DOCKET NO. FST CV 17 6031032 S	:	SUPERIOR COURT
GERALD METALS, LLC and GERALD METALS SARL,	:	JUDICIAL DISTRICT OF STAMFORD /NORWALK
PLAINTIFFS,	:	AT STAMFORD
v.	:	
CERTAIN UNDERWRITERS SUBSCRIBING TO MARINE CARGO INSURANCE POLICIES Nos. B07853PC1309890000, B0753PC1412113000, and B1353DC15012530000,	:	
DEFENDANTS.	:	AUGUST 10, 2023

MEMORANDUM OF DECISION RE

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (No. 365)

The defendant Underwriters (referred to herein as "Lloyd's") have moved for entry of summary judgment against the plaintiffs (referred to herein as "Gerald"). Based on the doctrines of collateral estoppel and judicial estoppel, defendants contend that plaintiffs cannot establish a prima facie case of an insurable loss under the all-risk marine cargo polices at issue in this case because they adopted positions in an undisclosed but related proceeding before the London Metals Exchange which were diametrically opposed to positions they have argued in this proceeding. As more fully explained below, the court finds in favor of the defendants and grants their summary judgment motion.

I. BACKGROUND

On January 26, 2017, the plaintiffs commenced this action against Lloyd's claiming breach of its insurance contracts for loss arising from its inability to take possession of 25,250 metric tons of alumina from a bonded warehouse at the Port of Qingdao, China (the "Loss"), as well as breach

365.05

of the covenant of good faith and fair dealing and breach of the Connecticut Unfair Trade Practices Act (CUTPA) enforcing the Connecticut Unfair Insurance Practices Act (CUIPA).

A. Allegations of the Operative Complaint

The Revised Second Amended Complaint, filed on July 31, 2019 (Docket No. 211) (the Complaint), is the operative complaint and claims that the defendants have failed to pay "Gerald's claim for insurance coverage arising from Gerald's covered loss arising from the theft and/or misappropriation of its 25,250 metric tons of alumina" from the bonded warehouse at the Port of Qingdao, China. Id. ¶ 2. Paragraph 3 of the Complaint alleges that Defendants violated the covenant of good faith and fair dealing by "conducting a protracted and dilatory investigation into the Loss, by failing to properly and promptly adjust Gerald's claim and inform Gerald of their coverage position . . . ," failing to make a payment for the loss, and forcing Gerald to incur significant cost to recover under the Policies.

The Complaint alleges that Lloyd's sold Gerald a series of all-risk marine cargo insurance policies covering the period November 1, 2013 to October 31, 2016 (the "Policies")[1]. Id. ¶ 6. Paragraph 13 alleges that "The Policies provide all-risk coverage to Gerald for, among other things, losses occurring during the transport and storage of insured goods." Paragraph 14 states, "The Policies insure Gerald against all causes of loss other than those specifically excluded by the Policies. Defendant Underwriters bear the burden to establish application of any exclusion in the Policies". Paragraph 16 explains that the Policies provide coverage for "goods and/or merchandise of every description, consisting principally of Non-Ferrous Metals, Ores and Concentrates, Ferro Alloys, Mercury, Precious, Semi-Precious and Exotic Metals, Precious Metal Bearing Materials,

[1] Copies of the Policies are appended to the Complaint as Exhibits A, B and C.

in whatever form or shape, and all other goods and/or merchandise incidental to the business of the Assured consigned to or shipped by the Assured, or consigned to or shipped by others for the Assured's account or control, or in which the Assured may have an interest . . . ."

Paragraph 20 alleges, "On or about December 13, 2013, Gerald purchased 25,250 tons of alumina ("Material") from Shenhuo, a Chinese aluminum smelter. The Material was previously shipped from the Port of Bunbury, Australia onboard the vessel M/V AS Elysia to the Port of Qingdao, China ("Qingdao Port"), where it was offloaded and bagged in individual 1 metric ton ("MT") bags." Paragraph 21 alleges, "The total purchase price of the Material was $9,090,000 (in words: nine million ninety thousand USD). At the time of purchase, Gerald paid in full for the Material. Gerald received title to the Material." Paragraph 22 alleges, "After purchasing the Material, Gerald received a warehouse receipt, No. CCCI 40100102, from CWT Commodities ("CWT"), a warehousing company in Qingdao, China, advising that the Material was being stored in a bonded warehouse (the "Warehouse") at the Qingdao Port." [2]

Paragraph 24 provides, "On or about May 26, 2014, Gerald gave CWT instructions regarding the release of the Material in connection with a pending sale of the Material." ¶ 25: "On or about June 4, 2014, CWT informed Gerald that CWT was unable to release the Material." The Complaint alleges that subsequently Gerald, along with a representative of the defendants, made several inspections of the Material in the Warehouse. However, the Material was dwindling.

Paragraph 34 states, "Accordingly, as of October 28, 2015, only 504 MT [metric tons] of Gerald's alumina remained, with the other 24,746 metric tons apparently having been stolen or misappropriated by unknown entities either through outright removal or through the changing of

[2] Subsequently, it became clear that the CWT receipt was based on a fraudulent receipt (the "Rukudan"). issued by the operator of the warehouse. See Paragraphs I(D)(5) and (10)(i & j), below.

identifying tags on the remaining bags." On January 23, 2019, Gerald discovered "all remaining bags of alumina now bear a different vessel's name." Paragraph 37.

Gerald filed a first notice of claim on January 14, 2015 under the 2013-2014 Policy, and a subsequent notice on June 4, 2019 under the 2014-2015 and 2015-2016 Policies. ¶ ¶ 25 and 30. On January 18, 2016, the Defendant sent Gerald's broker its refusal to pay Gerald's claim. Paragraph 38.

Count I for breach of contract alleges that "Gerald's Loss resulted from the Material's theft and/or misappropriation." Paragraph 54. Count II for breach of covenant of good faith and fair dealing alleges, as mentioned above, "Defendant Underwriters have breached their duty of good faith and fair dealing by: (1) conducting a protracted and dilatory investigation into the loss; (2) by failing to adjust properly and promptly Gerald's claim and inform Gerald of their coverage position; (3) by placing their own interest ahead of that of their policyholder's by drawing every inference in Defendant Underwriters' favor and adversely to Gerald; and (4) compelling Gerald to seek to recover amounts due under the Policies through litigation." Paragraph 60. The operative complaint does not contain a CUIPA/CUTPA count because it had been stricken. Docket No.139.02, December 28, 2017.

