UNITED STATES DEPARTMENT OF COMMERCE
OFFICE OF ADMINISTRATIVE LAW JUDGE
Suite 6716
WASHINGTON, D.C. 20230

In the Matters of:	)	DOCKET NUMBERS:
	)	
TSANGEOS PANAGIOTIS	)	755-051
SEAGROUP, INC.	)	755-052
EL MINI LAUREL, INC.	)	755-053
	)	
Respondents.	)	

GOVERNMENT'S CLOSING ARGUMENT AND
PROPOSED FINDINGS OF FACTS

THE GOVERNMENT, through the undersigned attorney, submits its Closing Argument and Proposed Findings of Fact in the above-captioned proceedings initiated by the National Oceanic and Atmospheric Administration (NOAA). The Government's submission is filed in accordance with the Order of the Administrative Law Judge dated April 27, 1988, which extended the date for filing closing briefs to May 27, 1988.

CLOSING ARGUMENT

The two count Notice of Violation and Assessment (NOVA) issued by the Government on December 15, 1986, charged the Respondents jointly and severally with (1) operating a vessel in such a manner as to strike or damage a coral reef in the Key Largo National Marine Sanctuary (the Sanctuary) and (2) with injuring, harmfully disturbing, breaking, cutting, or damaging coral in the Sanctuary. Such activities are prohibited for the Key Largo Marine Sanctuary at 15 C.F.R. §929.7(a)(6)(i) and 15 C.F.R. §929.7(a)(1)(i), respectively. The charges are based

upon harm or injury occurring to coral species situated upon or adjacent to Molasses Reef on December 11, 1986. Respondents Tsangeos Panagiotis, El Mini Laurel, Inc., and Seagroup, Inc., were the Greek captain, owner, and United States disclosed agent for the M/V MINI LAUREL, a Panamanian registered bulk freighter operating in the Key Largo National Marine Sanctuary that date.

There is no question but that coral species suffered damage, harm, or injury that date. That is certain upon the Government's evidence (TR at 189-219; Gov't Exh. #12);[1] and Respondents acknowledge as much (ML Exh. #10). Respondents defend, however, that they are not responsible for the acts alleged in the NOVA either in law or in fact. In so asserting, Respondents raise the following issues:

(1) whether the Government's application of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, (the MPRSA), 16 U.S.C. 1431 et seq., and regulations implemented thereunder at 15 C.F.R. Part 929 to the foreign owner and foreign operator of the M/V MINI LAUREL is in accordance with international law,

(2) whether the M/V MINI LAUREL even caused the injury, harm or damage to coral species documented in this case, and

(3) whether Respondent Tsangeos Panagiotis, the M/V MINI LAUREL's captain, and Seagroup, Inc., the vessel's disclosed U.S. agent, are properly charged and held liable for the violations

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[1] References to the hearing transcript will be noted as TR, Government Exhibits noted as Gov't Exh. by number, and Respondents' exhibits as ML by number throughout this brief.

pled.

Respondents further maintain the penalty assessed by the Government is improper for a whole host of reasons. The Government submits that upon both the law and the evidence, the violations alleged are properly charged and convincingly proven as to Respondents El Mini Laurel, Inc., and Tsangeos Panagiotis, the owner and operator of the M/V MINI LAUREL, and that the penalties assessed are reasoned and appropriate as against these two. The Government concurs in the dismissal of Respondent Seagroup, Inc., as a party.

I. THE APPLICATION OF SANCTUARY REGULATIONS TO THE M/V MINI LAUREL, HER FOREIGN OPERATOR AND FOREIGN OWNERSHIP INTERESTS IS IN ACCORDANCE WITH RECOGNIZED PRINCIPLES OF INTERNATIONAL LAW

Section 305 of the MPRSA, 16 U.S.C. at §1435, provides:

> Sec. 305. Application of Regulations and International Negotiations.
> (a) Regulations. - The regulations issued under section 304 shall be applied in accordance with generally recognized principles of international law, and in accordance with the treaties, conventions, and other agreements to which the United States is a party. No regulations shall apply to a person who is not a citizen, national, or resident alien of the United States, unless in accordance with-
> (1) generally recognized principles of international law;
> (2) an agreement between the United States and the foreign state of which the person is a citizen or
> (3) an agreement between the United States and the flag state of a foreign vessel, if the person is a crewmember of the vessel.
> (b) Negotiations. - The Secretary of State, in consultation with the Secretary, shall take appropriate action to enter into negotiations with other governments to make necessary arrangements for the protection of any national marine sanctuary and to promote the purposes for which the sanctuary is established. (emphasis supplied)

Respondents argue that the statute itself denies the United

States the authority to sanction a foreign state's vessels and citizens unless there is a treaty or formal agreement between the United States and the foreign state concerned which expressly "acknowledges the right of the United States to maintain jurisdiction over the coral seabed beyond the three-mile territorial sea claimed by the United States." Respondents' Memorandum In Support of Motion to Dismiss Civil Proceedings, dated February 23, 1988, Page 5. Respondents reason that "since the United States only claims a three-mile territorial sea, ... any additional amount of coral seabed territory claimed by the government would have to be expressly acknowledged by the foreign government whose nationals are the intended recipients of such penalties." Id at page 5-6. This argument is fatally flawed. First, the argument ignores the plain wording of the statute. The language of Section 305 is disjunctive and permits the application of a regulation to foreign citizens in the absence of any treaty or agreement where the action is "in accordance with.... generally recognized principles of international law." Second, the actions of the United States in designating the Sanctuary, issuing regulations to protect living coral resources within its bounds, and imposing civil penalties for violations of the Sanctuary regulations are not an assertion of territorial sovereignty over the high seas. Rather, these actions represent an exercise by the United States of its sovereign rights in the natural resources outside the territorial sea. It is an exercise which is, in fact, fully consistent with recognized principles of

international law.

