

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. [REDACTED]
c/w [REDACTED]
c/w [REDACTED]
c/w [REDACTED]

DIVISION "J"

SECTION 13

[REDACTED] ET AL.

VERSUS

[REDACTED] ET AL.

FILED

DEPUTY CLERK

MOTION FOR SUMMARY JUDGMENT

NOW INTO COURT, through undersigned counsel, come defendants, [REDACTED] [REDACTED] to move for Summary Judgment pursuant to Article 966 of the Louisiana Code of Civil Procedure. For the reasons more fully set forth in the Memorandum in support of this Motion for Summary Judgment, there are no genuine issues of material fact concerning the absence of a duty owed by the defendants to the crew and officers of the [REDACTED] [REDACTED] and defendants are entitled to judgment as a matter of the maritime law governing the very limited duties owed by marine surveyors. Accordingly, defendants move this Honorable Court for a Summary Judgment in their favor, with prejudice.

Respectfully submitted,

MONTGOMERY, BARNETT, BROWN,
READ, HAMMOND & MINTZ, L.L.P.

[REDACTED]
1100 Poydras Street, Ste. 3300
New Orleans, LA 70163-3200
[t] (504) 585-3200 [f] (504) 585-7688

[REDACTED]

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been forwarded to all counsel of record by facsimile, or electronic or United States mail, postage pre-paid, on this ____ day of _____, 2007.

PLEASE SERVE:

Plaintiffs, through their attorney of record:

[REDACTED]

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

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NO.
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RULE TO SHOW CAUSE

Considering the foregoing Motion for Summary Judgment filed by defendants,



IT IS HEREBY ORDERED that plaintiffs in the above-captioned matter must show cause on the ___ day of _____, 2007, at ___ . m. why summary judgment should not be granted to defendants,

New Orleans, Louisiana, this ___ day of _____, 2007.

JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been forwarded to all counsel of record by facsimile, or electronic or United States mail, postage pre-paid, on this ____ day of _____, 2007.

PLEASE SERVE:

Plaintiffs, through their attorney of record:

[REDACTED]

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

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STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

1. Mitsubishi Heavy Industries, Ltd. (MHI) constructed an ore/oil carrier at its Yokohama, Japan, shipyard for [REDACTED] and delivered the vessel to [REDACTED] in Yokohama, Japan, under the name, [REDACTED] on July 18, 1973. MHI had no further involvement or contact with the vessel or its owners or operators thereafter.
2. The vessel was classed by defendant, [REDACTED] a vessel classification society.
3. [REDACTED] was sold by [REDACTED] to [REDACTED] and was renamed [REDACTED].
4. After undergoing modifications at a shipyard, [REDACTED] was redesignated as an ore carrier by its owner, [REDACTED].
5. In 1984, [REDACTED] was classed as an ore carrier by defendant [REDACTED]. The vessel was registered in the Republic of Liberia with her home port in Monrovia, Liberia.
6. The hull of [REDACTED] was last surveyed by [REDACTED] in Pireaus, Greece between March 12 and April 15, 1993. During that time, [REDACTED] effected extensive repairs to the vessel. Approximately 360 tons of steel were renewed in way of the forepeak and the Nos. 1, 2, 4, and 7 port and starboard side water ballast tanks. Additionally, extensive areas were cleaned, examined and found or placed in satisfactory condition for class purposes.
7. The repairs to the vessel were also overseen by [REDACTED] who was retained by the vessel's mortgagee, [REDACTED] was to ascertain the vessel's general condition and report his findings to [REDACTED] so that [REDACTED] could determine whether or not to advance additional funds to [REDACTED] for the repairs.
8. On May 25, 1993, [REDACTED] issued a Report of Survey which concluded that the quality of work performed at the shipyard was "of very good standards" which "improved the vessel's structural condition" and which placed it "within the approved limits of the Classification Society [REDACTED]."

