

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA  
PITTSBURGH

STEVANNA TOWING, INC.,	)	
	)	
Plaintiff,	)	2:15-CV-01419-DSC
	)	
And	)	
	)	
FRANK BRYAN, INC. and	)	
GEORGETOWN SAND & GRAVEL, INC.,	)	
and M/V TIMOTHY JAMES,	)	
	)	
Intervenor Plaintiffs,	)	
	)	
vs.	)	
	)	
ATLANTIC SPECIALTY INSURANCE	)	
COMPANY,	)	
	)	
Defendant,	)	

Cynthia Reed Eddy, Chief United States Magistrate Judge.

**Report and Recommendation**

**I. Recommendation**

This civil action was initiated in this court on October 30, 2015, by Stevanna Towing, Inc. (“Stevanna”),<sup>1</sup> against its insurer, Atlantic Specialty Insurance Company (“Atlantic”). On July 8, 2016, Frank Bryan, Inc. (“Bryan”), Georgetown Sand & Gravel, Inc. (“Georgetown”), and the M/V Timothy James,<sup>2</sup> were granted permission to intervene as plaintiffs in this action (collectively,

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<sup>1</sup> Stevanna is owned by Samuel and Jennifer Stile. Joint Concise Statement of Undisputed Material Facts (“JCS”) (ECF No. 150) at ¶ 1.

<sup>2</sup> Bryan owns the M/V Timothy James, which it chartered to Georgetown. JCS (ECF No. 150) at ¶¶ 7-8.

“Intervenor Plaintiffs”). This court has subject matter jurisdiction over the controversy pursuant to 28 U.S.C. § 1332.

Presently before the court are cross-motions for partial summary judgment filed by all parties. (ECF Nos. 146, 148, and 151). Both Stevanna and Intervenor Plaintiffs request the court enter a declaratory judgment in their favor, concluding that Atlantic must indemnify Stevanna for liability related to an accident that occurred on the M/V Timothy James. Atlantic moves for summary judgment in its favor on the basis that it is not required to indemnify Stevanna. For the reasons that follow, it is respectfully recommended that Atlantic’s motion be granted and that the motions filed by Stevanna and Intervenor Plaintiffs be denied.

## **II. REPORT**

### **A. Factual and Procedural Background<sup>3</sup>**

On October 8, 2014, Raymond Robinson was injured while working as a deckhand aboard the M/V Timothy James.<sup>4</sup> Robinson filed a claim against Stevanna, Bryan, Bryan Materials Group,<sup>5</sup> and the M/V Timothy James, for injuries he sustained as a result of this accident pursuant to the Jones Act, 46 U.S.C. § 30104. JCS (ECF No. 150) at ¶¶ 44-50; *see also* Atlantic’s Concise Statement of Material Facts (“CSF”) (ECF No. 153) at ¶¶ 44-50.

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<sup>3</sup> This case, and its related cases (docket numbers 2:15-cv-00475-CRE, 2:15-cv-01291-CRE, 2:16-cv-01611-CRE, and 2:15-cv-01308-CRE), have long procedural histories, much of which is not relevant to the issues at this juncture. Accordingly, in this report, the undersigned includes only the factual and procedural history necessary to understand the issues presented on summary judgment.

<sup>4</sup> Robinson was employed by Stevanna. JCS (ECF No. 150) at ¶ 44.

<sup>5</sup> Bryan Materials Group is not a legal entity, but rather is a trade name used by Bryan, Georgetown, and affiliated entities. JCS (ECF No. 150) at ¶ 50.

Stevanna reported Robinson's accident to Atlantic, with which it maintained a marine protection and indemnity (P&I) insurance policy. *Id.* at ¶ 53. Atlantic assigned a claims adjuster to investigate the accident and explore coverage. On November 5, 2014, Atlantic sent a letter to Stevanna denying coverage, because the M/V Timothy James was not included in the schedule of vessels covered under the P&I policy issued to Stevanna by Atlantic. *Id.* at ¶ 58; *see also* Letter (ECF 61-2).

