No. 08-214

In The Supreme Court of the United States

ATLANTIC SOUNDING CO., INC.
and WEEKS MARINE, INC.,

Petitioners,

vs.

EDGAR L. TOWNSEND,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF *AMICUS CURIAE* CRUISE LINES INTERNATIONAL ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Cruise Lines International Association ("CLIA"), based in Fort Lauderdale, Florida with a satellite office in Washington D.C., is the world's largest cruise line non-profit trade association. CLIA's 24 cruise line members represent 97 percent of the cruise capacity operating in North America. CLIA's Executive Partners include over 80 strategic business allies, providing a wide array of services to the cruise industry. In addition, CLIA has nearly 16,000 travel agent professionals as members. CLIA's member lines operate over 150 ships, the largest of which carries over 1,200 crewmembers. In fact, the cruise industry is the largest employer of maritime workers of any industry operating in the U.S. CLIA's members in 2007 collectively employed over 140,000 crewmembers, a number that continues to grow each year.

Accordingly, CLIA is uniquely situated to request that this Court clarify the present confusion in the circuit courts over the availability of punitive damages upon a showing of willful failure to pay maintenance and cure and reaffirm the limitation on

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[1] *Amicus Curiae* informed counsel of record for all parties of its intention to file this brief more than 10 days prior to the date it became due. Pursuant to Rule 37.3(a), the parties' letters of consent for the filing of this brief have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, *Amicus Curiae* certifies that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amicus Curiae*, its members or its counsel has made a monetary contribution to this brief, preparation, or submission.

damage recovery for an alleged willful failure to pay maintenance and cure to the crewmember's attorneys' fees incurred, as was originally intended by the Supreme Court in *Vaughan v. Atkinson*, 369 U.S. 527 (1962).

CLIA exists, in part, to promote all measures that foster a safe, secure, and healthy cruise experience for both passengers and crew. Ensuring the health and safety of crewmembers is of utmost importance because vessel operations are dependent on the valuable services provided by many skilled employees recruited worldwide. When crewmembers are injured or become ill while in service, CLIA's cruise line members are committed to promptly providing any and all benefits dictated by the circumstances, the relevant contractual obligations (such as those contained in collective bargaining agreements), and applicable law.

Despite the cruise lines' best efforts at promoting the health and safety of its crewmembers, injuries, illnesses, and disabilities are unfortunately inevitable. The approximately 140,000 crewmembers employed by CLIA's cruise line members hail from all over the world[2] and are employed in countless capacities, from entertainers to engine room oilers. The diversity of the workforce alone presents myriad circumstances in which potential payment of maintenance and cure, or

[2] Over 90% of the crewmembers employed by CLIA's member lines are foreign seamen.

some other form of benefits or remuneration dictated by foreign law, is triggered.

Many of the situations involve foreign crew with union contracts or government-mandated systems to which all shipowners hiring crew from those nations must adhere. Their prescribed remedies are often different than maintenance (a daily living allowance), cure (payment of "curative" medical bills), and unearned wages applicable under U.S. law. In some nations, such as the United Kingdom, there is no such concept as maintenance or cure; it is the norm in many nations to provide socialized medical benefits and wages for a specified period during the incapacity.[3] Other countries have a system of "sick wages" which continues the contractual wages while the crewman is recuperating, up to a maximum period.[4]

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[3] The U.K.'s Merchant Shipping Act 1995, Part III. Section 45 provides that a shipowner must pay the domestic and foreign medical expenses of a seaman for necessary treatment "which cannot be postponed without impairing efficiency." There is no separate maintenance requirement. Italy's "Cassa Maritima" similarly provides a no-fault death and injury cover in respect of Italian crew where the crewmember has been repatriated to Italy.

[4] For example, the employment of Filipino seamen working aboard ocean-going vessels is governed by the Philippine Overseas Employment Administration ("POEA") Standard Employment Contract which sets forth minimum terms and conditions. Under the POEA contract, a seaman is entitled to medical care until the seaman recovers, is found fit for shipboard duty, or is found to be disabled (triggering disability compensation); the seaman is also entitled to "sick wages" for

(Continued on following page)

An employer's analysis of what benefits to pay each crewman in the cruise industry is complicated not only by these choice of law issues, but also by the potential defenses reasonably available to the employer under the U.S. maintenance and cure scheme of benefits. For example, maintenance and cure are forfeited if the medical need arose from willful misconduct.[5] These benefits can also be waived if a prior material medical fact was undisclosed or misrepresented during a required pre-sign on or periodic medical fitness exam.[6]

Exposing maritime employers such as cruise lines to punitive damages for making mistakes in choosing foreign over domestic benefits schemes, or for applying the domestic scheme improperly, both frustrates the otherwise orderly administration of benefits for a huge multi-national work force, and chills the employer's implementation of otherwise

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120 days from the day the seaman either signs off the vessel due to illness or injury or is found disabled. (POEA Sections 20.B.1. and 3.)

