No. 17-

IN THE

Supreme Court of the United States

AMERICAN COMMERCIAL LINES LLC,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

GLENN G. GOODIER
RICHARD D. BERTRAM
JONES WALKER LLP
201 St. Charles Avenue,
50th Floor
New Orleans, LA 70170
(504) 582-8000

JOHN A.V. NICOLETTI
Counsel of Record
TERRY L. STOLTZ
NICOLETTI HORNIG & SWEENEY
Wall Street Plaza
88 Pine Street, 7th Floor
New York, NY 10005
(212) 220-3830
jnicoletti@nicolettihornig.com

Counsel for Petitioner

278558

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Congress passed the Oil Pollution Act of 1990 ("OPA") in response to the Exxon Valdez oil spill to "streamline federal law so as to provide quick and efficient cleanup of oil spills, compensate victims of such spills, and internalize the costs of spills within the petroleum industry." *Rice v. Harken Expl. Co.*, 250 F.3d 264, 266 (5th Cir. 2001). OPA authorized the use of the Oil Spill Liability Trust Fund ("OSLTF"), funded through taxes and penalties assessed on the petroleum industry, to fund uncompensated removal costs and damages resulting from an oil spill. 26 U.S.C. § 9509; *see also Great American Ins. Co. v. United States*, 55 F. Supp. 3d 1053, 1059 (N.D. Ill. 2014). Under OPA, a responsible party is entitled to limit its liability to a specified dollar amount based on the tonnage of the vessel from which oil is spilled, unless the United States can establish an exception to the general limitation of liability applies. 33 U.S.C. § 2704(a)-(c).

The question presented is whether the courts below erred when they denied American Commercial Lines LLC ("ACL"), the owner of the inland tank barge DM 932, limitation of liability under section 2704(c) of the Oil Pollution Act of 1990. The lower courts held that the secret, illegal acts of third-party towing company, DRD Towing Company, LLC ("DRD") and DRD employees Terry Carver and John Bavaret which led to the collision between the barge DM 932 and the M/V TINTOMARA, were actions that were taken "pursuant to" to the charters between ACL and DRD.

PARTIES TO ACTION IN THE FIFTH CIRCUIT COURT OF APPEALS

The parties to the proceeding are listed in the caption.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner American Commercial Lines LLC is a privately held limited liability company wholly owned by Commercial Barge Line Company.[1] There is no publicly traded company that owns 10% or more of its stock or ownership interests.

1. American Commercial Lines LLC has changed its name to American Commercial Barge Line LLC, but it remains the same company under the same ownership.

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The District Court opinion (Appendix C, pp. 22a-58a) is not reported. The opinion of the Court of Appeals is reported at *United States v. American Commercial Lines, L.L.C.*, 875 F.3d 170 (5th Cir. 2017); (Appendix A, pp. 1a-18a).

JURISDICTIONAL STATEMENT

The Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court on November 7, 2017. A judgment was entered on the same day. This Court has jurisdiction to review the opinion by a writ of certiorari under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

From no later than January 1, 2007, D.R.D. Towing Company, LLC ("DRD") had engaged in systemic practices of: (i) manning its tugs with unlicensed and/or improperly licensed crews in violation of the laws, statutes, and regulations of the United States, and (ii) allowing its tugs to be operated for unsafe, extended periods without proper relief crews in violation of the laws, statutes, and regulations of the United States (Appendix A, p. 5a; ROA.1039-1042, pp. 3 – 6). DRD "knowingly assigned, or caused to be assigned, employees without appropriate licenses and qualifications to critical positions to operate certain vessels as the master or mate" (ROA.1042-43, pp. 6 – 7). DRD's management "engaged in the practice of using unlicensed crew members aboard its vessels . . . prior to [the] collision," *Gabarick v. Laurin Maritime, Inc.*, 900 F. Supp. 2d 669, 677 (E.D. La. 2012), and were aware that for "a few months prior to [the] collision that its vessels were

being operated by crew members in excess of 12 working hours." *Id.* at 678. The captain who was assigned to the MEL OLIVER, but absent from the tug at the time of the collision, "was acknowledged by DRD to have been working excessive hours aboard the M/V PAM D at the time of that tug's collision with another vessel." *Id.* at 678.

Unaware of this ongoing illegal activity (ROA.2812:8-2813:6, Bryan Christy, T.Tr. VII (PM), pp. 85 – 86; ROA.2853:1-23, Hecht Depo., March 24, 2011, p. 80; ROA.2826:5-12, Sellers, T.Tr. Vol. VII (AM), p. 75), ACL negotiated with DRD for the bareboat charter of ACL tugs, or suitable substitutes, to DRD which DRD would, in turn, time charter back to ACL to tow ACL's barges as directed (ROA.2857, Munoz Aff., ¶ 3).

During those negotiations, ACL proposed terms for the charters which required DRD to operate and man the tugs with a properly licensed crew and in accordance with all applicable laws and regulations (Appendix A, pp. 2a-3a; ROA.2857, Munoz Aff., ¶ 4). Furthermore, the proposed time charter contained Performance Standards that made DRD 100% responsible for insuring that the tugs were "fully crewed with appropriate wheel-house personnel" and that "crewmembers have the skills necessary to meet all operational and technical requirements…" (Appendix A, p. 3a; ROA.1233, nos. 2, 3).

The executed versions of the Charters[1] (ROA.1196-1121; ROA.1122-37) contained identical Clauses 7 entitled "Compliance with Laws and Regulations," pursuant to

1. The Bareboat and Fully Found Charters are collectively referred to as "the Charters."

which DRD agreed to comply with all applicable laws and regulations with respect to the manning and operation of the chartered tugs or any substitute tugs. The Fully Found Charter also contained Performance Standards making DRD solely responsible for properly manning the tugs (ROA.1233, Performance Standards 2 and 3).

The crewing and operation of the chartered tugs with a properly trained and licensed crew and in compliance with all applicable laws and regulations were material elements of the Charters and ACL would not have entered into the Charters without those provisions (ROA.2857-58, Munoz Aff., ¶ 5-6). Had ACL known that DRD was not going to comply with those requirements, ACL would not have entered into the Charters (ROA.2835:5-17, Masters, T.Tr. Vol. IX (AM), p. 35; ROA.2853:1-2855:4, Hecht Depo., March 24, 2011, pp. 80 - 82; ROA.2858-59, Munoz Aff., ¶¶ 6, 14).

In May 2008, DRD's management, although fully aware, concealed from both the Coast Guard and ACL that at the time of a collision between the PAM D and the M/V LOUISIANA STAR, DRD had been operating the tug PAM D for more than 12 hours with only one licensed navigating officer aboard (Appendix A, p. 5a). *See also Gabarick v. Laurin Maritime*, 900 F. Supp. 2d at 679.

Unaware of DRD's illegal activities, on June 19, 2008, ACL entered into an Amendment to the Charters (ROA.1238-39) allowing DRD to substitute the tug MEL OLIVER for the tug PAM D (Appendix A, p. 2a; ROA.2858, Munoz Aff., ¶ 9).

On the same day DRD entered into the Amendment, John Bavaret was serving as the mate of the crew which took possession of the MEL OLIVER for DRD. Bavaret had been fired previously by the captain, Terry Carver, for sleeping while either on watch or at the control of a DRD tug, but this decision was overruled by DRD's management. *Gabarick v. Laurin Maritime*, 900 F. Supp. 2d at 677. "[D]espite not being a properly licensed operator," Bavaret "was designated the relief [captain] and was serving in the position of mate" of the MEL OLIVER at the time of the collision and was "the only person onboard, licensed or unlicensed, to operate the *Mel Oliver* from July 20, 2008 to July 23, 2008" (Appendix A, p. 3a; ROA.1185-86).

On July 23, 2008, the ACL barge DM 932, while pushed by the tug MEL OLIVER under the command of Bavaret, collided with the M/V TINTOMARA. As a result of the Collision, some 300,000 gallons of oil were spilled into the Mississippi River (Appendix A, pp. 3a-4a).

As the owner of the DM-932, ACL was designated as a potential Responsible Party under OPA. In compliance with its obligations under OPA, ACL promptly contracted with several Oil Spill Response Organizations ("OSROs") to clean up the spill and published a notice to all possible claimants who may have suffered damages as a result of the spill to file their claims with ACL's claims adjustor, Worley Catastrophe. ACL paid over $70 million in clean-up costs and damages incurred by innocent third parties.

Limitation of liability actions were filed by ACL, DRD and the owner of the M/V TINTOMARA. A non-jury trial was held in those consolidated actions in which the

District Court entered an Opinion finding that collision was caused by the sole fault of DRD and its employees Carver and Bavaret. The District Court found that ACL had acted properly in vetting DRD in connection with the Charters and ACL was exonerated from any liability for the collision. *Gabarick*, 900 F. Supp. 2d at 679.

The United States Attorney for the Eastern District of Louisiana opened a criminal investigation into the operations of DRD which resulted in a guilty plea by DRD on September 8, 2010. The factual basis for the guilty plea of DRD confirmed that before the Bareboat and Fully Found Charters were executed, DRD had systemic practices of: (i) manning its tugs with unlicensed and/or improperly licensed crews in violation of the laws, statutes, and regulations of the United States, and (ii) allowing its tugs to be operated for unsafe, extended periods without proper relief crews in violation of the laws, statutes, and regulations of the United States (ROA.1179-87; ROA.2959, Munoz Aff., ¶ 13).

During discovery in the limitation actions, ACL learned of the United States criminal actions against DRD, Carver and Bavaret, who all pled guilty, and that DRD had been engaging in criminal activity by using improperly licensed personnel to act as navigation officers aboard its tugs and by allowing properly licensed personnel to work hours in excess of the safe working hours provided by the governing statutes. ACL filed an action to have the Charters declared void *ab initio.* Because DRD had largely gone out of business, the United States intervened in the action to assert that the Charters should not be voided. ACL's motion for summary judgment declaring the Charters void was denied on the basis that ACL was

judicially estopped from voiding the Charters because it had relied on the Charters in avoiding liability in the collision action. This decision was upheld in the Fifth Circuit and the petition for certiorari was denied.

The United States also filed a complaint to recover costs and expenses incurred in responding to the oil spill. After the nullification action was concluded, the United States filed an amended complaint followed by a motion for Partial Summary Judgment, seeking an order holding ACL strictly liable to the United States[2] and denying ACL all defenses or limitations of liability under OPA (ROA.1138-1279). Over ACL's opposition (ROA.1292-1332), the District Court granted the motion for Partial Summary Judgment (ROA.1377-78).

After the completion of discovery, the United States and ACL entered into a stipulation providing that the recoverable removal costs and damages of the United States were $20 million (ROA.2691-94), and the District Court entered final judgment (Appendix B, pp. 19a-21a; ROA.2697-99). ACL filed a timely Notice of Appeal (ROA.2700-01). After briefing and oral argument, the Fifth Circuit affirmed the decision below on November 7, 2017 (Appendix A, pp. 1a-18a). *United States v. American Commercial Lines, L.L.C.*, 875 F.3d 170 (5th Cir. 2017).

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2. ACL does not dispute the District Court's finding that, subject to the OPA provisions on defenses from liability, 33 U.S.C. § 2703, and limitation of liability, 33 U.S.C. § 2704, ACL as a responsible party is strictly liable under OPA. 33 U.S.C. § 2701.

REASONS FOR GRANTING THE PETITION

POINT I.

THE SUPREME COURT NEEDS TO GRANT CERTIORARI TO EXERCISE ITS SUPERVISORY POWER TO CONFIRM THAT IN THIS CASE OF FIRST IMPRESSION ACL IS ENTITLED TO LIMIT ITS LIABILITY UNDER OPA FOR THE CLEAN UP COSTS AND DAMAGES RESULTING FROM THE OIL SPILL CAUSED BY THE SECRET, ILLEGAL ACTS OF DRD, CARVER AND BAVARET WHICH LED TO THE COLLISION BETWEEN THE BARGE DM-932 AND THE M/V TINTOMARA

ACL, as a responsible party, is strictly liable under 33 U.S.C. § 2702(a) which provides that:

> …subject to the provisions of this Act, each responsible party for a vessel … from which oil is discharged … into or upon the navigable waters or adjoining shorelines … is liable for the removal costs and damages … that result from such incident.

In spite of this strict liability, OPA provides a presumption that ACL is entitled to limit its liability. However, there is an exception to that right to limitation under OPA when

> the incident was proximately caused by –
>
> (A) gross negligence or willful misconduct of, or

> (B) the violation of an applicable Federal safety, construction or operating regulation by,
>
> … a person acting pursuant to a contractual relationship with the responsible party….

33 U.S.C. § 2704(c)(1).

Burden of Proof

The burden is on the United States to prove that an exception to limitation applies. *See Great American Ins. Co. v. United States*, 55 F. Supp. 3d 1053 (N.D. Ill. 2014). As the court stated in *Great American Insurance Co.*,

> If Congress had intended for a responsible party to establish, by a preponderance of the evidence, that it was entitled to limit its liability, and to disprove the applicability of the exceptions to limitation, wouldn't it have done so by expressly including that language, as it did in § 2703? However, 'Congress did not write the statute that way', suggesting that it views a responsible party's burdens with respect to complete defenses and limitations of liability differently.

Id. at 1062. (internal citation omitted); *but see Bean Dredging, LLC v. U.S.*, 773 F. Supp. 2d 63 (D.D.C. 2011); *Water Quality Ins. Syndicate v. U.S.*, 632 F. Supp. 2d 108 (D. Mass. 2009).[3] The court in *Great American Insurance Co.* stated

3. "However, neither decision discusses or reconciles the difference between § 2703 which explicitly imposes the burden of

> Common sense also suggests that an interpretation which essentially asks the responsible party to disprove the exceptions – that is, to prove the multitude of ways in which they were not grossly negligent or did not violate federal statutes – would not have been the intention of Congress, particularly where Congress explicitly provided for a limitation of liability as the 'general rule.'

Great American Ins. Co. v. U.S., 55 F. Supp. 3d at 1061 (N.D. Ill. 2014). Indeed, the United States admitted in its reply memo of law in support of its motion in the District Court that "it bears the burden of proof in showing an exception to limitation under § 2704(a)"… (ROA.1343, n.4), and the District Court agreed that the burden of proof with respect to ACL's right to limitation was on the United States (Appendix C, p. 50a). The United States did not carry its burden to prove that an exception to limitation applies.

ACL is Entitled to Limitation of Liability Under OPA

Again, the premise of the United States' assertion and the District Court's decision, is that "in connection with" and "pursuant to" "mean much the same thing" (Appendix C, pp. 32a-33a), and that ACL is not entitled to limitation under § 2704(a) of OPA because the mere existence of the Charters is sufficient to deny ACL limitation (Appendix

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proof on the party seeking a complete defense, and §§ 2704 and 2708, which do not discuss burden of proof." *Great American Ins. Co. v. United States*, 55 F. Supp. 3d at 1064 (N.D. Ill. July 9, 2014).

C, pp. 33a-34a, 54a). As shown in Point II below, the mere existence of the Charters does not require a denial of ACL's right to limitation.

Indeed, the National Pollution Funds Center[4] ("NPFC") does not apply the third-party limitation provision in the manner contended for by the United States. In the claims arising out of the grounding of the ATHOS I, which involved a spill of 263,000 gallons of heavy oil into the Delaware River, the NPFC allowed the owner of the vessel to limit its liability under section 2704 of OPA and reimbursed the owner for all removal costs and damages paid in excess of the limitation amount even though the owner had a contractual obligation to CITGO, which was ultimately held at fault for the grounding, requiring the vessel owner to deliver a cargo of oil to the terminal owned by CITGO. The NPFC made this decision while litigation was ongoing, and is still ongoing, as to whether the owner and/or a party with whom it had a contractual relationship, CITGO, had violated numerous safety and operating regulations which may have led to the Delaware River spill. *In re Frescati Shipping Company, Ltd.*, 05-civ-305-JHS, 08-2898-JHS, 2016 WL 4035994, at * 4, * 7-8 (E.D. Pa. July 25, 2016), *appeal filed In re Frescati Shipping Co.*, No. 16-3470 (3d Cir. August 31, 2016).

For the exception to apply, the United States had to show not merely that DRD's actions were "in connection

4. The National Pollution Funds Center is the Federal agency tasked with adjudicating, *inter alia*, claims by a responsible party for exoneration or limitation of liability under OPA. In the underlying action, the United States sought a judicial, rather than agency, declaration of ACL's rights under OPA.

with" the Charters, but rather that the actions were "pursuant to" the Charters.[5]

The Court of Appeals acknowledged this was a case of first impression and that OPA did not define "pursuant to" so they looked to ordinary meaning of those words (Appendix A, p. 14a). Specifically, the Court of Appeals noted

> Black's Law Dictionary defines "pursuant to" as "[i]n compliance with; in accordance with," "[a]s authorized by," or "in carrying out." BLACK'S LAW DICTIONARY 1431 (10th ed. 2014). Webster's Third similarly defines "pursuant to" as "in the course of carrying out; in conformance to or agreement with; [or] according to." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1848 (2002). *See also* OXFORD ENGLISH DICTIONARY 887 (2d Ed. 1989) (defining "pursuant to" as "following upon, consequent and conformable to, [or] in accordance with."

5. In the courts below, ACL contended that it was entitled to both exoneration and limitation of its liability because the acts of DRD and its employees were not taken either "in connection with" (33 U.S.C. § 2703(a)(3)) or "pursuant to" (33 U.S.C. § 2704(c)(1) the Charters with DRD. However, unlike the District Court, the Fifth Circuit acknowledged that the standards were different and that "pursuant to" was less encompassing that "in connection with" (Appendix A, p. 14a). *United States v. American Commercial Lines, L.L.C.*, 875 F.3d 170, 177 (5th Cir. 2017). Therefore, ACL is only seeking review in this Court of the Fifth Circuit's holding that ACL was not entitled to the statutory presumption of limitation of its liability.

> Accordingly, and as ACL contends, "pursuant to" has a narrower meaning that "in connection with." While the latter encompasses any conduct that is logically related to the contractual relationships in the sense that it would not have occurred but for the third party's contractual relationship with the responsible party, the former contemplates compliance or conformity.

(Appendix A, p. 14a). *United States v. American Commercial Lines, L.L.C.*, 875 F.3d at 177. The Court of Appeals specifically noted that section 2704's language "contemplates [a contracting party's] compliance or conformity [with the contract]" (Appendix A, p. 14a). *United States v. American Commercial Lines, L.L.C.*, 875 F.3d 170, 177 (5th Cir. 2017). Nevertheless, despite acknowledgement that the statutory language expressly requires a finding that the actions of the contracting party be pursuant to and in conformance with the contract, the opinions of the district court and the Fifth Circuit give little to no meaning to the statutory language.

The Fifth Circuit indicated that ACL "goes too far when it indicates that the specific acts of omissions must be authorized by the contract" (Appendix A, p. 14a). *Id.* ACL has never argued, nor does the statute require, that the violation of an operating or safety regulation be "authorized" by the contract. Certainly, ACL acknowledges that regulatory violations, gross negligence and/or willful misconduct can and does occur while a party is acting pursuant to a contract, and a responsible party would not be entitled to limitation under OPA.

Here, however, the criminal actions of DRD and its employee Bavaret were wholly not in compliance or conformity with the Charters and therefore were not taken "pursuant to" the Charters. Despite the terms in the Charters requiring DRD to comply with all laws and regulations and to properly man the tug, DRD engaged in the deliberate, criminal act of improperly manning the MEL OLIVER. It cannot be contended that such deliberate, criminal acts were taken "pursuant to" the Charters. Criminal conduct is never pursuant to a legal contract.

