

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

IN THE MATTER OF THE COMPLAINT OF : **CASE NO. 12 CIV 8892 (TPG)**
CONTI 11. CONTAINER SCHIFFARHRTS-GMBH :
& CO. KG MS “MSC FLAMINIA,” :
AS OWNER, AND NSB NIEDERELBE :
SCHIFFAHRSTGESELLSCHAFT MBH & CO. KG, :
AS OPERATOR, OF THE MSC FLAMINIA FOR :
EXONERATION FROM OR LIMITATION OF :
LIABILITY :

**CLAIMANT IWONA SIUTA’S RESPONSE IN OPPOSITION TO PETITIONERS
MOTION FOR SUMMARY JUDGMENT [D.E. 832]**

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COMES NOW, Claimant, Iwona Siuta, as Personal Representative of the Estate of Cezary Siuta (“Claimant”), by and through undersigned counsel, files her Response in Opposition to Petitioners Conti and NSB (“Petitioners”) Motion for Summary Judgment [D.E. 832]. In support thereof, Claimant alleges as follows:

I. FACTUAL BACKGROUND.

This case arises out of a tragic incident aboard the MSC Flaminia. On or about July 14, 2012, a fire and explosion occurred in the vessel's number 4 cargo hold. The fire, allegedly caused by the negligence and unseaworthiness attributable to the petitioning owners and operators of the vessel, ignited in the early hours of July 14, 2012. The MSC Flaminia’s Chief Mate (Claimant’s spouse) Cezary Siuta, was forced to fight the fire in an attempt to save the vessel. About three hours after the fire began, a massive explosion occurred inside the cargo hold killing Cezary Siuta and other crewmembers. As a result of the fire and subsequent explosion, the MSC Flaminia was completely destroyed and Cezary Siuta suffered severe burns and injuries which, following several hours of conscious pain and suffering, resulted in his death.

II. PROCEDURAL BACKGROUND.

On December 7, 2012, Petitioners¹ filed a Verified Complaint for Exoneration From or Limitation of Liability, pursuant to 46 U.S.C. §§ 30501, et seq., (“The Limitation Act”). [D.E. 1]. In the Verified Complaint, Petitioners invoke the Limitation Act, to be either exonerated from Liability for Claimant’s personal injury claims, or that such liability be limited to Petitioners' interest in the MSC Flaminia after the July 14, 2012 incident. According to Petitioners, Petitioners' interest in the MSC Flaminia is \$0.00. [D.E. 1, ¶ 22].

Claimant, IWONA SIUTA, as Personal Representative of the Estate of Cezary Siuta, filed Claims against Petitioners under the Jones Act, 46 U.S.C. § 30104, the Death on the High Seas Act, 46 U.S.C. § 30301 et seq., and the General Maritime Law of the United States. [D.E. 90, ¶ 4]. Claimant's Claim against petitioners seeks substantial compensation for her spouse's death, pre-death pain and suffering, and other related losses.

On March 23, 2016, Petitioners filed a Motion for Summary Judgment. In the Motion, Petitioners argue that the claims of the Estate of Cezary Siuta should be dismissed because the

¹ Throughout the course of this Response, Petitioners refer to Conti II Container Schiffahrts GmbH & Co. KG, as Owner and NSB Niederelbe Schiffahrtsgesellschaft MbH & Co. KG, as Operator of the MSC Flaminia.

decedent Cezary Siuta, was not a Jones Act seaman, nor were Petitioners Jones Act employers. Rather, Petitioners claim, German law exclusively applies to the Siuta Estate's claims.

In federal district court, sitting in admiralty, resolution of a shipowner's motion to dismiss Jones Act claims (on grounds that foreign law exclusively governs the claims) depends entirely on the resolution of a pivotal issue: the application of U.S. law. Under the seminal Supreme Court case of *Hellenic Lines v. Rhoditis*, 398 U.S. 306 (1970) the U.S. Jones Act applies to foreign shipowners and operators with substantial operational business contacts with the United States. See *Membreno v. Costa Crociere S.p.A.*, 425 F.3d 932 (11th Cir. 2005), citing *Rhoditis* at 936 ("Thus, the only significant question is whether the defendants have a substantial base of operations in the United States warranting the application of United States law. If Defendant's have a substantial base of operations in the United States, **this factor alone can justify the application of United States law.**")

For the reasons outlined below, Petitioners substantial business operational contacts with the United States subjects them to the Jones Act. The Motion for Summary Judgment [D.E. 832] should be denied in its entirety.

III. ARGUMENT.

A. Petitioners arguments that United States law does not apply to the Claimant's causes of action are incorrect. Under the seminal Supreme Court case of *Hellenic Lines v. Rhoditis*, the U.S. Jones Act applies to foreign shipowners and operators with a 'base of operations' in the United States. In this case, discovery revealed that Petitioners have substantial business operations in the United States.

1. Petitioners are Jones Act employers.

As a preliminary matter, there is no question that Petitioners are Jones Act employers. The Jones Act, 46 U.S.C. §30104, was enacted in 1920 by Congress to grant seamen – foreign and domestic - a cause of action against employers for negligence. The Jones Act provides as follows:

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain a cause of action for damages at law, with the right to a trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seamen as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of a trial by jury, and in such an action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

Thus, the Jones Act grants seamen who suffer personal injury in the course of their employment the right to seek damages in a jury trial against their employers in the same manner as the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51, which governs claims by railroad employees. In identical fashion to FELA, the employer under the Jones Act is liable in damages for injury or death resulting in whole or in part from the negligence of its officers, agents, or employees. *Jacob v. New York*, 315 U.S. 752, 755 (1942). This means that if a seaman is injured by the negligent act of a fellow crew member or the captain, the employer is vicariously liable. *Wilburn v. Maritrans GP Inc.*, 139 F. 3d 350 (3d Cir. 1998). Further, under the Jones Act, the employer has a fundamental duty to provide a seaman with a reasonably safe place to work. *Davis v. Hill Engineering, Inc.*, 549 F. 2d 314 (5th Cir. 1977). The duty to provide a reasonably safe place to work is absolute and non-delegable. *Bertrand v. International Mooring and Marine*, 710 F. 2d 837 (5th Cir. 1983).

A Jones Act lawsuit may be properly filed only against the seaman's employer. *Corsair v. Stapp Towing Co., Inc.*, 228 F. Supp. 2d 795 (S.D. Tex. 2002). Usually the employer and the shipowner will be the same. However, in some cases a seaman may be employed by a company other than the shipowner. In such a case, the shipowner is liable in rem. *Solet v. M/V Capt. H.V. Dufrene*, 303 F. Supp. 980 (E.D. La. 1969). Resolution of the issue concerning who is the proper Jones Act employer is a mixed question of law and fact, within the province of the jury upon instructions by the trial court.² These questions of fact include ascertaining: 1) who had the power to engage the seaman, 2) who determined the wage to be paid, 3) who had the power of dismissal; and 4) who had the right to control the seaman's on-the-job conduct. *Health v. American Sail Training Association*, 644 F. Supp. 1459 (D.R.I. 1986).

In light of this, "it is possible for a seaman to have more than one Jones Act employer, and under the borrowed servant doctrine a seaman may sue a number of employers, forcing these to argue their culpability to the jury." *Petrovic v. Princess Cruise Lines, Ltd.*, 12-21588 (S.D. Fla. Sep. 17, 2012) (Altonaga, J.) In that respect, the borrowed servant doctrine is the functional rule that places the risk of a worker's injury on his actual rather than his nominal employer. *Baker v. Raymond Int'l, Inc.*, 656 F. 2d 173, 178 (5th Cir. 1981) (The borrowed servant doctrine is the functional rule that places the risk of a worker's injury on his actual rather than his nominal

² *Thomas J. Schoenbaum*, Admiralty and Maritime Law, Fourth Edition, §4-23, p. 282.

employer.”) *See also Hall v. Diamond M Co.*, 635 F. Supp. 362, 364 (E.D. La. 1986) (“The borrowed servant doctrine is a venerable one in maritime law, having been around since 1909. The purpose of the rule is to place the risk of a worker’s injury on his actual rather than his nominal employer by permitting the injured worker to recover from the company that was actually directing his work. The rule therefore allows plaintiffs to sue a number of ‘employers,’ forcing them to argue their respective culpability to the jury.”)

In this case it is undisputed that decedent-Claimant Cezary Siuta was employed as a seafarer, and in particular, Chief Mate, of the MSC *Flaminia*. During the deposition of Petitioner NSB, NSB admitted that Mr. Siuta was an employee of NSB. *See* Exhibit “1,” Deposition Torge Schulz, p. 123, lines 12-17:

Q My client, Mr. Siuta, Cezary Siuta, he was the chief mate on the FLAMINIA. Was he one of the four officers directly hired by NSB in Germany?

A That's right.

Q So he was an employee of NSB?

A That's right.

Therefore, there is no question that under NSB’s own admission, Petitioner NSB was Mr. Siuta’s Jones Act employer. More importantly, under the borrowed servant doctrine, whether Petitioner Conti II was also a Jones Act employer, is a question of fact reserved for the jury.

Paragraph 13 of the Claimants counterclaim [D.E. 90], under his Jones Act allegations, further alleges: “At all times material, Decedent was employed by Counter-Defendants as a seaman aboard the vessel. Alternatively, the Decedent was controlled by the Counter-Defendants as a borrowed-servant so that the Decedent was effectively employed by Counter-Defendants.” This paragraph was expressly admitted by Petitioners in their ‘Reply to Estate of Cezary Siuta’s Answer, Affirmative Defenses and Counterclaims’ [D.E. 118, p. 4] (“13. Plaintiffs Conti and NSB admit that decedent was employed by Plaintiff/Counter-Defendant NSB, as a seaman aboard the vessel.”).

2. Under the Supreme Court’s decision in *Rhoditis*, Petitioners have a base of operations in the United States. As a result, the Jones Act applies to them.

In order to determine whether the Jones Act applies to a foreign shipowner/operator, the United States Supreme Court developed a choice-of-law analysis in *Lauritzen v. Larsen*, 345 U.S. 571 (1953) and *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970).

For purposes of the analysis, one factor alone is determinative: whether the shipowner/operator has operational business contacts with the United States. *See Membreno v. Costa Crociere S.p.A.*, 425 F. 3d 932 (11th Cir. 2005) (“Thus, the only significant question is whether the defendants have a substantial base of operations in the United States warranting the application of United States law. If Defendants have a substantial base of operations in the United States, **this factor alone can justify the application of United States law.**”) (Emphasis added). *See also Szumlicz v. Norwegian American Line, Inc.*, 698 F. 2d 1192, 1195 (11th Cir. 1983): “*Rhoditis* noted an eighth factor of importance, the shipowner's 'place of operations' indicating that otherwise an alien owner with substantial business operations in this country might, by escaping his obligations as a Jones Act 'employer, ' be unfairly advantaged over citizens of this country engaged in the same business.”

