IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

COTTON BAYOU MARINA, INC, d/b/a TACKY JACK'S RESTAURANT,	)	
Plaintiff,	)	
v.	)	CASE NO. 1:10-cv-00243-WS-C
BP plc; *et al.*	)	
Defendants.	)	

PLAINTIFF'S RESPONSE AND MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

Plaintiff, Cotton Bayou Marina, Inc. d/b/a Tacky Jack's Restaurant, (hereinafter "Plaintiff"), submits its Response Brief in opposition to Defendants' BP, plc., BP Products North America, Inc., and BP America, Inc., ("BP"), (collectively "Defendants") Rule 12(b)(1) and 12(b)(6) Motions to Dismiss. In further support, the Plaintiff state as follows:

I. INTRODUCTION

Plaintiff is an owner and operator of a marina and restaurant seeking damages from Defendants as a result of the Deepwater Horizon oil spill. The above-mentioned Defendants have filed motions to dismiss the Plaintiff's claim for damages. Specifically, Defendants allege the Plaintiff's claim, is preempted by the alleged exclusive remedy for oil spills, the Oil Pollution Act of 1990 "OPA"; that the Plaintiff has failed to meet the presentment requirements of the OPA; and that the Plaintiff's claim is barred pursuant to the economic loss doctrine

The Defendants' Motions are due to be denied. First, Plaintiff has standing to bring its claim pursuant to the laws of the State of Alabama, general maritime law and the OPA. Moreover, the OPA specifically contains a broad savings clause for Plaintiff's federal and state

law claims and remedies, including punitive damages. Moreover, Plaintiff has not yet incorporated an OPA claim in its complaint and is not required to satisfy the OPA's presentment requirements as to state law remedies or "non-responsible" parties. Second, the Defendants' motions are premature as they amount to merits-based inquiries improper for adjudication at this time. Third, the economic loss rule is not applicable to the Plaintiff's claims and whether the rule is applicable is a fact based inquiry.

II. QUESTIONS PRESENTED

The questions to be addressed in the present case are as follows: (A) Is the OPA the exclusive remedy for oil spills, thereby preempting all maritime and state law claims and remedies for oil pollution damages?; (B) Are the Defendants' arguments purely merits based given the substance and context of its arguments?; and (C) Does the economic loss rule bar recovery to Plaintiff's claim in this specific type of case?;

III. ARGUMENT

A. THE PLAINTIFF HAS STANDING TO BRING ITS CLAIMS FOR DAMAGES UNDER STATE LAW, MARITIME LAW AND THE OIL POLLUTION ACT OF 1990.

The Defendants argue that the OPA preempts all maritime and state law remedies, and as such, any maritime and state law remedies claimed by Plaintiff should be dismissed. As stated in detail below, this conclusion is far from determined and assumes detailed and complicated factual questions that are non-existent without merits based discovery. For these reasons alone, the Defendants' arguments should be denied. Moreover, the Defendants ignore the savings clause of the Oil Pollution Act, which specifically permits Plaintiff to allege additional, supplementary claims. In addition, the Defendants assume what is not included in the OPA statute should be summarily prohibited.

1. Plaintiff's claim is governed by state law, general maritime law and the Oil Pollution Act of 1990.

Plaintiff has standing to bring a claim before this Court pursuant to general maritime law, state law and the Oil Pollution Act of 1990 ("OPA"), and as such, it retains its right to plead its claim in the alternative.

In deciding whether a negligence suit is within admiralty jurisdiction, the Eleventh Circuit has stated: "Determination of the question whether a tort is 'maritime' and thus within the admiralty jurisdiction of the federal courts has traditionally depended upon the locality of the wrong. If the wrong occurred on navigable waters, the action is within admiralty jurisdiction; if the wrong occurred on land, it is not." See *Miller v. United States*, 725 F.2d 1311, 1313 (11th Cir. 1984).

The Deepwater Horizon, a semi-submersible drilling rig, may be a vessel for purposes of admiralty jurisdiction. See *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 497 (2005) (citing 1 U.S.C. § 3, which defines a "vessel" to include "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation in water"). Explosions aboard a vessel in navigable water resulting in potential disruption of maritime commerce squarely meet the requirements of maritime jurisdiction. See *Grubart, Inc. v. Great Lakes Dredge and Dock Co.*, 513 U.S. 527 (1995). "With maritime jurisdiction comes the application of substantive admiralty law." See *East River S.S. Corp. v. Transamerica Deleval, Inc.*, 476 U.S. 858, 864 (1986).

