No. 13-

IN THE

Supreme Court of the United States

CITGO ASPHALT REFINING COMPANY; CITGO PETROLEUM CORPORATION; CITGO EAST COAST OIL CORPORATION,

Petitioners,

v.

FRESCATI SHIPPING COMPANY, LTD.; TSAKOS SHIPPING & TRADING, S.A.; AND UNITED STATES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

DEREK A. WALKER
J. DWIGHT LEBLANC, JR.
DOUGLAS L. GRUNDMEYER
CHAFFE MCCALL, L.L.P.
2300 Energy Centre
1100 Poydras Street
New Orleans, LA 70163
(504) 585-7000

CARTER G. PHILLIPS*
JACQUELINE G. COOPER
RICHARD E. YOUNG
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

RICHARD Q. WHELAN
FRANK P. DEGIULIO
PALMER, BIEZUP & HENDERSON LLP
190 N. Independence Mall West, Suite 401
Philadelphia, PA 19106
(215) 625-9900

Counsel for Petitioners

* Counsel of Record

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QUESTIONS PRESENTED

1. Whether a safe berth provision in a voyage charter contract is a guarantee of the safety of the berth, rather than a duty of due diligence, and whether such a contractual provision runs to the benefit of a third-party vessel owner when there is no evidence of the contracting parties' intent to benefit the vessel owner.

2. Whether a wharf owner's tort duty to provide a safe approach extends to routes selected exclusively by a vessel's navigators in federally maintained waters over which the wharf owner does not exercise dominion or control.

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption.

RULE 29.6 STATEMENT

CITGO Asphalt Refining Company is not a corporation and has no parent corporations. It is a privately held general partnership whose General Partners are CITGO Petroleum Corporation and CITGO East Coast Oil Corporation, both of which are private, non-publicly held entities.

CITGO Petroleum Corporation's parent is PDV America, Inc., a private, non-publicly held entity. No publicly held company owns 10% or more of CITGO Petroleum Corporation's stock.

CITGO East Coast Oil Corporation's parent is CITGO Investment Company, a private, non-publicly held entity. No publicly held company owns 10% or more of CITGO East Coast Oil Corporation's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners CITGO Asphalt Refining Company, CITGO Petroleum Corporation, and CITGO East Coast Oil Corporation (collectively, "CARCO") respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-58a, is reported at 718 F.3d 184. An earlier opinion, Pet. App. 62a-119a, later amended, is unreported. The court of appeals' order denying the petition for panel rehearing and rehearing en banc, Pet. App. 135a-136a, is unreported. The opinion of the district court, Pet. App. 120a-134a, is reported at 2011 WL 1436878.

JURISDICTION

The court of appeals issued its opinion on May 16, 2013. Pet. App. 1a-58a. A timely petition for rehearing was denied on July 12, 2013. *Id.* at 135a-136a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves issues of federal common law. Relevant statutes are discussed as part of the case background.

STATEMENT OF THE CASE

The court of appeals' decision upends decades of settled expectations in both contract and tort law concerning risk-allocation in the maritime setting.

First, its interpretation of a standard "safe berth" provision in a ship charter contract both imposes liability on innocent charterers in circumstances where other circuits have expressly refused to impose responsibility and massively expands third-party beneficiary status in ways that conflict with decisions of other federal courts. *Second*, the ruling below that a wharf owner's tort duty to provide a safe approach to its berth extends beyond the immediate entrance to the berth and includes federal waters that it does not maintain or control is unprecedented and conflicts with the decisions of other federal courts. Moreover, by not defining the "approach" in terms of a finite geographical area controlled by the wharf owner, the decision below shifts responsibilities and duties from public agencies to private entities, imposes substantial new liabilities on wharf owners, and creates uncertainty and confusion for all maritime interests.

These holdings present recurring and important issues of federal maritime law that warrant this Court's review, particularly in light of this Court's vital role in shaping rules of admiralty and safeguarding maritime commerce. See *Fitzgerald* v. *United States Lines Co.,* 374 U.S. 16, 20 (1963) ("Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law"); *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310, 314 (1955) ("this Court has fashioned a large part of the existing rules that govern admiralty"); *Exxon Corp.* v. *Cent. Gulf Lines, Inc.,* 500 U.S. 603, 608 (1991) ("[T]he 'fundamental interest giving rise to maritime jurisdiction is "the protection of maritime commerce."'"); *Black Diamond S.S. Corp.* v. *Robert Stewart & Sons, Ltd.*, 336 U.S. 386, 388 (1949) (granting certiorari to "determin[e]

important issues in the administration of admiralty law").

A. Factual and Regulatory Background.

This case involves claims for contract and tort damages against CARCO arising from an oil spill caused when the oil tanker *Athos I* struck a submerged and uncharted anchor abandoned by an unknown party in a federally maintained and controlled portion of the Delaware River. It is undisputed that CARCO neither knew, nor had any reason to know, that the anchor was in the river.

The Charter Contracts. In 2001, the ship owner, Frescati Shipping Company, Ltd. ("Frescati"), chartered the *Athos I* to Star Tankers Inc. ("Star") via a standard industry form contract known as a "time charter." That contract granted Star authority to subcharter the ship for specific voyages. Three years later, Star chartered the oil tanker to CARCO for a single voyage from Venezuela to CARCO's asphalt refinery in Paulsboro, New Jersey under a "voyage charter" contract, to which Frescati was not a party. The voyage charter defined Star as the "owner" of the vessel for purposes of the contract and provided for U.S. law. It also included the following "safe berth" clause, see C.A. App. 1222:

> [t]he Vessel shall load and discharge at any safe place or wharf, . . . which shall be designated and procured by the Charterer, provided the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat.[1]

[1] Frescati's time charter with Star had a similar but more "qualified" safe berth clause, under which Star only promised to exercise "'due diligence'" to ensure the safety of berths. Pet. App. 9a (quoting C.A. App. 1157). The time charter provided for English law.

The Casualty. The casualty giving rise to this lawsuit occurred on November 26, 2004, near the end of the ship's 1900-mile voyage. The vessel was crossing and "approximately halfway through" an area known as Federal Anchorage No. 9 (the "Federal Anchorage Area") when it struck an abandoned anchor. Pet. App. 10a-11a. The vessel was still some 900 feet or three football fields away from CARCO's berth at the time that it struck the anchor and had not reached the waters that were maintained by CARCO and that provided ingress and egress to the CARCO dock. *Id.* at 10a-11a and 58a (illustration). Its hull was punctured, causing it to spill approximately 263,000 gallons of crude oil into the Delaware River. *Id.* at 4a.

The Federal Anchorage Area, one of 16 federal anchorages in the Delaware River, is approximately 2.2 miles long and was established by Congress in 1930 as a place for ships to anchor while awaiting cargo or an available dock so long as they do not "interfere unreasonably with the passage of other vessels to and from Mantua Creek." 33 C.F.R. § 110.157(a)(10); see Pet. App. 13a-14a. Vessels arriving or departing from 30 other terminals, in addition to CARCO's terminal, may sail through and anchor in the Federal Anchorage Area. The boundaries of the Federal Anchorage Area are set forth in federal regulations and are shown on nautical charts of the area.

The Federal Anchorage Area is exclusively maintained, controlled, and regulated by the United States. The U.S. Army Corps of Engineers conducts hydrographic surveys of the Federal Anchorage Area and dredges to maintain a depth of 40 feet. Pet. App. 14a. It also regulates construction and dredging within the Federal Anchorage Area, including by

issuing dredging permits. 33 U.S.C. § 403. Notably, as the court of appeals recognized, the entirety of the Federal Anchorage Area, including that portion where the abandoned anchor laid, is open to general vessel traffic and "is neither controlled nor maintained by CARCO." Pet. App. 14a. As the district court further found, "the volume of traffic illustrates that CARCO had no control over the use of the Anchorage." *Id.* at 127a. More than one hundred vessels anchor in the Federal Anchorage Area each year, *id.*, and many more pass through it.

The Cleanup under the Oil Pollution Act. The cleanup following the casualty was conducted pursuant to the Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. §§ 2701, *et seq.*, a statute passed in the wake of the Exxon-Valdez incident and designed to "encourage rapid private party responses" to oil spills, *In re Complaint of Metlife Capital Corp.*, 132 F.3d 818, 822 (1st Cir. 1997) (internal quotation marks omitted). OPA statutorily identifies "responsible parties" who are required to pay for a cleanup in the first instance. 33 U.S.C. § 2702(a). As the owner of the vessel discharging the oil, Frescati was designnated as a "responsible party." *Id.* § 2701(32)(A).

OPA also permits "responsible parties" to limit their liability. *Id.* § 2704. Here, Frescati filed an ex parte administrative claim asking the National Pollution Fund Center ("NPFC") to limit its liability and recover uncompensated costs and damages. The NPFC limited Frescati's liability to $45,475,000 and reimbursed Frescati from the federal Oil Spill Liability Trust Fund for approximately $88,000,000 in excess of the limitation amount. The Trust Fund, which is separate from the general treasury, consists of taxes collected on imported petroleum products, plus payments received from environmental taxes

and penalties. 26 U.S.C. § 9509(b). CARCO paid approximately $103 million into this Fund between 1990 and 2004. The United States then became subrogated to Frescati's rights against third parties for the $88 million paid from the Trust Fund. 33 U.S.C. § 2715(a).

OPA also provides that a responsible party can be exonerated from liability if it demonstrates that the spill was caused by "an act or omission of a third party" and the responsible party exercised due care. 33 U.S.C. § 2703(a)(3). Frescati initially applied for exoneration under this provision, based on the sole fault of the unknown party that lost the anchor, but later withdrew this claim. See Pet. App. 13a n.6 (noting that "[i]t is unclear why Frescati withdrew this claim"). Frescati's exoneration claim would have reimbursed all of its cleanup costs from the Oil Spill Liability Trust Fund and would do so today if presented. See 33 U.S.C. §§ 2708(a)(1), 2713(b)(1)(B).

B. Prior Proceedings.

Respondents' Lawsuits. On January 31, 2005, Frescati filed an action in the district court pursuant to the court's admiralty jurisdiction, 28 U.S.C. § 1333(1). Specifically, Frescati filed a "Petition for Exoneration from or Limitation of Liability," pursuant to 46 U.S.C. app. § 183 (2005). CARCO filed a claim in this limitation action for the loss of its cargo, and Frescati then counterclaimed against CARCO in both contract and tort for its unreimbursed clean-up costs and additional damages totaling nearly $56 million. Frescati asserted that CARCO (1) breached the "safe berth" clause in its voyage charter contract with Star (even though Frescati was not a party to that contract); and (2) was negligent in its role as the wharf owner. As partial subrogee to Frescati's claims, the United States later

filed a separate action against CARCO raising contract and tort claims, in which it sought to recover the $88 million paid by the Trust Fund to Frescati. Star is not a party to either action.

The two actions against CARCO were consolidated for trial. At trial, the United States' claims were limited to its contract claims because, by pre-trial agreement, the United States agreed not to advance tort-based theories of recovery against CARCO. The resulting bench trial was conducted over 41 days in the fall of 2010, and involved 61 live witnesses, 48 witnesses by deposition, and 1,800 exhibits.

In addition to the instant litigation, Frescati commenced an arbitration in London against Star pursuant to the safe berth clause in the time charter contract between them, seeking to recover the same losses. Pet. App. 9a. That arbitration is pending and has been stayed.

District Court Decision. The district court found CARCO "not liable in either tort or contract." Pet. App. 126a. The court determined that there was "no evidence" that CARCO or any other party to the litigation "knew or had reason to believe that the anchor was in the river." *Id.* at 124a. "After hearing all of the evidence," the court concluded that "the fault for the casualty lies with the anchor's former owner, who abandoned it in the river without notifying anyone." *Id.* at 134a; see also *id.* at 124a (noting "supposition" at trial that the anchor "may have been used as part of dredging operations" by a federal contractor).

The district court rejected Frescati's negligence claim because it concluded "as a matter of law that CARCO had no duty to scan for hazards within the Anchorage." Pet. App. 128a. The court acknowledged

that CARCO had a duty as wharf owner under federal maritime law to "furnish a safe berth," which includes the "approach," but rejected Frescati's position that "the location of the casualty was within the approach to the berth because ships berthing at the CARCO terminal naturally would traverse the area where the anchor was found." *Id.* at 126a-127a. The court reasoned that Frescati's proposed definition of "approach" was "unreasonably expansive" because "CARCO had no control over the use of the Anchorage," which is "open for the passage of all ships" and is "not an area used exclusively, or even primarily, by vessels docking at the Paulsboro refinery." *Id.* at 127a.

The district court also denied the claim of Frescati (and the United States as its subrogee) that CARCO was liable in contract pursuant to the "safe berth" clause in the voyage charter contract. Although Frescati was not a party to that contract, it sought to invoke the clause "as an intended third-party beneficiary." Pet. App. 130a. The district court rejected this argument, finding that there was "no testimony from representatives of either CARCO or Star Tankers that Frescati was an intended third-party beneficiary of the contract." *Id.*; see also *id.* (noting that Frescati "has its own contractual remedy" under the time charter, which it was pursuing in "arbitration in London").

Moreover, the district court held that CARCO did not breach the "safe berth" clause. Pet. App. 131a-133a. The district court acknowledged that some courts have interpreted such clauses "as an unconditional guarantee, in effect imposing strict liability" upon charterers, but found "more persuasive" the view of the Fifth Circuit that such clauses merely "'impose[] upon the charterer a duty of due diligence

to select a safe berth.'" *Id.* at 131a (quoting *Orduna S.A.* v. *Zen-Noh Grain Corp.*, 913 F.2d 1149, 1156-57 (5th Cir. 1990)). It then found that "CARCO fulfilled its duty of due diligence" and that "the port and berth were generally safe." *Id.* at 132a. The court also noted that "it is safe to say that the crew of the *Athos I* did not devote the care and attention to preparation of the voyage planning that might have been advisable." *Id.* at 134a.

Third Circuit Decision. The court of appeals vacated most of the district court's opinion and remanded. It first determined that the district court's narrative discussion of its factual findings and legal conclusions, and the "overall dearth of clear factual findings," constituted "a violation" of Federal Rule of Civil Procedure 52 and necessitated a remand. Pet. App. 19a-21a. Despite its conclusion that proper appellate review was not possible, the court of appeals nevertheless proceeded to review the case and make its own legal determinations.

Contract Claims: The court of appeals concluded that Frescati's contract claim is viable. It first held that Frescati was an "implied" third-party beneficiary of the safe berth clause in the voyage charter contract between Star and CARCO. Pet. App. at 6a, 21a-26a. The court acknowledged that the district court had found that "the testimony at trial failed to reveal any intent by CARCO to benefit Frescati," but found that the district court "failed to inquire whether the contract itself established a third-party beneficiary relationship, a question of law." *Id.* at 22a. It then resolved this "question of law" in Frescati's favor on the ground that the safe berth clause "necessarily benefits the vessel, and thus benefits its owner as a corollary beneficiary." *Id.* at 22a, 24a; *id.* at 22a ("the

Athos I benefits from" the clause, and Frescati "is thus a third-party beneficiary").

The court of appeals then turned to the scope of CARCO's safe berth obligation and held that the district court "incorrectly" adopted the Fifth Circuit's position in *Orduna* that a safe berth provision "require[s] only due diligence." Pet. App. at 27a; see also *id.* at 33a ("we . . . decline to follow" the Fifth Circuit). Instead, the court adopted the Second Circuit's "longstanding formulation" that a safe berth provision guarantees the safety of the berth "without regard to the amount of diligence taken by the charterer." *Id.* at 32a-33a; see also *id.* at 33a n.18 (emphasizing the "strict nature" of the warranty and rejecting the argument that it "applies only to known hazards").

The court of appeals remanded the question whether the safe berth clause "was actually breached." Pet. App. 33a. The court reasoned that the relevant question was whether the berth was "unsafe for a ship of the *Athos I*'s agreed-upon dimensions and draft," and that the district court's findings did not answer that question. *Id.* at 33a-37a.

Tort Claims: The court of appeals also permitted Frescati's negligence claim to proceed, reasoning that CARCO had a duty of care with respect to the casualty because the Federal Anchorage Area where the accident occurred constituted an "approach" to its berth. In so holding, the court of appeals adopted the following definition of "approach":

> [W]hen a ship transitions from its general voyage to a final, direct path to its destination, it is on an approach. . . . [I]n most instances the approach will begin where the ship makes its last significant turn from the channel toward its

> appointed destination following the usual path of ships docking at that terminal.

Pet. App. 45a. Although acknowledging that there would be "close and difficult cases" under this definition, it reasoned that this definition comports with the term's "plain meaning in the maritime context." *Id.* at 45a-46a. It also found that this definition is supported by various analogies, including "a driveway leading to a home from the public road." *Id.* at 46a.

The court of appeals then applied this definition and concluded that "the *Athos I* was well within the approach to CARCO's terminal when the casualty occurred." Pet. App. at 49a. The court reasoned that the vessel was following "the usual path" to CARCO's terminal, *id.* at 46a, and that CARCO's "failure to exercise control" over the site of the casualty did not "limit the scope of its duty," *id.* at 47a. Having concluded that CARCO owed a duty of care, it remanded the questions of breach of duty and causation. *Id.* at 49a-53a.

The Third Circuit denied rehearing and rehearing en banc. In conjunction with its rehearing denial, it issued an order amending its opinion. Pet. App. 59a-61a.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS' INTERPRETATION OF A "SAFE BERTH" PROVISION IN A STANDARD CHARTER CONTRACT VASTLY EXPANDS BOTH WHAT DUTIES THE PROVISION IMPOSES UPON THE CHARTERER AND WHO CAN BRING A CLAIM BASED ON THE PROVISION.

The court of appeals' contract holdings present important questions of federal maritime law. Where, as here, a contract "is a maritime one, and the dispute is not inherently local, federal law controls the contract interpretation." *Norfolk S. Ry.* v. *James N. Kirby*, *Pty Ltd.*, 543 U.S. 14, 23 (2004). This lawmaking power in the federal courts derives from their admiralty jurisdiction. *Id.* at 22-23; U.S. Const. art. III, § 2, cl. 1.

A. The court of appeals acknowledged that the scope of a charterer's obligation under a "safe berth" provision in a charter contract presented "a question of first impression" in the circuit and that its ruling on this issue widens an existing circuit conflict because it rejected the view of the Fifth Circuit. Pet. App. 26a, 32a-33a. This circuit split on an "important matter" of federal maritime law alone warrants this Court's review. Sup. Ct. R. 10(a). In addition, the court of appeals' ruling will be detrimental to maritime commerce because it erroneously imposes unprecedented liability on a charterer who bore no fault for a loss.

"Safe berth" clauses are standard provisions in maritime charter contracts. See Pet. App. 8a, 122a-123a (noting that the clause in the charter contract between Star Tankers and CARCO was based on a standard industry form). Pursuant to these clauses,

the charterer "bargains for the privilege of selecting the precise place for discharge [of its cargo] and the ship surrenders that privilege in return for the charterer's acceptance of the risk of its choice." *Park S.S. Co.* v. *Cities Serv. Oil Co.*, 188 F.2d 804, 806 (2d Cir. 1951). Here, CARCO undertook to "designate[] and procure[]" a "safe place or wharf" where the *Athos I* could "proceed thereto, lie at, and depart therefrom always safely afloat." C.A. App. 1222.

The Second Circuit has long adhered to the view that such clauses guarantee the safety of the berth: "the charter [contract is] itself an express assurance, on which the master [is] entitled to rely, that at the berth 'indicated' the ship would be able to lie 'always afloat.'" *Cities Serv. Transp. Co.* v. *Gulf Ref. Co.*, 79 F.2d 521, 521 (2d Cir. 1935) (per curiam); *Park S.S. Co.*, 188 F.2d at 806 (clause is "an express assurance that the berth [is] safe"); *Paragon Oil Co.* v. *Republic Tankers, S.A.*, 310 F.2d 169, 173 (2d Cir. 1962) (clause is a "warranty"); *Venore Transp. Co.* v. *Oswego Shipping Corp.*, 498 F.2d 469, 472-73 (2d Cir. 1974) (voyage charterer "had an express obligation to provide a *completely* safe berth, an obligation which was nondelegable") (emphasis added).

The Fifth Circuit rejected this standard in *Orduna S.A.* v. *Zen-Noh Grain Corp.*, 913 F.2d 1149, 1156-57 (5th Cir. 1990). It acknowledged the Second Circuit's precedents, but noted that "commentators have strongly criticized" them because they "impose liability without fault on the charterer." *Id.* at 1156. It also noted that the Second Circuit's standard is in apparent conflict with "a Supreme Court decision which has never been overruled or weakened." *Id.* (citing *Atkins* v. *Fibre Disintegrating Co.*, 2 F. Cas. 78 (E.D.N.Y. 1868) (No. 601), *aff'd*, 85 U.S. (18 Wall.) 272 (1873)). The Fifth Circuit explained that the

district court in *Atkins* rejected the argument that a safe berth clause was a warranty, *id.* (citing 2 F. Cas. at 79), and that this Court affirmed the district court's merits rulings in conjunction with addressing a jurisdictional issue, *id.* at 1156-57 (citing 85 U.S. (18 Wall.) at 299).

Based on these authorities, the Fifth Circuit held that:

> [N]o legitimate legal or social policy is furthered by making the charterer warrant the safety of the berth it selects. Such a warranty could discourage the master on the scene from using his best judgment in determining the safety of the berth. Moreover, avoiding strict liability does not increase risks because the safe berth clause itself gives the master the freedom not to take his vessel into an unsafe port.

Id. at 1157. It therefore expressly rejected the Second Circuit's view that "make[s] a charterer the warrantor of the safety of a berth," and held instead that a safe berth clause merely "imposes upon the charterer a duty of due diligence to select a safe berth." *Id.*

As the Fifth Circuit noted, several commentators have criticized the Second Circuit's standard that a safe berth clause guarantees the safety of the berth. The leading Gilmore & Black admiralty treatise[2]

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[2] *See, e.g.*, *Neely* v. *Club Med Mgmt. Servs., Inc.*, 63 F.3d 166, 176 (3d Cir. 1995) (en banc) (describing Gilmore & Black as "a leading admiralty treatise"); *Man Ferrostaal, Inc.* v. *M/V Akili*, 704 F.3d 77, 85 (2d Cir. 2012) (describing Gilmore & Black as "the classic admiralty treatise"). This Court routinely cites the Gilmore & Black treatise on admiralty matters. *See, e.g.*, *Atl. Sounding Co.* v. *Townsend*, 557 U.S. 404, 412, 413, 423-24 (2009); *Norfolk S. Ry.*, 543 U.S. at 24.

states that this view "go[es] too far" because the ship's master "ordinarily has the best means of judging the safety of a port or berth" and "is *not* obligated to take his vessel to any unsafe port or berth." G. Gilmore & C. Black, Jr., *The Law of Admiralty*, § 4-4, at 204 (2d ed. 1975) (emphasis in original); see also *id.* (stating that holding the charterer liable "regardless of fault" is "quite inconsonant with the position of the parties" with respect to vessel safety). See also J. Bond Smith, Jr., *Time and Voyage Charters: Safe Port/Safe Berth*, 49 Tul. L. Rev. 860, 868 (1975) (the Second Circuit's approach places "an undeserved burden on the charterer in holding him to a warrantor's liability" and the due diligence approach achieves "more equitable result[s]"); P. Hartman, *Safe Port/Berth Clauses: Warranty or Due Diligence?*, 21 Tul. Mar. L.J. 537, 555 (1997) ("[u]nless the charterer is negligent in some manner," there is "no economic reason to place the risk of damage on the charterer").

As noted, the district court adopted the Fifth Circuit's "due diligence" standard, reasoning that the Second Circuit's "unconditional guarantee" standard would "impos[e] strict liability" upon the charterer. Pet. App. 131a. The court of appeals, however, widened and perpetuated the circuit conflict by expressly "part[ing] from th[e] holding" of the Fifth Circuit and instead adopting the Second Circuit's view that the safe berth clause "is an express assurance made without regard to the amount of diligence taken by the charterer." *Id.* at 26a-27a, 33a.

The resulting conflict between the Fifth Circuit and the Third and Second Circuits on this important issue of maritime law presents a question that warrants this Court's review. It is clear that if Frescati and

the United States had brought their contract claims in the Fifth Circuit, that court would have held that the safe berth clause imposed on CARCO only a duty of due diligence to provide a safe berth. Important questions of federal law should not be decided by the vagaries of geography. See *Norfolk S. Ry.,* 543 U.S. at 28 ("Article III's grant of admiralty jurisdiction "'must have referred to a system of law coextensive with, and operating uniformly in, the whole country"'" (quoting *Am. Dredging Co.* v. *Miller,* 510 U.S. 443, 451 (1994))); *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199, 210 (1996) (recognizing that "vindication of maritime policies demand[s] uniform adherence to a federal rule of decision"). The prospect that charterers with identical contract clauses can have categorically different liability in different circuits is intolerable. See Hartman, *supra,* at 554 (charterers with identical clauses should not be subject to different legal standards and liability with respect to vessel damage, based on the "twist of fate" of where the litigation occurs). This is precisely the sort of inconsistency in federal law that this Court grants certiorari to prevent. See Gilmore & Black, *supra,* at 207 (urging this Court to resolve this circuit split); Hartman, *supra,* at 556 (same).

Moreover, the court of appeals' ruling merits this Court's review because its reasons for rejecting the "due diligence" approach are unsound, and ignore the onerous and unwarranted liability its ruling would impose upon charterers. The court of appeals' main rationale was that the charterer, as the party that selects the port, is "normally" in a "better position" than the ship master "to appraise a port's more subtle dangers." Pet. App. 31a. As noted, the reasoning of the Fifth Circuit and the Gilmore & Black treatise cast serious doubt on this premise. *Orduna*, 913 F.2d

at 1156; Gilmore & Black, *supra,* at 204 (the master is "an expert in navigation," "knows his vessel," and is "on the spot," while the charterer is not a "nautical expert at all"). Even if the Third Circuit's premise were "normally" correct, however, using it as the basis for imposing strict liability on charterers ignores the facts and circumstances of particular cases, and therefore reduces the incentives of masters and vessel owners to exercise due care, 913 F.2d at 1157. It also ignores the modern sources of information and sophisticated equipment available to navigators who ultimately determine whether a port and berth are safe.

In addition, as this case starkly illustrates, the court of appeals' approach inevitably results in liability on wholly "'innocent[]'" charterers. Julian Cooke et al., *Voyage Charters* ¶ 5.129 (3d ed. 2007). CARCO had no knowledge of the abandoned anchor (in a federally maintained waterway) that caused the casualty. Pet. App. 124a (finding no evidence that CARCO "knew or had reason to believe that the anchor was in the river"). Yet under the court of appeals' ruling, it faces liability for tens of millions of dollars in damages, even though it exercised due diligence and bears no fault for the oil spill. The due diligence standard avoids such manifestly unjust results.[3]

Finally, the court of appeals' ruling presents a recurring and "important question" of federal law. See Sup. Ct. R. 10(c). Safe berth clauses are standard

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[3] The court of appeals' assertion that the fact that some safe berth clauses expressly adopt a due diligence standard "suggests that the understood default is to impose liability on the charterer without regard to the care taken," Pet. App. 32a, ignores that parties often adopt contract terms that mirror – rather than change – the common law rule.

provisions in charter contracts, so the question of what obligations they impose affects virtually every chartering arrangement. The uncertainty and unfairness created by the existing circuit conflict are detrimental to maritime commerce, which "depend[s] on consistent application of law." Hartman, *supra,* at 554. The Third Circuit's widening of the circuit split makes clear that the conflict will not resolve itself. It is therefore vital that this Court grant review to ensure uniformity in this important area of federal common law.

B. Not only has the decision below expanded the scope of the duty that a "safe berth" provision imposes upon the charterer, but also it has improperly expanded the parties who can invoke a "safe berth" provision. The court of appeals' ruling that Frescati is a third-party beneficiary of the "safe berth" provision in the voyage charter contract between CARCO and Star is flatly contrary to the standards recognized by other federal courts in several respects, and constitutes an unprecedented departure from the doctrine of privity of contract. If left undisturbed, this ruling will have serious adverse consequences for the maritime industry and for contracting parties generally.

First, the court of appeals characterized the issue of whether the contract established a third-party beneficiary relationship as "a question of law." Pet. App. 22a. This holding is in direct conflict with the holdings of other courts of appeals that the issue of third-party beneficiary status is not a pure question of law, but rather a mixed question of law and fact that is reviewed *de novo*. See, *e.g.*, *Flexfab, L.L.C.* v. *United States*, 424 F.3d 1254, 1259 (Fed. Cir. 2005); *Smith* v. *Cent. Ariz. Water Cons. Dist.*, 418 F.3d 1028, 1034 (9th Cir. 2005); see also *Boye* v. *United States*,

90 Fed. Cl. 392, 409 (2009), *aff'd,* 413 F. App'x 239 (Fed. Cir. 2011); *Thomas* v. *New York City*, 814 F. Supp. 1139, 1152 (E.D.N.Y. 1993). This is because the issue of whether the parties *intended* to confer a direct benefit on the purported third-party beneficiary – which is "the cornerstone of a claim for third-party beneficiary status," *Flexfab*, 424 F.3d at 1259 – is ultimately a question of fact, although the contract generally provides the clearest evidence of the parties' intent. See*, e.g., In re Telluride Global Dev., LLC,* 380 B.R. 585, 594 (B.A.P. 10th Cir. 2007); *S. Farm Bureau Cas. Ins. Co.* v. *United States*, 395 F.2d 176, 179 (8th Cir. 1968); *Starr Int'l Co.* v. *United States,* 106 Fed. Cl. 50, 79, *reconsideration denied,* 107 Fed. Cl. 374 (2012); *Vianix Del.* v. *Nuance Commc'ns, Inc.,* 637 F. Supp. 2d 356, 361 (E.D. Va. 2009); *DeBary* v. *Harrah's Operating Co.,* 465 F. Supp. 2d 250, 261 (S.D.N.Y. 2006), *aff'd sub nom.* 547 F.3d 115 (2d Cir. 2008).

Second, the court of appeals employed a more lenient standard for establishing third-party beneficiary status than the standard used by other federal courts. The Third Circuit purported to find support for its expansive holding that Frescati is an "implied" third-party beneficiary based solely on the contract. Pet. App. 6a, 22a-25a. Nothing in the language of the contract, however, remotely suggests that the parties to it envisioned that Frescati would be a third-party beneficiary. It does not contain a third-party beneficiary clause, and it designates Star, not Frescati, as the vessel owner. Cf. *Rice Co. (Suisse), S.A.* v. *Precious Flowers Ltd.*, 523 F.3d 528, 534 (5th Cir. 2008) (vessel owner not bound by arbitration clause in voyage charter contract because the contracting parties "unambiguously structured their relationship such that the [titled] vessel owner was not a party to

the voyage charter"). In addition, the safe berth provision of the charter contract does not even mention Frescati, or contain any language reflecting any intent to benefit Frescati. See C.A. App. 1222. Accordingly, the contract itself and the relevant "safe berth" provision do not constitute a showing – much less a "compelling showing" – that Frescati is an intended beneficiary of that provision.[4]

Moreover, the court of appeals did not cite any other evidence of the parties' intent that could satisfy the "compelling showing" standard. Notably, the court did not dispute, or find clearly erroneous, the district court's finding that "the testimony at trial failed to reveal any intent by CARCO to benefit Frescati." Pet. App. 5a-6a, 21a-22a. Indeed, the court of appeals failed to cite any evidence whatsoever concerning the parties' intent. Instead, the court based its finding that Frescati was a third-party beneficiary solely on the fact that the vessel itself and therefore Frescati indirectly received *some* benefit from the CARCO-Star safe berth warranty. See, *e.g.*,

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[4] The original panel opinion required only that Frescati make "some showing" that it is an "intended beneficiary" of the contract, *see* Pet. App. 82a – a standard that conflicts with the more stringent standard used by other courts and previously used by the Third Circuit itself. *See* Petition for Rehearing or Rehearing En Banc at 3-5 (3d Cir. filed July 1, 2013); *Doe* v. *Pa. Bd. of Prob. & Parole,* 513 F.3d 95, 106-07 (3d Cir. 2008) (requireing showing of "compelling evidence" to prove third-party beneficiary status). After petitioners pointed out this conflict in their petition for rehearing, the court of appeals attempted to eliminate it by substituting the words "a compelling showing" for "some showing" in the opinion. *See* Pet. App. 61a (order amending opinion); *id.* at 21a (amended opinion). It is clear, however, that the court of appeals only gave lip service to the "compelling showing" standard, because the court made *no other change* to the panel's opinion or its analysis of the evidence.

id. at 24a ("a safe berth warranty necessarily benefits the vessel, and thus benefits its owner as a corollary beneficiary"); *id.* at 22a ("the *Athos I* benefits from this warranty, and Frescati, as the vessel's owner, is thus a third-party beneficiary").

