151.25(d)(4); (2) entries must be "recorded without delay" and "signed by the person or persons in charge of the operation[]," with "each completed page . . . signed by the master or other person having charge of the ship," *id.*, § 151.25(h); (3) the ORB must be "readily available for inspection" and "kept on board the ship," *id.*, § 151.25(i); and (4) the "master or other person in charge of [the] ship . . . shall be responsible for the *maintenance* of such record." *Id.*, § 151.25(j) (emphasis added). These regulations apply to U.S. registered ships that operate beyond U.S. waters and any foreign-flagged ships "while in the navigable waters of the United States or while at a port or terminal under the jurisdiction of the United States."[4] *Id.*, § 151.09(a)(1)-(5); *see also* 33 U.S.C. § 1902(a)(2).

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[4] The term "navigable waters" of the United States refers herein to the "territorial seas" and internal waters. *See* 33 C.F.R. § 2.36. For purposes of this case, the "territorial seas" are waters within three miles of a "baseline" along the coast. *See* 33 C.F.R. §§ 2.20, 2.22(a)(2).

This Court reviews *de novo* the propriety of jury instructions. *United States v. Cullen*, 499 F.3d 157, 162 (2d Cir. 2007). This Court will reverse only if it determines that a challenged instruction "'failed to inform the jury adequately of the law or misled the jury about the correct legal rule.'" *United States v. Ganim*, 510 F.3d 134, 142 (2d Cir. 2007) (quoting *United States v. Ford*, 435 F.3d 204, 209-10 (2d Cir. 2006)), *cert. denied*, 128 S. Ct. 1911 (2008).

### C. Discussion

Ionia argues (*Brief* at 10-16) that Section 151.25 of the APPS regulations requires a foreign-flagged vessel to record relevant operations that occur while the ship is in U.S. waters, but that the regulation does not obligate foreign-flagged vessels to correct or ensure the correctness of ORB entries for operations (including overboard discharges) that occur on the high seas before the vessel enters U.S. waters. Ionia's argument has been squarely rejected by the Fifth Circuit in *Jho*, — F.3d —, 2008 WL 2579240, and is contrary to the plain language of the regulation and purpose of APPS.

#### 1. *Jho* establishes the correct legal standard.

Shortly after Ionia filed its brief in this case, the Fifth Circuit issued its opinion in *Jho*. As here, the indictment in *Jho* charged the operators of a foreign-flagged vessel with failing to maintain an ORB, in violation of APPS, 33 U.S.C. § 1908(a) and 33 C.F.R. § 151.25. The defendants argued that they could not be held liable for such

violations because "the allegedly incorrect entries were made in international waters" and because the regulatory duty to "maintain" an ORB did not attach to events outside of U.S. waters. *Jho*, 2008 WL 2579240 *3. The Fifth Circuit disagreed, holding that the requirement to "maintain" an ORB "impos[es] a duty upon a foreign-flagged vessel to ensure that its [ORB] is accurate . . . upon entering the ports of navigable waters of the United States." *Id.* The Fifth Circuit reasoned that the defendants' interpretation would "obviously . . . frustrate" the United States' ability to enforce MARPOL by enabling foreign-flagged vessels to avoid ORB obligations "simply by falsifying all of its record book information just before entry into a port or [U.S.] navigable waters." *Id.* The Fifth Circuit's analysis is in accord with the plain language of the regulation and purpose of APPS and should be followed by this Court.

**2. To "maintain" means to keep in good order.**

Regulatory interpretation, like statutory interpretation, begins with the relevant text viewed in appropriate context. *New York Currency Research Corp. v. CFTC*, 180 F.3d 83, 92 (2d Cir. 1999); *Rock of Ages Corp. v. Secretary of Labor*, 170 F.3d 148, 155 (2d Cir. 1999). The APPS ORB regulation (33 C.F.R. § 151.25) was issued under APPS, a statute enacted to implement MARPOL and the treaty objective of preventing pollution on the high seas. *Jho*, 2008 WL 2579240, *3.

Like MARPOL Annex I, Section 151.25 furthers this goal by requiring ships to self-report, in ORBs, oil transfer

operations relevant to compliance with MARPOL's discharge prohibitions. Section 151.25 imposes an overarching duty to "maintain" the ORB, 33 C.F.R. § 151.25(a), and sets out particular obligations in relation to this duty, including the obligation to record specified operations "without delay" whenever they occur, *id.*, § 151.25(d), (e), (f) & (h), and the obligation to keep the ORB available for inspection "at all reasonable times." *Id.*, 151.25(i). Because the obligation to "maintain" the ORB is for purposes of regulatory inspections that may occur at any "reasonable time" (and, under Annex I, by any "competent authority") ship operators have a continuing obligation to ensure the accuracy of ORB entries, as long as the ORB remains subject to inspection.[5] Stated differently, if a ship operator knowingly preserves for inspection an ORB known to contain false entries or omissions, the operator fails to "maintain" the ORB for its regulatory purpose.

This interpretation is in accord with standard usage. Contrary to Ionia's argument (*Brief* at 13, n.16 & 15-16), the word "maintain" means more than merely to "keep" or "possess." To "maintain" a record is to keep or preserve it in proper order. *See Webster's Third New International Dictionary* 1362 (1993) (defining "maintain" as "to keep in a state of repair, efficiency, or validity" or "preserve

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[5] Under MARPOL Annex I, ships must maintain ORBs for a period of three years after the last entry. IMO, MARPOL Consolidated Edition 72 (2006); *see also* 33 C.F.R. § 151.25(k) (same for U.S. ships).

from failure or decline").[6] If an ORB contains false entries or material omissions, it is not in a "state of . . . validity" and must be corrected to be properly "maintained." The district court's answer to the jury question correctly conveyed this interpretation.

### 3. Ionia's interpretation is unsupported.

Ionia argues (*Brief* at 11-14) that the district court erred in giving "maintain" its ordinary meaning because MARPOL Annex I – which the APPS regulation is designed to implement – only requires that the ORB be "kept." This misconstrues Annex I and the relationship between Annex I and the APPS regulations.

Like the APPS rules, Annex I requires ships to make accurate entries "without delay" and to keep ORBs

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[6] Ionia cites the online Cambridge Advanced Learner's Dictionary, which defines "maintain" to mean, *inter alia*, "to continue to have; to keep in existence, or not allow to become less." *See Ionia Brief* at 13 & n.16 (citing http://dictionary.cambridge.org/define.asp?key=48202&dict=CALD. These definitions imply keeping something in a baseline condition and not allowing it to deteriorate. The baseline condition for ORBs, mandated by MARPOL and APPS, is a condition of accuracy. If a ship fails to record relevant operations, thus allowing an ORB to become inaccurate, the ORB is not being maintained. *See* http://dictionary.cambridge.org/define.asp?key=48204&dict=CALD (defining "maintain" to mean "to keep a road, machine, building, etc. in good condition").

available for inspection. IMO, MARPOL Consolidated Edition 71 (2006); *see also* SA60 (comparable former provision). Under Ionia's interpretation, if a ship fails to timely record an entry, the ship's obligation to make the entry would end, and its obligation to "keep" the ORB would compel it to preserve the omission. So interpreted, Annex I would mandate false reporting.[7] This cannot be the proper interpretation. Rather, Annex I is properly read as imposing a continuing obligation to report the circumstances surrounding an operation, even if the ship fails to record the entry in a timely fashion (*i.e.*, "without delay") or fails to accurately record the information in the first instance.

Equally important, there is no merit to Ionia's suggestion (*Brief* at 12-14) that the APPS regulations cannot go beyond the express terms of Annex I. Congress authorized the Coast Guard to "prescribe any necessary or *desired* regulations to carry out the provisions of . . . MARPOL," 33 U.S.C. § 1903(c)(1) (emphasis added); and made it a felony for any person to knowingly violate either MARPOL or the APPS regulations. *Id.*, § 1908(a).

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[7] There is no merit to Ionia's argument (*Brief* at 15) that "preserving [an] ORB in its original [inaccurate] form" would "preserve[] important evidence of possible MARPOL violations on the high seas." A failure to record unlawful discharges on the high seas would conceal those violations, not provide evidence thereof. Further, preserving the false entries or material omissions would preserve evidence of the record keeping violation, only if the discharge violation is independently proven.

Through these provisions, Congress clearly authorized the Coast Guard to plug any regulatory gaps in the Annex I regulations, in order to implement MARPOL under U.S. law. Thus, the term "maintain" in Section 151.25 may be given its ordinary meaning – to keep in a state of validity – even if there is no express Annex I counterpart.[8]

Ionia's contention (*Brief* at 16, 18) that "presenting" a false ORB to the Coast Guard may lead to criminal liability under Title 18 (Sections 1001 or 1519) but not APPS is a *non sequitur*. As explained, the APPS regulation (like Annex I) requires ships to maintain ORBs for inspection, whenever an inspection might occur, not to submit ORBs to the Coast Guard at particular times. Thus, the offense of failing to maintain is complete whenever a failure to maintain occurs or, in the case of foreign-flagged vessels, whenever such failure occurs while the ship is within U.S. waters. *See* 33 U.S.C. § 1902(a)(2); 33 C.F.R. § 151.09(a)(1)-(5). An inspection or "presentation" is unnecessary.

