

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION**

DONJON-SMIT, LLC

VS.

**ADMIRAL KARL L. SCHULTZ, CAPTAIN
JOHN W. REED, COMMANDER NORM C.
WITT, and COMMANDER MATTHEW J.
BAER, IN THEIR OFFICIAL CAPACITY
AS OFFICERS OF THE UNITED STATES
COAST GUARD**

NO. 2:20-CV-00011 LGW-BWC

**PLAINTIFF DONJON-SMIT, LLC'S
RESPONSE TO THE COURT'S INITIAL QUESTIONS**

Pursuant to this Court's February 21, 2020 Order, Plaintiff DONJON-SMIT, LLC ("DONJON-SMIT") files this Response to the Court's initial questions, and in support of this submission offers the Affidavit of Timothy P. Williamson¹, who offers his testimony individually and in behalf of Donjon-SMIT, and states as follows:

1. **How does the Large Section Demolition plan (or plan put forth by T&T Salvage) provide for a "more expeditious or effective response to the spill or mitigation of its environmental effects" than the Small Section Demolition plan put forth by Plaintiff?**

DONJON-SMIT contends that the plan put forth by T&T Salvage does *not* provide for a more expeditious or effective response to the spill or mitigation of its environmental effects. In fact, the T&T plan increases the risk of environmental damages, moves the completion date

¹ Each and every factually assertion in this submission is supported by the Affidavit of Timothy P. Williamson, in his individual capacity and as corporate representative of Donjon-SMIT, LLC. The undersigned placed direct cites to paragraphs in the affidavit, where most helpful, but incorporates the affidavit herein as verified testimony.

forward by only one month under a very questionable schedule, and costs significantly more than DONJON-SMIT's plan. Affidavit of Timothy P. Williamson, Attached hereto.

The T&T methodology (LSD), compared to the DONJON-SMIT's preferred methodology (SSD), is determinedly not more expeditious or effective for the following reasons:

Methodology Risk: The T&T LSD has failed to remove all the large sections on two previous occasions, when tried on similar casualties. The T&T plan calls for cutting the Golden Ray into eight, ultra large sections. The discussion of why ultra large sections will not work was addressed in DONJON-SMIT's salvage plan. *Id.* at 8.i. The only car carrier (of three similar casualties) successfully removed without spilling cargo used DONJON-SMIT's proposed methodology. No explanation has been given as to why large section cuts would possibly work this time, in the middle of the St. Simons Sound. DONJON-SMIT fully expects the wreck and her sections to break up and spill cargo should this method be utilized. Further, the T&T plan made sweeping inaccurate generalizations on the wreck condition and they are, essentially, planning for failure. In fact, technical deficiencies of T&T's plan were noted in an email exchange between FOOSC and SERT. *Id.* at 8.a.ii. A repeat of the structural failures of the types that were experienced by the Baltic Ace or the Tricolor would be catastrophic in the St. Simons Island Sound, especially when it is a known likely outcome. Upon information and belief, during a recent public meeting, Jim Elliott of T&T stated that T&T expects to lose one hundred cars overboard, per cut. It is unclear whether T&T's timeline contemplates the additional time it will take to recover the roughly 700 cars that will end up in the St. Simons Sound, as a result of the LSD proposed by T&T.

Unchallenged Assumptions: The FOOSC, either intentionally or unwittingly, in issuing his decision letter on Owners request for deviation to allow for another resource provider, relied upon assumptions that simply were untrue, as follows:

- FOSC assumed that DONJON-SMIT's plan would push until 2021, which was not accurate. DONJON-SMIT's plan would have completed approximately one month later than the plan proposed by T&T. At a meeting with DNER discussing the EPB, DNER was surprised to learn that the DONJON-SMIT completion date was significantly less than what they had been told by RP (i.e., that the removal under DONJON-SMIT proposal would stretch into 2021, which is why the barrier was so necessary).
- FOSC wrongly assumed the failure of the P&I Club and DONJON-SMIT to finalize a salvage plan was due to the P&I Club waiting for the plan to be developed by DONJON-SMIT. This is not true. The Insurer failed and refused to use best endeavors to reach an agreement on the salvage plan, because it was insisting on renegotiating the pre-approved contract and pricing terms as set forth in the NTVRP, in direct violation of OPA 90. DONJON-SMIT provided to the P&I Club a detailed salvage plan that contemplated possible salvage and wreck removal options that could be utilized, but also made it clear to the P&I Club that it was not renegotiating the terms of the NTVRP. *Id.* at 3.d.
- FOSC wrongly assumed that DONJON-SMIT was not flexible regarding the methodology of the salvage plan. That is simply not true. DONJON-SMIT was not willing to accept the commercial terms proposed by Owner in which Owner was insisting on a riskier plan, i.e., the LSD, but placing the risk and expense on DONJON-SMIT. *Id.* at 3.e.

2. Who, specifically, made the decision to select T&T?

Upon information and belief, DONJON-SMIT believes that the Owner and Owner's Insurer selected T&T at a time when such a deviation from the NTVRP should not have been allowed. DONJON-SMIT contends that the USCG should vigorously enforce its own regulations, including not allowing a deviation that is impermissible under the OPA 90.

3. Who, specifically, was consulted in making the decision to select T&T?

DONJON-SMIT was not consulted and is not aware of all persons or entities who were consulted prior to the decision to select T&T. *Id.* at 7.a. But the record shows that at least the Owner, the Owner's QI, the Owner's Insurer and the Owner's salvage consultant, Global Salvage Consultancy each were involved in the process of review of methodology and in pursuing the ITT, which resulted in the selection of T&T. We also know that FOOSC personally met with representatives of T&T on or about December 19, 2019. *Id.* at 7.c.

As cited in the Defendants' responses, the USCG repeatedly took the position that it was the RP's responsibility to select the plan and that the USCG was not going to interfere in that selection process. They apparently did not care that the DONJON-SMIT (then current SMFF) was capable of completing any of the methodologies (see preamble to DONJON-SMIT proposal submitted December 8, 2019) nor that there was a significant disagreement between DONJON-SMIT and RP on the inherent risks of the large section removal.

In reference to the Insurer, the record shows that the P&I Club was critical of the SSD approach, DONJON-SMIT's preferred methodology, and the Owner communicated that information to FOOSC in its letter of November 25, 2019. See Dkt. 20-1, Pgs. 14-18 (at page 8, reference to P&I Club). *Id.* at 3.f.

In reference to Global Salvage Consultancy, the ITT was generated by and bears the watermark of Global Salvage Consultancy. See Dkt. 20-1, Pgs. 27 – 41.

The Owner and the Owner's QI and Insurer were pressing for a Large Scale Demolition but using negotiations for costs and risk management as the basis for failing to agree to a final salvage plan with DONJON-SMIT. *Id.* at 3.g. The letter of intent shows that the P&I Club entered into "exclusive negotiations" with DONJON-SMIT "in order to conclude suitable contracting principles for recovery and removal of the Vessel and cargo...." (See Letter of Intent, Dkt. 21-1, Pgs. 6-8.) The Owner also engaged the services of Global Salvage Consultancy and an early communication with DONJON-SMIT made it clear that they requested DONJON-SMIT analysis of "three high level dismantling scenarios including of pro's and con's on feasibility...." (See Dkt. 20-1, Pgs. 10-12).

However, the record shows that the Owner requested the deviation from NTVRP on December 20, 2019 and FOSC issued his decision letter, granting the deviation, on December 21, 2019, within twenty-four hours of the deviation request. During that twenty-four hour period, FOSC consulted with U.S. Navy Supervisor of Salvage and Diving and the U.S. Coast Guard Salvage Engineering Response Team (See Dkt. No. 20-1 at pdf pages 57-61).

DONJON-SMIT is not critical that FOSC, as part of his due diligence allowed T&T to present its LSD plan to UC; however, DONJON-SMIT is critical that FOSC allowed T&T to present its plan ignoring that DONJON-SMIT was SMFF provider and not allowing DONJON-SMIT to present the DONJON-SMIT plan to address any concerns. If FOSC had allowed such a presentation, DONJON-SMIT would have highlighted the pros and cons of the competing methodologies and would have emphasized its willingness to pursue any plan approved by UC under their SMFF agreement. *Id.* at 3.l.

It is interesting to note that just one day prior to approving RPs deviation request, the USCG Salvage Emergency Response Team specifically charged with reviewing technical details of salvage plans, offered the following criticisms of the T&T plan:

“ limited technical detail is provided, the plan indicates further analysis will be conducted prior to operations.”

“(2) The structural analysis does not include an analysis of the structure in the current condition, nor does it include an analysis of remaining sections throughout cutting and removal; this should be addressed in future revisions of the wreck removal plan.”

According to USGC’s own internal analysis, the T&T plan provided “limited technical detail,” the USCG decided a deviation to be granted. (See SERT emails setting forth conclusions upon review of DONJON-SMIT’s plan and T&T’s plan).

4. Who, specifically, had input into the decision to select T&T?

DONJON-SMIT attempted to provide input into the decision to select any resource provider other than DONJON-SMIT, the resource provider for SMFF as set forth in NTVRP. *Id.* at 3.m. However, its input was seemingly ignored. DONJON-SMIT does not have a complete list of others who provide input into the decision to select T&T. But the record shows that at least the Owner, the Owner’s QI, the Owner’s Insurer and the Owner’s salvage consultant, Global Salvage Consultancy each were involved in the process of selecting T&T. Further, the record shows that FOSC and UC met with T&T prior to the decision to select T&T. Prior to the selection of T&T, the FOSC consulted with U.S. Navy Supervisor of Salvage and Diving and the U.S.

Coast Guard Salvage Engineering Response Team (See Dkt. No. 20-1 at pdf pages 57-61) and their input is set forth in the referenced emails.

5. What evidence exists showing that the vessel owner, as opposed to the Federal On-Scene Coordinator, made the decision to select T&T?

The Letter of Intent, shows that the Owner's Insurer was supposed to use their *best endeavors* to "conclude suitable contracting principles for recovery or removal of the Vessel and cargo...to the satisfaction of the competent authorities." See Dkt. 20-1, Pg. 6.

The Invitation to Tender, prepared and submitted by Global Salvage Constituency, the Owner's salvage consultant, shows that Owner and its Insurer successfully managed to delay a salvage plan in order to secure a competitive bidding scenario. See Dkt. 20-1, Pgs. 26-41. Further, the ITT shows terms economically different from the terms set forth in the NTVRP. Under the terms of the contract between DONJON-SMIT and Owner, Owner was required to compensate DONJON-SMIT "for its services in accordance with the terms of applicable contract form for the category of the response." See Dkt. 22-5, Page 3 of 60. The contract expressly provides that if there is any dispute regarding which category and compensate rate would apply, such a dispute would be "handled in accordance with Article 7 below, but in no case will a response be delayed or altered pending such agreement." See Dkt. 22-5, Page 3 of 60. The parties' agreement then directs DONJON-SMIT to "undertake() and use its best endeavors promptly to commence and execute the salvage, firefighting, and/or lightering services and have the category decided, during or after completion of the services in the manner appearing hereafter. *Id.* at Page 4 of 60. The parties' contract further directs them to "attempt to settle amicably", "mediate" and if mediation fails then proceed to arbitration. *Id.*

The Owner's letter requesting deviation from the NTVRP shows that Owner used the so-called "philosophical differences" in methodology to attempt to justify a deviation from the NTVRP. See Dkt. 20-1, Pgs. 43 – 47. The Owner then provides the FOSC with its own comparison of methodologies and suggests, in conclusion, that the "T&T methodology provides for a more expeditious and effective response and mitigates the environmental risks." See Dkt. 20-1 at 46.

The letter from David L. Reisman, attorney for Owner, to Paul Hankins, representative of DONJON-SMIT, in which he states that Owner "made the decision to utilize a contractor they believe gives them the best opportunity to successfully and expediently remove the wreck." See Letter from Reisman to Hankins, dated December 24, 2019, Dkt. 21-2 at 4. Mr. Reisman goes on to assert that the "Contract does not give DJS the right to determine the means or methodology to respond to a particular casualty. Nor would it make sense for DJS to have such a right, because it's the Owners, not DJS, who may be responsible in the first instance to the United States government and third parties harmed by the casualty and response." *Id.* at 4-5.

The United States Coast Guard ("USCG") responsive pleadings to DONJON-SMIT's Injunction infers the USCG never engaged in a discussion of plan methodology with the USCG approved SMFF provider named in the Vessel Response Plan (VRP) designated and engaged Salvage and Marine Fire Fighting (SMFF) provider. The FOSC seemingly expected the Owner/Responsible Party to select a plan and the FOSC perhaps saw his role merely to approve or reject that plan. The USCG's court filings repeatedly claim that the Owner/Responsible Party wanted a large section removal procedure, yet that USCG never explains why the two plans weren't compared given there was disagreement on methodologies. Further, DONJON-SMIT always maintained it was capable of doing either plan once those alternatives were fully vetted by

the Unified Command (UC) Those actions indicate the UC and FOSC deferred the decision to others. *Id.* at 3.n.

Additionally, DONJON-SMIT offers the following to support that FOSC gave in to the excessive demands of the Owner and Insurer:

- “T&T’s salvage plan met the Owner’s demands and proposed a Large Section Demolition and an Environmental Protection Barrier.” Dkt. 20, at 6.
- “T&T’s plan met [the Owner’s] preferred demolition methodology and preference for placement of an environmental barrier prior to cutting...” Dkt. 20, at
- The Large Section Removal and Environmental Protection Barrier were “preferred by Owner.” See Dkt. 20, Pg. 17.
- “Plaintiff simply failed to provide a plan that the Owner found satisfactory.” Dkt. 20, at 21.
- “Plaintiff ... plan that did not address the Owner’s stated preference for Large Section Demolition and placement of a pre-demolition Environmental Protection Barrier.” Dkt. 20, at 21.
- The “Owner ultimately rejected DJS’ plan.” Dkt. 20-1, page 50 of 67.
- “Owner asserts that they prefer the LSD be performed with the EPB to maximize containment and minimize any adverse environmental impact.” See Dkt. 20-1, 53 of 67.

The FOSC, in his decision memorandum, cites conflict between the Owner and DONJON-SMIT, and sides with Owner without the benefit of any type of presentation or meeting with DONJON-SMIT. See Dkt. 20-1, at 53 of 67.

6. What specific facts and circumstances led to selecting T&T?

On October 26, 2019, DONJON-SMIT, as the designated services provider under the NTVRP, entered into a LOI with Owner's insurer and had a 21-day exclusive time period to provide a salvage plan to the Owner and to the Owner's insurance provider. Dkt. 20, Pg. 5. DONJON-SMIT and Owner and Owner's insurer entered into an exclusive letter of intent, under which they were negotiating exclusively for a salvage plan..

DONJON-SMIT submitted its salvage plan to Owner and Owner's representative on November 5, 2019. Id at. 3.j.

As of November 6, 2019, after expiration of the 21-day period, DONJON-SMIT and Owner still had not discussed salvage plan was because Owner and Owner's Insurer refused to meet. A meeting was scheduled but canceled by P&I Club as soon as they received DONJON-SMIT's salvage plan. Id. at 3.k. At that point, the Owner proceeded to pursue different salvage providers. Dkt. 20, Pg. 5. DONJON-SMIT recommended a Small Section Demolition (SSD) , but Owner and Owner's representatives were insistent that the wreck removal occur with Large Section Demolition (LSD). Id at. 3.h. DONJON-SMIT contends that *Owner did not use "Best Endeavors" during the LOI process and instead, preferred to resort to a competitive bidding process to end up with a fixed price contract (limiting its exposure)*. Further, the USCG did not exercise their statutory responsibility to participate in and oversee the planning process to help reach a final determination on an approved salvage plan. Id. at 3.i.

On November 8, 2019, FOSC issued Amendment 1 to Administrative Order 01-19 to clarify expectations. The Owner was ordered to provide a plan detailing all intended pollutant removal through November 19th, the estimated completion date. Also, Amendment 1 rejected

the Owner's assertion that the removal of the oil from the fuel tanks marked the end of the pollution threat.

On November 8, 2019, DONJON-SMIT, Owner, and a different salvage provider, Donjon Marine Co., Inc. entered into a transitional agreement, under which Donjon Marine Co., Inc. would continue as resource provider for wreck removal services under Owner's NTVRP; however, Owner did not submit to FOSC a request for deviation and FOSC ultimately determined that the circumstances did not warrant a deviation. Dkt. 20, Pg. 5; Id. at 3.o.

On November 18, 2019, Owner's insurer sent an Invitation to Tender for the wreck removal to nine companies, including DONJON-SMIT. The invitation requested LSD, contrary to the recommendation of DONJON-SMIT. Dkt. 20, Pg. 5. The ITT offered financial terms and conditions different from those set forth in the NTVRP; namely, the ITT sought "lump sum budgets clearly stating whether the budgets are for PHASE 1 only, PHASE 2 only or PHASES 1 and 2 combined...." See Dkt 20-1, at Page 37. It is also interesting to note that the ITT was silent on the need for an EPB, ostensibly because DONJON-SMIT had been told that an EPB would be installed regardless of who would be selected under the ITT process. Another peculiarity of the ITT is that a bidder requested the definition of LSD, which was answered "150 tons". This confused the process even further which led to reference to "Ultra large removal" to define the large 4500-ton sections, which DONJON-SMIT opposed.

On November 22, 2019, the FOSC issued Amendment 2 to Administrative Order -01-19 to address possible deviation from the NTVRP. This amendment disallowed deviation from "Wreckshire #1" contract to "Wreckshire #2" contract, i.e., from DONJON-SMIT, LLC to Donjon Marine. Amendment 2 also noted that DONJON-SMIT provided to Owner's RP the salvage plan on November 6th, a day after the end of the exclusive negotiating period. The RP

was also directed in Amendment 2 to provide certain information to FOSC, including a copy of the original LOI, the entire DONJON-SMIT salvage proposal along with supporting documents, a detailed explanation why the DONJON-SMIT salvage proposal was unacceptable, and any additional information provided from DONJON-SMIT why it believed its salvage proposal met all requirements. The RP was also directed to provide, by November 25th, the Invitation to Tender (ITT).

On November 26, 2019, DONJON-SMIT representatives met with the FOSC and the State On-Scene Coordinator (SOSC) to present to FOSC information that DONJON-SMIT believed had been withheld from the UC, primarily the salvage plan for wreck removal. Once these documents were provided to the FOSC, there were no further discussions with the FOSC, the SOSC or the US. *Id.* at 3.t.

DONJON-SMIT again submitted a timely bid (i.e., prior to December 8th) citing commercial terms consistent with the NTVRP and Donjon Marine submitted a bid with identical methodology, proposing a WRECKFIX contract (lump sum effort). The two bids were submitted to provide the RP and its representatives the latitude to make a selection while maintaining compliance with the NTVRP. *Id.* at 3.u.

On December 16, 2019, DONJON-SMIT presented its salvage plan for wreck removal to the RP's Special Salvage Representative. Although DONJON-SMIT made repeated requests for a meeting with UC, no UC representatives were in attendance. *Id.* at 3.v-w.

On December 17, 2019, DONJON-SMIT met with the FOSC and the QI informing them that DONJON-SMIT would undertake whatever wreck removal option the FOSC decided upon, but only under the terms of the NTVRP, not under the fixed price arrangement called for in the ITT. *Id.* at 3.x.

On the first page of its proposal, the DONJON-SMIT plan stated the following: “While this plan was developed to meet Unified Command (UC) objectives with the benefit of DONJON-SMIT’s experience, we are committed to a full planning review at the onset and are open to changes in methodology and tactics as determined by the UC before plan execution and at any of the plan’s various stages. Additionally, we are prepared to assess progress with the UC and adjust tactics and assets as UC objectives possibly change from the initial salvage plan as the work progresses. Other tactics that were considered are discussed in section VII, Other Methodologies Considered, of the attached document.” Id. at 3.y.

DONJON-SMIT’s plan expressly provided that ultra large and very large removal was one of the other methodologies considered and setting forth the pros and cons of such an approach. DONJON-SMIT did not refuse to pursue LSD but refused to recommend the riskier plan and unfairly be required to assume the risk for such a risky approach. Id. at 3.z-aa.

