UNITED STATES OF AMERICA
DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES COAST GUARD, Complainant,	)	
	)	Docket Number: 2023-0094
vs.	)	
	)	MISLE Activity ID: 7635195
LARRY THOMAS BELL, Respondent.	)	

ORDER DISMISSING COMPLAINT FOR LACK OF JURISDICTION

This matter comes before me *sua sponte*. On May 23, 2023, I held a pre-hearing conference wherein I ordered the parties to file briefs regarding jurisdiction. Specifically, I directed the parties to address whether the March 6, 2023, Complaint, as plead by the United States Coast Guard (Coast Guard), alleged sufficient facts to establish Larry Thomas Bell (Respondent) was acting under the authority of his Merchant Mariner Credential (MMC). 46 C.F.R. § 5.57(a)(1).

As set forth below, after considering the parties' submissions, the law, and regulations, I conclude the Coast Guard lacks jurisdiction as plead in the Complaint. Specifically, I find, as plead, the Coast Guard cannot prove Respondent was acting under the authority of his MMC. Accordingly, this matter is **DISMISSED WITHOUT PREJUDICE** for lack of jurisdiction.

I. BACKGROUND

On March 6, 2023, the Coast Guard filed a Complaint alleging Respondent caused a collision near Corpus Christi, Texas, on or about September 10, 2022. The Complaint alleges the collision resulted from Respondent's negligence, misconduct, and a violation of law or regulation while operating an Uninspected Passenger Vessel (UPV). In support of the Complaint, the Coast

Guard asserted jurisdiction pursuant to 46 C.F.R. § 5.57(a)(1), which requires a mariner to be "acting under the authority" of his credential at the time the alleged incident occurs.[1]

Respondent filed an Answer on April 20, 2023, admitting the jurisdictional allegations and some, but not all, factual allegations. Thereafter, I held a prehearing conference where I explained my independent obligation to question jurisdiction and provided the parties with pertinent authority for discussion. See, e.g., 46 U.S.C. § 2101(29), 46 U.S.C. § 2101(53), 46 C.F.R. § 25.26-1, Appeal Decision 2733 (SCHWIEMAN) (2020), and Appeal Decision 2497 (GUIZZOTTI) (1990). See May 26, 2023, Order. During the call, I directly questioned the Coast Guard whether its theory of jurisdiction depends on Respondent operating a UPV at the time of the collision. The Coast Guard agreed with my summation and agreed its theory of jurisdiction turned on whether Respondent was required to hold an MMC at the time of the collision, i.e., because he was allegedly a UPV operator.

In response, I observed that as plead, the Complaint appeared to allege facts contradicting the notion Respondent was operating a UPV.[2] My reading of the Complaint seemed to indicate there were no passengers aboard at the time of the collision. It seemed to me that without passengers, jurisdiction could not rest on the theory that Respondent was acting under his license based on a law or regulation requiring UPV operators to have an MMC.

The Coast Guard admitted the theory of this case would assert Respondent was alone aboard the vessel, and it did not intend to present any evidence at the hearing showing any

[1] As explained by Commandant Decisions on Appeal, the Coast Guard has jurisdiction, and a mariner is "acting under the authority" of his license when, inter alia, the license is required by law or regulation. Appeal Decision 2497 GUIZZOTTI) 1990. As plead in the Complaint, the Coast Guard asserts Respondent was required to have an MMC because he was operating a UPV at the time of the incident.

[2] This decision does not address the harder question of whether jurisdiction exists over a mariner's credential when his vessel carries passengers who have already embarked on a UPV, but temporarily disembarked before the end of the charter.

individual other than Respondent was on board at the time of the collision.[3] Given my questions, and after some discussion, I set a briefing schedule, provided the parties with relevant authority, and invited the parties to rely on any other authority germane to the question of jurisdiction.

The parties have since submitted their briefs and this matter is ripe for ruling.[4]

II. DISCUSSION

1. Coast Guard Jurisdiction

The issue before me is whether the Coast Guard had jurisdiction over Respondent's credential at the time of the collision. "To prevail in a suspension or revocation case, the Coast Guard must first prove that it has jurisdiction to seek suspension or revocation." U.S. Coast Guard v. Schwieman, 2019 WL 8643835 at *3 (ALJ Decision Sept. 13, 2019). "Jurisdiction is a question of fact and must be determined before the substantive issues of the case are decided." Appeal Decision 2620 (COX) (2001). Even where a mariner admits jurisdictional facts, the question of jurisdiction remains. Appeal Decision 2677 (WALKER) (2008). Furthermore, a complaint must include sufficient factual allegations that form a basis for jurisdiction. Id.

Coast Guard jurisdiction over mariners is not plenary; the Coast Guard does not have authority to seek suspension or revocation just because a mariner is operating a vessel while holding a credential. Relevant case law outlines two types of jurisdiction in Coast Guard cases: 1) when the mariner simply holds an MMC, referred to as a "holder offense;" and 2) when a

[3] Judicial admissions are formal concessions in the pleadings or stipulations by a party or counsel that is binding on the party making them. Martinez v. Bally's Louisiana, Inc., 244 F.3d 474, 476–77 (5th Cir. 2001) (internal citations omitted). Although a judicial admission is not itself evidence, it has the effect of withdrawing a fact from contention. Id.

[4] Pursuant to my scheduling order, the Coast Guard was permitted to file a reply to Respondent's brief. However, as of the date of this order, the Coast Guard has not done so. I also note Respondent's brief raises objections to jurisdiction in this case. However, Respondent has not amended his Answer, which admitted to the jurisdictional portion of the Coast Guard's pleading.

mariner holds the credential and commits an offense while acting under the authority of his credential, referred to as an "acting under the authority offense." See Appeal Decision 2668 (MERRILL) (2007); see also 46 U.S.C. § 7703 (distinguishing offenses that require a mariner to be acting under the authority of the MMC with those that simply require a mariner to "hold" the license). Jurisdiction alleging a holder offense is proper no matter what the mariner is doing—the mere possession of an MMC, whether the mariner is on land or sea, at work or not, will confer jurisdiction over the credential. See Appeal Decision 2668 (MERRILL) (2007) at 6. For example, if a mariner uses dangerous drugs, no matter the circumstance, the Coast Guard will have jurisdiction to bring a claim against that credential. Id.