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[8] In arguing that "maintain" only means "keep," Ionia cites 33 C.F.R. § 151.25(k), which states that the "[ORB] for a U.S. ship shall be maintained on board for not less than three years," and the Coast Guard's "official ORB," which likewise states that "this book must be maintained aboard the ship for at least three years . . . " *Brief* at 13-14. Both citations are inapposite, applying only to U.S. ships, and addressing only one aspect of the overarching duty to maintain, 33 C.F.R. § 151.25(a), which applies to U.S. and foreign-flagged vessels.

The fact that a ship operator might also face liability under Title 18 for "presenting" a false ORB to federal officials is of no moment for interpreting APPS or APPS regulations. APPS establishes a comprehensive regulatory regime, including both criminal and civil penalties. 33 U.S.C. § 1908. Under Ionia's interpretation, whenever a ship presents a false ORB to the Coast Guard during a U.S. port inspection, such conduct would be subject to criminal enforcement under Title 18, but not to civil (or criminal) enforcement under APPS, the very statute establishing the ORB requirements. There is no reason to believe Congress intended such an anomalous result.

**4. The prosecution did not violate international law.**

There is also no merit to Ionia's argument (*Brief* at 17-18) that the term "maintain" must be read narrowly to avoid conflict with international law. *See generally* 33 U.S.C. § 1912 (actions under APPS to be "in accordance with international law"). Ionia's argument rests on the erroneous notion (*Brief* at 18) that requiring foreign-flagged vessels to ensure the correctness of ORBs before entering U.S. waters would "impose American rules while the ship is outside our waters and in international seas." To the contrary, the standards of conduct at issue (including the discharge prohibitions) are international standards established under MARPOL Annex I. If the APPS regulations impose a duty above and beyond these standards – *e.g.*, an ongoing obligation to ensure the

correctness of ORB entries[9] – that duty is a record-keeping obligation that applies only while a ship operates within U.S. waters. 33 U.S.C. § 1902(a)(2); 33 C.F.R. § 151.09(a)(1)-(5). To impose such a requirement is not to assert U.S. authority beyond U.S. waters. *Jho*, 2008 WL 2579240, *8-*9. To be sure, the focus of the APPS regulations is to implement MARPOL and its standards for operations on the high seas. Nevertheless, imposing a heightened record-keeping requirement for foreign-flagged vessels that visit U.S. ports and operate in U.S. waters does not constitute a regulation of such vessels in international waters.

**5. The rule of lenity is inapplicable.**

Ionia's reliance on the "rule of lenity" (*Brief* at 19) also fails. The rule of lenity is a due process principle that applies only when there is a "'grievous ambiguity'" in a statute or regulation, *United States v. Cohen*, 260 F.3d 68, 76 (2d Cir. 2001) (quoting *Huddleston v. United States*, 415 U.S. 814, 831 (1974)), such that "'after seizing everything from which aid can be derived, [a court] can make no more than a guess as to what Congress intended.'" *Id.* (quoting *Reno v. Koray*, 515 U.S. 50, 65 (1995)); *see also Burgess v. United States*, 128 S. Ct. 1572, 1580 (2008) (rule of lenity only applies if ambiguity remains after "consulting traditional canons of . . . construction"). For reasons already stated, § 151.25 is not

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[9] The Government does not concede that the duty to "maintain" ORBs is materially different from the duties imposed in Annex I. *See* pp. 5-8, *supra*.

ambiguous. By imposing a duty to "maintain" ORBs, the regulation plainly informs ship operators that ORBs must be kept in an accurate condition at all times.

## II. The evidence was sufficient to convict Ionia for the acts of its employees.

### A. Relevant facts

Ionia concedes (*Brief* at 33) that the evidence in this case was sufficient to establish that the *Kriton*'s crew engaged in "exceptional discharges" at sea and failed to record those discharges in the ship's ORB. And Ionia does not challenge the evidence demonstrating the falsity of environmental compliance checklists submitted to the Coast Guard, or the evidence demonstrating efforts to obstruct the Coast Guard's March 2007 investigation. The trial testimony shows that the *Kriton*'s Chief Engineers – the Ionia employees in charge of engine room operations and ORB compliance – were personally involved in all unlawful acts. *See* pp. 10-17, *supra*.

The jury also heard testimony regarding the costs and potential delays associated with maintaining an Oily Water Separator and complying with MARPOL discharge requirements. GA131-34, GA138-39. In addition, the Government called Coast Guard Lt. Commander Alan Blume, who testified, *inter alia*, that foreign-flagged vessels are required to present ORBs during routine port-state inspections. GA2-3. Finally, the Government called Coast Guard Lt. Craig Toomey, who performed an annual port-state control compliance examination on the *Kriton* in

July 2006, during the period charged in the indictment. GA125. Lt. Toomey testified that he would not have allowed the *Kriton* to sail out of New York if it posed an unreasonable threat to the marine environment, GA126-126a, or if the ship's officers had revealed that the *Kriton* was dumping waste oil at sea and falsifying their records. GA127.

**B. Governing law and standard of review**

It is well settled that a corporation "may be held criminally responsible for . . . violations committed by its employees or agents acting within the scope of their authority." *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656, 660 (2d Cir. 1989); *see also New York Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 493-95 (1909); *United States v. Demauro*, 581 F.2d 50, 54 n.3 (2d Cir. 1978); *United States v. George F. Fish, Inc.*, 154 F.2d 798, 801 (2d Cir. 1946); *United States v. Potter*, 463 F.3d 9, 25 (1st Cir. 2006). An agent acts within the scope of employment when: (1) the agent acts within his authority and (2) the agent acts with intent to benefit the employer. *See United States v. Koppers Co., Inc.*, 652 F. 2d 290, 298 (2d Cir. 1981); *Potter*, 463 F.3d at 25.

An agent need not have conferred any actual benefit to the employer. Rather, it is sufficient if the there was an intent, at least in part, to benefit the employer. *J.C.B. Super Markets, Inc. v. United States*, 530 F. 2d 1119, 1122 (2d Cir. 1976); *see also Potter*, 463 F.3d at 25 ("The test is whether the agent is 'performing acts of the kind which

he is authorized to perform,' and those acts are 'motivated – at least in part – by an intent to benefit the corporation.'") (quoting *United States v. Cincotta*, 689 F.2d 238, 241-42 (1st Cir. 1982)); *accord United States v. Singh*, 518 F.3d 236, 249 (4th Cir. 2008).

Whether the Government presented sufficient evidence on corporate liability is a question reviewed *de novo* by this Court. *United States v. Ebbers*, 458 F.3d 110, 125 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 1483 (2007). The question is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "Under this stern standard, a court, whether at the trial or appellate level, may not 'usurp[] the role of the jury.'" *United States v. MacPherson*, 424 F.3d 183, 187 (2d Cir. 2005) (quoting *United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003)). The evidence must be viewed in its totality, not in isolation, and the "government need not negate every theory of innocence." *United States v. Autuori*, 212 F.3d 105, 114 (2d Cir. 2000). The jury is "exclusively responsible" for determinations of witness credibility, and a jury's decision to convict may be based upon circumstantial evidence and inferences from the evidence. *United States v. Strauss*, 999 F.2d 692, 696 (2d Cir. 1993). Moreover, the task of choosing among competing, permissible inferences is for the fact-finder, not the reviewing court. *See United States v. Best*, 219 F.3d 192, 200 (2d Cir. 2000).

### C. Discussion

#### 1. The *Kriton*'s crew acted to benefit Ionia.

Contrary to Ionia's argument, the Government's evidence amply supports a finding of corporate liability. All four Ionia employees who testified to participating in unlawful discharges explained that they engaged in such conduct at the direction of their supervisors. The unlicensed crew members (Senolay, Calubag, and Lalu) testified that they acted on instructions from Second Engineer Mercurio, as well as his predecessors, Second Engineers Cantillio and Galudin. GA26-32, GA58-63, GA71-72, GA18-19. Mercurio testified that he acted upon directions from Chief Engineers Tsinogakis and Reneries. GA86-98. Based on such evidence – and the testimony regarding the potential costs and delays associated with regulatory compliance – the jury could reasonably infer that the engine room crew in general, and the Chief Engineers in particular, committed the unlawful dumping at sea (bypassing the Oily Water Separator) to avoid the costs and potential delays associated with maintaining pollution-control equipment and disposing the oily residues such equipment would generate, all for the benefit of Ionia.

While Ionia argues (*Brief* at 39) that the cost savings from regulatory noncompliance could not have motivated its employees in this case – on the theory that Ionia could have contractually passed regulatory costs to the *Kriton*'s owner – that argument ignores the benefits to Ionia, in terms of its relations with the ship owner, of not having to

pass on costs or report delays relating to regulatory compliance issues.

Moreover, there is no evidence of any personal motive (*i.e.*, a motive other than an intent to benefit the corporation) on behalf of Ionia employees that would explain the unlawful conduct in this case. Ionia attempts to show (*Brief* at 36, 39) that Mercurio was "lazy" and thus acted out of a personal motive to make his job "a little easier." In so doing, however, Ionia ignores the evidence that Mercurio did not contrive the "magic hose" or act alone in its use. To the contrary, the evidence showed that the two Second Engineers who preceded Mercurio on the *Kriton* used the magic hose before his arrival; and that both Chief Engineers who served over Mercurio directed its use. The involvement of the highest level managers in the engine room, the overall number of employees involved, and the duration of the unlawful dumping across changes in engine-room management strongly support the inference that the crew acted, at least in part, in furtherance of a scheme to benefit Ionia.