The Defendants' erroneously argue that Plaintiff cannot maintain a state law action simply based on the application of the Outer Continental Shelf Lands Act ("OCSLA"). However, the Defendants' assumption that state law could only apply through the OCSLA is ill conceived. In *Brockington v. Certified Electric, Inc.*, 903 F. 2d 1523 (11th Cir. 1990), The Court stated that

"…federal courts sitting in admiralty should, according to the dictates of comity, acknowledge and protect state-created rights, even at times to the exclusion of an existing maritime law." *Id.* at 1530. As a result Courts have oftentimes recognized the "maritime but local" doctrine, which allows a judge in a maritime case to supplement maritime law with substantive state law. *See Askew v. American Waterways Operators, Inc.*, 93 S. Ct. 1590 (1973); *Bouchard Trans. Co. v. Updegraff,* 147 F. 3d 1344 (11th Cir. 1998).

In addition, to the extent that Plaintiff's injuries and damages occurred or were consummated on land due to the activities of a vessel on navigable waters, state common law applicable to the local of the damage would provide a remedy. In fact, prior to passage of the Admiralty Extension Act of 1948, the only remedy available for damages done on land due to vessels on navigable waters was pursuant to state common law. See *The Admiral Peoples*, 295 U.S. 649,651 (1935) and *Cleveland Terminal and Valley R.R. Co. v. Cleveland Steamship Co.*, 208 U.S. 316 (1908). In passing the Act, Congress did not create a new cause of action, but made admiralty law a concurrent remedy with existing common law remedies to actions brought under the Act (46 U.S.C. 540). See *Shell Oil Co. v. The Tynemouth*, 205 F. Supp. 838 (E.D. La 1962) (vacated on other grounds); *Vega v. U.S.*, 86 F. Supp. 293 (SDNY 1949), aff'd 191 F. 2d 921 (2d Cir. 1951), cert. denied 343 U.S. 909 (1952).

Assuming the OCSLA is the only way state law could apply to this case – which it is not - the application of state law to the common law claims could arise from the provisions of the OCSLA. The OPA does not preempt or displace the OCSLA. Defendants have not cited any statute or court decision which says it does. Considering the amount of merits based discovery necessary to determine whether OCSLA applies, it is too early at this stage in the case to decide on a motion to dismiss.

Obviously, the OPA may also apply to Plaintiff's claim arising from the oil spill. The OPA was created to establish responsibility via federal statute for clean-up of oil discharges and certain damages caused by those discharges. OPA sets out liability for a designated "responsible party" as strict liability. "Notwithstanding any other provisions or rule of law, and subject to the provisions of this Act, each responsible party … is liable for the removal costs and damages specified in section (b) of this section that result from such incident." See 33 U.S.C. § 2702(a). For purposes relevant to this brief, OPA provides the following "damages" recoverable by affected parties: real or personal property, See 33 U.S. C. § 2702(b)(2)(B), subsistence use of natural resources, See 33 U.S.C. § 2702(b)(2)(C), and profits and earning capacity. See 33 U.S.C. § 2702(b)(2)(E). For these reasons, the Plaintiff has standing to assert its claims under maritime law, state law and the OPA.

2. The OPA preserves state and maritime law remedies as part of its savings clause.

In support of its motions to dismiss, the Defendants completely overstate the preemptive breadth of the OPA as the exclusive remedy for oil spills. There is no language in the OPA specifically preempting state or maritime law and, in fact, the OPA contains two savings provisions preserving the applicability of traditional common law and maritime remedies:

> (e) Admiralty and Maritime Law – Except as otherwise provided in this Act, this Act does not affect -
>
> (1) admiralty and maritime law; or
>
> (2) the jurisdiction of the district courts of the United States with respect to civil actions under admiralty and maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled. See 33 U.S.C. § 2751(e)(1)-(2).

