

**SLIP OP. 07-172**

**UNITED STATES COURT OF INTERNATIONAL TRADE**

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HORIZON LINES, LLC,	:	
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Plaintiff,	:	
	:	Before: Jane A. Restani, Chief Judge
v.	:	
	:	Court No. 05-00435
UNITED STATES,	:	
	:	
	:	
Defendant.	:	

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**OPINION**

[Defendant’s motion for summary judgment granted in part and denied in part.]

Dated: November 20, 2007

Williams Mullen (Evelyn M. Suarez, Francisco J. Orellana, and Dean A. Barclay)  
for the plaintiff.

Peter D. Keisler, Assistant Attorney General; Barbara S. Williams, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (Edward F. Kenny); Michael Heydrich, Office of the Assistant Chief Counsel, U.S. Customs and Border Protection, of counsel, for the defendant.

**BACKGROUND**

**Restani, Chief Judge:** This matter is before the court on Defendant United States’ motion for summary judgment. Plaintiff Horizon Lines, LLC, challenges the partial denial of a protest against certain duties required for repairs made to a vessel under 19 U.S.C. § 1466.

Plaintiff operates the U.S.-flag vessel Horizon Crusader (“the Crusader”), a vessel

used primarily for trade with Puerto Rico. Following its arrival in Hong Kong on September 4, 2001, with a shipment of empty containers, the Crusader departed for Karimun Sembawang Shipyard (“KSS”), a shipyard in Indonesia. (See Pl.’s Ex. 1 (Walla Aff. ¶ 19); see also Pl.’s Mem. in Opp’n Mot. Summ. J. (“Pl.’s Br.”) 2–3.) The Crusader was required to undergo American Bureau of Shipping (“ABS”) inspections by September 25, 2001.<sup>1</sup> (Pl.’s Ex. 2 (Dolan Aff. ¶ 25).) Since the vessel could not complete inspections by the deadline, the Crusader went into lay-up<sup>2</sup> at KSS on September 7, 2001, at which point the required deadline was held in abeyance. (Id. ¶ 26; see also Pl.’s Ex. 1 (Walla Aff. ¶ 20).) The Crusader remained in lay-up at KSS until November 28, 2001. (Pl.’s Ex. 1 (Walla. Aff. ¶ 20).) Pursuant to guidelines provided by ABS, a survey was conducted by ABS on October 20, 2001, which determined that the Crusader had been laid-up properly. (Id. ¶ 21.)

After securing a dry-dock facility to undergo ABS inspection, the Crusader was towed to the Jurong Shipyard in Singapore (“Jurong”) on November 29, 2001. (Pl.’s Ex. 2 (Dolan Aff. ¶¶ 23, 27).) The Crusader was then placed in dry-dock from December 8 to December 15, 2001, where it underwent inspections as well as certain repairs. (Id. ¶ 28.) Following the repairs and inspection, the Crusader departed Jurong on January 7, 2002, and returned to the United States, arriving at the Port of Tacoma, Washington on January 26, 2002.

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<sup>1</sup> According to United States Coast Guard (“USCG”) regulation, inspections must occur at least twice in a five-year period with no more than three years elapsing between any two examinations. See 46 C.F.R. § 91.40-3 (Nov. 14, 2007). The ABS has been delegated inspection authority by USCG. See 46 C.F.R. § 8.420 (Nov. 14, 2007).

<sup>2</sup> Lay-up “generally means the ship is taken out of service for an indefinite period of time and certain work is performed to both de-activate and protect the vessel’s equipment and systems.” (See Def.’s Mem. in Supp. Mot. Summ. J. (“Def.’s Br.”) 3 n.2.)

(Def.'s Br. 4.)

Upon arrival in the United States, Plaintiff was required to notify U.S. Customs and Border Protection ("Customs") of all foreign repairs conducted on the vessel on a Customs Form CF-226. Such repairs are dutiable at a 50 percent ad valorem rate on the cost of equipment, materials and parts or for expenses of repairs made to U.S.-flag vessels outside the United States. 19 U.S.C. § 1466. Under Section 4.14 of the Customs regulations, vessel owners are required to complete CF-226 within ninety days from the date of arrival. Plaintiff submitted the form on January 31, 2002 (Def.'s Ex. 1 (Horizon's Form 226)), but did not submit all of the supporting documentation detailing the vessel's repairs until June 24, 2002 (Def.'s Ex. 2 (Horizon's June 24, 2002 Letter to Customs)), more than ninety days after the date of arrival. On August 30, 2002, after receiving all the required documentation, Customs liquidated the repair entry and concluded that Plaintiff owed \$810,295.99 in duties. (Def.'s Ex. 3 (Custom's Notice of Liquidation).) Customs further concluded that Plaintiff's application for relief from repair duties included in the June 24, 2002 letter was untimely and would not be considered.<sup>3</sup> (Id.)

On November 27, 2002, Plaintiff timely filed a protest of Customs' liquidation determination. (Def.'s Ex. 4 (Horizon's Protest and Memorandum to Customs ("Horizon's Protest").)) On December 15, 2004, Customs Headquarters granted Plaintiff's protest in part, and denied it in part. HQ 116237 (Dec. 15, 2004). Pursuant to that decision, Plaintiff's duties were reduced to \$534,636.14. (Def.'s Ex. 6 (Custom's Reliquidation Spreadsheet at 3).) On October 13, 2005, Plaintiff filed suit to challenge the partial denial of its protest and to obtain a refund of

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<sup>3</sup> Customs' review of Horizon's protest was de novo and all provided documentation was considered, regardless of whether it was initially filed in a timely manner. (Def.'s Br. 5 n.4.)

all excess duties paid. (Def.'s Ex. 7 (Horizon's Complaint).) This Court has jurisdiction pursuant to 19 U.S.C. § 1514 and 28 U.S.C. § 1581(a).

The parties' dispute involves three primary issues. First, Defendant contends that Horizon's decision to lay-up the Crusader in KSS was made, at least in part, for the purpose of obtaining repairs at Jurong Shipyard. Second, Defendant contends that, because various general expenses associated with the lay-up were also incurred to obtain repairs at Jurong, those expenses are dutiable under 19 U.S.C. § 1466, in part. Third, Defendant argues that a variety of expenses incurred in Jurong itself were related entirely or in part to the repair of the vessel. The court will address each issue in turn.<sup>4</sup>

#### STANDARD OF REVIEW

On a motion for summary judgment, the Court must determine whether any genuine issues of fact are material to the resolution of the action and whether the movant is entitled to judgment as a matter of law. See USCIT R. 56; see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit

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<sup>4</sup> Plaintiff also contends that the method employed by Customs to prorate duties for dual-purpose expenses was not in accordance with the law. (Pl.'s Resp. Def.'s Supp. Mem. 1.) Plaintiff claims that Customs "assumes that all dutiable expenses incurred in the voyage caused all dual-purpose expenses" and included dutiable repairs in its ratio calculation which did not have a connection to the dual purpose items. (Id. at 3–5.) Customs argues that the methodology used to determine the ratio apportioning for dual purpose expenses, consisting of totaling up all of the dutiable expenses and dividing that amount by the total of the dutiable and free expenses, was a reasonable and equitable interpretation of the Customs' laws. (Def.'s Supp. Mem. 2–4.) On its face it appears that Customs' calculation was rational and therefore entitled to deference. SL Serv., Inc. v. United States, 357 F.3d 1358, 1362–63 (Fed. Cir. 2004) ("Customs' long-standing practice of apportioning the cost of various expenses between dutiable repairs and non-dutiable inspections and modifications comports with both the statute and common sense."). As Plaintiff did not raise this issue in its initial briefing, the court will not further explore whether, under the facts of this case, there is a unique problem with the ratio employed.

under the governing law will properly preclude the entry of summary judgment.” Id.

