

UNITED STATES OF AMERICA
U.S. DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES COAST GUARD
Complainant

vs.

OLIMPIO BORGES SCOTO Jr.

Respondent

Docket Number 2010-0049
Enforcement Activity No. 3648094

DECISION AND ORDER
Issued: November 07, 2011

By Hon. Parlen L. McKenna
Presiding

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I. Preliminary Statement

Just after midnight on October 2, 2008, a tragic collision occurred between a 29 foot Bayliner and the barge ISLANDER that was being towed by the tug REBEL II. The REBEL II/ISLANDER was returning from delivering cargo to Catalina Island. The Bayliner was traveling from Alamitos Bay in a straight line to Catalina Island, with its wheel locked and traveling at a high rate of speed (20 knots). The Bayliner struck the front of the ISLANDER and was run over by the barge. Neither Respondent nor his deckhand ever saw the Bayliner and both were unaware that a collision had occurred. The Bayliner refloated after being run over by the barge and sank after about 20 minutes. The two people aboard the Bayliner died as a result of the collision. This accident occurred in the precautionary zone approximately three miles from the breakwater outside of Los Angeles/Long Beach Port.

The United States Coast Guard investigated the incident and brought a negligence charge against Respondent. Specifically, the Coast Guard alleged Respondent failed to keep an adequate lookout in violation of Rule 5 of the International Rules of the Road. By this charge, the Coast Guard's argument is akin to the legal theory of strict liability – the Bayliner should have been seen by a proper lookout prior to the collision and therefore Respondent was negligent. Subsumed therein, the Coast Guard argues that Respondents' posting of his lookout in the lower wheelhouse of the REBEL II was improper because the REBEL II's upper wheelhouse offered a better location for such a lookout.

Additionally, during the course of the investigation, the Coast Guard discovered that Respondent had strained his back during the cargo off-load at Catalina Island and spent approximately 30-45 minutes resting his back in a bunk located in the REBEL II's lower wheelhouse while en route back to Los Angeles/Long Beach. While there was clearly no causal connection between Respondent lying in the rack and the collision with the Bayliner, the Coast Guard nevertheless charged Respondent with misconduct for inappropriately relinquishing

direction and control of the REBEL II to his unlicensed deckhand, the only other crewmember on the REBEL II.

For the reasons given in this Decision and Order, the undersigned finds the charge of misconduct proven. Respondent's actions in lying down where he could not see the surrounding waters, nor monitor the vessel's radar for a block of time amounting to 30-45 minutes, was imprudent and constitutes legal misconduct.

The negligence charge is a much closer case, but ultimately must be found not proven. First, Rule 5 does not specify any particular location for a lookout. The Coast Guard's reliance on there being an allegedly better position for a lookout on the REBEL II with a 360-degree view misses the mark and is contrary to precedent. Indeed, Respondent maintained an adequate lookout under the particular facts and circumstances as they existed at the time in compliance with Rule 5.

Furthermore, the Bayliner crossed approximately 4/10ths of a mile in front of another vessel before colliding with the ISLANDER shortly thereafter. The CAPT. T LE's crew did not see the Bayliner visually or on radar. The failure of both the REBEL II (a master and his dedicated lookout) and the CAPT. T LE (a master and his dedicated lookout) to see the Bayliner is difficult to explain in the abstract. But not every collision necessitates a finding of an inadequate lookout and Respondent offered several credible reasons why the Bayliner was not picked up on radar or visually. None of these reasons had anything to do with Respondent being negligent. Weighing the entirety of the record evidence leads to the conclusion that Respondent's lookout was not improper.

II. Procedural History

On January 27, 2010, the Coast Guard filed a Complaint against Respondent. The Complaint alleged three violations in connection with Respondent serving as Master aboard the

vessel REBEL II on October 1-2, 2008. The Complaint charged Respondent with two counts of misconduct and one count of negligence.

Specifically, Charge I alleged that Respondent committed a violation of 46 U.S.C. § 7703(1)(B) and 46 C.F.R. § 5.27 (misconduct) in connection with Respondent's alleged failure to maintain direction and control of the REBEL II and the tow ISLANDER as required by 46 C.F.R. § 15.610. Charge II alleged that Respondent committed a violation of 46 U.S.C. § 7703(1)(B) and 46 C.F.R. § 5.29 (negligence) by failing to maintain a proper lookout, which contributed to a collision with a 29 foot Bayliner pleasure craft (the Sanchez Bayliner). Charge III alleged that Respondent committed a violation of 46 U.S.C. § 7703(1)(B) and 46 C.F.R. § 5.27 (misconduct) in connection with Respondent failing to alter his vessel's navigational display when reducing his tow to less than 200 meters in violation of 33 U.S.C. § 2024(a).

On February 19, 2010, Respondent filed his Answer, in which he admitted all jurisdictional allegations but denied the substantive bases for the three charges. Respondent's Answer also asserted affirmative defenses to all three charges, with the defense to Charges I and III being that the offense, if proven, was not relevant to the casualty asserted in Charge II. Additionally, for Charge II, Respondent asserted that the proximate cause of the collision with the Sanchez Bayliner "was entirely the fault of the recreational vessel . . . and others and not the fault of Respondent." Answer at 1.

The affirmative defense relating to the charged conduct not being relevant to the casualty must be rejected outright. Nothing requires a marine casualty as an antecedent to finding proved charges of negligence or misconduct. See 46 C.F.R. §§ 5.27, 5.29 (definitions of "misconduct" and "negligence"). The issue is not whether the charges of misconduct were related to the eventual collision with the Sanchez Bayliner, but rather whether Respondent's actions complied with the relevant statutory and regulatory requirements.

For the three alleged violations, the Coast Guard sought 12 months outright suspension of Respondent's Merchant Mariner's License.¹ At the first day of hearing, the Coast Guard moved to withdraw Charge III. Tr. at 6:10-16.² The Coast Guard's Motion was granted. Id. at 6:18-19.

On the second day of hearing, the undersigned accompanied the parties on a site visit to Catalina Freight Company, during which, the undersigned went aboard and examined the REBEL II, including accessing both the upper and lower wheelhouses, the aft bridge, and the deck. See Tr. at 461:2-462:16.

The Coast Guard offered 6 witnesses and 28 exhibits in support of its case. Respondent offered 8 witnesses and 76 exhibits in rebuttal. The parties' witnesses and exhibits entered into evidence are identified in **Attachment A**.

On March 8, 2011, the Coast Guard submitted its Closing Brief, which included Proposed Findings of Fact. On March 8, 2011, Respondent filed his Post Hearing Brief without any Proposed Findings of Fact or Conclusions of Law. Rulings on the Coast Guard's Proposed Findings of Fact are found in **Attachment B**. On March 15, 2011, corrections to the hearing transcript were ordered. On March 15, 2011, Respondent filed his Post Hearing Reply Brief and the Coast Guard filed its Reply Brief.

The record of this proceeding, including the transcript, evidence, pleadings and other submissions, has now been reviewed and the case is ripe for decision. The findings of fact and conclusions of law that follow are prepared upon my analysis of the entire record, applicable regulations, statutes, and case law. Each exhibit entered, although perhaps not specifically mentioned in this Decision, has been carefully reviewed and given thoughtful consideration.

¹ Despite dropping one of the three charges against Respondent, the Coast Guard nevertheless maintained in its post-hearing briefing that a 12 months outright suspension remained an appropriate sanction.

² References to the hearing transcript are indicated by "Tr. at [pg.]:[line #s]" with the exception of the testimony of Captain Pancho, whose testimony is indicated as "Feb. 15, 2011 Tr. at [pg.]:[line #s]" due to the fact that the transcript of Captain Pancho's testimony was not kept in sequence with earlier hearing transcripts and began at page 1 anew.

III. Findings of Fact

A. The Rebel II/Islander and Crew

1. Between 4:00 and 4:30 p.m. on October 1, 2008, the tug REBEL II and the barge ISLANDER departed the Catalina Freight Lines (“Catalina Freight”) facility in the Port of Los Angeles, California bound for Santa Catalina Island (“Catalina Island”). Tr. at 80:19-82:4.³
2. The REBEL II’s voyage from Catalina Freight’s dock to the dock at Catalina Island takes approximately four hours. Tr. at 84:22-85:2.
3. The REBEL II is depicted in the photographs in Coast Guard Exhs. 1- 5. Tr. at 72:11-25; 74:21-75:8; 76:5-76:20; 77:12-19; 77:24-78:6.
4. The REBEL II is a 61.8-foot towing vessel that was originally constructed in 1969. Coast Guard Exh. 11; Resp. Exh. EE.
5. The barge ISLANDER is a 128-foot cargo barge used by Catalina Freight to transport cargo between Catalina Island and the Port of Los Angeles and was originally constructed in 1964. Tr. at 79:19-80:20; Coast Guard Exh. 12; Resp. Exh. GG.
6. The barge depicted in Coast Guard Exh. 2 is the ISLANDER. Tr. at 75:24-76:2.
7. At all times relevant to this proceeding, the REBEL II was operating in waters governed by the International Regulations for the Prevention of Collisions at Sea (72 COLREGS; 33 U.S.C. §§ 1601-1608). See Coast Guard Exhs. 25, 27; Tr. at 678:6-14.
8. There were two crewmembers on the REBEL II during the transit to and from Catalina Island on October 1-2, 2008 – Captain Scoto was the master and licensed operator and Mr. John Amstutz was the unlicensed deckhand. Tr. at 71:25-72:5; 80:3-18.
9. At all times relevant to this matter, Captain Scoto was the holder of a Coast Guard-issued credential as a master of steam or motor vessels of not more than 1600 gross registered tons

³ This run will be referred to in this Decision and Order as the “LA/LB Port-Catalina run”.

(Domestic tonnage), 3,000 gross tons (ITC tonnage) upon oceans, master of towing vessels upon oceans, and radar observer (unlimited). Tr. at 8:19-9:19; Coast Guard Exh. 10.

10. Captain Scoto was first licensed by the Coast Guard in 1973 and has extensive experience in the ocean-going tug industry spanning approximately 40 years. Tr. at 435:14-449:4; Resp. Exhs. C, E, F.

11. Deckhand Amstutz did not hold any Coast Guard-issued credentials, radar endorsements, or radar observer certifications. In this regard, Deckhand Amstutz had no formal training in the use of radar, but had received years of practical training in the use of radar by Captain Scoto and another captain. Tr. at 131:17-19; 133:6-11; 491:11-15; 533:14-18.

12. At the time of the accident, Deckhand Amstutz had worked as a deckhand on two towing vessels (the REBEL II and another vessel) for approximately 10 years. Tr. at 70:19-71:9; 71:21-23.

13. Deckhand Amstutz made the LA/LB Port-Catalina run approximately three to five times a week. Tr. at 81:4-10.

14. Deckhand Amstutz usually works with Captain Scoto on the LA/LB Port-Catalina runs and had done so for approximately 6 years at the time of the accident. Tr. at 81:11-16; 139:11-13; 502:12-15.

15. Captain Scoto made the LA/LB Port-Catalina run approximately four times a week for approximately six and half years without incident prior to the collision with the Sanchez Bayliner. Tr. 449:20-450:19.

16. Captain Scoto admitted that because of the heavy commercial and recreational traffic in the precautionary zone, he has had a lot of close calls and that “[w]e always have a problem with small boats.” Tr. at 450:18-21.

17. On October 1, 2008, Deckhand Amstutz's duties during the trip to Catalina Island included checking the tow wire to be sure it was not slipping, conducting engine room checks and performing lookout duties. Tr. at 85:3-18; 87:3-5.
18. On October 1, 2008, Deckhand Amstutz performed his lookout duties from the lower pilot house on the transit to Catalina Island. Tr. at 86:5-24.
19. The REBEL II was originally constructed with only one wheelhouse. Tr. at 472:4-8; 588:7-17; 934:2-933:7.
20. The original REBEL II tug design (i.e., with only one wheelhouse) was a standard design in the tug industry for decades. Tr. at 472:9-24; 933:7-18.
21. Because of this industry standard of one wheelhouse, all of the steering and navigational equipment was necessarily contained therein.
22. The lower wheelhouse of the REBEL II had a forward visibility toward the bow through five forward-facing windows, which were separated by support stanchions. This configuration provided approximately 180-degree visibility out the front of the vessel. Coast Guard Exh. 1; Resp. Exh. RR; Tr. at 375:5-15; 503:5-12.
23. With the wheelhouse doors closed, visibility out of the port and starboard sides of the lower wheelhouse was through one square window in each of the doors. These door windows were smaller than the large forward-facing wheelhouse windows. Coast Guard Exhs. 1, 2, 5.
24. Historically, because of the one wheelhouse design of this type of tug, it was industry practice for operators to station their lookouts in the wheelhouse, except where circumstances dictated otherwise. Tr. at 935:11-936:9
25. In order to comply with Rule 5, it was industry practice (including Captain Scoto's) for designated lookouts to move to different locations in the wheelhouse to ensure that a 360-degree

lookout was maintained. Tr. at 142:15-19; 143:2-8; 509:14-21; 732:15-733:17; 1062:11-25; 1052:2-1057:24; 1337:2-13; Resp. Exh. N at 31-37, 38-39; Resp. Exh. O at 7-8, 39-40.⁴

26. The REBEL II's upper wheelhouse was not original to the tug but was a later add-on for navigating the tug when in the harbor and when breaking the barge because the operator needs visibility down the side and over the tow. Tr. at 472:4-8; 473:3-6; Resp. Exh. O at 37.

27. The lower wheelhouse's autopilot and the GPS, allows the operator to put the vessel on autopilot and pay more attention to navigation duties including watching out for incoming vessels. Tr. at 474:8-23; 476:1-5; 476:15-477:1.

28. With the exception of autopilot and GPS, the upper wheelhouse had the same compliment of navigational equipment as the lower wheelhouse, thus allowing the operator to have two locations from which the REBEL II could have been operated. Tr. at 473:10-474:4; 475:19-476:5.

29. Once set, the autopilot on the REBEL II could not be disengaged from the upper wheelhouse, and the operator would be required to manually steer the vessel from that location assuming that the autopilot was not engaged. Tr. at 487:15-24.

30. For tugs that were modified with an upper wheelhouse, the record evidence does not support a finding that it was industry practice to use the upper wheelhouses for stationing a lookout. Tr. at 934:7-935:2.

31. The lower wheelhouse of the REBEL II is normally used by Captain Scoto for his lookout while the vessel is underway in the transit between Catalina Island and the Port of L.A. Tr. at 119:9-11; 120:10-13; 374:4-8.

⁴ The undersigned specifically finds that Captain Scoto and Deckhand Amstutz testimony to be credible with respect to the maintenance of their lookout during the time within the precautionary zone (i.e., visually scanning the waters around the REBEL II and Captain Scoto observing the radar). Furthermore, the undersigned finds Captain Johnson's and Captain Hickey's testimony on this subject to be credible as well. The undersigned cannot accept the premise that an experienced licensed mariner like Captain Scoto and a trained, experienced lookout like Deckhand Amstutz simply stayed glued to one spot throughout the time the REBEL II/ISLANDER traversed the precautionary zone and neglected to look out of the REBEL II's available points of view to deal with design obstructions.

32. Captain Scoto stations his lookout in the lower wheelhouse because he can more easily work with and confer with the lookout. Tr. at 477:20-25; Resp. Exh. O at 6-7.⁵

33. The wheelhouse doors could be left closed, opened, or cracked. Leaving the doors fully open would increase visibility out of the port and starboard sides of the lower wheelhouse. Coast Guard Exh. 1; Resp. Exh. RR.

34. On the transit from Catalina Island on October 1-2, the wheelhouse doors of the REBEL II were neither fully opened nor closed, but were cracked open. Tr. at 534:14-536:7, 588:5-6.

35. The view out of each side of the lower wheelhouse aft of 90 and 270 degrees relative bearing was restricted by steel bulkheads that extended on each side of the lower wheelhouse from the side doors to the aft bulkhead. Coast Guard Exh. 1; Tr. at 125:24-128:2; 129:1-131:10; 257:20-258:5; 544:6-545:3.

36. The view aft from the lower wheelhouse of the REBEL II was provided through a window on the starboard-aft bulkhead and a small, round porthole window on the aft-port bulkhead. These windows were contained within the lower wheelhouse's aft steel bulkhead. This aft bulkhead obstructed the view aft from the lower wheelhouse. The view aft out of the starboard-aft window was further obstructed by a gray, plastic garbage can positioned against the railing just outside the window. Coast Guard Exhs. 3, 4; Tr. at 76:5-77:19, 126:5-131:10

37. The presence of the bulkheads in the Rebel II's lower wheelhouse creates blind spots. Tr. at 121:10-16, 126-131, 257:20-258:5, 354:4-11, 589:5-12; 1062:11-25.

⁵ Captain Tilford testified that Captain Scoto's placement of his lookout in the lower wheelhouse constituted negligence. This expert testimony is specifically rejected. The undersigned finds Captain Johnson's and Captain Hickey's testimony on this subject to be more credible. Indeed, both of these experts testified that the placement of the lookout in the lower wheelhouse was proper. In particular, Captain Johnson's greater experience in running tugs like the REBEL II in similar conditions as opposed to Captain Tilford's lack of experience in ocean going and coastwise tugs (with tows on the line from the rear) makes his opinion concerning the placement of the lookout in this particular case questionable. For the reasons given in this Decision and Order, however, Captain Johnson's opinion about the appropriateness of Captain Scoto resting in the rack is rejected.

38. Assuming a target is acquired from the lower wheelhouse, the blind spots in the lower wheelhouse of the REBEL II can be eliminated by moving around to maintain tracking of such a target. Tr. at 123:4-16; 140:12-141:2; 141:8-23.

39. Most tugboats in the industry are configured like the REBEL II's lower wheelhouse with forward 180-degree views and as a result, watchstanders and lookouts move around while on watch to maintain effective scanning of the horizon around the vessel due to obstructions within the wheelhouse (particularly aft). Tr. at 930:4-931:14.

40. The upper wheelhouse of the REBEL II provides an unobstructed, 360-degree view of the horizon, as there are no bulkheads in the upper wheelhouse and with the exception of narrow window support stanchions there are no blind spots or significant impairments. Coast Guard Exhs. 1, 2, 3, 4, 5; Tr. at 120:19-121:5, 353:15-354:3; 534:8-13, 589:13-15, 1062:4-8.

41. At all times material to this case, the REBEL II was towing the ISLANDER astern at a distance of between 1,100 and 1,200 feet. Tr. at 91:7-12; 541:20-23.

42. During the transits to and from Catalina Island on October 1-2, 2008, Deckhand Amstutz had no responsibility or authority to adjust the REBEL II's radar or alter the REBEL II's course or speed and did not do so. Tr. at 117:4-10; 133:12-16; 134:5-11, 146:22-147:4, 150:8-10; 552:18-553:11.

43. During the REBEL II's transit to Catalina Island on October 1, 2008, Captain Scotto permitted Deckhand Amstutz to take a nap in the lower wheelhouse rack of the REBEL II, and Deckhand Amstutz spent approximately thirty minutes lying in the rack. Tr. at 87:6-88:5; 88:21-25; 538:18-25; 551:20-22.

44. The REBEL II and ISLANDER arrived at Catalina Island at approximately 8:25 p.m. on the night of October 1, 2008. Coast Guard Exh. 14; Tr. at 89:18-22.

45. The REBEL II and ISLANDER departed on the return trip from Catalina Island at approximately 9:55 p.m. on the night of October 1, 2008. Coast Guard Exh. 14; Tr. at 483:15-484:4.