Conversely, jurisdiction based on allegations that a mariner is "acting under the authority" of the credential turns on the application of 46 C.F.R. § 5.57, which provides:

> (a) A person employed in the service of a vessel is considered to be acting under the authority of a credential or endorsement when the holding of such credential or endorsement is:
>
> (1) Required by law or regulation; or
>
> (2) Required by an employer as a condition for employment.
>
> (b) A person is considered to be acting under the authority of the credential or endorsement while engaged in official matters regarding the credential or endorsement. This includes, but is not limited to, such acts as applying for renewal, taking examinations for raises of grade, requesting duplicate or replacement credentials, or when appearing at a hearing under this part.
>
> (c) A person does not cease to act under the authority of a credential or endorsement while on authorized or unauthorized shore leave from the vessel.

See 2497 (GUIZZOTTI) at 3 (considering section 5.57 before addressing jurisdiction).

Against this backdrop, I turn to the case at bar. Here, jurisdiction depends on whether Respondent was acting under the authority of his credential when the collision occurred. As noted above, the Coast Guard's theory of jurisdiction is simple: when the collision transpired, Respondent was operating a UPV, and, thus, jurisdiction exists because a law or regulation

required Respondent to hold an MMC at that time. See 46 U.S.C. § 8903 and 46 C.F.R. § 15.605 (requiring operators of UPVs to hold a credential). As set forth below, I agree with the Coast Guard in theory, but not in application.

2. Respondent Was Not Operating a UPV at the Time of the Collision[5]

Given that the Coast Guard agrees Respondent was alone on the vessel at the time of the collision, and, as their brief shows, the vessel had not yet picked up any passengers, I conclude Respondent was not operating a UPV at the time of the alleged collision. Title 46 U.S.C. § 2101(53) defines an UPV as follows:

> "[U]ninspected passenger vessel" means an uninspected vessel--
>
> (A) of at least 100 gross tons as measured under section 14502 of this title, or an alternate tonnage measured under section 14302 of this title as prescribed by the Secretary under section 14104 of this title--
>
> (i) carrying not more than 12 passengers, including at least one passenger for hire; or
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> (ii) that is chartered with the crew provided or specified by the owner or the owner's representative and carrying not more than 12 passengers; and
>
> (B) **of less than 100 gross** tons as measured under section 14502 of this title, or an alternate tonnage measured under section 14302 of this title as prescribed by the Secretary under section 14104 of this title--
>
> (i) carrying not more than 6 passengers, including at least one passenger for hire; or
>
> (ii) that **is chartered with the crew** provided or specified by the owner or the owner's representative and **carrying not more than 6 passengers**.

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[5] The Coast Guard's brief infers that a UPV may be used for recreational purposes. See Coast Guard Br. at 6. Moreover, the Coast Guard has publicly acknowledged:

> [T]he number of uninspected passenger vessels is constantly changing since a boat used as a charterboat one day may be used for the owner's recreational purposes on another day. When operating as a charterboat, the boat comes under the regulations for uninspected commercial vessels in 46 CFR subchapter C. When used strictly for recreational purposes with no paying passengers on board, the boat comes under the regulations in 33 CFR subchapter S.

Emergency Position Indicating Radio Beacons and Visual Distress Signals for Uninspected Vessels, 59 Fed. Reg. 8100-01 (Feb. 17, 1994). Therefore, it is clear the Coast Guard recognizes that a UPV is not "always" a UPV, and that UPV status may toggle on and off given the facts surrounding the boat's use.

(emphasis added); see also 46 C.F.R. § 24.10-1. Applying this definition here, I conclude that because Respondent's vessel was not carrying passengers at the time of the collision, Respondent was not operating a definitional UPV. Moreover, because Respondent was not operating a UPV, the provisions in 46 U.S.C. § 8903 and 46 C.F.R. § 15.605—which require a UPV operator to hold an MMC—are simply inapplicable. Furthermore, because the Coast Guard advances no other theory in the Complaint that might show Respondent was acting under the authority of his license, I conclude the lack of UPV status is fatal to the jurisdictional allegations. As set forth below, at least one Commandant Decision on Appeal (CDOA), and two appellate courts considering similar questions, lends support to my conclusion.

In GUIZZOTTI, the Coast Guard brought charges against a credentialed mariner, alleging he committed an assault against a young woman while onboard a vessel he operated pursuant to his employment. Based on these allegations, and a state court conviction, the Coast Guard asserted jurisdiction by alleging the misconduct—assault—transpired while the mariner was acting under the authority of his license. After a hearing, a Coast Guard ALJ revoked his credentials.

On appeal, Guizzotti argued the Coast Guard did not have jurisdiction at the time of the assault because the vessel was being operated as an "uninspected vessel" but "carrying no passengers." [6] (GUIZZOTTI) at 3. Relying on the definition of a passenger in 46 U.S.C. § 2101, Guizzotti argued the victim was not a "passenger" but merely a "guest." Consequently, the mariner asserted there were no "passengers" onboard the vessel and he was not required to have a license by law or regulation. Thus, the mariner reasoned, he could not have been acting under

[6] An uninspected vessel is not defined the same as a UPV, though all UPVs are uninspected vessels.

the authority of his license and the Coast Guard lacked jurisdiction. Id. The Commandant disagreed.