Consequently, factual issues may not be tried or resolved upon a motion for summary judgment.

Phone-Mate, Inc. v. United States, 12 CIT 575, 577, 690 F. Supp. 1048, 1050 (1988).

## DISCUSSION

### I. Whether the “Lay-Up” of the Crusader Was Made in Part for the Purpose of Obtaining Foreign Repairs

The Federal Circuit has often repeated that the phrase “expenses of repairs” in 19 U.S.C. § 1466 is to be read broadly. Texaco Marine Serv. Inc. v. United States, 44 F.3d 1539, 1544 (Fed. Cir. 1994). In cases involving expenses incurred solely for the purpose of repairs, the Federal Circuit applies a “but for” test to determine whether a particular expense is dutiable. SL Serv., Inc., 357 F.3d at 1360. Thus, expenses incurred by repairs include all expenses ““which, but for dutiable repair work, would not have been incurred.”” Id. (citing Texaco, 44 F.3d at 1544). That standard, however, does not apply in cases involving so-called “dual-purpose” expenses, i.e., those expenses incurred in part for reasons other than the repair of a vessel. SL Serv., Inc., 357 F.3d at 1361.

Plaintiff contends that lay-up expenses are, as a matter of law, not considered “expenses of repairs.” (Pl.’s Br. 8–12.) Plaintiff’s primary authority for this proposition is a 1916 decision rendered by the Board of General Appraisers (the “Board”). See In re Thousand Islands Steamboat Co., T.D. 36,685 (1916). In that case, the plaintiff, Thousand Islands, protested duties of \$44.46 assessed on expenses associated with laying-up a steamboat in a harbor during the winter season. Applying Rev. Stat. 3114, the Board determined that the laying-up expense did not come within the term of “equipment” or “expense of repairs.” Id. In its one

sentence explanation of its position, the Board stated that “[i]t is merely the expense of putting the boat away in winter quarters.” Id.

The court is not persuaded that this case implies that no “lay-up” could ever be considered an “expense of repair.” Rather, as the Board indicated, it is the purpose for which the lay-up was made that determines whether the costs associated with the lay-up are “expenses of repairs.” If, for example, the lay-up is made because the boat is operated on a seasonal basis, but not for the purpose of obtaining repairs, then the costs are not covered by § 1466. If, by contrast, the lay-up occurs in part to facilitate the repair of a vessel, then the expenses of the lay-up may be dutiable in appropriate proportion. Thus, the question of whether the Crusader was “laid up” or merely “parked” at KSS is irrelevant. The relevant question is whether the expenses incurred at KSS were necessary to the repairs scheduled to take place at Jurong. To phrase the question another way, was the lay-up at KSS necessitated, at least in part, by the repairs to be made at Jurong?

Turning to the evidence on the record, Defendant, as the party seeking summary judgment, has met its burden by pointing to evidence indicating that Horizon Lines decided to lay-up the Crusader at KSS in large part because of its proximity to Jurong, where it was scheduled to be repaired. Defendant notes various email discussions of where to send the Crusader for its scheduled inspection. Those emails conclude that the vessel would best be sent to “an anchorage at an island just off Singapore that has an anchorage and small shipyard.” (Def.’s Ex. 14 (Email from Glen Moyer, Horizon Lines, LLC, to Jim McKenna et al. (Aug. 29, 2001))).) Another email notes that the Crusader would lay idle at KSS for two months, with the vessel then “shifting to [Jurong] in early Nov[ember] to commence a longer than usual repair

period.” (Def.’s Ex. 15 (Email from Joe Breglia, Horizon Lines, LLC, to Francis Lai (Aug. 29, 2001)).) Thus, Defendant has produced evidence from which a reasonable fact-finder could conclude that the lay-up in KSS was made in part to allow for repairs of the Crusader. The burden therefore shifts to Plaintiff.

Plaintiff claims that the lay-up in KSS was not precipitated in any way by the need for repairs in Jurong. Plaintiff points to evidence from its expert witness’s deposition, stating that none of the work performed on the Crusader at KSS was “crossover work” that actually advanced the repair work that was done at Jurong. (Def.’s Ex. 9 (Dolan Dep. 60:11–14).) Instead, the lay-up at KSS was purportedly made due to a seasonal decline in the Puerto Rico trade, and for a mandated ABS inspection. Evidence clearly indicates that inspection and seasonal variation in trade were additional considerations prompting the decision to lay-up the Crusader in KSS, and then place her in dry-dock in November. Nevertheless, Plaintiff has pointed to no evidence suggesting that the lay-up was in no way prompted by Horizon’s desire to conduct repairs at Jurong. In order to avoid summary judgment, Plaintiff must not only point to evidence suggesting additional reasons to place the Crusader in KSS, it must also point to evidence suggesting that preparation for repairs at Jurong was not among the reasons for the lay-up at KSS. In the absence of such evidence, summary judgment on this issue is proper, and the court concludes that there is no genuine issue of material fact that the Crusader was laid-up in KSS, at least in part, in anticipation of a “longer than usual repair period” at Jurong. Thus, the lay-up itself is an “expense of repair” in part, and all costs related to the lay-up at KSS are in part “expenses of repairs” and dutiable at a prorated amount.

## **II. Expenses Incurred at KSS During Lay-Up**

### **A. Invoices 2 & 3**

These invoices concern expenses incurred by obtaining electric generators to supply the Crusader with power while laid-up in KSS between September 11 and November 9, 2001. Defendant points to evidence that the generators were integral to laying-up the Crusader at KSS. (Def.'s Ex. 19 (Walla Dep. 38:22–39:22).) Plaintiff argues that the generators were not necessary for the actual repairs performed at Jurong. (Pl.'s Br. 13.) Plaintiff fails to present any evidence, however, that the electrical generators were not necessary to the lay-up at KSS. Given that the lay-up itself was in part an “expense of repair” for the Crusader, summary judgment for Defendant with respect to these invoices is proper.

### **B. Invoice 4**

This invoice covers expenses related to the use of devices such as heaters, blowing fans, desiccants, and hoses used to keep parts of the Crusader dry while she was laid-up in KSS. Defendant argues that these items “consist[] of foreign equipment purchases for the vessel” and are, therefore, fully dutiable under 19 U.S.C. § 1466. (Def.'s Br. 19.) Plaintiff argues that these items are disposable purchases. (Pl.'s Br. 14.) Customs has ruled that consumable items intended for use in transit, such as disposable silverware, are not dutiable as a vessel’s “equipment.” See C.S.D. 85-18 (treating disposable silverware, retained on board an airplane and not removed for sale or use on other aircraft, as not dutiable). As evidence the items were disposable, Plaintiffs note the testimony of their expert witness, who stated that blowers are “basically a consumable item.” (Def.'s Ex. 19 (Walla Dep. 54:24–25).) Such evidence raises a genuine issue of material fact as to whether these items are not part of the vessel’s “equipment.” Therefore, summary



judgment with respect to Invoice 4 is denied.