On December 19, 2019, DONJON-SMIT learned that T&T was presenting their salvage plan to the entire UC. DONJON-SMIT requested but was refused to also have an opportunity to present its salvage proposal directly to UC; however, it was not given opportunity to present its plan to entire UC. Instead, the FOSC instructed that DONJON-SMIT should follow up directly with the Owner. Id. at 3.bb.

On December 20, 2019, Owner requested a deviation from the NTVRP in order to replace another resource provider, T&T Salvage (T&T). Dkt. 20, Pg. 5.

On December 21, 2019, within twenty-four hours of receiving a deviation request from the Owner, the FOSC approved Owner’s request for deviation from NTVRP and added T&T as resource provider. Attached to Defendant’s response is a December 21, 2019 FOSC Decision Memo (“Decision Memo”).

On December 21, 2019, FOSC approved Owner's NTVRP and claims it was the result of a "thorough review of the Owner's request and relevant information" and determined that "doing so would provide for a more expeditious and effective response to the spill or mitigation of its environmental effects in accordance with 33 U.S.C. § 132(c)(3)(B)", all within 24 hours of the Owner's and Owner's Insurer's request.

DONJON-SMIT was not involved in selecting T&T. *Id.* at 7.b. DONJON-SMIT was the SMFF, preapproved and selected in and under the NTVRP. During the period within which DONJON-SMIT had an exclusive period of negotiating for the salvage plan, the Owner and Insurer failed to negotiate using their best endeavors to finalize terms of the salvage plan. *Id.* at 3.b, 7.b. Although DONJON-SMIT submitted a salvage plan that showed very clearly its willingness to fulfill the terms of its SMFF responsibilities under the NTVRP, the Owner and its insurer did not accept the salvage plan and, instead, used the opportunity to pursue competitive bidding. *Id.* at 3.j, 7.b.

Car carriers are unique vessels. To DONJON-SMIT knowledge and belief, only SMIT, partners in DONJON-SMIT, has attempted wreck removals of these difficult car carrier projects. T&T has little experience in wreck removal on this scale of difficulty. In fact, their wreck removal experience in large scale removal vessels in general is extremely limited.

7. Exactly what exceptional circumstances justify deviation from the Non-Tank Vessel Response Plan?

DONJON-SMIT contends there were no exceptional circumstances to justify Defendants' deviation from Owner's NTVRP. Defendants claim that "exceptional circumstances" existed to justify a deviation under 33 CFR § 155.4032(a), but their interpretation of that phrase frustrates

the entire purpose of requiring NTVRPs and contradicts the Coast Guard's own administrative guidance. Defendants' interpretation of "exceptional circumstances" is nonsensical because it would make practically every vessel oil spill an exceptional circumstance deserving of an NTVRP deviation. Defendants argue that exceptional circumstances existed because "[t]he vessel is very large and in very close proximity to a navigable channel that is the sole access route to the one of the busiest ports in the United States – the Port of Brunswick. . . [t]he vessel is grounded in an environmentally sensitive area that includes prime shrimping grounds and a significant roosting area for migratory birds[.]. . . [and] [t]he vessel is aground in close proximity to the major tourist destinations of St. Simons and Jekyll Islands. Dkt. 20:13; *see also* Dkt. 20-1:51-67. Yet these factors merely indicate that a substantial discharge threat exists. Under 33 CFR § 155.5010, NTVRPs are to be implemented anytime the FOSC determines there is a "substantial threat of discharge." Therefore, under Defendants' interpretation of "exceptional circumstances", every time an NTVRP is triggered by a substantial threat, that same threat would also justify immediate deviation from the NTVRP under 33 CFR § 155.4032(a), rendering NTVRPs pointless. Every NTVRP implementation cannot also constitute an "exceptional circumstance".

Defendant's interpretation of "exceptional circumstances" is also contradicted by congressional intent and the Coast Guard's own stated purpose for promulgating the NTVRP requirement. OPA 90 as a whole was "designed to streamline federal law so as to provide quick and efficient cleanup of oil spills[.]" *Water Quality Ins. Syndicate v. United States*, 225 F. Supp. 3d 41, 48 (D.D.C. 2016). The NTVRP requirement is just one example of how OPA 90 'streamlines' oil spill responses. Before NTVRPs, when a spill occurred the responsible party was also charged with selecting its own emergency resource providers, causing slower response times, limiting federal officials to a much more passive role, and pitting the responsible party's desire to

reduce its cleanup costs against significant environmental considerations. Now, when a discharge occurs or may be imminent, a non-tank vessel owner is required to act in accordance with its NTVRP and immediately solicit the help of its pre-contracted SMFF providers. 33 U.S.C. § 1321(c)(3)(B).

According to the Coast Guard's own administrative guidance published in 2009, the purpose of the NTVRP requirement was "to ensure a timely response for an incident." *Salvage and Marine Firefighting Requirements; Vessel Response Plans for Oil*, 73 FR 80618-01. When confronted with one commenter's concerns that the NTVRP requirement would prevent owners from "select[ing] the most suitable salvage and firefighting resources for each individual emergency and the response beyond that available via individual entities heavily reliant on dedicated resources[,]," the Coast Guard explained that it "fe[lt] that there is a need to ensure that an incident be responded to quickly and without the need for contract negotiations during an actual emergency. In order to ensure this happens, contracts must be in place as part of the vessel's response plan." *Id.* The Coast Guard also noted that "based upon resource providers' past performance. . . this [NTVRP] regulation is necessary to ensure resources are available when needed." *Id.* The Coast Guard's only given examples of an exceptional circumstance are "in the case of a resource provider's inability to perform their required services. . . [or] if a resource provider is found to be non-responsive or deficient[,]," neither of which occurred here. Defendants' definition of "exceptional circumstances" is much broader and would frustrate the Coast Guard's stated purpose for NTVRPs by allowing responsible parties to re-open contract negotiations seemingly every time a "substantial threat" exists.

In this instance, there simply is no evidence or suggestion that DONJON-SMIT failed to perform or was unable to perform their required services or that it was non-responsive or deficient.

In fact, the record shows that at all times relevant, DONJON-SMIT' performance satisfied the purposes of OPA 90, by being immediately responsive and available to provide the services contracted for under NTVRP. Id. at 3.gg.

In this instance, there is no evidence or suggestion that DONJON-SMIT failed to or was unable to perform their required services or that it was non-responsive or deficient. In fact, DONJON-SMIT was immediately responsive, on the scene within two hours, and was praised for its performance as resource provider. Id. at 3.ii.

If all FOSCs used Defendants' definition of "exceptional circumstances" and frequently authorized NTVRP deviations, marine salvage companies would also likely stop bidding to become SMFF providers. To become the SMFF provider for the GOLDEN RAY, DONJON-SMIT had to expend significant time, money, and resources. Further, once DONJON-SMIT was awarded the SMFF contract, it had to continuously deploy its resources to ensure it was always prepared to respond to the GOLDEN RAY. But under Defendants' interpretation of "exceptional circumstances", DONJON-SMIT's significant efforts and investment could be easily and frequently cast aside by FOSCs even after receiving the SMFF contract. Few companies would be willing to endure such a competitive and expensive competitive process only to be rewarded with a meaningless contract.

Casually allowing a deviation from the NTVRP undermines the confidence in the resource providers. The Coast Guard should vigorously enforce its own regulations, including not deviating unless there are, in fact, exceptional circumstances, to ensure that resource providers will have confidence that the time and energy that they put into the NTVRPs and their contracts is warranted. DONJON-SMIT spends significant time and millions of dollars putting its capability together, as

a ready and capable resource provider. The primary return DONJON-SMIT receives on that investment is responding to these types of incidents.

Moreover, while nowhere in its administrative guidance does the Coast Guard expressly define “exceptional circumstances”, the term has been used in other federal rules and regulations to establish a high threshold. For example, under Supreme Court Rule 20, an “extraordinary writ” such as a writ of mandamus or habeas corpus may only be granted upon a showing of “exceptional circumstances [that] warrant the exercise of the Court’s discretionary powers[.]” U.S. Sup. Ct. R. 20. Tellingly, though thousands of such petitions have been filed, the Court has not granted an extraordinary writ of habeas corpus since 1925, *see Ex parte Grossman*, 267 U.S. 87 (1925), or a writ of mandamus since 1962. *See Fong Foo v. United States*, 369 U.S. 141 (1962). Similarly, under Section 1229a of the Immigration and Nationality Act, a judge’s removal order made in absentia may only be rescinded under “exceptional circumstances”. 8 U.S.C. § 1229a(e)(1). This language has been interpreted to “set[] a high bar that ‘will be met in only rare cases.’” *Jimenez-Castro v. Sessions*, 750 F. App’x 406, 408–09 (6th Cir. 2018) (quoting *Kaweesa v. Gonzales*, 450 F.3d 62, 68 (1st Cir. 2006)); *see also Herbert v. Ashcroft*, 325 F.3d 68, 72 (1st Cir. 2003). Likewise, pursuant to 18 U.S.C.A. § 3145(c), which governs the review of detention or release orders in criminal proceedings, a judicial officer may only order the release of a defendant held under a detention order if “it is clearly shown that there are exceptional reasons why such person’s detention would not be appropriate.” 18 U.S.C.A. § 3145. Here again, what qualifies as exceptional has been narrowly defined. *See United States v. McGillivray*, No. 2:11 CR 22-7, 2012 WL 137409, at *2 (quotations omitted) (W.D.N.C. Jan. 18, 2012) (“Courts generally have defined ‘exceptional reasons’ as circumstances which are clearly out of the ordinary, uncommon, or rare.”); *United States v. Lea*, 360 F.3d 401, 403 (2d Cir.2004) (quoting *United States v. DiSomma*, 951 F.2d 494,

497 *2d Cir.1991) (“Exceptional circumstances exist where there is ‘a unique combination of circumstances giving rise to situations that are out of the ordinary.’”).

8. What process was used to discover and analyze any exceptional circumstances?

Based on Defendants’ own definition of “exceptional circumstances” as discussed above, Defendants’ process seemingly amounted to the FOSC’s evaluation and determination that there was a “substantial threat of discharge” which threatened the surrounding environment. Again, such an interpretation of 33 CFR § 155.4032(a) would completely undermine the intent behind requiring NTVRPs and justify deviations any time a response plan is implemented.

According to the USGC, FOSC “*First determined* the request was for a specific service, salvage, and limited in scope to this specific request” (See Dkt. 20, 6) and “*then determined* exceptional circumstances existed to consider the Owner’s request given the location, scale, and rarity of a casualty of this magnitude in the U.S. coastal waters.” See Dkt. 20, 6 (emphasis added). FOSC made his determination that exceptional circumstances existed not based upon philosophical differences between DONJON-SMIT and the Owner, or the quality of separate methodologies but, rather, based upon the ship’s size, the fact that it was capsized in an environmentally sensitive area, and its proximity to two resort islands. Dkt. 20, 13. FOSC in this instance is not exercising discretion to determine whether exceptional circumstances exist, he is using his power to create an entirely new definition under the regulations and expand his authority to allow a deviation simply because an event has occurred.

Based upon FOSC determination as set forth in his decision letter, *exceptional circumstances* existed from the moment he arrived on scene as the federal officer. If the court were to allow such broad discretion, then at the very first moment FOSC would have been

empowered to accede to the requests of Owner to deviate from the NTVRP, without regard to all of the resource providers who were already deemed “qualified” and contractually obligated to provide the services set forth in the NTRVP.

Additionally, FOSC appears not to have considered the potential economic motivations of the Owner and Owner’s insurer for requesting a deviation. Noticeably absent from FOSC’s decision letter is any reference or mention to the change in economic terms or risk between the NTVRP and the ITT and proposal submitted by T&T. The very fact that the economic terms had changed should have alerted FOSC that the delays associated with securing approved salvage plan between DONJON-SMIT was not the result of an uncooperative designated resource provide, but the result of the types of economic negotiations that were specifically the target of OPA 90.

FOSC, in his decision letter approving a deviation on the basis of so-called “exceptional circumstances” writes: “**It is unclear** why DJS has been unwilling or unable to acquiesce to the Owner’s reasonable requests for LSD and an EPB. However, DONJON-SMIT’ lack of adaptability in meeting the owner’s demands supports a determination that DONJON-SMIT and the Owner have philosophical disagreements as to the preferred methodology for salvage operations.” See Memorandum from N.C. Witt, CDR to File, dated 21 Dec. 2019, Page 6, attached as Exhibit 8 to Docket #20. If FOSC had conducted a proper review and consideration of the Owner’s deviation request, he would have properly concluded that DONJON-SMIT was willing to perform its pre-contracted services (pursuant to NTVRP), including any one of three types of salvage and wreck removal methodologies, but that the stalemate between DONJON-SMIT and Owner was the result of the Owner attempting to re-negotiate its contract with DONJON-SMIT and/or force a stalemate to justify Owner resorting to competitive bidding. The

net effect has been a delay in continuing and completing the salvage operations for which DONJON-SMIT was pre-contracted and approved under NTVRP. *Id.* at 4.d.

Additionally, Defendants seemingly had no established process to make the decision whether the T&T plan was superior to DONJON-SMIT's plan and, if so, whether that should have been considered in the context of a deviation request (particularly where DONJON-SMIT indicated its willingness to consider other methodology). DONJON-SMIT, as the pre-contracted SMFF provider (with SMIT as the world's most experienced and leading marine salvor) was not given any opportunity to meet with the FOSC or Unified Command and discuss why a small section removal plan would be best. Nor did Defendants ever solicit any technical data from DONJON-SMIT, the entity that had worked on the GOLDEN RAY for months and acquired significant knowledge about the vessel's condition. Nor did Defendants ever solicit any technical data from DONJON-SMIT identifying DONJON-SMIT's concerns on the risks posed by a large section removal. *Id.* at 7.f. Weeks were spent developing this engineering data and it was seemingly ignored as evidenced by the T&T plan's wrong general assumptions on the wrecks condition and the UC's willingness to accept those faulty assumptions (as evidenced by their approval of deviation and ignoring their own SERT's observation that there was incomplete engineering data). *Id.*

Besides clearly violating DONJON-SMIT's due process rights, Defendants also disregarded the Coast Guard's 'Environmental Response and Preparedness Manual', which states that "FOSCs should be mindful of the need for salvors during a response and ***ensure close coordination with contracted SMFFs*** to ensure successful salvage operations for saving life or property in danger and for preventing damage to the environment." *USCG Marine Environmental*

Response and Preparedness Manual, COMDTINST M16000.14A, Paragraph 2.C.2.b. (30 November 2016) (emphasis added).

Defendants instead met exclusively with Owner, Owner's representatives, Owner's Insurer, and T&T regarding their preferences, effectively shutting DONJON-SMIT out of its 'process' entirely. Further, the FOSC's review of Owner's NTVRP deviation request lasted approximately twenty-four hours; Commander Witt received Owner's request on December 20 and approved the deviation on December 21, ostensibly taking all of the information that Owner provided at face value without seeking any verification or consultation from DONJON-SMIT.

9. **If exceptional circumstances are found, is there any provision of law mandating they be communicated to the approved salvage and marine firefighter?**

The Coast Guard's stated policy is to have excellent communication with the public and stakeholders, from the start and throughout any project. The Coast Guard's policy recognizes the importance to manage External Affairs, i.e., communication and transparency with the public and stakeholder groups ,i.e., "hit it hard and hit it fast to set the correct tone at the onset of a response." See COMDTINST M3010.24, 90-1.

Also, it is "Coast Guard policy is to make available to the public all information about, and imagery of, service activities except those specifically restricted by Reference (l), law, operational security, or policy. This information shall be done in a forthright, expeditious manner. It is critical to manage the balance of timeliness, completeness, accuracy, and synchronization to ensure that information is conveyed in a reasonable manner. Information can be made public electronically, in writing, through imagery, by live or taped broadcast, or person to person. The rules for release of information apply equally to all methods of information

sharing (official and unofficial) and across all mediums and audiences.” See COMDTINST M3020.24, 9-1A.

Further, the Coast Guard’s guidance regarding compliance with OPA 90 and the Chafee Amendment states that “FOSCs should be mindful of the need for salvors during a response and *ensure close coordination with contracted SMFFs* to ensure successful salvage operations for saving life or property in danger and for preventing damage to the environment.” USCG Marine Environmental Response and Preparedness Manual, COMDTINST M16000.14A, Section 2.C.2.b (30 November 2016) (emphasis added). Plainly, while the Coast Guard’s own interpretation of OPA 90 requires FOSCs to closely coordinate with SMFF providers, Defendants instead chose to completely leave DONJON-SMIT in the dark and never afforded DONJON-SMIT with a single meeting to discuss its small-section removal plan.

The same administrative guidance provides that, “[b]efore the FOSC authorizes a deviation, the *FOSC must clearly document why the deviation is necessary* in the MISLE activity and/or other relevant incident response documentation, such as an Incident Action Plan (IAP).” *Id.* at Section 5.C.5.b.(4) (emphasis added); *see also* *Id.* at Section 9.E.1.d.(3) (emphasis added) (“The FOSC may authorize deviations from the services and resources called for in its VRP/FRP under certain circumstances when a deviation from the plan provides a more expeditious or effective response. *The FOSC shall document any authorized deviations.*”). Again, DONJON-SMIT was left in the dark regarding the FOSC’s reasons for approving Owner’s deviation request and did not discover those reasons until filing receiving the Government’s response to DONJON-SMIT motion for injunctive relief.

In this instance, all early communications confirm that USCG and UC had complete confidence in Donjon SMIT, LLC and our client overperformed in all areas and FOSC shuts

down communication with DONJON-SMIT the moment the Owner, the Owner's Insurer and the Owners representatives (QI and salvage consultant) set their focus on a methodology that is not recommended by DONJON-SMIT, but one that it would have undertaken if approved by UC.

As noted above, the USCG regulation implementing the Chafee Amendment [33 CFR § 155.4032(a)], the authority of the FOSC to authorize deviation from an approved VRP for a specific response is limited to a "specific service". The deviation request of the RP in this matter did not limit itself to a specific service or specific services. Rather, it requested a wholesale change in the SMFF response contractor, replacing pre-approved DONJON-SMIT with T&T Salvage. The FOSC approval is for the deviation requested and is not limited to one or more specific services. Thus, the deviation, as approved, exceeds the authority of the FOSC to grant.

More broadly, because the FOSC's deviation approval voided DONJON-SMIT's contract with Owner, DONJON-SMIT's Fifth Amendment rights mandate that Defendants at the very least must share the basis for their "exceptional circumstances" determination. Under the Fifth Amendment of the U.S. Constitution, no person shall "be deprived of life, liberty, or property, without due process of law[.]" The "root requirement" of the Due Process Clause is "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest." *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971); *see also Bell v. Burson*, 402 U.S. 535, 542, 91 S.Ct. 1586, 1591, 29 L.Ed.2d 90 (1971). It is well-established that protected property interests include valid contracts. *See Lynch v. United States*, 292 U. S. 571, 579 (1934) ("The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States."); *see also Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (noting the range of "intangible interests," including contracts, that are

"property for purposes of the Fifth Amendment's Takings Clause"); *Chang v. United States*, 859 F.2d 893, 895 (Fed. Cir. 1988) (quotations omitted) ("There is no question that valid contracts are property[.]"); *Long Island Water-Supply Co. v. City of Brooklyn*, 166 U.S. 685, 690, 17 S. Ct. 718, 720, 41 L. Ed. 1165 (1897) ("A contract is property, and like any other property, may be taken...subject to rule of just compensation[.]"); *United States v. Petty Motor Co.*, 327 U.S. 372, 381, 66 S.Ct. 596, 90 L.Ed. 729 (1946) (holding that plaintiff was entitled to just compensation for government's taking of option to renew a lease); *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 19 n. 16, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977) ("Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid."). Here, by depriving DONJON-SMIT of its contract with Owner, Defendants were required at a minimum to afford DONJON-SMIT an opportunity to be heard. *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S. Ct. 780, 786, 28 L. Ed. 2d 113 (1971) (stating that parties deprived of a "significant property interest" must be "given an opportunity for a hearing [absent] extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.").