B. Allegations of the Operative Answer

Defendants' Amended Answer to Revised Second Amended Complaint, dated June 1, 2021 (Docket No. 262) admits the sale of the Policies and that the lead underwriter remained the same for all of the Policies. ¶ 8. The answer denies or denies sufficient knowledge to plead with respect to the factual allegations of the operative complaint. The answer denies that "Gerald received title

to the Material" (at ¶ 21) and that "Gerald's Loss resulted from the Material's theft and/or misappropriation" (at ¶ 54).

The answer sets forth fifteen special defenses, five of which are relevant to this motion:

FIFTH SPECIAL DEFENSE

The subject policy or policies provide(s) as follows:

11. AVERAGE TERMS AND CONDITIONS

All goods and/or merchandise ON DECK, UNDER DECK or otherwise are insured:

Subject to the American Institute Cargo Clauses (Sept. 1, 1965) 32B-10 but with Clause No. 3 amended to read as follows: Against all risks of physical loss or damage from any external cause including mysterious disappearance and infidelity of Assured's employees. . . .Docket No.211, Ex. A, Clause 11 (identical language in all three policies).

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The loss alleged in the Plaintiffs' Revised Second Amended Complaint, which is expressly denied, was not a "physical loss or damage" within the meaning of the above-referenced policy or policies provision(s) (similar provisions exist throughout the Policies.) Therefore, the claim is not covered.

SEVENTH SPECIAL DEFENSE

The subject policy or policies provide(s)as follows:

32. F.C.&S. [Free of Capture and Seizure] WARRANTY

The following warranty shall be paramount and shall not be modified or superseded by any other provision included herein or stamped or endorsed hereon unless such other provision refers specifically to the risks excluded by this warranty and expressly assumes the said risks.

F.C.&S. WARRANTY: Notwithstanding anything herein contained to the contrary, this insurance is warranted free from: capture, seizure, arrest, restraint, detainment,

confiscation, preemption, requisition or nationalization, and the consequences thereof or any attempt thereat, whether in time of peace or war and whether lawful or otherwise;
Docket No. 211, Ex. A, Clause 32.

* * *

The loss alleged in the Plaintiffs' Revised Second Amended Complaint, which is expressly denied, was the result of capture, seizure, arrest, restraint, detainment, confiscation, preemption, requisition, nationalization by the government or government-controlled entities of the People's Republic of China or other excluded reason. Therefore, the claim is not covered.

EIGHTH SPECIAL DEFENSE

No coverage under the Policies attached because the warehouse receipts purporting to cover the Material were fraudulently issued or were otherwise the result of fraud. Therefore, there was no insurable interest to which insurance coverage attached.

ELEVENTH SPECIAL DEFENSE

Plaintiffs have not demonstrated the loss of the product, nor a physical loss, such as would be covered under the terms and conditions of the Policies.

TWELFTH SPECIAL DEFENSE

Plaintiffs have not demonstrated title in the cargo claimed for.

The plaintiffs' Reply denied "each and every factual allegation filed in the Amended Answer and Special Defenses." Docket No. 263.

C. Procedural Posture

This matter was actively contested, with 349 filings on the docket as of November 15, 2022, including discovery disputes, a motion for partial summary judgment, a motion to dismiss for lack of subject matter jurisdiction, and numerous motions in limine. Trial by jury was ultimately scheduled to commence on Tuesday, November 15, 2022. The jury was selected.

However, two days before the commencement of trial, on Sunday afternoon, November 13, 2022, Gerald's counsel sent Lloyd's counsel an email enclosing Gerald's Supplemental Response to Defendant's Interrogatory No. 8, dated October 16, 2017. The Response disclosed that, unbeknownst to Lloyd's or this court, Gerald had been engaged in an arbitration before the London Metals Exchange (the "LME") with the vendor of the alumina at issue in this case, Shezou Shenhuo Trading ("SST"), since October 29, 2019. Because of the confidentiality of the proceedings, counsel refused to disclose further details without a court order.

Lloyd's filed an emergency motion for sanctions on Monday, November 14, 2022 (Docket. No. 338), which the court heard on Tuesday, November 15, 2022. The motion contended that the failure to disclose this proceeding was a flagrant violation of Gerald's discovery obligations.[3]

Lloyd's contended it would be unfair to proceed to trial without full discovery of Gerald's positions in the LME proceedings, especially because its holdings could constitute collateral estoppel and would be subject to judicial estoppel. While Lloyd's sought dismissal or nonsuit against Gerald, it alternatively sought a mistrial. Further, Lloyd's sought discovery of the proceedings and an award of attorneys' fees.

The court held a hearing on Lloyd's motion on Tuesday, November 15, 2022. The court ordered Gerald to immediately produce the Third Arbitration Award handed down by the arbitrators on February 25, 2022 in the LME proceeding entitled *Gerald Metals Sarl v. Shenzhen Shenhuo Trading Co. Ltd.* (the "Third Award"). At the continued hearing on November 18, 2022, the court heard further argument and, on November 21, 2022, issued an order (Docket No. 338.01)

[3] Lloyd's Interrogatory No. 8, served on July 5, 2017, requested that Gerald identify "any legal proceedings relating to or concerning the Material or Insurance Claim including but not limited to lawsuit(s), arbitration proceeding(s) or other dispute resolution forums to which the plaintiffs or their affiliate are or were parties anywhere in the world." On October 16, 2017, Gerald responded, "[T]here are no other legal proceedings concerning the Material or Insurance Claim to which Gerald or their affiliates are or were parties anywhere in the world other than this current claim before the State Court of Connecticut." See Exhibits A and B, attached to the Affidavit of Jamison T. Jedziniak, dated November 14, 2022, Docket No. 339.

continuing the trial to dates in April, 2023 and discharging the jury. The Order also directed plaintiffs to produce by November 29, 2022 all filings in the LME proceedings and authorized limited depositions relating to those proceedings. It set a briefing schedule, subsequently modified, for the present motion for summary judgment. The court reserved consideration of defendants' motion for sanctions.

The defendants filed this motion for summary judgment on January 24, 2023 with a supporting memorandum of law and an affidavit with ten documentary exhibits relating to the LME Arbitration. Defendants filed a notice of supplemental authorities on February 3, 2023. Plaintiffs filed their opposition to the motion for summary judgment on February 21, 2023 with a supporting affidavit. The defendants filed a reply memorandum and affidavit on March 1, 2023. The court heard oral argument on March 22, 2023. At that time, plaintiffs sought permission to submit supplemental briefing. By order at Docket No. 365.02, the court granted the request and allowed defendants to file a response. The court also continued sine die jury selection and commencement of the trial. Plaintiffs filed their supplemental memorandum on April 6, 2023 and defendants filed their supplemental memorandum on April 14, 2023.

