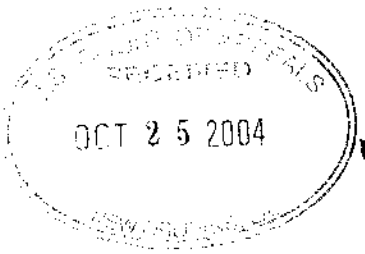


UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OFFSHORE MARINE SERVICE ASSOCIATION, EDISON CHOUEST OFFSHORE, LLC, HORNBECK OFFSHORE SERVICES, LLC, L & M BOTRUC RENTAL, INC., OTTO CANDIES, LLC, SEACOR MARINE, INC., and TIDEWATER, INC.,	
Petitioners,	**PETITION FOR REVIEW**
v.	
UNITED STATES OF AMERICA,	
Respondent.	

PETITION FOR REVIEW

Petitioners Offshore Marine Service Association ("OMSA"), Edison Chouest Offshore, LLC ("Chouest"), Hornbeck Offshore Services, LLC ("Hornbeck"), L & M BoTruc Rental, Inc. ("L & M BoTruc"), Otto Candies, LLC ("Otto Candies"), SEACOR Marine, Inc. ("SEACOR"), and Tidewater, Inc. ("Tidewater") (jointly, "Petitioners"), hereby petition this Court, pursuant to the Hobbs Act, 28 U.S.C. §§ 2341-51, to review, set aside and issue appropriate orders concerning a "final agency action" decision of the United States Coast Guard ("Coast Guard" or "USCG"), dated August 24, 2004. A copy of the subject Coast Guard decision is appended as Attachment ("Attmt") 1 to this Petition for Review.

The challenged decision denies Petitioners' two separate appeals of the issuance by the Coast Guard's National Vessel Documentation Center ("NVDC") of two separate Certificates of

Documentation ("CODs"), each with a coastwise endorsement, to Rigdon Marine, LLC ("Rigdon") for two platform supply vessels – the *M/V Orleans* (Official Number ("O.N.") 1151395) and the *M/V Bourbon* (O.N. 1158133). The two agency appeals were based, *inter alia*, upon NVDC's failure to investigate and resolve what NVDC termed "serious" and "troubling" questions raised by prior submissions and public statements, which NVDC stated gave rise to the "probability" "of direct or indirect [foreign] control of Rigdon by GB [Groupe Bourbon, a large French marine services company] . . . [that] would disqualify Rigdon as a citizen under the provisions of Section 2 of the Shipping Act, 1916." Based upon this "probability" of impermissible foreign control, among other things, NVDC refused on several occasions to document these vessels under the so-called lease financing provision (46 U.S.C. app. 12106(e)). Although the same Section 2 foreign control considerations apply to Rigdon as the vessel owner under mortgage financing, NVDC abruptly switched course and issued the challenged CODs when the transaction was restructured under mortgage financing. NVDC did this even though no evidence was submitted resolving NVDC's previously stated concerns as to the "probability" of Groupe Bourbon's impermissible foreign control of Rigdon. Moreover, NVDC did this notwithstanding its knowledge that Groupe Bourbon is an operating marine company, not a bank or financing institution, and was financing more than 100% of the cost of the vessels.

The challenged Coast Guard decision also denies Petitioners' alternative request that the Coast Guard launch a post-COD issuance investigation as to whether Groupe Bourbon has unlawful foreign control of Rigdon in violation of Section 2 of the Shipping Act, 1916, 46 U.S.C. app. 802, such that Rigdon does not qualify as a Section 2 citizen entitled to operate vessels in the protected coastwise trade.

As set forth below, the challenged Coast Guard decision was issued pursuant to a seriously flawed Coast Guard appeal process conducted in total disregard of Petitioners' due process rights under the Fifth Amendment to the U.S. Constitution. Specifically, and among other things, the Coast Guard (1) failed to establish any procedures for the handling and processing of Petitioners' appeals, (2) failed to provide Petitioners the record upon which the challenged NVDC vessel documentation decisions were made, (3) failed to afford Petitioners the opportunity to comment based upon such record, (4) engaged in *ex parte* supplementation of such record, both from NVDC and from Rigdon, without any notice to, or opportunity to participate in such supplementation by, Petitioners, (5) failed to disclose such *ex parte* record supplementation to Petitioners, and afford Petitioners the opportunity to comment based upon the newly-obtained supplemental information, and (6) unlawfully relied upon such supplemental information in rendering the challenged decision.

Moreover, the Coast Guard's decisions (1) to deny Petitioners' agency COD appeals, and (2) to refuse to investigate the serious Section 2 foreign control issues, are irrational, arbitrary and capricious, an abuse of discretion, and are otherwise contrary to law, and specifically to the Coast Guard's Congressionally-entrusted responsibility to administer the vessel documentation laws consistently with the Jones Act and the important cabotage principles embodied therein (*see* the Final Rule in Dkt USCG-2001-8825 (the "Final Rule"), 69 Fed. Reg. 5390, at 5394 (Feb. 4, 2004)).

In support of this Petition for Review, Petitioners respectfully aver as follows:

Parties

1. Petitioner OMSA is a national trade organization of offshore marine operators and affiliated companies. OMSA's member companies, many of which are small family-run

businesses, own and operate offshore supply vessels in the coastwise trade, including the Gulf of Mexico market in which Rigdon intends to operate the subject vessels. These companies have invested hundreds of millions of dollars in vessels for the coastwise trade. One of OMSA's principal objectives, on behalf of its members, is preserving the integrity of the Jones Act (46 U.S.C. app. 883), which prohibits foreign control over coastwise vessels. OMSA has pursued this objective for many years before the Coast Guard, the Congress and, where necessary, in the courts, including in the instant case. OMSA was an initiating party with respect to the subject Coast Guard appeals. OMSA is a non-profit Louisiana corporation, and has its principal office at 900 N. Corporate Drive, Suite 200, Harahan, LA 70123 (Tel.: 504-734-7622).

2. Petitioner Chouest is a family-owned and operated Louisiana limited liability company, with its principal office at 16201 East Main Street, Galliano, LA 70354 (Tel.: 985-632-7144).

3. Petitioner L & M BoTruc is a family-owned and operated Louisiana corporation, with its principal office at 18692 West Main Street, Galliano, Louisiana (Tel.: 985-475-5733).

4. Petitioner Hornbeck is a Delaware limited liability company, and is wholly-owned by Hornbeck Offshore Services, Inc., a publicly-traded Delaware corporation (Symbol: HOS) listed on the New York Stock Exchange ("NYSE"), both having their principal offices at 103 Northpark Boulevard, Suite 300, Covington, LA 70433 (Tel.: 985-727-2000).

5. Petitioner Otto Candies is a family-owned and operated Louisiana limited liability company, with its principal office at 17271 Highway 90, Des Allemands, LA, 70030 (Tel.: 504-469-7700).

6. Petitioner SEACOR is a wholly-owned, Delaware-incorporated subsidiary of SEACOR Holdings, Inc., a publicly-held Delaware corporation, whose common stock (Symbol:

CKH) is traded on the NYSE. Both SEACOR and SEACOR Holdings, Inc. have their principal offices at 11200 Richmond Avenue, Suite 400, Houston, TX 77082 (Tel.: 281-899-4800).

7. Petitioner Tidewater is a publicly-held Delaware corporation, whose common stock (Symbol: TDW) is traded on the NYSE, and maintains its principal office at 601 Poydras Street, Suite 1900, New Orleans, LA 70130 (Tel.: 504-568-1010).

8. Chouest, Hornbeck, L & M BoTruc, Otto Candies, SEACOR and Tidewater are all members of OMSA. Each of these companies qualifies as a Section 2 citizen, and each operates vessels in the U.S. Gulf of Mexico coastwise trade in competition with the subject Rigdon vessels and their anticipated sister vessels when completed and delivered. These six companies each participated in initiating the subject vessel documentation appeals to the Coast Guard, and were specifically determined by the Coast Guard to have standing to file and pursue such appeals before the Coast Guard.

9. The Respondent United States of America, acting here through the United States Coast Guard (which is now part of the Department of Homeland Security; *see* Homeland Security Act of 2002, Pub. L. 107-296, *codified at* 6 U.S.C. § 101, *et seq.*), is responsible for implementation of the vessel documentation laws consistently with "the important cabotage principles embodied in the Jones Act . . . that are the essence of the Jones Act as expressed by Congress in the Act itself and its legislative history" (Final Rule, 69 Fed. Reg. at 5394). As stated recently by the Coast Guard, "Congress entrusted the Coast Guard with the responsibility, under 46 U.S.C. chapter 121, to administer the vessel documentation laws consistently with the Jones Act, 46 U.S.C. app. 802, 808, and 883, and 46 U.S.C. 12106" (*id.*).

10. The Commandant of the Coast Guard is the head of the agency, and exercises overall direction over the policy and administration of the Coast Guard (46 C.F.R. § 1.01-10(a)).

The Commandant has delegated certain of his authority to various elements within the Coast Guard, subject to such review as is provided in the Coast Guard's Regulations.

