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Benedict on Admiralty

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Volume 4: Practice and Procedure: Forms
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Scope

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FORM No. 3-539 Defendant Cruise Line's Motion to Dismiss, or, in the Alternative, for Summary Judgment

Scope

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FORM No. 3-554 Petition for Declaratory Judgment--Obligation To Pay for Medical Procedure Requested by

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FORM No. 3-580 Motion for a New Trial, Rule 59(a)

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Scope

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Scope

FORM No. 3-647 Order for Release of Funds Pursuant to Settlement

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FORM No. 3-649 Motion for Cancellation of Bonds Posted by Various Shippers

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Scope

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Scope

FORM No. 3-652 Order Directing Clerk to Accept Funds in Reduction of Stipulation, to Sell Treasury Notes, and for Distribution of Funds Pursuant to Settlement

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Scope

FORM No. 3-692 Motion of Defendant for Stay Pending Arbitration

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FORM No. 3-698 Petition for Removal, Rule 81(c)

Scope

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Scope

FORM No. 3-700 Verified Statement of Facts Entitling Defendant to Removal, Rule 81(c)

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FORM No. 3-701 Plaintiff's Jury Demand in Action Removed to District Court, Rule 81(c)

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FORM No. 3-703 Notice of Motion To Remand Action Removed to District Court, Rule 81(c)

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Form 3-711 Motion to Exclude Evidence of Worker's Compensation

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FORM No. 3-742 Notice to Clerk of Publication of Notice of Arrest-In Newspaper of General Circulation, Rule C(4)

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FORM No. 3-775 Order Dispensing with the Prepayment of Marshal's Cost on the Arrest of a Vessel in a Seaman's Wage Action

Scope

FORM No. 3-776 Order of Issuance of Process of Maritime Attachment and Arrest

Scope

FORM No. 3-777 Arrest of Vessel: Marshal's Return, Rule E(4)

Scope

FORM No. 3-778 Arrest of Submerged Vessel

Scope

FORM No. 3-779 Request to Clerk to Issue Warrant of Arrest, Rule E(4)

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Scope

FORM No. 3-781 Motion for Order Appointing Substitute Custodian of Submerged Vessel

Scope

FORM No. 3-782 Order Appointing Substitute Custodian, Rule E(4)

Scope

FORM No. 3-783 Affidavit of Counsel in Support of Appointment of Substitute Custodian

Scope

Form 3-784 Declaration of Substitute Custodian, Rule E(4)

Scope

FORM No. 3-785 Amendment to Order Appointing Substitute Custodian of Submerged Vessel

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FORM No. 3-786 Affidavit of Substitute Custodian, Rule E(4)

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FORM No. 3-787 Motion to Permit Arrested Vessel to Shift Berth, Rule E(4)

Scope

FORM No. 3-788 Affidavit in Support of Motion to Permit Arrested Vessel to Shift Berth, Rule E(4)

Scope

FORM No. 3-789 Order Permitting Arrested Vessel to Shift Berth, Rule E(4)

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FORM No. 3-790 Stipulation and Order Permitting Arrested Vessel to Move to Pier and Discharge Cargo, Rule E(4)

Scope

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Scope

FORM No. 3-792 Stipulation for Value, Rule E(5)

Scope

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FORM No. 3-794 Order To Release Vessel, Rule E(5)

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FORM No. 3-795 Order To Release Vessel, Rule E(5)

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FORM No. 3-796 Order for Release of and Partial Discontinuance as to One Defendant Vessel, Rule E(5)

Scope

FORM No. 3-797 Order for Release of Vessel From Arrest Upon Voluntary Dismissal of Action, Rule E(5)

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FORM No. 3-798 Consent Order Vacating Attachment, Rule E(6)

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FORM No. 3-800 Motion To Vacate or Reduce Security, Rule E(6)

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Scope

FORM No. 3-802 Order To Show Cause--Posting of Security, Rule E(5)

Scope

FORM No. 3-803 Motion for Restricted Appearance, Rule E(8)

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FORM No. 3-804 Motion for Restricted Appearance

Scope

FORM No. 3-805 Motion for Restricted Appearance and To Dissolve Writ of Foreign Attachment, Rule E(8)

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FORM No. 3-806 Order--Decree of Forfeiture, Rule E(9)

Scope

FORM No. 3-807 Motion for Order of Default Judgment and Sale of Vessel, Rule E(9)

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FORM No. 3-808 Order of Default (With Reference to Rights of Intervenor, Rule E(9)

Scope

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Scope

FORM No. 3-810 Affidavit in Support of Motion for Interlocutory Sale of Vessel, Rule E(9)

Scope

FORM No. 3-811 Order to Show Cause-Sale of Vessel, Rule E(9)

Scope

FORM No. 3-812 Order for Interlocutory Sale, Rule E(9)

Scope

FORM No. 3-813 Order for Interlocutory Sale, With Terms, Rule E(9)

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FORM No. 3-814 Motion For Order of Sale of Vessel, Rule E(9)

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FORM No. 3-815 Final Judgment--Condemnation and Sale of Vessel, Rule E(9)

Scope

FORM No. 3-816 Consent Judgment With Provisions for Sale of Vessel and Satisfaction From Proceeds, Rule E(9)

Scope

FORM No. 3-817 Order--Sale of Vessel, Rule E(9)

Scope

FORM No. 3-818 Order--Sale of Vessel, Rule E(9)

Scope

Form 3-819 Order -- Sale of the Vessel (With Reference to Right for Credit Bid)

Scope

FORM No. 3-820 Order--Sale of (With Reference to Rights of Intervenor) Rule E(9)

Scope

FORM No. 3-821 Motion to Confirm Sale, Rule E(9)

Scope

FORM No. 3-822 Marshal's Notice of Interlocutory Sale

Scope

FORM No. 3-823 Motion for Confirmation of Sale (With Reference to Supporting Affidavits by Plaintiff's Attorney and Marine Surveyor, Rule E(9))

Scope

FORM No. 3-824 Affidavit by Plaintiff's Attorney in Support of Motion To Confirm Sale (With Reference to Objections of Intervenor)

Scope

FORM No. 3-825 Affidavit of Value by Marine Surveyor

Scope

FORM No. 3-826 Order Confirming Sale of Vessel, Rule E(9)

Scope

Form 3-827 Order Confirming Sale of Vessel, Rule E(9)

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FORM No. 3-829 Stipulation Adjourning Sale, Rule E(9)

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FORM No. 3-830 Order Directing Publication of Notice of Sale

Scope

FORM No. 3-831 Notice for Clerk of Publication of Notice of Sale, Rule E(9)

Scope

FORM No. 3-832 Motion for Order Directing the Marshal and Clerk To Pay Plaintiff for Cost of Sale and To Deposit Remainder of Proceeds in a Savings Account, Rule E(9)

Scope

FORM No. 3-833 Judgment and Order of Distribution, Rule E(9)

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FORM No. 3-834 Letter of Undertaking

Scope

Form 3-835 Ex Parte Application For an Order to Appoint Substitute Custodian, Rule E(4)

Scope

Form 3-836 Memorandum of Points and Authorities in Support of Motion for Relief from Stay

Scope

Form 3-837 Proposed Notice of Marshal's Sale, Rule E(9)

Scope

Form 3-838 Writ of Venditioni Exponas, Rule E(4)

Scope

Form 3-839 Certification of Interested Parties

Scope

Form 3-840 Ex Parte Application for Confirmation of Sale of Vessel (With Reference to Foreclosure of First Preferred Ship Mortgage), Rule E(9)

Scope

Form 3-841 Ex Parte Application for Order - Sale of Vessel, Rule E(9)

Scope

Form 3-842 Order Appointing Substitute Custodian, Rule E(4)

Scope



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CHAPTER III MOTIONS AND REMEDIES
RULE 4 -- PROCESS

4-III Benedict on Admiralty FORM No. 3-1

FORM No. 3-1 Summons, Rule 4(b)

_____ Corporation,)	
Plaintiff, v. Vessel _____, Her En-)	Civil Action
gines,)	No. _____
Broilers, etc. n1)	Summons
)	

To the above-named Defendant:

You are hereby summoned and required to serve upon _____, plaintiff's attorney, whose address is _____, an answer to the complaint which is herewith served upon you, within 20 [60] days after service of this summons upon you [*the United States Attorney for the _____ District of _____*], exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Clerk

[*Seal of the U.S. District Court*]

Dated: _____

(This summons is issued pursuant to *Rule 4 of the Federal Rules of Civil Procedure*.)

FOOTNOTES:

(n1)Footnote 1. If the complaint is *in personam* rather than *in rem*, substitute the name of the defendant for the vessel, i.e., "_____ Corporation, defendant," in lieu of "Steamship _____, Her Engines, Boilers, etc." If the complaint in both *in rem* and *in personam*, add "and _____ Corporation, defendant."



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RULE 4 -- PROCESS

4-III Benedict on Admiralty FORM No. 3-2

FORM No. 3-2 Affidavit of Service of Process

[Caption] n1

I, _____, one of the attorneys for Plaintiff _____, do hereby swear and affirm, under penalties of perjury, that based upon my personal knowledge, I served the defendant _____, pursuant to *Rule 4(c)(2)(C)(ii) of the Federal Rules of Civil Procedure* and state as follows:

1. That on _____, 20 ____, I served by certified mail, return receipt requested on _____, a Summons, Complaint, _____ [list other items served] two copies of Notice/Acknowledgment for service on defendant and a return envelope, postage prepaid, addressed to this office, as evidenced by attached Exhibit _____.

2. That the _____ received the above-described materials and letter on _____, 20 ____, as evidenced by the return receipt received by this office on _____ 20 ____, which receipt is signed by "_____" and dated _____, 20 ____, and which is attached as Exhibit _____.

Attorneys for Plaintiff

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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RULE 4 -- PROCESS

4-III Benedict on Admiralty FORM No. 3-3

FORM No. 3-3 Motion for Service of Summons in Manner Prescribed by State Law, Rule 4(d)

[Caption] n1

Now comes the Plaintiff _____, by its attorneys, _____, and moves this court for an order permitting summons to be served upon the defendant and shows to the court as follows.

1. Under the laws of the State of _____, service of the summons upon a defendant in action brought in the courts of general jurisdiction of that state may be made under the following circumstances: _____ in the following manner: _____

2. The conditions for the service of the summons in this action in the foregoing manner exists here in that [*show that state statute is applicable*], as more fully shown by the affidavit of _____ attached hereto.

Wherefore, plaintiff moves this court for an order permitting summons to be served upon the defendant herein by:

_____.

Dated: _____

Attorney for Plaintiff

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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RULE 4 -- PROCESS

4-III Benedict on Admiralty FORM No. 3-4

FORM No. 3-4 Motion for Service of Summons Without State Pursuant to Federal Statute, Rule 4(e)

[Caption] n1

Now comes the Plaintiff _____, by its attorneys, _____, and moves this court for summons to issue to the defendant and shows to the court as follows.

1. This is an action for [set forth nature of action], under the _____ Act, as more fully shown by the complaint herein [and the affidavit of _____ hereto annexed].

2. The defendant, _____, is not an inhabitant of, and cannot be found within the State of, _____, and is an inhabitant of the _____ District of _____, residing at _____ [as more fully shown by the affidavit of hereto annexed].

3. Personal service upon said defendant at _____ is permitted by the _____ Act.

4. The period of _____ days is a reasonable period within which defendant should be required by summons served upon him at _____ to appear and defend this action.

Wherefore, plaintiff moves the court for an order that summons issue from this court to defendant, _____, requiring said defendant to appear and defend this action within _____ days after service of said summons upon him, and that said summons be forwarded to the United States Marshal for the _____ District of _____ for personal service upon said defendant in the manner prescribed by the Federal Rules of Civil Procedure.

Dated: _____

Attorney for Plaintiff

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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RULE 4 -- PROCESS

4-III Benedict on Admiralty FORM No. 3-5

FORM No. 3-5 Order for Service Without State Pursuant to Federal Statute, Rule 4(e)

[Caption] n1

Upon motion of the plaintiff, it is

Ordered, that summons issue from this court to defendant, _____, requiring said defendant to appear and defend this action within _____ days after service of said summons upon him, and that said summons be forwarded by the Clerk to the United States Marshal for the _____ District of _____ for personal service upon said defendant in the manner prescribed by the Federal Rules of Civil Procedure.

Dated: _____, 20 _____

United States District Judge

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-6

FORM No. 3-6 Motion for Service of Summons Without United States Pursuant to Federal Statute, Rule 4(i)

[Caption] n1

Now comes the Plaintiff _____, by its attorneys, _____, and moves this court for an order that summons issue and shows to the court as follows.

1. This is an action for (*set forth nature of action*), under the _____ Act, as more fully shown by the complaint herein [*and the affidavit of _____ hereto attached*].

2. The defendant, _____, is not an inhabitant of, and cannot be within, any of the States of the United States, and is an inhabitant of _____, residing at _____ (as more fully shown by the affidavit of _____ hereto annexed).

3. Personal service upon said defendant is permitted by the _____ Act.

4. The law of _____ requires that personal service be made by [*foreign official*].

5. The period of _____ days is a reasonable period within which defendant should be required by summons served upon him at _____ to appear and defend this action.

Wherefore, plaintiff moves the court for an order that summons issue from this court to defendant, _____, requiring said defendant to appear and defend this action within _____ days after service of said summons upon him, and that said summons be forwarded to _____ in _____ for personal service upon said defendant by any one or more of the following _____ methods:

Dated:

United States District Judge

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-7

FORM No. 3-7 Order for Service Without United States Pursuant to Federal Statute, Rule 4(i)

[Caption] n1

Upon motion of the plaintiff, it is

Ordered, that summons issue from this court to defendant _____, requiring said defendant to appear and defend this action within _____ days after service of said summons upon him, and that said summons be forwarded to _____ in _____ for personal service upon said defendant by any one or more of the following _____ methods:

1. _____
2. _____
3. _____, etc.

United States District Judge
Dated: _____, 20 ____

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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 RULE 5 SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

4-III Benedict on Admiralty FORM No. 3-8

FORM No. 3-8 Affidavit of Service on Party or Attorney by Mailing, With Variations, Rule 5(b)

[Caption] n1

[Use Paragraph A, B or C as appropriate.]

A. _____)
 _____) ss
 _____)
 _____)

_____, being duly sworn, says that [he/she] served the attached _____ upon
 _____, the defendant herein [or, attorney for defendant], on _____, 20____, by
 mailing a copy to him at _____, defendant's last known address [or last known address of attorney
 for defendant].

[Jurat] _____)
 _____) ss
 _____)
 _____)

B. _____, being first duly sworn, deposes and says:

That [he/she] is a citizen and resident of the State of _____ over twenty-one (21) years of age, and
 that on the _____ day of _____, 20____, [he/she] deposited in the United States

4-III Benedict on Admiralty FORM No. 3-8

Post Office at _____, _____, a true copy of] *identify papers served*] in a sealed envelope, with first-class postage thereon fully prepaid, and addressed to _____, United States District Attorney, _____; and another true copy of [*identify papers served*], in a similarly sealed envelope, with first-class postage thereon fully prepaid, and addressed to _____ and _____, Attorneys at Law, _____, _____ their last known address.

That _____ and _____ are attorneys for Appellant in said cause, and have their office in and reside at _____, _____, and that there is a regular communication by mail between said City of _____ and said City of _____, _____, on the one hand, and between said City of _____, _____, and said City of _____ on the other hand. n2

[*Jurat*]

C. _____)
 _____) ss
 _____)
 _____)

On this day personally appeared before me, _____, to me well known, who, being by me first duly sworn, deposes and says that she is employed in the law office of _____, attorneys for the plaintiffs in the above styled cause, and that on the _____ day of _____, A.D. 20____, at _____ o'clock P.M., she served a true and correct copy of [*identify paper*] upon _____, the attorney of record for the defendants in said cause, by mailing a true copy thereof to him at his last known address, said copy being enclosed in an envelope, bearing the requisite amount of uncanceled United States postage stamps, by depositing said envelope, containing such copy, properly sealed, stamped and addressed as given below, in the post office at _____, _____, said envelope being addressed as follows: n3

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.

(n2)Footnote 2. Adapted from the papers on appeal in *Great Northern Ry. Co. v. United States*, 315 U.S. 262, 62 S. Ct. 529, 86 L. Ed. 836 (1942) .

(n3)Footnote 3. Adapted from the papers on appeal in *Meredith v. Winter Haven*, 320 U.S. 228, 64 S. Ct. 7, 88 L. Ed. 9 (1943) .



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4-III Benedict on Admiralty FORM No. 3-9

FORM No. 3-9 Affidavit of Service on Party or Attorney Other Than By Mailing, With Variation, Rule 5(b)n1

[Caption] n2

[Use Paragraph A, B, C, D, E, F, G, or H as appropriate]

A. (Affidavit of personal service on party or on his attorney)

_____) ss
_____)
_____)
_____)

_____, being duly sworn, says that [he/she] served the attached _____ upon
_____, the defendant herein [or, attorney for defendant], on _____, 20 _____, by
delivering a copy to him personally at _____ Street.

_____ n3

[Jurat]

B. (Counsel's certificate of service at attorney's office)

I, _____, attorney for plaintiff in the above-entitled action, hereby certify that on the
_____ day of _____, 20 _____, I served the attached

4-III Benedict on Admiralty FORM No. 3-9

_____ upon _____, attorney for defendant, by leaving a copy at [his/her] office at _____, with _____ [his/her] clerk [or, the person in charge thereof; or, leaving it in a conspicuous place therein, there being no one in charge].

C. (Counsel's certificate of service at attorney's home)

I, _____, attorney for plaintiff in the above-entitled action, hereby certify that on the _____ day of _____, 20 _____, I served the attached _____ upon _____, attorney for defendant, by leaving a copy at his dwelling house [or, usual place of abode] with _____, a person of suitable age and discretion then residing therein, his office at the time being closed [or defendant's attorney having no office].

D. (Counsel's certificate of personal service on attorney)

I, _____, attorney for plaintiff in the above-entitled action, hereby certify that on the _____ day of _____, 20 _____, I served the attached _____ upon _____, attorney for defendant, by delivering a copy to [him/her] personally at _____ Street.

E. (Affidavit of service on party or on his attorney by leaving it at his office)

_____, being duly sworn, says that [he/she] served the attached _____ upon _____, the defendant herein [or, attorney for defendant], on _____, 20 _____, by leaving a copy at defendant's [or defendant's attorney's] office at _____ Street _____ with _____, the person in charge thereof [or leaving it in a conspicuous place in defendant's/defendant's attorney's office, there being no one in charge]. n4

F. (Affidavit of service on party or on (his/her) attorney by leaving it at his home)

_____, being duly sworn, says that [he/she] served the attached _____ upon _____, the defendant herein [or, attorney for defendant] on _____, 20 _____, by leaving a copy at his dwelling house [or, usual place of abode] with _____, a person of suitable age and discretion then residing therein, defendant's office [or, defendant's attorney's office] then being closed [or, defendant/defendant's attorney having no office]. n5

G. (Affidavit of service on party or [his/her] attorney by leaving it with Clerk of Court)

_____, being duly sworn, says that [he/she] served the attached _____ upon _____, the defendant herein [or, attorney for defendant], on _____, 20 _____, by leaving a copy with the Clerk of the Court, the address of _____ the defendant [the attorney for the defendant] being unknown. n6

H. (Counsel's certificate of service on attorney by leaving paper with Clerk of Court)

I, _____, attorney for plaintiff in the above-entitled action, hereby certify that on the _____ day of 20 _____, I served the attached _____ upon _____, attorney for defendant, by leaving a copy with the Clerk of the Court, the address of the defendant's attorney being unknown.

FOOTNOTES:

4-III Benedict on Admiralty FORM No. 3-9

(n1)Footnote 1. The appropriate title for each of the eight forms below is given at this head.

(n2)Footnote 2. *See* Form No. 3-1 *supra*.

(n3)Footnote 3. Requires complete affidavit form, including state and county of notarization and *jurat*.

(n4)Footnote 4. *See* Note 3 *supra*.

(n5)Footnote 5. *See* Note 3 *supra*.

(n6)Footnote 6. *See* Note 3 *supra*.



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4-III Benedict on Admiralty FORM Nos. 3-10-3-20

Reserved

FORM Nos. 3-10Reserved



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RULE 6 TIME

4-III Benedict on Admiralty FORM No. 3-21

FORM No. 3-21 Stipulation Extending Time, Rule 6(b)

[Caption] n1

It is hereby stipulated between the parties hereto that an order may be entered herein extending the time of the plaintiff [or, defendant] to _____ [name the particular act] to and including the _____ day of _____, 20 ____ [or, for _____ days from the date hereof].

Dated: _____

Attorney for Plaintiff

Attorney for Defendant

FOOTNOTES:

(n1)Footnote 1. See Form No. 3-1 *supra*.



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RULE 6 TIME

4-III Benedict on Admiralty FORM No. 3-22

FORM No. 3-22 Stipulation for Extension of Time/Salvage

[Caption] n1

Whereas, the State of _____ [the State] has asserted certain interests in the subject vessel, without waiving any defenses, by filing a Motion to Dismiss the complaint and a Motion to Amend certain orders of this court; and

Whereas, plaintiffs have requested the State's consent to an extension of time for filing responses to said Motions; and

Whereas, the State is willing to consent to the requested extension provided that plaintiffs stipulate and agree that no salvage operations concerning the subject vessel will occur prior to _____ days after their filing of responses to the State's Motions, and provided further that it is stipulated by plaintiffs that the State's consent to this extension does not waive any points in the State's Motions, including specifically the contention in its Motion to Amend that payment of custodial fees to plaintiffs prior to any actual salvage of artifacts is unwarranted;

Now Therefore:

1. The State of _____ consents to an extension of _____ days for plaintiffs' filing of their responses to defendant's Motions.

2. Plaintiffs, on behalf of themselves, their employees, agents, and assigns, stipulate that they will not conduct any salvage operations concerning the referenced vessel, including specifically but not limited to any removal of artifacts and any excavation or displacement of sand on the ocean floor by hydraulic device or other mechanical means, in any area lying within the three-mile limit off defendant's coast, until such time as plaintiffs file their responses to defendant's Motions.

3. Plaintiffs further stipulate that the consent by the State to this extension shall not be deemed a waiver by the State of any points raised in its motions.

4. Plaintiffs further stipulate that, notwithstanding this Court's Order of _____, 20 _____, no custodial fees shall accrue to plaintiffs during the period of time between the State's filing of its Motions and fifteen days after the filing of plaintiffs' response to said Motions, except such fees, if any, as may later be determined by the Court to be appropriate.

Stipulated by:

Attorney for Plaintiffs

Attorney for the State of _____

Approved this _____ day of

_____, 20 _____

Judge

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-23

FORM No. 3-23 Order--Approval of Stipulation for Extension of Time, Rule 6(b)

[Caption] n1

Upon consideration of the attached stipulation, it is

Ordered, that the said stipulation be and hereby is approved and that the time of the plaintiff [*or, defendant*] to _____ [*name the particular act*] is hereby extended to and including the _____ day of _____, 20 ____ [*or, for* _____ *days from the date hereof*].
Dated: _____

United States District Judge

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-24

FORM No. 3-24 Motion to Extend Time, Rule 6(b)

[Caption] n1

Plaintiff [Defendant] moves the court to extend until _____, 20 _____, the time within which plaintiff [defendant] may _____, on the ground that _____. No previous extensions of such time have been obtained for the defendant [plaintiff] or granted by this court.

or

Plaintiff [Defendant] shows to the court as follows:

1. [Set out former proceedings in the case which are relevant to the motion.]
2. [State facts showing that failure to do the act required within the prescribed time was the result of excusable neglect.]

Wherefore, plaintiff [defendant] moves the court for an order enlarging the period within which he may _____ until the _____ day of _____, 20 _____, notwithstanding the expiration of the period originally prescribed [or, as extended by order of this court dated the _____ day of _____, 20 _____] for the doing of the aforementioned act.

Dated: _____

Attorney for Plaintiff [Defendant]

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-25

**FORM No. 3-25 Motion to Extend Time to Answer or Otherwise Plead Pending Motion for Summary Judgment,
Rule 6(b)n1**

[Caption] n2

Now comes the Defendant, _____, by its attorneys, _____, and moves this court to extend the time in which to answer or otherwise plead to and until _____ under *Rule 6(b) of the Federal Rules of Civil Procedure* on the following grounds:

1. Defendant is still preparing certain affidavits in support of a motion for summary judgment in this matter.
2. The plaintiff's action is under the _____ Act for _____.
3. A determination of this motion will aid the parties by saving time and expense.
4. A request for an extension of time to file an answer or otherwise plead was made to plaintiff's attorneys and denied.
5. No previous application has been made to this court for an extension of time to answer or otherwise plead.

Wherefore, defendant _____ moves this court to extend the time in which to answer or otherwise plead to and until _____.

Attorney for Defendant

FOOTNOTES:

(n1)Footnote 1. Adapted from the papers in *Hughes v. United States*, 383 F. Supp. 1071 (S.D. Iowa 1973), furnished

through the courtesy of Paul A. Zoss, Esq. of the Office of the United States Attorney, Des Moines, Iowa.

(n2)Footnote 2. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-26

FORM No. 3-26 Motion for Enlargement of Time to Answer and Accompanying Affidavit (Case Removed to Federal Court), Rule 6(b)n1

[Caption] n2

Now Come the defendants, _____ and _____, by their attorneys, _____, and, pursuant to Rule 6(b), move the Court for an order enlarging the time in which these defendants must serve and file their answer to the plaintiff's amended complaint until _____, said date being sixty (60) days after first service of this amended complaint upon the defendant _____.

Attorney for Defendants
Office and P.O. Address

STATE OF _____)
COUNTY OF _____) ss
_____)
_____)

_____, being duly sworn deposes and says: That he is one of the attorneys for the defendants in this cause and that service of the plaintiff's summons on amended complaint and amended complaint was made upon the defendant _____ in _____, _____ on _____, and upon defendant _____ at _____ at some date thereafter; that attorneys for said defendants first received copies of said summons on amended complaint and amended complaint on _____ and will not have sufficient time to properly investigate the facts of this cause so as to prepare

4-III Benedict on Admiralty FORM No. 3-26

a defendants' answer and possible counterclaim within the time required by Rule 81(c):

That said summons on amended complaint, issued by plaintiff under process of the _____ Court of the State of _____ for _____ County required said defendants to answer only within sixty (60) days after service thereof if served outside of the State of _____, and that service of said summons on amended complaint was in fact made upon said defendants outside the State of _____, and that pursuant to said summons and the provisions of _____, the defendants would have sixty (60) days from date of service to answer the plaintiff's amended complaint with its cause to remain in the _____ Court and not be removed to this court; and that it is just and equitable that the defendants, having removed this cause to the United States District Court, should nevertheless have sixty (60) days from date of service on _____, _____, to prepare, serve, and file their answer, and any counter-claim that might be appropriate in this cause; and that said sixty (60) days would expire on _____.

[Signature with name printed underneath]

[Jurat]

FOOTNOTES:

(n1)Footnote 1. Adapted from papers in *Bitton v. International Transport, Inc.*, 437 F.2d 817 (9th Cir. 1970), furnished through the courtesy of Randall and Danskin, Spokane, Washington.

(n2)Footnote 2. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-27

FORM No. 3-27 Plaintiff's Motion for an Enlargement of Time to Respond to Motion to Dismiss or Motion for Summary Judgment

[Caption] n1

Plaintiffs, _____ and _____, by their attorneys, _____, respectfully move the Court for an enlargement of time, from the current day of _____, 20 _____, to and including _____, 20 _____, within which to file their response to the defendant's Motion to Dismiss or Motion for Summary Judgment filed in the above captioned case. This is plaintiff's first request for an enlargement of time for this purpose. Counsel for defendant has been consulted on this matter and has indicated that [he/she] has no objection to this Motion.

In support of this Motion, plaintiffs _____ and _____, submit that counsel for plaintiffs have been unable to complete the work on the required filing because of the press of other business. Among other activities, counsel for plaintiffs have been occupied in protracted litigation concerning the case of _____, with trial expected to continue for at least another two weeks from the date this Motion is filed. Additionally, counsel for plaintiffs has been occupied in conducting discovery and preparing for hearings in the case of _____ and _____. The two above cases concern _____ [description of claim] and involve extensive pretrial preparation. The enlargement of time requested will be needed to allow counsel sufficient time to review defendant's Motions and prepare the necessary response.

For the foregoing reason, plaintiffs respectfully request that their Motion for an Enlargement of Time be granted.