In the Commandant's view, the victim met the definition of a passenger and therefore she was not simply a guest. Rejecting the jurisdictional attack, the Commandant reasoned:

> Given that the vessel **was carrying a passenger** rather than a guest, it qualified as an "uninspected passenger vessel" within the meaning of 46 U.S.C. 2101(42),[7] and it required a licensed operator, 46 U.S.C. 8903; 46 C.F.R. 10.466. Appellant was, therefore, acting under the authority of a license required both by law and regulation at the time and was, again, subject to Coast Guard jurisdiction for these administrative proceedings pursuant to 46 C.F.R. 5.57.

(emphasis added). A straightforward reading of GUIZZOTTI stands for the proposition that to meet the definition of a UPV, a vessel must be carrying at least one passenger. If no passengers are required under the UPV definition, then the Commandant would not have spilled so much ink defining the victim as a passenger. In other words, if Guizzotti's vessel was a UPV regardless of any passengers, as the Coast Guard asserts in this case, the Commandant would have said so. Ultimately, GUIZZOTTI supports my conclusion that a mariner is only required to hold a license under the guise of being a UPV operator when the vessel he operates actually meets the UPV definition, i.e., carrying at least one passenger.

Other jurisdictions considering verbiage similar to 46 U.S.C. § 2101(53) reach the same conclusion as my decision today. In Yommer v. Outdoor Enterprises, Inc., the Ohio Court of Appeals considered a statute that defined a "passenger car" as "any motor vehicle that is designed and used for carrying not more than nine persons." 711 N.E.2d 296, 298 (Ohio Ct. App. 1998). There, three appellate judges agreed, albeit in dicta, that had the statue read

[7] The UPV definition is now located at 46 U.S.C. § 2101(53), but its substance has not changed.

"carrying not more than nine passengers" then "**at least one passenger** would be necessary to meet the definition of 'passenger car.'" Id. (emphasis added).

A California appellate court has come to a similar conclusion after construing language strikingly similar to the words at issue in this case. In Park City Services, Inc. v. Ford Motor Co., the court of appeals considered the definition of "new motor vehicle" in the California code, which provided in pertinent part:

> 'New motor vehicle' also means a new motor vehicle with a gross vehicle weight under 10,000 pounds that is bought or used primarily for business purposes by a person, including a partnership, limited liability company, corporation, association, or any other legal entity, to which **not more than five motor vehicles** are registered in this state.

50 Cal.Rptr.3d 373, 380–81 (Cal. Ct. App. 2006) (emphasis added) (italics in original omitted). On appeal, the plaintiff specifically argued it had "zero vehicles registered in California" and "zero vehicles" satisfies the "plain reading" of the statue since, mathematically speaking, "zero is less than five." Id. at 381. In rejecting the argument, the appellate court considered the legislative intent of the statute and concluded the statute should be construed as requiring "at least one, but not more than five" vehicles registered in California. Id. at 383. The court worried that construing the statue to mean "zero to five" would expand the breadth and application of the statue to businesses not intended by the state legislature. Id.

Given the strength of the foregoing authority, I could end the analysis here and conclude as a matter of law Respondent was not operating a UPV and therefore any jurisdictional assertion based on that theory fails. However, because the Coast Guard has advanced several other arguments, some of which I find have colorable merit, I will address them below.[8]

[8] From this point forward I will primarily reference the statute defining a UPV because the law and the regulation at issue are virtually identical.

III. THE COAST GUARD'S ARGUMENTS

As set forth below, the Coast Guard argues: 1) a plain reading of the phrase "carrying not more than 6 passengers" includes a vessel carrying "zero passengers"; 2) if at least one passenger is required, it is sufficient to establish that some future prospect of carrying an individual may take place; 3) prior CDOAs support asserting jurisdiction in this case; and 4) Respondent's credentials were subject to the Coast Guard's jurisdiction because Respondent was operating a vessel for a commercial purpose in furtherance of a charter at the time of the collision. I reject each argument in turn.[9,]

1. A Plain Reading of the Phrase "Carrying Not More than 6 Passengers" Does Not Mean "Zero to Six Passengers"

The Coast Guard first asserts that a plain language reading of the operative phrase "carrying not more than 6 passengers" naturally translates to "carrying zero to six passengers." Specifically, the Coast Guard argues:

> 46 U.S.C. § 2101(53)(B)(ii) does not state "at least one passenger but less than six." It only requires less than six passengers, which does not include the charterer. A chartered vessel, with crew provided, carrying the charterer and zero passengers meets this definition.

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[9] The Coast Guard makes other arguments I do not find necessary to fully address. For example, the Coast Guard argues that if I were to "find[] the vessel in this case was not operating as a[] [UPV, it] would be detrimental to maritime safety because it excludes vessels that will engage in commercial passenger service from compliance with safety regulations." Coast Guard Br. at 17. Such a finding, the Coast Guard argues, "would result in the curious paradox where an uninspected commercial vessel would be required to comply with safety regulations only when carrying passengers or goods but would be exempt at any time immediately before or after that time." Id. at 20–21. This would be "inconsistent," the Coast Guard argues, to its mission of promoting safety at sea. Id.

I agree a "paradox" might exist, i.e., a statement that is opposed to common sense and yet is perhaps true. Paradox, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/paradox. But as explained in footnote 4, this UPV toggle has widely been accepted and acknowledged by the Coast Guard. Furthermore, as discussed infra, the plain language of the statutes produces this outcome. Regardless, "vague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the specific issue under consideration." Great-W. Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 220 (2002). Furthermore, the National Transportation Safety Board, the administrative body overseeing the Commandant's decisions, has recognized, the Coast Guard cannot implement a policy change contradicting a regulation. United States Coast Guard v. Michael S. Moore, 2005 WL 2119329, at *6 (NTSB 2005).

Coast Guard Br. at 5 (emphasis added). I disagree.

