

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA : CRIMINAL NO. 15-197
: :
: SECTION: "H"
VERSUS : :
: :
GRAND ISLE SHIPYARD, INC. : :
: :

**GOVERNMENT'S SURREPLY TO DEFENDANT'S REPLY TO GOVERNMENT'S
OPPOSITION TO DISMISS COUNTS 4-11 OF THE SUPERSEDING INDICTMENT**

NOW INTO COURT, comes the United States of America, to respond to Grand Isle Shipyard, Inc.'s ("GIS") Reply in Support of its Motion to Dismiss Counts 4-11 of the Superseding Indictment. Rec. Doc. 171-2. For the reasons stated in its Opposition and those stated below, the government requests that this Court deny GIS's Motion to Dismiss Counts 4-11.¹

GIS objects to the government's legal arguments opposing GIS's Motion to Dismiss the OCSLA counts in the indictment. GIS asserts that the government has attempted to "re-write how Congress structured OCSLA as well as parse OCSLA and the implementing regulations in an arbitrary manner." Rec. Doc. 171-2, p. 1. GIS argues that because Title 43, United States Code, Section 1348(b), under the title "Enforcement of Safety and Environmental Regulations," imposes a *duty upon any holder of a lease or permit* to "maintain all operations within such lease area or within the area covered by such permit in compliance with regulations intended to protect persons, property, and the environment on the outer Continental Shelf," Section 1348 is the

¹ The Second Superseding Indictment returned on March 10, 2016, did not change the substance of Counts 4-11. For ease of reference, the government's citations to the allegations against GIS will continue to refer to the Superseding Indictment.

provision that also “determines the entities subject to liability.” *Id.* at 2. A plain reading of the text does not support this assertion. Section 1348(a) provides that the “Secretary, the Secretary of the Department in which the Coast Guard is operating, and the Secretary of the Army shall enforce safety and environmental regulations promulgated pursuant to this subchapter.” It does not specify upon *whom* the departments will take enforcement action. In effect, because Section 1348(b) imposes specific duties upon “any holder of a lease or permit under this subchapter,” GIS infers, without support in the text, that Section 1348(b) limits liability under OCSLA to those two categories *exclusively*, because it “determines the entities subject to liability.” *Id.* at 2-3, 9. But Section 1348(b) does not say that it limits all liability under OCSLA. In fact, reading Section 1348(b) that broadly would moot entire swaths of regulation, because, as noted by the IBLA in its *Island Operating* opinion, “reliance on 1348(b) as imposing exclusive responsibility for compliance with OCSLA’s implementing regulations on lessees would preclude enforcement actions against operators.” *Island Operating*, 186 IBLA 206 (Ex. A to Rec. Doc. 160-1), p. 9, n. 11; *cf.* 30 C.F.R. § 250.105 (“*You* means a lessee, the owner or holder of operating rights, a designated operator . . .”).

In Section 250.146(c), under the title “Who is Responsible for Fulfilling Leasehold Obligations?” when it comes to determining who is responsible for complying with the requirements of Section 250, the answer is that “*the lessee, the operator (if one has been designated) and the person actually performing the activity to which the requirement applies are jointly and severally responsible for complying with the regulation.*” 30 C.F.R. § 250.146(c) (emphasis added). OCSLA states that *any person* who knowingly and willfully violates a regulation designed to protect health, safety, or the environment or conserve natural resources, is liable for criminal penalties. 43 U.S.C. § 1350(c) (emphasis added). The term “person” in the

regulations is not limited to lessees or permit holders who have a duty under Section 1348 to maintain operations in compliance with regulations. 30 C.F.R. § 250.105 (“*Person* includes a natural person, an association (including partnerships, joint ventures, and trusts), a State, a political subdivision of a State, or a private, public, or municipal corporation.”) (emphasis in original). Despite that language, GIS argues that it is contrary to Congressional intent to hold those persons, in this case contractors, who perform activities under the welding regulations and are required by law to comply with those regulations, criminally *liable* when they knowingly and willfully violate the regulations. Rec. Doc. 171-2, pp. 3, 5, 8.

