No. 18A_____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 2018

CITGO ASPHALT REFINING COMPANY; CITGO PETROLEUM CORPORATION;
CITGO EAST COAST OIL CORPORATION,
Applicants,

v.

FRESCATI SHIPPING COMPANY, LTD.; TSAKOS SHIPPING & TRADING, S.A.;
AND UNITED STATES,
Respondents.

Application for an Extension of Time
To File Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

APPLICATION TO THE HONORABLE JUSTICE SAMUEL A. ALITO, JR. AS CIRCUIT JUSTICE

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July 30, 2018

PARTIES TO THE PROCEEDINGS

Applicants Citgo Asphalt Refining Company, Citgo Petroleum Corporation, and Citgo East Coast Oil Corporation were appellants/cross-appellees in the court of appeals proceedings.

Respondents Frescati Shipping Company, Ltd., Tsakos Shipping & Trading, S.A., and United States of America were appellees/cross-appellants in the court of appeals proceedings.

STATEMENT PURSUANT TO RULE 29.6

Pursuant to Supreme Court Rule 29.6, applicants Citgo Asphalt Refining Company, Citgo Petroleum Corporation, and Citgo East Coast Oil Corporation state as follows:

CITGO Asphalt Refining Company is not a corporation and has no parent corporations. It is a privately held General Partnership whose general partners are CITGO Petroleum Corporation and CITGO East Coast Oil Corporation, both of which are private, non-publicly held entities.

CITGO Petroleum Corporation's parent is CITGO Holding, Inc., which is a wholly owned subsidiary of PDV Holding, Inc., which is a wholly owned subsidiary of Petróleos de Venezuela, S.A. ("PDVSA"). No publicly held company owns 10% or more of CITGO Petroleum Corporation's stock.

CITGO East Coast Oil Corporation's parent is CITGO Investment Company, a private, non-publicly held entity. No publicly held company owns 10% or more of CITGO East Coast Oil Corporation's stock.

APPLICATION FOR EXTENSION OF TIME

Pursuant to this Court's Rules 13.5, 22, and 30.3, applicants Citgo Asphalt Refining Company, Citgo Petroleum Corporation, and Citgo East Coast Oil Corporation (collectively, "CARCO") hereby request a 30-day extension of time, to and including September 27, 2018, within which to file a petition for a writ of certiorari in this case.

JUDGMENTS FOR WHICH REVIEW IS SOUGHT

The judgments sought to be reviewed are the decisions of the United States Court of Appeals for the Third Circuit in *In Re: Petition of Frescati Shipping Co.*, 886 F.3d 291 (3d Cir. 2018) (attached as Exhibit A), and *In Re: Petition of Frescati Shipping Co.*, 718 F.3d 184 (3d Cir. 2013) (attached as Exhibit B).

JURISDICTION

The Third Circuit issued its most recent decision on March 29, 2018. On May 30, 2018, the Third Circuit denied a petition for *en banc* and panel rehearing (unreported order attached as Exhibit C). Pursuant to this Court's Rules 13.1, 13.3, and 30.1, a petition for a writ of certiorari would be due for filing on August 28, 2018. This application is made at least 10 days before that date. This Court's jurisdiction would be invoked under 28 U.S.C. § 1254(1).

REASONS JUSTIFYING AN EXTENSION OF TIME

Applicants respectfully request a 30-day extension of time, to and including September 27, 2018, within which to file a petition for a writ of certiorari seeking review of the decisions of the United States Court of Appeals for the Third Circuit in this case.

1. This case involves claims for contract damages against CARCO arising from an oil spill caused when the oil tanker *Athos I* struck a submerged and uncharted anchor abandoned by an unknown party in a portion of the Delaware River that was exclusively maintained and controlled by the United States. CARCO neither knew, nor had any reason to know, that the anchor was in the river.

2. On January 31, 2005, Frescati Shipping Company, Ltd. ("*Frescati*") and Tsakos Shipping & Trading, S.A. ("*Tsakos*") filed a lawsuit in the United States District Court for the Eastern District of Pennsylvania raising contract and tort claims against CARCO arising from the oil spill. As partial subrogee to Frescati's claims, the United States later filed a separate action against CARCO. The two actions were consolidated for trial. The district court ruled on April 12, 2011, that CARCO was not liable. On May 16, 2013, the United States Court of Appeals for the Third Circuit vacated most of the district court's opinion and remanded the case for further proceedings in the district court. As relevant here, the Third Circuit ruled that Frescati, the vessel owner, was a third-party beneficiary of a voyage charter contract between CARCO and the chartering agent. It further ruled that a safe berth provision in the voyage charter contract guaranteed the ship's safety rather than imposed a duty of due diligence on CARCO. CARCO's petition for certiorari to this Court, No. 13-462, was denied on February 24, 2014.

3. On remand, the district court found CARCO liable to Frescati (and the United States as subrogee) on the contract claims. CARCO, Frescati, and the United States appealed various aspects of the court's rulings. The Third Circuit

affirmed the contract rulings that are relevant here. CARCO's petition for *en banc* and panel rehearing was denied on May 30, 2018.

4. The Third Circuit's ruling that a safe berth provision in a voyage charter contract is a guarantee of the ship's safety unquestionably conflicts with the Fifth Circuit's ruling in *Orduna S.A. v. Zen-Noh Grain Corp.*, 913 F.2d 1149, 1156-57 (5th Cir. 1990), that safe berth provisions merely impose a duty of due diligence on the charterer. The Second Circuit has long adhered to the view (adopted by the Third Circuit here) that such provisions guarantee the safety of the ship. *Cities Serv. Transp. Co. v. Gulf Ref. Co.*, 79 F.2d 521, 521 (2d Cir. 1935) (per curiam); *Park S.S. Co. v. Cities Serv. Oil Co.*, 188 F.2d 804, 806 (2d Cir. 1951); *Paragon Oil Co. v. Republic Tankers, S.A.*, 310 F.2d 169, 173 (2d Cir. 1962); *Venore Transp. Co. v. Oswego Shipping Corp.*, 498 F.2d 469, 472-73 (2d Cir. 1974). The decision below merits review because of this conflict.

5. The court of appeals' holding also presents a recurring and important issue of federal maritime law that warrants this Court's review, particularly in light of this Court's vital role in shaping uniform rules of admiralty and safeguarding maritime commerce. *See Fitzgerald v. U.S. Lines Co.*, 374 U.S. 16, 20 (1963) ("Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law."); *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 314 (1955) ("[T]his Court has fashioned a large part of the existing rules that govern admiralty."); *Exxon Corp. v. Cent. Gulf Lines, Inc.*, 500 U.S. 603, 608 (1991) ("[T]he 'fundamental interest giving rise to maritime jurisdiction is "the

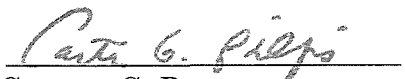
protection of maritime commerce.'"'); *Black Diamond S.S. Corp. v. Robert Stewart & Sons, Ltd.*, 336 U.S. 386, 388 (1949) (granting certiorari to "determin[e] important issues in the administration of admiralty law").

6. Undersigned counsel of record has a variety of obligations before various courts that would make it difficult to complete a petition for certiorari by the current deadline. These matters include *Promega Corp. v. Life Technologies Corp.*, No. 17-1669 (S. Ct.) (brief in opposition to petition for certiorari); *Koninklijke KPN N.V. v. Gemalto MDM GmbH*, No. 18-1863 (Fed. Cir.) (intervenor brief); *Underwriting Members of Lloyd's Syndicate 2. v. Al Rajhi Bank*, No. 18-1201 (2d Cir.) (opening brief); *Brundle v. Wilmington Trust, N.A.*, No. 17-1873 (4th Cir.) (response/reply brief); *Coleman v. Wilson*, No. 18-1623 (4th Cir.) (amicus brief); and *Patient Services, Inc. v. United States*, No. 18-CV-16 (E.D. Va.) (motion briefing).

CONCLUSION

For the foregoing reasons, applicants respectfully request that this Court grant them a 30-day extension of time, to and including September 27, 2018, within which to file a petition for a writ of certiorari.

Respectfully submitted,



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July 30, 2018

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CERTIFICATE OF SERVICE

Pursuant to Rules 23.2, 29, and 33.2 of the this Court, I hereby certify that, on this thirtieth day of July, 2018, I caused a copy of the foregoing application for to be served via first-class mail and via electronic mail on the following persons:

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July 30, 2018

Carter G. Phillips

Exhibit A

argument were preserved, the due process violation was not harmless.

VI. Conclusion

We will reverse the District Court's order denying habeas corpus relief and remand with instructions to grant a conditional writ of habeas corpus as to Bennett's conviction for first degree murder [20] so that the matter may be returned to state court for further proceedings consistent with this opinion.[21]

IN RE: Petition of FRESCATI SHIPPING COMPANY, LTD., as Owner of the M/T Athos I and Tsakos Shipping & Trading, S.A., as Manager of the Athos I for Exoneration from or Limitation of Liability (E.D. Pa. No. 2–05–cv–00305)

United States of America

v.

CITGO Asphalt Refining Company; CITGO Petroleum Corporation; CITGO East Coast Corporation (E.D. Pa. No. 2–08–cv–02898)

CITGO Asphalt Refining Company; CITGO Petroleum Corporation; CITGO East Coast Oil Corporation, Appellants in Nos. 16–3470; 16–3552

Frescati Shipping Company, Ltd.; Tsakos Shipping and Trading, S.A., Appellants in No. 16–3867

United States of America, Appellant in No. 16–3868

No. 16-3470, 16-3552, 16-3867 & 16-3868

United States Court of Appeals, Third Circuit.

Argued November 8, 2017

(Filed: March 29, 2018)

Background: Owner of single-hulled tanker ship and United States, as owner's subrogee, brought actions against marine terminal owner to recover costs they incurred in cleaning up oil spill after ship hit abandoned ship anchor hidden on bottom of river near terminal. After actions were consolidated, bench trial was held. The United States District Court for the Eastern District of Pennsylvania, John P. Fullam, J., 2011 WL 1436878, and 2011 WL 1379647, entered judgment in terminal owner's favor, and shipowner and United States appealed. The Court of Appeals, 718 F.3d 184, affirmed in part, vacated in part, and remanded. On remand, the United States District Court for the Eastern District of Pennsylvania, Nos. 2–05–cv–00305; 2–08–cv–02898, Joel H. Slomsky, J., granted in part and denied in part terminal owner's motion for partial summary judgment, 2015 WL 12829620, and awarded damages to shipowner and United States, 2016 WL 4035994. Parties filed cross-appeals.

Holdings: The Court of Appeals, Smith, Chief Judge, held that:

20. Under *Laird*, "[o]ur holding in no way undermines the jury's guilty verdict on the remaining charges." *Laird*, 414 F.3d at 430 n.9; *see also Everett*, 290 F.3d at 516 (granting the writ "with regard to [the defendant's] conviction for first degree murder").

21. The Court acknowledges and thanks the Drexel University Appellate Litigation Clinic for the skillful pro bono advocacy provided to Mr. Bennett in this appeal.

(1) district court's finding that ship complied with terms of safe berth warranty was not clearly erroneous;

(2) shipowner operated ship with neither bad navigation nor negligent seamanship;

(3) operator could only assert defenses against United States' subrogated claims that it could have asserted against shipowner;

(4) operator failed to establish equitable recoupment defense;

(5) district court did not abuse its discretion in finding that operator waived argument that Oil Pollution Act (OPA) limited its liability; and

(6) district court did not abuse its discretion in awarding shipowner prejudgment interest at federal postjudgment interest rate.

Affirmed in part, reversed in part, and remanded.

1. Federal Courts ⇐3567, 3603(2)

On appeal from bench trial, Court of Appeals reviews district court's findings of facts for clear error and exercises plenary review over conclusions of law.

2. Federal Courts ⇐3603(2)

Finding of fact is clearly erroneous when it is completely devoid of minimum evidentiary support displaying some hue of credibility or bears no rational relationship to supportive evidentiary data.

3. Wharves ⇐20(3)

District court's finding that tanker ship was in compliance with term of safe berth warranty requiring that it have draft of no more than 37 feet at time of allision with abandoned anchor on river bottom was not clearly erroneous in action against terminal operator alleging breach of safe berth warranty, even if allision would not have occurred if anchor was in flukes-down position unless ship had draft of at least 38.23 feet, and shipowner could not explain how anchor shifted from flukes-down position before allision to flukes-up position at time of allision, in light of evidence that anchor was, in fact, flukes-up at time of allision, expert testimony that ship had 36′ 7″ draft, and visual observation of ship by experts and crewmembers immediately after allision suggesting that ship had 36′ 7″ draft before allision.

4. Wharves ⇐20(3)

Shipowner operated single-hulled oil tanker ship with neither bad navigation nor negligent seamanship, and thus was not precluded from asserting claim against terminal operator for breach of safe berth warranty after ship allided with abandoned anchor on river bottom, despite operator's contention that shipowner violated maritime regulations related to operation of single-hulled tankers by failing to adequately plan ship's passage, to estimate its underkeel clearance, and to ensure that adequate master-pilot exchange occurred, where regulations did not require written voyage plan or underkeel clearance estimates, shipowner provided written underkeel clearance guidance in its vessel operation procedures manual, and ship's master discussed factors such as sea state, tidal conditions, effect of squat, maneuvering characteristics, and anticipated underkeel clearance in planning passage in discussions with local river pilot and local docking pilot. 33 C.F.R. §§ 157.455, 164.11.

5. Wharves ⇐20(3)

Wharfinger's duty is to use reasonable diligence to ascertain whether approach to its berth is safe for invited vessel.

6. Subrogation ⇐1, 29

In general terms, "subrogation" means substitution of one person for another; that is, one person is allowed to

stand in shoes of another and assert that person's rights against third party.

See publication Words and Phrases for other judicial constructions and definitions.

7. Subrogation ⚖33(2), 38

Subrogee, having stepped into subrogor's shoes, is entitled to assert all of subrogor's rights and claims against responsible third party, and third party—now defending action brought by subrogee—is entitled to assert every defense it otherwise could have raised against subrogor. Restatement (Third) of Restitution & Unjust Enrichment § 24.

8. Subrogation ⚖33(1)

Responsible third party's liability to subrogee cannot be greater than it would have been to subrogor. Restatement (Third) of Restitution & Unjust Enrichment § 24.

9. Environmental Law ⚖447

In action by United States, as shipowner's subrogee under Oil Pollution Act (OPA), to recover from terminal operator under safe berth warranty for costs incurred in cleaning up oil spill, operator could only assert defenses against United States' subrogated claims that it could have asserted against shipowner, including equitable recoupment defense based on alleged misleading conduct by federal agencies. Oil Pollution Act of 1990 § 1015, 33 U.S.C.A. § 2715(a).

10. Set-off and Counterclaim ⚖6

"Equitable recoupment" is principle that diminishes party's right to recover debt to extent that party holds money or property of debtor to which party has no right.

See publication Words and Phrases for other judicial constructions and definitions.

11. Set-off and Counterclaim ⚖6

For equitable recoupment defense to succeed, defendant must possess claim against plaintiff arising from same transaction or occurrence as plaintiff's suit, seeking relief of same kind as that sought by plaintiff, in amount no greater than that sought by plaintiff.

12. Environmental Law ⚖447

Marine terminal operator failed to establish equitable recoupment defense to reduce its liability to United States, as shipowner's subrogee under Oil Pollution Act (OPA), for costs incurred in cleaning up oil spill based on its breach of safe berth warranty in its contract with shipowner, despite operator's contention that United States, through Coast Guard, National Oceanic and Atmospheric Administration (NOAA), and Army Corps of Engineers, failed to maintain anchorage where allision occurred free of obstructions, where operator failed to assert cognizable claim against United States, and United States sought contractual relief, but operator sought equitable relief. Oil Pollution Act of 1990 § 1015, 33 U.S.C.A. § 2715(a).

13. Federal Civil Procedure ⚖751

District court did not abuse its discretion in finding that terminal operator waived argument that Oil Pollution Act (OPA) limited its liability for damages arising from oil spill, even though operator listed as defense that "claims and causes of action set forth in the plaintiffs' Amended Counterclaim are barred in whole or in part by the provisions of the Oil Pollution Act of 1990," where OPA included several potential affirmative defenses, operator did not provide specific citation to limitation of liability defense or description of nature of defense, operator did not develop defense at any point before trial or clearly assert defense until nearly ten years after action commenced and over one year after first

trial and appeal had concluded, and, if it had asserted defense in timely fashion, 15 days of depositions and trial testimony from seven witnesses could have been avoided. Oil Pollution Act of 1990 § 1002, 33 U.S.C.A. § 2702(d)(2)(B).

14. Federal Courts ⇨3587(1)

District court's holding that affirmative defense has been waived is reviewed for abuse of discretion.

15. Estoppel ⇨52.10(2)

Waiver is appropriate if party raising defense did not do so at pragmatically sufficient time and if opposing party would be prejudiced if defense were allowed.

16. Federal Civil Procedure ⇨751

In general, affirmative defense need not be articulated with any rigorous degree of specificity, and is sufficiently raised by its bare assertion, but party asserting defense must actually do so, and in way that gives fair notice of that defense.

17. Federal Courts ⇨3618

Award of prejudgment interest is reviewed for abuse of discretion.

18. Interest ⇨31

When selecting prejudgment interest rate, district court must keep in mind that rate and corresponding award must be compensatory rather than punitive.

19. Interest ⇨31

District court did not abuse its discretion in awarding shipowner prejudgment interest at federal postjudgment interest rate, rather than United States prime rate, in its action to recover under safe berth warranty for costs it incurred in cleaning up oil spill, where court found that postjudgment rate would fairly and adequately compensate owner for its losses. 28 U.S.C.A. § 1961(a).

On Appeal from the United States District Court for the Eastern District of Pennsylvania, District Court Nos. 2–05–cv–00305; 2–08–cv–02898, District Judge: The Honorable Joel H. Slomsky

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Before: SMITH, Chief Judge, HARDIMAN, Circuit Judge, and BRANN, District Judge *

OPINION

SMITH, Chief Judge.

Table of Contents

I. Introduction

After a 1,900–mile journey from Venezuela to Paulsboro, New Jersey, the M/T *Athos I*, a single-hulled oil tanker, had come within 900 feet of its intended berth when it struck an abandoned anchor on the bottom of the Delaware River. The anchor pierced the *Athos I*'s hull, causing approximately 264,000 gallons of crude oil to spill into the river.

The cost of cleaning up the spill was $143 million. We are presented with the question of how to apportion responsibility for that cost between three parties. The first party comprises not only the shipowner, Frescati Shipping Company, Ltd., but also the ship's manager, Tsakos Shipping & Trading, S.A. (collectively, "Frescati"). Frescati, through an intermediary, contracted to deliver crude oil to the second party, which is made up of several affiliated companies—CITGO Asphalt Refining Company, CITGO Petroleum Corporation, and CITGO East Coast Oil Corporation (collectively, "CARCO"). The oil shipment was to be delivered to CARCO at its marine terminal in Paulsboro. After the oil spill, Frescati paid for the cleanup effort, and was eventually reimbursed $88 million by the third party to this litigation, the United States, pursuant to the Oil Pollution Act (OPA) of 1990, 33 U.S.C. § 2701 *et seq.* Frescati and the United States now seek to recover their cleanup costs from CARCO.

II. Background

a. Facts [1]

The M/T *Athos I* was a single-hulled tanker ship, measuring approximately 748 feet long and 105 feet wide.[2] As owner of the ship, Frescati chartered it to an intermediary which assigned it to a tanker pool.

* The Honorable Matthew W. Brann, United States District Judge for the Middle District of Pennsylvania, sitting by designation.

1. The facts are undisputed unless otherwise noted.

2. Single-hulled tanker ships drew the attention of regulators and the public in the wake of the 1989 *Exxon Valdez* oil spill off the Alaskan coast; the *Exxon Valdez*, like the *Athos I*, was a single-hulled tanker. Single-hulled ships were initially subjected to extra regulation, *see, e.g.*, 33 C.F.R. § 157.455, but have since been phased out of operation in the United States in favor of double-hulled ships. *See* 46 U.S.C. § 3703a.

CARCO sub-chartered the *Athos I* from the tanker pool to deliver a shipment of crude oil from Puerto Miranda, Venezuela, to CARCO's berth in Paulsboro, New Jersey. CARCO was the shipping customer as well as the wharfinger who operated the berth.

The *Athos I*, carrying CARCO's shipment, left Venezuela in mid-November 2004 under the command of the ship's master, Captain Iosif Markoutsis. CARCO had instructed the *Athos I* to load to a draft[3] of 37 feet or less in Venezuela, and provided a warranty that the ship would be able to safely reach the berth in Paulsboro as long as it arrived with a draft of 37 feet or less. When the *Athos I* left Venezuela, it had a draft of 36′ 6″. Over the course of the *Athos I*'s journey, the ship burned fuel and the crew consumed fresh water. As the ship grew lighter, it rode higher on the water. By the time it reached the entrance to the Delaware Bay, the *Athos I* was drawing 36′ 4″. Because the fuel and fresh water were consumed from tanks located in the stern, or rear, of the ship, the *Athos I* was no longer sailing at an even keel; it was "trimmed by the bow," meaning that the bow, or front of the ship, was deeper in the water than the ship's stern. To return the ship to an even keel, the *Athos I* took on approximately 510 metric tons of ballast to tanks in the rear of the ship. Although the parties dispute how much the *Athos I* was drawing as it approached CARCO's berth, the District Court found that the added ballast brought the ship's draft to 36′ 7″.

The *Athos I* reached the entrance to the Delaware Bay without incident on November 26th. All vessels traveling north from the Delaware Bay to the Delaware River are required to use a Delaware River Pilot to navigate the waters. At the appropriate time, a local river pilot, Captain Howard Teal, Jr. boarded the ship and guided it up the Delaware River until it reached a section of the river near CARCO's berth. At that point, a local docking pilot, Captain Joseph Bethel, replaced Captain Teal and began to navigate the ship to its berth at Paulsboro. Captains Teal and Bethel both engaged Captain Markoutsis in conversations about the *Athos I*, its passage from the Delaware Bay to the Paulsboro berth, water depth, underkeel clearance, and other local conditions. The substance and sufficiency of those conversations are disputed by the parties.

CARCO's berth is on the New Jersey side of the Delaware River, directly across from Philadelphia International Airport. To reach the berth from the main river channel, ships must pass through an anchorage immediately adjacent to the berth. The anchorage, known as Federal Anchorage Number 9 or the Mantua Creek Anchorage, is a federally-designated section of the river in which ships may anchor; it is periodically surveyed for depth and dredged by the Army Corps of Engineers, as Corps resources allow. No government agency is responsible for preemptively searching for unknown obstructions to navigation in the anchorage, although the Coast Guard, the National Oceanic and Atmospheric Administration (NOAA), and the Corps of Engineers work together to remove or mark obstructions when they are discovered. Anyone who wishes to search for obstructions in the anchorage may do so, but anyone wishing to dredge in the anchorage requires a permit from the Corps of Engineers.