It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 809 (1989). Therefore, a statute must be interpreted "as a symmetrical and coherent regulatory scheme" and "fit, if possible, all parts into a harmonious whole." Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (internal citations omitted). Furthermore, "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982). As recently observed by the United States District Court for the District of Columbia:

> [F]idelity to the text requires situating "text in context." Context is not found exclusively 'within the four corners' of a statute. It also includes "[b]ackground legal conventions" and "common sense." And it involves the "evident purpose of what a text seeks to achieve."

Medica Ins. Co. v. Becerra, No. 1:22-CV-1440-RCL, 2023 WL 6314571, at *7 (D.D.C. Sept. 28, 2023) (internal citations omitted), dismissed, No. 23-5276, 2024 WL 133680 (D.C. Cir. Jan. 11, 2024).

First, my analysis begins with an observation that Congress defined a UPV by using a present participle—"carrying." Courts roundly recognize using present participles denotes "present and continuing action." See., e.g., Westchester Gen. Hosp., Inc. v. Evanston Ins. Co., 48 F.4th 1298, 1307 (11th Cir. 2022). The Eleventh Circuit observed a present participle expresses present action, that in English is formed with the suffix -ing, and indicates action going on. Id. Similarly, the Seventh Circuit noted the use of a present participle does not connotate "something yet to come." Shell v. Burlington N. Santa Fe Ry. Co., 941 F.3d 331, 336 (7th Cir. 2019).

District courts reading similar language note "[t]he use of a present participle expresses a state of action in progress." St. Paul Fire & Marine Ins. Co. v. Pham, 2007 WL 1466747, at *4 (E.D. La. May 18, 2007); see also McCloskey v. U.S. Postal Service, 534 F. Supp. 667, 667 (E.D. Pa. 1982).

Applying these rules to 46 U.S.C. § 2101(53)(B)(ii), the Coast Guard would have me read the definition of a UPV as "carrying zero passengers." From a purely semantic standpoint, it seems odd to me that Congress would draft a provision defining an "Uninspected Passenger Vessel" using words showing a present and ongoing state of action, but never require the actual carrying of any passengers. However, I recognize that in the common parlance, a similar phrase "carrying no passengers" is sometimes used.[10] Therefore, like the Commandant and the court in Park City Services, Inc., I look to the legislative intent for guidance on how to read "carrying not more than 6 passengers."[11]

Recently, in Appeal Decision 2733 SCHWIEMAN (2020), the Commandant considered the legislative history when deciding whether a "charterer" who charters a boat without crew was a "passenger." In answering the question in the negative, the Commandant considered the legislative history surrounding the regulation of vessels under 100 gross tons, noting:

> Prior to passage of the Passenger Vessel Safety Act of 1993 (PVSA), operators of uninspected vessels of under 100 gross tons were exploiting the bareboat charter legal framework by "chartering" their vessels to putative demise charterers for short day cruises. These charter agreements allowed uninspected vessels to operate in a manner that was functionally indistinguishable from inspected small passenger

[10] See e.g., Corley v. United States, 2012 WL 12951540, at *1 (N.D. Ga. Nov. 19, 2012); McGregor v. Cross Link Inc., 2010 WL 2557754, at *1 (N.D. Cal. June 23, 2010).

[11] I note that legislative history is a tool of construction that should only be used when there is an ambiguity in a statute. See, e.g., Conn. Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992); In re Olivera, 378 B.R. 789, 792 (Bankr. E.D. Tex. 2007) (courts should only look to legislative intent when the statute is ambiguous or leads to absurdity). This decision does not consider the phrase "carrying not more than 6 passengers" to be ambiguous. However, the following analysis assumes, arguendo, that the language is ambiguous or may lead to absurd result. Either way, I conclude the legislative history supports my plain reading of the UPV definition.

> vessels, carrying dozens of guests or non-passenger "charterers" at a time. The PVSA closed that loophole.

Id. at 8. SCHWIEMAN made clear the purpose of regulating vessels under 100 gross tons was for the protection of the passengers who could have otherwise slipped through the bareboat charter loophole.

In another decision, the Commandant considered whether a vessel was "carrying" passengers when the vessel was moored. Appeal Decision 2719 (VOELCKERS) (2018). In answering the question in the affirmative, the Commandant again turned to the legislative history and, citing a Congressional subcommittee transcript, noted, "For enforcement purposes, the Coast Guard will only look at whether a vessel is operating under a charter and how many passengers are on board." Passenger Vessel Safety Act of 1993: Hearing Before the Subcomm. on Coast Guard & Navigation of the H. Comm. on Merchant Marine & Fisheries, 103d Cong. 27 (1993) (statement of Captain Robert North, USCG, Deputy Chief, Office of Marine Safety, Security, & Environmental Protection). After reading the legislative history, and purpose of the statue as a whole, the Commandant opined,

> the clear intent of the regulatory scheme is to ensure the safety of those on board. An empty vessel, whether at sea or tied to a dock may be subject to some safety controls or rules, but as soon as oil or hazardous materials or paying passengers are on board, the need for additional safety measures necessarily increases.

2719 (VOELCKERS) at 6.

Addressing a similar statute, a California appellate court considered the phrase "not more than five motor vehicles are registered in this state." Park City Servs., Inc. v. Ford Motor Co., 144 Cal. App. 4th 295 (Ca. App. 2006). The plaintiffs in that case, like the Coast Guard here, asked the court to construe the phrase to mean "zero to five." Id. Rejecting the plaintiff's argument, the court worried that such a reading would expand the ambit of the statute to entities

the legislature never intended to cover after conducting a thorough analysis of the legislative history. Id.