11. The National Vessel Documentation Center ("NVDC"), 792 T. J. Jackson Drive, Falling Waters, WV 25419, is the Coast Guard field command, charged, *inter alia*, with the responsibility to review applications for vessel documentation and coastwise trading endorsements, and to grant or deny such applications (46 C.F.R. § 1.01-10(b)(1)(ii)(D); *and see* 46 C.F.R. Part 67). NVDC reports to the Commandant through the Commanding Officer of the National Maritime Center in Arlington, VA ("NMC"), the Director of Field Activities (Code: G-MO) at Coast Guard Headquarters in Washington, DC, and the Assistant Commandant for Marine Safety, Security and Environmental Protection, also at Coast Guard Headquarters (46 C.F.R. § 1.01-10(b)(1)).

12. Under Coast Guard Regulations, vessel documentation determinations by NVDC are appealable by "[a]ny person directly affected by [such] decision or action" to the Commandant (G-MO)" – *i.e.*, the Director of Field Activities – via the Commanding Officer, NMC (46 C.F.R. § 1.03-45). The decision of the Director of Field Activities constitutes "final agency action on the appeal" (46 C.F.R. § 1.03-15(j)).

13. Groupe Bourbon is a large French maritime services company, with its principal office at La Mare, B.P n° 2 –97438, Sainte Marie, France.

14. Groupe Bourbon operates a worldwide fleet of more than 250 vessels, including more than 135 offshore oil/gas support vessels, with some 33 additional vessels under construction or recently delivered. Aided by French government tax and other policies favoring French shipowners, Groupe Bourbon has stated that its goal is to be a "dominant" player in the worldwide deepwater offshore drilling marine services supply market. On October 25, 2002,

Groupe Bourbon incorporated Bourbon Maritime U.S.A., Inc. ("Bourbon Maritime;" renamed Bourbon Capital U.S.A., Inc., as of July 2004), as a wholly-owned subsidiary under Delaware law.

15. Rigdon was established as a limited liability company under Louisiana law on October 30, 2002 – just eight days prior to the execution of the subject transaction with Groupe Bourbon on November 7, 2002. Upon information and belief, Rigdon's principal office now is 815 Walker Street, Suite 750, Houston, TX 77002 (Tel.: 713-236-9100).

Jurisdiction

16. The Coast Guard's August 24, 2004 decision denying Petitioners' appeals and investigation requests constitutes final agency action by the Coast Guard on vessel documentation and foreign control matters relating to Section 2 of the Shipping Act, 1916, as amended, 46 U.S.C. app. 802. *See* 46 C.F.R. § 1-03.15(j); *cf. Conoco, Inc. v. Skinner*, 970 F.2d 1203 (3d Cir. 1992).

17. This Court has jurisdiction over this Petition for Review of such decision under the Hobbs Act, and specifically 28 U.S.C. § 2342, which gives the Courts of Appeal *exclusive* jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of "all rules, regulations, or final orders of . . . the Secretary of Transportation issued pursuant to section [sic] 2, 9, 37, or 41 of the Shipping Act, 1916 (46 U.S.C. App. 802, 803, 808, 835, 839, and 841a)" (28 U.S.C. § 2342(3)(A)). While the foregoing language references the Secretary of Transportation, and, as discussed above, the Coast Guard has been transferred to the Department of Homeland Security (*see* Petition ¶ 9 above), Section 1512(d) of the Homeland Security Act, 6 U.S.C. § 552(d), expressly continues the same jurisdiction in the Courts of Appeal over petitions

for review of administrative decisions of the Coast Guard, notwithstanding its transfer to the Department of Homeland Security.

18. This Petition for Review is timely filed, within 60 days of the August 24, 2004 issuance or entry of the challenged decision, giving allowance to the facts that the actual 60th day was Saturday, October 23, 2004, and this Petition is being filed on the first working day thereafter (*see* Fed. R. App. P. 26(a)(3)). *See* 28 U.S.C. § 2344.

19. This Petition for Review is properly filed against the United States (*see* 28 U.S.C. § 2344).

Venue

20. Venue is proper in this Court under 28 U.S.C. § 2343, since each of the Petitioners has its principal office in this Circuit, in either Louisiana or Texas (*see* Petition ¶¶ 1-7 above).

Statutory Background

21. The Merchant Marine Act, 1920 (commonly referred to as the "Jones Act"), provides in part that

> "No merchandise . . . shall be transported by water . . . between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws, . . . in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States . . . ." 46 U.S.C. app. 883 (2004).

Offshore supply vessels used to transport materials from the U.S. mainland to drilling rigs and other facilities located on the Outer Continental Shelf in the Gulf of Mexico (the "OCS trades") must meet these requirements.

22. The key Jones Act provision at issue in this proceeding is the requirement that coastwise vessels must be "owned by persons who are citizens of the United States." Pursuant to

Section 37 of the Jones Act (46 U.S.C. app. 888), the definition of the term "citizen of the United States" is provided by Section 2 of the Shipping Act, 1916 (46 U.S.C. app. 802). Section 2 provides in part –

> "(a) . . . [I]n the case of a corporation, association, or partnership operating any vessel in the coastwise trade the amount of interest required to be owned by citizens of the United States shall be 75 per centum.
>
> * * * * *
>
> "(c) Seventy-five per centum of the interest in a corporation shall not be deemed to be owned by citizens of the United States (a) if the title to 75 per centum of its stock is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (b) if 75 per centum of the voting power in such corporation is not vested in citizens of the United States; or (c) if, through any contract or understanding, it is so arranged that more than 25 per centum of the voting power in such corporation may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (d) if by any other means whatsoever control of any interest in the corporation in excess of 25 per centum is conferred upon or permitted to be exercised by any person who is not a citizen of the United States." *id.*

23. These provisions construct a comprehensive ban on foreign ownership of, or control over, more than a 25 per cent interest in any vessel that can be authorized to serve coastwise trades, including the OCS trades. According to the legislative history of the Jones Act, Congress's objective was –

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

Accordingly, in considering whether foreign control exists over a vessel for Jones Act purposes, courts are "compelled to observe the substance rather than the form of the transaction." *Meacham Corp. v. United States*, 207 F.2d 535, 543 (4th Cir. 1953).

24. The policies and requirements of the Jones Act are implemented in part through the vessel documentation laws (46 U.S.C. Chapter 121). Owners of vessels meeting certain criteria are eligible to receive CODs issued by the U.S. Coast Guard (46 U.S.C. app. 12103). Such certificates identify the permitted use of the vessels by the type of endorsement shown on the COD. When endorsed with a coastwise endorsement, such certificates authorize use of the vessel in domestic trades (46 U.S.C. app. 12106). The endorsed certificate is "conclusive evidence" of the vessel's qualification to be used in accordance with the endorsement, except that the certificate is "not conclusive evidence of ownership in a proceeding in which ownership is in issue" (46 U.S.C. app. 12104).

25. By issuing, or refusing to issue, certificates of documentation with a coastwise endorsement, the Coast Guard has the legal authority and responsibility for assuring that vessels meet all legal requirements for serving the coastwise trades, including the requirement that such vessels are not subject to foreign control in excess of 25 per cent. The Coast Guard has issued regulations implementing this authority. *See* 46 C.F.R. Part 67. With respect to the U.S. citizen ownership requirement, the Coast Guard regulations provide –

> "An otherwise qualifying corporation or partnership may fail to meet stock or equity interest requirements because: Stock is subject to trust or fiduciary obligations in favor of non-citizens; non-citizens exercise, directly or indirectly, voting power; or non-citizens, by any means, exercise control over the entity." 46 C.F.R. § 67.31(a).

26. The Coast Guard Regulations further provide that a properly completed application for documentation "establishes a ***rebuttable presumption*** that the applicant is a United States citizen" (46 C.F.R. § 67.43, emphasis added). The Regulations do not address the evidence needed to rebut the presumption of citizenship, nor the showing needed affirmatively to establish citizenship where such a presumption has been rebutted. Importantly, the vessel

documentation process is normally one solely between the applicant and the Coast Guard, and there is no public notice of vessel documentation applications, nor right to public participation in the vessel documentation process.

27. Prior to 1996, the foreign control provisions absolutely prevented foreign persons, including foreign banks and leasing companies, from holding title to Jones Act vessels. They also were construed to prevent any foreign financial institution from holding a security interest in a Jones Act vessel by way of a mortgage, unless the mortgage was held in a trust arrangement meeting certain conditions.

28. Congress amended the vessel documentation laws in 1996 to permit U.S. citizen maritime companies to obtain financing from non-citizen banks and leasing companies. Congress thus permitted (under the lease financing provision) non-citizen financial institutions to hold title to a Jones Act vessel, provided the vessel is demise-chartered to a Section 2 U.S. citizen (46 U.S.C. app. 12106(e)). Congress also eliminated the requirement that a mortgage of a Jones Act vessel in favor of a non-citizen must be considered a vessel transfer subject to U.S. Government review and approval under Section 9 of the Shipping Act, 1916 (46 U.S.C. app. 808).