Respectfully submitted,

Attorneys for Plaintiffs

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-28

FORM No. 3-28 Order to Extend Time, Rule 6(b)

[Caption] n1

Plaintiff [*Defendant*] having moved the court to extend until _____, 20 _____, the time within which plaintiff [*defendant*] may _____, and it appearing to the court that the motion is made for good cause, it is

Ordered, that plaintiff's [*defendant's*] time to _____ in the above entitled cause be extended to and including the _____ day of _____, 20 _____.

or

Plaintiff [*Defendant*] having moved the court to extend the period within which plaintiff [*defendant*] may _____ until the _____ day of _____, 20 _____, and it appearing to the court that the motion is made for good cause and that plaintiff's [*defendant's*] failure to do the aforementioned action within the period originally prescribed was the result of excusable neglect, it is

Ordered, that plaintiff's [*defendant's*] time to _____ in the above entitled cause be extended to and including the _____ day of _____, 20 _____.

Dated: _____

United States District Judge

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-29

FORM No. 3-29 Order Granting Plaintiff Motion for Enlargement of Time to Respond to Motion to Dismiss or Motion for Summary Judgment

[Caption] n1

And now this _____ day of _____, 20 _____, upon the plaintiffs,
_____ and _____'s Motion for Enlargement of Time, it is

Ordered that plaintiffs are hereby granted an enlargement of time to file a response to the defendant's Motion to Dismiss, or in the alternative, Motion for Summary Judgment until _____, 20 _____.

United States District Judge

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3--30

FORM No. 3--30 Order Granting Defendant's Request for an Extension of Time to File Reply Memorandum

[Caption] n1

On this _____ day of _____, 20 _____, upon the defendant's request and plaintiffs' agreement for an extension of time within which defendant may file a Reply Memorandum, it is

Ordered that defendant is hereby granted an enlargement of time to file its Reply Memorandum in respect of the pending Motion to Dismiss, or in the alternative, Motion for Summary Judgment until _____, 20 _____.

United States District
Judge

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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Reserved

FORM Nos. 3-31Reserved



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4-III Benedict on Admiralty FORM No. 3-42

FORM No. 3-42 Notice of Motion--General Form Rule 7(b)n1

[Caption] n2

Please take notice, that the undersigned will bring the attached [*or, above*] motion on for hearing before this court at Room _____, United States Court House, City of _____, on the _____ day of 20____, at _____ o'clock in the _____ of that day or as soon thereafter as counsel can be heard.
Dated: _____

Attorney for Defendant

FOOTNOTES:

(n1)Footnote 1. This is substantially the "Notice of Motion" reproduced in Form 20 of the Official Forms annexed to the Federal Rules of Civil Procedure.

(n2)Footnote 2. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-43

FORM No. 3-43 Notice of Motion Combined With Motion--General Form, Rule 7(b)

[Caption] n1

Please take notice, that the undersigned will move this court at Room _____, United States Court House, _____ City of _____, on the _____ day of _____, 20____, at _____ o'clock in the _____ of that day or as soon thereafter as counsel can be heard, for an order [*set forth relief or order sought*], on the ground(s) that [*state ground(s) with particularity*].

Dated: _____

Attorney for Defendant

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-44

FORM No. 3-44 General Form of Order Granting or Denying Motion, Rule 7(b)

[Caption] n1

Granting motion:

This cause came on for hearing on _____, 20 _____, on plaintiff's motion to _____, and the court having heard the argument of counsel and being fully advised, it is

Ordered, that the plaintiff's motion be granted and that _____

or

Upon consideration of plaintiff's motion to _____

It Is Ordered that the said motion be granted and that _____

or

Plaintiff having moved the court to _____, and it appearing to the court that _____ and that the said motion should be granted, it is

Ordered that _____

Denying motion:

This cause came on for hearing on _____, 20 _____, on plaintiff's motion to _____, and the court having heard the argument of counsel and being fully advised, it is

Ordered, that the plaintiff's motion be denied.

or

Upon consideration of plaintiff's motion to _____

It Is Ordered that the said motion be denied.

Dated: _____, 20 _____

United States District Judge

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-45

FORM No. 3-45 Motion To Stay Proceedings Pending Arbitration, Rule 7(b)

[Caption] n1

Please Take Notice, that upon the attached Affidavit of _____, sworn to the _____ day of 20____, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court, before the Honorable _____, United States District Judge, at the Court House, _____, _____, _____, Courtroom No. _____ on the _____ day of 20____ at _____ o'clock in the _____, or as soon thereafter as counsel may be heard, for an Order pursuant to the provisions of the Federal Arbitration Act, Title 9 United States Code, staying proceedings between _____ and _____ pending arbitration between said parties, and for such other further and different relief as the Court may deem just and proper.
Dated: _____

Attorney for Defendant

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-46

FORM No. 3-46 Affidavit in Support of Motion To Stay Proceeding Pending Arbitration, Rule 7(b)n1

[Caption] n2

STATE OF _____)
COUNTY OF _____) ss
)
)

_____, being duly sworn, deposes and says:

1. I am a member of the firm of _____, attorneys for the defendants herein.
2. This is a suit brought in admiralty against the vessel _____ and her owner for an alleged contamination of cargo carried on board the vessel from _____ to the Port of _____. Suit is brought under the contract of carriage. Plaintiff alleges that it is the lawful holder of a negotiable bill of lading and thereby is the owner of the cargo and entitled to bring the action.
3. A copy of the bill of lading is attached hereto as Exhibit "A." By its terms, the bill of lading incorporates "all terms whatsoever" of the contract between the shipowner and the shipper, that is, the charterparty contract between _____ and the defendants dated _____, 20 _____, a copy of which is attached hereto as Exhibit "B." The charterparty contains an arbitration clause, which reads:

[Insert Provision]

4. This motion is brought pursuant to the Federal Arbitration Act, 9 U.S.C. § 3, which provides that whenever a suit is brought in a United States District Court upon any issue referable to arbitration, the Court shall stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.

5. Plaintiff's counsel has refused to voluntarily submit this controversy to arbitration, as is required by the terms of the contract of carriage.

Wherefore, defendants pray that this Court grant an Order referring all matters alleged in the Complaint herein to arbitration in accordance with the arbitration clause of the charterparty, which is part of the contract of carriage herein, and that all proceedings in this case be stayed until such arbitration has been had in accordance with the terms of the agreement.

Attorney for Defendants

Sworn to and subscribed before me this _____ day of _____, 20

_____.

[Seal]

Notary Public

FOOTNOTES:

(n1)Footnote 1. Adapted from papers filed in *Marc Rich & Co. International Ltd. v. M/T Nikos Kazantzakis*, Civ. No. 83-40 (E.D.N.Y. 1983).

(n2)Footnote 2. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-47

FORM No. 3-47 Notice of Motion To Compel Arbitration, Rule 7(b)

[Caption] n1

Please Take Notice that upon the attached petition, the undersigned will move this Court pursuant to Title 9, Sections 4 and 5 of the United States Code, at a stated term for the hearing of motions to be held in Room _____, United States Court House, City of _____, on the _____ day of _____, 20 _____, at _____ o'clock in the _____, or as soon thereafter as counsel can be heard for an order directing the Respondent to submit to arbitration and to appoint an arbitrator not later than _____ days after the entry of such order and that upon its failure to comply with the order, that an arbitrator shall be appointed by this Honorable Court on behalf of the Respondent upon the *ex parte* affidavit of Petitioner's counsel.

Please Take Further Notice that the Petitioner applies for such other and further and different relief as to the Court may seem just and equitable under the circumstances.

Dated: _____

Attorney for Petitioner

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-48

FORM No. 3-48 Order To Submit to Arbitration, Rule 7(b)

[Caption] n1

Petitioner having petitioned pursuant to Title 9, Sections 4 and 5 of the United States Code for an Order directing the Respondent to submit to arbitration and to appoint an arbitrator not later than _____ days after the entry of such Order and in the event of the Respondent's failure to appoint such an arbitrator as directed by the Court, this Court to appoint the Respondent's arbitrator thereof and further, on reading all papers and pleadings with regard to said Petition and no opposition having been offered by the Respondent and due deliberation having been had, it is

Ordered that the Respondent submit to arbitration any and all disputes arising out of the above-captioned Charter Party and appoint its arbitrator in the manner set forth in the above captioned Charter Party not later than _____ days from the date of entry of this Order, and it is

Further Ordered that in the event the Respondent fails to appoint its arbitrator as aforesaid, then this Court shall appoint an arbitrator on behalf of the Respondent upon the *ex parte* affidavit of counsel for the Petitioner.

Dated: _____

District Court Judge

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-49

FORM No. 3-49 Notice of Motion To Confirm Arbitrators' Award, Rule 7(b)

[Caption] n1

Please Take Notice, that upon the annexed Affidavit of _____, sworn to the _____ day of 20 _____, the Exhibits thereto and all the pleadings and proceedings heretofore had herein, the undersigned will move this Court at Room _____, United States Courthouse, City and State of _____, on the _____ day of _____, 20 _____ at _____ P.M. or as soon thereafter as counsel can be heard for an Order pursuant to the provisions of 9 U.S.C. §§ 8 and 9, confirming the Arbitration Award, for the entry of judgment thereon against the Respondent and for such other and further relief as may be just and proper, together with the cost of this proceeding.
Dated: _____

Attorney for Petitioner

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-50

FORM No. 3-50 Notice of Cross-Motion To Vacate Award of Arbitrator, Rule 7(b)

[Caption] n1

Please Take Notice, that upon the annexed affidavit of _____, sworn to the _____ day of 20____, the exhibits thereto, and all the pleadings and proceedings heretofore had herein, the undersigned will cross-move this Court at Room _____, United States Courthouse, City and State of _____, on the _____ day of _____, 20____, at _____ P.M. or as soon thereafter as counsel can be heard, for an Order pursuant to the provisions of the United States Arbitration Act, 9 U.S.C. § 10, vacating the award of arbitrators herein; and for such other, further or different relief as may be just in the premises.
Dated: _____

Attorney for Respondent

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-51

FORM No. 3-51 Motion for Leave To File Supplementary Memorandum in Support of Plaintiff's Motion for Summary Judgment, Rule 7(b)n1

[Caption] n2

Now Comes the plaintiff, _____ by and through its counsel, _____, and hereby requests leave of the Court to file the memorandum attached hereto supplementary to its Memorandum in Support of Plaintiff's Motion for Summary Judgment.

Plaintiff requests leave to take the opportunity to address itself to the decision of the _____ Circuit Court of Appeals in _____ [cite name and report of case], decided _____, 20 _____, the day prior to the filing of Plaintiff's Motion For Summary Judgment.

Counsel for defendants, having been advised of the filing of this motion, does not oppose the granting of the same.

Wherefore, it is respectfully requested that the Court grant movant leave to file the above Supplementary Memorandum.

Attorney for Plaintiff

FOOTNOTES:

(n1)Footnote 1. Adapted from papers in *Amerace Corp. v. National Labor Relations Court*, 431 F. Supp. 453 (D. Tenn. 1977), furnished through the courtesy of Jon P. McCalla, Armstrong Allen Braden Goodman McBride & Prewitt, Memphis, Tennessee.

(n2)Footnote 2. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-52

FORM No. 3-52 Motion for Leave to File Brief (or Memorandum of Law) With Excess Number of Pages, Rule 7(b)n1

[Caption] n2

Plaintiff _____, by [his/her] attorney, _____, moves this Court for leave to file a brief [or memorandum of law] in opposition to defendant's motion to _____ and in support of a motion for _____ filed instanter. In support of such motion, plaintiff shows the Court as follows:

1. Pursuant to Court order, Plaintiff has combined its brief in opposition to defendants' motion to _____ and in support of its motion for _____.
2. Such brief is _____ pages in length, or _____ pages in excess of the number permitted under Rule _____ of this Court's rules.
3. The extra length in the brief was necessary to properly present Plaintiff's position with respect to both motions.

Wherefore, it is prayed that this Court grant leave for Plaintiff to file such brief.

Attorney for Plaintiff

FOOTNOTES:

(n1)Footnote 1. Adapted from papers in *DiFoggio v. United States*, 484 F. Supp. 233 (N.D. Ill. 1979), furnished through the courtesy of William J. Wise, Coles & Wise, Ltd., Chicago, Illinois.

(n2)Footnote 2. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-53

FORM No. 3-53 Order Denying Plaintiff's Motion To Reconsider, Rule 7(b)

[Caption] n1

On this day came on to be considered Plaintiff's Motion to Reconsider, and after careful consideration, this Court is of the opinion and does find that said Motion should be denied. It is therefore,

Ordered, Adjudged and Decreed that Plaintiff's Motion to Reconsider be DENIED.

Signed and Entered this _____ day of 20 ____.

District Court Judge

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM Nos. 3-54-3-64

Reserved

FORM Nos. 3-54Reserved



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4-III Benedict on Admiralty FORM No. 3-65

FORM No. 3-65 Motion to Compel Separate Paragraphing of Complaint, Rule 10(b)

[Caption] n1

Now Comes the Defendant _____ by his attorneys, _____, and moves the court for an order requiring plaintiff to serve and file an amended complaint in which plaintiff's averments of claim are set forth in separate numbered paragraphs, each paragraph to be limited to a statement of a single set of circumstances, on the ground that such averments of claim [*or, the averments of claim in paragraphs _____ and _____ of plaintiff's complaint*] are not now so set forth.

Attorney for Defendant

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-66

FORM No. 3-66 Motion to Compel Statement of Claims in Separate Count, Rule 10(b)

[Caption] n1

Now Comes the Defendant _____ by its attorneys, _____, and moves the court for an order directing plaintiff(s) to serve an amended complaint herein, stating in separate counts each of the alleged claims for relief set forth in the complaint [*or, the claim(s) asserted by plaintiff _____ and the claim(s) asserted by plaintiff _____, respectively; the claim(s) asserted against defendant _____ and the claim(s) asserted against defendant _____*] on the ground that said claims are founded upon separate transactions [*or occurrences*] and separate statement is essential to the clear presentation of the matters set forth, in that _____.

Attorney for Defendant

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-67

FORM No. 3-67 Motion to Compel Separate Paragraphing of Defenses, Rule 10(b)

[Caption] n1

Now Comes the Plaintiff _____ by its attorneys _____ and moves the court to order defendant to serve and file an amended answer stating in separate numbered paragraphs his averments of defense, each paragraph to be limited to a statement of a single set of circumstances, on the ground that such averments of defense [*or, the averments of defense in paragraphs _____ and _____ of defendant's answer*] are not now so set forth.

Attorney for Plaintiff

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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RULE 11 SIGNING OF PLEADINGS, MOTIONS, AND OTHER PAPERS; SANCTIONS

4-III Benedict on Admiralty FORM No. 3-68

FORM No. 3-68 Motion for Fees and Expenses

[Caption] n1

Now Comes the Defendant, _____, by its attorneys, _____, moves for the imposition of an appropriate sanction on plaintiffs and their counsel, particularly for an Order pursuant to the Federal Rules of Civil Procedure to pay defendant the amount of reasonable expenses and fees incurred because of the filing of plaintiffs' Motion to _____.

The defendant states as reasons therefor that the plaintiffs' Motion is not well-grounded in fact, is not warranted by existing law or a good faith argument for the reversal of this Court's opinion and decision of _____, 20 _____, (and judgment entered on _____, 20 _____), and the plaintiffs' Motion has caused a needless delay and an increase in the cost of this litigation.

The defendant attaches hereto its Memorandum in Opposition to Motion to Amend Judgment or For Relief From Judgment attached hereto in support of this motion.

Attorneys for Defendant

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-69

FORM No. 3-69 Motion To Dismiss--General Defenses, Rule 12(b)n1

[Caption] n2

FIRST DEFENSE

The complaint fails to state a claim against defendant upon which relief can be granted.

SECOND DEFENSE

If defendant is indebted to plaintiffs for the goods mentioned in the complaint, he is indebted to them jointly with _____. [Joint debtor] is alive; is a citizen of the State of _____ and a resident of this district, is subject to the jurisdiction of this court, as to both service of process and venue; can be made a party without depriving this court of jurisdiction of the present parties, and has not been made a party.

THIRD DEFENSE

Defendant admits the allegations contained in paragraphs _____ and _____ of the complaint; alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph _____ of the complaint; and denies each and every other allegation contained in the complaint.

FOURTH DEFENSE

The right of action set forth in the complaint did not accrue within six years next before the commencement of this action.

COUNTERCLAIM

[Here set forth any claim as a counterclaim in the manner in which a claim is pleaded in a complaint. No statement of the grounds on which the court's jurisdiction depends need be made unless the counterclaim requires independent grounds of jurisdiction.]

CROSS-CLAIM AGAINST DEFENDANT

[Here set forth the claim constituting a cross-claim against defendant in the manner in which a claim is pleaded in a complaint. The statement of grounds upon which the court's jurisdiction depends need not be made unless the cross-claim requires independent grounds of jurisdiction.]

FOOTNOTES:

(n1)Footnote 1. This is substantially Form 20 of the Official Forms annexed to the Federal Rules of Civil Procedure.

(n2)Footnote 2. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-70

FORM No. 3-70 Notice of Motion To Dismiss, Rule 12(b)

[Caption] n1

Please Take Notice that upon the attached affidavit of _____, sworn to the _____ day of 20____, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court before the Honorable _____ on the _____ day of 20____ in Room _____ of the United States Courthouse, _____ in the City of _____, at _____ o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order pursuant to Rule 12(b) of the Rules of Civil Procedure for the following relief:

1. To dismiss the action or in lieu thereof quash the return of summons on the ground that defendant is a corporation organized under the laws of _____ and was not and is not subject to service of process within the _____ District or State of _____.
2. To dismiss the complaint on the ground that the action is barred by the statute of limitations.
3. To dismiss the complaint because the court lacks jurisdiction over the subject matter.

Please Take Further Notice that you are hereby required to serve any and all affidavits to be used in answer to this motion on the undersigned one day before the return date.

Dated: _____

Attorney for Defendant

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-71

FORM No. 3-71 Motion To Dismiss--Failure To State Claim: Lack of Service of Process; Improper Venue; Lack of Jurisdictional Amount, Rule 12(b)n1

[Caption] n2

Now Comes the defendant _____, by its attorneys, _____, and moves the court as follows:

1. To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.
2. To dismiss the action or in lieu thereof to quash the return of service of summons on the grounds (a) that the defendant is a corporation organized under the laws of _____ and was not and is not subject to service of process within the _____ District of _____, and (b) that the defendant has not been properly served with process in this action, all of which more clearly appears in the affidavits of _____ and _____ hereto attached as Exhibit _____ and Exhibit _____ respectively.
3. To dismiss the action on the ground that it is in the wrong district because (a) the jurisdiction of this court is invoked solely on the ground that the action arises under the Constitution and laws of the United States and (b) the defendant is a corporation incorporated under the laws of the State of _____ and is not licensed to do or doing business in the _____ District of _____, all of which more clearly appears in the affidavits of _____ and _____ hereto attached as Exhibits _____ and _____ respectively.
4. To dismiss the action on the ground that the court lacks jurisdiction because the amount actually in controversy is less

than fifty thousand dollars exclusive of interest and costs.

Dated: _____

Attorney for Defendant

FOOTNOTES:

(n1)Footnote 1. This is substantially Form 20 of the Official Forms attached to the Federal Rules of Civil Procedure.

(n2)Footnote 2. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-72

FORM No. 3-72 Motion To Dismiss-Stevedore and Compensation Insurer Not Real Parties in Interest in Longshoreman's Injury Suit Against Vessel Owner, Rule 12(b)n1

[Caption] n2

Now Come, the defendants _____ [Shipping Company] and _____ [Insurance Company], by its attorneys, _____ pursuant to the Federal Rules of Civil Procedure, and particularly Rule 12(b)(6) thereof, move this court to dismiss Count _____ of plaintiff's complaint filed against _____ and _____ and in support of the Motion state the following facts:

1. Plaintiff has commenced the instant action to recover for personal injuries sustained on or about _____, 20 _____, aboard the vessel _____, owned and operated by defendant, _____.
2. At the time of the accident that is the subject matter of the suit, plaintiff was employed by _____ as a longshoreman and was covered by the Longshoremen and Harbor Workers' Compensation Act, as amended in 1972, 33 U.S.C. §(EN)901, *et seq.*
3. Plaintiff's medical expenses resulting from his alleged injuries have been paid by _____ pursuant to the Act. Workmen's compensation benefits for temporary total disability were paid to plaintiff pursuant to the Act from _____, 20 _____, to _____, 20 _____, by _____, _____'s compensation insurance carrier.
4. _____ and _____ have asserted a medical and compensation lien against any recovery by plaintiff in this matter pursuant to the Act and the law applicable thereto.

5. In Count _____ of the Complaint, plaintiff has requested that the court enter a Declaratory Judgment that _____ and _____ are the real parties in interest in the third party action against _____ to the extent of their medical and compensation liens, that they be joined as involuntary plaintiffs, and that plaintiff may bring this action for damages to which he may be entitled in excess of said liens separate and apart from the lien claims of _____ and _____.

6. Plaintiff's prayer for declaratory relief is inappropriate, as (1) this court lacks jurisdiction over _____ and _____, (2) a comprehensive statutory scheme exists to reconcile the rights of _____, _____, and plaintiff, and (3) there is no actual controversy between _____, _____, and plaintiff.

7. Count II of plaintiff's complaint fails to state a claim upon which relief can be granted as neither _____ nor _____ are real parties in interest to this action nor are they susceptible to joinder as involuntary plaintiffs.

8. Count II of plaintiff's complaint fails to set forth a cause of action upon which relief can be granted, as plaintiff's cause of action against _____ and _____ as asserted is contrary to the terms and provisions of the Longshoremen and Labor Workers' Compensation Act, as amended in 1972, and the law applicable thereto, as is more fully set forth in the Memorandum of Law attached hereto.

9. Plaintiff has failed to set forth a claim against _____ and _____ upon which relief can be granted.

Wherefore, _____ [Shipping Company] and _____ [Insurance Company] pray that Count _____ of plaintiff's complaint against them be dismissed pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure* and that they may have such other and further relief as may be just and appropriate.

Attorney for Defendants

FOOTNOTES:

(n1)Footnote 1. Form adapted from papers filed in *Passman v. Companhia de Navegacao Maritima Netumar*, 544 F. Supp. 451 (E.D. Pa. 1982), *aff'd*, 725 F.2d 669 (3d Cir. 1983), furnished through the courtesy of Thomas S. Brown, Esq., Hecker Rainer and Brown, Philadelphia, Pennsylvania.

(n2)Footnote 2. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-73

FORM No. 3-73 Motion To Dismiss--Lack of Jurisdiction Over the Person, Rule 12(b)

[Caption] n1

Now Comes the Defendant _____, and moves the court to dismiss this action or in lieu thereof to quash the return of summons on the ground that the defendant is a corporation organized under the laws of the State of _____ and was not and is not subject to service of process within the _____ District of _____, as more clearly appears in the affidavits of _____ and _____, hereto attached as Exhibit _____ and Exhibit _____ respectively.

Dated: _____

Attorneys for Defendant

or [where service is without the district]

Now Comes the Defendant, _____, a _____ corporation, by its attorneys _____, and moves the court, pursuant to *Federal Rules of Civil Procedure 12(b)(2)*, for an Order dismissing the Complaint herein for and upon the grounds that this defendant was served with process in this cause in the State of _____; that it is a _____ corporation, not domesticated in the State of _____ and not doing business in the State of _____; that the claim for relief set forth in the Complaint is not of the type which would provide a basis for *in personam* jurisdiction as to this defendant under the _____ "long-arm" statutes, §§ _____ *et seq.*

Attached hereto is the Affidavit of _____, which is submitted in support of this Motion to Dismiss. Additionally, defendant is filing simultaneously herewith its Brief in Support of Motion to Dismiss.

Wherefore, defendant prays that upon consideration of this Motion, the Court enter an Order dismissing the plaintiff's Complaint for and upon the grounds above set forth. n2

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.

(n2)Footnote 2. Form adapted from papers in *Jem Engineering & Manufacturing, Inc. v. Toomer Electric Company, Inc.*, 413 F. Supp. 481 (D. Okla. 1976) , furnished through the courtesy of William C. Anderson, Esq., Doerner, Stuart, Saunders, Daniel & Langenkamp, Esqs., Tulsa, Oklahoma.



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4-III Benedict on Admiralty FORM No. 3-74

FORM No. 3-74 Affidavit in Support of Motion To Dismiss for Lack of Jurisdiction Over the Person, Rule 12(b)n1

[Caption] n2

_____, residing at _____, being duly sworn, deposes and says:

1. I am Secretary of _____ [Shipping Corporation], which is a corporation organized and existing under and by virtue of the laws of the Republic of _____ with an office and principal place of business at _____ in the Republic of _____.
2. This affidavit is submitted in support of the motion by defendant, _____ [Shipping Corporation] to vacate the service of the summons and complaint and to dismiss the action against said defendant. The grounds for this motion to dismiss are that defendant, _____ [Shipping Corporation], is not within the jurisdiction of this Honorable Court. It is a non-resident of the State of _____ and does not have any office or agent or bank accounts in the State of _____ and the claim asserted in the complaint did not arise from any transaction of business by _____ [Shipping Corporation] in the State of _____.
3. _____ [Shipping Corporation] is engaged in the business of ocean carriage and is not the owner of vessel _____. At all material times the vessel _____ was chartered by _____ [Shipping Corporation] to _____ [Steamship Company] pursuant to a charter party dated _____, 20 _____. _____ then sub-chartered the vessel to _____ for one voyage from _____ to _____.
4. I have been informed that plaintiffs, _____ and _____, commenced this action

4-III Benedict on Admiralty FORM No. 3-74

as owners of a shipment of _____ carried pursuant to a bill of lading issued by _____ for carriage from _____ to _____ to recover damages for alleged shortage and damage to that shipment.

5. _____ [*Shipping Corporation*] was not a party to any bills of lading or contract for the carriage of goods to a port within this Court's jurisdiction and had no contact of any kind with this jurisdiction.

6. In summary, the defendant, _____ [*Shipping Corporation*], is a non-resident of the State of _____, is not present in the State, has never conducted business in the State, and the claims asserted in the complaint did not arise out of any transaction of business by _____ [*Shipping Corporation*] in the State of _____.

Deponent

Sworn to and subscribed before me this _____ day of _____, 20_____
_____.

[*Seal*]

U.S. Consular Officer

FOOTNOTES:

(n1)Footnote 1. Form adapted from papers filed in ICC Handels, A.G. v. S/S Seabird, 544 F. Supp. 58 (S.D.N.Y. 1982), furnished through the courtesy of Jane Elizabeth Lawson, Esq., Kirlin, Campbell & Keating, New York, New York.

(n2)Footnote 2. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-75

FORM No. 3-75 Motion To Dismiss for Lack of Jurisdiction Over the Person--No Lawful Service, Rule 12(b)n1

[Caption] n2

Pursuant to *Rule 12(b) of the Federal Rules of Civil Procedure*, defendant, _____, appearing specially herein through its undersigned counsel for the limited purpose of contesting service of process and personal jurisdiction, hereby moves the Court to dismiss this action against defendant on the grounds that no lawful service of process has been made on defendant and that defendant is not subject to the jurisdiction of this Court. In support of this motion, defendant relies upon (1) the complaint and (2) the affidavit of _____, dated _____, 20 ____ filed herewith.

Wherefore, defendant respectfully prays that the Court grant this motion and that plaintiff's action against defendant be dismissed for lack of service of process and want of personal jurisdiction over defendant, or that the service of process be quashed, and grant such further relief as the Court may find just and appropriate under the circumstances.

Attorney for Defendant

FOOTNOTES:

(n1)Footnote 1. Form adapted from papers filed in *Robinson v. Ravenel Co., Inc.*, 411 F. Supp. 294 (N.D. Ga 1976), furnished through the courtesy of Frederick K. Heller, Jr., Esq., Kilpatrick, Cody, Rogers, McClatchey & Regenstein, Esq., Atlanta, Georgia.

(n2)Footnote 2. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-76

FORM No. 3-76 Affidavit in Support of Motion To Dismiss for Improper Service on Corporation

[Caption] n1

_____, being duly sworn, deposes and says:

That I am an associate of the firm of _____, attorneys for the defendant, _____, in the above-entitled action.

That I am familiar with the facts and circumstances of this matter being based upon the file maintained thereon in my office.

I submit this affidavit in support of the motion for an Order dismissing plaintiff's claim as against the defendant, _____ Corp., on the grounds set forth in the Notice of Motion and accompanying Memorandum of Law.

This action embraces a claim for personal injury to the plaintiff which allegedly occurred as a result of an accident which happened aboard a ship known as the " _____ " on _____, 20 ____.

That upon a personal review of the Court files, it appears as if the amended complaint naming _____ was filed with this Court on or about _____, 20 _____. A copy of said filing obtained from the Court files is attached hereto as Exhibit _____, for this Court's convenience. *[exhibit omitted.]*

That as can be seen from plaintiff's amended complaint, again, a copy of which was obtained from this Court's files and a copy of which is attached hereto as Exhibit _____ *[omitted]*, this is an action for personal injuries

4-III Benedict on Admiralty FORM No. 3-76

allegedly incurred by the plaintiff on _____, 20 ____ while plaintiff was working aboard a vessel known as the " _____ " allegedly owned by the codefendant _____.

Apparently, this action seeks recovery for the negligence of the defendant, _____, pursuant to the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901, *et seq.*).

