E-545-1

UNITED STATES DEPARTMENT OF COMMERCE
BUREAU OF EXPORT ADMINISTRATION
WASHINGTON, D.C. 20230

In the Matters of:

THANE-COAT, INC.
12725 Royal Drive
Stafford, Texas 77477,

JERRY VERNON FORD
President
Thane-Coat, Inc.
12725 Royal Drive
Stafford, Texas 77477

and with an address at

7707 Augustine Drive
Houston, Texas 77036,

PRESTON JOHN ENGEBRETSON
Vice-President
Thane-Coat, Inc.
12725 Royal Drive
Stafford, Texas 77477

and with an address at

8903 Bonhomme Road
Houston, Texas 77074,

EXPORT MATERIALS, INC.
3727 Greenbriar Drive, No. 108
Stafford, Texas 77477,

and

THANE-COAT INTERNATIONAL, LTD.
Suite C
Regent Centre
Explorers Way
P.O. Box F-40775
Freeport, The Bahamas,

Respondents

E-545-2

ORDER TEMPORARILY DENYING EXPORT PRIVILEGES

The Office of Export Enforcement, Bureau of Export Administration, United States Department of Commerce (hereinafter "BXA"), pursuant to the provisions of Section 766.24 of the Export Administration Regulations (61 *Fed. Reg.* 12734-13041, March 25, 1996, to be codified at 15 C.F.R. Parts 730-774) (hereinafter the "Regulations"), issued pursuant to the Export Administration Act of 1979, as amended (50 U.S.C.A. app. §§ 2401-2420 (1991 & Supp. 1997)) (hereinafter the "Act"),[1] has asked the Acting Assistant Secretary for Export Enforcement to issue an order temporarily denying all United States export privileges to Thane-Coat, Inc.; Jerry Vernon Ford, president, Thane-Coat, Inc.; Preston John Engebretson, vice-president, Thane-Coat, Inc.; Export Materials, Inc.; and Thane-Coat International, Ltd. (hereinafter collectively referred to as "respondents").

In its request, BXA states that, as a result of an ongoing investigation, it has reason to believe that, during the period from approximately June 1994 through approximately July 1996, Thane-Coat, Inc., through Ford and Engebretson, and using its affiliated companies, Thane-Coat International, Ltd. and Export Materials, Inc., made approximately 100 shipments of U.S.-origin pipe coating materials, machines, and parts to the Dong Ah Consortium in Benghazi, Libya. These items were for use in coating the internal surface of prestressed concrete cylinder pipe for the Government of Libya's Great Man-Made River Project. BXA's investigation gives it reason to believe that the respondents employed a

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[1] The Act expired on August 20, 1994. Executive Order 12924 (3 C.F.R., 1994 Comp. 917 (1995)), extended by Presidential Notices of August 15, 1995 (3 C.F.R., 1995 Comp. 501 (1996)) and August 14, 1996 (61 *Fed. Reg.* 42527, August 15, 1996), continued the Regulations in effect under the International Emergency Economic Powers Act (currently codified at 50 U.S.C.A. §§ 1701-1706 (1991 & Supp. 1997)).

scheme to export U.S.-origin products from the United States, through the United Kingdom or Italy, to Libya, a country subject to a comprehensive economic sanctions program, without the authorizations required under U.S. law and regulations, including the Regulations.

In light of these events, BXA believes that the violations respondents are suspected of having committed were significant, deliberate and covert and are likely to occur again unless a temporary denial order naming respondents is issued. In addition, BXA believes that a temporary denial order is necessary to give notice to companies in the United States and abroad that they should cease dealing with respondents in export-related transactions involving U.S.-origin goods.

Based on the showing made by BXA, I find that an order temporarily denying the export privileges of each respondent is necessary in the public interest to prevent an imminent violation of the Act and the Regulations and to give notice to companies in the United States and abroad to cease dealing with respondents in items subject to the Act and the Regulations, in order to reduce the substantial likelihood that respondents will continue to engage in activities that are in violation of the Act and the Regulations. This order is issued on an *ex parte* basis without a hearing, based on BXA's showing that expedited action is required.