Applying these decisions here, it is clear to me the purpose of the regulatory scheme defining a UPV is to protect **passengers** aboard small uninspected vessels. Furthermore, to adopt the Coast Guard's construction of the UPV definition would expand the reach of the definition to vessels I do not think Congress, nor the Coast Guard, intended. A hypothetical illustrates the point.

Before framing the hypothetical, I reiterate the definition at issue in this case, which defines a UPV as:

> An uninspected vessel--
> (B) of **less than 100 gross** tons as measured under section 14502 of this title, or an alternate tonnage measured under section 14302 of this title as prescribed by the Secretary under section 14104 of this title--
> (i) carrying not more than 6 passengers, including at least one passenger for hire; or
> (ii) that **is chartered with the crew** provided or specified by the owner or the owner's representative and **carrying not more than 6 passengers**.

46 U.S.C. § 2101(53)(B)(i)–(ii) (emphasis added). Here, the Coast Guard asserts a UPV need only meet two prongs of the definition, i.e., 1) less than 100 gross tons; and 2) chartered with crew. Again, the Coast Guard asserts zero passengers satisfies the "carrying not more than 6 passengers" element of the definition.

Using this definition, assume Tom Jones (a charterer) contacts Fancy Fishing Charter Co., a wholly owned corporation, and requests a time charter with crew, or a voyage charter with crew, to go fishing in state waters.[12] Assume Tom Jones is alone, and his charter only includes

[12] Tom Jones and the Fancy Fishing Charter Co. are wholly made up for the purposes of this hypothetical. No allusion to a real person or corporation is intended.

himself and the owner/operator of Fancy Fishing. Assume Tom boards the vessel, which is under 100 gross tons, and the fishing trip is underway. The only individuals on this vessel are the operator, which would be crew,[13] and Tom, the charterer. Definitionally speaking, neither Tom nor the crew would be passengers, as the Commandant recognized in SCHWIEMAN. However, under the Coast Guard's definition advanced here, this boat would be a UPV, despite there being two individuals classified by Congress as not passengers. See 46 U.S.C. § 2101(29)(A)(i) (excluding crew and charterer from passenger status).

A second example takes this analysis further. Let's suppose the next day Tom—the charterer—charters the same Fancy Fishing vessel—under 100 gross tons—simply to carry his luggage across a bay, without Tom aboard, leaving the owner of the vessel as the sole person on the boat, along with the luggage. Under this scenario, the Coast Guard's reading of the statute would bring this vessel under the ambit of the UPV definition, even though the vessel only has crew—the operator—aboard. Again, not even the charterer is aboard the vessel under this hypothetical, but the Coast Guard would call this boat a UPV.[14]

These hypotheticals lead me to conclude the Coast Guard's reading of the UPV definition misses the mark as it concerns the targeted persons Congress intended to cover by the UPV definition, i.e., passengers. Furthermore, like the appellate court in Park City Servs., Inc. v. Ford

[13] For purposes of this hypothetical, and the case at bar, I assume Respondent and "Tom Jones" meet the definition of crew.

[14] I could take the hypotheticals a step further. Consider facts similar to the instant case, where Respondent's vessel was "chartered" with crew provided on August 6, 2022, for a voyage that was not scheduled to commence until September 10, 2022. Applying the Coast Guard's definition here, Respondent's vessel would have been a UPV from the moment it was chartered on August 6, 2022, because it would have met the two requirements—under 100 gross tons, and chartered with crew. This is an extreme position to take because during the weeks between the August 6, 2022, and September 10, 2022, Respondent could have used the boat solely as a recreational vessel, or simply left it moored at a dock. However, the Coast Guard would identify this vessel as a UPV and all the licensure requirements, safety requirements, and other safety regulations would have applied, despite the potential that no passenger, no crew, and no charterers would have been on board.

Motor Co., such a reading would bring vessels that never carry passengers, or charterers, within the reach of the UPV definition, a consequence I do not think Congress intended. Instead, I find the better reading of the statue to require at least 1, but not more than 6, passengers.

The Coast Guard's "zero passengers" argument would also force me to give a strange reading to identical language used in other parts of the statute. A simple comparison of 46 U.S.C. §§ 2101(53)(B)(i) (vessels of at least 100 gross tons) and (53)(B)(ii) (vessels under 100 gross tons) illustrates this point. Plugging the Coast Guard's definition in 46 U.S.C. § 2101(53)(B)(i) would require me to read the definition as "carrying zero to 6 passengers, including at least one passenger for hire." Using this reading, the definition would contemplate an instance of having "zero passengers" which would create a discord with the rest of the sentence. You could never have "zero passengers, including at least one passenger for hire." Conversely, reading the same provision to mean "carrying 1 to 6 passengers, including at least one passenger for hire" harmonizes (53)(B)(i) and (53)(B)(ii). All scenarios—whether the vessel is carrying just 1 passenger, or 6—could be possible, i.e., have at least one passenger for hire.

Ultimately, I decline to adopt the Coast Guard's reading. It bears repeating, the "usual presumption [is] that 'identical words used in different parts of a statute' carry 'the same meaning.'" Henson v. Santander Consumer USA Inc., 582 U.S. 79, 85 (2017); 2733 (SCHWIEMAN) at 13 ("Statutes . . . are assumed to be internally consistent."). Accordingly, I find (53)(B)(ii) requires at least one passenger onboard to be a UPV.

2. Some Future Prospect of Carrying an Individual Does Not Satisfy the Passenger Element of the UPV Definition

The Coast Guard argues in the alternative that if at least one passenger is required to meet the UPV definition, it is sufficient to establish that some future prospect of carrying an individual

may take place. See Coast Guard Br. at 5. That is to say, I should read the term "passenger" to mean "passenger for planning purposes." Id. But the words "plan" and "planning" do not appear anywhere in 46 U.S.C. § 2101. Instead, the term and its definition clearly indicate the individual must have been onboard the vessel in some present capacity to qualify as a "passenger." Section 2101(29)(A) stresses the point by defining a passenger as "an individual carried on the vessel." 46 U.S.C. § 2101(29)(A). Furthermore, Congress could have easily adjusted the language to match what the Coast Guard argues here by drafting the provision to read "capable of carrying not more than 6 passengers" or "scheduled to carry not more than 6 passengers" or "under charter to carry not more than 6 passengers."