That upon information and belief, the defendant, _____, never learned of the instant litigation until _____, 20 ____, when a risk manager by the name of _____ received a telephone call from _____, attorney for the _____, inquiring as to _____'s legal representation in this matter.

Apparently, upon information and belief, as a result of this telephone conversation, _____ sent a copy of the amended complaint to _____ which, in turn, was forwarded to your affiant's law office.

Whereupon, your affiant reviewed this Court's files on the instant litigation and found that the plaintiff allegedly attempted personal service upon the defendant, _____, in this action by personal delivery to one _____ at _____ on _____, 20 _____. A copy of plaintiff's alleged affidavit of service is attached hereto for this Court's convenience as Exhibit _____ [omitted].

Your affiant then contacted _____ and found that _____ did in fact act as stevedores at the _____ Terminal from approximately _____, 20 _____ to _____, 20 _____.

However, the stevedores at said terminal on the date of alleged service were _____, in that _____ had ceased to be stevedores at said terminal on the date of purported service.

Your affiant is informed that upon information and belief _____, the person upon whom which personal service on behalf of was effected, is in fact an employee of the codefendant, _____. It is your affiant's assumption that, as such, _____ merely forwarded the copy of said summons and complaint to the codefendant, _____, in that _____ was named in the caption in the amended summons and complaint.

That annexed hereto as Exhibit _____ [omitted] is an affidavit from _____, Secretary to _____. Said affidavit clearly sets forth that _____ has not yet been served with a copy of the summons and complaint in the above-entitled action.

Further, said affidavit sets forth that _____ was not a person authorized to accept service on behalf of _____ but, in fact, upon information and belief, was not even an employee or agent of _____ on the date of alleged service.

On _____, 20 ____, your affiant appeared with co-counsel before the Honorable Judge _____ of this Court for a status conference at which time the issue giving rise to this motion was discussed.

Judge _____ directed that a motion be made on this issue within _____ days of said conference, and that plaintiff's attorney serve opposition papers within _____ days of service of said motion, and that, in turn, the defendant, _____, serve reply papers within _____ days of service of plaintiff's opposition.

That as is more fully set out in the accompanying Memorandum of Law, this motion should be granted since the

4-III Benedict on Admiralty FORM No. 3-76

defendant, _____, has never been properly served with a copy of plaintiff's summons and complaint with the 120-day period subsequent to filing provided by *Rule 4(j) of the Federal Rules of Civil Procedure* and that said claim is further time barred by the three-year statute of limitations which ran on _____, 20 _____.

Attorney for Defendant

Sworn to before me this

_____ day of _____, 20_____.

Notary Public

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-77

FORM No. 3-77 Appearance by State Attorney General and Motion To Vacate Arrest and To Dismiss for Lack of Jurisdiction

[Caption] n1

_____, Attorney General of _____, and _____, Assistant Attorney General, appear specially on behalf of the State of _____, without waiving the State's sovereign immunity, and move this Court to vacate the arrest effected by the United States Marshal and to dismiss the Complaint filed by Plaintiffs. As reasons for the State's motion, they state:

1. The abandoned, wrecked, and unidentified vessel and effects named Defendant in this case are located, as appears from the coordinates in the heading of the case and from the Complaint, under an undetermined amount of sand beneath territorial and navigable waters of the State of _____. The bed of the State's navigable waters is property of the State.
2. Pleadings filed by the Plaintiffs indicate Plaintiffs' belief that the Defendant property consists of the remains of a _____ that sank in 18 _____.
3. Under § _____ of the _____ Article of the Annotated Code of _____, any object of historical or archaeological value found on an archaeological site or land owned or controlled by the state is the property of the state. Moreover, under the State's sovereign prerogative, abandoned vessels and their effects recovered from territorial waters of the State belong to the State. Therefore, if the Defendant property in fact consists of the remains the Plaintiffs believe them to be, it is the property of the State of _____.

4. This Court has no jurisdiction to entertain suits by _____ corporations against the State of _____ and no legal authority to arrest property of the State of _____ to satisfy claims of _____ corporations. Because this is an action in which corporate citizens of the State of _____ claim title to or rights in State property, it must be dismissed, and the Defendant State property must be released from custody.

5. Plaintiffs have not alleged the performance of any salvage services. They have merely alleged in their Complaint that they have found or located the Defendant property and that they intend to raise and recover that property in the future. These allegations are insufficient to state a maritime cause of action for salvage.

6. a. The Defendant vessel is not presently engaged in navigation or commerce and therefore is not a proper object of a petitory suit under Supplemental Admiralty Rule D.

b. Alternatively, assuming that the Defendant vessel is a proper object of a petitory suit, Plaintiffs have not effected proper service under Supplemental Admiralty Rule D, in that they have not given notice in the manner provided by Supplemental Admiralty Rule B(2) to the State of _____.

7. Since this action cannot stand as one to enforce a maritime lien for salvage or as a petitory action, it is not within this Court's admiralty jurisdiction. Furthermore, there is no diversity of citizenship, no allegation of the amount in controversy, and no assertion of a federal question. This Court is wholly without jurisdiction in the circumstances.

For all of the reasons stated, the State of _____ prays:

1. That the arrest of the Defendant property be vacated and that the property be released from custody;
2. That the Complaint of the Plaintiffs be dismissed for want of jurisdiction over the Defendant property;
3. That the Complaint of the Plaintiffs be dismissed for want of subject matter jurisdiction;
4. Such other and further relief as the Court may find appropriate.

Attorney General

Assistant Attorney General

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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MOTION--MOTION FOR JUDGMENT ON PLEADINGS

4-III Benedict on Admiralty FORM No. 3-78

FORM No. 3-78 Notice of Motion To Dismiss--Lack of Subject Matter Jurisdictionⁿ¹

[Caption] ⁿ²

SIRS:

Please Take Notice that, upon the complaint herein, the undersigned will move this Court on the _____ day of _____, 20 ____ at _____ p.m., or as soon thereafter as counsel may be heard, for an order pursuant to *Fed. R. Civ. P. 12(b)(1)* dismissing the complaint for lack of jurisdiction over the subject matter thereof together with such other and further relief as to the court may seem just and proper.

Dated: _____

Attorneys for Defendant

FOOTNOTES:

(n1)Footnote 1. Form adapted from papers filed in *Continental Cameras Co. v. FOA & Son Corporation*, 658 F. Supp. 287 (S.D.N.Y. 1987). Papers furnished through the courtesy of Rivkin, Radler, Dunne & Bayh, Uniondale, New York.

(n2)Footnote 2. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-79

FORM No. 3-79 Affidavit in Support of Motion To Dismiss--Lack of Subject Matter Jurisdictionn1

[Caption] n2

_____, being duly sworn, deposes and says:

1. I am an attorney associated with the firm of _____ attorneys for defendant, _____. I submit this affidavit in support of the motion of defendant which seeks an order pursuant to *Fed. R. Civ. P. 12(b)(1)* dismissing the complaint of _____ for lack of subject matter jurisdiction. This case is before the court on plaintiffs' contention that subject matter jurisdiction is grounded in admiralty jurisdiction pursuant to *28 U.S.C. § 1333*. As will be demonstrated below, the claims for relief stated against defendant do not arise under the admiralty jurisdiction of this court.

2. This action arises from a purported cancellation of an ocean marine open cargo insurance policy with endorsements covering goods stored in domestic warehouses. The policy was issued by _____ [Insurance Company] to _____. Defendant was the broker for _____ in procuring the insurance. It is claimed by plaintiffs that defendant, upon learning of the cancellation from _____ [Insurance Company] failed to notify the insureds of such cancellation and failed to procure alternative insurance. As a result, it is claimed that certain inventory goods located in a warehouse in _____ known as the _____ warehouse were destroyed in a fire on _____, 20 _____, without the benefit of having fire insurance in place to cover the loss.

3. Plaintiffs' complaint alleges jurisdiction under *28 U.S.C. § 1333* claiming that this action arises from a breach of duties under a maritime insurance contract. A copy of plaintiffs' complaint is attached hereto as Exhibit "A". A copy of defendant's answer denying the jurisdictional allegation is attached hereto as Exhibit "B". Defendant was merely a

broker for _____ in the procurement of the policy. As a broker, defendant acted as an agent for _____ in collecting and submitting cargo reports and premiums. Defendant also acted as _____'s agent for receipt of cancellation notices. Plaintiffs, in paragraph 7 of their complaint, characterize these broker functions as a contractual undertaking by defendant under the _____ Company's insurance policy. However, defendant was not a party to that contract, either by reason of its placing of the coverage with _____ Company on behalf of _____, or by its function as an agent on behalf of _____. The insurance policy, in pertinent part, is annexed as Exhibit "C".

4. In connection with the above, paragraph _____ of the policy, entitled "Reporting Clause" reads, as follows:

[Insert Provision]

Paragraph _____ does not make defendant a party to this contract. Nor does it obligate defendant under the insurance policy to do anything, as plaintiffs would have this court believe (see para. _____ of the complaint). Rather, it is a clause wherein _____, as the assured, warrants to report and pay premiums to _____ Insurance Co., either directly to this insurance company or through defendant. While defendant acted as an agent for remitting reports and premiums to the insurance company on behalf of _____, it did not do so under any undertaking within the four corners of the insurance policy.

5. Plaintiffs' complaint in paragraph _____ admits that defendant was a mere "broker" and "intermediary" for _____ under the specific terms of the contract of insurance. Plaintiffs are presumably referring to paragraph _____ of the policy, which reads as follows:

It is a condition of this Policy, and it is hereby agreed that the intermediary named in this Policy, or any substituted intermediary, shall be deemed to be exclusively the agents of the Assured and not of the Company in any and all matters relating to, connected with or affecting this insurance. Any notice given or mailed by or on behalf of the Company to the said brokers in connection with or affecting this insurance or its cancellation shall be deemed to have been delivered to the Assured.

The plain language of paragraph _____ evidences the understanding and intent that defendant, as the "intermediary" in the policy, was the "agent of the assured," and not of _____ *[Insurance Company]* As an "agent" and "intermediary," it is clear defendant was not a party to the insurance contract. Thus, while _____ and _____ Insurance Co.'s contract may refer to defendant's agency, such reference does not make defendant a party to the policy or obligated under it. Any obligations which defendant may have agreed to were separately agreed to with _____, and, even if related to the policy, not a part of the policy.

6. In sum, whether it be the reporting requirements, the transmission of premiums or the receipt of notice under the policy, defendant performed these duties on behalf of _____, pursuant to its own separate agency agreement with _____ to service the policy, and not as a party to the insurance contract. Thus, plaintiffs' allegation that this lawsuit arises from a purported breach arising of a "marine insurance contract" is utterly spurious, unsupported by the facts and constitutes a contradiction of the clear language of the policy. The claims made against defendant amount to nothing more than negligence, broker malpractice or breach of an agency agreement, all of which are common law causes of action which are not the subject of admiralty jurisdiction.

7. The complaint, when sheered of its erroneous conclusions as to the role and obligations of defendant, merely alleges a claim that defendant allowed coverage to lapse and failed to procure future coverage for _____ upon the termination of the insurance policy. As shown in our accompanying memorandum of law, it is a black letter

rule of law in admiralty that the breach of a contract to procure or obtain insurance is a nonmaritime agreement not cognizable within admiralty jurisdiction.

8. It should also be noted that the underlying loss for which plaintiff seeks to recover was covered under the policy only by virtue of the domestic warehouse endorsement. Whatever goods were lost in the fire were simple inventory in a warehouse at the time of the loss. They had lost whatever connection they may have ever had with the admiralty interests of this court. As shown in our accompanying memorandum of law, an ocean marine policy which also covers domestic warehouses, at least to the extent of the domestic warehouse endorsement, is not an admiralty contract cognizable within the jurisdiction of this court. Thus, _____'s entitlement (if any) to insurance recovery for the warehouse loss arose out of a nonmaritime contract in any event. It is respectfully submitted that an admiralty court lacks subject matter to compel a party in the position of defendant to answer for damages, nonmaritime in nature, which derive ultimately from nonmaritime insurance coverage.

9. This motion is not made for delay. Indeed, there is no stay of discovery. In this connection, it is essential for defendant to assert the jurisdictional defect inasmuch as plaintiffs, if permitted to proceed under the admiralty jurisdiction of this court in error, would deprive defendant of its right to a trial by jury.

Wherefore, it is respectfully requested that the motion be granted.

Affiant

Sworn to before me this

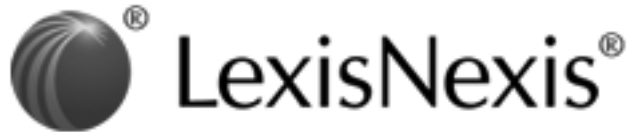
_____ day of _____, 20____.

Notary Public

FOOTNOTES:

(n1)Footnote 1. Form adapted from papers filed in *Continental Cameras Co. v. FOA & Son Corporation*, 658 F. Supp. 287 (S.D.N.Y. 1987). Papers furnished through the courtesy of Rivkin, Radler, Dunne & Bayh, Uniondale, New York.

(n2)Footnote 2. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-80

FORM No. 3-80 Motion To Dismiss--Lack of Jurisdiction (Sovereign Immunity), Rule 12(b)n1

[Caption] n2

Now Comes the Defendant United States of America and moves pursuant to *Fed. R. Civ. P. 12(b)* to dismiss plaintiff's action for lack of jurisdiction.

The reasons for this motion, as more fully appear in the supporting memorandum attached hereto, are that defendant United States of America has waived its sovereign immunity from suit and consented to be sued on plaintiff's alleged cause of action only pursuant to the terms and conditions of the Suits in Admiralty Act, 46 U.S.C. § 741, with the forthwith service requirements of which, at 46 U.S.C. § 742, plaintiff did not comply, in that plaintiff failed to serve defendant United States of America with a summons or a copy of the complaint for more than eight months after plaintiff's complaint was filed. Defendant United States of America has not waived its sovereign immunity from suit where the service of process is not timely and insufficient and defective, and plaintiff's action must therefore be dismissed for lack of jurisdiction.

Dated: _____

Attorney for Defendant

FOOTNOTES:

(n1)Footnote 1. Form adapted from papers filed in *Brown v. United States*, 403 F. Supp. 472, 2076 A.M.C. 1139 (C.D. Cal. 1975), courtesy of the U.S. Department of Justice, Admiralty and Shipping Section, San Francisco, California.

(n2)Footnote 2. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-81

FORM No. 3-81 Motion To Dismiss for Lack of Jurisdiction--Foreign Sovereign Immunities Act, Rule 12(b)n1

[Caption] n2

Now Comes the Defendant, _____ [*Ocean Line*], by its attorneys _____, moves this Court pursuant to *Rule 12(b) of the Federal Rules of Civil Procedure* for an Order dismissing plaintiff's complaint on the grounds of lack of jurisdiction.

As more fully appears from the affidavits of _____ and _____, attached hereto as Exhibits A and B respectively, defendant _____ [*Ocean Line*] is an agency or political subdivision of the government of the Republic of _____. As such a governmental entity of a foreign state, defendant _____ [*Ocean Line*] is immune from suit in the courts of the United States under the provisions of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, *et seq.* The vessel _____, being owned and operated by defendant, _____ [*Ocean Line*], is likewise immune from prejudgment attachment in the United States under the terms of the said Act.

Wherefore, defendant, _____ [*Ocean Line*], prays that the Complaint be dismissed and that defendant be awarded its costs, reasonable attorney's fees, and such other and further relief as this court may deem just and proper.

Attorney for Defendant

FOOTNOTES:

(n1)Footnote 1. Form adapted from papers filed in *O'Connell Machinery Co. v. M.V. Americana*, 566 F. Supp. 1381, (S.D.N.Y. 1983), *aff'd*, 734 F.2d 115 (2d Cir. 2084), *rehearing denied*, (June 14, 1984), *petition for cert. pending*,

furnished through the courtesy of De Orchis & Partners, New York, New York. *See also* Form Nos. 3-82 and 3-83, Affidavits in Support, *infra*.

(n2)Footnote 2. *See* Form 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-82

FORM No. 3-82 Affidavit of Attorney in Support of Motion To Dismiss--Foreign Sovereign Immunities Act, Rule 12(b)n1

[Caption] n2

STATE OF _____)
) ss
 COUNT OF _____)
)

_____, being duly sworn, deposes and says:

1. I am associated with the firm of _____, attorneys for defendant _____ [Ocean Line], and make this affidavit in support of _____ [Ocean Line's] motion to dismiss plaintiff's complaint on the ground that plaintiff violated the Foreign Sovereign Immunities Act, 26 U.S.C. § 1602, et seq. , by forcing _____ [Ocean Line] to post a letter of guarantee to avoid arrest of its vessel, the _____.

2. Plaintiff's counsel was advised on _____, 20 _____, by _____, counsel for _____ [Ocean Line], that it is a corporation organized in the Republic of _____, which is owned by _____, a political subdivision of the _____ Government, which oversees State-owned shipping companies. _____, in turn, is owned by _____, an organization of the Republic of _____, which is in charge of overseeing and financing state-owned industries. _____, counsel for plaintiff, indicated during a telephone conversation with deponent that

he was aware of the political subdivisions entitled _____ and _____, but did not believe that they created a defense of sovereign immunity for _____ [*Ocean Line*]. _____ was provided with an affidavit on _____, 20____, by _____, commercial counselor to the Ambassador of the Republic of _____, which explained in detail the structure of the governmental organization that controls _____ [*Ocean Line*]. A copy of that affidavit is attached as Exhibit _____.

3. On _____, 20____, plaintiff's counsel telephoned deponent and informed him that the vessel _____ would be arriving in the Port of _____ on _____, 20____, and that if a Letter of Undertaking was not posted the vessel would be arrested. In order to avoid formal arrest, a Letter of Undertaking was put up in the amount of \$ _____ plus costs and interest. See Exhibit _____ attached hereto. Plaintiff's counsel conceded that the demand for a Letter of Undertaking was tantamount to an actual arrest of the defendant's vessel See Exhibit _____, cover note to Letter of Undertaking.

4. The demand for a Letter of Undertaking has created a burden on the defendant, who must pay the underwriter for putting up the letter, and the service of motions on this issue has obviously involved substantial legal fees and disbursements. It was exactly this sort of litigation against a sovereign state that the Foreign Sovereign Immunities Act was intended to prevent. Plaintiff is employing every conceivable argument, including constitutionality, to force the _____ Government and its steamship line to put up a bond or letter to cover plaintiff's claimed damages. A letter of guarantee or bond has never been required of _____ [*Ocean Line*] before this litigation. If permitted now, the threat of arrest to this foreign state's vessels would be ever present and in this case the plaintiff would enjoy a special security allowed only to claimants under the U.S. Admiralty Rules of Procedure.

Wherefore, deponent respectfully requests this Honorable Court to issue an Order dismissing plaintiff's complaint on the grounds that plaintiff violated the Foreign Sovereign Immunity Act, 26 U.S.C. § 1602, *et seq.*, by forcing the defendant _____ [*Ocean Line*] to post security to avoid arrest of its vessel, _____, and for such other and further relief as this Court may deem just in the premises.

Attorney for Defendant

Subscribed and sworn to before me this _____ day of _____, 20____.

Notary Public

[Seal]

FOOTNOTES:

(n1)Footnote 1. Form adapted from papers filed in *O'Connell Machinery Co. v. M.V. Americana*, 566 F. Supp. 1381, (S.D.N.Y. 1983), *aff'd*, 734 F.2d 115 (2d Cir. 2084), *rehearing denied* (June 14, 1984), *petition for cert. pending*, furnished through the courtesy of De Orchis & Partners, New York, New York. *See also* Form Nos. 3-82 and 3-83, Affidavits in Support, *infra*.

(n2)Footnote 2. *See* Form 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-83

FORM No. 3-83 Affidavit of Government Official in Support of Motion To Dismiss--Foreign Sovereign Immunities Act, Rule 12(b)n1

[Caption] n2

STATE OF _____)
) ss
 COUNTY OF _____)
)

_____, being duly sworn, deposes and says:

1. I am the Counselor of Commercial Activities of the Republic of _____ at _____ and am chief officer of the Commercial Office at the Embassy of the Republic of _____ to the United States of America.

2. I have been recognized as the Counselor of commercial Activities of the Republic of _____ by the Government of the United States of America since _____, 20 _____. Attached hereto and made a part hereof is a true copy of the Diplomatic Identification Card recognizing my status as Counselor of Commercial Activities of the Republic of _____, issued to me by the Secretary of State of the United States of America on _____, 20 _____. The Diplomatic Identification Card has never been revoked and is still in full force and effect.

3. According to the official records of the Republic of _____, _____ [Ocean Line]

4-III Benedict on Admiralty FORM No. 3-83

is now and has been continuously from _____, 20 ____ to the present the sole owner of the vessel _____ flying the flag of the Republic of _____.

4. _____ [*Ocean Line*] is a stock corporation created and organized under the laws of the Republic of _____, with its world headquarters in _____.

5. The majority of the shares of _____ [*Ocean Line*] are owned by the _____.

6. _____ is a government-owned entity, set up in 20 ____ with the purpose of coordinating and controlling the large steamship companies of preeminent national interest. _____ is a subdivision of _____.

7. The _____, created pursuant to _____ [*law or decree*] of _____, 20 ____, and erected into a public financial entity pursuant to [*insert law or decree*] of _____, 20 ____, is authorized to accomplish all the financial operations with the enterprises of which the State or _____ itself owns stock participations, or with public entities whose formation capitals are, completely or partially, directly or indirectly, provided by the State. The instructions for the entity's activities are given by [*describe governing body*].

8. [*Describe legal relationship between state owned Company and Ocean Line*]

9. In view of the foregoing, _____ [*Ocean Line*] is a separate legal person and instrumentality of the government of the Republic of _____.

10. _____ [*Ocean Line*] is neither a citizen of a State of the United States nor created under the laws of any third country.

(Deponent)

Subscribed and sworn to before me this _____ day of _____, 20 ____.

[*Seal*]

Notary Public

FOOTNOTES:

(n1)Footnote 1. Form adapted from papers filed in *O'Connell Machinery Co. v. M.V. Americana*, 566 F. Supp. 1381, (S.D.N.Y. 1983), *aff'd*, 734 F.2d 115 (2d Cir. 1984), *rehearing denied* (June 14, 1984), *petition for cert. pending*, furnished through the courtesy of De Orchis & Partners, New York, New York. *See also* Form Nos. 3-82 and 3-83, Affidavits in Support, *infra*.

(n2)Footnote 2. *See* Form 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-84

FORM No. 3-84 Motion To Dismiss--Lack of Admiralty Jurisdiction; Lack of Diversity of Citizenship, Rule 12(b)

[Caption] n1

Defendant moves to dismiss the complaint upon the following grounds:

The facts alleged do not constitute a cause of action within the admiralty and maritime jurisdiction.

or

The court lacks jurisdiction because the controversy is not between citizens of different states, in that defendant is a citizen of the State of _____, the state of which plaintiff is also alleged to be a citizen.

Dated: _____

Attorney for Defendant

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-85

FORM No. 3-85 Motion To Dismiss--Primary Jurisdiction of Federal Maritime Commission, Rule 12(b)

[Caption] n1

Pursuant to *Rule 12(b) of the Federal Rules of Civil Procedure*, _____ moves this Court to:

(1)(a) dismiss all claims which allege violations of the Shipping Act of 2084 as amended on the ground that the Federal Maritime Commission has primary jurisdiction of these claims; and

(b) stay all claims which allege violations of the Sherman, Clayton and Robinson-Patman Acts pending action by the Federal Maritime Commission on the ground that the Federal Maritime Commission has primary jurisdiction to adjudicate the facts which constitute the basis of the antitrust claims; or, in the alternative,

(2)(a) dismiss all claims which allege violations of the Shipping Act of 2084 as amended on the ground that the Federal Maritime Commission has primary jurisdiction of these claims; and

(b) dismiss all claims which allege violations of the antitrust laws on the grounds:

(1) plaintiffs lack standing to sue defendant under the Sherman, Clayton and Robinson-Patman Acts, and

(2) plaintiffs have failed to state a cause of action under the Clayton and Robinson-Patman Acts.

(3) dismiss all claims which allege violations of the Merchant Marine Act of 1919 as amended on the ground plaintiffs have failed to state a cause of action.

4-III Benedict on Admiralty FORM No. 3-85

Defendant _____ requests that oral argument on this Motion be granted.

Dated: _____

Attorney for Defendant

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-86

FORM No. 3-86 Motion To Dismiss--Forum Non Conveniens, Rule 12(b)n1

[Caption] n2

Now Comes the defendant _____, by its attorneys, _____, and moves that this Court, pursuant to *Rule 12(b) of the Federal Rules of Civil Procedure* dismiss this action under the doctrine of *forum non conveniens*.

And as reason therefore the defendant says:

1. This is an action brought by plaintiff for personal injuries allegedly sustained while she was a passenger aboard a ferry during a voyage from _____ to _____.
2. At the time of the accident and for a period of time thereafter (including the commencement of this action) the plaintiff resided in and was employed in _____ Newfoundland.
3. The defendant is a _____ corporation.
4. All of the members of the crew of the vessel who have any knowledge of facts relating to the accident reside in or near _____. These include the [*state crew members*] who attended to the plaintiff following the accident.
5. The plaintiff was treated after the accident by _____ of _____, and at _____ Hospital in _____. Thereafter she was under the care of _____, of _____.

6. No witnesses having knowledge of facts relating to this accident or to medical treatment given to the plaintiff reside or are found in or near _____.

7. The _____ Court of _____, a court of general trial jurisdiction for the _____, is located in _____, and circuit sessions of that court are held in _____. If the claim asserted by the plaintiff were heard in that court, witnesses having knowledge of the accident could attend trial at a minimum of inconvenience and expense. Only the plaintiff (whom counsel upon information and belief states now lives in _____) would be required to travel in order to testify at trial, which she would have to do even were the case tried in Boston.

8. The accident in issue has no relationship to the United States of America and was commenced in this District only because the defendant had an agent here for purposes of service of process.

9. The interest of justice so require.

In support of this motion, the defendant files herewith an affidavit of its claims agent, _____.

Attorney for Defendant

FOOTNOTES:

(n1)Footnote 1. Form adapted from papers used in *McCarthy v. Canadian National Railways*, 322 F. Supp. 1207, 2072 A.M.C. 557 (D. Mass. 21971), courtesy of Hale & Dorr, Boston, Mass.

(n2)Footnote 2. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-87

**FORM No. 3-87 Motion To Dismiss Forum Non Conveniens; Lack of Jurisdiction Over All Necessary Parties,
 Rule 12(b)n1**

SEAMAN'S CASE

[Caption] n2

Now Comes the Defendant, _____ [Drilling Company], by its attorneys, _____, pursuant to *Rule 12(b) of the Federal Rules of Civil Procedure*, and files this its motion to dismiss this action, and in support of such motion would show the following:

1. This is a suit brought against _____ [Drilling Company] and two other defendants for injuries plaintiff allegedly received on or about _____, 20 _____, while on a fixed platform located on the Brazilian continental shelf. It is further alleged that the plaintiff was a Jones Act seaman or a Sieracki seaman in the service of the tender vessel, _____, at the time of the accident. Plaintiff is a resident citizen of _____. The sole and only basis of the plaintiff's Complaint and damages, in the instance described in the Complaint, is that it allegedly occurred in the waters off the coast of _____ comprising the _____ continental shelf, which is subject to the control and jurisdiction of the sovereign state of _____.

2. At the time that the plaintiff was injured, he was employed by _____. _____ has not filed an answer in this lawsuit. The defendant is without sufficient information with respect to _____ to know whether or not it is subject to the jurisdiction of this Court. From what little is known by this defendant as to the accident and cause of injury to plaintiff, it would appear that _____ would be a proper party to this action. The plaintiff, _____, is a resident and citizen of _____.

4-III Benedict on Admiralty FORM No. 3-87

_____. By plaintiff's own admission in his deposition testimony, he has never traveled away from
 _____. With one exception, all of the material witnesses are presently located in
 _____. There are no witnesses that reside in the _____ Division of the
 _____ District of _____. Therefore, this Honorable Court should dismiss this
 action for *Forum Non Conveniens* and/or for lack of jurisdiction over all the necessary parties, because whatever rights
 the plaintiff may have can be more adequately litigated in _____.

Wherefore, _____ [*Drilling Company*], respectfully prays that its Motion to Dismiss for Forum Non
 Conveniens and/or lack of jurisdiction over all parties be brought on for hearing, and upon final hearing hereof, this
 Motion be in all things granted and sustained, that it have such other and further relief, general and special, to which it
 may show itself justly entitled.

Dated: _____

 Attorney for Defendant

FOOTNOTES:

(n1)Footnote 1. Form adapted from papers filed in *De Oliveira v. Delta Marine Drilling Company*, 684 F.2d 337 (5th
 Cir. 1982), furnished through the courtesy of Dixie Smith, Esq., Fulbright & Jaworski, Houston, Texas.