29. The purpose of the 1996 amendments was –

> ". . . to eliminate technical impediments to using various techniques for financing vessels operating in the domestic trades. At the same time, the Conferees do not intend to undermine a basic principle of U.S. maritime law that vessels operated in domestic trades must be . . . operated and controlled by American citizens, which is vital to United States military and economic security." House Conf. Rept. No. 104-854, at 131.

Stated otherwise, these amendments were intended to permit qualified American citizens to obtain financing from non-citizens without affecting the eligibility of their vessels for coastwise

trades, but only if such vessels, despite the foreign financing component, remain free from control by non-citizens.

30. Congress amended the lease financing provision in Section 608 of the Coast Guard and Maritime Transportation Act of 2004 (Pub. L. No. 108-293). This amendment added a new subsection 12106(f) that supplies specific criteria that must be met before a non-citizen can hold title to a coastwise vessel under the lease financing provision. This amendment makes clear Congress' original intention that foreign shipping companies are not eligible to document vessels under lease-financing.

31. The Coast Guard issued final and additional proposed regulations implementing the lease financing provision on February 4, 2004 (*see* 60 Fed. Reg. 5390 ff; Feb. 4, 2004). The Coast Guard has not proposed or implemented regulations concerning the changes made by the 1996 amendments concerning mortgage financing of coastwise vessels. Nevertheless, since the 1996 amendments became effective, the Coast Guard has issued CODs with coastwise endorsements for tens of thousands of vessels that are subject to mortgage financing, and has followed its pre-existing procedures in issuing those CODs.

Groupe Bourbon

32. Several years ago, Groupe Bourbon made a strategic decision to divest its food-processing and retailing businesses, which at that time contributed the vast majority of Groupe Bourbon's revenues, and to focus its future efforts on growing its marine services business, including particularly the deepwater offshore oil drilling marine services market. In its 2002 Annual Report Groupe Bourbon candidly stated its "objective . . . to carve itself ***a major share of the world market*** – currently in full expansion – for supply of marine services in the deepwater

oil-prospecting business," and "to build up ***a dominant position*** in this rapidly-expanding business" (*id.*, §§ 4.1.1.1.2 & 4.1.1.1.3, at 25 & 26 respectively; emphasis added).

33. Groupe Bourbon stated that its strategies to accomplish this goal included (1) investments in new vessels, and (2) "working where need be [*i.e.*, required by local laws] in association with local operators in order to accelerate and secure introductions into new markets." In its 2001 Annual Report, Groupe Bourbon specifically cited, as successful examples of this local partnership strategy, Groupe Bourbon's "partnership," through its subsidiary Surf, with Société National des Petrole Angolais (SONANGOL) in Angola, and a recently purchased 50% stake in Delba Maritima in Brazil.

34. Groupe Bourbon stated, in its 2001 Annual Report, that through these activities and partnerships Groupe Bourbon had established and expanded its presence in the deepwater offshore markets "off West Africa and Brazil, the two largest and most promising markets" in the world. However, this still left Groupe Bourbon without a presence in the Gulf of Mexico – the important third leg of what Groupe Bourbon calls the "golden triangle" of "the deep-water offshore services business: Africa – Brazil – Gulf of Mexico."

The Groupe Bourbon/Rigdon Transaction

35. In 2002 Groupe Bourbon acted to fill this gap. Upon information and belief, in 2002 Groupe Bourbon was introduced to Larry Rigdon, a former executive with Tidewater. At that time Groupe Bourbon had, and may still have, a consulting relationship with Robert J. Gebhardt, an American citizen with a home in Switzerland. Mr. Gebhardt now owns an equity interest in, and is a member of, Rigdon.

36. In July 2002 Groupe Bourbon and Mr. Rigdon approached the Coast Guard, seeking advance approval and assurances as to a proposed transaction under which Groupe

Bourbon would fund the construction of ten platform supply vessels ("PSVs") to be built in the United States and operated by Rigdon pursuant to a bareboat charter from Groupe Bourbon, which would own the vessels through a then yet-to-be-established, wholly-owned U.S. subsidiary. The documents provided to the Coast Guard included a provision that, according to NVDC, would have permitted Groupe Bourbon to direct that the vessels be operated in foreign commerce. The documents also included a proposed international marketing agreement. Christian Munier, the head of Groupe Bourbon's Maritime Division, stated that "We have asked for confirmation from the US [C]oast [G]uard that the arrangements we have made corresponds to US [sic] law . . . because we are talking about a major commitment on our part." (Lloyd's List, Oct. 8, 2002).

37. The proposed PSVs were designed by a Groupe Bourbon technical team, working in conjunction with Guido Perla & Associates of Seattle, WA. Upon information and belief, Groupe Bourbon played a major, controlling role, in the solicitation and review of proposals from various U.S. shipyards for the construction of these vessels, and the negotiation of a contract, ultimately executed by Rigdon, for their construction by Bender Shipbuilding & Repair Co., Inc., of Mobile, AL ("Bender Shipbuilding"), at a cost of $12.5 Million ("M") each, or a total of $125M for ten vessels.

38. On November 7, 2002 -- prior to obtaining the previously requested Coast Guard confirmation – Groupe Bourbon executed various agreements with the newly-established Rigdon. These agreements included a Promissory Note, pursuant to which Groupe Bourbon agreed to loan Rigdon $128.55M -- $3.55M ***more*** than the total 10-vessel construction price. The agreements also included a Security Agreement and Collateral Assignment of Construction

Contract between Groupe Bourbon as lender and Rigdon as borrower. The Coast Guard has refused to provide copies of these agreements to Petitioners.

39. Upon information and belief, these agreements envisioned that Groupe Bourbon would be able to own and document the vessels for operation in the coastwise trade by Rigdon pursuant to a bareboat charter, under the lease finance exception in 46 U.S.C. app. 12106(e). However, Groupe Bourbon and Rigdon recognized that there was a reasonable chance that the Coast Guard might not approve documenting the vessels under Section 12106(e). They therefore agreed from the outset that, in such event, Groupe Bourbon would secure its $128.55M investment through a mortgage on the vessels. The executed agreements included an agreed form of a Preferred Ship Mortgage in favor of Bourbon Maritime.

40. Groupe Bourbon contemporaneously issued a Press Release publicly announcing that it had "concluded a cooperation agreement" with Rigdon pursuant to which Groupe Bourbon would finance what Groupe Bourbon termed "an ***initial series*** of 10" PSVs for the deep-water offshore market, with deliveries scheduled to begin in the first quarter of 2004, and continuing until the third quarter of 2005 (Groupe Bourbon Press Release, Nov. 28, 2002; emphasis added). Groupe Bourbon stated that "This development will provide ***a major step forward for Groupe Bourbon's strategic growth in the deepwater offshore marine service sector***" (*id.*). Groupe Bourbon also stated that, under this agreement, Groupe Bourbon would assist Rigdon in marketing the vessels internationally (*id.*).

41. Groupe Bourbon's Chairman touted this transaction and what he termed the "***strengthening of <u>our offshore division</u> with growth operations in . . . the United States (Rigdon Marine)***," in his Foreword to Groupe Bourbon's 2002 Annual Report (emphasis added). Groupe Bourbon went on in that same Annual Report to state that "An agreement already signed

with Rigdon Marine (USA) will enable ***Groupe Bourbon to be represented*** in the Gulf of Mexico as of 2004" (*id.*, § 4.1.1.1.3, at 26; emphasis added). Groupe Bourbon thus had achieved its goal to get into the closed U.S. coastwise Gulf of Mexico market as of 2004.

42. Groupe Bourbon's public Financial "Presentation of the year 2002," dated March 26, 2003, listed Rigdon and the 10 contracted PSVs as part of Groupe Bourbon's Offshore Division.

43. Groupe Bourbon's Financial "Presentation, Year 2003," dated March 24, 2004, which was presented publicly to financial analysts and is available on Groupe Bourbon's website, includes pictures and specification summaries of the first two vessels constructed by Bender Shipbuilding – the *Orleans* and the *Bourbon* – and describes these vessels as "New Vessels for ***our*** clients" (*id.*, at 44-46, emphasis added).

44. Groupe Bourbon's Website listed all 10 of the vessels being constructed by Bender Shipbuilding as part of Groupe Bourbon's fleet, and included detailed specifications for such vessels, as late as April 27, 2004. This information was deleted subsequently, after the Coast Guard queried Groupe Bourbon about the same.

Early Unanswered Coast Guard Concerns

45. On November 18, 2002 – eleven days ***after*** Groupe Bourbon and Rigdon executed their agreements – NVDC issued a letter stating NVDC's concern, based upon "indication of ambiguity" in the submissions, as to whether "the documents accomplish[] a complete transfer of control of the vessels to the bareboat charterer." NVDC stated that it would be willing to continue its review of the proposed transaction upon the receipt of "clarification of the apparent inconsistency."

46. Rather than respond to NVDC's straight-forward inquiry, Groupe Bourbon and Rigdon requested a meeting with the Coast Guard "to better understand the Coast Guard's concerns . . . and to respond to those concerns" (Groupe Bourbon 6/19/04 letter to NVDC, at 2).