Thus, on October 30, 2015, Stevanna filed its initial complaint against Atlantic. In the first amended complaint, Stevanna averred it had three insurance policies with Atlantic, all of which were issued on or about March 10, 2014.<sup>6</sup> For the policy at issue, B5JH26060 ("the Policy"), Stevanna admitted that the M/V Timothy James was not included in the schedule of vessels. The Policy specifically covered two vessels, the M/V Savanna Elise and the M/V John Kushner. JCS (ECF No. 150) at ¶ 18.

According to Stevanna, it had orally entered into an oral bareboat charter agreement with Bryan to charter M/V John Kushner. *Id.* at ¶ 9. That agreement was codified in writing on July 15, 2014. The written agreement required, *inter alia*, Stevanna to provide protection and indemnity insurance for the M/V John Kushner.<sup>7</sup> In accordance with the agreement, the M/V John Kushner was added to the Policy.<sup>8</sup>

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<sup>6</sup> *See* Policy (ECF No. 61-1) at pp. 27-91. These policies are numbered B5JH26038 and B5JH26039. Policy B5JH26038 is a commercial marine policy, which appears to cover two locations, but not any vessels. Policy B5JH26039 is for a marine excess bumbershoot policy.

<sup>7</sup> The written bareboat charter agreement between Bryan and Stevanna provided that Stevanna would pay Bryan a charter hire of \$1.00 per year. Agreement (ECF No. 150-4) at ¶ 5. The agreement further provided that Stevanna shall "have exclusive control" of the towboat and its crew. *Id.* at ¶ 1. In addition, Stevanna was responsible for and was to pay for all maintenance.

<sup>8</sup> *See* Policy (ECF No. 61-1) at 10, 21 (listing the M/V John Kushner on the schedule of vessels and listing BMG as an additional named insured).

With respect to this matter, recognizing that the M/V Timothy James was not specifically listed in the Policy, Stevanna relies on an endorsement to the Policy, which included an automatic acquisition clause. The clause provided, *inter alia*, that “it is understood and agreed that this policy covers automatically each vessel acquired, purchased, or chartered by the Assured<sup>9</sup> wherein the Assured is required to carry insurance on the vessel.” *Id.* at ¶ 21. It is Stevanna’s position that it had also entered into an oral bareboat charter agreement with Bryan with regard to the M/V Timothy James. Stile’s Depo. (ECF No. 150-1) at p. 28; Bryan’s Depo. (ECF No. 150-3) at p. 3. According to Stile, he and Bryan agreed that Stevanna would provide the same insurance for the M/V Timothy James that it did for the M/V John Kushner. *Id.* at 33. Thus, Stevanna believes it is entitled to coverage from Atlantic under the Policy for Robinson’s accident.

Based on the foregoing, Stevanna set forth claims for declaratory judgment with respect each of the three policies, as well as claims for breach of contract and bad faith.<sup>10</sup> On July 8, 2016, Intervenor Plaintiffs were granted permission to intervene in this matter. (ECF No. 45). Intervenor Plaintiffs “allege that Stevanna was required to provide insurance coverage to them and their affiliates as additional insureds on various insurance policies of Stevanna, including policies insuring the M/V Timothy James, policies insuring incidents involving the M/V Timothy James and policies insuring crewmembers of the M/V Timothy James, and to defend and indemnify them as primary insureds under those policies with respect to the claims asserted in the Robinson Action.” Intervenor Plaintiffs’ Amended Compl. (ECF No. 100) at ¶ 25. Thus, Intervenor

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<sup>9</sup> Stevanna is the Assured under the Policy.

<sup>10</sup> On March 2, 2016, the parties stipulated to the severance of the of the bad faith claim. (ECF No. 24).

Plaintiffs set forth claims for declaratory judgment, breach of contract, and bad faith against Atlantic. *Id.*

After Atlantic filed answers and discovery was completed, all parties filed motions for summary judgment, briefs in support thereof, and concise statements of material facts. (ECF Nos. 146-153). All parties also filed responsive briefs. (ECF Nos. 157-160, 165, 167). As the motions for summary judgment have been fully briefed, they are now ripe for disposition. The court's analysis follows.