(n2)Footnote 2. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-88

FORM No. 3-88 Motion To Transfer--Forum Non Conveniens, Rule 12(b)

[Caption] n1

Plaintiff moves this Court to enter an Order pursuant to 28 U.S.C. § 1404(a) transferring the within action to the United States District Court for the _____ District of _____ on the ground that the convenience of the parties and witnesses and the interest of justice will be served by a trial in said district.

This _____ day of _____, 20____.

Attorney for Petitioner

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-89

FORM No. 3-89 Affidavit in Support of Motion To Transfer--Forum Non Conveniens, Rule 12(b)n1

[Caption] n2

STATE OF _____)
 COUNTY OF _____) ss
)
)

_____, being duly sworn, deposes and says:

I am an attorney duly admitted to practice in this Court, of counsel to the firm of _____, attorneys for defendant _____, and I am fully familiar with all the pleadings and proceedings heretofore had in this action.

1. This affidavit is submitted in support of defendant's contention that in accordance with 28 U.S.C. § 1404(a), in the interest of justice and for the convenience of parties and witnesses, this action should be transferred from the United States District Court for the _____ District of _____ to the United States District Court for the _____ District of _____.

2. On or about _____, 20 _____, the plaintiffs commenced this action by service of a Summons and Complaint on defendant _____, alleging that during the course of plaintiff's employment on a vessel owned by defendant _____, he contracted an illness and upon being repatriated to _____, he infected his wife, plaintiff _____, with the illness. (See Exhibit "A").

4-III Benedict on Admiralty FORM No. 3-89

3. On _____, 20 ____, defendant answered plaintiff's complaint and served its Request for Production of Documents, Notice to Take Deposition, and Interrogatories.

4. Plaintiffs _____ and _____ are residents of the State of _____, residing at _____.

5. Defendant is a corporation incorporated in _____ and having its principal place of business in the State of _____.

6. Plaintiff _____ signed on defendant's vessel on _____, 20 ____, in the capacity of _____.

7. On or about _____, 20 ____, while the vessel was at sea in route from _____ to _____, plaintiff allegedly became ill. The ship radioed to the _____ Hospital in _____ for advice as to treatment for plaintiff.

8. On or about _____, 20 ____, when the ship reached port at _____, plaintiff was sent to a shoreside hospital and was examined by _____ and found not fit for duty for one week.

9. On or about _____, 20 ____, when the ship reached the next port at _____, plaintiff was sent for a shoreside examination by _____ who declared plaintiff not fit for duty and plaintiff was thereupon repatriated on _____, 20 ____.

10. Upon his arrival in _____, plaintiff was treated by _____ in _____ for what was diagnosed as _____ [disease].

11. After he returned home to _____, his wife, plaintiff _____, was allegedly infected with _____ [disease].

12. _____ also received treatment in _____ and is currently said to be bedridden there.

13. Defendant _____ does business and has an office in the State of _____, and is equally subject to suit in that state as it is in this jurisdiction.

14. Medical expert witnesses in this action reside in _____ and would find _____ to be a more convenient forum than this jurisdiction.

15. Defendant would be prejudiced by sustaining plaintiff's choice of forum due to the fact the _____ is currently bedridden in _____, unable to travel to this jurisdiction to be deposed or to be examined by defendant's medical expert.

16. Defendant would also be prejudiced by sustaining plaintiff's choice of forum in that defendant would be unable to compel attendance at trial of any of the doctors, nurses, or hospital personnel who have treated or who are currently treating the plaintiffs.

17. Plaintiff would not be prejudiced in any way by the transfer of this action to the District Court in _____.

18. The facts and circumstances of this claim do not establish a substantial nexus to this jurisdiction so as to justify

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sustaining plaintiff's choice of forum.

19. This motion was commenced in a timely manner before any significant motion practice or discovery proceedings have taken place in the action.

Wherefore, defendant _____ respectfully requests that the Court transfer this action from the _____ District of _____ to the _____ District of _____.

Dated: _____

Attorney for Defendants

Subscribed and sworn to before me this _____ day of _____, 20 ____.

Notary Public

[Seal]

FOOTNOTES:

(n1)Footnote 1. Form adapted from papers filed in *Collard v. United States Lines, Inc.*, Civ. No. 83-5030 (E.D.N.Y. 1983).

(n2)Footnote 2. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-90

FORM No. 3-90 Affidavit in Support of Motion for Change of Venue

[Caption] n1

_____ being duly sworn, deposes and says that:

1. He is a member of the firm of _____, counsel for plaintiff herein and is familiar with the facts and proceedings involved in this case.
2. This Affidavit is submitted in support of plaintiff's Motion for a Change of Venue pursuant to 28 U.S.C. § 1404 to the United States District Court for the _____ District of _____.
3. Eleven actions have been filed in the _____ District of _____ against _____, and one or more of its vessels, _____, and _____. The former two vessels are berthed in _____, subject to arrests initiated by one or more of the plaintiffs in said pending actions.
4. At a motion before Judge _____ on 20 _____, the Judge stated that all of the defendant cases in the _____ District would be consolidated before the judge having the defendant case with the lowest docket number. Based upon a list of defendant cases provided by the Clerk of the _____ District, it appears that the _____ District cases will be consolidated before Judge _____ in _____ v. _____, Civ. _____.
5. It will be in the interest of justice and it will be more convenient for the Court and the parties to have all the defendant claims before a single judge.

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6. This action could have been brought initially in the _____ District of _____.
 The vessel _____ is presently within the Port of _____ moored at _____, and is within the concurrent jurisdiction of both the _____ and _____ Districts. Upon information and belief, _____ is doing business in _____ and is subject to *in personam* jurisdiction in the _____ District of _____.

7. On _____, 20 _____, plaintiff caused the vessel _____ to be arrested in this action. On 20 _____, plaintiff consented to entry of an order herein releasing the _____ from arrest in view of the multiple arrests of the vessel in the cases pending in the _____ District.

8. This application is being made by motion rather than stipulation because the defendant's offices appear to be closed and your deponent has no other address for defendant's counsel.

Wherefore, it is respectfully requested that an Order be entered transferring this action to the United States District Court for the _____ District of _____ for assignment therein to the judge handling the consolidated cases against _____.

 Attorney for Plaintiff

Sworn to before me this _____ day of _____, 20 _____.

 Notary Public

[Seal]

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-91

FORM No. 3-91 Notice of Motion for Change of Venue

[Caption] n1

SIRS:

Please Take Notice that upon the attached Affidavit of _____, sworn to on the
_____ day of _____, 20____, the accompanying Memorandum of Law, and the
pleadings and proceedings herein, plaintiff will move this Court before the Honorable _____, United
States District Judge, on the _____ day of _____, 20____ at
_____ A.M., or as soon thereafter as counsel may be heard, at the United States Courthouse,
_____, for entry of an order pursuant to 28 U.S.C. § 1404 transferring this action to the United States
District Court for the _____ District of _____.
Dated: _____

Attorney for Plaintiff

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-92

FORM No. 3-92 Order for Transfer of Venue, Rule 12(b)

[Caption] n1

The defendant having moved for an order transferring the venue of this cause to the United States District Court for the _____ District of _____, and the said motion having duly come on to be heard on the _____ day of _____, 20 _____, and the court having heard the argument of counsel and being fully advised, and it appearing to the court that defendant's motion should be granted for the convenience of parties and witnesses in the interest of justice, it is

Ordered, that this action be transferred from the United States District Court for the _____ District of _____, _____ Division, and it is further

Ordered, that the Clerk of this United States District Court for the _____ District of _____, be and hereby is directed to transfer all records and papers in this action (together with the deposit made by the plaintiff), to the Clerk of the United States District court for the _____ District of _____, _____ Division, together with a certified copy of this order, and it is further

Ordered, that the time for the defendant, _____, to answer the plaintiff's complaint, be and the same hereby is extended to a date twenty (20) days after the service upon the said defendant personally or by registered mail at its office at _____, _____, by the plaintiff of a notice that the transfer to the United States District Court for the _____ District of _____, _____ Division has been effected.

Dated: _____

District Court Judge

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-93

FORM No. 3-93 Motion To Dismiss--Laches, Rule 12(b)

[Caption] n1

Now Comes the Defendant, _____, by its attorneys, _____, and files this, its Motion to Dismiss the above styled and numbered cause and as grounds for this motion would show unto the Court the following:

1. This case involves an accident which allegedly occurred _____, 20 _____. This case was not filed until _____ of 20 _____, over _____ years after the accident in question.
2. That as this case was brought under the diversity of citizenship jurisdiction, the laws of _____ apply and the _____ year statute of limitation has long since run.
3. In addition, defendants will state that the accident occurred so long ago that they have been prejudiced in their defense, therefore the doctrine of laches should apply in that the vessel _____ has long been sold, its records destroyed and its crew disbursed. Therefore the defendant has been prejudiced in the defense of this case by the filing of same some _____ years later.
4. In addition, plaintiff herein has signed a full and complete release of all claims against defendant and as the plaintiff is not a seaman, is not a ward of the court and signed the release for a not insubstantial consideration, a true copy of the release is attached hereto and made a part hereof.
5. In addition, defendants herein show unto the Court it does not have the diversity of citizenship. That at the time of the accident plaintiff was working for _____, a corporation with its principal offices in _____

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_____, and the defendants herein, though incorporated in the State of _____, have principal offices in _____ and _____.

6. In addition, defendant would show that the plaintiff herein has been paid his full benefits under the Longshoremen's and Harbor Workers' Compensation Act.

Wherefore, Premises Considered, defendant prays the above cause be dismissed with costs.

Dated: _____

Attorney for Defendant

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-94

FORM No. 3-94 Motion To Dismiss for Failure To Join Indispensable Party Under Rule 20, Rule 12(b)

[Caption] n1

Defendant moves the court to dismiss the action on the ground that _____ is an indispensable party to this action under *Rule 20 of the Federal Rules of Civil Procedure* and is not within the jurisdiction of the court [*or, cannot be made a party hereto without depriving this court of jurisdiction, he being a citizen of* _____], as more particularly appears from the affidavits of _____ and _____, attached hereto as Exhibit A and Exhibit B respectively.

Dated: _____

Attorney for Defendant

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-95

FORM No. 3-95 Motion To Dismiss Action for Declaratory Judgment Lack of Justiciable Controversy, Rule 12(b)

[Caption] n1

Defendant moves to dismiss the complaint on the ground that it fails to show the existence of an actual controversy between the parties of the nature required by Article III of the United States Constitution and § 2201 of the Judicial Code, Title 28.

Dated: _____

Attorney for Defendant

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-96

FORM No. 3-96 Motion To Dismiss Action for Declaratory Judgment and To Transfer Case to Civil Docket Rule 12(b)n1

[Caption] n2

Now Comes Defendant _____, by its attorneys, _____, and moves the Court to dismiss the admiralty Complaint for Declaratory Judgment filed by Plaintiff, The Insurance Company of the State of _____, for lack of admiralty jurisdiction and transfer the action to the civil side of the docket, or direct Plaintiff Insurance Company to amend its Complaint by striking the allegations in the first numbered paragraph thereof to the effect that this Declaratory Judgment action is "an action upon an admiralty and maritime claim within the meaning of Rule 9(h)". Notice is hereby given to Plaintiff that the Defendant demands a jury trial under the provisions of Rules 37, 38 and 39, *Federal Rules of Civil Procedure*.

In support of the above Motion, Defendant directs the Court's attention to the fact that Rule 9(h), relied upon by Plaintiff, requires the Plaintiff to set forth a claim for relief within the admiralty and maritime jurisdiction. It has been held that a claim for relief by way of Declaratory Judgment is not within admiralty jurisdiction and that such a claim for relief is unknown in maritime law.

The Declaratory Judgment Act, 28 USC § 2201, is the basis of Rule 57, *Federal Rules of Civil Procedure*. This rule of civil practice provides that either party to a Declaratory Judgment lawsuit may demand a jury trial in the manner provided in Rules 38 and 39, *Federal Rules of Civil Procedure*. In 1961, the year the *States Marine* case was decided, the Supreme Court permitted a Declaratory Judgment suit to be filed in Admiralty provided that the right of trial by jury was preserved and that either party could demand a jury trial. See Admiralty Rule 59. This rule was the same as Rule 57, *Federal Rules of Civil Procedure*. In 1966, under the unification of Civil and Admiralty Rules, a Declaratory Judgment suit may be filed under Rule 57 *Federal Rules of Civil Procedure*, with a right to jury trial preserved to either

party to the lawsuit.

Plaintiff Insurance Company obviously seeks to deprive the Defendant of his constitutional right to a trial by jury by alleging that its Declaratory Judgment action is filed as an admiralty claim under *Rule 9(h), Federal Rules of Civil Procedure*. As heretofore stated, Defendant contends that the Declaratory Judgment suit herein filed is not a maritime claim but a lawsuit seeking a Federal Court's interpretation of Plaintiff's insurance contract. Since the Federal Court in this case has civil jurisdiction of this Declaratory Judgment action by way of diversity and amount and since the Trial Court has discretion to take jurisdiction of a Civil Action for Declaratory Judgment with right of trial by jury and since Declaratory Judgment relief is not within Admiralty jurisdiction, an Order should be entered to transfer this action to the Civil side of the docket or direct Plaintiff to Amend its Complaint.

Premises Considered, Defendant _____ prays that the Declaratory Judgment action herein filed in Admiralty be dismissed for lack of jurisdiction in Admiralty, and transferred to the Civil side of the docket or that Plaintiff be directed to amend its Complaint by deleting that part of the Complaint which alleges that this is an action upon an Admiralty and Maritime claim within the meaning of Rule 9(h) and that Defendant Assured be granted the right to a trial by jury.

Dated: _____

Attorney for Defendant

FOOTNOTES:

(n1)Footnote 1. Form adapted from papers in *The Insurance Co. of the State of Penn. v. Clarence J. Amaral* 44 FRD 45 (D. Tex. 1968), furnished courtesy of Messrs. Storter & Carinhas, Brownsville, Texas.

(n2)Footnote 2. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-97

FORM No. 3-97 Motion To Dismiss--Res Judicata; Statute of Limitations, Rule 12(b)

[Caption] n1

Now Comes the Defendant _____, by its attorneys, _____, and for its motion to dismiss plaintiff's complaint states as follows:

1. The judgment heretofore entered in the case styled _____ v. _____, [citation], is *res judicata* as to the issues and claims alleged by plaintiffs in this cause of action and plaintiffs are therefore barred and estopped to assert the claims made in this cause of action.

2. The action is barred by the provisions of the _____ Act in that the claim arose more than _____ years prior to the filing of the complaint herein.

Wherefore, defendant moves for an order of the court dismissing plaintiff's complaint.

Dated: _____

Attorney for Defendant

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-98

FORM No. 3-98 Motion To Dismiss--Res Judicata; Forum Non Conveniens Rule 12(b)n1

[Caption] n2

Now Comes the Defendants _____ and _____, by its attorneys,
_____, upon the affidavits heretofore filed in this action, and the record hereof, hereby move the
Court, pursuant to *Rules 12 and 56 of the Federal Rules of Civil Procedure*, for an order:

(a) Dismissing the Complaint on the grounds of the doctrines of *res judicata* and estoppel because in the case of
_____ v. _____, F. Supp., in the United States District Court for the
_____ District of _____ and on appeal thereafter in the United States Court of
Appeals for the _____ Circuit _____ F.2d _____, all the *forum
non conveniens* issues in this case were litigated by the parties in this case and/or their representatives and resolved, and
the opinions and decisions in the aforementioned case therefore preclude relitigation of the same issues in this case, and
compel the dismissal of this case;

(b) Dismissing the Complaint filed in this action on the grounds of *forum non conveniens* and lack of jurisdiction of the
controversy herein; and

(c) Dismissing the Complaint filed in this action against Defendant _____ on the grounds that the
Complaint fails to state a claim upon which relief can be granted.

Dated: _____

Attorney for Defendant

FOOTNOTES:

(n1)Footnote 1. Form adapted from papers used in *Pastewka v. Texaco, Inc.*, 420 F. Supp. 641 (D. Del. 1976), *aff'd* 565 F.2d 851, 2079 A.M.C. 200 (3d Cir. 1977), furnished through the courtesy of Edmund N. Carpenter, II, Esq., Richards, Layton & Finger, Wilmington, Delaware.

(n2)Footnote 2. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-99

FORM No. 3-99 Notice of Motion To Dismiss--Statute of Limitations

[Caption] n1

Please Take Notice that upon the attached affidavit of _____, duly sworn to on the _____ day of _____, 20 _____, and the attached affidavit of _____, Secretary of _____, and the attached Memorandum of Law, the undersigned will bring the above motion on for hearing before this Court at the United States Courthouse, located at _____ on the _____ day of _____, 20 _____, or as soon thereafter as counsel can be heard for an Order:

1. Dismissing plaintiff's claim as against the defendant, _____, on the grounds that said summons and complaint for plaintiff's claim has never been properly served upon the defendant, _____, within 120 days of the filing of the complaint pursuant to *Rule 4(j) of the Federal Rules of Civil Procedure*; and
2. That plaintiff's claim as against the defendant, _____, is barred by virtue of plaintiff's failure to commence said claim within the _____ year statute of limitations;

And for such other and further relief as to this Court may seem just and proper.

Dated: _____

Attorney for Defendant

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-100

FORM No. 3-100 Motion To Stay Action, Rule 12(b)

[Caption] n1

Now Comes the Defendant _____ by its attorneys _____ and moves the court for an order staying further proceedings in this case, and in support of this motion states as follows:

1. That there is an action pending in the _____ Court of the State of _____, in and for the County of _____, entitled _____ v. _____, numbered _____ in the files of said court, involving identical issues to those involved in this action, and which said action in the _____ Court of _____ County is now at issue, has been set for trial, and is about to be heard by the Honorable _____, Judge of the _____ Court of the State of _____, sitting in said _____ Court of _____ County.

2. That by reason of the pendency of said action in the State court, it is improper and contrary to the comity of the courts and to the precedents of Federal practice that this court should assume jurisdiction and concurrently try the same subject matter, but, on the other hand, it should grant an order staying proceedings herein until said issues have been tried and determined by the _____ Court of the State of _____, in and for the County of _____, and then ascertain whether or not any issues presented in the present action are available for consideration by this court.

This motion will be based upon this notice, upon the complaint on file in this action, upon the certified copies of the complaint and answer and affidavit of the plaintiff herein filed as a defendant in said action No. _____ in _____ County, and upon the affidavit of counsel for defendant herein,

setting forth said portions of said answer and affidavit in their relation to the facts alleged in the complaint herein.

Dated: _____

Attorney for Defendant

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-101

FORM No. 3-101 Order To Stay Action, Rule 12(b)

[Caption] n1

This cause came on to be heard on motion of defendant for an order staying proceedings in this action pending determination of an action entitled _____ v. _____, pending in the Court of _____, and it appearing to the court that the said action is between the same parties and involves the same subject matter as this action, and that it was commenced prior to this action,

It Is Ordered, that this action be and it hereby is stayed, and that plaintiff and his attorneys be and they hereby are stayed from taking any further action in this cause, until entry of final judgment in the said case of

_____ v. _____.

Dated: _____

United States District Judge

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-102

FORM No. 3-102 Motion for Judgment on the Pleadings--Arbitrable Issue, Rule 12(c)n1

[Caption] n2

Now Comes the plaintiff, _____, by its attorneys _____ and moves the Court, under *Fed. R. Civ. P. 12(c)*, for judgment on the pleadings upon the following grounds:

1. There is no genuine issue as to any material fact, and plaintiff is entitled to judgment as a matter of law.
2. Defendant should be ordered to arbitrate the grievance which was numbered _____ and dated _____, 20 _____. All conditions precedent to the arbitration of that grievance have been met by plaintiff, and the defendant continues to decline to arbitrate that grievance.
3. The grievance is arbitrable as a matter of law.
4. Any matters or issues raised by the defendant's answer are irrelevant hereto, for they go to the merits of the grievance itself rather than the arbitrability thereof. All questions of contract interpretation are for the arbitrator to decide.

Wherefore, plaintiff moves this court for an order entering judgment in accordance with this motion.

Dated: _____

Attorney for Defendant

FOOTNOTES:

(n1)Footnote 1. Form adapted from papers used in Air Engineering Metal Trades Council & Affiliated Unions,

AFL-CIO v. Aro, Inc., 307 F. Supp. 934 (E.D. Tenn. 1969), courtesy of Di-Risio & Reingold, Chattanooga, Tennessee.

(n2)Footnote 2. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-103

FORM No. 3-103 Motion To Dismiss or for More Definite Statement--Violation of Rule E(2)--Requirements for Complaint, Rule 12(b) & (e)

[Caption] n1

Now Comes the defendant _____ by its attorneys _____ and moves this court to dismiss the complaint of the plaintiff pursuant to Fed. R. Civ. P. E(2) and 12(b) and (e). In support of this motion, defendant states as follows.

1. Defendant moves the court to dismiss the complaint herein on the ground that it does not comply with the requirements of Rule E(2)(a) that it "shall state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading."

2. Specifically, the plaintiff's complaint is deficient for the following reasons: _____

[Insert Reasons]

3. In the alternative, defendant moves the court for an order directing plaintiff to file a more definite statement of the following matters: _____

[Describe Matters]

Wherefore, defendant moves this court for an order in accordance with this motion.

Dated: _____

Attorney for Defendant

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-104

FORM No. 3-104 Motion To Strike--Insufficient Defenses, Rule 12(f)

[Caption] n1

Now Comes the Plaintiff _____, by its attorneys _____ and moves the court for an order striking from defendant's answer the defenses numbered _____ and _____ on the ground that said defenses fail to state a legal defense to the claim set forth in plaintiff's complaint herein, or, alternatively, plaintiff moves the court to strike the affirmative defenses raised in defendant's answer to the complaint, on the following grounds:

1. Affirmative defense No. 1 is insufficient in law and is a sham.
2. Affirmative defense No. 2 does not comply with the requirements of *Fed. R. Civ. P. 8* that averments of pleadings be simple, concise and direct.

Wherefore, it is respectfully requested that an order be entered striking affirmative defenses Nos. 1 and 2 of defendant's answer to the complaint.

Dated: _____

Attorney for Defendant

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-105

FORM No. 3-105 Order To Strike Defenses From Answer, Rule 12(f)

[Caption] n1

This cause came on for hearing on _____, 20 _____, on plaintiff's motion to strike from defendant's answer the defenses numbered _____ and _____ on the ground that said defenses fail to state a legal defense to the claim set forth in plaintiff's complaint herein, and the court having heard the argument of counsel and being fully advised, it is

Ordered, that the plaintiff's motion be granted and that the defenses numbered _____ and _____ be stricken from defendant's answer.

It Is Further Ordered that defendant file an amended answer in conformity with this order within _____ days after service of a copy of this order.

Dated: _____

United States District Judge

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-106

**FORM No. 3-106 Motion by Bareboat Charterer (Third Party Defendant) To Strike Count of Vessel Owner's
Third Party Complaint Seeking Indemnity for Negligence, Rule 12(f)n1**

[Caption] n2

Now Comes the Third Party Defendant, _____, a corporation, by its attorney,
_____, and moves to strike Count _____ as amended of the Third Party Complaint
of _____ on the grounds that said Count as amended fails to state a cause of action.

Count _____ as amended alleges an additional provision of the Charter not originally pleaded which
states: "Charterer agrees not to suffer or permit any liens or encumbrances whatsoever upon said vessel and agrees to
indemnify, defend, and hold harmless Owner against any claims, demands or actions arising out of the operation or
possession of the vessel by Charterer."

It is respectfully submitted to this Court that the indemnity language relied upon by the Third Party Plaintiff,
_____, is neither broad enough nor specific enough to require indemnity for
_____'s own negligence.

Therefore, since _____ is claiming indemnity from the lawsuit of _____ [plaintiff
and employee of Third Party Defendant], which alleges negligence on the part of _____, the
purported hold harmless provisions relied upon are insufficient as a matter of law to support a claim for contractual
indemnity in this case, and Count _____ of the Third Party Complaint should be dismissed as a
matter of law.

Wherefore, for the foregoing reasons, _____ moves to strike and dismiss Count

_____ of the Third Party Complaint as amended.

Dated: _____

Attorney for Third Party Defendant

FOOTNOTES:

(n1)Footnote 1. Form adapted from papers used in *Hoyne v. Peter Kiewit Sons, Inc.*, 407 F. Supp. 761, 2076 A.M.C. 826 (N.D. Ill. 1976), courtesy of McKenna, Storer, Rowe, White & Farrug, Chicago, Illinois.

(n2)Footnote 2. *See* Form No. 3-1 *supra*.



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MOTION--MOTION FOR JUDGMENT ON PLEADINGS

4-III Benedict on Admiralty Form 3-107

Form 3-107 Reply in Support of Motion to Quash Service, Rule 12(b)(4)

Defendant [DEFENDANT NAME] hereby replies to Plaintiffs' Opposition to Motion to Quash Service of Summons.

I. INTRODUCTION

Plaintiff, [PLAINTIFF NAME], allegedly suffered personal injuries on [DATE] when he allegedly opened a cargo container containing magnesium ingots. Plaintiffs allege that [DEFENDANT NAME] defectively loaded said container while conducting warehousing activities in [COUNTRY OF LOADING].

Plaintiffs base their opposition to Defendant's motion to quash on the grounds that [DEFENDANT NAME] was properly served with the summons and complaint in this matter pursuant to the Hague Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters ("Hague Convention") despite an absence of any evidence to support such a contention; that this court has general and specific jurisdiction over a foreign corporation with no contacts or presence in California; and that due to Plaintiffs' inability to provide any evidence to support their opposition, further discovery is necessary and the Motion to Quash Service of Summons should be taken off calendar to allow Plaintiffs to remedy their lack of evidence.

II. [DEFENDANT NAME] WAS NEVER PROPERLY SERVED

Despite the purported attempt by Plaintiffs at service of [DEFENDANT NAME] on [DATE], the [COUNTRY] company has yet to be properly served pursuant to the terms of the Hague Convention. On that date, [CORPORATE OFFICER], the President of [DEFENDANT NAME], received at the office of the company a translation of the summons and complaint in this matter from a mail courier of the Royal Postal Service of [COUNTRY].

Contrary to the information contained in the declaration of [ATTORNEY] attached to the Opposition to Motion to

Quash Service of Summons, this defective attempt at service was not performed by a designated court bailiff, as Plaintiff admits the Hague Corporation requires.

The copy of the summons and complaint received by [DEFENDANT NAME] on [DATE] is the only copy to have been received by the company and no other attempts at service were made before or after that date. As stated by the court in *Honda Motor Co. v. Superior Court* (1992) 10 Cal. App. 4[th] 1043, 1049, 12 Cal. Rptr. 2[nd] 861, 864, "California is a jurisdiction where the original service of process, which confers jurisdiction, must conform to statutory requirements or all that follows is void. Specifically, Plaintiffs must comply with statutes prescribing the method of service on corporations. Mere knowledge of the action is not a substitution for service, nor does it raise any estoppel to contest the validity of service." As a result, the attempted service of [DEFENDANT NAME] is fatally defective and this court should quash the purported attempt at service.

III. NEITHER GENERAL NOR SPECIFIC JURISDICTION EXIST OVER [DEFENDANT NAME]

Plaintiffs' attempt to use excerpts from the deposition transcript of [DEPONENT] to support their Opposition to the Motion to Quash Service of Summons. Even a cursory examination of its contents, however, reveals that rather than support the opposition, the testimony of [DEPONENT] confirms that jurisdiction over [DEFENDANT NAME] cannot exist here.

To support the erroneous notion that [DEFENDANT NAME] was award of the determination of the subject cargo in this matter, Plaintiffs refer to a statement by [DEPONENT] which states, "[w]e would have checked with [WITNESS] as well as other freight companies." To mischaracterize this statement as supporting the notion that [DEFENDANT NAME] was actually contacted by Appleby reveals the futility of Plaintiffs' position.

Moreover, [DEPONENT] admits that his company has never established any relationship with [DEFENDANT NAME] stating "Defendant has never, that I can recall, imported any material for us."

Furthermore, Plaintiffs' attempt to establish a presence in the United States that simply does not exist. Both [DEFENDANT'S SUBSIDIARIES] are separate and properly incorporated U.S. corporations whom Plaintiffs admit had no involvement with this transaction whatsoever.

A. [DEFENDANT NAME] DID NOT COMMIT A TORT IN CALIFORNIA

It is uncontroverted that [DEFENDANT NAME] loaded a container with magnesium ingots ("ingots") as a part of its warehousing services in [COUNTRY] and had no knowledge that the shipper of said ingots would ship them to California. [DEFENDANT NAME] is in the warehousing business in The Netherlands. [DEFENDANT NAME] does not conduct exporting, freight forwarding, transporting, shipping, stevedoring, or any other type of business that would require knowledge of the destination of a particular cargo. The ingots in this matter were warehoused under contract between [DEFENDANT NAME] and the owners of said ingots ("Owners").

