UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CARDINAL MARINE, LLC Plaintiff, v. CORBETT AGGREGATE COMPANY, LLC Defendant.	Civil Action No. 16-07833 (ZNQ) (TJB) **OPINION**

QURAISHI, District Judge

This matter comes before the Court upon a Motion for Partial Summary Judgment (the "Motion") (ECF No. 56) filed by Plaintiff Cardinal Marine, LLC ("Plaintiff") against Defendant Corbett Aggregate Company, LLC ("Defendant"). Plaintiff filed a Memorandum of Law in support of the Motion. (Moving Br., ECF No. 59.) Defendant opposed Plaintiff's Motion (Def.'s Opp'n, ECF No. 62), to which Plaintiff replied, (Pl.'s Reply, ECF No. 73).

Plaintiff filed a Statement of Material Facts (PSMF, ECF No. 57), to which Defendant responded with its supplemental statement of material facts. (Def.'s Resp. to PSMF, ECF No. 63; DSMF, ECF No. 63.) Plaintiff responded with another Statement of Material Facts (Pl.'s Resp. to Def.'s Resp. to PSMF, ECF No. 72.) The Court has carefully considered the parties' submissions and decides the matter without oral argument pursuant to Federal Rule of Civil Procedure 78 and Local Civil Rule 78.1. For the reasons stated herein, Plaintiff's Motion will be granted in part and denied in part, and partial summary judgment will be entered in favor of Plaintiff.

I. BACKGROUND

This action arises out of Plaintiff's claim for breach of a Marine Towing Services Agreement (the "Agreement," ECF No. 58-1 at 1–19) and its subsequent Amendment ("the Amendment," ECF No. 58-1 at 20–21). (Compl., ECF No. 1.) Under the Agreement, Plaintiff was to provide the services of a tugboat (the "Tug" or "Vessel") to tow Defendant's barge (the "Barge") loaded with sand or topsoil from Defendant's port in Salem, New Jersey to various ports in the New York Harbor. (PSMF ¶ 1; Def.'s Resp. to PSMF ¶ 1.) The Agreement was to have a one-year term, beginning in March 2015.[1] (PSMF ¶ 1; Def.'s Resp. to PSMF ¶ 1.)

The parties operated under the Agreement until December of 2015. According to Plaintiff, from the beginning Defendant "demonstrated contentious, bad faith with regard to its payment obligations and performance under the Agreement." (Compl. ¶ 16.) Ultimately, says Plaintiff, Defendant wrongfully terminated the Agreement without cause when it sent a letter in December 2015 stating that it was ending the Agreement "per advice from [its] Marine Consultant." (*Id.* ¶¶ 26, 35.) Defendant denies Plaintiff's claims and insists that it was Plaintiff who breached the Agreement and was negligent. (Def.'s Answer and Countercl. ¶¶ 46–86, ECF No. 7.) In relevant part, Defendant counterclaims for consequential damages in the form of its cost to hire substitute tugboats and trucking services to move its cargo. (*Id.* ¶¶ 90, 96.)

By the Motion, Plaintiff asks the Court to find that Defendant wrongfully terminated the Agreement, that Defendant's counterclaim for consequential damages is barred by the Agreement, and that Defendant is liable for: (1) unpaid and partially paid invoices issued before its wrongful

[1] The Court recognizes that more than five years have elapsed since this suit was filed. A substantial portion of that period, however, was exhausted by the parties' significant efforts to settle the case, first with the able assistance of the Magistrate Judge, and later with a Special Master. The parties' discovery efforts were also frustrated by the COVID-19 pandemic. The Motion was initially filed prior to the mediation before the Special Master, but was terminated by the Court during that mediation. When the parties were unable to settle the case, the Motion was re-listed. (ECF No. 75.)

termination, (2) payments due on the remaining term of the Agreement after the wrongful termination, and (3) reimbursement of Plaintiff's cost to replace gear for the Tug as set forth in the Agreement.[2] (Moving Br. at 1–2.)

A. Undisputed Material Facts

1. Terms of the Agreement

The parties do not dispute the validity of the Agreement.[3] On March 23, 2015, the parties modified it via the Amendment.[4] (PSMF ¶ 3; Def.'s Resp. to PSMF ¶ 3.) The Amendment adjusted the payment terms to require "50% payment upon departure for each trip, and 50% upon each delivery." (*Id.*)

2. The Bareboat Charter

To perform under the Agreement, Plaintiff effectively subcontracted to a third party for the tugboat by entering into a "bareboat charter party . . . with Gellatly & Criscione Services Corp." ("Gellatly")[5] for the Tug. (PSMF ¶ 4.)

