UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SEACOR MARINE LLC,

Plaintiff,

-v-

WHITE MARLIN OPERATING COMPANY, LLC,

Defendant.

REPORT AND RECOMMENDATION

1:23-CV-8081 (JGLC)(HJR)

HENRY J. RICARDO, United States Magistrate Judge.

To the Honorable Jessica G. L. Clarke, United States District Judge:

Plaintiff Seacor Marine LLC ("Seacor") brought this case against defendant White Marlin Operating Company, LLC ("WMOC") to recover sums owed in connection with the charter of a vessel. Seacor seeks judgment in the amount of $238,524.44 plus pre-judgment interest, post-judgment interest, and attorneys' fees and costs. After the Court entered a default judgment against WMOC, the case was referred to the undersigned for an inquest into damages. For the reasons described below, Seacor should be awarded damages in the amount of $128,770.60 in unpaid principal, $77,262.36 in pre-judgment interest, and post-judgment interest.

I. BACKGROUND

A. Procedural Background

On July 27, 2023, Seacor filed a complaint against WMOC in New York state court. Complaint ("Compl."), Dkt. No. 1. Seacor's complaint asserted five causes of action: (1) breach of contract; (2) non-payment of services rendered by Seacor; (3)

unjust enrichment; (4) failure to pay account stated; and (5) violation of duty to indemnify Seacor for the attorneys' fees and costs resulting from WMOC's intentional acts, omissions, and breaches of contract. Compl. ¶¶ 19–48.

WMOC removed the case to this court on September 12, 2023, claiming federal subject matter jurisdiction based on diversity and admiralty. Notice of Removal, Dkt. No. 1. After answering the complaint, WMOC filed a motion to dismiss for lack of personal jurisdiction on December 4, 2023. 12(b)(2) Motion to Dismiss ("12(b)(2) Motion"), Dkt. Nos. 13–14. Plaintiff timely opposed the motion. Dkt. No. 20.

On May 13, 2024, WMOC's counsel moved to withdraw, which the Court granted on May 29, 2024. Dkt. Nos. 26–27. Because a corporation must appear through counsel, the Court directed new counsel to file a notice of appearance by June 28, 2024. Dkt. No. 27. Following WMOC's failure to retain new counsel, the Court denied WMOC's 12(b)(2) Motion without prejudice, directed Seacor to file its motion for default judgment by August 16, 2024, and noted that WMOC had defaulted. Dkt. No. 30.

Seacor then filed its Proposed Default Judgment and supporting exhibits.[1] Dkt. Nos. 39–43. On August 22, 2024, the Court ordered WMOC to show cause by September 6, 2024 why an order should not be issued granting a default judgment.

[1] Seacor filed its initial Proposed Default Judgment and supporting exhibits on August 16, 2024, as ordered. Dkt. Nos. 31–35. Due to filing error, the Court asked Seacor to refile the same documents on August 20, 2024.

Dkt. No. 44. WMOC was served with the Order to Show Cause and the Motion for Default Judgment on August 23, 2024. Dkt. No. 45. On November 7, 2024, the Court granted a Default Judgment against WMOC and referred the matter for an inquest to determine damages. Dkt. No. 46.

In response to a November 14, 2024 order, Dkt. No. 48, Seacor filed its Proposed Findings of Fact and Conclusions of Law and supporting documents ("Prop. Findings") on January 10, 2025. Dkt. No. 49; Declaration of Joshua Feldman, Esq., dated January 10, 2025, Dkt. No. 49-1; Invoices for Legal Services, Dkt. No. 49-2; Attorney Summary Report, Dkt. No. 49-3; Declaration of Jesús Llorca dated January 10, 2025 (the "Llorca Decl."), Dkt. No. 49-4; Blanket Time Charter, Dkt. No. 49-5; Short Term Hire Order, Dkt. No. 49-6; Invoice, Dkt. No. 49-7; Notice of Non-Payment and Reservation of Rights, Dkt. No. 49-8; Bill Payment Report, Dkt. No. 49-9.

