No. 11-_____

In The
Supreme Court of the United States

FANE LOZMAN,

Petitioner,

v.

THE CITY OF RIVIERA BEACH, FLORIDA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a floating structure that is indefinitely moored receives power and other utilities from shore and is not intended to be used in maritime transportation or commerce constitutes a "vessel" under 1 U.S.C. § 3, thus triggering federal maritime jurisdiction.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Fane Lozman respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in *City of Riviera Beach v. That Certain Unnamed Gray*, 643 F.3d 1259 (11th Cir. 2011).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (Pet. App. 1a) is published at 643 F.3d 1259. The opinion of the United States District Court for the Southern District of Florida (Pet. App. 33a) is unpublished, but is appended at Pet. App. 33a.

JURISDICTION

The judgment of the Eleventh Circuit was entered on August 19, 2011. Pet. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

In relevant part, 1 U.S.C. § 3 provides: "the word 'vessel' includes every description of watercraft or other artificial contrivance used as a means of transportation on water."

28 U.S.C. § 1333 provides, in relevant part: "The district courts of the United States shall have original jurisdiction, exclusive of the courts of the state, of: (1) any civil case of admiralty or maritime jurisdiction."

46 U.S.C. § 31342 provides, in relevant part: "a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner – (1) has a maritime lien on the vessel; (2) may bring a civil action in rem to enforce the lien."

STATEMENT OF THE CASE

This case presents a frequently recurring and pivotal question of federal maritime law: whether the term "vessel" extends to a floating structure that is indefinitely moored to shore and that is not intended for use in maritime transport. The Eleventh Circuit Court of Appeals, applying a definition of "vessel" that it adopted three years earlier and that it has conceded conflicts with the definition of "vessel" adopted by the Fifth and Seventh Circuits, held that such a structure is indeed a "vessel."

1. In 2002, Fane Lozman purchased what Florida law calls a "floating residential structure," Pet. App. 12a n.6, and what is known in this case's caption in the lower courts (but at no other time) as "That Certain Unnamed Gray, Two Story Vessel Approximately Fifty-Seven Feet in Length." Lozman's floating residential structure was constructed using

methods and materials used for houses on land; it was rectangular in shape and was built out of plywood. It contained no bilge pumps for expelling water during transport; no raked bow (*i.e.*, a bow angled to ease transport); no navigation aids; no lifeboats or other saving equipment; no propulsion; and no steering. The structure had cleats, but they were inappropriate for towing.

The structure is not designed to be used for maritime transport, and Lozman never had any intent to use it that way. Indeed, Lozman's floating home lacked a Hull Identification Number ("HIN") and consequently could not even obtain Coast Guard Certification, which is required for legal navigability.

After purchasing the floating home, Lozman had the structure towed to North Beach Village, Florida, where he resided in it for three years. After Hurricane Wilma struck the area, Lozman had the structure towed to a marina located in the City of Riviera Beach ("the City"). The structure survived each of these voyages, but the towings had detrimental effects on it. The home remained afloat only because emergency repairs were immediately made to prevent it from sinking. Upon arriving at the City's marina and being repaired, the home was moored to the dock by cables and affixed to land-based utilities, including power, sewer lines, cable television, and the internet. Lozman signed a lease with the City and intended to live there indefinitely.

Problems arose, however, between Mr. Lozman and the City when Mr. Lozman filed suit in Palm Beach County Circuit Court alleging that a meeting the City had with private developers interested in developing the marina violated Florida's Sunshine Law, Florida Statute § 286.011. The redevelopment plan subsequently was abandoned.

Soon thereafter, however, the City issued Lozman a notice of eviction from the Marina and filed an eviction suit in Palm Beach County Circuit Court, claiming that Lozman was being evicted because he failed to muzzle his ten-pound dachshund and had used unlicensed repair persons to perform work on his floating home. After a trial, the jury returned a verdict in favor of Lozman, finding that the eviction had been an improper retaliation for Lozman's protected speech.

Later that year, the Riviera Beach City Council passed a revised dockage agreement and accompanying Marina Rules and Regulations. The City thereafter sent Lozman a letter, informing him that the City would revoke his structure's permission to remain in the marina unless Lozman complied with the new requirements, executed the new agreement, and paid allegedly unpaid dockage fees. Lozman did not execute the agreement and his floating home remained in the marina.

2. The City filed an *in rem* suit in admiralty for trespass and to foreclose on a maritime lien on Lozman's floating residential structure in the United

States District Court for the Southern District of Florida. As its basis for jurisdiction, the City invoked 28 U.S.C. § 1333, which vests original and exclusive federal subject matter jurisdiction in federal district courts over admiralty and maritime actions, *see, e.g., The Rock Island Bridge*, 73 U.S. 213 (1867), and the Federal Maritime Lien Act. A maritime lien, in turn, only may be used to collect money for repairs having been performed on a "vessel." As explained in *Crimson Yachts v. Betty Lyn II Motor Yacht*, 603 F.3d 864, 872 (11th Cir. 2010):

> [I]n each iteration of the Federal Maritime Lien Act, the statutory language specifies that only repairs performed on a "vessel" generate a maritime lien. Thus, a ship's characterization as a "vessel" is a mandatory prerequisite to the attachment of a maritime lien. Because a district court's authority to arrest a ship and to adjudicate an in rem proceeding against it requires the attachment of a maritime lien, both the lien and the district court's jurisdiction depend on a ship's status as a "vessel."

The district court granted a warrant for the arrest of Lozman's floating home pursuant to 46 U.S.C. § 31342, which grants a lien to persons providing necessaries to vessels at the request of the owner or a person authorized by the owner. Three U.S. Marshals then arrested Lozman's floating residential structure and had it towed to Miami, Florida. The next day, Lozman, *pro se*, filed an emergency motion to dismiss the complaint and to return his floating residential

structure to the City marina. The district court denied Mr. Lozman's motion three days later.

Subsequently in the litigation, the City filed for partial summary judgment on its trespass claim. In response, Lozman countered that his floating residential structure was not a "vessel" under 1 U.S.C. § 3, which defines the term for purposes of establishing maritime jurisdiction as "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water," and this Court's construction of that provision in *Stewart v. Dutra Construction Co.*, 543 U.S. 481 (2005). Instead, Lozman contended that his floating residential structure should be treated the same as a land-based residence and thus that this dispute should be governed by Florida law governing dwellings, including the State's homestead exemption that would prevent the City's arrest of his home.

The district court granted the City's motion, holding along the way that Lozman's floating residential structure was a "vessel" for admiralty jurisdiction purposes. The court further held that Lozman had notice of the withdrawal of permission to remain at the marina and that he remained at the marina after his permission was revoked. Following a bench trial on the issue of damages for the trespass claim and liability and damages for the maritime lien, the district court found Lozman delinquent in his payments to the City marina in the amount of $3,039.88. The district court also awarded the City $1.00 in nominal damages for the trespass. Finally, the district court

also ordered the U.S. Marshals to release Lozman's floating home and to execute its sale to satisfy the judgment.

3. The Eleventh Circuit affirmed. In the court of appeals' view, the "binding precedent" of its own decision in *Bd. of Comm'rs of the Orleans Levee Dist. v. M/V Belle of Orleans,* 535 F.3d 1299 (11th Cir. 2008), dictated that Lozman's floating structure was a "vessel." In *Belle of Orleans*, the Eleventh Circuit previously had held that a floating structure is a "vessel" so long as it has a "practical capacity for maritime transport." Pet. App. 16a (citing *Belle of Orleans*, 535 U.S. at 1311-12). It is irrelevant under this test whether the structure is moored indefinitely to land by cables or lacks any self-propulsion or motive steering. Pet. App. 17a-18a. Nor does the question whether something is a "vessel" depend under this test "in any way on either the purpose for which the craft was constructed or its intended use," Pet. App. 19a (citing *Belle of Orleans*, 535 F.3d at 1311), or "its present use or station." *Belle of Orleans*, 535 F.3d at 1311. So long as the structure is "capable of moving [under tow] over water" (even if "to her detriment") without sinking, it constitutes a vessel. *Belle of Orleans*, 535 F.3d at 1312. Because Lozman's floating home had been towed previously without sinking, the court held that it was "virtually indistinguishable" from the structure the Eleventh Circuit deemed a vessel in *Belle of Orleans* (a floating casino indefinitely moored to shore). Pet. App. 17a.

In reaching this decision, the Eleventh Circuit openly acknowledged that the Fifth and Seventh Circuits have adopted different tests for determining whether a structure is a "vessel," "both of which focus on the intent of the [structure's owner] rather than" the structure's potential ability to move or be towed across water. Pet. App. 16a (internal quotation marks and citations omitted); *see Tagliere v. Harrah's Ill. Corp.,* 445 F.3d 1012 (7th Cir. 2006); *De La Rosa v. St. Charles Gaming Co.,* 474 F.3d 185 (5th Cir. 2006); *Pavone v. Mississippi Riverboat Amusement Corp.,* 52 F.3d 560 (5th Cir. 1995). These tests would have precluded Lozman's home from being deemed a vessel because it was indefinitely moored to shore and Lozman intended to make the structure his permanent and stationary dwelling. But, the Eleventh Circuit explained that in *Belle of Orleans* it had squarely "rejected the reasoning of the Fifth and Seventh Circuits." Pet. App. 16a. Accordingly, unlike what would have occurred had his case been litigated in those circuits, the Eleventh Circuit deemed it "of little moment" that Lozman's home "was designed" and was being indefinitely used "as a residence that just happened to float." Pet. App. 19a.

REASONS FOR GRANTING THE WRIT

The federal courts of appeals (as well as various state appellate courts) are severely and openly split on the issue of whether a floating, indefinitely moored structure is a "vessel" within the meaning of

1 U.S.C. § 3 and the meaning of this Court's ruling in *Stewart v. Dutra Construction Co.*, 543 U.S. 481 (2005). The Eleventh Circuit has established a hard-line test under which any structure possibly capable of movement on water without sinking constitutes a "vessel," regardless of whether the owner intends it to be used for maritime transportation or it is actually used for such transportation. By contrast, the Fifth and Seventh Circuits focus on the owner's intended and actual use of the structure; if a floating structure is not intended ever to be used in maritime transportation or commerce and is indefinitely moored to shore, it is not a vessel.

This Court should resolve this conflict. The question of whether a floating indefinitely moored structure is a vessel for purposes of federal admiralty jurisdiction is important to innumerable private and commercial owners of such structures, as well as to the regulatory ability of state and local governments across the country. Furthermore, the Eleventh Circuit's decision to characterize floating indefinitely moored structures as "vessels" based on any capability to be towed across water without sinking, regardless of the intended use of such structures, is incorrect. Indeed, the Eleventh Circuit's interpretation of *Stewart* and "vessel" is so broad and disconnected to common sense that it would render a wooden garage door a vessel – the very result that Justice Breyer noted would be "absurd" at oral argument in *Stewart*. Transcript of Oral Argument at 12, *Stewart v. Dutra Construction Co.*, 543 U.S. 481

(2005) (No. 03-814). This Court should put an end to this overly expansive test and misinterpretation of *Stewart*.

I. The Eleventh Circuit Is In Direct Conflict With The Fifth And Seventh Circuits As To Whether Floating Indefinitely Moored Structures Are Vessels.

"Vessel" status is a mandatory prerequisite to federal admiralty jurisdiction under 28 U.S.C. § 1333. Pet. App. 12a. In turn, a "vessel . . . includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3. This statutory provision "codified the meaning that 'vessel' had acquired in general maritime law" and this Court has made clear that courts should "continue to construe § 3's definition in light of the term's established meaning in general maritime law." *Stewart*, 543 U.S. at 490, 492. And historically at maritime law, a floating structure that was indefinitely secured by cables to the mainland and not intended for use in waterborne transport was not a "vessel." *See Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19 (1926); *Cope v. Vallette Dry-Dock Co.*, 119 U.S. 625 (1887).

