

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA :
 :
 v. : **CRIMINAL NO. 08-765**
 :
PENDULUM SHIPMANAGEMENT INC. :

UNITED STATES' ENTRY OF PLEA MEMORANDUM

Defendant Pendulum Shipmanagement, Inc., through counsel, has indicated its desire to plead guilty to an information, waiving prosecution by indictment, pursuant to a plea agreement. Pendulum will plead guilty to Counts One through Four of a four-count information, waiving prosecution by indictment, charging it with (i) conspiracy, in violation of 18 U.S.C. § 371 (Count One); (ii) a knowing failure to maintain an Oil Record Book, in violation of 33 U.S.C. § 1908 (Count Two), (iii) false statement in a matter within the jurisdiction of the executive branch of the United States, in violation of 18 U.S.C. § 1001 (Count Three); and (iv) obstruction of an agency proceeding, in violation of 18 U.S.C. § 1505 (Count Four), all arising from acts of a Master and Chief Engineer, agents of the defendant, employed on a ship operated by the defendant, who were acting for the intended benefit of the defendant, relating to the management of the ship's oily waste and oil-contaminated ballast.

I. MAXIMUM PENALTIES

Statutory maximum sentence: Count One - (conspiracy - 18 U.S.C. § 371), five years probation, a \$500,000 fine, and a \$400 special assessment; Count Two (failure to maintain an accurate Oil Record Book - 33 U.S.C. § 1908), five years probation, a \$500,000 fine, and a \$400

special assessment; Count Three (false statement - 18 U.S.C. § 1001) five years probation a \$500,000 fine, and a \$400 special assessment; and Count Four (obstruction of agency proceeding - 18 U.S.C. § 1505) five years probation, a \$500,000 fine, and a \$400 special assessment; .

Total Maximum Sentence is: 5 years probation, a \$2,000,000 fine, and a \$1,600 special assessment.

II. ELEMENTS OF THE OFFENSE

In order to prove a violation of 18 U.S.C. § 371 as charged in Count One, the government must prove beyond a reasonable doubt that:

1. There was an agreement between two or more of persons, including the defendant, to commit at least one crime charged in the information;
2. The defendant became a member of the conspiracy knowing at least one of its objects and intending to help accomplish it; and
3. One of the members of the conspiracy performed at least one overt act for the purpose of carrying out the conspiracy.

In order to prove a violation of 33 U.S.C. § 1908(a) as charged in Count Two, the government must prove beyond a reasonable doubt that the defendant:

1. Is a “person” as provided by the Act to Prevent Pollution from Ships (APPS); and
2. Who, while subject to the APPS oil discharge regulations, knowingly failed to maintain an Oil Record Book for a vessel of at least 400 gross tons.

In order to prove a violation of 18 U.S.C. § 1001 as charged in Count Three, the

government must prove beyond a reasonable doubt that:

1. The defendant knowingly made false, fictitious, or fraudulent statements or representations to the government;
2. In making the false, fictitious, or fraudulent, statements, the defendants acted wilfully;
3. The statements were made in a matter within the jurisdiction of the executive, legislative, or judicial branch of the government of the United States; and
4. The statements made by the defendant were material to the United States Coast Guard.

In order to prove a violation of 18 U.S.C. § 1505 as charged in Count Four, the government must prove beyond a reasonable doubt that:

1. The defendant corruptly, or by threats or force, or by threatening communication;
2. Endeavored to influence, obstruct, or impede the due and proper administration of the law;
3. Knowing that there was a pending proceeding;
4. Before the United States Coast Guard, Department of Homeland Security.

III. FACTUAL BASIS FOR PLEA

If this case were to proceed to trial, the government would be able to prove each element of the crimes charged beyond a reasonable doubt. The government's evidence would consist of

both testimonial as well as physical evidence. The government would prove that, at all times material to the matter at bar:

On July 3, 2008, the M/V Quantum, an ocean-going container vessel, registered in Panama, and weighing approximately 9,965 gross tons, entered the Port of Philadelphia, Pennsylvania. The M/V Quantum was engaged in the carriage of cargo to ports around the world and the United States.

