

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION – IN ADMIRALTY**

IN RE SKANSKA USA CIVIL	§	
SOUTHEAST INC. AND	§	ADMIRALTY RULE 9(H)
SKANSKA USA, INC., AS	§	
OWNERS OF THE BARGE M8030	§	CIVIL ACTION NO.
PRAYING FOR EXONERATION	§	3:20-CV-05980 – RV/MJF
FROM OR FOR LIMITATION OF	§	
LIABILITY	§	SENIOR DISTRICT JUDGE
	§	LACEY A. COLLIER
	§	
	§	MAGISTRATE JUDGE
	§	HOPE THAI CANNON

CLAIMANTS’ POST-TRIAL BRIEF

Claimants respectfully submit this post-trial brief following the bench trial in respect to Skanska’s twenty-eight (28) separate petitions to this Court for exoneration or limitation of liability for the damage caused by its failure to properly secure the Pensacola Bay Bridge Project site in advance of Hurricane Sally. The facts stated herein are fully supported by the exhibits submitted by the parties and accepted by the Court, to which reference is made by exhibit number, along with the testimony of the fact and expert witnesses presented by the parties. Upon consideration of the parties’ stipulations of fact and law, together with the evidence adduced at trial as set forth herein, Claimants respectfully request this Honorable Court dismiss each of Skanska’s twenty-eight (28) Limitation of Liability Act

Petitions and dissolve the injunction staying Claimants' state court actions against Skanska.

FINDINGS OF FACT

I. The Pensacola Bay Bridge Replacement Project (the "Project")

Skanska entered into a contract with the Florida Department of Transportation ("FDOT") in 2016 to replace the Pensacola Bay Bridge (also known as the "Three Mile Bridge").¹

Under Skanska's design-build contract with FDOT, Skanska was contractually obligated to "develop, submit, and implement a plan for evacuation of barges in a number of instances, but including tropical storms and hurricanes."² These obligations were expressly set forth in the Request for Proposal that was incorporated into the design-build contract reached with FDOT.³ This contradicts

¹ C:458.

² Capt. DiNapoli Direct Exam, October 22, 2021, at 36:21-37:3. Claimants' Expert, Richard DiNapoli, testified to his expert and professional experience evaluating and drafting portions of maritime construction contracts. *Id.* at 36:9-12. He further testified that in preparation of his report, Capt. DiNapoli evaluated Skanska's obligations under the design build contract. *Id.* at 36:13-37:3. As Skanska Project Director and Vice President of Operations Tom Fulton testified, Skanska was required to have a hurricane preparedness plan in place for the Pensacola Bay Bridge Project both under Skanska's contract with FDOT as well as by Skanska corporate policy. August 20, 2021 Deposition of Thomas Fulton ("Tom Fulton Depo.") at 33:14-34:4; *see also* August 25, 2021 Deposition of Rob Rodgers ("Rob Rodgers Depo.") at 115:17-116:1. (Project Manager, Rob Rodgers, agreed that Skanska was required by the FDOT contract and corporate policy to have a hurricane preparedness plan in place). Specifically, the evidence demonstrated Skanska's Environmental, Health, and Safety Plan required having in place a hurricane preparedness plan for the Project. June 18, 2021 30(b)(6) Deposition of Thomas DeMarco ("Tom DeMarco 30(b)(6) Depo."), at 37:8-15; 56:2-57-9.

³ C:513 at 58 and C:458 at 10; Capt. DiNapoli Direct Exam, October 22, 2021, at 37:16-38:3.

the testimony of Tom Fulton, who claimed that Skanska was only required to submit—but not implement—a hurricane plan.⁴ In compliance with its contract and with company policy, Skanska submitted one or more hurricane preparedness plans to FDOT during the life of the Project.⁵

II. Skanska’s Preparation for Tropical Storms Prior to Hurricane Sally

The evidence before the Court establishes that Skanska took a variety of efforts in advance of a number of tropical storms and hurricanes in 2017, 2018, 2019, and 2020. As discussed below, many of these storms were not, however, predicted to impact the project site.⁶ Central to this matter is the requirement within various iterations of Skanska’s Hurricane Preparedness Plans that Skanska move barges and cranes to safe harbor prior to the effects of tropical weather systems reaching the Pensacola Bay Bridge Project Site—which is known as “demobilization.” Skanska’s obligation to demobilize its barges and cranes to safe harbor has been set forth in Condition Three of Skanska’s Hurricane Preparedness Work Plan. From 2017 to the present, Condition Three has been triggered upon “sustained winds of 50 knots or 58 miles per hour or greater expected within 72 hours or three days.”⁷

The evidence demonstrates that Skanska demobilized and secured its

⁴ Fulton Direct Exam, October 18, 2021, at 187: 17-18 and 187: 24-188:7.

⁵ *Id.* at 187:24-188:3; Fulton Cross Exam, October 19, 2021, at 63:12-22; *see also* Tom DeMarco 30(b)(6) Depo., Ex. 4. *See* C:776, Capt. DiNapoli Expert Report, at 6.

⁶ *See* DeMarco Cross Exam, October 19, 2021, at 155:18-156:3; C:347 (discussing Hurricane Dorian, Hurricane Olga, Tropical Storm Cristobal, and Hurricane Marco).

⁷ DeMarco Cross Exam, October 19, 2021, at 147:18-148: 3.

equipment ahead of prior storm events in conditions far less threatening than in the days prior to Hurricane Sally, despite the application of an identical Condition Three threshold to move barges and crane to safe harbor. Additionally, Skanska's preparation in anticipation of tropical weather systems prior to Hurricane Sally call into serious doubt Mr. Fulton's testimony that Skanska's Hurricane Preparedness Work Plan only applied to hurricanes and not tropical storms.⁸ That claim was directly disputed by Skanska Project Manager Rob Rodgers who agreed that it would be wrong to take the position that the plan has no application to tropical storms.⁹ Mr. Rodgers also acknowledged that the plan did not apply only to impending hurricanes.¹⁰

a. 2017 Hurricane Season

During the 2017 hurricane season, Skanska distributed its "General Hurricane Preparedness Guidelines" to several of its employees who were (or would later be) leaders of the Project, including Project Manager Daniel Francis, Project Director Tom Fulton, and General Superintendent Pat McGlynn.¹¹ That Plan included the following guidance:¹²

According to experts, forecasters only have a 10% chance of accurately predicting where a storm will hit 72 hours in advance. They have a 74% chance within 24 hours. Just because your project is not in the

⁸ Fulton Cross Exam, October 19, 2021, at 14:19-21.

⁹ Rodgers Cross Exam, October 19, 2021, at 200: 11-15.

¹⁰ *Id.* at 201: 1-3.

¹¹ C:212; *see* C:776, Capt. DiNapoli Expert Report, at 11-12.

¹² C:213; *see* C:776, Capt. DiNapoli Expert Report, at 12.

storm's projected path does not mean that it could change course, therefore projects near but outside of the storm's predicted path need to take precautions regardless.¹³

Prior to Hurricane Sally, Skanska seemingly heeded its own plan, often demobilizing its barges and cranes before a tropical weather system even reached the Gulf of Mexico, much less situating the project site within a watch or warning. In fact, Skanska engaged its 2017 hurricane plan and demobilized its barges and cranes for three storms during the 2017 Hurricane Season: Hurricane Harvey, Hurricane Irma, and Hurricane Nate.¹⁴

For Hurricane Harvey, Skanska engaged its hurricane plan and began to demobilize its fleet of barges and cranes under Condition Three on August 25, 2017.¹⁵ At this time, the project site was not under a watch or warning, nor was it within the probable path of the storm.¹⁶

Similarly, on September 7, 2017, Skanska engaged its hurricane plan and began demobilizing under Condition Three for Hurricane Irma.¹⁷ At that time, the project site was not under a watch or warning, and it was not within the path of a

¹³ C:213; *see* Fulton Cross Exam, October 19, 2021, at 10:11-23.

¹⁴ C:029 (summary prepared by Skanska of Skanska's demobilization movements related to prior storms that were approaching the Pensacola Bay Bridge project site). The "Impact dates" column is defined as "dates indicate time that was directly impacted by the storms track, where Skanska was required to halt productive work and engage the Hurricane Preparedness Plan." *Id.*

¹⁵ Tom Fulton Depo., August 20, 2021, at 263: 10-20 and C:222 (Dep. Ex. 33). *See* C:776, Capt. DiNapoli Expert Report, at 21.

¹⁶ C:222; Tom Fulton Depo. Ex. 33.

¹⁷ C:029; DeMarco Cross Exam, October 19, 2020, 148:4-22. Tom Fulton Depo., August 20, 2021, at 271: 25-272: 11; C:223 (Dep. Ex. 34).

probable storm.¹⁸ In fact, Hurricane Irma was between Puerto Rico and the Dominican Republic at the time Skanska took action to demobilize its barges and cranes to safe harbor.¹⁹

On October 4, 2017, Skanska initiated its 2017 hurricane plan in anticipation of Hurricane Nate, demobilizing its cranes and barges under Condition Three on October 4 and 5, 2017.²⁰ At this time, the project site was not within a watch or a warning but was within the potential Day 4-5 track area.

Shortly after, on October 6, 2017, Bill Klepac, an engineer with Eisman & Russo, emailed Skanska's project manager, Daniel Francis, stating that:

We understand that Tropical Storm Nate, which is expected to become Hurricane Nate, developed rapidly with little advance notice, resulting in a shortened duration for Skanska to fully implement its hurricane plan, and thus necessitating a deviation in plan location for the crane barges. *As such, Skanska's plan should be modified to include one or more contingent plans to allow for scenarios in which there is insufficient time to fully implement mass evacuation of material and crane barges to East Bay.*²¹

(emphasis added). As Capt. DiNapoli testified, the rapid development of Hurricane Nate led to the decision to move barges to Butcherpen Cove in place of East Bay.²²

¹⁸ DeMarco Cross Exam, October 19, 2021, at 153:4-17; C:224 and DiNapoli Direct Exam, October 22, 2021, at 27: 3-11. *See also* Tom Fulton Depo., August 20, 2021, at 273:5-274: 6.

¹⁹ DeMarco Cross Exam, October 19, 2021, at 153:9-12 and Tom Fulton Depo., August 20, 2021, at 931: 6-10 and 931: 14-18.

²⁰ Tom Fulton Depo., August 20, 2021, at 278: 17-279:21 and C:226 (Dep. Ex. 37).

²¹ DiNapoli Cross Exam, October 19, 2021, 87: 16-88: 20. *See* C:776, Capt. DiNapoli Expert Report, at 26.

²² DiNapoli Cross Exam, October 19, 2021, 88: 19-20.

b. 2018 Hurricane Season

Skanska's 2018 hurricane plan provided greater detail for the 2018 hurricane season.²³ The hurricane plan, prepared by Michelle Brown and dated June 13, 2018, maintained all of the requirements from the 2017 hurricane plan pertaining to "Condition Three." The hurricane location for barges continued to be East Bay, and the time to demobilize to East Bay continued to be a minimum of 30 hours (for 40 barges). In addition to the hurricane location of East Bay, the 2018 hurricane plan added a contingency—Option B "for short term moves for short notice storms."²⁴ The 2018 plan further contained detailed descriptions, along with visual depictions under Option A and Option B, for the placement of marine equipment.²⁵ In fact, in Skanska's 2018 Marine Management Plan for the Pensacola Bay Bridge, safe harbor was required to be identified in the hurricane preparedness plan.²⁶

For the 2018 hurricane season, Skanska engaged its 2018 hurricane plan and demobilized its barges and cranes under Condition Three for three storms: (1)

²³ See Rodgers Cross Exam, October 19, 2021, at 211:18-212:25; C:304. See also August 6, 2021 Deposition of Sarah Stephens ("Sarah Stephens Depo."), Ex. 7; See C:776, Capt. DiNapoli Expert Report, at 12.

²⁴ C:304. See also Sarah Stephens Depo. at 99:5-15; Ex. 7, at 41. See C:776, Capt. DiNapoli Expert Report, at 12.

²⁵ Sarah Stephens Depo., Ex. 7, Appendix A. See C:776, Capt. DiNapoli Expert Report, at 12.

²⁶ Rodgers Cross, October 19, 2021, at 212: 6-25; C-304.

Subtropical Storm Alberto;²⁷ (2) Tropical Storm Gordon;²⁸ and (3) Hurricane Michael.²⁹

On May 25, 2018, Skanska activated its hurricane plan in anticipation of a subtropical depression that would become Tropical Storm Alberto.³⁰ On that day, the subtropical depression was off the Yucatan peninsula and the site was under a tropical storm watch.³¹

On Monday, September 3, 2018, Skanska began to demobilize marine equipment to protected waters ahead of the storm system that would form into Tropical Storm Gordon.³² Over the course of that day, Tropical Storm Gordon crossed the Florida Keys and entered the Gulf of Mexico.³³ According to Skanska's Storm Summary, Skanska completed its preparations on Tuesday, September 4, 2018.³⁴ At the time Skanska engaged its hurricane plan and demobilized under Condition Three for Tropical Storm Gordon, the project site "was not in the path of the cone, and no warnings or watches were in place."³⁵

²⁷ C:029; Fulton Depo. at 282:13-283:02, 283:12-20; Fulton Depo. Exhibits 32, 32A, 38.

²⁸ C:029; DeMarco Cross Exam, October 19, 2021, 153:19-155:7, Exhibits C:228, C:345; Capt. DiNapoli Direct Exam, October 21, 2021, 27:12-21, Ex. C:773. *See also* Fulton Depo. at 288:01-290:03, 295:24-297:14; Fulton Depo. Exhibits 32, 39, 40, 41.

²⁹ C:029; Rob Hill Cross Exam, October 20, 2021, 59:20-60:08.

³⁰ Tom Fulton Depo., August 20, 2021, at 282: 13-22 and C:221 (Dep. Ex. 31) and C:029.

³¹ *Id.* at 283: 12-20 (Dep. Ex. 38) and C:227. *See* C:776, Capt. DiNapoli Expert Report, at 27.

³² C:029 and C:228; DeMarco Cross Exam, October 19, 2021, 153:19-155:7. *See* C:776, Capt. DiNapoli Expert Report, at 28.

³³ C:029; C:776, Capt. DiNapoli Expert Report, at 28.

³⁴ *Id.*

³⁵ C:773; Capt. DiNapoli, Direct Exam, October 22, 2021 at 27:17-21.

October 8, 2018, Skanska decided to demobilize for the storm that would become Hurricane Michael.³⁶ Even by the next day, on Monday, October 9, 2018, the project site was still not under a watch or a warning but was within the four- to five-day probable path of a tropical storm.³⁷ As Capt. Hill testified, Skanska demobilized its barge fleet to both Butcherpen Cove and Bayou Chico.³⁸

c. 2019 Hurricane Season

The detail and thoroughness contained in Skanska's 2016, 2017, and 2018 hurricane plans drastically changed in 2019. Given that hurricane season begins each year on June 1, Skanska had been working on the Project in 2019 for nearly three months without a hurricane plan for the 2019 hurricane season.³⁹

Skanska began demobilizing for Hurricane Dorian on August 28, 2019, without a hurricane plan.⁴⁰ The task of preparing the 2019 hurricane plan fell to a newly hired field engineer, Sarah Stephens.⁴¹ Ms. Stephens, by her own admission, had no qualifications for drafting a hurricane preparedness plan.⁴² As Claimants' expert, Capt. DiNapoli testified, however, the preparation of a Hurricane

³⁶ Stephens Depo., August 6, 2021, at 130: 12-23 and C:029 (Dep. Ex. 8A).

³⁷ C:029; Stephens Depo., August 6, 2021, at 130: 12-23 and C:346 (Dep. Ex. 13). *see* C:776, Capt. DiNapoli Expert Report, at 29.

³⁸ Capt. Hill Cross Exam, October 20, 2021 at 60: 5-8.

³⁹ Sarah Stephens Depo at 44:6-45:20. *See* C:776, Capt. DiNapoli Expert Report, at 13.

⁴⁰ *Id.* at 44:6-16. *See* C:776, Capt. DiNapoli Expert Report, at 13.

⁴¹ *See* Rodgers Redirect Exam, October 19, 2021, at 233:19-24. *See also* Sarah Stephens Depo. at 18:7-19; 24:19-25:2; 40:13-41:10; 45:16-20; 115:12-19. *See* C:776, Capt. DiNapoli Expert Report, at 13.

⁴² Sarah Stephens Depo. at 24:19-27:4. *See* C:776, Captain DiNapoli Expert Report, at 13.

Preparedness Work Plan for a 55-barge fleet would “definitely” require qualifications,⁴³ explaining:

Well, if you're going to explain what needs to be done with barges to secure them properly, you need to know a little bit about how they operate. How tugs mate up to them or latch themselves to them, how they move through the water, how long it takes -- you know, what kinds of speeds are involved. When you get to a destination, what it takes to properly secure the barge. You need a working knowledge of maritime transportation operations.⁴⁴

Rather than relying on the 2018 hurricane plan (which contained detailed descriptions of multiple options for safe harbor/hurricane locations), Ms. Stephens copied large portions of another hurricane plan for a land-based Skanska project in Orlando and deleted most of the detail provided in the 2017 and 2018 plans—including Option A and Option B.⁴⁵ According to Ms. Stephens’ emails and her own testimony, she prepared and finalized (or, as she put it, “whipped up”) the 2019 Hurricane Plan in the span of one day.⁴⁶

As to the locations for placement of equipment in the event of a hurricane, Ms. Stephens changed the 2019 plan to include, at least visually, Butcherpen Cove, Bayou Chico, and an anchorage just east of Deadman’s Island on the north side of

⁴³ Capt. DiNapoli Direct Exam., October 22, 2021, at 3:15-17.

⁴⁴ *Id.* at 3:19-4:1.

⁴⁵ Sarah Stephens Depo. at 53:3-56:19 and 71:16-73:12.

⁴⁶ *See* Dooley Cross Exam, October 18, 2021, at 123:15-23. *See* C:776, Capt. DiNapoli Expert Report, at 13.

Gulf Breeze (referred to herein as the “Gulf Breeze Anchorage”).⁴⁷ The text of the 2019 plan, however, was not changed and continued to be described as East Bay.⁴⁸ The 2019 plan not only continued to describe the safe harbor as East Bay, but it also failed to change the distance to the hurricane location or update the time it would take to accomplish demobilization to these much closer locations.⁴⁹ The 2019 hurricane plan was approved by Skanska’s project management.⁵⁰

According to Skanska’s Storm Summary, Skanska halted productive work and engaged the Hurricane Preparedness Plan on August 28, 2019.⁵¹ Not only was Hurricane Dorian outside of the Gulf of Mexico at that time, the project site was not in any cone of probability, nor within any watches or warnings.⁵² Skanska began moving rigs to safe mooring on August 29, 2019 and used a third-party towing service the next day.⁵³ At this time, while Hurricane Dorian had shifted north of Puerto Rico, the project site was not in any cone of probability, nor within any watches or warnings.⁵⁴

⁴⁷ See Fulton Cross Exam, October 19, 2021, at 43:22-44:2; C:078. See C:776, Capt. DiNapoli Expert Report, at 13-14.

⁴⁸ DeMarco Cross Exam, October 19, 2021, at 159:1-4. This is the case even though Tom DeMarco testified at trial that East Bay was not a utilized safe harbor in 2018 or 2019. See also Sarah Stephens Depo at 96:16-22. See C:776, Capt. DiNapoli Expert Report, at 14.

⁴⁹ C:078. See Rodgers Cross Exam, October 19, 2021, at 209:12-210:9. See also Sarah Stephens Depo at 97:1-13. See C:776, Capt. DiNapoli Expert Report, at 14.

⁵⁰ See C:776, Capt. DiNapoli Expert Report, at 14.

⁵¹ C:029.

⁵² C:347; Capt. DiNapoli, Direct Exam, October 22, 2021, at 28: 1-6.

⁵³ C:234; DeMarco Cross Exam, October 19, 2021, at 155: 8-17.