GIS reiterates its argument from its original Motion that “responsibility” and “liability” are not the same, and that Section 250.146(c) was written to “prevent lessees from foisting blame for violations of Part 250 regulations upon a contractor.” Rec. Doc. 171-2, p. 7. The government agrees that this language prevents *lessees*, whose duty it is to maintain operations in compliance with BSEE regulations, 43 U.S.C. § 1348, from shirking their duties, but that does not mean (nor does the regulation say) that lessees are *solely* or *exclusively* responsible. Instead, “[a]ny person” who knowingly and willfully violates health, safety, and environmental regulations governing their activity offshore may be held criminally liable. 43 U.S.C. § 1350(c). In other words, while BSEE’s regulations *allow* it to ignore the allocation of blame between a lessee and its contractors, nothing in the regulations or statute *requires* it to punish the lessee alone for a contractor’s wrongdoing or *forbids* it from holding contractors themselves liable. GIS argues that the government and a contractor must have *privity* (without citing any authority in either of its briefs) before the government can impose OCSLA liability. Rec. Doc. 171-2, p. 10. But “traditional notions of ‘privity’ as found in the civil jurisprudence do not apply in this criminal law context,” *United States v. Atl. States Cast Iron Pipe Co.*, No. 03-852, 2005 WL

2138701, at *7 n. 11 (D.N.J. Aug. 31, 2005), so the United States does not need, and OCSLA and its regulations do not require, privity as a condition to take enforcement action against criminal violations of these regulations.

The government's reading of OCSLA and its regulations does not require "a series of linguistic roadblocks," Rec. Doc. 171-2, p. 1; rather, it fits neatly with the use of the term "You" in all Part 250 regulations: The regulations use the term "You" for operators and lessees to inform them what regulations they must observe when operating on the OCS. Everyone else on a platform, including contractors, is only liable under Section 250.146(c) for compliance with the regulations governing the work they *actually perform*, so a company performing construction work on a platform that includes welding would not be responsible or liable for ensuring that the platform did not have open holes in its grating such that its employees or agents could fall and injure themselves. *See Island Operating*, 186 IBLA 206 (Ex. A to Rec. Doc. 160-1), p. 18, n. 29. This reading of the regulation does not distort the purpose of OCSLA or require new rule-making because Section 1350(c), which is not entity-specific like Section 1348(b), does not limit enforcement actions to those defined as "You" under Section 250.105. The regulations broadly define "person" to mean "a natural person, an association (including partnerships, joint ventures, and trusts), a State, a political subdivision of a State, or a private, public, or municipal corporation," and that is who may be held criminally liable for violations under Section 1350(c)²

None of GIS's arguments concerning its interpretations of OCSLA and its regulations warrants dismissal of the indictment under GIS's "Fair Notice and Due Process" argument. Rec. Doc. 171-2, p. 11. The government must prove at trial that GIS *knowingly and willfully* violated

² The Third Circuit came to a similar conclusion about the breadth of the term "any person" when it analyzed whether a provision in the Resource Conservation and Recovery Act that created criminal liability for "any person" who knowingly violated the Act's requirement that owners and operators of facilities that dispose of hazardous waste do so with a permit from the Environmental Protection Agency applied to those persons who were not owners and operators. *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 665 (3d Cir. 1984).

the welding regulations. When there is a scienter requirement for conviction of persons who violate the regulations governing the activity they perform, it is difficult to show a due process or fair notice violation. *See United States v. Kim*, 808 F. Supp. 2d 44, 52 (D.D.C. 2011); Rec. Doc. 132-2, p. 2.

WHEREFORE, for the reasons contained herein and those stated in the government's Opposition, the United States respectfully requests this Honorable Court deny Defendant's Motion to Dismiss Counts 4-11 of the Superseding Indictment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2016, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all defense counsel of record.

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