Given the reasonable inference that the crew illegally discharged to benefit Ionia, the jury could likewise infer that the charged acts of concealment and obstruction were committed for the benefit of Ionia. The Chief Engineers completed all ORB entries; and completed and submitted to the Coast Guard the Compliance Program Checklists, which were required as a condition of port entry. Based on this evidence and the testimony from officers Blume and Toomey regarding the importance of the ORBs in Coast Guard inspections, the jury could reasonably infer that the

Chief Engineers reported and maintained false information in the ORBs and Compliance Checklists to enable the *Kriton* to operate in U.S. ports without interference from Coast Guard officials, despite the vessel's noncompliance with MARPOL discharge regulations.

Similarly, the jury could reasonably infer that Chief Engineer Renieris cut and hid the magic hose (per Mercurio's testimony) during the March 2007 Coast Guard investigation– and directed the crew to lie to the Coast Guard about the hose (per Mercurio and Calubag's testimony) – to prevent the scheme from unraveling and subjecting the corporation to legal consequences. Indeed, Mercurio testified that, in the wake of the Coast Guard investigation, Ionia's superintendent Apostolatos told him to "forget" the truth, and Captain Chritis (the *Kriton*'s master) advised Mercurio that if he told the Coast Guard about the bypass hose, "the company will have a big problem." GA108-112, GA121.

To be sure, once the scheme began unraveling, each of the crew members who participated in the unlawful conduct had a personal motive to conceal his own involvement (*e.g.*, to avoid personal criminal liability or protect his employment). This is true whenever employees commit criminal offenses on behalf of a corporate employer. The fact that individual crew members had a personal motive to obstruct the Coast Guard investigation or otherwise conceal unlawful acts does not mean that they were not also motivated by a desire to protect the company. *See Potter*, 463 F.3d at 25; *Singh*, 518 F.3d at 249.

While Ionia variously attacks the credibility of Mercurio, Calubag and the other Government witnesses who implicated the Chief Engineers in the unlawful dumping and concealment (*Brief* at 30-31, 34-37), their testimony is generally consistent and corroborated by the testimony concerning the state of the ORBs themselves. At bottom, it is the province of the jury, not the Court, to make credibility determinations and draw inferences from the evidence. *Best*, 219 F.3d at 200.

Finally, Ionia's argument (*Brief* at 24, 37-38) that the Government could have and should have specifically asked the employees whether they intended to benefit Ionia when illegally discharging is inapt. The Government elicited testimony from each of these witnesses as to why they participated; each testified that he did as directed by his supervisor(s). Accordingly, in the present case, the intent of the Chief Engineers is equally relevant (if not paramount). Given their positions and ultimate responsibility over engine room operations, the jury could reasonably infer that the Chief Engineers approved unlawful discharges to expedite vessel operations, and that the subordinate employees acted in concert with the scheme, all to the benefit of Ionia.

Further, there is no requirement that the Government prove intent by direct admission of the relevant actor(s). The law recognizes that "the *mens rea* elements of knowledge and intent can often be proved through circumstantial evidence and the reasonable inferences drawn therefrom." *MacPherson*, 424 F.3d at 189; *see also United States v. Salemeh*, 152 F. 3d 88, 143 (2d Cir. 1998)

(noting that "as a general rule most evidence of intent is circumstantial").

**2. Evidence of compliance plans does not defeat corporate liability.**

Ionia argues (*Brief* at 38) that the evidence was insufficient to establish corporate liability because Ionia had written policies prohibiting MARPOL violations, because the engine room employees were aware of company policies and the "penalty" of termination, and because the employees acted "in a manner they knew was harmful to their employer." These contentions do not withstand scrutiny.

As Ionia acknowledges (*Brief* at 25), evidence that a corporation made efforts to prevent violations of law by its employees may "bear on" the issue of corporate liability; however, corporate compliance efforts do not, as a matter of law, "immunize the corporation from liability." *Twentieth Century Fox*, 882 F.2d at 660; *see also Potter*, 463 F.3d at 25-26; *J.C.B. Super Markets, Inc.*, 530 F.2d at 1122 (rejecting argument that employer was not liable for illegal acts of sales clerk because clerk was not authorized by employer to engage in illegal sales). Rather, as the trial court instructed in this case, corporate plans and policies constitute evidence that the jury may consider when determining "whether [an] agent intended to benefit the corporation and/or was acting within his authority." GA155-56.

Here, there was ample evidence to support the jury's finding of corporate liability, despite the corporate compliance program. To begin with, Ionia's evidence of the existence of a compliance program was perfunctory. Ionia introduced certificates of training, GA114-20, and "policies acceptance forms" indicating that employees "read and understood" environmental policies. However, Ionia presented no evidence on the specifics of training or efforts to reinforce training during shipboard operations. Calubag testified that although he had been told that Ionia had a "zero-tolerance" policy for discharges to the sea, he was not sure what "zero-tolerance" meant. GA76. The parties stipulated that Ionia was legally required to have an ECP. GA147. Evidence of *pro forma* compliance with legal obligations does not prove that corporate management heeded such policies in practice.

Equally important, the trial evidence in this case demonstrated that the *Kriton*'s Chief Engineers did not heed the corporate compliance programs but instead directed and condoned the use of the magic hose for unlawful discharges. The Chief Engineers were the very persons responsible for implementing Ionia's compliance program aboard the *Kriton*, and for otherwise ensuring that MARPOL/APPS requirements, including ORB requirements, were met. As part of their training, the engine crew members were advised to bring MARPOL/APPS compliance issues to the Chief Engineers, among others. The Chief Engineers (and Second Engineers) also had the authority to fire unlicensed crew members for insubordination. Oiler Ricky Lalu made it clear that he was to do exactly what his superior, the

Second Engineer, told him to do, despite knowing that the discharges were in violation of MARPOL. GA21.

Accordingly, there was more than sufficient evidence for the jury to conclude that Ionia's legally mandated compliance programs did not represent corporate policy or practice, at least aboard the *Kriton*. The Government was not obligated to implicate corporate officers beyond the *Kriton.* The touchstone of corporate criminal liability is simply whether an agent acted within his general authority and with an intent, in part, to benefit his employer. *Potter*, 463 F.3d at 25.

### 3. The Amici arguments are not properly presented.

Unlike Ionia, Amici Association of Corporate Counsel *et al.* ask this Court to establish corporate immunity from criminal prosecution based on compliance programs. Amici contend that the present standard for corporate criminal liability is based on a "mistaken application" of *New York Central & Hudson River RR*, 212 U.S. 481, and urge this Court to require, as an additional element, that a corporation "lacks effective policies and procedures to deter and detect criminal actions by their employees." Amici Br. at 5, 23 (internal quotations omitted). In so arguing, Amici erroneous imply that the ECP in this case was "effective" (it was not) and erect a strawman; *viz.*, that current law permits corporate liability "*regardless* of the employee's position . . . or the corporation's actions to prevent . . . criminal acts." *Id.* at 16. Per the court's jury instruction, GA156, such factors are relevant for

determining whether an employee acted "within his authority" and "for the benefit" of a corporation.

In any event, the standards for corporate criminal liability in this Court are longstanding and govern unless and until reconsidered by the Supreme Court or this Court sitting *en banc*. *In re Sokolowski*, 205 F.3d 532, 534-35 (2d Cir. 2000) (per curiam); *see also United States v. Coreas*, 419 F.3d 151, 159 (2d Cir. 2005); *United States v. Martinez*, 413 F.3d 239, 243 (2d Cir. 2005). Although Amici believe that their proposed standard is compelled by recent Supreme Court cases addressing *civil* liability, none of those cases purport to set forth standards for corporate criminal liability. It is for the Supreme Court, and not the lower courts, to overrule their decisions or extend them to new contexts. *See United States v. Santiago*, 268 F.3d 151, 155 n.6 (2d Cir. 2001). Moreover, amici are ordinarily not permitted to inject "new issues into an appeal" or expand the scope of issues raised by parties. *Ricci v. DeStefano*, 530 F.3d 88, 91 (2d Cir. 2008) (Parker, J.) (concurring in denial of rehearing en banc); *Bano v. Union Carbide Corp*., 273 F.3d 120, 127 n.5 (2d Cir. 2001). Ionia did not object below to the corporate liability instruction given by the trial court and does not argue on appeal for the standard urged by Amici.

### 4. The *Amiable Nancy* is inapposite.

Ionia also asserts (*Brief* at 23, 41) that the evidence is insufficient under the rule of *The Amiable Nancy*, 16 U.S. 546 (1818). In that case, Justice Story stated that the "innocent" owner of a vessel commissioned as a privateer could not be held liable in tort for punitive (non-compensatory) damages for the plundering of a neutral ship by the vessel operator, given that the owner "neither directed . . . nor countenanced . . . nor participated in [the plundering] in the slightest degree." *Id.* at 559; *see also Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2615-16 (2008) (describing case). Here, Ionia did "participate" in the illegal acts, through persons acting within their authority and for the benefit of Ionia.