Initially, in *Lauritzen v. Larsen*, 345 U.S. 571 (1953), the Supreme Court laid out seven factors to be considered in the choice of law analysis: (1) the place of the wrongful act; (2) the law of the flag; (3) the allegiance/domicile of the seaman;(4) the allegiance of the shipowner; (5) the place of the contract; (6) inaccessibility of a foreign forum; and (7) the law of the forum.

Subsequently, in *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970), the Supreme Court created an exception to the *Lauritzen* factors, and disregarded the emphasis on the vessel's flag. Instead, the *Rhoditis* Court held that the Jones Act was applicable if the shipowner/operator had substantial and continuing U.S. contacts. Under *Rhoditis*, these U.S. contacts outweighed all other factors.³ In *Rhoditis*, a Greek seaman, employed under a Greek contract, sought recovery under the Jones Act for injuries sustained on a ship of Greek registry. The Court held that although most of the *Lauritzen* factors favored application of Greek law, the Jones Act was applicable because of the foreign shipowner's substantial and continuing U.S. contacts.

Justice Douglas, delivering the opinion, wrote that the *Lauritzen* test was not to be applied mechanically, “but the significance of the factors must be considered in light of the national interest served by the assertion of Jones Act jurisdiction.” *Rhoditis* at 309. **That particular “national interest” is to “plac[e] a United States shipowner on the same competitive basis as an alien**

³ In *Rhoditis*, the Supreme Court adhered to the Second Circuit's substantial contacts test set out in *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437, 439, 1959 AMC 273 (2d Cir. 1959) holding that, in order to effectuate the liberal purposes of the Jones Act, substantial contact between the foreign ship's transaction and the United States is necessary for application of the Jones Act to seamen's claims.

shipowner who is in engaged in extensive business operations in our country.” Id. The Supreme Court specifically recognized that if “the liberal purposes of the Jones Act are to be effectuated, the facade of the operation must be considered minor, as compared with the real nature of the operation, and a cold objective look at the actual operational contacts that the ship and owner have with the United States.” Id. Otherwise, an alien shipowner with operations in the United States might escape his obligations as a “Jones Act employer” and unfairly disadvantage citizens of this country engaged in the same business. *Williams v. Cruise Ships Catering*, 299 F. Supp. 2d 1273 (S.D. Fla. 2003), citing *Rhoditis*, at 309.

On that theory, the Supreme Court in *Rhoditis* squarely held that the fact that the Greek corporate owner maintained a base of operations, extensive business, and broad operational contacts with the United States, overcame, as a matter of law, the *traditional* factors. These factors, including the vessel’s flag, the nationality of the seaman, and the place of contract, were, according to the Supreme Court “minor weights,” in the scales compared with the substantial and continuing contacts that this alien owner had with the United States. *See Rhoditis*, 398 U.S. at 309. It is worth noting that the Supreme Court made this choice-of-law determination despite the fact that: 1) the Defendant-shipowner was a Greek Corporation, 2) the Plaintiff-seafarer was a Greek citizen, 3) the Plaintiff-seafarer joined the vessel in Greece, 4) the vessel had a Greek flag 5) the employment contract was signed in Greece, 6) the employment contract provided that Greek law applied between the employer and the seaman and that all claims arising out of the employment contract had to be adjudicated in Greece. The Supreme Court disregarded these facts as “the facade of the [shipowner’s] operation” which “must be considered as minor, compared with the real nature of the operation, and a cold objective look at the actual operational contacts that this ship and this owner have with the United States.” Id., at 310. *See also Szumlicz v. Norwegian American Line, Inc.*, 698 F. 2d 1192 (11th Cir. 1983) (emphasis added):

The *Rhoditis* gloss on the *Lauritzen* tests indicate that the appropriate application of United States law to the foreign seaman's suit depended on the substantiality of the contacts with the United States of the foreign defendant involved in the transaction . . . The defendant complains however that the “contacts” in this case are substantially less than those in other cases in which the courts have not permitted an alien seaman to maintain his action in the United States against an alien shipowner. For instance, in applying the *Lauritzen* criteria to this case, defendant points out that (1) the place of the wrongful act occurred aboard the vessel while it was on a voyage between San Juan, Puerto Rico and Fort Lauderdale, Florida, where plaintiff went ashore and was hospitalized; (2) the law of the flag was Norwegian; (3) plaintiff was domiciled in

Poland; (4) the shipowner was Norwegian; (5) the place of contract was Norway and Germany; (6) a forum was accessible in Norway; (7) the law of the forum was Norway. **But this argument omits the *Rhoditis* gloss on *Lauritzen* factors—the “substantial use of a United States base of operations for the shipping and revenues of the vessel and its owner, together with the other United States contacts”, which justified the choice of the Jones Act and of general maritime law as administered by our courts as a more appropriate basis for decision than the Norwegian compensation law.**

All in all, percentages and relative comparisons of United States versus non-United States business are not primary factors in determining a *Rhoditis* base of operations. Rather, the important question is whether the contacts, irrespective of the defendant’s contacts in other countries, amount to a substantial relation to the United States. *Williams v. Cruise Ships Catering*, 299 F. Supp. 2d 1273, 1283 (S.D. Fla. 2003).

In the Second Circuit, courts rely on the substantial contacts doctrine as developed in *Bartholomew v. Universe Tankships Inc.*, 263 F. 437 (2d Cir. 1959) and take a liberal view of the *Rhoditis* decision. **The Second Circuit's choice of law analysis does not weigh present contacts with the United States against contacts with foreign jurisdictions, but rather determines whether the U.S. contacts are substantial enough to invoke the Jones Act.**⁴ Moreover, the Second Circuit focuses on the shipowner's American contacts without regard to the contacts of the seaman.⁵

(2)(a). NSB has a permanent base of operations in the United States: Forty percent of NSB’s itineraries consist of vessels traveling to and from United States ports. Accordingly, forty percent of NSB’s business consists in the operation of vessels transporting cargo to and from the United States.

⁴ See also *Moncada v. Lemuria Shipping Corp.*, 491 F.2d 470, 472 (2d Cir. 1974) (holding that the Jones Act applied because of shipowner's base of operations in the United States and vessel's stock was wholly owned by Americans); *Alvarez v. Bahama Cruise Line, Inc.*, 1990 AMC 1298 (S.D.N.Y. 1988) (finding substantial contacts where ship's principal place of business was New York City and the ship earned all of its income from voyages beginning or ending in the United States); cf. *Mattes v. National Hellenic Am. Line*, 427 F. Supp. 619, 1977 AMC 2089 (S.D.N.Y. 1977) (requiring some actual American business be conducted in order to trigger Jones Act application).

⁵ *Moncada*, 491 F.2d at 472. In *Moncada*, the court concentrated only on the contacts of the shipowner, despite the fact that the seaman had no U.S. contacts. Because the alien corporation's stock was owned solely by American citizens and the vessel managed its operations from the United States, the court found sufficient contacts to invoke the Jones Act. *Id.*

In *Fisher v. Agios Nicolaos V*, 628 F.2d 308, 317 (5th Cir. 1980), the Court held that the Jones Act was applicable where a foreign shipowner had no business offices in the United States, but earned revenue transporting American grain to and from the United States. In deciding the choice of law issue, the court held that substantial use of a U.S. base of operations to generate revenue outweighed all other factors. The Fifth Circuit applied the Jones Act, despite the fact that the foreign seaman's injury occurred at sea, and the Greek-owned vessel flew the flag of Greece.

In *Karvelis v. Constellation Lines, S.A.*, 608 F. Supp. 966 (S.D.N.Y. 1985), aff'd, 806 F.2d 49, 1987 AMC 616 (2d Cir. 1986), the Court ruled that that frequent visits to U.S. ports, revenue from U.S. cargo, and management of businesses in the United States were enough to establish an American base of operations. See *Karvelis* at 968-970, citing *Moncada v. Lemuria Shipping Corp.*, 491 F.2d 470, 472 (2d Cir. 1974) (emphasis added):

Most of the *Lauritzen* factors in this case point to application of Greek law. The plaintiff, defendants, and vessel are Greek. Plaintiff's articles of employment are Greek, and call for the resolution of all disputes arising out of his employment in Greek courts. *Karvelis* has access to a Greek forum. The only *Lauritzen* factors favoring United States law are the place of the accident (New Jersey) and the law of the forum. **These are not weighty factors.**

Plaintiff contends that the Jones Act should apply nevertheless because the defendant-shipowner has a "base of operations" in New York ... The Enterprise was hardly a "casual visitor" to the United States. **For the fifteen months preceding Karvelis' injury, the Enterprise was engaged in regular transatlantic trade**, carrying food items from Mediterranean ports to the Atlantic seaboard and returning to the Mediterranean with American-made tractors, military hardware, and other heavy machinery. **The ship's itinerary shows that all nine voyages in those fifteen months connected United States ports—chiefly New York, Charleston, S.C., and Baltimore, Md.—with ports in the Mediterranean.** Aside from the time the Enterprise was at sea, it was more often to be found in an American port than in the port of any other country. (*Id.*).

The Enterprise earned substantial income from cargo originating in or bound for the United States. This is an important consideration in determining whether the foreign defendants should be deemed to be in competition with American shippers. *Hellenic Lines, supra*, 398 U.S. at 310, 90 S.Ct. at 1734. Annually, the vessel earned approximately \$7 to \$8.5 million on cargo shipped from the United States to the Mediterranean, and \$1.5 to \$2.5 million on cargo shipped the other way. According to plaintiff, this constituted 100 percent of the Enterprise's revenues. **The Enterprise was thus more than just a periodic visitor to the United States; it was in direct competition with American shippers in an American market.** And in addition to the Enterprise, Lines and Entemar ran three other ships on their Constellation Line, linking the United States with the Mediterranean.

NSB, as operator, exercises complete control over its vessels' day-to-day operations.

Petitioner Conti 11 is the ship fund that owned the *Flaminia*. Conti 11 paid money to NSB Niederelbelbe Schiffahrtsgesellschaft MBH & Co. KG (hereinafter "NSB"), to operate and manage the *Flaminia*.^{6 7 8} NSB is in the business of operating vessels that travel to and from United States ports. As operator, NSB is responsible for the day-to-day management and operation of all of the vessels in its fleet.

