

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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Acadia Insurance Company,

Plaintiff,

-against-

**FINDINGS OF FACT &  
CONCLUSIONS OF LAW**  
14-CV-06561 (DG) (AYS)

Robert Hansen and HMS Bounty Organization, LLC,

Defendants.\*

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DIANE GUJARATI, United States District Judge:

On November 6, 2014, Plaintiff Acadia Insurance Company (“Acadia”) commenced this action against Defendants Robert Hansen and HMS Bounty Organization, LLC (“Bounty Org.”) (collectively, “Defendants”). *See* Complaint, ECF No. 1.<sup>1</sup> On December 31, 2014, Acadia filed the operative Amended Complaint. *See* Amended Complaint (“Am. Compl.”), ECF No. 13.

Acadia seeks judgment declaring that an insurance policy that Acadia issued to Bounty Org. is null and void *ab initio* or, alternatively, that there is no coverage under the policy, based on the following causes of action: breach of the duty of utmost good faith (First Cause of Action), Am. Compl. ¶¶ 115-23; that the loss at issue was not a covered fortuitous loss (Second Cause of Action), *id.* ¶¶ 124-29; breach of absolute implied warranty of seaworthiness (Third Cause of Action), *id.* ¶¶ 130-35; breach of implied negative modified warranty of seaworthiness (Fourth Cause of Action), *id.* ¶¶ 136-47; breach of crew warranty and compliance (Fifth Cause of Action), *id.* ¶¶ 148-51; breach of express warranty of seaworthiness (Sixth Cause of Action), *id.*

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\* The Clerk of Court is directed to amend the caption as set forth above.

<sup>1</sup> This Court has jurisdiction pursuant to 28 U.S.C. § 1333.

¶¶ 152-55; and breach of warranty to comply with state and federal regulations (Seventh Cause of Action), *id.* ¶¶ 156-59. *See generally id.* at 39-40. Acadia also asserts a cause of action for unjust enrichment (Eighth Cause of Action). *See id.* ¶¶ 160-63.<sup>2</sup>

A bench trial was held before the undersigned<sup>3</sup> from October 25, 2021 through October 29, 2021. *See* ECF Nos. 144-45, 149, 152-53.

At the close of Acadia's case, Defendants moved for a directed verdict with respect to all causes of action as to Mr. Hansen and with respect to certain causes of action as to Bounty Org. (specifically, with respect to the First, Second, Fifth, Seventh, and Eighth Causes of Action). *See* Tr. 535-40. In connection with their motion for a directed verdict, Defendants moved to have Mr. Hansen dismissed from the case. *See* Tr. 538. At the close of the defense case, Defendants renewed their motion for a directed verdict, including their motion with respect to Mr. Hansen, specifically. *See* Tr. 1123-24. Also at the close of the defense case, Acadia moved for judgment as a matter of law on Acadia's claim for breach of expressed warranty of seaworthiness (the Sixth Cause of Action). *See* Tr. 1126. The Court reserved decision on each of these motions. *See* Tr. 545, 1125, 1127.

On December 3, 2021, the parties submitted proposed findings of fact and conclusions of law. *See* Acadia's Proposed Findings of Fact and Conclusions of Law, ECF No. 155; Defendants' Proposed Findings of Fact and Conclusions of Law, ECF No. 156. On December

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<sup>2</sup> Mr. Hansen, in his Answer to the Amended Complaint, asserted a counterclaim against Acadia on the basis that Acadia, in bad faith, wrongfully denied and refused (and continued to refuse) to pay for separate counsel for Mr. Hansen. *See* Hansen's Answer to Amended Complaint ¶¶ 170-76, ECF No. 16. This counterclaim was withdrawn, *see* Fourth (Final) Amended Joint Pretrial Order at 5, ECF No. 140; Trial Transcript ("Tr.") 1096-97, ECF No. 158, and therefore is dismissed.

<sup>3</sup> This case was reassigned to the undersigned on January 14, 2021. *See* January 14, 2021 Docket Entry.

14, 2021, Defendants submitted a letter in which Defendants proposed certain amendments to their already-filed proposed findings of fact and conclusions of law. *See* ECF No. 157.

Having considered the trial evidence as a whole and assessed the credibility of the witnesses, the Court makes the following Findings of Fact and Conclusions of Law as required by Federal Rule of Civil Procedure 52(a).<sup>4</sup> For the reasons that follow, the Court finds in favor of Defendants with respect to each of Acadia’s claims.

### **FINDINGS OF FACT**

#### **I. The Parties, the Vessel, and the Vessel’s Operation**

Acadia is an insurance company organized pursuant to the laws of the State of New Hampshire, and with a principal place of business in Westbrook, Maine. *See* Joint Statement of Stipulated Facts (“Stip. Facts”) ¶ 1, Ex. 96; *see also* ECF No. 146.<sup>5</sup> Acadia was in the business of issuing marine insurance policy contracts. Stip. Facts ¶ 1.

Bounty Org. was the owner of the sailing Vessel HMS BOUNTY (the “Vessel”) from 2001 until the total loss by sinking of the Vessel in October 2012. Stip. Facts ¶ 2. The Vessel was built in 1960 as an enlarged replica of a famous British naval vessel, for use as a movie prop in the 1962 movie “Mutiny on the Bounty.” Stip. Facts ¶ 4. The Vessel was a 120-foot wooden hulled vessel. Ex. A at 1.

Bounty Org. was formed in 2001 for the purpose of purchasing and operating the Vessel as an authentic square-rigged sailing vessel. Stip. Facts ¶ 3. Bounty Org. purchased the Vessel

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<sup>4</sup> To the extent that a finding of fact constitutes a conclusion of law, it is adopted as such, and to the extent that a conclusion of law constitutes a finding of fact, it is likewise adopted as such.

<sup>5</sup> “Ex.” refers to an exhibit admitted at trial. Acadia’s exhibits were numbered, and Defendants’ exhibits were lettered.

in February 2001 for \$260,000 from the Tall Ship Bounty Foundation, Inc., in Fall River, Massachusetts. *See* Stip. Facts ¶ 4; Tr. 976-78.

Mr. Hansen owned ninety-nine percent of Bounty Org. at the time of the sinking of the Vessel. Stip. Facts ¶ 5. Mr. Hansen also owned a real estate company, Research Way LLC, which owned the remaining one percent of Bounty Org. at the time of the sinking of the Vessel. Stip. Facts ¶ 6.

Tracie Simonin worked for Bounty Org. from 2001 to 2012, handling the bookkeeping and accounting functions. Tr. 911-12. After Bounty Org. purchased the Vessel, Captain Robin Walbridge, who already had been the Vessel's captain, continued on as the Vessel's captain. *See* Tr. 976-77.

The Vessel was operated as an uninspected recreational vessel and an uninspected moored attraction vessel. Tr. 383; *see also* Tr. 121, 805.

## **II. The Relevant Policies and Policy Provisions**

In 2008, Bounty Org. applied for insurance of the Vessel with Acadia through an insurance broker, Allen Agency, with an anticipated inception of coverage on December 15, 2008. Stip. Facts ¶ 18. With the application for insurance in 2008, Bounty Org. provided a copy of a report from a survey of the Vessel by David Wyman, dated June 29, 2007. Stip. Facts ¶¶ 19-20. Acadia also received a certificate of inspection in connection with the application. Tr. 99; *see also* Ex. 58 at 16-17.

Brett Chase, who was a marine underwriter at Acadia in 2008, Tr. 92, and who testified at trial, explained Acadia's process for underwriting the Vessel, *see* Tr. 96-99. Mr. Chase reviewed Bounty Org.'s application, Mr. Wyman's June 29, 2007 survey report, and the certificate of

inspection, and provided a quote based on that information. Tr. 98-99. Mr. Chase testified that Mr. Wyman was acceptable as a provider of a survey report. Tr. 98; *see also* Tr. 123.

On December 2, 2008, Acadia sent a quote to Allen Agency for the insurance of the Vessel. Stip. Facts ¶ 21. The quote included hull and machinery coverage with a policy limit of \$4,000,000, and protection and indemnity coverage with a policy limit of \$1,000,000. Stip. Facts ¶ 22. Allen Agency accepted the December 2, 2008 quote on behalf of Bounty Org. on December 15, 2008. Stip. Facts ¶ 23. On December 15, 2008, Acadia issued a commercial insurance policy to Bounty Org. for the quoted amount (the “2008 Policy”). Stip. Facts ¶ 24; *see generally* Ex. 1.

The Vessel remained insured with Acadia pursuant to annual renewals of the policy until the date of the Vessel’s sinking in October 2012. Stip. Facts ¶ 25. The policy at issue, which reflects a renewal of the original 2008 Policy, incepted on December 15, 2011 (the “2011 Policy”). *See* Stip. Facts ¶ 26; *see generally* Ex. 2; *see also* Tr. 27. The 2011 Policy generally contains the same clauses and terms and conditions as did the 2008 Policy. Tr. 111, 140.

The 2011 Policy, as did the 2008 Policy, provides for three types of coverage relevant here: hull and machinery (“H&M”) coverage, *see* Ex. 2 at 8-17; protection and indemnity (“P&I”) coverage, *see* Ex. 2 at 26-33; and loss of earnings coverage, *see* Ex. 2 at 22-24. *See also* Tr. 129.

**A. H&M Coverage**

With respect to its H&M coverage, the 2011 Policy includes a section titled “American Institute Hull Clauses,” which provides, in relevant part:

**PERILS**

Touching the Adventures and Perils which the Underwriters are contented to bear and take upon themselves, they are of the Seas, Men-of-War, Fire, Lightning,

Earthquake, Enemies, Pirates, Rovers, Assailing Thieves, Jettisons, Letters of Mart and Counter-Mart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and Peoples, of what nation, condition or quality soever, Barratry of the Master and Mariners and of all other like Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the Vessel, or any part thereof, excepting, however, such of the foregoing perils as may be excluded by provisions elsewhere in the Policy or by endorsement thereon.

Ex. 2 at 10.<sup>6</sup> Mr. Chase explained with respect to this same language as it appeared in the initial 2008 Policy that “perils of the sea take in weather,” “[h]eavy weather,” and “[h]urricanes.” Tr. 131.

Also with respect to its H&M coverage, the 2011 Policy includes, in the “American Institute Hull Clauses” section, a clause titled “**ADDITIONAL PERILS (INCHMAREE)**,” which provides, in relevant part:

Subject to the Conditions of this Policy, this Insurance also covers loss of or damage to the Vessel directly caused by the following: . . .

Breakdown of motor generators or other electrical machinery and electrical connections thereto, bursting of boilers, breakage of shafts, or any latent defect in the machinery or hull, (excluding the cost and expense of replacing or repairing the defective part); . . .

Negligence of Charterers and/or Repairers, provided such Charterers and/or Repairers are not an Assured hereunder; . . .

Negligence of Masters, Officers, Crew or Pilots; provided such loss or damage has not resulted from want of due diligence by the Assured, the Owners or Managers of the Vessel, or any of them.

Masters, Officers, Crew or Pilots are not to be considered Owners within the meaning of this clause should they hold shares in the Vessel.

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<sup>6</sup> The Court hereinafter refers to this clause as the “Perils Clause.”

Ex. 2 at 10-11.<sup>7</sup> Mr. Chase explained with respect to the same language as it appeared in the initial 2008 Policy that an Inchmaree clause covers the perils named therein, and that such clauses “expand[] on some of the other items that we would also cover that may not actually be part of the sea.” Tr. 131-32.

The 2011 Policy provides, with respect to its H&M coverage, that the “Amount Insured Hereunder” is \$4,000,000. Ex. 2 at 17; *see also* Tr. 122.

### **B. P&I Coverage**

The 2011 Policy includes a section titled “**PROTECTION AND INDEMNITY**,” which provides, in relevant part:

The Assurer hereby undertakes to make good to the Assured or the Assured’s executors, administrators and/or successors, all such loss and/or damage and/or expense as the Assured shall as owners of the vessel named herein have become liable to pay and shall pay on account of the liabilities, risks, events and/or happenings herein set forth . . . .

Ex. 2 at 26. This section goes on to list the covered liabilities, risks, events, and/or happenings. *See* Ex. 2 at 26-32. The 2011 Policy provides, with respect to its P&I coverage, a “Liability Limit” of \$1,000,000. Ex. 2 at 33.

### **C. Loss of Earnings Coverage**

The 2011 Policy includes a section titled “**LOSS OF EARNINGS ENDORSEMENT**,” which provides, in relevant part, that the “Hull Insurance policy is extended to cover the Insured’s loss of earnings caused as a result of the necessary interruption of normal business.”

Ex. 2 at 22.<sup>8</sup> Relevant here, the 2011 Policy’s Loss of Earnings Endorsement provides that “[c]overage provided by this form shall only apply as a result of direct physical loss or damage

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<sup>7</sup> The Court hereinafter refers to this clause as the “Inchmaree Clause.”

<sup>8</sup> The Court hereinafter refers to this section as the “Loss of Earnings Endorsement.”

to the Insured vessel when such loss or damage is covered by a peril insured against under the . . . Hull Clauses and related endorsements.” Ex. 2 at 22. The 2011 Policy provides that the “Loss of Earnings Limit” is \$100,000. Ex. 2 at 24.

Mr. Chase explained with respect to the Loss of Earnings Endorsement as it appeared in the 2008 Policy that, if the Vessel were lost as a result of a hurricane, there would be coverage. *See* Tr. 134.

The 2011 Policy contains a section titled “**Commercial Hull Endorsement Passenger Vessel**,” which provides, in relevant part:

SPECIAL TERMS AND CONDITIONS

It is hereby understood and agreed that effective 12/15/2011, the following warranties are to be attached . . .

3. CREW WARRANTY & COMPLIANCE:

. . . It is warranted that the Assured has complied with all State, Federal and U.S. Coast Guard regulations pertaining to Passenger Vessels and that the Insured Vessel is properly equipped for the waters in which it is operating. . . .

9. SEAWORTHINESS WARRANTY:

The Underwriters shall not be liable for any loss, damage or expense, arising out of the failure of the Assured to exercise due diligence to maintain the vessels in a seaworthy condition and in all respects fit, tight, and properly manned, equipped and supplied after attachment of this policy; without regard to the knowledge or privity of the Assured to the cause. . . .

13. STATE AND FEDERAL REGULATIONS:

It is warranted that the insured has complied with all state and federal regulations pertaining to the carrying of passengers for hire.

Ex. 2 at 34-35. The 2008 Policy contained, in its “COMMERCIAL HULL ENDORSEMENT” section, an identical crew warranty and compliance clause and seaworthiness warranty. *See* Ex. 1 at 28-29.

### III. Initial Repairs Made to the Vessel in 2001

In 2001, Defendants retained the services of naval architect David Wyman, in order to survey the Vessel on Defendants' behalf in connection with the Vessel's purchase and moving the Vessel from Fall River to Boothbay Harbor Shipyard in Boothbay, Maine for repairs and restoration. *See* Stip. Facts ¶ 16; Tr. 564-65. Mr. Wyman testified at trial.<sup>9</sup> At the outset, and as described more fully below, the Court notes that it credits Mr. Wyman's testimony regarding the Vessel, including Mr. Wyman's testimony as to maintenance of and repairs made to the Vessel over time, and including Mr. Wyman's testimony as to the Vessel's structure, condition, and capabilities.

Mr. Wyman has been an independent naval architect and marine surveyor full-time, for approximately twenty years. Tr. 548. Mr. Wyman began his career as a United States Coast Guard officer doing marine inspections, inspecting ships and boats, from 1965 to 1968. Tr. 548. Upon leaving active service, Mr. Wyman remained in the Coast Guard Reserve for approximately eight years, with his final rank being lieutenant commander. Tr. 553. Mr. Wyman has a bachelor's degree in marine transportation and a master's degree in ocean engineering. Tr. 553-54. Mr. Wyman taught a variety of subjects at Maine Maritime Academy, including naval architecture, oceanography, sailing, ocean engineering, and boat building. Tr. 554-55. Mr. Wyman has held various professional licenses and is an accredited marine surveyor with the Society of Accredited Marine Surveyors. Tr. 555. Mr. Wyman has been involved with

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<sup>9</sup> Pursuant to a pretrial ruling issued by then-United States District Judge Joseph F. Bianco on January 3, 2018, *see* ECF Nos. 62-63, Mr. Wyman testified both as a fact witness and as an expert witness, *see* Tr. 562-63. Specifically, Mr. Wyman testified as an expert on naval architecture, marine engineering, and surveying. *See* Tr. 561-62. Despite some discussion of the issue at trial, Mr. Wyman did not testify as an expert regarding Coast Guard inspection regulations, although he did testify as a fact witness with respect to certain of his own interactions with the Coast Guard. *See* Tr. 561-63.

at least a dozen significant projects involving wooden ships. Tr. 558. Mr. Wyman has designed more than a dozen wooden vessels, “[i]ncluding small boats all the way up to ships.” Tr. 558-59. Mr. Wyman has been involved in the modification and restoration of wooden ships. Tr. 559. Mr. Wyman taught for a year at a school called the Wooden Boat School, Tr. 559, and has published various articles on wooden boats and ships, Tr. 559-60.

Mr. Wyman first had contact with the Vessel in 1976 when he went aboard as a tourist. Tr. 563. Mr. Wyman sailed on the Vessel sometime in the late ’80s or early ’90s, and again in 1998 for a ten-day period. Tr. 564.

According to Mr. Wyman, the Vessel was to be moved from Fall River to Boothbay in 2001 for “a significant rebuilding of the lower part of the vessel.” Tr. 564-65. Mr. Wyman, by letter dated February 6, 2001, made certain recommendations to Bounty Org. about repairs that needed to be made and steps to be taken before the Vessel was moved to Boothbay. *See* Ex. 23; Tr. 569-70. Mr. Wyman suggested that the Vessel be “hailed out for inspection and temporary repairs as soon . . . as is reasonable.” Ex. 23 at 1.

