

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

**EAGLE E&R LLC,
Plaintiff,**

V.

**SPECIALITY DIVING OF LOUISIANA,
INC., *et al.*,
Defendants.**

CIVIL ACTION: 1:20-00417-KD-C

ORDER

This matter is before the Court on the Plaintiff's motion for partial summary judgment (Docs. 110, 113), the Defendants' Response (Docs. 124, 125), and the Plaintiff's Reply (Doc. 128).

I. Findings of Fact¹

This litigation is the result of disputes stemming from June 2019 maritime contracts executed by Plaintiff Eagle E&R, LLC (Eagle), Defendant Specialty Diving of Louisiana, Inc. (Specialty Diving) and Defendant Specialty Offshore, Inc. (Specialty Offshore) (collectively Specialty), through which Specialty chartered dredging-related vessels from Eagle. These contracts include Charter Party contracts for the EDWARD G (dredge) and the CRISTI (dredge tender). (Doc. 44; Doc. 110-1 at 6 (Dep. Wallace at 6)).²

1 The facts are taken in the light most favorable to the non-movant. Tipton v. Bergrohr GmbH–Siegen, 965 F.2d 994, 998–999 (11th Cir. 1992). The “facts, as accepted at the summary judgment stage of the proceedings, may not be the actual facts of the case.” Priester v. City of Riviera Beach, 208 F.3d 919, 925 n. 3 (11th Cir. 2000). Additionally, the Court has limited the facts set forth in this Order to only those relevant to the issues/claims for which summary judgment relief is sought.

2 Deborah Wallace is the owner and president of Specialty Diving of Louisiana, Inc. and Specialty Offshore, Inc. (Doc. 110-1 at 6 (Dep. Wallace at 7-8)).

A. The EDWARD G Charter Contract

Eagle is the owner of the EDWARD G dredge. (Doc. 110-1 at 6-7 (Dep. Wallace at 6); Doc. 110-1 at 2-3 (Decltn. Simmons)).³ Eagle purchased the dredge in 2017 for \$268,000 from non-party Gulf Sand and Gravel, Inc. (Gulf Sand). After purchasing the dredge, Eagle rebuilt the dredge pump (new housing, new parts, bearings, etc.) and the parts were purchased through the Metso distributor. (Doc. 124-18 at 3 (3/20/20 Sanchez email to Whitmer)). Subsequently, a dispute arose between Eagle and non-party Gulf Sand regarding the condition of the dredge (and the repairs and modification Eagle had to make). This dispute resulted in state court litigation between Eagle and Gulf Sand, in the Circuit Court of Baldwin County, Alabama for breach of contract, unjust enrichment, and fraud/misrepresentation claims. (Doc. 114-2).⁴

On August 15, 2018, a marine survey for appraisal valuation of the dredge was conducted by Childs Dunbar of New Orleans Marine Services LLC. (Doc. 124-8 at 2-12). According to the survey findings, the dredge was in acceptable and satisfactory operating condition -- suitable for its intended service -- with a valuation of \$1,750,000 as its estimated market value and \$2,500,000 as its estimated replacement value. (*Id.*)

On June 27, 2019, Eagle and Specialty executed a Charter Party contract for Specialty to charter the EDWARD G from Eagle for \$59,000/month with the rate continuing until the dredge is redelivered to Eagle "in like good order and condition as when received[]" -- unless lost. (Doc. 110-1 at 21-27 (the contract); Doc. 110-1 at 9 (Dep. Wallace at 49-51); Doc. 1 at ¶9). During the

³ Charles Simmons is the Vice President of Operations for Eagle. (Doc. 110-1 (Decltn. Simmons)).

⁴ On occasion, for ease of reference and to provide a more complete picture of the parties' factual allegations, the Court has cited to Eagle's exhibits in opposition to Specialty's motion for summary judgment (Doc. 122 *set seq*) and Specialty's exhibits submitted in support of its motion (Doc. 114 *et seq*) as each party's briefing cross-references the other's summary judgment motions, arguments, and exhibits in support.

charter term, Specialty had exclusive possession of, and control over, the dredge; selected and paid the crew; provided all the food, fuels, stores, and other necessities; and obtained insurance for the dredge. (Doc. 110-1 at 9 (Dep. Wallace at 51-52)).

Relevant terms of the contract include the following:

... An On-charter survey was conducted and the following deficiencies will have to be corrected as per Schedule A (attached) prior to (1) above applying [delivery provision].

... Upon termination of this Charter, the Dredge shall be delivered by Charterer, at Charterer's expense, to Owner ... at which time the Dredge will be surveyed to determine if any damage has occurred to said Dredge. Charterer shall be responsible for the repair of any such damages and as further set out in Paragraph 8 ...

... The initial term of this Charter shall be for a period of 1 month commencing...June 26, 2019 and ending ... July 26, 2019 ... If the Charterer is not in default of this Charter, this Charter shall continue on a month-to-month bases ... Charterer and Owner are given the express right to terminate this Charter by delivery of written notice to the other party at least ... fourteen (14) days written notice to the other party at any time...

... Charterer shall pay Owner charter hire ... \$59,000 ... per month ... Charter hire shall continue at the rate stated until the Dredge is redelivered to Owner, unless lost, in like good order and condition as when received...

... Charterer shall at its own expense insure the Dredge ... for the joint account of Owner and Charterer as their respective interests may appear, naming both as an insured....naming owner as additional insured and loss payee...

... In connection with Charterer's use or operation of the Dredge ... Charterer agrees...to defend, indemnify and save harmless the Owner from any and all claims, demands, liens, cause of actions asserted against the Dredge and all expenses because of same or suffered in connection therewith ...

... Charterer ... agrees that upon expiration or termination of this Charter for any reason whatsoever that ... equipment and apparel will be immediately returned to the Owner ... unless the Dredge is lost, in like good order and conditions as when received, ordinary wear and tear resulting from proper use excepted and Charterer shall be liable for any and all injury and damages to the Dredge, her equipment and apparel whatsoever and howsoever caused during the term of this Charter, it being understood that this is a demise Charter of the Dredge. Charter Hire is to continue

in the event the Dredge is returned in a damaged condition for the reasonable repair period required to repair said damage ...

... Neither the Charterer nor Charterer's representative shall have any right or authority to create, incur or permit to be imposed upon the Dredge any lien whatsoever and Charterer agrees to carry a true copy of this Charter on board the Dredge, which on demand shall be exhibited to any person having business with the Dredge for any supplies, fuel, repairs or anything of any nature that would give rise to a lien on the Dredge. Charterer agrees to advise all persons furnishing supplies, repairs, fuel or necessities to the Dredge that neither the Charterer nor the Charterer's representative has any authority to authorize, incur or permit any lien of any kind or character to be levied against said dredge and that it is prohibited under the terms of this Charter from so doing ...

... No alteration to the Dredge should be made without prior written consent of the Owner. All repairs and maintenance to the Dredge are to be provided by the Charterer at its expense ...

... Charterer shall defend, indemnify and save harmless the Dredge and the Owner from any and all claims suits, demands, charges and loss of all kind and character and liens of all kind and character asserted against the Dredge and said equipment and the Owner arising from use or operation of same by Charterer or while same is or was in Charterer's custody, constructive or otherwise, Should ... attached levied upon or seized or held under legal or lawful lien or taken or taken in custody by or charge, Charterer shall within ten days thereafter cause the Dredge to be released and the lien discharged. It is agreed that this clause does not authorize the creation or sufferance of liens or attachments of any kind or character to be given on the Dredge ...

... The parties agree that should any dispute arise between them, same shall be litigated in the courts of the State of Alabama, which courts shall have exclusive jurisdiction. The parties further agree that should any dispute arising between them or any action or matter arising out of or concerning this Charter, same shall be governed solely by the laws of the State of Alabama, both parties submitting to exclusive jurisdiction of the Courts of the State of Alabama ...

(Doc. 110-1 at 21-27 at ¶¶2-3, 5-9, 13, 18).

Per the attached Schedule A (Pre-Inspection Deficiency List of Dredge Equipment), Eagle agreed to correct certain deficiencies identified by Specialty as follows:

- Change all fluids including bearings
- Provide all cables as needed
- Fix Turbo on Generator
- Hydraulic lines, which look like they could go anytime
- Pins for ladder are very worn
- Compartments that are in bad shape
- Fuel needs to be changed or cleaned
- All new oils and filters
- Safety Cables for Hand Rails need to be put on
- Change all batteries-
- Repack Stuffing Boxes on Dred pump and Tug boat

The above following items have to be done either by the Lessee (Owner) or the Lessor. If the Lessor addresses these items, the amount of cost of labor and supplies will be deducted from the First Lease Payment.

These items must be corrected prior to Charterer taking delivery.