**C. Invoice 5**

Invoice 5 concerns expenses for a “lay-up survey” conducted by ABS prior to the Crusader’s transfer to Jurong. Defendant argues that the cost of the ABS lay-up inspection was incurred in order to protect the vessel while it was in lay-up awaiting repairs at Jurong, and therefore, is dutiable at an appropriate prorated amount. (Def.’s Br. 20.) Plaintiff argues that the ABS lay-up survey was conducted only to ensure that the vessel is properly put into lay-up, not to verify that it is ready for repairs. (Pl.’s Br. 14–15.) Consequently, Plaintiff argues that the ABS report cannot be an “expense of repair” within the meaning of 19 U.S.C. § 1466. (*Id.*) As discussed above, however, the lay-up at KSS was itself an “expense of repair,” at least in part. Plaintiff’s evidence does not contradict Defendant’s assertion that the ABS survey was incident to the lay-up, and therefore an “expense of repair” at a prorated amount. Having failed to raise a genuine issue of material fact in this regard, summary judgment as to Invoice 5 is granted in favor of Defendant.

**D. Invoice 6a**

From the pages available on the record, it appears that this invoice covers expenses incurred by the Crusader while at KSS, including transportation of personnel, boat services, port clearances, agency fees, crew change, visa on arrival, and port navigation dues, which Customs found dutiable at a prorated amount.<sup>5</sup> HQ 116237 at 3. Defendant has pointed to the absence of evidence supporting Plaintiff’s contention that these expenses were not “expenses of repairs,”

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<sup>5</sup> Only pages 5, 6 and 8 of Invoice 6a were produced by Horizon Lines, who stated that they submitted everything they had received from KSS with respect to this invoice. (Oral Arg. Tr. 47:18–25.)

arguing that the costs necessary to complete the lay-up were costs associated in part with obtaining repairs at Jurong. (Def.'s Br. 20.) Plaintiff argues that there is a genuine issue as to whether "Horizon incurred these expenses to lay-up the ship pursuant to ABS standards" rather than to "advance repairs made at Jurong." (Pl.'s Br. 15.) Plaintiff admits, however, that the expenses associated with this invoice were necessary to successfully complete the lay-up. (Id.) As the court has concluded that the lay-up itself was an "expense of repair" in part, the associated costs in this invoice are likewise "expenses of repair" that are eligible for prorated duties. Summary judgment for Defendant regarding these items is therefore granted.

**E. Invoice 6b**

Customs found some of the items under this invoice dutiable at a prorated amount, but also concluded that full duties were owed on the "supply [of] manpower for mechanical work," the heating lamp and bilge alarm installation, some flexible cable, and a vent duct cover. (Def.'s Br. 21.) According to Defendant, full duties were charged on certain items because they were billed to an "owner's repair account," implying that the expenses were repairs performed in KSS, not charges related to the lay-up prior to seeking repair in Jurong. (Id. at 21–22.)

Plaintiff points to evidence that "manpower for mechanical work" was used to open the boiler for lay-up, to ensure that it would dry. (Pl.'s Br. 19.) This explanation is corroborated by the records kept by the ABS surveyor, who checked to ensure that the boiler doors were kept open as part of the lay-up inspection. (Pl.'s Ex. 5 (ABS Checklist).) Expert testimony also suggests that inspections, but not repairs, would have necessitated opening the boiler. (Def.'s Ex. 19 (Walla Dep. 61:7–24).) Specifically, Walla noted in his deposition that, although a boiler might be opened in places for repairs, it would be highly unusual to open all of

the boiler doors in the course of repairs. (See id. at 61:22–62:3 (“Typically in a repair you’d only remove those required to gain access to the repair area. In this case, we removed the majority, if not all, of the handholds and doors, again, to allow air circulation to prevent condensation.”).)

This evidence is sufficient to raise a genuine issue as to whether the boiler doors were opened for the purpose of laying-up the Crusader, not as part of repairs. Accordingly, summary judgment with respect to “manpower for mechanical work” is denied.

Plaintiff argues that the “heating lamp and bilge alarm installation” were both necessary to the lay-up of the Crusader, and therefore, were not exclusively for the purpose of repairs, regardless of which account they were charged to. (Pl.’s Br. 19.) To support this claim, Plaintiff points to the fact that both were procured in accordance with the ABS inspection standards for vessel lay-ups. (Id.) Furthermore, Plaintiff points to expert evidence asserting that a heat lamp is used to raise the condensation point within a vessel, preventing water damage while the vessel is not being used. (Def.’s Ex. 19 (Walla Dep. 63:8– 10).) Walla also testified that the additional bilge alarm was installed to notify the crew immediately if the vessel began taking on water while the vessel was not manned with a full crew. (Id. at 63:24–64:7.) With a full crew, a large influx of water would be identified more easily, and such a bilge alarm would be not be necessary. (Id.) This evidence is sufficient to raise a genuine issue of material fact as to whether the “heating lamp and bilge alarm installation” were expenses related to laying-up the Crusader, rather than solely for repairs. There is also evidence that the additional alarm was removed prior to entry of the vessel at Jurong, raising a genuine issue as to whether this item may be classified as “equipment” for the Crusader under 19 U.S.C. § 1466. (Pl.’s Br. 19 (citing Walla Dep. 64:8–19).) Therefore, summary judgment with respect to these items is denied.

With respect to costs incurred to cover the vent ducts, Plaintiff provides the ABS guidelines as evidence that the air intake vents were required to be covered during vessel lay-up (Pl.'s Ex. 6 (ABS Guidelines at 222)), as well as expert testimony stating that these covers actually had to be removed for repairs. (Def.'s Ex. 19 (Walla Dep. 37:8–18).) This evidence is sufficient to raise a genuine issue as to whether the vent duct cover expense was necessary to properly lay-up the Crusader, instead of specifically relating to repairs. Consequently, summary judgment with respect to this item is denied.

Finally, with respect to the “flexible cable” and “shipment of owner’s generator,” Plaintiff argues that it did not use the generators to make repairs, but to meet the requirements of the ABS for vessel lay-up. (Pl.'s Br. 17–18.) As evidence, Plaintiff notes that ABS guidelines specifically call for the vessel to have power, and that the ABS surveyor for the Crusader found that Plaintiff had complied with this requirement. (Pl.'s Ex. 5 (ABS Checklist); Pl.'s Ex. 6 (ABS Guidelines at 222).) This evidence is sufficient to raise a genuine issue as to whether the shipment of the generator and related cables were necessary to comply with lay-up requirements, rather than solely for repairs. Therefore, summary judgment with respect to these items is denied.

Customs prorated duties on the remaining items under this invoice. See HQ 116237 at 3. Plaintiff argues that those items were not necessary for repairs at Jurong. As discussed above, Customs correctly concluded that the lay-up itself was in part necessitated by repairs that would be completed at Jurong as soon as space became available. Therefore, the expenses incurred for the purpose of laying-up the Crusader are dutiable to the extent that the lay-up was made for the purpose of procuring repairs. Plaintiff has not raised any evidence suggesting that the lay-up was not made in part for the purpose of obtaining repairs, and therefore,

summary judgment with respect to the remainder of items under Invoice 6b is granted.

**F. Invoice 7a**

These invoices concern a variety of expenses associated with the lay-up, including long distance telephone charges, transportation of a rental generator to and from the vessel, land transportation for the owner's agent or contractor, port dues, navigation dues, and boat services (other than transportation of crew). Customs found these items dutiable at a prorated amount. (Def.'s Br. 22.) Plaintiff argues that telecommunications charges are "intrinsic to any lay-up," and, therefore, are not expenses of repair. (Pl.'s Br. 20.) Plaintiff has produced no evidence, however, showing that the lay-up was not, at least in part, related to the need for repairs at Jurong. As the expenses associated with the lay-up may be prorated as dutiable under 19 U.S.C. § 1466, telecommunications expenses integral to the lay-up are also dutiable on a prorated basis. Similarly, Plaintiff asserts that the costs associated with transporting a replacement generator are non-dutiable because they were costs incurred to place the Crusader in lay-up, not directly used for the purpose of repair. Once again, this argument fails to raise a genuine issue as to whether the lay-up itself was prompted in part by the need for repairs at Jurong. In the absence of a genuine issue of material fact on this issue, summary judgment for Defendant on this item is granted.