But other courts of appeals have routinely rejected the notion that a party's receipt of an indirect or incidental benefit from a contract is sufficient to confer "third-party beneficiary" status. See*, e.g., Sioux Honey Ass'n* v. *Hartford Fire Ins. Co.*, 672 F.3d 1041, 1056 (Fed. Cir.), *cert. denied sub nom.* 133 S. Ct. 126 (2012); *Hampton* v. *Dillard Dep't Stores, Inc.,* 247 F.3d 1091, 1119 (10th Cir. 2001) (third party's derivation of benefit from contract "does not, however, automatically render the contract a third-party beneficiary contract"). Thus, the court of appeals' finding that Frescati is a third-party beneficiary, where there was *no* evidence of the parties' intent to benefit Frescati, simply cannot be reconciled with other circuits' requirement that a plaintiff must make a "compelling showing" that it is an *intended* beneficiary.

Third, the court of appeals departed from the holdings of this Court and other federal courts that under general maritime law, evidence of "custom and usage" – including the type of contract and the industry involved – are relevant in determining the parties' intent. See*, e.g., Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.,* 559 U.S. 662, 674 n.6 (2010); *Int'l Multifoods Corp.* v. *Commercial Union Ins. Co.*, 309 F.3d 76, 87 & n.4 (2d Cir. 2002). For example, the court of appeals failed to consider that at the time CARCO and Star entered into their agreement, it was well-established that a vessel owner with its own separate time charter has no privity of contract with a subcharterer, and is not a third-party beneficiary of

a voyage charter. See Brief for Appellees at 68-70 in Nos. 11-2576, 11-2577 (3d Cir. filed Apr. 2, 2012).[5]

Moreover, the factual circumstances surrounding the formation of the contract show that Frescati was not an intended beneficiary. As noted, the parties identified Star (not Frescati) as the "owner," and negotiated a different safe berth clause than in the Frescati-Star time charter contract. It is simply implausible that Star would have intended Frescati to be a beneficiary of the safe berth clause in the CARCO-Star contract, when it negotiated and bargained for different language in its own time charter with Frescati. In construing and enforcing maritime contracts, this Court has held that courts must give effect to the parties' rights, expectations, and intentions and hold them to their bargains. *Stolt-Nielsen*, 559 U.S. at 682; *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 13-18 (1972).

By seeking a ruling in U.S. courts that it is a third-party beneficiary of the CARCO-Star agreement and that the safe berth clause in that agreement is a guarantee, Frescati is simply attempting to forum-shop and escape the "due diligence" language that it

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[5] The court of appeals sought support for its holding in the "analog[ous]" circumstances addressed in this Court's decisions in *Crumady* v. *The Joachim Hendrik Fisser,* 358 U.S. 423 (1959), and *Waterman Steamship Corp.* v. *Dugan & McNamara, Inc.,* 364 U.S. 421 (1960). *See* Pet. App 23a-25a. Those decisions are inapposite, however, because they addressed indemnification under an *implied* warranty of workmanlike service, while this case involves an express contractual provision. In addition, *Crumady* and *Waterman* are of dubious precedential value because in the 1972 amendments to the Longshoreman's Act, Congress abolished the right of indemnification recognized in those cases. *See* 33 U.S.C. § 905(b); *Scindia Steam Navigation Co.* v. *De Los Santos,* 451 U.S. 156, 164-65 & nn.11-12 (1981).

negotiated with Star. The court of appeals' opinion effectively gives Frescati two bites of the apple – one as a third-party beneficiary in U.S. courts under U.S. law, the other in the pending arbitration against Star under English law. The parties to the CARCO-Star contract could not have intended such a result. See also *United States* v. *Reliable Transfer Co.* 421 U.S. 397, 403-04 (1975) (disfavoring a rule of admiralty law that "encourages transoceanic forum shopping").

Review of the foregoing conflicts is warranted because the court of appeals' ruling seriously undermines the doctrine of privity of contract that is strongly rooted in American maritime law and traces its origins to British common law, which continues to adhere strictly to that doctrine, with only limited exceptions.[6] The court of appeals' dramatic alteration of the standards for third-party beneficiary status is therefore a question of exceptional importance that warrants review.

Moreover, the court of appeals' ruling has serious ramifications for all contracts, maritime and otherwise. In the maritime industry, which relies heavily on contractual arrangements and adheres strictly to principles of privity, the court of appeals' ruling will cause substantial uncertainty and disrupt commerce. Under the Third Circuit's decision, contracting parties will have involuntary and unintended

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[6] *See*, *e.g.*, H. Hunter, *Modern Law of Contracts* § 20.4 (2013) (English courts "remain tied to doctrine that makes it difficult to accept third-party beneficiary actions," and English Contracts Act of 1999 allows third parties to be beneficiaries only "under some limited circumstances"); V. Ulfbeck, *Multimodal Transports in the United States and Europe – Global or Regional Liability Rules?*, 34 Tul. Mar. L.J. 37, 75 n.175 (2009) (describing "rigid upholding of the doctrine of privity of contract" by English law).

responsibilities to parties with whom they have not negotiated agreements. Since every charter contract identifies a vessel, the effect of the Third Circuit's new standard is to make all vessel owners third-party beneficiaries of all charter contracts, whether or not they are a signatory. This will result in contractual uncertainty and inequity. For example, under the decision below, vessel owners can pick and choose among varying clauses in different contracts in the chain of charters, regardless of which contracts they actually signed. Cf. *In re Arb. New Ideal Shipping Corp.* v. *Maraven, S.A.*, S.M.A. Award No. 2975, 1993 WL 13653014 (Apr. 30, 1993) (Kalaidjian, Berg & Linsenmeyer Arbs.) (arbitration ruling that under standard maritime practice each charter contract extends benefits and obligations only to the signatory parties, because otherwise "upon the occurrence of a loss, an owner could peruse all of the outstanding sub-charters and base its claim on the contract containing the most favorable terms, as appears to be the case here.").

In addition, the standard applied by the court of appeals exposes *all* contract parties to unintended liability to non-parties. Under the court of appeals' standard, a party claiming to be a third-party beneficiary merely has to show that it derived some benefit from the contract, regardless of whether the parties to the contract actually *intended* to confer a direct benefit on that party and regardless of whether the benefit was merely indirect. This weakened standard enables incidental beneficiaries of contracts to obtain third-party beneficiary status and assert rights under a contract that they never signed or negotiated. Thus, contract disputes could arise in a wide variety of contexts, *e.g.*, property owners claiming to be third-party beneficiaries of contracts

between contractors and subcontractors; lessors claiming to be third-party beneficiaries of sub-leases; and shareholders of a corporation claiming to be third-party beneficiaries of contracts between the corporation and another party. Such a result would wreak havoc and uncertainty in numerous areas of commerce.

II. THE COURT OF APPEALS' HOLDING REGARDING THE SCOPE OF CARCO'S TORT DUTY TO PROVIDE A SAFE BERTH CONFLICTS WITH THE RULINGS OF OTHER FEDERAL COURTS.

The court of appeals' ruling that CARCO's duty as wharf owner to provide a safe berth extended to the location of the casualty conflicts with decisions of other federal courts and is unprecedented. By expanding a wharf owner's tort duty to the limitless navigational paths of vessels, into public waters that the federal government (rather than the wharf owner) controls, the decision below creates substantial new liabilities, uncertainty, and confusion for wharf owners.

Frescati's negligence claim alleges that CARCO breached its duty as a wharf owner under maritime law to provide a safe berth. Pursuant to this duty, a wharf owner "does not guaranty the safety of vessels coming to his wharves," but "is bound to exercise reasonable diligence" to furnish a safe berth. *Smith* v. *Burnett*, 173 U.S. 430, 433, 437 (1899) (wharf owner liable for damage to vessel that grounded "in the berth" on a dangerous rock). In addition to being responsible for the safety of the berth itself, the wharf owner must "maintain a safe approach" to its berth, such that a vessel can "enter, use and exit a wharfinger's dock facilities without being exposed to dangers that cannot be avoided by reasonably

prudent navigation and seamanship." *In re Complaint of Nautilus Motor Tanker Co.*, 85 F.3d 105, 116 (3d Cir. 1996). The wharf owner's duty extends only to the berth and its approach, and not to "surrounding[]" areas or the general "vicinity." *Id.*; see also *Sonat Marine Inc.* v. *Belcher Oil Co.*, 629 F. Supp. 1319, 1326-27 (D.N.J. 1985), *aff'd*, 787 F.2d 583 (3d Cir. 1986) (table) (duty does not extend to "adjacent areas").

The district court ruled that the Federal Anchorage Area where the accident occurred – which is maintained by the United States and "open for the passage of all ships" – "was not within the approach to CARCO's berth." Pet. App. 126a-127a. The court of appeals, however, held that the accident did occur within the "approach" by employing a new "moving target" definition of that term that is entirely dependent on the route to the berth chosen unilaterally by the vessel:

> [W]hen a ship transitions from its general voyage to a final, direct path to its destination, it is on an approach. . . . [I]n most instances, the approach will begin where the ship makes its last significant turn from the channel toward its appointed destination following the usual path of ships docking at that terminal.

Id. at 45a.

Notably, the court of appeals did not dispute that the United States, not CARCO, maintains and controls the Federal Anchorage Area. Pet. App. 14a (the Federal Anchorage Area "is neither controlled nor maintained by CARCO"); *id.* (explaining that the United States "surveys," "dredges" and "regulates any construction or excavation" in the Federal Anchorage Area). Nor did the court of appeals dispute that no

statute or regulation requires CARCO or any private wharf owner to survey the Federal Anchorage Area for unknown objects. It nevertheless rejected the argument that CARCO's "failure to exercise control" over the site of the casualty "limit[ed] the scope of its duty." *Id.* at 47a-48a.

The court of appeals' expansion of a wharf owner's duty to provide a safe berth to include publicly used and federally maintained waters conflicts with decisions of numerous federal courts that have refused to extend a wharf owner's duty to areas that it does not maintain or control. *In re Complaint of Nautilus Motor Tanker Co.*, 862 F. Supp. 1260, 1268, 1275-76 (D.N.J. 1994) (wharf owner did not violate duty where ship grounded approximately 125 feet from ship berth, because this was a "surrounding area for which [the wharf owner] was not responsible"), *aff'd*, 85 F.3d 105 (3d Cir. 1996); *Osprey Ship Mgmt., Inc.* v. *Jackson Cnty. Port Auth.*, No. 05-390, 2007 WL 4287701, at *11 (S.D. Miss. Dec. 4, 2007) (wharf owner's duty did not extend to area of river over which it had "no jurisdiction"); *W. Bulk Carriers, K.S.* v. *United States*, 1999 A.M.C. 2818, 2819, 2826-27 (E.D. Cal. 1999) (approach did not include ship channel maintained by United States, even though vessel had to traverse it to reach berth; wharf owner not liable for damage caused by "shoal located within a federally-maintained waterway"); *Elting* v. *Town of East Chester*, 50 F. 112, 113 (S.D.N.Y. 1892) (wharf owner not liable for damage to vessel that occurred in stream bed maintained by the United States, over which wharf owner had "no direct control"; "[t]he case is quite different from that of slips of which the wharfinger has control"); see also *McCaldin* v. *Parke*, 142 N.Y. 564, 566, 570 (1894) (wharf owner not liable for damage to vessel that occurred "about seventy feet

from the wharf," in area of "general navigation" where wharf owner did not "ha[ve] any control of the place").

Correspondingly, federal courts have held that a wharf owner's duty extends to areas outside the ship berth, in circumstances where the wharf owner *maintained or controlled that surrounding area.* See, *e.g.*, *Bouchard Transp. Co.* v. *Tug Gillen Bros.,* 389 F. Supp. 77, 81, 83 (S.D.N.Y. 1975) (wharf owner liable for damage to barge that grounded in an area "immediately adjacent" to wharf owner's dock that was "within its dominion and control"); *Sonat Marine,* 629 F. Supp. at 1327 (wharf owner liable for grounding that occurred outside its berth because it "assumed sufficient control" over this area by obtaining soundings and conducting voluntary dredging).

The court of appeals' ruling below that CARCO's "failure to exercise control" over the site of the casualty does *not* "limit the scope of its duty," Pet. App. 47a-48a, is wholly at odds with all of these authorities. While other federal courts have held that a wharf owner's duty encompasses only the berth and its immediate entrance and exit and does not extend to areas that are outside of its control, the court of appeals expressly rejected that standard and held that CARCO can be liable for a casualty that occurred in an area open to general, public navigation that the court acknowledges was maintained and controlled by the United States, not CARCO. This conflict warrants the Court's review because – like the conflicts discussed in Section I – it means that different federal courts are using different legal standards to define a wharf owner's duties, and are therefore reaching conflicting outcomes that give rise to unfairness and uncertainty.

Moreover, the court of appeals' reasoning was unsound. Its sole authority for the proposition that lack of control is not conclusive is the English appeal decision in *The Moorcock*, (1889) L.R. 14 P.D. 64 (appeal taken from Eng.), see Pet. App. 47a-48a. As the court acknowledged, however, that decision "was operating under a theory of implied contractual warranty," not tort. *Id.* at 47a n.30. In any event, *The Moorcock*'s rationale for holding the wharf owner liable, notwithstanding that the relevant section of the riverbed "was not under [its] actual control," was that the wharf owner was in the best position to know the hazardous condition in the berth that caused the vessel to be damaged while it was moored at the wharf owner's jetty, 14 P.D. at 69-70, which is not the case here. The court of appeals also asserted that it wanted to avoid a standard that would "allow CARCO to define the scope of its own liability," Pet. App. 48a, but that concern is inapposite here, where federal law itself dictates that the United States, not CARCO, controls the Federal Anchorage Area where the casualty occurred.

Finally, the court of appeals' holding that CARCO can be held liable for a casualty that occurred in federally maintained waters that it does not control presents an important question of federal maritime law. Indeed, the potential disruption to maritime commerce posed by the court of appeals' ruling cannot be overstated. Until that ruling, no federal court has ever held that a private wharf owner's tort duty – and hence potential tort liability – extends to federally maintained waters over which it does not exercise dominion or control. If allowed to stand, this unprecedented ruling will impose on wharf owners an affirmative duty to locate and remove hidden obstructions in federal waters – an obligation not

found in either federal regulations or maritime custom. The United States, in contrast, has long-standing obligations to dredge, maintain and control the Federal Anchorage Area pursuant to detailed federal statutes and regulations. The decision below therefore fundamentally alters the jurisdiction and responsibilities of private parties vis-à-vis the U.S. government with respect to federally maintained waters.

Moreover, if left undisturbed, this ruling will impose costly, onerous and amorphous burdens on wharf owners. Wharf owners are in a quandary as to how to satisfy their new affirmative obligation to locate underwater obstructions. It is wholly unclear what types of survey techniques and methods will satisfy a wharf owner's duty, how often surveys must be undertaken, or how wharf owners are supposed to coordinate their responsibilities in publicly-used waterways. As noted, 30 other terminals operate along the river, and vessels arriving at other terminals sail through, and anchor in, the Federal Anchorage Area. Review by this Court is vital to prevent this serious dislocation in federal maritime law.

Even if CARCO can be held liable for a casualty in federal maintained waters, the court of appeals' definition of "approach" – which focuses on the "usual path" of the vessel and invokes the analogy of a driveway leading from a public road, Pet. App. 45a-46a – is unsound. The court of appeals candidly admitted that the source of its definition was a "suggestion" in an amicus brief, not any clear line of maritime precedent. *Id.* at 44a. It is unsurprising that maritime courts have not embraced this test because there is no such thing as a "usual path." The "path" to a wharf is a decision within the sole

province of a vessel's navigators and local pilots, and it varies from ship to ship based on the tides, currents, winds, vessel speed and draft, vessels at anchor, vessel traffic, number of assisting tugboats, and an infinite number of other variables which affect how and when a vessel turns toward, or approaches, the dock. Because a wharf owner cannot predict or control navigational decisions, including when a vessel takes its "last significant turn" or is "on an approach," the court of appeals' definition is unworkable and provides no meaningful guidance.

In addition, the court's attempt to analogize the location of the casualty to a "driveway" leading from a public road to CARCO's terminal is wholly inapt. There is no "driveway" or path to CARCO's terminal. There is only a Federal Anchorage Area that is 2.2 miles long and that can be crossed at any point and at any angle by hundreds of vessels. Moreover, the Federal Anchorage Area is open to general vessel traffic heading to a variety of wharves and other locations and, unlike the homeowner's driveway in the analogy, is not under the control of CARCO.

The court of appeals' novel and unworkable definition of "approach" imposes unprecedented liability and will give rise to confusion and litigation. By defining a wharf owner's duty in terms of third parties' navigational choices, rather than a fixed geographical area within the wharf owner's dominion and control, the court of appeals' inherently uncertain standard puts wharf owners at the peril of trying to predict what a court will determine to be the "usual path." The court of appeals' acknowledgment that "there will be close and difficult cases" is a gross understatement. Pet. App. 45a-46a. Under the court of appeals' newly-minted definition of "approach," the

geographic scope of a wharf owner's tort duty to provide a safe berth is wholly unknowable.

CONCLUSION

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

Respectfully submitted,

DEREK A. WALKER
J. DWIGHT LEBLANC, JR.
DOUGLAS L. GRUNDMEYER
CHAFFE MCCALL, L.L.P.
2300 Energy Centre
1100 Poydras Street
New Orleans, LA 70163
(504) 585-7000

CARTER G. PHILLIPS*
JACQUELINE G. COOPER
RICHARD E. YOUNG
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

RICHARD Q. WHELAN
FRANK P. DEGIULIO
PALMER, BIEZUP &
HENDERSON LLP
190 N. Independence Mall
West, Suite 401
Philadelphia, PA 19106
(215) 625-9900

Counsel for Petitioners

October 10, 2013

* Counsel of Record

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 11–2576, 11–2577

IN RE PETITION OF FRESCATI SHIPPING COMPANY, LTD., AS OWNER OF THE M/T ATHOS I AND TSAKOS SHIPPING & TRADING, S.A., AS MANAGER OF THE ATHOS I FOR EXONERATION FROM OR LIMITATION OF LIABILITY

FRESCATI SHIPPING COMPANY, LTD. AND TSAKOS SHIPPING AND TRADING, S.A.,
Appellants.

UNITED STATES OF AMERICA,
Appellant

v.

CITGO ASPHALT REFINING COMPANY; CITGO PETROLEUM CORPORATION; CITGO EAST COAST OIL CORPORATION.

Appeal from the United States District Court
for the Eastern District of Pennsylvania

D.C. Civil Action Nos. 2-05-cv-00305/2-08-cv-02898

Trial District Judge: Honorable John P. Fullam
District Judge: Honorable Joel H. Slomsky[*]

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[*] Judge Slomsky was assigned to this matter following the retirement of Judge Fullam, who presided at trial and ruled on the merits.

Argued Sept. 20, 2012.
Opinion Filed May 16, 2013.
As Amended June 6, 2013.
As Amended June 28, 2013.
As Amended on Denial of Rehearing and Rehearing
En Banc July 12, 2013.

Before: AMBRO, GREENAWAY, Jr., and O'MALLEY,[**] Circuit Judges.

OPINION OF THE COURT

AMBRO, Circuit Judge.

[**] Honorable Kathleen M. O'Malley, United States Court of Appeals for the Federal Circuit, sitting by designation.

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As the oil tanker *M/T Athos I* neared Paulsboro, New Jersey, after a journey from Venezuela, an abandoned ship anchor lay hidden on the bottom of the Delaware River squarely within the *Athos I's* path and only 900 feet away from its berth. Although dozens of ships had docked since the anchor was deposited in the River, none had reported encountering it. The *Athos I* struck the anchor, which punctured the ship's hull and caused approximately 263,000 gallons of crude oil to spill into the River. The cleanup following the casualty was successful, but expensive.

This appeal is the result of three interested parties attempting to apportion the monetary liability. The first party (actually two entities consolidated as one for our purposes) includes the *Athos I's* owner, Frescati Shipping Company, Ltd., and its manager, Tsakos Shipping & Trading, S.A. (jointly and severally, "Frescati"). Although Frescati states that the spill caused it to pay out $180 million in cleanup costs and ship damages, it was reimbursed for nearly $88 million of that amount by the United States (the "Government")—the second interested party—pursuant to the Oil Pollution Act of 1990, 33 U.S.C. § 2701 *et seq*. In order to recoup the unreimbursed losses, Frescati made claims in contract and tort against the third interested party—a set of affiliates known as CITGO Asphalt Refining Company, CITGO Petroleum Corporation, and CITGO East Coast Oil Corporation (jointly and severally, "CARCO")—which requested the oil shipped on the *Athos I* and owned the marine terminal where it was to dock to unload its oil. Specifically, Frescati brought a contract claim for CARCO's alleged breach of the safe port/safe berth warranty (jointly and severally, "safe berth warranty") it made to an intermediary—Star Tankers, Inc.—responsible for chartering the *Athos I* to CARCO's

port, and alleged negligence and negligent misrepresentation against CARCO as the owner of the wharf the *Athos I* was nearing when it was holed. The Government, as a statutory subrogee that stepped into Frescati's position for the $88 million it reimbursed to Frescati under the Oil Pollution Act, has limited its claim for reimbursement from CARCO to Frescati's contractual claim pursuant to a limited settlement agreement.

Following a 41-day bench trial, the District Court for the Eastern District of Pennsylvania held that CARCO was not liable for the accident under any of these theories. The Court, however, made no separate findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52(a)(1). That calls for a remand to set out these mandated matters. However, for the sake of efficiency, we discuss—and, to the extent necessary, make holdings on—the legal issues appealed.

In regard to the contractual safe berth warranty, the Court determined that Frescati (and the Government as a subrogee) could not recover on their contractual claims. First, Frescati was not a party to the agreement that contained the warranty between CARCO and Star Tankers, and was not an intended beneficiary of that agreement. Furthermore, even if Frescati could claim the protection of the warranty, it was only a promise by CARCO to exercise due diligence and not an unconditional guarantee; moreover, sufficient diligence existed here. In any event, the warranty was excused because CARCO specified the port ahead of the *Athos I's* arrival, placing the burden on the *Athos I's* captain to accept it as safe or reject it under what is called the "named port exception."

For reasons elaborated below, we disagree with all three of these rulings. Instead, we hold that the *Athos I*—and by extension, its owner, Frescati—was an implied beneficiary of CARCO's safe berth warranty. We conclude as well that the safe berth warranty is an express assurance of safety, and that the named port exception to that warranty does not apply to hazards that are unknown to the parties and not reasonably foreseeable. We cannot be sure, however, that this warranty was actually breached, as the District Court made no finding as to the *Athos I's* actual draft nor the amount of clearance actually provided.

If on remand the District Court rules in favor of Frescati on its contractual warranty claim, its negligence claim becomes unnecessary. If this issue is reached, we do not agree with the District Court's conclusion that CARCO cannot be liable in negligence because the anchor lay outside the approach to CARCO's terminal—the area in which CARCO had a duty to exercise reasonable care in proving a safe approach. As such, the District Court would need to resolve the appropriate standard of care required, whether CARCO breached that standard, and if so, whether any such breach caused the accident. Conversely, we find no error with the Court's holding that CARCO's alleged misrepresentation as to the depth of its berth was geographically (and hence factually) irrelevant to the ultimate accident. In addition, we conclude that the Government has waived reliance on a partial settlement agreement with CARCO that, the Government contends, precludes CARCO from making certain equitable defenses to the Government's subrogation claims. In this context, we affirm in part, and vacate and remand in part for additional factfinding on the contractual (and possibly negligence) claims.

I. Factual and Procedural Background

A. The Tanker and Its Charters

At the heart of this dispute is the *Athos I*, a single-hulled oil tanker measuring 748 feet long and more than 105 feet wide. It was owned by Frescati at all relevant times. At the time of the accident, however, the *Athos I* had been chartered into a tanker pool assembled by Star Tankers, who is not a party to this consolidated action. In order to transport a load of heavy crude oil from Venezuela to its asphalt refinery in Paulsboro, New Jersey, CARCO sub-chartered the *Athos I* from the Star Tankers pool.

In admiralty, these contracts for service are known as "charter parties."[1] In specific regard to Star Tankers, the *Athos I* was enlisted into the tanker pool in October of 2001 pursuant to a "*time* charter party." "Under a time charter, the owner [Frescati] remains responsible for the navigation and operation of the vessel and the charterer [Star Tankers] assumes responsibility for arranging for the employment of the vessel, providing fuel and paying for certain cargo-related expenses." Terence Coghlin *et al., Time Charters* ¶ 1.59 (6th ed.2008). The time charter party gave Star Tankers, an intermediary or "middleman," the right to sub-charter the *Athos I* although Frescati

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[1] The term "charter party" may be confusing in that it does not refer to an entity, but a document. This is due to its historical genesis, deriving from the phrase "*charta partita, i.e.*, a deed of writing divided." *Black's Law Dictionary* 268 (9th ed.2009) (quoting Frank L. Maraist, *Admiralty in a Nutshell* 44-45 (3d ed.1996)). The *charta partita* was literally a divided document, the owner and the charterer each retaining one half of the agreement. *Id*.

remained responsible for keeping the vessel staffed and serviceable.

In contrast, CARCO's employment of the *Athos I* for the specific voyage was pursuant to a "*voyage* charter party" with Star Tankers. Unlike a time charter party in which a "vessel's employment is put under the orders of . . . charterers" for a period of time, under a voyage charter party the ship is hired "to perform one or more designated voyages in return for the payment of freight."[2] Julian Cooke *et al*., *Voyage Charters* ¶ 1.1 (3d ed.2007). CARCO's particular voyage charter party, based on a standard industry ASBATANKVOY form, contained what are customarily known as "safe port" and "safe berth" warranties (already defined, for convenience, as a "safe berth warranty"). It provided that

> [t]he vessel . . . shall, with all convenient dispatch, proceed as ordered to Loading Port(s) named . . ., or so near thereunto as she may safely get (always afloat), . . . and being so loaded shall forthwith proceed, as ordered on signing Bills of Lading, direct to the Discharging Port(s), or so near thereunto as she may safely get (always afloat), and deliver said cargo.

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[2] It has been observed that

> [t]he fundamental difference between voyage and time charters is how the freight or "charter hire" is calculated. A voyage charterparty specifies the amount due for carrying a specified cargo on a specified voyage (or series of voyages), regardless of how long a particular voyage takes. A time charterparty specifies the amount due for each day that the vessel is "on hire," regardless of how many voyages are completed.

David W. Robertson *et al*., *Admiralty and Maritime Law in the United States* 335 (2d ed.2008).

J.A. at 1222 (Tanker Voyage Charter Party, Part II, ¶ 1). It further directed that "[t]he vessel shall load and discharge at any safe place or wharf, . . . which shall be designated and procured by the Charterer [CARCO], provided the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat. . . ." *Id*. at 1222 (Tanker Voyage Charter Party, Part II, ¶ 9). We note that, in the time charter party between Frescati and Star Tankers, the latter contracted to provide a similar safe berth warranty, but this warranty was qualified whereby Star Tankers obligated itself to exercise "due diligence to ensure that the vessel is only employed between and at safe places. . . ." *Id*. at 1157 (Time Charter Party ¶ 4). Following the accident, Frescati began arbitration with Star Tankers regarding its claims for damage of the *Athos I*, but that proceeding has been stayed pending the outcome of this case. Oral Arg. Tr. 4:8-15, Sept. 20, 2012.

In preparation for the arrival in Paulsboro of the *Athos I*, its master[3] was provided with a copy of CARCO's Port Manual. This Manual indicated that the allowable maximum draft at the Paulsboro facility was 38 feet, but that this "may change from time to time and should be verified prior to the vessel's arrival." J.A. at 1095 (CITGO Terminal Regulations for Vessels ¶ 2). On November 22, 2004, four days before the *Athos I* arrived, CARCO reduced this maximum draft to 36 feet. The *Athos I* was not informed of this modification.

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[3] A ship's master is its commander and captain. *Black's Law Dictionary*, *supra*, at 1065.

B. The Accident

On November 26, 2004, the *Athos I* was nearing its ultimate destination, CARCO's asphalt refinery in Paulsboro, New Jersey. When the *Athos I* reached the mouth of the Delaware River, only 80 miles remained of its 1,900-mile journey. Although Captain Iosif Markoutsis was the ship's master, the seven-hour upriver transit was aided by Delaware River Pilot Captain Howard Teal. At approximately 8:30 p.m., while the *Athos I* was still navigating up the River channel, Docking Pilot Captain Joseph Bethel boarded the vessel (Captain Bethel was employed by non-party Moran Towing of Pennsylvania). The Docking Pilot relieved the River Pilot at about 8:40 p.m.

CARCO's Paulsboro facility sits on a jetty on the New Jersey side of the Delaware River. Federal Anchorage Number Nine ("the Anchorage" or "Anchorage Number Nine") separates the River channel from CARCO's port waters. As pictured in Appendix A to this opinion, the Anchorage's border runs diagonally to CARCO's waterfront, ranging between 130 and 670 feet from the face of its ship dock. Across the Anchorage, the River Channel begins less than 2,000 feet from CARCO's berth, a little more than two-and-a-half lengths of the *Athos I*. Customarily, a tanker of the *Athos I's* size would come up the River, make a starboard (right) 180° turn into the Anchorage, and would then be pushed sideways by tugs (i.e., parallel parked) into CARCO's pier. The *Athos I* was following this procedure when, at 9:02 p.m., it suddenly listed to the port (left) side, and oil became visible in the water. It was later determined that an abandoned anchor had punched two holes in the *Athos I's* hull, causing (as already noted) roughly 263,000 gallons of crude oil to spill into the River. At the time

of the allision,[4] the *Athos I* was only 900 feet from CARCO's berth, approximately halfway through the Anchorage. The tide was relatively low at the time of the accident after having reached its lowest point only 50 minutes prior. J.A. at 2102.

The anchor was eventually exhumed. Inspection revealed that it weighed roughly nine tons and measured 6'8" long, 7'3" wide, and 4'6" high. J.A. at 2192 (United States Coast Guard Marine Casualty Investigation Report). The Coast Guard further reported that the anchor was ultimately found lying prone with its blade reaching 54 inches above the floor of the River. *Id*. at 2196. Although the District Court made no finding of fact as to the exact position of the anchor at the time of the allision, it found persuasive the testimony of oceanographer and ocean engineer Dr. Peter Traykovski, who opined that the anchor was lying horizontal at the time of the accident with a height of only 41 inches above the bottom of the River. Traykovski Test., 24:25-25:13, Nov. 4, 2010. The Court also did not make any finding as to the depth of the Anchorage where the anchor lay, though the record before us seems to indicate that the depth was between 40.3 and 41.45 feet deep at low tide. *Id*. at 49:12-25; J.A. at 2196.

