

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

GULFMARK OFFSHORE, INC.,	)	
	)	
<i>Plaintiff,</i>	)	
	)	
v.	)	<b>CIVIL ACTION NO.</b>
	)	_____
<b>BENDER SHIPBUILDING &amp; REPAIR CO.,</b>	)	
<b>INC., THOMAS B. BENDER, JR., BRUCE J.</b>	)	
<b>CROUSHORE, DAVID BARNETT,</b>	)	<b>JURY DEMANDED</b>
<b>JOSEPH W. MANGIN, JR. AND</b>	)	
<b>FRANK TERRELL,</b>	)	
	)	
<i>Defendants.</i>	)	

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**COMPLAINT**

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COMES NOW GulfMark Offshore, Inc., and for its Complaint, says as follows:

**JURISDICTIONAL ALLEGATIONS**

1. Plaintiff, GulfMark Offshore, Inc. (hereinafter "GulfMark"), is a Delaware corporation having its principal place of business in Houston, Texas.
2. Defendant, Bender Shipbuilding & Repair Co., Inc. (hereinafter "Bender"), is an Alabama corporation having its principal place of business in Mobile, Alabama.
3. Defendant, Thomas B. Bender, Jr., is an individual citizen of the State of Alabama whom, on information and belief, resides in Mobile, Alabama.
4. Defendant, Bruce J. Croushore, is an individual citizen of the State of Alabama whom, on information and belief, resides in Mobile, Alabama.

5. Defendant, David Barnett, is an individual citizen of the State of Alabama whom, on information and belief, resides in Mobile, Alabama.

6. Defendant, Joseph W. Mangin, Jr., is an individual citizen of the State of Alabama whom, on information and belief, resides in Mobile, Alabama.

7. Defendant, Frank Terrell, is an individual citizen of the State of Alabama whom, on information and belief, resides in Mobile, Alabama.

8. This Court has diversity jurisdiction as conferred by 28 U.S.C. §1332, by virtue of the fact that there is complete diversity of citizenship between the Plaintiff and the Defendants and the amount in controversy exceeds \$75,000.00, exclusive of costs. Venue is properly laid out in this district pursuant to 28 U.S.C. § 1391(a) and (c). Venue is further proper in this district on account of a contractual forum selection clause between GulfMark and Bender.

### **FACTUAL ALLEGATIONS**

9. GulfMark is a leading global provider of marine transportation primarily to the upstream oil and gas industry. GulfMark serves its marine clients by providing safe, high-quality service using a fleet of modern vessels. As of the making of this complaint, GulfMark operates a fleet of approximately 96 vessels ranging in length from 155 feet to 306 feet in locations around the world.

10. Bender is in the business of shipbuilding and repair, and has been so engaged since the corporation was formed on, or about, July 19, 1923. Bender maintains approximately 7000 feet of deep water frontage at its shipyard located at 265 S. Water Street, Mobile, Alabama. As set forth in its web site, Bender advertises that it “builds all types of vessels . . .[including] offshore and platform supply vessels. . .” Bender goes on to proclaim that Defendant has “a company-wide commitment to quality,” and that “Bender is known throughout the world for solidly built vessels,

delivered on time at a competitive price.”

11. On, or about July 31, 2007, GulfMark and Bender entered into a “Shipbuilding Contract,” a true and correct copy of which appears attached hereto as Exhibit “A,” for the construction and delivery of three Vessels (as defined in the agreement) for an original contract price of \$75 million. The Vessels were to be designated as “Builder’s Hull Numbers 8184, 8188 and 8192” and were to have a length of 245 feet each with a beam of 54 feet. The purchase price per vessel was adjusted upward by agreement to \$25.5 million upon completion of the final drawings with progress payments to be periodically made by GulfMark from time to time upon the reaching of certain milestones in construction as defined by the “Shipbuilding Contract,” thereby increasing the total contract price to \$76,500,000.00.

12. At the time the “Shipbuilding Contract” was executed, and at all times material to this Complaint, GulfMark alleges that Defendant Thomas B. Bender, Jr. was the President of Bender; Defendant Joseph W. Mangin was the Chief Financial Officer of Bender; Defendant Bruce J. Croushore was the Secretary and Vice-President of Bender; Defendant Frank Terrell was the Vice-President of Bender and Defendant David Barnett was the Treasurer of Bender. Further, Defendants Thomas B. Bender, Jr., Bruce J. Croushore and Frank Terrell were Directors of Bender at all times material to this Complaint.