3. A ship's draft is the measurement from the water line to the bottom of the ship's hull, known as the keel. As a ship loads cargo, it becomes heavier and sits lower in the water. Its draft thereby increases.

It was in this anchorage on November 26, 2004, at 9:02 p.m., that the allision occurred.[4] The *Athos I* was only 900 feet—not much more than the ship's length—from CARCO's berth. The ship was "just about dead in the water" as Captain Bethel slowly positioned it to dock. Suddenly, the ship began to list and oil appeared in the river. At the time of the allision, the ship was in the middle of a 180° rotation, guided by tugboats, and moving astern and to port (backwards and to the ship's left). The path taken by the *Athos I* through the anchorage passed, at its shallowest point, over a 38–foot shoal. Most of the anchorage was deeper, and the depth of the river at the site of the allision was at least 41.65 feet at the time.

Captain Bethel immediately called the Coast Guard to alert them to the spill, while Captain Markoutsis rushed to the engine room and transferred oil from the breached cargo tank into another tank. The crew of the *Athos I* was eventually able to stop the leak, but not before 264,321 gallons of crude oil had spilled into the Delaware River.

The cleanup effort began almost immediately. Although it was ultimately successful, it took months to complete and the efforts of thousands of workers at a cost of $143 million. The cause of the allision was not discovered until more than a month later, when an abandoned anchor was discovered on the riverbed. The search for the obstruction that caused the allision proved difficult. An experienced sonar operator using side-scan sonar conducted the first search shortly after the allision, but did not recognize the anchor.[5] A second search by the same operator, conducted several weeks later, eventually discovered the anchor with the use of side-scan sonar in combination with divers and magnetometers. The anchor weighed approximately nine tons and was 6′ 8″ long, 7′ 3″ wide, and 4′ 6″ high. It has since been removed from the river.

The parties dispute the positioning of the anchor at the time of the allision. An anchor like the one that punctured the *Athos I* has two stable positions. It can sit at rest in the "flukes-up" or "flukes-down" position. A flukes-up anchor stands almost upright on its crown, with the flukes pointed upward at a 65° angle, while a flukes-down anchor has essentially tipped over, with both the crown and flukes of the anchor lying horizontally on the riverbed. In the flukes-up position, the anchor sticks up approximately seven feet above the riverbed, but in the flukes-down position, it rises only about 3′ 5″ above the riverbed. The District Court found that the anchor was flukes-up at the time of the allision, but CARCO asserts that the anchor was flukes-down, pointing to side-scan sonar data gathered as part of a geophysical study of the Delaware River that showed the anchor was flukes-down in 2001, three years before the allision.[6] The anchor was

4. An allision is "[t]he contact of a vessel with a stationary object such as an anchored vessel or a pier." *Allision*, BLACK'S LAW DICTIONARY (10th ed. 2014).

5. Side-scan sonar is used to locate objects on the sea floor and works like a camera, but using sound instead of light to form an image. Single-beam sonar, by contrast, uses sound to measure the depth along a single line traced by a sounding mechanism known as a towpath. If an obstruction is not located along the towpath, it would not be detected, and even if the towpath crossed an obstruction, the data would simply show a depth change rather than the obstruction itself. Before the allision, CARCO used single-beam sonar to survey its berthing area and a small portion of the anchorage. The government typically used single-beam sonar when it surveyed the anchorage for depth and dredging purposes.

6. The anchor was identified in the geophysical study data only after the allision occurred. The parties agree that in 2001, the anchor was flukes-down, and that no one was aware

also flukes-down when it was discovered after the allision. Between 2001 and the allision in 2004, 241 vessels went to CARCO's Paulsboro berth, and many others have anchored in the anchorage over the years. The District Court theorized that one of those anchored ships could have dragged its own anchor chain along the riverbed, catching on the abandoned anchor and shifting its position. The court ultimately concluded that although the actual cause of the anchor's movement would never be known, at some point between the geophysical study in 2001 and the allision in 2004, the anchor shifted from flukes-down to flukes-up. A flukes-down anchor would not have allided with the *Athos I* if the *Athos I*'s draft was less than 37 feet; a flukes-up anchor would have.

Now, more than thirteen years after the allision, the *Athos I* has been scrapped, the anchor removed from the river, and the oil spill cleaned up. What remains is this case for apportionment of cleanup costs.

b. Procedural History

This case, like the *Athos I*, has been on a long journey. Over the past thirteen years, the matter has been to trial before two different judges and heard on appeal before two separate panels of this Court. We briefly summarize that history.

Litigation began shortly after the allision in January, 2005, when Frescati filed a "Petition for Exoneration from or Limitation of Liability." CARCO and others filed claims for damages associated with the spill. Frescati then filed a counterclaim against CARCO for its damages. The United States eventually reimbursed Frescati for some of its cleanup expenses pursuant to the OPA, and filed suit against CARCO as a partial subrogee to some of Frescati's claims. The claims of Frescati and the United States against CARCO were consolidated with CARCO's counterclaims and defenses, forming the litigation as it exists today.

The case was first tried in a forty-one-day bench trial before the Honorable John P. Fullam. Judge Fullam found that CARCO was not liable for the casualty in contract, tort, or otherwise; Frescati and the United States appealed. On appeal, we affirmed in part, vacated in part, and remanded the case because the District Court had failed to make appropriate findings of fact and conclusions of law as required by Fed. R. Civ. P. 52(a)(1). *In re Frescati*, 718 F.3d 184, 189, 196–97 (3d Cir. 2013).

We determined, among other things, that Frescati was a third-party beneficiary of CARCO's safe berth warranty, and that the allision occurred in the approach to CARCO's terminal, meaning that CARCO had an unspecified duty of care to Frescati in tort. We remanded for the District Court to determine whether Frescati met the conditions for the safe berth warranty to apply. We also asked the District Court, if necessary, to determine the appropriate duty of care CARCO owed Frescati and whether CARCO breached that duty. 718 F.3d at 214–15.

Judge Fullam retired before the case was remanded. Upon its return to the District Court, the case was assigned to the Honorable Joel H. Slomsky as a successor judge pursuant to Fed. R. Civ. P. 63. Under the terms of that rule, Judge Slomsky certified his familiarity with the record and recalled more than twenty witnesses over the course of a thirty-one-day proceeding.

of the anchor's existence before the allision—except, perhaps, the still-unidentified owner who abandoned it.

The District Court held that CARCO was liable to Frescati, and the United States as Frescati's subrogee, for breach of contract. CARCO's contract included a provision known as a safe berth warranty, which, for purposes of this appeal, warrantied that CARCO's berth would be safe for the *Athos I* as long as the ship had a draft of 37 feet or less and Frescati did not cause the allision through bad navigation or negligent seamanship. The District Court concluded that CARCO breached the warranty because the *Athos I* had a draft of 36′ 7″ at the time of the allision, exercised good navigation and seamanship, and yet still hit an anchor within the geographic area covered by the warranty. On appeal, CARCO argues that the *Athos I* had a draft much deeper than the warrantied depth of 37 feet, and that Frescati demonstrated negligent seamanship by violating several federal maritime regulations relating to underkeel clearance and safe navigation.

The District Court also found CARCO liable in tort to Frescati,[7] concluding that CARCO had a duty, as operator of the berth, to search for obstructions in the approach to its berth. Specifically, the District Court concluded that CARCO had a duty to use side-scan sonar to search for unknown obstructions to navigation in the approach to its berth, and to remove any such obstructions or warn invited ships—like the *Athos I*—of their presence. Because CARCO had not taken any action to search for obstructions, the District Court held CARCO liable in tort—for the same amount for which it was liable in contract. The District Court's contract and tort holdings independently support the judgment for Frescati.

CARCO, in a motion for partial summary judgment before the District Court, asked that its liability, like Frescati's, be limited under the OPA. Because CARCO did not raise the defense until after the first trial and appeal, almost a decade into this litigation, the District Court held that the defense was waived, and in the alternative, that it failed on the merits.

The District Court did, however, partially credit CARCO's equitable recoupment defense against the United States. CARCO argued that the conduct of three federal agencies—the Coast Guard, NOAA, and the Army Corps of Engineers—misled CARCO into believing that the United States was maintaining the anchorage free of obstructions. In addition, CARCO argued that equity requires the United States to bear the cost of the cleanup rather than CARCO. The District Court ultimately reduced the United States' recovery against CARCO by 50%, rather than acceding to CARCO's request to eliminate its liability entirely.

Finally, the District Court held that Frescati was entitled to prejudgment interest at the federal postjudgment rate rather than the higher U.S. prime rate requested by Frescati.

The District Court ultimately awarded Frescati $55,497,375.95[8] on the claims of

7. The United States is not a party to the tort claim, pursuant to a partial settlement agreement it reached with CARCO in 2009.

8. Frescati's liability under the OPA for the cost of cleaning up the spill was limited to approximately $45 million. The United States reimbursed it for the remaining $88 million of its qualifying cleanup expenses. In addition to the $45 million in OPA damages, Frescati also incurred roughly $10 million in damages that fell outside the scope of the OPA's liability cap—third-party claims; cleanup expenses for recreational boats; the cost of removing the anchor and the pump casing from the riverbed; a settlement with a nearby nuclear power plant that had to shut down; unrepaired hull damage to the *Athos I*, and other miscellaneous expenses. Frescati's contract

breach of contract and negligence, plus prejudgment interest of $16,010,773.75, for a total judgment of $71,508,149.70. The United States, after the court's 50% reduction, was awarded $43,994,578.66 on its subrogated breach of contract claim, with prejudgment interest of $4,620,159.98, for a total judgment of $48,614,738.64.

All three parties now appeal. We will affirm the District Court's judgment in favor of Frescati on the breach of contract claim and the prejudgment interest award, as well as the District Court's denial of CARCO's motion for partial summary judgment on its limitation of liability defense. We will vacate the District Court's judgment in favor of Frescati on the negligence claim. We will affirm in part the District Court's judgment in favor of the United States with respect to CARCO's liability on the subrogated breach of contract claim, but because CARCO's equitable recoupment defense fails, we will reverse and remand for further proceedings to recalculate damages and prejudgment interest.

III. Jurisdiction and Standard of Review

The District Court had admiralty jurisdiction pursuant to 28 U.S.C. § 1333(1). We have jurisdiction over this appeal under 28 U.S.C. § 1291.

[1, 2] "On appeal from a bench trial, we review a district court's findings of facts for clear error and exercise plenary review over conclusions of law." *Norfolk S. Ry. Co. v. Pittsburgh & W. Va. R.R.*, 870 F.3d 244, 253 (3d Cir. 2017). "A finding of fact is clearly erroneous when it is completely devoid of minimum evidentiary support displaying some hue of credibility or bears no rational relationship to the supportive evidentiary data." *VICI Racing, LLC v. T-Mobile USA, Inc.*, 763 F.3d 273, 283 (3d Cir. 2014); *In re Frescati*, 718 F.3d at 196.

IV. The Safe Berth Warranty

CARCO promised that the *Athos I* would be directed to a location "she may safely get (always afloat)," a promise known as a safe port or safe berth warranty. JA at 1211. Such a promise provides, among other things, "protection against damages to a ship incurred in an unsafe port to which the warranty applies." *In re Frescati*, 718 F.3d at 197.

> A port is deemed safe where the particular chartered vessel can proceed to it, use it, and depart from it without, in the absence of abnormal weather or other occurrences, being exposed to dangers which cannot be avoided by good navigation and seamanship. Whether a port is safe refers to the particular ship at issue, and goes beyond the immediate area of the port itself to the adjacent areas the vessel must traverse to either enter or leave. In other words, a port is unsafe—and in violation of the safe berth warranty—where the named ship cannot reach it without harm (absent abnormal conditions or those not avoidable by adequate navigation and seamanship).

Id. at 200 (quotations and citations omitted). "[T]he safe berth warranty is an express assurance made without regard to the amount of diligence taken by the charterer." *Id.* at 203. For our purposes, a safe berth warranty promises that a ship with a draft less than the warrantied depth is covered by the warranty in the absence of bad navigation or negligent seamanship.

Our prior opinion called for the District Court to resolve three issues on remand: the draft limit beyond which the safe berth

recovery of $55 million was based on both its OPA and non-OPA damages.

warranty would not apply; the actual draft of the *Athos I* at the time of the allision; and whether the warranty was negated by bad navigation or negligent seamanship. *Id.* at 204–05, 204 n.20.

As an initial matter, the District Court found that the safe berth warranty applied to ships drawing less than 37 feet, a finding neither party challenges on appeal. The remaining issues, then, are whether the *Athos I* had a draft of less than 37 feet, and if it did, whether bad navigation or negligent seamanship by Frescati negated the warranty.

a. The Draft of the *Athos I*

The District Court found that the *Athos I* had a draft of 36′ 7″ at the time of the allision. The court based this finding on the undisputed draft of the *Athos I* at the time of its departure from Puerto Miranda—36′ 6″—as well as expert testimony regarding the condition of the ship and its estimated draft at Paulsboro.[9]

CARCO challenges the District Court's determination of the *Athos I*'s draft, arguing that the District Court improperly based its finding on a speculative assumption about the orientation of the abandoned anchor. Specifically, CARCO disputes the District Court's finding that the anchor shifted from a flukes-down position to a flukes-up position sometime between 2001 and the allision in 2004, a shift that caused the anchor to intrude within the 37-foot safe depth promised by CARCO. CARCO argues that the District Court failed to make a finding as to the precise mechanism by which the anchor shifted from flukes-down to flukes-up. The anchor's orientation matters; if the accident occurred while the anchor was flukes-down, the *Athos I* necessarily would have had a draft that exceeded the scope of CARCO's warranty.[10]

Broadly speaking, the District Court made three findings of fact related to the anchor's orientation. First, the court and parties agree that, three years before the allision, the anchor was in the flukes-down position.[11] Second, the District Court found that at some point before the allision, the anchor shifted into the flukes-up position. Finally, after the allision, the anchor was eventually discovered back in the flukes-down position—perhaps unsurprising, given the force of its encounter with the *Athos I*.

CARCO attacks the second finding, arguing that there was insufficient evidence in the record to support the District Court's suggestion that a "sweeping anchor chain" could have caught the anchor and shifted it into the flukes-up position.[12]

9. Frescati's expert, Anthony Bowman, developed the Seamaster software program, which allows him to enter the measurements of a ship—including the weight, dimensions, and strength of all its constituent parts, such as the hull, cargo, and supplies—and calculate, among other things, a ship's draft. Having considered the ship's records, information about the ballast tanks, and his own software, Bowman testified that at the time of the allision, the Athos I had a draft of 36′ 7″. The District Court credited his testimony.

10. The District Court made undisputed findings of fact as to the height of the anchor in a flukes-down position (41 inches or 3.42 feet) and the depth of the river at the time and location of the allision (41.65 feet). Assuming for the moment that the anchor was flukes-down, as CARCO argues, the allision would not have occurred unless the *Athos I* had a draft of at least 38.23 feet, or just under 38′ 3″, significantly in excess of the warrantied draft of 37 feet.

11. Experts for both sides were able to identify the flukes-down anchor in a sonar scan performed in 2001 as part of an independent geophysical study.

12. Ships at anchor move with the tide, back and forth as the tide comes in and goes out.

[3] We find CARCO's arguments unconvincing, primarily because the "sweeping anchor chain" theory, however plausible or implausible, is not necessary to sustain the District Court's finding. Let us imagine a piece of furniture (a sofa, perhaps, or an armchair) that has fallen off the back of a pickup truck onto a roadway. One driver reports seeing the furniture in the right lane. A while later, a second driver hits the furniture. The second driver asserts that the furniture was in the left lane when he struck it, and provides evidence to that effect. A highway patrolman shows up later and finds the furniture once again in the right lane. A court may find, without committing error, that the furniture was in the right lane and moved to the left without making a specific finding as to the precise method by which the furniture moved from one lane to the other. Perhaps another driver hit it; perhaps a pedestrian tried to move it out of the road but did not finish the job. When credible evidence shows that the second driver was driving in the left lane, a finding to that effect does not become error because the furniture was in the right lane when the first driver passed, or changed position after—or because of—the encounter with the second driver.

Here, the record contains sufficient evidence to support the finding that the anchor was, in fact, flukes-up at the time of the allision. How exactly the anchor changed position does not impact our sufficiency determination. As an initial matter, the movement of the *Athos I* at the time of the allision and the damage to its hull are sufficient to show that the anchor was flukes-up. And substantial evidence unrelated to the anchor showed that the *Athos I* was drawing 36′ 7″ at the time of the allision—a draft at which the allision would not have occurred had the anchor been flukes-down. That is enough to support the District Court's finding that the anchor moved from flukes-down to flukes-up.

The movement of the ship and damage to its hull shows that the anchor must have been flukes-up. The District Court found that the *Athos I* was moving astern and to port at the time of the allision, a finding CARCO does not challenge. Based on that movement, the scoring left by the anchor on the hull, the size and shape of the two holes the anchor created, and the damage to the anchor itself also supported the District Court's finding that the anchor must have been flukes-up at the time of the allision. CARCO's own expert witness, on cross-examination, testified that if the *Athos I* were moving astern and to port, the damage to the *Athos I*'s hull would necessarily require a flukes-up anchor.[13] JA at 1021–22.

The anchor chain drags or "sweeps" across the riverbed as the ship floats, potentially shifting the position of objects on the riverbed, and leaving scour marks on the riverbed. Anchor chains also move along the river bottom when the anchor is pulled back onto the ship. CARCO, for its part, characterizes the idea that an anchor chain might have moved the abandoned anchor as "fantastical," "inexplicabl[e]," an "astonishing assertion," "facially implausible," "pure and wild speculation," "pure speculation," "conjecture," "speculative and unsupported," and, once again, "implausible." CARCO Opening Br. 4, 53–55; CARCO Reply Br. 32. The District Court pointed out that scour marks were found on the river bottom near the site of the allision, but ultimately decided only that the anchor was in the flukes-up position at the time of the allision. JA at 78 ("Although the actual cause of the anchor's movement to a 'flukes-up' position will never be known, the Court finds that at some point after December 2001, this movement occurred and the anchor was positioned in a 'flukes-up' orientation when it allided with the Athos I.").

13. CARCO's theory at trial, abandoned on appeal, was that the ship was *not* moving astern and to port.

Nor did the District Court base its finding of a 36′ 7″ draft on the flukes-up anchor alone. While CARCO argues that the anchor was flukes-down, and that therefore the *Athos I* must have had a deep draft, the reverse is also true. If the *Athos I* had a draft of 36′ 7″, then the anchor must have been flukes-up. The District Court credited expert testimony that the ship had a 36′ 7″ draft. The ballast tanks contained no extra liquid that would have affected the ship's draft, a finding that CARCO does not challenge on appeal. The ship left Puerto Miranda with a draft of 36′ 6″. Visual observation of the ship by experts and crewmembers immediately after the allision suggested the *Athos I* had a 36′ 7″ draft before the allision. And, on appeal, CARCO fails to offer any suggestion as to how the draft might have increased by more than a foot without the crew's knowledge or any evidence that the ballast tanks were faulty.[14]

We conclude there was no clear error in the District Court's determination that the *Athos I* had a draft of 36′ 7″ at the time of the allision. The ship was, therefore, within the scope of CARCO's safe berth warranty.

b. Frescati's Seamanship

[4] A safe berth warranty applies only in the absence of bad navigation or negligent seamanship. CARCO argues on appeal that Frescati violated several maritime regulations related to the operation of single-hulled tankers, and that those regulatory violations serve as sufficient proof of negligent seamanship. The District Court concluded that Frescati did not violate any relevant regulations, and enforced the safe berth warranty. We agree with the District Court that Frescati did not violate any relevant regulations.

On appeal, CARCO argues specifically that Frescati violated two federal regulations: 33 C.F.R. § 157.455 and 33 C.F.R. § 164.11. Section 157.455 applied to certain single-hulled tankers during the period they were being phased out of operation, while § 164.11 applies to certain ships above 1,600 gross tons. 33 C.F.R. §§ 157.400, 164.01. Both sections applied to the *Athos I* at the time of the allision.

Section 157.455 requires the owner or operator of a single-hulled tanker to provide certain written guidance to the ship's master for purposes of estimating the tanker's underkeel clearance.[15] 33 C.F.R.

14. The *Athos I* passed safely over a 38–foot shoal less than fifteen minutes before the allision. JA at 203. It seems that if the *Athos I* had a draft deep enough to hit the flukes-down anchor (a minimum of 38.23 feet, *see* supra note 10), it would have encountered the 38–foot shoal before it ever encountered the anchor. A flukes-down anchor would have been deeper than the 38–foot shoal even at the anchor's shallowest point. JA at 77, 78, 85.

15. 33 C.F.R. § 157.455(a)–(b) reads:

> (a) The owner or operator of a tankship, that is not fitted with a double bottom that covers the entire cargo tank length, shall provide the tankship master with written under-keel clearance guidance that includes—
>
> (1) Factors to consider when calculating the ship's deepest navigational draft;
> (2) Factors to consider when calculating the anticipated controlling depth;
> (3) Consideration of weather or environmental conditions; and
> (4) Conditions which mandate when the tankship owner or operator shall be contacted prior to port entry or getting underway; if no such conditions exist, the guidance must contain a statement to that effect.
>
> (b) Prior to entering the port or place of destination and prior to getting underway, the master of a tankship that is not fitted with the double bottom that covers the entire cargo tank length shall plan the ship's passage using guidance issued under paragraph (a) of this section and estimate the antici-

§ 157.455(a). It also requires the master to use that guidance to plan the ship's passage, estimate the underkeel clearance, consult with the relevant pilots who will guide the ship to its berth, and make a log entry reflecting discussion of the ship's underkeel clearance with the pilot. 33 C.F.R. § 157.455(b). Section 164.11 mandates that the master ensure the pilot is informed of certain information, including the ship's draft and tidal conditions.[16] 33 C.F.R. § 164.11.

CARCO argues that Frescati was responsible for three specific violations, each of which allegedly caused the allision. First, CARCO claims that Frescati failed to adequately plan the ship's passage. Second, CARCO claims that Frescati failed to estimate the *Athos I*'s underkeel clearance. Finally, CARCO claims that Frescati failed to ensure that an adequate master-pilot exchange occurred, and made no log entry that would reflect such an exchange.

With respect to planning the passage, CARCO argues that 33 C.F.R. § 157.455 requires a written voyage plan. Frescati allegedly violated that requirement by failing to finalize an official voyage plan document using the Tsakos Voyage Plan form contained in the Tsakos Vessel Operation Procedures Manual. *See* JA at 1178–85.