EQUIPMENT MUST BE DELIVERED TO LESSEE IN GOOD OPERATING CONDITION TO PERFORM THE TASK IT WAS DESIGNED FOR. IF EQUIPMENT WILL NOT PERFORM WITHIN 15% OF THE ORIGINAL SPECIFICATIONS THEN THE LESSOR WILL BE RESPONSIBLE FOR ALL REPAIRS TO BRING THE EQUIPMENT BACK TO THE EXPECTED PERFORMANCE IN THE FIRST 30 DAYS OF OPERATION. DURING THIS TIME OF REPAIRS, THERE WILL BE NO RENT DUE. RENT WILL COMMENCE UPON ALL REPAIRS COMPLETED AND SIGNED OFF BY BOTH LESSEE AND LESSOR.

8.3

AFTER THIRTY (30) DAYS OF CONTINUOUS OPERATION LESSOR MAKES NO WARRANTIES OR REPRESENTATIONS, EXPRESS OR IMPLIED, AS TO THE MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OF THE EQUIPMENT OR ANY OTHER REPRESENTATION OR WARRANTY WITH RESPECT TO THE EQUIPMENT. LESSOR REPRESENTS AND WARRANTS THAT IT HAS THE RIGHT TO LEASE THE EQUIPMENT AS PROVIDED IN THIS LEASE

(Doc. 110-1 at 26 (Schedule A)). Additionally, per Schedule A's Section 8.3, once the EDWARD G operates for 30 consecutive days, it becomes Specialty's responsibility to make any needed repairs. (Id.; Doc. 110-1 at 8 (Dep. Wallace at 46-47)).

On July 24, 2019, Specialty (Roland Maturin (Maturin)) issued a notice to Eagle detailing costs incurred due to non-performance of the dredge. (Doc. 110-1 at 51). On July 26, 2019, Specialty (Marshall Whitmer (Whitmer)) emailed Eagle (Michael Sanchez (Sanchez), Richard Perry (Perry), Deborah Wallace (Wallace) and Maturin), complaining about the condition of the dredge and to make Eagle aware of the amount of money Specialty was spending trying to keep it running, stating that the companies needed to coordinate and work it out as Eagle owed Specialty \$65,810.37: "[b]ecause of the lack of being maintained and preparation for rental on Eagle's part, and because of on-going problems related to lack of Eagle's preparation and maintenance." (Doc. 110-1 at 39 (Dep. Whitmer at 63-64); Doc. 110-1 at 56-57 (7/26/19 email); Doc. 124-26 (emails)).

In response, Sanchez requested that Specialty provide a copy of the maintenance log and invoices for the dredge. (Doc. 110-1 at 55-56). Whitmer then emailed Sanchez, directing him to read the contract, Schedule A and Paragraph 2. (Doc. 110-1 at 55). On July 29, 2019, Specialty emailed Eagle that the dredge was "still not right" and it has "to monitor" it to keep it from sinking. (Doc. 110-1 at 53; Doc. 110-1 at 62 (Dep. Maturin at 67)). On July 30, 2019, Sanchez emailed Specialty (Whitmer, Wallace, Maturin, Simmons, Perry) stating "I understand the frustration of things not going to plan and appreciate the willingness to work towards solution[,]proposing counter-invoices for the repairs. (Doc. 124-13 at 4).

At that time, Specialty was aware of problems with the dredge but did not terminate the contract with Eagle. (Doc. 110-1 at 62 (Dep. Maturin at 65-66); (Doc. 110-1 at 41 (Dep. Whitmer at 70)). Per Specialty, it did not terminate even though it could have under the contract terms because: "[w]e were hoping that we could keep working with Eagle. We ... had contracts. We had a dredge. If they would work with us, we would keep repairing the dredge and get their dredge up in really good operational condition which would be a bonus for them. Also, they would be getting funds to put it toward their bank note and we would be making money with it so that we could move forward and stay in the dredging business." (Doc. 110-1 at 40 (Dep. Whitmer at 65)). At some point, Maturin also notified Eagle that the dredge had a hole in its hull that had apparently been fixed with a life jacket and a two-by-four. (Doc. 114-7 at 12 (Dep. Maturin at 152)).

On September 24, 2019, an insurance policy, with an effective date of June 30, 2019, issued with Specialty as the insured and Eagle as the certificate holder, listing the EDWARD G with an insured value of \$1,500,000. (Doc. 110-1 at 86-88). Eagle, as the listed certificate holder, is the loss payee and additional insured, and the waiver of subrogation applies to Eagle. (*Id.* at 87).

Per Maturin, the dredge had problems from June 29, 2019 - February 14, 2020. (Doc. 124-25 at 3 (Dep. Maturin at 53)). These problems were identified as follows by Maturin:

June 29, 2019- July 28, 2019 Dredge ... arrive at coast guard dock Galveston, TX routine inspection reveals all fluids are contaminated with water all have to be changed. clutch on dredge not engaging, no speed control on dredge, cracks on suction pipe, leak on stern tank with life vest wedged 2 X 4 to slow leak. ... brought to Mike Sanchez attention after he visited jobsite on or about July 22.

July 31, 2019 August 31, 2019 equipment moved to Houston clutch on dredge still not fixed, cutterdrive leaking badly, dredge taking on water on both sides. Eagle notified, of problems another visit by Sanchez. Divers attempted to put splash zone on leak area. Verbally indicated to Eagle the dredge would have to be drydock to address the leaks. Houston cement finished by August 15, 2019. Could not find a dry dock to repair the dredge. Had to wait till Sept 1 closest place with slot was Galveston.

Feb 14, 2020 Suction pipe fails due to wear, Sanchez indicates the pipe had been replaced before Specialty began use of dredge. At time of failure Specialty had dredged less than 200,000 yards of material (not enough material to wear pipe to less than quarter thickness} Eagle notified of a estimate to repair once repairs began it was found that more pipe had to be replaced which drove the cost up.

Feb 24, 2020 The pump shaft main bearings failed, the assembly was brought to local machine shop. The machine shop indicated the bearings where manufactured in the 70's. After further investigation it was found that the pump assembly was manufactured during the same period. Only two dredges had that pump assembly, the other is owned by coastal dredging of Slidel, La. According to Coastal the pumps were manufactured for a phosphorus mine in Florida, the threads are of a special ... type. No machine shops could manufacture the threads or even balance the impeller.

Eagle had informed Specialty the pump had been completely refurbished before lease. However the impeller had excessive wear and NO new impeller had been available so the worn out impeller must have been left in the pump. Between the worn out impeller and the 70's bearings, this is what caused the failure. Upon contacting Eagle it was found that the spare parts list provided to Specialty could not be used without extensive modifications. In addition Eagle did not have the bearings indicated on the parts list provided (see June 4th spare list) See email from Charles to bring parts to Pearce for repair.

(Doc. 124-25 at 4).

In or around September 2019, Maturin sent Eagle a letter disputing a \$49,500 invoice that Eagle billed for the month of September 2019, detailing various issues with the condition of dredge that had been noted in mid-July 2019 (void tank, clutch on main engine, dredge taking on water, etc.), stating that he had been in "constant dialogue" with Simmons (Eagle) "throughout all of this[,]" referencing the quote for \$11,500 in necessary repairs, noting that the cutter drive motor needs to be rebuilt or replaced, and asserting that "the condition of the equipment leased from Eagle has been seriously misrepresented from the beginning and Specialty has continued to attempt to work with you throughout this entire process. We will be amiable to move forward but we will not take the liability and costs it is requiring to get it operational." (Doc. 124-6 at 1-2).

On October 2, 2019, Whitmer sent a letter to Sanchez again referencing the issues and costs the dredge had cost them "which is of no fault of Specialty[,]" because the agreement was "that you would furnish equipment that will work as needed, and unfortunately, it has not since the inception." (Doc. 114-13 at 1). Specialty then explained its modifications to the dredge to get it operable and increase its value, adding that the modifications were discussed with Eagle's representative Charles Simmons (Simmons) and so they were not done without Eagle's knowledge or approval, and requested an adjustment to Eagle's invoice. (Id.)

As of October 8, 2019, Specialty received an email from Eagle that stated that all items -- regarding the dredge -- that needed to be addressed or repairs were completed, and that any maintenance and repairs going forward belong to Specialty as confirmed by Eagle (per Sanchez); to which Specialty responded it was good news and "we will abide by the contract." (Doc. 110-1 at 12 (Dep. Wallace at 77-79)). Specialty continued to use the dredge subject to the respective

agreements at that time and did not relinquish control or possession of the dredge to Eagle. (Id. (Dep. Wallace at 79)).

On October 21, 2019, Sanchez emailed Wallace about the unauthorized design change to the dredge (including a prior mid-October 2019 email) referencing billing disputes, hull repairs to the dredge, and other items -- expressing disbelief that Specialty performed unauthorized design modifications to the dredge without Eagle's authorization. (Doc. 124-14 at 1-4).