D. The LME Arbitration Proceedings

Materials obtained in the court-ordered discovery, and submitted with the affidavits in the briefing of this motion, reveal the following undisputed facts relating to the Arbitration proceedings before the London Metal Exchange between a defendant in this action, Gerald Metals SARL as claimant in the Arbitration, and Shenzhen Shenhuo Trading Co. Ltd (SST), as respondent.

1. Gerald Metals Sarl served a notice of arbitration on Shenzhen Shenhuo Trading Co., Ltd on October 29, 2019. The letter alleges that SST had failed to "provide evidence of full

title and provenance of the 25,250 mt of Alumina (the Material). . . .Questions and challenges in respect of Gerald's title to the Material are being raised in ongoing proceedings in Connecticut, USA (in which Gerald is one of the claimants). . . . In the event that and/or on the basis that Shenhuo has failed to pass good and unfettered title to Gerald, it is in breach of the Contract" (which contract also provided that all disputes relating to the Contract shall be submitted to the LME). Letter attached as Exhibit 1 to Affidavit of Thomas Tisdale submitted in support of Motion for Summary Judgment on January 24, 2023, Docket No. 367.00 (the "Tisdale Affidavit").

2. The LME proceeding commenced on October 29, 2019 after SST refused Gerald's request to toll the limitations period in the sale contract and enter into a standstill agreement pending resolution of this Connecticut proceeding. The three-arbitrator panel was constituted by December 5, 2019. Gerald then moved to stay the proceedings until resolution of this case pending in Connecticut. On January 13, 2020, the tribunal granted a stay until either the resolution of the Connecticut proceedings or July 13, 2020.

3. During the stay, SST applied to terminate the stay and dismiss the proceedings, claiming there was no real prospect of success. In its response, Gerald said, "Gerald has stated consistently that it will not pursue this arbitration...if it succeeds in the U.S. Proceeding. However, given the risk that Gerald's claim [in the U.S. Proceeding] will fail for want of title to the Material..., Gerald will naturally in that event wish to pursue in this Arbitration a claim against SST for breach of the SST/Gerald Sale Contract on the basis that SST did not have title to the Material. . . . In order to protect its position, Gerald had no choice but to commence this Arbitration." (Gerald's 4/19/2020 Response to Respondent's Application, Tisdale Affidavit, Ex. 3, at ¶¶ 2.9 and 4.) The tribunal denied this application in the First Award dated June 5, 2020, and

awarded Gerald its costs in the Second Award dated November 12, 2020. The tribunal lifted the stay on November 2, 2020.

4. The parties to the Arbitration submitted their claim submissions in January through May 2021, with amendments in September and October, 2021. In its Points of Claim, dated January 8, 2021, Gerald asserted "SST did not have the right to sell the Material at the time when the Material was to pass to Gerald because (i) SST did not have title to the Material (so that SST did not pass title to Gerald); (ii) further or alternatively, there was a cloud on SST's title making it difficult or impossible for Gerald to resell the Material; and/or Gerald was (and still is) not able to enjoy quiet possession of the Material." (Attached as Exhibit 5 to the Tisdale Affidavit, at p. 2).

5. At paragraphs 17 and 18 of its Points of Claim, Gerald stated, "A warehouse receipt relating to the Material with reference number ZJYY201304 bearing the date of 8 July 2013 (the "Rukudan") was issued by QPGC [Qingdao Port (Group) Co. Limited Dagang Branch, the controller and operator of the warehouse] to the order of CWT Commodities Shanghai Warehousing MGT Co Ltd ("CWT Shanghai"), an associate company of CWT. It is averred that the Rukudan is a fraudulent document (it is not alleged that SST was a perpetrator of that fraud). Id., at 8.

6. In his Witness Statement dated October 8, 2021, Mr. Gary Lerner, Executive Vice President and a Director of Gerald's parent, stated, "The facts in relation to this matter have evolved over time. Initially, it was Gerald's opinion that the Material was stolen, but during the years since these disputes arose, the Rukudan was ruled by the Qingdao Maritime Court's decision to be forged, a number of individuals admitted to forging the Rukudan and went to jail for it, then finally it became clear that the Material existed; however the Qingdao Intermediate Court decided it belonged to someone else (not Gerald and accordingly never had belonged to Gerald) and was

sold at an auction, with not a cent of the proceeds being paid to Gerald." (Attached as Exhibit 7 to the Tisdale Affidavit, Paragraph 13). In Paragraph 154, Mr. Lerner told the tribunal, "Gerald will not proceed with the claims in the Connecticut Proceedings if it succeeds in this arbitration." Id.

7. In its Closing Submission, Gerald stated, "For the reasons set out at ¶ 65 to ¶ 79 above, neither party has a pleaded case that the Material is stolen, and the Material was not stolen. For the reasons set out in those paragraphs, Gerald's case is that the entirety of the Material has been auctioned off." Attached as Exhibit 8 to the Tisdale Affidavit, at p.78.

8. The hearing took place before the arbitrators in London between November 15 and November 18, 2021. The parties submitted several filings and evidentiary proffers. Mr. Lerner attended and testified at the hearing on behalf of Gerald.

9. The tribunal issued its Third Award on February 25, 2022 (attached as Exhibit 9 to the Tisdale Affidavit, Doc No. 367). The ruling analyzed the claims over 337 paragraphs and awarded Gerald its claim of $9,090,000 with interest of 4.5 percent, but denied its claim for costs in various Chinese proceedings and its claim of $769.003.63 for costs in the U.S. proceedings.

10. The findings of the Third Award are of fundamental importance to the resolution of this motion. They include the following:

> a. In December 2013, the Claimant paid the Respondent USD9,090,000 pursuant to the Contract for 25,250mt of alumina (the "Material") DDU Bonded Warehouse in Qingdao, China. The Material was stored in areas 64 and 65 of a bonded warehouse (the "Warehouse") controlled and operated by Qingdao Port (Group) Co. Limited Dagang Branch ("QPGC"). The Claimant has never been able to gain access to the Material, has never been able to take possession of it and has never been able to on-sell it and now it never will because the Claimant submits that in April 2020 it was auctioned and bought by a third party. Paragraph 20.

b. The Claimant brought these proceedings to recover the money paid to the Respondent, together with other losses and costs on the basis that in breach of terms implied into the Contract pursuant to section 12 of the Sale of Goods Act 1979 (the "SGA") (a) the Respondent did not have the right to sell the Material and/or (b) the Respondent failed to give the Claimant quiet possession of the Material. These are, respectively, referred to in this Award as "The Right to Sell claim" and the "Quiet Possession claim". Paragraph 22.

