No. 22-

IN THE
Supreme Court of the United States

GREAT LAKES INSURANCE SE

Petitioner,

v.

RAIDERS RETREAT REALTY CO., LLC

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OR CERTIORARI

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QUESTION PRESENTED

The questions presented are:

1. Under federal admiralty law, what is the standard for judging the enforcement of a choice of law clause in a maritime contract?

2. Under federal admiralty law, can a choice of law clause in a maritime contract be rendered unenforceable if enforcement is contrary to the "strong public policy" of the state whose law is displaced?

RULE 29.6 STATEMENT

Great Lakes Insurance SE is a corporation organized and existing under the laws of the Federal Republic of Germany, with its office and principal place of business located in the Federal Republic of Germany (commercial register number: HRB 230378). Great Lakes Insurance SE is a wholly owned subsidiary of Munchener Ruckversicherungs-Gesellschaft (stock ticker symbol MUV2:GR Xetra), a company incorporated in Germany with its principal place of business in Munich, Germany.

PARTIES TO THE PROCEEDINGS AND RELATED CASES

The parties to this proceeding are listed on the front cover.

Related cases to this proceeding are:

- *Great Lakes Insurance SE v. Raiders Retreat Realty Co., LLC*, No. 21-1562 U.S. Court of Appeals for the Third Circuit. Judgment entered August 30, 2022
- *Great Lakes Insurance SE v. Andersson*, No. 4:20-cv-40020, United States District Court for the District of Massachusetts. Judgment entered June 21, 2021.
- *Great Lakes Insurance SE v. Raiders Retreat Realty Co., LLC*, No. 2:19-cv-04466, United States District Court of the Eastern District of Pennsylvania. Judgment entered March 15, 2021.
- *Great Lakes Insurance SE v. Raiders Retreat Realty Co., LLC*, No. 2:19-cv-04466, United States District Court of the Eastern District of Pennsylvania. Judgment entered February 22, 2021.
- *Great Lakes Insurance SE v. Martin Andersson*, No. 21-1648, United States Court of Appeals for the First Circuit.

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PETITION FOR WRIT OF CERTIORARI

Great Lakes Insurance SE (hereinafter "GLI") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The decision under review in this petition (App. A, pp. 1a-15a) reversing the judgment of the United States District Court for the Eastern District of Pennsylvania (App. B, pp. 16a-18a) is reported at *Great Lakes Insurance SE v. Raiders Retreat Realty Co., LLC*, 47 F.4th 225; 21-1562 (3d Cir. August 30, 2022).

The opinion of the United States District Court for the Eastern District of Pennsylvania (App. B, pp. 16a-18a) denying the respondent's motion for reconsideration is reported as *Great Lakes Insurance SE v. Raiders Retreat Realty Co., LLC*, 19-cv-04466 (E.D.Pa. March 15, 2021).

The opinion of the United States District Court for the Eastern District of Pennsylvania enforcing the disputed choice of law clause (App. C, pp. 19a-35a) is reported as *Great Lakes Insurance SE v. Raiders Retreat Realty Co., LLC*, 521 F.Supp.3d 580; 19-cv-04466 (E.D.Pa. February 22, 2021).

JURISDICTION

The order of the United States Court of Appeals for the Third Circuit (App. A 1a) from which this

appeal is taken was entered on August 30, 2022. *Great Lakes Insurance SE v. Raiders Retreat Realty Co., LLC*, 47 F.4th 225; 21-1562 (3d Cir. August 30, 2022) (App. A, p. 1a).

This Court has jurisdiction under 28 U.S.C.A. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--**to all Cases of admiralty and maritime Jurisdiction**;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S.C.A. Const. Art. III § 2 [emphasis added].

INTRODUCTION

This Court's *Wilburn Boat* decision threw the law of marine insurance into chaos. *Wilburn Boat Co.*

v. Fireman's Fund Ins. Co., 348 U.S. 310, 314; 1955 A.M.C. 467 (1955). *Wilburn Boat* held that, henceforth, in marine insurance matters, federal admiralty law only applied where the court could identify an already "entrenched" rule of federal admiralty law that governed the specific contract clause or legal issue in dispute. *Id.* Second, where an "entrenched" rule was absent, *Wilburn Boat* specifically enjoined the federal courts to consider whether to fashion new rules of federal admiralty law. *Id.* However, in practice, the appellate courts actively frustrate such attempts. *Ocean Reef Charters*, *infra*. Third, *Wilburn Boat* held that state law was to fill any gaps left by the absence of an "entrenched" rule. *Wilburn Boat*, at 314. Although *Wilburn Boat* clearly establishes that federal admiralty law is supreme, as it must be under the Supremacy Clause, the practical result has been that venerable marine insurance doctrines such as breach of warranty and *uberrimae fidei* ("utmost good faith") have suffered constant erosion, with federal law constantly ceding ground to encroaching state law. *Albany Ins. Co. v. Anh Thi Kieu*, 927 F.2d 882; 1991 A.M.C. 2211 (5th Cir.1991). The uncertainty caused by *Wilburn Boat* means that every case turns into a choice of law battle as the marine insurer attempts to defend these venerable doctrines, which it has relied upon when evaluating risk and setting premium, and the disgruntled insured, with the active assistance of encroaching state law, attempts to undermine them and to replace them with more favorable state law. *Travelers Property Casualty Company of America v. Ocean Reef Charters LLC*, 996 F.3d 1161 (11th Cir.2021).

Since 1955, the only countervailing force powerful enough to impose some kind of predicable order on entropy has been the consistent enforcement of choice of law clauses. Since *Wilburn Boat*, choice of law clauses have enabled the marine insurance industry, an industry especially attached to the predictable enforcement of uniform rules, to reliably judge risk based on the anticipated application of the law chosen by the parties to govern their relationship before any conflict has arisen. *Great Lakes Reinsurance (UK) PLC v. Durham Auctions, Inc.*, 585 F.3d 236; 2010 A.M.C. 185 (5th Cir.2009). For instance, the Fifth Circuit no longer applies the doctrine of *uberrimae fidei*, which has been part of federal admiralty law since at least 1828. *McLanahan v. Universal Ins. Co.*, 26 U.S. 170; 1998 A.M.C. 285 (1828), *Durham Auctions*, *supra*, *Anh Thi Kieu*, *supra*. Whereas risks in New York, California, and Florida are all governed by this duty to make voluntary truthful disclosure of material facts to the underwriter, risks in Texas, Louisiana, and Mississippi are not. *Fireman's Fund Ins. Co. v. Great American Ins. Co. of New York*, 822 F.3d 620; 2016 A.M.C. 1217 (2d Cir.2016), *Durham Auctions*, *supra*, *Certain Underwriters at Lloyds, London v. Inlet Fisheries Inc.*, 518 F.3d 645; 2008 A.M.C. 305 (9th Cir.2008), *Steelmet, Inc. v. Caribe Towing Corp.*, 747 F.2d 689; 1985 A.M.C. 956 (11th Cir.1984). It is a mystery why *uberrimae fidei* was an entrenched rule of federal admiralty law in California in 2008 (*Inlet Fisheries*), but was not an entrenched rule of federal admiralty law in Mississippi in 1991 (*Anh Thi Kieu*). *Id.*

Even this precarious stability is now at risk from the Third Circuit's decision in the *Raiders* case. *Great Lakes Insurance SE v. Raiders Retreat Realty Co.*, LLC, 47 F.4th 225 (3d Cir.2022) (App. A, p. 1a). As will be analyzed in more depth below, the Third Circuit has held that choice of law clauses in maritime contracts are to be analyzed under the standard which this Court has held is applied to forum selection clauses. *Bremen*, *infra*. Under *Bremen*, a forum selection clause in a maritime contract (which merely chooses the arena for the match, but not the rules) might not be enforced if enforcement would be contrary to the "strong public policy" of the displaced forum which would otherwise have the power to hear the case. *Id.* In order to invalidate a forum selection clause, the challenging party must show hardship so great as to be effectively "deprived of its day in court." *Id.*

Prior to the Third Circuit's decision in *Raiders*, the enforcement of choice of law clauses had enabled the marine insurance industry to continue to rely on the consistent application of legal principles which the parties had agreed to prior to any dispute. (App. A, p. 1a). As a result, the marine insurer in *Durham Auctions* was able to rely on the application of *uberrimae fidei* under New York law. *Durham Auctions*, *supra*. The circuit split now aggravated by the Third Circuit's decision represents a mortal threat to this certainty. *Id.*[1] But, as detailed below, the

[1] The circuit split analyzed herein first appeared in 1992 in the case of *Milanovich v. Costa Crociere, S.p.A.*, 954 F.2d 763; 1993 A.M.C. 1034 (D.C.Cir.1992). However, since that case did not involve a conflict between the law of a chosen state against the

Third Circuit's decision must be wrong and must be reversed because no state government can ever express a strong public policy which tells the federal government which clauses are, or are not, enforceable in a maritime contract.

STATEMENT OF THE CASE

The instant petition has its genesis in a policy of marine insurance (hereinafter "the Policy") issued by the Petitioner, GREAT LAKES INSURANCE SE (hereinafter "GLI") to the Respondent, RAIDERS RETREAT REALTY, LLC (hereinafter "RAIDERS"), affording $550,000.00 in first-party property damage coverage against "all risks" of physical loss or damage to the insured vessel. *Raiders*, at 227-28 (App A, p. 3a). The Policy contains this choice of law clause:

> It is hereby agreed that any dispute arising hereunder shall be adjudicated according to well established, entrenched principles and precedents of substantive United States Federal Admiralty law and practice[,] but where no such well established, entrenched precedent exists, this insuring agreement is subject to the substantive laws of the State of New York. *Id*, at 228 (App. A, p. 4a).

Following a loss in which insured vessel ran aground, GLI investigated the loss and discovered

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law of a displaced state, but concerned the displacement of federal law by the election for Italian law, its holding is not relevant here. *Id.*

that the vessel's fire extinguishers had not been properly certified and tagged. *Id* (App. A, p. 3a). With respect to the insured vessel's firefighting equipment, the Policy contained an express warranty that all such equipment would be properly certified and tagged and that any breach of this warranty would void the Policy from its inception. *Id.* Based on this clear breach of warranty, GLI filed a declaratory judgment action in the United States District Court for the Eastern District of Pennsylvania, seeking a decision from that court confirming GLI's decision that the Policy was void from its inception and afforded no coverage for the loss. *Id.*

In response to GLI's declaratory judgment action, RAIDERS filed a counterclaim which included causes of action for bad faith breach of contract and breach of fiduciary duty, both arising under Pennsylvania law. *Id* (App. A, pp. 3a-4a). Therefore, GLI filed a motion for judgment on the pleadings under Fed.R.Civ.P. 12(c) based on enforcement of the election in the choice of law clause for the application of New York law to any issue not governed by an "entrenched" principle of federal admiralty law. *Id* (App. A, p. 4a). Since there is no "entrenched" rule of federal admiralty law pertaining to bad faith breach of contract and breach of fiduciary duty, and since New York law includes no bad faith statute and does not recognize a cause of action for breach of fiduciary duty arising out of the alleged breach of a contract, the district court enforced the choice of law clause and dismissed the causes of action arising under Pennsylvania law. *Id.*

Despite sixteen years of federal district and appellate decisions enforcing this precise choice of law clause (*Chiariello v. Ing Groep NV*, 2006 A.M.C. 2148 (N.D.Cal.2006), the Third Circuit held that GLI's choice of law might not be enforceable if its election for New York law were contrary to the "strong public policy" of the displaced state, Pennsylvania. *Id*, at 233 (App. A, p. 15a).