B. Factual Background

The following facts, which are drawn from a review of Seacor's complaint and submissions related to this inquest, are deemed established for purposes of determining the damages to which Seacor is entitled. *See, e.g.*, *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 137 (2d Cir. 2011) ("It is an 'ancient common law axiom' that a defendant who defaults thereby admits all 'well-pleaded' factual allegations contained in the complaint.") (quoting *Vermont Teddy Bear Co. v. 1-800 Beargram Co.*, 373 F.3d 241, 246 (2d Cir. 2004)); *Au Bon Pain Corp. v. Artect, Inc.*, 653 F.2d 61, 65 (2d Cir. 1981) ("[The court should accept] as true all of the factual allegations of the [plaintiff's] complaint, except those relating to damages

[and plaintiff is] also entitled to all reasonable inferences from the evidence offered.").

WMOC operates oil and gas wells. Compl. ¶ 2; Llorca Decl. ¶ 3. Seacor owns and operates vessels that are chartered for use in the energy industry. Compl. ¶ 1; Llorca Decl. ¶ 3. On or about October 6, 2021, WMOC chartered one of Seacor's vessels, the LB Paul. Compl. ¶ 9; Llorca Decl. ¶ 6. Seacor provided the LB Paul to WMOC pursuant to two agreements between the parties: (1) a Blanket Time Charter (also, the "Agreement") and (2) a Short Term Hire Order (the "STHO"). WMOC chartered the LB Paul from 8:00 a.m. on October 6, 2021 to 4:00 p.m. on October 21, 2021. Compl. ¶ 10; Llorca Decl. ¶ 7.

Seacor sent WMOC an October 26, 2021 invoice in the amount of $257,541.20 for its charter of the LB Paul (the "LB Paul Invoice"). Dkt. No. 49-7; Compl. ¶ 11; Llorca Decl. ¶ 7. WMOC paid exactly half of this amount, $128,770.60, on or about August 2, 2022. Compl. ¶ 14; Llorca Decl. ¶ 9. On February 17, 2023, Seacor sent a Notice of Non-Payment and Reservation of Rights stating that WMOC owed the remaining $128,770.60, plus accrued interest (the "February 17 Notice"). Dkt. No. 49-8; Compl. ¶ 17; Llorca Decl. ¶ 10. WMOC did not object or otherwise respond to the February 17 Notice. Compl. ¶ 18; Llorca Decl. ¶ 10.

II. DISCUSSION

A. Legal Standards

"Even when a default judgment is warranted based on a party's failure to defend, the allegations in the complaint with respect to the amount of the damages are not deemed true. The district court must instead conduct an inquiry in order to

ascertain the amount of damages with reasonable certainty." *Credit Lyonnais Securities (USA), Inc. v. Alcantara*, 183 F.3d 151, 155 (2d Cir. 1999). A plaintiff "bears the burden of establishing [its] entitlement to recovery and thus must substantiate [its] claim with evidence to prove the extent of damages." *Dunn v. Advanced Credit Recovery Inc.*, 2012 WL 676350, at *2 (S.D.N.Y. Mar. 1, 2012) (citing *Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp.*, 973 F.2d 155, 158 (2d Cir. 1992)). When assessing damages, a court cannot rely on the plaintiff's statement of the damages alone; damages must be based on admissible evidence. *See Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp.,* 109 F.3d 105, 111 (2d Cir. 1997); *House v. Kent Worldwide Mach. Works, Inc.,* 359 F. App'x 206, 207 (2d Cir. 2010).

In a diversity case, the court must apply state law to determine the principal amount owed in a breach of contract claim, the award of pre-judgment interest, and the award of attorneys' fees and costs. *See Bleecker v. Zetian Systems, Inc.*, 2013 WL 5951162, at *7–8 (S.D.N.Y. Nov. 1, 2013); *Schipani v. McLeod,* 541 F.3d 158, 164 (2d Cir. 2008); *Morse/Diesel, Inc. v. Trinity Industries, Inc.*, 875 F. Supp. 165, 180 (S.D.N.Y. 1994) (citing *F.H. Krear & Co. v. Nineteen Named Trustees,* 810 F.2d 1250, 1265 (2d Cir. 1987)). On the other hand, "post[-]judgment interest is governed by federal statute." *Schipani,* 541 F.3d at 165 (citing 28 U.S.C. § 1961(a)).

Additionally, a federal court sitting in diversity must apply the choice-of-law rules of the forum state. *See Schwimmer v. Allstate Ins. Co.*, 176 F.3d 648, 650 (2d

Cir. 1999) (citing 28 U.S.C. § 1652; *Erie R.R. v. Tompkins,* 304 U.S. 64, 73 (1938)). Therefore, New York choice-of-law rules apply here.

