No. 13-1338

IN THE

# Supreme Court of the United States

AMERICAN PETROLEUM AND TRANSPORT, INC.,

*Petitioner,*

*v.*

CITY OF NEW YORK,
DEPARTMENT OF TRANSPORTATION OF THE CITY OF NEW YORK,

*Respondents.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit*

## PETITION FOR A WRIT OF CERTIORARI

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May 1, 2014

## QUESTION PRESENTED

Whether, under maritime law, an owner of a vessel may be awarded damages for economic loss due to negligence in the absence of physical damage to its property.

## LIST OF PARTIES

All parties to the proceeding in the court whose judgment is sought to be reviewed are listed in the caption.

The District Court ruled that the Department of Transportation of the City of New York is not a separate suable entity from the City of New York, but did not order the caption amended. Likewise, the Court of Appeals recognized the District Court's ruling on that point, but did not order the caption amended. Accordingly, the caption as presented to this Court names both entities as Respondents.

Petitioner is alternatively named as AMERICAN PETROLEUM & TRANSPORT, INC. (i.e., with "&" replacing "and") in the captions contained in the Appendix hereto in order to avoid repeated line carryover.

## CORPORATE DISCLOSURE STATEMENT

American Petroleum and Transport, Inc. has no parent or publicly held company owning 10% or more of its stock.

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## TABLE OF AUTHORITIES

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## OPINIONS BELOW

The opinion of the Court of Appeals is reported at 737 F.3d 185, 2014 A.M.C. 17 (2d Cir. 2013), and is reproduced in the appendix hereto ("App.") at 1a. The opinion and order of the District Court is reported at 902 F. Supp. 2d 466, 2012 A.M.C. 2892 (S.D.N.Y. 2012), and is reproduced at App. 28a.

## STATEMENT OF JURISDICTION

The judgment of the court below was entered on December 6, 2013. On February 28, 2014, Justice Ginsburg extended the time for filing this Petition until May 5, 2014 (13A891). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Article III, Section 2: "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction . . . ."

United States Code, Chapter 33, Section 494. App. 38a.

## STATEMENT OF THE CASE

Fourscore and seven years ago, Justice Holmes of this Court delivered his opinion in *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927). That decision, driving a widening path through the

federal common law of the admiralty, in the ensuing decades brought forth a new rule of maritime law, often but not always applied (but usually quite controversial), to the effect that the owner of a vessel may not be awarded damages for economic loss due to negligence in the absence of some physical damage to its property.

It was explicitly acknowledged by both of the courts below that *Robins* itself does not stand for the rule as stated above. App. 2a ("*Robins Dry Dock* has been overread to establish a rule barring damages for economic loss in the absence of an owner's property damage[.]"); App. 8a-9a ("Nowhere in the text of *Robins Dry Dock* is there a broad statement that economic losses for an unintentional maritime tort are not recoverable in the absence of physical damage to the claimant's property."); App. 32a ("American is quite correct that, on its facts, *Robins Dry Dock* itself does not address the situation presented here: a claim for economic damages by a vessel's owner[.]"). Nevertheless, the rule has gained sufficient traction as to have been applied to Petitioner's detriment notwithstanding the foregoing acknowledgments that it is nowhere to be found in *Robins* itself.[1]

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[1] The rule thus "amounts to a sort of intellectual adverse possession." *Tyler Pipe Indus. v. Washington Dep't of Revenue*, 483 U.S. 232, 265 (1987) (Scalia, J., concurring in part and dissenting in part) (describing established precedent that conflicts with the Constitution as such). Here, the rule in maritime law that prohibits recovery absent physical damage in any and all unintentional tort cases has been created wholly

The material facts are as follows: Petitioner, which owns and operates vessels in its business of transport and sale of petroleum products, suffered economic losses because its tug and barge were delayed for two and one-half days as a direct result of the failure of a drawbridge owned and operated by Respondents to open. The drawbridge had earlier opened to allow the tug and barge to enter the navigational "dead end" of the Eastchester Creek (also called the Hutchinson River) in order to access a terminal there, but later that same day, when Petitioner's vessels were ready to depart, a mechanical malfunction—which Petitioner alleges resulted from Respondents' negligence—unexpectedly (to Petitioner) prevented the same drawbridge from opening. *See* App. 2a-3a, 25a, 29a-30a, 41a-44a. Although Petitioner's tug and barge were physically *confined* in the waterway (which resulted in lost revenue, etc., even as the expenses of operating the vessels continued, *see* App. 43a), neither the tug nor the barge were physically *damaged*.

As the court below recognized, "the drawbridge operator in the pending case could surely have expected that its negligent delay in opening the bridge for a vessel not chartered would likely cause economic losses." App. 13a.

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by the lower federal courts without any firm foundation in this Court's decision in *Robins* itself. That it has by now become firmly enough entrenched to have been applied by the courts below to deny recovery even while recognizing that deficit suggests a striking parallel to the *Tyler Pipe* line of comparison.

Seeking to recover those economic losses, on May 8, 2012, Petitioner sued Respondents in federal court,[2] alleging causes of action for common law negligence and for violation of 33 U.S.C. § 494, which requires that a drawbridge over a navigable waterway "be opened promptly by the persons owning or operating such bridge upon reasonable signal for the passage of boats and other water craft." On July 2, 2012, Respondents moved to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, which motion was granted on October 10, 2012. App. 30a, 37a, 39a. The Second Circuit, having already explicitly acknowledged that "*Robins Dry Dock* has been overread to establish" what it called the "broad rule," App. 2a, 9a, nevertheless affirmed the dismissal and chose to "simply accept the broad rule, and [to] do so for four main reasons," App. 24a, namely:

(1) that "the rule has been accepted by a clear consensus of courts throughout the country, including many district courts within our Circuit," *id.*;[3]

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[2] Petitioner notes, for purposes of this Court's Rule 14.1(g)(ii), that the District Court had subject matter jurisdiction pursuant to the provisions of 28 U.S.C. § 1333 over what was presented as an admiralty and maritime claim within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure.

[3] But "accept[ance]" of a rule differs from the application of it, much as dicta differs from a holding. There appears to be no reported case other than this one in which the rule has been applied to bar recovery where an owner's vessels were physically trapped in a waterway as a foreseeable consequence of a

(2) that "Congress, possessing full authority to legislate on maritime matters . . . has neither altered the broad rule nor made any serious attempts to do so," *id.* (citation omitted);[4]

(3) that "the rule has the virtue of certainty," *id.*; and

(4) that "the context in which the broad rule primarily applies – financial losses incurred in the course of commercial shipping – is marked by the well recognized availability of first-party insurance to cover such losses and the frequent purchase of such insurance." *Id.* at 24a-25a.

Each of the foregoing four putative justifications was proffered in support of a rule that may cause substantial injustice in an area of the law that is constitutionally uniquely federal, and each accordingly invites this Court's review. It is respectfully submitted that, taken together, they demand it.

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drawbridge's failure to open to let them out after having opened earlier the same day to let them in. Further, a "consensus of courts" is not a consensus of judges. Reasonable judicial minds have differed sharply on the validity of the broad rule, as is amply illustrated by, *inter alia*, the differing opinions in *State of La. ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019, 1985 A.M.C. 1521 (5th Cir. 1985) ("*Guste*"), *q.v.*

[4] In a footnote, App. 25 n.15, the court below recognized Fifth Circuit Judge Rubin's advance reply to that argument, written in the conclusion of his dissent in *Guste*. *See also Exxon Shipping Co. v. Baker*, 554 U.S. 471, 508 n.21 (2008).

## REASONS FOR GRANTING THE PETITION

As the court below noted, App. 10a, this Court, in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986), had expressly left open the question of whether a firm rule prohibiting recovery for unintentional torts in the absence of physical damage is part of the general maritime law:

> We do not reach the issue whether a tort cause of action can ever be stated in admiralty when the only damages sought are economic. Cf. *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931). But see *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927).

*East River*, 476 U.S. at 871 n.6.

Now, nearly three decades later, that question still remains unresolved. This case presents an ideal vehicle through which it may be addressed both definitively and enlighteningly. The facts here complement those of *Robins* itself perfectly: whereas the *Robins* plaintiff was a time charterer of the vessel in question, here the plaintiff (Petitioner) is the owner.[5] Whereas in *Robins* there was physical damage to the ship's propeller, here there was no physical damage to either of the vessels. Moreover, in this case, there

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[5] Petitioner was the registered owner of the barge and the owner *pro hac vice* of the tug. *See* App. 29a n.3.

is a complete absence of any factual basis for a justification of the rule that would derive from a desire to limit recovery where the causal chain of secondary effects is far-reaching. Here, Petitioner's vessels were physically present at the very *locus* of the tort, and were directly – not secondarily – affected by the failure of the drawbridge to open. Indeed, they were physically confined although not physically damaged due to that failure, and the only damages, which were eminently foreseeable,[6] were economic. This case thus presents a straightforward, well-developed opportunity for this Court to examine the long-unanswered question of "whether a tort cause of action can *ever* be stated in admiralty when the only damages sought are economic." *East River*, 476 U.S. at 871 n.6 (emphasis added).

