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FILED

JUN 11 2018

CLERK OF COURTS
REPUBLIC OF THE MARSHALL ISLANDS

IN THE HIGH COURT

OF THE

REPUBLIC OF THE MARSHALL ISLANDS

Appeal : 2018- 005

Chubb Insurance (Thailand) Company Ltd, Tokio Marine & Nichido Fire Insurance Co Ltd, *et al.* Plaintiffs, v. Eleni Maritime Limited *in personam* and Empire Bulkers Limited Defendants.	H.Ct. Civil No. 2014-050 H.Ct. Civil No. 2014-110 H.Ct. Civil No. 2015-194 **NOTICE OF APPEAL; CERTIFICATE OF SERVICE**

NOTICE IS HEREBY GIVEN that Defendants-Appellants, Eleni Martime Limited and Empire Bulkers Limited, intend to appeal the ruling rendered by written Order of this Court dated May 11, 2018, the Order Granting Plaintiffs' Motion for [Partial] Summary Judgment, a copy of which is filed herewith.

The following is a concise statement of the questions presented by this Appeal:

1. whether the High Court erred in its application of the principals of *res judicata*, specifically non mutual offensive collateral estoppel, to the Hong Kong order apportioning liability where the issues and parties

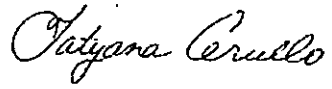
were different in the Hong Kong liability action than in the RMI action;

2. whether the High Court erred in applying choice of law rules and holding the Defendants 100% liable for Cargo Plaintiffs' damages pursuant to the U.S. "innocent cargo" rule where the established "black letter" rule is that foreign law applies to a collision in foreign territorial waters, and even if the U.S. Supreme Court's *Lauritzen-Rhoditis* factors apply, Vietnamese law is strongly favored.

Defendants intend to file a supplement within 10 days of this Notice of Appeal pursuant to SCRP Rule 3(c)(3). Proof of service of this Notice of Appeal on Plaintiffs as prescribed by the SCRP is filed herewith.

Date: June 11, 2018.

Respectfully submitted,



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Chubb Insurance (Thailand) Company Ltd, Tokio Marine & Nichido Fire Insurance Co Ltd, *et al.* Plaintiffs, v. Eleni Maritime Limited *in personam* and Empire Bulkers Limited Defendants.	H.Ct. Civil No. 2014-050 H.Ct. Civil No. 2014-110 H.Ct. Civil No. 2015-194 **CERTIFICATE OF SERVICE**

I hereby certify that on 11 JUNE 2018, a true and correct copy of DEFENDANTS' NOTICE OF APPEAL was served upon the following by email attachment to: Dennis J. Reeder, Attorney for Plaintiffs, dreeder.rmi@gmail.com Christopher Hannan, channan@bakerdonelson.com

Tatyana Cerullo

Tatyana Cerullo
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EMPIRE BULKERS LIMITED

FILED

MAY 1 1 2018

ASST. CLERK OF COURTS
REPUBLIC OF THE MARSHALL ISLANDS

IN THE HIGH COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

CHUBB INSURANCE (CHINA) COMPANY LTD, ET AL., plaintiffs, v. ELENI MARITIME LIMITED in personam and EMPIRE BULKERS LIMITED, Defendants.	CIVIL ACTION No. 2014-050
CHUBB INSURANCE (THAILAND) COMPANY LTD, ET AL., plaintiffs, v. ELENI MARITIME LIMITED in personam and EMPIRE BULKERS LIMITED, Defendants.	CIVIL ACTION No. 2014-110
FEDERAL INSURANCE COMPANY KOREA, ET AL., plaintiffs, v. ELENI MARITIME LIMITED in personam and EMPIRE BULKERS LIMITED, Defendants.	CIVIL ACTION No. 2015-194 **ORDER GRANTING PLAINTIFF'S MOTION FOR [PARTIAL] SUMMARY JUDGMENT**

TO: Dennis Reeder, counsel for the plaintiffs
Christopher Hannan, counsel for the plaintiffs
Tatyana Cerullo, counsel for the defendants
David Lowe, counsel for the defendants

Before the Court is the Motion for Summary Judgment regarding Liability ("Fault MSJ") filed by the plaintiffs ("Cargo Plaintiffs") on September 20, 2017. In their Fault MSJ, the Cargo Plaintiffs seeks entry of partial summary judgment on two grounds:

1. holding defendants Eleni Maritime Limited and Empire Bulkers Limited ("Eleni Defendants") at fault as a matter of law pursuant to

    a. principals of *res judicata*, specifically issue preclusion and/or collateral estoppel; and/or

    b. judicial estoppel, based upon the judgment issued by the High Court of the Hong Kong Special Administrative Region, Court of First Instance ("Hong Kong Court"), apportioning 70% of fault to the owner of the M/V ELENI (*i.e.*, Eleni Maritime Limited); and

2. holding the Eleni Defendants 100% liable for Cargo Plaintiffs' damages (to be determined at a later date) pursuant to the "innocent cargo" rule under United States general maritime law ("US GML," which applies as the surrogate maritime law of the Republic of the Marshall Islands ("Marshall Islands")).

The Court has considered all the briefing of the parties, exhibits/submissions attached thereto, and the arguments of counsel before the Court on October 25, 2017. Based upon the legal standard for a motion for summary judgment and the findings of fact and conclusions of law that follow, the Court **GRANTS** Cargo Plaintiffs' Fault MSJ on both grounds, as there is no genuine dispute as to any material fact and as Cargo Plaintiffs are entitled to judgment as a matter of law under the doctrine of issue preclusion and the innocent cargo rule.

I. LEGAL STANDARD

The legal standard for summary judgment is as set forth in Rule 56 of the Marshall

Islands Rules of Civil Procedure ("MIRCP"). Under Rule 56(a) "[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 moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Under Rule 56(c)(1) "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact."

Courts have held that "[s]ummary judgment is appropriate when, viewing the evidence in the light most favorable to the nonmoving party, 'there is no genuine dispute as to any material fact.' Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A genuine dispute of material fact exists if 'there is sufficient evidence favoring the nonmoving party for [the trier of fact] to return a verdict for that party.' *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)." *United States v. JP Morgan Chase Bank Account Number Ending 8215 in Name of Ladislao V. Samaniego, VI: $446,377.36*, 835 F.3d 1159, 1162 (C.A.9 (Ariz.), 2016). The relevant facts of this case are as follows.

II. FINDINGS OF FACT AND PROCEDURAL BACKGROUND

Cargo Plaintiffs assert their claims/causes of actions in these consolidated matters as

owners and/or subrogated insurers of cargo/cargo container shells[1] lost or damaged in the November 7, 2013 collision ("the Collision") off the coast of Vietnam between the vessels HEUNG-A DRAGON (the "carrying vessel" on which Cargo Plaintiffs' cargo was laden) and the non-carrying vessel, the M/V ELENI, which at all material times was owned/operated/managed by the Eleni Defendants.[2]

After the Collision, Defendant Eleni Maritime Limited on November 13, 2013, commenced two actions ("the Hong Kong Proceedings") in the Hong Kong Court:

- The first action, Case No. HCAJ 188/2013 (Admiralty Action No. 188 of 2013), sought to hold the owners/operators of the HEUNG-A DRAGON liable for the Collision, and further involved the arrest of the HEUNG-A BANGKOK (a sistership of the HEUNG-A DRAGON) ("Hong Kong Liability Action"); and

- The second action, Case No. HCAJ 189/2013 (Admiralty Action No. 189 of 2013), is a limitation of liability proceeding, seeking to limit liability for the Collision pursuant to the 1976 Convention on Limitation of Liability for Maritime Claims (which was applicable in Hong Kong at the time of filing) ("Hong Kong Limitation Action").

Defendant Eleni Maritime Limited is pursuing indemnity claims against the owners of the HEUNG-A DRAGON ("HAD Interests") in the Hong Kong Proceedings for any cargo damages that it pays out, including the claims of Cargo Plaintiffs in these consolidated proceedings.[3]

Cargo Plaintiffs filed the first action (CA No. 2014-050) in this Court on March 12, 2014,

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[1]*See* Exhibit P-4 to the First Amended Complaint in Case No. 2014-050; Exhibit P-4 to Complaint in Case No. 2014-110; Exhibit P-4 to Complaint in Case No. 2015-194.

[2]The Eleni Defendants are non-resident Marshall Islands corporations. The M/V ELENI (IMO No. 9460277) is a Marshall Islands flagged vessel, registered in the Port of Majuro. Complaints, ¶ 3, and Answer, ¶ 3. Defendant Eleni Maritime Limited was at all material times the owner of the M/V ELENI and Empire Bulkers Limited was at all material times the manager of the M/V ELENI. Complaint, ¶ 5, and Answer, ¶ 5.

[3]See Exhibit 2 to Plaintiffs' Reply Memorandum in Further Support of Fault MSJ, Declaration of Efthalia P. Paraskevopoulou at ¶ 31(A)(vii).

and the Eleni Defendants initially responded with a motion to dismiss for *forum non conveniens* filed May 8, 2014 ("FNC Motion") in favor of the Hong Kong Proceedings, based (*inter alia*, but ultimately) on the argument that the 1976 Convention on Limitation of Liability for Maritime Claims ("1976 LLMC") — and not the 1996 Protocol to the 1976 LLMC — applies and thus precluded the consolidated actions from proceeding parallel with the Hong Kong Limitation Action.

The Eleni Defendants' FNC Motion denied any liability for the Collision: "The [C]ollision was caused by or alternatively contributed to by the negligence of the owner of the HEUNG-A DRAGON, its servants or agents . . . [as that vessel] was observed transferring down the wrong side of the buoyed channel (the Song Sai Gon Channel) off Vung Tao, Vietnam, in breach of the International Regulations for Preventing Collision at Sea 1972[;] [and thus] [b]y failing to navigate as near to the outer limit of the channel which lay on its starboard side as was safe and practicable, by failing to maintain any or proper lookout and by failing to assess the risk of collision, by failing to keep clear of the ELENI, and by failing to take effective action and for other reasons, the HEUNG-A DRAGON caused the collision between the two vessels."[4] The Eleni Defendants further suggested that "the Hong Kong admiralty court [could determine] that [the Eleni] Defendants . . . [should be] totally exonerated from liability."[5]

While pre-answer motions (*i.e.*, ELENI Defendants' FNC Motion and Cargo Plaintiffs'

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[4]Eleni Defendants' Memorandum in Support of FNC Motion, p. 3 (filed May 8, 2014).

[5]Eleni Defendants' Reply Memorandum in Support of FNC Motion, p. 2 (filed August 11, 2014).

"Clash of Conventions Motion"[6]) were pending before this Court, litigation continued in the two cases pending before the Hong Kong Court. This Court eventually denied the Eleni Defendants' FNC motion on October 22, 2014; retained jurisdiction over the Plaintiffs' consolidated actions; and stayed the consolidated actions in this Court pending the outcome of any fault adjudication in the Hong Kong Liability Action on the assumption that any such liability apportionment would have binding effect on the proceedings in the Marshall Islands. Without objection or request for reconsideration from Eleni Defendants, this Court's Order of October 22, 2014 ordered as follows:

> [F]or reasons of judicial economy and administration, [the Court] grants the parties' requests to stay this action.
>
> * * *
>
> As the parties have argued, it is likely that the Hong Kong Court will in due course answer the question of liability. In turn, this Court, under the principle of *res judicata*, [will] most likely accept the Hong Kong High Court's decision on liability.
>
> Further, so that this matter does not become dormant, the Court orders counsel to advise the Court as soon as the Hong Kong High Court issues its decision in [the Hong Liability Action] or by 5:00 p.m. on April 22, 2015, report to the Court on the status of [the Hong Kong Liability Action], whichever first occurs.

Identically, the Court extended the stay order (by Order of May 7, 2015) until a liability decision was issued in the Hong Kong Court:

> [T]he Court continues its stay in this action pending the outcome of the [HCAJ 188 of 2013]. To ensure that this matter does not become dormant, the Court orders counsel to advise the Court as soon as the Hong Kong High Court issues its decision in [the Hong Kong Liability Action] or by 5:00 p.m. on April 22, 2016, report to the Court on the status of HCAJ 188 of 2013, whichever occurs first.

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[6]That is, the Cargo Plaintiffs' Motion for Declaratory Judgment as to the primacy in the Marshall Islands of the 1996 Protocol (and not the 1976 LLMC).

proceedings by the Hong Kong Court's Fault Order determination that the Defendant Eleni Maritime Limited was 70% to blame for the Collision.

1. Issue Preclusion/Collateral Estoppel

The doctrine of issue preclusion is recognized by the Marshall Islands Supreme Court as a subset of *res judicata*:

> *Res judicata* encompasses two separate preclusion doctrines: claim preclusion and issue preclusion
>
> * * *
>
> Issue preclusion binds parties in a subsequent action whether on the same or a different claim when "an issue of fact or law [has been] actually litigated and resolved by a valid final judgment.'" [*Fischel v. Equitable Life Assur. Soc'y of the United States*, 307 F.3d 997, 1005 n.5 (9th Cir. 2002)]. "In both the offensive and defensive use situations, the party against whom [issue preclusion] is asserted has litigated and lost in an earlier action." *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 329 (1979). The issue precluded must have been "actually decided" after a "full and fair opportunity" for litigation.[7]

Similarly, the Marshall Islands Supreme Court has recognized the effectively identical[8] principal of collateral estoppel:

> The doctrine of collateral estoppel is different from the doctrine of *res judicata* [at least in its "claim preclusion" iteration, which only applies as "between the same parties on the same 'claim' or 'cause of action'"[9]] in that, instead of preventing a second assertion of the same claim or cause of action, the doctrine of collateral estoppel prevents a second litigation of issues between the same parties or their

[7] *Jalley v Mojilong*, 3 MILR 106, 109 (2009).

[8] *See. e.g., In Re CWS Enterprises, Inc.*, 2017 WL 4051708, at *10 (9th Cir. Sept. 14, 2017) (noting that "courts have referred to issue preclusion using the older terms 'collateral estoppel' or 'estoppel by judgment' or the broader term '*res judicata*'[;] [but] [t]hey now use the modern term 'issue preclusion.'"); *United States v. Cessa*, 861 F.3d 121, 140 (5th Cir. 2017) (identifying "collateral estoppel" as identical to "issue preclusion").

[9] *Jalley*, at 109.

privies even in connection with a different claim or cause of action.[10]

In short, "[c]ollateral estoppel bars subsequent [litigation] based on issues that were already actually decided in a prior action."[11] The party asserting issue preclusion/collateral estoppel need not have been a party to (or in privity with a party to) the prior ruling for which estoppel is being sought.[12] This type of collateral estoppel — known as offensive, nonmutual collateral estoppel — is the basis for Cargo Plaintiffs' Fault MSJ, because Cargo Plaintiffs were not a party (*i.e.*, nonmutual) to the Hong Kong Proceedings in which the Hong Kong Fault Order was entered; and because they are seeking offensive preclusive application of that order in these consolidated proceedings.[13]

2. Nonmutual Issue Preclusion: Factors, Considerations, and a General Rule

Regarding the application of offensive nonmutual issue preclusion, the Marshall Islands Supreme Court, *citing Syverson v. Int'l Bus. Machines Corp.*, 472 F.3d 1072, 1078 (9th Cir. 2007), has held that offensive nonmutual issue preclusion is appropriate only if the following

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[10]*Zaion, et al., v. Peter and Nenam*, 1 MILR (Rev.) 228, 235 (1991).

[11]*Ueno v. Abner and Hosia, et al.*, 3 MILR 29, 31 (2007).

[12]*See, e.g., Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 327-28, 331 (1979) (stating that both parties do not have to be identical, so long as there are no special circumstances that would make issue preclusion/collateral estoppel unfair to the defendant); *Gulf Island-IV, Inc. v. Blue Streak-Gulf IS Ops.*, 24 F.3d 743, 746 (5th Cir. 1994) (*citing Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 328-30 (1971)) (contrasting issue preclusion/collateral estoppel branch of *res judicata* with claim preclusion branch, under which the party asserting *res judicata* also must have been a party to or in privity with a party to the prior proceeding); *ACLI Gov't Secs., Inc. v. Rhoades*, 963 F.2d 530, 533 (2d Cir. 1992) (stating that collateral estoppel can be raised by non-party to judgment against party that had opportunity to litigate relevant issue).

[13]See, e.g., *Parklane*, 439 U.S. at 329-331.

four factors are present:

- there was a full and fair opportunity to litigate the identical issue in the prior action;
- the issue was actually litigated in the prior action;
- the issue was decided in a final judgment; and.
- the party against whom issue preclusion is asserted was a party or in privity with a party to the prior action.[14]

These four *Syverson* factors are further and addition to four discretionary considerations set forth by the United States Supreme Court in *Parklane*. The *Parklane* discretionary considerations for offensive nonmutual issue preclusion apply, even if the first four *Syverson* factors are satisfied. They are as follows:

- "whether 'the plaintiff had the incentive to adopt a "wait and see" attitude in the hope that the first action by another plaintiff would result in a favorable judgment,' [for use] against the losing defendant;
- "[whether] the defendant had the incentive to defend the first suit with full vigor, especially when future suits are not foreseeable;
- "[whether] one or more judgments entered before the one invoked as preclusive are inconsistent with the latter or each other, suggesting that reliance on a single adverse judgment would be unfair; and
- "[whether] the defendant might be afforded procedural opportunities in the later action that were unavailable in the first 'and that could readily cause a different result.'"[15]

Based upon these discretionary considerations, the United States Supreme Court concluded "the general rule should be that in cases [I] where a plaintiff could easily have joined in the earlier

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[14] *Jalley v Mojilong*, 3 MILR 106, 111 (2009) (*citing Syverson*, at 1079).

[15] *Syverson*, at 1079 (*quoting Parklane*, 439 U.S. at 330-31).

action or [2] where, either for the reasons discussed above or for other reasons, the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel. *Parklane*, 439 U.S. at 331.

3. Application of the Tests for Nonmutual Issue Preclusion

In the present case, the above factors, discretionary considerations, and general rule are satisfied. All four factors of the *Syverson* test are met as follows:

1. full & fair opportunity to litigate the identical issue - The Eleni Defendants' own Hong Kong solicitors have stated in declarations to this Court that the Hong Kong Fault Order finding Eleni Maritime Limited 70% responsible for the Collision resulted from a "full and fair" opportunity to litigate — or in their words, a "fierce contest . . . [based on the] most direct, complete and best, evidence of events."[16] In the Hong Kong Liability Action, responsibility for the Collision was the "issue" before the court, and it is the issue before this Court, not the quantum of damages due Eleni Maritime Limited, HAD Interests, or even the cargo carriers (including Cargo Plaintiffs). Issues of quantum/affirmative defenses as to individual claims by the Cargo Plaintiffs will be determined at later proceedings. At any rate, Eleni Defendants have not established an intervening cause that would reduce Eleni Maritime Limited's responsibility for the Collision from 70% to less than 1%.

2. actually litigated — the issue of fault (*i.e.*, responsibility) was "actually litigated" in the consent order (as per 1 above);[17] In the context of preclusion,

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[16]Second Declaration of James Robert James (dated July 13, 2016), ¶ 11, attached to the Eleni Defendants' Reply in support of their Motion for Summary Judgment filed July 15, 2016. Eleni Defendants' subsequent claim that they are somehow prejudiced by not having HAD Interests before this Court ring hollow. They had an opportunity in the Hong Kong Liability Action to raise issues regarding HAD Interests' abandonment of the voyage and responsibility for salvage, and the pilferage of cargo.

[17]It also bears noting on this point that Eleni Maritime Limited and HAD Interests have an ongoing dispute in the Hong Kong Limitation Action regarding whether the HAD Interests' claims for wreck removal (as well as pollution prevention and SCOPIC costs) — totaling roughly $17 million — are subject to limitation under Hong Kong law. *See* https://www.hongkongcaselaw.com/eleni-maritime-ltd-v-heung-a- shipping-co-ltd-andothers/. Thus, Eleni Maritime Limited and HAD Interests had a huge incentive and impetus to fully and "fiercely" dispute fault allocation, because if the HAD Interests' $17 million wreck removal

> courts have held that a ruling derived from a consent order will "be given preclusive effect if that was the intent of the parties, [as] inferred either from the judgment or the record."[18] In these proceedings, Eleni Defendants have argued that the Fault Order should apply to cargo claimants generally.[19] Similarly, in the context of claim preclusion, the Marshall Islands Supreme

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claims are not limitable, Eleni Maritime Limited would benefit from minimized fault, whereas the HAD Interests would benefit from maximizing it.

[18]*See In re Berr*, 172 B.R. 299, 306 (9th Cir. 1994) ("[C]ourts are in accord holding that consent or stipulated judgments satisfy the actually litigated requirement when the judgment or the record evidences the parties' intent. *See, e.g., In re Lacy*, 947 F.2d 1276, 1277–78 (5th Cir.1991) (a consent judgment is not necessarily denied collateral estoppel effect where depositions were taken, exhibits introduced and where the debtor agreed to stipulate to facts and agreed to the form of judgment); *Gilbert v. Ben–Asher*, 900 F.2d 1407, 1410 (9th Cir.), *cert. denied*, 498 U.S. 865, 111 S.Ct. 177, 112 L.Ed.2d 141 (1990) (judgment by stipulation was held to be conclusive if the parties have entered an agreement manifesting such intention); *Hartley v. Mentor Corp.*, 869 F.2d 1469, 1473 (Fed.Cir.1989) (intent of the parties is generally controlling with respect to the preclusive effect of a stipulated judgment); Restatement (Second) of Judgments, § 27, comment (e) (1982) (a judgment should conclusively establish facts for the purpose of collateral estoppel only if that intention is evidenced by the stipulation)).

[19]*See* ¶¶ 20, 21, and 27 in the Declaration of James Robert James (dated April 25, 2016), attached to the Motion for Summary Judgment filed by Eleni Defendants on April 29, 2016.

> 20. Claims that were filed by the deadline [in the Hong Kong Limitation Action] will be adjudicated upon by the High Court of Hong Kong before being admitted to participate in the Limitation Fund [posted in the Hong Kong Limitation Action] which I expect will be distributed in accordance with the [Hong Kong Fault Order] in the collision proceedings, recording the apportionment of liability agreed on settlement by the parties thereto. . . .
>
> 21. Had Plaintiffs filed their claims in Hong Kong as other claimants have done, they would have been able to participate in the distribution of the Limitation Fund in accordance with the Court-ordered apportionment of liability mentioned above and 76 Convention limits of liability.
>
> * * *
>
> 27. All material factual disputes with regard to liability for the collision have been resolved in Hong Kong.

(Emphasis added).

Court has stated: "a stipulation of dismissal with prejudice is a final judgment on the merits and operates the same as any other final judgment for purposes of *res judicata*."[20] Accordingly, the fact that the Fault Order is a stipulated order does not mean the issue resolved was not litigated for purposes of preclusion.

3. final judgment - the Fault Order is a "final judgment" of the Hong Kong Court, as the Eleni Defendants themselves acknowledge: "The [Hong Kong Fault Order] becomes an order of the court *having the same effect as a judgment*" (emphasis added);[21] and

4. party to prior litigation - the Eleni Maritime Limited, as the plaintiff, was a party to the Hong Kong Proceedings. Defendant Empire Bulkers Limited was not a plaintiff in the Hong Kong proceedings, but in earlier papers Eleni Defendants maintained that "the limitation action [HCAJ 188/2013] includes Empire Bulkers by definition as the manager, and in the *in rem* liability proceeding [HCAJ 189/2013] there is a cross claim against it. As such, Plaintiffs are incorrect that Empire Bulkers is not included in the Hong Kong proceedings." Eleni Defendants Reply in Support of Motion to Dismiss filed August 11, 2014, p. 19. Given this admission, the Court finds that Empire Bulker Limited was a party to the Hong Kong proceedings. The Court is mindful for ELENI Defendants' more recent denials that Empire Bulker Limited participated in the Hong Kong proceedings. However, the Court will not relieve ELENI Defendants of their prior admission.

Additionally, the Eleni Defendants' argument (directed against the third "final judgment" factor of the *Syverson* test) that the Hong Kong Fault Order cannot have preclusive effect in these consolidated proceedings pursuant to Order 75, rule 35 of the Rules of the High Court of Hong Kong ("RHC") has no merit. First, it is the law of the Marshall Islands, not Hong Kong, that determines the discretionary collateral estoppel effect of the Fault Order in these Marshall Islands

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[20]*Gushi Bros Co. v. Kios, et al.*, 2 MILR 120, 123 (1998).

[21]Third Declaration of James Robert James (October 11, 2017), ¶ 3, attached to Eleni Defendants' Opposition to the Fault MSJ filed October 12, 2017.

proceedings.[22] Indeed, the RHC themselves (self-evidently) expressly provide that "these rules shall have effect in relation to all proceedings in the High Court." [23] And perhaps most importantly, the underlying purpose of RHC Order 75, rule 35 is to prevent cargo plaintiffs from being estopped and potentially prejudiced by self-interested fault allocation deals decided solely between the colliding vessels; this is exactly what *The Karo* decision (noted in Exhibit A to the 3rd James Declaration as the context for RHC Order 75, rule 35) ultimately held: "the owners of the cargo . . . are to be allowed to raise the question whether they are entitled to claim the full amount of their damages" against a non-carrying vessel, even though the two colliding vessels had previously agreed (and reduced to consent judgment) and even 50/50 split of fault.[24] The exact opposite scenario is in play here; Cargo Plaintiffs unequivocally accept the 70/30 split in the Fault Order (in conjunction with the "innocent cargo" rule, as discussed below), and are themselves seeking to be bound by it (unlike in *The Karo*, where cargo claimants sought to avoid an agreed fault split between the vessels).

Accordingly, the Hong Kong Fault Order satisfies all of the primary four *Syverson* factors

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[22]*See* Restatement (Third) of Foreign Relations Law § 481, cmt. c (1987) ("[N]o rule prevents a court in the United States from giving greater preclusive effect to a judgment of a foreign state than would be given in the courts of that state."). *Simmtech Co. v. Citibank, N.A.*, 2016 WL 4184296, at *8 (S.D.N.Y. Aug. 3, 2016), *aff'd* 2017 WL 3887984 (2d Cir. Sept. 6, 2017) ("[T]he prevailing practice appears to be follow[ing] domestic rules of preclusion [to a foreign judgment], whether they apply those of the applicable federal or state court[;] [and] [r]egardless of the mechanisms utilized by a foreign court to achieve its objectives [regarding preclusion], a United States court should not be confined to using the foreign court's mechanisms or else forgo achieving its own objectives.") (citations omitted).

[23]RHC, Order 1, ¶2(1) (Exhibit 4 to Plaintiffs' Reply Memorandum in Support of Fault MSJ).

[24]*The Karo* (1887) 13. P.D. 24, attached here as Exhibit 5 for the Court's ease of reference.

for offensive collateral estoppel effect in these consolidated proceedings. Similarly, all four of the *Parklane* discretionary considerations for application of nonmutual offensive collateral estoppel are met as well.

1. Cargo Plaintiffs had no incentive to adopt a "wait and see attitude" with respect to the Hong Kong Liability Action and/or the Hong Kong Fault Order. To the precise contrary, they were in agreement from the outset of this matter that any fault allocation in Hong Kong, regardless of the outcome, would be binding in these proceedings. Indeed, it was Cargo Plaintiffs themselves who suggested the stay of these proceedings pending a fault ruling in Hong Kong[25] — notwithstanding (as noted above p. 4-5, *supra*) that Eleni Maritime Limited was disclaiming any fault at all (*i.e.*, 0% liability) for the Collision. In fact, if any party had an incentive to "wait and see," it was the Eleni Defendants, because the cargo claimants who submitted their claims in the Hong Kong Limitation Action had no real reason to seek to maximize the M/V ELENI's fault in causing the Collision (given that their claims would never be fully recovered anyway due to the lower limits in Hong Kong); and because the Eleni Defendants knew that the Cargo Plaintiffs would not be seeking to maximize fault in the Marshall Islands given the stay of these proceedings and the Court's indication that a decision in Hong Kong would bind this case. It was the Eleni Defendants who had the biggest incentive to hold out (*i.e.*, "wait and see") in hopes of a beneficial fault finding in their favor — although this "best deal" was apparently only the 70/30 split reduced to judgment in the Hong Kong Fault Order.

2. By their own assessment, the Eleni Defendants had "incentive to defend the first suit with full vigor," particularly given the ongoing wreck removal dispute in Hong Kong (*see* note 16, *supra*). Indeed, their Hong Kong solicitor has attested that the Hong Kong Fault Order resulted from a "fierce contest" on the "best and most complete evidence" (*see* note 15, *supra*); and they did so in circumstances where "future suits [were] not foreseeable," insofar as many cargo plaintiffs had already filed claims in the Hong Kong limitation proceedings, and these consolidated proceedings (as well as others in India, *see* Marshall Islands Supreme Court Case No. 2016-002, Opinion on Removed Question, June 6, 2017) were already filed and progressing;

3. There are no prior judgments inconsistent with the Hong Kong Fault Order; and

[25] *See* Proposed Sur-Reply Memorandum in opposition to Eleni Defendants' FNC Motion, p. 4 (filed October 12, 2014, and ultimately not admitted into the record).

4. The Eleni Defendants have no "procedural opportunities" in these consolidated proceedings that could (or should) readily cause a different result as to their 70% fault in the Collision. Indeed, the only potential "procedural opportunity" that they argued was available here (*i.e.*, dismissal in favor of the 76 Convention proceedings in Hong Kong) was rejected by the Marshall Islands Supreme Court.

Finally, as the United States Supreme Court in *Parklane*, noted that "the general rule should be that in cases [1] where a plaintiff could easily have joined in the earlier action or [2] where, either for the reasons discussed above or for other reasons, the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.[26] However, this general rule has no application here. First, the Cargo Plaintiffs could not have joined in the Hong Kong Liability Action (the case in which the Hong Kong Fault Order was entered) because those proceedings were instituted against the owners of the HEUNG-A DRAGON against whom Cargo Plaintiffs have no claim as a matter of law because various bills of lading governed by various nation's laws (as is typical) incorporate either the Hague-Visby rules and/or some version of COGSA, both of which provide a complete defense/immunity to a carrying vessel for any "error in navigation."[27]

Second, to the extent the Eleni Defendants argue (as another effort at avoiding collateral estoppel) that the absence of the HAD Interests in these consolidated proceedings is somehow prejudicial as a matter of evidence/marshalling of proof, this complaint rings hollow. If the

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[26] *Parklane*, 439 U.S. at 331.

[27] *See* S. Mandelbaum, *International Ocean Shipping and Risk Allocation for Cargo Loss, Damage and Delay: A U.S. Approach to COGSA, Hague-Visby, Hamburg and the Multimodal Rules*, 5 J. TRANSNAT'L L. & POL'Y 1, 40 (1995) ("Under COGSA [*e.g.*, 46 U.S.C. §30706(a); 47 MIRC Ch.4, §405(2)(a); Korean Commercial Code art. 795], Hague and Hague-Visby, carriers [are] . . . exempted] from liability when the loss or damage arose from a negligent act in the navigation or management of the ship.").

Eleni Defendants feel the need to present any evidence in these consolidated proceedings regarding the HAD Interests, they can simply use in this Court any/all documents procured as part of the "fierce contest [and] the most direct, complete and best evidence of events surrounding the [C]ollision" in the Hong Kong Proceedings (which include their own indemnity claims against the HAD Interests, which would require substantially the same proof as any defense to Cargo Plaintiffs' claims in these proceedings). Thus, the Eleni Defendants' argument that this "general rule" somehow precludes issue preclusion/collateral estoppel in these consolidated proceedings is unavailable.

In sum, the factors, circumstantial considerations, and general rule set forth in *Syverson* and *Parklane Hosiery Co., Inc.*, favor application of discretionary nonmutual offensive collateral estoppel with respect to the Hong Kong Fault Order in these consolidated proceedings. Accordingly, the Court concludes as a matter of law that the Hong Kong Fault Order binds these proceedings pursuant to the doctrine/principles of issue preclusion/collateral estoppel, and that the Eleni Defendants are therefore adjudged to be 70% at fault in causing the Collision, and Cargo Plaintiffs' provable damages caused by the Collision, as a matter of law.

2. Judicial Estoppel

Since the Court has concluded that the Hong Kong Fault Order binds the Eleni Defendants in these proceedings under the doctrine of issue preclusion, it need not consider whether the Eleni Defendants are bound by the Fault Order under the doctrine of judicial estoppel. The next issue for the Court to consider is whether the "Innocent Cargo" Rule applies.

B. US GML as the GML of the Marshall Islands

Pursuant to Title 47, Marshall Islands Revised Code, Chap. 1 §113, "the non-statutory

general maritime law of the United States of America is . . . declared to be and is . . . adopted as the general maritime law of the Marshall Islands."

1. The US GML "Innocent Cargo" Rule

Under US GML jurisprudence, the "innocent cargo" rule provides that cargo interests who incur damages as the result of a collision between the vessel on which their cargo is carried and another non-carrying vessel can collect 100% of their damages from the non-carrying vessel as long as the non-carrying vessel is at least 1% at fault or greater.[28] While comparative fault is the general rule under US GML (pursuant to the United States Supreme Court's *Reliable Transfer* decision), the "time-honored"[29] "innocent cargo" rule specifically continues to apply to a non-carrying vessel's 100% liability to cargo interests if it is 1% or more at fault, as summarized by eminent admiralty jurist Hon. John R. Brown of the Fifth Circuit Court of Appeals:

> In *Complaint of Flota Mercante Grancolombiana, S.A.*, 440 F.Supp. 704, 725 (S.D.N.Y.1977), the Court, taking due notice of *Reliable Transfer*, stated:
>
> > This Court believes that the better rule would be to allow . . . a full recovery against the non-carrying vessel, allow the latter to add the payments it makes to cargo to its own damages, and then to permit it to recover this total from the carrying vessel in proportion to the fault of the

---

[28]35 *See, e.g., Calypso Tankers v. Panama Canal Comm'n*, 1994 WL 507403 (E.D. La. Sept. 14, 1994) ("When joint tortfeasors are involved and one is not a vessel, the 'innocent cargo rule' allows cargo interests to recover one hundred percent of its damages from a non-carrying vessel, regardless of that particular tortfeasor's portion of the fault. *Aktieselskabet Cuzco v. The Sugarseco*, 55 S.Ct. 467 (1935); *Allied Chemical Corp. v. Hess Tankship Co.*, 661 F.2d 1044 (5th Cir.1981).").

[29]*See Tokio Marine & Fire Ins. Co. v. M/V FLORA*, 1998 WL 516110, at *3 (E.D. La. Aug. 18, 1998) (*citing W. Tetley, Marine Cargo Claims*, 631 (3d Ed.1988) (restating the time-honored rule that the cargo owners of the carrying vessel is entitled to 100% recovery from the colliding vessel though the latter might have been only partially at fault).