### **B. Standard of Review**

Summary judgment is appropriate when the moving party establishes “that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. Pro. 56(a). A genuine issue of material fact is one that could affect the outcome of litigation. *Willis v. UPMC Children’s Hosp. of Pittsburgh*, 808 F.3d 638, 643 (3d Cir. 2015) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). However, “[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial.” *N.A.A.C.P. v. North Hudson Reg’l Fire & Rescue*, 665 F.3d 464, 475 (3d Cir. 2011) (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

“Cross-motions are merely claims by each side that it alone is entitled to summary judgment. They do not constitute an agreement that if one is denied the other is necessarily granted, or that the losing party waives judicial consideration and determination of whether genuine issues of material fact exist.” *Canal Ins. Co. v. Sherman*, 430 F. Supp. 2d 478, 483 (E.D. Pa. 2006). The initial burden is on the moving party to adduce evidence illustrating a lack of genuine, triable issues. *Hugh v. Butler Cnty. Family YMCA*, 418 F.3d 265, 267 (3d Cir. 2005) (citing *Celotex Corp.*

*v. Catrett*, 477 U.S. 317, 323–24 (1986)). Once the moving party satisfies its burden, the non-moving party must present sufficient evidence of a genuine issue, in rebuttal. *Santini v. Fuentes*, 795 F.3d 410, 416 (3d Cir. 2015) (citing *Matsushita Elec. Indus. Co.*, 475 U.S. at 587). When considering the parties’ arguments, the court is required to view all facts and draw all inferences in the light most favorable to the non-moving party. *Id.* (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). The benefit of the doubt will be given to allegations of the non-moving party when in conflict with the moving party’s claims. *Bialko v. Quaker Oats Co.*, 434 F. App’x 139, 141 n.4 (3d Cir. 2011) (citing *Valhal Corp. v. Sullivan Assocs.*, 44 F.3d 195, 200 (3d Cir. 1995)). “Where cross motions are pending, the paradigm applies separately to each of the cross motions.” *Canal Ins. Co.*, 430 F. Supp. 2d at 483.

Nonetheless, a well-supported motion for summary judgment will not be defeated where the non-moving party merely reasserts factual allegations contained in the pleadings. *Betts v. New Castle Youth Dev. Ctr.*, 621 F.3d 249, 252 (3d Cir. 2010) (citing *Williams v. Borough of West Chester*, 891 F.2d 458, 460 (3d Cir. 1989)). The non-moving party must resort to affidavits, depositions, admissions, and/or interrogatories to demonstrate the existence of a genuine issue. *Guidotti v. Legal Helpers Debt Resolution, L.L.C.*, 716 F.3d 764, 773 (3d Cir. 2013) (citing *Celotex Corp.*, 477 U.S. at 324).

## **C. Discussion**

### *1. Marine Protection & Indemnity Policies*

Because the Policy is a marine P&I policy, a specialized type of insurance policy, the undersigned provides an overview to better understand the issues involved in summary judgment. “The Protection and Indemnity (P&I) policy insures the vessel owner against specific types of liability that arise out of the vessel owner’s use and operation of the insured vessel. The P&I

policy is an indemnity policy, and not a liability policy, although the indemnity provides the shipowner with liability coverage.” Robert T. Lemon II, Allocation of Marine Risks: An Overview of the Marine Insurance Package, 81 Tul. L. Rev. 1467, 1480 (2007) (footnotes omitted). In addition, “coverage under P&I policy forms is afforded to the named insured only for liability it incurs as owner of the insured vessel.” *Id.* (internal quotation marks omitted). “Liabilities incurred by the insured in some capacity other than as owner are not protected or covered under the P&I policy.” *Id.* (internal quotation marks omitted). Furthermore, the “P&I policy is not a liability policy, and as such there is no duty-to-defend obligation imposed on the P&I underwriter, either by operation of law or by the terms of the policy. The assured must defend itself, but the P&I policy does provide coverage for attorney’s fees and litigation expenses.” *Id.* However, “[l]egal expenses defending a claim that is itself not covered by the P&I policy would not be covered. *Id.* at 1486.