As this Court has recently stated (citing a different "Robins Dry Dock" case decided two years before *Robins Dry Dock & Repair Co. v. Flint*), "[t]he common law traditionally did not compensate purely economic harms, unaccompanied by injury to person or property." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 508 n.21 (2008) (citing *Robins Dry Dock & Repair Co. v. Dahl*, 266 U.S. 449 (1925)). But, in that same footnote, this Court concluded: "Where there is a need for a new remedial maritime rule, past precedent argues for our setting a judicially derived

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[6] As the court below recognized, "the drawbridge operator. . . could surely have expected that its negligent delay in opening the bridge . . . would likely cause economic losses." App. 13a. (A more complete quotation appears at 3, *supra*.)

standard, subject of course to congressional revision." *Id.* (citing *United States v. Reliable Transfer Co.*, 421 U.S. 397, 409 (1975)).

Today, the proper "judicially derived standard" to be applied in maritime tort cases may be one that would, at least in appropriate situations, compensate economic losses in the absence of physical damage. By modifying the old common-law rule and applying more modern considerations like foreseeability and proximate cause, unjust results (as have undeniably occurred here) could be prevented. As the court below recognized, arguments for the application of those principles in maritime tort law have been advanced by judges in both the Second Circuit (App. 18a-21a, discussing *Kinsman I* and *Kinsman II*) and the Fifth Circuit (App. 7a n.4, discussing Judge Wisdom's dissent in *Guste*). Nor have those well-reasoned arguments been laid to rest by any "clear consensus" to which this Court owes recognition.

The court below "simply accept[ed] the broad rule" based in part on the argument that "Congress, possessing full authority to legislate on maritime matters . . . has neither altered the broad rule nor made any serious attempts to do so," App. 24a. (citation omitted). But, as this Court recognized in *Exxon*, "we may not slough off our responsibilities for common law remedies because Congress has not made a first move," 554 U.S. at 508 n.21 (citing and quoting from *Rapanos v. United States*, 547 U.S. 715, 749 (2006)).

Turning to the third proffered justification, that "the rule has the virtue of certainty," App. 24a, the efficacy of this virtue is significantly offset by the reality that numerous exceptions to the harsh bright-line rule have been made—and that new ones will likely continue to be created in the interest of justice to the extent that the rule, valid or not, remains a part of the maritime legal landscape. Indeed, the court below explicitly recognized that the rule "is permeated with numerous exceptions," App. 14a (citing *Union Oil Co. v. Oppen*, 501 F.2d 558, 565-68 & n.9 (9th Cir. 1974), for a cataloguing of several already in existence when that case was decided). But, in response to Petitioner's request for a new type of exception under the facts here, it concluded:

> Although the argument for a fact-specific exception to *Robins Dry Dock* gives us pause, we ultimately conclude that the case for such an exception on the particular facts here is outweighed by the benefits of adhering to the general rule that denies recovery for economic losses from unintentional maritime torts in the absence of physical damage.

App. 26a-27a.

Against the foregoing tripartite backdrop of proffered justifications (consensus, congressional inaction, and certainty), it is worthwhile to consider the closing paragraphs of Judge Rubin's dissent in

*Guste*, which remain relevant in a criticism of any or all of the three:

> I agree . . . that the subject calls for legislative consideration and that the necessary application of principle accompanied by suitable line drawing can be better accomplished by statute. However, I would not await such action, for, in default of it, every time we reject a claim we act as decisively and finally as if we had allowed it – as definitively as if we were adhering to a statutory command not to allow damages when no such command has been given. The constitutional grant of jurisdiction to federal courts over cases and controversies not only empowers but requires us to review the constitutionality of legislation, as the Court held in *Marbury v. Madison* a century and a half ago. It equally empowers and requires us to decide other cases within our jurisdiction whether or not Congress has provided a rule of decision and even when we think Congress should have acted and has not done so.
>
> *Robins* should not be extended beyond its actual holding and should not be applied in cases like this, for the result is a denial of recompense to innocent persons who have suffered a

> real injury as a result of someone else's fault. We should not flinch from redressing injury because Congress has been indifferent to the problem.

*Guste*, 752 F.2d at 1053 (Rubin, J., with whom Wisdom, Politz, and Tate, JJ, join, dissenting) (footnote and citation omitted).

Importantly, *Guste* lacked a congressional element that is present here: Congress has already set policy in a subject area relevant to the resolution of this case, namely, that a drawbridge should not "unreasonably obstruct the free navigation of the waters over which it is constructed," and, likewise, that it should be capable of being "opened promptly by the persons owning or operating such bridge upon reasonable signal for the passage of boats and other water craft." 33 U.S.C. § 494. App. 38a-39a. These statements of policy imply that, before drawbridge owners are rewarded with immunity for their failure to maintain their equipment in reliably functioning condition, serious scrutiny should be given to any rule admittedly not derived from *Robins* itself that purports to relieve them of liability to vessel owners directly and foreseeably harmed by that failure. Arguably, the general maritime law ought never take a path divergent from clear congressional intent. Such is present here, and on that basis a strong argument can be made—and indeed was made below—that the grounds for making an exception under these facts far outweigh any benefits of adhering to the "general rule." As noted, the court

below found the reverse to be the case, App. 26a-27a. Significantly, in the specific context of the statutory provision, it wrote:

> American seeks to draw support for its position from 33 U.S.C. § 494, which imposes duties upon bridge owners and operators. Recognizing that the statute does not create an implied private right of action, American nonetheless contends that it states a federal policy that we should enlist to narrow the broad rule of *Robins Dry Dock*. We are not persuaded. Accepting American's suggestion would effectively adopt a statutory private right of action in the guise of a tort rule.

App. 27a n.19. It is respectfully submitted that, by placing any and all consideration of the statute under the "private right of action" rubric, the court below avoided a far more jurisprudentially sound alternative: that of balancing the legislated policy that a drawbridge should not "unreasonably obstruct the free navigation of the waters over which it is constructed," etc., *together with* those other considerations that the court below *did* credit (*e.g.*, that Petitioner suffered a foreseeable harm), against the "benefits of adhering to the general [but not firmly grounded in *Robins*] rule that denies recovery for economic losses from unintentional maritime torts in the absence of physical damage," App. 26a-27a. Engaging in such an analysis likely would have

tipped the scales in the other direction in deciding whether to grant Petitioner's "earnest plea" for an exception to (or refutation of) the "rule," *see* App. 26a.

It is respectfully submitted that this Court should consider engaging in just such an analysis.

Turning to address the final justification put forth by the court below in putative support of the rule, "the well recognized availability of first-party insurance to cover such losses and the frequent purchase of such insurance," App. 24a-25a, it can be countered that none of the three traditional forms of marine insurance ((1) hull insurance, (2) cargo insurance, and (3) protection and indemnity ("P & I") insurance, *see, e.g.*, Shoenbaum, Admiralty and Maritime Law, § 18-1 (1987)) would have covered the losses complained of here. Certainly Petitioner, a vessel owner/operator at the time small enough to have been running its business from an office in the home of its chief officer (*see* App. 40a, ¶ 1 redaction), had no such coverage for the roughly $29,000 it lost in the aggregate for previously contracted work, crew costs, tug hire, generator fuel, and premiums for the types of insurance that it did carry, *see* App. 43a.

Carriage-of-coverage questions aside, the court below erred in assuming that the availability of insurance would necessarily counter the unfairness of its application of the "broad rule," for the court's assumption ignores the alternate consequences of, on the one hand, "denial of recompense to [uninsured] innocent persons who have suffered a real injury as

a result of someone else's fault," *Guste*, 752 F.2d at 1053 (Rubin, J., dissenting) (quoted at 10-11, *supra*), or (where the victim is insured for the loss) denial of subrogation rights to its insurer, on the other.

As one commentator has written: "The bright line interpretation of *Robins* is arbitrary, but it is easily applied and, in the author's opinion, *probably* produces just results in *most* maritime cases." David R. Owen, "Recovery for Economic Loss Under U.S. Maritime Law: Sixty Years Under *Robins Dry Dock*," 18 J. Mar. Law & Com. 157, 164 (1987) (emphasis added). But whether "probably" and "most" are adequate to ensure justice is a question that this Court, having the final judicial word in "Cases of admiralty and maritime Jurisdiction," rightly ought to decide.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 1, 2014

**Opinion of the United States Court of Appeals for the Second Circuit**

AMERICAN PETROLEUM & TRANSPORT, INC.,

Plaintiff Appellant,

v.

CITY OF NEW YORK, DEPARTMENT OF TRANSPORTATION OF THE CITY OF NEW YORK,

Defendants-Appellees.

Heard: August 27, 2013.
Decided: December 6, 2013.

Before: NEWMAN, RAGGI, and LYNCH, Circuit Judges.

JON O. NEWMAN, Circuit Judge.

The issue on this appeal is whether, under maritime law, an owner of a vessel may be awarded damages for economic loss due to negligence in the absence of physical damage to its property. For many years a number of courts have derived from the Supreme Court's opinion in *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927), a rule prohibiting such damages. Plaintiff-Appellant American Petroleum & Transport, Inc. ("American") appeals from the October 11, 2012, judgment of the United States District Court for the Southern District of New York (Paul A. Engelmayer, District Judge),

granting a motion to dismiss by Defendants-Appellees City of New York and the New York Department of Transportation ("City"). *See American Petroleum and Transport, Inc. v. City of New York*, 902 F. Supp. 2d 466 (S.D.N.Y. 2012). Although we conclude that *Robins Dry Dock* has been overread to establish a rule barring damages for economic loss in the absence of an owner's property damage, we believe the rule has been so consistently applied in admiralty that it should continue to be applied unless and until altered by Congress or the Supreme Court.