> carrying vessel. This resolution would be more in accord with the principles enunciated in *Reliable Transfer* (which) was intended to change the rule of damages so that the burden would fall more equitably on those parties whose fault contributed to the collision.
>
> We believe that *Flota Mercante* more nearly charts a Reliable course. The Supreme Court acted to abolish the doctrine of mutual fault-equal contribution, an anachronism which every other maritime nation had already rejected. The decision only alters the proportions in which damages are fixed-it does not abolish the procedure by which an innocent cargo owner traditionally could recover his damages in full from the tortious non-carrying vessel no matter what the degree of fault between the tortious actors.
>
> * * *
>
> Where a cargo suffers damages from a collision where both vessels were negligent, it is the only innocent party. *Reliable Transfer* certainly did not intend to shift the risk of loss away from the negligent parties.[30]

Likewise, the Supreme Court itself has held that "*Reliable Transfer* merely changed the apportionment from equal division to division on the basis of relative fault[;] [b]ut we did not upset the rule that the plaintiff may recover from one [emphasis original] of the colliding vessels the damage concurrently caused by the negligence of both."[31]

In sum, in scenarios like the Collision where both the non-carrying and carrying vessel are at fault, the US GML allows innocent cargo interests to collect 100% against the non-carrying vessel:

The *Reliable Transfer* Decision has no application to an action between innocent

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[30] *Allied Chem. Corp. v. Hess Tankship Co. of Delaware*, 661 F.2d 1044, 1058-59 (5th Cir. 1981); 1982 A.M.C. 1271 (*citing Gulfcoast Transit v. ANCO PRINCESS*, 1978 A.M.C. 2471 (E.D.La.1977), *citing Oriental Hero-Caster*, 1976 A.M.C. 1287, 1306 (S.D.N.Y.1976) ("The *Reliable Transfer* decision has no application to an action between innocent cargo and one of the vessels in a collision."); *Samuels v. Empresa Lineas Maritimas Argentinas*, 573 F.2d 884, 887-888 (5th Cir. 1978), *cert. denied*, 443 U.S. 915, 99 S.Ct. 3106, 61 L.Ed.2d 878 (1979)).

[31] *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 271 n. 30 (1979); 1979 A.M.C. at 1180.

> cargo and one of the vessels in the collision. Where more than one vessel is liable to cargo, the liability is joint and several. . . . American [maritime] law accordingly protects the innocent cargo owner in a both-to-blame collision on the theory that the vessels are joint tort feasors; thus innocent cargo can recover the full amount of its loss from the non-carrying vessel (subject of course to possible limitation of liability) even if the carrying vessel has a defense to liability. . . .[32]

Critically, "[t]he American rule on this point is contrary to international practice as reflected in the Brussels Convention,[33] which limits cargo's recovery against the non-carrying vessel to the proportion of that vessel's contributory fault[;] [t]he American rule allows the innocent cargo owner to recover his damages in full from the tortious non-carrying vessel no matter what the relative degree of fault between the tortious actors [*i.e.*, the two vessels in collision]."[34]

Moreover, the American "innocent cargo" rule does not create the ostensibly inequitable result that the non-carrying vessel interests will bear more than their share of liability, because those interests can recover (by way of set-off) from the carrying vessel by way of indemnity:

> The non-carrying vessel, in turn, may recover indemnity from the carrying vessel (subject of course to possible limitation of liability) even if the carrying vessel has a defense to [the "innocent cargo" plaintiffs' claims] under [the relevant contract of carriage and the law applicable thereunder]. The non-carrying vessel, in turn may recover indemnity from the carrying vessel in proportion to the latter's share of the blame.
>
> * * *
>
> [Thus], the damages that the non-carrying vessel must pay to [innocent] cargo in

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[32] 2 Thomas J. Schoenbaum, Admiralty and Maritime Law §14–8 (3d ed. 2001).

[33] Brussels Collision Liability Convention of 1910. Notably, the Republic of the Marshall Islands is not a party to the 1910 Brussels Convention. *See* Republic of the Marshall Islands, Maritime Administrator, Marine Notice No. 2011-1 (Rev. Feb/2017), International Maritime Conventions and Other Instruments Adopted by the Republic of the Marshall Islands, *available at* https://www.register-iri.com/forms/upload/MN-2-011-1.pdf.

[34] 2 Thomas J. Schoenbaum, Admiralty and Maritime Law §14–8 (3d ed. 2001).

> turn become part of the total damages that are proportionately allocated between the colliding vessels . . . . The result is that the carrying vessel, which may escape direct liability to [innocent] cargo by asserting its [contractual] defenses . . . may be liable indirectly to cargo upon apportionment of the total damages of the collision.[35]

Accordingly, under the law of the Marshall Islands, the Eleni Defendants, as owners/operators of the non-carrying vessel the M/V ELENI, would be 100% liable for all Cargo Plaintiffs' provable damages under the "innocent cargo" rule (given the preclusive effect of the Hong Kong Fault Order pursuant to which the Eleni Defendants are 70% at fault for the Collision, subject to a right of contribution/indemnity over against the HAD Interests for their 30% share of fault (which the Eleni Defendants are pursing in the Hong Kong Proceedings)).

2. The US GML Choice of Law Principles

In opposition to the US GML Innocent Cargo Rule, Eleni Defendants' invoke the purportedly "black letter" choice of law (from the United States Court of Appeals for the Ninth Circuit's decision in *The Mandu*, 102 F.2d 459, 463 (2d Cir. 1939)) that the law of the littoral state applies to damage claims in a collision in territorial waters. That is, because the Collision occurred in the territorial waters of Vietnam, the law of Vietnam should apply to Cargo Plaintiffs' claims. In particular, Article 208-4 of the Vietnam Maritime code, which provides for pure comparative fault and is thus antithetical to the US GML "innocent cargo" rule.

However, Eleni Defendants' reference to the law of *The Mandu* as the "black letter" choice of law provision for collisions in territorial waters is incomplete. As "subsequent case law [after *The Mandu*] demonstrates . . . the *lex loci* rule is not a wooden rule [and i]t has yielded

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[35] *Id.* (*citing Travelers Indem. Co. v. Calvert Fire Ins. Co.*, 798 F.2d 826 (5th Cir. 1988) and *Mathiesen v. M/V OBELIX*, 817 F.2d 345 (5th Cir. 1987)).

when a law other than *lex loci* is common to the most significant contacts."[36] Indeed, choice of law principles have evolved under US GML, pursuant to the Supreme Court's *Lauritzen-Rhoditis* test, since the 1939 decision in *The Mandu*:

> [The *lex loci delicti* rule for collisions is] not absolute, and might be departed from where there [are] "clear and satisfying grounds" to do so. In particular, where the events concerned had a close connection with English [*i.e.*, Marshall Islands] law and there were no policy reasons for having regard to the lex loci delicti [rule] the court might apply English [*i.e.*, Marshall Islands] law alone.[37]
>
> * * *
>
> Whether U.S. [*i.e.*, Marshall Islands] or foreign law governs a maritime tort depends on [the 8 *Lauritzen-Rhoditis* factors]: (1) the place of the wrongful act; (2) the law of the flag; (3) the allegiance or domicile of the injured party; (4) the allegiance of the defendant shipowner; (5) the place of the contract; (6) the inaccessibility of the foreign forum; (7) the law of the forum; and (8) the shipowner's base of operations. Because the *Lauritzen-Rhoditis* test is not a mechanical one, counting the number of factors in favor of each nation is not the controlling consideration. Rather, the weight of each factor depends on the particular context of the claim and the national interest that might be served by the application of United States [*i.e.*, Marshall Islands] law.[38]

In other words, the rule of *lex loci delicti*/littoral state choice of law set forth in *The Mandu* is only 1 of the 8 relevant *Lauritzen-Rhoditis* factors under modern US GML choice of law principles, and it is by no means solely determinative.[39] In this case, the *Lauritzen-Rhoditis*

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[36]45 Francesca Morris, THE PENNSYLVANIA RULE: NO LONGER THE RULE?, 32 TUL. MAR. L.J. 131, 137 (Winter 2007).

[37]MARSDEN ON COLLISIONS AT SEA, §17-13, p. 566 (Simon Gault, et al. eds. 12th ed. 1998).

[38]*Kriti Filoxenia Special Mar. Enter. v. YASA H. MEHMET Motor Vessel*, 442 F. App'x 167, 168–69 (5th Cir. 2011) (*emphasis added*).

[39]*See, e.g., In re Cent. Gulf Lines, Inc.*, 62 F. App'x 557 (5th Cir. 2003) (collision occurred in Indian river; while India had an interest in application of its substantive rules of inland navigation, American law would apply to fault/damages).

factors, on the balance, favor application of Marshall Islands law:

(1) place of wrongful act = Vietnam, whose jurisdiction no one has sought to invoke;
(2) law of flag = Marshall Islands (M/V ELENI);
(3) Cargo Plaintiffs = various nations;
(4) allegiance of Eleni Defendants = Marshall Islands (as non-resident Marshall Islands corporations;
(5) place of contract = N/A;
(6) inaccessibility of foreign forum = favors Marshall Islands law (because Hong Kong Limitation Proceedings are closed);
(7) law of the forum = Marshall Islands; and
(8) Eleni Defendants' base of operations = Greece (whose law has never been invoked).

On the other hand, equity does not support the Eleni Defendants' argument that the law of Vietnam should apply to these proceedings. First, Eleni Defendants have disparaged Vietnam's legal system in these proceedings,[40] And Vietnam is not a signatory to the 1976 LLMC or the 1996 Protocol to the 1976 LLMC.[41] Second, in other Collision-related proceedings, Eleni Defendants have relied on the law of the forum, *i.e.*, in the Hong Kong[42] and in India.[43] Third,

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[40]*See* Eleni Defendants' Reply in Support of FNC Motion, p. 4, filed August 8, 2014 ("the courts in Vietnam are not experienced in admiralty matters"); Eleni Defendants Motion for Summary Judgment, p. 2 ¶7, filed Apr. 29, 2016 ("[u]nlike Vietnam where the collision occurred, Hong Kong is an active and established maritime jurisdiction").

[41]*See* Eleni Defendants' Reply in Support of FNC Motion, p. 4, filed August 8, 2014; *see also* Exhibit C to the Declaration of Alanson T. Chenault Expert Opinion dated April 28, 2016, filed with Eleni Defendants' Motion for Summary Judgment filed April 29, 2016.

[42]Case No. HCAJ 188/2013 and Case No. HCAJ 189/2013.

[43]*See* filed at the same time as Cargo Plaintiffs' Proposed Findings of Fact and Conclusions of Law dated December 29, 2017, the Affidavit in Rejoinder of Efthalia Paraskevopoulou, dated September 18, 2016, at ¶18, filed in Admiralty Suit No. 329 of 2014, High Court of Judicature at Bombay, Admiralty and Vice Admiralty Jurisdiction (*citing Harding v. Wealands*, [2006] UKHL 32 ("Whatever relates to the remedy to be enforced, must be determined by the *lex fori*, the law of the country to the tribunals of which appeal is made").

even with application of the US GML "innocent cargo" rule, the Eleni Defendants' need (at the end of the day) not be liable for more than their 70% share of Cargo Plaintiffs' damages, as they can set off the extra 30% against the HAD Interests' claims via their Hong Kong indemnity action (including as against the extra-judicial "side limitation" fund). Fourth, it is appropriate that Eleni Defendants, as Marshall Islands non-resident corporations running a Marshall Islands-flagged vessel, be governed by the law of the Marshall Islands. Fifth, applying Marshall Islands law in these proceedings would not work any prejudice to Vietnam — as the littoral state with the most direct safety-related concern vis-a-vis the Collision — because the Vietnamese National Maritime Bureau investigated the Collision (and presumably took any enforcement proceedings necessary to ensure safe navigation in its territorial waters) after the Collision.[44]

IV. CONCLUSION & JUDGMENT

Pursuant to the above Findings of Fact and Conclusions of Law, the Court hereby **GRANTS** Cargo Plaintiffs' Fault MSJ, and it is accordingly

HEREBY ORDERED, ADJUDGED AND DECREED that there be partial summary judgment in favor of Cargo Plaintiffs as follows:

- The Eleni Defendants are hereby determined to be 70% at fault in causing the Collision.
- The Eleni Defendants are, therefore, liable to Cargo Plaintiffs for the full amount of all provable damages caused by the Collision (pursuant to the US GML "innocent cargo" rule).

Further, setting all other matters aside, counsel are to appear before the Court at 9:00 a.m. on May 22, 2018, for a scheduling conference to establish dates for further litigation of all

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[44] *See* October 10, 2017 Declaration of Ly Ouang Long attached to the Eleni Defendants' Opposition to the Fault MSJ, at ¶3.

remaining issues in this matter (up to and including a trial on the merits as may be necessary).

Ordered and Entered: May 11, 2018.

Carl B. Ingram
Chief Justice, High Court

IN THE HIGH COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

Chubb Insurance (Thailand) Company Ltd., Et Al.,
Plaintiff
v
Eleni Maritime Limited in personnam & Empire Bulkers Limited
Defendant

Civil Case No. 2014-110

CERTIFICATE OF SERVICE

I, Tanya Lomae, Asst. Clerk of the Courts, hereby certify that on 5/25/18

I served the Order Re Proposed Schedule For Further Proceedings

filed 05/25/2018 in the above captioned matter on:

1. Dennis Reeder by ☑ Email ☐ Fax ☐ Personal Hand Delivery
2. Chris Hannan by ☑ Email ☐ Fax ☐ Personal Hand Delivery
3. Tatyana Cerullo by ☑ Email ☐ Fax ☐ Personal Hand Delivery
4. David Lowe by ☐ Email ☐ Fax ☐ Personal Hand Delivery

Attached is a copy of my ☒ Sent Email / ☐ Fax Confirmation.

Tanya Lomae
Asst. Clerk of the Courts
Marshall Islands Judiciary

FILED:

FILED
MAY 25 2018
ASST. CLERK OF COURTS
REPUBLIC OF THE MARSHALL ISLANDS

FILED

MAY 25 2018

ASST. CLERK OF COURTS
REPUBLIC OF THE MARSHALL ISLANDS

IN THE HIGH COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

CHUBB INSURANCE (CHINA) COMPANY LTD, ET AL., plaintiffs, v. ELENI MARITIME LIMITED in personam and EMPIRE BULKERS LIMITED, Defendants.	CIVIL ACTION No. 2014-050
CHUBB INSURANCE (THAILAND) COMPANY LTD, ET AL., plaintiffs, v. ELENI MARITIME LIMITED in personam and EMPIRE BULKERS LIMITED, Defendants.	CIVIL ACTION No. 2014-110
FEDERAL INSURANCE COMPANY KOREA, ET AL., plaintiffs, v. ELENI MARITIME LIMITED in personam and EMPIRE BULKERS LIMITED, Defendants.	CIVIL ACTION No. 2015-194 **ORDER RE PROPOSED SCHEDULE FOR FURTHER PROCEEDINGS**

TO: Dennis Reeder, counsel for the plaintiffs
Christopher Hannan, counsel for the plaintiffs
Tatyana Cerullo, counsel for the defendants
David Lowe, counsel for the defendants

Having consulted with counsel by telephone on May 22, 2018, and having considered the plaintiff's submission filed May 25, 2018, the Court orders as follows.

1. The parties must file and serve all remaining motions of any kind, so as to be fully briefed by November 1, 2018.

2. On November 7, 2018, at 10:00 a.m., the Court shall hear oral argument on the motions, if any, and shall schedule trial on the plaintiffs' quantum/damages for early 2019.

Ordered and Entered: May 22, 2018.

Carl B. Ingram
Chief Justice, High Court

Tatyana Cerullo, M.I. Adm. # 150
David Lowe, M.I. Adm. # 121

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Attorneys for Defendants
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EMPIRE BULKERS LIMITED

FILED

MAY 25 2018

ASST. CLERK OF COURTS
REPUBLIC OF THE MARSHALL ISLANDS

IN THE HIGH COURT

OF THE

REPUBLIC OF THE MARSHALL ISLANDS

Chubb Insurance (Thailand) Company Ltd, Tokio Marine & Nichido Fire Insurance Co Ltd, *et al.* Plaintiffs, v. Eleni Maritime Limited *in personam* and Empire Bulkers Limited Defendants.	H.Ct. Civil No. 2014-050 H.Ct. Civil No. 2014-110 H.Ct. Civil No. 2015-194 **DEFENDANTS' PROPOSED SCHEDULE FOR FURTHER PROCEEDINGS**

Defendants, by and though undersigned counsel, and further to the Court's Order of May 22, 2018, respectfully submit the attached Proposed Schedule for Further Proceedings separately from Plaintiffs as the parties were not able to agree on further proceedings.

Date: May 25, 2018

Tatyana Cerullo

Tatyana Cerullo
Counsel for Defendants

IN THE HIGH COURT

OF THE

REPUBLIC OF THE MARSHALL ISLANDS

Chubb Insurance (Thailand) Company Ltd, Tokio Marine & Nichido Fire Insurance Co Ltd, *et al.* Plaintiffs, v. Eleni Maritime Limited *in personam* and Empire Bulkers Ltd Defendants.	H.Ct. Civil No. 2014-050 H.Ct. Civil No. 2014-110 H.Ct. Civil No. 2015-194 **SCHEDULE FOR FURTHER PROCEEDINGS**

[DEFENDANTS' PROPOSED] SCHEDULE FOR FURTHER PROCEEDINGS

Pursuant to the Court's May 22, 2018 Order, Defendants' propose the following scheduling order:

- All remaining motions of any kind, including Defendants' motion to direct entry of final judgment pursuant to S.Ct Rule 4(a)(l) and MIRCP Rule 54(b) and to stay proceedings shall be filed by September 21, 2018;

- Opposition shall be filed by October 12, 2018;

- Replies shall be filed by October 24, 2018;

- Hearing date: November 7, 2018 (or as the Court directs)

DATE: May 25, 2018 (Majuro Date)

Carl B. Ingram
Chief Justice, High Court

Tatyana Cerullo, M.I. Adm. # 150
David Lowe, M.I. Adm. # 121

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Attorneys for Defendants
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EMPIRE BULKERS LIMITED

FILED

MAY 25 2018

ASST. CLERK OF COURTS
REPUBLIC OF THE MARSHALL ISLANDS

IN THE HIGH COURT

OF THE

REPUBLIC OF THE MARSHALL ISLANDS

Chubb Insurance (Thailand) Company Ltd, Tokio Marine & Nichido Fire Insurance Co Ltd, *et al.* Plaintiffs, v. Eleni Maritime Limited *in personam* and Empire Bulkers Limited Defendants.	H.Ct. Civil No. 2014-050 H.Ct. Civil No. 2014-110 H.Ct. Civil No. 2015-194 **CERTIFICATE OF SERVICE**

I hereby certify that on 25 MAY 2018, a true and correct copy of DEFENDANTS' PROPOSED SCHEDULE FOR FURTHER BRIEFING was served upon the following by email attachment to: Dennis J. Reeder, Attorney for Plaintiffs, dreeder.rmi@gmail.com Christopher Hannan, channan@bakerdonelson.com

Tatyana Cerullo

Tatyana Cerullo
David Lowe
Attorneys for Defendants
ELENI MARITIME LIMITED and
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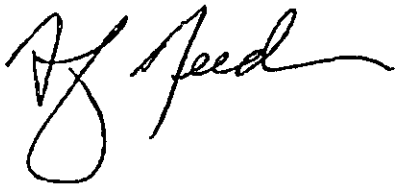
FILED
MAY 25 2018
ASST [illegible] COURTS
REPUBLIC OF THE MARSHALL ISLANDS

IN THE HIGH COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

Chubb Insurance (Thailand) Company Ltd, Tokio Marine & Nichido Fire Insurance Co Ltd, *et al.* **Plaintiffs,** **v.** ELENI Maritime Limited *in personam* and Empire Bulkers Limited **Defendants**	**H.Ct. Civil No. 2014-110** **H.Ct. Civil No. 2014-050** **H.Ct. Civil No. 2015-194** **PLAINTIFFS' PROPOSED SCHEDULING ORDER THROUGH TRIAL; CERTIFICATE OF SERVICE**

Plaintiffs, by and though Dennis J. Reeder and Christopher Hannan, *pro hac vice*; respectfully submit the attached unilaterally Proposed Scheduling Order pursuant to the Court's instructions during the telephonic status conference and subsequent order of May 22, 2018 (Majuro Date). This proposed schedule was previously circulated to Defendants' counsel for consideration by email of May 23, 2018 (Honolulu/New Orleans date), pursuant to the Court's order for counsel to "meet, confer and file a stipulated proposed schedule." However, in light of Defendants' counsel's email confirmation of today's date that Defendants have given "instructions not to agree with [Plaintiffs'] proposed schedule," and Defendants' refusal to present any alternative proposals

for discussion with Plaintiffs, Plaintiffs now file and serve their separate proposed schedule pursuant to the Court's May 22, 2018 Order.



Dennis Reeder - May 25, 2108 - Majuro Date
Attorney for Plaintiffs

-OF COUNSEL-
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IN THE HIGH COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

Chubb Insurance (Thailand) Company Ltd, Tokio Marine & Nichido Fire Insurance Co Ltd, *et al.* **Plaintiffs,** **v.** ELENI Maritime Limited *in personam* and Empire Bulkers Limited **Defendants**	**H.Ct. Civil No. 2014-110** **H.Ct. Civil No. 2014-050** **H.Ct. Civil No. 2015-194** **PLAINTIFFS' PROPOSED SCHEDULING ORDER THROUGH TRIAL**

PLAINTIFF'S PROPOSED SCHEDULING ORDER THROUGH TRIAL

Pursuant to the Court's instructions during the telephonic status conference and subsequent order of May 22, 2018 (Majuro Date), Plaintiffs' propose the following scheduling order for the remainder of this matter:

- All remaining motions of any kind shall be filed in sufficient time to be heard (to the extent any hearing(s) is/are necessary) by the Court's November 5, 2018 hearing date (the last available date this year, as the Court informed the parties during the May 22, 2018 telephone conference)
    - Motions may be filed for submission for decision solely on the briefs prior to the November hearing date.
    - Any motions to be heard in November or to be submitted on briefs before November will be subject to the briefing deadlines set forth in the Marshall Islands Rules of Civil Procedure (eff. March 5, 2018).
- Trial of Plaintiffs' quantum/damages to proceed as early as possible in 2019, which trial Plaintiffs' submit may be submitted on briefs and documentary proof of claim evidence, without the need for an actual trial.

DATE: May 25, 2018 (Majuro Date)

Carl B. Ingram
Chief Justice, High Court

IN THE HIGH COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

Chubb Insurance (Thailand) Company Ltd, Tokio Marine & Nichido Fire Insurance Co Ltd, *et al.*	**H.Ct. Civil No. 2014-110** **H.Ct. Civil No. 2014-050** **H.Ct. Civil No. 2015-194**
Plaintiffs, **v.**	
ELENI Maritime Limited *in personam* and Empire Bulkers Limited	**CERTIFICATE OF SERVICE**
Defendants	

CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2018, Majuro date, a true and correct copy of Plaintiff's Proposed Scheduling Order through Trial was served on Tatyana Cerullo and David Lowe, Attorneys for Defendants, by sending to them via email transmission in pdf.format to:

TC.LAW.lllc@gmail.com and davidloweesq@gmail.com.

Dated: May 25, 2018 (Majuro date).

Dennis Reeder
Attorney for Plaintiffs

IN THE HIGH COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

Chubb Insurance (Thailand) Company Ltd., Et Al.,) Civil Case No. 2014-110
Plaintiff)
v)
)
)
Eleni Maritime Limited in persona & Empire Bulkers Limted)
Defendant)
)

CERTIFICATE OF SERVICE

I, Tanya Lomae, Asst. Clerk of the Courts, hereby certify that on 5/22/18

I served the Order Re Proposed Schedule For Further Proceedings

filed 05/22/2018 in the above captioned matter on:

1. Dennis Reeder by ☑ Email ☐ Fax ☐ Personal Hand Delivery
2. Chris Hannan by ☑ Email ☐ Fax ☐ Personal Hand Delivery
3. Tatyana Cerullo by ☑ Email ☐ Fax ☐ Personal Hand Delivery
4. David Lowe by ☑ Email ☐ Fax ☐ Personal Hand Delivery

Attached is a copy of my ☒ Sent Email / ☐ Fax Confirmation.

Tanya Lomae
Asst. Clerk of the Courts
Marshall Islands Judiciary

FILED:

FILED
MAY 22 2018
ASST. CLERK OF COURTS
REPUBLIC OF THE MARSHALL ISLANDS

FILED
MAY 22 2018
ASST. CLERK OF COURTS
REPUBLIC OF THE MARSHALL ISLANDS

IN THE HIGH COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

CHUBB INSURANCE (CHINA) COMPANY LTD, ET AL., plaintiffs, v. ELENI MARITIME LIMITED in personam and EMPIRE BULKERS LIMITED, Defendants.	CIVIL ACTION No. 2014-050
CHUBB INSURANCE (THAILAND) COMPANY LTD, ET AL., plaintiffs, v. ELENI MARITIME LIMITED in personam and EMPIRE BULKERS LIMITED, Defendants.	CIVIL ACTION No. 2014-110
FEDERAL INSURANCE COMPANY KOREA, ET AL., plaintiffs, v. ELENI MARITIME LIMITED in personam and EMPIRE BULKERS LIMITED, Defendants.	CIVIL ACTION No. 2015-194 **ORDER RE PROPOSED SCHEDULE FOR FURTHER PROCEEDINGS**

TO: Dennis Reeder, counsel for the plaintiffs
Christopher Hannan, counsel for the plaintiffs
Tatyana Cerullo, counsel for the defendants
David Lowe, counsel for the defendants

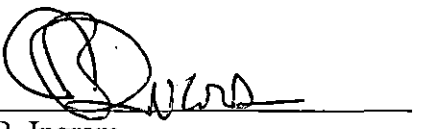
Having consulted with counsel by telephone on May 22, 2018, the Court orders and confirms as follows.

1. With respect to its Order Granting Plaintiff's Motion for [Partial] Summary Judgment entered May 11, 2018 ("Order"), the Court denies the plaintiffs' request for attorney's fees.

2. With respect to the Order, the Court confirms that it has not directed the entry of a final appealable judgment pursuant to Rule 54(b) of the Marshall Islands Rules of Civil Procedure. *See Yandal Investments Pty Ltd and Tahlia Family Trust v White Rivers Gold Limited and Mason*, SCT No. 2011-003, Slip Opn (2012), pp 7-9.

3. The Court orders counsel to meet, confer, and file a joint proposed schedule for further proceedings by 4:30 p.m. on May 25, 2018, or, failing agreement, file and serve their separate proposed schedules for further proceedings.

Ordered and Entered: May 22, 2018.



Carl B. Ingram
Chief Justice, High Court

IN THE HIGH COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

Chubbs Insurance (Thailand) Company Ltd, Et al.,
Plaintiff
v
Eleni Maritime Limited in personnam & Empire Bulkers Limited
Defendant

Civil Case No. 2014-110

CERTIFICATE OF SERVICE

I, Tanya Lomae, Asst. Clerk of the Courts, hereby certify that on 5/11/18

I served the Order Granting Plaintiff's Motion For Partial Summary Judgment

filed 05/11/2018 in the above captioned matter on:

1. Dennis Reeder by ☑ Email ☐ Fax ☐ Personal Hand Delivery
2. Christopher Hannan by ☑ Email ☐ Fax ☐ Personal Hand Delivery
3. Tatyana Cerullo by ☑ Email ☐ Fax ☐ Personal Hand Delivery
4. David Lowe by ☑ Email ☐ Fax ☐ Personal Hand Delivery

Attached is a copy of my ☒ Sent Email / ☐ Fax Confirmation.

Tanya Lomae
Asst. Clerk of the Courts
Marshall Islands Judiciary

FILED: FILED
MAY 11 2018
ASST. CLERK OF COURTS
REPUBLIC OF THE MARSHALL ISLANDS

FILED

MAY 17 2018

ASST. CLERK OF COURTS
REPUBLIC OF THE MARSHALL ISLANDS

IN THE HIGH COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

CHUBB INSURANCE (CHINA) COMPANY LTD, ET AL., plaintiffs, v. ELENI MARITIME LIMITED in personam and EMPIRE BULKERS LIMITED, Defendants.	CIVIL ACTION No. 2014-050
CHUBB INSURANCE (THAILAND) COMPANY LTD, ET AL., plaintiffs, v. ELENI MARITIME LIMITED in personam and EMPIRE BULKERS LIMITED, Defendants.	CIVIL ACTION No. 2014-110
FEDERAL INSURANCE COMPANY KOREA, ET AL., plaintiffs, v. ELENI MARITIME LIMITED in personam and EMPIRE BULKERS LIMITED, Defendants.	CIVIL ACTION No. 2015-194 **ORDER GRANTING PLAINTIFF'S MOTION FOR [PARTIAL] SUMMARY JUDGMENT**

TO: Dennis Reeder, counsel for the plaintiffs
Christopher Hannan, counsel for the plaintiffs
Tatyana Cerullo, counsel for the defendants
David Lowe, counsel for the defendants

Before the Court is the Motion for Summary Judgment regarding Liability ("Fault MSJ") filed by the plaintiffs ("Cargo Plaintiffs") on September 20, 2017. In their Fault MSJ, the Cargo Plaintiffs seeks entry of partial summary judgment on two grounds:

1. holding defendants Eleni Maritime Limited and Empire Bulkers Limited ("Eleni Defendants") at fault as a matter of law pursuant to

    a. principals of *res judicata*, specifically issue preclusion and/or collateral estoppel; and/or

    b. judicial estoppel, based upon the judgment issued by the High Court of the Hong Kong Special Administrative Region, Court of First Instance ("Hong Kong Court"), apportioning 70% of fault to the owner of the M/V ELENI (*i.e.*, Eleni Maritime Limited); and

2. holding the Eleni Defendants 100% liable for Cargo Plaintiffs' damages (to be determined at a later date) pursuant to the "innocent cargo" rule under United States general maritime law ("US GML," which applies as the surrogate maritime law of the Republic of the Marshall Islands ("Marshall Islands")).

The Court has considered all the briefing of the parties, exhibits/submissions attached thereto, and the arguments of counsel before the Court on October 25, 2017. Based upon the legal standard for a motion for summary judgment and the findings of fact and conclusions of law that follow, the Court **GRANTS** Cargo Plaintiffs' Fault MSJ on both grounds, as there is no genuine dispute as to any material fact and as Cargo Plaintiffs are entitled to judgment as a matter of law under the doctrine of issue preclusion and the innocent cargo rule.

I. LEGAL STANDARD

The legal standard for summary judgment is as set forth in Rule 56 of the Marshall

Islands Rules of Civil Procedure ("MIRCP"). Under Rule 56(a) "[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 moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Under Rule 56(c)(1) "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact."

Courts have held that "[s]ummary judgment is appropriate when, viewing the evidence in the light most favorable to the nonmoving party, 'there is no genuine dispute as to any material fact.' Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A genuine dispute of material fact exists if 'there is sufficient evidence favoring the nonmoving party for [the trier of fact] to return a verdict for that party.' *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)." *United States v. JP Morgan Chase Bank Account Number Ending 8215 in Name of Ladislao V. Samaniego, VL: $446,377.36*, 835 F.3d 1159, 1162 (C.A.9 (Ariz.), 2016). The relevant facts of this case are as follows.

II. FINDINGS OF FACT AND PROCEDURAL BACKGROUND

Cargo Plaintiffs assert their claims/causes of actions in these consolidated matters as

owners and/or subrogated insurers of cargo/cargo container shells[1] lost or damaged in the November 7, 2013 collision ("the Collision") off the coast of Vietnam between the vessels HEUNG-A DRAGON (the "carrying vessel" on which Cargo Plaintiffs' cargo was laden) and the non-carrying vessel, the M/V ELENI, which at all material times was owned/operated/managed by the Eleni Defendants.[2]

After the Collision, Defendant Eleni Maritime Limited on November 13, 2013, commenced two actions ("the Hong Kong Proceedings") in the Hong Kong Court:

- The first action, Case No. HCAJ 188/2013 (Admiralty Action No. 188 of 2013), sought to hold the owners/operators of the HEUNG-A DRAGON liable for the Collision, and further involved the arrest of the HEUNG-A BANGKOK (a sistership of the HEUNG-A DRAGON) ("Hong Kong Liability Action"); and

- The second action, Case No. HCAJ 189/2013 (Admiralty Action No. 189 of 2013), is a limitation of liability proceeding, seeking to limit liability for the Collision pursuant to the 1976 Convention on Limitation of Liability for Maritime Claims (which was applicable in Hong Kong at the time of filing) ("Hong Kong Limitation Action").

Defendant Eleni Maritime Limited is pursuing indemnity claims against the owners of the HEUNG-A DRAGON ("HAD Interests") in the Hong Kong Proceedings for any cargo damages that it pays out, including the claims of Cargo Plaintiffs in these consolidated proceedings.[3]

Cargo Plaintiffs filed the first action (CA No. 2014-050) in this Court on March 12, 2014,

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[1]*See* Exhibit P-4 to the First Amended Complaint in Case No. 2014-050; Exhibit P-4 to Complaint in Case No. 2014-110; Exhibit P-4 to Complaint in Case No. 2015-194.

[2]The Eleni Defendants are non-resident Marshall Islands corporations. The M/V ELENI (IMO No. 9460277) is a Marshall Islands flagged vessel, registered in the Port of Majuro. Complaints, ¶ 3, and Answer, ¶ 3. Defendant Eleni Maritime Limited was at all material times the owner of the M/V ELENI and Empire Bulkers Limited was at all material times the manager of the M/V ELENI. Complaint, ¶ 5, and Answer, ¶ 5.

[3]See Exhibit 2 to Plaintiffs' Reply Memorandum in Further Support of Fault MSJ, Declaration of Efthalia P. Paraskevopoulou at ¶ 31(A)(vii).

and the Eleni Defendants initially responded with a motion to dismiss for *forum non conveniens* filed May 8, 2014 ("FNC Motion") in favor of the Hong Kong Proceedings, based (*inter alia*, but ultimately) on the argument that the 1976 Convention on Limitation of Liability for Maritime Claims ("1976 LLMC") — and not the 1996 Protocol to the 1976 LLMC — applies and thus precluded the consolidated actions from proceeding parallel with the Hong Kong Limitation Action.

The Eleni Defendants' FNC Motion denied any liability for the Collision: "The [C]ollision was caused by or alternatively contributed to by the negligence of the owner of the HEUNG-A DRAGON, its servants or agents . . . [as that vessel] was observed transferring down the wrong side of the buoyed channel (the Song Sai Gon Channel) off Vung Tao, Vietnam, in breach of the International Regulations for Preventing Collision at Sea 1972[;] [and thus] [b]y failing to navigate as near to the outer limit of the channel which lay on its starboard side as was safe and practicable, by failing to maintain any or proper lookout and by failing to assess the risk of collision, by failing to keep clear of the ELENI, and by failing to take effective action and for other reasons, the HEUNG-A DRAGON caused the collision between the two vessels."[4] The Eleni Defendants further suggested that "the Hong Kong admiralty court [could determine] that [the Eleni] Defendants . . . [should be] totally exonerated from liability."[5]

While pre-answer motions (*i.e.*, ELENI Defendants' FNC Motion and Cargo Plaintiffs'

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[4]Eleni Defendants' Memorandum in Support of FNC Motion, p. 3 (filed May 8, 2014).