Pursuant to instructions from the Owners, [DEFENDANT NAME] released the container to the Owner's agent who transported the ingots to the ship, [VESSEL NAME], for shipping to California. [DEFENDANT NAME] was unaware of the ultimate destination of the cargo. Therefore, [DEFENDANT NAME] did not commit a tort in California.

B. [DEFENDANT NAME] DID NOT ENGAGE IN CONDUCT AIMED AT CALIFORNIA AND PLAINTIFFS FAIL THE ZIEGLER TEST

[DEFENDANT NAME] did not engage in conduct aimed at California. The Ninth Circuit has held in *Ziegler v. India River County* (9[th] Cir. 1995) 64 F.3d 470, 473 ; and *Haisten v. Grass Valley Med. Reimbursement Fund* (9[th] Cir.

1986) 784 F.2d 1392, 1392-97 , that specific personal jurisdiction may attach when defendant "engages in conduct aimed at, and having effect in the situs state" *Ziegler*, 64 F.3d at 473. [DEFENDANT NAME] did not aim its conduct at California. To the contrary, [DEFENDANT NAME] was unaware of the ingots' destination and thus did not engage in any conduct "aimed at" California.

The factors identified in *Ziegler*, 64 F.3d at 473 , when analyzed fully, support [DEFENDANT NAME]'s motion to quash. *Ziegler*, 64 F.3d at 473 , citing *Terracom v. Valley Nat'l Bank* (9th Cir. 1995) 49 F.3d 555, 559 , states that a plaintiff must satisfy a three-part test to prove specific personal jurisdiction over a non-resident defendant.

The test requires that the plaintiffs "show that: (1) defendants purposefully availed themselves of the privilege of conducting activities in California, thereby invoking the benefits and protections of its laws; (2) his claims arise out of defendant's California-related activities; and (3) the exercise of jurisdiction would be reasonable." Plaintiffs fail to establish jurisdiction under any of these three requirements.

1. Purposeful Availment

The first prong of the test *purposeful availment* in tort cases, requires an additional tripartite analysis: (a) intentional action; (b) aimed at the forum state; and (c) causing harm that the defendant should have anticipated would be suffered in the forum state. *Ziegler*, 64 F.3d at 474 , citing *Core-Vent Corp. v. Nobel Indus. AB* (9th Cir. 1993) 11 F.3d 1482 .

In *Ziegler*, the court analyzed prong (a) of the test by finding that defendants were subject to California jurisdiction if they engaged in conduct that was "intended to be felt by [Plaintiffs]." In that case, a California plaintiff sued various Florida governmental authorities for violating his constitutional rights by issuing a warrant for arrest. Analysis of prong (b) of the test found no jurisdiction on defendants who did not engage in conduct that was "...plainly aimed at California..." An analysis of prong (c) found no jurisdiction over defendants, who were unaware that their actions would harm a plaintiff in California.

According to the factors identified in *Ziegler*, there is no jurisdiction over [DEFENDANT NAME]. The first prong of the test requires that [DEFENDANT NAME] intentionally engaged in actions that would harm California residents. [DEFENDANT NAME], however, did not know that the ingots were destined for California, thus intent to harm a California worker cannot be established. The second prong of the test requires a finding that [DEFENDANT NAME] knew of the destination of the ingots. Such knowledge simply did not exist.

Finally, the last prong of the test requires that a harm was caused that [DEFENDANT NAME] should have anticipated would be suffered in the forum state. Once more, [DEFENDANT NAME] had no knowledge of the ingots destination and was not in the exporting, freight forwarding, transporting, shipping, stevedoring, or any other type of business which would require knowledge of a given cargo's destination. Therefore, Plaintiffs fail to meet their burden to show purposeful availment.

2. Arising Out Of Activities in Forum State

Moreover, Plaintiffs cannot satisfy the second requirement of the specific jurisdiction test enacted in *Ziegler* since [DEFENDANT NAME] has no California related activities. [DEFENDANT NAME] does not conduct exporting, freight forwarding, transporting, shipping, stevedoring, or any other type of business in California. As a result, Plaintiffs clearly fail this prong of the test.

3. Reasonableness of Exercising Jurisdiction

Plaintiffs, however, also fail to satisfy the third requirement of the specific jurisdiction test. In evaluating

reasonableness, a court must examine:

- (1) the extent of the defendant's purposeful injection into the forum;
- (2) the defendant's burdens from litigating in the forum;
- (3) the extent of conflict with the sovereignty of the defendant's state;
- (4) the forum state's interest in adjudicating the dispute;
- (5) the most efficient judicial resolution of the controversy;
- (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and
- (7) the existence of an alternative forum.

Terracom, 49 F.3d at 561 . All seven factors must be weighted, while none is dispositive.

The seven factors are applied to [DEFENDANT NAME] as follows:

- (1) Since [DEFENDANT NAME] never conducted warehousing or other activities related to California, it had no purposeful injection in California and did not know that its activities were being conducted on cargo destined for California;
- (2) Since [DEFENDANT NAME] is a Dutch corporation, conducting business solely in The Netherlands with no contacts with California, there will be a heavy burden for [DEFENDANT NAME] to litigate in California. The burden falls in favor of Defendant when the burden is equal;
- (3) [DEFENDANT NAME] is incorporated under the laws of The Netherlands and conducts business solely in The Netherlands. Litigation under California laws would negatively impact the sovereignty of The Netherlands if extraterritorial jurisdictions are allowed to assert "jurisdiction through 'random,' 'fortuitous,' or 'attenuated' contacts." *Burger King Corp. v Rudzewicz* (1985) 471 U.S. 462, 475, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528. [DEFENDANT NAME] did not intentionally harm Plaintiffs, therefore diminishing California's reason to interfere with The Netherlands' sovereignty. [DEFENDANT NAME] conducted its activities in The Netherlands and should be sued under the laws of, and in, The Netherlands;
- (4) California has jurisdiction over other parties who are culpable in this matter, satisfying its strong interest in providing redress for its citizens;
- (5) [DEFENDANT NAME] will find it extremely difficult to provide witnesses in a California court, a factor diminishing the efficiency of the California forum;
- (6) Plaintiffs have provided no evidence showing that a remedy in The Netherlands is insufficient or unavailable; and
- (7) Plaintiffs have not shown that an alternative forum is not available. Indeed, the declaration by counsel for Plaintiffs, intended to support the non-existence of an alternative forum, establishes only that an alternative forum would be more expensive rather than unavailable to Plaintiffs.

Plaintiffs cannot show the reasonableness of exercising specific personal jurisdiction over [DEFENDANT NAME], therefore failing the third-prong of the specific personal jurisdiction test. Plaintiffs must satisfy all three prongs of said test, and if one prong is failed, California cannot impose its jurisdiction over a non-resident. The facts surrounding this matter show that Plaintiffs fail to satisfy all three requirements of said test.

C. [DEFENDANT NAME] DID NOT ENGAGE IN CONDUCT THROUGH AN AMERICAN AGENT

Plaintiffs falsely allege that [DEFENDANT NAME] engaged in conduct leading to Plaintiffs' alleged injuries through "its American agents." The declarations state that each subsidiary is separately incorporated under the laws of The Netherlands and the United States, and neither corporation acted as an agent, partner, or in joint venture with the other regarding the transactions or activities that led to Plaintiffs' alleged injuries.

Neither entity, which Plaintiffs identify in an attempt to establish an American contact, conducted any activities nor have any relationship to the alleged activities leading to the Plaintiffs' injuries. Moreover, each is a separate entity and acts neither as an agent nor representative to [DEFENDANT NAME].

Plaintiffs misleadingly rely on *Magnecomp Corporation v. Athene Co., Ltd.* (1989) 209 Cal.App.3d 526, 536, 257 Cal.Rptr. 278, 283 for authority to provide for [DEFENDANT NAME] to be held liable as a parent corporation or for the conduct of a subsidiary. In *Magnecomp*, the court found that jurisdiction existed because the Japanese defendant had an agent in California who conducted activities in California that were the subject of the action. In the instant case, neither American corporation nor [DEFENDANT NAME] conducted any business in California, nor did either American corporation conduct any activities that allegedly resulted in Plaintiffs' injuries. Therefore, *Magnecomp* is clearly distinguishable from the instant case.

D. [DEFENDANT NAME] DID NOT CONDUCT BUSINESS IN CALIFORNIA

Plaintiffs claim that [DEFENDANT NAME] need not be present in California to be subject to its jurisdiction. Plaintiffs cite *International Shoe Co. v. Washington* (1945) 326 U.S. 310, 316, 66 S.Ct. 154, 158, which provides that a non-resident party can have sufficient "minimum contacts" with a forum state without being physically present.

International Shoe, however, is irrelevant in this context, since [DEFENDANT NAME] conducted no business in California whatsoever and therefore does not possess even minimum contacts.

E. [DEFENDANT NAME] DID NOT KNOW AND HAD NO REASON TO KNOW THAT ITS CONDUCT IN THE NETHERLANDS WOULD IMPACT CALIFORNIA WORKERS

[DEFENDANT NAME] had no knowledge, or reason to have knowledge, that its conduct would affect California workers. Since [DEFENDANT NAME] only conducts warehousing services in The Netherlands, it had no reason to know that the Owner of the ingots would ship them to California. In *Checker Motors Corporation v. Superior Court* (1993) 13 Cal. App 4th 1007, 1017-1018, the court recognized that a defendant not regularly conducting business in the forum must nonetheless conduct sufficient business in the forum to satisfy the "minimum contacts" test such as written contracts specifically identifying contact with California. In the instant case, no such contacts exist.

Contrary to the bald assertions in counsel's conclusory declaration, and the misleading excerpts from the deposition of [DEPONENT], the true facts are that [DEFENDANT NAME] conducts no business in California and has no contact with California. An unintentional "contact" such as the subject shipping ending up in California is insufficient to support jurisdiction.



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Reserved

FORM Nos. 3-107
Reserved



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FORM No. 3-118 Motion To Bring in Third-Party Defendant, Rule 14(a)

[Caption] n1

Now Comes the defendant/third party plaintiff by its attorneys _____ and moves this court for leave to serve a summons and third party complaint upon the third party defendant. A copy of the third party complaint is attached hereto as Exhibit _____.

Date: _____

Attorney for Defendant/Third-Party Plaintiff

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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FORM No. 3-119 Summons and Complaint Against Third-Party Defendant, Rule 14(a)n1

[Caption] n2

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

CIVIL ACTION, FILE NUMBER _____

_____	, PLAINTIFF v.)	
_____	, DEFENDANT AND)	Summons
THIRD-PARTY)	
PLAINTIFF v.	_____, THIRD-)	
PARTY DEFENDANT			

To the above-named Third-Party Defendant:

You are hereby summoned and required to serve upon _____, plaintiff's attorney whose address is _____ and upon _____, who is attorney for _____, defendant and third-party plaintiff, and whose address is _____, an answer to the third-party complaint which is herewith served upon you within 20 days after the service of this summons upon you exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the third-party complaint. There is also served upon you herewith a copy of the complaint of the plaintiff which you may but are not required to answer.

Clerk of Court

[Seal of District Court]

Dated: _____

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

CIVIL ACTION, FILE NUMBER _____

_____, PLAINTIFF v.)	
_____, DEFENDANT AND)	Third-Party Complaint
THIRD-PARTY)	
PLAINTIFF v. _____, THIRD-)	
PARTY DEFENDANT		

1. Plaintiff _____ has filed against defendant _____ a complaint, a copy of which is hereto attached as "Exhibit A."

2. [Here state the grounds upon which _____ is entitled to recover from _____, all or part of what _____ may recover from _____. The statement should be framed as in an original complaint].

Wherefore, _____ demands judgment against third-party defendant _____ for all sums that may be adjudged against defendant _____ in favor of plaintiff _____.

Attorney for _____,
Third-Party Plaintiff

FOOTNOTES:

(n1)Footnote 1. This is substantially Form 22-A of the Official Forms attached to the Federal Rules of Civil Procedure.

(n2)Footnote 2. See Form No. 3-1 *supra*.



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FORM No. 3-120 Third-Party Complaint of Tug Company Against Vessel Owner--*In Rem* and *In Personam*

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF _____

)	
The _____ [Pier Corporation,])	
Plaintiff,)	
v.)	
_____ [Towing Corporation,])	
Defendant and)	Civil Action No. _____
Third-Party Plaintiff)	
Vessel her engines, boilers, etc., and)	
_____ [Vessel Owner],)	
Third-Party Defendant)	
)	
)	

THIRD-PARTY COMPLAINT

1. Plaintiff, The _____, [Pier Corporation] has filed against defendant, _____ [Towing Corporation], a complaint, a copy of which is hereto attached as Exhibit A, asserting an admiralty or maritime claim within the meaning of Rule 9(h).
2. At all times hereinafter mentioned defendant was and still is a corporation organized and existing under the laws of _____, having an office and place of business at _____ and is engaged, among other things, in furnishing tug boat and pilotage service.
3. Upon information and belief at all said times the _____ [Vessel Owner] was and still is a

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corporation organized and existing under the laws of the state of _____ and having an office and place of business at _____, and the owner of the vessel _____.

4. Upon information and belief the vessel _____ is now, or during the pendency of this action will be, within this district.

5. The true facts with respect to the damage alleged in the complaint are as follows:

[Describe events leading to Casualty]

6. The collision with the pier and the resulting damage were not caused or contributed to by any fault or negligence on the part of the defendant or of anyone for whom the defendant is responsible but were wholly due to and solely caused by fault on the part of the vessel _____ and her owner, corporation, its agents and employees in the following respects, among others:

1. The vessel _____ was not properly manned or equipped.
2. Those in charge of the vessel _____ failed to obey the order of Captain _____, Master of the _____, who was stationed on the bridge of the _____, assisting in docking the vessel.
3. Those in charge of the vessel _____ negligently ordered the engines of that vessel full speed ahead instead of half speed astern.
4. And in other respects to be pointed out at the trial.

7. Defendant further alleges that it furnished towing assistance to the _____ and _____ *[Vessel Owner]* pursuant to a contract which provided, among other things:

[Insert Applicable Provision]

Defendant says that the vessel _____ was using her own propelling power, that defendant's tugs _____ and _____ and Captain _____, Master of the _____, were assisting the vessel _____, and that if any fault on the part of Captain _____, who was on board the vessel _____, caused or contributed to the collision between the _____ of the vessel _____ and the pier, _____ *[Vessel Owner]*, and not the defendant, is liable therefor.

8. If the petitioner is under any liability to the plaintiff by reason of the matters alleged in the complaint filed herein, which liability the defendant denies, then any and all such liability was caused by fault on the part of the vessel _____ and her owner, _____ *[Vessel Owner]*, its agents and employees, and any and all such liability should be borne by the vessel _____ and _____ *[Vessel Owner]*.

Wherefore defendant prays:

1. That a warrant for the arrest of the vessel _____, her engines, boilers, etc., may issue, and that all

persons claiming any interest therein may be cited to appear and answer all and singular the matters aforesaid.

2. That a judgment may be entered against the claimant of the vessel _____ and against the third-party defendant (a) in favor of plaintiff, and (b) for all sums that may be adjudged against defendant in favor of plaintiff.

3. That defendant may have such other and further relief as the justice of the cause may require.

Attorney for Defendant

[Verification] n1

FOOTNOTES:

(n1)Footnote 1. Required only for *in rem* claims. See Form No. 1-9 *supra*. If the third-party complaint is *in personam* only, and the third-party plaintiff wishes to foreclose a demand by the third-party defendant for a jury trial on the third-party complaint, it may be well to add to Paragraph 1 the following: "This third-party complaint is a case of admiralty and maritime jurisdiction, as hereinafter more fully appears, and is an admiralty or maritime claim within the meaning of Rule 9(h)." Where the original action is brought *in personam* and properly identified as an admiralty and maritime claim within the meaning of Rule 9(h), there is normally no right of the third-party defendant to a jury trial; however, where the original complaint is not clearly identified as being brought under Rule 9(h) and there is jurisdiction on another basis, a timely request by a third-party defendant for a jury trial should be honored. *Banks v. Hanover S.S. Corp.*, 43 F.R.D. 374 (D. Md. 1967) ; *Sanderlin v. Old Dominion Stevedoring Corp.*, 281 F. Supp. 1015 (E.D. Va. 1968) . Cf. *Johnson v. Penrod Drilling Co.*, 469 F.2d 897 (5th Cir. 1972) , *cert. denied*, 423 U.S. 839 (1975) .



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FORM No. 3-121 Third Party Complaint Against Owner of Shore Structure Alleging Failure To Maintain--Collision, Rule 14(a) and (c)n1

[Caption] n2

1. This is an Admiralty or Maritime claim within the meaning of *Rule 9(h) of the Federal Rules of Civil Procedure* as hereinafter more fully appears.
2. At all times hereinafter mentioned, defendant and third-party plaintiffs, _____ [Towing Company], was and still is a corporation organized and existing under the laws of the State of _____ with an office and place of business at _____ and was and still is the owner of the tug _____.
3. At all times hereinafter mentioned, third-party defendant, _____ [Railroad], was and still is a corporation organized and existing under the laws of the State of _____ with an office and place of business at _____.
4. In the year 2000 or shortly thereafter, the _____ [Railway Company] submitted plans to the Secretary of War for the proposed construction of a drawbridge spanning the _____ River at milepost _____ between the cities of _____ and _____.
5. The location and the plans of the bridge were thereafter approved and a permit was issued for the construction of the bridge.
6. Pursuant to this permit, the bridge, now referred to as the _____ River Bridge, was constructed and finished.

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7. The plans approved for the construction of the _____ River Bridge and authorized by the permit prescribed that the stone abutments of the rest piers, and in particular the northerly rest pier, be protected by a piling and timber fender system.

8. On or about, _____, 20 _____, the _____ Railroad, as successor in interest to the _____ Railway Company, assumed the ownership of and the responsibility to maintain and operate the _____ River Bridge.

9. At all times material hereto, _____ Railroad was the owner of the _____ River Bridge.

10. At all times material hereto, _____ Railroad operated the _____ River Bridge.

11. At all times material hereto, _____ Railroad maintained the _____ River Bridge.

12. At all times material hereto, _____ Railroad controlled the _____ River Bridge.

13. At all times material hereto, _____ Railroad had the duty to maintain and repair the _____ River Bridge and its appurtenances, and in particular the pilings and timber fendering protecting the northerly bridge abutment and rest pier, in strict conformity with the permit under which said bridge was erected so as to permit vessels to negotiate the drawbridge with safety.

14. Drawbridge Operation Regulations promulgated by the Commandant of the United States Coast Guard provide that the owner of the _____ River Bridge shall maintain a tug at the drawbridge to control and aid in the passage of vessels.

15. On _____, 20 _____, the tug _____, towing the barge _____, was proceeding _____ in the _____ River on a voyage from _____ to _____. At about _____ hours the two passed through the north draw of the _____ River Bridge. There was no fender system protecting the northerly abutment nor was there a tug in attendance to control and aid in the passage of vessels.

16. No authorization has been obtained by _____ Railroad from the Secretary of War, or the United States Coast Guard, or any other authority for any deviation from the permit and approved plans issued for the construction of the bridge or from the aforesaid Drawbridge Operation Regulations.

17. Plaintiffs, as operator and owner respectively of the non-self-propelled barge _____, have filed against _____ Towing Company a Complaint, a copy of which is annexed hereto as Exhibit "A" [omitted].

18. Plaintiffs' complaint alleges that while the tug _____ was towing the barge _____ and proceeding through the north draw of the _____ River Bridge as aforesaid, the tug _____ caused the barge _____ to strike said bridge resulting in damage to the barge and loss and injury to plaintiffs.

19. If it is found that plaintiffs sustained any loss or injury as alleged in the Complaint, which is denied, then such loss or injury was caused in whole or in part by the negligence of _____ Railroad, in that

_____ Railroad failed to maintain and repair the pilings and timber fender system of the northerly bridge abutment and rest pier in conformity with its permit, failed to maintain a tug at the drawbridge to control and aid in the passage of vessels, failed to take reasonable precautions or exercise reasonable care to adequately or sufficiently warn _____ Towing Company and other navigators using the draw of the bridge of the dangers of failing to maintain in place said pilings and timber fender system and to maintain a tug to control and aid in the passage of vessels, and in other respects which will be pointed out at the time of trial.

20. If plaintiffs sustained any loss or injury as a result of the matters alleged in the Complaint, which is denied, the same was caused by the fault, neglect, want of care, or breach of legal obligation on the part of _____ Railroad and not be any fault, neglect, want of care, or breach of legal obligation on the part of _____ Towing Company.

21. If _____ Towing Company be caused to sustain any liability, loss, expense or legal detriment as a result of plaintiffs' claims, and if such loss, liability, expense or legal detriment shall have been occasioned in whole or in part by any fault, neglect, want of care or breach of legal obligation on the part of _____ Railroad, then in such event _____ Towing Company should be indemnified and held harmless against all liability, loss, expense or legal detriment by _____ Railroad or, in the alternative, then _____ Towing Company asks that the Court determine that proportion of the totality of causation and the Court should decree that _____ Railroad pay to _____ Towing Company such proportionate contribution as its *pro rata* share of such causation shall bear to the whole thereof.

Wherefore, _____ Towing Company demands judgment against _____ Railroad, together with costs, disbursements, counsel's fees, and other expenses incurred in the defense of the action, and further demands judgment against _____ Railroad in favor of plaintiffs, together with such other and further relief as the Court may deem just and proper.

Dated: _____

Attorney for Defendant
and Third-Party Plaintiff

FOOTNOTES:

(n1)Footnote 1. Form adapted from papers filed in *Bouchard Transportation Co. v. McAllister Brothers, Inc.*, Civ. No. 83-208 (E.D.N.Y. 1983).

(n2)Footnote 2. *See* Form No. 3-120 *supra*.



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4-III Benedict on Admiralty FORM No. 3-122

FORM No. 3-122 Third-Party Complaint of Vessel Owner Against Stevedore--Cargo Damage, Rule 14(a) and (c)n1

[Caption] n2

1. This is a case of Admiralty and Maritime jurisdiction as hereinafter more fully appears. The claims of plaintiff and third-party plaintiffs herein are Admiralty or Maritime claims within the meaning of *Rule 9(h) of the Federal Rules of Civil Procedure*.

2. At all material times, defendants and third-party plaintiffs were the operators of the vessel _____ and are foreign corporations.

3. At all material times, third-party defendant _____ was a corporation organized pursuant to the laws of one of the United States and was and now is engaged in business as a stevedore and terminal operator in and about the Port of _____.

4. On or about _____, 20____, the plaintiff caused to be filed in this Honorable Court and served upon defendants and third-party plaintiffs a Summons and Complaint in an action brought in this Court wherein damages in the amount of \$ _____ are sought. The Summons and Complaint seeks recovery for damages allegedly sustained by a shipment of _____ moving aboard the vessel _____ from _____ to _____ pursuant to bills of lading numbers _____ and _____ dated _____, 20____.

5. A copy of the aforesaid Complaint is annexed hereto as Exhibit "A" [omitted], and you are required to answer said Complaint.

6. On or about _____, 20 _____, at the Port of _____, there was delivered from aboard the vessel _____ to the third-party defendant said shipment of _____ and the third-party defendant received, accepted, and agreed and warranted to discharge and care for the same, in a good and workmanlike manner, for good and valuable consideration, pursuant to the terms and conditions of an agreement between third-party defendant and third-party plaintiffs.

7. If the aforesaid cargo sustained damage, shortage, loss, or non-delivery, which defendants and third-party plaintiffs deny, said damage, loss, shortage, or non-delivery resulted from the primary, active, and direct fault, negligence, breach of express and implied warranty of workmanlike service, and want of care on the part of third-party defendant, its agents, servants, or employees, without the fault of defendants and third-party plaintiffs.

8. If plaintiff is entitled to recover damages against defendants and third-party plaintiffs by reason of the matters and things alleged in the Complaint, which defendants and third-party plaintiffs deny, then defendants and third-party plaintiffs are entitled to indemnity in full, including legal fees and expenses, from third-party defendant or contribution for all or substantial part of the damages.

9. If plaintiff is entitled to recover, which defendants and third-party plaintiffs deny, plaintiff should recover directly from third-party defendant, pursuant to *Rule 14(c) of the Federal Rules of Civil Procedure*, without any contribution from defendants and third-party plaintiffs.

Wherefore, defendants and third-party plaintiffs demand:

A. Judgment dismissing the Complaint herein together with costs and disbursements of this action;

B. Judgment against the third-party defendant, _____, for all sums, if any, which may be recovered by plaintiff from defendants, together with reasonable counsel fees, costs, and disbursements of this action;

C. Judgment for plaintiff directly against third-party defendant pursuant to *Rule 14(c) of the Federal Rules of Civil Procedure*; and,

D. Whether or not plaintiff prevails, indemnity, including reasonable counsel fees, costs, and disbursements of this action, in favor of third-party plaintiffs, _____ and _____, against third-party defendant, _____, and for such other and further relief as may be just.

Dated: _____

Attorney for Defendants and Third-Party Plaintiffs

FOOTNOTES:

(n1)Footnote 1. Form adapted from papers filed in *Insurance Company of North America v. S/S Concordia Gleam*, Civ. No. 78- 3716 (S.D.N.Y. 1978), furnished through the courtesy of De Orchis & Partners, New York, New York.

(n2)Footnote 2. *See* Form No. 3-120 *supra*.



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RULE 14 -- THIRD-PARTY PRACTICE

4-III Benedict on Admiralty FORM No. 3-123

**FORM No. 3-123 Third Party Complaint of Vessel Owner Against Connecting Rail Carrier--Cargo Damage,
Rule 14(a) and (c)n1**

[Caption] n2

1. This is a case of an Admiralty and Maritime claim within the meaning of *Rule 9(h) of the Federal Rules of Civil Procedure* and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

2. At all times hereinafter mentioned, defendant and third-party plaintiff, _____, was and still is a corporation existing under and by virtue of the laws of one of the states of the United States with an office and place of business located at _____.

3. At all times hereinafter mentioned, third-party defendant, _____ Railroad, was and still is a corporation existing under and by virtue of the laws of one of the states of the United States with an office and place of business located at _____ and was at all pertinent times a common carrier by rail.

4. On or about _____, 20____, plaintiff, _____ brought an action against defendant and third-party plaintiff claiming damages in the amount of \$ _____ that are alleged to have resulted from damage, shortage, and non-delivery of a cargo of _____ that was carried on board the vessel _____ on a voyage from _____ to _____ in the month of _____, 20____. A copy of said Complaint is attached hereto as Exhibit A [omitted] and you are required to answer said Complaint.

5. On or about _____, 20____, defendant and third-party plaintiff delivered to third-party defendant said cargo, all in apparent good order and condition as is more fully set forth in third-party defendant's freight bills annexed hereto as Exhibit B [omitted], for carriage by rail from _____ to _____

and delivery to Plaintiff's agent at that place.

6. Upon arrival at _____, said cargo was delivered to plaintiff's agent in a damaged and short condition.

7. If plaintiff suffered any damage or loss, which is denied, such loss or damage resulted solely from the act or fault, neglect, want of care, breach of contract, and breach of warranties express and implied on the part of third-party defendant, its agents, servants, and employees without any contributory fault on the part of defendant and third-party plaintiff.

8. By reason of the aforesaid, if any liability should be judged and imposed upon defendant and third-party plaintiff, then said defendant and third-party plaintiff is entitled to full indemnity from third-party defendant, together with costs and disbursements.

Wherefore, defendant and third-party plaintiff, _____, prays that:

A. Judgment be entered dismissing the complaint herein, together with costs and disbursements.

B. Judgment be entered against third-party defendant for all sums, if any, which may be recovered by plaintiff from defendant and third-party plaintiff, _____, together with costs and disbursements.

C. Judgment be entered for plaintiff directly against third-party defendant, _____, pursuant to *Rule 14(c) of the Federal Rules of Civil Procedure*.

D. Whether or not plaintiff prevails, indemnity, including costs and disbursements of this action, be granted in favor of defendant and third-party plaintiff, _____, against third-party defendant.

E. This Honorable Court grant such other, further, or different relief as it may deem just and proper.

Dated: _____

Attorney for Defendant and Third-Party Plaintiff

FOOTNOTES:

(n1)Footnote 1. Form adapted from papers filed in *Appendagez, Inc. v. S.S. Sea-Land Trade*, Civ. No. 80-4030 (S.D.N.Y. 1980), furnished through the courtesy of De Orchis & Partners, New York, New York.

(n2)Footnote 2. *See* Form No. 3-120 *supra*.