46. The weather for the return trip from Catalina Island was clear and calm, and the seas consisted of an approximately one-foot slow swell of approximately one-half minute duration with visibility of six miles plus. Tr. at 92:12-93:12.

47. Deckhand Amstutz performed the same duties on the voyage back from Catalina Island as he did on the transit to Catalina Island. Tr. at 93:14-16.

B. Captain Scoto Laid Down in the Rack during the Return Transit

48. At approximately 10:30 pm on October 1, Captain Scoto laid down in the rack of the lower wheelhouse of the REBEL II after the REBEL II got up to speed and its tow wire was fully out on the return voyage. Tr. at 93:20-25.

49. Captain Scoto told Deckhand Amstutz that his back was hurting him and “he wanted to get off his feet for a little bit.” Tr. at 94:3-8.

50. Captain Scoto believed that by resting his back while his vessel/tow was in open sea, he could stand a better watch upon nearing the precautionary area. Tr. at 567:20-23.

51. The record does not establish the degree of pain that Captain Scoto was experiencing, but it was sufficient that he felt that he wanted to rest it before entering the precautionary area. Tr. at 1040:18-1041:2.

52. Before lying down in the rack, Captain Scoto instructed Deckhand Amstutz to keep a lookout. Tr. at 94:9-13.

53. Before lying down in the rack, Captain Scoto: (1) called the Vessel Traffic Service (“VTS”), which reported no traffic in the area; (2) checked the radar at ranges of six and twelve miles and determined there were no contacts on the radar; and (3) did a visual check. Tr. at 145:3-9; 485:9-486:12.

54. When Captain Scoto lay down in the rack, the radar was set to six mile range. Tr. at 492:8-11.
55. Captain Scoto remained in the rack for a continuous period of between thirty and forty-five minutes, lying with his head to the port side of the REBEL II, and arose from the rack at between 11:00 and 11:15 p.m. Tr. at 94:14-18; 94:25-95:8; 97:1-3; 490:1-11, 498:7-11.
56. Captain Scoto's position in the rack was a "little bit on his back and a little bit on his side." Tr. at 96:11-15.
57. During the time Captain Scoto was in the rack, Deckhand Amstutz served as lookout, maintaining visual lookout and monitoring the radar. Tr. at 94:19-24; 502:6-11; 502:18-503:3.
58. While Captain Scoto was in the rack, Deckhand Amstutz tried to leave Captain Scoto alone so he could rest his back and so while Captain Scoto was in the rack, there was minimal conversation between Captain Scoto and Deckhand Amstutz. Tr. at 97:4-8; 145:12-24; 612:2-8.
59. Captain Scoto periodically asked Deckhand Amstutz if there was anything on the radar while he was lying down in the rack. Tr. at 488:12-21.
60. Captain Scoto was approximately 2-3 feet away from Deckhand Amstutz while he was in the rack. Tr. at 97:12-23.
61. Captain Scoto did not go to sleep while in the rack and appeared to Deckhand Amstutz to be alert during this period. Tr. at 145:25-146:10; 146:18-21; 490:13-21.
62. From his prone position in the rack, Captain Scoto was unable to see the waters around the REBEL II and would not have been able to see approaching vessels. Tr. at 354:15-355:12; 561:7-9.
63. From his prone position in the rack, Captain Scoto was unable to monitor the REBEL II's radar. The radar screen in the lower wheelhouse was located on the starboard side of the bridge next to the operating station located amidships. Resp. Exh. RR; Tr. at 561:10-12.

64. Captain Scoto admitted that while he was in the rack, he was not in a position to give informed helm commands. Tr. at 561:4-6.

65. It was a violation of Catalina Freight company policy for either Captain Scoto or Deckhand Amstutz to lie in the rack during the transit between Catalina Island and the LA/LB Port. Tr. at 551:20-25, 567:4-17.

66. After getting out of the rack, Captain Scoto took up his watch position on the starboard side of the wheelhouse in front of the REBEL II's radar. Deckhand Amstutz was posted as a lookout on the port side of the wheelhouse as the REBEL II transited through the precautionary area. Tr. at 98:4-23; 99:10-12; 142:20-23; 149:1-3, 1348:10-18.

C. Multiple Factors Made it Difficult for Respondent and his Lookout to Spot the Sanchez Bayliner

67. As the REBEL II approached the precautionary area that night near Buoy 1, Deckhand Amstutz was actively engaged in performing his lookout duties and Captain Scoto was observing the radar and performing visual scans of the water surrounding the REBEL II. Tr. at 148:13-22; 520:15-522:20.

68. The background lighting on the approach of Buoy 1 toward the LA port is bright and can cause difficulties in observing lights from vessels on the water at night but such backscatter lighting decreases as one looks away from the LA/LB Port and would be less of a concern from the direction the Sanchez Bayliner approached the REBEL II when compared to the LA/LB Port lights. Tr. at 149:8-16; 523:22-524:16; 576:10-17; 582:6-583:12; 644:8-645:7; 646:9-15; 647:19-649:16; 1012:6-13; 1322:13-1323:7; Coast Guard Exh. 27.

69. At approximately 2 miles from the REBEL II/ISLANDER, the Sanchez Bayliner would have been approaching at 036 degrees from the REBEL II and approximately 034 from the ISLANDER. Tr. at 779:20-780:5; 781:9-14.

70. When the Bayliner and the ISLANDER collided, the Bayliner was at a relative bearing of 180 degrees from the REBEL II. Tr. at 781:15-18.

71. The Sanchez Bayliner would have traversed from 036 degrees relative to the REBEL II to 180 degrees relative to the REBEL II within 4.5 minutes over the course of the two miles from the time its white light would have been visible at 2 miles until the time of the collision with the ISLANDER. Tr. at 781:19-22.

72. The masthead light on the Bayliner was within visual range of the REBEL II at a distance of two miles and passed through a relative bearing arc from the REBEL II starting at 036 degrees relative and ending at 180 degrees relative. Coast Guard Exh. 9. When the Bayliner was one mile away from the REBEL II, at least one of the Bayliner's sidelights was within the visual range of the REBEL II. As the Bayliner passed abeam of the REBEL II, its green starboard sidelight and its all-around white masthead light were within the visual range of the REBEL II. See Coast Guard Exh. 8 at 16 of 17; Coast Guard Exh. 9; Tr. at 50:8-24.

73. Immediately prior to the collision, the REBEL II was making way at approximately 8 knots and the Bayliner was travelling at 20 knots. Given their relative angles of approach, the closing speed of the vessels was 26.4 knots. Tr. at 735:10-736:7.

74. At a closing speed of 26.4 knots and a visibility range of two miles, the all-around masthead light on the Bayliner was within the visual range of the REBEL II for at least four minutes and forty-six seconds. At least one of the running lights on the Bayliner was within the visual range of the REBEL II for at least two minutes and twenty-eight seconds. Tr. at 741:3-21; 745:5-8; 777:9-24.

75. Prior to the collision between the ISLANDER and the Bayliner, the Bayliner passed within 300-600 feet directly off the starboard beam of the REBEL II. Coast Guard Exh. 8 at 16; Tr. at 237:14-23; 543:20-23.

76. Captain Scoto admitted that if someone was standing inside the REBEL II's lower wheelhouse and looked just aft of the beam on the starboard side, that person would see a solid steel bulkhead and it would not be possible to see the Sanchez Bayliner approximately 300-600 feet just aft the REBEL II's starboard beam; whereas someone positioned in the upper wheelhouse would have the Sanchez Bayliner in his field of view. Tr. at 544:6-545:18.

77. At a closing speed of 26.4 knots, the Bayliner passed directly abeam of the REBEL II between twenty-six and twenty-eight seconds before the collision with the ISLANDER. See Tr. at 541:11-23 (distance between REBEL II and ISLANDER between 1,100 and 1,200 feet); Coast Guard Exh. 11 (length of REBEL II- 61.8 feet); Coast Guard Exh. 8 at 16 of 17 (showing Bayliner passing abeam of REBEL II).

78. Respondent's expert – Captain Hickey – speculated that the Sanchez Bayliner's lights would not be moving relative to the REBEL II's course because it would be maintaining a constant bearing and this would make the Bayliner more difficult to see because the lights would not seem to be moving. Tr. at 734:4-735:10; 736:11-737:7. This assertion has merit and is partially accepted. However, its validity is tempered by the fact that the constant bearing/decreasing range of the Sanchez Bayliner was with the ISLANDER and not the REBEL II that was 1100-1200 feet in front of the actual collision. Tr. at 779:5-10.

D. The REBEL II's Radar

79. At 12:18 a.m. on October 2, 2008, the REBEL II's barge ISLANDER and the Bayliner collided. Coast Guard Exh. 8 at 17; Resp. Exh. M.

80. At the time of the collision, the REBEL II's radar was set on three miles range. Tr. at 392:25-393:5; 394:20-395:10.

81. On the night of the collision, the REBEL II's radar was turned on and functioning properly. Tr. at 361:14-25.

82. However, the REBEL II's radar on the night of the collision was not compliant with 33 C.F.R. § 164 due to: (1) an insufficient screen size and (2) compatibility with current technical standards. Tr. at 362:12-16; 362:23-363:8.

83. The radar on the REBEL II during October 1 and 2, 2008 had four range settings: one mile; three miles; six miles; and twelve miles. Tr. at 491:16-20.

84. During the REBEL II's approach to LA/LB Port, Captain Scoto had his radar optimized to detect buoys so that he could line up his approach in the channel. Tr. at 525:21-526:25, 527:22-25; 786:3-787:2, 856:2-13.

85. Small recreational vessels have posed a frequent hazard to Captain Scoto when operating with a tow between Catalina Island and the port of LA/LB. If Captain Scoto became aware of a vessel that was going to attempt to cross his towline, he would have used a handheld spotlight to draw attention to the barge and signal the other vessel. Tr. at 450:10-21; 519:5-15; 520:15-23; 521:1-10; 531:7-8; 584:22-585:19; Resp. Exh. N at 19; Resp. Exh. O at 30, 35-36.

E. The VTS Service, VTS Data, and the Precautionary Area Near LA/LB Port

86. VTS is responsible for the approaches to the port of LA/LB and covers the waters 25 miles seaward of Point Fermin, which includes Catalina Island. The REBEL II was within this charted Vessel Traffic Management System (VTMS) during its entire transit to and from Catalina Island. Tr. at 156:15-21; Coast Guard Exh. 25 at Note [D].

87. Vessels are categorized into three groups by VTS: 1) covered vessels that include (a) commercial vessels 131 feet or more; (b) passenger ferries certified to carry 50 or more passengers for hire; and (c) tugs 26 feet or more engaged in towing; (2) mandatory passive participants that include (a) any vessel over 100 gross tons; (b) any vessel 65 feet or more in length, but not 131 feet; and (c) dredges and floating plants; and (3) passive participants that monitor VTS' VHS radio channel. Tr. at 157:7-158:16.

88. Except in times of low visibility (i.e., 1 mile or less), VTS is not responsible for acquiring and tracking recreational vessels. Tr. at 166:4-11.
89. Even in clear visibility, however, VTS would inform a covered vessel if VTS noticed that a recreational boat was coming towards such a covered vessel. Tr. at 166:18-25.
90. The precautionary or regulated navigation area near LA/LB Port is where the northern and southern traffic lanes terminate and is an area of congestion or an area where vessels are coming from more than one direction. Tr. at 161:20-162:2; 162:17-164:22; Coast Guard Exh. 25 (Note B).
91. Because the charted precautionary area outside LA/LB Port is an area of increased vessel traffic density, vessels are advised to “proceed with extreme caution”. Tr. at 164:4-24; Coast Guard Exh. 27 at Note E.
92. The REBEL II/ISLANDER would be a covered vessel or mandatory user, which required that the REBEL II check in with VTS when leaving Catalina Island. In addition, it would be required to provide the vessel’s designation and ETA. VTS would tell the REBEL II to check back when it was entering the precautionary zone and again when checking out at the L.A. or Long Beach breakwater entrance. Tr. at 158:17-159:14.
93. The REBEL II checked in with VTS at 10:10 pm on October 1, 2008 when leaving Pebbly Beach, Catalina Island en route to Lost Angeles Port with an ETA to Los Angeles Raycon Buoy at 12:40 am on October 2, 2008. Tr. at 161:14-19; Coast Guard Exh. 6.
94. When a collision occurs in the area covered by VTS, VTS generates an incident report. Such a report was generated for the collision between the ISLANDER and the Sanchez Bayliner. Tr. at 168:1-169:9; Coast Guard Exh. 7.
95. The VTS incident report for the collision indicates that the collision occurred .32 nautical miles from Los Angeles Buoy 1 with the REBEL II proceeding at 8.1 kts. and the recreational vessel (i.e., the Sanchez Bayliner) travelling at 20 kts. Tr. at 169:19-25; Coast Guard Exh. 7 at 1.

96. Respondent's Exhibit M is a replay of the VTS data from early in the morning on October 2, 2008. Tr. at 627:12-628:3.

97. While VTS does not monitor recreational vessels in ideal weather situations, if VTS identifies a possible close quarters situation, it would have tried to contact the REBEL II. VTS never contacted the REBEL II to inform it that an unidentified vessel was approaching. Tr. at 208:19-209:8.

98. Captain Scoto's practice was to contact VTS upon entering the precautionary area, which is approximately three to four miles from LA Buoy No. 1, which normally takes the REBEL II approximately 40-45 minutes to transverse. Tr. at 396:15-397:6.

99. Captain Scoto did not receive information from VTS that there was a small vessel in the area when the REBEL II entered the precautionary area. Tr. at 397:7-11.

F. The Sanchez Bayliner

100. The boat occupied by Mr. Sanchez and Ms. Avila was a 1989 28.66-foot Bayliner Avanti model ("the Sanchez Bayliner"). Coast Guard Exhs. 15, 16, 22, 23; Tr. at 44:24-45:2; 45:11-20; 46:2-47:12.

101. The picture and specifications of the Bayliner 2950/2955 Avanti Sunbridge depicted in the upper right of Coast Guard Exh. 16 represent a similar model to the Sanchez Bayliner. Tr. at 47:11-23.

102. Small fiberglass boats, like the Sanchez Bayliner, are difficult to pick up on radar because fiberglass does not present a radar signature and the radar can only pick up non-fiberglass elements of such boats. Tr. at 889:11-14; 1111:8-18; 1323:25-1324:10; 1325:2-11.

103. The Sanchez Bayliner's light switch had three positions – (1) ANC – in which the all-around white light would be on; (2) NAV – in which the red and green running lights and the all-around white light would be on; and (3) OFF – in which no lights would be on. Tr. at 290:6-18; 292:13-293:4; 776:6-19.

104. Mr. Michael Avila, Ms. Avila's son, owned the Sanchez Bayliner. Tr. at 41:16-19.
105. On October 1, 2008, Mr. Avila picked up his mother and Mr. Sanchez at Ms. Avila's home around 8:00 pm. Tr. 41:19-42:5.
106. Mr. Avila, Mr. Sanchez and Ms. Avila arrived at the boat (located at 261 Bayshore Drive in Alamitos Bay, Long Beach) around 9:30 pm. Tr. at 43:1-2.
107. Mr. Avila saw Mr. Sanchez climb up onto the Sanchez Bayliner's bench seat and place an all-around white light on the canopy area of the boat near the radar dome. Tr. at 48:21-49:22.
108. When Mr. Sanchez put the light into its socket, Mr. Avila saw the white light illuminate. Tr. at 50:8-12.
109. Mr. Avila also saw from the dock that the Sanchez Bayliner's red and green running lights (located toward the front of the boat) were illuminated. Tr. at 50:13-20.
110. As the Sanchez Bayliner left the dock and made its way under the two bridges out of Alamitos Bay, Mr. Avila followed the boat in his car, stopped on the first bridge, got out of his car to watch the Sanchez Bayliner go under that bridge and then saw it proceed to and under the second bridge (i.e., the 2nd Street bridge). Tr. at 53:16-55:1.
111. As the Bayliner passed under the bridge at 2nd Street, the Bayliner's navigation lights (port and starboard running and all-around white) remained on and visible. The all-around white light was brighter than the port and starboard running lights. The Bayliner passed under the 2nd Street Bridge at approximately 11:40 p.m. Coast Guard Exh. 9; Tr. at 54:16-55:4; 55:19-56:6; 57:24-58:2.
112. Mr. Sanchez was driving the boat that night. Ms. Avila never drove the Sanchez Bayliner. Tr. at 55:5-13.
113. Mr. Avila had been out on the Sanchez Bayliner with Mr. Sanchez approximately 10 or more times. Tr. at 62:4-9.

114. Mr. Avila was not aware of any reason Mr. Sanchez would have for turning off his running lights at night. Tr. at 65:8-16.

115. The Coast Guard obtained video evidence from cameras near Alamitos Bay to try to determine whether the Sanchez Bayliner had its lights on when it left the dock. Tr. at 258:23-262:22; 266:22-24; 269:20-270:9; Coast Guard Exhs. 9, 24.

116. The Sanchez Bayliner had both its navigation lights and its white and green navigation light lit as it left Alamitos Bay. Coast Guard Exh. 9; Tr. at 282:13-283:2.

117. From the time the Bayliner left its dock in Alamitos Bay to the time of the collision with the ISLANDER, it is more likely than not that the Bayliner's navigation lights were turned on and were operating properly. Coast Guard Exh. 9; Tr. at 65:9-16.

118. Consistent with the requirements of Rule 22 of both the Inland and International Rules of the Road, the Bayliner's all-around masthead light had a visibility range of at least two miles and each of the Bayliner's sidelights had a minimum visibility range of one mile. See Coast Guard Exhs. 9, 15; Navigation Rules, Inland, 33 C.F.R. § 83.22 (c) and International, U.S. Coast Guard COMDINST M16672 (Rule 22).

G. The CAPT. T LE

119. On the night of October 1, early morning of October 2, 2008, the CAPT. T LE, a crewboat that runs back and forth from Long Beach to the oil platforms was transiting the area outbound from the LA/LB PORT. Tr. at 176:12-17; Coast Guard Exh. 8 at 7; Resp. Exh. EEE.

120. The Sanchez Bayliner passed directly in front of the CAPT. T LE at a speed of approximately 20 knots after emerging from behind the anchored tanker BALTIC at a range of approximately .388 nautical miles. Tr. at 233:3-16, 379:13-380:2; Coast Guard Exh. 8 at 7-10.

121. Captain Pancho was the master of the CAPT. T LE on the night of October 1/early morning of October 2, 2008. Feb. 15, 2011 Tr. at 6:19-20; 7:17-25.

122. Captain Pancho did not at the time have a radar endorsement but had practical training on the use of radar. Feb. 15, 2011 Tr. at 8:15-9:7; 10:1-5.

123. Captain Pancho's statement provided to the Coast Guard indicates that he did not see a small boat crossing ahead of the CAPT. T LE visually or on radar. Captain Pancho further speculated that based on the conditions that night, he believed he should have seen such a small vessel even if the vessel did not have its lights on. Tr. at 323:2-9; Feb. 15, 2011 Tr. at 19:21-23; Resp. Exh. TT.

124. Captain Raymond Blakeslee was serving as the CAPT. T LE's engineer and lookout on the night of October 1 and early morning of October 2, 2008. Tr. at 964:25-965:13; 908:23-981:23.

125. Captain Pancho was maintaining a visual lookout and monitoring the CAPT. T LE's radar. Tr. at 989:2-8; Feb. 15, 2011 Tr. at 22:4-21.

126. Visibility was good and Captain Blakeslee recalled that he could see at least eight miles with calm seas of 2-3 feet. Tr. at 979:11-18; Feb. 15, 2011 Tr. at 20:14-23.