⁵⁴ C:347, DeMarco Cross Exam, October 19, 2021, at 155: 18-156:3.

On August 31, 2019, Skanska Project Manager Rob Rodgers circulated a hurricane plan “revised to show rig placement for Dorian.”⁵⁵ This version of Skanska’s plan indicated that Skanska’s barges were demobilized away from the bridge to mooring locations in Butcherpen Cove (located east of the southern terminus of the Project), the Gulf Breeze Anchorage, and Bayou Chico.⁵⁶

On October 18, 2019, Skanska began storm preparation activities that included demobilizing its barges ahead of the storm that would become Tropical Storm Nestor.⁵⁷ At this time, the system that would become Tropical Storm Nestor was in the middle of the Gulf and projected to arrive at or near the project site as a tropical storm.⁵⁸

On October 25, 2019, the NWS issued a Tropical Storm Warning for the area of the project site for potential Tropical Storm Olga.⁵⁹ Skanska began storm preparation activities on October 25, 2019. The project site was not under a watch or warning or within the cone of uncertainty at the time Skanska commenced demobilization efforts.

d. 2020 Hurricane Season

⁵⁵ C:039; DeMarco Depo. at 42:19-20, 43:17-22. (Ex. 7).

⁵⁶ C:040; DeMarco Depo. at 42:19-20, 43:17-22. (Ex. 8); *see* C:776, Capt. DiNapoli Expert Report, at 33-35.

⁵⁷ C:130; DeMarco Depo. at 52:1, 52:7-10, 54: 6-14, 56:10-13; *see* C:776, Capt. DiNapoli Expert Report, at 36.

⁵⁸ C:131; DeMarco Dep. at 54: 6-14.

⁵⁹ C:133; Letter Fulton – Pielstick, November 6, 2019; *see* C:776, Capt. DiNapoli Expert Report, at 36, fn.73, 38C.

For the 2020 hurricane season, Ms. Stephens continued to have responsibility for preparing Skanska's hurricane plan. She had a final, approved plan in place and submitted to FDOT by June 8, 2020—seven days after hurricane season began.⁶⁰ Skanska's 2020 hurricane plan was virtually the same as the 2019 hurricane plan in all relevant respects except that the visual depictions in the 2020 plan no longer provided an image of a hurricane location at the Gulf Breeze Anchorage. Like all of the plans for the prior hurricane seasons, Skanska's 2020 hurricane plan listed reviewers of the plan.⁶¹ Notably, one of the reviewers of the 2020 hurricane plan, Catherine Burgess, testified that she had not reviewed the plan prior to Hurricane Sally and was not qualified to review a hurricane plan.⁶²

The 2020 hurricane plan continued to describe East Bay as the hurricane location while offering visual depictions of Bayou Chico and Butcherpen Cove—but not East Bay.⁶³ The 2020 hurricane plan included a chart that identified 11 cranes and 40 barges, as well as the time it took to move each with five tug boats.⁶⁴

⁶⁰ See C:078. See also Sarah Stephens Depo. at 165:11-22; Ex. 27A. See C:776, Capt. DiNapoli Expert Report, at 7.

⁶¹ Rodgers Cross Exam, October 19, 2021, at 210:20-22. See C:776, Capt. DiNapoli Expert Report, at 14. See also Sarah Stephens Depo. at 32:14-19, Ex. 2A.

⁶² Deposition of Catherine Burgess (“Catherine Burgess Depo.”), August 2, 2021, at 45:14-46:10. See C:776, Capt. DiNapoli Expert Report, at 14.

⁶³ C:007 and C:078. See DeMarco Cross Exam, October 19, 2021, at 160:21-24; 203:9-25. See also Sarah Stephens Depo. at 185:6-13. See C:776, Capt. DiNapoli Expert Report, at 14-15.

⁶⁴ See Fulton Direct Exam, October 18, 2021, at 160:16-22; Fulton Redirect Exam, October 19, 2021, at 72:18-19; DeMarco Cross Exam, October 19, 2021, at 146:3-6; Rodgers Direct Exam, October 19, 2021, at 196:16-20. See C:776, Capt. DiNapoli Expert Report, at 15.

However, at the time of Hurricane Sally, there were at least 55 barges in use at the project site—not 40 and only two tugs capable of moving barge without assistance.⁶⁵ Still, pursuant to the text of Skanska’s 2020 hurricane plan, it would take 30 hours at a minimum to demobilize 40 barges.⁶⁶ The 2020 hurricane plan was reviewed and approved by Skanska’s project management.⁶⁷

On August 21, 2020, Skanska caught an error in the 2020 hurricane plan and amended it.⁶⁸ The amended plan changed the text of the hurricane location for cranes and barges from East Bay to Butcherpen Cove to match the visual depictions of the barge locations. The text of the 2020 hurricane plan failed, however, to describe any safe harbor location in Bayou Chico.⁶⁹ While the 2020 hurricane plan updated the hurricane location to Butcherpen Cove, the plan failed to change the distance from the project site to Butcherpen Cove; the plan described the project site as being 10.6NM from the mouth of Bayou Chico.⁷⁰ Pensacola Bay Bridge Project Director, Tom Fulton, Project Executive and Construction Manager, Tom DeMarco, and

⁶⁵ See DeMarco Direct Exam, October 19, 2021, at 102:3-6. See also Sarah Stephens Depo. at 197:12-15. See C:776, Capt. DiNapoli Expert Report, at 15.

⁶⁶ See Hill Cross Exam, October 20, 2021, at 92:17-24 (testifying that he could move all of Skanska’s barges to Butcherpen Cove in 30 hours); see C:007; see also Rodgers Cross Exam, October 19, 2021, at 206:1-5; C:078. See C:776, Capt. DiNapoli Expert Report, at 15.

⁶⁷ C:078; Rodgers Cross Exam, October 19, 2021, at 205:15-21; see C:776, Capt. DiNapoli Expert Report, at 15.

⁶⁸ See Rodgers Cross Exam, October 19, 2021, at 203:9-25; C:078. See also Sarah Stephens Depo. at 199:6-17, Ex. 2. See C:776, Capt. DiNapoli Expert Report, at 15.

⁶⁹ Sarah Stephens Depo. at 198:21-199:1. See C:776, Capt. DiNapoli Expert Report, at 15.

⁷⁰ See C:078.

General Superintendent, Rob Rodgers, all testified this distance was an error, and that it would take less time to demobilize equipment from the Bridge to East Bay than to Butcherpen Cove.⁷¹ In reality, Butcherpen Cove is less than half of the distance to East Bay and is only 4.8NM from the mouth of Bayou Chico and approximately 2NM from the center of the bridge.⁷² In his deposition, Mr. Fulton estimated that moving equipment from the bridge to Butcherpen Cove was “approximately a mile and a half” and agreed a move to Butcherpen Cove would take place “a lot faster” than to East Bay.⁷³

In addition to not updating the distance in the 2020 hurricane plan, the plan failed to consider the shorter amount of time to demobilize barges to safe harbor in Butcherpen Cove than to East Bay.⁷⁴ Likewise, the 2020 hurricane plan failed to adjust the 30-hour minimum (for 40 barges) from the 2017, 2018, and 2019 plans, despite the fact that Skanska was using 55 barges on the project.

Skanska’s 2020 hurricane plan clearly identified its purpose⁷⁵:

The purpose of this plan is to summarize Skanska’s operations and responsibilities regarding their response to, and recovery from a hurricane. In general, Skanska personnel will be assigned to secure the

⁷¹ Rodgers Cross Exam, October 19, 2021, at 209:12-17; August 25, 2021 Deposition of Rob Rodgers (“Rob Rodgers Depo.”), at 133:21-24 and 138:13-21; August 20, 2021 Deposition of Tom Fulton (“Tom Fulton Depo.”), at 91:9-91:11; August 27, 2021 Deposition of Tom DeMarco (“Tom DeMarco Depo.”), at 100:23-112:5; *see* C:776, Capt. DiNapoli Expert Report, at 15; *see* C:078.

⁷² Rodgers Cross Exam, October 19, 2021, at 209:12-20; *see* C:776, Capt. DiNapoli Expert Report, at 15; *see* C:078.

⁷³ Fulton Depo. at 90:14-17; 90:20-91:4.

⁷⁴ Rodgers Cross Exam, October 19, 2021, at 209:21-210:19.

⁷⁵ *See* C:007; *see* C:776, Capt. DiNapoli Expert Report, at 16.

project site, secure all marine based equipment to safe harbor, and provide clean-up/recovery support at the project site. Also included are the duties required at the field and office building. This document is not intended to include all activities that could take place in the event of a hurricane. Depending on the severity of the hurricane, individuals may be assigned to provide additional support.⁷⁶

Additionally, the 2020 hurricane plan set forth Skanska's overall responsibilities in advance of a hurricane, which included securing all marine based equipment to safe harbor:⁷⁷

1. Secure loose materials and equipment prior to hurricane
2. Secure all marine based equipment to safe harbor
3. Engage in clean-up/recovery efforts on the job site
4. Document all activity and damage related to the storm event in order to submit to FDOT as required

Claimants' expert, Capt. DiNapoli, testified that the Hurricane Preparedness Plan in place prior to Hurricane Sally's landfall affirmed Skanska's responsibility to move equipment to safe harbor,⁷⁸ in addition to designating "multiple safe harbors."⁷⁹

The 2020 hurricane plan set forth "jobsite preparation" under four separate conditions, which included "Condition Three," described as "[s]ustained winds of 50 knots or 58 mph or greater expected within 72 hours / 3 days."⁸⁰ Condition Three required Skanska to perform a number of pre-storm activities, including:

⁷⁶ C:078; see Dooley Cross Exam, October 18, 2021, at 76:7-15.

⁷⁷ C:078. See e.g., Fulton Cross Exam, October 19, 2021, at 43:18-21; Rodgers Cross Exam, October 19, 2021, at 209:2-5; C:078; see C:776, Capt. DiNapoli Expert Report, at 16.

⁷⁸ Capt. DiNapoli Direct Exam, October 22, 2021, at 4:5-5:2.

⁷⁹ *Id.* at 5:3-6.

⁸⁰ C:078; C:007; see Fulton Cross Exam, October 19, 2021, at 16:25-17:4; *DeMarco* Cross Exam, October 19, 2021, at 147:24-148:3; C:776, Capt. DiNapoli Expert Report, at 16.

- Cease all routine activities which might interfere with securing operations.
- Commence securing and stow all gear and portable equipment.
- Make preparations for securing buildings.
- Begin packing office equipment and tools needed to stay dry or containing critical information.
- Conduct a thorough cleaning and remove any debris from job site.
- Reinforce/remove any scaffolding.

Condition Three also identified Skanska's obligations to manage its cranes and barges:

- The hurricane location for barges is Butcherpen Cove. It is approximately 10.6 nautical miles from the mouth of Bayou Chico.
- 30 hours at a minimum needs to be dedicated to moving the material barges and crane barges to the hurricane location in Butcherpen Cove. See chart below for example of breakdown.

Condition Three also provided the following instructions:

For barge mounted cranes and material barges

- Barge mounted cranes and all material barges will be moved to Butcherpen Cove.
- See the attached drawing that shows how the crane barges and material barges will be anchored and tied off. This drawing is for reference and is not the actual distance layout the barges should be positioned.
- The material barges shall be secured by soft line to a spud barge. In the event that there are additional spud barges, they should be placed on the outside of the material barges.

See attached sheet showing the marine heavy weather mooring

anchorage details. All cranes onsite will use similar mooring details.

- A 30K anchor (shall have hinging fluke and long stabilizers) is attached to 50' of heavy anchor chain which is connected to a sea buoy. The buoy is then rigged to a 2 5/8" poly soft line 75' long. This 2 5/8" line shall be doubled to have an overall capacity of 50T against pulling. Verify all connecting shackles.
- Anchors will be set with flukes toward the equipment it is holding. The fluke angle must be set between 50 and 35 degrees to the properly set. If these conditions are not met, the anchor will simply drag when the wind speed picks up.
- Once the buoy and line is paid out ensure that the points where the soft lines are connect[ed] to the barge are not prone to cut.
- Two (2) experienced marine supervisors will approve the mooring before leaving for the storm event. This shall be done for each of the mooring locations.⁸¹

In addition to identifying a 30-hour minimum for moving material and crane barges to Butcherpen Cove, the 2020 hurricane plan also set forth individual times required to relocate the barges and cranes.⁸² The 2020 hurricane plan included graphics identifying the positioning of the barges to be moored in Butcherpen Cove and Bayou Chico.⁸³ Capt. Rob Hill testified that from past experience, Skanska has

⁸¹ C:078.

⁸² See C:776, Capt. DiNapoli Expert Report, at 18.

⁸³ See Fulton Cross Exam, October 19, 2021, at 42:23-43:2; C:013; Rodgers Redirect Exam, October 19, 2021, at 233:19-24. See C:776, Capt. DiNapoli Expert Report, at 19.

demobilized the site in in two and a half days.⁸⁴ Capt. Hill also testified that, with the tugs and captains available to Skanska prior to Hurricane Sally's landfall, Skanska could have moved 40 barges to Butcherpen Cove in 30 hours.⁸⁵

On June 5, 2020, at the outset of the 2020 hurricane season, Skanska began to demobilize for Tropical Storm Cristobal.⁸⁶ On that day, the project site was not within the NHC's cone of probability, while a tropical storm warning extended to the Florida / Alabama state line.⁸⁷

On August 22, 2020, Skanska began to demobilize for the storm system that would become Hurricane Marco.⁸⁸ On August 22, 2020, the National Hurricane Center ("NHC") indicated a 60-percent probability of tropical storm force winds for the Project area due to potential Hurricane Marco.⁸⁹ Skanska began storm preparation activities on August 22, 2020. According to the NOAA projected storm track, however, the project site was not under a warning or in the cone at the time of demobilization. This is especially noteworthy as the Skanska re-used the same mooring locations for Hurricane Sally that were used in anticipation of Hurricane Marco. Mr. Rodgers sent an email on Saturday, August 22, 2020, stating:

We had a call this morning and are in the process of moving

⁸⁴ Hill Cross Exam, October 20, 2021, at 68:5-8.

⁸⁵ Hill Cross Exam, October 20, 2021, at 92:17-24. *See* C:776, Capt. DiNapoli Expert Report, at 20.

⁸⁶ DeMarco Depo. at 65: 16-22 and C:135.

⁸⁷ DeMarco Depo. at 70: 4-11 and 70: 17-20; C: 137 (Dep. Ex. 17).

⁸⁸ C:139 and C:140; DeMarco Cross Exam, October 19, 2021, 158:8-24; C:776.

⁸⁹ C:139; DeMarco Cross Exam, October 19, 2021, 158:4-12.

nonessential equipment back off the bridge and close to land on the Gulf Breeze side, not the full-blown move to the cove. The storm track looks better this morning than it did yesterday.⁹⁰

When Skanska made its decision to demobilize to the mooring piles, Marco was only a Tropical Storm with a cone of probability reaching no further east than western Louisiana and no warnings or watches extending beyond the Yucatán Peninsula.⁹¹ In contrast, at the time Skanska made its decision to demobilize to the mooring piles for Hurricane Sally, the project site was already in a tropical storm warning and only a few miles from a hurricane watch at the Florida / Alabama line.⁹²

e. Skanska's Motive to Forego Demobilization to Safe Harbor

Skanska's decision to forego its hurricane preparedness plan, contrary to its actions prior to numerous past tropical weather systems, only begins to make sense when viewed through a perspective limited to preserving Skanska's bottom line above obligations to preserve the region's surrounding lives and property. Mr. Tom DeMarco, Project Executive and Construction Manager for Skanska, testified that Skanska had available insurance coverage as well as a process through FDOT to receive payment on claims related to lost expenses and production related to demobilizing marine assets and other activities in preparation for tropical weather

⁹⁰ C:307, Rodgers Cross Exam, October 19, 2021, at 223: 16-224.

⁹¹ C:358; Rodgers Cross Exam, October 19, 2021, at 224: 10- 17.

⁹² C:207 and C:358; Rodgers Cross Exam, October 19, 2021, at 225: 1-25.

systems, such as tropical storms and hurricanes.⁹³ Skanska was able to and did pursue insurance claims relating to the cost and time of demobilizing its barges.⁹⁴

Nevertheless, Mr. DeMarco testified that Skanska began its preparations for Hurricane Sally *later* in the development of that storm than it had for previous storms.⁹⁵ General Superintendent Patrick McGlynn testified that prior to a change in project management that preceded Hurricane Sally, Skanska had been “very active, very proactive[,] and [was] making the right decisions” with regard to storm preparation.⁹⁶ Yet, heading into 2020, the Pensacola Bay Bridge project had fallen behind schedule and an effort was underway to catch back up to the intended completion date.⁹⁷ In a November 2019 letter from Eisman & Russo, the agent for FDOT on the project, Skanska had since fallen a month and a half behind schedule and was subject to a “partial recovery schedule.”⁹⁸ Mr. DeMarco testified that, at the same time, Skanska was working under a “critical path management” schedule in order to mitigate or limit delays in the project completion date.⁹⁹

In addition to falling behind, Skanska was also encountering challenges with

⁹³ DeMarco Cross Exam, October 19, 2021, 162:8-11 and 163:2-6. DeMarco Depo. at 40:21-40:25; 41:3; 64:16-64:20.

⁹⁴ DeMarco Depo. at 74: 21-3 and C:138 (Dep. Ex. 18).

⁹⁵ *Id.* at 162:12-15; 162:18-24.

⁹⁶ McGlynn Depo. at 25:9-26:5.

⁹⁷ DeMarco Depo. at 99:12-21.

⁹⁸ *Id.* at 90:22-91:03 and C:144 (Dep. Ex. 24).

⁹⁹ *Id.* at 93:04-93:09, 95:02-95:07, 96:09-96:11, 96:13-96:17 and 99:02-99:07; C:146 (Dep. Ex. 26).

its insurance and FDOT claims for reimbursement of demobilization costs and lost productivity. In a May 21, 2020 email, Skanska’s insurance adjuster acknowledged that it had been “more lenient on the identical prior storm claims for Gordon and Michael.”¹⁰⁰ In the summer of 2020, Skanska determined that demobilization and remobilization for tropical weather systems had cost Skanska roughly 15.3 million dollars in costs and delays.¹⁰¹ On August 31, 2020, Skanska’s Vice President of Insurance & Surety, Mary Ann Krautheim, described “fighting with the adjuster over Dorian & Nestor,” which Mr. DeMarco acknowledged understood to mean Ms. Krautheim was fighting with its insurer over demobilization and remobilization claims.¹⁰² Less than two weeks later, on September 11, 2020—the same day NHC released Advisory 1 for Hurricane Sally that placed the project site within the cone of probability—FDOT denied Skanska’s claim for reimbursement of expenses related to its preparations for Hurricane Marco as a result of Skanska’s apparent failure to provide timely notice.¹⁰³ In summary, Skanska had fallen behind project schedule, was fighting with insurers who were less lenient than for prior demobilization claims, and had just been denied its claim for Hurricane Marco by FDOT. This was the context against which Skanska opted to delay its preparations

¹⁰⁰ *Id.* at 87:08-87:12 and C:141 (Dep. Ex. 21).

¹⁰¹ Fulton Depo. at 333:19-333:22; 337:9-337:14; Exs. 50 and 50a.

¹⁰² DeMarco Depo. at 87:21-88:07 and 88:16-88:21 and C:141 (Dep. Ex. 21).