[5] Maintenance and cure may not be owed in the case of willful misconduct such as "gross inebriation" (*Aguilar v. Standard Oil Co.*, 318 U.S. 724 (1942)); fighting where the plaintiff was the aggressor (*Gulledge v. United States*, 337 F.Supp. 1108 (E.D.Pa. 1972), *aff'd*, 474 F.2d 1340 (3d Cir. 1973)); self-inflicted injuries (*Discovery Sun Partnership, Ltd. v. Kapsomenakis*, 2000 AMC 2402 (S.D. Fla. 2000)); and venereal disease (*Ressler v. State Marine Lines, Inc.,* 517 F.2d 579 (2d Cir. 1975), *cert. denied*, 423 U.S. 894 (1975)).

[6] *See*, *e.g., Brown v. Parker Drilling Offshore Corp.*, 410 F.3d 166, *cert. denied*, 127 S.Ct. 382 (2006).

legitimate defenses. In addition, the disparity between the remedies afforded in most countries for routine situations involving work benefits, and those afforded in the U.S. were punitive damages allowed, would likely lead to a flood of litigation in the United States by foreign crewmembers shopping for a more generous recovery than available in any other country, especially as many foreign nations do not permit recovery of punitive damages or even enforce U.S. awards.[7]

The cruise industry substantially benefits the U.S. economy.[8] A uniform and predictable rule that punitive damages are not available for a failure to pay maintenance and cure, will allow employers to understand their liabilities under U.S. law, assess with some degree of reliability the consequences of their often-difficult benefits determinations, reduce unnecessary litigation, and enable them to continue to offer affordable and diverse vacation choices for the

[7] *See, e.g.*, 2 L. Schlueter, Punitive Damages §§ 22.2(A)-(C), (E) (5th ed. 2005); Gotanda, Charting Developments Concerning Punitive Damages: Is the Tide Changing? 45 Colum. J. Transnat'l L. 507, 514, 518, 528 (2007).

[8] A 2007 annual Business Research Economic Advisors ("BREA") study found that the total economic benefit of the cruise industry in the United States is $38 billion and that cruise industry activity generated $15.4 billion in wages and 354,000 jobs for U.S. employees alone.

increasing number of passengers,[9] thereby benefitting both the U.S. job market and economy.

SUMMARY OF ARGUMENT

In 1962, the U.S. Supreme Court decided *Vaughan v. Atkinson*, 369 U.S. 527 (1962). The majority in *Vaughan* held a seaman was entitled to his attorneys' fees for bringing suit to recover maintenance (daily stipend) and cure (medical expenses) which were callously, recalcitrantly, willfully, and persistently denied by the shipowner. *Id.* Forty-five years later, the Eleventh Circuit decided in *Atlantic Sounding Co., Inc., et al. v. Townsend*, 496 F.3d 1282 (11th Cir. 2007) that punitive damages, in addition to attorneys' fees, can be sought by seamen who allege a willful and/or arbitrary failure of the shipowner to pay these U.S.-fashioned remedies. *Townsend*, and the intervening decisions it relied upon, have distorted the majority's holding in *Vaughan* as creating a punitive damage remedy for failure to pay

[9] Over the past 10 years, the industry has responded to extensive market and consumer research that has guided the addition of new destinations, new ship design concepts, new onboard/on-shore activities, new themes and new cruise lengths to reflect the changing vacation patterns of today's market. Over the next three years, nearly 51 million North Americans (from the U.S. and Canada) indicate an interest to cruise with 33.7 million stating a strong intent to act on that interest. By maintaining historical occupancy levels, the cruise industry will welcome 12.8 million guests in 2008.

maintenance and cure. The majority opinion in *Vaughan* never mentioned the words "punitive" or "exemplary" for good reason – the award of attorneys' fees was intended to compensate the plaintiff, not to deter or punish the defendant. Additionally, the language selected by *Vaughan*'s majority to describe the conduct required to impose an award of attorneys' fees (*i.e.*, "callous," "recalcitrant," "willful and persistent") is not indicative of an intention to award punitive damages which are generally reserved for extreme cases of malicious and oppressive conduct.