NSB is responsible for the crew - for manning all of the ships in its fleet.⁹ NSB pays the salaries of the crew that man (work and operate) all of the vessels in its fleet.¹⁰ On its German-flagged vessels (such as the *Flaminia*), NSB directly employs the vessel's top officers and Senior Officers (i.e. Captain, Chief Mate, Chief Engineer, and Second Technical Officer).¹¹ NSB directly trains these employees at simulators in their academy for seafarers.¹² NSB also establishes the salary amount paid to each crewmember on its vessels.¹³ NSB's Nautical, Quality and Fleet departments, retains people with expertise in United States legal regulations and requirements; including expertise in American port rules and regulations (i.e. docking), United States Coast Guard and Department of Homeland Security requirements. These experts ensure that NSB vessels visiting United States ports, comply with local rules and regulations.¹⁴ In short, NSB is in direct competition with American ship owners/operators.

NSB is also responsible for maintenance and repairs in all vessels, whether minor or major.¹⁵ NSB pays for food and provisions on all of the vessels in its fleet. It provides all of the essential materials that allows its vessels to navigate, including paint and lube oil.¹⁶ NSB also pays for insurance premiums (and deductibles) to cover the vessels hull, machinery, and to obtain

⁶ Exhibit "1," Deposition of Torge Schulz, NSB's Corporate Representative, p. 168, lines 5 – 8.

⁷ Schulz, p. 26, lines 16 – 19.

⁸ Id., p. 131, lines 2 – 14 (The Witness: "The operator of the *Flaminia* was in 2012 and today NSB Niederelbelbe Schiffahrtsgesellschaft MBH & Co. KG ... Yes. Every time I'm speaking about NSB or NSB Germany, it was this company.")

⁹ Exhibit "1," Deposition of Torge Schulz, NSB's Corporate Representative, p. 105, lines 2 – 6.

¹⁰ Schulz, p. 94, lines 10 -16.

¹¹ Id., p. 91, lines 24 – 25; p. 92, lines 2 – 25; p. 93, lines 2 – 5, lines 23 – 25; p. 94, lines 2 -4.

¹² Id., p. 106, lines 12 – 25; p. 107, lines 2 – 3.

¹³ Id, p. 99, lines 5 – 18.

¹⁴ Id., p. 110, lines 19 – 25; p. 111, lines 2-25; p. 112, lines 2-25; p. 113, lines 2 – 15; p. 114, 2-4.

¹⁵ Id., p. 105, lines 7 – 11.

¹⁶ Id., p. 67, lines 2 – 23.

protection and indemnity coverage.¹⁷ In the case of the *Flaminia*, NSB spent \$8,000 per day in these operational expenses.¹⁸ Without NSB, none of its vessels could go anywhere in the world.

Forty percent of NSB's business consist of NSB vessels traveling to and from United States ports. NSB operates a fleet of 65 vessels. During its deposition, NSB testified that forty percent of its business - forty percent of the itineraries in the NSB fleet - consists of vessels traveling to and from United States ports.

According to NSB's corporate representative, Torge Schulz, NSB's business involves three primary routes. The busiest route, involves vessels traveling from Europe to Asia. According to NSB's Corporate Representative, Torge Schulz, this route represents 60 percent of NSB's business.¹⁹ The *second busiest* route, **involves NSB vessels traveling from ports in the West Coast of the United States** to ports in Asia - and back. This route represents 30 percent of NSB's business. The *third busiest* route, **involves NSB vessels traveling from ports in the East Coast of the United States** to Europe - and back. This route represents 10 percent of NSB's business. All in all, therefore, **40 percent of NSB's business consist of NSB vessels traveling to and from United States ports.** See Deposition of Torge Schulz, p. 51, lines 3 – 14; p. 52, lines 18 – 25; p. 53, lines 2 – 12; p. 54, lines 15 – 25; p. 56, lines 6 – 25; page 57, lines 2 – 25:

Q Okay. So in terms of the busiest – I don't know if that's the correct word – shipping routes or itineraries -- let's call it itineraries -- in the NSB fleet, the busiest starts with Europe to East Asia?

A Yes.

Q The second busiest is California or west coast of the United States to East Asia?

A Yes.

Q And the third busiest is Europe to North America, and North America to Europe, vice versa?

A That's right.

...

Q. And, again, just to make it clear for the record, we're talking about the busiest itineraries for the NSB fleet. And your estimate is that for the busiest one, Europe to East Asia, it's about 60 percent of the fleet is invested in those itineraries. Is that a yes?

A. Yes.

Q. And then for the second busiest routes from the west coast of the United States to East Asia, your estimate is that there's about 25 percent, you said, of the fleet invested in those --

¹⁷ Id., p. 65, lines 6 – 8.

¹⁸ Id., p. 63, lines 6 – 17.

¹⁹ Exhibit "1," Deposition of Torge Schulz, NSB's Corporate Representative, p. 52, lines 8 – 24.

A Thirty percent.

Q Thirty percent. Okay. And then the last of the busiest is the routes from North America to Europe, Europe to North America. And your estimate was that ten percent of the fleet is involved in those particular routes?

A Yes.

...

Q Now, for the second busiest itineraries from California from -- the west coast of the United States to East Asia, that's basically -- the route is across the Pacific Ocean basically, from the west coast of the United States to East Asia?

A. Yes.

Q And back and forth?

A Yes.

Q And when you're talking about the west coast, what are the biggest ports on the west coast of the United States that NSB visits?

A. I think it would be Palm Beach.

Q Palm Beach? You mean Long Beach?

A Sorry. Long Beach. That's right

...

Q. Now, when you say Long Beach, that's also -- it could be -- my understanding of the Port of Long Beach is that it sort of works together with the Port of Los Angeles. So when you say Long Beach, that could also be the Port of Los Angeles, either/or?

A. Yes.

Q Now, in terms of the third busiest itineraries for the NSB fleet, from the east coast of the United States to Europe and from Europe to the east coast of the United States, are you including in that third busiest -- the third busiest itineraries, are you also including ports in the Gulf of Mexico?

A Yes.

Q So that's part of the ten percent of the fleet?

A Yes.

Q What are the busiest ports in that third busiest itineraries for the NSB fleet?

A. I knew that sometimes the vessels go to New Orleans. It goes to New York, I think to New Jersey, and Charlotte.

MR. RYAN: You mean Charlotte or Charleston?

A. Sorry. Yes. Yes, you're right.

Between 2006 and 2012, NSB vessels visited United States ports 4,355 times. Chart #1, below summarizes the contents of NSB's United States itineraries (Exhibit 742 of Torge Schulz's deposition/Exhibit "2," of this Response). Between 2006 and 2012, NSB vessels visited United States ports 4,355 times (an average of 2 daily visits, each day of the year, for 7 years).

Chart #1: Between 2006 and 2012, NSB vessels visited United States ports 4,355 times (an average of 2 daily visits, each day of the year, for 7 years). See Exhibit “2,” NSB vessel visits to United States ports between 2006 – 2012.			
Year	Number of times NSB vessels visited United States ports	Port cities in the United States visited by NSB vessels	Time period of NSB vessel visits to United States ports 2006 - 2012
2006	547 visits to U.S.	New Orleans, Seattle, Savannah, Long Beach, Charleston, Oakland, Norfolk, New York, Houston, Miami, Portland, Baltimore, Los Angeles, Newark, Pt. Everglades, Marcus Hook, Tampa, Mobile, Jacksonville.	(1-31-2006) – (12-31-2006)
2007	675 visits to U.S.	Same 19 U.S. port cities plus Tacoma and Philadelphia.	(1-2-2007) – (12-31-2007)
2008	571 visits to U.S.	Same 19 U.S. port cities plus Tacoma, Philadelphia, and Wilmington.	(1-2-2008) – (12-31-2008)
2009	536 visits to U.S.	Same 19 U.S. port cities plus Tacoma, Philadelphia, Wilmington, Galveston, Providence, Boston, New Haven, Port Arthur, Port Neches, and Port Elizabeth.	(1-3-2009) – (12-31-2009)
2010	624 visits to U.S.	Same 19 U.S. port cities plus Philadelphia, Wilmington, Port Elizabeth, Port Arthur, Port Allen, St. Rose, Texas City, St. James, and Point Comfort	(1-10-2010) – (12-31-2010)
2011	781 visits to U.S.	Same 19 U.S. port cities plus Tacoma, Philadelphia, Wilmington, Point Comfort, Corpus Christi, Garyville, Boston, and Port Neeches.	(1-2-2011) – (12-31-2011)
2012	621 visits to U.S.	Same 19 U.S. port cities plus Tacoma, Philadelphia, Port Elizabeth, Boston, and Corpus Christi.	(1-2-2012) – (12-31-2012)
Total	4,355 NSB vessel visits to U.S. ports between 2006 - 2012	38 U.S. port cities.	NSB vessels spent 2,527 days in the United States between 2006 – 2012.

During this time period, every day, NSB vessels visited 38 United States port cities including: New Orleans, Seattle, Savannah, Long Beach, Charleston, Oakland, Norfolk, New York, Houston, Miami, Portland, Baltimore, Los Angeles, Newark, Pt. Everglades, Marcus Hook, Tampa, Mobile, Jacksonville, Tacoma, Philadelphia, Wilmington, Galveston, Providence, Boston, New Haven, Port Arthur, Port Neches, and Port Elizabeth, Port Allen, St. Rose, Texas City, St. James, and Point Comfort, Corpus Christi, Garyville, Boston, Port Neeches, Boston, and Corpus Christi. **All in all, between 2006 and 2012, NSB vessels spent 2,527 days in the United States. As noted above, this amounts to forty percent of NSB's entire business.**

Accordingly, under *Rhoditis* and its progeny, NSB has substantial business operations in the United States, justifying the application of the Jones Act to this dispute. *See Karvelis* at 968-970, citing *Moncada v. Lemuria Shipping Corp.*, 491 F.2d 470, 472 (2d Cir. 1974) (“The Enterprise earned substantial income from cargo originating in or bound for the United States. This is an important consideration in determining whether the foreign defendants should be deemed to be in competition with American shippers. *Hellenic Lines, supra*, 398 U.S. at 310, 90 S.Ct. at 1734.”)

It is clear that by visiting United States ports 4,355 times, NSB is in direct competition with American shipowners and operators. As noted by the Supreme Court in *Rhoditis*, there is a “national interest served by the assertion of Jones Act jurisdiction.” *Id.* at 309. That particular “national interest” is to “plac[e] a United States shipowner on the same competitive basis as an alien shipowner who is engaged in extensive business operations in our country.” *Id.* The Supreme Court specifically recognized that if “the liberal purposes of the Jones Act are to be effectuated, the façade of the operation must be considered minor, as compared with the real nature of the operation, and a cold objective look at the actual operational contacts that the ship and owner have with the United States.” *Id.* Otherwise, an alien shipowner with operations in the United States might escape his obligations as a “Jones Act employer” and unfairly disadvantage citizens of this country engaged in the same business. *Williams v. Cruise Ships Catering*, 299 F. Supp. 2d 1273 (S.D. Fla. 2003), citing *Rhoditis*, at 309.

