UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 20-25046-CV-WILLIAMS

GREAT LAKES INSURANCE SE,

Plaintiff,

v.

CHARTERED YACHTS MIAMI LLC,

Defendant.
_____/

ORDER

THIS MATTER is before the Court on Plaintiff Great Lakes Insurance SE's ("***Plaintiff***" or "***Great Lakes***") Motion for Summary Judgment (DE 68) ("***Motion***"). Defendant Chartered Yachts Miami LLC ("***Defendant***" or "***CYM***") responded (DE 77), Plaintiff replied (DE 86), and the Parties have filed their respective statements of material facts and responses (DE 69; DE 78). For the reasons set forth below, Plaintiff's Motion for Summary Judgment is granted.

I. BACKGROUND

The present dispute arises out of a policy of marine insurance, Policy No. CSRYP/181202 (the "***Policy***") issued by Great Lakes to CYM and IPFS Corp.[1] The Policy afforded "Hull & Machinery" coverage in the amount of $725,000.00 on a 1988 88 foot Leopard vessel named "PETRUS" (the "***Vessel***") owned by CYM, for a one year period starting on March 8, 2020 and ending on March 8, 2021. (DE 65 ¶¶ 7–17.) Great Lakes seeks a ruling from this Court that the Policy affords no coverage for any loss which is

[1] Defendant IPFS Corp. was dismissed from this action pursuant to the Court's May 12, 2021 Order due to Plaintiff's failure to serve. (DE 11.)

alleged to have occurred on or about November 7, 2020 (during the policy period), when seawater entered the Vessel via the stern (the "***Incident***"). (DE 65 ¶ 19.) Specifically, Great Lakes moves for summary judgment on the following counts of its Amended Complaint (DE 65): Count 2 for a declaratory judgment that CYM breached the warranty of seaworthiness; Count 5 for a declaratory judgment that CYM breached the Policy by misrepresenting material facts; Count 6 for a declaratory judgment that CYM breached the survey compliance warranty; and Count 7 for a declaratory judgment that CYM breached the legal and regulatory compliance warranty.

On or about March 6, 2019, CYM submitted to Concept Special Risks Ltd. ("***Concept***"),[2] via CYM's agent, an application for a policy of marine insurance. (DE 69-2.) Great Lakes ultimately agreed to issue Policy No. CSRYP/174352 to CYM based on the representations set forth in the application. (DE 69 ¶ 13.) The application was signed by Greg Pack ("***Pack***") and represents that Greg Pack and Nancie Pack are beneficial owners of the Vessel. (DE 69-2 at 1, 4.) Greg Pack is listed as the first operator of the Vessel. (*Id.* at 3.) In response to the question on the application requiring the disclosure of Greg Pack's boating qualifications, it states, "USCG 100 ton – Had a USCG 200 ton." (*Id*.) The application states, "Any misrepresentation in this application for insurance may render insurance coverage null and void from inception." (*Id*. at 4.)

One year later, on or about March 5, 2020, CYM submitted a Renewal Questionnaire, signed by Greg Pack, to Concept seeking a policy of marine insurance. (DE 69-4.) The Renewal Questionnaire included a prompt which requested the disclosure

[2] At all relevant times, Concept was the authorized underwriting and claims handling agent for Great Lakes. (DE 69-1 ¶ 9.)

of Greg Pack's "[b]oating qualifications for which a valid license is held." (*Id*. at 3.) In response, Pack repeated his answer from the 2019 application, "USCG 100 Ton license." (*Id*.) On or about April 15, 2020, CYM submitted two Letters of Survey Recommendations Compliance ("***LOCs***") to Concept along with a copy of an April 2, 2020 survey performed by Global International Marine Surveyors (the "***Global Survey***"). (DE 69 ¶¶ 17, 19; DE 69-5; DE 69-6.) Each LOC references the Global Survey, which contained numerous recommendations, including those in Category A, "safety deficiencies," and those in Category B, "deficiencies needing immediate attention." (DE 69-6 at 33–34.[3]) The LOCs listed the following "outstanding recommendation(s)" with their "expected completion date":

Outstanding Recommendation(s)	Expected Completion Date
A-1[4] Hand held flares – New flares purchased	4-14-20
B-3[5] Life rafts – Solas	4-30-20
B-4[6] EPIRB – Solas	4-30-20

[3] Where there is a conflict between the native page numbering of a party's filing and the page numbering provided by the Case Management/Electronic Case Files ("***CM/ECF***") system, the Court relies on the page numbering provided by the CM/ECF system, which appears at the top of each page of each case filing.

[4] The Global Survey noted that the flares aboard the Vessel had expired and recommended that CYM obtain three new flares in compliance with 33 C.F.R. § 175.125. (DE 69-6 at 33.)

