No. _____

In The

Supreme Court of the United States

FREEMAN MARINE EQUIPMENT, INC.,

Petitioner,

v.

CHMM, LLC,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *East River S. S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858 (1986), this Court held that an admiralty plaintiff cannot recover in tort for the physical damage a defective product causes to "the product itself," but can recover for physical damage to "other property." In *Saratoga Fishing Co. v. J. M. Martinac & Co.*, 520 U.S. 875, 878 (1997), this Court construed "the product itself" to mean the product "when launched into the stream of commerce" and purchased by the initial user. The Court treated equipment that the initial user added to the product *after* purchasing it as "other property." 520 U.S. at 878.

Lower courts have adopted conflicting rules to determine whether a component is part of "the product itself" or "other property." The Third and Fifth Circuits apply the "object of the bargain" rule, which requires a court to identify the product the initial buyer contracted to purchase. The Ninth Circuit follows the "user added" rule, which turns on the identity of the person who added the component to the product.

The question presented is:

When an initial user hires the subcontractor that adds a component to a product during the manufacturing process *before* the product is sold, does the object-of-the-bargain rule or the user-added rule govern whether that component is part of the "product itself" or "other property"?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner Freeman Marine Equipment, Inc. hereby states that its parent corporation is B & M Miller Equity Holdings, Inc. There is no publicly held corporation owning 10% or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Freeman Marine Equipment, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

INTRODUCTION

In this maritime products liability case, respondent alleges that petitioner's "weather tight" door failed, resulting in water damage to the "interior outfit" of respondent's "super yacht." In determining that the harm to the yacht's "interior outfit" was damage to "other property" recoverable in tort, the Ninth Circuit rejected the "object of the bargain" rule followed by the Third and Fifth Circuits. Under that rule, when a component part of the integrated product that is the object of the user's bargain causes harm to other parts of the same integrated product, the damage is only to "the product itself" and is not recoverable in tort under the economic-loss doctrine that this Court adopted in *East River S. S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858 (1986).

The Ninth Circuit instead applied a "user added" rule, holding that any component part added to a product by the initial user is "other property" so long as the manufacturer had no responsibility for supplying or installing that part – even if the part was incorporated into an integrated product during the manufacturing process before it was sold to the initial

user. Because respondent hired the contractors that installed the "interior outfit" during construction of the yacht, the Ninth Circuit concluded that the "interior outfit" was "other property" and that respondent could sue in tort for repair costs in the alleged amount of $18 million.

The Ninth Circuit's decision below directly conflicts with the decisions of the Third and Fifth Circuits, and the conflict warrants immediate resolution. The existence of conflicting product liability rules in different circuits creates disuniformity in the maritime law and uncertainty for the numerous manufacturers and suppliers (and their insurers) engaged in the multi-billion dollar shipbuilding industry. And because the choice of the governing rule is determinative of a plaintiff's tort claims, the existence of conflicting rules in different circuits raises the specter of forum shopping.

The Ninth Circuit also erred in rejecting the object-of-the-bargain rule and applying a user-added rule because the latter rule undermines the purpose of the economic-loss doctrine, which is to maintain the appropriate balance between tort and contract law. When an initial user participates in the process of manufacturing an integrated product, it can – and typically does – obtain warranties from the other contractors and suppliers involved in the manufacturing process. An initial user has available contract remedies when a fully integrated product causes

damage to itself or a part of itself, and there is no need for an additional and unlimited tort remedy.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 791 F.3d 1059 (2015) and reproduced at App. 1-17. The district court's opinion is unreported and reproduced at App. 43-45. The Findings and Recommendation of the Magistrate Judge are unreported and reproduced at App. 18-42. The Ninth Circuit's order denying rehearing is unreported and reproduced at App. 46.

JURISDICTION

The Court of Appeals for the Ninth Circuit denied rehearing on August 5, 2015, and this petition was filed within 90 days thereafter. This Court has jurisdiction under 28 U.S.C. § 1254(1). Jurisdiction in the district court was based on 28 U.S.C. § 1333 (admiralty jurisdiction) and 28 U.S.C. § 1332 (diversity jurisdiction).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Court's authority to declare the substantive maritime tort law under U.S.

Const. art. III, § 2, cl. 1, which provides that "[t]he judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction."

STATEMENT OF THE CASE

I. Factual Background

Respondent entered into a shipbuilding contract with a German company, Nobiskrug GmbH ("Builder"), to construct a 195-foot "super yacht" called the *Jamaica Bay III*.[1] The yacht was completed and delivered after sea trials at a total cost of approximately $56 million.

During construction of the yacht, the Builder subcontracted with petitioner to design, manufacture, and supply a "weather tight" exterior door. Petitioner delivered the door to the Builder's shipyard in Germany, where petitioner's employees oversaw the installation of the door into the yacht during construction.

Respondent also entered into subcontracts with third parties to provide the "interior outfit" of the yacht, such as the interior walls, stairs, floor coverings, wiring, and electronics, including essential

[1] *See* Nobiskrug delivers Motor Yacht Jamaica Bay, Charterworld.com (August 24, 2010), *available at* http://www.charterworld.com/news/nobiskrug-deliver-motor-yacht-jamaica-bay (last visited Oct. 23, 2015).

communications and navigational electronics. The interior outfit was completed while the yacht was under construction at the Builder's shipyard and before respondent accepted delivery of the yacht after sea trials.

After sea trials, respondent accepted delivery of the fully completed yacht in international waters. Along with the yacht, respondent received the bill of sale, classification certificates, required export documents, and assignments of warranties granted by manufacturers of equipment installed in the yacht.

After the Builder delivered the yacht to respondent and while it was underway off the east coast of the United States, the door failed. Respondent alleges that the resulting flooding damaged the yacht's "interior spaces, woodwork, furnishings, insulation, soundproofing, carpeting, electrical wiring, and electronics." Respondent further alleges that the cost to repair the interior of the yacht is approximately $18 million.

II. Legal Background

In *East River*, this Court recognized products liability, including strict liability, as part of the general maritime law. This Court also recognized the "economic loss doctrine," which provides that no recovery is available in tort for purely economic loss caused by a defective product that damages only itself. 476 U.S. at 871-875. The *East River* Court concluded that damage to the product itself is "most

naturally understood as a warranty claim" and that the parties should be limited to their contract remedies. 476 U.S. at 872-873. In contrast, when a defective product causes bodily injury or injury to "other property," tort law provides the more appropriate remedy. 476 U.S. at 871-872.

The defendant in *East River* designed, manufactured, and installed steam turbines in four supertankers chartered by plaintiffs. A component part in each turbine failed, causing damage to the turbine itself. Plaintiffs sued in tort seeking the cost of repairs. The suit was dismissed because the tort claims alleged damage to only the "product itself." 476 U.S. at 861-862. In defining "the product itself," this Court noted:

> Since each turbine was supplied by [defendant] as an integrated package [ ], each is properly regarded as a single unit. "Since all but the very simplest of machines have component parts, [a contrary] holding would require a finding of 'property damage' in virtually every case where a product damages itself. Such a holding would eliminate the distinction between warranty and strict products liability."

476 U.S. at 867 (*quoting Northern Power & Engineering Corp. v. Caterpillar Tractor Co.*, 623 P.2d 324, 330 (Alaska 1981)) (third alteration by *East River* Court).

This Court again addressed the meaning of "the product itself" in *Saratoga Fishing Co. v. J. M. Martinac & Co.*, 520 U.S. 875 (1997). In that case, the

owner of a fishing vessel brought an admiralty tort action against the manufacturer of the vessel as well as the designer of the vessel's hydraulic system, claiming that the hydraulic system was defectively designed and caused the vessel to catch fire and sink. The owner, who was referred to by this Court as the "Subsequent User," purchased the vessel from the "Initial User," who, in turn, had purchased the vessel from the manufacturer. 520 U.S. at 877-878.

The issue in *Saratoga Fishing* was whether fishing equipment added to a ship by the Initial User after its purchase from the manufacturer was "other property" or "the product itself." 520 U.S. at 879. The Court held that the added equipment was "other property," reversing the Ninth Circuit's decision to the contrary. The Court stated:

> We conclude that equipment added to a product after the Manufacturer . . . has sold the product to an Initial User is not part of the product that itself caused physical harm. Rather, in *East River*'s language, it is "other property." . . . Thus the extra skiff, nets, spare parts, and miscellaneous equipment at issue here, added to the ship by a user after an initial sale to that Initial User, are not part of the product (the original ship with the defective hydraulic system) that itself caused the harm.

520 U.S. at 884-885.

In reaching that decision, this Court reiterated its earlier observation in *East River* that even the

simplest of machines have component parts, and that drawing the line between the product and "other property" at the component part level would allow tort recovery in most cases and eliminate the distinction between warranty and tort in cases involving only damage to the product. This Court stated it was not retreating from that observation but that case law supported drawing a distinction between the components added to a product by a manufacturer before the product's sale to a user and those items added by a user after the sale. 520 U.S. at 883-884.

III. Proceedings Below

Respondent filed a complaint in admiralty and at law alleging tort claims for negligence, misrepresentation, and strict products liability. Respondent later amended its complaint to allege a claim for breach of contract.

Petitioner moved to dismiss the tort claims on the ground that the "economic loss doctrine" barred them because the complaint alleged only damage to the interior outfit of the yacht which was part of "the product itself."