On November 4, 2019, Berkley Offshore insurance issued a marine insurance policy to insure Specialty from October 1, 2019 - October 1, 2020 for the dredge. (Doc. 124-24 at 1-74).

In response to a November 5, 2019 letter from Eagle, Specialty stated that Simmons knew about the dredge modifications and made no objections, and that Specialty will not pay rental for the time the repairs were being made because Eagle "knew of the need for repairs and possibility that the vessel could sink if not performed yet did nothing to address[] [p]rior to leasing the vessel to Specialty, Eagle was aware of the problems with the hull but failed to repair or inform Specialty of the problems. Had Eagle been honestly forth coming with this, Specialty would have required the repairs be made before Chartering[.]" (Doc. 124-17 at 1). Per Specialty, it "has been transparent during this whole agreement, had the dredge been in the proper working order as represented by Eagle, we would not be having this conversation. I want to be perfectly clear. Specialty is willing to work through these issues, however if Eagle wants to take an adverse position Specialty will take the same position and proceed accordingly." (Id.)

On November 19, 2019, Specialty sent an email to Sanchez regarding "Issues with Dredge Corrected by Specialty" listing 13 issues identified with the dredge (and with the CRISTI and equipment) that Specialty had to correct. (Doc. 110-1 at 12-13 (Dep. Wallace at 80-81)). Even

with these issues however, Specialty did not terminate the contract and continued to use the vessel when operational. (*Id.* at 13 (Dep. Wallace at 81)). Additionally, Specialty was interested in purchasing the vessel "to just end the relationship with Eagle and...continue....[to] stop pouring money into it[.]" (*Id.* (Dep. Wallace at 81-82)).

In February 2020, the dredge pipes failed and problems with the dredge pump occurred (failure on the shaft bearing and impeller was missing pieces). (Doc. 110-1 at 65-66 (Dep. Maturin at 129-130, 137)). Specialty conducted repairs and had the dredge fully repaired and operated the dredge in dredging operations thereafter without pump problems, continuing to use the dredge until the Summer of 2020. (*Id.* at 65-66 Dep. Maturin at 130-131, 137)). Despite these problems, Specialty never attempted to terminate the charter. (*Id.* at 66 (Dep. Maturin at 137)).

On March 16, 2020, Maturin emailed Whitmer regarding the dredge repairs, stating that it "has been down for repairs due to bearing failure[]" and that "it was found that the bearing[s] were manufactures [sic] in the 1970s.....the pump was manufactured within the same time period. NONE of the parts to repair the pump ...will fit that pump[]" even though Eagle presented the year the dredge was manufactured as 2008. (Doc. 124-8 at 13; Doc. 114-7 at 11 (Dep. Maturin at 149). Maturin then referenced a 2018 marine survey by Childs Dunbar on the dredge (Doc. 124-8 at 2-12), indicating it was built in 2008, adding that it is "clearly misleading as Specialty had no reason to believe that the pump is over 40yrs old....any and all costs will have to be charge[d] to Eagle...." (Doc. 124-8 at 13). On March 17, 2020, Whitmer emailed Sanchez stating that Specialty would not make any payments until verification of the age of the dredge was resolved and the correct dredge pump was obtained, and that "the problems...are your responsibility." (Doc. 124-18 at 4).

From March 20-25, 2020, Sanchez and Whitmer communicated via email about repairing the dredge. (Doc. 124-18 at 1-5). Specialty noted that it was trying to get the dredge running but explaining that the dredge "was represented as a Different year than the parts are. This is not our problem that you all were not aware of this...Trying to fix what was not what was represented...and has never operated continually...We have lost Millions of Dollars of revenue because of these problems....these parts are for equipment years older than what was represented....." (Id. at 1). On March 20, 2020, Whitmer emailed Sanchez stating that Specialty wanted to resolve the problems but the dredge needs to be put on other work or returned to Eagle, adding "I believe that you [Eagle] all got taken [by Gulf Sand] but that is up to you all to resolve. The dredge is not what was rep[re]sented to us and so that creates a challenge..." (Id. at 3). Sanchez responded via email to Whitmer, explaining as follows: after Eagle purchased the dredge from Gulf Sand in September 2017, it rebuilt it (new housing, new parts, bearings, etc.) and the parts were purchased through the Metso distributor; the August 2018 survey is accurate the dredge pump was totally rebuilt with new impeller, new pump housing and parts and new bearings and drive components in 2018; there is no documented agreement to provide Specialty spare parts and Specialty has still not paid Eagle for the spare parts supplied; the dredge had been in Specialty's possession since July 2019 without a bearing failure; and maintenance is Specialty's responsibility and the dredge "has long passed the 30 day continuous operation window (October 2019) AND operating at high pump rates[]" -- adding that Specialty "ha[s] no documented maintenance program for the dredge...that you are leasing..." (Doc. 124-18 at 3-4). Eagle further noted that Specialty had failed to make any payment arrangements on the unpaid invoice of \$49,500 and stated that if the money was not

wired/received, it terminated the charter contract per Section 15, and would take necessary legal action to repossess the dredge. (Id. at 4).

On March 26, 2020, in response to the payment request from Eagle, Whitmer emailed Eagle stating the dredge has been down for some time and is costing Specialty \$38-46,000/day and "will not consider paying anything till this problem is rectified....[by] eagle ...fixing these problems. But as stated before it is an Eagle problem." (Doc. 124-15). On April 6, 2020 Whitmer emailed Eagle again stating it would not be paying anything for Eagle's equipment "which has been mis[re]presented to us and you have not done anything to resolve the problems." (Doc. 124-19 at 1-2). "We have been out of pocket over \$350,000.00 fixing your Dredge which was mis[re]presented to us....the age of the dredge...was not what you represented to us....we will not pay for something that is not what it was represented..." (Id.) Sanchez responded via email stating that Whitmer was misinformed and was making erroneous claims. (Id. at 1). On May 25, 2020, Whitmer issued a letter to Sanchez identifying \$322,880.38 in expenses that Specialty had unexpectedly incurred due to deficiencies in the dredge and for the "Dredge not being what it was represented[]" (Doc. 124-21 at 2).

On June 3, 2020, Specialty received a termination of Charter Party and cease and desist letter from Eagle terminating the Charter Party contract, at which point Specialty canceled the contract and "the relationship with Eagle deteriorated beyond communications." (Doc. 110-1 at 11, 15-16 (Dep. Wallace at 67, 109, 114); Doc. 124-22). The letter detailed the issues Eagle raised with Specialty. (Doc. 124-22). Per Specialty, Eagle was within its rights to terminate the contract in the manner that they did. (Doc. 110-1 at 15 (Dep. Wallace at 110)).

On June 16, 2020, Specialty filed a notice of a claim of lien on the EDWARD G dredge with the National Vessel Documentation Center of the U.S. Coast Guard in the amount of **\$295,636.10** for unpaid vessel repairs, which Eagle alleges placed a cloud on the title of the dredge and has impaired its use and marketability. (Doc. 44 at 3-4 at ¶12-14; Doc. 110-1 at 16 (Dep. Wallace at 114-115); Doc. 110-1 at 80-82 (the Notice of Lien)). Per Specialty, the lien was filed to document and protect its interests, as it spent hundreds of thousands of dollars from January 1, 2020 through April 15, 2020, constantly fixing the equipment on the EDWARD G during the charter contract. (Doc. 110-1 at 16 -17 (Dep. Wallace at 114, 117-118)).

The expenses set forth on the lien include \$180,176.31 for payroll (amounts Specialty paid its employees while the dredge was inoperable) and \$35,000 for 42 days of equipment rental (*e.g.*, tanks, anchors, portable toilets, forklift, etc.) which was part of the dredging operation -- *i.e.*, Wallace testified that of the amount specified on the lien of \$61,650.17 for the equipment was related to repairs (parts and supplies), but that the \$35,000 for equipment rental and payroll costs were not incurred in the performance of any repairs on the dredge but "due to it being inoperable." (Doc. 110-1 at 17-18 (Dep. Wallace at 119-124); Doc. 110-1 at 84). Per Wallace, Specialty filed this lien though it was aware of a provision in the charter contract prohibiting Specialty from incurring a lien on the dredge. (*Id.* at 16 (Dep. Wallace at 115)). However, Wallace agrees that if the dredge was operable as represented for 30 straight days before the expenses described in the lien were incurred by Specialty, then Specialty would be responsible for those costs -- not Eagle. (*Id.* at 17 (Dep. Wallace at 116-117)). Wallace testified however, that Eagle breached the contract

by failing to comply with Schedule A and due to its misrepresentations about the dredge's condition to Specialty. (Doc. 110-1 at 19 (Dep. Wallace at 129-130)).⁵

On July 9, 2020 Specialty returned the dredge to Eagle. (Doc. 110-1 at 3 (Decltn. Simmons). Per Eagle, the dredge was in a substantially damaged condition and had been improperly modified without written consent. (Doc. 44 at 5).

