No. 18-

IN THE

Supreme Court of the United States

MARQUETTE TRANSPORTATION COMPANY, L.L.C. AND BLUEGRASS MARINE, L.L.C.,

Petitioners,

v.

ENTERGY MISSISSIPPI, INCORPORATED,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has unequivocally declared through takings decisions that a private property owner must have a compensable interest to recover damages. Since the earliest decisions, including *United States v. Chandler-Dunbar Water Power Company*, 229 U.S. 53 (1913), this Court has also acknowledged that the right to the use of the navigable waters is a qualified one and subordinate to the public right of use and absolute power of Congress to regulate them. When these principles are at issue in cases before the Court of Claims, the property owner must also prove a compensable claim and to do so must establish a valid permit issued by the Army Corps of Engineers.[1] On the admiralty side of law, however, the absolute requirement for a permit has been lost in the analysis of longstanding presumptions, including the *Oregon* and *Pennsylvania Rules*. A writ is necessary to resolve this conflict and reconcile admiralty law with these land-based decisions and resolve two questions:

1. Land-based decisions in the takings context mandate permit compliance as a threshold for a plaintiff to have a compensable property interest.[2] For the exact same issue under the general maritime law, should the plaintiff claiming damage to a structure placed on navigable waters and which is subject to permit compliance under the Rivers and Harbors Act also have to show that its structure was permitted in order to maintain a compensable property interest in a maritime tort action?

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1. *Yaist v. United States*, 17 Cl. Ct. 246 (1987).

2. *United States v. Chandler-Dunbar Water Power Company*, 229 U.S. 53 (1913); *Yaist v. United States*, 17 Cl. Ct. 246 (1987).

2. Since Entergy maintained an unpermitted structure in navigable waters, should it have been subjected to a different comparative fault analysis than what was used by the lower courts, and should the standard have required this plaintiff to show that its structure could not have been the cause of the incident?

This case also presents the unique opportunity for this Court to clarify and modify existing exceptions to the "nigh automatic" award of prejudgment interest in admiralty. Under the "peculiar circumstances" of this case, the lessee was awarded prejudgment interest without a valid permit, and after the damage award was determined under state common law. Damages were rewarded after the repair contract was determined to be non-maritime after a lengthy trial in state court because the lessee failed to mitigate its damages. The lessee also waited almost three years from the date of the incident before bringing a tort claim in admiralty, and almost four years to commence a single repair. Under Supreme Court precedent, including *City of Milwaukee*,[3] the peculiar procedural background and evidence of undue delay require review and answer to the following question:

3. *Does the discretionary right to award prejudgment interest in an admiralty proceeding extend so far as to allow the award of interest over the significant period of time when the money was not spent and during which time the plaintiff did not demonstrate any need to use the damaged property, and require the district court to evaluate "peculiar circumstances" and "undue delay?"*

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3. *City of Milwaukee v. National Gypsum Co.,* 515 U.S. 189 (1995).

LIST OF PARTIES

The parties are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

Marquette Transportation Company, LLC is a Delaware Limited Liability Company. No publicly traded company owns a 10% interest in the entity, or any corporate parents or any affiliated company.

Bluegrass Marine, LLC is a Delaware Limited Liability Company, and a wholly owned subsidiary of Marquette Transportation Company, LLC. No publicly traded company owns a 10% interest in the entity, or any corporate parents or any affiliated company.

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Memorandum Opinion of the United States District Court for the Southern District of Mississippi, Northern (Jackson) Division, issued on September 29, 2017. *Entergy Mississippi, Inc. v. Marquette Transportation Co., LLC, et al*; Case No. 3:13-cv-00879-HTW-LRA, R. Doc. 186 (ROA.4241-4273).

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Order (Granting Summary Judgment against Marquette) of the United States District Court for the Southern District of Mississippi, Northern (Jackson) Division, issued on March 27, 2015, *Entergy Mississippi, Inc. v. Marquette Transportation Co., LLC, et al;* Case No. 3:13-cv-00879-HTW-LRA, R. Doc. 123 (ROA.1570-1588).

Order of the United States Court of Appeals for the Fifth Circuit Denying Rehearing *En Banc* issued August 15, 2018; *Entergy Mississippi, Inc. v. Marquette Transportation Co., LLC, et al,* Case No. 17-60719.

STATEMENT OF THE BASIS FOR JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1254 to consider petitions for certiorari from cases decided by the United States Court of Appeals. It also has jurisdiction under 28 U.S.C. §1333(1) and Article III, Section 2 of the United States Constitution.

The Court of Appeals for the Fifth Circuit issued its original ruling on July 16, 2018. Marquette Transportation Company, LLC and Bluegrass Marine, LLC timely filed a Petition for Rehearing *En Banc* on July 30, 2018, which was denied on August 15, 2018.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article 3, Section 17 of the Mississippi Constitution that provides:

   "Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is public."

2. U.S. Constitution, Fifth Amendment, that provides:

AMENDMENT V

"…nor shall private property be taken for public use, without just compensation."

3. 33 U.S.C. §403, Rivers and Harbors Act, that provides:

"The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited, and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake . . . or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same."

4. Title 33 C.F.R. §64.06 that provides:

"Obstruction means anything that restricts, endangers, or interferes with navigation."

5. M.C.A. §75-17-7 (2013) that provides:

"All judgments or decrees founded on any sale or contract shall bear interest at the same rate as the contract evidencing the debt on which the judgment or decree was rendered. All other judgments or decrees shall bear interest at a per annum rate set by the judge hearing the complaint from a date determined by such judge to be fair but in no event prior to the filing of the complaint."

6. Under admiralty jurisdiction, the following cases establish statutory equivalents under the general maritime law:

   A. *Robins Drydock & Repair Co. v. Flint,* 275 U.S. 303 (1927)

   B. *Pennsylvania v. Troop (The Pennsylvania),* 19 Wall. 125, 86 U.S. 125, 22 L.Ed. 148 (1873)

   C. *The Oregon*, 158 U.S. 186, 15 S.Ct. 804, 39 L.Ed. 943 (1895)

7. Precedent cited but not followed under general maritime law includes:

   A. *Dow Chemical Co. v. Dixie Carriers, Inc.*, 463 F.2d 120 (5th Cir. 1972)

8. Contrary Supreme Court precedent embodied in:

   A. *United States v. Chandler-Dunbar Water Power Co.,* 229 U.S. 53 (1913)

   B. *Robins Drydock & Repair Co. v. Flint,* 275 U.S. 303 (1927)

   C. *United States v. Fuller*, 409 U.S. 488 (U.S. 1973)

9. Conflicting circuit precedent embodied in:

   A. *Yaist v. United States*, 17 Cl. Ct. 246 (1987)

B. *Bank v. Thermo Elemental Inc.*, 888 N.E. 2d 897 (Mass. 2008)(state law equivalent)

C. *Otto Candies, Inc. v. M/V Madelaine D*, 721 F.2d 1034 (5th Cir. 1983)

D. *Dow Chemical Co. v. Dixie Carriers, Inc.*, 463 F.2d 120 (5th Cir. 1972)

STATEMENT OF THE CASE

Without a permit approved by the Army Corps of Engineers, Entergy, the lessee, did not have a compensable interest to recover damages. Both lower courts agreed that the failure to obtain a valid permit created a violation of a safety statute and triggers the application of the admiralty rule recognized by the *Pennsylvania Rule*. However, both courts also adopted the rationale that the district court made on summary judgment (Appendix D), holding that because the captain of the towboat had seen the unpermitted structure on prior voyages, this evidence was enough to hold the vessel operator liable without shifting the burden of proof back to the plaintiff for having created an obstruction. Without a permit, the violation rebuts the presumption of the *Oregon Rule,*[1] and Entergy should be subject to comparative fault under the *Pennsylvania Rule.*[2] Once the burden is properly placed on the plaintiff, there is a further question as to the standard for same and whether it would require the

1. *The Oregon*, 158 U.S. 186, 15 S. Ct. 804, 39 L.Ed. 943 (1895).

2. *Pennsylvania v. Troop (The Pennsylvania),* 19 Wall. 125, 86 U.S. 125, 22 L.Ed. 148 (1873).

owner of an obstruction to prove more than its obstruction was not the probable cause of the collision, but further, whether it *could not have been a cause* of the collision. From Supreme Court precedent in *The Pennsylvania*,[3] through circuit precedent in *Otto Candies, Inc. v. M/V Madelaine D*,[4] when neither party is exonerated under the presumptions, the court must determine the proportionate degree of fault of both parties. Even the case cited by the lower courts, *Dow Chemical Co. v. Dixie Carriers, Inc.*,[5] holds that once a statutory violation under the Rivers and Harbors Act, 33 U.S.C. §403, is proven, these presumptions are rebutted and the plaintiff is required to prove negligence.[6] The unique issue presented in this petition goes deeper into establishing a uniform standard among the circuits for the burden placed on proving the plaintiff's fault when the collision involved an obstruction maintained by the plaintiff, and assuming the plaintiff was able to prove a property interest.

The lower courts allowed prejudgment interest at a rate of 8 percent during an approximate four-year timeframe between the date of incident and the commencement of repairs, even though Entergy did not have a use for the dolphin during that timeframe and did not spend the money for which it was awarded interest. Other procedural flaws, including remand of the case to state court due to a lack of admiralty jurisdiction created "peculiar circumstances." Likewise, Entergy waited

3. *Id.*

4. 721 F.2d 1034, 1036 (5th Cir. 1983).

5. 463 F.2d 120, 122 (5th Cir. 1972).

6. *Id.* at 121.

three years to file the complaint, and another four before any repairs from the date of the accident, clearly "undue delay."

This matter raises important questions on standing to recover damages and prejudgment interest by Entergy, following an allision with a non-permitted structure - - a dolphin fender - - installed on the Mississippi River by Entergy's predecessor, Mississippi Power and Light Company. Defendants, Marquette Transportation Company, LLC and Bluegrass Marine, LLC (collectively "Marquette") own and operate the towing vessel ROBERT E. FRANE, which was maneuvering a flotilla of barges downriver in high water conditions. One barge in its tow made a sliding contact with the outer wooden fender on Entergy's unpermitted steel mooring dolphin. As can be seen from the record and some photographs included in this petition, the steel superstructure of the dolphin was not damaged. The wooden fender of the dolphin was also not itself damaged and was later reused. The fender simply came loose from the steel superstructure and was hanging down on its safety chain; the result that was actually intended in the overall design of the dolphin where the wooden fender was attached to the steel superstructure with rubber buckles. Neither the ROBERT FRANE nor its barges sustained any noticeable damage. Trial evidence photos[7] show the dolphin structure extends hundreds of feet into the navigable waterway away from a floating dock.[8] Under the general maritime law, the dolphin fender created an obstruction in fact and as a matter of law, and without a permit rendered Entergy without a recoverable

7. Including ROA.3821, ROA.3860.

8. ROA.3821, ROA.3860.

property interest. However, the district court disregarded the permits that showed a violation under the Rivers and Harbors Act (RHA), 33 U.S.C. §403, and misapplied the *Pennsylvania Rule* to find Marquette solely at fault on summary judgment.[9] Instead of a trial on comparative fault, the district court turned to the *Oregon Rule* as the "pole star in the case"[10] despite the fact that Marquette rebutted this presumption by showing the permit violation.

Congress has mandated that certain enumerated structures are considered obstructions by their nature, unless they have been authorized by the Corps. In fact, §403 expressly forbids the construction of a dolphin outside the scope of the Corps permit. "It shall not be lawful to build or commence the building of any…dolphin…except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army." 33 U.S.C. §403.[11] Further, "the structures and activities set forth in the second and third clauses need not be shown to obstruct navigable capacity before federal authorization is required by the terms of the statute."[12]

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9. Appendix D.

10. Appendix D.

11. *United States v. Milner,* 583 F.3d 1174 (9th Cir. 2009) (citing *United States v. Alameda Gateway,* 213 F.3d 1161, 1165 (9th Cir. 2000); *Sierra Club v. Andrus*, 610 F.2d 581, 596 (9th Cir. 1979), rev'd on other grounds sub nom); *California v. Sierra Club,* 451 U.S. 287, 101 S. Ct. 1775, 68 L.Ed. 2d 101 (1981); *Zabel v. Tabb,* 430 F.2d 199 (5th Cir. 1970).

12. *Norfolk & Western Co. v. United States*, 641 F.2d 1201, 1210-1211 (6th Cir. Ohio 1980).

The duty not to create an obstruction to navigation extends to the entire width of a navigable waterway, and is not limited to the dredged channel.[13] In fact, the navigable waters even include the mud along the shore through which vessels are capable of running.[14]

The building of the dolphin fender by Entergy's predecessor, Mississippi Power, violated 33 U.S.C. §403. Violations of this statute require a finding that the dolphin is an obstruction, which triggers the *Pennsylvania Rule*, and also establishes Entergy's lack of a property right.

The United States Court of Appeals for the Fifth Circuit agreed there was no permit in place for the dolphin fender. The Fifth Circuit found none of the permits "explicitly cover the dolphin system."[15] Yet, both decisions ignored *Dow*'s requirement to prove negligence at trial when there is no valid permit issued.[16] Both the trial court and the Court of Appeals declined to consider whether Entergy had any property interest in an unpermitted structure.

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13. *Orange Beach Water, Sewer and Fire Protection Authority v. M/V ALVA*, 680 F.2d 1374, 1382-1383 (11th Cir. 1982); *United States v. Raven*, 500 F.2d 728, 732 (5th Cir. 1974); *United States v. Joseph G. Moretti, Inc.* 478 F.2d 418, 428-29, 429 n.37 (5th Cir. 1973).

14. *Western Union Tel. Co. v. Inman & I. S.S. Co.*, 59 Fed. 365 (2nd Cir. 1894); *Jones Towing, Inc. v. United States*, 277 F.Supp. 839, 848 (E.D. La. 1967); *In Re Martin*, 102 F.Supp. 43 (E.D. Pa. 1951).

15. Appendix A, p. 4.

16. *Id.*

A writ is necessary to resolve important questions of law governing the effect of non-compliance with the strict statutory requirements of the RHA and the ability of a plaintiff to recover damages without a legitimate property right and proprietary interest. A writ is also necessary to address the ability to recover prejudgment interest. First, Entergy waited almost three years to bring suit, delayed over four years before starting repairs, and did not have a use for the mooring dolphin or the dock used in connection with same during any of that time. Nevertheless, the district court awarded interest on the total amount of the repair costs starting from the incident date of April 5, 2008, at 8 percent through a judgment after a bench trial beginning on September 12, 2016, now eight (8) years post-incident.[17] The effect was to award Entergy a substantial sum of interest on money it had not expended and on property it was not using, did not own as a lessee, and effectively doubled the award.

1. The Permit Violation

After Entergy waited almost three years to file the complaint on March 28, 2011, Marquette submitted a Freedom of Information Act request to the U.S. Army Corps of Engineers asking for copies of all permits relevant to the river structures at this location. The Corps responded by sending copies of five separate permits which allowed the construction of structures in the river. None covered the enormous dolphin and fender built on the largest public navigable waterway – the Mississippi River – in the continental United States.

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17. Contrary to *Bank v. Thermo Elemental Inc.*, 888 N.E.2d 897, 916 (Mass. 2008), and M.C.A. §75-17-7.

In each permit from 1965 through 1973, the applicant, Mississippi Power, described the location and placement of all structures it intended to build in the river in the drawings provided. Nowhere is dolphin No. 4 identified and approved. The drawings related to the floating dock are part of the actual permit submitted on September 27, 1973, approved by the deputy district engineer on November 13, 1975.[18]

Under a plain reading of Section 403 of the RHA and 33 C.F.R §64.06,[19] a "dolphin" must have a permit, otherwise it is an unlawful obstruction subject to removal.

Thus, the absence of the dolphin in any drawing referenced by the dock permit demonstrates that construction of the dolphin No. 4 was never approved by the Corps. This fact is evident from the other permits provided for construction at this facility. Again, these permits contain similar conditions and none of them authorize the construction of the dolphin with the fender damaged by the barge.

A synopsis of the various permits the Corps issued follows:

Permit Date: April 13, 1965[20]	Permit to construct effluent discharge pipeline

18. ROA.416-427.

19. Title 33 C.F.R §64.06 provides "obstruction means anything that restricts, endangers, or interferes with navigation."

20. ROA.359-380.

Permit Date: June 15, 1965[21]	Permit to circulating water system, vehicular bridge and mooring facility to unload fuel oil
Permit Date: July 16, 1969[22]	Permit to construct circulating water system and one pile dolphin
Permit Date: Nov. 13, 1973[23]	Permit to construct a fuel unloading facility and a hydraulic land fill
Permit Date: Nov. 30, 1973[24]	Permit to install two mooring dolphins at the existing fuel oil terminal[25]

To emphasize this point, the dolphin and fender damaged and later lifted and replaced is enormous. As evident by the photographs showing repairs introduced at trial,[26] the structure is approximately six stories high. As evident by the photos below, the dolphin and fender extend hundreds of feet into the navigable waterway, and further away

21. ROA.152-165.

22. ROA.403-415.

23. ROA.416-427.

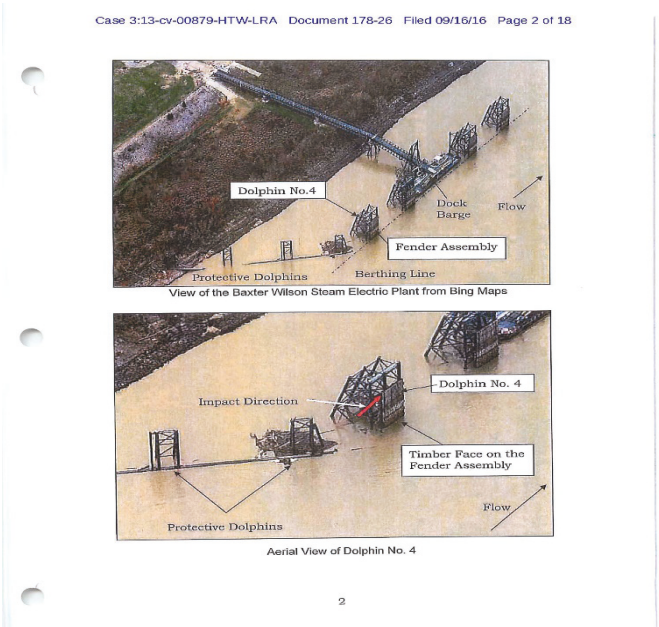
24. ROA.428-436.

25. Miss. Power specifically requested and received permission to construct two additional mooring dolphins (ROA.428-436) at a different fuel oil terminal.

26. ROA.3821, ROA.3860.

from the floating dock. These photos[27] also illustrate the floating dock was never impacted, only the unpermitted fender on dolphin No. 4.

To illustrate the hinderance to the free navigation of the Mississippi River, the permit drawings for the access bridge show this structure extends 593 feet to the floating dock, which extends another 140 feet into the River.[28]



The photo below shows the enormous size of dolphin No. 4, and the fender, which is still visibly hanging on the safety chain. Again, the size of the structure, and the extension into the navigable waters were not permitted.

27. ROA.3821, ROA.3860.

28. ROA.423.

2. Comparative fault principles not followed after permit violation.

With cross-motions for summary judgment on whether the dolphin and fender were properly permitted, the district court denied Marquette's motion improperly relying on the *Oregon Rule*. Instead of relying on the cases that show an unpermitted structure that extends into the navigable waters is an obstruction and rebuts the *Oregon Rule*, the district court found the captain was aware of the loading dock. The district court and Panel erroneously found Marquette did not rebut the presumption of the *Oregon*,[29] and changed the actual holding in *Dow* for this finding.[30]

Both tribunals had the permits, and the drawings before them on the record that establish the unpermitted

29. Appendix B. Specifically, despite the permit drawings.

30. 463 F.2d at 122 (Factually, *Dow* is readily distinguishable).

location extends over 700 feet into the navigable waters, and that this dolphin is constructed another 60-100 feet upriver from the actual mooring dock that was permitted. Under established precedent, this is an obstruction because the dolphin and fender clearly impede the navigable waterway, the Mississippi, and not a private channel used in the *Dow* case. A writ is necessary to clarify the existence of an unpermitted structure does rebut the presumption of the *Oregon Rule*.

3. Other actions result in excessive prejudgment interest awarded from the date of accident despite "peculiar circumstances" and "undue delay."

The incident took place on April 5, 2008.[31] Entergy waited almost three years to file suit, and another four years to hire a repair contractor. Except for the Merrill Marine survey used for bidding purposes and invoiced for $1,619.10 on October 20, 2008,[32] Entergy had not incurred any expense for repair related work until its conditional progress payment for $350,000.00 on October 26, 2012 (1665 days from the date of the incident).[33] On September 29, 2017, the district court awarded prejudgment interest from the date of the incident (3464 days).[34]

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31. ROA.1005-06.

32. ROA.2722.

33. ROA.3921.

34. A typographical error in the judgment says April 8, 2008 is the incident date (ROA.4273). The Findings of Fact, however, shows the incident date as April 5, 2008 (Appendix B, p. 5).

In addition to these delays, other procedural decisions render the prejudgment interest award excessive. Notably, only with admiralty jurisdiction the plaintiff may recover prejudgment interest at the court's discretion. A writ is necessary to ensure the award is not merely automatic, especially when another significant delay occurred because of a dispute between the repair contractor Riverside and Entergy, who as the lessee maintained it was responsible for repairing the dolphin. Further, except for the progress payment, Entergy never paid for any repairs until after losing in state court.

By order dated September 2, 2014,[35] the district court analyzed whether the repair contract was in fact maritime to confer admiralty jurisdiction, and also considered Riverside's alternative argument on whether it could pursue its claims in state court under the savings to suitors clause.

The district court decided the repair contract was not maritime, and there was no admiralty jurisdiction, effectively eliminating the ability of Entergy to claim prejudgment interest from the date of the accident - - April 5, 2008, almost 8 years before trial and subsequent judgment.[36] Specifically, the district court wrote:[37]

> This court grants Riverside's motion to remand. As articulated above, this court lacks subject-matter jurisdiction over the contract between

35. Appendix C.

36. Appendix C, p. 23.

37. Appendix C, p. 23.

> Riverside and Entergy, because the conflict between those two parties involves a contract for repairs as opposed to utilization of vessels in maritime navigation or commerce. In the alternative, if the contract between Riverside and Entergy was a maritime contract, this court would still be compelled to grant the motion to remand because the "savings to suitors" clause protects Riverside's choice of a state court forum.

In the same order,[38] the district court granted Entergy's amendment to increase the damages in the federal litigation to include the cost overruns now subject to a state court resolution. As a result, the case experienced subsequent delays as the state court resolved this dispute.

The state court in Warren County ultimately awarded Riverside $1,005,048.34 in *quantum meruit* damages due in part to Entergy's negligence in not drafting an enforceable contract.[39] It held that "significant contractual ambiguity prevented the parties from achieving a 'meeting of the minds,'" making the contract drafted by Entergy invalid and unenforceable.[40]

With damages being the only issue in the district court case remaining, it was essential for the judge to determine what were the reasonable costs of repair. At trial, Entergy again called experts Manley and Anderson,

38. Appendix C, p. 37.

39. ROA.3938.

40. ROA.3927-28.

who conceded that their opinions remained as stated in the Warren County litigation.

Riverside's President, Lewis Miller, also testified in the federal court proceeding that Entergy did not mitigate its damages because it planned to recover from Marquette:

> "It seemed that nobody was really concerned too much about the cost because Marquette's insurance was going to pay for it all the time, and that's why [Entergy] wanted to go forward in the end… And it was decided, and I understood because of insurance purposes to go with the Bechtel design, even though it was going to cost a lot, but Entergy wasn't going to have to pay for it."[41]

Similarly, Entergy's corporate representative could only testify that she had no idea if the structure was permitted.[42] Regarding prejudgment interest, she also confirmed the dolphin had no practical utility. She confirmed that the over three-year delay in repairing the dolphin had no impact on Entergy's operation of the electrical plant.[43]

Over two years after the state trial concluded, the district court followed the state court's judgment and awarded Entergy a judgment for $1,098,372.40, plus

41. ROA.2165.

42. ROA.4455.

43. ROA.4444-46.

eight percent prejudgment interest compounded annually from the date of the incident.[44] The evidence at trial was undisputed that Entergy paid nothing to repair the fender between the April 5, 2008 incident and its $350,000 conditional progress payment to Riverside on October 26, 2012.[45] Accordingly, Entergy was awarded prejudgment interest on $1,098,372.40 that accrued for 1,665 days during which it paid nothing for repairs and during which it did not need use of the fender for its business operations, a total of $1,182,958.36.

REASONS FOR ALLOWANCE OF THE PETITION

This action involves a maritime property damage claim arising from the collision of barges under tow in the Mississippi River near Vicksburg, Mississippi, and a mooring structure which had been installed in the navigable channel by the owner of an electrical generating plant which used the structure in the past to tie off oil barges when its plant used to use oil as a fuel source for the plant. Entergy did not have any immediate use for the structure. It waited until the three-year anniversary of the casualty to file suit and over four years from the casualty to begin any repairs. Both the district and appellate court agreed the structure was not permitted as mandated by the River and Harbors Act, 33 U.S.C. §403; and rendering it an obstruction under 33 C.F.R. §64.06.

Nevertheless, the towboat operator (Marquette) was held liable for an allision without the burden of proof

44. Appendix B.

45. ROA.3921; Entergy only paid Merrill Marine $1,619.10 for a survey on October 20, 2008, ROA.2722.

being shifted back to Entergy to prove its lack of fault for creating an obstruction. Repairs were awarded based on Entergy having a property interest in the dolphin and, Entergy was allowed pre-judgment interest on its repair expenditure dating back through the four-year period that it did not undertake repairs or demonstrate any use for the dolphin. This result raises three important issues of maritime law that are in conflict between the circuits and with earlier decisions of this Honorable Court, and which are contrary to the fundamental objective of uniformity in this important area of interstate marine commerce. As noted further below, there is precedent from this Court and other lower courts establishing that there is no private property interest in unpermitted structures which are located on property owned or under the exclusive control of the United States Government. Also, no interest attaches to the installation of structures by private parties within navigable water bodies of the United States, and clearly regulated by federal law without any permitting mechanism administered by the Army Corps of Engineers.