10. What is the proper definition of "exceptional circumstances" in the context of this case?

Considering congressional intent, the Coast Guard's own stated purposes for promulgating the NTVRP requirement, and other statutory uses of the same term, "exceptional circumstances" should be interpreted narrowly as only encompassing rare scenarios in which the SMFF provider is for some reason unable to perform or if its performance under the NTVRP is deficient. The Defendants' broad definition of "exceptional circumstances" would instead allow contractual negotiations and the bidding process to be constantly reopened during emergency scenarios,

slowing down response times and frustrating the stated purpose of the NTVRP requirement. If the Court were to accept the Coast Guard's definition in this matter, the Court would have to conclude that exceptional circumstances existed from the very moment that FOSC arrived in Glynn County.

OPA 90 as a whole was "designed to streamline federal law so as to provide quick and efficient cleanup of oil spills[.]" *Water Quality Ins. Syndicate v. United States*, 225 F. Supp. 3d 41, 48 (D.D.C. 2016). The NTVRP requirement is just one example of how OPA 90 'streamlines' oil spill responses. Before NTVRPs, when a spill occurred the responsible party was also charged with selecting its own emergency resource providers, causing slower response times, limiting federal officials to a much more passive role, and pitting the responsible party's desire to reduce its cleanup costs against significant environmental considerations. Now when a discharge occurs or may be imminent, a non-tank vessel owner is required to act in accordance with its NTVRP and immediately solicit the help of its pre-contracted SMFF providers. 33 U.S.C. § 1321(c)(3)(B). If "exceptional circumstances" were to be broadly interpreted, congressional intent would be frustrated and spill response authority would be shifted back to the responsible parties.

The Coast Guard's own administrative guidance, published in 2009, also supports a narrow definition of "exceptional circumstances". The Coast Guard stated purpose for the NTVRP requirement was "to ensure a timely response for an incident." *Salvage and Marine Firefighting Requirements; Vessel Response Plans for Oil*, 73 FR 80618-01. When confronted with one commenter's concerns that the NTVRP requirement would prevent owners from "select[ing] the most suitable salvage and firefighting resources for each individual emergency and the response beyond that available via individual entities heavily reliant on dedicated resources[.]" the Coast Guard explained that it "fe[lt] that there is a need to ensure that an incident be responded to quickly

and without the need for contract negotiations during an actual emergency. In order to ensure this happens, contracts must be in place as part of the vessel's response plan.” *Id.* The Coast Guard also noted that “based upon resource providers’ past performance. . . this [NTVRP] regulation is necessary to ensure resources are available when needed.” *Id.*

Perhaps most notably, the Coast Guard’s only given examples of an exceptional circumstance are “in the case of a resource provider's inability to perform their required services. . . [or] if a resource provider is found to be non-responsive or deficient.” *Id.* Both examples focus solely on the SMFF provider’s sudden inability to perform the required services, which did not occur here. Again, Defendants’ definition of “exceptional circumstances” is much broader and would frustrate the Coast Guard’s stated purpose for NTVRPs by allowing responsible parties to re-open contract negotiations seemingly every time a “substantial threat” exists.

Moreover, while nowhere in its administrative guidance does the Coast Guard specifically define “exceptional circumstances”, the term has been used in other federal rules and regulations to establish a high threshold. For example, under Supreme Court Rule 20, an “extraordinary writ” such as a writ of mandamus or habeas corpus may only be granted upon a showing of “exceptional circumstances [that] warrant the exercise of the Court’s discretionary powers[.]” U.S. Sup. Ct. R. 20. Tellingly, though thousands of such petitions have been filed, the Court has not granted an extraordinary writ of habeas corpus since 1925, *see Ex parte Grossman*, 267 U.S. 87 (1925), or a writ of mandamus since 1962. *See Fong Foo v. United States*, 369 U.S. 141 (1962). Similarly, under Section 1229a of the Immigration and Nationality Act, a judge’s removal order made in absentia may only be rescinded under “exceptional circumstances”. 8 U.S.C. § 1229a(e)(1). This language has been interpreted to “set[] a high bar that ‘will be met in only rare cases.’” *Jimenez-Castro v. Sessions*, 750 F. App’x 406, 408–09 (6th Cir. 2018) (quoting *Kaweesa v. Gonzales*, 450

F.3d 62, 68 (1st Cir. 2006)); *see also Herbert v. Ashcroft*, 325 F.3d 68, 72 (1st Cir. 2003). Likewise, pursuant to 18 U.S.C.A. § 3145(c), which governs the review of detention or release orders in criminal proceedings, a judicial officer may only order the release of a defendant held under a detention order if “it is clearly shown that there are exceptional reasons why such person’s detention would not be appropriate.” 18 U.S.C.A. § 3145. Here again, what qualifies as exceptional has been narrowly defined. *See United States v. McGillivray*, No. 2:11 CR 22-7, 2012 WL 137409, at *2 (quotations omitted) (W.D.N.C. Jan. 18, 2012) (“Courts generally have defined ‘exceptional reasons’ as circumstances which are clearly out of the ordinary, uncommon, or rare.”); *United States v. Lea*, 360 F.3d 401, 403 (2d Cir.2004) (quoting *United States v. DiSomma*, 951 F.2d 494, 497 *2d Cir.1991) (“Exceptional circumstances exist where there is ‘a unique combination of circumstances giving rise to situations that are out of the ordinary.’”).

In this instance, the record and history of this salvage operation does not support a finding of DONJON-SMIT failure or inability to perform as required under the NTVRP. In fact, the record in this case shows that the Owner selected DONJON-SMIT as properly designated the resource provider, DONJON-SMIT was approved by the USCG and the USCG accepted the Owner’s NTVPR, upon notice of the capsized *Golden Ray*, DONJON-SMIT arrived on scene within 2 hours and led a successful effort to cut through the hull of the capsized vessel and rescue the crew. *Id.* at 1.b, -2.a. Then DONJON-SMIT removed all accessible fuel oil from the wreck, stabilized the wreck so the situation would not worsen, developed a detailed plan for removal and proper disposal of the ship and its cargo, and commenced efforts to implement that plan. *Id.* at 2.c. FOSC’s assessment of DONJON-SMIT’s performance is laid out in FOSC’s decision letter: DONJON-SMIT “worked effectively during the initial incident response and fulfilled the primary purpose of the NTVRP regulations” (See Dkt. 20-1, page 51 of 67) and “all safely accessible liquid pollutants

have been removed from the vessel and the NTVRP has fulfilled its primary purpose under 33 CFR 155.5015” (Id.). Then, on January 7, 2020, the UC commended DONJON-SMIT for its hard work and commitment to the complicated initial response. Id. at 2.e.

11. **The Complaint references nineteen different salvage services for which Plaintiff is the approved salvage provider. Describe all nineteen. Which of the nineteen are implicated in this motion?**

The 19 services are identified below. The services originate from Table 250.4030, Salvage and Marine Firefighting Services and Response Timeframes of the SMFF Regulations. Service numbers 3, 4, 5, 6, 12, 13, 14, 15, 17, 18, and 19 (in **bold** below) are still required and at issue. In addition, specific justification for deviation was not provided. Id. at 1.3. Service numbers 1, 2, 7, 8, 9, and 16, have been performed and are currently not expected to be required in remaining operations.

SALVAGE ASSESSMENT AND SURVEY

1. Remote assessment and consultation - performed during first day by DONJON-SMIT.
2. Begin assessment of structural stability – assessment commenced in earnest immediately after the 4-souls were rescued from the GOLDEN RAY Engine Room, and continued until DONJON-SMIT was released from the site.
3. **On-site salvage assessment—salvage assessment commenced essentially immediately and continued until DONJON-SMIT was released from the site .**

4. **Assessment of structural stability–stability assessment of the wreck commenced essentially immediately and continued until DONJON-SMIT was released from the site .**
5. **Hull and bottom survey–Hull and bottom surveys commenced essentially immediately and continued until DONJON-SMIT was released from the site**

SALVAGE STABILIZATION SERVICES

6. **Emergency Towing – Not Applicable to this effort.²**
7. **Salvage Plan –Numerous Plans were developed and performed; including but not limited to; a Rescue Plan, Oil Removal Plan, Wreck Removal Plan. Moreover, Plans are revised as the project continued and information became known or conditions changed.**
8. **External emergency transfer operations – performed during the removal of oils and other pollutants from the GOLDEN RAY's tanks, Engine Room, and other accessible spaces. Additional pollutants would be transferred when spaces were made accessible; including the spoiled provisions, oils entrapped within the Pipe Tunnel and related Piping, as well as the removal of the vehicles and the numerous pollution streams they represent.**

² DONJON-SMIT brought in tugs for emergency towing in the event that was required in the early stages. While ultimately not required, DONJON-SMIT was poised and ready with assets on scene. The same may be true going forward as towing will be required to transport sections of the vessel.

9. **Emergency lightering – performed during removal of 300,000 gallons of fuel and oils from the GOLDEN RAY. Additional lightering would occur when the Pipe Tunnel was made accessible.**
10. **Other Refloating Methods – Refloating methodologies were analyzed and evaluated; however, they were found to be very high risk and considered unfeasible in the case of the GOLDEN RAY.**
11. **Making Temporary Repairs – Temporary repairs were deemed infeasible in the case of the GOLDEN RAY.**
12. **Diving services support – divers were mobilized immediately, were employed during the rescue of the 4-souls from the GOLDEN RAY Engine Room, and continued until DONJON-SMIT was released from the site.**

SPECIALIZED SALVAGE OPERATIONS

13. **Special salvage operations plan – Special salvage operations commenced essentially immediately, supported the personnel rescue, and continued until DONJON-SMIT was released from the site.**
14. **Subsurface product removal – although surveys were made for subsurface oils/hazmat none was found and therefore no subsurface removal was recovered. The vehicles, and their contents, constitute the greatest subsurface pollution threat.**
15. **Heavy Lift – Heavy lift operations commenced with the arrival of DONJON-SMIT's Crane Barge COLUMBIA and continued with the reefing of the Propeller after which DONJON-SMIT was released from the**

site. Heavy lifts would be required no matter the wreck removal methodology employed.

MARINE FIREFIGHTING – ASSESSMENT AND PLANNING

16. Remote Assessment and Consultation – commenced within an hour of notification, and continued thru the mobilization of Salvage. Masters, Engineers, and other Salvage talents performed during mobilization, assessments were being made on location, or within the Command Post
17. **On-site fire assessment – On-site commenced upon notification of the casualty, with the report that smoke was observed, and continued until DONJON-SMIT was released from the site.**

MARINE FIREFIGHTING – FIRE SUPPRESSION

18. **External firefighting teams – the DONJON-SMIT fire fighters were mobilized commenced upon notification of the casualty, with the report that smoke was observed, and continued– on location until DONJON-SMIT was released from the site.**
19. **External vessel firefighting systems - — DONJON-SMIT initially employed a Brunswick based Moran harbor tug with limited firefighting capability. The Moran tug was released with arrival of the DONJON-SMIT tugs ATLANTIC SALVOR and ATLANTIC ENTERPRISE. DONJON-SMIT had also mobilized a portable firefighting system to provide fire protection to the crews as they surveyed and lightered the wreck. DONJON-SMIT maintained firefighting systems on location until DONJON-SMIT was released from the site.**

The 19-SMFF services addressed above provide the basis upon which to execute salvage in a variety of possible salvage operations and formed the basis of DONJON-SMIT's agreement with Owner. *Id.* 1.d. There isn't a specific service for a wreck removal; just as there isn't a single service for a 'grounding' or an 'engine room fire', or 'salvage' for that matter. Rather, the SMFF services are designed as a system of potential services that together are meant to achieve the requirements that may be required in event of a vessel casualty. They are also utilized to develop and execute a plan in response to a vessel casualty.

12. Did Unified Command meet with Plaintiff and T&T? Why or why not? Did they have to meet?

The Unified Command did not meet with jointly with both DONJON-SMIT and T&T at any point. *Id.* at 7.j.

The Unified Command met with T&T for a plan presentation the day after their plan was selected by the Owner/Responsible Party.

On November 26, 2019, DONJON-SMIT met with FOSC in short meeting with FOSC and SOSC to present to FOSC information DONJON-SMIT believed had been withheld from UC, and documents were provided to FOSC. The following documents were provided to FOSC at that meeting: Donjon-SMIT salvage plan with all appendices, engineering data and email correspondence between Donjon-SMIT and P&I Club. The meeting was not for purposes of reviewing the Donjon-SMIT salvage plan.

DONJON-SMIT is unaware of any reasonable basis upon which UC would agree to meet with T&T, and allowed T&T to make a full presentation, but did not allow such an opportunity with DONJON-SMIT. *Id.* at 7.d.

On November 22nd, General Manager of DONJON-SMIT (Tim Williamson) emailed the FOSC stating his concerns that no comments or correspondence from the UC had been provided to DONJON-SMIT concerning the developed plan. The substance of this email was never properly addressed. *Id.* at 3.r. On November 25th, the head of SERT (Andrew Lawrence) emailed Tim Williamson to request a few minutes to discuss the Golden Ray. He happened to be in Washington D.C. on that day and offered to meet in person to discuss, which was agreed. *Id.* at 3.s. Mr. Williamson brought the plan and one of the lead engineers (Jeff Stettler, former head of SERT), who was not currently on rotation to the meeting. After arrival, Mr. Lawrence informed Mr. Williamson and Mr. Stettler that he was advised by his superiors not to discuss the Golden Ray or the DONJON-SMIT plan, which is highly unusual. A specific meeting was requested by DONJON-SMIT but denied by the FOSC, deferred to Owner/Responsible Party's discretion, citing that a decision had already been made. *Id.* at 3.v.

The Coast Guard's own preparedness manual directs the FOSC to be "mindful of the need for salvors during a response and ***ensure close coordination with contracted SMFFs*** to ensure successful salvage operations for saving life or property in danger and for preventing damage to the environment." *USCG Marine Environmental Response and Preparedness Manual*, COMDTINST M16000.14A, Paragraph 2.C.2.b. (30 November 2016) (emphasis added). It is clear that FOSC, for no justifiable reason, was not properly coordinating with DONJON-SMIT, as the designated resource provide under the NTVRP.

It is unclear when UC forward DONJON-SMIT's salvage plan to SERT, but we do know that within twenty-four hours of receiving RP's deviation request the SERT team forwarded its analysis to FOSC.

13. What specific evidence exists that Defendants did or did not act in bad faith?

First, Defendants declined to give DONJON-SMIT a single meeting, but instead did meet with T&T. A rational decision maker attempting in good-faith to select the best plan would have sat down with DONJON-SMIT to hear why it, as the world's most experienced marine salvor, is so adamant that a small-section removal plan should be used and why it was unable to secure a salvage plan with Owner during the exclusive period of negotiating under the letter of intent. Considering the potential environmental disaster at issue, no good-faith actor would completely ignore DONJON-SMIT's repeated attempts to gain an audience.

Further, no good faith actor would take only twenty-four hours to review Owner's deviation request. The FOSC's review of Owner's NTVRP deviation request lasted approximately twenty-four hours; Commander Witt received Owner's request on December 20 and approved the deviation on December 21, seemingly taking all of the information that Owner provided at face value without seeking verification or consultation from DONJON-SMIT or any other third-party expert. At the very least Defendants should have solicited technical data from DONJON-SMIT, who had already been working on the GOLDEN RAY for months. Further, FOSC should have consider whether the Owner's request for deviation from NTVRP was a pretext to strength its negotiation position with DONJON-SMIT and/or force the Tender and secure a competitive bidding process.

Again, one of the stated purposes of OPA 90 was to shift decision-making authority back to federal officials and away from the responsible party. Instead, Defendants were seemingly obsessed with ensuring Owner's satisfaction over the public welfare. In the USCG's Opposition to DONJON-SMIT's Motion for Preliminary Injunction, Defendants state constantly that they sought to ensure the Owner's satisfaction:

- “T&T’s salvage plan *met the Owner’s demands* and proposed a Large Section Demolition and an Environmental Protection Barrier.” Dkt. 20, at 6.
- “T&T’s plan *met [the Owner’s] preferred demolition methodology and preference* for placement of an environmental barrier prior to cutting...” Dkt. 20, at 6.
- The Large Section Removal and Environmental Protection Barrier were “*preferred by Owner.*” See Dkt. 20, Pg. 17.
- “Plaintiff simply failed to provide a *plan that the Owner found satisfactory.*” Dkt. 20, at 21.
- “Plaintiff ... plan that did not address the *Owner’s stated preference* for Large Section Demolition and placement of a pre-demolition Environmental Protection Barrier.” Dkt. 20, at 21.
- The “*Owner ultimately rejected DJS’ plan.*” Dkt. 20-1, page 50 of 67.
- “*Owner asserts that they prefer the LSD be performed with the EPB to maximize containment and minimize any adverse environmental impact.*” See Dkt. 20-1, 53 of 67.
- Witt cites conflict between the Owner and DONJON-SMIT...and Witt sides with Owner. See Dkt. 20-1, at 53 of 67.

Defendant’s fixation on courting Owner’s approval completely undermines the purpose of OPA 90 and gives decision-making authority back to the responsible party. A good-faith actor would recognize his greater obligation to the public interest and solicit opinions stakeholders other than the responsible party.

In addition to the above, DONJON-SMIT shows the court that the following documents will support its claims of bad faith:

1. A comparison of DONJON-SMIT's proposal and the ITT confirms that Owner and its representatives were in violation of OPA by re-negotiating pricing terms and unlawfully attempting to force the DONJON-SMIT to shoulder the risk of the Owner's preferred methodology, in the face of known increased risk to environment and likely increased costs.
2. FOSC failed to recognize in DONJON-SMIT proposal that it states very clearly that its plan would allow for lifts sections of 600 up to 1400 tons, vastly exceeding the Owner's state preferences in its ITT.
3. Owner's deviation request and FOSC's decision letter, within twenty-four hours.
4. Emails between FOSC and staff comparing the plans of DONJON-SMIT and T&T and confirming that DONJON-SMIT's plan was, in fact, feasible.
5. FOSC's decision letter confirming that DONJON-SMIT fulfilled the purposes of OPA-90 and NTVRP.

The lack of any correspondence or emails raising any concerns or criticisms of DONJON-SMIT and failure to raise any legitimate argument that it has failed to perform, is deficient or unable to perform. *Id.* at 2.f.

14. **What specific evidence exists that Defendants did or did not act arbitrarily and capriciously in deviating from the NTVRP?**

The FOSC's decision letter shows very clearly that he believes that his authority to "deviate" from NTVRP occurs the moment there is large capsized "vessel ... and in very close proximity to a navigable channel that is the sole access route to the one of the busiest ports in the United States – the Port of Brunswick. . . [t]he vessel is grounded in an environmentally sensitive area that includes prime shrimping grounds and a significant roosting area for migratory birds[.]. . . [and] [t]he vessel is aground in close proximity to the major tourist destinations of St. Simons and Jekyll Islands. Dkt. 20:13; *see also* Dkt. 20-1:51-67. FOSC does not have authority to expand his powers the moment there is a substantial discharge threat. Under 33 CFR § 155.5010, NTVRPs are to be implemented anytime the FOSC determines there is a "substantial threat of discharge." Therefore, under Defendants' interpretation of "exceptional circumstances", every time an NTVRP is triggered by a substantial threat, that same threat would also justify immediate deviation from the NTVRP under 33 CFR § 155.4032(a), rendering NTVRPs pointless. Every NTVRP implementation cannot also constitute an "exceptional circumstance". If the Court were to sanction and approve FOSC's definition, then such an approach is clearly beyond the scope and authority expressly granted under 33 CFR § 155.5010.

Defendants declined to give DONJON-SMIT a single meeting. Defendants instead arbitrarily and capriciously took whatever they were told by Owner at face value and did not follow their statutory mandate to work with the NTVRP SMFF to produce a plan acceptable to the UC. Considering the potential environmental disaster at issue, it was arbitrary and capricious to completely ignore DONJON-SMIT's repeated attempts to gain an audience.

