UNITED STATES DISTRICT COURT
400 North Miami Avenue
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Miami, Florida 33128-1810

Patricia A. Seitz
Senior District Judge

(305) 523-5530

September 21, 2022

Dear Chair Reeves and Members of the Sentencing Commission:

I recently finished supervising a large, publicly traded, recidivist corporation's five-year probation for environmental crimes. That experience illuminated the limited toolbox available to judges when faced with noncompliance with probation conditions. Chapter 8's guidelines and the sentencing statutes aim to hold organizations accountable. Based on my experience, I believe there is an opportunity for the Commission to provide courts guidance through guideline revisions that focus on leaders' responsibilities for noncompliance with probationary terms.

My three takeaway lessons are:

- A Chapter 8 revision could further the Guidelines' aim to reduce corporate recidivism, by guiding and supporting judges in the selection of Court Appointed Monitors ("CAM") and Third-Party Auditors ("TPA"). In criminal conviction cases, the CAM and the TPA are an extension of the court and the Office of Probation with the obligation to help the court and probation oversee criminal probation. Such guidance would ensure that courts are not simply acceding to selections the defendants and the government present but vetting the CAM and TPA to do the job the court needs done. This is particularly important as the Department of Justice recently announced that it will resist the successive use of Non-Prosecution and Deferred Prosecution Agreements ("NPA" and "DPA"), which may result in an increase in the number of monitorships under court supervision.

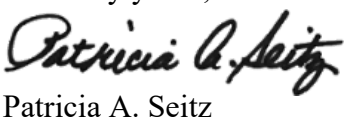
- There is widespread agreement that developing a sustainable compliance culture is critical to reduce corporate recidivism. However, there is little available to guide courts in determining whether the methods used to define or evaluate corporate culture are sufficiently robust. In my case, I found having a reliable culture survey was a critical tool for evaluating the relative value of post-conviction remedies.

- As the Commission's recently released study concluded, the present Chapter 8 incentivizes organizations to self-police through leniency in organizational sanctions. These comments are focused on whether more could be done to identify the approaches courts could apply when, following conviction, it appears that the organization's post-conviction efforts to correct its compliance weaknesses are inadequate.

I used a variety of tools to incentivize the corporate defendant to enhance its compliance efforts that were *not* part of the initial conditions of probation. Those included (1) quarterly public status conferences, and using technology to give stakeholders (including employees and the public) real-time access to the court's review of the company's efforts; (2) requiring the company's Board Chair and CEO to attend all hearings and to personally articulate both the steps taken and their role in meeting the goals of sustainable compliance; and (3) docketing CAM and TPA in-depth reports to allow public scrutiny and to assure both the tens of thousands of corporate employees and the public, that their compliance concerns were being heard and addressed.

The report attached to this letter provides the factual background to put these issues into context and offers ideas for how the Commission might capitalize on them. As noted above, the use of monitors, and the struggle to prevent corporate crime recidivism is a subject of significant DOJ effort. Regardless of whether the crimes be environmental, FCPA or fraud, the issue is one of significant effort and concern, and increasingly likely to present challenges to the judiciary. I hope the Commission will exercise its authority to assess how these issues relate to the Guidelines and to consider additional guidelines to facilitate Chapter 8's objectives, including the ability of the sentencing process to impose real accountability and facilitate lasting change. I am at your service to discuss these matters further with you or members of your staff.

Sincerely yours,



Patricia A. Seitz
Senior U.S. District Court Judge
Southern District of Florida

Organization Probation Supervision: Challenges Faced in Reducing Noncompliance

This report focuses on the five-year supervision for environmental crimes of a publicly traded company that owns many different, independently operated cruise lines (the "Company"). It had a history of prior criminal convictions and civil violations and was, prior to the pandemic, a highly profitable enterprise, clearing anywhere from three to four billion dollars on annual revenues exceeding fifteen billion dollars. The experience highlighted the challenges courts may face when confronting resistance and noncompliance with the terms and conditions of corporate probation. Beyond the lessons learned, I believe there are meaningful opportunities to better equip courts in navigating the supervision of massive organizations. This "case study" attempts to illustrate these challenges and opportunities.