In *Stewart*, this Court unanimously reaffirmed that a harbor dredge is a "vessel." *Stewart*, 543 U.S. at 495; *accord Ellis v. United States*, 206 U.S. 246 (1907); *The Virginia Ehrman and the Agnese,* 97 U.S. 309 (1878). In the course of this uncontroversial

holding, this Court stated for the first time in any case that a floating structure is "capable of" maritime transportation so long as "the watercraft's use 'as a means of transportation on water' *is a practical possibility*" instead of "*merely a theoretical one*." *Stewart*, 543 U.S. at 496 (emphasis added). This Court also stated that a "vessel" is "any watercraft capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment." *Id.* at 497.

Shortly after *Stewart* was decided, a leading authority on maritime law predicted that "the *Stewart* Court's initiation of a practical vs. theoretical debate is bound to fuel litigation. And the litigation will be messy, because 'merely theoretical' has an unduly manipulable range of meaning." David W. Robertson, *How The Supreme Court's New Definition Of "Vessel" Is Affecting Seaman Status, Admiralty Jurisdiction, And Other Areas of Maritime Law*, 39 J. MAR. L. & COM. 115, 155 (2008).

That prediction has proven correct. In the wake of *Stewart*, the circuits have divided three ways over whether a floating indefinitely moored structure – something previously considered *not* a "vessel" – is now a "vessel" within the meaning of 1 U.S.C. § 3. This conflict begs for a prompt clarification of this Court's opinion in *Stewart*.

1. In determining whether a craft was "rendered practically incapable of transportation or movement," *Stewart*, 543 U.S. at 494, the Eleventh Circuit

reads *Stewart* to require the court to focus on "the capability of the craft, 'not its present use or station.'" Pet. App. 13a (citing *Belle of Orleans*, 535 F.3d at 1310). According to the Eleventh Circuit, the "capability" of the craft now turns solely on whether the structure is physically capable of movement over water without sinking, regardless of the measures that must be taken to render it movable, the damage to the structure resulting from such movement, the infrequency of any such movement (based on necessity), or the intent, construction or use of the structure. Pet. App. 18a-20a. In the Eleventh Circuit's view, "[t]he owner's intentions with regard to a [structure] are analogous to the [structure's] 'purpose,' and *Stewart* clearly rejected any definition of 'vessel' that relies on such a purpose." Pet. App. 16a (quoting *Belle of Orleans*, 535 F.3d at 1311).

Thus, in addition to holding that the floating residential structure at issue here was a "vessel" because it could be unmoored and towed across the water (albeit to its detriment) without sinking, the Eleventh Circuit has held that a riverboat casino that was moored to a dock by steel cables and had electrical, computer and phone cables attached to shore, and which had a working engine and other machinery allowing it to have motive power of its own, was a "vessel." *Belle of Orleans*, 535 F.3d at 1304. The Eleventh Circuit also has held that a yacht that had been drydocked, removed from the water with cranes and disabled for extensive repairs was a "vessel" because it could be dropped back into the water and

"could be towed upon 24 hours notice." *Crimson Yachts v. Betty Lyn II Motor Yacht*, 603 F.3d 864, 875 (11th Cir. 2010). The Eleventh Circuit's interpretation of "practically incapable of transportation" excludes only those structures that under no circumstances can be moved over water without sinking, irrespective of the burden, owner's intent, or efforts required to make the structure ready for transportation.

2. As the Eleventh Circuit itself acknowledged in this case and in *Belle of Orleans*, 535 F.3d at 1311, its test for determining "vessel" status under 1 U.S.C. § 3 conflicts with the tests that the Fifth and Seventh Circuits have adopted and employed in the wake of *Stewart*. Specifically, the Fifth Circuit has held that floating structures that are indefinitely moored to shore and connected to land-based utilities are not vessels, and the Seventh Circuit has held that such structures are not vessels when they are "disabled from sailing."

a. In *De La Rosa v. St. Charles Gaming Co.,* 474 F.3d 185 (5th Cir. 2006), the Fifth Circuit held that a structure is "practically incapable of transportation or movement" – and thus not a "vessel" under 1 U.S.C. § 3 as construed in *Stewart* – when it is "indefinitely moored" to shore. *Id.* at 187. Reaffirming its holding in *Pavone v. Mississippi River Amusement Corp.*, 52 F.3d 560, 570 (5th Cir. 1995), that a riverboat that is tied to land by steel pilings, hooked up to land-based utilities, and not intended for any future maritime transportation is not a "vessel," the Fifth Circuit reasoned that "[e]ven after *Stewart*" such structures

are not vessels because "although [they are] still physically capable of sailing, such a use [is] merely theoretical." *De La Rosa*, 474 F.3d at 187-88. The Fifth Circuit found support for continuing to apply its intent-based test not only in the reasoning of *Stewart*, but also in the fact that the *Stewart* Court cited the Fifth Circuit's earlier *Pavone* holding with approval. *See id.* at 188 n.2. Accordingly, unlike the Eleventh Circuit, the Fifth Circuit held in *De La Rosa* that neither having moved across water in the past (as the riverboat at issue there had) nor being physically able to move in the future makes a floating structure a "vessel" when the owner's "intent" is to keep it "indefinitely moored." *Id*. at 187.

b. The Seventh Circuit has adopted yet a third approach to determine whether a structure is a "vessel." Prior to *Stewart*, the Seventh Circuit squarely held with little difficulty that a riverboat casino that was indefinitely moored to land and connected to land-based utilities was not a vessel, even though it could have disconnected from the dock in fifteen to twenty minutes if needed. *Howard v. Southern Ill. Riverboat Casino Cruises, Inc.*, 364 F.3d 854 (7th Cir. 2004). The Seventh Circuit emphasized that past cases from this Court "did not hinge on whether the vessel was ready and able to cruise, but looked to the vessel's purpose and actual use (whether it was used to move or transport anything)." *Id.* at 857.

Like the Fifth Circuit, and unlike the Eleventh, the Seventh Circuit continues after *Stewart* to refuse to deem a floating structure to be a vessel when it is

permanently moored to shore and is "disabled from sailing." *Tagliere v. Harrah's Ill. Corp*., 445 F.3d 1012, 1014 (7th Cir. 2006). But, unlike the Fifth Circuit, the Seventh Circuit has hesitated after *Stewart* to adhere entirely to its prior precedent, opining only that "maybe" an indefinitely moored boat that is *not* disabled from sailing ceases to be a "vessel" when "its owner intends that the boat will never again sail." *Id.* at 1016. District courts in the Seventh Circuit, however, have continued to follow the Seventh Circuit's prior precedent entirely, holding that floating indefinitely moored structures are not "vessels" when their owners "intend [them] to be kept out of navigation." *Earls v. Belterra Resort, Ind., LLC*, 439 F. Supp. 2d 884, 890 (S.D. Ind. 2006); *see also Wire v. Showboat Marina Casino P'ship*, 2008 WL 818310, at *6 (N.D. Ill. 2008) (riverboat was not a vessel because there was no evidence "that shows that the [owner] intends ever to move the [structure] from the dock and turn it again into a vessel in navigation").

3. The difficulty *Stewart* has created in determining whether a floating indefinitely moored structure is a "vessel" also has plagued state courts. In *RDI/Caesars Riverboat Casino, Inc. v. Conder*, 896 N.E.2d 1172 (Ind. Ct. App. 2008), the court outlined the circuit split at issue here and held that an indefinitely moored riverboat was not a "vessel." The Louisiana Court of Appeals recently reached the same conclusion by a three-to-two vote, with the majority expressly following the rationales enunciated in the

Fifth and Seventh Circuits and rejecting the Eleventh Circuit's "broader definition of the term 'vessel.'" *Breaux v. St. Charles Gaming Co.*, 68 So.3d 684, 687 (La. Ct. App. 2011) (floating riverboat that still was physically capable of navigation was not a "vessel" because it was moored to the shore, received utilities from shore, and did not perform any traditional maritime activity).

In contrast, the Illinois Court of Appeals held in *Booten v. Argosy Gaming Co.*, 848 N.E.2d 141 (Ill. App. Ct. 2006), that an indefinitely moored gaming boat was a "vessel," stating that "the intent of the owner at issue does not alter our finding." *Id.* at 146. The New York Court of Appeals (the highest court in the state) similarly has invoked *Stewart* to hold that a stationary barge was a "vessel" because it was towed once a decade for maintenance. *Lee v. Astoria Generating Co.,* 920 N.E.2d 350 (N.Y. 2009).

II. The Question Presented Is One Of Substantial Importance.

There are two overarching reasons why it is important for this Court to resolve the question of whether a floating structure whose owner intends it to remain indefinitely moored to shore is a "vessel."

1. Structures such as the one at issue here are prevalent nationwide, and that prevalence is growing, not abating. For starters, indefinitely moored floating structures are sometimes used as private residences (sometimes called "floating residential structures" or

"floating homes") in areas such as the Florida community at issue here. For example, the cities of Seattle, Washington, and Sausalito, California each have long contained hundreds of such structures.[1] Other cities across the country have them too.

In addition, as the cases cited above show, indefinitely moored floating structures also are commonly used nowadays as casinos, as well as restaurants,[2] and hotels.[3]

2. The question whether a structure constitutes a "vessel," and thus triggers federal maritime law, determines not just the procedural question whether a lawsuit should be filed in federal or state court (although that, in and of itself, is a highly significant matter), but also carries with it a variety of highly substantive consequences. To name just a few:

a. *Homestead exemptions and other local regulations of residences.* Owners of floating homes, unlike

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[1] *See* Floating Homes Association of Seattle, http://www.seattlefloatinghomes.org/; Floating Homes Association of Sausalito, http://www.floatinghomes.org/.

[2] One list of the "top ten" floating restaurants, includes structures in Seattle; Key West, Florida; Portland, Maine; Newport Beach, California; Philadelphia, Pennsylvania; Salem, Massachusetts; San Francisco, California; and Cleveland, Ohio. *See* Coastal Living, *Top 10 Floating Restaurants*, http://www.coastalliving.com/travel/top-10/top-10-floating-restaurants-00400000000324/.

[3] *See, e.g.,* Floating Rooms at Sea Cove Resort and Marina, Florida, http://floatingrooms.com/home.html; RMS Queen Mary Hotel, http://en.wikipedia.org/wiki/RMS_Queen_Mary.

owners of houseboats and yachts that actually are used in navigation, must pay real property taxes and are subject to a variety of other state laws regulating dwellings. For instance, almost every state in the U.S. has a homestead exemption law. Herbert T. Tiffany, *The Homestead Exemption – Scope of Treatment; Nature of Right*, 5 TIFFANY'S REAL PROP. § 1332 (2011). The provisions vary but in general the homestead property is protected from taxation up to a specified amount and is exempt from forced sale from most creditors. *Id*.

This case perfectly illustrates the significance of whether a floating structure is a "vessel" and thus preempts state law. The Florida Constitution exempts homesteads from forced sale from all creditors except the state for unpaid taxes and assessments, mechanics liens to improve the homestead, and mortgages. Fla. Const. art. X, § 4(a); *see also Sherbill v. Miller Mfg. Co*., 89 So.2d 28, 31 (Fla. 1956) ("no policy of this State is more strongly expressed in the constitution, laws and decisions of this State than the policy of our exemption laws"); *Olesky v. Nicholas*, 82 So.2d 510, 513 (Fla. 1955) ("We find no difficulty in holding that the Florida constitutional exemption of homesteads protects the homestead against every type of claim and judgment except those specifically mentioned in the constitutional provision."). This exemption serves the compelling public purpose of promoting the stability and welfare of the State of Florida by securing to the householder a home, so that the householder may live beyond the reach of financial misfortune. *See*

Public Health Trust v. Lopez, 531 So.2d 946, 948 (Fla. 1988).