The FOSC's review of Owner's NTVRP deviation request was also arbitrary and capricious because it lasted approximately twenty-four hours; Commander Witt received Owner's request on December 20 and approved the deviation on December 21, seemingly taking all of the information that Owner provided at face value without seeking verification or consultation from DONJON-SMIT or any other third-party expert. At the very least Defendants should have solicited technical data from DONJON-SMIT, who had already been working on the GOLDEN RAY for months.

Additionally, FOSC decision letter fails to mention or consider the differences between the NTVRP and DONJON-SMIT proposal and the ITT, and the differing economic implications and risks. Further, the FOSC failed to engage in any degree of due diligence to determine why there was a failure to agree to a salvage plan, and whether the deviation request from Owner was pretext for the Owner attempting to use the deviation request as a means to secure competitive bidding. *Id.* at 4.c.

Finally, the FOSC decision letter fails to recognize that DONJON-SMIT was willing to pursue other methodologies (see *Id.* at 3.dd), as approved by UC but instead wrongly suggests that "DJS has been unwilling or unable to acquiesce to the Owner's reasonable requests for LSD and an EPB" and that DONJON-SMIT showed a "lack of adaptability in meeting the owner's demand" and that "philosophical disagreements as to the preferred methodology for salvage operations" should justify a deviation from NTVRP. See Memorandum from N.C. Witt, CDR to File, dated 21 Dec. 2019, Page 6, attached as Exhibit 8 to Docket #20. What FOSC fails to recognize is that the preferred methodology was not at the heart of the dispute. If there was a philosophical difference, it was based upon the Owner and Owner's Insurer changing the economic and risk

parameters, trying to force DONJON-SMIT into a fixed price contract and assuming the risk of a more risky LSD methodology.

15. What evidence exists that Defendants exceeded their statutory authority?

Specifically, which provision or subpart of any statute(s) was exceeded and how?

Our evidence includes:

1. DONJON-SMIT was selected by owner as resource provider under NTVRP and satisfied all of the criteria. Id. at 1.1.
2. USCG approved the NTVRP as SMFF. Id. at 1.c-d.
3. DONJON-SMIT showed up when called and performed and was commended for it.
4. During 21-day period DONJON-SMIT attempted in good faith to reach salvage agreement with Owner failed to use its best endeavors and no salvage plan was approved by Owner. Id. at 3.c.
5. The ITT included economic terms that prove that economics/competitive bidding was behind actions of Owner/Insurer. Id. at 6.
6. Even after out of exclusive LOI period DONJON-SMIT still is trying to get proposal accepted with Owner/UC.
7. UC declined to meet, but we still try to get information to them via email and hand delivery in D.C.
8. FOSC's decision letter confirms that DONJON-SMIT performed well and that met the purpose of NTVRP, but wrongly suggests that DONJON-SMIT was unwilling to do LSD (which is not accurate, just not willing to assume risk).

Defendants violated C.F.R. § 155.4032, which provides:

Use of resource providers not listed in the VRP. If another resource provider, not listed in the approved plan for the specific service required, is to be contracted for a specific response, justification for the selection of that resource provider needs to be provided to, and approved by, the FOSC. Only under *exceptional circumstances* will the FOSC authorize deviation from the resource provider listed in the approved vessel response plan in instances where that would best affect a more successful response.”

33 C.F.R. § 155.4032(a) (emphasis added). Here, there were no exceptional circumstances to justify approving Owner’s NTVRP deviation request. The Coast Guard’s administrative guidance gives two examples of exceptional circumstances: “in the case of a resource provider's inability to perform their required services. . . [or] if a resource provider is found to be non-responsive or deficient.” Salvage and Marine Firefighting Requirements; *Vessel Response Plans for Oil*, 73 FR 80618-01. Here, neither circumstance existed because DONJON-SMIT was and still is ready to perform salvage work on the GOLDEN RAY, and Defendants never found DONJON-SMIT to be non-responsive or deficient. Instead, the only “exceptional circumstance” that Defendants cite to is the fact that the GOLDEN RAY poses a substantial threat to the environment. However, because NTVRPs are only implemented when a substantial environmental threat exists, Defendants’ definition of “exceptional circumstances” would nonsensically allow for NTVRP deviations in seemingly every spill scenario. Therefore, Defendants never found sufficient “exceptional circumstances” to justify their approval of Owner’s NTVRP deviation request as required by 33 C.F.R. § 155.4032(a).

Defendants also violated 33 U.S.C.A. § 1321(c)(3)(B), which provides:

An owner or operator participating in efforts under this subsection shall act in accordance with the National Contingency Plan and the applicable response plan required under subsection (j), or as directed by the President, except that the owner or operator may deviate from the applicable response plan if the President or the Federal On-Scene Coordinator ***determines that deviation from the response plan would provide for a more expeditious or effective response to the spill or mitigation of its environmental effects.***

33 U.S.C.A. § 1321(c)(3)(B) (emphasis added). Defendants did not themselves determine that the T&T plan would provide for a more expeditious or effective response, instead delegating that decision-making authority to Owner. Defendants never met with DONJON-SMIT, the world's most experienced marine salvor, to discuss why it was so adamant that small-section removal plan should be used. Rather, Defendants took everything that Owner told them at face value and capitulated to their demands.

In the USCG's Opposition to DONJON-SMIT's Motion for Preliminary Injunction, Defendants state constantly that they sought to ensure the Owner's satisfaction:

- "T&T's salvage plan *met the Owner's demands* and proposed a Large Section Demolition and an Environmental Protection Barrier." Dkt. 20, at 6.
- "T&T's plan *met [the Owner's] preferred demolition methodology and preference* for placement of an environmental barrier prior to cutting..." Dkt. 20, at 6.
- The Large Section Removal and Environmental Protection Barrier were "*preferred by Owner.*" See Dkt. 20, Pg. 17.

- “Plaintiff simply failed to provide a *plan that the Owner found satisfactory*.” Dkt. 20, at 21.
- “Plaintiff ... plan that did not address the *Owner’s stated preference* for Large Section Demolition and placement of a pre-demolition Environmental Protection Barrier.” Dkt. 20, at 21.
- The “*Owner ultimately rejected* DJS’ plan.” Dkt. 20-1, page 50 of 67.
- “*Owner asserts that they prefer the LSD be performed with the EPB to maximize containment and minimize any adverse environmental impact*.” See Dkt. 20-1, 53 of 67.
- FOSC, in his decision letter, identifies conflict between Owner and resource provider, without the benefit of a complete understanding of the nature of the conflict that is economic in nature, FOSC sides with Owner. See Dkt. 20-1, at 53 of 67.

Furthermore, Defendants’ review of Owner’s NTVRP deviation request lasted approximately twenty-four hours. Defendants were seemingly solely concerned with satisfying the Owner and did not independently determine that the NTVRP deviation request “would provide for a more expeditious or effective response to the spill or mitigation of its environmental effects” as required by 33 U.S.C.A. § 1321(c)(3)(B). In fact, during the twenty-four hour period within which FOSC made decision to deviate, he corresponded with others who concluded that both plans were feasible. Additionally, FOSC’s decision letter ignores the fact that DONJON-SMIT was, in fact, willing to pursue other methodology, but not willing to assume the risk of a plan that is “known” to fail.

16. Does the Coast Guard have any standard procedures for determining whether a request to deviate from the NTVRP satisfies the criteria set forth in C.F.R. § 155.4032? What are those procedures? Were any such procedures applied in this case?

The Coast Guard seemingly does not have any standard procedures in place to make such an important decision. DONJON-SMIT, as the pre-contracted SMFF provider and the world's most experienced and leading marine salvor, was not given any opportunity to meet with the FOSC or Unified Command and discuss why a small section removal plan would be best. *Id.* at 7.e. Nor did Defendants ever solicit any technical data from DONJON-SMIT, the entity that had worked on the GOLDEN RAY for months and acquired significant knowledge about the vessel's condition. *Id.* at 3.ff. Besides clearly violating DONJON-SMIT's due process rights, Defendants also disregarded the Coast Guard's 'Environmental Response and Preparedness Manual', which states that "FOSCs should be mindful of the need for salvors during a response and ***ensure close coordination with contracted SMFFs*** to ensure successful salvage operations for saving life or property in danger and for preventing damage to the environment." *USCG Marine Environmental Response and Preparedness Manual*, COMDTINST M16000.14A, Paragraph 2.C.2.b. (30 November 2016) (emphasis added).

Defendants instead met exclusively with Owner, Owner's representatives, Owner's Insurer, and T&T regarding their preferences, effectively shutting DONJON-SMIT out of its 'process' entirely. Further, the FOSC's review of Owner's NTVRP deviation request lasted approximately twenty-four hours; Commander Witt received Owner's request on December 20 and approved the deviation on December 21, seemingly taking all of the information that Owner

provided at face value without seeking verification or consultation from DONJON-SMIT or any other third-party expert.

There is a specific planning process set out in Incident Command manuals that is known as “Planning P”, which defines the general process of working towards an acceptable plan.

While there is no provision on "exceptional circumstances" being communicated to the approved salvage and marine firefighting provider, it's difficult to imagine a situation where the approved provider would not be consulted. Considering the provider is providing the assets and resources to meet the specific service requirements of the specific response, it would seem logical to inquire with the approved provider if the sought after additional resource could not be provided by them or matched in capabilities; thus, a deviation would not be necessary.

17. Does any provision of the Oil Pollution Act of 1990 or its implementing regulations guarantee Plaintiff a right to be heard before a deviation determination is made?

While there is no specific provision of law mandating such communication, the Coast Guard’s own guidance regarding compliance with OPA 90 and the Chafee Amendment states that “FOSCs should be mindful of the need for salvors during a response and *ensure close coordination with contracted SMFFs* to ensure successful salvage operations for saving life or property in danger and for preventing damage to the environment.” USCG Marine Environmental Response and Preparedness Manual, COMDTINST M16000.14A, Section 2.C.2.b (30 November 2016) (emphasis added). Plainly, while the Coast Guard’s own interpretation of OPA 90 requires FOSCs to closely coordinate with SMFF providers, Defendants instead chose to completely leave DONJON-SMIT in the dark and never afforded DONJON-SMIT with a single meeting to discuss its small-section removal plan.

The same administrative guidance provides that, “[b]efore the FOSC authorizes a deviation, the **FOSC must clearly document why the deviation is necessary** in the MISLE activity and/or other relevant incident response documentation, such as an Incident Action Plan (IAP).” *Id.* at Section 5.C.5.b.(4) (emphasis added); *see also* *Id.* at Section 9.E.1.d.(3) (emphasis added) (“The FOSC may authorize deviations from the services and resources called for in its VRP/FRP under certain circumstances when a deviation from the plan provides a more expeditious or effective response. **The FOSC shall document any authorized deviations.**”). Again, DONJON-SMIT was left in the dark regarding the FOSC’s reasons for approving Owner’s deviation request and did not discover those reasons until filing its complaint.

It is noteworthy that there is no provision in the OPA 90 that includes the P&I Club in the UC of critical decision-making process. According to the Commandant Publication P3120.17B, U.S. Coast Guard Incident Management Handbook, dated May 21, 2014, insurers for the responsible party have no role in the Incident Command System (ICS) utilized to respond to casualties such as the *Golden Ray*. Further, during the rulemaking process the USCG made it clear that including the insurer in the process was not favored. One commenter stated that the Coast Guard should focus on ensuring adequate participation in the casualty response by the financial stakeholders, which are often the insurers of the responsible parties. The FOSC should require that all marine insurers, including hull, protection and indemnity (P&I), and pollution insurers, have an individual available to discuss coverage with the FOSC on an as needed basis. Another commenter stated that the FOSC should require that some representative of the resource provider’s various marine insurers, such as a surveyor, be on scene to participate in the financial decisions made in the context of the ICS. These comments are beyond the scope of this

rulemaking, as they would introduce a new aspect to the overarching incident command structure.

18. Does the U.S. Constitution guarantee Plaintiff a right to be heard before a deviation determination is made? What Supreme Court holding best supports your conclusion?

Because the FOSC's deviation approval voided DONJON-SMIT's contract with Owner, a contract that DONJON-SMIT expended significant time, money, and resources to procure, The Fifth Amendment guarantees DONJON-SMIT right to due process of law. *Id.* at 3.ii. Under the Fifth Amendment of the U.S. Constitution, no person shall "be deprived of life, liberty, or property, without due process of law[.]" Indeed, the "root requirement" of the Due Process Clause is "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest." *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971); *see also Bell v. Burson*, 402 U.S. 535, 542, 91 S.Ct. 1586, 1591, 29 L.Ed.2d 90 (1971).

It is also well-established that protected property interests include valid contracts. *See Lynch v. United States*, 292 U. S. 571, 579 (1934) ("The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States."); *see also Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (noting the range of "intangible interests," including contracts, that are "property for purposes of the Fifth Amendment's Takings Clause"); *Chang v. United States*, 859 F.2d 893, 895 (Fed. Cir. 1988) (quotations omitted) ("There is no question that valid contracts are property[.]"); *Long Island Water-Supply Co. v. City of Brooklyn*, 166 U.S. 685, 690, 17 S. Ct. 718, 720, 41 L. Ed. 1165 (1897) ("A contract is property, and like any other property, may be taken...subject to rule of just compensation[.]"); *United States v. Petty Motor Co.*, 327 U.S. 372, 381, 66 S.Ct. 596, 90 L.Ed. 729 (1946) (holding that plaintiff was entitled to just

compensation for government's taking of option to renew a lease); *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 19 n. 16, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977) (“Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid.”).

Here, because Defendants’ deviation approval deprived DONJON-SMIT of “a significant property interest” worth millions of dollars, DONJON-SMIT should have been “given an opportunity for a hearing [absent] extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.” *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S. Ct. 780, 786, 28 L. Ed. 2d 113 (1971). Since no “extraordinary situation” existed to justify Defendants’ refusal to afford DONJON-SMIT even a single meeting to defend its property right, Defendants necessarily violated DONJON-SMIT’s fifth amendment right to due process of law.

19. **How much bunker fuel has been removed from the Golden Ray thus far? How much remains? What is the best current estimate of how much fuel, oil, and other contaminants have already entered the St. Simons Sound as a result of this incident?**

Approximately 300,000 gallons has been removed. See attached fuel accounting spreadsheet. With respect to the remaining fuel, there is fuel remaining in the fuel lines. DONJON-SMIT has not been provided with information regarding what contaminants have already entered the St. Simons Sound as a result of the grounding. See Attached Fuel Sheets, Exhibit 1.

20. Is there any dispute that the longer the Golden Ray remains in the Sound, the greater the environmental and navigational hazards become?

DONJON-SMIT believes that all involved will agree that the longer the Golden Ray remains in the Sound, the greater the environmental and navigational hazards become. However, this litigation is the result of FOOSC allowing Owner's excessive interference and control, and an improper attempt to renegotiate pricing in violation of OPA.

21. Is there any dispute that an important salvage goal is to complete the task prior to the onset of hurricane season?

If DONJON-SMIT had started in November when it first presented the plan DONJON-SMIT had a good chance of finishing before hurricane season. *Id.* at 4.c. But given the time it has taken to get the T&T plan and contract in place, it is unlikely T&T's would be able to complete their plan prior to the hurricane season either. Moreover, the risk to the environment by having a ship that has been opened up to the elements experience a hurricane is far greater than the risk of a hurricane passing over the ship with the hull still intact and cargo much more safely protected inside that hull.

There is no dispute that the hurricane season is one factor but by no means the only factor. Seemingly the risk to the environment posed by a potential collapse of the vessel into the Sound is an equal or greater risk. *Id.* at 8.a.vi. The hurricane season risk is also mitigated by a small section removal by keeping the hull intact (acting as a primary containment barrier). When DONJON-SMIT offered that we could compress the timeline by cutting above water line steel that would not put cargo at risk as the barrier was built, we were criticized for minimizing concern for the environment, which was the complete opposite of the intent of the suggestion.

22. Which method, Large Section Demolition or Small Section Demolition, presents the greatest risk of environmental damage? Why?

Large section demolition has a greater risk to the environment. Id. at 8.2.vii. The significant additional risk is collapse or loss of an unstable section after lifting onto a material barge after commencement of transit potentially spilling cars and / or wreck sections outside the environmental barrier into presently unaffected areas. The small section demolition does not have the risk of transporting unstable sections that may collapse or be lost overboard. Id.2.viii. During the TRICOLOR salvage some sections required the heavy lift sheerlegs to remain connected holding the wreck section during transit to the scrapping location. During the TRICOLOR and BALTIC ACE cases only the fore and aft sections could be lifted. The remaining sections--similar to those proposed in GOLDEN RAY Large Section Demolition--structurally collapsed and had to be recovered by grabbing and wrecking. The resultant wrecking is messy, more difficult, and more time consuming than the proposed Small Section Demolition. Prior to this litigation, it was unknown how the T&T submission addresses sections unable to be lifted. To date both the TRICOLOR and BALTIC ACE midship sections collapsed after cutting as proposed in the GOLDEN RAY large section removal plan. To the best of DONJON-SMIT's knowledge the only times this was attempted it was by SMIT, and both times resulted in the majority of the mid-sections of the Wreck collapsing. We do not understand how the GOLDEN RAY can reasonably be expected to react differently. Additionally, both TRICOLOR and BALTIC ACE were fully submerged making the option of Small Section Demolition much more problematic than that of the GOLDEN RAY with more than 50% of the ship above water making easy access and workability. The case of the MV REIJIN was similar with the majority of the Wreck above water.

The operation was successfully completed in small sections similarly as proposed for the GOLDEN RAY.

23. Which method, Large Section Demolition or Small Section Demolition, presents the greatest risk of navigational hazards? Why?

The large section removal presents the greatest danger to the navigation channel for two reasons. Id. at 8.2.ix. The first is the high risk for debris, vehicles and/or hull structure falling into the channel. While the nets are supposed to catch that debris, with 5 kts of current that net is not infallible. Id. Secondly, with such a large barrier and removal flotilla there will be equipment impacts on the channel. Id. The largest risk to the navigation channel exists after a complete large section is lifted and landed onto a material barge. Id. The sections can be unstable and subject to collapse after maneuvering out of the environmental barrier. Id. The relative height and width of the sections compared to the barge sizes available further exasperate the risk. Id. In the case of the TRICOLOR and BALTIC ACE, “Giant Barges” not available in the USA were utilized. Even with the Giant Barges the sheerlegs heavy lift asset(s) were required after some lifts to secure the sections during transit.

The small section removal plan mostly removes the cars prior to cutting the hull structure so release of debris and cargo into the Sound substantially minimized. The risk of large -scale collapse of the hull structure is significantly less than the large section removal due to the controlled removal of structure commiserate with reduction in hull strength.

24. What method was used in assessing the relative risks?

In developing its salvage plan, DONJON-SMIT used SMIT's internal risk analysis software that uses common algorithms to assess risks associated with a variety of tasks in a given methodology. That analysis in part was what convinced DONJON-SMIT not to recommend the Large Section Removal. A third-party company CL Risk was engaged to develop Risk Registries on plans submitted through the ITT. Although the algorithms used in the risk assessment are similar to what SMIT used in their internal risk process, the results were wildly different (nearly 3-month risk penalty in schedule alone). When these differences were questioned, DONJON-SMIT was not allowed to ask for reconsideration or provided explanation.

An after the fact analysis of the results found additional discrepancies as outlined in the attached review paper. *See* attached analysis, Golden Ray Comments to Risk Analysis of CL Risk.

DONJON-SMIT used the following software for calculating their risk budget and risk delays:

- @Risk from Palisade, a company with its headquarters in Ithaca, NY, USA
- Primavera from Oracle, a company with its headquarters in Redwood City, CA, USA
- Pertmaster from Oracle

The DONJON-SMITs first identify all potential risks in a multidisciplinary expert session and give each risk a p (chance of happening), a C (fixed consequence cost component) and T (consequence in time impact, that also creates extra indirect costs). Each C and T component get a Best Case and Worst Case.

For the schedule delay simulation, the risks are attached to all applicable tasks in the planning. For the risk budget, the indirect costs (T component) are added to the fixed cost

component in the Best Case and Worst Case. Via a Monte Carlo simulation the various risks will be ran and a P90 (cumulative risk) will be calculated. This P90 means that there's a 90% certainty, based on the Monte Carlo simulations, that the project will be executed in that P90 budget and finalized in that P90 date or less.