The District Court also did not make any finding as to the draft of the *Athos I*—that is, the distance between the lowest point of the ship and the waterline—but assumed, for purposes of analysis, that it was drawing 36'7" as represented by Frescati at the time of the accident. The Court also failed to resolve

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[4] An allision is "[t]he contact of a vessel with a stationary object such as an anchored vessel or a pier." *Black's Law Dictionary*, *supra*, at 88.

the anchor's depth or position, although it noted that there was "persuasive evidence" that the anchor was lying down at the time of the accident. *In re Frescati Shipping Co., Ltd*., Nos. 05-CV-00305-JF, 08-cv-02898-JF, 2011 WL 1436878, at *7 (E.D.Pa. Apr. 12, 2011). The parties, however, stipulated that the anchor had been in the same approximate location for at least three years because it was detectable from a sonar scan performed by the University of Delaware in 2001 as part of an independent geophysical study.[5] The owner of the anchor has never been determined, but the Court speculated that the anchor likely was used for dredging operations at the time it was lost.

C. The Cost of the Accident

Frescati claims that the accident cost it, as the "responsible party" under the Oil Pollution Act, approximately $180 million in clean-up costs and damages to the ship. (The Act was passed in the wake of the Exxon Valdez accident in 1989, and was designed to facilitate oil spill cleanups by requiring "responsible parties" to pay initially for removal costs and damages. *See* 33 U.S.C. § 2702(a).) Because the Act sets liability limits for cooperative responsible parties, *see id*. at § 2704(a), an incentive exists for responsible parties to respond quickly and competently in order to limit the extent of their financial exposure. *See Unocal Corp. v. United States*, 222 F.3d 528, 535 (9th Cir.2000) ("'The purpose of [the

[5] The stipulation suggests that the anchor was not mentioned in the report ultimately issued by the University of Delaware professors. *See* J.A. at 1310-12. Instead, it seems that it was not until after this litigation began that the parties obtained the 2001 side scan sonar data and agreed that it revealed the anchor's presence.

Oil Pollution Act] . . . was to encourage rapid private party responses.'" (quoting *In re Metlife Capital Corp*., 132 F.3d 818, 822 (1st Cir.1997))). Responsible parties in compliance with the Act may file a claim with the Oil Spill Liability Trust Fund, controlled by the United States Government, for reimbursement of costs beyond the liability limit. 33 U.S.C. § 2708(a)(2). Specifically, Frescati was able to limit its liability for cleanup to $45,474,000, thus allowing it to recover cleanup costs exceeding that amount from the Fund.[6] It was ultimately reimbursed for approximately $88,000,000 of its cleanup costs, and the Fund became subrogated as to that amount under 33 U.S.C. §§ 2712(f) and 2715(a).

D. Control of the Waters

The casualty here occurred squarely within Anchorage Number Nine. As the term implies, an anchorage ground is "a place where vessels anchor or a place suitable for anchoring." *Webster's Third New Int'l Dictionary* 79 (1971). Section 7 of the Rivers and Harbors Act of 1915 authorizes the establishment of "anchorage grounds for vessels in all harbors, rivers, bays, and other navigable waters of the United States whenever it is manifest . . . that the maritime or commercial interests of the United States require such anchorage grounds for safe navigation. . . ." 33 U.S.C. § 471. By 1930, a "lack of adequate anchorage room" was creating a hazard on the Delaware River between

[6] In February 2007, Frescati applied to have its liability exonerated pursuant to 33 U.S.C. § 2703(a)(3). That subsection directs that a responsible party is not liable for the acts or omissions of a third party. In this case, that third party would have been the unknown anchor-dropper. It is unclear why Frescati withdrew this claim in 2008.

navigating vessels and those "awaiting accommodation at the wharves, or awaiting cargo or orders." H. Doc. No. 71-304, 24 (1930). Anchorage Number Nine, also known as the Mantua Creek Anchorage, was established in 1930. Pub.L. No. 71-520, 46 Stat. 918, 921 (1930). Today it runs for approximately 2.2 miles along the Delaware River channel (*see* Appendix A) and provides a place for ships to anchor so long as they do not "interfere unreasonably with the passage of other vessels to and from Mantua Creek." 33 C.F.R. § 110.157(a)(10).

Anchorage Number Nine, though only a few hundred feet from CARCO's pier, is neither controlled nor maintained by CARCO. Instead, the federal Government's Army Corps of Engineers (the "Corps") conducts hydrographic surveys and dredges as necessary in an attempt to maintain the Anchorage's depth at 40 feet. The Corps also regulates any construction or excavation within the navigable waters, including the issuance of dredging permits, 33 U.S.C. § 403, and its regulatory jurisdiction "extend[s] laterally to the entire water surface and bed of a navigable waterbody, which includes all the land and waters below the ordinary high water mark," 33 C.F.R. § 329.11. The National Oceanic and Atmospheric Administration conducts surveys on occasion for various federal projects. No Government entity, however, is responsible for preemptively searching all federal waters for obstructions, and the District Court found that the Government does not actually survey the Anchorage for hazards. If, however, the Government is alerted to the presence of a threat, the Corps will remove the obstruction if it is a hazard to navigation and, if not removable, the Coast Guard will chart it. Ultimately, the "[p]rimary responsibility for removal of wrecks or other obstructions lies with the

[obstruction's] owner, lessee, or operator." 33 C.F.R. § 245.10(b).

CARCO maintains a self-described "area of responsibility" directly abutting its Paulsboro terminal, "a roughly triangular-shaped area . . . comprising the waters of the berth footprint and the immediate access area next to it where vessels enter and exit the footprint." CARCO's Br. at 19. This area, also set out in Appendix A to this opinion, runs essentially the length of CARCO's facility and extends offshore to the border of the Anchorage. It is based on a permit to dredge for maintenance purposes that was issued by the Corps to CARCO's predecessor in 1991. The scope of such a permit is derived from the initial request; put another way, it is self-defined subject to approval by the Corps. This area of responsibility is not large enough to rotate the 748 foot-long *Athos I*.

In maintaining its area of responsibility, CARCO retained a consulting engineering firm, S.T. Hudson Engineers, Inc., to perform hydrographic surveys. While CARCO had inspected that area for depth, it never specifically searched for debris or other hazards. Hudson interpolated the area's depth from a grid of pinpointed, single-beam sonar depth soundings at 50-foot intervals. This particular procedure is poor at detecting sunken objects because it is unlikely that any given hazard would fall within the exact spot measured, and if it did, it would not necessarily indicate that there was an object but only the depth of that object as indistinguishable from the bottom of the waterway. Long Test., 78:8-79:5, Nov. 17, 2010; Fish Test, 59:11-18, Sept. 29, 2010.

CARCO's Port Captain William Rankine estimated that approximately 250 ships with a draft of 36'6" or greater either entered or departed CARCO's port

between 1997 and 2005. Rankine Test., 22:25-23:15, Nov. 22, 2010. In specific regard to arriving vessels, from the time the anchor was spotted by the University of Delaware in August 2001 until the *Athos I* casualty, the record reflects that 61 ships with a draft of 36'6" or greater arrived at CARCO's facility. J.A. at 1788-94. The record does not reflect at what time these ships docked, and high tide adds approximately six feet of depth to the River. Moreover, Frescati points out that—unlike the *Athos I*—21 of these ships would have been required to dock within three hours prior to high-water due to their excessive drafts.[7] *Id*. at 1622-24.

E. The District Court Proceedings

In January 2005, Frescati filed in the District Court a Complaint for Exoneration From or Limitation of Liability pursuant to the Shipowner's Limitation of Liability Act, 46 U.S.C. § 30501 *et seq*. (formerly 46 App. U.S.C. § 181 *et seq*.). In that Complaint, Frescati sought a declaration that it was not liable for any losses stemming from the accident or, in the alternative, a limitation of liability to the value of the *Athos I* and its pending freight. CARCO was among the parties who asserted claims in that action, seeking recovery against Frescati for its lost oil in an amount

[7] The Docking Pilot Association ("DPA") Guidelines provide directives for the appropriate docking times for vessels of different sizes. The DPA Guidelines were developed after discussion with CARCO's previous Port Captain and were based in part on CARCO's desire to maximize the number of vessels that could dock at its berth. J.A. at 1104; Quillen Dep. 11:12-20, Sept. 2, 2010.

in excess of $259,217. Frescati then filed a counterclaim against CARCO for all costs incurred beyond those reimbursed by the Fund.

In June 2008, the Government filed a separate suit against CARCO seeking compensation on its subrogated right, pursuant to 33 U.S.C. §§ 2712(f) and 2715(a), to the approximately $88 million disbursed by the Fund. In a partial settlement agreement, the Government waived its negligence claims against CARCO in return for the latter's agreement not to pursue negligence claims against the United States. The Government, believing that CARCO was advancing against it negligence theories in violation of the settlement agreement, moved for partial summary judgment against CARCO's counterclaim for equitable recoupment. That motion was denied.

As noted, these two actions were consolidated, and they were tried over 41 days before Judge Fullam. After trial, the Court issued an 18-page opinion holding that CARCO could not be held responsible under contract or tort for any of the losses stemming from the accident. *See In re Frescati*, 2011 WL 1436878.

On the contractual safe berth warranty, the Court determined that Frescati had no standing for relief, as it was not a third-party beneficiary to the voyage charter party between CARCO and Star Tankers, and that, in any event, CARCO did not breach those warranties because they are not unconditional guarantees but instead "'impose[ ] upon the charterer a duty of due diligence to select a safe berth,'" a duty satisfied here. *Id*. at *6 (quoting *Orduna S.A. v. Zen-Noh Grain Corp*., 913 F.2d 1149, 1157 (5th Cir.1990)). The Court further ruled that, even if a stricter warranty applied, the naming of the port in advance

precluded recovery under the named port exception, which, as a general matter, protects a charterer when the port is named ahead of arrival and the master proceeds there without protest.

The Court also held that CARCO was not negligent in failing to search for or detect the abandoned anchor that lay within the Anchorage. As the Court deemed it outside the approach to CARCO's berth, detection and notification to others of its presence thus fell beyond CARCO's obligation to provide a safe entry to that berth. The Court also held that there was no negligent misrepresentation in CARCO's failure to alert the *Athos I* that—only four days prior to its arrival—the allowable maximum draft at CARCO's facility had been reduced from 38 feet to 36 feet. It reasoned that this was an internal determination pertaining to the area at the berth and outside the Anchorage, and therefore was "factually irrelevant to the casualty." *Id*. at *5.

In sum, the District Court concluded that the anchor-dropper rather than any of the named parties was at fault, and rejected all of Frescati's and the Government's arguments as to CARCO's liability.

II. Jurisdiction and Standard of Review

The District Court had admiralty jurisdiction pursuant to 28 U.S.C. § 1333(1). We have jurisdiction over this appeal under 28 U.S.C. § 1291.

Findings of fact made during a bench trial are reviewed for clear error, and will stand unless "'completely devoid of minimum evidentiary support displaying some hue of credibility, or . . . bear no rational relationship to the supportive evidentiary data.'" *In re Nautilus Motor Tanker Co*., 85 F.3d 105, 115 (3d Cir.1996) (alteration in original) (quoting *Haines v.*

Liggett Grp. Inc., 975 F.2d 81, 92 (3d Cir.1992)). Following a bench trial, we review *de novo* a district court's conclusions of law. *McCutcheon v. Am.'s Servicing Co.*, 560 F.3d 143, 147 (3d Cir.2009) (citation omitted). "[C]onstruction of an unambiguous contract is a matter of law and subject to plenary review." *Colliers Lanard & Axilbund v. Lloyds of London*, 458 F.3d 231, 236 (3d Cir.2006) (citing *U & W Indus. Supply, Inc. v. Martin Marietta Alumina, Inc.*, 34 F.3d 180, 185 (3d Cir.1994)). Similarly, we exercise "plenary review over the legal question of 'the nature and extent of the duty of due care. . . .'" *Andrews v. United States*, 801 F.2d 644, 646 (3d Cir.1986) (quoting *Redhead v. United States*, 686 F.2d 178, 182 (3d Cir.1982)).

III. Rule 52

Federal Rule of Civil Procedure 52(a)(1) provides that "[i]n an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately." Fed.R.Civ.P. 52(a)(1). This is a mandatory requirement. *H. Prang Trucking Co., Inc. v. Local Union No. 469*, 613 F.2d 1235, 1238 (3d Cir.1980) (citing 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2574, at 690 (1st ed.1971)); *Scalea v. Scalea's Airport Serv., Inc.*, 833 F.2d 500, 502 (3d Cir.1987) (*per curiam*). Typically, a Rule 52 violation occurs when a district court's inadequate findings render impossible "'a clear understanding of the basis of the decision,'" *H. Prang Trucking*, 613 F.2d at 1238 (quoting Wright & Miller, *supra*, § 2577, at 697), and those "'findings are obviously necessary to the intelligent and orderly presentation and proper disposition of an appeal,'" *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172,

1178 (3d Cir.1990) (quoting *Mayo v. Lakeland Highlands Canning Co*., 309 U.S. 310, 317, 60 S.Ct. 517, 84 L.Ed. 774 (1940)). *See also Berguido v. E. Air Lines, Inc*., 369 F.2d 874, 877 (3d Cir.1966) ("If a full understanding of the factual issues cannot be gleaned from the District Court's opinion, we would be obliged to remand for compliance with Rule 52(a)."). Although Rule 52 does not require hyper-literal adherence, *see Hazeltine Corp. v. Gen. Motors Corp*., 131 F.2d 34, 37 (3d Cir.1942), "an appellate court may vacate the judgment and remand the case for findings if the trial court has failed to make findings when they are required," *Giles v. Kearney*, 571 F.3d 318, 328 (3d Cir.2009) (citing *H. Prang Trucking*, 613 F.2d at 1238-39).

Instead of presenting his findings in accord with Rule 52, the trial judge here elected to "set forth in narrative fashion [his] findings of fact . . . and conclusions of law." *In re Frescati*, 2011 WL 1436878, at *1. Unfortunately, what followed leaves us unable to discern what were his intended factual findings. Moreover, in arriving at his particular legal conclusions, the trial judge held back making many of the factual findings that would support those conclusions, in effect going from first base to third across the pitcher's mound. While we do not endorse or require a panoply of extraneous factual findings, the overall dearth of clear factual findings, much less those pertaining to the heart of this matter—such as the draft of the *Athos I*—falls below what is required by Rule 52.

Because we cannot derive a full understanding of the core facts from the District Court's opinion, this was a violation of Rule 52 and itself a basis for remand. *Giles*, 571 F.3d at 328. In light of the legal

determinations set out below, factual clarification is required in any event.

IV. The Contractual Safe Berth Warranty

CARCO's promise to Star Tankers that the *Athos I* would be directed to a location that "she may safely get (always afloat)" is a provision known in context as either a safe port or safe berth warranty (to repeat again, we use for shorthand "safe berth warranty"). *See* Cooke *et al*., *supra*, ¶ 5.121 (citation omitted). This language triggers two separate protections: a contractual excuse for a master who elects not to venture into an unsafe port, and protection against damages to a ship incurred in an unsafe port to which the warranty applies. *See* 2 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 11-10, at 32-33 (5th ed.2011). In this case, only the second benefit of the safe berth warranty is at issue, as the *Athos I* was damaged in an allegedly unsafe port. Specifically at issue are the scope and applicability of this warranty, topics we explore below.

A. Was Frescati a Third-Party Beneficiary of the Safe Berth Warranty?

"'Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must at least show that it was intended for his direct benefit.'" *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 307, 48 S.Ct. 134, 72 L.Ed. 290 (1927) (quoting *German Alliance Ins. Co. v. Home Water Supply Co*., 226 U.S. 220, 230, 33 S.Ct. 32, 57 L.Ed. 195 (1912)). As Frescati is not a party to CARCO's promise to Star Tankers to provide a safe berth, there must be a compelling showing that it was nonetheless an intended beneficiary. The District Court held that this

was not the case because the testimony at trial failed to reveal any intent by CARCO to benefit Frescati. The Court, however, failed to inquire whether the contract itself established a third-party beneficiary relationship, a question of law. *See Pierce Assocs. v. Nemours Found.*, 865 F.2d 530, 535 (3d Cir.1988). We conclude that, although Frescati is not a named beneficiary to the safe berth warranty within the charter party between Star Tankers and CARCO, the *Athos I* benefits from this warranty, and Frescati, as the vessel's owner, is thus a third-party beneficiary.

Maritime contracts "must be construed like any other contracts: by their terms and consistent with the intent of the parties." *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 31, 125 S.Ct. 385, 160 L.Ed.2d 283 (2004). "When a contract is a maritime one, and the dispute is not inherently local, federal law controls the contract interpretation." *Id.* at 22-23, 125 S.Ct. 385 (citing *Kossick v. United Fruit Co.*, 365 U.S. 731, 735, 81 S.Ct. 886, 6 L.Ed.2d 56 (1961)). We typically look to the Restatement of Contracts for the federal law on third-party beneficiaries. *Doe v. Pennsylvania Bd. of Prob. & Parole*, 513 F.3d 95, 106 (3d Cir.2008); *see* Restatement (Second) of Contracts § 302 (1981). A third-party may be a beneficiary to a contract of others where it is "appropriate to effect[ ] the intention of the parties," and "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." Restatement, *supra*, § 302(1)(b); *see also Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1019 (2d Cir.1993) (holding that a third-party beneficiary to a charter party "must show that 'the parties to that contract intended to confer a benefit on [it] when contracting; it is not enough that some benefit incidental to the performance of the contract may accrue to [it]'" (alterations in

original) (quoting *McPheeters v. McGinn, Smith & Co*., 953 F.2d 771, 773 (2d Cir.1992))).

In 1959, the Supreme Court held that vessels are automatic third-party beneficiaries of warranties of workmanlike service made to their charterers by stevedores who unload vessels at docks. *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423, 428, 79 S.Ct. 445, 3 L.Ed.2d 413 (1959). This is because "[t]he warranty which a stevedore owes when he goes aboard a vessel to perform services is plainly for the benefit of the vessel whether the vessel's owners are parties to the contract or not." *Id*. This natural relationship between the entities was "enough to bring the vessel into the zone of modern law that recognizes rights in third-party beneficiaries." *Id*. (citation omitted). A year later, the Supreme Court extended this rule a logical step further in holding that "[t]he owner, no less than the ship, is the beneficiary of the stevedore's warranty of workmanlike service." *Waterman S.S. Corp. v. Dugan & McNamara, Inc*., 364 U.S. 421, 425, 81 S.Ct. 200, 5 L.Ed.2d 169 (1960).

Although these two Supreme Court cases aid Frescati's position, they do so only by analogy. As CARCO points out, the matter before us does not involve an implied warranty for workmanlike service, but an explicit assurance of safety in a document to which Frescati is not a party. The Court of Appeals for the Second Circuit, however, has applied *Crumady* and *Waterman* to a set of facts similar to the one before us. In *Paragon Oil Co. v. Republic Tankers, S.A*., 310 F.2d 169, 171 (2d Cir.1962) (Friendly, J.), a vessel owner (Paragon Oil Co., Inc.) and voyage charterer (Republic Tankers, S.A.) entered into a voyage charter with a safe berth warranty. Republic had executed a contract of affreightment (essentially a sub-voyage

charter) with a third-party that contained a safe berth warranty identical to the one it promised in the voyage charter. *Id*. From this, the Second Circuit concluded that Paragon (the owner) was "the true party in interest" to the safe berth assurance in the contract of affreightment even though it was not explicitly named in the contract between Republic (the voyage charterer) and the third-party. *Id*. at 175.

We agree with the Second Circuit's reasoning that *Crumady* and *Waterman* counsel in favor of Frescati's third-party beneficiary status.[8] Specifically, we are convinced that a safe berth warranty necessarily benefits the vessel, and thus benefits its owner as a corollary beneficiary.[9] "[T]he circumstances indicate"

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[8] CARCO makes a belated argument that *Crumady* and *Waterman* are of dubious precedential value in light of the 1972 amendments to the Longshore[] and Harbor Workers' Compensation Act. These amendments required negligence (as opposed to an unsafe condition) for a longshoreman to recover against a ship owner, and abolished the ship owner's right of indemnity against the stevedore. *See* 33 U.S.C. § 905(b); *Scindia Steam Nav. Co., Ltd. v. De Los Santos*, 451 U.S. 156, 164-65, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981). This legislative exclusion, however, does not undermine the fundamental premise that a ship owner may benefit from an arrangement between third parties. As such, Judge Posner has noted that, following this amendment, "indemnity has continued to be sought in cases not involving longshoremen and hence not within the scope of the Longshore and Harbor Workers' Compensation Act." *Hillier v. S. Towing Co*., 714 F.2d 714, 718-19 (7th Cir. 1983) (Posner, J.).

[9] Insofar as CARCO cites to *Bunge Corp. v. MV Furness Bridge*, 390 F.Supp. 603, 604 (E.D.La.1974), it is unpersuasive, as its conclusion that the owner was not a third-party beneficiary of the sub-charterer's safe berth warranty is unsupported by any reasoning. Further, this issue was abandoned when the Court later resolved the merits of the claim and held that the sub-charterer had "violated a legal duty [in tort] whether or not it also had a contractual one." *Bunge Corp. v. MV Furness Bridge*, 396

that the warranty is intended to endow the vessel with "the benefit of the promised performance." Restatement, *supra*, § 302(1)(b). Because the warranty explicitly covers the safety of the vessel, it would be nonsensical to deprive the vessel's owner the benefits of this promise, as the owner is ultimately the one most interested in the vessel's status and is obligated to maintain its condition.[10]

Moreover, it would work an odd windfall if Star Tankers were allowed to collect on CARCO's safe berth warranty but not be required to pass on those remedial dollars to the ship's ultimate owner. That illogical result could occur where the owner (Frescati) received no safe berth warranty from the time charterer (Star Tankers), or where—as in the case before us—Frescati received a less comprehensive warranty from Star Tankers than Star Tankers received from the voyage charterer (CARCO).[11] This would theoretically allow Star Tankers to collect for damages to the ship that were actually paid by Frescati. While we are mindful of the parties' ability to contract differently, there is no indication that Star Tankers bargained for the

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F.Supp. 852, 858 (E.D.La.1975), *rev'd*, 558 F.2d 790 (5th Cir.1977). On appeal, the Court of Appeals for the Fifth Circuit agreed that the issue of contractual liability was "irrelevant" because none of the parties could have intended to warrant complete safety of an inadequately small wharf. 558 F.2d at 801-02.

[10] Under the time charter, Frescati remained responsible for insuring, maintaining, and restoring the *Athos I* throughout the term of the charter. J.A. at 1447-48 (Time Charter Party ¶¶ 3, 6).

[11] Although we ultimately conclude that the full safe berth warranty from CARCO to Star Tankers is an express assurance made without regard to the amount of diligence taken by the charterer, *see infra* Part IV.B, Star Tankers only promised due diligence to Frescati, J.A. at 1448 (Time Charter Party 14).

potential of such an unearned windfall—profiting from the mishaps of the vessels within its tanker pool when it did not pay for the repair of those mishaps. Instead, requiring warranties from voyage charterers like CARCO is a way to insure against claims asserted by vessel owners. Per this path, the promise made to protect a vessel flows through the intermediary party(ies) to the ultimate party who bore the pain of an unsafe port, here the vessel's owner.

We discount CARCO's suggestion that it was unaware of Frescati's status as the true owner of the *Athos I*. CARCO had completed an internal vetting of the *Athos I* in October of 2004 that identified Frescati as its owner. J.A. at 1318 (Citgo Vetting Report). Regardless, even if the ultimate owner had been undisclosed, CARCO expressly warranted to provide a safe berth, which is a promise made "plainly for the benefit of the vessel." *Crumady*, 358 U.S. at 428, 79 S.Ct. 445. Thus we see no reason why the *Athos I's* owner would be any less entitled to rely on this warranty, whether it was identified or not. Frescati, as the owner of the *Athos I*, may therefore rely on CARCO's safe berth warranty as a third-party beneficiary.

B. The Scope of the Safe Berth Warranty

That Frescati may benefit from CARCO's safe port/safe berth warranty requires that we delineate its comprehensiveness, a question of first impression in our Circuit. Though the District Court did not need to reach this legal issue after determining that Frescati was not a third-party beneficiary, it nonetheless concluded—as an alternate holding—that the safe berth warranty was not breached because "CARCO fulfilled its duty of due diligence. . . ." *In re Frescati*, 2011 WL 1436878, at *6. We part from this holding, as

we believe the Court incorrectly relied on *Orduna S.A. v. Zen-Noh Grain Corp*., 913 F.2d 1149, 1157 (5th Cir.1990), which held that the safe berth provision was not a full warranty but required only due diligence.

A port is deemed safe where "the particular chartered vessel can proceed to it, use it, and depart from it without, in the absence of abnormal weather or other occurrences, being exposed to dangers which cannot be avoided by good navigation and seamanship." Cooke *et al., supra*, ¶ 5.137; *Leeds Shipping v. Societe Francaise Bunge* (*The Eastern City*), [1958] 2 Lloyd's Rep. 127, 131 (same). Whether a port is safe refers to the particular ship at issue, Cooke *et al*., *supra*, ¶ 5.68, and goes beyond "the immediate area of the port itself" to the "adjacent areas the vessel must traverse to either enter or leave," Coghlin *et al., supra*, ¶ 10.124. In other words, a port is unsafe—and in violation of the safe berth warranty—where the named ship cannot reach it without harm (absent abnormal conditions or those not avoidable by adequate navigation and seamanship).[12]

This formulation is deeply rooted. In 1888, the Supreme Court held charterers liable for breach of a safe berth warranty in insisting that a ship sail to Aalborg, Denmark, a port that was impossible for the particular ship to reach due to a sand bar and the absence of any reasonably safe place to anchor or discharge. *The Gazelle*, 128 U.S. 474, 485–86, 9 S.Ct. 139, 32 L.Ed. 496 (1888). In a similar fashion, the

[12] On the facts before us, we need not define the outer geographical bounds of the safe berth/safe port warranty. At oral argument CARCO conceded that the warranty—if applicable—"would include the area in and around Paulsboro," including the Anchorage. Oral Arg. Tr. 62:18-64:3, Sept. 20, 2012.

Supreme Court held in 1902 that charterers failed to provide a safe dock where the ship in question could not reach it without damage. *Mencke v. Cargo of Java Sugar*, 187 U.S. 248, 253, 23 S.Ct. 86, 47 L.Ed. 163 (1902). Specifically, the charterers were aware that the ship's mast was too tall to clear the Brooklyn Bridge when they designated a discharge dock upriver from the Bridge. *Id*. at 250, 23 S.Ct. 86. The Court concluded that this was a warranty violation by analogizing the overhead obstacle to a submerged one: "A ship could not be said to be afloat, whether the obstacle encountered was a shoal or bar in the port over which she could not proceed, or a bridge under or through which she could not pass, nor could she be said to have safely reached a dock if required to mutilate her hull or her permanent masts." *Id*. at 253, 23 S.Ct. 86; *see also Carbon Slate Co. v. Ennis*, 114 F. 260, 261 (3d Cir.1902) (concluding that safe berth warranty was violated where the ship "was directed to load at a berth where a full cargo, if taken aboard, would have made it impossible for her, at any stage of water or at any time, to pass out over the harbor bar").

The Court of Appeals for the Second Circuit has long held that promising a safe berth effects an "express assurance" that the berth will be as represented. *Cities Serv. Transp. Co. v. Gulf Ref. Co*., 79 F.2d 521, 521 (2d Cir.1935) (*per curiam*), recognized this principle in holding that a master was not liable for damages incurred in reliance on a charter party's safe berth warranty at a particular dock. In *Park S.S. Co. v. Cities Serv. Oil Co*., 188 F.2d 804, 806 (2d Cir.1951) (Swan, J.), the same Court elaborated that the purpose of the warranty was to memorialize the relationship between the contracting entities: "the charterer bargains for the privilege of selecting the precise place for discharge and the ship surrenders that privilege

in return for the charterer's acceptance of the risk of its choice." *Paragon* continued this tradition in contrasting the duty of a wharfinger (an admiralty term for an "owner or occupier of a wharf," *Black's Law Dictionary* 1733 (9th ed.2009))—to exercise reasonable diligence in keeping its berth safe for incoming vessels—with that of a charterer who is contractually bound to provide "not only a place which he believes to be safe, but a place where the chartered vessel can discharge 'always afloat.'" 310 F.2d at 173 (citation and internal quotation marks omitted). *See also Venore Transp. Co. v. Oswego Shipping Corp*. 498 F.2d 469, 472 (2d Cir.1974) (citing *Park S.S. Co*., 188 F.2d at 804) (sub-charterer had a non-delegable "obligation to provide a completely safe berth," which was breached when it permitted the ship to dock at a berth that it knew was unsafe).

Thus, prior to the Fifth Circuit's decision in *Orduna*, "the law concerning safe ports had a rather secure berth in maritime law and it was well settled that a safe port clause in a charter constituted a warranty given by a charterer to an owner." Cooke *et al*., *supra*, ¶ 5.124. *Orduna* created quite a splash in veering from the view that a charterer warrants a ship's safety, and established instead for the Fifth Circuit that a safe berth warranty merely "imposes upon the charterer a duty of due diligence to select a safe berth." 913 F.2d at 1157. While *Orduna* acknowledged the Second Circuit's contrary perspective, it dismissed that interpretation in deference to critical commentators, namely Professors Grant Gilmore and Charles L. Black. *Id*. at 1156 (citing Grant Gilmore & Charles L. Black, *The Law of Admiralty* § 4-4, at 204-06

(2d ed.1975)). We do not find their criticism so compelling.[13]

Orduna concluded that "no legitimate legal or social policy is furthered by making the charterer warrant the safety of the berth it selects." *Id*. at 1157. Primarily, the Court reasoned that it is more sensible to impose fault on the "master on the scene" rather than a far away merchant charterer.[14] *Id*. at 1156

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[13] Gilmore's book has been described as being

> more adapted for the teacher than for the active lawyer or judge. As teachers, the authors are interested in controversy. Wherever they can find it, in the long past or in the nearer present, they stir it up, and frequently label it 'confusion.' . . . It is all very interesting; but in the various admiralty fields—except personal injury and death—most of the old controversies have long been settled. Therefore, our authors tend to give a picture which does not resemble the daily grist of today. Sometimes indeed, straining to keep old battle-fires ablaze, they sprinkle harsh words on the judges who settled the old disputes. . . . On the whole, this is a teaching book rather than an office and courtroom work of reference; and it must be read as such.

Arnold W. Knauth, Book Review, 58 Colum. L.Rev. 425, 426-28 (1958) (reviewing Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* (1957)).