The text of § 157.455 undermines CARCO's argument. The regulation does not itself require a *written* voyage plan. Paragraph (a) of the regulation requires that Frescati create "written under-keel clearance guidance," which must contain "factors to consider" when evaluating draft, water depth, and weather conditions. Paragraph (b) requires that the master plan the ship's passage using those "factors to consider" in the guidance required by paragraph (a). Nowhere does this regulation require that the master's passage plan be in writing; the only reference to a writing in paragraph (b) comes in the requirement that some official log of the master-pilot conference be recorded. CARCO conflates the passage plan requirement of paragraph (b)—to consider certain relevant factors when planning—with the "Voyage Plan" form contained in Frescati's Vessel Operation Procedures Manual. *See* JA at 1180. The Voyage Plan form focuses on plotting the course of the vessel from berth to berth; paragraphs (a) and (b) of the regulation, on the other hand, serve to create a reference list for the ship's master of relevant factors to consider when estimating underkeel clearance.

Frescati satisfied the requirements of paragraph (a) by providing written underkeel clearance guidance in Section 3.4 [17] of its Vessel Operation Procedures Manual.

> pated under-keel clearance. The tankship master and the pilot shall discuss the ship's planned transit including the anticipated under-keel clearance. An entry must be made in the tankship's official log or in other onboard documentation reflecting discussion of the ship's anticipated passage.
>
> 33 C.F.R. § 157.455(a)–(b).

16. 33 C.F.R. § 164.11 reads:

> The owner, master, or person in charge of each vessel underway shall ensure that:
>
> . . . .
>
> (k) If a pilot other than a member of the vessel's crew is employed, the pilot is informed of the draft, maneuvering characteristics, and peculiarities of the vessel and of any abnormal circumstances on the vessel that may affect its safe navigation.
>
> . . .
>
> (n)Tidal state for the area to be transited is known by the person directing movement of the vessel . . . .
>
> 33 C.F.R. § 164.11.

17. The Vessel Operation Procedures Manual appears to contain a typographical error listing the appropriate section as 2.4 rather than 3.4, as it appears in the Table of Contents. *See* JA at 1189, 1191.

JA at 1191. The Manual appropriately lists factors to consider, including "sea state and swell," "tidal conditions," and "the effect of squat," [18] and suggests to the master that 10% or 5% underkeel clearance margins would typically be appropriate. *Id.*

Furthermore, Frescati satisfied the planning requirement of paragraph (b) because the *Athos I*'s master, Captain Markoutsis, considered factors like the sea state, tidal condition, and the effect of squat. Even though CARCO provided a safe berth warranty for a draft up to 37 feet, Captain Markoutsis loaded the ship to only 36′ 6″ because he was "afraid" of a 37–foot draft, and eventually entered the Delaware River with a draft of 36′ 7″. *In re Frescati*, 718 F.3d at 204. The charts in the *Athos I* were marked with the 38–foot controlling draft in the anchorage. JA at 992. Captain Teal, the river pilot, testified that he and Captain Markoutsis discussed the draft, wind, visibility, and tides. We agree with the District Court that Frescati fully complied with the planning requirement of § 157.455(b)—that is, to use the factors listed in the Vessel Operating Procedures Manual when planning the passage.

CARCO's second argument is that Frescati violated § 157.455(b) because Captain Markoutsis failed to estimate the *Athos I*'s underkeel clearance. The District Court did not err in finding that Captain Markoutsis had estimated underkeel clearance. Captain Markoutsis discussed the draft, tidal conditions, and anticipated underkeel clearance with Captain Teal. JA at 801–802. They estimated that the ship would have at least 1.5 meters' clearance—nearly five feet. *Id.* Captains Bethel and Markoutsis also discussed the draft and believed they would have sufficient clearance. JA at 833, 837. CARCO highlights that there is no evidence of *written* underkeel clearance estimates, but § 157.455 does not require written estimates.

Finally, CARCO argues that the master-pilot exchange required by § 157.455 and § 164.11 was inadequate. In general, master-pilot exchanges are intended to allow the master to share the navigational characteristics of his ship with the pilot who will be guiding it, and for the pilot to share local conditions such as weather, depth, and the tide with the master. Section 157.455(b) requires that "[t]he tankship master and the pilot shall discuss the ship's planned transit including the anticipated under-keel clearance. An entry must be made in the tankship's official log or in other onboard documentation reflecting discussion of the ship's anticipated passage." 33 C.F.R. § 157.455(b). Section 164.11 requires that the master ensure that

> [i]f a pilot other than a member of the vessel's crew is employed, the pilot is informed of the draft, maneuvering characteristics, and peculiarities of the vessel and of any abnormal circumstances on the vessel that may affect its safe navigation. . . . [and that the] [t]idal state for the area to be transited is known by the person directing movement of the vessel.

33 C.F.R. § 164.11(k), (n).

Captain Markoutsis was responsible for discussing the draft, underkeel clearance, maneuvering characteristics, and tidal

18. "Squat is a hydrodynamic phenomenon, which occurs when a ship is moving through the waters. As a ship moves forward, it displaces a volume of water. The displaced water rushes under the keel of the ship and creates a low pressure area causing the ship to sink down toward the riverbed. The faster a ship is moving, the more the ship will sink down towards the riverbed. This process causes a ship to be closer to the riverbed by increasing a vessel's draft." JA at 70 (citations omitted).

state with the two pilots who guided the *Athos I*. The testimony shows that Captain Markoutsis did so, discussing all the relevant information with both pilots, and that he recorded the conversation on the signed Pilot Card, which served as sufficient documentation of the master-pilot conference. The District Court additionally credited Frescati's expert witness, Captain Betz, who observed both Captain Teal and Captain Bethel testify. Captain Betz opined that the master-pilot exchanges were adequate and customary in all respects.

Frescati operated the *Athos I* with neither bad navigation nor negligent seamanship. Nevertheless, the allision occurred. The District Court did not err in concluding that the allision resulted from a breach of CARCO's safe berth warranty.

V. Wharfinger Negligence

CARCO wore two hats in its dealings with Frescati, as a shipping customer and as a wharfinger. These dual roles exposed CARCO to liability under two independent legal theories. CARCO's first role, as a shipping customer that contracted with Frescati for delivery of a shipment of crude oil, resulted in CARCO's liability under the contractual safe berth warranty, discussed above. The second, as the wharfinger for the Paulsboro berth that was the *Athos I*'s intended destination, resulted in the District Court's finding of negligence and CARCO's corresponding liability in tort.

Both theories of liability independently support the District Court's judgment against CARCO. As a result, our decision to affirm the judgment based on CARCO's contractual liability means that we are not required to delve into the District Court's tort analysis. However, having reviewed that analysis, we harbor serious doubts about the appropriateness of the court's proposed duty of care. For that reason, we are compelled to make clear that we will affirm the District Court's judgment based solely on CARCO's breach of contract.

[5] A wharfinger's duty is more limited than that of a shipping customer who has provided a safe berth warranty. As we previously wrote:

> In the tort context, ... a wharfinger is not a guarantor of a visiting ship's safety, but is bound to use reasonable diligence in ascertaining whether the berths themselves and the approaches to them are in an ordinary condition of safety for vessels coming to and lying at the wharf. This is not an unconstrained mandate to ensure safe surroundings or warn of hazards merely in the vicinity. Instead, a visiting ship may only expect that the owner of a wharf has afforded it a safe approach. In being invited to dock at a particular port, a vessel should be able to enter, use and exit a wharfinger's dock facilities without being exposed to dangers that cannot be avoided by reasonably prudent navigation and seamanship.

In re Frescati, 718 F.3d at 207 (quotations and citations omitted). In short, and as a general matter, a wharfinger's duty is to use reasonable diligence to ascertain whether the approach to its berth is safe for an invited vessel.[19]

We remanded for the District Court to determine in the first instance what reasonable diligence required of CARCO under the circumstances of this case, and whether CARCO breached that standard.

19. We previously determined that the allision occurred in the approach to CARCO's berth—the geographic area within which a wharfinger's duty exists—and as a result, CARCO had a duty to use reasonable diligence to provide the *Athos I* with a safe approach. *In re Frescati*, 718 F.3d at 211.

Id. On remand, the District Court concluded that

> a reasonably prudent terminal operator should periodically scan the approach to its dock for hazards to navigation as long as ships are being invited there. In this case, the standard would require that side-scan sonar be used to search the approach for obstructions that are potential hazards to navigation. If an obstruction is located, a terminal operator is then required to remove it, and if the terminal operator cannot remove it, notice of the hazard must be given to incoming ships by marking it as a hazard and/or warning ships of its presence.

JA at 132. Because CARCO did nothing to look for obstructions, the District Court held that it had breached its duty.

The District Court chose its standard by determining what the "demands of reasonableness and prudence" required. JA at 129. Citing Judge Learned Hand's famous formula from *United States v. Carroll Towing*, 159 F.2d 169 (2d Cir. 1947), the court concluded that the precaution of a preemptive side-scan sonar search would be less burdensome than the probability of an allision multiplied by the serious harm caused by a spill of toxic substances like crude oil.

We have doubts about the District Court's balancing of the cost of preventative measures on one hand and the cost of potential accidents on the other. The court found that a general scan of the approach to CARCO's berth and the berth itself would have cost between $7,500 and $11,000, and would have prevented the allision. Yet in this very case, the targeted scan of the area where the allision occurred, conducted only eight days after the allision, did not identify the anchor. The first set of 93 side-scan sonar passes conducted by Frescati's expert, John Fish—at a cost of $38,577—identified a pump casing on the river bottom. The anchor, however, went unrecognized.[20] We do not share the District Court's confidence that a general $11,000 scan of the approach and berth would have "recognized" the anchor with sufficient clarity to prevent the allision, given that a targeted $38,000 scan for obstructions failed to do so.

Beyond the questionable utility of side-scan sonar as applied to this case, we doubt whether imposing a specific duty to require side-scan sonar would be useful for wharfingers in the ordinary course of their business. Single-hulled vessels like the *Athos I* present unique risks, and have been treated with special care by regulators. *See, e.g.*, 33 C.F.R. § 157.455. Today, as a result of those unique risks, such vessels are no longer permitted to operate in the waters of the United States. *See* 46 U.S.C. § 3703a (banning single-hulled oil tankers in the waters of the United States after January 1, 2015). Furthermore, side-scan sonar is not the only method available to detect and recognize obstructions, as the District Court pointed out.[21] Even if we were to accept the court's balancing of cost, risk, and the magnitude of the potential harm, the high standard set forth in

20. Fish testified that the side-scan sonar equipment "detected" the anchor, but neither he nor anyone else "recognized" it until after the second set of scans were taken. JA at 927.

21. The court determined that CARCO should have used side-scan sonar to search for obstructions, but seemed willing to accept that other methods of searching for obstructions might accomplish the same purpose. It noted that "side-scan sonar . . . is not the only method available in the industry to search for hazardous debris. . . . Since the standard of care involves factual issues, the methods may vary when the conditions in the approach to each terminal are examined." JA at 132 n.109.

this case—involving a risky single-hulled vessel—would not necessarily apply to future cases, which will necessarily involve only double-hulled vessels.[22]

We are not unsympathetic to the position in which we placed the District Court by asking it to specify the duty of care at play in this case. The District Court has conscientiously complied. And we stand by our previous holding that CARCO had some duty to use reasonable diligence to provide the *Athos I* with a safe approach to its berth—a duty it may or may not have breached. *In re Frescati*, 718 F.3d at 211. Nevertheless, given CARCO's independent liability in contract and our decision to affirm on that basis, we will once again decline to outline precisely what CARCO's duty of reasonable diligence entailed.

VI. Subrogation and Equitable Recoupment

This litigation does not implicate the interests of only Frescati and CARCO. The United States reimbursed Frescati for $88 million in cleanup expenses above the liability limit established by the OPA. Consequently, the United States became subrogated to Frescati's claims, and joined the fray by filing suit against CARCO in 2008.[23]

Frescati initially paid for the oil spill cleanup costs as a "responsible party" under the OPA. *See* 33 U.S.C. § 2702(a). The OPA allows a responsible party like Frescati to limit its liability to a specified sum; any cleanup costs above that amount are reimbursed out of the Oil Spill Liability Trust Fund.[24] *See* 33 U.S.C. § 2704. Under this scheme, Frescati's liability for the cost of the oil spill cleanup was limited to ap-

22. Indeed, five years after the *Athos I* allision, the Norwegian tanker *SKS Satilla*, carrying nearly 42 million gallons of crude oil, allided with a sunken oil rig in the Gulf of Mexico, sustaining "substantial damage to the port side of her hull." Findings of Fact and Conclusions of Law, *In re Ensco Offshore Co.*, No. 4:09-CV-2838, ECF No. 185 at 3, ¶¶ 6–7 (S.D. Tex. Sept. 30, 2014). But "[b]ecause the SATILLA [was] a double hulled vessel[,] ... there was no discharge of crude oil." *Id.* at 3, ¶ 9.

23. The United States and CARCO reached a partial settlement agreement before the first trial. Both the United States and CARCO agreed to forgo any negligence claims they might have had against one another. The parties agreed that the United States would pursue only its contract claim against CARCO. As a result, the United States' judgment against CARCO was based solely on CARCO's contractual liability under the safe berth warranty. CARCO, for its part, reserved in the settlement agreement

> each and every substantive and procedural right available to a defendant ... including but not limited to the right to raise affirmative defenses under any theory or doctrine of law or equity, the right to assert setoff or recoupment and the right to assert compulsory or non-compulsory counterclaims other than a Claim for Contribution or Indemnity ....

JA at 391.

24. The Oil Spill Liability Trust Fund, administered by the Coast Guard, serves much like insurance for the oil transportation industry. Companies that import oil into the United States pay a per-barrel fee into the Trust Fund. When a tanker vessel spills oil, the OPA assigns liability for the cleanup to a "responsible party"—typically the owner of the vessel from which the oil spilled. The responsible party is liable for all cleanup costs associated with the spill. If the costs exceed a liability cap established by the OPA, the Trust Fund reimburses the responsible party for all expenses above the statutory cap. Liability under the OPA does not preclude a responsible party from bringing any claims it has against a third party under any other law. The United States, to the extent the Trust Fund has reimbursed the responsible party's costs, steps into the shoes of the responsible party as subrogee and may pursue claims against a third party as if it were the responsible party. Any recovery won by the United States is returned to the Trust Fund to cover future oil spill reimbursements.

proximately $45 million. The Trust Fund reimbursed Frescati for its remaining cleanup costs, which totaled approximately $88 million. The United States then became statutorily "subrogated to all rights, claims, and causes of action that the claimant [Frescati] has under any other law." 33 U.S.C. § 2715(a). The United States pursued these claims against CARCO as a "person who is liable, pursuant to any law, to the compensated claimant [Frescati] or to the Fund, for the cost or damages for which the compensation was paid." 33 U.S.C. § 2715(c).

Pursuant to the partial settlement agreement, the United States limited itself to the same contractual claims Frescati asserted. Because CARCO was liable to Frescati in contract, it was also liable to the United States for the amount the Trust Fund had reimbursed Frescati: nearly $88 million. But CARCO asserted a defense against the United States it did not assert against Frescati—equitable recoupment—and in response, the District Court reduced the United States' judgment by 50%. Both CARCO and the United States appealed. CARCO argues that the District Court erred by not eliminating the United States' recovery, while the United States argues that the District Court should have left the contract judgment untouched and denied CARCO any equitable remedy. We conclude that the District Court erred by reducing the United States' judgment by 50%. The United States is entitled to a full recovery.

a. Subrogation and Subrogee-Specific Defenses

[6–8] As an initial matter, we note that the dispute between CARCO and the United States presents an unusual question about the nature of subrogation. Subrogation itself is not unusual; in general terms, it "simply means substitution of one person for another; that is, one person is allowed to stand in the shoes of another and assert that person's rights against a third party." *US Airways v. McCutchen*, 569 U.S. 88, 97 n.5, 133 S.Ct. 1537, 185 L.Ed.2d 654 (2013). Most often, it arises in the insurance context as a procedural mechanism to allow an insurer (the subrogee) to step into the shoes of its insured (the subrogor) after it has compensated the insured for harm caused by a third party. The subrogee, having stepped into the shoes of the subrogor, is entitled to assert all of the subrogor's rights and claims against the responsible third party. Likewise, the third party—now defending an action brought by the subrogee—is entitled to assert every defense it otherwise could have raised against the subrogor. In that vein, the third party's liability to a subrogee cannot be greater than it would have been to the subrogor. Restatement (Third) of Restitution & Unjust Enrichment § 24.

All that is unexceptional. The unusual question presented here is whether a third party may assert a defense against a subrogee that it could *not* assert against the subrogor. As we discussed above, CARCO is liable to Frescati, the subrogor, in contract. Consequently, CARCO is liable to the United States, the subrogee, under that very same contract. But CARCO wishes to assert a defense against the United States—namely, that equitable recoupment requires the United States to bear the loss rather than CARCO because of the allegedly misleading conduct of three federal agencies—that it could not assert against Frescati.

The United States makes a related argument. Its position is that the equitable recoupment defense, predicated as it is on the conduct of federal agencies rather than the contractual relationship between Frescati and the United States, violates the

statutory subrogation provision of the OPA. Specifically, the United States argues that it is entitled to "all [of Frescati's] rights, claims, and causes of action" under the OPA. 33 U.S.C. § 2715(a). Frescati's contractual right is not limited by CARCO's claims against the Coast Guard, NOAA, and the Army Corps of Engineers; the United States asserting Frescati's contractual right should also not be so limited, and to do otherwise would infringe on the United States' statutory entitlement. When Frescati has the right to a full recovery under its contract, the argument goes, so does the United States.

[9] We agree. CARCO may only assert defenses against the United States' subrogated claims which it could have asserted against Frescati—including any equitable recoupment defense it could have asserted against Frescati. In its capacity as a subrogee, the United States should be subject to the same treatment as Frescati. Just as the United States, as subrogee, may only assert Frescati's claims, CARCO, as defendant, is not entitled to extra defenses because the United States asserts Frescati's claims rather than Frescati itself. Of course, no party is exempt from the Federal Rules of Civil Procedure. The United States is subject to the ordinary procedural rules governing counterclaims and third-party complaints, and the OPA does not bar CARCO from asserting whatever claims it has against the United States using those recognized procedural mechanisms where appropriate.[25]

In this case, the only claim asserted by the United States is Frescati's contract claim. *In re Frescati*, 718 F.3d at 189; JA at 390. It follows that CARCO's equitable recoupment defense must be directed toward the United States' contract claim. *See* 718 F.3d at 214 (declining to preclude CARCO from raising "equitable defense[s] to the Government's subrogation claims"). If CARCO had other cognizable claims against the three federal agencies involved in regulating the Delaware River and the anchorage, sounding in tort or otherwise, it was free to assert them in a third-party complaint or counterclaim, just as the United States was free to pursue other claims against CARCO.[26] In that light, we proceed to analyze CARCO's equitable re-

25. This issue is complicated by the fact that the specific defense asserted by CARCO, equitable recoupment, is sometimes pleaded as a defense, and sometimes as a counterclaim. We do not mean to imply that CARCO should have pleaded equitable recoupment as a counterclaim rather than a defense. However it is pleaded, "recoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded," and here, the plaintiff's action is grounded in Frescati's contractual right. *Bull v. United States*, 295 U.S. 247, 262, 55 S.Ct. 695, 79 L.Ed. 1421 (1935). To the extent CARCO had cognizable claims against the Coast Guard, NOAA, and the Army Corps of Engineers, it should have asserted those claims directly, rather than as a defense to Frescati's now-subrogated contract claim.

26. CARCO was also free to waive its claims against the United States, and vice versa. Indeed, both CARCO and the United States waived certain rights in the 2009 partial settlement agreement, including CARCO's waivers of the rights to bring a "Claim for Contribution or Indemnity ... whether based on principles of common law, contract, quasi-contract or tort," and "demand that the court reduce or offset the damages awarded to the United States ... based on evidence that the negligence or fault of the United States in failing to detect, mark and/or remove underwater obstructions to navigation ... caused or contributed to the ATHOS I Incident." JA at 389. At an earlier stage in the litigation, the United States argued that CARCO's equitable recoupment defense amounted to a violation of the settlement agreement. The United States eventually waived that argument by failing to raise it at the first trial, and so we need not consider it today. *In re Frescati*, 718 F.3d at 214.

coupment defense as it applies to the United States' contractual rights.

b. Equitable Recoupment

[10, 11] Equitable recoupment is a "principle that diminishes a party's right to recover a debt to the extent that the party holds money or property of the debtor to which the party has no right." [27] *In re Frescati*, 718 F.3d at 214 n.35. For an equitable recoupment defense to succeed, the defendant must possess a claim against the plaintiff arising from the same transaction or occurrence as the plaintiff's suit, seeking relief of the same kind as that sought by the plaintiff, in an amount no greater than that sought by the plaintiff. *See Livera v. First Nat'l State Bank of New Jersey*, 879 F.2d 1186, 1195 (3d Cir. 1989).

[12] CARCO's equitable recoupment defense faces at least two serious obstacles. As an initial matter, the United States questions whether CARCO possesses a "claim" against it, rather than a generalized request for the court to balance the equities. Second, the United States questions whether CARCO seeks relief of the same kind as the United States. On both points, CARCO fails to meet its burden.

CARCO's claim, such as it is, appears to be that the equities favor CARCO, and require the United States to bear the cost of the spill. CARCO argues that the United States, through the Coast Guard, NOAA, and the Army Corps of Engineers, had responsibility for maintaining the anchorage where the allision occurred free of obstructions. In the alternative, if the agencies were not responsible to preemptively search for obstructions, CARCO argues they should have more explicitly made clear that they were not conducting such searches. CARCO asserts that it reasonably believed, based on the agencies' conduct, that the agencies were maintaining the anchorage free of obstructions. Additionally, CARCO argues that equity requires the Oil Spill Liability Trust Fund to bear the cost of the cleanup rather than CARCO.[28]

27. A classic example of recoupment is a situation in which the statute of limitations is different for two related claims arising out of the same transaction—when, for example, the statute of limitations period during which the United States may file a claim against a taxpayer for underpayment of the income tax is longer than the period during which a taxpayer may file a claim for a refund of overpayment of the estate tax. The taxpayer (in this case, the estate of a decedent) pays the estate tax and final year's income tax. Sometime later, after the statute of limitations has run on the estate tax overpayment but not the income tax underpayment, the government claims the taxpayer owes additional income tax for the taxpayer's final year. Due to the increased income tax liability for the year, the taxpayer now owes less in estate tax—but the statute of limitations has already run, and the taxpayer cannot amend the estate tax return. In an action brought by the government to recover the extra income tax owed, the taxpayer may assert an equitable recoupment defense for the amount of the overpayment of the estate tax, even though the statute of limitations has run and the taxpayer would not otherwise have been able to recover the overpayment. *See generally Bull v. United States*, 295 U.S. 247, 55 S.Ct. 695, 79 L.Ed. 1421 (1935).