[5] The Global Survey noted that the inspection tags on both life rafts had expired and recommended that CYM comply with United States Coast Guard ("***U.S. Coast Guard***") regulations by testing, servicing and tagging the life rafts annually by a Factory Authorized Service Facility. (DE 69-6 at 33.)

[6] The Global Survey noted that the inspection of the Emergency Position Indicating Radio Beacon ("***EPIRB***") was past due and that the battery had expired and recommended that

B-3 Dropped off life rafts to Solas to tag	4-30-20
B-4 EPIRB Dropped off to Solas to inspect	4-30-20

(DE 69-5.) Each LOC contained the following statement: "Any misrepresentation in this letter of compliance may render insurance coverage null and void from inception." (DE 69-5.) Great Lakes ultimately agreed to issue Policy No. CSRYP/181202 to CYM based on the representations set forth in the Renewal Questionnaire and the LOCs. (DE 69 ¶ 25.) The Policy states in relevant part:

> **9. General Conditions & Warranties**
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> ******
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> i. It is warranted that covered persons must at all times comply with all laws and regulations [] governing the use and or operation of the Scheduled Vessel.
>
> ******
>
> l. This contract is null and void in the event of non-disclosure or misrepresentation of a fact or circumstances material to our acceptance or continuance of this insurance. No action or inaction by us shall be deemed a waiver of this provision.
>
> ******
>
> q. Unless we agree in writing to the contrary, if we request a survey of the Scheduled Vessel then it is warranted that such survey is in existence prior to the effective date of this insurance and a copy of the same must be received by us within 30 days of the effective date of this agreement. If the survey makes any recommendations with respect to the Scheduled Vessel, then it is warranted that all such recommendations are completed prior to any loss giving rise to any claim hereunder, by skilled workmen using fit and proper materials . . .

CYM renew the inspection and replace all maintenance parts as necessary. (DE 69-6 at 34.)

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> s. Where any term herein is referred to as a 'warranty' or where any reference is made herein to the word 'warranted', the term shall be deemed a warranty and regardless of whether the same expressly provides that any breach will void this insuring agreement from inception, it is hereby agreed that any such breach will void this policy from inception.

(DE 69-7 at 13–14.)

On or about November 7, 2020, during the Policy period, the Vessel sustained damage during an incident when seawater entered the Vessel via the stern. (DE 69 ¶ 35.) Great Lakes alleges that the Vessel was unseaworthy on the date of the Incident due to lack of maintenance and wear and tear. (DE 68 at 5.) Specifically, Great Lakes claims that the Vessel did not have a properly functioning transom door, which allowed for water ingress, and that only one of two bilge pumps was operational. (DE 68 at 5.) Great Lakes' expert, Revel Boulon, Senior Marine Surveyor and Adjuster at Sedgwick, opined that the Incident was caused by a combination of lack of maintenance to the transom door and the lack of a functional automatic bilge pump in the machinery space bilge. (DE 69-9 ¶ 12.) CYM's expert opined that the Incident was caused by an accidental event in which an underwater rope got caught on the Vessel's port propeller as the Vessel entered the Miami River. (DE 78-3 at 2–3.)

Great Lakes conducted a post-Incident investigation which concluded, in part, that the LOCs falsely represented that all Global Survey recommendations had or would be completed by April 30, 2020. (DE 69-10 at 5.) At the time of Great Lakes' investigation, there was only one life raft aboard the Vessel and its tag was expired (despite recommendation B3 of the Global Survey), there was no E.P.I.R.B. aboard the Vessel (despite recommendation B4 of the Global Survey), and there were allegedly no flares

aboard the Vessel (despite recommendation A1 of the Global Survey). (DE 69-10 at 5; DE 69-9 ¶ 21.) CYM claims that it completed all of the Global Survey recommendations and that the flares, life rafts and EPIRB were on board before and during the Incident, but that Great Lakes' investigator did not ask to see the flares during his investigation and that the EPIRB and one raft were lost during the water ingress on the Miami River. (DE 78-2, 45:1–9, 46:2–15, 49:2–24, 50:9–24.)

It is undisputed that on the date of the Incident, Greg Pack was acting as captain and sole operator of the Vessel with twelve passengers aboard and that Pack did not have a valid U.S. Coast Guard captain's license at the time of the insurance application, the Renewal Questionnaire, or the incident. (DE 69 ¶¶ 65–66; DE 78 ¶¶ 65–66.) It is also undisputed that the one life raft that remained aboard the Vessel after the Incident had a certification tag that had expired in January 2018.