As noted above, when reading statutory language, a court "may mark the limits of what the term might mean by looking again at what Congress did not say." Brouwer v. Raffensperger, Hughes & Co., 199 F.3d 961, 967 (7th Cir. 2000). Here, given that Congress did not say that passengers for planning purposes would meet the passenger element of the UPV definition, I decline to read that language into the statute as it applies in this case.

3. Prior CDOAs Do Not Support Asserting Jurisdiction in this Matter

As set forth below, the Coast Guard primarily relies on three cases in support of its assertion that jurisdiction exists in this case: Appeal Decision 1007 (POWELL) (1958); Appeal Decision 389 (VENTOLA) (1949); and Appeal Decision 795 (ELLEBY) (1955). As set forth below, I am not persuaded.

The Coast Guard's reliance on POWELL is misplaced. The Coast Guard suggests POWELL stands for the proposition "all acts taken in the course of employment," such as transiting a vessel to embark passengers, triggers the Coast Guard's jurisdiction. Coast Guard Br. at 9. POWELL says no such thing.

POWELL involved a mariner employed to operate a vessel involved in a collision resulting in injury and, ultimately, the suspension of his credential. On appeal, he argued the Coast Guard lacked jurisdiction because, for the type of the vessel involved, the Motorboat Act[15] only required a licensed operator "while carrying passengers for hire." At the time of the collision, there were no passengers onboard. Accordingly, the mariner argued, he could not have been acting under the authority of his license at the time of the collision.

In rejecting this argument, the Commandant found that, at the time of the collision, the mariner "was rendering services for which he was hired as a result of having his license." "Accordingly, . . . [the mariner] was, in fact, acting under the authority of his license . . . although he was not legally required by the terms of the Motorboat Act to have a license when no passengers were on board." In other words, the mariner was required to hold a license at the time of the collision as a condition of his employment (i.e., 46 C.F.R. § 5.57(a)(2)), regardless of whether he was required to by law or regulation (i.e., 46 C.F.R. § 5.57(a)(1)).

The holding in POWELL is reflected in the regulations today. As noted above, 46 C.F.R. § 5.57(a)(2) places a mariner under the authority of his license when required to hold the license as a condition of employment. Furthermore, even assuming the Coast Guard properly read POWELL, I note the Coast Guard does not base its jurisdiction allegations in this case on Respondent's scope of employment, under 46 C.F.R. § 5.57(a)(2). Rather, jurisdiction in the Complaint before me is expressly predicated upon Respondent acting under the authority of his credential "as required by law or regulation."[16] Compl. at 2. POWELL is not controlling here.

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[15] POWELL references the Motorboat Act, which pre-dates the current version of the law—the Passenger Vessel Safety Act of 1993—by over thirty years. However, the definition of a UPV was the same as in the case at bar.

[16] Indeed, the Coast Guard has had over a year to amend its Complaint to assert jurisdiction on the basis that Respondent was acting under the authority of his MMC because it was required as a condition of his employment, 46 C.F.R. § 5.57(a)(2), but it has not done so.

In addition to POWELL, the Coast Guard relies on two cases for the proposition that a mariner is acting under the authority of his credential when his actions are "in the service of the ship." Appeal Decision 389 (VENTOLA) (1949) at 4; Appeal Decision 795 (ELLEBY) (1955) at 3. Reading these decisions together, the Coast Guard asserts jurisdiction is proper here because Respondent was "in the service of the ship."

I interpret the Coast Guard's argument to mean that UPV status is irrelevant in this case. In other words, even if Respondent's vessel did not technically qualify as a UPV due to the lack of passengers, the Coast Guard still has jurisdiction because Respondent's actions (i.e., operating the vessel on a voyage to pick up passengers for a charter) were "in the service of the ship" and, therefore, he was "acting under the authority of" his credential. I disagree.

Before turning to the cited cases, I note as an initial matter, 46 C.F.R. § 5.57(a)(1) and (2) expressly outline when a mariner is acting under the authority of his credential. Title 46 C.F.R. § 5.57(a) provides: "A person employed in the service of a vessel **is considered** to be acting under the authority of a credential . . . **when** the holding of such credential . . . is [r]equired by law or regulation; or [r]equired by an employer as a condition for employment." (emphasis added). Implicitly, the regulation recognizes that mere service on a vessel is, alone, insufficient to be "acting under the authority of a credential." Instead, the regulation, using a conditional phrase, "is considered . . . when".

A close reading reveals, to be "acting under the authority" under section 5.57(a) a mariner must meet at least one of the following: 1) the mariner must be required to hold it by law or regulation; and/or 2) the mariner must be required to hold it as a condition of his employment. Clearly, then, there must be instances where a person employed in the service of a vessel is not

considered to be acting under the authority of his credential.[17] Otherwise, the regulation would simply read, "A person employed in the service of a vessel is considered to be acting under the authority of his/her credential."

Against this reading of section 5.57, I turn to the Coast Guard's reliance on VENTOLA and ELLEBY.[18] I find these cases align closer with jurisdictional assertions under § 5.57(a)(2), when an employer requires the MMC as a condition of employment. Again, it bears repeating, the Coast Guard's complaint expressly bases its jurisdictional allegations on the premise that a law or regulation required Respondent to hold the MMC, i.e., § 5.57(a)(1). It does not assert Respondent was required to hold his MMC as a condition of employment.