ACCORDINGLY, IT IS THEREFORE ORDERED:

FIRST, that Thane-Coat, Inc., 12725 Royal Drive, Stafford, Texas 77477, and all of its successors or assigns, and officers, representatives, agents, and employees when acting on

its behalf; Jerry Vernon Ford, president, Thane-Coat, Inc., 12725 Royal Drive, Stafford, Texas 77477, and with an address at 7707 Augustine Drive, Houston, Texas 77036; Preston John Engebretson, vice-president, Thane-Coat, Inc., 12725 Royal Drive, Stafford, Texas 77477, and with an address at 8903 Bonhomme Road, Houston, Texas 77074; Export Materials, Inc., 3727 Greenbriar Drive, No. 108, Stafford, Texas 77477, and all of its successors or assigns, and officers, representatives, agents, and employees when acting on its behalf; and Thane-Coat International, Ltd., Suite C, Regent Centre, Explorers Way, P.O. Box F-40775, Freeport, The Bahamas, and all of its successors or assigns, and officers, representatives, agents, and employees when acting on its behalf, may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as "item") exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, License Exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations; or

C. Benefiting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations.

SECOND, that no person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of any of the denied persons any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by any of the denied persons of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby any of the denied persons acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the any of the denied persons of any item subject to the Regulations that has been exported from the United States;

D. Obtain from any of the denied persons in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by any of the denied persons, or service any item, of

whatever origin, that is owned, possessed or controlled by any of the denied persons if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

THIRD, that, after notice and opportunity for comment as provided in Section 766.23 of the Regulations, any person, firm, corporation, or business organization related to any of the denied persons by affiliation, ownership, control, or position of responsibility in the conduct of trade or related services may also be made subject to the provisions of this Order.

FOURTH, that this Order does not prohibit any export, reexport, or other transaction subject to the Regulations where the only items involved that are subject to the Regulations are foreign-produced direct product of U.S.-origin technology.

FIFTH, that, in accordance with the provisions of Section 766.24(e) of the Regulations, any respondent may, at any time, appeal this Order by filing with the Office of the Administrative Law Judge, U.S. Coast Guard ALJ Docketing Center, 40 South Gay Street, Baltimore, Maryland 21202-4022, a full written statement in support of the appeal.

SIXTH, that this Order is effective immediately and shall remain in effect for 180 days.

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SEVENTH, that, in accordance with the provisions of Section 766.24(d) of the Regulations, BXA may seek renewal of this Order by filing a written request not later than 20 days before the expiration date. Any respondent may oppose a request to renew this Order by filing a written submission with the Assistant Secretary for Export Enforcement, which must be received not later than seven days before the expiration date of this Order.

A copy of this Order shall be served on each respondent. This Order shall be published in the *Federal Register.*

Date: May 5, 1997

Frank W. Deliberti

Frank Deliberti
Acting Assistant Secretary
for Export Enforcement

E-545-8

UNITED STATES DEPARTMENT OF COMMERCE
BUREAU OF EXPORT ADMINISTRATION
WASHINGTON, D.C. 20230

IN THE MATTER OF:	Docket Number 97-BXA-9
THANE-COAT, INC. 12725 Royal Drive Stafford, Texas 77477,	
JERRY VERNON FORD President Thane-Coat, Inc. 12725 Royal Drive Stafford, Texas 77477 and with an address at 7707 Augustine Drive Houston, Texas 77036,	
PRESTON JOHN ENGEBRETSON Vice-President Thane-Coat, Inc. 12725 Royal Drive Stafford, Texas 77477 and with an address at 8903 Bonhomme Road Houston, Texas 77074,	DECISION AND ORDER
EXPORT MATERIALS, INC. 3727 Greenbriar Drive, No. 108 Stafford, Texas 77477,	
and	
THANE-COAT, INTERNATIONAL, LTD. Suite C Regent Centre Explorers Way P.O. Box F-40775 Freeport, The Bahamas,	
Respondents	