[14] *Orduna* also noted that a due diligence standard would not upset a master's ability to rely on a safe berth warranty in rejecting an unsafe port. 913 F.2d at 1156. This goes only so far, as it addresses but half of the safe berth warranty's protection, which is both to provide a master with a contractual excuse for avoiding an unsafe port and to protect for damages actually sustained in unsafe ports. Additionally, to the extent *Orduna* relied on *Atkins v. Fibre Disintegrating Co*., 2 F.Cas. 78 (E.D.N.Y.1868), *aff'd sub nom. Atkins v. The Disintegrating Co*., 85 U.S. 272, 299, 18 Wall. 272, 21 L.Ed. 841 (1873), we are similarly unpersuaded. While *Atkins* featured a safe berth warranty, *id*. at 79, it was essentially an application of the named port exception. *See infra* Part IV.D. As the ship's master made

(citing Gilmore & Black, *supra*, § 4-4, at 204-06). The appeal of this construction here is illusory. While an owner is liable for its master's superseding negligence, *see* Cooke et al., *supra*, ¶ 5.151, we see no policy reason why a master on board a ship would normally be in any better position to appraise a port's more subtle dangers than the party who actually selected that port. The "commercial reality [is] that it is the charterer rather than the owner who is selecting the port or berth," *id*. ¶ 5.126, and the charterer is more likely to have at least some familiarity with the port it selected. After all, charterers do not select ports without good reason (and, in the case before us, CARCO was directly on the scene, *as it had selected its own berth*). Messrs. Gilmore and Black (famous in other areas of law-Gilmore on commercial law, including secured transactions, and Black on constitutional law) acknowledged that their rationale is undermined in those instances where a charterer has more knowledge of a danger than the master (although they explain that these situations could be remedied through tort liability[15]). We disagree. To any extent a charterer, however distant, bargains to send a ship to a particular port and warrants that it shall be safe there, we see no basis to upset this contractual arrangement.

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outside inquiries and was fully aware of the port's dangers and yet did not object, he waived his right to complain later for damage. *Id*. at 79-80.

[15] Specifically, Gilmore & Black would find an actionable wrong for charterers directing ships to ports with known dangers, and suggest that a charterer may sometimes be "so situated as reasonably to be charged with a duty of inquiry, particularly as to berth." Gilmore & Black, *supra*, § 4-4, at 205.

We are persuaded that the Second Circuit's longstanding formulation of the safe berth clause is the one we should follow.[16] *See* 2 Schoenbaum, *supra*, § 11-10, at 32-33 (citing *The Gazelle*, 128 U.S. 474, 9 S.Ct. 139, 32 L.Ed. 496 (1888)) ("[I]f the ship reasonably complies with the order and proceeds to port, the charterer is liable for any damage sustained."); Stewart C. Boyd *et al., Scrutton on Charter Parties and Bills of Lading*, Section IX, art. 69, at 127 (20th ed.1996) (same); 2A Michael F. Sturley, *Benedict on Admiralty* § 175, at 17-25 (7th ed.2012) (same); Coghlin *et al*., *supra*, ¶ 10.110 (same). *But see* Gilmore & Black, *supra*, § 4-4, at 204-06.

Beyond the near consensus of these authorities, we are also convinced that an "express assurance" warranty is most consistent with industry custom. *See Park S.S*., 188 F.2d at 806; *Cities Serv*., 79 F.2d at 521. Vessel charters are formalized via "highly standardized forms," 2 Schoenbaum, *supra*, § 11-1, at 4-5 (citation omitted). That some forms explicitly adopt a due diligence standard[17] suggests that the understood default is to impose liability on the charterer without regard to the care taken. *See* Coghlin *et al*., *supra*, ¶¶ 10.52, 10.54. Reading these warranties as dappled

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[16] Though not dispositive, we also note that adhering to the Second Circuit's view on this issue promotes uniformity of maritime law along the mid-Atlantic seaboard. *See Sea-Land Serv., Inc. v. Dir., Office of Workers' Comp. Programs*, 552 F.2d 985, 995–96 n. 18a (3d Cir.1977) (noting deference pursuant to federal comity and uniformity in maritime law to the Second Circuit, "since [the Third Circuit] shares appellate review with the Second Circuit over the geographical area comprising one of the country's major east coast harbor complexes").

[17] As already mentioned, the time charter party between Star Tankers and Frescati contains such a standard, as it is predicated on a Shelltime 4 form. *See* Coghlin *et al*., *supra*, ¶ 10.54.

with due diligence would make contractual language explicitly adopting a due diligence metric pointless, and we disfavor contract interpretation "that 'render[s] at least one clause superfluous or meaningless.'" *Sloan & Co. v. Liberty Mut. Ins. Co.*, 653 F.3d 175, 181 (3d Cir.2011) (alteration in original) (quoting *Garza v. Marine Transp. Lines, Inc.*, 861 F.2d 23, 27 (2d Cir.1988)). Moreover, the "always afloat" language plainly suggests an express assurance. To the extent the Fifth Circuit in *Orduna* deviated from this well-established standard, we are not persuaded by its reasoning and decline to follow the course it charted.[18] Hence we conclude that the safe berth warranty is an express assurance made without regard to the amount of diligence taken by the charterer.

C. Was the Safe Berth Warranty Breached ?

As explained, a berth is deemed safe when a ship may "proceed to it, use it, and depart from it without . . . being exposed to dangers." Coghlin *et al.*, *supra*, ¶ 10.123. As noted above, *see supra* note 12, CARCO conceded at oral argument that the safe berth warranty—if applicable—"would include the area in and around Paulsboro," including the Anchorage, and we therefore need not delineate the geographic sweep of this warranty. Thus having determined that Frescati was a beneficiary of CARCO's safe berth warranty and that this warranty applies irrespective of a charterer's diligence, we proceed to whether the warranty was actually breached by the anchor's presence. Specifically, we need to determine whether

[18] We are also unpersuaded that this warranty applies only to known hazards. This would effectively undermine the more strict nature of the warranty by requiring some level of due diligence, which, for the reasons above, we do not believe is the case.

the anchor rendered CARCO's port unsafe for a ship of the *Athos I's* agreed-upon dimensions and draft.

That the *Athos I* was injured by the anchor does not automatically indicate that the warranty was breached. CARCO's safe berth warranty was not a blank check; it did not warrant that any ship would be safe at its port, but instead assured that the port would be safe for the *Athos I*. Boyd *et al*., *supra*, Section IX, art. 69, at 129-30 (citations omitted) ("Whether a port is a 'safe port' is in each case a question of fact and degree and must be determined with reference to the particular ship concerned. . . ."); *In re Lloyd's Leasing Ltd*., 764 F.Supp. 1114, 1135 (S.D.Tex.1990) ("The safety of a port is to be determined with reference to the vessel and the circumstances surrounding that vessel's use of the port."). In this regard, the District Court correctly framed the ultimate issue as whether it was possible for a ship of the *Athos I's* purported dimensions to reach CARCO's berth safely. *In re Frescati*, 2011 WL 1436878, at *6.

The Court, however, neglected to make the necessary factual findings to resolve whether the warranty was actually breached. Instead, it concluded "that the port and berth were generally safe" due to "the volume of commercial traffic that passed without incident," notwithstanding that it was impossible to know how many of those ships had actually passed over the anchor. *Id*. That similar ships had successfully berthed at the port is irrelevant to whether the warranty was actually breached in this case, as "[a] dangerous place may often be stopped at or passed over in safety." *The Gazelle*, 128 U.S. at 485, 9 S.Ct. 139. Instead, the Court should have evaluated

whether the port was safe based on the facts particular to the *Athos I* and its arrival.

From what we can glean from the record, it appears that CARCO warranted a safe berth with the understanding that the *Athos I* would be drawing as much as 37 feet of water upon its arrival. The Voyage Instructions indicate that the vessel would be filled with a quantity of crude oil "always . . . consistent with a 37 [foot] or less [fresh water] sailing draft at loadport," J.A. at 1242, and Captain Markoutsis confirmed this directive, Markoutsis Test. 199:5-9, Oct. 13, 2010. He testified, moreover, that he was "afraid of that draft," and opted to load the ship to only 36'6".[19] *Id*. at 200:7-25. This latter figure was confirmed by CARCO Port Captain William Rankine, who testified that the *Athos I* reported that it was drawing 36'6", Rankine Test. 41:5-12, Nov. 22, 2010, and also by Steamship Agent Stephen Carroll, Carroll Test. 63:2-4, Oct. 7, 2010. In any event, the warranty made by CARCO appears to have covered the *Athos I* up to a draft of 37 feet.[20] Yet, as noted throughout this

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[19] We note there is minor disagreement as to this particular figure. While the record suggests that the *Athos I* was represented as drawing 36'6", Frescati explains that it was actually 367"[sic]. This one-inch difference is on its face irrelevant to our analysis, as both drafts are less than 37 feet.

[20] Of course, this is ultimately a factual matter for remand. As such, we also note that the Voyage Charter between CARCO and Star Tankers indicates that the "[l]oaded draft of Vessel on assigned summer freeboard [is] 12.423 meters [40.76 feet] . . . in salt water." J.A. at 1220 (Tanker Voyage Charter Party, Part I.A). While we understand this to mean that the *Athos I* could draw over 40 feet in salt water if filled to its summer capacity, the facts before us appear to indicate that it was directed to arrive at CARCO's port drawing 37 feet or less, and that this was the understood basis for the safe berth warranty.

opinion, the District Court made no finding on the vessel's actual draft at the time of the accident. This needs to be corrected on remand.[21]

If it is found that the *Athos I* was drawing 37 feet or less and absent a determination of bad navigation or seamanship,[22] that finding would indicate that the warranty had been breached because the ship sustained damage. What, if anything, under the water may have caused that margin to be diminished is therefore immaterial. It could have been the remnants of a shipwreck, a range of rocks, a jutting reef, or a shoal. In this case, it happened to be an abandoned anchor that protruded into the *Athos I's* hull. And by

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[21] We note that there is record evidence suggesting that the promised 37 feet of clearance was indeed afforded, namely that Dr. Traykovski opined that there was—in his most conservative estimate—between 37.2 and 37.8 feet of water not only above the riverbed but the anchor itself (presumably at low tide). Traykovski Test. 49:12-50:24, Nov. 4, 2010.

[22] Although the warranty exception for abnormal weather conditions is not at issue here, CARCO argues that the exceptions for bad navigation and seamanship apply. CARCO's Br. at 77, 80; *see also* Coghlin *et al*., *supra*, ¶¶ 10.148, 10.166 (citations omitted); Cooke *et al*., *supra*, ¶ 5.151 (citation omitted); *Paragon*, 310 F.2d at 173-74 (quoting *Constantine & Pickering S.S. Co. v. W. India S.S. Co*., 199 F. 964, 967-68 (S.D.N.Y.1912)) ("It is true that one liable for violating a safe berth clause 'may lessen the amount of damages for which he is responsible by showing negligence, or even lack of diligence, on the part of the person wronged, in failing to take steps to lessen certain or even probable damages.'").

CARCO argues that the vessel's master and the navigation officer believed they were docking at high tide, and in fact were not (as the tide at the time of the accident was rising but an hour removed from low tide). However, we find no indication in the record that the *Athos I* was attempting to dock at an inappropriate time.

its safe berth warranty, CARCO assumes liability for that damage.

If the draft at the time of the accident cannot be determined, or if the *Athos I* is found to have been drawing more than 37 feet, it will be necessary to ascertain the amount of clearance that existed above the anchor to conclude whether the promised 37 feet of water depth was actually provided.[23] Because it appears that CARCO assured a safe berth for a ship drawing 37 feet or less, our concern is whether 37 feet of clearance existed at the time of the accident.

D. The Named Port Exception

CARCO exposes one additional limitation to the broad protection generally afforded by the safe berth warranty—the named port exception. In essence, "[w]hen a charter names a port and the master proceeds there without protest, the owner accepts the port as a safe port, and is bound to the conditions that exist there." *Bunge Corp. v. M/V Furness Bridge*, 558 F.2d 790, 802 (5th Cir.1977) (internal quotation marks omitted) (quoting *Pan Cargo Shipping Corp. v. United*

[23] If the vessel is found to have been drawing more than 37 feet, this could potentially reduce CARCO's liability even if it were determined that a safe berth was not provided. In this circumstance, the commentators note a trend in which damages resulting from both a breach of a safe berth warranty and the master's negligence may appropriately be split between the parties. Cooke *et al*., *supra*, ¶ 5.152; 2A Sturley, *supra*, § 175, at 17-26; *see also Ore Carriers of Liber., Inc. v. Navigen Co*., 435 F.2d 549, 550-51 (2d Cir.1970) (affirming an order dividing a ship's damages between the owner and charterer where the charterer had warranted a safe port, but the owner nonetheless proceeded "with full knowledge of the probable unavailability of tug assistance," which was hazardous). In any event, these issues can also be resolved on remand.

States, 234 F.Supp. 623, 638 (S.D.N.Y.1964), *aff'd*, 373 F.2d 525 (2d Cir.1967)). The purpose of the exception is to shift liability to the owner once a ship's master has had ample opportunity to discover a port's hazards.[24] As such, the exception may apply in instances in which a master—without lodging any objection—is charged "with full knowledge of local conditions which make it unsafe for that particular voyage." Coghlin *et al*., *supra*, ¶ 10.158; *see also* Cooke *et al*., *supra*, ¶ 5.130 ("[T]he master's conduct in entering a port he considers unsafe without raising a protest may result in a waiver of the safe port warranty.").

This formulation is essentially an application of the above-mentioned rule that negligent seamanship will nullify the safe port warranty: once a particular risk becomes known, it is then the master's responsibility to avoid it through competent seamanship or to declare the port unsafe. This application of the exception does not apply to the case before us, however, as there is no suggestion that anyone—much

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[24] Although it never uses the term "named port exception," *Atkins v. Fibre Disintegrating Co*., 2 F.Cas. 78 (E.D.N.Y.1868), *aff'd sub nom. Atkins v. The Disintegrating Co*., 85 U.S. 272, 299, 18 Wall. 272, 21 L.Ed. 841 (1873), is a paradigm for the exception. There, "the peril of the port was such that no vessel of [the ship's] size could get out without making her safety from the reefs dependent entirely upon the continuance of the breeze." *Id*. at 79. Predictably, the breeze failed, and the ship was damaged on the reef. *Id*. at 78. The trial court concluded, however, that the master could not rely on the agent's representation that the port was safe because he failed to object to the port after having "made inquiries . . . as to the character of the port, which was, moreover, fully described in the Coast Pilot [the official publication describing the coast]." *Id*. at 79-80.

less the master of the *Athos I*—had any inkling as to the anchor's existence in the River.

Instead, and more pertinent to the *Athos I*, the exception is also triggered when a particular port is named in the charter party. *See* Cooke *et al*., *supra*, ¶ 5.130 ("If the charter names the ports or berths the vessel will call at, the general rule is that the ports or berths will have been accepted by the owner as safe, such that the safe port/safe berth warranty is deemed to have been waived."); Coghlin *et al*., *supra*, ¶ 10.164 (same) (citations omitted). This particular application of the exception is very broad and would seem poised to swallow the rule, but frequently the voyage charter will specify a range of ports, and thus the "safe [berth] warranty continues to play a role in voyage charters." Cooke *et al*., *supra*, ¶ 5.123. In fact, this is such a case; the voyage charterer (CARCO) did not specifically name the discharge port in the voyage charter party, but instead directed that the *Athos I* would transit to one or two safe ports located somewhere on the United States Atlantic Coast, Gulf Coast, or the Caribbean Sea. J.A. at 1225 (Tanker Voyage Charter Party, Special Provision 2). CARCO nonetheless maintains that this exception applies even where the port location is not specifically named in the charter so long as some advance notice of the designated port is given. It is unclear how much notice would be required under CARCO's theory of the exception, although CARCO argues that it applies here because there is evidence that the master knew approximately two weeks before the accident that the *Athos I* would be headed to Paulsboro, New Jersey.

We need not address this issue of advance notice because we conclude that the hazard of the submerged anchor was not the sort contemplated by the

exception. As explained above, the purpose of the named port exception is to "relieve[ ] the charterer of liability for damage arising from conditions at that port so long as those conditions were *reasonably foreseeable*." *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 387 (2d Cir.2003) (emphasis added) (citations omitted). Without at least an opportunity to discover a particular port's specific pitfalls, the identity of the port would be irrelevant. This would defeat the purpose of naming the port, which is to excuse charterers for the results of hazardous conditions known to the master, not to exonerate them completely from all resulting liability.

In sum, here the particular hazard—the submerged anchor—was unknown to the parties. As the naming of CARCO's port ahead of time did not provide the *Athos I* with an opportunity to accept this unknown hazard, the exception does not come into play.[25]

V. The Tort Claims

Should its claim regarding CARCO's contractual liability not succeed, Frescati argues in the alternative that CARCO is liable as the owner of the terminal receiving the *Athos I* under two tort theories: negligence and negligent misrepresentation. The

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[25] The District Court determined that although underwater hazards are a well-known threat, none of the parties had any reason to believe that Anchorage Number Nine was likely to conceal such a menace. *In re Frescati*, 2011 WL 1436878, at *2. To the extent the Court later determined that knowledge "in general of lost or abandoned objects in the river" was sufficient to trigger this exception, *id*. at *7, that amounted to an error of law. This sort of general knowledge cannot be used to impute knowledge of a specific condition, and we see no evidence that the Delaware River was known to be particularly treacherous in this regard.

District Court held both theories inapplicable. Although we agree that the negligent misrepresentation claim fails on these facts, we disagree with the Court's conclusion that Frescati's negligence claim is necessarily precluded.

A. Negligence

Negligence in admiralty law is essentially coextensive with its common law counterpart, requiring: (1) "[t]he existence of a duty required by law which obliges the person to conform to a certain standard of conduct"; (2) "[a] breach of that duty by engaging in conduct that falls below the applicable standard or norm"; (3) a resulting loss or injury to the plaintiff; and (4) "[a] reasonably close causal connection between the offending conduct and the resulting injury." 1 Schoenbaum, *supra*, §§ 5-2, at 252; *Pearce v. United States*, 261 F.3d 643, 647 (6th Cir.2001) (citation omitted) (same).

Because this accident resulted in a clear loss, we address the existence of a duty, the potential breach of that duty, and causation. As discussed above, the wharfinger in this case—CARCO—contracted to provide the *Athos I* a safe berth. In the tort context, however, a wharfinger is not a guarantor of a visiting ship's safety, but is "'bound to use reasonable diligence in ascertaining whether the berths themselves and the approaches to them are in an ordinary condition of safety for vessels coming to and lying at the wharf.'" *Smith v. Burnett*, 173 U.S. 430, 436, 19 S.Ct. 442, 43 L.Ed. 756 (1899) (quoting, with approval, *The Calliope*, [1891] A.C. 11 (H.L.) 23 (appeal taken from Eng.)). This is not an unconstrained mandate to "ensure safe surroundings or warn of hazards merely in the vicinity." *In re Nautilus*, 85 F.3d at 116 (citing *Trade Banner Line, Inc. v. Caribbean S.S. Co., S.A.*,

521 F.2d 229, 230 (5th Cir.1975)). Instead, a visiting ship may only expect that the owner of a wharf has afforded it a safe approach. *Id*. (citations omitted). In being invited to dock at a particular port, "a vessel should be able to enter, use and exit a wharfinger's dock facilities without being exposed to dangers that cannot be avoided by reasonably prudent navigation and seamanship." *Id*.

While CARCO has a duty to maintain a safe approach to its terminal, we must determine the geographic scope of that duty.

i. The Scope of the Approach

The geographic scope of a safe approach has been largely unaddressed by the courts. Frescati argues that the scope should be inferred as a matter of custom and practice, and CARCO counters that the approach should be a function of the wharfinger's exertion of control. The District Court, in attempting to adopt a workable method of analysis, was chiefly concerned about CARCO's lack of control in the Anchorage and the absence of a limiting principle if it were to define the approach as the waters that a ship "naturally would traverse." *In re Frescati*, 2011 WL 1436878, at *4. Accordingly, it opted to limit the approach to "the area 'immediately adjacent' to the berth or within 'immediate access' to the berth." *Id*. (quoting *Western Bulk Carriers v. United States*, No. S-97-2423, 1999 WL 1427719, 1999 U.S. Dist. LEXIS 22371, at *20-21 (E.D.Cal. Sept. 14, 1999)). Such immediacy, we believe, sets too constricted a path to the berth. Instead, we hold that an approach should be understood by its ordinary terms, and that its scope is derived from custom and practice at the particular port in question.

Bouchard Transportation Co. v. Tug Gillen Brothers, 389 F.Supp. 77 (S.D.N.Y.1975), is helpful in defining the geographic scope of an approach. It partially concerned a claim by a barge owner against the terminal owner for negligence in failing to maintain a safe approach and to warn of an unsafe condition. *Id*. at 79. The District Court there found that the approach began when the barge—traveling mid-channel up the Hudson River—altered its heading such that it was on a straight course to the terminal, which was the normal practice for ships docking there. *Id*. at 80. While executing this procedure, the barge grounded, its hull was punctured, and oil was lost.[26] *Id*. at 80-81. *Bouchard* concluded that the terminal owner "was negligent in failing to maintain the approach to its terminal, in particular that area outside the river channel and within its dominion and control, normally utilized as the southerly approach to its ship dock, free of obstruction and safe for vessels approaching said terminal."[27] *Id*. at 81.

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[26] The grounding in *Bouchard* occurred "immediately adjacent to the ballast dock," approximately 50 feet away. 389 F.Supp. at 81. This "immediately adjacent" language, however, does not refer to the beginning of the approach, but the location of the hazard within the approach. The District Court in our case adopted this language—citing *Western Bulk Carriers*, 1999 WL 1427719, 1999 U.S. Dist. LEXIS 22371, at *20—as a "reasonable definition of 'approach.'" *In re Frescati*, 2011 WL 1436878, at *4. We believe this interpreted *Bouchard* incorrectly.

[27] CARCO argues that this reference to "dominion and control" is a prerequisite to *Bouchard*'s holding. We do not view control as a requirement, but as a fact of that case where the port was also deemed negligent for failing to warn of shallow waters in an area directly off its dock where it had previously dredged. 389 F.Supp. at 80, 83. Instead, in relying primarily on *Smith v. Burnett*, *Bouchard* held that the terminal owner simply "had a duty to ascertain any imminent dangers to [the ship] as it approached."

Less instructive, but still worth exploring, is *P. Dougherty Co. v. Bader Coal Co*., 244 F. 267 (D.Mass.1917). There, an invitation to use a particular dock in a charter party was construed to "extend[ ] to the approaches to the dock, and to the water which would naturally be traversed or used by a vessel discharging there." *Id*. at 270 (citing *Hartford & N.Y. Transp. Co. v. Hughes*, 125 F. 981 (S.D.N.Y.1903)). Although *P. Dougherty* is of limited usefulness on its facts (the Court was interpreting the parties' express agreement to use the dock), its conclusion that the wharfinger's obligation covered "individual approaches," distinguished from "the common channel," is nonetheless helpful. *Id*. More recently, *MS Tabea Schiffahrtsgesellschaft mbH & Co. KG v. Bd. of Com'rs of the Port of New Orleans*, No. 08-3909, 2010 WL 3923168, at *2 (E.D.La. Sept. 29, 2010), *aff'd*, 434 Fed.Appx. 337 (5th Cir.2011), similarly defined the approach as "the area through which vessels travel in order to move from the main channel of the river to the berth." *See also McCaldin v. Parke*, 142 N.Y. 564, 37 N.E. 622, 624 (1894) (determining that a cluster of rocks "not in any channel which had to be used to approach the wharf," but potentially "in that part of the river used for general navigation," was not within the approach).

In light of these cases, we are persuaded by the suggestion in the maritime industry associations' *amici* brief that an approach should be afforded its plain meaning. *See* Mar. Indus. Ass'ns *Amici* Br. at 20. As a noun, "approach" is defined as "a drawing near in space or time," and "a way, passage, or avenue by which a place or a building can be approached."

Id. at 83. Further, to any extent *Bouchard* does suggest that control is required, we disagree for the reasons explained below.

Webster's Third New Int'l Dictionary 106 (1971). This suggestion is persuasively illustrated by *amici's* reference to an airplane on final approach or a golf ball approaching the green. Both examples capture the intuitive meaning of the term as the beginning of a final, linear path to a fixed point. In fact, *Webster's* specifically incorporates those examples into its definition, listing "a golfing stroke from the fairway for the green," "the steps and motion of a bowler before he delivers the ball," and the "descent of an airplane toward a landing strip." *Id*.

What is an approach should be given its same plain meaning in the maritime context; when a ship transitions from its general voyage to a final, direct path to its destination, it is on an approach. This is the most logical construction, and it comports with those cases suggesting that an approach should be gleaned from actual practice. *See, e.g., Bouchard*, 389 F.Supp. at 80-81 (concluding that the approach began where vessels departed the channel on a direct course to the receiving dock and defined it pursuant to the area "normally utilized"). It also reflects the definition used in the maritime industry. For example, *The Mariner's Handbook* defines "approaches" as "[t]he waterways that give access or passage to harbours, channels, and similar areas." J.A. Petty, *The Mariner's Handbook* 226 (8th ed.2004). Further, in most cases it will not result in a line-drawing problem, a concern raised by CARCO and shared by the District Court. Entire rivers, bays, and oceans will not be transformed into approaches. Instead, in most instances the approach will begin where the ship makes its last significant turn from the channel toward its appointed destination following the usual path of ships docking at that terminal. This analysis will necessarily vary on the characteristics of a particular port, and there will

be close and difficult cases. Accordingly, we believe it may be useful to analogize the final approach of a vessel to a port to that of a driveway leading to a home from the public road.[28] It is the last segment of the voyage leading directly to the host's door. Marine navigation is further complicated in that ships sometimes have the luxury of approaching through a variety of different courses across open water. Yet, so long as a ship is not approaching in an illogical, unreasonable, or disallowed manner, it will be deemed within its approach when it is within this final phase of its journey.

ii. Was the *Athos I* Within the Approach to CARCO's Terminal When the Accident Occurred ?

Fortunately, the case before us is not one of the difficult ones, for the facts indicate that the *Athos I* was within the approach when it struck the anchor. First, the vessel was following the usual path for ships of its size docking at CARCO's terminal, having turned

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[28] In *Smith v. Burnett*, the United States Supreme Court quoted a Massachusetts Supreme Court case making a similar comparison where a defendant failed to warn a schooner of a rock it knew of adjacent to its wharf.

> This case cannot be distinguished in principle from that of the owner of land adjoining a highway, who, knowing that there was a large rock or a deep pit between the traveled part of the highway and his own gate, should tell a carrier, bringing goods to his house at night, to drive in, without warning him of the defect, and who would be equally liable for an injury sustained in acting upon his invitation, whether he did or did not own the soil under the highway.

173 U.S. at 434, 19 S.Ct. 442 (quoting *Carleton v. Franconia Iron & Steel Co*., 99 Mass. 216, 219 (1868) (internal quotation marks omitted)).

away from the channel at the usual point and was being pushed by two tugboats in a straight path toward CARCO's pier. Moreover, there were other indicators that the *Athos I* had ceased navigating generally and was within the final phase of its travel, namely that it was rotated sideways and, as noted, assisted by tugs. While not dispositive factors, these trappings indicate that the *Athos I* was no longer voyaging, but was configured solely for docking.

To the extent CARCO argues that the sphere of control exercised by it should be used to limit the scope of its duty,[29] we hold that a failure to exercise control over an area is not conclusive in this analysis. The appeal of *The Moorcock* long-ago dispatched this argument.[30] [1889] 14 P.D. 64 (Eng.). The steamship *Moorcock* was invited to be discharged and loaded at a

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[29] In further support of this position, CARCO cites to *Sonat Marine Inc. v. Belcher Oil Co*., 629 F.Supp. 1319 (D.N.J.1985), *aff'd*, 787 F.2d 583 (3d Cir.1986) (table). That case, however, does not apply on its facts, and uses a wharfinger's assumption of control to *expand*, rather than *limit*, the scope of its liability. Specifically, that wharfinger took the initiative secretly to widen its approach because "it recognized that larger vessels had problems entering the barge berth and required a greater margin of safety." *Id*. at 1322. Insofar as the terminal operator had "assumed sufficient control over that area to attempt to ensure a proper approach to the ship and barge terminal," *id*. at 1327, it was deemed negligent for "fail[ing] to use means adequate[, such as side scans or wire drags,] to ensure that the new area where it thought larger barges could safely go was free of obstructions," *id*. at 1325. Control aside, the District of New Jersey Court also noted that a "safe approach to the berth had to include the additional . . . area." *Id*. at 1326.

[30] That the appeal of *The Moorcock* was operating under a theory of an implied contractual warranty does not reduce its import for purposes of this analysis. [1889] 14 P.D. 64 at 68 (Eng.).

particular wharf where it would be moored alongside the wharfingers' jetty. *Id*. at 64. Although the ship was expected to rest on the bottom of the River Thames at low tide, the particular section of riverbed was not actually under the wharfingers' control. *Id*. at 69. Even so, the Court explained that it "d[id] not follow that [the wharfingers] are relieved from all responsibility. They are on the spot." *Id*. at 70. It continued:

> No one can tell whether reasonable safety has been secured except themselves, and I think if they let out their jetty for use they at all events imply that they have taken reasonable care to see whether the berth, which is the essential part of the use of the jetty, is safe, and if it is not safe, and if they have not taken such reasonable care, it is their duty to warn persons with whom they have dealings that they have not done so.

Id.; see also The Cornell No. 20, 8 F.Supp. 431, 433 (S.D.N.Y.1934) ("However, it is clear that the obligation of the wharfinger is not limited to the area of the land under water actually owned by it. . . . It impliededly [sic] represents to the master of a vessel who is induced to bring his vessel to its wharf that the berth and immediate access to it are reasonably safe for the vessel.").

In addition, insofar as the sphere of responsibility exercised by CARCO is a voluntary assumption of duty, it cannot be relied on to restrict the scope of a port owner's duty as a matter of law. Limiting a wharfinger's responsibility to areas in which it has affirmatively assumed responsibility would allow it to define the scope of its own liability regardless of the port's actual approach. Such a construction plays poorly against a policy that places logic and common

sense over self-serving limitations of liability in the tort context. Moreover, we are not convinced that CARCO was actually precluded from extending its area of responsibility into the Anchorage. The record reflects that permission to it was not required for sonar scans, for example, and the record lacks an indication that CARCO could not have obtained a dredging permit for the Anchorage if it desired to do so.

We conclude that the *Athos I* was well within the approach to CARCO's terminal when the casualty occurred, and that it therefore had a duty to exercise reasonable diligence in providing the *Athos I* with a safe approach.

iii. Potential Breach of Duty to Maintain a Safe Approach

Having determined that the *Athos I* was within its approach when it was damaged and that CARCO therefore owed it a safe approach, did CARCO satisfy that duty by exercising the standard of care required of a reasonable wharfinger under the circumstances? Although "the nature and extent of the duty of due care is a question of law," factual issues predominate here as they do in most negligence litigation. *Redhead v. United States*, 686 F.2d 178, 182 (3d Cir.1982). Thus, we review findings of negligence as factual findings for clear error. *See In re Moran Towing Corp*., 497 F.3d 375, 377-78 (3d Cir.2007); *Andrews v. United States*, 801 F.2d 644, 646 (3d Cir.1986). As noted, there were no findings.

Negligence exists where there was a "fail[ure] to exercise that caution and diligence which the circumstances demanded, and which prudent men ordinarily exercise." *Grand Trunk R.R. v. Richardson*, 91 U.S. 454, 469, 23 L.Ed. 356 (1875). The admiralty

context is no different, requiring "reasonable care under the particular circumstances." 1 Schoenbaum, *supra*, § 5-2, at 253 (citation omitted); *see also Smith*, 173 U.S. at 436, 19 S.Ct. 442 (remarking that wharfingers are "bound to use reasonable diligence" (citation and quotation marks omitted)). In admiralty, the particular duty required under any given circumstance can be gleaned from statute, custom, or "the demands of reasonableness and prudence." 1 Schoenbaum, *supra*, § 5-2, at 253 (citing *Pennsylvania R.R. v. S.S. Marie Leonhardt*, 202 F.Supp. 368, 375 (E.D.Pa.1962), *aff'd*, 320 F.2d 262 (3d Cir.1963)). Of course, "the degree of care which the law requires in order to guard against injury to others varies greatly according to the circumstances of the case." *Richardson*, 91 U.S. at 469-70.