127. From the direction the CAPT. T LE was proceeding outbound from the LA/LB Port, there would be no background lighting forward of the vessel. Tr. at 651:22-652:5; 978:18-979:6; 1010:12-1011:5.

128. Neither Captain Blakeslee nor Captain Pancho saw any recreational craft cross the CAPT. T LE's bow as it was heading out of LA/LB Port – despite the fact that the Sanchez Bayliner clearly passed within visual range of Captain Blakeslee's lookout position for approximately 2.5 minutes. Tr. at 983:4-9; 997:22-998:2; Feb. 15, 2011 Tr. at 21:12-16.

129. Captain Pancho had his radar set at a one-mile range during the transit out of LA/LB Port. Feb. 15, 2011 Tr. at 23:11-17.

130. Captain Blakeslee believed he probably would have seen the Sanchez Bayliner at a range of approximately 4/10ths of a mile under the conditions of that night even if Bayliner's lights were off. Tr. at 1005:19-1006:15.

131. Captain Pancho also believed that he should have seen the Sanchez Bayliner cross the CAPT. T LE's bow, even if the Bayliner's lights were not illuminated because of the amount of light coming off the anchored ships in the area. Feb. 15, 2011 Tr. at 28:4-24.

132. The CAPT. T LE (not while Captain Pancho was master) was involved in an accident in November 2008 in which the vessel struck bow first into a lighted aid to navigation. Feb. 15, 2011 Tr. at 31:24-33:1.

133. Because streaked and dirty windows were identified as a contributing factor in the CAPT. T LE's accident, the owner of the vessel put procedures in place to ensure that the CAPT. T LE's windows were kept clean; Captain Pancho recalled that the windows were clean on the night of October 1/early morning of October 2, 2008 per his usual practice of making sure the windows are clean. Feb. 15, 2011 Tr. at 35:7-36:17.

134. Charges against Captain Pancho of the CAPT. T LE were not brought for failing to see the Sanchez Bayliner because there was no collision between the two vessels. Tr. at 390:13-21.

135. The Coast Guard stated that it did not conduct an extensive follow up with Captain Pancho regarding this incident because the area where the Sanchez Bayliner crossed the bow of the CAPT. T LE had a lot of deep-draft vessels at anchor and "a near miss wouldn't even be considered a near miss until a quarter of a mile, and this was beyond that." Tr. at 423:12-16.

H. The Collision between the ISLANDER and the Sanchez Bayliner

136. The parties stipulated that the collision between the ISLANDER and a recreational boat with two people on board (Mr. Henry Sanchez and Ms. Penny Avila) occurred on the morning of October 2, 2008. Tr. at 6:21-7:13.

137. The collision between the ISLANDER and the Sanchez Bayliner took place within the LA/LB precautionary area. Tr. at 164:2-3; 188:3-6.
138. The Sanchez Bayliner maintained a straight-line course toward the Isthmus of Catalina Island until it collided with the ISLANDER. Tr. at 641:21-642:6.
139. At approximately 12:18 am on October 2, 2008, the VTS data shows the ISLANDER and the Sanchez Bayliner merging into one radar signature, indicating a close quarters or a collision between the two vessels. Tr. at 187:11-22; Coast Guard Exh. 8 at 17.
140. The Sanchez Bayliner passed very close by Los Angeles Buoy 1 before striking the ISLANDER. Tr. at 207:19-208:18; Coast Guard Exh. 8 at 17.
141. An examination of the ISLANDER following the collision indicated that the collision was likely a very strong, hard impact and that the Sanchez Bayliner might have gone under the barge. Tr. at 253:3-254:9.
142. The Bayliner remained afloat for at least nineteen minutes after the collision with the REBEL II/ ISLANDER. Resp. Exh. M; Coast Guard Exh. 19 at 3, Coast Guard Exh. 20 at 3; Tr. at 642:13-644:2.
143. The crew of the REBEL II made no attempt to render aid after the collision to the Penny Avila or Henry Sanchez onboard the Bayliner. Tr. at 529:12-530:13.
144. Both Penny Avila and Henry Sanchez died of “probable drowning” and other unestablished factors. Coast Guard Exhs. 19, 20.
145. Neither Captain Scotto nor Deckhand Amstutz ever became aware of the presence of the Sanchez Bayliner at any time before, during, or after the collision between the REBEL II/ ISLANDER and the Bayliner. Tr. at 100:4-12; 110:15-20; 151, 517:10-15; 529:18-25.
146. The damage to the Sanchez Bayliner was significant, with the driver seat at the steering station sheared off the deck. Tr. at 286:6-287:19; Coast Guard Exhs. 17, 18.

147. The control switch panel of the Sanchez Bayliner suffered significant damage. Tr. at 297:11-19; 299:6-15; Coast Guard Exh. 26.

148. The light switch on the Sanchez Bayliner was found in the ANC position when the boat was recovered. Tr. at 293:8-14.

149. The switches of the Sanchez Bayliner were of a type that not much force is required to move the switch from one position to another. Tr. at 289:5-14.

150. The Sanchez Bayliner's wheel was recovered after the collision in the locked position, which would have prevented Mr. Sanchez from turning the wheel more than 2-3 degrees, and there is no reason to think the wheel was not locked at the time of the accident given the consistent course of the Sanchez Bayliner as revealed in the VTS data. Tr. at 401:11-403:7; Resp. Exh. VV.

151. The Sanchez Bayliner sank as a result of the collision with the ISLANDER and was sitting on the ocean floor, keel up, for seven days before it was recovered and brought to the surface. Tr. at 409:4-19.

152. Having the REBEL II's radar set to pick up the channel buoys in LA/LB Port should have also allowed the radar to pick up the Sanchez Bayliner. Tr. at 884:23-885:7.

153. Captain Scoto's practice and procedure while in the precautionary zone was generally two minutes scanning visually and one minute observing radar. Tr. at 521:2-17.

I. The "Re-Creation" of the Collision

154. One of the parties of interest conducted a "re-creation" of the collision under similar conditions, comparing the efficiency of the REBEL II's radar on the night of the collision with a federally compliant radar unit. Tr. at 362:5-12.

155. The law firm conducting the "re-creation" chose a night with similar conditions as the night of the collision to conduct the "re-enactment" and the conditions were substantially similar

other than the fact that on the night of the collision there was a little more wind. Tr. at 840:4-841:1.

156. One of Respondent's experts – Prof. Pecota – participated in the “re-creation” of the REBEL II/Sanchez Bayliner incident. Tr. at 839:2-9.

157. Prof. Pecota was conducting a test during the “re-enactment” to see if the REBEL II's radar that existed on the October 1 and 2, 2008 could pick up a Bayliner similar to the Sanchez Bayliner under similar conditions with a new, federally compliant radar installed as well for comparison purposes. Tr. at 842:8-23.

158. Prof. Pecota did not know what settings Captain Scoto used for his radar at the time of the collision, except for possibly the range setting, but knew that he was going to be looking for a fiberglass Bayliner on radar and optimized his settings to pick up such a vessel. Tr. at 842:2-7.

159. During the “re-creation”, both the REBEL II's existing radar and a federally compliant radar unit were able to pick up a 26-foot fiberglass Bayliner similar to the Sanchez Bayliner under similar conditions. Tr. at 363:23-365:8.

160. The “re-creation” Bayliner was 26 ft. whereas the Sanchez Bayliner 28 ft. 8 inches in length. Tr. at 368:19-25.

161. Prof. Pecota noted no material difference in the performance of the two radar units installed on the REBEL II and was able to pick up the Bayliner used in the “re-creation” with the radar. Tr. at 847:15-848:1.

162. The radar unit on the REBEL II on the night of the collision was capable of detecting the Bayliner. Tr. at 364-365, 368, 392, 493-494, 861.

163. Prof. Pecota knew approximately from what direction the Bayliner would be approaching the tug during the “re-creation”. Tr. at 843:10-20.

164. The Bayliner used in the “re-creation” had normal running lights (red and green) and an all-around white light. Tr. at 844:9-20.

165. Prof. Pecota found it difficult to pick out the lights of the Bayliner used in the “re-creation” from the background lights even though he knew in what direction to look for it, having acquired it on radar, and only picked it up within about a mile of the REBEL II and especially noticed it as it approached within a quarter of a mile (i.e., 1500-2000 feet) as the bearing drift of the light began to move more rapidly. Tr. at 861:16-864:9.⁶

IV. Principles of Law

The purpose of Coast Guard Suspension and Revocation proceedings is to promote safety at sea and to maintain standards of competence and conduct. See 46 U.S.C. §7701; 46 C.F.R. §5.5. Title 46 Code of Federal Regulations §5.19 authorizes an Administrative Law Judge (Judge) to conduct hearings and to suspend or revoke a license or certificate for violations arising under 46 U.S.C. §§ 7703 and/or 7704.

Determining the weight of the evidence and making credibility determinations as to the evidence is within the sole purview of the Judge. See Appeal Decision 2640 (PASSARO) (2003). aff'd sub nom., Collins v. Passaro, NTSB Order No. EM-199, 2004 WL 817119 (N.T.S.B. 2004). Additionally, the Judge is vested with broad discretion in resolving inconsistencies in the evidence. Moreover, findings may have some inconsistencies with the evidence of record as long as there is sufficient evidence to reasonably justify the findings reached. Id.; Appeal Decision 2639 (HAUCK) (2003).

A. Burden and Standard of Proof

The Coast Guard bears the burden of proof to establish the requisite facts mandated by 46 U.S.C. §7703(2) and the implementing regulations, 46 C.F.R. Part 5; Part 10, Subpart B; 33 C.F.R. Part 20. The Administrative Procedure Act (APA), 5 U.S.C. §§551-559, applies to Coast Guard Suspension and Revocation hearings before United States Administrative Law Judges.

⁶ The undersigned finds Prof. Pecota’s testimony on this subject to be credible. Clearly, visually picking up a vessel very similar to the Sanchez Bayliner during conditions similar to the night in question is problematic.

The APA authorizes imposition of sanctions if, upon consideration of the entire record as a whole, the charges are supported by reliable, probative and substantial evidence. See 5 U.S.C. §556(d). The Coast Guard bears the burden of proof to establish the charges are supported by a preponderance of the evidence. 33 C.F.R. §§ 20.701; 20.702(a). “The term substantial evidence is synonymous with preponderance of the evidence as defined by the U.S. Supreme Court.” Appeal Decision 2477 (TOMBARI) (1988).

The burden of proving a fact by a preponderance of the evidence “simply requires the trier of fact ‘to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact’s existence.’” Concrete Pipe & Products of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 622 (1993) (quoting In re Winship, 397 U.S. 358, 371-72 (1970). (Harlan, J., concurring) (brackets in original)). At the hearing, the Coast Guard therefore had to prove by credible, reliable, probative and substantial evidence that Respondent more-likely-than-not committed the violations charged.

B. Jurisdiction

“The jurisdiction of administrative bodies is dependent upon the validity and the terms of the statutes reposing power in them.” Appeal Decision 2620 (COX) (2001) quoting Appeal Decision 2025 (ARMSTRONG) (1975). Where an administrative forum acts without jurisdiction its orders are void. Id. Therefore, establishing jurisdiction is critical to the validity of a proceeding. Appeal Decision 2677 (WALKER) (2008). Jurisdiction is a question of fact that must be proven. Appeal Decision 2425 (BUTTNER) (1986). See also Appeal Decision (ARMSTRONG) (stating “jurisdiction must be affirmatively shown and will not be presumed”).

Here, the Coast Guard charged Respondent with both Misconduct and Negligence, i.e., 46 C.F.R. § 5.27 (misconduct) and 46 C.F.R. § 5.29 (negligence). The Complaint alleged that on or about October 1 and 2, 2008, Respondent, while as serving Master aboard the tug REBEL II,

failed to maintain a proper lookout as required by Rule 5 of the Inland Navigation Rules. The Complaint alleges that Respondent's alleged failure to maintain a proper lookout constitutes negligence under 46 C.F.R. §5.29. The Coast Guard also alleged that during the transit from Catalina to LA/LB Port, Respondent relinquished direction and control of the REBEL II to his unlicensed deckhand contrary to 46 C.F.R. 15.610.

To establish jurisdiction in both negligence and misconduct cases under the authority of 46 U.S.C. § 7703, the actions (or inactions) constituting the alleged negligence and misconduct must be proven to have occurred while the mariner was "acting under the authority" of his merchant mariner's license or credential. See Appeal Decisions 2516 (DALE) (2000) (negligence), 2677 (WALKER) (2008) (misconduct). The term "acting under the authority" is defined at 46 C.F.R. §5.57 and states, in part, "[a] person employed in the service of a vessel is considered to be acting under the authority of a license, certificate or document when the holding of such license, certificate or document is (1) [r]equired by law or regulation; or (2) [r]equired by an employer as a condition for employment." If neither one of these two criteria is met, then the Coast Guard has no jurisdiction to pursue a Suspension and Revocation proceeding. Appeal Decision 2620 (COX) (2001).

Whether Respondent was acting under the authority of his license at all relevant times was not a point of contention at any time during the case. In his Answer, Respondent admitted he was indeed acting under the authority of his MML on October 1-2, 2008, by serving as Master aboard the REBEL II as required by law or regulation. Moreover, the weight of the evidence clearly proves that Respondent was serving aboard the REBEL II as a Master on or about October 1-2, 2008, during the transit from Catalina to LA/LB Port: (1) during which Respondent laid down in the rack for 30 to 45 minutes (the facts constituting the alleged misconduct) and (2) during which the collision with the Sanchez Bayliner occurred (the facts constituting the alleged

negligence). Therefore, Respondent is found to have been acting under the authority of his Coast Guard-issued license at all relevant times.

C. Misconduct – Relinquishing Direction and Control of Tug to Unlicensed Person

To prove misconduct under 46 C.F.R. § 5.27, the Coast Guard must establish by a preponderance of the evidence that Respondent violated: “some formal, duly established rule. Such rules are found in, among other places, statutes, regulations, the common law, the general maritime law, a ship’s regulation or order, or shipping articles and similar sources. It is an act which is forbidden or a failure to do that which is required.”

It is well established under 46 U.S.C. § 8904(a)⁷ that a towing vessel at least 26 feet in length (like the REBEL II) “shall be operated by an individual licensed by the Secretary to operate that type of vessel in the particular geographic area, under prescribed regulations” and that an operator who relinquishes direction and control of a vessel to an unlicensed person is liable for misconduct. See Appeal Decisions 2292 (COLE) (1983), 2566 (WILLIAMS) (1995), aff’d sub nom. Kime v. Williams, NTSB Order No. EM-181 1996 WL 30281 (N.T.S.B. 1996); aff’d Williams v. National Transp. Safety Bd., 121 F.3d 720, 1997 WL 458606 (9th Cir. 1997).

Here, the Coast Guard charged a violation of 46 C.F.R. § 15.610(a), which provides:

Except as provided in this paragraph, every towing vessel of at least 8 meters (at least 26 feet) in length, measured from end to end over the deck (excluding sheer), must be under the direction and control of a person holding a license or MMC officer endorsement as master or mate (pilot) of towing vessels or as master or mate of vessels of greater than 200 gross register tons holding either an endorsement on his or her license or MMC for towing vessels or a completed Towing Officer’s Assessment Record (TOAR) signed by a designated examiner indicating that the officer is proficient in the operation of towing vessels.

(emphasis added).

Several Commandant Decisions on Appeal have addressed the direction and control issue. A leading case is Appeal Decision 2058 (SEARS) (1976) in which the Commandant held

⁷ Formerly 46 U.S.C. 405(b)(2).

that the “temporary absence from the wheelhouse of the licensed operator (officer of the watch) on an uninspected towing vessel is not, in every case, and absolute violation of 46 USC 405(b)(2), as this absence does not necessarily constitute relinquishment of ‘actual direction and control’ over the vessel.”⁸ Indeed, SEARS stands for the proposition that the licensed master of a tug may leave the wheelhouse under certain circumstances:

If the circumstances are such that an unlicensed crew member can temporarily steer the vessel, without any appreciable increase in risk to its safe navigation then the licensed operator may momentarily leave the wheelhouse (after giving appropriate instructions to the crewman) and still maintain “actual direction and control.” (emphasis added).

SEARS articulated several factors that would allow an unlicensed mate to take the wheel for training purposes – i.e., the course is straight, the visibility good, and the traffic sparse.

Furthermore, SEARS made a distinction where the “proven navigational competence of the crewmember is high” so that in such instances, “the licensed operator might briefly leave the wheelhouse and still maintain actual control of the vessel.”

The particular facts of SEARS, however, led to an affirmed finding of misconduct on the basis that the operator was “operating with a reduced degree of control when he himself was at the wheel” since the evidence indicated that his view was partially obstructed by his tow and he had not posted a lookout or used radar to compensate for the partial obstruction. Furthermore, SEARS found that the operator “left the wheelhouse without offering any instructions to the deckhand” about approaching obstacles extending into the river. These conditions of “increased navigational risk” made it improper for the operator to leave the wheelhouse in the hands of an unlicensed deckhand “unqualified to operate under the prevailing conditions.” The sanction imposed, as modified by the Commandant to effect only the operator’s license – not his merchant

⁸ In SEARS, the master apparently left the wheelhouse for a period of approximately 15 minutes so that he could use the restroom.

mariner's document, was suspension of 3 months outright with 6 months remitted on 12 months' probation.

Several cases following SEARS further refined the "direction and control" standard. For example, Appeal Decision 2122 (RODIECK) (1978) dealt with an operator of an uninspected tug who left the wheelhouse in the hands of an unlicensed crewmember for a few moments so that he could go to the restroom. In RODIECK, the situation involved a tug towing a 230 foot oil barge on a 100 foot hawser from Crystal River to Port Manatee, Florida, with clear weather and wind at 10 to 15 miles per hour and seas running three to four feet. Visibility was unlimited except for some glare from the water which hampered vision from directly ahead of the tug to a few degrees on the starboard bow. The unlicensed crewmember had previously been the master of a 73 foot shrimp boat that ran between Tampa, Florida and South America for 10 years prior to his employment on the tug and "therefore Appellant and the captain often permitted [him] to take over the watch for a few minutes during clear weather so that they could leave the wheelhouse for a short period of time."

Before leaving the wheelhouse, the operator "informed [the unlicensed crewmember] of the course, speed, and weather, and checked the radar", which had a range of 24 miles and did not indicate any vessels in the area. The tug was proceeding at a speed of 8 knots. During the operator's absence, a small 20 to 21 foot white, fiberglass, motor-powered boat appeared within 50 yards of the tug's starboard bow. A collision between the recreational boat and the tug's tow ensued and the three persons on the motorboat were killed.

As RODIECK instructs, the key questions for determining who in fact is directing and controlling the operation of the towing vessel are fact specific and involve a range of questions like: 1) who is at the wheel?; 2) where was the licensed operator?; 3) what was the operator doing?; 4) what was the makeup of the tow?; and 5) what was the weather? RODIECK nevertheless emphasized the "precise time or the precise duration of an interval [of the operator's

absence] are not of the essence” because “time is a factor, but it is only one of several that can contribute to the formation of a judgment as to the nature of the ‘direction and control’ of the vessel”. RODIECK also clearly stated that SEARS does not stand for the proposition that any one factor or set of factors necessarily defines the whole of determining the direction and control issue, but rather the articulated questions “do not individually determine ‘direction and control,’ nor does any predetermined number of factors necessarily establish compliance with the law.”

Rather,

“[a] pragmatic approach to the question must go with the reading of the law.”

