

Respectfully submitted this 30th day of March, 2007.

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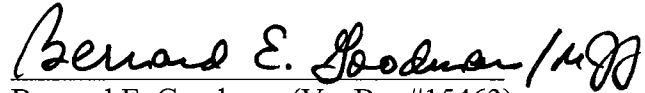
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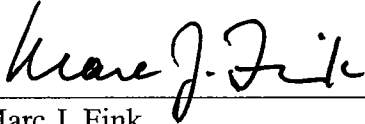
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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)**

SHIPBUILDERS COUNCIL OF AMERICA, INC., et al.)	
)	
Plaintiffs,)	
v.)	
)	
U.S. DEPARTMENT OF HOMELAND SECURITY, et al.)	Civil Action No. 1:06-cv-01297-TSE-LO
)	
Defendants.)	
)	
and)	
)	
MATSON NAVIGATION COMPANY, INC.)	
)	
Defendant-Intervenor)	

STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

Pursuant to Local Rule 56, Plaintiffs Shipbuilders Council of American, Inc. (“SCA”) and Pasha Hawaii Transport Lines, LLC (“PHTL”) submit that because this action involves a review of agency action based upon the Administrative Record filed with the Court, a full statement of undisputed material facts may not be necessary. However, based upon the Administrative Record, Plaintiffs present the following statement of material facts as to which there is no genuine issue to be tried, in support of their motion for summary judgment.

1. This is an action for review of a ruling by the National Vessel Documentation Center, United States Coast Guard, U.S. Department of Homeland Security,

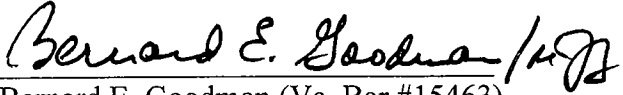
concerning work proposed to be done by Matson Navigation Company (“Matson”) on one or more of its C9 class vessels.

2. On June 15, 2004, Matson wrote to the Coast Guard regarding a project to perform shipyard work on one or more of the vessels in two phases. The work in the first phase is to be done in a shipyard in the People’s Republic of China (“PRC”). The balance of the work in the second phase is to be completed immediately thereafter in a shipyard in the United States. Matson sought a preliminary determination from the Coast Guard that the work it proposed to do would not constitute a “rebuilding” within the meaning of 46 U.S.C. §§ 12101(a) and 12132 (b) (formerly the Second Proviso of Section 27 of the Merchant Marine Act, 1920, 46 U.S.C. App. § 883 (the “Jones Act”)).
3. On June 23, 2004, the Coast Guard issued a ruling that based upon the documents and information supplied by Matson in its June 15 letter, the proposed work to be performed on the vessels (1) will not result in a rebuilding of the vessels, and (2) will not result in the vessels’ loss of coastwise (domestic) trading privileges. The sole basis for the Coast Guard’s decision was its determination that the percentage of steel work proposed to be done by Matson in the foreign shipyard would fall within regulatory threshold defining permissible work in the Coast Guard’s regulations. *See* 46 C.F.R. § 67.177(b).
4. On October 27, 2006, Plaintiff PHTL requested reconsideration of the June 23, 2004 ruling with the Coast Guard.
5. On October 30, 2006, Plaintiff SCA sent a letter to the Coast Guard in support of Plaintiff PHTL’s request for reconsideration.

6. Defendant Coast Guard issued a letter to Plaintiff PHTL dated November 2, 2006, stating “[i]n accordance with the provisions of 46 C.F.R. Subpart 1.03, that action [the ruling of June 23, 2004] is no longer subject to review or reconsideration.”

Respectfully submitted this 30th day of March, 2007.

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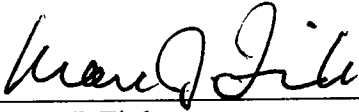
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PUBLIC DOCUMENT

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SHIPBUILDERS COUNCIL OF)
AMERICA, INC., et al.)

Plaintiffs,)

v.)

U.S. DEPARTMENT OF)
HOMELAND SECURITY, et al.)

Civil Action No. 1:06-cv-01297-TSE-LO

Defendants.)

and)

MATSON NAVIGATION)
COMPANY, INC.)