## Background

American is a corporation in the business of transporting petroleum products by water. At all relevant times, American was the registered owner of a barge, the *John Blanche*, and the demise charterer[1] of a tug, the *Caspian Sea.* The City operates a drawbridge, the Pelham Parkway Bridge, over the Hutchinson River. In March 2011, the tug and the barge, after passing upstream on the Hutchinson River under the opened bridge, requested the City to open the bridge for the downstream voyage. Due to a mechanical malfunction, which American alleges was the result

[1] In a demise or bareboat charter, the charterer is owner *pro hac vice* of the vessel, and the charterer is treated as the owner of the vessel with a sufficient property interest to recover lost profits. The demise charter is tantamount to, though just short of, an outright transfer of ownership. *Guzman v. Pichirilo*, 369 U.S. 698, 700 (1962).

of negligence, the City did not open the bridge, delaying the tug and the barge for approximately two and one-half days.

As a consequence of the delay, American alleges that it suffered $28,828 in economic losses. American acknowledges that it did not suffer any property damage.

In May 2012, American brought claims against the City for common law negligence and for violation of 33 U.S.C. § 494, which requires that a drawbridge over navigable water be opened promptly by the persons owning or operating such bridge upon reasonable signal for the passage of boats and other water craft.[2] In October 2012, the District Court, relying on *Robins Dry Dock v. Flint*, 275 U.S. 303 (1927), granted the City's motion to dismiss under Fed. R. Civ. P. 12(b)(6). *See American Petroleum*, 902 F. Supp. 2d at 468-71. The Court stated:

> The issue presented by the City's motion to dismiss is whether the "*Robins Dry Dock* rule," as the case law has come to refer to it, precludes American from recovery here. American is quite correct that, on its facts, *Robins Dry Dock* itself does not

[2] The District Court ruled that the City's Department of Transportation was an improper defendant, and American does not challenge that ruling on appeal. *See American Petroleum*, 902 F. Supp. 2d at 467 n.1.

> address the situation here: a claim for economic damages by a vessel's owner (as opposed to a time charterer). However, since that decision, the courts in this Circuit have extracted from it a broader prohibition with respect to maritime tort suits that is fatal to American's negligence claim here.
>
> Specifically, as the Second Circuit has stated, the *Robins Dry Dock* rule "effectively bars recovery for economic losses caused by an unintentional maritime tort absent physical damage to property in which the victim has a proprietary interest."

902 F. Supp. 2d at 468-69 (quoting *G & G Steel, Inc. v. Sea Wolf Marine Transportation, LLC*, 380 Fed. Appx. 103, 104 (2d Cir. 2010) (summary order), and citing *Gas Natural SDG S.A. v. United States*, No. 07-2129-CV, 2008 WL 4643944, at *1 (2d Cir. Oct. 21, 2008) (summary order)). Although both *G & G Steel* and *Gas Natural* were non-precedential summary orders, *see* 2d Cir. R. 32.1.1(a), we had unequivocally stated in the latter decision, "[T]here exists a bright line rule barring recovery for *economic losses* caused by an unintentional maritime tort absent physical damage to property in which the victim has a *proprietary interest*." *Gas Natural*, 2008 WL 4643944, at *1 (internal quotation marks and citations omitted) (emphases in original).

The District Court also concluded that most Circuits have held that 33 U.S.C. § 494 does not give rise to an implied private right of action. *American Petroleum*, 902 F. Supp. 2d at 470.

## Discussion

In *Robins Dry Dock*, a dry docking company damaged a propeller on a steamship, rendering the vessel unusable for two weeks. The steamship's time charterer sued the dry dock company to recover its lost profits resulting from the delay. The Supreme Court denied recovery. *See Robins Dry Dock*, 275 U.S. at 308-10. The Court first ruled that the time charterer could not prevail as a third-party beneficiary of the contract between the vessel owner and the dry docking company. *See id.* at 307-08. Turning to the time charterer's tort claim, the Court first stated generally that whether the dry dock company repaired the owner's vessel "promptly or with negligent delay was the business of the owners and of nobody else," and more specifically that "[t]he injury to the propeller was no wrong to the [time charterer] but only to those to whom it belonged." *Id.* at 308. The Court next considered what effect, if any, the charterparty had on the time charterer's claim: "But as there was a tortious damage to a chattel [the propeller of the owner's vessel] it is sought to connect the claim of the [time charterer] with that in some way." *Id.* The Court observed that the time charterer's loss "arose only through their contract with the owners," *id.*, and then rejected the time charterer's claim in the passage most often

quoted from *Robins Dry Dock*:

> [A]s a general rule, at least, a tort to the person or property of one man does not make the tort-feasor liable to another merely because the injured person was under a contract with that other unknown to the doer of the wrong. The law does not spread its protection so far.

*Id.* at 309 (internal citation omitted).[3]

*Robins Dry Dock* made two explicit rulings. The first ruling – that the time charterer was not the third-party beneficiary of the contract between the vessel owner and the drydocker – has no relevance to the pending case. The drawbridge operator has no contract with anyone. The second ruling was that the fact that the time charterer had a contract with the vessel owner whose property had been damaged by an unintentional tort gave the time charterer no right to recovery of its economic losses. This ruling, which we will call the "narrow ruling" of *Robins Dry Dock*, also seems to have no relevance to the pending

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[3] The Court also rejected the theory, which our Court had used to uphold the time charterer's claim, *see Flint v. Robins Dry Dock & Repair Co.*, 13 F.2d 3, 6 (2d Cir. 1926), that the time charterer should receive an appropriate portion of the damages that the drydocker paid to the owner for loss of use because the owner could have sued on the time charterer's behalf. *See Robins Dry Dock*, 275 U.S. at 309-10.

case: American Petroleum is not grounding its claim for economic losses on a contract between the negligent operator of the drawbridge and some other party whose property was damaged. Therefore, if American Petroleum's claim is barred, as the District Court held, by a *Robins Dry Dock* "rule" that economic losses cannot be recovered for an unintentional maritime tort in the absence of physical damage to the claimant's property, it must be because either there is some additional broader ruling implicit in that decision, or the narrow ruling has been extended, whether justifiably or not, into a broader ruling.[4]

Justice Holmes's text, however, gives no hint of either an implicit broader ruling or a basis for an extended broader ruling. He stated the *Robins Dry Dock* rule in narrow terms, explicitly declining to permit recovery just because the claimant has a contract with a party damaged by the tort. "[A]s a general rule, at least, a tort to the person or property of one man does not make the tort-feasor liable to another merely because the injured person was under a contract with that other unknown to the doer of the wrong." *Robins Dry Dock*, 275 U.S. at 309. Moreover,

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[4] Dissenting in *State of Louisiana ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019 (5th Cir. 1985), Judge Wisdom contended that the narrow rule of *Robins Dry Dock* "has been expanded now to bar recovery by plaintiffs who would be allowed to recover if judged under conventional principles of foreseeability and proximate cause." *Id.* at 1039 (Wisdom, J., with whom Rubin, Politz, Tate, and Johnson, JJ, join, dissenting) (footnote omitted).

the three cases Justice Holmes cited as a "good statement," *id*., of the "general rule" all involved a claimant seeking recovery because of its contract with the tort victim. *See The Federal No. 2*, 21 F.2d 313 (2d Cir. 1927)[5]; *Elliott Steam Tug Co. v. Shipping Controller*, 1 K.B. 127 (1921); *Byrd v. English*, 117 Ga. 191, 43 S.E. 419 (1903).[6] Nowhere in the text of

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[5] *The Federal No. 2* was "abandoned" by our Circuit in *Black v. Red Star Towing & Transportation Co.*, 860 F.2d 30, 34 (2d Cir. 1988).

[6] In *The Federal No. 2*, a seaman was injured due to the negligence of a tug whose towing hawser swept the deck of the barge on which he was working. The seaman could have sued for negligence but did not. The owner of the barge was required by its contract with the seaman to provide maintenance and cure, and did so. The barge owner then made a claim against the tug to recover the cost of providing maintenance and cure, *i.e*., the hospital expenses. We ruled against recovery. After pointing out the barge owner had no right of subrogation, we said that "damage suffered by one whose interest in the party or thing is contractual is too remote for recovery, unless the wrong is done with intent to affect the contractual relations." 21 F.2d at 314. Interestingly, we cited our decision in *Flint v. Robins Dry Dock*, 13 F.2d 3 (2d Cir.1926), before it was reversed by the Supreme Court.

In *Elliott Steam Tug*, a time charterer sued the agency that had requisitioned the vessel, seeking lost profits. In dictum, before the Court upheld a statutory indemnity claim, the Court said that the plaintiff had no claim at common law for injury to its contractual rights. *See* 1 K.B. at 140.

In *Byrd*, a printing company lost power for several hours during which it lost profits it could have earned. The loss of power resulted from the excavation of a nearby site, which

*Robins Dry Dock* is there a broad statement that economic losses for an unintentional maritime tort are not recoverable in the absence of physical damage to the claimant's property.