In addition, the jurisdiction section of the OPA indicates a savings of state court remedies, with a choice of state or OPA law:

> (c) STATE COURT JURISDICTION – A State trial court of competent jurisdiction over claims for removal costs or damages, as defined under this Act, **may consider claims under this Act *or* State law** and any final judgment of such court (when no longer subject to ordinary forms of review) shall be recognized, valid, and enforceable for all purposes of this Act. See *Id.* at § 2717(c).

At §2717(a) – (c) of the OPA, entitled "RELATIONSHIP TO OTHER LAW", the OPA provides an indication of saving state law and maritime claims:

> (a) PRESERVTION OF STATE AUTHORITIES … - Nothing in this Act or the Act of March 3, 1851 shall -
>
> (1) affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to –
>
> (A) the discharge of oil or other pollution by oil within such State; or
>
> (2) affect, or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person under … State law, including common law.
>
> …
>
> (c) ADDITIONAL REQUIREMENTS AND LIABILITIES; PENALITIES. – Nothing in this Act … shall in any way affect, or be construed to affect, the authority of the United States or any State or political subdivision thereof –
>
> (1) to impose additional liability or additional requirements;

Considering how the OPA is liberally constructed to benefit victims of oil pollution and punish its perpetrators, it is no surprise that courts has determined that OPA does not preempt state or federal law. See *South Port Marine, LLC v. Gulf Oil Ltd. P'ship*, 234 F.3d 58, 65 (1st Cir. 2000). Specifically, courts has held that OPA's breadth does not preempt state law remedies. See *Tanguis v. Westchester*, 153 F.Supp.2d 859, 863 (E.D. La. 2001) (holding that the OPA does not preempt state law in the area of oil spill liability and compensation); *Isla Corp. v. Sundown Energy LP*, 2007 WL 1240212 (E.D. La. 2007)(same); *U.S. v. Bodenger*, 2003 WL 22228517 (E.D. La. 2003)(same); *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623, 630-31 (1st Cir. 1994) (using OPA to support validity of state liability statute permitting recovery of purely

economic loss). The United States Supreme Court, in dictum, expressed that given the OPA's savings clause, the statute was not intended to preempt state laws. See *U.S. v. Lock*e, 529 U.S. 89, 105-106 (2000). Following suit, Courts has also recognized that the OPA was not designed to preempt federal law remedies. See *U.S. v. Egan Marine Corp.*, 2009 WL 855964 (N.D. Ill. 2009) (US may pursue claims under both OPA and River and Harbors Act); *United States v. M/V Cosco Busan*, 557 F.Supp.2d 1058, 1063 (N.D. Cal. 2008) (US may pursue claims based on other federal statutes in addition to OPA claims even when seeking to recover the same damages); *National Shipping Co. of Saudi Arabia v. Moran Mid-Atlantic Corp.*, 924 F.Supp. 1436 (E.D. Va. 1996), *aff'd*, 122 F.3d 1062 (4th Cir. 1997) (claimant may pursue general maritime law claims to the extent it seeks damages not covered by the OPA).

Alternatively, Article III, clause 2 of the Constitution creates the basis for admiralty and maritime law of the United States. Because the federal courts are constitutionally afforded jurisdiction over maritime law, there is an extremely high bar for Congress to change or preempt long-standing judge created general maritime law. Indeed, the Second Circuit in *U.S. v. Oswego Barge Corp.,* reviewed Supreme Court decisions and gleaned four factors to be considered when analyzing statutory preemption of general maritime law claims. See 664 F.2d 327 (2nd Cir. 1981). Those factors include (1) legislative history; (2) the scope of the legislation; (3) whether judge made law would fill a gap left by Congress's silence or rewrite rules that Congress enacted; and (4) likeliness of Congress's intent to preempt "long established and familiar principles of the common law or the general maritime law." See *Id.* at 344. Applying these factors to the OPA statute:

- Legislative History: H.R. Conf. Repp. 101-653 (1990) states that the OPA savings provision "is intended to clarify that the House bill does not supersede [Art. III, clause 2 of the Constitution], nor does it change the jurisdiction of the District Courts …." Another legislative reference states, "It is not the intent of the Congress to

change the jurisdiction in incidents that are within the admiralty and maritime laws of the United States." See 1990 U.S.C.C.A.N. 779, 839).