A. The District Court Dismisses the Tort Claims

Magistrate Judge Janice Stewart recommended granting petitioner's motion to dismiss in part. App. 41. On review, District Judge Anna J. Brown adopted

the Findings and Recommendations of Magistrate Judge Stewart and issued an order granting the motion in part and dismissing all of the tort claims to the extent that they sought to recover for damage to property installed on and integrated into the vessel prior to its delivery to respondent. App. 43-44.

B. The Ninth Circuit Reinstates the Tort Claims

In a published opinion, the Ninth Circuit reversed the order of dismissal and remanded the case to the district court. App. 1-17. The Ninth Circuit analyzed this Court's opinion in *Saratoga Fishing* and concluded that:

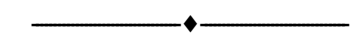
> The rule of *Saratoga Fishing* can thus be distilled as follows: Where the manufacturer of a product had no responsibility for manufacturing or assembling items that the user adds to the product, the user-added items are considered "other property" for purposes of the economic loss doctrine.

App. 13.

The Ninth Circuit construed *Saratoga Fishing* as establishing a rule that user-added "items" are considered "other property" so long as the manufacturer takes no part in manufacturing or assembling those items. App. 13. Adhering to its prior decision in *All Alaskan Seafoods, Inc. v. Raychem Corp*., 197 F.3d 992 (9th Cir. 1999), the court of appeals (at App. 13) expressly rejected the "object of the bargain" rule,

which holds that in determining whether a component part of an integrated product is "the product itself" versus "other property," a court must consider the object of the user's bargain. *See*, *e.g.*, *Sea-Land Service, Inc. v. General Electric Co.*, 134 F.3d 149, 153 (3d Cir. 1998) ("One looks to the 'object of the bargain' – [the] object purchased or bargained for by the plaintiff [–] in determining whether additions constitute 'other property.' ").

The Ninth Circuit ultimately concluded that the interior outfit amounted to "other property" because it was installed by contractors hired by petitioner and because the Builder "had no responsibility" for the installation of the interior outfit. App. 16-17. The court of appeals reversed the dismissal of respondent's tort claims and remanded the case to the district court for further proceedings. App. 17.



REASONS FOR GRANTING THE PETITION

In adopting its user-added rule, the Ninth Circuit expressly rejected the object-of-the-bargain rule employed by the Third and Fifth Circuits to determine whether component parts of an integrated product are "the product itself" or "other property." The Ninth Circuit's decision below thus directly conflicts with decisions of the Third and Fifth Circuits. That conflict is significant and requires resolution to ensure the uniformity of the maritime law; promote certainty in the commercial relationship

between users, shipbuilders, and component manufacturers and suppliers; and to prevent forum shopping.

The Ninth Circuit also erred in adopting its user-added rule. The rule conflicts with the policies underlying the economic-loss doctrine this Court articulated in *East River* and *Saratoga Fishing*. Simply put, there is no reason to expand tort remedies when an initial user who is directly involved in the manufacturing process has the motivation and opportunity to negotiate contract-warranty protections.

I. The Decision Below Conflicts with Decisions of the Third and Fifth Circuits

A. The Third Circuit Applies the Object-of-the-Bargain Rule

In *Sea-Land Service, Inc. v. General Electric Co.*, 134 F.3d 149 (3d Cir. 1998), the plaintiff vessel owner alleged that a replacement part of a diesel engine (a connecting rod) was defective and damaged the engine. The plaintiff sued the manufacturer of the connecting rod in tort for lost profits incurred while the ship was inoperable. 134 F.3d at 151-152. The Third Circuit, relying in part on *Saratoga Fishing*, concluded that every component that was the object of the bargain is considered part of the integrated "product itself." 134 F.3d at 153-156. Because the replacement connecting rod was a component part of an integrated product (the engine), plaintiff could not

recover in tort for damage to the engine and the resulting lost profits. As the court stated:

> One looks to the "object of the bargain" – [the] object purchased or bargained for by the plaintiff [–] in determining whether additions constitute "other property." . . . [E]very component that was the benefit of the bargain should be integrated into the *product*; consequently, there is no "other property." However, we distinguish from the *product* additional parts that are not encompassed in the original bargain but are subsequently acquired. These should not be integrated.

134 F.3d at 153. The Third Circuit further explained, again following *Saratoga Fishing*, that "[t]he law is clear that if a commercial party purchases all of the components at one time, regardless of who assembles them, they are integrated into one product." 134 F.3d at 154.

Under the object-of-the-bargain rule as explained by the Third Circuit, petitioner would easily have prevailed if that court had decided this case.

B. The Fifth Circuit Also Applies the Object-of-the-Bargain Rule

In *Shipco 2295, Inc. v. Avondale Shipyards, Inc.*, 825 F.2d 925 (5th Cir. 1987), the buyer of a vessel brought a tort action against the builder as well as the supplier of a defective steering mechanism that caused damage to the vessel. The Fifth Circuit

concluded that the buyer could not maintain a tort claim against either party because the only damage was to the finished, bargained-for product, *i.e.*, the vessel including its steering mechanism. 825 F.2d at 930. The court concluded "that the product in this context means the finished product bargained for by the buyer." 825 F.2d at 930.

To reach that conclusion, the Fifth Circuit applied the object-of-the-bargain rule:

> In attempting to identify the product, our analysis leads us to ask what is the object of the contract or bargain that governs the rights of the parties? The completed vessels were obviously the objects of the contract. . . . We are persuaded that those same vessels that were the object of the contract must be considered "the product" rather than the individual components that make up the vessels.

825 F.2d at 928. *See also Nicor Supply Ships Associates v. General Motors Corp.*, 876 F.2d 501, 505-506 (5th Cir. 1989) (seismic equipment placed on board vessel by time charterer and damaged in fire allegedly caused by defective engine was "other property" because it was not the "object of the contract" between owner and shipbuilder); *Petroleum Helicopters, Inc. v. Avco Corp.*, 930 F.2d 389, 392-393 (5th Cir. 1991) (a defective interchangeable component by the

same manufacturer is part of the product itself under *Shipco*'s object-of-the-bargain analysis).

C. The Ninth Circuit Expressly Rejects the Object-of-the-Bargain Rule

In the opinion below, the Ninth Circuit expressly rejected the object-of-the-bargain rule based on its interpretation of binding circuit precedent:

> Freeman claims that [the Third and Fifth Circuits] "evaluated the object of the parties' bargain, which was the acquisition of a fully functioning product." However, in *All Alaskan Seafoods* [*v. Raychem Corp.*, 197 F.3d 992 (9th Cir. 1999)], we interpreted *Saratoga Fishing* as having "rejected the view . . . that would define the 'product' . . . as the object of the purchaser's bargain." 197 F.3d at 994. In so doing, we emphasized "the distinction between components incorporated by a manufacturer before sale to an initial user and those items added by a user of the manufactured product." *Id.*

App. 13 (third and fourth alterations by the Ninth Circuit). The Ninth Circuit's rejection of the object-of-the-bargain rule was clear and categorical – and not based on the particular facts of any case.

II. This Case Provides the Court with an Ideal Vehicle to Decide a Recurring Question of Exceptional Importance

Domestic shipbuilders produce over one thousand new commercial vessels a year,[2] and domestic production comprises only a small fraction of the total number of commercial ships produced world-wide.[3] User participation in the manufacture of commercial ships is common-place, and in fact, standard shipbuilding contracts (foreign and domestic) anticipate that users will participate as suppliers and subcontractors in the shipbuilding process.[4] *See*, *e.g.*, App. 14 (quoting contract in this case). Resolution of the legal question presented here is of exceptional importance to shipbuilders and the numerous component

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[2] Maritime Administration (MARAD), The Economic Importance of the U.S. Shipbuilding and Repairing Industry 8 (May 30, 2013), *available at* http://www.marad.dot.gov/wp-content/uploads/pdf/MARAD_Econ_Study_Final_Report_2013.pdf (last visited Oct. 23, 2015).

[3] *See*, *e.g.*, The Shipbuilder's Association of Japan Shipbuilding Statistics 3 (March, 2014), *available at* http://www.sajn.or.jp/e/statistics/Shipbuilding_Statistics_Mar2014e.pdf (last visited Oct. 23, 2015).

[4] *See*, *e.g.*, 2D-XXII *Benedict on Admiralty* Form No. 22-1 Japanese Standard Shipbuilding Contract (Article XVII – Buyer's Supplies); Form No. 22-2 West European Ship Building Contract (Article 2: Inspection and Approval).

manufacturers and suppliers involved in the multi-billion dollar shipbuilding industry.[5]

Under the Ninth Circuit's user-added rule, component manufacturers and suppliers are subject to unpredictable and potentially staggering tort liability based on the fortuity of who purchases and installs a particular component part during the shipbuilding process. For example, when a component part is purchased and installed by the shipbuilder, the manufacturer or supplier of that part is subject to tort liability for damage to other parts of the ship supplied and installed by the initial user. When a component part is supplied and installed by the initial user, the manufacturer or supplier of that part is subject to tort liability for damage to every other part of the ship – which would be "other property" under the decision below. App 13. If the decision below stands, component manufacturers and suppliers would need to adjust their prices to account for the increased and unpredictable risk of tort liability that they would face – and the concomitant increase in insurance costs.

The reported cases also indicate that the question of whether components parts installed by the initial user are "the product itself" or "other property" arises with some regularity. *See*, *e.g.*, *Exxon Shipping*

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[5] *See* Maritime Administration (MARAD), The Economic Importance of the U.S. Shipbuilding and Repairing Industry, *supra* note 2, at E-2.