[5]Eleni Defendants' Reply Memorandum in Support of FNC Motion, p. 2 (filed August 11, 2014).

"Clash of Conventions Motion"[6]) were pending before this Court, litigation continued in the two cases pending before the Hong Kong Court. This Court eventually denied the Eleni Defendants' FNC motion on October 22, 2014; retained jurisdiction over the Plaintiffs' consolidated actions; and stayed the consolidated actions in this Court pending the outcome of any fault adjudication in the Hong Kong Liability Action on the assumption that any such liability apportionment would have binding effect on the proceedings in the Marshall Islands. Without objection or request for reconsideration from Eleni Defendants, this Court's Order of October 22, 2014 ordered as follows:

> [F]or reasons of judicial economy and administration, [the Court] grants the parties' requests to stay this action.
>
> * * *
>
> As the parties have argued, it is likely that the Hong Kong Court will in due course answer the question of liability. In turn, this Court, under the principle of *res judicata*, [will] most likely accept the Hong Kong High Court's decision on liability.
>
> Further, so that this matter does not become dormant, the Court orders counsel to advise the Court as soon as the Hong Kong High Court issues its decision in [the Hong Liability Action] or by 5:00 p.m. on April 22, 2015, report to the Court on the status of [the Hong Kong Liability Action], whichever first occurs.

Identically, the Court extended the stay order (by Order of May 7, 2015) until a liability decision was issued in the Hong Kong Court:

> [T]he Court continues its stay in this action pending the outcome of the [HCAJ 188 of 2013]. To ensure that this matter does not become dormant, the Court orders counsel to advise the Court as soon as the Hong Kong High Court issues its decision in [the Hong Kong Liability Action] or by 5:00 p.m. on April 22, 2016, report to the Court on the status of HCAJ 188 of 2013, whichever occurs first.

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[6]That is, the Cargo Plaintiffs' Motion for Declaratory Judgment as to the primacy in the Marshall Islands of the 1996 Protocol (and not the 1976 LLMC).

The Eleni Defendants accordingly advised the Court (by status report of February 3, 2016) that the Hong Kong High Court on January 6, 2016, had issued an Order apportioning liability for the Collision between the Eleni Defendants and the HAD Interests in the Hong Kong Liability Action. The January 6, 2016 order entered by the Hong Kong Court in the Hong Kong Liability Action ("Hong Kong Fault Order"), and attached to the Eleni Defendants February 3, 2016 status report, determined that the owners of the M/V ELENI were 70% "to blame for the [C]ollision."

After learning of the Hong Kong Fault Order, this Court by an Order filed on March 29, 2016, lifted the stay in this matter, which allowed Cargo Plaintiffs' Clash of Conventions Motion to proceed before this Court. Further to this end, the Court on July 27, 2016, removed to the Supreme Court the Clash of Conventions question: the supremacy of the 1996 Protocol versus the 1976 LLMC. On June 6, 2017, the Marshall Islands Supreme Court ruled that only the 1996 Protocol (and not the 1976 LLMC) applies in the Marshall Islands (*see* Supreme Court Case No. 2016-002, Opinion on Removed Question). Based upon the Supreme Court's Opinion, this Court on June 28, 2017, granted Cargo Plaintiffs' Clash of Conventions Motion and denied Eleni Defendants' Motion for Summary Judgment. Cargo Plaintiffs' instant Fault MSJ followed the Court's entry of judgment pursuant to the granting of the Clash of Conventions Motion.

III. ANALYSIS AND CONCLUSIONS OF LAW

A. Partial Summary Judgment Based upon Hong Kong Court Fault Order

Cargo Plaintiffs argue (i) that there is no genuine dispute as to any material fact regarding the Hong Kong Court's Fault Order's and (ii) that Cargo Plaintiffs, as a matter of law, *i.e.*, issue preclusion, are entitled to a partial summary judgment that Eleni Defendants are bound in these

proceedings by the Hong Kong Court's Fault Order determination that the Defendant Eleni Maritime Limited was 70% to blame for the Collision.

1. Issue Preclusion/Collateral Estoppel

The doctrine of issue preclusion is recognized by the Marshall Islands Supreme Court as a subset of *res judicata*:

> *Res judicata* encompasses two separate preclusion doctrines: claim preclusion and issue preclusion
>
> * * *
>
> Issue preclusion binds parties in a subsequent action whether on the same or a different claim when "an issue of fact or law [has been] actually litigated and resolved by a valid final judgment.'" [*Fischel v. Equitable Life Assur. Soc'y of the United States*, 307 F.3d 997, 1005 n.5 (9th Cir. 2002)]. "In both the offensive and defensive use situations, the party against whom [issue preclusion] is asserted has litigated and lost in an earlier action." *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 329 (1979). The issue precluded must have been "actually decided" after a "full and fair opportunity" for litigation.[7]

Similarly, the Marshall Islands Supreme Court has recognized the effectively identical[8] principal of collateral estoppel:

> The doctrine of collateral estoppel is different from the doctrine of *res judicata* [at least in its "claim preclusion" iteration, which only applies as "between the same parties on the same 'claim' or 'cause of action'"[9]] in that, instead of preventing a second assertion of the same claim or cause of action, the doctrine of collateral estoppel prevents a second litigation of issues between the same parties or their

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[7] *Jalley v Mojilong*, 3 MILR 106, 109 (2009).

[8] *See, e.g., In Re CWS Enterprises, Inc.*, 2017 WL 4051708, at *10 (9th Cir. Sept. 14, 2017) (noting that "courts have referred to issue preclusion using the older terms 'collateral estoppel' or 'estoppel by judgment' or the broader term '*res judicata*'[;] [but] [t]hey now use the modern term 'issue preclusion.'"); *United States v. Cessa*, 861 F.3d 121, 140 (5th Cir. 2017) (identifying "collateral estoppel" as identical to "issue preclusion").

[9] *Jalley*, at 109.

privies even in connection with a different claim or cause of action.[10]

In short, "[c]ollateral estoppel bars subsequent [litigation] based on issues that were already actually decided in a prior action."[11] The party asserting issue preclusion/collateral estoppel need not have been a party to (or in privity with a party to) the prior ruling for which estoppel is being sought.[12] This type of collateral estoppel — known as offensive, nonmutual collateral estoppel — is the basis for Cargo Plaintiffs' Fault MSJ, because Cargo Plaintiffs were not a party (*i.e.*, nonmutual) to the Hong Kong Proceedings in which the Hong Kong Fault Order was entered; and because they are seeking offensive preclusive application of that order in these consolidated proceedings.[13]

2. Nonmutual Issue Preclusion: Factors, Considerations, and a General Rule

Regarding the application of offensive nonmutual issue preclusion, the Marshall Islands Supreme Court, *citing Syverson v. Int'l Bus. Machines Corp.*, 472 F.3d 1072, 1078 (9th Cir. 2007), has held that offensive nonmutual issue preclusion is appropriate only if the following

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[10]*Zaion, et al., v. Peter and Nenam*, 1 MILR (Rev.) 228, 235 (1991).

[11]*Ueno v. Abner and Hosia, et al.*, 3 MILR 29, 31 (2007).

[12]*See, e.g., Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 327-28, 331 (1979) (stating that both parties do not have to be identical, so long as there are no special circumstances that would make issue preclusion/collateral estoppel unfair to the defendant); *Gulf Island-IV, Inc. v. Blue Streak-Gulf IS Ops.*, 24 F.3d 743, 746 (5th Cir. 1994) (*citing Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 328-30 (1971)) (contrasting issue preclusion/collateral estoppel branch of *res judicata* with claim preclusion branch, under which the party asserting *res judicata* also must have been a party to or in privity with a party to the prior proceeding); *ACLI Gov't Secs., Inc. v. Rhoades*, 963 F.2d 530, 533 (2d Cir. 1992) (stating that collateral estoppel can be raised by non-party to judgment against party that had opportunity to litigate relevant issue).

[13]See, e.g., *Parklane*, 439 U.S. at 329-331.

four factors are present:

- there was a full and fair opportunity to litigate the identical issue in the prior action;
- the issue was actually litigated in the prior action;
- the issue was decided in a final judgment; and
- the party against whom issue preclusion is asserted was a party or in privity with a party to the prior action.[14]

These four *Syverson* factors are further and addition to four discretionary considerations set forth by the United States Supreme Court in *Parklane*. The *Parklane* discretionary considerations for offensive nonmutual issue preclusion apply, even if the first four *Syverson* factors are satisfied. They are as follows:

- "whether 'the plaintiff had the incentive to adopt a "wait and see" attitude in the hope that the first action by another plaintiff would result in a favorable judgment,' [for use] against the losing defendant;
- "[whether] the defendant had the incentive to defend the first suit with full vigor, especially when future suits are not foreseeable;
- "[whether] one or more judgments entered before the one invoked as preclusive are inconsistent with the latter or each other, suggesting that reliance on a single adverse judgment would be unfair; and
- "[whether] the defendant might be afforded procedural opportunities in the later action that were unavailable in the first 'and that could readily cause a different result.'"[15]

Based upon these discretionary considerations, the United States Supreme Court concluded "the general rule should be that in cases [1] where a plaintiff could easily have joined in the earlier

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[14] *Jalley v Mojilong*, 3 MILR 106, 111 (2009) (*citing Syverson*, at 1079).

[15] *Syverson*, at 1079 (*quoting Parklane*, 439 U.S. at 330-31).

action or [2] where, either for the reasons discussed above or for other reasons, the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel. *Parklane*, 439 U.S. at 331.

3. Application of the Tests for Nonmutual Issue Preclusion

In the present case, the above factors, discretionary considerations, and general rule are satisfied. All four factors of the *Syverson* test are met as follows:

1. full & fair opportunity to litigate the identical issue - The Eleni Defendants' own Hong Kong solicitors have stated in declarations to this Court that the Hong Kong Fault Order finding Eleni Maritime Limited 70% responsible for the Collision resulted from a "full and fair" opportunity to litigate — or in their words, a "fierce contest . . . [based on the] most direct, complete and best, evidence of events."[16] In the Hong Kong Liability Action, responsibility for the Collision was the "issue" before the court, and it is the issue before this Court, not the quantum of damages due Eleni Maritime Limited, HAD Interests, or even the cargo carriers (including Cargo Plaintiffs). Issues of quantum/affirmative defenses as to individual claims by the Cargo Plaintiffs will be determined at later proceedings. At any rate, Eleni Defendants have not established an intervening cause that would reduce Eleni Maritime Limited's responsibility for the Collision from 70% to less than 1%.

2. actually litigated — the issue of fault (*i.e.*, responsibility) was "actually litigated" in the consent order (as per 1 above);[17] In the context of preclusion,

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[16]Second Declaration of James Robert James (dated July 13, 2016), ¶ 11, attached to the Eleni Defendants' Reply in support of their Motion for Summary Judgment filed July 15, 2016. Eleni Defendants' subsequent claim that they are somehow prejudiced by not having HAD Interests before this Court ring hollow. They had an opportunity in the Hong Kong Liability Action to raise issues regarding HAD Interests' abandonment of the voyage and responsibility for salvage, and the pilferage of cargo.

[17]It also bears noting on this point that Eleni Maritime Limited and HAD Interests have an ongoing dispute in the Hong Kong Limitation Action regarding whether the HAD Interests' claims for wreck removal (as well as pollution prevention and SCOPIC costs) — totaling roughly $17 million — are subject to limitation under Hong Kong law. *See* https://www.hongkongcaselaw.com/eleni-maritime-ltd-v-heung-a- shipping-co-ltd-andothers/. Thus, Eleni Maritime Limited and HAD Interests had a huge incentive and impetus to fully and "fiercely" dispute fault allocation, because if the HAD Interests' $17 million wreck removal

courts have held that a ruling derived from a consent order will "be given preclusive effect if that was the intent of the parties, [as] inferred either from the judgment or the record."[18] In these proceedings, Eleni Defendants have argued that the Fault Order should apply to cargo claimants generally.[19] Similarly, in the context of claim preclusion, the Marshall Islands Supreme

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claims are not limitable, Eleni Maritime Limited would benefit from minimized fault, whereas the HAD Interests would benefit from maximizing it.

[18]*See In re Berr*, 172 B.R. 299, 306 (9th Cir. 1994) ("[C]ourts are in accord holding that consent or stipulated judgments satisfy the actually litigated requirement when the judgment or the record evidences the parties' intent. *See, e.g., In re Lacy*, 947 F.2d 1276, 1277–78 (5th Cir.1991) (a consent judgment is not necessarily denied collateral estoppel effect where depositions were taken, exhibits introduced and where the debtor agreed to stipulate to facts and agreed to the form of judgment); *Gilbert v. Ben–Asher*, 900 F.2d 1407, 1410 (9th Cir.), *cert. denied*, 498 U.S. 865, 111 S.Ct. 177, 112 L.Ed.2d 141 (1990) (judgment by stipulation was held to be conclusive if the parties have entered an agreement manifesting such intention); *Hartley v. Mentor Corp.*, 869 F.2d 1469, 1473 (Fed.Cir.1989) (intent of the parties is generally controlling with respect to the preclusive effect of a stipulated judgment); Restatement (Second) of Judgments, § 27, comment (e) (1982) (a judgment should conclusively establish facts for the purpose of collateral estoppel only if that intention is evidenced by the stipulation)).

[19]*See* ¶¶ 20, 21, and 27 in the Declaration of James Robert James (dated April 25, 2016), attached to the Motion for Summary Judgment filed by Eleni Defendants on April 29, 2016.

> 20. Claims that were filed by the deadline [in the Hong Kong Limitation Action] will be adjudicated upon by the High Court of Hong Kong before being admitted to participate in the Limitation Fund [posted in the Hong Kong Limitation Action] which I expect will be distributed in accordance with the [Hong Kong Fault Order] in the collision proceedings, recording the apportionment of liability agreed on settlement by the parties thereto. . . .
>
> 21. Had Plaintiffs filed their claims in Hong Kong as other claimants have done, they would have been able to participate in the distribution of the Limitation Fund in accordance with the Court-ordered apportionment of liability mentioned above and 76 Convention limits of liability.
>
> * * *
>
> 27. All material factual disputes with regard to liability for the collision have been resolved in Hong Kong.

(Emphasis added).

Court has stated: "a stipulation of dismissal with prejudice is a final judgment on the merits and operates the same as any other final judgment for purposes of *res judicata*."[20] Accordingly, the fact that the Fault Order is a stipulated order does not mean the issue resolved was not litigated for purposes of preclusion.

3. final judgment - the Fault Order is a "final judgment" of the Hong Kong Court, as the Eleni Defendants themselves acknowledge: "The [Hong Kong Fault Order] becomes an order of the court *having the same effect as a judgment*" (emphasis added);[21] and

4. party to prior litigation - the Eleni Maritime Limited, as the plaintiff, was a party to the Hong Kong Proceedings. Defendant Empire Bulkers Limited was not a plaintiff in the Hong Kong proceedings, but in earlier papers Eleni Defendants maintained that "the limitation action [HCAJ 188/2013] includes Empire Bulkers by definition as the manager, and in the *in rem* liability proceeding [HCAJ 189/2013] there is a cross claim against it. As such, Plaintiffs are incorrect that Empire Bulkers is not included in the Hong Kong proceedings." Eleni Defendants Reply in Support of Motion to Dismiss filed August 11, 2014, p. 19. Given this admission, the Court finds that Empire Bulker Limited was a party to the Hong Kong proceedings. The Court is mindful for ELENI Defendants' more recent denials that Empire Bulker Limited participated in the Hong Kong proceedings. However, the Court will not relieve ELENI Defendants of their prior admission.

Additionally, the Eleni Defendants' argument (directed against the third "final judgment" factor of the *Syverson* test) that the Hong Kong Fault Order cannot have preclusive effect in these consolidated proceedings pursuant to Order 75, rule 35 of the Rules of the High Court of Hong Kong ("RHC") has no merit. First, it is the law of the Marshall Islands, not Hong Kong, that determines the discretionary collateral estoppel effect of the Fault Order in these Marshall Islands

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[20]*Gushi Bros Co. v. Kios, et al.*, 2 MILR 120, 123 (1998).

[21]Third Declaration of James Robert James (October 11, 2017), ¶ 3, attached to Eleni Defendants' Opposition to the Fault MSJ filed October 12, 2017.

proceedings.[22] Indeed, the RHC themselves (self-evidently) expressly provide that "these rules shall have effect in relation to all proceedings in the High Court." [23] And perhaps most importantly, the underlying purpose of RHC Order 75, rule 35 is to prevent cargo plaintiffs from being estopped and potentially prejudiced by self-interested fault allocation deals decided solely between the colliding vessels; this is exactly what *The Karo* decision (noted in Exhibit A to the 3rd James Declaration as the context for RHC Order 75, rule 35) ultimately held: "the owners of the cargo . . . are to be allowed to raise the question whether they are entitled to claim the full amount of their damages" against a non-carrying vessel, even though the two colliding vessels had previously agreed (and reduced to consent judgment) and even 50/50 split of fault.[24] The exact opposite scenario is in play here; Cargo Plaintiffs unequivocally accept the 70/30 split in the Fault Order (in conjunction with the "innocent cargo" rule, as discussed below), and are themselves seeking to be bound by it (unlike in *The Karo*, where cargo claimants sought to avoid an agreed fault split between the vessels).

Accordingly, the Hong Kong Fault Order satisfies all of the primary four *Syverson* factors

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[22]*See* Restatement (Third) of Foreign Relations Law § 481, cmt. c (1987) ("[N]o rule prevents a court in the United States from giving greater preclusive effect to a judgment of a foreign state than would be given in the courts of that state."). *Simmtech Co. v. Citibank, N.A.*, 2016 WL 4184296, at *8 (S.D.N.Y. Aug. 3, 2016), *aff'd* 2017 WL 3887984 (2d Cir. Sept. 6, 2017) ("[T]he prevailing practice appears to be follow[ing] domestic rules of preclusion [to a foreign judgment], whether they apply those of the applicable federal or state court[;] [and] [r]egardless of the mechanisms utilized by a foreign court to achieve its objectives [regarding preclusion], a United States court should not be confined to using the foreign court's mechanisms or else forgo achieving its own objectives.") (citations omitted).

[23]RHC, Order 1, ¶2(1) (Exhibit 4 to Plaintiffs' Reply Memorandum in Support of Fault MSJ).

[24]*The Karo* (1887) 13. P.D. 24, attached here as Exhibit 5 for the Court's ease of reference.

for offensive collateral estoppel effect in these consolidated proceedings. Similarly, all four of the *Parklane* discretionary considerations for application of nonmutual offensive collateral estoppel are met as well.

1. Cargo Plaintiffs had no incentive to adopt a "wait and see attitude" with respect to the Hong Kong Liability Action and/or the Hong Kong Fault Order. To the precise contrary, they were in agreement from the outset of this matter that any fault allocation in Hong Kong, regardless of the outcome, would be binding in these proceedings. Indeed, it was Cargo Plaintiffs themselves who suggested the stay of these proceedings pending a fault ruling in Hong Kong[25] — notwithstanding (as noted above p. 4-5, *supra*) that Eleni Maritime Limited was disclaiming any fault at all (*i.e.*, 0% liability) for the Collision. In fact, if any party had an incentive to "wait and see," it was the Eleni Defendants, because the cargo claimants who submitted their claims in the Hong Kong Limitation Action had no real reason to seek to maximize the M/V ELENI's fault in causing the Collision (given that their claims would never be fully recovered anyway due to the lower limits in Hong Kong); and because the Eleni Defendants knew that the Cargo Plaintiffs would not be seeking to maximize fault in the Marshall Islands given the stay of these proceedings and the Court's indication that a decision in Hong Kong would bind this case. It was the Eleni Defendants who had the biggest incentive to hold out (*i.e.*, "wait and see") in hopes of a beneficial fault finding in their favor — although this "best deal" was apparently only the 70/30 split reduced to judgment in the Hong Kong Fault Order.

2. By their own assessment, the Eleni Defendants had "incentive to defend the first suit with full vigor," particularly given the ongoing wreck removal dispute in Hong Kong (*see* note 16, *supra*). Indeed, their Hong Kong solicitor has attested that the Hong Kong Fault Order resulted from a "fierce contest" on the "best and most complete evidence" (*see* note 15, *supra*); and they did so in circumstances where "future suits [were] not foreseeable," insofar as many cargo plaintiffs had already filed claims in the Hong Kong limitation proceedings, and these consolidated proceedings (as well as others in India, *see* Marshall Islands Supreme Court Case No. 2016-002, Opinion on Removed Question, June 6, 2017) were already filed and progressing;

3. There are no prior judgments inconsistent with the Hong Kong Fault Order; and

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[25]*See* Proposed Sur-Reply Memorandum in opposition to Eleni Defendants' FNC Motion, p. 4 (filed October 12, 2014, and ultimately not admitted into the record).

4. The Eleni Defendants have no "procedural opportunities" in these consolidated proceedings that could (or should) readily cause a different result as to their 70% fault in the Collision. Indeed, the only potential "procedural opportunity" that they argued was available here (*i.e.*, dismissal in favor of the 76 Convention proceedings in Hong Kong) was rejected by the Marshall Islands Supreme Court.

Finally, as the United States Supreme Court in *Parklane*, noted that "the general rule should be that in cases [1] where a plaintiff could easily have joined in the earlier action or [2] where, either for the reasons discussed above or for other reasons, the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.[26] However, this general rule has no application here. First, the Cargo Plaintiffs could not have joined in the Hong Kong Liability Action (the case in which the Hong Kong Fault Order was entered) because those proceedings were instituted against the owners of the HEUNG-A DRAGON against whom Cargo Plaintiffs have no claim as a matter of law because various bills of lading governed by various nation's laws (as is typical) incorporate either the Hague-Visby rules and/or some version of COGSA, both of which provide a complete defense/immunity to a carrying vessel for any "error in navigation."[27]

Second, to the extent the Eleni Defendants argue (as another effort at avoiding collateral estoppel) that the absence of the HAD Interests in these consolidated proceedings is somehow prejudicial as a matter of evidence/marshalling of proof, this complaint rings hollow. If the

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[26] *Parklane*, 439 U.S. at 331.

[27] *See* S. Mandelbaum, *International Ocean Shipping and Risk Allocation for Cargo Loss, Damage and Delay: A U.S. Approach to COGSA, Hague-Visby, Hamburg and the Multimodal Rules*, 5 J. TRANSNAT'L L. & POL'Y 1, 40 (1995) ("Under COGSA [*e.g.*. 46 U.S.C. §30706(a); 47 MIRC Ch.4, §405(2)(a); Korean Commercial Code art. 795], Hague and Hague-Visby, carriers [are] . . . exempted] from liability when the loss or damage arose from a negligent act in the navigation or management of the ship.").

Eleni Defendants feel the need to present any evidence in these consolidated proceedings regarding the HAD Interests, they can simply use in this Court any/all documents procured as part of the "fierce contest [and] the most direct, complete and best evidence of events surrounding the [C]ollision" in the Hong Kong Proceedings (which include their own indemnity claims against the HAD Interests, which would require substantially the same proof as any defense to Cargo Plaintiffs' claims in these proceedings). Thus, the Eleni Defendants' argument that this "general rule" somehow precludes issue preclusion/collateral estoppel in these consolidated proceedings is unavailable.

In sum, the factors, circumstantial considerations, and general rule set forth in *Syverson* and *Parklane Hosiery Co., Inc.*, favor application of discretionary nonmutual offensive collateral estoppel with respect to the Hong Kong Fault Order in these consolidated proceedings. Accordingly, the Court concludes as a matter of law that the Hong Kong Fault Order binds these proceedings pursuant to the doctrine/principles of issue preclusion/collateral estoppel, and that the Eleni Defendants are therefore adjudged to be 70% at fault in causing the Collision, and Cargo Plaintiffs' provable damages caused by the Collision, as a matter of law.

2. Judicial Estoppel

Since the Court has concluded that the Hong Kong Fault Order binds the Eleni Defendants in these proceedings under the doctrine of issue preclusion, it need not consider whether the Eleni Defendants are bound by the Fault Order under the doctrine of judicial estoppel. The next issue for the Court to consider is whether the "Innocent Cargo" Rule applies.

B. US GML as the GML of the Marshall Islands

Pursuant to Title 47, Marshall Islands Revised Code, Chap. 1 §113, "the non-statutory

general maritime law of the United States of America is . . . declared to be and is . . . adopted as the general maritime law of the Marshall Islands."

1. The US GML "Innocent Cargo" Rule

Under US GML jurisprudence, the "innocent cargo" rule provides that cargo interests who incur damages as the result of a collision between the vessel on which their cargo is carried and another non-carrying vessel can collect 100% of their damages from the non-carrying vessel as long as the non-carrying vessel is at least 1% at fault or greater.[28] While comparative fault is the general rule under US GML (pursuant to the United States Supreme Court's *Reliable Transfer* decision), the "time-honored"[29] "innocent cargo" rule specifically continues to apply to a non-carrying vessel's 100% liability to cargo interests if it is 1% or more at fault, as summarized by eminent admiralty jurist Hon. John R. Brown of the Fifth Circuit Court of Appeals:

> In *Complaint of Flota Mercante Grancolombiana, S.A.*, 440 F.Supp. 704, 725 (S.D.N.Y.1977), the Court, taking due notice of *Reliable Transfer*, stated:
>
> > This Court believes that the better rule would be to allow . . . a full recovery against the non-carrying vessel, allow the latter to add the payments it makes to cargo to its own damages, and then to permit it to recover this total from the carrying vessel in proportion to the fault of the

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[28]35 *See, e.g., Calypso Tankers v. Panama Canal Comm'n*, 1994 WL 507403 (E.D. La. Sept. 14, 1994) ("When joint tortfeasors are involved and one is not a vessel, the 'innocent cargo rule' allows cargo interests to recover one hundred percent of its damages from a non-carrying vessel, regardless of that particular tortfeasor's portion of the fault. *Aktieselskabet Cuzco v. The Sugarseco*, 55 S.Ct. 467 (1935); *Allied Chemical Corp. v. Hess Tankship Co.*, 661 F.2d 1044 (5th Cir.1981).").

[29]*See Tokio Marine & Fire Ins. Co. v. M/V FLORA*, 1998 WL 516110, at *3 (E.D. La. Aug. 18, 1998) (*citing W. Tetley, Marine Cargo Claims*, 631 (3d Ed.1988) (restating the time-honored rule that the cargo owners of the carrying vessel is entitled to 100% recovery from the colliding vessel though the latter might have been only partially at fault).

> carrying vessel. This resolution would be more in accord with the principles enunciated in *Reliable Transfer* (which) was intended to change the rule of damages so that the burden would fall more equitably on those parties whose fault contributed to the collision.
>
> We believe that *Flota Mercante* more nearly charts a Reliable course. The Supreme Court acted to abolish the doctrine of mutual fault-equal contribution, an anachronism which every other maritime nation had already rejected. The decision only alters the proportions in which damages are fixed-it does not abolish the procedure by which an innocent cargo owner traditionally could recover his damages in full from the tortious non-carrying vessel no matter what the degree of fault between the tortious actors.
>
> * * *
>
> Where a cargo suffers damages from a collision where both vessels were negligent, it is the only innocent party. *Reliable Transfer* certainly did not intend to shift the risk of loss away from the negligent parties.[30]

Likewise, the Supreme Court itself has held that "*Reliable Transfer* merely changed the apportionment from equal division to division on the basis of relative fault[;] [b]ut we did not upset the rule that the plaintiff may recover from one [emphasis original] of the colliding vessels the damage concurrently caused by the negligence of both."[31]

In sum, in scenarios like the Collision where both the non-carrying and carrying vessel are at fault, the US GML allows innocent cargo interests to collect 100% against the non-carrying vessel:

The *Reliable Transfer* Decision has no application to an action between innocent

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[30] *Allied Chem. Corp. v. Hess Tankship Co. of Delaware*, 661 F.2d 1044, 1058-59 (5th Cir. 1981); 1982 A.M.C. 1271 (*citing Gulfcoast Transit v. ANCO PRINCESS*, 1978 A.M.C. 2471 (E.D.La.1977), *citing Oriental Hero-Caster*, 1976 A.M.C. 1287, 1306 (S.D.N.Y.1976) ("The *Reliable Transfer* decision has no application to an action between innocent cargo and one of the vessels in a collision."); *Samuels v. Empresa Lineas Maritimas Argentinas*, 573 F.2d 884, 887-888 (5th Cir. 1978), *cert. denied*, 443 U.S. 915, 99 S.Ct. 3106, 61 L.Ed.2d 878 (1979)).

[31] *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 271 n. 30 (1979); 1979 A.M.C. at 1180.

> cargo and one of the vessels in the collision. Where more than one vessel is liable to cargo, the liability is joint and several. . . . American [maritime] law accordingly protects the innocent cargo owner in a both-to-blame collision on the theory that the vessels are joint tort feasors; thus innocent cargo can recover the full amount of its loss from the non-carrying vessel (subject of course to possible limitation of liability) even if the carrying vessel has a defense to liability. . . .[32]

Critically, "[t]he American rule on this point is contrary to international practice as reflected in the Brussels Convention,[33] which limits cargo's recovery against the non-carrying vessel to the proportion of that vessel's contributory fault[;] [t]he American rule allows the innocent cargo owner to recover his damages in full from the tortious non-carrying vessel no matter what the relative degree of fault between the tortious actors [*i.e.*, the two vessels in collision]."[34]

Moreover, the American "innocent cargo" rule does not create the ostensibly inequitable result that the non-carrying vessel interests will bear more than their share of liability, because those interests can recover (by way of set-off) from the carrying vessel by way of indemnity:

> The non-carrying vessel, in turn, may recover indemnity from the carrying vessel (subject of course to possible limitation of liability) even if the carrying vessel has a defense to [the "innocent cargo" plaintiffs' claims] under [the relevant contract of carriage and the law applicable thereunder]. The non-carrying vessel, in turn may recover indemnity from the carrying vessel in proportion to the latter's share of the blame.
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> * * *
>
> [Thus], the damages that the non-carrying vessel must pay to [innocent] cargo in

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[32] 2 Thomas J. Schoenbaum, Admiralty and Maritime Law §14–8 (3d ed. 2001).

[33]Brussels Collision Liability Convention of 1910. Notably, the Republic of the Marshall Islands is not a party to the 1910 Brussels Convention. *See* Republic of the Marshall Islands, Maritime Administrator, Marine Notice No. 2011-1 (Rev. Feb/2017), International Maritime Conventions and Other Instruments Adopted by the Republic of the Marshall Islands, *available at* https://www.register-iri.com/forms/upload/MN-2-011-1.pdf.

[34]2 Thomas J. Schoenbaum, Admiralty and Maritime Law §14–8 (3d ed. 2001).

> turn become part of the total damages that are proportionately allocated between the colliding vessels . . . . The result is that the carrying vessel, which may escape direct liability to [innocent] cargo by asserting its [contractual] defenses . . . may be liable indirectly to cargo upon apportionment of the total damages of the collision.[35]

Accordingly, under the law of the Marshall Islands, the Eleni Defendants, as owners/operators of the non-carrying vessel the M/V ELENI, would be 100% liable for all Cargo Plaintiffs' provable damages under the "innocent cargo" rule (given the preclusive effect of the Hong Kong Fault Order pursuant to which the Eleni Defendants are 70% at fault for the Collision, subject to a right of contribution/indemnity over against the HAD Interests for their 30% share of fault (which the Eleni Defendants are pursing in the Hong Kong Proceedings)).

2. The US GML Choice of Law Principles

In opposition to the US GML Innocent Cargo Rule, Eleni Defendants' invoke the purportedly "black letter" choice of law (from the United States Court of Appeals for the Ninth Circuit's decision in *The Mandu*, 102 F.2d 459, 463 (2d Cir. 1939)) that the law of the littoral state applies to damage claims in a collision in territorial waters. That is, because the Collision occurred in the territorial waters of Vietnam, the law of Vietnam should apply to Cargo Plaintiffs' claims. In particular, Article 208-4 of the Vietnam Maritime code, which provides for pure comparative fault and is thus antithetical to the US GML "innocent cargo" rule.

However, Eleni Defendants' reference to the law of *The Mandu* as the "black letter" choice of law provision for collisions in territorial waters is incomplete. As "subsequent case law [after *The Mandu*] demonstrates . . . the *lex loci* rule is not a wooden rule [and i]t has yielded

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[35] *Id.* (*citing Travelers Indem. Co. v. Calvert Fire Ins. Co.*, 798 F.2d 826 (5th Cir. 1988) and *Mathiesen v. M/V OBELIX*, 817 F.2d 345 (5th Cir. 1987)).

when a law other than *lex loci* is common to the most significant contacts."[36] Indeed, choice of law principles have evolved under US GML, pursuant to the Supreme Court's *Lauritzen-Rhoditis* test, since the 1939 decision in *The Mandu*:

> [The *lex loci delicti* rule for collisions is] not absolute, and might be departed from where there [are] "clear and satisfying grounds" to do so. In particular, where the events concerned had a close connection with English [*i.e.*, Marshall Islands] law and there were no policy reasons for having regard to the lex loci delicti [rule] the court might apply English [*i.e.*, Marshall Islands] law alone.[37]
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> * * *
>
> Whether U.S. [*i.e.*, Marshall Islands] or foreign law governs a maritime tort depends on [the 8 *Lauritzen-Rhoditis* factors]: (1) the place of the wrongful act; (2) the law of the flag; (3) the allegiance or domicile of the injured party; (4) the allegiance of the defendant shipowner; (5) the place of the contract; (6) the inaccessibility of the foreign forum; (7) the law of the forum; and (8) the shipowner's base of operations. Because the *Lauritzen–Rhoditis* test is not a mechanical one, counting the number of factors in favor of each nation is not the controlling consideration. Rather, the weight of each factor depends on the particular context of the claim and the national interest that might be served by the application of United States [*i.e.*, Marshall Islands] law.[38]

In other words, the rule of *lex loci delicti*/littoral state choice of law set forth in *The Mandu* is only 1 of the 8 relevant *Lauritzen-Rhoditis* factors under modern US GML choice of law principles, and it is by no means solely determinative.[39] In this case, the *Lauritzen-Rhoditis*

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[36]45 Francesca Morris, THE PENNSYLVANIA RULE: NO LONGER THE RULE?, 32 TUL. MAR. L.J. 131, 137 (Winter 2007).

[37]MARSDEN ON COLLISIONS AT SEA, §17-13, p. 566 (Simon Gault, et al. eds. 12th ed. 1998).

[38]*Kriti Filoxenia Special Mar. Enter. v. YASA H. MEHMET Motor Vessel*, 442 F. App'x 167, 168–69 (5th Cir. 2011) (*emphasis added*).

[39]*See, e.g., In re Cent. Gulf Lines, Inc.*, 62 F. App'x 557 (5th Cir. 2003) (collision occurred in Indian river; while India had an interest in application of its substantive rules of inland navigation, American law would apply to fault/damages).

factors, on the balance, favor application of Marshall Islands law:

(1) place of wrongful act = Vietnam, whose jurisdiction no one has sought to invoke;
(2) law of flag = Marshall Islands (M/V ELENI);
(3) Cargo Plaintiffs = various nations;
(4) allegiance of Eleni Defendants = Marshall Islands (as non-resident Marshall Islands corporations;
(5) place of contract = N/A;
(6) inaccessibility of foreign forum = favors Marshall Islands law (because Hong Kong Limitation Proceedings are closed);
(7) law of the forum = Marshall Islands; and
(8) Eleni Defendants' base of operations = Greece (whose law has never been invoked).