47. By letter dated February 5, 2003, the Coast Guard declined the requested meeting, and again invited Groupe Bourbon and Rigdon to respond in writing to NVDC's November 18, 2002 letter.

48. Groupe Bourbon and Rigdon did not respond to the Coast Guard's inquiries, and did not further pursue a meeting with the Coast Guard.

The AGS 909 Barge Transaction and Lease-Financing Template

49. Upon information and belief, Groupe Bourbon decided instead to pursue a different strategy to obtain approval under Section 12106(e), and to establish a template and model for the anticipated future PSVs documentation. Specifically, Groupe Bourbon decided to acquire a 29-year old hopper barge – the AGS 909 (O.N. 551801) -- which Groupe Bourbon would bareboat charter to Rigdon, and apply to redocument in Bourbon Maritime's name, as the barge owner, under the lease financing provision, Section 12106(e).

50. On March 12, 2003, Groupe Bourbon, acting through Bourbon Maritime, entered into a "Master Bareboat Charter Agreement" with Rigdon. This agreement permits any number and type of vessels to be incorporated under the terms thereof through Schedules to be attached to the agreement. The initial attached Schedule A provided for Rigdon to charter the AGS 909. The terms of the AGS 909 charter have not been provided to Petitioners.

51. On March 14, 2003, Groupe Bourbon submitted an application to NVDC to document the AGS 909 in Bourbon Maritime's name, under Section 12106(e). This application included (i) the above-described Master Bareboat Charter Agreement and Schedule A, (ii) a

Certificate of Charterer, averring that Rigdon is a Section 2 citizen, and (iii) four successive Bills of Sale for the AGS 909 by various companies, ultimately concluding in a transfer of the vessel from Highland Marine, LLC to Bourbon Maritime. The managing member of Highland Marine, LLC, Mr. Richard D. Childers, is also the President of Bourbon Maritime.

52. NVDC issued a COD with a coastwise endorsement to Bourbon Maritime for the AGS 909 on April 15, 2003.

53. Upon information and belief, Groupe Bourbon believed that this Coast Guard action vindicated its plan to proceed with construction of the subject 10 PSVs, and that Groupe Bourbon would be able to document those vessels similarly under Section 12106(e), by adding them sequentially, as delivered, to the Master Bareboat Charter Agreement.

54. OMSA, acting on behalf of its members, timely appealed NVDC's documentation of the AGS 909 to the Commandant (G-MO), by letter dated May 15, 2003. OMSA did not have any knowledge or awareness of Groupe Bourbon's AGS 909 documentation application until after NVDC's issuance of the COD to Bourbon Maritime.

55. The Coast Guard has never acted on OMSA's AGS 909 appeal. This continues to be the case, notwithstanding OMSA's bringing this long-pending matter to the attention of the Coast Guard Judge Advocate General some six months ago, in April 2004.

Groupe Bourbon's Lease Financing Application and NVDC's Responses, Rejection

56. In early January 2004, Bender Shipbuilding applied to NVDC for the assignment of an Official Number for the *M/V Orleans,* the first of the ten vessels under construction. NVDC issued the requested O.N. (#1151394) in early March 2004. The *Orleans* was subsequently documented in the shipyard's name, with a coastwise trading endorsement, on April 16, 2004.

57. In early March 2004, *pro forma* documents to request documentation of the *Orleans* in Bourbon Maritime's name under the lease financing provision (Section 12106(e)) were submitted to NVDC "for review and approval" (Marine Documentation, Inc. letter to NVDC, dated March 2, 2004).

58. NVDC acknowledged receipt of that submission, and requested "documentation establishing that there is an element or component of financing involved with the transaction, i.e., that the vessel is financed with lease financing" (NVDC letter, dated March 8, 2004).

59. Groupe Bourbon and Rigdon responded by letter dated March 16, 2004, enclosing some 192 pages of documents. These documents have been withheld from Petitioners in their entirety.

60. On April 19, 2004, NVDC issued a letter to Groupe Bourbon, stating that "both the pro forma application itself and public information published by Groupe Bourbon ('GB') . . . raise ***serious questions*** about the accuracy and propriety of the expected application" (*id.*, at 1; emphasis added). NVDC cited Groupe Bourbon's public statements as being particularly "***troubling***," and stated that NVDC also had "concerns about the nature of the 'cooperation agreement' between GB and Rigdon" (*id.*; emphasis added). NVDC stated that "This raises ***the appearance of direct or indirect control of Rigdon by GB . . . [that] would clearly disqualify Rigdon as a citizen*** under the provisions of Section 2 of the Shipping Act, 1916" (*id.*; emphasis added). NVDC went to state that what it deemed the "***probability***" of such improper foreign control here is heightened by Groupe Bourbon's public statements and representations identifying Rigdon as a part of Groupe Bourbon's Offshore Division (*id.*, at 1-2). NVDC stated that this all "certainly suggests far more than a simple charter arrangement through a U.S. subsidiary," and noted that Groupe Bourbon "is not a bank, leasing company, or financial

institution" (*id.*, at 2). NVDC concluded by stating that "Without a complete explanation of the apparent discrepancies between GB's public pronouncements and the filing pursuant to 46 USC 12106(e), and disclosure of the cooperation agreement between Rigdon and GB, the Vessel cannot be documented as proposed" (*id.*).

61. Groupe Bourbon responded to NVDC by letter dated April 21, 2004. This letter has not been provided to Petitioners.

62. NVDC replied on May 3, 2004, unequivocally stating, "Based on the information before us ***we do not find that the vessel is eligible for documentation with a coastwise endorsement*** pursuant to the provisions of 46 USC § 12106(e)" (*id.*, at 1; emphasis added). NVDC specifically stated that "***Our concerns over the issue of a cooperation agreement*** referred to in Groupe Bourbon presentations ***remain unanswered***" (*id.;* emphasis added). NVDC further stated that "Public pronouncements of Groupe Bourbon are also ***troublesome***," and "certainly creates the appearance that Groupe Bourbon has ***more than a passive role*** with regard to the vessel" (*id.*, at 2; emphasis added). NVDC concluded by stating that "unless the issues above are resolved to the satisfaction of the Coast Guard, the ORLEANS cannot be documented under the provisions of 46 USC § 12106(e)" (*id.*).

63. On May 4, 2004, Groupe Bourbon submitted its actual formal application to NVDC to document the *Orleans* in Bourbon Maritime's name under Section 12106(e). This application apparently was forwarded prior to Groupe Bourbon's receipt of NVDC's May 3, 2004 letter discussed above (*see* Petition ¶ 62 above).

64. On May 7, 2004, NVDC sent an e-mail to Rigdon, responding to an inquiry as to the status of the documentation. NVDC stated that it had received Groupe Bourbon's application, and that Groupe Bourbon "has been informed that until questions raised in

[NVDC's] letter of 3 May have been answered to the satisfaction of the Coast Guard, a document endorsed for coastwise trading pursuant to the lease finance exception will not be issued" (*id.*). NVDC stated that it was "currently awaiting [Groupe Bourbon's] response" (*id.*).

65. Groupe Bourbon ***did not respond*** to NVDC's May 3 inquiries with respect to the *Orleans* application. Rather, by letter dated May 10, 2004, Groupe Bourbon unilaterally withdrew its application to document the *Orleans* under Section 12106(e).

The Substituted Mortgage-Financing Application and NVDC's Approval Thereof

66. Instead, Groupe Bourbon submitted a new application to document the *Orleans* in Rigdon's name, based upon the back-up mortgage financing alternative set forth in the parties' original agreements (*see* Petition ¶ 39 above). This application included Bills of Sale for the vessel first from Bender Shipbuilding to Bourbon Maritime, and then from Bourbon Maritime to Rigdon. The application also included a First Preferred Fleet Mortgage granted from Rigdon to Bourbon Maritime. Groupe Bourbon expressly reserved the right to attempt to document the anticipated follow-on vessels under Section 12106(e).

67. By fax letter to Groupe Bourbon the very next day, May 11, 2004, NVDC inquired as to whether (1) there is any arrangement whereby a non-Section 2 citizen could exercise control over the vessel, and (2) there is any interest in Rigdon that is subject to a trust or fiduciary obligation in favor of any non-Section 2 citizen.

68. Rigdon responded in the negative to each of NVDC's inquiries *in haec verba* with NVDC's phrasing of its inquiries. Rigdon did not supply any documents or other evidence supporting its self-serving assertions. Groupe Bourbon did not provide any separate response to NVDC's inquiries.

69. On May 13, 2004 – just three days after Groupe Bourbon's submission of the substituted mortgage financing documentation application – NVDC issued a COD with coastwise endorsement to Rigdon for the *Orleans*. NVDC did not provide any explanation for NVDC's change in position on the foreign control issues, and decision to document the vessel in Rigdon's name with a coastwise endorsement. NVDC specifically has not explained the basis for its apparent determination that Rigdon is now not subject to impermissible foreign control by Groupe Bourbon, and that Rigdon fully satisfies the requirements of a Section 2 citizen.