To begin, international law currently recognizes the sovereign right of a coastal state to protect and preserve the natural resources of its continental shelf. As early as 1945, the United States formally held to the doctrine that a coastal state has an original, natural, and exclusive right to the natural resources of the continental shelf. Policy of the United States with respect to the Natural Resources of the Subsoil and Seabed of the Continental Shelf, Proclamation No. 2667, 3 C.F.R. 67 (1948), 59 Stat. 884 (1945). That doctrine and the corresponding right to assert jurisdiction and control over those continental shelf resources were later affirmed as principles of international law by the Convention on the Continental Shelf, April 29, 1958 (CCS) 499 U.N.T.S. 311, 15 U.S.T. 471. Specifically, Article 2 of the CCS states:

1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

2. The rights referred to in paragraph 1 of this article are exclusive in the sense that if the coast State does not explore the Continental Shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the Continental Shelf, without the express consent of the coastal State.

3. The rights of the coastal state over the Continental Shelf do not depend on occupation, effective or national, or on any express proclamation.

4. The natural resources referred to in these articles consist of the mineral and other living resources of the seabed and subsoil together with living organisms belonging to the sedentary species, that is to say, organisms which, at the harvestable stage either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or

the subsoil. (emphasis supplied).

The United States ratified the CCS in 1961 and became a party when the Convention entered into force in 1964.

The principle of exclusive coastal state jurisdiction over continental shelf natural resources is the most fundamental of all the rules of law embodied in Article 2 of the CCS:

> ". . . The rights of coastal states in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist ipso facto and ab initio, by virtue of its sovereignty over the land, and as an extension of it, in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right.": (emphasis supplied).

North Sea Continental Shelf Cases 1969 I.C.J. Rep. 3, Para. 47.

The living coral resources of Molasses Reef are part of the continental shelf as defined in Article 1 and are sedentary species as defined in Article 2, paragraph 4 of the CCS. Proclamation No. 3339, 25 Fed. Reg. 2352 (1960) (establishing Key Largo Coral Reef Preserve, the predecessor to the Key Largo National Marine Sanctuary), U.S. v. Ray, 423 F. 2d. 16, 23 (5th Cir. 1970).[2] The CCS thus sets forth a principle of

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[2] In United States v. Ray, the defendants intended to conduct construction activities on two coral reefs, Triumph and Long Reefs, situated in international waters approximately 4-1/2 miles off the southeast coast of Florida. The United States brought an action for injunctive relief on the grounds that the activities of the defendants were an interference with the rights of the United States because the proposed construction would cause irreparable injury to the reefs which were subject to the control of the United States. The court held that the rights of the United States in the reefs and the vital interests which the government has in preserving the area required full and permanent injunctive relief against any interference with those rights. 423 F.2d at 23. The court in Ray determined that, "the [CCS] explicitly recognize[s] the sovereign rights of the United States

international law which clearly recognizes the sovereign rights of the United States over the natural resources of the continental shelf, including the living coral of Molasses Reef.[3]

The right of a coastal state to regulate the use or extraction of living natural resources seaward of the territorial sea is also recognized as part of customary international law supporting the exclusive economic zone concept. The United States, thus, has internationally recognized jurisdiction over Molasses Reef because it is a resource within the United States Exclusive Economic Zone. On March 10, 1983, President Ronald Reagan announced internationally recognized guidelines for United States ocean policy and proclaimed a 200-mile Exclusive Economic Zone (EEZ) for the nation, in which the United States would exercise sovereign rights for purposes of exploring, exploiting, conserving and managing living and non-living resources within 200 nautical miles of its coast. Proclamation No. 5030, Exclusive Economic Zone of the United States of America, (March 10, 1983, 3 C.F.R. 22 (1984).

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and the exclusiveness of those rights to explore the [continental] Shelf and exploit its natural resources." Id. at 21.

[3] The international propriety of this principle was most recently articulated in the United Nations Convention on the Law of the Sea (LOS Convention) U.N. Doc. A/Conf. 62/122 (1982), reprinted in United Nations, The Law of the Sea: United Nations Convention on the Law of the Sea (UN Pub. Sales No. E.83.V.5). The rights of coastal states over the continental shelf are specified in Article 77 of the LOS Convention. The living coral resources of Molasses Reef are within the scope of rights outlined in Article 77. Both Panama and Greece are signatories of the Convention. The United States' position relative to the LOS Convention is explained in footnote 4.

In doing so, the President declared that:

> Within the Exclusive Economic Zone, the United States has, to the extent permitted by international law, (a) sovereign rights for the purpose of exploring, exploiting, conserving and managing natural resources, both living and non-living, of the seabed and subsoil and the superjacent waters and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; and (b) jurisdiction with regard to the establishment and use of artificial islands, and installations and structures having economic purposes, and the protection and preservation of the marine environment.
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> * * *
>
> The United States will exercise these sovereign rights and jurisdiction in accordance with the rules of international law. (emphasis supplied)

Id. at 23.

The United States EEZ Proclamation is consistent with the sovereign rights of coastal states in resources outside the territorial sea described in Article 56 of the LOS Convention.[4] Supra at footnote 3. According to Article 56, a coastal state has:

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[4] The United States' position on the LOS Convention is set forth in a statement accompanying the President's EEZ Proclamation. Statement by the President, March 10, 1983, 19 Weekly Comp. Pres. Doc. 383 (March 14, 1983). While affirming his July 1982 decision that the United States would not sign the LOS Convention because of "several major problems" in the deep seabed mining provisions, the President stated that the "[LOS] Convention contains provisions with respect to traditional uses of the ocean which generally confirm existing maritime law and practice and fairly balance the interests of all States." Id. The President stated that his decision to proclaim an EEZ in which the United States will exercise sovereign rights over living and non-living resources will "promote and protect the oceans interests of the United States in a manner consistent with those fair and balanced results in the [LOS] Convention and international law." Id.

> sovereign rights [in the EEZ] for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil. . . (emphasis supplied).

So widely accepted is the concept of the EEZ, that the International Court of Justice (ICJ) stated in the Tunisia-Libya Continental Shelf case that "the exclusive economic zone. . . may be regarded as part of modern international law." Case Concerning the Continental Shelf (Tunisia/Libya Arab Jamahiriya), 1982 I.C.J. Rep. 18, Para. 100. Moreover, commenting on the applicability of the LOS Convention to the boundary dispute under consideration in the Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine, 1984 I.C.J. Rep. 24, Para. 19, the ICJ noted that the LOS Convention "is intended to endorse the institution of an exclusive economic zone," supra at 50, para. 84, and that the provisions of the Convention, concerning the continental shelf and the exclusive economic zone "may . . . be regarded as consonant at present with general international law on the question," supra at 53, para. 94.