c. By contract dated 20 January 2014, the Claimant sold the Material to Rio Tinto. Delivery was in bonded warehouse - Qingdao, China in Bags. Payment was against presentation of irrevocable warehouse release (among other documents). Paragraph 36.

d. Initial details of an alleged fraud were first made public on 6 June 2014, when Qingdao Port International Co. announced an investigation into fraud relating to certain aluminium and copper products stored at the bonded warehouse in the Port and that on 3 June 2014, the authorities had called upon Dagang Branch of QPGC to assist in the enforcement of sequestration orders in relation to certain metal products that were the subject of the investigation. Paragraph 38.

e. The police closed the Port on 14 July 2014. Paragraph 40.

f. On 9 June 2014, CITIC Resources Holdings Limited (the parent company of CITIC [a commodity company]) issued a formal company announcement stating that on around 3 June 2014, CITIC obtained sequestration (preservation) orders from the Qingdao court in respect of alumina and copper stored in bonded warehouses at the Port that it claimed to own. CITIC claimed to have purchased the Material after it had arrived in the Warehouse and claimed to hold a warehouse receipt in relation to it, issued by a party related to Thong Jun. The Claimant was informed about this by CWT on 26 June 2014. Paragraph 43.

g. On 15 January 2015, the Claimant's insurance broker issued a notice of claim under the Claimant's marine cargo insurance policy against the underwriters. On refusal to meet the claim, the Claimant commenced proceedings on 24 January 2017 in Connecticut, USA (the "US Proceedings") to recover the loss arising from the "theft and/or misappropriation" of the Material. The Claimant

contended that the loss fell within the scope of coverage provided by the policy. The underwriters denied liability on the basis that the Claimant did not have title to the Material. Those proceedings are still ongoing. Paragraph 46.

h. The Claimant submitted that . . . there was fraud at the Port, that the Material was owned by Dezheng (i.e. a third party), it had been "seized" by the public authorities and was ordered to be auctioned. Paragraph 67.

i. It would be strange if we did not recognise in this Award the sheer magnitude of the fraud, that had been going on for some time, that it targeted alumina (and other materials), that the perpetrators included Thong Ju and Hongtu both of whom appeared in the chain, that it involved material stored in the Warehouse (area nos. 64 and 65) where the Material was stored, that the Material was among the goods that were ordered to be auctioned and were said to have been auctioned, that the modus operandi involved forging and faking multiple warehouse receipts and passing them off as genuine for the purposes of selling the same material to more than one party, that expert evidence concluded that the Rukudan was forged, that CITIC (another innocent third party) claimed ownership of the Material and claimed to be in possession of a warehouse receipt but failed to prove its right before the Chinese court because it failed to establish it had a contract with QPGC which brings into play the point that the warehouse receipt (or rukudan) on which it relied was not authentic and of course CWT Shanghai failed to prove its ownership to the same Material too. As regards the views of the CWT witnesses, the difficulty is that if the Rukudan was forged with the assistance of QPGC employees, they would know how to make it look genuine and look like any other rukudan issued by QPGC.

j. We have to form a view and we did so by weighing up all the matters we have just set forth. We concluded that the Rukudan was forged. We did so because of the context and because CITIC [a third party] claimed they owned the Material too. The confessions of the wrongdoers supported our finding. Paragraph 163.

k. It is for all these reasons, that we concluded that the Material had not been stolen. It was there, in the Port somewhere, and successfully sold to Mercuria in April 2020. Paragraph 177.

l. The Claimant contended that there were a number of separate breaches at various points in time by the Respondent of the implied warranty of quiet possession. Those breaches occurred when CITIC obtained its preservation order; the police seized the Material; the Claimant was unable to obtain possession from the QPGC; the Claimant was unable to clear customs; and ultimately when the Material was sold at auction so that possession was no longer available. Paragraph 180.

m. We are unable to accept that either the action of the QPGC or the auction were unlawful. QPGC could not deliver the Material because it had been seized and confiscated by the police and subsequently by order of the QIPC. The auction was conducted at the order of the QIPC [the Qingdao Intermediate People's Court]. Paragraph 182.

n. [T]he CWT Warehouse Receipt was itself void. And for this reason too, . . . it could not be used by the Claimant to obtain possession of the Material, nor could transfer of it, transfer title to the Material. . . . Paragraph 299.

THE AWARD

(A) WE FIND AND HOLD THAT:

(1) The Claimant succeeds in its claim for US$9,090,000 for the Material.

(2) The Claimant fails in its claim for US$16,666.69 plus CNY348,967 being costs of the Chinese proceedings.

(3) The Claimant fails in its claim for US$769,003.63 being costs of the US proceedings.

(B) WE AWARD AND ADJUDGE THAT the Respondent shall forthwith pay to the Claimant US$9,090,000 (nine million and ninety thousand US Dollars) together with interest at the rate of 4.5% per annum compounded at three monthly rests on this sum payable to the Claimant, from 30 December 2013 until the date of reimbursement in full. Id., last page (unnumbered).

11. At his deposition on January 19, 2023, Mr. Lerner testified that he had forwarded the Award to counsel in China for collection. Gerald also indicated its concern that SST may have been dissolved. See Supplemental Tisdale Affidavit dated March 1, 2023, Exhibit 6 (Docket No. 374); Affidavit of Anthony Crawford dated February 21, 2023, Paragraph 13 (Docket No. 371).

In summary, it appears that Gerald started the LME proceeding as a hedge against an adverse result in this Connecticut proceeding. In seeking a stay of the LME proceedings, it sought to obtain a ruling from the Connecticut court first. The anticipated timing of results was reversed due to the Covid-related delays in the Connecticut proceeding, resulting in the LME tribunal ruling before a Connecticut court. In London, it contended that it was entitled to recovery of the purchase price of the alumina from SST because, among other things, SST did not convey title or possession of the Material. This is diametrically opposed to Gerald's position in the proceedings in this court, where it contends that the Material was stolen, which presupposes that Gerald had title or at least possession of the Material, neither of which the LME tribunal concluded it ever had. The consequence of the ruling by the LME tribunal and of Gerald's conduct in this court is discussed below.

II. CONTENTIONS OF THE PARTIES

The movant, Lloyd's, contends the following:

A. The holdings of the Third Award are binding on Gerald in this proceeding by reason of collateral estoppel. That doctrine applies here because it can be based on an arbitration award, and Gerald had a full and complete opportunity to litigate the issues necessarily decided by the panel. Those findings include that there was no theft and Gerald never had title or possession of the Material, the Rukudan was forged, and the Chinese authorities seized the Material and caused all of it to be sold to third parties at auction.