B. Personal Jurisdiction

In an inquest, a court need not accept that there is personal jurisdiction over the defendants or that the well-pleaded allegations of the complaint state a cause of action. *See, e.g.*, *Sinoying Logistics Pte Ltd. v. Yi Da Xin Trading Corp*., 619 F.3d 207, 214 (2d Cir. 2010) (concluding that a court may *sua sponte* dismiss an action for lack of personal jurisdiction when considering whether to enter a default judgment); *Hood v. Ascent Med. Corp.*, No. 13-cv-628, 2016 U.S. Dist. LEXIS 80080, at *1 (S.D.N.Y. June 20, 2016) (concluding that, where the district court had referred the action to a Magistrate Judge for a damages inquest after granting a default judgment, the Magistrate Judge had "authority to consider personal jurisdiction *sua sponte*"), *aff'd*, 691 F. App'x 8 (2d Cir. 2017).

Seacor contends that a forum selection clause in the Agreement establishes personal jurisdiction over WMOC. Contracting parties can consent to personal jurisdiction through a forum selection clause, and "[w]here an agreement contains a valid and enforceable forum selection clause . . . it is not necessary to analyze jurisdiction under New York's long-arm statute or federal requirements of due process." *Exp.-Imp. Bank of the U.S. v. Hi-Films S.A. de C.V.*, No. 09-cv-3573 (PGG), 2010 WL 3743826, at *4 (S.D.N.Y. Sept. 24, 2010). Thus, the relevant question is whether the forum selection clause contained in the Agreement is enforceable.

The Second Circuit has established a four-part analysis to determine whether a forum-selection clause is enforceable:

> Determining whether to dismiss a claim based on a forum selection clause involves a four-part analysis. The first inquiry is whether the clause was reasonably communicated to the party resisting enforcement. *See, e.g., D.H. Blair & Co. v. Gottdiener,* 462 F.3d 95, 103 (2d Cir. 2006). The second step requires us to classify the clause as mandatory or permissive, *i.e.,* to decide whether the parties are required to bring any dispute to the designated forum or simply permitted to do so. *See John Boutari & Son, Wines & Spirits, S.A. v. Attiki Imps. & Distribs. Inc.,* 22 F.3d 51, 53 (2d Cir. 1994). Part three asks whether the claims and parties involved in the suit are subject to the forum selection clause. *See, e.g., Roby v. Corp. of Lloyd's,* 996 F.2d 1353, 1358–61 (2d Cir. 1993).
>
> If the forum clause was communicated to the resisting party, has mandatory force and covers the claims and parties involved in the dispute, it is presumptively enforceable. *See id.* at 1362–63. The fourth, and final, step is to ascertain whether the resisting party has rebutted the presumption of enforceability by making a sufficiently strong showing that "enforcement would be unreasonable or unjust, or that the clause was invalid for such reasons as fraud or overreaching." *M/S Bremen v. Zapata Off–Shore Co.,* 407 U.S. 1, 15, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972) (establishing federal standard relating to enforcement of forum clauses applicable in admiralty and international transactions); *see Bense v. Interstate Battery Sys. of Am., Inc.,* 683 F.2d 718, 721 (2d Cir. 1982) (applying *Bremen* standard to contractual dispute between domestic parties in non-admiralty context).

Phillips v. Audio Active, Ltd., 494 F.3d 378, 383–84 (2d Cir. 2007).

Section XXIV of the Agreement contains both a choice-of-law provision and a forum-selection provision:

> This Charter shall be construed in accordance with the admiralty and maritime laws of the United States of America. To the extent that the foregoing laws are inapplicable to this Charter, it shall be construed in accordance with the laws of the State of New York. It is agreed by the parties that proper venue for the adjudication of any claims or controversies between them shall be the state or federal courts (as applicable) of or whose

> territorial jurisdiction includes the County of New York, in the State of New York.

Because WMOC is a direct party to the Agreement, this forum selection clause was communicated to it and the first requirement is met. Second, the forum selection clause is mandatory, not permissive, as shown by use of the verb "shall." Third, both the claims and parties are covered by the forum selection clause: the cause of action arises from the performance of the Agreement, and the litigants in this case are signatories of the Agreement. These first three requirements, which WMOC did not contest in its motion to dismiss, are all met. Accordingly, the forum selection clause is presumptively enforceable.