Port structures, docks, and mooring pilings such as the one at issue are prevalent across the country, and their intended purpose is to interact with maritime commerce. Accordingly, this case presents a unique opportunity to establish a uniform rule of law between earlier rulings that have denied a property interest in unpermitted land-based structures and conflicting rulings as to whether a property right exists in unpermitted structures affixed within navigable waterways. This matter also presents an opportunity to reconcile conflicting rulings between the circuits on the allocation of the burden of proof in maritime collisions with an unpermitted structure/obstruction, and

the standard of the burden of proof once allocated. Finally, this matter raises an abundantly practical question on the limits of the discretionary authority of a district court sitting in admiralty to award prejudgment interest when the interest is being applied during a multi-year period that the plaintiff did not expend money or demonstrate any need for the unrepaired property.

Circuit cases and Supreme Court precedent emphasize the RHA requirement for strict permit compliance is necessary for a lessee to recover damages.[46] Similarly, under a takings analysis, the failure of a claimant to obtain a permit results in the forfeiture of any claims for compensation.[47] Finally, a lessee, like Entergy, must prove under established basic maritime tort principle that a contracting party must have a proprietary interest to sue an injuring party for unintentional tortious conduct.[48] "A tort to the property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other unknown.[49] Thus, without a valid permit, Entergy as the lessee, is precluded from showing either a property right or a proprietary interest under Supreme Court precedent and decisions from the federal court of claims.

After Marquette rebuts the presumption of the *Oregon* by showing a violation of the RHA, Entergy

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46. See *Chandler-Dunbar Water Power Co.*, 229 U.S. 53 and *Yaist*, 17 Cl. Ct. 246.

47. *Id.*

48. *Robins Drydock & Repair Co. v. Flint,* 275 U.S. 303, 308-309 (1927).

49. *Id.*

cannot rebut the presumption of the *Pennsylvania Rule* and comparative fault principles should have applied at a trial on the merits. At the heart of the rules governing presumptions with a maritime tort and admiralty jurisdiction are the rules of presumption. These include the *Pennsylvania Rule* which requires the violator of a safety statute to show the violation could not have caused the accident, and the *Oregon Rule* which provides a presumption that a moving object, a barge in this instance, is at fault for striking a stationary object, a fender attached to an unpermitted dolphin. Marquette rebuts the presumption of the *Oregon Rule* by showing a statutory violation of the RHA due to the lack of a valid permit for constructing the enormous dolphin No. 4 with the fender attached.[50] Comparative fault principles should have been applied. Instead, both the district court and appellate court mistakenly relied on *Dow*,[51] to find that because the pilot of Marquette's tug, the FRANE, was aware of the dock under Entergy's control as the lessee, Marquette cannot rebut the *Oregon Rule*. Their respective analysis is flawed and ignores the undisputed facts that the barge broke away from the tug further upriver, and that the barge never contacted a permitted structure. Likewise, unlike *Dow,* where the structure was built on private, yet navigable waters, the Mississippi River is obviously a public and critical waterway for marine transportation.

To characterize the need for clarity on the interplay between the presumptions and RHA, *Dow also* holds that with such a statutory violation, comparative fault principles apply. In dealing with three separate collisions, Dow was required to prove negligence, unlike Entergy in

50. *Otto Candies,* 721 F.2d 1034.

51. 463 F.2d at 122.

this litigation. Likewise, under the "peculiar facts," the district court did not allow prejudgment interest from the date of incident and the Fifth Circuit affirmed.[52]

Review is necessary because a lessee is not favored in admiralty, and is also subject to strict proof of a proprietary interest. Second, the contract for repairs is not maritime and, in this case, resulted in the common law determining this critical element of damages - - namely the costs associated with repairs under a common law theory of *quantum meruit*. The decision to find the contract was not maritime resulted in further delays and improperly increased the total award for prejudgment interest, which ultimately totaled more than the judgment on *quantum meruit*. Similarly, use of common law effectively divests the court of admiralty jurisdiction, and should also preclude prejudgment interest under circuit court precedent, including cases where a Jones Act case is decided on the common law side. Finally, the decision on prejudgment interest ignores basic Mississippi principles for awarding prejudgment interest, including identifying when the interest begins to accrue.[53] Typically for a breach of repair contract, prejudgment interest will not be allowed until the date post breach expenses were incurred.[54] The rule in Admiralty should likewise not result in unchecked discretion when significant evidence of undue delay is proven. In this case, Entergy never paid for any repairs until after its dispute with the repair contractor, Riverside, was decided in state court, several years after the accident. To summarily allow prejudgment

52. *Id.* at 121-22.

53. M.C.A. §75-17-7.

54. *See e.g., Bank*, 888 N.E. 2d at 916.

interest after failing to mitigate damages should not be "nigh automatic" in admiralty.[55]

A. REVIEW IS WARRANTED TO RESOLVE A CONFLICT BETWEEN LAND-BASED LAW AND THE GENERAL MARITIME LAW ON WHETHER A PLAINTIFF HAS A PROPERTY INTEREST IN A STRUCTURE PLACED IN A NAVIGABLE WATERWAY AND WHICH LACKS A PERMIT UNDER THE RIVERS AND HARBORS ACT.

Although Entergy originally owned the mooring dolphin and the oil loading dock to which the dolphin was associated, it had engaged in a sale leaseback of the terminal from GE Capital prior to this incident and, therefore, was the lessee of the unpermitted mooring dolphin. Marquette challenges whether Entergy (or anyone else) can have a recoverable property interest in a structure which is placed on navigable waters and not permitted. The rationale begins with the reality that to build or place any structure on navigable waters you must first have a permit. Therefore, you cannot have greater rights to rebuild or repair something that the plaintiff had no right to build or place in the first instance. This position also supports an important policy of promoting compliance with federal law by entities which intend to place structures in navigable waters and where they could be at risk to damage. Under land-based takings law, Entergy could not recover damages because it lacked a compensable interest. Without ownership and a valid

55. *See e.g., Wyatt,* 735 F.2d at 956; *Barton*, 307 F.Supp. at 779-80.

permit, Entergy could not establish a takings and proper proprietary interest to recover any damages under *Robins Drydock*[56] and its progeny.

To illustrate, to establish a compensable interest for a "taking," only the property owner may recover. Specifically, Article 3, Section 17 of the Mississippi Constitution provides that:

> "Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is public."

To further emphasize the necessity for ownership under eminent domain under the Fifth Amendment, other decisions by the United States Supreme Court have mandated that the property owner must also have a valid permit to recover. Notably, *Chandler-Dunbar Water Power Co.*[57] first mandated that the RHA requires a valid permit in order for a riparian land owner to be compensated for structures built on the water. In denying the riparian land owner right to recover under eminent domain to a structure built on water, this Court made key points that remain authority today. Notably, this Court held:

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56. 275 U.S. 303 (1927).

57. 229 U.S. at 57-61.

- The technical title to the beds of navigable rivers of the United States is either in the States in which the rivers are situated, or in the riparian owners, depending upon the local law.[58]

- The title of the riparian owner to the bed of a navigable stream is a qualified one, and subordinate to the public right of navigation and subject to the absolute power of Congress over the improvement of navigable rivers.[59]

- Private ownership of running water in a great navigable stream is inconceivable.[60]

- Every structure in the water of a navigable river is subordinate to the right of navigation and must be removed, even if the owners sustain a loss thereby, if Congress, in assertion of its power over navigation so determines.[61]

The RHA is the Congressional mandate for enforcing these requirements. In order to build a structure on the navigable waters of the United States, the owner of the anticipated structure must obtain a permit:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

> States is prohibited; and **it shall not be lawful to build or commence the building of any** wharf, pier, **dolphin**, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, **except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army** … (Emphasis Added)[62]

There is no right to maintain any structure on navigable waters in the United States which is not compliant with a servitude owned exclusively by the Federal Government. The authority of the Federal Government to exercise control over navigable waters is also established in the Constitution:

> "All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various States and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal Government by the Constitution."[63]

Following the precedent established in *Chandler-Dunbar Water Power Co.*, where a party claims for

62. 33 U.S.C. §403. *See also*, *Verdin v. L&M Bo-Truc Rental, Inc.,* 1992 AMC 93, N. 9 (E.D. La. 1991).

63. *Chandler-Dunbar Water Power Co.,* 229 U.S. at 63.

the loss of an unpermitted structure built over the navigable waters of the United States, that party lacks a compensable interest in the structure.[64]

In *Yaist*, a plaintiff landowner sought damages from the United States for property taken by the government for use in the Everglades National Park. Included in the property taken was a dock which the court determined was located in navigable waters of the United States. Addressing the issue whether the government was required to reimburse the plaintiff landowner for the value of the dock constructed without a COE permit, the court held "no", stating in pertinent part:

> **Since Yaist did not have a Corps of Engineers permit for the dock in 1971**, and the record is void of evidence of a subsequent application for a permit, **the erection of the structure was unlawful** and the United States could have sought an injunction for the removal of the dock. *United States v. Joseph G. Moretti, Inc.,* 478 F.2d 418 (5th Cir. 1973). " One is not entitled to recover elements of value that the Government . . . . might have destroyed under exercise of government authority other than power of eminent domain." *Lemmons v. United States,* 204 Ct. Cl. 404, 423, 496 F.2d 864, 875 (1974) (citing *United States v. Fuller,* 409 U.S. 488, 491-92, 494, 93 S. Ct. 801, 35 L. Ed. 2d 16 (1973)). **Thus, plaintiff has no compensable interest in the dock.** [Emphasis added][65]

64. *Yaist,* 17 Cl. Ct. at 259.

65. *Yaist, supra.* at 259.

Under the facts *accepted by the district court and the Panel, Entergy leased a structure that had no permit. Without a permit, Entergy lacked a proper servitude to maintain the subject dolphin on the navigable waters of the United States, and therefore, it had no property interest on which it had a right to maintain the dolphin or to recover for damage to same.*[66]

As it currently stands, the decision by the Panel creates a conflict with established precedent following the Supreme Court's decision in *Chandler-Dunbar Water Power Co.* as interpreted by the Federal Court of Appeals in *Yaist.* Ignoring the necessity of a proper permit to establish a property interest also creates a conflict with other decisions as to whether proof of a *Pennsylvania Rule* violation rebuts the *Oregon Rule.*[67]

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66. *Id.; Pennzoil Prod. Co. v. Offshore Express, Inc.*, 943 F.2d 1465, 1472 (5th Cir. 1991).

67. *Complaint of Tug Helen B. Moran, Inc.*, 560 F.2d 527, 529 (2nd Cir. 1977) (Applying *Pennsylvania Rule* against Connecticut, which owned the bridge struck, where the state failed to comply with its permit's terms requiring that no "leaves" of the bridge extend over navigable water); *Chicago & Western Indiana R. Co. v. Motorship Buko Maru*, 505 F.2d 579, 584 (7th Cir. 1974) (*Pennsylvania Rule* applied to a bridge that did not open as much as required by its permit.); *Complaint of Wasson*, 495 F.2d 571, 580 (7th Cir. 1974) (*Pennsylvania Rule* should have been applied in the case of a railroad bridge, which violated its federal permit and a state statute).

B. REVIEW IS NECESSARY TO CLARIFY AND RESOLVE A CONFLICT IN THE DECISIONS CITED BY THE DISTRICT COURT AND PANEL OVER THE PROPER BURDEN SHIFTING ANALYSIS UNDER THE *OREGON* AND *PENNSYLVANIA RULES* AFTER A PERMIT VIOLATION IS FOUND.

Initially, there is no question dolphin No. 4 was not properly permitted. Both the district court and Panel agreed finding none of the permits obtained from the Corps of Engineers allowed construction of the No. 4 dolphin.

Second, the permit drawings and photographs show the No. 4 dolphin extends into the navigable channel by more than 600 feet and was built at least 100 feet further upriver than the floating dock, a permitted structure. Under these facts, the structure is considered an obstruction under general maritime law. Thus, if Entergy could rebut the presumption of the *Pennsylvania*, after Marquette rebutted the presumption of the *Oregon*, the only scenario is comparative fault.[68] These key doctrines of general maritime law are easily confused, and a writ is necessary to explain how a permit violation may be used to create questions of comparative fault in an admiralty tort claim.

The district court confused the interaction between the *Oregon Rule* and the *Pennsylvania*, and cited *Dow* for a contrary finding. Despite *Dow*'s holding that a lack of a permit requires proof of negligence, and the *Oregon*

68. *Otto Candies,* at 1034.

Rule is already rebutted, the decisions below ignored this requirement. With a permit violation, also a statutory violation, Entergy could not rebut the presumption of the *Pennsylvania Rule*, and the case required a trial on comparative fault.

These points were made in *Otto Candies.*[69] "Where both parties to a collision are guilty of statutory fault, the heavy presumption that the fault of each contributed to the accident may be rebutted by proof that, in fact, the fault of either of the parties was the sole cause of the accident or, instead, not a substantial contributing cause thereof."[70] If neither party is exonerated, the Court must determine the proportionate degree of fault of both parties.[71]

Other circuit decisions are in conflict with this one. For example, in *United States v. King Fisher Marine Service*, 640 F.2d 522 (5th Cir. 1981), the court recognized that dredging operations may not be undertaken without a permit from the Army Corps of Engineers. In particular, Section 10 of the RHA, 33 U.S.C. §403 "is structured as a flat prohibition *unless* – the unless being the issuance of approval by the Corps."[72] The statutes are mandatory in character and require strict compliance with the permit issued by the Corps of Engineers. Thus, where the defendant dredged to a greater depth of ten feet to

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69. 721 F.2d at 1036.

70. *Id.*

71. *Id.*

72. 640 F.2d at 523, citing *Zabel v. Tabb*, 430 F.2d 199, 207 (5th Cir. 1970), cert denied, 401 U.S. 910, 91 S. Ct. 873, 27 L. Ed.2d 803 (1971)(emphasis in original).

satisfy the "business needs of the company" rather than the four feet authorized by the permit, it violated the Act. In other words, a permit to dredge was insufficient in and of itself. Strict compliance with the permit was required.

C. REVIEW IS REQUIRED TO CLARIFY THAT THE REASONING IN *DOW* DOES NOT EXCUSE A VALID PERMIT FOR STRUCTURES PLACED IN NAVIGABLE WATERWAYS.

Both the Panel and district court created a conflict in decisions discussing obstructions in fact and by law[73] by misapplying *Dow Chemical v. Dixie Carriers.*[74] *Dow* correctly discusses the interplay between the strict compliance measures of the RHA, and the *Oregon* and *Pennsylvania Rules* but these requirements are lost in the decisions below. A writ is necessary to clarify a proper analysis must first determine whether the structure in question violates the RHA.

In creating a conflict with other circuit decisions or RHA, *Dow* is also distinguishable under the facts of this case. In *Dow,* the tug operator, Dixie, was under contract with the chemical plant operator (Dow). The navigable waterway was a private channel between plants and used exclusively by the tug operator. Thus, the initial question

73. *Dow* applies the correct law. It does not stand for the proposition cited. That is where the conflict develops. For example, in *Dow*, the district court found the statutory permit violation rebutted the *Pennsylvania Rule* in one of three separate collisions. After a trial where the plaintiff had to prove negligence, the court found a lack of evidence – not on summary judgment.

74. 463 F.2d at 122.

was whether an indemnity provision applied because liability could only attach for "negligence of the master, crew or other servant of Dixie."

After affirming this finding, the *Dow* panel then addressed the lack of a permit while acknowledging in apparent dicta that:

> Dow's appeal—if it really is an appeal from a judgment, rather than a disagreement with the Trial Court's opinion—results primarily from the determination that its private barge canal constitutes "navigable water of the United States" subject to regulation under the RHA. Like the District Court, we conclude that the characterization of the canal as "public" or "private" is irrelevant. *McKie v. Diamond Marine Co.*, 5 Cir., 1953, 204 F.2d 132, 135; *Dagger v. U.S.N.S. Sands, S.D.W.Va.*, 1968, 287 F.Supp. 939, 942; *Guilbeau v. Falcon Seaboard Drilling Co.*, E.D.La., 1963, 215 F.Supp. 909, 911. The evidence relating to Dow's use of the canal for the purpose of transporting substantial quantities of shell, chemicals and finished products to and from its two plants on a daily basis provides more than ample support for the conclusion that the canal was an instrumentality of interstate commerce subject to Congressional regulation under the Act. *Leovy v. United States*, 1900, 177 U.S. 621, 20 S. Ct. 797, 44 L. Ed. 914.[75]

75. *Id.* at 122.

The reliance on the passage cited usurps *Dow*'s actual holding. Namely, the case stands for the proposition a permit violation actually rebuts a presumption, not the reverse. Specifically, and significantly, because of Dow's statutory violation, the trial judge correctly "declined to apply the usual presumption of fault against the vessel colliding with a fixed object and imposed on Dow the burden of proving negligence."[76] Second, the circuit court affirmed the denial of prejudgment interest from the date of the accident under the "peculiar facts" of the case.

D. A WRIT IS NECESSARY TO CLARIFY THE EVIDENCE NECESSARY TO REBUT THE *PENNSYLVANIA RULE* AFTER A PERMIT VIOLATION IS SHOWN.

Presumptions of the *Oregon* and *Pennsylvania Rules* are relevant in understanding both a property right and the fault allocation. The lack of proof of a valid permit invokes the *Pennsylvania Rule*, and Marquette properly relied on this statutory violation to rebut the presumption of the *Oregon Rule.*

As established in *The Pennsylvania*,[77] where a party violates a statute or regulation intended to avoid collisions, that party must prove its conduct not only might not have caused the accident, but it could not have caused the accident:

> "The Pennsylvania Rule requires the violator of a statute to show not only that its conduct was

76. *Id.* at 121.

77. *The Pennsylvania*, 86 U.S. 125.

> not a contributing cause of the collision, but that it could not have been a cause of the collision. *Id.* at 138. The Pennsylvania Rule clearly applies to bridges as well as vessels."[78]

In *Kaiser*, the Fifth Circuit addressed the impact of a regulatory violation involving marking of a submerged vessel, and the application of the *Pennsylvania Rule* in consequence. Significantly, the court noted:

> [A] "vessel is entitled to the full reach of a navigable stream available to the line of high water, including muds along the shore".[79]

Marquette respectfully submits that nowhere in these holdings or the statutory text on which they are based, is there any evidence of a presumption that a plaintiff is entitled to replace structures in the River. Vessels have the presumptive right to the entire use of the River and dock owners have to show permitted placement of their structure for *both the right to maintain an ownership interest and for the right to maintain a presumption of fault if the stationary object is struck by a vessel.*

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78. *Florida East Coast Ry. Co. v. Revilo Corp.,* 637 F.2d 1060, 1064 (5th Cir. 1981); *Reyes v. Vantage S.S. Co.,* 609 F.2d 140, 143, 145 (5th Cir. 1980) (violation of a regulation prompts application of the *Pennsylvania Rule*); and, *Kaiser v. Traveler's Ins. Co.*, 359 F. Supp. 90, 94 (E.D. La. 1973) (violation of a regulation prompts application of the *Pennsylvania Rule*).

79. Quoting, *Reading v. Pope & Talbot, Inc.,* 192 F. Supp. 663, 667 (E.D. Pa. 1961); *aff'd,* 295 F.2d 40 (CA 3, 1961).

With a permit violation, a writ is necessary to evaluate whether Entergy could rebut the presumption of the *Pennsylvania Rule.* The rule has routinely been applied against owners of bridges and other obstructions to navigation that have been struck by vessels. As was well stated by one court.[80]

"While such a structure may not be injured negligently by a passing vessel with impunity, nevertheless the vessel which strikes it is not presumptively negligent or careless, but the bridge owner is presumptively at fault, unless he can show that the failure to comply with the requirements was not one of the factors or causes which contributed to the injury."[81]

E. A WRIT IS NECESSARY TO RESOLVE WHETHER PREJUDGMENT INTEREST MAY BE RECOVERED DURING THE TIME THE PLAINTIFF FAILS TO MAKE REPAIRS OR SHOW ANY NEED TO USE THE PROPERTY THAT IS DAMAGED, CLEARLY "PECULIAR CIRCUMSTANCES" AND "UNDUE DELAY."

The Panel's decision has allowed prejudgment interest to be awarded for a period of more than four years during

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80. See also: *Florida E.C. Ry. Co.*, 637 F.2d at 1066-67 (applying *Pennsylvania Rule* and comparative fault of 80% to a bridge owner who had violated several laws and regulations pertaining to drawbridges); In *Complaint of Tug Helen B. Moran, Inc.*, 560 F.2d at 529; *Chicago & Western Indiana R. Co.*, 505 F.2d at 584 (*Pennsylvania Rule* applied to a bridge that did not open as much as required by its permit); *Complaint of Wasson*, 495 F.2d at 580 (*Pennsylvania Rule* should have been applied).

81. *Florida E.C. Ry. Co.*, 637 F. 3d at 1066-67.

which the plaintiff did not *begin repairs or pay for the repairs that were later performed*, and during which time the plaintiff did not use the mooring dolphin or its dock for the operation of its electrical plant. The result is contrary to circuit precedent that does not allow prejudgment interest in admiralty for undue delay and expenses not paid, including *Inland Oil and Transp. v. Ark-White Towing,* 696 F.2d 321, 327-28 (5th Cir. 1982).

Awarding prejudgment interest with such evidence of a failure to mitigate and undue delay is an abuse of discretion.[82] Entergy waited three years before filing suit. Entergy never paid for any repairs until 2012.

This court has not addressed prejudgment interest since the *City of Milwaukee*[83] and in that case the focus remained on what constitutes a "peculiar circumstance" to deny prejudgment interest. This court found mutual fault is not an unusual circumstance after *Reliable Transfer Co.*[84] and is not a legitimate basis to deny prejudgment interest in admiralty.

As this decision leaves intact "undue delay" in prosecuting a lawsuit as a legitimate basis in preventing the award of prejudgment interest, the automatic award avoids this analysis.[85] The decision also leaves intact

82. *Inland Oil and Transp. Co.,* 696 F.2d at 327-28.

83. *City of Milwaukee v. National Gypsum Co.,* 515 U.S. 189 (1995).

84. *United States v. Reliable Transfer Co.,* 421 U.S. 397 (1975).

85. *General Motors Corp. v. Devex Corp.,* 461 U.S. 648, 657 (1983).

"peculiar circumstances" as a basis to deny prejudgment interest. In circuit cases, typical examples of "peculiar circumstances" include a damages award substantially less than sought, complex legal and factual issues, and a bad faith claim.[86] Equitable considerations which caution against an award may also constitute peculiar circumstances.[87]

This case is filled with reasons to deny prejudgment interest under this doctrine alone. When the district court divested its jurisdiction on a non-maritime contract and let the state court decide damages, prejudgment interest could not be awarded from the day of the accident. The case went to common law and under circuit precedent, including *Wyatt v. Penrod Drilling Co.,* 735 F.2d 951, 956 (5th Cir. 1984)(following J, Rubin in *Barton v. Zapata Offshore Co.*, 397 F. Supp. 778, 779-80 (E.D. La. 1975), prejudgment interest could not be decided. These cases establish that when a Jones Act case goes to the law side of the court, prejudgment interest is no longer available.

With the repair contract claim remanded to state court, the substantive law in Mississippi also precludes prejudgment interest under M.C.A. §75-17-7 because the courts must also determine when interest begins to accrue. The judgment the district court relied upon was the same judgment rendered by the state court under a theory of *quantum meruit*. As a state court judgment

86. *Nunley v. M/V Dauntless Colocotronis,* 863 F.2d 1190, 1204 (5th Cir. 1989); *Phillips Petroleum Co. v. Stokes Oil Company Co., Inc.,* 863 F.2d 1250, 1258 (6th Cir. 1988).

87. *Orduna S.A. v. Zen-Noh Grain Corp.,* 913 F.2d 1149, 1157 (5th Cir. 1990).

with respect to purely a state law claim, interest must also be determined by state substantive law.[88] Under Mississippi law, prejudgment interest is not allowed unless the plaintiff proves the date and rate interest accrues, which cannot be earlier than the date of filing.[89]

Under Supreme Court precedent, the district court must evaluate both peculiar circumstances and undue delay, including Entergy's failure to bring suit for almost three years after the accident.[90] Similarly, Entergy conceded that their loading facility was unharmed, and the damaged dolphin, its only purpose being something to tie barges to, did not interrupt Entergy's operations.[91] Accordingly, the award on prejudgment interest should be reduced by approximately 60%.

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88. *Sea Hawk Seafoods, Inc. v. Exxon Corp.,* 484 F.3d 1098, 2007 AMC 932 (9th Cir. 2007).

89. Pursuant to M.C.A. §75-17-7, interest cannot accrue earlier than the date of filing. In *Coho Resources, Inc. v. McCarthy,* 829 So. 2d 1 (Miss. 2002) (prejudgment interest is not allowed if the amount owed is unliquidated prior to judgment); *Bank*, 888 N.E.2d at 916-17.

90. *Id*.

91. Appendix B, pp. 4-6 (ROA.4244-46).

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND JUDGMENT, UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (JULY 16, 2018)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-60719
Summary Calendar

ENTERGY MISSISSIPPI, INCORPORATED,

Plaintiff-Appellee,

v.

MARQUETTE TRANSPORTATION COMPANY, L.L.C.; BLUEGRASS MARINE, L.L.C.,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Mississippi.
USDC No. 3:13-CV-879.

July 16, 2018, Filed

Before DAVIS, COSTA, and ENGELHARDT, Circuit Judges.