Pendulum Shipmanagement, Inc. (“Pendulum”), a Liberian company with headquarters in Greece, was the company that operated the M/V Quantum and employed the crew on the ship. As the M/V Quantum’s operator, Pendulum was responsible for the operation of the ship.

Co-defendant Nestor Alcantara is a citizen of the Philippines and beginning on or about April 18, 2007 was employed by Pendulum as a member of the crew of the M/V Quantum. In or about October of 2007, Nestor Alcantara became the master of the M/V Quantum. As master, co-defendant Alcantara was the senior officer in command of and responsible for all ship-board related operations, including, but not limited to, ultimate responsibility for maintaining an accurate Oil Record Book.

Co-defendant Alfredo Onita is a citizen of the Philippines and beginning on or about May 18, 2008, was employed by Pendulum as the Chief Engineer aboard the M/V Quantum. As the Chief Engineer, co-defendant Onita was the senior officer in command of the ship’s engine room and engine department, and he was directly responsible for directing and overseeing the engine room crew. Co-defendant Onita had overall responsibility for the operations of the engine department, including supervision of daily operations, formulation and implementation of engine room procedures, and verification that all systems, including mandatory pollution prevention

equipment known as the Oily Water Separator and Oil Content Meter, were functioning properly. Co-defendant Onita was responsible for record-keeping related to the functioning of the engine department, and for recording certain engine room operations in the vessel's Oil Record Book.

The acts and omissions of co-defendants Alcantara and Onita, and the crew of the M/V Quantum, described below were within the scope of their agency and employment and intended for the benefit of Pendulum.

On July 3, 2008, while in the Port of Philadelphia, the U.S. Coast Guard conducted an inspection of the M/V Quantum. During the inspection, the crew of the M/V Quantum was requested to present and did present the ship's Oil Record Book to the U.S. Coast Guard for review. The M/V Quantum's Oil Record Book contained materially false entries and omissions concerning the management of oily waste and other contaminants.

Pendulum, through the knowing and willful acts of Alcantara, Onita, and other persons, known and unknown to the government, conspired to impede the lawful and legitimate functions of the Department of Homeland Security and Department of Justice in enforcing MARPOL and United States law. More specifically, Pendulum, through the knowing and willful acts of Alcantara, Onita, and other persons, known and unknown to the government, conspired to knowingly fail to fully and accurately maintain an Oil Record Book in which required operations involving oil, oily mixtures, oily residue, or disposals of bilge waste, and ballast containing an oily mixture were accurately recorded without delay.

For the time period beginning on or about June 6, 2008 and continuing through on or about July 3, 2008, Pendulum, through the acts of Onita, knowingly made false entries in the Oil Record Book representing that the Oily Water Separator had been used to process bilge and oily

wastes stored in the ship's bilge (space located below the engine room that collects, among other things, oil leaking from engine room equipment) and bilge holding tank (the tank used to hold the mixture of oil, water and other contaminants that collect in the bilge or bottom of the ship) prior to discharge. Pendulum, through the acts of Onita and other shipboard personnel, knew that the Oily Water Separator was not functioning properly and was unable to draw suction from the bilge or the bilge holding tank. Additionally, Pendulum, through the knowing acts of Onita and other shipboard personnel, knowingly omitted from the Oil Record Book direct discharges overboard of oily waste from the bilge and bilge holding tank that were made via a "magic pipe." The "magic pipe" connected the ship's bilge piping system to a direct overboard discharge valve and allowed the crew to bypass the ship's Oily Water Separator. These discharges were required to be recorded in the M/V Quantum's Oil Record Book. Pendulum, through the knowing acts of Onita, falsified the Oil Record Book in order to conceal the problems with the Oily Water Separator and the use of the "magic pipe."

Moreover, for the time period beginning on or about June 11, 2008 and continuing through at least on or about June 28, 2008, Pendulum, through the knowing and willful acts of Alcantara and other persons, known and unknown to the government, undertook operations to clean the ballast system of the ship which had become contaminated with oil. The cleaning operations included the ballasting and deballasting of tanks and piping which resulted in the direct discharge into the ocean of ballast containing an oily mixture. The cleaning operations also included cleaning by hand of ballast tanks which resulted in the discharge of oil-contaminated ballast water directly overboard via a submersible pump which bypassed the M/V Quantum's Oily Water Separator. These discharges created a sheen on the surface of the ocean.