Moreover, attorneys' fees are, by their very nature, compensatory. It is therefore no surprise that subsequent Supreme Court cases discussing *Vaughan* have interpreted its award of attorneys' fees as a compensatory remedy. Courts throughout the U.S. also generally hold that attorneys' fees are compensatory by nature, not punitive. As a matter of practical application, an award of attorneys' fees is substantively and procedurally very different from an award of punitive damages. For example, a finder of fact in awarding punitive damages typically takes into consideration factors such as the reprehensibility of the defendant's conduct and the defendant's financial worth in assessing an appropriate punitive damage award. On the contrary, an award of attorneys' fees is based only on the reasonable hours worked by the attorney for the crewmember at that attorney's reasonable rate. The assessment of attorneys' fees to the crewmember is blind to the conduct and financial

worth of the defendant. Attorneys' fees and punitive damages are the proverbial "apples" and "oranges."

Nevertheless, lower courts have relied on language in *Vaughan*'s dissent, which improperly characterized the majority's award of counsel fees as "exemplary," as creating a punitive damage remedy.[10] These same courts have simultaneously diluted the standard of conduct necessary to justify such an award to a mere "arbitrary" failure to pay maintenance and cure. This has resulted in a complete distortion of *Vaughan* whereby some courts are now affording a punitive remedy never intended by *Vaughan* for conduct even less odious than that required by *Vaughan*. This Court now has an opportunity to reaffirm the original intent of *Vaughan*, which was to compensate seamen with a non-punitive award of attorneys' fees where appropriate.

Furthermore, permitting punitive damages in the maintenance and cure context will undoubtedly result

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[10] Justice Stewart, with Justice Harlan joining, stated: " . . . [I]f the shipowner's refusal to pay maintenance stemmed from a wanton and intentional disregard of the legal rights of the seaman, the latter would be entitled to exemplary damages in accord with traditional concepts of the law of damages. . . . While the amount so awarded would be in the discretion of the fact finder, and would not necessarily be measured by the amount of counsel fees, indirect compensation for such expenditures might thus be made. [Internal citations omitted.]" 369 U.S. at 540. Notably, the dissent used the language "wanton and intentional" to describe the level of conduct necessary to impose punitive damages; this is not the language used by the majority.

in transoceanic forum shopping, given the obvious worldwide predominance of foreign seamen over U.S. seamen.[11] The specter of a punitive damage award encourages foreign crewmembers to bring suit in the United States, even when the U.S. has no real connection to or interest in the parties or issues involved. Given the general unavailability of punitive damages in foreign countries from which a large number of cruise line employees hail,[12] the *Townsend* decision shows no concern about making U.S. courts the "courthouse of the world."

Finally, awarding punitive damages for a willful failure to pay maintenance and cure has a negative, chilling effect on the assertion by maritime employers of valid defenses to maintenance and cure claims such as the crewmember's willful misconduct or failure to disclose a pre-existing condition.[13] With the threat of a punitive damage award looming over a maritime employer for a mere "willful" failure to pay maintenance and cure, many an inappropriate claim will be paid because the very assertion of a defense will provide the "willfulness" upon which a

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[11] According to a 2006 study by the Maritime Administration ("MARAD") (an agency within the Department of Transportation), the number of U.S. water transportation workers employed in all capacities is approximately 60,000. The number of foreign seamen working aboard CLIA's cruise lines' vessels is more than double the number of all U.S. seamen combined. *See* MARAD Policy Paper, www.marad.dot.gov/documents/CabotageLaws.pdf.

[12] *See* footnote 7, *supra*.

[13] *See* footnotes 5 and 6, *supra*.

crewmember will seek to base a punitive damage award. In an effort to avoid the risk of punitive damages, maritime employers will instead pay maintenance and cure claims which might otherwise be unjust and appropriately denied, thus unnecessarily increasing the cost of doing business – a cost which will ultimately be passed along to consumers. For all of these reasons, the Eleventh Circuit's decision in *Townsend* should be reversed.

ARGUMENT

I. THE AWARD OF ATTORNEYS' FEES FOR A WILLFUL FAILURE TO PAY MAINTENANCE AND CURE IN *VAUGHAN V. ATKINSON* DOES NOT GIVE RISE TO AN AWARD OF PUNITIVE DAMAGES.