Lessons Learned

A Court's Oversight Team

Under the Department's current guidelines for plea/trial conviction cases, courts are typically presented with a proposed Court Appointed Monitor ("CAM") and/or a Third-Party Auditor ("TPA"). The CAM and the TPA are key to effective supervision during probation. Yet courts are generally expected to defer to the selections the criminal defendant and the Department make. Further guidance would be useful for several reasons.

In my case, the CAM and TPA served distinct, interdependent roles yet worked well together. The TPA is more of an auditor, and, thus, must be an industry expert, respected in the field, with a deep understanding of the relevant operations, including the minutiae, and the practical issues that arise in adhering to a complex ECP.[1] The CAM has a broader function, and, thus, must have deep experience in the field, but, in addition, must understand how the relevant law applies to operations, the compliance issues that arise, and the broader analyses needed to meet the goal of having the organization emerge from probation with a stronger culture of compliance and a significantly reduced likelihood of recidivism. As a result, the CAM must be a skilled, high-level strategist and communicator, a deft handler of company leadership (including its board of directors), and an unimpeachable representative of the court since the CAM serves as the court's and the Probation Office's eyes and ears.

The importance of CAM and TPA selection includes both process and timing. As to process, given how few monitorships have existed in the past, many judges have not had the training, or access to resources or benchmarks to inform this important selection. The Commission could aid in both respects, by providing training in selection criteria, as well as by maintaining a clearinghouse of resources for this task. I was fortunate that the parties agreed to excellent CAM and TPA selections without my intervention. As to timing, I insisted that the CAM and TPA be selected, and in place, prior to sentencing. This is not always the case. Even in the longest of monitorships, a full five years, it required every day of effort to move the needle. By having the

CAM and TPA selected at the time of sentencing, they were available to assist me with details that helped set parameters and expectations for the defendant from the beginning.

One post-case lesson – I should have required greater clarity as to the responsibility and authority of the Company's point-person for ECP implementation prior to sentencing. It took significant CAM efforts to uncover that the key person who was to implement the ECP had neither the authority nor the needed resources to undertake his work. This deficiency did not change until after I held the Company in violation of probation for the first of two times.

Separately, there is the issue of how the Probation Office interacts with the Court and the CAM and/or the TPA. I was fortunate to have the same Probation Officer throughout the five-year period, and he provided needed continuity in the work of the Office of Probation, and he was also a leader in seeking the Court's imposition of sanctions in connection with violations of the terms and conditions of probation. Further training and resources for probation officers on the oversight of corporate probation, though outside the purview of the Commission, would be helpful as well.

The Role of Corporate Compliance Culture

A robust corporate compliance culture is key to limiting recidivism. This was not the Defendant Company's first environmental criminal conviction. Its prior convictions were in 2002 and in the '90's, plus repeated regulatory violations during that time. The violations in the present case began while the Company was still on probation and presumably implementing the ECP from an earlier case. Notably, many of the senior leaders of the Company had been present during these prior offenses. The oversight the CAM and the TPA provided me illuminated that the leadership was resisting taking responsibility for prior compliance failures, and instead had created a blame culture (further described below), and, as one employee termed it, a culture of "excess frugality" in which employees believed that cutting compliance costs would put them in a better position in the Company. I was faced with a corporate leadership that bridled at probation, resisted engagement with ECP implementation, and too often failed to provide adequate support to employees seeking in good faith to make improvements. Although probation saw some improvements, recidivist tendencies persisted as evident in the fact that twice the Company faced revocation proceedings that resulted in additional fines and ECP measures. The corporate culture survey conducted in the first year was a critical baseline assessment tool to allow the Court (and the Company) to see clearly that there were significant weaknesses in the culture that required changes in the approach of leadership. The survey also allowed the Court to obtain empirical evidence of improvements in the organization's culture through the repeat of the survey in the final year of supervision. (Though not conclusive, it is noteworthy that the follow-up culture survey found improvements in the operating lines under court supervision, but one line, whose ships stopped calling on US ports, and were therefore excluded from probation coverage, showed an apparent weakening of its culture.)