Where an agent's criminal activities are outside the scope of his employment, the principal is not responsible for such action. *Inland Trucking Corp. v. U.S.*, 281 F.2d 457, 459 (Fed. Cl. 1960). "An employer is not responsible for the criminal acts or the intentional torts of their employees outside the scope of their employment unless the employer was negligent in some way – *e.g.*, in hiring the employee." *Dresser Indus., Inc. v. First Travel Corp.*, No. Civ. 88-581E, 1989 WL 87599, at *4 (W.D.N.Y. Aug. 2, 1989) (internal citations omitted). "It is axiomatic that an employer is not liable for the acts of an employee when those acts are undertaken outside the scope of employment." *Palestina v. Fernandez*, 701 F.2d 438, 440 (5th Cir. 1983). "The torts of an employee committed for motives personal to the employee which are unrelated to the furtherance of the employer's business, especially when serious in nature, may not be found to be within the scope of the employee's employment." *Dresser Indus., Inc.*, 1989 WL 87599, at *4.

In *Palestina*, the defendant worked as a fisherman for the owner of a boat rental facility. *Palestina*, 701 F.2d at

439. One day after work, without the authorization of his employer, the defendant took one of his employer's boats for a pleasure ride. *Id.* During this unauthorized ride, the defendant struck another vessel, killing the other driver. *Id.* The trial court held the defendant's employer liable but the Fifth Circuit reversed, finding that the employer could not be held liable for the acts of an employee taken outside the scope of employment. *Id.* at 440.

In *Inland Trucking Corp.*, plaintiff, a Philippine trucking company, sued to recover money owed under a government contract for transportation of army cargo. *Inland Trucking Corp.*, 281 F.2d at 458. The United States withheld payment to reimburse it for cargo lost while in transit in the company's trucks. *Id.* The plaintiff claimed that despite a clause to the contrary, it was not liable under the contract because its own negligence did not cause the losses. Rather, the army cargoes that were being transported were robbed by hijackers, made possible in part by the cooperation between the robbers, the military policemen that were employed by the United States, and the drivers that were employed by the plaintiffs. *Inland Trucking Corp.*, 281 F.2d at 459. The court explained that "it is true that defendant's agents, the military policemen, were in part responsible for the thefts, but of course criminal activities of this nature are outside the scope of the agent's employment, and it is well settled that the principal is not responsible for such action. There is no evidence in the record which would indicate the defendant was negligent in selecting its guards, and it, therefore, cannot be clothed with liability." *Inland Trucking Corp.*, 281 F.2d at 459.

In *Buchanan v. Stanships, Inc.*, the decedent was an illegal alien found in the ballast tank of a bulk cargo carrier. *Buchanan v. Stanships, Inc.*, 744 F.2d 1070 (5th Cir. 1984). His mother commenced an action under the Jones Act and general maritime law for damages for the wrongful death of her son. *Id.* The district court granted summary judgment to the defendants, finding that the owner and operator of the vessel could not be liable for the unlawful acts of their employees, *i.e.*, accepting money to smuggle the decedent into the United States, nor could the companies be liable for the tortious acts of employees who violated the company policy forbidding its vessel to carry passengers for hire because this conduct fell beyond the scope of their employment. *Id.* This Court reversed, explaining that it was up to the trier of fact to determine whether the employees were acting within the scope of their employment.

John Bavaret admitted in his guilty plea that he lost situational awareness and that this resulted in the collision with the TINTOMARA and the resulting oil spill (ROA.1191). DRD Towing Company, LLC admitted in its guilty plea that the negligence of Bavaret, who was acting within the scope of his employment for DRD, was a cause of the July 23, 2008 collision and conceded that it was liable for the faults of Bavaret (ROA.1187).

DRD may not have known that Carver left the MEL OLIVER on July 20, 2008. Nonetheless, by paying apprentice mates/steersmen extra to serve a watch by themselves and by paying properly licensed operators extra money to work more than 12 hours in a 24-hour day, DRD and its management knowingly created an atmosphere that allowed such illegal and unsafe conduct to occur (See, e.g. ROA.1181-82).

Since ACL was not held liable for the criminal acts of DRD and its employees, the United States did not carry its burden of proof to establish that those criminal acts were performed "pursuant to" the Charters. Therefore, ACL is entitled to limitation of its liability for removal costs and damages under OPA.[6]

This Court should grant the petition for certiorari and reverse the decision of the lower courts and direct that ACL be granted limitation of liability under OPA.

POINT II.

THE SUPREME COURT NEEDS TO GRANT CERTIORARI IN ORDER TO RESOLVE THE CONFLICT BETWEEN THE CIRCUITS AS TO WHAT MORE THAN THE MERE EXISTANCE OF THE CHARTERS BETWEEN ACL AND DRD IS REQUIRED TO PREVENT ACL FROM LIMITATION UNDER OPA

The assertion of the United States was that the "mere existence" of the Charters was sufficient (Appendix C, pp. 32a-34a). The premise of the District Court's decision, adopting the argument of the United States, was that ACL cannot rely upon the third party defense from liability under OPA, 33 U.S.C § 2703(a)(3), or the right to limitation under OPA, 33 U.S.C. § 2704(c)(1), because ACL entered

6. There has never been any suggestion that ACL did not promptly report the collision or provide all reasonable cooperation requested by the Unified Command in connection with the clean-up of the spill. Therefore, ACL is not precluded from limiting its OPA liability under 33 U.S.C. § 2704(c).

into the Charters with DRD who the District Court found solely at fault for the collision and resulting oil spill (Appendix C, pp. 54a-55a). The error in this premise is that the mere existence of the Charters does not prevent ACL from relying upon the third party defense.

The Fifth Circuit Court of Appeals had occasion to apply § 2703(a)(3) in *Buffalo Marine Sevs. Inc. v. U.S.*, 663 F.3d 750, 755 (5th Cir. 2011), where the OPA responsible party (*i.e.* the owner of the vessel from which the oil was spilled) had not entered into a contract with the party whose actions were the sole cause of the oil spill. The Court noted that the definition of "contractual relationship" in OPA "replicates the definition of 'contractual relationship' in" the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), *id.* at 756, and that under CERCLA the third party defense "does not apply where the third party's 'act or omission occurs in connection with a contractual relationship, *existing directly or indirectly,* with the defendant.'" *Id.* at 755 – 56 (emphasis in original). According to the court, "[g]iven the common purposes and shared history of CERCLA and the OPA, the use of the phrases 'any contractual relationship' and 'a contractual relationship, existing directly or indirectly' in parallel, similarly worded provisions is particularly significant." *Id.* at 756 (footnotes omitted). The Fifth Circuit concluded that "[t]he fact that no contract exists between two parties does not preclude the parties from having a 'contractual' relationship", *id.* at 755, and denied the responsible party the right to avoid liability under the third-party defense. *Id.* at 759.

Very few courts have had to decide when OPA's third-party complete defense or right to limitation were available

to a responsible party. Two district courts have indicated that OPA "requires only that 'any contractual relationship' exist to deny a third-party defense to liability." *Internat'l Marine Carriers v. Oil Spill Liability Trust Fund*, 914 F. Supp. 149, 152 (S.D. Tex. 1995); *see Seaboats, Inc. v. Alex C Corp.*, Nos. Civ.A 01-12184-DPW, Civ.A 01-12186-DPW, Civ.A 00-12500-DPW, 2003 WL 203078, at *4 (D. Mass. Jan. 30, 2003) (citing 33 U.S.C. § 2702(d)(1)(A)). However, these courts did not address the statutory requirement that the acts or omissions of the third party had to occur "in connection with" the contractual relationship to deny the responsible party exoneration or be "pursuant to" the contractual relationship to deny the responsible party limitation of liability.

CERCLA's third party defense provision, which the Fifth Circuit has held to be similar to OPA's provisions, *Buffalo Marine*, 663 F.3d at 755, similarly contains the "in connection with" requirement, 42 U.S.C. § 9607(b)(3). Several courts, including the Court of Appeals for the Second Circuit, have discussed the "in connection with" requirement under CERCLA.

In *Westwood Pharm., Inc. v. Nat. Fuel Gas Distrib. Corp.*, 964 F.2d 85 (2d Cir.1992), the Court of Appeals for the Second Circuit held that

> the phrase "in connection with a contractual relationship" in CERCLA § 107(b)(3) requires more than the mere existence of a contractual relationship between the owner of the land on which hazardous substances are or have been disposed of and a third party whose act or omission was the sole cause of the release

> or threatened release of such hazardous substances into the environment, for the landowner to be barred from raising the third-party defense provided for in that section. In order for the landowner to be barred from raising the third-party defense under such circumstances, the contract between the landowner and the third party must either relate to the hazardous substances or allow the landowner to exert some element of control over the third party's activities.

Id. at 91 – 92. *See also Emerson Enterprises, LLC v. Kenneth Crosby Acquisition Corp.*, No. 03-CV-6530-CJS, 2004 WL 1454389, at *5 (W.D.N.Y. June 23, 2004) ("[T]he Second Circuit has indicated that the mere existence of a contractual relationship with another PRP [potentially responsible party] is not sufficient to prevent a party from qualifying for a defense. Rather, the statutory reference to acts or omissions occurring 'in connection with a contractual relationship' requires that there be a nexus between the contract and the hazardous substances . . .").

Similarly, OPA's third-party limitation of liability provision requires that the acts or omissions of the third-party must be taken "pursuant to" the contractual relationship.

While the Court of Appeals for the Fifth Circuit acknowledged that the exoneration phrase "in connection with" was

> not so capacious as to be rendered meaningless. Conduct does not automatically occur "in connection with" a contractual relationship by the mere fact that such a relationship exists.

(Appendix A, p. 10a); *United States v. American Commercial Lines, L.L.C.*, 875 F.2d at 175. However, the Fifth Circuit specifically declined to adopt the test established by the Second Circuit that the contract had to relate to hazardous substances … or permit the responsible party to control the third party's activities (Appendix A, p. 12a). *United States v. American Commercial Lines, L.L.C.*, 875 F.3d at 176.

The Fifth Circuit rejected the application of the doctrine of *respondeat superior* on the grounds that the doctrine was created by the common law and this was a case of statutory construction (Appendix A, p. 17a). *United States v. American Commercial Lines, L.L.C.*, 875 F.3d at 178. However, the doctrine is applied in admiralty and maritime cases, see Point I above, and OPA specifically "does not affect – (1) admiralty and maritime law…." 33 U.S.C. § 2751(e).

Limitation of liability under 33 U.S.C. § 2704(c)(1) is not denied to a responsible party under OPA by the mere existence of a contractual relationship. Therefore, this Court should grant the petition for certiorari and then resolve the conflict between the Fifth and Second Circuits on what more is required to defeat a responsible party's right to limit its liability.

CONCLUSION

The courts below erred in denying American Commercial Lines LLC limitation of liability under the Oil Pollution Act of 1990 by holding that the secret, illegal acts of DRD Towing Company, LLC, Terry Carver and John Bavaret which led to the collision between the barge DM-932 and the M/V TINTOMARA were "pursuant to" to the Charters between ACL and DRD. Therefore, this Court should grant a writ of certiorari to hear this matter.

Respectfully submitted,

GLENN G. GOODIER
RICHARD D. BERTRAM
JONES WALKER LLP
201 St. Charles Avenue,
50th Floor
New Orleans, LA 70170
(504) 582-8000

JOHN A.V. NICOLETTI
Counsel of Record
TERRY L. STOLTZ
NICOLETTI HORNIG & SWEENEY
Wall Street Plaza
88 Pine Street, 7th Floor
New York, NY 10005
(212) 220-3830
jnicoletti@nicolettihornig.com

Counsel for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED NOVEMBER 7, 2017

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16-31150

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

AMERICAN COMMERCIAL LINES, L.L.C.,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before SMITH, OWEN, and HIGGINSON, Circuit Judges.

STEPHEN A. HIGGINSON, Circuit Judge:

On July 23, 2008, nearly 300,000 gallons of oil spilled into the Mississippi River when a tugboat veered across the river, putting the oil-filled barge it towed into the path of an ocean-going tanker. The tugboat, the M/V MEL OLIVER, was owned by American Commercial Lines ("ACL") but operated by DRD Towing Company pursuant

to a contractual agreement between the companies. As the statutorily-defined responsible party under the Oil Pollution Act ("OPA"), ACL incurred approximately $70 million in removal costs and damages. The United States also incurred approximately $20 million in removal costs and damages.

The United States initiated this action in 2014, seeking a declaration that ACL is liable for all removal costs and damages resulting from the spill and to recover the costs that it incurred. The United States moved for partial summary judgment on its claims that ACL was not entitled to any defenses to liability under OPA. The district court granted that motion, and later entered final judgment ordering ACL to pay the United States $20 million. ACL appealed. We AFFIRM.

I

In 2007, ACL, a marine-transportation company that operates a fleet of barges and tugboats, contracted with DRD Towing, another marine-transportation company, to operate some of its tugboats. ACL and DRD entered into two charter agreements. Under the "Master Bareboat Charter," ACL chartered several tugboats, including the M/V MEL OLIVER, to DRD for one dollar per day.[1] Under the "Master Fully Found Charter," DRD agreed to crew the tugboats and charter its services back to ACL.

1. The Master Bareboat Charter specified three vessels, M/V PAM D, M/V REGINA ANN, and M/V CELESTE MCKINNEY. When the PAM D suffered an engine failure, the MEL OLIVER was substituted in its place by amendment to the initial charter.

Both agreements required compliance with "all applicable laws and regulations [with] respect to the registration, licensing, use, manning, maintenance, and operation of the Vessel(s)."

The MEL OLIVER's crew consisted of Captain Terry Carver, Steersman John Bavaret, and two deckhands. Captain Carver was the only crewmember with a valid United States Coast Guard Master of Towing Vessels license, which authorized him to lawfully operate tugboats on the lower Mississippi River. Steersman Bavaret held only an Apprentice Mate (Steersman) license, which authorized him to serve as an apprentice mate under the direct supervision of a properly licensed master. He was not authorized to operate the vessel without continuous supervision. *See* 46 C.F.R. § 10.107(b) (requiring that Steersman "be under the direct supervision and in the continuous presence of a master"); 46 C.F.R. § 15.401 (prohibiting mariners from serving in any positions that exceed the limits of their credentials).

On July 20, 2008, Captain Carver left the MEL OLIVER to go on shore, leaving Steersman Baravet in control of the vessel. Two days later, while—unbeknownst to ACL—Captain Carver was still on shore, ACL directed the MEL OLIVER to tow an ACL barge, the DM-932, to pick up fuel from a facility in Gretna, Louisiana. At that time, Steersman Bavaret had worked for 36 hours with only short naps, in violation of Coast Guard regulations. *See* 46 U.S.C. § 8104(h) ("[A]n individual licensed to operate a towing vessel may not work for more than 12 hours in a consecutive 24-hour period except in an

emergency."); 46 C.F.R. § 15.705(d) (stating that "a master or mate (pilot)" may not work "more than 12 hours in a consecutive 24-hour period except in an emergency"). Still under Steersman Bavaret's control, the MEL OLIVER arrived at the Gretna facility around 2:00 p.m. on July 22, 2008. The DM-932 was loaded with fuel, and the MEL OLIVER departed for its return trip, with the fuel-filled barge in tow, at about 12:30 a.m. on July 23, 2008.

As the MEL OLIVER pushed the DM-932 along the Mississippi River, it began travelling erratically. At about 1:30 a.m., it turned to cross the path of an ocean-going tanker, the TINTOMARA, owned by a third party. The TINTOMARA's pilot and the Coast Guard's New Orleans Vessel Traffic Service staff attempted to hail the MEL OLIVER by radio, but no one answered. The TINTOMARA also sounded its alarm whistle. Unable to change course, the TINTOMARA collided with the DM-932. The DM-932 broke away from the MEL OLIVER and sank downriver, spilling approximately 300,000 gallons of oil into the Mississippi River. Immediately after the collision, a crewmember on the MEL OLIVER found Steersman Bavaret slumped over the steering sticks and non-responsive.

Following the spill, the government prosecuted DRD, Captain Carver, and Steersman Bavaret for criminal violations of federal environmental law. DRD and Steersman Bavaret each pleaded guilty to one count of violating the Ports and Waterways Safety Act, 33 U.S.C. § 1232(b)(1), and one count of violating the Clean Water Act ("CWA"), 33 U.S.C. § 1319(c)(1)(A). Captain Carver

pleaded guilty to one count of violating the Ports and Waterways Safety Act.

In the course of the criminal investigation, DRD admitted that it knowingly allowed its crewmembers to work without appropriate licenses or qualifications and to work more hours than were permitted under Coast Guard safety regulations and that it failed to report those "manning deficiencies" to the Coast Guard, also in violation of Coast Guard regulations. Captain Carver and Steersman Bavaret admitted to knowing that Bavaret was not licensed to act as captain in Carver's absence.

In addition to the criminal prosecution, the government sued ACL and DRD under OPA to recover clean-up costs resulting from the spill.[2] DRD promptly declared bankruptcy and later dissolved its LLC. The government moved for summary judgment against ACL on the issue of liability under OPA. The district court granted summary judgment in favor of the government, and later issued a final judgment ordering ACL to pay the government $20 million. This appeal followed.

II

We review a district court's grant of summary judgment de novo, applying the same legal standards as the district court. *Robinson v. Orient Marine Co.*, 505 F.3d 364, 365 (5th Cir. 2007). Summary judgment is

2. Related litigation came to this court in *United States v. Am. Commercial Lines, L.L.C.*, 759 F.3d 420 (5th Cir. 2014).

appropriate only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Any reasonable inferences are to be drawn in favor of the non-moving party. *Robinson*, 505 F.3d at 366.

III

A

OPA was enacted in 1990 in response to the Exxon Valdez oil spill. It "was intended to streamline federal law so as to provide quick and efficient cleanup of oil spills, compensate victims of such spills, and internalize the costs of spills within the petroleum industry." *Rice v. Harken Exploration Co.*, 250 F.3d 264, 266 (5th Cir. 2001) (citing S. REP. NO. 101-94, *reprinted in* 1990 U.S.C.C.A.N. 722, 723). OPA's cost-internalization measures, which increased the financial consequences of oil spills, were intended to "encourage greater industry efforts to prevent spills and develop effective techniques to contain them." S. REP. NO. 101-94 at 3. To that end, OPA redresses "gross inadequacies . . . in the CWA's provisions dealing with spiller responsibility for cleanup costs" by extending the CWA's regime of strict, joint, and several liability; limiting the available defenses to liability; increasing the applicable limits to liability; and eliminating the liability limits altogether under certain circumstances. *Id.* at 4-5, 12-14.

OPA holds statutorily-defined "responsible parties" strictly liable for pollution-removal costs and damages associated with oil spills. *See Buffalo Marine Servs. Inc.*

v. United States, 663 F.3d 750, 752 (5th Cir. 2011) (stating that OPA "creates a strict-liability scheme for the costs of cleaning up oil spills"). It provides that "each responsible party for a vessel or a facility from which oil is discharged . . . is liable for the removal costs and damages . . . that result from such incident." 33 U.S.C. § 2702(a). With respect to vessels, the "responsible party" is "any person owning, operating, or demise chartering the vessel." 33 U.S.C. § 2701(32)(A).

OPA generally limits the liability of a responsible party to a specified dollar amount based on the tonnage of the vessel from which oil was discharged. 33 U.S.C. § 2704(a). However, the limits on liability do not apply if:

> the incident was proximately caused by—(A) gross negligence or willful misconduct of, or (B) the violation of an applicable Federal safety, construction, or operating regulation by, the responsible party, an agent or employee of the responsible party, or a person acting pursuant to a contractual relationship with the responsible party . . . .

33 U.S.C. § 2704(c)(1). Accordingly, under those circumstances, there is no limit to the liability of the responsible party.