On the other hand, equity does not support the Eleni Defendants' argument that the law of Vietnam should apply to these proceedings. First, Eleni Defendants have disparaged Vietnam's legal system in these proceedings,[40] And Vietnam is not a signatory to the 1976 LLMC or the 1996 Protocol to the 1976 LLMC.[41] Second, in other Collision-related proceedings, Eleni Defendants have relied on the law of the forum, *i.e.*, in the Hong Kong[42] and in India.[43] Third,

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[40]*See* Eleni Defendants' Reply in Support of FNC Motion, p. 4, filed August 8, 2014 ("the courts in Vietnam are not experienced in admiralty matters"); Eleni Defendants Motion for Summary Judgment, p. 2 ¶7, filed Apr. 29, 2016 ("[u]nlike Vietnam where the collision occurred, Hong Kong is an active and established maritime jurisdiction").

[41]*See* Eleni Defendants' Reply in Support of FNC Motion, p. 4, filed August 8, 2014; *see also* Exhibit C to the Declaration of Alanson T. Chenault Expert Opinion dated April 28, 2016, filed with Eleni Defendants' Motion for Summary Judgment filed April 29, 2016.

[42]Case No. HCAJ 188/2013 and Case No. HCAJ 189/2013.

[43]*See* filed at the same time as Cargo Plaintiffs' Proposed Findings of Fact and Conclusions of Law dated December 29, 2017, the Affidavit in Rejoinder of Efthalia Paraskevopoulou, dated September 18, 2016, at ¶18, filed in Admiralty Suit No. 329 of 2014, High Court of Judicature at Bombay, Admiralty and Vice Admiralty Jurisdiction (*citing Harding v. Wealands*, [2006] UKHL 32 ("Whatever relates to the remedy to be enforced, must be determined by the *lex fori*, the law of the country to the tribunals of which appeal is made").

even with application of the US GML "innocent cargo" rule, the Eleni Defendants' need (at the end of the day) not be liable for more than their 70% share of Cargo Plaintiffs' damages, as they can set off the extra 30% against the HAD Interests' claims via their Hong Kong indemnity action (including as against the extra-judicial "side limitation" fund). Fourth, it is appropriate that Eleni Defendants, as Marshall Islands non-resident corporations running a Marshall Islands-flagged vessel, be governed by the law of the Marshall Islands. Fifth, applying Marshall Islands law in these proceedings would not work any prejudice to Vietnam — as the littoral state with the most direct safety-related concern vis-a-vis the Collision — because the Vietnamese National Maritime Bureau investigated the Collision (and presumably took any enforcement proceedings necessary to ensure safe navigation in its territorial waters) after the Collision.[44]

IV. CONCLUSION & JUDGMENT

Pursuant to the above Findings of Fact and Conclusions of Law, the Court hereby **GRANTS** Cargo Plaintiffs' Fault MSJ, and it is accordingly

HEREBY ORDERED, ADJUDGED AND DECREED that there be partial summary judgment in favor of Cargo Plaintiffs as follows:

- The Eleni Defendants are hereby determined to be 70% at fault in causing the Collision.
- The Eleni Defendants are, therefore, liable to Cargo Plaintiffs for the full amount of all provable damages caused by the Collision (pursuant to the US GML "innocent cargo" rule).

Further, setting all other matters aside, counsel are to appear before the Court at 9:00 a.m. on May 22, 2018, for a scheduling conference to establish dates for further litigation of all

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[44] *See* October 10, 2017 Declaration of Ly Ouang Long attached to the Eleni Defendants' Opposition to the Fault MSJ, at ¶3.

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FILED

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ASST. CLERK OF COURTS
REPUBLIC OF THE MARSHALL ISLANDS

IN THE HIGH COURT

OF THE

REPUBLIC OF THE MARSHALL ISLANDS

Chubb Insurance (Thailand) Company Ltd, Tokio Marine & Nichido Fire Insurance Co Ltd, *et al.* Plaintiffs, v. Eleni Maritime Limited *in personam* and Empire Bulkers Limited Defendants.	H.Ct. Civil No. 2014-050 H.Ct. Civil No. 2014-110 H.Ct. Civil No. 2015-194 **DEFENDANTS' RESPONSE TO PLAINTIFFS' SUPPLEMENTAL BRIEFING**

Defendants respectfully submit their response to Plaintiffs' supplemental briefing pursuant to this Court's March 27, 2018 Order.

Privity vis-à-vis Issue Preclusion

1. Plaintiffs claim that a non-party will be bound if his interests were represented adequately by a party in the original suit, i.e., the Hong Kong litigation here. In neither the collision action HCAJ188 of 2013 nor the limitation action HCAJ189 of 2013 is Empire Bulkers Limited ("EBL") a party. EBL is not a plaintiff in either action. Nor has any claim been made against it.

2. In the RMI pleadings filed by Defendants and Plaintiffs, it is correctly stated that EBL is not a party to the Hong Kong actions and that no claim has been made against EBL in the Hong Kong litigation. See (1) our Reply dated 8 August 2014, last paragraph under I on page 8, and (2) their Opposition dated 7 August 2014, last paragraph under A and again under B on page 15. As they say, "the Hong Kong action does not purport to address any claims involving Empire Bulkers, the Eleni's managers. Consequently, it cannot be said that their RMI action is the "same" action involving the "same" parties as the Hong Kong proceedings".

3. Defendants agree with the case cited by Plaintiffs that states: "To establish the necessary alignment of interests [to show privity], it is ***insufficient to show that the parties have parallel interests, that the first suit was competently litigated, or even that the same attorney was used in both suits.***" *See Benson and Ford, Inc. v. Wanda Petroleum Co.*, 833 F.2d 1172, 1175 (5th Cir.1987) (emphasis added). Nor can it be said that EBL is a party to the first suit (which can only mean in this context, the Hong Kong actions) and therefore by reason of its relationship with Eleni Maritime Limited, the owners, accountable to non-parties (i.e. the RMI Plaintiffs) who filed subsequent suits. The condition of this test is not satisfied.

4. It cannot be said that the owners represent the managers in the Hong Kong litigation. As a matter of fact and law this is not the case. Nor has the need for representation arisen. EBL has no possessory or proprietary interest in the vessel Eleni. EBL has no title to sue. EBL has not been sued in Hong Kong (see our Defendant's initial Supplemental Briefing, paragraphs 12 onwards).

5. The statement that EBL would be entitled to avail itself of the protection of the Hong Kong limitation fund in the event that EBL were sued in Hong Kong is based solely on our interpretation of the "76 Convention, Chapter I, Article I, paragraph 4, which reads as follows:

> 4. If any claims set out in Article 2 are made against any person for whose act, neglect or default the shipowner or salvor is responsible, such person shall be entitled to avail himself of the limitation of liability provided for in this Convention."

6. The key to this provision is that EBL, as manager, of the vessel, would be a party for whom Eleni Maritime Limited is responsible. The '76 Convention wording is wide enough to cover agents and independent contractors for whom the owner is responsible as a matter of law. In the Hong Kong litigation, it is only the responsibility of Eleni Maritime Limited that has been engaged, not that of EBL. It follows that EBL cannot be said to be "represented" by Eleni Maritime Limited. Since EBL were engaged by Eleni Maritime Limited to undertake management duties in respect of the vessel, EBL would be a party for whom Eleni Maritime Limited was responsible and as such a party who could avail itself of limitation protection if sued, but its interests as manager are not affected by the Hong Kong

litigation since it cannot sue and has not been sued and in no sense therefore is it being represented by Eleni Maritime Limited.

7. Empire Bulkers Limited is just the technical manager of the vessel and is not associated with the owners, Eleni Maritime Ltd. As a management company, EBL provides its services to many unrelated vessels / vessels with different ownership, i.e., not only vessels owned by different shipowning companies but also vessels owned by different holding companies.

8. The website provides the fleet list for which EBL acts as manager of many different ships with different owners:

https://www.empirebulkers.com/

Application of the Law

9. Plaintiffs assert what they seek to prove, namely that Eleni Maritime Limited and EBL are each other's virtual representatives. First, what is said above denies any basis for this assertion.

10. Eleni Maritime Limited and EBL cannot be taken to have waived their right to dispute privity because they have taken issue with the privity allegation from the time it was raised. They cannot have admitted a point before it was pleaded. Nor is there any conduct by the two entities from which privity can be inferred. Engaging the same legal representatives is not sufficient for this purpose. See Section 1 above and *Benson and Ford, Inc. v. Wanda Petroleum Co.*, 833 F.2d 1172, 1175 (5th Cir. 1987) (to establish privity "it is insufficient to show that the parties have parallel interests, that the first suit was competently litigated, ***or even that the same attorney was used in both suits.***") (emphasis added).

11. Plaintiffs cite the *In re Otal Investments Ltd* but this case can be distinguished from our case for the following reasons:

(i) EBL are not a party to the Hong Kong litigation. The issue in the RMI litigation is whether the apportionment of liability in the Hong Kong litigation should be adopted by the RMI court and applied to EBL as well as Eleni Maritime Limited. This issue did not rise *In re Otal.*

(ii) The court *In re Otal* had already issued its liability findings. This has not yet happened in the RMI litigation.

(iii) No individual liability has been asserted against EBL in the RMI litigation that arises from breach of duty on the part of EBL. No case has been put against EBL that has not also been put against Eleni Maritime Limited. By contrast in *In re Otal*, a specific case was made out against the managers arising from their overall responsibility for the vessel's operation.

(iv) As to the final remarks of Plaintiffs' brief, silence cannot be taken to amount to an admission or waiver of a point not in issue on the pleadings.

12. Second, Plaintiffs rely on a "virtual representation" analysis set forth in a 2005 9th Circuit case, *Headwaters Inc. v. U.S. Forest Serv.*, 399 F.3d 1047, 1053–54 (9th Cir. 2005). This analysis is not the current law. The Supreme Court specifically debunked the "virtual representation" analysis in 2008 with *Taylor v. Sturgell*, 553 U.S. 880 (2008), which set forth the context and specifically the six (6) factors (excluding "virtual representation") to be considered when determining if a prior judgment has preclusive effect on a non-party based on privity. *See* Defendants' initial Supplemental Brief. None of the factors apply in this case: 1) there was no

agreement to be bound by the determination of issues in an action between others, 2) there was no pre-existing substantive legal relationship between the Eleni Maritime Ltd. and EBL, such as preceding and succeeding owners of property, such as the vessel, 3) EBL was not adequately represented by someone with the same interests who [wa]s a party to the suit, such as in a class action; EBL has no title or interest in the vessel itself and had no reason to be part of the prior *in rem* action as the manager, 4) EBL never "assume[d] control" over the litigation in which the Hong Kong liability judgment was rendered, so as to say EBL already had its day in court, 5) EBL is not trying to avoid being bound by the Hong Kong judgment by relitigating here through a proxy, and 6) there is no special statutory scheme that may "expressly foreclos[e] successive litigation by nonlitigants ..." such as in bankruptcy or probate proceedings.

13. The two quotations from the Reply, dated 8 August 2014 are factually incorrect in that there is no cross claim against EBL, only against the plaintiff Eleni Maritime Limited – the only plaintiff. The error is obvious from the context of the Reply, as the next sentence on page 16 makes this clear: "In any event there is no basis for a claim against Empire Bulkers", and two sentences later on page 19 it is said, "In any event, as discussed above, there is no meritorious claim against (EBL) anyway". *See* Section I(E) of the Reply. The second sentence of that section reads: The answer is that it is neither necessary nor appropriate for (EBL) to be named as a Plaintiff as there can be no basis for a claim against it anyway. In the final paragraph, we repeat that no claim has been advanced against EBL except for in the RMI litigation.

14. The *in rem* pleadings speak for themselves. Plainly EBL are not a party. This is common ground on the pleadings filed in the RMI and evident on the face of the orders attached, so there can be no cross claim against it. The cross-claim, or counterclaim as it is called in Hong Kong, is only against Eleni Maritime Limited. It appears in the defendant owner's preliminary act. It reads as follows and makes no reference at all to EBL expressly or by implication.

"And the Defendants Counterclaim:

(1) Judgment against the Plaintiffs for the damage sustained, together with interest thereon and costs; and

(2) A declaration that those aspects of the Defendants' counterclaim (full particulars of which will be given at the time of the reference to the Registrar for assessment of damages) which relate to:-

(i) the raising and removal of the sunken wreck;

(ii) the destruction or rendering harmless of such wreck;

(iii) the raising, removal, destruction or rendering harmless of any cargoes and/or containers that were or had been on board the "HEUNG-A DRAGON" at the time of the aforesaid collision or were on board her by reason of or consequent upon the aforesaid collision;

(iv) the raising, removal, destruction or rendering harmless of fuel oil, marine diesel or anything else that was or had been on board the "HEUNG-A DRAGON" at the time of the aforesaid collision, or was on board her by reason of or consequent upon the aforesaid collision; are not subject to

limitation of liability under Article 2 of the Convention on Limitation of Liability for Maritime Claims 1976 as set out in Schedule 2 of the Merchant Shipping (Limitation of Shipowners Liability) Ordinance (Cap. 434), whatever the basis of the Plaintiffs' liability may be, and even if brought by the Defendants by way of recourse or for indemnity under a contract or otherwise; and

(3) A reference, if necessary, to the Registrar to assess the amount of damage."

(a) The Fault Order only binds the parties to the action in which it was made (HCAJ 188/2013)

(b) EBL are not a party to the limitation action (HCAJ189/2013) and have not invoked the limitation regime. Only Eleni Maritime Limited, the sole plaintiff in the limitation action, invoked the limitation regime. EBL benefits in the sense that if a claim were mounted against them (and it has not and it cannot because EBL does not have the necessary possessory or proprietary interest in the vessel), EBL would be able to avail itself of the protection which the limitation fund provides to a party for whose act, neglect or default Eleni Maritime Limited is responsible.

(c) The sharing of an office does not prove privity. It is common for managers to investigate a casualty involving a vessel under their management. It is also common for a manager to generate documents as part of its management system. These documents are used and completed by the master and crew.

(d) Counsel's website, giving details of Marie Kelly's practice at Norton Rose Fulbright refers to advice given to EBL on the collision of "its vessel Eleni".

Obviously it is part of the manager's function to seek legal advice and representation for proceedings relating to vessels under its management. This cannot be taken to mean that the owners and managers are in privity. Engaging the same law firm to represent both parties is not sufficient for this purpose – please see Section I above again and case quoted by Plaintiffs, *Benson and Ford, Inc. v. Wanda Petroleum Co.*, 833 F.2d 1172, 1175 (5th Cir. 1987) establishing this point.

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IN THE HIGH COURT

OF THE

REPUBLIC OF THE MARSHALL ISLANDS

Chubb Insurance (Thailand) Company Ltd, Tokio Marine & Nichido Fire Insurance Co Ltd, *et al.* Plaintiffs, v. Eleni Maritime Limited *in personam* and Empire Bulkers Limited Defendants.	H.Ct. Civil No. 2014-050 H.Ct. Civil No. 2014-110 H.Ct. Civil No. 2015-194 **CERTIFICATE OF SERVICE**

I hereby certify that on 24 April 2018, a true and correct copy of DEFENDANTS' RESPONSE TO PLAINTIFFS' SUPPLEMENTAL BRIEFING was served upon the following by email attachment in PDF format to:
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IN THE HIGH COURT
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Chubb Insurance (Thailand) Company Ltd, Tokio Marine & Nichido Fire Insurance Co Ltd, *et al.*

Plaintiffs,

v.

ELENI Maritime Limited *in personam* and Empire Bulkers Limited

Defendants

H.Ct. Civil No. 2014-050
H.Ct. Civil No. 2014-110
H.Ct. Civil No. 2015-194

RESPONSE BRIEF FURTHER TO THE COURT'S ORDER OF MARCH 26, 2018 AND STIPULATION OF APRIL 10, 2018; CERTIFICATE OF SERVICE

Plaintiffs, by and though Dennis J. Reeder and Christopher Hannan, *pro hac vice*, and further to the Court's order of March 26, 2018 and signed stipulation of April 10, 2018, respectfully submit the attached Response Brief in Opposition to ELENI Defendants brief of April 17, 2018 (regarding privity for purposes of issue preclusion).

Dennis Reeder April 24, 2018

Attorney for Plaintiffs

IN THE HIGH COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

Chubb Insurance (Thailand) Company Ltd, Tokio Marine & Nichido Fire Insurance Co Ltd, *et al.*	**H.Ct. Civil No. 2014-050** **H.Ct. Civil No. 2014-110** **H.Ct. Civil No. 2015-194**
Plaintiffs, **v.** ELENI Maritime Limited *in personam* and Empire Bulkers Limited **Defendants**	**RESPONSE/OPPOSITION TO PROPOSED FINDINGS OF FACT & CONCLUSIONS OF LAW SUBMITTED BY DEFENDANTS; CERTIFICATE OF SERVICE**

PLAINTIFFS' BRIEF FURTHER TO THE COURT'S ORDER OF MARCH 26, 2018

Plaintiffs respond briefly to certain points raised in ELENI Defendants' April 17, 2018 Brief regarding the Court's privity question:

- **Paragraph 1(c); 11, 12** - ELENI Defendants suggest that only ELENI Maritime Limited, and not Empire Bulkers Limited, is a party to HCAJ 188 of 2013. **But this is squarely contradicted by their joint statements to this Court in their August 8, 2014 FNC Reply briefing:**

> The limitation action [in Hong Kong, HCAJ 189/2013] includes Empire Bulkers by definition as the manager, **and in the in rem liability proceeding [HCAJ 188/2013 in which the Fault Order was issued] there is a cross claim against it.**
>
> ***
>
> [T]he limitation action includes Empire Bulkers by definition as the manager, and **in the in rem liability proceeding there is a cross claim against it. As such, Plaintiffs are incorrect that Empire Bulkers is not included in the Hong Kong proceedings.**

Thus, once again (as they have done all along) the ELENI Defendants have misrepresented facts to this Court for the sake of their own self-interest/expediency; either they were wrong *then* (and Empire Bulkers is not a party in HCAJ 188 of 2013) or they are wrong *now* (and Empire Bulkers is a party in HCAJ 188 of 2013). It cannot be both. Regardless, they have offered *no evidence* (such as pleadings from the Hong Kong proceedings, or anything else) to

substantiate their directly contradictory statement - changed 180° *now that it suits their interest* - that Empire Bulkers Limited is a non-party to HCAJ 188 of 2013. The Court should (in the absence of any evidence to support their now-self-serving contradiction of a prior statement submitted pursuant to MIRCP Rule 11) deny ELENI Defendants' attempt to disclaim their previously Rule 11-certified statements in their pleadings.

Very simply, because Empire Bulkers Limited has represented to this Court that it **is a party to the liability proceeding (HCAJ 188 of 2013) in which the Fault Order was entered** - a point which ELENI Defendants *have never contested* at any point (until the recent Court-ordered briefing) since this litigation was instituted against *both of them*, and *as they themselves argued* to this Court in their FNC Reply brief - the Fault Order binds them both **directly**. Based on this fact/representation, the question of privity does not even come into play because they are both directly subject to the Fault Order as parties to the case in which it was agreed and reduced to judgment.

- **Paragraph 3** - ELENI Defendants' suggest that "[a] person who was not a party to a suit generally has not had a full and fair opportunity to litigate the claims and issues settled in that suit." (ELENI Defendants Brief, p. 3). **This ignores the fact that both Empire Bulkers Limited and ELENI Maritime Limited were both** (as they have represented to this Court) **direct parties to HCAJ 188 of 2013 in which the Fault Order was entered.** Again, the question of privity is not even implicated, and issue preclusion binds both ELENI Defendants because they were both parties to the matter in which the Fault Order was entered.

And further, as Plaintiffs argued at length in their initial April 17, 2018 privity briefing to the Court, both ELENI Defendants **have waived any argument that they are not jointly subject to issue preclusion** because they have never themselves argued or raised any issue (including in their responsive pleadings) to suggest non-privity. Thus, as the United States

Second Circuit Court of Appeal held in *In re Otal Investments*, "despite [Plaintiffs'] grouping [Empire Bulkers Limited] with the rest of the [ELENI] interests, [Empire Bulkers Limited] do not explain their failure to argue until now [after many years of litigation *specifically pending against it* in these proceedings] that the Court should consider them separately."[1]

- **Paragraphs 4-9 - Six *Taylor* Exceptions** - ELENI Defendants list out the 6 applicable exceptions set forth by the Supreme Court in *Taylor v. Sturgell* as to when non-parties will be bound by issue preclusion. As noted above, however, **the *Taylor* exceptions are irrelevant because Empire Bulkers Limited *is a party to* HCAJ 188 of 2013**; thus, principles of non-party issue preclusion do not apply at all.

  In any event, exceptions 1 (¶4), 4 (¶7), and 5 (¶8) are irrelevant to the circumstances of this case,[2] and the remaining exceptions would support a finding of non-party issue preclusion against Empire Bulkers Limited (if they were applicable, which they are not because Empire Bulkers Limited *is a party* to HCAJ 188 of 2013 and has *wavied* any non-privity argument in any event). Moreover, it is critical to note that the six *Taylor* exceptions are "meant only to provide a framework for ... consideration of virtual representation, not to establish a definitive

[1] 2013 WL 6645438, at *4 (S.D.N.Y. Dec. 17, 2013).

[2] Plaintiffs also note that to the extent the *Taylor* decision rejected the concept of "virtual representation" as a basis for applying issue preclusion against a non-party in federal question cases, Plaintiffs' use of the term "virtual representation" in its initial April 17, 2018 privity briefing is analytically identical to the "substantive legal relationship" and "adequate representation" exceptions espoused by *Taylor*. Indeed, the Supreme Court acknowledged that its rejection of the *term* "virtual representation" from the non-party issue preclusion analytical framework did not necessarily invalidate earlier opinions/analyses using that terminology, because many of those "results [were] at least arguably defensible on established grounds [such as "substantive legal relationship"/"adequate representation"]." 553 U.S. at 904. *See also Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc.*, 568 F. Supp. 2d 1152, 1191 (C.D. Cal. 2008), *aff'd sub nom. Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983 (9th Cir. 2012) (initially finding non-party issue preclusion applied based on the "virtual representation" analysis; then after Supreme Court's decision in *Taylor* setting forth the 6 scenarios where non-party issue preclusion applies (and rejecting "virtual representation"), confirming issue preclusion still applied because "these recognized [6] exceptions apply irrespective of the Ninth Circuit's "virtual representation" test [and thus] *Taylor* has no effect on the outcome."). *See also Limon v. Berryco Barge Lines, L.L.C.*, 779 F. Supp. 2d 577, 584 (S.D. Tex. 2011) ("Although the Supreme Court in *Taylor* disapproved of the term 'virtual representation,' the Court approved the three categories of adequate representation that had been used by the Fifth Circuit—a nonparty who has succeeded to a party's interest in property, a nonparty who controlled the original suit, and a nonparty whose interests were represented adequately by a party in the original suit.").

taxonomy."[3] Thus, under all the relevant *Taylor* exceptions as well as the general *Taylor* analytical approach, "the underlying consideration is the same: **there must be a sufficiently close relationship between a party and a nonparty to merit the application of nonparty preclusion.**"[4] And under this analytical framework (general and specific) the relationship between Empire Bulkers Limited and ELENI Maritime Limited warrants issue preclusion under *Taylor* as to Empire Bulkers Limited.

- **Paragraph 5 - "Substantive Legal Relationship" Exception Applies** - This *Taylor* exception binds both ELENI Maritime Limited **and** Empire Bulkers Limited under the Fault Order. Empire Bulkers Limited's role as the ISM Manager of the vessel ELENI, owned by ELENI Maritime Limited, constitutes a "substantive legal relationship" because Empire Bulkers Limited (pursuant to agreement with ELENI Maritime Limited) took on all responsibilities as ISM manager to crew, maintain and operate the vessel pursuant to the ISM Code[5] *on ELENI Maritime Limted's behalf and as its agent.* The term "Company" is defined under the ISM Code to include "the Owner of the ship **or any other organization or person such as the Manager, or the Bareboat Charterer, who has assumed the responsibility for operation of the ship from the Shipowner** and who on assuming such responsibility has agreed to take over all the duties and responsibility imposed by the Code."[6] Indeed, the RMI Maritime Administrator requires an express declaration from an ISM Manager affirming that it

[3] *Taylor*, 553 U.S. at 893 n. 6.

[4] *Limon v. Berryco Barge Lines, L.L.C.*, 779 F. Supp. 2d 577, 584 (S.D. Tex. 2011).

[5] The International Safety Management Code (ISM Code) "provide[s] an international standard for the safe management and operation of ships and for pollution prevention." ISM Code, Resolution A.741(18) as amended by MSC.104(73), MSC179(79), MSC.195(80) and MSC.273(85).

[6] http://www.imo.org/en/Publications/PublishingImages/PagesfromEB117E.pdf.

"has **assumed the responsibility and duties** for operation of the below listed vessel(s) **and has agreed in writing to take over the duties and responsibilities imposed by the ISM Code from the owner**."[7] This is analogous to a bailor/bailee relationship - specifically defined by *Taylor* as one of the relationships that allows for non-party issue preclusion - between Empire Bulkers Limited and ELENI Maritime Limited vis-à-vis the M/V ELENI;[8] and is also (on its own facts viz. the operation of the vessel) a sufficiently "substantive legal relationship" to warrant non-party issue preclusion. Accordingly, even if Empire Bulkers Limited were not a party to HCAJ 188 of 2013, it would still be bound by the Fault Order based on its "substantive legal relationship" with ELENI Maritime Limited.

- **Paragraph 6 - "Adequate Representation" Exception Applies -** Additionally, for all the reasons set forth in Plaintiffs' original April 17, 2018 privity briefing regarding the "virtual representation" principle, the *Taylor* "adequate representation" exception also applies because Empire Bulkers Limited was "adequately represented" by ELENI Maritime Limited in HCAJ 188 of 2013 vis-à-vis entry of the Fault Order. Under *Taylor*, adequate representation requires that, "at a minimum: (1) the interests of the nonparty and [its] representative are aligned; and (2) either the party understood [itself] to be acting in a representative capacity or the original court took care to protect the interests of the nonparty."[9] Here, in addition to the fact that Empire Bulkers Limited *is a party to* HCAJ 188 of 2013 and has *waived* any non-privity argument, ELENI

[7] *See* https://www.register-iri.com/forms/upload/MI-297A%20(Declaration%20of%20Company).doc.

[8] *Braniff Airways, Inc. v. Exxon Co., U.S.A.*, 814 F.2d 1030, 1038 (5th Cir. 1987) ("The elements of a bailment are delivery of personal property by one person to another in trust for a specific purpose and acceptance of such delivery, and an express or implied contract that the trust will be carried out and the property returned to the bailor or dealt with as he directs.").

[9] *Taylor*, 553 U.S. at 900.

Maritime Limited "adequately represented" Empire Bulkers Limited in HCAJ 188 of 2013 because the *factual, operational* liability for the Collision necessarily implicated the actions of Empire Bulkers Limited as a practical matter. In other words, ELENI Maritime Limited (as owner) "adequately represented" the interests of its vessel's ISM Manager Empire Bulkers Limited in HCAJ 188 of 2013 (and in agreeing to the Fault Order), because the latter was the operational proxy for the former; that is, Empire Bulkers Limited *ran the vessel on a day-to-day basis*, and thus any liability of ELENI Maritime Limited as owner necessarily flowed through Empire Bulkers Limited by proxy.

Likewise, (as explained below), ELENI Maritime Limited "adequately represented" Empire Bulkers Limited by filing the Hong Kong Limitation proceedings (HCAJ 189 of 2013) and raising a limitation defense here.

- **Paragraph 9 - "Special Statutory Scheme" Exception Applies** - Finally, as Plaintiffs noted in their initial April 17, 2018 privity briefing, the sixth *Taylor* exception applies because both ELENI Maritime Limited and Empire Bulkers Limited are entitled to limit their liability (both via the limitation proceeding they initiated in Hong Kong, and via affirmative defense in these proceedings) for the Collision. It is undisputed that the Fault Order will have preclusive effect in the Hong Kong Limitation proceedings and will bind the distribution of the limitation fund to claimants in those proceedings.[10] Thus, because both ELENI Defendants will be protected by the "statutory scheme" of limitation of liability, which will foreclose successive litigation (including in these

[10] *See* Plaintiffs' Proposed Findings of Fact & Conclusions of Law, ¶13 (quoting Declaration of James Robert James (April 25, 2016), ¶¶20-21, attached to Motion for Summary Judgment filed by ELENI Defendants on April 29, 2016: "[T]he Limitation Fund [posted in Hong Kong Limitation Action] ... will be distributed in accordance with [the Hong Kong Fault Order], recording the apportionment of liability agreed on settlement by the parties thereto.").

proceedings, where they will be able to assert limitation of liability as a defense, albeit subject to the higher 1996 Protocol monetary limits and the innocent cargo rule as required under RMI law), the sixth *Taylor* exception supports non-party issue preclusion as against Empire Bulkers Limited.

• **Paragraph 10** - For all the reasons above, ELENI Defendants' blatantly conclusory and self-serving statement that "[n]one of [the] six [*Taylor*] exceptions applies" is wrong.

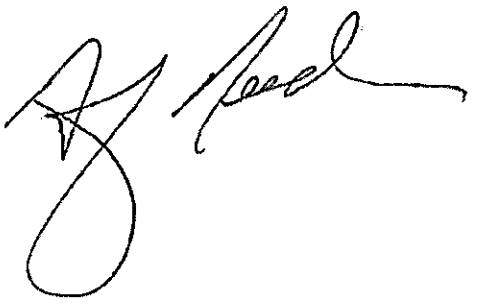
Moreover, their attempt to draw some distinction between *in personam* actions like the one before this Court and *in rem* actions like HCAJ 188 of 2013 **makes no sense at all.** Any issue of privity as between Empire Bulkers Limited and ELENI Maritime Limited **has nothing to do** with the latter's decision to sue someone else's vessel *in rem*. It is entirely incomprehensible why or how ELENI Defendants would argue that an *in rem* suit against someone else's vessel can have any bearing on the question of privity *as between themselves.*

CONCLUSION

The ELENI Defendants' arguments under *Taylor* ignore that (1) Empire Bulkers Limited **is a direct party to HCAJ 188 of 2013 and the Fault Order** (at least as far as they have represented to this Court), and thus *Taylor* does not even apply; (2) that Empire Bulkers **has waived any argument against non-party issue preclusion** by failing to ever raise this issue previously (including in its responsive pleadings); and that (3) the three *Taylor* exceptions that apply to the circumstances of this case **all support non-party issue preclusion** as against Empire Bulkers Limited.

Thus, for all these reasons and those set forth in Plaintiffs' original privity brief (filed April 17, 2018), Empire Bulkers and Eleni Maritime Limited should be deemed to be in privity

with one another for purposes of issue preclusion with respect to the Fault Order.



Dennis Reeder April 24, 2018 Majuro Date
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IN THE HIGH COURT
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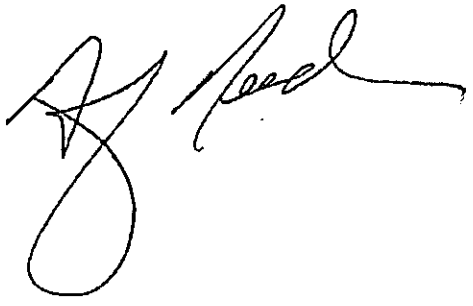
Chubb Insurance (Thailand) Company Ltd, Tokio Marine & Nichido Fire Insurance Co Ltd, *et al.*	**H.Ct. Civil No. 2014-050** **H.Ct. Civil No. 2014-110** **H.Ct. Civil No. 2015-194**
Plaintiffs, **v.**	
ELENI Maritime Limited *in personam* and Empire Bulkers Limited	**CERTIFICATE OF SERVICE**
Defendants	

CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2018, RMI Date (April 23, 2018, USA mainland date), a true and correct copy of the Plaintiffs' Opposition Brief in response to ELENI Defendants' Brief further to the Court's Order of March 23, 2018 and signed stipulation of April 10, 2018 was served on Tatyana Cerullo and David Lowe, Attorneys for Defendants, by sending to them via email transmission in pdf.format to:

TC.LAW.lllc@gmail.com and davidloweesq@gmail.com.

Dated: April 24, 2018 (Majuro date).



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Chubb Insurance (Thailand) Company Ltd, Tokio Marine & Nichido Fire Insurance Co Ltd, *et al.* Plaintiffs, v. Eleni Maritime Limited *in personam* and Empire Bulkers Limited Defendants.	H.Ct. Civil No. 2014-050 H.Ct. Civil No. 2014-110 H.Ct. Civil No. 2015-194 **DEFENDANTS' RESPONSE TO MARCH 27, 2018 ORDER FOR FURTHER BRIEFING**

Pursuant to this Court's March 27, 2018 Order For Further Briefing, Defendants hereby submit their response to the following question:

> Is Empire Bulkers Limited in privity with, or so closing related to, ELENI Maritime Limited, so that under issue preclusion Empire Bulkers Limited is

bound by ELENI Maritime Limited's blame allocation in Case No. HCAJ 188/2013?

1. The response of the two Defendants ELENI Maritime Limited and Empire Bulkers Limited is that:

   (a) they are separate and distinct legal entities;

   (b) they are respectively the beneficial owner and the technical manager of the vessel Eleni that provides the management system according to the ISM (International Safety Management) Code;

   (c) Only one of the two was a party to HCAJ 188 of 2013 and that was the owner, ELENI Maritime Limited, who is the plaintiff in the action. The defendant was the owner of the Heung-A Bangkok. The Heung-A Bangkok was, at the time, the sister ship of the Heung-A Dragon which was the vessel that came into contact with the Eleni in Vietnamese waters on or about 7 November 2013.

2. The U.S. Supreme Court in *Taylor v. Sturgell*, 553 U.S. 880 (2008) set forth the context and factors to be considered when determining if a prior judgment has preclusive effect on a non-party based on privity. 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 (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. 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 (1979).

3. A person who was not a party to a suit generally has not had a "full and fair opportunity to litigate" the claims and issues settled in that suit. The application of claim and issue preclusion to nonparties thus runs up against the "deep-rooted historic tradition that everyone should have his own day in court." *Richards*, 517 U. S., at 798 (internal quotation marks omitted). Indicating the strength of that tradition, we have often repeated the general rule that "one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry*, 311 U.S., at 40. See also, *e.g.*, *Richards*, 517 U.S., at 798; *Martin* v. *Wilks*, 490 U. S. 755, 761 (1989); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 110 (1969).

4. This rule is subject to exceptions that can be divided into six categories:

First, "[a] person who agrees to be bound by the determination of issues in an action between others is bound in accordance with the terms of his agreement." 1 Restatement (Second) of Judgments §40, p. 390 (1980) (hereinafter Restatement). For example, "if separate actions involving the same transaction are brought by different plaintiffs against the same defendant, all the parties to all the actions may agree that the question of the defendant's liability will be definitely determined, one way or the other, in a 'test case.' " D. Shapiro, Civil Procedure: Preclusion in Civil Actions 77–78 (2001) (hereinafter Shapiro). See also *California* v. *Texas*, 459 U. S. 1096, 1097 (1983)

(dismissing certain defendants from a suit based on a stipulation "that each of said defendants ... will be bound by a final judgment of this Court" on a specified issue).