Co. v. Pacific Resources, 835 F. Supp. 1195, 1201 (D. Haw. 1993) (object of bargain was completed "single point mooring system" even though part of the system was supplied by buyer); *ERA Helicopters, Inc. v. Bell Helicopter Textron, Inc*., 696 F. Supp. 1096, 1098 (E.D. La. 1987) (object of bargain was entire helicopter, even though plaintiff had acquired fuel governors and fuel control units directly and not as part of contract for helicopter); *Petroleum Helicopters, Inc. v. Avco Corp.*, 930 F.2d 389 (5th Cir. 1991) (finding that a flotation device and a helicopter were one product for economic-loss purposes, even though the flotation device had been removed, overhauled, and reinstalled several times, and at the time of its failure the device was installed on a different helicopter than the one with which it originally had been sold).

Those cases also underscore the fact that applying one rule or another – the object-of-the-bargain rule or the user-added rule – is dispositive of a plaintiff's tort claims. The existence of conflicting product liability rules in different circuits not only creates disuniformity in the maritime law and uncertainty for manufacturers and suppliers, it raises the specter of forum shopping. The decision below creates a strong incentive for plaintiffs alleging product liability claims to file their actions in the Ninth Circuit in order to benefit from a rule that systematically permits higher recoveries in property-damage cases than plaintiffs could recover on the East Coast or the Gulf Coast.

Finally, this case presents an ideal vehicle for resolving the question presented. The question was cleanly presented below and decided as a matter of law. *See also*, *e.g.*, *Petroleum Helicopters*, 930 F.2d at 393 n.9 ("whether [a component] constitutes 'other property' is a legal question and not . . . a factual determination").

There is no preliminary or threshold question this Court would have to decide before reaching the question presented. Nor is there any alternative ground for overturning the district court's dismissal of respondent's tort claims if this Court reverses the decision below.

III. The Ninth Circuit Erred in Rejecting the Object-of-the-Bargain Rule

The Ninth Circuit's user-added rule undermines the economic-loss doctrine articulated in *Saratoga Fishing* and *East River*. In both of those cases, this Court emphasized the need to maintain the traditional separation between contract and tort law. *See*, *e.g.*, *East River*, 476 U.S. at 866 (if products liability law is allowed to progress too far, contract law would "drown in a sea of tort"). A commercial buyer should be limited to its contract remedies when it "can negotiate a contract – a warranty – that will set the terms of compensation for product failure." *Saratoga Fishing*, 520 U.S. at 880. As this Court explained:

> If the buyer obtains a warranty, he will receive compensation for the product's loss,

> whether the product explodes or just refuses to start. If the buyer does not obtain a warranty, he will likely receive a lower price in return. Given the availability of warranties, the courts should not ask tort law to perform a job that contract law might perform better.

Id.

In creating a special rule for subsequent users, the *Saratoga Fishing* Court made clear that it was not abandoning the economic-loss doctrine or rejecting the object-of-the-bargain rule. On the contrary, it cited with approval the Fifth Circuit's *Shipco* decision applying the rule. *See* 520 U.S. at 883. The *Saratoga Fishing* Court merely concluded that a different rule was necessary when the plaintiff was a subsequent user and lacked the ability and opportunity to obtain warranties. 520 U.S. at 883-884. This Court found no justification in *East River* or "any relevant tort precedent" for limiting the tort remedies of a subsequent user when, as Justice Scalia put it, "contract-warranty protection is infeasible." 520 U.S. at 880, 888 (Scalia, J., dissenting).

Here, the Ninth Circuit justified its user-added rule on similar grounds, *viz.*, that the case was not in the "wheelhouse of warranty" and that it would be "unreasonable" to expect an initial user involved in the shipbuilding process to "depend on" its warranty remedies to protect against one component causing damages to another. App. 16. That justification for rejecting the object-of-the-bargain rule and applying a user-added rule makes no commercial sense,

particularly since initial users who are involved in the construction of commercial ships can – and typically do – obtain warranties from the major participants in the shipbuilding process.[6] Indeed, initial users of commercial ships typically oversee the construction process, ensure compliance with the plans and designs, and collect warranties from the suppliers or (as here) require their sellers by contract to provide them with pass-through warranties. Unlike the purchaser of a "used" vessel, an initial user who participates in the construction of a vessel can and usually does obtain "contract-warranty protection."

When an initial user acts as its own contractor or component supplier in connection with the construction of a new vessel, the object-of-the-bargain rule best accomplishes the goals of the *East River* economic-loss doctrine. It maintains the historical distinction between tort and contract; it protects the parties' freedom to allocate economic risk by contract; and it provides certainty and parity for all the parties involved in the manufacturing process. Contractors, suppliers, and manufacturers involved in the construction of a new vessel should not be subject to liability in tort for damage to the work or product of another party based solely on the fortuity that the other party was hired directly by the initial user and not the shipyard (or other contractor). All of the

[6] In this case, respondent obtained warranties from the Builder covering its own work and the goods and services provided by its suppliers and subcontractors, including petitioner.

parties involved in the manufacture of a fully integrated vessel – the product that is the object of the initial user's bargain – should be free to allocate the risk of product failure by private contract and without interference from tort law. *East River*, 476 U.S. at 873.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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October 28, 2015

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHMM, LLC, *Plaintiff-Appellant,* v. FREEMAN MARINE EQUIPMENT, INC., *Defendant-Appellee.*	No. 13-35163 D.C. No. 3:12-CV-01484-ST OPINION

Appeal from the United States District Court
for the District of Oregon
Anna J. Brown, District Judge, Presiding

Argued and Submitted
October 8, 2011 Portland, Oregon

Filed June 29, 2015

Before: Alex Kozinski, Raymond C. Fisher and Andre M. Davis,* Circuit Judges.

Opinion by Judge Kozinski

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* The Honorable Andre M. Davis, Senior Circuit Judge for the U.S. Court of Appeals for the Fourth Circuit, sitting by designation.

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OPINION

KOZINSKI, Circuit Judge:

The economic loss doctrine precludes recovery against a manufacturer for physical damage that the manufacturer's defective product causes to the "product itself." *E. River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 866-71 (1986). But the manufacturer can be sued for physical damage the product causes to "other property." *Id.* at 867-68. We consider whether a vessel owner may sue for the physical damage a defective vessel component causes to property that the owner adds to the vessel before the vessel is delivered. Put another way, is property added by the owner to a vessel prior to the delivery of the vessel considered "other property"?

I. Background

CHMM, LLC is the owner of M/Y JAMAICA BAY, a 59.5-meter luxury yacht. In 2006, CHMM contracted with Nobiskrug GmbH to "construct, equip, launch and complete [the yacht] at [Nobiskrug's] shipyard and to sell and deliver [the yacht] to [CHMM]" for approximately €34.2 million. Nobiskrug subcontracted with Freeman Marine Equipment for the manufacture of a "weathertight" door for installation in the yacht. This door provided access from the foredeck to the interior of the yacht.

The shipbuilding contract between Nobiskrug and CHMM states that "the Interior Outfit of the Yacht is to be provided by [CHMM]" and that "delivery and installation of the Interior Outfit has to be executed within the time frame laid down in [Nobiskrug's] Construction Schedule." CHMM contracted with third parties for the purchase and installation of the items in the yacht's interior. The yacht that Nobiskrug ultimately delivered to CHMM contained a finished interior outfit.

In 2011, while the yacht was at sea en route to the Bahamas, the Freeman door allegedly malfunctioned, letting in a substantial amount of water. The subsequent flooding severely damaged the yacht and its interior, including woodwork, furniture, carpeting, electrical wiring, and electronics. CHMM estimates it would cost over $18 million to repair the damage.

CHMM sued Freeman, alleging five tort claims – negligence, defect in design, defect in manufacture,

failure to properly instruct in the installation and use of the door and negligent misrepresentation. Freeman moved to dismiss on the ground that recovery for physical damage to the yacht's interior was barred by the economic loss doctrine announced in *East River Steamship*. While this motion was pending, CHMM amended its complaint to add a sixth claim for breach of "contract, quasi-contract and/or warranty."

The magistrate judge construed the motion as against the amended complaint and determined that the economic loss doctrine barred CHMM's five tort claims because the interior of the vessel was "integrated into" the completed vessel and was therefore part of the product itself. The magistrate judge held that the portion of the sixth count that alleged breach of contract should be dismissed because CHMM had no contractual relationship with Freeman. But the magistrate judge concluded that it would be premature to dismiss the breach of quasi-contract or express warranty claims without giving CHMM an opportunity for discovery. The district court adopted the magistrate judge's Findings and Recommendation in full and granted CHMM leave to file a second amended complaint "to the extent that [CHMM] seeks tort remedies for damage to 'other property' added after delivery of the Vessel by Nobiskrug to [CHMM]."

CHMM now appeals the district court's interlocutory order dismissing the five tort claims as barred by the economic loss doctrine. We have jurisdiction under 28 U.S.C. § 1292(a)(3), which allows us to hear appeals from "[i]nterlocutory decrees of . . . district

courts . . . determining the rights and liabilities of the parties to admiralty cases." 28 U.S.C. § 1292(a)(3); *see All Alaskan Seafoods, Inc. v. M/V Sea Producer*, 882 F.2d 425, 427 (9th Cir. 1989) ("To fall within the ambit of section 1292(a)(3), it is sufficient if a[ ] [district court] order conclusively determines the merits of a particular claim as between the parties."); *see also Sea Lane Bahamas Ltd. v. Europa Cruises Corp.*, 188 F.3d 1317, 1321 (11th Cir. 1999) ("As a general rule, a district court's order resolving one or more claims on the merits is appealable under § 1292(a)(3), irrespective of any claims that remain pending."). We review de novo, accepting all facts alleged in the amended complaint as true and construing them in the light most favorable to CHMM. *Barker v. Riverside Cnty. Office of Educ.*, 584 F.3d 821, 824 (9th Cir. 2009).