13. Following the execution of the “Shipbuilding Contract,” GulfMark made the initial advance required under the agreement of the parties in the amount of \$1,000,000.00 per vessel for a total of \$3,000,000. As per the “Milestone Payment Schedule” contained as Exhibit “C” to the “Shipbuilding Contract,” GulfMark continued to make timely progress payments to Bender upon the alleged completion of work by Bender as summarized below:

1.	Down payment at contract execution	\$1,000,000 per Vessel
2.	Confirmation of price & delivery	10% of Contract Price
3.	Issuance of purchase orders for main engines, gears and CPP system	10% of Contract Price
4.	Issuance of purchase order for steel	10% of Contract Price
5.	Start construction of panels for the first assembly, no sooner than 9/1/08	13% of Contract Price
6.	Start construction of panels for the superstructure	13% of Contract Price
7.	Set main engines in unit	20% of Contract Price
8.	Delivery	Balance of Contract Price

By October 13, 2008, the design phase of the project was substantially complete and actual construction was set to commence. By mutual agreement of GulfMark and Bender, the “Shipbuilding Contract” was revised in writing through the execution of “Change Order #7004” dated October 13, 2008, a true and correct copy of which is attached hereto as Exhibit “B.” Pursuant to “Change Order #7004,” GulfMark made an additional advance to Bender of \$8,000,744.00 which was allocated for milestone payments for the 4<sup>th</sup> Quarter of 2008 on the three (3) Vessels as follows: Hull 8184 - \$5,731,890.00; Hull 8188 - \$1,621,860.00; and Hull 8192 - \$646,994. Future milestone payments were modified under “Change Order #7004 - Attachment A” to reflect the \$8,000,744.00 payment by GulfMark to Bender which essentially amounted to an advance payment under the contract to which Bender would otherwise not have been entitled until later in the construction process.

14. In accordance with the construction progress represented by Bender to GulfMark, Plaintiff continued to make milestone payments to Bender pursuant to the “Shipbuilding Contract” as amended by “Change Order #7004” of not less than \$44 million as of March 18, 2009.

15. GulfMark alleges that it is the owner of “Builder’s Hull Numbers 8184, 8188 and 8192,” together with all materials and equipment procured and/or purchased by Bender for completion of the Vessels. As set forth at Article VII E of the “Shipbuilding Contract”:

Title to all materials (procured or purchased by Builder) and equipment at the Shipyard purchased for use in connection with the construction of the Vessels, shall, to the extent paid for by the Buyer, also vest in the Buyer as and when paid for, provided however, that the risk of loss or damage to such material or equipment shall remain with the Builder until the delivery and acceptance of the Vessels. Builder shall nonetheless always have a right of lien on the material and equipment until such time as the Vessels are delivered, accepted and paid for by the Buyer.

Further, as set forth in Article XIX of the “Shipbuilding Contract,” GulfMark” shall have a security interest in the Vessels to the extent of progress payments made by Buyer. . .” GulfMark alleges that said security interest attaches not only to the Vessels, but also to any cash proceeds or other goods, equipment or materials acquired by Bender which otherwise should have been used for the direct benefit of Plaintiff in the performance of the contract between the parties.

16. In order to more fully effectuate the security and ownership interests described above, GulfMark and Bender agreed as follows in “Change Order #7004” at Paragraphs 3 - 5:

- (3.) Buyer shall have a security interest in the material purchased with funding from previous milestone payments and in the material purchased with funding provided by this accelerated payment schedule. As material is paid in full with funding from milestone payments and this accelerated payment schedule, title to that material shall pass to the Buyer.
- (4.) Builder shall establish a separate checking account (“new account”) for the receipt and dispersal of funds received under this accelerated payment program. Periodically, a list of vendor invoices shall be provided to the Buyer by the Builder indicating the amount due to each vendor. The projected due dates for these vendor payments are identified in Attachment B. Along with this submittal of vendor invoices will be an invoice from the Builder in sum of the vendor invoices to facilitate the payment from the Buyer as the new account. These funds will only be used to pay vendor invoices related to the referenced Contract.