5. Second, nonparty preclusion may be justified based on a variety of pre-existing "substantive legal relationship[s]" between the person to be bound and a party to the judgment. Shapiro 78. See also *Richards*, 517 U. S., at 798. Qualifying relationships include, but are not limited to, preceding and succeeding owners of property, bailee and bailor, and assignee and assignor. See 2 Restatement §§43–44, 52, 55. These exceptions originated "as much from the needs of property law as from the values of preclusion by judgment." 18A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §4448, p. 329 (2d ed. 2002) (hereinafter Wright & Miller).

6. Third, we have confirmed that, "in certain limited circumstances," a nonparty may be bound by a judgment because she was "adequately represented by someone with the same interests who [wa]s a party" to the suit. *Richards*, 517 U. S., at 798 (internal quotation marks omitted). Representative suits with preclusive effect on nonparties include properly conducted class actions, see *Martin*, 490 U. S., at 762, n. 2 (citing Fed. Rule Civ. Proc. 23), and suits brought by trustees, guardians, and other fiduciaries, see *Sea-Land Services, Inc.* v. *Gaudet*, 414 U. S. 573, 593 (1974). See also 1 Restatement §41.

7. Fourth, a nonparty is bound by a judgment if she "assume[d] control" over the litigation in which that judgment was rendered. *Montana*, 440 U. S., at 154. See also *Schnell* v. *Peter Eckrich & Sons, Inc.*, 365 U. S. 260, 262, n. 4 (1961); 1 Restatement §39. Because such a person has had "the opportunity to present proofs and argument," he has already "had his day in court" even though he was not a formal party to the litigation. *Id.*, Comment *a*, p. 382.

8. Fifth, a party bound by a judgment may not avoid its preclusive force by relitigating through a proxy. Preclusion is thus in order when a person who did not participate in a litigation later brings suit as the designated representative of a person who was a party to the prior adjudication. See *Chicago, R. I. & P. R. Co.* v. *Schendel*, 270 U. S. 611, 620, 623 (1926); 18A Wright & Miller §4454, pp. 433–434. Preclusion is appropriate when a nonparty later brings suit as an agent for a party who is bound by a judgment. See *id.*, §4449, p. 335.

9. Sixth, in certain circumstances a special statutory scheme may "expressly foreclos[e] successive litigation by nonlitigants ... if the scheme is otherwise consistent with due process." *Martin*, 490 U. S., at 762, n. 2. Examples of such schemes include bankruptcy and probate proceedings, see *ibid.*, and *quo warranto* actions or other suits that, "under [the governing] law, [may] be brought only on behalf of the public at large," *Richards*, 517 U. S., at 804.

10. None of these six exceptions applies. Moreover, they pertain to the preclusive effect as to *in personam* actions. **The action HCAJ 188/2013 is an *in rem* action.** Thus, no privity between the owner and manager exists in this case for purposes of issue preclusion. There is no identity of interest. An action *in rem* is an action against a vessel itself. It is an action in which the owners of the vessel may choose to take part, and they can do this by filing with the court an acknowledgement of service of the writ by which the action is commenced. If they do take this step, the action proceeds *in personam* against the owners and *in rem* against the vessel. If in the course of the action the vessel is appraised and sold by the court, the sale proceeds held by the court become the *res* following completion of the sale in place of the vessel.

11. The plaintiff in HCAJ 188 of 2013 is the owner of the Eleni. The manager is not a party to the action. It was neither necessary nor appropriate for the manager to have been a party to the action. As a matter of Hong Kong law, a person may only recover damages in the tort of negligence if he has a possessory or proprietary interest in the property damaged at the time when the damage occurred. Therefore, a person without a possessory or proprietary interest in the damaged property does not have the necessary title to sue. This rule has been stated in a long line of cases, including *Candlewood Navigation Corporation Ltd v Mitsui O.S.K. Lines Ltd* [1986] AC 1 and *Leigh and Sullivan Ltd v Aliakmon Shipping Co. Ltd* [1986] AC 785.

12. As the manager did not have the necessary possessory or proprietary interest in the Eleni, it had no title to sue in respect of the damage to the Eleni arising from the collision. The manager was accordingly not a party to HCAJ 188 of 2013 and no claim was asserted against the manager in Hong Kong. Not being a party to the action, it is not bound by any of the orders made during the course of the action. It is not bound by the order dated 6 January 2016 recording the apportionment of liability agreed by the owners of the two vessels.

13. There were no other parties to the action while liability for the collision was a live issue between the owners. On 15 August 2016 the court made an order by consent of those parties (and other defendants) granting leave for the defendant owner's P&I club, Steamship Mutual Underwriting Association Limited, to be joined as second defendant. The order was agreed on grounds that the Club claimed to have paid or funded payment of certain of the expenses incurred by the defendant owner. The addition of the Club as 2nd Defendant is shown in the re-amended writ of summons in the action.

14. Similarly, the manager is not a party to the limitation action HCAJ 189 of 2013. In that action, the sole plaintiff is Eleni Maritime Limited, the court by order dated 14 May 2014 decreed that any liability of the plaintiff, as owner of the vessel, be limited to 4,006,998 special drawing rights, together with interest at 5.2 per cent per annum from 7 November 2013 to the date of the constitution of the fund. The plaintiff constituted the fund in accordance with the order.

15. No claim has been made against the manager in Hong Kong. Were a claim to be made against the manager, the manager would be entitled to avail itself of the limitation of liability provided for in the '76 Convention as applied in Hong Kong at the material time and the claim, if proven, would go against the owner's limitation fund. This is the effect of Article 1 of the '76 Convention as applied in Hong Kong at the material time.

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EMPIRE BULKERS LIMITED

FILED

APR 17 2018

ASST. CLERK, COURTS
REPUBLIC OF THE MARSHALL ISLANDS

IN THE HIGH COURT

OF THE

REPUBLIC OF THE MARSHALL ISLANDS

Chubb Insurance (Thailand) Company Ltd, Tokio Marine & Nichido Fire Insurance Co Ltd, *et al.* Plaintiffs, v. Eleni Maritime Limited *in personam* and Empire Bulkers Limited Defendants.	H.Ct. Civil No. 2014-050 H.Ct. Civil No. 2014-110 H.Ct. Civil No. 2015-194 **CERTIFICATE OF SERVICE**

I hereby certify that on 17 April 2018, a true and correct copy of DEFENDANTS' RESPONSE TO MARCH 27, 2018 ORDER FOR FURTHER BRIEFING was served upon the following by email attachment in PDF format to:
Dennis J. Reeder, Attorney for Plaintiffs, dreeder.rmi@gmail.com Christopher Hannan, channan@bakerdonelson.com

Tatyana Cerullo

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FILED

APR 17 2018

ASST. CLERK OF COURTS
REPUBLIC OF THE MARSHALL ISLANDS

IN THE HIGH COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

Chubb Insurance (Thailand) Company Ltd, Tokio Marine & Nichido Fire Insurance Co Ltd, *et al.*	**H.Ct. Civil No. 2014-110** **H.Ct. Civil No. 2014-050** **H.Ct. Civil No. 2015-194**
Plaintiffs, **v.**	**BRIEF FURTHER TO THE COURT'S ORDER OF MARCH 27, 2018; CERTIFICATE OF SERVICE**
ELENI Maritime Limited *in personam* and Empire Bulkers Limited	
Defendants	

Plaintiffs, by and though Dennis J. Reeder and Christopher Hannan, *pro hac vice*, and further to the Court's Orders of October 25, 2017 and December 3, 2017, respectfully submit the attached Brief further to the Court's order of March 27, 2018.

Dennis Reeder April 17, 2018

Attorney for Plaintiffs

IN THE HIGH COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

Chubb Insurance (Thailand) Company Ltd, Tokio Marine & Nichido Fire Insurance Co Ltd, *et al.*	**H.Ct. Civil No. 2014-110** **H.Ct. Civil No. 2014-050** **H.Ct. Civil No. 2015-194**
Plaintiffs,	
v.	**RESPONSE/OPPOSITION TO PROPOSED FINDINGS OF FACT & CONCLUSIONS OF LAW SUBMITTED BY DEFENDANTS; CERTIFICATE OF SERVICE**
ELENI Maritime Limited *in personam* and Empire Bulkers Limited	
Defendants	

PLAINTIFFS' BRIEF FURTHER TO THE COURT'S ORDER OF MARCH 27, 2018

The Court has asked for further briefing on the following question pursuant to its order of March 26, 2018: "Is Empire Bulkers Limited in privity with, or so close[ly] related to, ELENI Maritime Limited, so that under issue preclusion Empire Bulkers Limited is bound by ELENI Maritime Limited's blame allocation in Case No. HCAJ 188/2013?"

I. Law of Privity vis-à-vis Issue Preclusion

Privity for purposes of issue preclusion is determined according to the following principles:

> Privity merely "represents a legal conclusion that the relationship between the one who is a party on the record and the non-party is sufficiently close to afford application of the principle of preclusion." *Southwest Airlines Co. v. Texas International Airlines, Inc.*, 546 F.2d 84, 95 (5th Cir.1977). The general federal rule regarding the use of issue or claim preclusion against a non-party states that there are three circumstances where privity exists: 1) where a non-party has succeeded to a party's interest in property, the non-party will be bound by a judgment against that party; 2) a nonparty who controlled the original suit will be bound by the resulting judgment; and 3) **a non-party will be bound if his interests were represented adequately by a party in the original suit**. . .
>
> A non-party is adequately represented by a party in a prior suit whose interests were so closely aligned to her interests as to be her "virtual representative." Virtual representation is a narrow doctrine. To establish the necessary alignment of interests, it is insufficient to show that the parties have parallel interests, that the first suit was competently litigated, or even that the same attorney was used in both suits. See *Benson and Ford, Inc. v. Wanda Petroleum Co.*, 833 F.2d 1172, 1175 (5th Cir.1987). Virtual

representation requires an express or implied legal relationship in which parties to the first suit are accountable to non-parties who file a subsequent suit. *See Royal Insurance Co. of America v. Quinn–L Capital Corp.*, 960 F.2d 1286, 1297 (5th Cir.1992) (citing *Benson and Ford*, 833 F.2d at 1174–75). Whether such a legal relationship exists is a question of fact for the trial court.[1]

***

[T]he term "privity" is now used to describe various relationships between litigants that would not have come within the traditional definition of that term. [The Restatement (Second) of Judgments] adds to the traditional privity categories circumstances in which "[a] person who is not a party to an action ... is represented by a party," including trustees and beneficiaries, other fiduciary relationships and consensual or legal representational relationships, and "[t]he representative of a class of persons similarly situated, designated as such with the approval of the court, of which the person is a member." Restatement (Second) of Judgments § 41(1). [*Martin v. Wilks*, 490 U.S. 755, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989)] adds "certain limited circumstances [in which] a person, although not a party, has his interests adequately represented by someone with the same interests who is a party," including " 'class' or 'representative' suits" and "control of litigation on behalf of one of the parties in the litigation," as well as **"special remedial scheme[s] ... expressly foreclosing successive litigation by nonlitigants**, as for example in bankruptcy or probate."

Irwin v. Mascott, 370 F.3d 924 (9th Cir.2004), recently summarized the amalgam of circumstances, broader than traditional privity relationships, that have been referred to in our cases as "virtual representation." "A non-party can be bound by the litigation choices made by his virtual representative," *id.* at 929, only if certain criteria are met: "[A] close relationship, substantial participation, and tactical maneuvering all support

[1] *Meador v. Oryx Energy Co.*, 87 F. Supp. 2d 658, 664–65 (E.D. Tex. 2000).

a finding of virtual representation; identity of interests and adequate representation are necessary to such a finding."[2]

II. Application

In light of these principles, there are three straightforward reasons why the Court should find privity between both ELENI Defendants - i.e. Empire Bulkers and ELENI Maritime Limited - for purposes of issue preclusion:

1. ELENI Maritime Limited and Empire Bulkers Limited **have both positively and repeatedly represented to this Court** that the Hong Kong Court's fault ruling *would and should bind* these proceedings;[3] and never previously objected to this Court's indications that a liability ruling like the Fault Order would have preclusive effect in these proceedings. Thus, the Court should find privity as between Empire Bulkers and ELENI Maritime Limited vis-à-vis the Fault Order **precisely because they themselves have consistently indicated to this Court that it should be so.** The ELENI Defendants have been each other's "virtual representatives" in this case, and have both taken actively espoused the preclusive effect of the Fault Order *in these proceedings* as a "special remedial scheme[s] ... expressly foreclosing successive litigation by nonlitigants."

In other words, Empire Bulkers and Eleni Maritime Ltd. **have waived any basis** for disputing their privity with each other, and/or **acquiesced in such privity**. This was precisely

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[2] *Headwaters Inc. v. U.S. Forest Serv.*, 399 F.3d 1047, 1053–54 (9th Cir. 2005).

[3] *See, e.g.*, Exhibit C to Fault MSJ, ¶¶10-11. Plaintiffs in their Fault MSJ briefing - all of which is incorporated by reference in the instant memorandum - have pointed out numerous additional examples of the ELENI Defendants both advocating to this Court (in briefing and in sworn submissions) for the preclusive effect of the Fault Order. *See, e.g.*, Original brief in support of Fault MSJ)(filed 9/21/17), at §§I.E, II.A.2-3 ; Reply brief in support of Fault MSJ (filed 10/19/17), at §B.1-2; and Plaintiffs' Proposed Findings of Fact and Conclusions of Law on Fault MSJ (filed 12/29/17), at ¶¶13-18, 45, 50, 83-85.

the result, in precisely analogous circumstances, in *In re Otal Investments Ltd.*, when a vessel manager attempted late in the game to argue that it was somehow not in privity with the vessel owner for purposes of fault in a collision:

> Managers raise this argument too late. Indeed, Managers have been named Defendants in the third-party complaint against them since at least December 17, 2003. And in their papers prior to the bench trial in this action, the owners of the M/V KARIBA asked for liability to be apportioned to Managers on the same lines as the other M/V CLARY interests. Following the Second Circuit's first remand in 2007, cargo claimants also asked specifically that the Court find liability against the M/V CLARY "along with [its] owners, charterers and managers." **Yet despite multiple parties grouping Managers with the rest of the M/V CLARY interests, Managers do not explain their failure to argue until now that the Court should consider them separately**. The Court declines to reopen consideration of that issue as it was raised for the first time after this Court had already issued its liability findings.
>
> Nor is it clear error to find Managers liable... It is not clear error to conclude that these findings also impute liability to Managers, particularly given Managers' failure to address their individual liability and their overall responsibility for the operation of the M/V CLARY. See *Quinn v. Southgate Nelson Corp.*, 121 F.2d 190, 191 (2d Cir.1941) (finding manager "responsible for the acts of the master, officers, and crew" where "[i]t had a most substantial measure of control over the operation of the vessel"); see also *Johnson v. Holder*, 564 F.3d 95, 100 (2d Cir.2009) (no clear error where issue was "not of such a character as to obviously compel a result contrary to the one reached"). Indeed, MST's managing director testified that there was not "any part of the management of the ship that CLARY did not appoint MST as management for." I therefore decline to overturn Managers' liability at this stage.[4]

Similarly, in this case, after nearly four years of litigation (here and in Hong Kong), with myriad motions/submissions to the Court, and even intervening proceedings and a ruling from the RMI Supreme Court, **Empire Bulkers never once raised** the privity issue on its own

[4] 2013 WL 6645438, at *4 (S.D.N.Y. Dec. 17, 2013).

behalf (and it is only the Court that has raised the issue *sua sponte*);[5] and in fact **actively advocated for the preclusive effect of the Fault Order.** And even after the ELENI Defendants changed their tack 180° (in response to Plaintiffs Fault MSJ) to argue that the Fault Order *should not* govern this case, **never once** has either Empire Bulkers or Eleni Maritime Ltd. suggested that they should not be equally bound by the Fault Order, which silence itself *precisely indicates* that they should be.

2. Additionally, as the ELENI Defendants themselves have represented to this Court in their FNC briefing, **Empire Bulkers is itself a defendant in Case No. HCAJ 188/2013** (via cross claim by the Heung-A interests) **in which the Fault Order was entered.** Specifically, in their August 8, 2014 Reply Memorandum in support of their FNC Motion, the ELENI Defendants stated to this Court as follows:

> The limitation action [in Hong Kong, HCAJ 189/2013] includes Empire Bulkers by definition as the manager, **and in the in rem liability proceeding [HCAJ 188/2013 in which the Fault Order was issued] there is a cross claim against it.**
>
> ***
>
> [T]he limitation action includes Empire Bulkers by definition as the manager, and **in the in rem liability proceeding there is a cross claim against it. As**

[5] Indeed, the ELENI Defendants' Answer to the Complaints in these consolidated proceedings (filed July 12, 2017 Majuro date) **did not raise any affirmative defense** (or any other allegation) suggesting that Empire Bulkers was not in privity with Eleni Maritime Ltd.

such, Plaintiffs are incorrect that Empire Bulkers is not included in the Hong Kong proceedings.

Thus, not only is Empire Bulkers in *privity* with ELENI Maritime Limited via "virtual representation," **but it is actually a party to the very proceeding in which the Fault Order was entered *against it and Eleni Maritime Ltd.***

3. Third, as the ELENI Defendants have attempted to argue all along, Empire Bulkers, as manager of the M/V ELENI, is included along with ELENI Maritime Limited in the definition of "shipowner" for purposes of limitation (pursuant to Article I(2) of 1976 LLMC as well as RMI law).[6] Thus, Empire Bulkers may assert the same claim to limitation of liability as Eleni Maritime Limited under RMI law.

The Fault Order that will bind both Empire Bulkers and ELENI Maritime Limited *in the Hong Kong* proceedings should equally bind them both in the proceedings before this Court. In short, Empire Bulkers and ELENI Maritime Limited are in privity because they have affirmatively invoked (here and in Hong Kong) "special remedial scheme[s] ... expressly foreclosing successive litigation by nonlitigants."

And finally, the practicalities of the situation all support privity as between Empire Bulkers and ELENI Maritime Limited. As confirmed in the April 3, 2014 Affidavit of Efthalia Paraskevopoulou (in support of the FNC Motion), Empire Bulkers and ELENI Maritime Limited share the same office in Greece (88 Vouliagmenis Avenue., Elliniko, Athens 167 77, Greece). *See* Exhibit 3 to Plaintiffs' MSJ Reply, at ¶¶2-3. Moreover, Empire Bulkers was the entity directly involved with the management and operation of the MV ELENI, as well as the response to and investigation of the Incident on behalf of the MV ELENI and ELENI Maritime

[6] The same is true under Marshall Islands law. *See* 47 MIRC Ch.5 §502 ("The term "shipowner" shall mean the owner, charterer, manager and operator of a seagoing ship.").

Limited.[7] Indeed, the website of the ELENI Defendants' own Hong Kong counsel **identifies** **Empire Bulkers** as the party responsible for the MV ELENI:

> [A] team [of Norton Rose Fulbright lawyers is] **advising Empire Bulkers on its vessel Eleni's collision** with Heung A Dragon off the coast of Vietnam, which is one of the largest collision cases to be heard in the Hong Kong courts in recent years.[8]

III. Conclusion

For all these reasons under the governing principles of privity for issue preclusion, as well as the practical realities of this case, Empire Bulkers and Eleni Maritime Limited should be deemed to be in privity with one another for purposes of issue preclusion with respect to the Fault Order.

Dennis Reeder
April 17, 2018 - Majuro Date
Attorney for Plaintiffs

-OF COUNSEL-

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[7] *See* Exhibit 1, Excerpts from ELENI Defendants' partial discovery production, indicating Empire Bulkers' involvement with incident response/investigation and pre-voyage planning/preparations.

[8] http://www.nortonrosefulbright.com/news/149532/norton-rose-fulbright-announces-move-of-shipping-disputes-lawyer-to-london

INCIDENT INVESTIGATION ANALYSIS REPORT

VESSEL:	MV ELENI
TYPE OF INCIDENT:	Collision Incident
PLACE OF INCIDENT:	Off Vung Tau – Song Sai Gon Channel, Vietnam
DATE OF INCIDENT:	07.Nov.2013
REPORT DATE:	09.Jan.2014 (Preliminary)

EXHIBIT 1 - 1
12

BRIDGE CHECK LIST - PREPARATION FOR SEA

1	**Has a passage plan for the intended voyage been prepared?**	☑
2	**Has the following equipment been checked and found ready for use?**	
2.1	- anchors	☑
2.2	- bridge movement book/course and engine movement recorder	☑
2.3	- echo sounder	☑
2.4	- electronic navigational position fixing systems	☑
2.5	- gyro compass and repeaters	☑
2.6	- radar(s)	☑
2.7	- speed/ distance recorder	☑
2.8	- clocks	☑
3	**Has the following equipment been tested, synchronized and found ready for use?**	
3.1	- bridge and engine room telegraphs, *including,*	☑
	- rpm indicators	☑
	- emergency engine stops	☑
	- thruster controls & indicators	☑/h
	- controllable pitch propeller controls and indicators, if fitted	☑/h
3.2	- communications facilities, *including*	☑
	- bridge to engine room/ mooring station communications	☑
	- portable radios	☑
	- VHF radio communications with port authority	☑
	- GMDSS Entries in Logbook	☑
	-AIS	☑
	-VDR & BWAS	☑
3.3	- navigation and signal lights , *including*	☑
	- searchlights, signaling lamp, morse light	☑
3.4	- sound signaling apparatus, *including*	☑
	- whistles.	☑
	- fog bell and gong system	☑
3.5	- steering gear including manual, auto-pilot and emergency changeover arrangements and rudder indicators	☑
3.4	- window wiper/ clear view screen arrangements	☑
4	**- Is the ship secure for sea?**	
4.1	- cargo and cargo handling equipment secure	☑
4.2	- all hull openings secure and watertight	☑
4.3	- cargo/ passenger details available	☑
4.4	- stability and draught information available	☑
4.5	- are all the crew on board and all shore personnel ashore?	☑
4.6	- are the pilot disembarkation arrangements in place?	☑

Further to the above checks Master shall decide whether is a "GO" or "NO GO" situation and sign accordingly in the form's dedicated space:

"GO"		**"NO GO"**	

M/V : MV ELENI	
PORT: PAN MY	**DATE:** 07 NOV 13
RESPONSIBLE OFFICER 3/o [signature]	**MASTER** CAPT. MAGALLANES [signature]

EXHIBIT 1 - 2

VESSEL	DATE	TIME
M/V GUNI	07-Nov-2013 (AS PER LOGBOOK ENTRY)	2000 H (AS PER LOGBOOK ENTRY)

ENGINE ROOM CHECKLIST – PREPARATION FOR DEPARTURE	*Please tick √*
1. Main Engine jacket water to be kept at 60 °C and higher when engine is stopped	☑
2. Once bridge gives one hour notice perform the following:	
- Turn M/E using turning gear for 15 minutes	☑
- Advise bridge that you will make a test ahead and astern maneuvering if terminal permits to do so	☑
3. Has the engine crew been advised of the time of standby for sailing?	☑
4. Has any bunkering operation took place at this port?	☑
5. Have F.O. and D.O. service tanks been checked & drained as necessary?	☑
6. Has the following equipment been checked / tested and found in order?	
- Communications with bridge	☑
- Internal communications equipment	☑
- M/E controls (ahead & astern)	☑
- M/E local emergency maneuvering controls	☐
- Emergency Steering Gear	☑
7. Check that starting air bottles are fully charged.	☑
8. Check the condition of E/R bilges, oily water separator, overboard associated valves and ensure that all Engine Officers / ratings are informed that unauthorised discharge of any sort is not permitted.	☑

Chief Engineer

Responsible Engineer of the Watch

MARSHALL ISLANDS

EXHIBIT 1 - 3

Lloyd's Register

REQUEST FOR MARINE SERVICES

Reference Number: VTU1310164	
Name of Client Empire Bulkers Ltd	
Address 58/37, Vouliagmenis Avenue & Asklipiou Street, Glyfada 166 75 Athens, Greece.	Telephone no. +30 211 102 4000 Fax no. +30 210 960 4210 Email Address Ops@empirebulkers.com
Request: ELENI- LR 9460277- Request for Damage Survey after collision.	
Fees Applicable Standard marine fees plus expenses, overtime ect. as required	
Marine Services at (location / site) Vung tau, Vietnam	
This contract is between the Client and Lloyd's Register Asia (hereinafter referred to as LR) for Marine services and is subject to the terms and conditions on this document.	

TERMS AND CONDITIONS

1. In these terms and conditions: (i) "Services" means any and all services provided by any entity that is part of the LR Group, as hereinafter defined, including any classification of the Client's vessel, equipment or machinery; (ii) the "Contract" means this agreement for supply of the Services; (iii) the "LR Group" means LR, its affiliates and subsidiaries, and the officers, directors, employees, representatives and agents of any of them, individually or collectively; and (iv), the "Client" means the legal entity for whom the person accepting these contract terms is acting, its affiliates and subsidiaries and the officers, directors, employees, representatives and agents of any of them, individually or collectively.
2. The Client agrees to pay all Fees for the Services within 30 days of the invoice date (the due date). If the Client disputes an invoice, or part of an invoice, the Client must immediately notify LR in writing. If no notification is received by the due date, the Client will be deemed to have accepted the invoice in full. Where only part of an invoice is disputed, the undisputed amount must be paid by the due date. LR reserves the right to raise interim invoices for Services provided, calculated on a pro rata basis. Fees do not include any tax, including but not limited to Value Added Tax, Goods and Services Tax, withholding taxes, turnover taxes, surcharges or duties as required by law, and if required, any such tax or duty is chargeable to the Client and payable by the Client in addition to the above referenced fees. The Client shall pay the full Fees as invoiced irrespective of whether the Client is required by law to withhold any taxes or duties from the invoiced amount.
3. LR reserves the right to charge interest accruing on a daily basis at an annual rate of 2% above the greater of the London Interbank Offered Base Rate (LIBOR) (or the equivalent in the country where the Client maintains its principal office) on any amount remaining unpaid beyond the due date, and may withhold any or all Services until the arrears, including interest, are paid in full. LR may at its sole discretion at any time allocate payment received from the Client to satisfy other earlier invoices that remain unpaid by the Client.
4. LR reserves the right to charge for any work that is additional to that originally quoted.
5. LR will keep confidential and not use or disclose to any third party outside the LR Group any data, plan or other technical information received from the Client except as may be required by law or as may be authorised by the Client. (The inclusion of data and plans on www.eclive.lr.org does not in any way breach this duty of confidentiality.) This obligation will survive termination of the Contract. This obligation will not apply to any data, plans or other technical information that was in the LR Group's possession before its disclosure by or on behalf of the Client to the LR Group, or becomes part of the public domain through no fault of the LR Group or otherwise becomes available to the LR Group from an independent source not under a confidentiality obligation to the Client.
6. The Client shall indemnify and hold all members of the LR Group harmless from all claims, costs, proceedings, damages and expenses, (including legal and other professional fees and expenses), made against, incurred or paid by any member of the LR Group as a result of or in connection with any breach by the Client of this contract or any alleged or actual infringement, whether or not under English law, of any third party's intellectual property rights (including copyright) or other rights arising out of the use or supply of the information by or on behalf of the Client to any member of the LR Group.
7. This Contract continues in force until terminated by LR or the Client, after giving the other party 30 days' written notice.
8. If the Contract is terminated by LR or the Client before the Services under the Contract are completed, LR's fees will be calculated on a pro rata basis up to the date of termination. Any reasonable costs directly attributed to early termination and any amounts then due to LR will immediately become payable.
9. LR's Services do not assess compliance with any standard other than the applicable classification rules, international conventions, or any other standards that are expressly agreed in writing by LR and the Client. Without limiting the generality of the foregoing, the issuance of a class certificate does not relieve the owner or operator of the vessel of its non-delegable duty to maintain the vessel in a seaworthy condition.
10. If the Client requires classification Services relating to vessels, machinery, or equipment classed by LR in a jurisdiction in which LR itself does not do business the Client thereby acknowledges and agrees that these Services will be performed by a subsidiary or affiliate of LR that is part of the LR Group and that is authorised to conduct classification surveys and issue certificates on the vessel, machinery, or equipment.

EXHIBIT 1 - 24

PASSAGE PLAN
(PASSAGE PLAN MUST BE CHANGED / AMENDED IF VOYAGE ALTERED)

PASSAGE PLANNING CHECKLIST

Vessel/Voy: m/v Eleni / 1308	Yes	No	Comments
A. Charts			
Are largest-scale charts available for coastal waters?	☑	☐	
Voyage charts corrected up to week 38 / 13	☑	☐	
Are charts corrected for Navarea or local warnings?	☑	☐	
Are charts corrected for Temporary/Preliminary notices?	☑	☐	
Are routing, climatic, planning, pilot and load line zonecharts selected?			
Are charts in use the latest edition?	☑	☐	
B. Publications			
Sailing directions and pilot books corrected up to week 38/ 13	☑	☐	
Light lists and radio signals corrected up to week 38 / 13	☑	☐	
Are tide tables and tidal current -data available?	☑	☐	
Are guides to port entry, port Information orVTS requirements available?			
Are publications in use the latest edition?	☑	☐	
C. Have the following been considered/checked?			
Planning charts and publications.	☑	☐	
Weather, sea, swell Tidal conditions.	☑	☐	
Climatological information and navigational warnings.	☑	☐	
Navigation charts and publications for ship's routeing, ship reporting systems and vessel traffic services.	☑	☐	
Navigation charts and publications for land fall features.	☑	☐	
Bridge procedures guide.	☑	☐	
Vessel's departure and arrival drafts.	☑	☐	
Vessel's draft in relation to the available water depths.	☑	☐	
Effect of "Squat" and swell on under keel clearance.	☑	☐	
Effect of sea/channel bottom (rock/mud) on under keel clearance.	☑	☐	
Proper functioning of Navigation lights, Compasses,			

Radars and all other electric/electronic bridge equipment.	☑	☐	
Navigation charts and publications for pilotage requirements.	☑	☐	
Port guides and port information including arrival / berthing / departure restrictions.	☑	☐	
Pilot card and pilot exchange information form.	☑	☐	
Air draft clearances when passing under bridges or power lines.	☑	☐	

D. Chart Information

No-Go Areas and margins of safety.	☑	☐	
Plotted tracks and alternative or emergency tracks.	☑	☐	
Parallel indexes and wheel over points.	☑	☐	
Abort positions or emergency anchorage available	☑	☐	
Is the Bridge Team aware of the Passage Plan?	☑	☐	

Signed By:

MASTER: _____ Name: Capt. Rory B.Magallanes

CH. OFFICER: _____ Name: Randy Dayapdapan

2ND OFFICER: _____ Name: Ricky C.Barrion

3RD OFFICER: _____ Name: ShernandSaldon

EXHIBIT 1 - 6

PASSAGE PLAN BERTH TO BERTH

FROM :Phu My, Vietnam	TO :Singapore
FROM :	TO :.
FROM :	TO :

M/V	Eleni	Date	07Nov 2013	DIST. BERTH TO BERTH	616.9 nm
VOY No.	13/08	LAST NOTICE TO MARINERS	38/2013	DIST. PILOT TO PILOT	602.0nm

PILOTAGE :OUT BOUND / IN BOUND : SEE SEPARATE PLAN

W.P CROSS OUTWH ENPASS	TIMEPASS	CHART No.	REFERENCE/ NAME	LAT	LONG	ALTER COURSE TO	DIST. WP TO WP	DIST TO CO	POSITION FIXING METHOD	POSITION FIXING FREQUENCY
1.	-	1059	Phu My Berth	10 34.70 N	107 01.58 E	245	0.2	616.9	Visual/ Radar/ GPS	5 min
2.	07th 2142LT	1059	No. 39 Bouy	10 34.60 N	107 01.36 E	214	1.2	619.4	Visual/Radar/GPS	5 min
3.	2151LT	1059	No. 40 Bouy	10 33.61 N	107 00.68 E	189	0.3	618.2	Visual/Radar/GPS	5 min
4.	2153LT	1059	No. 38 Bouy	10 33.31 N	107 00.63 E	159	0.3	617.9	Visual/Radar/GPS	5 min
5.	2154 LT	1059	No. 36 Bouy	10 33.02 N	107 00.74 E	117	0.9	617.6	Visual/Radar/GPS	5 min
6.	2202 LT	1059	No. 32 Bouy	10 32.60 N	107 01.56 E	158	0.2	616.7	Visual/Radar/GPS	5 min
7.	2206 LT	1059	No. 30 Bouy	10 32.45 N	107 01.62 E	193	0.4	616.5	Visual/Radar/GPS	5 min
8.	2208 LT	1059	No. 25 Bouy	10 32.07 N	107 01.53 E	225	0.7	616.1	Visual/Radar/GPS	5 min
9.	2216 LT	1059	No. 26 Bouy	10 31.60 N	107 01.05 E	219	1.7	615.4	Visual/Radar/GPS	5 min
10.	2219 LT	1059		10 30.28 N	106 59.97 E	202	0.3	613.7	Visual/Radar/GPS	5 min
11.	2221 LT	1059		10 29.97 N	106 59.84 E	183	2.4	613.4	Visual/Radar/GPS	5 min
12.	2237 LT	1059	No. 17 Bouy	10 27.57 N	106 59.72 E	161	0.7	611.0	Visual/Radar/GPS	5 min
13.	2248 LT	1059	No. 15 & 16 Bouy	10 26.91 N	106 59.95 E	137	3.0	610.3	Visual/Radar/GPS	5 min
14.	2254 LT	1059	No. 11 & 12 Bouy	10 24.73 N	107 02.02 E	166	3.5	607.3	Visual/Radar/GPS	5 min
15.	2316 LT	1059	No. 6 & 7 Bouy	10 21.32 N	107 02.86 E	175	0.9	603.8	Visual/Radar/GPS	5 min
16.	2320 LT	1059	Vung Tau P/Stn	10 20.45 N	107 02.94 E	158	0.9	602.9	Visual/Radar/GPS	5 min
17.	2324 LT	1059	No. 4 & 5 Bouy	10 19.66 N	107 03.27 E	148	3.2	602.0	Visual/Radar/GPS	5 min
18.		1016	Racon M	10 16.90 N	107 05.00 E	180	71.9	598.8	Visual/Radar/GPS	5 min
19.		3986		09 05.00 N	107 05.00 E	190	264.4	526.9	Visual/Radar/GPS	20 min
20.		2869	KakapNatuna Field	04 45.00 N	106 17.00 E	214	78.0	262.5	Visual/Radar/GPS	1 hour
21.		2869	P. Anambas	03 40.00 N	105 34.00 E	205	144.0	184.5	Visual/Radar/GPS	1 hour
22.		2403	Ent. Sin St.	01 30.00 N	104 32.50 E	230	17.2	40.5	Visual/Radar/GPS	20 min