The genesis of the issue in this case – whether or not punitive damages are awardable against a shipowner for a willful failure to pay maintenance and cure – can be traced back to the U.S. Supreme Court decision of *Vaughan v. Atkinson,* 369 U.S. 527 (1962). In *Vaughan*, the majority awarded attorneys' fees to a seaman upon a showing that his maintenance and cure were callously, recalcitrantly, willfully, and persistently denied by the shipowner. *Id.* at 530-531. In deciding the present matter of *Townsend*, the Eleventh Circuit, citing its earlier decision in *Hines v. J.A. La Porte, Inc.*, 820 F.2d 1187 (11th Cir. 1987), stated "that it was unclear whether the *Vaughan* majority regarded attorney's fees as an item of

compensatory damages or as a punitive measure." *Townsend*, *supra*, 496 F.3d at 1285, footnote 2. Other federal circuit courts have professed similar confusion. Some courts have held that *Vaughan*'s award of attorneys' fees was compensatory in nature. *Glynn v. Roy Al Boat Management Corp.*, 57 F.3d 1495 (9th Cir. 1995), *cert. denied*, 516 U.S. 1046 (1996); *Guevara v. Maritime Overseas Corp.,* 34 F.3d 1279, 1283 (5th Cir. 1994)*, rev'd in part on reh'g,* 59 F.3d 1496 (1995), *cert. denied,* 516 U.S. 1046 (1996). Some courts have held that *Vaughan* permits recovery of *attorneys' fees only* as an item of punitive damages. *See*, *e.g.*, *Kraljic v. Berman Enter.*, 575 F.2d 412, 415 (2d Cir. 1978). Other courts, like *Townsend*, have held that punitive damages *in addition to attorneys' fees* are available in cases of willful failure to pay maintenance and cure. *See*, *e.g.*, *Robinson v. Pocahontas, Inc.*, 477 F.2d 1048 (1st Cir. 1973).

Despite the various interpretations of *Vaughan*, its holding is not unclear. A review of the majority opinion in *Vaughan,* in addition to a general examination and comparison of punitive damages and attorneys' fees, leads to one conclusion – *Vaughan* awarded attorneys' fees to compensate the plaintiff seaman and did not intend to create a punitive damage remedy. Accordingly, the *Townsend* matter now gives this Court the opportunity to "right the ship" and reestablish a consistent application of *Vaughan*'s holding that the measure of damages for a callous, recalcitrant, willful, and persistent failure to pay maintenance and cure is compensatory attorneys' fees.

A. PUNITIVE DAMAGES ARE NOT COMPENSATORY IN NATURE; THEY ARE DESIGNED TO DETER AND PUNISH.

An examination of the purpose of punitive damages is essential at the outset. Fortunately, this Court recently undertook this examination in *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605, 171 L.Ed.2d 570 (2008). In *Baker*, this Court reviewed case law and jury instructions from various U.S. jurisdictions[14] and concluded that the purpose of punitive damages is not

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[14] In particular, this Court cited: "Cal. Jury Instr., Civil, No. 14.72.2 (2008) ("You must now determine whether you should award punitive damages against defendant[s] . . . for the sake of example and by way of punishment"); N. Y. Pattern Jury Instr., Civil, No. 2:278 (2007) ("The purpose of punitive damages is not to compensate the plaintiff but to punish the defendant . . . and thereby to discourage the defendant . . . from acting in a similar way in the future")" and "*Moskovitz v. Mount Sinai Medical Center*, 69 Ohio St. 3d 638, 651, 1994 Ohio 324, 635 N.E.2d 331, 343 (1994) ("The purpose of punitive damages is not to compensate a plaintiff, but to punish and deter certain conduct"); *Hamilton Development Co. v. Broad Rock Club, Inc.*, 248 Va. 40, 45, 445 S. E. 2d 140, 143, 10 Va. Law Rep. 1449 (1994) (same); *Loitz v. Remington Arms Co.*, 138 Ill. 2d 404, 414, 563 N.E.2d 397, 401, 150 Ill. Dec. 510 (1990) (same); *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 222 (Ala. 1989) (same); *Masaki v. General Motors Corp.*, 71 Haw. 1, 6, 780 P.2d 566, 570 (1989) (same); *see also Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001) (punitive damages are "intended to punish the defendant and to deter future wrongdoing"); *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 416, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003) ("[P]unitive damages . . . are aimed at deterrence and retribution"); 4 Restatement § 908, Comment a." 128 S.Ct. at 2621 and footnote 9.

to compensate the plaintiff, but to deter future misconduct and punish the defendant. This Court stated:

> Regardless of the alternative rationales over the years, ***the consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct***. [Footnote omitted.] This consensus informs the doctrine in most modern American jurisdictions, where juries are customarily instructed on twin goals of punitive awards. [Emphasis added.] 128 S.Ct. at 2621.