REASONS FOR GRANTING THE PETITION

1. Without a choice of law clause, chaos.

The consistent enforcement of choice of law clauses is absolutely vital to the marine insurance industry because, as a result of *Wilburn Boat*, the parties to these policies, and often even the courts, have no idea what law should be applied to marine insurance coverage disputes. Where there is no choice of law clause, the courts are often compelled to do double duty in order to protect themselves from reversal, issuing alternative decisions which decide the case under all the laws which might hypothetically apply. For instance, in 2001, the Second Circuit considered a policy of marine insurance which contained an express warranty that the insured would not tow any vessel in excess of 50 feet. *Commercial Union Ins. Co. v. Flagship Marine Services, Inc.*, 190 F.3d 26; 2000 A.M.C. 1 (2d Cir.1999). Interpreting the tow warranty, the Second Circuit held that, under federal admiralty law, express warranties are subject to the rule of strict compliance, even where the fact warranted is collateral to the risk and the loss. *Id*, at 31. Under *Wilburn Boat*, this holding, that there was an existing

federal rule, should have ended the analysis. *Wilburn Boat*, at 314. But, instead of applying the federal rule it had just recognized, the Second Circuit inexplicably went on to apply both New York law and Florida law, without any further mention of federal admiralty law. *Commercial Union*, at 32. First, the Second Circuit held that New York law also applies the rule of strict or literal compliance. *Id.* Next, the Second Circuit recognized that Florida applies a different rule, under which warranties will only be enforced where the breach increased the hazard of the loss which occurred. *Id.* Finally, without deciding which state's law applied, the Second Circuit enforced the warranty because, on the facts, the result would be the same under both New York law and Florida law. *Id.*

Where there is no choice of law clause, this confusion has infected the caselaw for the last sixty-seven years. For instance, in 1984, the District of Rhode Island could not decide which law to apply to a dispute over the misrepresentation of material facts in the insurance application, federal admiralty law or New York law. *Albany Ins. Co. v. Wisniewski*, 579 F.Supp. 1004; 1985 A.M.C. 689 (D.R.I.1984). Therefore, the court only gave judgment to the marine insurer after satisfying itself that the result would be the same under either law.

In 2000, the Middle District of Florida could not decide which law to apply to a dispute over breach of a warranty requiring that the vessel be laid-up, federal admiralty law or Florida law. *AXA Global Risks (UK), Ltd. v. Webb*, 2000 A.M.C. 2679 (M.D.Fla.2000). Therefore, the court only gave

judgment to the marine insurer after satisfying itself that the result would be the same under either law.

In 2012, the District of Massachusetts could not decide which law to apply to a dispute over breach of a passenger warranty, federal admiralty law or Massachusetts law. *Northern Assur. Co. of America v. Keefe*, 845 F.Supp.2d 406; 2012 A.M.C. 958 (D.Mass.2012). Therefore, the court only gave judgment to the marine insurer after satisfying itself that the result would be the same under either law.

Two years ago, the District of Massachusetts dealt with a case in which the marine insurer sought to void the policy of marine insurance based on the insured's misrepresentation of material facts on the application, a breach of the duty of *uberrimae fidei* ("utmost good faith") under federal admiralty law. *Atlantic Specialty Insurance Company v. Karl's Boat Shop, Inc.*, 480 F.Supp.3d 322 (D.Mass.2020). The district court began its analysis by citing the First Circuit's binding decision establishing that *uberrimae fidei* is an entrenched rule of federal admiralty law, under which an applicant for insurance must truthfully disclose all material facts to the underwriter, even if not asked. *Id*, at 334, *citing*, *Catlin at Lloyd's v. San Juan Towing & Marine*, 778 F.3d 69, 80; 2015 A.M.C. 694 (C.A.1.2015). However, immediately after recognizing that Massachusetts law applied a different, stricter standard that favored the insured, the district court proceeded to apply Massachusetts law because the result would be the same under either law. *Id.*

The lesson to take from these decisions, which are just a small sampling of the chaos caused by *Wilburn Boat*, is that neither courts nor litigants really have any idea what law will eventually be applied.

Even worse than the Second Circuit's *Commercial Union* decision, *Wilburn Boat* typically leads to inconsistent appellate decisions which cannot be logically reconciled. Two decisions from the Eleventh Circuit perfectly illustrate the utter chaos concerning the law which applies to the enforcement of express warranties in marine insurance policies. In 1988, the Eleventh Circuit held that a navigational limits warranty which confined the vessel to operation within one hundred miles of shore was governed by an entrenched rule of federal admiralty law, strict or literal compliance. *Lexington Ins. Co. v. Cooke's Seafood*, 835 F.2d 1364; 1988 A.M.C. 1238 (11th Cir.1988). However, just last year, the Eleventh Circuit held that a warranty requiring that the vessel be manned by one captain and one crewman was not governed by an entrenched rule of federal admiralty law, but was governed by Florida law, under which the warranty was ineffective. *Ocean Reef Charters*, at 1170.

Why was a navigational limits warranty more worthy of veneration than a captain and crew warranty? Is a warranty pertaining to captain and crew somehow less "nautical and fascinating" than a

warranty limiting the vessel's scope of navigation?[2] To its credit, the Eleventh Circuit frankly admitted that it had no idea. Judge Jordan wrote, "the Supreme Court has left the lower federal courts at sea without a rudder or compass. If we were writing on a blank slate, we would consider holding that there should be a uniform maritime rule regarding the effect of a breach of an express warranty in a marine insurance policy—and from there determine what that uniform rule should be. The slate, however, is not blank. It is covered in graffiti, and we must somehow make sense of the layers of paint." *Id*, at 1167 [internal quotations and citation omitted].

In direct response to this chaos, the marine insurance industry has employed choice of law clauses in order to impose some modicum of predictability. However, the Third Circuit's decision threatens to upset this fragile stability.

2. **The Majority (Correct) Rule (Fifth, Ninth, and Eleventh Circuits): Choice of law clauses in maritime contracts are enforceable so long as the (1) chosen law has sufficient connection to the parties or transaction and (2) the chosen law does not conflict with the fundamental purposes of maritime law.**

For all maritime contracts, the correct rule, which GLI asks this Court to endorse, is that all choice of law questions are controlled by federal admiralty

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[2] *Master and Commander: The Far Side of the World*, starring Russell Crowe and Paul Bettany (Twentieth Century Fox, 2003) (https://getyarn.io/yarn-clip/12706b71-28c3-48f2-87e1-0d7d1005a73b)

choice of law rules, not state choice of law rules. *Wilburn Boat*, *supra*, *Great Lakes Insurance SE v. Wave Cruiser LLC*, 36 F.4th 1346, 1354 (11th Cir.2022), *St. Paul Fire and Marine Ins. Co. v. Board of Com'rs of Port of New Orleans*, 418 Fed.Appx. 305, 309 (5th Cir.2011), *Odin Shipping Ltd. v. Drive Ocean V MV*, 221 F.3d 1348 (9th Cir.2000), *Commercial Union*, *supra*, *Advani Enterprises, Inc. v. Underwriters at Lloyds*, 140 F.3d 157; 1998 A.M.C. 2045 (2d Cir.1998). State choice of law rules, even if they are contrary to federal choice of law rules, are utterly irrelevant because "States can no more override such judicial rules validly fashioned than they can override Acts of Congress." *Wilburn Boat*, at 314. Even state courts, rightly jealous of their prerogatives, recognize that maritime contracts are governed by the federal admiralty choice of law analysis. *Jones v. Lynn*, 498 P.3d 1174 (Id.2021), *Jarvis & Sons, Inc. v. International Marine Underwriters*, 768 N.W.2d 365 (Minn.App.2009), *Ross v. Frank B. Hall & Co. of Washington*, 870 P.2d 1007; 1994 A.M.C. 2378 (Wash.App.1994), *Aetna Insurance Co. v. Dudney*, 595 So.2d 238 (Fla. 4th DCA 1992). The Supremacy Clause of the Constitution requires nothing less. *Pope & Talbot v. Hawn*, 346 U.S. 406; 1954 A.M.C. 1 (1953).

In 1988, the Fifth Circuit Court of Appeals dealt directly with the test for the enforcement of a choice of law clause in a marine insurance contract which displaced otherwise applicable state law. *Stoot v. Fluor Drilling Services, Inc.*, 851 F.2d 1514; 1989 AMC 20 (5th Cir.1988). *Stoot* arose out of a maritime contract to provide catering services aboard an oil rig in the Gulf of Mexico. *Id*, at 1516. Following an

altercation in which an employee of the drilling rig cut off several fingers belonging to an employee of the caterer, the caterer sought defense and indemnification under the terms of the catering contract. *Id.* The applicable contract terms were enforceable under federal admiralty law. *Id.* However, the contract included a choice of law clause which displaced federal admiralty law. *Id.* The choice of law clause required the application of Louisiana law, under which the defense and indemnification terms were unenforceable. *Id.* The district court applied federal admiralty law and enforced the provisions, but the Fifth Circuit reversed. *Id.* The Fifth Circuit held that, "under federal admiralty law, where the parties have included a choice of law clause, that state's law will govern unless the state has no substantial relationship to the parties or the transaction or the state's law conflicts with the fundamental purposes of maritime law." *Id*, at 1517. Applying this test, the Fifth Circuit held that the choice of law clause was enforceable and that the district court's disregard of the choice of law clause was reversible error. *Id*, at 1518.

The most vital thing to note about *Stoot* is this: even though Louisiana law was different from federal admiralty law, and even though the application of Louisiana law would deprive the injured claimant of a remedy available under federal admiralty law, the Fifth Circuit held that the right of the parties to elect Louisiana as an alternative did not conflict with the fundamental purposes of maritime law. *Id*, at 1518.

To summarize, *Stoot* articulated this two-part test:

(1) First, does the chosen state's law have a substantial relationship to the parties or the transaction? If there is not a substantial relationship, the choice of law clause will not be enforced.

(2) Second, does the chosen state's law conflict with the fundamental purposes of maritime law? If the chosen state's law conflicts with the fundamental purposes of maritime law, the choice of law clause will not be enforced.

This test was applied again by the Fifth Circuit in 2009 in a case involving the exact same marine insurer and the exact same choice of law clause as the present case, *Great Lakes v. Durham Auctions, supra*.[3] Exactly like the present matter, *Durham Auctions* concerned a policy of marine insurance on a pleasure vessel. *Id*, 237-38. Following a sinking and the assertion of a claim for coverage, the marine insurer did the exact same thing as GLI in the present case, the marine insurer filed a declaratory judgment action in the federal court, invoking admiralty jurisdiction. *Id*. The marine insurer sought a declaration that the insured's failure to truthfully disclose material facts on the insurance application voided the policy of marine insurance from its inception. *Id*.

Since the Fifth Circuit no longer applies the federal admiralty law doctrine of *uberrimae fidei* (*Anh*

[3] GREAT LAKES INSURANCE SE was then known as Great Lakes Reinsurance (UK) PLC.

Thi Kieu, *supra*), the dispute turned on whether the policy's election for New York law was enforceable to defeat otherwise applicable Mississippi law. *Id*, at 241. If New York law applied, then the insured's misrepresentations would void the policy from inception and the marine insurer would prevail. *Id*. If Mississippi law applied (under which the insured had no duty to disclose facts where the insurer made no specific inquiry), then the policy would not be void and the insured would prevail. *Id*. Therefore, as the choice of law question was wholly outcome determinative, there could be no issue more fundamentally important to Mississippi.

The Fifth Circuit began its analysis by stating that, "the court in maritime cases must apply general federal maritime choice of law rules." *Id*, *quoting*, *Anh Thi Kieu*, at 890. Next, the Fifth Circuit affirmed that "[a] choice of law provision in a marine insurance contract will be upheld in the absence of evidence that its enforcement would be unreasonable or unjust." *Id*, at 242, *quoting*, 2 Schoenbaum, Admiralty and Maritime Law (4th Ed., 2004). To determine whether the marine insurer's choice of law clause was "unreasonable or unjust," the Fifth Circuit applied the two-part test articulated in *Stoot*. *Id*, at 244. First, the Fifth Circuit examined the marine insurer's connections to New York and held that these connections were sufficient to establish a "substantial connection" to the parties or transaction. *Id*. Second, the Fifth Circuit held that the application of *uberrimae fidei* under New York law did not conflict with the fundamental purposes of maritime law. *Id*.

