



1 **FOR PLAINTIFFS-**  
2 **APPELLEES:**

3 Anthony J. Pruzinsky, Hill  
4 Rivkins & Hayden, New York, New  
5 York.

6 **FOR APPELLEE/  
7 CROSS-APPELLANT:**

8 John P. Vayda (Shaun F. Carroll  
9 and Julia M. Moore, on the  
10 brief), Nourse & Bowles, LLP,  
11 New York, New York.

12 Appeal from judgments of the United States District  
13 Court for the Southern District of New York (Chin, J.).

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15 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**  
16 **AND DECREED** that the judgment of the district court be  
17 **AFFIRMED.**

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19 Defendant-Appellant/Cross-Appellee PPG Industries, Inc.  
20 ("PPG") appeals from a judgment of the United States  
21 District Court for the Southern District of New York (Chin,  
22 J.), which, on remand from this Court, found that PPG's  
23 failure to give the carrier proper instructions concerning  
24 the stowage of PPG's cargo, calcium hypochlorite (hydrated)  
25 ("cal-hypo"), caused the explosion on the M/V DG Harmony  
26 ("Harmony"). Appellee/Cross-Appellant Cho Yang Shipping  
27 Co., Ltd. ("Cho Yang") appeals from the denial of its motion  
28 for summary judgment seeking indemnity from PPG. Many of  
29 the relevant facts are set forth in this Court's prior  
30 opinion, In re M/V DG Harmony, 533 F.3d 83 (2d Cir. 2008)  
31 ("Harmony V"), as well as the six decisions issued by the  
32 district court: In re M/V DG Harmony, 394 F. Supp. 2d 649  
33 (S.D.N.Y. 2005) ("Harmony I"); In re M/V DG Harmony, 436 F.  
34 Supp. 2d 660 (S.D.N.Y. 2006) ("Harmony II"); In re M/V DG  
35 Harmony, No. 98 Civ. 8394(DC), 2006 WL 3821851 (S.D.N.Y.  
36 Dec. 29, 2006) ("Harmony III"); In re M/V DG Harmony, No. 98  
37 Civ. 8394(DC), 2007 WL 895251 (S.D.N.Y. Mar. 16, 2007)  
38 ("Harmony IV"); In re M/V DG Harmony, No. 98 Civ. 8394(DC),  
39 2009 WL 3170301 (S.D.N.Y. Sept. 30, 2009) ("Harmony VI");  
40 and In re M/V DG Harmony, No. 98 Civ. 8394(DC), 2009 WL  
41 3241238 (S.D.N.Y. Sept. 30, 2009) ("Harmony VII"). We  
42 repeat the facts insofar as we think it necessary to set out  
43 our resolution of this appeal.  
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1     **A.   PPG's Appeal: 09-4552-cv**  
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3           We review a district court's factual findings for clear  
4 error. See Harmony, 533 F.3d at 95; Ching Sheng Fishery  
5 Co., Ltd. v. United States, 124 F.3d 152, 157-58 (2d Cir.  
6 1997) ("A district court's finding on issues of causation  
7 and on its allocation of fault among negligent parties  
8 continues to be subject only to clearly erroneous review,  
9 and so long as the district court's factual findings are  
10 supported by the record, we will not overturn them.")  
11 (internal citations omitted). "If the district court's  
12 account of the evidence is plausible in light of the record  
13 viewed in its entirety, the court of appeals may not reverse  
14 it even though convinced that had it been sitting as the  
15 trier of fact, it would have weighed the evidence  
16 differently." Anderson v. City of Bessemer City, N.C., 470  
17 U.S. 564, 573-74 (1985). "This is so even when the district  
18 court's findings do not rest on credibility determinations,  
19 but are based instead on physical or documentary evidence or  
20 inferences from other facts." Id. at 574.  
21

22           Our prior opinion remanded to the district court to  
23 determine "whether a warning, if given, would have prevented  
24 [the explosion] by changing the carrier's stowage decision."  
25 Harmony V, 533 F.3d at 96. On remand, the parties  
26 "submitted additional papers and arguments." Harmony VI,  
27 2009 WL 3170301, at \*1. Relying on the testimony of those  
28 charged with booking PPG's shipment of cal-hypo and the  
29 ship's personnel, the district court concluded that if PPG  
30 had given special instructions concerning the hazardous  
31 nature of the cal-hypo, "the carrier would have changed its  
32 stowage decision, and the explosion would have been  
33 averted." Id. at \*6. PPG repeatedly cites testimony by  
34 Captain Michael Balitzki and Dimitri Afonin, the ship's  
35 stowage planner, who both testified that they relied on the  
36 International Maritime Dangerous Goods Code ("IMDG Code") in  
37 making stowage decisions, and that the IMDG Code did not  
38 prohibit the below-deck stowage of cal-hypo. This does not  
39 establish clear error, however, because the evidence also  
40 showed that PPG packaged the cal-hypo in such a way that  
41 caused a lower critical ambient temperature; a specific  
42 warning by PPG was therefore necessary to alert the shipper  
43 that standard IMDG protocols should not have been followed.  
44 In any event, we cannot overturn a district court's factual  
45 determination even if we would have weighed the evidence  
46 differently. See Zervos v. Verizon N.Y., Inc., 252 F.3d  
47 163, 168 (2d Cir. 2001). Here, the district court based its