Appendix A

PER CURIAM:*

A barge being pushed down the Mississippi River by a tow boat came loose and hit a mooring dolphin structure, which is "a cluster of closely driven piles used as a fender for a dock or as a mooring or guide for boats." Entergy Mississippi, which operates the dock as part of a fuel unloading facility near Vicksburg, filed this maritime suit seeking the cost of repairs from the owner (Marquette Transportation) and operator (Bluegrass Marine) of the tow boat. The district court found the Defendants liable at the summary judgment stage and after trial awarded damages of just over $1 million. Defendants assert the following grounds for reversal: (1) they should not have been liable because the dolphin was unpermitted, (2) it was error to allow Entergy to amend its pleading to increase the amount of damages sought, (3) the court should not have used the damages amount from a related state suit, and (4) the prejudgment interest was excessive. Finding no error, we AFFIRM.

I.

The towboat (also called a push boat) M/V ROBERT E. FRANE was towing several barges down the Mississippi in high water conditions. The current took the towboat and barges off their intended path, and the tow allided with the Vicksburg Bridge, which knocked several barges loose. The impact with the bridge caused one of the barges

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

to allide with the mooring dolphin outside the property leased by Entergy. Entergy hired Riverside Construction Company, Inc. to repair the dolphin. High water on the river prevented repairs from commencing for three years.

Shortly after the repairs began but well before they were completed, Entergy sued Defendants. Entergy initially claimed damages "in excess of $190,000." Several years into the repair project, Entergy and Riverside realized a mutual mistake about the scope of the repairs; Riverside believed the contract price covered only the removal of the fender from the water and inspection, but Entergy believed the price was for the entire repair including rehanging the damaged fender on the dolphin structure. Entergy moved to join Riverside to this suit, but Defendants successfully opposed. As a result, the dispute over the cost of repairs between Riverside and Entergy proceeded in state court.

Repair costs continued to mount, so Entergy was twice allowed to amend its complaint to increase its damages. Defendants unsuccessfully sought summary judgment on the ground that they were not liable because the dolphin was an unpermitted obstruction. The court instead granted Entergy's motion seeking summary judgment on liability.

After those liability rulings in federal court, the state court held a bench trial in the suit between Entergy and Riverside to determine the necessary and reasonable cost of the repairs. That court found the reasonable cost to be $1,005,048.34 and awarded Riverside a judgment for that

amount, less money already paid by Entergy. Entergy paid that judgment, and then sought this amount, plus other associated costs, from Defendants in the district court.

The district court conducted a four-day bench trial on damages in September 2016. A year later, it awarded Entergy a judgment for $1,098,372.40 plus prejudgment interest at a rate of eight percent, compounded annually from the date of the loss to the date of the judgment.

II.

Defendants first challenge the summary judgment ruling rejecting their liability argument. They contend that Entergy's failure to obtain a permit for the dolphin means Defendants are not liable for causing the allision.[1]

The general rule is that "[w]hen an unmanned barge strikes a stationary object such as a dolphin[,] . . . the custodian of the barge has the burden to prove that his negligence was not a proximate cause of the allision." *Pillsbury Co. v. Midland Enters., Inc.*, 715 F. Supp. 738, 758 (E.D. La. 1989) (citing *Koch-Ellis Marine Contractors v. Sewerage & Water Bd. Of New Orleans*, 218 F.2d at 772 & n.3 (5th. Cir. 1955)), *aff'd*, 904 F.2d 317 (5th Cir. 1990). That describes this incident, but Defendants cite the

1. Entergy contends that the issue of permitting may not be appealed because it was not raised in the pretrial order. But because the court had already rejected the defense as a matter of law, Defendants did not need to engage in the futile step of raising the issue again as part of the trial. *See Ultraflo Corp. v. Pelican Tank Parts, Inc.*, 845 F.3d 652, 655 (5th Cir. 2017).

Pennsylvania rule, which can shift the burden to Entergy. The *Pennsylvania* rule applies when the stationary object is not authorized to be in the water, in which case the party violating the statute must "show not only that its conduct was not a contributing cause of the collision, but that it could not have been a cause of the collision." *Fla. E. Coast Ry. Co. v. Revilo Corp.*, 637 F.2d 1060, 1064 (5th Cir. 1981) (citing *The Pennsylvania*, 86 U.S. 125, 138, 22 L. Ed. 148 (1873)). The *Pennsylvania* rule applies whether the object struck is a bridge or a vessel. *Fla. E. Coast Ry. Co.*, 637 F.2d at 1064.

Defendants contend that Entergy violated the Rivers and Harbors Act of 1899, 33 U.S.C. § 403 (2012), by having unpermitted dolphins in the river. The Act expressly prohibits any structures, including dolphins, from being built "except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army." 33 U.S.C. § 403. Defendants presented permits obtained from the Army Corps of Engineers pertaining to the property going back to 1965. None of them explicitly cover the dolphin fender system. *See id.*

Contrary to Defendants' assertion, the district court did assume *The Pennsylvania* applied and shifted the burden to Entergy. It held that "[e]ven if the [Corps] never condoned the dolphin fender system, the *Pennsylvania* rule will not shield the defendants for their negligent actions." This is because the crew of the M/V ROBERT E. FRANE was aware of the dolphin's existence and location, and Defendants provided no evidence that the dolphin "actually obstructed navigation, that it was inherently dangerous, or that any change in its design or placement

would have prevented the collisions." *Dow Chem. Co. v. Dixie Carriers, Inc.*, 463 F.2d 120, 122 (5th Cir. 1972). The allision was caused by the M/V ROBERT E. FRANE's previous allision with the Vicksburg Bridge; the captain of the ship admitted as much. The district court properly held Defendants liable. *Id.*

III.

Defendants next argue that the district court abused its discretion in allowing Entergy to twice amend its complaint to increase the amount of damages it sought. It is not clear that Entergy even had to amend as the original complaint requested damages "in excess of $190,000." But assuming Entergy needed to increase the amount it sought, the district court did not err in allowing it to do so. "The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a). The leave should be granted "unless the movant has acted in bad faith or with a dilatory motive, granting the motion would cause prejudice, or amendment would be futile." *Jebaco, Inc. v. Harrah's Operating Co., Inc.*, 587 F.3d 314, 322 (5th Cir. 2009) (citations omitted). There was good reason for the amendment as Entergy and Riverside had a misunderstanding about the scope of the repairs and river conditions substantially delayed the start of the work.

IV.

Defendants raise a couple challenges to the damages award. They first argue it was improper to rely on the state court's determination of the reasonable cost of repairs. We

do not have to decide the application of issue preclusion because the district court noted after its review of the evidence that it would reach the same result even if not legally bound by the state court ruling. We find no clear error in that determination. *See Todd Shipyards Corp. v. Turbine Serv., Inc.*, 674 F.2d 401, 405 (5th Cir. 1982) (noting that damage awards are reviewed for clear error).

The district court also did not err in refusing to deduct depreciation from its award. "[W]here the repairs do not extend the useful life of the property as it existed just before the collision, there should be no deduction for depreciation." *Brunet v. United Gas Pipeline Co.*, 15 F.3d 500, 505 (5th Cir. 1994) (quoting *Freeport Sulphur Co. v. The S/S Hermosa*, 526 F.2d 300, 305-06 (5th Cir. 1976)). The repaired portion of Entergy's dolphin fender system will still need to be replaced whenever the whole structure is replaced; the new materials used to repair the dolphin thus did not change the time frame of that replacement. Depreciation was not required.

V.

Defendants' final argument is that the district court erred in awarding prejudgment interest from the date of the allision. "[I]nterest from the date of loss has long been allowed, of course, in admiralty for property loss." *Alcoa S.S. Co. v. Charles Ferran & Co.*, 443 F.2d 250, 256 (5th Cir. 1971) (internal quotations omitted). The award of interest is, however, ultimately a matter of discretion. *Id.* Even if there were reasons that might have allowed the trial court to limit the time period for prejudgment

interest, we find no abuse of discretion in its following the normal rule.[2]

* * *

The judgment of the district court is AFFIRMED.

2. Entergy requests sanctions against Defendants. This appeal does not rise to the level of frivolity that warrants sanctions under Fed. R. App. P. 38.

APPENDIX B — MEMORANDUM OPINION, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI (SEPTEMBER 29, 2017) (ROA.4241-4273)

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

CIVIL ACTION NO.: 3:13-CV-879-HTW-LRA

ENTERGY MISSISSIPPI, INC.,

Plaintiff,

vs.

MARQUETTE TRANSPORTATION COMPANY,
LLC AND BLUEGRASS MARINE, LLC,

Defendants.

MEMORANDUM OPINION

The plaintiff, Entergy Mississippi, Inc. (hereinafter referred to as "Entergy"), brought this suit against the defendants Marquette Transportation Company, LLC (hereinafter referred to as "Marquette") and Bluegrass Marine, LLC (hereinafter referred to as "Bluegrass"), alleging various maritime causes of action, to wit: negligence; gross negligence; and *res ipsa loquitur*,

growing out an allision[1] between a barge (owned by Marquette) under tow (by Bluegrass) and the number 4 mooring dolphin of the fuel oil floating dock at the Baxter Wilson Electric Plant (owned by Entergy), located at 770 Kemp Bottom Road, Vicksburg, Mississippi.

Entergy brings this suit pursuant to Rule 9(h) of the Federal Rules of Civil Procedure[2] and the Admiralty Extension Act, codified at 46 U.S.C. § 30101[3]. Entergy seeks

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1. An allision is defined as the "running of one ship upon another that is stationary-distinguished from collision." Webster's Third New International Dictionary 56 (1971).

Trico Marine Assets Inc. v. Diamond B Marine Servs. Inc., 332 F.3d 779, 786 (5th Cir. 2003)

2. (h) Admiralty or Maritime Claim.

> (1) How Designated. If a claim for relief is within the admiralty or maritime jurisdiction and also within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim for purposes of Rules 14(c), 38(e), and 82 and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. A claim cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for those purposes, whether or not so designated.
>
> (2) Designation for Appeal. A case that includes an admiralty or maritime claim within this subdivision (h) is an admiralty case within 28 U.S.C. § 1292(a)(3).

Fed. R. Civ. P. 9(h)

3. a) In general. -- The admiralty and maritime jurisdiction of the United States extends to and includes cases of injury or

damages in excess of $1,000,000.00, plus prejudgment interest compounded annually at 8% through the date of judgment and post-judgment interest thereafter at the federal rate until paid in full.

This matter came before this court for a trial on September 12, 2016, and lasted for four (4) days. A "finder of fact" may be a jury duly chosen by the parties after *voir dire*[4] of citizens comprising a *venire*[5], or a "finder

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damage, to person or property, caused by a vessel on navigable waters, even though the injury or damage is done or consummated on land.

(b) Procedure. -- A civil action in a case under subsection (a) may be brought in rem or in personam according to the principles of law and the rules of practice applicable in cases where the injury or damage has been done and consummated on navigable waters.

46 U.S.C.A. § 30101 (West)

4. voir dire (vwahr deer also vor deer or vor dir) n. [Law French "to speak the truth"] (17c) 1. A preliminary examination of a prospective juror by a judge or lawyer to decide whether the prospect is qualified and suitable to serve on a jury. • Loosely, the term refers to the jury-selection phase of a trial. 2. A preliminary examination to test the competence of a witness or evidence. 3. Hist. An oath administered to a witness requiring that witness to answer truthfully in response to questions. — Also spelled voire dire. — Also termed voir dire exam; examination on the voir dire. — voir dire, vb. VOIR DIRE, Black's Law Dictionary (10th ed. 2014).

5. venire (və-ni-ree or -neer-ee or -nir or -neer) (1807) 1. A panel of persons selected for jury duty and from among whom the jurors are to be chosen. — Also termed array; jury panel; jury pool; (redundantly) venire panel.

VENIRE, Black's Law Dictionary (10th ed. 2014).

of fact" may be the judge sitting without a jury. On the latter occasion, the trial will feature a judge who will perform both the traditional roles of the trial judge (ruling on the admissibility of evidence; maintaining decorum in the courtroom and instructing the jury on points of law applicable to the jury's deliberations) and that of the citizen jury (returning a verdict).

This lawsuit was tried before the judge sitting without a jury. Accordingly, during this trial the undersigned rendered fact-finder appropriate services and jury services, such as weighing the credibility of witnesses and exhibits. Now, in that judge and jury-like capacity, this court, pursuant to Rule 52 of the Federal Rules of Civil Procedure[6] announces its findings of fact and conclusions of law. This court's verdict in this civil case is reached, of

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6. (a) Findings and Conclusions.

(1) In General. In 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. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58.

(2) For an Interlocutory Injunction. In granting or refusing an interlocutory injunction, the court must similarly state the findings and conclusions that support its action.

(3) For a Motion. The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion.

course, under the hoary and venerated standard of proof in civil cases of preponderance of the evidence.[7]

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(4) Effect of a Master's Findings. A master's findings, to the extent adopted by the court, must be considered the court's findings.

(5) Questioning the Evidentiary Support. A party may later question the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, moved to amend them, or moved for partial findings.

(6) Setting Aside the Findings. Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

F.R.C.P. 52 (West).

7. preponderance of the evidence -- (18c) The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. • This is the burden of proof in most civil trials, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be. — Also termed preponderance of proof; balance of probability; greater weight of the evidence. See reasonable doubt. Cf. clear and convincing evidence under evidence; burden of proof.

PREPONDERANCE OF THE EVIDENCE, Black's Law Dictionary (10th ed. 2014).

Appendix B

I. JURISDICTION

This lawsuit is an admiralty and maritime case involving damage arising from the operation of a vessel on the navigable waters of the United States of America and, as such, over which this court possesses subject matter jurisdiction pursuant to Title 28 U.S.C. § 1333[8] and Rule 9(h)[9] of the Federal Rules of Civil Procedure. *See Richard v. Anadarko Petroleum Corporation* 850 F.3d 701 (5th Cir. 2017).

II. THE TRIAL

As earlier stated, the courtroom trial of this dispute lasted four (4) days. This court heard from six (6) witnesses, five (5) called by plaintiff Entergy, and one (1) called by the defense. Both parties produced exhibits; the plaintiff submitted forty-three (43) into evidence, while the defense relied upon nineteen (19). Both sides provided proposed findings of fact and conclusions of law, which this court found quite helpful. This court also scheduled a post-trial hearing to engage the attorney on various questions the court had on the evidence. Finally, again

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8. The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

28 U.S.C.A. § 1333 (West)

9. See Footnote 2, *supra*.

post-trial, this court, with the permission and attendance of the parties' attorneys, conducted on March 20, 2017, a view of the damage site, that is, the floating dock and its Dolphin Fender System located at the Baxter Wilson Electrical Plant located in Vicksburg, Mississippi.

III. FINDINGS OF FACT

Entergy leases and operates a fuel unloading facility, bordering the Mississippi River, at the Baxter Wilson Electrical Plant, located at 770 Kemp Bottom Road, Vicksburg, Mississippi. This plant thrives on number 6 fuel oil[10] which, once unloaded from river barges, is kept in special storage tanks.

The facility has a floating dock that extends into the Mississippi River at mile 434. Under its lease[11], Entergy was contractually obligated to maintain the dock and make any repairs.

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10. Number 6 fuel oil is a high-viscosity residual oil requiring preheating to 220–260 °F (104–127 °C). Residual means the material remaining after the more valuable cuts of crude oil have boiled off. The residue may contain various undesirable impurities, including 2% water and 0.5% mineral soil. This fuel may be known as residual fuel oil (RFO), by the Navy specification of Bunker C, or by the Pacific Specification of PS-400.

Perry, Robert H., Chilton, Cecil H. and Kirkpatrick, *Sidney D. Perry's Chemical Engineers' Handbook* 4th edition (1963) McGraw Hill

11. The parties did not enter the lease into evidence and produced no evidence as to from whom Entergy leased the land.

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The floating dock is equipped with and protected by a Dolphin Fender System[12] (hereinafter referred to as "DFS"), which is designed to moor barges in tow during the fuel unloading process. The Bechtel Corporation[13] designed the DFS, hence, this court hereinafter refers to the original design of the DFS as the "Bechtel design". The DFS consists of four (4) dolphin structures constructed of large metal piles driven into the riverbed. Each dolphin is equipped with a protective fender made of wooden timbers and suspended from the metal structure by chains

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12. A dolphin is a man-made marine structure that extends above the water level and is not connected to shore.

Dolphins are usually installed to provide a fixed structure when it would be impractical to extend the shore to provide a dry-access facility, for example, when the number of ships is greater than can be accommodated by the length of the berth/pier.[1]

Typical uses include extending a berth (a berthing dolphin) or providing a mooring point (a mooring dolphin). Dolphins are also used to house navigation aids such as lights or daybeacons, and display regulatory information such as speed limits and other safety information, or advertising. They are also used to protect structures from possible impact by ships, in a similar fashion to boating fenders.[2]

Dolphins typically consist of a number of piles driven into the seabed or riverbed, and connected above the water level to provide a platform or fixing point. The piles can be untreated azobé wood, pressure treated pine wood poles, or steel or reinforced concrete beams, blocks or tubes. Smaller dolphins can have the piles drawn together with wire rope, but larger dolphins are typically fixed using a reinforced concrete capping or a structural steel frame.

13. Bechtel Corporation (Bechtel Group) is the largest construction and civil engineering company in the United States.

and turnbuckles[14]. Rubber bumpers (also referred to as "buckling fenders", "blocks", "Morse Fenders" or "Morse Blocks") are affixed between the fender and the dolphin to provide cushioning when barges are moored at the dock.

On April 5, 2008, a vessel owned by Marquette Transportation Company, LLC and operated by Bluegrass Marine, LLC (collectively referred to as "Defendants") was navigating down river when one of the barges in tow allided with the fender of the northernmost dolphin (dolphin no. 4). The barge struck the outer wooden fender of the dolphin and wrenched it from the dolphin's metal superstructure. The displaced fender fell into the river, becoming partially submerged in the river and suspended by one of the safety chains that was still attached to the dolphin. The fuel oil dock itself and the other three DFSs were not damaged in the incident. The allision was recorded by surveillance cameras situated on the dock at the Baxter Wilson facility.

On May 14, 2008, and June 9, 2008, Entergy sent letters notifying Marquette of the damage. Marquette sent a response letter to Entergy dated June 14, 2008, wherein it denied "all liability for damages of whatsoever kind arising from the . . . incident."

Marquette, though, provided Entergy with the contact information for a business marine surveyor,

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14. "Turnbuckle: a device that usually consists of a link with screw threads at both ends, that is turned to bring the ends closer together, and that is used for tightening a rod or stay" Merriam-Webster Dictionary.

Merrill Marine, to assess the damages to the dolphin. Entergy, thereafter, contacted this business and obtained a Preliminary Damage Survey (hereinafter referred to as the "Merrill Survey") dated October 15, 2008. Exhibit P-2. The Merrill Survey included a "scope of work" to retrieve and repair the fender and estimated the costs of the project to be approximately $85,000.00. Entergy paid Merrill Marine $1,619.10 for the survey.

Merrill Marine could not assess the full extent of the damage or the needed repairs because at the time of its survey most of the displaced fender was submerged. The Merrill Survey specified the replacement of twelve (12) rubber bumpers, while actually a total of sixteen (16) bumpers were sheared-off during the allision. Merrill Marine apparently did not realize that four (4) additional damaged bumpers were attached to the submerged section of the fender.

Entergy used the Merrill Survey to prepare a Request for Proposals and Instructions to Bidders (hereinafter referred to as "RFP"). Entergy copied the "scope of work" from the Merrill Survey and included the following description in its RFP:

> Bidders shall submit a proposal to supply all labor, supervision, tools, equipment, etc. to perform the repairs noted below:
>
> > 1.1 Provide mobilization and demobilization of crew, equipment (including tubboat [sic], crane), etc.

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> Work will be performed for Baxter Wilson Plant located at 770 Kemp Bottom Road, Vicksburg, MS 39180.
>
> 1.2 Provide for proper disposal of all materials as required by the Department of Environmental Quality.
>
> 1.3 Secure rigging to the fender system and pull up the fender system with a crane and set on the crane barge deck to further assess the damages. Findings shall be submitted directly to the Owner's Contract Manager.
>
> 1.4 Replace (12) twelve 2'x2'x3' rubber bumper/fender blocks. Note: Size of rubber bumper/fender blocks estimated.
>
> 1.5 Replace any safety chains damaged from the incident as needed.

Entergy's RFP likewise specified the replacement of twelve (12) rubber bumpers rather than sixteen (16). Using the RFP, Entergy began soliciting competitive bids for this project in December, 2008.

Entergy received a bid from a local marine contractor, Riverside Construction Company, Inc. (hereinafter referred to as "Riverside") and another marine contractor from New Orleans, Boh Brothers Construction Co., LLC

(hereinafter referred to as "Boh Brothers"). Riverside's bid proposal was a "time and material not to exceed estimate"[15] of $176,585.52. Boh Brothers' bid proposal was a "time and material budgetary estimate"[16] of $589,900. Entergy provided copies of the bid proposals to Marquette. Marquette acknowledged that Riverside was the low-bidder but did not otherwise involve itself in the bid process.

On September 9, 2009, Entergy entered into a contract with Riverside which incorporated Riverside's "not to exceed" bid of $176,585.52. Consistent with the RFP and the Merrill Survey, the contract described the scope of work for the project in Section 3.1, as follows:

> 3.1.1 Provide mobilization and demobilization of crew, equipment (including tugboat, crane, etc.)
>
> 3.1.2 Secure rigging to the fender [system] and pull up the fender system with a crane and set on the crane barge deck (on barge supplied by Riverside for that purpose) to further assess the damages of fender system.

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15. A bid not to exceed a set dollar figure for the scope of work contemplated by the parties to the bid.

16. A time and material budgetary estimate is a proposal based on what the contract believes will complete the scope of work, but is subject to over or under runs of both time and materials. The price, therefore, is subject to more fluctuation than that of a not to exceed bid.

> 3.1.4 Replace (12) twelve rubber bumper/fender blocks with a quantity of four (4) Morse 48 inch Buckling Column Fender #E46018, and replace a quantity of eight (8) each Morse 48 inch Buckling Column Fender #E46020.
>
> 3.1.5 Replace damaged safety chains as required.
>
> 3.1.6 Provide for proper disposal of all material as required by the Department of Environmental Quality.

Section 3.2 of the contract incorporated Riverside's proposal to furnish certain equipment: Crane Barge MM107 with American 9270 crane and crew; utility boat, mobile crane and/or manlift as needed; and miscellaneous tools and equipment as required. Section 3.3 of the contract incorporated Riverside's specification that the job would entail two (2) separate mobilizations/demobilizations—the first to lift the fender and the second to occur when the river level was at or below 10 feet.

Unbeknownst to the parties at the time they entered into the contract, each had a fundamentally different understanding of the scope of work and costs associated with this project. Entergy's understanding was that the contract called for a complete repair—retrieving the fender and reattaching it to the dolphin. Riverside's understanding was that the contract addressed only "phase 1" of the project—retrieving the fender and placing it on a barge for further assessment. It was not until several years later when the project was nearing

completion that the parties realized their significant misunderstanding. As discussed in more detail below, this misunderstanding evolved into litigation between Entergy and Riverside concerning the contract and the reasonable and necessary costs of repairs.

The contract originally specified a completion date of December 1, 2009. Due to historically high river levels and other delays, the completion date was extended by subsequent written amendments. By letter dated October 18, 2010, Entergy notified Marquette that the repair work had not yet begun due to the high river levels and that the project would not be completed before the three-year anniversary of the allision. In this letter, Entergy also asked Marquette to pay the amount of Riverside's repair estimate, pending a final reconciliation once the project was completed. Marquette did not respond to this request, or otherwise involve itself in the repair project. Thereafter, on March 28, 2011, Entergy filed this lawsuit against Marquette alleging: negligence; gross negligence; and *res ipsa loquitur* resulting from the allusion between the M/V Robert E. Frane and the number 4 dolphin of the Dolphin Fender System.

As part of its initial work on the project, Riverside procured twelve (12) new rubber bumpers from a third party supplier, Morse Rubber, LLC. On June 2, 2011, Riverside invoiced Entergy $57,183.01 for the material costs of the twelve (12) bumpers. The parties amended Section 4 of the Contract to account for the increase of $5,420 due to the cost of the bumpers.

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On or about September 30, 2011, Riverside made its first mobilization to the site. Although the river conditions were not ideal at that time, Riverside decided to proceed with attempting to lift the fender with its 150-ton crane barge (as specified in the contract). Riverside's president, Lewis Miller (hereinafter referred to as "Miller"), testified that he decided to abort this lift attempt for safety reasons once he felt the side-currents and weight of the fender. At this point, Miller decided to hire a subcontractor, Big River, to lift the fender at a later date with a larger "A-frame" crane. As it turned out, Big River was not available to make the lift for several months.

Miller testified that, while waiting on Big River to arrive, he had a conversation with Entergy's project manager, Don McArthur (hereinafter referred to as "McArthur"), about the status and direction of the project. Miller testified that during this conversation McArthur told him to proceed with reattaching the fender on the dolphin tower as opposed to simply placing it on a barge for further assessment (as specified by the contract). Miller viewed this instruction as a significant change in the scope of the work. Miller allegedly told McArthur that the costs of reattaching the fender would be "astronomical" and suggested that Entergy consider an alternative "sacrificial piling" system.

Entergy sent one of its engineers, Wayne Lofton (hereinafter referred to as "Lofton"), to review a small-scale model of the "sacrificial piling" system at Riverside's office. Based on Lofton's assessment, Entergy did not consider this system to be a viable alternative due to

structural concerns as well as concerns that replacing the damaged fender with an entirely different system would complicate matters with Marquette.

Ultimately, Entergy decided to restore the dolphin to its pre-allision condition in accordance with the original Bechtel design. Although Miller believed that the "sacrificial piling" could have been retrofitted to function with the other three (3) dolphins and that this would have been a less costly alternative to reattaching the fender, Miller/Riverside did not provide any design drawings, plans or cost comparison for Entergy to consider.