3. The Trips

On March 24, 2015, the Tug made its first trip. (PSMF ¶ 5.) That trip occurred between March 25, 2015, through April 2, 2015, and the Barge was delivered. (PSMF ¶ 5.) The invoice for that trip, labeled as Invoice No. 13, was for the amount of $46,147.50. (*Id.*) From April 2, 2015, through April 13, 2015, the Vessel made its second trip. (PSMF ¶ 6.) The corresponding invoice, Invoice No. 16, was for $57,517.50. (*Id.*; Def.'s Resp. to PSMF ¶ 6.) Defendant paid

[2] Plaintiff also seeks a finding by the Court that information regarding the seaworthiness of the Tug after termination of the Agreement is not relevant. For the reasons set forth herein, the Court will deny that request.

[3] For the purposes of clarity, the Court notes that the Agreement in fact consists of the ten-page "Marine Towing Services Agreement" and an eight-page "Adenddum" [sic].

[4] The Court notes that Defendant, in its submissions (Def's Opp'n at 2, ECF No. 62 & Def's Resp. to PSMF ¶ 1, ECF No. 63), stated the Agreement was amended on March 23, 2014. The Court looked to the Amendment itself and it is clear from its face the correct date is March 23, 2015. (Amendment to Agreement attached as Ex. B, ECF No. 62-2.)

[5] Gellatly is the owner of the Vessel and with whom Plaintiff had an agreement to use the Vessel to perform the towing services for Defendant.

only $31,737.50 of that total amount. (PSMF ¶¶ 6–7; DMSF ¶ 14.) Defendant cited repairs and an adjustment "for 53 hours of standby time and 10 hours of running time [which totaled $14,955]." (PSMF ¶ 7.) Accordingly, $10,825 remains unpaid from this invoice. (PSMF ¶ 7.) The third trip was performed from April 13, 2015, through April 19, 2015. (*Id.* ¶ 8.) The corresponding invoice, Invoice No. 19, was for $33,420. (*Id.*) Plaintiff performed the fourth trip between April 19, 2015, through April 26, 2015, and the accompanying invoice, Invoice No. 20, was for $24,932.50. (PSMF ¶ 9.) This amount included a discount, this time offered by Plaintiff, for "24 hours of standby time due to repairs on the Vessel." (*Id.*)

4. The Dispute

On August 24, 2015, Plaintiff sent Defendant a demand letter outlining its various outstanding payments due on Invoices 13, 16, 19, 20, 22, 26, 29, 30, 33, and 34. (PSMF ¶ 11; Def.'s Resp. to PSMF ¶ 11.) From May 29, 2015, through June 5, 2015, and from October 7 through October 9, 2015, the Vessel was out of operation due to necessary repairs. (PSMF ¶ 12; Def.'s Resp. to PSMF ¶ 12.) During that time Plaintiff did not charge Defendant for any work. (PSMF ¶ 12.) On December 18, 2015, Defendant sent Plaintiff a letter saying that it was terminating the Agreement. (*Id.* ¶ 15; Def.'s Resp. to PSMF ¶ 15.) A few days later, on or about December 23, 2015, Plaintiff sent Defendant a bill for outstanding invoices totaling $200,496.62. (PSMF ¶ 13.) Beginning in May of 2016, six months after Defendant sent its termination letter, Defendant hired another trucking service. (*Id.* ¶ 19; Def.'s Resp. to PSMF ¶ 19.) Defendant also claims expenses for hiring other tugs during the Agreement. (PSMF ¶ 19.)

B. Disputed Material Facts

There are several major disagreements between the parties. First, the parties dispute whether Defendant had the right to refuse to pay the invoices and whether Defendant is liable for the unpaid and partially paid invoices. Second, the parties dispute whether Plaintiff was negligent

in any way during the performance of the trips. Third, the parties dispute whether Defendant's termination of the Agreement was a breach and whether Defendant's failure to pay for replacement costs of equipment was also a breach. Fourth, the parties dispute whether Defendant is entitled to any damages for its counterclaim for negligence against Plaintiff.

II. LEGAL STANDARD

Summary judgment is appropriate if the record shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A material fact raises a "genuine" dispute if the evidence is such that a reasonable jury could return a verdict for the non[-]moving party." *Williams v. Borough of W. Chester*, 891 F.2d 458, 459 (3d Cir. 1989) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)). A fact is material if it "affect[s] the outcome of the suit under governing law." *Kaucher v. County of Bucks*, 455 F.3d 418, 423 (3d Cir. 2006). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248.

In evaluating the evidence, the Court must consider all facts and their logical inferences in the light most favorable to the non-moving party. *Curley v. Klem*, 298 F.3d 271, 276–77 (3d Cir. 2002) (citing *Bartnicki v. Vopper*, 200 F.3d 109, 114 (2d Cir. 1999)). On a motion for summary judgment, a court's "function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine [dispute] for trial." *Anderson*, 477 U.S. at 249. In essence, the question is whether the evidence on record presents a sufficient basis for disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Id*. at 251–252. "Once the moving party points to evidence demonstrating no issue of material fact exists, the non-moving party has the duty to set forth specific facts showing that a

genuine issue of material fact exists and that a reasonable factfinder could rule in its favor." *Azur v. Chase Bank, USA, Nat'l Ass'n,* 601 F.3d 212, 216 (3d Cir. 2010) (internal citation and quotation marks omitted).