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The respondents appeal from an order issued on May 5, 1997, by the Acting Assistant Secretary for Export Enforcement which temporarily denies their U.S. export privileges pursuant to Section 766.24 of the Export Administration Regulations (15 C.F.R. Parts 730-74). I have reviewed the files and records of this matter including the Recommended Decision and Order of the Administrative Law Judge which is attached hereto. Based upon the findings and conclusions of the Administrative Law Judge, I find that the Acting Assistant Secretary's decision to issue the order was fully supported by the facts and is consistent with the applicable law. Accordingly, the issuance of the Order Temporarily Denying Export Privileges to Thane-Coat, Inc., Jerry Vernon Ford, Preston John Engebretson, Export Materials, Inc., and Thane-Coat International, Ltd., is affirmed.

William A. Reinsch
Under Secretary
for Export Administration

Dated this 19th day of June, 1997
Washington, D.C.

E-545-10

UNITED STATES DEPARTMENT OF COMMERCE
BUREAU OF EXPORT ADMINISTRATION
WASHINGTON, DC 20230

IN THE MATTER OF: **THANE-COAT, INC** 12725 Royal Drive Stafford, Texas 77477, **JERRY VERNON FORD** President Thane Coat, Inc. 12725 Royal Drive Stafford, Texas 77477, **and with an address at** 7707 Augustine Drive Houston, Texas 77036, **PRESTON JOHN ENGEBRETSON** Vice-President Thane-Coat, Inc. 12725 Royal Drive Stafford, Texas 77477, **and with an address at** 8903 Bonhomme Road Houston, Texas 77074, **EXPORT MATERIALS, INC.** 3727 Greenbriar Drive, No. 108 Stafford, Texas 77477, **and** **THANE-COAT, INTERNATIONAL** Suite C Regent Centre Explorers Way P.O. Box F-40775 Freeport, The Bahamas, **Respondents**	**Docket Number** **97-BXA-9** **RECOMMENDED DECISION AND ORDER**

E-545-11

Preliminary Statement

This proceeding is an appeal from an Order Temporarily Denying Export Privileges, and brought pursuant to the Export Administration Act of 1979, (hereinafter "The Act"), 50 U.S.C.A. app.δδ 2401-2420 (1991 & Supp. 1997), and provisions of Section 766.24 of the Export Administration Regulations codified at 15 C.F.R. Parts 730-774 (1997). On May 1, 1997, the Office of Export Enforcement, Bureau of Export Administration, United States Department of Commerce, (hereinafter "BXA"), requested that the Acting Assistant Secretary for Export Enforcement issue an order, (hereinafter "TDO"), temporarily denying all United States export privileges to Respondents. The Acting Assistant Secretary, on May 5, 1997, issued the TDO on an *ex parte* basis. On May 23, 1997[1], the Respondents appealed this order to the Administrative Law Judge.

Findings of Fact[2]

1. Thane-Coat was founded in 1982 as a sole proprietorship engaged in the business of manufacturing and applying industrial paints and coatings*(Respondent's Exhibit 1, hereinafter "Resp. Ex.").*
2. The company was incorporated in Texas in 1984. (*Id*).
3. Thane-Coat markets its products through direct sales, commission representatives, distributors, and license agreements. The products include: coatings for steel pipes; materials for the repair of steel pipe coatings; epoxy materials for coating sewer manholes; coatings for concrete pipes; liquid casting materials; truck-bed liner coatings; fiberglass replacement materials for automotive after market products; and, coal tar pipe coating paint. (*Id.*).
4. During 1991, Respondents Ford and Engebretson sought a contract with the Great Man-Made River Authority of the Government of Libya to provide coating needed for the PCCP for the

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[1] The Appeal was not received in the Office of the Administrative Law Judge until May 28, 1997.