70. In a separate letter to Rigdon, dated the next day (May 14, 2004), the Assistant Commandant for Marine Safety, Security and Environmental Protection, stated that this COD was issued "because of the changed circumstances of this transaction . . . ."

71. Upon information and belief, NVDC's analysis, in the changed context of an application based upon mortgage financing, was limited to the "four corners" of the specific application, and did not consider or resolve the previously-stated concerns raised by other information in NVDC's possession and NVDC's expert judgment. Specifically, upon information and belief, NVDC accepted Rigdon's self-certifications at face value, notwithstanding NVDC's previously stated concerns as to the "probability" of impermissible foreign control of Rigdon by Groupe Bourbon.

The *Orleans* Appeal and Rejection of Groupe Bourbon's Standing Challenge

72. Petitioners timely appealed the issuance of the *Orleans* COD by letter dated May 19, 2004, with supporting Exhibits 1-21, in accordance with 46 C.F.R. §§ 1.03-15 & 1.03-45. Petitioners asked the Commandant (G-MO) (i) to stay the effect of the issued coastwise endorsement pending the resolution of the appeal (*see* 46 C.F.R. § 1.03-15(e)), and (ii) to direct NVDC not to issue any further CODs with coastwise endorsement to Rigdon for the additional

anticipated nine vessels until the Coast Guard resolves the serious foreign control issues identified by NVDC. Petitioners alternatively requested that the Coast Guard initiate a post-COD issuance investigation as to whether Groupe Bourbon impermissibly controls Rigdon, such that Rigdon does not qualify as a Section 2 citizen.

73. In view of the absence of any established procedures in the Coast Guard's Regulations for the processing of vessel documentation appeals once filed, Petitioners requested that the Coast Guard establish appropriate procedures for the prompt hearing, consideration and decision of the impermissible foreign control issues raised, including referral to an administrative law judge. Petitioners stated their availability to meet with the Coast Guard and interested parties to discuss the same. Petitioners emphasized the urgency of this matter in view of the adverse impact on legitimate Section 2 citizens from the improper entry of foreign-controlled vessels into an already severely overtonnaged and depressed U.S. Gulf of Mexico market.

74. The Coast Guard did not acknowledge or otherwise respond in writing to Petitioners' *Orleans* Appeal until the Coast Guard issued the subject August 24, 2004 "final agency action" decision denying the appeal and related requests.

75. Groupe Bourbon and Rigdon responded to the *Orleans* appeal by attacking Petitioners' standing to appeal. They argued that only the applicant and mortgagee have sufficient interests to appeal. They did not address the merits of the appeal.

76. Petitioners opposed this standing challenge, by letter dated June 24, 2004. Petitioners again requested a prompt scheduling conference, involving all parties, to discuss and establish procedures for the processing of the appeal.

77. The Coast Guard rejected Groupe Bourbon and Rigdon's standing attack by letter to Rigdon dated July 26, 2004. The Coast Guard stated that OMSA's members, as competing

vessel operators, have standing to appeal. This letter did not mention Petitioners' opposition, and said nothing about the further processing of the appeal. Curiously, the Coast Guard's letter was neither copied, nor contemporaneously provided by the Coast Guard, to Petitioners. Petitioners first learned of this letter from Rigdon, and obtained a copy thereafter only by specifically requesting the same from the Coast Guard.

Groupe Bourbon's Renewed Lease Financing Efforts and NVDC's Rejection

78. Pursuant to Groupe Bourbon's reservation to seek to document the follow-on vessels under the lease financing provision (Section 12106(e)), Groupe Bourbon finally responded to NVDC's May 3, 2004 inquiries by letter dated June 9, 2004. Groupe Bourbon's response consists largely of (i) self-serving assertions, unsupported by any documentary evidence, and (ii) legal argument. Groupe Bourbon asserted that the only agreements between it and Rigdon are the November 7, 2002 financing agreements, and that the parties never executed the proposed international marketing agreement (*id.*, at 3). However Groupe Bourbon did not address, or attempt to explain away, its many contemporaneous statements to the contrary and as to the true nature of the relationship between itself and Rigdon. Groupe Bourbon also did not provide much of the information and documentation that NVDC requested, and stated only that Groupe Bourbon might be willing to produce some of such information if the Coast Guard first indicated that "it is open to the issuance of a coastwise endorsement under 46 U.S.C. § 12106(e)" (*id.*).

79. Petitioners are not aware of any Coast Guard response to Groupe Bourbon's June 9, 2004 letter. However, it is apparent from subsequent actions that NVDC did not find Groupe Bourbon's submission responsive or adequate to resolve NVDC's concerns.

The Application and Documentation of the *Bourbon* Under Mortgage Financing

80. Specifically, on July 1, 2004, an application was submitted to NVDC to document the second vessel – the *M/V Bourbon* (O.N. 1158133), which had been initially documented to Bender Shipbuilding on June 23, 2004 – in Rigdon's name. This application followed the same mortgage-financing template used for the *Orleans*. In response to an inquiry by NVDC, Rigdon subsequently submitted a "corrected" application, changing the Form CG-1258 to state that Rigdon owns, and was not just chartering, the *Bourbon*.

81. This same flaw existed in the previously-submitted *Orleans* application (*see* Petition ¶ 66 above), but was not detected by NVDC at that time in the Coast Guard's haste to approve that application. Rigdon subsequently submitted a corrected CG-1258 for the *Orleans*.

82. To Petitioners' knowledge, NVDC did nothing new to resolve the previously identified foreign control concerns in connection with NVDC's review and processing of the *Bourbon* application.

83. On July 13, 2004, NVDC issued a COD with coastwise endorsement to Rigdon for the *Bourbon*. NVDC did not issue any explanation as to the bases for its action and implicit determination that Rigdon qualifies as a *bona fide* Section 2 citizen. Upon information and belief, NVDC approved such application based upon what was stated on the face of such application and NVDC's prior documentation of the *Orleans*.

The *Bourbon* Appeal Filing

84. Petitioners timely appealed this new COD with coastwise endorsement to the Commandant (G-MO) by letter dated July 22, 2004, with supporting Exhibits 1-35. Again, Petitioners requested the Commandant to (i) stay the effect of the issued coastwise endorsement pending determination of the appeal, and (ii) direct NVDC not to issue any further coastwise endorsements to Rigdon until the Coast Guard resolves the foreign control issues.

85. In the continuing absence of any Coast Guard action to establish procedures for the earlier *Orleans* appeal, Petitioners set forth in some detail their procedural concerns, including the need for the Coast Guard to provide the complete record upon which the challenged documentation decisions were based, for Petitioners' review and comment. Petitioners proposed that the Coast Guard enter an appropriate Protective Order, limiting access to authorized outside counsel, to the extent that there might be any legitimate concerns about disclosure of competitively-sensitive financial and business information.

86. Petitioners also discussed various procedural options and proposed steps, including the procedures that should apply in the event that Coast Guard Headquarters decided that additional evidence was necessary to supplement whatever record existed before NVDC. In this regard, Petitioners stressed that the proper information needed to be requested, and that all parties needed the opportunity to review whatever information was obtained, and the opportunity to comment in light of such additional information.

87. Petitioners requested a prompt meeting with all parties to establish appropriate procedures for the prompt consideration and decision of the *Bourbon* Appeal.

88. As in the case of the *Orleans* Appeal (*see* Petition ¶ 74 above), the first and only time that Petitioners heard from the Coast Guard with respect to the *Bourbon* Appeal was when

Petitioners received the subject challenged August 24, 2004 "final agency action" decision denying the appeal and related requests.

The Coast Guard's Defective Processing and Decision of the Two Appeals

89. As discussed above, and notwithstanding Petitioners' repeated requests, the Coast Guard never announced procedures for the processing of Petitioners' appeals. Moreover, the Coast Guard did not otherwise communicate with Petitioners with respect to the appeals, and did not even copy Petitioners on correspondence to others.

90. In fact, the very first piece of paper that Petitioners received directly from the Coast Guard with respect to either appeal was the subject August 24, 2004 decision denying the appeals and related requests.

91. The August 24, 2004 decision makes clear that Coast Guard Headquarters acted to supplement the record in at least two separate regards. First, Headquarters apparently solicited and obtained information from NVDC as to the procedures NVDC followed in considering and acting on the subject COD applications. Second, Headquarters, acting through NVDC, solicited and obtained additional input from Rigdon. Specifically, by NVDC letter dated July 26, 2004, Headquarters solicited certain additional information from Rigdon. Rigdon responded by letter dated July 27, 2004, providing some, but by no means all, of the requested information. Neither of these letters was copied or provided to Petitioners incident to the appeal process. Indeed to the contrary, Rigdon invoked Freedom of Information Act Exemption (b)(4) in a blatant attempt to conceal and shield its response from Petitioners, who would be in a position to assess the accuracy and meaning of Rigdon's representations.

92. Petitioners were not notified as to the decision to supplement the record, were not provided any opportunity to comment on or participate in such record supplementation, were not

notified as to the information provided to Headquarters in response to its inquiries, and were not provided an opportunity to submit comments in light of such new input.

93. In short, Petitioners were denied every possible modicum of due process throughout the course of the Coast Guard's processing and decision of the appeals, to their substantial detriment and prejudice.