The most vital thing to note about *Durham Auctions* is this: even though Mississippi law was different from New York law, and even though the application of Mississippi law would have produced the exact opposite result and would have produced victory on the merits for the Mississippi party, the Fifth Circuit held that the right of the parties to elect New York law as an alternative did not conflict with the fundamental purposes of maritime law. *Id*, at 1518.

There is one further thing to note about *Durham Auctions*. In its appellate brief, the insured made the exact same argument that was accepted by the Third Circuit, that GLI's choice of law clause should be analyzed in accordance with this Court's decision in *Bremen*. *Durham Auctions*, at 243-44, *citing*, *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 1972 A.M.C. 1407 (1972). As will be discussed in more depth below, *Bremen* had absolutely nothing to do with choice of law clauses. *Id*. Rather, *Bremen* dealt solely with forum selection clauses. *Id*. In *Bremen*, this Court ruled that a forum selection clause might be "unreasonable or unjust" if it was contrary to the fundamental public policy of the displaced forum preferred by the party challenging the forum selection clause. *Id*. Therefore, applying this test, this Court held that a forum selection clause calling for disputes to be resolved before the London Court of Justice had to be enforced in part because it was not contrary to any strong public policy of the American federal courts. *Id*, at 15.

Although *Bremen* said absolutely nothing about choice of law clauses, the insured in *Durham*

Auctions asked the Fifth Circuit to invalidate the choice of law clause on the grounds that it was contrary to the "fundamental policy" of Mississippi. *Id.* The Fifth Circuit declined to apply this inappropriate test. *Id.* But, in *dicta*, the Fifth Circuit wrote, "[a]ssuming, arguendo, that [the fundamental policy of Mississippi] would be determinative, it has not been shown." *Id*, at 244.

Three years later, the Fifth Circuit repeated the application of the *Stoot* test, this time without any unnecessary *dicta* concerning *Bremen*. *St. Paul Fire & Marine Ins. Co. v. Board of Com'rs of the Port of New Orleans*, 418 Fed.Appx. 305 (5th Cir.2011). The *St. Paul* case began with the issuance of a "bumbershoot" policy of marine insurance affording excess insurance coverage over various underlying policies of insurance. *St. Paul Fire & Marine Ins. Co. v. Board of Com'rs of the Port of New Orleans*, 646 F.Supp.2d 813, 816 (E.D.La.2009). When a dispute arose concerning an injury suffered by a vehicle operator at the dock, the marine insurer filed a declaratory judgment action seeking a ruling confirming that the disputed policy of marine insurance afforded no coverage for the insured's potential liability. *Id.* Although the policy of marine insurance was issued to an insured in Louisiana and covered risks exclusively in Louisiana, the policy of marine insurance contained a choice of law clause calling for the application of New York law. *Id*, at 817. Notwithstanding the fact that the policy's notice of occurrence provisions would not have been enforceable under Louisiana law, the marine insurer denied coverage based on the insured's breach of the

notice of occurrence provision because such clauses are enforceable under New York law. *Id*, at 819.

On appeal, both appellants made the exact same argument that was accepted by the Third Circuit in the present case, that the Fifth Circuit should apply the test from *Bremen* and allow the "strong public policy" of Louisiana to trump the contract's election for New York law. The Fifth Circuit rejected this argument and reiterated the *Stoot* test, "The parties' choice of law clause in an admiralty case will govern 'unless the [chosen] state has no substantial relationship to the parties or the transaction or the state's law conflicts with the fundamental purposes of maritime law.'" *St. Paul v. Board of Com'rs*, at 309 (internal quotations and citations omitted). Since there was an adequate connection to New York, and since the displacement of Louisiana law in favor of New York law was not contrary to the fundamental principles of maritime law, the Fifth Circuit enforced the choice of law clause and enforced the policy's notice of occurrence provision. *Id.*

The most vital thing to note about *St. Paul* is this: even though Louisiana law was different from New York law, and even though the application of Louisiana's law would have produced the exact opposite result and would have produced victory on the merits for the insured, the Fifth Circuit held that the right of the parties to elect New York law as an alternative did not conflict with the fundamental purposes of maritime law. *Id*, at 1518.

Stoot, *Durham Auctions*, and *St. Paul* demonstrate conclusively that the Fifth Circuit does not apply *Bremen* when weighing the enforceability of choice of law clause electing a specific state's law and that the Fifth Circuit does not consider whether the "strong public policy" of a displaced state might defeat enforcement of a choice of law clause in a maritime contract.

In 2018, the Ninth Circuit dealt with *Bremen* directly and held that the *Bremen* analysis does not apply to a choice of law clause which displaces otherwise applicable state law. *Galilea, LLC v. AGCS Marine Insurance Company*, 879 F.3d 1052; 2018 AMC 46 (9th Cir.2018). The *Galilea* case concerned a policy of marine insurance issued to an insured in Montana. *Id*, at 1054. The policy of marine insurance included a choice of law clause almost identical to GLI's in the present matter. *Id*. Following the sinking of the yacht and the denial of coverage, the insured brought suit in the U.S. District Court for the District of Montana, asserting multiple causes of action arising under Montana law. *Galilea, LLC v. AGCS Marine Insurance Company*, 2016 A.M.C. 808 (D.Mont.2016). In response, the marine insurer filed a motion to compel enforcement of the policy's arbitration clause and the policy's choice of law clause. *Id*. First, the district court correctly recognized that "***a federal court sitting in diversity applies the choice-of-law rules of the forum state, whereas a federal court sitting in admiralty must apply federal maritime choice-of-law rules.***" *Id*. at 2 [emphasis added]. Next, the district court held that "When a contract specifies which law applies, admiralty courts will generally give effect to that choice." *Id*. at 3. This

had to be so because, "[u]nder federal maritime choice of law rules, contractual choice of law provisions are generally recognized as valid and enforceable." *Id*, *quoting*, *Durham Auctions*, at 242. Therefore, the district court applied the choice of law clause and found that the policy's arbitration clause was enforceable under federal admiralty law. *Id*.

On appeal, the insured made the exact same mistake as the Third Circuit, arguing that, under this Court's decision in *Bremen*, the marine insurance policy's choice of law clause could be defeated by the "strong public policy" of Montana. *Galilea v. AGCS*, 879 F.3d 1052, 1059. The Ninth Circuit completely rejected this ill found contention:

> There are two critical problems with Galilea's reliance on *The Bremen*. First, that case did not discuss federal maritime law rules about choice- of-law clauses, but rather about forum selection clauses. By contrast, Galilea and the Underwriters agreed to a kind of forum selection provision—arbitration—and also to a separate choice-of-law provision—federal maritime law, and where that law has gaps, New York law. And as we have already established, here there is no gap in federal maritime law to fill with law from any state, Montana included, as the FAA supplies the governing arbitration law for maritime transactions.

> Second, and more foundationally, *The Bremen* considered whether the public policy of the forum where suit was brought—there, federal public policy as supplied by federal maritime law—outweighed the application of the law of other countries. In other words, under the rule of *The Bremen* and its progeny, courts consider the application of the laws of otherwise equally situated fora in light of the concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability. But here we encounter an unequal, hierarchical relationship between federal maritime law and state law; again, state law governs disputes arising under marine insurance contracts only in the absence of a federal statute, a judicially fashioned admiralty rule, or a need for uniformity in admiralty practice.

Id, at 1060 (internal quotations and citations omitted).

Therefore, the Ninth Circuit concluded that "Within federal admiralty jurisdiction, conflicting state policy cannot override squarely applicable federal maritime law." *Id*.

Earlier this year, the Eleventh Circuit considered the exact same choice of law clause in an

identical policy of marine insurance issued by the exact same marine insurer and applied the "unjust or unreasonable" standard from *Durham Auctions*, under which a choice of law clause displacing otherwise applicable state law will be enforced unless there is no substantial connection to the chosen law or the chosen law conflicts with the fundamental purposes of federal maritime law. *Wave Cruiser*, at 1354. Therefore, applying New York law, the Eleventh Circuit enforced an exclusion in the policy of marine insurance that shifted onto the vessel owner the burden of presenting evidence that certain engine damage was caused by an "external" event. *Id*, at 1358.

Moreover, even when not expressly citing *Durham Auctions* or *Stoot*, no federal court in the Eleventh Circuit has ever allowed a state law, either common law or statutory, to defeat the right of the parties to a maritime contract to choose an alternative state's law to govern their relationship:

- Six months ago, the Southern District of Florida enforced this precise choice of law clause under the "unjust or unreasonable" standard, holding that the application of a warranty in the disputed policy of marine insurance was governed by New York law, not Florida law, even though the otherwise applicable Florida statute would have rendered the warranty unenforceable and would have produced victory on the merits for the insured. *Great Lakes Insurance SE v. Lassiter*, 2022 WL 1288741 (S.D.Fla.2022).

- In 2010, the Middle District of Florida enforced this precise choice of law clause under the "unjust or unreasonable" standard, holding that a theft exclusion in the disputed policy of marine insurance was governed by New York law, not Florida law, even though the otherwise applicable Florida statute would have rendered the exclusion unenforceable and would have produced victory on the merits for the insured. *Great Lakes Reinsurance (UK) PLC v. Yellow Fin 36 LLC*, 736 F.Supp.2d 1302 (M.D.Fla.2010).

- The month before that, the Southern District of Florida enforced this precise choice of law clause under the "unjust or unreasonable" standard, holding that the application of a warranty in the disputed policy of marine insurance was governed by New York law, not Florida law, even though the otherwise applicable Florida statute would have rendered the warranty unenforceable and would have produced victory on the merits for the insured. *Great Lakes Reinsurance (UK) PLC v. Rosin*, 757 F.Supp.2d 1244; 2011 AMC 223 (S.D.Fla.2010).

The district courts of the First, Second, Fourth, and Seventh circuits have been applying the *Stoot* test: (1) does the chosen state's law have a substantial relationship to the parties or the transaction and (2) does the chosen state's law conflict with the fundamental purposes of maritime law?

In 2004, the District of Massachusetts applied this test to a choice of law clause in a maritime contract under which a Massachusetts corporation

leased a barge from a Florida corporation. *Cashman Equipment Corp. v. Kimmins Contracting Corp.*, 2004 WL 32961 (D.Mass.2004). The leased equipment was to be used in Florida. *Id.* The maritime contract included a clause requiring that any dispute be arbitrated in Massachusetts and decided under Massachusetts law. *Id.* However, when a dispute eventually arose, the Florida corporation filed suit in Florida because, under Florida law, the arbitration provision was void and unenforceable. *Id*, at 2. Clearly, Florida's total prohibition against enforcement of such provisions expressed some kind of public policy. Analyzing the choice of law clause, the district court first recognized that, absent a choice of law clause, Massachusetts law probably would not apply because of the stronger connections to Florida. *Id.* However, applying the *Stoot* test, the district court held that the strong connections to Florida, and the different Florida law, were irrelevant because the parties had a substantial connection to Massachusetts and the application of Massachusetts law did not conflict with the fundamental purposes of federal maritime law. *Id*, at 3.

In the case of *Maclean v. Travelers Ins. Co.* concerned a policy of marine insurance on a high-speed commercial vessel. 299 F.Supp.3d 231; 2017 AMC 2462 (D.Mass.2017). The marine insurer denied coverage based on the insured's breach of a named operator warranty. *Id*, at 233. The policy of marine insurance included a clause requiring the application of federal admiralty law. *Id.* On a motion to dismiss the insured's state law claims, the insured argued that the disputed warranty was unenforceable under Massachusetts law. *Id.* The District of Massachusetts

applied the *Stoot* test and held that the election for federal admiralty law had to be respected because there was no conflict with the fundamental purposes of federal maritime law. *Id*, at 234.