The Primavera is used for the planning and works together with Pertmaster to visualize the delays on the various tasks to determine the P90 finish date for the full project. In DONJON-SMIT'S case the P90 delay days amounted to 20.4 days. DONJON-SMIT did not use uncertainties as these were already applied in the task's durations used for the base case.

Furthermore, the Primavera planning and Pertmaster can correlate the impact of different risks in the same task making sure risks such as different hurricane levels and weather can only run consecutively. E.g. when a level 5 hurricane occurs, it will already include the delay of weather and/ or Hurricane level 3. Also, when a Hurricane level 3 would occur, this will already include delay of weather.

DONJON-SMIT informed the P&I Club at several instances that the P&I Club was using the wrong planning and wrong risk register for the risk delay calculation. Please note that DONJON-SMITs software did not use the uncertainties as introduced by P&I Club's CL Risk software, only the risks were applied. DONJON-SMIT did not see the need for adding uncertainties as this safety factor was already applied directly to the tons/hr production, meaning, the duration of the removal tasks is already conservative, including the uncertainties. It should also be noted that the planning as originally introduced by CL Risk prior to 5/Nov/19 suggested using this conservative production of 7.5mt per hour, while DONJON-SMIT foresaw a production of 15mt/hr based on prior experience and which was shown to the Defendants.

By using Defendants own software as a black box and not using DONJON-SMIT'S provided planning, even after several requests, the Defendants software (from CL Risk) provided a P90 of 72 days. DONJON-SMIT'S software (Pertmaster) provided only 20.4 days. This information was provided to the Defendants at the clarification meeting but was rejected by the Defendants.

At the clarification meeting after evaluation of the bids for the ITT as distributed by the P&I Club and their agents it was stated to DONJON-SMIT that we could only start Wreck removal operations after finalization of the EPB, which was not to be part of the Wreck removal scope. The finalization of the EPB at the meeting of 16/Dec/19 was set by the P&I Club at 20/Feb/20 on the basis that it would take 39 days to source and 19 days to install the EPB. DONJON-SMIT informed simops could be achieved by removing bigger items such as the ramp (and others), which have since been removed prior the installation of the EPB.

25. If the Large Section Demolition method fails, what is the worst-case scenario in terms of environmental impact and cost to the public?

Failure of the large section removal poses several significant worst-case scenarios.

First, a significant quantity of ship's fuel is thought to be entrapped within the crushed Pipe Tunnel (Pipe Duct) and Fuel Piping on the portside of the GOLDEN RAY. The Large Section cutting will open the Pipe Tunnel and Piping to the Sound. ***The Pipe Tunnel can be accessed thru the #3 Deck after vehicles are removed.***

Secondly, if there is a rigging failure, hull section collapse, or release of a significant number of vehicles, through either the known damage to the hull or at a cut line, while the VB 10000 is in position over the GOLDEN RAY; any such failure could result in the VB 10000 being severely damaged. Basically, resulting in a ship wreck within a ship wreck. Id. at 8.2.xi.

Even if the VB 10000 is not directly affected, a GOLDEN RAY hull collapse will spill large quantities of vehicles and debris into the Sound. Even with the net barrier, with the high velocity swirling currents, there is significant chance the debris will migrate into the channel and of course spread the waste pollution streams about the Sound and Estuary.

The impact to the St. Simons Sound, estuary and near shore environments is not just debris and chunks of steel. Each vehicle has at least one battery, about 5-gallons of gasoline, lubricating oils, steering/transmission fluids, antifreeze, refrigerants, and a host of synthetics; several of these fluids/items are water soluble. Many vehicles have already been damaged by the energy of the vessel capsizing as well as the fires that occurred onboard. Any vehicle allowed to enter the Sound has the potent to release multiple waste streams that would not be contained by either a net or a boom. These streams would enter one of the most productive environments on the East Coast. *Id.* at 8.2.xii.

The number of vehicles unaccounted for will not be ascertained until the completion of section disposal months after a section is harvested. *(Believe it was either 100miles or river keepers that protested)*

26. If the Small Section Demolition method fails, what is the worst-case scenario in terms of environmental impact and cost to the public?

A failure would essentially be limited to an increased time to complete the removal and sections may need to be lifted in smaller than planned sections. Securing and movement of the wreck from site will be much safer than that of the large section removal.

While all salvage methodologies impart risk, the key to selecting the best option is a robust risk analysis of all methods. The reasons a small section methodology is preferred is that the risks imparted should a cut fail or a piece dropped is much less than that risk imparted on a large section

failure or drop. Most importantly is the relative environmental risk. The small section removal might risk as many as a few cars at a time as compared to a large section removal failure risk of hundreds of cars. It is clearly a different magnitude of risk. Small section demolitions that have failed are generally due to environmental conditions not allowing for crane work. Saint Simon Sound is well protected and crane work has been successfully ongoing. Inability to use cranes on location would be the reason for a small section demolition from not working. That is not a significant risk at this location.

Major hurricanes and storm risks still exist. Under any approved salvage plan, the salvor would have to give that consideration.

27. If Plaintiff were to begin February 26, 2020, what is the best estimate of completion time and cost?

DONJON-SMIT still believes its proposed timeline submitted on December 8 to be a good estimate except that all of its vessels and portable equipment have been demobilized. If DONJON-SMIT were to start February 26 and it would finish on or about August 14. Using DONJON-SMIT's internal risk management software, the risk-adjusted completion would be on or about September 3 for the wreck removal. DONJON-SMIT's risk adjusted cost premium would be the same \$111M.

If DONJON-SMIT had started in November when it first presented the plan, DONJON-SMIT had a good chance of finishing before hurricane season. But given the time it has taken to get the T&T plan and contract in place, that plan cannot be completed prior to the hurricane season either. Moreover, the risk to the environment by having a ship that has been opened up to the

elements experience a hurricane is far greater than the risk of a hurricane passing over the ship with the hull still intact and cars much more safely protected inside that hull.

28. If Plaintiff were to prevail today, what is the best estimate of completion time and cost?

DONJON-SMIT still believes its proposed timeline submitted on December 8 to be a good estimate. While all of its vessels and portable equipment have been demobilized, remobilization of those assets could occur within the time period spent building the Environmental Protection Barrier. Since DONJON-SMIT's plan would work within the bounds of this barrier, there would be no need to stop that construction (albeit it's a much larger, more time intensive barrier to build). If DONJON-SMIT were to start February 26, with a month to complete the EPB, 64 days to remove to centerline, and 92 days to remove to seabed, the approx. finish date would be 9/Aug. Adding 20 days for unanticipated delays, completion date would be August 14, 2020.

Using DONJON-SMIT's internal risk management software, the risk-adjusted completion would be mid-November. DONJON-SMIT's risk adjusted cost premium would be the same \$111M.

If DONJON-SMIT had started in November when it first presented the plan, DONJON-SMIT had a good chance of finishing before hurricane season. But given the time it has taken to get the T&T plan and contract in place, that plan cannot be completed prior to the hurricane season either. Moreover, the risk to the environment by having a ship that has been cut in sections experience a hurricane is far greater than the risk of a hurricane passing over the ship with the hull still intact and cars much more safely protected inside that hull.

29. If T&T continues, what is the best estimate of completion time and cost?

DONJON-SMIT does not know T&T current estimate of completion and costs except that DONJON-SMIT understands that the T&T plan costs substantially more than the DONJON-SMIT's plan. DONJON-SMIT believes that the completion would be in late summer, 2020.

30. According to the Complaint, the Large Section Demolition method has only ever failed while the Small Section Demolition method has worked in a similar setting. Why was a method selected that has always failed?

This is a question that DONJON-SMIT has never received an answer to from USCG, T&T, or the Owner/Responsible Party.

31. What was the environmental impact of the Tricolor and Baltic Ace failures, respectively? Is the same risk present here?

The environmental impact during both TRICOLOR and BALTIC ACE wreck removals was significant due to the failure of the large sections. Once cut there was a large area where cars were falling from the cut sections once lifted. This is due to the fact that the sideshell breaks away remaining on the sea floor, which leaves the car decks literally open, so cars easily fall out of the collapsed or partly intact sections. The same risk is present at the GOLDEN RAY wreck removal.

The following link is to a video, by SMIT, that documents what happened to the BALTIC ACE after the hull was severed. Again, this is not how DONJON-SMIT plans to dismantle the GOLDEN RAY.

<https://www.youtube.com/watch?v=ZpOug8xsxa0>

The following video describes the TRICOLOR operations. It was similar to BALTIC ACE

<https://www.youtube.com/watch?v=0ENOJBLVgju>

The TRICOLOR and BALTIC ACE removals attempted to cut the ships transversely into large sections. For these two ships, with the exception of the bow and stern extremities, the hulls failed/collapsed and discharged cargo and structure across the ocean floor. In both cases, the ships were on flat seabed, both ships were significantly smaller and carried approximately half the number of vehicles still onboard the GOLDEN RAY. Both ships were in a relatively benign environment, certainly not as environmentally sensitive as Saint Simons Sound.

32. **What are the estimated chances that the Large Section Demolition method will succeed? What are the estimated chances that the Small Section Demolition method will succeed?**

DONJON-SMIT's plan has a very high chance of success as planned and there is 100% certainly that we will complete the operation. Both Donjon and Smit have successfully used this methodology multiple times over the last 40 years. The plan is to remove in sections that will not compromise hull integrity, maximizing chances of success.

For the large section method, if the Hull holds together long enough there is moderate chance of lifting the bow and stern sections intact. But once these rigid pieces are removed, we estimate a low chance of getting anything else in large pieces. There is an extremely low chance that all of the sections can be lifted intact and if so the risk of collapse or loss from the transport barge outside of the environmental barrier is high.

33. Have there been any Small Section Demolition method failures? If so, what was the environmental impact? Is the same risk present here?

Small section demolition (SSD) method on large vessels has a high probability of success completion. There is much more control on possible environmental issues. Id. at 89.b.i. While all salvage methodologies impart risk, the key to selecting the best option is a robust risk analysis of all methods. The reasons a small section methodology is preferred is that the risks imparted should a cut fail or a piece dropped is much less than that risk imparted on a large section failure or drop. Most importantly is the relative environmental risk. The small section removal might risk as many as a few cars at a time as compared to a large section removal failure risk of hundreds of cars. It is clearly a different magnitude of risk. Small section demolitions that have failed are generally due to environmental conditions not allowing for crane work. Saint Simon Sound is well protected and crane work has been successfully ongoing. Inability to use cranes on location would be the reason for a small section demolition from not working. That is not a significant risk at this location.

34. Is there any way to remove some of the automobiles independently of the sections?

Yes, this is the basis of the DONJON-SMIT approach. DONJON-SMIT's plan was to expose the cars by surgically removing sideshell/bulkheads, then removing the accessible cars and using the hull as primary containment to "hold" the cars as they are removed via crane barge. Once cars in a certain section were removed, we then would remove the "cleaned" section of hull which would expose more cars. See Id. at 8.b.ii. This process would be continued until the cars were completely removed. If small section demolition method is used work methods can easily be made or adjusted to clear/remove cars either deck by deck or per section. Sections where wreck section

and cars could be securely lifted together would be undertaken when safe and efficient to do so.
Id.

35. **What is the extent of any interference with the navigational channel occasioned by the thirty-one acre environmental protection barrier?**

In late October, at the demand of Owner, its consultants, and Insurer, DONJON-SMIT was told to start design on a sheet pile cofferdam, which is essentially an enclosed environment so that if there is a small discharge of pollutants, they are contained within the cofferdam and able to be cleaned up. DONJON-SMIT argued such a structure was not practicable but nevertheless proceeded on preparing a design. In December, we proposed an alternative design that could be built using widely spaced piles, floating boom, and vertical nets in the water column. It would have encircled the wreck tightly, covering approx. 5 acres.

Because of the size of the large section removal equipment, the alternative barrier concept was taken and expanded to over 31 acres. It is made up of floating “pollution” boom with a “mesh” underwater Skirt extending to the ocean bottom. The problem with the T&T design is that under the Sound conditions with up to 5 kts of current, if large debris, cars and pieces of the hull and structure, fall into the water, the net is unlikely to stop that debris being moved by those currents.
Id. at 8.2.xiv.

The only difference in our alternative and theirs is the size. We maintained that the primary containment would be the hull of the ship (all cars removed before the hull section was breached). This would limit the amount of pollutants impacting our structure. Because in the large section removal plan the hull is breached, this larger barrier now becomes the primary rather than secondary containment device. It will be subjected to far more cars and pollutants as the primary

barrier than would our secondary barrier that has the hull holding the vast majority of cars inside until they are removed.

36. What is the cost of the Large Section Demolition? What is the cost of the Small Section Demolition?

DONJON-SMIT understands that the T&T plan is substantially higher than the DONJON-SMIT plan. DONJON-SMIT does not have any information regarding final Agreed Wreck Removal Agreement with T&T that occurred on or about February 3.

37. What is the limit of the owner's exposure should further environmental damage ensue?

Donjon-Smit does not know the limit of the owner's exposure should further environmental damage ensue, but understands that the Owner, pursuant to OPA 90 can limit its exposure.

38. What role did salvage cost to the owner play in the deviation?

DONJON-SMIT is not aware what role salvage cost played in Owner's consideration to request a deviation.

39. Why was T&T permitted to proceed utilizing a different billing method?

DONJON-SMIT contends that T&T was improperly permitted to proceed utilizing a different billing method, which was the result of Owner and Insurer failing to use their best endeavors to reach an agreed salvage plan with the designated SMFF under the approve NTVRP. To accomplish this, the Owner secured approval from the FOSC for a deviation, which DONJON-

SMIT contends was improvidently granted. Allowing Owner to utilize this procedure and delay removal efforts for the purpose of securing price terms more favorable to insure and Owner was improper.

40. Explain the exact parameters of the competing billing methods: cost-plus and fixed price. Why was one deemed more desirable?

The Oil Spill Liability and Compensation law makes the responsible party fully responsible for the response costs and damages resulting from covered marine casualties. While the responsible party may procure insurance from a Coast Guard-approved insurance company or similar entity, it may not avoid those costs and damages by other means. This is made clear by regulations of the Coast Guard requiring that the responsible party's agreements with response contractors must be on a time-and-materials basis. The Owners' wreck removal contract (offered to and disapproved by DONJON-SMIT as it was moving to that stage of the response effort) provided for a fixed-price arrangement. Such a contract was contrary to federal requirements and was not accepted by DONJON-SMIT. The Owner then went to an alternative salvage resource provider, T&T Salvage, who apparently accepted the fixed-price arrangement. The USGC should be required to disclose the funding agreement in the alternative wreck removal contract that was presented to it for approval.

41. Is the owner responsible for all costs under either method, successful or not?

Yes, an owner is responsible for all costs under either method, successful or not. Title 33 U.S.C. § 2704 sets limits on liability and the impact of the Oil Spill Liability Trust Fund.

42. Why did Plaintiff wait fifty-three days to seek an injunction? Is it possible for Plaintiff to complete the work prior to the onset of hurricane season?

See DONJON-SMIT's Verified Response to the United States' Opposition to DONJON-SMIT's Motion for Temporary Restraining Order.

If DONJON-SMIT had started in November when it first presented the plan, DONJON-SMIT had a good chance of finishing before hurricane season. Given the time lost to change contractors and negotiate a new contract, our plan could not be completed prior to start of hurricane season. Similarly, it is unlikely the large section removal plan can be completed before 1 June. Moreover, the risk to the environment by having a wreck that has been opened up to the elements experience a hurricane is far greater than the risk of a hurricane passing over the ship with the hull still intact and cars much more safely protected inside that hull.

43. What evidence is there that T&T is "planning a failure" as alleged in Plaintiff's filings?

During the meeting with T&T on December we discussed the DONJON-SMIT view that it was extremely unlikely the 8 sections could be lifted as planned. The discussion acknowledged that the discussion between T&T and the P&I Club was not guaranteeing success but simply that they were willing to execute the plan that the P&I Club (Consultants) had requested/ suggested. They stated their plan was based on "as built" new drawings and not the actual situation (claimed that information was not available to them at the time of submissions responding to the ITT).

Representatives of DONJON-SMIT were Contacted by T&T to meet in Houston, Texas to discuss some sort of relationship where DONJON-SMIT would participate in the response.

Id. at 8.2.xvii. This was prior to RP's request for deviation. Due to the fact that DONJON-SMIT continued to maintain that LSD method was a mistake, the discussions did not get very far. During the roughly 36 hours that DONJON-SMIT representatives were in Houston, they were advised by Kevin Teichman and Matt Moore of North of England (Kevin Teichman in person and Matt Moore over the phone) that they believed that the large section removal would work for one section at the Bow and one at the Stern, but not for the mid Body. They Both suggested that the other sections could be handled by DONJON-SMIT. Id. at 8.2.xix. This was prior to any formal request for deviation and the FOSC decision on the deviation request. DONJON-SMIT was unwilling to agree to a riskier methodology at a time when it did not have information to suggest that FOSC was going to agree that the riskier methodology was the preferred approach. DONJON-SMIT fully expected FOSC to weigh in on the decision of the methodology utilized and to allow DONJON-SMIT to properly communicate its concerns. Throughout the 36-hour period, DONJON-SMIT representatives were contacted (via phone and text) by the FOSC asking for our "confirmation" of an agreement with T&T. This was certainly odd given that DONJON-SMIT was the SMFF at the time, was not aware of a formal deviation request, and further not aware that FOSC seemingly preferred an approach that included T&T, an entity not properly designated or approved as a resource provider under the NTVRP. DONJON-SMIT contends that FOSC should not be pushing any Salvor involved in an OPA-90 response to agree to partner with another savor, not currently approved in the NTVRP. Id. at 8.2.xxi. During the meetings with T&T, the T&T representatives suggested that DONJON-SMIT terminate its joint venture with SMIT and partner directly with T&T which, T&T and the P&I Club believed, would give the USCG more support for a deviation. Id. at 8.2.xxi. Finally, the DONJON-SMIT representatives had multiple discussions with Matt Moore of North of England

who cited varied reasons for selecting T&T over DONJON-SMIT. Initially it was the cost, then it was speed to complete, then it was environmental protection. DONJON-SMIT concluded, rightly so, that the P&I Club was simply trying to break OPA-90, which now appears to be the case.

44. Is the interior of the Golden Ray failing? If so, does this daily increase the risk of environmental pollutants being released?

The structural condition of the GOLDEN RAY has collapsed to port, the port side shell in the midbody is separated from the upper decks, and torque buckling is visible in the exposed decks and starboard side shell. The port bilge is known to be crushed at the ends in the Engine Room and forward Fuel Tanks; thus, it is reasonable to assume it is also crushed in the midbody where the ground reaction is higher. Equally important, the vessel's ends are cantilevered over scour holes, more than 50% of the ship is unsupported. This increases the amount of exposure to the sea slightly, but more importantly is the increasing risk of collapse of the vessel (over months and years vice days) and the extreme risk imposed by slicing into the intact hull components that are keeping the vessel relatively intact to this point.

45. Why should the public have confidence that the Federal On-Scene Coordinator has selected the best method and that it will work?

The public should not have confidence that the FOSC has selected the best method and that it will work because the FOSC failed to follow the requirements of ICS. To the best knowledge of Donjon-SMIT, T&T has never accomplished a wreck removal of this size or complexity, and certainly has no history with car carriers like the GOLDEN RAY. The USCG FOSC, based on

comments received to this complaint, clearly does not believe that the FOSC should be involved in selecting a best method. In fact, they specifically state this is not their responsibility.

Respectfully submitted,

**TAYLOR, ODACHOWSKI, SCHMIDT &
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**ATTORNEYS FOR PLAINTIFF
DONJON-SMIT, LLC**

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION**

DONJON-SMIT, LLC

VS.