III. DISCUSSION

A. Jurisdiction

A district court "shall have original jurisdiction, exclusive of the courts of the States, of [] [a]ny civil case of admiralty or maritime jurisdiction . . ." 28 U.S.C. § 1333(1). "Whether or not a contract falls within that admiralty or maritime jurisdiction depends upon the nature and subject-matter of the contract." *Hotung v. Cargo of Crate Containing Nine Boxes of Documents*, 452 F. Supp. 2d 564, 567 (D.N.J. 2006) (quoting *New England Mut. Marine Ins. Co. v. Dunham*, 78 U.S. 1, 26 (1870)). "A contract dispute falls within admiralty jurisdiction if the subject matter of the contract is maritime." *Goodman v. 1973 26 Foot Trojan Vessel*, 859 F.2d 71, 72 (8th Cir. 1988) (citing *Royal Ins. Co. of Am. v. Pier 39 Ltd. P'ship*, 738 F.2d 1035, 1036 (9th Cir. 1984)). Here, the parties entered into a maritime contract whereby Defendant retained Plaintiff to furnish towing services of a tugboat. (Marine Towing Services Agreement attached as Ex. 1.) Because this case involves a maritime dispute, it is within the Court's admiralty jurisdiction. *See Interpool, Inc. v. Four Horsemen, Inc.*, Civ. No. 162490, 2017 WL 522161, at *2 (D.N.J. Feb. 8, 2017) (explaining that district courts have original jurisdiction over any civil case of admiralty or maritime jurisdiction, . . . thus if the contract between the parties is a maritime contract, the Court has subject matter jurisdiction.") (internal citations omitted).

B. Choice of Law

The Agreement has a specific choice of law provision:

> This Agreement shall be construed and its performance shall be determined, in accordance with the general maritime law of the United States insofar as applicable, and otherwise according [to] the

> laws of the State of New Jersey. The parties irrevocably consent and submit to the exclusive jurisdiction of the federal courts in Trenton, Mercer County, New Jersey, and waive any objection to the laying of venue or inconvenient forum in any suit, action, or proceeding brought in said court to enforce the terms and provisions hereof.

Agreement ¶ 21(l). "Under federal maritime choice of law rules, contractual choice of law provisions are generally recognized as valid and enforceable." *Great Lakes Ins. SE v. Raiders Retreat Realty Co., LLC*, 521 F. Supp. 3d 580, 585 (E.D. Pa. 2021) (quoting *Great Lakes Reinsurance (UK) PLC v. Durham Auctions, Inc.*, 585 F.3d 236, 242 (5th Cir. 2009)). Typically, the parties' choice of law in an admiralty case governs "'unless the [chosen] state has no substantial relationship to the parties or the transaction or the state's law conflicts with the fundamental purposes of maritime law.'" *Id.* at 585–86. (quoting *Stoot v. Fluor Drilling Servs., Inc.*, 851 F.2d 1514, 1517 (5th Cir. 1988)). When there is a "freely-bargained for, reasonable choice of law clause whose operation does not contradict public policy of the United States," this will generally be enforced under federal maritime law. *Id.* at 586.

Here, the parties do not appear to dispute the choice of law provision set forth in the Agreement. Moreover, the Court finds that New Jersey does have a substantial relationship to this matter because: (1) both parties are incorporated in this state, with offices here; and (2) the services rendered under the Agreement took place at least partially in this state. Therefore, the Court will give effect to the Agreement's choice of law provision by first turning to general maritime law of the United States where applicable, and otherwise resorting to the laws of the State of New Jersey.

C. Power Declaration and Admissibility of Evidence

As a preliminary matter, the Court first addresses a procedural argument raised by Defendant in opposition to the Motion. (Def.'s Opp'n at 8–13.) As set forth above, Plaintiff submitted a Statement of Undisputed Material Facts in support of the Motion. The statement references certain documents that Plaintiff also submitted as exhibits attached to a declaration of

Plaintiff's counsel, James H. Power (the "Power Declaration," ECF No. 58.) Defendant argues that the Court should disregard Plaintiff's statement and the submitted documents because "Plaintiff's attorney does not have personal knowledge of the facts or the authenticity of the documents" and "Plaintiff has failed to provide an affidavit of a witness with personal knowledge who can lay a foundation for those documents." (Def.'s Opp'n at 9.) In essence, Defendant contends that Plaintiff's statements and submitted documents are largely hearsay. (*Id.* at 11–12.)