II. Discussion

We have described the economic loss doctrine, as applied in products liability cases, as follows:

> If a plaintiff is in a contractual relationship with the manufacturer of a product, the plaintiff can sue in contract for the normal panoply of contract damages, including foreseeable lost profits and other economic losses. Whether or not the plaintiff is in a contractual relationship with the manufacturer, the plaintiff can sue the manufacturer in tort only for damages resulting from physical injury to persons or to property *other than the product itself*.

Giles v. Gen. Motors Acceptance Corp., 494 F.3d 865, 874 (9th Cir. 2007) (emphasis added). This doctrine is rooted in "[t]he distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss." *Seely v. White Motor Co.*, 403 P.2d 145, 151 (Cal. 1965) (en banc). As Chief Justice Traynor explained in *Seely*, this distinction rests on the understanding that a manufacturer "can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm," but he "cannot be held [liable] for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands." *Id.*

The Supreme Court relied on *Seely* in applying the economic loss doctrine to products liability cases in *East River.* 476 U.S. at 871. There, supertanker charterers sought recovery in tort for damage caused by defective turbine parts. The Court held that the charterers were precluded from tort recovery because "there was no damage to 'other' property," as "each supertanker's defectively designed turbine components damaged only the turbine itself." *Id.* at 867. The Court reasoned:

> Damage to a product itself is most naturally understood as a warranty claim. Such damage means simply that the product has not met the customer's expectations, or, in other words, that the customer has received "insufficient

> product value." The maintenance of product value and quality is precisely the purpose of express and implied warranties. Therefore, a claim of a nonworking product can be brought as a breach-of-warranty action. Or, if the customer prefers, it can reject the product or revoke its acceptance and sue for breach of contract.

Id. at 872 (citations and footnote omitted).

The Court added that a contract or warranty action has a "built-in limitation on liability" in the form of the "agreement of the parties and the requirement that consequential damages, such as lost profits, be a foreseeable result of the breach." *Id.* at 874. By contrast, permitting tort recovery for "all foreseeable claims for purely economic loss could make a manufacturer liable for vast sums," as products liability law imposes "a duty to the public generally." *Id.* Indeed, it's "difficult for a manufacturer to take into account the expectations of persons downstream who may encounter its product." *Id.* Thus, the Court observed, the economic loss doctrine "account[s] for the need to keep products liability and contract law in separate spheres and to maintain a realistic limitation on damages." *Id.* at 870-71.

A decade later, the Court revisited this "corner of tort law" in *Saratoga Fishing Co. v. J.M. Martinac & Co.*, 520 U.S. 875, 877 (1997). Martinac built a fishing vessel in which it installed a hydraulic system designed by Marco Seattle Inc. Joseph Madruga purchased the vessel and added equipment – a skiff,

fishing net and spare parts. Madruga then sold the vessel, which contained the additional equipment, to Saratoga Fishing Company. The vessel later caught fire and sank as a result of a defective hydraulic system, after which Saratoga Fishing filed a tort suit against Martinac and Marco Seattle.

There was no dispute that the "product itself" consisted "*at least* of a ship as built and outfitted by its original manufacturer and sold to an initial user." *Id.* at 877. The question was whether Saratoga Fishing, the subsequent user, could recover in tort for "the physical destruction of *extra equipment . . . added* by the initial user after the first sale and then resold as part of the ship when the ship itself is later resold to a subsequent user." *Id.* The Court held that the equipment added by Madruga was "other property" and, as such, Saratoga Fishing was eligible to recover in tort for damage to that equipment. "When a manufacturer places an item in the stream of commerce by selling it to an Initial User, that item is the 'product itself' under *East River.* Items added to the product by the Initial User are therefore 'other property,' and the Initial User's sale of the product to a Subsequent User does not change these characterizations." *Id.* at 879.

Freeman argues that *Saratoga Fishing* established a "bright-line rule stating that the product is defined at the time it enters the stream of commerce, and that any items added after that time constitute 'other property' for purposes of the economic loss doctrine." Freeman views as dispositive that the yacht

wasn't "placed into the stream of commerce, *i.e.*, was not delivered to CHMM, until the [yacht] was fully complete." Its position is that the damaged property in the interior of the yacht consists of the "product itself," for which tort recovery is unavailable, because CHMM added that property *before* Nobiskrug delivered the completed yacht from the shipyard.

A closer look at *Saratoga Fishing* reveals that it draws no bright-line rule based on the time of delivery. Rather, in determining whether items added to a product can be considered "other property," the Court focused on who added those items to the product – the user or the manufacturer of the product.

Saratoga Fishing observed that "[s]tate law often distinguishes between items added [by a user] to or used in conjunction with a defective item purchased from a Manufacturer (or its distributors) and (following *East River*) permits recovery for the former when physically harmed by a dangerously defective product." 520 U.S. at 880 (citing, for example, *A.J. Decoster Co. v. Westinghouse Electric Corp.*, 634 A.2d 1330 (Md. 1994) (chicken farm owner could recover in tort for the death of his chickens caused by a defective chicken house ventilation system)). The Court also cited another admiralty case, *Nicor Supply Ships Associates v. General Motors Corp.*, 876 F.2d 501 (5th Cir. 1989), which held that a ship charterer who added seismic equipment to the ship may recover in tort for damage to that equipment caused by a defective engine. The Court concluded that it would maintain the distinction the case law suggests "between

the components added to a product by a manufacturer before the product's sale to a user" and "those items added by a user to the manufactured product." *Saratoga Fishing*, 520 U.S. at 884.

Saratoga Fishing does not turn on the *timing* of the addition to the product. What matters for purposes of tort recovery is that the items were added by the user. This is because there is a fundamental difference between the situation where "a defective manufactured product causes [damage] to property added by the Initial User" and the situation in *East River*, where "a defective component causes [damage to] the manufactured product, other than the component itself." *Id.* at 883. As the Court explained in *Saratoga Fishing*, the latter situation is well-suited for a warranty action, while the former is not:

> Initial users, when they buy, typically depend upon, and likely seek warranties that depend upon, a manufacturer's primary business skill, namely, the assembly of workable product components into a marketable whole. Moreover, manufacturers and component suppliers can allocate through contract potential liability for a manufactured product that does not work, thereby ensuring that component suppliers have appropriate incentives to prevent component defects that might destroy the product. There is no reason to think that initial users systematically control the manufactured product's quality or . . . systematically allocate responsibility for user-added equipment [ ] in similar ways.

Id. at 883-84 (citations omitted). This reasoning holds true regardless of whether the user added items "after the initial sale," as in *Saratoga Fishing, id.* at 884, or, as here, prior to it. In both instances, the manufacturer of the product to which the user added items had no responsibility for manufacturing or assembling the user-added items.

"Manufacturers of integrated products can avail themselves of warranty provisions and can spread the risk of product defect over their entire market." *All Alaskan Seafoods, Inc. v. Raychem Corp.*, 197 F.3d 992, 995 (9th Cir. 1999). For example, "[w]hen purchasing component parts, [they] can exercise market power to negotiate price and allocation of downstream risks of defective components." *Id.* They can also "impose specifications on component suppliers." *Id.* And they can "use the same components in multiple iterations of the same product" in order to achieve economies of scale. *Id.* But a manufacturer who lacks responsibility for the manufacture or assembly of user-added items isn't in a position to work with component suppliers of user-added items in such ways. Warranty law is thus ill-suited to protect against a malfunctioning product that causes physical damage to user-added items.

Freeman argues that "[t]he initial purchaser of a vessel has the opportunity to negotiate warranties with the various vessel builders with which it contracts – before vessel delivery into the stream of commerce – whereas such warranties typically are unavailable from those builders for equipment added

after delivery." But the Supreme Court rejected this very argument in *Saratoga Fishing*. In discussing whether the initial user should have been expected to offer a warranty to the subsequent purchaser for the items the initial user added to the vessel, the Court stated:

> Of course, nothing prevents a user/reseller from offering a warranty. But neither does anything prevent a Manufacturer and an Initial User from apportioning through their contract potential loss of any other items – say, added equipment or totally separate physical property – that a defective manufactured product, say, an exploding engine, might cause. *No court has thought that the mere possibility of such a contract term precluded tort recovery for damage to an Initial User's other property.*

520 U.S. at 882 (emphasis added).

None of the cases Freeman cites in support of its proposed bright-line rule are on point. *See, e.g.*, *All Alaskan Seafoods, Inc.*, 197 F.3d at 993-95 (the act of resale does not preclude the subsequent user from tort recovery); *Sea-Land Serv., Inc. v. Gen. Elec. Co.*, 134 F.3d 149, 154-55 (3d Cir. 1998) (a defective replacement component by the same manufacturer is part of the product itself); *Petroleum Helicopters, Inc. v. Avco Corp.*, 930 F.2d 389, 393 (5th Cir. 1991) (a defective interchangeable component by the same manufacturer is part of the product itself); *Shipco 2295, Inc. v. Avondale Shipyards, Inc.*, 825 F.2d 925,

929 (5th Cir. 1987) (manufacturer assembled the entire vessel, and thus the product was the completed vessel); *Exxon Shipping Co. v. Pac. Res., Inc.*, 835 F. Supp. 1195, 1201 (D. Haw. 1993) (a defective interchangeable component purchased directly from the manufacturer is part of the product itself). Freeman claims that these cases show that courts "evaluated the object of the parties' bargain, which was the acquisition of a fully-functioning product." However, in *All Alaskan Seafoods*, we interpreted *Saratoga Fishing* as having "rejected the view . . . that would define the 'product' . . . as the object of the purchaser's bargain." 197 F.3d at 994. In so doing, we emphasized "the distinction between components incorporated by a manufacturer before sale to an initial user and those items added by a user of the manufactured product." *Id.*

The rule of *Saratoga Fishing* can thus be distilled as follows: Where the manufacturer of a product had no responsibility for manufacturing or assembling items that the user adds to the product, the user-added items are considered "other property" for purposes of the economic loss doctrine.