Prior to the City's arrest of petitioner's floating home, Lozman had applied for – and been granted – homestead protection for his home. And even though he and the City became engaged in a dispute over dockage fees, such fees do not fall within any of the exemptions to Florida's homestead exemption. Yet, as a result of the district court's and then the Eleventh Circuit's determination that the structure was a vessel, and thus that the Federal Maritime Lien Act applied to this case, Florida's homestead protection was stripped away and the City was able to arrest, auction, and then destroy Lozman's residence in contravention of the Florida Constitution and fundamental state public policy.

b. *Tort law.* Federal maritime tort law governs torts involving "vessels" and differs from typical state tort law in several significant ways. First, non-pecuniary damages, as well as consequential damages in the absence of physical harm, are generally disallowed in personal-injury suits under maritime law, whereas they are recoverable under state law. *See, e.g., Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927); *Louisiana ex rel. Guste v. M/V TESTBANK,* 752 F.2d 1019 (5th Cir. 1985) (en banc); *In re Amtrack "Sunset Limited" Train Crash*, 121 F.3d 1421, 1429 (11th Cir. 1997). Second, the owner of a "vessel" owes a uniform duty of care to everyone lawfully on board his vessel, whereas some states impose different standards of care on landowners depending

on whether injured parties are visitors, business invitees, or licensees. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630-31 (1959); *Everett v. Carnival Cruise Lines*, 912 F.2d 1355, 1358 (11th Cir. 1990). Third, "admiralty tort plaintiffs can sue a vessel itself even when the owner has no liability." *Tagliere*, 445 F.3d at 1016. In state tort law cases, however, plaintiffs cannot sue structures involved in incidents. Fourth, admiralty defendants generally can limit their liability under The Limitation of Shipowners' Liability Act, 46 U.S.C. § 30505, to the value of the vessel and its contents, whereas defendants under state tort law are liable for the full amount of harm caused, plus any punitive damages assessed.

Some of these doctrines favor tort plaintiffs in admiralty cases, while others favor defendants. For instance, if a floating structure caught fire, the owner would be strictly liable to anyone lawfully on the structure who was injured, instead of only certain classes of individuals. But the owner would not be liable for any damages for pain or suffering, or indeed any damages at all beyond the value of the vessel and its contents.

The point is that all of these special admiralty rules have developed over the years to accommodate unique concerns of maritime navigation and commerce – that is, the "problems of vessels relegated to ply the waterways of the world, beyond whose shores they cannot go." *Exec. Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 269-70 (1967). Thus, these distinctive rules often will be "worse suited" to

resolving tort cases involving indefinitely moored structures because accidents involving such structures have "nothing to do with the fact that [they are] afloat" rather than "sitting on dry land." *Tagliere*, 445 F.3d at 1013. In other words, applying maritime tort law to indefinitely moored floating structures, such as floating homes, casinos, and hotels, "encroaches on a regulatory domain that might well be thought to belong more properly to state courts and legislatures than to federal admiralty courts." *Id.* at 1015.

Worse yet, the Eleventh Circuit's rule that a floating structure's intended use is irrelevant to whether it constitutes a vessel conflicts with the general maritime law doctrine of unseaworthiness, which is maritime law's version of strict liability. *See Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960). This doctrine grants claimants an avenue for recovery for injuries when the "vessel, its gear, appurtenances, and operation" are not "reasonably safe." *Drachenberg v. Canal Barge Co.,* 571 F.2d 912, 918 (5th Cir. 1978). Whether those objects are "reasonably safe" turns on whether they are "reasonably suitable for [the vessel's] *intended use*." *Mitchell v. Trawler Racer, Inc.*, 362 U.S. at 550 (emphasis added). Yet, when the structure at issue is not even intended to be used as a "vessel" at all, this test sensibly cannot be applied.

c. *Employment law*. Congress has enacted special statutory schemes to regulate employment aboard "vessels." In particular, the Jones Act, 46 U.S.C. § 30104, allows individuals who work on or

whose duties contribute to the function of "vessels" to sue for injuries sustained in the course of their employment. *See Stewart*, 543 U.S. at 487-88. The Longshore Harbor Workers Compensation Act (LHWCA), 33 U.S.C. §§ 903(2) & 904(b), similarly accommodates workers connected to maritime commerce, allowing land-based maritime workers who are injured working on "vessels" to recover scheduled workers' compensation on a no-fault basis. "The Jones Act was born from Congress' recognition of the greater perils of a life at sea and provides more extensive worker's compensation recovery for seamen than that available" under other applicable law. *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995). The same is true of the LHWCA. Yet the Eleventh Circuit's definition of "vessel" necessarily makes these favorable compensation regimes available to employees who have no connection whatsoever to "the greater perils of sea life," *i.e.* – individuals such as waitresses on floating restaurants and blackjack dealers on floating casinos. This Court should review the propriety of that definition before it alters such employment relationships in ways Congress never could have intended.

d. *Maritime safety laws.* "Vessels" are subject to federal safety statutes that impose certain duties and requirements upon their owners. For instance, the Federal Boat Safety Act (FBSA) grants the Coast Guard regulatory power over recreational "vessels." 46 U.S.C. § 4301. Through regulations implementing this Act, the Coast Guard requires the use of certain flotation devices; deployment of visual distress

signals; use of accident reporting procedures and compliance labeling; the construction of specified electrical and fuel systems; and much more. *Sprietsma v. Mercury Marine,* 537 U.S. 51, 59 (2002). Violations of the Act subject vessel owners to fines ($5,000 for a first offense, and up to $250,000 for multiple offenses) and sometimes to incarceration for up to one year. 46 U.S.C. § 4311. Once again, the need for federal law that preempts any inconsistent state regulation, *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157-58 (1978), and the severity of these penalties stems from the critical need to promote safety while watercraft are in motion and away from land. But, the regulations seem quite unnecessary – if not outright overkill – for indefinitely moored structures owners have no intent of moving. This is especially so when the structure at issue (as the Eleventh Circuit conceded is the case here) "could never obtain a Coast Guard certification [for legal navigability] in the first place." Pet. App. 20a.

III. This Case Is An Ideal Vehicle For The Court To Resolve This Issue.

This case presents an ideal vehicle for this Court to resolve this split among the circuits over whether indefinitely moored floating structures are "vessels." While the Eleventh Circuit noted that the record here does not contain every factual detail concerning the history of the floating home at issue, all of the *relevant* facts are documented and undisputed. As the Eleventh Circuit itself put it, Lozman's home at the

time of the events in question "was moored to the dock by cables, received power from land, and had no motive power or steering of its own." Pet. App. 18a. Furthermore, Lozman intended to use the structure solely as a stationary residence, never to move across water again and certainly not to navigate. Yet, while these facts would unquestionably have precluded the structure from being deemed a vessel in the Fifth and Seventh Circuits (as well as in several lower courts), the Eleventh Circuit held that the structure was a "vessel" simply because – just like a wooden garage door that Justice Breyer observed at oral argument in *Stewart* certainly would not be a vessel, *see supra* at 9 – it was "capable of transportation over water by means of a tow." Pet. App. 21a. The actual "purpose for which the [structure] was constructed" did not matter "in any way" to the Eleventh Circuit. Pet. App. 19a.

Indeed, this last aspect of the Eleventh Circuit's decision shows why this case is an even better vehicle for resolving the lower courts' disagreement over how to read *Stewart* than would be a case involving a floating casino or restaurant. The structures at issue in most of those cases actually were constructed as boats and at the time of the lawsuits were merely moored to shore. Thus, it is possible, as occurred in the Seventh Circuit's *Tagliere* case, that the record in one of those cases might be fuzzy or disputed concerning whether the owner of the craft at issue truly "intends that the boat will never again sail." 445 F.3d at 1016; *see also Harvey's Casino v. Isenhour*, 724 N.W.2d 705 (Iowa

2006) (moored gaming boat that moved two hundred hours per year was a vessel). There can be no such uncertainty in this case, however, because the home at issue was not designed ever to engage in maritime transportation and was incapable of being certified for legal navigability. This case, therefore, brings the conflict between the Eleventh Circuit and other courts into stark relief.

Finally, this case well illustrates the types of undesired and unjust consequences that are bound to occur under the Eleventh Circuit's overly expansive definition of "vessel." Here, the City used that definition to use an otherwise inapplicable federal law to oust a person from his home in contravention of a state's homestead protection laws.

IV. The Eleventh Circuit's Decision Is Incorrect.

The Eleventh Circuit's test for "vessel" status is unduly broad and improperly sweeps within its ambit floating structures that are indefinitely moored and connected to land-based utilities – especially when, as here, the structures were not even designed for waterborne navigation in the first place.

For over a century, "[t]he most basic criterion used to decide whether a structure is a vessel [has been] the purpose for which it is constructed and the business in which it is engaged." Thomas J. Schoenbaum, *What is a Vessel?*, 1 ADMIRALTY & MAR. LAW § 3-6 (2011); *see also Perry v. Haines*, 191 U.S.

17, 30 (1903) (the question whether a structure constitutes a "vessel" turns on "the purpose for which the craft was constructed, and the business in which it is engaged"). Accordingly, in *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19 (1926), this Court held that a floating wharfboat secured by cables to the shore and connected to onshore utilities was not a "vessel" because it was neither "taken from place to place" nor "used to carry freight from one place to another" or for any other purpose related to maritime commerce. Similarly, in *Roper v. United States,* 368 U.S. 20, 23 (1961), this Court held that a floating defunct cargo ship was not a "vessel" because it was being used as a "mobile warehouse" for grain storage and had "not been converted to any navigational use." *Id.* at 23; *see also Cope v. Vallette Dry-Dock Co.*, 119 U.S. 625, 626-27 (1887) (floating drydock was not a "vessel" because it was "moored and lying at [the] usual place" it had occupied for years).

Under this purpose-based test, it is clear that floating structures that are indefinitely moored and connected to land-based utilities do not constitute "vessels." Not only are such structures not used for any kind of maritime transportation or commerce, but their owners have no design whatsoever to use them in this way in the future. Accordingly, there is nothing to be gained – and much to be lost – by regulating them under admiralty law.

The Eleventh Circuit, however, held here and in *Belle of Orleans*, 535 F.3d at 1311-12, that *Stewart*

expanded the longstanding test for "vessel" status to cover indefinitely moored floating structures. Relying on a sentence in *Stewart* stating that "a 'vessel' is any watercraft practically capable of maritime transportation, *regardless of its primary purpose* or state of transit at a particular moment," 543 U.S. at 497, the Eleventh Circuit has concluded that indefinitely moored structures are now "vessels" because "the status of 'vessel' does not depend in any way on either the purpose for which the craft was constructed or its intended use." Pet. App. 19a (quoting *Belle of Orleans*, 535 F.3d at 1311).

The Eleventh Circuit is mistaken. The *Stewart* Court's mention of "primary purpose" was meant only to clarify that a structure can constitute a "vessel" even if it more often than not remains stationary. 543 U.S. at 495. Thus, even though the dredge in that case usually sat still and "was not in actual transit at the time" of the event at issue, it still was a "vessel" because "it *was*" sometimes "used to transport equipment and workers over water." *Id.* (emphasis in original) (internal quotation marks omitted). Nothing in this reasoning suggests that structures that are moored indefinitely to shore and were not created, and are *never* to be used in the future, for transport over water can now constitute vessels.

Lest there be any doubt, this Court in *Stewart* reaffirmed the *Evansville* and *Cope* decisions that such structures (even if formerly used for maritime transport) are not vessels. *Stewart*, 543 U.S. at 493. What is more, this Court expressly explained, citing

the Fifth Circuit's decision in *Pavone*, that ships formerly used for maritime transport are not vessels when they are "moored to the shore in a semi-permanent or indefinite manner," *id.* at 494 (quoting *Pavone*), even though there may be "a remote possibility that they may one day sail again." *Id.* This Court thus went out of its way to note that it was refusing to sweep within the reach of 1 U.S.C. § 3 "an array of fixed structures not commonly thought of as capable of being used for maritime transport." 543 U.S. at 494. That phrase describes perfectly the floating homes, restaurants, and other floating, indefinitely moored structures that the Eleventh Circuit has now deemed vessels.