28. Though it is not necessary to our holding, we note that these equities do not appear to favor CARCO. As to agency regulation and maintenance of the anchorage where the allision occurred, the District Court held that the agencies did not have a duty to maintain the anchorage free of obstructions. The United States does not preemptively search for obstructions in the anchorage, it is not responsible for doing so, and it did not tell CARCO that it would do so. To the extent CARCO believed otherwise, CARCO simply misunderstood the regulatory structure and the responsibilities (and indeed, the capabilities) of the agencies.

Equitable recoupment requires more than just a request to balance the equities. CARCO points out that although equitable recoupment most often arises in the context of offsetting monetary claims, as in tax or bankruptcy cases, it is not necessarily limited to those situations. *See, e.g., Oneida Indian Nation of New York v. New York*, 194 F.Supp.2d 104, 136–37 (N.D.N.Y. 2002) (allowing an equitable recoupment defense in the context of offsetting requests for declaratory judgments in a land rights case). But CARCO still must assert some cognizable claim, rather than simply a request for the Court to reduce the United States' damages in the interest of equity. Here, CARCO has failed to do so.

Neither does CARCO seek the same kind of relief as the United States. The United States seeks contractual relief, to which it is entitled by operation of statute. *See* 33 U.S.C. § 2715. CARCO, by contrast, seeks equitable relief, or (on another reading) essentially tort-based relief grounded in misrepresentation by the agencies. The mismatched relief sought by CARCO and the United States does not support CARCO's equitable recoupment defense.

The requirement that a defendant seek the same kind of relief as has been sought in the plaintiff's claim is a fundamental requisite for recoupment. The defense is not intended to be a catch-all to allow any claims otherwise barred by time, settlement, or statute to be heard as equity seems to require. Equitable recoupment is intended to allow only truly similar claims arising from the same transaction to offset one another in the interest of equity between the parties. As noted, equitable recoupment is well-suited for disputes in which two claims arise out of the same taxable event or the same contractual obligation, as often seen in tax or bankruptcy cases. When, as here, the plaintiff seeks relief on a contract, the defendant may not resort to equitable recoupment as a means to assert a non-contractual claim, whether sounding in an equitable-balancing analysis, in tort, or otherwise.

CARCO has failed to meet its burden of establishing an equitable recoupment defense. It is liable to the United States in full.

Additionally, to the extent—if at all—that the Coast Guard, NOAA, and the Army Corps of Engineers were responsible for the *Athos I* oil spill, reducing the recovery of the United States in this case would not be equitable. Beyond our concerns relating to subrogation (equity would certainly not favor reducing Frescati's recovery under these circumstances), such a decision would impose liability on the Oil Spill Liability Trust Fund, not the responsible agencies. Any recovery based on the United States' subrogated claim flows back to the Trust Fund, out of which the United States originally reimbursed Frescati. 26 U.S.C. § 9509(b)(3). The Trust Fund is not intended (or allowed by statute) to be used as a slush fund to cover the liabilities of federal agencies. *See* 33 U.S.C. § 2712 ("Uses of the Fund").

As a final point, the purpose of the Trust Fund is not to absorb the cost of cleaning up oil spills; indeed, almost the opposite is true. The OPA creates a strict liability regime for responsible parties, while capping that liability at a set amount. But the Trust Fund was not designed to bear those costs indefinitely; the subrogation provision of 33 U.S.C. § 2715 allows the United States, on behalf of the Trust Fund, to pursue any claim a responsible party could have brought against a third party under any law, in order to recover the money paid out by the Trust Fund and preserve the Trust Fund's ability to respond quickly to spills in the future. The OPA is intended to quickly compensate victims of spills, minimize environmental damage, and internalize the costs of oil spills within the oil industry. The subrogation provision serves those purposes by letting cleanup costs fall upon the liable party, rather than with the Trust Fund.

VII. Limitation of Liability under the Oil Pollution Act

[13] CARCO argues that a provision of the OPA, 33 U.S.C. § 2702(d)(2)(B), limits its liability in this case to the same extent to which Frescati's liability was limited—approximately $45 million. Because CARCO did not raise this defense with the requisite clarity until nearly ten years after this litigation began, the District Court concluded that CARCO waived it. We agree that the defense was waived.

[14, 15] A District Court's holding that an affirmative defense has been waived is reviewed for abuse of discretion. *Cetel v. Kirwan Financial Group, Inc.*, 460 F.3d 494, 506 (3d Cir. 2006). Waiver is appropriate if the party raising the defense did not do so at a "pragmatically sufficient time" and if the opposing party would be prejudiced if the defense were allowed. *Charpentier v. Godsil*, 937 F.2d 859, 864 (3d Cir. 1991).

[16] Whether CARCO raised its defense at a pragmatically sufficient time requires us to determine *when* CARCO first raised the § 2702(d)(2)(B) defense. CARCO argues that it first raised the limitation defense in its 2005 answer to Frescati's Amended Counterclaim by referring to the OPA. The District Court concluded that CARCO's answer contained nothing that would have put Frescati or the United States on notice that CARCO planned to rely on a limitation of liability defense. In general, "[a]n affirmative defense ... 'need not be articulated with any rigorous degree of specificity, and is sufficiently raised for purposes of [Fed. R. Civ. P. 8] by its bare assertion.'" *Moody v. Atl. City Bd. of Educ.*, 870 F.3d 206, 218 (3d Cir. 2017) (quoting *Zotos v. Lindbergh Sch. Dist.*, 121 F.3d 356, 361 (8th Cir. 1997)). Nevertheless, the party asserting the defense must actually do so, and in a way that gives fair notice of that defense.

CARCO relies on the averment listed as its "Seventh Separate Defense," which reads simply: "The claims and causes of action set forth in the plaintiffs' Amended Counterclaim are barred in whole or in part by the provisions of the Oil Pollution Act of 1990, 33 U.S.C. § 2701, et seq." JA at 355. Noticeably absent from this general averment is any specific citation to the limitation of liability defense or even a description of the nature of the defense. This is significant, because the OPA includes a number of potential affirmative defenses. *See, e.g.*, 33 U.S.C. § 2702(b) (limiting scope of damages for which the OPA imposes liability); § 2702(c) (excluding certain oil spills from OPA liability); § 2702(d)(1)(A) (shifting liability under the OPA to a solely responsible third party); § 2702(d)(2) (limiting the liability of certain parties under the OPA); § 2703 ("Defenses to liability"). CARCO's general reference to the entirety of the OPA did not provide adequate information from which Frescati could determine that CARCO was seeking to limit its liability under § 2702(d)(2)(B). Nor did CARCO develop this defense at any point before the first trial. For that reason, CARCO's unspecified reference to the OPA did not provide the requisite fair notice to Frescati.

Furthermore, Frescati would be prejudiced if the defense were allowed. As the District Court found, if CARCO had asserted its defense in a timely fashion, fifteen days of depositions and trial testimony from seven witnesses could have been avoided, along with the OPA damages phase of the first trial.[29]

29. Allowing CARCO to assert the defense after failing to raise it at a practicable time wastes the District Court's resources as well.

CARCO did not clearly assert the limitation defense until nearly a decade after this action commenced, and over a year after the first trial and appeal had concluded. The District Court appropriately concluded that CARCO had not raised the defense at a pragmatically sufficient time, and that Frescati would be prejudiced if the defense were allowed. The District Court did not abuse its discretion in finding the defense waived.[30]

VIII. Prejudgment Interest Rate

The District Court awarded Frescati prejudgment interest of just over $16 million. Frescati, in its cross-appeal from the District Court's judgment, argues that the District Court erred by using the federal postjudgment interest rate set by 28 U.S.C. § 1961(a) to determine the amount of the prejudgment interest award. Specifically, Frescati argues that the District Court improperly believed itself bound to use the federal postjudgment rate rather than the higher U.S. prime rate because Frescati did not present evidence of its borrowing costs.

[17, 18] An award of prejudgment interest is reviewed for abuse of discretion. *Ambromovage v. United Mine Workers of Am.*, 726 F.2d 972, 981–82 (3d Cir. 1984); *see also Sun Ship, Inc. v. Matson Nav. Co.*, 785 F.2d 59, 63 (3d Cir. 1986). When selecting an interest rate, the District Court must keep in mind that the rate and corresponding award "must be compensatory rather than punitive." *Del. River & Bay Auth. v. Kopacz*, 584 F.3d 622, 634 (3d Cir. 2009).

Here, the District Court awarded Frescati prejudgment interest at the one-year Treasury rate—the same rate used as the federal postjudgment interest rate. *See* 28 U.S.C. § 1961(a). Importantly, the District Court found that the postjudgment rate would "fairly and adequately compensate Frescati for its losses." JA at 183.

Frescati argues that, in the absence of evidence of borrowing costs, we should require the use of the U.S. prime rate. We grant that, had the District Court chosen to use the prime rate, it would not have abused its discretion even without extensive proof of borrowing costs. *Taxman v. Bd. of Educ.*, 91 F.3d 1547, 1566 (3d Cir. 1996) (en banc). Indeed, the prime rate is commonly used to approximate the cost the defendant would have paid to borrow in the market, and at least one court appears to require it. *See, e.g., Gorenstein Enters., Inc. v. Quality Care-USA, Inc.*, 874 F.2d 431 (7th Cir. 1989) (requiring use of the prime rate in certain circumstances); *see also Forman v. Korean Air Lines Co.*, 84 F.3d 446, 450–51 (D.C. Cir. 1996) ("[T]he prime rate is not merely *as* appropriate as the Treasury Bill rate, but *more* appropriate . . . ."). In this Circuit, however, a district court is not constrained to the use of only the prime rate: "[i]n exercising [its] discretion, . . . the court may be guided by the rate set out in 28 U.S.C.

> Affirmative defenses must be raised as early as practicable, not only to avoid prejudice, but also to promote judicial economy. If a party has a successful affirmative defense, raising that defense as early as possible, and permitting a court to rule on it, may terminate the proceedings at that point without wasting precious legal and judicial resources.
>
> *Robinson v. Johnson*, 313 F.3d 128, 137 (3d Cir. 2002).

30. It is worth noting that the United States similarly waived a defense by its failure to raise an argument in the first trial. We previously held that the United States waived its right to object to CARCO's equitable recoupment defense on the basis that it violated the terms of the partial settlement agreement. *In re Frescati*, 718 F.3d at 214.

§ 1961." *Sun Ship*, 785 F.2d at 63; *Taxman*, 91 F.3d at 1566 ("[A] court 'may' use the post-judgment standards of 28 U.S.C. § 1961(a) [to calculate prejudgment interest, though] it is not compelled to do so.").[31]

[19] The District Court determined that the federal postjudgment rate "fairly and adequately compensate[s] Frescati for its losses." JA at 183. Under our Court's precedent, the District Court acted within its discretion.

IX. Conclusion

The District Court's order dated August 17, 2016 will be affirmed in part, vacated in part, and reversed in part. The District Court's judgment in favor of Frescati on the breach of contract claim and the prejudgment interest award will be affirmed. The District Court's judgment in favor of Frescati on the negligence claim will be vacated. The District Court's judgment in favor of the United States will be affirmed in part with respect to CARCO's liability on the subrogated breach of contract claim, but the judgment will be reversed and remanded for further proceedings in light of our equitable recoupment ruling for the purpose of recalculating damages and prejudgment interest. The District Court's order dated April 9, 2015, denying CARCO's motion for partial summary judgment on its limitation of liability defense, will be affirmed.

31. Nor was it an abuse of discretion for the District Court to adopt a variable interest rate. Interest accumulated for more than a decade, and during that time prevailing interest rates changed substantially.

Spiridon SPIREAS, Appellant

v.

COMMISSIONER OF INTERNAL REVENUE

No. 17-1084

United States Court of Appeals, Third Circuit.

Argued October 10, 2017

(Opinion Filed: March 26, 2018)

As Amended June 1, 2018

Background: Taxpayer petitioned for redetermination of income-tax deficiencies arising from his receipt of royalties under patent license agreement, which taxpayer had characterized as long-term capital gain rather than ordinary income. The United States Tax Court, No. 13-10729, Albert G. Lauber, J., 2016 WL 4464695, granted judgment for IRS. Taxpayer appealed.

Holding: The Court of Appeals, Hardiman, Circuit Judge, held that inventor taxpayer did not advance argument before Tax Court that agreement with pharmaceutical company transferred all substantial rights to future drug formulations to it, including felodipine formulation, and therefore he waived it for consideration on appeal.

Affirmed.

Roth, Circuit Judge, filed dissenting opinion.

1. Internal Revenue ⇐4687

Inventor taxpayer's claim before Tax Court for long-term capital gains rate that was hinged on post-invention transfer of rights under licensing agreement that established comprehensive framework for licensing liquisolid technology to pharma-

Exhibit B

stake." Resentencing Tr. 92:13–14. The district court then reiterated these points in its statement of reasons justifying the above-Guidelines sentence. We conclude that these explanations sufficiently explained the district court's sentence in a manner that would "allow for meaningful appellate review." *Gall*, 552 U.S. at 50, 128 S.Ct. 586.

[9] Third, to the extent that Malki argues that the district court did not explain its deviation from Judge Korman's sentence, we conclude that no particular explanation was necessary. In the past, we have required that a second judge resentencing a defendant on largely identical facts explain any variation from a prior, vacated, sentence imposed by a different judge. *See United States v. Johnson*, 273 Fed.Appx. 95, 101 (2d Cir.2008) (summary order). There, however, the district court imposed a significantly longer sentence on remand with hardly any justification at all. *Id.* By contrast, in absolute terms, the 108–month sentence imposed by the district court here was *less* than the 121–month sentence imposed by Judge Korman. Thus, notwithstanding the new evidence introduced by Malki, after "giving due deference to the sentencing judge's exercise of discretion, and bearing in mind the institutional advantages of district courts," *Cavera*, 550 F.3d at 190, we conclude that the district court's explanation was sufficient.

* * *

In light of our decision to remand for the limited purpose of correcting the procedural error noted above, we do not address Malki's challenge to the substantive reasonableness of his sentence.

CONCLUSION

For the foregoing reasons, we VACATE the sentence of the district court and REMAND for resentencing. To be clear, this is a remand for a limited, and not a *de novo*, resentencing, and the district court shall resentence Malki by recalculating the Guidelines range without the two-level enhancement for abuse of a position of trust, and without re-litigating issues previously waived or abandoned by the parties, or decided by this or the prior panel. The mandate shall issue forthwith.

In re Petition of FRESCATI SHIPPING COMPANY, LTD., as owner of the M/T Athos I and Tsakos Shipping & Trading, S.A., as manager of the Athos I for Exoneration from or Limitation of Liability

Frescati Shipping Company, Ltd. and Tsakos Shipping and Trading, S.A., Appellants.

United States of America, Appellant

v.

Citgo Asphalt Refining Company; Citgo Petroleum Corporation; Citgo East Coast Oil Corporation.

Nos. 11–2576, 11–2577.

United States Court of Appeals, Third Circuit.

Argued Sept. 20, 2012.

Opinion Filed May 16, 2013.

As Amended June 6, 2013.

As Amended June 28, 2013.

As Amended on Denial of Rehearing and Rehearing En Banc July 12, 2013.

Background: In two consolidated actions, owner of sub-chartered oil tanker, which spilled its oil after hitting an abandoned ship anchor hidden on the bottom of river within 900 feet of its berth, brought a

contract claim for marine terminal owner's alleged breach of the safe port/safe berth warranty, and alleged negligence and negligent misrepresentation against terminal owner. The United States government, as a statutory subrogee that stepped into tanker owner's position for the $88 million it reimbursed tanker owner under the Oil Pollution Act, sought reimbursement from terminal owner to tanker owner's contractual claim pursuant to a limited settlement agreement. The United States District Court for the Eastern District of Pennsylvania, John P. Fullam, and Joel H. Slomsky, JJ., 2011 WL 1436878, and 2011 WL 1379647, found that terminal owner was not liable for the accident. Tanker owner and government appealed.

Holdings: The Court of Appeals, Ambro, Circuit Judge, held that:

(1) tanker owner was third-party beneficiary of safe port/safe berth warranty within the charter party;

(2) whether safe berth warranty was breached by presence of hidden anchor in oil tanker's path within 900 feet of its berth was dependent on whether the port was safe based on tanker's agreed-upon dimensions and sailing draft;

(3) tanker was within its final "approach" when it struck submerged anchor; and

(4) recovery for damage to oil tanker could not be based on a negligent misrepresentation by marine terminal owner about the ship dock.

Affirmed in part, vacated in part, and remanded.

1. Shipping ⇐81(1)

"Allision" is the contact of a vessel with a stationary object such as an anchored vessel or a pier.

See publication Words and Phrases for other judicial constructions and definitions.

2. Federal Civil Procedure ⇐2282.1

Violation of rule governing actions tried on the facts without a jury or with an advisory jury occurs when a district court's inadequate findings render impossible a clear understanding of the basis of the decision, and those findings are obviously necessary to the intelligent and orderly presentation and proper disposition of an appeal. Fed.Rules Civ.Proc.Rule 52(a)(1); 28 U.S.C.A.

3. Contracts ⇐189

Maritime contracts must be construed like any other contracts: by their terms and consistent with the intent of the parties.

4. Admiralty ⇐1.20(2)

When a contract is a maritime one, and the dispute is not inherently local, federal law controls the contract interpretation.

5. Contracts ⇐187(1)

A third-party may be a beneficiary to a contract of others where it is appropriate to effect the intention of the parties, and the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

6. Shipping ⇐54(1)

Although owner of chartered oil tanker was not a named beneficiary to safe port/safe berth warranty within the charter party between charterer and marine terminal owner, tanker benefited from the warranty, and tanker owner was thus a third-party beneficiary.

7. Shipping ⇐54(1)

Safe berth warranty is an express assurance made without regard to the amount of diligence taken by the charterer.

8. Wharves ⇐20(3)

A port is unsafe, and in violation of the safe berth warranty, where the named ship cannot reach it without harm, absent abnormal conditions or those not avoidable by adequate navigation and seamanship.

9. Wharves ⇐20(2)

Whether safe berth warranty was breached by presence of submerged anchor in oil tanker's path within 900 feet of its berth was dependent on whether the port was safe based on tanker's agreed-upon dimensions and sailing draft at load-port; whether similar ships had successfully berthed at the port was irrelevant to whether the warranty was actually breached, rather, court should have evaluated whether the port was safe based on the facts particular to the tanker and its arrival.

10. Shipping ⇐54(1)

Under port exception to safe port warranty, when a charter names a port and the master proceeds there without protest, owner accepts the port as a safe port, and is bound to the conditions that exist there; purpose of exception is to shift liability to the owner once a ship's master has had ample opportunity to discover a port's hazards, and, as such, the exception may apply in instances in which a master, without lodging any objection, is charged with full knowledge of local conditions which make it unsafe for that particular voyage.

11. Shipping ⇐63

Port exception to safe berth warranty is essentially an application of rule that negligent seamanship will nullify the safe port warranty; once a particular risk becomes known, it is then the master's responsibility to avoid it through competent seamanship or to declare the port unsafe.

12. Shipping ⇐54(1)

Port exception to safe berth warranty did not apply in determining whether warranty was breached by presence of submerged anchor in chartered oil tanker's path within 900 feet of its berth; hazard of the submerged anchor was not the sort contemplated by the exception since submerged anchor was unknown to the parties, and thus naming port ahead of time could not provide oil tanker with an opportunity to accept the unknown hazard.

13. Negligence ⇐202

Negligence in admiralty law is essentially coextensive with its common law counterpart, requiring: (1) existence of a duty required by law which obliges the person to conform to a certain standard of conduct; (2) breach of that duty by engaging in conduct that falls below the applicable standard or norm; (3) a resulting loss or injury to the plaintiff; and (4) a reasonably close causal connection between the offending conduct and the resulting injury.

14. Wharves ⇐20(1)

A wharfinger is not a guarantor of a visiting ship's safety, but is bound to use reasonable diligence in ascertaining whether the berths themselves and the approaches to them are in an ordinary condition of safety for vessels coming to and lying at the wharf.

15. Wharves ⇐20(3)

A visiting ship may only expect that the owner of a wharf has afforded it a safe approach; in being invited to dock at a particular port, a vessel should be able to enter, use and exit a wharfinger's dock facilities without being exposed to dangers that cannot be avoided by reasonably prudent navigation and seamanship.

16. Wharves ⇐20(3)

For purposes of determining scope of wharfinger's duty to use reasonable dili-

gence in ascertaining whether the berths themselves and the approaches to them are in an ordinary condition of safety for vessels coming to and lying at the wharf, final "approach" of a vessel to a port is analogous to that of a driveway leading to a home from the public road; thus, so long as a ship is not approaching in an illogical, unreasonable, or disallowed manner, it will be deemed within its approach when it is within such final phase of its journey.

17. Wharves ⇐20(3)

Oil tanker was within its final "approach" when it struck submerged anchor within 900 feet of its berth, and therefore marine terminal owner had a duty to exercise reasonable diligence in providing tanker with a safe approach; vessel was following the usual path for ships of its size docking at the terminal, having turned away from the channel at the usual point and was being pushed by two tugboats in a straight path toward terminal owner's pier.

See publication Words and Phrases for other judicial constructions and definitions.

18. Negligence ⇐210, 222, 230, 233

Negligence exists where there was a failure to exercise that caution and diligence which the circumstances demanded, and which prudent men ordinarily exercise; admiralty context is no different, requiring reasonable care under the particular circumstances, and the particular duty required under any given circumstance can be gleaned from statute, custom, or the demands of reasonableness and prudence.

19. Admiralty ⇐79

Questions of causation in admiralty are questions of fact.

20. Negligence ⇐422

There may be more than one proximate cause of an injury.

21. Wharves ⇐20(1)

Recovery for damage to oil tanker from hitting an abandoned ship anchor hidden on the bottom of river within 900 feet of its berth could not be based on a negligent misrepresentation by marine terminal owner about the ship dock because accident did not occur at the dock; there was no injury sustained that resulted from failure of terminal owner to note in its port manual the draft reduction at or immediately adjacent to owner's dock. Restatement (Second) of Torts § 552.

22. Set-Off and Counterclaim ⇐6

"Equitable recoupment" is a principle that diminishes a party's right to recover a debt to the extent that the party holds money or property of the debtor to which the party has no right.

See publication Words and Phrases for other judicial constructions and definitions.

Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Civil Action Nos. 2–05–cv–00305/2–08–cv–02898), Trial District Judge: Honorable John P. Fullam, District Judge: Honorable Joel H. Slomsky.*

Amelia Carolla, Esquire Reisman, Carolla & Gran, Haddonfield, NJ, Stacy A. Fols, Esquire, R. Monica Hennessy, Esquire, Melanie A. Leney, Esquire, John J. Levy, Esquire, Montgomery, McCracken, Walker & Rhoads, Cherry Hill, NJ, Leona John, Esquire, Alfred J. Kuffler, Esquire, John G. Papianou, Esquire, Tricia J. Sadd, Esquire, Timothy J. Bergere, Esquire,

* Judge Slomsky was assigned to this matter following the retirement of Judge Fullam, who presided at trial and ruled on the merits.