The MSC *Flaminia*, the vessel involved in this case, travelled extensively to and from United States ports. As noted in NSB and Conti’s Complaint for Exoneration From or Limitation of Liability [D.E. 1], at the time that the incident happened, “the MSC *Flaminia* was under way

from Charleston, United States, to Antwerp, Belgium [...].” Id. Chart #2 below, summarizes the visits of the *MSC Flaminia* to United States ports between 2006 and 2012.

Chart #2: Between 2006 and 2012, the <i>MSC Flaminia</i> visited United States ports 199 times (an average of 2 visits per month). See Exhibit “2,” NSB vessel visits to United States ports between 2006 – 2012.			
Year	Number of times the <i>MSC Flaminia</i> visited United States ports	Port cities in the United States visited by NSB vessels	Time period of <i>MSC Flaminia</i> visits to United States ports 2006 - 2012
2007	31 visits to U.S.	New Orleans, Savannah, Charleston, Norfolk, New York, and Houston.	(4-29-2007) – (12-30-2007)
2008	34 visits to U.S.	New Orleans, Savannah, Charleston, Port Everglades, and Houston	(1-25-2008) – (11 – 4 – 2008)
2009	7 visits to U.S.	New Orleans, Savannah, Charleston.	(11-7-2009) – (12-28-2009)
2010	52 visits to U.S.	New Orleans, Savannah, Charleston, Port Everglades and Houston	(1-8-2010) – (12-24-2010)
2011	48 visits to U.S.	New Orleans, Savannah, Charleston, Port Everglades Houston, and Norfolk.	(1-21-2011) – (12-31-2011)
2012	27 visits to U.S.	New Orleans, Savannah, Charleston, Port Everglades Houston, and Mobile	(1-1-2012) – (7-8-2012)
Total	199 <i>Flaminia</i> visits to U.S. ports between 2006 - 2012	8 U.S. port cities.	

Between 2006 and 2012, the *Flaminia* visited United States ports 199 times (an average of 2 visits per month). During this time period, NSB vessels visited 8 United States port cities including: New Orleans, Savannah, Charleston, Norfolk, New York, Houston, Port Everglades, and Mobile. Like the vessel in *Karvelis*, the *Flaminia* was “not a casual visitor to the United States.” Instead, from 2006 through 2012, it “was engaged in regular transatlantic trade,” carrying

items to and from ports in the United States. Indeed, at the time of the incident that led to the death of Claimant-decedent Cezary Siuta, “the MSC Flaminia was under way from Charleston, United States, to Antwerp, Belgium [...]”[D.E. 1]. See *Karvelis v. Constellation Lines, S.A.*, 608 F. Supp. 966 (S.D.N.Y. 1985), aff’d, 806 F.2d 49, 1987 AMC 616 (2d Cir. 1986) (emphasis added):

Plaintiff contends that the Jones Act should apply nevertheless because the defendant-shipowner has a “base of operations” in New York ... The Enterprise was hardly a “casual visitor” to the United States. **For the fifteen months preceding Karvelis' injury, the Enterprise was engaged in regular transatlantic trade**, carrying food items from Mediterranean ports to the Atlantic seaboard and returning to the Mediterranean with American-made tractors, military hardware, and other heavy machinery. **The ship's itinerary shows that all nine voyages in those fifteen months connected United States ports—chiefly New York, Charleston, S.C., and Baltimore, Md.—with ports in the Mediterranean.** Aside from the time the Enterprise was at sea, it was more often to be found in an American port than in the port of any other country. (*Id.*).

See also *Moncada v. Lemuria Shipping Corp.*, 491 F.2d 470, 472 (2d Cir. 1974) (emphasis added):

In the instant case all defendants have their base of operations in this country and the managing and chartering of the vessel were conducted from this country. In addition to those contacts all officers of the defendants are American. See *Bartholomew*, 263 F.2d at 441. **Approximately 40% of the vessel's voyages began or ended in American ports.** See *Rhoditis*, 398 U.S. at 310, 90 S.Ct. 1731. In light of the precedents construing the Jones Act and of the purposes of Congress in enacting the Jones Act we hold that the contacts between this transaction and the United States are substantial and that Jones Act jurisdiction exists. The decision of the district court must be reversed. Because plaintiff was entitled to have her Jones Act claim tried to a jury, she was also entitled to a jury trial on her claims under general maritime law.

(2)(b). NSB has a permanent base of operations in the United States: NSB offers and sells passenger cruises that start, end and visit United States ports.

Another source of NSB’s business is to offer and sell passenger cruises, starting and ending in United States ports. While NSB operates traditional container cargo vessels, NSB designates cabins in each of their vessels, for tourists who would like to travel on ships as passengers. Much like any other pleasure cruiser, these passengers pay for room and board, and are free to relax on the vessel’s pools. For this purpose, NSB operates a travel agency through which they sell cruises starting and ending in United States ports. In doing so, NSB is in direct competition with cruise lines and travel agencies based in the United States. See Deposition of Torge Schulz, p. 140, lines 20 – 25; p. 141, lines 2-25; p. 142, lines 21-25:

- Q. [A]ny person – not affiliated with NSB, not affiliated with Conti, not affiliated with the ship can purchase passage as a tourist on an NSB vessel?
- A. Absolutely. That's right.
- Q. And to do so, I, or any other regular person not affiliated with anyone in NSB or anyone in CONTI or anything with the ships, pays a fee just like if they were booking a cruise on Carnival, Royal Caribbean and a general cruise, cruise ship. It's the same process. They pay money for passage, and they are able to get on the ship and travel.
- A. Yes. It's only a question of advertisement. We are not as a travel agency and not a very big budget for advertisement and any journals or any internet pages or something like that.
- Q. Okay. Thank you. I understand that. Now, when we talked about the busiest travel ports, the busiest trading routes, the busiest itineraries, the second busiest was the west coast of the United States to East Asia. Are people, average people, not affiliated with NSB, with CONTI, with any other companies, with the ship, just a regular tourist, can they buy passage on ships on that route?
- A. Yes.
- Q. Through -- and that's, again, through the NSB travel agency?
- A. That's right.
- Q. Now, with the third busiest itineraries on NSB's ports, the third itineraries in the NSB fleet, the one that goes from the east coast of the United States to Europe, and from Europe to the east coast of the United States, can passengers buy passage on those cruises, on those ships?
- A. It's the same, yes, yes.
- Q. And when they buy cruises through the NSB travel agency, do they get assigned a cabin? In other words, they get sleeping quarters?
- A. Yes, of course.
- Q. Okay. Do any of the ships on the NSB fleet -- do they have pools?
- A. Yes.
- Q. Like swimming pools?
- A. Yes. Small ones, but with water in it.

Exhibit 735 of Torge Schulz's deposition (attached to this Response as Exhibit "3"), includes all of NSB's cruises. As advertised in its website, available to American tourists (www.nsb-reisebuero.de/en/travel-with-nsb), NSB states on the first page:

Experiencing the world as it is!

If you do not fancy being part of a holiday package, designed for mass tourism, but instead want to discover and experience the genuine, real world you have come to the right place. NSB Travel Agency brings you new horizons and perspectives beyond the beaten tracks, within individual freighter ship voyages.

... But a voyage on a cargo ship has additional advantages over travelling on a cruise ship: This type of individual, alternative mode of travel is characterized by the fact that you can decide for yourself if you would like to join the entire round trip or just a part of it, which ports you visit and where you want to get off the vessel.

The third and fourth page of Exhibit 735 of Torge Schulz's deposition (attached to this Response as Exhibit "3"), includes a list of all routes offering passenger cruises. In total, as summarized in Chart #3 below, out of a total 39 cruise itineraries that NSB offers, 18 cruise itineraries include visits to ports in the United States. **That is, 46% of the cruises that NSB sells, begin, end and/or visit United States ports.**

Chart # 3: Out of a total 39 cruise itineraries that NSB offers; 18 cruise itineraries include visits to ports in the United States or 46% of the total.	
Routes	United States cities visited
Europe – <i>USA East Coast</i> – Europe	New York, Newark, Baltimore, Norfolk, San Juan.
<i>USA</i> – Panama Canal-Far East-Panama Canal- <i>USA</i>	New York, Savannah, Charleston.
<i>USA</i> – Panama Canal-Far East-Panama Canal- <i>USA</i>	Begins in New York and ends in New York.
<i>USA</i> - Far East – <i>USA</i> (Pearl River Express)	Begins in Long Beach, visits Oakland and ends in Long Beach.
<i>USA</i> - Far East – <i>USA</i> (CPNW Service)	Begins in Seattle and ends in Seattle.
<i>USA</i> - Far East – <i>USA</i> (PNH)	Begins in Seattle and ends in Seattle.
<i>USA</i> - <i>Far East</i> – <i>USA</i>	Begins New York, visits Savannah, ends in New York.
<i>USA</i> - <i>Far East</i> – <i>USA</i>	Begins in Los Angeles, visits Oakland, send Los Angeles.
Europe – <i>USA</i> – Europe	New York, Newark, Norfolk.
Europe - <i>USA</i> - Europe	New York, Newark, Boston, Baltimore, Norfolk, Savannah, Charleston.
<i>USA</i> – Far East – <i>USA</i> (Hajin Dallas/Miami/Baltimore)	Begins in New York/Newark, visits Norfolk, Savannah, and ends in New York/Newark.
<i>USA</i> – South America - <i>USA</i>	Begins in New York/Newark, visits Baltimore, Savannah and ends in New York/Newark
<i>USA West Coast</i> - Far East – <i>USA West Coast</i>	Begins in Los Angeles, visits Oakland, and ends in Los Angeles.
<i>USA</i> – Far East – <i>USA</i> (Hajin Boston)	Begins in New York, visits Norfolk, Savannah, and ends in New York.
<i>USA</i> – Europe – Far East – <i>USA</i> – Far East – <i>USA</i>	Begins in New York/Newark, visits Norfolk, Savannah, Seattle, Vancouver, and ends in New York.
<i>USA</i> – Far East – <i>USA</i> (Hajin Yantian)	Begins Los Angeles, visits Oakland, ends Los Angeles.
<i>USA</i> – Far East – <i>USA</i> (Zim Ontario)	Begins in Charleston, visits Savannah, ends Charleston.
<i>USA</i> – Far East – <i>USA</i> (Hajin Geneva, Ottawa, Vienna)	Begins in Seattle, ends in Seattle

(2)(c). NSB has a permanent base of operations in the United States: NSB has a permanent branch in Alabama, for the single and exclusive purpose of managing NSB’s business affairs in the United States. For over 15 years, NSB has maintained an agent in the United States, a U.S. citizen, to provide services as a commercial representative, a technical advisor and a security advisor.