- (5.) The Builder shall present progress payment invoices to the Buyer for payment in accordance with Attachment C. These funds will also be deposited into the new account. These funds will be used by the Builder to cover the costs for labor, consumables and other overhead expenses related to the referenced Contract.

17. As of the making of this Complaint, GulfMark alleges that the following described equipment and materials which are subject to the ownership rights of Plaintiff are in the possession of Bender, to-wit:

Hull	Item	Qty	Description	Value
8184	Main engines	2 ea	MaK 6M25	\$1,739,048
	Main engines	1 shipset	Engine accessories	
	Generator sets	3 ea	Cummins QSK19	\$1,100,000
	Thruster engines	3 ea	Cummins QSK38	
	Bulk mud compressor	2 ea	Curtis	\$ 99,000
	Electrical Switchgear	1 shipset	Gulf Coast Power	\$ 350,420
8188	Main engines	2 ea	MaK 6M25	\$1,739,048
	Main engines	1 shipset	Engine accessories	

18. GulfMark alleges that upon its written declaration of default on March 18, 2009, and Bender's subsequent failure to timely cure, the continued possession by Bender of the steel, equipment and materials described in Paragraph 19, above, became wrongful. GulfMark further says that Bender's continued possession of Hulls 8184 and 8188 along with steel on site purchased for the construction of GulfMark Vessels is likewise wrongful. GulfMark alleges that it is entitled to damages for the continued wrongful detention thereof, recovery of the same, or the alternate value which is alleged to be not less than \$5,027,516.00 as to the steel, equipment and materials plus the value of Hulls 8184 and 8188 which are only partially completed.

19. GulfMark alleges that Defendant, Thomas B. Bender, Jr., by way of his status as President and Director of Bender, as early as October 18, 2008, had actual knowledge, or was on

notice of such material facts that a reasonable person could not conclude otherwise, that Bender could not timely perform the “Shipbuilding Contract” or the terms of “Change Order #7004.” By not later than the time “Change Order 7004” was executed and at all times subsequent thereto, Bender was insolvent in that the corporation was unable to pay its debts as they became due. At, or about the time that Thomas B. Bender, Jr. executed “Change Order #7004,” with GulfMark and obtained an advance of \$8,000,744.00, Bender was in substantial default in the performance of its contract obligations for the construction of two tugboats and six Articulated Tug and Barges (“ATB”) for OSG America, L.P. That status of default was in existence in the 4<sup>th</sup> Quarter of 2008 and ultimately resulted in the termination of the contract between OSG America, L.P. and Bender in March 2009, whereupon OSG America, L.P. took possession of certain vessels and abandoned the construction of the ATB’s by Bender. GulfMark alleges that both Thomas B. Bender and Bender had no present intent or ability to fully complete the “Shipbuilding Contract” as amended by “Change Order #7004,” as of the time he signed the change order on October 18, 2008, and extracted over \$8 million from Gulfmark. GulfMark alleges that by October 13, 2008, and continuing to the present, that Bender was in the “zone of insolvency” and had a heightened duty of care and loyalty not to the shareholders of the company, but rather to its creditors. Notwithstanding the intentional, reckless or negligent suppression of material facts as to the dire financial condition of the corporation, Bender, acting by and through its President, Officers and Directors, obtained substantial sums from GulfMark to the material detriment of Plaintiff. Had Plaintiff known the true financial condition of Bender, including the full blown nature of its existing default to OSG America, L.P., Plaintiff would not have acted to perform its payment obligations under the contracts.

20. In sum total, GulfMark has advanced not less than \$44 million to Bender as of the making of this Complaint. Of that sum, Plaintiff is unable to account for the use by Defendant of over \$25 million of the advances made by GulfMark to Bender. GulfMark alleges that the vast majority of the funds for which Plaintiff is unable to trace or account have been used by Bender, while in the “zone of insolvency” for the benefit of other customers and/or other improper purposes to the material detriment of Plaintiff. GulfMark alleges that Defendants, Thomas B. Bender, Jr., Bruce J. Croushore and Frank Terrell, acting either independently or together in their capacity as Directors of Bender violated their fiduciary duties to creditors, including GulfMark, while operating in the “zone of insolvency” by misrepresenting the ability of the corporation to perform its obligations, by failing to actually perform the contractual obligations of the corporation and by siphoning-off specifically earmarked funds provided by GulfMark to other projects or other improper uses.