9. Upon satisfactory completion of the survey, [REDACTED] issued a Cargo Ship Safety Construction Certificate to [REDACTED] on April 15, 1993. In the [REDACTED] survey report, the [REDACTED] surveyors concluded that there were no outstanding class items and that the vessel was in satisfactory condition upon completion of these repairs.
10. After the repairs were effected, [REDACTED] made voyages to France, South Africa, Slovenia and Brazil without incident.
11. On October 3, 1993, while the vessel was in Brazil, surveyor of the defendant, [REDACTED] defendant [REDACTED], carried out a limited random condition survey (known as a JH-115) of [REDACTED] for the account of its owner to comply with the hull underwriters' request for such a survey.
12. After both inspecting the vessel and discussing its overall condition with the captain and crew, [REDACTED] concluded that the condition of the vessel was satisfactory. [REDACTED] noted that the external shell plating was in good condition and that a considerable amount of new steel had been added in the forepeak and permanent ballast tanks.
13. The survey report of [REDACTED] and [REDACTED] was never provided to the crew and officers of the [REDACTED], nor was it intended or required to be provided to them. [REDACTED] and officers did not request the survey report of [REDACTED] and [REDACTED].
14. On December 22, 1993, [REDACTED] arrived at Seven Isles, Canada. According to the pre-stowage plan prepared by Chief Mate [REDACTED] the vessel was scheduled to have 149,400 metric tons of pelletized iron ore loaded aboard her. Instead, on December 27, 1993, [REDACTED] loaded a cargo of only 139,319 metric tons of iron ore into her five cargo holds.
15. Because the vessel was loaded with approximately 9,000 fewer metric tons than the captain and crew anticipated, the cargo holds were not completely full.
16. [REDACTED] master, Captain [REDACTED] recognized that the stevedores in Canada failed to properly stow and trim the cargo.
17. Captain [REDACTED] on behalf of [REDACTED] owners and charterers, issued a formal Letter of Protest to Iron Ore Company of Canada for the "bad trimming of cargo" by its stevedores. Notwithstanding this protest, the [REDACTED] departed Canada bound for The Netherlands on December 27, 1993, with Captain [REDACTED] in command.
18. On or about January 1, 1994, the [REDACTED] vanished in the North Atlantic Ocean approximately 700 miles off the coast of Newfoundland in what has been described as a fierce winter storm. Winds were blowing at 40-50 knots (46-58 mph), gusting to 55 knots (63 mph). Waves were rolling at more than 30 feet and swells were building to 10-13 meters (32-42 feet). Searchers found no trace of the vessel. None of the [REDACTED] crew, comprised of five Greek and 31 Filipino seamen, was ever found. The wreck has never been located. Consequently, the vessel was never inspected or recovered and there is no physical evidence of the cause of the vessel's loss.

Respectfully submitted,

MONTGOMERY, BARNETT, BROWN,
READ, HAMMOND & MINTZ, L.L.P.

[REDACTED]
1100 Poydras Street, Ste. 3300
New Orleans, LA 70163-3200
[t] (504) 585-3200 [f] (504) 585-7688

[REDACTED]

CERTIFICATE OF SERVICE

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CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. [REDACTED]
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SECTION 13

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FILED

DEPUTY CLERK

MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

MAY IT PLEASE THE COURT:

Defendants, [REDACTED] offer this Memorandum in support of their Motion for Summary Judgment. Under the general maritime law marine surveyors only very rarely owe third-parties a duty on which a theory of contract or tort recovery can be premised. None of those duty-inducing circumstances are manifest or even disputed in this case, and thus [REDACTED] and [REDACTED] are entitled to judgment as a matter of law.

I. BACKGROUND

Mitsubishi Heavy Industries, Ltd. (MHI) constructed an ore/oil carrier at its Yokohama, Japan, shipyard for [REDACTED] and delivered the vessel to [REDACTED] in Yokohama, Japan, under the name, [REDACTED], on July 18, 1973. MHI had no further involvement or contact with the vessel or its owners or operators thereafter.

The vessel was classed by defendant, the [REDACTED] a vessel classification society. [REDACTED] sets and administers standards for the design, construction and periodic survey of vessels. In accordance with the applicable [REDACTED] standards, [REDACTED] conducted various periodic surveys aboard the vessel to verify its classification.