**ADMIRAL KARL L. SCHULTZ, CAPTAIN
JOHN W. REED, COMMANDER NORM C.
WITT, and COMMANDER MATTHEW J.
BAER, IN THEIR OFFICIAL CAPACITY
AS OFFICERS OF THE UNITED STATES
COAST GUARD**

**CIVIL ACTION NO. 2:20-CV-11-
LGW-BWC**

AFFIDAVIT OF TIMOTHY P. WILLIAMSON

Personally, appeared before me, the undersigned attesting officer duly authorized to administer oaths, TIMOTHY P. WILLIAMSON, who, after being first duly sworn, deposes and states as follows:

1. I am 39 years of age and I am a graduate of the United States Merchant Marine Academy.
2. I am currently general manager of Donjon-SMIT, LLC. I have been employed with Donjon and Donjon-SMIT since 2005 working as salvage master, assistant salvage master and project manager.
3. My work experience with Donjon started in the aftermath of Hurricane Katrina, in which 1,000s of vessels were in need of salvage and/or removal.
4. Experience also includes pumping out the City of New York after Hurricane Sandy at the direction of the United States.
5. I am the current elected President of the American Salvage Association.
6. Donjon-SMIT, designated resource provider for SMFF
 - a. DONJON-SMIT was selected by owner as resource provider under NTVRP and satisfied all of the criteria.

- b. DONJON-SMIT was properly designated the resource provider
 - c. DONJON-SMIT was approved by the USCG and the USCG accepted the Owner's NTVPR
 - d. The 19-SMFF services provide the basis upon which to execute salvage in a variety of possible salvage operations. There isn't a specific service for a wreck removal; just as there isn't a single service for a 'grounding' or an 'engine room fire', or 'salvage' for that matter. Rather, the SMFF services are designed as a system of potential services that together are meant to achieve the requirements that may be required in event of a vessel casualty. They are also utilized to develop and execute a plan in response to a vessel casualty.
 - e. The Salvage and Marine Firefighting Services and Response Times listed in response to Question # 11 are those that are still required and are at issue.
7. Fulfilled Services under NTVRP:
- a. Upon notice of the capsized Golden Ray, DONJON-SMIT arrived on scene within 2 hours and led a successful effort to cut through the hull of the capsized vessel and rescue the crew.
 - b. DONJON-SMIT showed up when called and performed and was commended for it.
 - c. Then DONJON-SMIT removed all accessible fuel oil from the wreck, stabilized the wreck so the situation would not worsen, developed a detailed plan for removal and proper disposal of the ship and its cargo, and commenced efforts to implement that plan.
 - d. FOSC's assessment of DONJON-SMIT's performance is laid out in FOSC's decision letter: DONJON-SMIT "worked effectively during the initial incident

response and fulfilled the primary purpose of the NTVRP regulations” (See Dkt. 20-1, page 51 of 67) and “all safely accessible liquid pollutants have been removed from the vessel and the NTVRP has fulfilled its primary purpose under 33 CFR 155.5015” (Id.).

- e. On January 7, 2020, the UC commended DONJON-SMIT for its hard work and commitment to the complicated initial response.
- f. DONJON-SMIT did not receive communications of any sort, i.e., telephone calls, text messages or emails raising any concerns or criticisms of that it failed to perform, is deficient or unable to perform.

8. Failure to Reach Agreed Salvage Plan

- a. On October 16, 2019, DONJON-SMIT, as the designated services provider under the NTVRP, entered into a LOI with Owner’s insurer and had a 21-day exclusive time period to provide a salvage plan to the Owner and to the Owner’s insurance provider. Dkt. 20, Pg. 5.
- b. The failure of the P&I Club and DONJON-SMIT to finalize a salvage plan was not due to the P&I Club was waiting for the plan to be developed by DONJON-SMIT. The Insurer failed and refused to use best endeavors to reach an agreement on the salvage plan, because it was insisting on renegotiating the pre-approved contract and pricing terms as set forth in the NTVRP, in direct violation of OPA 90.
- c. During 21-day period DONJON-SMIT attempted in good faith to reach salvage agreement with Owner but couldn’t.
- d. On or about November 5, 2019, DONJON-SMIT provided to the P&I Club a detailed salvage plan that contemplated salvage and wreck removal options that

could be utilized, but also made it clear to the P&I Club that it was not renegotiating the terms of the NTVRP.

- e. During and throughout the letter of intent period of exclusive negotiations, DONJON-SMIT was and remained willing to negotiate the terms of the salvage plan. DONJON-SMIT was not willing accept the commercial terms proposed by Owner in which Owner was insisting on a riskier plan, i.e., the LSD, but placing the risk and expense on DONJON-SMIT.
- f. P&I Club was critical of the SSD approach, DONJON-SMIT's preferred methodology, and the Owner communicated that information to FOSC in its letter of November 25, 2019. See Dkt. 20-1, Pgs. 14-18 (at page 8, reference to P&I Club). DONJON-SMIT was not aware of the letter until after it was presented to FOSC.
- g. The Owner and the Owner's QI and Insurer were pressing for a Large Scale Demolition but using negotiations for costs and risk management as the basis for failing to agree to a final salvage plan with DONJON-SMIT.
- h. DONJON-SMIT recommended a Small Sectional Demolition (SSD), but Owner and Owner's representatives were insistent that the wreck removal occur with Large Section Demolition (LSD).
- i. DONJON-SMIT contends that *Owner did not use "Best Endeavors" during the LOI process and instead, preferred to resort to a competitive bidding process to end up with a fixed price contract (limiting its exposure).*
- j. DONJON-SMIT submitted its salvage plan to Owner and Owner's representative on November 5, 2019.

- k. As of November 6, 2019, after expiration of the 21-day period, DONJON-SMIT and Owner still had not agreed to a successful salvage plan. At that point, the Owner proceeded to pursue different salvage providers. Dkt. 20, Pg. 5.
- l. If FOCS had allowed DONJON-SMIT to present its salvage plan to UC, it would have highlighted the pros and cons of the competing methodologies and would have emphasized its willingness to pursue any plan approved by UC, as set forth expressly in its plan.
- m. DONJON-SMIT, the resource provider for SMFF as set forth in NTVRP, objected to any suggestion of a deviation request by Owner and repeatedly attempted to provide input into the FOSC decision to select a resource provider other than DONJON-SMIT.
- n. DONJON-SMIT always maintained it was capable of doing either plan once those alternatives were fully vetted by the Unified Command (UC). Those actions indicate the UC and FOSC deferred the decision to others.
- o. On November 8, 2019, DONJON-SMIT, Owner, and a different salvages provider, Donjon Marine Co., Inc. entered into a transitional agreement, under which Donjon Marine Co., Inc. would continue as resource provider for wreck removal services under Owner's NTVRP; however, Owner did not submit to FOSC a request for deviation and FOSC ultimately determined that the circumstances did not warrant a deviation. Dkt. 20, Pg. 5.
- p. DONJON-SMIT, once again, submitted to Owner its bid for wreck removal and DONJON-SMIT's bid includes SSD, which Owner once again rejected. Although DONJON-SMIT sent its proposal to them after the ITT, DONJON-SMIT resent our plan in reference to ITT process, with terms per NTVRP contract.

- q. Even after out of exclusive LOI period DONJON-SMIT still is trying to get proposal accepted with Owner/UC.
- r. On November 22nd, General Manager of DONJON-SMIT (Tim Williamson) emailed the FOSC stating his concerns that no comments or correspondence from the UC had been provided to DONJON-SMIT concerning the developed plan. The substance of this email was never properly addressed.
- s. On November 25th, the head of SERT (Andrew Lawrence) emailed Tim Williamson to request a few minutes to discuss the Golden Ray. He happened to be in Washington D.C. on that day and offered to meet in person to discuss, which was agreed. Mr. Williamson brought the plan and one of the lead engineers (Jeff Stettler, former head of SERT), who was not currently on rotation to the meeting. After arrival, Mr. Lawrence informed Mr. Williamson and Mr. Stettler that he was advised by his superiors not to discuss the Golden Ray or the DONJON-SMIT plan, which is highly unusual.
- t. On November 26, 2019, DONJON-SMIT representatives attempted to meet with the FOSC and the State On-Scene Coordinator (SOSC) to present to FOSC information that DONJON-SMIT believed had been withheld from the UC, primarily the salvage plan for wreck removal. Once these documents were provided to the FOCS, there were no further discussions with the FOSC, the SOSC or the US. The FOCS merely allowed Donjon-SMIT to hand him documents and refused to have any discussion.
- u. DONJON-SMIT again submitted a timely bid (i.e., prior to December 8th) citing commercial terms consistent with the NTVRP and Donjon Marine submitted a bid with identical methodology, proposing a WRECKFIX contract (lump sum effort).

The two bids were submitted to provide the RP and its representatives the latitude to make a selection while maintaining compliance with the NTVRP.

- v. A specific meeting was requested by DONJON-SMIT but denied by the FOSC, deferred to Owner/Responsible Party's discretion, citing that a decision had already been made.
- w. On December 16, 2019, DONJON-SMIT presented its salvage plan for wreck removal to the RP's Special Salvage Representative. Although DONJON-SMIT made repeated requests for a meeting with UC, no UC representatives were in attendance.
- x. On December 17, 2019, DONJON-SMIT met with the FOSC and the QI informing them that DONJON-SMIT would undertake whatever wreck removal option the FOSC decided upon, but only under the terms of the NTVRP, not under the fixed price arrangement called for in the ITT.
- y. On the first page of its proposal, the DONJON-SMIT plan stated the following:
“While this plan was developed to meet Unified Command (UC) objectives with the benefit of DONJON-SMIT's experience, we are committed to a full planning review at the onset and are open to changes in methodology and tactics as determined by the UC before plan execution and at any of the plan's various stages. Additionally, we are prepared to assess progress with the UC and adjust tactics and assets as UC objectives possibly change from the initial salvage plan as the work progresses. Other tactics that were considered are discussed in section VII, Other Methodologies Considered, of the attached document.”

- z. DONJON-SMIT's plan expressly provided that ultra large and very large removal was one of the other methodologies considered and setting forth the pros and cons of such an approach.
- aa. DONJON-SMIT did not refuse to pursue LSD but refused to pursue the riskier plan and unfairly be required to assume the risk for such a more-risky approach.
- bb. On December 19, 2019, DONJON-SMIT learned that T&T was presenting their salvage plan to the entire UC. DONJON-SMIT requested but was refused to also have an opportunity to present its salvage proposal directly to UC; however, it was not given opportunity to present its plan to entire UC. Instead, the FOSC instructed that DONJON-SMIT should follow up directly with the Owner.
- cc. FOSC did not inquire with DONJON-SMIT of the reasons why DONJON-SMIT and Owner and Owner's Insurer failed to agree to a salvage plan.
- dd. DONJON-SMIT was willing to pursue other methodologies, but the conflict between the parties was based upon the Owner and Owner's Insurer changing the economic and risk parameters, trying to force DONJON-SMIT into a fixed price contract and assuming the risk of a more risky LSD methodology.
- ee. UC refused to meet, but DONJON-SMIT continued to try to get information to UC via email and hand delivery in D.C.
- ff. DONJON-SMIT, as the pre-contracted SMFF provider and the world's most experienced and leading marine salvor, was not given any opportunity to meet with the FOSC or Unified Command and discuss why a small section removal plan would be best. Nor did Defendants ever solicit any technical data from DONJON-SMIT, the entity that had worked on the GOLDEN RAY for months and acquired significant knowledge about the vessel's condition. Donjon-SMIT fully performed:

gg. DONJON-SMIT was never notified that it had failed to perform or was unable to perform their required services or that it was non-responsive or deficient.

hh. DONJON-SMIT performance satisfied the purposes of OPA 90, by being immediately responsive and available to provide the services contracted for under NTVRP.

ii. DONJON-SMIT expended significant effort and investment to be prepared to fulfill its contractual obligations pursuant to the approved NTVRP. The only return DONJON-SMIT receives on that investment is responding to these types of incidents.

9. Delay in Salvage:

a. The net effect of Owner and Insurer failing to reach an agreement with Donjon-SMIT on a salvage plan, and the FOCS unwarranted approval of deviation, has been a delay in continuing and completing the salvage operations for which DONJON-SMIT was pre-contracted and approved under NTVRP.

b. DONJON-SMIT was ready, willing and able to begin the salvage of Golden Ray when it presented its salvage proposal to Owner. Further, if Owner and its Insurer had use best endeavors to agree to a salvabe plan, DONJON-SMIT could have begun the salvage work sooner.

c. The failure to agree to a salvage plan was not the result of philosophical differences in terms of methodology, but rather based upon the changed economic terms demanded by Owner and Insurer. However, this litigation is the result of FOCS allowing Owner's excessive interference and control, and an improper attempt to renegotiate pricing in violation of OPA.

- d. If DONJON-SMIT had started in November when it first presented the plan DONJON-SMIT had a good chance of finishing before hurricane season.

10. No basis for deviation from NTVRP:

- a. In the experience of DONJON-SMIT, not every “substantial threat of discharge” rises to the level of exceptional circumstances warranting a determination of exceptional circumstances.
- b. Donjon-SMIT did not receive a copy of the FOCS’s decision letter or know of its substance until USCG produced the documents in their responsive filing.
- c. DONJON-SMIT was left in the dark regarding the FOSC’s reasons for approving Owner’s deviation request and did not discover those reasons until filing its complaint.
- d. In his decision letter the FOSC notes: “**It is unclear** why DJS has been unwilling or unable to acquiesce to the Owner’s reasonable requests for LSD and an EPB. However, DONJON-SMIT’ lack of adaptability in meeting the owner’s demands supports a determination that DONJON-SMIT and the Owner have philosophical disagreements as to the preferred methodology for salvage operations.” See Memorandum from N.C. Witt, CDR to File, dated 21 Dec. 2019, Page 6, attached as Exhibit 8 to Docket #20. If FOCS had conducted a proper review and consideration of the Owner’s deviation request, and if he had inquired of DONJON-SMIT, we would have advised him that DONJON-SMIT was willing to perform its pre-contracted services (pursuant to NTVRP), including any one of three types of salvage and wreck removal methodologies, but that the stalemate between DONJON-SMIT and Owner was the result of the Owner attempting to re-negotiate

its contract with DONJON-SMIT and/or force a stalemate to justify Owner resorting to competitive bidding.

- e. DONJON-SMIT fully expected FOCS to weigh in on the decision of the methodology utilized and to allow DONJON-SMIT to properly communicate its concerns.

11. Intention to Tender: Donjon-SMIT contends that ITT included economic terms that prove that economics/competitive bidding was behind actions of Owner/Insurer.

12. Decision to Select T&T:

- a. DONJON-SMIT was not consulted and is not aware of all persons or entities who were consulted prior to the decision to select T&T.
- b. DONJON-SMIT was not involved in selecting T&T. DONJON-SMIT was the SMFF, preapproved and selected in and under the NTVRP. During the period within which DONJON-SMIT had an exclusive period of negotiating for the salvage plan, the Owner and Insurer failed to negotiate using their best endeavors to finalize terms of the salvage plan. Although DONJON-SMIT submitted a salvage plan that showed very clearly its willingness to fulfill the terms of SMFF under the NTVRP, the Owner and its insurer did not accept the salvage plan and, instead, used the opportunity to pursue competitive bidding.
- c. FOCS personally met with representatives of T&T on or about December 19, 2019.
- d. DONJON-SMIT is unaware of any reasonable basis upon which UC would agree to meet with T&T and not with DONJON-SMIT.
- e. DONJON-SMIT, as the pre-contracted SMFF provider and the world's most experienced and leading marine salvor, was not given any opportunity to meet with

the FOSC or Unified Command and discuss why a small section removal plan would be best.

- f. FOCS or UC never solicited any technical data from DONJON-SMIT identifying DONJON-SMITs concerns on the risks posed by a large section removal. Weeks were spent developing this engineering data and it was seemingly ignored as evidenced by the T&T plan's wrong general assumptions on the wrecks condition and the UC's willingness to accept those faulty assumptions (as evidenced by their approval of deviation and ignoring their own SERTs observation that there was incomplete engineering data.”
- g. DONJON-SMIT was never given an opportunity to discuss the request for deviation or to counter the Owner's deviation request.
- h. The Unified Command did not meet together with both DONJON-SMIT and T&T at any point.
- i. FOSC or UC never solicited any technical data from DONJON-SMIT, the entity that had worked on the GOLDEN RAY for months and acquired significant knowledge about the vessel's condition.
- j. DONJON-SMIT representatives had multiple discussions with Matt Moore of North of England who cited varied reasons for selecting T&T over DONJON-SMIT. Initially it was the cost, then it was speed to complete, then it was environmental protection. DONJON-SMIT concluded, rightly so, that the P&I Club was simply trying to break OPA-90, which now appears to be the case.

13. Methodology:

- a. T&T

- i. The T&T plan calls for cutting the Golden Ray into eight, ultra large sections. The discussion of why ultra large sections will not work was addressed in DONJON-SMIT's salvage plan.
- ii. The T&T plan made sweeping inaccurate generalizations on the wreck condition and they are, essentially, planning for failure.
- iii. T&T has, to our knowledge, no experience with wreck removal at this scale.
- iv. Based upon the experience and training of the affiant, it is not possible for T&T to complete its proposed plan prior to the hurricane season.
- v. The risk to the environment by having a ship that has been opened up to the elements experience a hurricane is far greater than the risk of a hurricane passing over the ship with the hull still intact and cars much more safely protected inside that hull.
- vi. The risk to the environment posed by a potential collapse of the vessel into the Sound is risk equal to or greater than the risks associated with hurricane season. Additionally, the hurricane season risk is also mitigated by a small section removal by keeping the hull intact (acting as a primary containment barrier).
- vii. Large section demolition has a greater risk to the environment. The significant additional risk is collapse or loss of an unstable section after lifting onto a material barge after commencement of transit potentially spilling cars and / or wreck sections outside the environmental barrier into presently unaffected areas.
- viii. The small section demolition does not have the risk of transporting unstable sections that may collapse or be lost overboard.

- ix. The large section removal presents the greatest danger to the navigation channel for two reasons. The first is the high risk for debris, vehicles and/or hull structure falling into the channel. While the nets are supposed to catch that debris, with 5 kts of current that net is not infallible. Secondly, with such a large barrier and removal flotilla there will be equipment impacts on the channel. The largest risk to the navigation channel exists after a complete large section is lifted and landed onto a material barge. The sections can be unstable and subject to collapse after maneuvering out of the environmental barrier. The relative height and width of the sections compared to the barge sizes available further exasperate the risk.
- x. Failure of the large section removal poses several significant worst-case scenarios. First, a significant quantity of ship's fuel is thought to be entrapped within the crushed Pipe Tunnel (Pipe Duct) and Fuel Piping on the portside of the GOLDEN RAY. The Large Section cutting will open the Pipe Tunnel and Piping to the Sound. ***The Pipe Tunnel can be accessed thru the #3 Deck after vehicles are removed.*** Secondly, if there is a rigging failure, hull section collapse, or release of a significant number of vehicles, through either the known damage to the hull or at a cut line, while the VB 10000 is in position over the GOLDEN RAY; any such failure could result in the VB 10000 being severely damaged. Basically, resulting in a ship wreck within a ship wreck.
- xi. Even if the VB 10000 is not directly affected, a GOLDEN RAY hull collapse will spill large quantities of vehicles and debris into the Sound. Even with the net barrier, with the high velocity swirling currents, there is

significant chance the debris will migrate into the channel and of course spread the waste pollution streams about the Sound and Estuary.

- xii. The impact to the St. Simons Sound, estuary and near shore environments is not just debris and chunks of steel. Each vehicle has at least one battery, about 5-gallons of gasoline, lubricating oils, steering/transmission fluids, antifreeze, refrigerants, and a host of synthetics; several of these fluids/items are water soluble. Many vehicles have already been damaged by the energy of the vessel capsizing as well as the fires that occurred onboard. Any vehicle allowed to enter the Sound has the potent to release multiple waste streams that would not be contained by either a net or a boom. These streams would enter one of the most productive environments on the East Coast.
- xiii. Interference with the navigational channel will be greater with the proposed EPB. In late October, at the demand of Owner, its consultants, and Insurer, DONJON-SMIT was told to start design on a sheet pile cofferdam, which is essentially an enclosed environment so that if there is a small discharge of pollutants, they are contained within the cofferdam and able to be cleaned up. DONJON-SMIT argued such a structure was not practicable but nevertheless proceeded on preparing a design. In December, DONJON-SMIT proposed an alternative design that could be built using widely spaced piles, floating boom, and vertical nets in the water column. It would have encircled the wreck tightly, covering approx. 5 acres.
- xiv. Because of the size of the large section removal equipment, the alternative barrier concept was taken and expanded to over 31 acres. It is made up of

floating “pollution” boom with a “mesh” underwater Skirt extending to the ocean bottom. The problem with the T&T design is that under the Sound conditions with up to 5 kts of current, if large debris, cars and pieces of the hull and structure, fall into the water, the net is unlikely to stop that debris being moved by those currents. The only difference in our alternative and theirs is the size.