Indeed, RODIECK states:

The range of possibilities is broad, however, moving across from a concept of negligence tested by the common prudent practice of peers to a statutory mandate which, however much light is needed for its ascertainment, sets up a definite limit to acceptable conduct beyond which there must be found a violation of the statute.

Whatever may be passable, or allowable, or tolerable, as exercising “direction and control” of a tow, it cannot be said, when a tow is navigated with the sole statutory qualified person below deck in an enclosed compartment, whether he be asleep or using toilet facilities, that he is in direction and control of the towing vessel at the time. This would be true no matter how many, if any, other unlicensed persons were up and about and on deck, doing whatever. There were in fact two licensed operators aboard ADMIRAL LEFFLER on this occasion. The one who was, at the time, in the head, was no more directing and controlling the operator of the vessel than was the one who was asleep in his quarters; the only difference was that one was charged with the immediate responsibilities of the person on duty while the other was not.

The length of time of absence “from the wheelhouse” then is not only of itself controlling, it is in some instances not even a consideration when the other end of the line - “Where was person during the absence?” renders the duration of no significance.

In RODIECK, the misconduct violation was affirmed, as well as the sanction of suspension for a period of 3 months remitted on 12 months’ probation.

In Appeal Decision 2264 (McKNIGHT) (1981), the Commandant affirmed a proven charge of negligence against a tug operator who “negligently absented himself from the wheelhouse” of the tug, leaving the tug’s navigation to an unlicensed deckhand,

which contributed to a collision with a bridge. McKNIGHT thus did not involve a charge of misconduct and instead concentrated on the operator's negligence related to the collision with the bridge.

The tug was pushing a barge which was fitted with a crane that had a 62.5 foot boom attached. Approximately one mile from the bridge where the collision occurred, the operator decided to check his computations about the clearance for passage under the bridge. The operator therefore left an unlicensed deckhand at the wheel, with another deckhand stationed on the barge itself to provide steering directions by hand signal because vision was obstructed from the pilothouse. The operator went to the barge's deckhouse to confirm his calculations regarding clearance for the bridge and remained in the deckhouse to study charts of the area beyond the bridge. The operator's calculations were incorrect, however, and the crane's boom struck the bridge and holed the bridge span. The boom bent under the force of the impact and fell upon the stern of the tug with no injuries resulting.

The Commandant affirmed the charge of negligence and noted that the operator had "only had a limited view of the flotilla, its components, and the bridge the flotilla was approaching." Communications with the vessel's wheelhouse was also limited and the operator only gave general instruction to the unlicensed helmsman when he left the wheelhouse. Indeed, the Commandant concluded the direction and control aspect of McKNIGHT by stating:

Licensed operators are required aboard vessels such as HOLLY to insure that a minimum level of experience and competence is possessed by the person actually directing and controlling the movements of the vessel. As prior decisions have stated, this does not mean that the operator must physically steer the flotilla; it does mean he must be in a position to provide timely corrective action if a hazardous situation develops. In light of this, Appellant's action in departing the pilothouse for 5 to 10 minutes as the flotilla approached a bridge, with minimally experienced personnel actually controlling the movement of the vessel, is not explicable by his "gut feeling" that he should check his clearance computations

again. Given the circumstances of this case, and the layout of the barge, I conclude that Appellant could not execute his duty as operator after placing himself in a position where he could not observe the progress of the flotilla as it approached the bridge. Since Appellant could not direct and control the vessel from his remote position, and made no pretense of doing so, he had relinquished direction and control of the vessel to unlicensed personnel.

McKNIGHT thus emphasized that an operator does not physically have to steer the vessel, but must be in a position to “provide timely corrective action if a hazardous situation develops” and that an operator’s position clearly has an effect on that operator’s ability to maintain direction and control over the tug. The sanction of 2 month suspension remitted on 9 months’ probation was thus affirmed.

Appeal Decision 2292 (COLE) (1983) further refined the SEARS standard particularly with respect to jurisdictional issues. The administrative law judge found the operator guilty of misconduct and negligence in connection with a tug operator wrongfully undertaking a voyage in excess of twelve hours with only a single, licensed operator on the boat and also wrongfully absenting himself from the wheelhouse. The operator at one point during a journey in the Intercoastal Waterway, Halifax River, Florida left the wheelhouse for approximately an hour and a half, during which time a collision occurred between the tug’s tow and a motorboat, resulting in loss of life. The unlicensed mate had more than 48 years of tow boat experience. The administrative law judge imposed a sanction of 2 month suspension, plus an additional 6 months remitted on 12 months’ probation.

On appeal, the Commandant cited to SEARS and upheld the decision of the administrative law judge, including the sanction. Importantly, COLE rejected the operator’s appeal on a jurisdictional ground and held that the operator’s conduct in relinquishing control of the vessel in violation of 46 U.S.C. § 405(b)(2) provided the basis for the Coast Guard’s jurisdiction.

Appeal Decision 2312 (HITT) (1983), represents an appeal of an adverse Equal Access to Justice Act (EAJA) claim. The underlying case in HITT involved the dismissal of a misconduct charge against an operator of an uninspected tug. Respondent filed an EAJA claim to recover attorney fees and costs, which the Commandant denied on the basis that the Coast Guard was substantially justified in bringing the misconduct charge.

The Coast Guard had brought the charge of misconduct based on the fact that the operator had left the wheelhouse to go to the head for four to five minutes in conditions where the weather was clear and the visibility was good and there was no close quarters situation with any other vessels. The operator further instructed the unlicensed crew member to hold a straight course to a distant landmark.

Reading SEARS, the administrative law judge dismissed the misconduct charge, even though at the hearing the unlicensed crewmember admitted that, while he could steer the tug, he had no navigational experience and could not read a nautical chart. Furthermore, the record indicated that the crewmember passed a black buoy off his starboard side instead of his port side – a violation of one of the most basic piloting rules.

In Appeal Decision 2387 (BARRIOS) (1985), a specification of misconduct against the licensed operator of an uninspected tow was found proved in connection with the operator relinquishing the actual direction and control while the tug was underway, which contributed to the tug's allusion with a bridge. In BARRIOS, the licensed operator relinquished control of the tug to the unlicensed mate and "went to his cabin, and went to bed." The mate had no formal training in the operation of that type of vessel and was not given any instructions or directions about how to navigate the river before the operator left the wheelhouse. BARRIOS reiterated that the operator of an uninspected towing vessel is "responsible for the safe operation of that vessel during the time that he is on

watch.” The appeal was denied and the sanction of 1 month suspension plus an additional 3 months remitted on 12 month’s probation was affirmed.

In Appeal Decision 2566 (WILLIAMS) (1995), aff’d sub nom. Kime v. Williams, NTSB Order No. EM-181, 1996 WL 3028 1(N.T.S.B. 1996),⁹ the operator of an uninspected tug called an unlicensed deckhand to the wheelhouse so that the operator could go to the head. At that time, the tug was travelling on autopilot in a vessel traffic lane and a 56 foot fishing vessel was about 100 to 250 yards away from the tug. The tug was overtaking the fishing vessel at the time and the operator left the wheelhouse to use the restroom for approximately three minutes. During the time the operator was absent from the wheelhouse, the tug collided with the fishing vessel, which sank with no loss of life. At the time of the collision, the weather was sunny with seas at 1-2 feet and unlimited visibility.

WILLIAMS reconfirmed that “a licensed operator’s temporary absence from the wheelhouse of a towing vessel is not in every case an absolute violation of 46 U.S.C. § 405(b)(2) (or its successor, § 8904) because the mere absence might not constitute relinquishment of ‘actual direction and control’ over the vessel.” (citing SEARS).

Unlike SEARS, WILLIAMS involved “risks to safe navigation . . . on all sides” – with a close-quarters situation existing at the time the operator left the wheelhouse with the autopilot engaged. WILLIAMS clearly indicated that a significant part of the problem was while the operator was in the head, he “was unable to perceive either course changes or the rapidly closing distance between the vessels.” Furthermore, the mere fact

⁹ The NTSB noted that the operator “entrusted the helm to a crewmember of little or no navigational experience.” NTSB Order No. EM-181 at n.9. The NTSB further noted that it read an affirmative obligation under SEARS for an operator “only to entrust the wheel to a crewmember of demonstrated navigational ability. The proper discharge of that obligation was especially important in this incident, as appellant wanted to leave the wheel at a time of obvious navigational risk, in that his tug was steadily closing on another vessel, albeit apparently then on a parallel track, whose immediate future directional intentions were unknown.” Id. (emphasis added).

that there was a collision during his absence “makes it plainer that the risks were high and getting worse”. Finally, WILLIAMS noted that the deckhand’s navigational competence was not high and that the deckhand was “oblivious to the apparent risks” at the time that the operator went to the rear of the wheelhouse to check the chart.

The charge of misconduct was affirmed and the sanction of 4 month suspension, plus a further 3 month suspension remitted on 12 months’ probation was also upheld.¹⁰ Even though two of the three specifications in WILLIAMS were dismissed, the total sanction imposed by the Administrative Law Judge was upheld because the misconduct charge was aggravated by the facts supporting those charges – even though those two charges were dismissed on appeal.

D. Negligence – Failure to Maintain an Adequate Lookout under Rule 5

To prove negligence under 46 C.F.R. §5.29, the Coast Guard must establish by a preponderance of the evidence:

- (1) That Respondent is a holder of a merchant mariners license;
- (2) That Respondent was acting under the authority of his license on October 1-2, 2008, when the alleged violation occurred; and
- (3) That Respondent either (a) committed an act which a reasonable and prudent person/mariner would not commit under the same circumstances; or (b) failed to perform an act which a reasonable and prudent person/mariner would have taken under the same circumstances.

As discussed above, there is no dispute Respondent is the holder of a merchant mariners license and that he was acting under the authority of that license on October 1-2, 2008.

Therefore, the first two (2) elements listed above are found **PROVED**. The dispute to be resolved in this case concerns the third element. Hence, the question is whether Respondent’s

¹⁰ WILLIAMS notes that the misconduct charge (relinquishing direction and control) is “in the nature of a failure to perform a duty related to vessel safety, or alternatively, improper performance of duties related to vessel safety, namely, ensuring a qualified relief at the con, for which the suggested range of orders in Table 5.569 is 2-6 months’ suspension.”

actions or omissions were that which a reasonable and prudent mariner of the same station would have taken under the same circumstances. See 46 C.F.R. § 5.29.

In suspension and revocation proceedings, a violation of a navigation rule itself is negligence. See Appeal Decisions 2386 (LOUVIERE) (1985); 2358 (BUISSET) (1984). Whether or not a respondent's actions actually caused the collision is not an element of negligence because it is not the function of suspension and revocation actions to determine such liability. Appeal Decision 2277 (BANASHAK) (1982); see also Appeal Decisions 2395 (LAMBERT) (1985); 2358 (BUISSET) (1984); 2261 (SAVOIE) (1981); 2174 (TINGLEY) (1980), aff'd sub nom. Commandant v. Tingley, NTSB Order EM-86 (1981). Proximate cause, although needed to establish civil liability for damages, is not an element of negligence for the purposes of 46 C.F.R. §5.0520-(a)(2). The purpose of this proceeding was not to establish fault for the collision, but solely to determine whether Respondent failed to maintain a proper lookout with respect to Charge II.

Indeed, the consequence of the negligence, i.e., a collision or an allision, “though unnecessary to support a decision finding negligence, may be an aggravating factor; or the lack thereof may be a mitigating factor” Appeal Decision 2639 (HAUCK) (2003) (quoting Appeal Decision 2415 (MARSHBURN) (1985)). Furthermore, “[c]ontributory negligence is not a defense in suspension and revocations proceedings” as these proceedings are remedial in nature and “[t]he only issue is whether Respondent's actions and omissions were negligent.” Appeal Decision 2639 (HAUCK) (2003). The focus of the inquiry must thus firmly remain on whether Respondent's actions complied with the applicable rules – not whether someone else's actions were compliant.

Rule 5 of the International Regulations for Preventing Collisions at Sea, 1972 (72 COLREGS)¹¹ pursuant to 33 C.F.R. § 80.1114 (San Pedro Bay – Anaheim Bay demarcation) defines the standard by which a reasonable and prudent mariner would conduct himself in maintaining a proper lookout for this case. Rule 5 states:

Every vessel shall at all times maintain a proper look-out by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and of the risk of collision.

72 COLREGS, Rule 5.

Congressional history, as expressed in Senate Report No. 96-979 (1980), which accompanied Inland Rule 5,¹² helps illuminate the scope of Rule 5. The commentary permitted the watch officer or helmsman to serve as the sole lookout in certain circumstances. However, the Report states in pertinent part:

On vessels where there is an unobstructed all-round view provided at the steering station, as on certain pleasure craft, fishing boats, and towing vessels, or where there is no impairment of night vision or other impediment to keeping a proper lookout, the watch officer or helmsman may safely serve as the lookout. However, it is expected that this practice will only be followed after the situation has been carefully assessed on each occasion, and it has been clearly established that it is prudent to do so. Full account shall be taken of all relevant factors, including but not limited to the state of the weather, conditions of visibility, traffic density, and proximity of navigational hazards. It is not the intent of these rules to require additional personnel forward, if none is required to enhance safety.

S. Rep. No. 979, 96th Cong., 2d Sess. 7-8 (1980), reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 7068, 7075.

This observation indicates that the question of an all-around 360-degree view is particularly relevant when a single operator (i.e., a watch officer or a helmsman) serves as both the navigator of the vessel and the lookout at the same time. See, e.g., Appeal Decision 2474

¹¹ See 33 U.S.C. § 1602 *et seq.*

¹² Because Inland Rule 5 is worded the same as International Rule 5, commentary on the purpose of Inland Rule 5 is applicable to interpreting the intent behind the International Rule.

(CARMENKE) (1988) (tug operator held not to have maintained an adequate lookout himself from upper wheelhouse where there was an obstruction caused by the elevator from the lower to the upper wheelhouse despite the operator's claim that he could lean around and get a 360-degree view). Where there is a dedicated lookout, whose sole duty to perform lookout functions, this Congressional history is less relevant to the adequacy of the lookout.

All things being equal, is it preferable for the lookout to have an unobstructed 360-degree view? Certainly. But does Rule 5 require such unobstructed 360-degree view from any one, particular location where the dedicated lookout is positioned? The answer must be no for the reasons more fully discussed in the Analysis section of this Decision and Order.¹³

The duty to maintain a proper lookout aboard a vessel underway has been a constant throughout the history of American maritime jurisprudence. “The duty of the lookout is of the highest importance In the performance of this duty the law requires indefatigable care and sleepless vigilance. The rigor of the requirement rises according to the power and speed of the vessel in question.” The Ariadne, 80 U.S. 475, 478 (1872). Moreover, “it is the risk of collision, not the collision itself, that masters must avoid.” Ocean S.S. Co. v. United States, 38 F. 2d. 782, 784 (2d Cir. 1930). “Performance of lookout duty,” the court declared in Anthony v. International Paper Co., 289 F.2d 574, 580 (4th Cir. 1961), “is an inexorable requirement of prudent navigation.”

The adequacy of a lookout on board a vessel underway is a question of fact to be determined in light of the existing facts and circumstances. Numerous Commandant Decisions on Appeal have held that the Administrative Law Judge is in the best position to determine whether the facts and circumstances of the case permitted a given respondent to serve as a proper

¹³ As the Fourth Circuit recently noted, “since all boats have blind spots, Congress could not have intended that the mere presence of a blind spot would serve as a condition automatically requiring an additional lookout, we see nothing incongruous about taking into consideration—the size of the blind spot when conducting a Rule 5 analysis.” Vulcan Materials Co. v. Massiah, 645 F.3d 249, 258 (4th Cir. 2011).

lookout. See Appeal Decisions 2581 (DRIGGERS) (1996); 2576 (AILSWORTH) (1996); 2503 (MOULDS) (1990), aff'd sub nom. Kime v. Moulds, NTSB Order No. Em-172, 1993 WL 171349 (N.T.S.B. 1993); 2474 (CARMIENKE) (1988); 2421(RADER) (1986); 2390 (PURSER) (1985), aff'd sub nom. Commandant v. Purser, NTSB Order No. EM-130, 1986 WL 82417 (N.T.S.B. 1986); 2319 (PAVELEC) (1983); 2302 (FRAPPIER) (1983); 2294 (TITTONIS) (1983).

“In order to determine the adequacy of the lookout, the presiding Administrative Law Judge must carefully consider all of the surrounding circumstances faced by the lookout and determine whether those circumstances permitted the lookout to adequately perform lookout duties.” Appeal Decision 2576 (AILSWORTH) (1996). Expert testimony on the issue, while potentially helpful, is not binding upon the court. Appeal Decisions 2581 (DRIGGERS) (1996); 2319 (PRAVELEC) (1983), 2390 (PURSER) (1985), 2474 (CARMIENKE) (1988).

Furthermore, the appropriate standard for evaluating a respondent’s conduct and compliance with Rule 5 is what the rule itself provides, not what industry custom or standards recommend as the proper course of conduct. Simply put, “[w]hat the industry does, or does not do, is not the standard imposed by the navigation rules; a custom in violation of a positive statutory enactment will not be enforced.” Appeal Decision 2581 (DRIGGERS) (1996).

Several Appeal Decisions hold that the existence of a blind spot or visual obstruction may require posting a lookout in areas other than the wheelhouse where such obstructions are present. See Appeal Decisions 2482 (WATSON) (1989); 2421 (RADER) (1986); 2414 (HOLLOWELL) (1985).

Other Appeal Decisions establish that the failure to see what reasonably ought to be seen is conclusive evidence of a deficient lookout. Appeal Decisions 2046 (HARDEN) (1976) (no lookout posted on river tug pushing barge ahead, thus creating a significant blind spot, and negative evidence of collision resulting from such failure to post a lookout indicating negligence

as it was inconceivable under the circumstances that the collision would have occurred, absent malicious intent, had there been such a lookout); 1007 (POWELL) (1958) (failure to keep an adequate lookout found where “there [was] no apparent reason why a vigilant lookout, properly stationed, would not have seen the other motorboat’s lights in time to avoid a collision on a clear night”).

Rule 5 is silent as to the actual placement of the lookout and speaks more in terms of the lookout’s function to avoid collisions. See Appeal Decision 2581 (DRIGGERS) (1996) (“Rule 5 does not specify a location for the lookout, [but] the overwhelming weight of authority . . . suggests that lookouts should ordinarily be on the bow and that a pilot steering the vessel is not a proper lookout unless a bow lookout would add no additional information”). Indeed, “[p]ersons in charge of the vessel’s navigation are obligated to position a lookout at a point best suited for that purpose, having due regard for the circumstances of the case and the conditions of the weather.” Nicholes v. M/V Maya, 949 F. Supp. 391, 398 (D.S.C. 1996) (emphasis added).

Long-standing precedent holds that a lookout generally should be placed as low to the water and as far forward as possible under prevailing conditions. See, e.g., The Ottawa, 70 U.S. 268 (1865). However, where circumstances do not dictate such placement, the fact of a lookout’s placement in another location does not render the lookout necessarily ineffective. See Inland Oil and Transport Co. v. Ark-White Towing Co., 696 F.2d 321, 325 (5th Cir. 1983) (refusing to overturn district court’s rejection of the argument that lookout stationed in tug’s wheelhouse constituted negligence) (abrogated on different grounds by City of Milwaukee v. Cement Div., Nat. Gypsum Co., 515 U.S. 189 (1995)); The Mamei, 152 F.2d 924, 929 (3d Cir. 1946) (lookout stationed on bridge of tug, where visibility was excellent and lookout had unobstructed view forward was not improper); Great American Ins. Co. v. Tug Cissi Renauer, et al., 933 F. Supp. 1205, (S.D.N.Y. 1996) (no violation of Rule 5 where the tug’s lookout positioned on the bridge; the tug was traveling at a slow speed; the accident occurred during

daylight hours; and there was no risk of sudden collision, given that the tug was following a narrow passage through the ice created by a Coast Guard); but see G. B. Zigler Co. v. Barker Barge Line, 167 F.2d 676, 678 (5th Cir. 1948) (finding that the deckhand in question was not performing the duties of a dedicated lookout and that a pilot house “over four hundred feet from the head of the craft” not a proper lookout location in any event).