94. The Coast Guard denied the two vessel documentation appeals, stating that "the procedures followed by [NVDC] in these cases . . . are consistent with well-established precedent" (Attmt 1, at 1). The only "procedures followed" that are mentioned in the decision are (1) that NVDC reviewed the COD application (Form CG-1258), to ensure that it was complete, and (2) that NVDC obtained Rigdon's supplemental statement (i) that there is no agreement or understanding by which a non-Section 2 citizen may exercise any control over Rigdon, and (ii) that no interest in Rigdon is subject to a trust or fiduciary obligation in favor of a non-Section 2 citizen (*id.*).

95. The Coast Guard stated that submission of the Form CG-1258 establishes a rebuttable presumption of Section 2 citizenship, citing 46 C.F.R. § 67.43 (*id.*). The decision states that no further evidence of qualification is required in the vast majority of cases, but that "If specific, hard information is received, the Coast Guard can consider investigating," and states that the Coast Guard "ha[s] done so on rare occasions" (*id.*).

96. The decision conspicuously does not acknowledge or discuss NVDC's earlier determination that there is a "probability" that Rigdon is subject to impermissible foreign control by Groupe Bourbon. The decision also does not discuss the extensive contemporaneous evidence and other considerations recited and relied upon by NVDC in reaching that determination.

97. The decision also does not discuss the impact of such evidence, and NVDC's earlier determination based thereon, on the "rebuttable presumption" under 46 C.F.R. § 67.43.

98. Rather, the decision simply states that there was "no specific disqualifying information" before NVDC (*id.*), and that "None of the materials submitted demonstrate that control as delineated [in 46 C.F.R. § 67.31(b)] has been granted to any person outside of Rigdon Marine" (*id.*, at 2).

99. Upon information and belief, the Coast Guard has not applied such a standard, or required the stated level of information or evidence, before instigating past Section 2 foreign control investigations.

100. The Coast Guard decision also denied Petitioners' alternative request for an investigation, stating simply that "further investigation into the relationship of Rigdon Marine with the mortgagee is not warranted" (*id.*).

101. Curiously, the decision goes out of its way to note that the 1996 Amendment to allow non-U.S. citizens to hold a mortgage (*see* Petition ¶ 30 above), and states that "The Coast Guard must implement that law as faithfully as it implements the lease finance law and all provisions of the Jones Act" (Attmt 1, at 2).

102. The decision again refers to mortgage financing at the end, suggesting that, in the Coast Guard's mind, the mortgage-financing context of the substituted applications was critical to the Coast Guard's decision. Thus, the decision states that, "based on the record as a whole, ***in the context of mortgage financed vessels***, I find that the NVDC correctly determined that the vessels are owned by a Section 2 citizen, and further investigation into the relationship of Rigdon Marine with the mortgagee is not warranted" (*id.*; emphasis added).

103. Shortly after the issuance of the subject decision, the Coast Guard submitted a position paper to the U.S. Senate, opposing a proposed legislative amendment (*see* Attmt 2 to this Petition). This position paper sheds some further light on the Coast Guard's reasoning in denying the subject appeals and investigation request. Specifically, the Coast Guard states that "The standard in existing law provides for self-certification by the applicant, along with certain documentary evidence" (*id.*). The Coast Guard further states that "***Requiring the Coast Guard to investigate*** vessel ownership records even after being! [sic] presented with evidence of compliance ***would impose heavy burden on assets that would be better deployed to other missions***" (*id.*; emphasis added).

104. The Coast Guard further states that it "does not have explicit subpoena or investigative authority for vessel documentation issues" (*id.*). However, the Coast Guard acknowledges that it nevertheless has conducted such investigations: "The Coast Guard does investigate beyond the materials required in certification application, but only when presented with substantive, credible evidence that indicates foreign control" (*id.*). The Coast Guard states that "Such investigations, without a strong basis in evidence, are often long, highly resource-intensive, and generally have an uncertain outcome" (*id.*).

105. The challenged Coast Guard decision harms Petitioners because it subjects them to improper, foreign-controlled competition against which the Jones Act and its citizenship requirements are expressly designed and intended to protect them, as legitimate Section 2 citizens, and leaves them without a remedy and ability to resolve the foreign control issues as to Rigdon.

Subsequent Developments

106. On August 27, 2004, NVDC documented the third of the 10 vessels being

constructed by Bender Shipbuilding – the *M/V Royal* (O.N. 1159200) – in Rigdon's name with a coastwise endorsement. The application was based upon the same mortgage financing scheme. Petitioners time appealed that documentation decision to the Commandant (G-MO) on September 27, 2004. That appeal is presently pending an initial response by the Coast Guard.

107. Petitioners anticipate that NVDC either has, or shortly will receive and approve, an application to document the fourth vessel – the *M/V Iberville* (O.N. 1163367) – in Rigdon's name following the same template. The additional six "initial" order vessels will follow at a rate of approximately one vessel every other month.

I. USCG Appeal Process Violations of Due Process

108. This Paragraph reincorporates the averments of the foregoing Paragraphs 1-107, as if fully set forth herein.

109. The Coast Guard's process in acting upon and deciding Petitioners' agency appeals was fundamentally flawed, and violated Petitioners' due process rights under the Fifth Amendment to the U.S. Constitution, to Petitioners' serious prejudice in properly developing and presenting their appeals and investigation requests, in at least the following regards:

A. Petitioners were denied any notice, and even the most nominal explanation, as to (i) the steps taken by NVDC in considering the subject vessel documentation applications, and (ii) the bases for NVDC's respective decisions to document these vessels with coastwise endorsements in Rigdon's name, in the face of the record before NVDC and NVDC's determination, just days earlier, that there is a "probability" that Rigdon is under impermissible foreign control by Groupe Bourbon.

B. Petitioners were denied notice as to the contents of the record before NVDC on each of the challenged vessel documentation determinations, including whatever NVDC

provided to Coast Guard Headquarters in such regard, and were not provided copies of such record or afforded the opportunity to comment based thereon. Indeed, the very first time that Petitioners will see the record, and many of the key documents, will be when Respondent produces the record in response to this Petition for Review (*see* 28 U.S.C. § 2346; Fed. R. App. P. 17).

C. Petitioners were denied the right to participate in and comment on the Coast Guard's decisions and actions to supplement whatever record was provided by NVDC, (i) through discussions or other communications with NVDC, and (ii) through requests, via NVDC, for additional information from Rigdon.

D. Petitioners also were denied the right to review and comment in light of whatever supplemental information that Coast Guard Headquarters obtained from NVDC and Rigdon.

E. Petitioners also were prejudiced by the Coast Guard's *ex parte* process and *ex parte* communications with other interested parties and entities; and

F. Petitioners were prejudiced because the challenged decision does not adequately explain the bases for the determinations set forth therein.

110. All of the foregoing, individually and collectively, seriously prejudiced Petitioners' ability to develop and present their appeals and investigation requests before the Coast Guard, resulting in a fundamental violation of Petitioners' constitutional due process rights.

111. In this regard, the fact that the Coast Guard's appeal Regulation does not specify procedures for the conduct and consideration of appeals does not mean that the Coast Guard can simply make up procedures as it goes along, and do whatever it wants, without due process applicability and limits.

II. Denial of Petitioners' Appeals Was Arbitrary, Capricious and Contrary to Law

112. This Paragraph reincorporates the averments of Paragraphs 1-107 above, as if fully set forth herein.

113. The Coast Guard's decision to deny Petitioners' two vessel documentation appeals was not in accordance with law in at least the following regards:

a. The Coast Guard failed to apply and adhere to the Coast Guard's own vessel documentation Regulations, and specifically failed to address the fact that 46 C.F.R. § 67.43 establishes only a "***rebuttable*** presumption," and that the record evidence before NVDC, which NVDC itself stated was sufficient to establish the "***probability***" of impermissible foreign control of Rigdon by Groupe Bourbon – *i.e.*, that such impermissible foreign control was more likely than not – was more than sufficient, as a matter of law, to ***rebut*** such presumption and require Rigdon to establish its Section 2 citizenship *de novo* and without the benefit of any presumption, and that Rigdon failed to present any independent evidence, much less evidence sufficient to overcome the effect of the massive contrary, contemporaneous, evidence that the relationship between Groupe Bourbon and Rigdon is not the arms-length financing asserted by Rigdon;

b. The Coast Guard erred in apparently believing, contrary to its own past statements (*see* 58 Fed. Reg. 60256, at 60258-59; Nov. 15, 1993), that the Coast Guard lacks the authority to require Rigdon to present evidence establishing Rigdon's satisfaction of the Section 2 criteria;

c. The Coast Guard relied upon an erroneous standard and burden of proof, and required Petitioners to present "specific, hard [disqualifying] information" before the Coast Guard would even be willing to consider probing further, rather than recognize that, as the Coast Guard has held in the past, it is the applicant which has the burden to prove that it satisfies the Section 2 citizen criteria before being entitled to the privilege of a coastwise trading endorsement

(58 Fed. Reg. at 60258-59), and that, as set forth in 46 C.F.R. § 5.101(a), the appropriate standard is merely whether the evidence establishes "***reasonable grounds*** to believe that the holder of a certificate or document issued by the Coast Guard ***may*** have . . . [v]iolated or failed to comply with subtitle 2 of title 46, U.S.C. . . ." (emphasis added);

d. The Coast Guard erred, in failing to find, notwithstanding the foregoing erroneous standard and burden of proof, that there nevertheless was sufficient, "specific, hard" evidence, before both NVDC and Coast Guard Headquarters, in the form of Groupe Bourbon's many, contemporaneous, public statements and representations, that Groupe Bourbon does, or at least may, have many of the disqualifying rights enumerated in 46 C.F.R. § 67.31(b), so as to have required NVDC to probe further before numbly accepting Rigdon's unsupported, self-serving, self-certifications; and

e. The Coast Guard abdicated its Congressionally-entrusted responsibility and duty to implement its vessel documentation responsibilities consistently with the important cabotage principles embodied in the Jones Act, and specifically in giving unwarranted primacy to the mortgage finance provisions to the effective extinction of the Section 2 citizenship provisions; and

f. The Coast Guard erred in apparently believing that mortgage financing somehow imparts different considerations and standards under Section 2 than does lease financing.