The question for the Commission is: Given the potential for an increasing reliance on the use of monitors in criminal conviction cases, what tools, resources, or training could be developed to support courts in overseeing a successful period of corporate probation.[2]

Highlights of Probation's Enduring Challenges[3]

First, as noted above, the Company's senior leadership resisted addressing the Company's status as a convicted, recidivist criminal. Their actions reflected an attempt to treat the case as though it were a civil matter delegated to its outside counsel. The Company initially openly resisted the CAM and made efforts to significantly restrict the CAM's ability to effectively monitor the Company. Part of future training and resources could be a guide to clarifying the scope of a CAM's review and necessary resources. Significant time was wasted in resolving these issues. Even after that was accomplished, the Court had to confront senior leadership's resistance to learning about its own role in the root causes of its criminal conduct, or fully accepting responsibility and supervision. While leaders were happy to make statements that appeared consistent with ECP goals, their actions were initially inconsistent with those statements.

Second, the employee survey found that a blame culture persisted. This focus on individual fault prevented analysis of the systemic, organizational conditions that led to negative outcomes. Even in the final year of probation, it was revealed that multiple ships had mismanaged the handling of food wastes to appease leadership because they still feared the consequences of demanding the resources needed to properly manage their compliance obligations, and because of mangers' abusive behavior against those who spoke out. Notably, the revelation of these issues did show an improvement in the willingness to speak out – again, a function of the public availability of the CAM's reports and the Court's status conferences – but employees remained concerned about the status of the Company's culture once probation was concluded.

Probation Revocation Proceedings

In March 2019, the Office of Probation filed a revocation petition due to ECP violations. The Company appears to be among the few corporate defendants to have faced revocation. Among other violations, it was revealed that the Company had made efforts to "clean up" ships prior to the CAM and the TPA visits and persisted in this conduct after the CAM discovered this behavior and the Company leadership personally assured the Court it would stop. The CAM also found a continuing failure to fully support the authority of the Company officer in charge of the ECP. The Government emphasized that the petition resulted from Company leadership's ongoing failures to support environmental compliance.

In June 2019, the Company pled guilty to these and other violations and paid an additional $20M penalty. Top leadership also issued a statement to employees in which they took personal responsibility for the violations, agreed to enhanced Court oversight and reporting requirements, and restructured Company roles to promote compliance. In response to a CAM review of the

Board of Directors, it was at this point that the Company brought onto its Board a member with significant compliance experience for a multinational company. Nonetheless, the Company-side ECP point-person continued to lack sufficient authority, even though the June 2019 probation settlement included admitting as much.

Towards the end of probation, in November 2021, the Company's persistent failure to establish an independent internal investigation function (a requirement of the ECP) led to another revocation proceeding. The CAM determined that top leadership's culture of minimizing or avoiding negative, uncomfortable information was, among other things, impeding the ability of the internal investigation function to conduct effective root cause analyses. In January 2022, the Company pled guilty to this violation, agreed to action to rectify the failure, paid an additional $1M penalty, and top leadership members individually signed and issued another written statement to all employees. Despite most of the Company's leadership taking responsibility as part of this third plea, the Board Chair pushed back at the hearing, wanting to distinguish between "statements of fact" and "statements of opinion" – the former of which he wished to characterize as the latter. His statements could leave an observer with uncertainty about the Company's commitment to address the issue – the culture problems that had impeded the internal investigation function – identified in the CAM's first-year report to the Court.

The Supervising Court's Limited Toolbox

Without cultural compliance change clearly taking root during probation, the threat of recidivism looms. A strong organizational compliance culture with buy-in from top leaders is necessary to achieve sustainable compliance beyond probation. However, during probation, courts typically can consider only two means to redirect noncomplying leadership.