A lookout in the wheelhouse is thus not per se negligent. See In re: Diamond B. Marine Services, Inc., 2001 WL 1164914, Sept. 28, 2001 (E.D.La. 2001) (finding that vessel maintained proper lookout where lookout stationed in the wheelhouse and doors were open to allow lookout and master to listen for fog signals and/or other sounds from other vessels and rejecting claim that lookout should have been posted outside the wheelhouse because stationing lookout on deck (1) “raises obvious safety concerns” and (2) stationing lookout in the wheelhouse reduced the noise from the vessels’ own engines). Furthermore, “[i]t is well-settled, however, that the watch officer or helmsman may, under appropriate circumstances, serve as lookout from the wheelhouse of a tug in addition to performing other duties.” Marport, Inc. v. Stabbert and Assoc., Inc., 771 F.2d 1216, 1218 (9th Cir. 1985) (emphasis added) (finding that at time of accident, the tug was in calm and uncrowded waters and no evidence was introduced to show lookout from the wheelhouse was improper).

A key question for this case is whether, under all the circumstances existing at the time of the collision, Respondent’s positioning of his dedicated lookout in the REBEL II’s lower wheelhouse was negligent as a matter of law. Clearly, under certain, exceptional conditions (e.g., unavoidable blind spots, compromised weather conditions, traffic, etc.), placement of the lookout in the wheelhouse can be improper, but absent such conditions, the danger exists of second-guessing a captain’s judgment of his positioning of the lookout simply based on the particular facts of a collision. See, e.g., Illinois Constructors Corp. v. Logan Transp., Inc., 715 F. Supp. 872, 884 (N.D.Ill. 1989) (noting that tug captain need not post a lookout where night was

clear, waters calm, and the trip uneventful, and no prior notices or warnings of any problems along the river prior to approaching the area); Mystic S.S. Corp. v. S.S. Amalfi, 307 F. Supp. 885, 886 (D.C.Va. 1969) (noting that placement of the tug's lookout in the wheelhouse appropriate where the lookout had "fast and reliable communication" with the operator and because "the pilothouse was only 15 feet aft of, and somewhat higher than, the bow, the lookout's visibility was better than from the bow").

E. Respondent's Motion to Dismiss at Conclusion of Coast Guard's Case

At the close of the Coast Guard's case, Respondent made a Motion to Dismiss the charges. See Tr. at 432:7-434:12. The undersigned reserved ruling on the motion and for the reasons given below hereby **DENIES** the Motion to Dismiss. A motion to dismiss will only be granted if no evidence is introduced in support of at least one of the required elements of the government's case. See Appeal Decisions 2603 (HACKSTAFF) (1998); 2461 (KITTRELL) (1987); 2321 (HARRIS) (1983).

As discussed above, a determination of what constitutes a proper lookout is based on the examining the particular facts and circumstances of each case. In making out a prima facie case that Respondent violated Rule 5, the Coast Guard "was only required to submit evidence that some circumstances existed which indicated that Appellant was not maintaining a proper lookout." Appeal Decision 2581 (DRIGGERS) (1996).

Here, the Coast Guard introduced enough such evidence during its case in chief (and prior to Respondent's rebuttal) that Respondent failed to maintain an adequate lookout. First, the Coast Guard demonstrated that a collision between the Sanchez Bayliner and the REBEL II occurred. Second, the Coast Guard offered credible, reliable evidence that the Sanchez Bayliner had its navigational lights properly lit. Third, the Coast Guard provided evidence that neither Captain Scoto nor his deckhand saw the Sanchez Bayliner from their positions in the REBEL II's lower wheelhouse, which had several obstructions impeding a 360-degree view from any one

position. Therefore, the Respondent's Motion to Dismiss Charge II is properly denied despite the fact that Respondent's rebuttal results in a finding of the negligence charge not proved.

With respect to the misconduct alleged in Charge I, the Coast Guard presented evidence that during the transit from Catalina to LA/LB Port, Captain Scoto laid down in the rack, located in the wheelhouse, for a period of 30-45 minutes. For the reasons discussed below in finding Charge I proved, Respondent's arguments that there was no functional difference between Captain Scoto laying in the rack for 30-45 minutes and standing within arm's reach are rejected. See, e.g., Tr. at 432:8-433:12 (articulating basis for dismissal of Charge I). Captain Scoto's failure to get up from a position of compromised situational awareness for a single, uninterrupted period of 30-45 minutes while leaving an unlicensed deckhand, who was unqualified on radar and who was not authorized to make any course corrections or changes, to maintain situational awareness for him, is unacceptable and represents a clear case of misconduct. The Coast Guard certainly presented enough evidence in its case in chief to withstand Respondent's Motion to Dismiss.

V. Analysis

Many of the facts of this case are undisputed. Captain Scoto does not deny the fact of the collision with the Sanchez Bayliner. Nor did Captain Scoto deny that he spent 30-45 minutes lying in the rack during the transit between Catalina and LA/LB Port. The central questions concern whether Captain Scoto committed the alleged acts of Misconduct and Negligence asserted in Charges I and II.

A. Captain Scoto Relinquished Direction and Control of the REBEL II during the Transit from Catalina Island to LA/LB Port

The record establishes that Captain Scoto chose to lie down in the lower bunk of the REBEL II's lower wheelhouse for a period of 30-45 minutes during the transit from Catalina Island to LA/LB Port. See Findings of Fact (FoF) Nos. 48, 55. Prior to lying down because of

his sore back, Captain Scoto took the precautions of checking with VTS to establish whether there was traffic in the area; monitoring his radar at various ranges (up to 12 miles); and performing a visual scan of the waters surrounding the REBEL II. FoF Nos. 49-50, 53. Furthermore, Captain Scoto directed his deckhand to maintain a visual lookout while he rested his back. FoF No. 52.

Captain Scoto also never went to sleep, remained physically present in the Rebel II's wheelhouse at all times, and maintained minimal conversation with Deckhand Amstutz. FoF No. 58-59, 61. However, Captain Scoto never once got up from the rack to visually check the waters around the REBEL II or to check the radar or make any adjustments to the six mile range upon which it had been set prior to his lying down. Instead, Captain Scoto relied upon (1) the autopilot to steer the REBEL II and maintain the proper course and (2) Deckhand Amstutz to maintain a proper lookout both visually and on radar, even though Deckhand Amstutz was not qualified as a radar observer and could make no changes to the radar's setting. FoF Nos. 11, 42.

Captain Scoto would have one believe that there was no practical difference between his position in the rack and his standing in the wheelhouse and being 2-3 feet away from his deckhand. See Respondent's Post Hearing Brief at 5-6; Reply Brief at 1-3. In both instances, Captain Scoto argued that he would have been ready and able to address whatever situation arose within seconds. Indeed, Captain Scoto argued that because neither statute nor regulations explicitly define "direction and control" under 46 C.F.R. § 15.610(a), one should look to definitions of "direct supervision" and "directly supervising" taken from other sources within the regulations. See Reply Brief at 3-4. However, these definitions and terms are clearly contained in contexts other than the absolutely clear mandates of 46 C.F.R § 15.610(a), which addresses specifically the kind of vessel Captain Scoto was operating (i.e., a tug over 26 ft. in length). Furthermore, the CDOAs on the subject discussed above also specifically define the contours of what constitutes direction and control. Nowhere in any of those cases has the Commandant

affirmed the proposition that simply because a deckhand is under the operator's "direct supervision", the mandates of Section 15.610(a) have been met.

Captain Scoto is correct in the sense that nothing in the CDOAs indicate that an operator must at all times be ever vigilant to the degree that one may never turn one's back, e.g., to consult a chart while operating a tug like the REBEL II. Indeed, as fully discussed above, the CDOA's permit an operator even a brief absence from the wheelhouse without necessarily losing direction and control of the vessel.¹⁴

However, a magnitude of difference exists between (1) temporarily absenting oneself from the wheelhouse for a brief period of time (per SEARS and its progeny), (2) briefly checking a chart, or (3) having one's back turned for a moment versus the situation in which Captain Scoto placed himself and the REBEL II. Even though the REBEL II's course was straight, the visibility was good, and the traffic sparse, there was certainly an "appreciable risk to [the REBEL II's] safe navigation" under these circumstances. See Appeal Decision 2058 (SEARS).

The REBEL II was on autopilot and no one but an unlicensed deckhand, who had no authority to alter direction or make adjustments to the radar, was left to maintain any kind of direct situational awareness of the vessel while Captain Scoto laid down. There was effectively nobody at the REBEL II's wheel available to make any necessary course changes or even ensure that the REBEL II stayed on course. See, e.g., Appeal Decision 2122 (RODIECK) (highlighting key questions including who was at the wheel and under what conditions); see also Appeal Decision 2264 (McKNIGHT) (operator must be in position to take timely corrective action if a hazardous situation develops).

¹⁴ The undersigned agrees with the Coast Guard's questioning of Respondent's reliance on Appeal Decision 1887 (VIGILANT) (1972). See Complainant's Reply Brief at 4-5. At the time, there was no statutory/regulatory requirement for the vessel in question in that case to be under the "direction and control" of a licensed operator. Here, the clear mandates of 46 C.F.R § 15.610(a) and CDOAs thereunder provide the proper frame of analysis for Captain Scoto's actions.

Even though Captain Scoto never physically left the wheelhouse, he absented himself from the navigational situation of the REBEL II by lying down in the rack without any means to directly observe the radar or surrounding conditions. This situation held for 30-45 uninterrupted minutes, which distinguishes this case from the situation presented in Appeal Decision 2312 (HITT) (absence of only 4-5 minutes). While no one factor can be controlling, the extreme length of time involved here is of particular import. Captain Scoto did not once get up to check the radar himself or make a visual scan of the waters around the REBEL II and admitted that he was unable to issue effective navigational commands from his position in the rack. FoF No. 64.

Instead, Captain Scoto chose to absent himself from effective control of the vessel and put himself in a position from which he could neither monitor the radar nor even observe the horizon. FoF Nos. 62-63. The situation surrounding the REBEL II easily could have changed during the 30-45 minutes Captain Scoto was in the rack. A vessel, like the Sanchez Bayliner, coming toward the REBEL II at 20 knots, easily could have traversed the 12 mile radar range that Captain Scoto checked on his radar before lying down in the rack. Given the length of time Captain Scoto absented himself from direct navigational and situational observations, an appreciable risk to the safe operation of the vessel existed during that time.¹⁵ As in Appeal Decision 2566 (WILLIAMS), Captain Scoto would have been unable to perceive either any course changes or rapidly closing distance between the REBEL II and a possible approaching vessel or other hazard.

No matter how experienced the deckhand or how much faith Captain Scoto placed in him, such a lengthy absence from directing and controlling the REBEL II and attending to his navigational duties is unacceptable and unquestionably violated 46 C.F.R. § 15.610(a). Just

¹⁵ Captain Scoto also admitted that his actions were contrary to Catalina Freight's unwritten policy, which in itself, possibly could have been charged as misconduct. However, for the reasons given at the hearing (see Tr. at 569:18-574:9), the undersigned rejected any such attempt to conform the charges to this fact and Captain Scoto's admission on this point will not serve as an independent basis for finding misconduct.

because nothing occurred during Captain Scoto's time in the rack and the situation around the REBEL II remained steady and without incident does not mean that his failure to maintain the required amount of direction and control can be condoned.¹⁶

B. Captain Scoto Maintained a Proper Lookout under Rule 5

The record evidence reveals that Captain Scoto posted a dedicated lookout while en route from Catalina Island to LA/LB Port. FoF Nos. 57, 66. At the time of the collision with the Sanchez Bayliner, Deckhand Amstutz was stationed next to Captain Scoto in the REBEL II's lower wheelhouse performing lookout duties. FoF No. 66, 67. Whether Captain Scoto himself could effectively serve as his own lookout while engaged in navigation duties from the lower wheelhouse is thus not an issue because he had a dedicated lookout – in addition to himself. Indeed, the REBEL II has no specific manning requirements while underway on the run in question, other than the REBEL II must be operated by a licensed operator while underway (i.e., as an uninspected tug, there is no Coast Guard COI and the length of the run did not require a second licensed mariner to assume a second shift).

Furthermore, in addition to having a dedicated lookout, Captain Scoto was essentially performing lookout duties in addition to his navigation responsibilities at the time of the collision with the Sanchez Bayliner. FoF No. 66, 67. Captain Scoto was observing the radar and performing visual scans of the water surrounding the REBEL II as he approached Buoy No. 1 outside LA/LB Port. *Id.*, FoF No. 153. Given Captain Scoto's navigational duties, it is not accurate to say that Captain Scoto had two fully dedicated lookouts. However, there certainly

¹⁶ See Respondent's Post Hearing Brief at 8. The Coast Guard never alleged that there was a causal connection between Respondent lying in the rack and the collision with the Sanchez Bayliner. While the REBEL II's situation did not change during Captain Scoto's time in the lower bunk, the crucial point is whether Captain Scoto complied with his duties under 46 C.F.R. § 15.610(a), which he did not.

were more than one set of eyes performing lookout duties around the time of the collision.¹⁷ With these basic facts in mind, several important points must be addressed to evaluate Captain Scoto's conduct in connection with the collision with the Sanchez Bayliner.

1. Positioning the Lookout in the Lower Wheelhouse was not Per Se Negligent under the Prevailing Conditions

The record reveals that the prevailing conditions at the time of the collision were clear weather, light swell, and good visibility (ca. 6 miles). FoF No. 46. This was not a situation where weather was an issue (e.g., no fog). VTS had reported no conflicting traffic. Captain Scoto and his deckhand were experienced with this particular run and the approach toward LA/LB Port. FoF Nos. 13-14.

The precautionary zone, in which the collision took place, certainly required heightened attention to duty and Captain Scoto was aware that small boats were often a problem in this area and had experienced close quarters situations there. See FoF Nos. 85, 90-92, 137. Nothing in the record indicates that Deckhand Amstutz was doing anything other than performing his lookout duties at the time. In this regard, I so find.

The visibility from any one spot in the lower wheelhouse certainly would be obstructed by bulkheads and a lack of all-around windows. FoF Nos. 35-37. Such a problem would not be an issue in the REBEL II's upper wheelhouse. FoF No. 40. A lookout stationed there would have had the advantage of an unobstructed 360-degree view around the REBEL II. Id.

However, having his lookout stationed in the upper wheelhouse conceivably could have compromised direct communications between Captain Scoto and Deckhand Amstutz. FoF No. 32. For example, the ambient noise from the engines is greater in the upper wheelhouse when

¹⁷ Given that neither Captain Scoto nor Deckhand Amstutz were aware of the collision, it is impossible to know with certainty what exactly they were doing at the precise moment of collision. However, one can legitimately surmise from pattern and practice and what both crewmembers recalled generally that Captain Scoto was more likely than not monitoring the REBEL II's radar, navigating the vessel, and visually scanning the horizon; while Deckhand Amstutz was performing his usual lookout duties.

compared to the lower wheelhouse. See Resp. Exh. OOO.¹⁸ Additionally, one of Respondent's experts opined that prudent bridge management techniques caution against separating the bridge crew, which the undersigned finds to be credible. FoF No. 38.

Assuming that the visibility problems in the lower wheelhouse could be adequately addressed by moving about the lower wheelhouse and not remaining stationary, the benefits of placing the lookout in the lower wheelhouse could outweigh the benefits of placing the lookout in the upper wheelhouse.

Nothing in Rule 5 mandates a particular position for the lookout as long as the lookout duties are able to be performed under the prevailing conditions. One of the problems with the Coast Guard's position in this case, is that it is attempting to use ex post judgments to question the adequacy of the lookout's placement in the lower wheelhouse. Despite denials to the contrary, the Coast Guard consistently argued that because there was a better location for the lookout (i.e., the upper wheelhouse), failure to post the lookout in that spot when a collision results constituted negligence.

However, why would it not be equally negligent for Captain Scotto to have operated the REBEL II from the lower wheelhouse during the transit from LA/LB Port to Catalina Island during the time he allowed Deckhand Amstutz to nap in the rack? Apparently, Captain Scotto (and any other single operator tug captain who maintains a watch while at the helm without a dedicated lookout in a tug constructed similarly to the REBEL II) was properly operating the vessel at this time. Otherwise, why was no charge of negligence filed for failing to maintain a proper lookout on the transit to Catalina?

¹⁸ Respondent's noise readings indicate a level of 80db in the lower wheelhouse and 85db in the upper wheelhouse. See Tr. at 1286:25-1291:6. While these readings were taken by Respondent himself and not an independent examiner, the undersigned accepts as more likely than not that these readings accurately reflect that there would be differences between the two locations in terms of noise levels with the boat running. This fact is supported from the undersigned's inspection of the REBEL II, which confirmed that the lower wheelhouse was constructed of steel; whereas the upper wheelhouse was wooden construction. As a side note – an exposure to 85db over an eight hour period can require employee notification and preventive action under OSHA regulations. See 29 C.F.R. § 1910.95.

As discussed above, a collision is not an element of a negligence charge. The only question is whether Captain Scoto's lookout was inadequate. Making a legal distinction between the two instances is thus problematic, especially when the former (i.e., the transit without a dedicated lookout) demonstrates arguably a lesser degree of vigilance.¹⁹ Finally, Rule 5 of the 72 COLREGS only requires a vessel to "maintain a proper lookout." Except in unusual circumstances, which were not present here, the lookout requirement on a vessel like the REBEL II is singular (i.e., a single dedicated lookout could perform the duties). Captain Scoto not only had such a designated lookout (i.e., Deckhand Amstutz), but also an additional set of eyes (himself), scanning the radar and visually scanning the waters. Captain Scoto's actions thus far exceeded the mandates of Rule 5.

2. The Sanchez Bayliner's Lights were Properly Lit at the Time of the Collision

During the hearing, much time and effort was expended arguing about whether the Sanchez Bayliner was properly lit at the time of the accident. As explained above, under Coast Guard precedent, contributory negligence is not an issue in these proceedings. However, it is incontrovertible that to evaluate the adequacy of the REBEL II's lookout, the prevailing facts and circumstances must be considered. Such facts and circumstances unquestionably include the degree to which the Sanchez Bayliner should have been seen by the REBEL II's lookout. Part of that analysis must address whether the Sanchez Bayliner had its lights (both its all-around white light and its red and green running lights properly lit).