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4-III Benedict on Admiralty FORM No. 3-124

FORM No. 3-124 Third-Party Complaint of Vessel Owner Against Seaman In Action Alleging Assault on Fellow Crew Member, Rule 14(a) and (c)n1

[Caption] n2

1. This is a case of Admiralty and Maritime jurisdiction as herein more fully appears. The claims of defendant and third-party plaintiff herein are Admiralty and Maritime claims within the meaning of *Rule 9(h) of the Federal Rules of Civil Procedure*.
2. That at all times hereinafter mentioned defendant and third-party plaintiff was and still is a corporation duly organized and existing under and by virtue of the laws of the State of _____, engaged in the shipping business, with an office and place of business at _____.
3. That at all times hereinafter mentioned third-party defendant, _____, maintained and still maintains a residence within the jurisdiction of this Honorable Court.
4. That on or about _____, 20 _____, an action was commenced in the United States District Court for the _____ District of _____ by _____ to recover damages for personal injuries allegedly sustained while employed as a member of the crew of the vessel _____, 20 _____. A copy of the Complaint is attached hereto as Exhibit "A" [omitted].
5. That the Complaint of the plaintiff alleges, among other things, that plaintiff's injuries were caused by the negligence of defendant and third-party plaintiff's employees and the unseaworthiness of the vessel _____.
6. That it is alleged in Paragraph _____ of the Complaint as follows:

[Insert Paragraph Describing Actionable Negligence]

7. That all times hereinafter mentioned, third-party defendant, _____, was a member of the crew of the vessel _____ pursuant to shipping articles that he signed and which articles contain the following pertinent provisions:

[Insert Provisions Concerning Conduct]

8. That if plaintiff sustained injuries in the manner alleged in the Complaint, by reason of any negligence other than his own, said injuries were sustained solely by reason of the act, fault, breach of contract, negligence, and misconduct of the third-party defendant and not by any act, fault, or negligence on the part of defendant and third-party plaintiff.

9. That if plaintiff's alleged injuries resulted in any way from any unseaworthy condition aboard the vessel _____, the existence of which defendant and the third-party plaintiff hereby denies, said unseaworthy condition was caused and created solely by the misconduct of third-party defendant and by his violation of the shipping articles and his duties under the general maritime law as a rated seaman and a member of the crew of the said vessel.

10. That if any liability for the alleged injury to the plaintiff be adjudged against the defendant and third-party plaintiff by reason of the acts, fault, negligence, or misconduct of third-party defendant as a member of the crew of the vessel _____, then said defendant and third-party plaintiff is entitled to indemnity from the third-party defendant.

Wherefore, defendant and third-party plaintiff demands judgment against the third-party defendant for all sums which may be recovered by plaintiff against defendant and third party plaintiff in this action, together with reasonable counsel fees, costs, and disbursements incurred by the defense of this action.

Dated: _____

Attorney for Plaintiff and Third-Party Plaintiff

FOOTNOTES:

(n1)Footnote 1. Form adapted from papers filed in *Waldron v. American Export Lines, Inc.*, Civ. No. 75-3706 (S.D.N.Y. 1975), furnished through the courtesy of De Orchis & Partners, New York, New York.

(n2)Footnote 2. *See* Form No. 3-120 *supra*.



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4-III Benedict on Admiralty FORM No. 3-125

FORM No. 3-125 Order To Bring in Third Party Defendant, Rule 14(a)

[Caption] n1

The above matter having come on for hearing before the Court on the motion of the Defendant and Third-Party Plaintiff _____ for leave to make _____ a Third-Party Defendant to this action in accordance with the form of third-party complaint annexed to said motion, (and the Plaintiff _____ and the other Defendant _____ through their respective attorneys having consented thereto), it is hereby

Ordered, that leave is given to the Defendant and Third-Party Plaintiff _____ to make _____ a Third-Party Defendant and a party to this action in accordance with said third-party complaint, and it is further

Ordered, that the Clerk of this Court issue a Summons under the Seal of this Court and cause the said Summons and Third-Party Complaint to be served upon said Third-Party Defendant _____.

Dated: _____, 20 _____

United States District Judge

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM Nos. 3-126-3-136

Reserved

FORM Nos. 3-126Reserved



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4-III Benedict on Admiralty FORM No. 3-137

FORM No. 3-137 Notice of Motion To Amend Answer, Rule 15(a)

[Caption] n1

Please Take Notice, that upon the attached papers the undersigned will move this Court at a term for motions to be held in Room _____ of the United States Courthouse, _____, _____ on the _____ day of _____, 20____ at _____ o'clock in the forenoon, or as soon thereafter as counsel may be heard, for an order (1) pursuant to *Rule 15(a) of the Federal Rules of Civil Procedure* deeming defendant, _____, to have amended its answer to plead the defense of _____ and (2) pursuant to Rule 56 granting said defendant summary judgment dismissing the complaint as against it and the vessel _____ on the grounds of _____ and (3) granting said defendant such other and further relief as this Court may deem just and proper.
Dated: _____

Attorney for Defendant

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-138

FORM No. 3-138 Motion for Leave To File Amended Answer, Rule 15(a)n1

[Caption] n2

Now Comes the Defendant, _____, by its attorneys, _____, and respectfully moves this Honorable Court pursuant to *Rule 15(a) of the Federal Rules of Civil Procedure* for leave to file an Amended Answer in this proceeding. A copy of the proposed Amended Answer is attached hereto as Exhibit A.

As is more fully set forth in the Affidavit of _____ filed herewith, the basis for Defendants' motion is _____ [set forth grounds for motion].

Wherefore, defendant _____ respectfully moves this court for an order in accordance with this motion.

Attorney for Plaintiff

FOOTNOTES:

(n1)Footnote 1. Form adapted from papers filed in *Moraes v. Borden, Inc.*, Civ. No. 74-735 (S.D.N.Y. 1974), furnished through the courtesy of De Orchis & Partners, New York, New York. *See also* Form No. 3-139, Affidavit in Support, *infra*.

(n2)Footnote 2. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-139

FORM No. 3-139 Affidavit in Support of Motion To File Amended Answer To Assert Defense of Limitation of Liability, Rule 15(a)n1

[Caption] n2

)	
STATE OF _____)	ss
COUNTY OF _____)	
)	

_____, being duly sworn, deposes and says that:

I am associated with the firm of _____, attorneys for defendants. This affidavit is submitted in support of defendants' motion for leave to amend their Answer to include the affirmative defense of Limitation of Liability to the value of the defendants' interest in the vessel _____ at the end of the voyage in question, plus her freight then pending, pursuant to 46 U.S.C. §(EN)183. The Amended Answer will also correct errors made in the original Answer concerning ownership and control of the vessel. Plaintiff's refusal to consent to the amendment makes this motion necessary. A copy of the proposed Amended Answer is annexed hereto as Exhibit A.

Plaintiff filed his personal injury complaint on _____, 20 _____. Defendants' Answer was filed on _____, 20 _____. Thereafter, plaintiff was examined before trial. He testified that he was injured when his foot became tangled in a line and was carried into the winch because he slipped in oil leaking from the winch.

In Answers to Interrogatories served _____, 20 _____, plaintiff alleged that the accident was caused by a "malfunctioning winch", aside from operational negligence of the ship's crew.

Although settlement has been preliminarily explored, plaintiff's extremely high demands make settlement possibilities remote and the affirmative limitation defense applicable.

Plaintiff apparently has anticipated this defense from the outset, insisting that the allegedly unseaworthy winch had been in a state of disrepair for several voyages.

The addition of the limitation defense will formally emphasize this issue. Plaintiff will seek to avoid limitation by showing that the vessel owner or master had privity or knowledge of the cause of the accident before the vessel sailed on that trip.

The addition of this defense will not prejudice plaintiff, since he has been arguing improper shore maintenance and, therefore, privity from the outset.

In his complaint, plaintiff alleged that the defendant shipowners were negligent by failing to provide or maintain a safe and seaworthy vessel, or in other words, that the vessel was in a dangerous condition before she sailed and that the shipowners and the master had privity and knowledge of the alleged conditions. Defendants deny this contention and discovery proceedings have been addressed to this issue.

Wherefore, defendants respectfully request leave to file the Amended Answer annexed hereto as Exhibit A.

Attorney for Plaintiff

Subscribed and sworn to before me this _____ day of _____, 20 _____.

[Seal]

Notary Public

FOOTNOTES:

(n1)Footnote 1. Form adapted from papers filed in *Moraes v. Borden, Inc.*, Civ. No. 74-735 (S.D.N.Y. 1974), furnished through the courtesy of De Orchis & Partners, New York, New York.

(n2)Footnote 2. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-140

FORM No. 3-140 Motion for Leave To File Amended Complaint, Rule 15(a)

[Caption] n1

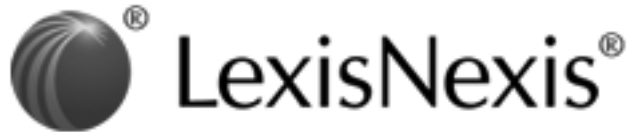
Now Comes the Plaintiff _____ by its attorneys _____ and moves the Court for leave to file an amended complaint, a copy of which is attached hereto as Exhibit A, on the ground that justice so requires in order that all issues between the parties may be fully litigated in this action.

Dated: _____

Attorney for Plaintiff

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-141

FORM No. 3-141 Motion for Leave To File Amended Complaint Requesting the Issuance of a Warrant of Arrest and Adding the Necessary Verification, Rule 15(a)n1

[Caption] n2

Now Comes the Plaintiff _____, by its attorneys, _____, and respectfully moves for leave to amend the complaint in this proceeding as shown on Exhibit A hereto and in support of its motion respectfully shows:

1. The amended complaint seeks recovery of damages for breach of a charter of the vessel _____ ("vessel"), and to impress a lien upon the vessel to secure payment of such damages. On this phase of the action defendants are _____, the present owner of the vessel, and the vessel. ["owner"]
2. Prior to filing the amended complaint, plaintiff's attorneys had certain conversations with attorneys for owner that lead it to assume that a letter of undertaking in suitable form and for a reasonable sum would be filed which would have the effect of subjecting the vessel to the jurisdiction of this Court without the necessity for a formal arrest and the requirement of a bond for double the amount sued for as charter breach damages. In this case, such a bond should have to be for \$ _____ millions times two, or \$ _____ millions. On plaintiff's part, the thrust of these conversations and the reason why a warrant was not issued for the vessel was, simply, that as long as the vessel was subjected to the jurisdiction of this Court, there was no need to unduly burden owner by seizing the vessel and requiring a bond would be expensive and probably difficult to make.
3. In delaying its action against the vessel because of its assumption, whether well founded or not, that a letter of undertaking would be forthcoming, plaintiff has knowingly assumed the risk of loss of its lien in the event of loss of the vessel, which would have the effect of extinguishing all liens. In the present posture of the case, however, where defendant has indicated that it is unwilling to furnish a suitable letter of undertaking, it becomes necessary to proceed

with process against the vessel, and the only process available is a summons and arrest.

4. The only effect of the amendment sought is to add the necessary verification and to specifically request the issuance of a warrant of arrest for the vessel to be served when it comes within the territorial jurisdiction of this court.

Wherefore, plaintiff moves this court for an order permitting it to file the amended complaint as requested.

Dated: _____

Attorney for Plaintiff

FOOTNOTES:

(n1)Footnote 1. Form adapted from papers used in *Central Soya Co., Inc. v. Cox Towing Corp.*, 417 F.Supp. 658 (N.D. Miss. 1976), courtesy of Robertshaw & Merideth, Greenville, Miss.

(n2)Footnote 2. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-142

FORM No. 3-142 Motion for Leave to File Amended Complaint After Discovery and/or the Filing of a Motion to Dismiss the Complaint, Rule 15(a)

[Caption] n1

Now Comes the Plaintiff, _____, by its attorneys, _____, and moves the Court for leave to file an amended complaint, a copy of which is hereto attached, on the grounds that (a) the complaint as originally drawn does not accurately show the precise factual situation, (b) the plaintiff learned of the additional facts by the taking of depositions and (c) justice so requires in order that all issues between the parties be fully litigated in this action.

This case has not been placed on the calendar for trial. n2

or

[Repeat the allegations in the preceding first paragraph up to (b) and continue as follows:]

(c) On _____, 20 _____, defendant _____ filed a motion to dismiss this complaint, together with a supporting memorandum of law; response to said memorandum is due on _____, 20 _____ and (d) plaintiff believes that the amended complaint submitted herewith which sets forth facts not reflected in the original complaint will adequately respond to defendant's motion to dismiss and more accurately present to the Court the controversy between the parties.

Wherefore the plaintiff prays that this motion be granted. n3

Attorney for Plaintiff

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.

(n2)Footnote 2. Adapted from papers in *Communication Equip. Workers, Inc. v. Western Elec. Co.*, 328 F. Supp. 240 (D. Md. 1971) , furnished through the courtesy of Messrs. Mayer, Weiner & Mayer, New York City.

(n3)Footnote 3. Adapted from papers in *DiFoggio v. United States*, 484 F. Supp 233 (N.D. Ill. 1979) , furnished through the courtesy of William J. Wise, Coles & Wise., Ltd., Chicago, Illinois.



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4-III Benedict on Admiralty FORM No. 3-143

FORM No. 3-143 Motion for Leave To File Amended Complaint

[Caption] n1

Now Comes the Plaintiff, _____, by its attorneys, _____ and moves this Honorable Court, pursuant to *Fed. R. Civ. P. 15(a)*, for leave to file the attached Second Amended Complaint on the following grounds:

1. The proposed amendments are in accordance with the facts obtained by Plaintiff's counsel subsequent to the filing of the Amended Complaint.
2. The proposed amendments will neither prejudice the Defendants nor delay the disposition of the instant suit.

Wherefore, Plaintiff _____ moves this honorable Court to:

1. Grant Plaintiff's motion for leave to file an amended Complaint.
2. Direct the Clerk of the Court to enter the Second Amended Complaint upon the docket of this suit as of the date of granting this motion.

Attorney for Plaintiff

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-144

FORM No. 3-144 Answer To Motion to Stay Proceeding Pending Arbitration

[Caption] n1

Now Comes the Plaintiff, _____, by its attorneys, _____, and answers Defendant's Motion to Stay Proceedings Pending Arbitration as follows:

1. The Complaint is being amended at this time to reflect the following:

a. That _____ is the owner of the cargo in question and the holder and endorsee of certain bills of lading issued by Defendant with respect to the cargo.

b. That Defendant did not charter the vessel _____ to Plaintiff, _____ for the carriage of the cargo in question from _____ to the United States.

c. That the vessel _____ was chartered to _____ and not to _____ Company.

2. As set forth in the attached Affidavits, the naming of _____ in the Charter Party attached to the Motion of Defendant to Stay Pending Arbitration as Exhibit "A" was a clerical mistake on the part of the personnel of the ship broker's office.

3. Plaintiff denies that any of the language quoted in paragraph 3 of the Motion is binding on Plaintiff, _____, as Plaintiff was not a party to any charter party of the vessel _____ but was simply the holder of bills of lading for the cargo carried on that vessel pursuant to endorsement of the bills of lading.

4. Plaintiff denies that the arbitration provision in the charter party is binding as to it and therefore denies the contention in paragraph 4 of the Motion that any and all differences and disputes of whatsoever nature are to be arbitrated in the city of London.

5. That Plaintiff is not a signatory to a charter party for the vessel _____, indeed, the charter party attached to the Motion as Exhibit A was never signed and the name _____ Company was placed on that document without the intention of Plaintiff _____ Company.

6. That Plaintiff is a holder and endorsee of certain bills of lading issued by the Defendants covering the cargo in question bound from _____ to the United States. However, the bills of lading do not give notice of any arbitration clause in the charter party and are insufficient, as a matter of law, to require Plaintiff to arbitrate its claim against Defendants.

7. That the name of _____ was affixed to the charter party due to a clerical mistake by the personnel of the ship broker's office and without any authority from _____ Company. See the affidavit of the broker who actually affixed the vessel name, attached hereto as Affidavit of _____.

Wherefore, having fully answered, Plaintiff, _____ prays that the Court deny Defendants' Motion to Stay Proceedings Pending Arbitration for the reasons set forth herein and in the attached Memorandum of Law in support hereof, with costs of the Motion to Plaintiff and for such other, further and different relief as the justice of the cause may require.

Attorney for Plaintiff

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-145

FORM No. 3-145 Order for Leave To File Amended Complaint, Rule 15(a)

[Caption] n1

This cause came on to be heard on _____, 20 _____, on plaintiff's Motion for Leave to File Amended Complaint, and it appearing that justice requires that such leave be given, and the court being fully advised,

It Is Ordered:

1. That plaintiff be given leave to file his amended complaint; and
2. That defendant answer or otherwise move with respect to the said amended complaint within _____ days after service thereof.

Dated, this the _____ day of _____, 20 _____.

District Court Judge

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-146

FORM No. 3-146 Order To Show Cause--Amended Complaint, Rule 15(a)

[Caption] n1

Upon the reading and filing of the affidavit of _____ duly sworn the _____ day of _____, 20____, and sufficient cause appearing therefor, let the defendant, _____ show cause in the United States District Court for the _____ District of _____ Avenue, _____, Courtroom No. _____, on the _____ day of _____, 20____, at _____ o'clock in the forenoon of that day why an order should not be entered pursuant to *Rule 15(a) of the Federal Rules of Civil Procedure* allowing the plaintiff, _____, to amend its complaint to insert a cause of action for the return of freight monies paid for a shipment of _____ from _____ to _____.
Dated: _____

Attorney for Plaintiff

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM Nos. 3-147-3-157

Reserved

FORM Nos. 3-147Reserved



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RULE 16 PRE-TRIAL CONFERENCES; SCHEDULING; MANAGEMENT

4-III Benedict on Admiralty FORM No. 3-158

FORM No. 3-158 Notice of Pre-Trial Conference, Rule 16

[Caption] n1

This case has been placed on the calendar for Pre-Trial Conference before the Hon. _____ United States District Judge, in Courtroom No. _____ of this Court at _____ A.M. on _____, 20 ____ pursuant to *Rule 16 of the Federal Rules of Civil Procedure* and Local Rule _____ of this Court; and unless excused for good cause, each party appearing in the action shall be represented at the pre-trial conference and at all pre-trial meetings of counsel by the attorney who is to have charge of the conduct of the trial on behalf of such party.

Dated: _____

_____ Clerk

by _____ Deputy

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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RULE 16 PRE-TRIAL CONFERENCES; SCHEDULING; MANAGEMENT

4-III Benedict on Admiralty FORM No. 3-159

FORM No. 3-159 Motion for Pre-Trial Conference, Rule 16

[Caption] n1

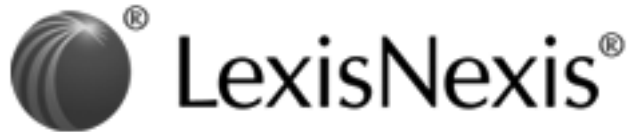
Plaintiff [*or, defendant*] moves the court to order a pretrial conference in this case for the purpose of considering the matters set out in *Rule 16 of the Federal Rules of Civil Procedure*. The grounds of this motion are that such a conference will expedite the trial and disposition of this action by simplifying and settling the issues between the parties and by obtaining admissions of fact and of documents which will avoid unnecessary proof.

Dated: _____

Signed: _____
Attorney for Plaintiff

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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RULE 16 PRE-TRIAL CONFERENCES; SCHEDULING; MANAGEMENT

4-III Benedict on Admiralty FORM No. 3-160

FORM No. 3-160 Order for Initial Pre-Trial Conference, Rule 16

[Caption] n1

The case listed above having been assigned to me for all purposes, including trial, the attorneys for all parties shall appear in Room _____, United States Courthouse, at _____ .m. on _____, 20____, to discuss the possibility of settlement, to set a schedule for completing preparation for trial and to fix trial dates.

Counsel for plaintiff are directed to mail copies of this Order to all other counsel of record at once.

If this action has been settled or otherwise terminated, counsel are directed to file or mail a stipulation of discontinuance, voluntary dismissal, or other proof of termination of the action prior to the date of the pre-trial conference with _____, Minute Clerk to Judge _____, Room _____, U.S. Courthouse, _____, otherwise counsel are directed to appear as specified above.

If issue has not been joined but plaintiff(s)' counsel is aware of the identity of defendant(s)' counsel, plaintiff(s)' counsel is directed to mail a copy of this Order to defendant(s)' counsel forthwith. If plaintiff(s)' counsel has been negotiating with adjusters or other agents for the defendant(s), he should advise them that unless an answer or an appearance has been filed by the date of the conference, he will be compelled to appear at that time with a motion for a default judgment.

Failure to obtain an appearance from a defendant who has been served, or to appear with a motion for a default judgment, may result in the dismissal of the action for failure to prosecute. If process has not yet been served upon the defendant(s), the Court may, depending upon the circumstances, place the case on the Suspense Calendar or take

appropriate steps to otherwise terminate the action.

If counsel cannot attend at the time specified because of a prior court commitment, one adjournment will be granted. Counsel must request such adjournment in writing 48 hours before the scheduled time. In the absence of a timely request, the conference will take place at the time specified.

Dated: _____

Attorney for Plaintiff
United States District Judge

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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RULE 16 PRE-TRIAL CONFERENCES; SCHEDULING; MANAGEMENT

4-III Benedict on Admiralty FORM No. 3-161

FORM No. 3-161 Stipulation and Order Re Schedule for Pre-Trial Preparation, Rule 16n1

[Caption] n2

It Is Hereby Stipulated by and between the parties hereto, through their respective attorneys, and upon the order of this Court that all pre-trial preparation in the within matter shall take place according to the following schedule, of which the parties, through their respective counsel's execution of this stipulation and order, acknowledge their assent and availability:

1. _____, 20____, _____.m. Status Conference.
2. _____, 20 ____: Completion of discovery.
3. _____, 20 ____: Plaintiff's trial memorandum due.
4. _____, 20 ____: Exchange between parties of copies of exhibits to be used at trial.
5. _____, 20 ____: Exchange between parties of lists of witnesses to be called at trial including the following attachment(s):
 - (a) a short, narrative statement of the expected testimony of each such witness; and
 - (b) for each expert witness, if any, an exhibit setting forth his qualifications and experience,
6. _____, 20 ____: Objections, if any, to exhibits (see #4), due in writing from either party.

4-III Benedict on Admiralty FORM No. 3-161

7. _____, 20 ____: Defendant's response due to plaintiff's trial memorandum (see #3).
8. _____, 20 ____: Plaintiff's reply, if any, to defendant's response to plaintiff's trial memorandum (see #7).
9. _____, 20 ____, _____ - ____ a.m.: Pre-trial conference.
10. _____, 20 ____: Parties to lodge a Proposed Joint Pre-trial Order with the following attachments:
- (a) As an exhibit, a statement of stipulated facts; and
- (b) As an exhibit, a statement indicating the approximate amount of time spent by the attorneys in arriving at the stipulation of facts (See #10(a)).
11. _____, 20 ____ Parties to lodge Proposed Findings of Fact and Conclusions of Law.
12. _____, 20 ____, _____.m.: Trial.

 Attorney for Plaintiff
 Office and P.O. Address

 Attorney for Defendant
 Office and P.O. Address

It Is So Ordered:
 Dated _____, 20 ____

 United States District Judge

FOOTNOTES:

(n1)Footnote 1. Adapted from papers in *National Association of Blue Shield Plans v. Lovelace*, 435 F.Supp. 115 (N.D. Cal. 1977), furnished through the courtesy of Melville Owen, Owen, Wickersham & Erickson, San Francisco, California.

(n2)Footnote 2. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-162

FORM No. 3-162 Pre-Trial Order--General Form, Rule 16

[Caption] n1

The parties to this action or their attorneys having appeared before the court at a pre-trial conference pursuant to *Federal Rule of Civil Procedure 16*, the following action was taken:

- (i) It is ordered that the following amendments to the pleadings are allowed: _____.
 - (ii) The parties agreed that the trial of this action shall be based upon the pleadings as amended, except that the following issues raised by the pleadings are abandoned: _____.
 - (iii) The parties stipulated the following facts: _____.
 - (iv) The parties agreed that the following documents, which were marked for identification, may be received in evidence: _____.
 - (v) The parties agreed to limit the number of expert witnesses as follows: _____.
 - (vi) The parties agreed that the following are all of the claims for damages or for other relief in this action, as of the date of this conference: _____.
 - (vii) The parties also agreed on the following matters: _____.
 - (viii) The issues to be tried are formulated by the court as follows: _____.
- Dated: _____

District Court Judge

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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RULE 16 PRE-TRIAL CONFERENCES; SCHEDULING; MANAGEMENT

4-III Benedict on Admiralty FORM No. 3-163

FORM No. 3-163 Pre-Trial Order--Breach of Towage Contract, Rule 16n1

[Caption] n2

1. Pre-Trial conference was held before the Honorable _____ at _____ o'clock A.M. on _____, 20____.

2. For plaintiff, _____, of _____; for defendants, _____ and _____, of _____ & _____ (Note: Default Judgment has been entered against _____)

3. _____ & _____ are defendants to the complaint of _____.

4. Jurisdiction is founded on the admiralty and maritime jurisdiction of this Honorable Court but defendants, _____ & _____, claim there is no jurisdiction over them as they are nonresidents, inasmuch as the business transacted, which is the subject of this suit was between _____ and Defendants, _____ and _____, claim that they transacted no personal business which would give rise to a cause of action on behalf of plaintiff, and further that the long arm statute cannot confer jurisdiction in this situation.

5. There are no pending motions.

6. (a) Plaintiff claims that following the devastation of Hurricane _____ on _____, 20____, defendants, all residents of the State of _____, came to _____ for the express purpose of availing themselves of the emergency conditions then existing in an attempt to make some quick profit salvaging grain.

4-III Benedict on Admiralty FORM No. 3-163

On or about _____, 20 _____, defendant, then staying at the _____ Hotel in _____, contacted Mr. _____ of _____ and contracted with plaintiff to render towage services and to rent its barges to defendant, _____, and subsequently to defendant, _____, to assist them in their business of grain salvage. On the following morning, a contract was entered into between _____ and _____, whereby _____ agreed to rent its _____ to move the damaged grain Barge _____ from Point _____ to just below the sugar dock at _____. This contract was initiated by _____ and confirmed by him the following morning while said _____ was living at the _____ Hotel in _____. The entire contract was executed completely within the State of _____.

Similar contracts were entered into by _____ and executed in _____ by plaintiff until sometime after the _____ of _____, 20 _____, when _____ instructed plaintiff that _____ would make arrangements for future services to be rendered by the plaintiff _____, then departed _____ for _____, whereupon defendant, took over the grain salvage operations in _____.

Thereafter, _____, who was then staying at the _____ Motel or _____ Hotel in _____, entered into several contracts with plaintiff for towage services and barge rentals to assist said defendants in their grain salvage operations. All of these contracts were fully performed by plaintiff, said performance being completed wholly within the State of _____.

On or about _____, 20 _____, plaintiff received a check for \$ _____ drawn on the account of _____ of which check was signed by defendant, _____, said check being in partial payment of the claim of plaintiff. _____ was aware of the continued contractual arrangements by way of long-distance telephone with Mr. _____ of _____.

On or about _____, 20 _____, _____ withdrew from _____ and returned to _____ leaving a balance due and owing unto plaintiff in the sum of \$ _____. Plaintiff claims that _____ and _____ along with _____ and _____ engaged in the aforesaid contracts individually, jointly, and/or as agents of _____ and that they were engaged in a joint venture or commercial partnership which, pursuant to Articles _____ and _____ of the Civil Code of _____ renders them liable to plaintiff *in solido*.

(b) Defendants, _____ and _____, contend that they were acting as employees or agents of _____, and that _____ was aware of the fact that _____ and _____ were acting solely as employees and/or agents. These defendants claim that nothing in their actions bound them personally; that they did not exceed their authority, nor did they in any way mislead or deceive _____. Defendants, _____ and _____, further contend that in the event _____ is shown not to exist, then _____ and _____ claim they were innocent parties, believing said corporation did exist, and were, therefore, innocent employees and/or agents of that corporation and did not bind themselves.

7. It is stipulated between plaintiff and defendant that the services of _____ were, in fact, performed for someone.

8. The contested issues of fact are:

4-III Benedict on Admiralty FORM No. 3-163

(a) Whether or not _____ was dealing solely with _____ or was dealing with defendants as individuals;

(b) Whether or not _____ and/or _____ were employees, and/or agents of _____;

(c) Whether or not _____ and _____ bound themselves personally or exceeded their authority as agents of _____;

(d) Whether or not _____ and/or _____ were engaged in a joint venture with _____ and/or _____ were engaged in a joint venture with _____ and/or _____ and/or _____;

(e) Whether or not _____ and _____ engaged in such activities in _____ that would subject them personally to the jurisdiction of this Honorable Court.

9. The contested issues of law are:

(a) Those issues inherent in the foregoing issues of fact;

(b) Does the _____ long arm statute apply to _____ and _____.

10. (a) Exhibits that may be used by plaintiff are:

(i) Copies of invoice numbers: _____, _____, _____, and _____

(ii) Copy of check dated ____ / ____ / ____ issued by _____ to _____;

(iii) Affidavit of _____ submitted by him in connection with his motion for summary judgment;

(iv) Affidavit of _____ to be submitted by him in connection with his motion for summary judgment;

(v) Deposition of _____;

(vi) All exhibits listed by defendants.