B. Lloyd's also contends that the doctrine of judicial estoppel leads to a similar result because Gerald's positions in this proceeding are clearly inconsistent with the positions it took in the LME Arbitration, the tribunal adopted Gerald's arguments while holding in its favor, and Gerald would derive an unfair advantage if the LME findings are not honored here. Failing to do so would impact judicial integrity because Gerald ignored relevant discovery requests, and seeks a result that is inconsistent with the LME Award.

C. As a result of the forgoing, Lloyd's is entitled to summary judgment because Gerald has failed to establish a prima case for coverage under the applicable policies because there has been no physical loss or damage to the Material. Further, any loss caused by the seizure of the Material by local authorities would be precluded by the FC&S Warranty. These points do not raise questions of fact, and there is no evidence that Gerald's positions were the result of a good faith mistake or an unintentional error.

The respondent, Gerald, contends the following:

A. Collateral estoppel does not apply to arbitration holdings, and cannot be used defensively against a party that prevailed in the earlier proceeding. There is no identity of issues between the LME Arbitration and this Connecticut insurance coverage action. Specifically, different contracts were involved in the proceedings, and the Award does not cover all the damages sought in this proceeding because Lloyd's would need to pay another ten percent for expenses above the Loss if Gerald is successful. Any issue precluded here must have been fully and fairly litigated, and actually and necessarily decided, and the critical issue of an insurable interest was not before the LME tribunal. Also, Gerald claims that the tribunal did not actually find that the Material was seized and sold by the local authorities. If the tribunal did so find, the issues were only raised in the final submissions, so Gerald did not have an opportunity to fairly litigate the

issue, and a finding of theft or title is not necessary to the Arbitration decision regarding an insurable interest.

B. Judicial estoppel should not apply because Gerald did not take inconsistent positions in the two proceedings. No unfair advantage would result from a judgment in its favor because Gerald cannot obtain a double recovery. If coverage is found here, Lloyd's could take advantage of the LME ruling by subrogation. Finally, Gerald fully disclosed the Connecticut proceeding to the LME panel, so it did nothing improper in pursuing the two proceedings.

C. Summary judgment is improper here because there are numerous questions of fact and intent. Title is not necessary to an insurable interest, which can be shown on the basis of documentary evidence. No seizure has been proven.

III. DISCUSSION

The court addresses these contentions in three sections below, relating to collateral estoppel, judicial estoppel, and summary judgment as to insurance coverage under Lloyd's all-risk maritime policy.

A. Collateral Estoppel

Initially, this court must determine whether any of the findings of the LME tribunal as set forth above are entitled to collateral estoppel in this proceeding. The applicable principles of law are well-established.

First, an arbitration award against an adverse party is, under proper circumstances, applicable to a court proceeding. See *Doyle v. Universal Underwriters Ins. Co.*, 179 Conn. App. 9, 15-16 (2017) ("Thus, a court properly may grant summary judgment on the ground that the plaintiff's claims are barred by the doctrine of collateral estoppel on the basis of a prior arbitration

award. See, e.g., *Burton v. Stamford*, 127 Conn. App. 651, 653, 18 A.3d 590, cert. denied, 301 Conn. 915, 19 A.3d 1261 (2011)"; *Marques v. Allstate Ins. Co.*, 140 Conn. App. 335, 340-41 (2013) (previous arbitration award entitled to collateral estoppel or issue preclusion effect). Further, the findings of a foreign arbitration may be entitled to the same force and effect as a domestic arbitration. *Alghanim v. Alghanim*, 828 F. Supp. 2d 636, 665 (S.D.N.Y. 2011) ("[I]n the Second Circuit, the doctrine of collateral estoppel has long been applied to arbitrator's decisions, . . . and the effects of foreign arbitration are no less preclusive than domestic arbitration. . . .") (citations omitted).

"To assert successfully the doctrine of issue preclusion, therefore, a party must establish that the issue sought to be foreclosed actually was litigated and determined in the prior action ... and that the determination was essential to the decision in the prior case." (Internal quotation marks omitted). *Doyle v. Universal Underwriters Ins. Co.*, supra, 179 Conn. App. 14. "Collateral estoppel may be invoked against a party to a prior adverse proceeding or against those in privity with that party." *Young v. Metropolitan Property & Casualty Ins. Co.*, 60 Conn. App. 107, 114, cert. denied, 255 Conn. 906 (2000).

Contrary to Gerald's contentions, the doctrine may be invoked offensively, in support of a party's affirmative claim against his opponent, or defensively, in opposition to his opponent's affirmative claim against him. The present case involves the defensive use of collateral estoppel, which "occurs when a defendant in a second action seeks to prevent a plaintiff from relitigating an issue that the plaintiff had previously litigated in another action against the same defendant or a different party." *Gionfriddo v. Gartenhaus Cafe*, 15 Conn. App. 392, 404 (1988), aff'd, 211 Conn. 67 (1989). It is well established "that privity is not required in the context of the defensive use of collateral estoppel. . . ." (Citations omitted.) *Coyle Crete, LLC v. Nevins*, 137 Conn. App. 540, 560

(2012). "[T]he court must determine what facts were necessarily determined in the first [proceeding], and must then assess whether the [party] is attempting to relitigate those facts in the second proceeding." *Wiacek Farms, LLC v. Shelton*, 132 Conn. App. 163, 169 (2011), cert. denied, 303 Conn. 918 (2012).

"Unlike the doctrine of res judicata, the doctrine of collateral estoppel does not depend on the plaintiff's ability to assert an identical claim in the prior proceeding - it depends, instead, on the actual resolution of an identical *issue* in the prior proceeding following a full and fair opportunity for litigation (emphasis in original)." [4] *Solon v. Slater*, 217 Conn. 794, 824 (2023). This flows from the essential difference between res judicata, which relates to claim preclusion, and collateral estoppel, which relates to issue preclusion. Id., at 810. Confounding this distinction, Gerald argues that there was insufficient identity between the Arbitration, which was based on the sale contract with SST, and the present proceeding based on its insurance contract with Lloyd's.

Gerald claims that the important issue of an insurable interest was not raised in the Arbitration. While it is true that the two proceedings addressed different ultimate issues, the court finds that significant subsidiary issues were the same and fully addressed - such as theft, title and governmental seizure. For example, this court in colloquy with Gerald's lead counsel about its theory of coverage, inquired,

THE COURT: Okay. But so what is your theory? What happened to the alumina?

ATTY BERRINGER: It was stolen.