¹⁰³ DeMarco Cross Exam, October 19, 2021, 163: 17-20. DeMarco Depo. at 164:3-164:15; Ex. 23.

for Hurricane Sally until far *later* in the development of that storm than it had for previous storms.¹⁰⁴

III. Preparation for Hurricane Sally

a. Perspective of the Captain of the Port

United States Coast Guard Captain of the Port, LaDonn Allen, serves as the Sector Commander and Captain of the Port for the Mobile Sector that includes Pensacola Bay and the Project Site.¹⁰⁵ Capt. Allen also served as the Incident Commander for Hurricane Sally and various other storms.¹⁰⁶ Contrary to Skanska's claims, Capt. Allen testified that because she was not aware that Skanska was taking actions to prepare for Hurricane Sally, she could not have approved or disapproved any actions taken by Skanska in preparation for that storm.¹⁰⁷ However, as she testified:

I would have had concern had I known about them and had I known what they were going to do. Had I known they did not seek safe shelter, and I had known that they would not be prudent in listening to my direction, then I would have been very concerned, yes.¹⁰⁸

Capt. Allen further testified that the fact that she has not issued any enforcement order or Captain of the Port Order does not represent a finding that Skanska was not at fault, nor does that fact represent any finding that Skanska's

¹⁰⁴ DeMarco Depo. at 162:12-15; 162:18-24.

¹⁰⁵ Capt. Allen Direct Exam, October 22, 2021, at 224:1-12.

¹⁰⁶ *Id.* at 225:2-3.

¹⁰⁷ *Id.* at 226:23-227:2.

¹⁰⁸ *Id.* at 238:23-239:6.

preparations for Hurricane Sally were reasonable and prudent in the eyes of the Coast Guard.¹⁰⁹ Capt. Allen explained of the Coast Guard's decision to not issue any fines, penalty, or sanctions for any vessel as a result of Hurricane Sally:

That would include all vessels that went astray, that went aground or any – or that had any damage, because we know there will be civil penalties coming. We know that salvage is a high cost to operation, and therefore, if they are doing anything to salvage -- although Skanska, we couldn't get in touch with them after the hurricane. Quite often, communications were very poor. We tried several time to contact them with no success, as you can probably see in the emails and everything.¹¹⁰

Capt. Allen further testified that “And had I known that they would not seek shelter, I probably would have issued a Captain of the Port order.”¹¹¹ In fact, Capt. Allen twice characterized as “preposterous” claims by Skanska's expert, Retired United States Coast Guard Captain, Lincoln Stroh, that Capt. Allen tacitly or implicitly approved of Skanska's Actions or found the same reasonable and prudent.¹¹² Unlike Capt. Allen, Capt. Stroh had never served as Captain of the Port of the Mobile Sector.¹¹³ Despite this, Capt. Stroh testified that Skanska asked him to provide his expert opinions from a Captain of the Port perspective.¹¹⁴ Capt. Stroh, however, did testify that the decision of whether or not to institute an enforcement

¹⁰⁹ *Id.* at 228:24-229:10.

¹¹⁰ *Id.* at 247:7-21.

¹¹¹ Capt. Allen Cross Exam, October 22, 2021, at 245:22-24.

¹¹² Capt. Allen Direct Exam, October 22, 2021, at 230:23-231:6.

¹¹³ Capt. Stroh Cross Exam, October 22, 2021, at 130:13-16.

¹¹⁴ *Id.* at 130:23-131:12.

action is within the discretion of the Captain of the Port.¹¹⁵

When asked if it should have been within the purview of her office to determine what actions were being taken by every member of the maritime community in the Port of Pensacola, Capt. Allen responded:

So I'm going to tell you right now, sir, that's impossible. That is impossible. There are hundreds of thousands of vessels throughout the states of Alabama, Florida, and Mississippi, and so our focus, therefore, are on inspected vessels that are over 300 gross tons with our limited resources.¹¹⁶

Even Skanska's expert, Capt. Stroh, agreed that it is not incumbent upon the United States Coast Guard to go behind Skanska and make sure that it moved its barges to safe harbor.¹¹⁷ Capt. Stroh also testified that it is not the Captain of the Port's responsibility to ensure Skanska follows its Hurricane Preparedness Plan.¹¹⁸ When asked "[d]o barge owners and operators have any obligation to take reasonable precautions prior to tropical storms and hurricanes to protect other vessels," Skanska's expert Capt. Stroh responded, "[w]ell, they need to protect the critical infrastructure first," which he clarified included bridges.¹¹⁹ Capt. Stroh also testified that barge owner and operators have an obligation to take reasonable precautions prior to tropical storms and hurricanes to protect others' lives and property.¹²⁰

¹¹⁵ *Id.* at 145:14-17.

¹¹⁶ Capt. Allen Cross Exam, October 22, 2021, at 238:9-238:18.

¹¹⁷ Capt. Stroh Cross Exam, October 22, 2021, at 142:22-143:2.

¹¹⁸ *Id.* at 153:13-19.

¹¹⁹ *Id.* at 154:25-155:7.

¹²⁰ *Id.* at 155:10-14.

Capt. Allen also testified that the Coast Guard does not review hurricane plans outside of vessels that want to stay in port that are over 300 gross tons and over.¹²¹ Skanska, as the vessel owner and operator, ultimately holds the responsibility to ensure that it has adequately prepared its project site for the effects of a tropical weather system.¹²² Capt. Allen testified, “[w]e do not approve hurricane plans for any vessel,” before adding, “[t]herefore, we did not approve or recommend anything for Skanska.”¹²³

Capt. Allen further testified that she issues Broadcast Notice to Mariners as “direction to the maritime community to do what they need to do to prevent incidents, similar to our Marine Safety Information Bulletins that we put out.”¹²⁴ Additionally, she testified, “prudent mariners would follow those guidelines and heed those directions.”¹²⁵ As Capt. Allen explained, “I consider them direction to each and every mariner. A prudent mariner would follow that direction.”¹²⁶

b. Thursday, September 10, 2020

In the afternoon of September 10, 2020, the NOAA five-day tropical weather outlook for the Atlantic Basin, including the Gulf of Mexico, issued its notice of a 40-60% chance that a tropical cyclone would develop and track westward into the

¹²¹ Capt. Allen Direct Exam, October 22, 2021, at 229:16-24.

¹²² Capt. Allen Direct Exam, October 22, 2021, at 229:25-230:4.

¹²³ Capt. Allen Cross Exam, October 22, 2021, at 246:24-247:2.

¹²⁴ Capt. Allen Direct Exam, October 22, 2021, at 232:4-18.

¹²⁵ *Id.* at 232:20-21.

¹²⁶ Capt. Allen Cross Exam, October 22, 2021, at 249:4-8.

Gulf of Mexico and potentially threaten the Gulf Coast.¹²⁷

c. Friday, September 11, 2020

On Friday September 11, 2020, the NHC issued Advisory 1 for Tropical Depression 19 at 4:00 PM (CST)/5:00 PM (EST). Advisory 1 put the project site within the cone of uncertainty for a tropical storm within the next 72 hours.¹²⁸ General Superintendent Ronnie Benton testified that Advisory 1 “obviously triggers the condition 3,” including condition three obligations such as the removal of Rig 20’s A-frame.¹²⁹ Mr. Benton’s testimony was echoed by several of his colleagues who agreed that Advisory 1 triggered condition 3, including General Superintendent Pat McGlynn,¹³⁰ Field Engineer and Hurricane Plan Preparer Sarah Stephens.¹³¹ Project Engineer Catherine Burgess testified that the Condition Three threshold was met according to the forecast within Advisory 1.¹³² Advisory 1 clearly signaled that the onset of Condition Three was likely imminent. The forecast and observed weather at the project site from Friday, September 11, 2020 up to the morning of Sunday, September 13, 2020 was favorable for the movement of barges and other marine equipment. In fact, Captain Hill, Skanska’s internal tugboat captain,

¹²⁷ C:547; Henning Direct Exam, October 21, 2021, at 90:23-92:1.

¹²⁸ C:008.1; Henning Direct Exam, October 21, 2021, 92:2-94:19.

¹²⁹ Benton Cross Exam, October 20, 2021 at 150: 24-151:3 and 151: 9-13.

¹³⁰ McGlynn Depo., 84: 10-21 and 84:24.

¹³¹ Stephens Depo., 217: 25-218: 7.

¹³² Burgess Depo., 138: 5-14.

described the local weather on Saturday and Sunday as “lovely.”¹³³

Capt. DiNapoli testified that, as a tugboat operator and tug fleet manager, he learned to rely on the NHC advisories.¹³⁴ Upon evaluating the NHC advisories alongside the local Mobile National Weather Service Marine Zone Forecasts, Capt. DiNapoli testified that “There was considerable discrepancy between the NOAA broadcasts and the information available in the NHC advisories.”¹³⁵ When asked how a “reasonably prudent manager of a tug fleet in Skanska’s shoes” would evaluate this discrepancy, Capt. DiNapoli testified that:

In this case, the NHC advisories were predicting much more severe weather than what the NOAA local area forecasts were predicting. It's the old cliché: It is best to prepare for the worst and hope for the best. If you prepare for the best and get caught by the worst, I would suggest that would be a bit imprudent.¹³⁶

Later the same day at 8:00 PM (CST), Capt. Allen issued a Marine Safety Information Bulletin (“MSIB”) setting Port Status Whiskey for Pensacola Bay “due to the possibility of gale force winds (39-73 mph) associated with Tropical Depression Nineteen entering Sector Mobile’s area of responsibility within 72 hours”¹³⁷ Capt. Allen explained that she issues the MSIB in order to “give them adequate warning and direction for them to be safe in the – prior to the event of

¹³³ Capt. Hill Cross Exam, October 20, 2021, at 31:14-19, 69:13-19, and 70:15-17.

¹³⁴ Capt. DiNapoli Direct Exam, Oct. 22, 2021 at 17:22-18:10.

¹³⁵ Capt. DiNapoli Direct Exam, Oct. 22, 2021, at 18:11-18.

¹³⁶ *Id.* at 18:19-19:3.

¹³⁷ C:599; Capt. Allen Direct Exam, October 22, 2021, at 233:5-234:7.

hurricane storm-force winds and seas reaching our area of responsibility.”¹³⁸

Dr. Dooley, Skanska’s retained meteorology witness, referenced another Coast Guard MSIB in his report, Saturday’s Port Status Yankee, as justification for Skanska’s continued Sunday morning pile driving using Rig 20.¹³⁹ On cross examination, Dr. Dooley was shown the Coast Guard MSIB (Port Condition Whiskey) issued on Friday, September 11, 2020, at 8:00 P.M. local time in which the Coast Guard announced: “Gale force winds are predicted within 72 hours” and extended Port Condition Whiskey to the Port of Pensacola.¹⁴⁰ Dr. Dooley quibbled with the MSIB definition of gale force winds but ultimately conceded that the MSIB expressly listed them as winds between 39-73 mph and then conceded that 58 mph was within that range.¹⁴¹ Dr. Dooley asserted that “it doesn’t say that 59 (sic) miles an hour is going to occur. It’s possible.”¹⁴² Dr. Dooley then claimed “whether or not the Coast Guard updated this, I don’t know” even though Dr. Dooley himself referenced an update, Port Condition Yankee, in his very own expert report.¹⁴³

Condition Three, which required Skanska to secure its equipment, including its barges, to the two safe harbor locations designated in Skanska’s Plan was triggered on Friday, September 11, 2020. Advisory 1 issued on Friday afternoon at

¹³⁸ Capt. Allen Direct Exam, October 22, 2021, at 234:10-12.

¹³⁹ S:149 and C:601.

¹⁴⁰ C:601; Dooley Cross Exam, October 18, 2021, at 135:2-139:2.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

4:00 P.M. local time warned of a storm that was “forecast to strengthen to near hurricane intensity by early next week as it moves over the northeastern Gulf of Mexico.”¹⁴⁴ That very first advisory warned that “dangerous impacts from storm surge, wind and heavy rainfall will be possible along the Gulf Coast from the Florida Panhandle to Southeastern Louisiana this weekend and early next week.”¹⁴⁵ NHC’s Advisory 1 did not simply describe the possibility of condition three triggering conditions; the NHC discussion ended with a section labeled in all capital letters as “FORECAST POSITION AND MAX WINDS” which placed the forecast position of the max winds of 70 mph within 50 miles of the bridge at 72 hours.¹⁴⁶

Claimants provided expert meteorological opinion testimony from Mr. Richard Henning, a trained meteorologist and former United States Air Force and current NOAA onboard research meteorologist and flight director for airborne hurricane hunter flights into tropical storms and hurricanes.¹⁴⁷ In Mr. Henning’s current work as a flight director he is directly involved in the study and tracking of storms and gathering the airborne reconnaissance data for NHC to use in creating their advisory packages.¹⁴⁸ Mr. Henning reviewed the Skanska Hurricane Preparedness Plan and the Condition Three trigger contained within that Plan.¹⁴⁹ He

¹⁴⁴ C:615.

¹⁴⁵ C:615; Mr. Henning Direct Exam, October 21, 2021, at 99:09-100:23.

¹⁴⁶ C:612 and C:615.

¹⁴⁷ Henning Direct Exam, October 21, 2020, 56:13-58:16.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 62:23-63:12.

testified that NHC's Friday, Advisory 1 forecast Graphics, Key Messages, Forecast Position and Max Winds informed a reasonable user that Pensacola would experience dangerous tropical storm-force weather in the coming week in Pensacola and that, based on his meteorological education and experience, Skanska's Condition Three, of expected 58 MPH winds in 72 hours, was at play and at that point triggered.¹⁵⁰ Even beyond the clear warnings contained within Advisory 1, Mr. Henning's testimony regarding the NHC's issuance of a Tropical Storm Warning encompassing the Pensacola Bay area is persuasive. Mr. Henning testified that NHC's predawn Sunday issuance of a Tropical Storm Warning constituted a Condition Three triggering forecast.¹⁵¹ Skanska has asserted that it was surprised by an unexpected right turn made by Sally that brought it to its ultimate landfall near Gulf Shores, Alabama. Mr. Henning considered this issue and testified that this right turn was well forecast and was the subject of repeated warnings in the NHC advisories, including Advisory 1.¹⁵² Mr. Henning reviewed the graphics, and even the NWS local Mobile forecasts, the discussions and the text advisories, and opined that, from Friday's Advisory 1 throughout the history of the storm there was never any point where Pensacola wasn't either within the 1–3-day cone or within a tropical

¹⁵⁰ Henning, Direct Exam, October 21, 2021, at 99:09-100:23.

¹⁵¹ *Id.* at 109:4-25.

¹⁵² *Id.* at 75:17-77:3, 78:9-81:10, 82:09-23, 95:16-96:14, 106:23-107:7, and 112:14-114:02.

storm watch, tropical storm warning or hurricane warning and that Condition Three was triggered.¹⁵³

Dr. Dooley, Skanska's testifying meteorologist, conceded that the NHC forecasts constitute the "big picture" and that "you want to know the big picture, so you would have to look at the NHC."¹⁵⁴ Dr. Dooley described the National Hurricane Center thusly: "the NHC is the premier agency for tropical storm cyclone forecasting in - - basically the world."¹⁵⁵ He inconsistently claimed that the NOAA Marine Zone Forecasts promulgated by the Mobile, Alabama, National Weather Service office were "more valuable" than the NHC advisories.¹⁵⁶ The Court should reject Dr. Dooley's testimony that the Mobile Marine Zone Forecast supported Skanska's decision not to implement the Condition Three barge mobilization required by Skanska's own Hurricane Preparedness Plan. Dr. Dooley's use of the NHC centerline path, with the 50 knot radius wind circles imposed, improperly ignores the published forecast error rates, and eliminates the well-known and well accepted cone used by the NHC to warn communities in the probable path of a storm of the dangers posed by these powerful yet unpredictable tropical weather systems.

¹⁵³ *Id.* at 114:03-115:03.

¹⁵⁴ Dooley, Direct Exam, October 18, 2021, 7:6-7.

¹⁵⁵ *Id.* at 6:3-11.

¹⁵⁶ *Id.* at 5:17-7:9; *See also*, S:77.0006.

Skanska's own Hurricane Preparedness Plan recognized the fallacy of Skanska's purported reliance on the Mobile NWS text forecast and its focus on the centerline track: "Beyond the eye, counterclockwise winds bring destruction to coastlines and islands in their erratic path."¹⁵⁷ Dr. Dooley agreed the average track error at 72 hours is 96.3 miles and "that tells us that the error in the forecast at 72 hours could be off by 96.3 miles."¹⁵⁸ He conceded that the track data that he started with to create his graphical 72-hour track/50-knot wind circles "could be 96 miles off."¹⁵⁹ Nonetheless, Dr. Dooley limited his opinion to the exact track line without consideration of this NHC published average error.¹⁶⁰ Dr. Dooley even admitted that he was unaware whether Skanska actually employed his methodology of imposing a 50-knot radius upon the track line in their decision making process.¹⁶¹ He was, however, aware that Skanska had received and reviewed the NOAA graphical track forecasts.¹⁶²

Dr. Dooley further claimed that upon receipt of a Tropical Storm Warning "you must then go look at the local site-specific forecast, Pensacola Bay, and see what they said for that five-day period."¹⁶³ He agreed, however, "you could get any

¹⁵⁷ C: 078; Dooley Cross Exam, October 18, 2021, 77:21-81:9.

¹⁵⁸ C:540; Dooley Cross Exam, October 18, 2021, 123:24-125:25.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 100:2-7.

¹⁶² Dooley Cross Exam, October 18, 2021, 100:8-102:15.

¹⁶³ *Id.* at 102:17-21.

kind of tropical storm condition” including “heavy rain,” “storm surge” and even “downbursts from tornadoes.”¹⁶⁴ Dr. Dooley’s use of the NHC center-line “track” without accounting for the published forecast error rates, is unreliable. Dr. Dooley’s methodology failed to consider the cone, the Tropical Storm Watch and the Tropical Storm Warning.¹⁶⁵ The narrow focus of Dr. Dooley’s track with imposed 50-knot wind radii, improperly ignores the NHC’s cone containing the probable path of the storm.

Skanska claims that it valued the Mobile NWS local forecast for Pensacola Bay System wind and waves over the NHC Advisories. However, Skanska made no attempt to demonstrate a custom and past practice of using these local text forecasts to inform its prior storm mobilization efforts. These prior storms were very much at issue. Claimants, using side-by-side comparisons of the Sally NHC advisories and NHC advisories from prior storms, demonstrated at trial that Skanska’s mobilization history was inconsistent with its claims regarding Sally. Skanska made no attempt to justify its earlier, prior storm mobilization decisions based on local wind and wave forecasts.

Mr. Richard Henning, Claimants’ meteorology expert, is necessarily more credible than that of Dr. Dooley. Mr. Henning explained that the site-specific

¹⁶⁴ *Id.* at 102:17-103:3.

¹⁶⁵ Dooley Cross Exam, October 18, 2021, 80:9-81:18.

Mobile area zone forecasts for the Pensacola Bay system represented a binary product. In other words, these local text forecasts acknowledged the well-known track errors and unpredictability of the storm. These local forecasts expressly warned of the danger of approaching tropical weather but also provided a continuing forecast that would be applicable if the storm did not, in fact, enter the Pensacola Bay system. As early as Friday, September 11, 2020, this local forecast warned of possible tropical storm conditions.¹⁶⁶ Later, on Saturday afternoon, this same product¹⁶⁷ mentioned, 6 times, the possibility of tropical storm conditions in Pensacola Bay. Skanska's misuse of the local text forecast is perhaps best illustrated by Skanska's selective reading of the forecast issued on Sunday September 13, at 5:00 A.M. This text warning expressly warned "Tropical Storm Warning In Effect." An issuance of a Tropical Storm Warning indicates that the NHC has determined that Tropical Storm conditions are expected in the noticed region within 36 hours.¹⁶⁸ Skanska chose to ignore this warning and purportedly relied on the forecast winds and waves contained within the text.

A contemporaneous letter dated September 14, 2020, from Skanska's Project Executive, Thomas J. DeMarco to Brett Pielstick, the Eisman & Russo, Project Administrator, casts significant doubt on Skanska's claimed reliance on zone area

¹⁶⁶ Henning Direct Exam, October 21, 2021, 82:24-87:15. *See also* S:770.0005.

¹⁶⁷ S:770.0009.