(b) Exhibits that may be used by defendants are:

(i) Certified copy of a certificate from the Secretary of State of the State of _____ for _____;

(ii) Certified copy of the charter of _____;

(iii) All exhibits listed by plaintiff.

(c) The authenticity of the foregoing exhibits has been stipulated, but they are subject to objections, if any, at the trial, other than to authenticity; and that if other exhibits are to be offered by any party, then at least ten days prior to trial, they will be submitted to opposing counsel and a supplemental note of evidence will be filed into the record of this case.

11. (a) Plaintiff will call the following witnesses:

(i) _____, Vice President of _____, who will testify as to facts.

(b) Plaintiff may call the following witnesses:

(i) _____, defendant, under cross-examination.

(ii) _____, defendant, under cross-examination.

(iii) _____ of _____ who may testify to facts surrounding this claim.

(c) Defendants will call the following witnesses:

(i) _____, who will testify on his own behalf concerning facts surrounding this claim.

(ii) _____, who will testify on his own behalf concerning facts surrounding this claim.

(d) In the event that there are other witnesses to be called at the trial, then at least ten days prior to the trial a supplemental note of evidence containing the names, addresses, and a concise narrative statement of all material facts expected to be established by the testimony of each witness will be served on opposing counsel, with the original of said supplemental note of evidence to be filed in the record of this case. This restriction shall not apply to rebuttal witnesses, the necessity of whose testimony cannot reasonably be anticipated before the time of trial.

12. There are no requested amendments to the pleadings.

13. It is estimated that the trial of this claim will require one-half day, and trial has been set for the _____ day of _____ 20 ____ A.M., Third Case.

14. This pre-trial order has been formulated after conference at which counsel for the respective parties have appeared. Reasonable opportunity has been afforded counsel for corrections, or additions, prior to signing. Thereafter, this order will control the course of the trial and may not be amended except by consent of the parties and the Court, or by order of the Court to prevent manifest injustice.

15. Possibility of settlement of this case was considered.

District Court Judge

FOOTNOTES:

(n1)Footnote 1. Form adapted from papers used in *Star Towing Co., Inc. v. Harvester Supply Co., Inc.*, 421 F.2d 628, 2070 A.M.C. 1430 (5th Cir. 1970), courtesy of Phelps, Dunbar, Marks, Claverie & Sims, New Orleans, Louisiana.

(n2)Footnote 2. *See* Form No. 3-1 *supra*.



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RULE 16 PRE-TRIAL CONFERENCES; SCHEDULING; MANAGEMENT

4-III Benedict on Admiralty FORM No. 3-164

**FORM No. 3-164 Motion to Strike Certain Exhibits for Failure to Comply With Pre-Trial Order, or,
Alternatively, to Extend Time to File a List of Trial Exhibits, Rule 16n1**

[Caption] n2

Defendant, _____, respectfully moves this Court to strike all of the Plaintiffs' exhibits not contained in the list of exhibits attached as Appendix "A" or in the alternative to grant a one week extension of time from _____, 20____, to _____, 20____, for Defendant to file a supplemental list of trial exhibits on the following grounds, more fully explained in the attached memorandum:

1. Counsel for the Plaintiffs have failed to make available for inspection by counsel for Defendants a large number of their exhibits, or even to designate with specificity what those exhibits are, on or before _____, 20____, as required by this Court's Order of _____, 20____.
2. As a result, it will be virtually impossible for counsel for Defendant to meaningfully analyze and prepare objections and select Defendant's exhibits prior to _____, 20____, the date on which Defendant is required to file its list of trial exhibits pursuant to the Court's Order of _____, 20____.

Under these circumstances, Defendant moves the Court to order that all the exhibits of the Plaintiffs not produced for

Defendant's inspection on _____, 20____ and listed in Appendix "A" be stricken from Plaintiffs' list of exhibits served on Defendant _____, 20____, or from any subsequent list, or in the alternative, that Defendant be given until _____, 20____, to file a supplemental list of exhibits.

Attorney for Defendant

FOOTNOTES:

(n1)Footnote 1. Adapted from papers in *Jarrell v. Eastern Air Lines., Inc.*, 430 F. Supp. 884 (E.D. Va. 1077), furnished through the courtesy of Hunton & Williams, Richmond, Virginia.

(n2)Footnote 2. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-165

FORM No. 3-165 Note of Issue and Statement of Readiness, Rule 16

[Caption] n1

1. The specific nature and object of the matter is a cause of Maritime collision.
 2. Issue has actually been joined.
 3. The last pleading, defendant's answer to the complaint, was served on _____, 20 ____.
 4. This is an Admiralty action, and no jury can be demanded.
 5. The parties have taken or have had reasonable opportunity to take and complete the necessary depositions and other discovery proceedings.
 6. The plaintiff has unsuccessfully approached the defendant as to the possibility of settlement.
 7. The cause is, in all respects, ready for trial.
 8. There is no other cause of action resting upon the same matter of right or defense.
- Dated: _____

Attorney for Plaintiff

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM Nos. 3-166-3-176

Reserved

FORM Nos. 3-166Reserved



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RULE 17 PARTIES PLAINTIFF AND DEFENDANT; CAPACITY

4-III Benedict on Admiralty FORM No. 3-177

FORM No. 3-177 Petition To Include Real Party in Interest, Rule 17(a)

[Caption] n1

Now Comes the defendant _____, by its attorneys, _____, and moves this Court to amend the caption of the case to include _____ Insurance Company as the use plaintiff and for reason therefor says:

1. As the compensation carrier for the stevedore, _____, _____ Insurance Company is a real party in interest to the extent of its compensation lien.

2. _____ [Insurance Company] does have an interest in the case to the extent of its lien, it is, by virtue of *Rule 17(a) of the Federal Rules of Civil Procedure*, a real party in interest and should be included as a use plaintiff. The Court is respectfully referred to _____ v. _____ as authority for this proposition.

Wherefore, defendant respectfully moves this court for an order amending the caption of the case as requested above.
Dated: _____

Attorney for Plaintiff

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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RULE 17 PARTIES PLAINTIFF AND DEFENDANT; CAPACITY

4-III Benedict on Admiralty FORM No. 3-178

FORM No. 3-178 Motion To Substitute Real Party in Interest, Rule 17(a)n1

[Caption] n2

Now Comes the Plaintiff, _____, by its attorneys, _____, and moves pursuant to *Rule 17(a) of the Federal Rules of Civil Procedure* that _____ be substituted for _____ as party plaintiff in this action on the following grounds:

1. On _____, 20 _____, _____ was the owner of a vessel named _____.
2. On _____, 20 _____, _____ executed the Charter Party involved in this action as agent for _____.
3. Attorney for defendant _____ Company, on _____, 20 _____, verbally raised the issue whether _____ is the real party plaintiff in interest.

In order that there be no question about the real party plaintiff in interest, _____, should be substituted as the party plaintiff.

Attorney for Plaintiff

FOOTNOTES:

(n1)Footnote 1. Adapted from papers in *Trade & Transport, Inc., v. Caribbean Steamship Company*, 384 F. Supp. 782 (S.D. Tex. 1974), furnished through the courtesy of Kleberg, Mobley, Lockett and Weil, Corpus Christi, Texas.

(n2)Footnote 2. *See* Form No. 3-1 *supra*.



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RULE 17 PARTIES PLAINTIFF AND DEFENDANT; CAPACITY

4-III Benedict on Admiralty FORM No. 3-179

FORM No. 3-179 Motion To Dismiss--Plaintiff Not Real Party in Interest, Rule 17(a)

[Caption] n1

Now Comes the Defendant, _____, by its attorneys, _____, and moves the court to dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted, in that plaintiff is not the real party in interest herein, as more particularly appears from the affidavits of _____ and _____, attached hereto as Exhibit A and Exhibit B respectively.

Dated: _____

Attorney for Defendant

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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RULE 17 PARTIES PLAINTIFF AND DEFENDANT; CAPACITY

4-III Benedict on Admiralty FORM No. 3-180

FORM No. 3-180 Order To Dismiss Unless Real Party in Interest Be Substituted, Rule 17(a)

[Caption] n1

This cause came on to be heard _____, 20 _____, on defendant's motion for an order dismissing the complaint herein on the ground that the plaintiff, _____, is not the real party in interest herein, and it appearing to the court that one _____ is the real party in interest but that a reasonable time should be allowed for the substitution of said _____ as plaintiff herein (or, ratification of commencement of the action by the real party in interest, or, joinder, as the case may be), it is

Ordered, that this action shall be dismissed unless the said _____ be substituted as plaintiff herein (or as the case may be) within _____ days after service of notice of entry of this order upon the plaintiff herein.

Dated: _____

United States District Judge

FOOTNOTES:

(n1)Footnote 1. *See* Form 3-1 *supra*.



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RULE 21 MISJOINDER AND NON-JOINDER OF PARTIES

4-III Benedict on Admiralty FORM No. 3-181

FORM No. 3-181 Motion To Drop Parties Not Real Parties in Interest Pursuant to Rule 21

[Caption] n1

Now comes the Defendant, _____, by its attorneys, _____, and moves the court for an order dropping plaintiffs _____ and _____ respectively as parties plaintiff herein, and for grounds therefore shows:

1. The complaint is for damages for personal injuries in subrogation under the Longshoremen's and Harbor Workers' Compensation Act, *33 U.S.C. § 933*.

2. Plaintiff, _____ [*Insurance Company*], paid certain compensation to plaintiffs _____ and _____ respectively, pursuant to the compensation order of Administrative Law Judge _____, dated _____, 20____, Docket No. _____. The compensation order was filed in the office of the Deputy Commissioner on _____, 20_____.

3. The acceptance of such compensation by said plaintiffs under the Longshoremen's and Harbor Workers' Compensation Act and as shown by the complaint, and plaintiffs' failure to commence an action against defendant herein within six months after such award, as required by *33 U.S.C. § 933(b)*, operated as an assignment to the employer by said plaintiffs of all their rights and claims of any character to recover any alleged damages against the defendant.

Wherefore, defendant, _____, respectfully moves this court for an order dropping plaintiffs _____ and _____ as parties plaintiff.

Dated: _____

Attorney for Defendant

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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RULE 21 MISJOINDER AND NON-JOINDER OF PARTIES

4-III Benedict on Admiralty FORM No. 3-182

FORM No. 3-182 Order To Drop Parties as Not Real Parties in Interest, Rule 21

[Caption] n1

This cause came on to be heard on _____, 20 _____, on motion of defendant to drop certain parties as parties plaintiff, and it appearing to the court that plaintiffs _____ and _____ have elected to receive compensation for their injuries under the Longshoremen's and Workers' Compensation Act, and that they are therefore not real parties in interest herein,

It Is Ordered, that _____ and _____ be and they hereby are dropped as parties plaintiff herein, with leave to plaintiff _____ [*Insurance Company*] to serve and file an amended complaint herein within twenty days after the service on it of a copy of this order; and that the caption of this action is amended accordingly.

Dated: _____

United States District Judge

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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RULE 21 MISJOINDER AND NON-JOINDER OF PARTIES

4-III Benedict on Admiralty FORM No. 3-183

FORM No. 3-183 Motion To Drop Defendant or for Severance of Claim, Rule 21

[Caption] n1

Now Comes the defendant, _____, by its attorneys, _____, and moves the court for an order dropping it as a party defendant herein or in the alternative for an order severing the claim asserted against it by plaintiff herein from the claim asserted against defendant, _____ on the grounds that:

(1) The alleged claim asserted against defendant, _____, does not arise out of the same transaction, occurrence, or series of transactions or occurrences as the claim asserted against defendant, _____, nor do the two alleged claims involve questions of law or fact common to both defendants.

(2) The moving defendant will be put to undue expense and embarrassment if he is required to proceed with his defense without a severance of the issues.

(3) The trial of the action will be embarrassed and the jury confused by a joint trial of the claims asserted against the two defendants herein, all to the prejudice of the moving defendant.

Wherefore, defendant _____ respectfully moves this court for an order dropping it as a party defendant.

Dated: _____

Attorney for Defendant

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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RULE 21 MISJOINDER AND NON-JOINDER OF PARTIES

4-III Benedict on Admiralty FORM No. 3-184

FORM No. 3-184 Order To Sever Claims Against Defendant, Rule 21

[Caption] n1

This cause came on to be heard on _____, 20 _____, on motion of defendant, _____, for an order dropping it as a party or in the alternative for an order severing the claim asserted against it from the claim asserted against the other defendants, and it appearing to the court that the claim asserted against defendant, _____, does not arise out of the same transaction or occurrence or series of transactions or occurrences as that out of which arise the claims asserted against the other defendants, and does not involve any question of law or fact common to all defendants,

It Is Ordered,

(1) That the claim asserted against defendant _____ be severed from the claims asserted against the other defendants, and that it be treated henceforth as a separate action under the title of _____, File No. _____; and that the caption of this action shall be amended accordingly;

(2) That plaintiff serve and file amended complaints against defendant _____ and the other defendants herein within twenty days after service upon plaintiff of a copy of this order.

Dated: _____

United States District Judge

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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Volume 4: Practice and Procedure: Forms
CHAPTER III MOTIONS AND REMEDIES
RULE 23 CLASS ACTIONS

4-III Benedict on Admiralty FORM No. 3-185

FORM No. 3-185 Notice of Motion (Combined With Motion) for Determination That Action Is Maintainable as Class Action, Rule 23(c)n1

[Caption] n2

Please Take Notice that on the attached affidavit of _____ sworn to _____, 20 _____ and on the pleadings and all proceedings hitherto had herein, the undersigned will move this court in Room _____, United States Court House _____ on _____, 20 _____ at _____ A.M. or as soon thereafter as counsel may be heard, for an Order under *Rule 23(c)(1) of the Federal Rules of Civil Procedure* (1) determining that this consolidated action be maintained as a class action, (2) setting forth the requisite notice, and (3) for such other and further relief as the Court may deem proper.

Dated: _____

Yours, etc.

Attorney for Plaintiff

FOOTNOTES:

(n1)Footnote 1. Form adapted from papers used in *Rosenblatt v. Omega Equities Corp.*, 50 F.R.D. 61 (2d Cir. 1970), courtesy of Markewich, Rosenhaus, Markewich & Friedman, New York, New York.

(n2)Footnote 2. *See* Form No. 3-1 *supra*.



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RULE 23 CLASS ACTIONS

4-III Benedict on Admiralty FORM No. 3-186

FORM No. 3-186 Order Class Action, Rule 23(c)

[Caption] n1

And Now, to wit, this _____ day of _____, 20 _____, upon consideration of the within Motion, it is hereby

Ordered and Decreed that the within Motion is granted, and that the above captioned matter is determined to be a class action in accordance with *Federal Rules of Civil Procedure 23*.

District Court Judge

or

This cause came on for hearing on _____, 20 _____, before the Honorable _____, District Judge, upon the plaintiff's motion for certification of the cause as a class action. Arguments from counsel for both parties were heard, and upon consideration of these arguments and the record, it is

Ordered that since the Court finds that questions of law and fact, common to the members of the class, predominate over any questions affecting only individual members, and that since a class-action is superior to other available methods for the fair and efficient adjudication of the controversy, this matter should be and is hereby certified as a class action under *Rule 23(b)(3), Fed. R. Civ. P.*, and the defendants are hereby ordered to deliver a copy of the notice attached hereto to each and every individual who *[describe members of the class.]* n2

Dated: _____

United States District Judge

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.

(n2)Footnote 2. Adapted from papers in *Crafton v. Luttrell*, 378 F. Supp. 521 (M.D. Tenn. 1974) , furnished through the courtesy of Stephen C. Small, Esq., Nashville, Tennessee.



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RULE 23 CLASS ACTIONS

4-III Benedict on Admiralty FORM Nos. 3-187-3-192

Reserved

FORM Nos. 3-187Reserved



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RULE 24 INTERVENTION

4-III Benedict on Admiralty FORM No. 3-193

FORM No. 3-193 Notice of Motion for Intervention, Rule 24(a)

[Caption] n1

Please Take Notice, that upon the attached affidavit of _____, verified the _____ day of _____, 20 ____ and upon the attached proposed complaint, the undersigned will move this Court on _____, 20 ____ in Court Room _____ of this Court, _____, before the Honorable United States District Judge, at _____ of said date or as soon thereafter as counsel can be heard for an order permitting _____ to intervene as a plaintiff in this action in order to assert a claim of maritime lien against the defendant vessel, _____, set forth in the proposed complaint annexed hereto, pursuant to the provisions of *Rule 24(a) of the Federal Rules of Civil Procedure*, on the ground that the proposed intervening plaintiff claims an interest in the defendant vessel, _____, and its proceeds and the disposition of this action might impair or impede said proposed intervening plaintiff's ability to protect its interest.
Dated: _____

Attorney for Intervenor

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-194

FORM No. 3-194 Motion To Intervene--General Form, Rule 24(a)

[Caption] n1

Now comes _____ by its attorneys _____ and moves this court for leave to intervene as a plaintiff [*or, defendant*] in this action, in order to assert the claim set forth in its proposed complaint [*or, in order to assert the defenses set forth in his proposed answer*] of which a copy is hereto attached, on the ground that _____.

Dated: _____

Signed: _____

Attorney for _____

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-195

FORM No. 3-195 Motion by Materialman To Intervene as Plaintiff, Rule 24(a)

[Caption] n1

Now comes _____ [Materialman] by its attorneys _____ and pursuant to *Rule 24(a) of the Federal Rules of Civil Procedure* moves this court for leave to intervene as a plaintiff herein in order to assert claims against the _____ [Vessel Owner], that vessel now being within the jurisdiction of this Honorable Court and under arrest; and it recites the following as grounds why it should be permitted to intervene: it has a maritime lien in the vessel _____ and its interests are such that disposition of Civil Action No. _____ may, as a practical matter, impair or impede its interests in the vessel _____, which appear more fully in the proposed intervening complaint, attached hereto as Exhibit "A", and which may be competing with the interests of other plaintiffs.
Dated: _____

Attorney for Intervening Plaintiff

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-196

FORM No. 3-196 Motion by Insurance Carrier To Intervene To Assert Lien Against Longshoreman's Recovery, Rule 24(a)n1

[Caption] n2

Now comes _____ [*Insurance Company*] by its attorneys _____ and, pursuant to *Rule 24(a) of the Federal Rules of Civil Procedure*, respectfully moves the Court for leave to intervene in the above styled case in order to assert its claim as set forth in its proposed intervention, a copy of which is hereto attached, on the ground that it is the insurance carrier for plaintiff's employer under the Longshoremen's and Harbor Workers' Compensation Act as amended, 33 U.S.C. §(EN)901 *et seq.*, and, by reason of payments of benefits under said Act, Intervenor is entitled to a lien upon any recovery which may be had by the plaintiff.

Dated: _____

Attorney for Applicant for Intervention

FOOTNOTES:

(n1)Footnote 1. Form adapted from papers used in *Slaughter v. S.S. Ronde*, 390 F. Supp. 637, 2074 A.M.C. 2290 (S.D. Ga. 1974), *aff'd*, 509 F.2d 973, 2075 A.M.C. 1311 (5th Cir. 1975), courtesy of Chamlee, Dubus & Sipple, Savannah, Georgia.

(n2)Footnote 2. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-197

FORM No. 3-197 Affidavit in Support of Applicants' Motion To Intervene

[Caption] n1

_____, being duly sworn, deposes and says:

1. I am an attorney at law, associated with the firm of _____, attorneys for _____ and _____, the applicants for intervention herein (hereinafter the "Applicants"). I submit this affidavit in support of the Applicants' motion to intervene pursuant to *Rule 24(a) of the Federal Rules of Civil Procedure*.

2. The Applicants claim a maritime lien against the defendant vessel as is more particularly set forth in the proposed Complaint, a copy of which is attached hereto as Exhibit "A." [*exhibit omitted.*] The Applicants' claimed interest is such that the disposition of this action may impair or impede their ability to protect their claimed interest in the subject vessel; moreover, the Applicants' claimed interest is not adequately represented by the existing parties to this action.

3. The Applicants have filed this motion in response to a notice of arrest published by _____ in the _____ [*Newspaper*] on _____, 20____, a copy of which is attached hereto as Exhibit "B." [*exhibit omitted.*] The notice provides that persons claiming maritime liens against the defendant vessel must file an application for intervention within 10 days of the date of publication. According to the notice, applications for intervention "may be untimely" if filed after _____, 20____.

Attorney for Intervenor

Sworn to before me this

4-III Benedict on Admiralty FORM No. 3-197

_____ day of _____, 20____

Notary Public

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-198

FORM No. 3-198 Order Permitting Intervention, Rule 24(a)

[Caption] n1

The above captioned action having been commenced by the filing of a Complaint and Issuance of a Warrant of Arrest against the _____ on _____, 20 ____, and the said vessel having subsequently been sold pursuant to order of this Court, and this Court having ordered on _____, 20 ____ that all claims against the fund realized from the sale of the _____ must be filed on or before _____, 20 _____ or be forever barred, and it appearing from the annexed affidavit of _____, sworn to the _____ day of 20 ____ and the proposed intervening complaint, a copy of which is attached thereto, that _____ claims a maritime lien upon the _____ for necessary services furnished to said Vessel of a value of \$ _____.

Now, upon motion of _____, attorney for the intervening plaintiff, _____, pursuant to the *Federal Rules of Civil Procedure, Rule 24*, it is

Ordered, that _____ be permitted to intervene as a plaintiff in this action and to be heard therein with respect to its claim against the _____ and her Owner, and that the Order of this Court dated _____, 20 ____ is hereby modified to the same effect, and that service of a copy of this Order with Notice of Entry thereof, together with a copy of the intervening complaint, upon the attorneys of record for the _____ and her Owners, be deemed sufficient service upon the Vessel and her Owners.

Dated: _____

United States District Judge

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-199

FORM No. 3-199 Order Permitting Intervention on Consent, Rule 24(a)n1

[Caption] n2

This matter having been brought to the Court by _____, the proposed plaintiff in intervention, by its attorneys, _____, for an Order pursuant to *Rule 24(a) of the Federal Rules of Civil Procedure* granting leave for _____ to intervene as a plaintiff in the within action;

And it appearing to the Court that _____ claims an interest in the vessel, _____, which is the subject of this action, by virtue of a First Preferred Ship Mortgage in the original principal amount of \$ _____ on the above named vessel [*or as otherwise*];

And it appearing that the continuation of this action without the intervention of _____ will impair _____'s ability to protect its interest in the vessel and that its interest cannot adequately be represented by the present parties to the action;

And it further appearing that plaintiff, _____ has consented to the intervention of _____ in this action;

And it further appearing that defendants _____ and _____ have not appeared in the action [*or do not object*];

And for good cause appearing, it is

Ordered, that _____ is hereby granted leave to intervene as a plaintiff in the action; and it is further

Ordered that the caption of the action shall be amended to read as follows:

[*Amended Caption*]

and it is further

Ordered, that plaintiff in intervention, _____ shall serve and file the proposed Complaint in Intervention attached to the Stipulation of Consent, on or before _____, 20____.

Dated: _____

U.S. District Judge

FOOTNOTES:

(n1)Footnote 1. Form adapted from papers filed in Laguna Shipping Limited v. M/V Oceanus Countess, Civ. No. 84-2664 (E.D.N.Y. 1984).

(n2)Footnote 2. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-200

FORM No. 3-200 Stipulation Consenting to Intervention, Rule 24(a)n1

[Caption] n2

It is hereby stipulated and agreed by and between the attorneys for plaintiff, _____, and the attorneys for _____, that plaintiff hereby consents to the intervention of _____ as a plaintiff in intervention in the above-captioned action.

Dated: _____

Attorney for Plaintiff

Attorney for Intervenor

FOOTNOTES:

(n1)Footnote 1. Form adapted from papers filed in Laguna Shipping limited v. M.V Oceanus Countess, Civ. No. 84-2662 (E.D.N.Y. 1984).

(n2)Footnote 2. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-201

FORM No. 3-201 Complaint of Intervention by Insurance Carrier for Reimbursement Out of Proceeds of Longshoreman's Recovery, Rule 24(c)n1

[Caption] n2

Now come _____ [Insurance Company] and _____ [defendant], by their attorneys, _____, and for their complaint of Intervention state as follows:

1. Intervenor, _____ [Insurance Company], was the Longshoremen's and Harbor Workers' Compensation insurer of _____ [defendant], on or about _____, 20 _____, when the alleged accident occurred resulting in personal injury and disability to the plaintiff, all as is more fully described in the original Complaint filed by plaintiff in these proceedings.

2. The accident and resulting injuries to plaintiff, as set forth in the original complaint filed herein and made a part hereof by reference, occurred while plaintiff was acting within the course and scope of his employment for _____ [defendant].

3. As a result of the accident and injury, intervening complainants are obligated to incur and have to date incurred, expenses under the Longshoremen's and Harbor Workers' Compensation Act in the amount of \$ _____ in compensation benefits and have also expended the sum of \$ _____ in medical expenses for treatment and care of plaintiff as of _____, 20 _____.

4. Furthermore, intervenors are entitled to be reimbursed herein by priority out of the proceeds of any judgment which may be rendered in these proceedings in favor of plaintiff and against defendants, together with any additional parties which may be added herein, for such disability benefits and medical expenses as may have been actually paid to date and for which intervenors are obligated to pay in the future, with legal interest on said benefits, medical and/or

disability, costs and fees from the date thereof until reimbursed.

5. The filing of this intervention in these proceeds will in no way retard the progress thereof, but will on the contrary permit the rights of all parties to be disposed of at the same time in one proceeding.

Wherefore, intervenors demand that there be judgment rendered in favor of intervenors and against defendants, and any other parties subsequently made a defendant, jointly, severally and *in solido*, in the full sum of \$ _____, in addition to any additional benefits or expenses paid by the time of any pertinent judgment rendered herein, together with interest and costs and providing that the intervenors be paid by preference and priority out of any judgment rendered herein, and that intervenors be released from the payment of any further compensation benefits and medical expenses that might otherwise be legally due by it to plaintiff, and for all general and equitable relief, interest, costs and fees as justice may require.

Dated: _____

Attorney for Intervenors

FOOTNOTES:

(n1)Footnote 1. Form adapted from papers filed in *Jones v. Mississippi River Grain Elevator Co.*, 703 F.2d 108 (5th Cir. 1983), furnished through the courtesy of Darryl D. Sicarelli, Esq., Bailey & Leininger, Metairie, Louisiana.

(n2)Footnote 2. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-202

FORM No. 3-202 Order Granting/Denying Intervention, Rule 24(c)

[Caption] n1

This cause having come on to be heard on _____, 20 _____, on motion of _____
for an order permitting it to intervene as a [plaintiff or defendant] in this cause, and the court having heard argument of
counsel, and being fully advised, it is

Ordered, that the motion be and the same hereby is [granted or denied.]

United States District Judge

Dated: _____

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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RULE 25 SUBSTITUTION OF PARTIES

4-III Benedict on Admiralty FORM No. 3-203

FORM No. 3-203 Motion by Plaintiff's Representative for Substitution, Rule 25(a)

[Caption] n1

Now comes _____, by its attorneys, _____, and moves the Court for an order substituting him, in his capacity as executor of the last will [*or, administrator of the estate*] of _____, plaintiff herein, deceased, as plaintiff in this action, without prejudice to the proceedings already had in this action. In support of his motion, _____ shows to the court that _____, plaintiff herein, died on _____, 20 ____; that the said _____ was appointed executor of the last will [*or, administrator of the estate*] of _____ by the _____ Court of the State of _____, and that he has duly qualified and is now acting as such executor [*or, administrator*]; and that this is an action for _____, and therefore the claim has not been extinguished by the death of plaintiff.

Wherefore, _____ moves this court for an order substituting him as plaintiff in this action.

Dated: _____

Attorney for Defendant

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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RULE 25 SUBSTITUTION OF PARTIES

4-III Benedict on Admiralty FORM No. 3-204

FORM No. 3-204 Order for Substitution of Plaintiff's Representative, Rule 25(a)

[Caption] n1

On motion of _____ for substitution as plaintiff in place of _____, deceased, it appearing to the court that the said _____ died [*testate or, intestate*] on the _____ day of _____, 20 ____; that the claim asserted by him in this action was not thereby extinguished; and that _____ has been duly appointed [*executor or, administrator*] of said _____, and has qualified and is acting as such;

It Is Ordered, that _____, [*executor or administrator*] of _____, be substituted as plaintiff herein in place of _____, deceased, without prejudice to any proceedings heretofore had in this action, and that the title of the action be amended accordingly.

Dated: _____

United States District Judge

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-205

FORM No. 3-205 Motion by Plaintiff for Substitution of Defendant's Representative, Rule 25(a)

[Caption] n1

Now comes the plaintiff _____ by its attorneys _____ and moves this court for an order substituting _____ for _____ as a party defendant herein. Plaintiff shows to the court that _____, the above-named defendant, died [testate or intestate] on or about the _____ day of _____; that _____ was duly appointed executor of the last will of _____ by the Court of the State of _____ and qualified as such executor on the _____ day of _____, 20 ____ [or, that letters of administration upon the estate of the said _____ were issued on the _____ day of _____, 19____ to _____ as administrator, by the _____ Court of the State of _____]; and that this is an action for _____ and the claim of plaintiff was therefore not extinguished by the death of defendant.