21. In like fashion, GulfMark alleges that Thomas B. Bender, Jr., as President, Joseph Mangin as Chief Financial Officer, Bruce J. Croushore as Vice-President of Sales and David Barnett as Treasurer of Bender each breached their respective fiduciary duties to creditors while the corporation was in the “zone of insolvency” from not later than October 13, 2008 to the present by misrepresenting the ability of the corporation to perform its obligations, by failing to actually perform the contractual obligations of the corporation and by siphoning-off specifically earmarked funds provided by GulfMark to other projects or other improper uses.

**COUNT I**

**BREACH OF CONTRACT - BENDER**

22. GulfMark realleges and reavers each and every allegation above as if set forth fully herein.

23. GulfMark claims damages from Bender on account of Defendant's breach of that certain "Shipbuilding Contract" executed on, or about July 31, 2007, a true and correct copy of which is attached hereto as Exhibit "A," as amended by "Change Order #7004" executed on, or about, October 13, 2008, a true and correct copy of which is attached hereto as Exhibit "B." GulfMark says that it gave written notice of default to Bender, on, or about, March 18, 2009, and that Defendant failed to timely cure the multiple defaults declared therein. GulfMark alleges that Bender is insolvent, and incapable of performing the Shipbuilding Contract according to its terms.<sup>1</sup>

24. GulfMark claims such actual, and direct damages incurred by Plaintiff on account of Bender's breach in the amount of not less than \$44,288,808.13, said amount being the aggregate of the sums advanced by GulfMark to Bender from July 31, 2007 upon execution of the "Shipbuilding Contract" to the declaration of default on, or about, March 18, 2009. GulfMark claims consequential damages from Bender including but not limited to lost profits, the cost of cover and related expenses. GulfMark further claims from Bender such actual attorney's fees, interest, costs and other damages as may be awarded.

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<sup>1</sup> GulfMark says this civil action is timely brought. The "Shipbuilding Contract" requires the parties to mediate for a single day prior to suit. GulfMark says the parties to the contract have negotiated extensively for multiple days in the aggregate since the declaration of default without success, thereby substantially complying with the mediation requirement.

WHEREFORE, GulfMark Offshore, Inc. demands judgment from Bender Shipbuilding & Repair, Inc. the sum of not less than \$44,288,808.13, plus such actual attorney's fees, interest, costs and other damages as may be awarded by the Court or by struck jury.

**COUNT II**

**ACCOUNTING - BENDER**

25. GulfMark realleges and reavers each and every allegation above as if set forth fully herein.

26. GulfMark alleges that in the performance of the "Shipbuilding Contract" dated July 31, 2007, as amended by "Change Order #7004," Plaintiff advanced sums to Bender of not less than \$44,288,808.13 between July 31, 2007 and the declaration of default by Plaintiff on, or about March 18, 2009, which default remains uncured. GulfMark says that the Vessels which were to be built with said funds are only partially constructed, and in fact physical construction of "Builder's Hull Number 8192" has not even commenced. GulfMark says that Defendant Bender has improperly used the contract proceeds for purposes other than the construction of Plaintiff's Vessels under the "Shipbuilding Contract" and Plaintiff cannot account for Bender's use of approximately \$25 million of the contract proceeds received by said Defendant.

27. GulfMark alleges that an accounting is required to determine how and where Plaintiff's contract proceeds have been used by Bender in the performance of the "Shipbuilding Contract," or the lack thereof by Bender. GulfMark further requests that the costs of such accounting be assessed against Defendant Bender.

WHEREFORE, the premises considered, GulfMark Offshore, Inc. demands judgment for an accounting from Bender Shipbuilding & Repair Co., Inc., plus assessment of the costs thereof against said Defendant, along with such other relief as may be deemed appropriate.