It makes no difference, contrary to the Eleventh Circuit's analysis, *see* Pet. App. 21a, whether a floating structure may have been towed to reach its ultimate location or that it might be capable of being towed again. The wharfboat in *Evansville* did not qualify as a "vessel," even though each winter the structure was towed to a protected harbor to shield it from ice. *Evansville*, 271 U.S. at 22. The cargo ship in *Roper* likewise was not a "vessel," even though it was moved on occasions to an unloading facility. *Roper*, 368 U.S. at 23. In each of those cases, the facts that the structures were secured by cables to the mainland, connected to land-based utilities, and were not used for maritime purposes precluded them from being regulated as "vessels." The same is true here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 10-10695

D.C. Docket No. 9:09-cv-80594-WPD

THE CITY OF RIVIERA BEACH,

Plaintiff-Appellee,

versus

THAT CERTAIN UNNAMED GRAY, TWO-STORY VESSEL APPROXIMATELY FIFTY-SEVEN FEET IN LENGTH, her engines, tackle, apparel, furniture, equipment and all other necessaries appertaining and belonging in rem,

Defendant,

FANE LOZMAN,

Claimant-Appellant.

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

(August 19, 2011)

Before EDMONDSON and MARCUS, Circuit Judges, and FAWSETT,* District Judge.

MARCUS, Circuit Judge.

Claimant-Appellant Fane Lozman appeals the district court's entry of an order of partial summary judgment and, following a two-day bench trial, an order of final judgment for Plaintiff-Appellee City of Riviera Beach ("City") in an *in rem* proceeding against Defendant Unnamed Gray, Two-Story Vessel Approximately Fifty-Seven Feet in Length ("Defendant"). The City filed a complaint in admiralty against the Defendant, first, claiming that the Defendant committed the maritime tort of trespass, because the Defendant remained at the City marina after the City explicitly revoked its consent, and second, seeking to foreclose its maritime lien for necessaries (unpaid dockage provided to the Defendant by the City). On partial summary judgment, the district court concluded that it had admiralty jurisdiction over the Defendant because the Defendant was indeed a "vessel" under 1 U.S.C. § 3, and that the Defendant was liable for maritime trespass.[1] After a bench trial, the district court determined that the trespass gave rise to nominal damages of $1 and that

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* Honorable Patricia C. Fawsett, United States District Judge for the Middle District of Florida, sitting by designation.

[1] On appeal, Lozman does not challenge the district court's trespass ruling (except to the extent that he claims the district court lacked jurisdiction in the first place).

the Defendant owed the City approximately $3,000 under the maritime lien. After thorough review, we **AFFIRM** the judgments of the district court in all respects.

I.

The relevant facts are these. Lozman purchased the Defendant vessel in 2002. After purchasing the Defendant, Lozman had it towed from a location near Fort Myers, Florida to North Beach Village, Florida, a distance of at least 200 miles. In North Bay Village, Lozman lived in the Defendant from the time of purchase until Hurricane Wilma struck in late 2005.[2] Lozman had the Defendant towed to the City marina in March 2006, where he continued to use the Defendant as his primary residence until its arrest in April 2009.

The City owns and operates a municipal marina on the Atlantic Intracoastal Waterway. The marina provides wet and dry storage for approximately 510 vessels, both commercial and recreational. The marina leases slips to vessels on both a monthly basis and at a higher daily transient rate. On March 10, 2006, Lozman and the City marina entered into a

[2] According to Lozman, he moved the Defendant to two different marinas in North Bay Village after he was evicted from another marina for attempting to require that marina to provide reasonable accommodation – in the form of a wheelchair ramp – for his disabled houseboat neighbor.

"Wet-Slip or Dry Storage Agreement" (the "Agreement"). It called for Lozman to pay a monthly dockage fee of $1,174.48 by the first of each month, and dockage was provided on a month to month basis. It is undisputed that Lozman paid the entire monthly dockage fee for the month of March 2006, although he arrived at the marina some time in the middle of the month.

Conflict – indeed, litigious conflict – between the City and Lozman erupted shortly after Lozman's arrival. According to Lozman, on May 10, 2006, one day before then-Governor Jeb Bush signed an anti-eminent domain bill, the City entered into an agreement with a private developer for the redevelopment of the marina. Seeking to scuttle the redevelopment agreement, Lozman filed suit in Palm Beach County Circuit Court, alleging that the City's May 10, 2006 meeting with the developer violated the Florida Sunshine Law, Fla. Stat. § 286.011, because the public was only given one day's notice of the meeting. While it is not clear from the record how that lawsuit was resolved, the redevelopment plan was ultimately postponed or abandoned, a result for which Lozman takes credit.

On August 9, 2006, the City issued Lozman a notice of eviction from the marina, and subsequently filed an eviction suit also in the Circuit Court for Palm Beach County. The City's purported reasons for the eviction were that Lozman had failed to muzzle his ten-pound daschund and had used unlicensed repair persons to perform work on the Defendant. In

the eviction proceedings, the City argued on summary judgment that the Agreement between Lozman and the City established a nonresidential tenancy under Florida law. The Circuit Court agreed that the Agreement established a nonresidential tenancy under Florida law and was therefore governed by Florida's landlord-tenant statute. The court, however, denied the City's motion for summary judgment because Lozman had raised an issue of material fact as to whether the eviction was improper retaliation for his opposition to the redevelopment plan. On March 2, 2007, after a three-day trial, a jury returned a verdict in Lozman's favor, finding that Lozman's protected speech was a substantial or motivating factor in the City's attempt to terminate the lease, and that the attempted termination would not have occurred absent the protected speech. Lozman continued to pay the monthly dockage fee throughout the proceedings, and remained at the marina.

On June 14, 2007, a few months after Lozman's state court victory, the Riviera Beach City Council unanimously passed a resolution adopting a revised dockage agreement and accompanying Marina Rules & Regulations. The revised agreement and rules and regulations require all vessels docked at the marina and their owners to: (1) secure and maintain liability insurance to specified limits and name the marina as an additional insured; (2) show proof of valid registration or documentation; (3) be operational and capable of vacating the marina in case of an emergency; and (4) comply with the Florida Clean Vessel Act, Fla.

Stat. § 327.53, which, among other things, prohibits owners of vessels or floating structures from discharging raw sewage into Florida waters.

The City marina sent numerous letters to all marina residents and customers describing the new requirements. On or about July 25, 2007, the marina sent its initial notice of the new requirements and provided residents and customers with the revised dockage agreement to be executed by September 30, 2007. The marina sent customers an additional letter on November 13, 2007, further describing the new insurance requirements. On January 25, 2008, the marina sent Lozman a letter repeating the new insurance requirements and listing deficiencies in his and the Defendant's compliance with the marina's new rules and regulations. Specifically, the letter informed Lozman that he needed to sign a revised dockage agreement, that he lacked sufficient insurance coverage for the Defendant, and that he needed to provide insurance and registration documentation to the marina. Two months later, the marina performed an assessment of the vessels' compliance with the City resolution, and determined that seventeen vessels docked at the marina, including the Defendant, were not in compliance.[3] On April 22, 2008, the marina

[3] Of the seventeen vessels that were not in compliance as of the March 2008 assessment, some later came into compliance or vacated the marina; others were abandoned by their owners; and others were donated to charity and removed from the marina. The Defendant was the only noncompliant craft as of April 1, 2009.

sent Lozman a letter informing him that he had missed the deadline to execute a new agreement and procedures to enforce the City's rights would be implemented against the Defendant.

Lozman claims that he never received these letters. He does not dispute, however, that he received a letter from the marina dated March 6, 2009, which provided final notice of the marina's revocation of permission for the Defendant to remain at the marina unless (1) Lozman brought the Defendant into compliance with the City resolution's new requirements, (2) Lozman paid the outstanding balance on the account, and (3) Lozman executed the revised dockage agreement. The letter stated that "[s]hould your vessel remain and you fail to pay your account in full, execute the 'Marina Dockage Agreement,' and otherwise bring your vessel into compliance with the Agreement's provisions by **April 1, 2009**, the City will promptly institute legal proceedings against you and your vessel for trespass and to foreclose the City's lien on your vessel." It is undisputed that Lozman never executed the new agreement and that the Defendant remained at the marina after April 1, 2009.

Accordingly, on April 20, 2009, the City filed a two-count verified complaint in admiralty against the Defendant to foreclose its maritime liens for "necessaries" (dockage provided by the City marina to the Defendant), under 46 U.S.C. § 31342,[4] and for

[4] 46 U.S.C. § 31342 provides:

(Continued on following page)

trespass. The United States District Court for the Southern District of Florida issued a warrant for the arrest of the Defendant under Supplemental Rule C for Certain Maritime and Admiralty Claims, which provides, in relevant part, that "[i]f the conditions for an in rem action appear to exist, the court must issue an order directing the clerk to issue a warrant for the arrest of the vessel or other property that is the subject of the action." Fed. R. Civ. P. Supp. Rule C(3)(a)(i). On the afternoon of April 20, 2009, the United States Marshal arrested the Defendant, and had it towed from the City marina to Miami, Florida, a distance of approximately eighty miles. The next day, Lozman filed, pro se,[5] an emergency motion to dismiss the complaint and return the Defendant to the marina. After a hearing on April 23, 2009, the district court denied Lozman's motion.

On August 12, 2009, the City moved for partial summary judgment on its maritime trespass claim. After considering Lozman's response, the district court

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(a) Except as provided in subsection (b) of this section, a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner –

(1) has a maritime lien on the vessel;

(2) may bring a civil action in rem to enforce the lien; and

(3) is not required to allege or prove in the action that credit was given to the vessel.

(b) This section does not apply to a public vessel.

[5] Lozman proceeded pro se for the entirety of the case below, including the bench trial. He now has representation on appeal.

granted the City's motion, finding that the Defendant was a "vessel" for purposes of federal admiralty jurisdiction. The district court also found that the Defendant was trespassing on the marina as of April 1, 2009. Lozman had received notice of the Defendant's failure to comply with the marina rules and regulations in early March 2009, and the notice expressly terminated the City's consent as of April 1, 2009. The Defendant, however, remained at the marina until its arrest on April 20, 2009. The district court concluded that the Defendant vessel remained at the marina after the City terminated consent.

On November 23 and 24, 2009, the district court held a two-day bench trial on the issues of damages for the trespass claim, and liability and damages for the maritime lien for necessaries claim. On January 6, 2010, the district court entered its findings of fact and conclusions of law, and issued an order of final judgment in the City's favor. The district court found that the Defendant's account was delinquent as of April 20, 2009 in the amount of $3,039.88. The court credited the City marina's ledger and the testimony of the City's forensic accountant in determining the amount owed. The court found no real harm resulting from the trespass, awarding the City nominal damages of $1.

On February 25, 2010, the entry of final judgment was amended to include $3,053.26 in prejudgment interest plus custodial fees. The district court also ordered the U.S. Marshal to release the Defendant and execute its sale in satisfaction of the

judgment. Lozman filed an emergency motion to stay the sale and to stay enforcement of the district court's final judgment in this Court, which was denied on March 3, 2010. The City purchased the Defendant in a Bill of Sale executed on March 4, 2010. This timely appeal of both the district court's partial summary judgment and final judgment orders followed.

II.

The standard of review for a district court's grant of summary judgment is well settled. "This court reviews a district court's grant of summary judgment *de novo*, applying the same legal standards used by the district court." *Krutzig v. Pulte Home Corp.*, 602 F.3d 1231, 1234 (11th Cir. 2010). "Summary judgment is appropriate where, viewing the movant's evidence and all factual inferences arising from it in the light most favorable to the nonmoving party, there is no genuine issue of any material fact, and the moving party is entitled to judgment as a matter of law." *Id.*; *see also Celotex Corp v. Catrett*, 477 U.S. 317, 322 (1986). As for the district court's entry of final judgment after a bench trial, "[w]e review a district court's factual findings when sitting without a jury in admiralty under the clearly erroneous standard. We review the district court's conclusions of law de novo." *Sea Byte, Inc. v. Hudson Marine Mgmt. Servs., Inc.*, 565 F.3d 1293, 1298 (11th Cir. 2009) (quoting *Venus Lines Agency, Inc. v. CVG Int'l Am., Inc.*, 234 F.3d 1225, 1228 (11th Cir. 2000)). "A finding of fact is clearly erroneous when the entirety of the evidence

leads the reviewing court to a definite and firm conviction that a mistake has been committed." *Id.* (quoting *Dresdner Bank AG v. M/V Olympia Voyager*, 446 F.3d 1377, 1380 (11th Cir. 2006)).