- Legislative Scope: The OPA defines its scope explicitly through its statutory text. It defines what damages are covered in the Act, and the process for pursing the claim, while still being flexible in terms of supplementing rather than supplanting alternative claims and remedies.
- Whether judge made law would fill a gap left by Congress's silence: Applying judge-made general maritime law (if it is determined maritime law applies in this case) allows the Plaintiff to pursue claims that are not covered under the OPA. For example, the OPA is silent as to the potential extreme conduct of the Defendants, whereas state and maritime law specifically provide remedies to compensate Plaintiff and punish perpetrators for intentional, willful, wantonness or grossly negligent conduct (i.e., punitive damages).
- Likeliness of Congress's intent to preempt "long established and familiar principles of the common law or the general maritime law": The statutory language of OPA does not contain an explicit preemption clause or otherwise expressly preempt the general maritime law. When taken in context with OPA's strong savings clauses and silence on state and maritime law, the statute's face is not indicative of an intent to preempt those traditional remedies – only to supplement them. See Senate Report No. 101-94.

For these reasons, the Defendants' statutory preemption arguments are due to be denied.

The Defendants argue that Plaintiff's case should be dismissed based on other, inapplicable cases. Not one of the cases cited by Defendants involved only state law or maritime remedies on its own – as the Plaintiff has pled in this case. Namely, there are very few instructive cases that speak to the application of the OPA, and its intertwining nature with state and federal laws. It would also be safe to assume that no case on record involves the sheer breadth, devastation, factual and financial impacts as this particular case does. Nor is there a case that is instructive as to what Plaintiff is to do when the responsible parties' claims procedure proves completely inadequate and confusing – as the Plaintiff believes is occurring with the current oil spill.

While it has been held, albeit in completely different factual circumstances in foreign jurisdictions, that the OPA provides the exclusive federal remedy *for those damages recoverable under OPA* caused by oil spills, thereby limiting the application of general maritime law, **no**

court has held that OPA preempts state common law claims or state law claims for damages not recoverable under OPA. The Defendants rely on *South Port Marine, LLC v. Gulf Oil Ltd. Partnership* See 234 F.3d 58 (1st Cir. 2000) and *Gabarick v. Laurin Maritime (America) Inc;* 623 F. Supp. 2d. 741 (E.D. La. 2009). Neither case holds that OPA preempts common law tort claims generally or that the OPA preempts state common law claims for damages not recoverable in an action under the OPA. In *South Port Marine*, plaintiff's common law state claims were dismissed due to the application of that state's oil pollution compensation statute, **not** as a result of application of the federal OPA. The *South Port Marine* Court noted that, had the common law tort claims not been dismissed due to application of state statutory law, some of the tort claims may has been adequate to support an award of punitive damages under state common law even though it was determined that punitive damages were not recoverable under the federal OPA. In *Gabarick*, the court held that general maritime law is only preempted by the OPA to the extent that the damages claimed under the common law claims are recoverable under the federal OPA. Moreover, the *South Port Marine* Court observed that "we have indeed acknowledged that Congress did not intend the OPA to bar the imposition of additional liability by the States." See 234 F.3d at 65.

These courts, as well as Defendants here, do not address the recent decision in *Baker v. Exxon Shipping*, 128 S. Ct. 2605 (2008), wherein the Supreme Court refused to find that The Clean Water Act preempted common law claims for compensatory and punitive damages for economic losses when silent on the issue and when specifically protecting water and natural resources. The holding in *Baker* strongly supports that, as with The Clean Water Act, the OPA does not preempt common law remedies.

Reading these cases together with a plain reading of the Act itself indicates that the Plaintiff's claim is not preempted. Moreover, given the breadth and circumstances surrounding this case, it is questionable whether the cases cited by the Defendants will be instructional at all in this jurisdiction or other jurisdictions that are incurring continuing and widespread damages from the oil spill.

3. Because the OPA is not an exclusive remedy and Plaintiff has not alleged an OPA count in its Complaint at this time, Plaintiff did not have to satisfy the OPA presentment process and this Court does have jurisdiction.