The Southern District of New York applied this test to a choice of law clause in a policy of marine insurance covering a cargo vessel whose home port was in Maine. *American S.S. Owners Mut. Protection and Indem. Ass'n v. Henderson*, 2013 WL 1245451 (S.D.N.Y.2013). The policy of marine insurance contained a choice of law clause requiring the application of New York law. *Id.* Following an incident in which a crewman was injured, the vessel owner became insolvent, and the injured crewman brought a direct claim for coverage against the marine insurer. *Id.* Such direct suits are not permitted under New York law, but are permitted under Maine law. *Id*, at p. 2. Applying the *Stoot* test, the Southern District of New York held that the choice of law clause was enforceable because there was a substantial connection to New York and because, even though New York's rule was directly contrary to Maine's rule, New York's prohibition against such direct suits was not contrary to the fundamental purposes of maritime law. *Id*, at p. 4. Vital to note, enforcement of the choice of law clause meant absolutely foreclosing a remedy otherwise available under Maine law. *Id*, at p. 2. Nonetheless, Maine's interest in the matter was irrelevant. Since the election of New York law did not conflict with the fundamental purposes of maritime law, the choice of law clause was enforced., *See also*, *Apex Maritime Co., Inc. v. Furniture, Inc.*, 2013 WL 2444151 (E.D.N.Y.2013) (correctly applying the *Stoot* test), *Farrell Lines Inc. v. Columbus Cello-Poly Corp.*,

32 F.Supp.2d 118; 1998 A.M.C. 334 (S.D.N.Y.1997) (correctly applying the *Stoot* test).

The Western District of North Carolina had occasion to apply the *Stoot* test to a maritime contract to renovate a pleasure vessel. *Zepsa Industries, Inc. v. Kimble*, 2008 A.M.C. 2885 (W.D.N.C.2008). A dispute arose in which a vessel owner brought suit demanding loss of use damages. *Id.* While such damages are not available under federal admiralty law, the contract contained a choice of law clause requiring the application of North Carolina law, which permits the recovery for loss of use of a pleasure vessel. *Id.* First, the district court held that there was a substantial enough connection to North Carolina to justify enforcement of the clause. *Id.* Second, even though North Carolina law permitted a form of recovery which was unavailable under federal admiralty law, the district court held that the choice of law clause was still enforceable because the election for North Carolina law did not conflict with the "fundamental purposes" of federal admiralty law. *Id.*

See also, *Perzy v. Intercargo Corp.*, applying the *Stoot* test to a marine insurance cargo policy that specifically elected for the application of Illinois law. 827 F.Supp. 1365; 1994 AMC 1805 (N.D.Ill.1994) (Seventh Circuit).

Recently, the District of Massachusetts perfectly applied the *Stoot* test to an identical policy of marine insurance issued by the same marine insurer. *Great Lakes Insurance SE v. Andersson*, 544 F.Supp.3d 196 (D.Mass.2021). First, the District Court recognized that GLI had a substantial enough

relationship to New York. *Id.* Second, the District Court correctly recognized that "[a] federal court sitting in admiralty must apply federal (rather than state) choice of law rules." *Id*, at 201, *citing*; *Durham Auctions* and *Maclean*. Third, even though the application of the choice of law clause would deprive the unhappy insured of a remedy available under Massachusetts law, enforcement of the policy's choice of law clause would not be contrary to the "fundamental purposes of maritime law." *Id.*[4]

Only seven months ago, Judge Altonaga of the Southern District of Florida perfectly explained the proper test for enforcing GLI's choice of law clause. *Great Lakes Insurance SE v. Lassiter*, 2022 WL 1288741. *Lassiter* concerned an identical policy of marine insurance, containing an identical choice of law clause. *Id.* Coverage for a grounding was denied based on the insured's breach of a named operator warranty. *Id.* Since there is no rule of federal admiralty applying to named operator warranties, the court had to apply state law. *Id.* Despite the policy's election for New York law, the insured asked the court to apply Florida law, under which the warranty might be invalid. *Id.* Exactly like the present case, the insured argued that the choice of law clause was invalid because New York law would contravene a "strong public policy" of Florida. *Id.* Judge Altonaga rejected this argument and explained that, under the

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[4] The *Andersson* decision is currently in appeal before the First Circuit. *Great Lakes Insurance SE v. Martin Andersson*, 21-1648. The insured is challenging GLI's clause on the exact same issue that is before this Court, that the *Bremen* analysis should apply and that enforcement of the choice of law clause is contrary to the strong public policy of Massachusetts. *Id.*

proper test articulated in *Stoot*, it is irrelevant that the chosen law might be contrary to the displaced law. *Id.* The correct inquiry is whether the chosen law is contrary to federal admiralty law. *Id.* As long as the chosen law is not repugnant to federal admiralty law, the choice of law clause is valid and should be enforced. *Id.*

The majority rule is the correct rule for the precise reason stated by the Ninth Circuit in *Galilea*: "Within federal admiralty jurisdiction, conflicting state policy cannot override squarely applicable federal maritime law." *Galilea*, at 1060. If this Court allows the Third Circuit's decision to stand, then "squarely applicable federal maritime law" on the enforcement of choice of law clauses will become hostage to alleged conflicts with Pennsylvania public policy.

The recent *Andersson* decision perfectly explains why GLI's choice of law clause must prevail over any alleged "strong public policy" of a state. Such clauses must be enforced, and the parties to such contracts must be allowed to choose the state law which will apply in the absence of federal admiralty law, because there is no "fundamental" policy of federal admiralty law against the enforcement of choice of law clauses in maritime contracts. To allow a state's preference for its own law to defeat a choice of law clause in a policy of marine insurance would be to allow "state policy [to] override squarely applicable federal maritime law." *Galilea*, at 1060. This the Constitution forbids.

3. The Third's Circuit's decision in *Raiders* will make choice of law clauses in maritime contracts subject to state choice of law rules.

The Third Circuit's error can be stated very simply: if the enforcement of a choice of law clause in a maritime contract can be defeated by the strong public policy of the displaced state, then choice of law clauses will cease to be governed by federal admiralty law. Instead, every choice of law analysis will degenerate into an analysis of state law, and every court will have to ask, "is it contrary to the strong public policy of the displaced state to allow the enforcement of this clause in a maritime contract?" This cannot be the proper test because the enforcement of a choice of law clause is judged under federal admiralty choice of law rules, not state choice of law rules. *Wave Cruiser*, at 1354. But, if the Third Circuit's decision stands, if the "strong public policy" of the displaced state becomes the test for the enforcement of a choice of law clause in a maritime contract, this will effectively nullify the federal rule. In place of the federal rule, courts will simply look to whether such clauses are enforced under state law.

The Third Circuit's decision does not even deign to consider the mountain of caselaw cited above, nor the threat that state law will nullify federal law. The Third Circuit's opinion cites *Durham Auctions*, but does not even mention the majority test applied by the Fifth Circuit. *Raiders*, *supra* (App. A, p. 1a). The Third Circuit's decision simply ignores decades of caselaw in which choice of law clauses have been enforced. Instead, based on *Bremen*, the Third Circuit's decision just announces that "we consider it

altogether reasonable that a 'strong public policy of the forum [state] in which suit is brought' could, as to that policy specifically, render unenforceable a choice of state law in a maritime contract." *Id*, at 233 (App. A, p. 15a).

Bremen concerned a contract between an American corporation and a German corporation to tow an oil drilling rig from Louisiana to Italy. *Bremen*, at 2. The contract contained no choice of law clause. *Id*. But, it did contain a forum selection clause requiring that "[a]ny dispute arising must be treated before the London Court of Justice." *Id*. When a claim arose, the owner of the rig ignored the forum selection clause and filed suit against the owner of the tug in the Middle District of Florida. *Id*, at 3-4. The owner of the tug moved the dismiss based on the forum selection clause, the district court denied the motion, and the Firth Circuit affirmed the denial. *Id*, at 6-7.

This Court reversed the Fifth Circuit, starting with the declaration that, "in the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside." *Id*, at 15. Next, this Court held that "[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." *Id*. Therefore, since a forum selection clause in a contract between two international parties to resolve their dispute before the London Court of Justice was not contrary to any strong public policy of

federal admiralty law, this Court enforced the clause. *Id.*

Bremen said absolutely nothing with respect to the enforcement of a choice of law clause. *Id.* The only mention of any choice of law issue was this Court's suggestion that, "selection of a remote forum to apply differing foreign law to an essentially American controversy might contravene an important public policy of the [federal] forum." *Id*, at 16.

The *Bremen* case did not concern a choice of law clause and the decision expressly recognized that the case presented no choice of law issue. As even state courts recognize, within the federal system, the choice of forum has no impact whatsoever on the choice of law analysis. *See cases cited supra*. No less than federal courts, state courts faced with a maritime contract governed by federal admiralty law must apply the federal admiralty choice of law analysis. *Id.*

Instead, *Bremen* said only one thing about how a court should determine whether a forum selection clause was contrary to a strong public policy of the displaced forum. The decision noted merely that a forum selection clause might not be enforced where "selection of a remote forum to apply differing foreign law to an essentially American controversy might contravene an important public policy of the [displaced American] forum." *Bremen*, at 17.

The dispositive fault in the Third Circuit's decision is that it cedes control of choice of law clauses in maritime contracts to the states. As the caselaw above demonstrates, the enforcement of choice of law

clauses is governed by federal admiralty law. But, under the Third's Circuit's decision in *Raiders*, states will try to defeat the enforcement of choice of law clauses in maritime contracts simply by announcing a "strong public policy" against the enforcement of such clauses. It would be categorially impossible for choice of law clauses to be enforceable under federal admiralty law if their enforcement could be overridden when a state expresses a "strong public policy" that such clauses should not be enforced. To suggest out loud that a state might buck federal admiralty law simply by asserting a contrary rule is to illustrate the absurdity. Under the federal structure, states cannot nullify squarely applicable federal law.

Most obviously, there is the danger that courts will hold that, where the chosen law is different from the displaced law, the mere fact of difference shows that the displaced state has a "strong pubic policy" that must be given priority. But, if that did not suffice, all a state legislature would have to do is modify any statute to say, "Moreover, this statute makes clear that it is the strong public policy of this state that marine insurers who deny coverage in bad faith should pay attorney's fees. We really mean in it. We could not be more serious. With all our strength, we desire that the parties to a maritime contract, notwithstanding their many connections to other states, should not be allowed to elect the law to govern their maritime contract."

To allow this would mean that choice of law clauses would no longer be enforceable under federal admiralty law. Instead, the entire test for the

enforcement of such clauses would simply degenerate into an analysis of state choice of law rules. States would then have the power to invalidate choice of law clauses which would otherwise be enforceable. Under the Supremacy Clause, holding a choice of law clause in a contract governed by federal admiralty law hostage to the contrary public policy of a state simply cannot be permitted. *Pope*, *supra*.

This principle is perfectly illustrated by one of this Court's earliest cases, *Gibbons v. Ogden*, an admiralty matter arising out of an act of New York granting certain exclusive navigational privileges within its territorial waters. 22 U.S. 1 (1824). In response to a challenge to the law, this Court struck down the New York statute as contrary to the supremacy of federal law in matters pertaining to interstate commerce. *Id*, at 186. This Court wrote, "[T]he framers of our Constitution foresaw this state of things, and provided for it by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law." *Id*, at 210-211. Therefore, since New York's statute restricted conduct otherwise allowed under the power of the federal government to regulate interstate commerce, the supremacy of federal law required the nullification of the New York statute.