## 2. *Atlantic’s Motion for Summary Judgment against Stevanna*

Having gained a better understanding of the insurance policy at issue, this court turns to Atlantic’s motion for summary judgment. Atlantic contends that the evidence fails to establish as a matter of law that Stevanna was the owner of the M/V Timothy James and requests summary judgment be entered in its favor. All parties agree that the M/V Timothy James was not listed in the schedule of insured vessels on the Policy, and the only way for Stevanna to establish entitlement to coverage by the Policy is through application of the Automatic Acquisition Clause, which provides the following.

### **5. AUTOMATIC ACQUISITION CLAUSE—**

Subject to the terms, conditions and limits of this policy, it is understood and agreed that this policy covers automatically each vessel acquired, purchased, or chartered by the Assured wherein the Assured is required to carry insurance on the vessel. It is further agreed that the Assured shall give

notice to the Underwriters where practicable prior to the acquisition. Premium shall be paid at pro-rata of rates to be agreed.

The agreed valuation for Hull Insurance shall be as follows:

With respect to purchased vessels  
The purchase price

With respect to bareboat chartered vessels:

The amount set forth in the charter party executed by the Assured and vessel owner, or in the event of an oral bareboat charter, the amount agreed upon by the assured and the owner, but in no event shall the amount be more than the original purchase price, or the amount the chartered vessel was insured for prior to being chartered to the Assured.

Amended Compl. (ECF No. 61) at ¶ 13; *see also* Policy (ECF No. 150-5) at 14.

Atlantic contends that to establish a right to coverage, Stevanna was required to satisfy the following: “(1) that the [M/V] Timothy James was ‘acquired, purchased, or chartered by’ Stevanna, as those words are used in the Clause; (2) that Stevanna was ‘required to carry insurance on the vessel’ as part of the acquisition, purchase, or charter; and (3) that Stevanna gave ‘notice to the Underwriters where practicable prior to such acquisition.’” Atlantic’s Br. (ECF No. 152) at 5. It is Atlantic’s position that Stevanna failed to satisfy all three requirements as a matter of law. *Id.*

First, Atlantic contends that Stevanna neither “acquired,” nor “chartered” the M/V Timothy James within the meaning of the Policy as a whole.<sup>11</sup> According to Atlantic, the Policy, as a P&I policy, required Stevanna to take on the responsibilities of being an owner, which it did not do. Stevanna responds that “it is clear that the indemnity provision applies to ownership and non-ownership of a vessel.” Stevanna’s Reply Br. (ECF No. 157) at 5 (unnumbered).<sup>12</sup>

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<sup>11</sup> All parties agree that Stevanna did not “purchase” the M/V Timothy James.

<sup>12</sup> Stevanna spends much of its argument contending that Atlantic owes Stevanna a duty to defend. *See* Stevanna’s Br. (ECF No. 147) at 11-14. However, as discussed *supra*, marine “P&I policies do not ordinarily create a duty to defend and are indemnity policies, not liability policies.” *Gabarick v. Laurin Mar. (Am.), Inc.*, 650 F.3d 545, 552-53 (5th Cir. 2011). Thus, the undersigned

“Under Pennsylvania law, the interpretation of an insurance contract is a question of law for the court to decide. Thus, on a summary judgment motion a court can determine, as a matter of law, whether a claim is within a policy’s coverage.” *Frederick Mut. Ins. Co. v. Ahatov*, 274 F. Supp. 3d 273, 278 (E.D. Pa. 2017) (internal citations and quotation marks omitted).

“In construing an insurance policy, if the words of the policy are clear and unambiguous, the court must give the words their plain and ordinary meaning.” *Pac. Indem. Co. v. Linn*, 766 F.2d 754, 760-61 (3d Cir. 1985) (citing *Northbrook Insurance Co. v. Kuljian Corp.*, 690 F.2d 368, 372 (3d Cir.1982)). “When a term in the policy is ambiguous, however, and the intention of the parties cannot be discerned from the face of the policy, the court, in its attempts to arrive at a reasonable construction of the policy that is in accord with the parties’ apparent intention, may look to extrinsic evidence of the purpose of the insurance, its subject matter, the situation of the parties, and the circumstances surrounding the making of the contract.” *Id.* at 761. “Where ambiguous, insurance contracts are to be construed strictly against the insurer.” *Id.* “Hence, any ambiguities are to be resolved in favor of the insured. The language of a policy may not be tortured, however, to create ambiguities where none exist.” *Id.*