In the context of summary judgment, it is common and accepted practice for parties to submit documents by attorney certification. *OFI Int'l, Inc. v. Port Newark Refrigerated Warehouse* is illustrative of the point. In that case, the defendant objected to several declarations offered by the plaintiff, including a declaration offered by the plaintiff's attorney. Civ. No. 11-06376, 2015 WL 140134, at *3 (D.N.J. Jan. 12, 2015). The defendant similarly argued that the attorney's declaration was inadmissible because the attorney did not have personal knowledge of the information within the declaration. *Id.* The defendant in that case also argued that because some of the exhibits were produced by the plaintiffs and not by the defendants during discovery, they were not properly authenticated and should be excluded. *Id.* As to the documents plaintiffs themselves produced, the court held there was sufficient circumstantial evidence to authenticate those documents. *Id.* The court opined that the burden of authentication is minimal and only requires a foundation that a factfinder could reasonably infer that the evidence is what the proponent claims it to be. *Id.* The court then analyzed each challenged exhibit, holding they were all admissible largely because the exhibits had distinctive characteristics such as company logos, headers, explanations in the body of the documents, and other circumstantial evidence to authenticate them. *Id.*

Specifically, the court in *OFI* found the following: that one of the exhibits, a letter, was properly authenticated as it was on "Defendant's own letterhead addressed to [plaintiff] regarding the customer complaints;" that another exhibit which contained warehouse receipts, with "Port Newark Refrigerated Warehouse Company" printed along the top, was also found to be properly authenticated; that work orders and invoices, which contained a "Refrigeration Design & Service Inc." logo, was also properly authenticated; and that another exhibit, an email, was sufficiently authenticated because it had a detailed description of its contents. *Id.* The court then concluded that even if there was insufficient evidence to authenticate the documents, they could nonetheless be authenticated through testimony at trial. *Id. See also Shell Trademark Mgmt. BV v. Ray Thomas Petroleum Co., Inc.*, 642 F. Supp. 2d 493, 511 (W.D.N.C. 2009) (observing that an attorney is an appropriate source to authenticate documents received in discovery).

Here, the Court has reviewed the Power Declaration and finds there is sufficient circumstantial evidence to authenticate its attached documents. First with regards to Exhibits 1, 2, and 3—the Agreement, Amendment, and Plaintiff's contract with Gellatly respectively—the Court finds these are all properly authenticated because these documents had the initials of all the contracting parties. Further, all of these documents were signed by the contracting parties, another indicator of circumstantial evidence in favor of authentication. Additionally, the contents of these documents likewise favor authentication. Second, there is also circumstantial evidence that the invoices, Exhibits 4 through 10, were also properly authenticated because each invoice has the official logo with the address and contact information of Plaintiff imprinted on its face. Third, the demand letter sent to Defendant also bore Plaintiff's attorney's letterhead. Fourth, Exhibits 11, 12, 15, 16, and 17 representing Plaintiff's statement of damages, outstanding invoices, and trucking invoices are also authentic because its contents are sufficiently descriptive and have

Plaintiff's unique logo imprinted on the face of the documents. Fifth, the exhibits representing emails between the parties, Exhibits 13, 14 15, and 18 are also similarly authentic because the contents of these emails are sufficiently descriptive to show it is a true and accurate copy. Finally, even if these documents were not properly authenticated, they could be authenticated through testimony at trial. The Court therefore finds that Defendant's objections are misplaced, and it will accept and consider Plaintiff's statement and submitted documents..

D. Plaintiff's Claim for Breach of Contract

1. The Agreement

As set forth above, the Court will apply maritime law first, and turn to New Jersey law if needed. Interpretation of maritime contracts is rooted in federal common law; therefore, the Court will look to the "general common law of contracts" for guidance in its consideration. *See Internaves de Mex. s.a. de C.V. v. Andromeda S.S. Corp.*, 898 F.3d 1087, 1093 (11th Cir. 2018). Under federal common law, "[t]he elements of a breach of contract claim are the existence of a contract, material breach, and damages." *Crown Bay Marina, L.P.*, Civ. No. 28-68, 2021 WL 1240631, at *12 (citing *Kol B'Seder, Inc. v. Certain Underwriters at Lloyd's of London*, 766 Fed. Appx. 795, 803 (11th Cir. 2019)).[6]

In applying the principles of contract interpretation, "a court must first determine whether the [contract's] language states the parties' intentions clearly and unambiguously." *Crown Bay Marina, L.P.*, 2021 WL 1240631, at *12. "To be unambiguous, an agreement must be reasonably capable of only one construction." *Id.* "Whether the contract is ambiguous is a question of law, but 'if the terms are ambiguous, the issue of the meaning of the terms becomes a question of fact.'"

[6] These are essentially the same elements specified by New Jersey state law. *See Goldfarb v. Solimine*, 245 N.J. 326, 338 (2021) (noting that to prevail on a claim for breach of contract, plaintiffs must prove four elements: "first, that the parties entered into a contract containing certain terms; second, that plaintiffs did what the contract required them to do; third, that defendants did not do what the contract required them to do, defined as a breach of the contract; and fourth, that defendants' breach, or failure to do what the contract required, caused a loss to the plaintiffs.")