1 factual finding on evidence showing that had PPG given a  
2 proper warning that the cal-hypo should not have been stored  
3 below-deck, the shipper would have heeded that warning, and  
4 the explosion would have been avoided. We do not find the  
5 district court's factual determination to be clearly  
6 erroneous and thus affirm the judgment.  
7

8 **B. Cho Yang's Appeal: 09-4622-cv**  
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10 "We review de novo the grant or denial of summary  
11 judgment and view the evidence in the light most favorable  
12 to the non-moving party." Tasini v. N.Y. Times Co., Inc.,  
13 206 F.3d 161, 165 (2d Cir. 2000).  
14

15 Prior to the bench trial which resulted in the district  
16 court's liability finding in Harmony I, Cho Yang settled all  
17 claims brought against it by various cargo interests.  
18 Following Harmony I, Cho Yang moved for summary judgment  
19 against PPG seeking indemnity for settlement sums,  
20 attorneys' fees and defense costs. In Harmony II, the  
21 district court denied Cho Yang's motion and held that the  
22 indemnity provisions in the bill of lading between PPG and  
23 Cho Yang did not "trump the rules set forth by the Supreme  
24 Court in [McDermott, Inc. v. AmClyde, 511 U.S. 202 (1994)]."  
25 436 F. Supp. 2d at 670. The district court found that the  
26 "bill of lading [between Cho Yang and PPG] mirrored the law,  
27 as interpreted by the Supreme Court in AmClyde." Id. Cho  
28 Yang timely appealed, and this Court placed the appeal on  
29 suspense pending the resolution of PPG's appeal of Harmony  
30 I.  
31

32 Subsequently, Cho Yang moved for clarification of the  
33 district court's decision in Harmony II (which found PPG  
34 100% at fault) and sought an explicit finding that Cho Yang  
35 was 0% at fault for the explosion, which the district court  
36 MADE in Harmony IV. 2007 WL 895251, at \*2. On February 22,  
37 2009, the district court entered an order accepting remand  
38 of Cho Yang's appeal from Harmony II for reconsideration of  
39 all issues raised therein in light of the court's subsequent  
40 orders. Cho Yang resubmitted its summary judgment motion  
41 arguing that: (1) because the district court observed in  
42 Harmony II that Cho Yang would be entitled to indemnity for  
43 any amounts it paid above its liability or responsibility,  
44 and (2) because the district court found Cho Yang to be 0%  
45 at fault in Harmony IV, Cho Yang should be entitled to  
46 indemnity from PPG for the amounts paid in settlement.  
47 Nevertheless, in Harmony VII, the district court denied Cho

1 Yang's summary judgment motion seeking indemnity, on the  
2 ground that by settling with plaintiffs and by not pursuing  
3 its indemnity claims at trial, Cho Yang forfeited its  
4 indemnity claim. 2009 WL 3241238, at \*\*4-6. Cho Yang  
5 timely appealed.  
6

7 We conclude that Cho Yang waived its indemnity claim by  
8 not participating in the trial. See Broadway Delivery Corp.  
9 v. United Parcel Serv. of Am., Inc., 651 F.2d 122, 126 (2d  
10 Cir. 1981) (finding antitrust claim to have been abandoned  
11 because plaintiffs "failed to pursue it at trial");  
12 Complaint of Berkley Curtis Bay Co., 557 F. Supp. 335, 337  
13 (S.D.N.Y. 1983) (finding that indemnity claim was not  
14 preserved below and therefore the waiver of the claim would  
15 not lead to a "miscarriage of justice").  
16

17 Cho Yang did not pursue its indemnification claim at  
18 trial. As Cho Yang's counsel made clear at oral argument,  
19 Cho Yang withdrew from trial because it had settled its  
20 claims and "desperately wanted to cap its exposure, and more  
21 importantly, to cut off its attorneys' fees." As the  
22 district court observed, Cho Yang "made what . . . turned  
23 out to be an unwise settlement: they paid monies to settle  
24 claims that they were negligent, and now [that] they have  
25 been found not to have been negligent at all," they are  
26 looking for reimbursement. Harmony VII, 2009 WL 3241238, at  
27 \*7. We agree. Accordingly, we affirm the district court's  
28 judgment denying Cho Yang's motion for summary judgment on  
29 the ground that Cho Yang waived its claim for  
30 indemnification by failing to pursue the claim at trial.  
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32 Finding no merit in PPG's or Cho Yang's remaining  
33 arguments, we hereby **AFFIRM** the district court's judgments.  
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36 FOR THE COURT:  
37 CATHERINE O'HAGAN WOLFE, CLERK  
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