For the past 7 years, NSB has maintained a permanent office in Fairhope, Alabama. Further, NSB has maintained agents in the United States for over 15 years. Despite attempts by NSB to disguise this office as an independent entity (incorporated in Alabama as NSB-USA LLC), discovery revealed that at all relevant times the Alabama office has existed for the single and exclusive purpose of managing NSB’s business affairs in the United States. *See Szumlicz v. Norwegian American Line, Inc.*, 698 F. 2d 1192, 1194 (11th Cir. 1983) (holding that Defendant had a substantial base of operations because it maintained both offices as well as shipping agents in Ft. Lauderdale); *See also Fatome v. Frederick*, 2003 WL 23009844 (Cir. 11th 2003) (holding that - despite the fact that the ship never entered a U.S. port and all of its repairs took place in the Caribbean - Defendant had a substantial base of operations in U.S. because it maintained offices in Miami Beach, Florida from where it coordinated its U.S. business).

In its website, **NSB advertises to the public that it has permanent offices in** Germany (Reederei NSB), Singapore (NSB Singapore), South Korea (NSB Korea), and **the United States** (NSB USA). The NSB United States offices are advertised as follows:

NSB USA

Mailing address
P.O. Box 448
Alabama 36533 / USA

Office location:
19059 Greeno Rd / HWY 98
Fairhope
Alabama 36532 / USA
lyborg@nsb-usa.com
+1-251-990 44 48

Exhibit 594, Deposition of Jonas Lyborg (attached to this Response as Exhibit “4”). The NSB website also **advertises that NSB has branches in the United States**. *Id.*, at page 1 of 2 (emphasis added):

Starting from the training and further education of seafarers to the ship’s equipment with modern technologies up to the efficient cooperation between sea and shore,

Reederei NSB²⁰ ensures a profit-making ship operation. From our company headquarters in Buxtehude – ideally located between seaports of Hamburg and Bermenhaven – we operate globally as a modern, efficient and reliable service company. **We are supported by our branches in the USA** and the Far East.

Jonas Lyborg, NSB-USA’s president, is an American citizen.²¹ He has resided in Fairhope, Alabama since 2000.²² There is no question that Mr. Lyborg is NSB’s permanent agent in the United States. As expressly outlined **in his contract with NSB, Jonas Lyborg is NSB’s “Key Person” in the United States**. The contract, in effect from 2009 to the present, also describes NSB-USA’s mission as providing services “[w]ithin the territorial waters of the United States of America ... **to protect the interests of NSB**, including, but not limited to, services as a commercial representative, services as a technical advisor and services as a security advisor.” *See* Exhibit 598, Contract with NSB, Deposition of Jonas Lyborg (attached to this Response as Exhibit “5”):

Background and Purpose

...
(E) NSB has agreed to use NSB USA, LLC’s services and NSB USA LLC has agreed to provide its services to NSB and NSB Vessels.

1.1 Scope of Services. Within the territorial waters of the United States of America and at other places as requested by NSB, NSB USA LLC will perform such services as requested by NSB as may be necessary to protect the interests of NSB, including, but not limited to, services as a commercial representative, services as a technical advisor and services as a security advisor. NSB USA, LLC shall promptly upon the request of NSB: travel to the scene of any collusion, grounding, fire, explosion, contamination or other extraordinary loss or damage to an NSB Vessel or its cargo; conduct an investigation of loss, cause and remedial action needed to minimize further delay or expense to such NSB Vessel; select the method of cure and salvage; determine the scope of repairs and identity of repair yards to perform remedial work; engage the services of entities needed to perform salvage or repair and to contain environmental contamination; and otherwise protect the interests of NBS in damage and loss situations.

1.3. Key Person. NSB USA LLC recognizes and understands that NSB has entered into this agreement in reliance upon NSB USA LLCs representation that Jones Lyborg, NSB USA, LLC’s Manager (“Key Person”), will be the person directly involved in performing these services. Unless otherwise agreed, NSB expects that Mr. Lyborg will perform the services.

²⁰ “NSB Reederei” is another name Petitioner NSB, the operator of the *Flaminia*. *See* Deposition of Jonas Lyborg, p. 86 – 87 (attached to this Response as Exhibit “4”).

²¹ Deposition of Jonas Lyborg, p. 11, lines 10 – 23.

²² *Id.*, p. 11, lines 24 – 25; p. 12, line 2.

See also Deposition of Jonas Lyborg, p. 155, lines 7 – 14; p. 70, lines 15 – 25:

Q. So under this agreement you are NSB, the operator of the Flaminia – you are their key person in the United States under this Agreement?

A. Yes.

Q. And this agreement is exclusive to you. In other words, only you can be the key person under this agreement and nobody else.

A. Yes, as listed.

...

Q. So going back to my original question – and I appreciate your trying to explain it. When it comes to your retainer with NSB, the operator of the FLAMINIA, that you have through NSB-USA in your office in Alabama, when needed, do you act as their representative in the United States?

A. If requested and when needed, yes.

Q. Okay. Out of your office in Alabama?

A. Yes.

Jonas Lyborg has been providing these services to NSB vessels, out of Alabama, **for over 15 years**. Initially, Lyborg provided services to NSB in the United States from 2000 through 2008 under Lyborg's company J.L. Maritime. Subsequently, from 2009 to the present, Lyborg (at NSB's request and direction), setup and incorporated NSB USA, LLC in Alabama, and opened an NSB USA, LLC bank account in Alabama, all for the single and exclusive purpose of managing NSB's business affairs in the United States. Tellingly, **NSB USA, LLC only provides services to one entity: NSB, the operator of the Flaminia**. Lyborg, p. 22, lines 3 – 12; p. 33, lines 3 - 25; p. 34, lines 2 – 6, lines 14 – 25:

Q. And these services, you're providing the services to NSB, the operator of the FLAMINIA, from 2009 to the present out of your office in Alabama; is that fair to say?

A. Yes.

Q. Okay. Now, before 2008, in other words, between 2000 and 2008, did you provide services to NSB, the operator of the FLAMINIA, through J.L. Maritime?

A. Yes.

Q. So you created NSB-USA, LLC and the company's headquartered in Alabama; right?

A. Yes.

Q. For the purpose of providing services to NSB, the operator of the FLAMINIA.

A. Yes.

Q. Now, does NSB, LLC provide any services out of Alabama to anyone other than NSB, the operator of the FLAMINIA, in Germany?

A. No.

Q. So NSB-USA, LLC's only customer -- I'm not talking about J.L. Maritime -- NSB-USA, LLC's only customer is NSB, the operator of the FLAMINIA, in Germany.

A. Yes.

Q. And is this the reason why you opened a separate bank account for NSB-USA, LLC, to assist you in providing services to NSB, the operator of the FLAMINIA, in Germany?

A. Well, it was -- yes.

Q. So you entered into this services agreement, this retainer, as you call it, and it's been in place from 2009 to the present. And so in order to provide those services out of your office in Alabama to NSB, the operator of the FLAMINIA, you set up a company and the name of the company is NSB-USA, LLC. Is that fair to say?

A. Correct.

...

Q. So earlier you said that NSB-USA, LLC, their only customer is NSB, the operator of the FLAMINIA.

A. Correct.

Q. And you also talked about how when you created NSB-USA, LLC it was to provide those services to NSB, the operator of the FLAMINIA.

A. Correct.

Q. And so part of that also involved opening a bank account in the United States in Alabama under the name of NSB-USA, LLC.

A. Correct.

From 2009 to the present, NSB, the operator of the *Flaminia*, has fully funded the operations of NSB USA, LLC in Alabama. Lyborg, p. 35, lines 2 – 25; p. 36, lines 2 – 4:

Q. And when you are providing services – and we'll talk about the services in a second. When NSB-USA, LLC and Jonas Lyborg is providing services under that retainer agreement to NSB, the operator of the FLAMINIA, out of your office in Alabama, when money moves around to be able to perform those services under the retainer agreement, that money flows through this NSB-USA, LLC bank account in Alabama. Is that fair to say?

A. It comes into that account and is thereafter transferred into the J.L. Maritime account to cover the expenses because J.L. Maritime is paying all the invoices for various things.

Q. So money comes in from NSB, the operator of the FLAMINIA, in Germany and that money is sent to the Alabama account of NSB-USA. Is that fair to say?

A. Correct.

Q. And that's pursuant to the retainer agreement that you entered into to provide services out of your office in Alabama to NSB, the operator of the FLAMINIA. Is that fair to say?

A. Correct.

Q. Okay. And because you control the J.L. Maritime Services and J.L. Maritime Services controls NSB-USA, LLC, sometimes you move money around between accounts to different companies to help you fund the operations of J.L. Maritime. Is that more or less --

A. Yes.

Under the contract with Petitioner NSB, NSB USA (and therefore Jonas Lyborg) must communicate with NSB (described as the “home office of NSB”) and employees there for appropriate input on the planning and scope of services performed by NSB USA. Nevertheless, in cases in which NSB USA cannot communicate with the NSB home office, NSB USA is empowered to take whatever action it deems fit and necessary to protect the interests of NSB and NSB vessels in the United States. *See* Exhibit 598, Lyborg deposition (attached to this Response as Exhibit “5”)(emphasis added):

1.1 Scope of Services. Within the territorial waters of the United States of America ... NSB USA, LLC shall communicate *with the home office* of NSB and appropriate employees located there for NSB’s input on the planning and scope of services to be performed by NSB USA, LLC before directing remedial action. However, in circumstances where such communication is not reasonably practicable due to emergency or other cause, NSB USA, LLC shall utilize its professional knowledge and experience to take whatever action is necessary or appropriate to protect the interests of NSB and NSB Vessels, without communication.

See also Deposition of Jonas Lyborg, p. 73, lines 2 – 25; p. 67, lines 1-2; p. 70, lines 15 – 25:

Q. And you do this out of your office in Alabama.

A. Yes.

Q. That's the same office where NSB-USA's headquartered or is based?

A. Yes. It's not correct. I need to correct your question or my answer. You said that's NSB's office in Alabama.

Q. NSB-USA.

A. Yes. And it's their contact position.

Q. Right. So the office in Alabama is NSB's --

A. NSB-USA, LLC has an address in that office, yes.

Q. In Alabama, and it's also the address for the contact in the United States for NSB. Is that what you're saying? For NSB, the operator of the FLAMINIA.

A. It's listed as that, yes, on their website.

Q. Listed in NSB, the operator's website?

A. I think so.

Q. Okay. That's the address in Alabama; right?

A. Yes.

Under the contract, NSB USA (and therefore Jonas Lyborg) is required to be NSB’s liaison with the United States Coast Guard, United States port authorities, marine surveyors, the master, crew, pilots, charters, agents, repair yards, suppliers, and other entities necessary or appropriate under the circumstances. *See Id.*:

1.1 Scope of Services. Within the territorial waters of the United States of America ...NSB USA LLC shall conduct necessary liaison with Coast Guard, port authorities, marine surveyors, the master, crew, pilots, charterers, agents, repair yards suppliers and other entities necessary or appropriate under the circumstances.