In any event, neither VENTOLA nor ELLEBY relieves the Coast Guard of its duty to plead sufficient facts when alleging a mariner is required to hold the MMC by law or regulations. As plead here, the Coast Guard had to prove Respondent operated a UPV at the time of the collision. Again, had the Complaint alleged sufficient facts, I could have, after a hearing or proper motion, ruled that a law or regulation required Respondent to hold a credential at the time of the collision. As it currently reads, and with the Coast Guard's judicial admissions, I cannot do so.

Moreover, it is worthy to note that VENTOLA and ELLEBY tethered the Coast Guard's jurisdiction directly to the question of whether a mariner could recover "maintenance and cure" under the general maritime law. Recovery under a theory of maintenance and cure was, and still

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[17] Take for example a deckhand working on a vessel that does not require an MMC by law or regulation, i.e., vessels under 100 gross tons. Further assume the employer does not require the MMC. While working aboard the vessel, the mariner would most certainly be in the service of the ship, but he would not meet the criteria of 46 C.F.R. § 5.57. Thus, even if he had an MMC, because he would not be within reach of the regulation, the Coast Guard would lack jurisdiction over his credential.

[18] I also observe neither case addresses a fact pattern where a vessel is an alleged UPV, without passengers. The Commandant's discussion in GUIZZOTTI is more on point.

is, dependent on whether a mariner meets "seaman status." Cooper v. Vigor Marine, LLC, 2024 WL 1836098, at *6 (D. Haw. Apr. 26, 2024) (only seaman can recover maintenance and cure). Seaman status is established via a two-prong test: 1) the mariner's duties must "contribut[e] to the function of the vessel or to the accomplishment of its mission," and 2) the mariner must have a substantial connection to the vessel in terms of duration and nature. See Chandris, Inc. v. Latsis, 515 U.S. 347, 368–69 (1995); Alexander v. Express Energy Servs. Operating, L.P., 784 F.3d 1032, 1033–34 (5th Cir. 2015).

The reasoning behind ELLEBY and VENTOLA maintenance-and-cure-based jurisdictional analysis was premised on the notion that a mariner who got the benefit of maintenance and cure were subject to the burden of Coast Guard jurisdiction—discipline—while in that status. Indeed, VENTOLA references Appeal Decision 361 (GROVES) (1949) as a authority for its approach. In GROVES, the Commandant explained:

> The jurisdiction in this proceeding is based on the same theory as is the right of seamen to maintenance and cure as set out in [Aguilar v. Standard Oil Co. of N.J., 318 U.S. 724 (1943)]. A seaman must be in the status of "acting under authority of his license or certificate," at the time of the alleged "misconduct", in order to be subject to proceedings under 46 U.S.C. 239. The employment relationship and the status of being "in the service of the ship" are what the license or certificate authorizes. Hence, if they have the status of being in the service of the ship, they are acting under authority of their license or certificate. The test is not the place where the alleged "misconduct" occurred, it is the seaman's status or relationship to the service of the ship at the time the "misconduct" occurs. Thus, in holding that a seaman is entitled to maintenance and cure for injuries sustained while on shore leave, the Supreme Court necessarily held, in the Aguilar case, that while on shore leave the seaman continued to have a distinct status in relation to his ship, the status of being in its service. **It is, therefore, logical to attach to that status not only the beneficial incident of the right to maintenance and cure but also the incident of amenability to discipline. A status which carries with it beneficial incidents carries with it corresponding obligations and responsibilities when the reasons creating the status are the same in both cases**; i.e. the necessity for granting shore leave. Accordingly, the "misconduct" of certificated personnel

> while on shore leave from the vessel on which they are legally authorized to serve only if they are holders of a license or certificate may be the basis for disciplinary proceedings under 46 U.S.C. 239.

361 (GROVES), at *6 (emphasis added).

Similarly, when deciding jurisdiction, ELLEBY makes reference to whether the mariner in that case was entitled to maintenance and cure. There, the Commandant tied jurisdiction directly to maintenance and cure, and necessarily to seaman status. Finding jurisdiction, the Commandant opined:

> Ordinarily, proceedings under 46 U.S.C. 239 are based on a seaman being in the status of "acting under authority of his document" at the time of the alleged misconduct. The employment relationship and the status of being in the service of the ship are what the document authorizes. If a seaman has the status of being in the service of the ship, he is acting under authority of his document. The test is not the place where the misconduct occurred, but is the seaman's status or relationship to the service of the ship at the time the misconduct occurred. If he has the right to maintenance and cure while in such status, he is also subject to amenability to discipline.

795 (ELLEBY), at *3.

More recently, in Appeal Decision 2724 (EDENSTROM) (2020), the Commandant acknowledged the Coast Guard's jurisdiction argument there dated back to approximately 70 years, citing to VENTOLA. However, the Commandant did not flatly adopt the jurisdictional approach in VENTOLA, but ultimately held "Respondent's continued employment with Brusco, in a credentialed position, was conditioned on his completion of the October 8, 2015 random drug test." 2724 (EDENSTROM) at 11. And though it is true the Commandant ultimately applied a course of employment analysis to determine jurisdiction in that case, it is important to note, none of these cases address an argument similar to the one at hand, i.e., where the Coast Guard asserts jurisdiction on the allegation that the mariner is required to hold the credential by law or regulation, as it has in the instant case.

Notwithstanding the foregoing analysis, I posit that with the advent of the 46 C.F.R. § 5.57, the analysis in VENTOLA, and ELLEBY, has been severely eroded. A credentialed mariner holding an MMC may never meet the seaman status test, and never be able to receive maintenance and cure. But if he satisfies the dictates of 46 C.F.R. § 5.57, the Coast Guard will still have jurisdiction. Thus, any reliance on decisions using the maintenance and cure doctrine, and/or seaman status, has simply been supplanted by regulation. In other words, a mariner used to be acting under the authority of his license if he met the requirements for maintenance and cure because he was a seaman, but today, his seaman status test is no longer controlling.