Recognizing the legitimacy of the EEZ concept, courts have upheld the enforcement of the Magnuson Fishery Conservation and Management Act's scheme for the exclusive conservation and management of fishery resources within this 200-mile limit.[5] See, United States v. Kaiyo Maru No. 53, 669 F.2d 989 (9th Cir. 1983); Washington Trollers Association v. Kreps, 645 F.2d 684 (9th Cir. 1981).

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[5] 16 U.S.C. §1801 et seq.

The Government's interest in preserving the reefs off its shores because of their unique character and importance and for the public use and enjoyment, and the statutory and regulatory measures the United States has taken to protect such living coral resources fit well within these recognized international law principles. The MPRSA provided explicit statutory authority for the Secretary of Commerce to designate the Key Largo National Marine Sanctuary and to protect Molasses Reef and other Sanctuary resources. At the time the Sanctuary was so designated, the statute permitted the designation of ocean areas "as far seaward as the outer Continental Shelf"[6] as national marine sanctuaries in order to preserve such areas "for their conservation, recreational, ecological or esthetic values." Pub. L. No. 92-532, §302. The regulations violated in this case are among those issued as "necessary and reasonable regulations to implement the terms of the designation" and proscribe activities detrimental to reefs and coral species within the Sanctuary.

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[6] The Secretary's authority to designate and protect marine sanctuaries is no longer restricted to the outer edge of the continental shelf, but extends to "ocean waters" and "submerged lands over which the United States exercises jurisdiction consistent with international law." 16 U.S.C. §1432(3). As the legislative history of this section makes clear, the MPRSA applies to the water column and seabed lying beyond the outer limit of the continental shelf to a distance 200 miles from the base line from which the territorial sea is measured. This extension of the seaward limit was made to conform the statute to developments in domestic and international law. H. Rep. No. 187, 98th Cong. 1st Sess. 18-20 (1983). Such developments include the widespread proliferation of coastal state resource jurisdiction to 200 miles and establishment by the United States of a 200-mile EEZ. See discussion of recognized principles of international law, supra.

In sum, the MPRSA permits the application of these regulations to foreign vessels or citizens because these regulations are specifically designed to protect living corals within the Sanctuary, and the right of the United States to act to conserve, manage, and protect such a resource beyond its territorial sea is established according to well recognized principles of international law. The United States is, therefore, lawfully applying the regulations at 15 C.F.R. 929.7(a)(1)(i) and (6)(i) to the M/V MINI LAUREL's Greek captain and Greek corporate owner.[7]

II. THE M/V MINI LAUREL IS WELL ESTABLISHED AS THE OFFENDING VESSEL

A. Proof of the Violations

On December 11, 1986, at approximately 5:00 p.m. while trolling inbound across the south end of Molasses Reef aboard his charter vessel, the F/V MISS KITTY, Captain Roger Blevin noticed a freighter "coming down on the reef" (TR at 23, 25 and 55; Gov't Exh. #1). The apparent course of the vessel "looked like it was going to take it right into the tower," referring to the Molasses

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[7] This court should be aware that there is an unreported precedent supporting the Government's position on this issue. In the well known case of a Cypriot freighter grounding on Molasses Reef, Judge Clyde Atkins upheld the right of the United States to maintain a natural resource damage claim against the foreign Defendants, in part, upon finding that the United States has "a protectable sovereign interest in Molasses Reef." United States v. M/V Wellwood, No. 84-1888 (S.D.Fla. filed August 10, 1984), Order Denying Motion for Summary Judgment filed September 29, 1986 (copy attached as Appendix A).

Reef Light Tower situated behind the reef (TR at 25).[8]

Recognizing the freighter's course would take it across the eastern reaches of the reef, Blevin and his mate aboard the F/V MISS KITTY undertook to try and warn the freighter off the reef. Using VHS Channel 16, a hailing distress frequency, Blevin hailed the freighter a number of times (TR at 25 and 26; Gov't Exh. #1). The freighter did not respond (TR at 26). Finally, Blevin broadcast a warning that if the freighter did not change course it was going to run into Molasses Reef (TR at 26). Again, the freighter evidenced no response (TR at 26). After pulling in her trolling lines, Captain Blevin brought the F/V MISS KITTY about and headed towards the freighter blowing the F/V MISS KITTY's horn while his first mate stood on her bow waving to the freighter (TR at 26). There was no watch or lookout visible on the bow of the freighter (TR at 26). Still, there was no response and the freighter continued on its errant course (TR at 27). As the freighter came upon the reef, the F/V MISS KITTY was abreast of her (TR at 27). At hearing, Captain Blevin illustrated the path of the MISS KITTY relative to the path of this freighter as it traversed, passed behind and exited out across Molasses Reef to the south (TR at 31-33). From his

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[8] In describing the course of the freighter, Captain Blevin speaks with authority. He has made his living on the water since moving to Key Largo 15 years ago, and is intimately familiar with both the location and the features of Molasses Reef, by virtue of his years of operating dive and glass bottom boats in, around and through the Sanctuary and the adjacent John Pennekamp State Park as well as his own in-the-water diving experiences (TR at 24 and 25). At one time it was estimated that Captain Blevin had run 60,000-65,000 divers to the area of Molasses Reef (TR at 57).

description of her course and witnessed events, there is simply no doubt that this freighter, the M/V MINI LAUREL,[9] crossed and transitted behind Molasses Reef.