Accepting this consensus rationale for awarding punitive damages, the analysis turns to the language of *Vaughan* to determine whether the majority intended to compensate the plaintiff or punish and deter the defendant.

B. THE MAJORITY IN *VAUGHAN* INTENDED ATTORNEYS' FEES TO COMPENSATE THE PLAINTIFF, NOT TO DETER OR PUNISH THE DEFENDANT.

1. The *Vaughan* Majority Opinion Clearly Expressed Its Intent to Compensate the Plaintiff.

In *Vaughan*, a seaman was discharged from service aboard a vessel upon the end of a voyage; shortly thereafter, he was diagnosed with tuberculosis at a shoreside hospital. 369 U.S. at 528. The seaman sought maintenance and cure benefits from

the shipowner for the period he was in treatment and recuperating. *Id.* The shipowner denied the seaman's claim for maintenance and cure after its investigation which was limited to interrogation of the ship's Master and Chief Engineer, who both stated the seaman never complained of any illness during his service aboard the vessel. *Id.*

The majority in *Vaughan* found that the shipowner's failure to pay maintenance and cure was "callous," "recalcitrant," "willful and persistent." *Id.* at 530-531. The Court then awarded the seaman his attorneys' fees for bringing suit to recover his maintenance and cure benefits. However, it is evident from the majority's opinion that attorneys' fees were designed to *compensate* the plaintiff seaman, not deter or punish the defendant shipowner. The Court held, "As a result of [the shipowner's] recalcitrance, [the seaman] was forced to hire a lawyer and go to court to get what was plainly owed him under laws that are centuries old. . . . It is difficult to imagine a clearer case of damages suffered for failure to pay maintenance than this one." *Id.* The Court's reasoning centered on making whole (*i.e.*, compensating) the seaman for being forced into hiring an attorney to recover benefits owed to him. The attorneys' fees were awarded as compensation for "damages suffered" by the seaman, not to deter or punish the shipowner.

Nowhere does the *Vaughan* majority mention "punitive" or "exemplary" damages in its opinion. Moreover, the cases cited by *Vaughan* for the proposition that a crewmember is entitled to attorneys' fees

are not punitive damages cases. In particular, *Vaughan* relied upon the decision in *Cortes v. Baltimore Insular Line, Inc.,* 287 U.S. 367, 371 (1932) wherein this Court held: "If the failure to give maintenance or cure has caused or aggravated an illness, the seaman has his right of action for the injury thus done to him, the recovery in such circumstances including not only ***necessary expenses***, but also compensation for the hurt. [Emphasis added.]" The *Vaughan* majority awarded attorneys' fees as part of the "necessary expenses" incurred by the seaman, not as an item of punitive damages.

2. The Language Used by the *Vaughan* Majority to Describe Conduct Warranting Imposition of Attorneys' Fees Is Not Indicative of Punitive Damages.

Additionally, the majority's language of "callous," "recalcitrant," "willful and persistent" is not indicative of an intention to award punitive damages. As recently recognized by this Court in its *Baker* decision:

> The prevailing rule in American courts also limits punitive damages to cases of . . . "enormity," where a defendant's conduct is "outrageous," 4 Restatement § 908(2), owing to "gross negligence," "willful, wanton, and reckless indifference for the rights of others," or behavior even more deplorable, 1 Schlueter § 9.3(A). 10 [Citation]

In *Vaughan*, it is to be assumed the majority carefully selected the words "callous," "recalcitrant," "willful and persistent" to define the type of conduct necessary to award attorneys' fees. However, these words fall short of describing the odious behavior punitive damages are designed to deter and punish.

Merriam-Webster pertinently defines the adjective "callous" as "a: feeling no emotion; b: feeling or showing no sympathy for others"; "Recalcitrant" is defined as "1: obstinately defiant of authority or restraint; 2 a: difficult to manage or operate; b: not responsive to treatment; c: resistant"; "Willful" is defined as "done deliberately; intentional"; and "persistent" is defined as "continuing or inclined to persist in a course." None of these words smack of the "enormity" or "outrageousness" required to support an award of punitive damages. Punitive damages are typically awarded upon a showing of "malicious," "outrageous," "wanton," "oppressive," or "fraudulent" behavior[15] over and above a mere lack of sympathy or recalcitrance. Even the dissent in *Vaughan* stated that exemplary damages are awardable for "a *wanton and intentional* disregard of the legal rights of the seaman. [Emphasis added.]" 369 U.S. at 540. Notably, the majority did not use this phrasing.