EXHIBIT 1 - 7

23.		3831	P. Mungging	01 19.00 N	104 19.40 E	260	9.6	23.2	Visual/Radar/GPS	2⁰ Min
24.		4042		01 17.40 N	104 10.00 E	262	12.8	13.7	Visual/Radar/GPS	15 min
25.		4041	EBGB	01 15.65 N	103 57.40 E	332	0.9	0.9	Visual/Radar/GPS	15 min
26.		4041	Eastern Bunkering C	01 16.40 N	103 57.00 E	-	-	0.0	Visual/Radar/GPS	15 min
						TOTAL N.M.	616.9 nm			

ZONE TIMES	
DEPART.	+ ~~11hrs 07~~
ARRIVAL	+ ~~10hrs 08~~
DIFFER.	±1hrs
NOTE	

TIDAL INFORMATION			
DATE	TIME	H.W.	L.W.
	See Outbound &		
	Inbound Page		

POSITION FIXING FREQUENCY
a) OpenSea: 1 Hour
b) Coastal Waters: 10-20 Min
c) Restricted Waters: As per Master's discretion but not more than 5 Min

TIME (UTC) AND POSITION THAT ECHO SOUNDER TURNED ON / OFF	
TURNED ON TIME:	
POSITION:	See Outbound &
TURNED OFF TIME:	In bound Page
POSITION:	

SIGNATURES	
CH. OFF.	
2 / OFF	
3 / OFF	
MASTER	

Charts and Nautical Publications to be used for the passage

EXHIBIT 1 - 8

CHARTS (IN THE ORDER THEY WILL BE USED)

No.	Edition	Last Correct	No.	Edition	Last Correct	No.	Edition	Last Correct
1059	28/03/13	2549/13						
1016	09/02/12	3007/13						
1261	17/02/11	2309/13						
3986	17/12/09	2127/13						
3482	14/06/12	3286/13						
2414	20/01/05	331/13						
2869	30/08/07	3734/13						
2403	19/11/05	3734/13						
3831	24/03/11	2008/13						
4042	16/08/12	2008/13						
4041	09/05/13	new						

NAUTICAL PUBLICATIONS

N.P No.	Edition	SUPL/ ment	N.P No.	Edition	SUPL/ ment	N.P No.	Edition	SUPL/ ment
281(2)	2013/14	Nil	79	2013/14	Nil			
282	2013/14	Nil	30	2010	Nil			
283(2)	2012/13	Nil	44	2011	Nil			
284	2012/13	Nil	100	2009	Nil			
285	2013/14	Nil	136	2004	Nil			
286(4)	2013/14	Nil						
286(6)	2012/13	Nil						
203	2013	Nil						

Ch. Officer's Signature : Randy Dayapdapan

2nd Officer's Signature : Ricky C. Barrion

3rd Officers Signature : Shernand Saldon

Master's Signature : Capt. Rory B. Magallanes

Vessel: m/v Eleni

Date: ~~17 Oct 2013~~ 07 Nov 2013

EXHIBIT 1 - 9

PILOTAGE (OUT BOUND)

ALL VITAL INFORMATION FOR PILOTAGE IS TO BE TAKEN FROM ALL RELEVANT CHARTS AND PUBLICATIONS

JETTY:	Phu My, Berth		
DATE:	07Nov 2013	MAX DRAFT UNDERWAY:	6.46 m

W/P CROSS OUT WHEN PASSED	TIME	ALTER COURSE TO	DISTANCE OF LANDMARK	UKC	POSITION FIXING		REMARKS
					FREQUENCY	METHOD	
1	-		-	5.9m	5 min	Visual/Radar /GPS	
2	07th 2142 LT		0.1'	5.6m	5 min	Visual/Radar /GPS	
3	2151 LT	PER	0.1'	5.2m	5 min	Visual/Radar /GPS	
4	2153 LT	QM	0.1'	5.8m	5 min	Visual/Radar /GPS	
5	2158 LT	ORDER	0.1'	12.6m	5 min	Visual/Radar /GPS	
6	2202 LT	SPD	0.1'	14.0m	5 min	Visual/Radar /GPS	
7	2206 LT		0.1'	15.3m	5 min	Visual/Radar /GPS	
8	2208 LT	Co + MASTER'S	0.1'	13.8m	5 min	Visual/Radar /GPS	
9	2210 LT		0.1'	7.1m	5 min	Visual/Radar /GPS	
10	2219 LT	VARIOUS	0.1'	21.4m	5 min	Visual/Radar /GPS	
11	2221 LT	PILOT &	0.20	32.4m	5 min	Visual/Radar /GPS	
12	2237 LT		0.1'	7.0m	5 min	Visual/Radar /GPS	
13	2245 LT		0.1'	6.5m	5 min	Visual/Radar /GPS	
14	2254 LT		0.1'	10.5m	5 min	Visual/Radar /GPS	
15	2316 LT		0.1'	8.4m	5 min	Visual/Radar /GPS	
16	2320 LT		0.8'	8.8m	5 min	Visual/Radar /GPS	

EXHIBIT 1 - 10

OTHER INFORMATION
ECHO SOUNDER ON
Time: 2024 PSN: Pilot my Berth
ECHO SOUNDER OFF
Time: PSN:
PILOT'S DISEMBARKATION PSN
Lat: 10 20.2 N Long: 107 03.0 E
EMERGENCY ANCHORAGE PSN
Lat: 10 24.1 N Long: 107° 02.3 E
POSITION FIXING FREQUENCY:
5 – 10 MIN or Less

TIDAL INFORMATION			
DATE	TIME	H.W.	L.W.
07 Nov 13	0253 H	3.67 m	
	1000 H		0.27 m
	1711 H	3.67 m	
	22224 H		2.45 m
SIGNATURES			
CH. OFF.			
2/OFF			
3/OFF			
MASTER			

Vessel: m/v Eleni Date: 07 Nov 2013

EXHIBIT 1 - 11

PILOTAGE (IN BOUND)

ALL VITAL INFORMATION FOR PILOTAGE IS TO BE TAKEN FROM ALL RELEVANT CHARTS AND PUBLICATIONS

JETTY:	SINGAPORE		
DATE:		MAX DRAFT UNDERWAY:	

W/P CROSS OUT WHEN PASSED	TIME	ALTER COURSE TO	DISTANCE OF LANDMARK	UKC	POSITION FIXING		REMARKS
					FREQUENCY	METHOD	
25					5 Min	Visual/Radar /GPS	
26					5 Min	Visual/Radar /GPS	

OTHER INFORMATION
ECHO SOUNDER ON
Time: PSN:
ECHO SOUNDER OFF
Time: PSN:
PILOT'S EMBARKATION PSN
Lat: Long:
EMERGENCY ANCHORAGE PSN
Lat: Long:
POSITION FIXING FREQUENCY
5 – 10 MIN or Less

TIDAL INFORMATION			
DATE	TIME	H.W.	L.W.
SIGNATURES			
CH. OFF.			
2/OFF			
3/OFF			
MASTER			

EXHIBIT 1 - 12

Parallel Indexing Information

(CHART NUMBER)

Target	NIL
Minimum Distance	
Target	
Minimum Distance	
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Minimum Distance	
Target	
Minimum Distance	
Target	
Minimum Distance	
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Target	
Minimum Distance	

Prepared by: Navigation Officer _____

Acknowledgement by: 3rd Officer / Chief Officer _____

Approved by: Master _____

EXHIBIT 1 - 13

NAVIGATION AIDS USED OR MATTERS TAKEN INTO CONSIDERATION GENERAL INFORMATION & DANGERS POINTS

a.	ROUTING / WEATHER CHARTS No.:	*5126 (11)*
b.	ADMIRALTY SAILING DIRECTIONS (PILOTS):	*NP 30, NP44*
c.	LIST OF LIGHTS:	*NP 79*
d.	TIDE TABLES:	*NP203*
e.	RADIO SIGNALS VOL:	*NP281-2, NP282,NP 283-2, NP284, NP285, NP286-4, NP286-6*
f.	RADAR NAVIGATION AIDS:	*X &S Band*
g.	HEAVY TRAFFIC AREAS MARKED – (MENTION POSITION IF ANY):	*Off Vung Tau &South China Sea fishing boats expected, Heavy Traffic in Singapore Strait*
h.	REEFS MARKED / SHALLOW WATERS - (MENTION POSITION IF ANY):	*Off Vung Tau less water depth.*
i.	DANGER POINTS-BRIDGE AND AIRDRAFTS-TIDES-DEPTHS-CURRENTS E.T.C.:	*Outbound Channel from Phu My*
j.	PIRACY AREAS MARKED – (MENTION POSITION IF ANY):	*South China Sea Pulau Anambas Island areas*
k.	VESSEL REPORTING SYSTEM – (MENTION COASTAL STATION AND REPORTING PROCEDURES):	*N/A*
l.	VESSEL TRAFFIC SERVICES: (MENTION SHORE STATION, REPORTING VHF CHANNEL AND REPORTING PROCEDURES):	*Singapore Strait VTS, VTIS CH.10 & 14 (See ALRS 286-4 for complete details)*
m.	LOAD LINE ZONE:	*Summer*
n.	U.S. COTP ZONE	*N/A*
o.	ENVIRONMENTAL SENSITIVE & SPECIAL AREAS:	*N/A*
p.	OTHERS VARIOUS REMARKS:	*None*

Prepared by: Navigation Officer _____

Acknowledgement by: 3rd Officer / Chief Officer _____

Approved by: Master _____

EXHIBIT 1 - 14

Vessel: M/V ELENI **Voyage No:**
From: **To:**

Transit Pilotage (If Applicable – For example transiting Panama, Singapore, Bosporus etc.)

Location / Channel / Passage	Great Barrier Inner Route & Torres Strait		Arrival Date /Time
Pilot Boarding Position			Pilots VHF Channel
Maximum DraftUnderway	Fore:	Aft:	VTS / Port Control VHF Ch.:
Abort Position / Chart No :			Maximum Allowable Draft:
Emergency Anchorage			

W/P No.	Latitude	Longitude	Distance to next W/P	ETA	Course	Pos. Fix Frequency	Pos. Fix Methods	Landmarks Remarks
		TOTAL DISTANCE						

N/A

Pilot's Disembarkation Position : Lat:			Long:	
TIDE INFORMATION			OTHER CHECK LISTS ATTACHED	
TIME	HEIGHT	NOTE	1	
			2	
			3	
			4	
			5	
			6	

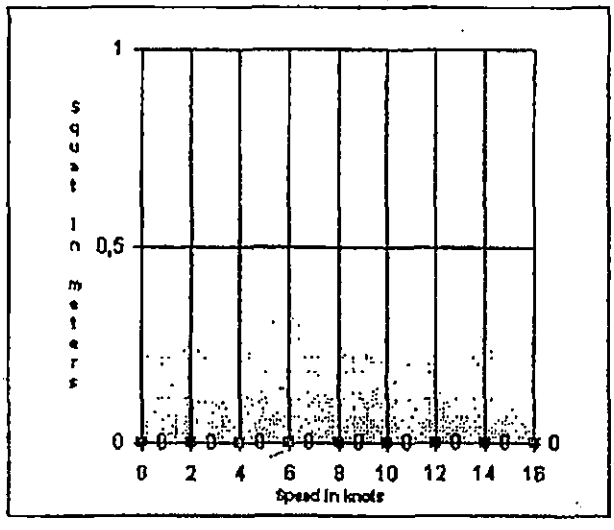
Prepared by: Navigation Officer _____
Acknowledgement by: 3rd Officer / Chief Officer _____
Approved by: Master _____

EXHIBIT 1 - 15

PASSAGE PLAN - SQUAT CALCULATION

Vessel: M/V "ELENI" **Voy:** 13/08 **Date:** 07 Nov 2013

Squat Graph



Kts	Squat in meters	
Speed	Confined	Open
0	0.00	0.00
2	0.06	0.03
4	0.25	0.13
6	0.57	0.29
8	1.01	0.51
10	1.58	0.79
12	2.28	1.14
14	3.10	1.55
16	4.06	2.03
VolDispl.		
L:		
B:		
D:		
Calculated C_B =		
C_B from table=		
Vessel's actual speed input		
8.0	1.01	0.51

$$C_B = \frac{\nabla}{L \times B \times D}$$

Calculated C_B =

$$\text{Squat in meters confined waters} = \frac{2 \times C_B \times V^2}{100}$$

$$\text{Squat in meters open waters} = \frac{C_B \times V^2}{100}$$

∇ The volume of displacement, (m3) i.e Displacement in MT divided by the sea water specific gravity.

L: is length between perpendiculars.(m)
B: is the extreme breadth underwater. (m)
D: is the mean draft corresponding to the actual displacement used in the formula. (m)
C_B: Block Coefficient - *V:* Speed in Knots
Confined waters: When the depth of the water is less than twice the vessels draft.
Open waters: When the depth of the water is greater than twice the vessels draft.

NOTES **1.Calculated C_B** Fill the values in the blue cells to calculate the C_B and the squat table.

2. CB from Tables If you obtain the C_B value direct from the vessels Hydrostatic Tables you may enter it in the purple cell.

2M Ricky Barrion
Prepared By:

Capt. Rory B. Magallanes
Approved By:

EXHIBIT 1 - 16

IN THE HIGH COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

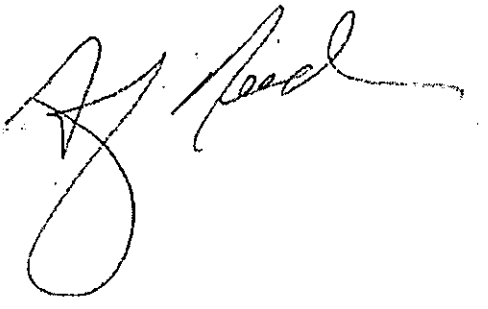
Chubb Insurance (Thailand) Company Ltd, Tokio Marine & Nichido Fire Insurance Co Ltd, *et al.*	**H.Ct. Civil No. 2014-110** **H.Ct. Civil No. 2014-050** **H.Ct. Civil No. 2015-194**
Plaintiffs, **v.**	
ELENI Maritime Limited *in personam* and Empire Bulkers Limited	**CERTIFICATE OF SERVICE**
Defendants	

CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2018, RMI Date (April 9, 2018, USA mainland date), a true and correct copy of the Plaintiffs' Brief further to the Court's Order of March 27, 2018, was served on Tatyana Cerullo and David Lowe, Attorneys for Defendants, by sending to them via email transmission in pdf.format to:

TC.LAW.lllc@gmail.com and davidloweesq@gmail.com.

Dated: April 17, 2018 (Majuro date).



Dennis Reeder
Attorney for Plaintiffs

IN THE HIGH COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

Chubb Insurance (China) Company Ltd., et al.,
Plaintiff
v
Eleni Maritime Limited in personam and Empire Bulkers Limited
Defendant

Civil Case No. 2014-110

CERTIFICATE OF SERVICE

I, Tanya Lomae, Asst. Clerk of the Courts, hereby certify that on 4/10/18

I served the Order Extending Time For Supplemental Briefing

filed 04/10/2018 in the above captioned matter on:

1. Tatyana Cerullo by ☑ Email ☐ Fax ☐ Personal Hand Delivery
2. Dennis Reeder by ☑ Email ☐ Fax ☐ Personal Hand Delivery
3. _____ by ☐ Email ☐ Fax ☐ Personal Hand Delivery
4. _____ by ☐ Email ☐ Fax ☐ Personal Hand Delivery

Attached is a copy of my ☒ Sent Email / ☐ Fax Confirmation.

Tanya Lomae
Asst. Clerk of the Courts
Marshall Islands Judiciary

FILED:

FILED
APR 10 2018
ASST. CLERK OF COURTS
REPUBLIC OF THE MARSHALL ISLANDS

FILED
APR 10 2018
ASST. CLERK OF COURTS
REPUBLIC OF THE MARSHALL ISLANDS

IN THE HIGH COURT

OF THE

REPUBLIC OF THE MARSHALL ISLANDS

Chubb Insurance (China) Company Ltd., *et al.*,

Plaintiffs,

v.

Eleni Maritime Limited *in personam* and Empire Bulkers Limited

Defendants.

H.Ct. Civil No. 2014-050
H.Ct. Civil No. 2014-110
H.Ct. Civil No. 2015-194

ORDER EXTENDING TIME FOR SUPPLEMENTAL BRIEFING

TO: Dennis Reeder, counsel for the plaintiffs
Tatyana Cerullo, counsel for the defendants

Having considered the parties joint Stipulation on Extension for Supplemental Briefing, filed today on April 10, 2018, the Court orders as follows:

1. On or before 4:30p.m. on 17 April 2018, the parties must file and serve their response to the question set forth in the Court's Order filed 27 March 2018; and

2. On or before 4:30p.m. on 24 April 2018, the parties must file and serve their opposition to opposing parties' submission.

DATED: 10 April 2018

Carl B. Ingram
Chief Justice, High Court

Tatyana Cerullo, M.I. Adm. No. 150
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Cellular: 805-814-9697
Facsimile: 805-830-1686
davidloweesq@gmail.com

Attorney for Defendants
ELENI MARITIME LIMITED and
EMPIRE BULKERS LIMITED

FILED
APR 10 2018
ASST. CLERK OF COURTS
REPUBLIC OF THE MARSHALL ISLANDS

IN THE HIGH COURT

OF THE

REPUBLIC OF THE MARSHALL ISLANDS

Chubb Insurance (China) Company Ltd., *et al.*, Plaintiffs, v. Eleni Maritime Limited *in personam* and Empire Bulkers Limited Defendants.	H.Ct. Civil No. 2014-050 ~~H.Ct. Civil No. 2014-110~~ H.Ct. Civil No. 2015-194 **STIPULATION ON EXTENSION FOR SUPPLEMENTAL BRIEFING**

STIPULATION ON EXTENSION FOR SUPPLEMENTAL BRIEFING

In the Order filed March 27, 2018, this Court ordered supplemental briefing ("Order"). Counsel has conferred and IT IS HEREBY STIPULATED by and between the parties, through their respective counsels, to extend the dates to respond as follows:

1. On or before 4:30p.m. on April 17, 2018, the parties must file and serve their response to the question set forth in the Order; and

2. On or before 4:30p.m. on April 24, 2018, the parties must file and serve their opposition to opposing parties' submission.

DATED: 7 APRIL 2018 (Honolulu)

Tatyana Cerullo

Tatyana Cerullo
David Lowe

Attorneys for Defendants
Eleni Maritime Limited
Empire Bulkers Limited

Dated: APRIL 9, 2018

Dennis J. Reeder
Attorney for Plaintiffs
dreeder@ntamar.net
dreeder.rmi@gmail.com

APPROVED AND SO ORDERED

Carl B. Ingram
Chief Justice, High Court

FILED
MAR 27 2018
ASST. CLERK OF COURTS
REPUBLIC OF THE MARSHALL ISLANDS

IN THE HIGH COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

CHUBB INSURANCE (CHINA) COMPANY LTD, ET AL., plaintiffs, v. ELENI MARITIME LIMITED in personam and EMPIRE BULKERS LIMITED, Defendants.	CIVIL ACTION No. 2014-050
CHUBB INSURANCE (THAILAND) COMPANY LTD, ET AL., plaintiffs, v. ELENI MARITIME LIMITED in personam and EMPIRE BULKERS LIMITED, Defendants.	CIVIL ACTION No. 2014-110
FEDERAL INSURANCE COMPANY KOREA, ET AL., plaintiffs, v. ELENI MARITIME LIMITED in personam and EMPIRE BULKERS LIMITED, Defendants.	CIVIL ACTION No. 2015-194 **ORDER FOR FURTHER BRIEFING**

TO: Dennis Reeder, counsel for the plaintiffs
Christopher Hannan, counsel for the plaintiffs
Tatyana Cerullo, counsel for the defendants
David Lowe, counsel for the defendants

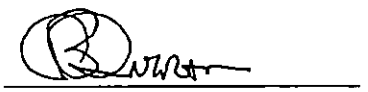
Having considered the plaintiffs' Motion for Summary Judgment regarding Liability, briefing, and argument, the Court has identified an issue for which it requires further briefing:

> Is Empire Bulkers Limited in privity with, or so closing related to, ELENI Maritime Limited, so that under issue preclusion Empire Bulkers Limited is bound by ELENI Maritime Limited's blame allocation in Case No. HCAJ 188/2013?

In response to this question, the Court wants to see not just unsupported argument from counsel but legal authority. Accordingly, the Court orders as follows:

1. On or before 4:30 p.m. on April 10, 2018, the parties must file and serve their response to the above question; and
2. On or before 4:30 p.m. on April 17, 2018, the parties must file and serve their opposition to opposing parties' submission.

Ordered and Entered: March 26, 2018.



Carl B. Ingram
Chief Justice, High Court

IN THE HIGH COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

federal Insurance Company Korea, et al,,) Civil Case No. 2015-194
Plaintiff)
v)
)
) **CERTIFICATE OF SERVICE**
Eleni Maritime Limited in personam & Empire Bulkers Limited)
Defendant)
)

I, Item I. Note, Asst. Clerk of the Courts, hereby certify that on 3/27/2018

I served the Order for Further Briefing

filed 03/27/2018 in the above captioned matter on:

1. Dennis Reeder by ☑ Email ☐ Fax ☐ Personal Hand Delivery
2. Christopher Hanan by ☑ Email ☐ Fax ☐ Personal Hand Delivery
3. Tatyana Cerullo by ☑ Email ☐ Fax ☐ Personal Hand Delivery
4. David Lowe by ☑ Email ☐ Fax ☐ Personal Hand Delivery

Attached is a copy of my ☒ Sent Email / ☐ Fax Confirmation.

Item I. Note
Asst. Clerk of the Courts
Marshall Islands Judiciary

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CA2014-050/110 & 2015-194

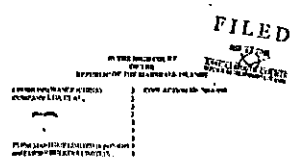
Marshall Islands Judiciary <marshall.islands.judiciary@gmail.com>
to Dennis, Chris, Tatyana, David

Iakwe Counsels,

I have attached an Order signed by CJ for the above cases. Please confirm receipt.

Komol,

Item



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IN THE HIGH COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

Chubb Insurance (Thailand) Company Ltd. et al., Plaintiff

v

Eleni Maritime Limted & Empire Bulkers Limited, Defendant

Civil Case No. 2014-110

CERTIFICATE OF SERVICE

I, Tanya Lomae, Asst. Clerk of the Courts, hereby certify that on 2/7/18

I served the Deficiency Notice Re Plaintiffs' Response/Opposition To Proposed Findings Of Fact & Conclusions Of Law Submitted By Defendants

filed 02/07/2018 in the above captioned matter on:

1. Dennis Reeder by ☑ Email ☐ Fax ☐ Personal Hand Delivery
2. Christopher Hannan by ☑ Email ☐ Fax ☐ Personal Hand Delivery
3. David Lowe by ☑ Email ☐ Fax ☐ Personal Hand Delivery
4. Tatyana Cerullo by ☑ Email ☐ Fax ☐ Personal Hand Delivery

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Tanya Lomae
Asst. Clerk of the Courts
Marshall Islands Judiciary

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REPUBLIC OF THE MARSHALL ISLANDS

IN THE HIGH COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

CHUBB INSURANCE (CHINA) COMPANY LTD, ET AL., plaintiffs, v. ELENI MARITIME LIMITED in personam and EMPIRE BULKERS LIMITED, Defendants.	CIVIL ACTION No. 2014-050
CHUBB INSURANCE (THAILAND) COMPANY LTD, ET AL., plaintiffs, v. ELENI MARITIME LIMITED in personam and EMPIRE BULKERS LIMITED, Defendants.	CIVIL ACTION No. 2014-110
FEDERAL INSURANCE COMPANY KOREA, ET AL., plaintiffs, v. ELENI MARITIME LIMITED in personam and EMPIRE BULKERS LIMITED, Defendants.	CIVIL ACTION No. 2015-194 **DEFICIENCY NOTICE RE PLAINTIFFS' RESPONSE/OPPOSITION TO PROPOSED FINDINGS OF FACT & CONCLUSIONS OF LAW SUBMITTED BY DEFENDANTS**

TO: Dennis Reeder, counsel for the plaintiffs
Christopher Hannan, counsel for the plaintiffs
David Lowe, counsel for the defendants
Tatyana Cerullo, counsel for the defendants

The plaintiffs' "Response/Opposition to Proposed Findings of Fact & Conclusions of Law Submitted by Defendants" dated January 26, 2018, is missing page 1 and presumably the signature page number page "2" is rather page 17. Accordingly, the Court orders the plaintiffs to file and serve page 1 of the Response/Opposition and confirm that the signature page is page 17 on or before 4:300 on February 8, 2018.

Date: February 7, 2018.

Carl B. Ingram
Chief Justice, High Court

Dennis Reeder (Marshall Islands Bar Certificate No. 80)
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Majuro, MH 96960
Telephone: +692-625-3602
Honolulu Tel.: 808-352-0749
Email: dreeder@ntamar.net; dreeder.rmi@gmail.com

Attorneys for Plaintiffs

FILED

JAN 26 2018

ASST. CLERK OF COURTS
REPUBLIC OF THE MARSHALL ISLANDS

IN THE HIGH COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

Chubb Insurance (Thailand) Company Ltd, Tokio Marine & Nichido Fire Insurance Co Ltd, *et al.*

Plaintiffs,

v.

ELENI Maritime Limited *in personam* and Empire Bulkers Limited

Defendants

H.Ct. Civil No. 2014-110
H.Ct. Civil No. 2014-050
H.Ct. Civil No. 2015-194

RESPONSE/OPPOSITION TO PROPOSED FINDINGS OF FACT & CONCLUSIONS OF LAW SUBMITTED BY DEFENDANTS; CERTIFICATE OF SERVICE

Plaintiffs, by and though Dennis J. Reeder and James Roussel and Christopher Hannan, *pro hac vice*, and further to the Court's Orders of October 25 2017 and December 3, 2017, respectfully submit the attached Response/Opposition to the Proposed Findings of Fact and Conclusions of Law submitted by Defendants.

Dennis Reeder January 26, 2018
Attorney for Plaintiffs

4837-0671-8810 v1

2900428-000007 01/23/2018
4837-0671-8810 v2

2900428-000007 01/24/2018

like-numbered paragraphs to Defendants PFFCL, with cross-references to their above-noted/incorporated briefing/argument that refute Defendants' positions.

1-2. Defendants belabor the point that the owners/operators of the HEUNG A-DRAGON ("HAD Interests") are not defendants in this case.[1] **This is a red herring. Cargo Plaintiffs *have no claim* against the HAD Interests as a matter of law** under the relevant bills of lading (which, as is typical, incorporate the Hague or Hague-Visby rules and/or some version of COGSA, all of which provide a complete defense/immunity to a carrying vessel for any "error in navigation"[2]). *See* Plaintiffs' reply memorandum at p. 5. Plaintiffs did not sue the HAD Interests here, but **they could not have sued them anywhere.**

Moreover and relatedly, Defendants' unceasing refrain (*see* Defendants' PFFCL at ¶35) that Plaintiffs could and should have "joined in the earlier Hong Kong actions" as to both liability and limitation **is equally misguided.** The Hong Kong Fault Order was issued in the Hong Kong Liability Action, in which Defendants sued the HAD Interests **based on the HAD Interests alleged fault in causing the Collision.** As a result, Plaintiffs in this case **could not as a matter of law have participated in the Hong Kong Liability Action** (and/or the resulting agreed fault allocation in that proceeding) **because they were barred by the applicable bills of lading** from asserting any claims (such as those in the Hong Kong Liability Action) against the HAD

[1] It bears noting that Defendants themselves have made no effort to add the HAD Interests as parties in this case, which (putting aside issues of personal jurisdiction, which the HAD Interests could waive), would fall within this Court's subject matter jurisdiction. *See* 27 MIRC §605(1)(c); §264(1).

[2] *See* S. Mandelbaum, *International Ocean Shipping and Risk Allocation for Cargo Loss, Damage and Delay: A U.S. Approach to COGSA, Hague-Visby, Hamburg and the Multimodal Rules*, 5 J. TRANSNAT'L L. & POL'Y 1, 40 (1995) ("Under COGSA [e.g. 46 U.S.C. §30706(a); 47 MIRC Ch.4, §405(2)(a); Korean Commercial Code art. 795], Hague and Hague-Visby, carriers [are] ... exempted] from liability when the loss or damage arose from a negligent act in the navigation or management of the ship.").

Interests. Indeed, this is the precise scenario at issue in *The Karo* (cited by Defendants, but which in reality supports Plaintiffs position, *see* Plaintiffs' reply memorandum at p. 9), where innocent cargo was suing *only the non-carrying vessel* (because it had no claims against the carrying vessel), and was seeking to avoid a beneficial prior deal agreed between the non-carrying and carrying vessel.

3-4. Defendants suggest summary judgment is inappropriate in maritime cases on the issue of negligence. But this is not a case where negligence is to be tried in a vacuum or in the first instance because Defendants themselves have already agreed in a binding judgment that they are 70% at fault for the Collision.

5. Defendants assert that the Hong Kong Fault Order was between them and the HAD Interests and "no one else." This, however, yet again, flies in the face of Defendants' own position taken previously in this Court - **and in sworn affidavits** - that the Hong Kong Fault Order (once issued) **would be binding in these proceedings**. *See, e.g.*, Plaintiffs' original memorandum in support, §E, pp. 4-6; reply memorandum, §2.A, pp. 7-13; Plaintiffs' PFFCL, ¶13-18, pp. 6-10. Frankly, the fact the Defendants **are still trying to take diametrically contrary positions from those they have actively and affirmatively pursued earlier in these same proceedings is the height of bad faith.**

6.-7. Defendants again suggest that "the absence of the [HAD Interests] creates further genuine disputes" precluding summary judgment, again ignoring that *Plaintiffs could not possibly have sued* the HAD Interests. Likewise, Defendants suggest a litany of "reasonableness inquiries" that they claim preclude summary judgment, all of which have to do with whether/how the HAD Interests responded to or dealt with cargo after the Collision, and all of which at the end of the

day coalesce into Defendants' affirmative defense of the alleged comparative fault of the HAD Interests. First and foremost, **this is totally irrelevant**; these issues go to *Defendants' affirmative defense* of comparative fault, **and have nothing to do with the relief sought in the Fault MSJ.** *See* Plaintiffs' reply memorandum, §A, pp. 1-2. All Plaintiffs' Fault MSJ seeks is a judgment finding that Defendants were 70% at fault *for the Collision itself* - as they themselves agreed in a binding judgment viz. the Hong Kong Fault Order - with any issues of quantum/affirmative defenses as to *individual claims* to be reserved for trial/future motion practice as necessary.

And even aside from the total lack of relevance, the further substantive problem with this line of argument is that **Defendants bear the burden of proof on all their affirmative defenses**, including any supposed comparative fault of the HAD Interests. *See, e.g., Nichols v. Nw. Mut. Life Ins. Co.*, 487 F. App'x 339, 341 (9th Cir. 2012("[a defendant] has to show a genuine issue of material fact regarding [an alleged affirmative defense] to defeat summary judgment"). On the present summary judgment record, **Defendants have not presented any evidence to create a genuine, legally relevant issue of fact** with respect to Plaintiffs' innocent cargo claims. To begin with, all of their "evidence" submitted to create supposed issues of fact vis-à-vis the HAD Interests comparative fault **are not competent summary judgment evidence.** *See, e.g.*, Plaintiffs' reply memorandum, §A(b), pp. 3-4.

And as a practical matter, Defendants themselves have been engaged directly with the HAD Interests for years in the Hong Kong Liability and Limitation Proceedings, in the latter of which Defendants are seeking indemnity against the HAD Interests for any cargo damages that they (Defendants) pay out (including any damages paid in these proceedings to Plaintiffs). As a

result, Defendants had years and the impetus to develop evidence of any supposed fault of the HAD Interests (with respect to the issues of pilferage, abandonment, salvage, etc. that they are attempting to raise as genuine issues of fact precluding Plaintiffs' Fault MSJ in these proceedings) to support their indemnity claims. Yet, the only "evidence" they have mustered in an effort to defeat summary judgment (by resort to their affirmative defense, *on which they bear the burden of proof*, regarding supposed comparative fault of the HAD Interests) is rank hearsay, filled with rank speculation. And moreover this incompetent, speculative "evidence" is *ultimately irrelevant* because as the owners/operators of the 70% at-fault vessel in the Collision, Defendants must show not mere negligence of the HAD Interests to prevail on any affirmative defense of comparative fault, but that the HAD Interests committed some "intervening act of negligence so extravagant and unusual, and in such disregard of every rule of prudence, as to be beyond the horizon of ordinary foresight."[3] In other words, in addition to being incompetent, Defendants "evidence" is substantively insufficient.

8.-17. Defendants contend that hearsay evidence is somehow relevant and admissible in summary judgment proceedings. Notably, they do not even address the equally dispositive problem **that their evidence is also patently and rankly speculative.** Likewise, they do not address the fact that under MIRCP Rule 56, affidavits/declarations submitted in support of/opposition to a motion for summary judgment **must be based on personal knowledge.** However, the two statements (not affidavits or declarations) they have submitted in support of alleged comparative fault of the HAD Interests are **admittedly not based on personal knowledge**: (1) Capt. Kierulf

[3] *Fed. Ins. Co. v. S.S. Royalton*, 328 F.2d 515, 517 (6th Cir. 1964) (citing *The Walter A. Luckenbach*, 14 F.2d 100, 103 (9th Cir., 1926); *The Algonquin*, 70 F.2d 335, 336, 337 (2d Cir. 1934), other citations omitted).

talks about what he physically saw, but then only offers *admittedly speculative "beliefs"* about what he thinks those sights might have meant (*see* Exhibit A to Declaration of Tatyana Cerullo, PDF pp. 5-6, Statement of Capt. Kierulf at ¶5); and Master Mariner Davidson likewise talks about what he saw, but then *admittedly relies* on statements of unidentified crew members of the ELENI as to what they "apparently" saw and what it meant, as well what "seems likely to [him]" (*id.* at PDF pp. 19-20, ¶¶6-7). **None of this is based on personal knowledge; it is based on personal speculation and guessing**. And putting all this aside, Defendants are also wrong on the law regarding admissibility of hearsay on summary judgment in the circumstances of this case. There is no doubt that an opposition to summary judgment may be supported by "hearsay evidence submitted in an inadmissible form, so long as the underlying evidence could be provided in an admissible form at trial, such as by live testimony."[4] However, in this case, the statements of Capt. Kierful and Master Mariner Davidson **cannot possibly be provided in admissible form at trial.** First of all, as explained above, they are inherently and admittedly speculative. Second, as to Master Mariner Davidson, his statements are **derived from what unidentified crew of the ELENI told him** - that is, *they are double hearsay*. As such, in order for his statement to be sanitized for trial, the unidentified crew would have to testify live as to what they told him, which is impossible (as Defendants themselves have previously confirmed to this Court in their *forum non conveniens* briefing) because they are far-flung on vessels sailing

[4] *Raimondo v. Fed. Bureau of Investigation*, 2018 WL 398236, at *5 (N.D. Cal. Jan. 12, 2018).

around the world. Defendants' effort to whitewash their patently incompetent evidence does not withstand scrutiny.