The Defendants incorrectly states that since Plaintiff's claims involve damages caused by the Deepwater Horizon oil spill, Plaintiff had to satisfy the OPA presentment process before first bringing suit against them. This argument is fundamentally flawed. First, Plaintiff did not incorporate an OPA count in its complaint – thus, it does not have to satisfy the presentment requirements of OPA before first filing suit pursuant to state and maritime law. Consequently, whether Plaintiff has previously presented an OPA claim is irrelevant and so are the Defendants' attacks in its motions on this Court's subject matter jurisdiction in this matter. Second, nowhere in the OPA statute is the Plaintiff required to satisfy presentment prior to bringing traditional state and maritime law claims. Again, the Defendants are impermissibly overstating the breadth and reach of the OPA into traditional state and maritime law remedies. To the extent maritime law is found to apply to the Plaintiff's claim, the Court has jurisdiction in admiralty.

Assuming, *arguendo,* that no federal question jurisdiction exist in this case (which it does) this court still has subject matter jurisdiction based upon diversity jurisdiction as clearly set out in the Plaintiff's Complaint. Thus, Defendants 12(b)(1) Motion is due to be denied.

B. THE DEFENDANTS' MOTIONS TO DISMISS ARE PREMATURE.

1. The Defendants' choice of law arguments encompass factual inquiries that are improper for resolution at this stage.

The Defendants' motion is based primarily on the preemptive effect of the OPA over state law and general maritime law. Beyond the Defendants' improper assessment of the OPA's preemptive breadth, the Defendants cannot even reach this argument until they first conclude which choice of law governs – state, maritime or both. This determination can only be made after a thorough analysis of the specific facts surrounding the operation of the Deepwater Horizon drilling rig. Considering this litigation remains in the earliest stages and the Defendants have not even filed an answer, there are insufficient facts before the Court to allow this determination to be made and Defendants' motions to dismiss should be denied.

For instance, to determine if the OCSLA and its state law borrowing provisions apply, the Court must determine that three necessarily fact determinate requirements has been met: (1) That the controversy arises on a site covered by the OCSLA; (2) That federal maritime law does not apply of its own force; and (3) The state's law applicable is not inconsistent with federal law. However, determination of the application of maritime law is a "fact based inquiry." See *Domingue*, 923 F. 2d at 395.

Attempting to resolve the second OCSLA element for application of state law (whether maritime law applies of its own force) also evidences why resolution of these issues will require a factual record before being decided. For maritime law to apply of its own force, the machine or equipment involved must first be found to be a "vessel" on a navigable waterway. Again, the Deepwater Horizon may or may not be considered a vessel for purposes of the second element required for application of state law under the OCSLA depending on the facts to be established. It is clear however that discovery could demonstrate the second element's inapplicability, which is further reason why the Defendants' motions to dismiss should be denied.

A factual inquiry is also necessary with respect to consideration of the "connection – to – maritime activity" test used to determine if maritime law is applicable because the maritime commerce requirement must also involve a "vessel". As stated by the Court in *Sohyde*, the determination of a maritime activity must be considered "in light of the facts of the instant case." See 644 F.2d at 1136.

Other fact based issues are also present that have a bearing on resolution of the issues raised by BP in brief. If the OSCLA applies, which state's common law applies? This is a factually specific inquiry. What damages to plaintiff occurred on land versus navigable waters? Depending on the facts, maritime or state common law may apply.

Without a thorough merits-based inquiry, it is unclear whether maritime law or state law will apply to the present litigation. Surely, Defendants' unsupported, factual assertions do not resolve these issues. Plaintiff is entitled to its own investigation through merits-based discovery to determine whether state or maritime law does (or does not) apply. For these reasons, Defendants' motions to dismiss are due to be denied.

For these reasons, the Plaintiff's OPA claim does not exist in its complaint at this time. However, these circumstances underscore the necessity for judicial supervision and relaxed treatment of the OPA's presentment requirements, so that claimants may proceed with claims in a neutral court system rather than sit in purgatory with a claims process slanted to protect BP's interests. Consequently, it is essential for the Plaintiff's claim to have a neutral alternative to an otherwise BP-dominated claims process.

C. THE DEFENDANTS' ECONOMIC LOSS DOCTRINE ARGUMENTS ARE DUE TO BE REJECTED

The Defendants' arguments regarding the economic loss doctrine are misguided and must

fail. As stated *supra*, the Plaintiff needs only present any set of facts in support of its claim which would entitle them to relief to survive the Defendants' motions to dismiss. The Plaintiff has clearly met this threshold. As stated above, until it is determined through factual inquiry what law may apply to Plaintiff's claims, it is impossible to determine if the economic loss rule would apply, and if so, the scope of its application.