**G. Invoices 7b1 and 7b2**

These invoices cover a number of expenses that were treated as fully dutiable, including expenses for a blank vent, hawse pipe grating, installation of air conditioning, a penetration pipe, an Indonesian flag, and the special shipment of an electric generator. HQ 116237 at 3–4. The invoices also cover expenses that were prorated, including "riggers

assistance,” garbage disposal, shore power, tug assistance, towing charges, wharfage, security watchman, pilotage, marine gas oil, fresh water and “walkie-talkies.” (Def.’s Ex. 18 (Invoice 7b1).) With respect to the prorated items, Plaintiff once again argues that the expenses were incurred for the purposes of the lay-up, implying that they, therefore, cannot be considered “expenses of repairs.” (See Pl.’s Br. 21–22.) As noted, as the lay-up itself was made in part for the purpose of obtaining repairs, a prorated duty on expenses associated with the lay-up is appropriate. Consequently, Defendant’s motion for summary judgment with respect to these items is granted.

With respect to the blank vent, the expense appears to relate to a covering placed on the air intake or exhaust pipe of the vessel during lay-up. (See Def.’s Ex. 19 (Walla Dep. 37:8–18) (stating that exhaust vents were closed during lay-up but opened during repairs at Jurong).) Plaintiff’s evidence suggests that the exhaust coverings are not used in repairs, and were removed at the end of the lay-up, and therefore do not constitute an “expense of repair” or “equipment.” (See *id.*) Plaintiff has also produced evidence that the penetration pipe was installed to aid in dehumidifying the Crusader during lay-up, and that the pipe was removed at the time the vessel was reactivated. (See *id.* at 68:7–12; see also Def.’s Ex 18 (Invoice 22a, Item H-055) (stating that the dehumidifying exhaust penetration was “closed”).) As such, summary judgment for Defendant is denied with respect to these items.

Similarly, Plaintiff has produced evidence that the hawse pipe grating was installed to protect the vessel during lay-up. (See Pl.’s Ex. 9 (Dolan Report 16).) Plaintiff has also produced evidence indicating that the hawse pipe was removed after the lay-up was finished. (Pl.’s Br. 23 (citing Def.’s Ex. 18, Invoice 22a, Item H-055).) This evidence is sufficient to raise

a genuine issue as to whether the hawse pipe was “equipment” or an “expense of repair” within the meaning of 19 U.S.C. § 1466. Therefore, summary judgment with respect to this item is denied.

Similarly, Customs treated installation of an air-conditioning unit as equipment and/or an expense of repair, and, therefore, as fully dutiable. Defendant points to the fact that the air conditioning unit was charged to the “owner’s repair account” as evidence supporting Customs’s conclusion. (Def.’s Br. 23.) Plaintiff claims that air-conditioning is a necessity for successfully accomplishing the lay-up because it serves to protect electronic equipment, in accordance with ABS guidelines. (Pl.’s Br. 23.) It appears that this system was installed temporarily to assist with the lay-up, and was not used during repairs, nor was it permanently affixed to the vessel. Therefore, Plaintiff has raised a genuine issue as to whether the air-conditioning unit is fully-dutiable as “equipment” or an “expense of repair.” Summary judgment with respect to this item is, therefore, denied.

The final item in this invoice is an Indonesian flag. Vessel owners purchased this flag after the September 11, 2001 terrorist attacks in New York and Washington, D.C., in order to protect against sabotage of their vessel. Defendant argues that Plaintiff has not produced any evidence showing that the flag was not part of the vessel’s “equipment” within the meaning of 19 U.S.C. § 1466. (Def.’s Br. 23.) Plaintiff has not pointed to any evidence showing that the flag was discarded or treated as a consumable item. As such, the court finds that summary judgment for Defendant is appropriate with respect to this item.

#### **H. Invoice 8a**

This invoice also concerns expenses incurred during lay-up, including lay-up

charges, hiring a security guard, use of walkie-talkies, and the purchase of marine gas oil.

Plaintiff has produced no evidence suggesting that these items are not general lay-up expenses.

As noted above, expenses related to the lay-up are dutiable to the extent that the lay-up at KSS was made for the purpose of obtaining repairs at Jurong. Summary judgment for Defendant with regard to this invoice is therefore granted.

**I. Invoice 8b**

This invoice concerns a number of expenses incurred during lay-up from November 1 to November 28, 2001, including land transportation, certain boat services charges, port navigation dues and port clearance. Plaintiff claims that these expenses were incurred to ensure that the vessel was not dragging its anchor while in lay-up, as required by the ABS lay-up standards. (Pl.'s Br. 24.) As above, the court finds that the lay-up was in part prompted by the need for repairs at Jurong, and therefore is dutiable at a prorated amount. The court thus finds that summary judgment with respect to the land transportation, boat services charges, and port navigation dues is granted.

Plaintiff also points to the fact that Customs appears to have inconsistently granted relief from duties for harbor navigation dues. In Invoice 6a, Customs granted Plaintiff's protest with respect to port clearance. (Def.'s Br. 20.) Such inconsistent treatment raises a genuine issue of material fact as to whether the port clearance fee should be dutiable at all. Therefore, summary judgment with respect to the port clearance fee is denied.

**J. Invoice 11a1**

This invoice covers the purchase of one twenty-foot long refrigerated container. Plaintiff contends that the container was purchased for another vessel, the CSX Challenger, not



the Crusader, and therefore, should not be dutiable. (Pl.'s Br. 24.) As evidence, Plaintiff points to an affidavit submitted by its witness, Joseph Walla, stating that the purchase was for the Challenger. (Pl.'s Ex. 1 (Walla Aff. ¶ 38).) Additionally, Plaintiff points to the fact that the invoice itself, dated November 22, 2001, concerns the "CSX 'Challenger' dry-docking at Jurong Shipyard in Singapore." (Def.'s Ex. 18 (Invoice 11a1).)

Defendant argues that the affidavit evidence cannot be accepted because Walla testified at his deposition that the container was purchased for the Crusader. (Def.'s Reply Mem. in Supp. Mot. Summ. J. ("Def.'s Reply Br.") 12.) Defendant is correct in this respect; an affidavit contradicting prior deposition testimony generally cannot be used to create a genuine issue of material fact. Colantuoni v. Alfred Calcagni & Sons, Inc., 44 F.3d 1, 4–5 (1st Cir. 1994) ("When an interested witness has given clear answers to unambiguous questions, he cannot create a conflict and resist summary judgment with an affidavit that is clearly contradictory, but does not give a satisfactory explanation of why the testimony is changed."). The invoice itself, however, corroborates Walla's statement that the container was purchased for the Challenger, not the Crusader. Defendant claims that the date of the invoice, November 22, 2001, indicates that the costs were incurred at the time the Crusader entered dry dock at Jurong. (Def.'s Reply Br. 12.) The Crusader entered Jurong on November 29, 2001, for her scheduled dry-dock. (Def.'s Ex. 4 (Horizon's Protest at 3).) Moreover, the invoice clearly identifies the sale of the container as being "for the subject vessel arrived in Singapore on 7th May 2001." (Def.'s Ex. 18 (Invoice 11a-1).) The contents of the invoice are sufficient to raise a genuine issue as to whether the container was purchased for the Crusader. Consequently, summary judgment with respect to this invoice is denied.