First, a court could add to the fines, as occurred here. But fines can become merely a cost of doing business, and for a company with multibillion dollar revenues, even a $20M fine is not much of a cost. As one commentator notes, the corporate decision to commit a crime "is not malicious; it is rational."[4] Past cases suggest that many corporations approach the Government seeking to admit just enough responsibility to obtain a settlement at a fine amount that does not impair operations. For larger organizations, a maximum cap on fines puts them in an even better position.[5]

Second, CEPs can be strengthened, but some see compliance programs as time-limited nuisances. One Company employee present during both ECP periods stated that the Company "took their foot off the gas" when the 2002 ECP was terminated early in August 2006. The Company's Chief Maritime Officer echoed this sentiment, admitting that "shore management lost focus on environmental issues" after the 2002 ECP passed. He acknowledged that environmental officers were not trained or utilized sufficiently once that ECP ended and were given additional responsibilities that took their time away from compliance issues. As noted above, some employees also expressed concern that the Company's support and resources for environmental compliance would expire with this probation.

Moreover, reliance on a pre-existing compliance program to guide change could be problematic. One commentator found that the number of internal compliance programs increased considerably since they became a mitigating factor in determining fines, but many were mere "window dressing."[6] The fact that culpability in fine calculation can be reduced by presence of a compliance program is surely not lost on senior leaders. This is an admittedly pessimistic analysis, and hopefully improving judicial sophistication in review of compliance program components will help judges in the future effectively evaluate the quality of corporate compliance programs both before and after sentencing.[7]

Thoughts on Expanding the Toolbox

In this case, the statutory five-year probation limit hamstrung any longer-term commitment and monitoring required to implement change. The additional $20M in June 2019 and $1M in January 2022 – all following the original unprecedented $40M fine – had, by themselves, limited effect. I only secured corporate leadership's personal involvement after I threatened to close all U.S. ports to the Company's ships! Such a nuclear option, however, is not a very practical tool.

Nonetheless, I tried to fashion three measures to improve behavior. The first of those actions was requiring the Board Chair, CEO, and other high-ranking Company officers to attend all probation status conferences, which were often lengthy. This began with the Board Chair and CEO personally taking responsibility at the first revocation proceeding. This time cost the Company, but, more importantly, the personal attendance was an effort to improve compliance through individual accountability. My next tool, while initially a side-effect of the pandemic, was a call-in listening option so that Company employees around the world, shareholders, and the media could hear and scrutinize leadership claims at each hearing. Finally, I made the CAM reports part of the public docket so that they, too, could be scrutinized by Company stakeholders. These three actions along with the empirical information obtained through the culture survey, provided modest gains. But future success is still uncertain.

I am confident that, without these additional measures, improvements in the Company's compliance culture would have lagged. Nonetheless, more tools are needed. As noted above, they could come in the form of judicial training or resource-gathering and Commission recommended statutory or guideline changes. Traditional tools of praise and disapproval used with individual defendants under supervision have limited impact in these instances because there is no personal risk to leadership if not individually indicted. Still, such techniques were useful to encourage certain behavior where the Court could not directly require it.

Conclusion

The Company ultimately made many changes during its probation that may have put it on the path to more consistent compliance. Since probation began, in addition to the new Board member, the Company changed its CEO, its General Counsel, and it created a new position of a

Chief Compliance Officer, at the same level as its equivalent of a Chief Operating Officer. These are significant changes. Change also requires the concerted efforts of thousands of individuals focused on making their employer the best it can be as an industry leader and corporate citizen. In the past, their efforts were undermined when corporate leaders failed to undertake both the "talk" and the "walk" needed to instill a culture of compliance, even when required to do so. It is my hope that the positive changes made during probation will "stick" and that the Commission can use my experience, and that of other judges and monitors, to identify the tools, statutory and guideline changes, training, and resources to help courts in these circumstances redirect organizations and their leadership to increased compliance and a reduction of corporate criminal recidivism.