See also Lyborg, p. 81, lines 10 – 25;

- Q.** And that also means dealing with local United States authorities? In other words, the Coast Guard is doing an investigation or the Customs and Border Patrol, Department of Homeland Security. Is that one of the things that you also advise them about?
- A.** If they reach out and ask for assistance, yes.
- Q.** And they've done that before?
- A.** Yes. It happens.

During his deposition, Jonas Lyborg admitted that there is no limit to the scope of his duties to protect NSB's interests in the United States. Lyborg testified that as NSB's representative in the United States, he has "a lot of contacts in the United States" and uses those contacts (and his technical qualifications) to provide services to NSB in the United States. Lyborg, p. 82, lines 2- 25:

- Q.** Other than what we discussed, what other things are the duties of you as a surveyor for NSB in the United States? We've talked about the repairs. We've talked about dealing with local U.S. government authorities. What other things do you do for them, do you advise them on?
- A.** It's such an open question that I have problems answering that. I am a technical, fairly qualified person. I live in the United States. I have a lot of contacts in the United States. And when something happens in the United States or when there is a question regarding anything in the United States, I might be asked for assistance or guidance. And it could relate to a dive inspection, who is a suitable diving company. It could relate to repairs, as we have said. It could relate to – if there is an oil spill, for example, it could relate to things relating with that. So there are so many, many different things, and the maritime field is such an open field that it's difficult to start giving you a lot of specific. That is why I have a little bit of a problem answering that question.

NSB pays for Jonas Lyborg (its "Key Person" in the United States), to take American maritime safety courses and participate in shipping industry seminars in the United States. Lyborg, p. 53, lines 8 – 25; p. 54, lines 2 – 22:

- Q.** Have any of the courses that you've taken taken place or been sponsored by NSB, the operator of the FLAMINIA?
- A.** The ISPS course in Seattle was partly paid for by NSB.

Q. Let's talk about this 2003 ISPS course. I know you talked briefly about it. Why did you decide to attend this course?

A. Well, development in the shipping market included after 9/11 a lot of security issues, and if you are a surveyor, as I am, and I am attending 25 different vessels and different companies' vessels you need to know a little bit more about the security issues. And the ISPS code has just come into effect and it was important to understand what is this new code requiring. That is why I found it to be extremely important to attend as soon as possible.

Q. So the ISPS course is a sort of post-9/11 course to teach people in the industry what the new regulations are in terms of ship safety and to prevent --

A. Ship security.

Q. Ship security. Okay. Now, why did NSB sponsor this in Seattle, USA?

MR. RYAN: Objection to the form.

THE WITNESS: Security is a major issue in the United States, and as attending on different vessels, it was important and NSB obviously considered the same thing and said that yes, it might be an important issue for the future. So we prepared to sponsor that.

Jonas Lyborg also goes on NSB vessels (as NSB's representative) to assist the company with internal audits and vessel inspections in the United States. Lyborg, p. 83, lines 5 – 25; p. 84, lines 2-7:

Q. Okay. Do you ever go on NSB vessels for any reason on their behalf as their representative? In other words, do you ever --

A. On behalf of who?

Q. On behalf of NSB.

A. Yes.

Q. You do.

A. Yes.

Q. And what are the reasons why you go on the vessels?

A. It could be that they ask for assistance with an internal audit and vessel inspection, some problem with an electrical motor or something similar.

...

Q. Who would be doing the audit?

A. Internal audit is done by company representatives or appointed persons from the company.

Q. So you've participated in those whenever the ship is in the United States. You've been on the vessel present to assist in the auditing.

A. On special requests if and when needed.

Q. And this is pursuant to the retainer agreement that you've had through NSB-USA, LLC with NSB, the operator of the FLAMINIA.

A. Yes.

Under the contract, Jonas Lyborg and NSB USA must be available to perform these services for NSB "24/7." *See* Exhibit 598 (attached to this Response as Exhibit "5"):

1.2 Availability/Resources. [...] NSB USA, LLC agrees that it will be available to perform the Services “24/7” and it will have adequate communication facilities to enable NSB to contact NSB USA, LLC at any time, day or night. NSB USA, LLC agrees to provide NSB with the necessary contact numbers and means to do so. In addition, NSB USA, LLC agrees that its office will be staffed from 8:00 am to 11:00 am. Alabama time to maximize overlap between working hours in Germany and Alabama.

The services that NSB USA (and therefore Jonas Lyborg) provides to NSB, include representing NSB as a technical advisor in the event that hull and machinery in NSB vessels need repairs in the United States. Lyborg, p. 65, lines 7 – 25; p. 66, lines 2 – 15:

- Q.** Hull and machinery service, what does that mean?
- A.** If a vessel runs aground, it will be damaged and then they will need a hull and machinery surveyor to come there and find out what has happened, what is damaged, what could it cost to repair, where can it go to repair, et cetera. If an engine breaks down, it could be the same thing. A surveyor has to go there and look at it and say we can see what has happened. We know roughly what needs to be repaired, roughly how much it's going to cost and this is a repair company that can be used for it. And at the end of all that the surveyor will most of the time get a bunch of invoices to approve as related to the case in question and approve them for the insurance company, and the insurance companies take care of the claims.
- Q.** And you coordinate this particular service out of your office in Alabama.
- A.** Yes.
- Q.** And so this type of service you provided any time there's issues within the United States territorial waters or in the United States ports. In other words, they don't reach you if there's some problem in Hong Kong. It's only if it happens in the United States. Is that fair to say?
- A.** U.S., Caribbean, Canada and associate, close areas.
- Q.** Okay. Now, do you also provide this service through NSB-USA, LLC to NSB, the operator of the FLAMINIA, in Germany?
- A.** Yes, if they so request.

NSB also relies on NSB USA (and therefore Jonas Lyborg) to “travel to the scene of any collision, grounding, fire, explosion, contamination or other extraordinary loss or damage to an NSB Vessel or its cargo; conduct an investigation of loss.” Lyborg, p. 67, lines 10 – 25:

- Q.** Okay. So when NSB, the operator of the FLAMINIA, has this particular issue happen to them, there's an oil spill or some sort of problem, they reach out to you because you're in the United States and you're their -- under your retainer agreement, their representative here. You go ahead and you do all of that for them; right?
- A.** If they reach out to me instead of somebody else, then I will go and do exactly the same as I do for the insurance companies.

Q. So either for NSB, the operator of the FLAMINIA, or for NSB, the operator of the FLAMINIA's insurance.

THE WITNESS: Yes; for the insurance companies also, yes.

In the event that an NSB vessel needs repairs while navigating in (and/or near) United States territorial waters, Jonas Lyborg, from the NSB USA office in Alabama, assesses the type of maintenance and repairs needed, and coordinates with local United States service providers to carry out the repairs. Lyborg, p. 70, lines 24 – 25; p. 71, lines 2 – 20; p. 72, lines 3 – 25; p. 73, lines 2 – 4:

Q. Okay. Now, we've talked about some of the things that that entails, being a representative. You talked about P&I service but that's for insurance companies so that's not included in your services to NSB. Is that fair to say?

A. Yes.

Q. Okay. Now, what other things do you do as their representative in the United States?

A. I might advise on a suitable repair company, give them a company to contact, and I might advise on other items that might be related. It's a little bit difficult to specify because as a surveyor -- I'm basically doing the same thing as I do as a surveyor. I give advice and recommendations and it could relate to different things.

Q. So under your agreement, your retainer agreement with NSB, the operator of the FLAMINIA, that you've maintained from 2009 to the present, you are their surveyor in the United States.

A. One of them. Again, we come back to that. If they want to use me, yes.

...

Q. Okay. You said that one of the things that you do -- and we're talking again about NSB, the operator of the FLAMINIA. One of the things that you do for them in the United States, you said you advised on a suitable repair company. Is that fair to say?

A. Yes.

Q. So walk me through that. Give me an example. If there is a problem with one of their ships and they are in the vicinity and the territory or in a United States port, what you do in this instance is you reach out to a local United States company to conduct those repairs or you suggest a local United States company that they can hire to conduct those repairs?

A. Yes.

Q. And to do that you do research or you ask around. You figure out who is the more suitable repair company in the particular area of the United States where their ship is at.

A. Partly, but I basically don't experience working with so many different companies and visiting so many ports and working together with IMC, et cetera, but sometimes I have to do a little bit of extra research.

Q. And you do this out of your office in Alabama.

A. Yes.

When problems and technical issues on NSB vessels, arise in the United States, a superintendent at NSB's offices in Germany reaches out to Jonas Lyborg in Alabama to coordinate (on NSB's behalf and at their direction) the repairs, and find suitable vendors for parts in the United States. Lyborg, p. 73, lines 24 – 25; p.74, lines 2 – 25; p. 75, lines 2 – 17; p. 76, lines 6 – 11:

Q. Since you've been in this relationship with NSB since you started the retainer in 2009 and you opened up -- you started the NSB-USA, LLC company in Alabama, what kind of repairs have you advised on whenever NSB ships come to the United States?

A. Many different. There could be an electrical repair, for example, of a winch motor and they need an electrical company or they need an electrical engineer to go on board and I can recommend to call this person or that person. If there is a breakdown on a main engine which belongs to MAN, then I can recommend that they call MAN, which has an office in Houston, in Long Beach, in New York, et cetera.

Q. And how does this go about? Let's say that there is an NSB vessel coming into a United States port and they have some sort of technical issue, technical problem. Does the ship reach out to NSB, the operator of the FLAMINIA, in Germany?

A. Yes.

Q. And then they reach out to you in Alabama?

A. Yes. The ship should always contact the superintendent because the superintendent is in charge for the vessel and he's in Germany. And then it's up to him to take the next decision. I'm never involved

...

Q. This superintendent is a person that works for NSB, the operator, in Germany.

A. Yes.

Q. And the superintendent's job, he's assigned a set of a number of vessels or a particular vessel?

A. A number of vessels, I think.

Q. And he works shoreside in Germany.

A. Yes.

Q. And so if it's an issue that happens in the United States where the repairs are needed to be conducted in the United States, is the superintendent the person that reaches out to you? "Mr. Lyborg, I need you to find us a suitable repair company to conduct these repairs in the United States." Is that what happens?

A. He might do that.

...

Q. And every time that you are the one that is advising on a suitable repair company or has to contact the repair company, that's the process. It's the superintendent from Germany reaching out to you in Alabama.