The final question is whether WMOC has rebutted the presumption of enforceability by making a sufficiently strong showing that the clause should not be enforced. In its motion to dismiss for lack of personal jurisdiction, WMOC argued that it would be "unreasonable or unjust" to exercise personal jurisdiction because the parties lack any connection to New York. Dkt. No. 14 at 4–6. WMOC's argument is unavailing.

The Supreme Court has explained that a party resisting a forum selection clause in the maritime context bears a "heavy burden of proof" and that "it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17–18 (1972). WMOC's protestations that it lacks connections with New York fall far short of the standard set by *M/S Bremen*.

WMOC alleges no fraud or coercion in the drafting of the Agreement. Dkt. No. 14 at 5–6. Further, WMOC cited no precedent supporting its claim that mere lack of connections to a forum is sufficient to render an otherwise valid forum selection clause unenforceable. Finally, WMOC failed to show that trying the case in New York would cause it to be "deprived of [its] day it court." *M/S Bremen*, 407 U.S. at 17–18. Accordingly, the Agreement's forum selection clause is enforceable.

Because there is an enforceable forum selection clause, there is no need to conduct an analysis under New York's long arm statute and federal standards for due process. *Exp.-Imp. Bank of the U.S.*, 2010 WL 3743826, at *4. Seacor has demonstrated that this Court has personal jurisdiction over WMOC.

C. Assessment of Damages

1. Unpaid Principal

a. Legal Standards

Seacor claims entitlement to $128,770.60 in principal based on four causes of action: (1) breach of contract, (2) services rendered, (3) unjust enrichment, and (4) account stated. Prop. Findings at 4–7. "Courts evaluating damages first look to the complaint to determine whether the plaintiff has established a *prima facie* case for recovery." *Bleecker*, 2013 WL 5951162, at *6 (citing *Lenard v. Design Studio,* 889 F. Supp. 2d 518, 528 (S.D.N.Y. 2012)). Once liability has been established, the only remaining issue is "whether the plaintiff has provided adequate support for the relief it seeks." *Id.* (citing *Transatlantic Marine*, 109 F.3d at 111).

Starting with Seacor's claim for breach of contract, New York law gives full effect to parties' choice-of-law provisions that import only substantive law. *See*

Woodling v. Garrett Corp., 813 F.2d 543, 551 (2d Cir. 1987) (citing *A.S. Rampell, Inc. v. Hyster Co.,* 3 N.Y.2d 369, 381 (1957); *Gambar Enterprises, Inc. v. Kelly Services, Inc.,* 69 A.D.2d 297, 304 (4th Dep't 1979)). Seacor and WMOC consented to the application of New York law to determine liability under the Agreement to the extent that federal admiralty and maritime law are inapplicable. Dkt. No. 49-5 at Section XXIV. Therefore, this Court will apply New York law on damages for breach of contract to determine how much unpaid principal WMOC owed to Seacor.

Under New York law, "damages for breach of contract should put the plaintiff in the same economic position he would have occupied had the breaching party performed the contract." *Oscar Gruss & Son, Inc. v. Hollander*, 337 F.3d 186, 196 (2d Cir. 2003). To establish the amount of damages, "the plaintiff need only show a stable foundation for a reasonable estimate of the damage incurred as a result of the breach." *Tractebel Energy Marketing, Inc. v. AEP Power Marketing, Inc.*, 487 F.3d 89, 110 (2d Cir. 2007) ("[W]hen it is certain that damages have been caused by a breach of contract, and the only uncertainty is as to their amount, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatsoever for the breach.").

Seacor also claims an account stated, which "is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and the balance due." *Jim-Mar Corp. v Aquatic Const., Ltd.*, 195 A.D.2d 868, 869 (3d Dep't 1993). Under New York law, an account stated is an agreement, independent of the underlying agreement, based on the

defendant's receipt and retention of a plaintiff's invoices seeking payment for services rendered, without objection within a reasonable time. *See Aronson Mayefsky & Sloan, LLP v. Praeger*, 228 A.D.3d 182, 185-87 (1st Dep't 2024). Such claim can be asserted simultaneously with a breach of contract claim arising from the same contractual relationship. *Id.* at 185 (granting summary judgment on account stated claim even though there was a retainer agreement entered into by the parties that could have been the basis for a breach of contract claim). Here, Seacor alleges that an account was stated in the form of the LB Paul Invoice. Dkt. No. 49-7.