From March 8 to March 10, 2001, the Vessel was examined while afloat, in Fall River. Ex. G(a) at 1. Mr. Wyman issued a “Report of Survey” with respect to this March 2001 survey. *See generally* Ex. G(a); *see also* Tr. 568-69. This report of survey included observations made based on inspections performed at least in part by Mr. Wyman himself as to the Vessel’s “topsides,”<sup>10</sup> weather deck and rigging, and machinery, as well as an “internal examination”

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<sup>10</sup> “Topsides” refers to “the areas of the vessel from the wale on up to the deck on both sides.” Tr. 606-07. “Wale” refers to a larger plank piece about four or five feet above the waterline. Tr. 580.

The Trial Transcript at times refers to the term “wale” as “whale” – seemingly reflecting a typographical error. The Court herein uses the correct spelling, even where citing to those portions of the transcript containing the incorrect spelling.

conducted by Mr. Wyman. Tr. 572-73; *see also* Ex. G(a) at 1, 3. The survey also included observations made based on an underwater survey of the Vessel conducted by a diver who closely communicated with Mr. Wyman throughout the inspection dive. Tr. 571; *see also* Ex. G(a) at 1-2.

In his report concerning the March 2001 survey, Mr. Wyman reported that the Vessel was in poor condition and Mr. Wyman made certain recommendations as to what needed to be done in order to move the Vessel from Fall River to Boothbay. Tr. 569; *see also* Ex. G(a) at 2, 4-5. Specifically, Mr. Wyman's report indicated that, in general, the underwater hull of the Vessel was in poor condition. Ex. G(a) at 2. With respect to the Vessel's "topsides from the waterline to the tween deck level," the report indicated that certain of the Vessel's planks appeared to be in poor condition and that the Vessel had two areas of "deteriorated planking." Ex. G(a) at 3. With respect to the Vessel's weather deck and rigging, the report indicated that, in general, the decks were found in fair condition but a profusion of small leaks were noted. Ex. G(a) at 3. The report noted that an internal examination of the Vessel revealed no obvious conditions that would be a problem during the Vessel's anticipated brief voyage, and that the Vessel's ceiling<sup>11</sup> planks and other internal structure were found to be in generally good condition. Ex. G(a) at 3. With respect to the Vessel's machinery, the report noted that the Vessel's main engines were old but that they appeared to run adequately for the intended voyage. Ex. G(a) at 3. Also with respect to the Vessel's machinery, the report noted: "The operation of the generator and the bilge pump was observed. This area of the ship will require extensive work in the future, some of which should be done at this shipyard period." Ex. G(a) at 3.

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<sup>11</sup> "Ceiling" refers to planking that is on the interior, rather than the exterior, of a vessel's frames; ceiling exists to provide additional strength. Tr. 582-84.

Mr. Wyman's report concerning the March 2001 survey included various repair recommendations. *See* Ex. G(a) at 4. At trial, Mr. Wyman clarified that these recommendations were "not really recommendations for repairing [the Vessel]" but, rather, "were recommendations for making [the Vessel] sufficiently seaworthy to make the trip [to Boothbay]." Tr. 573.

Mr. Wyman believed that the repairs he recommended be made to facilitate the Vessel's trip to Boothbay were completed. Tr. 573. The Vessel was moved to Samples Shipyard<sup>12</sup> in Boothbay Harbor, Maine. *See* Tr. 574; *see also* Ex. G(b) at 1.

#### **IV. The 2001-2002 Repair Period**

While at Samples Shipyard, the Vessel underwent "extensive rebuilding," Ex. G(b) at 1; *see also* Tr. 575, 669, from August 2001 through July 2002, Tr. 589; *see also* Ex. G(d) at 1. Both Mr. Wyman and Mr. Hansen testified at trial as to the repairs made to the Vessel from 2001 to 2002.

When the Vessel was moved to Samples Shipyard, the "original plan" was to do a couple of months of repair to the Vessel and to "pick [up] where Mr. [Leon] Poindexter had left off." Tr. 981-82. Mr. Poindexter was a shipwright<sup>13</sup> who had, approximately three or four years before Bounty Org. purchased the Vessel, done a rebuilding of the "below waterline area of the bow and back into the mid ship . . . area" of the Vessel. Tr. 655-56. When the Vessel was worked on in 2001, the work done by Mr. Poindexter that was uncovered "for the most part looked real good," *see* Tr. 656, but there were "significant problems" with the planking that Mr.

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<sup>12</sup> Samples Shipyard and Boothbay Shipyard refer to the same shipyard. *See* Tr. 574.

<sup>13</sup> A "shipwright" is "in charge of the heavy structural rebuild or building of a new wooden boat, or a variety of different tasks. They could also be installing engine components, wright work; but mostly the large structural build of the boat." Tr. 265.

Poindexter had worked on, Tr. 657. Worms had gotten into the planking and eaten up a good deal of the planking. Tr. 657. Mr. Hansen had the opportunity to assess the damage done to the Vessel's hull and observed that "[t]he bottom of the hull looked like somebody had unloaded a .22 rifle or machine gun, millions of holes, quarter inch diameter from teredo worms." Tr. 982. The "original plan . . . to pick [up] where Mr. Poindexter had left off" was revised to include a "multimillion dollar, entire bottom restoration;" "[a]ll new interior, new engines, tankage, generators;" and "[c]ompletely redo[ing] the boat, stem to stern." Tr. 982.

During the 2001-2002 repair period, the outside of the Vessel, from the wale down, was "totally rebuilt" – *i.e.*, "any items that were deteriorated were replaced." Tr. 580; *see also* Tr. 1011-12. The Vessel's exterior planking was removed to get to the Vessel's framing. Tr. 580. The Vessel's exterior framing was examined, and the framing that was still in good condition was kept. Tr. 580. Approximately half of the framing – or the "better half of 50 percent" of the original framing – was replaced. *See* Tr. 673-74, 1012. All of the Vessel's exterior planking "from the wale on down" was replaced with new white oak planking. Tr. 580-81. A few pieces of the Vessel's ceiling planks were replaced, but the majority of the Vessel's ceiling planks were found to be in a reasonable/adequate condition. Tr. 584. There was evidence of deterioration in the Vessel's topside planking. Tr. 677. The Vessel's "keel" and "keelson" – *i.e.*, pieces of timber that form the backbone of the ship – were found to be in "adequate condition" and were not replaced. Tr. 581-82. Mr. Wyman testified that, if there was any rot on the keel or keelson at that time, it was insignificant. Tr. 582. Watertight bulkheads<sup>14</sup> were installed. Tr. 1079. The Vessel was not required to have watertight bulkheads. Tr. 640.

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<sup>14</sup> "A bulkhead is a structural member of the vessel that runs across or transversely in the vessel." Tr. 203.

Also during the 2001-2002 repair period, “the interior lower portions of the ship were redone – new fuel tanks, new engines, new shaft logs, new shafts, new propellers, [and] living quarters for the crew.” Tr. 1012. The tween deck level was “completely gutted,” and the Vessel was equipped with a new galley and with new cabins, heads, showers, and sewage systems. Tr. 1012. A new windlass was installed, along with new pipes, anchors, and chain. Tr. 1012.

Near the end of this extensive rebuilding, the Vessel was examined while “hailed out” at Samples Shipyard in connection with a survey conducted by Mr. Wyman on June 1, 2002. *See* Ex. G(b) at 1.<sup>15</sup> Mr. Wyman issued a “Report of Survey” with respect to this June 2002 survey, which reflects the work done on the Vessel during the 2001-2002 repair period. *See generally* Ex. G(b).

In his report concerning the June 2002 survey, Mr. Wyman noted that, “[w]ith the completion of this rebuild the vessel should be in **GOOD CONDITION** with the hull basically new from the waterline down and almost all of the major electrical and mechanical systems newly installed.” Ex. G(b) at 6 (emphasis in original). Mr. Wyman’s report – consistent with Mr. Wyman’s and Mr. Hansen’s testimony at trial – indicated with respect to the Vessel’s underwater hull exterior that the Vessel’s underwater body had undergone a “major rebuilding which included replacement of all planking and most of the framing with high quality white oak with the workmanship completed to high standards.” Ex. G(b) at 6. With respect to the Vessel’s “topsides from the waterline to the tween deck level” and weather deck, the report indicated that these areas had “received only minor repairs to make the vessel watertight and cosmetic work to

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<sup>15</sup> Although the report issued with respect to this survey indicates that the “Date of Survey” was June 1, 2001, *see* Ex. G(b) at 1, the report’s header refers to June 1, 2002, *see, e.g.*, Ex. G(b) at 2-7. The reference to 2001 was a typographical error and should have been a reference to 2002. Tr. 669.

upgrade the appearance.” Ex. G(b) at 6. With respect to the Vessel’s sailing rig, the report indicated that the majority of the spars, including all yards and topgallant masts, had been taken down, overhauled, and replaced, and that the standing riggings and running rigging had been overhauled. Ex. G(b) at 6. With respect to the Vessel’s internal tween deck, the report indicated that the forward area of the Vessel had been completely gutted and a new galley area and crew’s mess constructed, which was nearing completion. Ex. G(b) at 6. The report noted that the remainder of the tween deck was similar to its original condition. Ex. G(b) at 6. With respect to the Vessel’s internal hold spaces, the report indicated that “all deteriorated ceiling planks [were] replaced.” Ex. G(b) at 7. The report further indicated with respect to the Vessel’s internal hold spaces that watertight bulkheads were under construction, and that new water, sewage, and fuel tanks had been constructed and installed, as well as new piping systems for each. Ex. G(b) at 7. With respect to the Vessel’s machinery, the report indicated that a new diesel electric drive system was being installed; that a new bilge system had been installed; and that the existing auxiliary generator was rebuilt and reinstalled along with all new wiring. Ex. G(b) at 7.

Mr. Wyman’s report concerning the June 2002 survey included three recommendations: (1) “[t]he rebuild and outfitting of the vessel including installation of all safety and firefighting equipment needs to be completed;” (2) “[a] preliminary stability test should be performed to verify adequate stability;” and (3) “[a] trial trip needs to be conducted to prove all systems are in good working order.” Ex. G(b) at 7. Each of these recommendations was carried out. Tr. 591-92, 600-02; *see also* Ex. G(e) at 1.

#### **V. Mr. Wyman’s May 2005 Survey**

Mr. Wyman issued a “Report of Survey” based on an examination of the Vessel conducted on May 17 and 18, 2005 in St. Petersburg, Florida, while the Vessel was afloat. *See*

*generally* Ex. G(f); *see* Tr. 603. The “Report of Survey” includes information about the work done on the Vessel from 2001 to 2002, as well as information about additional work done on the Vessel prior to May 17-18, 2005. *See* Ex. G(f) at 1, 6-7.

Mr. Wyman’s report concerning the May 2005 survey noted that the Vessel “ha[d] been extensively rebuilt starting in 2001.” Ex. G(f) at 6. Mr. Wyman’s report further noted: “The lower hull up to the tween decks was rebuilt at Samples Shipyard in 2001/2 and limited topside work was done at Lunenburg, NS in 2004.” Ex. G(f) at 6. The report noted that “[m]ost of the machinery has been replaced including the entire main engine propulsion system, new anchor windlass, new tanks, etc.” Ex. G(f) at 6. The report indicated that the Vessel’s sail rig had been totally disassembled including the removal of the lower masts starting in November 2004, and that the rigging had been completely overhauled or replaced with the installation of many new spars, running rigging, standing rigging, and sails. Ex. G(f) at 6.

Mr. Wyman’s report concerning the May 2005 survey noted that, during the past four years, the Vessel had “had an ongoing upgrading of structure and systems” and that Mr. Wyman had “made numerous recommendations which ha[d] been followed.” Ex. G(f) at 6. Mr. Wyman concluded in his report that the Vessel was “in **VERY GOOD CONDITION** with the exception of the topsides which still need rebuilding within the next few years.” Ex. G(f) at 6 (emphasis in original). The report noted that the underwater body of the vessel was assumed to be in very good condition based on pictures and reports made during a 2004 dry docking; that the weather deck was in good condition; that the sailing rig was in excellent condition; that the lower masts were in very good condition; that the internal tween deck was in good structural condition and fair cosmetic condition; that the Vessel’s internal hold spaces were functional and in good condition; and that the Vessel’s main engines and all auxiliary equipment were in very good

condition. *See* Ex. G(f) at 6-7. With respect to the Vessel's topsides, the report noted that "[t]he structural condition of the topsides is fair and will require major rebuilding within the next few years to maintain an adequate degree of structural integrity." Ex. G(f) at 6.

Mr. Wyman's report concerning the May 2005 survey included a recommendation noting that the brows<sup>16</sup> were in poor structural condition and that, although they were considered adequate for crew use only, they should be replaced prior to public access. Ex. G(f) at 7; *see also* Tr. 604-05. The Vessel's brows were thereafter replaced. Tr. 605. The report contained an additional recommendation that the Vessel's topsides would need to be rebuilt within the next few years. Ex. G(f) at 7; *see also* Tr. 604-05.

## **VI. The 2006-2007 Repair Period**

The Vessel underwent a second significant repair period in Boothbay Harbor in 2006-2007. Stip. Facts ¶ 17. Mr. Wyman and Todd Kosakowski testified at trial as to the work done on the Vessel during the 2006-2007 repair period. Mr. Kosakowski was a project manager and a shipwright at Boothbay Harbor Shipyard. Tr. 265.

The Vessel was in Boothbay Shipyard during this 2006-2007 period to have the Vessel's topsides rebuilt, Tr. 616-17, consistent with Mr. Wyman's recommendation as to the Vessel's topsides in his report concerning the May 2005 survey. During the 2006-2007 repair period, some of the Vessel's frames were replaced with white oak frames. Tr. 617; *see also* Tr. 273. The 2006-2007 haul-out period also involved significant planking replacement. Tr. 270; *see also* Tr. 617. The Vessel was "basically re-planked" from the waterline. Tr. 270.

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<sup>16</sup> "Brow" refers to a vessel's "gangway, the bridge, basically, that goes from the land to the vessel." Tr. 605.

Douglas fir was used in replacing the Vessel's planking during the 2006-2007 period. *See* Tr. 617; *see also* Tr. 272. Whereas Mr. Wyman testified that Douglas fir was used, without specifying the grade of the Douglas fir used, *see* Tr. 617, Mr. Kosakowski testified that the wood used to replace the above-the-waterline planking on the Vessel was construction-grade fir planking, specifically, *see* Tr. 272. Mr. Wyman thought that the decision to use Douglas fir was made by Mr. Wyman, Joe Jackimovicz, and Captain Walbridge, and that Mr. Hansen likely was involved in that decision, as well. Tr. 617-18. Mr. Jackimovicz was a boatwright, carpenter, and yard manager at Samples Shipyard. Ex. 97 (March 24, 2016 deposition testimony of Joseph J. Jackimovicz) 6:14-7:2.

The planking used below the waterline before the Vessel got to the yard in 2006 was white oak. Tr. 273. Mr. Kosakowski explained that white oak is traditionally used around or above the waterline and that white oak "would be a lot more resilient to a lot of things," as compared to construction-grade fir. Tr. 272. Mr. Wyman similarly explained that "[f]ir is less rot resistant than good white oak." Tr. 686.

Even so, Mr. Wyman opined that fir is an acceptable wood for wooden boats and explained that, although fir is not used very often on the East Coast, it is used fairly often on ships in the Pacific Northwest. Tr. 618. Mr. Wyman was aware that "many of the boats, tall ships, on the West Coast and Pacific [N]orthwest have been built with fir throughout the structure," including with respect to these ships' framing and – Mr. Wyman believed – below the waterline on these ships. Tr. 619. Somewhat in tension with Mr. Wyman's testimony, Mr. Kosakowski testified that construction-grade Douglas fir had never been used in the shipyard while he was there and that "[i]t was pretty atypical when I compared it to the ships I had seen before that and after." Tr. 272.

During the rebuilding of the planking and the framing in 2006 and 2007, Mr. Wyman went to the yard “probably every few weeks, maybe every two weeks, maybe occasionally every four weeks,” and observed the work done. Tr. 619. Based on his observations, Mr. Wyman concluded that the work done on the Vessel was done in a workmanlike manner. Tr. 619. Mr. Wyman made recommendations regarding what he observed. Tr. 620. To the best of Mr. Wyman’s recollection, his recommendations were carried out. Tr. 620.

Mr. Wyman issued a “Report of Survey” based on an examination of the Vessel on June 29, 2007 in Boothbay Harbor, at the completion of the “total rebuild” in Boothbay Shipyard. *See generally* Ex. G(h); *see* Tr. 621. In his report regarding the June 2007 survey, Mr. Wyman noted that, “[d]uring the past 15 months the vessel was examined both internally and externally every two to four weeks during the rebuild process” and that “this survey documents the entire rebuilding of the ship.” Ex. G(h) at 6. The report noted that, “[d]uring the past five years, the vessel has had a complete upgrading of structure and systems” and that Mr. Wyman had “made numerous recommendations which ha[d] been followed.” Ex. G(h) at 6. Mr. Wyman’s report concluded that, “[a]t the completion of this rebuild the vessel was found to be in **Very Good Condition.**” Ex. G(h) at 1 (emphasis in original).