In addition to the necessary factual inquiries, the motion to dismiss should be denied on additional grounds. Where the rule applies (and this remains to be seen in the case at bar), its application generally has been limited to third parties damaged as a result of commercial contractual relationships with a entity directly damaged. Plaintiff's claims here did not arise from such a relationship.

As indicated in the cases analyzing the economic loss doctrine, the Defendants' conduct is important in determining whether the doctrine even applies. Indeed, numerous courts have already indicated that the economic loss rule may not apply where intentional conduct caused the damages. See *Conoco, Inc. v. Halter-Calcasieu, LLC,* 865 So. 2d 813, 822 (La. App. 2003); *Getty Refining & Marketing Co. v. MT FADI B*, 766 F.2d 829 (Pa. CA 1985) (adopted *Robins Dry Dock* and held that absent physical damage, there can be no recovery for purely economic harm resulting from **unintentional** maritime torts); see also *M/V Testbank*, 752 F.2d 1019 (5th Cir. 1985); Determining the Defendants' conduct is a merits-based inquiry – and requires a thorough discovery investigation in order to resolve these issues. Unfortunately, all claimants, including the Plaintiff in the present motion, were not privy to the internal decisions and discussions between BP, Halliburton, Cameron and Transocean regarding the drilling, cementing, application and analysis of the blow out preventer, or the critical decisions leading to the Deepwater Horizon explosion. Moreover, even after the leak occurred, Plaintiff does not

have the necessary information to determine which steps the Defendants took, or intentionally did not take, in laying out its remedial measures for protecting coastlines and fishing estuaries from the approaching oil. All of these documents and discussions would be available to the Plaintiff in formal discovery – of which the Plaintiff is entitled. Importantly, Plaintiff has yet to receive an answer from the Defendants to the allegations set forth in Plaintiff's complaint. As a result, the applicability of the economic loss rule to this case has yet to be determined.

Recent examples from the Exxon Valdez oil spill disaster indicate that Plaintiff's investigation may show reckless, wanton and/or intentional conduct of the Defendants. For example, evidence dating back to the Exxon Valdez disaster demonstrates the intentional lack of preparedness in the oil industry for major spills. Indeed, reports indicated that oil company response was "… unreasonably slow [and] confused," See S. Rep. No. 101-94, at 2 (1989), reprinted at 1990 U.S.C.C.A.N. 722, 723-24.and "was clearly inadequate to contain and recover the spilled oil." See United States General Accounting Office, Adequacy of Preparation and Response to the Exxon Valdez Oil Spill 1 (1989). The problems identified with the inadequate response "ranged from a shortage of equipment and skilled personnel to inadequate communications and organizational structures." See Id. at 14. Effectively, "[m]ajor problems were encountered because no one had realistically prepared to deal with a spill of that magnitude in the Prince William Sound." See Id. at 1. Compounding matters was the ineffectiveness of the recovery techniques used to manage the spill. See Id. at 2.

The accounts from the Exxon Valdez disaster are all too ironic – they seem to paint a very close picture to the type of behavior leading up to the Deepwater Horizon spill, and the failures in managing the subsequent leak. The combined alleged conduct between the Defendants leading up to the Deepwater Horizon explosion, suggest the Defendants were

engaged in conduct that falls well beyond simple negligence. (See http://online.wsj.com/article/SB10001424052748704062604575266560930780190.html "BP Decisions Set Stage for Disaster" By Ben Casselman and Russel Gold, May 27, 2010. The Wall Street Journal. Last checked on July 01, 2010.) All of this information needs to be flushed out in discovery, and Plaintiff should have the opportunity to do just that to establish the conduct of all parties.

For these reasons, Plaintiff is entitled to merits based discovery to determine the specific conduct of the parties and Defendants' arguments must fail and its motions to dismiss denied.