114. The Coast Guard's denial of Petitioners' vessel documentation appeals also is irrational, arbitrary and capricious, an abuse of discretion, and is otherwise contrary to law, in at least the following regards:

a. NVDC was wrong in apparently believing that it was limited to the "four corners" of the specific mortgage-financing application, and could not consider other evidence in

NVDC's files or known to NVDC, and that NVDC could not consider its gut sense and best judgment, based upon years of reviewing thousands, if not hundreds of thousands, of such applications, that something was wrong warranting further investigation before issuing CODs with coastwise endorsements allowing these vessels into the protected coastwise trades;

b. It was irrational, arbitrary and capricious, an abuse of discretion, and otherwise contrary to law, for NVDC to reverse its course, and determination only days earlier that there is a "probability" of impermissible foreign control of Rigdon by Groupe Bourbon, and to determine that Rigdon satisfies the Section 2 citizen criteria in the context of mortgage-financing, without first resolving the "serious" foreign control concerns previously identified by NVDC;

c. It was irrational, arbitrary and capricious, an abuse of discretion, and otherwise contrary to law, for the Coast Guard to believe, determine or affirm, that the determined "probability" of impermissible foreign control here could be put to rest simply by one or more further, self-serving, affirmations by Rigdon that no such control exists; and

d. It was irrational, arbitrary and capricious, an abuse of discretion, and otherwise contrary to law, for the Coast Guard to ignore the specific, hard, contemporaneous, repeated, published statements by Groupe Bourbon, and other direct and circumstantial evidence, establishing that, the relationship between Groupe Bourbon and Rigdon, whatever it is, is certainly not that of a mere mortgagor and mortgagee, as asserted by Rigdon and apparently swallowed wholesale by Coast Guard Headquarters, and not to have required NVDC to probe further, under the unique circumstances here, before issuing the challenged CODs allowing these vessels into the domestic coastwise trade.

III. The Refusal to Investigate Was Arbitrary, Capricious and Contrary to Law

115. This Paragraph reincorporates the averments of the Paragraphs 1-107 above, as if fully set forth herein.

116. The Coast Guard's decision to deny Petitioners' alternative request for a post-COD issuance investigation into the relationship between Groupe Bourbon and Rigdon, and as to whether Rigdon is subject to impermissible foreign control by Group Bourbon that disqualifies Rigdon as a Section 2 citizen eligible to own and operate vessels in the coastwise trade, is irrational, arbitrary and capricious, an abuse of discretion, and is otherwise contrary to law, in at least the following regards:

a. The Coast Guard is charged, required and has the affirmative duty and responsibility, to implement the vessel documentation laws consistently with the Jones Act, and the important cabotage principles embodied therein, including specifically the citizenship criteria of Section 2 that are designed to prevent undue foreign control "by any means whatsoever";

b. The 1996 amendment to permit foreign companies to hold a mortgage on a coastwise vessel applies only where there is a *bona fide* Section 2 vessel owner, and does not relax or modify the Section 2 foreign control considerations as to the vessel owner – here, Rigdon;

c. As reflected in 46 C.F.R. § 5.101(a), the appropriate legal standard as to whether the Coast Guard should investigate possible violations of the Section 2 foreign control criteria in connection with the documentation of a coastwise vessel is whether the evidence before the Coast Guard establishes "***reasonable grounds to believe*** that the holder of a certificate or document issued by the Coast Guard ***may*** have . . . [violated]" Section 2 requirements (emphasis added);

d. The evidence before the Coast Guard, including, but not limited to the evidence that was before NVDC and led NVDC, in the exercise of its experienced judgment and discretion as the Coast Guard's expertised Command on this issue, to conclude that there is a "probability" that Rigdon is subject to impermissible foreign control by Groupe Bourbon, is more than sufficient, as a matter of law, to meet the foregoing standard and require an investigation here;

e. The Coast Guard erred in failing to follow the foregoing Coast Guard Regulation, and the Coast Guard's prior practice, when the Coast Guard stated that Petitioners would have to produce "specific," "hard," "disqualifying information," "demonstrat[ing] that control" has been transferred to or exists in any non-Section 2 citizen outside Rigdon, before the Coast Guard would even consider investigating the serious Section 2 foreign control issues identified by NVDC and Petitioners;

f. This is particularly so in view of the Coast Guard's past recognition that "one of the key inquiries" in vessel documentation is "whether control . . . is vested . . . by any agreement, including a side agreement . . ., and understanding . . ., or otherwise, that would vest control . . ." in a non-Section 2 citizen (Final Rule, 69 Fed. Reg. at 5395), and the Coast Guard's awareness as to the factual intensity of the issues pertaining to such "key" inquiry, and the difficulties in obtaining and producing such evidence without the very investigation that Petitioners were requesting;

g. The evidence here, including Groupe Bourbon's uncontested, contemporaneously-published statements, satisfies even the Coast Guard's new, higher, stated standard, and raises serious issues of material fact as to the truthfulness of Rigdon's assertions and characterization of the relationship between Groupe Bourbon and Rigdon, and thus reinforces NVDC's determination as to the "probability" of impermissible foreign control here;

h. Neither the difficulty nor factual intensity of the issues, nor the Coast Guard's preference to devote its resources to other tasks, justifies or excuses the Coast Guard's refusal to perform its statutory, mandated, duty to implement and protect the integrity of the Jones Act; and

i. The Coast Guard's refusal to investigate essentially leaves Petitioners without a remedy, and opens the Jones Act to nullification by anyone willing to certify it is in compliance, in spite of every indication and common sense to the contrary.

Relief Requested

WHEREFORE, Petitioners respectfully request that the Court grant the following relief:

a. Expedite the scheduling and calendaring priority of this Petition for Review due to the recurring nature of the subject issues, and increasing serious competitive harm to Petitioners, as the Coast Guard continues to document the follow-on vessels under construction, one at a time as each vessel is being completed, at a rate of approximately one vessel every other month;

b. Direct Respondent to provide Appellants, on an expedited basis, the complete record in this matter, including the complete record that was before NVDC relating to Groupe Bourbon and Rigdon's various COD applications;

c. Determine that the challenged Coast Guard decision is irrational, arbitrary and capricious, an abuse of discretion, and otherwise contrary to law, and set aside the decision, and remand the matter to the Coast Guard with instructions to cancel the challenged COD coastwise endorsements as having been issued erroneously; and

d. Award Petitioners their costs in filing and pursuing this Petition for Review; and

e. Grant Petitioners such other and further relief as the Court determines just and proper under the circumstances.

Respectfully submitted,

Hopewell H. Darneille III
Michael G. Roberts

THOMPSON COBURN LLP
1909 K Street, N.W. - Suite 600
Washington, DC 20006-1167
Tel: 202-585-6900
Fax: 202-585-6969

Counsel for Offshore Marine Service Association, Inc., Edison Chouest Offshore LLC, Hornbeck Offshore Services, Inc., L & M Botruc Rental, Inc., Otto Candies, LLC, SEACOR Marine, Inc., and Tidewater, Inc.