¹⁶⁸ C:535; Henning Direct Exam, October 21, 2021, 63:23-64:14.

text forecasts over the NHC advisories, watches and warnings. In that letter, written and sent while Skanska was moving its barges to the mooring piles and spud islands, Mr. DeMarco asserted: “On September 13, 2020, the National Weather Service (“NWS”) issued a Tropical Storm Warning for the area due to Tropical Storm Sally. Anytime the project is within the potential path of a tropical storm, advance preparations are required in order to secure material and equipment. Accordingly, (Skanska) began storm preparations on September 13, 2020.”¹⁶⁹ Mr. DeMarco chose to inform the Project Administrator, in this letter requesting an extension of Contract Time and additional compensation for additional costs incurred due to this delay, that they had begun securing their equipment due to a Tropical Storm Warning. This invocation of the National Weather Service, and specifically the Tropical Storm Warning issued for the area on Sunday, September 13, 2020, indicates clearly that Skanska leadership was well aware of the impending danger posed by Tropical Storm Sally and was aware of the importance and value of the NHC advisories.

Skanska claimed at trial, through Dr. Dooley, that the local wind and wave forecasts were more valuable than the “big picture” NHC advisories and Tropical Storm Warnings. If Skanska did, in fact, choose local wind and wave forecasts over the express warnings of tropical storm conditions and Tropical Storm Warnings contained within those same local forecasts, Skanska’s actions were imprudent and

¹⁶⁹ C:115; Dooley Cross Exam, October 18, 2021, 90:23-92:03.

resulted in the release of its barges and the subsequent allisions with the bridge and other property.

Skanska's purported use of site-specific local text forecasts to limit the NHC advisories was ill advised and did not indicate that Skanska properly considered the real-world risk of the approaching storm. Skanska, through its leadership team of Mr. Fulton, Mr. DeMarco and Mr. Rodgers failed to appropriately consider the clear warnings provided by the National Hurricane Center. Skanska's leadership was required to exercise judgment consistent with a person familiar with the ways and vagaries of the sea. In this instance Skanska's reliance on these site-specific text forecasts over the NHC advisories, indicate a failure to act within that standard.

There is no evidence that Skanska performed any hurricane preparation work on Friday, September 11, 2020.¹⁷⁰ In fact, construction continued as usual and Skanska took no preparations for a potential storm. Claimants' expert, Capt. DiNapoli was asked "as a manager of a 55-barge fleet, are there any measures you believe Skanska should have taken upon its first notice of the storm system that became Hurricane Sally?" He responded:

Well, that would have been on late Friday afternoon, and under the circumstances, I think I would have put all of the tug crews on immediate standby, be ready to -- be at your station on, whatever's reasonable, perhaps 60 minutes' notice. [. . .]

So you can get a crew out there and start moving barges when you need

¹⁷⁰ Fulton Cross Exam, October 19, 2021, at p. 212:12-213:12.

to.¹⁷¹

As Capt. DiNapoli continued:

Once a watch is in place for a storm like this and you can see the track, it's reasonable to assume that more serious conditions are going to follow. So at this point, when you see that watch and the potential for more severe conditions, you need to ask yourself, how long do I need to get my barges to safe harbor.

And in this case, if I remember the hurricane plans correctly, Skanska had represented to the Department of Transportation, and the Coast Guard as well, by giving them a copy, that I believe they were able to move -- they had the capability to move five -- I'm sorry, 40 barges with five tugboats in 30 hours. However, that's not the reality of the situation.

That representation was based upon three larger tugboats, the 1200-horsepower models, moving two barges at a time and the two smaller ones moving one barge at a time to the safe harbor areas.

The two tugboats that they had -- and that was 30 hours.

With the two tugboats that they had, what they found -- the senior captain, Captain Hill, testified that they could move two barges at a time, but only under benign weather conditions. As soon as any winds started to blow, they would only move one barge at a time. And, in fact, when they started on Sunday afternoon to demobilize, those tugs did only move one barge at a time.

So if you do some quick math on that, with two tugs and 55 barges, one has to make 28 moves, the other one has to make 27. So it becomes a question of how long does it take to make one of those moves. And the distances from the bridge to Butcherpen and Bayou Chico are such that a round trip, meaning you pull up to a barge at the bridge, make up to it, which is not something you do in a couple of minutes, then unmoor it, move it to the safe harbor, securely moor it there, and then run the - - what we call the light tugboat back to the bridge would require at minimum of 2.5 hours for each of those moves.

So go with the big one that has to make 28 moves at 2.5 hours, that

¹⁷¹ Capt. DiNapoli Direct Exam, October 22, 2021, at 14:10-19.

means Skanska had to know or should have known they needed 70 hours, at least, to do the evacuation.

So when you see a forecast like this, you have to say, okay, I need 70 hours. What is the probability that I'm going to hit that threshold wind where these tugs really can't work anymore, and in what time?¹⁷²

Capt. DiNapoli evaluated the NHC's Tropical Depression 19 Advisory 2, which established a tropical storm watch for an area in the Florida panhandle extending from just east of Apalachicola extending to approximately Destin, Florida.¹⁷³ As he testified,

I would not -- you have to understand hurricanes do not run on railroad tracks. In my experience, when you see boundaries of a watch area like that, I always consider that. And it's been proven reliable and firsthand experience. I assign that a margin of 25 -- plus or minus 25 to 30 miles. So in this case, when I saw that one, I would say this -- this has the potential to affect me, and I need to start taking action. [. . .]

This is one of the further sheets that was included in Advisory Number 2, and it shows the tropical storm-force wind speed probabilities. As you can see, the Pensacola area is right at that line where you're looking at about a 40 percent probability of tropical storm-force winds within the upcoming period.¹⁷⁴

At the very least, Skanska's management should have held some manner of pre-hurricane/tropical storm meeting that day.¹⁷⁵

Instead, the evidence shows that Skanska had trouble controlling at least one

¹⁷² *Id.* at 19:15-21:7.

¹⁷³ C:614; Capt. DiNapoli Direct Exam, October 22, 2021, at 21:17-19.

¹⁷⁴ *Id.* at 22:3-23:5.

¹⁷⁵ The 2018 hurricane plan, C:248, required such a meeting no less than five days before the storm is predicted to arrive. The 2019 (*see* C:040) and 2020 (*see* C:007) plans prepared by Ms. Stephens and approved by Skanska management did not set a timeframe by which such a meeting should occur.

barge, Ringer 2, as early as the morning of Friday, September 11, 2020 before there were any noticeable effects on the project site by the storm system that would become Hurricane Sally. Project Superintendent, Grant Walker, texted the Project Executive and Construction Manager, Tom DeMarco:

Came in this morning to ringer 2 beating up against the trophy they set last night. Guaranteed it moved but survey should check. We have to monitor our barges at the end of each shift and slack our spud cables.¹⁷⁶

Nevertheless, Mr. DeMarco testified that it did not raise an alarm that Skanska could not secure a ringer barge in regular weather.¹⁷⁷

d. Saturday, September 12, 2020

On Saturday, September 12, 2020 at 10:00 AM (CST), Capt. Allen issued a Marine Safety Information Bulletin (“MSIB”) setting Port Status X-RAY for Pensacola Bay “due to the possibility of gale force winds (39-73 mph) associated with Tropical Depression Nineteen entering Sector Mobile’s area of responsibility within 48 hours . . . ,” which Capt. Allen explained tells the maritime community “that there will be gale-force winds entering our area within 48 hours.”¹⁷⁸

When asked whether or not Skanska “could have moored the barges to safe harbor in time if Skanska began early Saturday morning using just the two boats they used to deploy ahead of Sally,” Capt. DiNapoli testified:

¹⁷⁶ DeMarco Depo., at 126:22-127:4, Ex. 32.

¹⁷⁷ *Id.* at 131:6-131:10; 131:13.

¹⁷⁸ C:600; Capt. Allen Direct Exam, October 22, 2021, at 234:13-235:19.

According to my calculations, if they had started on Saturday morning, they probably would have just made it before the teeth of the storm approached. And, again, you have to recognize that these tugboats have limited capabilities. Once the wind gets up above 40 or 45 miles an hour, they just can't do anything. But they've -- if they had started Saturday morning, it's possible they could have evacuated the whole barge fleet before that level of wind occurred.¹⁷⁹

At 11:26 AM, Robert Rodgers, Skanska's Project Manager, texted the project leadership team, stating, "Tropical Depression 19 warrants discussion. Could be impacted Monday morning. I'm setting up a Webex invite for 1:00PM CST."¹⁸⁰ This Saturday meeting was the first meeting to discuss preparations for what would become Hurricane Sally.¹⁸¹ Per the previously-referenced NOAA storm track projection, at the time of that meeting, the project site was within the probable path cone of a hurricane.

Skanska Project Director and Vice-President of Operations, Tom Fulton, testified that, based on available weather forecasts, by Saturday, it was a "foregone conclusion" that Skanska "would be moving equipment away from the bridge in preparation for this weather," despite the fact that Skanska did not even begin demobilization until the next day.¹⁸² Whereas Mr. Fulton had already determined demobilization was a "foregone conclusion," Mr. Rodgers elected to take a "wait and see" approach on Saturday, testifying that:

¹⁷⁹ Capt. DiNapoli Direct Exam, October 22, 2021, at 15:7-18.

¹⁸⁰ S:069.13; Fulton Cross Exam, October 18, 2021, at 167:1-168:12.

¹⁸¹ *Id.* at 165:2-19.

¹⁸² *Id.* at 199: 18-200:3.

I was on board with waiting for further updates and continuing to monitor based upon the data that we had and the conditions that were forecast for the area.¹⁸³

According to notes from the 1:00 PM meeting, Skanska had one tug captain scheduled to be on site Sunday, and Skanska Superintendent, Nick Johnson, intended to call other tug captains to let them know they may need to be called in Sunday “pending track of the storm.”¹⁸⁴ Superintendent Grant Walker was assigned the task of calling a third-party tow service as a potential backup to assist moving barges.¹⁸⁵ Project Executive and Construction Manager, Tom DeMarco, testified that he assumed that Mr. Walker called them but did not learn until after the storm that he did not reach them.¹⁸⁶ When asked if there was any reason that Skanska could not have called in a third-party tow service to assist with demobilization, Project Manager, Rob Rodgers, testified that Skanska “could call anybody at any time.”¹⁸⁷

Despite the “lovely” weather described by Capt. Hill, there is no evidence Skanska made any substantive preparations for Hurricane Sally on Saturday, September 12, 2020. Dr. Dooley, Skanska’s trial weather expert, testified regarding Skanska’s weekend preparations: “They monitored it [TD 19] on the 11th. They discussed it on the 12th, [and they] began to take action on the morning of Sunday

¹⁸³ Rodgers Cross, October 19, 2021, at 220: 3-13.

¹⁸⁴ S:039.

¹⁸⁵ S:040; *see e.g.*, Fulton Cross Exam, October 18, 2021, at 167:1-168:12; DeMarco Depo. at 141:14-142:2.

¹⁸⁶ Fulton Cross Exam, October 18, 2021, at 140:17-22.

¹⁸⁷ Rodgers Depo. at 188:18-20; 188:23.

the 13th.”¹⁸⁸

When Capt. DiNapoli asked what Skanska should have gleaned from Advisory 5 from the NHC, he testified:

Advisory 5 extended the storm watch to the -- to the Florida-Alabama border, but then it also instituted a hurricane watch at that border which, again, is only -- what's it from here to the border? Probably 8 miles, 9 miles. So I would now be assuming I've got a hurricane coming. And this is 5:00 p.m. on Saturday, the 12th.¹⁸⁹

Later the same day at 8:00 PM (CST), Capt. Allen issued a Marine Safety Information Bulletin (“MSIB”) setting Port Status X-RAY for the portion of Pensacola Bay east of the bridge and setting Port Status YANKEE for the portion of Pensacola Bay west of the bridge “due to the possibility of gale force winds (39-73 mph) associated with Tropical Storm Sally entering Sector Mobile’s area of responsibility within 24 hours . . . ”¹⁹⁰ When asked what this MSIB was “telling” the maritime community, Capt. Allen explained:

Again, it’s telling them that there would be a possibility of gale-force winds associated with the storm in this case Tropical Storm Sally within 24 hours. And it also provides, again, that similar direction to seek safe haven, safe shelter and all of the other guidance and direction.¹⁹¹

e. Sunday, September 13, 2020

To begin with, as Skanska represented to FDOT’s agent, Eisman & Russo,

¹⁸⁸ Dr. Dooley Cross Exam, October 18, 2021, at 90:23-92:17.

¹⁸⁹ C:207; Capt. DiNapoli Direct Exam, October 22, 2021, at 23:19-24.

¹⁹⁰ C:601; Capt. Allen Direct Exam, October 22, 2021, at 235:20-235:24.

¹⁹¹ Capt. Allen Direct Exam, October 22, 2021, at 235:25-236:5.

Skanska did not begin storm preparations for Hurricane Sally until September 13, 2020.¹⁹² At around 7:30 AM (CST), on Sunday, September 13, 2020, Skanska's project leadership team, including DeMarco, Rodgers, and Fulton, collectively decided that Skanska would implement a "verbal" plan instead of the written 2020 hurricane plan.¹⁹³ Specifically, Skanska would forego moving the barges and cranes to the hurricane plan-designated locations of Butcherpen Cove and Bayou Chico. Rather, Skanska planned to moor the barges in clusters in the immediate vicinity of the bridge,¹⁹⁴ "driven several hundred feet, probably 500 feet away from the bridge itself."¹⁹⁵ Such a mooring configuration was never contemplated or described in any hurricane plan prepared by Skanska. Project Manager, Rob Rodgers, testified that Skanska did not have a written hurricane preparedness plan that called for mooring barges at mooring piles on the east and west side of the bridge.¹⁹⁶ Mr. Rodgers described these mooring piles locations as "not as safe as the other places that have been listed in the hurricane preparedness plans."¹⁹⁷

Skanska did not move its barges to the two designated safe harbor locations contained in the hurricane preparedness plan, rather they left their barges in the

¹⁹² C:115; Fulton Cross Exam, October 19, 2021, at 13:17-25.

¹⁹³ DeMarco Cross Exam, October 19, 2021, at 164:10-165:3.

¹⁹⁴ 30(b)(6) Deposition of Tom DeMarco, June 18, 2021, at 119:2-6; 132:12-18; 145:5-25; 167:6-15.

¹⁹⁵ *Id.* at 174:16-20.

¹⁹⁶ Rodgers Depo. at 143:19-143:25.

¹⁹⁷ *Id.* at 144:1-3, 144:6-8.

middle of the bay on mooring piles and spud islands.¹⁹⁸ Skanska did this work with only two tugs, Capt. Hill's Dawson, and the Albert Pike under Capt. Brad Thach.¹⁹⁹ Although Skanska had used third parties to contract out tug services in the past, including Portside Marine, no third-party tug service assisted in these moves to pipe piles and spud islands.²⁰⁰ Along with Bradley Thach, Capt. Hill is listed in Skanska's Hurricane Preparedness Plan as a Skanska tug boat captain point of contact, however, Capt. Hill could not tell the Court whether this move to mooring piles was contemplated in that same plan. In fact, his testimony on the subject was inconsistent to the point of lacking credibility.²⁰¹

After the Sunday morning meeting, Skanska began to move the barges "away from bridge."²⁰² Rig 20, however, was in use on Sunday morning to drive piles and was then left essentially "where it was."²⁰³ Skanska did not even move Rig 20 away from the project. Skanska believed that Rig 20, anchored between the bridge and the fishing pier, was "more sheltered than other parts of the project;" thus, Skanska purposefully chose to leave Rig 20 only 60 feet away from the bridge.²⁰⁴

¹⁹⁸ S:034; Capt. Hill Direct Exam, October 20, 2021, at 14:13-15:13, 16:02-18:12, 18:20-19:02, 19:12-19:21, 22:01-22:20, 23:05-24:10, 24:22-25:12.

¹⁹⁹ *Id.* at 31:01-31:13.

²⁰⁰ Capt. Hill Cross Exam, October 20, 2021, at 65:03-65:19.

²⁰¹ *Id.* at 73:21-74:08, 76:03-76:13.

²⁰² Dooley Cross Exam, October 18, 2021, at 112:3-23; Fulton Direct Exam, October 18, 2021, at 172:6-23.

²⁰³ Fulton Direct Exam, October 18, 2021, at 169:1-17.

²⁰⁴ *Id.*; DeMarco Direct Exam, October 19, 2021, at 108:2-13.

Notwithstanding Skanska's representations in its hurricane plan that it had five tugs available, Skanska conducted its operations to demobilize its barges to mooring spots around the bridge with only two tugs and without the assistance of a third-party tow company.²⁰⁵

Claimants' expert Capt. DiNapoli testified that, as a barge fleet manager, it is "essential" when evaluating weather forecasts to take into consideration the capabilities of the tug boat fleet in moving barges.²⁰⁶ As he explained, "You would have to know how long it would take for the assets that you have to accomplish the evacuation that you need to accomplish."²⁰⁷ Further, when asked if there was a "relationship between relationship between Skanska's margin of error to account for any mistakes or equipment failures as it relates to the timeliness of Skanska's decision to begin demobilizing," Capt. DiNapoli testified that:

Certainly. Anything you could do to increase your margin of error or your float time, you know, the earlier you can start, the better chance you have of successfully accomplishing the evacuation.²⁰⁸

Accordingly, Capt. DiNapoli, evaluated the two tugboats Skanska used when it began to demobilize on Sunday, the *Albert Pike* and *F. Dawson*:

Both of those are 1200-horsepower tugs, and in the scale of modern tugboat production, that is way down at the low end of propulsion power. I've commanded tugs of similar horsepower and capability, and

²⁰⁵ Hill Cross Exam, October 20, 2021, at 71:9-71:24; see Rob Rodgers Depo. at 173:7-173:14; DeMarco Depo. at 141:14-142:2.

²⁰⁶ Capt. DiNapoli Direct Exam, October 22, 2021, at 16:25-17:6.

²⁰⁷ *Id.* at 17:4-6.

²⁰⁸ *Id.* at 17: 17-20.

I can tell you firsthand, they would be able to handle the barges that would be typical to a project like this, but only in benign weather conditions.

As soon as any sort of significant wind or wave action is generated, they're going to struggle mightily to move those barges. In fact, one of the Skanska's tug captains, I believe it was Captain Hill, testified that they're almost useless after the wind hits a sustained velocity of 35 miles per hour.²⁰⁹

Capt. DiNapoli further testified that additional tug boat resources, particularly with greater horsepower than the *Albert Pike* and *F. Dawson* could significantly reduce the amount of time to complete the barge moves.²¹⁰

When asked if Skanska had begun to demobilize its barges to Bayou Chico and Butcherpen Cove at 7:00 AM on Sunday, September 13th and whether it could have completed the task with two tugs, Rob Rodgers, testified:

With two tugs, a large majority. And if we would have made the decision to demobilize, we would have certainly got help from Portside.²¹¹

Rodgers agreed that there would have been enough time to complete a full demobilization of Skanska's barges to Bayou Chico and Butcherpen Cove, including Rig 20, if the decision had been made to stop working with it and to demobilize it.²¹²

Capt. DiNapoli also evaluated the NHC Advisory 7 issued at 4:00 AM (CST), which set a hurricane watch as far East as the Alabama / Florida border. As Capt. DiNapoli

²⁰⁹ *Id.* at 12:1-15.

²¹⁰ *Id.* at 21:8-16.

²¹¹ *Id.*; Rodgers Depo. at 189:25-190:5, 190:190:10.