18.-23. Defendants' effort to escape the effect of the Hong Kong Fault Order by resort to the procedural rules of the Hong Kong Court is procedurally, legally, and common-sensically wrong. *See* Plaintiff's reply memorandum, §B.1, pp. 8-9; Plaintiffs' PFFCL, ¶¶40-41, pp. 17-18. First, the **law of the Marshall Islands**, not Hong Kong, determines the discretionary collateral estoppel effect of the Hong Kong Fault Order in these Marshall Islands proceedings,[5] as the Hong Kong Rules of the High Court (RHC) themselves (self-evidently) expressly provide.[6] Second, the *purpose* of the rule Defendants attempt to rely on (as per *The Karo* decision cited in the RHC) is meant to protect against **the exact opposite scenario** from the one in this case (i.e. when an innocent cargo interest seeks to *avoid* a detrimental-to-cargo "sweetheart" deal between shipowners, as opposed to the situation here where Plaintiffs *seek to enforce* an inter-owner deal).

24.-29. Defendants cite essentially the same cases regarding collateral estoppel as Plaintiffs, and thus Plaintiffs have no opposition vis-à-vis the applicable law. However, for all the reasons set forth in Plaintiffs' Incorporated Materials, Plaintiffs **do object to Defendants' improper *application* of those cases** to the facts here. Moreover, Plaintiffs object to Defendants **complete failure to**

---

[5] *See* Restatement (Third) of Foreign Relations Law § 481, cmt. c (1987) ("[N]o rule prevents a court in the United States from giving greater preclusive effect to a judgment of a foreign state than would be given in the courts of that state."). *Simmtech Co. v. Citibank, N.A.*, 2016 WL 4184296, at *8 (S.D.N.Y. Aug. 3, 2016), *aff'd* 2017 WL 3887984 (2d Cir. Sept. 6, 2017) ("[T]he prevailing practice appears to be follow[ing] domestic rules of preclusion [to a foreign judgment], whether they apply those of the applicable federal or state court[;] [and] [r]egardless of the mechanisms utilized by a foreign court to achieve its objectives [regarding preclusion], a United States court should not be confined to using the foreign court's mechanisms or else forgo achieving its own objectives.") (citations omitted).

[6] *See* Exhibit 4 to Plaintiff's' reply memorandum, RHC, Order 1, ¶2("these rules shall have effect in relation to all proceedings in the High Court.").

acknowledge/address the secondary factors under *Parklane Hosiery*. *See* Plaintiffs' reply memorandum, §B, pp. 7-8; Plaintiffs' PFFCL, ¶42, pp. 18-19.

30.-39. (Re *Parklane Hosiery* Application)

Defendants seek to rely on "[t]he general rule ... that in cases where [1] a plaintiff could easily have joined in the earlier action, or [2] where the application of offensive collateral estoppel would be unfair to a defendant, a trial judge" should deny collateral estoppel. *Parklane Hosiery*, 439 U.S. at 323. **This first part of this general rule** (cited by Defendants particularly at ¶¶35-36 of their PFFCL) **is inapplicable here** because (as discussed *supra* at 6.-7.) **Plaintiffs *could not as a matter of law* have joined in the Hong Kong Liability Action** because they have no viable claim against the HAD Interests.

Likewise, Defendants contention under the second part of the "general rule" - i.e. that collateral estoppel would be "unfair" because the Hong Kong proceedings did "not hav[e] anything to do with cargo issues" (PFFCL at ¶37) - **is blatantly incorrect.**[7] Cargo claims resulting from the Collision **are absolutely and have always been an issue in Hong Kong** because Defendants are actively seeking indemnity from the HAD Interests in those proceedings for any cargo damages they (Defendants) pay out to cargo claimants. *See* Exhibit 2 to Plaintiffs' reply memorandum, at PDF p. 9, ¶31.A(vii). The suggestion that Defendants agreed to entry of a binding judgment against them of 70% fault without their giving any consideration of cargo claims arising from the Collision is simply not true. And even more utterly contradictory, **Defendants themselves stated in a *sworn affidavit* submitted to this Court** (re-quoted here

[7] Also, the *Flowers* decision is not on point. *See* Plaintiffs' reply memorandum, p. 6 n.20.

not merely for repetition, but to reiterate the profoundly contrary positions Defendants have taken in these proceedings) **that cargo claimants in Hong Kong would participate in distribution of any Hong Kong limitation fund *pursuant to the Hong Kong Fault Order*:**

> "Claims that were filed by the deadline [in the Hong Kong Limitation Action] will be adjudicated upon . . .before being admitted to participate in the Limitation Fund [posted in Hong Kong Limitation Action] which I expect **will be distributed in accordance with [the Hong Kong Fault Order], recording the apportionment of liability agreed on settlement by the parties thereto**. . . Had Plaintiffs [in these RMI proceedings] filed their claims in Hong Kong as other claimants have done, **they would have been able to participate in the distribution of the Limitation Fund in accordance with the Court-ordered apportionment of liability [in the Hong Kong Fault Order]."**
>
> Declaration of James Robert James (April 25, 2016), ¶¶20-21, attached to Motion for Summary Judgment filed by ELENI Defendants on April 29, 2016.

See Plaintiffs' PFFCL, ¶13, pp. 6-8. Defendants' contention that the Hong Kong Fault Order was agreed in a vacuum entirely incognizant of cargo claim considerations **is patently false on their own prior sworn statements.**

Finally, Defendants also assert (PFFCL ¶¶32-34) that Plaintiffs cannot meet the first three elements of collateral estoppel (i.e. (1) full/fair opportunity to litigate the issue; (2) actual litigation of the issue; (3) final judgment on the issue) because the issues in this case are different from those in the Hong Kong Liability Action that resulted in the Hong Kong Fault Order. **This, again is wrong** (*see supra* at 6.-7.) because Plaintiffs' Fault MSJ seeks entry of judgment **on the exact same issue** as the Hong Kong Fault Order (i.e. Defendants' 70% fault for the Collision). Defendants themselves have injected the extraneous/irrelevant issues of comparative fault/claim specific quantum - all of which concern *their own affirmative defense* for which they bear the burden of proof - into this motion practice in an effort to muddy the otherwise crystal clear waters regarding **fault for the Collision**. In short, the Fault MSJ **seeks entry of judgment on the same**

exact terms as the Hong Kong Fault Order, nothing less and nothing more, such that all elements of collateral estoppel are met. And again, as noted earlier, Defendants' incessant complaint about the absence of the HAD Interests ignores the practical reality that Defendants had years and incentive (given their indemnity claims) to develop/discover evidence from the HAD Interests *in the Hong Kong proceedings* - all of which would be equally relevant in these proceedings - regarding any supposed comparative fault of the HAD Interests. Defendants' complaints about the supposedly problematic absence of the HAD Interests from these proceedings ring hollow.

40.-55. (Re Judicial Estoppel)

Defendants' arguments against application of judicial estoppel have effectively all been addressed in Plaintiffs Incorporated Materials. *See* reply memorandum, §§B.2, pp. 9-10; Plaintiffs' PFFCL, ¶¶47-52, pp. 20-23. Plaintiffs, however, respond specifically to several specific, continued misrepresentations by Defendants relative to the judicial estoppel elements.

Defendants claim the first element (clear inconsistency with prior position) is not met because "Defendants never have taken the position that the liability apportionment in Hong Kong means that the Court should proceed to judgment [here]" (PFFCL ¶49). This is true only in the most disingenuous hyper-technical sense, because Defendants **unequivocally stated to this Court in a sworn affidavit** that cargo claimants in Hong Kong *would be bound by* the Hong Kong Fault Order, and also acquiesced in a stay of these proceedings pending entry of the Hong Kong Fault Order *on the basis that the fault order would bind these proceedings*. *See supra*

block quote at p. 8; Plaintiffs' PFFCL, ¶13, pp. 6-8. Defendant's position now is **squarely contrary** to their prior position and submissions to this Court.

Defendants claim the second element (convincing the Court to accept their earlier position) is not met because this Court denied their prior motion for summary judgment (PFFCL, ¶50). This **ignores** that the Court relied on Defendants' affirmative sworn confirmations that the Hong Kong Fault Order would bind cargo claimants, as well as their acquiescence in the stay pending that binding order, to stay this case *for three years*, during which no discovery proceeded (while it continued apace in Hong Kong, although Defendants have *refused to provide* any of the Hong Kong discovery in response to Plaintiffs' discovery here) and interest continued to accrue on Plaintiffs' claims. *See* Plaintiffs' PFFCL, ¶45, p. 20; ¶50, pp. 22-23.

Defendants finally claim the third element (unfair advantage) does not apply because Plaintiffs allegedly forum shopped and did not file their claims in Hong Kong (PFFCL, ¶53); and that Plaintiffs would actually be unfairly advantaged because Defendants would not be able to defend themselves properly (*id.* at ¶54). This ignores that **Defendants themselves forum shopped** by filing both the Hong Kong Liability and Limitation Actions **in an unnatural forum *with no nexus whatsoever* to the Collision,** all in an effort to avoid the higher limitation amount of their own flag state/state of incorporation; and then **attempted to forum "shoplift"** (by entering a private side limitation agreement with the HAD Interests viz. the India Agreement, and seeking to invalidate the South Africa Security *they themselves agreed to* as being responsive to an RMI judgment by later seeking to have these RMI proceedings dismissed, *see* Reply Memorandum in support of Clash of Conventions MSJ, pp. 9-10, filed April 22, 2016 RMI Date). And as to the supposed "unfairness" due to Defendants' supposed inability to present their

defense, again, **they had ample time, opportunity and incentive** to develop any evidence viz. the HAD Interests comparative fault *in the Hong Kong proceedings*. The legally necessary absence of the HAD Interests (because Plaintiffs *have no claim* against them) will not as a practical matter prevent the affirmative defense Defendants claim they have.

56.-76. (Re: Innocent Cargo Rule/Choice of Law)

Again, Defendants' arguments regarding the "innocent cargo" rule and choice of law have effectively all been addressed in Plaintiffs Incorporated Materials. *See* reply memorandum, §§C, pp. 10-13; Plaintiffs' PFFCL, ¶¶64-82, pp. 28-33. Plaintiffs, however, respond specifically to several specific, continued misrepresentations/errors by Defendants on the choice of law issue.

First, Defendants **have not responded** (at least in briefing) to the initial, dispositive argument that Marshall Islands Revised Code Title 47, Chap. 1, Section 113 **prescribes that choice of law in maritime cases shall be the US GML for Defendants as Marshall Islands corporations running a Marshall Islands-flagged vessel;** and, thus, the "innocent cargo" rule. *See* Plaintiffs' reply memorandum, §C.2, pp. 11-12; Plaintiffs' PFFCL, ¶¶60-63, pp. 27-28. For this statutory reason *alone*, the US GML "innocent cargo" rule applies as surrogate RMI maritime law, and the jurisprudential choice-of-law inquiry is irrelevant.

Even if this statutory conclusion were not dispositive, Defendants are also wrong on their choice-of-law analysis. Defendants again state at ¶¶68-71 a supposed "black letter" choice of law rule that the littoral state's law applies in a collision in territorial waters. But this supposed "black letter" law **is not a mandatory, black-and-white proposition.** Rather, pursuant to the more recent Supreme Court maritime law choice-of-law *Lauritzen-Rhoditis* test, the rule of *lex loci delicti* is just one of eight factors to be considered, and is not on its own dispositive as to the

applicable law *even in* a collision in foreign waters. *See* Plaintiffs' reply memorandum, §C.3, pp. 12-13; Plaintiffs' PFFCL, ¶¶72-79, pp. 30-33. Indeed, the very academic authorities cited by Defendants (and provided to the Court via Defendants' supplement of October 24, 2017) acknowledge as much, noting that nearly eight-decade old *lex loci delicti* rule of *The Mandu* is only "a **general** rule" (emphasis added), and is thus subject to exceptions/deviation (*see* 2 Thomas J. Schoenbaum, Admiralty & Maritime Law §14-9 (4th Ed. 2004). Moreover, other academics confirm that the *lex loci delicti* rule is not absolute. *See* Plaintiffs' reply memorandum, p. 12-13, n. 40; Plaintiffs' PFFCL, ¶74 (citing MARSDEN ON COLLISIONS AT SEA, §17-13, p. 566 (Simon Gault, *et al.* eds. 12th ed. 1998)). And perhaps most importantly, **more recent jurisprudence** recognizes that *lex loci delicti* is not absolute for foreign territorial water collisions and does not even cite to *The Mandu* or its progeny. *Id.* at n. 41 (citing *Kriti Filoxenia Special Mar. Enter. v. YASA H. MEHMET Motor Vessel*, 442 F. App'x 167, 168–69 (5th Cir. 2011)).[8]

Defendants also incorrectly suggest (¶72) that the *Lauritzen-Rhoditis* test should only apply in personal injury cases. **This is objectively wrong**: courts apply *Lauritzen-Rhoditis* in collision/allision cases.[9]

Finally, Defendants rely on *Man Ferrostaal* to suggest the *Lauritzen-Rhoditis* factors weigh against application of the "innocent cargo" rule as RMI surrogate maritime law (¶¶73-

[8] Notably, the *Man Ferrostaal, Inc.* case cited by Defendants themselves applies *Lauritzen-Rhoditis* **without regard** to the purportedly "black letter" law of *The Mandu*.

[9] *Kriti Filoxenia Special Mar. Enter. v. YASA H. MEHMET Motor Vessel*, 442 F. App'x 167 (5th Cir. 2011); *Cotemar S.A. De Cv. v. Motor Vessel BEAUFORT*, 2014 WL 1330203, at *3 (E.D. La. Apr. 3, 2014) ("[T]he choice-of-law factors for determining which nation's law governs a maritime action [such as an allision between a supply vessel and oil rig]were set forth by the Supreme Court of the United States in [*Lauritzen/Rhoditis*].")

76). Notably, however, their analysis of *Lauritzen-Rhoditis* **does not even suggest** support applicability of Vietnamese law - the only law for which they have offered any proof, but which **they themselves have previously disparaged and sought to avoid at every turn** since the Collision occurred (*see* Plaintiffs' reply memorandum, §C pp. 10-11; Plaintiffs' PFFCL, ¶¶22-28, pp. 11-12; ¶¶68-71, pp. 29-30). Rather, their analysis merely seeks to offer reasons why RMI law *should not* apply, without any proposal for what law *should* apply. Indeed, they effectively **concede** (¶74) that only 1 of the 8 *Lauritzen-Rhoditis* factors - namely *lex loci delicti* - tends to favor the Vietnamese law they now seek to invoke after **actively and affirmatively discounting it and avoiding it at every stage.** In short, they offer no alternative proof as to what law should apply, and instead invoke the law they have always sought to avoid.

Moreover, they attempt to rely on *their own* inequitable forum shopping/"shoplifting" resort to the entirely unnatural venue of Hong Kong (where they sought lower limits and a side limitation deal with the HAD Interests) as somehow weighing against RMI law. And they also suggest that Plaintiffs should have known their cargo would sail through the waters of non-"innocent cargo" rule countries and should accordingly bear the burden of its non-application. This pointedly **ignores that the Defendants are RMI-incorporated entities, running an RMI-flagged vessel;** their efforts to avoid the law *of their own flag state and country of incorporation* is inequitable and against the interest of the RMI as a sovereign nation. Finally, Defendants passing, unsupported reference to the laws of Vietnam, Hong Kong, Greece, Korea

and China - **all without any proof/evidence of what those countries' laws actually provide** - does nothing to supplant application of RMI law.

Ultimately, Defendants have failed to offer any proof of any other country's law that should supposedly apply (other than Vietnam, which is inapplicable under *Lauritzen-Rhoditis* and which they themselves have actively avoided and criticized as "not experienced" and "[un]established," *See* Plaintiffs' PFFCL, ¶24, p. 11). This necessarily renders **RMI law applicable by default:** "[w]hen the parties have failed to conclusively establish foreign law, a court is entitled to look to its own forum's law in order to fill in any gaps."[10] *See* Plaintiffs' PFFCL, ¶¶80-82, p. 33.

Moreover, as Plaintiffs have shown, the balance of the *Lauritzen-Rhoditis* factors (**four of which favor application of RMI law**, one of which is not applicable, and only the first of which favors Vietnam),[11] and in the "particular context" of this case where the RMI-incorporated Defendants, responsible for an RMI-flagged vessel, have (inequitably) sought to avoid application of RMI law by resort to the entirely unnatural jurisdiction of Hong Kong in an effort to gain the benefit of a lower limitation regime, and *have themselves disclaimed* Vietnamese law all along, the equities all favor application of the "innocent cargo" rule under US GML *qua* Marshall Islands maritime law. This is particularly true because *even with* application of the "innocent cargo" rule, the ELENI Defendants' should (at the end of the day)

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[10] *Banco de Credito Indus., S.A. v. Tesoreria Gen.*, 990 F.2d 827, 836 (5th Cir. 1993)

[11] (1) wrongful act = Vietnam; (2) law of flag = Marshall Islands (ELENI); (3) Cargo Plaintiffs = various nations; (4) allegiance of ELENI Defendants = Marshall Islands (as non-resident RMI corporations; (5) place of contract = N/A; (6) inaccessibility of foreign forum = favors Marshall Islands law (because limitation proceedings are closed); (7) law of the forum = Marshall Islands; (8) ELENI Defendants' base of operations = Greece.

not be liable for more than their 70% share of Cargo Plaintiffs' damages, as they can set off the extra 30% against the HAD Interests' claims via their Hong Kong indemnity action (including as against the extra-judicial "side limitation" fund). Defendants' reliance on *Man Ferrostaal, Inc.* is inapposite, as the *Lauritzen-Rhoditis* factors *did not favor* any country other than the littoral state.[12]

FINAL NOTE REGARDING ATTORNEY'S FEES

As a final note in response/opposition to Defendants' PFFCL, Plaintiffs point out that Defendants have yet again doubled (perhaps tripled)-down on their multiple, blatantly, objectively contradictory sworn affidavits and other sworn submissions to this Court espousing diametrically opposed positions on the issue of the preclusive/estoppel effect of the Hong Kong Fault Order. For all the reasons set forth in Plaintiffs' PFFCL (*see* ¶¶13-18, pp. 6-10; ¶¶83-86, pp. 33-35), Plaintiffs seek an award of costs, charges, expenses and attorney's fees incurred in responding to Defendants' opposition to the Fault MSJ.

CONCLUSION

For all the reasons set forth herein, and in the Incorporated Materials, Plaintiffs pray for entry of summary judgment as set forth in their PFFCL.

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[12] In particular, the court in *Man Ferrostaal, Inc.* concluded that there was no consensus under the 8 factors: "Clearly the concatenation of factors set out in *Lauritzen* is confusing and inconclusive. The interests of many countries are potentially implicated, without any clear path to resolving the confusion." *MAN Ferrostaal, Inc. v. M/V VERTIGO*, 447 F. Supp. 2d 316, 323 (S.D.N.Y. 2006). Only after determining that there was no clearly appropriate venue under the various factors did the court turn to the *lex loci delicti* factor. Likewise, the court found that applying Danish law under the *lex loci delicti* factor would be appropriate because "Denmark [has a predominant interest] in regulating the conduct of ships within its territorial waters." *Id.* In this case, to the contrary, the balance of the *Lauritzen-Rhoditis* factors (4 out of 8) clearly point to the law of the RMI as the appropriate applicable law; and moreover, the interest of Vietnam in regulating conduct in its territorial waters *has been satisfied* given that the Vietnamese National Maritime Bureau investigated the Collision (and presumably took any enforcement proceedings necessary to ensure safe navigation in its territorial waters) after the Collision. *See* Plaintiffs' PFFCL, ¶78 n. 50.

Dennis Reeder January 26, 2018 Majuro Date
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IN THE HIGH COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

Chubb Insurance (Thailand) Company Ltd, Tokio Marine & Nichido Fire Insurance Co Ltd, *et al.*	**H.Ct. Civil No. 2014-110** **H.Ct. Civil No. 2014-050** **H.Ct. Civil No. 2015-194**
Plaintiffs, **v.**	
ELENI Maritime Limited *in personam* and Empire Bulkers Limited	**CERTIFICATE OF SERVICE**
Defendants	

CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2018, RMI Date (January 25, 2018, USA mainland date), a true and correct copy of the Plaintiffs' Response/Opposition to Proposed Findings of Fact & Conclusions of Law Submitted by Defendants was served on Tatyana Cerullo and David Lowe, Attorneys for Defendants, by sending to them via email transmission in pdf.format to:

TC.LAW.llc@gmail.com and davidloweesq@gmail.com.

Dated: January 26, 2018 (Majuro date).

Dennis Reeder
Attorney for Plaintiffs

4830-6626-3888 v1

2900428-000007 09/18/2017
4837-0671-8810 v1
2900428-000007 01/23/2018
4837-0671-8810 v2

2900428-000007 01/24/2018

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FILED
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ASST. CLERK OF COURTS
REPUBLIC OF THE MARSHALL ISLANDS

IN THE HIGH COURT

OF THE

REPUBLIC OF THE MARSHALL ISLANDS

Chubb Insurance (Thailand) Company Ltd, Tokio Marine & Nichido Fire Insurance Co Ltd, *et al.* Plaintiffs, v. Eleni Maritime Limited *in personam* and Empire Bulkers Limited Defendants.	H.Ct. Civil No. 2014-050 H.Ct. Civil No. 2014-110 H.Ct. Civil No. 2015-194 **PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW; OBJECTION TO PLAINTIFFS' LETTER REQUEST FOR SUPPLEMENTAL FILING; CERTIFICATE OF SERVICE**

Defendants ELENI MARITIME LIMITED and EMPIRE BULKERS LIMITED ("Eleni Maritime") and ("Empire Bulkers") (collectively, "Defendants") respectfully submit their proposed Findings of Fact and Conclusions of Law on Plaintiffs' partial Motion for Summary Judgment and Objection to Plaintiffs' Letter Request for Supplemental Filing.

Dated: 29 December 2017

Tatyana Cerullo

Tatyana Cerullo
David Lowe
Attorneys for Defendants
ELENI MARITIME LIMITED and
EMPIRE BULKERS LIMITED

IN THE HIGH COURT

OF THE

REPUBLIC OF THE MARSHALL ISLANDS

Chubb Insurance (Thailand) Company Ltd, Tokio Marine & Nichido Fire Insurance Co Ltd, *et al.* Plaintiffs, v. Eleni Maritime Limited *in personam* and Empire Bulkers Limited Defendants.	H.Ct. Civil No. 2014-050 H.Ct. Civil No. 2014-110 H.Ct. Civil No. 2015-194 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

TO: Dennis Reeder, Counsel for Plaintiffs
Christopher Hannan, Counsel for Plaintiffs
James Roussel, Counsel for Plaintiffs
Tatyana Cerullo, Counsel for Defendants
David Lowe, Counsel for Defendants

INTRODUCTION

On October 25, 2017, this Court heard oral arguments on Plaintiffs' Motion for Summary Judgment filed herein on September 20, 2017 (the "Motion") under Rule 56 of the Marshall Islands Rules of Civil Procedure ("MIRCP"). The Motion seeks summary judgment regarding: 1) whether *res judicata* effect should be given to the settlement agreement reduced to a judgment in Hong Kong (....) and 2) whether the US/RMI "innocent cargo rule" should apply in this case.

At oral argument, Plaintiffs were represented by Dennis Reeder, Esq. and Christopher Hannan, Esq. and Defendants were represented by Tatyana Cerullo, Esq. and David Lowe, Esq.

This Court, having carefully considered Plaintiffs' Motion, the briefs filed by the parties and the arguments made and the authorities cited therein, the argument of counsel, and being otherwise fully advised, hereby finds, concludes, and orders as follows:

I. RES JUDICATA: FINDINGS OF FACT & CONCLUSIONS OF LAW

Introduction – *Res Judicata*

1. This is a negligence lawsuit arising from a ship collision between two ships in Vietnamese territorial waters, and it was brought by cargo plaintiffs in the Marshall Islands against only one of the shipowners (the owner of the Eleni).
2. The other shipowner (owner of the Heung-A-Dragon, "HAD") is missing from this lawsuit.
3. A party may avoid summary judgment by pointing to any genuine dispute about the other's partial liability. *Holzhauer v. Golden Gate Bridge Highway & Transp. Dist.*, No. 13-02862, 2015 WL 628255, at *3 (N.D. Cal. Feb. 12, 2015) (citing, inter alia, *United States v. Reliable Transfer Co., Inc., 421 U.S. 397 (1975)*, and *Cliffs-Neddrill Turnkey Int'l-Oranjestad v. M/T Rich Duke*, 947 F.2d 83, 87 (3d Cir. 1991)).
4. Maritime negligence cases are rarely resolved at summary judgment; whether the parties acted reasonably is ordinarily a question for the fact-finder. *Christensen v. Georgia-Pac. Corp.*, 279 F.3d 807, 813 (9th Cir. 2002).
5. Plaintiffs claim *res judicata* effect of the January 6 2016 Order issued in the Hong Kong liability action (HCAJ 188), which was between the shipowners only, namely the owners of the Eleni and the owners of the HAD, no one else, resulting in a settlement between them and the recording of the terms (the "Hong Kong Order"). *See* Defendants' Opposition to Motion for Summary Judgment, JRJ Declaration.
6. However, the Hong Kong Order does not address the genuine issues of material fact in this case regarding the extent to which each shipowner is liable for damages to the cargo

that was aboard the HAD at the time of the collision. The absence of the owners of the HAD in this case creates further genuine disputes.

7. More specifically, reasonableness inquiries due to the absence of the owners of the HAD which create genuine issues of material fact include, *inter alia*: 1) whether the owners of the HAD prematurely abandoned the cargo, 2) whether the owners of the HAD took reasonable precautions to prevent pilferage, 3) whether the owners of the HAD took reasonable steps to salvage as much cargo as possible, to account for the salvaged amount, and allocate it appropriately, 4) whether the owners of the HAD took reasonable steps to track the containers and mitigate damages, and 5) what was the comparative fault of the owners of HAD with regard to damage to the cargo.

Evidence

8. Defendants offered evidence raising genuine issues of material fact. *See* Declaration of Tatyana Cerullo, Exhibit A - Notice of Abandonment, articles regarding the collision, salvage and pilferage, and two witness statements regarding pilferage on board the HAD after the collision by Captain Felino G. Kierulf and Paul W.R. Davidson, a Master Mariner and partner at Brookes Bell, Singapore.
9. Plaintiffs objected to the evidence on grounds of form, i.e., unsworn statements, and hearsay.
10. However, at the summary judgment stage, the evidence's propriety depends not on its form, but on its content. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Block v. City of Los Angeles*, 253 F.3d 410, 418-19 (9th Cir. 2001).
11. An initially unsworn statement may be considered at summary judgment if it is later affirmed under oath. *See, e.g., DG & G, Inc. v. FlexSol Packaging Corp. of Pompano*

Beach, 576 F.3d 820, 825-26 (8th Cir. 2009) (collecting cases); *see also Irise v. Axure Software Solutions, Inc.*, No. 08-03601, 2009 WL 3615075, at *11 n.5 (C.D. Cal. Sept. 11, 2009) (overruling a similar objection made in light of a later declaration affirming the expert could testify competently to the truth of the statements in his report).

12. A court has discretion to permit a litigant to supplement the summary judgment record. *See Betz v. Trainer Wortham & Co.*, 610 F.3d 1169, 1171 (9th Cir. 2010); *Doremus v. United States*, 793 F. Supp. 942, 948 (D. Idaho 1992); *see also* Fed. R. Civ. P. 56(e) ("If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may: (1) give an opportunity to properly support or address the fact; . . . or (4) issue any other appropriate order."); See also MIRCP Rule 56 (same).

13. Hearsay objections are often premature at summary judgment when asserted by a moving party. Without doubt, should the court grant a motion for summary judgment, it must do so on the basis of admissible evidence. *See, e.g., Gleklen v. Democratic Cong. Campaign Comm., Inc.*, 199 F.3d 1365, 1369 (D.C. Cir. 2000) ("Verdicts cannot rest on inadmissible evidence.").

14. But a party opposing a motion for summary judgment seeks a trial, not a verdict, and it stands to reason that if evidence may be converted to admissible form for trial, it should not be excluded at summary judgment. *See Fraser v. Goodale*, 342 F.3d 1032, 1036 (9th Cir. 2003) (declining to exclude hearsay statements because in alternate form the testimony could be admitted at trial); *Hatcher v. Cnty. of Alameda*, No. 09-1650, 2011 WL 1225790, at *3 (N.D. Cal. Mar. 31, 2011) (same).

15. The evidence proffered in opposition to Plaintiffs' motion for summary judgment raises genuine issues of material fact.

16. Since Defendants here seek a trial, not a verdict, and the evidence may be converted to admissible form for trial, this Court will not exclude such evidence.

17. As such, summary judgment is not appropriate.

Non-binding Effect of Hong Kong Order

18. The Hong Kong liability action (HCAJ 188) was between the shipowners, namely the owners of the Eleni and the owners of the HAD, no one else, resulting in a settlement between them and the recording of the terms in an order of the court dated 6 January 2016 ("Hong Kong Order"). *See* Defendants' Opposition to Motion for Summary Judgment, JRJ Declaration.

19. Furthermore, the Hong Kong Order was made pursuant to a provision in Hong Kong's Rules of High Court (Order 75, rule 35 RHC), which enables a written agreement between solicitors for parties to an admiralty action to be filed in the court registry, after review by the registrar or judge. *See* Defendants' Opposition to Motion for Summary Judgment, JRJ Declaration. The agreement thereupon became an order of the court having the same effect as a judgment. *See id.* A copy of Order 75, rule 35 RHC is attached as Exhibit A to the JRJ Declaration.

20. The comments to the Hong Kong rule state that an agreement filed in this way binds only the parties to it, and reference is made to a case as authority for the proposition that it does not affect the owners of cargo aboard the ships. *See id.*

21. Therefore, the Hong Kong Order binds the parties to the settlement agreement only. It does not bind other parties. It does not even bind those cargo claimants who filed claims

against the limitation fund in Hong Kong, still less does it bind cargo claimants who are Plaintiffs in this lawsuit.

22. In this case, Plaintiffs claim a total loss and seek to recover 100% of the damages from the one shipowner named in this case, the owners of the Eleni, despite the many material factual questions in dispute with regard to the cargo damage and the extent to which each shipowner is liable for cargo damage.

23. The Hong Kong Order has *res judicata* effect only as to the two shipowners, not third party cargo plaintiffs with different issues in the Marshall Islands.

Res Judicata

24. Plaintiffs rely on the doctrine of *res judicata*, however, generally it only comes into play "when the earlier suit: (1) reached a final judgment on the merits; (2) involved the same cause of action or claim; and (3) involved identical parties or privies." (emphasis added). *People v. IntelliGender, LLC*, 771 F.3d 1169 (9th Cir. 2014) (citation omitted).

25. Res judicata encompasses two separate preclusion doctrines: claim preclusion and issue preclusion (also referred to as "collateral estoppel."). *Jalley v. Mojilong*, 3 MILR 106, 109 (2009).

26. The Plaintiffs specifically are asserting offensive collateral estoppel, which "occurs when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party." *Pena v. Gardner*, 976 F.2d 469, 472 (9th Cir. 1992) (internal citations and punctuation omitted).

27. The U.S. Supreme Court analyzed offensive collateral estoppel in *Parklane Hosiery Co. v. Shore* and concluded that courts have broad discretion in determining when to allow it. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 331 (1979).

28. Reliance on collateral estoppel as a bar to further litigation "is appropriate only if (1) there was a full and fair opportunity to litigate the identical issue in the prior action; (2) the issue was actually litigated in the prior action; (3) the issue was decided in a final judgment; and (4) the party against whom issue preclusion is asserted was a party or in privity with a party to the prior action." *Id.*; *Syverson v. Int'l Bus. Machs. Corp.*, 472 F.3d 1072, 1078 (9th Cir. 2007).

29. "The offensive use of collateral estoppel (when, as here, the plaintiff seeks to foreclose the defendant from litigating an issue that the defendant has previously litigated unsuccessfully in an action with another party) does not promote judicial economy in the same manner that is promoted by defensive use (when a defendant seeks to prevent a plaintiff from asserting a claim that the plaintiff has previously litigated and lost against another defendant), and such offensive use may also be unfair to a defendant in various ways." *Parklane Hosiery Co., Inc.*, 439 U.S. at 322.

30. Therefore, "the general rule should be that, in cases where a plaintiff could easily have joined in the earlier action, or where the application of offensive estoppel would be unfair to a defendant, a trial judge, in the exercise of his discretion, should not allow the use of offensive collateral estoppel." 439 U. S. at 323, 329-331.

31. In exercise of its discretion, this Court will not allow the use of offensive collateral estoppel in this case.

32. First, Plaintiffs do not satisfy the first three criteria for application of offensive collateral estoppel that (1) there was a full and fair opportunity to litigate the identical issue in the prior action; (2) the issue was actually litigated in the prior action; (3) the issue was decided in a final judgment.

33. The "issue" here is liability as to the cargo claims with many unique considerations. It is not identical to the issue in the Hong Kong liability action, which was specifically the allocation of liability as between the shipowners regarding the collision with considerations completely unrelated to the cargo.

34. Since the issues are not identical, the three criteria for the application of offensive collateral estoppel have not been met.

35. Further applying the general rule in *Parklane Hosiery* (p. 23 supra) regarding fairness, the Court finds that Plaintiffs easily could have joined in the earlier Hong Kong actions, both the liability and limitation proceedings in Hong Kong.

36. Joining in the proceedings in Hong Kong in the center of Asia where all of the cargo plaintiffs are located and where the proceedings included the key evidence and parties, both shipowners and other cargo claimants, and where proceedings were already far advanced at the time that Plaintiffs filed in the Marshall Islands, would have been much easier for Plaintiffs.

37. Furthermore, offensive collateral estoppel also would be unfair because again the issues in this negligence case between cargo claimants and one shipowner to determine liability for cargo damages differ from those in the Hong Kong liability action between just the two shipowners to determine liability for damages between them – not having anything to do with cargo issues. *Romero v. Flowers Bakeries, LLC*, (N.D. Cal. 2016) (February 8, 2016) (court disallowed use of offensive collateral estoppel because of unfairness since issues in earlier action were different from second action).

38. A determination that offensive collateral estoppel here would be unfair is bolstered by the fact that only one shipowner is present in this case, and the presence of the other

shipowner, the owners of the HAD, is necessary for a fair allocation of responsibility for cargo damage.

39. Thus, Plaintiffs do not meet the general rule for application of offensive collateral estoppel because (1) Plaintiffs easily could have joined in the earlier action, and (2) application of offensive estoppel would be unfair to Defendants.

Judicial Estoppel Is Inapplicable

40. Judicial estoppel is inapplicable, as supported by case law cited by both parties.

41. "[J]udicial estoppel is an equitable doctrine invoked by a court at its discretion." *Ah Quin v. Cnty. of Kauai Dep 't of Transp.*, 733 F.3d 267, 270 (9th Cir. 2013) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001)). "[S]everal factors typically inform the decision whether to apply the doctrine.'" *Ah Quin*, 733 F.3d at 270 (quoting *New Hampshire*, 532 U.S. at 750).

42. "'First, a party's later position must be clearly inconsistent with its earlier position.'" *Id.* (omitting internal quotation marks) (quoting *New Hampshire*, 532 U.S. at 750).