Meanwhile, Entergy's lawsuit against Marquette was proceeding in this court. On January 19, 2012, Miller had a meeting at the site with one of Entergy's expert witnesses, William Manley (hereinafter referred to as "Manley"), to discuss the status of the project. Miller and Manley mentioned that Riverside was still waiting on the "A-frame" crane and that in the meantime Riverside intended to construct "falsework"[17] to use as a temporary support once the fender was hoisted out of the water. Manley testified that he was familiar with the term "falsework" as used in the marine construction industry and that he had no particular concerns at that time with Riverside's proposed plan of action.

17. Merriam-Webster defines falsework as "[a] temporary construction work on which a main work is wholly or partly built and supported until the main work is strong enough to support itself."

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In May, 2012, in anticipation of the arrival of Big River's crane, Riverside mobilized to the site again and began constructing the falsework. Miller testified that the falsework construction involved an intricate and labor-intensive process of installing steel beams on the dolphin structure at precise locations. Miller added that the costs associated with the falsework were fairly substantial due to the manpower and equipment involved. Miller concluded, though, that these costs were reasonable and necessary and that no other viable means existed for temporarily hanging the fender.

On August 7, 2012, Big River arrived at the site, lifted the fender and hung it on the completed falsework. Riverside then started the process of assessing what materials were needed in order to re-attach the fender to the dolphin. During this process, Riverside realized that four (4) additional rubber bumpers had been damaged and had to be replaced.

Meanwhile, on August 10, 2012, Marquette filed a Motion to Dismiss Entergy's complaint under Fed.R.Civ.P. 12(b)(6)[18] as well as a Motion for Partial Summary Judgment. Entergy likewise filed a Motion for Partial

18. (b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

> (6) failure to state a claim upon which relief can be granted;

Fed. R. Civ. P. 12

Summary Judgment. Rule 56[19] of the Federal Rules of Civil Procedure, served as the juridical foundation for these motions.

On August 28, 2012, Riverside personnel met with Entergy's engineer, Loftin, to discuss the procurement of the four (4) additional bumpers and the need to make some structural changes to the rigging. *See* Exhibit P-9. Through emails, these issues were ultimately directed to the attention of Entergy's procurement specialist, Nancy Parker (hereinafter referred to as "Parker").

On August 31, 2012, Parker sent an email to Riverside, inquiring about the proposed structural changes and how they would impact the "not to exceed" contract--that is, whether these changes would increase or decrease the costs on the project. Riverside responded to Parker that it would address her request once it had compiled its costs to date on the project. The Riverside contract did not require Riverside to submit an invoice to Entergy until the completion of the project, nor did it require other periodic cost reporting.

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19. (a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense--or the part of each claim or defense--on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

Fed. R. Civ. P. 56.

Riverside and Entergy representatives next met on October 15, 2012, to discuss the status of the project. During this meeting, Riverside explained its position that this project had two (2) separate phases: "Phase 1" being the retrieval and assessment of the fender as per the contract and "Phase 2" being the reattachment of the fender as instructed by McArthur after the initial lift attempt. Riverside also informed Entergy that its costs to date were approximately $1.4 million dollars and that it anticipated additional costs to reattach the fender once the necessary rigging materials were procured.[20] At this point, it became apparent to both Entergy and Riverside that each had a fundamental misunderstanding and disagreement about the meaning and scope of the contract.

Meanwhile, on October 17, 2012, this court held a status conference during which it announced rulings on the pending motions filed by Marquette and Riverside.

This court's rulings included an adjudication as to Marquette's liability for the accident and the damages. At this time, Entergy informed Marquette and this court that a dispute had recently arisen between itself and Riverside regarding the costs of repairs and that this dispute was likely to have an impact on the amount of

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20. Entergy ultimately approved and purchased additional chains, turnbuckles and shackles from DCL Rigging. These additional materials were not specified in the contract but were necessary to reattach the fender to the dolphin. The cost of these additional materials was $91,704.90. Entergy also paid $18,721.58 to procure the additional four (4) rubber bumpers which were likewise not specified in the contract.

damages that Entergy would be seeking to recover from Marquette.

In order to finalize the repairs and return dolphin no. 4 to service, Entergy agreed to make a conditional progress payment of $350,000 to Riverside, while reserving its right to contest the amount ultimately owed. Riverside accepted and reserved its rights to seek full payment of its costs. Riverside completed the repairs in November, 2012, and, thereafter, it submitted to Entergy a final invoice indicating a balance due of $1,303,041.55 (after deducting the $350,000 conditional progress payment and the bumper costs).

On November 21, 2012, Entergy filed a Motion for Leave to Amend its First Amended Complaint to reflect the change in the cost of repairs arising from the dispute with Riverside and to preserve its right to recoup Riverside's additional repair costs from Marquette. Also, on January 31, 2013, Entergy filed a motion to join Riverside as a necessary party in this case.

Although this court had found Marquette liable for the reasonable repair costs, Marquette opposed Entergy's request to join Riverside as a party in this case. Marquette argued that if Riverside were joined, then Entergy could "sit back" with the knowledge "that Marquette would be required to pay the final repair costs" and would not have any "real, true interest in litigating its own dispute with Riverside . . .." Entergy, taking a contrary position, posits that Marquette obviously wanted Entergy to litigate its dispute with Riverside so it could continue to "sit back"

and claim that the "not to exceed" contract amount was the extent of its liability for the damages. Indeed, continues Entergy, Marquette opposed Entergy's motion to amend the amount of its damages, claiming that Entergy was bound to the not-to-exceed contract amount.

On February 4, 2013, Riverside filed a lawsuit against Entergy in the Circuit Court of Warren County, Mississippi (hereinafter referred to as "Riverside Litigation"). *See Riverside Construction Co. v. Entergy Mississippi, Inc.*, Civil Action No. 3:13-cv-876-HTW-LRA, docket no. 1, exh. 2. Therein, Riverside sought full payment for its repair work under the theories of breach of contract and *quantum meruit*. On March 6, 2013, Entergy removed the Riverside Litigation to this federal forum, arguing that the contract between itself and Riverside raised questions of federal maritime law. On March 21, 2013, Riverside sought a remand of the Riverside Litigation to state court on the grounds that the contract was not maritime in nature and, therefore, this court lacked subject-matter jurisdiction over the contract dispute between Riverside and Entergy. This court consolidated this case *sub judice* with the removed Riverside Litigation because they involved common questions of law and fact, but mindful that Riverside had outstanding a motion to remand, to be heard once the parties had completed briefing and appeared for oral argument.

On September 2, 2014, this court entered an Order, remanding the Riverside Litigation to state court and denying Entergy's request to join Riverside as a necessary party. This court found that it lacked subject matter jurisdiction over Entergy's dispute with Riverside because

the contract was not maritime in nature. This court, however, granted Entergy's Motion for Leave to Amend as to its damages, noting:

> [T]his case has now become one about damages owed to Entergy. The question thus becomes what damages are reasonable. That amount may be the not-to-exceed amount in the contract between Entergy and Riverside, the ultimate cost of repairs, or somewhere in between. This will be a question for the trier of fact, and Marquette and Entergy will be permitted to present evidence and arguments in support of their competing visions of what damages are reasonable. This court will permit Entergy to amend its complaint accordingly.

Id. at pg. 36.

Entergy filed its Second Amended Complaint on September 10, 2015. Therein, Entergy alleged that it had paid $517,609.55, for repairs to the date, as follows:

> Twelve Rubber Bumpers $57,183.01
> Four Additional Bumpers $18,721.58
> Reservation of Rights Payment $350,000.00
> DCL Rigging & Mooring $91,704.96

Entergy also alleged that Riverside was seeking to recover the additional amount of $1,303,041.56 as the balance due on its final invoice. As for its claimed damages against Marquette, Entergy, in its Second Amended Complaint, included the following allegations:

45. In part, Entergy seeks $293,319.55 from Marquette based on the following repair costs:

Riverside Contract	$176,590.00
Increased Cost of Twelve Bumpers	$6,303.01
Four Additional Bumpers	$18,721.58
DCL Rigging & Mooring	$91,704.96
[Total]	$293,319.55

46. Entergy further seeks damages for all of the reasonable and necessary repair costs to the dock and Dolphin Fender System, currently estimated to be in excess of $293,319.55, including without limitation, the T&M costs pertaining to the additional four bumpers and chains added to the repair of the Dolphin Fender System, any and all reasonable and necessary repair costs related to any modification of the Contract as alleged by Riverside, reservation of rights payments, any damage assessment expenses, attorneys' fees, costs of these proceedings, and any other damages to be shown at a trial of this matter.

47. Alternatively, Entergy seeks any additional damages that this court may

> deem appropriate after [the] resolution of Entergy's claims between Riverside that are currently being litigated in state court. As such, Entergy seeks additional damages from Marquette to the extent this court determines that necessary and reasonable repairs were made to the Dolphin Fender System outside of the Contract. Should Riverside be awarded any amount greater than $293,319.55, Entergy seeks those additional damages from Marquette at a trial of this matter as part of the necessary and reasonable repair costs.

[Docket no. 141].

On March 27, 2015, this court entered an Order confirming the rulings which it previously had announced from the bench on October 17, 2012. [Docket no. 123]. This court confirmed that it had subject matter jurisdiction over Entergy's complaint against Marquette and that Marquette was liable for the damages. In making its rulings, this court also rejected Marquette's arguments that Entergy, as the lessee of the dock, lacked standing and that the damaged dolphin structure was not properly permitted by the Army Corps of Engineers[21] (hereinafter referred to as "ACOE").

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21. The [United States Army Corps of Engineers] is responsible for investigating, developing and maintaining the nation's water and related environmental resources.

http://www.usace.army.mil/

Appendix B

On April 9, 2015, Entergy filed a Motion to Stay this case while the Riverside Litigation was progressing in state court. Entergy subsequently withdrew this motion, and it was denied as moot by an Order dated August 13, 2015. The trial of this matter was originally scheduled for January 16, 2016, but was postponed several times by agreement of the parties.

A bench trial of the Riverside Litigation was conducted over the course of eight (8) days in November and December, 2015 before the Honorable James Chaney, Circuit Court of Warren County, Mississippi in Cause No. 12-00016. Judge Chaney issued an Amended Opinion and Order in the Riverside Litigation on March 31, 2016. A Final Judgment was entered on April 12, 2016 in Riverside's favor in the amount of $579,143.75.

Judge Chaney ruled that there was "no valid, enforceable contract" between Riverside and Entergy because "significant contractual ambiguity prevented the parties from achieving a meeting of the minds." Judge Chaney then considered Riverside's alternative claim of *quantum meruit* "to determine what were the reasonable and necessary costs incurred."[22]

Based on Judge Chaney's thorough opinion, it is clear that he carefully considered the testimony and evidence concerning the repair work that Riverside performed and

22. *Id.* at pg. 17. Judge Chaney noted that under quantum meruit, "[t]he measure of recovery is the 'reasonable value of the materials or services rendered.'" Id. (*citing Estate of Johnson v. Adkins*, 513 So.2d 922, 926 (Miss. 1987)).

the associated costs. After deducting certain billing errors and specific costs which he found to be unreasonable, Judge Chaney calculated the "reasonable value of the materials and services rendered" to be $1,005,048.34, as follows:

Explanation	Amount
Final Riverside Invoice during the trial of the *Riverside* Litigation[23]	$1,729,296.15
Overbilling Conceeded by Riverside	-$28,213.01
Typographical Error admitted by Riverside	-$350.00
Billing Errors asserted by Entergy	-$12,659.38
Unreasonable Charges not included in Riverside's original bid to Entergy	-$447,112.50
Unreasonable Profit Mark-up on materials	-$28,425.73
Unreasonable Overtime Charges	-$42,529.39
Unreasonable Double-billing for crane barge/crew and additional labor	-$164,957.80
Subtotal	$1,005,048.34

23. During the Riverside trial, Riverside introduced a revised summary of charges to correct certain billing entries and errors in the final invoice it previously provided to Entergy in November, 2012. See Exhibit P-1. This revised summary was identified and admitted as Exhibit P-63 in the Riverside trial.

Appendix B

Payment made by Entergy under Reservation of Rights	$350,000.00
Payment made by Entergy for Morse Bumpers	$75,904.59
Subtotal of Payments made by Entergy	**$425,904.59**
Total Due to Riverside	**$579,143.75**

Entergy paid the Judgment amount to Riverside on or about May 3, 2016, and a Satisfaction of Judgment was entered to reflect the same. Neither Entergy nor Riverside appealed Judge Chaney's ruling.

During the trial of this matter *sub judice*, Entergy clarified the damages that it is seeking against Marquette, as follows:

Whom Paid	Explanation Of Cost	Amount
Riverside/Morse	For Morse Rubber Bumpers	$57,183.01
Riverside/Morse	For Additional Buckling Column Fender	$18,721.58
Riverside	For Reservation of Rights Payment	$350,000.00
	Subtotal of Payments to Riverside/Morse	**$425,904.59**

Appendix B

Final Judgment	*Riverside* Litigation	$579,143.75
	Subtotal of Riverside/Morse Payments and Final Judgment	**$1,005,048.34**
Merrill Marine	Merrill Survey Cost	$1,619.10
DCL Mooring and Rigging	Replacement Turnbuckles and Safety Anchor Shackles	$91,704.96
	Subtotal of Additional Vendors	**$93,324.06**
	TOTAL	**$1,098,372.40**

Entergy has paid $1,098,372.40 out of pocket for the costs of repairs and seeks this amount in damages from defendants. The primary question before this court is whether the amounts paid by Entergy fairly represent the reasonable and necessary costs to repair the damages caused by defendants.

IV. CONCLUSIONS OF LAW

A. The Reasonable and Necessary Costs of Repairs

In maritime cases, the plaintiff is generally entitled to the costs of repairs needed to restore damaged property to

its condition before the collision. *Tug June S v. Bordagain Shipping Co.*, 418 F.2d 306, 307 (5th Cir.1969). Stated differently, "a vessel owner at fault in a maritime collision is responsible for the full cost of necessary and reasonable repairs to the damaged structure. . .." *Marathon Pipe Line Co. v. Drilling Rig Rowan/Odessa*, 761 F.2d 229, 233 (5th Cir. 1985). Damages must only be proven with "reasonable certainty" and mathematical precision is not required since reasonable approximations will suffice. *Great Lakes Bus. Trust v. M/T ORANGE SUN*, 855 F. Supp. 2d 131, 149 (S.D.N.Y. 2012), *aff'd*, 523 Fed. Appx. 780 (2d Cir. 2013)(*citing Story Parchment Co. v. Paterson Parchment Paper Co.,* 282 U.S. 555, 563, 51 S.Ct. 248, 75 L.Ed. 544 (1931) ("it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference, although the result be only approximate"); *United Transp. Co. v. Berwind–White Coal Mining Co.,* 13 F.2d 282, 283 (2d Cir.1926) (noting that "approximate accuracy is all that can be reasonably expected")).

Entergy seeks to recover the amount of $1,098,372.05 from Marquette. Entergy argues that this amount is what it actually paid to restore the damaged fender to its pre-allision condition and that this amount fairly represents the reasonable and necessary costs of repair.[24] Entergy also argues that, in determining the amount of damages to assess against Marquette, this court should give

24. Miller testified that, although Judge Chaney made certain reductions, all of Riverside's charges were reasonably and necessarily incurred in order to restore the damaged dolphin to its pre-allision condition.

substantial weight, if not preclusive effect[25], to Judge Chaney's ruling as to the reasonable and necessary costs incurred by Riverside.

Marquette, on the contrary, argues that the amount sought by Entergy is unreasonable. Over Entergy's objection at trial, Marquette offered an opinion with lower amounts from its expert witness, Fred Budwine (hereinafter referred to as "Budwine"). He testified that the reasonable repair costs for this project should have been in the range of Riverside's initial bid of $176,000, a figure not disclosed in any of Budwine's four (4) expert reports.

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25. The preclusive effect of a judgment is defined by claim preclusion and issue preclusion, which are collectively referred to as "res judicata." Under the doctrine of claim preclusion, a final judgment forecloses "successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit." *New Hampshire v. Maine*, 532 U.S. 742, 748, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001). Issue preclusion, in contrast, bars "successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment," even if the issue recurs in the context of a different claim. *Id.*, at 748-749, 121 S. Ct. 1808, 149

L. Ed. 2d 968. By "preclud[ing] parties from contesting matters that they have had a full and fair opportunity to litigate," these two doctrines protect against "the expense and vexation attending multiple lawsuits, conserv[e] judicial resources, and foste[r] reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States*, 440 U.S. 147, 153-154, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979).

Taylor v. Sturgell, 553 U.S. 880, 892, 128 S. Ct. 2161, 2171 (2008).

Suggesting that this court should disallow or reduce Entergy's recovery, Marquette also raises several other issues. First, Marquette claims that it was unreasonable for Entergy to incur any repair costs because the structure was not properly permitted. Next, Marquette claims that Entergy is at fault because it failed to enter into an "enforceable" contract with Riverside for a full repair and because it otherwise failed to manage a "simple repair project." Finally, Marquette claims that depreciation and/or betterment should offset any damage award because new materials (bumpers) were installed as part of the repairs. Each one of these challenges will be discussed below.

B. The Permit Issue

After the close of Entergy's case in chief, Marquette moved for a directed verdict, arguing, *inter alia*, that it was unreasonable for Entergy to repair a structure that was not properly permitted by the ACOE. This court previously addressed this permitting issue in the context of its liability determination and found Marquette's arguments to be unpersuasive [Docket no. 123]; still this court will repeat the challenge here and explain its prior ruling.

In its prior ruling, this court noted that the ACOE permit governing Entergy's dock provided authorization to "construct a fuel unloading facility . . . [to] consist of a floating platform, walkway, piping and pertinent auxiliary equipment."[26] Marquette has not presented any evidence

26. *Id.* (*citing* Docket No. 69-1). This court may take judicial notice of the ACOE permit issued to Entergy. *See* Fed. R.Civ.P. 201(b)(2); *Mack v. South Bay Beer Dist., Inc.*, 798 F.2d 1279, 1282

to convince this court that the DFS lacked a proper permit from the ACOE.

When Marquette challenged the permit of the dock in its previous motion for summary judgment, this court found the *Pennsylvania Rule*[27] did not apply, but the *Oregon Rule*[28] did. This court then discussed the application of both the *Pennsylvania Rule* and the *Oregon Rule*. In that discussion this court specifically found that the captain of the Bluegrass vessel knew about the existence of the dolphins, was familiar with that stretch of the river, and never lost control of his vessel; and the dolphin at issue *sub judice* was not at fault. Bluegrass and Marquette were.

Moreover, this court notes that Marquette did not raise any unresolved issue regarding the permit for the DFS in the Pre-trial Order. Even if this issue had been properly preserved, Marquette has not cited any authority for the proposition that it is *per se* unreasonable for an owner to repair unpermitted structure. Indeed, the fact that

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(9th Cir.1986) (a court may take judicial notice of official reports and records of federal agencies and administrative bodies).

27. *The Pennsylvania*, 19 Wall. 125, 86 U.S. 125, 136, 22 L.Ed. 148 (1873)(where the US Supreme Court found that a statutory violation places a rebuttable presumption on the party who violated the law.).

28. *The Oregon*, 158 U.S. 186, 192-93, 15 S.Ct. 804, 807, 39 L.Ed. 943 (1895)(where the US Supreme Court found that where a moving ship allides with a stationary object, the law presumes that the moving vessel is at fault.).

a damaged structure may lack a proper permit is only relevant to the allocation of the ultimate burden of proof as to liability.[29] As earlier stated, this is an issue which this court already has resolved.

C. Entergy's Alleged Default

Marquette argues that Entergy failed to mitigate its damages by failing to ensure that it had a valid, enforceable contract with Riverside. Marquette, though, has not presented any evidence that a contract was required, or that it had a right to rely on the existence of this contract in terms of limiting its ultimate liability to Entergy. Marquette denied liability for the damages and took no part in the RFP process, or the resulting contract. Thus, the fact that the contract was ultimately held by Judge Chaney to be unenforceable as between Riverside and Entergy is of no consequence as to the issue before this court which concerns the reasonable costs of repairs. As this court previously has recognized, the contract amount is arguably relevant to the reasonable costs of repairs, but it is not necessarily dispositive. *See* Docket No. at 114 at pg. 36. Moreover, Marquette did not present any expert testimony to demonstrate how a valid, enforceable contract (one which entailed a complete and total repair) would have ultimately affected or reduced the reasonable costs of the project.

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29. [Docket no. 123](discussing the *Pennsylvania* rule which assigns the burden of proving liability to the party who violated the law). Once this court resolved the issue of Marquette's liability, the permitting issue became irrelevant and cannot be re-urged as a bar to Entergy's damages. To hold otherwise would convert the *Pennsylvania* rule into an absolute bar on the recovery of damages.

This court finds that Entergy acted reasonably in challenging Riverside's costs of $1.7 million dollars and in seeking to enforce the not-to-exceed contract. Entergy's efforts were partially successful in reducing Riverside's costs by approximately $700,000 to an amount which Judge Chaney found to be reasonable. Having litigated the issue of Riverside's reasonable cost to a judgment, Entergy, in this court's eye acted reasonable in paying the amount thereof.

Although Budwine did not address this particular issue in his reports or during his testimony, Marquette seems to suggest that it was unreasonable for Entergy to rehang the fender after Riverside recommended "sacrificial pilling" as a less costly alternative. Entergy, however, was not obligated to accept a less costly alternative (which may not have been structurally compatible with its existing system). Entergy's efforts to restore the dolphin to its pre-allision condition in accordance with the original design specifications were entirely reasonable. The fact that the costs of restoration were substantially more than an alternative system does not establish that such costs are unreasonable.

D. Betterment and Depreciation

In *Gulf States Utilities Co. v. M/V SS Chilbar*, 986 F.2d 1418 (5th Cir. 1993), the Fifth Circuit upheld the district court's ruling that betterment does not apply as an offset where the repairs do not add value to, or extend the life of, the structure:

The fact that repairs may utilize new materials does not affect the general rule in maritime cases. This well-settled [and hoary] principle was recognized [over a century ago] in *The Baltimore*, 75 U.S. (8 Wall.) 377 (1869), which stated:

> [W]here repairs are practicable the general rule followed by the admiralty courts in such cases is that the damages assessed against the respondent shall be sufficient to restore the injured vessel to the condition in which she was at the time the collision occurred; and in respect to the materials for the repairs the rule is that there shall not, as in insurance cases, be any deduction for the new materials furnished in the place of the old, because the claim of the injured party arises by reason of the wrongful act of the party by whom the damage was occasioned .... **Id.* at 385.

This principle, that plaintiff's recovery need not be reduced on account of new materials used for repair, has continued into this century. *See e.g. Phillips Petroleum Co. v. Stokes Oil Co.*, 863 F.2d 1250 (6th Cir.1988). In *Stokes*, the crew of a vessel [helped cause] a fire that damaged a terminal facility. The court assessed damages based on the cost of restoring the

> damaged terminal to its condition before the fire. The court rejected an argument to reduce the damages on a "new for old" theory, noting that "usually repairs are made with new materials." *Id.* at 1257. While the substitution of new materials for old does not equate with an unjust windfall, appellants note that courts will reduce plaintiff's recovery when repairs constitute a betterment to a structure and enhance its useful life. *See e.g. Pizani v. M/V Cotton Blossom*, 669 F.2d 1084, 1088 (5th Cir.1982); *Freeport Sulphur Co. v. S/S Hermosa*, 526 F.2d 300, 304 (5th Cir.1976). Where repair costs form the basis of the damage award, the court must determine whether the repair adds new value to or extends the useful life of the property. *Pillsbury Co. v. Midland Enterprises, Inc.*, 715 F.Supp. 738, 764 (E.D.La.1989), aff'd, 904 F.2d 317 (5th Cir.), cert. denied, 111 S.Ct. 515 (1990).

Budwine conceded that the repairs did not extend the useful life of or add value to either dophin no. 4 or the DFS as a whole. Budwine contends, though, that some unspecified reduction to the repair costs is necessary because new bumpers were installed. Still, based on the authorities cited above, this court is satisfied that the law is clear: there is to be no deduction for betterment where the use of new materials in connection with repairs does not extend the useful life of or add value to the structure. This court so finds here; accordingly, this court declines to apply any deduction for alleged betterment.

As for depreciation, Marquette has failed to present any evidence to support any such reduction. In his report, Budwine suggested that "Marquette should consider a depreciation approach to settlement of unrepaired damage." When asked at trial about depreciation, Budwine admitted that he had made no calculation for depreciation. Accordingly, this court declines to apply any reduction for depreciation.[30]

Determining the reasonable and necessary repair costs entails an assessment of the time (labor and equipment) and the materials involved in this project. Marquette does not challenge the reasonableness and necessity of the materials (rubber bumpers and rigging) which were procured to rehang the damaged fender. Nor does Marquette challenge whether the actual costs of these materials were unreasonable. Accordingly, this court finds that Entergy is entitled to the full cost of these materials as part of its damage award: Morse $57,183.01; Morse $18,721.58 and DCL $91,704.96 (total $167,609.55).

Likewise, Marquette does not challenge the reasonableness and necessity of obtaining a preliminary damage survey from Merrill Marine. Nor does Marquette

30. In a recent case involving repairs to a dolphin damaged from an allision, the court declined to reduce the damages for depreciation because the repairs did not enhance the value or extend the life of the structure. *Paktank Corp.-Deer Park Terminal v. M/V M.E. Nunez*, 35 F. Supp. 2d 521, 530–31 (S.D. Tex. 1999)(citing *Petition of M/V ELAINE JONES*, 480 F.2d 11, 27 (5th Cir.1973); *Freeport Sulphur Co. v. S/S Hermosa*, 526 F.2d 300 (5th Cir.1976)).

challenge the reasonableness of the cost of the Merrill Survey.[31] Accordingly, this court finds that Entergy is entitled to the full cost of the Merrill Survey as part of its damage award: $1,619.10.