Lozman first claims that the district court incorrectly concluded on summary judgment that the Defendant was a "vessel" subject to federal admiralty jurisdiction. He further says that the City did not have a maritime lien because the Defendant did not owe the City money for dockage, but rather the City owed Lozman. Lozman also asserts that the City improperly instituted this admiralty action in retaliation against him for the exercise of his First Amendment rights in opposing the City's development plan for its marina, and that the district court erred in finding that Lozman had failed to establish such a defense. Finally, Lozman argues that his March 2007 success in resisting an eviction attempt by the City in state court precludes the City, under the doctrines of judicial and collateral estoppel, from bringing a federal maritime claim against him in May 2009, and that the district court erred in declining to apply either estoppel doctrine. We consider each claim in turn.

A.

The United States Constitution extends the judicial power of the United States "to all Cases of admiralty or maritime Jurisdiction." U.S. Const. art. III, § 2, cl. 1. Under that clause, Congress has granted

federal district courts exclusive original jurisdiction over "[a]ny civil case of admiralty or maritime jurisdiction." 28 U.S.C. § 1333(1). This is an *in rem* case against the Defendant for the maritime tort of trespass and for the enforcement of a maritime lien for necessaries. A "mandatory prerequisite" to the district court's admiralty jurisdiction over the Defendant, and to the attachment of a maritime lien, is that the Defendant be a "vessel" under federal law.[6] *Crimson Yachts v. Betty Lyn II Motor Yacht*, 603 F.3d 864, 872 (11th Cir. 2010). We review the district court's conclusion that the Defendant was a "vessel" de novo. *Bunge Corp. v. Freeport Marine Repair, Inc.*, 240 F.3d 919, 922 (11th Cir. 2001).

The determination of whether the Defendant is a "vessel" is dictated by binding precedent. Both this Court and the former Fifth Circuit in binding

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[6] Lozman spends considerable ink describing Florida state law and the difference under Florida law between a "floating residential structure" and a "vessel." Lozman claims that the Defendant is a "floating residential structure," not a "vessel," as the terms are defined under Florida law. These arguments miss the point. Federal law governs the existence of admiralty jurisdiction, and the term "vessel" is specifically defined in the United States Code. Accordingly, for purposes of federal admiralty jurisdiction, any differences among the definitions of vessel under the laws of various states or between state and federal law must yield to the federal definition and the required uniformity of federal maritime law. *See Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 490 (2005) ("[1 U.S.C.] § 3 continues to supply the default definition of 'vessel' throughout the U.S. Code. . . ."); *S. Pac. Co. v. Jensen*, 244 U.S. 205, 215-16 (1917).

precedent have employed a broad definition of vessel pursuant to 1 U.S.C. § 3. Section 3 provides, in full: "The word 'vessel' includes every description of watercraft or other artificial contrivance used, *or capable of being used*, as a means of transportation on water." 1 U.S.C. § 3 (emphasis added). We have unambiguously said that the primary inquiry in determining whether a craft is a vessel is whether the craft was "rendered practically incapable of transportation or movement." *Bd. of Comm'rs of the Orleans Levee Dist. v. M/V Belle of Orleans*, 535 F.3d 1299, 1312 (11th Cir. 2008) (quoting *Stewart*, 543 U.S. at 494). In so doing, we have echoed the Supreme Court's pronouncement in *Stewart*, 543 U.S. 481, that the determination of whether a craft is a "vessel" focuses on "whether the watercraft's use 'as a means of transportation on water' is a practical possibility or merely a theoretical one." *Id.* at 496. We therefore look at the capability of the craft, "not its present use or station." *Belle of Orleans*, 535 F.3d at 1310.

Our cases provide further context for this broad definition. In *Pleason v. Gulfport Shipbuilding Corp.*, 221 F.2d 621 (5th Cir. 1955), the Carol Ann, a salvage and repair vessel built for the Navy, had been declared surplus and was subsequently sold and re-sold to private parties. *Id.* at 622. One of the vessel's owners decided to scrap the vessel, and at the time the vessel was brought in for certain repairs, she was in the following condition: "her propellers and propeller shafts had been removed; she had no crew; none of her machinery was in operation; she had no light,

heat, or power in operation; her main engines had been completely removed; all of her steering apparatus, with the exception of the rudder, had been removed and sold; her superstructure and masts were intact; her navigation lights were in place, though not operable; [and] her compartmentation, including cargo holds, was intact." *Id.* at 622-23. After these repairs were performed, the Carol Ann was moored to a dock by cables, and she received telephone and electrical service through connections to sources on land. *Id.* at 623. Although the Carol Ann was almost completely gutted, except for her superstructure, the former Fifth Circuit[7] held that she was a vessel. *Id.* The Court, as it had done in the past, "saw fit to emphasize the words 'capable of being used' in discussing Section 3 of Title 1." *Id.* The Carol Ann was afloat and capable of being towed, had a deck, cabins, and superstructure, and therefore "was capable of being used as a means of transportation under tow" despite having "no steering mechanism" and "no motive power of its own." *Id.*

The case of *Miami River Boat Yard, Inc. v. 60' Houseboat*, Serial No. SC-40-2860-3-62, 390 F.2d 596 (5th Cir. 1968) is equally instructive. There, a panel of the former Fifth Circuit concluded that a houseboat with no motive power of her own that was used as a

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[7] In *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

residence in a marina was still a vessel. *Id.* at 597. The undisputed facts showed that the defendant houseboat had "made the rather considerable maritime voyage to libelant's shipyard in Miami . . . with the expectation that she would be towed away." *Id.* The Court noted that a houseboat "affords a waterborne place to live with the added advantage of at least some maritime mobility." *Id.* Accordingly, "[t]hat she has no motive power and must, as would the most lowly of dumb barges, be towed does not deprive her of the status of a vessel." *Id.*

More recently, in 2008, we had occasion in *Belle of Orleans* to consider whether a riverboat casino that was moored to a dock by steel cables and had electrical, computer, and phone cables attached to a shore side source was a vessel. 535 F.3d at 1304. We held that it was. A panel of this Court reaffirmed that *Pleason* was still good law and that it "addressed precisely the legal issue we face in the instant case." *Id.* at 1306. We also found the riverboat at issue to be factually indistinguishable from the vessel in *Pleason*, with the exception that the riverboat had a working engine and other machinery and therefore motive power of its own. *Id.* at 1307. That distinction, of course, led us further toward the conclusion that the riverboat was capable of maritime transport and was, therefore, a vessel, but we did not depart from the *Pleason* analysis. *Id.*

We distinguished both legally and factually the Fifth Circuit's opinion in *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560 (5th Cir. 1995), on

which Lozman now relies, where the court held that a floating casino that was semi-permanently and indefinitely moored to the shore was not a vessel because it was "removed from navigation" and "was constructed to be used primarily as a work platform." *Id.* at 570. We rejected the reasoning of the Fifth and Seventh[8] Circuits, both of which "focus on the intent of the shipowner rather than whether the boat has been 'rendered practically incapable of transportation or movement.'" *Belle of Orleans*, 535 F.3d at 1311 (quoting *Stewart*, 543 U.S. at 494). Again we observed that "[t]he owner's intentions with regard to a boat are analogous to the boat's 'purpose,' and *Stewart* clearly rejected any definition of 'vessel' that relies on such a purpose." *Id.* at 1311 (citing *Stewart*, 543 U.S. at 497 ("Under [1 U.S.C.] § 3, a 'vessel' is any watercraft practically capable of maritime transportation, regardless of its primary purpose. . . .") (footnote omitted)). Moreover, we noted that "such a test is incompatible with the Supreme Court's focus on providing uniformity within admiralty jurisdiction," *id.* (citing *Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891, 902 (11th Cir. 2004)), because "state law can change" and "an owner's intentions may change in ways never anticipated," *id.* at 1311-12.

A panel of this Court reiterated the analysis employed in *Belle of Orleans* and the enduring vitality of

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[8] *See Tagliere v. Harrah's Ill. Corp.*, 445 F.3d 1012 (7th Cir. 2006).

Pleason and *60′ Houseboat* still again in *Crimson Yachts*, 603 F.3d 864. After reviewing the purpose and history of maritime liens and prior precedent interpreting the term "vessel," the Court noted that a "case-by-case approach is often necessary to determine whether admiralty jurisdiction applies to novel or unusual situations." *Id.* at 875 (internal quotation marks omitted). We ultimately held that the Betty Lyn II, a yacht that had been drydocked, removed from the water with cranes, and temporarily disabled for extensive repairs, was still a vessel. *Id.* We stated that "[t]he BETTY LYN II need merely be capable of transportation on water to be a vessel. The law does not require that she be able to self-propel." *Id.* (citing *Belle of Orleans*, 535 F.3d at 1307; *60′ Houseboat*, 390 F.2d at 597). Although the yacht was on dry land for repairs, it retained the status of vessel because it still "could be towed upon 24 hours notice." *Id.*

Lozman's efforts to distinguish *Pleason* and the line of precedent that followed are unavailing. Aside from his discussion of Florida law, which is of no moment in defining the term "vessel" for purposes of federal admiralty jurisdiction, Lozman raises three somewhat interrelated arguments in an effort to avoid controlling precedent. First, he argues that the Defendant was *not* practically capable of transportation over water, even by tow. The record disputes Lozman's characterization. The Defendant in this case is virtually indistinguishable from the vessels in the aforementioned cases in terms of its capacity for maritime transport. Like the vessel in *Pleason*, the

Defendant was moored to a dock by cables, received power from land, and had no motive power or steering of its own. Moreover, the Defendant *was* towed several times over considerable distances: first, from the place of purchase near Fort Myers to North Bay Village; next, among several marinas in North Bay Village; then, from North Bay Village down to the City; and finally, after its arrest, from the City to Miami.

Lozman claims, nevertheless, without any evidentiary support in the record, that each of the three times the Defendant was moved over 250 feet it sustained serious damage and that it would have sunk two out of the three times if immediate underwater repairs had not been performed. But absent a shred of evidence, and in light of the contradictory evidence of the actual voyages made by the Defendant under tow, this assertion alone cannot preclude a determination that the Defendant was practically capable of maritime transportation. In addition, as the district court recognized, in *Belle of Orlean*s, the claimant raised a similar concern that moving the vessel would damage it, and we stated that "the BELLE OF ORLEANS was capable of moving over water, *albeit to her detriment*, and was capable of being transported under tow. As such, we hold that the BELLE OF ORLEANS is a 'vessel' for purposes of admiralty jurisdiction." 535 F.3d at 1312 (emphasis added).

Second, Lozman argues, again without any record support, that the Defendant was constructed using methods and materials appropriate for houses

on land and, accordingly, that the Defendant is not a vessel. Thus, Lozman asserts that the Defendant is a "floating shack, built out of plywood with only 1/16" of fiberglass surrounding its unraked hull, without proper cleats for towing,[9] no bilge pumps, no navigation aids, no lifeboats and other lifesaving equipment, no propulsion, [and] no steering." In essence, Lozman claims that the Defendant "was designed as a residence that just happened to float." But the Defendant's design, however unusual or unorthodox, is of little moment. We clearly stated in *Belle of Orleans* that the status of "vessel" does not depend in any way on either the purpose for which the craft was constructed or its intended use. 535 F.3d at 1311.

Lozman also uses these claims about the Defendant's construction to again suggest that the Defendant was not practically capable of moving over water, even by tow. But that argument, too, is contradicted by the record. The fact that the Defendant was an unusually designed craft is relevant only to the extent that the design prevents it from having any practical capacity for transportation over water, and the record is clear that the Defendant had this practical capacity. *See Burks v. Am. River Transp. Co.*, 679

[9] Lozman's own brief and the evidence presented at trial appear to contradict this point. Before he even arrived in the City, and thus before the attachment of a maritime lien and the district court's exercise of its admiralty jurisdiction over the Defendant, Lozman had a repairperson fit the Defendant with four towing bitts prior to its approximately-seventy mile tow from North Bay Village to the City marina.