Defendant-Intervenor)

**MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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MATSON NAVIGATION COMPANY, INC.)	
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**MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

This action is a challenge by Plaintiffs Shipbuilders Council of America, Inc. ("SCA") and Pasha Hawaii Transport Lines, LLC ("PHTL") under the Administrative Procedure Act ("APA") to a June 23, 2004 ruling of the Coast Guard (the "Ruling"). See Administrative Record ("A.R.") at Tab 2. The Ruling held that shipyard work undertaken in the People's Republic of China by Matson Navigation Company, Inc. ("Matson") to convert one or more containerships to combination roll-on/roll-off container vessels with newly constructed, fully

enclosed, multi-deck car garages will not result in a foreign rebuilding within the meaning of the Second Proviso of the Merchant Marine Act of 1920 (the “Jones Act”). The Ruling of the Coast Guard was arbitrary and capricious and otherwise not in accordance with law as the Coast Guard, *inter alia*, failed to comply with the Second Proviso and failed to adhere to its own established regulations and precedent.

I. PRELIMINARY MATTER

Before addressing the merits of their motion for summary judgment, Plaintiffs begin with a remaining threshold issue in this case. During the oral argument on March 23, 2007, the defendants and defendant-intervenor asserted—for the first time—that the filing of a CG-1258 pursuant to 46 C.F.R. §67.167(c)(1) is the final step in determining whether a vessel is rebuilt foreign. This argument belies common sense because this regulation has nothing to do with rebuild determinations. Indeed, the filing of this form is governed by a separate statute and a separate set of implementing regulations. Moreover, it is not even clear that Matson would be required to submit such a filing, and even if it was, Matson would not file any plans, blueprints, or other documents along with this form to evidence the amount of steelwork actually performed in the foreign shipyard. Accordingly, the Court should reject defendants’ argument that the filing of this form is the final agency action subject to judicial review.

The vessel documentation laws require in relevant part that:

... on application by the owner of a vessel eligible for documentation, the Secretary of Transportation shall issue a certificate of documentation, or a temporary certificate of documentation, endorsed with one or more of the endorsements specified in sections 12105-12109 of this title.

(b)(1) The Secretary may prescribe the form of, the manner of filing, and the information to be contained in, applications for certificates of documentation.

(2) The Secretary shall require each person applying to document a vessel to provide--

(A) the person's social security number; or

(B) for a person other than an individual--

(i) the person's taxpayer identification number; or. . .¹

The Coast Guard's regulations implementing the vessel documentation laws are set forth in 46 C.F.R. Subparts K and L.² Pursuant to 46 C.F.R. 67.167(c)(1), an application for a new Certificate of Documentation must be applied for whenever "the gross or net tonnages of dimensions of the vessel change." However, the gross and net tonnages of a vessel have nothing to do with its steel weight, and therefore nothing to do with the Coast Guard's rebuilding determination process.³

An application filed under §67.167(c) must be filed in accordance with Subpart K.⁴ In other words, the vessel owner must submit an "Application for Initial Issue, Exchange, or Replacement of Certificate of Documentation; or Redocumentation," which is commonly known as a form CG-1258.⁵ The filing fee for a CG-1258 with a coastwise endorsement is \$ 113.⁶ The CG-1258 has nothing to do with a rebuild determination. These determinations are governed by

¹ 46 U.S.C. § 12103 (recodified at 46 U.S.C. § 12104, 12105 and 12133).

² 46 C.F.R. § 67.141 *et seq.* and 46 C.F.R. § 67.161 *et seq.*

³ These terms have to do with the vessel's volume. *See* 46 C.F.R. §§ 69.57 and 69.63 (defining gross tonnage and net tonnage).

⁴ 46 C.F.R. § 67.167(a).

⁵ 46 C.F.R. § 67.141.

⁶ 46 C.F.R. §§ 67.503, 67.511 and 67.550. (\$84 + \$29 = \$113)

Subpart M (Miscellaneous Applications) of the Coast Guard regulations, specifically 46 C.F.R. 46 C.F.R. §67.177.⁷ The filing fee for each rebuild determination (preliminary or final) is \$450.⁸