In applying this rule to our case, we begin by examining Section 2.10 of the Shipbuilding Contract, entitled "Interior Outfit," which sets forth the respective responsibilities of CHMM ("the Purchaser" and user) and Nobiskrug ("the Builder" and manufacturer):

(a) The Interior Outfit of the Yacht is to be provided by the Purchaser. The Builder does not assume any responsibility or liability with regard to the Interior Outfit, except as provided herein. The interface between the scope of work of the Builder and the Interior Outfit is described in the Interior Outfitting Demarcation List.

(b) The Purchaser will supply and install the Interior Outfit by using materials and methods which are consistent with the requirements and Specifications related to specified noise and vibration standards as pre-approved by the Builder, the Classification Society and the Flag State and in compliance with the weight limits for the Interior Outfit as stipulated in the Weight Limits List attached as Schedule 11. The delivery and installation of the Interior Outfit has to be executed within the time frame laid down in the Builders' Construction Schedule and in the Action List by the contractor(s) chosen and employed by the Purchaser who will not interfere with the Builders' scope of work. Any delay in delivering and installing of the Interior Outfit shall be a Permissible Delay.

(c) The Purchaser shall furnish the Builder with all documentation related to the Interior Outfit which is needed for Classification of the Yacht.

The "Interior Outfitting Demarcation List" specifies that Nobiskrug's scope of work is the "bare ship,"

while CHMM's is the Interior Outfit. To further clarify matters, the Contract defines "Interior Outfit" as "the Interior Outfit of the Yacht for which [CHMM] is responsible."

In Section 2.10, Nobiskrug disclaims "any responsibility or liability with regard to the Interior Outfit," with the exception of pre-approving the noise and vibration standards that CHMM used for the Interior Outfit and obtaining Classification certificates for the yacht once it received the relevant documentation from CHMM. CHMM, on the other hand, is responsible for "supply[ing] and install[ing] the Interior Outfit by using materials and methods which are consistent" with certain industry specifications; completing delivery and installation of the Interior Outfit "within the time frame laid down in [Nobiskrug's] Construction Schedule"; ensuring that the contractors CHMM hired to work on the Interior Outfit don't "interfere with [Nobiskrug's] scope of work"; and providing Nobiskrug with "all documentation related to the Interior Outfit which is needed for Classification of the Yacht."

The relevant facts can be boiled down to the following: (1) Nobiskrug was responsible for manufacturing the bare ship; (2) CHMM, the user, added items to the bare ship; and (3) Nobiskrug wasn't responsible for manufacturing or assembling these user-added items. Under *Saratoga Fishing*, the items in the Interior Outfit consist of "other property," while the bare ship consists of the "product itself."

As discussed above, this is not a case within the wheelhouse of warranty law. CHMM and Nobiskrug didn't work together to manufacture or assemble the Interior Outfit *and* the bare ship. Rather, CHMM assumed sole responsibility for providing and installing items in the Interior Outfit, and Nobiskrug assumed sole responsibility for manufacturing the bare ship. It's unreasonable to expect CHMM to depend upon a warranty from Nobiskrug that the bare ship would not damage any items in the Interior Outfit. And it should come as no surprise that Nobiskrug did not offer such a warranty; the shipbuilding contract states that the warranties provided therein "apply only to the work of [Nobiskrug], [Nobiskrug's] employees, and of its subcontractors and suppliers."

It makes no difference that CHMM added the items comprising the Interior Outfit prior to the delivery of the yacht from Nobiskrug's shipyard. CHMM agreed in the Shipbuilding Contract to complete the Interior Outfit by the time Nobiskrug finished construction of the bare ship. Perhaps this arrangement was made to speed up the process so CHMM didn't have to wait until the bare ship was ready to then outfit the interior and receive the necessary registration and Classification certificates. Whatever the parties' motivations, CHMM shouldn't be penalized for not waiting until after the delivery of the bare ship to outfit the interior.

Nobiskrug subcontracted with Freeman to provide the door connecting the foredeck to the interior of the yacht, and there is no dispute that this door is

part of the product. CHMM's claim is that the product (the bare yacht, which included the Freeman door) caused physical damage to other property (the Interior Outfit). The economic loss doctrine does not bar CHMM from suing in tort for damage to the Interior Outfit caused by the allegedly defective Freeman door.

REVERSED and REMANDED.

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

CHMM, LLC, Plaintiff, v. FREEMAN MARINE EQUIPMENT, INC., Defendant.	Case No. 3:12-cv-01484-ST FINDINGS AND RECOMMENDATION

INTRODUCTION

Plaintiff, CHMM, LLC ("CHMM"), an entity organized and existing under the laws of the Marshall Islands, was and is the owner of M/Y JAMAICA BAY III ("Vessel"), a 59.5-meter motor yacht. NOBISKRUG GmbH ("Nobiskrug") built the Vessel for CHMM at its shipyard in Germany. Defendant, Freeman Marine Equipment, Inc. ("Freeman"), an Oregon corporation, manufactured and/or supplied a weathertight exterior door for installation on the Vessel in order to provide access from the deck to the interior spaces.

On or about November 16, 2011, while the Vessel was underway, the door failed and allowed seawater to flood the interior of the Vessel, causing severe damage to the Vessel and its contents. To recover $18 million in economic damages, CHMM filed a Complaint alleging five tort claims against Freeman for

negligence (First Claim), defect in design (Second Claim), defect in manufacture (Third Claim), failure to properly instruct in the installation and use of the door (Fourth Claim), and negligent misrepresentation (Fifth Claim). CHMM asserts admiralty jurisdiction pursuant to 28 USC § 1333 based on the maritime torts or, in the alternative, diversity jurisdiction pursuant to 28 USC § 1332.

Freeman has filed a Motion to Dismiss (docket #11), contending that CHMM has failed to state a claim upon which relief may be granted. Shortly before filing its opposition to that motion, CHMM filed an Amended Complaint adding a Sixth Claim for breach of contract, quasi-contract, and/or warranty.[1] With the consent of the parties, this court construes Freeman's Motion to Dismiss as against the Amended Complaint. For the reasons set [forth] below, that motion should be granted in part and denied in part.

STANDARDS

In order to state a claim for relief, a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" FRCP 8(a)(2). This standard "does not require

[1] Contracts relating to the construction of vessels are not considered maritime contracts. *Kossick v. United Fruit Co.*, 365 US 731, 735 (1961). Consequently, claims for breach of such contracts are not within the admiralty jurisdiction. However, the court may exercise diversity jurisdiction over the breach of contract claim.

'detailed factual allegations,' but does demand "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 US 662, 678 (2009), citing *Bell Atl. Corp. v. Twombly*, 550 US 544, 555 (2007). "A pleading that offers 'labels and conclusions' or a formulaic recitation of the elements of a cause of action will not do." *Id*, quoting *Twombly*, 550 US at 555. In order to survive a motion to dismiss for failure to state a claim pursuant to FRCP 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id*, quoting *Twombly*, 550 US at 570.

In evaluating a motion to dismiss, the court must accept the allegations of material fact as true and construe those allegations in the light most favorable to the non-moving party. *Sateriale v. R.J. Reynolds Tobacco Co.*, 687 F3d 777, 783 (9th Cir 2012). In addition to the allegations of the complaint, the court may also consider documents whose authenticity no party questions which are attached to, or incorporated by reference into, the complaint, as well as matters capable of judicial notice. *Skilstaf Inc. v. CVS Caremark Corp.*, 669 F3d 1005, 1016 n9 (9th Cir 2012); *Coto Settlement v. Eisenberg*, 593 F3d 1031, 1038 (9th Cir 2010). The court need not accept as true allegations in the complaint that contradict these sources. *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F3d 992, 998 (9th Cir 2010) ("We are not, however, required to accept as true allegations that contradict exhibits attached to the Complaint or matters properly subject

to judicial notice, or allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.") (citation omitted).

FINDINGS

I. Tort Claims (First through Fifth Claims)

A. Allegations

Pursuant to a Shipbuilding Contract dated April 19, 2006, CHMM purchased the Vessel from Nobiskrug for approximately $41 million. Amended Complaint, ¶ 6; Pruzinsky Decl., ¶ 4, Ex. C.[2] The Vessel was outfitted with a purportedly weathertight door manufactured and/or supplied by Freeman and installed on the exterior bulkhead near the bow, enabling passage from the exterior deck to the inside cabin. Amended Complaint, ¶¶ 12-15. During construction, Freeman representatives visited the shipyard to inspect the door, to oversee its installation, and to further assist with problems experienced by Nobiskrug during installation and testing of the door. *Id,* ¶ 11. Freeman represented to Nobiskrug and/or CHMM that the door was weathertight and suitable for installation in the forward part of the Vessel. *Id*, ¶ 12.