**K. Invoice 11a2**

This invoice concerns various professional services, “main agency fees,” and telecommunications charges for the Crusader while it was laid-up in KSS. Customs assessed full duties on these professional services because Horizon allegedly provided no evidence to show that the expenses did not relate to foreign repairs. HQ 116237 at 4. Customs also assessed prorated duties on the agency fees and telecommunications charges. Id. Defendant claims that the professional services charge should be fully dutiable because Plaintiff has not produced evidence demonstrating that it does not consist of foreign repair services. (Def.’s Br. 25.) Plaintiff has presented evidence, however, that the professional services were rendered to ensure that the vessel did not drag anchor while in lay-up. (See Def.’s Ex. 19 (Walla Dep. 71:6–13).) Additionally, the invoice itself states that, rather than being repairs, these were “[l]aid-[u]p condition surveys.” (Def.’s Ex. 18 (Invoice 11a2, Item F).) These facts are sufficient to raise a genuine issue as to whether the inspections were performed in the course of a lay-up, as opposed to being, in and of themselves, repairs. Therefore, summary judgment with respect to this item is denied.

With regard to the remainder of the charges, the court notes that Plaintiff has produced no evidence suggesting that these fees were not incurred in the course of completing the lay-up of the Crusader. Because the lay-up was conducted in part for the purpose of obtaining repairs in Jurong, these fees are dutiable at a prorated amount. Summary judgment with respect to the “main agency fees” and “telecommunications charges” included in Invoice 11a2 is, therefore, granted.

**L. Invoice 11a3**

This invoice covers expenses for the supply of provisions, which Customs found dutiable because Defendant did not produce evidence showing that the provisions were not foreign equipment or expenses of repairs. HQ 116237 at 4. Plaintiff has submitted an affidavit stating that the cost of hiring the night engineer was prompted by the need to provide assistance while Joseph Blunt was alone on the vessel. (Pl.’s Ex. 1 (Walla Aff. ¶ 39).) The affidavit also states that a night cook and provisions were needed to feed Horizon’s personnel who were tending to the ship during the lay-up. (Id.) These facts are sufficient to raise a genuine issue as to whether the provisions were fully dutiable as “expenses of repairs” or “equipment.”

Customs treated the hotel accommodations as outside the scope of 19 U.S.C. § 1466. HQ 116237 at 4. The remaining costs, including telecommunications expenses, are admitted to have been expenses incurred during the lay-up of the Crusader, and therefore, are dutiable at the prorated amount as discussed above. (Pl.’s Br. 25–26.) Accordingly, summary judgment with respect to the remaining charges in Invoice 11a3 is granted.

**M. Invoice 11b1**

Invoice 11b1 concerns expenses incurred at KSS during October 2001, including “main agency fee,” crew transit, telecommunication equipment, land transportation charges, ferry tickets to Karimun Island, transit visa fees and professional services. Consistent with its prior rulings, Customs determined that crew transit, land transportation, and transit visa fees were outside the scope of 19 U.S.C. § 1466. HQ 116237 at 4. As before, Customs treated the professional services as fully dutiable, and prorated the remaining charges. Id. With respect to the prorated charges, Plaintiff argues that summary judgment is inappropriate because the fees

were related to the lay-up, and were not directly used for repairs of the vessel. (Pl.'s Br. 25–27.) As noted, because the lay-up was necessitated in part by the repairs at Jurong, summary judgment is appropriate with respect to the prorated fees. With respect to the professional services fees, the invoice itself states that the services consisted of “[l]aid-[u]p condition surveys.” (Def.'s Ex. 18 (Invoice 11b1, Item G).) As above, this evidence is sufficient to raise a genuine issue of material fact as to the nature of the professional services. Therefore, summary judgment with respect to this item is denied.

**N. Invoice 11b3**

This invoice covers expenses for the purchase of a television for the vessel, the purchase of provisions from the KSS store, the hire of a night engineer, and the survey of a damaged portable generator. Customs treated the television and provisions as fully dutiable, and the remainder as dutiable at a pro-rated amount. HQ 116237 at 4. Plaintiff argues, as before, that the provisions and night engineer related to the lay-up, not to the repair of the vessel. (Pl.'s Br. 27.) As noted above, Plaintiff has submitted an affidavit stating that the cost of hiring the night engineer was prompted by the need to provide assistance while Joseph Blunt was alone on the vessel. (Pl.'s Ex. 1 (Walla Aff. ¶ 39).) The affidavit also states that the provisions were needed to feed Horizon's personnel who were tending to the ship during lay-up. (Id.) The affidavit raises a genuine issue as to whether the provisions were fully dutiable as “expenses of repairs” or “equipment.” Plaintiff does not appear to contest that the television is dutiable as equipment. (Pl.'s Br. 27.) The remainder of the items, including survey of the faulty generator, are admitted to have been expenses incurred during the lay-up of the Crusader, and, therefore, are dutiable at the pro-rated amount as discussed above. (Id.) Accordingly, summary judgment with respect to

the remaining items on Invoice 11b3 is granted.

**O. Invoice 11b4**

This invoice consists of charges incurred by the Crusader during September of 2001, including land transportation, courier services, hotel accommodations, and an airline ticket for Wally Becker. Customs treated the land transportation and hotel accommodations as outside the scope of 19 U.S.C. § 1466, and the remainder were assessed duties at a prorated amount. HQ 116237 at 4. Plaintiff contends that the remaining charges relate to the lay-up, not to repairs, and are therefore not dutiable. (Pl.'s Br. 28.) As discussed above, the court finds that the lay-up was made in part to assist the Crusader in obtaining repairs at Jurong. As such, costs associated with the lay-up are dutiable at a prorated amount. Summary judgment with respect to the remaining items is granted.

**P. Invoice 11c**

This invoice covers the expenses of hiring tug boats to tow the Crusader from its lay-up in KSS to Jurong for repairs. Customs found all the expenses associated with the tow to be dutiable at a prorated amount. HQ 116237 at 5. Plaintiff argues that “only the lay-up necessitated the towage of the vessel from Singapore to Jurong.” (Pl.'s Br. 28.) If the Crusader had not been in lay-up, it could have entered Jurong under its own power. Although there may be evidence to support that claim, the court's finding that the lay-up itself was made in part for the purposes of repairs renders the towing an “expense of repair” that may be assessed at a prorated amount. Consequently, summary judgment with respect to Invoice 11c is granted.

**Q. Invoice 11d1**

This invoice concerns expenses incurred during November 2001, including main

agency fees, telecommunication expenses, crew transit, land transportation expenses, and professional services rendered. As with Invoice 11b1, Customs assessed full duties on professional services, and prorated duties on the main agency fee and telecommunications charges. HQ 116237 at 5. As before, Customs found that crew transit and land transportation were outside the scope of 19 U.S.C. § 1466. Id. As noted, because the lay-up was necessitated in part by the repairs at Jurong, summary judgment is appropriate with respect to the prorated fees. With respect to the professional services fees, the invoice itself states that the services consisted of “[l]aid-[u]p condition surveys.” (Def.’s Ex. 18 (Invoice 11d1, Item E).) As above, this evidence is sufficient to raise a genuine issue of material fact as to the nature of the professional services. Therefore summary judgment with respect to this item is denied.