Based upon the foregoing discussion of marine P&I policies, it is clear that Atlantic is only required to cover Stevanna for this incident to the extent Stevanna was acting as an owner of the M/V Timothy James at the time of Robinson’s accident.<sup>13</sup> *See Cont’l Oil Co. v. Bonanza Corp.*,

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agrees with Atlantic, *see* Atlantic’s Br. (ECF No. 152) at n.1, that Stevanna’s duty-to-defend argument is not relevant here.

<sup>13</sup> Stevanna argues that language in the Policy extends coverage to situations even where Stevanna may not have been acting as owner. *See* Policy (ECF No. 150-5) at 7 (“Subject to all exclusions and other terms of this Policy the Underwriters agree to indemnify the Assured for any sums which the Assured, **as owner of the Vessel**, shall have become liable to pay, and shall have paid, in respect of any casualty or occurrence during the currency of the Policy but only in consequence of any of the matters set forth hereunder PROVIDED, however, that if the interest of the Assured is

706 F.2d 1365, 1372 (5th Cir. 1983) (pointing out that P&I policy only covered expenses incurred by entity when acting as owner of a vessel). One way to become an owner within the meaning of the Policy was through the oral bareboat charter agreement into which Stile and Bryan purportedly entered.<sup>14</sup> However, it is Atlantic's position that the evidence "is insufficient as a matter of law to establish a bareboat charter." Atlantic's Br. (ECF No. 152) at 8. According to Atlantic, "Georgetown never completely relinquished possession and control of the [M/V] Timothy James," and Stevanna never paid a charter hire to Georgetown. *Id.* at 8-9. On the other hand, Stevanna contends that it did indeed, as a matter of law, satisfy the elements of a bareboat charter, based upon "the uncontradicted testimony of David Bryan and Samuel Stile – the gentlemen who negotiated the deal." Stevanna's Br. (ECF No. 147) at 15.

"Under general maritime principles, there are three types of charter parties: the voyage charter, the time charter, and the demise or bareboat charter." *Dougherty v. Navigazione San Paolo, S.P.A. Medafrica Line*, 622 F. Supp. 1, 3 (E.D. Pa. 1984). "In a demise or bareboat charter, the charterer takes over full control of the ship and becomes the owner *pro hac vice*. The charterer thus assumes control of management and navigation." *Id.* "To create a demise the owner of the vessel must completely and exclusively relinquish 'possession, command, and navigation' thereof

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or includes interests other than the owner of the Vessel, the Underwriters' liability shall not be greater than if the Assured was the owner entitled to all defenses and limitations of liability to which a shipowner is entitled[.]") (emphasis added). According to Stevanna, this language in the aforementioned "indemnity provision applies to ownership and non-ownership of a vessel." Stevanna's Reply Br. (ECF No. 157) at 5 (unnumbered). Stevanna's argument is incorrect. In order for this indemnity provision to apply to the M/V Timothy James, the Policy would have to apply to the M/V Timothy James. As suggested *infra*, the Policy does not cover the M/V Timothy James, and therefore this clause, even if it were to provide indemnity for an entity acting in a capacity other than owner, does not apply here.

<sup>14</sup> See Amended Comp. (ECF No. 61) at ¶ 14 ("Sometime before October 8, 2014, Stevanna entered into an oral bareboat charter party with Georgetown [.]").

to the demisee.” *Guzman v. Pichirilo*, 369 U.S. 698, 699 (1962) (quoting *United States v. Shea*, 152 U.S. 178 (1894)). “It is therefore tantamount to, though just short of, an outright transfer of ownership. However, anything short of such a complete transfer is a time or voyage charter party or not a charter party at all.”<sup>15</sup> *Id.* at 700.