A claim for services rendered sounds in quantum meruit. *See Stephan B. Gleich & Associates v. Gritsipis*, 87 A.D.3d 216, 222 (2d Dep't 2011) (citing *AHA Sales, Inc. v Creative Bath Prods., Inc.*, 58 A.D.3d 6, 19 (2d Dep't 2008)). "Quantum meruit and unjust enrichment theories are equitable in nature, and they are appropriate only if there is no valid and enforceable contract between the parties covering the dispute at issue." *Id.*; *see also Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382, 388–89 (1987). In other words, "[i]t is impermissible . . . to seek damages in an action sounding in quasi contract where the suing party has fully performed on a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties." *Clark-Fitzpatrick, Inc.*, 70 N.Y.2d at 389.

Here, it is undisputed that the relationship between the parties was governed by the Blanket Time Charter and the STHO. Compl. ¶¶ 7, 9; Llorca Decl. ¶¶ 4, 6;

Dkt. No. 49-5; Dkt. No. 49-6. Moreover, Seacor seeks no damages outside these agreements, but instead seeks damages for breach of contract. Compl. ¶¶ 10, 19–26. Therefore, the Court need not calculate damages for Seacor's claims for services rendered and unjust enrichment.

b. Application and Calculation

The Court evaluates the damages owed for breach of contract and account stated separately. *See Bamishile-Richards v. Akintoye*, 2022 WL 17826507, at *7 (S.D.N.Y. Dec. 5, 2022), *report and recommendation adopted*, 2023 WL 4863604 (S.D.N.Y. July 31, 2023). Under both claims, Seacor is entitled to unpaid principal in the amount of $128,770.60.

For the breach of contract claim, Section VIII of the Agreement determines the amount of principal that is owed:

> "For the use of said vessel, [WMOC] shall pay [Seacor] at the rate previously agreed upon each day or each part of a day, beginning on the day said vessel is delivered to [WMOC] and ending on the day the vessel is redelivered to [Seacor]." Dkt. No. 49-5 at Section VIII.

WMOC charted the LB Paul from 8:00 a.m. on October 6, 2021 to 4:00 p.m. on October 21, 2021, or for 15 days and 8 hours. Compl. ¶ 10; Llorca Decl. ¶ 7. In the STHO, the parties agreed upon the daily charter rate as well as daily rates for meals, lodging and VSAT/communications. Dkt. No. 49-6. Charges for these items at the rates agreed-upon in the STHO, as well as the rebilling of certain invoices, were set forth as individual line items in the LB Paul Invoice and amounted to $257,541.20. Dkt. No. 49-7. WMOC paid Seacor $128,770.60 on or about August 2, 2022, with the rest of the principal still unpaid. Compl. ¶ 14; Llorca Decl. ¶ 9.

Therefore, to "put [Plaintiff Seacor] in the same economic position [it] would have occupied had [WMOC] performed the contract," WMOC would owe Seacor $128,770.60. *Oscar Gruss & Son, Inc.*, 337 F.3d at 196.

For Seacor's account stated claim, the amount due is simply the unpaid account stated, which Seacor has established as a sum certain of $128,770.60. *See Bamishile-Richards*, 2022 WL 17826507, at *7 (S.D.N.Y. Dec. 5, 2022) (awarding damages for account stated in total amount of unpaid statement). The LB Paul Invoice constituted a statement of account in the amount of $257,541.20. Dkt. No. 49-7. By retaining the LB Paul Invoice and failing to object to the statement of account within a reasonable time, WMOC is deemed to agree that it owed Seacor $257,541.20. Compl. ¶¶ 40–41; Llorca Decl. ¶ 9. In addition, Section VIII of the Agreement required WMOC to notify Seacor of any contested amount in the LB Paul Invoice, which WMOC never did. Compl. ¶ 12; Dkt. No. 49-5 at Section VIII; Llorca Decl. ¶ 7. WMOC made a partial payment of $128,770.60. Compl. ¶ 14; Llorca Decl. ¶ 9. Therefore, WMOC owes Seacor the unpaid amount of $128,770.60.

2. Pre-Judgment Interest

a. Legal Standard

Based on this unpaid principal amount, Seacor seeks of $75,330.81 in pre-judgment interest. Under New York choice-of-law rules, the law of the jurisdiction that determines liability governs the award of pre-judgment interest. *See Entron, Inc. v. Affiliated FM Insurance Co.,* 749 F.2d 127, 131 (2d Cir. 1984) (noting that "under New York choice of law principles, the allowance of pre[-]judgment interest

is controlled by the law of [the state], whose law determined liability on the main claim."). As discussed, *supra*, New York law governs liability. Under New York law, "[i]nterest shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred." *Artnet Worldwide Corp Inc. v. Gruber*, 2024 WL 5245562, at *5 (S.D.N.Y. July 22, 2024) (quoting N.Y. C.P.L.R. § 5001(b)).