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[1] Chapter 8 of the Guidelines Manual outlines Compliance and Ethics Programs ("CEPs"), but this attachment uses interchangeably the term CEPs and the Environmental Compliance Program ("ECP") at issue here.

[2] The CAM in this case recently highlighted some of the challenges facing prosecution of corporate crimes. *See* Steven P. Solow & Leslie Couvillion*, Solving Corporate Crime*, 47.4 J. Corp. L. 1, 1-17 (2022).

[3] Greater detail regarding the Company's counts of conviction and probation is included in the Appendix.

[4] Mary Kreiner Ramirez, *The Science Fiction of Corporate Criminal Liability: Containing the Machine Through the Corporate Death Penalty*, 47 Ariz. L. Rev. 933, 962-63 (Winter 2005).

[5] This raises a separate issue. As the Commission is aware, Chapter 8 does not apply to organizational fines for environmental crimes. Environmental crimes were excluded from Chapter 8, in anticipation of a Chapter 9 that would cover organizational sentencing for environmental crimes. Despite significant progress on a draft of Chapter 9, the work was never completed. Thus, for an environmental case, courts are left with either the statutory maximums (typically $1million for a felony) or use of the Alternative Fines Act, 18 USC § 3571 ("AFA"). However, in many if not most cases, the AFA is found to be unduly complicated or burdensome. Beyond the issues related to the use of monitorships, the Commission may wish to revisit the effort to complete and produce a Chapter 9.

[6] Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 Wash. U. L.Q. 487, 513-14 (2003).

[7] *See* Elizabeth McCready, *Corporate Criminal Liability*, 59 Am. Crim. L. Rev. 571, 600-04 (2022). (considering the components of CEPs and referring to efforts to develop evaluation rubrics).

Appendix

Defendant's Criminal Actions

In 2013, an engineer on a Defendant brand-line cruise ship observed crew handling of "oily bilge water"[1] in a manner intended to defeat environmental monitoring equipment. His reports met push back from supervisors who condoned the actions. He took photos, ultimately resigned, and reported his experience to UK maritime authorities. The resulting government investigation involved evidence tampering, instructions to lie to regulators, and false statements. The investigation ultimately identified similar violations dating back to at least 2005, and similar practices on four other Defendant vessels. Notably, this wrongdoing began while the company was still implementing an ECP as the result of the previous plea noted above.

Conviction and Sentence

In December 2016, the brand-line Defendant pled guilty to environmental crimes.[2] The seven felony counts included conspiracy, falsifying records, and obstructing justice, covering 2005 through September 2013.[3] Defendant admitted that it made illegal discharges, systematically falsified logbooks, and attempted to obstruct the investigation. Its written plea agreement provided for a five-year probation (the maximum under 18 U.S.C. § 3561(c)(1)) and required compliance with another ECP – a 57-page plan – to remedy past environmental failures and ensure future compliance across the Company's multiple brands. The plea also specified the payment at sentencing of $40M, which included fines of $27M as to Count One, and $500,000 as to each of Counts Two through Seven, the maximum per offense fine pursuant to 18 U.S.C. § 3571(c)(3) and (d), and an organization community service payment of $10M. Finally, the Company also paid a special assessment fee of $400 per felony (under 18 U.S.C. § 3013(a)(2)(B)).[4]

Environmental Compliance Plan ("ECP")

The ECP went well beyond oily bilge waters, to include other hazardous emissions, such as sewage and air emissions. Failure to meet the ECP's terms was a basis for probation revocation. The plea required the Company to fund a TPA and a CAM that reported regularly to the Office of Probation and the Court. The CAM functioned as the Court's and Probation's eyes and ears on ECP progress. The Company, as required by the ECP, had named an employee to oversee the ECP's implementation. However, the company ultimately plead guilty during the first probation revocation process to having failed to give that person the necessary authority and resources to perform their role.