[2] Neither Respondent nor Agency submitted Proposed Findings of Fact. As a result, no rulings are made thereon

second stage of the Great Man-Made River Project. *(Government's Exhibit 1, hereinafter "Gov. Ex. ").*

5. Thane-Coat also sought the advice of counsel regarding corporate restructuring. (*Id.*).
6. On September 5, 1991, Thane-Coat's counsel, in memorandum, advised Respondent to apply for a license to sell products to Libya. (*Id.*). Respondents did not do so.
7. On September 20, 1991, Respondent Engebretson contacted the Bahamian Transportation Office, stating that he was interested in establishing a "manufacturing/blending facility" in the free trade area of Freeport. (*Id.*).
8. On, or about, October 9, 1991, the name "Thane-Coat International Limited" was reserved as a Bahamian Ordinary Company. (*Id.*).
9. In Mid-1992, Respondents Ford and Engebretson traveled to Libya to pursue a contract to provide coating for the external surface of the PCCP for the second phase of the Great Man-Made River Project. This contract was not procured. (*Id.*).
10. On, or about, March 17, 1993, Respondents Ford and Engebretson incorporated Thane-Coat International Limited in the Commonwealth of the Bahamas. (*Id.*)
11. During 1995 and the first half of 1996, a significant portion of the company's revenues was derived from exports. *(Resp. Ex. 1).*
12. On September 11, 1995, TIC, Ltd. purchased 256 drums of a corrosive, synthetic resin (hereinafter "coating material"), from Everest Coatings of Spring, Texas, a manufacturer of chemicals, *(Gov. Ex. 1 at Ex. 4).*
13. The consignee of the shipments was Harkmel International in Middlesex, United Kingdom. *(Id).*
14. On, or about, September 23, 1995, the coating material was exported from Houston Texas to Felixstowe, U.K., in four 40-foot containers, each containing 64 pallets. *(Gov. Ex. 1 at Ex 4).*

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15. In the U.K., the coating material was unloaded and taken to a warehouse by a U.K. freight forwarder, where it was repackaged into four 20-foot containers before transfer to Harwich, U.K. *(Id).*

16. At Harwich, the four 20-foot containers were loaded aboard the "Norlandia" for delivery to Marsa El Brega, Libya. *(Id).*

17. On July 5, 1996, the Respondents were targeted in a federal investigation regarding the alleged export of concrete pipe coating materials and technology to Libya when a search warrant was executed on Thane-Coat's business premises and a large volume of documents was seized in relation to Respondents' business *(Resp. Ex. 1).*

18. On April 28, 1997, a civil forfeiture action was initiated by the Government *in rem* against certain real and personal property owned by the Respondents. *(Id).*

19. The complaint filed therein alleged that the Respondents had performed one or more contracts to provide concrete pipe coating materials and technology to the government of Libya between January 1994 and July 1996. It is further alleged that the materials were sold through certain Bahamian companies with knowledge that they would be used in connection with the construction of a large-scale aqueduct project designed to transfer freshwater from internal regions of Libya to cities related on its coast. *(Id)*

20. On April 28, 1997, United States Magistrate Judge for the Southern District of Texas, authorized the arrest and seizure of the defendant property. This order has been appealed, the resolution of which is still pending. *(Id.)*.

21. On May 5, 1997, based upon an *ex parte* application of the Bureau of Export Administration's Office of Enforcement, the Acting Assistant Secretary for Export Enforcement issued a TDO to the Respondents.

22. The TDO was issued based upon the belief of BXA that the Respondents had made approximately 100 shipments of U.S.-origin pipe coating materials, machines, and parts to a

concern in Libya during the period from June 1994 through July 1996, for use in coating the internal surface of pre-stressed concrete cylinder pipe for the Government of Libya's Great Man-Made River project. *(Gov. Ex. 1).*

23. The TDO bars Respondents from further participation in any exports from the United States that are subject to the EAR, or engaging in any other activity that is subject to the EAR for 180 days. *(Gov. Ex. 1).*