In addition to the general limits on liability, OPA provides for a complete defense to liability under four enumerated circumstances. It provides that:

> [a] responsible party is not liable for removal costs or damages . . . if [that] party establishes, by a preponderance of the evidence, that the discharge . . . of oil and the resulting damages or removal costs were caused solely by—(1) an act of God; (2) an act of war; (3) an act or omission of a third party, other than an employee or agent of the responsible party or a third party whose act or omission occurs in connection with any contractual relationship with the responsible party . . . or (4) any combination of paragraphs (1), (2), and (3).

33 U.S.C. § 2703(a). To be entitled to the third-party defense, a responsible party must also establish that it "exercised due care with respect to the oil concerned" and that it "took precautions against foreseeable acts or omissions" of the third party. 33 U.S.C. § 2703(a)(3)(A)-(B).[3]

ACL contends that it is entitled to the third-party defense under § 2703(a)(3) or, in the alternative, that it is entitled to limit its liability pursuant to § 2704(a). For the reasons stated below, we disagree.

---

3. The district court concluded that ACL failed to present sufficient evidence to establish that it satisfied those two requirements. Because we hold that ACL is not entitled to the third-party defense on the ground that DRD's conduct occurred "in connection with" its contractual relationship with ACL, we do not reach the issues of whether ACL exercised due care and took the necessary precautionary measures.

Appendix A

B

ACL contends that it is entitled to a complete defense to liability under 33 U.S.C. § 2703(a)(3) on the ground that the conduct of DRD, a third party, caused the spill. The government responds that the third-party defense is not available because DRD's conduct occurred in connection with a contractual relationship with ACL. The parties agree that DRD's acts and omissions were the sole cause of the spill and that ACL and DRD had a contractual relationship. They dispute only whether DRD's acts and omissions occurred in connection with that contractual relationship.

The meaning of § 2703(a)(3)'s "in connection with" language is a question of first impression. To determine whether DRD's conduct occurred "in connection with" its contractual relationship with ACL, we begin with the meaning of "connection." *See Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566, 132 S. Ct. 1997, 182 L. Ed. 2d 903 (2012). Because the term is not defined in the statute, we must give it its ordinary meaning. *See id.* ("When a term goes undefined in a statute, we give the term its ordinary meaning."). Webster's Third New International Dictionary defines "connection" as "relationship or association in thought (as of cause and effect, logical sequence, mutual dependence or involvement)." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 481 (2002). The Oxford English Dictionary defines it as "[t]he condition of being related to something else by a bond of interdependence, causality, logical sequence, coherence, or the like; relation between things

one of which is bound up with, or involved in, another." 3 OXFORD ENGLISH DICTIONARY 747 (2d ed. 1989).

"Connection" is therefore a capacious term, encompassing things that are logically or causally related or simply "bound up" with one another. It is, however, not so capacious as to be rendered meaningless. Conduct does not automatically occur "in connection with" a contractual relationship by the mere fact that such a relationship exists. *See Westwood Pharm., Inc. v. Nat'l Fuel Gas Distrib. Corp.*, 964 F.2d 85, 89 (2d Cir. 1992) (interpreting virtually identical language in the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") and holding that "[t]he mere existence of a contractual relationship . . . does not foreclose the owner of and from escaping liability"). Rather, the conduct must be causally or logically related to the contractual relationship. Accordingly, the third party's acts or omissions that cause a spill occur "in connection with any contractual relationship" between the responsible party and the third party whenever the acts or omissions relate to the contractual relationship in the sense that the third party's acts and omissions would not have occurred but for that contractual relationship.

This reading of the ordinary meaning of "connection" is consistent with OPA's purpose. *See Buffalo Marine Servs.*, 663 F.3d at 757 ("To determine the meaning of a statute, 'we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.'" (quoting *Crandon v. United States*, 494 U.S. 152, 156-58, 110 S. Ct. 997, 108 L. Ed.

2d 132 (1990))). The legislative history shows that, in enacting OPA, Congress wanted not only to quickly contain and clean up spills, but also to prevent spills from occurring in the first place by using weighty financial consequences to encourage responsible parties to take all available precautionary measures. S. REP. NO. 101-94 at 3. To give effect to that purpose, Congress intended to narrowly limit the third-party defense in order to "preclude defendants from avoiding liability by claiming a third party was responsible, when that third party had a contractual relationship with the defendant and was acting, in essence, as an extension of the defendant." *Id.* at 13. Accordingly, the third-party defense should not be available where a spill is caused by third-party acts or omissions that would not have occurred but for the contractual relationship between the third party and the responsible party.

ACL's proposed definition of "in connection with" is contrary to both the statute's text and its purpose. ACL contends that we should adopt the Second Circuit's interpretation of similar language CERCLA.[4] In *Westwood*, the Second Circuit held that the "in connection with" language in CERCLA's third-party defense requires that "the contract between the landowner and the third party must either relate to the hazardous substances *or*

4. CERCLA's third-party defense provides for a complete defense to liability where the release of a hazardous substance was caused solely by "an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant." 42 U.S.C. § 9607(b)(3).

allow the landowner to exert some element of control over the third party's activities." 964 F.2d at 91-92 (emphasis added). Even though that test is met here factually in light of the parties' contract to transport oil, we decline to adopt that approach because its additional requirements go beyond what is required by OPA's plain text. Section 2703(a)(3) requires only two things: (1) that a third party's act or omission caused the spill at issue and (2) that that act or omission did not "occur[] in connection with *any* contractual relationship with the responsible party." 33 U.S.C. § 2703(a)(3) (emphasis added). It does not condition the applicability or inapplicability of the exception on the nature of the contract between the parties. Accordingly, the contract need not explicitly relate to hazardous substances (here, oil) or permit the responsible party to control the third party's activities.

ACL also contends that DRD's acts and omissions cannot be "in connection with" their contractual relationship because those acts and omissions directly violated the terms of their contracts. The charter agreements specifically required DRD to comply with all applicable laws and regulations, but the acts and omissions that caused the spill did not. But "in connection with" does not mean "in compliance with," and the meaning of "connection" is broad enough to encompass acts that are not specifically contemplated, or even acts that are specifically not contemplated, in a contract. A contrary reading would permit responsible parties to circumvent OPA by easily contracting out of liability, a result Congress specifically sought to avoid. *See* S. REP. NO. 101-94 at 13 (stating that the contractual-relationship exception

from the third-party defense is intended to "preclude defendants from avoiding liability" through contractual relationships); *see also Buffalo Marine Servs.*, 663 F.3d at 757 & n.36 (citing to *United States v. LeBeouf Bros. Towing Co.*, 621 F.2d 787, 789 (5th Cir. 1980) and rejecting interpretation of "contractual relationship" that would enable defendants to easily avoid liability).

Given the broad meaning of "in connection with," ACL has failed to establish that it is entitled to the third-party defense. The conduct that caused the spill—Captain Carver's leaving the MEL OLIVER under the control of an unlicensed Steersman and Bavaret's working more consecutive hours than permitted under Coast Guard regulations, becoming unconscious while in command of the vessel, and veering into the path of the TINTOMARA while transporting oil at ACL's direction—occurred "in connection with" DRD's contractual relationship with ACL. Pursuant to the charter agreements, DRD agreed to crew the MEL OLIVER and charter DRD's services to ACL. But for those charter agreements, DRD would not have been operating the MEL OLIVER and transporting ACL's fuel-filled barge, and the spill would not have occurred.

C

ACL alternatively contends that it is entitled to OPA's general limit on liability. The government responds that DRD's conduct falls within the exception from limited liability for spills proximately caused by "gross negligence," "willful misconduct," or federal regulatory

violations committed by "a person acting pursuant to a contractual relationship with the responsible party." *See* 33 U.S.C. § 2704(c)(1). We agree.

The parties dispute whether DRD was acting "pursuant to" its contractual relationship with ACL when it committed the regulatory and criminal violations that caused the spill. Once again, the meaning of § 2704(c)(1)'s "pursuant to" language, which is not defined in the statute, appears to be a matter of first impression. As before, we turn to the ordinary meaning of the words. Black's Law Dictionary defines "pursuant to" as "[i]n compliance with; in accordance with," "[a]s authorized by," or "[i]n carrying out." BLACK'S LAW DICTIONARY 1431 (10th ed. 2014). Webster's Third similarly defines "pursuant to" as "in the course of carrying out; in conformance to or agreement with; [or] according to." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1848 (2002). *See also* OXFORD ENGLISH DICTIONARY 887 (2d ed. 1989) (defining "pursuant to" as "following upon, consequent and conformable to, [or] in accordance with"). Accordingly, and as ACL contends, "pursuant to" has a narrower meaning than "in connection with." While the latter encompasses any conduct that is logically related to the contractual relationships in the sense that it would not have occurred but for the third party's contractual relationship with the responsible party, the former contemplates compliance or conformity.

However, ACL goes too far when it argues that the specific acts or omissions that cause the spill must be authorized by the contract. Section 2704(c)(1) requires only that the gross negligence, willful misconduct, or

federal regulatory violations that cause the spill be committed by the responsible party, its agent or employee, or "a person acting pursuant to a contractual relationship with the responsible party." Accordingly, the "pursuant to" language is satisfied if the person who commits the gross negligence, willful misconduct, or regulatory violation does so in the course of carrying out the terms of the contractual relationship with the responsible party. Reading the statute to require that the negligent or wrongful act itself be "pursuant" to the contract would be nonsensical; it would be a rare contract indeed that specifically contemplated gross negligence, willful misconduct, or the violation of federal safety regulations. Exceptions to statutes are to be construed narrowly, but ACL's proposed construction would read the exception out of the statute altogether.

That the conduct that caused the spill here rose to the level of a criminal violation does not take it out of § 2704(c)(1). ACL contends that because § 2704(c)(1) specifically mentions gross negligence, willful misconduct, and the violation of federal regulations, but says nothing of criminal violations, the exception from limited liability must not apply to the latter. But that draws a false distinction. As evidenced by the facts of this case, there is considerable overlap between gross negligence, willful misconduct, and violations of federal regulations, on the one hand, and criminal violations on the other. There is no principled basis on which to distinguish between the negligent acts that would lift the general limits on liability and the criminal acts that would not. Would the relevant conduct simply have to *be* a criminal violation? That would

seem to largely eviscerate the exception. Or would the responsible actors have to be actually charged with a criminal violation, or convicted, to take the conduct out of § 2704(c)(1) and reimpose the limits to liability?

Nor would such a distinction give effect to OPA's purpose. OPA increased the financial consequences of oil spills in order to encourage responsible parties to take precautionary measures to prevent such spills. Section 2704(c)(1), in particular, encourages compliance with the kinds of regulations that are themselves intended to prevent oil spills—like the manning requirements violated by DRD—by providing for unlimited liability where those regulations are flouted. *See* S. REP. NO. 101-94 at 14 (stating that "where compliance [with federal regulations] perhaps could have prevented or mitigated the effects of an oilspill [sic], no such limits [to liability] will apply"). There is no reason to think that Congress intended to lift the limits on liability for spills caused by conduct that is forbidden by federal regulation but to reimpose those limits for spills caused by conduct considered so dangerous or risky that it is also subject to criminal penalties. Such a distinction would run counter to OPA's purpose of encouraging compliance with the very rules and regulations intended to prevent oil spills in the first instance.

Finally, ACL's reliance on the doctrine of *respondeat superior* is inapposite. Under that doctrine, employers are not liable for the intentional torts or criminal acts of their employees if those acts are committed outside the scope of their employment. But that is of no help to ACL. First, employer liability under the doctrine of

respondeat superior is a creature of the common law of agency. *See* RESTATEMENT (THIRD) OF AGENCY § 2.04 cmt. b (2006) (noting that the doctrine of *respondeat superior* "has long been classified as an element of agency doctrine"). The liability of a responsible party for oil spills caused by the negligence or misconduct of a third party under OPA is a creature of statute. Second, even if the doctrine of *respondeat superior* were applicable here by analogy, it appears to support our reading of "pursuant to." Employers *are* liable for the intentional torts of their employees if committed by an employee "acting within the scope of their employment." *Id.* § 2.04. Conduct may be within the scope of employment, even if not authorized, if it occurs "while performing work assigned by the employer" and if it is "intended to further any purpose of the employer." *Id.* § 7.07 cmt. b. Accordingly, even if the doctrine of *respondeat superior* were relevant here, our reading of what it means to be "acting pursuant to a contractual relationship" appears to be consistent with the imposition of liability on employers for torts committed by employees in the course of their employment.

Here, there is no dispute that the July 23, 2008 spill was caused by DRD's wrongful conduct and regulatory violations, committed in the course of carrying out its contractual obligation to transport ACL's fuel-filled barge. Accordingly, the spill was caused by the gross negligence, willful misconduct or regulatory violations of "a person acting pursuant to a contractual relationship with" ACL, and ACL is therefore not entitled to limited liability.

IV

For the foregoing reasons, we AFFIRM the district court's grant of summary judgment.

APPENDIX B — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, FILED OCTOBER 26, 2016

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 11-2076
SECTION "B" – (2)

UNITED STATES OF AMERICA,

Plaintiff,

VERSUS

AMERICAN COMMERCIAL LINES, LLC
AND D.R.D. TOWING COMPANY, LLC,

Defendants.

JUDGE LEMELLE
MAGISTRATE JUDGE WILKINSON

FINAL JUDGMENT

For reasons orally assigned (R.Doc. 130 (transcript)) and in conjunction with the Court's Order of January 21, 2015 (R.Doc. 125), the Court granted the Motion for Partial Summary Judgment filed by Plaintiff, United States of America, pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*, finding that:

(1) Defendant, American Commercial Lines LLC ("ACL"), is designated a "responsible party" within the meaning of that term for purposes of liability for removal costs and damages under the Oil Pollution Act of 1990 (the "OPA"), 33 U.S.C. § 2702;

(2) ACL is not entitled to invoke the complete sole-fault third-party defense established under the OPA at 33 U.S.C. § 2703 (a)(3) against the claims of the Government in these proceedings; and

(3) ACL is not entitled to invoke the limitation of liability defense established under the OPA at 33 U.S.C. § 2704 against the claims of the Government in these proceedings.

In accordance with the Parties' Stipulation, the United States of America is entitled to recover from ACL removal costs and damages as set forth in R. Doc. 206. ACL is liable to, and shall pay to, the United States of America the sum of $20 million dollars, inclusive of any prejudgment interest, with each party to bear its respective costs of Court and attorneys' fees. Post-judgment interest shall be governed by statute, 28 U.S.C. § 1961.

In accordance with the previous stipulation regarding Natural Resource Damage Claims (R.Doc. 107), all claims of the United States of America against ACL seeking damages related to injuries to, destruction of, loss of, or loss of use of natural resources were dismissed without prejudice, it being understood that this dismissal did not

determine or conclude the merits of any claims made or held by the United States for damages related to "injuries to, destruction of, loss of, or loss of use of natural resources" under the OPA or other law. The aforementioned natural resource damage claims are thus preserved.

This Judgment is a Final Judgment pursuant to 28 U.S.C. § 1291.

This __ day of __, 2016.

_____

UNITED STATES DISTRICT JUDGE

APPENDIX C — EXCERPT FROM TRANSCRIPT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, FILED MARCH 10, 2015

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action
No. 11-2076
Section B

UNITED STATES OF AMERICA

versus

AMERICAN COMMERCIAL LINES, LLC, *et al.*

January 21, 2015

TRANSCRIPT OF PROCEEDINGS BEFORE
THE HONORABLE IVAN L.R. LEMELLE
UNITED STATES DISTRICT JUDGE

[2]PROCEEDINGS
(January 21, 2015)

THE COURT: Good morning. Be seated, please.

Isidore, let's call it.

THE DEPUTY CLERK: Civil Action 11-2076, United States versus American Commercial Lines, LLC, et al.

THE COURT: Counsel.

MR. DILAURO: Good morning, Your Honor. Michael Dilauro for the United States, and I have with me Jessica Sullivan.

MR. BERTRAM: Your Honor, Richard Bertram, Jones Walker, counsel for ACL. We wanted to apologize to the Court. We had a glitch on our calendaring. Mr. Nicoletti can be dialed in if the Court --

THE COURT: He is not on the phone yet? I thought he was on the phone. Let's get him on.

MR. NICOLETTI: John Nicoletti.

MR. BERTRAM: Good morning, John. This is Richard Bertram. We are in court with Judge Lemelle now.

MR. NICOLETTI: Good morning, Your Honor.

THE COURT: Good morning, Mr. Nicoletti. Mr. Bertram was explaining some, I'll call it, mixup in terms of whether or not you were required to be here today for oral argument. As you all recall, I set this down for oral argument. I don't know whether or not it was done on my own motion or on the [3]motion of the parties. After doing that, there was a motion to continue, which I granted, setting it for today.

While that order continuing it until today was silent in terms of oral argument or on the briefs, we never vacated the order for oral argument. So be mindful that, at least from my interpretation of our rules, if we don't vacate any part of a prior order, it's still in effect.

As you know, under our Local Rules, we call the hearing dates now submission dates. Perhaps there was some confusion on your part or somebody's part on what that meant. It didn't mean to vacate oral argument, which I always intended on having in this case.

So with that, I don't need any further explanation. Don't worry. I'm not going to issue sanctions or anything like that. I think that we need to go forward with oral argument today. I have read the briefs from all parties. I'll just chalk this up as a miscommunication through no fault of anyone and we will go from there.

We have present, Mr. Nicoletti, local counsel, Mr. Bertram, as well as counsel for the government, Mr. Dilauro, and -- Is it Ms. Keast?

MS. SULLIVAN: Ms. Sullivan, Your Honor.

THE COURT: Thank you.

As you all know, this particular case involving [4] OPA claims asserted by the United States against ACL as well as ACL's defenses to that action is a subject now of a motion for partial summary judgment where the government seeks the Court to declare that the defenses that ACL seeks to urge here should be dismissed.

In this case ACL, as I understand their argument, states that the United States has failed to show that the acts and omissions of DRD, the third-party tug operators of the ACL barge, satisfied the "in connection with" standard of § 2703(a)(3) of Title 33 of the United States Code. ACL further argues that the government cannot, therefore, satisfy the narrower "pursuant to" language of § 2704 of the same codal title.

The United States has replied and cited basically five propositions that they believe ACL has not challenged:

(1) That two charter agreements were in existence between ACL and DRD at the time of the maritime collision here;

(2) That DRD violated a host of federal safety and operating regulations in proximately causing the July 2008 accident;

(3) That OPA claims are unaffected by the provisions of the Limitation of Liability Act;

(4) That ACL's counterclaim against the [5] United States is not legally cognizable; and

(5) That the United States is entitled to judicial declaration concerning ACL's liability to the United States.

So the issue that I have before me, then, is whether ACL is precluded from invoking the complete defense

of § 2703 or the limitation defense of § 2704 of the Oil Pollution Act of 1990.

(5) That the United States is entitled to judicial declaration concerning ACL's liability to the United States.

So the issue that I have before me, then, is whether ACL is precluded from invoking the complete defense of § 2703 or the limitation defense of § 2704 of the Oil Pollution Act of 1990.

Let's go to movant for argument here. In this particular matter, Counsel, it seems as if you would agree with ACL that our laws here, the OPA laws, that is, require this "in connection with" on the defense side and "pursuant to" on the § 2704 side of the case. ACL seems to argue that because they were not found at fault in the limitation action and the related actions arising from this maritime collision and the Court found the sole responsible party in that action was DRD that they should be provided with the defenses that they assert here.

You argued that, well, no this Court and the Fifth Circuit have found that the contracts that ACL had with DRD would establish their strict liability under OPA since the actions here all occurred while these contracts were in existence and pursuant to the voyage charter agreements.

They cite us to a Second Circuit case that says that the existence of the agreements per se is insufficient for [6]our purposes here. What's your response to that?