Specifically, the report indicated that, during the 2006-2007 rebuild period, the Vessel’s underwater body was thoroughly inspected and recaulked, and that a new lead ballast shoe was added. Ex. G(h) at 6. Consistent with Mr. Wyman’s and Mr. Kosakowski’s testimony at trial, the report indicated that the Vessel’s topsides from the waterline to the main deck level had been totally rebuilt with all new framing and planking during the 2006-2007 rebuild. Ex. G(h) at 6. Mr. Wyman’s report further noted that, “[a]s a result, the structural condition of the topsides [was] in new condition.” Ex. G(h) at 6. With respect to the Vessel’s weather deck, the report

indicated that “[t]he weather deck was rebuilt by replacing all deteriorated wood and then covering the deck with ice and water shield and then installing a 3/4 inch thick deck on top of this.” Ex. G(h) at 6. The report noted that the Vessel’s sailing rig was in excellent condition, having been substantially upgraded during 2005 with additional work being done during the 2006-2007 rebuild. Ex. G(h) at 7. The report noted that the Vessel’s internal tween deck was found in good structural condition and that, during 2006-2007, the tween deck was gutted and totally rebuilt. Ex. G(h) at 7. With respect to the Vessel’s internal hold space, the report indicated that watertight bulkheads and deep floors to meet tonnage regulations were partially installed. Ex. G(h) at 7. With respect to the Vessel’s machinery and electrical, the report noted that the Vessel’s main engines and all auxiliary equipment were found to be in very good condition, all having been replaced or overhauled within the past few years. Ex. G(h) at 7. Mr. Wyman’s report concerning the June 2007 survey also noted that the Vessel had “new watertight bulkheads.” Ex. G(h) at 3.

Mr. Wyman’s report concerning the June 2007 survey contained no recommendations, including with respect to the Vessel’s ventilation. *See* Ex. G(h) at 7. The report concluded: “This vessel is in essentially new condition after five years spent on the total rebuild of the ship to high standards. The ship has a long history of successful operation and now with her totally rebuilt hull, rig, and new machinery is in Very Good Condition and well suited for Ocean voyaging with up to 12 passengers and up to 150 persons aboard for dockside events.” Ex. G(h) at 7.

## **VII. The Vessel from 2007 to 2012**

Following the 2006-2007 repair period, the Vessel took a number of trips as to which Mr. Hansen testified. Mr. Hansen believed the Vessel took a trip along the West Coast in 2008,

beginning “as high up as Vancouver” and sailing all the way down the West Coast. Tr. 1017. The Vessel sailed to the Galapagos. Tr. 1017-18. In 2009, the Vessel sailed from the United States to Europe, a trip which typically takes twenty-four to thirty days, depending on weather. Tr. 1018. In 2010, the Vessel sailed to the Great Lakes or along the East Coast – Mr. Hansen could not recall which trip was made. Tr. 1019.

Evidence as to maintenance and repairs undertaken with respect to the Vessel after 2007 came from various sources, including Mr. Wyman, John Svendson, and Laura Groves. John Svendson, who provided deposition testimony, portions of which were admitted into evidence at trial, *see* Ex. Y (April 16, 2019 deposition testimony of John Svendson), was employed in connection with the Vessel from the beginning of 2010 through the end of 2012, *see* Ex. Y 8:21-9:1, and was, at one point, the Vessel’s chief mate and first officer, *see* Tr. 836. Ms. Groves joined the Vessel’s crew in 2010 as a deckhand, Tr. 828, and was promoted to bosun toward the end of the 2011 season, Tr. 834.<sup>17</sup> Ms. Groves testified at trial as to various issues, including work done on the Vessel in 2010 and 2011, as well as her own experience on the Vessel during the Vessel’s final voyage. As described more fully below, the Court credits Ms. Groves’ testimony.

As Ms. Groves explained, there was a haul-out of the Vessel in 2010. Tr. 829. The Vessel’s hull was inspected, some caulking was done, the Vessel’s seams were redone, and a couple of the Vessel’s planks were replaced. Ex. Y 48:19-49:5. The Vessel underwent a “bottom job,” which Ms. Groves explained was standard during a haul-out. Tr. 829. Ms. Groves explained that a “bottom job” entails pressure washing a boat before removing, with sanders and

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<sup>17</sup> A vessel’s “bosun” is “in charge of every day maintenance” – *i.e.*, things worked on “throughout the season on a daily basis.” Tr. 835.

scrapers, any “fouling community” that may have built up on the boat – *i.e.* certain organisms that attach to surfaces underwater including, for example, barnacles. Tr. 829. Ms. Groves explained that, once the hull is cleaned, the boat’s seams between its planks are checked and re-caulked if needed. Tr. 829. Once the caulking is finished, the boat is coated twice with “bottom paint.” Tr. 829-30. Ms. Groves participated in each step of this process during the 2010 haul-out. Tr. 830. The Vessel’s then-bosun, Dan Cleveland, did most of the caulking. Tr. 830. Ms. Groves believed that one of the Vessel’s masts was replaced with a new mast during the 2010 haul-out. Tr. 830.

The Vessel was hauled out again in 2011, in St. Thomas, Virgin Islands. Tr. 835. The Vessel underwent a bottom job that year. *See* Tr. 835.

Mr. Wyman believed that the Vessel was hauled out almost yearly between 2002 and 2012. Tr. 609.

### **VIII. Pursuit of a Load Line Certification**

In 2009, Mr. Hansen and others considered getting a “load line” for the Vessel, which would have allowed the Vessel to carry twelve passengers. Tr. 1028; *see also* Tr. 205. The Vessel did not need a load line to operate in U.S. domestic waters as an uninspected recreational vessel or as a moored attraction vessel. Tr. 383; *see also* Tr. 1030.

The American Bureau of Shipping (“ABS”) was engaged to evaluate the Vessel in connection with the possibility of getting a load line. Tr. 1028; *see also generally* Ex. 61. ABS performed an inspection of the Vessel. Tr. 1029. An ABS “Statutory Survey Report” (the “ABS Survey Report”) was issued, *see generally* Ex. 61, based on an inspection conducted on November 11, 2010, Ex. 61 at 2. The ABS Survey Report noted certain “outstanding

deficiencies” after noting that “[i]t is recommended that the following outstanding deficiencies be dealt with to the satisfaction of the attending Surveyor as follows.” Ex. 61 at 3.

Mr. Hansen testified that, in this context, a “deficiency” is “basically a requirement that you would need to do in order to be compliant for a load line.” Tr. 1031. Mr. Hansen explained that, in this context, the term “deficiency” does not refer to a deficiency under Coast Guard regulations. Tr. 1031. It was decided not to move forward with the load line. Tr. 1036-37. Without the load line, the Vessel still was permitted to operate as a moored attraction vessel and as a private leisure yacht. Tr. 1037.

#### **IX. 2011 Coast Guard Inspection**

Sometime in 2011, the Vessel took another transatlantic trip to Europe. Tr. 914-15. It was arranged for the Coast Guard to make a visit and inspect the Vessel. Tr. 915. When the Coast Guard came aboard the Vessel, the Coast Guard felt that there had been some modifications to the Vessel that voided a tonnage certificate previously issued in connection with the Vessel. Tr. 915-16.

The Coast Guard allowed the Vessel to continue on its European tour. Tr. 916. The Coast Guard instructed that, when the Vessel arrived back in the United States, the Vessel’s certificate of inspection had to be turned in until the discrepancies that the Coast Guard noted were rectified. Tr. 916. The only issue was a tonnage issue. Tr. 916. The Coast Guard’s decision was appealed and then re-appealed to the Commandant of the Coast Guard, who granted the appeal. Tr. 918. The Vessel was thereafter brought in compliance with the Coast Guard’s requirements, and the Vessel’s tonnage was reinstated at some point during 2012. Tr. 945. The Vessel was ultimately granted the right to continue operating as it was, assuming that, at some

point in 2012, a staircase that the Coast Guard felt was voiding the Vessel's tonnage was removed. Tr. 918-19. The staircase was thereafter removed. Tr. 919.

#### **X. The 2012 Yard Period**

The Vessel was hauled out of the water in late Summer 2012 at Boothbay Harbor Shipyard for general maintenance work. Stip. Facts ¶ 27; *see also* Tr. 835. Ms. Groves and Mr. Kosakowski testified at trial as to the work done on the Vessel during the 2012 yard period.

Ms. Groves estimated that the 2012 yard period lasted a month. Tr. 840. Ms. Groves oversaw the bottom job during this time. Tr. 839.

During the 2012 haul-out period, crew members on the Vessel performed certain outer layers of caulking work below the waterline on the hull. Stip. Facts ¶ 32. Ms. Groves and others recaulked "any seams that needed recaulking below the waterline." Tr. 840; *see also* Tr. 315-16.

Ms. Groves detailed the recaulking process, explaining that the process involves one person taking a "hawsing iron" – *i.e.*, a metal tool that is approximately two or three inches wide and similar in width to a vessel's seam – and holding it against a particular seam. Tr. 840-41. Another person will then take a mallet, called a "beetle," and swing that mallet onto the hawsing iron. Tr. 841. Where the seam is good, the resulting impact of the beetle on the hawsing iron will not cause the caulking to move. Tr. 841. However, if the caulking is in need of replacing, the impact will result in the caulking going into the Vessel's seam, or sometimes in the Vessel's seam producing squirts of water – which sometimes results in "a pretty foul smell." Tr. 841. Ms. Groves explained, with respect to the 2012 yard period, that this occurred with respect to a "small/medium" amount of the caulking material of the Vessel's bottom and that this was "nothing surprising." Tr. 841. Before removing any caulking, Ms. Groves went around the Vessel and spray painted any of the Vessel's seams that did not look like they were still in great

condition “to make sure that we addressed them so that we couldn’t overlook them.” Tr. 841-42. Where needed, Ms. Groves would remove the Vessel’s caulking with a reefing iron – *i.e.*, a tool “like a metal hook” – so that “all of the old stuff” was pulled out. Tr. 842. She would then recaulk the seam with a caulking iron, and use a hawsing iron and mallet to ensure the seam’s caulking was tight. Tr. 842.

Mr. Kosakowski also performed certain recaulking work on the Vessel’s bottom during this 2012 yard period. *See* Tr. 312. Specifically, Mr. Kosakowski explained that “[t]here were maybe three places that [Captain Walbridge] saw the boat leaking, so the water was coming into the boat, and he had me and Jim Jones, the other shipwright that would have been able to caulk those areas, had us address those.” Tr. 312.

Ms. Groves’ and Mr. Kosakowski’s testimony differed somewhat with respect to the amount of recaulking work done on the bottom of the Vessel during the 2012 yard period. Whereas Mr. Kosakowski testified that, during this period, very minimal work was done on the bottom of the boat, Tr. 312, Ms. Groves testified that “[p]robably a quarter to a third” of the bottom was recaulked, Tr. 840. Regardless, Mr. Kosakowski felt that the Vessel’s bottom was in very good condition. Tr. 311. Mr. Kosakowski did not see any rotting at all on the bottom of the boat during this period. Tr. 314.

As to the caulking done on the Vessel’s topsides during the 2012 yard period, Mr. Kosakowski explained that less than five percent of the Vessel’s caulking needed to be redone at this time, and that the caulking that was done by the crew was satisfactory. Tr. 315-16.

## **XI. The Vessel's Rot Condition**

During the 2012 yard period, two decayed planks were removed on the Vessel's port and starboard side, respectively, and replaced. *See* Stip. Facts ¶ 31. Evidence as to this issue came from various sources, including Ms. Groves, Mr. Kosakowski, and Mr. Jackimovicz.

In her position as bosun, Ms. Groves conducted monthly inspections of the Vessel's rigging and hull. Tr. 846. During these inspections, Ms. Groves would use a "marlin spike" – a tool made of metal – to tap on the Vessel's hull above the waterline, to ensure that there were no spots where the Vessel was starting to decay or rot. Tr. 846-47. During Summer 2012, Ms. Groves found unusual spots – specifically, "a few pockets of rot underneath the channels a little aft of midships on either side of the boat." Tr. 847. Ms. Groves testified that the degree of the rot "was insignificant. It was a small amount." Tr. 897; *see also* Tr. 871. When Ms. Groves found these pockets of rot, she notified Captain Walbridge. Tr. 847. Ms. Groves believed that the Vessel would be hauled out "for a reasonably long haul out period in the fall" and that the pockets she discovered would be addressed then. Tr. 847. Ms. Groves testified that the rot she saw was not "structural" and that there was no problem with sailing the Vessel during the time between when Ms. Groves discovered the rot and when the Vessel was scheduled to be hauled out. Tr. 898; *see also* Tr. 905-06.

During the 2012 yard period, employees at the yard entirely removed the planks with respect to which Ms. Groves had found pockets of rot. Tr. 848. The boards that were removed were replaced with new oak planking. Tr. 849; *see also* Tr. 282-83, 293-94. Wood preservative was applied to at least certain parts of the Vessel, and no other planks were removed. Ex. 97 42:5-7. Mr. Kosakowski testified that the planks that were replaced on both sides of the Vessel were approximately four feet above the waterline. Tr. 312-13.

Ms. Groves', Mr. Kosakowski's, and Mr. Jackimovicz's testimony differ with respect to the degree and the extent of the rot condition.

Ms. Groves explained that, beyond the Vessel's planking, "[t]he rot in at least one place had spread into one of the frames behind it." Tr. 848. Ms. Groves looked briefly at what was behind the board once it was removed and noticed that rot had spread into the frame. Tr. 851. When Ms. Groves was looking at the frame, she saw a pocket of rot "probably a little more than a foot" wide and "six inches in diameter." Tr. 851-52. Ms. Groves testified that she did not see rot anywhere else. Tr. 852. Ms. Groves testified that she was not able to determine how far the rot had spread. Tr. 868. Ms. Groves testified that she was not "shocked or terrified" by the rot. Tr. 868. Ms. Groves recalled thinking that the rot was manageable. Tr. 868. When asked about the extent of the rot beyond the rot that she was able to see, Ms. Groves testified that she understood that the rot other than what she saw was not structural to the Vessel's frames. Tr. 908.

Mr. Jackimovicz provided deposition testimony, portions of which were admitted into evidence at trial, *see* Ex. 97, that – like Ms. Groves' trial testimony – depicts a manageable and non-structural rot condition. According to Mr. Jackimovicz, "[t]here was a couple of plank[s] that we had put in in 2007 that he [Captain Walbridge] wanted looked at. One plank on the [starboard] side, and one plank on the port side that looked a little rough on the outside so they had the plank removed, and they found a fair amount of decay behind in that area." Ex. 97 41:9-14. Mr. Jackimovicz saw the Vessel with the planks removed. Ex. 97 41:18-19. Mr. Jackimovicz did not recollect how deep the decay was but knew that the decay did not go to the back side of the Vessel's frame because he "poked around in a couple of these places with a pocket knife and felt some solid wood behind there." Ex. 97 45:6-10. Mr. Jackimovicz

explained that this condition “required attention,” Ex. 97 45:11-12, and that there was a plan to examine this condition in the next year or two, Ex. 97 46:18-20. Mr. Jackimovicz considered this to be a sufficient timeframe within which to deal with the problem as long as the Vessel was operated in calm to moderate conditions. Ex. 97 46:18-24. Mr. Jackimovicz explained that “we discussed a little bit what the problem might be and came to the conclusion of lack of ventilation.” Ex. 97 42:7-9.

Mr. Kosakowski, meanwhile, testified to a comparatively more severe and extensive rot condition. Mr. Kosakowski testified that, during the 2012 yard period, he and Captain Walbridge examined a spot that was “mid ship on the portside [and] had a one-by-one plywood patch on the hole.” Tr. 277. Mr. Kosakowski testified that he and Captain Walbridge “took the patch off and found a hole through the planking about the size of a softball. The hole was black and looked . . . very rotten.” Tr. 278. Mr. Kosakowski testified that this hole was in the Vessel’s Douglas fir planking. Tr. 278. Mr. Kosakowski explained that he and Captain Walbridge decided to investigate and make as minimally intrusive of a hole as they could to see if it was the entire plank that needed to be pulled off of the Vessel. Tr. 278. Mr. Kosakowski testified that, when that section was taken out, more decay was found. Tr. 279.

Like Ms. Groves and Mr. Jackimovicz, Mr. Kosakowski testified that there was decay beyond the Vessel’s planking, into the Vessel’s framing. Tr. 279. Mr. Kosakowski testified, though, that “[w]e couldn’t find an end to the decay,” Tr. 279, and that, in a 14-foot span, there were “probably, say, six frame sets and they were all showing the same decay,” Tr. 280. Mr. Kosakowski further testified, in tension with Ms. Groves’ and Mr. Jackimovicz’s testimony, that the framing he saw – and the planking as well – had no strength to it, and that “[a] lot of the planking and the framing had the same mass as foam.” Tr. 280-81. Mr. Kosakowski testified

that “[i]t was almost like it had been completely turned to charcoal. There was very little mass left to it and it was just not rigid like oak typically is.” Tr. 281.

Mr. Kosakowski further testified as to certain photographs that he took of portions of the Vessel that he claimed were exhibiting rot. Tr. 281-82; *see also* Ex. 6. When asked why he took and kept photographs both of the Vessel and of other projects, Mr. Kosakowski explained that “it’s nice to have pictures of remembering how you put that together, but also, you know, bragging rights” – “Look what I built.” Tr. 321.

Certain of Mr. Kosakowski’s photographs depicted planking that was taken off of the Vessel. Tr. 283. Mr. Kosakowski testified as to one of these photographs showing the “inside face of the plank” – *i.e.*, “the side that would have been touching the frames,” Tr. 285; *see also* Ex. 6 at 1, explaining that the planking shown in the photograph exhibited white mold, charring, and cracking, Tr. 285-86. Mr. Kosakowski testified that the “cracks that you see are very catastrophic for the strength of the planking” and that “these cracks go almost all the way through the width of the planking rendering it almost useless as a plank.” Tr. 286.

Mr. Kosakowski testified as to planks or pieces of planks that were not removed from the Vessel that exhibited the same characteristic. Tr. 286-87. Specifically, Mr. Kosakowski testified as to a photograph of “the aft section of the ship,” explaining that some planks were pulled off in that area, revealing “the same amount of decay.” Tr. 287; *see also* Ex. 6 at 23. Mr. Kosakowski testified that “[t]here was no way to structurally repair the planking in this area.” Tr. 287. Mr. Kosakowski testified as to the photograph of the aft section of the ship that the photograph depicted a frame that was in very poor condition, with considerably deep cracking and checking.<sup>18</sup> Tr. 288. Mr. Kosakowski testified as to other photographs depicting checking and

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<sup>18</sup> “Checked” means to have a lot of cracks. Tr. 684.