To resurrect the analysis in VENTOLA and ELLEBY could subject Coast Guard jurisdiction to the whims of the various federal circuit courts, given that there are widespread differences in what seaman status is, i.e., who is entitled to maintenance and cure. To maintain uniformity, the better approach is to hold that 46 C.F.R. § 5.57, and the cases interpreting this regulation, is the controlling law on Coast Guard jurisdiction. See Sanchez v. Smart Fabricators of Texas, L.L.C., 997 F.3d 564, 569 (5th Cir. 2021) (addressing the fluctuating law controlling seaman status).

4. The Coast Guard Does Not Have Jurisdiction Simply Because Respondent was Operating a Vessel for a Commercial Purpose in Furtherance of a Charter at the Time of the Collision

In perhaps its most sweeping argument, the Coast Guard suggests jurisdiction is proper over any mariner operating a vessel for a commercial purpose in furtherance of a charter. I reject the Coast Guard's attempt to expand its jurisdiction with such broad sweeping strokes.

As noted above, Coast Guard jurisdiction comes in two forms, holder offenses and offenses when the mariner is acting under the authority of the MMC, as specifically outlined in 46 C.F.R. § 5.57. No reading of this regulation supports the Coast Guard's theory, that a mariner

operating a vessel in a commercial capacity, in furtherance of a charter, is considered acting under the authority. The regulation makes clear when a mariner is under the authority of his credential in 46 C.F.R. § 5.57(a)(1)–(2). But the rule does not stop there, instead it goes on to note that a mariner is acting under the authority of his credential when "engaged in official matters regarding the credential or endorsement." And to bring clarity, the regulation notes the broad nature of the "official matters" application, as follows:

> [An official matter] includes, but is not limited to, such acts as applying for renewal, taking examinations for raises of grade, requesting duplicate or replacement credentials, or when appearing at a hearing under this part.
> (c) A person does not cease to act under the authority of a credential or endorsement while on authorized or unauthorized shore leave from the vessel.

A careful reading of the "acting under the authority" regulation shows the deliberate, thoughtful process employed by the regulation's drafters. However, the Coast Guard would have me wield extraordinary, ultra vires, authority, and expand this definition to cover a mariner's acts that are "for a commercial purpose in furtherance of a charter." I refuse.

First, I note the Coast Guard's theory could be achieved by notice-and-comment rulemaking. Indeed, it would not be difficult to draft a regulation that simply says, a mariner is considered operating under the authority of his or her license when operating a vessel for a commercial purpose, in furtherance of a charter. Or, the Coast Guard could promulgate a regulation that flatly requires "all vessels operated in a commercial capacity" be operated by an appropriately credentialed mariner. Neither regulation, to my knowledge, exists. And it is not as if this "commercial" language is nonexistent in the regulations; the term is scattered throughout the definitions used by Congress and the Coast Guard. See, e.g., 46 U.S.C. §§ 2101(4) ("commercial service"), (12) ("commercially engages"), (52) ("commercial vessel"). Thus, the concept of a commercial venture, in furtherance of a charter, would not be foreign to the drafters.

Ultimately, I reject the Coast Guard's argument because Congress and the Coast Guard are in a position to craft such a provision but have chosen not to do so despite the commercial nature of the terms at its fingertips. The situation would call for the flat application of the "familiar 'easy-to-say-so-if-that-is-what-was-meant' rule of statutory interpretation." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 181–82 (2012) (quoting Comm'r v. Beck's Estate, 129 F.2d 243, 245 (2d Cir. 1942)).

At the end of the day, I agree with Respondent the Coast Guard's jurisdiction is lacking and its arguments are without "any grounding in the statutory text." Dep't of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz, 601 U.S. 42, 62 (2024). Again, like the "commercial service" argument Congress or the Commandant, via the rulemaking process, could have defined a UPV by simply drafting some version of "carrying zero to six passengers" if that was the intent. Similar language is present in various legal and non-legal texts.[19] Instead, Congress' and the Commandant's express language, delineating the limitations on what constitutes a UPV, militate against the adoption of the Coast Guard's position. To adopt the Coast Guard's argument would introduce discord into an otherwise harmonious statutory framework. See Julian Depot Miami, LLC v. Home Depot U.S.A., Inc., 824 F. App'x 609, 616 (11th Cir. 2020) (citing Scalia & Garner, supra, at 180 ("The provisions of a text should be interpreted in a way that renders them compatible, not contradictory. . . . Hence there can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously.")).

III. CONCLUSION

[19] See supra note 10 and accompanying text.

The Coast Guard chose to charge Respondent on the theory that he was acting under the authority of his MMC "as required by law or regulation." The law and regulation at issue here apply only when a mariner operates a vessel that qualifies as a UPV. The Coast Guard's pleading, and judicial admissions, however, show that as a matter of law Respondent was not operating a UPV at the time of the collision. Thus, any jurisdictional assertion, based on an obligation to have a license because he was allegedly a UPV operator must fail.

WHEREFORE,

ORDER

IT IS HEREBY ORDERED, this matter is **DISMISSED WITHOUT PREJUDICE**[20] for lack of **JURISDICTION.**[21]

PLEASE TAKE NOTICE, service of this Order on the parties serves as notice of appeal rights set forth in 33 C.F.R. §§ 20.1001 through 20.1004 (Attachment A).

Done and dated this 22nd day of July 2024, at Houston, Texas

THE HON. TOMMY CANTRELL
UNITED STATES COAST GUARD
ADMINISTRATIVE LAW JUDGE

[20] Nothing in this order prevents the Coast Guard from refiling this Complaint under other theories of jurisdiction.
[21] Respondent's Brief raises two objections to the Coast Guard's brief. Both objections are **OVERRULED** as moot.