A clear example of the fact that the CG-1258 has nothing to do with the rebuild determination is evidenced by Matson's vessel the LURLINE. Matson obtained a "final rebuilding" determination for this vessel on March 26, 2004.⁹ Yet a review of the Coast Guard records shows that no CG-1258 was filed after the installation of two new levels of automobile capacity above the existing roll-on/roll-off area on the main deck. Instead, Coast Guard records show that the last CG-1258 filed for this vessel was on August 24, 1998 (Exhibit 1), the date a bill of sale from The Bank of New York as Owner Trustee to Matson was filed with the Coast Guard (Abstract, Exhibit 2, Continuation Sheet 3)). The Certificates of Documentation for this vessel have been automatically renewed each year after the 2004 final rebuilding determination and the foreign work on the LURLINE (Exhibit 3).¹⁰

Further, contrary to the representations made by the intervenor, copies of the abstract, Certificate of Documentation, and CG-1258 can only be obtained through the Freedom of Information Act ("FOIA") with appropriate fees paid (Exhibit 4). Unless a FOIA request is filed daily or weekly, interested parties such as Plaintiffs would have no way of knowing when a CG-

⁷ 46 C.F.R. § 67.175 *et seq.*

⁸ 46 C.F.R. §§ 67.525 and 67.550.

⁹ A.R. at Tab 12, Letter to William N. Myhre, Esq. from Thomas L. Willis (July 13, 2003); Letter to Sloan White, Esq. from Patricia J. Williams, Deputy Director (Mar. 26, 2004).

¹⁰ Renewals of the Certificate of Documentation are automatic under 46 C.F.R. § 67.163 upon the filing of a form that the information contained in the Certificate of Documentation and any endorsements thereon remain accurate.

1258 is filed or a Certificate of Documentation issued. In cases such as the LURLINE, another CG-1258 may never be filed.

Finally, Plaintiffs question how the intervenor could rely so strongly on the issuance of a Certificate of Documentation with regard to their finality argument, yet not once in either their Motion to Dismiss or Reply Memorandum was this argument ever raised. Indeed, neither the statute nor implementing regulations governing the issuance of a Certificate of Documentation were ever cited in their pleadings. As the Court properly noted, neither a Coast Guard Form 1258 nor a Certificate of Documentation were included in the administrative record. As the Court can see on its face, the Certificate of Documentation in no way reflects the issuance of a rebuild determination. (Exhibit 3). Plaintiffs are at a loss as to what exactly the defendants' suggest can be challenged in Court with respect to rebuilding as a result of the issuance of a Certificate of Documentation, which is ministerial in nature. The Certificate contains no analysis or agency decision-making whatsoever. Nor is there any review of the facts with regard to the steelwork performed in a foreign yard, or any application of the Second Proviso or the agency's rebuilding regulations to these facts. In short, there simply is no agency action at all with respect to rebuilding, and as a result, there would be nothing for the Court to review. The defendants and intervenors' argument should be rejected.

II. STATUTORY SCHEME AND LEGISLATIVE HISTORY

The Second Proviso of the Jones Act

For nearly 200 years, it has been the maritime policy of the United States to require that vessels operating in the domestic (coastwise) trade be built in the United States.¹¹ A major

¹¹ See e.g., Act of March 1, 1817, chap. 31, 3 Stat. 351.

reason for this restrictive policy has been the preservation of an adequate U.S. shipbuilding and ship-repair industry, which is essential to national defense.¹² Prior to 1956, however, United States law did not prohibit vessels rebuilt abroad from operating in the domestic trades. This gap in the law became untenable and in 1956 Congress enacted corrective legislation:

With major developments in technology in recent years there have been instances of American-owned, American-built vessels which have been substantially rebuilt in foreign shipyards, and then have returned to operate in American coastwise trade. Even though these rebuildings have been so extensive as to completely change the character of the vessels, the existing law does not subject the owners to payment of duty, nor is there any restriction against their use in domestic shipping service. This appears to be a gap in the law, which is clearly inconsistent with traditional policy. This bill is designed to close the gap and deny the right of vessels rebuilt abroad to operate thereafter in the domestic trade.¹³

The bill, adding the so-called “Second Proviso” to the Jones Act, was designed “to assist the shipyards of the United States by making applicable to vessels rebuilt in foreign yards the historic policy of exclusion from the coastwise trades which has always been applied with certain exceptions to vessels constructed outside the United States.”¹⁴ As first enacted, the Second Proviso provided:

. . . That no vessel of more than five hundred gross tons which has acquired the lawful right to engage in the coastwise trade, either by virtue of having been built in or documented under the laws of the United States, and which has later been rebuilt outside the United States, its Territories (not including trust territories), or its possessions shall have the right thereafter to engage in the coastwise trade.¹⁵

The Second Proviso did not contain a definition of “rebuilt,” “leaving that interpretation

¹² See e.g., H.R. Rep. No. 2293, 84th Cong. (2d Sess. 1956) at 2.