Marquette's expert, Budwine, suggests that Riverside's initial bid of $176,000 represents the reasonable costs of repairs. This court, however, does not find this suggestion to be credible or sufficiently supported by reliable computations. The reasonable and necessary cost of the materials ($167,609.55) and the lift ($20,000)[32] would have exceeded Riverside's initial bid of $176,000, leaving no allocation for the significant labor and equipment costs required to reattach the fender to the dolphin. Moreover, Riverside's position, which Judge Chaney accepted, was that its initial bid of $176,000 only covered "phase 1" of the project—lifting the fender and placing it on a barge for inspection. Riverside's initial bid obviously did not include the costs associated with the falsework which were not specified in the contract, nor the costs associated with the four (4) additional bumpers which were not discovered until after the fender was lifted.

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31. Engineering and surveying costs are as necessary and integral part of replacement costs as are a contractor's construction costs. *See Pillsbury Co. v. Midland Enterprises, Inc.,* 715 F. Supp. 738, 768 (E.D. La. 1989), *aff'd* 904 F.2d 317 (5th Cir. 1990).

32. Budwine agreed that Big River's day rate for the use of its "A-frame" crane is $20,000 and that this is a reasonable charge.

Marquette did not offer any evidence to challenge the reasonableness of Riverside's labor or equipment rates.[33] Marquette, instead, offers only Budwine's unsupported "belief" that the project took too long and could have possibly been completed in less time at a lower overall cost if better managed by Riverside and Entergy. Budwine, though, did not review Entergy's RFP documents, the contract between Entergy and Riverside, Riverside's invoices or Riverside's daily cost reports. Likewise, Budwine did not provide any independent damage assessment or cost estimate for restoring the dolphin to its pre-allision condition. Nor did Budwine explain how the project could have been better managed, how better management would have eliminated or reduced the delays and complications encountered during this project or how better management would have translated into specific cost savings.

Moreover, as Entergy points out, Judge Chaney already has determined the amount of Riverside's reasonable repair costs. In his opinion, Judge Chaney carefully reviewed Riverside's invoices and daily cost reports, as well as the opinions of Entergy's expert witnesses, Manley and Neil Anderson (hereinafter referred to as "Anderson"). In the Riverside Litigation, Entergy's experts testified that certain costs incurred by Riverside were excessive and unreasonable. Entergy's experts also testified that, assuming no valid contract,

33. Entergy's experts agreed that the rates included within Riverside's initial bid were reasonable and in accordance with industry nor In his ruling, Judge Chaney excluded certain rates from Riverside's award as unreasonable because they were not identified in the initial bid documents submitted by Riverside.

the reasonable costs of repairs should have been in the range of $577,353. As Anderson testified during the trial of this matter, this figure represented a "best case scenario" estimate which completely excluded the costs of the falsework and assumed that the fender could be re-attached by some other alternative method. In determining Riverside's reasonable repair costs, Judge Chaney included the costs of the falsework but disallowed other costs that Entergy challenged as excessive.

According to Riverside's costs reports, the total costs associated with the falsework were $487,691.64. This amount was excluded in its entirety from the cost estimate of $577,353 proffered by Entergy's experts. As Anderson testified during the trial of this matter, if one assumes that it was reasonable and necessary for Riverside to construct some type of falsework in order to rehang the fender, then his cost estimate would have to be significantly increased to account for those additional costs.[34] If Riverside's actual falsework costs are added to Anderson's estimate, then the revised cost estimate would be $1,065,044.00, which is consistent with Judge Chaney's total award of $1,005,048.34.[35]

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34. Entergy's other expert, Manley, testified that it was not unreasonable for Riverside to utilize some type of falsework to rehang the fender. Although Manley was critical of the overall cost of the falsework that Riverside utilized, he did not offer any opinion in the Riverside litigation or in this case as to any specific cost savings which could have been realized by utilizing "less extensive" falsework.

35. Anderson's estimate included the costs of the additional rigging materials ($91,704.96) which Entergy paid directly to DCL. The Riverside judgment did not include this amount because it was not owed to Riverside.

E. The Preclusive Effect of the *Riverside* Judgment

Marquette essentially asks this court to reexamine the same evidence that Judge Chaney considered in making his ruling and to make an independent determination as to Riverside's reasonable repair costs. The question then is what weight this court should give to the Riverside judgment in this case.

The doctrine of issue preclusion bars "successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment." *Taylor v. Sturgell*, 553 U.S. 880, 893 (2008). Clearly, the reasonable cost of repairs was an issue that was actually litigated in the Riverside Litigation and was essential to the resulting judgment. Marquette was not a party to the Riverside Litigation and, ordinarily, issue preclusion does not apply to non-parties. Still, as the United States Supreme Court noted in *Taylor,* there are exceptions to this rule. *Taylor,* 553 U.S. at 893.

One recognized exception is that non-party issue preclusion may be justified based on a "pre-existing substantive legal relationship" between the party to be bound (here Marquette) and the party to the judgment (here Entergy). *Id.* at 894. In a ruling announced from the bench on October 17, 2012, this court found that Marquette was liable to Entergy for the accident and the damages. By virtue of this court's ruling, Marquette became legally obligated to Entergy for the reasonable costs of repair. This ruling imposed an affirmative obligation on Marquette and established a "substantive

legal relationship" between the parties.[36] This court's ruling effectively changed the parties' relationship from one of owner and alleged tortfeasor to one of obligor and obligee. *See Lincoln-Dodge, Inc. v. Sullivan*, 588 F. Supp.2d at 224, 236 (D.R.I. 2008)(noting that a "substantive legal relationship" may exist by virtue of an indemnity obligation between the parties). Obviously, the obligation imposed on Marquette by this court's ruling pre-existed the Riverside judgment by several years.

It is important to note that Marquette had actual notice of the total repair costs that Riverside was seeking to recover against Entergy within days of this court's ruling as to liability. Despite having a substantive legal obligation to Entergy by virtue of that ruling, Marquette took no role in the Riverside litigation whatsoever and left it to Entergy to challenge the reasonableness of Riverside's repair costs. Now that Judge Chaney has judicially determined the reasonable costs of repair, Marquette wants to re-litigate the issue in this court. Under the circumstances, preclusive effect should be afforded to Judge Chaney's ruling as to the reasonable cost of repairs because Marquette essentially elected at its peril to "sit on the side-lines" while this same issue was being litigated in the Riverside litigation.

Even if issue preclusion were technically inapplicable to Marquette in this situation, this court finds that substantial weight should be given to Judge Chaney's well-

36. According to Black's Law Dictionary, an obligation is a duty imposed by law and may arise by reason of a judgment.

reasoned assessment. Sitting in admiralty, this court "is not tied to any strict rules of the common law, but has the authority to make equitable decisions, considering all of the facts and circumstances." *BP Exloration & Oil, Inc. v. Moran Mid-Atlantic Corp.*, 147 F. Supp. 2d 333 (D.N.J. 2001); *Pizani v. M/V Cotton Blossom*, 669 F.2d 1084, 1089 (5th Cir. 1982)(finding that a federal court sitting in admiralty has equitable powers). This court has considered Riverside's cost reports, the testimony of the witnesses concerning the work that was performed to restore the damaged dolphin as well as the delays and complications that were encountered during this project. Having conducted its own independent review, this court finds that Judge Chaney's award to Riverside fairly represents the reasonable and necessary cost of repairs. This court also finds that, under these circumstances, it would be inequitable to award Entergy less than the out-of-pocket costs that it paid to repair the damages caused by Defendants. This court therefore finds as a matter of law and equity that Entergy is entitled to recover the full amount of the repair costs: $1,098,372.05 (which includes the material and incidental costs noted above).

F. Arguments Not Raised in the Pre-Trial Order

In its Proposed Findings of Fact and Conclusions of Law, Marquette asked this court to address the following questions in its bench opinion:

> In turn, this presents to the Court the following subset of issues which are relevant to this analysis:

(1) Should dolphin No. 4 have ever been repaired by Entergy? This issue involves both a question of whether the dolphin served any useful purpose to Entergy in its operation of the electrical plant and, alternatively, if Entergy had the right to maintain the dolphin if it was not permitted by the United States Army Corps of Engineers.

(2) Was dolphin No. 4 a partial loss or a constructive total loss?

(3) If dolphin No. 4 was a partial loss, what was the reasonable and necessary cost to repair the dolphin to its prior functionality?

(4) What was the useful life expectancy of dolphin No. 4, and was the useful life expectancy extended under either a constructive total loss or a partial loss/repair scenario? As a subset issue to this question, the Court would also need to determine if dolphin No. 4 was an integral part of the overall fuel oil loading terminal, or if it was an independent structure. In a partial loss scenario, the Court would further need to determine if replacement of the sixteen Morse rubber fender buckles,

> which acted as shock absorbers between the exterior wooden fender and the metal superstructure of the dolphin, extended the life expectancy of the overall structure.

[Docket no. 181, P. 12].

The Fifth Circuit standard regarding pretrial orders is clear:

> It is a well-settled ruled that a joint pretrial order signed by both parties supersedes all pleadings and governs the issues and evidence to be presented at trial." *McGehee v. Certainteed Corp.*, 101 F.3d 1078, 1080 (5th Cir.1996); *Branch–Hines v. Hebert*, 939 F.2d 1311, 1319 (5th Cir.1991). The claims, issues, and evidence are narrowed by the pretrial order to expedite the proceeding. *Elvis Presley Enterprises, Inc. v. Capece*, 141 F.3d 188, 206 (5th Cir.1998). Once the pretrial order is entered, it controls the scope and course of the trial. See Fed.R.Civ. Proc. 16. If a claim or issue is omitted from the order, it is waived, even if it appeared in the complaint. *Elvis*, 141 F.3d at 206; *Valley Ranch Dev. Co. v. FDIC*, 960 F.2d 550, 554 (5th Cir.1992); *Flannery v. Carroll*, 676 F.2d 126, 129 (5th Cir.1982).

Kona Tech. Corp. v. S. Pac. Transp. Co., 225 F.3d 595, 604 (5th Cir. 2000).

Appendix B

This court has reviewed the Pretrial Order filed and signed by the parties in this lawsuit. Specifically, this court reviewed: "The Contested Issues of Fact" sections of both Entergy and Marquette [Docket no. 172, P. 9-12, ¶ 10]; and "The Contested Issues of Law" sections of both Entergy and Marquette [Docket no. 172, P. 12-13, ¶ 11]. After a thorough review, this court agrees with Entergy that Marquette failed to include several of the above listed issues in the Pretrial Order, to wit, whether dolphin 4 served any useful purpose, or whether it was properly permitted by the ACOE "for construction and or maintenance purposes"; whether dolphin 4 was a partial loss or constructive loss; and replacement cost of $966,445 and depreciation. Entergy thus concludes that Marquette has waived these issues by failing to include them in the Pretrial Order. This court, though, is aware that the doctrine of "trial by consent" under Rule 15(b)(2) of the Federal Rules of Civil Procedure allows this court to address issues not raised in the pretrial order.[37] Even so,

37. (b) Amendments During and After Trial.

> (2) For Issues Tried by Consent. When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move--at any time, even after judgment--to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue

Fed. R. Civ. P. 15.

See also In re Signal Intern., LLC, 579 F.3d 478 (5th Cir. 2009) (allowing the parties to question witnesses about matters outside the pretrial order constituted "trial by consent");

having reviewed the evidence during trial and all evidence and arguments, bearing on these issues, post-trial, this court concludes that these issues, to the extent, that they collide with the court's findings herein are without merit.

G. Pre-Judgment Interest

Prejudgment interest is normally awarded in maritime cases. *City of Milwaukee v. Cement Div., Nat. Gypsum Co.*, 515 U.S. 189, 195 (1995). "As a general rule, prejudgment interest should be awarded in admiralty cases—not as a penalty, but as compensation for the use of funds to which the claimant was rightfully entitled. Discretion to deny prejudgment interest exists only when there are "peculiar circumstances" that would make it inequitable for the losing party to be forced to pay prejudgment interest. *Noritake Co., Inc. v. M/V Hellenic Champion*, 627 F.2d 724, 728 (5th Cir. 1980). "The essential rationale for awarding prejudgment interest is to ensure that an injured party is fully compensated for its loss." *City of Milwaukee*, 515 U.S. at 195.

A measure of prejudgment interest that has been upheld by the Fifth Circuit as being within a trial court's discretion is the prejudgment interest rate of the state in which the court sits. *Randolph v. Laeisz*, 896 F.2d 964, 969 (5th Cir. 1990)(upholding an award of ten percent

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"Courts have "broad discretion in determining whether or not a pretrial order should be modified or amended." *Balfour Beatty Rail, Inc. v. Kansas City S. Ry. Co.*, 173 F. Supp. 3d 363, 398 (N.D. Tex. 2016)(*Quoting United States v. Texas*, 680 F.2d 356, 370 (5th Cir.1982)).

prejudgment interest based on Texas law). The Fifth Circuit has held that the proper rate of prejudgment interest, in accordance with Mississippi Code Section § 75-17-1(1), is eight percent (8%) per annum compounded annually. *Baptist Mem. Hospital-Desoto, Inc. v. Crain Auto., Inc.*, 2008 U.S. Dist. LEXIS 76611 (N.D. Miss. Sept. 9, 2008)(citing *Exxon Corp. v. Crosby-Mississippi Resources*, 40 F.3d 1474 (5th Cir. 1995)), *aff'd by Baptist Mem. Hosp. - Desoto, Inc. v. Crain Auto., Inc.*, 392 Fed. Appx. 289 (5th Cir. 2010). Moreover, the Fifth Circuit has consistently held that prejudgment interest on repair costs runs from the date of the accident even though the owner does not pay these costs until some later date. *Ryan Walsh Stevedoring Co, Inc. v. James Marine Services, Inc.*, 792 F.2d 489, 493 (5th Cir. 1986).

V. CONCLUSION

For the foregoing reasons, this court finds that the Plaintiff has proved by a preponderance of the evidence that Marquette and Bluegrass negligently damaged the Number Four (4) Dolphin of the fuel oil dock at the Baxter Wilson Electrical Plant on the Mississippi River. This court is further persuaded that the repairs effected by Riverside on behalf of the parties to this litigation to be reasonable and necessary. This court further is persuaded that the well-reasoned opinion of Judge Chaney reflects the most accurate valuation of the costs to effectuate the reasonable and necessary repairs to the number 4 dolphin. Contrariwise, this court is unpersuaded by any of the arguments of the defendants contrary to the findings herein. Accordingly, this court finds that Entergy is entitled to judgment in its favor.

IT IS THEREFORE ORDERED that the defendants are jointly and severally liable to Entergy in the principal amount of $1,098,372.40.

IT IS FURTHER ORDERED that the defendants are jointly and severally liable to Entergy for pre-judgment on the principal amount of $1,098,372.40, to be calculated at an interest rate of 8% compounded annually from the date of the accident, April 5, 2008, through the date of the Judgment and for post-judgment interest thereafter at the federal rate until paid in full.

IT IS FURTHER ORDERED that Entergy's Motion for Ruling filed on September 27, 2017 is hereby MOOT and DENIED as such. **[Docket no. 185]**.

IT IS FINALLY ORDERED that this case is hereby closed with prejudice and court costs are to be taxed against the defendants in favor of Entergy.

SO ORDERED AND ADJUDGED, this the 29th day of September, 2017.

/s/ HENRY T. WINGATE
UNITED STATES DISTRICT
COURT JUDGE

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

CIVIL ACTION NO.: 3:13-CV-879-HTW-LRA

ENTERGY MISSISSIPPI, INC.,

Plaintiff,

vs.

MARQUETTE TRANSPORTATION
COMPANY, LLC and BLUEGRASS MARINE, LLC,

Defendants.

FINAL JUDGMENT ON BENCH VERDICT

This matter came on to be tried before this court for a bench trial. This court, this date, has filed a Memorandum Opinion And Order finding for the plaintiff on all claims asserted by it against the defendants in the lawsuit *sub judice*. Thus, this court awards damages to the plaintiff in this matter in the principle amount of $1,098,372.40. This court further awards pre-judgment interest on the principle amount to be calculated at an interest rate of 8% compounded annually from the date of accident, April 8, 2008, through the date of the judgment. Additionally, this court awards post-judgment interest thereafter at the federal rate until the judgment is paid in full. This court hereby incorporates the Memorandum Opinion as part of this order.

IT IS, THEREFORE, ORDERED AND ADJUDGED that judgment is entered in favor of the plaintiff, Entergy Mississippi, Inc., on all counts.

This matter, thus, is dismissed with prejudice. Plaintiff Entergy Mississippi, Inc., is entitled to its costs of court.

SO ORDERED AND ADJUDGED, this the 29th day of September, 2017.

/s/ HENRY T. WINGATE
UNITED STATES
DISTRICT COURT JUDGE

APPENDIX C — ORDER GRANTING REMAND AND DENYING MOTION TO AMEND, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, NORTHERN (JACKSON) DIVISION, (SEPTEMBER 2, 2014) (R. DOC. 114) (ROA.1489-1525)

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI NORTHERN DIVISION

CIVIL ACTION NO. 3:13-CV-876-HTW-LRA;
CIVIL ACTION NO. 3:13-CV-879-HTW-LRA

RIVERSIDE CONSTRUCTION COMPANY, INC.,

Plaintiff,

v.

ENTERGY MISSISSIPPI, INC.,

Defendant/Plaintiff,

v.

MARQUETTE TRANSPORTATION COMPANY, LLC, AND BLUEGRASS , LLC,

Defendants.

September 2, 2014, Decided
September 2, 2014, Filed

ORDER GRANTING REMAND AND DENYING MOTION TO AMEND

Appendix C

This lawsuit presents the following parties: Entergy Mississippi, Inc.; Marquette Transportation Company, LLC; Bluegrass Marine, LLC; and Riverside Construction Company. These parties are engaged in two separate lawsuits: *Entergy Mississippi, Inc. v. Marquette Transportation Co., et al.*, Civil Action No. 3:13-cv-879-HTW-LRA[1] ("Marquette Litigation"), and *Riverside Construction Co. v. Entergy Mississippi, Inc.*, 3:13-cv-876-HTW-LRA ("Riverside Litigation"). These two separate lawsuits have been consolidated to this court because they feature similar questions of law and fact.

Before the court are four (4) motions: Entergy Mississippi, Inc.'s, Motion for Leave to Amend and Join Necessary Party [3:13-cv-879, docket no. 84]; Riverside Construction Company, Inc.'s, Motion to Remand [3:13-cv-876, docket no. 6]; Entergy Mississippi, Inc.'s, Motion to Strike [3:13-cv-876, docket no. 26]; and Marquette Transportation Company, LLC's, and Bluegrass Marine, LLC's, Motion for Written Reasons [3:13-cv-879, docket no. 100].

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1. The case numbers in these two lawsuits may pose some confusion to the casual reader. Although the Marquette Litigation was the first lawsuit filed (in 2011), its current case number falls sequentially after the Riverside Litigation, which was filed 2013. This is the result of the recent divisional realignment within the United States District Court for the Southern District of Mississippi. Both of these cases were previously assigned to the Western Division of the Southern District of Mississippi. *See Entergy Mississippi, Inc., v. Marquette Transportation Co., et al.*, Civil Action No. 5:11-cv-49-HTW-LRA; *see also Riverside Construction Co., v. Entergy Mississippi, Inc.*, Civil Action No. 5:13cv29-HTW-LRA. Due to realignment, these case numbers were altered as above.

Appendix C

Marquette Transportation Company, LLC, and Blue Grass Marine, LLC, have withdrawn their Motion for Written Reasons [3:13-cv-879, docket no. 100]. Further, having studied the parties' submissions and applicable law, this court denies the Motion to Strike [3:13-cv-876, docket no. 26] and grants the Motion to Remand [docket no. 3:13-cv-876, docket no. 6]. In addition, this court grants, in part, and denies, in part, the Motion for Leave to Amend and Join a Necessary Party [3:13-cv-879, docket no. 84].

I. BACKGROUND

Entergy Mississippi, Inc. ("Entergy"), leases and operates a fuel unloading facility with a dock that extends into the Mississippi River at the Baxter Wilson Plant in Vicksburg, Mississippi. Under Entergy's lease it is contractually obligated to maintain the dock and make any repairs. The dock has a Dolphin Fender System which is a "structure placed in a waterway near a dock system which is used to moor vessels and protect the adjacent dock from damage." Marquette memo at 1, Civil Action No. 3:13-cv-879-HTW-LRA, docket no. 58. Marquette Transportation Company, LLC ("Marquette"), owns and Bluegrass Marine, LLC ("Bluegrass")[2], operates the M/V Robert E. Frane, a push boat[3] that moves barges on the Mississippi River.

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2. Marquette and Bluegrass are hereinafter referred to collectively as "Marquette".

3. A "push boat" is defined as "a powerboat used especially for pushing a tow of barges." MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/push%20boat (last visited Aug. 29, 2014).

Appendix C

On April 5, 2008, Captain Larry Gwin was navigating the M/V Robert E. Frane downstream on the Mississippi River near Vicksburg, Mississippi, pushing twenty-five (25) barges. Entergy memo at 2, Civil Action No. 3:13-cv-879-HTW-LRA, docket no. 62, when one of the barges struck the Vicksburg Railroad Bridge and came loose. *Id.* While the captain and crew were attempting to get the barges under control, another one of their barges struck and damaged the Dolphin Fender System at the Baxter Wilson Plant dock. *Id.* These events, surrounding the initial damage to the Dolphin Fender System, are the subject of the Marquette Litigation, *Entergy Mississippi, Inc. v. Marquette Transportation Company, LLC, et al.*, Civil Action No. 3:13-cv-879-HTW-LRA.

On September 9, 2009, Entergy entered into a contract with Riverside Construction Company, Inc. ("Riverside"), whereby Riverside would repair the Dolphin Fender System at a not-to-exceed price of $176,585.62. Motion for Leave to Amend ¶ 3, Civil Action No. 3:13-cv-879-HTW-LRA, docket no. 84. The contract called for the repairs to be completed when the river reached a stage of ten (10) feet. *Id.* Due to historically high river levels and other work conflicts, Riverside did not actually start the repair work until over two (2) years later, in 2011. *Id.*

On March 28, 2011, Entergy filed its maritime action against Marquette in this federal court seeking damages caused by the M/V Robert E. Frane when it allided[4]

4. "Allide" is a specialized nautical term referring to a situation where a moving object impacts a stationary object. 15 C.J.S. Collision § 234.

with the Dolphin Fender System at the Baxter Wilson Plant dock. *Entergy Mississippi, Inc. v. Marquette Transportation Company, LLC, et al.*, Civil Action No. 3:13-cv-879-HTW-LRA. Entergy's original complaint in the Marquette Litigation estimated the cost for the repairs to be approximately $190,000.00. Complaint, ¶ IX, Civil Action No. 3:13-cv-879-HTW-LRA, docket no. 1. The estimated cost was later changed to $210,575.00, based on amendments to the not-to-exceed contract between Entergy and Riverside. First Amended Complaint ¶ IX, Civil Action No. 3:13-cv-879-HTW-LRA, docket no. 13.

On October 5, 2012, after the close of discovery in the Marquette Litigation, Riverside informed Entergy that it was "over contract" by approximately $1.1 million[5] and the repair work was still not complete. Motion for Leave to Amend ¶ 7, Civil Action No. 3:13-cv-879-HTW-LRA, docket no. 84. Entergy contends that Riverside is attempting to disavow the not-to-exceed contract provision.

On October 17, 2012, Entergy revealed to Marquette that the costs of repairs had exceeded one (1) million dollars. At this point, Entergy filed a Motion to Amend its First Amended Complaint [Civil Action No. 3:13-cv-879-HTW-LRA, docket no. 74] in the Marquette Litigation to

5. At this time, it is unclear how much Riverside has exceeded the contract. Both Marquette and Entergy have articulated various amounts between one (1) million dollars and two (2) million dollars. Also, under protest, Entergy provided Riverside with a portion of the disputed amount. On August, 29, 2014, however, the parties agreed that Riverside was claiming damages between $1.1 and $1.3 million.

reflect the change in the cost of repairs. Entergy claims that this decision to seek leave to amend was motivated by an abundance of caution and a wish to preserve its right to recoup Riverside's additional repair costs from Marquette. Motion for Leave to Amend ¶ 8, Civil Action No. 3:13-cv-879-HTW-LRA, docket no. 84. Entergy noted that the court already had ruled that Marquette was liable for the damages[6]. Thus, the only litigable issue remaining in the Marquette Litigation was the amount of those damages.

On January 31, 2013, Entergy filed a Motion to Amend and Join Necessary Party [Civil Action No. 3:13-cv-879-HTW-LRA, docket no. 84] in the Marquette Litigation. Therein, Entergy requested permission to amend its First Amended Complaint for the purpose of joining Riverside as a necessary party and to clarify and supplement the amount of damages sought.

On February 4, 2013, Riverside filed its lawsuit against Entergy in the Circuit Court of Warren County, Mississippi ("Riverside Litigation"). *See Riverside Construction Co. v. Entergy Mississippi, Inc.*, Civil Action No. 3:13-cv-876-HTW-LRA, docket no. 1, exh. 2. Therein, Riverside sought payment for its repair work under the theories of breach of contract and *quantum meruit*.

On March 6, 2013, Entergy removed the Riverside Litigation to this federal forum, arguing that the contract between itself and Riverside raises questions of federal

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6. See Minute Entry for October 17, 2012, 3:13-CV-879-HTW-LRA.

maritime law. Notice of Removal, Civil Action No. 3:13-cv-876-HTW-LRA, docket no. 1.