“cracking but in very small increments.” Tr. 288-89; *see also* Ex. 6 at 20, 24. Mr. Kosakowski testified that certain of the Vessel’s “black locust dowels”<sup>19</sup> exhibited rot and fungus. Tr. 291. Mr. Kosakowski testified that the framing on the starboard side of the Vessel was in the same condition as the portside was. Tr. 293.

Mr. Kosakowski testified that nothing was done to remedy this condition “other than to try to put enough wood back to fasten the plank.” Tr. 293. Mr. Kosakowski testified that the repairs made were “a cosmetic fix,” and that “we were not going to get a structural fix in such a small area.” Tr. 293-94.

Mr. Kosakowski testified that Ms. Groves, as the Vessel’s bosun, would have been involved in the exploratory work related to the Vessel’s rot condition. Tr. 295. When asked if he discussed this rotting condition with any crew member, Mr. Kosakowski testified that “[t]he only person that I would have grabbed specifically would have been Laura [Groves] and the captain, Captain Walbridge.” Tr. 296. Mr. Kosakowski testified that Ms. Groves and Adam Prokosch came to discuss this condition with him. Tr. 296. Mr. Prokosch was a crew member of the Vessel. *See* Tr. 836.

Although the Coast Guard was present at some point during the 2012 haul-out, *see* Tr. 322, Mr. Kosakowski did not mention the rot that he found to the Coast Guard representative, Tr. 323. Mr. Kosakowski did not tell anyone at Bounty Org. other than Captain Walbridge about this issue. Tr. 324.<sup>20</sup>

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<sup>19</sup> “Black locust” is a “very, very dense” material. Tr. 273.

<sup>20</sup> Over defense objection, Mr. Kosakowski testified that Captain Walbridge met Mr. Kosakowski in Mr. Kosakowski’s office the morning after “we found the rotten frames” and that Captain Walbridge told him that “Bob really wants to see if he could sue the yard.” Tr. 298. Mr. Kosakowski, over defense objection, testified that Captain Walbridge told him that Captain Walbridge had convinced Mr. Hansen not to sue the yard. Tr. 299. Also over defense objection, Mr. Kosakowski testified that Captain Walbridge told him that Captain Walbridge

The Court credits Ms. Groves' testimony, including her testimony as to the Vessel's rot condition, and credits Ms. Groves' testimony and Mr. Jackimovicz's testimony as to the Vessel's rot condition over Mr. Kosakowski's testimony as to the Vessel's rot condition.

At trial, Ms. Groves came across as detail-oriented and discerning. Ms. Groves spoke about the Vessel and the work done on the Vessel with a clear command of the Vessel, including the Vessel's structure, condition, capabilities, and maintenance/repair needs. Ms. Groves carefully and methodically walked the Court through various processes used in maintaining and repairing the Vessel with a precision that lent support to her credibility. Ms. Groves' precise and methodical approach to describing work done on the Vessel left the Court with the impression that Ms. Groves was not inclined toward exaggeration.

By contrast, Mr. Kosakowski's testimony – including Mr. Kosakowski's suggestion that he had taken pictures of the Vessel's rot condition for “bragging rights” – gave the impression that Mr. Kosakowski was prone to exaggeration, undercutting Mr. Kosakowski's testimony as to the Vessel's rot condition.

Mr. Kosakowski's testimony as to the Vessel's rot condition is further undercut by his testimony that he spoke with Ms. Groves about the rot condition. Had the Vessel's rot condition, indeed, been as severe and extensive as the rot condition Mr. Kosakowski described in his

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had told Mr. Hansen “we need[] to get rid of the boat as soon as possible.” Tr. 299. Defendants sought to exclude this testimony on hearsay grounds. *See* Tr. 297-98. The parties submitted briefing on this evidentiary issue during the course of trial, *see* ECF Nos. 147-48, 150-51, and Acadia made arguments as to this issue in its proposed findings of fact and conclusions of law, *see* Acadia's Proposed Findings of Fact and Conclusions of Law at 40. Notably, Mr. Hansen denied having had the conversation described in the objected-to portions of Mr. Kosakowski's testimony. *See* Tr. 1037-38. In any event, the Court need not resolve the parties' dispute concerning the objected-to portions of Mr. Kosakowski's testimony because, even if the Court were to consider that testimony, it would not alter the Court's conclusions herein.

testimony, and had Mr. Kosakowski, indeed, discussed that rot condition with Ms. Groves, one would have expected Ms. Groves not to have testified as to a rot condition that was manageable and non-structural, as she did.

Mr. Kosakowski's testimony as to the Vessel's rot condition is yet further undercut by Mr. Jackimovicz's testimony as to the Vessel's rot condition. If, as Mr. Kosakowski's testimony suggested, significant portions of the Vessel's framing had the mass of foam or charcoal, it would have been unlikely for Mr. Jackimovicz to have detected solid wood in the portions of the Vessel's framing that he examined using a pocketknife.

Particularly when accounting for the credibility of the witnesses who testified as to the Vessel's rot condition, the greater weight of the evidence indicates that the Vessel's rot condition was not severe or extensive, and did not compromise the Vessel's structure.

## **XII. Mr. Wyman's October 2012 Survey**

In October 2012, Acadia requested a "condition and value" survey, preferably done by Mr. Wyman. *See* Ex. W at 3-4. Acadia indicated that an in-water survey would be acceptable. *See* Ex. W at 2. Mr. Wyman remembered questioning the validity of doing an in-water survey, Tr. 760, but had done an in-water survey of the Vessel before, *see* Ex. G(a) at 1.

At the time of the request for a new survey on October 4, 2012, the Vessel was dry docked at Boothbay Harbor Shipyard. Stip. Facts ¶ 35. Mr. Wyman surveyed the Vessel while the Vessel was in the water on October 19, 2012. Stip. Facts ¶ 36; *see also* Tr. 689. Mr. Wyman made a verbatim copy of the notes that he made while doing the survey. Tr. 688-89; *see also* Ex. G(i) at 1. Mr. Wyman was on the Vessel for about four hours in connection with this survey. Tr. 690; *see also* Ex. G(i) at 1. Mr. Wyman checked the bilges and was down in the lower holds. Tr. 692. Mr. Wyman did not remember seeing water in the bilges but noted that "it's not

uncommon for a little bit of water to be in the bilges of a wooden ship.” Tr. 692-93. Mr. Wyman did not operate the bilge pumping systems, or the generators or engines. Tr. 693. Mr. Wyman did some “tap[p]ing” on the wood and did not discover any signs of deterioration that stood out to him. Tr. 693. Mr. Wyman used a knife like a pocketknife to test for rot “[w]herever something looked suspect or potentially suspect.” Tr. 693-94. Mr. Wyman testified that it was essentially correct that when he did the inspection there was no way to tell what condition the Vessel’s framing was in. Tr. 694. Mr. Wyman could see a “very small part of a very small percentage of the framing.” Tr. 695-96.

Mr. Wyman’s handwritten notes regarding the October 2012 survey reflect that Mr. Wyman inspected all compartments. Ex. G(i) at 1. Mr. Wyman’s notes state that “[t]he Vessel was found in good condition,” that the Vessel “had just completed a haul out and painting of bottom prior to [Mr. Wyman’s] survey,” and that the Vessel’s “Captain reported bottom was in good condition.” Ex. G(i) at 1. The conclusion that Mr. Wyman reached at the end of the work done in 2007 – including Mr. Wyman’s determination that the Vessel was in “essentially new condition” – did not change after Mr. Wyman’s 2012 survey. Tr. 636.

Mr. Wyman’s notes regarding the October 2012 survey include, *inter alia*, a recommendation that a tiller be repaired “where significantly corroded by adding a new reinforced top plate.” Ex. G(i) at 1. Mr. Wyman testified that the condition with respect to the tiller was repaired. Tr. 634.

Mr. Wyman was not told about the rot condition that was discovered in 2012, and he was unaware of that condition prior to the Vessel’s sinking. Tr. 696-97. Mr. Wyman had been on board the Vessel in September 2012 for a day and a half and did not smell any rot on the Vessel in that time. Tr. 636-37. Mr. Wyman testified that, if someone had brought the rot condition to

his attention during his survey on October 19, he would have had concern but “probably not” about the watertight integrity of the Vessel. Tr. 697. Mr. Wyman explained that, where this rot plank was found was “above the wale . . . above the tween deck” in an area “called the shelter deck space” which “is specifically a non-watertight space.” Tr. 697. Mr. Wyman testified that, “as far as being concerned about watertightness, if there is a damage to a plank there, it’s not good but it’s not of extreme concern to me.” Tr. 697-98. Mr. Wyman explained that “the higher up [deterioration or a lack of watertight integrity] is, the less probability that you’re going to get water in through anything like this.” Tr. 699. In contrast to Mr. Kosakowski’s testimony that the planks that were replaced on both sides of the Vessel were approximately four feet above the waterline, Tr. 312-13, Mr. Wyman testified that the “location where that rot was found was about 10 feet above the water line, which is a long way,” Tr. 699. Mr. Wyman testified that it would probably not concern him if the rot was lower down closer to the wale because the wale is still “six feet above the waterline.” Tr. 700.<sup>21</sup>

Mr. Wyman testified as to certain of Mr. Kosakowski’s photographs. As to certain of the photographs depicting the Vessel’s frames, Mr. Wyman testified that he never personally observed what was shown in the photographs. Tr. 754. Mr. Wyman, upon reviewing certain photographs of the Vessel’s frames, saw discoloration but did not see anything that he could specifically identify as rot in the Vessel’s frame. Tr. 754. Mr. Wyman, in reviewing the photographs, did not “see any chunks of the frame missing or areas where it’s obviously rotted.” Tr. 754. Mr. Wyman testified that, if he had seen the condition depicted in the photographs, he

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<sup>21</sup> Given Mr. Wyman’s significant history and experience with the Vessel, the Court credits Mr. Wyman’s testimony concerning the location of the rot discovered in the Vessel’s planking over Mr. Kosakowski’s testimony concerning the rot’s location. However, even if the rot were only four feet above the waterline, as Mr. Kosakowski’s testimony indicates, that fact would not alter the Court’s conclusions herein.

would have agreed with a decision to defer any repairs until the Vessel's next drydock or haul-out. Tr. 781.

Mr. Wyman's testimony as to the Vessel's rot condition and as to Mr. Kosakowski's photographs – which the Court credits – further undercuts Mr. Kosakowski's testimony regarding the Vessel's rot condition and, additionally, further indicates that the Vessel's rot condition was not severe or extensive, and did not compromise the Vessel's structure.

### **XIII. The Vessel's Bilge Pumping System**

Sometime after the Vessel was purchased in 2001 but before June 29, 2007, the Vessel's bilge system was changed. Tr. 622-23. Mr. Wyman designed the Vessel's new bilge system. Tr. 623. Whereas the original bilge system used galvanized steel piping, the new system had copper-nickel piping – which is corrosion resistant. Tr. 623. In addition to the piping, a new manifold hold was installed that brought all the pipes together, each with their own valves. Tr. 623. Additionally, whereas the original bilge system had two electric pumps, Tr. 623, the new system had two electric pumps and one hydraulic pump, with three separate power systems, Tr. 624. The two electric pumps could be powered off of the Vessel's two generators, and the hydraulic pump was powered off of one of the Vessel's main engines. Tr. 624. This system gave the Vessel three options for pumping the bilges. Tr. 624. Any of the Vessel's compartments could be pumped with any one of these three pumps. Tr. 624.

Further, an additional “totally independent hydraulic pump” was installed, which could be powered off of the main engine that had the other hydraulic pump on it. Tr. 624. The two hydraulic pumps were called “trash pumps” because they were “designed to pass a fair amount of debris through them and not get clogged, because pumps can get clogged on occasion.” Tr. 624-25.

The pipe that was used for the main bilge system was larger than required, the pumps were more than required, and the powering for the pumps was more than was required. Tr. 625.

Generally, the Vessel's bilge pump systems were run at the end of every four-hour watch while the Vessel was underway. Tr. 875; *see also* Ex. 99 (June 28, 2016 deposition testimony of Adam Prokosch) 83:6-11. If the Vessel was in really bad weather, the pumps would need to be run longer than if the Vessel were in nice weather. Tr. 875.

#### **XIV. The Vessel's Ventilation**

Mr. Wyman testified that “[w]ooden ships in general do better if they are well ventilated. If it is ventilated well, it's less likely to deteriorate through rot.” Tr. 634-35. Mr. Wyman testified that the principal concern with ventilation is the deterioration of the wood. Tr. 685-86.

Mr. Wyman testified that the Vessel, in particular, did not have as much ventilation as he felt was appropriate. Tr. 635. Mr. Wyman's handwritten notes regarding his October 19, 2012 survey of the Vessel included a recommendation that “better ventilation for all hold spaces should be provided.” Ex. G(i) at 1. Mr. Wyman testified that this was not the first time he had recommended considering getting better ventilation and that he suspected he had recommended it “during conversations right along from 2001 right on through 2012.” Tr. 635. Mr. Wyman testified that he had been recommending enhancement ventilation from the beginning of his involvement with the Vessel. Tr. 684-85. Mr. Wyman testified that “there were some minor things done” but that he did not “believe that there was any major work done to increase the ventilation.” Tr. 685.

Mr. Wyman testified that it is not common for wooden ships to have a ventilation system. Tr. 779. Mr. Wyman testified that he had surveyed “[p]robably a couple of dozen, probably

more” wooden ships over the years, and that only one of those ships had ventilation systems on board. Tr. 779.

## **XV. The Vessel’s Stability**

At one point, a “stability letter” was issued with respect to the Vessel. Tr. 475; *see also* Tr. 206. The stability letter resulted from efforts to obtain a load line certification for the Vessel. *See* Tr. 205-06. A stability letter signifies that the relevant vessel meets certain requirements set forth by the U.S. Coast Guard for the amount of passengers and for the route that the vessel intends to sail with those passengers. Tr. 207. A stability letter was not required for the Vessel to act as a moored attraction vessel or as a recreational vessel. *See* Tr. 241, 386, 413, 502.

Harold Whitacre – a naval architect and marine engineer who has worked on a number of wooden tall ships, Tr. 197, including the Vessel, Tr. 200, and who testified at trial – performed stability calculations which led to the issuance of a stability letter with respect to the Vessel, Tr. 207. A document dated August 7, 2009 and titled “Stability Letter” (the “Stability Letter”) indicated that a stability test, witnessed by the U.S. Coast Guard, was conducted on the Vessel at St. Petersburg, Florida, on April 15, 2009. Ex. 57 at 3. The Stability Letter noted that the stability test’s results indicated that the Vessel’s stability was satisfactory for operation in certain waters, provided that certain restrictions were observed. *See* Ex. 57 at 3-4. The Stability Letter provided, in relevant part, that “[t]his stability letter has been issued based upon the following light ship parameters” and listed certain parameters. *See* Ex. 57 at 3. The Stability Letter further provided that “[a]ny alteration resulting in a change in these parameters will invalidate this stability letter.” Ex. 57 at 4.

During the 2012 yard period, certain tanks on the Vessel were moved around. Tr. 626-27; *see also* Ex. 99 61:24-62:2. The tanks were moved horizontally from one of the

Vessel's compartments to another. Tr. 629-30. According to Mr. Wyman, there was no significant change in weight as a result of the tanks being moved, and there was no change in the stability of the Vessel as a result of the tanks being moved. Tr. 630. Mr. Wyman did calculations to make that determination. Tr. 630. Mr. Wyman explained that, because the weight of the tanks was moved horizontally with no vertical change, the center of gravity had not changed and the meta-center had not changed. Tr. 630. He explained that "the vessel is still the same vessel," and that there was no change in the Vessel's "indicator of stability, so there was no change in stability." Tr. 630.

Also as part of the 2012 yard period's work, ballast was moved. Tr. 861; Ex. 99 62:25-63:1. The ballast was moved from one place in the bilge to another place in the bilge, and was moved horizontally only. Tr. 862-63; *see also* Tr. 734. The ballast was not moved far. Ex. 99 63:2-4. Mr. Wyman testified that the ballast's movement had no measurable impact on stability. Tr. 734. Mr. Wyman testified that he did not do any calculations to confirm that "because it was obvious." Tr. 734.

Mr. Wyman testified that the Vessel's stability was adequate in 2012 when the Vessel left port. Tr. 630-31.

Mr. Whitacre testified that, at some point in what he thought was approximately late 2012, he talked to Captain Walbridge about things that had been moved about on the Vessel, including tanks and ballast. Tr. 229-30. Mr. Whitacre raised a concern in his professional capacity as to the potential invalidation of the Stability Letter. Tr. 230-31.

## **XVI. The Vessel's October 2012 Voyages**

After Mr. Wyman's inspection of the Vessel on October 19, 2012, the Vessel sailed to New London, Connecticut, where the Vessel remained until departing for the Vessel's final voyage on the evening of October 25, 2012. Stip. Facts ¶ 38.

During the Vessel's trip from Boothbay to New London, Ms. Groves checked the Vessel's bilges every hour for most of the trip. Tr. 853. According to Ms. Groves, the bilges "were incredibly dry" – the "driest [she] had every seen those bilges" – and "[t]here was no water in them." Tr. 853. Ms. Groves' testimony aligns with Mr. Svendson's deposition testimony that the Vessel's bilge pumps were working prior to the 2012 yard period, and that he witnessed them working after that. *See* Ex. Y 62:25-63:7.

### **A. Dr. Dooley's Testimony and Report Regarding the Vessel's Final Voyage**

Dr. Austin Dooley testified at trial as an expert on weather hindcast and forecast. Tr. 432. Dr. Dooley methodically and carefully walked the Court through a report that he prepared regarding the weather conditions present during the Vessel's final voyage, and the Vessel's location as compared to Hurricane Sandy's location during the Vessel's final voyage. *See* Ex. 13; *see also* Tr. 463-64. The Court credits Dr. Dooley's testimony as to these issues.