II. LEGAL STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "[O]nly disputes over facts that might affect the outcome of the suit under the governing [substantive] law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Any such dispute is "genuine" only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

In evaluating a motion for summary judgment, the Court considers the evidence in the record, "including depositions, documents, electronically stored information, affidavits

or declarations, stipulations . . . , admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A). The party seeking summary judgment carries the burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. "To discharge this burden, the movant must point out to the Court that there is an absence of evidence to support the nonmoving party's case." *Feinman v. Target Corp.*, No. 11-62480-CIV, 2012 WL 6061745, at *3 (S.D. Fla. Dec. 6, 2012) (citing *Celotex*, 477 U.S. at 325). Once the movant satisfies their burden, the burden of production shifts to the non-moving party, which must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

The Court "must view all the evidence and all factual inferences reasonably drawn from the evidence in the light most favorable to the nonmoving party and must resolve all reasonable doubts about the facts in favor of the non-movant." *Rioux v. City of Atlanta*, 520 F.3d 1269, 1274 (11th Cir. 2008) (quotation marks and citations omitted). However, "[t]he mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson*, 477 U.S. at 252; *see also Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990). Evidence that is "merely colorable" or "not significantly probative" is insufficient to defeat a motion for summary judgment. *Anderson*, 477 U.S. at 249–50. At the summary judgment stage, the Court's task is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* at 249.

III. DISCUSSION[7]

A. Count 5: Misrepresentation of material facts

Plaintiff argues that Defendant's failure to truthfully disclose facts related to Greg Pack's boating qualifications breached the duty under federal admiralty law to truthfully disclose all material facts to the underwriter considering the application. Defendant argues that Plaintiff fails to establish that the alleged misrepresentations regarding the status of Pack's boating license were material.

"It is well-settled that the marine insurance doctrine of *uberrimae fidei* is the controlling law of this circuit." *HIH Marine Servs. v. Fraser,* 211 F.3d 1359, 1362 (11th Cir.2000). The doctrine of *uberrimae fidei*, or utmost good faith, requires an "insurance applicant [to] voluntarily and accurately disclose to the insurance company all facts which might have a bearing on the insurer's decision to accept or reject the risk." *Certain Underwriters at Lloyds, London v. Giroire*, 27 F. Supp. 2d 1306, 1311 (S.D. Fla. 1998). The duty extends to all facts which are material to the calculation of the insurance risk regardless of whether the insurer, underwriter, or application specifically inquires into them. *See HIH Marine Servs.*, 211 F.3d at 1362. A fact is material if it could "possibly influence the mind of a prudent and intelligent insurer in determining whether he would accept the risk." *Kilpatrick Marine Piling v. Fireman's Fund Ins. Co.*, 795 F.2d 940, 942–43 (11th Cir. 1986) (stating that Eleventh Circuit believes the foregoing "to be a correct statement of law").

[7] The Court notes that, pursuant to the Parties' choice of law agreement, it will apply New York law where there is no established federal admiralty law.

The doctrine of *uberrimae fidei* requires the insured to exercise the "highest degree of good faith" in entering a marine insurance contract because "the underwriter often has no practicable means of checking on either the accuracy or the sufficiency of the facts" that the insured furnishes to the insurer before the insurer accepts the risk and sets the policy's conditions and premiums. *HIH Marine Servs.*, 211 F.3d at 1362 (quoting Gilmore & Black, *The Law of Admiralty* 62 (2d ed. 1975)). "Under *uberrimae fidei,* a material misrepresentation on an application for marine insurance is grounds for voiding the policy." *HIH Marine Servs.*, 211 F.3d at 1363 (citing *Steelmet, Inc. v. Caribe Towing Corp.*, 747 F.2d 689, 695 (11th Cir. 1984), *on reh'g*, 779 F.2d 1485 (11th Cir. 1986)).

"[A]n insurer may void the policy even if the failure to disclose material facts was the result of actions by a person acting on behalf of the actual insured." *Great Lakes Reinsurance (UK) PLC v. Atl. Yacht & Marine Servs., Inc*., No. 07-20295-CIV, 2008 WL 2277509, at *3 (S.D. Fla. Feb. 26, 2008) (citing *Certain Underwriters at Lloyds, London v. Giroire*, 27 F. Supp. 2d 1306 (S.D. Fla. 1998); *Royal Ins. Co. of Am. v. Cathy Daniels, Ltd.,* 684 F. Supp. 786 (S.D.N.Y.1986)). Thus, to prevail on its claim for misrepresentation of material facts, Plaintiff must establish two elements: (1) that there was a misrepresentation by Defendant and (2) that Defendant's misrepresentation related to a material fact.