The discharges were required to be recorded in the M/V Quantum's Oil Record Book, but were not recorded in order to conceal the contamination of the vessel's ballast system.

Prior to reaching a U.S. port of call, a vessel is required to complete a Ballast Water Reporting Form and to submit the form to the U.S. Coast Guard's National Ballast Information Clearinghouse ("NBIC"). The Reporting Form is required to document ballast operations on-board the vessel, including specific information as to which ballast tanks are ballasted/deballasted and where these activities occurred. Reporting Forms are required by U.S. regulation to be maintained on-board a vessel for inspection by the U.S. Coast Guard.

Prior to reaching the Port of Philadelphia, Pennsylvania, a Ballast Water Reporting Form was completed by the crew of the M/V Quantum and then submitted to the U.S. Coast Guard's NBIC. Pendulum, acting through the crew of the M/V Quantum maintained the form in the files of the M/V Quantum. The Reporting Form was false in that Pendulum, through the acts and omissions of the crew of the M/W Quantum, omitted material information concerning the ballasting operations that occurred on the ship before its arrival in port in Philadelphia on July 3, 2008.

When the vessel reached port in Philadelphia, Pennsylvania, the U.S. Coast Guard reviewed the NBIC form as part of their Port State Control inspection. The U.S. Coast Guard wanted to review the form to confirm or ascertain the ballasting operations that had taken place on the vessel and possibly confirm information about contamination of the ballast system.

To conceal the oil contamination of the M/V Quantum's ballast system, a false hose was inserted by shipboard personnel into the sounding tube of the ship's after peak ballast tank. One end of the hose was sealed and the hose was filled with seawater. Pendulum, through the acts of

Alcantara and the crew of the M/V Quantum, maintained the false hose in the sounding tube when the M/V Quantum entered the Port of Philadelphia in order to conceal the contamination of the ballast system from the U.S. Coast Guard and to mislead the U.S. Coast Guard during an inspection of the ship into believing that the ballast tank contained only seawater.

IV. PLEA AGREEMENT

The defendant has signed a written plea agreement with the government. A copy of the plea agreement is attached to this memorandum. (Attachment A). The terms of the plea agreement are summarized as follows:

1. The defendant agrees to plead guilty to Counts One through Four of a four count information waiving prosecution by indictment and charging it with (i) conspiracy, in violation of 18 U.S.C. § 371 (Count One); (ii) a knowing failure to maintain an Oil Record Book, in violation of 33 U.S.C. § 1908 (Count Two), (iii) false statement in a matter within the jurisdiction of the executive branch of the United States, in violation of 18 U.S.C. § 1001 (Count Three); and (iv) obstruction of an agency proceeding, in violation of 18 U.S.C. § 1505 (Count Four), all arising out of acts of a Master and Chief Engineer, agents of the defendant, employed on a ship operated by the defendant, who were acting for the intended benefit of the defendant, relating to the management of the ship's oily waste and oil-contaminated ballast.

2. The parties agree that the plea agreement is made pursuant to Fed.R.Crim.P. 11(c)(1)(C); and that the fine in this case is appropriate pursuant to 18 U.S.C. §§ 3553 and 3572, and that the following specific sentence is the appropriate disposition of the case. The agreed upon sentence is as follows:

a. The defendant will pay the special victims/witness assessment in

the amount of \$1,600 at or before the time of sentencing.

- b. The defendant will pay a \$1,300,000 fine, payable as follows:
 - (1) \$750,000 payable at or within fourteen (14) days of the date of the sentencing;
 - (2) \$200,000 payable at or before 12 months after the date of sentencing;
 - (3) \$200,000 payable at or before 24 months after the date of sentencing; and
 - (4) \$150,000 payable at or before 36 months after the date of sentencing.

The aggregate sum of \$550,000 that is due after sentencing shall be secured by a bank guarantee obtained by the defendant before the date of sentencing and approved by the parties, guaranteeing the payment of each sum in the event of a default by the defendant.