Holding a choice of law clause in a maritime contract hostage to an alleged "strong public policy" of Pennsylvania would allow the states to nullify federal maritime choice of law rules. It would allow the states to prohibit the parties to maritime contracts to agree

beforehand which law will govern possible disputes. Since federal admiralty law is largely a body of common law, the federal courts clearly have the power to declare when choice of law clauses might not be enforced. As discussed above, the federal courts have required that parties show that there is a sufficient connection to the chosen law and that the chosen law is not repugnant to the "strong public policy" of federal admiralty law. However, what the federal courts cannot do is hand this question over to the states. The federal courts cannot say, "Pennsylvania, tell us whether the parties to a maritime contract may elect which state's law will govern their obligations." Under the structure established by the Constitution, this cannot be permitted. *Pope*, *supra*.

CONCLUSION

Which is to be master of maritime contracts, federal choice of law rules or state choice of law rules?[5] The Third Circuit's decision in *Raiders* says that the "strong public policy" of the displaced state must be supreme. If that stands, then state choice of law rules will be master. Against that, the Supremacy Clause and *Wilburn Boat* say that federal maritime choice of law rules, including the rules pertaining to the enforcement of a choice of law clause in a maritime contract, must be supreme. Therefore, the Third Circuit's decision must be reversed.

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[5] "'The question is,' said Humpty Dumpty, 'which is to be master — that's all.'" *Alice's Adventures in Wonderland*, by Lewis Carol (Macmillan Publishers, 1865).

Wherefore, GLI prays that this Court will accept its petition for certification, and award all such further relief as may be appropriate in the premises.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED AUGUST 30, 2022

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-1562

GREAT LAKES INSURANCE SE

v.

RAIDERS RETREAT REALTY CO., LLC,

Appellant.

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 2-19-cv-04466)
District Judge: Honorable Eduardo C. Robreno

Argued on June 8, 2022

Before: CHAGARES, *Chief Judge*, AMBRO, and
FUENTES, *Circuit Judges*.

(Opinion Filed: August 30, 2022)

Appendix A

OPINION

AMBRO, *Circuit Judge*

A yacht owned by Raiders Retreat Realty Co., LLC ran aground. Luckily (or so it believed), Raiders had insured the vessel with marine insurer Great Lakes Insurance SE ("GLI"). But after Raiders submitted a claim under its policy, GLI left it high and dry. The insurer's reason for denying coverage: the yacht's fire-extinguishing equipment had not been timely recertified or inspected notwithstanding that the vessel's damage was not caused by fire. GLI sued first, seeking in federal court a declaratory judgment that Raiders' alleged failure to recertify or inspect its fire-suppression equipment rendered the policy void from its inception.

Raiders responded with five counterclaims, including three extra-contractual counterclaims arising under Pennsylvania law for breach of fiduciary duty, insurance bad faith, and breach of Pennsylvania's Unfair Trade Practices and Consumer Protection Law, 73 Pa. Stat. Ann. § 201-1, *et seq.* (the "Unfair Trade Practices Law"), respectively. Concluding the policy's choice-of-law provision mandated the application of New York law and thus precluded Raiders' Pennsylvania-law-based counterclaims, the District Court dismissed those claims. In so doing, the Court rejected Raiders' argument that applying New York law would contravene Pennsylvania public policy, thereby making the choice-of-law provision unenforceable under *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972), which held that under federal admiralty law a forum-

selection provision is unenforceable "if enforcement would contravene a strong public policy of the forum in which suit is brought." The District Court held that *The Bremen* did not apply for the choice-of-law issue, such that it need not consider whether there is strong Pennsylvania public policy that precludes applying New York law. We think the answer may be otherwise.

I. Background

Raiders, a Pennsylvania-based company, insured a yacht for up to $550,000 with GLI, a company headquartered in the United Kingdom. That yacht ran aground in June 2019, incurring at least $300,000 in damage. Raiders submitted a claim to GLI for loss of the vessel, but GLI rejected it, claiming that the yacht's fire-extinguishing equipment was not timely recertified or inspected contrary to Raiders' prior statements otherwise. Though the damage to the yacht was free of fire, GLI maintained Raiders misrepresented the vessel's fire-suppression system's operating ability, thus making the policy void from inception. The insurer then filed an action for declaratory judgment in the U.S. District Court for the Eastern District of Pennsylvania to determine whether the policy was indeed void.

As noted, Raiders contested GLI's allegations and brought five counterclaims. It alleged breach of contract (Count I); breach of the implied covenant of good faith and fair dealing (Count II); breach of fiduciary duty (Count III); insurance bad faith, in violation of 42 Pa. Stat. and Cons. Stat. Ann. § 8371 (Count IV); and violation of Pennsylvania's Unfair Trade Practices Law (Count V).

Relying on the policy's choice-of-law provision, GLI moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) as to Counts III through V, which sought relief available against insurance companies under Pennsylvania law (hence not based on the insurance contract and thereby referred to as extra-contractual claims), on the ground that New York law, which precludes these claims, governs. The choice-of-law provision in the policy reads:

> It is hereby agreed that any dispute arising hereunder shall be adjudicated according to well established, entrenched principles and precedents of substantive United States Federal Admiralty law and practice[,] but where no such well established, entrenched precedent exists, this insuring agreement is subject to the substantive laws of the State of New York.

App. at 113. The District Court concluded that New York law governed and barred Raiders' Pennsylvania-law-based counterclaims, thereby dismissing Counts III through V. The Court later denied Raiders' motion to reconsider its judgment. Raiders now appeals.

II. Standard of Review

We give a fresh, or plenary, review of the District Court's choice-of-law determination. *See Berg Chilling Sys., Inc. v. Hull Corp.*, 435 F.3d 455, 462 (3d Cir. 2006). We likewise exercise plenary review of the Court's

construction of a written contract, *see USX Corp. v. Prime Leasing Inc.*, 988 F.2d 433, 437 (3d Cir. 1993), and apply the same standard to its grant of a motion for judgment on the pleadings, "accept[ing] the nonmoving party's factual allegations as true and constru[ing] all allegations in the light most favorable to that party," *Fed Cetera, LLC v. Nat'l Credit Servs., Inc.*, 938 F.3d 466, 469 n.7 (3d Cir. 2019).

III. Discussion

A. Our jurisdiction over this interlocutory appeal.

Because this case concerns a maritime insurance contract, it fell within the District Court's maritime jurisdiction. 28 U.S.C. § 1333(1); *AGF Marine Aviation & Transp. v. Cassin*, 544 F.3d 255, 260, 50 V.I. 1134 (3d Cir. 2008). Our jurisdiction over the appeal is less clear. Though neither party contests it, before reaching the merits of this case we must first independently establish our authority to decide. *In re Klaas*, 858 F.3d 820, 825 (3d Cir. 2017). We have, under 28 U.S.C. § 1292(a)(3), jurisdiction over appeals from "[i]nterlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed." For interlocutory appeals in admiralty cases, our precedent makes this language "appl[y] to situations such as the dismissal of parties from the litigation, grants of summary judgment (even if not to all parties), and other cases where a claim has somehow been terminated." *In re Complaint of PMD Enters., Inc.*, 301 F.3d 147, 149 (3d Cir. 2002).

In short, "the order appealed from must conclusively determine the merits of a claim or defense." *Kingstate Oil v. M/V Green Star*, 815 F.2d 918, 921 (3d Cir. 1987).

In practice, we have allowed interlocutory appeals in admiralty cases where parties' claims against one of the defendants suffered dismissal for lack of subject matter jurisdiction, *see Jones & Laughlin Steel, Inc. v. Mon River Towing, Inc.*, 772 F.2d 62, 64 n.1 (3d Cir. 1985); the grant of judgment on a counterclaim where the principal claim was undecided, *see In re Nautilus Motor Tanker Co.*, 85 F.3d 105, 110 n.3 (3d Cir. 1996); and even in an appeal from an order determining the rights and liabilities of some but not all parties, *see Bankers Tr. Co. v. Bethlehem Steel Corp.*, 761 F.2d 943, 945 n.1 (3d Cir. 1985).

On the other hand, we refused to allow an interlocutory appeal in admiralty where the trial court dismissed one claim on which forfeiture of a vessel was based but three other grounds for that remedy remained. *See United States v. The Lake George*, 224 F.2d 117, 118-19 (3d Cir. 1955). We likewise rejected an interlocutory appeal in admiralty where the District Court denied a plaintiff's motion for summary judgment on the defendant's counterclaim because "no right or liability of the parties ha[d] been 'conclusively determine[d].'" *PMD*, 301 F.3d at 151 (second alteration in original) (quoting *Kingstate Oil*, 815 F.2d at 921). We explained that "[h]ad the District Court denied [the defendant] the right to file the counterclaim or had it granted summary judgment to [the plaintiff] on [the defendant's] counterclaim, the rights and liabilities of the parties may well have been conclusively determined, in

which case the District Court's decision would have been appealable." *Id.*

Because it foreclosed certain counterclaims, the District Court's decision to dismiss Raiders' extracontractual counterclaims is analogous to the hypothetical scenarios we outlined in *PMD*. As we explained, "the rights and liabilities of the parties may well have been conclusively determined" and so "would have been appealable." *Id.*

Applying that logic here warrants interlocutory review. Further, while Raiders still maintains two remaining counterclaims (Counts I and II), the Pennsylvania-law-based counterclaims dismissed by the District Court seek forms of relief unavailable under the surviving counts. *Cf. Lake George*, 224 F.2d at 118-19 (foreclosing appeal in admiralty where remaining claims sought same relief as dismissed claim). Moreover, "[i]n maritime cases, [a] choice-of-law . . . determination," such as the one before us, is deemed a "determination on the merits and may be treated as the equivalent of a motion for summary judgment." *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 680 n.26 (5th Cir. 2003). For these reasons, we hold that the District Court's dismissal of Raiders' extracontractual counterclaims "determin[ed] the rights and liabilities of the parties" under § 1292(a)(3). Hence we have jurisdiction over this interlocutory appeal.

B. The District Court should have considered whether applying New York substantive law would contravene Pennsylvania's "strong public policy" under *The Bremen*.

As our Court has summarized, the seminal maritime insurance decision in *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 75 S. Ct. 368, 99 L. Ed. 337 (1955), established that "maritime contracts are governed by federal admiralty law when there is an established federal rule, but absent such a rule, state law applies." *Royal Ins. Co. of Am. v. KSI Trading Corp.*, 563 F.3d 68, 73 (3d Cir. 2009). One such established federal rule is that "[a] choice of law provision in a marine insurance contract will be upheld in the absence of evidence that its enforcement would be unreasonable or unjust." 2 Thomas J. Schoenbaum, Admiralty and Maritime Law § 19:6 (6th ed. 2020); *see also Great Lakes Reinsurance (UK) PLC v. Durham Auctions, Inc.*, 585 F.3d 236, 242-44 (5th Cir. 2009) (determining whether enforcing identical choice-of-law section in maritime insurance policy "would be unreasonable or unjust"); *cf. Neely v. Club Med Mgmt. Servs., Inc.*, 63 F.3d 166, 197 n.36 (3d Cir. 1995) (observing in dicta that choice-of-law provisions are "typically . . . enforced under federal maritime law").

Raiders, however, contends this presumption of enforceability should not control the choice of law here.[1]

1. Raiders also maintains the express language of the policy's choice-of-law provision does not mandate applying New York law to preclude its claims arising under Pennsylvania law. But as it failed to raise this argument in the District Court (or, for that matter,

Citing *The Bremen*, it argues that enforcing the choice of law in the policy would be unreasonable and unjust, as applying New York law would contravene the strong public policy of Pennsylvania, which protects insureds in Pennsylvania from, among other things, bad faith and unfair trade practices by insurance companies.

The Bremen involved a dispute between an American and a German company about the enforceability of a forum-selection provision in a towing contract drawn up to facilitate the transport of a drilling rig from Louisiana to the Adriatic Sea off the coast of Italy: "Any dispute arising must be treated before the London Court of Justice." 407 U.S. at 2. When a contractual dispute arose, the American company sued in a federal court. *Id.* at 3-4.