A leading treatise on maritime law has candidly acknowledged that the broad rule is not to be found in *Robins Dry Dock*. Referring to the broad rule, Professor Schoenbaum states, "This is the interpretation *accorded to* the case of *Robins Dry Dock and Repair Co. v. Flint*, 275 U.S. 303, 48 S.Ct. 134 (1927)." 1 Thomas J. Schoenbaum, Admiralty and Maritime Law § 5-16, at 317 n.3 (5th ed. 2011) (emphasis added), and also acknowledges that the "Robins Dry Dock holding was later *transformed* into a bright-line rule against liability for pure economic loss that has been consistently applied in admiralty in a wide variety of contexts . . . ." 2 Schoenbaum, supra § 18-4, at 319 (emphasis added).

Since *Robins Dry Dock*, the Supreme Court has cited it three times, all without illuminating its meaning. In *Aktieselskabet Cuzco v. The Sucarseco*, 294 U.S. 394, 404 (1935), the Court only distinguished the narrow contract rule of *Robins Dry Dock*.

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caused a quantity of earth to fall on underground conduits through which an electric company's power lines ran. The plaintiff sued the company doing the excavating, relying on the plaintiff's contract with the company that supplied electric power. The Court rejected the claim, ruling that the wrong was done to the power company, and that the plaintiff had only a claim against the power company, not the excavating company. *See* 43 S.E. at 420-21.

In *Caldarola v. Eckert*, 332 U.S. 155, 158 (1947), it simply noted that no claim was made under the narrow contract rule of *Robins Dry Dock*. The third case, *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986), was a products liability ruling, made under maritime law. The Court's narrow holding was that "a manufacturer in a commercial relationship has no duty under either a negligence or strict products-liability theory to prevent a product from injuring itself." *Id.* at 871. Notably, the Court explicitly left open the question whether a broad rule is to be derived from *Robins Dry Dock*:

> We do not reach the issue whether a tort cause of action can ever be stated in admiralty when the only damages sought are economic. Cf. *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931). But see *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927).

*East River*, 476 U.S. at 871 n.6.

Two opinions of Courts of Appeals have thoughtfully endeavored to explain why the broad rule attributed to *Robins Dry Dock* exists: *State of Louisiana ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019, 1022 (5th Cir. 1985) (in banc), and *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50 (1st Cir. 1985).

The argument that such a broad rule is

implicit in the narrow rule that Justice Holmes stated was expressed by Judge Higginbotham for the 10-5 majority of the in banc court in *Guste*. *Guste* involved numerous claims for economic losses suffered as a result of the temporary closing of the Mississippi River Gulf outlet because of chemicals that had spilled into the outlet after a collision of two vessels. None of the plaintiffs claimed to have had a contract with either of the vessels involved in the collision.[7] After noting the plaintiffs' attempt to limit *Robins Dry Dock* to claimants relying on a contract with the victim of a maritime tort, Judge Higginbotham seemed to find the broader rule implicit in what he terms Justice Holmes's "delphic" opinion. *Guste*, 752 F.2d at 1022. Judge Higginbotham stated:

> If a time charterer's relationship to its negligently injured vessel is too remote, other claimants without even the connection of a contract are even more remote.

752 F.2d at 1023.

For Judge Higginbotham, the rationale animating the narrow rule of *Robins Dry Dock* was the avoidance of recovery for losses thought to be too remote from a defendant's negligence, from which he

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[7] The opinion does not indicate which vessel was considered the maritime tort victim, perhaps because negligence was apportioned between the two colliding vessels.

reasoned that claimants without a contract to a party suffering a tort are more remote than claimants with a contract. Although we agree that remoteness of losses is always relevant to tort recoveries, a concept usually expressed in terms of the extent of the tortfeasor's duty, *see Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928), or foreseeability or proximate cause, *see In re Kinsman Transit Co.* ("*Kinsman II*"), 388 F.2d 821, 823 (2d Cir. 1968),[8] we are not as sure as Judge Higginbotham that the losses of a claimant without a contract with a tort victim are inevitably more remote from the tort than the losses of those with such a contract.[9] Even if the

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[8] "In the final analysis, the circumlocution whether posed in terms of 'foreseeability,' 'duty,' 'proximate cause,' 'remoteness,' etc. seems unavoidable." *Kinsman II*, 388 F.2d at 825.

[9] In dissent, Judge Wisdom has endeavored to refute Judge Higginbotham's argument that a claim for economic losses in the absence of a contract with the tort victim is inevitably less meritorious than a claim invoking such a contract:

> This argument would be sound in instances where the plaintiff suffered no loss *but for a contract* with the injured party. We would measure a plaintiff's connection to the tortfeasor by the only line connecting them, the contract, and disallow the claim under *Robins* [*Dry Dock*]. In the instant case [involving an economic loss resulting from a collision of two ships producing an oil spell that blocked a Mississippi outlet to all shipping], however, some of the plaintiffs suffered damages whether

drydocker in *Robins Dry Dock* could not reasonably foresee that the vessel owner would charter his vessel, which strikes us as an unlikely supposition, the drawbridge operator in the pending case could surely have expected that its negligent delay in opening the bridge for a vessel not chartered would likely cause economic losses.

Judge Higginbotham also explained *Robins Dry Dock* as based on "a principle . . . which refused recovery for negligent interference with 'contractual rights,'" *Guste*, 752 F.2d at 1022, and on what he called the "well established" principle "that there could be no recovery for economic loss absent physical injury to a proprietary interest," *id.* at 1023. Although this principle has been articulated by distinguished torts commentators, *see, e.g.*, 4 Fowler V. Harper, Fleming James, Jr., Oscar S. Gray, *The Law of Torts* § 25.18A, at 619 (2d ed. 1986), these same commentators have noted that "[c]ourts are,

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> or not they had a contractual connection with a party physically injured by the tortfeasor. These plaintiffs do not need to rely on a contract to link them to the tort: The collision proximately caused their losses, and those losses were foreseeable. These plaintiffs are therefore freed from the *Robins* [*Dry Dock*] rule concerning the recovery of those who suffer economic loss because of an injury to a party with whom they have contracted.

*Guste*, 752 F.2d at 1040 (Wisdom, J., with whom Rubin, Politz, Tate, and Johnson, JJ, join, dissenting).

however, beginning to disclaim the existence of any such 'absolute rule,' and to refer instead to the applicability of pragmatic considerations," *id.* at 619-20 n.1, and have more recently observed that the "rule" is permeated with numerous exceptions, *see id.* at 326 n. 9a (cumulative supp. 2005). Several of these exceptions are catalogued in *Union Oil Co. v. Oppen*, 501 F.2d 558, 565-68 & n.9 (9th Cir. 1974).

*Barber Lines*, like *Guste*, also involved an oil spill caused by a ship's negligence, this one causing economic losses to a vessel delayed from docking at its assigned berth. Unlike Judge Higginbotham, however, then-Judge Breyer did not contend that the rationale of *Robins Dry Dock*, which he called "[t]he leading 'pure financial injury' case," 764 F.2d at 51, was the remoteness of the claimed economic losses. On the contrary, he "assume[d] that the [financial] injury was foreseeable." *Id.* Nor did he express the view that the absence of a contract between the claimant and a tort victim made the claim more remote than that of a claimant with a contract. Indeed, he stated that "[t]he authority that Justice Holmes says contains a 'good statement' of the legal principle does not, however, turn so much on the existence of a formal contract as on the *192 existence of limitations upon tort recovery for financial injury." *Id.* (citing *Elliott Steam* and *Byrd*).[10]

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[10] In a somewhat perplexing attempt to show that the circumstances of the claim in *Barber Lines* were not significantly different than those of the claim in *Robins Dry Dock*, then-Judge Breyer explicitly rejected a distinction based

Instead of relying on remoteness, he simply embraced what he understood to be the holdings of post-*Robins Dry Dock* cases, which, he stated, "refuse to hold a defendant liable for negligently caused financial harm without accompanying physical injury or other special circumstances." *Id.* at 53. And he candidly acknowledged that he favored the broad rule claimed to be derived from *Robins Dry Dock* because of "pragmatic or practical administrative considerations which, when taken together, offer support for" the broad rule. *Id.* at 54 (emphasis in original). Among these, he noted, were that "[t]he number of persons suffering foreseeable financial harm in a typical accident is likely to be far greater than those who suffer traditional (recoverable) physical harm," *id.*; the share of amounts paid by tort suit defendants to victims is less than the share of premium dollars earned by insurance companies that is paid out to victims who insure themselves; and the typical victim of financial losses is a business firm that is able to

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on the time charterer's contract. He stated that "the present appellants must have had a 'right' to use the dock," that "interference with that 'right' caused the loss," and that "[i]t is difficult in this instance to see why the technical legal label applied to that right should make a legal difference." 764 F.2d at 51. We can accept that the claimant in *Barber Lines* likely had a right to use the dock, which is arguably similar in law to the time charterer's contract with the vessel owner in *Robins Dry Dock*, but this comparison overlooks the very point Justice Holmes was making: the time charterer was trying to benefit from a contract it had with the victim of a tort; the dock in *Barber Lines* suffered no tort injury, and the claimant was not trying to use its right (or contract) to dock to support its claim.

purchase first-party insurance, *see id.* at 54-56. Judge Higginbotham also invoked these considerations. *See Guste*, 752 F.2d at 1029.