**COUNT III**

**DECLARATORY JUDGMENT - BENDER**

28. GulfMark realleges and reavers each and every allegation above as if set forth fully herein.

29. GulfMark seeks a declaratory judgment that certain equipment, materials and “Builder’s Hull Numbers 8184 and 8188” are the property of Plaintiff. GulfMark alleges that its actions in contracting with and making payment to Bender under the “Shipbuilding Contract” dated July 31, 2007, as amended by “Change Order #7004” dated October 13, 2008, were made in the ordinary course of business.

30. By virtue of the terms of Articles VII E and XIX of the “Shipbuilding Contract” (as previously recited above in Paragraph 17), and the terms of “Change Order #7004” (as previously recited above in Paragraph 18), GulfMark is the contractual owner of all of the goods, materials and equipment purchased by Bender in the performance of the “Shipbuilding Contract.”<sup>2</sup> GulfMark says that it is the holder of a special interest as the goods to be manufactured by Bender are unique and were specifically identified to the original contract between the parties, to-wit: “Builder’s Hull Numbers 8184, 8188 and 8192.” GulfMark alleges that Bender became insolvent not later than the execution of “Change Order #7004” and Plaintiff’s advance of \$8,000,744.00 pursuant to that change

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<sup>2</sup> This declaratory judgment solely seeks to determine the relative ownership interests of GulfMark and Bender.

order.

31. GulfMark alleges that, at the insistence of Plaintiff, Bender was required to maintain equipment and materials located on the job site at the shipyard in a segregated area for installation on the two partially completed hulls. GulfMark says that the following described items are either presently maintained in the segregated area, or are installed on Hulls 8184 and 8188:

Hull	Item	Qty	Description	Value
8184	Main engines	2 ea	MaK 6M25	\$1,739,048
	Main engines	1 shipset	Engine accessories	
	Generator sets	3 ea	Cummins QSK19	\$1,100,000
	Thruster engines	3 ea	Cummins QSK38	
	Bulk mud compressor	2 ea	Curtis	\$ 99,000
	Electrical Switchgear	1 shipset	Gulf Coast Power	\$ 350,420
8188	Main engines	2 ea	MaK 6M25	\$1,739,048
	Main engines	1 shipset	Engine accessories	

32. GulfMark seeks declaratory relief determining that the equipment and materials described in Paragraph 33, above, together with the partially constructed “Builder’s Hull Numbers 8184 and 8188,” materials and the steel on site which was acquired to construct Plaintiff’s Vessels are the property of Plaintiff as both a matter of law and contract between the parties.

WHEREFORE, the Plaintiff, GulfMark Offshore, Inc., demands the entry of a declaratory judgment against the Defendant, Bender Shipbuilding and Repair Co., Inc., determining that Plaintiff is the owner of the property described above, along with such other relief as may be deemed appropriate.

**COUNT IV****DETINUE - BENDER**

33. GulfMark realleges and reavers each and every allegation above as if set forth fully herein.

34. GulfMark claims a right to possession of “Builder’s Hull Numbers 8184 and 8188,” as more particularly described above and the following described equipment and materials:

Hull	Item	Qty	Description	Value
8184	Main engines	2 ea	MaK 6M25	\$1,739,048
	Main engines	1 shipset	Engine accessories	
	Generator sets	3 ea	Cummins QSK19	\$1,100,000
	Thruster engines	3 ea	Cummins QSK38	
	Bulk mud compressor	2 ea	Curtis	\$ 99,000
	Electrical Switchgear	1 shipset	Gulf Coast Power	\$ 350,420
8188	Main engines	2 ea	MaK 6M25	\$1,739,048
	Main engines	1 shipset	Engine accessories	

35. GulfMark says that pursuant to Articles VII E and XIX of the “Shipbuilding Contract,” and “Change Order #7004,” as more fully recited in Paragraphs 17 and 18 above, Plaintiff is the rightful owner of “Builder’s Hull Numbers 8184 and 8188,” and the steel on site which was acquired for the construction of Plaintiff’s Vessels, together with the equipment and materials described above. GulfMark alleges that Plaintiff gave Bender written notice of default on, or about March 18, 2009, that said defaults remained uncured after the expiration of ten (10) days and that the default continues to the present. GulfMark alleges that effective March 29, 2009, Bender’s continued possession of the property described herein became wrongful in light of Plaintiff’s superior ownership interests.