A. Yes.

At all material times, **NSB has exercised such level of control over NSB USA that it has amounted to a total domination of its affairs.** The control and dominion is to such extent that **NSB-USA manifests no separate interests of its own and functions solely to manage the business operations of NSB in the United States.**

Under the contract, NSB funds one-hundred percent of the operating costs of NSB-USA, including paying for: office rent, insurance, office computers, utility bills, Jonas Lyborg's vehicle expenses (i.e. lease, gasoline and car insurance), Jonas Lyborg's credit card, office supplies, and Jonas Lyborg's travel and lodging expenses while on NSB business, and business development expenses. *See* Exhibit 598 (attached to this Response as Exhibit "5"):

2.2 Expenses. Office expenses including office supplies, equipment, telephone, facsimile, utilities, one (1) car, car insurance and fuel will be reimbursed by NSB. A monthly lump sum amount of US \$1,500.00 (US One Thousand Five Hundred Dollars and No./100) shall be advanced for three (3) months (3 x \$1,500.00) at a time and in advance. Expenses to be itemized by NSB USA, LLC on a quarterly basis.

2.3 Reimbursement. In connection with performing services, NSB recognizes that NSB USA, LLC will incur certain expenses not covered by the Monthly Fee and agrees to reimburse NSB USA, LLC for the following:

2.31 Travel Expenses. NSB will reimburse NSB USA, LLC for travel expenses incurred by NSB USA, LLC in travelling to/from NSB vessels. For international travel, NSB USA, LLC must book flights and other travel arrangements through NSB's travel agent.

2.32 Food Expenses. NSB will reimburse NSB USA, LLC \$70.00 per day for food expenses incurred by NSB USA, LLC for each day the Key Person is out of the office travelling to/from visiting an NSB vessel.

2.33 Lodging Expenses. NSB will reimburse NSB USA, LLC for reasonable lodging and associated expenses incurred by the Key Person in connection with NSB USA, LLC's visits to NSB Vessels.

...

2.35 Business Development Expenses NSB is the customer of a variety of companies and persons servicing NSB Vessels. NSB does not routinely expect that NSB USA, LLC will incur business development expenses in this regard. Nevertheless, NSB recognizes that such occasions may arise and will reimburse NSB USA, LLC for business development expenses relating to meals, entertainment, athletic events, etc., in connection with NSB USA, LLC's dealings with persons and companies supplying services and materials to NSB Vessels.

See Lyborg, p. 160, lines 6 – 25; p. 161, lines 19 – 22; p. 162, lines 6 – 15; p. 163, lines 20 – 25:

- Q.** So does that mean that NSB, the operator of the FLAMINIA, pays for all of these expenses of NSB-USA in Alabama? They pay for office supplies, equipment, telephone, facsimile, utilities and one car.
- A.** When it's related to NSB-USA, LLC, yes.
- Q.** So related to you providing services to them, so whenever there are expenditures related to your services to NSB out of your Alabama office, NSB pays for those expenses.
- A.** They reimburse me for that.
- Q.** And that includes your office expenses such as office supplies, equipment, telephone, facsimile, utilities and one car.
- A.** Yes.
- Q.** Do they also pay for car insurance?
- A.** Yes.
- Q.** Do they also reimburse you for the fuel say if you drive to an accident location?
- A.** Yes.
- ...
- Q.** Now, do you ever update your office equipment? For example, if your computer is not working, do you buy new computers?
- A.** Yes.
- ...
- Q.** So NSB has not paid for computer upgrades?
- A.** They have paid for part of the upgrades.
- Q.** So if you need to upgrade your computers and the cost is \$10,000 for new computers or \$2,000, whatever it is, you apportion those costs -- part of those costs to NSB-USA as expense in furtherance of your agreement.
- A.** Or I will buy one computer and when the other one breaks down I will charge that to NSB, because I have several computers, of course, in the office.
- ...
- Q.** And when you want to get reimbursement for those expenses do you prepare any type of documentation saying this is what I need in terms of reimbursement and then you send that to their office in Germany?
- A.** Yes.

The contract also contemplates that NSB will pay for Jonas Lyborg's (and his wife's) medical health, and disability insurance. Further, NSB USA is required to obtain comprehensive general liability insurance (in amounts pre-approved by NSB) – naming NSB (the operator of the *Flaminia*) as “[a]dditional Insured.” NSB is required to pay for costs and premiums to secure that insurance. *Id.*, p. 6 of 9:

5.7 Insurances. NSB USA, LLC shall obtain and pay for medical, health, disability and worker's compensation insurance as it deems appropriate to cover the Key Person and the assistant Mrs. Ingrid Lyborg. NSB USA, LLC shall obtain comprehensive general liability insurance in amounts subject to approval by NSB, naming NSB as "Additional Insured." Costs or premiums of such comprehensive general liability insurance shall constitute "Expenses" subject to reimbursement under Section 2.3.

As noted above, NSB USA has a bank account in Fairhope, Alabama. The bank account is exclusively used for services that Lyborg provides to NSB out of the Alabama office/branch. Lyborg, p. 129, lines 3 – 9:

- Q.** Okay. And everything that NSB-USA does in terms of the bank account that NSB-USA has in Alabama and the services that NSB-USA provides under the retainer agreement, that's exclusively to provide services to NSB, the operator of the FLAMINIA; is that correct?
- A.** Correct.

NSB pays for Jonas' Lyborg's American Express credit card. Lyborg, p. 108, lines 9 – 25, p. 109, lines 9 – 25; p. 110, lines 2 – 25; p. 111, lines 2 - 25:

- Q.** Mr. Lyborg, in order to run the day-to-day operations of NSB-USA -- and I'm talking about since 2009 to the present -- and in furtherance of your retainer agreement with NSB, the operator of the FLAMINIA, do you use a credit card for obvious expenses? I'm not talking about your personal credit. I'm talking about like an office credit.
- A.** No, not for office expenses, but I have a designated credit card related to NSB-USA.
- Q.** So you have a designated credit card related to NSB-USA.
- A.** Correct.
- Q.** And that's in furtherance of your services, the services that you provide to NSB, the operator of the FLAMINIA.
- A.** Correct.
- Q.** What is the name of the bank, the entity that issued the card?
- A.** American Express.
- ...
- Q.** Who pays for this credit card?
- A.** NSB.
- Q.** The last question I asked you, who pays for this credit card, and your answer was NSB?
- A.** Yes.
- Q.** And that's NSB, the operator of the FLAMINIA.
- A.** Yes.
- Q.** Okay. Now, how does NSB go about paying for that? Every month you get a statement from American Express; is that correct?

A. Yes.

Q. And that's sent to your Alabama office.

A. Yes.

...

Q. And what department in NSB do you send that to in Germany?

A. Finance department

..

Jonas Lyborg's American Express' credit card is exclusively used for services that Lyborg provides to NSB out of the Alabama office/branch. Moreover, Lyborg opened the American Express credit account and the bank account in Fairhope, Alabama *at the same time* that he started the service agreement with NSB, and *at the same time* that NSB USA was incorporated in Alabama. Lyborg, p.111, lines 20 – 25; p. 112, lines 2 - 22:

Q. So the credit card is exclusively used for NSB services that you provide in Alabama to NSB, the operator of the FLAMINIA.

A. Yes.

Q. Who opened the American Express card account?

A. I did.

Q. You did? Okay. Now, when you opened it, when did you do this?

A. I think at the same time as we started with the service agreement.

Q. So in 2009 when you started with the service agreement with NSB, the operator of the FLAMINIA, you also incorporated or formed NSB-USA, LLC, and in addition to that, you opened this credit card account with American Express.

A. Yes.

Q. Okay. And also you opened -- I think we said a bank account under the name of NSB-USA, LLC in Fairhope, Alabama.

A. Yes.

Q. Okay. And again, all of this was done at the same time in furtherance of the services that you provided out of your Alabama office to NSB, the operator of the FLAMINIA.

A. Yes; more or less the same time, yes. Of course, the time spread. You don't do everything in the same day.

NSB testified that its Singapore branch, is an NSB company department. Notably, NSB's control and domination over its Singapore department, is indistinguishable from NSB's control and domination of its United States branch (NSB USA, LLC). This leads to a simple conclusion: **if NSB's Singapore office is an NSB department, then NSB USA is also an NSB department.** Like its "branch" in the United States, NSB funds one-hundred percent of the operating expenses/costs of its department in Singapore, including paying for: rent, insurance, computers, utility bills, employee salaries, employee travel expenses, employee health insurance, employee

car leases, gasoline, repairs to office equipment, etc. *See* Deposition of Torge Schulz, p. 178, lines 2 – 18; p. 186, lines 14 – 25; 187, lines 2 – 25; p. 188, lines 2 -25; p. 189, lines 2 – 16:

Q Now, there's another company listed, NSB Singapore. Can you explain to us, please, what relationship NSB Singapore has with NSB Reederei?

A NSB Singapore isn't an owned company. It's a department from NSB Germany with about three employees. And they do for the superintendents in Germany technical inspections for the vessels in Singapore and support in dry-dock jobs, when we go in Singapore in the dry-dock.

Q And if I understand your answer, NSB Singapore is actually a department --

A Yes.

Q -- of Reederei?

A In Germany.

Q In Germany?

A Yes. It's not an owned company.

Q It's not an owned company. It's actually a department of the German company located in Singapore.

A That's right.

...

Q And as a department of NSB Germany, does NSB Germany pay for the operating expenses of NSB Singapore?

A Yes.

Q Does that include for paying for office supplies?

A Yes, for the office. And --

Q Electricity?

A -- NSB Germany pays the salaries of these three persons who work there.

Q Okay. So for the Singapore office, which is a department of NSB Germany, NSB Germany pays the salaries of the employees on NSB Singapore's office?

A Yes.

Q And NSB Germany also pays for the operating expenses, which includes just running that office, utilities, like electricity, office supplies, if they want to replace computers, things of that nature?

A Yes.

...

Q. And does that also include paying for upgrades to their computer system, for example they need new computers or the need --

A. Yes, yes.

Q. And does that include paying for utilities, electricity, just the general operation of the office?

A. Yes.

Q And you also said that NSB Germany also pays for NSB Singapore the salaries of the three people that work for that office?

A That are employees of NSB Germany.

Q Okay. And so, accordingly, NSB Germany pays for those salaries?

A Yes, that's right.

Q And does NSB also provide the -- pay for the car that they drive, the NSB Singapore employees?

A Yes.

Q Okay. Does NSB pay for the insurance, the car insurance, that the car has, the car that is used by the NSB Singapore, if you know?

A Yes. I don't know if they have their own car, but should it be, then NSB Germany pays it.

Q What about if they're on company time, company business, and they're driving the car that NSB provides -- and, again, I'm talking about NSB's department in Singapore -- does NSB also pay for the gasoline?