The record establishes that the Sanchez Bayliner had its lights properly lit when it left Alamitos Bay. FoF Nos. 107-111, 114-117. The collision occurred approximately 25 minutes following video evidence that the Sanchez Bayliner had its all-around light lit as it passed under

¹⁹ One distinguishing element is that the collision occurred in the precautionary zone where heightened vigilance is required. However, Captain Scoto apparently laid down in the rack on the way to the precautionary area because he knew he would need to be more vigilant in that area and in bringing the REBEL II/ISLANDER to dock at LA/LB Port. This observation is not to be viewed as excusing Captain Scoto's behavior, but does serve to mitigate the impact of his imprudent decision-making.

the 2nd Street Bridge heading toward San Pedro Bay. The Coast Guard cites precedent for the proposition that when a vessel leaves a dock with her lights on, it can be presumed that the lights remained on. See Closing Brief at 29-30 (citing Hess Tankship Co. v. S.S. M. L. Gosney, 230 F. Supp. 1, 4 (D.C. Va. 1963); Clary Towing Co., Inc. v. Port Arthur Towing Co., 367 F. Supp. 6, 9 (D.C. Tex. 1973)). These cases lend further support to the fact that the Sanchez Bayliner's lights were more likely than not properly lit at the time of the collision.

Indeed, the only "evidence" to support Captain Scoto's claim that the lights were off involve pure speculation based on: 1) the fact that neither the crew aboard the CAPT. T LE or the REBEL II saw the Sanchez Bayliner; 2) the idea that a recreational boat operator generally prefers to see, rather than be seen and given the glare from the all-around white light, Mr. Sanchez turned off the navigational light; and 3) the Sanchez Bayliner's light switch was found in the "off" position.²⁰ See Respondent's Post-Hearing Brief at 2 ("the 360 degree light and/or navigation lights . . . had either been turned off or were . . . extremely difficult to see, as supported by the testimony of both independent witnesses Captain Blakeslee and Captain Pancho"); 25, 27-29. Indeed, one of Respondent's experts (CDR Larson) opined that the lights either were off or were so dim as not to be seen, but he had not viewed the videotape evidence showing the lights lit as the vessel left Alamitos Bay. See Tr. at 1132-34.

The fact that the Sanchez Bayliner's light switch was found in the ANC position does not alter this analysis. See FoF No. 103. Despite Respondent's speculations that Mr. Sanchez might have turned off his lights to avoid the glare effects from his all-around white light, there is simply no credible evidence to suggest that Mr. Sanchez switched the Sanchez Bayliner's lights

²⁰ Respondent is simply incorrect that the switch was found in the "Off" position. As explained below – the switch was found in the ANC position, which – even assuming the position of the switch on the recovered panel indicates the state of the switch at the time of the collision – indicates that the all-around light – and not the navigational red/green lights – would have been lit.

to the ANC position prior to the collision or incapacitated the all-around white light.²¹ First, the ANC position would not have turned off the all-around white light, but merely would have turned off the red/green running lights. Second, given the catastrophic nature of the collision; the fact that the Sanchez Bayliner's control panel was severely damaged,²² and the toggle nature of the switches,²³ the position of the light switch on the Sanchez Bayliner after being recovered from the ocean floor seven days after the collision is not indicative of how the switch was positioned at the time of the accident. See FoF Nos. 141, 146-149, 151.

3. The Background Lighting from the Shore while Entering LA/LB Port

Captain Scoto argued that the Sanchez Bayliner might have been difficult to spot from the REBEL II due to the backscatter effect of the lights from the shore as the REBEL II approached the LA/LB Port. The record establishes that the shore lights in the general area of LA/LB Port generally become less of a problem as one looks away from LA/LB Port toward Alamitos Bay (from where the Sanchez Bayliner approached the REBEL II/ISLANDER). FoF No. 68. The precise degree of difference between looking directly into the LA/LB Port and more toward Alamitos Bay is not sufficiently clear. However, the record shows that the background lighting in the direction of Alamitos Bay can make picking out a small vessel's white light and navigation lights (similar to the Sanchez Bayliner) difficult – even where an observer knows there is a vessel coming from that precise direction. Id., FoF Nos. 154-156, 163-165.

4. The CAPT. T LE's Failure to See the Sanchez Bayliner

²¹ Respondent's discussion of Mr. Sanchez's prior incident of being stopped by harbor police for failing to have adequate lighting is simply too remote to be any kind of reliable evidence indicating the state of the Sanchez Bayliner's lights at the time of the collision with the ISLANDER. There are no details about when or where this reported incident occurred. The record clearly reveals affirmative, positive evidence that the Sanchez Bayliner's lights were lit upon leaving Alamitos Bay on October 1, 2008.

²² The state of other switches on the control panel indicates that such switches were more likely than not impacted by the collision and put in positions different from what one would have expected given the conditions (e.g., windshield wipers "on" and control panel lights "off").

²³ Additionally, the Sanchez Bayliner's light switch was a three-position toggle-type switch, with an OFF position that would have eliminated all the lights. Only the running lights would have been turned off in the ANC position. The idea that Mr. Sanchez would have manually taken the all-around white light out of its socket on top of the vessel while underway is simply too incredible to credit as a possibility.

The record indicates that the CAPT. T LE failed to see the Sanchez Bayliner as it crossed its bow at a range of less than 4/10ths of a mile. FoF Nos. 119-135. The CAPT. T LE should have had good visibility through its forward facing windows, was proceeding outbound from LA/LB Port toward essentially open water with no background lights to interfere with vision, and yet neither the CAPT. T LE's dedicated lookout nor its master saw the Sanchez Bayliner. Id. Captain Pancho also did not pick up the Sanchez Bayliner on the CAPT. T LE's radar, which was set to 1 mile range. Id.

The CAPT. T LE's failure to see the Sanchez Bayliner can be partially explained by the fact that the Sanchez Bayliner emerged from behind a large, anchored vessel and was proceeding at a relatively high rate of speed (ca. 20 knots) when it passed in front of the CAPT. T LE. FoF No. 20. Nevertheless, the failure of two experienced mariners to see the Sanchez Bayliner as it crossed the CAPT. T LE's bow at such a distance is difficult to explain. Indeed, both Captain Pancho (the captain at the time) and Captain Blakeslee (Captain Pancho's lookout) stated that they should have seen the Sanchez Bayliner under the prevailing conditions even if the Sanchez Bayliner did not have its lights illuminated.

The Coast Guard offered numerous explanations why the CAPT. T LE might not have seen the Sanchez Bayliner. See Closing Brief at 30-34. Such proffered reasons included: 1) they were not looking in the Sanchez Bayliner's direction as it passed; 2) they did not have good visibility out of the streaked and dirty windows of the CAPT. T LE; 3) their view was obstructed by one or more anchored vessels; 4) they were focused on navigating their way through a crowded anchorage and were not looking ahead of them for vessels on non-conflicting courses; 5) the radar image of the Sanchez Bayliner was obscured by nearby vessels; 6) Captain Pancho was not looking at the radar as the Sanchez Bayliner passed within the one-mile range; 7) the CAPT. T LE's radar was not optimally tuned; and 8) they might have seen the Sanchez Bayliner but simply not have recalled it after the fact. Id.

Some of these arguments are supported by the record; whereas others are pure speculation. For example, some record evidence indicates that the CAPT. T LE (while being operated by a different captain) struck a lighted aid to navigation a few weeks following the collision accident between the ISLANDER and the Sanchez Bayliner. FoF No. 132. A contributing factor to the CAPT. T LE's accident was a failure to keep the forward windows clean and possibly ineffective radar usage. FoF No. 133. However, Captain Pancho claimed that he always kept the CAPT. T LE's windows clean. Id.

The CAPT. T LE certainly was proceeding through a crowded anchorage when the Sanchez Bayliner crossed its bow and the Sanchez Bayliner more likely than not was obscured for some time by a large anchored vessel. However, the VTS data indicates that the dedicated lookout had approximately 2.5 minutes to see the Sanchez Bayliner from the time it emerged from behind the anchored vessel and proceeded across the CAPT. T LE's bow and out from its starboard side.

Other explanations indicate that the CAPT. T LE might not have been maintaining an adequate watch (e.g., not paying attention to vessels on non-conflicting headings; not looking in Sanchez Bayliner's direction; not having the radar "optimally tuned"; Captain Pancho paying more attention to his navigational duties). The question becomes whether such explanations might apply with at least some similar force to Captain Scoto. And yet – there were no charges filed for the CAPT. T LE's failure to see that which should have been seen.

The Coast Guard seems to be at great pains to explain away the CAPT. T LE's failures as attributable to anything other than negligence. While the charging decisions of the Coast Guard are not the subject of this proceeding, one must question what distinction exists (other than the fact of the collision)²⁴ to hold Captain Scoto as negligent and so vigorously explain away the

²⁴ LCDR Waddington provided the fact of collision as the reason for treating the CAPT. T LE and the REBEL II differently.

circumstances leading to the CAPT. T LE's failure to see the same vessel under arguably better conditions (i.e., proceeding out of the harbor with the Sanchez Bayliner passing directly forward).

The Coast Guard makes much of the idea that not seeing what should have been seen evinces an inadequate lookout. While the general proposition is valid, a combination of non-negligent factors could have led to the REBEL II not seeing the Sanchez Bayliner during the approximately 4.5 minutes the REBEL II could have seen the approaching recreational vessel.

First, the radar signature of a small, fiberglass boat without a radar reflector (like the Sanchez Bayliner) is not good. See FoF No. 102. Captain Scoto had his radar tuned primarily for navigational purposes, but such a setting would not have markedly affected the ability to pick up the Sanchez Bayliner.²⁵ FoF 152. Second, the background lights could have negatively impacted the ability of a lookout to see the lights of the Sanchez Bayliner. Third, a lookout is responsible for maintaining a watch all around a vessel and it is unlikely that Deckhand Amstutz was only looking in the area from which the Sanchez Bayliner was approaching for the full 4.5 minutes the lights could have been visible.²⁶ Fourth, another vessel with both a master and a dedicated lookout failed to see the Sanchez Bayliner either visually or on radar, even though the Sanchez Bayliner passed right across the bow of that vessel at less than 4/10ths of a mile, which indicates the difficulty of spotting the Sanchez Bayliner on that night. Fifth, Captain Scoto had a dedicated lookout positioned in the lower wheelhouse for a variety of reasonable reasons in

²⁵ Respondent also argued that the probability of detection in search and rescue operations for similar types of boats is so small that to impute negligence because such a boat was missed by a lookout is not reasonable. Respondent's argument on this point must be rejected as inadequately founded and too speculative. The material Respondent relied upon is simply too dissimilar to the particular facts and circumstances at issue here to make a meaningful comparison much less impute any kind of percentage to the REBEL II's chances of seeing the Sanchez Bayliner.

²⁶ The fact that the Sanchez Bayliner would have had traversed 036-180 relative to the REBEL II before striking the ISLANDER mitigates this factor somewhat, but clearly, given the rate of approach, the closer the Sanchez Bayliner got to the ISLANDER, the quicker it would have passed through this 144-degree arc of visibility relative to the REBEL II. Indeed, the Sanchez Bayliner would have gone from 036-90 degrees of unobstructed view even assuming the lookout did not move as the REBEL II had an unobstructed view of approximately 180 degrees forward.

conditions where visibility was good and there were no adverse weather conditions (such as fog or rain, or obstructions forward) that would recommend placing the lookout in the bow. One cannot impute negligence simply on the basis that a collision occurred under these circumstances, and therefore the charge alleging such negligence must be found **NOT PROVED**.

VI. Ultimate Findings of Fact and Conclusions of Law

1. Respondent was acting under the authority of his Coast Guard issued Merchant Mariners License when he was operating the tug REBEL II on the night of October 1 and early morning of October 2, 2008.
2. No other licensed mariner was present on the REBEL II during this voyage.
3. The only other crewmember on the REBEL II at the time was an unlicensed deckhand who had no formal training or endorsements in radar observations and was not authorized to make any course corrections.
4. During this voyage, Respondent laid down in the rack located in the REBEL II's lower wheelhouse while transiting from Catalina Island to LA/LB Port for an uninterrupted 30-45 minutes.
5. From his position in the rack, Respondent could neither monitor the radar nor the waters surrounding the REBEL II and effectively ceded situational awareness responsibilities for his vessel, the REBEL II, and its tow, the ISLANDER, to an unlicensed deckhand.
6. Respondent's actions violated 46 C.F.R. § 15.610(a) because, for all practical purposes, the REBEL II was left without a licensed mariner in direction and control of the vessel for the period during which Respondent absented himself from his duties and laid down in the rack for 30-45 minutes.

7. Respondent had a dedicated lookout at the time of the REBEL II/ISLANDER's collision with the Sanchez Bayliner on October 2, 2008 stationed in the lower wheelhouse of the REBEL II.
8. Respondent's lookout comported with the requirements of Rule 5 of the 72 COLREGS and no negligence can be found proven.

VII. Sanction

The authority to impose sanctions at the conclusion of a case is exclusive to the administrative law judge. 46 C.F.R. §§ 5.567; 5.569(a); Appeal Decision 2362 (ARNOLD) (1984). The nature of this non-penal administrative proceeding is to “promote, foster, and maintain the safety of life and property at sea.” Appeal Decision 1106 (LABELLE) (1959); see also, 46 U.S.C. §7701; 46 C.F.R. §5.5.

Here, Respondent committed an act of misconduct by relinquishing direction and control of the REBEL II while he lay down in the rack for 30-45 minutes on the night of October 1, 2008. The Coast Guard seeks a 12 month suspension of Respondent's Coast Guard-issued credentials pursuant to 46 U.S.C. § 7703.

Title 46 C.F.R. §5.569 provides the Table of Suggested Range of Appropriate Orders (Table) for various offenses. The purpose of this Table is to provide guidance to the judge and promote uniformity in orders rendered. 46 C.F.R. §5.569(d); Appeal Decision 2628 (VILAS) (2002), aff'd, sub nom. Collins v. Vilas, NTSB Order No. EM-197, 2004 WL 557602 (N.T.S.B. 2004). An administrative law judge's sanction will be upheld on appeal/review unless obviously excessive or an abuse of discretion. Appeal Decision 2450 (FREDERICKS) (1987), aff'd, sub nom. Commandant v. Fredericks, NTSB Order No. EM-129, 1988 WL 250833 (N.T.S.B. 1988); Appeal Decision 2414 (HOLLOWELL) (1985).

It is well-established that the Judge is not bound by the range of appropriate orders found in 46 C.F.R. § 5.569(d). Appeal Decisions 2680 (McCARTHY) (2008), 2423 (WESSELS)

(1986). The table of suggested sanctions at 46 C.F.R. § 5.569(d) suggests a sanction of 1-3 months for a failure to comply with U.S. law or regulations and 2-5 months for improper performance of duties related to vessel safety. As Appeal Decision (2566) WILLIAMS (1995) instructs, improper relinquishing direction and control of a vessel falls most appropriately in the improper performance of duties related to vessel safety.²⁷

The original Coast Guard Complaint alleged two counts of misconduct and one count of negligence and sought a 12 month suspension of Respondent's Merchant Mariners License. The Coast Guard did not indicate what it was suggesting for each of the three alleged violations. Thus, the undersigned is left to surmise whether the Coast Guard was proposing 4 months for each count or some other combination, for the 3 counts equaling 12 months.

At hearing, the Coast Guard orally moved to dismiss one of the two misconduct counts, leaving the allegations of one count of negligence and one count of misconduct in place. Yet, in its post-hearing submission, the Coast Guard still seeks a 12 month suspension for the two remaining counts. The Coast Guard's post-hearing brief does not account for the dropping of one of the charges in maintaining the 12 month requested sanction.

1. Aggravating Factors

Respondent's Misconduct was a significant lapse in judgment. The single most aggravating factor related to Captain Scoto's conduct that night involves the length of time Captain Scoto absented himself from the REBEL II/ISLANDER's situational awareness, i.e., for a period of 30-45 minutes, without once observing the radar or performing a visual scan of the horizon for navigational hazards.²⁸

²⁷ The Coast Guard also argued that the Misconduct charge as a "failure to perform duties related to vessel safety" under Table 5.569. See Complainant's Closing Brief at 41, n.17.

²⁸ This fact alone readily distinguishes this case from HITT, where the operator was only absent from the wheelhouse for 4-5 minutes.

Captain Scoto knew that small, recreational vessels, could present problems during the LA/LB Port-Catalina run. While he checked for possible contacts and hazards with both radar (at a maximum of 12 mile range) and visually before lying in the rack, the speed of the REBEL II (8 knots) and the speed of a possible recreational vessel (e.g., 20 knots like the Sanchez Bayliner) renders the single observation of radar during this period ineffective. At a converging speed of 26.4 knots over the course of even 30 minutes, the vessels would cover 15.18 miles (well within the 12 mile radar range), and if one assumes Captain Scoto was in the rack for 45 minutes, the vessels would have covered 22.77 miles.²⁹ Captain Scoto's reliance on the 12 mile radar check before lying down in the rack was thus imprudent. Importantly, in this case where Captain Scoto hurt his back, had he arose every 15 minutes and performed his duties, it was very unlikely that any vessels could have entered his proximity without being detected and he would have maintained situational control. Conversely, because he did not get up, no adjustments were made to the radar from the time Captain Scoto lay down in the rack until he resumed his position at the helm and he did not have situational awareness of his surroundings.

Additionally, the REBEL II was on autopilot and Deckhand Amstutz was not authorized to make any course changes (or changes to the radar). Captain Scoto did not once get up from the rack during the 30-45 minute period to ensure the autopilot was operating properly and the REBEL II maintained its course and speed. Captain Scoto's complete reliance on Deckhand Amstutz to maintain navigational awareness was inappropriate.

2. Mitigating Factors

A number of mitigating factors are present that must be considered when assessing the proper sanction for Captain Scoto's proven Misconduct. First, the area he chose to lay down in

²⁹ 1 knot = 1.15 miles per hour (rounded to the nearest hundredths). Notably, Captain Scoto placed the REBEL II's radar back on 6 mile range before lying down in the rack. Thus, the 12 mile range (and associated calculations here) does not account for this reduced range at the time Captain Scoto was actually in the rack. Captain Scoto relied on Deckhand Amstutz to monitor the radar and tell him about any contacts that were within this 6 mile range (as Deckhand Amstutz had no authority to alter the radar settings).

the rack was not within the precautionary zone, which requires heightened vigilance. Captain Scoto lay down only after the ISLANDER was fully out on its tow line and the REBEL II was in open waters where the general risk of encountering other vessels was less than in the precautionary area and the more crowded anchorage near one of the nation's busiest ports.

Second, Captain Scoto ascertained through available means the immediate traffic situation of his vessel. Captain Scoto called into the VTS and provided his ETA to LA/LB Port; performed a visual scan of the waters around the REBEL II (and had Deckhand Amstutz do the same; and used his radar to scan out to a distance of 12 miles (which for the reasons given above cannot be deemed adequate for the length of time he actually remained in the rack, but nevertheless, evinces an attempt to evaluate possible risks to the vessel before laying down in the rack).

Third, the sea was calm and the night was clear, with visibility for at least 6 miles. There were no inclement weather or sea conditions that cautioned enhanced vigilance.

Fourth, Captain Scoto directed Deckhand Amstutz to maintain a lookout while he was in the rack, never went to sleep, and maintained communication with Deckhand Amstutz during that time, including asking him if all was clear. Compare SEARS, for example, where the operator left the wheelhouse for 15 minutes, a collision resulted between the tow and a pier, partially as a result of no lookout being posted and the operator was given a 3 month's suspension with 6 months on 12 months' probation.

Fifth, Captain Scoto and Deckhand Amstutz had made the LA/LB-Catalina run hundreds of times together. Captain Scoto clearly had full confidence in Deckhand Amstutz's ability through (1) practical experience and (2) the training he had given him during the hundreds of LA/LB- Catalina runs, to properly perform his watch duties and observe the radar on the REBEL II.