B. The CRISTI Dredge Tender Charter Contract

Eagle owns the CRISTI, a dredge tender. (Doc. 110-1 at 6 (Dep. Wallace at 6; Doc. 110-1 at 3 (Decltn. Simmons))). On June 27, 2019, Eagle and Specialty entered into a charter contract for Specialty to charter the CRISTI from Eagle for \$9,000/month. (Doc. 110-1 at 29-35; Doc. 110-1 at 10 (Dep. Wallace at 54-55)). The contract was a month to month charter which allowed either party to terminate the contract on 14 days written notice. (Doc. 110-1 at 11 (Dep. Wallace at 66)). During the term of the charter contract, Specialty had exclusive possession of, and control over, the CRISTI; selected and paid the crew; provided all the food, fuels, stores, and other necessities; insured the dredge; and had exclusive control of its operations and navigation. (*Id.* (Dep. Wallace at 55-56)). The contract terms for the CRISTI Charter Party contract are essentially the same as those for the EDWARD G, except for the term and rate of pay. See supra Section I.A. See also (Doc. 110-1 at 29-35 at ¶¶2-3, 5-9, 13, 18).

Additionally, per the attached Schedule A (Pre-Inspection Deficiency List of Dredge Equipment), Eagle agreed to correct the specific deficiencies listed by Specialty. See supra Section I.A. See also (Doc. 110-1 at 34 (Schedule A)). Schedule A (Section 8.3) provides that

⁵ Maturin testified that the "misrepresentations" were that Eagle had equipment that it turned out it did not have, thickness of the suction pipe that failed in February 2020 (that it had been changed and was 3/8 inch), the dredge pipe (that it had been replaced), replacement of bearings on the pump, and the condition of the pump). (Doc. 110-1 at 66-67 (Dep. Maturin at 139-143)).

once the CRISTI operates for 30 consecutive days, it would be Specialty's responsibility to make any repairs. (Id.) The CRISTI Schedule A is identical to the EDWARD G Schedule A because the same Schedule A covers "both the dredge boat and tug/support boat." (Id.)

Whitmer testified that there were problems with the dredge tender after it was picked up from Eagle: namely, the CRISTI's transmission (Doc. 110-1 at 38-39 (Dep. Whitmer at 60-61)). Additionally, Whitmer testified that Eagle did not fix a number of items in Schedule A before the dredge tender was picked up -- "those weren't done....It had to continue working for 30 days without any problems or breakdowns, and at that point Specialty would be responsible. They never made that 30 days." (Doc. 110-1 at 40, 46 (Dep. Whitmer at 65-66, 68, 136)). As to whether Specialty has any written documentation establishing that the dredge tender was not operational for a consecutive 30 days, it has none, because all maintenance logs were kept on the CRISTI which sank. (Doc. 110-1 at 40 (Dep. Whitmer at 66-68)).

Additionally, Maturin testified that there were problems with the CRISTI from the start, but because Eagle had already spent a large amount of money to move the dredge tender to the job site, Specialty wanted to continue the charter and keep possession of the CRISTI. (Doc. 110-1 at 61 (Dep. Maturin at 62-63)). Per Maturin, Eagle also arranged a repair plan for the CRISTI because it was not fully operational. (Id. at 61 (Dep. Maturin at 64)).

On July 12 or 13, 2019, Specialty discovered the steering on the CRISTI would not work, it was missing flanking rudders (which would have been originally installed but were not present), and the transmission and heat exchanger had to be repaired. (Doc. 110-1 at 39 (Dep. Whitmer at 61-62)). Eagle repaired the main steering, the transmission, and the heat exchanger, but did not replace the flanking rudders. (Id. (Dep. Whitmer at 62-63)). On July 24, 2019, Maturin issued a

notice to Eagle detailing the costs that Specialty had incurred due to non-performance of the dredge tender (and EDWARD G and a tug) in the amount of \$135,310.07. (Doc. 110-1 at 51). On July 26, 2019, Whitmer emailed Eagle (Richard Perry and Deborah Wallace) complaining about the condition of the CRISTI, to make it aware of the amount of money Specialty was spending (that Eagle owed \$65,810.37) trying to keep their equipment running and the cost, and that they needed to coordinate and work it out: "[b]ecause of the lack of being maintained and preparation for rental on Eagles part, and because of on-going problems related to lack of Eagle's preparation and maintenance." (Doc. 110-1 at 39 (Dep. Whitmer at 63-64); Doc. 110-1 at 49 (7/26/19 emails)). Per Specialty, the equipment was still not right and it had to monitor the dredge tender to keep it from sinking. (Id.; Doc. 110-1 at 62 (Dep. Maturin at 67)).

Per Specialty, it did not terminate the contract at that time within 14 days written notice, as it could have, because they were hoping to keep working with Eagle: "[w]e had contracts. We had a dredge. If they would work with us, we would keep repairing the dredge and get their dredge up in really good operational condition which would be a bonus for them. Also, they would be getting funds to put it toward their bank note and we would be making money with it so that we could move forward and stay in the dredging business." (Doc. 110-1 at 40 (Dep. Whitmer at 65)). Per Eagle, as of July 29, 2019, Specialty was aware of a number of problems with the dredge tender. (Doc. 110-1 at 41 (Dep. Whitmer at 70); Doc. 110-1 at 53-58)).

On July 30, 2019, Sanchez emailed Specialty (Whitmer, Wallace, Maturin, Simmons, Perry) stating "I understand the frustration of things not going to plan and appreciate the willingness to work towards solution[]" and proposing counter-invoices for the repairs. (Doc. 124-13 at 4).

On September 24, 2019, an insurance policy (effective date of June 30, 2019) issued with Specialty as the insured and Eagle as the certificate holder, listing the CRISTI valued at \$288,250. (Doc. 110-1 at 86-88). Eagle is the named loss payee and additional insured, and the policy includes a waiver of subrogation applicable to Eagle as the certificate holder. (*Id.* at 88).

Even in its purported condition, Specialty used the CRISTI in dredging operations before October 2019 (when it became fully operational) because it could be used for dredging with one engine. (Doc. 110-1 at 61-62 (Dep. Maturin at 64-65)). In October 2019, the CRISTI became fully operational. (Doc. 110-1 at 61 (Dep. Maturin at 64)). On October 8, 2019, Specialty received an email from Eagle that stated that all items -- regarding the CRISTI -- that needed to be addressed or repairs were completed and that any maintenance and repairs going forward belong to Specialty, as confirmed by Eagle (per Mr. Sanchez); to which Specialty responded it was good news and "we will abide by the contract." (Doc. 110-1 at 12 (Dep. Wallace at 77-79)). Specialty continued to use the CRISTI subject to the respective agreements at that time and did not relinquish control or possession of the dredge tender back to Eagle. (*Id.* (Dep. Wallace at 79)).

On November 4, 2019, Berkley Offshore insurance issued a marine insurance policy to insure Specialty from October 1, 2019 - October 1, 2020 for the CRISTI. (Doc. 124-24 at 1-74).

On November 19, 2019, Wallace sent an email and letter to Sanchez regarding "Issues with Dredge Corrected by Specialty" listing 13 issues identified with the vessels and equipment (including the CRISTI) that Specialty had to correct. (Doc. 110-1 at 12-13 (Dep. Wallace at 80-81); Doc. 110-1 at 70-74). Even with issues with the dredge tender, Specialty did not terminate the contract and continued to use the CRISTI when operational. (*Id.* at 13 (Dep. Wallace at 81)). Specialty was also interested in purchasing the CRISTI "to just end the relationship with Eagle

and...continue....[to] stop pouring money into it[.]" (Id. (Dep. Wallace at 81-82)). Specialty never took steps to terminate the charter, even when it had issues with Eagle, because it "desperately needed a dredge. We had clients that were counting on us. Our reputation was at stake...." (Doc. 110-1 at 11 (Dep. Wallace at 66-67)).

On December 9, 2019, Specialty was notified by Eagle that an individual named Dirk Peacock wished to view the CRISTI on December 10, 2019 for potential purchase, and so the dredge tender needed to be brought to dock for an on-site visit. (Doc. 110-1 at 45 (Dep. Whitmer at 105); (Doc. 110-1 at 92 (Dep. Peacock at 18); Doc. 124-2 at 1-10 (emails)). Eagle directed Specialty to take the CRISTI to the dock so Peacock could review it for a potential purchase and such was done by Specialty's employees. (Doc. 110-1 at 13 (Dep. Wallace at 84)).