According to Dr. Dooley, at 5:00 p.m. on Thursday, October 25, 2012, a National Hurricane Center chart depicting what Mr. Dooley called a "cone . . . of uncertainty" came out, showing a three-day forecast track of Hurricane Sandy. Tr. 435. This forecast indicated that "[Hurricane] Sandy was traveling first at a northeasterly direction, then would turn to the north – northerly direction, and then ultimately head towards the continental U.S. in a northwesterly direction." Tr. 435. Hurricane Sandy "was forecast to run into anywhere from the Delmarva Peninsula to the coast of New Jersey." Tr. 435.

The Vessel left New London on October 25 around 6:00 p.m. Tr. 448. St. Petersburg, Florida was the Vessel's ultimate destination. Tr. 1106; *see also* Tr. 878. Dr. Dooley estimated that, when the Vessel left on October 25, Hurricane Sandy was 2,000 to 3,000 miles away from the Vessel – “[a] long way away.” Tr. 450-51.

On Friday, October 26, there was a five-day outlook issued with respect to Hurricane Sandy that indicated landfall somewhere around Cape May, New Jersey. Tr. 452. The forecast at that time was that Hurricane Sandy would turn eventually north and then northwest. Tr. 452. On October 26 at 11:00 p.m., Hurricane Sandy was approximately 500 or 600 miles south of the Vessel. Tr. 452.

A forecast issued at 8:00 a.m. on Saturday, October 27 predicted that Hurricane Sandy's turn would occur sometime after 2:00 a.m. on Monday, October 29. Tr. 453-54. On October 27 at 9:21 a.m., the Vessel turned to the Southwest. Tr. 455. Hurricane Sandy was, at that time, heading northeast with forecast to turn to the Northwest at around 2:00 a.m. on October 29. Tr. 455.

According to Dr. Dooley, the traditional less dangerous side of a hurricane is the western side of the hurricane. Tr. 456. With respect to Hurricane Sandy, though, “the heaviest conditions were in the southwest quadrant.” Tr. 460. A text issued at 10:00 a.m. on October 27, which forecasted Hurricane Sandy's track, showed that the southwest quadrant was forecast to have a 90-mile radius of 64-knot winds. Tr. 461.

At noon on October 27, wind and wave conditions were reaching 30 knots and 10 to 15 feet. Ex. 13 at 29. Wind speeds at the Vessel increased thereafter until 8:00 p.m. to 9:00 p.m. on Sunday, October 28. Ex. 13 at 29.

At about 2:00 a.m. on Sunday, October 28, the Vessel changed course again – and was then headed southeast. Tr. 456-57. Significant wave heights at the Vessel reached 25 to 30 feet in the morning of October 28. Ex. 13 at 29. During the overnight period from 8:00 p.m. on October 28 to the time of abandon ship, the Vessel “was within the radius of tropical storm force and 50 knot winds.” Ex. 13 at 29. “Conditions at the time of abandon ship included sustained winds of 45 to 50 knots and SWH values of 20 feet.” Ex. 13 at 29.

At 2:00 a.m. on October 29, the Vessel was about 200 miles from Hurricane Sandy. Tr. 458-59. Hurricane Sandy had already gone past the Vessel. Tr. 459. The Vessel was in Hurricane Sandy’s southwest quadrant at the time. Tr. 459.

The Vessel was lost on October 29, 2012. Stip. Facts ¶ 39. The Vessel was headed southeast at the time of the Vessel’s loss. Tr. 457.

#### **B. Captain Walbridge and the Vessel’s Final Voyage**

Additional evidence regarding the Vessel’s final voyage came from Ms. Simonin and Mr. Hansen.

During the Vessel’s final voyage, Ms. Simonin sent Captain Walbridge weather updates from the National Hurricane Center’s web page about every four hours, via email. Tr. 921. Ms. Simonin could see the Vessel’s current location during the Vessel’s final voyage and monitored it. Tr. 922-23. A series of email messages sent between Ms. Simonin and Captain Walbridge (and in which an email account named “rhansen@islandaire.com” appears), *see* Ex. X at 4-10, includes a message from Captain Walbridge indicating that, on October 27 at 7:54 a.m., Captain Walbridge still had not seen any physical signs of the hurricane, Ex. X at 5. The email messages indicate that, on October 27, 2012 at 8:09 a.m., Captain Walbridge felt “okay about trying to sneak to the west of Sandy” and was adopting a “[n]ew course.” Ex. X at 6. The email

messages indicate that, on October 27, 2012 at 7:38 p.m., Captain Walbridge planned to “go fast and squee[z]e by the storm and land as fast as we can. I am thinking that we will pass each other sometime Sunday night or Monday morning.” Ex. X at 7. The email messages indicate that, on October 28, 2012 at 1:11 a.m., Captain Walbridge was “trying to stay out of the way” of the hurricane. Ex. X at 8. A subsequent message sent from Ms. Simonin on October 28, 2012 at 5:38 a.m. stated: “Looks like you will pass the storm tonight or today based on where it is at the moment and your current location.” Ex. X at 9. In a subsequent message sent on October 28, 2012 at 7:32 a.m. from Captain Walbridge to Ms. Simonin (and rhansen@islandaire.com), Captain Walbridge wrote, “I am thinking we will pass in the night [tonight].” Ex. X at 10. Ms. Simonin lost contact with Captain Walbridge at about 11:00 p.m. on October 28. Tr. 923.

Mr. Hansen approved of Captain Walbridge sailing the Vessel south by east, and had approved of Captain Walbridge “turn[ing] tail and run[ning] north if the hurricane came to him.” Tr. 1106. Mr. Hansen testified that Captain Walbridge “was not authorized in any way, shape or form to head into a hurricane. That I can guarantee you.” Tr. 1106. The ultimate course of navigation was up to the Captain. Tr. 1106.

### **C. Additional Evidence Regarding the Vessel’s Final Voyage**

Additional evidence regarding the Vessel’s final voyage came from, *inter alia*, Ms. Groves, Mr. Svendson, and Mr. Prokosch.

Before the Vessel’s departure on October 25, the Vessel’s crew became aware of a “hurricane along the voyage.” Tr. 878. Ms. Groves had some concerns about the impending weather but, eventually, the entire crew deferred to Captain Walbridge’s discretion on the storm. Tr. 879. Ms. Groves’ testimony regarding the plan for the Vessel’s voyage aligns with Mr. Svendson’s deposition testimony on this issue, in which Mr. Svendson explained that, before the

Vessel departed New London, there was a meeting held with the crew at which Captain Walbridge talked about, *inter alia*, “the weather and what his options and plans were to stay away from the weather as far as either going out to sea or even north or being able to tuck in between land and the hurricane if the weather presented that option . . . depending if the hurricane went straight, went in or went out.” Ex. Y 74:8-21.

According to Ms. Groves, when the Vessel left New London, “[w]e had just completed a lot of work” and the Vessel was “in great condition, you know, relatively speaking.” Tr. 857. Ms. Groves, who had been on the Vessel for three years at that time, thought that the Vessel was in the best shape in which Ms. Groves had seen the Vessel. Tr. 857. The crew was in good shape. Tr. 857. When the Vessel left New London, the Vessel’s crew knew that the Vessel would “hit some heavy weather,” and a list of jobs had been prepared for the crew to complete so that the Vessel would “be ready for heavy weather.” Tr. 853-54. These jobs were completed underway during the first two days of the Vessel’s final voyage. Tr. 854. The weather was “[d]elightful” the first two days. Tr. 854. When the Vessel left New London, the Vessel’s bilge pumps, as far as Ms. Groves knew, were working fine. Tr. 854. Also during the first two days of the Vessel’s final voyage, the Vessel’s bilge pumps, as far as Ms. Groves knew, were working fine. Tr. 854.

It was not until approximately Saturday, October 27 that the Vessel encountered some heavy weather. Tr. 879. It was at that time that the waves and wind started increasing. Tr. 879. By the evening of October 27, the Vessel and crew were in “pretty bad” weather. Tr. 882.

Approximately late Saturday, the Vessel’s bilge pumps became surprisingly full. Tr. 880. At this point, Captain Walbridge was operating the bilge pumps. Tr. 881. Ms. Groves relieved the Captain by operating the bilge pumps herself for a brief period of time. Tr. 880. During the

evening of October 27, the water was not yet over the Vessel's floorboards – *i.e.*, the Vessel's "sole boards." Tr. 882. Ms. Groves felt that things were still under control at that time. Tr. 884.

At some point on Sunday, October 28, Captain Walbridge gave orders to "hove to" in order to put water on the starboard side of the Vessel because, at the time, the starboard side pump was working better. Tr. 888. It was on Sunday that it became apparent that the Vessel's crew was losing the "water battle." Tr. 884. At some point, water rose all the way up to the Vessel's sole boards and the bilges. Tr. 884. Ms. Groves thought that it was Sunday evening when the sole boards started to go under water. Tr. 884. Water was coming through seams in the Vessel's engine room, mop closet, and line locker – at locations approximately ten feet above the waterline. Tr. 891-94. With respect to the seam in the engine room, Ms. Groves explained that the seam "opened up because we were getting smacked in the side by 30-foot waves." Tr. 892. At some point, the Vessel's generators and engines lost power. Tr. 895. Ms. Groves understood that the Vessel's engines lost power because they went underwater at some point. Tr. 895.

Early in the morning on Monday, October 29, the crew began shutting down compartments because of water ingress. Tr. 891. At some point, the Vessel's crew, including Ms. Groves, abandoned ship. Tr. 896, 904-05. There were two deaths. Tr. 925.

Mr. Prokosch, who also was on the Vessel's final voyage, *see* Tr. 836, provided deposition testimony, portions of which were admitted into evidence at trial, *see* Ex. 99, depicting a somewhat different version of events, particularly with respect to the operation of the Vessel's bilge pumping system. According to Mr. Prokosch, during the first two days after the Vessel left New London, there was trouble with the Vessel's bilges. Ex. 99 82:16-18. Mr. Prokosch testified that "[t]he bilge pumps still were not catching prime" and that he thought this

was “a very big deal.” Ex. 99 82:20-22. According to Mr. Prokosch, the Vessel was taking on water those first few days. Ex. 99 82:25-83:2. Mr. Prokosch testified that, at the time the Vessel left Boothbay, “we needed to address that bilge pump issue,” Ex. 99 83:21-25, but that “[i]t didn’t happen,” Ex. 99 84:4. Mr. Prokosch testified that “we were losing the sinking battle at the dock, before we ever went into a hurricane.” Ex. 99 75:19-21. Mr. Prokosch testified that he could not “say that leaving Boothbay Harbor or New London was any more sinky than any normal day on board the [Vessel].” Ex. 99 75:2-5.

Mr. Prokosch’s testimony as to the Vessel’s final voyage echoed other portions of his deposition testimony in which he remarked that the Vessel “was always taking on water” and that the Vessel “was a sinking boat.” *See* Ex. 99 83:2-3. According to Mr. Prokosch, the Vessel “was always sinking,” and the Vessel “was sinking the first time [he] stepped aboard the vessel.” Ex. 99 74:18-20. Mr. Prokosch testified that “we’d pump [the Vessel] out, just keep the pumps running.” Ex. 99 74:24-25.

The Court credits Ms. Groves’ testimony as to the Vessel’s final voyage and as to the Vessel’s condition and capabilities, including the Vessel’s condition and capabilities when the Vessel departed for and during the Vessel’s final voyage, over Mr. Prokosch’s testimony as to these issues. The solemn manner with which Ms. Groves recounted the Vessel’s final voyage gave the impression that the events of that voyage were etched in Ms. Groves’ memory. Ms. Groves remained poised and clear, even when describing a harrowing situation. The Court was persuaded that Ms. Groves described the Vessel’s final voyage as it had occurred.

Mr. Prokosch’s deposition testimony, by contrast, sounds in exaggeration. Mr. Prokosch’s refrain that the Vessel was “always sinking” is conclusory and, tellingly, stands at odds with the uncontroverted evidence of the Vessel’s successful trips between 2007 and 2012,

some of which were transatlantic voyages. Additionally – and notably – Mr. Prokosch, despite his alleged concerns with respect to the Vessel’s bilge pump system during the Vessel’s final voyage, did not tell Ms. Groves, the Vessel’s bosun, that there was a problem with the bilges. Tr. 856. Although Ms. Groves was not in the chain of command that Mr. Prokosch would have gone to first with any such issue, Tr. 856, it is nevertheless noteworthy that Mr. Prokosch did not mention the issue to Ms. Groves.

Particularly accounting for the credibility of the witnesses who testified as to the Vessel’s final voyage, the greater weight of the evidence indicates that the Vessel’s bilge pumping system was working properly at the outset of the Vessel’s final voyage and during the first two days of the Vessel’s final voyage. Similarly, and particularly when accounting for the credibility of the witnesses who testified as to the Vessel’s final voyage, the greater weight of the evidence indicates that it was not until the Vessel and Hurricane Sandy drew close to one another – specifically, on October 28, 2012 – that the Vessel began experiencing significant water ingress and trouble with its bilge pumping system, generators, and engines.

## **XVII. The Vessel’s Crew**

As of September 2012, there were sixteen crew members onboard the Vessel, seven of whom held master’s licenses and several of whom had able seaman<sup>22</sup> credentials, *see* Tr. 839, including Ms. Groves, Tr. 832.

All of the Vessel’s officers had licenses. Tr. 839. Captain Walbridge had a 1600-ton master’s license and a license that enabled him to go across the Atlantic. Tr. 838. Captain Walbridge was an experienced sailor. Tr. 414.

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<sup>22</sup> “Able seamen” is a Coast Guard credential that requires certain sea time and classes and exams, and that qualifies a person to work as a senior-most deckhand. Tr. 832.

Mr. Svendson, the chief mate/first officer, had a 500-ton license and able seaman rating, and was in the process of getting a 1600-ton license. Tr. 836. Matt Sanders, the second mate, was a Maine Maritime graduate and had a 200-ton license and an able seaman rating. Tr. 836. Dan Cleveland, the third officer, had a 100-ton license and an able seaman limited rating. Tr. 836.

Drew Salipadic, Doug Font, and Mr. Prokosch all had able seaman credentials, and Mr. Prokosch also had his 100-ton master's license. Tr. 836. Jessica Hewett, who was a deckhand, also was a graduate of Maine Maritime Academy with a 200-ton master's license and able seaman rating. Tr. 836-37.

Chris Barksdale was a new crew member on the Vessel during its final voyage. Tr. 886. He was the engineer. Tr. 886. Mr. Barksdale had a lot of experience as a mechanical engineer but not specifically on a wooden hull vessel, as far as Ms. Groves knew. Tr. 886. At some point during the Vessel's final voyage, Mr. Barksdale was seasick. Tr. 885-86. Ms. Groves testified that he was "probably a bit limited" due to seasickness. Tr. 886. Ms. Groves remembered Mr. Barksdale both being seasick and working some. Tr. 886.

### **XVIII. Claims Made to Acadia and Associated Payments**

Acadia was notified of the loss of the Vessel on October 29, 2012. Stip. Facts ¶ 40. Bounty Org. made claims under the policies for the hull, business interruption and coverage under the liability policy. Stip. Facts ¶ 54. Claims included personal injuries, two deaths, and the loss of the Vessel. Stip. Facts ¶ 41.

The Proof of Loss was filed by Bounty Org. with Acadia on or about November 27, 2012. Stip. Facts ¶ 57. Bounty Org. also forwarded information regarding the Loss of Earnings to justify its claim under that part of the policy. Stip. Facts ¶ 56.

Acadia paid the policy limit of \$4 million on the Hull claim on December 5, 2012. Stip. Facts ¶ 44; *see also* Tr. 1109. Acadia also paid the policy limit of \$100,000 on the loss of income claim. Tr. 68-69; *see also* Tr. 1109.

On December 5, 2012, Acadia caused two checks to be issued to Bounty Org.; check no. 0400787980 in the amount of \$4,000,000.00 and check no. 0400787981 in the amount of \$100,000.00. Stip. Facts ¶ 58. The checks issued by Acadia had the following language on the face of the check “Full and final payment for loss of income due to the sinkin(g) sic” (check no. 400787981 in the amount of \$100,000.00) and “Full and final payment for the hull damage to the Bount(y) sic” (check no. 0400787980 in the amount of \$4,000,000.00). Stip. Facts ¶ 59.

Beginning immediately after the sinking, Acadia paid for the defense of Bounty Org. in the personal injury and death claims. Stip. Facts ¶ 42. Acadia agreed to provide a defense under the liability policy to lawsuits commenced by decedent Claudene Christian, Mr. Prokosch, and Mr. Barksdale. Stip. Facts ¶ 55. Acadia paid the policy limit of \$1 million under the P&I portion of the Policy for defense and settlement of the personal injury and death claims beginning immediately after the sinking until November 2014 when the policy limit of \$1 million was exhausted. Stip. Facts ¶ 43.

#### **XIX. Acadia’s Reservation of Rights and Commencement of the Instant Action**

Acadia sent its reservation of rights letters regarding the P&I claims on May 24, 2013, and on the hull claim on June 21, 2013. Stip. Facts ¶ 49.

Acadia commenced this suit for declaratory judgment on November 6, 2014. Stip. Facts ¶ 50.

**XX. Testimony of Experts as to the Vessel's Seaworthiness**

Three witnesses who testified as experts testified as to the Vessel's seaworthiness: Quentin Snediker and Blake Powell (for Acadia), and Mr. Wyman (for Defendants).

**A. Mr. Snediker**

Mr. Snediker testified as an expert on wooden boat preservation, maintenance, and repair. Tr. 337, 344. Mr. Snediker is employed by Mystic Seaport Museum, where he has been director of the shipyard since 2001. Tr. 331; *see also* Tr. 333. Mystic Seaport is the largest maritime museum in the United States. Tr. 333. Mr. Snediker has a Bachelor of Science in marine transportation and a master's degree from Goucher College in historic preservation. Tr. 333.