On the facts before us, we are insufficiently informed to delineate the exact standard of care required by CARCO,[31] let alone whether there was a

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[31] In evaluating the specific nature of this duty, the parties point to no statute on point and our research reveals none. As to custom, it "is only evidence of a standard of care[,] and violation of custom or adherence to it does not necessarily constitute negligence or lack of negligence." *In re J.E. Brenneman Co.*, 322 F.2d 846, 855 (3d Cir.1963) (citations omitted); *Norton v. Ry. Express Agency, Inc.*, 412 F.2d 112, 114 (3d Cir.1969) ("Although not controlling, custom and practice may be shown to establish the standard of care to which the party charged with the wrongful act may be required to conform.").

The District Court also determined that no industry custom would have "put CARCO on notice that it should scan into the Anchorage." *In re Frescati*, 2011 WL 1436878, at *4. It is unclear if this apparent factual finding refers to other River terminals not searching their full approaches, federal waters generally, or Anchorage Number Nine specifically. Unfortunately, a review of the record leaves us similarly adrift. While several trial witnesses testified that they did not know of any Delaware River terminal

breach of that standard (a.k.a. duty). That task rests with the District Court on remand should it need to reach the negligence claim.

iv. Causation

On remand, the District Court will also need to determine whether the failure, if any, to meet the standard of care proximately caused the accident. "Questions of causation in admiralty are questions of fact." *Stolt Achievement, Ltd. v. Dredge B.E. LINDHOLM*, 447 F.3d 360, 367 (5th Cir.2006); *see also In re Nautilus*, 85 F.3d at 116 (reviewing, in admiralty, a district court's determination as to causation for clear error).

The purpose of requiring proximate cause is "to limit the defendant's liability to the kinds of harms he risked by his negligent conduct." 1 Dan B. Dobbs *et al*., *The Law of Torts* § 198, at 681 (2d ed.2011) (citations omitted). Proximate cause is something of a misnomer in that it "is not about causation at all but about the appropriate scope of legal responsibility." *Id*. at 682. Instead, "proximate cause holds that a negligent defendant is liable for all the general kinds of harms he foreseeably risked by his negligent conduct and to the class of persons he put at risk by that conduct." *Id*. at 682-83; 1 Schoenbaum, *supra*, § 5-3, at 260-61

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taking precautionary action within federal waters, the Chief of Operations Division for the U.S. Army Corps of Engineers suggested that at least one terminal had surveyed the federal waters preceding its berth. *See* DePasquale Test. 104:20-105:13, Oct. 6, 2010. Ultimately, the record is unhelpful on this point because we do not know if any of the terminals on the River had an approach that also traversed federal waters like CARCO's did. Of course, the only relevant consideration for custom would be similarly situated terminals, and we are unable to make any meaningful assessment of industry custom on these facts.

("[T]he injury or damage must be a reasonably probable consequence of the defendant's act or omission.").

CARCO argues that proximate cause is lacking on these facts because the presence of an anchor in the anchorage was not foreseeable, especially by virtue of other ships arriving unharmed in the past. Once again, we decline to resolve this issue on the record before us. CARCO further argues that proximate cause is lacking on the basis that the anchor-dropper was the actual cause of the accident. It is clear, however, "'that there may be more than one proximate cause of an injury.'" *Serbin v. Bora Corp.*, 96 F.3d 66, 75 (3d Cir.1996) (quoting *Davis v. Portline Transportes Mar. Internacional*, 16 F.3d 532, 544 (3d Cir.1994)).

More crucially, the issue is whether the accident would have been prevented had CARCO exercised its duty to act as a prudent wharfinger within the approach. At a minimum, this requires "that the injury would not have occurred without the defendant's negligent act." 1 Schoenbaum, *supra*, § 5-3, at 259. Here, the causation inquiry turns on whether prudent behavior—had it been exercised, a factual inquiry—would have prevented the injury. *See* Dobbs *et al.*, *supra*, § 184, at 620. In light of CARCO's invitation that the *Athos I* arrive drawing 37 feet or less, *see supra* Part IV.C, it may be that the anchor lay sufficiently deep such that it would not have been detected even if CARCO had acted as a prudent wharfinger. Conversely, it could be the case that—even if the 37 feet of contractual clearance were provided—CARCO's duty as a wharfinger required something more. Should this be put in issue, further inquiry must occur as to what diligence was required of a prudent wharfinger, and only then can the District

Court determine whether a failure to implement those procedures proximately caused the accident.[32]

Therefore, because factual issues remain to be resolved if Frescati's negligence claim becomes relevant, we also remand for further proceedings, as necessary, on this claim.

B. Negligent Misrepresentation

Frescati argues that CARCO's failure to inform the *Athos I* of the reduction in maximum draft at its facility's ship dock prior to the vessel's arrival was a negligent misrepresentation. The District Court held otherwise, reasoning that "the area of concern was not the area where the casualty occurred and the draft at the berth was factually irrelevant to the casualty." *In re Frescati*, 2011 WL 1436878, at *5. We reach essentially the same result.

Negligent misrepresentation stems from a failure to exercise reasonable care in supplying incorrect information during the course of a business transaction. *Coastal (Berm.) Ltd. v. E.W. Saybolt & Co., Inc*., 826 F.2d 424, 428 (5th Cir.1987) (citing *Grass v. Credito Mexicano, S.A*., 797 F.2d 220, 223 (5th Cir.1986)). The receiving party must rely on that false information and thereby suffer injury. *Id*. at 428-29 (citing same). This formulation, set out by § 552 of the Restatement (Second) of Torts, implicitly incorporates the standard elements of negligence: duty of care, a breach of that duty, injury, and causation. *See J.E.*

[32] We note that the District Court was "not convinced that had the area been scanned the anchor would perforce have been detected. . . ." *In re Frescati*, 2011 WL 1436878, at *4. We interpret the Court's remark as contemplating the effort required to detect the anchor absent an incident, as the anchor was in fact discovered with the use of side-scan technology.

Mamiye & Sons, Inc. v. Fid. Bank, 813 F.2d 610, 615 (3d Cir.1987); 1 Schoenbaum, *supra*, § 5-2, at 252.

CARCO initially explained in its Port Manual that the allowable maximum draft at its Paulsboro facility was 38 feet, but this "may change from time to time and should be verified prior to the vessel's arrival." J.A. at 1095 (CITGO Terminal Regulations for Vessels ¶ 2). On November 22, 2004, four days before the *Athos I* arrived, CARCO's Port Captain Rankine announced internally that "the maximum draft at Paulsboro berth # 1 (ship dock) has been reduced to 36-00 feet." J.A. at 1702. No one informed the *Athos I* of the change (and apparently its personnel did not inquire). This meant that the *Athos I* would have to enter CARCO's port under an exception to the maximum draft, and in any event Port Captain Rankine was comfortable with this because the *Athos I* would not be lying in the shallower area next to its dock that motivated the draft reduction.[33] Rankine Test. 41:22-42:3, Nov. 22, 2010.

On its terms, the reduction was limited to CARCO's ship dock. Although Frescati argues that the *Athos I* would not have berthed at CARCO's facility (its actual ship dock, but not the approach to it through the Anchorage) so early in the rising tide if its crew had known of the reduction in maximum allowable draft,

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[33] Rankine testified that such exceptions are common in the industry, and that he was not concerned for the *Athos I* because a ship drawing 37'3" had sat through low water just ten days before without harm. Rankine Test. 38:22-23, 41:22-42:9, Nov. 22, 2010. When the trial judge inquired about the rationale for making regular exceptions, Rankine replied that he was required by the guidelines to make the reduction, but that he did not "have any worries about the depth of water in the area where the ship was going to sit." *Id*. at 45:18-25.

this is irrelevant to its decision to enter Anchorage Number Nine—the site of the submerged anchor.

In this context, any misrepresentation about the ship dock is factually irrelevant to the accident because it did not occur at the dock, but rather 900 feet out in the Anchorage. There was no injury sustained that resulted from the failure to note the draft reduction at or immediately adjacent to CARCO's dock. Frescati's negligent misrepresentation claim thus fails on its merits as a matter of law.

VI. Effect of the Government's Settlement With CARCO

In its limited settlement agreement with the Government, CARCO promised not to

> demand that the court reduce or offset the damages awarded to the United States against [CARCO] in the Lawsuit based on evidence that the negligence or fault of the United States in failing to detect, mark and/or remove underwater obstructions to navigation in the navigable waters of the Delaware River caused or contributed to the ATHOS I Incident.

J.A. at 95 (Release ¶ 3.1(b)). It thus asks us to preclude CARCO on remand from raising any equitable defense premised on the Government's regulation of the Anchorage. CARCO responds that it retained unspecified equitable defenses relevant to defending against, *inter alia*, the contractual claims, and that the Government conflates defenses to these claims with violations of CARCO's promise to forbear making

claims against the Government sounding in tort to reduce or offset damages awarded to it.[34]

The Government also argues that the District Court mistakenly denied its earlier motion for summary judgment on CARCO's defense of equitable recoupment,[35] as that defense was really just a disguised attempt for indemnity or contribution payments. After hearing oral argument, the District Court denied the Government's pretrial motion on the ground "that the question of subrogation defenses [by CARCO] is better resolved with the benefit of a full trial record." J.A. at 101. CARCO claims that the Government failed to follow up at trial, and thus waived the issue. We agree, as we see no indication that the Government renewed its argument at trial (or argued before us how the issue has not been waived). Thus, we decline to preclude CARCO from revisiting

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[34] The Government argues that CARCO has attempted to circumvent this partial settlement agreement by presenting against it negligence claims couched as equitable defenses. CARCO explicitly retained "the right to raise affirmative defenses under any theory or doctrine of law or equity, the right to assert setoff or recoupment and the right to assert compulsory or non-compulsory counterclaims other than a Claim for Contribution or Indemnity. . . ." J.A. at 97 (Release ¶ 4.2). It was further agreed that the partial settlement would have no force as to CARCO's suit with Frescati. *Id*. at 97-98 (Release ¶ 4.3).

[35] Equitable recoupment is "[a] principle that diminishes a party's right to recover a debt to the extent that the party holds money or property of the debtor to which the party has no right." *Black's Law Dictionary*, *supra*, at 618. The competing claims must arise from the "same transaction." *Phila. & Reading Corp. v. United States*, 944 F.2d 1063, 1075 (3d Cir.1991) (quoting *United States v. Dalm*, 494 U.S. 596, 608, 110 S.Ct. 1361, 108 L.Ed.2d 548 (1990)).

any previously raised equitable defense to the Government's subrogation claims.

VII. Conclusion

Although remand is appropriate because the District Court failed to set out separate findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52(a)(1), our legal conclusions also make it necessary to remand for factual findings.

We conclude that the *Athos I*, and Frescati as its owner, are beneficiaries of CARCO's contractual safe berth warranty. This was an express assurance that CARCO's port would be safe for the *Athos I* within the scope of its invitation—that is, drawing 37 feet or less. Therefore, on remand it will need to be determined whether this amount of clearance was actually provided. This analysis may require inquiries into the arriving draft of the *Athos I* and, if the vessel was drawing more than the agreed-upon depth of 37 feet, the depth and positioning of the anchor.

CARCO's assertion of the named port exception is unavailing. Even if it were eligible on the type of notice given to the *Athos I*, its crew did not have an opportunity to accept a hazard (the anchor) that was unknown to the parties prior to the accident, and the exception is inapplicable.

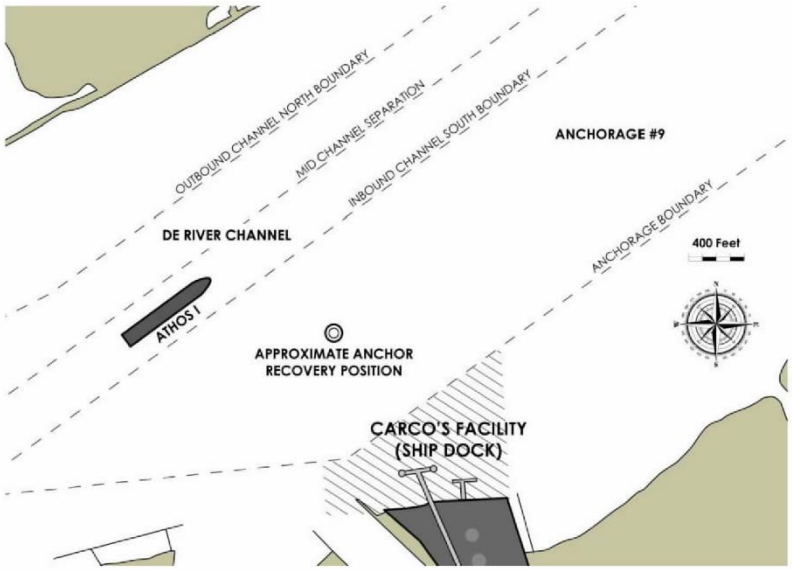
We further conclude that, as this case is primarily a contractual one, analysis of Frescati's negligence claim is required only if the contractual safe berth warranty of CARCO is deemed satisfied. In that event, because we conclude that the accident occurred within the approach to CARCO's terminal, the District Court would need to determine the appropriate standard of care, whether it was breached, and, if so, was that breach a cause of the spill. The negligent

misrepresentation claim, however, fails for lack of factual causation because the alleged misrepresentation applied to an area unrelated to the accident.

Finally, we conclude that the Government has waived its reliance on its partial settlement agreement in challenging CARCO's defenses to liability.

We thus affirm in part, vacate in part the District Court's judgment orders of April 12, 2011 against Frescati and the Government, and remand for further proceedings consistent with this opinion. Further appeals relating to this case will be referred to the current panel.

Appendix A



APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11-2576

IN RE: PETITION OF FRESCATI SHIPPING COMPANY, LTD., AS OWNER OF THE M/T ATHOS I AND TSAKOS SHIPPING & TRADING, S.A., AS MANAGER OF THE ATHOS I FOR EXONERATION FROM OR LIMITATION OF LIABILITY

No. 11-2577

UNITED STATES OF AMERICA,
Appellant

v.

CITGO ASPHALT REFINING COMPANY; CITGO PETROLEUM CORPORATION; CITGO EAST COAST OIL CORPORATION

Appeal from the United States District Court
for the Eastern District of Pennsylvania

D.C. Civil Action Nos. 2-05-cv-00305 / 2-08-cv-02898)

Trial District Judge: Honorable John P. Fullam
District Judge: Honorable Joel H. Slomsky*

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* Judge Slomsky was assigned to this matter following the retirement of Judge Fullam, who presided at trial and ruled on the merits.

Argued September 20, 2012
Opinion filed May 16, 2013

Before: AMBRO, GREENAWAY, Jr., and O'MALLEY,[**] Circuit Judge

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ORDER AMENDING PRECEDENTIAL OPINION

AMBRO, Circuit Judge

IT IS NOW ORDERED that the published Opinion in the above case filed May 16, 2013, be amended as follows:

> On page 25, in the first full paragraph, first sentence, replace the word "that" with "with" and the first "in" with "that" so that the sentence reads: "We agree with the Second Circuit's reasoning that *Crumady* and *Waterman* counsel in favor of Frescati's third-party beneficiary status."

Following that same sentence, insert an additional footnote, which shall read:

> CARCO makes a belated argument that *Crumady* and *Waterman* are of dubious precedential value in light of the 1972 amendments to the Longshore and Harbor Workers' Compensation Act. These amendments required negligence (as opposed to an unsafe condition) for a longshoreman to recover against a ship owner, and abolished the ship owner's right of indemnity against the stevedore. See 33 U.S.C. § 905(b); *Scindia Steam*

[**] Honorable Kathleen M. O'Malley, United States Court of Appeals for the Federal Circuit, sitting by designation.

Nav. Co., Ltd. v. De Los Santos, 451 U.S. 156, 164-65 (1981). This legislative exclusion, however, does not undermine the fundamental premise that a ship owner may benefit from an arrangement between third parties. As such, Judge Posner has noted that, following this amendment, "indemnity has continued to be sought in cases not involving longshoremen and hence not within the scope of the Longshore[] and Harbor Workers' Compensation Act." *Hillier v. S. Towing Co*., 714 F.2d 714, 718-19 (7th Cir. 1983) (Posner, J.).

On page 23, in the first paragraph, second sentence, replace "some" with "a compelling" so that the phrase reads: "there must be a compelling showing"

By the Court,

/s/ Thomas L. Ambro, Circuit Judge

Dated: July 12, 2013

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11-2576

IN RE: PETITION OF FRESCATI SHIPPING COMPANY, LTD., AS OWNER OF THE M/T ATHOS I AND TSAKOS SHIPPING & TRADING, S.A., AS MANAGER OF THE ATHOS I FOR EXONERATION FROM OR LIMITATION OF LIABILITY

No. 11-2577

UNITED STATES OF AMERICA,
Appellant

v.

CITGO ASPHALT REFINING COMPANY; CITGO PETROLEUM CORPORATION; CITGO EAST COAST OIL CORPORATION

Appeal from the United States District Court
for the Eastern District of Pennsylvania

(D.C. Civil Action Nos. 2-05-cv-00305 / 2-08-cv-02898)

Trial District Judge: Honorable John P. Fullam
District Judge: Honorable Joel H. Slomsky[*]

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[*] Judge Slomsky was assigned to this matter following the retirement of Judge Fullam, who presided at trial and ruled on the merits.

Argued September 20, 2012
Opinion Filed: May 16, 2013

Before: AMBRO, GREENAWAY, Jr., and O'MALLEY,[**] *Circuit Judges*

OPINION OF THE COURT

AMBRO, Circuit Judge

[**] Honorable Kathleen M. O'Malley, United States Court of Appeals for the Federal Circuit, sitting by designation.

Table of Contents

As the oil tanker *M/T Athos I* neared Paulsboro, New Jersey, after a journey from Venezuela, an abandoned ship anchor lay hidden on the bottom of the Delaware River squarely within the *Athos I's* path and only 900 feet away from its berth. Although dozens of ships had docked since the anchor was deposited in the River, none had reported encountering it. The *Athos I* struck the anchor, which punctured the ship's hull and caused approximately 263,000 gallons of crude oil to spill into the River. The cleanup following the casualty was successful, but expensive.

This appeal is the result of three interested parties attempting to apportion the monetary liability. The first party (actually two entities consolidated as one for our purposes) includes the *Athos I's* owner, Frescati Shipping Company, Ltd., and its manager, Tsakos Shipping & Trading, S.A. (jointly and severally, "Frescati"). Although Frescati states that the spill caused it to pay out $180 million in cleanup costs and ship damages, it was reimbursed for nearly $88 million of that amount by the United States (the "Government")—the second interested party—pursuant to the Oil Pollution Act of 1990, 33 U.S.C. § 2701 *et seq*. In order to recoup the unreimbursed losses, Frescati made claims in contract and tort against the third interested party—a set of affiliates known as CITGO Asphalt Refining Company, CITGO Petroleum Corporation, and CITGO East Coast Oil Corporation (jointly and severally, "CARCO")—which requested the oil shipped on the *Athos I* and owned the marine terminal where it was to dock to unload its oil. Specifically, Frescati brought a contract claim for CARCO's alleged breach of the safe port/safe berth warranty (jointly and severally, "safe berth warranty") it made to an intermediary—Star Tankers, Inc.—responsible for chartering the *Athos I* to CARCO's port, and alleged

negligence and negligent misrepresentation against CARCO as the owner of the wharf the *Athos I* was nearing when it was holed. The Government, as a statutory subrogee that stepped into Frescati's position for the $88 million it reimbursed to Frescati under the Oil Pollution Act, has limited its claim for reimbursement from CARCO to Frescati's contractual claim pursuant to a limited settlement agreement.

Following a 41-day bench trial, the District Court for the Eastern District of Pennsylvania held that CARCO was not liable for the accident under any of these theories. The Court, however, made no separate findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52(a)(1). That calls for a remand to set out these mandated matters. However, for the sake of efficiency, we discuss—and, to the extent necessary, make holdings on—the legal issues appealed.

In regard to the contractual safe berth warranty, the Court determined that Frescati (and the Government as a subrogee) could not recover on their contractual claims. First, Frescati was not a party to the agreement that contained the warranty between CARCO and Star Tankers, and was not an intended beneficiary of that agreement. Furthermore, even if Frescati could claim the protection of the warranty, it was only a promise by CARCO to exercise due diligence and not an unconditional guarantee; moreover, sufficient diligence existed here. In any event, the warranty was excused because CARCO specified the port ahead of the *Athos I's* arrival, placing the burden on the *Athos I's* captain to accept it as safe or reject it under what is called the "named port exception."

For reasons elaborated below, we disagree with all three of these rulings. Instead, we hold that the *Athos I*—and by extension, its owner, Frescati—was an implied beneficiary of CARCO's safe berth warranty. We conclude as well that the safe berth warranty is an express assurance of safety, and that the named port exception to that warranty does not apply to hazards that are unknown to the parties and not reasonably foreseeable. We cannot be sure, however, that this warranty was actually breached, as the District Court made no finding as to the *Athos I's* actual draft nor the amount of clearance actually provided.

If on remand the District Court rules in favor of Frescati on its contractual warranty claim, its negligence claim becomes unnecessary. If this issue is reached, we do not agree with the District Court's conclusion that CARCO cannot be liable in negligence because the anchor lay outside the approach to CARCO's terminal—the area in which CARCO had a duty to exercise reasonable care in proving a safe approach. As such, the District Court would need to resolve the appropriate standard of care required, whether CARCO breached that standard, and if so, whether any such breach caused the accident. Conversely, we find no error with the Court's holding that CARCO's alleged misrepresentation as to the depth of its berth was geographically (and hence factually) irrelevant to the ultimate accident. In addition, we conclude that the Government has waived reliance on a partial settlement agreement with CARCO that, the Government contends, precludes CARCO from making certain equitable defenses to the Government's subrogation claims. In this context, we affirm in part, and vacate and remand in part for additional factfinding on the contractual (and possibly negligence) claims.

I. Factual and Procedural Background

A. The Tanker and Its Charters

At the heart of this dispute is the *Athos I*, a single-hulled oil tanker measuring 748 feet long and more than 105 feet wide. It was owned by Frescati at all relevant times. At the time of the accident, however, the *Athos I* had been chartered into a tanker pool assembled by Star Tankers, who is not a party to this consolidated action. In order to transport a load of heavy crude oil from Venezuela to its asphalt refinery in Paulsboro, New Jersey, CARCO sub-chartered the *Athos I* from the Star Tankers pool.

In admiralty, these contracts for service are known as "charter parties."[1] In specific regard to Star Tankers, the *Athos I* was enlisted into the tanker pool in October of 2001 pursuant to a "*time* charter party." "Under a time charter, the owner [Frescati] remains responsible for the navigation and operation of the vessel and the charterer [Star Tankers] assumes responsibility for arranging for the employment of the vessel, providing fuel and paying for certain cargo-related expenses." Terence Coghlin *et al*., *Time Charters* ¶ 1.59 (6th ed. 2008). The time charter party gave Star Tankers, an intermediary or "middleman," the right to sub-charter the *Athos I* although Frescati

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[1] The term "charter party" may be confusing in that it does not refer to an entity, but a document. This is due to its historical genesis, deriving from the phrase "*charta partita*, *i.e*., a deed of writing divided." *Black's Law Dictionary* 268 (9th ed. 2009) (quoting Frank L. Maraist, *Admiralty in a Nutshell* 44-45 (3d ed. 1996)). The *charta partita* was literally a divided document, the owner and the charterer each retaining one half of the agreement. *Id*.

remained responsible for keeping the vessel staffed and serviceable.

In contrast, CARCO's employment of the *Athos I* for the specific voyage was pursuant to a "*voyage* charter party" with Star Tankers. Unlike a time charter party in which a "vessel's employment is put under the orders of . . . charterers" for a period of time, under a voyage charter party the ship is hired "to perform one or more designated voyages in return for the payment of freight."[2] Julian Cooke *et al*., *Voyage Charters* ¶ 1.1 (3d ed. 2007). CARCO's particular voyage charter party, based on a standard industry ASBATANKVOY form, contained what are customarily known as "safe port" and "safe berth" warranties (already defined, for convenience, as a "safe berth warranty"). It provided that

> [t]he vessel . . . shall, with all convenient dispatch, proceed as ordered to Loading Port(s) named . . . , or so near thereunto as she may safely get (always afloat), . . . and being so loaded shall forthwith proceed, as ordered on signing Bills of Lading, direct to the Discharging Port(s), or so near

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[2] It has been observed that

> [t]he fundamental difference between voyage and time charters is how the freight or "charter hire" is calculated. A voyage charterparty specifies the amount due for carrying a specified cargo on a specified voyage (or series of voyages), regardless of how long a particular voyage takes. A time charterparty specifies the amount due for each day that the vessel is "on hire," regardless of how many voyages are completed.

David W. Robertson *et al*., *Admiralty and Maritime Law in the United States* 335 (2d ed. 2008).

> thereunto as she may safely get (always afloat), and deliver said cargo.

J.A. at 1222 (Tanker Voyage Charter Party, Part II, ¶ 1). It further directed that "[t]he vessel shall load and discharge at any safe place or wharf, . . . which shall be designated and procured by the Charterer [CARCO], provided the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat . . . ." *Id*. at 1222 (Tanker Voyage Charter Party, Part II, ¶ 9). We note that, in the time charter party between Frescati and Star Tankers, the latter contracted to provide a similar safe berth warranty, but this warranty was qualified whereby Star Tankers obligated itself to exercise "due diligence to ensure that the vessel is only employed between and at safe places . . . ." *Id*. at 1157 (Time Charter Party ¶ 4). Following the accident, Frescati began arbitration with Star Tankers regarding its claims for damage of the *Athos I*, but that proceeding has been stayed pending the outcome of this case. Oral Arg. Tr. 4:8-15, Sept. 20, 2012.

In preparation for the arrival in Paulsboro of the *Athos I*, its master[3] was provided with a copy of CARCO's Port Manual. This Manual indicated that the allowable maximum draft at the Paulsboro facility was 38 feet, but that this "may change from time to time and should be verified prior to the vessel's arrival." J.A. at 1095 (CITGO Terminal Regulations for Vessels ¶ 2). On November 22, 2004, four days before the *Athos I* arrived, CARCO reduced this

[3] A ship's master is its commander and captain. *Black's Law Dictionary*, *supra*, at 1065.

maximum draft to 36 feet. The *Athos I* was not informed of this modification.

B. The Accident

On November 26, 2004, the *Athos I* was nearing its ultimate destination, CARCO's asphalt refinery in Paulsboro, New Jersey. When the *Athos I* reached the mouth of the Delaware River, only 80 miles remained of its 1,900-mile journey. Although Captain Iosif Markoutsis was the ship's master, the seven-hour upriver transit was aided by Delaware River Pilot Captain Howard Teal. At approximately 8:30 p.m., while the *Athos I* was still navigating up the River channel, Docking Pilot Captain Joseph Bethel boarded the vessel (Captain Bethel was employed by non-party Moran Towing of Pennsylvania). The Docking Pilot relieved the River Pilot at about 8:40 p.m.

CARCO's Paulsboro facility sits on a jetty on the New Jersey side of the Delaware River. Federal Anchorage Number Nine ("the Anchorage" or "Anchorage Number Nine") separates the River channel from CARCO's port waters. As pictured in Appendix A to this opinion, the Anchorage's border runs diagonally to CARCO's waterfront, ranging between 130 and 670 feet from the face of its ship dock. Across the Anchorage, the River Channel begins less than 2,000 feet from CARCO's berth, a little more than two-and-a-half lengths of the *Athos I*. Customarily, a tanker of the *Athos I's* size would come up the River, make a starboard (right) 180º turn into the Anchorage, and would then be pushed sideways by tugs (i.e., parallel parked) into CARCO's pier. The *Athos I* was following this procedure when, at 9:02 p.m., it suddenly listed to the port (left) side, and oil became visible in the water. It was later determined that an abandoned anchor had punched two holes in the *Athos*

I's hull, causing (as already noted) roughly 263,000 gallons of crude oil to spill into the River. At the time of the allision,[4] the *Athos I* was only 900 feet from CARCO's berth, approximately halfway through the Anchorage. The tide was relatively low at the time of the accident after having reached its lowest point only 50 minutes prior. J.A. at 2102.

The anchor was eventually exhumed. Inspection revealed that it weighed roughly nine tons and measured 6'8" long, 7'3" wide, and 4'6" high. J.A. at 2192 (United States Coast Guard Marine Casualty Investigation Report). The Coast Guard further reported that the anchor was ultimately found lying prone with its blade reaching 54 inches above the floor of the River. *Id*. at 2196. Although the District Court made no finding of fact as to the exact position of the anchor at the time of the allision, it found persuasive the testimony of oceanographer and ocean engineer Dr. Peter Traykovski, who opined that the anchor was lying horizontal at the time of the accident with a height of only 41 inches above the bottom of the River. Traykovski Test., 24:25-25:13, Nov. 4, 2010. The Court also did not make any finding as to the depth of the Anchorage where the anchor lay, though the record before us seems to indicate that the depth was between 40.3 and 41.45 feet deep at low tide. *Id*. at 49:12-25; J.A. at 2196.

The District Court also did not make any finding as to the draft of the *Athos I*—that is, the distance between the lowest point of the ship and the waterline—but assumed, for purposes of analysis, that

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[4] An allision is "[t]he contact of a vessel with a stationary object such as an anchored vessel or a pier." *Black's Law Dictionary*, *supra*, at 88.

it was drafting at 36'7" as represented by Frescati at the time of the accident. The Court also failed to resolve the anchor's depth or position, although it noted that there was "persuasive evidence" that the anchor was lying down at the time of the accident. *In re Frescati Shipping Co., Ltd.*, Nos. 05-CV-00305-JF, 08-cv-02898-JF, 2011 WL 1436878, at *7 (E.D. Pa. Apr. 12, 2011). The parties, however, stipulated that the anchor had been in the same approximate location for at least three years because it was detectable from a sonar scan performed by the University of Delaware in 2001 as part of an independent geophysical study.[5] The owner of the anchor has never been determined, but the Court speculated that the anchor likely was used for dredging operations at the time it was lost.

C. The Cost of the Accident

Frescati claims that the accident cost it, as the "responsible party" under the Oil Pollution Act, approximately $180 million in clean-up costs and damages to the ship. (The Act was passed in the wake of the Exxon Valdez accident in 1989, and was designed to facilitate oil spill cleanups by requiring "responsible parties" to pay initially for removal costs and damages. *See* 33 U.S.C. § 2702(a).) Because the Act sets liability limits for cooperative responsible parties, *see id.* at § 2704(a), an incentive exists for responsible parties to respond quickly and competently in order to limit the extent of their financial exposure.

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[5] The stipulation suggests that the anchor was not mentioned in the report ultimately issued by the University of Delaware professors. *See* J.A. at 1310-12. Instead, it seems that it was not until after this litigation began that the parties obtained the 2001 side scan sonar data and agreed that it revealed the anchor's presence.

See Unocal Corp. v. United States, 222 F.3d 528, 535 (9th Cir. 2000) ("'The purpose of [the Oil Pollution Act] . . . was to encourage rapid private party responses.'" (quoting *In re Metlife Capital Corp.*, 132 F.3d 818, 822 (1st Cir. 1997))). Responsible parties in compliance with the Act may file a claim with the Oil Spill Liability Trust Fund, controlled by the United States Government, for reimbursement of costs beyond the liability limit. 33 U.S.C. § 2708(a)(2). Specifically, Frescati was able to limit its liability for cleanup to $45,474,000, thus allowing it to recover cleanup costs exceeding that amount from the Fund.[6] It was ultimately reimbursed for approximately $88,000,000 of its cleanup costs, and the Fund became subrogated as to that amount under 33 U.S.C. §§ 2712(f) and 2715(a).