On December 10, 2019, Peacock inspected the CRISTI after meeting the boat owner and 2 deckmates at the dock; boat owner Mike Sanchez was also present. (Doc. 110-1 at 92 (Dep. Peacock at 18); Doc. 124-2 at 10 (email)). Peacock testified that when he boarded the CRISTI, the door or hatch to the engine room was open and he went through that open door down into the engine room by himself. (Doc. 124-3 at 3-4 (Dep. Peacock at 31-32)). Peacock testified that he decided that he was not interested in the dredge tender because it was not in the shape needed mechanically for him to purchase it; after looking down in the engine room and taking pictures, he concluded it was "just unkept[.]" "needed a lot of maintenance work on it[.]" and did not appear to be being maintained. (Doc. 110-1 at 92 (Dep. Peacock at 20); Doc. 124-2 at 7 (Dep. Peacock at 81)).

Regarding the hatch, Peacock testified that he did not open the hatch and did not see anyone else open any hatches or manhole covers on the vessel during his inspection: "nobody opened

them." (Doc. 110-1 at 92 (Dep. Peacock at 21)). Per Peacock, when he left the engine room, he did not close the engine room door and did not speak with anyone about closing the door or tell anyone the door was open. (Doc. 124-2 at 3-4 (Dep. Peacock at 31-32)). Peacock testified that excluding the engine room, he did not have an opportunity to be somewhere on the boat without an Eagle representative. (Id. at 6 (Dep. Peacock at 37)).

Later that day, while being operated by Specialty and in Specialty's possession, the CRISTI was involved in a casualty and sank. Per Specialty, what happened is "still inconclusive" per the U.S. Coast Guard. (Doc. 110-1 at 13, 19 (Dep. Wallace at 83-84, 131-132)). Captain Jonathan Stelly was rescued, but a deckhand was trapped inside and died. (Id. (Dep. Wallace at 84)).

On December 13, 2019, a survey was conducted of the CRISTI by marine surveyor Dan Duplantis (Duplantis) (a post sinking condition report). The survey did not note any hatches being open, only that the manhole covers were open, that the tank voids/seals need to be inspected and cleaned, and general maintenance was needed; but Duplantis does not know when the manhole covers were opened. (Id. (Dep. Whitmer at 95-96); Doc. 110-1 at 105, 107-108 (Dep. Duplantis at 7-8, 103-105)). Duplantis has no opinion regarding the cause of the sinking and was only trying to assess the condition of the vessel after it sank. (Id.) By that time, however, the Specialty salvage team had closed the hatches to make it watertight to float it back to the dock. (Doc. 110-1 at 42-43 (Dep. Whitmer at 96-97)).

After the sinking, Maturin only directed repairs to the engines. (Doc. 110-1 at 63-64 (Dep. Maturin at 124-125)). Specialty operated the CRISTI after the sinking and before it was returned to Eagle -- it was fully operational and performed dredging operations. (Doc. 110-1 at 64 (Dep. Maturin at 125)). Indeed, Specialty continued to use the CRISTI until it was returned to Eagle in

July 2020 (except for the time it was being repaired after the sinking). (Doc. 110-1 at 66 (Dep. Maturin at 137-138)).

On January 10, 2020, the U.S. Coast Guard's issued a Captain of the Port Order 027-20. (Doc. 124-12 at 9-10). The Order states that "during the course of the investigation, the Coast Guard discovered the vessel's watertight integrity was in question, with one hatch cover inoperable and the other hatch cover left open." (Doc. 124-12 at 9).

On June 3, 2020, Specialty received a termination of the Charter Party for the CRISTI and a cease and desist letter, citing Section 5 and Section 15, at which point Specialty canceled the contract and "the relationship with Eagle deteriorated beyond communications." (Doc. 110-1 at 11, 15-16 (Dep. Wallace at 67, 109, 114); Doc. 110-1 at 76-79)). Per Specialty, Eagle was within its rights to terminate the contract in the manner that they did. (Doc. 110-1 at 15 (Dep. Wallace at 110)). Wallace testified, however, that Eagle breached the contract by failing to comply with Schedule A and due to its misrepresentations.⁶ (Doc. 110-1 at 19 (Dep. Wallace at 129-130)).

On July 9, 2020 Specialty returned the CRISTI. (Doc. 110-1 at 3 (Decltn. Simmons)).

C. Current Litigation

On August 21, 2020, Eagle initiated this litigation, and as amended on March 8, 2021 alleges various claims against Specialty including a First Cause of Action for a declaratory judgment claim against Specialty pursuant to 46 U.S.C. § 31343(c)(2) declaring that the dredge is not subject to Specialty's Notice of Claim of Lien. Specifically, that the EDWARD G charter

⁶ Per Specialty, Eagle's misrepresentation -- via Simmons -- was about the condition of the CRISTI's shaft (one (1) bad bearing). (Doc. 110-1 at 38 (Dep. Whitmer at 57-58)). Maturin testified that the only misrepresentations he asserts Eagle made about the CRISTI were those he has already referenced (about the inventory in the vessel). (Doc. 110-1 at 66 (Dep. Maturin at 138-139)).

contract is valid and binding and contains a "no lien" clause. (Doc.1; Doc. 44 at 10-11 (amended complaint)). As relief, Eagle seeks a declaratory judgment that the EDWARD G is not subject to any lien in favor of Specialty and that the lien filed with the National Vessel Documentation Center of the U.S. Coast Guard be canceled, removed, discharged, withdrawn and/or expunged, and that the Court order the Secretary of Homeland Security and the National Vessel Documentation Center to accomplish such. (*Id.* at 11).⁷

In response, Specialty denies the allegations and asserts a counterclaim for indemnity, alleging that on December 10, 2019, Eagle caused the CRISTI to sink and the death of its employee who was a crew member at that time. (Doc. 49). Specifically:

... On or about December 10, 2019, the M/V CRISTI was crewed by Fredrick Tanner, Jr. and Johnathon Stelly. The M/V CRISTI and her crew were in the La Quinta Channel near Ingleside, Texas when the M/V CRISTI suddenly sank. Mr. Tanner did not escape the vessel and drowned when the vessel sunk. Mr. Stelly did escape and was forced to swim nearly a mile to shore after trying to hang onto a channel marker.

Stelly executed a release of all his claims on December 11, 2019, which specifically included his claims against Eagle. The settlement funds were paid, by or on the account of, Specialty.

On January 8, 2020, Falon Thierry, in her capacity as Administratrix of the Succession of Fredrick Tanner, Jr., and as the legal guardian of A.T. and F.T., asserted claims under the Jones Act and the General Maritime Law for damages against Specialty Diving of Louisiana, Inc., Specialty Offshore, Inc., and Eagle E&R, LLC ... all as set forth more fully in the matter entitled *Falon Thierry, as Administratrix of the Succession of Fredrick Tanner, Jr. and as Next Friend of A.T. and F.T., minors Versus Specialty Diving of Louisiana, Inc. and Specialty Offshore,*

⁷ Additional claims alleged by Eagle include: Second Cause of Action -- attorneys' fees pursuant to 46 U.S.C. § 31343(c)(2) due to Specialty's lien on the EDWARD G and efforts required to have such cancelled, removed, withdrawn and/or discharged; Third Cause of Action -breach of contract/charter party related to the EDWARD G; Fourth Cause of Action -- breach of contract/Charter party related to the CRISTI; Fifth Cause of Action -- breach of contract/equipment lease; and Sixth Cause of Action -- conversion (laptop and hypack systems).

Inc., filed in the United States District Court for the Eastern District of Louisiana, bearing Case No. 20-00059.

On March 1, 2021, Falon Thierry, in her capacity as Administratrix of the Succession of Fredrick Tanner, Jr., and as the legal guardian of A.T. and F.T., settled and resolved all her claims against Specialty and Eagle. The settlement funds were paid, by or on the account of, Specialty.

The cause of the sinking of the M/V CRISIT was directly attributable to the fault, neglect, or unseaworthy conditions created by the actions or inactions of Eagle, their agents, employees, or representatives.

... Eagle requested that the M/V CRISTI return from its jobsite to a dock so that Eagle could perform an inspection of the M/V CRISTI on the morning of December 10, 2019, during which time its employees, representatives, or agents removed a hatch cover from the deck of the M/V CRISTI and failed to properly replace it.

Due to the failure of Eagle, its employees, representatives, or agents to properly replace the hatch on the M/V CRISTI, the vessel's hull filled with water on its voyage, causing it to sink, and consequently causing the death of Mr. Tanner and injury to Mr. Stelly.

Specialty maintains that they are not liable for the December 10, 2019 incident, in any respect, and that such incident was caused by the sole fault of Eagle, its employees, representatives, or agents, or the unseaworthiness of the M/V CRISTI.