Ultimate Findings of Fact and Conclusions of Law

1. The Acting Assistant Secretary's decision to issue a TDO is supported by the record.
2. A violation is "imminent" if "the general circumstances of the matter under investigation demonstrate a likelihood of future violations. To indicate the likelihood of future violations, BXA may show that the violation under investigation "is significant, deliberate, covert and/or likely to occur again "
3. The Administrative Law Judge does not have the authority to decide whether or not the Regulations as applied against the Respondents violate Due Process. *Frost v. Weinberg, 375* F. Supp. 1312, 1320, (E.D.N.Y 1974), *rev'd on other grounds, 515* F.2d 57 (2d Cir. 1975), *cert. denied,* 424 U.S. 958 (1976).
4. The Administrative Law Judge does not have the authority to determine whether or not the deprivation of Respondent's export privileges violates their right to procedural due process. *D'Amico v. Schweiker,* 698 F.2d 903, 906 (7th Cir. 1983); *Steiberger v. Heckler,* 615 F. Supp. 1315, 1386 (S.D.N.Y. 1985); *Association of Administrative Law Judges v. Heckler*, 594 F. Supp. 1132, 1141 (D.D.C. 1984).
5. The Administrative Law Judge does not have the authority to decide whether or not the TDO will prevent further proceedings to impose additional penalties on respondents for any alleged past violations and Fifth Amendment concerns. *Frost v. Weinberg*, 375 F. Supp. 1312, 1320.

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(E.D.N.Y 1974), *rev'd on other grounds,* 515 F.2d 57 (2d Cir. 1975), *cert. Denied,* 424 U.S. 958 (1976).

Opinion

1. Due Process and the Validity of the Regulations

Respondents initially urge vacation of the Temporary Denial of Export Privileges Order by averring that the Regulations, as applied to Respondents are inconsistent with the Act and the Constitution. First, Respondents contend that the issuance of a Temporary Denial Order based upon the regulatory requirement of a showing that a violation is "imminent", is in conflict with the Terms of the Act, and inconsistent with its intent. Second, Respondents contend that the allowance of the imposition of a TDO based upon "the general circumstances of the matter under investigation,"[3] or because the alleged violation is significant instead of technical is unconstitutionally vague and violates Due Process. Third, Respondents argue that the imposition of a TDO on an *ex parte* basis denies the Respondents their rights to procedural Due Process. Lastly Respondents contend that due to the Double Jeopardy clause of the Fifth Amendment, the TDO will prevent any further proceedings to impose additional penalties on Respondents for any alleged violations of the past.

Regardless of the validity, or invalidity, of these arguments, the Administrative Law Judge does not have the authority to consider them. *See Frost v. Weinberg,* 375 F.Supp. 1312, 1320, (E.D.N.Y 1974), *rev'd on other grounds, 515* F.2d 57 (2d Cir. 1975), *cert. denied, 424* U.S. 958 (1976)(holding that an administrative law judge is precluded from passing upon the constitutionality of the very procedures he is called upon to administer);. *See also D'Amico v. Schweiker,* 698 F.2d 903, 906 (7thCir. 1983); *Steiberger v. Heckler,* 615 F. Supp. 1315, 1386 (S.D.N.Y. 1985); *Association of Administrative Law Judges v. Heckler,* 594 F. Supp. II 32, 1141 (D.D.C. 1984). Wherefore, consideration of these arguments will not be undertaken.

2. The Temporary Denial Order and the Definition of "Imminent"

[3] (Respondent's Brief at 16.).

Respondents contend that the purpose of this proceeding "is not to determine whether any of the Respondents ever allegedly violated the Act, the EAR, or any order of license issued thereunder," but rather to determine whether "BXA has proved that it is entitled to emergency, ex *parte* relief to prevent Respondents from committing future, imminent. violations of the Act, the EAR, an order or a license". (*Resp. Brief at 1*). Respondents further contend that in so determining this issue, the definition of the term "imminent" should be "likely to happen without delay". As a result, Respondents aver that a TDO may only be issued where violations are likely to happen presently and cannot be issued for past, suspected violations of the Act. I cannot agree with this statement of the issue at hand.

The Regulations provide that a Temporary Denial of Export Privileges may be granted if the Secretary finds that the order is necessary in the public interest to prevent an imminent violation. *15 C.F.R.δ 766.24*. A Respondent may appeal the imposition of any such TDO on the grounds that the finding that the order is necessary in the public interest to prevent an imminent violation is unsupported. *15 C.F.R. δ 766.24(e)(4)*. The relevant issue at hand, therefore, is whether or not the finding that a TDO was necessary to prevent an "imminent" violation is supported.