As is clear from the charts, slides, photographs and testimony of record, Molasses Reef is positioned along the reef line but arcs slightly seaward along its length. The crest of the reef is marked by a series of mooring buoys. Molasses Light itself sits shoreside of the reef near the reef's southern extension and shoreside of the shallower transition zone immediately behind the reef (Gov't Exh. #7 and 10; ML Exh. #11a, b and c). When passing the freighter amidships, the mooring buoys and the Straights of Florida were seaward of the F/V MISS KITTY while the M/V MINI LAUREL was shoreward (TR at 31). Thus, the F/V MISS KITTY was inside the mooring buoys and the M/V MINI LAUREL was between the F/V MISS KITTY and Molasses Tower Light (TR at 33). To find itself in that position, the M/V MINI LAUREL necessarily transitted Molasses Reef. The Government's evidence, thus, irrefutably places the M/V MINI LAUREL where the observed damage occurred. The following evidence places her there when it occurred as well.

As the M/V MINI LAUREL passed over and behind Molasses Reef, Blevin saw that the vessel was "churning up the bottom" (TR at

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[9] The freighter's identity is certain as Blevin copied her name, the M/V MINI LAUREL, and her Panamanian registration number from their display on her stern and thereafter immediately reported the witnessed incident and this information to appropriate authorities (TR at 34 and 43; Gov't Exh. #1 and ML Exh. #14).

28). The vessel left a brown trail or sediment wake as it proceeded (TR at 28 and 29). Common sense is consistent with Blevin's own observation that these circumstances suggested the vessel was "stirring up the bottom" (TR at 27). This appears to have been recognized by at least one person on board the M/V MINI LAUREL. As the freighter passed, Blevin saw two to three people standing on her stern (TR at 28-29; Gov't Exh. #1). Through waving and tooting the F/V MISS KITTY's horn, Blevin was able to draw the attention of these people to the freighter's obvious wake (TR at 29). At this point, one of these individuals took off running toward the front of the ship and shortly thereafter the ship altered course turning southward, out toward deeper water[10] (TR at 29). When Sanctuary Manager William Harrigan arrived onscene at approximately 5:40 p.m.[11], it was also immediately apparently to him that something had occurred (TR at 61; Gov't Exh. #3). Harrigan saw clear indications that coral had been hit. Specifically, he observed fine white calcium powder and brown debris stirred up in the water (TR at 61). This condition was unmistakably recent because the water in the disturbed area was still thoroughly mixed while the rest of the reef was marked by normal, clear water (TR at 62). That coral had indeed been impacted was confirmed when Harrigan entered the water using mask, snorkel and divelight (TR at 62; Gov't Exh.

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[10] The course as altered took the freighter between mooring buoys marking the Reef (TR at 29).

[11] TR at 61; Gov't Exh. #3.

#3). Harrigan could see the stark white calcium interior of a coral formation that had been exposed by an impact (TR at 62; Gov't Exh. #3). He noted that debris from the coral was still suspended in the water, again, a sign that the impact had been recent (TR at 63). At that moment, the M/V MINI LAUREL was still visible from that location heading southward (TR at 63; Gov't Exh. #3) and there were no other vessels in sight[12] (TR at 63).

That which was obvious to these witnesses - that the M/V MINI LAUREL had disturbed and damaged coral as it passed - was corroborated and strengthened by information gathered in the hours and days that followed. First, as Harrigan recalled at the hearing, the coral damage he saw on scene was in about 8 feet of water with seas running at that location about 2 to 4 feet (TR at 121 and 145-146). Shortly after the incident, he observed the M/V MINI LAUREL's draft to be approximately 5-1/2 feet forward and 9 feet aft[13] (TR at 125-126; Gov't Exh. #3). Considered together, these facts make the conclusion that the M/V MINI LAUREL had bottom contact all the more reasonable because that conclusion is shown to be both consistent with and to be expected upon known physical circumstances. Second, the grounding site itself offered information about the course and characteristics

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[12] When Blevin witnessed the M/V MINI LAUREL traverse Molasses Reef, there were only two other vessels on scene. One was the F/V MISS KITTY and the other was a "private vessel.... in the area of 20 feet, 25 feet long" (TR at 31). Based upon the water depth at the grounding site, neither of these vessels could have caused the documented damage.

[13] Respondent Tsangeos states that the vessel's draft was about 8-1/2 feet upon departing Baltimore.

of the offending vessel. Specifically, from the direction of coral displacement, Sanctuary Biologist John Halas was able to conclude the vessel had entered the site from a northeasterly direction and travelled out to the west-southwest (TR at 251-252). Further, Halas' examination identified the presence of twin furrows through the site which paralleled each other for a significant distance in the live bottom area behind the reef (Gov't Exh. #12). These furrows are visible in aerial photos taken by Harrigan during the conduct of Halas' site exam (TR at 80-81; Gov't Exh. #7a-d). Based upon later in-the-water measurements, Harrigan found the furrows to be approximately 1-1/2 - 2-1/2' wide and, from apparent center to apparent center, from approximately 17'3" to 18' apart (TR at 84; Gov't Exh. #8). From this information, it was apparent to both Harrigan and Halas that the bottom of the vessel causing the tracts would have two low protrusions, such as keels, skegs, or rudders (TR at 85-86 and 225-226). Halas also concluded the vessel had to have been large (TR at 225-226; Gov't Exh. #12 at 2). At approximately 210' in length, the M/V MINI LAUREL certainly fits that requirements.

Further, the information the site yielded concerning the vessel's direction of travel fits the M/V MINI LAUREL's actual course as witnessed by Captain Blevin. Her fit to the furrows was discovered by Sanctuary personnel upon travelling to the Port of Lake Charles, Louisiana to investigate the underside of her hull.

Owing to water conditions at the M/V MINI LAUREL's dockage in Lake Charles,[14] Halas and Harrigan were limited to conducting underwater measurements of the features of the rudders and skegs at her stern. Using a surveyor's tape and feeling their way through this process, Harrigan determined the M/V MINI LAUREL had twin skegs which were each approximately 1'3" in width at the bottom with approximately 17'3" between them measured from their apparent centers (Gov't Exh. #8). The essential fit of these masurements to those taken of the furrows laid by the culprit vessel is clear.

From all the foregoing testimony and evidence the fact the M/V MINI LAUREL is the culprit vessel is undeniable.