Id. (citations omitted.) "Whether a contract is ambiguous is informed by reference to extrinsic evidence of the contracting parties' intent, such as their conduct." *Id.*

The Court will first address the claims for breach of the Agreement. The first element, the existence of a valid contract, is readily satisfied in this instance. The existence and validity of the Agreement and its subsequent Addendum is not disputed by the parties. (PSMF ¶ 1; Def.'s Resp. to PSMF ¶ 1.)

The second element, the parties' respective performance under the Agreement, is hotly contested. As proof of its performance, Plaintiff's Motion appears to rely upon the series of invoices it issued to Defendant (Invoice Nos. 12, 13, 16, 19, 20). Defendant does not dispute that Plaintiff made the invoiced deliveries. Defendant nevertheless maintains that Plaintiff breached the Agreement.

2. Plaintiff's Performance: Surveys

The Court will begin by addressing Defendant's position that the Agreement required Plaintiff to provide surveys of the Vessel. (Def.'s Opp'n at 17.) In summary fashion, Defendant quotes Clause 2 of the Agreement and accuses Plaintiff of refusing to provide surveys to which Defendant was entitled. As a threshold matter, the Court notes Defendant did not raise the absence of a survey in its response to the Complaint.[7] (ECF No. 7.) Instead, it introduces the issue for the first time in its brief. Irrespective of its questionable timing, the Court finds Defendant's argument is without merit because, contrary to Defendant's assertion, Plaintiff had no obligation to provide surveys under the Agreement. Clause 2 of the Agreement expressly states:

> Hire and Payment Terms. Company agrees to pay hire and compensation to Tower at the rate(s) and on the terms set forth in the Addendum. In the event that the contemplated voyages cannot

[7] Defendant also omitted its assertion that it failed to receive a survey from its Statement of Facts and the supporting affidavit of Thomas F. Corbett. III (ECF No. 62-4.)

> be made because the approval of underwriters' surveyors, if required, cannot be obtained **with respect to the Barge**, no hire shall accrue if the failure to secure such approval is due to deficiencies in the Tug; also no hire shall accrue if the failure to secure such approval from underwriters' surveyors is due to deficiencies in the Barge.

(Agreement ¶ 2) (emphasis added.) As Plaintiff points out, the surveys referenced in this paragraph concern the Barge, not the Tug. Insofar as Defendant owns the Barge, its surveys would have been in Defendant's possession. Defendant has not articulated a reason why it believes Plaintiff was nevertheless the obligated party. The Court therefore finds that Plaintiff cannot reasonably be faulted for not providing surveys of the Barge.

3. Plaintiff's Performance: Seaworthiness

The Court turns next to Defendant's contention that an issue of fact remains as to whether Plaintiff defaulted on a provision of the Agreement by failing to provide a seaworthy vessel. (Def.'s Opp'n at 18.) According to Defendant, it has maintained this position throughout this suit, and it is an essential issue of fact that must be determined by the Court. (*Id.*) Defendant's opposition brief, however, fails to cite any bases for its asserted breaches of seaworthiness. (*Id.*) This itself is a potentially fatal failure under Rule 56(c)(1)(A). In the interest of deciding the Motion on the merits, the Court searched Defendant's submission and concludes that Defendant's sole support for its assertions with respect to lack of seaworthiness is contained in the affidavit of Thomas J. Corbett, III. (the "Corbett Affidavit," ECF No. 62-4.)

In seven relevant paragraphs, he attests as set forth below.

> 5. Cardinal failed to provide a tug that was seaworthy and failed to use due diligence to maintain tug in seaworthy condition with all push gears and fenders maintained and replaced.
>
> 12. That on or about March 27, 2015 on the first trip of the Agreement Cardinal's tug had only one engine.
>
> 17. Cardinal's tug was not seaworthy or operating properly, causing tug to arrive at Port Elizabeth on April 10, 2015 at 1850.

> The tug's unseaworthiness caused it to take approximately 4 and 1/2 days (approximately 108 hours).
>
> 18. On or about April 11, 2015, Cardinal's tug left Port Elizabeth at 600 to sail to Port Salem but returned to Port Elizabeth because Cardinal's tug was not seaworthy, not-operational and in need of repairs.
>
> 20. On or about April 13, 2015 Cardinal's tug experienced additional operational problems regarding seaworthiness.
>
> 40. Cardinal breached the Agreement in that Cardinal was negligent, careless and reckless in the operation, control, maintenance, management, inspection and repair of the aforementioned tug.
>
> 41. Cardinal breached the Agreement in that Cardinal was negligent[,] careless and reckless in the operation, control[,] maintenance, management, inspection and repair of the aforementioned tug in that said tug was operated while not in a seaworthy condition, said tug was not proper control [sic] and management Cardinal failed to steer maneuver and keep a proper lookout so as to avoid collision with docks, to avoid grounding defendant's barge.