Because the December 10, 2019 incident was caused by the sole fault of Eagle E&R, LLC, its employees, representatives, or agents, or the unseaworthiness of the M/V CRISTI, Specialty ... demands indemnity and full reimbursement from Eagle for all sums paid as a result of the December 10, 2019 incident, inclusive of any settlements, benefits, or other damages....

(Doc. 49 at 15-17 (emphasis added)).

II. Standard of Review

“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” FED. R.

CIV. P. 56(a). Rule 56(c) provides as follows:

(c) Procedures

(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) Objection That a Fact Is Not Supported by Admissible Evidence. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) Materials Not Cited. The court need consider only the cited materials, but it may consider other materials in the record.

(4) Affidavits or Declarations. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

FED.R.CIV.P. Rule 56(c).

To succeed, the movant must demonstrate “that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” [Fed. R. Civ. P. 56\(a\)](#). The Court must view the evidence and the inferences from that evidence in the light most favorable to the nonmovant. [Jean-Baptiste v. Gutierrez](#), 627 F.3d 816, 820 (11th Cir. 2010). The party moving for summary judgment “always bears the initial responsibility of informing the district court of the basis for its motion.” [Celotex Corp. v. Catrett](#), 477 U.S. 317, 323 (1986). This responsibility includes identifying the portions of the record illustrating the absence of a genuine dispute of material fact. [Id.](#) Alternatively, a movant who does not have a trial burden of production can assert, without citing the record, that the nonmoving party “cannot produce admissible evidence to support” a material fact. [Fed. R. Civ. P. 56\(c\)\(1\)\(B\)](#); see also [Fed. R. Civ. P. 56](#) Adv. Cmte. Note

(“Subdivision (c)(1)(B) recognizes that a party need not always point to specific record materials.... [A] party who does not have the trial burden of production may rely on a showing that a party who does have the trial burden cannot produce admissible evidence to carry its burden as to the fact.”). If the movant meets its burden, the burden shifts to the nonmoving party to establish -- with evidence beyond the pleadings—that a genuine dispute material to each of its claims for relief exists. [Celotex](#), 477 U.S. at 324. A genuine dispute of material fact exists when the nonmoving party produces evidence allowing a reasonable fact finder to return a verdict in its favor. [Waddell v. Valley Forge Dental Assoc.](#), 276 F.3d 1275, 1279 (11th Cir. 2001).

III. Conclusions of Law⁸

Eagle moves for partial summary judgment on its First Cause of Action (Declaratory Judgment) that the lien is invalid and should be removed (Declaration pursuant to 46 U.S.C. § 31343(c)(2) that the EDWARD G is not subject to Specialty's Notice of Claim of lien), and on Specialty's counterclaim for indemnity related to the sinking of the CRISTI.

A. First Cause of Action (Declaratory Judgment) -- the EDWARD G Lien

Eagle moves for summary judgment on its Declaratory Judgment claim (First Cause of Action - 46 U.S.C. § 31343(c)(2)) arguing that Specialty's lien on the EDWARD G for repairs is invalid because: 1) a lien is barred under the plain and unambiguous "no lien provision" of the enforceable Charter Party contract (per Paragraph 10 *supra*); and 2) even if the Charter Party

⁸ As an initial matter, Eagle's motion for summary judgment suggests that Specialty asserted *counterclaims* asserted for fraud. (Doc. 113 at 2). There are no such counterclaims. Specialty only raised fraud (and misrepresentation) as affirmative defenses in their Answer to Eagle's breach of contract claim. (Doc. 49 at 14 -- Fourteenth and Fifteenth Defenses). And while Specialty filed a motion for leave to amend its original counterclaim (Doc. 49) to add counterclaims for fraud/fraud in the inducement and for breach of contract (Doc. 62), the Court denied that motion (Doc. 72). As such, to the extent Eagle's motion seeks relief on a counterclaim by Specialty for any claim other than indemnity, the motion is **MOOT**.

contract is voidable based on Specialty's claims of fraudulent inducement, Specialty as a bareboat charterer (owner *pro hac vice*) cannot place a lien against the dredge because under maritime law Specialty is considered the owner.

Eagle argues further, that any repairs to the dredge were ratified by Specialty and so Specialty -- not Eagle -- bears those expenses. Eagle also contends that attorneys' fees should be awarded in its favor due to Specialty's placement of an improper lien on the dredge.

In response, Specialty argues that that the contract is void *ab initio* because it was procured through Eagle's fraudulent misrepresentation (mainly that the dredge pump was manufactured in 1975, not 2008, as Eagle represented, so none of the spare parts fit the pump for repairs). Moreover, Specialty contends that even if the contract is deemed valid, the lien prohibition clause does not preclude it, as the charterer, from asserting a lien for costs it actually incurred and for which it was not reimbursed as those costs were due to breaches of contract by Eagle. Further, Specialty asserts that it repeatedly repudiated the contract. Finally, Specialty argues that attorneys' fees are only permissive, not mandatory, if the lien is found to have been improperly placed on the dredge.

For those reasons detailed in the Order denying Specialty's motion (Doc. 129), genuine issues of material fact preclude summary judgment based on fraudulent inducement and whether the contract is voidable (and case law appears to preclude Specialty's argument that the contract is void *ab initio*.) Additionally, even assuming *arguendo* the validity of the contract for purposes of summary judgment, Eagle's claim that Specialty ratified the contract and thus bears the costs of the dredge repairs (*i.e.*, Specialty's lien is improper and summary judgment should be granted on Eagle's declaratory judgment claim), is strongly disputed. Both parties submit contradictory evidentiary support for their respective positions (ratification versus repudiation) and the result is

that genuine issues of material fact preclude summary judgment on this basis as well (including but not limited to the timing of Specialty's communications about repairs to the dredge, whether Specialty accepted the dredge "as is," whether the parties agreed to work through any repair issues, what actions establish repudiation or ratification by Specialty, whether Specialty's failure to terminate the contract (at any point) constitutes ratification, etc.).

This leaves the Court with Specialty's arguments that: 1) the lien prohibition clause in the contract has no effect on Specialty's lien because it arises from Eagle's breaches of contract; and 2) even if the contract is valid as a bareboat charter, its lien on the dredge is proper as a matter of law, again due to Eagle's breaches of contract.

Concerning the impact of the lien prohibition clause, Specialty argues as follows:

... [the contract's] ... lien prohibition clauses do not foreclose ... Specialty ... from asserting a lien that arises out of Eagle's breach of the Charter Parties. The law holds that a lien prohibition clause contained in a charter party agreement does not waive a charterer's lien rights for damages that arise out of a vessel owner's breach of that charter party.[] That is exactly the situation ... Specialty ... (the charterers) have asserted their lien based on a breach of the Charter Parties by Eagle (the vessel owner). As such, the lien prohibition clause in the Charter Parties, even if they were valid, does not preclude ... Specialty ... from enforce their rights against Eagle by filing a lien.

(Doc. 125 at 17). As framed by Specialty, the breaches of contract by Eagle meriting the lien constitute the following: 1) Eagle's failure to deliver the dredge in good, operating, and seaworthy condition to perform the task it was designed for and as fit for duty in all respects; 2) Eagle's alleged failure to correct the Schedule A items; and 3) Eagle's failure to provide critical spare parts for the dredge. (*Id.* at 17-18). In support, Specialty relies on the non-binding case of International Towing, Inc., 722 F.2d 126, 127 (5th Cir. 1983) and Nurmi Prop. LLC v. SourcePoint LLC, 2017 WL 2082799, 7 (S.D. Fla. May 15, 2017). International Towing concluded that "[a]lthough the

bareboat charterer might be characterized as the owner *pro hac vice* as to third parties, the charterer is still the charterer as to the vessel owner and is thus entitled to a maritime lien against the vessel for the owner's breach of the charter party[]" (*i.e.*, a prohibition of lien clause in a bareboat charter party contract does not prevent a charterer such as Specialty from asserting a lien for damages suffered as a result of the vessel owner's breach of the contract).

Eagle agrees that a maritime lien can be asserted by a charterer when the lien is directly related to the breach, but again argues there was no breach. Specialty's argument is rooted in Eagle's alleged breaches of contract based on fraudulent misrepresentations. As noted *supra* and in the Order on Specialty's motion for summary judgment (Doc. 129), genuine issues of material fact preclude a determination as to whether Eagle breached the contract and/or committed fraud.

In the alternative, Specialty argues that if the EDWARD G contract is deemed valid as a bareboat charter, its lien on the dredge is still proper as a matter of law based on International Towing. Again, however, Specialty's argument is dependent upon the alleged breaches of contract by Eagle for which the Court has already concluded that genuine issues of material fact exist.