Mr. Snediker has been involved in "just about everything involved in the restoration of large wooden vessels." Tr. 331-32. Mr. Snediker's expertise is mainly, if not exclusively, in the restoration and preservation of historic vessels. Tr. 340. Most of the vessels owned by the Mystic Seaport Museum are "essentially exhibit vessels" that are "kept afloat on their own bottoms and sometimes subjected to the rigors of weather." Tr. 340. Mr. Snediker had worked on other certified operational inspected passenger vessels. Tr. 340.

Mr. Snediker believed that he had gone aboard the Vessel once in 1972. Tr. 346. Mr. Snediker had seen the Vessel many times at tall ship events, and the Vessel had made at least one visit to Mystic Seaport Museum. Tr. 347. The last time Mr. Snediker was on the Vessel was before the Vessel was owned by Bounty Org. Tr. 372.

Mr. Snediker opined that "the vessel was in no way fit to take a voyage to sea with a pending hurricane." Tr. 368. Mr. Snediker expressed his view that "there was an overall sense of casual approach to regulation and survey to evaluate the structure of the vessel." Tr. 345-46. According to Mr. Snediker, "there were a lot of instances where known maintenance issues were

deferred to a later date, especially . . . regarding deficiencies in the structure discovered in 2012.” Tr. 348. Mr. Snediker was of the view that, “driven by economics, choices were often made that were not in the interest of seaworthiness which is not atypical in this business.” Tr. 346. Mr. Snediker acknowledged, however, that Mr. Wyman is “a very capable naval architect.” Tr. 414. Mr. Snediker further acknowledged that, when the Vessel went to Europe in 2011, the Vessel “[m]ust have been” seaworthy. Tr. 422-23.

Mr. Snediker opined that the Vessel proceeded to sea despite difficulties with “basic things” that he viewed as “part and parcel” of making a vessel fit for its intended voyage. Tr. 346. Mr. Snediker expressed the view that the Vessel lacked proper fuel filters, and opined that management of the Vessel’s bilge de-watering system was known to be fraught with difficulties. Tr. 346. Mr. Snediker further opined that the Vessel had issues with clogging of intakes due to debris. Tr. 348. Mr. Snediker noted with respect to the Vessel’s bilge pump system that he had “questions on the capacity of the pumps” – “that the diameter of the piping was inadequate for the discharge capacity of the pumps.” Tr. 348-49. Mr. Snediker emphasized that all vessels, no matter what material they are fabricated from, must have bilge pumping systems that are effective. Tr. 351. Mr. Snediker opined, with respect to the Vessel’s loss, that “[t]he sinking occurred when the ability to de-water the bilge was slowing . . . as the increased ingress of water was increasing due to the strains of the vessel working, of the masts, of the deficiencies in the structure.” Tr. 355.

Mr. Snediker opined as to “hogging” of the Vessel, explaining that hogging is a “[d]eformation of the shape of the hull over time due to the influences of buoyancy and gravity. The weaker a hull structure might be, the more that hog is manifest.” Tr. 355-56. Mr. Snediker did not note any particular amount of hogging present on the Vessel, although he expressed the

view that there was greater hogging on the Vessel in 2012 than there was in 2010. *See* Tr. 374.

Mr. Snediker acknowledged that a vessel that has hog in it is not necessarily unseaworthy.

Tr. 383.

As to the use of Douglas fir on the Vessel, Mr. Snediker explained that fir is a softwood. Tr. 363. Mr. Snediker further explained that construction-grade is the lowest grade of Douglas fir and that he had never seen it used in the construction of a large timber vessel. Tr. 363-64.

Mr. Snediker provided his opinion as to the photographs that Mr. Kosakowski took, explaining that the level of degradation or rot in the photographs was, on the one hand, surprising, but that he easily understood how it occurred. Tr. 365. Mr. Snediker opined that rot like what was shown in the photographs would be widespread because “conditions that would foster this at the very least existed throughout that entire compartment.” Tr. 366. Mr. Snediker further opined that the rot exhibited in the photographs must have contributed to a lack of watertight integrity “because it lacks the strength.” Tr. 366. Mr. Snediker expressed the view that the deformation and sheering of dowels on the Vessel was “[e]specially telling.” Tr. 366.

Mr. Snediker rested his opinion that the extent of the rot depicted in Mr. Kosakowski’s photographs was “not limited to the perimeter of the image” on his forty years of experience. Tr. 421. Mr. Snediker acknowledged, however, that he had no idea what the extent of the rot was. Tr. 421.

**B. Mr. Powell**

Mr. Powell testified as an expert architect. Tr. 466. Mr. Powell is a naval architect who received his degree in naval architecture in 1990 from the University of California. Tr. 465. Mr. Powell has worked primarily on steel hull vessels, but also has worked on aluminum vessels and

with some number of wooden vessels. Tr. 481. Mr. Powell had never been on the Vessel. Tr. 484.

Mr. Powell opined “that at the time that the [Vessel] left New London, it was in an unseaworthy condition” and that “the ship was not in the condition it should be to reasonably withstand environmental conditions that were predicted.” Tr. 467. Mr. Powell testified, specifically, as to what he viewed as issues with the Vessel’s structural and watertight integrity, including issues with the Vessel’s de-watering system and the “rot and decay that was noted during the shipyard period.” *See* Tr. 467-69.

Mr. Powell opined, specifically, that the Vessel “did not have watertight integrity.” Tr. 468. In support of that opinion, Mr. Powell referenced the ABS Survey Report, which he explained “listed several major discrepancies relative to the vessel’s watertight integrity.” Tr. 468. Mr. Powell expressed the view that, given certain issues with the Vessel, including the discrepancies listed in the ABS Survey Report, “it would be even more important that the vessel maintained its de-watering capacity to the most reliable level possible.” Tr. 468.

As to the Vessel’s de-watering system, Mr. Powell opined that, although the Vessel’s de-watering system itself was not inadequate, was “designed fine,” and – Mr. Powell thought – “met regulations,” “it was the operation, or maintenance of it that was a problem.” Tr. 478-79. Mr. Powell expressed the view that “the pumps were either being clogg[ed] from debris in the bilges, or some other reason” and that “the two electric pumps were both having difficulty maintaining prime.” Tr. 479-80.

As to the Vessel’s rot condition, Mr. Powell opined that “the decay and the rot that was noted in the shipyard could easily contribute to a lack of watertight integrity on the vessel.” Tr. 473. Mr. Powell expressed his view that the “the decayed condition had caused . . . a lack of

watertight integrity by seams opening up.” Tr. 472. He explained that, as the Vessel “worked,” the Vessel’s planking was “going to deflect,” and that such deflection “could cause the caulking . . . to fail” and that “[i]t could also open up seams more allowing water ingress.” Tr. 472.

Mr. Powell also testified as to the Vessel’s Stability Letter, expressing the view that, after the 2012 yard period, the Stability Letter was invalid “as soon as the fuel tank[s] were relocated and the ballast was loaded onboard.” Tr. 477. Mr. Powell acknowledged that an invalidated stability letter would not necessarily have any impact on the Vessel’s seaworthiness and that it would not necessarily negatively impact the Vessel’s stability. Tr. 477. Mr. Powell noted that, prior to the Vessel’s sinking, it had never exhibited a stability problem. Tr. 495.

Mr. Powell opined that, at the time that the Vessel left New London, the Captain and crew “had full knowledge of the forecast that they were sailing into” and “had knowledge about unreliability of their bilge pumping system.” Tr. 467. Mr. Powell further opined that, at the time the Vessel left New London, the Captain and crew “had full knowledge of the serious concerns that the shipyard had about [the Vessel’s] condition.” Tr. 467. Somewhat in tension with that opinion, however, Mr. Powell explained that his opinion as to the Vessel’s seaworthiness was based on the Captain and crew’s “[f]ailure to understand the full extent of what rot and decay that was noted during the shipyard period was.” Tr. 469.

**C. Mr. Wyman**

In contrast with Mr. Snediker’s and Mr. Powell’s testimony, Mr. Wyman opined that the Vessel’s structure was in good condition and that the Vessel was operated in a good manner. Tr. 638. Mr. Wyman expressed the view that those operating the Vessel had a good operation, and that the Vessel was operated properly. Tr. 638. According to Mr. Wyman, the Vessel’s

maintenance was good. Tr. 638. Mr. Wyman expressed the view that repairs to the Vessel were made when repairs were required. Tr. 646. Mr. Wyman recounted that “everything [he] recommended . . . that had anything to do with seaworthiness were complied with.” Tr. 785.

Mr. Wyman explained that the Vessel “had far more licensed personnel on board” than required. Tr. 638. Mr. Wyman further explained that the Vessel was required to have only one licensed master of appropriate tonnage, and that that was Captain Walbridge. Tr. 648.

As to the Vessel’s de-watering system, Mr. Wyman opined that the Vessel’s bilge system was properly installed. Tr. 639. As far as Mr. Wyman was aware, the Vessel’s bilge system was functioning properly. Tr. 639. As to the Vessel’s watertight integrity, Mr. Wyman opined, with respect to the Vessel’s final voyage, that there had been no change to the Vessel’s watertight integrity. Tr. 639. Mr. Wyman similarly opined that nothing had changed in the Vessel’s stability that would have rendered the Vessel’s stability a problem. Tr. 639. Also with respect to the Vessel’s stability, Mr. Wyman expressed the view that the possible cancellation of the Vessel’s Stability Letter due to movement of tanks aboard the Vessel would not have affected the Vessel’s stability at all – “[i]t had no [e]ffect on the ship.” Tr. 644.

Mr. Wyman firmly disagreed with certain of Mr. Snediker’s and Mr. Powell’s opinions regarding the Vessel’s seaworthiness. Mr. Wyman disagreed with the view that the Vessel was unseaworthy because of failure to maintain the Vessel in accordance with prevailing norms of prudent seamanship and prudent maintenance by a vessel owner. Tr. 637-38. Mr. Wyman further disagreed with the view that Bounty Org. failed to maintain and operate the Vessel in a seaworthy condition by failing to adequately address deficiencies in the Vessel’s de-watering systems and issues affecting the Vessel’s stability and watertight integrity. Tr. 639. Mr. Wyman also disagreed with the notion that there was a “pattern of neglect” with respect to the Vessel’s

installations, modifications, maintenance, and repairs. Tr. 646-47. Mr. Wyman recounted that he had not experienced any “improper delegation” from Bounty Org. with respect to repairs or maintenance. Tr. 647.

The Court credits Mr. Wyman’s testimony regarding the Vessel, including Mr. Wyman’s testimony as to the Vessel’s seaworthiness; the maintenance of and repairs made to the Vessel over time; and the Vessel’s structure, condition, and capabilities. Mr. Wyman had a longstanding history of employment with the Vessel dating from the Vessel’s purchase by Bounty Org. in 2001 up until the Vessel’s loss. Mr. Wyman surveyed the Vessel numerous times over that period, and the observations and recommendations included in Mr. Wyman’s detailed surveys indicate that Mr. Wyman recognized and was willing to point out issues with respect to the Vessel. In testifying at trial, Mr. Wyman evinced a nuanced understanding of the Vessel, including the Vessel’s structure, condition, and capabilities. Mr. Wyman came across as earnest and capable, and spoke about the Vessel with an ease that indicated a firm understanding of the Vessel, including the Vessel’s structure, condition, and capabilities. Mr. Wyman’s significant experience with wooden ships, including his involvement in at least a dozen significant projects involving wooden ships and his experience designing more than a dozen wooden vessels, lent further credibility to his testimony.<sup>23</sup>

Further, and importantly, the Court credits Mr. Wyman’s testimony as to the Vessel’s seaworthiness over Mr. Snediker’s and Mr. Powell’s testimony as to the Vessel’s seaworthiness. Mr. Wyman was the only one of the three who had been aboard the Vessel during the time in

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<sup>23</sup> As to Mr. Wyman’s longstanding history with the Vessel, Mr. Wyman’s demeanor at trial, together with the evidence indicating that Mr. Wyman recognized and was willing to point out issues with the Vessel, undercut the notion that Mr. Wyman’s testimony was the result of bias or a conflict of interest. Indeed, the way in which Mr. Wyman’s history with the Vessel informed his testimony lent further support to Mr. Wyman’s credibility.

which it was owned by Bounty Org. or after the Vessel's significant repair periods in 2001 to 2002 and in 2006 to 2007. Additionally, Mr. Wyman was the only one of the three to have conducted a survey of the Vessel prior to the Vessel's loss, or to have conducted calculations as to the Vessel's stability prior to the Vessel's loss. *See Atl. Specialty Ins. Co. v. Coastal Env't Grp.*, 368 F. Supp. 3d 429, 440 (E.D.N.Y. 2018), *aff'd sub nom. Atl. Specialty Ins. Co. v. Coastal Env't Grp. Inc.*, 945 F.3d 53 (2d Cir. 2019).

Moreover, Mr. Snediker acknowledged that his expertise was mainly, if not exclusively, in the restoration and preservation of historic vessels, and that most of the vessels owned by the museum at which he works are exhibit vessels only sometimes subjected to the rigors of weather. Mr. Snediker's testimony regarding the Vessel's seaworthiness, and particularly with respect to the Vessel's general condition, structure, and capabilities, is significantly undercut by Mr. Snediker's acknowledgement that the Vessel must have been seaworthy when the Vessel went to Europe the year prior to the Vessel's loss. Furthermore, Mr. Snediker came across as overly critical in a way that cast doubt on his ability to realistically assess the Vessel's seaworthiness. As to Mr. Powell, although Mr. Powell had worked with some number of wooden vessels, he had worked primarily on steel hull vessels. Mr. Wyman, by contrast, had more significant experience with wooden vessels.

## CONCLUSIONS OF LAW<sup>24</sup>

Acadia seeks judgment declaring that the Policy<sup>25</sup> is null and void *ab initio* or, alternatively, that there is no coverage under the Policy, based on the following causes of action: breach of the duty of utmost good faith (First Cause of Action), Am. Compl. ¶¶ 115-23; that the loss at issue was not a covered fortuitous loss (Second Cause of Action), *id.* ¶¶ 124-29; breach of absolute implied warranty of seaworthiness (Third Cause of Action), *id.* ¶¶ 130-35; breach of implied negative modified warranty of seaworthiness (Fourth Cause of Action), *id.* ¶¶ 136-47; breach of crew warranty and compliance (Fifth Cause of Action), *id.* ¶¶ 148-51; breach of express warranty of seaworthiness (Sixth Cause of Action), *id.* ¶¶ 152-55; and breach of warranty to comply with state and federal regulations (Seventh Cause of Action), *id.* ¶¶ 156-59.

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<sup>24</sup> “[A]bsent a specific federal rule, federal courts look to state law for principles governing maritime insurance policies and apply federal maritime choice of law principles to determine which state’s law applies.” *Ins. Co. of N. Am. v. Zagloul*, 526 F. Supp. 2d 361, 365 (E.D.N.Y. 2007) (alteration accepted) (quoting *Com. Union Ins. Co. v. Flagship Marine Servs., Inc.*, 190 F.3d 26, 30 (2d Cir. 1999)). Where the parties have not identified, and the Court has not found, a specific federal rule, the Court herein applies New York law, as the parties generally have done in their post-trial submissions. *See* Defendants’ Proposed Findings of Fact and Conclusions of Law at 28-30; *see, e.g.*, Plaintiff’s Proposed Findings of Fact and Conclusions of Law at 34-41.

<sup>25</sup> Generally, the relevant policy for purposes of analyzing Acadia’s claims is the 2011 Policy – *i.e.*, the policy that was in effect when the Vessel was lost. However, certain of Acadia’s claims, at least in part, concern the 2008 Policy. Because the 2011 Policy reflects a renewal of the original 2008 Policy and because the 2011 Policy generally contains the same clauses and terms and conditions as did the 2008 Policy, the Court hereinafter generally refers to the relevant policies collectively as “the Policy,” without distinguishing which specific policy is being referenced – except where a distinction between the relevant policies bears on the Court’s analysis herein. The Court notes that the parties do not draw any meaningful distinction between the 2008 Policy and any renewal thereof, including the renewal reflected in the 2011 Policy.

*See generally id.* at 39-40. Acadia also asserts a cause of action for unjust enrichment (Eighth Cause of Action). *See id.* ¶¶ 160-63.<sup>26</sup>

For the reasons that follow, the Court finds in favor of Defendants with respect to each of Acadia's claims.

### **I. The Court Finds in Favor of Defendants with Respect to Acadia's Claims Concerning Seaworthiness Warranties**

Acadia asserts claims for breach of express warranty of seaworthiness, breach of absolute implied warranty of seaworthiness, and breach of negative modified warranty of seaworthiness.

For the reasons that follow, the Court finds in favor of Defendants with respect to each of these claims.

#### **A. Applicable Law**

“Seaworthiness is the ability of a vessel adequately to perform the particular services required of her on the voyage she undertakes.” *Atl. Specialty Ins. Co. v. Coastal Env't Grp.*, 368 F. Supp. 3d 429, 446 (E.D.N.Y. 2018) (quoting *Cont'l Ins. Co. v. Lone Eagle Shipping Ltd. (Liber.)*, 952 F. Supp. 1046, 1065 (S.D.N.Y. 1997), *aff'd*, 134 F.3d 103 (2d Cir. 1998)), *aff'd sub nom. Atl. Specialty Ins. Co. v. Coastal Env't Grp. Inc.*, 945 F.3d 53 (2d Cir. 2019). “The general rule is that the vessel must be ‘staunch, strong, well equipped for the intended voyage and manned by a competent and skillful master of sound judgment and discretion.’” *Haney v. Miller's Launch, Inc.*, 773 F. Supp. 2d 280, 288 (E.D.N.Y. 2010) (quoting *Tug Ocean Prince, Inc. v. United States*, 584 F.2d 1151, 1155 (2d Cir. 1978)); *see also In re MS Angeln GmbH &*

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<sup>26</sup> The Court analyzes each of Acadia's claims as though each claim is asserted against both Defendants. Whether Acadia meant to assert any of its claims against solely Bounty Org. or Mr. Hansen (or, instead, meant to assert all of its claims against both Defendants) does not alter the Court's ultimate conclusion that Acadia is not entitled to judgment on any of its claims.