MR. DILAURO: Well, we disagree with the interpretation of the case, but we do not disagree that a circle of precedent could be applied.

THE COURT: The Fifth Circuit, I think, pretty much says that as well in *Buffalo*, I believe, as well as to some extent in the appeal from our initial findings that were affirmed by the Fifth Circuit, that ACL could not have a right of action against the oil pollution cleanup people that they selected.

MR. DILAURO: Yes, Your Honor. So we have this language in § 2703 which requires a "connection with" and in § 2704 the words are "pursuant to." Both of those sets of words refer to the contractual relationship.

So we see this as simply a plain language interpretation of the OPA statute. We have no objection to CERCLA informing that analysis. I think the CERCLA cases are a little bit different because they are factually different. They typically involve situations where a landowner has passed a piece of real estate on to another landowner or perhaps there is some operation of that real estate.

THE COURT: Assuming that ACL is arguing that that's basically what occurred here, our findings that DRD was a *pro hac vice* owner, that that somehow falls within the factual scenario of the Second Circuit case, which was the [7]pharmaceutical case --

MR. DILAURO: *Westwood*, Your Honor.

THE COURT: -- *Westwood*, correct, what's your response to that? I'm playing devil's advocate, so to speak.

MR. DILAURO: Yes, Your Honor.

THE COURT: Sorry to characterize your client as the devil, Mr. Bertram or Mr. Nicolleti. That's not intended.

MR. BERTRAM: Understood.

MR. DILAURO: What we would say is that it's fair to look to the facts of the *Gabarick* case which was tried before this Court. The government relies on those facts, but the standard of liability in that case was different. It was a negligence standard. That was a limitation case. So one should look to the facts as they were developed in the case, but they have to be viewed through the strict liability prism or lens that's part of the OPA regime.

THE COURT: Well, § 2703 states that "A responsible party is not liable for removal costs or damages under § 2702 if the responsible party establishes by a preponderance of the evidence that the discharge or substantial threat of a discharge of oil and the resulting damages or removal costs were caused solely by," and then it lists a number of facts:

(1) Act of God;

(2) Act of war;

(3) And perhaps pertinent for our purposes [8]here, an act or omission of a third party other than an employee or agent of the responsible party or a third party whose act or omission occurs in connection with any contractual relationship with the responsible party except where the sole contractual arrangement arises in connection with carriage by a common carrier by rail, which we don't have here, if the responsible party establishes by a preponderance of the evidence that the responsible party: (A) exercised due care with respect to the oil concerned; (B) took precautions against foreseeable acts or omissions against of any such third party and the foreseeable consequences of those acts or omissions; or

(4) Any combination of paragraphs 1, 2, and 3.

So wouldn't that require, then, for ACL to show that DRD's acts or omissions were the sole cause of the discharge, that no contractual relationship or sufficiently attenuated contractual relationship existed between ACL and DRD at the time of the discharge, and that ACL exercised due care and took precautions against foreseeable consequences?

That later part, that ACL exercised due care and took precautions against foreseeable consequences, isn't that -- to the extent that the facts in this case, I think, have already been established and affirmed to some extent by the circuit, this issue of a strict liability in the context of whether or not ACL exercised this due care and took precautions, that's a legal conclusion, in my opinion, based [9]upon facts that to me are not in dispute. How do I jump

to that legal conclusion in view of the factual findings already made?

I know you say -- and I agree with you -- that this is a strict liability scenario, the limitation act and general maritime laws are preempted by Congressional intent in enacting OPA and the language it shows. I'm just wondering, however, though, in terms of the application here, whether or not you are arguing solely the existence of this contractual relationship between DRD and ACL and does that draw it within (3)(A), (3)(B), or (4), or a combination?

MR. DILAURO: Well, our position is that the Court's focus should fall primarily on § 2703(a)(3), act or omission of a third party, more importantly the language which discusses "a third party whose act or omission." And I don't think there's any question but that DRD committed numerous acts or omissions, Your Honor, that led to that collision on July 23, 2008. So there's no question about the acts or omissions.

We would submit also that on the record there's no question that they occurred in connection with a contractual relationship and, in particular, the pair of charter parties that existed at the time. The charters were the mechanism that put DRD in operation of the *Mel Oliver*. When it entered into the charters, ACL recognized that DRD would be operating the *Mel Oliver*, that it would be using the *Mel Oliver* to push ACL's [10]barge DM-932. That was the very purpose of the charter.

THE COURT: So if DRD is acting pursuant to its contractual relationship with ACL, you think that's sufficient?

MR. DILAURO: I do believe that's sufficient, Your Honor. I believe the Court could and, in fact, should find in the United States' favor based on this alone.

I think, however, beyond that the Court can look further to the two additional provisions, Subsections (A) and (B), which speak to the exercise of due care and the taking of precautions. I don't think that the Court has to do so, but I certainly think it may and that it would be appropriate for the Court to do so.

THE COURT: You don't believe that our findings in the related limitation actions -- I'll use my exact language here -- "that ACL had neither actionable fault for nor foreseeability into DRD's misdeeds that caused the collision" --

MR. DILAURO: Well, I think there are two aspects of the Court's decision, one of them concerned with vetting; and as I read the opinion, certainly the vetting was less than perfect.

THE COURT: I acknowledge that it was an issue that I found in that case. I think I pulled that as well and talked about the evidence here that -- and I'm quoting -- "while ACL's vetting of DRD's vessel operators for licensing, accident [11]history, and compliance with the federal 12-hour watch rule was imperfect and needs improvement,"

I further found that there was evidence that ACL acted reasonably in that vetting process, albeit minimally here. It draws into question, then, to what extent would OPA's strict liability standard somehow preempt that finding.

MR. DILAURO: Right, and I'm not sure that we agree that it has to preempt the finding. What we would suggest is that under a strict liability standard, it's a different law, and so the Court can reach a different conclusion based on the same facts because OPA is a strict liability statute and the standard that was at issue in the limitation actions was a negligence standard.

THE COURT: In a sense, in this context at least, I felt torn between the idea that establishing negligence -- and I'll say it in terms of a standard or a burden -- was perhaps easier than establishing whether or not someone is absolutely responsible under strict liability standards, which I know may be contrary to what we typically have understood over the years between the two.

It's like the old premise liability theories which strict liability kind of grew out of, for instance, slip-and-falls. I don't mean to oversimplify this, but you understand where I'm going in terms of torn between what's required in one as opposed to the other.

[12]**MR. DILAURO:** Yes, Your Honor, I believe so.

THE COURT: In your argument you said that we could still go beyond the mere existence of the contractual relationship. Could you expand upon that a little bit.

MR. DILAURO: We think the mere existence of the contractual relationship is sufficient. But our point is if the Court believed it appropriate to do so, it could also look to the two prongs in (A) and (B). I don't believe that those are essential to the decision.

I believe that ACL cannot carry its burden of proof under § 2703. It does bear the burden of proof, and it cannot because of the contractual relationship. It would be sufficient to stop there, but it would also be appropriate, we think, to look to those two prongs, the due care prong and the taking of precautions prong.

THE COURT: In ACL's argument, it seems to draw a distinction between the language in § 2703, "in connection with," and the language in § 2704, "pursuant to," and says that the "pursuant to" language of § 2704 is narrower than the "in connection" language of § 2703. Do you draw a line between those two provisions?

MR. DILAURO: No, Your Honor, we do not. It's obviously different language, but I think it leads to the same end.

In the first instance, § 2703, the conduct is [13]certainly occurring in connection with a contractual relationship. It seems to me somewhat a semantic distinction when one moves to § 2704 and says that it's pursuant to the contractual relationship. They, to us, mean much the same thing, and I don't believe that there's any case law that elucidates it further. So we read it much the same way. I certainly saw ACL's argument, but I didn't really find it a profitable distinction.

Appendix C

THE COURT: I thought it interesting, in reading the *Buffalo Marine v. U.S.* case out of the Fifth Circuit in 2011, where the court held, as I think both parties acknowledge, that the common purposes and shared history of CERCLA and OPA are such that the similarly worded provisions relating to contractual connections was particularly significant and indicated that § 2703(a)(3), which is what you are arguing here, of OPA is to be interpreted consistently with the intended provisions of CERCLA.

It went on to hold in that case, in the context of OPA, Congress' use of "any contractual relationship" emphasized the breadth of the contractual relationship limitation. That seems to indicate that the Fifth Circuit holds an expansive view of that congressional language, particularly where it says "any contractual relationship."

Of course, I know it was talking about that you could have various types of contracts and so forth, but I was [14]struck by that language. It was done in 2011, and there were two cases prior to that out of a district court in Texas in 1994, *International Marine Carriers v. Oil Spill Liability Trust Fund*, and a district court case out of Massachusetts in January of 2003, *Seaboats, Inc. v. Alex C. Corp.* In those two district court opinions, it appears as if they have indicated that OPA requires only that "any contractual relationship" exists in order to deny a third-party defense to liability. Is that Fifth Circuit law?

MR. DILAURO: I believe that that is Fifth Circuit law.

THE COURT: Even though the Fifth Circuit obviously didn't write those opinions, the question is: Is that controverted in any way by Fifth Circuit law?

MR. DILAURO: Not to my knowledge, Your Honor. The focus --

MR. NICOLETTI: Your Honor, may I be heard on that?

THE COURT: No. I don't do slip shots. You'll get your shot. Calm down.

MR. NICOLETTI: Thank you.

MR. DILAURO: The focus in *Buffalo Marine* -- and admittedly I looked at the other cases more quickly, but the focus in those cases was on whether there was or was not a contractual relationship. I think our focus today is a little bit different. There's an admission that there was a [15]contractual relationship. The issue or the focus here, based on ACL's responsive brief, is on whether or not that was "in connection with" or "pursuant to."

So I don't think that what we are talking about today is inconsistent with those precedents. I think those precedents counsel an expansive reading of those sections of OPA, one that favors the government's position. So I don't think that we are advising anything that's inconsistent with Fifth Circuit precedent, but neither do I think that the Fifth Circuit precedent has spoken exactly to the issue before the Court today.

THE COURT: Let's hear from your opponent and then you will have a chance for rebuttal.

MR. DILAURO: Thank you.

THE COURT: Mr. Nicoletti.

MR. NICOLETTI: Your Honor, the government has been accurate when it says the Fifth Circuit has not as yet ruled on what constitutes "in connection with" the third-party contractor and that's what we are focusing on. The fact that there is criminal activity by DRD which is the proximate cause of the collision breaks the connectivity between the contract and the conduct of the third party.

If Congress and/or the courts wanted to focus solely on any contract, they wouldn't have put -- and if the existence of that contract was in and of itself sufficient to [16]deprive either the defense or the limitation, then in that context it would have not put the words "in connection with" in § 2703 or "pursuant to" in § 2704.

Now, in regards to those two terms, "in connection with" and "pursuant to," we just received the government's brief on those two points. I think, again, the way the statutory construction is, you look at the dictionary definition of the word "connection" and the dictionary definition of the word "pursuant." You will see that there is some distinction between the two terms, "connection" being broader and "pursuant" being narrower.

The main focus of ACL's argument is those two terms, "in connection with" or "pursuant to," that those are broken and severed by the criminal activity. There is no case law on point other than the cases we have cited in regards to general maritime law, which is also the law in most common law states, that a person cannot be responsible for the criminal activities which are not foreseeable, of course, of their employees, agents, or servants.

Now, we are not saying that's on all fours because we are dealing with a statutory interpretation, but that gives you the legal analysis as to why criminal activity breaks the contractual relationship between DRD and ACL.

THE COURT: If that's so, the Fifth Circuit certainly was aware of all of that in the various appeals in this case, [17]and they have found that the contract was in existence at the time of this accident, as I found, and that it was not void because of any of the arguments or positions taken by ACL in the underlying related proceedings.

So I'm having difficulty buying into that argument that the prior findings of this Court and the Fifth Circuit that found these contracts do exist, they existed at the time of the collision and were not voided in any fashion, as somehow now drawing into question, in my opinion, that binding authority. It just seems that that would be inconsistent and beyond my authority to do.

MR. NICOLETTI: We are not disputing the contracts that exist. As far as the avoidance argument, that was

never really heard by the Court because of the adoption of judicial estoppel.

We are making ourselves perfectly clear here. We are not disputing the existence of the contracts. We are saying that both § 2703 and § 2704 require more than the existence of any contract or a contract. It requires the activity of the responsible party, DRD, here -- I should say the liable party, DRD, to have acted in connection with that contract or pursuant to that contract. What we are saying is contracts do exist, but the criminal conduct was not pursuant to either contract or in connection with either contract.

THE COURT: So if the Court has previously found in [18]those related proceedings -- and we did -- that DRD contracted with ACL to perform towing operations of ACL's barges in order to satisfy the transportation needs of ACL's customers and discussing ACL's role in that venture and ultimately for the dedicated purpose of that mission, that is, ACL's economic gain, don't we have that extra set of facts that you argue we need in order to say that you don't have the benefit of these defenses?

Obviously these charters were, indeed, related to the movement of oil and further allowed ACL to use DRD for those activities. Isn't that what was contemplated, as well, in *Westwood Pharmaceuticals*, that is, a relationship to hazardous substances and the exertion of the dedicated purpose or control of the third-party activities?

Certainly I don't come into this without some law out there. And while to my readings of what we have in the Fifth Circuit, the *Buffalo* case in the Fifth Circuit, to some extent the Fifth Circuit's opinions arising out of this case, seem to suggest that these charter agreements executed with ACL and the resulting accident all arose from the existence of that relationship.

Even beyond that, there's some cases, again parallel provisions of CERCLA that I believe you may have argued, but I'm not certain if they are that supportive of ACL's position on the issue of the connection between the [19]charter agreements and DRD's actions in the present case.

For instance, in the *State of New York v. Lashins Arcade Company* case from the Second Circuit, 1996, there was a straightforward sale of contaminated property that clearly did not relate to hazardous substances and was not a defense-barring agreement. Isn't that case not supportive of your position here, perhaps factually distinguished?

Then there is another case, I believe, out of the Second Circuit, or a district court opinion from the Western District of New York, *Emerson Enterprises v. Kenneth Crosby Acquisition Corp.*, where a lease, unlike a sales contract in *Lashins*, contemplated third party's operation of a manufactured gas plant, and the lease was found, quote, connected with handling of hazardous substances. That sounds to me -- and convince me why this may be wrong -- more supportive of the mover's position than the opponent here.

MR. NICOLETTI: Simply because in both of those cases the contracts were executed in a legal fashion, such as the contract to process the substances. Here we have criminal activity, and none of the cases address the criminal activity elements because they weren't existent in those cases.

If DRD had been operating those tugs legally, with a legal crew, and had they violated some statute, I would say to you in that situation you have a civil violation, and that's what the statute contemplated when it said if you have a [20]contractual relationship and your third party does a civil liability, then you can't avail yourself of the defense.

THE COURT: Well, I found, in part, reliance upon the criminal liability of DRD's principals and employees in the underlying limitation proceedings and found that that further supported the finding of DRD's fault. Here I'm dealing with strict liability.

Wouldn't your argument displace OPA's strict liability if I would simply rely upon what I would consider to be the principles that we have in the limitation proceedings, the principles that we have under common law?

I can see that it's not difficult to think about situations where the contractual relationship in and of itself would not be sufficient to bar ACL's use of a third-party defense. For instance, if ACL had sold the *Mel Oliver* outright to DRD and then you had this collision resulting in a discharge and the collision had nothing to do with the *Mel Oliver*'s condition at the time of sale, it would not be

appropriate, then, for OPA purposes, from my perspective at least, to characterize the acts of DRD in transporting oil on its own behalf as connected to the contract of sale between the parties. That seems to be somewhat similar to what may have happened in *Westwood*, although in a different context.

MR. NICOLETTI: I would agree that would be one type of way to break the connection.

[21]**THE COURT:** But you think the other type is solely by the finding of criminal fault of the third party?

MR. NICOLETTI: Yes, and let me explain why. The purpose of the strict liability was to make sure that someone would pay, in the first instance, and ACL has done that. Then the statute goes on to give relief to an innocent party who is found without fault, and the way it is done is it is done by § 2703 and § 2704.

In both those instances, they say that the innocent party can avail itself of the defense of limitation except on certain enumerated issues, one being the contractual relationship, but Congress didn't say "any contractual relationship" without reference to a further term, which was either "in connection with" or "pursuant to."

In this situation DRD itself had no knowledge that its captain had abandoned the vessel to the unqualified mate, and that's what makes this even more of a case where the criminal activity was even without the direct knowledge of DRD. Although you properly found that they created that

atmosphere, in this particular instance even DRD didn't know about the criminal activity. That's what breaks the "pursuant to" or "in connection with" nexus which the government needs to show in order to bar ACL from these defenses and from the limitation.

So that's what the crux of this argument is, does the criminal activity satisfy the purpose of the statute [22]in breaking that "connection" or "pursuant." And I would say yes because, again, the statute was designed, one, to have somebody pay up front, which was done here, but then gives relief to those who are innocent. ACL was found to be innocent.

Now, I want to address the other part of the government's argument, which Your Honor did hear something on, and that is whether or not ACL acted with due diligence and took the appropriate precautions. One, as you found, although minimally, they did adequately vet the activities of DRD before entering into the charter party and did quarterly reviews of their relationship and how the tugs were being operated. That alone shows that you have already found they exercised due diligence and that they exercised the appropriate precautions.

Now, remember, you made those findings in the context of limitation proceedings, which is not negligence. It's a high standard of lack of privity and knowledge. So this Court has already found that ACL had no privity and knowledge of the illegal manner in which DRD was operating those tugs.

THE COURT: Accepting your argument concerning the criminal responsibility of DRD as well as a violation of other federal laws or regulations here, wouldn't that lead to exculpating similarly situated parties in every oil spill incident involving a contract towboat operator's violation of a regulation or law, which it must be assumed include many such [23]instances?

MR. NICOLETTI: No. If this was a mere civil violation, then I would agree with you, but your opinion was quite correct when it found that it was the criminal conduct which was the actual cause of this particular incident. It was the criminal conduct which protected ACL because it had no knowledge of that criminal conduct. It had performed due diligence, which protected ACL from that liability.

So if we were talking civil violations only, I would grant the Court that that's in connection with the contract. Once you add in the criminality, under all jurisprudence, if it's not foreseeable, the party is not responsible for the acts of those who it may be in contract with.

THE COURT: Bring me back into the context over the action between your client and the United States. The United States is seeking recovery here for monies that it paid out of the OPA fund to some contractors hired by ACL that ACL paid substantial funds to but withheld some sums, claiming that those contractors it hired either didn't show a right to the extra funds or that it was excessive. Is that basically what we have here ultimately on the merits, if we have to go to full trial on the issues, on whether or

not the decision here to pay those cleanup providers was capricious or not by the Coast Guard and the government? Is that ultimately what we [24]have here?

MR. NICOLETTI: No, we actually don't, Your Honor. Let me make one or two points.

Even if you were to grant them summary judgment, the Fifth Circuit, in dismissing the third-party claims, said that we can defend against the government on three grounds; not just solely capricious, but it also said if they negligently paid or didn't pay in accordance or failed to pay --

THE COURT: Right. I saw that.

MR. NICOLETTI: So you have multiple levels here to go through yet. So even if you would grant summary judgment,we would still have to determine whether or not the government paid negligently or not because that was one of the standards that the Fifth Circuit put when it dismissed the third-party claims.

THE COURT: It's interesting, in the context of that case, that the circuit discussed -- and again I think it's interesting in the context of what I would call the underlying action, the limitation action -- the thought that -- I'm not trying to insult anyone, but it sort of seems as if ACL is again taking some inconsistent positions here.