**R. Invoice 11d2**

This invoice concerns expenses incurred in November by the Crusader, including telecommunications, hire of a night engineer, provisions, and freight forwarding. Customs treated the provisions as fully dutiable, the remainder were assessed with prorated duties as expenses related to the lay-up. HQ 116237 at 5. Plaintiff argues, as it did with respect to Invoices 11a3 and 11b4, that these expenses are not related to repairs, and therefore are not dutiable at all. (Pl.’s Br. 29.) Plaintiff has submitted an affidavit stating that the cost of hiring the night engineer was prompted by the need to provide assistance while Joseph Blunt was alone on the vessel. (Pl.’s Ex. 1 (Walla Aff. ¶ 39).) The affidavit also states that a night cook and provisions were needed to feed Horizon’s personnel who were tending to the ship during the lay-up. (Id.) These facts are sufficient to raise a genuine issue as to whether the provisions were fully dutiable as “expenses of repairs” or “equipment.”

The remaining costs, including telecommunications expenses, are admitted to have been expenses incurred during the lay-up of the Crusader, and therefore, are dutiable at the prorated amount as discussed above. (Pl.'s Br. 29.) Accordingly, summary judgment with respect to the remaining charges is granted.

### **III. Expenses Incurred at Jurong**

#### **A. Invoice 22a**

This extensive invoice covers numerous activities performed on the Crusader while dry-docked at Jurong between November 29, 2001, and January 7, 2002. (Def.'s Ex. 18 (Invoice 22a).) Although Plaintiff concedes that many of the items on the invoice are dutiable as repairs,<sup>6</sup> it did protest the assessment of prorated duties on items included in Section 1, entitled "services and port charges." (Pl.'s Br. 30–31.) Specifically, Plaintiff argues that certain apportioned duties, including lay-berth charges, telephone services, fireline water, garbage removal, crane services and line handlers should not have been assessed duties because they do not relate to repairs. (*Id.* at 32.)

Plaintiff argues that these tasks were not part of the repairs that were performed at Jurong. Defendant argues that performance of these support tasks was necessary to the completion of the repairs and the scheduled inspection, even if these tasks do not constitute repairs themselves. SL Serv., Inc., 357 F.3d at 1362, held that certain expenses that are not

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<sup>6</sup> Plaintiff did not protest all of Invoice 22a in its initial protest to Customs and conceded that items 3.1, 4.2, 5.1 and 8 were dutiable, and therefore not properly before the court. (See Pl.'s Supp. Mem. in Opp'n Mot. Summ. J. ("Pl.'s Supp. Br.") 2–4; Pl.'s Ex. 7 (Horizon's Application for Further Review, dated May 18, 2004, at 8) (stating that Plaintiff protested only items 1-1 to 1-16 under Invoice 22a); Def.'s Ex. 4 (Horizon's Protest at 6). Under 28 U.S.C. § 1581(a), the court cannot resolve claims for items that were not subject to a protest. XL Specialty Ins. Co. v. United States, 341 F. Supp. 2d 1251, 1255 (CIT 2004).

themselves repairs, such as the cost of dry docking, might nonetheless be dutiable if they would have been caused by the repair work, absent the other, non-dutiable inspection. Id.

Plaintiff argues, that to complete repairs, Horizon did not need: telephone services or a fireline; to remove the crew's garbage or the dehumidification equipment; the assistance of line handlers; or to place the vessel into a lay-berth. (Pl.'s Br. 32.) Plaintiff has presented an affidavit stating that no repairs, other than repainting and hull work, required dry-docking. (Pl.'s Ex. 1 (Wall Aff. ¶ 35).) Plaintiff has not, however, pointed to any other evidence raising a genuine issue that the telephone services, fireline water, garbage removal, and crane services were not incidental to repairs of the vessel, despite the fact that they did not constitute repairs themselves. Accordingly, summary judgment with respect to these prorated items is granted.

**B. Invoice 22b**

Under this invoice, Defendant contends that there is no genuine issue as to whether Section 2.1-1, "Dry-docking Time," Section 2.1-9A, "Cargo Hold Tank Top Cleaning," Section 2.1-9B, "Cargo Hold Cell Guide Support Structure Cleaning," and Section 2.1-34, "Engine Room and Fan Room Cleaning," should be prorated because they are necessary to both inspection and repair of the Crusader. (Def.'s Br. 32-34.)

Plaintiff points to evidence that "many challenged items were used exclusively for non-dutiable work." (Pl.'s Br. 34.) Plaintiff provides testimony of their expert, Walla, stating that the garbage removal charge (Section 1-7) was necessary to clean up after the crew. (Def.'s Ex. 19 (Walla Dep. 85:4-7); Pl.'s Supp. Br. 4-5.) Walla's testimony also indicates, however, that garbage removal was a "dual accumulation" and that repairs were occurring along with inspections at this time. (Def.'s Ex. 19 (Walla Dep. 96:8-14).) Walla's testimony, therefore,



supports Defendant's argument for summary judgment, and summary judgment with respect to garbage removal is granted.

Plaintiff also points to evidence that the crane service (Section 1-8) was not used for repairs, but to remove items from the vessel that had been placed on various hatches. (Def.'s Ex. 19 (Walla Dep. 97:9–24).) Walla testified that the items would have to be removed in order to allow the hatches to be opened for inspection. (Id.) Walla makes no mention of any need to open the hatches for the purpose of repairs. (Id.) Indeed, Invoice 22d, covers crane lifts used to open hatches for repairs. (Def.'s Ex. 18 (Invoice 22d, Item 8-10032.2).) This evidence raises a genuine issue as to whether the cranes were necessary to remove loads to allow the hatches to be opened for the purpose of repair. Therefore, summary judgment with respect to the crane fees is denied.

In addition, Plaintiff points to evidence that reefer cooling water was used to provide air conditioning for the crew, not the repair personnel and notes that the invoice does not indicate that the air conditioning was repaired. (Pl.'s Br. 34; Pl.'s Supp. Br. 5 (citing Def.'s Ex. 18 (Invoice 22b at 5).) Walla states, however, that the bridge, where repairs were being conducted on the radar, was air-conditioned; thus, at least one air-conditioned area was the site of repairs. (Def.'s Ex. 19 (Walla Dep. 99:19–24).) As Plaintiff's expert appears to concede that repairs were ongoing in air-conditioned portions of the vessel, the court finds that the reefer cooling water was used, at least in part, for the purpose of repair. Therefore, summary judgment for Defendant with respect to the cooling water is granted.

Plaintiff next points to evidence that charges for fresh water were incurred for the benefit of the crew, not repair workers. (Pl.'s Br. 34.) Walla testified that the fresh water was

used for crew showers and washing machines. (Def.'s Ex. 19 (Walla. Dep. 100:3–7).) This raises a genuine issue of material fact as to whether the charge relates to repairs. Summary judgment with respect to the provision of fresh water is therefore denied.

Likewise, Plaintiff points to evidence that compressed air was provided for the use of the crew, either for air-conditioning or for the use of air-powered tools. (Def.'s Ex. 19 (Walla Dep. 111:3–112:17).) Walla could not confirm whether the crew on board at the time actually used any tools that required compressed air (*id.* at 112:12–17), but this evidence raises a genuine issue as to whether the purpose of the compressed-air hookup was used for repairs. Summary judgment with respect to the provision of compressed air is therefore denied.

Plaintiff also points to evidence that the removal of all debris from cargo holds was necessary for inspections, but not necessarily needed for repairs conducted in the holds. (Def.'s Ex. 19 (Walla Dep. 117:21–119:2).) This evidence is sufficient to raise a genuine issue of material fact regarding the relationship between the cleaning of the holds and repairs. Thus, summary judgment with respect to cargo hold top cleaning (Section 2.1-9A), cargo hold guide support cleaning (Section 2.1-9B), and engine room/ fan cleaning (Section 2.1-34) is denied.