Other circuits have also found in *Robins Dry Dock* a broad rule barring economic losses for unintentional maritime torts in the absence of physical injury. *See Channel Star Excursions, Inc. v. Southern Pacific Transportation Co.*, 77 F.3d 1135, 1137-38 (9th Cir. 1996); *Getty Refining & Marketing Co. v. MT FADI B*, 766 F.2d 829, 831-33 (3d Cir. 1985); *Kingston Shipping Co. v. Roberts*, 667 F.2d 34, 35 (11th Cir. 1982); *see generally* Trey D. Tankersley, *The Robins Dry Dock Rule: The Tar Baby of Maritime Tort Law*, 25 Tul. Mar. L.J. 371 (2000) (The "Tar Baby" allusion is borrowed from Judge Wisdom's dissent in *Guste*, 752 F.2d at 1035.). In the Fourth Circuit, *Robins Dry Dock* was followed to disallow a time charterer's claim for lost profits, but its claim for the amount it paid the owner for the period the vessel was out of service was allowed. *See Venore Transportation Co. v. M/V Struma*, 583 F.2d 708, 710 11 (4th Cir. 1978). The Ninth Circuit has made exceptions to a broad *Robins Dry Dock* rule for seamen's lost wages, *see Carbone v. Ursich*, 209 F.2d 178, 181 82 (9th Cir. 1953), and commercial fishermen's lost profits resulting from an oil spill, *see Union Oil*, 501 F.2d at 565-71.

Our Circuit's view of the broad rule attributed to *Robins Dry Dock* has followed a somewhat uneven course. Prior to the Supreme Court's decision, our Court had allowed the time charterer's claim for

economic losses when the case was here, *see Flint v. Robins Dry Dock & Repair Co.*, 13 F.2d 3, 5-6 (2d Cir. 1926), *rev'd*, 275 U.S. 303 (1927), deeming the economic losses to have been the "proximate results" of the tortfeasor's negligence, *id.* at 6.

Our first direct reckoning with the Supreme Court's decision in *Robins Dry Dock* occurred in *Agwilines, Inc. v. Eagle Oil & Shipping Co.*, 153 F.2d 869 (2d Cir. 1946).[11] *Agwilines* is a slightly more complicated version of *Robins Dry Dock*. The owner of a time chartered ship, the *Agwidale*, sued the owner of the *San Veronica*, with which it had collided. Pursuant to the charterparty, the time charterer paid the *Agwidale*'s owner for an interval when the *Agwidale* was out of service. The *Agwidale*'s owner then sued the *San Veronico*'s owner for what was alleged to be the time charterer's loss. Judge

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[11] Two prior decisions had cited *Robins Dry Dock* for the accepted proposition that liability would exist for an intentional interference with contractual relations. *See New York Trust Co. v. Island Oil & Transport Corp.*, 34 F.2d 649, 652 (2d Cir. 1929); *Sidney Blumenthal & Co. v. United States*, 30 F.2d 247, 249 (2d Cir. 1929). A third prior decision, *The Toluma*, 72 F.2d 690, 693 (2d Cir. 1934), *aff'd sub nom. Aktieselskabet Cuzco v. The Sucarseco*, 294 U.S. 394 (1935), had cited *Robins Dry Dock* for what we have called the "narrow rule," but found the rule inapplicable because of the special circumstances that the claim was for return of a cargo owner's contribution in general average, which had been made pursuant to a so-called "Jason clause," (named for *The Jason*, 225 U.S. 32 (1912)). *See The Toluma*, 72 F.2d at 693-94.

Learned Hand's opinion for a divided panel[12] rejected the claim stating:

> [The Supreme Court] thought that the only basis for charging the drydocker with liability was because he had prevented the performance of the charterparty by the promisor – the owner – and that interference by a third person with the performance of a contract was an actionable wrong only if it was intentional. The Court thought it irrelevant that this resulted in exonerating the drydocker from nearly all liability through the fortuity that the profitable use of the ship had been divided between the owner and the charterer: The difficulty went deeper; the drydocker had committed no legal wrong against the charterer a[t] all, though he had caused it serious damage.

*Id.* at 871. Thus, *Agwilines* appears to have recognized both a narrow *Robins Dry Dock* rule – the contract with the owner does not help the time charterer – and a broad rule – a negligent tortfeasor has no legal liability for economic losses in the absence of physical damage.

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[12] Judge Clark dissented. *Agwilines*, 153 F.2d at 872.

Our next significant consideration of *Robins Dry Dock* occurred in *Kinsman II*, 388 F.2d 821 (2d Cir. 1968), so named because it was preceded by *In re Kinsman Transit Co.* ("*Kinsman I*"), 338 F.2d 708 (2d Cir. 1964).[13] The *Kinsman* litigation concerned an extraordinary series of calamities of the sort more likely found in a law school torts exam than occurring in the real world. In brief, a vessel, inadequately moored, drifted down the Buffalo River, and collided with another vessel; both vessels drifted farther down the river and collided with a third vessel; a lift bridge farther downstream was not raised despite a warning; the second vessel crashed into the bridge causing a tower to fall into the river; the obstruction formed by the first two vessels and ice caused water to overflow the river banks; the overflowing water damaged a grain elevator located three miles upstream. The facts are more fully elaborated in *Kinsman I*, 338 F.2d at 711-713, 714-16.

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[13] Decisions of our Court citing *Robins Dry Dock* after *Agwilines* and before *Kinsman I* and *II* shed no new light on its proper interpretation. *See Paragon Oil Co. v. Republic Tankers, S.A.*, 310 F.2d 169, 175 (2d Cir. 1962) (bailee entitled to value of damaged goods); *Hanlon v. Waterman Steamship Corp.*, 265 F.2d 206, 207 (2d Cir. 1959) (claimant not third-party beneficiary of contract); *International Brotherhood of Electrical Workers v. NLRB*, 181 F.2d 34, 38 & n.11 (2d Cir. 1950) (referring generally to tort of interference with contractual obligation); *Conmar Products Corp. v. Universal Slide Fastener Co.*, 172 F.2d 150, 155 & n.2 (2d Cir. 1949) (same); *Ozanic v. United States*, 165 F.2d 738, 743 (2d Cir. 1948) (vessel owner's contract to pay part of economic losses of crew members could not create liability for second vessel with which first vessel collided).

Judge Friendly upheld the various claims for physical injuries to property, deeming them foreseeable under traditional tort principles. He acknowledged, however, that "[s]omewhere a point will be reached when courts will agree that the link [between negligent conduct and injury] has become too tenuous – that what is claimed to be consequence is only fortuity." *Id.* at 725. In the absence of a claim for economic losses, he had no occasion to consider *Robins Dry Dock*.

Claims for economic losses were before us, however, when the same litigation returned four years later in *Kinsman II*. Cargill, Inc., sought to recover the expenses of its extra transportation and storage costs incurred because the river flooding prevented it from unloading wheat on a vessel in the Buffalo harbor, and it was obliged to obtain replacement wheat to fulfill its contracts. *See Kinsman II*, 388 F.2d at 823. Cargo Carriers, Inc., sought to recover the extra expenses of unloading its cargo of corn from yet another vessel that had been struck by the original two colliding vessels, the damage to this vessel necessitating special equipment for unloading cargo. *See id.*

Judge Kaufman began his consideration of these claims by noting that the District Court, in the absence of proof of intentional interference with contracts, had rejected what the Court deemed interference-with-contract claims on the authority of *Robins Dry Dock*. *See id.* He then stated, "We too deny recovery to the claimants, but on other

grounds." *Id.* Leaving what he termed "the rock-strewn path of negligent interference with contract," he grounded decision on more familiar tort terrain. *Id.* at 824. Judge Kaufman rejected the claims as simply "too remote or indirect a consequence of defendants' negligence." *Id.* Rather than invoking the narrow rule of *Robins Dry Dock*, rejecting a claim for economic losses sought to be based on the victim's contractual relation to an injured vessel, or the broad rule identified in *Agwilines*, rejecting all claims for economic losses in the absence of physical injury, Judge Kaufman used the traditional tort concept of foreseeability and rejected the claims as too remote. *Id.* at 825. All that he drew from *Robins Dry Dock* was Justice Holmes's statement, appended to his rejection of a contract-related claim, that "[t]he law does not spread its protection so far." *Id.* (quoting *Robins Dry Dock*, 275 U.S. at 309).[14]

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[14] In *Guste*, Judge Higginbotham endeavored to enlist *Kinsman II* in support of his categorical rejection of economic losses in the absence of physical injury by claiming that Judge Kaufman had recognized "the need for the imposition of limitations on recovery for the *foreseeable* consequences of an act of negligence," an analysis he deemed "compatible with our own." *Guste*, 752 F.2d at 1026 (emphasis added) (footnote omitted). In fact, Judge Kaufman had rejected liability because he thought the claimed losses were not foreseeable. *Kinsman II*, 388 F.2d at 824-25. As Judge Wisdom noted in *Guste*, *Kinsman II* "rejected the requirement of physical damages without even bothering to distinguish *Robins*, and instead relied on customary negligence principles." *Guste*, 752 F.2d at 1042 (Wisdom, J., with whom Rubin, Politz, Tate, and Johnson, JJ, join, dissenting).