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[15] *See*, *e.g.*, *BMW of N. Am. v. Gore,* 517 U.S. 559, 588-589 (1996) for its discussion of the Alabama punitive damages statute which requires "oppression, fraud, wantonness, or malice."

Punitive damage statutes are designed to deter and punish actors for behavior that has, at a minimum, some degree of subjective intent to injure another. The *Vaughan* majority chose not to use any of the traditional words associated with punitive damage statutes. The logical conclusion is that *Vaughan* did not intend the award of attorneys' fees to serve as a punitive measure.

C. ATTORNEYS' FEES ARE NOT PUNITIVE DAMAGES.

The Supreme Court itself subsequently interpreted *Vaughan*'s award of attorneys' fees as compensatory. In *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967),[16] the Court cited *Vaughan* for the proposition that "an admiralty plaintiff may be awarded counsel fees ***as an item of compensatory damages*** (not as a separate cost to be taxed). [Emphasis added.]" As noted by petitioners in their Brief on the Merits, this Court has cited *Vaughan* at least six other times for the proposition that it stands for nothing more than an exception to the "American rule" that parties are to bear their own attorneys' fees.[17] The Fifth Circuit also correctly

[16] Superseded by statute on other grounds; *see Decorations for Generations, Inc. v. Home Depot USA, Inc.*, 2003 U.S. Dist. LEXIS 26608 (E.D.Cal. Sept. 19, 2003).

[17] *See Summit Valley Indus., Inc. v. Local 112*, 456 U.S. 717, 721 (1982); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980); *Runyon v. McCrary*, 427 U.S. 160, 183 (1976); *Alyeska*

(Continued on following page)

concluded that *Vaughan*'s award of attorneys' fees was clearly compensatory and non-punitive. The Fifth Circuit in *Guevara, supra*, held:

> The Vaughan award was clearly not a punitive damages award in the tort sense of punishing the underlying conduct that gave rise to the litigation, and the developing case law does not support such a position.
>
> Simply put, all we can confidently say about Vaughan is that it entitles an injured seaman to recover attorney's fees – perhaps as part of compensatory damages – when his employer willfully fails to pay maintenance and cure. We cannot definitively conclude, however, that Vaughan establishes any broader principle to support Holmes's rule that tort-like punitive damages, not limited to attorney's fees, are available in cases of willful nonpayment of maintenance and cure.

59 F.3d at 1503.

The circuits which have interpreted *Vaughan* as permitting punitive damages focus on the majority's discussion of the defendant's conduct as somehow justifying an award of punitive damages. In *Kraljic v. Berman Enter.*, *supra*, 575 F.2d at 415, the Second Circuit recognized that *Vaughan*'s award of attorneys' fees appeared to be compensatory as a "necessary

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Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258 (1975); *F.D. Rich Co. v. United States*, 417 U.S. 116, 129 (1974); *Hall v. Cole*, 412 U.S. 1, 5 (1973).

expense," but found it "difficult to understand the Court's emphasis on the malice of the shipowner"[18] and ultimately concluded that the award of attorneys' fees must therefore have been punitive in nature. However, the *Vaughan* court's discussion of the shipowner's conduct does not transform the award of attorneys' fees into punitive damages. For example, in *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, 383 F.3d 1337, 1347 (Fed. Cir. 2004), the majority held in a willful patent infringement case:

> The appellants also argue that the award of attorney fees is a matter of punitive damages, and is therefore improper. Precedent and statute do not support this position. 35 U.S.C. § 285 provides that "the court in exceptional cases may award reasonable attorney fees to the prevailing party"; and the court has confirmed that a finding of willful infringement may qualify a case as exceptional under § 285. [Internal citation omitted.] That there were not actual damages does not render the award of attorney fees punitive. ***Attorney fees are compensatory***, and may provide a fair remedy in appropriate cases. Upon a finding of willful infringement, the award of attorney fees is within the district court's sound discretion.

[18] The word "malice" was not used by the *Vaughan* majority.