The U.S. Supreme Court ultimately held that the contract's forum selection was facially valid and should be honored unless a compelling and countervailing reason rendered enforcement unreasonable. *Id.* at 10, 15, 20. It explained that that forum-selection articles in maritime cases should be enforced absent a "strong showing" that "enforcement would be unreasonable and unjust, or that the clause [is] invalid for such reasons as fraud or overreaching." *Id.* at 15. It then provided examples of circumstances where enforcement of a choice-of-forum

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the more intriguing argument that the provision is ambiguous and therefore should be construed against GLI as the drafting party), Raiders has not properly preserved this argument for our review. *See Simko v. U.S. Steel Corp.*, 992 F.3d 198, 205 (3d Cir. 2021) ("It is well-established that arguments raised for the first time on appeal are not properly preserved for appellate review.").

provision would be "unreasonable and unjust," including, among other things, situations where enforcement would "*contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision*." *Id.* (emphasis added). The choice of forum there was enforceable because there was "strong evidence that the forum clause was a vital part of the [parties'] agreement," *id.* at 14, and it was not "an agreement between two Americans to resolve their essentially local disputes in a remote alien forum," *id.* at 17.

Nearly twenty years later, in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 588, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991), the Supreme Court extended *The Bremen*'s framework to a dispute over which of two competing states was the proper forum for a tort action in admiralty. *Carnival* stemmed from a suit in Washington State filed by a cruise ship passenger who sustained injuries in international waters off the coast of Mexico. *Id.* The passenger's ticket contained a forum-selection proviso that "all disputes and matters" be litigated in Florida courts. *Id.* at 587-88.

The Supreme Court analyzed the case under the framework laid out in *The Bremen* to evaluate the "reasonableness of the forum clause," "refin[ing]" the latter case's analysis "to account for the realities of form passage contracts." *Id.* at 593. It noted that "a cruise line has a special interest in limiting the fora in which it potentially could be subject to suit." *Id.* And "[b]ecause a cruise ship typically carries passengers from many locales, it is not unlikely that a mishap on a cruise could subject the

cruise line to litigation in several different fora." *Id.* The Court further explained that "a clause establishing *ex ante* the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended." *Id.* at 593-94. Forum aside, "the fact that [the passenger's] accident occurred off the coast of Mexico" meant "this dispute [was not] an essentially local one inherently more suited to resolution in the State of Washington than in Florida." *Id.* at 594 (quotation marks omitted). In *Carnival*, therefore, the Supreme Court extended *The Bremen*'s framework to disputes over whether one state or another was the proper forum to bring suit under a forum-selection provision.

GLI argues *The Bremen* "is utterly irrelevant because it had absolutely nothing to do with the enforcement of choice of *law* clauses." Ans. Br. at 26 (emphasis added). We do not agree. Though the contract in *The Bremen* "did not specifically provide that the substantive law of England should be applied," the Court nonetheless "conclude[d] that the forum clause was also an effort to obtain certainty as to the applicable substantive law," as "it is the general rule in English courts that the parties are assumed, absent contrary indication, to have designated the forum with the view that it should apply its own law." *The Bremen*, 407 U.S. at 13 n.15.

The U.S. Court of Appeals for the D.C. Circuit grasped this in *Milanovich v. Costa Crociere, S.p.A.*, 954 F.2d 763, 767 n.7, 293 U.S. App. D.C. 332 (D.C. Cir. 1992), by extending *The Bremen*'s framework to the choice of law in a cruise ticket: while "*The Bremen* involved a choice-

of-forum clause, . . . the Supreme Court recognized that enforcing the provision would have the effect of subjecting the contract to foreign law." *Milanovich* concerned whether American or Italian law governed a cruise ship passenger's personal injury lawsuit where the contract contained a provision specifying the application of Italian law. *Id.* at 765-66. In resolving this question, the D.C. Circuit relied on *The Bremen* and *Carnival* to hold that

> courts should honor a contractual choice-of-law provision in a passenger ticket unless the party challenging the enforcement of the provision can establish that "enforcement would be unreasonable and unjust," "the clause was invalid for such reasons as fraud or overreaching," or "*enforcement would contravene a strong public policy of the forum in which suit is brought*."

Id. at 768 (quoting *The Bremen*, 407 U.S. at 15) (emphasis added).

In the intervening decades, other circuits have relied on *Milanovich* when considering choice-of-law provisions in maritime contracts. *See Chan v. Soc'y Expeditions, Inc.*, 123 F.3d 1287, 1297 (9th Cir. 1997) (upholding choice of law in cruise ticket over defendants' objections that Liberian law should apply); *Durham Auctions*, 585 F.3d at 243-45 (upholding identical choice-of-law provision where insured did not show applying New York law would contravene strong public policy of Mississippi). We are therefore persuaded that *The Bremen*'s framework is not "utterly irrelevant" in the context of choice-of-law provisions but rather applies equally to them as it does to those provisions selecting a forum.

GLI argues, however, that admiralty law is different: even if *The Bremen* does extend to choices of law in addition to forums, the framework it laid out does not apply here because, based on the Supreme Court's statement in *Wilburn Boat* discussed above, "there is a rule of federal admiralty law that choice of law clauses in policies of marine insurance are presumptively valid and enforceable." Ans. Br. at 29. Hence we "must apply that federal rule, no matter what." *Id.* at 21. This mirrors the District Court's opinion here, which held that the public policy of Pennsylvania could not overcome "the well-established principle that choice-of-law provisions in maritime contracts are presumptively valid." App. at 21.

In reaching its conclusion, the District Court also relied on the U.S. Court of Appeals for the Ninth Circuit's decision in *Galilea, LLC v. AGCS Marine Insurance Co.*, 879 F.3d 1052 (9th Cir. 2018). GLI likewise points to *Galilea* to argue *The Bremen* does not apply here. We disagree. *Galilea*, which does not bind our Court, involved a dispute over the scope of an insurance contract for a yacht owned by a Nevada company. 879 F.3d at 1054. The yacht's policy contained a forum-selection provision mandating arbitration in New York and a choice-of-law provision applying federal maritime law, but where no such established principles and precedents exist, New York law applied. *Id.* at 1055. The yacht's owner sued in federal court in Montana and argued the choice-of-law and choice-of-forum provisions were precluded by Montana law (which purportedly has a strong public policy against enforcement of arbitration agreements) under *The Bremen*. *Id.* at 1055, 1059-60.

The Ninth Circuit disagreed. It first explained that because the arbitration provision was enforceable under

the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.*, "there [was] no gap in federal maritime law to fill with law from *any* state, Montana included, as the FAA supplies the governing arbitration law for maritime transactions." *Id.* at 1060 (emphasis in original). The Court then reasoned that "*The Bremen* considered whether the public policy of the forum where suit was brought—there, federal public policy as supplied by federal maritime law—outweighed the application of the law of other countries." *Id.* The *Galilea* dispute, in contrast, concerned an "unequal, hierarchical relationship between federal maritime law and state law." *Id.* Because "[w]ithin federal admiralty jurisdiction, conflicting state policy cannot override squarely applicable federal maritime law," the Ninth Circuit held that the insured's "reliance on Montana law under *The Bremen* [was] misplaced." *Id.* at 1060-61.

From this, the District Court here "conclude[d] that the public policy of a state where a case was filed cannot override the presumptive validity, under federal maritime choice-of-law principles, of a provision in a marine insurance contract where the chosen forum has a substantial relationship to the parties or the transaction." App. at 21. "The issue is not," the Court explained, "whether New York law conflicts with Pennsylvania public policy." *Id.* Rather, it is "whether the well-established principle that choice-of-law provisions in maritime contracts are presumptively valid must yield to the public policy preferences of the particular state in which the case happens to have been brought." *Id.* In holding the answer is no, the Court's opinion (relying on *Galilea*) turned on the view that *The Bremen* and its progeny apply to one set of circumstances whereas there is a separate regime governing choice-of-law concerns in marine insurance contracts. *Id.* at 21-22.

But the principle of generally enforcing choice-of-law provisions in marine insurance contracts is *not* altogether separate from the choice-of-forum/choice-of-law regime set out in *The Bremen* and *Milanovich*. Indeed, the rule that choice-of-law provisions in maritime insurance contracts are presumed enforceable unless "enforcement would be unreasonable or unjust," Schoenbaum, *supra*, § 19:6, is identical to *The Bremen*'s rule that forum-selection provisions should be honored unless "enforcement would be unreasonable and unjust," 407 U.S. at 15. Given this overlap—coupled with *The Bremen*'s "strong public policy" exception comprising but one part of the holding's broader "unreasonable and unjust" standard—we consider it altogether reasonable that a "strong public policy of the forum [state] in which suit is brought" could, as to that policy specifically, render unenforceable the choice of state law in a marine insurance contract. *See id.*

Moreover, the District Court's confining of *The Bremen* and its progeny only to disputes between international fora and U.S. law is belied by *Carnival* (uncited by the parties), in which the Supreme Court applied *The Bremen* to a dispute over whether Washington State or Florida was the proper forum to decide. Given the broad language in *The Bremen*, its oft-recognized applicability to choice-of-law provisions, *see e.g., Milanovich*, 954 F.2d at 768, and the extension of its holding to a state-versus-state question in *Carnival*, we hold that *The Bremen's* framework extends to the choice-of-law provision at issue here. Accordingly, the District Court needed to consider whether Pennsylvania has a strong public policy that would be thwarted by applying New York law. We thus vacate and remand for further proceedings consistent with this holding.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, DATED MARCH 15, 2021

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 19-04466

GREAT LAKES INSURANCE SE,

Plaintiff,

v.

RAIDERS RETREAT REALTY CO., LLC,

Defendant.

ORDER

AND NOW, this **15th** day of **March, 2021**, after considering Defendant's Motion to Alter or Amend Judgment and/or Motion for Permission to Appeal and

Plaintiff's Response thereto, it is hereby **ORDERED** that the Motion (ECF No. 53) is **DENIED**.[1]

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1. Defendant asks the Court to reconsider its February 22, 2021, Order granting Plaintiff's motion for judgment on the pleadings with respect to three of Defendant's counterclaims. *See* Fed. R. Civ. P. 59(e); *see also* Feb. 22, 2021, Order, ECF No. 52. In the alternative, Defendant seeks leave to file an interlocutory appeal.

I. Motion for Reconsideration

A court may alter or amend a judgment if the party seeking reconsideration shows at least one of the following: "(1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion . . . ; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." *Max's Seafood Cafe ex rel. Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999).

Defendant argues the Court's decision constitutes a clear error of law because the Court applied the wrong analytical framework to the parties' dispute. In doing so, Defendant rehashes an argument the Court has already considered at length and found wanting. *See* Feb. 22, 2021, Mem., ECF No. 51. While the Court understands that Defendant is disappointed with its ruling, Defendant has not satisfied any of the criteria necessary to succeed on a motion for reconsideration.

II. Interlocutory Appeal

In the alternative, Defendant seeks leave to file an interlocutory appeal.

28 U.S.C. § 1292(b) "permits discretionary interlocutory review when a district judge certifies that an order not otherwise appealable 'involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.'" *Lupian v. Joseph Cory Holdings LLC*, 905 F.3d 127, 130 n.3 (3d Cir. 2018) (quoting 28 U.S.C. § 1292(b))

AND IT IS SO ORDERED.

/s/ Eduardo C. Robreno
EDUARDO C. ROBRENO, J.

Granting Defendant's request would do little to materially advance the ultimate termination of the litigation, as the merits of Plaintiff's claim must still be litigated even in the absence of Defendant's counterclaims. *See McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1259 (11th Cir. 2004) (explaining that appeal materially advances the ultimate termination of litigation where it "serve[s] to avoid a trial or otherwise substantially shorten[s] the litigation"). In fact, allowing interlocutory appeal at this stage of the proceedings risks unnecessarily delaying resolution of the underlying matter.