Attachments (2):

1. Coast Guard 8/24/04 Decision
2. Coast Guard Response to Proposed Amendment

October 25, 2004

CERTIFICATE OF SERVICE

I, Hopewell H. Darneille III, Counsel of Record for the Petitioners, hereby certify that the foregoing "Petition for Review" is being served by delivering true and correct copies thereof by hand or first-class mail (as indicated below) upon all known interested parties on the 25th day of October, 2004, as follows:

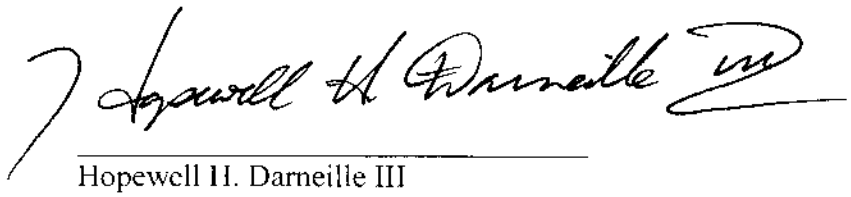
Leonard Egan, Esq. (By Hand)
1030 15th Street N.W. – Suite 300
Washington, DC 20005
Counsel for Rigdon Marine, LLC

Stewart Peck, Esq. (By First Class Mail)
Lugenbuhl, Wheaton, Peck, Rankin & Hubbard
601 Poydras Street, 27th Floor
New Orleans, LA 70130
Counsel for Rigdon Marine, LLC

Constantine G. Papavizas, Esq. (By Hand)
H. Allen Black, Esq.
Winston & Strawn
1400 L Street, N.W.
Washington, DC 20005
Counsel to Groupe Bourbon and Bourbon Capital U.S.A., Inc.

John Ashcroft, Esq. (By Hand)
Attorney General of the United States
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Rear Admiral John E. Crowley, Jr. (By Hand)
Judge Advocate General (G-L)
United States Coast Guard
2100 2nd Street, S.W. – Room 1422
Washington, D.C. 20593-0001



Hopewell H. Darneille III

U.S. Department of Homeland Security

United States Coast Guard

Commandant
United States Coast Guard

2100 Second Street, S.W.
Washington, DC 20593-0001
Staff Symbol: G-MO
Phone: (202) 267-1412
Fax: (202) 267-4839

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Mr. Hopewell H. Darneille, III
1909 K Street, NW
Washington, DC 20006-1167

Dear Mr. Darneille:

This is in response to your letters of May 19, 2004 and July 22, 2004 on behalf of the Offshore Marine Service Association and its individual members who claim to be directly affected and adversely impacted by issuance of Certificates of Documentation ("COD") with coastwise endorsements to the M/V ORLEANS, official number 1151394 and M/V BOURBON, official number 1158133 (the "Vessels"). Those letters appeal issuance of the CODs and request immediate stays of coastwise endorsement effectiveness. For the reasons given below, I am denying your appeals and your requested stays of effectiveness.

I have reviewed the procedures followed by the National Vessel Documentation Center (NVDC) in these cases. They are consistent with well-established precedent. Since assuming responsibility for vessel documentation functions in 1967, the Coast Guard has consistently relied upon self-certification by applicants for documentation. The applicant for documentation, Rigdon Marine LLC, ("Rigdon Marine") filed properly completed, original Applications for Initial Issue, Exchange, or Replacement of Certificate of Documentation (form CG-1258) which established rebuttable evidence of its qualification as a citizen entitled to engage in coastwise trade (46 CFR 67.43). No further evidence of qualification to engage in the coastwise trade of the U.S. is required in the vast majority of applications received and acted on by NVDC. If specific, hard information is received, the Coast Guard can consider investigating, and we have done so on rare occasions. In this instance, publicly available information on Groupe Bourbon's web site indicated that Groupe Bourbon considered M/V ORLEANS part of its fleet. This, and the general opposition (without specific disqualifying information) expressed by your clients to the issuance of CODs with coastwise endorsements raised the issue of whether Rigdon Marine was subject to control by a non-U.S. citizen in violation of the Shipping Act of 1916. Therefore, the Director of the NVDC requested and received a written declaration by Mr. Larry T. Rigdon, the manager of Rigdon Marine, affirming that:

(1) There is no agreement, arrangement, contract, or understanding, by which any person not a citizen as defined in Section 2 of the Shipping Act, 1916 (46 App. USC Sec. 802), may exercise directly or indirectly, voting power, or by any means exercise any control over Rigdon Marine LLC.

(2) No interest in Rigdon Marine LLC is subject to a trust or fiduciary obligation in favor of any person not a citizen as defined in 46 App USC Sec. 802.

For purposes of determining control, the Coast Guard looks to the following issues:

(1) The right to direct the business of the entity that owns the vessels;

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Subj: OMSA Appeal letters of May 19, 2004 and July 22, 2004 concerning M/V ORLEANS and M/V BOURBON

(2) The right to limit the actions of or to replace the chief executive officer, the majority of the board of directors, any general partner, or any person serving in a management capacity of the entity that owns the vessels;

(3) The right to direct the transfer, the operation, or the manning of the vessels.

(4) The right to otherwise exercise authority over the business of the entity that owns the vessels.

The right to simply participate in these activities or the right to receive a financial return, e.g., interest or the equivalent of interest on a loan or other financing obligation, does not constitute control (46 CFR 67.31(b)).

None of the materials submitted demonstrate that control as delineated above has been granted to any person outside of Rigdon Marine. I share your interest in upholding the integrity of the Jones Act. However, the law was changed in 1996 to allow non-U.S. citizens to hold a mortgage on a vessel. The Coast Guard must implement that law as faithfully as it implements the lease finance law and all provisions of the Jones Act. Thus, the NVDC obtained the affirmative statement in respect of control of Rigdon Marine prior to issuing the CODs with coastwise endorsements. Additionally, in conjunction with the Maritime Administration, we have inquired further to ascertain whether Rigdon Marine or its principals have executed any charters with a Bourbon entity by which control of the vessels might be exercised by Groupe Bourbon or any of its affiliates. Mr. Rigdon has affirmed to us that the vessels are not under any time charter to any affiliate of Groupe Bourbon, and that there is no oral or written agreement, time charter, management agreement, marketing agreement cooperation agreement or other arrangement between Rigdon Marine LLC (including any of its current or former parents, subsidiaries, affiliates, and principals) and Groupe Bourbon (including any of its current or former parents, subsidiaries, affiliates and principals). If that situation were to change, we would become concerned regarding whether too much control had been ceded to Bourbon, such that Rigdon Marine LLC might be disqualified as a Section 2 citizen. Accordingly, and based on the record as a whole, in the context of mortgage financed vessels, I find that the NVDC correctly determined that the vessels are owned by a Section 2 citizen, and further investigation into the relationship of Rigdon Marine with the mortgagee is not warranted.

In the instant cases, I further find that the NVDC properly followed established procedures. Your appeal of the issuance of CODs to these vessels and your request for stays of coastwise endorsement effectiveness are denied.

This letter constitutes final agency action on your appeals and requests.

Sincerely,

J. P. Brusseau
Captain, U.S. Coast Guard
Director of Field Activities

Subj: OMSA Appeal letters of May 19, 2004 and July 22, 2004 concerning M/V ORLEANS and M/V BOURBON

Cc: H. Allen Black, Esq., Counsel for Bourbon Maritime U.S.A., Inc.
Leonard Egan, Esq., Counsel for Rigdon Marine, LLC
Representative Gene Taylor
Mr. Ken Wells, President, OMSA
ADM Thomas H. Collins, USCG, Commandant
RADM John E. Crowley, Jr., USCG, Chief Counsel
Mr. Thomas L. Willis, Director, NVDC

Attmt 2

Coast Guard Response
to
the Proposed Amendment under consideration by Senator Landrieu

The Coast Guard strongly objects to the proposed amendment titled "Enhancing Homeland Security, Strict Enforcement of Maritime Cabotage Laws."

Existing law already includes provisions to preclude foreign control of U.S. coastwise vessels. The standard in existing law provides for self-certification by the applicant, along with certain documentary evidence. So the Coast Guard already does not issue certificates of documentation with coastwise endorsements for any vessel that does not produce evidence sufficient to satisfy the Coast Guard that impermissible foreign control does not exist, as measured against the standard in law.

The proposed amendment would require the Coast Guard to deny a certificate of documentation with a coastwise endorsement to any vessel it "reasonably suspects" of foreign control, without clarifying a threshold of suspicion nor a standard of evidence to allay suspicion. It would require the Coast Guard to initiate endless investigations based on nothing more than vague accusations.

Rather than freeing domestic operators from any threat of foreign control, the amendment would certainly enslave them to anyone willing to make a false accusation. Most likely to be adversely affected would be small, entrepreneurial start-ups who might be falsely accused and forced into bankruptcy from lack of revenue during the course of a long investigation.

If the current standard of evidence for these purposes is deemed insufficient, the preferred course is to articulate in law a standard that can be fairly and expeditiously applied in each case. Such a standard might limit the maximum percentage of a vessel's value allowed to be mortgaged by a foreign entity, for example, or might even repeal the foreign financing provisions of the Coast Guard Authorization Act of 1996.

The Coast Guard does not have explicit subpoena or investigative authority for vessel documentation issues. The Coast Guard does investigate beyond the materials required in certification applications, but only when presented with substantive, credible evidence that indicates impermissible foreign control. The Coast Guard does not investigate in cases of suspicion or accusation, since doing so would shift the responsibility to prove compliance with foreign ownership regulations from the vessel owner to the Coast Guard itself. Such investigations, without a strong basis in evidence, are often long, highly resource-intensive, and generally have an uncertain outcome. Requiring the Coast Guard to investigate vessel ownership records even after being! presented with evidence of compliance would impose heavy burdens on assets that would be better deployed to other missions.

call if you need anything else. Anthony Popiel