[REDACTED] was sold by [REDACTED] to [REDACTED] and was renamed [REDACTED]. After undergoing modifications at a shipyard, [REDACTED] was redesignated as an ore carrier by its owner, [REDACTED]. In 1984, [REDACTED] was classed as an ore

carrier by defendant [REDACTED]. The vessel was registered in the Republic of Liberia with her home port in Monrovia, Liberia.

a. Repairs and Surveys of [REDACTED]

The hull of [REDACTED] was last surveyed by [REDACTED] in Pireaus, Greece between March 12 and April 15, 1993. During that time, [REDACTED] effected extensive repairs to the vessel. Approximately 360 tons of steel were renewed in way of the forepeak and the Nos. 1, 2, 4, and 7 port and starboard side water ballast tanks. Additionally, extensive areas were cleaned, examined and found or placed in satisfactory condition for class purposes.

The repairs to the vessel were also overseen by [REDACTED] who was retained by the vessel's mortgagee, [REDACTED]. [REDACTED] was to ascertain the vessel's general condition and report his findings to [REDACTED] so that [REDACTED] could determine whether or not to advance additional funds to [REDACTED] for the repairs.² On May 25, 1993, [REDACTED] issued a Report of Survey which concluded that the quality of work performed at the shipyard was "of very good standards" which "improved the vessel's structural condition" and which placed it "within the approved limits of the Classification Society ([REDACTED])."³

In the [REDACTED] survey report, the [REDACTED] surveyors concluded that there were no outstanding class items and that the vessel was in satisfactory condition upon completion of these repairs.⁴ Upon satisfactory completion of the survey, [REDACTED] issued a Cargo Ship Safety Construction Certificate to [REDACTED] on April 15, 1993.⁵

After the repairs were effected, [REDACTED] made voyages to France, South Africa, Slovenia and Brazil without incident. On October 3, 1993, while the vessel was in Brazil, [REDACTED] surveyor, [REDACTED], carried out a limited random condition survey (known as a JH-115) of [REDACTED] for the account of its owner to comply with the hull underwriters' request for such a survey. [REDACTED] inspected the vessel and noted that the external shell plating was in good condition and that a considerable amount of new steel had been added in the forepeak and permanent

¹ Exhibit A, Deposition testimony of [REDACTED] at pp. 13-14.

² Exhibit B, Deposition testimony of [REDACTED] at pp. 10-13, 47-50.

³ Exhibit C, May 25, 1993 report of [REDACTED] at p. 7.

⁴ Exhibit D, April 14, 1993 [REDACTED] Survey Report No. [REDACTED]

⁵ Exhibit E, April 15, 1993 [REDACTED] Cargo Ship Safety Construction Certificate.

ballast tanks. After both inspecting the vessel and discussing its overall condition with the captain and crew, ██████████ concluded that the condition of the vessel was satisfactory.⁶

b. The Loading of ██████████

On December 22, 1993, ██████████ arrived at Seven Isles, Canada. According to the pre-stowage plan prepared by Chief Mate ██████████ (represented by a plaintiff in this case), the vessel was scheduled to have 149,400 metric tons of pelletized iron ore loaded aboard her.⁷ Instead, on December 27, 1993, ██████████ loaded a cargo of only 139,319 metric tons of iron ore into her five cargo holds. Because the vessel was loaded with approximately 9,000 fewer metric tons than the captain and crew anticipated, the cargo holds were not completely full.

██████████ master, Captain ██████████ (represented by a plaintiff in this case), recognized that the stevedores in Canada failed to properly stow and trim the cargo. Accordingly, Captain ██████████ on behalf of ██████████ owners and charterers, issued a formal Letter of Protest to Iron Ore Company of Canada for the “bad trimming of cargo” by its stevedores.⁸ Notwithstanding this protest, the ██████████ departed Canada bound for The Netherlands on December 27, 1993, with Captain ██████████ in command.

c. The Loss of ██████████

On or about January 1, 1994, the ██████████ vanished in the North Atlantic Ocean approximately 700 miles off the coast of Newfoundland in what has been described as a fierce winter storm. Winds were blowing at 40-50 knots (46-58 mph), gusting to 55 knots (63 mph). Waves were rolling at more than 30 feet and swells were building to 10-13 meters (32-42 feet).⁹ Searchers found no trace of the vessel. None of the ██████████ crew, comprised of five Greek and 31 Filipino seamen, was ever found. The wreck has never been located. Consequently, the vessel was never inspected or recovered and there is no physical evidence of the cause of the vessel’s loss.