D. Control of the Waters

The casualty here occurred squarely within Anchorage Number Nine. As the term implies, an anchorage ground is "a place where vessels anchor or a place suitable for anchoring." *Webster's Third New Int'l Dictionary* 79 (1971). Section 7 of the Rivers and Harbors Act of 1915 authorizes the establishment of "anchorage grounds for vessels in all harbors, rivers, bays, and other navigable waters of the United States whenever it is manifest . . . that the maritime or commercial interests of the United States require such anchorage grounds for safe navigation . . . ." 33 U.S.C.

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[6] In February 2007, Frescati applied to have its liability exonerated pursuant to 33 U.S.C. § 2703(a)(3). That subsection directs that a responsible party is not liable for the acts or omissions of a third party. In this case, that third party would have been the unknown anchor-dropper. It is unclear why Frescati withdrew this claim in 2008.

§ 471. By 1930, a "lack of adequate anchorage room" was creating a hazard on the Delaware River between navigating vessels and those "awaiting accommodation at the wharves, or awaiting cargo or orders." H. Doc. No. 71-304, 24 (1930). Anchorage Number Nine, also known as the Mantua Creek Anchorage, was established in 1930. Pub. L. No. 71-520, 46 Stat. 918, 921 (1930). Today it runs for approximately 2.2 miles along the Delaware River channel (*see* Appendix A) and provides a place for ships to anchor so long as they do not "interfere unreasonably with the passage of other vessels to and from Mantua Creek." 33 C.F.R. § 110.157(a)(10).

Anchorage Number Nine, though only a few hundred feet from CARCO's pier, is neither controlled nor maintained by CARCO. Instead, the federal Government's Army Corps of Engineers (the "Corps") conducts hydrographic surveys and dredges as necessary in an attempt to maintain the Anchorage's depth at 40 feet. The Corps also regulates any construction or excavation within the navigable waters, including the issuance of dredging permits, 33 U.S.C. § 403, and its regulatory jurisdiction "extend[s] laterally to the entire water surface and bed of a navigable waterbody, which includes all the land and waters below the ordinary high water mark," 33 C.F.R. § 329.11. The National Oceanic and Atmospheric Administration conducts surveys on occasion for various federal projects. No Government entity, however, is responsible for preemptively searching all federal waters for obstructions, and the District Court found that the Government does not actually survey the Anchorage for hazards. If, however, the Government is alerted to the presence of a threat, the Corps will remove the obstruction if it is a hazard to navigation and, if not removable, the Coast Guard will

chart it. Ultimately, the "[p]rimary responsibility for removal of wrecks or other obstructions lies with the [obstruction's] owner, lessee, or operator." 33 C.F.R. § 245.10(b).

CARCO maintains a self-described "area of responsibility" directly abutting its Paulsboro terminal, "a roughly triangular-shaped area . . . comprising the waters of the berth footprint and the immediate access area next to it where vessels enter and exit the footprint." CARCO's Br. at 19. This area, also set out in Appendix A to this opinion, runs essentially the length of CARCO's facility and extends offshore to the border of the Anchorage. It is based on a permit to dredge for maintenance purposes that was issued by the Corps to CARCO's predecessor in 1991. The scope of such a permit is derived from the initial request; put another way, it is self-defined subject to approval by the Corps. This area of responsibility is not large enough to rotate the 748 foot-long *Athos I*.

In maintaining its area of responsibility, CARCO retained a consulting engineering firm, S.T. Hudson Engineers, Inc., to perform hydrographic surveys. While CARCO had inspected that area for depth, it never specifically searched for debris or other hazards. Hudson interpolated the area's depth from a grid of pinpointed, single-beam sonar depth soundings at 50-foot intervals. This particular procedure is poor at detecting sunken objects because it is unlikely that any given hazard would fall within the exact spot measured, and if it did, it would not necessarily indicate that there was an object but only the depth of that object as indistinguishable from the bottom of the waterway. Long Test., 78:8-79:5, Nov. 17, 2010; Fish Test., 59:11-18, Sept. 29, 2010.

CARCO's Port Captain William Rankine estimated that approximately 250 ships with a draft of 36'6" or greater either entered or departed CARCO's port between 1997 and 2005. Rankine Test., 22:25-23:15, Nov. 22, 2010. In specific regard to arriving vessels, from the time the anchor was spotted by the University of Delaware in August 2001 until the *Athos I* casualty, the record reflects that 61 ships with a draft of 36'6" or greater arrived at CARCO's facility. J.A. at 1788-94. The record does not reflect at what time these ships docked, and high tide adds approximately six feet of depth to the River. Moreover, Frescati points out that—unlike the *Athos I*—21 of these ships would have been required to dock within three hours prior to high-water due to their excessive drafts.[7] *Id*. at 1622-24.

E. The District Court Proceedings

In January 2005, Frescati filed in the District Court a Complaint for Exoneration From or Limitation of Liability pursuant to the Shipowner's Limitation of Liability Act, 46 U.S.C. § 30501 *et seq*. (formerly 46 App. U.S.C. § 181 *et seq*.). In that Complaint, Frescati sought a declaration that it was not liable for any losses stemming from the accident or, in the alternative, a limitation of liability to the value of the *Athos I* and its pending freight. CARCO was among the parties who asserted claims in that action, seeking recovery against Frescati for its lost oil in an amount

[7] The Docking Pilot Association ("DPA") Guidelines provide directives for the appropriate docking times for vessels of different sizes. The DPA Guidelines were developed after discussion with CARCO's previous Port Captain and were based in part on CARCO's desire to maximize the number of vessels that could dock at its berth. J.A. at 1104; Quillen Dep. 11:12-20, Sept. 2, 2010.

in excess of $259,217. Frescati then filed a counterclaim against CARCO for all costs incurred beyond those reimbursed by the Fund.

In June 2008, the Government filed a separate suit against CARCO seeking compensation on its subrogated right, pursuant to 33 U.S.C. §§ 2712(f) and 2715(a), to the approximately $88 million disbursed by the Fund. In a pretrial settlement agreement, the Government waived its negligence claims against CARCO in return for the latter's agreement not to pursue negligence claims against the United States. The Government, believing that CARCO was advancing against it negligence theories in violation of the settlement agreement, moved for partial summary judgment against CARCO's counterclaim for equitable recoupment. That motion was denied.

As noted, these two actions were consolidated, and they were tried over 41 days before Judge Fullam. After trial, the Court issued an 18-page opinion holding that CARCO could not be held responsible under contract or tort for any of the losses stemming from the accident. *See In re Frescati*, 2011 WL 1436878.

On the contractual safe berth warranty, the Court determined that Frescati had no standing for relief, as it was not a third-party beneficiary to the voyage charter party between CARCO and Star Tankers, and that, in any event, CARCO did not breach those warranties because they are not unconditional guarantees but instead "'impose[] upon the charterer a duty of due diligence to select a safe berth,'" a duty satisfied here. *Id*. at *6 (quoting *Orduna S.A. v. Zen-Noh Grain Corp*., 913 F.2d 1149, 1157 (5th Cir. 1990)). The Court further ruled that, even if a stricter warranty applied, the naming of the port in advance

precluded recovery under the named port exception, which, as a general matter, protects a charterer when the port is named ahead of arrival and the master proceeds there without protest.

The Court also held that CARCO was not negligent in failing to search for or detect the abandoned anchor that lay within the Anchorage. As the Court deemed it outside the approach to CARCO's berth, detection and notification to others of its presence thus fell beyond CARCO's obligation to provide a safe entry to that berth. The Court also held that there was no negligent misrepresentation in CARCO's failure to alert the *Athos I* that—only four days prior to its arrival—the allowable maximum draft at CARCO's facility had been reduced from 38 feet to 36 feet. It reasoned that this was an internal determination pertaining to the area at the berth and outside the Anchorage, and therefore was "factually irrelevant to the casualty." *Id*. at *5.

In sum, the District Court concluded that the anchor-dropper rather than any of the named parties was at fault, and rejected all of Frescati's and the Government's arguments as to CARCO's liability.

II. Jurisdiction and Standard of Review

The District Court had admiralty jurisdiction pursuant to 28 U.S.C. § 1333(1). We have jurisdiction over this appeal under 28 U.S.C. § 1291.

Findings of fact made during a bench trial are reviewed for clear error, and will stand unless "'completely devoid of minimum evidentiary support displaying some hue of credibility, or . . . bear no rational relationship to the supportive evidentiary data.'" *In re Nautilus Motor Tanker Co*., 85 F.3d 105, 115 (3d Cir. 1996) (alteration in original) (quoting

Haines v. Liggett Grp. Inc., 975 F.2d 81, 92 (3d Cir. 1992)). Following a bench trial, we review *de novo* a district court's conclusions of law. *McCutcheon v. Am.'s Servicing Co.*, 560 F.3d 143, 147 (3d Cir. 2009) (citation omitted). "[C]onstruction of an unambiguous contract is a matter of law and subject to plenary review." *Colliers Lanard & Axilbund v. Lloyds of London*, 458 F.3d 231, 236 (3d Cir. 2006) (citing *U & W Indus. Supply, Inc. v. Martin Marietta Alumina, Inc.*, 34 F.3d 180, 185 (3d Cir. 1994)). Similarly, we exercise "plenary review over the legal question of 'the nature and extent of the duty of due care . . . .'" *Andrews v. United States*, 801 F.2d 644, 646 (3d Cir. 1986) (quoting *Redhead v. United States*, 686 F.2d 178, 182 (3d Cir. 1982)).

III. Rule 52

Federal Rule of Civil Procedure 52(a)(1) provides that "[i]n an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately." Fed. R. Civ. P. 52(a)(1). This is a mandatory requirement. *H. Prang Trucking Co., Inc. v. Local Union No. 469*, 613 F.2d 1235, 1238 (3d Cir. 1980) (citing 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2574, at 690 (1st ed. 1971)); *Scalea v. Scalea's Airport Serv., Inc.*, 833 F.2d 500, 502 (3d Cir. 1987) (*per curiam*). Typically, a Rule 52 violation occurs when a district court's inadequate findings render impossible "'a clear understanding of the basis of the decision,'" *H. Prang Trucking*, 613 F.2d at 1238 (quoting Wright & Miller, *supra*, § 2577, at 697), and those "'findings are obviously necessary to the intelligent and orderly presentation and proper disposition of an appeal,'" *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1178 (3d Cir. 1990) (quoting

Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310, 317 (1940)). *See also Berguido v. E. Air Lines, Inc.*, 369 F.2d 874, 877 (3d Cir. 1966) ("If a full understanding of the factual issues cannot be gleaned from the District Court's opinion, we would be obliged to remand for compliance with Rule 52(a)."). Although Rule 52 does not require hyper-literal adherence, *see Hazeltine Corp. v. Gen. Motors Corp.*, 131 F.2d 34, 37 (3d Cir. 1942), "an appellate court may vacate the judgment and remand the case for findings if the trial court has failed to make findings when they are required," *Giles v. Kearney*, 571 F.3d 318, 328 (3d Cir. 2009) (citing *H. Prang Trucking*, 613 F.2d at 1238-39).

Instead of presenting his findings in accord with Rule 52, the trial judge here elected to "set forth in narrative fashion [his] findings of fact . . . and conclusions of law." *In re Frescati*, 2011 WL 1436878, at *1. Unfortunately, what followed leaves us unable to discern what were his intended factual findings. Moreover, in arriving at his particular legal conclusions, the trial judge held back making many of the factual findings that would support those conclusions, in effect going from first base to third across the pitcher's mound. While we do not endorse or require a panoply of extraneous factual findings, the overall dearth of clear factual findings, much less those pertaining to the heart of this matter—such as the draft of the *Athos I*—falls below what is required by Rule 52.

Because we cannot derive a full understanding of the core facts from the District Court's opinion, this was a violation of Rule 52 and itself a basis for remand. *Giles*, 571 F.3d at 328. In light of the legal determinations set out below, factual clarification is required in any event.

IV. The Contractual Safe Berth Warranty

CARCO's promise to Star Tankers that the *Athos I* would be directed to a location that "she may safely get (always afloat)" is a provision known in context as either a safe port or safe berth warranty (to repeat again, we use for shorthand "safe berth warranty"). *See* Cooke *et al*., *supra*, ¶ 5.121 (citation omitted). This language triggers two separate protections: a contractual excuse for a master who elects not to venture into an unsafe port, and protection against damages to a ship incurred in an unsafe port to which the warranty applies. *See* 2 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 11-10, at 32-33 (5th ed. 2011). In this case, only the second benefit of the safe berth warranty is at issue, as the *Athos I* was damaged in an allegedly unsafe port. Specifically at issue are the scope and applicability of this warranty, topics we explore below.

A. Was Frescati a Third-Party Beneficiary of the Safe Berth Warranty?

"'Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must at least show that it was intended for his direct benefit.'" *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 307 (1927) (quoting *German Alliance Ins. Co. v. Home Water Supply Co*., 226 U.S. 220, 230 (1912)). As Frescati is not a party to CARCO's promise to Star Tankers to provide a safe berth, there must be some showing that it was nonetheless an intended beneficiary. The District Court held that this was not the case because the testimony at trial failed to reveal any intent by CARCO to benefit Frescati. The Court, however, failed to inquire whether the contract itself established a third-party beneficiary relationship, a

question of law. *See Pierce Assocs. v. Nemours Found.*, 865 F.2d 530, 535 (3d Cir. 1988). We conclude that, although Frescati is not a named beneficiary to the safe berth warranty within the charter party between Star Tankers and CARCO, the *Athos I* benefits from this warranty, and Frescati, as the vessel's owner, is thus a third-party beneficiary.

Maritime contracts "must be construed like any other contracts: by their terms and consistent with the intent of the parties." *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 31 (2004). "When a contract is a maritime one, and the dispute is not inherently local, federal law controls the contract interpretation." *Id.* at 22-23 (citing *Kossick v. United Fruit Co.*, 365 U.S. 731, 735 (1961)). We typically look to the Restatement of Contracts for the federal law on third-party beneficiaries. *Doe v. Pennsylvania Bd. of Prob. & Parole*, 513 F.3d 95, 106 (3d Cir. 2008); *see* Restatement (Second) of Contracts § 302 (1981). A third-party may be a beneficiary to a contract of others where it is "appropriate to effect[] the intention of the parties," and "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." Restatement, *supra*, § 302(1)(b); *see also Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1019 (2d Cir. 1993) (holding that a third-party beneficiary to a charter party "must show that 'the parties to that contract intended to confer a benefit on [it] when contracting; it is not enough that some benefit incidental to the performance of the contract may accrue to [it]'" (alterations in original) (quoting *McPheeters v. McGinn, Smith & Co.*, 953 F.2d 771, 773 (2d Cir. 1992))).

In 1959, the Supreme Court held that vessels are automatic third-party beneficiaries of warranties of

workmanlike service made to their charterers by stevedores who unload vessels at docks. *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423, 428 (1959). This is because "[t]he warranty which a stevedore owes when he goes aboard a vessel to perform services is plainly for the benefit of the vessel whether the vessel's owners are parties to the contract or not." *Id*. This natural relationship between the entities was "enough to bring the vessel into the zone of modern law that recognizes rights in third-party beneficiaries." *Id*. (citation omitted). A year later, the Supreme Court extended this rule a logical step further in holding that "[t]he owner, no less than the ship, is the beneficiary of the stevedore's warranty of workmanlike service." *Waterman S. S. Corp. v. Dugan & McNamara, Inc*., 364 U.S. 421, 425 (1960).

Although these two Supreme Court cases aid Frescati's position, they do so only by analogy. As CARCO points out, the matter before us does not involve an implied warranty for workmanlike service, but an explicit assurance of safety in a document to which Frescati is not a party. The Court of Appeals for the Second Circuit, however, has applied *Crumady* and *Waterman* to a set of facts similar to the one before us. *In Paragon Oil Co. v. Republic Tankers, S.A*., 310 F.2d 169, 171 (2d Cir. 1962) (Friendly, J.), a vessel owner (Paragon Oil Co., Inc.) and voyage charterer (Republic Tankers, S.A.) entered into a voyage charter with a safe berth warranty. Republic had executed a contract of affreightment (essentially a sub-voyage charter) with a third-party that contained a safe berth warranty identical to the one it promised in the voyage charter. *Id*. From this, the Second Circuit concluded that Paragon (the owner) was "the true party in interest" to the safe berth assurance in the contract of affreightment even though it was not explicitly named

in the contract between Republic (the voyage charterer) and the third-party. *Id*. at 175.

We agree that the Second Circuit's reasoning in *Crumady* and *Waterman* counsel in favor of Frescati's third-party beneficiary status. Specifically, we are convinced that a safe berth warranty necessarily benefits the vessel, and thus benefits its owner as a corollary beneficiary.[8] "[T]he circumstances indicate" that the warranty is intended to endow the vessel with "the benefit of the promised performance." Restatement, *supra*, § 302(1)(b). Because the warranty explicitly covers the safety of the vessel, it would be nonsensical to deprive the vessel's owner the benefits of this promise, as the owner is ultimately the one most interested in the vessel's status and is obligated to maintain its condition.[9]

Moreover, it would work an odd windfall if Star Tankers were allowed to collect on CARCO's safe berth warranty but not be required to pass on those remedial

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[8] Insofar as CARCO cites to *Bunge Corp. v. MV Furness Bridge*, 390 F. Supp. 603, 604 (E.D. La. 1974), it is unpersuasive, as its conclusion that the owner was not a third-party beneficiary of the sub-charterer's safe berth warranty is unsupported by any reasoning. Further, this issue was abandoned when the Court later resolved the merits of the claim and held that the sub-charterer had "violated a legal duty [in tort] whether or not it also had a contractual one." *Bunge Corp. v. MV Furness Bridge*, 396 F. Supp. 852, 858 (E.D. La. 1975), *rev'd*, 558 F.2d 790 (5th Cir. 1977). On appeal, the Court of Appeals for the Fifth Circuit agreed that the issue of contractual liability was "irrelevant" because none of the parties could have intended to warrant complete safety of an inadequately small wharf. 558 F.2d at 801-02.

[9] Under the time charter, Frescati remained responsible for insuring, maintaining, and restoring the *Athos I* throughout the term of the charter. J.A. at 1447-48 (Time Charter Party ¶¶ 3, 6).

dollars to the ship's ultimate owner. That illogical result could occur where the owner (Frescati) received no safe berth warranty from the time charterer (Star Tankers), or where—as in the case before us—Frescati received a less comprehensive warranty from Star Tankers than Star Tankers received from the voyage charterer (CARCO).[10] This would theoretically allow Star Tankers to collect for damages to the ship that were actually paid by Frescati. While we are mindful of the parties' ability to contract differently, there is no indication that Star Tankers bargained for the potential of such an unearned windfall—profiting from the mishaps of the vessels within its tanker pool when it did not pay for the repair of those mishaps. Instead, requiring warranties from voyage charterers like CARCO is a way to insure against claims asserted by vessel owners. Per this path, the promise made to protect a vessel flows through the intermediary party(ies) to the ultimate party who bore the pain of an unsafe port, here the vessel's owner.

We discount CARCO's suggestion that it was unaware of Frescati's status as the true owner of the *Athos I*. CARCO had completed an internal vetting of the *Athos I* in October of 2004 that identified Frescati as its owner. J.A. at 1318 (Citgo Vetting Report). Regardless, even if the ultimate owner had been undisclosed, CARCO expressly warranted to provide a safe berth, which is a promise made "plainly for the benefit of the vessel." *Crumady*, 358 U.S. at 428. Thus we see no reason why the *Athos I's* owner

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[10] Although we ultimately conclude that the full safe berth warranty from CARCO to Star Tankers is an express assurance made without regard to the amount of diligence taken by the charterer, *see infra* Part IV.B, Star Tankers only promised due diligence to Frescati, J.A. at 1448 (Time Charter Party ¶ 4).

would be any less entitled to rely on this warranty, whether it was identified or not. Frescati, as the owner of the *Athos I*, may therefore rely on CARCO's safe berth warranty as a third-party beneficiary.

B. The Scope of the Safe Berth Warranty

That Frescati may benefit from CARCO's safe port/safe berth warranty requires that we delineate its comprehensiveness, a question of first impression in our Circuit. Though the District Court did not need to reach this legal issue after determining that Frescati was not a third-party beneficiary, it nonetheless concluded—as an alternate holding—that the safe berth warranty was not breached because "CARCO fulfilled its duty of due diligence . . . ." *In re Frescati*, 2011 WL 1436878, at *6. We part from this holding, as we believe the Court incorrectly relied on *Orduna S.A. v. Zen-Noh Grain Corp.*, 913 F.2d 1149, 1157 (5th Cir. 1990), which held that the safe berth provision was not a full warranty but required only due diligence.

A port is deemed safe where "the particular chartered vessel can proceed to it, use it, and depart from it without, in the absence of abnormal weather or other occurrences, being exposed to dangers which cannot be avoided by good navigation and seamanship." Cooke *et al.*, *supra*, ¶ 5.137; *Leeds Shipping v. Societe Francaise Bunge* (*The Eastern City*), [1958] 2 Lloyd's Rep. 127, 131 (same). Whether a port is safe refers to the particular ship at issue, Cooke *et al.*, *supra*, ¶ 5.68, and goes beyond "the immediate area of the port itself" to the "adjacent areas the vessel must traverse to either enter or leave," Coghlin *et al.*, *supra*, ¶ 10.124. In other words, a port is unsafe—and in violation of the safe berth warranty—where the named ship cannot reach it without harm (absent abnormal conditions or

those not avoidable by adequate navigation and seamanship).[11]

This formulation is deeply rooted. In 1888, the Supreme Court held charterers liable for breach of a safe berth warranty in insisting that a ship sail to Aalborg, Denmark, a port that was impossible for the particular ship to reach due to a sand bar and the absence of any reasonably safe place to anchor or discharge. *The Gazelle*, 128 U.S. 474, 485-86 (1888). In a similar fashion, the Supreme Court held in 1902 that charterers failed to provide a safe dock where the ship in question could not reach it without damage. *Mencke v. Cargo of Java Sugar*, 187 U.S. 248, 253 (1902). Specifically, the charterers were aware that the ship's mast was too tall to clear the Brooklyn Bridge when they designated a discharge dock upriver from the Bridge. *Id*. at 250. The Court concluded that this was a warranty violation by analogizing the overhead obstacle to a submerged one: "A ship could not be said to be afloat, whether the obstacle encountered was a shoal or bar in the port over which she could not proceed, or a bridge under or through which she could not pass, nor could she be said to have safely reached a dock if required to mutilate her hull or her permanent masts." *Id*. at 253; *see also Carbon Slate Co. v. Ennis*, 114 F. 260, 261 (3d Cir. 1902) (concluding that safe berth warranty was violated where the ship "was directed to load at a berth where a full cargo, if taken aboard, would have made it impossible for her,

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[11] On the facts before us, we need not define the outer geographical bounds of the safe berth/safe port warranty. At oral argument CARCO conceded that the warranty—if applicable—"would include the area in and around Paulsboro," including the Anchorage. Oral Arg. Tr. 62:18-64:3, Sept. 20, 2012.

at any stage of water or at any time, to pass out over the harbor bar").

The Court of Appeals for the Second Circuit has long held that promising a safe berth effects an "express assurance" that the berth will be as represented. *Cities Serv. Transp. Co. v. Gulf Ref. Co.*, 79 F.2d 521, 521 (2d Cir. 1935) (*per curiam*), recognized this principle in holding that a master was not liable for damages incurred in reliance on a charter party's safe berth warranty at a particular dock. In *Park S.S. Co. v. Cities Serv. Oil Co.*, 188 F.2d 804, 806 (2d Cir. 1951) (Swan, J.), the same Court elaborated that the purpose of the warranty was to memorialize the relationship between the contracting entities: "the charterer bargains for the privilege of selecting the precise place for discharge and the ship surrenders that privilege in return for the charterer's acceptance of the risk of its choice." *Paragon* continued this tradition in contrasting the duty of a wharfinger (an admiralty term for an "owner or occupier of a wharf," *Black's Law Dictionary* 1733 (9th ed. 2009))—to exercise reasonable diligence in keeping its berth safe for incoming vessels—with that of a charterer who is contractually bound to provide "not only a place which he believes to be safe, but a place where the chartered vessel can discharge 'always afloat.'" 310 F.2d at 173 (citation and internal quotation marks omitted). *See also Venore Transp. Co. v. Oswego Shipping Corp*. 498 F.2d 469, 472 (2d Cir. 1974) (citing *Park S.S. Co.*, 188 F.2d at 804) (sub-charterer had a non-delegable "obligation to provide a completely safe berth," which was breached when it permitted the ship to dock at a berth that it knew was unsafe).

Thus, prior to the Fifth Circuit's decision in *Orduna*, "the law concerning safe ports had a rather secure

berth in maritime law and it was well settled that a safe port clause in a charter constituted a warranty given by a charterer to an owner." Cooke *et al*., *supra*, ¶ 5.124. *Orduna* created quite a splash in veering from the view that a charterer warrants a ship's safety, and established instead for the Fifth Circuit that a safe berth warranty merely "imposes upon the charterer a duty of due diligence to select a safe berth." 913 F.2d at 1157. While *Orduna* acknowledged the Second Circuit's contrary perspective, it dismissed that interpretation in deference to critical commentators, namely Professors Grant Gilmore and Charles L. Black. *Id*. at 1156 (citing Grant Gilmore & Charles L. Black, *The Law of Admiralty* § 4-4, at 204-06 (2d ed. 1975)). We do not find their criticism so compelling.[12]

Orduna concluded that "no legitimate legal or social policy is furthered by making the charterer warrant the safety of the berth it selects." *Id*. at 1157. Primarily, the Court reasoned that it is more sensible to impose

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[12] Gilmore's book has been described as being

> more adapted for the teacher than for the active lawyer or judge. As teachers, the authors are interested in controversy. Wherever they can find it, in the long past or in the nearer present, they stir it up, and frequently label it 'confusion.' . . . It is all very interesting; but in the various admiralty fields—except personal injury and death—most of the old controversies have long been settled. Therefore, our authors tend to give a picture which does not resemble the daily grist of today. Sometimes indeed, straining to keep old battle-fires ablaze, they sprinkle harsh words on the judges who settled the old disputes. . . . On the whole, this is a teaching book rather than an office and courtroom work of reference; and it must be read as such.

Arnold W. Knauth, Book Review, 58 Colum. L. Rev. 425, 426-28 (1958) (reviewing Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* (1957)).

fault on the "master on the scene" rather than a far away merchant charterer.[13] *Id*. at 1156 (citing Gilmore & Black, *supra*, § 4-4, at 204-06). The appeal of this construction here is illusory. While an owner is liable for its master's superseding negligence, *see* Cooke *et al*., *supra*, ¶ 5.151, we see no policy reason why a master on board a ship would normally be in any better position to appraise a port's more subtle dangers than the party who actually selected that port. The "commercial reality [is] that it is the charterer rather than the owner who is selecting the port or berth," *id*. ¶ 5.126, and the charterer is more likely to have at least some familiarity with the port it selected. After all, charterers do not select ports without good reason (and, in the case before us, CARCO was directly on the scene, *as it had selected its own berth*). Messrs. Gilmore and Black (famous in other areas of law—Gilmore on commercial law, including secured transactions, and Black on constitutional law) acknowledged that their rationale is undermined in those instances where a charterer has more knowledge of a danger than the master

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[13] *Orduna* also noted that a due diligence standard would not upset a master's ability to rely on a safe berth warranty in rejecting an unsafe port. 913 F.3d at 1156. This goes only so far, as it addresses but half of the safe berth warranty's protection, which is both to provide a master with a contractual excuse for avoiding an unsafe port and to protect for damages actually sustained in unsafe ports. Additionally, to the extent *Orduna* relied on *Atkins v. Fibre Disintegrating Co*., 2 F. Cas. 78 (E.D.N.Y. 1868), *aff'd sub nom*. *Atkins v. The Disintegrating Co*., 85 U.S. 272, 299 (1873), we are similarly unpersuaded. While *Atkins* featured a safe berth warranty, *id*. at 79, it was essentially an application of the named port exception. *See infra* Part IV.D. As the ship's master made outside inquiries and was fully aware of the port's dangers and yet did not object, he waived his right to complain later for damage. *Id*. at 79-80.

(although they explain that these situations could be remedied through tort liability[14]). We disagree. To any extent a charterer, however distant, bargains to send a ship to a particular port and warrants that it shall be safe there, we see no basis to upset this contractual arrangement.

We are persuaded that the Second Circuit's long-standing formulation of the safe berth clause is the one we should follow.[15] See 2 Schoenbaum, *supra*, § 11-10, at 32-33 (citing *The Gazelle*, 128 U.S. 474 (1888)) ("[I]f the ship reasonably complies with the order and proceeds to port, the charterer is liable for any damage sustained."); Stewart C. Boyd *et al*., *Scrutton on Charter Parties and Bills of Lading*, Section IX, art. 69, at 127 (20th ed. 1996) (same); 2A Michael F. Sturley, *Benedict on Admiralty* § 175, at 17-25 (7th ed. 2012) (same); Coghlin *et al*., *supra*, ¶ 10.110 (same). *But see* Gilmore & Black, *supra*, § 4-4, at 204-06.

Beyond the near consensus of these authorities, we are also convinced that an "express assurance" warranty is most consistent with industry custom. *See Park S.S*., 188 F.2d at 806; *Cities Serv*., 79 F.2d at 521.

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[14] Specifically, Gilmore & Black would find an actionable wrong for charterers directing ships to ports with known dangers, and suggest that a charterer may sometimes be "so situated as reasonably to be charged with a duty of inquiry, particularly as to berth." Gilmore & Black, *supra*, § 4-4, at 205.

[15] Though not dispositive, we also note that adhering to the Second Circuit's view on this issue promotes uniformity of maritime law along the mid-Atlantic seaboard. *See Sea-Land Serv., Inc. v. Dir., Office of Workers' Comp. Programs*, 552 F.2d 985, 995–96 n.18a (3d Cir. 1977) (noting deference pursuant to federal comity and uniformity in maritime law to the Second Circuit, "since [the Third Circuit] shares appellate review with the Second Circuit over the geographical area comprising one of the country's major east coast harbor complexes").

Vessel charters are formalized via "highly standardized forms," 2 Schoenbaum, *supra*, § 11-1, at 4-5 (citation omitted). That some forms explicitly adopt a due diligence standard[16] suggests that the understood default is to impose liability on the charterer without regard to the care taken. *See* Coghlin *et al*., *supra*, ¶¶ 10.52, 10.54. Reading these warranties as dappled with due diligence would make contractual language explicitly adopting a due diligence metric pointless, and we disfavor contract interpretation "that 'render[s] at least one clause superfluous or meaningless.'" *Sloan & Co. v. Liberty Mut. Ins. Co*., 653 F.3d 175, 181 (3d Cir. 2011) (alteration in original) (quoting *Garza v. Marine Transp. Lines, Inc*., 861 F.2d 23, 27 (2d Cir. 1988)). Moreover, the "always afloat" language plainly suggests an express assurance. To the extent the Fifth Circuit in *Orduna* deviated from this well-established standard, we are not persuaded by its reasoning and decline to follow the course it charted.[17] Hence we conclude that the safe berth warranty is an express assurance made without regard to the amount of diligence taken by the charterer.