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[2] Because the Amended Complaint refers to the Shipbuilding Contract, this court may consider the copy of that contract submitted by CHMM in resolving the motion to dismiss.

The forward compartment of the Vessel housed the owner's, VIP and guest accommodations, the Captain's stateroom, and other interior spaces which were not supplied and installed by Nobiskrug. *Id*, ¶ *10*. CHMM provided the interior outfitting of the Vessel pursuant to agreements between CHMM and third parties. *Id*; Pruzinsky Decl., ¶¶ 7-9, Exs. E, F, & G. These agreements, which were separate and distinct from the Shipbuilding Contract, totaled approximately $10.4 million and related to the purchase, installation and outfitting of woodwork, furnishings, carpeting, and electronics. Pruzinsky Decl., ¶¶ 7-9, Exs. E, F, & G. In other words, the Shipbuilding Contract provided for completion and delivery of a Vessel by Nobiskrug with the "Interior Outfit" provided by CHMM. *Id*, Ex. C, § 2.10(a) & (b); Amended Complaint, ¶¶ 7-11.

Although not alleged, CHMM represented at oral argument that it accepted delivery of the Vessel from Nobiskrug on June 30, 2010, after successful completion of the sea trials.

CHMM alleges that on November 16, 2011, while the Vessel was underway, the door suffered a catastrophic failure in an expectable marine environment which allowed seawater to enter and damage the internal spaces "and the other property contained therein including woodwork, furnishings, insulation, soundproofing, carpeting, electrical wiring, and electronics." Amended Complaint, ¶¶ 14, 19-20. The estimated "costs to repair, replace and otherwise restore

the Vessel and other property contained therein to the pre-incident condition" is $18 million. *Id*, ¶ 29.

The Shipbuilding Contract contains a limited warranty from Nobiskrug (§ 11) and requires Nobiskrug to deliver to CHMM any "assignments of warranties granted by manufacturers of the equipment installed in the Yacht" (§ 7.5(c)(x)). However, CHMM has located no warranty from Freeman relating to the door. Pruzinsky Decl., Ex H ("Kercher Decl."), ¶¶ 2-3. CHMM also has submitted evidence that, under Swiss law which governs the Shipbuilding Contract, Freeman has no standing to claim the benefit of any of its provisions. *Id*, Ex. D ("Cellier Decl."), ¶¶ 5-11.

B. Economic Loss Rule

Freeman seeks dismissal of the five tort claims based on the economic loss rule under admiralty law. Under admiralty law, a plaintiff may not maintain a tort cause of action and is restricted to contract law "when a defective product purchased in a commercial transaction malfunctions, injuring only the product itself and causing purely economic loss." *East River S.S. Co. v. Transamerica Deleval, Inc.*, 476 US 858, 859 (1986).

In *East River*, defective turbine components damaged only the turbine and interrupted the commercial operation of the vessel. The bareboat charterer of the vessel sought damages in product liability from the turbine manufacturer. The Court restricted the charterer's claim to the contractual warranty

between the manufacturer and the purchaser, holding "that a manufacturer in a commercial relationship has no duty under either a negligence or strict products-liability theory to prevent a product from injuring itself." 476 US at 871. It noted that the "tort concern with safety is reduced when an injury is only to the product itself" and that actions to recover for such economic damage should be "most naturally understood as a warranty claim . . . , mean[ing] simply that the product has not met the customer's expectations." *Id* at 871-72. It further explained as follows:

> Contract law, and the law of warranty in particular, is well suited to commercial controversies of the sort involved in this case because the parties may set the terms of their own agreements. The manufacturer can restrict its liability, within limits, by disclaiming warranties or limiting remedies. In exchange, the purchaser pays less for the product. Since a commercial situation generally does not involve large disparities in bargaining power, we see no reason to intrude into the parties' allocation of the risk.

Id at 872-73 (internal citations omitted).

As later described by the Ninth Circuit, the "economic loss rule serves as a boundary at the intersection of contract and tort law to protect the law of warranty from being absorbed into tort." *All Alaskan Seafoods, Inc. v. Raychem Corp.*, 197 F3d 992, 995 (9th Cir 1999), citing *East River*, 476 US at 866-68.

The Court later applied the *East River* rule in *Saratoga Fishing Co. v. J.M. Martinac & Co.*, 520 US 875, 880 (1997), to bar tort claims by the buyer of a fishing vessel against both the manufacturer of the vessel and the subcontractor who designed the hydraulic system which malfunctioned, causing the vessel to sink. This corollary to the economic loss rule, known as "the component part rule," bars tort claims against the supplier of a component part which is integrated into the product. *All Alaskan Seafoods*, 197 F3d at 995. "Manufacturers of integrated products can avail themselves of warranty provisions and can spread the risk of product defect over their entire market . . . Alternatively, integrated product manufacturers can exercise market power to impose specifications on component suppliers." *Id*, citing *Saratoga Fishing*, 520 US at 884.

However, the economic loss rule does not completely exclude tort claims for economic loss caused by a defective product. A plaintiff may seek a tort remedy in admiralty when a defective product causes damage to "other property" installed or placed aboard a vessel by the buyer. In *Saratoga Fishing*, 520 US at 877-79, the Court concluded that a plaintiff can recover in tort for loss to extra equipment (a skiff, a fishing net, spare parts) added by the initial user after the initial purchase and delivery of the vessel and then resold to a subsequent user as part of the vessel.

C. Application of Economic Loss Rule

CHMM first argues that the economic loss rule does not apply when no contractual or warranty claim against the manufacturer exists, as in this case. It points out that the rule is premised on the existence of a "commercial relationship" between the manufacturer and the purchaser:

> Damage to a product itself is most naturally understood as a warranty claim. Such damage means simply that the product has not met the customer's expectations, or, in other words, that the customer has received "insufficient product value." The maintenance of product value and quality is precisely the purpose of express and implied warranties. Therefore, a claim of a nonworking product can be brought as a breach-of-warranty action. Or, if the customer prefers, it can reject the product or revoke its acceptance and sue for breach of contract.

East River, 476 US at 872 (citations omitted).

Although CHMM has a contract with Nobiskrug, it cannot sue Freeman for breach of contract[3] and has been unable to locate any pass-through warranty provided by Freeman.[4] Because it has no contractual

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[3] At oral argument, CHMM advised that it is also pursuing a claim for damages against Nobiskrug through arbitration pursuant to § 16 of the Shipbuilding Contract.

[4] Pursuant to § 7.5(c)(x), upon delivery of the Vessel, Nobiskrug was required to deliver to CHMM "assignments of

(Continued on following page)

warranty remedy against Freeman, CHMM contends that a tort remedy must be available.

However, that argument is based on a misunderstanding of the basis for the economic loss rule. The rule relies upon the parties' opportunity to negotiate a warranty, not on the actual existence of a contractual warranty. As acknowledged by the Supreme Court when explaining the reason for choosing contract over tort remedies, warranties may not always accompany commercial transactions:

> The commercial buyer and commercial seller *can* negotiate a contract a warranty that will set the terms of compensation for product failure. *If* the buyer obtains a warranty, he will receive compensation for the product's loss, whether the product explodes or just refuses to start. *If the buyer does not obtain a warranty*, he will likely receive a lower price in return. Given the availability of warranties, the courts should not ask tort law to perform a job that contract law might perform better.

Saratoga Fishing, 520 US at 880 (emphasis added).

Defining the line of demarcation between contract and tort law, the economic loss rule focuses on the opportunity for the parties to negotiate a warranty

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warranties granted by manufacturers of the equipment installed in the Yacht, if any." At this juncture, CHMM does not know whether Freeman manufactured the door and whether it provided any warranty to Nobiskrug.

and not on the actual inclusion of an express warranty. From a bargaining perspective, CHMM was in the same position as an initial user who enters into one contract with a builder for the new construction and delivery of a completed vessel. It could demand a suitable warranty from Nobiskrug or a lower purchase price. Based on its potential exposure to the risk that [its] door might fail, Freeman was free to negotiate the allocation of that risk with Nobiskrug by way of express warranties in its subcontract and pass them on to CHMM upon delivery of the Vessel. In addition, as a party to each of the coordinated construction contracts, CHMM was free to negotiate warranties for each of those individual contracts and also to consider how components provided by one vendor might affect components provided by another vendor. Even if CHMM failed to negotiate and obtain a contractual warranty to cover a failure of the door, it cannot obtain a tort remedy against Freeman that does not otherwise exist. *See, e.g.*, *Petroleum Helicopters, Inc. v. Avco Corp.*, 930 F2d 389, 393 (5th Cir 1991) (rejecting plaintiff's claim that the absence of a warranty provision "mandates that [plaintiff] should be allowed to pursue its strict products liability and negligent design and manufacture claims").

Second, CHMM argues that it does not seek to recover damages to the product (Vessel) itself, for which tort claims are barred by the economic loss rule, but seeks to recover damages to "other property." Freeman concedes that if CHMM sought to recover damages only to items added to the Vessel

after delivery to CHMM on June 30, 2010, then the economic loss rule would not bar the tort claims. However, CHMM seeks to recover damages to the Interior Outfit and other Purchaser Supplied Property installed prior to delivery of the Vessel to CHMM on June 30, 2010. The issue is whether those items fall within the category of "other property."