Seven years later, however, a panel with two members from the *Kinsman II* panel (Judges Kaufman and Feinberg) explicitly applied *Robins Dry Dock* to reject a time charterer's claim for economic losses. *See Federal Commerce & Navigation Co. v. M/V Marathonian*, 528 F.2d 907, 908 (2d Cir. 1975). The per curiam opinion noted an effort "to justify the [narrow] rule [of Robins Dry Dock] on the basis of remoteness of injury," and added, perhaps nostalgically, "If free to do so, we might question whether at least the damage to the principal time charterer is not so reasonably to be expected as to justify recovery." *Id.* (citing *Kinsman II* ). The retreat from *Kinsman II* is brought into sharp focus by the District Court's opinion, which our Court labeled "considered and thorough," *id.* at 907, in which Judge Canella had written:

> [W]ere this Court . . . not constrained by the weight of precedent, we would reject the negligent interference with contract doctrine in favor of a negligence-causation-foreseeability analysis, such as that adopted by Chief Judge Kaufman in *Petition of Kinsman Transit Co.* [*Kinsman II*].

*Federal Commerce & Navigation Co. v. M/V Marathonian*, 392 F. Supp. 908, 913 (S.D.N.Y.1975).

Our Court's next three encounters with *Robins Dry Dock* before today were all non-precedential summary orders, each of which, without elaboration,

approved or announced what has become the broad rule that economic losses for an unintentional maritime tort are not recoverable in the absence of physical injury. In *Allders International (Ships) Ltd. v. United States*, 100 F.3d 942 (2d Cir. 1996) (summary order), we rejected a claim by a concessionaire that lost revenue when a cruise ship canceled voyages because of a grounding accident. We affirmed "for substantially the same reasons set forth" in the District Court's opinion, *id.* at 942, in which Judge Martin had dismissed as dicta the tort-based approach of *Kinsman II* in favor of a "bright line approach." *Allders International (Ships) Ltd. v. United States*, No. 94 CIV. 5689, 1995 WL 251571, at *1-2 (S.D.N.Y. Apr. 28, 1995). Next came the two summary orders on which Judge Engelmayer relied in the pending case, *Gas Natural*, 2008 WL 4643944, at *1 (stating "a bright line rule barring recovery for economic losses caused by an unintentional maritime tort absent physical damage to property in which the victim has a proprietary interest") (emphases and internal quotation marks omitted), and *G & G Steel*, 380 Fed. App'x at 104 (same).

Although, since *Marathonian*, we have not considered *Robins Dry Dock* in a published opinion, the district court decisions in our Circuit, in addition to Judge Engelmayer's decision in the pending case, have regularly invoked the "bright line rule" barring economic losses in the absence of physical damage. *See G & G Steel, Inc. v. Sea Wolf Marine Transportation, LLC*, No. 06 Civ. 1840, 2008 WL

192049, at *3 (S.D.N.Y. Jan. 23, 2008); *Gas Natural SDG S.A. v. United States*, No. 04 CIV. 8370, 2007 WL 959259, at *6 & n.5 (S.D.N.Y. Mar. 22, 2007); *Conti Corso Schiffahrts GMBH & Co. KG NR. 2 v. M/V "Pinar Kaptanoglu"*, 414 F. Supp. 2d 443, 446-47 (S.D.N.Y. 2006); *Brown v. Royal Caribbean Cruises, Ltd.*, No. 99 Civ. 11774, 2000 WL 34449703, at *5 (S.D.N.Y. Aug. 24, 2000); *American Dredging v. Plaza Petroleum Inc.*, 845 F. Supp. 91, 93 (E.D.N.Y. 1993); *Plaza Marine, Inc. v. Exxon Corp.*, No. 92 Civ. 1189, 1992 WL 197398, at *1 (S.D.N.Y. Aug. 5, 1992).

Having surveyed the field and our own slightly wavering contribution to it, we now explicitly accept the broad rule attributed to *Robins Dry Dock* that economic losses are not recoverable for an unintentional maritime tort in the absence of physical injury, mindful that for some categories of claims, exceptions may well be appropriate. We see little point in endeavoring to determine whether the broad rule that has been attributed to *Robins Dry Dock* was implicit in that decision or has resulted from an unstated extension of the narrow rule there announced. Instead, as then-Judge Breyer did in *Barber Lines*, we simply accept the broad rule, and do so for four main reasons. First, the rule has been accepted by a clear consensus of courts throughout the country, including many district courts within our Circuit. Second, Congress, possessing full authority to legislate on maritime matters, *see Panama Railroad Co. v. Johnson*, 264 U.S. 375, 386 (1924), has neither altered the broad rule nor made

any serious attempts to do so.[15] Third, the rule has the virtue of certainty.[16] Fourth, the context in which the broad rule primarily applies – financial losses incurred in the course of commercial shipping – is marked by the well recognized availability of first-party insurance to cover such losses and the frequent purchase of such insurance.[17]

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[15] Judge Rubin, in dissent in *Guste*, has replied to this point:

> The constitutional grant of jurisdiction to federal courts over cases and controversies not only empowers but requires us . . . to decide . . . cases within our jurisdiction whether or not Congress has provided a rule of decision and even when we think Congress should have acted and has not done so.

*Guste*, 752 F.2d at 1053 (Rubin, J., with whom Wisdom, Politz, and Tate, JJ, join, dissenting).

[16] Even in dissent, Judge Wisdom acknowledged this virtue:

> There is only one justification for the requirement of physical injury: If *Robins* [*Dry Dock*] establishes a policy of restricting the type of plaintiff who can recover for a defendant's negligence, physical property damage furnishes an easily discernible boundary between recovery and nonrecovery.

*Guste*, 752 F.2d at 1045 (Wisdom, J., with whom Rubin, Politz, Tate, and Johnson, JJ, join, dissenting).

[17] In dissent in *Guste*, Judge Wisdom disputed the validity of this factor:

We are not unsympathetic to the Appellant's earnest plea that, even if a broad *Robins Dry Dock* rule exists, recovery could be allowed in this case without countenancing an unbounded exposure of maritime tortfeasors to a vast number of economic loss claims that would stretch the concept of foreseeability up to and often beyond any discernible limit. It was surely foreseeable that an operator who had opened a drawbridge to let vessels move upriver and negligently failed to open the bridge when the vessels returned will cause economic losses to at least some of the vessels expecting to pass under the bridge. And when that operator is a governmental entity, the burden of such foreseeable losses can be spread narrowly through user fees or broadly through taxation.[18] Although the argument for a fact-specific

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> The *Robins* [*Dry Dock*] approach restricts liability more severely than the policies behind limitations on liability require and imposes the cost of the accident on the victim, who is usually not in a superior position to obtain insurance to cover this loss.

752 F.2d at 1052 (Wisdom, J., with whom Rubin, Politz, Tate, and Johnson, JJ, join, dissenting).

[18] Discussing the liability of the municipal operators of a drawbridge, the negligently delayed opening of which contributed to a variety of claims for *physical* damage, Judge Friendly wrote:

> Here it is surely more equitable that the losses from the operators' negligent failure to raise the Michigan Avenue Bridge should be ratably borne by Buffalo's taxpayers than left with the innocent victims of the flooding.

exception to *Robins Dry Dock* gives us pause, we ultimately conclude that the case for such an exception on the particular facts here is outweighed by the benefits of adhering to the general rule that denies recovery for economic losses from unintentional maritime torts in the absence of physical damage. In weighing the case for exceptions to the general rule, the benefits of its certainty, the customary use of first-party insurance to mitigate or eliminate its effects, and its long recognized establishment within maritime jurisprudence weigh heavily.[19]

## Conclusion

The judgment of the District Court is affirmed.

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*Kinsman I*, 338 F.2d at 726.

[19] American seeks to draw support for its position from 33 U.S.C. § 494, which imposes duties upon bridge owners and operators. Recognizing that the statute does not create an implied private right of action, American nonetheless contends that it states a federal policy that we should enlist to narrow the broad rule of *Robins Dry Dock*. We are not persuaded. Accepting American's suggestion would effectively adopt a statutory private right of action in the guise of a tort rule.

## Opinion and Order of the United States District Court for the Southern District of New York

AMERICAN PETROLEUM & TRANSPORT, INC.,

Plaintiff,

v.

THE CITY OF NEW YORK and THE DEPARTMENT OF TRANSPORTATION OF THE CITY OF NEW YORK,

Defendants.

PAUL A. ENGELMAYER, District Judge:

In this admiralty case, plaintiff American Petroleum and Transport, Inc. ("American"), the owner of a barge, seeks to recover economic damages to its business resulting from the unexpected closure of a drawbridge owned and operated by defendant the City of New York ("the City").[1] The City has moved to dismiss, on the grounds that under a line of cases

[1] American has also sued the Department of Transportation of the City of New York. However, the City is the only proper defendant, because the City's departments are not separate suable entities. *See Jenkins v. City of New York*, 478 F.3d 76, 93 n.19 (2d Cir. 2007); New York City Charter § 396 ("All actions and proceedings for the recovery of penalties for the violation of any law shall be brought in the name of the city of New York and not in that of any agency, except where otherwise provided by law.").

arising out of *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927), economic losses caused by an unintentional maritime tort are not recoverable where the plaintiff has not suffered personal injury or physical damage to its property. For the reasons stated herein, the motion to dismiss is granted.

## I. Background[2]

American, incorporated in New York State, was in the business of transporting petroleum products by water. Compl. ¶¶ 1, 9. On March 1, 2011, American owned a barge, the *John Blanche*, and was the demise charterer[3] of a tug, the *Caspian Sea* (together, the "tug and barge"). *Id.* ¶¶ 7-8. That day, the tug and barge entered into the Hutchinson

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[2] For the purpose of resolving the motion to dismiss, the Court assumes all facts pled in the plaintiff's Complaint to be true.