¹³ *Id.*

¹⁴ S. Rep. No. 2395, 84th Cong. (2d Sess. 1956) at 1.

¹⁵ Pub. L. No. 84-714 (1956).

to the courts.”¹⁶ However, Congressional reports cited with approval the Treasury Department Report memorandum which noted:

The Supreme Court has adopted a definition of the term (which would be applicable), to the effect that --

a vessel is considered rebuilt if any considerable part of the hull of the vessel in its intact condition, without being broken up, is built upon.¹⁷

The 1956 Act authorized the Secretary of the Treasury to “prescribe regulations as may be necessary to carry out the purposes of this Act.”¹⁸ The next year, the Customs Service amended its regulations to provide that a vessel would be considered “rebuilt” if “any considerable part of the hull in its intact condition without having been broken up is built upon or substantially altered.”¹⁹

The 1960 Amendment

Unfortunately, vessel owners sought to evade the “rebuild” requirements by constructing large ship sections (midbodies) in foreign countries, towing them to the United States, and installing them in the middle of U.S.-built vessels.²⁰ Congress thus found it necessary in 1960 to amend the Second Proviso “to close a loophole therein which would permit a frustration of the

¹⁶ S. Rep. No. 2395 at 1.

¹⁷ *Id.* at 1-2. See also H.R. Rep. No. 2993 at 8. This definition was found in *United States v. The Grace Meade*, 25 F. Cas. 1387 (E.D. Va. 1876) (No. 15,243), which decision was adopted by the Supreme Court in *New Bedford Dry Dock Co. v. Purdy (The Jack-O’Lantern)*, 258 U.S. 96 (1922).

¹⁸ Pub. L. No. 84-714, at § 3.

¹⁹ 22 Fed. Reg. 6380, 6381 (1957).

²⁰ H.R. Rep. No. 1887, 86th Cong. (2d Sess. 1960) at 2.

intent of Congress that vessels of foreign construction shall not be permitted to operate in the coastwise trades of the United States.”²¹

Shipbuilding officials in this country view with alarm the Customs ruling permitting the use, without loss of coastwise privileges, of foreign midsections in the rebuilding of domestic vessels. It was contrary to the spirit of the statute involved, they argued, and could open the way to other even more damaging possibilities. . .

* * *

Your committee is of the opinion that this legislation is needed to close the above-mentioned loophole in the existing statute and to buttress our traditional national objectives affecting the coastwise trade and the shipbuilding industry. . .²²

The Second Proviso was amended to read as follows: (deletions marked by strikeout and additions marked by underlining):²³

That no vessel of more than five hundred gross tons which has acquired the lawful right to engage in the coastwise trade, by virtue of having been built in or documented under the laws of the United States , and which has later been rebuilt outside the United States, its Territories ~~(not including trust territories), or its possessions~~ shall have the right thereafter to engage in the coastwise trade, unless the entire rebuilding, including the construction of any major components of the hull or superstructure of the vessel, is effected within the United States, its Territories (not including trust territories), or its possessions:²⁴

²¹ *Id.* at 1, 3. *See also* S. Rep. No. 1279, 86th Cong. (2d Sess. 1960) at 3.

²² *Id.* at 3. *See also* S. Rep. No 1279, 86th Cong. (2d Sess. 1960) at 3.

²³ *Compare* Pub. L. No. 84-714 (1956) *with* Pub. L. No. 86-583 (1960). In 1988, Congress struck the words “of more than five hundred gross tons.” *See* Pub. L. No. 100-239, at § 6(c)(1). The Congressional purpose was to “require all domestic vessels, regardless of size, to be rebuilt domestically to participate in the coastwise trade.” H.R. Rep. No. 100-423 (1987).

²⁴ As part of the completion of the codification of title 46, United States Code, the Second Proviso of the Jones Act was recodified by Pub. L. No. 109-304 on Oct. 6, 2006 as 46 U.S.C. §§ 12101(a) and 12132(b) which provide:

§ 12101. Definitions