1. Misrepresentation

In both the marine insurance application and the Renewal Questionnaire, Defendant stated that Greg Pack, the first-listed operator of the Vessel, had a U.S. Coast Guard 100-ton boating license at the time of the application and the Renewal Questionnaire. (*See* DE 69-2 at 3 and DE 69-4 at 3, respectively.) However, Pack did

not hold such a license during either time period. Pack stated at his December 2021 deposition that he had a U.S. Coast Guard 200-ton license in the past but that it lapsed ten or fifteen years prior to his deposition. (DE 69-3, 17:2–8.) At his deposition, Pack explicitly confirmed that, during the time the Policy was in effect, he did not have a captain's license. (*Id.* at 17:9–12.)

Defendant's argument that it accurately disclosed that Pack "had" a U.S. Coast Guard 200-ton license does not address the salient question; it does not dispute the fact that Pack represented that he had a U.S. Coast Guard 100-ton license at the time of the application and Renewal Questionnaire, when he did not. Defendant notes that the Court should draw all reasonable inferences in its favor, but no reasonable inference can avoid the clear evidence that a misrepresentation was made with respect to the status of Pack's boating license at the time the Policy was issued.

2. Materiality

Whether the doctrine of *uberrimae fidei* applies in this case then, depends on whether the misrepresentation was material to the calculation of insurance risk, i.e., whether the misrepresentation could "possibly influence the mind of a prudent and intelligent insurer in determining whether he would accept the risk." *Kilpatrick Marine*, 795 F.2d at 942–43. Plaintiff sets forth two arguments that would separately and independently establish the materiality of Defendant's misrepresentation regarding Pack's boating license. First, Plaintiff argues that because the insurance application specifically required Defendant to disclose whether any named operator possessed any valid boating licenses, the materiality of that fact to Plaintiff's insurance underwriter should be presumed. Second, Plaintiff argues that the undisputed affidavit of its underwriter,

Beric Usher, who stated that the terms of the Policy would have been different if the lack of Pack's boating license was disclosed, establishes the materiality of the misrepresentation. Based on the following analysis, the Court finds that there is no genuine issue of material fact as to whether the misrepresentation was material.

The underwriter who issued the Policy, Beric Usher, submitted an affidavit[8] which unequivocally states that he would have issued different policy terms if he had been made aware that Pack did not have a U.S. Coast Guard captain's license.[9] (DE 69-1 ¶¶ 39–41.) Defendant argues that Usher's affidavit is a "self-serving 'after the fact' statement that must be rejected" (DE 77 at 14) and relies on *Great Lakes Reinsurance (UK) PLC. v. Roca*[10] (and applied in *Great Lakes Ins. SE v. SEA 21-21 LLC*, 568 F. Supp. 3d 1318, 1325 (S.D. Fla. 2021)) for the proposition that summary judgment cannot be supported on the affidavit of an underwriter alone. The decision in *Roca*, however, does not disqualify all underwriters' statements as conclusory and self-serving. Rather, as another Court in this district has observed, *Roca* "affirm[s] that when underwriters' statements are

[8] The document is titled a "Declaration" but both Parties refer to it as an affidavit, and Usher states at the end of the document that he "certif[ies] under penalty of perjury . . . that [the] foregoing is true and correct." (DE 69-1 at 1, 9.)

[9] Usher also states that at all times material, he was employed as Managing Director and Senior Underwriter for Concept Special Risks Ltd. (DE 69-1 ¶ 1.) Usher states that he "was responsible for the entire department and for all personnel who are involved in the yacht & pleasure boat account, and the small commercial craft account." (*Id.* at ¶ 2.) Usher's duties at Concept included "making the final determination as to whether and on what terms marine insurance coverage will be agreed to with respect to any particular risk that is submitted by a broker to Concept." (*Id.* at ¶ 4.) Usher represented that he was "responsible for overseeing all underwriting decisions" (*id.*) and that he has 35 years of experience in the marine insurance industry. (*Id*. at ¶ 26.) Defendant points to no evidence in the record which would show that Usher is not a prudent and intelligent underwriter.

[10] No. 07-23322-CIV, 2009 WL 200252 (S.D. Fla. Jan. 27, 2009).

inherently contradictory or entirely conclusive, they are insufficient to support a finding of materiality on summary judgment." *Shoreline Found. Inc. v. New York Marine & Gen. Ins. Co.*, No. 20-60191-CIV, 2021 WL 4393082, at *4 (S.D. Fla. Aug. 23, 2021). In *Roca*, the magistrate judge found that certain statements in the affidavit of the insurer's underwriter were "inconsistent with and unsupported by [the insurer's] own written guidelines." *Great Lakes Reinsurance (UK) PLC. v. Roca,* No. 07-23322-CIV, 2009 WL 200252, at *6 (S.D. Fla. Jan. 27, 2009). For instance, the underwriter stated that he would have increased the insurance premium by 10% had the insured disclosed a prior theft of the subject vessel, but this so-called "loss-record debit" adjustment did not appear anywhere in the insurer's written guidelines. *See id.* Additionally, the magistrate judge in *Roca* found that the underwriter's statement that he had relied on a misrepresentation that the subject vessel had no prior marine losses in providing a discount on the insurance premium was actually contradicted by the insurance policy because the discount appeared nowhere in the policy. *See id.* at *5.