You acknowledge now the contract existed, which again is binding conclusions from the circuit as well, but

that somehow the binding nature of those contracts can be ignored because of the criminal wrongdoing of the third party, DRD, and [25]also in that context create another exception that's not in the statute against the imposition of strict liability. Am I misinterpreting your argument?

MR. NICOLETTI: You are, Your Honor. We are being consistent with -- since we were precluded from arguing the contracts are void *ab initio*, we have accepted the existence of the contracts. What we are saying is the statute doesn't say the mere existence of any contract. It says the conduct of the liable party, the third party, must be under § 2703 "in connection" with the contract or under § 2704 "pursuant to" the contract. I don't think anybody can reasonably argue that criminal activity is performed pursuant to a contract.

THE COURT: Rebuttal.

MR. DILAURO: Your Honor, the key is the existence of the contractual relationship at the time of the accident. That's what OPA requires.

Now, Mr. Nicoletti just said that ACL was found to have been an innocent party. Those are his words. But, in fact, that doesn't matter under the OPA regime because it is a strict liability regime.

Another point I would make is that although Mr. Nicoletti admits to the existence of a contract, it does feel as if we are moving back towards these void *ab initio* arguments. In other words, in the first breath, the

contracts existed, but they didn't exist because of this so-called [26]criminal activity. Well, that is kind of trying to have it both ways. Again, the fundamental point is that there was a contractual relationship in place when the accident occurred.

Another point I would make, in the *Westwood* case there were two elements, and I don't think I was perfectly clear in my brief. I dealt with them. I said we met both, and I think we do, but in fact meeting either one would be sufficient.

In other words, *Westwood* spoke to a relationship to hazardous substances. Well, "hazardous substances" are a CERCLA term. OPA's term is "oil," but that's what was happening on the day of the accident. It was an oil spill. So we meet that prong.

Then the other one was allowing the landowner to exercise control, and I think certainly this Court's findings in the *Gabarick* case demonstrated that ACL exercised a fairly significant degree of control over DRD's actions.

Now, it also found that that degree of control was insufficient to interrupt the *pro hac vice* status on DRD's part, but again we are under different law here, Your Honor.

THE COURT: Thank you.

MR. DILAURO: Thank you.

Appendix C

THE COURT: In this particular action, the United States seeks to recover damages and removal costs under the Oil Pollution Act of 1990, which I will refer to as OPA [27]further in these proceedings, found at 33 U.S.C. §§ 2701-61.

The facts underlying the subject lawsuit and the subject oil spill have spawned significant amounts of litigation with which this Court and the parties are intimately familiar. Those facts are set forth in particular detail. And for a full discussion of those facts see, for example, the *Gabarick v. Laurin Maritime* case at 900 F. Supp. 2d 669, 678, from September of 2012, along with to some extent the subsequent Fifth Circuit opinions in these proceedings and related proceedings.

ACL is a maritime transportation company that contracted in 2008 with DRD Towing Company to operate a towboat, the *Mel Oliver*. Pursuant to two charters with ACL, DRD was to transport fuel oil owned by ACL on the Mississippi River.

On July 23, 2008, the *Mel Oliver* pushed the ACL-owned barge the DM-932, laden with ACL-owned fuel oil, across the Mississippi River and into the path of the oceangoing vessel the *Tintomara*. The *Tintomara* and *Mel Oliver*/DM-932 convoy collided, causing approximately 419,286 gallons of fuel oil to spill into the Mississippi River.

Several lawsuits were filed in the wake of that collision and this case was stayed during their pendency. Relevant for our purposes here, ACL brought a declaratory [28]

judgment action, Civil Action No. 09-4466, asking this Court to find the two charter agreements referenced above to be void *ab initio*. This Court denied that request. See No. 09-4466 from this Court in 2014, Record Documents 1530 (Order and Reasons) and 1531 (Judgment). That ruling was affirmed on appeal to the United States Fifth Circuit Court of Appeals on May 21, 2014, in the Fifth Circuit opinion found at 753 F.3d 550 (5th Cir. 2014).

Of further relevance to this particular action between the United States and ACL, related proceedings arising out of the accident resulted in a determination that DRD personnel had violated a number of federal safety and navigational regulations and criminal laws. See Record Document 113-3 and 113-5 as well as the factual bases in related criminal proceedings. In the wake of the spill, extensive removal and cleanup costs were undertaken, resulting in costs alleged to total approximately $93,180,790.68. See Record Document 123-1.

The United States specifically requests in this particular motion:

(1) A declaration that prima facie elements of strict liability for response costs and damages have been established under OPA, confirming that ACL is a responsible party;

(2) A declaration under OPA, at § 2717(f)(2), [29]and the Declaratory Judgment Act that none of the statutory defenses to liability under OPA are available to ACL;

(3) A declaration under those authorities that ACL's liability to the United States under OPA is limited only by proof and not by a monetary cap, statutory or otherwise; and

(4) Dismissal of ACL's counterclaim against the United States because OPA displaces other law and does not allow ACL to sue the United States in this particular case.

The pertinent statutory provisions at issue are found at 33 U.S.C. §§ 2703 and 2703(a)(3), which deals with the complete third-party defense, along with § 2704, the limitation defense found under the same title.

Under § 2703(a)(3), a successful showing of the complete defense under that section would require ACL to show:

(1) DRD's acts or omissions were the sole cause of the discharge;

(2) No contractual relationship or a sufficiently attenuated contractual relationship existed between ACL and DRD at the time of the discharge; and

(3) ACL exercised due care and took precautions against foreseeable consequences.

See, in comparison, *International Marine Carriers v. Oil Spill Liability Trust Fund*, a Southern District of Texas opinion from 1994 at 903 F. Supp. 1097.

Appendix C

The limitation of liability provision at [30]§ 2704(a) provides a tonnage-based cap to liability of a responsible party. The exception to that rule is set forth at § 2704(c), which states that Subsection (a) of this section, the limitation provision, does not apply if the incident was proximately caused by gross negligence or willful conduct of, or the violation of an applicable federal safety, construction, or operating regulation by the responsible party, an agent or employee of the responsible party, or a person acting pursuant to contractual relationship with the responsible party.

There's an exception made to that latter party dealing with carriage by common carrier by rail, which doesn't apply here. The key language here is "a person acting pursuant to contractual relationship with the responsible party" under § 2704.

The United States bears the burden of establishing that the discharge was proximately caused by the gross negligence and/or violations of federal safety, construction, or operating regulation by DRD, which entity was acting pursuant to a contractual relationship with ACL.

As I stated earlier at the beginning of oral argument here today, the issues before the Court concern ACL's potential entitlement to the complete third-party defense afforded by § 2703(a)(3) and the limitation defense of § 2704.

As to the complete third-party defense under § 2703(a)(3), the parties dispute whether the acts and

omission [31]of DRD may properly be said to have occurred in connection with the charter agreements between DRD and ACL.

As I already noted, this Court has found in related proceedings DRD caused the discharge at issue and included: improperly placing an unlicensed steersman in control of the *Mel Oliver*, violating statutory and regulatory caps on maximum work hours in a 24-hour period, various radio and inland navigational rules, as well as reliance to an extent as well on the criminal factual basis findings in the related criminal charges against DRD owners, principals, and personnel. See Record Document 110 at 5-9 and authorities cited in that case.

In *Buffalo Marine Services, Inc. v. United States*, a Fifth Circuit opinion from 2011 found at 663 F.3d 750, specifically at pages 755 through 756, the Fifth Circuit held that the common purposes and shared history of CERCLA and OPA are such that the similarly worded provisions relating to contractual connections was particularly significant and indicated that § 2703(a)(3) of OPA is to be interpreted consistently with the attendant provisions of CERCLA. To that end, the Fifth Circuit held, in the context of OPA, Congress' use of "any contractual relationship" emphasized the breadth of the contractual relationship limitation.

In the context of this motion, ACL argues that the "in connection with" language of § 2703(a)(3) requires some [32]nexus between the contracts relied upon and the acts or omissions of the responsible party. I have already noted

there were two district court opinions which we found, one out of the Southern District of Texas in 1994 and another from the District of Massachusetts in January of 2003, that appear to have indicated that OPA requires only that "any contractual relationship" exists in order to deny a third-party defense to liability. ACL, however, argues that it is insufficient merely to show the existence of charter agreements between ACL and DRD. Instead, ACL argues that it must be shown that DRD's acts and omissions occurred in connection with those charter agreements.

ACL cites us to decisions of the Second Circuit interpreting parallel provisions of CERCLA. In *Westwood Pharmaceuticals v. National Fuel Gas Distribution Corporation* from 1992, found at 964 F.2d 85, specifically at page 89, the Second Circuit held that a responsible party is precluded from raising the third-party defense only if the contract between the responsible party and the third party somehow is connected with the handling of hazardous substances or if the contract allows the responsible party to exert some control over the third party's actions so that the responsible party can be held liable for the release or threatened release of hazardous substances caused solely by the actions of the third party. The Court went on to state that the mere existence of a [33]contractual relationship between such parties without more was insufficient to preclude the third-party defense. The United States argues basically, in reply, that the charter agreements between ACL and DRD satisfy the requirements of *Westwood Pharmaceuticals*.

Appendix C

This Court previously found in related proceedings that DRD contracted with ACL to perform towing operations of ACL's barges in order to satisfy the transportation needs of ACL's customers. See the *Gabarick* opinion from this Court in 2012 found at 900 F. Supp. 2d 669, page 673.

This Court also discussed ACL's constructive role in directing the captain where to take the vessel, the reason for the assigned voyage, and ultimately the dedicated purpose of that mission, ACL's economic gain. Because the charters at issue are related to the movement of oil and further allow ACL to exert some degree of control over DRD's activities, it would appear that the United States' argument has some basis in fact and law for the scenarios contemplated by *Westwood Pharmaceuticals*, that is, a relation to hazardous substances and exertion of control over third-party activities as being present. Accordingly, we find that DRD's acts and omissions arose in connection with the charter agreements it executed with ACL.

Additional cases on the issue of the parallel [34] provisions of CERCLA are further unsupportive of ACL's position on the issue of the connection between the charter agreements and DRD's actions in the present case. I have noted earlier in oral argument the *Lashins Arcade* case from the Second Circuit in 1996, found at 91 F.3d 353, concerning a straightforward sale of contaminated property that clearly did not relate to hazardous substances was not a defense-barring agreement; as well as the *Emerson* case from the Western District of New York in June of 2014, found at 2004 WL 1454389, specifically at Sections 6 through 7, where a lease, unlike

a sales contract in *Lashins*, contemplated third party's operation of a manufactured gas plant, and the lease was found to be connected with handling of hazardous substances.

I have given an example of a circumstance where a contractual relationship at issue would not be sufficient to bar ACL's use of the third-party defense, the examples being, as in the cases I have just cited, an outright sale of the *Mel Oliver* to DRD and a subsequent collision resulting in a discharge, which collision had nothing to do with the *Mel Oliver*'s condition at the time of the sale and would not be appropriate for OPA purposes to characterize the acts of DRD in transporting oil in its own behalf as connected to the contract of sale between the parties. However, where as here, the charter agreements contemplated that DRD would transport oil on behalf of ACL, DRD's activities while transporting that oil, [35]which ultimately caused the discharge, clearly occurred in connection with the charter agreements. Accordingly, the United States' motion for summary judgment is granted by declaring that ACL is not entitled to raise the § 2703(a)(3) defense under OPA.

As to the § 2704 limitation defense, the United States does not dispute that it bears the initial burden of establishing that preclusion of the defense, which is the exception to the general rule allowing limitation, applies. However, for many of the same reasons set forth already, it seems clear that the United States has established that the acts of DRD occurred pursuant to the charter agreements with ACL.

Appendix C

To the extent ACL argues that the actions of DRD fell beyond the scope of the charter agreements for purposes of either § 2703 or § 2704 based upon criminal conduct of DRD and other acts that this Court found against DRD, these claims by ACL are unpersuasive. First, Congress elected to apply strict liability under the provisions of OPA. Accordingly, the authorities cited by ACL, which rely primarily on exceptions to employer vicarious liability and arose under the general maritime law or even under the common or criminal laws, are inapposite.

The Fifth Circuit recently explained in an earlier appeal from this case:

[36]"When Congress enacts a carefully calibrated liability scheme with respect to specific remedies, the structure of the remedies suggests that Congress intended for the statutory remedies to be exclusive. Indeed, we are to conclude that federal common law has been preempted as to every question to which the legislative scheme spoke directly and every problem that Congress has addressed."

See the Fifth Circuit's 2014 opinion at 759 F.3d 420, specifically at pages 424 to 425.

Thus where Congress has enumerated specific statutory defenses and attendant exceptions to those defenses, the statutory provisions must be interpreted to be the exclusive mechanisms governing liability or the lack thereof under the act. As such, ACL's arguments that language requiring regulatory compliance, including compliance with civil and criminal laws, in the charter

agreements was sufficient to bring DRD's conduct beyond the scope of those agreements for purposes of OPA liability are unpersuasive.

The government correctly points out that accepting ACL's argument would be to exculpate similarly situated parties in every oil spill incident involving a contract towboat operator's violation of a regulation or law, civil or criminal, which it must be assumed include many such incidents.

See in comparison the *Buffalo Marine Services* [37] case, which I quoted earlier, from the Fifth Circuit in 2011, where the Fifth Circuit stated, "The interpretation advocated by appellants would allow contracting parties in cases such as this to avoid liability by the simple expedient of inserting an extra link or two in the chain of distribution and is inconsistent with the strict liability policy at the center of the statutory scheme enacted by Congress."

Because the position advocated by ACL would effectively allow the exception to swallow the strict liability rule contemplated by OPA through a simple inclusion, for example, of contractual language relating to regulatory or other laws' compliance, this Court grants the government's motion for summary judgment and we declare that ACL is not entitled to invoke the limitation defense under § 2704 of OPA.

The government has argued here that ACL is further not entitled to the complete defense under § 2703(a), the issues of connection to contract aside, because ACL did not

satisfy the requirements of exercising due care and taking precautions against foreseeable acts and consequences of DRD. Withholding judgment on whether or not the United States' arguments in this respect are correct, which arguments rely on statements in related proceedings that ACL turned the *Mel Oliver* over to DRD without conducting proper 100-point inspections and by completing "imperfect" vetting, the United States is entitled to prevail on this issue for other [38]reasons.

33 U.S.C. § 2703(a)(3) provides that the responsible party may invoke the complete defense "if" -- and I emphasis *if* -- "the responsible party establishes by a preponderance of the evidence that the responsible party (A) exercised due care with respect to the oil concerned, taking into consideration the characteristics of the oil and in light of all relevant facts and circumstances; and (B) took precautions against foreseeable acts or omissions of any such third party and the foreseeable consequences of those acts or omissions." Thus ACL bears the burden of establishing this component of the § 2703(a)(3) defense.

The United States placed ACL's ability to carry its burden in this respect at issue by asserting the arguments referenced above. ACL has failed to come forward with anything to the contrary and, therefore, in my opinion has failed to satisfy its burden in the context of the instant summary judgment motion and the attendant rules of summary judgment proceedings under *Celotex*, etc., of the Supreme Court.

Accordingly and in conjunction with the reasons articulated in Section A above, the Court grants the government's motion for summary judgment, declaring that ACL is precluded from raising the § 2703(a)(3) defense under OPA; finding, therefore, that ACL has failed to raise genuine issues of material fact sufficient to prevent entry of summary [39]judgment as to its entitlement to the statutory defenses as already noted. ACL raises no challenge to its designation as the responsible party for purposes of this act. The United States is entitled to the relief requested and the motion for summary judgment is granted. In that connection, the Court will follow up with the necessary written paperwork to satisfy this particular record.

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED NOVEMBER 7, 2017

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16-31150

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

AMERICAN COMMERCIAL LINES, L.L.C.,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before SMITH, OWEN, and HIGGINSON, Circuit Judges.

STEPHEN A. HIGGINSON, Circuit Judge:

On July 23, 2008, nearly 300,000 gallons of oil spilled into the Mississippi River when a tugboat veered across the river, putting the oil-filled barge it towed into the path of an ocean-going tanker. The tugboat, the M/V MEL OLIVER, was owned by American Commercial Lines ("ACL") but operated by DRD Towing Company pursuant

to a contractual agreement between the companies. As the statutorily-defined responsible party under the Oil Pollution Act ("OPA"), ACL incurred approximately $70 million in removal costs and damages. The United States also incurred approximately $20 million in removal costs and damages.

The United States initiated this action in 2014, seeking a declaration that ACL is liable for all removal costs and damages resulting from the spill and to recover the costs that it incurred. The United States moved for partial summary judgment on its claims that ACL was not entitled to any defenses to liability under OPA. The district court granted that motion, and later entered final judgment ordering ACL to pay the United States $20 million. ACL appealed. We AFFIRM.

I

In 2007, ACL, a marine-transportation company that operates a fleet of barges and tugboats, contracted with DRD Towing, another marine-transportation company, to operate some of its tugboats. ACL and DRD entered into two charter agreements. Under the "Master Bareboat Charter," ACL chartered several tugboats, including the M/V MEL OLIVER, to DRD for one dollar per day.[1] Under the "Master Fully Found Charter," DRD agreed to crew the tugboats and charter its services back to ACL.

1. The Master Bareboat Charter specified three vessels, M/V PAM D, M/V REGINA ANN, and M/V CELESTE MCKINNEY. When the PAM D suffered an engine failure, the MEL OLIVER was substituted in its place by amendment to the initial charter.

Both agreements required compliance with "all applicable laws and regulations [with] respect to the registration, licensing, use, manning, maintenance, and operation of the Vessel(s)."

The MEL OLIVER's crew consisted of Captain Terry Carver, Steersman John Bavaret, and two deckhands. Captain Carver was the only crewmember with a valid United States Coast Guard Master of Towing Vessels license, which authorized him to lawfully operate tugboats on the lower Mississippi River. Steersman Bavaret held only an Apprentice Mate (Steersman) license, which authorized him to serve as an apprentice mate under the direct supervision of a properly licensed master. He was not authorized to operate the vessel without continuous supervision. *See* 46 C.F.R. § 10.107(b) (requiring that Steersman "be under the direct supervision and in the continuous presence of a master"); 46 C.F.R. § 15.401 (prohibiting mariners from serving in any positions that exceed the limits of their credentials).

On July 20, 2008, Captain Carver left the MEL OLIVER to go on shore, leaving Steersman Baravet in control of the vessel. Two days later, while—unbeknownst to ACL—Captain Carver was still on shore, ACL directed the MEL OLIVER to tow an ACL barge, the DM-932, to pick up fuel from a facility in Gretna, Louisiana. At that time, Steersman Bavaret had worked for 36 hours with only short naps, in violation of Coast Guard regulations. *See* 46 U.S.C. § 8104(h) ("[A]n individual licensed to operate a towing vessel may not work for more than 12 hours in a consecutive 24-hour period except in an

emergency."); 46 C.F.R. § 15.705(d) (stating that "a master or mate (pilot)" may not work "more than 12 hours in a consecutive 24-hour period except in an emergency"). Still under Steersman Bavaret's control, the MEL OLIVER arrived at the Gretna facility around 2:00 p.m. on July 22, 2008. The DM-932 was loaded with fuel, and the MEL OLIVER departed for its return trip, with the fuel-filled barge in tow, at about 12:30 a.m. on July 23, 2008.

As the MEL OLIVER pushed the DM-932 along the Mississippi River, it began travelling erratically. At about 1:30 a.m., it turned to cross the path of an ocean-going tanker, the TINTOMARA, owned by a third party. The TINTOMARA's pilot and the Coast Guard's New Orleans Vessel Traffic Service staff attempted to hail the MEL OLIVER by radio, but no one answered. The TINTOMARA also sounded its alarm whistle. Unable to change course, the TINTOMARA collided with the DM-932. The DM-932 broke away from the MEL OLIVER and sank downriver, spilling approximately 300,000 gallons of oil into the Mississippi River. Immediately after the collision, a crewmember on the MEL OLIVER found Steersman Bavaret slumped over the steering sticks and non-responsive.