(Corbett Affidavit ¶¶ 5, 12, 17, 18, 20, 40, & 41.) Of these seven paragraphs, four—paragraphs 5, 20, 40, and 41—consist of bald accusations of lack of seaworthiness and the Court therefore accords them no weight. The remaining three paragraphs are only marginally more forthcoming: paragraph 12 does not explain or assert that operating the Vessel on one engine renders it unseaworthy; paragraph 17 asserts, without supporting evidence of any kind from the record, that a prolonged trip time was caused by lack of seaworthiness; and paragraph 19 asserts, again without evidence, that the Vessel returned to port because it was not seaworthy. (*Id.*) Given the foregoing, the Corbett Affidavit, on its own, cannot establish that there is a genuine issue of material fact as to whether Plaintiff breached the Agreement by providing an unseaworthy vessel.[8] *See Robinson*

[8] The parties do not agree as to what level of warranty or duty of care was required of Plaintiff by the Agreement with respect to the seaworthiness of the Vessel. The Court need not decide that issue, because it finds that Defendant has not made a showing sufficient to survive summary judgment when measured against any of the warranties or duties presented by the parties.

v. Danberg , 673 F. App'x 205, 208–09 (3d Cir. 2016) (quoting *Anderson*, 477 U.S. at 252) ("the nonmoving party must offer more than a "mere 'scintilla of evidence'" to create a genuine issue of material fact, and conclusory affidavits are insufficient to survive summary judgment."); *Superior Offshore Int'l, Inc. v. Bristow Grp.* , 490 F. App'x 492, 501-02 (3d Cir. 2012) (explaining that it was proper to conclude that appellant's affidavit failed to demonstrate how additional discovery would preclude summary judgment). The Court, therefore, finds that Plaintiff is entitled to summary judgment as to this issue.

4. Defendant's Performance: Payment for Deliveries

The Court now turns to Defendant's performance with respect to payment. Clause 2 of the Agreement states that the Addendum governs payments. (Agreement ¶ 2.) The Addendum itself expressly states:

> Due in advance every two weeks. All past due invoice[s] will accrue interest at a rate of 18% per month beginning the first day after the due date. Company shall be responsible for all fees incurred while attempting to collect past due monies including but not limited to legal, administrative and other fees

(Addendum at 2, "Payment Terms.") This term was modified by the parties in the Amendment. First, the "[d]ue in advance every two weeks" language was replaced by "50%, of total estimated trip payable upon each departure from Port of Salem" and "50% of total estimated trip payable upon each delivery to Port of New York." (Amendment.) It also added that "[a]ctual trip times versus estimated trip times will be reconciled at the end of each month beginning in April 2015." (*Id.*) Notably absent from the face of the Agreement, Addendum, and Amendment is any basis for Defendant to withhold payments. Also absent is any basis for Defendant to offset or lessen the amount of the invoices submitted by Plaintiff. Given the clarity of the Agreement and its corresponding documents, Defendant had no contractual right to refuse to pay invoices, even partially. The Court, therefore, finds Defendant breached the Amendment's payment terms.

5. Dispute Regarding Tow Gear, Bridals, Push Gear, and Fenders

Plaintiff also seeks summary judgment as to Defendant's liability for replacement of the tow gear, bridals, push gear, and fenders. Clause 3 of the Agreement states that "[a]ny tow gear, bridals, push gear or fenders shall be maintained or replaced throughout the duration of this agreement [and] will be the responsibility of [Defendant]." (Agreement ¶ 3.) Accordingly, the terms here place an affirmative duty on Defendant to pay for maintenance and replacement of the above-mentioned equipment. Indeed, Defendant concedes in its opposition brief that "the Agreement contemplated that Corbett would be responsible for replacement of gear, bridals, push gears and fenders that was due to normal wear and tear." (Def Opp'n at 24.) However, Defendant contends that the equipment needed to be replaced due to Plaintiff's negligence rather than normal wear and tear. Present within Defendant's submission are unsupported assertions that due to Plaintiff's negligence, it incurred costs to replace numerous equipment. (Def.'s Resp. to DSMF ¶¶ 42–52.) Defendant asserted that "the replacements were due to negligence [] operation of [the] tug[,] not normal wear and tear." (Def.'s Opp'n at 24.) However, Defendant's submissions failed to specify how Plaintiff was negligent. Defendant further says that it never received an invoice for equipment during the dispute until after the Agreement was terminated. (Def.'s Opp'n at 24.) This point, however, has no significance because the Agreement did not require Plaintiff to invoice the gear at an earlier time.

On summary judgment, Plaintiff, as moving party, had the initial burden to show Defendant's liability with regards to the replacement of tow gear, bridals, push gears and fenders. Plaintiff did so by citing Clause 3 of the Agreement. Plaintiff also highlighted Defendant's concession of this point in its opposition brief. As a result, the burden shifted to Defendant to either provide evidence contradicting Plaintiff or to show how a genuine issue of material fact remains. Defendant's bald and unsupported assertions that Plaintiff was negligent without more

do not satisfy its burden. Accordingly, the Court finds that Plaintiff is entitled to summary judgment as to Defendant's liability on the issue of the replacement for the tow gear, bridals, push gear, and fenders.