In any event, this case is distinguishable from *Roca*. The underwriter clearly states that he would have offered different policy terms if he had been made aware that Pack did not currently hold a U.S. Coast Guard captain's license (*see* DE 69-1 ¶ 39), and he provides meaningful reasons to support this statement. Usher states, "no prudent or intelligent marine underwriter could possibly just ignore the fact that Mr. Pack did not hold a USCG captain's license, as it was assumed that he would be offering the insured vessel for captain charter and that he would be the captain on many of those occasions." (*Id.* at ¶ 37.) Usher explained that the initial and renewal policy were "Named Operator policies, meaning that they include a warranty whereby only those individuals who have been

disclosed to and approved by Underwriters will operate the insured vessel." (*Id.* at ¶ 19.) Because the policies were "Named Operator" policies, Usher stated that they "did not permit bareboat chartering, which by definition involves giving the subject vessel to another person without a captain." (*Id.* at ¶ 20.)

Usher further elaborates that "[u]nderwriters could never condone or provide coverage for the illegal chartering of a vessel without a USCG-licensed captain, in violation of USCG regulations, as to do so would possibly expose Underwriters to financial or even criminal penalties." (*Id.* at ¶ 38.) Indeed, had the application and Renewal Questionnaire submitted by Defendant's agent accurately disclosed that Pack did not have a current U.S. Coast Guard captain's license, Usher notes that "Concept would have included an additional warranty requiring that a licensed captain be on board whenever the insured vessel is on a charter." (*id.* at ¶ 39.) Alternatively, had the application and Renewal Questionnaire disclosed that Defendant "intended to bareboat charter the insured vessel (i.e., provide it to others without a captain), Concept would have charged a higher premium for bareboat chartering." (*Id.* at ¶ 40.) In Usher's view as a prudent and intelligent marine underwriter, "it would have been careless, even negligent . . . to have been made aware that Mr. Pack intended to charter the insured vessel with himself as the captain, despite not having a USCG Captain's License, and not include an additional warranty requiring that a licensed captain be on board whenever the insured vessel [was] on a charter." (*Id.* at ¶ 41.)

Furthermore, the insurance application specifically inquired about boating qualifications. As Usher states, "The application form and Renewal Questionnaire which we have carefully drafted and which we insist upon in every submission of a policy of

marine insurance specifically asks for the 'boating qualifications' of each disclosed operator of the insured vessel." (*Id.* at ¶ 35.) This should have put Defendant on notice that boating qualifications were material to the insurance application and would therefore impact whether the underwriter would ultimately agree to issue a policy and what premium to charge.[11]

Moreover, Usher's affidavit is unrebutted. Multiple courts in this district have found that an unrebutted affidavit from this very same underwriter, Beric Usher, suffices to establish the materiality of a misrepresented fact. *See, e.g.*, *Great Lakes Reinsurance (UK) PLC v. Morales*, 760 F. Supp. 2d 1315 (S.D. Fla. 2010); *Great Lakes Reinsurance PLC v. Barrios*, No. 08-20281-CV, 2008 WL 6032919 (S.D. Fla. Dec. 10, 2008). *Morales*, like this case, was a marine insurance coverage dispute involving a "Hull & Machinery" policy in which the marine insurer denied coverage based on the insured's alleged breach of the doctrine of *uberrimae fidei*. *See generally Morales*, 760 F. Supp. 2d. At summary judgment in *Morales*, there was no dispute that the insurance applications indicated that the defendant insured, who was the owner of the vessel and one of two named operators under the policy, had prior boat ownership and experience when, in fact, he did not. *Id*.