Montgomery, McCracken, Walker & Rhoads, Philadelphia, PA, Jack A. Greenbaum, Esquire, (Argued), John D. Kimball, Esquire, Blank Rome, New York, NY, Eugene J. O'Connor, Esquire, Chalos O'Connor, LLP, Port Washington, NY, for Appellants Frescati Shipping Company, Ltd. Tsakos Shipping & Trading, S.A.

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William J. Honan, Esquire, Chester D. Hooper, Esquire, Lissa D. Schaupp, Esquire, K. Blythe Daly, Esquire, F. Robert Denig, Esquire, Holland & Knight, New York, NY, for Amici Appellants.

George R. Zacharkow, Esquire, Mattioni Limited, Philadelphia, PA, for Amici Appellees.

Before: AMBRO, GREENAWAY, Jr., and O'MALLEY,** Circuit Judges.

OPINION OF THE COURT

AMBRO, Circuit Judge.

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** Honorable Kathleen M. O'Malley, United States Court of Appeals for the Federal Circuit, sitting by designation.

As the oil tanker *M/T Athos I* neared Paulsboro, New Jersey, after a journey from Venezuela, an abandoned ship anchor lay hidden on the bottom of the Delaware River squarely within the *Athos I's* path and only 900 feet away from its berth. Although dozens of ships had docked since the anchor was deposited in the River, none had reported encountering it. The *Athos I* struck the anchor, which punctured the ship's hull and caused approximately 263,000 gallons of crude oil to spill into the River. The cleanup following the casualty was successful, but expensive.

This appeal is the result of three interested parties attempting to apportion the monetary liability. The first party (actually two entities consolidated as one for our purposes) includes the *Athos I's* owner, Frescati Shipping Company, Ltd., and its manager, Tsakos Shipping & Trading, S.A. (jointly and severally, "Frescati"). Although Frescati states that the spill caused it to pay out $180 million in cleanup costs and ship damages, it was reimbursed for nearly $88 million of that amount by the United States (the "Government")—the second interested party—pursuant to the Oil Pollution Act of 1990, 33 U.S.C. § 2701 *et seq.* In order to recoup the unreimbursed losses, Frescati made claims in contract and tort against the third interested party—a set of affiliates known as CITGO Asphalt Refining Company, CITGO Petroleum Corporation, and CITGO East Coast Oil Corporation (jointly and severally, "CARCO")—which requested the oil shipped on the *Athos I* and owned the marine terminal where it was to dock to unload its oil. Specifically, Frescati brought a contract claim for CARCO's alleged breach of the safe port/safe berth warranty (jointly and severally, "safe berth warranty") it made to an intermediary—Star Tankers, Inc.—responsible for chartering the *Athos I* to CARCO's port, and alleged negligence and negligent misrepresentation against CARCO as the owner of the wharf the *Athos I* was nearing when it was holed. The Government, as a statutory subrogee that stepped into Frescati's position for the $88 million it reimbursed to Frescati under the Oil Pollution Act, has limited its claim for reimbursement from CARCO to Frescati's contractual claim pursuant to a limited settlement agreement.

Following a 41–day bench trial, the District Court for the Eastern District of Pennsylvania held that CARCO was not liable for the accident under any of these theories. The Court, however, made no separate findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52(a)(1). That calls for a remand to set out these mandated matters. However, for the sake of efficiency, we discuss—and, to the extent necessary, make holdings on—the legal issues appealed.

In regard to the contractual safe berth warranty, the Court determined that Frescati (and the Government as a subrogee) could not recover on their contractual claims. First, Frescati was not a party to the agreement that contained the warranty between CARCO and Star Tankers, and was not an intended beneficiary of that agreement. Furthermore, even if Frescati could claim the protection of the warranty, it was only a promise by CARCO to exercise due diligence and not an unconditional guarantee; moreover, sufficient diligence existed here. In any event, the warranty was excused because CARCO specified the port ahead of the *Athos I's* arrival, placing the burden on the *Athos I's* captain to accept it as safe or reject it under what is called the "named port exception."

For reasons elaborated below, we disagree with all three of these rulings. Instead, we hold that the *Athos I*—and by extension, its owner, Frescati—was an implied beneficiary of CARCO's safe berth warranty. We conclude as well that the safe berth warranty is an express assurance of safety, and that the named port exception to that warranty does not apply to hazards that are unknown to the parties and not reasonably foreseeable. We cannot be sure, however, that this warranty was actually breached, as the District Court made no finding as to the *Athos I's* actual draft nor the amount of clearance actually provided.

If on remand the District Court rules in favor of Frescati on its contractual warranty claim, its negligence claim becomes unnecessary. If this issue is reached, we do not agree with the District Court's conclusion that CARCO cannot be liable in negligence because the anchor lay outside the approach to CARCO's terminal—the area in which CARCO had a duty to exercise reasonable care in proving a safe approach. As such, the District Court would need to resolve the appropriate standard of care required, whether CARCO breached that standard, and if so, whether any such breach caused the accident. Conversely, we find no error with the Court's holding that CARCO's alleged misrepresentation as to the depth of its berth was geographically (and hence factually) irrelevant to the ultimate accident. In addition, we conclude that the Government has waived reliance on a partial settlement agreement with CARCO that, the Government contends, precludes CARCO from making certain equitable defenses to the Government's subrogation claims. In this context, we affirm in part, and vacate and remand in part for additional factfinding on the contractual (and possibly negligence) claims.

I. Factual and Procedural Background

A. The Tanker and Its Charters

At the heart of this dispute is the *Athos I*, a single-hulled oil tanker measuring 748 feet long and more than 105 feet wide. It was owned by Frescati at all relevant times. At the time of the accident, however, the *Athos I* had been chartered into a tanker pool assembled by Star Tankers, who is not a party to this consolidated action. In order to transport a load of heavy crude oil from Venezuela to its asphalt refinery in Paulsboro, New Jersey, CARCO sub-chartered the *Athos I* from the Star Tankers pool.

In admiralty, these contracts for service are known as "charter parties." [1] In spe-

1. The term "charter party" may be confusing in that it does not refer to an entity, but a document. This is due to its historical genesis, deriving from the phrase *"charta partita, i.e.,* a deed of writing divided." *Black's Law Dictionary* 268 (9th ed.2009) (quoting Frank L. Maraist, *Admiralty in a Nutshell* 44–45 (3d ed.1996)). The *charta partita* was literally a

cific regard to Star Tankers, the *Athos I* was enlisted into the tanker pool in October of 2001 pursuant to a "*time* charter party." "Under a time charter, the owner [Frescati] remains responsible for the navigation and operation of the vessel and the charterer [Star Tankers] assumes responsibility for arranging for the employment of the vessel, providing fuel and paying for certain cargo-related expenses." Terence Coghlin *et al., Time Charters* ¶ 1.59 (6th ed.2008). The time charter party gave Star Tankers, an intermediary or "middleman," the right to sub-charter the *Athos I* although Frescati remained responsible for keeping the vessel staffed and serviceable.

In contrast, CARCO's employment of the *Athos I* for the specific voyage was pursuant to a "*voyage* charter party" with Star Tankers. Unlike a time charter party in which a "vessel's employment is put under the orders of ... charterers" for a period of time, under a voyage charter party the ship is hired "to perform one or more designated voyages in return for the payment of freight." [2] Julian Cooke *et al., Voyage Charters* ¶ 1.1 (3d ed.2007). CARCO's particular voyage charter party, based on a standard industry ASBATANKVOY form, contained what are customarily known as "safe port" and "safe berth" warranties (already defined, for convenience, as a "safe berth warranty"). It provided that

> [t]he vessel ... shall, with all convenient dispatch, proceed as ordered to Loading Port(s) named ..., or so near thereunto as she may safely get (always afloat), ... and being so loaded shall forthwith proceed, as ordered on signing Bills of Lading, direct to the Discharging Port(s), or so near thereunto as she may safely get (always afloat), and deliver said cargo.

J.A. at 1222 (Tanker Voyage Charter Party, Part II, ¶ 1). It further directed that "[t]he vessel shall load and discharge at any safe place or wharf, ... which shall be designated and procured by the Charterer [CARCO], provided the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat...." *Id.* at 1222 (Tanker Voyage Charter Party, Part II, ¶ 9). We note that, in the time charter party between Frescati and Star Tankers, the latter contracted to provide a similar safe berth warranty, but this warranty was qualified whereby Star Tankers obligated itself to exercise "due diligence to ensure that the vessel is only employed between and at safe places...." *Id.* at 1157 (Time Charter Party ¶ 4). Following the accident, Frescati began arbitration with Star Tankers regarding its claims for damage of the *Athos I*, but that proceeding has been stayed pending the outcome of this case. Oral Arg. Tr. 4:8–15, Sept. 20, 2012.

In preparation for the arrival in Paulsboro of the *Athos I*, its master [3] was provided with a copy of CARCO's Port Manual. This Manual indicated that the allowable maximum draft at the Pauls-

divided document, the owner and the charterer each retaining one half of the agreement. *Id.*

2. It has been observed that

> [t]he fundamental difference between voyage and time charters is how the freight or "charter hire" is calculated. A voyage charterparty specifies the amount due for carrying a specified cargo on a specified voyage (or series of voyages), regardless of how long a particular voyage takes. A time charterparty specifies the amount due for each day that the vessel is "on hire," regardless of how many voyages are completed.

David W. Robertson *et al., Admiralty and Maritime Law in the United States* 335 (2d ed.2008).

3. A ship's master is its commander and captain. *Black's Law Dictionary, supra,* at 1065.

boro facility was 38 feet, but that this "may change from time to time and should be verified prior to the vessel's arrival." J.A. at 1095 (CITGO Terminal Regulations for Vessels ¶ 2). On November 22, 2004, four days before the *Athos I* arrived, CARCO reduced this maximum draft to 36 feet. The *Athos I* was not informed of this modification.

B. The Accident

On November 26, 2004, the *Athos I* was nearing its ultimate destination, CARCO's asphalt refinery in Paulsboro, New Jersey. When the *Athos I* reached the mouth of the Delaware River, only 80 miles remained of its 1,900–mile journey. Although Captain Iosif Markoutsis was the ship's master, the seven-hour upriver transit was aided by Delaware River Pilot Captain Howard Teal. At approximately 8:30 p.m., while the *Athos I* was still navigating up the River channel, Docking Pilot Captain Joseph Bethel boarded the vessel (Captain Bethel was employed by non-party Moran Towing of Pennsylvania). The Docking Pilot relieved the River Pilot at about 8:40 p.m.

[1] CARCO's Paulsboro facility sits on a jetty on the New Jersey side of the Delaware River. Federal Anchorage Number Nine ("the Anchorage" or "Anchorage Number Nine") separates the River channel from CARCO's port waters. As pictured in Appendix A to this opinion, the Anchorage's border runs diagonally to CARCO's waterfront, ranging between 130 and 670 feet from the face of its ship dock. Across the Anchorage, the River Channel begins less than 2,000 feet from CARCO's berth, a little more than two-and-a-half lengths of the *Athos I*. Customarily, a tanker of the *Athos I's* size would come up the River, make a starboard (right) 180° turn into the Anchorage, and would then be pushed sideways by tugs (*i.e.*, parallel parked) into CARCO's pier. The *Athos I* was following this procedure when, at 9:02 p.m., it suddenly listed to the port (left) side, and oil became visible in the water. It was later determined that an abandoned anchor had punched two holes in the *Athos I's* hull, causing (as already noted) roughly 263,000 gallons of crude oil to spill into the River. At the time of the allision,[4] the *Athos I* was only 900 feet from CARCO's berth, approximately halfway through the Anchorage. The tide was relatively low at the time of the accident after having reached its lowest point only 50 minutes prior. J.A. at 2102.

The anchor was eventually exhumed. Inspection revealed that it weighed roughly nine tons and measured 6′8″ long, 7′3″ wide, and 4′6″ high. J.A. at 2192 (United States Coast Guard Marine Casualty Investigation Report). The Coast Guard further reported that the anchor was ultimately found lying prone with its blade reaching 54 inches above the floor of the River. *Id.* at 2196. Although the District Court made no finding of fact as to the exact position of the anchor at the time of the allision, it found persuasive the testimony of oceanographer and ocean engineer Dr. Peter Traykovski, who opined that the anchor was lying horizontal at the time of the accident with a height of only 41 inches above the bottom of the River. Traykovski Test., 24:25–25:13, Nov. 4, 2010. The Court also did not make any finding as to the depth of the Anchorage where the anchor lay, though the record before us seems to indicate that the depth was between 40.3 and 41.45 feet deep at low tide. *Id.* at 49:12–25; J.A. at 2196.

4. An allision is "[t]he contact of a vessel with a stationary object such as an anchored vessel or a pier." *Black's Law Dictionary, supra,* at 88.

The District Court also did not make any finding as to the draft of the *Athos I*—that is, the distance between the lowest point of the ship and the waterline—but assumed, for purposes of analysis, that it was drawing 36'7" as represented by Frescati at the time of the accident. The Court also failed to resolve the anchor's depth or position, although it noted that there was "persuasive evidence" that the anchor was lying down at the time of the accident. *In re Frescati Shipping Co., Ltd.*, Nos. 05–CV–00305–JF, 08–cv–02898–JF, 2011 WL 1436878, at *7 (E.D.Pa. Apr. 12, 2011). The parties, however, stipulated that the anchor had been in the same approximate location for at least three years because it was detectable from a sonar scan performed by the University of Delaware in 2001 as part of an independent geophysical study.[5] The owner of the anchor has never been determined, but the Court speculated that the anchor likely was used for dredging operations at the time it was lost.

C. The Cost of the Accident

Frescati claims that the accident cost it, as the "responsible party" under the Oil Pollution Act, approximately $180 million in clean-up costs and damages to the ship. (The Act was passed in the wake of the Exxon Valdez accident in 1989, and was designed to facilitate oil spill cleanups by requiring "responsible parties" to pay initially for removal costs and damages. *See* 33 U.S.C. § 2702(a).) Because the Act sets liability limits for cooperative responsible parties, *see id.* at § 2704(a), an incentive exists for responsible parties to respond quickly and competently in order to limit the extent of their financial exposure. *See Unocal Corp. v. United States*, 222 F.3d 528, 535 (9th Cir.2000) (" 'The purpose of [the Oil Pollution Act] ... was to encourage rapid private party responses.' " (quoting *In re Metlife Capital Corp.*, 132 F.3d 818, 822 (1st Cir.1997))). Responsible parties in compliance with the Act may file a claim with the Oil Spill Liability Trust Fund, controlled by the United States Government, for reimbursement of costs beyond the liability limit. 33 U.S.C. § 2708(a)(2). Specifically, Frescati was able to limit its liability for cleanup to $45,474,000, thus allowing it to recover cleanup costs exceeding that amount from the Fund.[6] It was ultimately reimbursed for approximately $88,000,000 of its cleanup costs, and the Fund became subrogated as to that amount under 33 U.S.C. §§ 2712(f) and 2715(a).

D. Control of the Waters

The casualty here occurred squarely within Anchorage Number Nine. As the term implies, an anchorage ground is "a place where vessels anchor or a place suitable for anchoring." *Webster's Third New Int'l Dictionary* 79 (1971). Section 7 of the Rivers and Harbors Act of 1915 authorizes the establishment of "anchorage grounds for vessels in all harbors, rivers, bays, and other navigable waters of the United States whenever it is manifest ... that the maritime or commercial interests of the United States require such anchorage grounds for safe navigation...." 33 U.S.C. § 471. By 1930, a "lack of ade-

5. The stipulation suggests that the anchor was not mentioned in the report ultimately issued by the University of Delaware professors. *See* J.A. at 1310–12. Instead, it seems that it was not until after this litigation began that the parties obtained the 2001 side scan sonar data and agreed that it revealed the anchor's presence.

6. In February 2007, Frescati applied to have its liability exonerated pursuant to 33 U.S.C. § 2703(a)(3). That subsection directs that a responsible party is not liable for the acts or omissions of a third party. In this case, that third party would have been the unknown anchor-dropper. It is unclear why Frescati withdrew this claim in 2008.

quate anchorage room" was creating a hazard on the Delaware River between navigating vessels and those "awaiting accommodation at the wharves, or awaiting cargo or orders." H. Doc. No. 71–304, 24 (1930). Anchorage Number Nine, also known as the Mantua Creek Anchorage, was established in 1930. Pub.L. No. 71–520, 46 Stat. 918, 921 (1930). Today it runs for approximately 2.2 miles along the Delaware River channel (*see* Appendix A) and provides a place for ships to anchor so long as they do not "interfere unreasonably with the passage of other vessels to and from Mantua Creek." 33 C.F.R. § 110.157(a)(10).

Anchorage Number Nine, though only a few hundred feet from CARCO's pier, is neither controlled nor maintained by CARCO. Instead, the federal Government's Army Corps of Engineers (the "Corps") conducts hydrographic surveys and dredges as necessary in an attempt to maintain the Anchorage's depth at 40 feet. The Corps also regulates any construction or excavation within the navigable waters, including the issuance of dredging permits, 33 U.S.C. § 403, and its regulatory jurisdiction "extend[s] laterally to the entire water surface and bed of a navigable waterbody, which includes all the land and waters below the ordinary high water mark," 33 C.F.R. § 329.11. The National Oceanic and Atmospheric Administration conducts surveys on occasion for various federal projects. No Government entity, however, is responsible for preemptively searching all federal waters for obstructions, and the District Court found that the Government does not actually survey the Anchorage for hazards. If, however, the Government is alerted to the presence of a threat, the Corps will remove the obstruction if it is a hazard to navigation and, if not removable, the Coast Guard will chart it. Ultimately, the "[p]rimary responsibility for removal of wrecks or other obstructions lies with the [obstruction's] owner, lessee, or operator." 33 C.F.R. § 245.10(b).

CARCO maintains a self-described "area of responsibility" directly abutting its Paulsboro terminal, "a roughly triangular-shaped area ... comprising the waters of the berth footprint and the immediate access area next to it where vessels enter and exit the footprint." CARCO's Br. at 19. This area, also set out in Appendix A to this opinion, runs essentially the length of CARCO's facility and extends offshore to the border of the Anchorage. It is based on a permit to dredge for maintenance purposes that was issued by the Corps to CARCO's predecessor in 1991. The scope of such a permit is derived from the initial request; put another way, it is self-defined subject to approval by the Corps. This area of responsibility is not large enough to rotate the 748 foot-long *Athos I*.

In maintaining its area of responsibility, CARCO retained a consulting engineering firm, S.T. Hudson Engineers, Inc., to perform hydrographic surveys. While CARCO had inspected that area for depth, it never specifically searched for debris or other hazards. Hudson interpolated the area's depth from a grid of pinpointed, single-beam sonar depth soundings at 50–foot intervals. This particular procedure is poor at detecting sunken objects because it is unlikely that any given hazard would fall within the exact spot measured, and if it did, it would not necessarily indicate that there was an object but only the depth of that object as indistinguishable from the bottom of the waterway. Long Test., 78:8–79:5, Nov. 17, 2010; Fish Test, 59:11–18, Sept. 29, 2010.

CARCO's Port Captain William Rankine estimated that approximately 250 ships with a draft of 36′6″ or greater either

entered or departed CARCO's port between 1997 and 2005. Rankine Test., 22:25–23:15, Nov. 22, 2010. In specific regard to arriving vessels, from the time the anchor was spotted by the University of Delaware in August 2001 until the *Athos I* casualty, the record reflects that 61 ships with a draft of 36′6″ or greater arrived at CARCO's facility. J.A. at 1788–94. The record does not reflect at what time these ships docked, and high tide adds approximately six feet of depth to the River. Moreover, Frescati points out that—unlike the *Athos I*—21 of these ships would have been required to dock within three hours prior to high-water due to their excessive drafts.[7] *Id.* at 1622–24.

E. The District Court Proceedings

In January 2005, Frescati filed in the District Court a Complaint for Exoneration From or Limitation of Liability pursuant to the Shipowner's Limitation of Liability Act, 46 U.S.C. § 30501 *et seq.* (formerly 46 App. U.S.C. § 181 *et seq.*). In that Complaint, Frescati sought a declaration that it was not liable for any losses stemming from the accident or, in the alternative, a limitation of liability to the value of the *Athos I* and its pending freight. CARCO was among the parties who asserted claims in that action, seeking recovery against Frescati for its lost oil in an amount in excess of $259,217. Frescati then filed a counterclaim against CARCO for all costs incurred beyond those reimbursed by the Fund.

In June 2008, the Government filed a separate suit against CARCO seeking compensation on its subrogated right, pursuant to 33 U.S.C. §§ 2712(f) and 2715(a), to the approximately $88 million disbursed by the Fund. In a partial settlement agreement, the Government waived its negligence claims against CARCO in return for the latter's agreement not to pursue negligence claims against the United States. The Government, believing that CARCO was advancing against it negligence theories in violation of the settlement agreement, moved for partial summary judgment against CARCO's counterclaim for equitable recoupment. That motion was denied.

As noted, these two actions were consolidated, and they were tried over 41 days before Judge Fullam. After trial, the Court issued an 18–page opinion holding that CARCO could not be held responsible under contract or tort for any of the losses stemming from the accident. *See In re Frescati*, 2011 WL 1436878.

On the contractual safe berth warranty, the Court determined that Frescati had no standing for relief, as it was not a third-party beneficiary to the voyage charter party between CARCO and Star Tankers, and that, in any event, CARCO did not breach those warranties because they are not unconditional guarantees but instead "'impose[ ] upon the charterer a duty of due diligence to select a safe berth,'" a duty satisfied here. *Id.* at *6 (quoting *Orduna S.A. v. Zen–Noh Grain Corp.*, 913 F.2d 1149, 1157 (5th Cir.1990)). The Court further ruled that, even if a stricter warranty applied, the naming of the port in advance precluded recovery under the named port exception, which, as a general matter, protects a charterer when the port is named ahead of arrival and the master proceeds there without protest.

7. The Docking Pilot Association ("DPA") Guidelines provide directives for the appropriate docking times for vessels of different sizes. The DPA Guidelines were developed after discussion with CARCO's previous Port Captain and were based in part on CARCO's desire to maximize the number of vessels that could dock at its berth. J.A. at 1104; Quillen Dep. 11:12–20, Sept. 2, 2010.

The Court also held that CARCO was not negligent in failing to search for or detect the abandoned anchor that lay within the Anchorage. As the Court deemed it outside the approach to CARCO's berth, detection and notification to others of its presence thus fell beyond CARCO's obligation to provide a safe entry to that berth. The Court also held that there was no negligent misrepresentation in CARCO's failure to alert the *Athos I* that—only four days prior to its arrival—the allowable maximum draft at CARCO's facility had been reduced from 38 feet to 36 feet. It reasoned that this was an internal determination pertaining to the area at the berth and outside the Anchorage, and therefore was "factually irrelevant to the casualty." *Id.* at *5.