F.2d 69, 75 (5th Cir. Unit A 1982) ("No doubt the three men in a tub would also fit within our definition [of "vessel"], and one probably could make a convincing case for Jonah inside the whale."); *McCarthy v. The Bark Peking*, 716 F.2d 130, 134 (2d Cir. 1983) ("[V]irtually any capacity for use as seagoing transportation – perhaps even the hypothetically plausible possibility has sufficed to lend the dignity of 'vessel' status to a host of seemingly unlikely craft.").

Finally, Lozman argues that the Defendant did not have a Hull Identification Number ("HIN") and could not obtain Coast Guard certification, both of which are required for legal navigability, and that therefore it cannot be considered a vessel. This argument misapprehends the relevant inquiry. As we recognized in *Belle of Orlean*s, legal navigability is not the test for vessel status. 535 F.3d at 1311-12 ("[I]f legal navigability is the test for vessel status, any ship with an expired Coast Guard certification becomes a non-vessel. . . . Such a result is clearly not what the Supreme Court intended [in *Stewart*]."). Lozman claims the Defendant is distinguishable from the hypothetical vessel in *Belle of Orleans* because the Defendant could never obtain a Coast Guard certification in the first place. But in distinguishing this Court's hypothetical illustration of a principle, he fails to dispute – nor could he dispute – the principle itself; namely, that we do not consider legal navigability at all in determining whether a craft is a vessel, but rather only the craft's practical capacity for maritime transport.

In short, based on long precedent, the Defendant is a "vessel" under 1 U.S.C. § 3. Like the vessels in *Pleason* and *60′ Houseboat*, the Defendant was practically capable of transportation over water by means of a tow, despite having no motive or steering power of its own. The district court did not err in concluding that it had federal admiralty jurisdiction over the Defendant.

B.

Under 46 U.S.C. § 31342, a "person providing necessaries to a vessel" has a maritime lien on the vessel that may be enforced by means of an *in rem* civil action against the vessel. 46 U.S.C. § 31342(a). We have held that dockage, which was undisputedly provided by the City marina to the Defendant, constitutes "necessaries" for purposes of maritime law. *Belle of Orleans*, 535 F.3d at 1314 (citing *Inbesa Am., Inc. v. M/V Anglia*, 134 F.3d 1035, 1037-38 (11th Cir. 1998)).

Lozman does not dispute the legal standard for a maritime lien, but rather argues that the City has failed to prove that a maritime lien accrued in this case because he allegedly did not owe any money to the marina. The proper balance of Lozman's dockage account with the marina is a question of fact and was the primary issue in the two-day bench trial before the district court. Accordingly, we review the district court's factual determinations for clear error. *Myers v. Cent. Fla. Invs., Inc.*, 592 F.3d 1201, 1211 (11th Cir. 2010). A "court will not disturb a district court's

findings of fact under the clearly erroneous standard unless it is left 'with the definite and firm conviction that a mistake has been made' after making all credibility choices in favor of the fact-finder's choice, in light of the record as a whole." *Meek v. Metro. Dade Cnty.*, 985 F.2d 1471, 1481 (11th Cir. 1993), *abrogated on other grounds by Dillard v. Chilton Cnty. Comm'n*, 495 F.3d 1324 (11th Cir. 2007) (per curiam) (quoting *Maddox v. Claytor*, 764 F.2d 1539, 1545 (11th Cir. 1985)). An appellate court may not reverse a district court's finding that is plausible in light of the entire record even if "convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985).

Based primarily on the marina's records and the in-court testimony of marina director Edwin Legue, forensic accountant Glenn Troast, and Lozman himself, the district court found that Lozman owed the marina "$805.78 for unpaid dockage" and "$608.60 for unpaid late fees" as of March 31, 2009, and "$1624.50 in dockage at the transient rate for [the] period from April 2, 2009 to April 20, 2009, inclusive," for a total of $3,038.88.

Lozman makes several arguments in response, all of which invite us to reconsider the well-grounded factual findings of the district court. First, Lozman claims that one of his checks was not properly credited to his account. Second, Lozman asserts that he was erroneously charged late fees. Third, Lozman contends that he is entitled to a prorated dockage fee

for the month of March 2006, because he paid for the full month but did not dock the Defendant at the marina until on or around March 17. Finally, Lozman claims that the marina owes him a credit for fifteen months of spotty or non-existent electrical service. We consider each claim in turn.

First, Lozman says that his September 2008 dockage fee check, #1157, was cashed by the City but was not properly credited to his account. As evidence, Lozman claims that his marina billing statement dated April 1, 2009, did not show a credit for this check. But the district court did not rely on the April 1, 2009 billing statement in computing the amount owed. Instead, the evidence upon which the district court relied was the marina's ledger card for Lozman's account, and the testimony of the City's forensic accountant, Glenn Troast, which was based on a review of that ledger. And the ledger has an entry for the amount of check #1157 on the date it was sent, September 9, 2008. The district court therefore found that check #1157, in addition to the other checks Lozman claimed were not properly credited to his account, were properly accounted for in the ledger.

Lozman further claims that the marina accounting staff intentionally held three of his checks for up to three months before depositing them. Presumably, Lozman is suggesting that the City's actions led him to unfairly incur late fees. At trial, however, forensic accountant Troast testified that Lozman was credited for any late fees that were assessed against him while those checks were being held. Indeed, the

ledger shows that, on July 9, 2008, shortly after the City deposited the three checks in question, Lozman's account was credited $473.11 for past late fees.[10] At all events, we can find no clear error in the district court's factfinding.

Lozman's next claim is that he is entitled to a prorated dockage fee for March 2006, his first month at the marina. It is undisputed that Lozman paid the monthly fee in full and that he arrived at the marina on or around March 17, 2006. But those two undisputed facts alone do not lead to the conclusion that Lozman was entitled to pay a prorated dockage fee. Nothing in the Agreement itself addresses the issue of prorated monthly payments, and nothing in the record suggests that Lozman ever demanded a credit or proration of his March 2006 payment before this case began. Without more, the district court did not commit clear error by declining to find that the City owed Lozman a prorated portion of his March 2006 dockage fee.

Finally, Lozman asserts that he was owed "15 months electric, $750.00, for one outlet he paid for that never worked and that he did not use." Although Lozman claims that his electricity did not work for two years, the record lacks any evidence – not even a

[10] Lozman also received substantial credits on other occasions. Thus, for example, the forensic accountant testified at trial that, in August 2007, the marina forgave a full month of unpaid dockage fees for July 2007, effectively crediting Lozman's account the unpaid amount.

single electrical bill – to support this claim. In addition, it is undisputed that the City credited Lozman $450 for nine months of electrical service on July 9, 2008, because of alleged service interruptions.

At the end of the day, nothing in the record indicates that we may second-guess the district court's weighing of the evidence. We are not persuaded that the district court erred in its factfinding, and neither are we left, therefore, "with the definite and firm conviction that a mistake has been made." *Maddox*, 764 F.2d at 1545. The district court's factual findings regarding the amount Lozman owed under the City's maritime lien for necessaries were not clearly erroneous.

C.

Lozman claims next that the City's federal admiralty complaint against the Defendant "was simply part of an ongoing retaliation by the CITY against LOZMAN for his success (with the support of then Governor Bush and then Attorney General Crist) in stopping the CITY from using eminent domain to take thousands of homes and businesses, along with the CITY marina, to be given to a private developer in a 2.4 billion dollar redevelopment deal," as well as for his success in the state court eviction case.

In order to successfully advance a First Amendment retaliation defense, Lozman must show (1) that his conduct was constitutionally protected; and (2) that his conduct "was a substantial or motivating factor

in" the City's decision to arrest the Defendant. *Cuban Museum of Arts & Culture, Inc. v. City of Miami*, 766 F. Supp. 1121, 1125 (S.D. Fla. 1991) (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)); *see also Gattis v. Brice*, 136 F.3d 724, 726 (11th Cir. 1998) ("To succeed in a section 1983 suit based on a claim of retaliation for speech, the plaintiff must show that his speech was a substantial or motivating factor in the allegedly retaliatory decision." (internal quotation marks omitted)). If Lozman makes this showing, the burden then shifts to the City to show "by a preponderance of the evidence" that the action against the Defendant would have occurred "even in the absence of the protected conduct." *Mt. Healthy*, 429 U.S. at 287; *see also Cuban Museum*, 766 F. Supp. at 1125.

The district court concluded on summary judgment that Lozman had failed to show that his 2006 opposition to the marina redevelopment plan was a substantial or motivating factor in the City's decision to bring this case. The court, therefore, did not reach the question of whether Lozman's conduct was constitutionally protected or whether the City could show by a preponderance of the evidence that the arrest of the Defendant would have occurred even in the absence of Lozman's conduct. The district court noted that, while the timing of the City resolution mandating compliance with revised marina rules and regulations – which occurred three months after Lozman's victory in the state court eviction case – was "enough to raise eyebrows," it was still not enough, absent *any*

firm evidence, to show that Lozman's speech was a substantial or motivating factor in the City's decision to implement those rules and to arrest the Defendant. The district court further found that the evidence submitted by Lozman – much of which was inadmissible, and which consisted primarily of (1) the minutes from a City Council meeting held approximately one year before the decision to change the rules was made, and (2) newspaper articles asserting that the rules changes were effectuated as a personal vendetta against Lozman – suggested at most an ongoing feud between Lozman and the City, but did "not establish a connection between Mr. Lozman's protected conduct and the specific action at issue here: the changing of the marina rules and their enforcement against the Defendant vessel."

The district court's conclusions were sound. On appeal, Lozman argues that what "is enough to raise eyebrows" – here, the timing of the rules changes – is circumstantial evidence sufficient to preclude summary judgment. We are unpersuaded. It is certainly true that "[w]here the circumstantial evidence and reasonable inferences drawn therefrom create a genuine issue of material fact for trial, summary judgment is improper." *Chapman v. Am. Cyanamid Corp.,* 861 F.2d 1515, 1518-19 (11th Cir. 1988). "However, an inference based on speculation and conjecture is not reasonable." *Id.* at 1518. As noted by the City, "circumstantial evidence must do more than simply 'raise some eyebrows'; it must be sufficient to raise a jury question." Lozman has presented no evidence in the

record to support his retaliation claims beyond the timing of the rules changes. And that timing is hardly enough to raise a *genuine* issue of material fact.

Indeed, the evidence that is in the record overwhelmingly contradicts Lozman's claims. To begin with, the new marina rules did not apply solely to the Defendant. Rather, the Defendant was one of seventeen vessels that were not in compliance with the new rules, and, on April 1, 2009, was the only non-compliant vessel remaining at the marina. Thus, there is no evidence to suggest that the Defendant was specifically targeted. The City's stated goals behind the revisions to the marina rules were "to become more fully compliant with state and federal laws and to better insulate the City from financial loss and liability exposure." Lozman marshals no evidence to dispute any of this.

Perhaps most significantly, the causal link between the March 2, 2007 state court eviction verdict in Lozman's favor and the June 20, 2007 rules changes is highly attenuated, if not wholly implausible. Notably, between those two events there was a new City Council election, which completely changed the composition of the City Council. As Lozman himself testified at the bench trial: "[T]he elections in Riviera Beach are in March. So the March, 2007, election all new people came in. And the feeling around town was they came in – that my win and the eminent domain defeat had a lot to do with it." Indeed, Lozman supported the campaigns of two of the new council members elected in 2007, who then

turned around and signed the *unanimous* City Council resolution authorizing the marina's new rules and regulations.

The district court did not err in granting summary judgment to the City on Lozman's affirmative defense of retaliation. Like the district court, we need not reach the questions of whether Lozman's speech was constitutionally protected and whether the City's rules changes and arrest of the Defendant would have occurred in the absence of Lozman's speech.

III.