A Yes.

Q And if the employees have to travel to a particular location to, say, board a vessel somewhere in East Asia, right, or somewhere close to the NSB Singapore office, does NSB pay for the travel expenses?

A Yes, of course.

Q And just for purposes of making the record clear, you explained that NSB Singapore is a department of NSB Germany?

A Yes.

Finally, the same New York attorneys that represent NSB, the operator of the Flaminia, and owner Conti II (and who filed the Limitation of Liability Act in the United States on behalf of NSB and Conti II [D.E. 1]); represent Jonas Lyborg and NSB USA LLC. Lyborg, p. 136, lines 22 – 25; p. 137, lines 2 – 25; p. 138, lines 2 – 25:

Q. Today we're sitting at the offices of Montgomery McCracken in New York City taking your deposition, Mr. Lyborg. Did NSB-USA, LLC hire Montgomery McCracken to represent you in this deposition?

A. I cannot answer those questions.

Q. Did you hire them to represent you in this deposition?

MR. RYAN: You mean personally?

MR. LLINÁS: Sure.

Q. If the answer's no, it's whatever the answer is.

A. I have requested support and it's been provided to me.

Q. Who did you request support to?

A. I requested support -- if anything develops with anything regarding this, I need to be supported and I need to have legal advice provided to me.

Q. And who did you request the support from?

A. It's a good question. I requested that to NSB insurance department.

Q. In Germany?

A. Yes.

Q. And that's NSB insurance department that's the same NSB that operates the FLAMINIA.

A. Yes.

Q. So to be clear, you're not paying for the services of the fine law firm of Montgomery McCracken today.

A. Correct

...

Q. Either way, you're here represented by counsel but you've said that you are not paying for their fees and you didn't hire them. You simply said "I need help" and you reached out for support so you reached out to NSB in Germany and they are providing that to you.

A. Correct.

Q. Whoever the lawyers are.

A. Correct.

Q. Okay. And those lawyers are in New York.

A. I think they are.

In sum, NSB USA LLC was incorporated and created for the single and exclusive purpose of managing NSB's business affairs in the United States. There is no question that NSB USA is NSB's permanent base of operations in the United States. Furthermore, there is no question that U.S. citizen Jonas Lyborg (NSB's "Key Person" in the United States) is NSB's permanent agent in the United States.

B. Alternatively, it is disingenuous, and subject to the doctrine of judicial estoppel, for Petitioners to invoke the protections of United States law to limit their liability for the MSC Flaminia incident, while simultaneously seeking to avoid its obligations.

Petitioners Conti and NSB argue that while United States law allows them to file this lawsuit in United States district court, to limit (and/or exonerate them from) their liability under United States law (i.e. the Limitation Act, 46 U.S.C. §§ 30501 – 30512); United States law does not apply to the Claimant's Jones Act claims.

Petitioners Conti and NSB should be judicially estopped from filing this lawsuit in United States district court, cherry-pick the provisions of the United States Limitation Act that benefits them (i.e. 46 U.S.C. § 30505(a)), while simultaneously ignoring the provisions that impose burdens on them (i.e. 46 U.S.C. § 30504(b)).

Petitioners did not file the limitation action in Germany. Petitioners also did not seek to limit their liability under German law for the *MSC Flaminia* incident. Rather, Petitioners voluntarily reached out to American courts and filed this lawsuit invoking the protections and benefits of United States law, in order to obtain exoneration or to limit their liability under the Limitation of Liability Act, 46 U.S.C. §§ 30501 – 30512. [D.E. 1]. Petitioners also pled defenses provided by the Limitation Act. *See* D.E. 1, ¶25:

Plaintiffs Conti and NSB, as owner and operator, respectively, of the MSC Flaminia and while denying liability to any and all claimants, potential or otherwise, is entitled to, among other defenses, the benefit of limitation of liability, including the fire defense, as provided in 46 U.S.C. §30501, *et seq.*, and all laws supplemental thereto, and Rule F of the Supplemental Rule for Certain Admiralty and Maritime Claims as the casualty was occasioned and occurred without their privity or knowledge.

In doing so, Petitioners voluntarily and purposefully availed themselves to be subject to United States law. Petitioners cannot reap the benefits of United States law, and yet seek to avoid the burdens of performing its obligations.

As the Supreme Court explained in *New Hampshire v. Maine*, 532 U.S. 742 (2001), “where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. This rule, known as judicial estoppel, ‘generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.’” *New Hampshire*, at 749, quoting 8 Moore's Federal Practice § 134.30, p. 134-62 (3d ed. 2000) (“The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding”) and 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4477, p. 782 (1981) (“absent any good explanation, **a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory**”) (emphasis added).

Courts have uniformly recognized that the purpose behind judicial estoppel is “to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment.” *New Hampshire*, at 749-50 citing *Edwards v. Aetna Life Ins. Co.*, 690 F. 2d 595, 598 (6th Cir. 1982). *See also In re Cassidy* 892 F. 2d. 637, 641 (7th Cir. 1990) (“Judicial estoppel is a doctrine intended to prevent the perversion of the judicial process”); *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982) (judicial estoppel “protect[s] the essential integrity of the judicial process”); *Scarano v. Central R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953) (judicial estoppel prevents parties from “playing ‘fast and loose with the courts’”).

Certainly, at an absolute minimum, NSB and Conti's invocation of U.S. limitation of liability law is further evidence of a substantial base of operations in the United States.

IV. CONCLUSION.

Petitioners Motion for Summary Judgment [D.E. 832] should be denied in its entirety. Under the seminal Supreme Court case of *Hellenic Lines v. Rhoditis*, the U.S. Jones Act applies to foreign shipowners and operators with a 'base of operations' in the United States. In this case, discovery revealed that Petitioners have substantial business operations in the United States.

Forty percent of NSB's business consists in the operation of vessels transporting cargo, to and from the United States. Between 2006 and 2012, NSB vessels visited United States ports 4,355 times. The *MSC Flaminia*, the vessel in this case, visited United States ports 199 times (an average of 2 visits per month) between 2006 and 2012. For over 15 years, NSB has maintained a U.S. citizen as its permanent agent in the United States to provide services as a commercial representative, a technical advisor and a security advisor. For over 7 years, NSB has maintained a permanent office and branch in Alabama, for the exclusive purpose of managing its affairs in the United States. Finally, throughout the year, NSB offers and sells 19 passenger cruises that start, end and/or visit United States ports. **There is no question, therefore, that under *Rhoditis* and its progeny, NSB has substantial business operations in the United States, justifying the application of the Jones Act to this dispute.**

Much like in *Rhoditis*, NSB and Conti II are in direct competition with American shipowners and operators. As the Supreme Court explained in *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 309 (1970), there is a "national interest served by the assertion of Jones Act jurisdiction." *Id.* at 309. That "national interest" is to "plac[e] a United States shipowner on the same competitive basis as an alien shipowner who is engaged in extensive business operations in our country." *Id.* The Supreme Court specifically recognized that if "the liberal purposes of the Jones Act are to be effectuated, the façade of the operation must be considered minor, as compared with the real nature of the operation, and a cold objective look at the actual operational contacts that the ship and owner have with the United States." *Id.* Otherwise, an alien shipowner with operations in the United States might escape his obligations as a "Jones Act employer" and unfairly disadvantage citizens of this country engaged in the same business. *Williams v. Cruise Ships Catering*, 299 F. Supp. 2d 1273 (S.D. Fla. 2003), citing *Rhoditis*, at 309. *See also Sea-Land Services, Inc. v. Pepper Source*, 941 F.2d 519 (7th Cir. 1991) ("If there is such unity of interest

that the separate personalities of the corporation and the individual [or other corporation] no longer exist, adherence to the fiction of separate corporate existence would sanction a fraud and promote injustice”).

In *Szumlicz v. Norwegian American Line, Inc.*, 698 F. 2d 1192 (11th Cir. 1983), the Eleventh Circuit held that a foreign ship operator had a *Rhoditis* substantial base of operations in the United States because: 1) it maintained offices as well as shipping agents in Ft. Lauderdale, Florida, 2) its vessels called on Port Everglades, Florida on a regular basis, 3) its vessels made scheduled stops in other United States ports, and 4) it operated cruises that began and ended in United States ports. *See Szumlicz* at 1994 (emphasis added):

Plaintiff, a citizen and resident of Poland, entered the service of the VISTAFJORD in Hamburg, Germany on December 16, 1978, to work for a period of six months as a musician. The ship proceeded from Hamburg to another port in Germany where passengers boarded, and thence to England where additional passengers came aboard. The vessel then sailed to the Canary Islands, and from there to South Florida where she arrived on January 19, 1979. Between that date and February 17, 1979, when the plaintiff was hospitalized, the VISTAFJORD called at Port Everglades, Florida every two weeks. During a four-month period the vessel called at that port nine times. The ship flies the Norwegian flag and is owned by Norwegian companies whose offices are in Norway. It is substantially financed by American concerns

The defendant maintains offices in Fort Lauderdale, Florida, and in New York, New York. The VISTAFJORD and other Norwegian America Line vessels operate on a regular basis out of Port Everglades, in Fort Lauderdale. Defendant advertises and operates two, three and four week Caribbean cruises, commencing and terminating in Fort Lauderdale. Special rates are offered to passengers flying in from various points in the Continental United States. The VISTAFJORD and other cruise ships of Norwegian America Line have their Caribbean cruise routes based in Florida with scheduled stops in other United States ports such as San Juan, Puerto Rico, and St. Thomas and St. Croix in the Virgin Islands. **Defendant has shipping agents in Fort Lauderdale**, and has a physician there who regularly treats defendants' seamen.

The district court's determination that the defendant shipowner had a substantial base of operations in the United States is a factual finding that should not be disturbed on review unless clearly erroneous. So tested we find no reversible error.

Here, in this case the facts are stronger than in *Szumlicz*. As noted above, the overwhelming evidence is that under *Rhoditis* and its progeny, NSB has substantial business operations in the United States, justifying the application of the Jones Act to this dispute.

Petitioners Motion for Summary Judgment [D.E. 832] should be denied in its entirety.

Respectfully submitted on March 25, 2016,

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CERTIFICATE OF PRE-MOTION CONFERENCE AND CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on January 8, 2016 counsel for Claimants sent a letter to counsel for Petitioners, James E. Ryan, Esq., regarding the aforementioned relief. Accordingly, under the Court's Individual Rules and Procedures, Claimant certifies that pre-motion letters were exchanged.

I HEREBY CERTIFY March 25, 2016, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

By: /s/ Carlos Felipe Llinás Negret
CARLOS FELIPE LLINÁS NEGRET
FL Bar No.: 73545
Admitted in this case *Pro Hac Vice*.