In sum, the District Court concluded that the anchor-dropper rather than any of the named parties was at fault, and rejected all of Frescati's and the Government's arguments as to CARCO's liability.

II. Jurisdiction and Standard of Review

The District Court had admiralty jurisdiction pursuant to 28 U.S.C. § 1333(1). We have jurisdiction over this appeal under 28 U.S.C. § 1291.

Findings of fact made during a bench trial are reviewed for clear error, and will stand unless " 'completely devoid of minimum evidentiary support displaying some hue of credibility, or ... bear no rational relationship to the supportive evidentiary data.' " *In re Nautilus Motor Tanker Co.*, 85 F.3d 105, 115 (3d Cir.1996) (alteration in original) (quoting *Haines v. Liggett Grp. Inc.*, 975 F.2d 81, 92 (3d Cir.1992)). Following a bench trial, we review *de novo* a district court's conclusions of law. *McCutcheon v. Am.'s Servicing Co.*, 560 F.3d 143, 147 (3d Cir.2009) (citation omitted). "[C]onstruction of an unambiguous contract is a matter of law and subject to plenary review." *Colliers Lanard & Axilbund v. Lloyds of London*, 458 F.3d 231, 236 (3d Cir.2006) (citing *U & W Indus. Supply, Inc. v. Martin Marietta Alumina, Inc.*, 34 F.3d 180, 185 (3d Cir.1994)). Similarly, we exercise "plenary review over the legal question of 'the nature and extent of the duty of due care....' " *Andrews v. United States*, 801 F.2d 644, 646 (3d Cir. 1986) (quoting *Redhead v. United States*, 686 F.2d 178, 182 (3d Cir.1982)).

III. Rule 52

[2] Federal Rule of Civil Procedure 52(a)(1) provides that "[i]n an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately." Fed.R.Civ.P. 52(a)(1). This is a mandatory requirement. *H. Prang Trucking Co., Inc. v. Local Union No. 469*, 613 F.2d 1235, 1238 (3d Cir.1980) (citing 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2574, at 690 (1st ed.1971)); *Scalea v. Scalea's Airport Serv., Inc.*, 833 F.2d 500, 502 (3d Cir.1987) *(per curiam)*. Typically, a Rule 52 violation occurs when a district court's inadequate findings render impossible " 'a clear understanding of the basis of the decision,' " *H. Prang Trucking*, 613 F.2d at 1238 (quoting Wright & Miller, *supra*, § 2577, at 697), and those " 'findings are obviously necessary to the intelligent and orderly presentation and proper disposition of an appeal,' " *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1178 (3d Cir.1990) (quoting *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 317, 60 S.Ct. 517, 84 L.Ed. 774 (1940)). *See also Berguido v. E. Air Lines, Inc.*, 369 F.2d 874, 877 (3d Cir.1966) ("If a full understanding of the factual issues cannot be gleaned from the District Court's opinion, we would be obliged to remand for compli-

ance with Rule 52(a)."). Although Rule 52 does not require hyper-literal adherence, *see Hazeltine Corp. v. Gen. Motors Corp.*, 131 F.2d 34, 37 (3d Cir.1942), "an appellate court may vacate the judgment and remand the case for findings if the trial court has failed to make findings when they are required," *Giles v. Kearney*, 571 F.3d 318, 328 (3d Cir.2009) (citing *H. Prang Trucking*, 613 F.2d at 1238–39).

Instead of presenting his findings in accord with Rule 52, the trial judge here elected to "set forth in narrative fashion [his] findings of fact . . . and conclusions of law." *In re Frescati*, 2011 WL 1436878, at *1. Unfortunately, what followed leaves us unable to discern what were his intended factual findings. Moreover, in arriving at his particular legal conclusions, the trial judge held back making many of the factual findings that would support those conclusions, in effect going from first base to third across the pitcher's mound. While we do not endorse or require a panoply of extraneous factual findings, the overall dearth of clear factual findings, much less those pertaining to the heart of this matter—such as the draft of the *Athos I*—falls below what is required by Rule 52.

Because we cannot derive a full understanding of the core facts from the District Court's opinion, this was a violation of Rule 52 and itself a basis for remand. *Giles*, 571 F.3d at 328. In light of the legal determinations set out below, factual clarification is required in any event.

IV. The Contractual Safe Berth Warranty

CARCO's promise to Star Tankers that the *Athos I* would be directed to a location that "she may safely get (always afloat)" is a provision known in context as either a safe port or safe berth warranty (to repeat again, we use for shorthand "safe berth warranty"). *See* Cooke *et al.*, *supra*, ¶ 5.121 (citation omitted). This language triggers two separate protections: a contractual excuse for a master who elects not to venture into an unsafe port, and protection against damages to a ship incurred in an unsafe port to which the warranty applies. *See* 2 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 11–10, at 32–33 (5th ed.2011). In this case, only the second benefit of the safe berth warranty is at issue, as the *Athos I* was damaged in an allegedly unsafe port. Specifically at issue are the scope and applicability of this warranty, topics we explore below.

A. Was Frescati a Third–Party Beneficiary of the Safe Berth Warranty?

" 'Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must at least show that it was intended for his direct benefit.' " *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 307, 48 S.Ct. 134, 72 L.Ed. 290 (1927) (quoting *German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U.S. 220, 230, 33 S.Ct. 32, 57 L.Ed. 195 (1912)). As Frescati is not a party to CARCO's promise to Star Tankers to provide a safe berth, there must be a compelling showing that it was nonetheless an intended beneficiary. The District Court held that this was not the case because the testimony at trial failed to reveal any intent by CARCO to benefit Frescati. The Court, however, failed to inquire whether the contract itself established a third-party beneficiary relationship, a question of law. *See Pierce Assocs. v. Nemours Found.*, 865 F.2d 530, 535 (3d Cir.1988). We conclude that, although Frescati is not a named beneficiary to the safe berth warranty within the charter party between Star Tankers and CARCO, the *Athos I* benefits from this warran-

ty, and Frescati, as the vessel's owner, is thus a third-party beneficiary.

[3–5] Maritime contracts "must be construed like any other contracts: by their terms and consistent with the intent of the parties." *Norfolk S. Ry. Co. v. Kirby,* 543 U.S. 14, 31, 125 S.Ct. 385, 160 L.Ed.2d 283 (2004). "When a contract is a maritime one, and the dispute is not inherently local, federal law controls the contract interpretation." *Id.* at 22–23, 125 S.Ct. 385 (citing *Kossick v. United Fruit Co.,* 365 U.S. 731, 735, 81 S.Ct. 886, 6 L.Ed.2d 56 (1961)). We typically look to the Restatement of Contracts for the federal law on third-party beneficiaries. *Doe v. Pennsylvania Bd. of Prob. & Parole,* 513 F.3d 95, 106 (3d Cir.2008); *see* Restatement (Second) of Contracts § 302 (1981). A third-party may be a beneficiary to a contract of others where it is "appropriate to effect[ ] the intention of the parties," and "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." Restatement, *supra,* § 302(1)(b); *see also Cargill Int'l S.A. v. M/T Pavel Dybenko,* 991 F.2d 1012, 1019 (2d Cir.1993) (holding that a third-party beneficiary to a charter party "must show that 'the parties to that contract intended to confer a benefit on [it] when contracting; it is not enough that some benefit incidental to the performance of the contract may accrue to [it]' " (alterations in original) (quoting *McPheeters v. McGinn, Smith & Co.,* 953 F.2d 771, 773 (2d Cir.1992))).

In 1959, the Supreme Court held that vessels are automatic third-party beneficiaries of warranties of workmanlike service made to their charterers by stevedores who unload vessels at docks. *Crumady v. The Joachim Hendrik Fisser,* 358 U.S. 423, 428, 79 S.Ct. 445, 3 L.Ed.2d 413 (1959). This is because "[t]he warranty which a stevedore owes when he goes aboard a vessel to perform services is plainly for the benefit of the vessel whether the vessel's owners are parties to the contract or not." *Id.* This natural relationship between the entities was "enough to bring the vessel into the zone of modern law that recognizes rights in third-party beneficiaries." *Id.* (citation omitted). A year later, the Supreme Court extended this rule a logical step further in holding that "[t]he owner, no less than the ship, is the beneficiary of the stevedore's warranty of workmanlike service." *Waterman S.S. Corp. v. Dugan & McNamara, Inc.,* 364 U.S. 421, 425, 81 S.Ct. 200, 5 L.Ed.2d 169 (1960).

Although these two Supreme Court cases aid Frescati's position, they do so only by analogy. As CARCO points out, the matter before us does not involve an implied warranty for workmanlike service, but an explicit assurance of safety in a document to which Frescati is not a party. The Court of Appeals for the Second Circuit, however, has applied *Crumady* and *Waterman* to a set of facts similar to the one before us. In *Paragon Oil Co. v. Republic Tankers, S.A.,* 310 F.2d 169, 171 (2d Cir.1962) (Friendly, J.), a vessel owner (Paragon Oil Co., Inc.) and voyage charterer (Republic Tankers, S.A.) entered into a voyage charter with a safe berth warranty. Republic had executed a contract of affreightment (essentially a sub-voyage charter) with a third-party that contained a safe berth warranty identical to the one it promised in the voyage charter. *Id.* From this, the Second Circuit concluded that Paragon (the owner) was "the true party in interest" to the safe berth assurance in the contract of affreightment even though it was not explicitly named in the contract between Republic (the voyage charterer) and the third-party. *Id.* at 175.

[6] We agree with the Second Circuit's reasoning that *Crumady* and *Waterman* counsel in favor of Frescati's third-party beneficiary status.[8] Specifically, we are convinced that a safe berth warranty necessarily benefits the vessel, and thus benefits its owner as a corollary beneficiary.[9] "[T]he circumstances indicate" that the warranty is intended to endow the vessel with "the benefit of the promised performance." Restatement, *supra*, § 302(1)(b). Because the warranty explicitly covers the safety of the vessel, it would be nonsensical to deprive the vessel's owner the benefits of this promise, as the owner is ultimately the one most interested in the vessel's status and is obligated to maintain its condition.[10]

Moreover, it would work an odd windfall if Star Tankers were allowed to collect on CARCO's safe berth warranty but not be required to pass on those remedial dollars to the ship's ultimate owner. That illogical result could occur where the owner (Frescati) received no safe berth warranty from the time charterer (Star Tankers), or where—as in the case before us—Frescati received a less comprehensive warranty from Star Tankers than Star Tankers received from the voyage charterer (CARCO).[11] This would theoretically allow Star Tankers to collect for damages to the ship that were actually paid by Frescati. While we are mindful of the parties' ability to contract differently, there is no indication that Star Tankers bargained for the potential of such an unearned windfall—profiting from the mishaps of the vessels within its tanker pool when it did not pay for the repair of those mishaps. Instead, requiring warranties from voyage charterers like CARCO is a way to insure against claims asserted by vessel owners. Per this path, the promise made to protect a vessel flows through the intermediary party(ies) to the ultimate party who bore the pain of an unsafe port, here the vessel's owner.

We discount CARCO's suggestion that it was unaware of Frescati's status as the true owner of the *Athos I*. CARCO had completed an internal vetting of the *Athos I* in October of 2004 that identified Frescati as its owner. J.A. at 1318 (Citgo Vetting Report). Regardless, even if the ultimate owner had been undisclosed, CARCO

8. CARCO makes a belated argument that *Crumady* and *Waterman* are of dubious precedential value in light of the 1972 amendments to the Longshore and Harbor Workers' Compensation Act. These amendments required negligence (as opposed to an unsafe condition) for a longshoreman to recover against a ship owner, and abolished the ship owner's right of indemnity against the stevedore. *See* 33 U.S.C. § 905(b); *Scindia Steam Nav. Co., Ltd. v. De Los Santos*, 451 U.S. 156, 164–65 (1981). This legislative exclusion, however, does not undermine the fundamental premise that a ship owner may benefit from an arrangement between third parties. As such, Judge Posner has noted that, following this amendment, "indemnity has continued to be sought in cases not involving longshoremen and hence not within the scope of the Longshore[ ]and Harbor Workers' Compensation Act." *Hillier v. S. Towing Co.*, 714 F.2d 714, 718–19 (7th Cir. 1983) (Posner, J.).

9. Insofar as CARCO cites to *Bunge Corp. v. MV Furness Bridge*, 390 F.Supp. 603, 604 (E.D.La.1974), it is unpersuasive, as its conclusion that the owner was not a third-party beneficiary of the sub-charterer's safe berth warranty is unsupported by any reasoning. Further, this issue was abandoned when the Court later resolved the merits of the claim and held that the sub-charterer had "violated a legal duty [in tort] whether or not it also had a contractual one." *Bunge Corp. v. MV Furness Bridge*, 396 F.Supp. 852, 858 (E.D.La.1975), *rev'd*, 558 F.2d 790 (5th Cir. 1977). On appeal, the Court of Appeals for the Fifth Circuit agreed that the issue of contractual liability was "irrelevant" because none of the parties could have intended to warrant complete safety of an inadequately small wharf. 558 F.2d at 801–02.

10. Under the time charter, Frescati remained responsible for insuring, maintaining, and restoring the *Athos I* throughout the term of the charter. J.A. at 1447–48 (Time Charter Party ¶¶ 3, 6).

11. Although we ultimately conclude that the full safe berth warranty from CARCO to Star Tankers is an express assurance made without regard to the amount of diligence taken by the charterer, *see infra* Part IV.B, Star Tankers only promised due diligence to Frescati, J.A. at 1448 (Time Charter Party 14).

expressly warranted to provide a safe berth, which is a promise made "plainly for the benefit of the vessel." *Crumady*, 358 U.S. at 428, 79 S.Ct. 445. Thus we see no reason why the *Athos I's* owner would be any less entitled to rely on this warranty, whether it was identified or not. Frescati, as the owner of the *Athos I*, may therefore rely on CARCO's safe berth warranty as a third-party beneficiary.

B. The Scope of the Safe Berth Warranty

[7] That Frescati may benefit from CARCO's safe port/safe berth warranty requires that we delineate its comprehensiveness, a question of first impression in our Circuit. Though the District Court did not need to reach this legal issue after determining that Frescati was not a third-party beneficiary, it nonetheless concluded—as an alternate holding—that the safe berth warranty was not breached because "CARCO fulfilled its duty of due diligence...." *In re Frescati*, 2011 WL 1436878, at *6. We part from this holding, as we believe the Court incorrectly relied on *Orduna S.A. v. Zen–Noh Grain Corp.*, 913 F.2d 1149, 1157 (5th Cir.1990), which held that the safe berth provision was not a full warranty but required only due diligence.

[8] A port is deemed safe where "the particular chartered vessel can proceed to it, use it, and depart from it without, in the absence of abnormal weather or other occurrences, being exposed to dangers which cannot be avoided by good navigation and seamanship." Cooke *et al.*, *supra*, ¶ 5.137; *Leeds Shipping v. Societe Francaise Bunge (The Eastern City)*, [1958] 2 Lloyd's Rep. 127, 131 (same). Whether a port is safe refers to the particular ship at issue, Cooke *et al.*, *supra*, ¶ 5.68, and goes beyond "the immediate area of the port itself" to the "adjacent areas the vessel must traverse to either enter or leave," Coghlin *et al.*, *supra*, ¶ 10.124.[12] In other words, a port is unsafe—and in violation of the safe berth warranty—where the named ship cannot reach it without harm (absent abnormal conditions or those not avoidable by adequate navigation and seamanship).[12]

This formulation is deeply rooted. In 1888, the Supreme Court held charterers liable for breach of a safe berth warranty in insisting that a ship sail to Aalborg, Denmark, a port that was impossible for the particular ship to reach due to a sand bar and the absence of any reasonably safe place to anchor or discharge. *The Gazelle*, 128 U.S. 474, 485–86, 9 S.Ct. 139, 32 L.Ed. 496 (1888). In a similar fashion, the Supreme Court held in 1902 that charterers failed to provide a safe dock where the ship in question could not reach it without damage. *Mencke v. Cargo of Java Sugar*, 187 U.S. 248, 253, 23 S.Ct. 86, 47 L.Ed. 163 (1902). Specifically, the charterers were aware that the ship's mast was too tall to clear the Brooklyn Bridge when they designated a discharge dock upriver from the Bridge. *Id.* at 250, 23 S.Ct. 86. The Court concluded that this was a warranty violation by analogizing the overhead obstacle to a submerged one: "A ship could not be said to be afloat, whether the obstacle encountered was a shoal or bar in the port over which she could not proceed, or a bridge under or through which she could not pass, nor could she be said to have safely reached a dock if required to mutilate her hull or her permanent masts." *Id.* at 253, 23 S.Ct. 86; *see also Carbon Slate Co. v. Ennis*, 114 F. 260, 261 (3d Cir.1902) (concluding that safe berth warranty was violated where the ship "was directed to load at a berth where a full cargo, if taken aboard, would have made it impossible for her, at any stage of water or at any time, to pass out over the harbor bar").

12. On the facts before us, we need not define the outer geographical bounds of the safe berth/safe port warranty. At oral argument CARCO conceded that the warranty—if applicable—"would include the area in and around Paulsboro," including the Anchorage. Oral Arg. Tr. 62:18–64:3, Sept. 20, 2012.

The Court of Appeals for the Second Circuit has long held that promising a safe berth effects an "express assurance" that the berth will be as represented. *Cities Serv. Transp. Co. v. Gulf Ref. Co.*, 79 F.2d 521, 521 (2d Cir.1935) (*per curiam*), recognized this principle in holding that a master was not liable for damages incurred in reliance on a charter party's safe berth warranty at a particular dock. In *Park S.S. Co. v. Cities Serv. Oil Co.*, 188 F.2d 804, 806 (2d Cir.1951) (Swan, J.), the same Court elaborated that the purpose of the warranty was to memorialize the relationship between the contracting entities: "the charterer bargains for the privilege of selecting the precise place for discharge and the ship surrenders that privilege in return for the charterer's acceptance of the risk of its choice." *Paragon* continued this tradition in contrasting the duty of a wharfinger (an admiralty term for an "owner or occupier of a wharf," *Black's Law Dictionary* 1733 (9th ed.2009))—to exercise reasonable diligence in keeping its berth safe for incoming vessels—with that of a charterer who is contractually bound to provide "not only a place which he believes to be safe, but a place where the chartered vessel can discharge 'always afloat.' " 310 F.2d at 173 (citation and internal quotation marks omitted). *See also Venore Transp. Co. v. Oswego Shipping Corp.* 498 F.2d 469, 472 (2d Cir.1974) (citing *Park S.S. Co.*, 188 F.2d at 804) (subcharterer had a non-delegable "obligation to provide a completely safe berth," which was breached when it permitted the ship to dock at a berth that it knew was unsafe).

Thus, prior to the Fifth Circuit's decision in *Orduna*, "the law concerning safe ports had a rather secure berth in maritime law and it was well settled that a safe port clause in a charter constituted a warranty given by a charterer to an owner." Cooke *et al.*, *supra*, ¶ 5.124. *Orduna* created quite a splash in veering from the view that a charterer warrants a ship's safety, and established instead for the Fifth Circuit that a safe berth warranty merely "imposes upon the charterer a duty of due diligence to select a safe berth." 913 F.2d at 1157. While *Orduna* acknowledged the Second Circuit's contrary perspective, it dismissed that interpretation in deference to critical commentators, namely Professors Grant Gilmore and Charles L. Black. *Id.* at 1156 (citing Grant Gilmore & Charles L. Black, *The Law of Admiralty* § 4–4, at 204–06 (2d ed.1975)). We do not find their criticism so compelling.[13]

Orduna concluded that "no legitimate legal or social policy is furthered by making the charterer warrant the safety of the berth it selects." *Id.* at 1157. Primarily, the Court reasoned that it is more sensible to impose fault on the "master on the scene" rather than a far away merchant charterer.[14] *Id.* at 1156 (citing Gilmore &

13. Gilmore's book has been described as being

> more adapted for the teacher than for the active lawyer or judge. As teachers, the authors are interested in controversy. Wherever they can find it, in the long past or in the nearer present, they stir it up, and frequently label it 'confusion.' ... It is all very interesting; but in the various admiralty fields—except personal injury and death—most of the old controversies have long been settled. Therefore, our authors tend to give a picture which does not resemble the daily grist of today. Sometimes indeed, straining to keep old battle-fires ablaze, they sprinkle harsh words on the judges who settled the old disputes.... On the whole, this is a teaching book rather than an office and courtroom work of reference; and it must be read as such.

Arnold W. Knauth, Book Review, 58 Colum. L.Rev. 425, 426–28 (1958) (reviewing Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* (1957)).

14. *Orduna* also noted that a due diligence standard would not upset a master's ability to

Black, *supra*, § 4–4, at 204–06). The appeal of this construction here is illusory. While an owner is liable for its master's superseding negligence, *see* Cooke *et al.*, *supra*, ¶ 5.151, we see no policy reason why a master on board a ship would normally be in any better position to appraise a port's more subtle dangers than the party who actually selected that port. The "commercial reality [is] that it is the charterer rather than the owner who is selecting the port or berth," *id.* ¶ 5.126, and the charterer is more likely to have at least some familiarity with the port it selected. After all, charterers do not select ports without good reason (and, in the case before us, CARCO was directly on the scene, *as it had selected its own berth*). Messrs. Gilmore and Black (famous in other areas of law-Gilmore on commercial law, including secured transactions, and Black on constitutional law) acknowledged that their rationale is undermined in those instances where a charterer has more knowledge of a danger than the master (although they explain that these situations could be remedied through tort liability [15]). We disagree. To any extent a charterer, however distant, bargains to send a ship to a particular port and warrants that it shall be safe there, we see no basis to upset this contractual arrangement.

We are persuaded that the Second Circuit's longstanding formulation of the safe berth clause is the one we should follow.[16] *See* 2 Schoenbaum, *supra*, § 11–10, at 32–33 (citing *The Gazelle*, 128 U.S. 474, 9 S.Ct. 139, 32 L.Ed. 496 (1888)) ("[I]f the ship reasonably complies with the order and proceeds to port, the charterer is liable for any damage sustained."); Stewart C. Boyd *et al.*, *Scrutton on Charter Parties and Bills of Lading*, Section IX, art. 69, at 127 (20th ed.1996) (same); 2A Michael F. Sturley, *Benedict on Admiralty* § 175, at 17–25 (7th ed.2012) (same); Coghlin *et al.*, *supra*, ¶ 10.110 (same). *But see* Gilmore & Black, *supra*, § 4–4, at 204–06.