The plaintiffs in this case are heirs and representatives of the crew and officers that went down with the ██████████. They have alleged in their Second Amended and Supplemental

██████████ Exhibit F, ██████████ October 14, 1993 survey report.

⁷ Exhibit G, Pre-Stowage Plan for ██████████ Decision of the Commissioner of Maritime Affairs, Republic of Liberia, Annex 3.

⁸ Exhibit G, Master’s Letter of Protest, Decision of the Commissioners of Maritime Affairs, Republic of Liberia, Annex 6.

⁹ Exhibit G, Decision of the Commissioner of Maritime Affairs, Republic of Liberia, at pp. 1, 12.

Petition that [REDACTED] and [REDACTED] are liable to for the loss of the [REDACTED] for: (1) failing to properly perform condition surveys; (2) failing to follow guidelines in performing condition surveys; (3) failing to properly advise of survey findings; and (4) other respects to be shown.

These allegations sound in contract, and the crew and officers were not parties to [REDACTED] marine surveying contract or even third-party beneficiaries thereof. To the extent these allegations sound in tort, the outcome is the same because [REDACTED] and [REDACTED] owed no duty to the crew and officers. [REDACTED] and [REDACTED] have found no law that provides the plaintiffs with any rights of recovery in tort or contract as alleged in these proceedings.

II. THE CREW AND OFFICERS OF THE [REDACTED] ARE NOT THIRD-PARTY BENEFICIARIES OF THE SURVEY CONTRACT

The JH-115 survey conducted by [REDACTED] and [REDACTED] was a limited survey required to qualify the [REDACTED] for insurance coverage written by the [REDACTED] hull underwriters.¹⁰ It is a far less exacting survey than that conducted by classification societies. However, marine surveyors and classification societies are treated similarly under the federal general maritime law of third-party liability theories,¹¹ and cases treating both are noted interchangeably throughout this memorandum.

Under the federal general maritime law, a duty sometimes owed¹² by a marine surveyor on his contract is the warranty of workmanlike performance.¹³ This duty is primarily owed to parties to the surveying contract.¹⁴ It may also be owed to third-party beneficiaries of that contract.¹⁵

¹⁰ Exhibit H, Affidavit of [REDACTED]

¹¹ See Claude L. Stuart and Evan T. Caffrey, *Liability of Marine Surveyors, Adjusters, and Claims Handlers*, 22 Tul. Mar L. J. 1, 7 (1997); Brian J. Beck, *Liability of Marine Surveyors for Loss of Surveyed Vessels: When Someone Other Than the Captain Goes Down With the Ship*, 64 Notre Dame L. Rev. 246 (1989).

¹² A warranty is sometimes applied to those who under a contract for services are vested with some degree of control over circumstances that may create vessel hazards or rectify vessel hazards. Marine surveyors often do not fit into this category. See *Sundance Cruises Corp. v. American Bureau of Shipping*, 799 F.Supp. 363 (S.D.N.Y. 1992) (classification society not within ambit of warranty); *Royal Embassy of Saudi Arabia and Insurance Company of North America v. Steamship Ioannis Martinos*, 1986 A.M.C. 769, 782, 784 (E.D.N.C. 1984) (treating liability for a very involved and bungled cargo survey vis-a-vis a ship and shipowner, the court stated “the implied warranty of workmanlike service can extend to the marine surveyors *on the particular facts of this case*”).

¹³ *Tucker Energy Services, Inc. v. Noble Denton & Associates, Inc.*, 2003 WL 24108197, *27 (S.D.Tex. 2003) (the warranty of workmanlike performance is a claim sounding in contract).