²¹² Rodgers Depo. at 190:13-20, 191:16-20.

testified, “As I said, I have learned in my career to not accept that boundary as a hard and fast line but to accord it a leeway of 25 to 30 miles.”²¹³ On the basis of these facts, Capt. DiNapoli offered the expert opinions that Skanska’s preparations for Hurricane Sally were “not adequate,”²¹⁴ and that Skanska failed to exercise reasonable care in securing its maritime assets in preparation for Hurricane Sally.²¹⁵

Tom DeMarco agreed that Skanska had begun its preparations earlier in the development of past storms than it did with Hurricane Sally.²¹⁶ Claimants’ expert, Capt. DiNapoli, testified that Skanska failed to have adequate resources to appropriately and timely prepare for Hurricane Sally when it decided to demobilize on Sunday morning ahead of Hurricane Sally.²¹⁷

In addition to tug boat resources, Capt. DiNapoli found that Skanska did not have “sufficient, adequate, qualified personnel to move its barge fleet to safe harbor” prior to Hurricane Sally’s landfall.²¹⁸ As Capt. DiNapoli testified, the lack of having sufficient, adequate, qualified deck hands requires considerable more direction and time.²¹⁹ In fact, Skanska’s payroll record only reflected 251 hours for the project site, which was less hours than for Labor Day the Monday before and far less than

²¹³ C:207, at 13; Capt. DiNapoli Direct Exam, October 22, 2021, at 24:3-20.

²¹⁴ Capt. DiNapoli Direct Exam, October 22, 2021, at 3:7-10.

²¹⁵ *Id.* at 3:11-14.

²¹⁶ DeMarco Depo. at 162:12-15; 162:18-24.

²¹⁷ Capt. DiNapoli Direct Exam, October 22, 2021, at 38:19-23.

²¹⁸ *Id.* at 13:4-7.

²¹⁹ *Id.* at 13:8-14:9.

for Saturday, which reflected 667.5 hours.²²⁰ In fact, Skanska's payroll record reflected that no deckhands were scheduled for Sunday, September 13, 2020, the day Skanska decided to demobilize.²²¹ This calls into serious question Mr. Fulton's response when asked if Skanska called for "all hands on deck:" "No, because all of our hands don't have skill in the marine aspect of our work. There are many people on the job that don't work on the water and don't have the skills necessary to perform the task of securing barges."²²² If this were true, why were there no deckhands schedule for Sunday? Further, why then did Mr. DeMarco testify that no deckhands "showed up?"²²³ This also raises questions with respect to Mr. Fulton's testimony that he had realized on Saturday the need to move from the bridge, despite Skanska waiting until Sunday to begin the process as, in his words, "you can't just click your fingers and bring tugboat captains and staff and craft in."²²⁴ Additionally, one of Skanska's tugboat captains, Terry McKinney, was also not scheduled.²²⁵

The conditions attendant to Condition Three in Skanska's 2020 hurricane plan makes clear that the A-frames for a pile driving rig, such as Rig 20, take time to remove and should be "one of the first activities completed" when severe weather with greater than 58 miles per hour is expected within less than 96 hours. In fact, it

²²⁰ Benton Cross Exam, October 20, 2021, at 167: 12-168:22; C:047 and C:048.

²²¹ *Id.* at 169: 13-170:5; C:047 and C:048.

²²² Fulton Cross Exam, October 18, 2021, at 202: 22-203:1.

²²³ DeMarco Cross Exam, October 19, 2021, at 126: 20-127:1.

²²⁴ Fulton Cross Exam, October 18, 2021, at 200: 17-24.

²²⁵ Benton Cross Exam, October 20, 2021, at 170: 6-8; C:047 and C:048.

was “the last thing” they did.²²⁶ Project Executive and Construction Manager, Thomas DeMarco, testified that the complete removal of Rig 20’s A-frame ahead of Hurricane Sally would have taken 6 to 8 hours and required Skanska to forego using the rig to drive piles.²²⁷ Removal of Rig 20’s A-frame, however, was not possible given that Skanska was still using it to drive piles until 2:05pm on Sunday.²²⁸ Skanska ignored the hurricane plan’s requirement to remove Rig 20’s A-frame in order to continue production. Rig 20 could have been moved after the 7:00 AM meeting if Skanska made the decision to stop working with Rig 20 and begin demobilizing it.²²⁹ General Superintendent Ronnie Benton testified that Rig 20 could fit within a “flotilla” in Butcherpen Cove as described on the graphic on the last page of the hurricane plan.²³⁰

Skanska’s substantive storm preparations that day included:

- Mr. Thatch began moving barges around 7:00 AM;
- Mr. Hill was first called by Nick Johnson at 10:00 AM on Sunday morning and asked to come in on his day off. He arrived about noon;²³¹
- Mr. Johnson told Mr. Hill “we’re going to start pulling stuff off the bridge;”²³²

²²⁶ C:007; Fulton Cross Exam, October 19, 2021, at 19:9-19; 20:11-21:3.

²²⁷ C:776, DeMarco Depo. at 123:21-124:3.

²²⁸ Benton Cross Exam, October 20, 2021, at 165: 3-5.

²²⁹ Rodgers Depo. at 191:16-20.

²³⁰ Benton Cross Exam, October 20, 2021, at 159: 1-12.

²³¹ C:776, 46; Capt. Hill Direct Exam, October 20, 2021, at 11:1-19.

²³² *Id.* at 12:24-13:1.

- Even as late as Sunday afternoon, when Mr. Hill joined the effort to move stuff off the bridge, “the crane barges that were out there and manlift barges, quite a few of them still had their material barges laid alongside;”²³³
- Mr. Hill received instructions to clear barges from the bridge and to put two barges together, or abreast, on mooring pipe piles which had been in place for construction of the bridge for three years. The four mooring pipe piles were located on the east side of the bridge and one mooring pipe pile was leftover and located on the west side of the bridge. Barges were moved to these moorings or remained on location at the bridge;²³⁴
- During the course of these Sunday moves Mr. Hill also moved barges to floating spud islands that did not use pipe piles but rather depended on self-contained spuds that were dropped from the barges;²³⁵
- At the time of the move, Skanska “had a lot more [barges] than [they] thought [they] did” so they used an anchorage known as East Number 2 mooring “to store extra barges;”²³⁶
- At least two of Skanska’s manlift barges could not be moved due to broken cables on the winches that lift the spuds. Unable to lift the spuds on Sunday and having “just too much other stuff that we prioritized over it,” these barges were not moved away from the bridge. On Monday, when Mr. Johnson and Mr. Hill came back the “conditions had deteriorated where [they] were not able to pull those spuds.” As Captain Hill testified: “We had missed our window.”²³⁷

f. Monday, September 14, 2021

On Monday, September 14, 2020 at 12:00 PM (CST), Capt. Allen issued a

²³³ Capt. Hill Direct Exam, October 20, 2021, at 13:1-11.

²³⁴ *Id.* at 14:16-15:13; 16:2-7; 16:24-17-14; 18:2-12; 18:20-19:2; 19:12-21; 22:1-11; 23:5-24:10; 24:22-25:5;

²³⁵ *Id.* at 22:1-22:11; 24:6-10.

²³⁶ *Id.* at 23:5-17.

²³⁷ *Id.* at 20:5-21:12.

Marine Safety Information Bulletin (“MSIB”) setting Port Status X-RAY for the portion of Pensacola Bay east of the bridge and setting Port Status ZULU for the portion of Pensacola Bay west of the bridge “due to the possibility of gale force winds (39-73 mph) associated with Tropical Storm Sally entering Sector Mobile’s area of responsibility within 12 hours . . . ”²³⁸

Despite the fact that Pensacola was in the one-to-three day cone of the probable path of the storm at the issuance of Advisory 1 at 4:00 PM local time on Friday, September 11, 2020, and despite being well aware of the time and effort required to conduct a demobilization, Skanska did not begin its demobilization efforts until the morning of Sunday, September 13th, after the issuance of Advisory 7. At that time, the project site was under a Tropical Storm Warning. Skanska failed to heed clear warnings issued by the NHC and the USCG regarding the expected and predicted dangers associated with Hurricane Sally. From the issuance of Advisory 1 on the afternoon of Friday, September 11th, to the landfall of Hurricane Sally on the morning of Wednesday, September 16th, the work site was either in the cone of the storm, under a watch or warning, or under a USCG Port Condition warning of gale force winds. There is simply no justification for Skanska’s failure to begin its demobilization efforts earlier.

Skanska asserts that its decision and effort to move the barges to mooring piles

²³⁸ C:602; Capt. Allen Direct Exam, October 22, 2021, at 236:6-236:10.

and spud islands was justified by the local zone forecasts of lesser winds and waves from NWS for the Pensacola Bay System. However, even if the Court assumes this assertion is accurate, the preparations chosen by Skanska leadership, to move the barges to mooring piles and spud islands, proved totally inadequate even for these lesser conditions. Skanska barges began to break free long before the arrival of Hurricane Sally “in winds less than what was forecast.”²³⁹ Mr. Dean, Skanska’s retained witness on operations, testified that his retainer was expressly limited; he was tasked only to consider whether Skanska’s preparations were suitable for “2-foot seas and 23-knot winds.”²⁴⁰ Mr. Dean conceded that Skanska’s Hurricane Preparedness Plan required it to move its barges to “safe harbor” and that the Plan identified two safe harbor locations, Bayou Chico and Butcherpen Cove.²⁴¹ He further agreed that the mooring piles were not identified by Skanska, in their Plan, as safe harbor and that these mooring piles out in the middle of the bay are not safe harbor for a hurricane.²⁴² Mr. Dean admitted that the middle of the bay could not be considered safe harbor because of “the long fetch and also the fact that the revolving storm, the wind direction is going to change.”²⁴³ He also agreed that spud islands were not safe harbor.²⁴⁴ In addition to excluding mooring piles and spud islands as

²³⁹ Dean, Cross Exam, October 21, 2021, at 30:08-25.

²⁴⁰ *Id.* at 32:19-33:06.

²⁴¹ *Id.* at 6:12-7:8.

²⁴² *Id.* at 7:9-8:22.

²⁴³ *Id.* at 8:23-9:5.

²⁴⁴ *Id.* at 13:03-25.

safe harbor, Mr. Dean conceded that Bayou Chico was a safe harbor and that Butcherpen Cove provided an “element of protection” with a land mass that would block the winds expected when the project was in the northeast quadrant of an approaching storm such that the conditions in Butcherpen Cove would not be as bad as at the mooring piles in the middle of the bay.²⁴⁵

g. Tuesday, September 15, 2020

Before 3:00 AM on Tuesday, September 15, 2020, at least one of Skanska’s barges had broken loose from its moorings.²⁴⁶ Mr. Rodgers agreed that barges broke free from their moorings as early as 3:00 AM on Tuesday, September 15th and continued to break free before Hurricane Sally made landfall in winds that, as recorded at the NOS Station, never exceeded sustained wind speeds over 20 miles per hour.²⁴⁷ In fact, on September 15, 2020 from 2:30 AM to 3:18 AM (CST), the NOS station closest to the bridge recorded winds of only 9 to 11 knots.²⁴⁸ As shown below, another barge broke free at 6:30 AM (CST) on September 15, 2020, which impacted the Escambia County Fishing pier. Shortly after, at 6:52 AM (CST) the winds at the Pensacola International Airport were only 15 miles-an-hour.²⁴⁹

Skanska was well aware that its barges were exposed to the winds and waves

²⁴⁵ *Id.* at 10:10-11:9.

²⁴⁶ Rodgers Depo. at 46:13-16.

²⁴⁷ *Id.*

²⁴⁸ C:292; Fulton Cross Exam, October 19, 2021, at 51: 1-4.

²⁴⁹ Fulton Cross Exam, October 19, 2021, at 53: 7-21.

and required a sheltered safe harbor. Captain Rob Hill was tasked with scouting for safe harbor sites for the Skanska project; he had recommended to Skanska that they use Butcherpen Cove as a mooring site for barges. He claims that: “there is nowhere in Pensacola Bay that I would call safe harbor.” Nonetheless, Skanska designated Butcherpen Cove as a safe harbor in its Hurricane Preparedness Plan. Capt. Hill testified that Pensacola Bay is problematic because “you have a considerable amount of fetch anywhere in this bay . . . the winds and the waves have a tremendous distance to build before they get to their destination.” Capt. Hill recommended Butcherpen Cove, at least in part, on the presence of a “huge bluff right there to block the wind.”²⁵⁰ One of the barges that broke free early Tuesday morning was placed on a mooring buoy in Butcherpen Cove and remained there throughout the storm.²⁵¹ There were four anchors available in Butcherpen Cove, but Skanska used only one of the four.²⁵²

Skanska had long established safe harbor locations in anticipation of tropical weather systems. Claimants’ expert, Capt. DiNapoli, testified that Butcherpen Cove provided safe harbor for Skanska’s barges ahead of a storm like Hurricane Sally.²⁵³

He further testified:

The picture is worth a lot of the words because it shows you the

²⁵⁰ Capt. Hill Cross Exam, October 20, 2021, at 89:12-90:17. *See also* C:078.

²⁵¹ *Id.* at 86:6-91:6.

²⁵² *Id.*

²⁵³ Capt. DiNapoli Direct Exam, October 22, 2021, at 5:17-20.

configuration of Butcherpen Cove. And what it does is it provides what we called a lee shore to the south and east. What that means is as winds are blowing from the south or east -- Butcherpen Cove has a bluff and deep enough to put the barges in. And what happens with that bluff is it creates almost a ceiling over which the wind has to blow before it can start whipping up big waves or causing any other difficulties. So you kind of get in the shadow of the wind from anywhere from the south or east when you're in Butcherpen Cove.²⁵⁴

This was also understood by Skanska leadership, specifically Project Manager, Rob Rodgers. When asked if the mooring pile location Skanska used for Hurricane Sally was “not as safe for a storm as the safe harbors that were identified in your hurricane plan,” Mr. Rodgers responded: “They’re not – they are not. That’s – they’re not as safe as Butcherpen Cove.”²⁵⁵

He also evaluated the effect of “fetch” in relation to Skanska’s placement of barges as well as the locations of Skanska’s designated safe harbor locations:

Well, fetch is just how much open water surface is available for the wind to blow across. A storm coming in from the ocean is said to have unlimited fetch. There's nothing in front of it, nothing to disrupt the wind motions and effects whatsoever. Here, Pensacola Bay is fairly open to the northeast and east. So any winds coming from those directions are going to be able to generate the waves that we saw in the record. So if you're moored out in the open bay, the fetch is going to permit you to experience some very large waves. [. . .]

As I said before, Butcherpen Cove gives you a lee shore to the east, so you wouldn't -- you wouldn't experience as serious waves as you would out in the middle of the open bay.²⁵⁶

²⁵⁴ *Id.* at 6:10-19.

²⁵⁵ Rodgers Cross Exam, October 19, 2021, at 231: 14-18.

²⁵⁶ Capt. DiNapoli Direct Exam, October 22, 2021, at 11:4-21.

Capt. DiNapoli further explained the post-landfall location of Skanska's barges supported his expert opinion that Skanska should have moved its barges to safe harbor:

It is what you would expect for a storm that was approaching from the south and -- with winds blowing on shore. You would expect anything that got loose to wind up on the opposite shore. [. . .]

It shows that it was blowing from the south and east, as I think Mr. Henning explained yesterday, with a counterclockwise rotation around a cyclonic system.²⁵⁷

In support of his opinions, Capt. DiNapoli provided the example of barge KS-6012, which "remained moored and survived the passing storm,"²⁵⁸ which, as he testified, "indicates that Butcherpen Cove did work as a safe harbor."²⁵⁹

Skanska's expert, Donald Barnes, opined that moving the barges to Butcherpen Cove "[w]ould have made little difference," adding "[i]t would have possibly reduced the number of barges that broke free."²⁶⁰ When asked whether the winds the barges were subjected to in the bay would be substantially higher than those in Butcherpen Cove, Mr. Barnes responded, "somewhat."²⁶¹ In contrast to Capt. DiNapoli, then, Mr. Barnes' testimony is equivocal as to the extent to which the number of barges that broke free would have been reduced had more barges been

²⁵⁷ *Id.* at 7:23-8:6 and C:021.

²⁵⁸ *Id.* at 8:7-13.

²⁵⁹ *Id.* at 8:14-17.

²⁶⁰ Barnes Direct, October 22, 2021, at 168: 21-169: 2.

²⁶¹ *Id.* at 185:1-5.

moored in Butcherpen Cove rather than on mooring piles alongside the bridge, including, as Mr. Barnes conceded, several piles “in the middle of the bay.”²⁶² Mr. Barnes’ report also included the finding that it is likely that “some mooring failures will occur during a direct hit from a Category 2 hurricane, as experience,”²⁶³ despite the fact that a Category 2 hurricane did not hit the project site.²⁶⁴ He was shown the National Hurricane Center Tropical Cyclone Report for Hurricane Sally, which stated “[i]n Florida, sustained wind of 64 knots and a gust to 80 knots was reported at the Pensacola Naval Air Station,” which, as Mr. Barnes conceded” is a low Category 1 storm-force wind of approximately 75 miles per hour.²⁶⁵

Mr. Barnes acknowledged that there was not a time from the NHC’s release of Advisory 1 until Hurricane Sally made landfall that the project site was not within either the cone or a watch or warning.²⁶⁶

Capt. DiNapoli further testified that Bayou Chico provided safe harbor “for different reasons than Butcherpen Cove,” adding:

This is an inland waterway, an inland cree[k], so you're not going to have the wave action that would develop out in the open bay. And there is considerable structure surrounding this area that would again break up the wind as it's passing through.²⁶⁷

²⁶² *Id.* at 168:21-169: 2 and 183: 17-18.

²⁶³ *Id.* at 178:18-179:4.

²⁶⁴ *Id.* at 179:5-23.

²⁶⁵ Barnes Cross, October 22, 2021, at 181:7-19 and C:042.

²⁶⁶ *Id.* at 198:16-24.

²⁶⁷ Capt. DiNapoli Direct Exam, October 22, 2021, at 8:9:4-13.

When asked if there were “enough mooring lines and ropes that Skanska could use to make up for the fact that these barge were not in Butcherpen Cove or Bayou Chico,” Capt. DiNapoli testified:

You cannot make up mooring in an area that has a 7-foot wave and where the barges are going to heave, as we saw yesterday, with just lines. In fact, I've had situations where I've had wire, solid wire rope between my tugboat and a barge, and if I get a little too adventurous and take it out into ocean waters where I should have really put it behind me on a separate line, I've had those -- you know, in even 4- or 5-foot seas, I've had those wires part, just like rope does.²⁶⁸

FDOT's CEI prepared the following “Hurricane Sally Timeline,”²⁶⁹ which captured the following events that took place on Tuesday, September 15, 2021 as a result of Skanska's barges and cranes not being demobilized to safe harbor:

6:30 AM - A material barge being used in the construction of the Bridge broke free from its moorings and struck the Escambia County fishing pier adjacent to the bridge.

7:00 AM – Skanska retrieved the material barge from fishing pier and then captured/retrieved a second barge (demo barge) that broke free from its mooring.

7:30 AM - As winds and seas associated with Hurricane Sally increased, a third barge equipped with a man-lift broke free. This barge struck the bridge and became lodged beneath the structure at pier 62. The impact of the barge caused visible damage to the concrete beams that support the bridge. It was at this time the crew members on-scene closed the bridge to all traffic so that a thorough damage assessment could be conducted once weather conditions improved.²⁷⁰

²⁶⁸ *Id.* at 10:2-9.

²⁶⁹ C:721.

²⁷⁰ At 7:56 AM (CST) the same day, the sustained winds reported at the Pensacola International Airport were 26 miles-per-hour. Fulton Cross Exam, October 19, 2021, at 54: 17-20.

8:03 AM - The NOAA tidal station conditions were 77 degrees, wind ESE 6 knots gusts to 14 knots, pressure 1009 mb, tide at elevation 4'. The Gulf Breeze station was reporting 20 mph winds from east. Pensacola airport was reporting 18 mph winds from east.

4:00 p.m. - A fourth barge worked its way free of anchorage and floated beneath and through the bridge (around spans 95-99). It was reported by Skanska that this barge did not contact the bridge and was recovered without further incident.²⁷¹

6:00 PM - One of the disposal barges broke free and lodged under span 36. Skanska tried to retrieve the barge, but the high seas (8'-10') prevented the tug from reaching the barge safely.²⁷²

10:30 PM - A barge carrying a crane came free and struck the bridge. The boom of the crane came to rest across the travel lanes of span 92 of the bridge.