6. Defendant's Liability for Remaining Term of Contract

Finally, the Court turns to Defendant's termination of the Agreement and whether that too constituted a breach. As set forth above, the Court has found that Plaintiff is entitled to summary judgment as to Defendant's assertions that Plaintiff materially breached the Agreement by failing to provide surveys or to provide a seaworthy vessel. The Court thus finds that Defendant had no grounds to terminate the Agreement on that basis.

For the reasons set forth below, the Court further finds that even if Plaintiff had failed to perform in accordance with the Agreement, Defendant had no contractual right to terminate the Agreement prior to the elapse of its term.

To begin, the duration of the Agreement is governed by Clause 19. It states the following:

> Term; Duration of Agreement: Automatic Extension. It is understood and agreed by the parties that this Agreement is effective from the date hereof, and, unless sooner cancelled or terminated by Company pursuant to the default provisions herein; Towage agreement shall remain in effect for one year starting at commencement date.

(Agreement ¶ 19.) Under its terms, the Agreement therefore would continue for one year and could only be terminated "pursuant to the default provisions herein." (*Id.*) The Agreement contained such default provisions, outlined in Clause 21. Those default provisions, however, only allowed Plaintiff "Tower" to terminate the Agreement. Defendant "Company" had no equivalent right. Clause 21 sub-section (j) of the Agreement states that:

> **Tower may terminate this Agreement for default prior to the expiry [*sic*] date** if (i) thy [*sic*] Company fails to perform or comply with any term or condition of this Agreement; (ii) Company abandons or becomes unable to perform, in whole or in part, the

> contemplated work; (iii) any taking or detention of the Company's vessels by any federal or state judicial or governmental authority; (iv) the occurrence of any event causing Company to be prohibited by governmental or other action from/continuing its business activities with respect to this Agreement; or (v) the filing of a petition in bankruptcy by or against Company; the entry of an order adjudicating Company a bankrupt; the making by Company of a general assignment for the benefit of creditors; the appointment of a receiver of any kind, whether in admiralty, bankruptcy, common law or equity proceedings; the filing by Company of a petition for reorganization under the Bankruptcy Act, and/or failure of Company to comply with any applicable provisions of federal, state or local laws.

(Agreement ¶ 21) (emphasis added).

To the extent that Defendant appears to separately argue that any noncompliance by Plaintiff with the Agreement constituted a "default" under Clause 19, Defendant's position is inconsistent with the Agreement. "Default" permitted in Clause 19 is according to the "default provisions herein" and those are provided exclusively by Clause 21.[9]

Furthermore, Defendant also waived any right to repudiate the Agreement because it failed to timely pursue its claim for breach, but instead continued to utilize Plaintiff's services for months after the first purported breach. *See, e.g.*, *Nat'l Westminster Bank, U.S.A. v. Yaeger*, 130 B.R. 656, 675 (S.D.N.Y. 1991), *aff'd*, 962 F.2d 1 (2d Cir. 1992) ("It is well-established that where a party to an agreement has actual knowledge of another party's breach and continues to perform under and

[9] Even if this Court were to accept Defendant's position that Plaintiff breached the Agreement in some way, it would not automatically entitle Defendant to walk away from the Agreement. Under maritime law, the breach would have needed to be so substantial that it frustrated the purpose of the Agreement. *See, e.g., Kopac International, Inc. v. M/V Bold Venture*, 638 F.Supp. 87, 92 (W.D. Wash 1986) ("[e]ven if the vessel were found to be unseaworthy in certain ways, unless the unseaworthiness went to the root of the contract, the charterers were obliged to continue the charter . . . and to seek their remedies in damages."); *Natures Way Marine, LLC v. Everclear of Ohio, Ltd.*, 37 F. Supp. 3d 1232, 1241 (S.D. Ala. 2014) ("After this warranty is breached, a charterer may repudiate the contract and seek damages. But repudiation is permissible only where the breach of seaworthiness is so substantial that it defeats or frustrates the commercial purpose of the charter.").

accepts the benefits of the contract, such continuing performance constitutes waiver of the breach.") Defendant concedes that the first alleged breach occurred on June 21, 2015, however, it was not until December 18, 2015, that it first notified Plaintiff it would be terminating the Agreement. (Letter of Termination attached as Ex. 14, ECF No. 58-2.) Defendant attempts to dispel this fact by referencing an earlier June 6, 2015 letter it sent disputing an invoice. However, even after this June 2015 letter was sent, Defendant nonetheless continued to use Plaintiff's services. Defendant further concedes in its brief that Plaintiff breached "before and after June 6, 2015." (Def.'s Opp'n at 21.) Therefore, the Court rejects Defendant's alleged bases for its premature termination and finds that such termination was a breach of the Agreement.