As such, due to the presence of genuine issues of material fact, Eagle's motion for partial summary judgment on its Declaratory Judgment claim (First Cause of Action - 46 U.S.C. § 31343(c)(2)) that Specialty's lien on the EDWARD G is invalid, is **DENIED**.

B. Specialty's Counterclaim for Indemnity relating to the CRISTI

In moving for summary judgment, Eagle bears the initial burden of proving that there is no issue as to any material fact and that judgment should be entered as a matter of law on Specialty's indemnity counterclaim. However, since Specialty will bear the burden at trial on its counterclaim -- of proving the necessary elements for indemnity -- Eagle may satisfy its burden by showing

"that there is an absence of evidence to support the non-moving party's case." [Fitzpatrick v. City of Atlanta](#), 2 F.3d 1112, 1115–1116 (11th Cir.1993). Notably, a party that will not bear the burden of proof at trial discharges this burden by demonstrating the absence of evidence in the record supporting at least one essential element of the non-moving party's claim. [Celotex](#), 477 U.S. 317. Once the burden of pointing out an absence of evidence is met, the non-movant must go beyond the pleadings and present evidence designating specific facts showing that there is a genuine issue for trial. [Id.](#) at 324. And “[i]f the non-moving party fails to ‘make a sufficient showing on an essential element of her case with respect to which she has the burden of proof,’ then the court must enter summary judgment for the moving party.” [Gonzalez v. Lee County Housing Auth.](#), 161 F.3d 1290, 1294 (11th Cir. 1998) (quoting [Celotex](#), 477 U.S. at 323). In other words, if Eagle shows that Specialty, who has the burden at trial on its indemnity counterclaim, will be unable to establish an essential element of that counterclaim, Specialty must respond to Eagle's motion with evidence sufficient to create a genuine issue of material fact on that essential element. [Anderson](#), 477 U.S. at 251-52; [Fitzpatrick](#), 2 F.3d at 1115.

Specialty's indemnity counterclaim against Eagle alleges that "[b]ecause the December 10, 2019 incident was caused by the sole fault of Eagle E&R, LLC, its employees, representatives, or agents, or the unseaworthiness of the M/V CRISTI, Specialty hereby demands indemnity and full reimbursement from Eagle for all sums paid as a result of the December 10, 2019 incident, inclusive of any settlements, benefits, or other damages." (Doc. 49 at 17). The Counterclaim alleges that Eagle must indemnify Specialty for payments made in a separate lawsuit arising from the sinking of the CRISTI because Eagle is liable for the CRISTI sinking (caused the incident).

In moving for summary judgment, Eagle argues first, that there is no evidence that it caused the CRISTI to sink and that under Alabama law, Specialty bears the burden of showing that it is legally liable, which it has failed to do. Namely, that: 1) Specialty's fact witnesses testified that they have no personal knowledge supporting any allegation that Eagle is legally liable; 2) Specialty's retained witnesses have no knowledge or opinions about the case of the CRISTI sinking or Eagle's responsibility for same (*e.g.*, Tulloch's testimony that no one has enough information to opine about the cause); and 3) Dirk Peacock's testimony fails to provide support that Eagle is liable for the sinking of the dredge tender. (Doc. 113 at 11-12).

Second, Eagle argues that even assuming such evidence exists, Specialty's counterclaim is prohibited due to the waiver of subrogation contained in the CRISTI insurance policy such that Specialty "cannot act as the cat's paw of its insurer to recover funds to benefit the insurer when the insurer could not do so." (Doc. 113 at 12-13). Eagle argues this is because Specialty named Eagle as a Loss Payee and Additional Insured on the policy and the policy contained a waiver of subrogation clause. As such, Specialty cannot seek indemnity from Eagle because such an award would be improper subrogation against Eagle for the benefit of Specialty's insurer. (Doc. 113 at 13-14). In response, Specialty argues that the indemnification claim, at least as it concerns their deductibles and any uninsured costs, is not subsumed by the subrogation clause and survives.

1. Liability

In Alabama,⁹ "to recover [indemnity damages], the indemnitee settling the claim *must show that the indemnitor was legally liable*, and that the settlement was reasonable." FabArc Steel

⁹ The parties do not dispute the applicability of Alabama law. Moreover, the contract contains a choice of law provision stating "that should any dispute arise between [Eagle and Specialty] or any action or matter arising out of or concerning this Charter, same shall be governed solely by the laws of the State of Alabama." (Doc. 110 at 35 at ¶ 18).

Supply, Inc. v. Composite Const. Sys., Inc., 914 So. 2d 344, 356 (Ala. 2005) (emphasis in original).

Under federal maritime law, “the only circumstance in which the general maritime law allows a party to seek indemnification is when that party paid damages based on vicarious liability.” Sol v. City of Miami, 776 F. Supp. 2d 1375, 1379 (S.D. Fla. 2011) (citing Hardy v. Gulf Oil Corp., 949 F.2d 826, 833–834 (5th Cir.1992)). See also Compania Chilena De Navegacion Interoceanica, S.A. v. D.H.C. Trucking, Inc., 2016 WL 1722425, *8 (S.D. Fla. Apr. 29, 2016) (“[u]nder federal maritime law, a ‘vicariously liable or non-negligent tortfeasor’ is entitled to common law indemnity ‘from a co-debtor guilty of actual fault[.]’”).

For its indemnity counterclaim, Specialty alleges that Eagle is liable for the CRISTI sinking because it or one of its representatives did not properly replace the hatch, causing it to sink, and that Eagle should indemnify Specialty for monies spent in settling claims arising from that incident. As noted *supra*, Specialty’s Counterclaim asserts that:

Because the December 10, 2019 incident was caused by the sole fault of Eagle E&R, LLC, its employees, representatives, or agents, or the unseaworthiness of the M/V CRISTI, Specialty hereby demands indemnity and full reimbursement from Eagle for all sums paid as a result of the December 10, 2019 incident, inclusive of any settlements, benefits, or other damages.

(Doc. 49). Additionally, in discovery Specialty alleged in its Second Supplemental Interrogatory Responses as follows:

... [U]nder the direction of Plaintiff’s president, Mike Sanchez, the hatches were removed for inspection using a pipe wrench and crowbar. The hatches were not replaced and tightened like they were before being removed. The hatches, which had been sealed with silicon, did not have proper gaskets as required by the U.S. Coast Guard. Because the silicon seal of the hatch cover was broken by the removal of the hatches during the inspection and the hatches did not have proper gaskets, water on the deck during normal operation seeped into the hull. The water that seeped into the hull caused the M/V CRISTI to become unstable by filling the stern compartment with water, causing the M/V CRISTI to sink... Since Plaintiff directed

the crew to remove the sealed hatches, it was Plaintiff's responsibility to oversee resealing the hatches.

(Doc. 110-1 at 121).

To survive summary judgment on this counterclaim, Specialty must show that Eagle is legally liable for the sinking of the CRISTI on December 10, 2019 -- the burden it would bear at trial on this counterclaim. FabArc, 914 So.2d at 356. In an effort to do so, Specialty relies on the following: 1) that fact witness Captain Jonathon Stelly is expected to testify that representatives or agents of Eagle took actions which caused or contributed to the sinking of the CRISTI; 2) Eagle called the vessel to port immediately before the sinking and permitted a guest to enter into the CRISTI's engine hatches; and 3) both parties' experts opine that Eagle, as owner, had obligations to ensure that the vessel was seaworthy when it was turned back over to Specialty. (Doc. 125 at 2). Specialty adds that "the expected testimony of expert witness **Captain [Elliot] Tulloch**, [Eagle's expert witness] **Captain [Gerard] Maurice**, and **Dirk Peacock** create a factual dispute regarding the cause of the sinking of the CRISTI and Eagle's responsibility therefor ... " (Doc. 125 at 27 (emphasis added)). From this, Specialty asserts that there is no factual dispute as to whether Eagle is responsible for the sinking, and, in turn, the uninsured sums incurred by Specialty in defending the lawsuit arising from that sinking.