On March 21, 2013, Riverside sought a remand of the Riverside Litigation to state court on the grounds that the contract is not maritime in nature and, therefore, this court lacks subject-matter jurisdiction over the contract dispute between Riverside and Entergy. Motion to Remand, Civil Action No. 3:13-cv-876-HTW-LRA, docket no. 6.

On July 18, 2013, this court consolidated the Marquette Litigation and the Riverside Litigation because they involve common questions of law and fact. That is, both the Motion to Amend and Join a Necessary Party [Civil Action No. 3:13-cv-879-HTW-LRA, docket no. 84] and the Motion to Remand [Civil Action No. 3:13-cv-876-HTW-LRA, docket no. 6] require this court to determine whether it has subject-matter jurisdiction over the contract between Riverside and Entergy.

II. JURISDICTION

Entergy alleges that the Marquette Litigation is within the court's admiralty and maritime jurisdiction[7],

7. The terms admiralty and maritime often are used interchangeably to refer to law applying upon navigable waters. Thomas J. Schoenbaum, 1 Admiralty & Mar. Law § 1-1 (5th ed 2012). Admiralty law, as practiced in the United States, "typically refers to the law of ships and shipping." *Id.* Up until the last half-century, maritime law shared this same definition. Maritime law now typically refers to "the entire body of laws, rules, legal

invoked under Rule 9(h)[8] of the Federal Rules of Civil Procedure. Entergy also cites the Admiralty Extension Act, Title 46 U.S.C. § 30101[9], as conferring subject-matter jurisdiction on this court.

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concepts and processes that relate to the use of marine resources, ocean commerce, and navigation." *Id.*

8. Rule 9(h) of the Federal Rules of Civil Procedure states, in its pertinent part:

> (h) ADMIRALTY OR MARITIME CLAIM.
>
> (1) *How Designated.* If a claim for relief is within the admiralty or maritime jurisdiction and also within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim for purposes of Rules 14(c), 38(e), and 82 and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. A claim cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for those purposes, whether or not so designated.

9. Title 46 U.S.C. § 30101 states, in its pertinent part:

> (a) In general.--The admiralty and maritime jurisdiction of the United States extends to and includes cases of injury or damage, to person or property, caused by a vessel on navigable waters, even though the injury or damage is done or consummated on land.
>
> (b) Procedure.--A civil action in a case under subsection (a) may be brought in rem or in personam according to the principles of law and the rules of practice applicable in cases where the injury or damage has been done and consummated on navigable waters.

Appendix C

Federal subject-matter jurisdiction is limited, and the federal courts have an obligation, independent of whether the parties challenge jurisdiction, to ascertain their own subject-matter jurisdiction over the matters before them. *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 131 S.Ct. 1197,1202, 179 L.Ed.2d 159 (2011). "The primary purpose of federal admiralty jurisdiction is to protect commercial shipping with uniform rules of conduct." *MLC Fishing, Inc. v. Velez*, 667 F.3d 140, 141 (2d Cir. 2011).

Federal courts apply a two (2) pronged test to decide whether a tort claim falls under admiralty or maritime subject-matter jurisdiction. Whether the court has admiralty and maritime jurisdiction, generally invoked under Title 28 U.S.C. § 1333[10], depends on whether: (1) the alleged tort occurred on or over "navigable waters"[11] (commonly referred to as the "location test"); and (2) the activity giving rise to the incident had a substantial relationship to traditional maritime activity, such that the incident had a potentially disruptive influence on maritime commerce (commonly referred to as the "connection test"). *Hickam v. Segars*, 905 F. Supp. 2d 835, 2012 WL 5931883 (M.D. Tenn. 2012).

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10. Title 28 U.S.C. § 1333(1) states: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of: . . . Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

11. A "navigable water" is "[a] body of water that is used, or typically can be used, as a highway for commerce with ordinary modes of trade and travel on water." BLACK'S LAW DICTIONARY (9th ed. 2009). No one disputes that the Mississippi River is a "navigable water".

Appendix C

A. Location Test

To satisfy the location test, "a plaintiff must show that the tort at issue either occurred on navigable water, or if the injury is suffered on land, that it was caused by a vessel on navigable water." *Barker v. Hercules Offshore, Inc.*, 713 F.3d 208, 215 (5th Cir. 2013). Traditionally, subject-matter jurisdiction for an admiralty tort was determined by location alone. THOMAS J. SCHOENBAUM, 1 ADMIRALTY & MAR. LAW § 3-5 (5th ed. 2012). In *The Plymouth*, 70 U.S. 20, 33, 18 L.Ed. 125, 3 Wall. 20 (1865) (*superseded by statute as stated in Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 115 S.Ct. 1043, 130 L.Ed. 2d 1024 (1995)), the United States Supreme Court stated:

> the jurisdiction of the admiralty over marine torts depends upon locality-the high seas, or other navigable waters within admiralty cognizance; and, being so dependent upon locality, the jurisdiction is limited to the sea or navigable waters not extending beyond high-water mark.

This interpretation, however, was superseded by statute, which states that "[t]he admiralty and maritime jurisdiction of the United States extends to and includes cases of injury or damage, to person or property, caused by a vessel on navigable waters, even though the injury or damage is done or consummated on land." Title 46 U.S.C. § 30101(a).

Appendix C

Torts that occur on fixed piers or docks usually are not governed by admiralty or maritime law because docks and piers are deemed to be an extension of the land. *MLC Fishing, Inc.*, 667 F.3d at 142. For example, if a party sues to recover damages for an injury suffered because of slipping and falling on a dock, that lawsuit generally would not be governed by maritime law. *Id.* Damages or injury caused by a "*vessel* on navigable water," however, are governed by admiralty law, "notwithstanding that such damage or injury was done or consummated on land." *Jerome B. Grubart, Inc.*, 513 U.S. at 535 (emphasis added) (*citing* Title 46 App. U.S.C. § 740, now codified at Title 46 U.S.C. § 30101).

In *Jerome B. Grubart, Inc.*, the United States Supreme Court determined that flooding from the Chicago River into the basements of adjacent buildings on the land implicated federal admiralty jurisdiction when the flooding "resulted from events several months earlier, when [the defendant] had used a crane, sitting on a barge in the river next to a bridge, to drive piles into the riverbed." *Id.* at 529. The court reached that conclusion because the crane that drove the piles into the riverbed was affixed to a barge upon navigable waters. *Id.* at 1049.

In the Marquette Litigation, a push boat carrying cargo on the Mississippi River, a navigable waterway, allided with the Dolphin Fender System, which is a part of the Fuel Oil Handling and Storage Facilities at the Baxter Wilson Plant. The pier and fenders serve as a dock for vessels that carry fuel on the Mississippi River. The location test is satisfied here, because the damage to

the Dolphin Fender System was caused by a vessel (the barges being pushed by the push boat) on navigable water (the Mississippi River).

B. Connection Test

The connection test encompasses two factors: "whether the incident involved was of a sort with the potential to disrupt maritime commerce" and "whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity." *Jerome B. Grubart, Inc.*, 513 U.S. at 538-539.

In *Sisson v. Ruby*, 497 U.S. 358, 362, 110 S.Ct. 2892, 111 L.Ed.2d 292 (1990), the United States Supreme Court concluded that a fire on a noncommercial vessel docked at a marina posed "a potentially disruptive impact on maritime commerce, as it can spread to nearby commercial vessels or make the marina inaccessible to such vessels." The Court further determined that "storage and maintenance of a vessel at a marina on navigable waters" was substantially related to traditional maritime activities because "[d]ocking a vessel at a marina on a navigable waterway is a common, if not indispensable, maritime activity." *Id.* 367.

Likewise, in *Jerome B. Grubart, Inc.*, 513 U.S. at 539, the United States Supreme Court concluded that damage to a structure beneath the riverbed could disrupt the waterway and restrict navigational use. Further, the Supreme Court concluded that "maintenance work on a navigable waterway preformed from a vessel" was

substantially related to a traditional maritime activity because it was common for barges to engage in such repair work.

In contrast, however, the court in *Rollin v. Kimberly Clark Tissue Co.*, 211 F.R.D. 670, 674 (S.D. Ala. 2001), determined that medical malpractice in the treatment of an injured sailor was not likely to disrupt maritime commerce because "such everyday risks encountered [by sailors] on land are more adequately addressed by state law." Further, the court determined that treatment to a sailor, not in the middle of a voyage, was not substantially related to a traditional maritime activity. *Id.*

In the Marquette Litigation, both factors of the connection test weigh in favor of maritime jurisdiction. First, an incident in which a push boat moving cargo on navigable waters strikes a dolphin or a dock has the potential to disrupt maritime commerce. The dock in question is used to unload fuel for the Baxter Wilson Plant. Interruption to use of the dock interferes with the maritime transport of the fuel. Further, repairs to the dock have the potential to interfere with the procession of boats and barges on the Mississippi River. Second, the activity involved is a quintessentially maritime activity—that of a vessel moving cargo on navigable waters. This court is persuaded that the connection test is satisfied here.

This court finds, then, that it has admiralty subject-matter jurisdiction over the tort claims in the Marquette Litigation.

Appendix C

III. MOTION TO REMAND IN THE RIVERSIDE LITIGATION

In the Riverside Litigation, Riverside has filed a Motion to Remand [3:13-cv-876-HTW-LRA, docket no. 6]. Therein, Riverside asks this court to remand its cause of action against Entergy to state court for two reasons: (1) the court lacks subject-matter jurisdiction over the lawsuit, and (2) even if this court did have subject-matter jurisdiction over the lawsuit, the "savings to suitors" clause of Title 28 U.S.C. § 1333(1) requires remand. In response, Entergy argues that this court does have subject-matter jurisdiction, and that Riverside has waived its right to invoke the "savings to suitors" clause.

A defendant may remove "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." Title 28 U.S.C. § 1441(a). The removing party bears the burden to establish subject-matter jurisdiction. *Carriere v. Sears Roebuck & Co.*, 893 F.2d 98, 100 (5th Cir. 1990). The plaintiff, in turn, may move the federal court to remand the case to state court. A plaintiff has thirty (30) days from the time of removal to seek remand based on any defect other than lack of subject-matter jurisdiction. Title 28 U.S.C. § 1447(c)[12].

12. Title 28 U.S.C. § 1447(c) states, in its pertinent part:

> A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks

As with removal, in a motion for remand the party who championed removal bears the burden of proving that removal to a federal venue was proper. *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002).

A. Subject-Matter Jurisdiction

In its Motion to Remand [3:13-cv-876-HTW-LRA, docket no. 6], Riverside argues that this court lacks subject-matter jurisdiction. In the Riverside Litigation, Riverside asserts claims for breach of contract, quantum meruit, and unjust enrichment. These are state-law claims that do not invoke this court's federal question jurisdiction under Title 28 U.S.C. § 1331[13]. Riverside also states that both Riverside and Entergy are Mississippi corporations with their principal places of business in Mississippi. Thus, Riverside and Entergy are not diverse in citizenship, as required for diversity jurisdiction under Title 28 U.S.C. § 1332[14].

> subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.

13. Title 28 U.S.C. § 1331 states: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

14. Title 28 U.S.C. § 1332(a)(1) states: "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different States."

Appendix C

Entergy removed the Riverside Litigation to federal court contending that the contract Riverside allegedly breached is a maritime contract, thus giving this court federal question jurisdiction under Title 28 U.S.C. § 1333. Riverside disputes this characterization of the contract.

For a contract to be characterized as a maritime contract, its subject matter must be maritime in nature. *Ambassador Factors v. Rhein-, Maas-, Und See-Schiffahrtskontor GMBH*, 105 F.3d 1397, 1399 (11th Cir. 1997). Indeed, "such contracts must pertain directly to and be necessary for commerce or navigation upon navigable waters." *Id.* Not every contract that touches maritime activities is necessarily a maritime contract. "[T]here must be a direct and proximate juridicial link between the contract and the operation of a ship." *See J.A.R., Inc. v. M/V Lady Lucille*, 963 F.2d 96, 98 (5th Cir. 1992).

In *Richard Bertram & Co. v. Yacht Wanda*, 447 F.2d 966, 967-68 (5th Cir. 1971), the United States Court of Appeals for the Fifth Circuit provided a particularly strict and limited definition:

> A maritime contract is one which concerns transportation by sea, relates to navigable waters and concerns maritime employment . . . . [W]hether this suit is viewed as one to enforce a security interest or mortgage on a vessel, a suit to try or quiet title, a suit for breach of a contract of sale, or a suit upon a contract to construct a vessel, it is not within the admiralty jurisdiction of this Court.

Appendix C

The contract at issue in the Riverside Litigation involves the repair of a dock on the Mississippi River, a navigable body of water. Entergy, seeking to have the dock repaired after Marquette's allision, hired Riverside to make repairs. The contract contains a deadline and a not-to-exceed cost provision. The contract, in paragraph 3, also mentions that repairs are to be made to "[t]he Entergy Dock Dolphin Fender System at Baxter Wilson Plant," which is located in the Mississippi River.

References to navigable waters in the contract are sparse. Paragraph 3 states that that the Dolphin Fender System is located in a river. Further, paragraphs 3.1 and 3.2 require Riverside to provide, *inter alia*, a tug boat, a barge, and a utility boat.

Riverside argues that there is nothing inherently maritime about its contract with Entergy. The subject matter of the contract is repair-work to a dock, which, similar to the construction of a vessel, does not directly impact maritime commerce. *See N. Pac. S. S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co.*, 249 U.S. 119, 39 S.Ct. 221, 63 L.Ed. 510 (1919) (stating "[i]t is settled that a contract for building a ship or supplying materials for her construction is not a maritime contract"); *see also The Jefferson*, 61 U.S. 393, 20 How. 393, 15 L.Ed. 961 (1957) (shipbuilding is not "directly connected with maritime commerce"). Furthermore, a court in the District of Columbia, dealing with issues of dock leases and damages said:

> It could hardly be contended that a contract for building or repairing a wharf is embraced in the class of contracts denominated maritime, any more than it could (and not with as much propriety) be contended that a contract to build a ship is a maritime contract; and it has been expressly held by the Supreme Court of the United States that a contract for building a ship is not of a maritime character, and therefore not within the admiralty jurisdiction. *Ferry Co. v. Beers*, 61 U.S. 393, 20 How., 393, 15 L. Ed. 961. . . . The only contracts relating to wharves that are of a maritime character are those for wharfage, for wharf service rendered to vessels, and such claims are due to the lessee and not to the lessor of the wharf.

Upper Steamboat Co. v. Black, 2 App.D.C. 51, 57 (App. D.C.1893).

Entergy urges this court to hold that its contract with Riverside is a maritime contract. According to Entergy, the contract contemplates work to be performed from a floating barge on a structure that is integral to maritime commerce (i.e., loading and unloading fuel oil), which is situated within the navigable waters of the United States. Moreover, says Entergy, the Dolphin Fender System is an integral part of the fuel unloading/loading facility and is necessary to allow marine vessels, which are transporting goods over navigable waters, to moor at the dock in a safe manner.

There is no dispute that all repair work would have to be conducted on navigable waters through the use of barges. The contract between Riverside and Entergy expressly contemplated the use of a barge, a tugboat, and a utility boat. Both sides agree that the use of the barge was integral to the contractual repair work. Using a crane stationed on the barge, Riverside's employees lifted the Dolphin Fender System out of the river, inspected it, and then performed repairs from the barge. The barge was moved into place by a tugboat, but was subsequently tethered to the bank and functioned as a stationary platform from which Riverside's employees conducted repairs. Further, the utility boat was used to transport Riverside's employees from the bank to the barge. The utility boat and the tugboat, however, were not used in conducting the actual repairs.

The use of a vessel, while not determinative, can be suggestive of the existence of a maritime contract. *Energy XXI, GoM, LLC v. New Tech Eng'g, L.P.*, 787 F.Supp.2d 590, 601-02 (5th Cir. 2011); *Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 538 (5th Cir. 1986). Mere flotation upon water, however, does not turn a structure into a vessel for the purposes of maritime law. *Bernard v. Binnings Constr. Co.*, 741 F.2d 824, 830 (5th Cir. 1984). Structures that are moored and primarily used as work platforms normally are not considered vessels. *Daniel v. Ergon, Inc*, 892 F.2d 403, 407 (5th Cir. 1990). Further, structures may be capable of movement across navigable waters, but will still lack vessel status if transportation is "merely incidental to their primary purpose of serving as work platforms." *Id.* The question, then, is whether the barge functions as a vessel or as a platform.

This court does not address the use of the tug boat and utility boat because Entergy has provided no evidence that either was used to carry out the contract repairs. The tug boat was not used in repairing the Dolphin Fender System; rather, it was used to move the non-self-propelling barge into place. Barges do not materialize upon the worksite, but must be moved. The use of a tugboat to transport a barge to a worksite is not determinative of whether the barge is currently a vessel. *See Cook v. Belden Concrete Prods., Inc.*, 472 F.2d 999, 1001 n. 5 (5th Cir. 1973) (the fact that a dry dock has been towed through navigable waters in the past does not turn the dry dock into a vessel when it is later secured in place). As to the utility boat, it was used to transport Riverside's workers from land to the barge, which may be considered a maritime activity, but there is no evidence that it was used to conduct repairs, which is about what Entergy complains. *See Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223, 1231 (5th Cir. 1985) ("mere inclusion of maritime obligations in a mixed contract does not, without more, bring nonmaritime obligations within the pale of admiralty law").

Understandably, Entergy champions the class of cases that recognizes barges as vessels. The cases to which Entergy points, however, deal with contracts "relating to a ship in its use as such, or to commerce or navigation on navigable waters." *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313, 316 (5th Cir. 1990) (contract required use of self-propelling barges to maintain off-shore oil well facilities); *Theriot*, 783 F.2d at 538 (contract whose specific purpose focused on the use of a submersible drilling barge to conduct oil and gas activity was maritime in nature);

Energy XXI GoM, LLC, 787 F.Supp.2d at 602-05 (a contract whose specific purpose required the use of a jack-up drilling rig, a vessel in the Gulf of Mexico, to perform a recompletion operation on an oil well was maritime in nature). These cases involve the use of structures that not only were integral to the contract, but also had greater mobility and engaged in activities other than providing a platform over water.

The Riverside Litigation is distinguishable from the cases championed by Entergy. As an initial matter, the barge, by necessity, was stationary. In *Leonard v. Exxon Corp.*, 581 F.2d 522, 523 (5th Cir. 1978), the Fifth Circuit concluded that a floating barge that was moored to the bank of the Mississippi River and served as a construction platform was not a vessel. The court noted that the barge was not self-propelled, was not engaged in navigation, and was "moored 'more or less permanently'" to the shore. *Id.* at 524. Likewise, in *Cook v. Belden Concrete Prods., Inc.*, 472 F.2d at 1001-02, the Fifth Circuit determined that a flat-deck barge, moved on occasion by tug boats, but essentially utilized as a work platform in the fabrication of concrete barges, was not a vessel.

Further, the contract obligation *sub judice* focuses upon a subject matter that is not maritime in nature. In *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d at 1225, a contract dispute arose over the construction of an off-shore oil and gas platform that would be permanently fixed to the ocean floor. The oil company, contending that the construction company had installed the piles improperly, refused to pay. *Id.* As a

result, the construction company filed suit. *Id.* Although vessels were involved in the construction of the stationary platform, the "principal obligation under the contract was the construction of a stationary platform, and . . . it is the alleged breach of this obligation that gave rise to the instant action." *Id.* at 1231. The court further stated that the contemplation of "the use of instruments of admiralty" is not enough to confer maritime jurisdiction if the contractual obligation is not traditionally maritime. *Id.* 1231-32.

The Riverside Litigation is similar to *Laredo* in that the primary obligation of the contract is the repair of the Dolphin Fender System within the cost and time parameters set forth by Entergy. Entergy's and Riverside's conflict arises from the cost element of the contract for construction, not from the utilization of vessels in maritime navigation or commerce. For the forgoing reasons, this court grants Riverside's Motion to Remand the Riverside Litigation to the Warren County Circuit Court [3:13-cv-876-HTW-LRA, docket no. 6].

B. Savings to Suitors

In its reply brief [3:13-cv-876-HTW-LRA, docket no. 25] to Entergy's opposition to the motion to remand, Riverside, for the first time, argued that even if the contract was a maritime contract, then the court should still favor remand under the "savings to suitors" clause of Title 28 U.S.C. § 1333. In response, Entergy filed a Motion to Strike [3:13-cv-876-HTW-LRA, docket no. 26] asking this court to strike Riverside's new argument as untimely

and to estop Riverside from espousing two contradicting positions.

The "savings to suitors" clause states that maritime jurisdiction "sav[es] to suitors in all cases all other remedies to which they are otherwise entitled." Title 28 U.S.C. § 1333(1). Courts have interpreted this clause "to permit admiralty and maritime actions, otherwise exclusively within the jurisdiction of the federal district courts, to be brought in state court as well." *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1542. Therefore, pursuant to the "savings to suitors" clause, the plaintiff in a particular cause of action has the option to bring the lawsuit in state court or federal court. *Alleman v. Bunge Corp.*, 756 F.2d 344, 345 (5th Cir. 1984). "Unless a state law frustrates a fundamental tenet of admiralty law, this saving to suitors clause preserves state court jurisdiction over admiralty and maritime claims brought under state statutory or common law." *Rafter v. Stevenson*, 680 F.Supp.2d 275, 280 (D. Me. 2010) (internal quotations and citations omitted).

Absent some independent jurisdiction, such as diversity of citizenship jurisdiction, removal of a lawsuit based in maritime law from state court to federal court is improper. *Baris*, 932 F.2d at 1543 (in the absence of diversity of citizenship, the court lacked independent jurisdiction); *Gaitor v. Peninsular & Occidental S.S. Co.*, 287 F.2d 252, 255 (5th Cir. 1961) ("except in diversity cases, maritime litigation brought in state courts could not be removed to the federal courts."). As discussed earlier, in this Riverside Litigation this court lacks diversity

of citizenship jurisdiction because both Riverside and Entergy are citizens of Mississippi.

Lack of removal jurisdiction, which is separate from subject-matter jurisdiction, however, may be waived if the plaintiff fails timely to file a motion to remand. *Baris*, at 1543. Entergy claims that Riverside has waived this "savings to suitors" argument by not raising it earlier. Upon removal, a plaintiff has thirty (30) days to file "[a] motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction." Title 28 U.S.C. § 1447(c). While Riverside filed a motion to remand within that period of time, Riverside raised its "savings to suitors" argument in a reply brief outside the thirty (30) day period.

Entergy's position is seemingly supported by *Davis v. Ciba-Geigy Corp.*, 958 F.Supp. 264 (M.D. La. 1997). In that case, the United States District Court for the Middle District of Louisiana held that even though the plaintiff had filed a timely motion to remand based on lack of subject-matter jurisdiction, she had waived her right to raise a new procedural objection to removal in a reply brief because the reply brief was filed outside of the thirty (30) day period. *Id.* at 265-66. The court in *Davis* based this conclusion on a decision from the United States Court of Appeals for the Ninth Circuit, *N. Cal. Dist. Council of Laborers v. Pittsburg-Des Moines Steel Co.*, 69 F.3d 1034 (9th Cir. 1995). The Ninth Circuit stated that "the critical date is not when a motion to remand is filed, but when the moving party asserts a procedural defect as a basis for remand." *Id.* at 1038.

The Fifth Circuit, however, has explicitly rejected the Ninth Circuit's analysis. In *BEPCO, L.P. v. Santa Fe Minerals, Inc.*, 675 F.3d 466, 471 (5th Cir. 2012), the Fifth Circuit said

> On its face, Section 1447(c)'s 30—day requirement governs the timeliness of the filing of a motion to remand, not the time limit for raising removal defects. . . . Given the unambiguous statutory language, we reject any suggestion that the timing of the presentation of a removal defect—rather than the submission of the remand motion—is what matters for a timeliness analysis under Section 1447(c).

As such, Riverside has not waived its right to remand based on the "savings to suitors" clause because Riverside timely filed its motion to remand, thus preserving the right to raise other objections.

Entergy also contends that the "savings to suitors" argument should be disregarded because it is a non-responsive pleading that was outside the scope of previous arguments. Entergy says that the original scope of the motion to remand was lack of subject-matter jurisdiction based on Riverside's contention that the contract was not maritime in nature. In response, Entergy presented arguments against remand on the topic of subject-matter jurisdiction and maritime contracts. In its reply brief, however, Riverside did not attempt to rebut Entergy's arguments, but presented an entirely new argument based on the "savings to suitors" clause. Entergy contends

that this response was outside the scope of the maritime subject-matter jurisdiction issue initially raised by Riverside.

In support, Entergy cites cases that say that courts do not consider arguments that are raised for the first time in a reply brief. *See Navarijo-Barrios v. Ashcroft*, 322 F.3d 561, 564 n.1 (8th Cir. 2003) ("[i]t is well settled that we [the court of appeals] do not consider arguments raised for the first time in a reply brief."); *United States v. Litten*, 201 F.3d 438, *2 [published in full-text format at 1999 U.S. App. LEXIS 30042] (4th Cir. 1999) ("[t]his court [the court of appeals] ordinarily will not address new arguments raised for the first time in the reply brief."). *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) ("[w]here new evidence is presented in a reply to a motion for summary judgment, the district court should not consider the new evidence without giving the [non-]movant an opportunity to respond."); *Gold v. Wolpert*, 876 F.2d 1327, 1331 n.6 (7th Cir. 1989) ("[i]t is well-settled that new arguments cannot be made for the first time in reply").

Entergy does not cite any Fifth Circuit precedent on whether a new argument may be raised in a reply brief. Furthermore, the cases Entergy cites are largely concerned with a party raising an issue for the first time on appeal or where there is no opportunity for the opposing party to respond. In *McDaniel v. Miss. Baptist Med. Ctr*, 869 F.Supp. 445, 453 (S.D. Miss. 1994), the court agreed to disregard a defendant's arguments raised for the first time in a reply brief. The court made this decision, not because it considered the defendant's actions procedurally

unacceptable, but because it was not fair to the plaintiff to permit this new argument when there was not sufficient time to compose a response before the pretrial conference. *Id.* Unlike the circumstances in *McDaniel*, this court has permitted Entergy to respond to the new arguments; thus, Entergy has not been prejudiced.