12:00 AM - The two CEI Inspectors assigned to monitor the bridge and roadway since 5:00 PM left the project due to deteriorating conditions.

It was observed/reported that six barges total broke loose from moorings on September 15, 2020.

The CEI's timeline also indicated that tropical storm force winds were recorded on NAS Pensacola from 1:56 AM to 10:56 AM with the highest gust at 3:56 AM reaching 86 miles per hour.²⁷³ Despite the fact that seven of Skanska's barges had already broken free before tropical storm force winds had even reached the project site, Mr. Fulton represented to FDOT:

²⁷¹ At 4:56 PM (CST), the same day, the winds at NAS Pensacola were 27 miles-per-hour with gusts to 58 miles-per-hour. Fulton Cross Exam, October 19, 2021, at 55:23-25.

²⁷² At 6:00 PM (CST), the same day, the winds at NAS Pensacola were 28 miles-per-hour with gusts to 58 miles-per-hour. Fulton Cross Exam, October 19, 2021, at 57:12-14.

²⁷³ C:721.

Up until then, Skanska took all necessary and reasonable steps to secure its equipment and the site was prepared for what was expected at that time, which was tropical storm-force winds.²⁷⁴

Ed Hudec with FDOT emailed the message below to several Skanska managers, including Tom Fulton, on September 15, 2020 at 8:30 PM:²⁷⁵

As I'm sure you [sic] aware the bridge has been struck twice today and the fishing pier once due to Skanska barges that have broken loose of their moorings/spuds.

US 98 has been closed since early this AM due to the first barge hit. The extent of the damage is as of yet undetermined. We need to provide answers to the State Secretary's Office and the Governor's Office as to when the bridge can be re-opened to traffic.

As of this minute FDOT has received no assistance from the Skanska Team-to help determine the structural adequacy of the bridge. The problem arose due to Skanska's inability to properly secure barges or move them to a safe haven. The first barge that hit the bridge occurred when the local airport registered winds of 29 mph, not exactly tropical force winds.

This is totally unacceptable!

FDOT has now paid Skanska for a new bridge but due to poor management decisions on Skanska's part, has a bridge with unknown structural deficiencies.

I am asking Skanska to assist in providing answers to the extent of damage, repair procedures and most importantly the structural integrity of the damaged structure.

An expedient answer is of the utmost importance.

h. Wednesday, September 16, 2020

Hurricane Sally made landfall on Wednesday, September 16, 2020, at 4:45

²⁷⁴ C:224; Fulton Cross Exam, October 19, 2021, at 62:5-9.

²⁷⁵ C:776

AM near Gulf Shores, Alabama. According to the “Hurricane Sally Timeline”²⁷⁶ prepared by FDOT’s CEI, the following events took place on that day:

4:45 AM - Hurricane Sally makes landfall at 4:45 am at Gulf Shores, Alabama, with maximum winds of 105 mph.

7:17 AM – The CEI’s Senior Inspector and Senior Project Engineer arrived on the Project site to observe the conditions. He immediately observed rig 20 (a pile driving rig between the fishing pier and the newly-constructed bridge span) had impacted the new span during the night with the A-frame at span 15.

7:40 AM - The tide gauge was elevation 6.5 ft, winds at 41 knots and gusts to 54 knots.

7:40 AM - Span 37 was observed to be missing, except for the pedestrian path. Damage was apparently caused by material barge with girders.

8:10 AM - The A-frame bent over the new bridge and separated from the barge and the barge and rig floated through the Escambia County fishing pier impacting two spans before moving slightly north taking out 4 spans of the pier. The rig and barge appeared to be dragging an anchor and headed northeast at the time where it stopped for the remainder of the storm.

8:28 AM. - One of the Manitowoc 888 ringer cranes was observed to be floating freely in the Pensacola Bay headed northeast.

8:44 AM - CEI observed the first social media post in Pensacola that a barge had washed up in someone’s back yard.

9:27 AM - The Manitowoc 888 ringer was observed moving north in Escambia Bay along the bluff behind the Bay Winds Condominiums at

²⁷⁶ C:721. See Fulton Cross Exam, October 19, 2021, at 52:9-52:17, 53:7-61:1. See also DeMarco Cross Exam, October 19, 2021, at 146:7-13; Rodgers Direct Exam, October 19, 2021, at 196:16-196:22 (agreeing that 27 of 40 barges moored off the bridge broke free, meaning two-thirds of Skanska’s barge fleet moored off the Pensacola Bay Bridge broke free).

600 Scenic Highway. CEI notified FDOT and FDOT closed the Interstate 10 bridge over Escambia Bay.

9:33 AM - CEI Senior Project Engineer informed Skanska's Project Manager that the Manitowoc 888 ringer was observed moving north in Escambia Bay towards Interstate 10.

10:45 AM - CEI observed that a demo barge was damaging spans 22 and 23 and ultimately the west half of both spans had collapsed and the outside trophy at pier 23 was missing.

11:30 AM - CEI Senior Project Engineer observed the Manitowoc 888 ringer to be near the center of Escambia Bay approximately 1000 to 1500 yards south of the Interstate 10 bridge. The wind shifted from out of the south-south west to more out of the west, moving the Manitowoc 888 ringer on an easterly course.

12:10 PM - The Manitowoc 888 ringer was observed to have beached itself along the east side of Escambia Bay between the Interstate 10 bridge and Garcon Point. Late afternoon/early evening of September 16, 2020, Skanska was coordinating a tugboat to secure the rig.

5:44 PM - CEI informed that Barge M-8002 was found to have impacted/damaged the Garcon Point Bridge at the southwest corner of Garcon Point (near north abutment, west side).

As of Thursday, September 17, 2020, 27 barges had escaped or broken loose from their moorings as a result of Hurricane Sally.²⁷⁷ A number of the barges allided with the bridge, the Pensacola Bay Fishing Pier, and other publicly and privately owned structures.

IV. Skanska's Post-Sally Tropical Weather Preparations

Skanska's activities following Hurricane Sally call into question its claims

²⁷⁷ C:013; Fulton Cross Exam, October 19, 2021, at 41:6-15 and 60:13-19.

that it was both impossible and infeasible to demobilize in accordance with Condition Three of the written Hurricane Preparedness Work Plan in place at the time of Hurricane Sally's Landfall, which required moving its barges and cranes to the designated safe harbors of Bayou Chico and Butcherpen Cove.

When considering Skanska's more recent moves it is helpful to consider the testimony related to why Skanska designated Butcherpen Cove as a safe harbor in the first place. In addition to the wind sheltering bluff, discussed above, the nearby location of the cove was important to Skanska's selection criteria. Capt. Hill, one of two tugboat captains listed in Skanska's Hurricane Preparedness Plan, and one of only two Captains who participated in the Sally move, testified regarding his recommendation of Butcherpen Cove as safe harbor: "So we were all the way in East Bay at Redfish Point to begin with. That turned out to be prohibitive because of the travel time; took us too long to get there. We had to go through the Garcon Point bridge to get there. So that's when the plan was reevaluated. We said, well, I think Butcher (sic) will serve just as well and will be a lot closer to the project."²⁷⁸

More recently, Skanska fully demobilized its barges to both designated safe harbors in anticipation of the system that would become Tropical Storm Fred.²⁷⁹ Skanska began this effort around 10:00 AM on the morning of August 13, 2021

²⁷⁸ Capt. Hill Cross Exam, October 20, 2021, at 89:22-90:05.

²⁷⁹ Rodgers Depo. at 216:19-21.

when the system was a Tropical Depression.²⁸⁰ While the NHC advisory at this time placed the project site within the one-to-three-day potential track area, it did not place the project site in any form of watch or warning.²⁸¹ Project Manager, Rob Rodgers, testified that Skanska employed four tugs and completed the move of its barges to either Butcherpen Cove and Bayou Chico by Sunday morning, which he described as taking between “24 and 30 hours” of “work time.”²⁸² This evidence shows that it was more than feasible and possible for Skanska to complete a demobilization of its barges and cranes into both Bayou Chico and Butcherpen Cove. In fact, when asked what lessons Skanska learned from Hurricane Sally, Skanska General Superintendent Ronnie Benton testified:

And, like I said, I said it a couple times, we're gonna -- we're gonna demob. Threatens us, and we're in the cone, we're going to get out of the way.²⁸³

V. Skanska’s Leadership Team on the Project

Three Skanska employees were vested with responsibility for storm preparation at the Pensacola Bay Bridge construction site from September 11-15, 2020:

Thomas DeMarco – Project Executive and Construction Manager

Thomas Fulton – Project Director and Vice-President of Operations

²⁸⁰ *Id.* at 218:18-219:1; C:160 (Depo. Ex. 41).

²⁸¹ Rodgers Depo. at 220:2-220:9; C:160 (Depo. Ex. 41).

²⁸² *Id.* at 222: 4-7, 223: 9-17 and Rodgers Cross, October 19, 2021, at 207: 5-25.

²⁸³ Benton Cross, October 20, 2021, at 174: 17-21.

Robert Rodgers – Project Manager

Mr. Fulton testified that he was fully aware of—and agreed with—the decisions made with respect to how and when to play for Hurricane Sally.²⁸⁴ The evidence reflects that Mr. DeMarco, Mr. Fulton, and Mr. Rodgers shared responsibility for making the decision to transition from construction work to securing equipment ahead of a storm, as well as for keeping track of the monitoring or forecasting of weather conditions in advance of Hurricane Sally.²⁸⁵

Likewise, the evidence indicates that Mr. DeMarco, Mr. Fulton, and Mr. Rodgers were the only Skanska employees who had the responsibility for deciding whether and when to move construction barges to safe harbor.²⁸⁶ In addition to having responsibility with respect to the decision-making process of whether to implement the hurricane preparedness plan, Mr. Fulton also had responsibility for protecting the bridge and Skanska’s assets.²⁸⁷ When Skanska General Superintendent Ronnie Benton was asked if Skanska bears responsibility for “this catastrophe,” he responded, “I agree it was our barges and our bridge” and that the “people on hand in this event, yes, made that decision to put [the barges] where they were at.”²⁸⁸ Mr. Benton further agreed that the destruction of the bridge was the

²⁸⁴ Fulton Cross Exam, October 18, 2021, 195: 23-196:8.

²⁸⁵ DeMarco 30((b)(6) Depo. at 140:23-141:6, 143:2-19.

²⁸⁶ *Id.* at 147:2-8.

²⁸⁷ DeMarco 30(b)(6) Depo. at 190:15-191:1.

²⁸⁸ Benton Cross, October 20, 2021, at 171: 12-20.

outcome.²⁸⁹

While Mr. Rodgers testified that Skanska project management, including himself, devised the plan implemented for Hurricane Sally where barges were sent to mooring piles on the east and west side of the bridge, he further testified that he was not aware of any errors or mistakes made by deckhands, crew, or anyone in implementing that plan.²⁹⁰ Similarly, Mr. DeMarco testified that “[p]roject leadership is responsible for the project’s actions,” when asked if there was responsibility for the barges breaking free, whether that responsibility would rest with project leadership.²⁹¹ Mr. DeMarco also testified that he was not blaming any of the barges having broken free on any members of his crew.²⁹²

VI. The Adequacy of Skanska’s Preparation for Hurricane Sally

Skanska did not reasonably prepare for Tropical Depression 19/Hurricane Sally. All of the graphical NHC forecasts from Hurricane Sally were available to the public, including Skanska. Moreover, Tom Fulton, Skanska’s Project Director and VP of Operations (who was the highest-ranking on-site executive for Skanska for the Project) texted that this was “the most accurate forecast source.”²⁹³ Mr. Fulton added:

And I find in my 30 years’ experience in marine work in the southeast

²⁸⁹ *Id.* at 171: 12-20.

²⁹⁰ Rodgers Depo. at 225: 6-9, 226:11-16.

²⁹¹ DeMarco Depo. at 233: 1-7.

²⁹² *Id.* at 232:17-22.

²⁹³ Stephens Depo. at 227: 9-228:9; C:360 (Depo. Ex. 39A).

US that this is the most reliable forecast source. I – the reason I hesitate – hesitated to say that it was the most accurate is because I’m probably not qualified to make that judgment. I did make that statement here, but I certainly have found this to be the most reliable, and it is the – it is one of the sources that I rely heavily on for forecast data.²⁹⁴

The evidence demonstrates that Skanska had sufficient advance warning of significant, and likely damaging, effects on the project site and the barges from the storm, but failed to timely implement reasonable storm preparation efforts.

Claimants’ position is supported by the testimony of a number of Skanska’s supervisors. For example, when Skanska General Superintendent Patrick McGlynn was asked under oath if Skanska complied with its own hurricane plan in preparation for Hurricane Sally, Mr. McGlynn testified: “Absolutely not.”²⁹⁵ Similarly, Tom Fulton stated via text message on September 16, 2020 that Skanska was unprepared for the impact of Hurricane Sally.²⁹⁶ For example, Mr. Fulton texted “Prepared for 25 and got 85. Got a Mess,”²⁹⁷ and testified that he told others that Skanska only prepared for 25 mile-per-hour winds.²⁹⁸ Mr. McGlynn, further testified that the damage caused by Skanska’s barges was “definitely avoidable,”²⁹⁹ and he hoped Skanska would have learned from Hurricane Sally “to follow work plans, to follow

²⁹⁴ Fulton Depo. at p. 130:10-133:14; C:208 (Depo. Ex. 15).

²⁹⁵ McGlynn Depo. at 19:12-15, 19:20.

²⁹⁶ Fulton Depo. at 369:10-369:16; C:245 (Depo. Ex. 57).

²⁹⁷ *Id.* at 369:10-369:16; C:245 (Depo. Ex. 57).

²⁹⁸ *Id.* at 366: 2-12.

²⁹⁹ *Id.* at 177:20-178:5.

policy, to follow – doing it right.”³⁰⁰ When further asked if Skanska complied with its own Hurricane Preparedness Work Plan in preparing for Hurricane Sally, Mr. McGlynn testified, “[a]bsolutely not.”³⁰¹ When asked why he was surprised to find that Skanska had not demobilized its barges prior to Sunday, September 13, Mr. McGlynn testified:

Just for the natures of we’ve done it before prior to this hurricane, and it’s just what we do. It’s what we – we’ve always done any time a hurricane, tropical storm threat; find safe harbor.³⁰²

Mr. McGlynn’s testimony is also consistent with his communications with colleagues at the time the damage to the bridge was beginning to be realized. The same day as Hurricane Sally’s landfall, Mr. McGlynn texted his fellow General Superintendent Ronnie Benton: “I have seen the massive fuck ups we are going to have to deal with.”³⁰³

Furthermore, Skanska’s actual efforts to secure barges were unreasonable and insufficient. Skanska had a total of 55 barges on location for use during construction of the Pensacola Bay Bridge. At the time Skanska decided to move its barges, some of the barges were in Bayou Chico, but most of its barges were close to the Pensacola Bay Bridge. At least 40 of Skanska’s fleet of 55 barges were moved to these pipe

³⁰⁰ *Id.* at 177:2-177:12.

³⁰¹ Fulton Depo. at 19:12-19:15, 19:20.

³⁰² *Id.* at 23:5-23:7, 23:11-23:23.

³⁰³ S:723; Benton Cross Exam, October 20, 2021, at 172: 8-19.

pilings, sea anchors, or spudded barges located in the vicinity.³⁰⁴ These pipe pilings and sea anchors were not part of the Hurricane Preparedness Plan but were used by Skanska in preparation for Hurricane Sally because Skanska waited too long to move the barges to a safer location.³⁰⁵

The USCG did not approve Skanska's placement of barges at the mooring pilings and sea anchor locations during tropical storms or hurricanes.³⁰⁶ As Capt. Allen testified of the mooring piles, "[t]hey were not approved for heavy weather moorings, no, sir, they were not," before adding:

They were approved while they were conducting operations. But under my specific direction, with the MSIBs and broadcasts and other means necessary, they were directed otherwise, to seek other moorings and a safe haven.³⁰⁷

At least 27 of the 40 barges—more than two-thirds—that Skanska attempted to secure at the mooring piles off the bridge broke free from their moorings and struck the Pensacola Bay Bridge, the Escambia County Fishing Pier, Garcon Point Bridge, and public and private properties.³⁰⁸ Barge numbers KS1451 and KS1453 had problems with their spuds and remained at the bridge, and Barge 460007 was being

³⁰⁴ DeMarco Cross Exam, October 19, 2021, at 146:7-13; Rodgers Direct Exam, October 19, 2021, at 196:16-196:22 (agreeing 27 of 40 barges moored off the bridge broke free, meaning two-thirds of Skanska's barge fleet moored off the Pensacola Bay Bridge broke free) and C:013.

³⁰⁵ Rodgers Cross Exam, October 19, 2021, at 220:14-221:4; C:078.

³⁰⁶ Capt. Allen Direct Exam, October 22, 2021 at 230:20-22.

³⁰⁷ Capt. Allen Cross Exam, October 22, 2021 at 242:2-242:11.

³⁰⁸ DeMarco Cross Exam, October 19, 2021, at 146:7-13; Rodgers Direct Exam, October 19, 2021, at 196:16-196:22 (agreeing 27 of 40 barges moored off the bridge broke free, meaning two-thirds of Skanska's barge fleet moored off the Pensacola Bay Bridge broke free).

taken to a mooring but did not make it because a spud dropped prematurely and so it too was left at the bridge.³⁰⁹

Securing the barges to the mooring pilings with rope was unreasonably risky and dangerous because a rise of tide of only several feet could and likely did cause the rope to slide off of the top of the mooring pilings allowing the barges to become unsecured and left to roam the bay crashing into stationary objects. Yet, not all of the barges that broke free were secured with rope. As noted above, barges that had their spuds down also broke free. In fact, two of the four barges that struck the Pensacola Bay, KS5531 and 460007, are spud barges whose movement had nothing to do with rope or breakage of it.³¹⁰ John Flory, Skanska's expert in marine ropes and use of ropes in mooring of vessels testified that Skanska's ropes and mooring arrangements were sufficient. Yet, while the Court denied Claimants' Motion to Strike Mr. Flory's testimony, numerous issues came to light during his cross examination that weaken the veracity of his testimony and reliability of his opinions. He could not speak to the reason why several barges broke free prior to tropical storm-force winds arriving at the project site,³¹¹ how many barges had (or had not) broken free as a result of mooring lines breaking,³¹² how many barges had broken

³⁰⁹ Rodgers Cross Exam, October 19, 2021, at 230:14-20; C:014 (Skanska's Second Amended Answers to Claimants' First Master Set of Interrogatories, Response to Interrogatory 11).

³¹⁰ C:353 (Ex. 29a to Stephens Dep.).

³¹¹ Flory Cross Exam, October 21, 2021, at 210: 17-211:1.

³¹² *Id.* at 225:14-226:1.

free as a result of spud failure,³¹³ when the barges broke free,³¹⁴ where or how the mooring lines he inspected were used during the effects of Hurricane Sally,³¹⁵ or even the condition of the edge of the barges from which the lines broke.³¹⁶ Additionally, he further testified to his use of multiple sources that were not set forth in his report.³¹⁷ His testimony should therefore be disregarded as unreliable. Nevertheless, evidence does show that the barges that Skanska attempted to secure with rope ahead of Hurricane Sally were not done so with reasonable care³¹⁸ or adequate supplies of lines.³¹⁹

As Capt. DiNapoli testified, Skanska did not take adequate precautions to ensure the security of its barges prior to the arrival of Hurricane Sally.³²⁰ Foregoing safe harbor for mooring piles a few hundred feet from the Bridge was a failure of reasonable care that resulted in widespread destruction to the Pensacola Bay Bridge and the region.

VII. Application of the Spoliation Presumptions to Findings of Fact

Of the 13 custodians Skanska self-identified in this litigation, five³²¹

³¹³ *Id.* at 198:14-15.