B. Respondents' Defense on the Facts

Respondents, of course, view the facts differently. Ignoring the convincing weight of the foregoing testimony and evidence, Respondents focus on the color of paint found at a few points along the path of observed damage, the results of an underwater survey conducted of the M/V MINI LAUREL on December 18, 1986, and the Captain's denials. Upon examination, however, it is clear the conclusions Respondents would have this court draw on each of these points is an unreasonable stretch of the evidence.

However they phrase it, Respondents essentially argue that

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[14] The underwater inspection was intended to include an examination of her hull for physical marks and abrasions but essentially zero visibility water conditions prevented this type of inspection (TR at 86, 159, and 223-224).

since the M/V MINI LAUREL's bottom antifoulant paint was red (TR at 344; ML Exh. #9a), it was not the M/V MINI LAUREL which caused the damage to coral species documented in this case because bottom paint residues found at the site are not red.[15] The argument fails at its foundation. First, the M/V MINI LAUREL received four coats of hull paint at its drydocking on October 16, 1986 (ML Exh. #15 at 5). The evidence establishes the color of only her outer antifoulent layer. There is a basis for concluding her inner layers were a darker, non-red color. Areas of the M/V MINI LAUREL's hull where scrape marks were noted in the red paint amidships appeared dark on Respondents' underwater video and were described as black by diver Dan Wiitela (TR at 358; ML Exh. #9a). Coral bottom disturbing the vessel's bottom paint might well be expected to extend unto and, therefore, evidence such inner paint layers.[16] Second, some showing of a reddish paint is evident on coral in one of the slides taken by John Halas and that fact was pointed out at the hearing (TR at 196 and 248; Gov't Exh. #13). There is simply no reason to doubt that the M/V MINI LAUREL was the offending vessel

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[15] The characterization of the predominant color of the paint residue as observed at the site under 8 to 9 feet of water proved a devilish subject at the hearing. Witnesses variously described it as "a dark substance that appeared to be a greyish paint.... maybe a dark blue, somewhere between grey and black" (TR a 147-148), "a greyish, sort of a greyish tending towards a darker shade of grey or even blackish" (TR at 193), "as grey, to tending towards black" (TR at 246), and "this bluish and blackish greyish material." (TR at 380)

[16] John Halas noted the paint residues he saw were "layered up" in appearance (TR at 249).

on the basis of this argument.

Respondents argue that it was not the M/V MINI LAUREL that caused the documented damage because no suspect paint abrasions or other bottom damage was found during their own underwater survey of her hull. Although this argument is appealing in its logic, it too suffers weaknesses in its foundation. The argument asks the Court to infer the M/V MINI LAUREL had no suspect bottom abrasions from the fact none were found. However, it is not reasonable to draw such an inference where the circumstances of the grounding and the conditions attending the survey suggest another equally likely explanation - that the evidence of abrasions or scratches was simply missed. To begin, bottom abrasions from this grounding would not necessarily be expected to be numerous or extensive for a number of reasons. The damage done was predominantly to protected "soft corals," i.e., sea fans and sea whips (TR at 194; Gov't Exh. #12). As shown in the videotape of the grounding damage, these species mainly suffered breaking or uprooting, events which would not be likely to scar the underside of a 210 foot freighter (Gov't Exh. #14). A review of this videotape as well as the underwater slides will show that there were but a few places where paint residues were even apparent. This, in turn, suggests the vessel's paint would not be disturbed to a great extent. Captain Tsangeos himself reported he noticed no detectable change in the M/V MINI LAUREL's speed, an observation confirming the judgment of Harrigan that this grounding involved only a glancing blow to the reef (TR at

85-86; ML Exh. #6).[17]

As to the underwater survey, although the Government does not question Diver Dan Wiitella's good faith in believing his search was thorough, the circumstances themselves make that questionable. His testimony establishes he was in the water a little over an hour (TR at 351). Part of that time - about one third by his estimate - was spent making the videotape in evidence as ML Exh. #9a (TR at 351). The original visual survey involved the length and breath of the M/V MINI LAUREL's underside (TR at 352). Wiitella estimated the underwater length to be about 200 feet with a width of 50 to 60 feet (TR at 353). At those dimensions, Wiitella's task required the survey of in the neighborhood of 11,000 square feet of area in about 40 minutes. The task for Wiitella was made more difficult by the fact it, too, was carried out in the murky waters of the Port of Lake Charles. Wiitella's visibility during the survey varied from 3 to 6 feet (TR at 344). Commentary by Dan Gilbert, Wiitella's dive supervisor, during the underwater filming twice makes mention the very poor visibility (ML Exh. #9a). On the whole, the government submits the survey, under the conditions it was conducted, was akin to a search for the proverbial needle in a haystack.

In the final analysis, looking to all the evidence, it is simply more likely the M/V MINI LAUREL is the offending vessel

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[17]Halas also testified he would not have expected persons on board the offending vessel to feel her bottom contact through track area (TR at 219-220).

than not.

III. THE CAPTAIN AND DISCLOSED U.S. AGENT AS PARTIES TO THIS PROCEEDING

A. The Respondent Vessel Operator is a Proper Party

It is axiomatic that a person may be held liable for his own illegal or tortuous acts. Captain Tsangeos, therefore, bears first line responsibility for his own acts or omissions in operating the M/V MINI LAUREL and the harm to protected corals that resulted. The doctrine of respondeat superior, which holds an employer/principal liable for the acts of his employee/agent committed within the course and scope of his employment, operates to impute liability to the master; in doing so it does not absolve the servant in the first instance.

In truth, Respondents appear to argue only that Captain Tsangeos' continued presence is unnecessary as the owner of the M/V MINI LAUREL has appeared and is available to litigate all issues and, presumably, pay a penalty in the event a violation of regulations is found. NOAA, however, has an interest in establishing an independent record in such proceedings as to vessel operators since established violations justify higher penalties in the event of further violations. Captain Tsangeos is, therefore, both a proper and necessary party.