Plaintiff does not point to evidence showing that the lay-berth was used exclusively for the purpose of inspections. Indeed, Walla's testimony suggests that during the time this lay-berth was charged, "[t]here could have been" ongoing repairs on the vessel. (Def.'s Ex. 19 (Walla Dep. 92:15–19).) Plaintiff bears the burden of proof at trial, and therefore, must produce evidence to raise a genuine issue as to its claim. Since Plaintiff concedes that repairs could be ongoing at this time, it also appears that use of telephone services (Section 1-2), fireline water (Section 1-4), a certificate the vessel is "gas free" (Section 1-5), sanitary facilities (Section

1-6), line handlers (Section 1-16), heat lamps (Section 1-18), dock trial (Section 1-19), sea trial (Section 1-20), tank ventilation (Section 1-21), passageway (Section 1-22), and ballast water (Section 1-24), could be related to repairs. Plaintiff has pointed to no evidence to the contrary. Summary judgment with respect to these items is therefore granted.

Finally, Plaintiff concedes in its brief that Section 1 items 1-9 (shore power connection), 1-10 (shore power supply), 1-11 (shore power while the vessel was afloat), and 1-3 (use of the port engineer's office to coordinate activities onboard the Crusader) were dutiable at a prorated amount. (Pl.'s Br. 34 n.33.) Therefore, summary judgment is granted with respect to these items.

Invoice 22b also covers numerous items for cleaning, inspections, and tests that Customs found to be fully dutiable. (Def.'s Ex. 18 (Invoice 22b).) This opinion will address these items in the order in which Defendant has argued in its summary judgment memorandum. (See Pl.'s Br. 33–38.)

Defendant argues that item 2.1-12, for rudder inspection, is related solely to repairs of the vessel, and therefore is fully dutiable. (Def.'s Br. 35.) Plaintiff contests this assertion by pointing to evidence that the ABS survey shows that “[r]udder(s), rudder pintle(s) . . . rudder gudgeon(s)[,] rudder stock(s) and stuffing box(es)” were inspected. (See Pl.'s Ex. 13 (ABS Dry-dock Report).) This evidence is sufficient to raise a question as to whether the rudder was inspected, and whether the cleaning was done, for the purpose of those inspections. Summary judgment for this item is denied.

Customs found that item 2.1-18, a cherry picker used for inspection of a box girder, was related to a repair survey, not the general inspection, and therefore, fully dutiable. HQ

116237 at 5. This box girder inspection involved the use of a movable platform to look into hatch covers and the box girder for inspections. Defendant contends that this was necessary for steel renewals and coatings work, citing to a corrosion report prepared by EPS Corrosion Control, Inc. (Def.'s Br. 35 (citing Def.'s Ex. 16 (EPS Corrosion Control Report))). Plaintiff argues that the movable platform was also necessary for inspections, as evidenced by the ABS Dry-dock Report (Pl.'s Ex. 13), which includes entries for inspection of hatch openings. (Pl.'s Br. 35–36.) Such evidence raises a genuine issue as to whether this item related to inspections or repairs.

Therefore, summary judgment with respect to this item is denied.

Similarly, Defendant argues that there is no genuine issue with respect to item 2.1-23, cleaning of port fuel tank, because it was necessary for repair of the vent pipe and sounding tube described in Invoice 22d, item number 8.9000-04, which Plaintiff conceded as dutiable. (Def.'s Br. 36.) Plaintiff argues that this cleaning was carried out solely for purpose of the ABS inspection, and there is no evidence in the invoice or the testimony that show the cleaning was for the purpose of repair. (Pl.'s Br. 36.) Plaintiff cites to Walla's testimony, which states that items 2.1-23 through 2.1-25 were for cleaning for the purposes of inspection by ABS. (Def.'s Ex. 19 (Walla Dep. 121:7–12).) This evidence is sufficient to raise a genuine issue as to whether the cleaning was conducted solely for repair, and should be fully dutiable. Therefore, summary judgment for this item is denied.

Defendant asserts the same arguments with respect to items 2.1-24 (cleaning No. 3 fuel oil tank), 2.1-25 (cleaning No. 5 fuel oil tank), and 2.1-28 (cleaning hydraulic oil from No. 8 cargo hold). (Def.'s Br. 36.) Plaintiff raises similar responses to items 2.1-24 and 2.1-25, but makes no mention of 2.1-28, thus conceding the item as fully dutiable. (Pl.'s Br. 36; Oral Arg.

Tr. 59:16–60:10.) Therefore, summary judgment is denied with respect to items 2.1-24 and 2.1-25, but granted with respect to 2.1-28.

Item 4.1-11 covers inspection of the main and emergency switchboards on the Crusader, which was treated as fully dutiable. Defendant notes that Horizon’s specifications include vacuum cleaning, replacement of wiring, a replacement of circuit breakers with “pitting or burn spots.” (Def.’s Br. 36 (citing Def.’s Ex. 22 (Horizon’s Standard Specifications)).) Plaintiff points to evidence that ABS inspected the switchboard, and that the invoice itself does not mention repairs of the switchboard, only cleaning and tightening. (See Pl.’s Ex. 13 (ABS Dry-dock Report); see also Def.’s Ex. 18 (Invoice 22b, Item 4.1-11).) Plaintiff notes that where a specification for work conflicts with the actual invoice for the work once it was performed, the invoice will ordinarily prevail. (Pl.’s Br. 36); see also HQ 112910 (Dec. 1, 1993) (“Given the frequency with which work orders are changed, we cannot assume that the work actually performed was identical to the work proposed.”). The apparent conflict between the specification and invoice raises a genuine issue as to whether the switchboards were repaired at all. Accordingly, summary judgment is denied with respect to this item.

Item 4.1-16 covers expenses for the inspection of a forepeak valve. Defendant argues that the invoice itself describes repairs that were made to a block valve in the forepeak tank, and that the laborers “[f]reed up valve spindle & reassembled back in order.” (Def.’s Ex. 18 (Invoice 22b, Item 4.1-16).) Plaintiff argues that this statement is ambiguous, and it is not clear whether freeing up the spindle was part of reassembly after inspection, or part of a repair. (Pl.’s Br. 37.) Reviewing the phrasing of the invoice, the court concludes that a reasonable fact finder could infer that “freeing” the spindle was part of reassembly following inspection, and not

necessarily repair. On summary judgment, all reasonable inferences are drawn in favor of the non-moving party, consequently, summary judgment on this item is denied.

Item 4.2-1 covers expenses for the inspection of a “forced draft fan.” Customs found this item to be fully dutiable because the “wording of the invoice itself indicates that the work performed was a complete repair overhaul of the fan.” (Def.’s Br. 37.) The invoice includes certain tasks that could be taken to suggest repairs, such as placing the “fan shaft in [a] lathe to confirm trueness.” (Def.’s Ex. 18 (Invoice 22b, Item 4.2-1).) Plaintiff, however, points to evidence that ABS inspected this item, and contends that “[a]ny work undertaken to ensure the proper reassembly and functioning of the fan was part of the inspection itself.” (Pl.’s Br. 37.) Because Plaintiff has not provided sufficient evidence as to whether this invoice was incurred solely for the purpose of repairing the fan, the court finds that summary judgment is granted with respect to this item.