- xv. Because of the size of the large section removal equipment, the alternative barrier concept was taken and expanded to over 31 acres. It is made up of floating “pollution” boom with a “mesh” underwater Skirt extending to the ocean bottom. The problem with the T&T design is that under the Sound conditions with up to 5 kts of current, if large debris, cars and pieces of the hull and structure, fall into the water, the net is unlikely to stop that debris being moved by those currents. The only difference in our alternative and theirs is the size.
- xvi. Representatives of DONJON-SMIT were Contacted by T&T to meet in Houston, Texas to discuss some sort of relationship where DONJON-SMIT would participate in the response. This was prior to RP’s request for deviation. Due to the fact that DONJON-SMIT continued to maintain that LSD method was a mistake, the discussions did not get very far. During the roughly 36 hours that DONJON-SMIT representatives were in Houston, they were advised by Ken Teichman and Matt Moore of North of England (Kevin Teichman in person and Matt Moore over the phone) that they believed that the large section removal would work for one section at the Bow and one at the Stern, but not for the mid Body. They Both

suggested that this is the section that Donjon or DONJON-SMIT would handle if DONJON-SMIT was willing to agree to work with T&T. This was prior to any formal request for deviation and the FOCS decision on the deviation request.

- xvii. During the meeting with T&T on December we discussed the DONJON-SMIT view that it was extremely unlikely the 8 sections could be lifted as planned. The discussion acknowledged that the discussion between T&T and the P&I Club was not guaranteeing success but simply that they were willing to execute the plan that the P&I Club (Consultants) had requested/suggested. They stated their plan was based on “as built” new drawings and not the actual situation (claimed that information was not available to them at the time of submissions responding to the ITT).
- xviii. DONJON-SMIT was unwilling to agree to a riskier methodology at a time when it did not have information to suggest that FOCS was going to agree that the riskier methodology was the preferred approach.
- xix. Throughout the 36-hour period, DONJON-SMIT representatives were contacted (via phone and text) by the FOCS asking for our “confirmation” of an agreement with T&T. This was certainly odd given that DONJON-SMIT was SMFF at the time, was not aware of a formal deviation request, and further not aware that FOCS seemingly preferred an approach that included T&T, an entity not properly designated or approved as a resource provider under the NTVRP.

- xx. DONJON-SMIT contends that FOSC should not be pushing any Salvor involved in an OPA-90 response to agree to partner with another savor, not currently approved in the NTVRP.
- xxi. During the meetings with T&T, the T&T representatives suggested that DONJON-SMIT terminate its joint venture with SMIT and partner directly with T&T which, T&T and the P&I Club believed, would give the USCG more support for a deviation.

b. Donjon-SMIT

- i. Small section demolition (SSD) method on large vessels have always been successfully completed. There is much more control on possible environmental issues. While all salvage methodologies impart risk, the key to selecting the best option is a robust risk analysis of all methods. The reasons a small section methodology is preferred is that the risks imparted should a cut fail or a piece dropped is much less than that risk imparted on a large section failure or drop. Most importantly is the relative environmental risk. The small section removal might risk as many as a few cars at a time as compared to a large section removal failure risk of hundreds of cars. It is clearly a different magnitude of risk. Small section demolitions that have failed are generally due to environmental conditions not allowing for crane work. Saint Simon Sound is well protected and crane work has been successfully ongoing. Inability to use cranes on location would be the reason for a small section demolition from not working. That is not a significant risk at this location.

- ii. It is possible to remove some of the automobiles independent of the sections. This is the basis of the DONJON-SMIT approach. DONJON-SMIT's plan was to expose the cars by surgically removing sideshell/bulkheads, then removing the accessible cars and using the hull as primary containment to "hold" the cars as they are removed via crane barge. Once cars in a certain section were removed, we then would remove the "cleaned" section of hull which would expose more cars. This process would be continued until the cars were completely removed. If small section demolition method is used work methods can easily be made or adjusted to clear/remove cars either deck by deck or per section. Sections where wreck section and cars could be securely lifted together would be undertaken when safe and efficient to do so.
- iii. The small section removal plan mostly removes the cars prior to cutting the hull structure so release of debris and cargo into the Sound substantially minimized. The risk of large -scale collapse of the hull structure is significantly less than the large section removal due to the controlled removal of structure commiserate with reduction in hull strength.
- iv. DONJON-SMIT offered to compress the timeline by cutting above water line steel that would not put cargo at risk as the barrier was built, we were criticized for minimizing concern for the environment, which was the complete opposite of the intent of the suggestion.
- v. A failure of SSD would essentially be limited to an increased time to complete the removal and sections may need to be lifted in smaller than

planned sections. Securing and movement of the wreck from site will be much safer than that of the large section removal.

- vi. While all salvage methodologies impart risk, the key to selecting the best option is a robust risk analysis of all methods. The reasons a small section methodology is preferred is that the risks imparted should a cut fail or a piece dropped is much less than that risk imparted on a large section failure or drop. Most importantly is the relative environmental risk. The small section removal might risk as many as a few cars at a time as compared to a large section removal failure risk of hundreds of cars. It is clearly a different magnitude of risk. Small section demolitions that have failed are generally due to environmental conditions not allowing for crane work. Saint Simon Sound is well protected and crane work has been successfully ongoing. Inability to use cranes on location would be the reason for a small section demolition from not working. That is not a significant risk at this location.

14. Risks

- a. The T&T plan increases the risk of environmental damages, moves the completion date forward by only one month under a very questionable schedule, and costs nearly double what DONJON-SMIT's plan would cost.
- b. DONJON-SMIT fully expects the wreck and her sections to break up and spill cargo should this method be utilized.
- c. During a recent public meeting, Jim Elliott of T&T stated that T&T expects to lose one hundred cars overboard, per cut. It is unclear whether T&T's timeline

contemplates the additional time it will take to recover the roughly 800 cars that will end up in the St. Simons Sound, as a result of the LSD proposed by T&T.

- d. Car carriers are unique vessels. Only SMIT, partners in DONJON-SMIT, has attempted wreck removals of these difficult car carrier projects. T&T has no experience in wreck removal on this scale of difficulty. In fact, their wreck removal experience in large scale removal vessels in general is extremely limited.
- e. In developing its salvage plan, DONJON-SMIT used SMIT's internal risk analysis software that uses common algorithms to assess risks associated with a variety of tasks in a given methodology. That analysis in part was what convinced DONJON-SMIT not to recommend the Large Section Removal. A third-party company CL Risk was engaged to develop Risk Registries on plans submitted through the ITT. Although the algorithms used in the risk assessment are similar to what SMIT used in their internal risk process, the results were wildly different (nearly 3-month risk penalty in schedule alone). When these differences were questioned, DONJON-SMIT was not allowed to ask for reconsideration or provided explanation.
- f. An after the fact analysis of the results found additional discrepancies as outlined in the attached review paper. *See attached analysis*
- g. DONJON-SMIT used the following software for calculating their risk budget and risk delays:
 - i. @Risk from Palisade, a company with its headquarters in Ithaca, NY, USA
 - ii. Primavera from Oracle, a company with its headquarters in Redwood City, CA, USA
 - iii. Pertmaster from Oracle

- h. The DONJON-SMITs first identify all potential risks in a multidisciplinary expert session and give each risk a p (chance of happening), a C (fixed consequence cost component) and T (consequence in time impact, that also creates extra indirect costs). Each C and T component get a Best Case and Worst Case.
- i. For the schedule delay simulation, the risks are attached to all applicable tasks in the planning. For the risk budget, the indirect costs (T component) are added to the fixed cost component in the Best Case and Worst Case. Via a Monte Carlo simulation the various risks will be ran and a P90 (cumulative risk) will be calculated. This P90 means that there's a 90% certainty, based on the Monte Carlo simulations, that the project will be executed in that P90 budget and finalized in that P90 date or less.
- j. The Primavera is used for the planning and works together with Pertmaster to visualize the delays on the various tasks to determine the P90 finish date for the full project. In DONJON-SMIT'S case the P90 delay days amounted to 20.4 days. DONJON-SMIT did not use uncertainties as these were already applied in the task's durations used for the base case.
- k. Primavera planning and Pertmaster can correlate the impact of different risks in the same task making sure risks such as different hurricane levels and weather can only run consecutively. E.g. when a level 5 hurricane occurs, it will already include the delay of weather and/ or Hurricane level 3. Also, when a Hurricane level 3 would occur, this will already include delay of weather.
- l. DONJON-SMIT informed the P&I Club at several instances that the P&I Club was using the wrong planning and wrong risk register for the risk delay calculation.

- m. Please note that DONJON-SMITs software did not use the uncertainties as introduced by P&I Club's CL Risk software, only the risks were applied. DONJON-SMIT did not see the need for adding uncertainties as this safety factor was already applied directly to the tons/hr production, meaning, the duration of the removal tasks is already conservative, including the uncertainties. It should also be noted that the planning as originally introduced by CL Risk prior to 5/Nov/19 suggested using this conservative production of 7.5mt per hour, while DONJON-SMIT foresaw a production of 15mt/hr based on prior experience and which was shown to the Defendants.
- n. By using Defendants own software as a black box and not using DONJON-SMIT'S provided planning, even after several requests, the Defendants software (from CL Risk) provided a P90 of 72 days. DONJON-SMIT'S software (Pertmaster) provided only 20.4 days. (exhibits can be provided). This information was provided to the Defendants at the clarification meeting but was rejected by the Defendants.
- o. At the clarification meeting after evaluation of the bids for the ITT as distributed by the P&I Club and their agents it was stated to DONJON-SMIT that we could only start Wreck removal operations after finalization of the EPB, which was not to be part of the Wreck removal scope. The finalization of the EPB at the meeting of 16/Dec/19 was set by the P&I Club at 20/Feb/20 on the basis that it would take 39 days to source and 19 days to install the EPB. DONJON-SMIT informed simops could be achieved by removing bigger items such as the ramp (and others), which have since been removed prior the installation of the EPB.
- p. DONJON-SMIT's plan has a very high chance (>90%) of success as planned and there is 100% certainly that we will complete the operation. Both Donjon and Smit

have successfully used this methodology multiple times over the last 40 years. The plan is to remove in sections that will not compromise hull integrity, maximizing chances of success.

- q. For the large section method, if the Hull holds together long enough there is moderate (50/50) chance of lifting the bow and stern sections intact. But once these rigid pieces are removed, we estimate a low (<20%) chance of getting anything else in large pieces. There is an extremely low chance that all of the sections can be lifted intact and if so the risk of collapse or loss from the transport barge outside of the environmental barrier is high. T&T has reportedly told attendees at one of their “Town Meetings” that they will be losing **100** cars every cut.

15. Timing to Completion:

- a. DONJON-SMIT’s plan would not push completion until 2021. DONJON-SMIT’s plan would have completed only one month later than the plan proposed by T&T.
- b. At a meeting with DNER discussing the EPB, DNER was surprised to learn that the DONJON-SMIT completion date was significantly less than what they had been told by RP (i.e., that the removal under DONJON-SMIT proposal would stretch into 2010, which is why the barrier was so necessary).
- c. DONJON-SMIT still believes its proposed timeline submitted on December 8 to be a good estimate except that all of its vessels and portable equipment have been demobilized. If DONJON-SMIT were to start February 26, it would need two weeks to remobilize and it would finish on October 14. Using DONJON-SMIT’s internal risk management software, the risk-adjusted completion would be mid-November. DONJON-SMIT’s risk adjusted cost premium would be the same \$111M.

- d. If DONJON-SMIT had started in November when it first presented the plan, DONJON-SMIT had a good chance of finishing before hurricane season. But given the time it has taken to get the T&T plan and contract in place, that plan cannot be completed prior to the hurricane season either. Moreover, the risk to the environment by having a ship that has been opened up to the elements experience a hurricane is far greater than the risk of a hurricane passing over the ship with the hull still intact and cars much more safely protected inside that hull.
- e. Since DONJON-SMIT's plan would work within the bounds of this barrier, there would be no need to stop that construction (albeit it's a much larger, more time intensive barrier to build). If DONJON-SMIT were to start February 26, with a month to complete the EPB + 64 days to remove to centerline and 92 days to remove to seabed, the approx. finish date would be 9/Aug. Adding 20 days for unanticipated delays, completion date would be 29/Aug excl EPB and debris removal.
- f. Using DONJON-SMIT's internal risk management software, the risk-adjusted completion would be mid-November. DONJON-SMIT's risk adjusted cost premium would be the same \$111M.
- g. DONJON-SMIT does not know T&T current estimate of completion and costs except that DONJON-SMIT understands that the T&T plan costs approximately 190M compared to DONJON-SMIT's 111M plan.

16. Status of Golden Ray:

- a. The structural condition of the GOLDEN RAY has collapsed over 7-meters to port, the port side shell in the midbody is separated from the upper decks, and torque buckling is visible in the exposed decks and starboard side shell. The port bilge is

known to be crushed at the ends in the Engine Room and forward Fuel Tanks; thus, it is reasonable to assume it is also crushed in the midbody where the ground reaction is higher. Equally important, the vessel's ends are cantilevered over scour holes, more than 50% of the ship is unsupported. This increases the amount of exposure to the sea slightly, but more importantly is the increasing risk of collapse of the vessel (over months and years vice days) and the extreme risk imposed by slicing into the intact hull components that are keeping the vessel relatively intact to this point.

- b. Approximately 300,000 gallons has been removed. See attached fuel accounting spreadsheet. With respect to the remaining fuel, there may be fuel remaining in the fuel lines. DONJON-SMIT has not been provided with information regarding what contaminants have already entered the St. Simons Sound as a result of the grounding.
- c. The longer the Golden Ray remains in the Sound, the greater the environmental and navigational hazards become.

17. Cost

- a. The cost associate with the T&T plan is nearly double the cost of the DONJON-SMIT plan.
- b. DONJON-SMIT understands that the P&I Club is approaching their limits of coverage.
- c. DONJON-SMIT understands that the T&T plan is approximately \$190M. DONJON-SMIT's plan is \$111M. DONJON-SMIT does not have any information regarding final Agreed Wreck Removal Agreement with T&T that occurred on or about February 3.

18. Other Examples

- a. The T&T plan has failed on two previous occasions, when tried on similar casualties.
- b. The only car carrier (of three similar casualties) successfully removed without spilling cargo used DONJON-SMIT's proposed methodology.
- c. A repeat of the structural failures of the types that were experience by the Baltic Ace or the Tricolor would be catastrophe in the St. Simons Island Sound, especially when it is a known likely outcome.
- d. During the TRICOLOR salvage some sections required the heavy lift sheerlegs to remain connected holding the wreck section during transit to the scrapping location. During the TRICOLOR and BALTIC ACE cases only the fore and aft sections could be lifted. The remaining sections--similar to those proposed in GOLDEN RAY Large Section Demolition--structurally collapsed and had to be recovered by grabbing and wrecking in an uncontrolled manner. The resultant wrecking is messy, more difficult, and more time consuming than the proposed Small Section Demolition.
- e. Both the TRICOLOR and BALTIC ACE midship sections collapsed after cutting as proposed in the GOLDEN RAY large section removal plan.
- f. The only times this type of salvage plan on a was attempted it was by DONJON-SMIT, and both times resulted in the majority of the Wreck collapsing, and the undersigned reasonably expects that the GOLDEN RAY will react no differently.
- g. Both TRICOLOR and BALTIC ACE were fully submerged making the option of Small Section Demolition much more problematic than that of the GOLDEN RAY with more than 50% of the ship above water making easy access and workability.

The case of the MV REIJIN was similar with the majority of the Wreck above water. The operation was successfully completed in small sections similarly as proposed for the GOLDEN RAY.

- h. In the case of the TRICOLOR and BALTIC ACE “Giant Barges” not available in the USA were utilized. Even with the Giant Barges the sheerlegs heavy lift asset(s) were required after some lifts to secure the sections during transit.
- i. The environmental impact during both TRICOLOR and BALTIC ACE wreck removals was significant due to the failure of the large sections. Once cut there was a large area where cars were falling from the cut sections once lifted. This is due to the fact that the sideshell breaks away remaining on the sea floor, which leaves the car decks literally open, so cars easily fall out of the collapsed or partly intact sections. The same risk is present at the GOLDEN RAY wreck removal.
- j. The following link is to a video, by SMIT, that documents what happened to the BALTIC ACE after the hull was severed. Again, this is not how DONJON-SMIT plans to dismantle the GOLDEN RAY. See <https://www.youtube.com/watch?v=ZpOug8xsxa0> and <https://www.youtube.com/watch?v=0ENOJBLVgjlw>
- k. The TRICOLOR and BALTIC ACE removals attempted to cut the ships transversely into large sections. For these two ships, with the exception of the bow and stern extremities, the hulls failed/collapsed and discharged cargo and structure across the ocean floor. In both cases, the ships were on flat seabed, both ships were significantly smaller and carried approximately half the number of vehicles still onboard the GOLDEN RAY. Both ships were in a relatively benign environment, certainly not as environmentally sensitive as Saint Simons Sound.

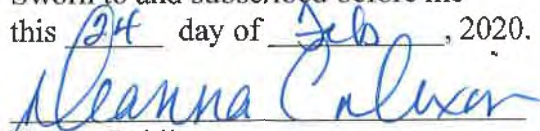
History of OPA and impact on salvage efforts: Before NTVRPs, when a spill occurred the responsible party was also charged with selecting its own emergency resource providers, causing slower response times, limiting federal officials to a much more passive role, and pitting the responsible party's desire to reduce its cleanup costs against significant environmental considerations. Now, when a discharge occurs or may be imminent, a non-tank vessel owner is required to act in accordance with its NTVRP and immediately solicit the help of its pre-contracted SMFF providers. 33 U.S.C. § 1321(c)(3)(B).

FURTHER, DEPONENT SAYETH NOT.

This 24 day of Feb, 2020.


Timothy P. Williamson

Sworn to and subscribed before me
this 24 day of Feb, 2020.


Deanna C. Dixon
Notary Public

My Commission Expires: 09/21/2021

[Notarial Seal]



EXHIBIT “1”



Golden Ray Comments to risk analysis of CL Risk



Donjon Marine co.,inc. - 100 Central ave., Hillside, NJ 07205, United States of America
SMIT Salvage Americas Llc. - Suite 316, 15402 Vantage Parkway East, Houston, Texas 77032, United States of America

ORIGIN :	R. Meijer, L. Roda, H. van Loon	DATE	27 th January, 2020
CHECKED :	TBD	REF.NO.	SUS192006-M101
PROJECT :	Golden Ray	REV:	rev C
SUBJECT :	Comments to risk analysis of CL Risk		

Introduction

This memo presents the comments found on the risk analysis performed on the proposal of Donjon Marine (DJM) and SMIT Salvage (SMIT), together the Contractors, for the wreck removal of the Golden Ray (GR) for the Company.

These comments have not yet been reviewed by CL Risk (CLR) and to date no replies to any of the below stated queries have been received.