¹⁴ See *Dolphin Titan International, Inc. v. M/V Robert Alario*, 1994 WL 67867 (E.D.La. 1994) (duty of workmanlike performance owed to shipowner who was a party to surveying contract); *Tucker*, 2003 WL 24108197 (S.D.Tex. 2003) (same); *Great American Ins. Co. v. Bureau Veritas*, 338

However, under the federal general maritime law, “to be a third-party beneficiary of a contract, one must be within the group of persons that the contract was intended to benefit. The members of this group depend on the intention of the parties to the contract.”¹⁶

Despite extensive research, [REDACTED] and [REDACTED] found only one case that permitted a third-party to proceed with rights on a surveying contract under the federal general maritime law the third-party was a shipowner and the contract was for a cargo survey.¹⁷ No case granting crew and/or officers third-party contract rights has been found. And no case granting third-party contract rights for a condition survey (like the JH-115) was found.

The crew and officers were not intended beneficiaries of the JH-115 it was a general condition survey conducted for insurance purposes.¹⁸ Thus, [REDACTED] and [REDACTED] did not owe the crew and officers a duty in contract.

III. DEFENDANT SURVEYORS DO NOT OWE A DUTY IN TORT TO THE CREW AND OFFICERS OF THE [REDACTED]

The federal general maritime law recognizes three duties in tort that may be owed by a marine surveyor: (1) to detect and warn of hazardous conditions; (2) to not negligently misrepresent material information; and (3) to not negligently provide services for the benefit of a third-person.

a. The Duty to Detect and Warn is Not Owed to the Crew and Officers Because They are Not in Privity with the Surveyor

The marine surveyor’s duty to detect and warn of vessel defects duty is owed only to parties in privity with the surveyor ordinarily the vessel owner.¹⁹

[A] ship’s surveyor or classification society should be charged in law with the reasonable duty of detecting all perceptible defects of the vessel encountered during the survey and notifying the *owner and/or charterer* thereof.²⁰

There is good reason for this rule. While a first-party shipowner in privity with a surveyor

F.Supp. 999, 1009-1011 (D.C.N.Y. 1972) (same).

¹⁵ *Royal Embassy of Saudi Arabia*, 1986 A.M.C. at 784.

¹⁶ *Royal Embassy of Saudi Arabia*, 1986 A.M.C. at 783.

¹⁷ *Royal Embassy of Saudi Arabia*, 1986 A.M.C. at 783.

¹⁸ Exhibit F, Affidavit of [REDACTED]

¹⁹ See *Great American*, 338 F.Supp. at 1012-1013; *Krohnert v. Yacht Systems Hawaii, Inc.*, 664 P.2d 738, 742 (Haw.App. 1983).

²⁰ *Great American*, 338 F.Supp. at 1013 (emphasis added).

may recover under a duty owed by the surveyor without shifting its duty to warrant the seaworthiness of its vessel,²¹ a *third-party* not in privity with surveyor cannot. The United States Court of Appeals, Fifth Circuit, ruled in the *Otto Candies* case that, without a shadow of a doubt, vessel owners owe a *nondelegable* duty to maintain a seaworthy vessel.²² All attempts by plaintiffs to craft a theory of recovery in this case under the duty to detect and warn end with this rule because any alleged basis for relief asserted against [REDACTED] and [REDACTED] by plaintiffs—*third-parties* not in privity with [REDACTED] or [REDACTED]—seeks to shift the vessel owner’s nondelegable duty to warrant the seaworthiness of the vessel from the shipowner to the marine surveyors—a result which has been rejected time and again.²³

[A] [marine surveyor] cannot be liable in contract or tort . . . for a negligent survey regarding vessel seaworthiness . . . The shipowner, not the [marine surveyor], must remain ultimately responsible for the ship’s condition.²⁴

“[A vessel owner] may not create a condition of unseaworthiness, exercise all control over the reconstruction and servicing of the vessel and then burden a [marine surveyor] with liability that is [hundreds of] times that of the fee for the [survey report].”²⁵ Marine surveyors do not insure the seaworthiness of vessels.²⁶

Here, the [REDACTED] and [REDACTED] only owed a duty to the owner, and perhaps to the hull underwriters as intended third-party beneficiaries. They do not owe any duty to the crew and officers of the vessel.²⁷

²¹ See *Dolphin Titan*, 1994 WL 67867 at *1.

²² *Otto Candies, L.L.C. v. Nippon Kaiji Kyokai Corp.*, 346 F.3d 530, 538 (5th Cir. 2003).