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[4] The plaintiff misstates this court's discussion on this point in *Deutsche Bank AG v. Sebastian Holdings, Inc.*, Superior Court, Complex Litigation Docket at Stamford, Docket No. X08 FST CV 135014167 S (Sept. 7, 2021), aff'd, 346 Conn. 564, 294 A.3d 1 (2023). The accurate quote is from the court's decision on a motion in limine, where it stated that the "holdings in Paragraph 1426 (i)-(viii) of the English Judgment of November 8, 2013 are entitled to preclusive effect, but only to the extent that they relate to identical issues in this case." (Docket No. 356.01.).

November 15, 2022 Hearing Transcript, p. 48, l. 18-20. See also, Revised Second Amended Complaint, Docket No. 211, paragraph 2 regarding "Gerald's covered loss arising from the theft and/or misappropriation of its 25,250 metric tons of alumina." Lloyd's Amended Answer to Revised Complaint (Docket No. 262) contains a denial of theft or misappropriation (paragraph 54) and denies that Gerald received title to the alumina (paragraph 21).

Gerald raised the issue of SST's failure to convey title in its initial demand for arbitration (Docket No. 367, Ex. 1), and in its Points of Claim. (Id., Ex. 5, paragraph 2). According to Gerald, in the Arbitration, its theory of theft evolved to one of forgery of the warehouse receipts, with the alumina being sold to third parties. Lerner Affidavit, (Docket No. 7, Ex. 7, paragraph 13).

After extensive factual development and trial, the LME tribunal concluded that the Material was not stolen. Third Award, Paragraph 177. It also concluded that "the Material had been seized and confiscated by the police and subsequently by order of QIPC. The auction was conducted at the order of the QIPC." Id., Paragraph 182. The tribunal also concluded that "the CWT Warehouse Receipt was itself void. And for this reason too, ... it could not be used by the Claimant [Gerald] to obtain possession of the material, nor could transfer of it, transfer title to the Material. . . ." Id., Paragraphs 299 and 300.

As a result of the foregoing, the court concludes that Gerald is estopped from arguing in this proceeding that the alumina was stolen, that Gerald ever obtained title or possession of it, and that the alumina was not seized by the Qing Dao police and sold to third parties. These were fully and fairly actually litigated. They were actually and necessarily decided by the tribunal because it needed to determine what happened to the alumina in order to render its decision that SST failed to deliver title or possession.

Although Gerald appears to claim that the issue of seizure of the Material and its auction was unfairly raised late in the LME proceedings, the court notes that Gerald itself raised the issue of the seizure and auction of the Material in the affidavit of its Executive Vice President and Board Member, Mr. Lerner, which was submitted to the tribunal (Docket No. 367, Ex. 7, Paragraph 13), and in its Closing Submission (Id., Ex. 8, Paragraph 78). Gerald cannot be heard to complain about the timing of the submissions, when it controlled their timing.

Finally, Gerald notes that the potential award in this proceeding of ten percent in expenses in addition to any recovery of insurance was not considered by the tribunal. While correct, this observation is insignificant if the court finds that there is no coverage obligation on the part of Lloyd's.

As more fully discussed in Section C, below, Gerald reaffirmed in its brief that "the issue before this Court is whether or not there was a covered loss by theft within the meaning of the insurance contract between the Plaintiffs and the Defendants." Defendants' Memorandum in Opposition to Motion, Docket No. 370, at 14-15. The theft at issue in the Arbitration related to exactly the same Material in this proceeding. Similarly, the title in question related to the Material in both matters, as did the seizure by local authorities and its sale. As a result, there is a clear identity as to these issues in the Arbitration and this proceeding, and the court holds that collateral estoppel applies to preclude relitigation of those issues.

B. Judicial Estoppel

The court next turns to the application of the doctrine of judicial estoppel to this case. The leading case on this topic is *Association Residence, Inc. v. Wall*, 298 Conn. 145, 169–71 (2010), which explains, "Because this case presents the first opportunity for this court or the Appellate Court to consider the doctrine of judicial estoppel as a matter of Connecticut law, we turn for

guidance to the significant body of federal case law addressing this doctrine, and note that '[j]udicial estoppel prevents a party in a legal proceeding from taking a position contrary to a position the party has taken in an earlier proceeding. . . . The courts invoke judicial estoppel as a means to preserve the sanctity of the oath or to protect judicial integrity by avoiding the risk of inconsistent results in two proceedings.' (Citations omitted; internal quotation marks omitted.) *Simon v. Safelite Glass Corp.*, 128 F.3d 68, 71 (2d Cir.1997); see also, e.g., *New Hampshire v. Maine*, 532 U.S. 742, 749–50, 121 S .Ct. 1808, 149 L.Ed.2d 968 (2001) (judicial estoppel 'protect [s] the integrity of the judicial process ... by prohibiting parties from deliberately changing positions according to the exigencies of the moment' [citation omitted; internal quotation marks omitted]).' 'Typically, judicial estoppel will apply if: 1) a party's later position is clearly inconsistent with its earlier position; 2) the party's former position has been adopted in some way by the court in the earlier proceeding; and 3) the party asserting the two positions would derive an unfair advantage against the party seeking estoppel. . . . We further limit judicial estoppel to situations where the risk of inconsistent results with its impact on judicial integrity is certain.' (Citation omitted; internal quotation marks omitted.) *DeRosa v. National Envelope Corp.*, 595 F.3d 99, 103 (2d Cir.2010). Thus, courts generally will not apply the doctrine if the first statement or omission 'was the result of a good faith mistake ... or an unintentional error.' (Citations omitted.) *Simon v. Safelite Glass Corp.*, supra, 128 F.3d at 73.

...

'Because the rule is intended to prevent improper use of judicial machinery . . . judicial estoppel is an equitable doctrine invoked by a court at its discretion . . ..' (Citation omitted; internal quotation marks omitted.) *New Hampshire v. Maine*, supra, 532 U.S. at 750, 121 S. Ct. 1808; see

also *Galin v. Internal Revenue Service*, supra, 563 F. Supp. 2d [332] at 339 [D. Conn. 2008] (same)."

In summary, in order to apply judicial estoppel, the court must find three things: 1) inconsistency between a party's current position and a prior position; 2) adoption of the prior position in some way by the decision-making body in the prior proceeding; and 3) the party adopting two positions would obtain an unfair advantage over the adverse party. These principles have been followed consistently in *Barton v. City of Norwalk*, 326 Conn. 139, 156 (2017); *Dept. of Transportation v. White Oak Corp.*, 319 Conn. 582, 612 (2015); *Dougan v. Dougan*, 301 Conn. 361, at 372–73 (2011).