43. "'Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled."' *Id.* (quoting *New Hampshire*, 532 U.S. at 750).

44. "'A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.'" *Id.* (quoting New Hampshire, 532 U.S. at 751). "This court has restricted the application of judicial estoppel to cases where the court relied on, or 'accepted,' the party's previous inconsistent position." *Id.* at 783.

45. In this case, all three elements for judicial estoppel are not satisfied.

46. First, Defendants' position is not clearly inconsistent with its earlier position.

47. In the first phase of this case, Defendants asserted that Hong Kong was the more appropriate and convenient forum and that Plaintiffs' case should be dismissed in favor of the Hong Kong forum where all of the key parties and evidence are located, and where Plaintiffs could join in the liability and limitation actions and receive compensation for their damage claims.

48. Likewise, in the declaratory/summary judgment phase, Defendants' position was that the Hong Kong Order/liability apportionment meant that the case should be disposed of, and by application of international law and comity Plaintiffs must join the proceedings in Hong Kong.

49. Defendants never have taken the position that the liability apportionment in Hong Kong means that the Court should proceed to judgment in the Marshall Islands.

50. Second, Defendants never succeeded in persuading this Court to accept its earlier position to dispose of the case in favor of the Hong Kong forum's resolution of liability and limitation issues between all parties.

51. Thus, there is no possibility that judicial acceptance of an alleged inconsistent position in this proceeding would create the perception that either the Hong Kong court or this Court was misled.

52. In accordance with judicial precedent cited by both parties, this Court will apply judicial estoppel only to cases where the court relied on, or accepted, the party's previous alleged inconsistent position. *See Nuno v. WELLS FARGO BANK, N.A*, 2017 WL 4083140, at *3 (C. D. Cal. Sept. 13, 2017). Such is not the case here.

53. Third, Defendants would not derive an unfair advantage or impose an unfair detriment on the Plaintiffs if not estopped. Plaintiffs forum-shopped, had ample time, and easily could have filed their claims in the liability action and limitation action in Hong Kong.

54. Rather than unfair for Plaintiffs, it would be unfair for the owners of the Eleni in this case not to be able to defend itself against liability for Plaintiffs' cargo claims.

55. In sum, Plaintiffs' Motion for Summary Judgment on the issue of res judicata is DENIED for the following reasons:

1) the Hong Kong Order does not have preclusive effect as to cargo claimants in Hong Kong or in the Marshall Islands;

2) Plaintiffs have not met the criteria for *res judicata*, specifically offensive collateral estoppel, because the issues in the prior Hong Kong action (between only the shipowners with regard to collision liability) are not identical to the issues in the present case (between cargo claimants and only one shipowner regarding cargo liability) and there are considerable fairness issues;

3) there are genunine issues of material fact, exacerbated by the absence from the case of the owners fo the HAD, regarding allocation of responsibility for cargo damage that are not addressed by the Hong Kong Order;

4) Plaintiffs' objections to Defendants' evidence are overruled and Defendants may convert such allegedly inadmissible evidence to admissible form for trial; and

5) application of judicial estoppel is inapplicable in this case because this Court did not rely on, or accept, the party's previous alleged inconsistent position, and

there is nothing unfair to any party to allow the owners of the Eleni to defend themselves against liability for Plaintiffs' cargo claims.

II. INNOCENT CARGO RULE: FINDINGS OF FACT & CONCLUSIONS OF LAW

56. Cargo Plaintiffs have raised the innocent cargo rule because they aim to claim, that even if the Eleni is found to be only 1% liable in Hong Kong, Cargo Plaintiffs can recover 100% of their claims in the RMI.

57. Plaintiffs have not shown that the innocent cargo rule applies as a matter of law.

58. Choice of law rules do not support application of Marshall Islands law, and therefore application of the innocent cargo rule.

59. Choice of law rules in ship collision cases support application of Vietnamese law (i.e., proportionate liability rather than joint and several liability), since the collision occurred in the territorial waters of Vietnam. *See* Defendants' Oppositin to Motion for Summary Judgment, Declaration of Ly Quang Long, confirming location of the collision and Vietnamese law regarding allocation of proportionate liability in ship collisions.

60. The innocent cargo rule is derived from U.S. statutory law, the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. app. §§ 1300-1315 (2006).

61. Liability in maritime actions under U.S. law is joint and several and, as such, each individual tortfeasor is liable in full for damages sustained by the plaintiff. In the U.S., such principle of joint and several liability is particularly critical in light of COGSA's potential grant of immunity to carrying vessels in privity with the injured party.

62. Specifically, COGSA provides that neither the carrier nor the vessel may be held liable for any loss or damage resulting from "[a]ct, neglect, or default of the master, mariner,

pilot, or the servants of the carrier in the navigation or in the management of the ship." COGSA, § 1304(2)(a).

63. Thus, where a relationship of privity exists as between the carrier and the cargo, the carrier will not be liable in tort, provided that the fault of the carrier in privity consists of an "act, neglect, or default ... in the navigation or in the management of the ship." COGSA, §1304(2)(a). Instead, cargo must protect its interest through the terms of its contract with the vessel, or through insurance.

64. The interaction between this error in navigation defense and the principle of joint and several liability has given rise to the so-called "innocent cargo" rule, i.e., where cargo is precluded by operation of COGSA from pursuing claims against the carrying vessel, the cargo is relegated to its recovery as against the non-carrying vessel only.

65. United States general maritime law provides for joint and several liability and based on certain provisions of COGSA, the innocent cargo rule has arisen.

66. The RMI has similar wording in its own carriage of goods at sea act, but it is not exactly the same. 47 MIRC Ch.4. The general maritime law interpreting the language that operates to create the innocent cargo rule is the law in the Marshall Islands.

67. However, Marshall Islands law, i.e., the innocent cargo rule, does not apply in this case based on choice of law rules.

68. The simple "black letter" choice of law rule for collision cases is that when a collision occurs in foreign territorial waters, that country's law is applied. The principal cases in this area of the law are *The Mandu*, 102 F.2d 459, 463 (2d Cir. 1939 ("Liability for tort caused by collision in the territorial waters of a foreign country is governed by the laws

of that country.") and *Smith v. Condry*, 42 U.S. (1 How.) 28, 33 (1843) (stating that English law applies to a collision taking place in the territorial waters of England).

69. This approach to choice of law in collision cases is widely recognized. See Defendants' October 25, 2017 Supplemental Filing, Exhibit 1, 2 THOMAS J. SCHOENBAUM, ADMIRALTY & MARITIME LAW § 14-9, at p. 132 & n. 9 (4th ed. 2004). Thomas J. Schoenbaum, the author of a widely cited maritime law treatise states unequivocally: "If the collision occurs in foreign territorial waters, liability and damages are as a general rule determined according to the law of that country," citing *The Mandu* as principal authority. Prof. Schoenbaum quotes extensively from *The Mandu* in footnote 9, where the Second Circuit based its holding on Section 409 of the Restatement of Conflict of Laws and three Supreme Court cases. *Id.*

70. See also Defendants' October 25, 2017 Supplemental Filing, Exhibit 2, an excerpt from ROBERT FORCE, ADMIRALTY & MARITIME LAW 140 (2d ed. 2013). Similarly, Professor Robert Force is an internationally known authority on admiralty law, director emeritus of the Maritime Law Center at Tulane, its founding director, and he holds the only endowed chair in maritime law in the United States. This excerpt states unequivocally: "If suit were brought in the United States based on a collision that occurred in the territorial waters of a foreign country, then the U.S. court would apply the law of the country where the collision occurred."

71. Based on the black letter law, Plaintiffs' motion for summary judgment on application of the innocent cargo rule is denied.

72. Even if the Court were to rely on an analysis of the *Lauritzen* factors (as presented by Plaintiffs), which were set forth in the context of maritime personal injuries rather than

ship collision cases, still Marshall Islands law does not apply. See Defendants' October 25, 2017 Supplemental Filing, Exhibit 3, copy of *Man Ferrostaal, Inc. v. m/v Vertigo, et al.*, 447 F.Supp. 2d 316 (S.D.N.Y 2006), which establishes that *even if* the Court were to analyze the *Lauritzen* factors, the factors do not weigh in favor of applying U.S. substantive law/RMI law (i.e., the innocent cargo rule).

73. The main interests the *Man Ferrostaal, Inc.* Court weighed were the domicile of the parties suffering damage, the country where the accident occurred, and where maritime law is directly concerned with the conduct of the ship.

74. Here, the reasons for applying U.S./RMI law are even more tenuous than in *Man Ferrostaal, Inc.* since: (1) the domicile of the injured parties is not the RMI or U.S., but rather many different Asian countries; (2) the location of the collision was Vietnam; (3) the carrying vessel's domicile is Korea; and (4) the chosen forum of the RMI-domiciled parties is not the RMI, but rather Hong Kong, an accessible and adequate forum with the capacity to serve all interested parties and where proceedings in this matter are already well-advanced; and (5) the RMI parties' principle place of business is not the RMI – it is Greece. Moreover, the RMI should have no interest in applying COGSA because it is not conduct-regulating in nature.

75. In addition, as in *Man Ferrostaal, Inc.*, the parties here are sophisticated business enterprises that entered into shipping contracts fully aware of the risks inherent to such contracts, including the potential application of law adverse to that which would be applied in an action governed solely by the laws of the United States/RMI. That local law providing proportionate liability might have effect, should have been clearly apparent as the Heung-A-Dragon surely would pass through waters controlled by proportionate

liability nations, such as Vietnam or Hong Kong – the last port of call before the collision. In fact, all countries, except the Marshall Islands, having to do with the collision, the ships, and the cargo and cargo claimants maintain laws providing for proportionate liability (i.e., Vietnam, Hong Kong, Greece, Korea, and China) for damages in ship collision cases.

76. Plaintiffs' motion for summary judgment on application of the innocent cargo rule is therefore DENIED.

Date: _____

_____
Carl B. Ingram
Chief Justice, High Court

IN THE HIGH COURT

OF THE

REPUBLIC OF THE MARSHALL ISLANDS

Chubb Insurance (Thailand) Company Ltd, Tokio Marine & Nichido Fire Insurance Co Ltd, *et al.* Plaintiffs, v. Eleni Maritime Limited *in personam* and Empire Bulkers Limited Defendants.	H.Ct. Civil No. 2014-050 H.Ct. Civil No. 2014-110 H.Ct. Civil No. 2015-194 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

TO: Dennis Reeder, Counsel for Plaintiffs
Christopher Hannan, Counsel for Plaintiffs
James Roussel, Counsel for Plaintiffs
Tatyana Cerullo, Counsel for Defendants
David Lowe, Counsel for Defendants

INTRODUCTION

On October 25, 2017, this Court heard oral arguments on Plaintiffs' Motion for Summary Judgment filed herein on September 20, 2017 (the "Motion") under Rule 56 of the Marshall Islands Rules of Civil Procedure ("MIRCP"). The Motion seeks summary judgment regarding: 1) whether *res judicata* effect should be given to the settlement agreement reduced to a judgment in Hong Kong (....) and 2) whether the US/RMI "innocent cargo rule" should apply in this case.

At oral argument, Plaintiffs were represented by Dennis Reeder, Esq. and Christopher Hannan, Esq. and Defendants were represented by Tatyana Cerullo, Esq. and David Lowe, Esq.

This Court, having carefully considered Plaintiffs' Motion, the briefs filed by the parties and the arguments made and the authorities cited therein, the argument of counsel, and being otherwise fully advised, hereby finds, concludes, and orders as follows:

1. RES JUDICATA: FINDINGS OF FACT & CONCLUSIONS OF LAW

Introduction – *Res Judicata*

1. This is a negligence lawsuit arising from a ship collision between two ships in Vietnamese territorial waters, and it was brought by cargo plaintiffs in the Marshall Islands against only one of the shipowners (the owner of the Eleni).
2. The other shipowner (owner of the Heung-A-Dragon, "HAD") is missing from this lawsuit.
3. A party may avoid summary judgment by pointing to any genuine dispute about the other's partial liability. *Holzhauer v. Golden Gate Bridge Highway & Transp. Dist.*, No. 13-02862, 2015 WL 628255, at *3 (N.D. Cal. Feb. 12, 2015) (citing, inter alia, *United States v. Reliable Transfer Co., Inc., 421 U.S. 397 (1975)*, and *Cliffs-Neddrill Turnkey Int'l-Oranjestad v. M/T Rich Duke*, 947 F.2d 83, 87 (3d Cir. 1991)).
4. Maritime negligence cases are rarely resolved at summary judgment; whether the parties acted reasonably is ordinarily a question for the fact-finder. *Christensen v. Georgia-Pac. Corp.*, 279 F.3d 807, 813 (9th Cir. 2002).
5. Plaintiffs claim *res judicata* effect of the January 6 2016 Order issued in the Hong Kong liability action (HCAJ 188), which was between the shipowners only, namely the owners of the Eleni and the owners of the HAD, no one else, resulting in a settlement between them and the recording of the terms (the "Hong Kong Order"). *See* Defendants' Opposition to Motion for Summary Judgment, JRJ Declaration.
6. However, the Hong Kong Order does not address the genuine issues of material fact in this case regarding the extent to which each shipowner is liable for damages to the cargo

that was aboard the HAD at the time of the collision. The absence of the owners of the HAD in this case creates further genuine disputes.

7. More specifically, reasonableness inquiries due to the absence of the owners of the HAD which create genuine issues of material fact include, *inter alia*: 1) whether the owners of the HAD prematurely abandoned the cargo, 2) whether the owners of the HAD took reasonable precautions to prevent pilferage, 3) whether the owners of the HAD took reasonable steps to salvage as much cargo as possible, to account for the salvaged amount, and allocate it appropriately, 4) whether the owners of the HAD took reasonable steps to track the containers and mitigate damages, and 5) what was the comparative fault of the owners of HAD with regard to damage to the cargo.

Evidence

8. Defendants offered evidence raising genuine issues of material fact. *See* Declaration of Tatyana Cerullo, Exhibit A - Notice of Abandonment, articles regarding the collision, salvage and pilferage, and two witness statements regarding pilferage on board the HAD after the collision by Captain Felino G. Kierulf and Paul W.R. Davidson, a Master Mariner and partner at Brookes Bell, Singapore.
9. Plaintiffs objected to the evidence on grounds of form, i.e., unsworn statements, and hearsay.
10. However, at the summary judgment stage, the evidence's propriety depends not on its form, but on its content. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Block v. City of Los Angeles*, 253 F.3d 410, 418-19 (9th Cir. 2001).
11. An initially unsworn statement may be considered at summary judgment if it is later affirmed under oath. *See, e.g., DG & G, Inc. v. FlexSol Packaging Corp. of Pompano*

Beach, 576 F.3d 820, 825-26 (8th Cir. 2009) (collecting cases); *see also Irise v. Axure Software Solutions, Inc.*, No. 08-03601, 2009 WL 3615075, at *11 n.5 (C.D. Cal. Sept. 11, 2009) (overruling a similar objection made in light of a later declaration affirming the expert could testify competently to the truth of the statements in his report).

12. A court has discretion to permit a litigant to supplement the summary judgment record. *See Betz v. Trainer Wortham & Co.*, 610 F.3d 1169, 1171 (9th Cir. 2010); *Doremus v. United States*, 793 F. Supp. 942, 948 (D. Idaho 1992); *see also* Fed. R. Civ. P. 56(e) ("If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may: (1) give an opportunity to properly support or address the fact; . . . or (4) issue any other appropriate order."); See also MIRCP Rule 56 (same).

13. Hearsay objections are often premature at summary judgment when asserted by a moving party. Without doubt, should the court grant a motion for summary judgment, it must do so on the basis of admissible evidence. *See, e.g., Gleklen v. Democratic Cong. Campaign Comm., Inc.*, 199 F.3d 1365, 1369 (D.C. Cir. 2000) ("Verdicts cannot rest on inadmissible evidence.").

14. But a party opposing a motion for summary judgment seeks a trial, not a verdict, and it stands to reason that if evidence may be converted to admissible form for trial, it should not be excluded at summary judgment. *See Fraser v. Goodale*, 342 F.3d 1032, 1036 (9th Cir. 2003) (declining to exclude hearsay statements because in alternate form the testimony could be admitted at trial); *Hatcher v. Cnty. of Alameda*, No. 09-1650, 2011 WL 1225790, at *3 (N.D. Cal. Mar. 31, 2011) (same).

15. The evidence proffered in opposition to Plaintiffs' motion for summary judgment raises genuine issues of material fact.

16. Since Defendants here seek a trial, not a verdict, and the evidence may be converted to admissible form for trial, this Court will not exclude such evidence.

17. As such, summary judgment is not appropriate.

Non-binding Effect of Hong Kong Order

18. The Hong Kong liability action (HCAJ 188) was between the shipowners, namely the owners of the Eleni and the owners of the HAD, no one else, resulting in a settlement between them and the recording of the terms in an order of the court dated 6 January 2016 ("Hong Kong Order"). *See* Defendants' Opposition to Motion for Summary Judgment; JRJ Declaration.

19. Furthermore, the Hong Kong Order was made pursuant to a provision in Hong Kong's Rules of High Court (Order 75, rule 35 RHC), which enables a written agreement between solicitors for parties to an admiralty action to be filed in the court registry, after review by the registrar or judge. *See* Defendants' Opposition to Motion for Summary Judgment, JRJ Declaration. The agreement thereupon became an order of the court having the same effect as a judgment. *See id.* A copy of Order 75, rule 35 RHC is attached as Exhibit A to the JRJ Declaration.

20. The comments to the Hong Kong rule state that an agreement filed in this way binds only the parties to it, and reference is made to a case as authority for the proposition that it does not affect the owners of cargo aboard the ships. *See id.*

21. Therefore, the Hong Kong Order binds the parties to the settlement agreement only. It does not bind other parties. It does not even bind those cargo claimants who filed claims

against the limitation fund in Hong Kong, still less does it bind cargo claimants who are Plaintiffs in this lawsuit.

22. In this case, Plaintiffs claim a total loss and seek to recover 100% of the damages from the one shipowner named in this case, the owners of the Eleni, despite the many material factual questions in dispute with regard to the cargo damage and the extent to which each shipowner is liable for cargo damage.

23. The Hong Kong Order has *res judicata* effect only as to the two shipowners, not third party cargo plaintiffs with different issues in the Marshall Islands.

Res Judicata

24. Plaintiffs rely on the doctrine of *res judicata*, however, generally it only comes into play "when the earlier suit: (1) reached a final judgment on the merits; (2) involved the same cause of action or claim; and (3) involved identical parties or privies." (emphasis added). *People v. IntelliGender, LLC*, 771 F.3d 1169 (9th Cir. 2014) (citation omitted).

25. Res judicata encompasses two separate preclusion doctrines: claim preclusion and issue preclusion (also referred to as "collateral estoppel."). *Jalley v. Mojilong*, 3 MILR 106, 109 (2009).

26. The Plaintiffs specifically are asserting offensive collateral estoppel, which "occurs when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party." *Pena v. Gardner*, 976 F.2d 469, 472 (9th Cir. 1992) (internal citations and punctuation omitted).

27. The U.S. Supreme Court analyzed offensive collateral estoppel in *Parklane Hosiery Co. v. Shore* and concluded that courts have broad discretion in determining when to allow it. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 331 (1979).

28. Reliance on collateral estoppel as a bar to further litigation "is appropriate only if (1) there was a full and fair opportunity to litigate the identical issue in the prior action; (2) the issue was actually litigated in the prior action; (3) the issue was decided in a final judgment; and (4) the party against whom issue preclusion is asserted was a party or in privity with a party to the prior action." *Id.*; *Syverson v. Int'l Bus. Machs. Corp.*, 472 F.3d 1072, 1078 (9th Cir. 2007).

29. "The offensive use of collateral estoppel (when, as here, the plaintiff seeks to foreclose the defendant from litigating an issue that the defendant has previously litigated unsuccessfully in an action with another party) does not promote judicial economy in the same manner that is promoted by defensive use (when a defendant seeks to prevent a plaintiff from asserting a claim that the plaintiff has previously litigated and lost against another defendant), and such offensive use may also be unfair to a defendant in various ways." *Parklane Hosiery Co., Inc.*, 439 U.S. at 322.

30. Therefore, "the general rule should be that, in cases where a plaintiff could easily have joined in the earlier action, or where the application of offensive estoppel would be unfair to a defendant, a trial judge, in the exercise of his discretion, should not allow the use of offensive collateral estoppel." 439 U. S. at 323, 329-331.

31. In exercise of its discretion, this Court will not allow the use of offensive collateral estoppel in this case.

32. First, Plaintiffs do not satisfy the first three criteria for application of offensive collateral estoppel that (1) there was a full and fair opportunity to litigate the identical issue in the prior action; (2) the issue was actually litigated in the prior action; (3) the issue was decided in a final judgment.

33. The "issue" here is liability as to the cargo claims with many unique considerations. It is not identical to the issue in the Hong Kong liability action, which was specifically the allocation of liability as between the shipowners regarding the collision with considerations completely unrelated to the cargo.

34. Since the issues are not identical, the three criteria for the application of offensive collateral estoppel have not been met.

35. Further applying the general rule in *Parklane Hosiery* (p. 23 supra) regarding fairness, the Court finds that Plaintiffs easily could have joined in the earlier Hong Kong actions, both the liability and limitation proceedings in Hong Kong.

36. Joining in the proceedings in Hong Kong in the center of Asia where all of the cargo plaintiffs are located and where the proceedings included the key evidence and parties, both shipowners and other cargo claimants, and where proceedings were already far advanced at the time that Plaintiffs filed in the Marshall Islands, would have been much easier for Plaintiffs.

37. Furthermore, offensive collateral estoppel also would be unfair because again the issues in this negligence case between cargo claimants and one shipowner to determine liability for cargo damages differ from those in the Hong Kong liability action between just the two shipowners to determine liability for damages between them – not having anything to do with cargo issues. *Romero v. Flowers Bakeries, LLC*, (N.D. Cal. 2016) (February 8, 2016) (court disallowed use of offensive collateral estoppel because of unfairness since issues in earlier action were different from second action).

38. A determination that offensive collateral estoppel here would be unfair is bolstered by the fact that only one shipowner is present in this case, and the presence of the other

shipowner, the owners of the HAD, is necessary for a fair allocation of responsibility for cargo damage.

39. Thus, Plaintiffs do not meet the general rule for application of offensive collateral estoppel because (1) Plaintiffs easily could have joined in the earlier action, and (2) application of offensive estoppel would be unfair to Defendants.

Judicial Estoppel Is Inapplicable

40. Judicial estoppel is inapplicable, as supported by case law cited by both parties.

41. "[J]udicial estoppel is an equitable doctrine invoked by a court at its discretion." *Ah Quin v. Cnty. of Kauai Dep 't of Transp.*, 733 F.3d 267, 270 (9th Cir. 2013) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001)). "[S]everal factors typically inform the decision whether to apply the doctrine.'" *Ah Quin*, 733 F.3d at 270 (quoting *New Hampshire*, 532 U.S. at 750).

42. "'First, a party's later position must be clearly inconsistent with its earlier position.'" *Id.* (omitting internal quotation marks) (quoting *New Hampshire*, 532 U.S. at 750).

43. "'Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled.'" *Id.* (quoting *New Hampshire*, 532 U.S. at 750).

44. "'A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.'" *Id.* (quoting New Hampshire, 532 U.S. at 751). "This court has restricted the application of judicial estoppel to cases where the court relied on, or 'accepted,' the party's previous inconsistent position." *Id.* at 783.

45. In this case, all three elements for judicial estoppel are not satisfied.

46. First, Defendants' position is not clearly inconsistent with its earlier position.

47. In the first phase of this case, Defendants asserted that Hong Kong was the more appropriate and convenient forum and that Plaintiffs' case should be dismissed in favor of the Hong Kong forum where all of the key parties and evidence are located, and where Plaintiffs could join in the liability and limitation actions and receive compensation for their damage claims.

48. Likewise, in the declaratory/summary judgment phase, Defendants' position was that the Hong Kong Order/liability apportionment meant that the case should be disposed of, and by application of international law and comity Plaintiffs must join the proceedings in Hong Kong.

49. Defendants never have taken the position that the liability apportionment in Hong Kong means that the Court should proceed to judgment in the Marshall Islands.

50. Second, Defendants never succeeded in persuading this Court to accept its earlier position to dispose of the case in favor of the Hong Kong forum's resolution of liability and limitation issues between all parties.

51. Thus, there is no possibility that judicial acceptance of an alleged inconsistent position in this proceeding would create the perception that either the Hong Kong court or this Court was misled.

52. In accordance with judicial precedent cited by both parties, this Court will apply judicial estoppel only to cases where the court relied on, or accepted, the party's previous alleged inconsistent position. *See Nuno v. WELLS FARGO BANK, N.A*, 2017 WL 4083140, at *3 (C. D. Cal. Sept. 13, 2017). Such is not the case here.

53. Third, Defendants would not derive an unfair advantage or impose an unfair detriment on the Plaintiffs if not estopped. Plaintiffs forum-shopped, had ample time, and easily could have filed their claims in the liability action and limitation action in Hong Kong.

54. Rather than unfair for Plaintiffs, it would be unfair for the owners of the Eleni in this case not to be able to defend itself against liability for Plaintiffs' cargo claims.

55. In sum, Plaintiffs' Motion for Summary Judgment on the issue of res judicata is DENIED for the following reasons:

1) the Hong Kong Order does not have preclusive effect as to cargo claimants in Hong Kong or in the Marshall Islands;

2) Plaintiffs have not met the criteria for *res judicata*, specifically offensive collateral estoppel, because the issues in the prior Hong Kong action (between only the shipowners with regard to collision liability) are not identical to the issues in the present case (between cargo claimants and only one shipowner regarding cargo liability) and there are considerable fairness issues;

3) there are genunine issues of material fact, exacerbated by the absence from the case of the owners fo the HAD, regarding allocation of responsibility for cargo damage that are not addressed by the Hong Kong Order;

4) Plaintiffs' objections to Defendants' evidence are overruled and Defendants may convert such allegedly inadmissible evidence to admissible form for trial; and

5) application of judicial estoppel is inapplicable in this case because this Court did not rely on, or accept, the party's previous alleged inconsistent position, and

there is nothing unfair to any party to allow the owners of the Eleni to defend themselves against liability for Plaintiffs' cargo claims.

II. INNOCENT CARGO RULE: FINDINGS OF FACT & CONCLUSIONS OF LAW

56. Cargo Plaintiffs have raised the innocent cargo rule because they aim to claim, that even if the Eleni is found to be only 1% liable in Hong Kong, Cargo Plaintiffs can recover 100% of their claims in the RMI.

57. Plaintiffs have not shown that the innocent cargo rule applies as a matter of law.

58. Choice of law rules do not support application of Marshall Islands law, and therefore application of the innocent cargo rule.

59. Choice of law rules in ship collision cases support application of Vietnamese law (i.e., proportionate liability rather than joint and several liability), since the collision occurred in the territorial waters of Vietnam. *See* Defendants' Oppositin to Motion for Summary Judgment, Declaration of Ly Quang Long, confirming location of the collision and Vietnamese law regarding allocation of proportionate liability in ship collisions.

60. The innocent cargo rule is derived from U.S. statutory law, the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. app. §§ 1300-1315 (2006).

61. Liability in maritime actions under U.S. law is joint and several and, as such, each individual tortfeasor is liable in full for damages sustained by the plaintiff. In the U.S., such principle of joint and several liability is particularly critical in light of COGSA's potential grant of immunity to carrying vessels in privity with the injured party.

62. Specifically, COGSA provides that neither the carrier nor the vessel may be held liable for any loss or damage resulting from "[a]ct, neglect, or default of the master, mariner,

pilot, or the servants of the carrier in the navigation or in the management of the ship." COGSA, § 1304(2)(a).

63. Thus, where a relationship of privity exists as between the carrier and the cargo, the carrier will not be liable in tort, provided that the fault of the carrier in privity consists of an "act, neglect, or default ... in the navigation or in the management of the ship." COGSA, §1304(2)(a). Instead, cargo must protect its interest through the terms of its contract with the vessel, or through insurance.

64. The interaction between this error in navigation defense and the principle of joint and several liability has given rise to the so-called "innocent cargo" rule, i.e., where cargo is precluded by operation of COGSA from pursuing claims against the carrying vessel, the cargo is relegated to its recovery as against the non-carrying vessel only.

65. United States general maritime law provides for joint and several liability and based on certain provisions of COGSA, the innocent cargo rule has arisen.

66. The RMI has similar wording in its own carriage of goods at sea act, but it is not exactly the same. 47 MIRC Ch.4. The general maritime law interpreting the language that operates to create the innocent cargo rule is the law in the Marshall Islands.

67. However, Marshall Islands law, i.e., the innocent cargo rule, does not apply in this case based on choice of law rules.

68. The simple "black letter" choice of law rule for collision cases is that when a collision occurs in foreign territorial waters, that country's law is applied. The principal cases in this area of the law are *The Mandu*, 102 F.2d 459, 463 (2d Cir. 1939 ("Liability for tort caused by collision in the territorial waters of a foreign country is governed by the laws

of that country.") and *Smith v. Condry*, 42 U.S. (1 How.) 28, 33 (1843) (stating that English law applies to a collision taking place in the territorial waters of England).

69. This approach to choice of law in collision cases is widely recognized. See Defendants' October 25, 2017 Supplemental Filing, Exhibit 1, 2 THOMAS J. SCHOENBAUM, ADMIRALTY & MARITIME LAW § 14-9, at p. 132 & n. 9 (4th ed. 2004). Thomas J. Schoenbaum, the author of a widely cited maritime law treatise states unequivocally: "If the collision occurs in foreign territorial waters, liability and damages are as a general rule determined according to the law of that country," citing *The Mandu* as principal authority. Prof. Schoenbaum quotes extensively from *The Mandu* in footnote 9, where the Second Circuit based its holding on Section 409 of the Restatement of Conflict of Laws and three Supreme Court cases. *Id.*

70. See also Defendants' October 25, 2017 Supplemental Filing, Exhibit 2, an excerpt from ROBERT FORCE, ADMIRALTY & MARITIME LAW 140 (2d ed. 2013). Similarly, Professor Robert Force is an internationally known authority on admiralty law, director emeritus of the Maritime Law Center at Tulane, its founding director, and he holds the only endowed chair in maritime law in the United States. This excerpt states unequivocally: "If suit were brought in the United States based on a collision that occurred in the territorial waters of a foreign country, then the U.S. court would apply the law of the country where the collision occurred."

71. Based on the black letter law, Plaintiffs' motion for summary judgment on application of the innocent cargo rule is denied.

72. Even if the Court were to rely on an analysis of the *Lauritzen* factors (as presented by Plaintiffs), which were set forth in the context of maritime personal injuries rather than

ship collision cases, still Marshall Islands law does not apply. See Defendants' October 25, 2017 Supplemental Filing, Exhibit 3, copy of *Man Ferrostaal, Inc. v. m/v Vertigo, et al.*, 447 F.Supp. 2d 316 (S.D.N.Y 2006), which establishes that *even if* the Court were to analyze the *Lauritzen* factors, the factors do not weigh in favor of applying U.S. substantive law/RMI law (i.e., the innocent cargo rule).

73. The main interests the *Man Ferrostaal, Inc.* Court weighed were the domicile of the parties suffering damage, the country where the accident occurred, and where maritime law is directly concerned with the conduct of the ship.

74. Here, the reasons for applying U.S./RMI law are even more tenuous than in *Man Ferrostaal, Inc.* since: (1) the domicile of the injured parties is not the RMI or U.S., but rather many different Asian countries; (2) the location of the collision was Vietnam; (3) the carrying vessel's domicile is Korea; and (4) the chosen forum of the RMI-domiciled parties is not the RMI, but rather Hong Kong, an accessible and adequate forum with the capacity to serve all interested parties and where proceedings in this matter are already well-advanced; and (5) the RMI parties' principle place of business is not the RMI – it is Greece. Moreover, the RMI should have no interest in applying COGSA because it is not conduct-regulating in nature.

75. In addition, as in *Man Ferrostaal, Inc.*, the parties here are sophisticated business enterprises that entered into shipping contracts fully aware of the risks inherent to such contracts, including the potential application of law adverse to that which would be applied in an action governed solely by the laws of the United States/RMI. That local law providing proportionate liability might have effect, should have been clearly apparent as the Heung-A-Dragon surely would pass through waters controlled by proportionate

liability nations, such as Vietnam or Hong Kong – the last port of call before the collision. In fact, all countries, except the Marshall Islands, having to do with the collision, the ships, and the cargo and cargo claimants maintain laws providing for proportionate liability (i.e., Vietnam, Hong Kong, Greece, Korea, and China) for damages in ship collision cases.

76. Plaintiffs' motion for summary judgment on application of the innocent cargo rule is therefore DENIED.

Date: _____

_____
Carl B. Ingram
Chief Justice, High Court

Tatyana Cerullo, M.I. Adm. # 150
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IN THE HIGH COURT

OF THE

REPUBLIC OF THE MARSHALL ISLANDS

Chubb Insurance (Thailand) Company Ltd, Tokio Marine & Nichido Fire Insurance Co Ltd, *et al.* Plaintiffs, v. Eleni Maritime Limited *in personam* and Empire Bulkers Limited Defendants.	H.Ct. Civil No. 2014-050 H.Ct. Civil No. 2014-110 H.Ct. Civil No. 2015-194 **OBJECTION TO PLAINTIFFS' LETTER REQUEST FOR SUPPLEMENTAL FILING**

OBJECTION TO PLAINTIFFS' LETTER REQUEST FOR SUPPLEMENTAL FILING

Defendants ELENI MARITIME LIMITED and EMPIRE BULKERS LIMITED ("Eleni Maritime") and ("Empire Bulkers") (collectively, "Defendants") hereby object to Plaintiffs' letter request to supplement the record. The hearing was on October 25, 2017, and Plaintiffs waited over two months later until the day of filing, today, to request to supplement the record for an already lengthy 44-page proposed Findings of Fact and Conclusions of Law. Defendants, on the other hand, requested to supplement on the day of the hearing in response to Plaintiffs' reply that was oversized (more than double the length allowed by the MIRCP) and much of it

single-spaced that raised new issues. Plaintiffs' day-of-filing request typical of the aggressive tactics violative of the MIRCP that have occurred throughout the proceedings should not be allowed. Defendants respectfully request the Court to deny Plaintiffs' request to supplement the record.

Tatyana Cerullo

Dated: 29 December 2017

Tatyana Cerullo
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IN THE HIGH COURT

OF THE

REPUBLIC OF THE MARSHALL ISLANDS

Chubb Insurance (Thailand) Company Ltd, Tokio Marine & Nichido Fire Insurance Co Ltd, *et al.* Plaintiffs, v. Eleni Maritime Limited *in personam* and Empire Bulkers Limited Defendants.	H.Ct. Civil No. 2014-050 H.Ct. Civil No. 2014-110 H.Ct. Civil No. 2015-194 **CERTIFICATE OF SERVICE**

I hereby certify that on December 29, 2017, a true and correct copy of Defendants' Proposed Findings of Fact and Conclusions of Law and Defendants' Objection to Plaintiffs' Letter Request for Supplemental Filing were served upon the following by email attachment in PDF format to:

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