Following the spill, the government prosecuted DRD, Captain Carver, and Steersman Bavaret for criminal violations of federal environmental law. DRD and Steersman Bavaret each pleaded guilty to one count of violating the Ports and Waterways Safety Act, 33 U.S.C. § 1232(b)(1), and one count of violating the Clean Water Act ("CWA"), 33 U.S.C. § 1319(c)(1)(A). Captain Carver

pleaded guilty to one count of violating the Ports and Waterways Safety Act.

In the course of the criminal investigation, DRD admitted that it knowingly allowed its crewmembers to work without appropriate licenses or qualifications and to work more hours than were permitted under Coast Guard safety regulations and that it failed to report those "manning deficiencies" to the Coast Guard, also in violation of Coast Guard regulations. Captain Carver and Steersman Bavaret admitted to knowing that Bavaret was not licensed to act as captain in Carver's absence.

In addition to the criminal prosecution, the government sued ACL and DRD under OPA to recover clean-up costs resulting from the spill.[2] DRD promptly declared bankruptcy and later dissolved its LLC. The government moved for summary judgment against ACL on the issue of liability under OPA. The district court granted summary judgment in favor of the government, and later issued a final judgment ordering ACL to pay the government $20 million. This appeal followed.

II

We review a district court's grant of summary judgment de novo, applying the same legal standards as the district court. *Robinson v. Orient Marine Co.*, 505 F.3d 364, 365 (5th Cir. 2007). Summary judgment is

2. Related litigation came to this court in *United States v. Am. Commercial Lines, L.L.C.*, 759 F.3d 420 (5th Cir. 2014).

appropriate only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Any reasonable inferences are to be drawn in favor of the non-moving party. *Robinson*, 505 F.3d at 366.

III

A

OPA was enacted in 1990 in response to the Exxon Valdez oil spill. It "was intended to streamline federal law so as to provide quick and efficient cleanup of oil spills, compensate victims of such spills, and internalize the costs of spills within the petroleum industry." *Rice v. Harken Exploration Co.*, 250 F.3d 264, 266 (5th Cir. 2001) (citing S. REP. NO. 101-94, *reprinted in* 1990 U.S.C.C.A.N. 722, 723). OPA's cost-internalization measures, which increased the financial consequences of oil spills, were intended to "encourage greater industry efforts to prevent spills and develop effective techniques to contain them." S. Rep. No. 101-94 at 3. To that end, OPA redresses "gross inadequacies . . . in the CWA's provisions dealing with spiller responsibility for cleanup costs" by extending the CWA's regime of strict, joint, and several liability; limiting the available defenses to liability; increasing the applicable limits to liability; and eliminating the liability limits altogether under certain circumstances. *Id.* at 4-5, 12-14.

OPA holds statutorily-defined "responsible parties" strictly liable for pollution-removal costs and damages associated with oil spills. *See Buffalo Marine Servs. Inc.*

v. United States, 663 F.3d 750, 752 (5th Cir. 2011) (stating that OPA "creates a strict-liability scheme for the costs of cleaning up oil spills"). It provides that "each responsible party for a vessel or a facility from which oil is discharged . . . is liable for the removal costs and damages . . . that result from such incident." 33 U.S.C. § 2702(a). With respect to vessels, the "responsible party" is "any person owning, operating, or demise chartering the vessel." 33 U.S.C. § 2701(32)(A).

OPA generally limits the liability of a responsible party to a specified dollar amount based on the tonnage of the vessel from which oil was discharged. 33 U.S.C. § 2704(a). However, the limits on liability do not apply if:

> the incident was proximately caused by—(A) gross negligence or willful misconduct of, or (B) the violation of an applicable Federal safety, construction, or operating regulation by, the responsible party, an agent or employee of the responsible party, or a person acting pursuant to a contractual relationship with the responsible party . . . .

33 U.S.C. § 2704(c)(1). Accordingly, under those circumstances, there is no limit to the liability of the responsible party.

In addition to the general limits on liability, OPA provides for a complete defense to liability under four enumerated circumstances. It provides that:

> [a] responsible party is not liable for removal costs or damages . . . if [that] party establishes, by a preponderance of the evidence, that the discharge . . . of oil and the resulting damages or removal costs were caused solely by—(1) an act of God; (2) an act of war; (3) an act or omission of a third party, other than an employee or agent of the responsible party or a third party whose act or omission occurs in connection with any contractual relationship with the responsible party . . . or (4) any combination of paragraphs (1), (2), and (3).

33 U.S.C. § 2703(a). To be entitled to the third-party defense, a responsible party must also establish that it "exercised due care with respect to the oil concerned" and that it "took precautions against foreseeable acts or omissions" of the third party. 33 U.S.C. § 2703(a)(3)(A)-(B).[3]

ACL contends that it is entitled to the third-party defense under § 2703(a)(3) or, in the alternative, that it is entitled to limit its liability pursuant to § 2704(a). For the reasons stated below, we disagree.

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3. The district court concluded that ACL failed to present sufficient evidence to establish that it satisfied those two requirements. Because we hold that ACL is not entitled to the third-party defense on the ground that DRD's conduct occurred "in connection with" its contractual relationship with ACL, we do not reach the issues of whether ACL exercised due care and took the necessary precautionary measures.

Appendix A

B

ACL contends that it is entitled to a complete defense to liability under 33 U.S.C. § 2703(a)(3) on the ground that the conduct of DRD, a third party, caused the spill. The government responds that the third-party defense is not available because DRD's conduct occurred in connection with a contractual relationship with ACL. The parties agree that DRD's acts and omissions were the sole cause of the spill and that ACL and DRD had a contractual relationship. They dispute only whether DRD's acts and omissions occurred in connection with that contractual relationship.

The meaning of § 2703(a)(3)'s "in connection with" language is a question of first impression. To determine whether DRD's conduct occurred "in connection with" its contractual relationship with ACL, we begin with the meaning of "connection." *See Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566, 132 S. Ct. 1997, 182 L. Ed. 2d 903 (2012). Because the term is not defined in the statute, we must give it its ordinary meaning. *See id.* ("When a term goes undefined in a statute, we give the term its ordinary meaning."). Webster's Third New International Dictionary defines "connection" as "relationship or association in thought (as of cause and effect, logical sequence, mutual dependence or involvement)." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 481 (2002). The Oxford English Dictionary defines it as "[t]he condition of being related to something else by a bond of interdependence, causality, logical sequence, coherence, or the like; relation between things

one of which is bound up with, or involved in, another." 3 OXFORD ENGLISH DICTIONARY 747 (2d ed. 1989).

"Connection" is therefore a capacious term, encompassing things that are logically or causally related or simply "bound up" with one another. It is, however, not so capacious as to be rendered meaningless. Conduct does not automatically occur "in connection with" a contractual relationship by the mere fact that such a relationship exists. *See Westwood Pharm., Inc. v. Nat'l Fuel Gas Distrib. Corp.*, 964 F.2d 85, 89 (2d Cir. 1992) (interpreting virtually identical language in the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") and holding that "[t]he mere existence of a contractual relationship . . . does not foreclose the owner of and from escaping liability"). Rather, the conduct must be causally or logically related to the contractual relationship. Accordingly, the third party's acts or omissions that cause a spill occur "in connection with any contractual relationship" between the responsible party and the third party whenever the acts or omissions relate to the contractual relationship in the sense that the third party's acts and omissions would not have occurred but for that contractual relationship.

This reading of the ordinary meaning of "connection" is consistent with OPA's purpose. *See Buffalo Marine Servs.*, 663 F.3d at 757 ("To determine the meaning of a statute, 'we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.'" (quoting *Crandon v. United States*, 494 U.S. 152, 156-58, 110 S. Ct. 997, 108 L. Ed.

2d 132 (1990))). The legislative history shows that, in enacting OPA, Congress wanted not only to quickly contain and clean up spills, but also to prevent spills from occurring in the first place by using weighty financial consequences to encourage responsible parties to take all available precautionary measures. S. REP. NO. 101-94 at 3. To give effect to that purpose, Congress intended to narrowly limit the third-party defense in order to "preclude defendants from avoiding liability by claiming a third party was responsible, when that third party had a contractual relationship with the defendant and was acting, in essence, as an extension of the defendant." *Id.* at 13. Accordingly, the third-party defense should not be available where a spill is caused by third-party acts or omissions that would not have occurred but for the contractual relationship between the third party and the responsible party.

ACL's proposed definition of "in connection with" is contrary to both the statute's text and its purpose. ACL contends that we should adopt the Second Circuit's interpretation of similar language CERCLA.[4] In *Westwood*, the Second Circuit held that the "in connection with" language in CERCLA's third-party defense requires that "the contract between the landowner and the third party must either relate to the hazardous substances *or*

4. CERCLA's third-party defense provides for a complete defense to liability where the release of a hazardous substance was caused solely by "an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant." 42 U.S.C. § 9607(b)(3).

allow the landowner to exert some element of control over the third party's activities." 964 F.2d at 91-92 (emphasis added). Even though that test is met here factually in light of the parties' contract to transport oil, we decline to adopt that approach because its additional requirements go beyond what is required by OPA's plain text. Section 2703(a)(3) requires only two things: (1) that a third party's act or omission caused the spill at issue and (2) that that act or omission did not "occur[] in connection with *any* contractual relationship with the responsible party." 33 U.S.C. § 2703(a)(3) (emphasis added). It does not condition the applicability or inapplicability of the exception on the nature of the contract between the parties. Accordingly, the contract need not explicitly relate to hazardous substances (here, oil) or permit the responsible party to control the third party's activities.

ACL also contends that DRD's acts and omissions cannot be "in connection with" their contractual relationship because those acts and omissions directly violated the terms of their contracts. The charter agreements specifically required DRD to comply with all applicable laws and regulations, but the acts and omissions that caused the spill did not. But "in connection with" does not mean "in compliance with," and the meaning of "connection" is broad enough to encompass acts that are not specifically contemplated, or even acts that are specifically not contemplated, in a contract. A contrary reading would permit responsible parties to circumvent OPA by easily contracting out of liability, a result Congress specifically sought to avoid. *See* S. REP. NO. 101-94 at 13 (stating that the contractual-relationship exception

from the third-party defense is intended to "preclude defendants from avoiding liability" through contractual relationships); *see also Buffalo Marine Servs.*, 663 F.3d at 757 & n.36 (citing to *United States v. LeBeouf Bros. Towing Co.*, 621 F.2d 787, 789 (5th Cir. 1980) and rejecting interpretation of "contractual relationship" that would enable defendants to easily avoid liability).

Given the broad meaning of "in connection with," ACL has failed to establish that it is entitled to the third-party defense. The conduct that caused the spill—Captain Carver's leaving the MEL OLIVER under the control of an unlicensed Steersman and Bavaret's working more consecutive hours than permitted under Coast Guard regulations, becoming unconscious while in command of the vessel, and veering into the path of the TINTOMARA while transporting oil at ACL's direction—occurred "in connection with" DRD's contractual relationship with ACL. Pursuant to the charter agreements, DRD agreed to crew the MEL OLIVER and charter DRD's services to ACL. But for those charter agreements, DRD would not have been operating the MEL OLIVER and transporting ACL's fuel-filled barge, and the spill would not have occurred.

C

ACL alternatively contends that it is entitled to OPA's general limit on liability. The government responds that DRD's conduct falls within the exception from limited liability for spills proximately caused by "gross negligence," "willful misconduct," or federal regulatory

violations committed by "a person acting pursuant to a contractual relationship with the responsible party." *See* 33 U.S.C. § 2704(c)(1). We agree.

The parties dispute whether DRD was acting "pursuant to" its contractual relationship with ACL when it committed the regulatory and criminal violations that caused the spill. Once again, the meaning of § 2704(c)(1)'s "pursuant to" language, which is not defined in the statute, appears to be a matter of first impression. As before, we turn to the ordinary meaning of the words. Black's Law Dictionary defines "pursuant to" as "[i]n compliance with; in accordance with," "[a]s authorized by," or "[i]n carrying out." BLACK'S LAW DICTIONARY 1431 (10th ed. 2014). Webster's Third similarly defines "pursuant to" as "in the course of carrying out; in conformance to or agreement with; [or] according to." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1848 (2002). *See also* OXFORD ENGLISH DICTIONARY 887 (2d ed. 1989) (defining "pursuant to" as "following upon, consequent and conformable to, [or] in accordance with"). Accordingly, and as ACL contends, "pursuant to" has a narrower meaning than "in connection with." While the latter encompasses any conduct that is logically related to the contractual relationships in the sense that it would not have occurred but for the third party's contractual relationship with the responsible party, the former contemplates compliance or conformity.

However, ACL goes too far when it argues that the specific acts or omissions that cause the spill must be authorized by the contract. Section 2704(c)(1) requires only that the gross negligence, willful misconduct, or

federal regulatory violations that cause the spill be committed by the responsible party, its agent or employee, or "a person acting pursuant to a contractual relationship with the responsible party." Accordingly, the "pursuant to" language is satisfied if the person who commits the gross negligence, willful misconduct, or regulatory violation does so in the course of carrying out the terms of the contractual relationship with the responsible party. Reading the statute to require that the negligent or wrongful act itself be "pursuant" to the contract would be nonsensical; it would be a rare contract indeed that specifically contemplated gross negligence, willful misconduct, or the violation of federal safety regulations. Exceptions to statutes are to be construed narrowly, but ACL's proposed construction would read the exception out of the statute altogether.

That the conduct that caused the spill here rose to the level of a criminal violation does not take it out of § 2704(c)(1). ACL contends that because § 2704(c)(1) specifically mentions gross negligence, willful misconduct, and the violation of federal regulations, but says nothing of criminal violations, the exception from limited liability must not apply to the latter. But that draws a false distinction. As evidenced by the facts of this case, there is considerable overlap between gross negligence, willful misconduct, and violations of federal regulations, on the one hand, and criminal violations on the other. There is no principled basis on which to distinguish between the negligent acts that would lift the general limits on liability and the criminal acts that would not. Would the relevant conduct simply have to *be* a criminal violation? That would

seem to largely eviscerate the exception. Or would the responsible actors have to be actually charged with a criminal violation, or convicted, to take the conduct out of § 2704(c)(1) and reimpose the limits to liability?

Nor would such a distinction give effect to OPA's purpose. OPA increased the financial consequences of oil spills in order to encourage responsible parties to take precautionary measures to prevent such spills. Section 2704(c)(1), in particular, encourages compliance with the kinds of regulations that are themselves intended to prevent oil spills—like the manning requirements violated by DRD—by providing for unlimited liability where those regulations are flouted. *See* S. REP. NO. 101-94 at 14 (stating that "where compliance [with federal regulations] perhaps could have prevented or mitigated the effects of an oilspill [sic], no such limits [to liability] will apply"). There is no reason to think that Congress intended to lift the limits on liability for spills caused by conduct that is forbidden by federal regulation but to reimpose those limits for spills caused by conduct considered so dangerous or risky that it is also subject to criminal penalties. Such a distinction would run counter to OPA's purpose of encouraging compliance with the very rules and regulations intended to prevent oil spills in the first instance.

Finally, ACL's reliance on the doctrine of *respondeat superior* is inapposite. Under that doctrine, employers are not liable for the intentional torts or criminal acts of their employees if those acts are committed outside the scope of their employment. But that is of no help to ACL. First, employer liability under the doctrine of

respondeat superior is a creature of the common law of agency. *See* RESTATEMENT (THIRD) OF AGENCY § 2.04 cmt. b (2006) (noting that the doctrine of *respondeat superior* "has long been classified as an element of agency doctrine"). The liability of a responsible party for oil spills caused by the negligence or misconduct of a third party under OPA is a creature of statute. Second, even if the doctrine of *respondeat superior* were applicable here by analogy, it appears to support our reading of "pursuant to." Employers *are* liable for the intentional torts of their employees if committed by an employee "acting within the scope of their employment." *Id.* § 2.04. Conduct may be within the scope of employment, even if not authorized, if it occurs "while performing work assigned by the employer" and if it is "intended to further any purpose of the employer." *Id.* § 7.07 cmt. b. Accordingly, even if the doctrine of *respondeat superior* were relevant here, our reading of what it means to be "acting pursuant to a contractual relationship" appears to be consistent with the imposition of liability on employers for torts committed by employees in the course of their employment.

Here, there is no dispute that the July 23, 2008 spill was caused by DRD's wrongful conduct and regulatory violations, committed in the course of carrying out its contractual obligation to transport ACL's fuel-filled barge. Accordingly, the spill was caused by the gross negligence, willful misconduct or regulatory violations of "a person acting pursuant to a contractual relationship with" ACL, and ACL is therefore not entitled to limited liability.

IV

For the foregoing reasons, we AFFIRM the district court's grant of summary judgment.

APPENDIX B — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, FILED OCTOBER 26, 2016

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 11-2076
SECTION "B" – (2)

UNITED STATES OF AMERICA,

Plaintiff,

VERSUS

AMERICAN COMMERCIAL LINES, LLC
AND D.R.D. TOWING COMPANY, LLC,

Defendants.

JUDGE LEMELLE
MAGISTRATE JUDGE WILKINSON

FINAL JUDGMENT

For reasons orally assigned (R.Doc. 130 (transcript)) and in conjunction with the Court's Order of January 21, 2015 (R.Doc. 125), the Court granted the Motion for Partial Summary Judgment filed by Plaintiff, United States of America, pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*, finding that:

(1) Defendant, American Commercial Lines LLC ("ACL"), is designated a "responsible party" within the meaning of that term for purposes of liability for removal costs and damages under the Oil Pollution Act of 1990 (the "OPA"), 33 U.S.C. § 2702;

(2) ACL is not entitled to invoke the complete sole-fault third-party defense established under the OPA at 33 U.S.C. § 2703 (a)(3) against the claims of the Government in these proceedings; and

(3) ACL is not entitled to invoke the limitation of liability defense established under the OPA at 33 U.S.C. § 2704 against the claims of the Government in these proceedings.

In accordance with the Parties' Stipulation, the United States of America is entitled to recover from ACL removal costs and damages as set forth in R. Doc. 206. ACL is liable to, and shall pay to, the United States of America the sum of $20 million dollars, inclusive of any prejudgment interest, with each party to bear its respective costs of Court and attorneys' fees. Post-judgment interest shall be governed by statute, 28 U.S.C. § 1961.

In accordance with the previous stipulation regarding Natural Resource Damage Claims (R.Doc. 107), all claims of the United States of America against ACL seeking damages related to injuries to, destruction of, loss of, or loss of use of natural resources were dismissed without prejudice, it being understood that this dismissal did not

determine or conclude the merits of any claims made or held by the United States for damages related to "injuries to, destruction of, loss of, or loss of use of natural resources" under the OPA or other law. The aforementioned natural resource damage claims are thus preserved.

This Judgment is a Final Judgment pursuant to 28 U.S.C. § 1291.

This __ day of __, 2016.

_____

UNITED STATES DISTRICT JUDGE

APPENDIX C — EXCERPT FROM TRANSCRIPT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, FILED MARCH 10, 2015

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action
No. 11-2076
Section B

UNITED STATES OF AMERICA

versus

AMERICAN COMMERCIAL LINES, LLC, *et al.*

January 21, 2015

TRANSCRIPT OF PROCEEDINGS BEFORE
THE HONORABLE IVAN L.R. LEMELLE
UNITED STATES DISTRICT JUDGE

[2]PROCEEDINGS
(January 21, 2015)

THE COURT: Good morning. Be seated, please.

Isidore, let's call it.