[3] In a demise, or "bareboat," charter, the charterer is owner *pro hac vice*. To create a demise the owner of the vessel must completely and exclusively relinquish possession, command, and navigation thereof to the demisee. It is therefore tantamount to, though just short of, an outright transfer of ownership. *Guzman v. Pichirilo*, 369 U.S. 698, 699 (1962) (citation and quotation marks omitted); *see also Gowanus Indus. Park, Inc. v. Arthur H. Sulzer Assocs., Inc.*, 436 Fed. App'x 4, 5 n.1 (2d Cir. 2011) ("A demise charter party transfers full possession and control of the vessel to the charterer for the period of the contract, and the charterer is treated as the owner of the vessel for most purposes." (quotation marks omitted)); *accord* Thomas J. Schoenbaum, 2 Admiralty & Mar. Law § 11-3 (5th ed.); 22 Williston on Contracts § 58:6 (4th ed.).

River. However, a drawbridge owned and/or operated by the City—the Pelham Parkway (or Shore Road) Bridge—failed to open to vessel traffic. *Id.* ¶ 12. American alleges that the City had been timely notified of the need for the drawbridge to be open to permit the tug and barge to pass through. *Id.* The drawbridge's functionality was not restored until March 3, 2011, and the drawbridge did not open to vessel traffic until that afternoon. *Id.* ¶ 13. As a result of the drawbridge's closure, the tug and barge was delayed by approximately two and one-half days. *Id.*

As a result of the delay, American alleges it suffered $28,828 in monetary damages. These consist of $21,000 in lost work previously contracted; $4,500 in crew wages; $2,000 in rent of the tug; $500 in fuel; and $828 in insurance. *Id.* ¶ 14. American does not claim to have suffered any property damage or physical injury.

On May 8, 2012, American filed its Complaint in this District. It brings causes of action for common law negligence, *id.* ¶¶ 18-19, and for violation of 33 U.S.C. § 494, which requires that a drawbridge over navigable water "be opened promptly by the persons owning or operating such bridge upon reasonable signal for the passage of boats and other water craft." *Id.* ¶¶ 15-17.

On July 2, 2012, the City filed a motion to dismiss. Dkt. 8-10. On July 20, 2012, American filed a memorandum of law in opposition to that motion.

Dkt. 12. On July 31, 2012, the City filed a reply. Dkt. 13.

## II. Discussion

The City moves to dismiss on the grounds that, under a line of maritime tort law cases tracing to *Robins Dry Dock*, recovery is barred for economic loss in the absence of physical harm. American disputes this reading of the law, arguing that the *Robins Dry Dock* rule is addressed to more limited circumstances not present here.

### A. Applicable Legal Standard

To survive a motion to dismiss under Rule 12(b)(6), a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Accordingly, a district court must accept as true all well-pleaded factual allegations in the complaint, and draw all inferences in the plaintiff's favor. *Allaire Corp. v. Okumus*, 433 F.3d 248, 249-50 (2d Cir. 2006); *see also Famous Horse Inc. v. 5th Ave. Photo Inc.*, 624 F.3d 106, 108 (2d Cir. 2010) ("We review the district court's grant of a Rule 12(b)(6) motion to dismiss *de novo*, accepting all factual claims in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor."). A claim will only have "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662,

663 (2009). A complaint is properly dismissed, where, as a matter of law, "the allegations in a complaint, however true, could not raise a claim of entitlement to relief." *Twombly*, 550 U.S. at 558.

B. Analysis

In *Robins Dry Dock*, the propeller of a vessel was negligently damaged while undergoing scheduled maintenance at a dry dock. The damage delayed, by two weeks, the vessel's return to operation. During that time, the vessel was subject to a time charter. The time charterer sued the dry dock to recover profits lost while the vessel was out of commission. *Robins Dry Dock*, 275 U.S. at 307-08. The Supreme Court denied recovery. It held that the charterer's loss arose only as a result of the lost benefit of the contract, and that the plaintiff, lacking a protected interest in the vessel itself, had no recovery in tort. Writing for the Court, Justice Holmes stated: "[A]s a general rule . . . a tort to the person or property of one man does not make the tort feasor liable to another merely because the injured person was under a contract with that other unknown to the doer of the wrong. The law does not spread its protection that far." *Id.* at 309 (citation omitted). The issue presented by the City's motion to dismiss is whether the "*Robins Dry Dock* rule," as the case law has come to refer to it, precludes American from recovery here. American is quite correct that, on its facts, *Robins Dry Dock* itself does not address the situation presented here: a claim for economic damages by a vessel's owner (as opposed to a time charterer).

However, since that decision, the courts in this Circuit have extracted from it a broader prohibition with respect to maritime tort suits that is fatal to American's negligence claim here.

Specifically, as the Second Circuit has stated, the *Robins Dry Dock* rule "effectively bars recovery for economic losses caused by an unintentional maritime tort absent physical damage to property in which the victim has a proprietary interest." *G & G Steel, Inc. v. Sea Wolf Marine Transp., LLC*, 380 Fed. App'x 103, 104 (2d Cir. 2010) (summary order); *see also Gas Natural SDG S.A. v. United States*, No. 07-2129-CV, 2008 WL 4643944, at *1 (2d Cir. Oct. 21, 2008) (summary order) ("[T]here exists a 'bright line rule barring recovery for *economic losses* caused by an unintentional maritime tort absent physical damage to property in which the victim has a *proprietary interest*.'" (quoting *Conti Corso Schiffahrts-GMBH & Co. KG NR. 2 v. M/V "Pinar Kaptanoglu*," 414 F. Supp. 2d 443, 446-47 (S.D.N.Y. 2006)) (emphasis added by *Gas Natural SDG*)); *Brown v. Royal Caribbean Cruises, Ltd.*, No. 99 Civ. 11774 (KMW), 2000 WL 34449703, at *5 (S.D.N.Y. Aug. 24, 2000) (in the Second Circuit, "plaintiffs who suffer no physical injury to their person or property from an alleged maritime tort may not recover for alleged economic losses, even though such losses may be deemed a foreseeable consequence of defendant's conduct"); *Allders Int'l (Ships) Ltd. v. United States*, No. 94 Civ. 5689 (JSM), 1995 WL 251571, at *1 (S.D.N.Y. April 28, 1995) ("Most courts have read

*Robins Dry Dock* to establish a bright line rule against recovery for economic loss caused by an unintentional maritime tort absent physical damage to property.").

To be sure, many of the cases in which the *Robins Dry Dock* rule is thus articulated are factually distinguishable, in that, as in *Robins Dry Dock* itself, the plaintiffs were charterers who lacked a proprietary interest in the vessel in question, and it was on that basis that the rule was held to bar recovery. *See, e.g., G & G Steel*, 380 Fed. App'x at 104 (affirming grant of summary judgment against plaintiff based on absence of proprietary interest); *Gas Natural SDG*, 2008 WL 4643944, at *3-4 (same); *Fed. Commerce & Navigation Co. v. The M/V Marathonian*, 392 F. Supp. 908, 909-10 (S.D.N.Y.) (granting judgment on pleadings against claim by time charterer), *aff'd*, 528 F.2d 907 (2d Cir. 1975). *But see Allders Int'l*, 1995 WL 251571, at *2 (dismissing plaintiff's claim based on absence of physical damage); *cf. Dick Meyers Towing Serv., Inc. v. United States*, 577 F.2d 1023, 1025 (5th Cir. 1978) (holding that *Robins Dry Dock* rule precludes economic-damage claims by owners and operators, not only third parties incidentally affected by the defendant's negligence). There is also dicta in a 1968 case in which the Second Circuit indicated a desire to depart from the *Robins Dry Dock* rule in favor of traditional, and more flexible, tort-law notions of proximate cause and foreseeability. *See Petitions of Kinsman Transit Co.* ("*Kinsman II*"), 388 F.2d 821,

824-25 (2d Cir. 1968). And some decisions in this Circuit since *Kinsman II* have criticized, or noted others' criticism of, such a bright-line rule, as to both the requirements of proprietary interest and of physical damage. *See Fed. Commerce & Navigation Co.*, 528 F.2d at 908 (noting arguments for and against bright-line rule as to time charterers); *Allders*, 1995 WL 251571, at *1 (collecting post-*Kinsman II* cases); *Fed. Commerce & Navigation Co.*, 392 F. Supp. at 912-13 (noting that "[w]ere this Court now free to write upon a tabula rasa and not constrained by the weight of precedent, we would reject the [contract-based *Robins Dry Dock* rule] in favor of a negligence-causation-foreseeability analysis" such as that articulated in *Kinsman II*).

However, in light of the Second Circuit's repeated articulation of the *Robins Dry Dock* rule to prohibit recovery of economic losses in cases of unintentional maritime torts where there has been no allegation of physical damage to property, including where the plaintiff is the owner of the vessel, it is not for this Court to reassess the wisdom of that rule. Any such reassessment is properly the province of the Second Circuit or the Supreme Court. *See Fed. Commerce & Navigation Co.*, 528 F.2d at 908. Moreover, the *Robins Dry Dock* rule has defenders along with its detractors. A number of sister circuits with significant maritime dockets have adopted the same bright-line rule. They have justified the *Robins Dry Dock* rule on the grounds that it is a uniform rule which advances judicial economy, serves to limit expansive and potentially

*vast tort liability to parties remotely injured by maritime events, and leaves maritime players at liberty to guard against risk by insurance, contract, or other business planning devices.[4]

Consequently, American, having alleged only economic loss to itself, and not physical damage, as a result of the temporary closure of the Pelham Parkway bridge, may not recover in maritime tort. The Court is, therefore, compelled to dismiss its negligence claim.