Therefore, Defendant's alternative motion will be denied.

APPENDIX C — MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, FILED FEBRUARY 22, 2021

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

CIVIL ACTION NO.
19-04466

GREAT LAKES INSURANCE SE,

Plaintiff,

v.

RAIDERS RETREAT REALTY CO., LLC,

Defendant.

MEMORANDUM

EDUARDO C. ROBRENO, J. February 22, 2021

I. INTRODUCTION

This is an insurance coverage case under maritime law. The case involves a marine insurance policy issued by Plaintiff Great Lakes Insurance SE ("GLI") affording hull coverage for a vessel owned by Defendant Raiders Retreat Realty Co., LLC ("Raiders"). The vessel ran aground, suffering substantial damage. Raiders filed a claim for coverage, which GLI denied. In the instant action, GLI

seeks a declaratory judgment that the policy affords no coverage due to Raiders' alleged misrepresentations and breach of an express warranty.

In turn, Raiders asserts counterclaims against GLI for: (I) breach of contract, (II) breach of implied covenant of good faith and fair dealing, (III) breach of fiduciary duty, (IV) bad faith liability, in violation of 42 Pa. Cons. Stat. § 8371, and (V) violations of Pennsylvania's Unfair Trade Practices and Consumer Protection Law.

GLI filed an Answer to the counterclaims and now moves for judgment on the pleadings with respect to Counts III, IV, and V of the counterclaims. GLI contends that the policy contains a choice—of-law provision designating federal maritime law and, in its absence, New York law as the applicable law of the case. Raiders contends that the choice-of-law provision here is unenforceable and that therefore Pennsylvania law, the law of the forum in which the suit is pending, applies. This question is outcome determinative with respect to Counts III, IV, and V of the counterclaims.

Because the parties' contractual choice-of-law provision bars the counterclaims at issue, the Court will grant GLI's Motion for Judgment on the Pleadings as to Counts III, IV, and V of the counterclaims.

Appendix C

II. BACKGROUND[1]

From 2007 to 2019, GLI insured a vessel owned by Raiders. As part of the 2016-2017 policy renewal process, a third party conducted a survey of the vessel's condition. The survey stated the following under the heading "Findings & Recommendations":

> Priority 1 recommendation:
>
> *Halon system, service and date tag.
> *Fire extinguishers, purchase and store aboard.

Compl. ¶ 13, ECF No. 1.

Raiders subsequently submitted a Letter of Survey Recommendations Compliance to GLI. The letter stated: "I certify, as owner of the above vessel, that all recommendations pertaining to the above vessel contained within the detailed survey submitted herein, have been complied with, other than those listed below along with the date of expected completion." *Id.* Ex. D. In a table below the text, Raiders wrote "N/A" in a column labeled "Outstanding Recommendation(s)." *Id.*

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1. When reviewing a motion for judgment on the pleadings, the Court "view[s] the facts presented in the pleadings and the inferences to be drawn therefrom in the light most favorable to the nonmoving party." *In re Fosamax (Alendronate Sodium) Prods. Liab. Litig. (No. II)*, 751 F.3d 150, 153 n.4 (3d Cir. 2014) (quoting *Rosenau v. Unifund Corp.*, 539 F.3d 218, 221 (3d Cir. 2008)).

GLI renewed Raiders' coverage that year and in following years. The applicable policy contains the following provision in a section entitled "General Conditions & Warranties":

> If the Scheduled Vessel is fitted with fire extinguishing equipment, then it is warranted that such equipment is properly installed and is maintained in good working order. This includes the weighing of tanks once a year, certification/ tagging and recharging as necessary.

Id. Ex. F.

In June of 2019, the vessel ran aground near Fort Lauderdale, Florida, and sustained significant damage. No fire occurred and, therefore, no fire equipment was needed or used. Raiders filed a claim with GLI for coverage of the loss.

GLI investigated the accident and determined that, at the time of the accident, the vessel's fire extinguishers had not been inspected or recertified. GLI therefore concluded that Raiders, contrary to its representations, had not completed the recommendations contained in the 2016 survey. Raiders disputes this conclusion and maintains that the vessel's fire extinguishers were fully functional and maintained in good operating order. Raiders also emphasizes that the damage to the vessel "was not caused by anything having to do with the fire extinguishers." Answer ¶ 24, ECF No. 5.

Based on the results of the investigation, GLI denied the claim on the grounds that Raiders violated the policy's express warranty concerning fire extinguishers, and that Raiders' 2016 letter contained a material misrepresentation. GLI brought the instant action, and Raiders filed the counterclaims presently before the Court. This memorandum disposes of three of the counterclaims (Counts III, IV, and V) and leaves to another day the issue of whether Raiders has asserted a valid claim under the policy.

III. LEGAL STANDARD

"After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). Rule 12(c) motions are "designed to provide a means of disposing of cases when the material facts are not in dispute between the parties and a judgment on the merits can be achieved by focusing on the content of the competing pleadings." 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1367 (3d ed. 2020). Such a motion "may be employed by the defendant as a vehicle for raising several of the defenses enumerated in Rule 12(b) after the close of the pleadings." *Id.* When considering a Rule 12(c) motion, the Court "must view the facts presented in the pleadings and the inferences to be drawn therefrom in the light most favorable to the nonmoving party." *In re Fosamax (Alendronate Sodium) Prods. Liab. Litig. (No. II)*, 751 F.3d 150, 153 n.4 (3d Cir. 2014) (quoting *Rosenau*

v. Unifund Corp., 539 F.3d 218, 221 (3d Cir. 2008)).[2] Judgment on the pleadings is available to a counterclaim defendant. *See, e.g., Audiotext Int'l v. Sprint Communs. Co.*, No. 03-CV-2110, 2006 U.S. Dist. LEXIS 34515, 2006 WL 1490129 (E.D. Pa. May 26, 2006).

IV. DISCUSSION

"The appropriate choice-of-law rules to be applied is controlled by the basis for [a court's] federal jurisdiction, or power to adjudicate the [plaintiff's] claims." *Calhoun v. Yamaha Motor Corp., U.S.A.*, 216 F.3d 338, 343 (3d Cir. 2000) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)). "It is axiomatic that a federal court sitting in diversity must apply the choice-of-law rules of the state in which it sits." *Id.* (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941)). But

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2. Choice-of-law issues present mixed questions of law and fact. *See, e.g., Toll v. Tannenbaum*, 982 F. Supp. 2d 541, 548 (E.D. Pa. 2013) (Robreno, J.) (explaining that "choice of law is a legal question for the court to resolve, which, however, may require resolution of disputed facts," and that a district court may hold a hearing at which "parties present[] evidence regarding the factual disputes underlying the choice-of-law issue"), *aff'd*, 596 F. App'x 108 (3d Cir. 2014).

Because the instant choice-of-law issue requires resolution of disputed facts, the Court notified the parties in advance of the hearing on the Motion that it would afford them an opportunity to present evidence on the issue of which state's law applies. *See* Dec. 11, 2020, Order, ECF No. 34; *Toll*, 982 F. Supp. 2d at 548.

The Court then held a hearing pursuant to Federal Rule of Evidence 104 and ordered GLI to submit affidavits and any additional evidence regarding its connections with New York, *see* Jan. 12, 2021, Order, ECF No. 42, which the parties have done.

where a Court's jurisdiction is grounded in admiralty, federal choice-of-law principles apply. *See id.*

"[M]arine insurance contracts" fall "within the federal courts' maritime jurisdiction." *AGF Marine Aviation & Transp. v. Cassin*, 544 F.3d 255, 260, 50 V.I. 1134 (3d Cir. 2008) (citing *New England Mut. Marine Ins. v. Dunham*, 78 U.S. 1, 20 L. Ed. 90 (1870)). Accordingly, federal choice-of-law principles govern the instant action.

GLI argues Counts III, IV, and V of the counterclaims are barred by the insurance policy's choice-of-law provision. That provision states:

> It is hereby agreed that any dispute arising hereunder shall be adjudicated according to well established, entrenched principles and precedents of substantive United States Federal Admiralty law and practice but where no such well established, entrenched precedent exists, this insuring agreement is subject to the substantive laws of the State of New York.

Compl. Ex. F, ECF No. 1.

GLI argues it is entitled to judgment on the pleadings with respect to counterclaim Counts IV (bad faith liability) and V (unfair trade practices) because the causes of action arise under Pennsylvania statutes and therefore contravene the policy's choice-of-law provision, which designates New York law as the jurisdiction that supplies the rule of decision in the absence of applicable federal maritime law. It argues it is entitled to judgment on the pleadings with respect to counterclaim Count III (breach

of fiduciary duty) because federal admiralty law is silent on the cause of action and New York law does not recognize a cause of action for breach of fiduciary duty arising out of the alleged breach of an insurance contract.

Raiders argues GLI waived application of the choice-of-law provision by failing to raise it as an affirmative defense in its Answer to the counterclaims. Raiders also argues that even if the choice-of-law clause applied, the provision is unenforceable and Pennsylvania law, the law of the forum where the case is pending, governs the dispute. The Court will address these arguments seriatim.

A. Waiver of Affirmative Defense

Rule 8(c) of the Federal Rules of Civil Procedure requires a party responding to a pleading to "affirmatively state any avoidance or affirmative defense." Raiders argues GLI waived its choice-of-law argument by failing to identify the argument in its Answer as an affirmative defense.

This argument is unpersuasive, and courts that have squarely addressed the issue have reached the opposite conclusion. *See, e.g., Wallace v. Nat'l R.R. Passenger Corp.*, 5 F. Supp. 3d 452, 476 (S.D.N.Y. 2014) ("Weeks asserts that a choice of law clause is unenforceable if the party invoking the clause fails to include choice of law allegations in its pleadings. . . . But it does not cite any cases for that proposition."); *Coachmen Indus., Inc. v. Alt. Serv. Concepts L.L.C.*, No. CIV.A. H-06-0892, 2008 U.S. Dist. LEXIS 3683, 2008 WL 177715, at *2 (S.D. Tex. Jan. 17, 2008) (["C]hoice-of-law is not an affirmative defense

and a party need only 'call the applicability of another state's law to the court's attention in time to be properly considered.'" (quoting *Kucel v. Walter E. Heller & Co.*, 813 F.2d 67, 74 (5th Cir. 1987))).

The cases Raiders cites in support of this argument involve ERISA preemption, a markedly different context. *See, e.g., Kenepp v. American Edwards Lab.*, 859 F. Supp. 809, 815 (E.D. Pa. 1994). Moreover, Raiders points to no cases in which, under circumstances similar to those in this case, courts have concluded that failure to raise a choice-of-law clause as an affirmative defense in an Answer constitutes a waiver.

GLI timely raised the choice-of-law issue by identifying it in a motion filed only two weeks after it answered the counterclaims. *See* Pl.'s Mot. Dismiss Countercls., ECF No. 8. Contrary to Raiders' assertions, GLI did not waive the argument by failing to raise it in its Answer.

B. Enforceability of the Choice-of-Law Provision

Next, Raiders argues the parties' contractual choice-of-law provision is unenforceable and that Pennsylvania law should apply.

"Under federal maritime choice of law rules, contractual choice of law provisions are generally recognized as valid and enforceable." *Great Lakes Reinsurance (UK) PLC v. Durham Auctions, Inc.*, 585 F.3d 236, 242 (5th Cir. 2009); *see also Cassin*, 544 F.3d at 260 (resolving marine insurance dispute pursuant to the contractual choice-of-law provision).