Captain Elliot Tulloch: Specialty references Captain Tulloch's expert report opinions as "providing a litany of reasons" that Eagle is responsible for the CRISTI sinking. The Court cannot agree. Rather, Tulloch's six (6) opinions (Doc. 124-11 (Tulloch Expert Report)) appear to reflect *assumptions* about the condition of the dredge tender at the time of delivery to Specialty based -- repeatedly -- on "the Operating Restrictions imposed on the vessel after the sinking incident[]" (Doc. 124-11 at 11 (emphasis added)), as well as *assumptions* about the conduct of Peacock when

he inspected the vessel on December 10, 2019 (*e.g.*, the assumption that he had directly observed an unseaworthy condition but failed to communicate this to anyone). Specialty's argument is further undermined because Tulloch testified that while he was retained by Specialty "[t]o review all the documents ... and produce an opinion regarding the responsibilities of the various parties on board[]" the vessel at the time of the sinking, **he has no opinion about the actual cause of the sinking -- "unless further information is produced. I don't have enough information or facts to opine on cause."** (Doc. 110-1 at 97 (Dep. Tulloch at 6-7 (emphasis added))). Moreover, Tulloch testified that he has no information or evidence showing any hatch covers or manholes were open at the time of the sinking, and that it is possible that at the time of the inspection there was no defect in the vessel. (*Id.* at 99-100 (Dep. Tulloch at 110-111, 119-120)). Further, per Tulloch, he does not believe that anyone has enough information or facts to opine on a cause of the Cristi's sinking: "[i]t would be pure speculation at this point." (*Id.* at 101 (Dep. Tulloch at 127)). Finally, Tulloch testified that he does not know if anyone from Eagle actually observed any dangerous or defective conditions or anything that would compromise the vessel's ability to operate safely "because I don't know [w]hat theyobserved and didn't observe." (*Id.* (Dep. Tulloch at 118)).

Captain Gerard Maurice: Specialty also relies on the testimony of Eagle's expert Captain Maurice to create a genuine issue of material fact regarding Eagle's liability. (Doc. 125 at 25 (citing Doc. 124-12 (Dep. Maurice))). However, Captain Maurice's testimony simply attests to what a vessel owner's responsibilities are generally, when an owner provides a vessel to another to use, and that if anyone inspects a vessel and finds it unseaworthy, then he/she should bring it to the captain's attention. (Doc. 124-12 at 5-7 (Dep. Maurice at 76, 82-83)). These generalities do not create a genuine issue of material fact *as to Eagle's liability* for the sinking of the CRISTI, and do

not even address the fact that at the time of the December 10, 2019 inspection, the vessel was under Charter Party hire with Specialty and had been since July 2019. Moreover, Maurice testified that it was Captain Stelly's obligation, as captain of the CRISTI, to ensure that all deck hatches, cargo holds, and void spaces were properly closed and secured after inspection. (Doc. 124-12 at 6-7 at 7 (Dep. Maurice at 82-83)).

Dirk Peacock: Specialty argues that Peacock's presence on the CRISTI, to inspect the dredge tender for purchase, coupled with his testimony, create a genuine issue of material fact as to Eagle's liability. The testimony from Peacock upon which Specialty relies is as follows: Peacock testified that during the 10 minutes or so he was on board the vessel he did not open hatches to any void spaces, but entered the engine room through an open hatch which he did not close upon leaving; Peacock did not notify anyone with Eagle about the engine room's open hatch or his observations about the vessel's condition and he was not asked by anyone with Eagle about the vessel. From this, Specialty argues "Eagle shirked its responsibility to follow-up regarding the condition of the vessel as observed by Mr. Peacock and the effect that failure may have had on the sinking minutes thereafter." (Doc. 125 at 24). The Court cannot agree.

At the time of Peacock's brief inspection of the CRISTI, the dredge tender was under charter with Specialty -- and had been since July 2019. And Specialty's argument that Peacock's visit to the CRISTI removed a charterer's care, custody, and control obligations under the Charter Party, for the 10 minutes or so he was on board, has not been supported by case law. Specialty instead unilaterally asserts that "[t]here exists a legitimate question as to who was responsible for Mr. Peacock's conduct while on board[]" and "whether that conduct caused or contributed to the sinking[.]" (Doc. 125 at 25). Moreover, Peacock testified that Specialty's captain or deckhand

were standing above him when he visited the engine room. (Doc. 124-3 at 5 (Dep. Peacock at 36)). In sum, Specialty has submitted no evidence that Peacock did anything -- removed a hatch cover or otherwise - to create an issue of fact regarding Eagle's liability. And further, Specialty's own expert Tulloch testified that "typical operating practice" would be to leave the engine room hatch open during operations when a deckhand was in the engine room. (Doc. 110-1 (Dep. Tulloch at 111-112 ("Oh, he most certainly would leave it open, yes[]"))).

Captain John Stelly: Specialty also references the captain of the CRISTI at the time of the sinking, Captain Jonathan Stelly, stating his "**anticipated** testimony" creates factual dispute regarding Eagle's responsibility and liability. (Doc. 125 at 26 (emphasis added)). Per Specialty, Captain Stelly "**will** testify at trial as to facts which support the Specialty Entities' contention that a representative of Eagle caused or contributed to the sinking of the CRISTI." (*Id.* at 25 (emphasis added)). In support, Specialty references its responses to Eagle's Second Supplemental Interrogatories ##8-9 (*Id.* at 26 at note 96), but nothing more (*i.e.*, no other evidence or sworn statement (*e.g.*, affidavit, declaration, deposition, etc.)). As a result, Specialty's reliance on Captain Stelly is misplaced as such does not constitute evidence on summary judgment. Accordingly, because Specialty has failed to produce sufficient evidence for a reasonable factfinder to determine that Eagle was responsible for the sinking of the CRISTI, summary judgment is **GRANTED** on Specialty's claim of indemnity.

2. Insurance and Subrogation

Specialty seeks indemnity from Eagle for the settlement amounts paid by Specialty's insurer for the sinking of the CRISTI. Eagle argues that Specialty's counterclaim is prohibited due to the waiver of subrogation in the insurance policy, and that even if Specialty had evidence to

support Eagle's liability, Specialty "cannot act as the cat's paw of its insurer to recover funds to benefit the insurer when the insurer could not do so." (Doc. 113 at 12-13). Under the policy, Eagle is an additional insured, and per Eagle, Specialty cannot seek indemnity because:

... if recovered, [it] would constitute improper subrogation against Eagle for the benefit of Specialty's insurer. "Subrogation does not arise... in favor of the insurer against its insured since by definition subrogation arises only with respect to the rights of the insured against third persons to whom the insurer owes no duty." *Frank Briscoe Co. v. Georgia Sprinkler Co.*, 713 F.2d 1500, 1502 (11th Cir. 1983) (emphasis added). "[I]t has been held that where there are two co-insureds and the insurer pays one insured under the policy, no right of subrogation arises against the additional insured." *Id.* The Fifth Circuit has held that what an insurer "could not do directly by suit in their own name, they cannot do indirectly, by using [an insured] as their cat's-paw." *Marathon Oil Co. v. Mid-Continent Underwriters*, 786 F.2d 1301, 1304 (5th Cir. 1986); *see also Peavey Co. v. M/V ANPA*, 971 F.2d 1168, 1177 (5th Cir. 1992) ("This Circuit has overwhelmingly upheld the fundamental principle of insurance law which states that an insurer may not sue its own insured to recover under the insurance policy."); *Wilson v. Fla. Marine Transporters, LLC*, 2019 WL 6464985, at *6 (E.D. La. Dec. 2, 2019) ("Thus, under the anti-subrogation principles of *Marathon Oil* and *Dow*, the insurer would be prohibited from seeking to recoup from Warren Paving any amounts it paid out on the risk, and the **insurer cannot use the FMT entities as named insureds to do** what it could not do in its own name.").

(Doc. 113 at 13 (emphasis in original)). Eagle argues that as a matter of law Specialty cannot seek indemnity and subrogation for the benefit of its insurer.

In response, Specialty appears to agree that it cannot recover on its indemnity claim for settlement monies paid, but argues -- summarily -- that it can recover their \$10,000 deductible and any uninsured costs incurred: "the indemnification claim, at least as it concerns the ... deductibles, is not subsumed by the subrogation clause ..." (Doc. 125 at 2, 28). This leaves Specialty's claim for the \$10,000 deductible and any uninsured costs incurred as a result of the sinking. In support, Specialty refers to the policy provision stating that "[i]n the event of payments under this insurance, Underwriters shall be subrogated to all rights of recovery therefor of the Assured and any person

entitled to the benefits of this insurance. ..." (Doc. 124-24 at 50 at "Section 10. Subrogation"). However, as noted by Eagle, Specialty has failed to cite any legal authority for the contention that an insured may seek such costs from an additional insured on a policy (Eagle) and has failed to submit any evidence establishing that it paid a \$10,000 deductible or incurred uninsured costs. The Court agrees. So, even if Specialty could establish that Eagle was liable (which the Court has determined that it has not), Specialty is not entitled to indemnity for the out of pocket expenses of Specialty to settle the claim.

IV. Conclusion

Accordingly, it is **ORDERED** that Eagle's motion for summary judgment (Docs. 110, 113) is **DENIED in part** and **GRANTED in part** as follows: **DENIED** as to the EDWARD G lien (First Cause of Action) and **GRANTED** as to Specialty's indemnity counterclaim as to the CRISTI.

DONE and ORDERED this the 24th day of **January 2022**.

/s/ Kristi K. DuBose
KRISTI K. DuBOSE
UNITED STATES DISTRICT JUDGE