Moreover, the *Amiable Nancy* is a civil case that did not purport to address standards for criminal prosecution. Ionia does not begin to explain the relevance of *The Amiable Nancy* to its appeal, other than obliquely suggesting that it establishes a special rule for maritime cases that forecloses any punitive action – including a criminal prosecution – against a vessel operator on a *respondeat superior* theory. Ionia cites no authority for this sweeping legal proposition, did not argue it below, and does not acknowledge or attempt to meet the consequent "plain error" review standard. *See* Fed. R. Crim. P. 52(b); *United States v. Whab*, 355 F.3d 155, 158 (2d Cir. 2004) (explaining that to meet this standard, there must be an error, that is plain, that affects substantial rights, and that seriously affects the fairness, integrity, or public reputation of the judicial proceedings).

## III. The district court did not plainly err in instructing the jury on corporate criminal liability.

### A. Relevant facts

Each of the indictments in this case charged Ionia, in language substantially similar to the following, with committing offenses:

> . . . through its agents and employees, who were acting within the scope of their agency and employment, and for the benefit of defendant IONIA . . .

*See, e.g.*, A4.

In its general charge on corporate liability, the court stated that a "corporation can only act vicariously through its agents" and that a corporation

> may be held criminally liable for the acts of its agent done on behalf of and for the benefit of the corporation, and directly related to the performance of the duties the employee has authority to perform.

GA154. When describing the elements of an APPS offense, the court added that Ionia may be held liable for "acts or omissions of its agents performed 'within the scope of their employment.'" The court defined the latter clause as follows:

> An act or omission that was specifically authorized by the corporation would be within the scope of the agent's employment. 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.
>
> It is not necessary that the government prove that the corporation was actually benefitted, only that the agent intended it would be. If you find that the agent was acting within the scope of his employment, the fact that the agent's act was illegal, contrary to his employer's instructions or against the corporation's policies will not necessarily relieve the corporation of responsibility for the agent's act. You may consider whether the agent disobeyed instructions or violated company policy in determining whether the agent intended to benefit the corporation and/or was acting within his authority. In determining whether an agent was acting for the benefit of the corporation, you are instructed that the government need not prove that the agent was only concerned with benefitting the corporation. It is sufficient if one of the agent's purposes was to benefit the corporation.

GA155-56. Ionia did not object to these instructions in the proceedings below.

### B. Governing law and standard of review

This Court reviews the propriety of jury instructions *de novo*. *Cullen*, 499 F.3d at 162. No particular form of instruction is required. *Ganim*, 510 F.3d at 142. "[T]he question is whether the challenged instruction misled the jury as to the correct legal standard or did not adequately inform the jury on the law." *United States v. Goldstein*, 442 F.3d 777, 781 (2d Cir. 2006). This Court does not "'review portions of the instructions in isolation, but rather consider[s] them in their entirety to determine whether, on the whole, they provided the jury with an intelligible and accurate portrayal of the applicable law.'" *Ganim*, 510 F.3d at 142 (quoting *United States v. Weintraub*, 273 F.3d 139, 151 (2d Cir. 2001)).

A constructive amendment of an indictment occurs when the trial evidence and jury instructions "'so modify'" the terms of an indictment that "'there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment.'" *United States v. Mollica*, 849 F.2d 723, 729 (2d Cir. 1988) (quoting *United States v. Hathaway*, 798 F.2d 902, 910 (6th Cir. 1986)). To prevail on such a claim, a defendant must "demonstrate that either the proof at trial or the . . . jury instructions so altered an essential element of the charge that, upon review, it is uncertain whether the defendant was convicted of conduct that was the subject of the grand jury's indictment." *United States v. Frank*, 156 F.3d 332, 337 (2d Cir. 1998) (per curiam). On this question, this Court's cases "have 'consistently permitted significant flexibility in proof, provided that the defendant

was given *notice* of the *core of criminality* to be proven at trial.'" *United States v. Rigas*, 490 F.3d 208, 228 (2d Cir. 2007) (quoting *United States v. Patino*, 962 F.2d 263, 266 (2d Cir. 1992)) (footnote omitted), *cert. denied*, 128 S. Ct. 1471 (2008).

When a defendant fails to object to a jury instruction at trial, this Court reviews for plain error. *United States v. Thomas*, 377 F.3d 232, 242 (2d Cir. 2004). Under this standard, a defendant must show an "error that is plain and affects substantial rights," and this Court will reverse only if the error "seriously affects the fairness, integrity, or public reputation of the judicial proceedings." *Goldstein*, 442 F.3d at 781; Fed. R. Crim P. 52(b).

### C. Discussion

#### 1. The instructions did not constructively amend the indictments.

As part of its instructions on corporate liability, the district court advised the jury that it could find an employee's conduct "within the scope of his employment," for corporate liability purposes, if: (1) the act was "specifically authorized by the corporation," or (2) the agent acted "for the benefit of the corporation" and "within his authority." During closing arguments, Government counsel referred to the former instruction and argued that the unlawful acts in this case were "all at the direction of the superior officers of the engine room crew, namely the chief engineers . . . and the second engineers below them." GA160. Ionia now contends (*Brief* at 41-44)

that the instruction and argument "constructively amended" the indictments, permitting Ionia to be convicted without proof that employees acted for the company's benefit, and thus for conduct different from that upon which the company was indicted.

Ionia is mistaken. The rule against "constructive amendments" is designed to ensure that defendants are not compelled to stand trial for acts or omissions for which the indictment failed to provide sufficient notice. *Rigas*, 490 F.3d at 228. The critical issue is whether the indictments provided notice of the "core of criminality" proven at trial. *Id.* Here, the indictments clearly alleged, *inter alia*, that Ionia acted through its employees and that senior employees directed subordinate employees to commit unlawful acts. For example, the Connecticut Indictment alleged (as an overt act of the conspiracy count) that "senior engineers in the engine department of the *Kriton* . . . routinely directed subordinate engine department crew members to pump [oily wastes] directly overboard . . . through a flexible, black rubber hose . . . " A9. This and other allegations put Ionia on notice of the need to defend against evidence that the Chief Engineers and Second Engineers directed such conduct.

Further, the district court's instructions in no way limited Ionia's ability to present its defense. When advising the jury that Ionia could be held liable for acts "specifically authorized" by the corporation, the trial court did not state that every order from a supervisory employee constitutes "specific authorization" from the corporation. Per the court's general instruction, Ionia would only be

liable for orders given by its employees within the scope of their authority and for the benefit of Ionia. To be sure, for reasons stated *supra*, there was sufficient evidence in this case to permit the jury to readily infer that the orders of the Chief Engineers were for the benefit of Ionia.

Nevertheless, the court's instructions enabled Ionia to argue to the jury that supervisory employees – and particularly Mercurio – acted in their own interests and not for the benefit of Ionia. *See* GA161-62 ("each of the crew told you that they were just following the orders of Mercurio"); GA163 ("You'll have to determine if there were discharges, were they for the benefit of Ionia, were they authorized by Ionia, or were they just something that happened by a lazy second engineer to benefit himself to make his own life a little easier so he can go sit back, put his smelly feet up on the table."). Ionia did not argue below that the court's instruction prejudiced its defense; and has not shown plain error now, nor any impact on "substantial rights." *Goldstein*, 432 F.3d at 781.

**2. Corporate liability is not limited to "managerial" employees.**

Contrary to Ionia's argument (*Brief* at 21, 45), the district court also did not err by not charging the jury that corporations can only be liable for the acts of "managerial employees." Although there is language in some cases from this Court suggesting that liability is not imputed unless the agent was a "managerial" employee, *see*, *e.g.*, *Koppers*, 652 F.2d at 298; *Twentieth Century Fox*, 882 F.2d at 659, that language is *dicta.* Indeed, in *George F.*

*Fish*, this Court expressly rejected the argument that a corporation could not be held liable for the acts of a low-level salesman: "[T]he Supreme Court has long ago determined that the corporation may be held criminally liable for the acts of an agent within the scope of his employment. . . . No distinctions [in these cases] are made . . . between officers and agents, or between persons holding positions involving varying degrees of responsibility." 154 F.2d at 801.

Against this background, the "managerial" language in *Koppers* and *Twentieth Century Fox* is best understood as another way of saying that the agent's actions must be within the scope of the agent's employment. Thus, in *Koppers*, the district court defined a "managerial agent" as "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*." 652 F.2d at 298 (emphasis added). The court's instruction here conveyed the same concept. The court instructed the jury that "[a]s a legal entity, a corporation can only act vicariously through its agents, that is, through its directors, officers, employees, or other persons *authorized to act for it.*" GA154 (emphasis added). This standard is not materially different from the *Koppers* instruction, and in any event, any error is not "plain." *See Whab*, 355 F.3d at 158.

Moreover, even if there were some error in omission of the word "managerial" from the instructions, it did not affect Ionia's substantial rights. The trial evidence showed that the *Kriton*'s Chief Engineers – indisputably

managerial agents of Ionia – directed the use of the magic hose to bypass the Oily Water Separator and failed to record overboard discharges in the ORBs. Moreover, while Ionia challenges the evidence implicating the Chief Engineers, Ionia does not dispute Second Engineer Mercurio's role in the unlawful conduct; nor does Ionia assert that Mercurio was not a "manager" for corporate liability purposes. Rather, Ionia only disputes whether Mercurio acted to benefit the company, a separate issue already addressed.