The dissent in *Knorr-Bremse* agreed with the majority in pertinent part, stating:

> This case, of course, does not involve an award of enhanced damages, but rather an award of attorney fees based on a willfulness finding. ***The majority correctly rejects the contention that an award of attorney fees pursuant to 35 U.S.C. § 285 is a form of punitive damages***. . . . ***While attorney fees are not punitive damages***, our case law makes clear that, where attorney fees are awarded based on a willfulness finding, the same standard for willfulness applies to both enhancement and attorney fees. [Internal citation omitted.] [Emphasis added.] *Id.* at 1348.

In other words, a court's examination of whether a defendant's willfulness justifies an award of attorneys' fees within its discretion does not mean the award of such fees is punitive. Similarly, the *Vaughan* court's holding that the defendant's "callous," "recalcitrant," "willful and persistent" conduct justified an award of attorneys' fees does not render its award of attorneys' fees punitive.

State courts have similarly found that even though awards of attorneys' fees may have a punitive effect, they are compensatory in nature. In *City of Warner Robins v. Holt*, 220 Ga. App. 794, 795 (Ga. Ct. App. 1996), the court held:

> Though awards of litigation expenses and attorney fees may often have a somewhat

> punitive effect on the party against whom they are awarded, to punish or penalize is not their purpose. Rather, in those limited circumstances under which such awards are authorized by law, ***the purpose is to compensate an injured party***, in order that such parties are not further injured by the cost incurred as a result of the necessity of seeking legal redress for their legitimate grievances. [Emphasis added.]

In *H & H Subs v. Lim*, 223 Ga. App. 656, 660-661 (Ga. App. Ct. 1996), the court held, "In short, litigation expenses and attorney fees are not punitive damages." *See also Wilhelm v. Barnes*, 1982 Ohio App. LEXIS 13779, *19 (Ohio Ct. App. 1982) ("Attorneys fees are not punitive damages. . . .")

D. AN AWARD OF ATTORNEYS' FEES IS SUBSTANTIVELY AND PROCEDURALLY DIFFERENT FROM AN AWARD OF PUNITIVE DAMAGES.

As a practical matter, an award of attorneys' fees bears no resemblance to the typical assessment and award of punitive damages. To the extent punitive damages are designed to punish, and thus deter, future conduct, certain factors are typically considered in assessing such an award and later determining whether such award is inadequate or excessive. In *BMW of N. Am. v. Gore, supra*, 517 U.S. at 605, this Court identified three guideposts for reviewing an award of punitive damages, namely, "the degree of

reprehensibility of the [conduct]; the disparity between the harm or potential harm suffered by [the plaintiff] and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases." The "financial position" of a defendant is also "typically considered in assessing punitive damages." *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462, footnote 28 (1993). *See also Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21-22 (1991) (wherein this Court approved the consideration of a defendant's financial worth as one of several factors in assessing punitive damages.) It is within the discretion of the finder of fact to both: (1) award punitive damages; and (2) determine the appropriate amount of such punitive damages based on the typical factors identified above. "'[Punitive] damages are typically determined by reference to factors such as the character of the wrong, the amount necessary to 'punish' the defendant . . . and the jury has a great deal of discretion in deciding both whether such damages should be awarded and the amount of the punitive award.' *See, e.g.*, C. McCormick, Law of Damages § 85 (1935)." *Carlson v. Green*, 446 U.S. 14, 47-48 (1980).

However, none of these typical factors used in assessing a punitive damage award are accounted for in awarding a plaintiff attorneys' fees for bringing suit. The amount of reasonable attorneys' fees is based solely on the reasonable amount of time spent by the plaintiff's attorney multiplied by the reasonable

hourly rate of such attorney. The computation does not account for the "reprehensibility" of the defendant's conduct; it is not based on comparable civil penalties in similar cases; it does not account for the financial worth of the defendant. A finder of fact does not consider any of these various factors when damages are limited to attorneys' fees. The conclusion is therefore inescapable that *Vaughan*, in awarding attorneys' fees to the plaintiff, was not awarding punitive damages and did not intend to do so. As the result of circuit courts misinterpreting *Vaughan*'s award of attorneys' fees as punitive damages, it is now necessary for this Court to reestablish the intention of *Vaughan*'s majority and restore a uniform rule that the measure of damages for a callous, recalcitrant, willful, and/or persistent failure to pay maintenance and cure is an award of compensatory attorneys' fees.