- c. The defendant will be sentenced to a three-year period of probation.
- d. As a condition of probation, the defendant will implement the attached Environmental Compliance Plan.

3. The defendant waives any claim under the Hyde Amendment.

4. At sentencing, the government will comment on the evidence and circumstances of the case, bring to the Court's attention all relevant evidence and facts, address the nature and seriousness of the offense, respond factually to questions raised by the Court, correct the presentencing report or sentencing record, and rebut any statements of fact made by or on behalf

of the defendant. The agreement does not limit the parties' responses to post-sentencing matters.

5. The defendant understands the statutory maximum sentence.

6. Pursuant to USSG § 6B1.4, the parties enter into the following stipulations under the Sentencing Guidelines Manual effective November 1, 2008, with respect to Count Three (false statement). It is understood and agreed that: (1) the parties are free to argue the applicability of any other provision of the Sentencing Guidelines, including offense conduct, offense characteristics, criminal history, adjustments and departures; (2) these stipulations are not binding upon either the Probation Department or the Court; and (3) the Court may make factual and legal determinations that differ from these stipulations and that may result in an increase or decrease in the Sentencing Guidelines range and the sentence that may be imposed:

a.	Base Offense Level [U.S.S.G. § 2B1.1(a)(2)]	6
b.	Acceptance of Responsibility [U.S.S.G. § 3E1.1]	-2
	Total Offense Level	4

With respect to Counts One, Two, and Four, the parties agree that, pursuant to U.S.S.G. § 8C2.10, the applicable fine is governed by 18 U.S.C. §§ 3553 and 3572. The parties further agree that a \$1,300,000 fine is fair and reasonable taking into consideration the factors set forth in United States Sentencing Guidelines and 18 U.S.C. §§ 3553 and 3572.

7. The government and the defendant agree to the attached Factual Basis for the Plea.

8. The defendant waives his right to appeal or collaterally attack his conviction and sentence unless the government files an appeal or unless he claims that the sentence exceeded the statutory maximum or that the court erroneously departed upward or that the court imposed an

unreasonable sentence above the guideline range. The defendant also waives any right to request or receive from any department or agency of the United States any records pertaining to the investigation or prosecution of this case.

9. The defendant also waives all rights, whether asserted directly or by a representative, to request or receive from any department or agency of the United States any records pertaining to the investigation or prosecution of this case, including without limitation any records that may be sought under the Freedom of Information Act, 5 U.S.C. § 552, or the Privacy Act, 5 U.S.C. § 552a.

10. The government agrees not to file additional criminal charges against the defendant arising out of the government's investigation of criminal conduct in this matter relating to the M/V Quantum's call at the port of Philadelphia on or about July 3, 2008.

11. The defendant is satisfied with the legal representation provided by its lawyer. The defendant and its lawyer have fully discussed the plea agreement and the defendant is agreeing to plead guilty because the defendant admits that it is guilty.

12. Defendant will acknowledge acceptance of this plea agreement by the signature of its counsel and of a responsible corporate officer. Defendant shall provide to the government for attachment to this plea agreement a notarized resolution of defendant's Board of Directors authorizing the corporation to enter a plea of guilty and authorizing that responsible corporate officer to execute this agreement.

13. If acceptable to the Court, the parties agree to waive the presentence investigation and report pursuant to F.R.Cr.P. 32(c)(1) and ask that the defendant be sentenced at the time the guilty plea is entered.

14. No additional promises, agreements or conditions have been entered into, and none will be entered into unless in writing and signed by all parties.

Respectfully submitted,

LAURIE MAGID
Acting United States Attorney

JOSEPH J. LISA
Special Assistant United States Attorney
JONATHAN SHAPIRO
Assistant United States Attorney

Date: _____

CERTIFICATE OF SERVICE

I hereby certify that, on the date provided below, I caused a copy of the

UNITED STATES' ENTRY OF PLEA MEMORANDUM

to be filed electronically and to be served electronically and by U.S. Postal, first class mail, upon:

Michael Chalos, Esq.
Chalos, O'Connor & Duffy, LL.P.
366 Main Street
Port Washington, NY 11050

JOSEPH J. LISA
Special Assistant United States Attorney

Date: _____

ATTACHMENT A