Item 4.2-7 concerns expenses for inspecting the Crusader’s boiler stack. Defendant contends that the removal of soot described in the invoice constituted a repair. (Def.’s Br. 37.) Defendant also notes that Horizon’s specifications do not mention the inspection of the boiler stack. (Id.) Plaintiff points to the ABS Dry-dock Report that shows that the boiler stack was inspected (see Pl.’s Ex. 13 (ABS Dry-dock Report)) and testimony that soot removal is necessary for inspection. (Def.’s Ex. 19 (Walla Dep. 131:25–132:9).) The court finds that this evidence is sufficient to raise a genuine issue of material fact, and summary judgment is therefore denied for this item.

Item 4.2-8 relates to expenses for washing of boilers for inspection, which Customs found dutiable as a repair because no evidence was provided demonstrating that this

item was for “periodic inspections or surveys performed by ABS.” HQ 116237 at 6. Defendant argues that it is “evident” that washing was necessary for the “extensive boiler repairs.” (Def.’s Br. 37–38.) Plaintiff argues that the invoice states that the washing was “for inspections.” (Def.’s Ex. 18 (Invoice 22b, Item 4.2-8).) The terms of the invoice raise a genuine issue as to whether the washing was conducted for the purpose of ABS inspections. Consequently, summary judgment with respect to this item is denied.

Item 4.2-10 is an invoice for inspection of the Crusader’s Nos. 1 and 2 service pump discharge valves, which Customs found fully dutiable. The invoice states “[r]emoved to workshop for inspection.” (Def.’s Ex. 18 (Invoice 22b, Item 4.2-10).) Defendant seeks summary judgment because it contends that the removal of two “globe valves” to a workshop “is indicative that dutiable work on them was actually performed.” (Def.’s Br. 38.) Plaintiff points to the terms of the invoice as well, which state that the valves were “removed for inspection.” (Def.’s Ex. 18 (Invoice 22b, Item 4.2-10).) Plaintiff also notes that ABS inspected these items. (Pl.’s Ex. 13 (ABS Dry-dock Report).) In addition, Plaintiff argues that the daily status reports from the Crusader refer to “renewal” of packing valve gaskets, which raises a factual dispute as to whether “renewal” constitutes “repair.” (Pl.’s Br. 38.) Although “renewal” may be interpreted as a repair, Plaintiff has presented sufficient evidence to raise a genuine issue as to the purpose of removing the globe valves. Summary judgment with respect to this item is denied.

Item 5.1-12 relates to the inspection of a combined first stage heater, gland condenser and drain cooler packing, which Customs found fully dutiable. The invoice for this item refers to hydrostatically testing the heat exchanger to prove that it was leak free. (Def.’s Ex. 18 (Invoice 22b, Item 5.10-12).) As above, the invoice refers to inspections, not repairs, and

Plaintiff has pointed to evidence that these items were inspected by ABS. Consequently, summary judgment with respect to item 5.1-12 is denied.

Finally, Defendant argues that summary judgment is warranted with respect to items 5.2-1,<sup>7</sup> 5.2-3, 5.2-4, 5.2-5, 5.2-6 and 5.2-7, which related to inspection of the Crusader's boiler and boiler access doors. Defendant asserts that these items were integral to repairs conducted on the boiler and to determine if repairs were done correctly. (Def.'s Br. 38.) Defendant argues that these services are part of the repairs completed on the boiler that were conceded by Plaintiff as dutiable in Invoice 22d, Section 5.2 ("Machinery Maintenance and Repairs Items Propulsion Boiler"). (*Id.*) Plaintiff, however, points to the invoice, as well as the ABS Dry-dock Report, as evidence that the items under Invoice 22b, Section 5.2 ("Machinery Inspection Items Propulsion Boiler") do not relate to repairs but were for the inspection of the boilers. (Pl.'s Br. 38; Def.'s Ex. 18 (Invoice 22b, Section 5.2).) Because the invoice refers only to inspections, and there is a separate invoice for repairs completed on the boiler, and Plaintiff has provided evidence that these items were inspected by ABS, summary judgment with respect to these items is denied.

### **C. Invoice 26**

This invoice involves parts that were used in inspections at Jurong, which Plaintiff conceded to be dutiable at the protest stage. (Def.'s Ex. 4 (Horizon's Protest 2-4).) As noted above, the court lacks jurisdiction to review an item which was not protested. See XL Speciality Ins., 341 F. Supp. 2d at 1255.

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<sup>7</sup> It appears Defendant erroneously listed Item 5.1.1 in its brief, of which there is none, instead of Item 5.2.1 ("Stage Port and Stbd Boilers").



**D. Invoices 31a through 31c**

These invoices cover expenses incurred, as above, for the “main agency fee,” telecommunications fee, hiring of a cook, courier services, port dues, pilotage, tug boats, Singapore goods and services tax , and freight forwarding. Customs found these fees relevant to both inspections and repairs and prorated duties. HQ 116237 at 6. Defendant argues that Plaintiff provided no evidence to show the items are non-dutiable. (Def.’s Br. 39.) Plaintiff argues that it incurred these expenses when moving the Crusader from dry-docking to lay-berth in order for the vessel to be reactivated. (Pl.’s Br. 39.) As noted earlier, the court’s finding that the lay-up itself was made in part for the purposes of repairs renders these an “expense of repair” that may be assessed at a prorated amount. Consequently, summary judgment for Defendant on this item is granted.

**E. Invoice 31e**

This invoice concerns various global marine services for the “supply of provision[s].” (Def.’s Ex. 18 (Invoice 31e).) Plaintiff argues that it incurred these expenses in order to feed the crew. (Pl.’s Br. 39.) Plaintiff, however, has not provided any evidence detailing what each expense consisted of, and thus, why the expenses should not be dutiable. Therefore, summary judgement is granted with respect to this item.

**F. Invoice 32**

This invoice is for emergency and rescue materials. Customs determined that all costs on this invoice were dutiable, with the exception of the first aid kit and seasickness tablets. HQ 116237 at 7. Plaintiff points to the ABS SLE Mandatory Annual Survey as evidence that all of these expenses were required for inspection and not related to repairs. (Pl.’s Br. 39–40; Pl.’s

Ex. 15 (ABS SLE Mandatory Annual Survey).) Because Plaintiff provides evidence that ABS inspected these items, the court finds that Plaintiff has raised a genuine issue as to whether this invoice was incurred solely for the purpose of inspection. Consequently, summary judgment for this item is denied.

### CONCLUSION

In accordance with the opinion above, summary judgment is granted in part and denied in part. Accordingly, summary judgment is granted as to the following items:

- **Invoices 2 & 3;**
- **Invoice 5;**
- **Invoice 6a;**
- **Invoice 6b:** Items 1100 (lay-up charges), 1104 (riggers assistance), 1108 (garbage disposal), 1109 (shore power), 1118 (tug charge), 1118A (towing charges), 1119 (wharfage), 1124 (security watchman), 1135 (pilotage), and 8060 (marine gas oil supply) only;
- **Invoice 7a;**
- **Invoice 7b:** Items 1104 (riggers assistance), 1108 (garbage disposal), 1109 (shore power), 1118 (tug assistance), 1119 (wharfage), 1124 (security watchman), 1135 (pilotage), 8061 (Indonesian flag), 8062 (marine gas oil), and 8071 (walkie talkie) only;
- **Invoice 8a;**
- **Invoice 8b:** Items 9904 (land transportation), 9906 (boat services), and 9908 (port and navigation dues) only;
- **Invoice 11a2:** Items A (main agency fees) and B (telecommunications charges) only;
- **Invoice 11a3:** Items A (telecommunications charges) and C (air ticket for Mr. Joe Blunt) only;