The doctrine can be applied where the prior proceeding is an arbitration, and an inconsistent position is presented in a litigation. *Republic of Ecuador v. Connor*, 708 F.3d 651, 658 (5th Cir. 2013); *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F3d 274, 294 (5th Cir. 2004) (judicial estoppel applied to arguments from Swiss arbitration); *Carson v. United States*, 161 Fed. Cl. 696, 705–06 (2022) ("It is widely held that a position taken in arbitration can give rise to judicial estoppel. *Speroni S.p.A. v. Perceptron, Inc.*, 12 Fed. App'x 355, 358 n.1 (6th Cir. 2001) (unpublished) (citing *Lydon v. Bos. Sand & Gravel Co.*, 175 F.3d 6, 12–13 (1st Cir. 1999); *Admiral Ins. Co. v. Rushmore*, 70 F.3d 1277 (9th Cir. 1995) (unpublished); *Fewell v. Kozak*, No. 98 C 2924, 1999 WL 966447 (N.D. Ill. Oct. 19, 1999) (unpublished); *Am. Life Ins. Co. v. Parra*, 63 F. Supp. 2d 480 (D. Del. 1999); . . . *Arcor, Inc. v. Textron, Inc.*, No. 88 C 1188, 1990 WL 84548 (N.D. Ill. June 11, 1990); *In re Cohn–Phillips, Ltd.*, 193 B.R. 757 (Bkrtcy. E.D. Va. 1996)"); *Dapelo v. Banco Nacional de Mexico*, No. 91 CIV. 0093 (JSM), 1993 WL 159943, at *3–4 (S.D.N.Y. May 11, 1993) ("[T]he well-established doctrine, sometimes referred to as 'judicial estoppel', precludes a litigant from leading a court to find one way in one proceeding and

then, because his interests have changed, leading the court to find another way in a subsequent proceeding.")

1. Prior inconsistent positions

As demonstrated by the facts set forth above, Gerald took clearly inconsistent positions between the LME Arbitration and this proceeding. This dichotomy is demonstrated by Gerald's differing positions depending on which proceeding is involved: No title conveyed by vendor (former) v. adequate title conveyed (current); no theft of material because no delivery (former) v. theft of material (current); seizure and auction by Chinese authorities (former) v. no seizure or auction proven (current). In short, Gerald's positions in this case are clearly inconsistent with its positions in the Arbitration.

2. Adoption of prior positions

Gerald obtained an arbitration award in excess of $9 million, with the LME tribunal endorsing virtually all of Gerald's arguments. As set forth above, the tribunal found that no theft had occurred (Award, ¶ 177); that the alumina had been seized by local authorities and auctioned off to third parties (Id., ¶182); and that neither title nor possession had passed from the vendor to Gerald due to fraud in the warehouse receipts (¶ 299). Gerald's positions were clearly adopted by the Arbitration panel.

3. Unfair advantage

For years, Gerald ignored Lloyd's discovery request seeking information about pending legal proceedings relating to the Material or its insurance claim. (See n.2, above.) To deny application of judicial estoppel would condone Gerald's disregard of Connecticut's rules of civil practice. Indeed, it would condone counsel's misleading statement to the court regarding Gerald's

coverage position made with knowledge of the contrary LME decision. November 15, 2022 Hearing Transcript, supra, p. 48, l. 18-20. Further, it would be fundamentally unfair to allow Gerald to present its current theory to a jury when it has been rejected, at Gerald's urging, after an extensive proceeding before the LME tribunal, especially after its representation to the LME tribunal that it would not pursue the Connecticut case if it received a favorable response in London. Lerner Affidavit, supra, Docket No. 367, Paragraph 154. Finally, if the court were to adopt Gerald's inconsistent arguments here, the result would be completely inconsistent with the LME Award, making its impact on judicial integrity certain.

In its defense, Gerald asserts, among other things, that it would not obtain a double recovery if this court found coverage under Lloyd's' policies because any recovery against SST would be subject to subrogation. This is speculative and dependent on collection of the LME Award in China, which Gerald now advises is unlikely.[5] Finally, Gerald claims that its disclosure of the Connecticut proceedings to the London tribunal shows its good faith. However, this argument is the rhetorical equivalent of looking through the wrong end of a telescope: the important point is that no disclosure of the parallel, but contrary, proceedings was made to the Connecticut court. The proceedings of this court were easily discoverable on legal databases, and so it was likely the LME tribunal would have discovered them without any disclosure by Gerald. On the other hand, the LME proceedings were confidential and were not discoverable until Gerald disclosed them in this proceeding two days before commencement of the jury trial. As a result, the court is not persuaded by Gerald's arguments against application of judicial estoppel.

[5] See Defendants' Mem. in Opp., Docket No. 370 at 20, n.10: "The party against whom the arbitration Award has been rendered has since dissolved, rendering any recovery on the arbitration award (sic) uncertain at best. See Crawford Aff. ¶ 13."

The purpose of the doctrine of judicial estoppel is to "preserve the sanctity of the oath" and "to prevent improper use of judicial machinery." Both of these principles command application of the preclusive doctrine here. The court in its discretion does so, and finds Gerald should be estopped from asserting positions clearly inconsistent with its arguments that were adopted in obtaining the $9,090,000 award in the LME Arbitration.

C. Summary Judgment and Insurance Coverage

"Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." (Internal quotation marks omitted.) *Graham v. Commissioner of Transportation*, 330 Conn. 400, 414-15 (2018). "[T]he genuine issue aspect of summary judgment requires the parties to bring forward before trial evidentiary facts, or substantial evidence outside the pleadings, from which the material facts alleged in the pleadings can warrantably be inferred . . . . A material fact has been defined adequately and simply as a fact which will make a difference in the result of the case." (Citation omitted; internal quotation marks omitted.) *Buell Industries, Inc. v. Greater New York Mutual Ins. Co.*, 259 Conn. 527, 556 (2002). "[T]he party moving for summary judgment. . . . is required to support its motion with supporting documentation, including affidavits." (Internal quotation marks omitted.) *Romprey v. Safeco Ins. Co. of America*, 310 Conn. 304, 324 n.12 (2013). "The existence of the genuine issue of material fact must be demonstrated by counteraffidavits and concrete evidence. . . . If the affidavits and the other supporting documents are inadequate, then the court is justified in granting the summary judgment, assuming that the

movant has met his burden of proof." (Internal quotation marks omitted.) *Rivera v. CR Summer Hill, Ltd. Partnership*, 170 Conn. App. 70, 74 (2017).

Lloyd's motion contends that it is entitled to summary judgment because, in the absence of a showing of theft or misappropriation, Gerald cannot make a prima facie case for coverage under the Policies and their applicable grant of coverage.