²³ See, e.g., *Cargill, Inc. v. Bureau Veritas*, 902 F.Supp. 49, 52 (S.D.N.Y. 1995) (“[surveyor] is not liable as an insurer of a vessel’s seaworthiness to third party”).

²⁴ *Otto Candies*, 346 F.3d at 534 (citing *Sundance*, 7 F.3d 1077).

²⁵ *Sundance Cruises Corp. v. American Bureau of Shipping*, 7 F.3d 1077, 1085 (2nd Cir. 1993) (“the [marine survey] industry could not continue to exist under such terms”).

²⁶ *Steamship Mutual Underwriting Association Ltd. v. Bureau Veritas*, 1973 A.M.C. 2184, 2202 (E.D.La. 1973) (“[T]o lessen the [shipowner’s] burden would be to place the [surveyor] more in the position of an insurer of the vessel, a situation commensurate with neither the services rendered nor the fees charged.”).

²⁷ It should be noted that neither the owner nor the hull underwriters have asserted any claim against [REDACTED] or [REDACTED].

b. The Duty to Not Negligently Misrepresent Material Information is Not Applicable Here Because the JH-115 Survey Has Not Been and Was Not Intended to Be Provided to the Crew and Officers

The marine surveyor's duty to not negligently misrepresent material information has been extended to third-parties, but only in very limited circumstances,²⁸ none of which are present in this case. This limited duty is based on the Restatement (Second) of Torts §552.²⁹

The Fifth Circuit has expressly stated that recourse to this theory by third-parties should be "strictly and carefully limited."³⁰ The duty is owed only to a

person, or member of a limited group of persons, for whose benefit and guidance the defendant either intends to supply the information or knows that the recipient intends to supply it.³¹

[Liability is limited] to a select group of non-clients who the misinformer actually knows will receive inaccurate information. The fact that it was merely possible or foreseeable that a nonclient of the [marine surveyor] would rely on the information is insufficient.³²

The marine surveyor's liability under this theory "is limited to those persons whom the engagement is intended to benefit."³³

The court in *Otto Candies* stated in stark terms why the plaintiffs cannot recover here under this theory:

²⁸ See *Otto Candies*, 346 F.3d 530 (information provided to plaintiff); *Coastal Bermuda Ltd. v. E.W. Sayboalt & Co., Inc.*, 826 F.2d 424, 429 (5th Cir. 1987) (information not provided to plaintiff); *Cargill*, 902 F.Supp. at 52 (information not provided to plaintiff).

²⁹ (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information. (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction. (3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

³⁰ *Otto Candies*, 346 F.3d at 535.

³¹ *Otto Candies*, 346 F.3d at 535 (internal quotations omitted).

³² *Otto Candies*, 346 F.3d at 535-536 (internal citation and quotation omitted).

³³ *Otto Candies*, 346 F.3d at 536.

Thus, in this context, we *reject* any implication that [marine surveyors] can be liable for negligent misrepresentation to parties, including without limitation *seamen*, longshoremen, passengers, cargo owners, and charterers that may rely upon a survey or class certificate, *absent actual knowledge by the [marine surveyor] that the certificate or survey report was being provided for the guidance and benefit of the party.*³⁴

Here, it is impossible for the plaintiffs to recover under this theory. [REDACTED] and [REDACTED] could not have knowledge that their report was being provided to the crew and officers because it is undisputed that it was never provided to the crew and officers or intended to be provided to the crew and officers, and that such reports are never as a matter of industry practice provided to crew and officers.³⁵

“Put simply, the purpose of the [marine survey report] is not to guarantee safety, but merely to permit [the vessel owner] to take advantage of the insurance rates available to a classed vessel.”³⁶ The crew and officers are simply not a part of the surveying equation, and no case has been found where this theory was even pled with reference to crew and/or officers.

c. The Duty to Not Negligently Provide Services for the Benefit of a Third-Person is Not Applicable Because the JH-115 Survey Is Not Recognized as Necessary to the Protection of Crew and Officers

The marine surveyor’s duty to not negligently provide services for the benefit of a third-person is by its very nature applicable to third-parties, but not where the services are not recognized as necessary to the protection of a certain third-person. This limited duty is based on the Restatement (Second) of Torts §324A.³⁷ Note that §324A(b) and (c) have already been disqualified on the facts presented.³⁸

Two cases under the federal general maritime law must be considered together. *Shipe v. Chesapeake Bay Fishing Parties, Inc.*, 940 F.Supp. 130, 134-136 (D.Md. 1996), discusses the

³⁴ *Otto Candies*, 346 F.3d at 537 (emphasis added).