*Co. KG*, 10 F. Supp. 3d 424, 431-32 (S.D.N.Y. 2014). The standard for seaworthiness “is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service.” *Fed. Ins. Co. v. PGG Realty, LLC*, 538 F. Supp. 2d 680, 693-94 (S.D.N.Y. 2008) (quoting *Italia Societa per Azioni di Navigazione v. Or. Stevedoring Co.*, 376 U.S. 315, 322, (1964)), *aff’d sub nom. Fed. Ins. Co. v. Keybank Nat’l Ass’n*, 340 F. App’x 5 (2d Cir. 2009). “The meaning of ‘seaworthy’ is ‘relative – it varies with the vessel involved and the use for which the vessel is intended.’” *Atl. Specialty Ins. Co.*, 368 F. Supp. 3d at 446 (quoting *Fed. Ins. Co.*, 538 F. Supp. 2d at 693).

Consistent with this definition of seaworthiness, an express warranty of seaworthiness “require[s] a vessel to be able ‘adequately to perform the particular services required of her on the voyage she undertakes.’” *Atl. Specialty Ins. Co.*, 945 F.3d at 68 (quoting *GTS Indus. S.A. v. S/S “Havtjeld”*, 68 F.3d 1531, 1535 (2d Cir. 1995)).

The absolute implied warranty of seaworthiness discharges the insurer from liability “if the vessel is in fact not seaworthy at the inception of the policy.” *Cont’l Ins. Co.*, 952 F. Supp. at 1068 (quoting *Emps. Ins. of Wausau v. Occidental Petroleum Corp.*, 978 F.2d 1422, 1436 (5th Cir. 1992)); *see also Royal Ins. Co. of Am. v. Deep Sea Int’l*, No. 02-CV-03175, 2006 WL 8454021, at \*6 (S.D.N.Y. Mar. 24, 2006), *report and recommendation adopted sub nom. Royal Indem. Co. v. Deep Sea Int’l*, 619 F. Supp. 2d 14 (S.D.N.Y. 2007). In order to void a policy on this basis, “[t]he insurer need not demonstrate that the insured had knowledge of the unseaworthy condition nor that the insured was somehow at fault in not discovering the unseaworthy condition.” *Cont’l Ins. Co.*, 952 F. Supp. at 1068 (quoting *Emps. Ins. of Wausau*, 978 F.2d at 1436); *see also Royal Indem. Co.*, 619 F. Supp. 2d at 26. “Rather, the insurer simply

must demonstrate that the vessel was unseaworthy at the time the policy attached.” *Royal Ins. Co. of Am.*, 2006 WL 8454021, at \*6 (citing *Emps. Ins. of Wausau*, 978 F.2d at 1436).<sup>27</sup>

Under the so-called negative implied warranty of seaworthiness, “the insured promises not to knowingly send a vessel to sea in an unseaworthy condition.” *Cont’l Ins. Co.*, 952 F. Supp. at 1070 (quoting *Emps. Ins. of Wausau*, 978 F.2d at 1432). “To find a breach of the negative implied warranty, the Court must find that the insured – the owner of the vessel – had knowledge of the unseaworthy condition of the vessel.” *Id.* (citing *Emps. Ins. of Wausau*, 978 F.2d at 1432). A breach of the negative implied warranty of seaworthiness “will exclude coverage only if the loss or damage was proximately caused by that unseaworthiness.” *Royal Ins. Co. of Am.*, 2006 WL 8454021, at \*6; *see also Royal Indem. Co.*, 619 F. Supp. 2d at 27. “[W]hile the absolute [implied warranty of seaworthiness] is implied once, at the inception of the insurance policy, the negative version is an ongoing promise that the insured will not ‘knowingly send a vessel to sea in an unseaworthy condition.’” *Royal Indem. Co.*, 619 F. Supp. 2d at 27 (quoting *Emps. Ins. of Wausau*, 978 F.2d at 1432). “The negative warranty is therefore implied each time a vessel leaves ‘the safety of a port for the open sea.’” *Id.* (quoting *Cont’l Ins. Co.*, 952 F. Supp. at 1071).

With respect to all three relevant warranties concerning seaworthiness – *i.e.*, the express warranty of seaworthiness; the absolute implied warranty of seaworthiness; and the negative

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<sup>27</sup> The Court notes that there appears to be some uncertainty as to whether an absolute implied warranty of seaworthiness exists in time hull insurance policies, as compared to “voyage” insurance policies, and – relatedly – as to whether any such implied warranty exists only when the insured vessel was in port at the time the policy period began. *See Royal Indem. Co.*, 619 F. Supp. 2d at 27. The Court need not – and does not – resolve these questions as, even if the Court were to accept that an absolute implied warranty of seaworthiness exists in the Policy, the Court still would conclude that Acadia did not carry its burden of demonstrating that the Vessel was unseaworthy at the time the Policy attached, for the reasons set forth herein.

implied warranty of seaworthiness – the burden is on the insurer to prove unseaworthiness. *See Atl. Specialty Ins. Co.*, 945 F.3d at 67 (concluding, in case in which insurer alleged breach of an express warranty of seaworthiness and breach of an implied warranty of seaworthiness, that “we agree with the consensus of authority that places that burden [*i.e.*, the burden of proving seaworthiness] on the insurer”); *Cont’l Ins. Co.*, 952 F. Supp. at 1066-67 (noting, in case in which insurer alleged breach of the absolute implied warranty of seaworthiness and breach of the negative implied warranty of seaworthiness, that “[t]he burden is on the insurer to prove unseaworthiness”).

**B. Acadia Did Not Carry Its Burden of Proving Unseaworthiness at Any Relevant Time**

As to Acadia’s claims for breach of express warranty of unseaworthiness and for breach of negative implied warranty of seaworthiness, Acadia must have proven, *inter alia*, that the Vessel was unseaworthy when the Vessel departed on its final voyage. *See Cont’l Ins. Co.*, 952 F. Supp. at 1070. As to Acadia’s claim for breach of absolute implied warranty of seaworthiness, the parties have not specified whether the relevant date for assessing the Vessel’s seaworthiness at the “inception of the policy,” *Cont’l Ins. Co.*, 952 F. Supp. at 1068 (quotation marks omitted), is the date on which the 2008 Policy was issued (December 15, 2008) or the date on which the 2011 Policy incepted (December 15, 2011).<sup>28</sup>

Having considered the evidence as a whole and assessed the credibility of the witnesses, the Court concludes that Acadia did not prove, by a preponderance of the evidence, that the

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<sup>28</sup> The Court need not – and does not – determine which of these dates is the relevant date for purposes of analyzing Acadia’s claim for breach of absolute implied warranty of seaworthiness because, as set forth below, Acadia did not prove that the Vessel was unseaworthy *either* when coverage attached under the 2008 Policy on December 15, 2008 *or* when the 2011 Policy incepted on December 15, 2011. Indeed, Acadia did not prove that the Vessel was unseaworthy at any relevant time.

Vessel was unseaworthy at any relevant time, including when coverage attached under the 2008 Policy on December 15, 2008; when the 2011 Policy incepted on December 15, 2011; and when the Vessel departed on its final voyage on October 25, 2012.<sup>29</sup>

As to the Vessel's seaworthiness around December 15, 2008, the Court places significant weight on Mr. Wyman's testimony concerning the work done on the Vessel during the 2006-2007 repair period, and on Mr. Wyman's report concerning the June 2007 survey, in which Mr. Wyman noted that the Vessel was "in essentially new condition after five years spent on the total rebuild of the ship to high standards" and that the Vessel, "with her totally rebuilt hull, rig, and new machinery is in Very Good Condition and well suited for Ocean voyaging with up to 12 passengers and up to 150 persons aboard for dockside events," Ex. G(h) at 7.

As to the Vessel's seaworthiness around December 15, 2011, the Court places significant weight on Ms. Groves' testimony regarding work done on the Vessel during 2010 and 2011. Mr. Wyman's testimony and survey regarding the Vessel's "essentially new condition" in June 2007, paired with Ms. Groves' testimony regarding the work done on the Vessel in 2010 and 2011, indicates that the Vessel was seaworthy at the time the 2011 Policy incepted on December 15, 2011 – and Acadia presented no more-persuasive evidence to the contrary.

As to the Vessel's seaworthiness when the Vessel departed on its final voyage, the Court concludes with respect to the Vessel's "intended voyage," *see Haney*, 773 F. Supp. 2d at 288

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<sup>29</sup> Because the Court concludes that Acadia did not prove that the Vessel was unseaworthy at any relevant time, the Court need not – and does not – conclude whether the Policy does, indeed, contain the seaworthiness warranties on which Acadia rests its claims regarding seaworthiness warranties. Similarly, the Court need not – and does not – conclude whether the seaworthiness warranty contained in Paragraph 9 of the Policy's special terms and conditions, *see* Ex. 2 at 34-35, applies to all three types of coverage at issue. *See* Defendants' Proposed Findings of Fact and Conclusions of Law at 43-44 (arguing that seaworthiness warranty does not apply to the P&I coverage or loss of earnings coverage).

(quotation marks omitted), that the Vessel was not intended to sail *through* Hurricane Sandy but, rather, to avoid the hurricane. Even up until the Vessel encountered Hurricane Sandy, Captain Walbridge did not intend for the Vessel to sail into the hurricane.

In concluding that Acadia did not prove that the Vessel was unseaworthy when it departed on its final voyage, the Court places significant weight on the testimony of Mr. Wyman concerning the Vessel's seaworthiness, including Mr. Wyman's testimony that the Vessel's structure was in good condition; that the Vessel was operated in a good manner; that those operating the Vessel had a good operation; that the Vessel was operated properly; that the Vessel's maintenance was good; and that repairs to the Vessel were made when repairs were required. As set forth above, the Court credits Mr. Wyman's testimony as to the Vessel's seaworthiness, and credits Mr. Wyman's testimony as to the Vessel's seaworthiness over Mr. Snediker's and Mr. Powell's testimony as to the Vessel's seaworthiness.

With respect to the rot condition discovered in Summer 2012 and addressed – at least in part – during the 2012 yard period, the Court concludes that Acadia did not prove that the Vessel suffered from a rot condition that was so severe or extensive as to render the Vessel unseaworthy. As set forth above, the Vessel's rot condition was not severe or extensive, and did not compromise the Vessel's structure.

With respect to this issue, the Court places significant weight on the testimony of Ms. Groves as to the Vessel's rot condition, which, as explained above, the Court credits – and credits over Mr. Kosakowski's testimony as to the Vessel's rot condition. Ms. Groves' testimony that, when she observed a segment of the Vessel's framing, she saw a pocket of rot that was only approximately a foot wide and six inches in diameter indicates that the Vessel's rot condition was not particularly extensive or severe. Ms. Groves' testimony that she was not

shocked or terrified by the rot, that she thought the rot was manageable, and that she understood that the rot that she was unable to see was not structural to the Vessel's frames indicates that the Vessel's rot condition was not particularly extensive or severe, and not so extensive or severe as to compromise the Vessel's structure or seaworthiness. Mr. Jackimovicz's testimony that he, using a pocketknife, detected solid wood in certain portions of the Vessel's framing exhibiting rot further suggests that the Vessel's rot condition was not so extensive or severe as to compromise the Vessel's structure or seaworthiness.

Additionally, that multiple witnesses, including Mr. Jackimovicz and Mr. Wyman, indicated that the Vessel's rot condition need not be addressed immediately but, rather, could be addressed later (possibly as long as two years later) further indicates that the Vessel's rot condition was not so severe or extensive as to compromise the Vessel's structure or seaworthiness. Mr. Wyman's testimony that the rot that was found was in a specifically non-watertight space, about 10 feet above the water line, and that any rot damage to a plank there would not be of extreme concern to Mr. Wyman further supports the conclusion that the Vessel's rot condition did not compromise the Vessel's structure or seaworthiness.

With respect to the decision to use Douglas fir on the Vessel's planking, the Court concludes that Acadia did not prove that the Douglas fir used on the Vessel rendered the Vessel unseaworthy. In reaching this conclusion, the Court credits and places significant weight on the testimony of Dr. Wyman that fir is an acceptable wood for wooden boats, and that fir is used fairly often throughout the structure of ships in the Pacific Northwest, including in framing.

With respect to the Vessel's ventilation, the Court concludes that Acadia did not prove that the Vessel's ventilation rendered the Vessel unseaworthy. Although Dr. Wyman consistently recommended enhancing the Vessel's ventilation, the evidence indicates that it is

not common for wooden ships to have ventilation systems, suggesting that the Vessel's lack of a ventilation system in and of itself did not render the Vessel unseaworthy. Additionally – and importantly – the principal concern with respect to ventilation is the possibility of wood deterioration. As set forth above, though, the Vessel's rot condition was not severe or extensive, and did not compromise the Vessel's structure. That no more extensive or severe rot condition was present on the Vessel, and that the Vessel's structure was not compromised by a rot condition, indicates that the Vessel's ventilation system was not so lacking as to render the Vessel unseaworthy.

With respect to the Vessel's bilge pumping system, the Court concludes that Acadia did not prove that the Vessel's bilge pumping system rendered the Vessel unseaworthy, either generally or specifically when the Vessel departed for its final voyage. With respect to the Vessel's bilge pumping system generally, the pipe that was used for the main bilge system was larger than required, the pumps were more than required, and the powering for the pumps was more than was required. With respect to the functioning of the Vessel's bilge pumping system during the Vessel's final voyage, as set forth above, the Vessel's bilge pumping system was working properly at the outset of the Vessel's final voyage and during the first two days of the Vessel's final voyage. With respect to this issue, the Court places significant weight on Ms. Groves' testimony that, during the Vessel's trip from Boothbay to New London (just before the Vessel departed on its final voyage), the bilges were incredibly dry and there was no water in them, and on Ms. Groves' testimony that, when the Vessel left New London and during the first two days of the Vessel's final voyage, the Vessel's bilge pumps, as far as Ms. Groves knew, were working fine. Mr. Wyman's testimony that, as far as he knew, the Vessel's bilge pumping

system was functioning properly further indicates that the Vessel's bilge pumping system was sufficient for purposes of the Vessel's seaworthiness.

With respect to the Vessel's stability, the Court concludes that Acadia did not prove that the Vessel's stability rendered the Vessel unseaworthy. As to the movement of certain tanks and ballast during the 2012 yard period – and the effect of such movement on the Vessel's stability – the Court places significant weight on Mr. Wyman's testimony that there was no change in the Vessel's stability based on the movement of the tanks, and no measurable impact on the Vessel's stability as a result of the ballast's movement. As to the potential invalidation of the Vessel's Stability Letter, the Court notes the uncontradicted testimony indicating that the Vessel did not require a stability letter to operate in the manner that it did, and Mr. Powell's testimony that an invalidated stability letter would not necessarily have any impact on the Vessel's seaworthiness or even a negative impact on the Vessel's stability.

Similarly, with respect to the pursuit of a load line certification, the Court concludes that the Vessel's lack of a load line certification does not reflect that the Vessel was unseaworthy, given the uncontradicted testimony that a load line certification was not required for the Vessel to operate as it did. Nor do the "deficiencies" listed in the ABS Survey Report show that the Vessel was unseaworthy. As Mr. Hansen explained, the term "deficiency" in this context refers to an unmet requirement necessary for obtaining a load line certification. Such a "deficiency" does not necessarily equate to a deficiency in a vessel's seaworthiness.

With respect to the 2011 Coast Guard inspection, the Court concludes that the Coast Guard's actions regarding the Vessel's tonnage do not reflect that the Vessel was unseaworthy, given the uncontradicted testimony that, following appeal, the Coast Guard ultimately granted

the Vessel the right to continue operating as it was, with one modification that was thereafter made.

Finally, with respect to the Vessel's crew, the Court concludes that Acadia did not prove that the Vessel's crew was incompetent or unskilled, much less so incompetent or unskilled as to render the Vessel unseaworthy. With respect to this issue, the Court places significant weight on Ms. Groves' detailed testimony regarding the crew's various experience, licenses, and credentials. Further, as explained by Mr. Wyman, the Vessel was required to have only one licensed master of appropriate tonnage, and that that was Captain Walbridge. With respect to Mr. Barksdale, the Court concludes that Acadia did not prove that, during the Vessel's final voyage, Mr. Barksdale was so incapacitated as to render the Vessel unseaworthy, or that Mr. Barksdale was so inexperienced as to render the Vessel unseaworthy.<sup>30</sup>

In sum, Acadia did not prove that the Vessel was unseaworthy at any relevant time, including when coverage attached under the 2008 Policy on December 15, 2008; when the 2011 Policy incepted on December 15, 2011; and when the Vessel departed on its final voyage on October 25, 2012. Accordingly, Acadia has failed to prove its claims for breach of express warranty of unseaworthiness, breach of absolute implied warranty of seaworthiness, and breach of negative implied warranty of seaworthiness, and the Court finds in favor of Defendants with respect to each of these claims.

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<sup>30</sup> Although the Court has, in large part, limited its discussion herein of the Vessel's seaworthiness to the alleged conditions discussed in Acadia's filings, the Court concludes that Acadia failed to prove that the Vessel was unseaworthy in any regard, at any relevant time.

**II. The Court Finds in Favor of Defendants with Respect to Acadia’s Claim for Breach of the Policy’s Crew Warranty and Compliance Clause and with Respect to Acadia’s Claim for Breach of the Policy’s Warranty to Comply with State and Federal Regulations**

Acadia asserts claims for breach of the Policy’s crew warranty and compliance clause and for breach of the Policy’s warranty to comply with state and federal regulations. For the reasons that follow, the Court finds in favor of Defendants with respect to each of these claims.