B. Upon the Record, Seagroup, Inc., Should be Dismissed From These Proceedings

The affidavit of Seagroup's President, Christopher

Bastis, constitutes the only clear evidence with respect to the relationship of Seagroup to the M/V MINI LAUREL and her interests. According to that affidavit, Seagroup, Inc., is "in the primary business of conducting [disclosed] agency representation for owners of oceangoing vessels in the United States." (M.L. Exh. #1 at 1.) As the United States agent for El Mini Laurel, Inc., Bastis states Seagroup's functions were limited to "assisting the managing agents in Greece [, Ceres Hellenic Shipping Enterprises, S.A.,].... collecting freights and/or charter hire and transmitting these funds to the owners and various other administrative agency functions." (M.L. Exh. #12 at 2.) Mr. Bastis further affirms Seagroup has no ownership interests in any vessels, did not manage, operate, or control the day-to-day operations or navigation of the M/V MINI LAUREL in 1986, and had no hiring or firing authority over her crew.

Government counsel has carefully reviewed prior decisions of this court wherein other persons have been held to share responsibility for the transgressions of a vessel operator. This court has done so only where such persons (1) authorized the operator to engage in activities which led to prohibited conduct, Brownsville Shrimp Cases, 3 O.R.W. 828 (NOAA 1984); Boggess, 4 O.R.W. 260 (NOAA 1985) rev. den. 4 O.R.W. (NOAA APP 1985); Gulf Shrimp Boats, Inc., 4 O.R.W. 657 (NOAA 1986), (2) was in a position to exercise control over vessel operations or pertinent equipment, Deaton et al, 4 O.R.W. 496 (NOAA 1986), rev. den. 4 O.R.W. 580 (NOAA APP 1986); Mattson, Claim for Attorney's Fees

Under EAJA, 4 O.R.W. 202 (NOAA 1985), rev. denied on other grounds, 4 O.R.W. 276 (NOAA APP 1985), aff'd 4 O.R.W. 385 (DOC APP 1985), or (3) was a significant beneficiary of the profits or operation of the vessel. Millis, 4 O.R.W. 340 (NOAA 1985). In this case, it is certainly true that Seagroup's functions on behalf of El Mini Laurel, Inc., and Ceres Hellenic Shipping permitted them to operate the M/V MINI LAUREL in commerce within the United States. Further, Seagroup no doubt served to profit from that commerce by facilitating its occurrence. Nonetheless, measured against precedents of this Court, the Government joins Respondents in requesting dismissal of Seagroup, Inc., as a party.

V. THE PENALTY ASSESSED IS REASONABLE

The MPRSA authorizes a civil penalty not to exceed $50,000.00 for each violation of regulations issued under its authority. Obviously, all violations do not call for maximum assessments. The nature, extent, and gravity of the offending acts and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay and any other relevant factors are appropriately taken into account when determining a proper civil penalty amount. 15 C.F.R. 904.108(a) (authority at 15 C.F.R. 904.108(b) prior to March 31, 1987).

Penalty schedules guide the agency in this process. Penalty schedules are guidelines which permit the realization of two equally important goals: individualizing penalties for the

specific facts of a case and establishing relative uniformity for similar violations. These guidelines serve as a starting point from which all civil penalty assessments are calculated, thus assuring to the maximum extent practicable that all other relevant factors are considered. Verna, 4 O.R.W. 64 at 65 (NOAA App. 1985). NOAA conscientiously revises and updates these guidelines as experience demonstrates it is appropriate to do so to ensure they remain a responsible tool.

The penalty schedule for violations of Key Largo National Marine Sanctuary regulations had been recently revised as of December 11, 1986.[18] The draft revised schedule in use on that date appears in the record as ML Exh. #16. The draft reflected the addition of categories for grounding or coral damage cases based upon fundamental navigational circumstances and the degree of negligence attending a case (TR at 370-371).

The Respondents were assessed a total civil penalty of $25,000.00 for two identified violations. The process by which this penalty was determined was described in the Government's Preliminary Position on Issues and Procedures (PPIP). The design of the draft schedule ensured that the base penalty amount so determined - $16,000.00 - was directly related to the degree of damage done to coral species, i.e., the physical extent of the damage by area and density of protected corals affected, as well

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[18] As NOAA Staff Counsel Frederick Kyle explained at the hearing, penalty amounts applicable to Sanctuary vessel groundings and coral damage have generally increased over time because lower amounts have failed to deter these types of violations (TR at 372-373).

as the serious degree of negligence involved in the case. The calculation of the physical extent of the damage to coral species was based directly upon information contained in the biological assessment of the grounding site conducted by Sanctuary Biologist John Halas on December 12, 1986 (Gov't Exh. #12). Further, there is no question but that seriously negligent practices marked the operation of the M/V MINI LAUREL. Specifically, Respondent Tsangeos was using an antiquated chart[19] which it is evident had never been updated or maintained with Notice to Mariners information (TR at 72; Gov't Exh. 3 at 2 and 4; ML Exh. #8). Having selected a course for this 210 foot freighter close along a major line of shallow coral reefs, Respondent Tsangeos chose to navigate along that course apparently by sight and radar fixes alone (TR at 65; ML Exh. #6 at 1-2). The Government contends the choice of method itself was imprudent (TR at 179-180) but, to make matters worse, the evidence establishes it was not even reasonably applied. During at least the 2-1/2 hours proceeding this occurrence, only 2 such fixes are shown to have been taken, the first approximately 2 hours before at Carysfort Light and the second approximately 1-1/4 hours before at Elbow Light (TR at 79-80; Gov't Exh. #3; ML #5 as translated at 5a). Prevailing easterly wind conditions alone should have warranted greater

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[19] The nautical chart in use aboard the vessel was NOS Chart #11462, 15th Edition, March 1975 (TR at 72; Gov't Exh. #3 and 4). The chart edition in use aboard the MINI LAUREL did not reflect the existence or position of the Sanctuary and contained no loran lines (TR at 70; Gov't Exh. #3 and 4).

attention to maintaining such a large vessel's course[20] (TR at 35 and 78; Gov't Exh. #15). Further, it is equally clear Respondent Tsangeos did not use adequate "visual" practices. No watch was apparent on her bow and no one was visible in her bridge as the M/V MINI LAUREL approached and then transitted Molasses Reef (TR at 26). The truth of these observations is confirmed by the apparent failure of anyone on board her to see her dangerous proximity to the reef[21] and the known failure of anyone on board her to respond to or otherwise acknowledge warnings broadcast, blared, and signaled from the 40 foot fishing vessel in her path (TR at 25-27; Gov't Exh. #1).