The Regulations provide that a violation is "imminent" if:

> [T]he general circumstances of the matter under investigation demonstrate a likelihood of future violations. *To indicate the likelihood of future violations, BXA may show that the violation under investigation is significant, deliberate, covert and/or likely to occur again,* rather than technical or negligent, and that it is appropriate to give notice to companies in the United States and abroad to ceased along with the person in U.S.-origin items in order to reduce the likelihood that a person under investigation continues to export or acquire abroad such items, risking subsequent disposition contrary to export control requirements.

15 C.F.R.δ 766.*24(b)(3)(emphasis added).*

The BXA introduced the following in support of its argument that the violation under investigation is significant, deliberate and covert. First, BXA avers, and I concur, that the activities under question involved exports of U.S.-origin commodities to Libya. Libya, is a country which is

subject to restrictive economic controls. *See Libyan Sanction Regulations, 31 C.F.R. Part 550 (1996)*. Under the regulations virtually all exporting and re-exporting to Libya are monitored and controlled, requiring a license issued by the Office of Foreign Assets Control (hereinafter "OFAC"). This office has no record of Thane-Coat, Inc. or TIC, Ltd. ever requesting such a license. *(Gov. Ex. 1, Ex. 15)*.

Second, an export scheme was undertaken to complete the export of pipe coating materials to Libya. Thane-Coat, Inc. through Ford and Engebretson, using TIC, Ltd. as the exporter of record, obtained coating products from U.S. manufacturers and had those items delivered to U.S. ports for export to Felixstow, United Kingdom. *(Gov. Ex. 1)*. Once in the U.K., Harkmel International "re-stuffed" the cargo, unloading it from 40-foot containers at the U.K. port of Felixstowe and reloading it into 20-foot containers. These containers were re-stuffed based upon the advice from Harkmel that use of the same containers would be "a flag for person following movements to country". *(Gov. Ex. 1)*. The repackaged containers were then sent to Marsa El Brega, Libya. *(Id.)*.

Based upon the above evidence, BXA has shown that Respondents committed a violation that was both significant, deliberate and covert. In light of this, the Acting Assistant Secretary's decision to issue a TDO is clearly supportable.

Conclusion

In light of the fact that Respondents entered into a scheme of violations which were not only deliberate, but also covert, it is hereby strongly recommended that the decision of the Acting Assistant Secretary to temporarily deny export privileges to the Respondents for a period of 180 days be affirmed.

Recommendation

IT IS HEREBY RECOMMENDED that the issuance of the Order Temporarily Denying Export Privileges to Thane-Coat, Inc., Jerry Vernon Ford, Preston John Engebretson, Export Materials, Inc. and Thane-Coat International, Ltd., be **AFFIRMED.**

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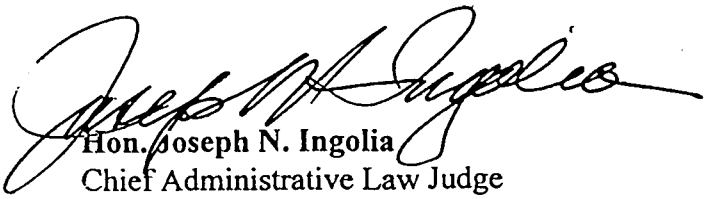

Hon. Joseph N. Ingolia
Chief Administrative Law Judge
United States Coast Guard

Dated on the 11th day of June, 1997
Baltimore, Maryland

copy: Jeffrey M. Joyner, Esq.
Samuel J. Buffone, Esq.
Thomas B. Smith, Esq.

E-545-219

Certificate of Mailing

I hereby certify that I forwarded the attach document by federal express to the following persons:

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Joi L. Johnson

JOI L. JOHNSON
Legal Assistant to Chief Judge Ingolia

Dated this 11th day of June, 1997
Baltimore, Maryland