ECP monitoring formed the framework for supervision, which was no small task, given the Company's resistance to the ECP and its decentralized corporate structure – at the start of probation the Company had no organizational chart. Likewise, the selection of the Company-side point person was crucial. In this case, the Company chose an individual who was

committed to the ECP and a skillful communicator. As noted below, the probation issues rested not with this individual but with Company leadership's failure to give him the requisite authority and resources.

Probation

Year One

In the first year alone, the CAM and TPA teams visited more than 20 vessels and shoreside offices, conducted hundreds of interviews, and reviewed thousands of documents. From the beginning, their work was substantial and sustained throughout the probation period. On a quarterly basis, the parties followed a schedule that required the CAM to provide a detailed progress report, then responses from the parties to the report, and the Court's review of all of this, prior to quarterly status conferences that reviewed the materials in detail and set measurable goals for the next conference. This process required an immense time commitment of all involved on a quarterly basis.

A Government Status Report in 2017 portended a discouraging future, and stated a refrain echoed in numerous status conferences in subsequent years:

> [T]he ECP got off to a slower than expected start as the result of positions taken by [the Company] with regard to establishing the [CAM] and [TPA]. The government credits the reports and representations made by [the Company], the CAM and TPA that significant progress has been made in remedying failures that led to the offenses of conviction, including upgrading environmental equipment and procedures, and improving management controls. At the same time, the government remains very concerned that the company's senior leadership does not understand the full nature and extent of the root causes of the company's criminal conduct. Despite the significant efforts and accomplishments of many engineers and managers, there appears to be a continuing reluctance at the very top of the corporation to accept responsibility and court supervision.

This statement was consistent with the first year's results: Defendant had no recurrence of the same illegal activity, implemented most of the hardware and training required of the ECP's first year objectives, established a corporate compliance manager ("CCM"), raised employee awareness of environmental obligations, began an outside audit of its investigation practices, and allowed for the conduct of the culture survey. Nonetheless, the CAM identified several areas for improvement, many of which emerged from the statements and observations of the company's own employees. These included clarifying lines of responsibility in the complex corporate structure, addressing the Company's "blame culture," which focused on individual fault instead of systemic issues, improving the Company's "critically flawed" internal investigation procedures, and ceasing new (different) environmental violations, which included during the first year of supervision at least four known instances of record falsification and more than 55 prohibited discharges.

The Company's in-court statements rarely were an issue. It stated in April 2017 that it was "looking for a culture of compliance and that is what our focus is going to be over the next five years." Later that year, outside defense counsel stated,

> I can't impress upon you enough how important this is to the company, from the CEO right down throughout management…and through the employees. We get this and we understand exactly what you're saying. It is the company's goal to be the best in class and to set an example for the industry.

Unfortunately, despite Court/CAM/TPA admonitions, patience, and guidance, the Company's actions too often fell short in meeting their probation requirements. Some of the Company's uphill battle has been what any similarly situated organization might have faced. Counsel at an April 2018 hearing aptly identified this issue: The Company faced "the challenge of having a centralized compliance function in a company that has historically been more decentralized." This issue came to light, relatively early in the initial probation period, when the Company "prepped" its ships in advance of TPA and CAM visits, undermining the ability of the court to receive an unvarnished picture of the compliance status of the company's operations. Moreover, it was learned that this effort was done without the knowledge of the Company's officer in charge of ECP implementation, further underlining his lack of authority. While decentralization was a contributory cause of some of the Defendant's shortcomings during the probationary period, the real culprit was a lingering culture of cutting corners to serve the bottom line.

Years Two and Three

During the next couple years of probation, the Company made some notable improvements. By April 2020 before the onset of COVID-19-related restricted operations, changes at the board of directors' level included compliance training and a new related Board committee. While culture was identified early in the process, it took until 2019 to complete the development and execution of a survey by an experienced marine culture consultant. The consultant surveyed over 70,000 employees and produced a report that illuminated the deficits in the company culture related to compliance. The Company initiated efforts to respond to these survey results that echoed the refrain that the Company housed a blame culture, and observations that its leadership did not take steps to learn from failures. On the positive side, the person in charge of ECP compliance continued to grow a strong environmental officer corps. The Company also made some efforts to enhance its internal audit function, designed to maintain monitoring of improvements after probation ended.