Beyond the near consensus of these authorities, we are also convinced that an "express assurance" warranty is most consistent with industry custom. *See Park S.S.*, 188 F.2d at 806; *Cities Serv.*, 79 F.2d at 521. Vessel charters are formalized via "highly standardized forms," 2 Schoenbaum, *supra*, § 11–1, at 4–5 (citation omit-

rely on a safe berth warranty in rejecting an unsafe port. 913 F.2d at 1156. This goes only so far, as it addresses but half of the safe berth warranty's protection, which is both to provide a master with a contractual excuse for avoiding an unsafe port and to protect for damages actually sustained in unsafe ports. Additionally, to the extent *Orduna* relied *on Atkins v. Fibre Disintegrating Co.*, 2 F.Cas. 78 (E.D.N.Y.1868), *aff'd sub nom. Atkins v. The Disintegrating Co.*, 85 U.S. 272, 299, 18 Wall. 272, 21 L.Ed. 841 (1873), we are similarly unpersuaded. While *Atkins* featured a safe berth warranty, *id.* at 79, it was essentially an application of the named port exception. *See infra* Part IV.D. As the ship's master made outside inquiries and was fully aware of the port's dangers and yet did not object, he waived his right to complain later for damage. *Id.* at 79–80.

15. Specifically, Gilmore & Black would find an actionable wrong for charterers directing ships to ports with known dangers, and suggest that a charterer may sometimes be "so situated as reasonably to be charged with a duty of inquiry, particularly as to berth." Gilmore & Black, *supra*, § 4–4, at 205.

16. Though not dispositive, we also note that adhering to the Second Circuit's view on this issue promotes uniformity of maritime law along the mid-Atlantic seaboard. *See Sea–Land Serv., Inc. v. Dir., Office of Workers' Comp. Programs*, 552 F.2d 985, 995–96 n. 18a (3d Cir.1977) (noting deference pursuant to federal comity and uniformity in maritime law to the Second Circuit, "since [the Third Circuit] shares appellate review with the Second Circuit over the geographical area comprising one of the country's major east coast harbor complexes").

ted). That some forms explicitly adopt a due diligence standard [17] suggests that the understood default is to impose liability on the charterer without regard to the care taken. *See* Coghlin *et al., supra*, ¶¶ 10.52, 10.54. Reading these warranties as dappled with due diligence would make contractual language explicitly adopting a due diligence metric pointless, and we disfavor contract interpretation "that 'render[s] at least one clause superfluous or meaningless.'" *Sloan & Co. v. Liberty Mut. Ins. Co.*, 653 F.3d 175, 181 (3d Cir.2011) (alteration in original) (quoting *Garza v. Marine Transp. Lines, Inc.*, 861 F.2d 23, 27 (2d Cir.1988)). Moreover, the "always afloat" language plainly suggests an express assurance. To the extent the Fifth Circuit in *Orduna* deviated from this well-established standard, we are not persuaded by its reasoning and decline to follow the course it charted.[18] Hence we conclude that the safe berth warranty is an express assurance made without regard to the amount of diligence taken by the charterer.

C. Was the Safe Berth Warranty Breached?

[9] As explained, a berth is deemed safe when a ship may "proceed to it, use it, and depart from it without ... being exposed to dangers." Coghlin *et al., supra*, ¶ 10.123. As noted above, *see supra* note 12, CARCO conceded at oral argument that the safe berth warranty—if applicable—"would include the area in and around Paulsboro," including the Anchorage, and we therefore need not delineate the geographic sweep of this warranty. Thus having determined that Frescati was a beneficiary of CARCO's safe berth warranty and that this warranty applies irrespective of a charterer's diligence, we proceed to whether the warranty was actually breached by the anchor's presence. Specifically, we need to determine whether the anchor rendered CARCO's port unsafe for a ship of the *Athos I's* agreed-upon dimensions and draft.

That the *Athos I* was injured by the anchor does not automatically indicate that the warranty was breached. CARCO's safe berth warranty was not a blank check; it did not warrant that any ship would be safe at its port, but instead assured that the port would be safe for the *Athos I*. Boyd *et al., supra*, Section IX, art. 69, at 129–30 (citations omitted) ("Whether a port is a 'safe port' is in each case a question of fact and degree and must be determined with reference to the particular ship concerned...."); *In re Lloyd's Leasing Ltd.*, 764 F.Supp. 1114, 1135 (S.D.Tex.1990) ("The safety of a port is to be determined with reference to the vessel and the circumstances surrounding that vessel's use of the port."). In this regard, the District Court correctly framed the ultimate issue as whether it was possible for a ship of the *Athos I's* purported dimensions to reach CARCO's berth safely. *In re Frescati*, 2011 WL 1436878, at *6.

The Court, however, neglected to make the necessary factual findings to resolve whether the warranty was actually breached. Instead, it concluded "that the port and berth were generally safe" due to "the volume of commercial traffic that passed without incident," notwithstanding that it

17. As already mentioned, the time charter party between Star Tankers and Frescati contains such a standard, as it is predicated on a Shelltime 4 form. *See* Coghlin *et al., supra*, ¶ 10.54.

18. We are also unpersuaded that this warranty applies only to known hazards. This would effectively undermine the more strict nature of the warranty by requiring some level of due diligence, which, for the reasons above, we do not believe is the case.

was impossible to know how many of those ships had actually passed over the anchor. *Id.* That similar ships had successfully berthed at the port is irrelevant to whether the warranty was actually breached in this case, as "[a] dangerous place may often be stopped at or passed over in safety." *The Gazelle,* 128 U.S. at 485, 9 S.Ct. 139. Instead, the Court should have evaluated whether the port was safe based on the facts particular to the *Athos I* and its arrival.

From what we can glean from the record, it appears that CARCO warranted a safe berth with the understanding that the *Athos I* would be drawing as much as 37 feet of water upon its arrival. The Voyage Instructions indicate that the vessel would be filled with a quantity of crude oil "always ... consistent with a 37 [foot] or less [fresh water] sailing draft at loadport," J.A. at 1242, and Captain Markoutsis confirmed this directive, Markoutsis Test. 199:5–9, Oct. 13, 2010. He testified, moreover, that he was "afraid of that draft," and opted to load the ship to only 36'6".[19] *Id.* at 200:7–25. This latter figure was confirmed by CARCO Port Captain William Rankine, who testified that the *Athos I* reported that it was drawing 36'6", Rankine Test. 41:5–12, Nov. 22, 2010, and also by Steamship Agent Stephen Carroll, Carroll Test. 63:2–4, Oct. 7, 2010. In any event, the warranty made by CARCO appears to have covered the *Athos I* up to a draft of 37 feet.[20] Yet, as noted throughout this opinion, the District Court made no finding on the vessel's actual draft at the time of the accident. This needs to be corrected on remand.[21]

If it is found that the *Athos I* was drawing 37 feet or less and absent a determination of bad navigation or seamanship,[22] that finding would indicate that the warranty had been breached because the ship

19. We note there is minor disagreement as to this particular figure. While the record suggests that the *Athos I* was represented as drawing 36'6", Frescati explains that it was actually 367". This one-inch difference is on its face irrelevant to our analysis, as both drafts are less than 37 feet.

20. Of course, this is ultimately a factual matter for remand. As such, we also note that the Voyage Charter between CARCO and Star Tankers indicates that the "[l]oaded draft of Vessel on assigned summer freeboard [is] 12.423 meters [40.76 feet] ... in salt water." J.A. at 1220 (Tanker Voyage Charter Party, Part I.A). While we understand this to mean that the *Athos I* could draw over 40 feet in salt water if filled to its summer capacity, the facts before us appear to indicate that it was directed to arrive at CARCO's port drawing 37 feet or less, and that this was the understood basis for the safe berth warranty.

21. We note that there is record evidence suggesting that the promised 37 feet of clearance was indeed afforded, namely that Dr. Traykovski opined that there was—in his most conservative estimate—between 37.2 and 37.8 feet of water not only above the riverbed but the anchor itself (presumably at low tide). Traykovski Test. 49:12–50:24, Nov. 4, 2010.

22. Although the warranty exception for abnormal weather conditions is not at issue here, CARCO argues that the exceptions for bad navigation and seamanship apply. CARCO's Br. at 77, 80; *see also* Coghlin *et al., supra,* ¶¶ 10.148, 10.166 (citations omitted); Cooke *et al., supra,* ¶ 5.151 (citation omitted); *Paragon,* 310 F.2d at 173–74 (quoting *Constantine & Pickering S.S. Co. v. W. India S.S. Co.,* 199 F. 964, 967–68 (S.D.N.Y.1912)) ("It is true that one liable for violating a safe berth clause 'may lessen the amount of damages for which he is responsible by showing negligence, or even lack of diligence, on the part of the person wronged, in failing to take steps to lessen certain or even probable damages.' ").

CARCO argues that the vessel's master and the navigation officer believed they were docking at high tide, and in fact were not (as the tide at the time of the accident was rising but an hour removed from low tide). However, we find no indication in the record that the *Athos I* was attempting to dock at an inappropriate time.

sustained damage. What, if anything, under the water may have caused that margin to be diminished is therefore immaterial. It could have been the remnants of a shipwreck, a range of rocks, a jutting reef, or a shoal. In this case, it happened to be an abandoned anchor that protruded into the *Athos I's* hull. And by its safe berth warranty, CARCO assumes liability for that damage.

If the draft at the time of the accident cannot be determined, or if the *Athos I* is found to have been drawing more than 37 feet, it will be necessary to ascertain the amount of clearance that existed above the anchor to conclude whether the promised 37 feet of water depth was actually provided.[23] Because it appears that CARCO assured a safe berth for a ship drawing 37 feet or less, our concern is whether 37 feet of clearance existed at the time of the accident.

D. The Named Port Exception

[10] CARCO exposes one additional limitation to the broad protection generally afforded by the safe berth warranty—the named port exception. In essence, "[w]hen a charter names a port and the master proceeds there without protest, the owner accepts the port as a safe port, and is bound to the conditions that exist there." *Bunge Corp. v. M/V Furness Bridge*, 558 F.2d 790, 802 (5th Cir.1977) (internal quotation marks omitted) (quoting *Pan Cargo Shipping Corp. v. United States*, 234 F.Supp. 623, 638 (S.D.N.Y.1964), *aff'd*, 373 F.2d 525 (2d Cir.1967)). The purpose of the exception is to shift liability to the owner once a ship's master has had ample opportunity to discover a port's hazards.[24] As such, the exception may apply in instances in which a master—without lodging any objection—is charged "with full knowledge of local conditions which make it unsafe for that particular voyage." Coghlin *et al.*, *supra*, ¶ 10.158; *see also* Cooke *et al.*, *supra*, ¶ 5.130 ("[T]he master's conduct in entering a port he considers unsafe without raising a protest may result in a waiver of the safe port warranty.").

[11] This formulation is essentially an application of the above-mentioned rule that negligent seamanship will nullify the safe port warranty: once a particular risk becomes known, it is then the master's responsibility to avoid it through compe-

23. If the vessel is found to have been drawing more than 37 feet, this could potentially reduce CARCO's liability even if it were determined that a safe berth was not provided. In this circumstance, the commentators note a trend in which damages resulting from both a breach of a safe berth warranty and the master's negligence may appropriately be split between the parties. Cooke *et al.*, *supra*, ¶ 5.152; 2A Sturley, *supra*, § 175, at 17–26; *see also Ore Carriers of Liber., Inc. v. Navigen Co.*, 435 F.2d 549, 550–51 (2d Cir.1970) (affirming an order dividing a ship's damages between the owner and charterer where the charterer had warranted a safe port, but the owner nonetheless proceeded "with full knowledge of the probable unavailability of tug assistance," which was hazardous). In any event, these issues can also be resolved on remand.

24. Although it never uses the term "named port exception," *Atkins v. Fibre Disintegrating Co.*, 2 F.Cas. 78 (E.D.N.Y.1868), *aff'd sub nom. Atkins v. The Disintegrating Co.*, 85 U.S. 272, 299, 18 Wall. 272, 21 L.Ed. 841 (1873), is a paradigm for the exception. There, "the peril of the port was such that no vessel of [the ship's] size could get out without making her safety from the reefs dependent entirely upon the continuance of the breeze." *Id.* at 79. Predictably, the breeze failed, and the ship was damaged on the reef. *Id.* at 78. The trial court concluded, however, that the master could not rely on the agent's representation that the port was safe because he failed to object to the port after having "made inquiries ... as to the character of the port, which was, moreover, fully described in the Coast Pilot [the official publication describing the coast]." *Id.* at 79–80.

tent seamanship or to declare the port unsafe. This application of the exception does not apply to the case before us, however, as there is no suggestion that anyone—much less the master of the *Athos I*—had any inkling as to the anchor's existence in the River.

[12] Instead, and more pertinent to the *Athos I*, the exception is also triggered when a particular port is named in the charter party. *See* Cooke *et al.*, *supra*, ¶ 5.130 ("If the charter names the ports or berths the vessel will call at, the general rule is that the ports or berths will have been accepted by the owner as safe, such that the safe port/safe berth warranty is deemed to have been waived."); Coghlin *et al.*, *supra*, ¶ 10.164 (same) (citations omitted). This particular application of the exception is very broad and would seem poised to swallow the rule, but frequently the voyage charter will specify a range of ports, and thus the "safe [berth] warranty continues to play a role in voyage charters." Cooke *et al.*, *supra*, ¶ 5.123. In fact, this is such a case; the voyage charterer (CARCO) did not specifically name the discharge port in the voyage charter party, but instead directed that the *Athos I* would transit to one or two safe ports located somewhere on the United States Atlantic Coast, Gulf Coast, or the Caribbean Sea. J.A. at 1225 (Tanker Voyage Charter Party, Special Provision 2). CARCO nonetheless maintains that this exception applies even where the port location is not specifically named in the charter so long as some advance notice of the designated port is given. It is unclear how much notice would be required under CARCO's theory of the exception, although CARCO argues that it applies here because there is evidence that the master knew approximately two weeks before the accident that the *Athos I* would be headed to Paulsboro, New Jersey.

We need not address this issue of advance notice because we conclude that the hazard of the submerged anchor was not the sort contemplated by the exception. As explained above, the purpose of the named port exception is to "relieve[ ] the charterer of liability for damage arising from conditions at that port so long as those conditions were *reasonably foreseeable.*" *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 387 (2d Cir.2003) (emphasis added) (citations omitted). Without at least an opportunity to discover a particular port's specific pitfalls, the identity of the port would be irrelevant. This would defeat the purpose of naming the port, which is to excuse charterers for the results of hazardous conditions known to the master, not to exonerate them completely from all resulting liability.

In sum, here the particular hazard—the submerged anchor—was unknown to the parties. As the naming of CARCO's port ahead of time did not provide the *Athos I* with an opportunity to accept this unknown hazard, the exception does not come into play.[25]

V. The Tort Claims

Should its claim regarding CARCO's contractual liability not succeed, Frescati

25. The District Court determined that although underwater hazards are a well-known threat, none of the parties had any reason to believe that Anchorage Number Nine was likely to conceal such a menace. *In re Frescati*, 2011 WL 1436878, at *2. To the extent the Court later determined that knowledge "in general of lost or abandoned objects in the river" was sufficient to trigger this exception, *id.* at *7, that amounted to an error of law. This sort of general knowledge cannot be used to impute knowledge of a specific condition, and we see no evidence that the Delaware River was known to be particularly treacherous in this regard.

argues in the alternative that CARCO is liable as the owner of the terminal receiving the *Athos I* under two tort theories: negligence and negligent misrepresentation. The District Court held both theories inapplicable. Although we agree that the negligent misrepresentation claim fails on these facts, we disagree with the Court's conclusion that Frescati's negligence claim is necessarily precluded.

A. Negligence

[13] Negligence in admiralty law is essentially coextensive with its common law counterpart, requiring: (1) "[t]he existence of a duty required by law which obliges the person to conform to a certain standard of conduct"; (2) "[a] breach of that duty by engaging in conduct that falls below the applicable standard or norm"; (3) a resulting loss or injury to the plaintiff; and (4) "[a] reasonably close causal connection between the offending conduct and the resulting injury." 1 Schoenbaum, *supra*, §§ 5–2, at 252; *Pearce v. United States*, 261 F.3d 643, 647 (6th Cir.2001) (citation omitted) (same).

[14, 15] Because this accident resulted in a clear loss, we address the existence of a duty, the potential breach of that duty, and causation. As discussed above, the wharfinger in this case—CARCO—contracted to provide the *Athos I* a safe berth. In the tort context, however, a wharfinger is not a guarantor of a visiting ship's safety, but is " 'bound to use reasonable diligence in ascertaining whether the berths themselves and the approaches to them are in an ordinary condition of safety for vessels coming to and lying at the wharf.' " *Smith v. Burnett*, 173 U.S. 430, 436, 19 S.Ct. 442, 43 L.Ed. 756 (1899) (quoting, with approval, *The Calliope*, [1891] A.C. 11 (H.L.) 23 (appeal taken from Eng.)). This is not an unconstrained mandate to "ensure safe surroundings or warn of hazards merely in the vicinity." *In re Nautilus*, 85 F.3d at 116 (citing *Trade Banner Line, Inc. v. Caribbean S.S. Co., S.A.*, 521 F.2d 229, 230 (5th Cir.1975)). Instead, a visiting ship may only expect that the owner of a wharf has afforded it a safe approach. *Id.* (citations omitted). In being invited to dock at a particular port, "a vessel should be able to enter, use and exit a wharfinger's dock facilities without being exposed to dangers that cannot be avoided by reasonably prudent navigation and seamanship." *Id.*

While CARCO has a duty to maintain a safe approach to its terminal, we must determine the geographic scope of that duty.

i. The Scope of the Approach

[16] The geographic scope of a safe approach has been largely unaddressed by the courts. Frescati argues that the scope should be inferred as a matter of custom and practice, and CARCO counters that the approach should be a function of the wharfinger's exertion of control. The District Court, in attempting to adopt a workable method of analysis, was chiefly concerned about CARCO's lack of control in the Anchorage and the absence of a limiting principle if it were to define the approach as the waters that a ship "naturally would traverse." *In re Frescati*, 2011 WL 1436878, at *4. Accordingly, it opted to limit the approach to "the area 'immediately adjacent' to the berth or within 'immediate access' to the berth." *Id.* (quoting *Western Bulk Carriers v. United States*, No. S–97–2423, 1999 WL 1427719, 1999 U.S. Dist. LEXIS 22371, at *20–21 (E.D.Cal. Sept. 14, 1999)). Such immediacy, we believe, sets too constricted a path to the berth. Instead, we hold that an approach should be understood by its ordinary terms, and that its scope is derived

from custom and practice at the particular port in question.

Bouchard Transportation Co. v. Tug Gillen Brothers, 389 F.Supp. 77 (S.D.N.Y. 1975), is helpful in defining the geographic scope of an approach. It partially concerned a claim by a barge owner against the terminal owner for negligence in failing to maintain a safe approach and to warn of an unsafe condition. *Id.* at 79. The District Court there found that the approach began when the barge—traveling mid-channel up the Hudson River—altered its heading such that it was on a straight course to the terminal, which was the normal practice for ships docking there. *Id.* at 80. While executing this procedure, the barge grounded, its hull was punctured, and oil was lost.[26] *Id.* at 80–81. *Bouchard* concluded that the terminal owner "was negligent in failing to maintain the approach to its terminal, in particular that area outside the river channel and within its dominion and control, normally utilized as the southerly approach to its ship dock, free of obstruction and safe for vessels approaching said terminal."[27] *Id.* at 81.

Less instructive, but still worth exploring, is *P. Dougherty Co. v. Bader Coal Co.*, 244 F. 267 (D.Mass.1917). There, an invitation to use a particular dock in a charter party was construed to "extend[ ] to the approaches to the dock, and to the water which would naturally be traversed or used by a vessel discharging there." *Id.* at 270 (citing *Hartford & N.Y. Transp. Co. v. Hughes*, 125 F. 981 (S.D.N.Y.1903)). Although *P. Dougherty* is of limited usefulness on its facts (the Court was interpreting the parties' express agreement to use the dock), its conclusion that the wharfinger's obligation covered "individual approaches," distinguished from "the common channel," is nonetheless helpful. *Id.* More recently, *MS Tabea Schiffahrtsgesellschaft mbH & Co. KG v. Bd. of Com'rs of the Port of New Orleans*, No. 08–3909, 2010 WL 3923168, at *2 (E.D.La. Sept. 29, 2010), *aff'd*, 434 Fed.Appx. 337 (5th Cir. 2011), similarly defined the approach as "the area through which vessels travel in order to move from the main channel of the river to the berth." *See also McCaldin v. Parke*, 142 N.Y. 564, 37 N.E. 622, 624 (1894) (determining that a cluster of rocks "not in any channel which had to be used to approach the wharf," but potentially "in that part of the river used for general navigation," was not within the approach).

In light of these cases, we are persuaded by the suggestion in the maritime industry associations' *amici* brief that an approach should be afforded its plain meaning. *See* Mar. Indus. Ass'ns *Amici* Br. at 20. As a noun, "approach" is defined as "a drawing near in space or time," and "a way, pas-

26. The grounding in *Bouchard* occurred "immediately adjacent to the ballast dock," approximately 50 feet away. 389 F.Supp. at 81. This "immediately adjacent" language, however, does not refer to the beginning of the approach, but the location of the hazard within the approach. The District Court in our case adopted this language-citing *Western Bulk Carriers*, 1999 WL 1427719, 1999 U.S. Dist. LEXIS 22371, at *20—as a "reasonable definition of 'approach.'" *In re Frescati*, 2011 WL 1436878, at *4. We believe this interpreted *Bouchard* incorrectly.

27. CARCO argues that this reference to "dominion and control" is a prerequisite to *Bouchard*'s holding. We do not view control as a requirement, but as a fact of that case where the port was also deemed negligent for failing to warn of shallow waters in an area directly off its dock where it had previously dredged. 389 F.Supp. at 80, 83. Instead, in relying primarily on *Smith v. Burnett*, *Bouchard* held that the terminal owner simply "had a duty to ascertain any imminent dangers to [the ship] as it approached." *Id.* at 83. Further, to any extent *Bouchard* does suggest that control is required, we disagree for the reasons explained below.

sage, or avenue by which a place or a building can be approached." *Webster's Third New Int'l Dictionary* 106 (1971). This suggestion is persuasively illustrated by *amici's* reference to an airplane on final approach or a golf ball approaching the green. Both examples capture the intuitive meaning of the term as the beginning of a final, linear path to a fixed point. In fact, *Webster's* specifically incorporates those examples into its definition, listing "a golfing stroke from the fairway for the green," "the steps and motion of a bowler before he delivers the ball," and the "descent of an airplane toward a landing strip." *Id.*

What is an approach should be given its same plain meaning in the maritime context; when a ship transitions from its general voyage to a final, direct path to its destination, it is on an approach. This is the most logical construction, and it comports with those cases suggesting that an approach should be gleaned from actual practice. *See, e.g., Bouchard,* 389 F.Supp. at 80–81 (concluding that the approach began where vessels departed the channel on a direct course to the receiving dock and defined it pursuant to the area "normally utilized"). It also reflects the definition used in the maritime industry. For example, *The Mariner's Handbook* defines "approaches" as "[t]he waterways that give access or passage to harbours, channels, and similar areas." J.A. Petty, *The Mariner's Handbook* 226 (8th ed.2004). Further, in most cases it will not result in a line-drawing problem, a concern raised by CARCO and shared by the District Court. Entire rivers, bays, and oceans will not be transformed into approaches. Instead, in most instances the approach will begin where the ship makes its last significant turn from the channel toward its appointed destination following the usual path of ships docking at that terminal. This analysis will necessarily vary on the characteristics of a particular port, and there will be close and difficult cases. Accordingly, we believe it may be useful to analogize the final approach of a vessel to a port to that of a driveway leading to a home from the public road.[28] It is the last segment of the voyage leading directly to the host's door. Marine navigation is further complicated in that ships sometimes have the luxury of approaching through a variety of different courses across open water. Yet, so long as a ship is not approaching in an illogical, unreasonable, or disallowed manner, it will be deemed within its approach when it is within this final phase of its journey.

ii. Was the *Athos I* Within the Approach to CARCO's Terminal When the Accident Occurred ?

