UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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August Term, 2008

(Argued: November 21, 2008 Decided: January 20, 2009)

Docket Nos. 07-5801-cr, 08-1387-cr

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UNITED STATES OF AMERICA,

*Appellee*,

– v. –

IONIA MANAGEMENT S.A.,

*Defendant-Appellant.*

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Before: McLAUGHLIN, CALABRESI, LIVINGSTON, *Circuit Judges*.

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Appeal from a jury verdict in the United States District Court for the District of Connecticut (Arterton, *J.*) convicting Defendant-Appellant Ionia Management S.A. of violating the Act to Prevent Pollution on Ships ("APPS") by failing to "maintain" an oil record book while in U.S. waters as required by 33 C.F.R. § 151.25. We join the Fifth Circuit in holding that the APPS imposes a duty on subject ships to ensure that their oil record books are accurate (or at least not knowingly inaccurate) upon entering the ports or navigable waters of the United States.



We find that this requirement complies with international law, is supported by the plain text of the applicable regulation, and is necessary to advance the aims of the international treaties governing pollution in marine environments. Accordingly, the conviction is AFFIRMED.

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SANDRA S. GLOVER, Assitant United States Attorney (William M. Brown, Jr., Assistant United States Attorney, *on the brief*), *for* Nora R. Dannehy, Acting United States Attorney, District of Connecticut, New Haven, Conn., and JOHN L. SMELTZER, Attorney (Lana N. Pettus, Attorney, *on the brief*), *for* Ronald J. Tenpas, Assistant Attorney General, Environment and Natural Resources Division, Washington, D.C., *for Appellee*.

IRWIN H. SCHWARTZ, Sheryl Gordon McCloud, Seattle, Wa., *for Defendant-Appellant*.

ANDREW WEISSMANN, Jenner & Block LLP, New York, N.Y., *for Amici Curiae* The Chamber of Commerce of the United States, The Washington Legal Foundation, The Association of Corporate Counsel, The National Association of Criminal Defense Lawyers, The National Association of Manufacturers, and The New York State Association of Criminal Defense Lawyers.

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PER CURIAM:

Defendant-Appellant Ionia Management S.A. ("Ionia") appeals from a jury verdict convicting it of, *inter alia*, violating the Act to Prevent Pollution on Ships ("APPS") by failing to "maintain" an oil record book ("ORB") while in U.S. waters. The charges in this case derive from events aboard the M/T *Kriton* ("*Kriton*"), a 600-foot oil tanker managed (but not owned) by Ionia that flies under the flag of the Bahamas.[1] Ionia is incorporated in Liberia and headquartered in Greece. During the period named in the indictment (January 2006 to April 2007), the *Kriton*

[1] We recite only an abbreviated version of the facts here, as the full background is not necessary for reaching the legal issue presented in this case. Because we review a jury verdict, we view the facts and evidence in the light most favorable to the verdict.

*v. George F. Fish, Inc.*, 154 F.2d 798, 801 (2d Cir. 1946) (per curiam). But regardless of these, there was overwhelming evidence that the *Kriton*'s Chief Engineers specifically directed crew members to use the "magic hose," and so Ionia's argument is without merit in any event.

Furthermore, we refuse to adopt the suggestion that the prosecution, in order to establish vicarious liability, should have to prove as a separate element in its case-in-chief that the corporation lacked effective policies and procedures to deter and detect criminal actions by its employees. We note that this argument is made only by *amici curiae* and not by Ionia, and so we are not obligated to consider it. But the argument, whoever made it, is unavailing. Adding such an element is contrary to the precedent of our Circuit on this issue. *See Twentieth Century Fox Film Corp.*, 882 F. 2d at 660 (holding that a compliance program, "however extensive, does not immunize the corporation from liability when its employees, acting within the scope of their authority, fail to comply with the law"). And this remains so regardless of asserted new Supreme Court cases in other areas of the law. As the District Court instructed the jury here, a corporate compliance program may be relevant to whether an employee was acting in the scope of his employment, but it is not a separate element.

*B. Falsification Under 18 U.S.C. § 1519*

Ionia next asserts that the District Court's jury charge as to falsification under 18 U.S.C. § 1519 constructively amended the indictment by failing to instruct the jury that the falsification had to be "material." Because Ionia requested the instruction given by the District Court on the § 1519 counts, it has likely waived any argument concerning a constructive amendment. *See United States v. Giovanelli*, 464 F.3d 346, 351 (2d Cir. 2006) (per curiam) ("[I]f a party invited the charge . . . she has waived any right to appellate review of the charge." (internal quotation



marks omitted)). In any event, however, a constructive amendment occurs only when the trial evidence and jury instructions "so modify" the terms of an indictment that "there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment." *United States v. Mollica*, 849 F.2d 723, 729 (2d Cir. 1988) (internal quotation marks omitted). In considering this question, courts "have constantly permitted significant flexibility in proof, provided that the defendant was given *notice* of the *core of criminality* to be proven at trial." *United States v. Rigas*, 490 F.3d 208, 228 (2d Cir. 2007) (footnote omitted) (internal quotation marks omitted). Here, Ionia was on notice of the "core criminality" to be proven at trial. Moreover, the evidence shows that the falsification in this case was indisputably material, and thus Ionia's rights were not substantially affected.

*C. Sentencing*

Lastly, Ionia appeals its sentence, arguing that the District Court made several procedural errors that warrant a remand. Ionia primarily argues that the District Court erred in its grouping analysis by not following Sentencing Guidelines Section 3D1.2. The District Court, however, was not sentencing pursuant to this section, and was not required to do so because there were no guidelines applicable to the organizational offense at issue. Accordingly, the District Court "determine[d] an appropriate fine by applying the provisions of 18 U.S.C. §§ 3553 and 3572." *See* U.S.S.G. §§ 8C2.1, 8C2.10. In announcing the sentence, the District Court stated: "And I want you to understand that I in no way felt constrained and confined or mandated [by the Guidelines]." The District Court also explained how the sentence was appropriate to serve the "deterrent[,] punishment and public message function" for a company that had "previously been convicted of a like crime" and "apparently failed to see the seriousness" of its obligations. Thus,

the District Court was not distracted by any alleged erroneous Guidelines calculation or grouping. The other sentencing challenges are similarly without merit. Given that a fine of $4.9 million is also substantively reasonable in this case, there is no reason to disturb the District Court's sentence.

## III. Conclusion

We have carefully considered all of Ionia's claims, and we find them to be without merit. Accordingly, the judgment of the District Court and the jury verdict are AFFIRMED.