## IV. The court's § 1519 instruction was proper.

### A. Relevant facts

Ionia was charged with three counts under 18 U.S.C. § 1519, one each in the Connecticut, New York, and Florida Indictments. The New York and Florida indictments alleged, in substantively identical language, that Ionia

> did knowingly falsify and make a false entry in a document, to wit: a Compliance Program Checklist, with the intent to impede, obstruct and influence the proper administration of a matter, and in relation to and contemplation of such matter, to wit: the monitoring of IONIA's environmental compliance program, within the jurisdiction of a department and agency of the United States . . . in that the Compliance Program Checklist was falsified and contained *materially* false assertions and entries . . .

A21-22, A35-36 (emphasis added). In contrast, the Connecticut indictment did not allege "material" falsifications, but simply tracked the language of the statute, alleging that Ionia falsified documents with an "intent to impede, obstruct, and influence" an investigation. A12.

The district court instructed the jury that the Government had to prove two elements to establish the Section 1519 offenses:

> 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 it 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.

GA158.

Ionia did not object to this instruction and proposed a substantially similar instruction that likewise did not allege a "materiality" element. Dkt # 164; GA170-79.

**B. Governing law and standard of review**

See Part III.B, *supra*.

### C. Discussion

Ionia does not argue that proof of "material" falsifications is a required element under § 1519[10] or that the district court erred in stating the elements of a § 1519 offense. Rather, Ionia argues (*Brief* at 45-56) that because the New York and Florida indictments alleged "material" falsifications, the district court's failure to charge "materiality" as to those indictments constituted an impermissible constructive amendment. Ionia's claim fails.

As a preliminary matter, because Ionia itself requested instructions on the § 1519 counts that did not include a materiality requirement, Dkt. # 164, Ionia has waived any argument concerning a constructive amendment. When a defendant affirmatively invites a jury charge, appellate review of that instruction is foreclosed. *United States v. Giovanelli*, 464 F.3d 346, 351 (2d Cir. 2006) (citing *United States v. Crowley*, 318 F.3d 401, 411 (2d Cir. 2003)), *cert. denied*, 128 S. Ct. 206 (2007).

On the merits, the court's failure to include a "materiality" charge did not constructively amend the relevant indictments. Because the "materiality" of falsifications is not an element of a Section 1519 offense, the language alleging materiality was mere surplusage.

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[10] Case law is to the contrary. *See United States v. Hunt*, 526 F.3d 739, 743 (11th Cir. 2008); *United States v. Lessner*, 498 F.3d 185, 196 (3rd Cir. 2007), *cert. denied*, 128 S. Ct. 1677 (2008); *United States v. Wortman*, 488 F.3d 752, 754-55 (7th Cir. 2007).

The Government is under no obligation to prove surplusage. *United States v. Autorino*, 381 F.3d 48, 54 (2d Cir. 2004). Further, because the falsifications named in the relevant indictments were the same false statements proven at trial, there is no "substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment" and no constructive amendment. *Mollica*, 849 F.2d at 729.

Finally, even if there were some error in the court's instruction, there was no impact upon Ionia's substantial rights. Contrary to Ionia's assertion (*Brief* at 47), *United States v. Gaudin*, 515 U.S. 506 (1995) and *Johnson v. United States*, 520 U.S. 461 (1997) are inapposite. In both cases, there was no doubt that the offense at issue included a "materiality" element. *Gaudin*, 515 U.S. at 509 (18 U.S.C. § 1001); *Johnson*, 520 U.S. at 465 (18 U.S.C. § 1623). Here, the challenged instruction did not omit a necessary element and thus cannot constitute, as Ionia alleges (*Brief* at 47), a violation of the company's Sixth Amendment jury rights. Ionia does not allege or identify any other prejudice.

## V. The district court did not err or abuse its discretion in sentencing.

### A. Relevant facts

#### 1. Presentence report

In its Presentence Report ("PSR"), the probation office reported, *inter alia*, that the *Kriton* "routinely pumped oily waste . . . into the sea by way of a flexible bypass hose. . . ." PSR ¶ 8. At sentencing, Ionia objected to the PSR's recitation of the offense conduct, but did not dispute particular findings.[11] The district court asked Ionia for clarification, noting that the convictions and facts underlying the convictions were no longer before the court. GA277-78. Counsel responded that Ionia's "main objection . . . is the recitation relating to pollution as being a basis for a sentence enhancement." GA277.

The district court replied that under the reasoning of *Abrogar*, 459 F.3d at 437, extra-territorial discharges could not form the basis for a sentencing enhancement

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[11] In its sentencing memoranda, Ionia argued that the electrician who first reported unlawful discharges acted out of a financial motive (to share in any APPS penalty award) and that there was "absolutely no . . . physical evidence" to corroborate the trial testimony regarding discharges. A95-99; *see also* A164-66. Ionia did not challenge the trial evidence – regarding the North Sea Oil slick and unaccounted-for oily wastes – that Ionia now purports to dispute on appeal (*Brief* at 58).

under U.S.S.G. § 2Q1.3(b)(1)[12] but that such discharges were relevant to the "purposes of . . . APPS" and could be considered under 18 U.S.C. § 3553. GA277-79. While noting that Ionia would have "more to say" on these issues, counsel did not press any *factual* objection regarding extraterritorial discharges. GA279-80. As relevant here, the court adopted the factual findings in the PSR, noting Ionia's right to argue about the significance of extra-territorial discharges under the § 3553 factors. GA279, GA285.

**2. Government's position**

At sentencing, the Government urged the district court to impose a $9 million fine (the statutory maximum of $500,000 on each of the 18 counts) for purposes of general and specific deterrence. A122, A151. The Government noted that the Sentencing Guidelines for organizational fines did not apply to the offenses in this case and that the statutory sentencing factors applied. A125-26, A147-48; *see also* U.S.S.G. § 8C2.1, comment (backg'd); § 8C2.10. With respect to these factors, the Government cited the routine and widespread discharges that occurred in this case, A127-32; Ionia's prior conviction (which had not deterred such offenses), A132-35; and published news accounts demonstrating that principals of Ionia were doubling their fleet through the purchase of nine new

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[12] The United States disagrees with *Abrogar*, which is not binding on this Court. The issue in *Abrogar* (regarding application of Part 2Q of the Sentencing Guidelines) is not raised in this case.

vessels worth tens of millions of dollars and thus had the ability to pay a substantial fine, A139; *see also* GA342-43.

The Government also presented studies estimating that deliberate oily waste discharges like those in this case were responsible for many times more oil pollution than catastrophic accidental spills such as from the Exxon *Valdez* and were a significant cause of seabird mortality. A131. In addition, the Government presented evidence: (1) that Ionia was closely associated (via common ownership) with Kriton Maritime S.A., the owner of the *Kriton*, A139;(2) that the principals of Ionia and Kriton Maritime incorporated both companies in Liberia, at a time that that country was in the midst of "civil war and political instability" and "require[d] little or no corporate reporting," A139, A141; and (3) that the *Kriton* was registered in the Bahamas, a country that likewise "does not require [ship] owners to disclose any details of their company when they register." A140. The Government argued that the "places and circumstances" in which Ionia did business demonstrated Ionia's general desire to "avoid[] accountability." A140-41.

**3. Ionia's position**

In response, Ionia presented evidence regarding the shipping registries of Liberia and the Bahamas, A166-67, including materials indicating that the Bahamas (the State of registry for the *Kriton*) had a "vessel registry with a superior Port State Control record." A167. Ionia also argued that upper level management or "shore-side personnel" were not involved in the illegal actions of

"rogue crewmembers" and that Ionia had "environmental policies and programs" in place to prevent violations. A157-59. In addition, Ionia argued that the Government's "estimates" concerning the impacts of oil pollution were "mere speculations" with "no factual relevance to the instant matter" because they were "in no way connected to what occurred on board" the *Kriton*. A168.

Ionia urged the district court to apply the Sentencing Guidelines to determine the fine to be imposed in this case; to group all eighteen counts in the indictment per the Guidelines grouping rules; and to impose a fine within a Guidelines range of $153,000 to $306,000. A171-74.

**4. Sentencing**

While observing that it was "in no way . . . constrained, [or] confined" by the Sentencing Guidelines, the district court chose to calculate a fine range, per the corporate fine guidelines, as an "advisory" tool. GA286-87, GA363. The court grouped the offenses to determine Ionia's offense conduct and culpability score, and calculated a fine range of $350,000 to $700,000. GA351-53. The court then multiplied the calculated maximum by seven to establish the fine. The court stated that its multiplier represented the "seven different kinds of offenses" charged in the indictments; *viz.*, the "four distinct offenses" in the Connecticut indictment and "one category from the three other districts." GA352-53.

The court also explained that the $4.9 million fine was necessary to serve the "deterrent[,] punishment and public

message function." GA352. The court cited a "scent of contumaciousness" in Ionia's conduct, and the need to send a message of deterrence for a company that was "previously convicted of a like crime" and "apparently faile[d] to see the seriousness" of its obligations. GA346-48, GA351-52. The court noted that the offense was not merely a "record-keeping case," as Ionia alleged, but a concerted effort to conceal high-seas discharges that "affect[] every country in the world." GA346. The court also observed that Ionia had "willful[ly] fail[ed] to disclose finances in a way that even comes close to looking like an effort to disclose [the company's] real financial picture." GA353.