In order to determine what constitutes "other property," the court must first define what is the allegedly defective "product." To define the "product," the cases interpreting the economic loss rule use the "object of the contract" analysis. As explained by the Supreme Court, "it is not a component part, but the vessel – as placed in the stream of commerce by the manufacturer and its distributors – that is the 'product' that itself caused the harm." *Saratoga Fishing*, 520 US at 883 (citations omitted); *see also Shipco 2295, Inc. v. Avondale Shipyards, Inc.*, 825 F2d 925, 928 (5th Cir 1987), *cert denied*, 485 US 1007 (1988) ("The "completed vessels were obviously the objects of the contract . . . rather than the individual components that make up the vessels."). This maintains the "distinction between components added to a product by a manufacturer before the product's sale to a user, and those items added by a user to the manufactured product." *Saratoga Fishing*, 520 US at 884 (internal citations omitted); *see also Sea-Land Serv., Inc. v. Gen. Elec. Co.*, 134 F3d 149, 153 (3rd Cir 1998) ("One looks to the 'object of the bargain' – object purchased or bargained for by the plaintiff, in determining

whether additions constitute other property.'") (citations omitted).

CHMM contends that the product in this case is the Vessel's empty hull (including the door) which it purchased from Nobiskrug and excludes the Interior Outfit which CHMM agreed to provide, "supply and install."[5] Shipbuilding Contract, § 2.10(a) & (b). At a minimum, it argues that, due to a factual dispute, it is premature to determine what constitutes "other property" on a motion to dismiss based solely on the allegations in the Complaint.

The latter argument is easily rejected. The question of what constitutes "other property" "is a legal question and not . . . a factual determination" and "rests upon a contractual interpretation" of the contract between the parties. *Petroleum Helicopters*, 930 F2d at 393 n9. Here the only contract at issue is the Shipbuilding Contract which is referenced in the Amended Complaint and has been submitted to the court for interpretation.

According to the terms of the Shipbuilding Contract, the Interior Outfit was not added after the Vessel was placed in the stream of commerce, but was incorporated into the Vessel during construction and prior to delivery. Although Nobiskrug did not assume full responsibility or liability for the Interior Outfit

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[5] In contrast, Nobiskrug agreed to install Purchaser Supplied Items delivered by CHMM to Nobiskrug. Shipbuilding Contract, § 2.9 (a)-(c).

(Shipbuilding Contract, § 2.10(a)), it did agree to complete the Vessel in compliance "with the applicable laws, rules, regulations, and enactments" and to "ensure that all requisite inspections by the Flag State, the Classification Society, and any other relevant regulatory authorities take place in a timely manner and with satisfactory results." *Id,* § 7.6 (a) & (b). Nobiskrug agreed to deliver the required Classification Certificates to CHMM upon delivery of the Vessel after successful completion of the sea trials. *Id,* § 7.5(a) & (c). To that end, CHMM was required to furnish Nobiskrug "with all documentation related to the Interior Outfit which is needed for Classification of the Yacht." *Id, §* 2.10(c). In other words, pursuant to the Shipbuilding Contract, Nobiskrug delivered a completely outfitted and legal Vessel, not just a bare hull, to CHMM.

The cases cited by CHMM are distinguishable from the facts alleged here. In *Transco Syndicate #1, Ltd v. Bollinger Shipyards, Inc.*, 1 F Supp2d 608, 613 (ED La 1998), the court allowed a tort theory of recovery for fire damage to a vessel caused by one of two replacement engines which the plaintiff had purchased from a supplier other than the supplier of the original engines on the vessel when entering the stream of commerce. The court noted the distinction made in *Saratoga Fishing* "between components added to a product by a manufacturer before its initial sale and items added to the product by a subsequent user," which it found consistent with the "object of the contract test" previously adopted by the

Fifth Circuit. *Id* at 611 (internal citations omitted). It then distinguished *Shipco* and several other cases in which the plaintiffs "all purchased a single product with integrated parts *from the product's manufacturer.*" *Id* at 612 (emphasis in original). Because "[t]he [vessel] was a separate product that was purchased through the stream of commerce from a different supplier at a different point in time," it concluded that any damage caused by the replacement engines "is harm to 'other property.'" *Id* at 613. In contrast, here all of the construction contracts for the Vessel, including those for the Interior Outfit, were entered into and completed prior to the Vessel entering the stream of commerce.

Nicor Supply Ships Assocs. v. General Motors Corp., 876 F2d 501 (5th Cir 1989), similarly involved equipment added after the vessel had entered the stream of commerce. Nicor chartered a vessel one year after its construction was completed and subsequently installed its own seismic equipment on the vessel. The court held that "the [vessel], as delivered to Nicor, was the product of that bargain," and the seismic equipment "was, therefore, not part of the vessel." *Id* at 505-06. The court therefore allowed recovery in tort for damage caused by the seismic equipment.

All Alaskan Seafoods also dealt with products added to a vessel that already had entered the stream of commerce. Over two years after purchasing the hull of an oil drill ship and spending over $25 million to construct a seafood processing factory on the hull,

the plaintiff installed off-the-shelf heating cable on a new drain line using an off-the-shelf cable end cap. Approximately four years later, the vessel suffered substantial damage allegedly as a result of defects in the heating cable and end cap. As mass-produced products, the Ninth Circuit noted that the cable and end cap were "not acquired in a negotiated allocation of downstream risk" and, therefore, "[u]nder the principles of product liability, . . . are products and not components." *All Alaskan Seafoods*, 197 F3d at 996. In contrast, the Interior Outfit at issue here was acquired by CHMM pursuant to negotiated contracts prior to delivery of the Vessel.

CHMM also points out that other cases denying tort recovery for defective components involved a single contract between the plaintiff and the vessel builder. The presence of a single contract, however, is not determinative.

In *Petroleum Helicopters*, a helicopter capsized when a float allegedly malfunctioned during an emergency water landing. The float was manufactured by a third party and included with the helicopter which was sold by the helicopter manufacturer to the plaintiff. The plaintiff later relocated the float from the original helicopter to the helicopter that capsized. The plaintiff argued that the capsized helicopter was "other property" because the contract for purchasing the float did not include the damaged helicopter. *Petroleum Helicopters*, 930 F2d at 393. Distinguishing *Shipco* and *Nicor*, the Fifth Circuit concluded that the float was a component part of the helicopter, not

"other property." *Id.* As later summarized by another court:

> [T]he analysis in the "object of the bargain" test is more than a mechanical or formalistic determination of whether the injuring and injured components were sold under the umbrella of the same contract. In *Petroleum Helicopters*, they plainly were not. Instead, the court focused on the fact that the objects of the parties' bargain were the entire helicopter. *Petroleum Helicopters* suggests that spare and replacement parts may therefore be part of the "object of the bargain," regardless of whether or not they are purchased under the same contract.

Exxon Shipping Co v. Pac. Resources, Inc., 835 F Supp 1195 (D [Haw] 1993).

The recognition that a product can result from multiple contracts entered into by the product owner extends beyond contracts for spare or replacement parts. In *Am. Home Assurance Co. v. Major Tool & Machinery, Inc.*, 767 F2d 446 (8th Cir 1985), the buyer of a turbine entered into a contract with one company for supply of the turbine inner housing and a separate contract with a second company for supply of the turbine case. After construction was completed and the turbine was running, a wear pin caused extensive damage to the turbine vanes and blades. The plaintiff, on behalf of the buyer, claimed that the turbine vanes and blades constituted "other property" for which it could seek recovery in tort. The Eighth

Circuit disagreed, holding that the entire turbine was a "single product fabricated under a series of subcontracts." *Id* at 448.

In *Exxon Shipping*, a defective chafe chain on a single point mooring ("SPM") failed, causing a ship to break away from its berth and suffer damage. Sofec manufactured, assembled and installed the SPM which included the defective chafe chain, a buoy, and hoses. The chafe chain manufacturer provided one chain to Sofec and contracted directly with HIRI, the buyer, for a second, spare chafe chain. HIRI also contracted separately for the purchase of the hoses, which were assembled and installed with the rest of the SPM by a Sofec subcontractor. The court reasoned that *Shipco's* "object of the bargain" analysis:

> does not require that the entire product be supplied under a single, umbrella contract. Even a multi-party purchase arrangement, where the purchaser acts as its own general contractor in a series of coordinated transactions with several vendors, does not upset the analysis. In such cases, the object of the bargain is the acquisition of the completed product, even though this object is realized via a series of coordinated transactions with several sellers.

Exxon Shipping, 835 FSupp at 1201 (citations omitted).

It then precluded tort recovery against the manufacturers of the chafe chain and hoses because

they were components of the SPM, an integrated product:

> The fact that the chafe chain may have been the spare purchased directly by HIRI rather than the one purchased by Sofec makes no difference. This is consistent with *Petroleum Helicopters*. An integrated product may have any number of components replaced with spare parts in the ordinary course of events. To hold that these parts are "other property" would lead to absurd results. Although the hoses were specifically excluded from the contract and purchased separately by HIRI, they were intended for integration with the rest of the SPM. [Thus], the court finds that HIRI purchased the hoses as part of a co-ordinated series of transactions leading to the acquisition of a completed SPM.

Id.

Similarly, construction of the Vessel in this case was the result of a coordinated series of transactions leading to the acquisition by CHMM from Nobiskrug of a completed Vessel. The Interior Outfit was integrated into that Vessel. The fact that CHMM entered into several separate, related construction contracts with third parties prior to the Vessel entering the stream of commerce does not affect the "object of the bargain" analysis. Otherwise, the mere existence of a separate contract for part of an integrated product would eviscerate the economic loss rule.