Nevertheless, evidence of continued executive lack of commitment to the ECP's purpose and goals persisted, which culminated in the March 2019 revocation petition discussed above. Other challenges continued. While the Company implemented significant measures to reduce the discharge of non-food items in food waste, it only did so after the TPA surfaced the issues. The issue had been previously raised by the company's own engineers in an ECP required

engineering survey. However, the company ignored those concerns, and it was not until the TPA physically examined food waste tanks that this problem was further identified and addressed. Ships also experienced repeated gaps in basic compliance support relating to pollution prevention and equipment. Crew expressed that malfunctioning equipment was creating a significant workload issue and that Company efforts reflected a mindset that failed to learn from prior incidents. They also expressed frustration as to the Company's failure generally to listen to common issues the crews raised. Barriers driven by corporate decentralization and lack of coordination also remained, leading to hindered development of comprehensive responses to the corporate-wide survey, among other recurring issues. In addition, the Company persistently failed to develop an effective, independent internal investigation function. Finally, officers in charge of ECP compliance continued to lack the authority to implement it, even following the June 2019 probation violations, which included admitting as much. This, too, was a product, in part, of the Company's decentralized structure and leaderships' tepid commitment to prioritizing a more robust, healthy corporate culture.

By July 2020, the Court's enduring concern remained that the Company did not lack for those with the ability and dedication to accomplish compliance goals; instead, the continuing question was whether the Company's top leadership had the lasting resolve to back up its words and support such efforts, to develop a learning culture, and to focus on root cause analysis instead of narrowly blaming individuals or minimizing the causes of chronic problems.

Finally, this period was shaped by the unexpected arrival of COVID-19. The pandemic certainly created unprecedented challenges for the Company, including those well beyond compliance in this matter, while it experienced mounting, massive financial losses. However, the pandemic also put into ever starker relief the Company's continued lip service to compliance while its deeds demonstrated otherwise. Notably, the pandemic struck after more than three years of probation in this matter. As the Court pointed out to the Company, the unprecedented downtime in passenger service offered it an equally rare opportunity to pursue certain compliance goals. Nonetheless, the Company did not take full advantage of this opportunity, and its struggles under probation continued as passenger service slowly resumed.

The pandemic of course created challenges for the CAM and the TPA. Building on relationships established in the first years of the monitorship, the CAM and TPA were able to continue to monitor the operations of the ships, using a variety of virtual meetings and informal communications.

Year Four

Moving toward the first half of 2021, the Company made some headway, with some notable Board-related measures. They included hiring a new board member with significant compliance experience, forming a new compliance committee with outside counsel, participating in compliance training, and setting clearer expectations for compliance for senior management tied to performance-based compensation.

In addition, there was an increase in top Company leadership engagement in compliance matters by this point. A C-level position was set up, reporting to the Company CEO on compliance issues. Development of the environmental officer program continued. Also, acknowledging its continued shortcomings in internal investigations, the Company created a new related investigation group. The Company also finally began to act on the results of its Company-wide survey (noted above, involving 70,000 shipboard and shoreside employees), which called for changes to corporate culture.

The Company readily admitted at this time, however, that it still had fallen short of many of the ECP's objectives. Moreover, most of the noted achievements appear to have been motivated (or required) by the Court's threat to close US ports to Company ships and the March 2019 probation revocation discussed above, and its subsequent resolution agreement, all of which were rooted in the Company's failures to achieve the ECP's objectives. This period was also marked by a hearing at which the Court had to remind a recalcitrant and defensive Company that it was a convicted criminal, and a recidivist one at that.