[17] Fortunately, the case before us is not one of the difficult ones, for the facts indicate that the *Athos I* was within the approach when it struck the anchor. First, the vessel was following the usual path for ships of its size docking at CARCO's terminal, having turned away from

28. In *Smith v. Burnett,* the United States Supreme Court quoted a Massachusetts Supreme Court case making a similar comparison where a defendant failed to warn a schooner of a rock it knew of adjacent to its wharf.

> This case cannot be distinguished in principle from that of the owner of land adjoining a highway, who, knowing that there was a large rock or a deep pit between the traveled part of the highway and his own gate, should tell a carrier, bringing goods to his house at night, to drive in, without warning him of the defect, and who would be equally liable for an injury sustained in acting upon his invitation, whether he did or did not own the soil under the highway.

173 U.S. at 434, 19 S.Ct. 442 (quoting *Carleton v. Franconia Iron & Steel Co.,* 99 Mass. 216, 219 (1868) (internal quotation marks omitted)).

the channel at the usual point and was being pushed by two tugboats in a straight path toward CARCO's pier. Moreover, there were other indicators that the *Athos I* had ceased navigating generally and was within the final phase of its travel, namely that it was rotated sideways and, as noted, assisted by tugs. While not dispositive factors, these trappings indicate that the *Athos I* was no longer voyaging, but was configured solely for docking.

To the extent CARCO argues that the sphere of control exercised by it should be used to limit the scope of its duty,[29] we hold that a failure to exercise control over an area is not conclusive in this analysis. The appeal of *The Moorcock* long-ago dispatched this argument.[30] [1889] 14 P.D. 64 (Eng.). The steamship *Moorcock* was invited to be discharged and loaded at a particular wharf where it would be moored alongside the wharfingers' jetty. *Id.* at 64. Although the ship was expected to rest on the bottom of the River Thames at low tide, the particular section of riverbed was not actually under the wharfingers' control. *Id.* at 69. Even so, the Court explained that it "d[id] not follow that [the wharfingers] are relieved from all responsibility. They are on the spot." *Id.* at 70. It continued:

> No one can tell whether reasonable safety has been secured except themselves, and I think if they let out their jetty for use they at all events imply that they have taken reasonable care to see whether the berth, which is the essential part of the use of the jetty, is safe, and if it is not safe, and if they have not taken such reasonable care, it is their duty to warn persons with whom they have dealings that they have not done so.

Id.; see also The Cornell No. 20, 8 F.Supp. 431, 433 (S.D.N.Y.1934) ("However, it is clear that the obligation of the wharfinger is not limited to the area of the land under water actually owned by it.... It impliedly [sic] represents to the master of a vessel who is induced to bring his vessel to its wharf that the berth and immediate access to it are reasonably safe for the vessel.").

In addition, insofar as the sphere of responsibility exercised by CARCO is a voluntary assumption of duty, it cannot be relied on to restrict the scope of a port owner's duty as a matter of law. Limiting a wharfinger's responsibility to areas in which it has affirmatively assumed responsibility would allow it to define the scope of its own liability regardless of the port's actual approach. Such a construction plays poorly against a policy that places logic and common sense over self-serving limitations of liability in the tort context. Moreover, we are not convinced that CAR-

29. In further support of this position, CARCO cites to *Sonat Marine Inc. v. Belcher Oil Co.*, 629 F.Supp. 1319 (D.N.J.1985), *aff'd*, 787 F.2d 583 (3d Cir.1986) (table). That case, however, does not apply on its facts, and uses a wharfinger's assumption of control to *expand*, rather than *limit*, the scope of its liability. Specifically, that wharfinger took the initiative secretly to widen its approach because "it recognized that larger vessels had problems entering the barge berth and required a greater margin of safety." *Id.* at 1322. Insofar as the terminal operator had "assumed sufficient control over that area to attempt to ensure a proper approach to the ship and barge terminal," *id.* at 1327, it was deemed negligent for "fail[ing] to use means adequate[, such as side scans or wire drags,] to ensure that the new area where it thought larger barges could safely go was free of obstructions," *id.* at 1325. Control aside, the District of New Jersey Court also noted that a "safe approach to the berth had to include the additional ... area." *Id.* at 1326.

30. That the appeal of *The Moorcock* was operating under a theory of an implied contractual warranty does not reduce its import for purposes of this analysis. [1889] 14 P.D. 64 at 68 (Eng.).

CO was actually precluded from extending its area of responsibility into the Anchorage. The record reflects that permission to it was not required for sonar scans, for example, and the record lacks an indication that CARCO could not have obtained a dredging permit for the Anchorage if it desired to do so.

We conclude that the *Athos I* was well within the approach to CARCO's terminal when the casualty occurred, and that it therefore had a duty to exercise reasonable diligence in providing the *Athos I* with a safe approach.

iii. Potential Breach of Duty to Maintain a Safe Approach

Having determined that the *Athos I* was within its approach when it was damaged and that CARCO therefore owed it a safe approach, did CARCO satisfy that duty by exercising the standard of care required of a reasonable wharfinger under the circumstances? Although "the nature and extent of the duty of due care is a question of law," factual issues predominate here as they do in most negligence litigation. *Redhead v. United States*, 686 F.2d 178, 182 (3d Cir.1982). Thus, we review findings of negligence as factual findings for clear error. *See In re Moran Towing Corp.*, 497 F.3d 375, 377–78 (3d Cir.2007); *Andrews v. United States*, 801 F.2d 644, 646 (3d Cir.1986). As noted, there were no findings.

[18] Negligence exists where there was a "fail[ure] to exercise that caution and diligence which the circumstances demanded, and which prudent men ordinarily exercise." *Grand Trunk R.R. v. Richardson*, 91 U.S. 454, 469, 23 L.Ed. 356 (1875). The admiralty context is no different, requiring "reasonable care under the particular circumstances." 1 Schoenbaum, *supra*, § 5–2, at 253 (citation omitted); *see also Smith*, 173 U.S. at 436, 19 S.Ct. 442 (remarking that wharfingers are "bound to use reasonable diligence" (citation and quotation marks omitted)). In admiralty, the particular duty required under any given circumstance can be gleaned from statute, custom, or "the demands of reasonableness and prudence." 1 Schoenbaum, *supra*, § 5–2, at 253 (citing *Pennsylvania R.R. v. S.S. Marie Leonhardt*, 202 F.Supp. 368, 375 (E.D.Pa.1962), *aff'd*, 320 F.2d 262 (3d Cir.1963)). Of course, "the degree of care which the law requires in order to guard against injury to others varies greatly according to the circumstances of the case." *Richardson*, 91 U.S. at 469–70.

On the facts before us, we are insufficiently informed to delineate the exact standard of care required by CARCO,[31] let

31. In evaluating the specific nature of this duty, the parties point to no statute on point and our research reveals none. As to custom, it "is only evidence of a standard of care[,] and violation of custom or adherence to it does not necessarily constitute negligence or lack of negligence." *In re J.E. Brenneman Co.*, 322 F.2d 846, 855 (3d Cir.1963) (citations omitted); *Norton v. Ry. Express Agency, Inc.*, 412 F.2d 112, 114 (3d Cir.1969) ("Although not controlling, custom and practice may be shown to establish the standard of care to which the party charged with the wrongful act may be required to conform.").

The District Court also determined that no industry custom would have "put CARCO on notice that it should scan into the Anchorage." *In re Frescati*, 2011 WL 1436878, at *4. It is unclear if this apparent factual finding refers to other River terminals not searching their full approaches, federal waters generally, or Anchorage Number Nine specifically. Unfortunately, a review of the record leaves us similarly adrift. While several trial witnesses testified that they did not know of any Delaware River terminal taking precautionary action within federal waters, the Chief of Operations Division for the U.S. Army Corps of Engineers suggested that at least one terminal had surveyed the federal waters preceding its berth. *See* DePasquale Test. 104:20–105:13,

alone whether there was a breach of that standard (a.k.a. duty). That task rests with the District Court on remand should it need to reach the negligence claim.

iv. Causation

[19] On remand, the District Court will also need to determine whether the failure, if any, to meet the standard of care proximately caused the accident. "Questions of causation in admiralty are questions of fact." *Stolt Achievement, Ltd. v. Dredge B.E. LINDHOLM,* 447 F.3d 360, 367 (5th Cir.2006); *see also In re Nautilus,* 85 F.3d at 116 (reviewing, in admiralty, a district court's determination as to causation for clear error).

The purpose of requiring proximate cause is "to limit the defendant's liability to the kinds of harms he risked by his negligent conduct." 1 Dan B. Dobbs *et al.*, *The Law of Torts* § 198, at 681 (2d ed.2011) (citations omitted). Proximate cause is something of a misnomer in that it "is not about causation at all but about the appropriate scope of legal responsibility." *Id.* at 682. Instead, "proximate cause holds that a negligent defendant is liable for all the general kinds of harms he foreseeably risked by his negligent conduct and to the class of persons he put at risk by that conduct." *Id.* at 682–83; 1 Schoenbaum, *supra,* § 5–3, at 260–61 ("[T]he injury or damage must be a reasonably probable consequence of the defendant's act or omission.").

[20] CARCO argues that proximate cause is lacking on these facts because the presence of an anchor in the anchorage was not foreseeable, especially by virtue of other ships arriving unharmed in the past. Once again, we decline to resolve this issue on the record before us. CARCO further argues that proximate cause is lacking on the basis that the anchor-dropper was the actual cause of the accident. It is clear, however, " 'that there may be more than one proximate cause of an injury.' " *Serbin v. Bora Corp.,* 96 F.3d 66, 75 (3d Cir.1996) (quoting *Davis v. Portline Transportes Mar. Internacional,* 16 F.3d 532, 544 (3d Cir.1994)).

More crucially, the issue is whether the accident would have been prevented had CARCO exercised its duty to act as a prudent wharfinger within the approach. At a minimum, this requires "that the injury would not have occurred without the defendant's negligent act." 1 Schoenbaum, *supra,* § 5–3, at 259. Here, the causation inquiry turns on whether prudent behavior—had it been exercised, a factual inquiry—would have prevented the injury. *See* Dobbs *et al.*, *supra,* § 184, at 620. In light of CARCO's invitation that the *Athos I* arrive drawing 37 feet or less, *see supra* Part IV.C, it may be that the anchor lay sufficiently deep such that it would not have been detected even if CARCO had acted as a prudent wharfinger. Conversely, it could be the case that—even if the 37 feet of contractual clearance were provided—CARCO's duty as a wharfinger required something more. Should this be put in issue, further inquiry must occur as to what diligence was required of a prudent wharfinger, and only then can the District Court determine whether a failure to implement those procedures proximately caused the accident.[32]

Oct. 6, 2010. Ultimately, the record is unhelpful on this point because we do not know if any of the terminals on the River had an approach that also traversed federal waters like CARCO's did. Of course, the only relevant consideration for custom would be similarly situated terminals, and we are unable to make any meaningful assessment of industry custom on these facts.

32. We note that the District Court was "not convinced that had the area been scanned the anchor would perforce have been detect-

Therefore, because factual issues remain to be resolved if Frescati's negligence claim becomes relevant, we also remand for further proceedings, as necessary, on this claim.

B. Negligent Misrepresentation

[21] Frescati argues that CARCO's failure to inform the *Athos I* of the reduction in maximum draft at its facility's ship dock prior to the vessel's arrival was a negligent misrepresentation. The District Court held otherwise, reasoning that "the area of concern was not the area where the casualty occurred and the draft at the berth was factually irrelevant to the casualty." *In re Frescati*, 2011 WL 1436878, at *5. We reach essentially the same result.

Negligent misrepresentation stems from a failure to exercise reasonable care in supplying incorrect information during the course of a business transaction. *Coastal (Berm.) Ltd. v. E.W. Saybolt & Co., Inc.*, 826 F.2d 424, 428 (5th Cir.1987) (citing *Grass v. Credito Mexicano, S.A.*, 797 F.2d 220, 223 (5th Cir.1986)). The receiving party must rely on that false information and thereby suffer injury. *Id.* at 428–29 (citing same). This formulation, set out by § 552 of the Restatement (Second) of Torts, implicitly incorporates the standard elements of negligence: duty of care, a breach of that duty, injury, and causation. *See J.E. Mamiye & Sons, Inc. v. Fid. Bank*, 813 F.2d 610, 615 (3d Cir.1987); 1 Schoenbaum, *supra*, § 5–2, at 252.

CARCO initially explained in its Port Manual that the allowable maximum draft at its Paulsboro facility was 38 feet, but this "may change from time to time and should be verified prior to the vessel's arrival." J.A. at 1095 (CITGO Terminal Regulations for Vessels ¶ 2). On November 22, 2004, four days before the *Athos I* arrived, CARCO's Port Captain Rankine announced internally that "the maximum draft at Paulsboro berth # 1 (ship dock) has been reduced to 36–00 feet." J.A. at 1702. No one informed the *Athos I* of the change (and apparently its personnel did not inquire). This meant that the *Athos I* would have to enter CARCO's port under an exception to the maximum draft, and in any event Port Captain Rankine was comfortable with this because the *Athos I* would not be lying in the shallower area next to its dock that motivated the draft reduction.[33] Rankine Test. 41:22–42:3, Nov. 22, 2010.

On its terms, the reduction was limited to CARCO's ship dock. Although Frescati argues that the *Athos I* would not have berthed at CARCO's facility (its actual ship dock, but not the approach to it through the Anchorage) so early in the rising tide if its crew had known of the reduction in maximum allowable draft, this is irrelevant to its decision to enter Anchorage Number Nine—the site of the submerged anchor.

In this context, any misrepresentation about the ship dock is factually irrelevant to the accident because it did not occur at

ed...." *In re Frescati*, 2011 WL 1436878, at *4. We interpret the Court's remark as contemplating the effort required to detect the anchor absent an incident, as the anchor was in fact discovered with the use of side-scan technology.

33. Rankine testified that such exceptions are common in the industry, and that he was not concerned for the *Athos I* because a ship drawing 37'3" had sat through low water just ten days before without harm. Rankine Test. 38:22–23, 41:22–42:9, Nov. 22, 2010. When the trial judge inquired about the rationale for making regular exceptions, Rankine replied that he was required by the guidelines to make the reduction, but that he did not "have any worries about the depth of water in the area where the ship was going to sit." *Id.* at 45:18–25.

the dock, but rather 900 feet out in the Anchorage. There was no injury sustained that resulted from the failure to note the draft reduction at or immediately adjacent to CARCO's dock. Frescati's negligent misrepresentation claim thus fails on its merits as a matter of law.

VI. Effect of the Government's Settlement With CARCO

In its limited settlement agreement with the Government, CARCO promised not to

> demand that the court reduce or offset the damages awarded to the United States against [CARCO] in the Lawsuit based on evidence that the negligence or fault of the United States in failing to detect, mark and/or remove underwater obstructions to navigation in the navigable waters of the Delaware River caused or contributed to the ATHOS I Incident.

J.A. at 95 (Release ¶ 3.1(b)). It thus asks us to preclude CARCO on remand from raising any equitable defense premised on the Government's regulation of the Anchorage. CARCO responds that it retained unspecified equitable defenses relevant to defending against, *inter alia*, the contractual claims, and that the Government conflates defenses to these claims with violations of CARCO's promise to forbear making claims against the Government sounding in tort to reduce or offset damages awarded to it.[34]

[22] The Government also argues that the District Court mistakenly denied its earlier motion for summary judgment on CARCO's defense of equitable recoupment,[35] as that defense was really just a disguised attempt for indemnity or contribution payments. After hearing oral argument, the District Court denied the Government's pretrial motion on the ground "that the question of subrogation defenses [by CARCO] is better resolved with the benefit of a full trial record." J.A. at 101. CARCO claims that the Government failed to follow up at trial, and thus waived the issue. We agree, as we see no indication that the Government renewed its argument at trial (or argued before us how the issue has not been waived). Thus, we decline to preclude CARCO from revisiting any previously raised equitable defense to the Government's subrogation claims.

VII. Conclusion

Although remand is appropriate because the District Court failed to set out separate findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52(a)(1), our legal conclusions also make it necessary to remand for factual findings.

We conclude that the *Athos I*, and Frescati as its owner, are beneficiaries of CARCO's contractual safe berth warranty.

34. The Government argues that CARCO has attempted to circumvent this partial settlement agreement by presenting against it negligence claims couched as equitable defenses. CARCO explicitly retained "the right to raise affirmative defenses under any theory or doctrine of law or equity, the right to assert setoff or recoupment and the right to assert compulsory or non-compulsory counterclaims other than a Claim for Contribution or Indemnity...." J.A. at 97 (Release ¶ 4.2). It was further agreed that the partial settlement would have no force as to CARCO's suit with Frescati. *Id.* at 97–98 (Release ¶ 4.3).

35. Equitable recoupment is "[a] principle that diminishes a party's right to recover a debt to the extent that the party holds money or property of the debtor to which the party has no right." *Black's Law Dictionary, supra,* at 618. The competing claims must arise from the "same transaction." *Phila. & Reading Corp. v. United States,* 944 F.2d 1063, 1075 (3d Cir.1991) (quoting *United States v. Dalm,* 494 U.S. 596, 608, 110 S.Ct. 1361, 108 L.Ed.2d 548 (1990)).

This was an express assurance that CARCO's port would be safe for the *Athos I* within the scope of its invitation—that is, drawing 37 feet or less. Therefore, on remand it will need to be determined whether this amount of clearance was actually provided. This analysis may require inquiries into the arriving draft of the *Athos I* and, if the vessel was drawing more than the agreed-upon depth of 37 feet, the depth and positioning of the anchor.

CARCO's assertion of the named port exception is unavailing. Even if it were eligible on the type of notice given to the *Athos I*, its crew did not have an opportunity to accept a hazard (the anchor) that was unknown to the parties prior to the accident, and the exception is inapplicable.

We further conclude that, as this case is primarily a contractual one, analysis of Frescati's negligence claim is required only if the contractual safe berth warranty of CARCO is deemed satisfied. In that event, because we conclude that the accident occurred within the approach to CARCO's terminal, the District Court would need to determine the appropriate standard of care, whether it was breached, and, if so, was that breach a cause of the spill. The negligent misrepresentation claim, however, fails for lack of factual causation because the alleged misrepresentation applied to an area unrelated to the accident.

Finally, we conclude that the Government has waived its reliance on its partial settlement agreement in challenging CARCO's defenses to liability.

We thus affirm in part, vacate in part the District Court's judgment orders of April 12, 2011 against Frescati and the Government, and remand for further proceedings consistent with this opinion. Further appeals relating to this case will be referred to the current panel.

Appendix A

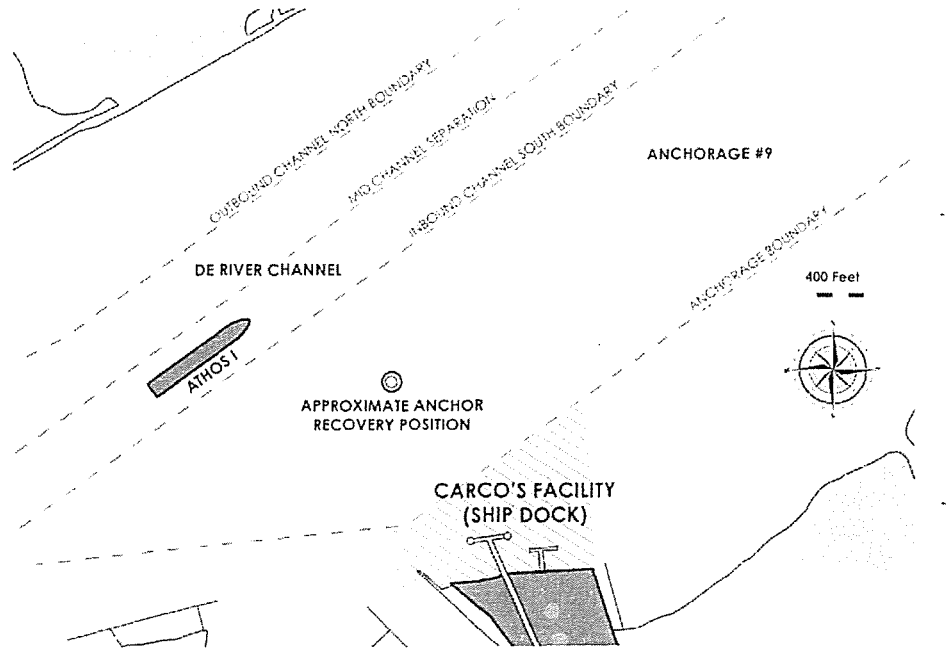

Exhibit C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16-3470
No. 16-3552
No. 16-3867
No. 16-3868

In Re: PETITION OF FRESCATI SHIPPING COMPANY, LTD.,
AS OWNER OF THE M/T ATHOS I and TSAKOS SHIPPING & TRADING, S.A.,
AS MANAGER OF THE ATHOS I FOR EXONERATION FROM OR
LIMITATION OF LIABILITY
(E.D. Pa. No. 2-05-cv-00305)

UNITED STATES OF AMERICA

v.

CITGO ASPHALT REFINING COMPANY; CITGO PETROLEUM
CORPORATION; CITGO EAST COAST CORPORATION
(E.D. Pa. No. 2-08-cv-02898)

CITGO Asphalt Refining Company; CITGO Petroleum Corporation;
CITGO East Coast Oil Corporation,
Appellants

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES,
JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE,
SHWARTZ, KRAUSE, RESTREPO, and BIBAS, Circuit Judges
and BRANN, District Judge*

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*The vote of the Honorable Matthew W. Brann, District Judge for the United States District Court for the Middle District of Pennsylvania, who sat by designation, is limited to panel rehearing.

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/D. Brooks Smith
Chief Circuit Judge

Dated: May 30, 2018
CJG/cc: Timothy J. Bergere, Esq.
Jack A. Greenbaum, Esq.
Alfred J. Kuffler, Esq.
John J. Levy, Esq.
Eugene J. O'Connor, Esq.
Matthew M. Collette, Esq.
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Benjamin Beaton, Esq.
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Carter G. Phillips, Esq.
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