THE DEPUTY CLERK: Civil Action 11-2076, United States versus American Commercial Lines, LLC, et al.

THE COURT: Counsel.

MR. DILAURO: Good morning, Your Honor. Michael Dilauro for the United States, and I have with me Jessica Sullivan.

MR. BERTRAM: Your Honor, Richard Bertram, Jones Walker, counsel for ACL. We wanted to apologize to the Court. We had a glitch on our calendaring. Mr. Nicoletti can be dialed in if the Court --

THE COURT: He is not on the phone yet? I thought he was on the phone. Let's get him on.

MR. NICOLETTI: John Nicoletti.

MR. BERTRAM: Good morning, John. This is Richard Bertram. We are in court with Judge Lemelle now.

MR. NICOLETTI: Good morning, Your Honor.

THE COURT: Good morning, Mr. Nicoletti. Mr. Bertram was explaining some, I'll call it, mixup in terms of whether or not you were required to be here today for oral argument. As you all recall, I set this down for oral argument. I don't know whether or not it was done on my own motion or on the [3]motion of the parties. After doing that, there was a motion to continue, which I granted, setting it for today.

While that order continuing it until today was silent in terms of oral argument or on the briefs, we never vacated the order for oral argument. So be mindful that, at least from my interpretation of our rules, if we don't vacate any part of a prior order, it's still in effect.

As you know, under our Local Rules, we call the hearing dates now submission dates. Perhaps there was some confusion on your part or somebody's part on what that meant. It didn't mean to vacate oral argument, which I always intended on having in this case.

So with that, I don't need any further explanation. Don't worry. I'm not going to issue sanctions or anything like that. I think that we need to go forward with oral argument today. I have read the briefs from all parties. I'll just chalk this up as a miscommunication through no fault of anyone and we will go from there.

We have present, Mr. Nicoletti, local counsel, Mr. Bertram, as well as counsel for the government, Mr. Dilauro, and -- Is it Ms. Keast?

MS. SULLIVAN: Ms. Sullivan, Your Honor.

THE COURT: Thank you.

As you all know, this particular case involving [4] OPA claims asserted by the United States against ACL as well as ACL's defenses to that action is a subject now of a motion for partial summary judgment where the government seeks the Court to declare that the defenses that ACL seeks to urge here should be dismissed.

In this case ACL, as I understand their argument, states that the United States has failed to show that the acts and omissions of DRD, the third-party tug operators of the ACL barge, satisfied the "in connection with" standard of § 2703(a)(3) of Title 33 of the United States Code. ACL further argues that the government cannot, therefore, satisfy the narrower "pursuant to" language of § 2704 of the same codal title.

The United States has replied and cited basically five propositions that they believe ACL has not challenged:

(1) That two charter agreements were in existence between ACL and DRD at the time of the maritime collision here;

(2) That DRD violated a host of federal safety and operating regulations in proximately causing the July 2008 accident;

(3) That OPA claims are unaffected by the provisions of the Limitation of Liability Act;

(4) That ACL's counterclaim against the [5] United States is not legally cognizable; and

(5) That the United States is entitled to judicial declaration concerning ACL's liability to the United States.

So the issue that I have before me, then, is whether ACL is precluded from invoking the complete defense

of § 2703 or the limitation defense of § 2704 of the Oil Pollution Act of 1990.

(5) That the United States is entitled to judicial declaration concerning ACL's liability to the United States.

So the issue that I have before me, then, is whether ACL is precluded from invoking the complete defense of § 2703 or the limitation defense of § 2704 of the Oil Pollution Act of 1990.

Let's go to movant for argument here. In this particular matter, Counsel, it seems as if you would agree with ACL that our laws here, the OPA laws, that is, require this "in connection with" on the defense side and "pursuant to" on the § 2704 side of the case. ACL seems to argue that because they were not found at fault in the limitation action and the related actions arising from this maritime collision and the Court found the sole responsible party in that action was DRD that they should be provided with the defenses that they assert here.

You argued that, well, no this Court and the Fifth Circuit have found that the contracts that ACL had with DRD would establish their strict liability under OPA since the actions here all occurred while these contracts were in existence and pursuant to the voyage charter agreements.

They cite us to a Second Circuit case that says that the existence of the agreements per se is insufficient for [6]our purposes here. What's your response to that?

MR. DILAURO: Well, we disagree with the interpretation of the case, but we do not disagree that a circle of precedent could be applied.

THE COURT: The Fifth Circuit, I think, pretty much says that as well in *Buffalo*, I believe, as well as to some extent in the appeal from our initial findings that were affirmed by the Fifth Circuit, that ACL could not have a right of action against the oil pollution cleanup people that they selected.

MR. DILAURO: Yes, Your Honor. So we have this language in § 2703 which requires a "connection with" and in § 2704 the words are "pursuant to." Both of those sets of words refer to the contractual relationship.

So we see this as simply a plain language interpretation of the OPA statute. We have no objection to CERCLA informing that analysis. I think the CERCLA cases are a little bit different because they are factually different. They typically involve situations where a landowner has passed a piece of real estate on to another landowner or perhaps there is some operation of that real estate.

THE COURT: Assuming that ACL is arguing that that's basically what occurred here, our findings that DRD was a *pro hac vice* owner, that that somehow falls within the factual scenario of the Second Circuit case, which was the [7]pharmaceutical case --

MR. DILAURO: *Westwood*, Your Honor.

THE COURT: -- *Westwood*, correct, what's your response to that? I'm playing devil's advocate, so to speak.

MR. DILAURO: Yes, Your Honor.

THE COURT: Sorry to characterize your client as the devil, Mr. Bertram or Mr. Nicolleti. That's not intended.

MR. BERTRAM: Understood.

MR. DILAURO: What we would say is that it's fair to look to the facts of the *Gabarick* case which was tried before this Court. The government relies on those facts, but the standard of liability in that case was different. It was a negligence standard. That was a limitation case. So one should look to the facts as they were developed in the case, but they have to be viewed through the strict liability prism or lens that's part of the OPA regime.

THE COURT: Well, § 2703 states that "A responsible party is not liable for removal costs or damages under § 2702 if the responsible party establishes by a preponderance of the evidence that the discharge or substantial threat of a discharge of oil and the resulting damages or removal costs were caused solely by," and then it lists a number of facts:

(1) Act of God;

(2) Act of war;

(3) And perhaps pertinent for our purposes [8]here, an act or omission of a third party other than an employee or agent of the responsible party or a third party whose act or omission occurs in connection with any contractual relationship with the responsible party except where the sole contractual arrangement arises in connection with carriage by a common carrier by rail, which we don't have here, if the responsible party establishes by a preponderance of the evidence that the responsible party: (A) exercised due care with respect to the oil concerned; (B) took precautions against foreseeable acts or omissions against of any such third party and the foreseeable consequences of those acts or omissions; or

(4) Any combination of paragraphs 1, 2, and 3.

So wouldn't that require, then, for ACL to show that DRD's acts or omissions were the sole cause of the discharge, that no contractual relationship or sufficiently attenuated contractual relationship existed between ACL and DRD at the time of the discharge, and that ACL exercised due care and took precautions against foreseeable consequences?

That later part, that ACL exercised due care and took precautions against foreseeable consequences, isn't that -- to the extent that the facts in this case, I think, have already been established and affirmed to some extent by the circuit, this issue of a strict liability in the context of whether or not ACL exercised this due care and took precautions, that's a legal conclusion, in my opinion, based [9]upon facts that to me are not in dispute. How do I jump

to that legal conclusion in view of the factual findings already made?

I know you say -- and I agree with you -- that this is a strict liability scenario, the limitation act and general maritime laws are preempted by Congressional intent in enacting OPA and the language it shows. I'm just wondering, however, though, in terms of the application here, whether or not you are arguing solely the existence of this contractual relationship between DRD and ACL and does that draw it within (3)(A), (3)(B), or (4), or a combination?

MR. DILAURO: Well, our position is that the Court's focus should fall primarily on § 2703(a)(3), act or omission of a third party, more importantly the language which discusses "a third party whose act or omission." And I don't think there's any question but that DRD committed numerous acts or omissions, Your Honor, that led to that collision on July 23, 2008. So there's no question about the acts or omissions.

We would submit also that on the record there's no question that they occurred in connection with a contractual relationship and, in particular, the pair of charter parties that existed at the time. The charters were the mechanism that put DRD in operation of the *Mel Oliver*. When it entered into the charters, ACL recognized that DRD would be operating the *Mel Oliver*, that it would be using the *Mel Oliver* to push ACL's [10]barge DM-932. That was the very purpose of the charter.

THE COURT: So if DRD is acting pursuant to its contractual relationship with ACL, you think that's sufficient?

MR. DILAURO: I do believe that's sufficient, Your Honor. I believe the Court could and, in fact, should find in the United States' favor based on this alone.

I think, however, beyond that the Court can look further to the two additional provisions, Subsections (A) and (B), which speak to the exercise of due care and the taking of precautions. I don't think that the Court has to do so, but I certainly think it may and that it would be appropriate for the Court to do so.

THE COURT: You don't believe that our findings in the related limitation actions -- I'll use my exact language here -- "that ACL had neither actionable fault for nor foreseeability into DRD's misdeeds that caused the collision" --

MR. DILAURO: Well, I think there are two aspects of the Court's decision, one of them concerned with vetting; and as I read the opinion, certainly the vetting was less than perfect.

THE COURT: I acknowledge that it was an issue that I found in that case. I think I pulled that as well and talked about the evidence here that -- and I'm quoting -- "while ACL's vetting of DRD's vessel operators for licensing, accident [11]history, and compliance with the federal 12-hour watch rule was imperfect and needs improvement,"

I further found that there was evidence that ACL acted reasonably in that vetting process, albeit minimally here. It draws into question, then, to what extent would OPA's strict liability standard somehow preempt that finding.

MR. DILAURO: Right, and I'm not sure that we agree that it has to preempt the finding. What we would suggest is that under a strict liability standard, it's a different law, and so the Court can reach a different conclusion based on the same facts because OPA is a strict liability statute and the standard that was at issue in the limitation actions was a negligence standard.

THE COURT: In a sense, in this context at least, I felt torn between the idea that establishing negligence -- and I'll say it in terms of a standard or a burden -- was perhaps easier than establishing whether or not someone is absolutely responsible under strict liability standards, which I know may be contrary to what we typically have understood over the years between the two.

It's like the old premise liability theories which strict liability kind of grew out of, for instance, slip-and-falls. I don't mean to oversimplify this, but you understand where I'm going in terms of torn between what's required in one as opposed to the other.

[12]**MR. DILAURO:** Yes, Your Honor, I believe so.

THE COURT: In your argument you said that we could still go beyond the mere existence of the contractual relationship. Could you expand upon that a little bit.

MR. DILAURO: We think the mere existence of the contractual relationship is sufficient. But our point is if the Court believed it appropriate to do so, it could also look to the two prongs in (A) and (B). I don't believe that those are essential to the decision.

I believe that ACL cannot carry its burden of proof under § 2703. It does bear the burden of proof, and it cannot because of the contractual relationship. It would be sufficient to stop there, but it would also be appropriate, we think, to look to those two prongs, the due care prong and the taking of precautions prong.

THE COURT: In ACL's argument, it seems to draw a distinction between the language in § 2703, "in connection with," and the language in § 2704, "pursuant to," and says that the "pursuant to" language of § 2704 is narrower than the "in connection" language of § 2703. Do you draw a line between those two provisions?

MR. DILAURO: No, Your Honor, we do not. It's obviously different language, but I think it leads to the same end.

In the first instance, § 2703, the conduct is [13]certainly occurring in connection with a contractual relationship. It seems to me somewhat a semantic distinction when one moves to § 2704 and says that it's pursuant to the contractual relationship. They, to us, mean much the same thing, and I don't believe that there's any case law that elucidates it further. So we read it much the same way. I certainly saw ACL's argument, but I didn't really find it a profitable distinction.

Appendix C

THE COURT: I thought it interesting, in reading the *Buffalo Marine v. U.S.* case out of the Fifth Circuit in 2011, where the court held, as I think both parties acknowledge, that the common purposes and shared history of CERCLA and OPA are such that the similarly worded provisions relating to contractual connections was particularly significant and indicated that § 2703(a)(3), which is what you are arguing here, of OPA is to be interpreted consistently with the intended provisions of CERCLA.

It went on to hold in that case, in the context of OPA, Congress' use of "any contractual relationship" emphasized the breadth of the contractual relationship limitation. That seems to indicate that the Fifth Circuit holds an expansive view of that congressional language, particularly where it says "any contractual relationship."

Of course, I know it was talking about that you could have various types of contracts and so forth, but I was [14]struck by that language. It was done in 2011, and there were two cases prior to that out of a district court in Texas in 1994, *International Marine Carriers v. Oil Spill Liability Trust Fund*, and a district court case out of Massachusetts in January of 2003, *Seaboats, Inc. v. Alex C. Corp.* In those two district court opinions, it appears as if they have indicated that OPA requires only that "any contractual relationship" exists in order to deny a third-party defense to liability. Is that Fifth Circuit law?

MR. DILAURO: I believe that that is Fifth Circuit law.

THE COURT: Even though the Fifth Circuit obviously didn't write those opinions, the question is: Is that controverted in any way by Fifth Circuit law?

MR. DILAURO: Not to my knowledge, Your Honor. The focus --

MR. NICOLETTI: Your Honor, may I be heard on that?

THE COURT: No. I don't do slip shots. You'll get your shot. Calm down.

MR. NICOLETTI: Thank you.

MR. DILAURO: The focus in *Buffalo Marine* -- and admittedly I looked at the other cases more quickly, but the focus in those cases was on whether there was or was not a contractual relationship. I think our focus today is a little bit different. There's an admission that there was a [15]contractual relationship. The issue or the focus here, based on ACL's responsive brief, is on whether or not that was "in connection with" or "pursuant to."

So I don't think that what we are talking about today is inconsistent with those precedents. I think those precedents counsel an expansive reading of those sections of OPA, one that favors the government's position. So I don't think that we are advising anything that's inconsistent with Fifth Circuit precedent, but neither do I think that the Fifth Circuit precedent has spoken exactly to the issue before the Court today.

Appendix C

THE COURT: Let's hear from your opponent and then you will have a chance for rebuttal.

MR. DILAURO: Thank you.

THE COURT: Mr. Nicoletti.

MR. NICOLETTI: Your Honor, the government has been accurate when it says the Fifth Circuit has not as yet ruled on what constitutes "in connection with" the third-party contractor and that's what we are focusing on. The fact that there is criminal activity by DRD which is the proximate cause of the collision breaks the connectivity between the contract and the conduct of the third party.

If Congress and/or the courts wanted to focus solely on any contract, they wouldn't have put -- and if the existence of that contract was in and of itself sufficient to [16]deprive either the defense or the limitation, then in that context it would have not put the words "in connection with" in § 2703 or "pursuant to" in § 2704.

Now, in regards to those two terms, "in connection with" and "pursuant to," we just received the government's brief on those two points. I think, again, the way the statutory construction is, you look at the dictionary definition of the word "connection" and the dictionary definition of the word "pursuant." You will see that there is some distinction between the two terms, "connection" being broader and "pursuant" being narrower.

The main focus of ACL's argument is those two terms, "in connection with" or "pursuant to," that those are broken and severed by the criminal activity. There is no case law on point other than the cases we have cited in regards to general maritime law, which is also the law in most common law states, that a person cannot be responsible for the criminal activities which are not foreseeable, of course, of their employees, agents, or servants.

Now, we are not saying that's on all fours because we are dealing with a statutory interpretation, but that gives you the legal analysis as to why criminal activity breaks the contractual relationship between DRD and ACL.

THE COURT: If that's so, the Fifth Circuit certainly was aware of all of that in the various appeals in this case, [17]and they have found that the contract was in existence at the time of this accident, as I found, and that it was not void because of any of the arguments or positions taken by ACL in the underlying related proceedings.

So I'm having difficulty buying into that argument that the prior findings of this Court and the Fifth Circuit that found these contracts do exist, they existed at the time of the collision and were not voided in any fashion, as somehow now drawing into question, in my opinion, that binding authority. It just seems that that would be inconsistent and beyond my authority to do.

MR. NICOLETTI: We are not disputing the contracts that exist. As far as the avoidance argument, that was

never really heard by the Court because of the adoption of judicial estoppel.

We are making ourselves perfectly clear here. We are not disputing the existence of the contracts. We are saying that both § 2703 and § 2704 require more than the existence of any contract or a contract. It requires the activity of the responsible party, DRD, here -- I should say the liable party, DRD, to have acted in connection with that contract or pursuant to that contract. What we are saying is contracts do exist, but the criminal conduct was not pursuant to either contract or in connection with either contract.

THE COURT: So if the Court has previously found in [18]those related proceedings -- and we did -- that DRD contracted with ACL to perform towing operations of ACL's barges in order to satisfy the transportation needs of ACL's customers and discussing ACL's role in that venture and ultimately for the dedicated purpose of that mission, that is, ACL's economic gain, don't we have that extra set of facts that you argue we need in order to say that you don't have the benefit of these defenses?

Obviously these charters were, indeed, related to the movement of oil and further allowed ACL to use DRD for those activities. Isn't that what was contemplated, as well, in *Westwood Pharmaceuticals*, that is, a relationship to hazardous substances and the exertion of the dedicated purpose or control of the third-party activities?

Certainly I don't come into this without some law out there. And while to my readings of what we have in the Fifth Circuit, the *Buffalo* case in the Fifth Circuit, to some extent the Fifth Circuit's opinions arising out of this case, seem to suggest that these charter agreements executed with ACL and the resulting accident all arose from the existence of that relationship.

Even beyond that, there's some cases, again parallel provisions of CERCLA that I believe you may have argued, but I'm not certain if they are that supportive of ACL's position on the issue of the connection between the [19]charter agreements and DRD's actions in the present case.

For instance, in the *State of New York v. Lashins Arcade Company* case from the Second Circuit, 1996, there was a straightforward sale of contaminated property that clearly did not relate to hazardous substances and was not a defense-barring agreement. Isn't that case not supportive of your position here, perhaps factually distinguished?

Then there is another case, I believe, out of the Second Circuit, or a district court opinion from the Western District of New York, *Emerson Enterprises v. Kenneth Crosby Acquisition Corp.*, where a lease, unlike a sales contract in *Lashins*, contemplated third party's operation of a manufactured gas plant, and the lease was found, quote, connected with handling of hazardous substances. That sounds to me -- and convince me why this may be wrong -- more supportive of the mover's position than the opponent here.

MR. NICOLETTI: Simply because in both of those cases the contracts were executed in a legal fashion, such as the contract to process the substances. Here we have criminal activity, and none of the cases address the criminal activity elements because they weren't existent in those cases.

If DRD had been operating those tugs legally, with a legal crew, and had they violated some statute, I would say to you in that situation you have a civil violation, and that's what the statute contemplated when it said if you have a [20]contractual relationship and your third party does a civil liability, then you can't avail yourself of the defense.

THE COURT: Well, I found, in part, reliance upon the criminal liability of DRD's principals and employees in the underlying limitation proceedings and found that that further supported the finding of DRD's fault. Here I'm dealing with strict liability.

Wouldn't your argument displace OPA's strict liability if I would simply rely upon what I would consider to be the principles that we have in the limitation proceedings, the principles that we have under common law?

I can see that it's not difficult to think about situations where the contractual relationship in and of itself would not be sufficient to bar ACL's use of a third-party defense. For instance, if ACL had sold the *Mel Oliver* outright to DRD and then you had this collision resulting in a discharge and the collision had nothing to do with the *Mel Oliver*'s condition at the time of sale, it would not be

appropriate, then, for OPA purposes, from my perspective at least, to characterize the acts of DRD in transporting oil on its own behalf as connected to the contract of sale between the parties. That seems to be somewhat similar to what may have happened in *Westwood*, although in a different context.