**A. Applicable Law**

New York courts have “consistently recognized” that, generally, an express warranty in a marine insurance contract ““must be literally complied with and noncompliance forbids recovery, regardless of whether the omission had causal relation to the loss.”” *Ins. Co. of N. Am.*, 526 F. Supp. 2d at 366 (alteration accepted) (quoting *Jarvis Towing & Transp. Corp. v. Aetna Ins. Co.*, 82 N.E.2d 577, 577 (1948)); *see also St. Paul Fire & Marine Ins. Co. v. Matrix Posh, LLC*, No. 10-CV-04776, 2011 WL 13377651, at \*6 (E.D.N.Y. Nov. 22, 2011). Thus, generally, failure to comply with an express warranty bars an insured from recovering for its losses. *See St. Paul Fire & Marine Ins. Co.*, 2011 WL 13377651, at \*6.

**B. Defendants Did Not Violate the Policy’s Crew Warranty and Compliance Clause or the Policy’s Warranty to Comply with State and Federal Regulations**

Having considered the evidence as a whole and assessed the credibility of the witnesses, the Court concludes, by a preponderance of the evidence, that Defendants did not fail to comply with the Policy’s crew warranty and compliance clause or fail to comply with the Policy’s warranty to comply with state and federal regulations.

As an initial matter, the Court notes that Acadia appears to rest its theories with respect to these claims on the argument that these provisions were breached “based on the unseaworthy

condition of the Vessel.” *See* Acadia’s Proposed Findings of Fact and Conclusions of Law at 37. This argument fails for the reasons set forth above.

Beyond its argument regarding seaworthiness, Acadia has not clearly specified any particular regulation, with respect to the Vessel’s crew or otherwise, as to which Acadia seeks to hold Defendants liable; nor has Acadia articulated how Defendants violated any particular regulation with respect to the Vessel’s crew or otherwise.

In any event, as to the Policy’s crew warranty and compliance clause, the Court – largely for the reasons set forth above as to why the Vessel’s crew did not render the Vessel unseaworthy – concludes that this provision was not violated. The evidence indicates that the Vessel’s crew was in compliance with all applicable regulations and that the Vessel was properly equipped for the waters in which it was operating.

As to the Policy’s warranty to comply with state and federal regulations, the evidence indicates that Defendants were in compliance with all state and federal regulations pertaining to the carrying of passengers for hire. The evidence that might be viewed as bearing on this issue is that concerning the Vessel’s Stability Letter, the Vessel’s possible load line certification, and the 2011 Coast Guard inspection. With respect to the Stability Letter and the load line certification, the evidence includes uncontradicted testimony that neither a stability letter nor a load line certification was required for the Vessel to operate as it did. With respect to the 2011 Coast Guard inspection, as set forth above, the Coast Guard, following appeal, ultimately granted the Vessel the right to continue operating as it was, with one modification that was thereafter made.

Accordingly, the Court finds in favor of Defendants with respect to Acadia’s claim for breach of the Policy’s crew warranty and compliance clause and with respect to Acadia’s claim for breach of the Policy’s warranty to comply with state and federal regulations.

**III. The Court Finds in Favor of Defendants with Respect to Acadia’s Claim for Breach of the Duty of Utmost Good Faith, or *Uberrimae Fidei***

Acadia asserts a claim for breach of the duty of utmost good faith, or *uberrimae fidei*.

For the reasons that follow, the Court finds in favor of Defendants with respect to this claim.

**A. Applicable Law**

“*Uberrimae fidei* is a doctrine in admiralty law that requires ‘the party seeking insurance to disclose all circumstances known to it which materially affect the risk.’” *Atl. Specialty Ins. Co.*, 945 F.3d at 66 (alteration accepted) (quoting *Fireman’s Fund Ins. Co. v. Great Am. Ins. Co. of N.Y.*, 822 F.3d 620, 633 (2d Cir. 2016)). “The doctrine of *uberrimae fidei* obligates the assured to volunteer information which might have a bearing on the scope of the risk assumed, and the failure to do so will allow the insurer to avoid the policy.” *Atl. Specialty Ins. Co.*, 368 F. Supp. 3d at 445 (quoting *Contractors Realty Co. v. Ins. Co. of N. Am.*, 469 F. Supp. 1287, 1294 (S.D.N.Y. 1979)).

The doctrine of *uberrimae fidei* “does not require the voiding of the contract unless the undisclosed facts were material and relied upon.” *Atl. Specialty Ins. Co.*, 945 F.3d at 66 (quoting *Fireman’s Fund Ins. Co.*, 822 F.3d at 638). “Further, a minute disclosure of every material circumstance is not required. The assured complies with the rule if he discloses sufficient to call the attention of the underwriter in such a way that, if the latter desires further information, he can ask for it.” *Id.* (quoting *Puritan Ins. Co. v. Eagle S.S. Co. S.A.*, 779 F.2d 866, 871 (2d Cir. 1985)). “The materiality of the information and the underwriter’s reliance on the information are distinct elements to be proven . . . and the burden of proof is on the insurer to show that there was a breach of this duty . . . .” *Id.* (citations omitted); *see also Contractors Realty Co.*, 469 F. Supp. at 1293-94. “Finally, because the duty is imposed ‘so that the insurer can decide for itself whether to accept the risk,’ the duty to disclose ceases once the insurer has accepted the risk by

binding coverage.” *Atl. Specialty Ins. Co.*, 945 F.3d at 66 (alteration accepted) (quoting *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 14 (2d Cir. 1986)).

**B. Acadia Did Not Carry Its Burden of Proving that Defendants Violated the Duty of Utmost Good Faith, or *Uberrimae Fidei***

Having considered the evidence as a whole and assessed the credibility of the witnesses, the Court concludes that Acadia did not prove, by a preponderance of the evidence, that Defendants violated the duty of utmost good faith, or *uberrimae fidei*.

As an initial matter, Defendants cannot be said to have violated the duty of utmost good faith by failing to disclose to Acadia information regarding unseaworthiness of the Vessel, as Plaintiff argues. As set forth above, Acadia did not carry its burden of proving that the Vessel was in an unseaworthy condition, at any relevant time.

Nor did Acadia prove that Defendants failed to disclose, at any relevant time, any other known circumstance which materially affected the risk associated with the Vessel, as to which there was reliance on Acadia’s part. Although Acadia has identified a variety of “facts” which, in Acadia’s view, Defendants should have disclosed to Acadia, Acadia did not prove, by a preponderance of the evidence, that any of these “facts” was *material*, or that Acadia *relied* on any of these “facts” (or their absence), in connection with assessing the risk associated with the Vessel.

The evidence as a whole does not reflect materiality.<sup>31</sup> As to reliance, Mr. Chase testified that he relied on the documents submitted in connection with Bounty Org.’s initial insurance

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<sup>31</sup> Although Acadia argues that, *inter alia*, the ABS Survey Report and the 2011 Coast Guard Inspection revealed issues that Defendants should have disclosed to Acadia, Acadia did not prove that the topics raised in the ABS Survey Report and the 2011 Coast Guard Inspection materially bore on the risk associated with the Vessel, particularly in light of the evidence regarding the meaning of “deficiencies” in the ABS Survey Report and the evidence that the

policy application – *i.e.*, the application itself, the certificate of inspection, and Mr. Wyman’s report concerning the June 2007 survey. However, Acadia did not prove that Defendants failed to disclose in these documents any material fact affecting the risk associated with the Vessel. Although Mr. Wyman’s report concerning the June 2007 survey did not note Mr. Wyman’s views regarding the Vessel’s ventilation, Acadia did not prove that Mr. Wyman’s views regarding the Vessel’s ventilation, including his view that the Vessel did not have as much ventilation as he felt was appropriate, materially bore on the risk associated with the Vessel. Indeed, as explained above, the greater weight of the evidence indicates with respect to the principal concern associated with ventilation – *i.e.*, deterioration of wood – that the Vessel did not suffer from a severe or extensive rot condition and that the Vessel’s structure was not compromised by a rot condition, suggesting that the Vessel’s ventilation did not materially bear on the scope of the risk assumed.

Accordingly, the Court concludes that Acadia has failed to prove its claim for breach of the duty of utmost good faith, or *uberrimae fidei*, and the Court finds in favor of Defendants with respect to this claim.

#### **IV. The Court Finds in Favor of Defendants with Respect to Acadia’s Claim that the Vessel’s Loss (and Associated Losses and/or Liability) Was Not a Fortuitous Covered Loss under the Policy**

Acadia asserts a claim that the Vessel’s loss (and certain associated losses and/or liability) was not a fortuitous covered loss under the Policy. *See* Am. Compl. at 39.<sup>32</sup> For the reasons that follow, the Court concludes that Defendants proved, by a preponderance of the

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Coast Guard ultimately granted the Vessel the right to continue operating as it was, with one modification that was thereafter made.

<sup>32</sup> The Court hereinafter refers to the Vessel’s loss and the associated losses and/or liability at issue collectively as the Vessel’s loss.

evidence, that the Vessel's loss was due to a covered peril under the Policy's Perils Clause and thus within the Policy's coverage.<sup>33</sup>

#### A. The Perils Clause and Applicable Law

The Perils Clause provides, in relevant part: "Touching the Adventures and Perils which the Underwriters are contented to bear and take upon themselves, they are of the Seas . . . and of all other like Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the Vessel, or any part thereof . . ." Ex. 2 at 10.

"A peril of the sea is a maritime insurance term, defined with reference to 'those perils which are peculiar to the sea, and which are of an extraordinary nature or arise from irresistible force or overwhelming power.'" *Atl. Specialty Ins. Co.*, 945 F.3d at 69 (quoting *R. T. Jones Lumber Co. v. Roen S.S. Co.*, 270 F.2d 456, 458 (2d Cir. 1959)). Decisions of the United States Court of Appeals for the Second Circuit "have applied the term to 'damage done by the fortuitous action of the sea,'" and "have held the term includes 'occasional visitations of the violence of nature, like great storms, even though these are no more than should be expected.'" *Id.* (alteration accepted) (first quoting *N.Y., New Haven & Hartford R.R. Co. v. Gray*, 240 F.2d

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<sup>33</sup> With respect to Acadia's "fortuitous covered loss" claim, Defendants argue, *inter alia*: (1) "that a hurricane is a covered peril under the Acadia policy at issue;" and (2) that "[t]he negligent course change by Capt. Walbridge resulting in the Vessel being placed in the previously forecasted severest wind and sea conditions [in the] Southwest quadrant of Sandy, and the subsequent breakdown of its generators and bilge pumps as a result, both of which are covered perils under the [Policy's] Inchmaree Clause, was the proximate cause of the [Vessel's] loss." Defendants' Proposed Findings of Fact and Conclusions of Law at 34-36. The Court concludes that the Vessel's loss was covered under the Policy's Perils Clause and thus need not rely on any conclusion as to Defendants' alternative proposed bases for coverage. However, the Court would conclude, in the alternative, that Defendants also proved, by a preponderance of the evidence, that the breakdown of the Vessel's bilge pumping system, generators, and engines proximately caused the Vessel's loss and that Defendants therefore proved coverage under the Policy's Inchmaree Clause, in addition to coverage under the Policy's Perils Clause.

460, 464 (2d Cir. 1957), *cert. denied*, 353 U.S. 996 (1957); then quoting *Cont'l Ins. Co. v. Hersent Offshore, Inc.*, 567 F.2d 533, 535 (2d Cir. 1977)). “Indeed, fortuitous actions of the sea much less violent than storms have been held to be within its intended coverage.” *Id.* at 69-70 (quoting *Cont'l Ins. Co.*, 567 F.2d at 535). “The determination of whether certain weather or sea conditions constitute a peril of the sea ‘is a fact-intensive inquiry which requires examination of the type of vessel, the location of the vessel, the expectability [sic] of the weather, as well as its severity.’” *Id.* at 70 (alteration in original) (quoting *Cont'l Ins. Co.*, 952 F. Supp. at 1061). “The primary requirement for a finding of the existence of a peril of the sea is that ‘damage be done by the *fortuitous* action of the sea.’” *Cont'l Ins. Co.*, 952 F. Supp. at 1060 (quoting *N.Y., New Haven & Hartford R.R. Co.*, 240 F.2d at 464 (emphasis added)).

Where, as here, there are specific perils identified in the relevant policy, the insured bears the burden of proving that the claimed loss was due to a covered peril. *See Atl. Specialty Ins. Co.*, 368 F. Supp. 3d at 447 (citing *Cont'l Ins. Co.*, 952 F. Supp. at 1059-60).

**B. Defendants Carried Their Burden of Proving that the Vessel was Lost Due to a Covered Peril**

Having considered the evidence as a whole and assessed the credibility of the witnesses, the Court concludes that Defendants carried their burden of proving that the Vessel was lost due to a “peril of the sea” – and, thus, that the Vessel’s loss is covered under the Policy.

As to the “expectability” and severity of Hurricane Sandy, *Atl. Specialty Ins. Co.*, 945 F.3d at 70 (quoting *Cont'l Ins. Co.*, 952 F. Supp. at 1061), the Court notes that – as set forth above – although a hurricane was anticipated, the Vessel was not intended to sail *through* Hurricane Sandy but, rather, to avoid the hurricane. *See Cont'l Ins. Co.*, 952 F. Supp. at 1060-61 (“With respect to a peril of the sea due to weather, the Second Circuit has made clear that heavy weather may be a peril of the sea even if it may have been foreseeable that the vessel would

encounter severe weather conditions.” (citing *Cont’l Ins. Co.*, 567 F.2d at 535)). It was not expected that the Vessel would encounter Hurricane Sandy, or that the Vessel would encounter weather as severe as that which the Vessel did.

In concluding that the Vessel was lost due to a “peril of the sea” rather than some other condition, the Court places significant weight on Ms. Groves’ testimony as to the Vessel’s final voyage, which – as set forth above – the Court credits, and credits over Mr. Prokosch’s testimony as to the Vessel’s final voyage. In particular, the Court places significant weight on Ms. Groves’ testimony indicating that the Vessel was in great condition when the Vessel left New London on October 25, 2012 and that, during the first two days of the Vessel’s voyage, the Vessel’s bilge pumps were working fine. The Court also places significant weight on Ms. Groves’ testimony that the Vessel first encountered heavy weather on October 27, and that she felt that the Vessel was still under control during the evening of October 27.

As set forth above, it was not until the Vessel and Hurricane Sandy drew close to one another – specifically, on October 28 – that the Vessel began experiencing significant water ingress and trouble with its bilge pumping system, generators, and engines. By the time it became obvious that the Vessel’s crew was losing the water battle, the Vessel already had encountered wind and wave conditions that were reaching 30 knots and 10 to 15 feet. Wind speeds and wave heights increased thereafter, with the Vessel, on the night of October 28, located within the radius of tropical storm force and 50 knot winds. It was around that time that the Vessel’s sole boards began to go under water, and that water began to come through certain of the Vessel’s seams.

It was these fortuitous conditions – namely, the weather and wave conditions, and the Vessel’s location in relation thereto – that resulted in significant water ingress into the Vessel;

the eventual failure of the Vessel's bilge pumping system, generators, and engines; and, ultimately, the Vessel's loss as a result of these conditions. Defendants therefore have proven that these fortuitous conditions were the proximate cause of damage to the Vessel, and the Vessel's ultimate loss. Accordingly, the Court concludes that Defendants proved that the Vessel's loss was caused by a "peril of the sea" under the Policy's Perils Clause, and that the Vessel's loss therefore was subject to coverage under the Policy.

**V. The Court Finds in Favor of Defendants with Respect to Acadia's Claim for Unjust Enrichment**

Acadia asserts a claim for unjust enrichment against both Defendants. The Court concludes that Acadia did not prove its unjust enrichment claim by a preponderance of the evidence.

As an initial matter, the Court notes that Acadia's claim for unjust enrichment – at least insofar as Acadia asserts that claim against Bounty Org. – appears to be duplicative of Acadia's breach of warranty claims and therefore subject to dismissal. *See Gonzalez v. Costco Wholesale Corp.*, No. 16-CV-02590, 2018 WL 4783962, at \*11 (E.D.N.Y. Sept. 29, 2018) ("Unjust enrichment is not a catchall cause of action to be used when others fail and an unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim." (alterations accepted) (quoting *Corsello v. Verizon N.Y., Inc.*, 967 N.E.2d 1177, 1185 (2012))). Regardless, the Court finds in favor of Defendants on the merits of Acadia's unjust enrichment claim. As set forth above, the Vessel's loss was subject to the Policy's coverage, and Acadia has identified no viable basis for declaring the Policy void *ab initio* or for denying coverage under the Policy. Accordingly, Defendants were not unjustly enriched.

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In sum, for the reasons set forth above, the Court finds in favor of Defendants with respect to each of Plaintiff's claims.<sup>34</sup>

Because the Court has found that each of Plaintiff's claims fails on its merits, the parties' motions made at the close of Plaintiff's and Defendants' cases are denied.

### CONCLUSION

For the reasons set forth above, the Court grants judgment in favor of Defendants on each of Plaintiff's claims, and Defendant Robert Hansen's counterclaim is dismissed.

The Clerk of Court is directed to enter judgment accordingly and to close this case.

SO ORDERED.

/s/ Diane Gujarati

DIANE GUJARATI

United States District Judge

Dated: April 11, 2022  
Brooklyn, New York

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<sup>34</sup> Because the Court finds in favor of Defendants with respect to each of Acadia's claims for the reasons set forth above, the Court need not – and does not – herein analyze various of Defendants' arguments as to why judgment should be entered in Defendants' favor, including, for example, Defendants' argument that Acadia failed to properly decline coverage under the Policy. *See* Defendants' Proposed Findings of Fact and Conclusions of Law at 48-50; *see also* ECF No. 157. For the same reasons, the Court need not – and does not – herein analyze the parties' arguments regarding the doctrine of accord and satisfaction, *see, e.g.*, Acadia's Findings of Fact and Conclusions of Law at 37, or the parties' arguments regarding piercing of the corporate veil as to Mr. Hansen, *see id.* at 38-40; Defendants' Proposed Findings of Fact and Conclusions of Law at 45-47.