Sixth, Captain Scoto remained in the REBEL II's wheelhouse the entire period, was within 2-3 feet of Deckhand Amstutz and could have addressed a hazardous situation in seconds should one have arisen.³⁰ While not equivalent to standing at his post at the helm, such proximity does distinguish this case from others. Compare Captain Scoto's actions with the situation in BARRIOS (where the operator left the wheelhouse and went to his cabin and went to bed and was given a sanction of 1 month suspension plus 3 months remitted on 12 months' probation).

As indicated in the CDOAs addressing charges of misconduct related to relinquishing direction and control, the range of penalties assessed for such proven violations often involve sanctions of a few months, with some period of probation, even where a marine casualty or actual loss of human life was involved in connection with the misconduct. See, e.g., RODIECK (operator's misconduct led to collision with a small boat and 3 people were killed and operator given 3 months suspension on 12 months' probation); COLE (operator left the wheelhouse for an hour and a half, during which time a collision occurred with loss of life and operator given 2 month suspension with an additional 6 months on 12 months' probation); McKNIGHT (operator's negligence in leaving the wheelhouse contributed to collision with bridge and operator given 2 month suspension remitted on 9 months' probation); and WILLIAMS (operator's leaving the wheelhouse contributed to collision with fishing vessel, which sank with no loss of life, and operator given 4 month suspension with an additional 3 months remitted on 12 months' probation).

Indeed, the cases discussed above dealt with marine casualties resulting from the operator's misconduct in relinquishing direction and control of the vessel. Here, there is no

³⁰ To be clear, none of these mitigating factors can possibly excuse Captain Scoto's imprudent choice to lay down in the rack, but they do highlight the overall conditions and situation that need to be considered when evaluating the appropriate sanction.

connection between Respondent's proven misconduct and the tragic collision between the ISLANDER and the Sanchez Bayliner. One must therefore be careful to cabin the proven Misconduct charge from the unproven Negligence charge and not allow the collision with the Sanchez Bayliner (which was clearly separate and apart from Captain Scoto's Misconduct) to color the tenor of the sanction. A sanction on the lower end of the suggested range is therefore appropriate in light of Coast Guard precedent and considering the aggravating and mitigating factors present in this particular case.

Captain Scoto's actions in relinquishing situational responsibility to an unlicensed deckhand for 30-45 minutes certainly cannot be condoned and some sanction is appropriate. Captain Scoto effectively relinquished direction and control over the REBEL II/ISLANDER for an unacceptably long period of time. Nevertheless, Captain Scoto's misconduct was not related to any actual marine casualty, unlike the leading CDOAs on the topic. Therefore, given all the facts and circumstances, a one month outright suspension of Respondent's Merchant Mariners License is an appropriate and sufficient sanction.

VIII. Order

WHEREBY:

IT IS HEREBY ORDERED that the allegation of Misconduct (Charge I) in the Complaint filed against Respondent Olimpio Borges Scoto, Jr. is found **PROVED**.

IT IS HEREBY FURTHER ORDERED that the allegation of Negligence (Charge II) in the Complaint filed against Respondent Olimpio Borges Scoto, Jr. is found **NOT PROVED**.

IT IS HEREBY FURTHER ORDERED that Respondent Olimpio Borges Scoto, Jr.'s Coast Guard-issued Merchant Mariners License is suspended outright for one month.

PLEASE TAKE NOTE, that issuance of this Decision and Order serves as notice of the parties' right to appeal under 33 C.F.R. Part 20, Subpart J. A copy of Subpart J is provided as

Attachment C.

SO ORDERED,

Hon. Parlen L. McKenna
US Coast Guard Administrative Law Judge

Date:

November 07, 2011

Attachment A – Witness and Exhibit List

Coast Guard Witnesses

1. Mr. Michael Avila
2. Mr. John Amstutz
3. Mr. William Law
4. LT James Serber
5. LT CDR Randy Waddington
6. Cpt. Mark Tilford

Respondent's Witnesses

1. Cpt. Olimpio Scoto
2. Mr. Reid Crispino
3. CPT Eugene Hickey, ret.
4. Prof. Sam Pecota
5. Cpt. Russell Johnson
6. Cpt. Raymond Blakeslee
7. CDR Paul Larson, ret.
8. Cpt. John Pancho

Coast Guard Exhibits

1. Picture of the REBEL II
2. Picture of the REBEL II and barge ISLANDER
3. Picture of the REBEL II
4. Picture of the REBEL II
5. Picture of the REBEL II
6. VTS Vessel Identification Sheet dated October 1/2, 2008
7. VTS LA/LB Incident Report
8. VTS data screen shots
9. Videos from bridge cameras
10. Copy of Respondents Merchant Mariners License
11. REBEL II's Certificate of Documentation
12. ISLANDER's Certificate of Documentation
13. ISLANDER's Certificate of Inspection
14. REBEL II's Tug Log from Catalina Island Freight Line dated October 1, 2008
15. Registration information for the Sanchez Bayliner from the Los Angeles Port Police
16. Specifications of Bayliners similar to the Sanchez Bayliner
17. Picture of the Sanchez Bayliner after recovery
18. Picture of the Sanchez Bayliner after recovery
19. Coroner's Report for Ms. Penny Avila
20. Coroner's Report for Mr. Henry Sanchez
21. Radar Re-Enactment Videos
22. Picture of the Sanchez Bayliner at the dock (at a date prior to the collision)
23. Picture of the Sanchez Bayliner at the dock (at a date prior to the collision)
24. Partial nautical chart of Alamitos Bay

25. Nautical Chart of San Pedro Channel (Chart No. 18746)
26. Video of Sanchez Bayliner after recovery operations
27. Nautical Chart of San Pedro Bay (Chart No. 18749)
28. Curriculum Vitae of Captain Mark A. Tilford

Respondent's Exhibits

- A. USCG License Issued to Captain Scoto on May 23, 2007
- B. Endorsement to USCG License Issued to Captain Scoto on May 23, 2007
- C. Safety Training and Certificates Issued to Captain Scoto from July 20, 2001 through January 8, 2002
- D. Armed Forces Report of Transfer of Captain Scoto, April 1, 1967
- E. Personal Background of Captain Scoto
- F. List of Vessels Worked by Captain Scoto
- G. Letter Supporting High Moral Character of Captain Scoto, written by Anthony Tirro, Senior Superintendent at Warren George, Inc.
- H. Letter Supporting High Moral Character of Captain Scoto, written by Captain Randy Hilliard
- I. Letter Supporting High Moral Character of Captain Scoto, written by Captain Peter R. Hicks
- J. Capn Voyager Portion of Chart 18746 with Approximate Vessel Courses
- K. DRMSolver Spreadsheet Showing Ship, Target and Solution Figures
- L. VTS Radar Screen Shots Depicting the REBEL II and the Bayliner on October 1, 2008
- M. VTS Radar Screen Shots Depicting the near miss between the CAPT. T LE and the Bayliner on October 1, 2009
- N. Transcript of Audio Recording of John Amstutz Conducted by the USCG on December 15, 2008
- O. Transcript of Audio Recording of Captain Scoto Conducted by the USCG on December 15, 2008
- P. **Withdrawn**
- Q. **Withdrawn**
- R. Transcript of Audio Recording of Michael Avila Conducted by the USCG on December 16, 2008
- S. Statement of VTS Watchstander on Duty the Evening of October 1, 2008
- T. Documents Describing the Function and Capacity of a Furuno 1832 Radar
- U. Letter Supporting High Moral Character of Captain Scoto, written by Captain Donn Dill
- V. Letter Supporting High Moral Character of Captain Scoto, written by Captain Gerald Allen
- W. Letter Supporting High Moral Character of Captain Scoto, written by Captain David Selga
- X. Excel Worksheet "Exhibit 1 to the Expert Report of Captain Eugene Hickey, Jr."
- Y. Two photographs of the radar aboard the vessel CAPT. T LE
- Z. Certificate of Inspection of the vessel CAPT. T LE
- AA. Radar Detectability and Collision Risk, S.W. Bell, Nautical Briefing, Supplement to SEAWAYS, The Journal of The Nautical Institute, January, 1994
- BB. Service documents for the Furuno 1832 Marine Radar aboard the REBEL II
- CC. Documents related to USCG inspections of the REBEL II in August and September, 2007
- DD. Certifications and Documentations for the REBEL II at the time of the subject incident

- EE. Report of Survey for the REBEL II , 28 November, 2008
- FF. Certifications and Documentations for the ISLANDER at the time of the subject incident
- GG. Report of Survey for the ISLANDER, 28 November, 2008
- HH. ISLANDER General Arrangement and Tank Plan
- II. Documents related to the USCG inspections of, and work performed on, the ISLANDER and REBEL II in mid-2008
- JJ. Complete GPS Locations of REBEL II Recorded by USCG at time of incident
- KK. **Withdrawn**
- LL. “The Law of Marine Collision” 1st ed., Nicholas J. Healy and Joseph C. Sweeney, Cornell Maritime Press, not attached, mutually accessible
- MM. “Farwell's Rules of the Nautical Road”, 8th ed., Craig H. Allen, Naval Institute Press, not attached, mutually accessible
- NN. Vessel Traffic Safety and Marine Exchange Manual, entered into evidence at December 16, 2008 interview of LCDR Hennigan, not attached, mutually accessible and already in the possession of the USCG
- OO. Report #9: Running Lights, Foundation Findings, pages 43-45
- PP. Aqua Signa, Hell, and Perko Win Nav-Light Shine-off, Powerboat Reports, May 1993, pages 15-19
- QQ. **Withdrawn**
- RR. 6 Photographs of vessel inspection on September 1, 2010 taken by expert, Captain Eugene Hickey
- SS. Lieutenant Surber’s handwritten notes from his October 5, 2008 telephone conversation with Captain John Pancho
- TT. Typed statement of Captain John Pancho addressed to Lieutenant Surber
- UU. USCG Activity Summary Report for October 27, 2006 boarding of Sanchez Bayliner
- VV. Photographs of steering wheel lock from Sanchez Bayliner, taken by Respondent’s Expert Captain Eugene Hickey during hearing on October 15, 2010
- WW. Curriculum Vitae of Respondent’s Expert Captain Eugene Hickey
- XX. From the Masthead: Fading Out, September/October 1994
- YY. Transport Canada Bulletin No.:04/1992 entitled Subject: The Fitting of Radar Reflectors on Small Vessels
- ZZ. Performance Investigation of marine radar reflectors on the market, Steve Luke, March 2007, QinetiQ Ltd.
- AAA. Davis Echomaster Superior In SRI Radar Reflector Tests, Practical Sailor, September 1995
- BBB. Curriculum Vitae of Respondent’s Expert Samuel R. Pecota
- CCC. Curriculum Vitae of Respondent’s Expert Captain Russell Johnson
- DDD. NOAA Chart 18746 Portion Showing Location of Oil Platforms Serviced by SoCal Ship Services and the CAPT. T LE
- EEE. Two Photographs of the vessel CAPT. T LE
- FFF. Merchant Mariner Credential Information for Respondent’s Expert Captain Russell Johnson
- GGG. Towing Vessel Designated Examiner Letter for Respondent’s Expert Captain Russell Johnson
- HHH. USCG Port State Information Exchange Search Results for Vessel GENUS STAR II
- III. Marine Safety Manual, Vol. III, pages 22-1, 22-5 and 22-6
- JJJ. Pilothouse Visibility QAT, Final Report, 24 July 1998
- KKK. Towing Safety Advisory Committee (TSAC) Task Statement, Task #05-03
- LLL. USCG Requirements for Uninspected Towing Vessels, Change 1, March 2009

- MMM. Curriculum Vitae for USCG Expert Mark A. Tilford
- NNN. Mariner's Guide to the Inland and International Rules (Revised), Mark A. Tilford and William D. Kline, 2008, selected pages
- OOO. Towing Vessel Incline and Noise Recordings and EXTECH Digital Sound Meter User's Guide
- PPP. Video of Backscatter Lighting Taken by Captain Scotto from the wheelhouse of the REBEL II, to be produced when as soon as possible after completion
- QQQ. **Reserved**
- RRR. Photographs showing visibility from the wheelhouse of the REBEL II, December 31, 2010
- SSS. Collision between the Danish fishing vessel METTE ELIASSEN and the Maltese-registered tanker FREYJA in the North Sea on 15 March 2003, CASUALTY REPORT, February 19, 2004
- TTT. USCGC HEALY INSTRUCTION M1603.1C, June 10, 2006
- UUU. Appendix H to COMDTINST M16130.2E, pages H-29 and H-30
- VVV. Selected Navigation safety Advisory Council Resolutions, 2005, page 655
- WWW. USCG Addendum to the United States National Search and Rescue Supplement, full 631 page document is not attached as it is also in the possession of the Complainant, page H-75 only is attached for ease of reference
- XXX. Google Earth View of Point of Collision
- YYY. Will the Look-Out Be Redundant?, Capt. Joseph P. Brusseau and Lt. Cmdr. Brian J. Peter, the EXPERT, Fall 1998
- ZZZ. Bridge Watchkeeping Safety Study, Marine Accident Investigation Branch, July 2004
- AAAA. Radar Images showing the "Effects of sea on PPI displays of radars having different wavelengths", RADAR NAVIGATION MANUAL, Second Edition, 1975
- BBBB. Radar Reflectors, A good way to prevent collisions, USCG Office of Boating Safety, March 9, 2000
- CCCC. Curriculum Vitae of Commander Paul Larson

Attachment B – Rulings on Proposed Findings of Fact

United States Coast Guard’s Proposed Findings of Fact³¹

1. Between 4:00 and 4:30 p.m. on October 1, 2008, the Tug REBEL II and the barge ISLANDER departed the Catalina Freight Lines (“Catalina Freight”) facility in the Port of Los Angeles, California bound for Santa Catalina Island (“Catalina Island”). Tr. at 80-82.

RULING: Accepted and Incorporated.

2. At all times relevant to this proceeding, the REBEL II was operating in waters governed by the International Regulations for the Prevention of Collisions at Sea (72 COLREGS; 33 U.S.C. §§ 1601-1608). See Coast Guard Exh. 27; Tr. at 678.

RULING: Accepted and Incorporated.

3. There were two crewmembers on the REBEL II during the transit to and from Catalina Island on October 1st and 2nd, 2008. Respondent was the master and licensed operator and Mr. John Amstutz was the deckhand. Tr. at 80.¹

¹ The only transits of the REBEL II addressed in this brief are the transit to Catalina Island on the evening of October 1, 2008 and the return transit from Catalina Island to the Port of Los Angeles/Long Beach on the night of October 1, 2008 and into the early morning of October 2, 2008. Within this brief, the trip “to Catalina” references the former and those to the trip “from Catalina” refer to the latter. Both alleged offenses occurred on the trip from Catalina Island.

RULING: Accepted and Incorporated.

4. At all times relevant to this matter, Respondent was the holder of a Coast Guard-issued credential as a master of steam or motor vessels of not more than 1600 gross registered tons (Domestic tonnage), 3,000 gross tons (ITC tonnage) upon oceans, master of towing vessels upon oceans, and radar observer (unlimited). Tr. at 8-9; Coast Guard Exh. 10.

RULING: Accepted and Incorporated.

5. Deckhand Amstutz did not hold any Coast Guard-issued credential or any type of radar endorsement or radar observer certification. Deckhand Amstutz had no formal training in the use of vessel radar. Tr. at 131, 133, 433, 491.

RULING: Accepted and Incorporated. As noted in this Decision and Order, Deckhand Amstutz was an experienced deckhand and had been informally trained by Captain Scotto and another captain on radar observations.

³¹ The Coast Guard submitted its Proposed Findings of Fact as part of its Closing Brief. The Coast Guard did not file any separate Proposed Conclusions of Law. Respondent filed neither Proposed Findings of Fact nor Conclusions of Law. The Coast Guard had several footnotes in its Proposed Findings of Fact, which have been retained. Any footnotes in the rulings were made by the Court.

6. The REBEL II is a 61.8-foot towing vessel. The REBEL II was originally constructed in 1969. Coast Guard Exh. 11.

RULING: Accepted and Incorporated.

7. The REBEL II had two locations from which the vessel could have been operated – an upper wheelhouse and a lower wheelhouse. With the exception of autopilot and GPS, the upper wheelhouse had the same compliment of navigational equipment as the lower wheelhouse. Tr. at 476.

RULING: Accepted and Incorporated. As noted in this Decision and Order, the upper wheelhouse's steering station was more limited than the lower wheelhouse in that one would have to manually steer the REBEL II from the upper wheelhouse. Furthermore, the upper wheelhouse was an add-on construction whose purpose per industry standards was for maneuvering the REBEL II in docking situations and where visibility was compromised by position of the tow.

8. Once set, the autopilot on the REBEL II could not be disengaged from the upper wheelhouse. If the master of the REBEL II were to operate the REBEL II from the upper wheelhouse, he would be required to manually steer the vessel. Tr. at 487.

RULING: Accepted and Incorporated.

9. The lower wheelhouse of the REBEL II had visibility toward the bow through five forward-facing windows. The windows were separated by support stanchions. Coast Guard Exh. 1; Resp. Exh. RR; Tr. at 375, 503.

RULING: Accepted and Incorporated.

10. With the wheelhouse doors closed, visibility out of the port and starboard sides of the lower wheelhouse was through one square window in each of the doors. These door windows were smaller than the large forward-facing wheelhouse windows. Coast Guard Exhs. 1, 2, 5.

RULING: Accepted and Incorporated. As noted in this Decision and Order, while visibility from any one spot within the lower wheelhouse is compromised, moving around the wheelhouse (as is industry standard and Captain Scoto and Deckhand Amstutz's practice) can eliminate the blind spots created by the lower wheelhouse's configuration.

11. The wheelhouse doors could be left closed, opened, or cracked. Leaving the doors fully open would increase visibility out of the port and starboard sides of the lower wheelhouse. Coast Guard Exh. 1; Resp. Exh. RR.

RULING: Accepted and Incorporated.

12. On the transit from Catalina Island, the wheelhouse doors of the REBEL II were neither fully opened nor closed, but were cracked open. Tr. at 534-536, 588.

RULING: Accepted and Incorporated.

13. The view out of each side of the lower wheelhouse aft of 90 and 270 degrees relative bearing was restricted by steel bulkheads that extended on each side of the lower wheelhouse from the side doors to the aft bulkhead. Coast Guard Exh. 1; Tr. at 125-127, 129, 257-258, 544-545.

RULING: Accepted and Incorporated. As noted in this Decision and Order, while visibility from any one spot within the lower wheelhouse is compromised, moving around the wheelhouse (as is industry standard and Captain Scoto and Deckhand Amstutz's practice) can eliminate the blind spots created by the lower wheelhouse's configuration.

14. The view aft from the lower wheelhouse of the REBEL II was provided through a window on the starboard-aft bulkhead and a small, round porthole window on the aft-port bulkhead. These windows were contained within the lower wheelhouse's aft steel bulkhead. This aft bulkhead obstructed the view aft from the lower wheelhouse. The view aft out of the starboard-aft window was further obstructed by a gray, plastic garbage can positioned against the railing just outside the window. Coast Guard Exhs. 3, 4; Tr. at 76-77, 126-129.

RULING: Accepted and Incorporated. As noted in this Decision and Order, while visibility from any one spot within the lower wheelhouse is compromised, moving around the wheelhouse (as is industry standard and Captain Scoto and Deckhand Amstutz's practice) can eliminate the blind spots created by the lower wheelhouse's configuration.

15. The presence of the bulkheads noted in Findings 13 and 14 above creates blind spots from any one location in the lower wheelhouse. Tr. at 121, 126-131, 257-258, 354, 589, 1062.