As the probation moved into these later years, employees increasingly feared whether Company support for compliance measures would continue beyond probation's end. Similarly, although improvements could be seen, such as centralizing governance in several areas, the Court still looked for more concrete evidence that Company leadership really intended to "walk the walk," i.e., transition from predominantly messaging to concrete, measurable compliance actions that moved the Company away from a blame culture. Some examples included the authority of the Chief Ethics & Compliance Officer and the Environmental Corporate Compliance Manager remained unclear, the implementation of the corporate-wide survey's results was still unresolved, and the lack of true independence of the newly established internal investigation group.

Final Year of Probation

Like previous years, the final year of probation included both promise and concern. On the positive side, the Court commended the Company's establishment of a new Ethics & Compliance group at the same level as operations in the corporate structure. The Court also saw incidents in which employees felt comfortable enough to speak up (anonymously or otherwise) when they encountered issues such as compliance requirements putting crew well-being at risk.

Employees voices, however, also uncovered discouraging evidence of enduring culture shortfalls. Several reports from multiple ships led to an investigation about culture akin to this case, where crew members were accused of intentionally mismanaging food waste accompanied by abusive behavior for those who disagreed with it. In addition, a follow-up survey, administered (like the first) to tens of thousands of shipboard and shoreside employees, revealed significant, encouraging progress but also enduring, substantial deficits in areas key to continued improvement *post*-probation: weak organizational culture maturity and leadership behavior areas of trust, care, and openness. Finally, an environmental officer reported evidence of

falsified maintenance records, which led to an investigation that showed similar conduct on other ships.

Critical aspects of the Company that led it to being a recidivist criminal endure. By the last year of probation, some employees still reported a blame culture where leadership is unwilling to learn from mistakes and resists feedback and efforts to face its shortcomings until legally forced to do so, despite convicted prior criminal activity. Employees, many of whom still felt uncomfortable speaking up even after five years of Company probation, reported sharing the same concern as the Court: Will management backslide on compliance efforts after probation ends?

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[1] Known as well by other names, this liquid is the oily mixture that collects in the bottommost depths of ships' engine and mechanical rooms. Ships are required to employ certain technology, namely an Oily Water Separator ("OWS"), to separate the oil and water before any discharge outside the vessel.

[2] The applicable statutes include the Act to Prevent Pollution from Ships, 33 U.S.C. §§ 1901 to 1914 ("APPS"), which codified the International Convention for the Prevention of Pollution from Ships, as modified by the Protocol of 1978 (the "MARPOL Protocol").

Proper treatment of oily bilge water includes several steps but has two key components: an OWS and an oil content monitor, which tests whether the amount of oil in the bilge water is below a certain threshold. Regulations further require a proper treatment and discharge log.

APPS and the MARPOL Protocol cover more than just oily bilge water and apply to more than cruise liners, including container ships, oil and chemical tankers, and cargo ships.

[3] The counts were conspiracy (under 18 U.S.C. § 371, Count 1), failing to log or falsifying logs for discharge of oily bilge water without proper treatment (under APPS, 33 U.S.C. § 1908(a), Counts 2-5), and obstruction of proceedings for presenting false log records to federal inspectors (under 18 U.S.C. § 1505, Counts 6-7).

[4] The parties decided that restitution was not applicable in this case, but that remediation in the form of payment to community service organizations was appropriate, pursuant to U.S.S.G. § 8B1.3. The $10M organizational community service payment allocated $7M to the National Fish and Wildlife Foundation (for projects focusing on environmental remediation and restoration) and $3M to the South Florida National Parks Trust (for a variety of conservation efforts with the wetland and ocean national parks in South Florida). As of 2016, fines from other organizations related to APPS violations have totaled more than $360 million. The parties here agreed that the fines would be determined pursuant to 18 U.S.C. §§ 3553 and 3571, and that U.S.S.G. §§8C2.1 and 8C2.10 did not determine the fine range for the environmental crimes at issue, because the base offense level was determined by § 2QI.3.