[11] The Court does not presume that materiality is established merely by the fact that the insurer specifically inquired about boating qualifications. *See Markel Am. Ins. Co. v. Fernandez*, No. 09-20449-CIV, 2010 WL 11602243, at *3 (S.D. Fla. July 20, 2010) (declining to follow this "harsh standard for materiality based upon the Eleventh Circuit's selection of a fact-specific inquiry rather than a bright line rule as applied by [the] Ninth Circuit"); *compare New Hampshire Ins. Co. v. C'est Moi, Inc.*, 519 F.3d 937, 939 (9th Cir. 2008) (finding that the mere "fact that the insurer has demanded answers to specific questions in an application for insurance is in itself usually sufficient to establish materiality as a matter of law") (citation and quotations omitted); *with HIH Marine Servs.*, 211 F.3d at 1364 (analyzing the materiality of the insured's misrepresentations based on facts in the record); *and Roca*, 2009 WL 200252, at *4-5 (analyzing the materiality element based on facts in the record)).

at 1325. In support of its motion for summary judgment, the plaintiff insurer submitted the affidavit of underwriter Beric Usher, which indicated that the underwriter would not have issued the policy if it had known that the defendant had no prior boat ownership or experience.[12] *Id*. at 1326. The Court found that Usher's affidavit established that the defendant's misrepresentations were material because they involved criteria that the insurer used to determine whether to issue the marine insurance policy on the vessel, and the Court accordingly granted summary judgment in favor of the insurer. *Id*.

Defendant has not provided any testimony regarding the factors bearing on the risk to be assumed by an insurer, such as that of an underwriter. *Cf. Great Lakes Ins. SE v. Sunset Watersports, Inc.*, 570 F. Supp. 3d 1252, 1265–66 (S.D. Fla. 2021) (finding that an issue of material fact existed as to whether omitted information in an insurance application was material based on expert testimony offered by the insured to rebut the insurance underwriter's affidavit, where the insured's expert was a former underwriter with over 40 years of experience as a marine broker and underwriter), *appeal dismissed*, No. 21-14270, 2022 WL 758020 (11th Cir. Feb. 17, 2022). Instead, Defendant argues that, although Pack was not licensed, he was qualified to captain a yacht because "he had a current and active Florida's boating license" and "he attended sea school in Florida . . . and received a certification for completing a US Coast Guard approved course." (DE 77 at 14.) However, Defendant's opinion about boating qualifications does not provide

[12] As with Usher's affidavit in this case, the affidavit in *Morales* recounted the misrepresented facts and explained how the misrepresentation by the insured involved information that was critical to his underwriting decision. *See Affidavit of Beric A. Usher in Support of Plaintiff's Motion for Summary Judgment* at ¶¶ 25–27, *Great Lakes Reinsurance (UK) PLC v. Morales*, 760 F. Supp. 2d 1315 (S.D. Fla. 2010) (No. 09-20814), ECF No. 60.

the Court with sufficient information as to what would influence a prudent and intelligent insurer in determining whether to accept the risk of issuing a marine insurance policy. *See Kilpatrick Marine*, 795 F.2d at 942–43.[13]

Lastly, Defendant contends that the incident occurred during a "bareboat charter" and that there was no legal requirement for Pack to be licensed during such a charter. (DE 77 at 15). Defendant appears to argue that the issue of whether Pack held a valid U.S. Coast Guard license for bareboat chartering was not material to the insurer's evaluation of risk. However, Defendant fails to cite a single case or regulation in support of its claim that a U.S. Coast Guard-licensed captain is not required on a "bareboat charter" or posit facts sufficient to support the contention that Defendant was operating a bareboat charter on the date of the incident. Additionally, in the insurance application, Defendant answered "no" to the question, "Is this vessel chartered to others without a captain (bareboat)?" (DE 69-2 at 2.) Thus, it would seem that if Defendant did indeed bareboat charter the vessel at any time during the coverage period, they would have made another, potentially material, misrepresentation in the insurance application.[14]

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[13] In any case, Pack's course certification was no longer valid on the alleged date of loss (November 7, 2020) because it was dated March 26, 2019 and was valid for one year from that date. (DE 78-13.) Additionally, during his deposition, Pack testified that he was not sure what the Florida boating license was for (DE 78-2, 17:13–19) and Defendant provides no further explanation in its submissions.

[14] Although Defendant mentioned in a "Captain Charter Supplementary Sheet" to the insurance application that the charters undertaken would include "bareboat charters" (DE 69-2 at 8), this is not an appropriate disclosure, as the application form states that if the vessel will be bareboat chartered, the applicant should complete a "*Bareboat* Charter Supplementary Sheet" (emphasis added) (*id*. at 2), and no such supplementary sheet appears in the record. Furthermore, the application specifically indicates that the "Captain Charter Supplementary Sheet" is to be completed if the vessel will be chartered to others *with* a captain. (*See id.*) In any case, to the extent Defendant made contradictory representations in the insurance application, one of those was unavoidably a

Based on the foregoing analysis, the Court finds that there is no genuine issue of material fact as to whether Defendant's misrepresentations regarding Pack's boating qualifications were material to the calculation of the insurance risk. Defendant's misrepresentations breached the doctrine of *uberrimae fidei* such that Plaintiff is entitled to have the Policy rendered void *ab initio*.