Lozman's final argument is that the City was judicially estopped from bringing a federal maritime claim against the Defendant in light of the City's argument in state court that Lozman's dockage agreement with the marina gave rise to a nonresidential tenancy subject to Florida law. Lozman's argument is without merit. Judicial estoppel is "designed to prevent parties from making a mockery of justice by inconsistent pleadings." *McKinnon v. Blue Cross & Blue Shield of Ala.*, 935 F.2d 1187, 1192 (11th Cir. 1991). While judicial estoppel "cannot be reduced to a precise formula or test," *Zedner v. United States*, 547 U.S. 489, 504 (2006), three factors typically inform the inquiry: (1) whether there is a clear inconsistency between the earlier position and the later position; (2) a party's success in convincing a court of the earlier position, so that judicial acceptance of the inconsistent later position would create the perception

that either the earlier or later court was misled; and (3) whether the inconsistent later position would unfairly prejudice the opposing party if not estopped. *Jaffe v. Bank of Am., N.A.*, 395 F. App'x 583, 587 (11th Cir. 2010) (per curiam) (unpublished); *see also Zedner*, 547 U.S. at 504.

The first factor is crucial; without inconsistency there is no basis for judicial estoppel and no reason even to reach the other two factors. *See Zedner*, 547 U.S. at 506. Lozman does not even begin to show how there could be a "clear inconsistency" between the City's earlier position that a dockage agreement between *him* and the City is governed by state landlord-tenant law and the City's current position that the *Defendant* is a vessel subject to federal admiralty jurisdiction. Because there is no clear inconsistency here, the district court correctly concluded that the City was not estopped from bringing its action in admiralty against the Defendant.

Lozman makes a second estoppel argument, which is equally unpersuasive. Specifically, Lozman asserts that, because the state court ruled that the City's 2006 eviction attempt was improper retaliation, under the doctrine of collateral estoppel, the district court was required to rule that the City's admiralty action was also improper retaliation against him for the exercise of his First Amendment rights. An element of collateral estoppel is that "the issue at stake must be identical to the one alleged in the prior

litigation." *Greenblatt v. Drexel Burnham Lambert, Inc.*, 763 F.2d 1352, 1360 (11th Cir. 1985).[11] Moreover, "[t]he application of collateral estoppel is committed to the sound discretion of the district court," *id.*, and, accordingly, we review the district court's decision whether or not to apply collateral estoppel for abuse of discretion. *Dailide v. U.S. Att'y Gen.*, 387 F.3d 1335, 1341 (11th Cir. 2004).

The district court could not have abused its discretion in declining to apply collateral estoppel, because the issues at stake here are significantly different from those in dispute in the state court proceeding. In this case, the issues before the district court were whether the Defendant was a vessel, whether the Defendant was trespassing, and whether the City held a maritime lien for necessaries on the Defendant (and the amount owed under that lien). None of these issues were previously litigated. Lozman contends that the "identical" issue at stake is whether the City retaliated against him "for the exercise of his First Amendment rights, which issue was resolved in his favor in the state court action." But this statement of the issue is misleading. The

[11] "There are several prerequisites to the application of collateral estoppel: (1) the issue at stake must be identical to the one alleged in the prior litigation; (2) the issue must have been actually litigated in the prior litigation; and (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in that earlier action." *Greenblatt*, 763 F.2d at 1360 (citing *DeWeese v. Town of Palm Beach*, 688 F.2d 731, 733 (11th Cir. 1982)).

factual predicate for the retaliation claim, as we have discussed, has wholly changed since the 2007 state court verdict in Lozman's favor. There is a new City Council, which passed a unanimous resolution revising the marina rules and regulations, and this is an *in rem* action against the Defendant based in large part on Lozman's failure to comply with those rules and regulations (and on Lozman's failure to pay dockage fees). The City's earlier 2006 eviction attempt – the purported reasons for which were Lozman's failure to muzzle his small dog and his use of unapproved repairpersons – is not identical or even similar – factually or legally – to the City's 2009 admiralty action. The district court was not required to give any credence to the state court proceedings in this case, and did not abuse its discretion in declining to apply collateral estoppel.

The district court's orders of partial summary judgment and final judgment in favor of the City are **AFFIRMED**.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CITY OF RIVIERA BEACH, Plaintiff, vs. That certain unnamed gray, two story vessel approximately fifty-seven feet in length, her engines, tackle, apparel, furniture, equipment, and all other necessaries, appertaining and belonging in rem, Defendant. /	CASE NO. 09-80594-CIV-DIMITROULEAS Magistrate Judge Snow IN ADMIRALTY

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

(Filed Nov. 19, 2009)

THIS CAUSE is before the Court upon the Plaintiff City of Riviera Beach's Motion for Partial Summary Judgment [DE 80], filed on August 21, 2009. The Court has carefully considered the Motion, the Claimant Fane Lozman's Response to Plaintiff's Corrected Motion Dated August 21, 2009 for Partial Summary Judgment [DE 110], the Plaintiff's Reply to Claimant's Response [DE 117], the parties' affidavits and exhibits, and is otherwise fully advised in the premises.

I. BACKGROUND

The City of Riviera Beach and the Claimant Fane Lozman have been a protracted struggle concerning the City's development plans. In this battle there have been allegations of corruption, several lawsuits between the two, and arrests, among other incidents. Rather than delve into the full details of the parties' history against each other, we describe below the relevant facts to the instant action.

Plaintiff City of Riviera Beach ("City") holds title to and manages a Riviera Beach municipal marina in trust for the public. In this capacity, the City leases slips for vessels, and what the Plaintiff contends are floating structures rather than vessels. Mr. Lozman and the City executed an agreement on March 10, 2006 for Mr. Lozman to store his floating structure at a slip in the marina. In August, 2006, the City attempted to terminate the agreement with the Mr. Lozman. The City initiated an eviction proceeding against Mr. Lozman in state court (Case No. 50 2006 CA 014054, in the Fifteenth Judicial Circuit in and for Palm Beach County). On March 23, 2007, Mr. Lozman prevailed against the City, and consequently kept his structure at the marina and continued to pay the dockage fees. Specifically, the jury found that the City had attempted to terminate Mr. Lozman's lease for his exercise of his constitutionally-protected rights.

The Riviera Beach City Council passed a resolution in June, 2007, in which the City adopted a new dockage agreement and new Marina Rules &

Regulations. The new rules required vessels docked at the marina to: have insurance with the marina as an additional insured, have proof of registration, be capable of vacating in an emergency, and be compliant with the Florida Clean Vessel Act. The City claims to have sent numerous letters to Mr. Lozman between July 2007 and January 2009 regarding the new rules; Mr. Lozman asserts that he never received them. On or about March 10, 2009, Mr. Lozman received a letter from the City about Mr. Lozman's failure to execute the new dockage agreement, comply with the new rules, and pay certain charges on his account. The letter stated that if the Defendant floating structure did not come into compliance by April 1, 2009, the City would institute trespass proceedings against the vessel. In early April, 2009, Mr. Lozman attempted to pay the dockage fee by check. Although this attempt was initially credited to his account with the marina on April 6, 2009, it was reversed the same day. On April 17, 2009, the City returned Mr. Lozman's check with a letter notifying him that no further payments would be accepted from him on the account. On April 20, 2009, the City filed a Verified Complaint against the Defendant floating structure. [DE 1]. At the same time, the City moved for the issuance of an arrest warrant. The Court issued the warrant [DE 6], and the Defendant was towed out of the marina and into custody of National Maritime Services, Inc.

The City's Verified Complaint has two counts. Count I is for "Enforcement of a Maritime Lien –

Necessaries", in which the City seeks to collect the amount it claims was due on the Defendant's account along with the value of dockage between April 1, 2009, and April 20, 2009, fees and costs. Count II is for Enforcement of "Maritime Lien – Maritime Trespass", in which the City claims it has a maritime lien for damages from Mr. Lozman's failure to remove the Defendant from the marina by April 1, 2009. In this Motion for Partial Summary Judgment [DE 80], the City seeks summary judgment only on liability for Count II of the Verified Complaint.

II. DISCUSSION

A. Summary Judgment Standard

The Court may grant summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The stringent burden of establishing the absence of a genuine issue of material fact lies with the moving party. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). The Court should not grant summary judgment unless it is clear that a trial is unnecessary, *see Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986), and any doubts in this regard should be resolved against the moving party, *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157 (1970). The movant "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those

portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex,* 477 U.S. at 323. To discharge this burden, the movant must point out to the Court that there is an absence of evidence to support the nonmoving party's case. *Id.* at 325.

After the movant has met its burden under Rule 56(c), the burden of production shifts and the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986). According to the plain language of Federal Rule of Civil Procedure 56(e), the nonmoving party "may not rest upon the mere allegations or denials of the adverse party's pleadings," but instead must come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Matsushita,* 475 U.S. at 587.

Essentially, so long as the non-moving party has had an ample opportunity to conduct discovery, it must come forward with affirmative evidence to support its claim. *Anderson,* 477 U.S. at 257. "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be a sufficient showing that the jury could reasonably find for that party." *Walker v. Darby,* 911 F.2d 1573, 1577 (11th Cir. 1990). If the evidence advanced by the non-moving party "is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson,* 477 U.S. 242, 249-50 (internal citations omitted). Consideration of a motion for summary judgment, however, "does not

lessen the burdens on the non-moving party: the non-moving party still bears the burden of coming forward with sufficient evidence on *each element* that must be proven." *Earley v. Champion Int'l Corp.,* 907 F.2d 1077, 1080 (11th Cir. 1990) (emphasis in original).

B. Subject Matter Jurisdiction

As a preliminary matter, Mr. Lozman contends that this Court does not have jurisdiction over this case because his floating residential structure is not a vessel subject to jurisdiction in federal courts. Mr. Lozman also argues that the City is estopped from arguing that his floating structure is a vessel. The City argues that the Defendant is a vessel, and that estoppel does not apply.

1. Estoppel Does Not Apply

Mr. Lozman argues that the City should be "legally and equitably estopped" from arguing that this Court has subject matter jurisdiction. To support this contention, Mr. Lozman submits that the City argued in state court proceedings that Mr. Lozman was a nonresidential tenant at the marina and therefore subject to certain Florida state laws. The circuit court agreed that Mr. Lozman was a nonresidential tenant (though Mr. Lozman ultimately prevailed on other grounds).

Judicial estoppel is "designed to prevent parties from making a mockery of justice by inconsistent

pleadings." *McKinnon v. Blue Cross & Blue Shield,* 935 F.2d 1187, 1192 (11th Cir. 1991) (quoting *Am. Nat'l Bank v. Fed. Dep. Ins. Corp.,* 710 F.2d 1528, 1536 (11th Cir. 1983)). Judicial estoppel is an equitable doctrine that "cannot be reduced to a precise formula or test". *Zedner v. United States,* 547 U.S. 489, 504 (2006). The Supreme Court has given three factors that typically inform a court's judicial estoppel inquiry: clear inconsistency between the earlier position and the later position; a party's success in convincing a court of the previous position; and whether the inconsistent position would unfairly prejudice the opposing party. *Id.*

We find that Mr. Lozman's arguments for estoppel are misplaced. Mr. Lozman has not shown a clear inconsistency between the City's previous position that Mr. Lozman falls under Florida law for nonresidential tenancy at the marina, and their current position that the Defendant floating structure is a vessel under federal law. Mr. Lozman has neither argued that the definitions under state law are identical to that under federal law, nor that the City has made such an argument. Since we find no clear inconsistency, we find that judicial estoppel should not apply.[1]

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[1] To the extent that Mr. Lozman intended to argue that *res judicata* or collateral estoppel applies, we find that they do not. Res judicata does not apply because the cause of action here is clearly distinguishable from that of the state court action because of the change of factual circumstances (i.e., the imposition of new marina rules). *Citibank, N.A. v. Data Lease Fin.*

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2. This Court Has Subject Matter Jurisdiction

The United States Constitution establishes that judicial power of the United States extends "to all Cases of admiralty and maritime Jurisdiction". U.S. CONST. art. III, §2, cl. 1. Pursuant to that clause, Congress vested federal district courts with original jurisdiction over "[a]ny civil case of admiralty or maritime jurisdiction". 28 U.S.C. §1333(1).