**B. Standard of review**

In *United States v. Booker*, the Supreme Court excised 18 U.S.C. § 3742(e), the statutory provision governing appellate review of sentences, along with the provision making the Guidelines mandatory (18 U.S.C. § 3553(b)(1)), finding both contrary to the Court's constitutional holding that the facts necessary to support a mandatory sentence must be proved to a jury beyond a reasonable doubt. 543 U.S. 220, 244-45, 259 (2005). In place of § 3742(e), *Booker* established a "reasonableness" standard. *Id.* at 261-62; *United States v. Jones*, 531 F.3d 163, 170 (2d Cir. 2008) (citing, *inter alia*, *Booker*, 543 U.S. at 262; *Gall v. United States*, 128 S. Ct. 586, 591 (2007)). Under such review, this Court first looks to whether the sentencing court committed "procedural error," including whether the court correctly calculated the Guidelines range. *Jones*, 531 F.3d at 170. During such

review, this Court interprets the Guidelines *de novo*. *United States v. Parnell*, 524 F.3d 166, 169 (2d Cir. 2008).

If the sentencing was "procedurally sound," this Court turns to the "totality of the circumstances" to determine if the sentence is "substantively reasonable." *Jones*, 531 F.3d at 170. "[S]ubstantive reasonableness reduces to a single question:" whether the district court "abused its discretion" in imposing sentence per the statutory sentencing factors. *Id.* (citing *Gall*, 128 S. Ct. at 600); *see also* 18 U.S.C. § 3553(a). Among other things, § 3553 directs courts to consider the "nature and circumstances of the offense and the history and characteristics of the defendant" and the need for a sentence to "reflect the seriousness of the offense" and "afford adequate deterrence to criminal conduct." 18 U.S.C. § 3553(a)(1)-(2). A court must also consider the relevant Guidelines range when a guideline has been established by the Sentencing Commission.[13] *Id.*, § 3553(a)(4).

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[13] Where "there is no applicable sentencing guideline," the sentencing statute limits appeal and appellate review to whether a sentence is "plainly unreasonable." 18 U.S.C. §§ 3742(a)(4), (e)(4). This Court has determined that *Booker*'s "reasonableness" standard displaces "plainly unreasonable" review in § 3742(e)(4), at least where there is a Guidelines policy statement. *See United States v. Fleming*, 397 F.3d 95, 99 (2d Cir. 2005) (citing *Booker*, 543 U.S. at 261-62). *But see United States v. Finley*, 531 F.3d 288, 293-94 (4th Cir. 2008) (recognizing continuing validity of § 3742(e)(4) "plainly unreasonable" standard (continued...)

This Court "'presumes in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully discharged her duty to consider the statutory factors . . . and will not conclude that a district judge shirked her obligation to consider the § 3553(a) factors simply because she did not discuss each one individually or did not expressly parse or address every argument relating to those factors that the defendant advanced.'" *United States v. Pereira*, 465 F.3d 515, 523 (2d Cir. 2006) (quoting *United States v. Fernandez*, 443 F.3d 19, 30 (2d Cir.), *cert. denied*, 127 S. Ct. 192 (2006)). This Court will reverse a sentence only if it finds an "actual abuse" of the district court's "considerable sentencing discretion." *Jones*, 531 F.3d at 174.

### C. Discussion

#### 1. The court's sentence is substantively reasonable.

Ionia appeared before the district court as a repeat offender. In 2004, Ionia pleaded guilty to presenting an ORB to the Coast Guard that falsely concealed the direct discharge of oily wastes to the sea from the M/T *Alkyon*, another Ionia-operated vessel. A133; *see also United States v. Kostakis*, 364 F.3d 45 (2d Cir. 2004) (appeal from parallel conviction of co-defendant). The company was fined $150,000 and directed to comply with an ECP.

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[13](...continued)
where "there is no federal guideline against which . . . uniformity or disparity can be ascertained").

A133; GA332. Despite the conviction and sentence, Ionia continued its unlawful practices. For at least fifteen months (during the charged conspiracy), the *Kriton*'s crew routinely discharged oily wastes at sea, not using the Oily Water Separator and falsifying the ORBs to conceal the discharges. The *Kriton*'s Chief Engineers likewise falsified the very checklists required by the ECP, in order to enable continuing access to U.S. ports.

Given the seriousness of this repeat conduct, the duration of the offenses, and the potential adverse impacts to the marine environment, the district court correctly determined that the $4.9 million fine was necessary to deter Ionia from future offenses and to inform the industry that such offenses – and the flouting of prior convictions – will not be tolerated. *See* GA346-48, GA351-53; 18 U.S.C. §§ 3553(a)(1)-(2). Ionia does not argue that the district court abused its discretion in imposing the $4.9 million fine for these purposes.

Nor does Ionia argue that the district court abused its discretion in relation to any other applicable sentencing factor. Significantly, while Ionia argued at sentencing that it lacked the ability to pay the $4.9 million fine "in one lump sum," GA 353-54, Ionia did not argue an inability to pay in installments, and the company declined to disclose information necessary to provide the court a full financial report. *See* 18 U.S.C. § 3572(a) (financial factors relevant to imposition of fine). In short, Ionia has identified no grounds for holding the fine "substantively unreasonable" per the factors under Sections 3553(a) and 3572(a).

**2. The district court committed no procedural error.**

Instead of addressing the relevant statutory factors, Ionia contends (*Brief* at 48-57) that the court committed a *Booker* "procedural" error under the Sentencing Guidelines, by multiplying its calculated maximum fine by seven to represent the "seven different kinds of offenses" in the indictments. This was not error. Ionia does not contest the "combined offense level" or "culpability score" the district court used to calculate the Guidelines range or $700,000 maximum; Ionia merely contests the court's subsequent decision to multiply the maximum fine amount by seven. Significantly, however, Ionia fails to show that the court intended to apply the Guidelines grouping rules when it made this decision. Indeed the experienced district judge made no attempt to justify this final "multiplication" according to the Guidelines grouping rules or to apply the standards or procedures set forth in those rules. *See* U.S.S.G. § 3D1.2. To the contrary, the district judge evidently rejected the calculated Guidelines maximum as an appropriate fine in this case and, as an exercise of her discretion under § 3553, applied her own analysis to account for the different kinds of harm caused by Ionia's offense conduct and to account for the other § 3553 factors. GA351-53.

In other words, Ionia's argument that the district court erred in its Guidelines calculation when it multiplied the maximum fine amount by seven misses the mark because that final multiplication was not a *Guidelines* grouping calculation. The court certainly understood how to

calculate the corporate fine Guidelines, but also understood that it was in "no way" "constrained" or "confined" by those Guidelines, GA363, and that the "3553 factors" ultimately governed "the exercise of [the court's] discretion." GA328-29. Accordingly, in this context, the district court's final multiplication is best understood as a rejection of the calculated maximum as an appropriate fine per the § 3553 factors.

Moreover, contrary to Ionia's argument (*Brief* at 50-51), the district court in this case was not required to determine the Guidelines fine range in the first place. The corporate fine Guidelines do not apply to the offenses charged here. *See* U.S.S.G. § 8C2.1 (listing provisions). The offenses here (obstruction of justice, conspiracy, and APPS violations) are covered by Part 2J ("offenses involving the administration of justice") and Part 2Q ("offenses involving the environment"), and are not subject to the corporate fine Guidelines. *Id.*, § 8C2.1(a). For these and other excluded offenses, the Sentencing Commission has issued no corporate fine Guidelines. Instead, the Sentencing Commission has directed the courts to "determine an appropriate fine by applying the provisions of 18 U.S.C. §§ 3553 and 3572," *id.*, § 8C2.10, *i.e.*, the "general statutory provisions governing sentencing." *Id.*, comment (backg'd).

Contrary to Ionia's assertion (*Brief* at 50-51), this is not a situation where the Sentencing Commission has issued a binding Guideline rendered "advisory" by *Booker*. *See United States v. Canova*, 485 F.3d 674, 679 (2d Cir. 2007) ("Although *Booker* rendered the Sentencing Guidelines

advisory, sentencing courts must still consider the . . . applicable Guidelines range. . . ."). Nor is it a case where the Commission has issued a non-binding "policy statement." *See* 18 U.S.C. § 3553(a)(5) (directing courts to consider "any pertinent policy statement."). Here, there is no guidance from the Sentencing Commission.

Thus, contrary to Ionia's apparent request (*Brief* at 56-57), there would be no basis for a remand for a "correct" Guidelines calculation (even if there were a Guidelines calculation error in the court's non-Guidelines sentence – and there is not), because there is no Guideline that applies. U.S.S.G. § 8C2.10; *see also Finley*, 531 F.3d at 293-94 ("When there is no relevant sentencing guideline, it is impossible for the Sentencing Guidelines to be the starting point and the initial benchmark of the sentencing process for any purpose . . . .") (internal quotations and citations omitted). Moreover, when the district court looked to the corporate fine Guidelines, it fully understood that they were in "no way" binding upon the court's discretion. GA363. Because the district court correctly understood the fundamental inapplicability of the corporate fine Guidelines, the relevant question here is whether the district court abused its discretion in establishing the $4.9 million fine under the statutory sentencing factors. *Jones*, 531 F.3d at 170. And as described above, it did not.

### 3. There is no cause for remand under Rule 32(i)(3).

Nor is there merit to Ionia's argument (*Brief* at 58-63) that the sentence must be vacated due to procedural errors under Fed. R. Crim. P. 32(i)(3)(B). That rule provides that a district 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[.]