36. In addition to possession, GulfMark further claims damages for the continued wrongful detention of said property by Bender from March 29, 2009, to the present, damages for the reasonable loss of use thereof, and/or the alternative value thereof which is alleged to be not less than \$5,027,516.00 plus the reasonable value of the sections of Hulls 8184 and 8188 under construction and other materials on site, including but not limited to steel.

WHEREFORE, the Plaintiff, GulfMark Offshore, Inc., demands judgment from the Defendant, Bender Shipbuilding & Repair Co., Inc., for possession of the property described herein, together with damages for the wrongful detention of same, the reasonable use thereof and/or the alternate value of the property as may be determined by the Court or by struck jury, plus costs of Court.

#### **COUNT V**

#### **CONSTRUCTIVE TRUST - BENDER**

37. GulfMark realleges and reavers each and every allegation above as if set forth fully herein.

38. GulfMark says that, pursuant to Article XIX of the “Shipbuilding Contract,” Plaintiff has “a security interest in the Vessels to the extent of progress payments made by Buyer. . .” GulfMark further alleges that Plaintiff is the holder of “a security interest in the material purchased with the funding from previous milestone payments and in the material purchased with funding provided by this accelerated payment schedule,” under “Change Order #7004” executed on, or about October 13, 2008. GulfMark alleges that its rights as a secured creditor extend not only to actual materials procured by Bender, but also to the use of Plaintiff’s cash proceeds to the extent they can be traced. GulfMark alleges that it has advanced not less than \$44,288,808.13 to Bender in performance of

Plaintiff's obligations under the contracts between the parties, of which GulfMark is unable to account for approximately \$25 million of Bender's use of the cash proceeds.

39. GulfMark alleges that Bender's use of substantial portions of the milestone payments tendered by Plaintiff to Defendant were misapplied by either actual or constructive fraud, abuse of confidence or other questionable means such that a constructive trust should be imposed upon the assets of Bender for the benefit of GulfMark to the extent of Defendant's misuse or misappropriation of funds.

40. GulfMark seeks the recovery of such reasonable fees and costs may be appropriate.

WHEREFORE, the Plaintiff, GulfMark Offshore, Inc. demands judgment for the imposition of a constructive trust against the assets of the Defendant, Bender Shipbuilding & Repair Co., Inc., as may be deemed appropriate, plus an award of reasonable fees and costs.

#### **COUNT VI**

#### **SUPPRESSION - THOMAS B. BENDER, JR.**

41. GulfMark realleges and reavers each and every allegation above as if set forth fully herein.

42. GulfMark alleges that at all times material to this Complaint, Thomas B. Bender, Jr. was the President and served as a Director for Defendant Bender. In his role as a Director and as President, Thomas B. Bender, Jr. was armed with superior knowledge as to the financial condition of the company, its lack of liquidity, inability to pay debts as they became due, and other matters, which if brought to light by an auditor would be the basis for the issuance of a "going concern" opinion under Generally Accepted Audit Standards. In particular, Thomas B. Bender, Jr. knew not later than October 18, 2008, at the time he signed "Change Order #7004," that his company was

insolvent, and that notwithstanding the infusion of over \$8,000,000 to Bender by GulfMark, that there was no present ability to perform the “Shipbuilding Contract.”

43. GulfMark alleges that not later than October 13, 2008, Bender was in the “zone of insolvency.” At the time that “Change Order #7004” was executed, Thomas B. Bender, Jr. was under a duty to disclose material facts to GulfMark relating to the true financial condition of the company both because of the heightened duty owed to creditors by an insolvent company and because of the particular circumstances of the case. GulfMark alleges that Thomas B. Bender, Jr. suppressed those facts, which had they been known to GulfMark, would have caused Plaintiff to act differently. Instead, in reasonable reliance upon Thomas B. Bender, Jr., GulfMark executed “Change Order #7004,” made an initial advance of over \$8,000,000 and made subsequent advances pursuant to the milestones set forth in the agreement.