MR. NICOLETTI: I would agree that would be one type of way to break the connection.

[21]**THE COURT:** But you think the other type is solely by the finding of criminal fault of the third party?

MR. NICOLETTI: Yes, and let me explain why. The purpose of the strict liability was to make sure that someone would pay, in the first instance, and ACL has done that. Then the statute goes on to give relief to an innocent party who is found without fault, and the way it is done is it is done by § 2703 and § 2704.

In both those instances, they say that the innocent party can avail itself of the defense of limitation except on certain enumerated issues, one being the contractual relationship, but Congress didn't say "any contractual relationship" without reference to a further term, which was either "in connection with" or "pursuant to."

In this situation DRD itself had no knowledge that its captain had abandoned the vessel to the unqualified mate, and that's what makes this even more of a case where the criminal activity was even without the direct knowledge of DRD. Although you properly found that they created that

atmosphere, in this particular instance even DRD didn't know about the criminal activity. That's what breaks the "pursuant to" or "in connection with" nexus which the government needs to show in order to bar ACL from these defenses and from the limitation.

So that's what the crux of this argument is, does the criminal activity satisfy the purpose of the statute [22]in breaking that "connection" or "pursuant." And I would say yes because, again, the statute was designed, one, to have somebody pay up front, which was done here, but then gives relief to those who are innocent. ACL was found to be innocent.

Now, I want to address the other part of the government's argument, which Your Honor did hear something on, and that is whether or not ACL acted with due diligence and took the appropriate precautions. One, as you found, although minimally, they did adequately vet the activities of DRD before entering into the charter party and did quarterly reviews of their relationship and how the tugs were being operated. That alone shows that you have already found they exercised due diligence and that they exercised the appropriate precautions.

Now, remember, you made those findings in the context of limitation proceedings, which is not negligence. It's a high standard of lack of privity and knowledge. So this Court has already found that ACL had no privity and knowledge of the illegal manner in which DRD was operating those tugs.

THE COURT: Accepting your argument concerning the criminal responsibility of DRD as well as a violation of other federal laws or regulations here, wouldn't that lead to exculpating similarly situated parties in every oil spill incident involving a contract towboat operator's violation of a regulation or law, which it must be assumed include many such [23]instances?

MR. NICOLETTI: No. If this was a mere civil violation, then I would agree with you, but your opinion was quite correct when it found that it was the criminal conduct which was the actual cause of this particular incident. It was the criminal conduct which protected ACL because it had no knowledge of that criminal conduct. It had performed due diligence, which protected ACL from that liability.

So if we were talking civil violations only, I would grant the Court that that's in connection with the contract. Once you add in the criminality, under all jurisprudence, if it's not foreseeable, the party is not responsible for the acts of those who it may be in contract with.

THE COURT: Bring me back into the context over the action between your client and the United States. The United States is seeking recovery here for monies that it paid out of the OPA fund to some contractors hired by ACL that ACL paid substantial funds to but withheld some sums, claiming that those contractors it hired either didn't show a right to the extra funds or that it was excessive. Is that basically what we have here ultimately on the merits, if we have to go to full trial on the issues, on whether or

not the decision here to pay those cleanup providers was capricious or not by the Coast Guard and the government? Is that ultimately what we [24]have here?

MR. NICOLETTI: No, we actually don't, Your Honor. Let me make one or two points.

Even if you were to grant them summary judgment, the Fifth Circuit, in dismissing the third-party claims, said that we can defend against the government on three grounds; not just solely capricious, but it also said if they negligently paid or didn't pay in accordance or failed to pay --

THE COURT: Right. I saw that.

MR. NICOLETTI: So you have multiple levels here to go through yet. So even if you would grant summary judgment,we would still have to determine whether or not the government paid negligently or not because that was one of the standards that the Fifth Circuit put when it dismissed the third-party claims.

THE COURT: It's interesting, in the context of that case, that the circuit discussed -- and again I think it's interesting in the context of what I would call the underlying action, the limitation action -- the thought that -- I'm not trying to insult anyone, but it sort of seems as if ACL is again taking some inconsistent positions here.

You acknowledge now the contract existed, which again is binding conclusions from the circuit as well, but

that somehow the binding nature of those contracts can be ignored because of the criminal wrongdoing of the third party, DRD, and [25]also in that context create another exception that's not in the statute against the imposition of strict liability. Am I misinterpreting your argument?

MR. NICOLETTI: You are, Your Honor. We are being consistent with -- since we were precluded from arguing the contracts are void *ab initio*, we have accepted the existence of the contracts. What we are saying is the statute doesn't say the mere existence of any contract. It says the conduct of the liable party, the third party, must be under § 2703 "in connection" with the contract or under § 2704 "pursuant to" the contract. I don't think anybody can reasonably argue that criminal activity is performed pursuant to a contract.

THE COURT: Rebuttal.

MR. DILAURO: Your Honor, the key is the existence of the contractual relationship at the time of the accident. That's what OPA requires.

Now, Mr. Nicoletti just said that ACL was found to have been an innocent party. Those are his words. But, in fact, that doesn't matter under the OPA regime because it is a strict liability regime.

Another point I would make is that although Mr. Nicoletti admits to the existence of a contract, it does feel as if we are moving back towards these void *ab initio* arguments. In other words, in the first breath, the

contracts existed, but they didn't exist because of this so-called [26]criminal activity. Well, that is kind of trying to have it both ways. Again, the fundamental point is that there was a contractual relationship in place when the accident occurred.

Another point I would make, in the *Westwood* case there were two elements, and I don't think I was perfectly clear in my brief. I dealt with them. I said we met both, and I think we do, but in fact meeting either one would be sufficient.

In other words, *Westwood* spoke to a relationship to hazardous substances. Well, "hazardous substances" are a CERCLA term. OPA's term is "oil," but that's what was happening on the day of the accident. It was an oil spill. So we meet that prong.

Then the other one was allowing the landowner to exercise control, and I think certainly this Court's findings in the *Gabarick* case demonstrated that ACL exercised a fairly significant degree of control over DRD's actions.

Now, it also found that that degree of control was insufficient to interrupt the *pro hac vice* status on DRD's part, but again we are under different law here, Your Honor.

THE COURT: Thank you.

MR. DILAURO: Thank you.

Appendix C

THE COURT: In this particular action, the United States seeks to recover damages and removal costs under the Oil Pollution Act of 1990, which I will refer to as OPA [27]further in these proceedings, found at 33 U.S.C. §§ 2701-61.

The facts underlying the subject lawsuit and the subject oil spill have spawned significant amounts of litigation with which this Court and the parties are intimately familiar. Those facts are set forth in particular detail. And for a full discussion of those facts see, for example, the *Gabarick v. Laurin Maritime* case at 900 F. Supp. 2d 669, 678, from September of 2012, along with to some extent the subsequent Fifth Circuit opinions in these proceedings and related proceedings.

ACL is a maritime transportation company that contracted in 2008 with DRD Towing Company to operate a towboat, the *Mel Oliver*. Pursuant to two charters with ACL, DRD was to transport fuel oil owned by ACL on the Mississippi River.

On July 23, 2008, the *Mel Oliver* pushed the ACL-owned barge the DM-932, laden with ACL-owned fuel oil, across the Mississippi River and into the path of the oceangoing vessel the *Tintomara*. The *Tintomara* and *Mel Oliver*/DM-932 convoy collided, causing approximately 419,286 gallons of fuel oil to spill into the Mississippi River.

Several lawsuits were filed in the wake of that collision and this case was stayed during their pendency. Relevant for our purposes here, ACL brought a declaratory [28]

judgment action, Civil Action No. 09-4466, asking this Court to find the two charter agreements referenced above to be void *ab initio*. This Court denied that request. See No. 09-4466 from this Court in 2014, Record Documents 1530 (Order and Reasons) and 1531 (Judgment). That ruling was affirmed on appeal to the United States Fifth Circuit Court of Appeals on May 21, 2014, in the Fifth Circuit opinion found at 753 F.3d 550 (5th Cir. 2014).

Of further relevance to this particular action between the United States and ACL, related proceedings arising out of the accident resulted in a determination that DRD personnel had violated a number of federal safety and navigational regulations and criminal laws. See Record Document 113-3 and 113-5 as well as the factual bases in related criminal proceedings. In the wake of the spill, extensive removal and cleanup costs were undertaken, resulting in costs alleged to total approximately $93,180,790.68. See Record Document 123-1.

The United States specifically requests in this particular motion:

(1) A declaration that prima facie elements of strict liability for response costs and damages have been established under OPA, confirming that ACL is a responsible party;

(2) A declaration under OPA, at § 2717(f)(2), [29]and the Declaratory Judgment Act that none of the statutory defenses to liability under OPA are available to ACL;

(3) A declaration under those authorities that ACL's liability to the United States under OPA is limited only by proof and not by a monetary cap, statutory or otherwise; and

(4) Dismissal of ACL's counterclaim against the United States because OPA displaces other law and does not allow ACL to sue the United States in this particular case.

The pertinent statutory provisions at issue are found at 33 U.S.C. §§ 2703 and 2703(a)(3), which deals with the complete third-party defense, along with § 2704, the limitation defense found under the same title.

Under § 2703(a)(3), a successful showing of the complete defense under that section would require ACL to show:

(1) DRD's acts or omissions were the sole cause of the discharge;

(2) No contractual relationship or a sufficiently attenuated contractual relationship existed between ACL and DRD at the time of the discharge; and

(3) ACL exercised due care and took precautions against foreseeable consequences.

See, in comparison, *International Marine Carriers v. Oil Spill Liability Trust Fund*, a Southern District of Texas opinion from 1994 at 903 F. Supp. 1097.

Appendix C

The limitation of liability provision at [30]§ 2704(a) provides a tonnage-based cap to liability of a responsible party. The exception to that rule is set forth at § 2704(c), which states that Subsection (a) of this section, the limitation provision, does not apply if the incident was proximately caused by gross negligence or willful conduct of, or the violation of an applicable federal safety, construction, or operating regulation by the responsible party, an agent or employee of the responsible party, or a person acting pursuant to contractual relationship with the responsible party.

There's an exception made to that latter party dealing with carriage by common carrier by rail, which doesn't apply here. The key language here is "a person acting pursuant to contractual relationship with the responsible party" under § 2704.

The United States bears the burden of establishing that the discharge was proximately caused by the gross negligence and/or violations of federal safety, construction, or operating regulation by DRD, which entity was acting pursuant to a contractual relationship with ACL.

As I stated earlier at the beginning of oral argument here today, the issues before the Court concern ACL's potential entitlement to the complete third-party defense afforded by § 2703(a)(3) and the limitation defense of § 2704.

As to the complete third-party defense under § 2703(a)(3), the parties dispute whether the acts and

omission [31]of DRD may properly be said to have occurred in connection with the charter agreements between DRD and ACL.

As I already noted, this Court has found in related proceedings DRD caused the discharge at issue and included: improperly placing an unlicensed steersman in control of the *Mel Oliver*, violating statutory and regulatory caps on maximum work hours in a 24-hour period, various radio and inland navigational rules, as well as reliance to an extent as well on the criminal factual basis findings in the related criminal charges against DRD owners, principals, and personnel. See Record Document 110 at 5-9 and authorities cited in that case.

In *Buffalo Marine Services, Inc. v. United States*, a Fifth Circuit opinion from 2011 found at 663 F.3d 750, specifically at pages 755 through 756, the Fifth Circuit held that the common purposes and shared history of CERCLA and OPA are such that the similarly worded provisions relating to contractual connections was particularly significant and indicated that § 2703(a)(3) of OPA is to be interpreted consistently with the attendant provisions of CERCLA. To that end, the Fifth Circuit held, in the context of OPA, Congress' use of "any contractual relationship" emphasized the breadth of the contractual relationship limitation.

In the context of this motion, ACL argues that the "in connection with" language of § 2703(a)(3) requires some [32]nexus between the contracts relied upon and the acts or omissions of the responsible party. I have already noted

there were two district court opinions which we found, one out of the Southern District of Texas in 1994 and another from the District of Massachusetts in January of 2003, that appear to have indicated that OPA requires only that "any contractual relationship" exists in order to deny a third-party defense to liability. ACL, however, argues that it is insufficient merely to show the existence of charter agreements between ACL and DRD. Instead, ACL argues that it must be shown that DRD's acts and omissions occurred in connection with those charter agreements.

ACL cites us to decisions of the Second Circuit interpreting parallel provisions of CERCLA. In *Westwood Pharmaceuticals v. National Fuel Gas Distribution Corporation* from 1992, found at 964 F.2d 85, specifically at page 89, the Second Circuit held that a responsible party is precluded from raising the third-party defense only if the contract between the responsible party and the third party somehow is connected with the handling of hazardous substances or if the contract allows the responsible party to exert some control over the third party's actions so that the responsible party can be held liable for the release or threatened release of hazardous substances caused solely by the actions of the third party. The Court went on to state that the mere existence of a [33]contractual relationship between such parties without more was insufficient to preclude the third-party defense. The United States argues basically, in reply, that the charter agreements between ACL and DRD satisfy the requirements of *Westwood Pharmaceuticals*.

Appendix C

This Court previously found in related proceedings that DRD contracted with ACL to perform towing operations of ACL's barges in order to satisfy the transportation needs of ACL's customers. See the *Gabarick* opinion from this Court in 2012 found at 900 F. Supp. 2d 669, page 673.

This Court also discussed ACL's constructive role in directing the captain where to take the vessel, the reason for the assigned voyage, and ultimately the dedicated purpose of that mission, ACL's economic gain. Because the charters at issue are related to the movement of oil and further allow ACL to exert some degree of control over DRD's activities, it would appear that the United States' argument has some basis in fact and law for the scenarios contemplated by *Westwood Pharmaceuticals*, that is, a relation to hazardous substances and exertion of control over third-party activities as being present. Accordingly, we find that DRD's acts and omissions arose in connection with the charter agreements it executed with ACL.

Additional cases on the issue of the parallel [34] provisions of CERCLA are further unsupportive of ACL's position on the issue of the connection between the charter agreements and DRD's actions in the present case. I have noted earlier in oral argument the *Lashins Arcade* case from the Second Circuit in 1996, found at 91 F.3d 353, concerning a straightforward sale of contaminated property that clearly did not relate to hazardous substances was not a defense-barring agreement; as well as the *Emerson* case from the Western District of New York in June of 2014, found at 2004 WL 1454389, specifically at Sections 6 through 7, where a lease, unlike

a sales contract in *Lashins*, contemplated third party's operation of a manufactured gas plant, and the lease was found to be connected with handling of hazardous substances.

I have given an example of a circumstance where a contractual relationship at issue would not be sufficient to bar ACL's use of the third-party defense, the examples being, as in the cases I have just cited, an outright sale of the *Mel Oliver* to DRD and a subsequent collision resulting in a discharge, which collision had nothing to do with the *Mel Oliver*'s condition at the time of the sale and would not be appropriate for OPA purposes to characterize the acts of DRD in transporting oil in its own behalf as connected to the contract of sale between the parties. However, where as here, the charter agreements contemplated that DRD would transport oil on behalf of ACL, DRD's activities while transporting that oil, [35]which ultimately caused the discharge, clearly occurred in connection with the charter agreements. Accordingly, the United States' motion for summary judgment is granted by declaring that ACL is not entitled to raise the § 2703(a)(3) defense under OPA.

As to the § 2704 limitation defense, the United States does not dispute that it bears the initial burden of establishing that preclusion of the defense, which is the exception to the general rule allowing limitation, applies. However, for many of the same reasons set forth already, it seems clear that the United States has established that the acts of DRD occurred pursuant to the charter agreements with ACL.

Appendix C

To the extent ACL argues that the actions of DRD fell beyond the scope of the charter agreements for purposes of either § 2703 or § 2704 based upon criminal conduct of DRD and other acts that this Court found against DRD, these claims by ACL are unpersuasive. First, Congress elected to apply strict liability under the provisions of OPA. Accordingly, the authorities cited by ACL, which rely primarily on exceptions to employer vicarious liability and arose under the general maritime law or even under the common or criminal laws, are inapposite.

The Fifth Circuit recently explained in an earlier appeal from this case:

[36]"When Congress enacts a carefully calibrated liability scheme with respect to specific remedies, the structure of the remedies suggests that Congress intended for the statutory remedies to be exclusive. Indeed, we are to conclude that federal common law has been preempted as to every question to which the legislative scheme spoke directly and every problem that Congress has addressed."

See the Fifth Circuit's 2014 opinion at 759 F.3d 420, specifically at pages 424 to 425.

Thus where Congress has enumerated specific statutory defenses and attendant exceptions to those defenses, the statutory provisions must be interpreted to be the exclusive mechanisms governing liability or the lack thereof under the act. As such, ACL's arguments that language requiring regulatory compliance, including compliance with civil and criminal laws, in the charter

agreements was sufficient to bring DRD's conduct beyond the scope of those agreements for purposes of OPA liability are unpersuasive.

The government correctly points out that accepting ACL's argument would be to exculpate similarly situated parties in every oil spill incident involving a contract towboat operator's violation of a regulation or law, civil or criminal, which it must be assumed include many such incidents.

See in comparison the *Buffalo Marine Services* [37] case, which I quoted earlier, from the Fifth Circuit in 2011, where the Fifth Circuit stated, "The interpretation advocated by appellants would allow contracting parties in cases such as this to avoid liability by the simple expedient of inserting an extra link or two in the chain of distribution and is inconsistent with the strict liability policy at the center of the statutory scheme enacted by Congress."

Because the position advocated by ACL would effectively allow the exception to swallow the strict liability rule contemplated by OPA through a simple inclusion, for example, of contractual language relating to regulatory or other laws' compliance, this Court grants the government's motion for summary judgment and we declare that ACL is not entitled to invoke the limitation defense under § 2704 of OPA.

The government has argued here that ACL is further not entitled to the complete defense under § 2703(a), the issues of connection to contract aside, because ACL did not

satisfy the requirements of exercising due care and taking precautions against foreseeable acts and consequences of DRD. Withholding judgment on whether or not the United States' arguments in this respect are correct, which arguments rely on statements in related proceedings that ACL turned the *Mel Oliver* over to DRD without conducting proper 100-point inspections and by completing "imperfect" vetting, the United States is entitled to prevail on this issue for other [38]reasons.

33 U.S.C. § 2703(a)(3) provides that the responsible party may invoke the complete defense "if" -- and I emphasis *if* -- "the responsible party establishes by a preponderance of the evidence that the responsible party (A) exercised due care with respect to the oil concerned, taking into consideration the characteristics of the oil and in light of all relevant facts and circumstances; and (B) took precautions against foreseeable acts or omissions of any such third party and the foreseeable consequences of those acts or omissions." Thus ACL bears the burden of establishing this component of the § 2703(a)(3) defense.

The United States placed ACL's ability to carry its burden in this respect at issue by asserting the arguments referenced above. ACL has failed to come forward with anything to the contrary and, therefore, in my opinion has failed to satisfy its burden in the context of the instant summary judgment motion and the attendant rules of summary judgment proceedings under *Celotex*, etc., of the Supreme Court.

Accordingly and in conjunction with the reasons articulated in Section A above, the Court grants the government's motion for summary judgment, declaring that ACL is precluded from raising the § 2703(a)(3) defense under OPA; finding, therefore, that ACL has failed to raise genuine issues of material fact sufficient to prevent entry of summary [39]judgment as to its entitlement to the statutory defenses as already noted. ACL raises no challenge to its designation as the responsible party for purposes of this act. The United States is entitled to the relief requested and the motion for summary judgment is granted. In that connection, the Court will follow up with the necessary written paperwork to satisfy this particular record.

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