C. Was the Safe Berth Warranty Breached?

As explained, a berth is deemed safe when a ship may "proceed to it, use it, and depart from it without . . . being exposed to dangers." Coghlin *et al*.,

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[16] As already mentioned, the time charter party between Star Tankers and Frescati contains such a standard, as it is predicated on a Shelltime 4 form. *See* Coghlin *et al*., *supra*, ¶ 10.54.

[17] We are also unpersuaded that this warranty applies only to known hazards. This would effectively undermine the more strict nature of the warranty by requiring some level of due diligence, which, for the reasons above, we do not believe is the case.

supra, ¶ 10.123. As noted above, *see supra* note 11, CARCO conceded at oral argument that the safe berth warranty—if applicable—"would include the area in and around Paulsboro," including the Anchorage, and we therefore need not delineate the geographic sweep of this warranty. Thus having determined that Frescati was a beneficiary of CARCO's safe berth warranty and that this warranty applies irrespective of a charterer's diligence, we proceed to whether the warranty was actually breached by the anchor's presence. Specifically, we need to determine whether the anchor rendered CARCO's port unsafe for a ship of the *Athos I's* agreed-upon dimensions and draft.

That the *Athos I* was injured by the anchor does not automatically indicate that the warranty was breached. CARCO's safe berth warranty was not a blank check; it did not warrant that any ship would be safe at its port, but instead assured that the port would be safe for the *Athos I*. Boyd *et al*., *supra*, Section IX, art. 69, at 129-30 (citations omitted) ("Whether a port is a 'safe port' is in each case a question of fact and degree and must be determined with reference to the particular ship concerned . . . ."); *In re Lloyd's Leasing Ltd*., 764 F. Supp. 1114, 1135 (S.D. Tex. 1990) ("The safety of a port is to be determined with reference to the vessel and the circumstances surrounding that vessel's use of the port."). In this regard, the District Court correctly framed the ultimate issue as whether it was possible for a ship of the *Athos I's* purported dimensions to reach CARCO's berth safely. *In re Frescati*, 2011 WL 1436878, at *6.

The Court, however, neglected to make the necessary factual findings to resolve whether the

warranty was actually breached. Instead, it concluded "that the port and berth were generally safe" due to "the volume of commercial traffic that passed without incident," notwithstanding that it was impossible to know how many of those ships had actually passed over the anchor. *Id*. That similar ships had successfully berthed at the port is irrelevant to whether the warranty was actually breached in this case, as "[a] dangerous place may often be stopped at or passed over in safety." *The Gazelle*, 128 U.S. at 485. Instead, the Court should have evaluated whether the port was safe based on the facts particular to the *Athos I* and its arrival.

From what we can glean from the record, it appears that CARCO warranted a safe berth with the understanding that the *Athos I* would be drafting as much as 37 feet of water upon its arrival. The Voyage Instructions indicate that the vessel would be filled with a quantity of crude oil "always . . . consistent with a 37 [foot] or less [fresh water] sailing draft at loadport," J.A. at 1242, and Captain Markoutsis confirmed this directive, Markoutsis Test. 199:5-9, Oct. 13, 2010. He testified, moreover, that he was "afraid of that draft," and opted to load the ship to only 36'6".[18] *Id*. at 200:7-25. This latter figure was confirmed by CARCO Port Captain William Rankine, who testified that the *Athos I* reported that it was drafting 36'6", Rankine Test. 41:5-12, Nov. 22, 2010, and also by Steamship Agent Stephen Carroll, Carroll Test. 63:2-4, Oct. 7, 2010. In any event, the warranty

[18] We note there is minor disagreement as to this particular figure. While the record suggests that the *Athos I* was represented as drafting 36'6", Frescati explains that it was actually 36'7". This one-inch difference is on its face irrelevant to our analysis, as both drafts are less than 37 feet.

made by CARCO appears to have covered the *Athos I* up to a draft of 37 feet.[19] Yet, as noted throughout this opinion, the District Court made no finding on the vessel's actual draft at the time of the accident. This needs to be corrected on remand.[20]

If it is found that the *Athos I* was drafting 37 feet or less and absent a determination of bad navigation or seamanship,[21] that finding would indicate that the

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[19] Of course, this is ultimately a factual matter for remand. As such, we also note that the Voyage Charter between CARCO and Star Tankers indicates that the "[l]oaded draft of Vessel on assigned summer freeboard [is] 12.423 meters [40.76 feet] . . . in salt water." J.A. at 1220 (Tanker Voyage Charter Party, Part I.A). While we understand this to mean that the *Athos I* could draft over 40 feet in salt water if filled to its summer capacity, the facts before us appear to indicate that it was directed to arrive at CARCO's port drafting 37 feet or less, and that this was the understood basis for the safe berth warranty.

[20] We note that there is record evidence suggesting that the promised 37 feet of clearance was indeed afforded, namely that Dr. Traykovski opined that there was—in his most conservative estimate—between 37.2 and 37.8 feet of water not only above the riverbed but the anchor itself (presumably at low tide). Traykovski Test. 49:12-50:24, Nov. 4, 2010.

[21] Although the warranty exception for abnormal weather conditions is not at issue here, CARCO argues that the exceptions for bad navigation and seamanship apply. CARCO's Br. at 77, 80; *see also* Coghlin *et al*., *supra*, ¶¶ 10.148, 10.166 (citations omitted); Cooke *et al*., *supra*, ¶ 5.151 (citation omitted); *Paragon*, 310 F.2d at 173-74 (quoting *Constantine & Pickering S.S. Co. v. W. India S.S. Co*., 199 F. 964, 967-68 (S.D.N.Y. 1912)) ("It is true that one liable for violating a safe berth clause 'may lessen the amount of damages for which he is responsible by showing negligence, or even lack of diligence, on the part of the person wronged, in failing to take steps to lessen certain or even probable damages.'").

CARCO argues that the vessel's master and the navigation officer believed they were docking at high tide, and in fact were

warranty had been breached because the ship sustained damage. What, if anything, under the water may have caused that margin to be diminished is therefore immaterial. It could have been the remnants of a shipwreck, a range of rocks, a jutting reef, or a shoal. In this case, it happened to be an abandoned anchor that protruded into the *Athos I's* hull. And by its safe berth warranty, CARCO assumes liability for that damage.

If the draft at the time of the accident cannot be determined, or if the *Athos I* is found to have been drafting more than 37 feet, it will be necessary to ascertain the amount of clearance that existed above the anchor to conclude whether the promised 37 feet of water depth was actually provided.[22] Because it appears that Frescati assured a safe berth for a ship drafting 37 feet or less, our concern is whether 37 feet of clearance existed at the time of the accident.

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not (as the tide at the time of the accident was rising but an hour removed from low tide). However, we find no indication in the record that the *Athos I* was attempting to dock at an inappropriate time.

[22] If the vessel is found to have been drafting more than 37 feet, this could potentially reduce CARCO's liability even if it were determined that a safe berth was not provided. In this circumstance, the commentators note a trend in which damages resulting from both a breach of a safe berth warranty and the master's negligence may appropriately be split between the parties. Cooke *et al*., *supra*, ¶ 5.152; 2A Sturley, *supra*, § 175, at 17-26; *see also Ore Carriers of Liber., Inc. v. Navigen Co*., 435 F.2d 549, 550-51 (2d Cir. 1970) (affirming an order dividing a ship's damages between the owner and charterer where the charterer had warranted a safe port, but the owner nonetheless proceeded "with full knowledge of the probable unavailability of tug assistance," which was hazardous). In any event, these issues can also be resolved on remand.

D. The Named Port Exception

CARCO exposes one additional limitation to the broad protection generally afforded by the safe berth warranty—the named port exception. In essence, "[w]hen a charter names a port and the master proceeds there without protest, the owner accepts the port as a safe port, and is bound to the conditions that exist there." *Bunge Corp. v. M/V Furness Bridge*, 558 F.2d 790, 802 (5th Cir. 1977) (internal quotation marks omitted) (quoting *Pan Cargo Shipping Corp. v. United States*, 234 F. Supp. 623, 638 (S.D.N.Y. 1964), *aff'd*, 373 F.2d 525 (2d Cir. 1967)). The purpose of the exception is to shift liability to the owner once a ship's master has had ample opportunity to discover a port's hazards.[23] As such, the exception may apply in instances in which a master—without lodging any objection—is charged "with full knowledge of local conditions which make it unsafe for that particular voyage." Coghlin *et al.*, *supra*, ¶ 10.158; *see also Cooke et al.*, *supra*, ¶ 5.130 ("[T]he master's conduct in entering a port he considers unsafe without raising a

[23] Although it never uses the term "named port exception," *Atkins v. Fibre Disintegrating Co.*, 2 F. Cas. 78 (E.D.N.Y. 1868), *aff'd sub nom. Atkins v. The Disintegrating Co.*, 85 U.S. 272, 299 (1873), is a paradigm for the exception. There, "the peril of the port was such that no vessel of [the ship's] size could get out without making her safety from the reefs dependent entirely upon the continuance of the breeze." *Id.* at 79. Predictably, the breeze failed, and the ship was damaged on the reef. *Id.* at 78. The trial court concluded, however, that the master could not rely on the agent's representation that the port was safe because he failed to object to the port after having "made inquiries . . . as to the character of the port, which was, moreover, fully described in the Coast Pilot [the official publication describing the coast]." *Id.* at 79-80.

protest may result in a waiver of the safe port warranty.").

This formulation is essentially an application of the above-mentioned rule that negligent seamanship will nullify the safe port warranty: once a particular risk becomes known, it is then the master's responsibility to avoid it through competent seamanship or to declare the port unsafe. This application of the exception does not apply to the case before us, however, as there is no suggestion that anyone—much less the master of the *Athos I*—had any inkling as to the anchor's existence in the River.

Instead, and more pertinent to the *Athos I*, the exception is also triggered when a particular port is named in the charter party. *See* Cooke *et al*., *supra*, ¶ 5.130 ("If the charter names the ports or berths the vessel will call at, the general rule is that the ports or berths will have been accepted by the owner as safe, such that the safe port/safe berth warranty is deemed to have been waived."); Coghlin *et al*., *supra*, ¶ 10.164 (same) (citations omitted). This particular application of the exception is very broad and would seem poised to swallow the rule, but frequently the voyage charter will specify a range of ports, and thus the "safe [berth] warranty continues to play a role in voyage charters." Cooke *et al*., *supra*, ¶ 5.123. In fact, this is such a case; the voyage charterer (CARCO) did not specifically name the discharge port in the voyage charter party, but instead directed that the *Athos I* would transit to one or two safe ports located somewhere on the United States Atlantic Coast, Gulf Coast, or the Caribbean Sea. J.A. at 1225 (Tanker Voyage Charter Party, Special Provision 2). CARCO nonetheless maintains that this exception applies even where the port location is not specifically named in the charter so long

as some advance notice of the designated port is given. It is unclear how much notice would be required under CARCO's theory of the exception, although CARCO argues that it applies here because there is evidence that the master knew approximately two weeks before the accident that the *Athos I* would be headed to Paulsboro, New Jersey.

We need not address this issue of advance notice because we conclude that the hazard of the submerged anchor was not the sort contemplated by the exception. As explained above, the purpose of the named port exception is to "relieve[] the charterer of liability for damage arising from conditions at that port so long as those conditions were *reasonably foreseeable*." *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 387 (2d Cir. 2003) (emphasis added) (citations omitted). Without at least an opportunity to discover a particular port's specific pitfalls, the identity of the port would be irrelevant. This would defeat the purpose of naming the port, which is to excuse charterers for the results of hazardous conditions known to the master, not to exonerate them completely from all resulting liability.

In sum, here the particular hazard—the submerged anchor—was unknown to the parties. As the naming of CARCO's port ahead of time did not provide the *Athos I* with an opportunity to accept this unknown hazard, the exception does not come into play.[24]

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[24] The District Court determined that although underwater hazards are a well-known threat, none of the parties had any reason to believe that Anchorage Number Nine was likely to conceal such a menace. *In re Frescati*, 2011 WL 1436878, at *2. To the extent the Court later determined that knowledge "in general of lost or abandoned objects in the river" was sufficient to

V. The Tort Claims

Should its claim regarding CARCO's contractual liability not succeed, Frescati argues in the alternative that CARCO is liable as the owner of the terminal receiving the *Athos I* under two tort theories: negligence and negligent misrepresentation. The District Court held both theories inapplicable. Although we agree that the negligent misrepresentation claim fails on these facts, we disagree with the Court's conclusion that Frescati's negligence claim is necessarily precluded.

A. Negligence

Negligence in admiralty law is essentially coextensive with its common law counterpart, requiring: (1) "[t]he existence of a duty required by law which obliges the person to conform to a certain standard of conduct"; (2) "[a] breach of that duty by engaging in conduct that falls below the applicable standard or norm"; (3) a resulting loss or injury to the plaintiff; and (4) "[a] reasonably close causal connection between the offending conduct and the resulting injury." 1 Schoenbaum, *supra*, §§ 5-2, at 252; *Pearce v. United States*, 261 F.3d 643, 647 (6th Cir. 2001) (citation omitted) (same).

Because this accident resulted in a clear loss, we address the existence of a duty, the potential breach of that duty, and causation. As discussed above, the wharfinger in this case—CARCO—contracted to

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trigger this exception, *id*. at *7, that amounted to an error of law. This sort of general knowledge cannot be used to impute knowledge of a specific condition, and we see no evidence that the Delaware River was known to be particularly treacherous in this regard.

provide the *Athos I* a safe berth. In the tort context, however, a wharfinger is not a guarantor of a visiting ship's safety, but is "'bound to use reasonable diligence in ascertaining whether the berths themselves and the approaches to them are in an ordinary condition of safety for vessels coming to and lying at the wharf.'" *Smith v. Burnett*, 173 U.S. 430, 436 (1899) (quoting, with approval, *The Calliope*, [1891] A.C. 11 (H.L.) 23 (appeal taken from Eng.)). This is not an unconstrained mandate to "ensure safe surroundings or warn of hazards merely in the vicinity." *In re Nautilus*, 85 F.3d at 116 (citing *Trade Banner Line, Inc. v. Caribbean S.S. Co., S.A.*, 521 F.2d 229, 230 (5th Cir. 1975)). Instead, a visiting ship may only expect that the owner of a wharf has afforded it a safe approach. *Id*. (citations omitted). In being invited to dock at a particular port, "a vessel should be able to enter, use and exit a wharfinger's dock facilities without being exposed to dangers that cannot be avoided by reasonably prudent navigation and seamanship." *Id*.

While CARCO has a duty to maintain a safe approach to its terminal, we must determine the geographic scope of that duty.

i. The Scope of the Approach

The geographic scope of a safe approach has been largely unaddressed by the courts. Frescati argues that the scope should be inferred as a matter of custom and practice, and CARCO counters that the approach should be a function of the wharfinger's exertion of control. The District Court, in attempting to adopt a workable method of analysis, was chiefly concerned about CARCO's lack of control in the Anchorage and the absence of a limiting principle if it were to define the approach as the waters that a ship "naturally

would traverse." *In re Frescati*, 2011 WL 1436878, at *4. Accordingly, it opted to limit the approach to "the area 'immediately adjacent' to the berth or within 'immediate access' to the berth." *Id*. (quoting *Western Bulk Carriers v. United States*, No. S-97-2423, 1999 U.S. Dist. LEXIS 22371, at *20-21 (E.D. Cal. Sept. 14, 1999)). Such immediacy, we believe, sets too constricted a path to the berth. Instead, we hold that an approach should be understood by its ordinary terms, and that its scope is derived from custom and practice at the particular port in question.

Bouchard Transportation Co. v. Tug Gillen Brothers, 389 F. Supp. 77 (S.D.N.Y. 1975), is helpful in defining the geographic scope of an approach. It partially concerned a claim by a barge owner against the terminal owner for negligence in failing to maintain a safe approach and to warn of an unsafe condition. *Id*. at 79. The District Court there found that the approach began when the barge—traveling mid-channel up the Hudson River—altered its heading such that it was on a straight course to the terminal, which was the normal practice for ships docking there. *Id*. at 80. While executing this procedure, the barge grounded, its hull was punctured, and oil was lost.[25] *Id*. at 80-81. *Bouchard* concluded that the terminal owner "was negligent in failing to maintain the approach to its terminal, in

[25] The grounding in *Bouchard* occurred "immediately adjacent to the ballast dock," approximately 50 feet away. 389 F. Supp. at 81. This "immediately adjacent" language, however, does not refer to the beginning of the approach, but the location of the hazard within the approach. The District Court in our case adopted this language—citing *Western Bulk Carriers*, 1999 U.S. Dist. LEXIS 22371, at *20—as a "reasonable definition of 'approach.'" *In re Frescati*, 2011 WL 1436878, at *4. We believe this interpreted *Bouchard* incorrectly.

particular that area outside the river channel and within its dominion and control, normally utilized as the southerly approach to its ship dock, free of obstruction and safe for vessels approaching said terminal." [26] *Id*. at 81.

Less instructive, but still worth exploring, is *P. Dougherty Co. v. Bader Coal Co*., 244 F. 267 (D. Mass. 1917). There, an invitation to use a particular dock in a charter party was construed to "extend[] to the approaches to the dock, and to the water which would naturally be traversed or used by a vessel discharging there." *Id*. at 270 (citing *Hartford & N.Y. Transp. Co. v. Hughes*, 125 F. 981 (S.D.N.Y. 1903)). Although *P. Dougherty* is of limited usefulness on its facts (the Court was interpreting the parties' express agreement to use the dock), its conclusion that the wharfinger's obligation covered "individual approaches," distinguished from "the common channel," is nonetheless helpful. *Id*. More recently, *MS Tabea Schiffahrtsgesellschaft mbH & Co. KG v. Bd. of Com'rs of the Port of New Orleans*, No. 08-3909, 2010 WL 3923168, at *2 (E.D. La. Sept. 29, 2010), *aff'd*, 434 F. App'x 337 (5th Cir. 2011), similarly defined the approach as "the area through which vessels travel in order to move from the main channel of the river to the berth." *See also McCaldin v. Parke*, 37 N.E. 622, 624

[26] CARCO argues that this reference to "dominion and control" is a prerequisite to *Bouchard*'s holding. We do not view control as a requirement, but as a fact of that case where the port was also deemed negligent for failing to warn of shallow waters in an area directly off its dock where it had previously dredged. 389 F. Supp. at 80, 83. Instead, in relying primarily on *Smith v. Burnett*, *Bouchard* held that the terminal owner simply "had a duty to ascertain any imminent dangers to [the ship] as it approached." *Id*. at 83. Further, to any extent *Bouchard* does suggest that control is required, we disagree for the reasons explained below.

(N.Y. 1894) (determining that a cluster of rocks "not in any channel which had to be used to approach the wharf," but potentially "in that part of the river used for general navigation," was not within the approach).

In light of these cases, we are persuaded by the suggestion in the maritime industry associations' *amici* brief that an approach should be afforded its plain meaning. *See* Mar. Indus. Ass'ns *Amici* Br. at 20. As a noun, "approach" is defined as "a drawing near in space or time," and "a way, passage, or avenue by which a place or a building can be approached." *Webster's Third New Int'l Dictionary* 106 (1971). This suggestion is persuasively illustrated by *amici's* reference to an airplane on final approach or a golf ball approaching the green. Both examples capture the intuitive meaning of the term as the beginning of a final, linear path to a fixed point. In fact, *Webster's* specifically incorporates those examples into its definition, listing "a golfing stroke from the fairway for the green," "the steps and motion of a bowler before he delivers the ball," and the "descent of an airplane toward a landing strip." *Id*.

What is an approach should be given its same plain meaning in the maritime context; when a ship transitions from its general voyage to a final, direct path to its destination, it is on an approach. This is the most logical construction, and it comports with those cases suggesting that an approach should be gleaned from actual practice. *See, e.g.*, *Bouchard*, 389 F. Supp. at 80-81 (concluding that the approach began where vessels departed the channel on a direct course to the receiving dock and defined it pursuant to the area "normally utilized"). It also reflects the definition used in the maritime industry. For example, *The Mariner's Handbook* defines "approaches" as "[t]he waterways

that give access or passage to harbours, channels, and similar areas." J.A. Petty, *The Mariner's Handbook* 226 (8th ed. 2004). Further, in most cases it will not result in a line-drawing problem, a concern raised by CARCO and shared by the District Court. Entire rivers, bays, and oceans will not be transformed into approaches. Instead, in most instances the approach will begin where the ship makes its last significant turn from the channel toward its appointed destination following the usual path of ships docking at that terminal. This analysis will necessarily vary on the characteristics of a particular port, and there will be close and difficult cases. Accordingly, we believe it may be useful to analogize the final approach of a vessel to a port to that of a driveway leading to a home from the public road.[27] It is the last segment of the voyage leading directly to the host's door. Marine navigation is further complicated in that ships sometimes have the luxury of approaching through a variety of different courses across open water. Yet, so long as a ship is not approaching in an illogical, unreasonable, or disallowed manner, it will be deemed

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[27] In *Smith v. Burnett*, the United States Supreme Court quoted a Massachusetts Supreme Court case making a similar comparison where a defendant failed to warn a schooner of a rock it knew of adjacent to its wharf.

> This case cannot be distinguished in principle from that of the owner of land adjoining a highway, who, knowing that there was a large rock or a deep pit between the traveled part of the highway and his own gate, should tell a carrier, bringing goods to his house at night, to drive in, without warning him of the defect, and who would be equally liable for an injury sustained in acting upon his invitation, whether he did or did not own the soil under the highway.

173 U.S. at 434 (quoting *Carleton v. Franconia Iron & Steel Co.*, 99 Mass. 216, 219 (1868) (internal quotation marks omitted)).

within its approach when it is within this final phase of its journey.

ii. Was the *Athos I* Within the Approach to CARCO's Terminal When the Accident Occurred?

Fortunately, the case before us is not one of the difficult ones, for the facts indicate that the *Athos I* was within the approach when it struck the anchor. First, the vessel was following the usual path for ships of its size docking at CARCO's terminal, having turned away from the channel at the usual point and was being pushed by two tugboats in a straight path toward CARCO's pier. Moreover, there were other indicators that the *Athos I* had ceased navigating generally and was within the final phase of its travel, namely that it was rotated sideways and, as noted, assisted by tugs. While not dispositive factors, these trappings indicate that the *Athos I* was no longer voyaging, but was configured solely for docking.

To the extent CARCO argues that the sphere of control exercised by it should be used to limit the scope of its duty,[28] we hold that a failure to exercise control

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[28] In further support of this position, CARCO cites to *Sonat Marine Inc. v. Belcher Oil Co*., 629 F. Supp. 1319 (D.N.J. 1985), *aff'd*, 787 F.2d 583 (3d Cir. 1986) (table). That case, however, does not apply on its facts, and uses a wharfinger's assumption of control to *expand*, rather than *limit*, the scope of its liability. Specifically, that wharfinger took the initiative secretly to widen its approach because "it recognized that larger vessels had problems entering the barge berth and required a greater margin of safety." *Id*. at 1322. Insofar as the terminal operator had "assumed sufficient control over that area to attempt to ensure a proper approach to the ship and barge terminal," *id*. at 1327, it was deemed negligent for "fail[ing] to use means adequate[, such as side scans or wire drags,] to ensure that the new area where it

over an area is not conclusive in this analysis. The appeal of The *Moorcock* long-ago dispatched this argument.[29] [1889] 14 P.D. 64 (Eng.). The steamship *Moorcock* was invited to be discharged and loaded at a particular wharf where it would be moored alongside the wharfingers' jetty. *Id*. at 64. Although the ship was expected to rest on the bottom of the River Thames at low tide, the particular section of riverbed was not actually under the wharfingers' control. *Id*. at 69. Even so, the Court explained that it "d[id] not follow that [the wharfingers] are relieved from all responsibility. They are on the spot." *Id*. at 70. It continued:

> No one can tell whether reasonable safety has been secured except themselves, and I think if they let out their jetty for use they at all events imply that they have taken reasonable care to see whether the berth, which is the essential part of the use of the jetty, is safe, and if it is not safe, and if they have not taken such reasonable care, it is their duty to warn persons with whom they have dealings that they have not done so.

Id.; *see also The Cornell No. 20*, 8 F. Supp. 431, 433 (S.D.N.Y. 1934) ("However, it is clear that the obligation of the wharfinger is not limited to the area of the land under water actually owned by it. . . . It impliededly [sic] represents to the master of a vessel

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thought larger barges could safely go was free of obstructions," *id*. at 1325. Control aside, the District of New Jersey Court also noted that a "safe approach to the berth had to include the additional . . . area." *Id*. at 1326.

[29] That the appeal of *The Moorcock* was operating under a theory of an implied contractual warranty does not reduce its import for purposes of this analysis. [1889] 14 P.D. 64 at 68 (Eng.).

who is induced to bring his vessel to its wharf that the berth and immediate access to it are reasonably safe for the vessel.").

In addition, insofar as the sphere of responsibility exercised by CARCO is a voluntary assumption of duty, it cannot be relied on to restrict the scope of a port owner's duty as a matter of law. Limiting a wharfinger's responsibility to areas in which it has affirmatively assumed responsibility would allow it to define the scope of its own liability regardless of the port's actual approach. Such a construction plays poorly against a policy that places logic and common sense over self-serving limitations of liability in the tort context. Moreover, we are not convinced that CARCO was actually precluded from extending its area of responsibility into the Anchorage. The record reflects that permission to it was not required for sonar scans, for example, and the record lacks an indication that CARCO could not have obtained a dredging permit for the Anchorage if it desired to do so.

We conclude that the *Athos I* was well within the approach to CARCO's terminal when the casualty occurred, and that it therefore had a duty to exercise reasonable diligence in providing the *Athos I* with a safe approach.

iii. Potential Breach of Duty to Maintain a Safe Approach

Having determined that the *Athos I* was within its approach when it was damaged and that CARCO therefore owed it a safe approach, did CARCO satisfy that duty by exercising the standard of care required of a reasonable wharfinger under the circumstances? Although the "the nature and extent of the duty of due

care is a question of law," factual issues predominate here as they do in most negligence litigation. *Redhead v. United States*, 686 F.2d 178, 182 (3d Cir. 1982). Thus, we review findings of negligence as factual findings for clear error. *See In re Moran Towing Corp.*, 497 F.3d 375, 377-78 (3d Cir. 2007); *Andrews v. United States*, 801 F.2d 644, 646 (3d Cir. 1986). As noted, there were no findings.

Negligence exists where there was a "fail[ure] to exercise that caution and diligence which the circumstances demanded, and which prudent men ordinarily exercise." *Grand Trunk R.R. v. Richardson*, 91 U.S. 454, 469 (1875). The admiralty context is no different, requiring "reasonable care under the particular circumstances." 1 Schoenbaum, *supra*, § 5-2, at 253 (citation omitted); *see also Smith*, 173 U.S. at 436 (remarking that wharfingers are "bound to use reasonable diligence" (citation and quotation marks omitted)). In admiralty, the particular duty required under any given circumstance can be gleaned from statute, custom, or "the demands of reasonableness and prudence." 1 Schoenbaum, *supra*, § 5-2, at 253 (citing *Pennsylvania R.R. v. S.S. Marie Leonhardt*, 202 F. Supp. 368, 375 (E.D. Pa. 1962), *aff'd*, 320 F.2d 262 (3d Cir. 1963)). Of course, "the degree of care which the law requires in order to guard against injury to others varies greatly according to the circumstances of the case." *Richardson*, 91 U.S. at 469-70.

On the facts before us, we are insufficiently informed to delineate the exact standard of care required by CARCO,[30] let alone whether there was a

[30] In evaluating the specific nature of this duty, the parties point to no statute on point and our research reveals none. As to custom, it "is only evidence of a standard of care[,] and violation of custom or adherence to it does not necessarily constitute

breach of that standard (a.k.a. duty). That task rests with the District Court on remand should it need to reach the negligence claim.

iv. Causation

On remand, the District Court will also need to determine whether the failure, if any, to meet the standard of care proximately caused the accident. "Questions of causation in admiralty are questions of fact." *Stolt Achievement, Ltd. v. Dredge B.E. LINDHOLM*, 447 F.3d 360, 367 (5th Cir. 2006); *see also In re Nautilus*, 85 F.3d at 116 (reviewing, in

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negligence or lack of negligence." *In re J.E. Brenneman Co.*, 322 F.2d 846, 855 (3d Cir. 1963) (citations omitted); *Norton v. Ry. Express Agency, Inc.*, 412 F.2d 112, 114 (3d Cir. 1969) ("Although not controlling, custom and practice may be shown to establish the standard of care to which the party charged with the wrongful act may be required to conform.").

The District Court also determined that no industry custom would have "put CARCO on notice that it should scan into the Anchorage." *In re Frescati*, 2011 WL 1436878, at *4. It is unclear if this apparent factual finding refers to other River terminals not searching their full approaches, federal waters generally, or Anchorage Number Nine specifically. Unfortunately, a review of the record leaves us similarly adrift. While several trial witnesses testified that they did not know of any Delaware River terminal taking precautionary action within federal waters, the Chief of Operations Division for the U.S. Army Corps of Engineers suggested that at least one terminal had surveyed the federal waters preceding its berth. *See* DePasquale Test. 104:20-105:13, Oct. 6, 2010. Ultimately, the record is unhelpful on this point because we do not know if any of the terminals on the River had an approach that also traversed federal waters like CARCO's did. Of course, the only relevant consideration for custom would be similarly situated terminals, and we are unable to make any meaningful assessment of industry custom on these facts.

admiralty, a district court's determination as to causation for clear error).

The purpose of requiring proximate cause is "to limit the defendant's liability to the kinds of harms he risked by his negligent conduct." 1 Dan B. Dobbs *et al*., *The Law of Torts* § 198, at 681 (2d ed. 2011) (citations omitted). Proximate cause is something of a misnomer in that it "is not about causation at all but about the appropriate scope of legal responsibility." *Id*. at 682. Instead, "proximate cause holds that a negligent defendant is liable for all the general kinds of harms he foreseeably risked by his negligent conduct and to the class of persons he put at risk by that conduct." *Id*. at 682-83; 1 Schoenbaum, *supra*, § 5-3, at 260-61 ("[T]he injury or damage must be a reasonably probable consequence of the defendant's act or omission.").

CARCO argues that proximate cause is lacking on these facts because the presence of an anchor in the anchorage was not foreseeable, especially by virtue of other ships arriving unharmed in the past. Once again, we decline to resolve this issue on the record before us. CARCO further argues that proximate cause is lacking on the basis that the anchor-dropper was the actual cause of the accident. It is clear, however, "'that there may be more than one proximate cause of an injury.'" *Serbin v. Bora Corp*., 96 F.3d 66, 75 (3d Cir. 1996) (quoting *Davis v. Portline Transportes Mar. Internacional*, 16 F.3d 532, 544 (3d Cir. 1994)).

More crucially, the issue is whether the accident would have been prevented had CARCO exercised its duty to act as a prudent wharfinger within the approach. At a minimum, this requires "that the injury would not have occurred without the defendant's

negligent act." 1 Schoenbaum, *supra*, § 5-3, at 259. Here, the causation inquiry turns on whether prudent behavior—had it been exercised, a factual inquiry—would have prevented the injury. *See* Dobbs *et al*., *supra*, § 184, at 620. In light of CARCO's invitation that the *Athos I* arrive drafting 37 feet or less, *see supra* Part IV.C, it may be that the anchor lay sufficiently deep such that it would not have been detected even if CARCO had acted as a prudent wharfinger. Conversely, it could be the case that—even if the 37 feet of contractual clearance were provided—CARCO's duty as a wharfinger required something more. Should this be put in issue, further inquiry must occur as to what diligence was required of a prudent wharfinger, and only then can the District Court determine whether a failure to implement those procedures proximately caused the accident.[31]

Therefore, because factual issues remain to be resolved if Frescati's negligence claim becomes relevant, we also remand for further proceedings, as necessary, on this claim.