44. GulfMark alleges that Bender had no present ability to perform the “Shipbuilding Contract” as of the time “Change Order #7004” was executed. GulfMark alleges that Defendant, Thomas B. Bender, Jr., either had actual knowledge of the true state of affairs, or that was on notice of such material facts that a reasonable person could not conclude otherwise. GulfMark alleges that the failure to disclose material facts by Thomas B. Bender, Jr. to Plaintiff was either deliberate, or wanton or negligent and that GulfMark has suffered damages as a direct and proximate cause of the suppression of material facts by Thomas B. Bender, Jr.

45. Notwithstanding the knowledge that his company was insolvent and had no present ability to complete the “Shipbuilding Contract,” Thomas B. Bender, Jr. set about a course of events whereby GulfMark advanced tens of millions of dollars to Bender after the execution of “Change Order #7004” thereby extracting cash from Plaintiff where the company had no ability to perform

and thereby placing GulfMark's entire investment through the date of this Complaint of \$44,288,803.13 at risk of total loss. GulfMark claims compensatory damages from Defendant, Thomas B. Bender, Jr., of \$44,288,803.13, and such punitive damages as a struck jury may assess plus costs of Court.

WHEREFORE, the Plaintiff, GulfMark Offshore, Inc., demands judgment from the Defendant, Thomas B. Bender, Jr., in the amount of \$44,288,803.13 plus punitive damages and costs of Court as may be awarded by a struck jury.

### **COUNT VII**

#### **NEGLIGENT MISREPRESENTATION - THOMAS B. BENDER, JR.**

46. GulfMark realleges and reavers each and every allegation above as if set forth fully herein.

47. GulfMark alleges that at all times material to this Complaint, Thomas B. Bender, Jr. was President and served as a Director for Defendant Bender. In his role as a Director and as President, Thomas B. Bender, Jr. was charged with knowledge as to the financial condition of the company, its lack of liquidity, inability to pay debts as they became due, and other matters, which if brought to light by an auditor would be the basis for the issuance of a "going concern" opinion under Generally Accepted Audit Standards. GulfMark alleges that Thomas B. Bender, Jr. knew, or should have known not later than October 18, 2008, at the time he signed "Change Order #7004," that his company was insolvent, and notwithstanding the infusion of over \$8 million to Bender by GulfMark, that there was no present ability to perform the "Shipbuilding Contract."

48. GulfMark alleges that as of the time "Change Order #7004" was executed, Thomas B. Bender, Jr. represented that the company had a present ability to perform the "Shipbuilding

Contract.” GulfMark alleges that this fact was important to Plaintiff and was taken as true. GulfMark alleges that said representation by Thomas B. Bender, among others, was false, even if made by mistake or negligence. Nonetheless, GulfMark reasonably relied upon the statements of Thomas B. Bender, Jr. to its detriment, and was harmed. As a direct and proximate cause of the negligent misrepresentations of Thomas B. Bender, Jr. upon which Plaintiff reasonably relied, GulfMark has lost its entire investment through the date of this Complaint of \$44,288,803.13, together with such other compensatory damages as may be assessed.

WHEREFORE, the Plaintiff, GulfMark Offshore, Inc., demands judgment from the Defendant, Thomas B. Bender, Jr., in the amount of not less than \$44,288,803.13, plus costs of Court as may be awarded by a struck jury.

#### **COUNT VIII**

##### **BREACH OF FIDUCIARY DUTY - OFFICERS & DIRECTORS**

49. GulfMark realleges and reavers each and every allegation above as if set forth fully herein.

50. GulfMark alleges that as of October 13, 2008, and at all times material to this complaint, Defendant Thomas B. Bender, Jr. was the President of Bender; Defendant Joseph W. Mangin was the Chief Financial Officer of Bender; Defendant Bruce J. Croushore was the Secretary and Vice-President of Bender; Defendant Frank Terrell was the Vice-President of Bender and Defendant David Barnett was the Treasurer of Bender (hereinafter “Officer Defendants”). Further, Defendants Thomas B. Bender, Jr., Bruce J. Croushore and Frank Terrell were Directors of Bender at all times material to this Complaint (hereinafter “Director Defendants”) (hereinafter sometimes “D&O Defendants” as to both Officers and Directors collectively).