RULING: As noted in this Decision and Order, while visibility from any one spot within the lower wheelhouse is compromised, moving around the wheelhouse (as is industry standard and Captain Scoto and Deckhand Amstutz's practice) can eliminate the blind spots created by the lower wheelhouse's configuration.

16. The upper wheelhouse of the REBEL II provides an unobstructed, 360-degree view of the horizon. There are no bulkheads in the upper wheelhouse and, with the exception of narrow window support stanchions, there are no blind spots or significant impairments to the all-around, 360-degree view from the upper wheelhouse. Coast Guard Exhs. 1, 2, 3, 4, 5; Tr. at 120-121, 353-354, 534, 589, 1062.

RULING: ACCEPTED AND INCORPORATED AS MODIFIED. As noted in this Decision and Order, while visibility from any one spot within the lower wheelhouse is compromised, moving around the wheelhouse (as is industry standard and Captain Scoto and Deckhand Amstutz's practice) can eliminate the blind spots created by the lower wheelhouse's configuration. To the extent this Proposed Finding of Fact is suggesting that it was improper to station Deckhand Amstutz in the lower wheelhouse – as compared to the upper wheelhouse – it is **REJECTED** for the reasons given in this Decision and Order.

17. The barge ISLANDER is a 128-foot cargo barge used by Catalina Freight to transport cargo between Catalina Island and the Port of Los Angeles. The ISLANDER was originally constructed in 1964. Tr. at 79-80; Coast Guard Exh. 12.

RULING: ACCEPTED AND INCORPORATED.

18. At all times material to this case, the REBEL II was towing the cargo barge astern at a distance of between 1,100 and 1,200 feet. Tr. at 91, 541.

RULING: ACCEPTED AND INCORPORATED.

19. The average transit time, dock to dock, between Catalina Freight in the Port of Los Angeles and Catalina Island is approximately four hours. Tr. at 84-85.

RULING: ACCEPTED AND INCORPORATED.

20. During the transits to and from Catalina Island on October 1st and 2nd, 2008, Deckhand Amstutz had no responsibility or authority to adjust the REBEL II's radar or alter the REBEL II's course or speed. Tr. at 117, 133-134, 147, 150, 552-553.

RULING: ACCEPTED AND INCORPORATED.

21. During the REBEL II's transit to Catalina Island on October 1, 2008, Respondent permitted Deckhand Amstutz to take a nap in the lower wheelhouse rack of the REBEL II. Deckhand Amstutz spent approximately thirty minutes lying in the rack during the transit to Catalina Island. Tr. at 87-88, 538, 551.

RULING: ACCEPTED AND INCORPORATED.

22. The REBEL II and ISLANDER arrived at Catalina Island at approximately 8:25 p.m. on the night of October 1, 2008. Coast Guard Exh. 14; Tr. at 89.

RULING: ACCEPTED AND INCORPORATED.

23. The REBEL II and ISLANDER departed on its return trip from Catalina Island at approximately 9:55 p.m. on the night of October 1, 2008. Coast Guard Exh. 14; Tr. at 483-484.

RULING: ACCEPTED AND INCORPORATED.

24. The weather for the return trip from Catalina Island was clear and calm. The seas consisted of an approximately one-foot slow swell of approximately thirty-second duration. Visibility was at least six miles. Tr. at 92-93.

RULING: ACCEPTED AND INCORPORATED.

25. At approximately 10:30 p.m., Respondent lay down in the lower rack of the lower wheelhouse of the REBEL II. Respondent remained in the rack for a continuous period of between thirty and forty-five minutes. During his time in the rack, Respondent was lying with his head to the port side of the REBEL II and his feet to the starboard side. Respondent arose from the rack at between 11:00 and 11:15 p.m. Tr. at 490, 498.

RULING: ACCEPTED AND INCORPORATED.

26. It was a violation of Catalina Freight company policy for either Respondent or Deckhand Amstutz to lie in the rack during the transit between Catalina Island and the port of Los Angeles/ Long Beach (“LA/LB”). Tr. at 551, 567.

RULING: ACCEPTED AND INCORPORATED.

27. While Respondent was in the rack, Deckhand Amstutz made an effort to leave Respondent alone so he could rest his back. For the period of time Respondent was in the rack, there was minimal conversation between Respondent and Deckhand Amstutz. Tr. at 97, 145, 612.

RULING: ACCEPTED AND INCORPORATED.

28. From his prone position in the lower rack, Respondent was unable to see the waters around the REBEL II and would not have been able to see approaching vessels while he was in the rack. Tr. at 354-355, 561, 607.

RULING: ACCEPTED AND INCORPORATED.

29. From his prone position in the rack, Respondent was unable to monitor the REBEL II’s radar. The radar screen in the lower wheelhouse was located on the starboard side of the bridge next to the operating station located amidships. Resp. Exh. RR; Tr. at 561.

RULING: ACCEPTED AND INCORPORATED.

30. The Vessel Traffic Service (“VTS”) responsible for the approaches to the port of LA/LB covers the waters 25 miles seaward of Point Fermin and includes Catalina Island. The REBEL II/ ISLANDER was within this charted Vessel Traffic Management System (VTMS) during its entire transit to and from Catalina Island. Tr. at 156; Coast Guard Exh. 25 at Note [D].

RULING: ACCEPTED AND INCORPORATED.

31. Small recreational vessels have posed a frequent hazard to the Respondent when operating with a tow between Catalina Island and the port of LA/LB. If Respondent became aware of a vessel that was going to attempt to cross his towline, he would have used a handheld spotlight to draw attention to the barge and signal the other vessel. Tr. at 100-101, 115-118, 450, 518-519, 521-522, 584-585, 740; Resp. Exh. N at 19.

RULING: ACCEPTED AND INCORPORATED.

32. At approximately 11:30 p.m. on October 1, 2008, Mr. Henry Sanchez and Ms. Penny Avila departed from a dock at 261 Bayshore Drive, in Alamitos Bay, Long Beach, California on a twenty-nine foot Bayliner en route to Catalina Island. Tr. at 42-43, 56.

RULING: ACCEPTED AND INCORPORATED.

33. The boat occupied by Mr. Sanchez and Ms. Avila was a 1989 28.66-foot Bayliner Avanti model (“the Bayliner”). Coast Guard Exhs. 15, 16; Tr. at 47.

RULING: ACCEPTED AND INCORPORATED.

34. On October 1, 2008, the Bayliner was equipped with red and green navigation lights on the bow and an all-around white navigation/anchor light. On the night of October 1, 2008, both the bow running lights and the all-around white light on the Bayliner were operable and turned on[, when it departed its mooring and when it passed under the 2nd Street Bridge]. The all-around white light was observed to be brighter than the bow running lights when Mr. Sanchez and Ms. Avila departed the dock in Alamitos Bay. Tr. at 48-50.

RULING: ACCEPTED AND INCORPORATED AS MODIFIED.

35. While transiting from its dock at 261 Bayshore Drive to San Pedro Bay, the Bayliner passed under automobile bridges at Appian Way and 2nd Street. Tr. at 56, 263; Coast Guard Exhs. 9, 24.

RULING: ACCEPTED AND INCORPORATED.

36. As the Bayliner approached the bridge at Appian Way, the port and starboard running lights and the all-around white light were visible. The all-around white light on the Bayliner was visible from the aft of the vessel as it passed under the bridge at Appian Way. Tr. at 54.

RULING: ACCEPTED AND INCORPORATED.

37. As the Bayliner passed under the bridge at 2nd Street, the Bayliner's navigation lights (port and starboard running and all-around white) remained on and visible. The all-around white light was brighter than the port and starboard running lights. The Bayliner passed under the 2nd Street Bridge at approximately 11:40 p.m. Coast Guard Exh. 9; Tr. at 56.

RULING: ACCEPTED AND INCORPORATED.

38. From the time the Bayliner left its dock in Alamitos Bay to the time of the collision with the REBEL II/ ISLANDER, the Bayliner's navigation lights were turned on and were operating properly. Coast Guard Exh. 9; Tr. at 65.

RULING: ACCEPTED AND INCORPORATED.

39. Consistent with the requirements of Rule 22 of both the Inland and International Rules of the Road, the Bayliner's all-around masthead light had a visibility range of at least two miles and each of the Bayliner's sidelights had a minimum visibility range of one mile. See Coast Guard Exhs. 9, 15; Navigation Rules, Inland, 33 C.F.R. § 83.22 (c) and International, U.S. Coast Guard COMDINST M16672 (Rule 22).

RULING: ACCEPTED AND INCORPORATED.

40. During the return trip from Catalina Island, Respondent got up out of the rack at approximately 11:00-11:15 p.m., after lying down for approximately thirty to forty-five minutes. Tr. at 97, 498.

RULING: ACCEPTED AND INCORPORATED.

41. After getting out of the rack, Respondent took up his watch position on the starboard side of the wheelhouse in front of the REBEL II's radar. Deckhand Amstutz was posted as a [dedicated] lookout on the port side of the wheelhouse as the REBEL II transited through the precautionary area. Tr. at 98, 142, 1348-1349.

RULING: ACCEPTED AND INCORPORATED AS MODIFIED.

42. The charted precautionary area outside LA/LB harbor is an area of increased vessel traffic density. Vessels are advised to "proceed with extreme caution" in the precautionary area. Tr. at 164, 518; Coast Guard Exh. 27 at Note E.

RULING: ACCEPTED AND INCORPORATED.

43. When the Bayliner was two miles away from the REBEL II, the Bayliner was at a relative bearing of 036 degrees from the REBEL II. Tr. at 779.

RULING: ACCEPTED AND INCORPORATED.

44. When the Bayliner and the ISLANDER collided, the Bayliner was at a relative bearing of 180 degrees from the REBEL II. Tr. at 781.

RULING: ACCEPTED AND INCORPORATED.

45. The masthead light on the Bayliner was within visual range of the REBEL II at a distance of two miles and passed through a relative bearing arc from the REBEL II starting at 036 degrees relative and ending at 180 degrees relative. Coast Guard Exh. 9; Tr. at 781; see also Findings of Fact 24, 39.

RULING: ACCEPTED AND INCORPORATED.

46. When the Bayliner was one mile away from the REBEL II, at least one of the Bayliner's sidelights was within the visual range of the REBEL II. As the Bayliner passed abeam of the REBEL II, its green starboard sidelight and its all-around white masthead light were within the visual range of the REBEL II. See Coast Guard Exh. 8 at at 16 of 17; Coast Guard Exh. 9; Tr. at 50; Findings of Fact 24, 39.

RULING: ACCEPTED AND INCORPORATED.

47. Immediately prior to the collision the REBEL II was making way at approximately eight knots and the Bayliner was travelling at twenty knots. Given their relative angles of approach, the closing speed of the vessels was 26.4 knots. Tr. at 735-736.

RULING: ACCEPTED AND INCORPORATED.

48. At a closing speed of 26.4 knots and a visibility range of two miles, the all-around masthead light on the Bayliner was within the visual range of the REBEL II for at least four minutes and forty-six seconds. At least one of the running lights on the Bayliner was within the visual range of the REBEL II for at least two minutes and twenty-eight seconds. See Findings of Fact 24, 39.²

² These calculations are slightly larger than those by Respondent's expert, Captain Hickey. See Tr. at 745, 777 (finding 135 seconds at one mile and 270 seconds at two miles). At 26.4 knots relative speed, two vessels would close a distance of one mile in 137.4 seconds or 2 minutes 17.4 seconds. Two miles would be closed in 4 minutes 34.8 seconds. This minor discrepancy appears to be the result of Captain Hickey rounding numbers. See Tr. at 738. Also, Captain Hickey appears to have conducted his calculations as if the Bayliner were on a course directly at the REBEL II. It was not. Because the Bayliner came within 300-600 feet of the REBEL II then proceeded another 1,100 to 1,200 feet to the ISLANDER, any calculation of time that the Bayliner's lights were visible to the REBEL II must be increased by the time it took the Bayliner to travel 1,100-1,200 feet to the ISLANDER minus the 300-600 feet it had remaining if it were on a course directly at the REBEL II (i.e., an additional travel distance of 500-900 feet). This would mean the Bayliner's lights were within the visual range of the REBEL II for an additional eleven to twenty-one seconds. Complainant has used the most conservative number of eleven seconds.

RULING: ACCEPTED AND INCORPORATED.

49. Prior to the collision between the ISLANDER and the Bayliner, the Bayliner passed within 300-600 feet directly off the starboard beam of the REBEL II. CG-08 at 16; Tr. at 237, 542.

RULING: ACCEPTED AND INCORPORATED.

50. At a closing speed of 26.4 knots, the Bayliner passed directly abeam of the REBEL II between twenty-six and twenty-eight seconds before the collision with the ISLANDER. See Tr. at 541 (distance between REBEL II and ISLANDER between 1,100 and 1,200 feet); Coast Guard Exh. 11 (length of REBEL II- 61.8 feet); Coast Guard Exh. 8 at 16 of 17 (showing Bayliner passing abeam of REBEL II).³

³ This calculation uses "abeam" to indicate a position off the starboard side of the REBEL II at the fore and aft midpoint of the REBEL II. Therefore, the time and distance calculations were based on distances of 1,130.9 feet and 1,230.9 feet at a speed of 26.4 knots. This calculation is consistent with the time indications on CG-08 at 16 & 17. The elapsed time between those images is twenty-two seconds. Given the timing calculations, CG-08 at 17 likely represents a period of time before the collision indicating a close-quarters situation in which the radar images have merged seconds before the actual collision. See TR at 185.

RULING: ACCEPTED AND INCORPORATED.

51. At 12:18 a.m. on October 2, 2008, the REBEL II's barge ISLANDER and the Bayliner collided. Coast Guard Exh. 8 at 17; Resp. Exh. M.

RULING: ACCEPTED AND INCORPORATED.

52. At the time of the collision, the REBEL II's radar was set on the three-mile range. Tr. at 392-393.

RULING: ACCEPTED AND INCORPORATED.

53. On the night of the collision, the REBEL II's radar was turned on and functioning properly. Tr. at 361.

RULING: ACCEPTED AND INCORPORATED.

54. The radar unit on the REBEL II on the night of the collision was capable of detecting the Bayliner. Tr. at 364-365, 368, 392, 493-494, 861.

RULING: ACCEPTED AND INCORPORATED. As noted in this Decision and Order, small fiberglass vessels like the Sanchez Bayliner can be difficult to acquire on radar and no finding is made that Captain Scoto failed to operate his radar in the manner of a prudent mariner. Having his radar optimized to detect the channel buoys would not have compromised his ability to pick up the Sanchez Bayliner and any implication by this Proposed Finding of Fact that Captain Scoto was negligent in his radar operation is **REJECTED**.

55. During the REBEL II's approach to LA/LB harbor, Captain Scoto had his radar optimized to detect buoys. Tr. at 526, 786-787, 856.

RULING: As noted in this Decision and Order, small fiberglass vessels like the Sanchez Bayliner can be difficult to acquire on radar and no finding is made that Captain Scoto failed to operate his radar in the manner of a prudent mariner. Having his radar optimized to detect the channel buoys would not have compromised his ability to pick up the Sanchez Bayliner and any implication by this Proposed Finding of Fact that Captain Scoto was negligent in his radar operation is **REJECTED**.

56. Neither Respondent nor Deckhand Amstutz ever became aware of the presence of the Bayliner at any time before, during, or after the collision between the REBEL II/ ISLANDER and the Bayliner. Tr. at 151, 529-530.

RULING: ACCEPTED AND INCORPORATED.

57. The Bayliner remained afloat for at least nineteen minutes after the collision with the REBEL II/ ISLANDER. Resp. Exh. M; Coast Guard Exh. 19 at 3, Coast Guard Exh. 20 at 3; Tr. at 642-644.⁴

⁴ The video that comprises Resp. Exh. M was not played start to finish at the hearing. When viewed in its entirety, the image of the Bayliner intermittently appears on the VTS radar until the end of the video. Resp. Exh. M. The Bayliner continues to appear on the VTS radar after the REBEL II is well past the Los Angeles RACON (No. 3) buoy. See Resp. Exh. M at time 37:00 (RACON indicated by three yellow/green dashes- TR at 513); Coast Guard Exh. 27. The REBEL II was due to arrive at the RACON buoy at forty minutes after midnight- twenty-two minutes after the collision with the Bayliner. Tr. at 144, 161; Coast Guard Exh. 6.

RULING: ACCEPTED AND INCORPORATED.

58. The crew of the REBEL II made no attempt to render aid after the collision to the Penny Avila or Henry Sanchez onboard the Bayliner. Tr. at 529-530.

RULING: ACCEPTED AND INCORPORATED.

59. Both Penny Avila and Henry Sanchez died of “probable drowning” and other unestablished factors. Coast Guard Exhs. 19, 20.

RULING: ACCEPTED AND INCORPORATED.

Attachment C – Notice of Appeal Rights

33 C.F.R. Part 20

Subpart J—Appeals

§ 20.1001 General.

(a) Any party may appeal the ALJ's decision by filing a notice of appeal. The party shall file the notice with the U. S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201–4022. The party shall file the notice 30 days or less after issuance of the decision, and shall serve a copy of it on the other party and each interested person.

(b) No party may appeal except on the following issues:

- (1) Whether each finding of fact is supported by substantial evidence.
- (2) Whether each conclusion of law accords with applicable law, precedent, and public policy.
- (3) Whether the ALJ abused his or her discretion.
- (4) The ALJ's denial of a motion for disqualification.

(c) No interested person may appeal a summary decision except on the issue that no hearing was held or that in the issuance of the decision the ALJ did not consider evidence that that person would have presented.

(d) The appeal must follow the procedural requirements of this subpart.

§ 20.1002 Records on appeal.

(a) The record of the proceeding constitutes the record for decision on appeal.

(b) If the respondent requests a copy of the transcript of the hearing as part of the record of proceeding, then,—

- (1) If the hearing was recorded at Federal expense, the Coast Guard will provide the transcript on payment of the fees prescribed in 49 CFR 7.45; but,
- (2) If the hearing was recorded by a Federal contractor, the contractor will provide the transcript on the terms prescribed in 49 CFR 7.45.

§ 20.1003 Procedures for appeal.

(a) Each party appealing the ALJ's decision or ruling shall file an appellate brief with the Commandant at the following address: U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201–4022, and shall serve a copy of the brief on every other party.

(1) The appellate brief must set forth the appellant's specific objections to the decision or ruling. The brief must set forth, in detail, the—

(i) Basis for the appeal;

(ii) Reasons supporting the appeal; and

(iii) Relief requested in the appeal.

(2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record.

(3) The appellate brief must reach the Docketing Center 60 days or less after service of the ALJ's decision. Unless filed within this time, or within another time period authorized in writing by the Docketing Center, the brief will be untimely.

(b) Any party may file a reply brief with the Docketing Center 35 days or less after service of the appellate brief. Each such party shall serve a copy on every other party. If the party filing the reply brief relies on evidence contained in the record for the appeal, that brief must specifically refer to the pertinent parts of the record.

(c) No party may file more than one appellate brief or reply brief, unless—

(1) The party has petitioned the Commandant in writing; and

(2) The Commandant has granted leave to file an added brief, in which event the Commandant will allow a reasonable time for the party to file that brief.

(d) The Commandant may accept an amicus curiae brief from any person in an appeal of an ALJ's decision.

§ 20.1004 Decisions on appeal.

(a) The Commandant shall review the record on appeal to determine whether the ALJ committed error in the proceedings, and whether the Commandant should affirm, modify, or reverse the ALJ's decision or should remand the case for further proceedings.

(b) The Commandant shall issue a decision on every appeal in writing and shall serve a copy of the decision on each party and interested person.