Entergy also asks the court to judicially estop Riverside from seeking remand on the "savings to suitors" clause because in doing so Riverside has asserted inconsistent and contradictory positions. Judicial estoppel is an equitable doctrine that prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same proceeding. *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 347 (5th Cir. 2008).

Entergy contends Riverside is promoting two irreconcilable positions: (1) that this court must remand the Riverside Litigation because the contract is not a maritime contract and (2) that this court must to remand the Riverside Litigation because, if the contract is maritime in nature, removal was improper under the "savings to suitors" clause. Riverside, however, contends that it is presenting two (2) alternative arguments that favor remand. While Riverside believes that this court lacks subject-matter jurisdiction, it has urged the "savings to suitors" clause should the court determine that it has subject-matter jurisdiction. This court accepts Riverside's argument. It is common for attorneys to provide alternative arguments out of an abundance of caution.

For the forgoing reasons, this court denies Entergy's motion to strike. Entergy has had adequate opportunity to reply to Riverside's "savings to suitors" clause arguments. Further this court rejects Entergy's estoppel argument. Riverside has merely presented alternative arguments, which urge the court to reach the same conclusion.

This court grants Riverside's motion to remand. As articulated above, this court lacks subject-matter jurisdiction over the over the contract between Riverside and Entergy, because the conflict between those two parties involves a contract for repairs as opposed to utilization of vessels in maritime navigation or commerce. In the alternative, if the contract between Riverside and Entergy was a maritime contract, this court would still be compelled to grant the motion to remand because the "savings to suitors" clause protects Riverside's choice of a state court forum.

IV. MOTION FOR LEAVE TO AMEND AND JOIN IN THE MARQUETTE LITIGATION

A. Rule 15(a) Standard

Entergy seeks to amend its First Amended Complaint in the Marquette Litigation. Specifically, Entergy seeks to join Riverside as a party under Rule 19[15] of the Federal

15. Rule 19(a)(1) of the Federal Rules of Civil Procedure states:

> (1) *Required Party*. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

Rules of Civil Procedure and to supplement and clarify the amount of damages sought against Marquette. Rule 15(a)(2) of the Federal Rules of Civil Procedure states that a "party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires."

In deciding whether to grant leave, "a district court may consider such factors as (1) undue delay; (2) bad faith; (3) dilatory motive on the part of the movant; (4) repeated failure to cure deficiencies by any previously allowed amendment; (5) undue prejudice to the opposing party; and (6) futility of amendment." *Ellis v. Liberty Life Assurance Co.*, 394 F.3d 262, 268 (5th Cir. 2004).

B. Proposed Amended Complaint

In the Proposed Amended Complaint in the Marquette Litigation, Entergy states that it entered into a contract with Riverside. The contract contained a "T&M not to

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(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

exceed" clause[16] in which Riverside allegedly agreed not to exceed the contract price of $176,585.52. Section 10 of the contract permitted only minor changes in the scope of the work to be approved without written contract, but those changes would only be permitted if "the change does not affect the compensation, cost, or schedule of performance." According to the Proposed Amended Complaint, the contract further articulated that "no waiver, addition, deletion, or modification of any provision contained in the Contract shall be binding unless in writing and signed by duly-authorized representatives of both parties."

On December 1, 2010, Entergy and Riverside agreed to modify the contract to extend the work completion date to January 31, 2011.

On June 23, 2011, Entergy and Riverside agreed to amend the contract due to increased costs of the twelve (12) rubber bumpers. The June 23, 2011 amendment increased the "not to exceed" contract to $182,010.00. On July 25, 2011, Entergy paid $56,300.00 to Riverside for the cost of the twelve (12) bumpers, plus $883.01 for the cost of freight. Entergy claims that at this time the balance remaining that Entergy owed to Riverside under the contract was $125,710.00.

During the spring of 2012, Entergy claims that Riverside advised Entergy that it needed to construct

16. Entergy explains that a "T&M not to exceed" contracts involve a flat rate "not to exceed" the cost of "time and materials" (T&M).

"falsework"[17] to secure temporarily the fender to the dolphin. Riverside, according to Entergy, did not inform Entergy that the "falsework" constituted a change in the scope or work, that "falsework" would increase the cost of the contract, or request a written amendment to the contract for said work.

On May 25, 2012, Riverside and Entergy agreed to amend the contract to extend the completion date to May 31, 2013, to allow time to make repairs due to the constantly changing river levels.

On August 28, 2012, Riverside met with Entergy to request approval of certain changes in construction. On August 31, 2012, Entergy asked Riverside to provide information on how these changes would affect the not-to-exceed contract price. Riverside did not respond, so Entergy did not approve the changes.

On September 11, 2012, Entergy approved Riverside's request for the purchase of four (4) additional rubber bumpers at a cost of $18,721.58. Entergy also agreed to obtain price quotes for new and/or additional chains, shackles, and turnbuckles.

On October 5, 2012, Riverside informed Entergy that it was "over contract" by approximately $1.1 million and that repairs were still not completed. Entergy claims that this was the first time Riverside had provided any such information to Entergy.

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17. Falsework is a temporary structure used in construction to support the main structure until that main structure can support itself.

On October 15, 2012, Entergy met with Riverside to discuss the issue. At the meeting, Riverside presented Entergy with approximately 1,000 pages of documents consisting of daily, monthly, and overall work summaries. The invoice totaled $1,399,454.80. Entergy claims it had never seen these documents before.

On October 24, 2012, Riverside informed Entergy that it would not complete the remaining repairs until it received an additional payment from Entergy. Riverside also informed Entergy that the Dolphin Fender System was unsafe in its current, unrepaired state.

On October 26, 2012, Entergy offered to pay $350,000.00 to Riverside under protest and with full reservation of rights. Entergy then paid $18,721.58 to Riverside for the four (4) additional rubber bumpers, and purchased new and/or additional chains, shackles, and turnbuckles for $91,704.96. Riverside accepted Entergy's payment terms and completed the remaining repairs on or about November 16, 2012. To date, Entergy claims it has paid $517,609.55 for repairs. Subsequently, Riverside submitted a final invoice to Entergy for $1,303,041.56.

Count I of the Proposed Amended Complaint in the Marquette Litigation asserts a negligence and/or gross negligence claim against Marquette. Entergy contends that the allision resulted from the fault, neglect, and lack of care exhibited by Marquette in the navigation, management, and training of the M/V Robert E. Frane and its crew. Entergy contends that Marquette is liable through the application of the doctrine of *res ipsa loquitur*,

because the M/V Robert E. Frane was at all times under Marquette's exclusive control and this particular incident does not ordinarily occur in the absence of negligence. Further, Entergy states that Marquette is presumed to be at fault by virtue of the maritime presumption of fault arising when a moving vessel like the M/V Robert E. Frane strikes a stationary object such as the Dolphin Fender System. Entergy requests damages in excess of $293,319.55, along with any unknown damages, damage assessment expenses, lost revenue, additional transportation expenses from loss of dock use, attorney fees, and costs.

Count II of the Proposed Amended Complaint in the Marquette Litigation asserts a claim of negligent and/or intentional misrepresentation as to Riverside. Entergy contends that Riverside induced Entergy to enter into the contract by offering a fair and reasonable not-to-exceed cost of repairs contract. Riverside, however, engaged in a pattern of concealment, negligent and/or intentional misrepresentations, and/or nondisclosure, thereby causing Entergy to rely detrimentally on the contract. Entergy suggests that Riverside was motivated by a desire for financial gain and knew of the likely injury it would cause to Entergy. Furthermore, Entergy contends that Riverside negligently and/or intentionally misrepresented the scope of work under the contract, causing Entergy to rely detrimentally on the misrepresentations. Entergy seeks compensatory and punitive damages.

Count III of the Proposed Amended Complaint in the Marquette Litigation asserts a breach of contract

claim against Riverside. Entergy contends that under the contract and amendments to the contract, Riverside agreed to complete the repairs in an amount "not to exceed" $182,010.00. Entergy claims that any Riverside invoice for repair work that exceeds the approximately $120,000.00 due to Riverside for labor costs is a material breach of contract. Entergy seeks a declaratory judgment that the contract is valid and that all of the work performed by Riverside was done pursuant to and within the description and schedule of work as defined in the contract. Entergy also seeks a declaratory judgment stating that Riverside is only entitled to the remaining payment of approximately $120,000.00 for services rendered. As a result of the breach, Entergy seeks damages and the return of any additional funds paid to Riverside under protest.

Count IV of the Proposed Amended Complaint in the Marquette Litigation asserts a claim of unjust enrichment as to Riverside. Entergy contends that Riverside attempted to extort money when it demanded full payment before it would complete repairs to the unsafe Dolphin Fender System. Entergy agreed to pay $350,000.00, under protest, so that Riverside would ameliorate the unsafe condition. Entergy says that Riverside was only entitled to the remaining $120,000.00 for labor costs. As a result, Entergy argues that Riverside was unjustly enriched in the amount of $230,000.00.

Count V of the Proposed Amended Complaint in the Marquette Litigation asserts a claim of breach of implied duty of good faith and fair dealing as to Riverside. Entergy

contends that, by virtue of the contractual nature of the transaction at issue, Riverside owed Entergy an implied duty of good faith and fair dealing. Entergy says that Riverside breached this due by its conduct. Therefore, Entergy claims it is entitled to recover damages, attorney fees, and punitive damages.

C. Application

1. Joinder

Entergy seeks to join Riverside under Rule 19 of the Federal Rules of Civil Procedure, which governs compulsory joinder. Under Rule 19, the first inquiry is whether joinder of the party would defeat this court's subject-matter jurisdiction. If joinder would not defeat the court's subject-matter jurisdiction, the party must be joined if (1) "the court cannot accord complete relief among existing parties" in the absence of this proposed party; or (2) the proposed party "claims an interest relating to the subject of the action" and disposing of the action may "impair or impede" that party's ability to protect the interest or leave an existing party at risk of incurring inconsistent obligations. Fed. R. Civ. P. 19(a)(1).

Defendant Marquette urges this court to deny joinder on the grounds that it will be prejudiced by Entergy's delay in joining Riverside. Unlike Rule 15(a), Rule 19 compulsory joinder makes no exception in the event the party urging joinder has been dilatory or joinder will cause prejudice; the language is mandatory, stating that a party "must be joined" if the elements are met. In fact,

the comments to the 1966 Amendment to Rule 19 state: "A person may be added as a party at any stage of the action on motion or on the court's initiative (see Rule 21); and a motion to dismiss, on the ground that a person has not been joined and justice requires that the action should not proceed in his absence, may be made as late as the trial on the merits." The Ninth Circuit has also held that the issue of necessary parties is so important that it may be raised at any stage of the proceedings. *See McCowen v. Jamieson*, 724 F.2d 1421, 1424 (9th Cir. 1984).

a. Feasibility of Joinder

The initial question is whether this court may properly exercise jurisdiction over the proposed claim against Riverside. There is no dispute that Entergy and Riverside are both Mississippi citizens, thus depriving the court of diversity jurisdiction under Title 28 U.S.C. § 1332. The essence of the claim arises out of a contract dispute between Entergy and Riverside. Contract disputes, in general, involve questions of state law, over which federal courts do not have original jurisdiction. In order to obtain jurisdiction over this claim against Riverside, the court must either have supplemental jurisdiction over the contract dispute, or the contract dispute must involve a federal question.

Supplemental jurisdiction, codified at Title 28 U.S.C. § 1367[18], permits the court to retain jurisdiction over claims

18. Title 28 U.S.C. § 1367(a) states, in its pertinent part:

> [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have

closely related to claims over which the court already has jurisdiction. The most common test is whether the proposed state law claim arises "from a common nucleus of operative fact, such that the relationship between [the federal] claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional case." *City of Chi. v. Int'l Coll. Of Surgeons*, 522 U.S. 156, 165, 118 S.Ct. 523, 139 L.Ed.2d 525 (1997) (internal quotations omitted) (*citing Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966)).

The facts surrounding the Marquette Litigation, however, are not the same as those surrounding the proposed claim against Riverside. The claim against Marquette involves the April 5, 2008 accident, in which the M/V Robert E. Frane allided with Entergy's dock. The claim against Riverside involves alleged contract overruns, discovered in October 2012, relating to the repair of that dock. While the dock may be a common thread between the two (2) claims, the events precipitating the claims are completely different and separated in time by many years. Therefore, this court cannot exercise supplemental jurisdiction over the claim against Riverside.

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supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

Alternatively, Entergy argues that the contract dispute with Riverside raises an independent federal question, entitling this court to federal question jurisdiction under Title 28 U.S.C. § 1331. Entergy contends that, like the tort claim against Marquette, this contract dispute involves a question of admiralty and maritime law. This court, however, has already determined that it lacks maritime jurisdiction over Entergy's contract with Riverside.

b. Necessity of Riverside

The second question the court must determine is whether the court can accord complete relief in Riverside's absence or whether disposing of the action may "impair or impede" Riverside's interests. Fed. R. Civ. P. 19(a)(1).

Entergy contends that complete relief cannot be accorded between Entergy and Marquette until the threshold matter of repair costs is settled in the Riverside Litigation. In the absence of Riverside, says Entergy, if the court limits Entergy's recovery in the Marquette Litigation to the not-to-exceed contract amount, then Entergy will be afforded incomplete relief because Riverside, in the Riverside Litigation, is seeking the remaining amount due on its invoice. Entergy contends separate adjudications in the Riverside Litigation and the Marquette Litigation could result in disparate outcomes and inconsistent obligations: this court, in the Marquette Litigation, could limit Entergy to the not-to-exceed contract amount, and another court, in the Riverside Litigation, could order Entergy to pay the full amount demanded by Riverside.

In response, Marquette does not address the necessity of Riverside as a party. Marquette, instead, urges this court against joinder based on the prejudice it would cause in delaying the case and requiring additional discovery. Marquette, in addition, contends that it should only be required to pay the "not to exceed" contract amount.

This court is not persuaded that Riverside is a necessary party to the Marquette Litigation. Further, this court believes that complete relief may be afforded in Riverside's absence. The Riverside Litigation involves a parsing of a construction contract, which has no connection with the tortious allision in the Marquette Litigation. A resolution of the contract amount in the Riverside Litigation may affect the resolution of Entergy's damages, but the calculus of the reasonable cost of repairs is not dependent upon the Riverside Litigation. Therefore, the court denies the motion as it regards joining Riverside.

2. Entergy's Damages

Entergy also requests permission to amend its complaint in the Marquette Litigation in order to clarify the amount of damages Marquette caused. Entergy's proposed Second Amended Complaint requests $293,319.55 in damages, which includes the not-to-exceed contract amount and the cost for additional materials used to complete the repairs. Alternatively, Entergy seeks any additional damages from Marquette that this court may deem appropriate after the resolution of Entergy's claims against Riverside.

In response, Marquette opposes any departure from the not-to-exceed contract price of $210,575.00 that was articulated in the First Amended Complaint. Marquette notes that Entergy only revealed that Riverside had exceeded the contract after the close of discovery. As such, Marquette argues that the amendment is untimely and prejudices Marquette.

Marquette says that under Rule 37(c)(1)[19] of the Federal Rules of Civil Procedure, Entergy's damages are limited to the amount it pled and never amended during discovery. Rule 37(c)(1) bars late disclosure of evidence "unless the failure was substantially justified or is harmless."

a. Justification

Marquette argues that Entergy's late disclosure in the Marquette Litigation was not justified. Although Entergy says that it did not learn that Riverside exceeded the contract price until October 2012, Marquette believes Entergy knew or should have known earlier.

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19. Rule 37(c)(1) of the Federal Rules of Civil Procedure states, in its pertinent part:

> *Failure to Disclose or Supplement.* If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.

Entergy, however, denies that it intentionally delayed repairs or intentionally delayed supplementing its damages. Entergy contends that Marquette's objections are simply conclusory allegations without support in case law or fact. Entergy reminds the court that it delayed its repairs due to weather and river conditions. Entergy also continues to assert that it was unaware of the over-contract costs until October 2012, when Riverside revealed the cost overruns.

In addition, Entergy contends that it seasonably disclosed Riverside's contract overruns. Rule 26(e)(1)[20] of the Federal Rules of Civil Procedure requires parties to supplement their discovery responses "seasonabl[y]." *Reed v. Iowa Marine & Repair Corp.*, 16 F.3d 82 84 (5th Cir. 1994). Under Rule 26(e)(1), a party must supplement its discovery responses and initial disclosures "in a timely manner if the party learns that in some material respect

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20. Rule 26(e) of the Federal Rules of Civil Procedure states:

> (1) *In General.* A party who has made a disclosure under Rule 26(a)--or who has responded to an interrogatory, request for production, or request for admission--must supplement or correct its disclosure or response:
>
> > (A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or
> >
> > (B) as ordered by the court.

the disclosure or response is incomplete and incorrect . . . ." Further, Entergy states that "the duty to amend only binds individuals who become aware of errors in previous discovery responses." *Reed*, 16 F.3d at 85 n. 6. In the Marquette Litigation, Entergy claims it did not learn of Riverside's cost overruns until two (2) days before it disclosed the information. Entergy contends that it could not disclose information that it did not possess, and that Marquette has no proof that Entergy was aware of the cost overruns prior to October 2012.

b. Harmless

Marquette argues that the failure to amend the cost of damages earlier was not harmless. In evaluating whether a party's failure to disclose is harmless, the court must consider the following factors: (1) the explanation for the party's failure to disclose; (2) the potential prejudice to the opposing party if the evidence is allowed; (3) the availability of a continuance to cure such prejudice; (4) the importance of the evidence. *CQ, Inc. v. TXU Mining Co., L.P.*, 565 F.3d 268, 280 (5th Cir. 2009).

As to the first factor, Entergy has said it only just discovered Riverside's cost overruns in October 2012. Marquette suggests that Entergy should have known that after many months of work, with minimal progress towards completion, the not to exceed contract price was a distant memory. Entergy, however, continues to assert that it only learned of the cost overruns in October 2012, and any assertion to the contrary is a conclusory statement without basis in fact.

On the second factor, Marquette contends that it will suffer significant prejudice if Entergy is allowed to amend its damages. Marquette states that if Entergy is allowed to amend, Marquette will be forced to defend against a judgment several times larger than it anticipated. Based on the amount of damages initially pled, Marquette claims that it had chosen to focus its defenses on the amount of damages rather than liability for the damage.

In response, Entergy contends that its First Amended Complaint in the Marquette Litigation never limited recovery to $210,575.00, but said Entergy was seeking damages

> currently estimated to be in excess of $210,000.00, including without limitation unknown damages to the Dolphin Fender System, damage assessment expenses, lost revenue, additional transportation expenses from loss of dock use, attorney fees, costs of these proceedings and any other damages to be shown at a trial of this matter.

First Amended Complaint ¶ XI, Civil Action No. 3:13-cv-879-HTW-LRA, docket no. 13. Entergy also states that it was not required under Rule 8[21] of the Federal Rules of Civil Procedure to declare a specific amount of damages, but only an allegation of the type of relief requested.

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21. Rule 8(a)(3) of the Federal Rules of Civil Procedure states: "A pleading that states a claim for relief must contain . . . a demand for the relief sought, which may include relief in the alternative or different types of relief."

R.S.E., Inc. v. Penn. Supply, Inc., 77 F.R.D. 702, 703 (M.D.Pa. 1977).

As to the third factor, Marquette contends that a continuance will not cure the prejudice. Marquette argues that a continuance would require re-opening discovery and a new scheduling order, which would further delay proceedings and prejudice Marquette. *See Hoffman v. Constr. Protective Servs., Inc.*, 541 F.3d 1175, 1180 (9th Cir. 2008) ("Later disclosure of damages would have most likely required the court to create a new briefing schedule and perhaps re-open discovery, rather than simply set a trial date. Such modifications to the court's and the parties' schedules supports a finding that the failure to disclose was not harmless."). Entergy, however, suggests that a continuance will cure any prejudice and allow Entergy to focus fully on determining contractual damages with Riverside. After the resolution of Entergy's dispute with Riverside, this court could properly turn to the amount in damages, and Marquette could still assert its defenses of betterment, depreciation, and mitigation.

On the final factor, Marquette does not address the importance of the evidence. Marquette, instead, focuses on the time and expense it would incur in disputing contract overruns with Riverside. Entergy responds saying that the importance of the evidence of cost cannot be overstated. The evidence of the cost to repair the damage, says Entergy, paints the fullest picture of the total damages stemming from Marquette's negligent allision with the Dolphin Fender System.

This court is content that Entergy's late disclosure was justified. There is no evidence to contradict Entergy's assertion that it was unaware of the cost overruns. Also, this case has now become one about damages owed to Entergy. The question thus becomes what damages are reasonable. That amount may be the not-to-exceed amount in the contract between Entergy and Riverside, the ultimate cost of repairs, or somewhere in between. This will be a question for the trier of fact, and Marquette and Entergy will be permitted to present evidence and arguments in support of their competing visions of what damages are reasonable. This court will permit Entergy to amend its complaint accordingly.

V. CONCLUSION

For the forgoing reasons, this court grants Riverside's Motion to Remand [3:13-cv-876, docket no. 6] in the Riverside Litigation. This court does not possess subject-matter jurisdiction over the contract between Riverside and Entergy. Even if this court did possess subject-matter jurisdiction, the "savings to suitors" clause counsels this court to remand the case to state court. This court denies Entergy's Motion to Strike [3:13-cv-876, docket no. 26] in the Riverside Litigation.

As it regards the joinder of Riverside, this court denies Entergy's Motion to Amend and Join Necessary Party [3:13-cv-879, docket no. 84] in the Marquette Litigation. This court lacks subject-matter jurisdiction over the contract and can afford relief in the Marquette Litigation without Riverside's presence. As the motion

regards Entergy's desire to amend its complaint in the Marquette Litigation to reflect a change in damages, the court grants Entergy's motion to amend [3:13-cv-879, docket no. 84] to reflect said changes in damages.

SO ORDERED this 2nd day of September 2014.

/s/ HENRY T. WINGATE
UNITED STATES DISTRICT
COURT JUDGE

APPENDIX D — ORDER, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, NORTHERN (JACKSON) DIVISION (MARCH 27, 2015) (R. DOC. 123) (ROA.1570-1588) (GRANTING SUMMARY JUDGMENT AGAINST MARQUETTE)

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI NORTHERN DIVISION

CIVIL ACTION NO. 3:13-CV-879-HTW-LRA

ENTERGY MISSISSIPPI, INC.,

Plaintiff,

v.

MARQUETTE TRANSPORTATION COMPANY, LLC AND BLUEGRASS MARINE, LLC,

Defendants.

ORDER

Before the court are three motions: a motion to dismiss [docket no. 57] filed by defendants Bluegrass Marine, LLC, and Marquette Transportation Company, LLC; a motion for partial summary judgment [docket no. 59] filed by defendants Bluegrass Marine, LLC, and Marquette Transportation Company, LLC; and a motion for partial summary judgment [docket no. 61] filed by Entergy Mississippi, Inc. For the reasons which follow, this court denies the defendants' motions to dismiss and for partial summary judgment

[docket nos. 57, and 59] and grants the plaintiff's motion for partial summary judgment [docket no. 61].

Entergy Mississippi, Inc., ("Entergy") filed this lawsuit against Bluegrass Marine, LLC, and Marquette Transportation Company, LLC, to recover damages after the defendants' tugboat allided[1] with a dolphin fender system at a fuel oil unloading dock maintained by Entegy in the Mississippi River near the Baxter Wilson Steam Electric Station ("Baxter Wilson Plant") in Vicksburg, Mississippi.

I. Jurisdiction

Entergy alleges that its complaint falls within the admiralty and maritime[2] jurisdiction of this court, invoked

1. "Allide" is a specialized nautical term referring to a situation where a moving object impacts a stationary object. 15 C.J.S. Collision § 234.

2. The terms admiralty and maritime often are used interchangeably to refer to law applying upon navigable waters. Thomas J. Schoenbaum, 1 Admiralty & Mar. Law § 1-1 (5th ed. 2012). Admiralty law, as practiced in the United States, "typically refers to the law of ships and shipping." *Id.* Up until the last half-century, maritime law shared this same definition. *Id.* Maritime law now typically refers to "the entire body of laws, rules, legal concepts and processes that relate to the use of marine resources, ocean commerce, and navigation." *Id.* "Admiralty law is both narrower and broader than maritime law: it is narrower in the sense that it refers only to the private law of navigation and shipping; it is broader in that it covers inland as well as marine waters." *Id.*

under Rule 9(h)[3] of the Federal Rules of Civil Procedure. Plaintiff also cites the Admiralty Extension Act, Title 46 U.S.C. § 30101,[4] as conferring subject-matter jurisdiction on this court.

Strictly speaking, this case involves the application of admiralty law, as the facts involve shipping vessels traveling upon the Mississippi River, a non-marine, navigable body of water. This court, however, will occasionally make reference to maritime law due to the intertwined nature of maritime law and admiralty law.

3. Fed.R.Civ.P. 9(h) states in pertinent part:

(h) ADMIRALTY OR MARITIME CLAIM.

(1) How Designated. If a claim for relief is within the admiralty or maritime jurisdiction and also within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim for purposes of Rules 14(c), 38(e), and 82 and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. A claim cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for those purposes, whether or not so designated.

4. Title 46 U.S.C. § 30101 states in pertinent part:

(a) In general.—The admiralty and maritime jurisdiction of the United States extends to and includes cases of injury or damage, to person or property, caused by a vessel on navigable waters, even though the injury or damage is done or consummated on land. (b) Procedure.—A civil action in a case under subsection (a) may be brought in rem or in personam according to the principles of law and the rules of practice applicable in cases where the injury or damage has been done and consummated on navigable waters.