References

- Ref.[1] CLR Risk Forecast, dated 31-Oct, 2019
- Ref.[2] CLR Risk Planning, dated 31-Oct, 2019
- Ref.[3] CLR Risk Forecast, dated 04-Nov, 2019
- Ref.[4] CLR Risk Planning, dated 04-Nov, 2019
- Ref.[5] Contractors Risk Planning, dated 08-Dec, 2019
- Ref.[6] Contractors Risk Register and MC, dated 08-Dec, 2019
- Ref.[7] CLR Risk Forecast, dated 12-Dec, 2019
- Ref.[8] CLR Risk Planning, dated 12-Dec, 2019
- Ref.[9] Contractors Risk Planning, dated 14-Dec, 2019
- Ref.[10] CLR Risk Forecast, dated 17-Dec, 2019
- Ref.[11] CLR Risk Planning, dated 17-Dec, 2019
- Ref.[12] Contractors Risk Planning, dated 17-Dec, 2019

Timeline

19-Sep, 2019	LOI agreed between Contractors and Company to bid for the wreck removal of GR. CLR starts interviews with Contractors for risks/uncertainties.
31-Oct, 2019	First reports available from CLR show initial delay 217 days and residual 125 days. It is unclear from the planning and risk review if uncertainties were accounted for (Ref.[1] and Ref.[2]).
04-Nov, 2019	CLR delivers results package for LOI risk meeting with Company. P90 Risk budget show \$44.3m and 131 days delay, from initial \$103.5m budget and 366 days delay, uncertainties are included (Ref.[3] and Ref.[4]).
04-Nov, 2019	Company informs to not award Contractors the Wreck Removal contract and to go for public tender.
07-Nov, 2019	Meet with CLR, ask about exorbitant risk budgets – no explanation, only received request to meet up in NL office to explain how QRA works.
11-Nov, 2019	Expression of Interest received from P&I Club
18-Nov, 2019	ITT received with bid date 8-Dec, 2019, planning in MS Projects/ Primavera/ Asta and basis open risk dialogue on risk mitigation and sharing)
21-Nov, 2019	Received login details Xposure

24-Nov, 2019	Q&A ITT received
27-Nov, 2019	After recalculation by Contractor's risk engineer budget came to \$24m vs. \$44m. Contractor sends request to CL Risk for clarification.
01-Dec, 2019	Received response from CL Risk with basic explanation on risk calculating, no response to request of difference between \$44 and our \$24m P90 budget. CL Risk's proposal is to meet in January in Boskalis office, after ITT submission.
05-Dec, 2019	2 nd Q&A ITT received.
08-Dec, 2019	Bid submitted including Risk budgets at \$29.5m, Primavera planning (Ref.[5]), Risk Register and MC. Detailed Risk Register and MC (Ref.[6]).
10-Dec, 2019	Paul Hankins from DJM informs risks have been updated online in Xposure for DJM and can be mirrored for DJS bid.
11-Dec, 2019	Online risks have been mirrored by CLR.
12-Dec, 2019	Clarifications meeting invite received, included are CLR Risk Register (Ref.[7]), Planning (Ref.[8]) and Budget based on 4-Nov, 2019 – these do not match ours. It has been confirmed the wrong planning is shared with Unified Command and operation would end in December 2020 based on CLR risks.
12-Dec, 2019	Informed Client of wrong risks and planning used, Contractor would (re)send updated Risk Register with correct Phase Day Rates and EPB risks removed. Risks will be assigned to specific phases and added to the Primavera planning. Risks will be updated on CLR online software Xposure.
13-Dec, 2019	Informed CL Risk that we did not have proper authorization. CLR responds with fix, but informed they would likely not be able to run a risk forecast for Contractors. Fix did not work and informed CLR. CLR never responded.
14-Dec, 2019	Send updated Risk Register, updated Risk Budget, Updated Primavera Planning (Ref.[9]) including attached phase risks and P90 delay at 44 days.
16-Dec, 2019 AM	Clarifications meeting in Brunswick, where all risks were discussed at length. Company presented "old" 4-Nov, 2019 planning (Ref.[4]) which was pointed out by Contractors and same "old" Risk Register. Even though Contractors sent updated risks and planning at various stages. After AM discussion on risks, CLR ran another delay simulation and would discuss in PM.
16-Dec, 2019 PM	CLR presents updated P90 risks as per CLRRisks simulation – result was 72 days delay (Ref.[10] and Ref.[11]). Contractor disputed strongly, even stating Client using wrong planning. Client informs it's due to "uncertainties" that Contractor did not have in their ITT proposal.
17-Dec, 2019	Contractor ran own simulation from discussions in Clarifications meeting, result is P90 delay 20.4 days (Ref.[12]).
17-Dec, 2019	Updated planning and P90 delay was shared between Contractors to show 20.4 days (Ref.[12]).
21-Dec, 2019	Client informed ITT bid was not successful.

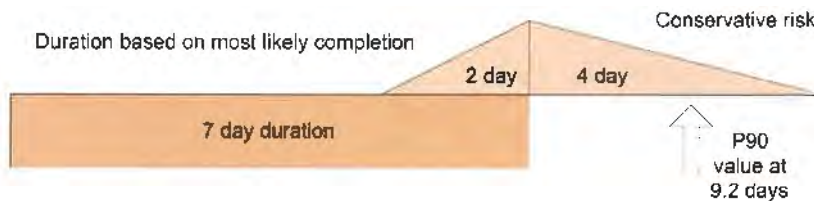
Definitions for Risk Modelling

Risk – Effect of an unwanted event on any project objective (time, cost, safety, health, etc.). Risks have a chance of happening of less than a 100%. Risks are paid items. Can be modelled as uniform, triangular, normal distributions.

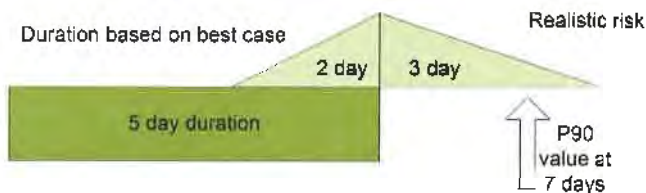
Uncertainty – Expected variations on planned activities or cost items excluding the realization of a risk. Uncertainties have a 100% chance of happening and are usually modelled as triangular distributions. Uncertainties are non-paid items. E.g.: variation on cutting operation due to variations in the performance of a tool or due to learning curve. The effect of weather, breakdowns, fire and other unwanted events should not be accounted in the quantification of uncertainties, as they have a separate quantification in its specific risk item.

For the initial planning of the removal of the wreck, the operators were asked to give a most likely duration of the removal of a certain piece. This operator will then give his best estimate of completion which will include certain risks that exist in his experience. If this duration is then used to calculate the total duration by adding risks, the total duration is then very conservative as the risks are added twice. This process is visualized in the image below.

Total duration based on conservative Initial duration and risk



Total duration based on realistic Initial duration and risk



In the below examples the application of the uncertainties by the Contractor together with CL Risk are shown. The results are taken from the 4-Nov planning from the Client (Ref.[2], Ref.[4], Ref.[8] or Ref.[11]).

Example 1 - shows how breaking down the tasks (per cut) and adding a high estimate for uncertainty amounts to a large number of additional delay days for uncertainty.

26-FEB-20	1-MAR-20	27	2 - 2fwd A
27-FEB-20	4-MAR-20	28	2 - 2aft A (7 6 9)
2-MAR-20	6-MAR-20	29	3 - 3fwd B
5-MAR-20	10-MAR-20	30	3 - 3aft B (6 6 9)
7-MAR-20	11-MAR-20	31	4 - 4fwd A
11-MAR-20	16-MAR-20	32	4 - 4aft A (6 5 9)
12-MAR-20	19-MAR-20	33	5 - 5fwd B
17-MAR-20	30-MAR-20	34	5 - 5aft B (14 14 18)
20-MAR-20	24-MAR-20	35	6 - 6fwd A
25-MAR-20	29-MAR-20	36	6 - 6aft A
30-MAR-20	6-APR-20	37	7 - 7fwd B
30-MAR-20	8-APR-20	38	7 - 7aft B (10 10 13)
7-APR-20	17-APR-20	39	8 - 8 A



Example 2 - Shows the extreme additional days in case uncertainty improperly applied, in this case the normal execution time was 7 days, while the uncertainty shows an uncertainty execution of 21 days.

27-JUL-'20 2-AUG-'20 79 Final debris removal and survey (7 6 21)



Comments to risk analysis of CL Risk

- Doubled impact assessment
Risks were considered during the quantification of the uncertainties, for example, during the interviews the team members were asked what is the worst case duration of a task if a breakdown and other unwanted events happens. After that, the same risks (breakdown, weather, etc.) were added again as separate risk items from the excel file (Ref.[6]). This is not in line with our instructions (we instructed CL Risk to use only the risks from the Ref.[6] as input).
- Closed risks were used in the simulation
Risks 128, 139, and 97 can be seen used in the Risk model (Ref.[8] and Ref.[11]), these were closed and should not have been used in the risk analysis— again not in line with our instructions.
- Incorrectly applied risks
Risks 112, 94, 95, 180, 184 should be in the Removal to Centre Line block not the SSD block (Ref.[8] and Ref.[11])
- Incorrect completion date
Milestone MS.03.LS – Phase 3 completed (Ref.[8] and Ref.[11]) should coincide with completion of task 77 on 26 July 2020, instead it coincides with the start of the next activity on the following day.
- Incorrect time sensitivity table
Tasks names in the Time sensitivity table in the Risk Forecast Report (Ref.[10]) do not correspond to the CLR Planning (Ref.[11]) from 5- 5 fwd B downwards, instead, it matches the old planning (Ref.[2], Ref.[4] and Ref.[8]), this means that the results are not presented correctly.
- Unknown origin of uncertainties
Planning from (Ref.[4] and Ref.[8]) show the uncertainties only every other removal task/module (ID 19-55), in the latest planning (Ref.[11]) all task are with uncertainties, where do these come from as we understood, no new interviews have been held?
- Unknown inclusion of SSD block in simulation
Was the SSD block turned off for simulation in the latest planning (Ref.[11])?
 - Gantt chart shows distributions and active risks attached in this block
 - Some active risks are ONLY attached to this block (112, 94, 95, 180, 184) which would indicate that the block is still active in the simulation.
- Risk allocation
It is unclear from the chart (Ref.[11]) which risks are attached to which specific tasks.
- Risk modelling
Similarly, how the risks (Ref.[10] and Ref.[11]) were modelled, uniform/normal distributions?
- Unnecessary inclusion of cost only risks
Cost only risks are attached to the schedule (Ref.[11]), why?

- Unknown correlation of risks
Unknown if hurricane risk is correlated to other risks

Test case simulations

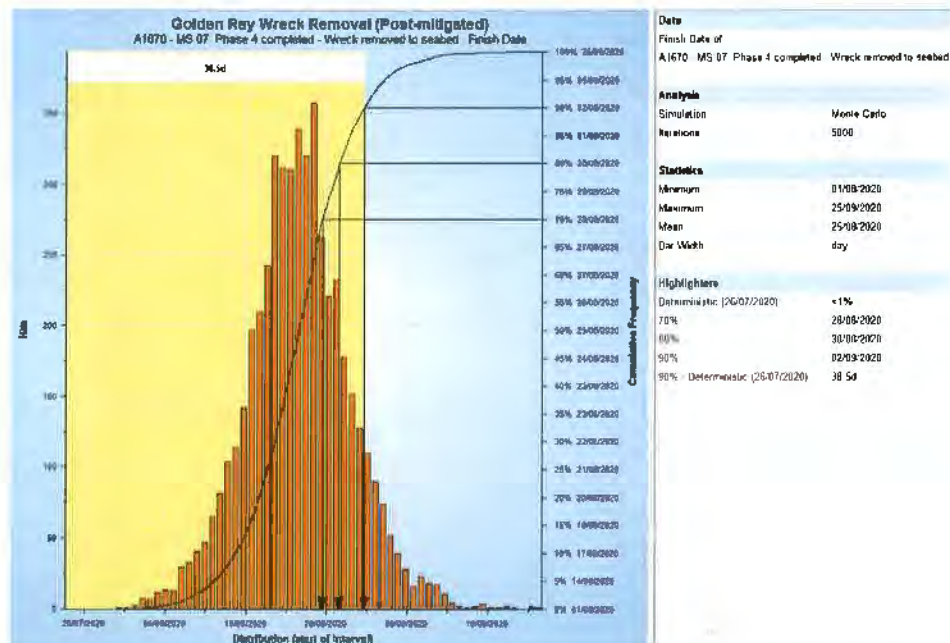
In order to try to duplicate the results of the delay in the CLR analysis, several simulations have been run to try to achieve the same result of a delay of 72 days.

Even though an increase of the delay days could be achieved by calculating the risk in an incorrect manner, the result of 72 days delay could not be achieved without adding the SSD section of the planning (including the attached delays). The SSD has not been added in these simulations because the planning that included the SSD method was not readily available in the risk software used for these simulations.

Lastly, a correct simulation has been added in simulation 4 to show what the result of the risk analysis should look like.

Simulation 1 – Contractor's risks, including CLR uncertainties

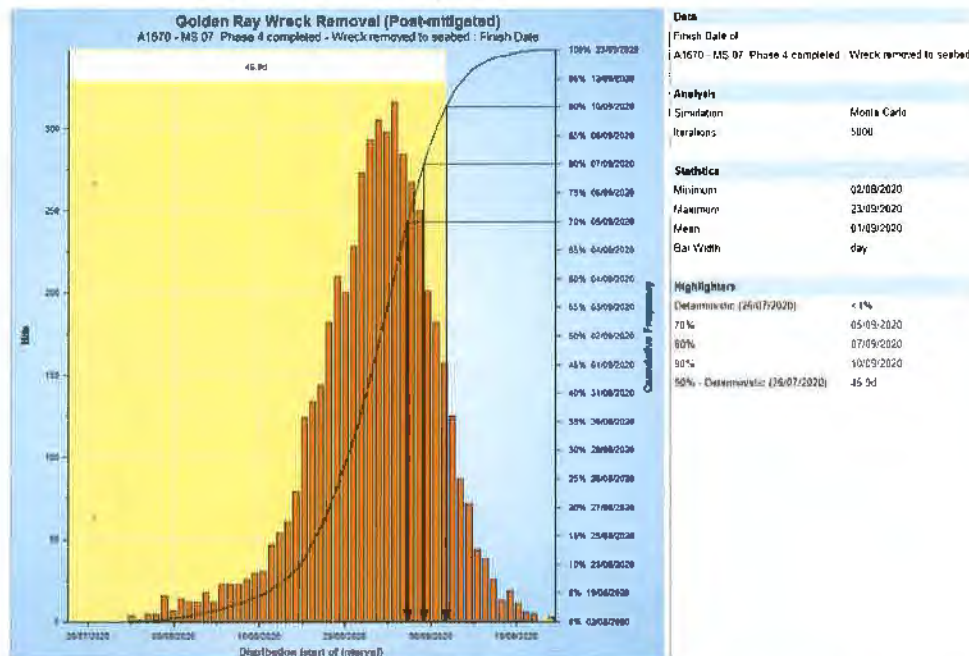
Adding the uncertainties as seen in CLR report + our risk modelling (Incorrect calculation in order to replicate CLR result) – 38.5 days



Simulation 2 – Company risks attached to milestones, including CLR uncertainties and the risks of the SSD block

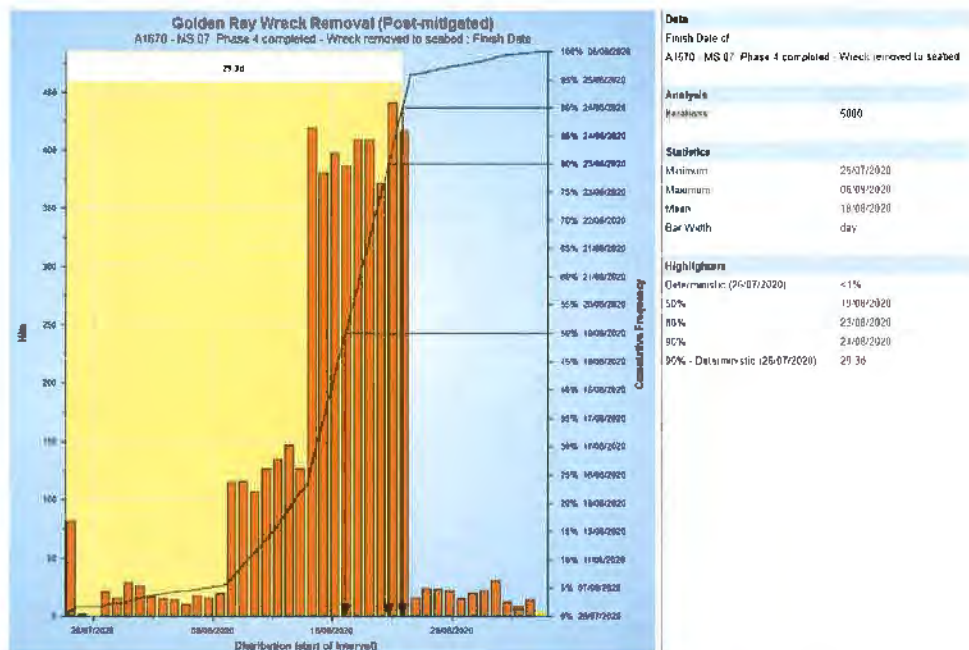
Adding the uncertainties as seen in CLR risk report + adding the risks to summary tasks and end milestones, this result was as close as possible to what looks like CLR risk modelling (Incorrect calculation in order to replicate CLR Risk Result) – 45.9d

Note: risks that were seen on the SSD block in the CLR Risk analysis were added to the CL block summary task.



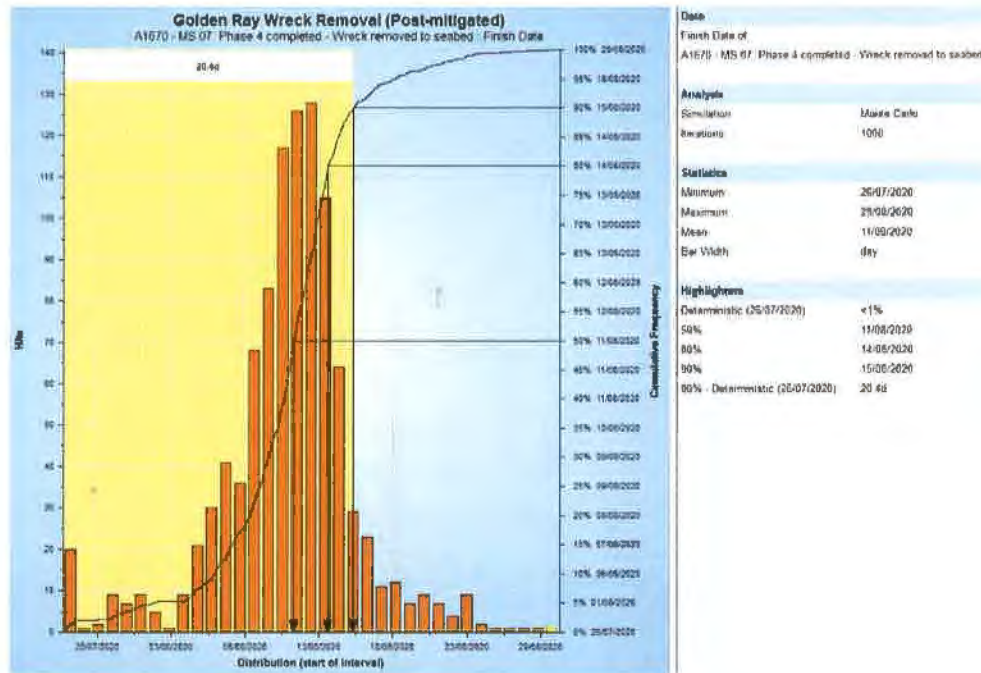
Simulation 3 – Contractor's risks attached to milestones, no uncertainties

Correct risk modelling (only excel input), with conservative modelling (most risks attached to summary tasks and milestones). All uncertainties were removed for this simulation as they are incorrectly doubling the risks effect – 29.3d



Simulation 4 – Contractor P90 delay duration, no uncertainties

Correct risk modelling (only excel input) no uncertainties, with risks attached to each applicable task – what CLR should have done – 20.4d



Closure

This report was written with the information presently known to us. If any new and/or additional information will be available or a change of circumstances occurs, this report may become obsolete.

For any question, remarks or additional information, contact the person below.

Robert Meijer,
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SMIT Salvage BV