Although New York's statutory pre-judgment interest rate is 9% per annum under C.P.L.R. § 5004(a), a court can decline to award statutory pre-judgment interest "where it can be established that the nonbreaching party has otherwise been made whole, including where the parties have 'contracted around' CPLR [§] 5001(a) or where interest would amount to a windfall to the nonbreaching party." *Concrete Works Corp. v. Volmar Construction Inc.*, 2024 WL 4635393, at *2 (S.D.N.Y. Oct. 31, 2024) (quoting *IHG Harlem I LLC v. 406 Manhattan LLC*, 224 A.D.3d 22, 25 (1st Dep't 2024)). In other words, New York law permits parties to "chart their own course" and fashion "how damages are to be computed without interference by the courts." *J. D'Addario & Co. v. Embassy Indus., Inc.*, 20 N.Y.3d 113, 119 (2012). "[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms." *Id.* at 118 (quoting *W.W.W. Assocs., Inc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990)).

b. Application and Calculation

Here, the parties reached their own agreement as to pre-judgment interest on unpaid principal. Section VIII of the Agreement provides, "[WMOC] shall pay one

and one-half percent (1½%) interest per month on all receivables due and payable to [Seacor] in arrears sixty (60) days or more after the date of [Seacor]'s invoices." Dkt. No. 49-5 at Section VIII. Seacor claims that, to the date of filing the Proposed Findings, January 10, 2025, the unpaid principal amount has been in arrears for thirty-nine (39) months. Llorca Decl. ¶ 11. However, this calculation does not take into account the 60-day period starting from the invoice date during which WMOC can pay without incurring interest charges. Dkt. No. 49-5 at Section VIII. In calculating interest of $75,330.81, Plaintiff assumed that interest began to accrue on October 26, 2021, the date of the LB Paul Invoice.

However, Section VIII of the Agreement provides that interest did not begin to accrue until December 25, 2021, 60 days after the invoice date. Under New York law, "a contract should be read as a whole, and every part will be interpreted with reference to the whole." *Trireme Energy Holdings, Inc. v. RWE Renewables Americas, LLC*, 2024 WL 4825975 (S.D.N.Y. Nov. 19, 2024) (quoting *Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 324–25 (2007)). Section VIII of the Agreement reads as follows:

> "[Seacor] shall bill [WMOC] . . . at the end of each calendar month and [WMOC] shall pay [Seacor] within twenty (20) days after expiration of each billing period. . .
>
> [WMOC] shall pay one and one-half percent (1½%) interest per month on all receivables due and payable to [Seacor] in arrears sixty (60) days or more after the date of [Seacor's] invoices.
>
> Should [WMOC] contest the amount of any invoice, it shall, within twenty (20) days from invoice receipt, notify [Seacor] of the contested amount and specify the

> reason(s) therefor, whereupon payment of the contested amount will be suspended until the settlement of the dispute. The uncontested amount shall, however, be paid within the term set forth hereinabove." Dkt. No. 49-5 at Section VIII.

Section VIII provides a 60-day period without the accrual of interest. Seacor invoiced WMOC for the charter of the LB Paul on October 26, 2021. Dkt. No. 49-7. Interest on this amount did not start to accrue until December 25, 2021, 60 days after the invoice date. Calculating interest through the date of this Report and Recommendation, May 1, 2025, Seacor would be entitled to pre-judgment interest in the amount of $77,262.36 accrued for 40 months at the rate of 1.5% per month ($77,262.36 = $128,770.60 * 40 * 1.5%).[2]

3. Post-Judgment Interest

Seacor seeks post-judgment interest, which is mandatory pursuant to 28 U.S.C. § 1961. *See Bleecker*, 2013 WL 5951162, at *2. Accordingly, I respectfully recommend that post-judgment interest be awarded at the statutory rate calculated by the Clerk of the Court pursuant to 28 U.S.C. § 1961. *See Gruber*, 2024 WL 5245562, at *6.