Instantly, Stile testified about the agreement entered into and his responsibilities with respect to the M/V Timothy James. *See* Stile’s Depo. (ECF No. 150-1) at 17-42. Stile testified that in June 2014, his company, Stevanna, moved from Donora, Pennsylvania to Georgetown, Pennsylvania. *Id.* at 12. Around that time, one of the Bryan’s barges sank, “and the company [(Phil’s Towing)] that was watching their fleet wasn’t there.” *Id.* at 14. Thus, David and Matt Bryan indicated that they were going to fire Phil’s Towing and have Stevanna “take over their boat.” *Id.* According to Stile, in July 2014, the M/V Timothy James “was in such bad shape” that Stevanna spend a month and a half repairing it. *Id.* at 16. Stile testified that Georgetown paid for those repairs.<sup>16</sup> *Id.* According to Stile, the initial agreement between he and Bryan with respect to the M/V Timothy James was for Stevanna “to handle all their harbor work, shifting barges in and out, loading barges.” *Id.* at 18. In August 2014, once the M/V Timothy James became operational, Stile and Bryan agreed that Bryan would pay Stevanna “an hourly rate” of “\$65 an hour.” *Id.* at 19. According to Stile, in calculating what amount to charge Bryan, Stile included his insurance costs as well as the cost for a pilot and deckhand. *Id.* at 20-21. This agreement provided that

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<sup>15</sup> Stevanna contends that the use of the word “charter” in the Automatic Acquisition Clause, as opposed to “bareboat charter,” suggests that any type of charter would implicate the Policy. *See* Stevanna’s Reply Br. (ECF No. 157) at 8-9. However, as discussed *supra*, the Policy applies only to a party acting as an owner. The only type of charter which transfers ownership sufficient to implicate the Policy is a bareboat charter.

<sup>16</sup> In fact, Stile testified that at that time, he believed that Georgetown was the owner of the M/V Timothy James, but he later learned, after Robinson’s accident, that Frank Bryan was the owner of the M/V Timothy James and Georgetown was leasing/chartering it. *Id.* at 17.

Stevanna was to operate the M/V Timothy James for 10 hours per day, five days per week. *Id.* at 21. Stile further testified that Georgetown would continue to pay for maintenance and fuel for the M/V Timothy James. According to Stile, the agreement between Stevanna and Bryan permitted Stevanna to shift barges inside the harbor, but Stevanna was not permitted to use the M/V Timothy James for work outside the harbor. *Id.* at 30. Stile testified that either party could cancel the agreement at any time. Furthermore, Stile testified that he and Bryan agreed that Stile “had to get insurance like [he had] for the [M/V John] Kushner.” *Id.* at 33. Nevertheless, Stile acknowledged the arrangement between the parties for the M/V John Kushner was “different.” *Id.* at 31-32.

David Bryan also testified regarding the relationship between he and Stile. According to him, Stevanna was hired to “[t]end operations at the Georgetown plant on the marine side.” D. Bryan’s Depo. (ECF No. 150-3) at p. 4. According to Bryan, this meant “[m]ovement of barges in and around the facility for the loading and unloading of raw material and loading of the finished product.” *Id.*

“[C]ontrol of the vessel becomes the crucial factor in determining whether a valid bareboat charter agreement exists.” *Backhus v. Transit Cas. Co.*, 532 So. 2d 447, 449 (La. Ct. App. 1988). Here, by examining what happened on the day of Robinson’s accident, it is demonstrated as a matter of law that Stevanna lacked full control over the M/V Timothy James that was necessary to establish a valid bareboat charter agreement. *See Bossard v. Port Allen Marine Service, Inc.*, 624 F.2d 671, 672 (5<sup>th</sup> Cir. 1980) (“The charterer takes over the ship, lock, stock and barrel, and mans her with his own people. He becomes ... the owner *pro hac vice*, just as does the lessee of a house and lot, to whom the demise charterer is analogous.”).