Over and above these considerations, the Government increased the penalty to $25,000.00. The Government contends it had good cause to do so. Beyond being seriously flawed, Respondent Tsangeos' navigational practices combine with his inattentiveness to evince a recklessness regarding the risks his conduct might pose to human life. Molasses Reef, in particular, is a popular reef for diving, boating and sightseeing. Subject to weather conditions, persons can be found enjoying the reefsite throughout the year, throughout each day, and even into the nights (TR at 32, 89-90, 116, and 292-293). That harm could not

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[20] As explained at hearing, an easterly wind would be expected to move the vessel inshore (TR at 78).

[21] The presence of the reef line and Molasses Reef in particular is visible on the water by characteristic color differences between waters associated with the reef and waters over deep bottom and by a number of white with blue striped mooring buoys 18" in diameter (TR at 29-30; Gov't Exh. #7; ML Exh. #11a-c).

or did not occur under the circumstances of this case is fortunate. That Respondent Tsangeos' recklessness includes a potential to do harm or take life, however, is appropriately considered an aggravating circumstance.

From the record it appears Respondents believe the assessed penalty is (1) arbitrary and capricious, (2) unrelated in any way to the charged violations, (3) discriminates against them in some unspecified way and (4) cannot be imposed because damage to coral resources is not "legally compensable or capable of being quantified." The foregoing discussion, however, outlines the reasoned basis for the assessed amount and demonstrates that it is, indeed, fundamentally related to elements of the charged violations. Further, there is absolutely no support in the record for the notion that the Respondents were charged with these violations for any reason other than that they were reasonably believed to have committed or to be responsible for the commission of acts prohibited by 15 C.F.R. 929.7(a)(1)(i) and (6)(i). Lastly, Respondents misperceive the purpose of the civil penalty assessment in these proceedings. It operates as a sanction for the commission of a prohibited act, not as a quantification of compensatory damages in a tort sense. In short Respondents' complaints regarding the penalty assessed are without merit.

CONCLUSION

Upon the authorities cited here, the Government is

proceeding lawfully in seeking to impose penalties upon Respondents Tsangeos Panagiotis and El Mini Laurel, Inc., for their violation of Sanctuary regulations protecting coral species. Further, the overwhelming weight of the evidence in the record, including the reasonable inferences to be drawn therefrom, clearly establishe that Respondents Tsangeos Panagiotis and El Mini Laurel, Inc., jointly and severally violated the MPRSA and regulations issued thereunder for the protection of coral as alleged in the Government's Notice of Violation and Assessment. As to these two Respondents, the Government respectfully submits that this tribunal should assess penalties as set forth in the NOVA totalling $25,000.00. The Government joins in requesting the dismissal of Respondent Sea Group, Inc., as a party in this proceeding.

PROPOSED FINDINGS OF FACT

1. Respondents Tsangeos Panagiotis, El Mini Laurel, Inc., and Sea Group, Inc., are persons within the meaning of Section 3(e) of the Marine Protection, Research, and Sanctuaries Act of 1972, as amended.

2. On December 11, 1986, Respondent El Mini Laurel, Inc., a Greek corporation, was the owner of the M/V MINI LAUREL, Panamanian Registration No. 2686-72-B.

3. On December 11, 1986, Respondent Tsangeos Panagiotis, a Greek citizen, was the operator of the M/V MINI LAUREL.

4. On December 11, 1986, Respondent Sea Group, Inc., a

domestic corporation was the disclosed United States agent for the M/V MINI LAUREL and her owners for the purpose of facilitating commerce within the United States.

5. Respondents Tsangeos Panagiotis and El Mini Laurel, Inc., at all times pertinent hereto, are and have been lawfully subject to the jurisdiction of the United States and the provisions of the MPRSA regarding the prohibitions implemented thereunder which these Respondents were accused of violating.

6. Respondents Tsangeos Panagiotis and El Mini Laurel, Inc., jointly or through individuals under their control, did operate the M/V MINI LAUREL in such a manner as to strike, or otherwise cause damage to the natural features of Molasses Reef within the Key Largo National Marine Sanctuary, in violation of 15 C.F.R. 929.7(a)(6)(i).

7. On December 11, 1986, Respondents Tsangeos Panagiotis and El Mini Laurel, Inc., jointly or through individuals under their control, did unlawfully destroy, injure, harmfully disturb, break, cut or similarly damage protected coral species within the Key Largo National Marine Sanctuary, in violation of 15 C.F.R. 929.7(a)(1)(i).

8. That in doing so, Respondent Tsangeos Panagiotis displayed negligent and imprudent navigational practices which contributed directly to the occurrence of these violations.

9. The circumstances of the alleged violations are aggravated by Respondents apparent disregard for the foreseeable effect their imprudent and negligent navigational practices might

have upon human life.

10. Respondent Sea Group, Inc.'s relationship to the M/V MINI LAUREL and her owners is sufficiently attenuated from control, operation, and participation in the profits of the M/V MINI LAUREL to render reasonable the dismissal of Sea Group, Inc., as a party herein.

11. The record does not disclose any prior violations by Respondents Tsangeos Panagiotis or El Mini Laurel, Inc., under the MPRSA.

12. Respondent El Mini Laurel, Inc., has made no claim that it is unable to pay the assessed penalty. As to Respondent Tsangeos Panagiotis, the record is inadequate to support a claim that he is unable to pay the assessed penalty, no evidence having been submitted to support such a claim.