4. Attorneys' Fees and Costs

a. Legal Standard

Seacor seeks to recover the attorneys' fees and costs that it incurred in litigating this case, which are $32,873.75 in fees plus $1,549.28 in costs. Llorca

[2] In the event that Plaintiff seeks to obtain additional interest from May 1, 2025, to the date that District Judge Clarke enters an order with respect to the recommendations contained herein, Plaintiff shall make an appropriate application to Judge Clarke.

Decl. ¶ 14; Feldman Decl. ¶¶ 12–14. It is well established that, under the "American Rule," "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 247 (1975). There are exceptions to this principle, for example, where Congress authorized an award attorneys' fees, *see, e.g.*, *Ekukpe v. Santiago*, 2020 WL 1529259, at *1 (S.D.N.Y. Mar. 31, 2020) (awarding reasonable attorneys' fees to the prevailing party in a civil rights case under 42 U.S.C. § 1988), and where parties have agreed to a fee-shifting arrangement, *see, e.g.*, *OVES Enter., SRL v. NOWwith Ventures, Inc.*, 2024 WL 4635399, at *6 (S.D.N.Y. Oct. 31, 2024) (awarding reasonable attorneys' fees to the prevailing party because the governing agreement clearly manifests the parties' intent to provide counsel fees as damages for breach).

New York law does not permit recovery of attorneys' fees for breach of contract absent a contractual provision clearly stating otherwise. *See Oscar Gruss & Son, Inc.*, 337 F.3d at 199 ("Under the general rule in New York, attorneys' fees are the ordinary incidents of litigation and may not be awarded to the prevailing party unless authorized by agreement between the parties, statute, or court rule."). Courts applying New York law should not infer a promise to pay attorneys' fees "unless the intention to do so is unmistakably clear from the language of the promise." *Hooper Associates, Ltd. v. AGS Computers, Inc.,* 74 N.Y.2d 487, 492 (1989); *see Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 151 A.D.3d 83, 89 (1st Dep't 2017).

b. Application and Calculation

Seacor claims it is entitled to recover attorneys' fees and costs under Section XIV(C) of the Agreement, Llorca Decl. ¶ 13, which provides:

> "Except as provided in XIV B(3), above, [Seacor] and [WMOC] agree to release and waive on behalf of themselves and the members of their GROUP, and to defend and indemnify the other party and its GROUP, from any claim for indirect, special or consequential damages, punitive damages, exemplary damages, fines or penalties regardless of how such damages are incurred and whether based on negligence, unseaworthiness, breach of warranty (express or implied), breach of contract, strict liability, absolute liability or joint or concurrent negligence or fault of the other party or those whom the other party may be responsible." Dkt. No. 49-5 at Section XIV(C).

Section XIV(C) provides for indemnification "from any claim for indirect, special or consequential damages, punitive damages, exemplary damages, fines or penalties." Notably, this provisions makes no mention of attorneys' fees and costs. Moreover, it does not expressly state that the parties are providing indemnity for *first-party* claims (*i.e.*, claims between the parties), as opposed to *third-party* claims. *See Ambac*, 151 A.D.3d at 89. Therefore, Section XIV(C) does not evince an "unmistakably clear" intent to permit Seacor to recover attorneys' fees and costs incurred in enforcing the Agreement against WMOC. *Hooper Associates*, 74 N.Y.2d at 492. Seacor should not be granted attorneys' fees in this case.

III. CONCLUSION

For the foregoing reasons, I recommend that damages be awarded in the amount of $128,770.60 in unpaid principal, $77,262.36 in pre-judgment interest, and post-judgment interest.

PROCEDURE FOR FILING OBJECTIONS

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties have fourteen (14) days (including weekends and holidays) from service of this Report and Recommendation to file any objections. *See* Fed. R. Civ. P. 6(a), (b), (d). Such objections, and any responses to objections, shall be filed with the Clerk of Court, with courtesy copies delivered to the chambers of the Honorable Jessica G. L. Clarke, United States Courthouse, 500 Pearl Street, New York, New York 10007-1312. Any requests for an extension of time for filing objections must be directed to Judge Clarke.

FAILURE TO FILE OBJECTIONS WITHIN FOURTEEN (14) DAYS WILL RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72. *See Thomas v. Arn*, 474 U.S. 140 (1985); *Wagner & Wagner, LLP v. Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, P.C.*, 596 F.3d 84, 92 (2d Cir. 2010).

Dated: May 1, 2025
New York, New York

Henry J. Ricardo
United States Magistrate Judge