³¹⁴ *Id.* at 200: 15-16.

³¹⁵ *Id.* at 201:11-202:14 and 206: 8-18.

³¹⁶ *Id.* at 213: 21-214:16.

³¹⁷ Flory Cross Exam, October 21, 2021, at 195:5-197:2 and 197:12-16.

³¹⁸ McGlynn Depo. at 153:2-153:10.

³¹⁹ *Id.* at 166:23-167:1, 167:4, 167:6-167:9.

³²⁰ Capt. DiNapoli Direct Exam, October 22, 2021, at 16:17-19.

³²¹ Sarah Stephens, William Bender, Nicholas Johnson, Patrick McGlynn, and Eduardo Rubio (referred to collectively as the “spoliation custodians”).

custodians' cell phone data was destroyed, including text messages sent and received in the days and hours immediately before Hurricane Sally's landfall. These five custodians served crucial roles in the activities most relevant to this litigation, including (a) Skanska's decision to abandon its written hurricane preparedness work plan for an orally conveyed alternative plan,³²² and (b) Skanska's implementation of the alternative plan. Skanska's alternative plan resulted in Skanska's barges breaking free and damaging public and private property.

Skanska waited until 7:00 AM on Sunday, September 13, 2020 to formulate and initiate the alternative plan. The alternative plan was thus implemented in a narrow window of time with a minimal number of Skanska's employees, which included the five spoliation custodians. Skanska's counsel has argued and its witnesses have testified that text messages were used more frequently than email on the jobsite and that text messages were a more "common method of communication" than emails.³²³ Skanska's destruction of these communications resulted in the loss of incomparable, contemporaneous and candid evidence of Skanska's activities throughout the minutes, hours and days prior to Hurricane Sally's landfall.

On August 23, 2021, Judge Cannon found that "Skanska acted in bad faith" in destroying cell phone data for five of its thirteen self-selected custodians and that

³²² Tom Demarco 30(b)(6) Deposition, June 18, 2021, at 132:6-25, 150:18-23.

³²³ Deposition of Grant Walker at 37:5-15. Mr. Walker's testimony was not admitted during the bench trial and is only offered here in support of Claimants' request for an adverse presumption.

“this is a text book case of spoliation.”³²⁴ As such, Judge Cannon imposed monetary sanctions and the application of two adverse inferences: (1) that the information that was contained in the spoliated cell phone data was relevant and favorable to claimants; and (2) that it was not these five custodians’ conduct that caused the barges to go adrift. Judge Cannon noted that because this is not a jury trial, these inferences are subject to the trial court’s discretion and determination of whether any rebuttal evidence will be allowed from Skanska.³²⁵ Based on the evidentiary record to date, both adverse inferences are appropriate and not subject to rebuttal by Skanska.³²⁶ While application of presumptions are not necessary to resolve any factual disputes and that dismissal is warranted even absent the presumptions, discussion of their application is warranted.

a. Presumption 1: Information that was contained in the spoliated cell phone data was relevant and favorable to Claimants.

As to the first presumption, Judge Cannon’s order requires a finding of fact that for each of the five custodians whose cell phone data was destroyed, their text messages would have been relevant and favorable to Claimants’ case, had they been produced. Should any of these five witnesses have provided testimony that was contradictory to the evidence or to testimony provided to other witnesses, any factual

³²⁴ ECF No. 1265 at 7, 19.

³²⁵ *Id.* at 25.

³²⁶ See Doc. 1265 (citing *Optowave Co., Ltd. V. Nikitin*, 2006 WL 3231422, at *12 (M.D. Fla. Nov. 7, 2006)).

inconsistencies should be found in favor of Claimants. In effect, it should be presumed that these communications would have provided additional evidence that Skanska failed to exhibit reasonable care in preparing for Hurricane Sally.

i. Factual Disputes Predicated on Conflicting Testimony of Spoliation Custodians Should Be Resolved in Favor of Claimants.

In certain instances in which witnesses offered deposition testimony that was inconsistent with the evidence or with other witnesses' testimony, Claimants were unable to refresh these witnesses' recollection or impeach them with text messages because their cell phone data had been spoliated. In those instances, any factual disputes or credibility assessments should be determined in favor of Claimants.

For example, given any conflicting testimony between or among witnesses with spoliated text messages, application of the first adverse inference requires a finding that the evidence found on either witness's cell phone would have been favorable to Claimants and unfavorable to Skanska. As such, any accounts that are conclusory or inconsistent with the evidence and testimony provided by other witnesses should be disregarded.

For example, Mr. McGlynn was the highest ranking spoliation custodian, serving as the General Superintendent on the Pensacola Bay Bridge project. Several text messages contained on the phones that were produced indicate that Mr. McGlynn was a frank, candid communicator over text messages with colleagues.

Q. Okay. Let's look at the first text, the September 16th, 10:57 a.m. You text, "Are you out there trying to do anything? I have seen the massive fuck ups we are going to have to deal with." So. Mr. McGlynn, can you describe what you're referring to when you're texting with Mr. Benton?

A. Just – just the situation that we were dealing with a hurricane and – and our barges no being secured –

Q. Okay.

A. -- correctly. Secured correctly.³²⁷

The loss of Mr. McGlynn's text messages is among the most consequential evidence spoliated by Skanska. Mr. McGlynn's spoliated text messages would have been helpful to Claimants by providing further support to his critical account of Skanska's failures within his deposition testimony. Testimony that is inconsistent with Mr. McGlynn's testimony critical of Skanska's decisions should be decided in favor of Claimants.

In applying the first presumption, all factual disputes or inconsistencies within a spoliation custodian's testimony, all factual disputes or inconsistencies among spoliation custodians, and all credibility assessments should be decided in favor of Claimants. However, no such factual disputes or inconsistencies required an application of this first presumption in order for this matter to be resolved in favor of Claimants.

b. Presumption 2: It was not the actions of the five non-managerial custodians with spoliated cell phone data that caused the barges to

³²⁷ McGlynn Depo. at 173:10-173:14; 173:22-174:4.

go adrift.

The second presumption, that it was not the actions of these five custodians that caused the barges to go adrift, goes directly toward the issue of privity and knowledge. Skanska argues that some preparations for Hurricane Sally might have been carried out by non-managerial employees without the privity or knowledge of Skanska's managers—Fulton, DeMarco, and Rodgers. The cell phone data for those with decision-making authority (again, DeMarco, Fulton, and Rodgers) was produced. The custodians with spoliated cell phones were lower-level employees without managerial authority, including the drafter of the Hurricane Preparedness Plan in effect during Hurricane Sally and the individuals responsible for manning tugboats and securing barges in preparation for Hurricane Sally. Applying the inference that these lower-level custodians' conduct did not cause the barges to go adrift necessarily undercuts Skanska's argument against privity and knowledge.

Judge Cannon acknowledged that Skanska “downplayed the importance of DeMarco, Fulton, and Rodgers' roles” in its summary judgment briefing and that “it appears Skanska intends to rely on the conduct of lower-level employees, such as the custodians at issue here” to dispute Skanska's privity and knowledge.³²⁸ In one such example, Tom DeMarco attempted to shift blame to lower-level superintendent Pat McGlynn for the barges going adrift. When asked about a situation where Grant

³²⁸ Doc. No. 1265 at 16.

Walker reported on the morning of September 11, 2020, “ringer 2 beating up against the trophy” because “it moved” DeMarco replied, “[t]hat was the result of Pat McGlynn’s supervision.”³²⁹ Applying the second presumption to this testimony, this Court must find that it was not Mr. McGlynn’s conduct—nor the conduct of any of the other five custodians with spoliated cell phone data—that caused the barges to go adrift.

This second presumption essentially requires a finding that it was not the actions of these five spoliation custodians that caused the barges to go adrift; *i.e.*, that no preparations for Hurricane Sally that were carried out by these non-managerial spoliation custodians were done so in a manner that caused the barges to go adrift or without the privity or knowledge of Skanska’s managers—Fulton, DeMarco, and Rodgers. However, application of this second presumption is not required in order to resolve any factual or legal issues related to privity and knowledge in favor of claimants.

³²⁹ McGlynn Depo. at 126:9-127:4. Skanska did not designate testimony at 127: 5-9, which includes the following statement: “That was the result of Pat McGlynn’s lack of supervision.”

CONCLUSIONS OF LAW

Jurisdiction

This Court has jurisdiction over this action pursuant to its admiralty jurisdiction as provided at 28 U.S.C. § 1333.

The Limitation of Liability Act

Under 46 U.S.C. § 30505 (“Limitation of Liability Act” or “LLA”), a vessel owner’s liability for damage caused by the vessel is limited to the value of the vessel and cargoes, so long as the owner proves that the acts and losses were “done, occasioned, or incurred, without the privity or knowledge of the owner.”³³⁰

A court must generally engage in a two-step analysis to determine if a vessel owner is entitled to limit his or her liability under the Act.³³¹ “First, the court must determine what acts of negligence or conditions of unseaworthiness caused the accident. Second, the court must determine whether the shipowner had knowledge or privity of those same acts of negligence or conditions of unseaworthiness.”³³²

Once the negligence or unseaworthy condition is proven, the burden shifts to the vessel owner to prove the lack of privity or knowledge.

³³⁰ *Am. River Transp. Co. v. Ryan*, 579 F. 3d 820, 822 (7th Cir. 2009) (citing 46 U.S.C. § 30505(b)).

³³¹ *Hercules Carriers, Inc. v. State of Fla.*, 768 F.2d 1558, 1563-64 (11th Cir. 1985) (citations omitted); *Empresa Lineas Maritimas Argentinas, S.A. v. United States*, 730 F.2d 153, 155 (4th Cir. 1984).

³³² *Am. Dredging Co.*, 81 F.3d at 129, quoting *Hercules Carriers, Inc.* 768 F.2d at 1563-64; See also, Doc. No. 1223 at 18.

I. Exoneration

A vessel owner is entitled to exoneration from all liability for a maritime collision *only* if the owner, vessel, and crew are free from *any contributory fault*.³³³ Here, the acts of negligence asserted by Claimants include: 1) the place and manner in which Skanska secured the 27 barges that broke free prior to and during Hurricane Sally (specifically the decision to moor the majority of their 55 barges at locations within hundreds of feet of the bridge and between the bridge and the fishing pier); 2) Skanska's failure to implement its written hurricane plan despite triggering weather information; 3) Skanska's failure to maintain sufficient and working equipment such that non-motorized vessels could be moved or effectively moored during the hurricane; 4) Skanska's failure to have sufficient tug boats, captains, and deckhands available to move the barges out of the vicinity of the bridge; 5) Skanska's failure to maintain a sufficient supply of mooring lines to adequately secure 27 barges that broke free prior to and during Hurricane Sally; 6) Skanska's failure to have sufficient personnel to adequately secure its barges; 7) Skanska's failure to begin securing barges far enough in advance of severe winds that it could be accomplished safely, with the delay causing some efforts to be abandoned or shortchanged.

As shown herein, there is substantial, un rebutted evidence supporting these

³³³ *Am. Dredging Co.*, 81 F.3d at 129.

claims of negligence.

II. Application of the *Louisiana* Rule to this Case.

While claimants generally have the burden of proving negligence or contributory fault,³³⁴ this is subject to burden shifting under certain common law presumptions. Here, the *Louisiana* Rule applies. The *Louisiana* Rule applies when a drifting vessel allides with a stationary object or property, there is a rebuttable presumption that the moving vessel is at fault for any damages.³³⁵

The *Louisiana* presumption operates not just against the vessel, but against all parties who participated in the management of the vessel.³³⁶ In the context of storms, “[t]he Eleventh Circuit has held that under the *Louisiana* Rule, a vessel owner will be held liable for an allision (1) if they had timely and accurate warnings about [an] approaching storm; and (2) they failed to use reasonable means to take proper action to guard against, prevent or mitigate the dangers posed by the hurricane.”³³⁷

Here, it is undisputed that Skanska’s construction barges were drifting

³³⁴ *Hercules Carriers*, 768 F.2d at 1564.

³³⁵ *Bunge Corp. v. Freeport Marine Repair*, 240 F.3d 919, 923, 926 (11th Cir. 2001) (upholding *Bunge Corp. v. Freeport Marine Repair Inc.*, 97-CV-240, Doc. No. 85 (N.D. Fla. Sept. 14, 1999)) (citing *The Louisiana*, 70 U.S. 164, 173 (1865); *Stuart Cay Marina v. M/V Special Delivery*, 510 F. Supp. 2d 1063, 1069, 1071, 1074 (S.D. Fla. 2007)).

³³⁶ *Bunge Corp.*, 240 F.3d at 923.

³³⁷ *Stuart Cay Marina*, 510 F. Supp. 2d at 1072 (citing *Boudoin v. J. Ray McDermott & Co.*, 281 F.2d 81, 82 (5th Cir. 1960)). Of note, pursuant to *Bonner v. City of Pritchard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent the decisions of the former Fifth Circuit issued prior to October 1, 1981.

unmoored during the storm and allided with and damaged various stationary objects, including the Pensacola Bay Bridge, the Garcon Point Bridge, the Pensacola Bay Fishing Pier, and various private and public properties. The uncontroverted facts establish that the (rebuttable) presumption of fault applies in this case.

It is also uncontroverted that 27 of the barges being used on the Project broke loose from their moorings before, during, or after Hurricane Sally. It is likewise uncontroverted that all 27 of the barges were unmanned at the time they broke loose from their moorings. There is no dispute that, before, during or after Hurricane Sally, some of the 27 escaped barges allided with the Bridge and other publicly- and privately-owned property. Thus, under the *Louisiana* Rule, Skanska is presumed to be at fault for the damage caused by those barges.

a. Rebuttal of the Presumption of Fault under the *Louisiana* Rule.

The *Louisiana* Rule's presumption of fault is subject to rebuttal by the vessel owner. In some circumstances, not applicable here, the presumption can be rebutted by showing that the allision was the fault of the stationary object.³³⁸ A vessel owner can also rebut the presumption of liability under the *Louisiana* Rule by proving by a preponderance of evidence that it was not negligent (*i.e.*, that it satisfied the standard of prudent seamanship and ordinary care and reasonableness, as measured by the

³³⁸ *Bunge Corp.*, 240 F.3d at 923.

circumstances that are known prior to the event³³⁹), or by proving that the drifting and allisions were inevitable accidents or the result of a *vis major*, “which human skill and precaution and a proper display of nautical skill could not have prevented.”³⁴⁰

b. Skanska Cannot Prove by a Preponderance of Evidence That It Was Not Negligent.

Skanska may overcome the presumption of liability by demonstrating by a preponderance of evidence that it was not negligent. However, the company has not well short of meeting its burden.

To begin with, Skanska has presented no evidence of any contributory negligence by claimants or *third parties* in this case. The evidence Skanska put forward at trial additionally fails to prove by a preponderance of evidence that the company satisfied the standard of prudent seamanship and ordinary care and reasonableness, as measured by the circumstances that are known prior to the event.

Skanska agreed with the State of Florida to create a Hurricane Preparedness Work Plan that would apply to its preparations for tropical weather systems that threatened the project site. Accordingly, Skanska prepared and submitted a plan at the outset of the bridge’s construction wherein Skanska acknowledged its obligation

³³⁹ See *Fischer v. S/Y Neraida*, 508 F.3d 586 (11th Cir. 2007).

³⁴⁰ *The Louisiana*, 70 U.S. at 173; *Bunge Corp.*, 240 F.3d at 923, 925-26; *Stuart Cay Marina*, 501 F. Supp. 2d at 1069, 1071-72, 1074; *Boudoin*, 281 F.2d at 85, 88.

to move its marine assets to safe harbor/safe haven in anticipation of tropical weather systems exactly like the one that developed into Hurricane Sally. As Capt. DiNapoli made clear, Skanska was contractually bound not only to have a hurricane preparedness plan, but also to timely and completely implement that plan. Members of Skanska's project site leadership, such as **both** General Superintendents, Ronnie Benton and Pat McGlynn, along with Field Engineer and Hurricane Plan Preparer, Sara Stephens, and the Project Engineer, Catherine Burgess, all testified that Condition Three had been triggered by Advisory 1. As Capt. DiNapoli testified, once Advisory 1 had been issued, a reasonably prudent mariner in Skanska's shoes would have put its crew on stand-by and evaluated the time and materials needed to get its barges to safe harbor. Skanska chose instead to delay demobilization.

From the issuance of Advisory 1 on the afternoon of Friday, September 11th, to the landfall of Hurricane Sally on the morning of Wednesday, September 16th, the work site was either in the cone of the storm, under a watch or warning, or under a USCG Port Condition warning of gale force winds. Throughout the trial, Skanska routinely invoked NOAA's Marine Text Forecasts as justification for its inaction. Yet, from the 4:03 PM (CST) Friday, September 11, 2020 forecast forward, each forecast included "tropical storm conditions possible" for Monday to Wednesday. The Marine Text Forecast issued prior to Skanska's demobilizing to its mooring piles, rather than safe harbor as required under its hurricane plan, stated that there

was a “Tropical Storm Warning in Effect.” Yet, even when its trusted, go-to forecast source was sounding the alarm, Skanska still decided against moving its barges and cranes to safe harbor. Mr. Rodgers even testified to his belief that Skanska could have moved its barges to Butcherpen Cove or Bayou Chico as late as Sunday morning. As Capt. DiNapoli testified, a reasonable owner and operator of a barge fleet takes into consideration the capabilities of its tugboat fleet when evaluating weather forecasts. There is no legitimate justification, then, for Skanska’s failure to demobilize to safe harbor earlier. As Capt. DiNapoli testified, prudent mariners prepare for the worst and hope for the best, not the other way around as Skanska so clearly did for Hurricane Sally.

The evidence has shown that Skanska began its preparations for the tropical depression that became Hurricane Sally later in the development of that storm than it had for storms that preceded it. For numerous storms prior to and after Hurricane Sally, Skanska full demobilized its barge fleet into designated safe harbors (East Bay, Butcherpen Cove, and Bayou Chico) well before the project site fell within the National Hurricane Center’s potential track area or was subject to tropical storm or hurricane warnings or watches. Often, Skanska would demobilize before the storm even entered the Gulf of Mexico. It is noteworthy that, while Skanska now purports to find only NOAA’s Marine Text Forecasts reliable, not once did Skanska ever submit to the Court such forecasts as justification demobilizing so early in the

development of storms that preceded Hurricane Sally.

Skanska invokes its demobilization to the mooring piles for Hurricane Marco as justification for it having done so for Hurricane Sally. Mr. Rodgers, the Project Manager, conceded the mooring piles were “not as safe as the other places that have been listed in the hurricane preparedness plans.” Yet, when Skanska demobilized to the mooring piles for Hurricane Marco, the project site was nowhere near the cone of probability and the only watch or warning was limited to the Yucatan Peninsula. For Hurricane Sally, Skanska waited to demobilize to the mooring piles once the project site itself was subject to a tropical storm warning and only miles from a Hurricane Watch at the Alabama / Florida line—days after the site fell within the cone of probability and was under intensifying Port Condition Statuses. Despite this, Tom Fulton testified that the day before, on Saturday, it was a “foregone conclusion” that Skanska would have to move its barges from the bridge. Rather than take action then, Skanska continued its wait-and-see approach, neglecting even to schedule its deckhands to demobilize the barges and cranes. In fact, Sunday morning, Skanska only had on hand a single captain to begin the process, Brad Thatch. The second captain, Rob Hill, finally showed midday. Skanska also had only two superintendents on the water to help demobilize the barges and only one crane to lift spuds. Skanska further failed to enlist a third party tow service for help, which would have significantly reduced Skanska’s capability to demobilize sooner.