Appendix D

Federal subject-matter jurisdiction is limited; thus, the federal courts have an obligation, independent of whether the parties challenge jurisdiction, to ascertain whether the courts have subject-matter jurisdiction over any matter before them. *MLC Fishing, Inc. v. Velez*, 667 F.3d 140, 143 (2d Cir. 2011).

"The primary purpose of federal admiralty jurisdiction is to protect commercial shipping with uniform rules of conduct." *Id.* at 141. To decide whether an alleged tort claim falls under admiralty subject-matter jurisdiction, generally invoked under Title 28 U.S.C. § 1333,[5,6] federal courts apply a two-pronged test: (1) whether the alleged tort occurred on or over "navigable waters" (commonly referred to as the "location test"); and (2) whether the activity giving rise to the incident had a substantial relationship to "traditional maritime activity", such that the incident had a potentially disruptive influence on maritime commerce (commonly referred to as the "connection test"). *Hickam v. Segars*, 905 F.Supp.2d 835, 840 (M.D. Tenn. 2012).

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5. Title 28 U.S.C. § 1333(1) states:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

6. Incidentally, Entergy did not mention § 1333 in its complaint, invoking jurisdiction through Rule 9(h) and the Admiralty Extension Act. This court does not perceive this omission as fatal to Entergy's claim of admiralty law.

Appendix D

A. Location Test

To satisfy the location test, "a plaintiff must show that the tort at issue either occurred on navigable water, or if the injury is suffered on land, that it was caused by a vessel on navigable water." *Barker v. Hercules Offshore, Inc.*, 713 F.3d 208, 215 (5th Cir. 2013). Traditionally, subject-matter jurisdiction for an admiralty tort was determined by location alone. THOMAS J. SCHOENBAUM, 1 ADMIRALTY & MAR. LAW § 3-5 (5th ed. 2012). In *The Plymouth*, 70 U.S. 20, 33, 18 L.Ed. 125, 3 Wall. 20 (1865) (superseded by statute as stated in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 115 S.Ct. 1043, 130 L.Ed. 2d 1024 (1995)), the United States Supreme Court stated:

> [T]he jurisdiction of the admiralty over marine torts depends upon locality-the high seas, or other navigable waters within admiralty cognizance; and, being so dependent upon locality, the jurisdiction is limited to the sea or navigable waters not extending beyond high-water mark.[7]

7. The "high-water mark" generally refers to the highest point at which the water rises to interact with the shore. BLACK'S LAW DICTIONARY (10th ed, 2014) defines "high-water mark" as:

> The shoreline of a sea reached by the water at high tide. . . . In a freshwater lake created by a dam in an unnavigable stream, the highest point on the shore to which the dam can raise the water in ordinary circumstances. . . . In a river not subject to tides, the line that the river impresses on the soil by covering it long enough to deprive it of agricultural value.

This interpretation, however, was superseded by statute, which states that "[t]he admiralty and maritime jurisdiction of the United States extends to and includes cases of injury or damage, to person or property, caused by a vessel on navigable waters, even though the injury or damage is done or consummated on land." Title 46 U.S.C. § 30101(a).

Torts occurring on fixed piers or docks usually are not governed by admiralty law because docks and piers are deemed to be an extension of the land. MLC Fishing, Inc., 667 F.3d at 142. For example, if a party sues to recover damages for an injury suffered because of slipping and falling on a dock, that lawsuit would generally not be governed by admiralty law. *Id.* Damages or injury caused by a "vessel on navigable water," however, are governed by admiralty law, "notwithstanding that such damage or injury was done or consummated on land." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 535, 115 S. Ct. 1043, 1049, 130 L. Ed. 2d 1024 (1995) (citing Title 46 App. U.S.C. § 740, now codified at Title 46 U.S.C. § 30101).

The Mississippi River flows through the continental United States from its headwaters in the State of Minnesota to the State of Louisiana, where it drains into the Gulf of Mexico. No party disputes that the Mississippi River is a "navigable water." which is "[a] body of water that is used, or typically can be used, as a highway for commerce with ordinary modes of trade and travel on water." BLACK'S LAW DICTIONARY (9th ed. 2009).

In this case, a push boat carrying cargo on the Mississippi River allided with a dolphin fender system that

is a part of the Fuel Oil Handling and Storage Facilities at the Baxter Wilson Plant. The pier and fenders serve as a dock for vessels which carry fuel on the Mississippi River. The location test is satisfied here, because the damage to the dolphin fender system was caused by a vessel on navigable water.

B. Connection Test

The connection test encompasses two factors: "whether the incident involved was of a sort with the potential to disrupt maritime commerce" and "whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity." *Jerome B. Grubart, Inc.*, 513 U.S. at 538-539.

In *Sisson v. Ruby*, 497 U.S. 358, 362, 110 S.Ct. 2892, 111 L.Ed.2d 292 (1990), the United States Supreme Court concluded that a fire on a noncommercial vessel docked at a marina posed "a potentially disruptive impact on maritime commerce, as it can spread to nearby commercial vessels or make the marina inaccessible to such vessels." The Court further determined that "storage and maintenance of a vessel at a marina on navigable waters" was substantially related to traditional maritime activities because "[d]ocking a vessel at a marina on a navigable waterway is a common, if not indispensable, maritime activity." *Id.* 367.

Likewise, in *Jerome B. Grubart, Inc.*, 513 U.S. at 539, the United States Supreme Court concluded that damage to a structure beneath the riverbed could disrupt

the waterway and restrict navigational use. Further, the Supreme Court concluded that "maintenance work on a navigable waterway preformed from a vessel" was substantially related to a traditional maritime activity because it was common for barges to engage in such repair work.

In contrast, however, the court in *Rollin v. Kimberly Clark Tissue Co.*, 211 F.R.D. 670, 674 (S.D. Ala. 2001), determined that medical malpractice in the treatment of an injured sailor was not likely to disrupt maritime commerce because "such everyday risks encountered [by sailors] on land are more adequately addressed by state law." Further, the court determined that treatment to a sailor, not in the middle of a voyage, was not substantially related to a traditional maritime activity. *Id.*

Both factors of the connection test weigh in favor of admiralty jurisdiction in this case. An incident where a push boat moving cargo on navigable waters strikes a dolphin or pier certainly has the potential to disrupt maritime commerce. The dock in question is used to unload fuel for the Baxter Wilson Plant. Interruption to use of the dock interferes with the maritime transport of the fuel. Further the activity involved here is a quintessentially maritime activity–that of a vessel moving cargo on navigable waters. This court is persuaded that the connection test is satisfied here.

This court finds, then, that both the location test and the connection test are satisfied here. Therefore, this court concludes that it has admiralty subject-matter jurisdiction over the tort claims in this lawsuit.

Appendix D

II. Facts Relative to the Dispute

Entergy leases and operates a fuel unloading facility with a dock and pier that extends into the Mississippi River at the Baxter Wilson Plant in Vicksburg, Mississippi. Under Entergy's lease, it is contractually obligated to maintain the dock and make any repairs. The dock has a dolphin fender system, which is a "structure placed in a waterway near a dock system which is used to moor vessels and protect the adjacent dock from damage." Marquette & Bluegrass memo at 1, docket no. 58.

Marquette Transportation Company, LLC ("Marquette") owns and Bluegrass Marine, LLC ("Bluegrass") operates the M/V Robert E. Frane, a push boat that moves barges on the Mississippi River. On April 5, 2008, Captain Larry Gwin was navigating the M/V Robert E. Frane downstream on the Mississippi River near Vicksburg, Mississippi, pushing twenty-five barges, Entergy memo at 2, docket no. 62, when one of the barges struck the Vicksburg Railroad Bridge and came loose. *Id.* While the captain and crew were attempting to get the vessel and barges under control, one of the other freed barges struck and damaged the dolphin fender system at the Baxter Wilson Plant pier. *Id.*

When Entergy filed this lawsuit, on March 28, 2011, Entergy had not begun repairs on the dolphin fender system, but had hired Riverside Construction Company to effect repairs at the "not-to-exceed" contract price of approximately $190,000.

Complaint, ¶ IX, docket no. 1. The final costs of repairs now have grown to an alleged amount of $1,820,651.10. Proposed amended complaint, ¶ IX, docket no. 74-1.

The structure in question originally was built by Mississippi Power & Light, which, from 1965 to 1973, obtained five permits from the United States Army Corps of Engineers to construct various water-bound structures and terminals in the Mississippi River to serve an adjacent power plant. The permit pertaining to the fuel unloading dock was issued in November of 1973. That permit will be discussed later as it bears upon a significant disputed issue in this litigation.

III. Motion to Dismiss

A. Standing: An Overview

The United States Supreme Court has explained that "[i]n essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 S.Ct. 2197 (1975). At its core, the issue of standing is intended to address whether the plaintiff has made out a "case or controversy" in compliance with the requisites of Article III[8] of the United States Constitution. *Id.*

8. U.S. Const. art. III, §2, cl. 1 states:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases

A determination of standing involves three elements. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Firstly, the plaintiff must establish that he or she has suffered an injury in fact. *Id.* An injury in fact is "an invasion of a legally protected interest" that is both (1) concrete and particularized, and (2) actual or imminent. *Id.* Secondly, a causal relationship must exist between the alleged injury and the alleged conduct. *Id.* Thirdly, the alleged injury must be one that likely could be resolved by a favorable ruling by the court. *Id.* at 561.

B. Marquette's and Bluegrass' Challenge

Defendants Marquette and Bluegrass challenge Entergy's standing to bring this lawsuit [docket no. 57]. Entergy, say defendants, merely leases the damaged dock, but does not own it. Further, say defendants, the owners of the damaged dock have not filed, nor joined, suit. Entergy, continue Marquette and Bluegrass, here has only a subrogation or equitable subrogation right, similar to that of an insurance company. According to

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affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

the defendants, while Entergy has a duty under the lease to maintain the pier and dolphin fender system, until Entergy actually spends any money for any repairs, it can show no damages or injury and, thus, no standing to pursue this litigation.

At the time Marquette and Bluegrass filed this motion [docket no. 57], they said that Entergy had not repaired the facility. Defendants concede in their briefs that Entergy has a contractual obligation to repair the dolphin fender system. Marquette & Bluegrass reply at 2, docket no. 72; see lease agreement, docket no. 66-1. Defendants, however, argue that if Entergy is allowed to sue Marquette and Bluegrass and recover damages, while leaving the dolphin fender system unrepaired, Marquette and Bluegrass risk suit by the true owner of the facility and potentially having to pay the damages twice.

Entergy says it has standing because the lease clearly places the duty of repairs on Entergy, not the owner. Entergy claims it is the "real party in interest" here, and, as such, may enforce its own legal right to damages. Subrogation does not apply here, says Entergy. Further, Entergy has secured bids and has conducted repairs since this issue was initially briefed.

The court denies Marquette's and Bluegrass' motion to dismiss [docket no. 57] as moot. Since filing this motion, Entergy has contracted with Riverside Construction Company ("Riverside") and Riverside has conducted repairs on the dolphin fender system.

Appendix D

IV. Admiralty Law

Entergy and the defendants, Marquette and Bluegrass, have filed dueling cross motions for summary judgment [docket nos. 59 and 61]. The primary issue is one of law. Each party argues that an admiralty legal rule places the burden of proof and persuasion on the other party, and that the opposing party cannot meet its burden.

Marquette and Bluegrass argue that because Entergy placed an unpermitted dolphin fender system in navigable waters, in violation of a strict statutory prohibition, the Pennsylvania rule applies and places the burden on Entergy to show that its "statutory violation could not reasonably be held to have been the proximate cause of the collision." *The Pennsylvania*, 19 Wall. 125, 86 U.S. 125, 136, 22 L.Ed. 148 (1873), overruled on other grounds by *United States v. Reliable Transfer Co.*, 421 U.S. 397, 411, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975).

Entergy counters that under admiralty law and the rule of *Oregon*, when a moving ship allides with a stationary object, the law presumes that the ship is at fault. *The Oregon*, 158 U.S. 186, 192-93, 15 S.Ct. 804, 807, 39 L.Ed. 943 (1895); Am. *Petrofina Pipeline Co. v. M/V Shoko Maru*, 837 F.2d 1324, 1326 (5th Cir. 1988).

A. The Pennsylvania Rule

In *The Pennsylvania*, 19 Wall. 125, 86 U.S. 125, 127, 136, 22 L.Ed. 148 (1873), a steamship ran over a sailing ship while both were traveling in a thick fog. The rules

governing fog signals required a steamship that was underway to sound a steam whistle and a sailing ship that was underway to sound a foghorn. *Id.* at 126. While the steamship sounded its whistle, the sailing ship sounded a bell, instead of a foghorn, thus violating the regulation. *Id.* at 127-28. Although the crew onboard the sailing ship heard the whistle and rung their bell in response, the steamship did not stop, as it was traveling at a rate of speed which the Court ultimately deemed excessive under the circumstances. *Id.* at 133. The Court found that because the sailing ship had violated the law, the burden rested upon the sailing ship to show "not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been." *Id.* at 136.

This "*Pennsylvania* rule" assigns the burden of proof to the party who violated the law. *Pennzoil Producing Co. v. Offshore Express, Inc.*, 943 F.2d 1465, 1471 (5th 1991). The rule requires the "statutory violator who is a party to a maritime accident" to show that the violation of the statute did not cause the accident. *Id.* at 1472; Fla. *Marine Transporters, Inc. v. Sanford*, 255 Fed.Appx. 885, 888-89 (5th Cir. 2007).

The Pennsylvania rule, however, does not apply where "a causal connection between the statutory violation and the resulting injury [is] implausible." Fla. Marine Transporters, Inc., 225 Fed.Appx. at 889. In other words, the Court in Pennsylvania "did not intend to establish a hard and fast rule that every vessel guilty of a statutory fault has the burden of establishing that its fault could not by any stretch of the imagination have had any causal relation to

the collision, no matter how speculative, improbable, or remote." In re Mid-South Towing Co., 418 F.3d 526, 534 (5th Cir. 2005). Thus, the party who allegedly violated the statute need only demonstrate that its alleged violation did not contributorily or proximately cause the accident. *Id.*

B. The *Oregon* Rule

Entergy submits its counter to Marquette's and Bluegrass' arguments, saying that the Oregon rule applies here, which places the burden on Marquette and Bluegrass to demonstrate that the moving vessel was not at fault for striking a stationary object.

In the *Oregon* case, the United States Supreme Court found the owners of a moving steamship liable for all damages caused when the steamship struck another ship, the Clan MacKenzie, which was at anchor. *The Oregon*, 158 U.S. 186, 192-93, 15 S.Ct. 804, 807, 39 L.Ed. 943 (1895). The Court found that the Oregon, the defendant in that case, was negligent, *inter alia*, for relying on an inattentive or incompetent lookout. *Id.* at 197. The Court also determined that it could not apportion fault to the stationary Clan MacKenzie, stating:

> Where one vessel, clearly shown to have been guilty of a fault, adequate in itself to account for the collision, seeks to impugn the management of the other vessel, there is a presumption in favor of the latter, which can only be rebutted by clear proof of a contributing fault. This principle is peculiarly applicable to the case of a vessel

> at anchor, since there is not only a presumption in her favor, by the fact of her being at anchor, but a presumption of fault on the part of the other vessel, which shifts the burden of proof upon the latter.

Id. In other words, "when a moving ship collides with a stationary object, the moving ship is [presumed to be] at fault." *Am. Petrofina Pipeline Co.*, 837 F.2d at 1326(citing *The Oregon*, 158 U.S. at 192-193.). The presumption of fault derives from the idea that a moving ship would not strike a stationary object unless the ship, or its crew, were negligent in some way. *Id.* This presumption operates to shift both the burden of proof and the burden of persuasion onto the moving ship. *Id.* In order to rebut the presumption of fault, the moving ship must show "that the collision was the fault of the stationary object, that the moving ship acted with reasonable care, or that the collision was an unavoidable accident." *Id.*

In this case, the visibility of the dolphin fender system, the captain's prior experience navigating the river, and his familiarity with the dolphin fender system bring into focus a somewhat related rule bearing on this dispute: that "when a mariner knows of obstructions to navigation, he must avoid them." *Pennzoil,* 943 F.2d at 1470.

C. The River and Harbors Act, Title 33 U.S.C. § 403.

The Rivers and Harbors Act prohibits the building or creation of obstructions in the navigable waters of the United States without prior approval by the United States

Army Corps of Engineers. See *Zabel v. Tabb*, 430 F.2d 199, 207 (5th Cir. Unit B 1970). The Act states in part:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf[9], pier[10], dolphin[11] . . . or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army.

Title 33 U.S.C. § 403.

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9. A "wharf" is "a flat structure that is built along the shore of a river, ocean, etc., so that ships can load and unload cargo or passengers." Merriam-Webster's Dictionary, http://www.merriam- webster.com/dictionary/wharf (last visited Jan. 6, 2015).

10. A "pier" is "a structure that goes out from a shore into the water." Merriam-Webster's Dictionary, http://www.merriam-webster.com/dictionary/pier (last visited Jan. 6, 2015).

11. A "dolphin" is "a spar or buoy for mooring boats; also: a cluster of closely driven piles used as a fender for a dock or as a mooring or guide for boats." Merriam-Webster's Dictionary, http://www.merriam-webster.com/dictionary/dolphin (last visited Jan. 6, 2015)

Appendix D

V. Summary Judgment Motions

The plaintiff and the defendants have asked the court to grant partial summary judgment motions [docket nos. 59 and 61]. Understandably, this court should grant a motion for summary judgment only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007). A fact is material if "it might affect the outcome of the suit under the overning law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). To determine whether a genuine dispute exists as to any material fact, the court must consider "all of the evidence in the record but refrain from making any credibility determinations or weighing the evidence." *Turner*, 476 F.3d at 343 (*citing Reeves v. Sanderson Plumbing Prods.*, Inc., 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000)). While the court must make all reasonable inferences in favor of the non-moving party, "a party cannot defeat summary judgment with conclusory allegations, unsubstantiated assertions, or 'only a scintilla of evidence.'" Reeves, 530 U.S. at 150 (*citing Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994)).

Because the summary motions are similar, this court will consider them together to avoid redundancy. As an initial matter, Marquette and Bluegrass argue that the dolphin fender system is a *per se* obstruction of navigable waters because it was not permitted as required by the Rivers and Harbors Act.

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Entergy's predecessor, Mississippi Power & Light, obtained five permits from the United States Army Corp of Engineers ("ACOE") for this area. The permits mention the dock structure, but do not explicitly describe the dolphin fender system. According to Marquette and Bluegrass, the Rivers and Harbors Act requires a permit specifically for the dolphin fender system, and the lack of a permit is a violation of this Act. The Rivers and Harbors Act says "it shall not be lawful to build or commence the building of any wharf, pier, dolphin . . . navigable river . . . outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army." Title 33 U.S.C. § 403.

An obstruction, as considered by this Act, is "anything that restricts, endangers, or interferes with navigation. Title 33 C.F.R. § 64.06.[12]

Marquette and Bluegrass say that because Entergy has violated the Rivers and Harbors Act, Entergy bears the burden to show that the dolphin fender system had no part in causing the accident. The defendants argue that Entergy has not met this burden and, thus, is liable for the accident.

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12. Title 33 C.F.R. § 64.06 says in pertinent part:

> Obstruction means anything that restricts, endangers, or interferes with navigation. Structures means any fixed or floating obstruction, intentionally placed in the water, which may interfere with or restrict marine navigation.

Entergy says that the *Pennsylvania* rule is an affirmative defense, and Marquette and Bluegrass bear the burden of showing, by a preponderance of the evidence, that the dolphin fender system was constructed without the requisites permits. Because the defendants have not shown that the dolphin fender system was not permitted, only that the permits do not specifically mention the dolphin fender system, then Marquette and Bluegrass have not satisfied their burden of proof, says Entergy.

Entergy offers the following evidence to show that the dolphin fender system was permitted, and that the captain was aware of the dolphin fender system and should have avoided it: the dolphin fender system had been in place for 40 years without any challenge by ACOE or other authorities; the ACOE navigation charts included the dock; Larry Gwin, the push boat captain actually knew of the existence and location of the dolphin fender system; and David Griggs, the Marquette's Senior Vice President of Operations, admitted that the boat should never have hit the dolphin fender system.

The ACOE permit governing Entergy's pier gives authorization to:

> construct a hydraulic land fill behind top bank and construct a fuel unloading facility. The land fill will consist of about 575,000 cubic yards of dredged material from the bed of the Mississippi River. The terminal will consist of a floating platform, walkway, piping *and pertinent auxiliary equipment in the Mississippi River.*

Docket no. 69-1 at 3 (emphasis added).

Entergy says that the dolphin fender system is necessary for use of the dock and is "pertinent auxiliary equipment in the Mississippi River" as named in the permit. Further, says Entergy, the dolphin fender system has been in place and marked on ACOE river navigation charts for the last 40 years.

Marquette and Bluegrass requested an opinion from ACOE as to whether the dolphin fender system was permitted by any one of the five permits. *See* ACOE letter at 2, docket no. 69-5. The ACOE, however, refused to provide an opinion because "that would constitute a legal and/or factual conclusion" regarding whether a violation had occurred. *Id.* The ACOE opined that "providing such information would be akin to providing expert testimony," which the ACOE considered to be inappropriate given the circumstances:

> At the very least, responding to such questions would be inappropriate under the circumstances. Asking us to respond to such questions essentially asks us to make a permitting decision through non-permitting procedures. Stating in a deposition whether or not a facility was in violation of a permit, based upon a review of permits that were issued over 40 years ago; by an employee who was not involved in the original permitting process; but who would be responsible for any potential enforcement actions in the future, would not

> be appropriate given the limited nature of the information made available in the questions and could prejudice any future enforcement actions by this agency, if necessary.

Id. at 2-3.

ACOE, however, despite having been aware of the dolphin fender system for at least 40 years, has not prosecuted or fined Entergy, the owner, or predecessors for the purportedly unpermitted dolphins.

In the alternative, Marquette and Bluegrass say that even if the fender system was permitted, the dolphin fender system was an obstruction to navigable waters and, ultimately, caused this accident.

Entergy counters that under the Oregon Rule the burden is on the boat captain to avoid colliding with a known object or obstruction. Entergy points to *Dow Chemical Co. v. Dixie Carriers*, Inc., 463 F.2d 120, 122 (5th Cir. 1972), in which the Fifth Circuit refused to conclude that a fender works, which was not approved by the ACOE, was an obstruction to navigation or inherently hazardous when the crew was familiar with the navigation of the waterway. Nor could the court find any evidence in the record to suggest "that the fender system 'caused or contributed to' the collisions simply by being there." *Id.* The court opined that even if the owner's "statutory violation rendered it presumptively liable for damages resulting from collision," the *Pennsylvania* rule should not be read as placing all the blame upon the party in

violation of the statute when the other party's negligence is so glaring and "when the accident was undoubtedly due to the negligence of an offending vessel whose actions could not be anticipated." *Id.* At 122 n. 5 (*citing Webb v. Davis* 236 F.2d 90, 93 (4th Cir. 1956).

Under a similar analysis here, this court is persuaded to deny Marquette's and Bluegrass' motion for summary judgment. The push boat captain *sub judice* has admitted that he was familiar with the river, but that he lost control of the vessel. Even if the ACOE never condoned the dolphin fender system, the *Pennsylvania* rule will not shield the defendants for their negligent actions.

This court, instead, grants Entergy's motion for partial summary judgment, finding that the *Oregon* rule is the appropriate pole star in this case. The *Oregon* rule applies a presumption of fault to a moving ship that allides with a stationary object. To rebut the presumption, the ship owner must show by a preponderance of the evidence that the stationary object caused the collision, the ship acted with reasonable care, or the accident was unavoidable. *Bunge Corp. v. M/V Furness Bridge*, 558 F.2d 790, 795 (5th Cir. 1977).

As explained above, Marquette and Bluegrass' representatives have admitted that the captain was familiar with the location of the dock and should not have hit the dolphin fender system. Simply put, Marquette and Bluegrass have not bourn their burden of proof under the *Oregon* rule to demonstrate that the dolphin fender system caused this accident

Appendix D

VI. Conclusion

For the foregoing reasons, this court denies Marquette's and Bluegrass' motions to dismiss and for partial summary judgment [docket nos. 57 and 59] and grants Entergy's motion for partial summary judgment [docket no. 61]. The *Oregon* rule applies to this situation, thus Marquette and Bluegrass bear the burden of proving they were not at fault when their push boat allided with the stationary dolphin fender system. Defendants have not succeeded in that burden. Thus, this court finds them liable for the accident and the damages. The parties shall contact the court regarding their respective schedules for setting a trial on damages.

SO ORDERED this 27th day of March 2015.

/s/ HENRY T. WINGATE
UNITED STATES DISTRICT
COURT JUDGE

APPENDIX E — DENIAL OF PETITION FOR REHEARING *EN BANC*, UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (AUGUST 15, 2018)

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-60719

ENTERGY MISSISSIPPI, INCORPORATED,

Plaintiff-Appellee,

v.

MARQUETTE TRANSPORTATION COMPANY, L.L.C.; BLUEGRASS MARINE , L.L.C.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Mississippi

ON PETITION FOR REHEARING *EN BANC*

(Opinion 07/16/18, 5 Cir., _____, _____ F.3d _____)

Before DAVIS, COSTA, and ENGELHARDT, Circuit Judges.

PER CURIAM:

Appendix E

(✓) Treating the Petition for Rehearing *En Banc* as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing *En Banc* (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing *En Banc* is DENIED.

( ) Treating the Petition for Rehearing *En Banc* as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing *En Banc* is DENIED.

ENTERED FOR THE COURT:

/s/_____
UNITED STATES CIRCUIT JUDGE

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* Judge GRAVES did not participate in the consideration of the rehearing *en banc*.