Stephanie W. Kelley
National Oceanic and Atmospheric Administration

5/27/88
Date

CERTIFICATE OF SERVICE

I, Eileen Telford, hereby certify that I have this day served, by depositing in the United States mail, copies of the Government's Closing Argument and Proposed Findings of Fact to the following:

Office of Administrative Law Judge
U.S. Department of Commerce
Suite 6716
14th Street & Constitution Avenue, N.W.
Washington, D.C. 20230

Robert B. Fisher, Jr., Esq.
Chaffe, McCall, Phillips, Toler & Sarpy
1500 First National Bank of Commerce Bldg.
New Orleans, LA 70112-1790

5/27/88
Date

Eileen Telford
Paralegal Specialist

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OCT - 9 1986

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

Plaintiff,

vs

No. 84-1888-Civ-ATKINS

M/V WELLWOOD, her engines, apparel, appurtenances, etc., in rem, WELLWOOD SHIPPING CO., LTD., and CHRISTOPHER VICKERS, in personam,

Defendants.

FILED by ____ D.C.
SEP 29 1986
ROBERT M MARCH
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ORDER DENYING MOTION FOR SUMMARY JUDGMENT

This cause is before the court on defendant Vicker's motion for summary judgment. The court has reviewed the motion, memoranda, and the record and has considered the oral presentations by counsel, therefore, it is

ORDERED AND ADJUDGED that said motion is DENIED. The facts can be briefly stated. On August 4, 1984, the M/V Wellwood, a steel motor cargo vessel of Cypriot registry, entered the Key Largo National Marine Sanctuary[1] ("Sanctuary") and grounded upon Molasses Reef damaging a large portion of the reef's coral and corresponding flora and fauna. Defendant Christopher Vickers was the master of the vessel. Plaintiff has

[1]The sanctuary is a unique natural wonder encompassing roughly 100 square miles of submerged coral. The reef attracks a multitude of sightseers and divers each year who come to view its exquisite beauty. Additionally, the reef corals and calcareous algae are a significant source of sand which is essential for the growth of seagrass meadows that support thousands of organisms including crabs, shrimp, mollusks, conch, and grazing fish.

- APPENDIX A -
9-29-86

alleged that this event occurred due to the unseaworthiness of the vessel and the negligence of the individuals in charge of the vessel.

Plaintiff seeks relief pursuant to the Marine Protection, Research and Sanctuaries Act of 1972, 16 U.S.C. § 1433 et seq. In addition, plaintiff requests recovery of expenses pursuant to the Intervention on the High Seas Act, 33 U.S.C. § 1471 et seq., and the Federal Water Pollution Control Act, 33 U.S.C § 1321. In response, defendant Vickers has moved for summary judgment asserting that this court lacks personal jurisdiction over him.[2] This court has considered this issue in prior motions to dismiss; however, recent developments in the case law indicate that further discussion is required.

Defendant Vickers has submitted a very recent case. Point Landing V. Omni Capital International, No. 84-3445, slip op. at 8199 (5th Cir. Aug. 8, 1986)(en banc), in support of his position. Point Landing expressly overruled Lapeyrouse v. Texaco, 693 F.2d 581 (5th Cir. 1982) and Terry v. Raymond International, 658 F.2d 398 (5th Cir. 1981). This is significant because plaintiff has consistently relied upon these decisions. Nevertheless, I must reject defendant's argument.

I acknowledge that this area of the law is rather complex and that the courts and commentators have reached conflicting conclusions. However, I prefer the approach of the dissent in

[2]It is not completely clear from defendant's motion, but it would seem that defendant has only challenged his amenability to personal jurisdiction. Plaintiff has now provided proof of service upon defendant Vickers pursuant to the Hague Convention for Service Abroad of Judicial and Extrajudicial Documents.

Point Landing, see id., at 8221, which is consistent with the approach adopted by the Sixth Circuit in Handley v. Indiana & Michigan Electric Co., 732 F.2d 1265 (1984).[3] Yet even, if I found Point Landing to be persuasive, I would be compelled to reject it. Current Fifth Circuit decisions are persuasive, but earlier decisions are binding. See Bonner v. Prichard, 661 F.2d 1206 (11th Cir. 1981). Thus, it would appear that I am compelled to follow Lone Star Package Car Co. v. Baltimore & O.R. Co., 212 F.2d 147, 152-154 (5th Cir. 1954).

Applying the Handley test, I find that due process is satisfied. Because the United States has a protectable sovereign interest in Molasses Reef, the alleged tortious conduct satisfies the requirement for minimum contacts.

DONE AND ORDERED at Miami, Florida, this 29 day of September, 1986.

Clyde Atkins
UNITED STATES DISTRICT JUDGE

cc: Gerhardt Schreiber (for mailing to all counsel of record)
Irivng Pianin
Patricia Kenny
Eric Taylor
John Kelso

[3]Other courts have also adopted this position. See Centronics Data Computer Corp. v. Mannesmann, A.G., 432 F. Supp. 659, 664 (D. N.H. 1977); Cryomedics, Inc. v. Spembly, Ltd., 397 F. Supp. 287 (D. Conn. 1975); Engineered Sports Products v. Brunswick Corp., 362 F. Supp. 722, 728 (D. Utah 1973).

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

M/V WELLWOOD, etc., et al.,

Defendants.
_____/

CASE NO. 84-1888-CIV-ATKINS

ORDER ON VARIOUS MOTIONS

FILED by _____ D.C.
JUL 17 1985
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S.D. OF FLA - MIAMI
85 JUL 22 PM 3:30

THIS CAUSE is before the Court on various motions. Upon consideration of the motions, the supporting and opposing memoranda, and the record, it is

ORDERED AND ADJUDGED as follows:

1. Defendant Hanseatic Shipping Co., Ltd.'s motion for reconsideration is GRANTED. Upon reconsideration, the Court reaffirms its December 6, 1984 order and denies Hanseatic's motion to dismiss and to quash service of process. The Court has jurisdiction over Hanseatic and service of process has been effected properly over Hanseatic. The United States has a protectable sovereign interest in Molasses Reef.

2. Defendant Hanseatic's alternative motion for § 1292(b) certification is DENIED.

3. Defendant Christopher Vickers's motion to dismiss and to quash service of process is DENIED.

DONE AND ORDERED at Miami, Florida, this 17th day of July, 1985.

copies to:

Irving A. Pianin, Esq.
John R. Kelson, Esq.
Patricia D. Kenny, Esq.

UNITED STATES DISTRICT JUDGE

7-17-85