³⁵ Exhibit H, Affidavit of [REDACTED]

³⁶ *Sundance*, 7 F.3d at 1084.

³⁷ One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

³⁸ See Section III(a), ¶2 and Section III(b), ¶5, of this Memorandum, respectively.

“services to another” element of §324A with respect to an insurer who inspected a doomed vessel. The court only concluded that the insurer’s motion for summary judgment should be denied because there were at least disputed issues of material fact as to whether the insurer was acting as a surveyor to provide services to the shipowner when it inspected the subject vessel for insurance purposes.³⁹ Because it was inconclusive, that case sheds little light on the circumstances of the instant case.

The Fifth Circuit’s treatment of §324A in *Graham v. Milky Way Barge, Inc.*, 923 F.2d 1100 (5th Cir. 1991), is more relevant and actually dispositive here. In that case, an intermediate insurance broker was sued by the representative of a deceased passenger of a doomed jack-up vessel.⁴⁰ The broker dispatched a marine surveyor to inspect the barge for insurance purposes prior to the casualty.⁴¹ The plaintiff argued that under §324A the broker had a duty to inform the vessel owner, charterer and passengers of the information contained in the survey report.⁴²

The Fifth Circuit discussed the “should recognize as necessary for the protection of a third person” element of §324A, and ruled that under both Louisiana and the federal general maritime law⁴³

[plaintiff] has failed to show that [the broker] should have recognized that its inspection for insurance risk purposes was necessary for the protection of [decedent] as required under section 324A . . . There is no evidence that indicates that [the broker] intended to use the surveyor’s report for anything other than its own insurance purposes.⁴⁴

The instant matter must follow suit. Plaintiffs here have not and cannot allege or prove that the survey conducted by [REDACTED] and [REDACTED] was intended for anything other than insurance purposes.⁴⁵ Instructions for the survey came from the underwriters,⁴⁶ and the survey report itself in the first paragraph on the first page states that

³⁹ *Shipe*, 940 F.Supp. at 135.

⁴⁰ *Graham*, 923 F.2d at 1102-1104.

⁴¹ *Graham*, 923 F.2d at 1105.

⁴² *Graham*, 923 F.2d at 1104.

⁴³ *Graham*, 923 F.2d at 1109.

⁴⁴ *Graham*, 923 F.2d at 1109.

⁴⁵ Exhibit H, Affidavit of [REDACTED]

⁴⁶ Exhibit H, Affidavit of [REDACTED]

the Undersigned and Undernamed Surveyor did . . . *on behalf of Underwriters concerned*, carry out a JH-115 structural condition survey⁴⁷

IV. CONCLUSION

There are no theories of recovery available to plaintiffs in this case. The plaintiffs cannot recover from [REDACTED] and [REDACTED] on a third-party beneficiary theory under contract law, nor can they recover on any of the three possibly applicable tort theories for a failure to detect and warn, negligent misrepresentation, or negligent provision of services to another for the benefit of a third-person.

Because of the nature of the JH-115 survey and the disconnect between [REDACTED] and [REDACTED] and the crew and officers, [REDACTED] and [REDACTED] owed no legal duty to the crew and officers under any theory of law.

WHEREFORE, [REDACTED] respectfully request summary judgment in their favor, with prejudice.

Respectfully submitted,

MONTGOMERY, BARNETT, BROWN,
READ, HAMMOND & MINTZ, L.L.P.

[REDACTED]
1100 Poydras Street, Ste. 3300
New Orleans, LA 70163-3200
[t] (504) 585-3200 [f] (504) 585-7688

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been forwarded to all counsel of record by facsimile, or electronic or United States mail, postage pre-paid, on this ____ day of _____, 2007.

■ Exhibit F, [REDACTED] October 14, 1993 survey report.