The grant of coverage is found in Clause 11 of the Policies, entitled "Average Terms and Conditions." As set forth in the Fifth Special Defense, above, and found at Docket No. 211, Ex. A, Clause 11, the clause provides in pertinent part, "All goods and/or merchandise ON DECK, UNDER DECK or otherwise are insured: Against all risks of physical loss or damage from any external cause including mysterious disappearance and infidelity of Assured's employees." Defendants contend that, without theft or misappropriation, Gerald's claim does not involve "physical loss or damage from any external cause" because it was subject to fraudulent documents, seizure by the local authorities and sold to another party. The court agrees with Lloyd's on this point. As a result, Gerald has failed to demonstrate a prima facie case for coverage.

Lloyd's also maintains that coverage is defeated by the FC&S Exclusion, as set forth in the Special Defense, above, and Docket No. 211, Ex. A, Clause 32. In pertinent part, that exclusion provides "Notwithstanding anything herein contained to the contrary, this insurance is warranted free from: (a) capture, seizure, arrest, restraint, detainment, confiscation, preemption, requisition or nationalization, and the consequences thereof or any attempt thereat, whether in time of peace or war and whether lawful or otherwise; . . ." Based on the Award's finding that the alumina was seized by local authorities, the court agrees with Lloyd's claim that the FC&S exclusion applies and defeats coverage, even if the grant of coverage cited above applied.

In response, Gerald claims that issues of fact relating to treatment of the alumina in the bonded warehouse would defeat Lloyd's motion for summary judgment. Gerald also claims that summary judgment is improper when relating to issues of intent. Finally, it claims that lack of title is unimportant because an insurable interest can be demonstrated without it, especially when Gerald paid $9 million for the Material. With regard to the application of the FC&E exclusion, Gerald argues that it cannot apply because, if the doctrines of collateral estoppel and judicial estoppel do not apply, then it has raised issues of disputed fact as to the disposition of the Material. The court responds to these contentions, below.

1. No issues of disputed fact

Quite simply, because the court has found that collateral estoppel and judicial estoppel apply, there can be no disputed issues of fact with respect to what the LME tribunal found, i.e., absence of theft, no transfer of title or possession, forgery of the warehouse documents, seizure of the material by the local authorities, and sale of all the Material at auction.

2. Intent

Gerald does not specify any issues of intent relating to the merits of the case. The issue of intent is not mentioned in relevant Connecticut authority, except to observe that judicial estoppel should not be applied if the contrary statement or omission "was the result of a good faith mistake . . . or an unintentional error." *Simon v. Safelite Glass Corp.,* supra, 18 F.3d at 73. However, Gerald does not claim that any of its positions on the relevant issues are the result of either mistake or unintentional error; nor can the court find sua sponte any such mistake or error in connection with issues which were intensely litigated and extensively briefed.

3. Gerald has failed to show an insurable interest

While Gerald claims that title is not necessary to demonstrate an insurable interest, its argument is hampered by its position, as stated in its Memorandum in Opposition (Docket No. 370) at 14-15, that " [T]he issue before this Court is whether or not there was a covered loss by theft within the meaning of the insurance contract between the Plaintiffs and the Defendants." Even ignoring the obvious problem with this assertion, i.e., the absence of theft, and agreeing that title is not an absolute prerequisite to an insurable interest, the plaintiffs do not establish the basis of the alleged insurable interest. While they claim that the interest might be shown by transaction documents, that argument is foreclosed by the Award's finding that the documents were fraudulent. Docket No. 367, supra, Ex. 9, Paragraphs 163 and 299. The sparse authority Gerald cites for its proposition relates to situations where the claimant at least had possession of the material in question for a time. According to the LME Award, that was never the case here. Id., Paragraph 180 (finding factors causing lack of quiet possession). As a result, the identified findings of the Arbitration Award preclude any showing of an insurable interest.

4. Gerald has not demonstrated physical loss or damage from any external cause

While Gerald concedes that the Policy limits coverage to the risk of physical loss or damage to the Material, Gerald fails to demonstrate anything that would qualify as such. Gerald makes reference to dwindling piles of alumina in the bonded warehouse, but cannot escape the collateral and judicial estoppel effect of its assertion in its Closing Statement that "Gerald's case is that the entirety of the Material has been auctioned off" (Docket No. 367, Ex. 8, at 78), or the Third Award's finding that all the Material was seized by the local authorities and all of it was sold at auction. Id., Ex. 9, Paragraphs 177 and 182. These holdings effectively preclude Gerald's argument relating to the Policies' grant of coverage.

5. Lloyd's has satisfied its burden of showing application of the FC&S exclusion

Under Connecticut law, as recently stated by our Supreme Court in *Nationwide Mut. Ins. Co. v. Pasiak*, 346 Conn. 216, 228 (2023), the insurer has the burden of satisfying the court with a "high degree of certainty that the policy language clearly and unambiguously excludes the claim. (Internal quotation marks omitted.) *Connecticut Ins. Guaranty Assn. v. Drown*, 314 Conn. 161, 188, 101 A.3d 200 (2014)." Here, the LME tribunal found that the Material "had been seized and confiscated by the police. . . ." "[U]ltimately . . . the Material was sold at auction so that possession was no longer available" (Docket No. 367, Ex. 9, Paragraphs 180 and 182). This clearly and unambiguously conforms to the language of the FC&E exclusion from coverage for "(a) capture, seizure, arrest, restraint, detainment, confiscation, preemption, requisition or nationalization, and the consequences thereof" as cited in the Seventh Special Defense, above. See *International Multifoods Corp. v. Commercial Union Ins. Co.*, 309 F.3d 76, 90-91 (2d Cir. 2002) (FC&S clause defeated coverage under an all-risk marine policy where the ship and its cargo were "arrested" at the port of St. Petersburg incident to a criminal investigation, and the cargo was appropriated by Russian authorities and never recovered). Based on the facts and the law, the court finds that Lloyd's has satisfactorily shown that the FC&S exclusion bars Gerald's claim under the Policies.

CONCLUSION

For the reasons set forth above, the court grants the defendants' motion for summary judgment on the issues of collateral estoppel and judicial estoppel, and dismisses the plaintiffs' second amended complaint in its entirety. Pursuant to the court's order at Docket No. 338.01,

Paragraph 6, the defendants may submit their motion for sanctions with a supporting affidavit within thirty days of the entry hereof.

Hon. Charles T. Lee, JTR

Decision entered in accordance with the foregoing
All counsel & self represented parties of record
Notified, JDNO notice sent 8-10-23
Scott Ale
Asst. Clerk