B. Count 6: Breach of survey compliance warranty

Plaintiff argues that the failure of Defendant to have the Vessel's life raft inspected and tagged was a breach of the duty under federal admiralty law and New York law to comply -- strictly and literally -- with the Policy's survey compliance warranty.

Under New York law, express warranties in policies of marine insurance mandate strict and literal compliance.[15] *See Stony Brook Marine Transp. Corp. v. Wilton*, No. 94-5880-CIV, 1997 WL 538913, at *11 (E.D.N.Y. Apr. 21, 1997); *Colvin v. Cigna Prop. & Cas. Co.*, No. 90-3788-CIV, 1992 WL 188347, at *2 (S.D.N.Y. July 27, 1992). As Judge Jordan has observed, "New York law has long provided that the breach of an express warranty [in a marine insurance policy], whether material to the risk or not, whether a loss happens through the breach or not, absolutely determines the policy and the assured forfeits his rights under it." *Great Lakes Reinsurance (UK), PLC v. Rosin*, 757 F. Supp. 2d 1244, 1257 (S.D. Fla. 2010) (alteration in original) (internal quotations and citation

misrepresentation, and Defendant should not be able to choose after the fact which one of the contradictory representations it meant to make at the time of the application.

[15] Plaintiff contends that this is also the rule of federal admiralty law but cites no authority to support this proposition. In fact, this district has recently recognized that "there is no firmly established federal maritime precedent governing . . . survey-compliance warranties." *Clear Spring Prop. & Casualty Co. v. Viking Power LLC*, 608 F. Supp. 3d 1220, 1226 (S.D. Fla. 2022) (citing *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 314–16 (1955).

omitted). "As New York's Court of Appeals has explained, an express warranty in a marine insurance policy 'must be literally complied with, and that noncompliance forbids recovery, regardless of whether the omission had a causal relation to the loss.'" *Id.* (citing *Jarvis Towing & Transp. Corp. v. Aetna Ins. Co.*, 298 N.Y. 280, 282 (1948)); *Sirius Ins. Co. (UK) v. Collins*, No. 92-3544-CIV, 1993 WL 645926, at *2 (E.D.N.Y. June 29, 1993) (Under New York law, "compliance with a marine policy warranty is a condition precedent to the Underwriters' liability thereunder and affords a complete defense to coverage if not complied with, regardless of whether causation between the breach and injury exists."), *aff'd*, 16 F.3d 34 (2d Cir. 1994); *see also Levine v. Aetna Ins. Co.,* 139 F.2d 217, 218 (2d Cir.1943) (barring coverage where there was breach of warranty that vessel would be equipped with a searchlight).[16]

The case of *Openwater Safety IV, LLC v. Great Lakes Ins. SE*, 435 F. Supp. 3d 1142 (D. Colo. 2020), is instructive. *Openwater* involves an insurance policy issued by Great Lakes which contained a named operator warranty restricting operation of the subject vessel to those individuals specifically named on the policy's declarations page. *Openwater Safety*, 435 F. Supp. at 1147. The policy contained the same provision that exists in the Policy here, that any breach of a warranty would void the policy from

[16] The Court notes the case of *Serendipity at Sea, LLC v. Underwriters at Lloyd's of London Subscribing to Pol'y No. 187581*, 56 F.4th 1280, (11th Cir. 2023), in which the Eleventh Circuit found under Florida law that a disputed question of material fact existed about whether a boat owner's breach of the Captaincy Warranty in a marine insurance policy "increased the hazard" posed to the subject vessel by an unpredictable hurricane. *Id.* at 1289–91. Under Florida law, a breach of a warranty in a marine insurance policy does not void the policy unless such breach "increased the hazard by any means within the control of the insured." FLA. STAT. § 627.409. The critical difference between *Serendipity* and this case is that New York law applies in this case pursuant to the Parties' choice of law agreement.

inception. *Id.* at 1147–48.[17] During the policy period, the mast of the vessel came down. *Id.* at 1148. The district court, applying New York law, enforced the rule of strict or literal compliance with a marine insurance warranty and held that the policy was void from inception where it was undisputed that the named operator policy had been violated, even though that violation had nothing to do with the dismasting. *Id.* at 1155–57.