Wherefore, plaintiff moves the court for an order substituting _____, as such [executor or, administrator of the estate], as a party defendant herein.

Dated: _____

Attorney for Plaintiff

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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RULE 25 SUBSTITUTION OF PARTIES

4-III Benedict on Admiralty FORM No. 3-206

FORM No. 3-206 Order for Substitution of Defendant's Representative, Rule 25(a)

[Caption] n1

This cause came on for hearing on _____, 20 _____, on plaintiff's motion for substitution of the representative of _____, defendant herein, deceased, and it appearing to the court that _____, defendant herein, died [testate or, intestate] on or about the _____ day of 20 _____; that _____ has been duly appointed [executor or administrator] of the estate of _____ and that the claim set forth in the complaint was not extinguished by the death of said _____.

It Is Ordered, that _____, [executor or administrator] of _____, deceased, be substituted as defendant herein, and that the title of the action be amended accordingly.

Dated: _____

United States District Judge

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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RULE 25 SUBSTITUTION OF PARTIES

4-III Benedict on Admiralty FORM No. 3-207

FORM No. 3-207 Suggestion of Death Upon the Record, Rule 25(a)n1

[Caption] n2

_____, *[describe as a party, or as executor, administrator, or other representative or successor of*
_____, *the deceased party]* suggests upon the record, pursuant to Rule 25(a)(1), the death of
_____, *[describe as party]* during the pendency of this action.

Dated: _____

Attorney for Plaintiff or Defendant

FOOTNOTES:

(n1)Footnote 1. This is substantially Form 30 of the Official Forms attached to the Federal Rules of Civil Procedure.

(n2)Footnote 2. *See* Form No. 3-1 *supra*.



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RULE 25 SUBSTITUTION OF PARTIES

4-III Benedict on Admiralty FORM No. 3-208

FORM No. 3-208 Motion for Substitution of Corporate Transferee, Rule 25(c)

[Caption] n1

Now comes _____ by its attorneys _____ and moves this court for an order substituting it as the party plaintiff in place of _____ or joining it as a party plaintiff. In support of this motion, _____ states as follows.

(1) _____ is a corporation incorporated under the laws of the State of _____ and with its principal place of business in that state,

(2) This is an action [*state facts indicating that the claim is assignable*];

(3) _____, plaintiff herein, by a written assignment dated _____, 20 _____, a copy of which is attached hereto and marked Exhibit A, assigned to the said _____ all his right, title and interest in the claim herein;

(4) _____ has ever since been and is now the lawful owner of the claim asserted herein [*or set out other facts showing transfer of interest*].

Wherefore, the said _____ moves this court for an order substituting it as party plaintiff herein in place of _____, or in the alternative for an order joining it as a party plaintiff herein.

Dated: _____

Attorney for Petitioner

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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RULE 25 SUBSTITUTION OF PARTIES

4-III Benedict on Admiralty FORM No. 3-209

FORM No. 3-209 Order for Substitution or Joinder of Transferee, Rule 25(c)

[Caption] n1

This cause came on for hearing on _____, 20 _____, on motion of _____ that it be substituted as party plaintiff herein in place of plaintiff _____, and thereupon, upon consideration thereof,

It Is Ordered, that _____ be and it is hereby substituted as party plaintiff herein in place of _____ [or, made a party plaintiff herein] and that the title of the action be amended accordingly, and that the action be continued by and in the name of the said _____ [and _____ as co-plaintiffs] without prejudice to any proceeding already had in this action.

Dated: _____

United States District Judge

FOOTNOTES:

(n1)Footnote 1. See Form No. 3-1 *supra*.



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RULE 37 FAILURE TO MAKE DISCOVERY: SANCTIONS

4-III Benedict on Admiralty FORM No. 3-368

FORM No. 3-368 Motion To Require Responsive Answers to Interrogatories, Rule 37(a)

[Caption] n1

Now comes the Plaintiff _____ by its attorneys, and moves this Honorable Court for an order compelling Defendant, _____, to give full, complete and responsive answers to interrogatories numbered _____, inclusive, _____ inclusive, and _____ heretofore served on the Defendant and partially answered on, to-wit, _____ 20 _____, and for such other relief to which _____ Plaintiff may be entitled under the Federal Rules of Civil Procedure. In support of this motion, plaintiff states as follows.

1. Plaintiff propounded interrogatories on the defendant on _____.
2. Defendant served answers to the interrogatories on _____ but its answers to interrogatories numbers _____ and _____ were non-responsive or incomplete for the following reasons.

[State Reasons with Specificity]

3. Plaintiff is entitled to responsive and complete answers to its interrogatories.

Wherefore, plaintiff _____ moves this court for an order compelling the defendant to give full, complete and responsive answers to interrogatories _____ and _____ and for such other further relief as the court deems appropriate.

Dated: _____

Attorney for Plaintiff

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-369

FORM No. 3-369 Motion To Compel Answers to Interrogatories, Rule 37(a)n1

[Caption] n2

Now comes the Plaintiff _____, by his attorneys, _____ and respectfully moves this court for an order compelling the defendant to answer interrogatories. In support of this motion, the plaintiff states as follows.

1. This is an action to recover damages for personal injuries sustained by the plaintiff.
2. Interrogatories were propounded on behalf of the plaintiff to be answered by the defendant under oath, and served on or about _____, 20____.
3. Answers thereto were due, under the Rules of Court, on _____, 20 ____.
4. Defendant has failed and neglected to answer the said Interrogatories, and said answers remain unfiled as of this date.
5. No objections have been filed to the Interrogatories, nor has any reason been advanced for the delay in filing the said answers, and there is no justification for the failure to file same.
6. The information requested in the Interrogatories is necessary in order to properly prepare the plaintiff's case for trial.
7. Counsel have been unable to resolve this matter amicably by consultation.

Wherefore, plaintiff prays Your Honorable Court for an Order compelling defendant to answer the said interrogatories and for such other further relief as the court deems appropriate.

Dated: _____

Attorney for Plaintiff

FOOTNOTES:

(n1)Footnote 1. Form adapted from papers used in *Meitla v. Warner Co.*, 387 F. Supp. 937, 2075 A.M.C. 1491 (E.D. Pa. 1975), furnished through the courtesy of Freedman, Borowsky & Lorry, Philadelphia, Pa.

(n2)Footnote 2. *See* Form No. 3-1 *supra*.



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RULE 37 FAILURE TO MAKE DISCOVERY: SANCTIONS

4-III Benedict on Admiralty FORM No. 3-370

FORM No. 3-370 Motion To Require Third-Party Defendant To Answer Interrogatories, Rule 37(a)

[Caption] n1

Now comes the Defendant/Third-Party Plaintiff _____ by its attorneys _____ and moves the Court for an order compelling Third-Party Defendant to answer the interrogatories heretofore served on Third-Party Defendant on, _____, which Third-Party Defendant has refused to answer. Defendant and Third-Party Plaintiff would further move the Court to order Third-Party Defendant to pay to Defendant/Third-Party Plaintiff the sum of _____ as a reasonable expense incurred in obtaining such order on the ground that said refusal was without substantial justification.

In support of this motion, the Defendant/Third-Party plaintiff states as follows:

1. Defendant/Third Party Plaintiff served interrogatories on the Third Party Defendant on _____. A copy of the interrogatories is attached hereto as Exhibit 1.
2. The Third Party Defendant has refused to answer the interrogatories without substantial justification.
3. The Defendant/Third Party Plaintiff has incurred expenses for the motion of _____.

Wherefore, the Defendant/Third Party Plaintiff moves this court for the requested relief and such other further relief as the court deems appropriate.

Dated: _____

Attorney for Third Party Plaintiff

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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RULE 37 FAILURE TO MAKE DISCOVERY: SANCTIONS

4-III Benedict on Admiralty FORM No. 3-371

FORM No. 3-371 Order Requiring Party To Answer Interrogatories, Rule 37(a)

[Caption] n1

Upon hearing argument by counsel on plaintiff's motion that the defendant be required to answer certain interrogatories,

It Is Ordered that the defendant shall, on or before _____, 20 ____, serve its answer to the interrogatories as enumerated in plaintiff's motion on file in this cause.

or

This cause having come on to be heard on motion of plaintiff for an order compelling defendant to answer certain interrogatories served on him by plaintiff on _____, 20 ____, it is

Ordered that defendant answer Interrogatories Nos. _____ and _____ within _____ days after service of this order.

It appearing to the court that the refusal of defendant to answer the said questions was without substantial justification, it is further

Ordered, that the defendant pay to plaintiff the sum of \$ _____ as reasonable expenses incurred in obtaining this order.

Dated: _____

District Court Judge

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-372

FORM No. 3-372 Motion To Compel Production of Witnesses for Deposition, Rule 37(a)n1

[Caption] n2

Now comes the Plaintiff, _____, by its attorneys, _____, and moves this court for an order compelling defendant, _____, to produce for deposition on a date certain in _____ the captain of vessel _____ and the mate on watch on the vessel _____ at the time of the collision between the vessel _____ and the vessel _____ on _____, 20 _____, on the following grounds:

1. The above described individuals are managing agents of defendant, _____, within the meaning of *Rule 30(b)(6) of the Federal Rules of Civil Procedure*.

2. Plaintiff has heretofore filed two notices of depositions of the above described individuals and defendant, _____, has failed to produce said individuals for deposition.

3. After defendant, _____, failed to produce the aforesaid witnesses in response to the aforesaid notices of deposition, counsel for moving plaintiff requested counsel for said defendant to suggest, prior to _____, 20 _____, a date certain for the taking of the depositions of the above described individuals. Counsel for defendant _____, has failed to suggest a date for the taking of said depositions.

Wherefore, the plaintiff _____ moves this court for an order compelling the defendant _____ to produce _____ and _____ for deposition and for such other further relief as the court deems proper.

Dated: _____

Attorney for Plaintiff

FOOTNOTES:

(n1)Footnote 1. Form adapted from papers used in *Linehan v. United States Lines, Inc.*, 417 F. Supp. 678 (D. Del 1976), furnished through the courtesy of Potter, Anderson & Corroon, Wilmington, Delaware.

(n2)Footnote 2. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-373

FORM No. 3-373 Order To Compel Production of Witnesses for Deposition, Rule 37(a)n1

[Caption] n2

It Is Hereby Ordered this _____ day of _____, 20____, that defendant, _____, shall produce for deposition in _____, the master or former master of the vessel _____, and the vessel _____, second officer or former second officer of the vessel _____, on a date certain to be agreed upon by the parties, which date shall not be later than _____, 20____.

It Is Further Ordered that defendant, _____, shall pay plaintiff, _____, the sum of \$ _____ as counsel fees incurred in connection with preparation and presentation of said plaintiff motion to compel production of witnesses for deposition. Such payment shall be made within ten days of the date of this order.

Dated: _____

United States District Judge

FOOTNOTES:

(n1)Footnote 1. Form adapted from papers used in *Linehan v. United States Lines, Inc.*, 417 F. Supp. 678 (D. Del. 1976), furnished through the courtesy of Potter, Anderson & Corroon, Wilmington, Delaware.

(n2)Footnote 2. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-374

FORM No. 3-374 Motion To Compel Answer to Questions Upon Oral Examination, Rule 37(a)n1

[Caption] n2

Now comes the plaintiff (or *defendant*) _____ by its attorneys _____ and moves this court for an order compelling the _____ to answer questions upon oral examination. In support of this motion, the plaintiff (or *defendant*) states as follows.

1. Pursuant to stipulation, plaintiff (or *defendant*) commenced taking defendant's (or *plaintiff's*) oral deposition on _____, 20 _____. During the deposition, defendant (or *plaintiff*) refused to answer questions concerning the grounds on which he asserts his counterclaim (or *claim*) in this action.

2. Plaintiff, (or *defendant*) pursuant to *Rule 37, F.R.C.P.*, respectfully applies for an order compelling the defendant (or *plaintiff*) to produce any records relating to these subjects and to answer orally, at a continuation of his deposition, each of such questions and any others which plaintiff (or *defendant*) may reasonably ask based upon defendant's (or *plaintiff's*) answers and any additional records produced.

3. The questions asked and defendant's (or *plaintiff's*) refusals are the following (page references are to the deposition transcript):

[Set forth the questions to which answer is sought, and any response made by deponent or his counsel]

4. The testimony sought in each case is either itself relevant to the subject matters involved in this action or is reasonably calculated to lead to the discovery of admissible evidence.

Wherefore, Defendant (or *plaintiff*) _____ pursuant to *Rule 37(a)(2) of the Federal Rules of Civil*

Procedure, respectfully moves the Court for an Order compelling plaintiff (or *defendant*) _____ to answer in deposition certain questions to which plaintiff's (or *defendant's*) counsel improperly directed plaintiff (or *defendant*) not to respond in previous depositions.

Defendant (or *plaintiff*) _____ further moves, pursuant to *Rule 37(a)(4) of the Federal Rules of Civil Procedure*, that it be awarded its costs incurred in seeking this discovery.

The relevant areas of discovery to which defendant (or *plaintiff*) seeks responses, and the grounds therefor, are set forth in the attached memorandum. n3

Attorney for Plaintiff
(or Defendant)

FOOTNOTES:

(n1)Footnote 1. Form adapted from papers sued in *Pasternak v. Pan American Petroleum Corp.* (D. Colo. 1968), furnished through the courtesy of Holme, Roberts & Owen, Denver, Colorado.

(n2)Footnote 2. *See* Form No. 3-1 *supra*.

(n3)Footnote 3. Form adapted from papers in *Jarrell v. Eastern Air Lines, Inc.*, 430 F. Supp. 884 (E.D. Va. 1977), furnished through the courtesy of Hunton & Williams, Richmond, Virginia



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4-III Benedict on Admiralty FORM No. 3-375

FORM No. 3-375 Order Compelling Answer to Question Upon Oral Examination, Rule 37(a)

[Caption] n1

The defendant (or *plaintiff*) having moved this court for an order requiring the plaintiff (or *defendant*) to answer certain questions propounded to him upon his oral examination; and the court having heard the argument of counsel and due deliberation having been had thereon, it is

Ordered, that the said motion be, and the same hereby is, granted as to Items Nos. 1, 2, 5, 6, 7, 8, 11 and 20, set forth in Exhibit B to the affidavit of _____ attached to defendant's (or *plaintiff's*) motion, and that said motion be, and the same hereby is, denied as to all other items set forth in said Exhibit B; and it is further

Ordered, that the examination of the plaintiff (or *defendant*) be resumed at a time and place to be filed by stipulation of the attorneys for the respective parties, with the provision that if they are unable to agree, either party may apply to the court on two days' notice for an order fixing such time and place.

or

This cause came on to be heard on motion of plaintiff (or *defendant*) for an order compelling _____ to answer certain questions propounded to him on the taking of his deposition on oral examination (or, *written questions*) on _____, 20 _____, and it appearing to the court that the said questions should be answered, it is

Ordered, that _____ appear before the officer taking the deposition at such time and place as plaintiff (or *defendant*) may designate on _____ days' written notice to the defendant (or *plaintiff*), and answer

under oath the following questions:

1. _____

2. _____

It further appearing to the court that the failure of the witness to answer the said questions was without substantial justification, it is further

Ordered, that _____ pay to plaintiff (or *defendant*) the sum of \$ _____ as reasonable expenses and attorney's fees incurred in obtaining this order.

or

This Matter being heard upon plaintiff's (or *defendant's*) Motion to Require Defendant to Answer Deposition Questions, and the Court being fully advised in the premises,

It Is Ordered, that defendant's (or *plaintiff's*) oral deposition shall be resumed at any time after _____, 20____, upon reasonable written notice from plaintiff (or *defendant*), and defendant (or *plaintiff*) shall answer each of the unanswered questions listed in plaintiff's (or *defendant's*) motion and all others which plaintiff's counsel may reasonably ask based upon defendant's (or *plaintiff's*) answers and any additional records produced.

Dated: _____

United States District Judge

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-376

FORM No. 3-376 Motion To Compel Production of Documents, Rule 37(a)n1

[Caption] n2

Now comes the Plaintiff, _____, by his attorneys, _____ and hereby moves the Court, pursuant to *Rule 37 of the Federal Rules of Civil Procedure*, for an Order compelling defendant, _____, to produce the following documents which were identified, but not produced, in defendant's response to plaintiff's motion for production and/or in defendant's response to plaintiff's interrogatories upon the grounds set forth herein.

1. The rough deck log of vessel _____ covering the period from midnight on _____, 20 _____, until 24 hours after the collision between vessel _____ and vessel _____. Said document was requested in plaintiff's request for production No. _____ and was identified as a document maintained on board vessel _____ in an entry on _____, 20 _____, in the finished deck log of that vessel which has been produced by defendant.
2. The engine log book of the vessel _____ requested in plaintiff's request for production No. _____ and identified as a document maintained on the vessel _____ in defendant's answer to plaintiff's interrogatory No. _____.
3. The vessel _____'s course recorder requested in plaintiff's request for production No. _____ and identified in defendant's answer to plaintiff's interrogatory No. _____.
4. Such portions of statements obtained from witnesses by counsel for defendant identified and objected to in defendant's response to plaintiff's request for production No. _____ with the exception of such

portion of said statements which contain the legal theories or mental impressions of defendant's counsel.

5. All reports and statements requested in plaintiff's request for production No. _____ which were not prepared by counsel for defendant.

Dated: _____

Attorney for Plaintiff

FOOTNOTES:

(n1)Footnote 1. Form adapted from papers used in *Linehan v. United States Lines, Inc.*, 417 F. Supp. 678 (D. Del. 1976), furnished through the courtesy of Potter, Anderson & Corroon, Wilmington, Delaware.

(n2)Footnote 2. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-377

FORM No. 3-377 Order To Compel Production of Document, Rule 37(a)n1

[Caption] n2

It Is Hereby Ordered this _____ of _____, 20 _____, that defendant, _____, shall produce the documents identified in plaintiff _____'s motion to compel production within ten days of the date of this order.

It Is Further Ordered that defendant, _____, shall pay plaintiff, _____, the sum of \$ _____ as counsel fees incurred in connection with preparation and presentation of said plaintiff's motion to compel production. Such payment shall be made within ten days of the date of this order.

Dated: _____

United States District Judge

FOOTNOTES:

(n1)Footnote 1. Form adapted from papers used in *Linehan v. United States Lines, Inc.*, 417 F. Supp. 678 (D. Del. 1976), furnished through the courtesy of Potter, Anderson & Corroon, Wilmington, Delaware.

(n2)Footnote 2. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-378

FORM No. 3-378 Motion for Default for Failure to Comply With an Order Compelling Discovery, Rule 37(b)n1

[Caption] n2

Now comes the plaintiff _____ by its attorneys _____ in the above entitled action and moves, pursuant to Rule of Civil Procedure 37(b) that the Court enter the default of the defendant _____, for failure to comply with an order compelling discovery entered by this Court on _____, 20 _____, a copy of which is attached as exhibit A.

Dated: _____

Attorney for Plaintiff

FOOTNOTES:

(n1)Footnote 1. Form adapted from papers filed in *Valm v. Hercules Fish Products, Inc.*, 701 F.2d 235 (1st Cir. 1983), furnished through the courtesy of Glynn & Dempsey, Boston, Massachusetts.

(n2)Footnote 2. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-379

FORM No. 3-379 Motion To Impose Sanction for Failure To Comply With an Order Compelling Discovery, Rule 37(b)n1

[Caption] n2

Now comes the plaintiff, _____, by its attorneys _____, and moves this court for sanctions against the defendant for failure to comply with an order compelling discovery. In support of this motion, plaintiff states as follows.

1. Counsel for the plaintiff contacted counsel for _____ for the purpose of selecting a date to inspect the vessel involved in this action at _____, as ordered by the court.

2. Defendant refused to provide any such date.

3. Defendant's counsel informed plaintiff's counsel that defendant would not provide any person to show plaintiff and his expert the location on the vessel where the vessel was fractured and where the fire started, in relation to where plaintiff was working.

4. Plaintiff has been informed that the vessel has been in the _____ area several times since the court ordered _____ to give plaintiff advance notice of when the vessel would be in the _____ area. Wherefore plaintiff moves the court to dismiss all of _____

Company's defenses, or impose such other sanctions as the court may deem reasonable.

Dated: _____

Attorney for Plaintiff

FOOTNOTES:

(n1)Footnote 1. Form adapted from papers filed in *Magee v. Bayou Teche*, 548 F. Supp. 270 (E.D. La. 1982), furnished through the courtesy of James A. Cobb, Jr., Esq., Emmett, Cobb, Waits & Kessennich, New Orleans, Louisiana.

(n2)Footnote 2. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-380

FORM No. 3-380 Order That Fact Be Taken a Established, Rule 37(b)

[Caption] n1

This cause came on to be heard on plaintiff's motion for an order that certain facts be taken as established for failure and refusal of the defendant to comply with this court's order of _____, 20 ____ that defendant _____; and the court having heard the argument of counsel and being fully advised, it is

Ordered that the following facts be taken as established for the purposes of this action, that plaintiff need introduce no further proof with respect to said facts, and that defendant will not be permitted to introduce evidence controverting said facts:

1. _____

2. _____

Dated: _____

United States District Judge

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-381

FORM No. 3-381 Motion for Expenses on Failure To Admit, Rule 37(c)

[Caption] n1

Now comes the plaintiff, _____, by its attorneys and moves this court for an order awarding it reasonable expenses against the defendant for defendant's failure to admit certain facts in support of this motion, represents to the court as follows:

1. On _____, 20 _____, plaintiff served on defendant a request to admit the truth of matters and the genuineness of documents under *Rule 36 of the Federal Rules of Civil Procedure*. Among the matters which defendant was requested to admit were the following:

(a) _____

(b) _____

2. On _____, 20 _____, defendant served on plaintiff his written and signed answers in reply to the said request, in which he stated in part:

(a) _____

(b) _____

3. As a consequence of defendant's denial of the said matters of substantial importance plaintiff was required to prove said matters at the trial of this action by the testimony of _____ and _____ and by introducing in evidence a certified copy of _____ Plaintiff's reasonable expenses in making such

proof amounted to \$ _____, as more particularly appears from the affidavit of
_____ attached hereto as Exhibit A.

Wherefore, plaintiff moves the court for an order requiring defendant to pay plaintiff the sum of \$
_____ as reasonable expenses in making such proof and the sum of \$ _____ as a
reasonable attorney's fee.

Dated: _____

Attorney for Plaintiff

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-382

FORM No. 3-382 Order for Expenses on Failure To Admit, Rule 37(c)

[Caption] n1

This cause came on to be heard on plaintiff's motion for an order requiring defendant to pay plaintiff the reasonable expenses incurred in proving certain matters, and it appearing to the court that plaintiff on _____, 20____, served on defendant a request to admit the truth of certain matters; that defendant on _____, 20____, served a written and signed answer denying the truth of said matters; that plaintiff thereafter proved the said matters at the trial of this action by the testimony of _____ and _____ and the introduction in evidence of a certified copy of _____; that the said matters were material and relevant and of substantial importance to the trial of this action; that the request was not held objectionable pursuant to Rule 36(a); that there were no good reasons for the denial; and there was no reasonable ground for defendant to believe that he might prevail in the matter,

It Is Ordered that defendant pay to plaintiff the sum of \$ _____ as reasonable expenses of proving said facts and \$ _____ as a reasonable attorney's fee.

Dated: _____

United States District Judge

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-383

FORM No. 3-383 Notice of Motion To Dismiss--Failure To Answer Interrogatories, Rule 37(d)

[Caption] n1

Please Take Notice, that upon all the pleadings and proceedings heretofore had herein, upon the annexed affidavit of _____, sworn to on the _____ day of _____, 20 _____, and upon a copy of the proposed interrogatories attached hereto, a motion will be made in Room _____ of the United States Courthouse, _____, City of _____, on the _____ day of _____, 20 _____, at _____ o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, pursuant to *Rule 37(d) of the Federal Rules of Civil Procedure*, for an order dismissing this action, and for such other and further relief as to this court may seem just and proper.

Dated: _____

Attorney for Defendant

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-384

FORM No. 3-384 Motion To Dismiss--Failure To Answer Interrogatories, Rule 37(d)

[Caption] n1

Now comes the Defendant, _____, a corporation, by and through its undersigned attorneys and hereby moves the Court for an order striking the complaint of the plaintiffs and dismissing the action with prejudice and with costs to defendant. In support of this motion the defendant states as follows.

1. On _____, 20 _____, defendant served on plaintiffs interrogatories pursuant to *Rule 33 of the Federal Rules of Civil Procedure*, which interrogatories are now on file in the office of the Clerk of this Court;

2. More than _____ days have elapsed and plaintiffs have wilfully failed to answer or object to said interrogatories.

Wherefore defendant respectfully submits that in accordance with Rule 37(d) of the Rules of Federal Practice it is entitled to relief herein requested.

At _____ this _____ day of _____, 20 _____.

Attorney for Defendant

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-385

FORM No. 3-385 Notice of Motion to Strike Pleadings and for Judgment by Default--Failure to Answer Interrogatories, Rule 37(d)n1

[Caption] n2

Please Take Notice that upon the attached affidavit of _____, sworn to the _____ day of 20 _____, and upon all the prior proceedings heretofore had herein, the undersigned will make a motion before the Honorable _____ of the United States District Court for the _____ District of _____ at the Courthouse, _____, on the _____ day of _____, 20 _____, at _____ o'clock in the forenoon in Room _____, for an order pursuant to *Rule 37(d) of the Federal Rules of Civil Procedure* to strike defendants' Answer and render judgment by default against defendants because of their failure to answer Interrogatories or, in the alternative, for an Order compelling the service of the Answers to Interrogatories within 15 days, and for such other relief as the Court deems just in the premises.

Attorney for Plaintiff

FOOTNOTES:

(n1)Footnote 1. Form adapted from papers filed in *Sea-Land Service, Inc. v. Aetna Insurance Co.*, Civ. No. 72-1170 (S.D.N.Y. 1972), furnished through the courtesy of De Orchis & Partners, New York, New York.

(n2)Footnote 2. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-386

FORM No. 3-386 Affidavit in Support of Motion To Strike Pleadings and for Judgment by Default--Failure To Answer Interrogatories, Rule 37(d)n1

[Caption] n2

STATE OF _____)
 COUNTY OF _____) SS.:
)
)

_____, being duly sworn, deposes and says:

1. He is a member of the firm of _____, attorneys for plaintiff, and is familiar with all the pleadings and proceedings heretofore had herein, and makes this affidavit in support of a motion pursuant to *Rule 37(d) of the Federal Rules of Civil Procedure* to strike defendants' Answer for failure to answer interrogatories.
2. On _____, 20____, and in accordance with a previous agreement between counsel, plaintiff served by mail interrogatories upon the defendants. To date, defendants have failed to answer said interrogatories.
3. The default of defendants in answering the interrogatories is seriously hampering plaintiff in its investigation and preparation of the case. The interrogatories are designed to obtain information within the knowledge of defendants necessary to plaintiff's preparation for trial.

Wherefore, it is respectfully requested that the defendants' answer be stricken, and/or judgment be entered against defendants, or that defendants be compelled to answer the interrogatories within 15 days, and that plaintiff have such other and further relief as to the Court seems just in the premises.

4-III Benedict on Admiralty FORM No. 3-386

Attorney for Plaintiff

Subscribed and sworn to before me this _____ day of _____, _____.

[Seal]

Notary Public

FOOTNOTES:

(n1)Footnote 1. Form adapted from papers filed in *Sea-Land Service, Inc. v. Aetna Insurance Co.*, Civ. No. 72-1170 (S.D.N.Y. 1972), furnished through the courtesy of De Orchis & Partners, New York, New York.

(n2)Footnote 2. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM No. 3-387

FORM No. 3-387 Order To Dismiss--Failure To Answer Interrogatories, Rule 37(d)

[Caption] n1

Defendant having moved for an order striking the plaintiffs' complaint with prejudice because of plaintiffs' willful failure to answer interrogatories served on plaintiffs pursuant to *Rule 33 of the Federal Rules of Civil Procedure*; the Court having heard the argument of counsel; and upon due deliberation, the Court having concluded that the plaintiffs have wilfully and deliberately defaulted in failing to answer the duly-served interrogatories, it is

Ordered, Adjudged And Decreed that the defendant's motion be and the same is hereby granted; and it is further

Ordered, Adjudged And Decreed that the plaintiffs' complaint herein be and the same is hereby dismissed with prejudice against another action upon the same grounds, and that defendant recover his costs.

_____, this _____ day of _____, 20 _____.

District Court Judge

FOOTNOTES:

(n1)Footnote 1. *See* Form No. 3-1 *supra*.



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4-III Benedict on Admiralty FORM Nos. 3-388-3-399

Reserved

FORM Nos. 3-388Reserved