*Id.* Ionia contends that the district court violated this requirement by failing to specifically rule on the company's objections to arguments by the Government based on "extraterritorial" acts. Ionia misconstrues Rule 32 and the record.

#### a. Rule 32(i)(3)(B) applies only to material factual disputes.

The primary purpose of Rule 32(i)(3)(B) is to ensure the accuracy of the PSRs that guide sentencing proceedings. *See United States v. Ursillo*, 786 F.2d 66, 68-69 (2d Cir. 1986). Under Rule 32, parties must raise any objection to the PSR prior to sentencing, and the court "may accept any undisputed portion of the [PSR] as a finding of fact." Fed. R. Crim. P. 32(f) & (i)(3)(A). By mandating judicial findings where PSR facts are

challenged, Rule 32(i)(3)(B) protects defendants from the presumption of accuracy otherwise accorded to the PSR, in both sentencing and post-sentencing proceedings. *Dunston v. United States*, 878 F.2d 648, 650 (2d Cir. 1989) (per curiam); *see also* Fed. R. 32(i)(3)(C) (requiring district court to "append a copy of [its] determinations under [the] rule to any copy of the [PSR] made available to the Bureau of Prisons").

To be sure, Rule 32(i)(3)(C) also applies to "controverted matter[s]," "other" than PSR disputes. Fed. R. Crim. P. 32(i)(3)(B). However, Ionia cites no authority for the proposition (*Brief* at 62) that the rule is "strictly" enforced as to such matters. The cases cited by Ionia all involve PSRs and the need to ensure their accuracy. *United States v. Feigenbaum*, 962 F.2d 230, 232-33 (2d Cir. 1992) (defendant "entitled" to "corrected" PSR); *United States v. Herrera-Rojas*, 243 F.3d 1139, 1142-43 (9th Cir. 2001) ("strict compliance" with rule necessary to resolve disputes over PSR); *United States v. Carter*, 219 F.3d 836, 866 (9th Cir. 2000) (Rule 32 strictly enforced to prevent the "unfairness that would result to a defendant if prison or parole officials were to rely on false allegations or uncorrected [PSRs]"). Here, Ionia does not challenge any PSR findings.

Further, as Ionia acknowledges (*Brief* at 62), Rule 32(i)(3)(B) is limited to "material, disputed *factual* issues" (emphasis added). The rule does not obligate courts to issue findings or specific rulings on every disputed argument raised in a sentencing memo or at a sentencing hearing. *See United States v. Cereceres-Zavala*, 499 F.3d

1211, 1214 (10th Cir. 2007) ("'Rule 32 is not a vehicle for advancing legal challenges to sentencing'. . . .") (quoting *United States v. Furman*, 112 F.3d 435, 440 (10th Cir. 1997)); *United States v. Lindholm*, 24 F.3d 1078, 1085 n.7 (9th Cir. 1994) (Rule 32(i)(3)(B) inapplicable where "[t]here [are] no disputed facts, merely disputed arguments"). Rather, the rule's mandate is limited to factual disputes specifically presented. *United States v. Stoterau*, 524 F.3d 988, 1011 (9th Cir. 2008); *United States v. Lang*, 333 F.3d 678, 681 (6th Cir. 2003).

**b. The "extra-territorial" acts were not controverted.**

Contrary to Ionia's characterization (*Brief* at 58, 60), there is no factual dispute about extraterritorial discharges. At trial, the Government presented evidence that, for at least fifteen months, the *Kriton* routinely discharged oily waste at sea through the "magic hose" that bypassed the ship's Oily Water Separator and discharge-monitoring equipment. Such evidence included: (1) testimony that at least 968 tons of oily waste was unaccounted for in the *Kriton*'s ORBs; and (2) testimony that Dutch officials had captured a radar image of a five-mile oil slick trailing the *Kriton* in the North Sea. A124. Such evidence was essential for proving the charges in the indictments; *viz.*, that Ionia failed to report these discharges in its ORBs. The jury convicted on all counts.

Based on the trial evidence and convictions, the PSR reported that the *Kriton* "routinely discharged" oily wastes directly overboard through the magic hose, a finding Ionia

did not contest below and does not contest on appeal. Accordingly, the occurrence of routine improper discharges is no longer subject to dispute. *See Feigenbaum*, 962 F.2d at 233 (PSR disputes not raised are waived); *see also Lang*, 333 F.3d at 681 ("'bare denial'" insufficient to raise PSR dispute) (quoting *United States v. Mustread*, 42 F.3d 1097, 1102 (7th Cir. 1994)).

While Ionia also objects (*Brief* at 58) to evidence presented by the Government to show the general scope and impact of deliberate oil pollution from vessels, Ionia misconstrues the purpose of that evidence. The Government did not present such evidence to show the specific effects of Ionia's conduct; rather the Government presented such information to provide context for evaluating Ionia's offenses. A131. The district court understood the nature of the exhibits and limited purpose for which they were offered, specifically noting Ionia's objection to the exhibits on "high seas dumping" and Ionia's complaint that such exhibits were not connected to Ionia and merely "intended to inflame." GA278-79; *see also* A168 (Ionia's objection). No further ruling was required.

Contrary to Ionia's representations (*Brief* at 58-59, 62-63), the Government also did not argue that Ionia was "responsible for . . . Liberian instability, Charles Taylor's criminality, or arms trafficking" in Liberia. Rather, the Government highlighted Ionia's country of incorporation to show that Ionia chose to do business in a country that

was not likely to exercise regulatory control.[14] While Ionia disputes this argument, Ionia does not challenge the predicate facts.[15] As already noted, arguments about the significance of facts – as opposed to specific disputes over the facts themselves – do not trigger fact-finding obligations under Rule 32(i)(3)(B). *Lindholm*, 24 F.3d at 1085 n.7.

### 4. The court properly considered the discharges.

Ionia also errs in asserting (*Brief* at 64-65) that the district court was not permitted to consider the *Kriton*'s improper discharges of oily waste. Ionia contends that the district court was prohibited from considering these "extraterritorial 'bad acts'" because APPS regulatory jurisdiction (over foreign-flagged vessels) is limited to territorial waters. This is a *non sequitur*.

The "clear" purpose of APPS is to "prevent pollution at sea according to MARPOL." *Jho*, 2008 WL 2579240,

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[14] Contrary to Ionia's representation (*Brief* at 60), the Government noted that the Bahamian shipping registry does not require registrants to disclose financial information; not that the Bahamas is a "rogue" state. A140.

[15] Ionia profferred evidence regarding the Liberian shipping registry, A166, which the Government did not controvert.

*3. The fact that the United States asserts APPS regulatory jurisdiction over foreign-flagged ships only when those ships operate in United States' "navigable waters," 33 U.S.C. § 1902(a)(2); 33 U.S.C. § 151.09(a)(1)-(5), does not alter the "high seas" focus of the APPS/MARPOL regulatory program.[16] As a treaty signatory, the United States is obligated to enforce and has an interest in enforcing MARPOL. Imposing and enforcing ORB requirements upon foreign-flagged ships operating in U.S. waters fosters MARPOL compliance. While the United States lacks jurisdiction under APPS to penalize extraterritorial acts of pollution,[17] the United States has

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[16] Discharges from foreign-flagged and U.S. ships within the navigable waters of the United States are separately regulated under the Federal Water Pollution Control Act. *See* 33 U.S.C. § 1311(a) (prohibition on non-permitted discharges); *see also id.*, §§ 1362(7), (12) & (14) (defining "discharge" to include discharges from vessels within the territorial seas).

[17] If Ionia had correctly reported the unlawful discharges in its ORBs, the United States could have referred the violations to the Bahamas, 33 U.S.C. § 1908(f); and a certified copy of the ORB entries would have been automatically "admissible in any judicial proceedings as evidence" of the violations. *See* IMO, MARPOL Consolidated Edition 72 (2006); *see also* SPA 60 (former regulation). Ionia's ORB falsifications undermined the efficacy of any referral for prosecution in the Bahamas, as the evidence of violations depended upon the testimony of

(continued...)

jurisdiction under APPS to penalize domestic ORB offenses that conceal and enable deliberate acts of pollution on the high seas. When penalizing such offenses, the extraterritorial harms are properly considered in accord with the clear purpose of the statute.

Contrary to Ionia's argument (*Brief* at 64-65), the "presumption against extraterritorial application" is inapposite. That presumption applies where there is no indication within the text of a general enactment whether Congress intended the legislation to cover actions subject to U.S. regulatory jurisdiction, but occurring beyond U.S. borders. *See Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 173-74 (1993) (whether Immigration Act applies on the high seas); *Smith v. United States*, 507 U.S. 197, 204 (1993) (whether Federal Tort Claims Act applies in Antarctica); *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (whether Title VII applies to American employers outside of the United States). Here, the ORB offenses occurred within the United States; and Congress plainly intended to regulate actions by foreign-flagged ships in U.S. waters that cause or contribute to pollution on the high seas. *Jho*, 2008 WL 2579240, *3.

**5. Ionia's "hearsay" objection is meritless.**

Ionia's final "hearsay" objection (*Brief* at 65-67) is readily dismissed. As Ionia acknowledges, hearsay is

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[17](...continued)
non-Bahamian nationals who gave statements to U.S. officials.

admissible at sentencing proceedings, subject only to due process constraints. *United States v. Martinez*, 413 F.3d 239, 242-44 (2d Cir. 2005). Ionia raised no hearsay objections below. Nor does Ionia identify the documents it now claims were improperly considered under the hearsay rule, referring instead only to unnamed "articles and reports" concerning "foreign matters." Ionia has not begun to demonstrate how its due process rights were violated, much less overcome the rule of waiver. *See United States v. Belk*, 346 F.3d 305, 315 (2d Cir. 2003) .

## CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: August 15, 2008

Respectfully submitted,

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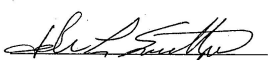

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**CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)**

This is to certify that the foregoing brief is calculated by the word processing program to contain approximately 17,428 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules. By order dated August 5, 2008, this Court granted the Government's motion for permission to file an answering brief of up to 17,500 words.

SANDRA S. GLOVER
ASSISTANT U.S. ATTORNEY

# ADDENDUM

**18 U.S.C. § 1519. Destruction, alteration, or falsification of records in Federal investigations and bankruptcy**

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

**18 U.S.C. § 3553. Imposition of a sentence**

**(a) Factors to be considered in imposing a sentence.** The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider --

**(1)** the nature and circumstances of the offense and the history and characteristics of the defendant;

**(2)** the need for the sentence imposed --

**(A)** to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

**(B)** to afford adequate deterrence to criminal conduct;

**(C)** to protect the public from further crimes of the defendant; and

**(D)** to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

**(3)** the kinds of sentences available;

**(4)** the kinds of sentence and the sentencing range established for --

**(A)** the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines --

**(i)** issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

**(ii)** that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

**(B)** in the case of a violation of probation, or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

**(5)** any pertinent policy statement–

**(A)** issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

**(B)** that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

**(6)** the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

**(7)** the need to provide restitution to any victims of the offense.

* * *

**18 U.S.C. § 3572. Imposition of a sentence of fine and related matters.**

**(a) Factors to be considered.** – In determining whether to impose a fine, and the amount, time for payment, and method of payment of a fine, the court shall consider, in addition to the factors set forth in section 3553(a) –

(1) the defendant's income, earning capacity, and financial resources;

(2) the burden that the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person (including a government) that would be responsible for the welfare of any person financially dependent on the defendant, relative to the burden that alternative punishments would impose;

(3) any pecuniary loss inflicted upon others as a result of the offense;

(4) whether restitution is ordered or made and the amount of such restitution;

(5) the need to deprive the defendant of illegally obtained gains from the offense;

(6) the expected costs to the government of any imprisonment, supervised release, or probation component of the sentence;

(7) whether the defendant can pass on to consumers or other persons the expense of the fine; and

(8) if the defendant is an organization, the size of the organization and any measure taken by the organization to discipline any officer, director, employee, or agent of the organization responsible for the offense and to prevent a recurrence of such an offense.

* * *

**Act to Prevent Pollution from Ships ("APPS")**

**§ 1908. Penalties for violations**

**(a) Criminal penalties; payment for information leading to conviction**

A person who knowingly violates the MARPOL Protocol, Annex IV to the Antarctic Protocol, this chapter, or the regulations issued thereunder commits a class D felony. In the discretion of the Court, an amount equal to not more than 1/2 of such fine may be paid to the person giving information leading to conviction.

**(b) Civil penalties; separate violations; assessment notice; considerations affecting amount; payment for information leading to assessment of penalty**

A person who is found by the Secretary, or the Administrator as provided for in this chapter, after notice and an opportunity for a hearing, to have--

(1) violated the MARPOL Protocol, Annex IV to the Antarctic Protocol, this chapter, or the regulations issued thereunder shall be liable to the United States for a civil penalty, not to exceed $25,000 for each violation; or

(2) made a false, fictitious, or fraudulent statement or representation in any matter in which a statement or representation is required to be made to the

Secretary, or the Administrator as provided for in this chapter, under the MARPOL Protocol, Annex IV to the Antarctic Protocol, this chapter, or the regulations thereunder, shall be liable to the United States for a civil penalty, not to exceed $5,000 for each statement or representation.

Each day of a continuing violation shall constitute a separate violation. The amount of the civil penalty shall be assessed by the Secretary, or the Administrator as provided for in this chapter or his designee, by written notice. In determining the amount of the penalty, the Secretary, or the Administrator as provided for in this chapter, shall take into account the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other matters as justice may require. An amount equal to not more than 1/2 of such penalties may be paid by the Secretary, or the Administrator as provided for in this chapter, to the person giving information leading to the assessment of such penalties.

**(c) Abatement of civil penalties; collection by Attorney General**

The Secretary, or the Administrator as provided for in this chapter, may compromise, modify, or remit, with or without conditions, any civil penalty which is subject to assessment or which has been assessed under this section. If any person fails to pay an assessment of a civil penalty after it has become final, the Secretary, or the

Administrator as provided for in this chapter, may refer the matter to the Attorney General of the United States for collection in any appropriate district court of the United States.

**(d) Liability in rem; district court jurisdiction**

A ship operated in violation of the MARPOL Protocol, Annex IV to the Antarctic Protocol, this chapter, or the regulations thereunder is liable in rem for any fine imposed under subsection (a) of this section or civil penalty assessed pursuant to subsection (b) of this section, and may be proceeded against in the United States district court of any district in which the ship may be found.

**(e) Ship clearance or permits; refusal or revocation; bond or other surety**

If any ship subject to the MARPOL Protocol, Annex IV to the Antarctic Protocol, or this chapter, its owner, operator, or person in charge is liable for a fine or civil penalty under this section, or if reasonable cause exists to believe that the ship, its owner, operator, or person in charge may be subject to a fine or civil penalty under this section, the Secretary of the Treasury, upon the request of the Secretary, shall refuse or revoke the clearance required by section 60105 of Title 46. Clearance may be granted upon the filing of a bond or other surety satisfactory to the Secretary.

**(f) Referrals for appropriate action by foreign country**

Notwithstanding subsection (a), (b), or (d) of this section, if the violation is by a ship registered in or of the nationality of a country party to the MARPOL Protocol or the Antarctic Protocol, or one operated under the authority of a country party to the MARPOL Protocol or the Antarctic Protocol, the Secretary, or the Administrator as provided for in this chapter acting in coordination with the Secretary of State, may refer the matter to the government of the country of the ship's registry or nationality, or under whose authority the ship is operating for appropriate action, rather than taking the actions required or authorized by this section.

**Coast Guard APPS Regulations**

**§ 151.25 Oil Record Book.**

(a) Each oil tanker of 150 gross tons and above, ship of 400 gross tons and above other than an oil tanker, and manned fixed or floating drilling rig or other platform shall maintain an Oil Record Book Part I (Machinery Space Operations). An oil tanker of 150 gross tons and above or a non oil tanker that carries 200 cubic meters or more of oil in bulk, shall also maintain an Oil Record Book Part II (Cargo/Ballast Operations).

(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 with the U.S. Government.

(d) Entries shall be made in the Oil Record Book on each occasion, on a tank to tank basis if appropriate, whenever any of the following machinery space operations take place on any ship to which this section applies--

(1) Ballasting or cleaning of fuel oil tanks;

(2) Discharge of ballast containing an oily mixture or cleaning water from fuel oil tanks;

(3) Disposal of oil residue; and

(4) Discharge overboard or disposal otherwise of bilge water that has accumulated in machinery spaces.

(e) Entries shall be made in the Oil Record Book on each occasion, on a tank to tank basis if appropriate, whenever any of the following cargo/ballast operations take place on any oil tanker to which this section applies--

(1) Loading of oil cargo;

(2) Internal transfer of oil cargo during voyage;

(3) Unloading of oil cargo;

(4) Ballasting of cargo tanks and dedicated clean ballast tanks;

(5) Cleaning of cargo tanks including crude oil washing;

(6) Discharge of ballast except from segregated ballast tanks;

(7) Discharge of water from slop tanks;

(8) Closing of all applicable valves or similar devices after slop tank discharge operations;

(9) Closing of valves necessary for isolation of dedicated clean ballast tanks from cargo and stripping lines after slop tank discharge operations; and

(10) Disposal of oil residue.

(f) Entries shall be made in the Oil Record Book on each occasion, on a tank-to-tank basis if appropriate, whenever any of the following operations take place on a fixed or floating drilling rig or other platform to which this section applies--

(1) Discharge of ballast or cleaning water from fuel oil tanks; and

(2) Discharge overboard of platform machinery space bilge water.

(g) In the event of an emergency, accidental or other exceptional discharge of oil or oily mixture, a statement shall be made in the Oil Record Book of the circumstances of, and the reasons for, the discharge.

(h) Each operation described in paragraphs (d), (e) and (f) of this section shall be fully recorded without delay in the Oil Record Book so that all the entries in the book appropriate to that operation are completed. Each completed operation shall be signed by the person or persons in charge of the operations concerned and each completed page shall be signed by the master or other person having charge of the ship.

(i) The Oil Record Book shall 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.

(j) The master or other person having charge of a ship required to keep an Oil Record Book shall be responsible for the maintenance of such record.

(k) The Oil Record Book for a U.S. ship shall be maintained on board for not less than three years.

(l) This section does not apply to a barge or a fixed or floating drilling rig or other platform that is not equipped to discharge overboard any oil or oily mixture.

(m) This section does not apply to a fixed or floating drilling rig or other platform that is operating in compliance with a valid National Pollutant Discharge Elimination System (NPDES) permit.