51. GulfMark alleges that the D&O Defendants, by virtue of their superior knowledge, as early as October 18, 2008, had actual knowledge, or were on notice of such material facts that a reasonable person could not conclude otherwise, that Bender could not timely perform the “Shipbuilding Contract” or the terms of “Change Order #7004.” By not later than the time “Change Order #7004” was executed and at all times subsequent thereto, Bender was insolvent in that the corporation was unable to pay its debts as they become due. At, or about the time that Thomas B. Bender, Jr. executed “Change Order #7004” with GulfMark and obtained an advance of \$8,000,744.00, Bender was in substantial default in the performance of its contract obligations for the construction of two tugboats and six Articulated Tug and Barges (“ATB”) for OSG America, L.P. That status of default was in existence in the 4<sup>th</sup> Quarter of 2008 and ultimately resulted in the termination of the contract between OSG America, L.P. and Bender in March 2009, whereupon OSG America, L.P. took possession of certain vessels and abandoned the construction of the ATB’s by Bender. GulfMark alleges that Bender had no present intent or ability to fully complete the “Shipbuilding Contract” as amended by “Change Order #7004,” as of the time the change order was executed on October 18, 2008, and over \$8 million was extracted from Gulfmark. GulfMark alleges that by October 13, 2008 and continuing to the present that Bender was in the “zone of insolvency.” The D&O Defendants have a heightened duty of care and loyalty not to the shareholders of the company, but rather to its creditors while the company is in the “zone of insolvency.” Notwithstanding the knowing, reckless or negligent suppression of material facts as to the dire financial condition of the corporation, Bender, acting by and through the Officer Defendants and Director Defendants, obtained substantial sums from GulfMark to the material detriment of Plaintiff. Had Plaintiff known the true financial condition of Bender, including the full blown nature of its existing default to OSG America, L.P., Plaintiff would not have acted to perform its payment

obligations under the contracts.

52. GulfMark alleges that the advance milestone payment procured by Bender from Plaintiff in the amount of \$8,000,744.00 was obtained by the corporation shortly following the execution of “Change Order #7004” while Bender was in the “zone of insolvency.” Those funds, along with the additional milestone payments, were procured from GulfMark by Bender through the actions of the Officer Defendants and Director Defendants at a time when the D&O Defendants owed a fiduciary duty to Plaintiff. The D&O Defendants acted with either actual or constructive knowledge that Bender was both insolvent and had no ability to perform the “Shipbuilding Contract” with GulfMark. The D&O Defendants facilitated and/or directed the wrongful use of the milestone payments made by GulfMark to other projects and uses to the direct detriment of Plaintiff.

53. GulfMark alleges that as a direct and proximate cause of the wrongful actions of the D&O Defendants with respect to the improper use of the milestone payments obtained from Plaintiff, the D&O Defendants breached their fiduciary duty to GulfMark such that Plaintiff has been damaged through the loss of its investment of \$44,288,803.13. GulfMark further alleges that the D&O Defendants are liable for such punitive damages as may be properly assessed on account of their breach of fiduciary duties to Plaintiff. Plaintiff further seeks costs of Court.

WHEREFORE, the Plaintiff, GulfMark Offshore, Inc. demands judgment against Defendant, Thomas B. Bender, Jr; Defendant, Joseph W. Mangin; Defendant, Bruce J. Croushore; Defendant, Frank Terrell and Defendant, David Barnett for compensatory damages of \$44,288,803.13 and such punitive damages as may be awarded by the Court or a struck jury, plus costs of Court.

**COUNT IX**

**UNJUST ENRICHMENT - BENDER**

54. GulfMark realleges and reavers each and every allegation above as if set forth fully herein.

55. GulfMark claims damages from the Defendant, Bender, in the amount of \$44,288,803.13 on account of the unjust enrichment received by said Defendant through the receipt of funds from GulfMark in performance of the "Shipbuilding Contract." Plaintiff further claims interest and costs of Court.

WHEREFORE, the Plaintiff, GulfMark Offshore, Inc., demands judgment against the Defendant, Bendership Building & Repair Company, Inc., in the amount of \$44,288,803.13, plus interest and costs of Court.

/s/ Eric J. Breithaupt  
Eric J. Breithaupt

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**JURY DEMAND**

Plaintiff demands trial by struck jury on all matters triable by jury.

/s/ Eric J. Breithaupt  
Eric J. Breithaupt

Please serve Defendants by Private Process Server, Scott Hawk:

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