The Eleventh Circuit has stated that whether federal courts have admiralty jurisdiction over a boat is decided by focusing on whether the boat "was rendered practically incapable of transportation or movement". *Bd. of Comm'rs of the Orleans Levee Dist. v. M/V Belle of Orleans,* 535 F.3d 1299, 1312 (11th Cir. 2008); *see Miami River Boat Yard, Inc. v. 60' Houseboat,* 390 F.2d 596, 597 (5th Cir. 1968) (a houseboat that could only move under tow was still a vessel for jurisdictional purposes). The Eleventh Circuit focuses on a boat's capability of maritime transport, rather than its primary or present use, or the owner's intent. *Belle of Orleans,* 535 F.3d at 1310. In *Belle of Orleans*,

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Corp., 904 F.2d 1498, 1501 (11th Cir. 1990) (listing one of the elements of *res judicata* to be that the same cause of action must be involved in both cases). Collateral estoppel does not apply either, as the issue at stake here is whether the Defendant is a vessel subject to admiralty jurisdiction, which was not an issue in a prior proceeding. *Greenblatt v. Drexel Burnham Lambert, Inc.,* 763 F.2d 1352, 1361 (11th Cir. 1985) (listing an element of collateral estoppel to be that "the issue at stake must be identical to the one alleged in the prior litigation").

the Eleventh Circuit considered both the Supreme Court's decision in *Stewart v. Dutra Construction Co.* and the Fifth Circuit's opinion in *Pleason v. Gulfport Shipbuilding* to establish its definition of vessel. *Id.* at 1306. The Eleventh Circuit placed primary focus on "whether the watercraft's use 'as a means of transportation on water' is a practical possibility or merely a theoretical one" and whether the vessel was "'rendered practically incapable of transportation or movement'". *Id.* at 1309, 1312 (quoting *Stewart v. Dutra Constr. Co.,* 543 U.S. 481, 496 (2005)). *Belle of Orleans* also emphasized that *Pleason* is still binding precedent. *Belle of Orleans,* 535 F.3d at 1309.[2] *Pleason* held that a boat that had a deck, cabins, and a superstructure, was capable of being used as a means of transportation and therefore subject to admiralty jurisdiction though it had no motor power of its own and no steering. *Pleason v. Gulfport Shipbuilding Corp.,* 221 F.2d 621, 623 (5th Cir. 1955).

We earlier ruled that there was a factual dispute as to what the seized structure was, and we chose not to decide whether the floating structure was a vessel subject to this Court's jurisdiction. We now find that Mr. Lozman has put forth no evidence that would convince us that the vessel at issue is substantively different than the vessel *Pleason*. Like the vessel in *Pleason*, the Defendant vessel here was moored to the

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[2] *Bonner v. City of Prichard* held that all of the former Fifth Circuit opinions prior to October 1, 1981, are binding precedent on the Eleventh Circuit. 661 F.2d 1206, 1209 (11th Cir. 1981).

dock with cables, received power from the land, and needed to be towed in order to be moved. Mr. Lozman places significance on the fact that moving the Defendant vessel may easily damage it. However, the same was true of the vessel in *Belle of Orleans*. *Belle of Orleans,* 535 F.3d at 1312 ("the Belle of Orleans was capable of moving over water, albeit to her detriment, and was capable of being transported under tow"). Neither does the Defendant vessel's ability to be registered in Florida prevent it from being considered a vessel. *Id.* at 1311-12 ("state law can change. . . . if legal navigability is the test for vessel status, any ship with an expired Coast Guard certification becomes a non-vessel. . . . Such a result is clearly not what the Supreme Court intended."). Mr. Lozman also relies upon the Fifth Circuit's decision in *De La Rosa v. St. Charles Gaming Co.*, which ruled that an indefinitely moored casino ship with utility lines from land-based sources was not a vessel for purposes of admiralty jurisdiction. *De La Rosa,* 474 f.3d 185, 188 (5th Cir. 2006). However, the Eleventh Circuit specifically rejected the reasoning of *De La Rosa* in *Belle of Orleans*, and found that *Pleason* is still binding precedent. *Belle of Orleans,* 535 F.3d at 1311-12. This Court thus has admiralty jurisdiction over this action.

C. Maritime Trespass

Maritime trespass is governed by federal common law because "there is no distinct claim for maritime trespass under the admiralty substantive body

of law." *Stuart Cay Marina v. M/V Special Delivery,* 510 F. Supp. 2d 1063, 1075 (S.D. Fla. 2007). This Court has looked to Restatement (Second) of Torts for guidance on the requirements of a maritime trespass claim. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 158). The Restatement provides that a person is liable for trespass by intentionally remaining on land after the possessor of the land revokes its consent, so long as the person knows or has reason to know of the revocation of consent. RESTATEMENT (SECOND) OF TORTS §§158, 171. An actor is liable for trespass irrespective of whether the trespass "causes harm to any legally protected interest of the other". *Id.* at § 158.

It is undisputed that the Defendant vessel initially had consent to be in the marina. It is also undisputed that Mr. Lozman received notice in early March, 2009, that the vessel was to come into compliance by April 1, 2009, or trespass proceedings would be taken against it.[3] The Defendant vessel remained in the marina though Mr. Lozman never complied with the conditions of the letter. It is therefore undisputed that the Defendant vessel remained at the marina after the City terminated consent.

Mr. Lozman argues that the Defendant vessel was not trespassing because the City accepted payment

[3] Mr. Lozman did not directly deny that he received the letter in his Response to Plaintiff's Motion for Partial Summary Judgment. [DE 110, ¶11]. The parties stated in their pretrial stipulation that it was an undisputed fact that he received the letter on March 10, 2009. [DE 138].

for the dockage fee for April, 2009. However, his own submitted evidence shows that the City credited and reversed the credit on his account on April 6, 2009, and that the City returned his check unprocessed. [DE 9, Ex. 5]. Mr. Lozman also argues that there was no damage caused by his vessel remaining at the marina because the slip remained empty for several months after it was seized. However, there need not be any actual harm in a trespass action. RESTATEMENT (SECOND) OF TORTS §§158. Mr. Lozman contends that he did not owe any money on his account prior to this April, 2009 payment, and that therefore there was no basis for a maritime lien. This argument is irrelevant, as the City is moving for summary judgment only on its claim for a maritime lien for maritime trespass, which does not require that the Defendant vessel owe the City any money. Mr. Lozman also asserts that federal preemption does not apply because the state court action is still being litigated for Mr. Lozman's counter-claim for damages. The state court eviction action is a separate proceeding for factual circumstances that have since changed significantly since Mr. Lozman prevailed in that case.

D. First Amendment Defense

Finally, Mr. Lozman argues that the City is violating his First Amendment rights by instituting this action in order to silence him. The City responds that Mr. Lozman has failed to satisfy his burden in raising this defense.

The party asserting that their First Amendment rights have been violated has the burden of "showing that their conduct was constitutionally protected and that the conduct was a substantial or motivating factor in the governmental decision to deny a benefit." *Cuban Museum of Arts & Culture, Inc. v. Miami,* 766 F. Supp. 1121, 1125 (S.D. Fla. 1991). The opposing party must then show by a preponderance of the evidence "that the benefit would have been denied in the absence of the protected conduct or expression." *Id.*

Mr. Lozman apparently argues that his opposition to a development project planned by the City is the constitutionally-protected conduct for which he is being retaliated against by the City. The City argues that Mr. Lozman has not properly put forth what conduct of his is constitutionally protected. We need not decide whether Mr. Lozman's opposition to the development project is constitutionally protected,[4] as Mr. Lozman has failed to show that his conduct was a substantial or motivating factor in the decision to not allow him to renew his lease. Mr. Lozman has presented no evidence that the City changed its rules and attempted to enforce them against him because of his opposition to the development plan. While the

[4] We note that a jury found in a state court action (before the Fifteenth Judicial Circuit in and for Palm Beach County, *City of Riviera Beach v. Fane Lozman,* Case No. 50 2006 CA 014054) that the City previously attempted to terminate Mr. Lozman's lease for his exercise of protected speech. [DE 9, ex. 2].

timing of the rules changes after Mr. Lozman's victory against the City in a state court action concerning his constitutionally-protected rights is enough to raise eyebrows, it is not enough to show that his protected speech was a substantial or motivating factor in the City's decision.

Neither does the evidence that Mr. Lozman submitted establish that it was a substantial or motivating factor. Mr. Lozman has submitted evidence of a City Council meeting in which the members speak of trying to "intimidate" and "shadow" him. [DE 63, ex. 4]. However, this was a year before the decision to change the marina rules was made, and there was no mention of attempting to evict him. The newspaper articles Mr. Lozman relies upon do not add any weight to his claim. Even if they were admissible evidence, they merely state the City changed its rules in a personal vendetta against Mr. Lozman without giving the basis for their conclusion. [DE 69, Ex. 1; DE 42, ex. 5; DE 135, ex. 2]. Furthermore, some of the articles indicate another substantial or motivating factor for the rules changes: to remove all of those living at the marina in order to make way for the development project Mr. Lozman has been fighting. *Cuban Museum*, upon which Mr. Lozman primarily relies, indicated that there was evidence of the Miami City Commission's meetings in which the tenant's constitutionally-protected activity was discussed for years culminating in the decision to terminate the lease, and that the city's proffered reasons for the lease termination were pretextual. *Cuban Museum,*

766 F. Supp. 1121, 1124, 1126-1127 (S.D. Fla. 1991).[5] Mr. Lozman has not submitted similar evidence.

We therefore find that Mr. Lozman fails in establishing the First Amendment defense.

E. Mr. Lozman's Surreply

On October 6, 2009, Mr. Lozman filed a Surreply to Plaintiff's Motion for Partial Summary Judgment [DE 127]. The City responded with a Motion to Strike [DE 128], in which it argued that Mr. Lozman failed to request leave from the Court when filing the Surreply. Mr. Lozman responded by filing a Motion for Leave to File Surreply and to Deny the Plaintiff's Motion to Strike Surreply [DE 136], which we construe as also being a Response to the City's Motion to Strike.

Local Rule 7.1.C prohibits the filing of memoranda of law beyond responses and replies without prior leave of Court. S.D. Fla. L.R. 7.1.C. Mr. Lozman did not request leave prior to filing the Surreply, which

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[5] Mr. Lozman also complains of an intimidation campaign against him by the City involving litigation, false arrests, harassment at the marina, and forced removals from City Council meetings. Mr. Lozman's allegations in this regard are largely supported by inadmissible evidence. Furthermore, while the evidence suggests an ongoing feud between Mr. Lozman and the City, they do not establish a connection between Mr. Lozman's protected conduct and the specific action at issue here: the changing of the marina rules and their enforcement against the Defendant vessel.

would be grounds to deny his Motion. In this case, even if Mr. Lozman had properly requested leave prior to filing the Surreply, we would deny it. The City's Reply was limited to rebutting arguments in Mr. Lozman's Response as required by the Local Rules. *Id.* There was thus no need for this Court to allow Mr. Lozman to file an additional memorandum of law. We therefore grant the City's Motion to Strike and deny Mr. Lozman's Motion for Leave to File Surreply.

F. Mr. Lozman's Motion to Supplement the Record

Mr. Lozman filed a Motion to Supplement the Record [DE 135] on October 15, 2009. A Response was due on November 2, 2009, but the City failed to respond. We thus grant Mr. Lozman's Motion by default, noting that the evidence he supplied did not establish his First Amendment defense.

III. CONCLUSION

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. Plaintiff City of Riviera Beach's Motion for Partial Summary Judgment [DE 80] is hereby **GRANTED**;

2. Plaintiff City of Riviera Beach's Motion to Strike [DE 128] is hereby **GRANTED**;

3. Claimant's Surreply [DE 127] is hereby **STRICKEN**;

4. Claimant's Motion for Leave to File Surreply and to Deny the Plaintiff's Motion to Strike Surreply [DE 136] is hereby **DENIED**;

5. Claimant's Motion to Supplement the Record [DE 135] is hereby **GRANTED by default**.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida this 18th day of November, 2009.

/s/ William P. Dimitrouleas
WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

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