The evidence further shows that Skanska had available avenues of recovery for lost productivity and profits due to storm demobilization, including coverage from its insurers and agreements with FDOT. Given these avenues for recovery, it makes little sense for Skanska to forgo its earlier practice of demobilizing before tropical weather systems posed an imminent threat to the project site. Skanska's practice changed once it found these avenues for cost recovery were in doubt. Skanska's project leadership faced increasing financial pressure given that Skanska had fallen behind project schedule, was fighting with its insurers who were now less lenient than for past demobilization claims, and was facing the denial of its claim with FDOT for costs related to the Hurricane Marco demobilization. Skanska faced a financial motive as a result of these pressures to forgo its obligations to the state and stakeholders to adequately secure its barges and cranes and instead take a wait and see approach rather than the more proactive approach it took for past storm systems.

Skanska went so far as to hire a retired, former Coast Guard Captain of the Port, Capt. Stroh to testify that the actual, on-duty Captain of the Port, Capt. Allen, tacitly or implicitly approved Skanska's preparations. This was, in Capt. Allen's words, "preposterous." Capt. Allen further testified that, had she known that Skanska would forego moving its barges and cranes to safe harbor, she probably would have issued a Captain of the Port Order as is within her discretion. Even Capt.

Stroh admitted that the responsibility to move Skanska's barges and cranes to safe harbor falls on Skanska and Skanska alone and that barge owners and operators "need to protect the critical infrastructure first," which includes bridges. As early as Friday, September 11, 2020, Capt. Allen had put Skanska together with the entire Pensacola Bay maritime community on notice of the need to prepare for the storm that became Hurricane Sally.

Skanska's written Hurricane Preparedness Work Plan emphasized in multiple places of the importance of *beginning* demobilization with the disassembly of an "a-frame" on various crane-mounted barges, that included "Rig 20," which was situated between the Pensacola Bay Bridge and the Escambia County Fishing Pier. Rather than start with the disassembly of the A-frame, Skanska's project leadership instead elected to continue with production work, driving two piles that Sunday, the last of which was completed after 2:00 PM. As Mr. DeMarco testified, Rig 20's A-frame could have been disassembled in six to eight hours, but only if the rig was not used to drive piles as Skanska had opted to continue doing.

The first of Skanska's barges to break free did so just before 3:00 AM on Tuesday, September 15, 2020, more than 24 hours before landfall. At this point, the closest weather station to the bridge had not recorded sustained winds in excess of 11 knots, while a weather station at NAS Pensacola had not recorded sustained winds in excess of 25 knots. The first of Skanska's barges to break free and impact the

Pensacola Bay Bridge did so later on Tuesday morning when the nearest weather station had not registered winds in excess of 12 knots. This was the first of 27 of Skanska's barges to impact and damage public or private property. The highest ranking member of Skanska's project leadership, Mr. Fulton, stated that Skanska "[p]repared for 25 and got 85." The evidence indicates that Skanska's preparations were insufficient even for its expectation of 25 knot winds.

KS-6012 was among the Skanska barges that broke free well before the storm's landfall. Skanska was able to secure that barge in Butcherpen Cove where it rode out the worst of Hurricane Sally without breaking free from its mooring. This is the only Skanska barge that was moored in Butcherpen Cove—Skanska's designated safe harbor. This invalidates Skanska's claim that moving its barges to its own designated safe harbor would not have made a difference.

As shown by the evidence, Skanska's negligence was the sole and proximate cause of the damage to the bridges, the Pensacola Bay Fishing Pier, and other private and public properties. Because Skanska is not free from contributory fault, it is not entitled to exoneration from liability in this case.³⁴¹

a. *Vis Major/Act of God Defense*

The Act of God defense is limited to those events caused by natural forces of "such inevitability and irresistibility that man cannot cope with it, either to predict,

³⁴¹ *Am. Dredging Co.*, 81 F.3d at 129-130.

forestall it or control it when it arrives.”³⁴² “[T]he burden of proving inevitable accident or Act of God rests heavily upon the vessel asserting such defense.”³⁴³ The vessel must not only show that the damage was caused by the natural event, but also that no reasonable precautions or exercise of reasonable care could have prevented such harm.³⁴⁴ Accordingly, the defense cannot be sustained where human negligence was a contributing cause to the accident.³⁴⁵

Where an owner has timely and accurate warnings about an approaching storm, “the issue to be determined . . . is whether they used all reasonable means and took proper action to guard against, prevent or mitigate the dangers posed by the hurricane.”³⁴⁶

When a ship owner argues a *vis major* or “act of God” defense³⁴⁷ (*e.g.*, arguing that the hurricane would have produced the same damage irrespective of the party’s negligence), the owner must prove that it took not just one reasonable course of action among many, but *all* reasonable measures—*e.g.*, that it took *every* reasonable

³⁴² *In re Matteson Marine Serv., Inc.*, No. 08-cv- 4023, 2011 WL 2731340, at *9 (C.D. Ill. July 13, 2011).

³⁴³ *Bunge Corp.*, 240 F.3d at 926.

³⁴⁴ *See Fischer v. S/Y Neraida*, 508 F.3d 586, 596 (11th Cir. 2007).

³⁴⁵ *See City of Chicago v. M/V Morgan*, 375 F.3d 563, 576 (7th Cir. 2004).

³⁴⁶ *Stuart Cay Marina*, 510 F. Supp. 2d at 1072.

³⁴⁷ The Eleventh Circuit explains that this is a distinct argument that rebuts causation, even where there is negligence, by establishing a superseding cause of the accident. *Fischer*, 508 F.3d at 593, 595-96.

and prudent precaution in preparation for the storm.³⁴⁸ That is, the Court must look to whether the hurricane would have caused the allisions even if all reasonable preparations had been made.

What the ordinarily prudent barge owner should do in advance of an impending storm

is not to be measured by what hundreds or even thousands of ordinary persons—housewives, children, laborers, salesmen, and the like—either did or ought to have done . . . he has under his command a thing which may be the instrument of further damage—here a large, cumbersome, unmanned, unwieldy craft which, once loosed before these forces, would smash all in her path. He has, therefore, a special duty to take all reasonable steps consistent with safety to this ship and her crew, to avoid or minimize the chance of harm to others.³⁴⁹

Skanska has failed to meet its burden to demonstrate that, due to Sally's severity, the allisions would have occurred even with the exercise of all reasonable precautionary efforts. While Hurricane Sally was a force of nature, it was not unanticipated and the NWS's forecast created a situation in which reasonable precautions, if taken in a timely manner, could have avoided the allisions that occurred all over Pensacola Bay.

The measures taken to secure the construction barges in advance of the storm were in fact not reasonable. Had Skanska followed the *reasonable precautions* set

³⁴⁸ *Bunge Corp.*, 240 F.3d at 925-26; *Stuart Cay Marina*, 501 F. Supp. 2d at 1072, 1074; *Boudoin*, 281 F.2d at 85, 88; *Fischer*, 508 F.3d at 595-96.

³⁴⁹ *Boudoin*, 281 F.2d at 84-85.

forth in its own hurricane plan, as it had during prior storms, the accidents would have been avoided. After all, any and all barges moved to safe harbor during Hurricane Sally remained moored. Skanska's hurricane plan required the reasonable precaution of moving all construction barges away from the project site. Instead, in advance of Hurricane Sally, Skanska attempted to moor approximately 40 barges, most of which moorings were in the middle of Pensacola Bay, in close proximity to the bridge and other private and public property. In no version of any of Skanska's hurricane plans was this contemplated as a reasonable method to protect the bridge or the barges in the event of a tropical storm or hurricane. Even Skanska's Project Manager, Rob Rodgers conceded this mooring location was less safe than those set forth in Skanska's hurricane plan.

Again, Skanska failed to even schedule its deckhands to be on site for the demobilization effort that Mr. Fulton realized was a "foregone conclusion" the day before. Whereas Skanska's hurricane preparedness plan required disassembly of Rig 20's A-frame first, Skanska instead ignored the requirement completely, choosing instead to continue production. These are just more examples of the overwhelming evidence that Skanska's failed to take reasonable measures in preparation for the storm. As Mr. Hudec with FDOT stated, "the problem arose due to Skanska's inability to properly secure barges or move them to safe haven." After all, seven of Skanska's barges had broken free before tropical storm force winds

even reached the project site, which directly contradicts Mr. Fulton’s representation to FDOT that Skanska was prepared for tropical storm force winds. As Mr. Fulton texted to a friend, Skanska only “prepared for 25.” Further, to paraphrase Skanska General Superintendent Ronnie Benton’s response when he was asked if Skanska bears responsibility for this catastrophe, the bridge’s destruction was the outcome of Skanska’s decision to put the barges where they were moored. His fellow General Superintendent Pat McGlynn went further, testifying that Skanska failed to comply with its own hurricane plan in preparation for Hurricane Sally.

The Act of God defense is not available to Skanska. Skanska had ample notice of a major storm and the opportunity to prepare for it. A reasonable precaution would have been to moor the barges at the anchorages set forth in one or more of the various versions of Skanska’s hurricane plans—Bayou Chico, Butcherpen Cove, the Gulf Breeze Anchorage, or East Bay. Another reasonable precaution would have been to reduce the number of barges being used at any given time on the project site so as to account for the limited number and capacity of the tugboats and time available to move the barges in the event of a tropical storm. To prove it is without fault Skanska must show that it fulfilled its “special duty to take *all* reasonable steps consistent with safety to this ship and her crew, to avoid or minimize the chance of harm to others”.³⁵⁰ With its early inaction and its half-measure effort to move the barges to

³⁵⁰ *Id.* (emphasis added).

an area directly adjacent to the bridge, Skanska has not met its burden of proof that it took all reasonable steps to avoid the damage it eventually caused. Accordingly, the Act of God defense is not applicable.³⁵¹

Skanska failed to abide by the applicable standard of care, *i.e.*, prudent seamanship and ordinary care and reasonableness. Skanska had the burden of proof to demonstrate that the escape of the barges was an inevitable accident or attributable to *vis major*. Skanska failed to meet its burden in this regard. It failed to demonstrate that, irrespective of its negligence, there was a superseding cause of the allisions (*e.g.*, *vis major* or act of God) such that the allisions could not have been avoided even if Skanska had taken all reasonable precautions.

III. Knowledge and Privity

A vessel owner may limit his or her liability for a damages claim by proving that the losses were occasioned without the privity or knowledge of the owner.³⁵² The personal participation of a company manager in the fault or negligence that caused or contributed to the injury or damage constitutes “privity or knowledge” under the Limitation Act.³⁵³ When the vessel owner is a corporation, privity or knowledge means the privity or knowledge of a managing agent, officer, or

³⁵¹ Also, Skanska was not acting *in extremis*. See *M/V Morgan*, 375 F.3d at 577 (finding vessel was not operating in extremis).

³⁵² 46 U.S.C. § 30505; *Am. River Transp. Co. v. Ryan*, 579 F.3d 820, 822 (7th Cir. 2009) (citing 46 U.S.C. § 30505(b)).

³⁵³ *Great Lakes Dredge & Dock Co. v. City of Chicago*, 3 F.3d 225, 231 (7th Cir. 1993).

supervisory employee.”³⁵⁴ Thus, when the vessel owner is a corporation, liability will not be limited under the Act “where the negligence is that of an executive officer, manager, or superintendent, whose scope of authority included supervision over the phase of the business out of which the injury occurred.”³⁵⁵

Thus, under the Limitation Act, there are three possible outcomes:

- 1) An owner may be exonerated of all liability if the owner, vessel and crew had no fault in the accident;³⁵⁶
- 2) An owner may have liability limited to the value of the vessel and its freight if the owner, vessel or crew had some fault in the accident, but the owner did not have privity and knowledge of the acts of negligence or unseaworthiness that caused the accident;³⁵⁷ or
- 3) An owner may be denied both exoneration and limitation of liability, and therefore be liable beyond the value of the ship, if the owner, vessel or crew had some fault, and the owner had privity and knowledge of the acts of negligence that caused the accident.³⁵⁸

In the context of a corporate vessel owner, like Skanska, the Eleventh Circuit attributes to the corporation “the privity and knowledge of ‘corporate managers

³⁵⁴ *Am. Dredging Co.*, 81 F.3d at 130.

³⁵⁵ *Empresa*, 730 F.2d at 155.

³⁵⁶ *Am. Dredging Co.*, 81 F.3d at 129; *Tittle v. Aldacosta*, 544 F.2d 752, 755 (5th Cir. 1977).

³⁵⁷ 46 U.S.C. § 30505; *Am. Dredging Co.*, 81 F.3d at 129.

³⁵⁸ *Hercules Carriers, Inc.*, 768 F.2d at 1563.

vested with discretionary authority.”³⁵⁹ A corporate vessel owner, then, cannot limit its liability where “the negligence is that of an executive officer, manager, or superintendent whose scope of authority includes supervision over the phase of the business out of which the loss or injury occurred.”³⁶⁰ “The privity and knowledge of a managing agent, officer or supervising employee, including supervisory shoreside personnel, is attributable to the corporation.”³⁶¹ Stated otherwise, “knowledge is adjudged by what the corporation’s managing agents knew or should have known with respect to the conditions or actions likely to cause the loss.”³⁶²

The Eleventh Circuit has defined privity as the personal participation of the owner in some fault, or act of negligence, causing or contributing to the loss, and knowledge as some personal knowledge, *or* the means of obtaining knowledge by reasonable inquiry or inspection, of conditions likely to contribute to the accident.³⁶³

The burden is on the vessel owner

trying to limit liability to prove lack of privity or knowledge. This burden is not met by simply proving a lack of actual knowledge, for privity and knowledge is established where the means of obtaining

³⁵⁹ *Am. Dredging Co.*, 81 F.3d at 130; *see also Suzuki of Orange Park, Inc. v. Shubert*, 86 F.3d 1065 (11th Cir. 1996) (collecting cases).

³⁶⁰ *Suzuki*, 86 F.3d at 1065 (quoting *Coryell v. Phipps*, 317 U.S. 406, 410-11 (1943)).

³⁶¹ *Suzuki*, 86 F.3d at 1065 (quoting *Continental Oil Co. v. Bonanza Corp.*, 706 F.2d 1365 (5th Cir. 1983) (en banc)); *see also Am. Dredging Co.*, 81 F.3d at 130.

³⁶² *Hellenic Inc. v. Bridgeline*, 252 F.3d 391, 394 (5th Cir. 2001); *Carr v. PMS Fishing Corp.*, 191 F.3d 1, 4 (1st Cir. 1999) (“When a corporation owns the vessel, the test is whether culpable participation or neglect of duty can be attributed to an officer, managing agent, supervisor, or other high-level employee of the corporation.”).

³⁶³ *Petition of M/V Sunshine II*, 808 F.2d 762, 763-64 (11th Cir. 1987); *Am. Dredging Co.*, 81 F.3d at 130; *Suzuki*, 86 F.3d at 1064.

knowledge exist, or where reasonable inspection would have led to the requisite knowledge. Thus, while knowledge may stem from an owner's personal participation in the negligence, it also may exist where the owner could have and should have obtained the information by reasonable inquiry or inspection.³⁶⁴

As Skanska's negligence contributed to causing the damage at issue, the Court must proceed to the second step and determine whether the vessel owner had knowledge of or was in privity with the acts of negligence.³⁶⁵

The burden is on Skanska to establish *a lack of* privity or knowledge.³⁶⁶ A vessel owner who fails to meet the burden of showing a lack of privity and knowledge is not entitled to limit liability under the Limitation of Liability Act.

The individuals Skanska vested with discretionary authority for preparing for storms, including Hurricane Sally, were: 1) Thomas Fulton, Skanska's Vice President of Operations and Project Director; 2) Thomas DeMarco, Skanska's Project Executive and Construction Manager; and 3) Robert Rodgers, Skanska's Project Manager. The knowledge and privity of these managers is attributable to Skanska.

Skanska failed to prove that Messrs. Fulton, DeMarco, and Rodgers lacked privity or knowledge. The evidence demonstrated that these individuals exerted

³⁶⁴ *Am. Dredging Co.*, 81 F.3d at 130 (internal citations and quotations omitted). *See also Hercules*, 769 F.2d at 1564.

³⁶⁵ *Am. Dredging Co.*, 81 F.3d at 130.

³⁶⁶ *Am. Dredging Co.*, 81 F.3d at 130. *See also* Doc. No. 1223 at 19.

broad supervisory control over the project, and had authority as to control when, and how, Skanska was to prepare for extreme weather events. Mr. Fulton testified that he was fully aware of—and agreed with—the decisions made with respect to how and when to play for Hurricane Sally. The evidence demonstrated that these individuals were negligent in failing to appropriately prepare the project site and the barges for Hurricane Sally. Messrs. DeMarco, Fulton, and Rodgers shared responsibility for making the decision to transition from construction work to securing equipment ahead of a storm, as well as for keeping track of the monitoring or forecasting of weather conditions in advance of Hurricane Sally.

Likewise, the evidence indicates that Messrs. DeMarco, Rodgers and Fulton were the only Skanska employees who had the responsibility for deciding whether and when to move construction barges to safe harbor. In addition to having responsibility with respect to the decision-making process of whether to implement the hurricane preparedness plan, Mr. Fulton also had responsibility for protecting the bridge and Skanska's assets.

While Mr. Rodgers testified that Skanska project management, including himself, devised the plan implemented for Hurricane Sally where barges were sent to mooring piles on the east and west side of the bridge, he further testified that he was not aware of any errors or mistakes made by deckhands, crew, or anyone in implementing that plan. Similarly, Mr. DeMarco testified that “[p]roject leadership

is responsible for the project's actions," when asked if there was responsibility for the barges breaking free, whether that responsibility would rest with project leadership" and that he was not blaming any of the barges having broken free on any members of his crew.

Because Skanska has failed to meet its burden to demonstrate a lack of privity and knowledge, its liability will not be limited to the value of the barges.

IV. Spoliation Presumption and Any Remaining Unresolved Matters of Law.

On August 23, 2021, Judge Cannon found that "Skanska acted in bad faith" in destroying cell phone data for five of its thirteen self-selected custodians and that "this is a text book case of spoliation."³⁶⁷ As such, Judge Cannon imposed monetary sanctions and the application of two adverse inferences: (1) that the information that was contained in the spoliated cell phone data was relevant and favorable to claimants; and (2) that it was not these five custodians' conduct that caused the barges to go adrift. Judge Cannon noted that because this is not a jury trial, these inferences are subject to the trial court's discretion and determination of whether any rebuttal evidence will be allowed from Skanska.³⁶⁸

Based on the evidentiary record to date, both adverse inferences are appropriate and should not be subject to rebuttal by Skanska. Judge Cannon found

³⁶⁷ ECF No. 1265 at 7, 19.

³⁶⁸ *Id.* at 25.

that Skanska spoliated the evidence in bad faith.³⁶⁹ As such, an irrebutable presumption is appropriate.³⁷⁰

To the extent there remain any disputed issues of law before the Court that were not resolved during the bench trial, Claimants incorporate the argument and authority set forth in the Trial Memorandum as to Disputed Issues of Law.³⁷¹

CONCLUSION

For the above reasons and upon consideration of the parties' stipulations of fact and law, together with the evidence adduced at trial as set forth herein, Claimants respectfully request this Honorable Court dismiss each of Skanska's twenty-eight (28) Limitation of Liability Act Petitions and dissolve the injunction staying Claimants' state court actions against Skanska.

Date: November 8, 2021

Respectfully submitted,

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³⁶⁹ *Id.* at 16, 17, 19, 21, 23.

³⁷⁰ *Compass Chem. Int'l, LLC v. True North Prods., LLC*, 2011 WL 13213914, at * 28 (N.D. Ga. Feb. 15, 2011) (emphasis added) (quoting *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 469 (S.D.N.Y. 2010), abrogated by *Chin v. Port Auth. of New York & New Jersey*, 685 F.3d 135 (2d Cir. 2012)) (“[W]hen a spoliating party has acted willfully or in bad faith, a jury can be instructed that certain facts are deemed admitted and must be accepted as true.”).

³⁷¹ Doc. 1273.

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I CERTIFY that this document has been filed via CM/ECF for electronic distribution to all counsel of record on November 8, 2021.

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