American alternatively argues that, even if its negligence claim is barred as a matter of law, its separate claim based on 33 U.S.C. § 494 survives. This statute, part of the Bridge Act of 1906, 33 U.S.C. §§ 491-498, imposes certain duties upon bridge owners and operators, who may suffer fines and

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[4] *See, e.g., Getty Refining & Marketing Co. v. MT FADI B*, 766 F.2d 829, 832-33 (3d Cir. 1985); *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 51-52 (1st Cir. 1985) (Breyer, C.J.); *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1022-23 (5th Cir. 1985) (en banc) ("*Robins* was a pragmatic limitation imposed by the [Supreme] Court upon the tort doctrine of foreseeability."); *Kingston Shipping Co. v. Roberts*, 667 F.2d 34, 35 (11th Cir. 1982). Other circuits, however, have eschewed the *Robins Dry Dock* rule in favor of applying fact-dependent tort principles; and even circuits that have followed *Robins* have sometimes carved out exceptions, such as to protect fisherman plaintiffs. *See generally* Trey D. Tankersley, "The *Robins Dry Dock* Rule: The Tar Baby of Maritime Tort Law," 25 Tul. Mar. L. J. 371 (2000) (canvassing and commenting on each circuit's treatment of *Robins Dry Dock*).

imprisonment for failing to open bridges properly. The statute, however, has been widely held not to provide an implied private right of action. *See, e.g., Channel Star Excursions v. S. Pac. Transp. Co.*, 77 F.3d 1135, 1136-37 (9th Cir. 1996) (collecting cases, from majority of circuits, so holding). Thus, while a defendant's violation of 33 U.S.C. § 494 may be relevant evidence of the standard of care in a negligence action, *see, e.g., Nassau Cnt'y Bridge Auth. v. Tug Dorothy McAllister*, 207 F. Supp. 167, 171-72 (E.D.N.Y. 1962), *aff'd*, 315 F.2d 631 (2d Cir. 1963), including insofar as it may shift the burden of proof, *accord The Pennsylvania*, 86 U.S. 125, 126 (1873); *Mar. & Mercantile Int'l LLC v. United States*, No. 02 Civ. 1446 (KMK), 2007 WL 690094, at *18-*19 (S.D.N.Y. Feb. 28, 2007), such a violation does not give rise to a freestanding claim for relief in a private lawsuit. This claim must, therefore, also be dismissed.

## CONCLUSION

For the reasons stated, American's Complaint fails to state a claim, and is, therefore, dismissed. The Clerk of Court is directed to terminate the motion pending at docket number 8, and to close this case. SO ORDERED.

/s Paul A. Engelmayer
United States District Judge

Dated: October 10, 2012
New York, New York

## PERTINENT STATUTORY PROVISION
## (not reproduced in body of Petition)

33 U.S.C. § 494

Obstruction of navigation; alterations and removals; lights and signals; draws

No bridge erected or maintained under the provisions of sections 491 to 498 of this title, shall at any time unreasonably obstruct the free navigation of the waters over which it is constructed, and if any bridge erected in accordance with the provisions of said sections, shall, in the opinion of the Secretary of Homeland Security at any time unreasonably obstruct such navigation, either on account of insufficient height, width of span, or otherwise, or if there be difficulty in passing the draw opening or the drawspan of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the Secretary of Homeland Security after giving the parties interested reasonable opportunity to be heard, to notify the persons owning or controlling such bridge to so alter the same as to render navigation through or under it reasonably free, easy, and unobstructed, stating in such notice the changes required to be made, and prescribing in each case a reasonable time in which to make such changes, and if at the end of the time so specified the changes so required have not been made, the persons owning or controlling such bridge shall be deemed guilty of a violation of said sections; and all such alterations shall be made and all such obstructions shall be removed at the expense

of the persons owning or operating said bridge. The persons owning or operating any such bridge shall maintain, at their own expense, such lights and other signals thereon as the Commandant of the Coast Guard shall prescribe. If the bridge shall be constructed with a draw, then the draw shall be opened promptly by the persons owning or operating such bridge upon reasonable signal for the passage of boats and other water craft.

**Civil Complaint**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN PETROLEUM & TRANSPORT, INC.,

Plaintiff,

v.

THE CITY OF NEW YORK and THE DEPARTMENT OF TRANSPORTATION OF THE CITY OF NEW YORK,

Defendants.

AMERICAN PETROLEUM AND TRANSPORT, INC., by its attorney, James M. Maloney, as and for its complaint against the above-named defendants, declares as follows:

PARTIES

1. At the commencement of this action and at all times hereinafter mentioned, Plaintiff AMERICAN PETROLEUM AND TRANSPORT, INC. was and is a corporation duly organized under the law of the State of New York, licensed to do business therein, and having an office within the State of New York, County [of] Suffolk, at [redacted home address, no longer principal office of business].

2. At the commencement of this action and at

all times hereinafter mentioned, Defendant CITY OF NEW YORK was and is a municipal organization organized under the law of the State of New York.

3. Upon information and belief, at the commencement of this action and at all times hereinafter mentioned, Defendant DEPARTMENT OF TRANSPORTATION OF THE CITY OF NEW YORK was and is a Department of THE CITY OF NEW YORK.

JURISDICTION AND VENUE

4. This is an admiralty and maritime claim within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure.

5. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1333.

6. Venue is properly placed in the United States District Court for the Southern District of New York pursuant to 28 U.S.C. § 1391(b)(2) as this the judicial district in which a substantial part of the events or omissions giving rise to the claim occurred.

RELEVANT FACTS

7. On or about March 1, 2011, Plaintiff was the disponent owner (i.e., charterer under a demise charter party) of a tug, the CASPIAN SEA, Official No. 640953.

8. On or about March 1, 2011, Plaintiff was the registered owner of a barge, the JOHN BLANCHE, Official No. 1229015.

9. Plaintiff is in the business of transporting petroleum products by water.

10. At all relevant times, including on or about March 1, 2011, Plaintiff was engaged in its usual business using the CASPIAN SEA and the JOHN BLANCHE as a tug and barge unit (hereinafter, "TUG & BARGE").

11. On or before March 1, 2011, the TUG & BARGE entered the Hutchinson River (also known as Eastchester Creek).

12. On or about March 1, 2011, a drawbridge owned and/or operated by THE CITY OF NEW YORK and/or THE DEPARTMENT OF TRANSPORTATION OF THE CITY OF NEW YORK, known as the Pelham Parkway (or Shore Road) Bridge, spanning the Hutchinson River (Eastchester Creek), failed to open to vessel traffic, although the personnel of THE CITY OF NEW YORK and/or THE DEPARTMENT OF TRANSPORTATION OF THE CITY OF NEW YORK were duly and timely notified in the proper manner by reasonable signal of the need for the drawbridge to open in order to permit passage of the TUG & BARGE and their egress from Hutchinson River (Eastchester Creek).

13. The functionality of the drawbridge was

not restored, and the drawbridge accordingly not opened for vessel traffic, until the afternoon of March 3, 2011, making the egress of the TUG & BARGE from Hutchinson River (Eastchester Creek) impossible, causing the movements of the TUG & BARGE to be delayed approximately two and one-half days, and causing monetary damages to Plaintiff as more fully described herein.

14. As a result of the foregoing, Plaintiff has suffered monetary damages as follows:

| | |
|---|---|
| Lost work previously contracted | $21,000 |
| Crew wages | 4,500 |
| Prorated hire ("rent" of tug under demise charter @ $800/day) | 2,000 |
| Fuel for generator | 500 |
| Prorated insurance | 828 |
| TOTAL | $28,828 |

FIRST CAUSE OF ACTION

15. Plaintiff repeats and realleges each and every allegation set forth in the foregoing paragraphs 1 through 14 as if fully set forth herein.

16. Hutchinson River (Eastchester Creek) is a navigable river of the United States.

17. From about March 1, 2011, through about March 3, 2011, the drawbridge over the Hutchinson River (Eastchester Creek) was not "opened promptly by the persons owning or operating such bridge upon

reasonable signal for the passage of boats and other water craft" as provided at 33 U.S.C. § 494, causing damages to Plaintiff as more fully described herein.

SECOND CAUSE OF ACTION

18. Plaintiff repeats and realleges each and every allegation set forth in the foregoing paragraphs 1 through 14 as if fully set forth herein.

19. From about March 1, 2011, through about March 3, 2011, the functionality of the drawbridge over the Hutchinson River (Eastchester Creek) was compromised due to the negligence of Defendants and through no fault of Plaintiff, causing damages to Plaintiff as more fully described herein.

WHEREFORE, Plaintiff respectfully requests that this Court:

(1) assume jurisdiction over this action;

(2) award Plaintiff actual damages in the amount of $28,828 as hereinbefore enumerated; and

(3) award Plaintiff reasonable attorney's fees, reasonable expert witness fees, and other costs of bringing and maintaining this action.

Plaintiff additionally prays for such other, further, and different relief as this Court may deem just and proper.

Dated: May 8, 2012
Port Washington, New York