In this case, Defendant submitted to Plaintiff, via Concept, two LOCs. (DE 69 ¶¶ 17, 19; DE 69-5.) Each LOC references the Global Survey, which contained numerous recommendations, including Category A, "safety deficiencies," and Category B, "deficiencies needing immediate action." (DE 69-6 at 33–34.) The LOCs warranted that all recommendations would be completed by April 30, 2020. (*See* DE 69-5.) These recommendations included obtaining new flares (A-1), recertifying the two expired life rafts (B-3), and renewing the inspection of the EPIRB (B-4). (*Id*.) The Policy contains a warranty that specifies that, "If the survey makes any recommendations with respect to the Scheduled Vessel, then it is warranted that all such recommendations are completed prior to any loss giving rise to any claim hereunder. . ." (DE 69-7 at 14.) The Policy also contains a provision specifying that any breach of a warranty would void the policy from its inception. (*Id.*)

The post-Incident investigation conducted by Sedgwick on behalf of Plaintiff revealed that, at the time of the investigation, there was no E.P.I.R.B. aboard the Vessel, there were no flares aboard the Vessel, and there was only one life raft aboard the Vessel "and the affixed tag indicated that the next service date was January 2018." (DE 69-10

[17] The policy in *Openwater* also contained a choice of law provision, identical to the one here, which specified that New York law would govern in the absence of established federal admiralty law. *Id*. at 1148.

at 5; DE 69-9 ¶ 21.) Defendant claims that it completed all of the Global Survey recommendations and that the flares, life rafts and EPIRB were on board before and during the Incident but, as Greg Pack testified, Plaintiff's investigator did not ask to see the flares during his investigation, and the EPIRB and one raft were lost during the water ingress on the Miami River. (DE 78-2, 45:1–9, 46:2–15, 49:2–24, 50:9–24.) Nonetheless, Defendant provides no evidence to dispute the fact that the one life raft that did remain aboard the Vessel after the Incident had a certification tag that had expired in January 2018. The failure to inspect and tag the life raft annually, as expressly required by the Global Survey and the Policy, constitutes a breach of the survey compliance warranty under New York law. Due to this breach, the Policy is rendered void *ab initio* and Plaintiff is entitled to summary judgment.

C. Count 7: Breach of legal and regulatory compliance warranty

Plaintiff argues that the legal and regulatory compliance warranty of the Policy was breached for multiple reasons. As already discussed, under New York law, express warranties in policies of marine insurance must be strictly and literally complied with. *See Stony Brook Marine Transp. Corp.*, 1997 WL 538913, at *11; *Colvin*, 1992 WL 188347, at *2. The Policy contains the following warranty: "It is warranted that covered persons must at all times comply with all laws and regulations, governing the use and or operation of the Scheduled Vessel." (DE 69-7 at 13.) The Policy also contains a provision specifying that any breach of a warranty would void the policy from its inception. *Id* at 14. U.S. Coast Guard regulations require that life rafts be periodically serviced, inspected, and tested by an approved servicing facility, and the regulations provide a comprehensive

list of procedures to be carried out at each servicing. *See* 46 C.F.R. § 160.151-57.[18] The regulations provide that "[t]he expiration date of the servicing sticker is 12 months after the date the liferaft was repacked . . ." 46 C.F.R. § 160.151-57(n). Here, it is undisputed that the one life raft that remained aboard the Vessel after the Incident had a certification tag that had expired in January 2018. Therefore, Defendant was in violation of the servicing requirements under 46 C.F.R. § 160.151-57, and Defendant's failure to comply with these requirements constitutes a breach of the legal and regulatory compliance warranty under New York law. Due to this breach, the Policy is rendered void *ab initio* and Plaintiff is entitled to summary judgment.

Finding three separate and independent bases for granting Plaintiff's motion for summary judgment, the Court need not address whether there are genuine issues of material fact as to the Vessel's seaworthiness.

IV. CONCLUSION

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. Plaintiff's Motion for Summary Judgment (DE 68) is **GRANTED**.
2. The Court will separately issue a final judgment.
3. All pending motions, if any, are **DENIED AS MOOT**.
4. All deadlines and hearings are **CANCELED**.
5. This case is **CLOSED**.

[18] Plaintiff incorrectly cited 46 C.F.R. § 131.575 for the proposition that life rafts must be inspected at least once per year; this provision applies only to offshore supply vessels. Even so, Defendant does not dispute Plaintiff's error. Regardless of whether the U.S. Coast Guard regulations require Defendant's life rafts to be inspected yearly or at some other interval, it is undisputed that the life raft that remained aboard the Vessel after the Incident had a certification tag that was expired and was therefore in violation of the servicing requirements under 46 C.F.R. § 160.151-57.

DONE AND ORDERED in Chambers in Miami, Florida, this 6th day of June, 2023.

KATHLEEN M. WILLIAMS
UNITED STATES DISTRICT JUDGE