CHMM also argues that its claims for negligence and negligent misrepresentation are not barred by the economic loss rule because they are independent torts. The first four claims allege that Freeman negligently selected and supplied the door for installation on the Vessel, negligently designed and/or manufactured a defective door, and negligently provided inspection and/or installation instructions for the door. In particular, it alleges that a Freeman representative was present at the shipyard in response to problems experienced with installation of its door. The Fifth Claim alleges Freeman negligently misrepresented the weathertight nature of the door.

Freeman's duty to supply the door arose solely pursuant to a subcontract with Nobiskrug in accordance with the requirements of the Shipbuilding Contract. The presence of its representative during installation was merely to ensure that installation occurred in accordance with that contractual duty. If supervision at a job site to ensure contractual performance could give rise to tort liability, then component manufacturers would have little incentive to ensure proper delivery and installation of their goods. Thus, the economic loss rule bars CHMM's claims based on negligent design, manufacture, inspection or installation. *See, e.g.*, *Sea-land Service*, 134 F3d at 156 (applying economic loss rule to bar claim for negligently repairing an engine connecting rod provided pursuant to a contract); *Apollo Group, Inc. v. Avnet, Inc.*, 58 F3d 477, 481 (9th Cir 1995) ("[The plaintiff] complains that it has failed to receive the

anticipated benefit of its bargain. Such benefit of the bargain claims are based in contract law and should be governed thereby.").

In support of its contention that the economic loss rule does not bar its negligent misrepresentation claim, CHMM cites *Otto Candies, LLC v. Nippon Kaki Kyokai Corp.*, 346 F3d 530 (5th Cir 2003), *cert denied*, 541 US 1009 (2004). However, *Otto Candies* is clearly distinguishable. It did not involve a products liability claim, a construction contract, or the economic loss rule, but instead involved a claim for negligent misrepresentation by a classification society. It held only that "general maritime law cautiously recognizes the tort of negligent misrepresentation as applied to classification societies and that on the specific facts presented in this case, [the classification society] owed a legal duty to" the plaintiff. *Id* at 532. As the court noted, "a claim for negligent misrepresentation in connection with the work of maritime classification societies should be strictly and carefully limited." *Id* at 535.

A more applicable case is *Apollo Group*, involving a claim for negligent misrepresentation based on information provided by the defendant's representatives relating to the plaintiff's purchase of computer hardware that proved inadequate for its needs. The Ninth Circuit affirmed the dismissal of the negligent misrepresentation claim because the plaintiff sought "to recover purely 'benefit of the bargain'" economic losses and because "[s]uch foreseeable risks could have been – and indeed were – allocated by the

parties in their contractual agreement." *Apollo Group*, 58 F3d at 480. The court held that "negligent misrepresentation is not an exception to the 'economic loss' rule." *Id* (applying Arizona law). Oregon courts similarly have held that negligent misrepresentation is not an exception to the economic loss doctrine. *See, e.g.*, *Onita Pac. Corp. v. Trustees of Bronson*, 315 Or 149, 165, 843 P2d 890, 899 (1992) ("In an arms-length negotiation, a negligent misrepresentation is not actionable.").

CHMM seeks to recover for economic losses that arose from a failure of the product (the Vessel) to live up to contract-based expectations. As such, the Fifth Claim for negligent misrepresentation is not based on an independent tort, but rather is based on contract and barred by the economic loss rule.

In sum, CHMM is precluded from tort recovery against Freeman for damage to anything installed on and integrated into the Vessel prior to its delivery by Nobiskrug to CHMM. To the extent that CHMM seeks to recover damage to "other property" added after delivery of the Vessel by Nobiskrug for which tort claims are not precluded, it should be allowed to amend its claims against Freeman accordingly.

II. Breach of Contract/Warranty Claim (Sixth Claim)

The Sixth Claim alleges in a conclusory fashion that "[i]f any of the damages alleged herein are governed by principles of contract, quasi-contract, and/or

warranty, [Freeman] has breached such provisions, duties and obligations with respect to the failed Door." Amended Complaint, ¶ 93. CHMM concedes that it has no contractual relationship with Freeman and to date has located no warranty from Freeman. However, CHMM explains that it alleges the Sixth Claim as an alternative claim based on the possibility that further investigation may yet uncover a warranty from Freeman of which it is a beneficiary.

Pursuant to FRCP 11(b), a pleading must allege claims which are "warranted by existing law" and factual contentions which "have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." Given the admitted lack of a contractual relationship and the provisions of the Shipbuilding Contract, this court can conceive of no legal or factual basis for alleging that Freeman is liable to CHMM for breach of contract. Accordingly, that portion of the Sixth Claim should be dismissed.

However, CHMM apparently believes that after a reasonable opportunity for further investigation or discovery, it may find evidentiary support for a breach of quasi-contract or warranty claim. Therefore, assuming that CHMM is willing to accept the risk of Rule 11 sanctions, it is premature to dismiss the alleged, breach of quasi-contract or express warranty claim at this juncture.

Moreover, even if discovery fails to uncover an express warranty from Freeman, CHMM asserted at oral argument that it may have a claim under the Uniform Commercial Code against Freeman for breach of an implied warranty. Because the Sixth Claim does not include any allegation for breach of an implied warranty, it is premature to resolve the viability of such a claim at this juncture.

RECOMMENDATION

For the reasons set forth above, Freeman's Motion to Dismiss (docket # 11) should be GRANTED as to the First through Fifth Claims in the Amended Complaint for damage to property installed on and integrated into the Vessel prior to its delivery by Nobiskrug to CHMM, GRANTED as to that portion of the Sixth Claim in the Amended Complaint alleging a breach of contract, and otherwise DENIED.

To the extent that CHMM seeks tort remedies for damage to "other property" added after delivery of the Vessel by Nobiskrug to CHMM, it should be allowed to amend its tort claims accordingly.

SCHEDULING ORDER

The Findings and Recommendation will be referred to a district judge. Objections, if any, are due Thursday, January 03, 2013. If no objections are filed, then the Findings and Recommendation will go under advisement on that date.

If objections are filed, then a response is due within 14 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

DATED December 17, 2012.

s/ Janice M. Stewart
Janice M. Stewart
United States
Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CHMM, LLC,

Plaintiff,

v.

FREEMAN MARINE EQUIPMENT, INC.,

Defendant.

3:12-cv-01484-ST

ORDER

BROWN, Judge.

Magistrate Judge Janice M. Stewart issued Findings and Recommendation (#28) on December 17, 2012, in which she recommended the Court grant Defendant's Motion (#11) to Dismiss as to Plaintiff's First through Fifth Claims for damage to property installed on and integrated into the Vessel prior to its delivery by Nobiskrug to Plaintiff, grant Defendant's Motion (#11) as to that portion of Plaintiff's Sixth Claim alleging a breach of contract, and deny the remaining portions of Defendant's Motion as to Plaintiff's other claims. The Magistrate Judge also recommended Plaintiff be allowed to amend its Amended Complaint to the extent that Plaintiff seeks tort remedies for damage to "other property" added after delivery of the Vessel by Nobiskrug to Plaintiff. Plaintiff filed timely Objections to the Findings and Recommendation. The matter is now before this Court pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure 72(b).

When any party objects to any portion of the Magistrate Judge's Findings and Recommendation, the district court must make a *de novo* determination of that portion of the Magistrate Judge's report. 28 U.S.C. § 636(b)(1). *See also United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (*en banc*); *United States v. Bernhardt*, 840 F.2d 1441, 1444 (9th Cir. 1988).

In its Objections, Plaintiff reiterates the arguments contained in its Response to Defendant's Motion to Dismiss and stated at oral argument. This Court has carefully considered Plaintiff's Objections and concludes they do not provide a basis to modify the Findings and Recommendation. The Court also has reviewed the pertinent portions of the record *de novo* and does not find any error in the Magistrate Judge's Findings and Recommendation.

CONCLUSION

The Court **ADOPTS** Magistrate Judge Stewart's Findings and Recommendation (#28), **GRANTS** Defendant's Motion (#11) to Dismiss as to Plaintiff's First through Fifth Claims for damage to property installed on and integrated into the Vessel prior to its delivery by Nobiskrug to Plaintiff, **GRANTS** Defendant's Motion (#11) as to that portion of Plaintiff's Sixth Claim alleging a breach of contract, and **DENIES** the remaining portions of Defendant's Motion as to Plaintiff's other claims.

The Court **GRANTS** Plaintiff leave to file a Second Amended Complaint no later than **February 21, 2013**, to the extent that Plaintiff seeks tort remedies for damage to "other property" added after delivery of the Vessel by Nobiskrug to Plaintiff. If Plaintiff does not file a Second Amended Complaint, this matter will proceed on the remaining claims in Plaintiff's Amended Complaint.

IT IS SO ORDERED.

DATED this 7th day of February, 2013.

/s/ Anna J. Brown
ANNA J. BROWN
United States
District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHMM, LLC, Plaintiff-Appellant, v. **FREEMAN MARINE EQUIPMENT, INC.**, Defendant-Appellee.	No. 13-35163 D.C. No. 3:12-cv-01484-ST **ORDER** (Filed Aug. 5, 2015)

Before: **KOZINSKI, FISHER** and **DAVIS**,* Circuit Judges.

The petition for panel rehearing or rehearing en Banc is **DENIED**.

* The Honorable Andre M. Davis, Senior Circuit Judge for the U.S. Court of Appeals for the Fourth Circuit, sitting by designation.