1. The circumstances of this case require specialized treatment under the economic loss doctrine.

Plaintiff derives income and its livelihood by feeding and providing marina services to vacationers who travel to the Alabama Gulf Coast to enjoy the bountiful natural resources of the area, specifically its beaches, waterways, and access to, what were before this environmental catastrophe, some of the best fishing grounds in the United States. As a result of the Deepwater Horizon oil spill and its devastating effects on these natural resources, the Plaintiff's businesses are devastated. While the Plaintiff does not dispute that the Robin's Dry Dock has been applied in maritime cases, the principle "does not bar every single economic loss claim that is unaccompanied by physical damage." See *Seko Energy Inc. v. M/V Margaret Chouest*, 820 F.Supp. 1008, 1011 (E.D. La. 1993). Indeed, the full extent of the Robins Dry Dock rule is not clear in the Eleventh Circuit, except that fishermen and fishing boat owners can sue to recover economic damages without suffering physical damage to its proprietary interest. Miller Industries v. Caterpillar Tractor Co., 733 F.2d 813, 820 (11th Cir. 1984).

The instant case can be distinguished from Robins Dry Dock in that Plaintiff does not complain that a party in contractual privity with it was injured by the acts of the Defendants,

which in turn caused its damages. Rather, here Plaintiff seeks recovery for damages it has directly suffered as a result of Defendants' tortuous conduct. The fact that its direct damages are economic in nature should not forestall Plaintiffs ability to recover for those damages. See Herculese Carriers, Inc. v. State of Florida, 720 F.2d 1201, 1201 (11th Cir. 1983)(Clark, J., concurring), vacated and affirmed by equally divided en banc court, 728 F.2d 1359 (11th Cir. 1984). Indeed, Plaintiff has been unable to find any Eleventh Circuit cases which hold that parties like Plaintiff, who suffer direct damages resulting from Defendants' tortuous conduct, are barred by the Robins Dry Dock rule. The facts here create a compelling reason to limit the Robins Dry Dock rule to its original boundaries – to cases where unintentional conduct by the defendant causes damage to a party in contractual privity with the plaintiff.

Plaintiff contends that a determination of whether the Robins Dry Dock rule applies in this case should not be done at this early stage of this case. Such a determination should be made only after the parties have had the opportunity to conduct thorough and extensive factual discovery. Thus, Defendants' Motion to Dismiss should be denied.

The Robins Dry Dock rule also does not apply to this case because it has been statutorily overruled by Congress by passage of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), Pub. L. 96-510, H.R. 7020, 94 Stat. 2767 (Dec. 11, 1980). When the Act was amended in 1986, Senator Bentsen in introducing the amendment stated:

> "It classifies the congressional intent in that regard, allowing claims for third-party damages under other applicable federal and state law. Additionally, I have clarified that under CERCLA and maritime tort law third parties may recover for economic loss due to release of hazardous substances even though there is no direct physical damage".[1]

[1] 2A LEGISLATIVE HISTORY OF THE SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT OF 1986, at 1180 (Committee on Env't & Public Works ed., 1990) (emphasis added) (See also S. Olssen, Recovery for the Lost Use of Water Resources: M/V TESTBANK on the Rocks?, 67 TUL.L.REV.271 (1992)("Though Senator

The Defendants erroneously attempt to compare this unprecedented oil spill to previous chemical spills, and argue that damages to the Plaintiff's business operations are too unforeseeable and speculative to warrant a damage recovery. However, this is not a typical spill or a typical environmental disaster. Indeed, the Deepwater Horizon oil spill is the **worst** environmental disaster in United States history. The oil slick, which spreads hundreds of miles, has almost completely shut down all fishing operations and has severely damaged tourism along the Gulf Coast, specifically the Alabama Gulf Coast.

IV. CONCLUSION

For the reasons set forth above: the Oil Pollution Act does NOT preempt Plaintiff's maritime and state law claims; the Defendants' arguments are purely merits based and premature given the current status of this litigation; and the economic loss rule does NOT bar recovery for Plaintiff's claims. Therefore, Defendants' motions to dismiss should be DENIED.

Respectfully submitted by,

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Bentsen specifically refers to liability for ocean incineration vessels, the plain wording of § 9607(h) does not contain any limiting language which would suggest that it is only applicable to ocean incineration vessels").

Dated: July 30, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of July, 2010, a copy of the foregoing pleading was filed electronically with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent to all counsel of record registered to receive electronic service by operation of the Court's electronic filing system. I also certify that I have mailed this filing by United States Postal Service to all counsel of record who are not registered to receive electronic service by operation of the Court's electronic filing system.

s/Richard D. Stratton
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