According to Stile, on the day of Robinson’s accident, the “Bryans had an accident on another vessel” so the Bryans asked Stile if they could borrow the pilot Stile intended use for the

M/V Timothy James for the other vessel. Stile's Depo. (ECF No. 150-1) at 42. Stile himself was on another vessel, and it was his understanding that the M/V Timothy James was not going to be needed that day, so he sent his pilot to the Bryan vessel. Subsequently, David Bryan called Stile and told him that "he needed barges moved that day," and Stile explained that he did not have a pilot to do so. Bryan decided to send his pilot, Gary Stanley, an employee of Georgetown, to pilot the M/V Timothy James. Stanley was the pilot when Robinson's accident occurred. Stile testified that "[a]t the moment of this accident," he did not "consider Stevanna Towing to have been acting as the owner of the vessel."<sup>17</sup> *Id.* at 44-45.

In this case, the failure of Stevanna to have complete control over the crew and operations of the M/V Timothy James provides conclusive evidence as to a lack of complete agreement. *See Martin v. Walk, Haydel & Assocs., Inc.*, 742 F.2d 246, 248 (5th Cir. 1984) ("The test [of a demise charter] is one of 'control'; if the owner retains control over the vessel, merely carrying the goods furnished or designated by the charter, the charter is not a demise; if the control of the vessel itself is surrendered to the charterer, so that the master is his man and the ship's people are his people, then we have to do with a demise."). Instantly, not only was the pilot not chosen or employed by Stevanna, Stile even testified that he did not believe he was the owner of the M/V Timothy James on the day of the accident. Stile's Depo. (ECF No. 150-1) at 44-45.

Based on the foregoing, we conclude that Stevanna has failed to come forward with sufficient facts as a matter of law to establish that it owned the M/V Timothy James *pro hac vice* through a bareboat charter agreement on the day of Robinson's accident. The failure of Stevanna to establish ownership absolves Atlantic of responsibility to indemnify Stevanna for Robinson's

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<sup>17</sup> According to Bryan, he does not recall how his pilot, Gary Stanley, came to be the pilot of the M/V Timothy James on the day of the accident. *Id.* at 5.

accident. Accordingly, this court recommends that summary judgment be granted in favor of Atlantic and against Stevanna.<sup>18</sup> Furthermore, this court recommends that Stevanna's motion for summary judgment be denied, as Atlantic has established as a matter of law that the M/V Timothy James was not covered under the Policy.

### *3. Intervenor Plaintiffs' Motion for Summary Judgment*

Intervenor Plaintiffs move for summary judgment on the basis that they are an additional insured under the Policy. However, because this court recommends that summary judgment be granted in favor of Atlantic with respect to Stevanna, this court also recommends that summary judgment be granted in favor of Atlantic with respect to Intervenor Plaintiffs. Atlantic is not required to indemnify Stevanna, and therefore it is also not required to indemnify Intervenor Plaintiffs as additional insureds.

### **D. Conclusion**

Based on the foregoing, it is respectfully recommended that Atlantic's motion for summary judgment be granted. In addition, it is respectfully recommended that the motions filed by Stevanna and Intervenor Plaintiffs be denied.

Accordingly, pursuant to 28 U.S.C. § 636(b)(1)(B)-(C), Federal Rule of Civil Procedure 72, and the Local Rules for Magistrates, the parties have until **May 8, 2020**, to file objections to this report and recommendation. Unless Ordered otherwise by the District Judge, responses to

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<sup>18</sup> Stevanna also contends that that even if it did not charter the M/V Timothy James, it acquired the M/V Timothy James pursuant to the Automatic Acquisition Clause. Stevanna contends that the use of the word "acquire" in the Automatic Acquisition Clause means "possession." Stevanna's Br. (ECF No. 147) at 17 (unnumbered). However, as discussed *supra*, a P&I policy requires ownership, not merely possession. See *Cont'l Oil Co.*, 706 F.2d at 1372. Thus, this court agrees with Atlantic, that the use of the word acquire in the Automatic Acquisition Clause must mean to acquire an ownership interest.

objections are due **May 22, 2020**. Failure to file timely objections may constitute a waiver of any appellate rights. *Brightwell v. Lehman*, 637 F.3d 187, 193 n. 7 (3d Cir. 2011).

Dated: April 24, 2020.

Respectfully submitted,

s/ Cynthia Reed Eddy

Chief United States Magistrate Judge

cc: Honorable David Cercone  
United States District Judge  
*via electronic filing*

Counsel of record  
*via electronic filing*