"A choice of law provision in a marine insurance contract will be upheld in the absence of evidence that its enforcement would be unreasonable or unjust." 2 Thomas J. Schoenbaum, *Admiralty & Mar. Law* § 19:6 (6th ed. 2020); *see also St. Paul Fire & Marine Ins. Co. v. Bd. of Comm'rs of Port of New Orleans*, 418 F. App'x 305, 309 (5th Cir. 2011) ("The parties' choice of law clause in an admiralty case will govern 'unless the [chosen] state has no substantial relationship to the parties or the transaction or the state's law conflicts with the fundamental purposes of maritime law.'" (alteration in original) (quoting *Stoot v. Fluor Drilling Servs., Inc.*, 851 F.2d 1514, 1517 (5th Cir. 1988))); *see also Neely v. Club Med Mgmt. Servs., Inc.*, 63 F.3d 166, 197 n.36 (3d Cir. 1995) (en banc) ("[A] freely-bargained for, reasonable choice of law clause whose operation does not contradict a strong public policy of the United States . . . would typically be enforced under federal maritime law.").

Raiders argues that GLI does not have sufficient contacts with New York and that, therefore, enforcing the choice-of-law provision would be unreasonable and unjust. Upon review of the parties' evidence, the Court finds that GLI has sufficient contacts with New York, to wit: (1) it maintains an agent for service of process in New York, (2) it maintains its trust accounts in New York, and (3) it was admitted as a surplus lines insurer in New York. Decl. of Beric Anthony Usher ¶¶ 11-13, ECF No. 43.[3]

Multiple courts have found the same or very similar contacts sufficient to enforce the choice-of-law clause at

3. Raiders relies on Raiders' contacts with Pennsylvania, the forum. These contacts are not relevant to the issue.

issue here. *See, e.g., Durham Auctions*, 585 F.3d at 242; *Great Lakes Reinsurance (UK) PLC v. S. Marine Concepts Inc.*, No. CIV.A.G-07-276, 2008 U.S. Dist. LEXIS 109327, 2008 WL 6523861, at *2 (S.D. Tex. Oct. 21, 2008) ("Great Lakes has offered evidence that it has substantial assets in and connections to New York, including the presence of its agent for service. This is enough to uphold the agreed-to choice of law provision."); *Great Lakes Reinsurance (UK), PLC v. Rosin*, 757 F. Supp. 2d 1244, 1251 (S.D. Fla. 2010) (collecting cases and concluding that "New York has a sufficient substantial relationship with Great Lakes to allow application of New York law").

Raiders further argues that, notwithstanding GLI's contacts with New York, enforcing the choice-of-law provision would also be "unreasonable and unjust" because applying New York law would frustrate "Pennsylvania's 'strong public policy' of punishing insurers who deny coverage in bad faith." Def.'s Suppl. Memo 3, ECF No. 35-1.

In support of this argument, Raiders points to the Supreme Court's decision in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972). *The Bremen* involved a choice-of-forum clause, not a choice-of-law clause as in this case, in an admiralty suit. In its analysis, the Supreme Court noted that "[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." *Id.* at 15.

Twenty years later, in *Milanovich v. Costa Crociere, S.p.A.*, 954 F.2d 763, 768, 293 U.S. App. D.C. 332 (D.C.

Cir. 1992), the D.C. Circuit applied *The Bremen's* choice-of-forum analysis to a choice-of-law clause. *Milanovich* laid a rule that a contractual choice-of-law provision in a maritime contract should be honored "unless the party challenging the enforcement of the provision can establish that 'enforcement would be unreasonable and unjust,' 'the clause was invalid for such reasons as fraud or overreaching,' or 'enforcement would *contravene a strong public policy of the forum* in which suit is brought.'" *Id.* (quoting *The Bremen*, 407 U.S. at 15) (emphasis added)).

Raiders points to the last prong of *Milanovich*'s rule and its progeny as standing for the proposition that this Court must consider whether enforcing the choice-of-law clause at issue would contravene a strong public policy of the forum state (in this case, Pennsylvania). Some district courts in other circuits have, under similar circumstances, followed this approach. *See, e.g., Great Lakes Reinsurance (UK) PLC v. Dion*, No. 09 CV 1781 JM, 2009 U.S. Dist. LEXIS 119225, 2009 WL 5174372, at *2 (S.D. Cal. Dec. 18, 2009) ("[T]he parties have not identified any fundamental policy of either California or admiralty law that conflicts with New York law. . . . [T]herefore, the court finds that the choice of law provision in the policy should be enforced, and New York Law shall apply."); *Great Lakes Reinsurance (UK), PLC v. Sea Cat I, LLC*, 653 F. Supp. 2d 1193, 1198 (W.D. Okla. 2009) (considering whether applying New York law would contravene Oklahoma public policy). The Fifth Circuit in *Durham Auctions* also applied this framework but declined to expressly endorse it. *See* 585 F.3d at 244 ("Durham argues that application of New York law would be contrary to fundamental policy of Mississippi. *Assuming, arguendo, that this would be determinative*, it has not been shown." (emphasis added)).

However, this Court is not persuaded that the *Bremen* framework is applicable to the instant action. In relying on *Milanovich*, Raiders asks the Court to interpret the term "forum" as a synonym for "state." This interpretation misapplies *Milanovich*. In *Milanovich*, the court addressed whether U.S. or Italian law should govern the parties' dispute, and it used the term "forum" to refer not to a particular state or jurisdiction, but to the United States as a whole. *See* 954 F.2d at 768; *see also Chan v. Soc'y Expeditions, Inc.*, 123 F.3d 1287, 1296-97 (9th Cir. 1997) (holding that U.S. law, rather than Liberian law, governed the action).

The Ninth Circuit recognized this important distinction in *Galilea, LLC v. AGCS Marine Insurance Co.*, 879 F.3d 1052 (9th Cir. 2018). *Galilea* involved a dispute about the scope of insurance coverage for a yacht owned by Montana residents. The choice-of-law provision in the insurance contract, which is almost identical to the one in this case, provided that the policy "shall be governed by . . . substantive United States Federal Maritime Law, but where no such established and entrenched principles and precedents exist, the policy shall be governed [by] . . . the substantive laws of the State of New York" and that all disputes arising under the policy "shall be resolved exclusively by binding arbitration." *Id.* at 1055.

The insured argued this provision was unenforceable under *The Bremen* because it contravened the "strong public policy . . . against enforcement of arbitration agreements" in Montana, the state in which they filed suit. The Ninth Circuit disagreed, noting that "*The Bremen* considered whether the public policy of the forum where suit was brought—there, federal public policy as supplied

by federal maritime law—outweighed the application of the law of other countries." *Id.* at 1060 (citing *The Bremen*, 407 U.S. at 17-18). The Ninth Circuit explained that under *The Bremen*, "courts consider the application of the laws of otherwise equally situated fora in light of the 'concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability.'" *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 629, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)). In contrast, the dispute before the court in *Galilea* involved an "unequal, hierarchical relationship between federal maritime law and state law." *Id.* The court therefore concluded that the insured's reliance on Montana law was misplaced, as "[w]ithin federal admiralty jurisdiction, conflicting state policy cannot override squarely applicable federal maritime law." *Id.*

Here, the Court concludes that the public policy of a state where a case was filed cannot override the presumptive validity, under federal maritime choice-of-law principles, of a provision in a marine insurance contract where the chosen forum has a substantial relationship to the parties or the transaction. See *Stoot v. Fluor Drilling Servs., Inc.*, 851 F.2d 1514, 1517 (5th Cir. 1988)); *see supra* Section IV.B (concluding, as many other courts have, that GLI has sufficient contacts with New York). The issue is not, as Raiders contends, whether New York law conflicts with Pennsylvania public policy; the issue is whether the well-established principle that choice-of-law provisions in maritime contracts are presumptively valid must yield to the public policy preferences of the particular state in which the case happens to have been brought.

The Court's conclusion is consistent with maritime law's primary purpose: "to protect and encourage commercial maritime activity." *Aqua Log, Inc. v. Lost & Abandoned Pre-Cut Logs & Raft of Logs*, 709 F.3d 1055, 1061 (11th Cir. 2013) (citing *Sisson v. Ruby*, 497 U.S. 358, 367, 110 S. Ct. 2892, 111 L. Ed. 2d 292 (1990)). "This body of law serves to protect commercial activity by ensuring that uniform rules of conduct are in place." *Id.* (citing *Exec. Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249, 269-70, 93 S. Ct. 493, 34 L. Ed. 2d 454 (1972)). Permitting state public policy to override presumptively valid contractual choice-of-law provisions in marine insurance contracts would frustrate such uniformity and, with it, the central purpose of maritime law.

For the foregoing reasons, the parties' contractual choice-of-law provision is valid and enforceable.[4]

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4. Raiders' remaining arguments about the instant choice-of-law analysis are also unavailing.

First, Raiders argues the Court must apply the multi-factor test articulated in *Lauritzen v. Larsen*, 345 U.S. 571, 582, 73 S. Ct. 921, 97 L. Ed. 1254 (1953), for resolving conflicts of law in maritime disputes. *See* Def.'s Memo. Contra Pl.'s Rule 12(c) Mot. 13-14, ECF No. 20-1. However, the *Lauritzen* analysis applies only in the absence of a contractual choice-of-law provision. *See* 1 Thomas J. Schoenbaum, *Admiralty & Mar. Law* § 5:19 (6th ed. 2020) ("Where application or choice of law issues are not decided by agreement of the parties or by statute, admiralty applies a general choice of law analysis derived from three Supreme Court cases, [including] *Lauritzen v. Larsen*."); *Calhoun v. Yamaha Motor Corp., U.S.A.*, 216 F.3d 338, 343 (3d Cir. 2000) (applying *Lauritzen* in the absence of a contractual choice-of-law provision). Here, because the contract at issue contains a choice-of-law provision, the *Lauritzen* analysis is inapposite.

C. Effect on Counterclaims

Raiders concedes,[5] and the Court agrees, that the three counterclaims at issue are not cognizable under New York law. Counts IV and V allege violations of Pennsylvania statutes, and New York law does not recognize a cause of action for breach of fiduciary duty (Count III) arising out of the alleged breach of an insurance contract. *See Batas v. Prudential Ins. Co. of Am.*, 281 A.D.2d 260, 724 N.Y.S.2d 3, 7 (N.Y. App. Div. 2001) ("No special relationship of trust or confidence arises out of an insurance contract

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Second, Raiders argues New York law conflicts with the federal maritime doctrine of *uberrimae fidei*, or "utmost good faith," and therefore should not apply to Raiders' bad faith claim. Raiders first raised this argument in a Reply after the parties had filed multiple briefs on the instant Motion and, in contravention of this Court's policies and procedures, Raiders did not seek leave to file the Reply. *See* Def.'s Reply 8, ECF No. 38. Accordingly, the Court will not consider this argument.

Finally, on February 18, 2021, Raiders filed yet another brief after the court held a hearing and without leave of court raising not previously raised arguments as to whether GLI has substantial contacts with New York. *See* Def.'s Reply to Pl.'s Opp'n, ECF No. 50. This latest submission also will be disregarded as having been filed without leave of Court.

5. The Court notes that Raiders appears to have changed its position as to whether the breach of fiduciary duty claim is cognizable under New York law. In its briefing, Raiders argued that the doctrine of *uberrimae fidei* "creates a fiduciary relationship between the insurance company and the insured" that "is sufficient to maintain a claim for breach of fiduciary duty." *See* Def.'s Memo. Contra Pl.'s Rule 12(c) Mot. 20, ECF No. 20-1. At oral argument, however, Raiders took the position that none of the three counterclaims at issue is cognizable under New York law. *See* Tr. 30:15-25, ECF No. 40.

between the insured and the insurer." (citing *New York Jurisprudence (Insurance)* § 651 (2d ed.))).

Given that New York law applies, GLI is entitled to judgment on the pleadings with respect to the counterclaims at issue.

V. CONCLUSION

For the foregoing reasons, the Court will grant GLI's Motion for Judgment on the Pleadings. An appropriate order follows.