B. Negligent Misrepresentation

Frescati argues that CARCO's failure to inform the *Athos I* of the reduction in maximum draft at its facility's ship dock prior to the vessel's arrival was a negligent misrepresentation. The District Court held otherwise, reasoning that "the area of concern was not the area where the casualty occurred and the draft at

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[31] We note that the District Court was "not convinced that had the area been scanned the anchor would perforce have been detected . . . ." *In re Frescati*, 2011 WL 1436878, at *4. We interpret the Court's remark as contemplating the effort required to detect the anchor absent an incident, as the anchor was in fact discovered with the use of side-scan technology.

the berth was factually irrelevant to the casualty." *In re Frescati*, 2011 WL 1436878, at *5. We reach essentially the same result.

Negligent misrepresentation stems from a failure to exercise reasonable care in supplying incorrect information during the course of a business transaction. *Coastal (Berm.) Ltd. v. E.W. Saybolt & Co., Inc.*, 826 F.2d 424, 428 (5th Cir. 1987) (citing *Grass v. Credito Mexicano, S.A.*, 797 F.2d 220, 223 (5th Cir. 1986)). The receiving party must rely on that false information and thereby suffer injury. *Id.* at 428-29 (citing same). This formulation, set out by § 552 of the Restatement (Second) of Torts, implicitly incorporates the standard elements of negligence: duty of care, a breach of that duty, injury, and causation. *See J.E. Mamiye & Sons, Inc. v. Fid. Bank*, 813 F.2d 610, 615 (3d Cir. 1987); 1 Schoenbaum, *supra*, § 5-2, at 252.

CARCO initially explained in its Port Manual that the allowable maximum draft at its Paulsboro facility was 38 feet, but this "may change from time to time and should be verified prior to the vessel's arrival." J.A. at 1095 (CITGO Terminal Regulations for Vessels ¶ 2). On November 22, 2004, four days before the *Athos I* arrived, CARCO's Port Captain Rankine announced internally that "the maximum draft at Paulsboro berth #1 (ship dock) has been reduced to 36-00 feet." J.A. at 1702. No one informed the *Athos I* of the change (and apparently its personnel did not inquire). This meant that the *Athos I* would have to enter CARCO's port under an exception to the maximum draft, and in any event Port Captain Rankine was comfortable with this because the *Athos I* would not be lying in the shallower area next to its dock that motivated the

draft reduction.[32] Rankine Test. 41:22-42:3, Nov. 22, 2010.

On its terms, the reduction was limited to CARCO's ship dock. Although Frescati argues that the *Athos I* would not have berthed at CARCO's facility (its actual ship dock, but not the approach to it through the Anchorage) so early in the rising tide if its crew had known of the reduction in maximum allowable draft, this is irrelevant to its decision to enter Anchorage Number Nine—the site of the submerged anchor.

In this context, any misrepresentation about the ship dock is factually irrelevant to the accident because it did not occur at the dock, but rather 900 feet out in the Anchorage. There was no injury sustained that resulted from the failure to note the draft reduction at or immediately adjacent to CARCO's dock. Frescati's negligent misrepresentation claim thus fails on its merits as a matter of law.

VI. Effect of the Government's Settlement With CARCO

In its limited settlement agreement with the Government, CARCO promised not to

> demand that the court reduce or offset the damages awarded to the United States against

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[32] Rankine testified that such exceptions are common in the industry, and that he was not concerned for the *Athos I* because a ship drafting 37'3" had sat through low water just ten days before without harm. Rankine Test. 38:22-23, 41:22-42:9, Nov. 22, 2010. When the trial judge inquired about the rationale for making regular exceptions, Rankine replied that he was required by the guidelines to make the reduction, but that he did not "have any worries about the depth of water in the area where the ship was going to sit." *Id*. at 45:18-25.

> [CARCO] in the Lawsuit based on evidence that the negligence or fault of the United States in failing to detect, mark and/or remove underwater obstructions to navigation in the navigable waters of the Delaware River caused or contributed to the ATHOS I Incident.

J.A. at 95 (Release ¶ 3.1(b)). It thus asks us to preclude CARCO on remand from raising any equitable defense premised on the Government's regulation of the Anchorage. CARCO responds that it retained unspecified equitable defenses relevant to defending against, *inter alia*, the contractual claims, and that the Government conflates defenses to these claims with violations of CARCO's promise to forbear making claims against the Government sounding in tort to reduce or offset damages awarded to it.[33]

The Government also argues that the District Court mistakenly denied its earlier motion for summary judgment on CARCO's defense of equitable recoupment,[34] as that defense was really just a

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[33] The Government argues that CARCO has attempted to circumvent this partial settlement agreement by presenting against it negligence claims couched as equitable defenses. CARCO explicitly retained "the right to raise affirmative defenses under any theory or doctrine of law or equity, the right to assert setoff or recoupment and the right to assert compulsory or non-compulsory counterclaims other than a Claim for Contribution or Indemnity . . . ." J.A. at 97 (Release ¶ 4.2). It was further agreed that the partial settlement would have no force as to CARCO's suit with Frescati. *Id*. at 97-98 (Release ¶ 4.3).

[34] Equitable recoupment is "[a] principle that diminishes a party's right to recover a debt to the extent that the party holds money or property of the debtor to which the party has no right." *Black's Law Dictionary*, *supra*, at 618. The competing claims must arise from the "same transaction." *Phila. & Reading Corp.*

disguised attempt for indemnity or contribution payments. After hearing oral argument, the District Court denied the Government's pretrial motion on the ground "that the question of subrogation defenses [by CARCO] is better resolved with the benefit of a full trial record." J.A. at 101. CARCO claims that the Government failed to follow up at trial, and thus waived the issue. We agree, as we see no indication that the Government renewed its argument at trial (or argued before us how the issue has not been waived). Thus, we decline to preclude CARCO from revisiting any previously raised equitable defense to the Government's subrogation claims.

VII. Conclusion

Although remand is appropriate because the District Court failed to set out separate findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52(a)(1), our legal conclusions also make it necessary to remand for factual findings.

We conclude that the *Athos I*, and Frescati as its owner, are beneficiaries of CARCO's contractual safe berth warranty. This was an express assurance that CARCO's port would be safe for the *Athos I* within the scope of its invitation—that is, drafting 37 feet or less. Therefore, on remand it will need to be determined whether this amount of clearance was actually provided. This analysis may require inquiries into the arriving draft of the *Athos I* and, if the vessel was drafting more than the agreed-upon depth of 37 feet, the depth and positioning of the anchor.

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v. United States, 944 F.2d 1063, 1075 (3d Cir. 1991) (quoting *United States v. Dalm*, 494 U.S. 596, 608 (1990)).

CARCO's assertion of the named port exception is unavailing. Even if it were eligible on the type of notice given to the *Athos I*, its crew did not have an opportunity to accept a hazard (the anchor) that was unknown to the parties prior to the accident, and the exception is inapplicable.

We further conclude that, as this case is primarily a contractual one, analysis of Frescati's negligence claim is required only if the contractual safe berth warranty of CARCO is deemed satisfied. In that event, because we conclude that the accident occurred within the approach to CARCO's terminal, the District Court would need to determine the appropriate standard of care, whether it was breached, and, if so, was that breach a cause of the spill. The negligent misrepresentation claim, however, fails for lack of factual causation because the alleged misrepresentation applied to an area unrelated to the accident.

Finally, we conclude that the Government has waived its reliance on its partial settlement agreement in challenging CARCO's defenses to liability.

We thus affirm in part, vacate in part the District Court's judgment orders of April 12, 2011 against Frescati and the Government, and remand for further proceedings consistent with this opinion. Further appeals relating to this case will be referred to the current panel.

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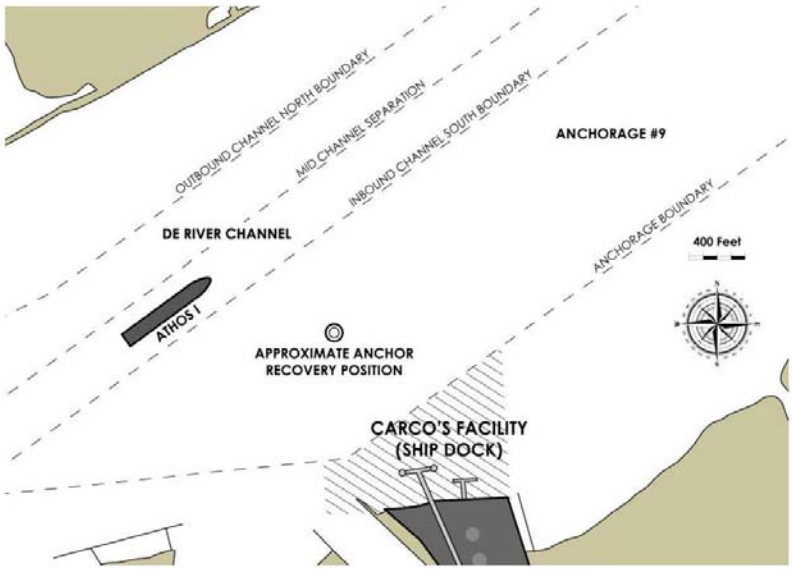
Appendix A



APPENDIX D

UNITED STATES DISTRICT COURT,
E.D. PENNSYLVANIA

Civil Action Nos. 05-cv-00305-JF, 08-cv-02898-JF

IN RE PETITION OF FRESCATI SHIPPING COMPANY, LTD., AS OWNER OF THE M/T ATHOS I AND TSAKOS SHIPPING & TRADING, S.A., AS MANAGER OF THE ATHOS I FOR EXONERATION FROM OR LIMITATION OF LIABILITY.

UNITED STATES OF AMERICA

v.

CITGO ASPHALT REFINING COMPANY, CITGO PETROLEUM CORPORATION, AND CITGO EAST COAST OIL CORPORATION.

April 12, 2011

ADJUDICATION

FULLAM, Senior District Judge.

On November 26, 2004, the single-hulled tanker *ATHOS I* was traveling up the Delaware River, nearing the end of a 1900-mile journey from Puerto Miranda, Venezuela to Paulsboro, New Jersey. Approximately 900 feet from the dock of the refinery where it was to discharge its cargo, the tanker struck a submerged nine-ton object that ripped two holes in the hull. Some 200,000 barrels of heavy crude oil spilled into the river, with devastating ecological

results. The United States government launched a multi-agency response to the disaster, at great cost but with marked success. The issue to be decided by this Court, one explored in exhaustive detail during 41 days of a non-jury trial, is whether the companies associated with the refinery, CITGO Asphalt Refining Company, CITGO Petroleum Corporation, and CITGO East Coast Oil Corporation (collectively, "CARCO") may be held responsible for the clean-up costs and the losses associated with the damage to the ship. For the reasons explained below, I conclude that they may not. I have set forth in narrative fashion my findings of fact (as determined by a preponderance of the credible evidence) and conclusions of law.

The Litigation

On January 21, 2005, Frescati Shipping Company, Ltd., as owner of the *M/T ATHOS I*, and Tsakos Shipping & Trading, S.A., as manager of the *ATHOS I* (collectively, "Frescati") filed a "Petition for Exoneration from or Limitation of Liability" pursuant to 46 U.S.C. § 183, in connection with claims by the government or others affected by the spill. In the limitation action, filed at Civil Action No. 05-305, CITGO Asphalt Refining Company filed a claim for damages associated with the spill (as did others), and Frescati filed a counterclaim against all three CARCO entities. The United States government later filed a separate action against CARCO at Civil Action No. 08-2898. Frescati and the government resolved their differences, and many claims were settled through administrative proceedings. The trial before the Court comprised all claims by Frescati and the government against CARCO. As the government's claims are based upon its status as statutory subrogee to the contract-based

claims raised by Frescati, they will not be discussed separately.

The Ship, the Contracts, and the Cargo

The *ATHOS I* was a Panamax-sized tanker[1] with a beam of 105 feet, six inches, and a length of 748 feet. It sailed under the flag of Cyprus and was chartered by Frescati to Star Tankers, Inc., as part of a pooling agreement or time charter. Star Tankers chartered the ship to CARCO with the terms summarized on a "Fixture Recap" dated November 12, 2004. The Fixture Recap incorporated the standard industry form known as "ASBATANKVOY" and included additional terms; it did not specify the port other than as a "safe port" in the United States or the Caribbean. On November 15, 2004, the master of the *ATHOS I*, Captain Iosif Markoutsis, received a "Fixture Note" that confirmed the ship would discharge at a safe port in the United States. The load port was designated as Puerto Miranda, Venezuela.

Star Tankers and CARCO executed a formal "Charter Party," dated November 12, 2004, with an addendum dated December 8, 2004 providing that the laws of the United States govern the contract. The Charter Party (sometimes referred to as a "Voyage Subcharter") was prepared on the standard ASBATANKVOY form and included warranties that the vessel would proceed to the discharging port "or so near thereunto as she may safely get (always afloat) and deliver said cargo," and that the vessel would discharge "at any safe place or wharf" designated by the Charterer, "provided the Vessel can proceed

[1] A Panamax-sized ship is one that is the maximum size able to sail through the Panama Canal.

thereto, lie at, and depart therefrom always safely afloat." Ex. P-357.

Upon arriving at Puerto Miranda, the *ATHOS I* loaded slightly more than 300,000 barrels of heavy crude oil from facilities owned by PDVSA Petroleo, S.A. (the parent company of CARCO). As loading was completed, Captain Markoutsis was presented with the bill of lading for the voyage. The front of the bill of lading form contained spaces for certain information to be filled in for the specific voyage. In the spaces available for the insertion of information concerning the Charter Party, the word "NIL" (meaning "nothing") appeared several times.

The reverse side of the bill of lading included a series of preprinted clauses, one of which specified that English law would govern any disputes. The bill of lading also included language that the cargo was "to be delivered at the Port of Paulsboro, New Jersey, or, so near thereto as the vessel can safely get, always afloat...." Ex. P-375.

Captain Markoutsis signed the bill of lading on November 19, 2004, but also issued two letters of protest dated the same day. One letter noted a discrepancy of 310.53 barrels between the vessel's records and the bill of lading, Ex. P-381, and the other protested that the bill of lading did not record the date of the Voyage Subcharter of November 12, 2004, which the master requested that PDVSA Petroleo record on the original bills of lading, Ex. P-380. The *ATHOS I* left Puerto Miranda on November 20, 2004.

The Site of the Casualty

At approximately 9:02 p.m. on November 26, 2004, the Delaware River docking pilot was on board the *ATHOS I* and tug boats were maneuvering into

position when the ship began to list to the port side and oil was observed in the water. The *ATHOS I*, although damaged, remained afloat; it did not run aground at any point. The cause of the disaster is uncontested to the extent that all parties agree that the *ATHOS I* struck a submerged object. Although the object is always referred to as an anchor, the shank had been removed at some point before the object was deposited in the river, so that it could not be used as a ship's anchor (and, because any identifying marks would have been on the shank, its owner could not be traced). No evidence as to how the anchor came to rest in the river was proffered at trial, but there is supposition that it may have been used as part of dredging operations. There is no evidence that any party to this litigation—Frescati, CARCO, or the government—knew or had reason to believe that the anchor was in the river, although it is well-known that all sorts of objects that present a potential danger to navigation lurk beneath the surface of the waters. The parties stipulated that the anchor had been in the river since at least 2001, as close examination of a sonar scan conducted that year by researchers from the University of Delaware reveals the anchor in approximately the same spot where the *ATHOS I* came to grief, in an area of the Delaware River known as Federal Anchorage No. 9 or the Mantua Creek Anchorage ("the Anchorage").[2]

By federal law, the United States Army Corps of Engineers bears the responsibility of keeping the Anchorage dredged to a depth of 40 feet, lest it become too shallow for commercial navigation. The testimony at trial was to the effect that the government does not

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[2] The Anchorage is approximately 2.2 miles long from north to south. N.T. Nov. 10, 2010 at 68 (P. Myhre).

regularly survey the Anchorage for possible hazards to navigation, but that if a hazard is brought to the government's attention it will be removed if feasible, or mariners will be notified of its location.

At trial, each side blamed the other for the casualty. The plaintiffs contend that CARCO is liable in tort under the theories of wharfinger negligence and misrepresentation, because CARCO failed to survey for obstructions into the Anchorage and because CARCO failed to notify the crew of the *ATHOS I* that CARCO recently had determined that the maximum draft (i.e., the distance from the bottom of the ship to the surface of the water) that would be accepted at its berth had been reduced from 38 feet to 36 feet. The *ATHOS I* had a draft of at least 36 feet, six inches, and thus, according to the plaintiffs, had Captain Markoutsis known of the change, the *ATHOS I* either would not have attempted to reach the berth, would have attempted to decrease the ship's draft before moving upriver, or would have scheduled the passage to arrive at high tide. Frescati also argues that CARCO is liable under the Charter Party and the bill of lading on various contract and warranty theories.

The defendants argue that the blame lies with Frescati (because the *ATHOS I* was in poor condition, its draft was significantly more than 36 feet, six inches, and its crew failed to engage in proper voyage planning that would have brought the ship in at the proper stage of the tide); with the government (because the Anchorage is solely its responsibility); or with the unknown former owner of the anchor (because the hazard to navigation was abandoned without notifying anyone).

After carefully considering all of the evidence, I conclude that CARCO is not liable in either tort or contract.

The Tort Claims

Negligence

The government maintains, correctly, that it has no statutory or regulatory duty to scan the Anchorage for hazards to navigation (although it may have assumed a duty through course of conduct, *see Japan Line, Ltd. v. United States*, 1976 AMC 355 (E.D.Pa.1975), *aff'd* 547 F.2d 1161, 1977 AMC 265 (3d Cir.1976)). The absence of a duty on the part of the government, however, does not mean that a duty then falls upon CARCO.

"It is well settled that a terminal operator such as [CARCO] does not guarantee the safety of vessels coming to its docks." *In re Complaint of Nautilus Motor Tanker Co.*, 862 F.Supp. 1260, 1275 (D.N.J.1994) (citation omitted), *aff'd*, 85 F.3d 105 (3d Cir.1996). CARCO does have the duty to furnish a safe berth, including determining whether there are hidden hazards that it could have located with the exercise of reasonable care and inspection. *Id*. CARCO did inspect its berth; beyond that

> "there is no duty on the part of the wharfinger to provide a berth with safe surroundings (other than an entrance and exit) or to warn that hazards exist in its vicinity...." [*Trade Banner Line, Inc. v. Caribbean Steamship Co.*, 521 F.2d 229, 230 (5th Cir.1975)]. The duty to provide a safe berth and approach does not create a duty to make safe "adjacent areas." [*Sonat Marine, Inc. v. Belcher Oil Co.*, 629 F.Supp. 1319, 1327 (D.N.J.1985), *aff'd*, 787 F.2d 583)].

Id. Frescati argues that the location of the casualty was within the approach to the berth because ships berthing at the CARCO terminal naturally would traverse the area where the anchor was found. *See P. Dougherty Co. v. Bader Coal Co*., 244 F. 267, 270 (D.Mass.1917) (a case in which the ship grounded five or six feet from the dock). But the definition of "approach" that Frescati urges the Court to adopt is unreasonably expansive. Although the docking pilot was aboard the *ATHOS I*, the ship was in an area of the Anchorage open for the passage of all ships, not an area used exclusively, or even primarily, by vessels docking at the Paulsboro refinery. From 2000 to 2004, a total of 673 vessels anchored in the Anchorage (including repeat visits from the same vessel), and in 2004 alone, 121 different cargo vessels anchored in the Anchorage. N.T. Nov. 10, 2010 at 47, 53 (P. Myhre). In 2004, 42 vessels docked at CARCO's terminal (including repeat visits from the same vessel). Ex. D-586. Although not all of these ships would have passed through the area that Frescati contends CARCO should have scanned, the volume of traffic illustrates that CARCO had no control over the use of the Anchorage. To accept Frescati's argument would have the effect of potentially expanding the definition of "approach" to the entire Anchorage or to the entire Delaware River. A more reasonable definition of "approach" is the area "immediately adjacent" to the berth or within "immediate access" to the berth. *Western Bulk Carriers, K.S. v. United States*, Civ. S-97-2423, 1999 U.S. Dist. LEXIS 22371, at *19-21, 1999 WL 1427719 (E.D.Cal. Sept. 14, 1999) (citing cases). Under these definitions, the Anchorage was not within the approach to CARCO's berth, and CARCO did not have the legal obligation to survey there.

Frescati also argues that CARCO could have scanned the relevant area of the Anchorage for as little as $10,000, and that such a scan would have detected the presence of the anchor that posed a danger to the *ATHOS I*, a single-hulled tanker that CARCO invited to its berth. Frescati asks the Court to apply the formula first stated by Judge Learned Hand in *United States v. Carroll Towing Co*., 159 F.2d 169, 173 (2d Cir.1947), by weighing whether the burden of adequate precautions is less than the gravity of the injury discounted by the probability that the injury will occur. *See In re City of New York*, 522 F.3d 279, 284 (2d Cir.2008). Judge Hand's formula does not seem to have been accepted in this Circuit, but in any event I do not find it useful here. So far as the evidence at trial shows, neither industry custom nor government regulation would have put CARCO on notice that it should scan into the Anchorage. I am not convinced that had the area been scanned the anchor would perforce have been detected, and although the gravity of the injury is undoubtedly severe, I cannot find that the burden of adequate precautions falls upon CARCO rather than upon the government or upon whoever abandoned the anchor. I thus conclude as a matter of law that CARCO had no duty to scan for hazards within the Anchorage and is not responsible for the harm caused by the anchor.[3]

Misrepresentation

William Rankine, CARCO's Senior Port Captain at Paulsboro in 2004, made the decision to lower the

[3] In so holding, I find unpersuasive Frescati's citation to New Jersey law governing the liability of business owners. This case is governed by maritime principles, and the cases cited are insufficiently analogous.

acceptable draft at the berth from 38 feet to 36 feet on November 22, 2004. Frescati argues that the failure to notify the *ATHOS I* of this change constituted a material misrepresentation upon which the ship's captain relied to the plaintiffs' detriment, because the ship, with a draft of more than 36 feet, six inches, would not have attempted to reach the berth or would have traveled at a different stage of the tide.

The evidence shows that the decisions regarding the timing of the Delaware River passage were made by the *ATHOS I*, not CARCO. The decision to change the draft at the berth was not made in anticipation of the arrival of the *ATHOS I* but because the refinery's "season" was ending (the *ATHOS I* was the last ship scheduled to arrive at Paulsboro until the following spring); the change was an internal one made in expectation of the end of the season, to allow the maintenance crew to perform dredging if necessary. N.T. Nov. 22, 2010 at 16-18, 39, 47 (W.Rankine). The change of the controlling draft did not in any way affect the depth of the water at the berth; nor did it affect the berthing window (the stage of the tide at which ships could berth safely). More important, the decision was based on CARCO's concern over increased silting outside of the area where the ship would float when lying at the berth, an area also outside of the Anchorage. N.T. Nov. 22, 2010 at 42 (W.Rankine). In other words, the area of concern was not the area where the casualty occurred and the draft at the berth was factually irrelevant to the casualty.

Accordingly, even if the change in draft and the noncommunication of it to Frescati constituted a misrepresentation, which I do not find, it would not have been a material misrepresentation and it did not cause the loss. *See Nautilus Motor Tanker Co*., 862

F.Supp. at 1270 ("Since there is no nexus between what did or did not happen in the ship berth and the accident, the shoaling [in the berth] and its cause are irrelevant."). The same is true of any other information that Frescati claims should have been provided by CARCO. To the extent that Frescati attempts to recast these claims as a breach of an express or implied warranty, I find that no warranty was breached, and that the berth was safe for the *ATHOS I*.

The Contract Claims

Frescati (and the government as its subrogee) also claim that CARCO is liable under contract. Both the Charter Party and the bill of lading include what are commonly known as safe port and safe berth warranties, where the designated port or berth is one that the ship can reach, safely afloat. Frescati, which is not a party to the Charter Party, seeks to invoke the safe port and safe berth clauses of that contract as an intended third-party beneficiary. In this case, there was no testimony from representatives of either CARCO or Star Tankers that Frescati was an intended third-party beneficiary of the contract. Star Tankers, not Frescati, assumed the role of owner of the *ATHOS I* for purposes of the voyage. There was also testimony to the effect that Frescati and Star Tankers are engaged in an arbitration in London over Frescati's claims for damage to the *ATHOS I*, persuasive evidence that Frescati has its own contractual remedy, rather than status as a third-party beneficiary. Nor do I find persuasive Frescati's argument that because the Charter Party included a provision that the master would sign bills of lading in the form set forth in the Charter Party (requiring that the shipment would be carried pursuant to the terms of the Charter Party),

Frescati became a beneficiary of the Charter Party or can rely upon the bill of lading.

In maritime cases, a bill of lading may function as a contract or simply as a receipt, depending upon the circumstances. When the bill of lading is negotiated to a third party not subject to the terms of a charter party, the bill of lading may become a contract of carriage. *See Asoma Corp. v. SK Shipping Co*., 467 F.3d 817, 823-24 (2d Cir.2006). Here, the shipper was PDVSA Petroleo, which arguably negotiated the bill of lading to CARCO, but as CARCO was a party to the Charter Party, the bill of lading did not then become a contract. Frescati also argues, however, that Captain Markoutsis signed the bill of lading and endorsed it with the ship's seal, manifesting an intent to sign on behalf the vessel's owners. I do not find that the evidence, including the testimony of Captain Markoutsis, supports this argument.

Moreover, even if Frescati did have the benefit of the safe port and safe berth warranties, I find that CARCO did not breach any contractual warranties.[4] I do not agree with the cases cited by Frescati that would interpret the warranties as an unconditional guarantee, in effect imposing strict liability upon the wharfinger. Instead, I find more persuasive the view of the Court of Appeals for the Fifth Circuit that "a charter party's safe berth clause does not make a charterer the warrantor of the safety of a berth. Instead the safe berth clause imposes upon the charterer a duty of due diligence to select a safe berth."

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[4] The parties dispute whether English or U.S. law applies. I find that the choice of law does not affect the result, but for purposes of this discussion I have accepted Frescati's position that U.S. law applies.

Orduna S.A. v. Zen-Noh Grain Corp., 913 F.2d 1149, 1156-57 (5th Cir.1990). CARCO fulfilled its duty of due diligence, and I also find that the port and berth were generally safe. Hundreds of vessels anchored in the Anchorage during the time the anchor is known to have been in the river. Although it is not possible to determine exactly how many ships passed over the anchor's location, nonetheless, the volume of commercial traffic that passed without incident through the Anchorage suggests that the port is safe. With regard to the CARCO berth specifically, during 2004, vessels docked at Paulsboro 42 times. Ex. D-586. On 25 occasions, vessels either arrived or departed from the CARCO berth with a draft of at least 36 feet, six inches, without incident. N.T. Nov. 22, 2010 at 16 (W.Rankine). One vessel, the *NEW RIVER*, arrived on November 16, 2004, just days before the *ATHOS I*, with a draft of 36 feet, 11 inches, and departed with a draft of 37 feet, three inches. The *NEW RIVER* completed loading just before low water and sat at the berth through low water without any problem. N.T. Nov. 22, 2010 at 44-45 (W.Rankine). Based on the evidence, I conclude as a matter of law that the port and the berth were safe for commercial tankers with a draft of 36 feet, seven inches, which Frescati maintains was the draft of the *ATHOS I*.

I am also persuaded by CARCO's argument that the named-port exception precludes a finding of liability pursuant to the warranties. Under this doctrine, "[w]hen a charter names a port [or berth] and the master proceeds there without protest, the owner accepts the port [or berth] as a safe port, and is bound to the conditions that exist there." *Bunge Corp. v. M/V FURNESS BRIDGE*, 558 F.2d 790 (5th Cir.1977). Frescati argues that the existence of the anchor was not "reasonably foreseeable" and thus the named port

doctrine does not apply. *See Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 387 (2d Cir.2003).

I conclude that Frescati was sufficiently familiar with the port. Between April 1, 1998 and December 9, 2004, 14 vessels operated by Tsakos called at the Paulsboro refinery (including the *ARAMIS*, sister ship to the *ATHOS I*)[5] and a total of 70 Tsakos-operated vessels came into the Delaware River. N.T. Nov. 10, 2010 at 45-46 (P. Myhre). Although the anchor itself was not known to Frescati, the existence in general of lost or abandoned objects in the river was well disseminated through notices to mariners. Accordingly, even if Frescati can claim the benefit of the safe port and safe berth warranties, CARCO did not breach the warranties and neither Frescati nor the government can recover in contract.

Notes on Other Evidence

The parties devoted much time at trial to questions that I have found unnecessary to my decision, including the questions of whether the *ATHOS I* violated various laws and regulations such that it was responsible for the casualty; whether the *ATHOS I* had sufficient under-keel clearance (the distance from the bottom of the ship to the riverbed), as determined in part by whether the anchor was in a "flukes up" or "flukes down" position, etc. Because it may be of some use to the parties, I add the following comments. With regard to the position of the anchor, I found most of the expert testimony, particularly the evidence of computer "modeling", unpersuasive. The most useful

[5] Other Tsakos ships referenced during the trial included the *PORTHOS* and the *D'ARTAGNON*.

evidence regarding the anchor's position came from Peter Traykovski, who analyzed sonar scans and concluded that the anchor was lying with its flukes down both in 2001 and after the casualty, which is persuasive evidence that the anchor tended to remain in that position, rather than at a 65° angle with the flukes up. Although it is safe to say that the crew of the *ATHOS I* did not devote the care and attention to preparation of the voyage planning that might have been advisable, I am not persuaded that these errors caused the ship to strike the anchor. After hearing all of the evidence, I am of the opinion that the fault for the casualty lies with the anchor's former owner, who abandoned it in the river without notifying anyone. Finally, although I did not reach the issue of damages, I note that the testimony of the witnesses was compelling with regard to the complexity and difficulty of the oil spill response, and that costs were monitored to the best extent possible under the circumstances.

Conclusion

I have considered all of the arguments in favor of liability against CARCO raised by Frescati and the government, and to the extent that any are not addressed specifically in this adjudication they have been rejected.

Appropriate orders will be entered.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11-2576

IN RE: PETITION OF FRESCATI SHIPPING COMPANY, LTD., AS OWNER OF THE M/T ATHOS I AND TSAKOS SHIPPING & TRADING, S.A., AS MANAGER OF THE ATHOS I FOR EXONERATION FROM OR LIMITATION OF LIABILITY

No. 11-2577

UNITED STATES OF AMERICA,
Appellant

v.

CITGO ASPHALT REFINING COMPANY; CITGO PETROLEUM CORPORATION; CITGO EAST COAST OIL CORPORATION

Appeal from the United States District Court
for the Eastern District of Pennsylvania

(D.C. Civil Action Nos. 2-05-cv-00305 / 2-08-cv-02898)

Trial District Judge: Honorable John P. Fullam
District Judge: Honorable Joel H. Slomsky*

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* Judge Slomsky was assigned to this matter following the retirement of Judge Fullam, who presided at trial and ruled on the merits.

Before: McKEE, *Chief Judge*, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, Jr., VANASKIE, SHWARTZ, and O'MALLEY[**] *Circuit Judges*

PETITION FOR REHEARING *EN BANC*

The petition for rehearing filed by Appellees, having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing by the panel and the Court en banc is DENIED.

By the Court,

/s/ Thomas L. Ambro
Circuit Judge

Dated: July 12, 2013

[**] Honorable Kathleen M. O'Malley, United States Court of Appeals for the Federal Circuit, sitting by designation.