Last, because Defendant's termination of the Agreement was improper, the Court finds that it had no effect. The parties have pointed to no other argument or reason as to why the Agreement should otherwise be terminated before the conclusion of the one-year term provided under Clause 19. It follows that Defendant's obligation to pay continued through that term. The Court therefore concludes that Defendant is liable for such payments in an amount to be determined at trial.

E. Defendant's Counterclaim for Consequential Damages

Plaintiff requests that the Court dismiss Defendant's counterclaims for its costs to retain other towing and trucking services, *i.e.*, consequential damages, as barred under the Agreement. (Moving Br. at 17–20.) Defendant's opposition brief cites Clause 5 as entitling it to such damages because of Plaintiff's negligence. (Def.'s Opp'n at 25.) Plaintiff counters that the portion of Clause 5 cited by Defendant is inapplicable for two reasons. First, the cited portion of Clause 5 applies only to third-party claims made against Defendant. Second, a later portion of Clause 5 specifically excludes liability between the parties for consequential damages. (Pl.'s Reply at 13.) The exclusion in Clause 5 states:

> Notwithstanding the foregoing indemnities, neither party shall be liable to the other for any consequential, special or indirect damages whatsoever arising out of or in connection with the performance or non-performance of this Agreement. The term "consequential, special or indirect damages" shall include, but not be limited to, loss of use, loss of revenue and profits, and loss of production, whether or not foreseeable or within the contemplation of the parties on the date of this Agreement.

(Agreement ¶ 5.)

The Court finds that the exclusion is clear: neither party is liable to the other for any consequential damages resulting from any performance or nonperformance of this Agreement. This provision, therefore, acts as a bar to Defendant's claim for consequential damages. The Court will therefore grant Plaintiff's request for summary judgment as to Defendant's counterclaims for consequential damages.

i. Duty to Mitigate

The Court will briefly address Defendant's argument that Plaintiff had a duty to mitigate "damages by attempting to offer the tug for hire." (Def.'s Opp'n at 23–24.) Plaintiff responds that it did not have a duty to mitigate because it qualifies as a lost volume seller, and that Defendant has the burden of proving mitigation. (Pl.'s Reply at 9–11.) The Court does not reach the parties' dispute because, as Plaintiff also notes, Defendant's mitigation argument refers to damages rather than liability, where the Motion seeks summary judgment solely as to liability. (Reply at 5, 9.) Accordingly, the Court will reserve judgment as to this issue.

F. Evidence of Unseaworthiness

Finally, seemingly in passing, Plaintiff also asks the Court to find that the Vessel's seaworthiness, or any lack thereof, after the termination of the Agreement is irrelevant. (Moving Br. at 15.) The bases for this request are unclear for at least two reasons. First, it is unclear on its face whether by "after the termination of the Agreement" Plaintiff refers to the period after

Defendant's attempted termination in December 2015 or after the conclusion of the one-year term of the Agreement in March 2016. Second, Plaintiff's request with respect to a finding of relevance is comingled with its arguments as to why Defendant wrongfully terminated the Agreement. Plaintiff does not elaborate on its request in its Reply.

Defendant is equally dismissive of this issue insofar as it appears to acknowledge the relevance of post-termination seaworthiness only briefly and in a parenthetical inserted in the context of mitigation when it complains that "Cardinal has also not presented any evidence that the tug was seaworthy and, but for Corbett's termination of the Agreement, the charges would have been earned (significantly, Cardinal has refused to produce documents regarding the condition of the tug during this period of time)." (Def's Opp'n at 24.)

Given the dearth of briefing as to this issue, and the fact that it seems better addressed as a discovery motion and/or motion in limine, the Court will deny this portion of the instant motion without prejudice.

IV. CONCLUSION

For the reasons stated above, the Motion will be granted in part and denied in part.

The Motion will be granted insofar as Partial Summary Judgment will be entered in favor of Plaintiff, holding that: (1) Defendant wrongfully terminated the Agreement; (2) Defendant is liable for unpaid and partially unpaid invoices issued before the Agreement's wrongful termination; (3) Defendant is liable for payments due on the remaining term of Agreement; (4) Defendant is liable for Plaintiff's costs to replace tow gear, bridals, push gear, and fenders; and (5) Defendant's counterclaim for consequential damages is barred by the Agreement.

The Motion will be denied insofar as the Court declines to find that any evidence as to the seaworthiness of the Vessel after termination of the Agreement is not relevant to the parties'

dispute. This denial is without prejudice to Plaintiff's right to renew its arguments at a later time by appropriate motion.

An appropriate Order will accompany this Opinion.

Date: December 21, 2021

s/ Zahid N. Quraishi
ZAHID N. QURAISHI
UNITED STATES DISTRICT JUDGE