E. CIRCUIT COURTS HAVE ADDITIONALLY DILUTED THE CONDUCT NECESSARY TO AWARD ATTORNEYS' FEES UNDER *VAUGHAN*.

The *Townsend* case also gives this Court the opportunity to curb the further dilution by the circuit courts of the standard necessary to award attorneys' fees under *Vaughan*. In *Vaughan*, this Court noted the employers in that case were:

> . . . *callous* in their attitude, making no investigation of libellant's claim and by their silence neither admitting nor denying it. As a

> result of that *recalcitrance*, libellant was forced to hire a lawyer and go to court to get what was plainly owed him. . . . The default was *willful and persistent*. It is difficult to imagine a clearer case of damages suffered for failure to pay maintenance than this one. [Emphasis added.]

369 U.S. at 530-531.

However, subsequent circuit court decisions diluted the *Vaughan* standard to allow an award of punitive damages for the "arbitrary" failure to pay maintenance and cure. In 1984 (before overruling its precedent awarding punitive damages in maintenance and cure cases), the Fifth Circuit cited *Vaughan* for the proposition that "an employer's *willful and arbitrary* refusal to pay maintenance and cure gives rise to a claim for damages in the form of attorneys' fees in addition to the claim for general damages. [Emphasis added.]" *Holmes v. J. Ray McDermott & Co.*, 734 F.2d 1110, 1118 (5th Cir. 1984). Other courts subsequently adopted this new standard. For example, the Fourth Circuit cited *Holmes* and noted, "courts have long awarded punitive damages to seamen where maintenance and cure benefits have been *arbitrarily and willfully* denied. [Emphasis added.]" *Manuel v. United States*, 50 F.3d 1253, 1260 (4th Cir. 1995).

The Eleventh Circuit's decision in *Hines*, which the *Townsend* court held was binding, also exemplifies the diluted standard for circumstances justifying awards of punitive damages:

> Although there is no bright line to measure arbitrary conduct, the Fifth Circuit has identified examples of willfulness meriting punitive damages and counsel fees [including] . . . laxness in investigating a claim. . . .

Hines, *supra*, 820 F.2d at 1190. Between *Vaughan* and *Hines*, the degree of odious conduct upon which an award of attorneys' fees could be awarded was lowered from a callous, recalcitrant, willful, and persistent failure to investigate a crewmember's maintenance and cure to a mere arbitrary "laxness in investigating a claim." The new standard for imposing punitive damages is even less than the "wanton and intentional disregard" language stated in the *Vaughan* dissent. This reflects the judicial confusion not only about whether *Vaughan*'s grant of attorneys' fees was compensatory or punitive in nature, but also the type of conduct upon which an award can be based. Although it is clear that attorneys' fees are compensatory in nature, this Court has the opportunity in *Townsend* to reestablish the standard of conduct originally set forth in *Vaughan* for recovery of attorneys' fees.

II. ALLOWING PUNITIVE DAMAGES FOR A WILLFUL FAILURE TO PAY MAINTENANCE AND CURE WILL ENCOURAGE "THE MISCHIEF OF FORUM SHOPPING" AND INCREASE LITIGATION OF CASES IMPROPERLY BROUGHT IN U.S. COURTS.

As long as punitive damages over and above attorneys' fees are available for an alleged willful failure to pay maintenance and cure, a crewmember with a maintenance and cure claim is encouraged to bring suit in the U.S., regardless whether the case is more appropriately brought, or more convenient, in a foreign jurisdiction. This Court has addressed the menace of transoceanic forum shopping. In *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975), this Court reversed the previous admiralty rule against "divided damages,"[19] finding: "Indeed, the United States is now virtually alone among the world's major maritime nations in not adhering to the Convention with its rule of proportional fault – a fact that encourages transoceanic forum shopping." *Id.* at 403-404. [Footnote omitted.]

The threat of transoceanic forum shopping is real. Over 90% of the approximately 140,000 crewmembers employed by CLIA's member lines alone are foreign seamen. This percentage continues to grow.

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[19] The "divided damages" rule, typically in collision cases, required the equal division of property damage whenever both parties are found to be guilty of contributing fault, whatever the relative degree of fault may have been. *Id.* at 397.

These seamen are employed in countless capacities, from entertainers to engine room oilers, and work aboard vessels sailing all over the world, many times with little to no contact with the U.S. The sheer number of crewmembers and diversity of the workforce presents myriad circumstances in which potential payment of maintenance and cure, or some other form of benefits or remuneration dictated by foreign law, is triggered. Accordingly, the opportunity to benefit from generous provisions of U.S. law continually occurs and presents a constant threat of forum shopping.

To combat forum shopping by foreign plaintiffs improperly bringing suit in the United States solely to benefit from the more generous relief provided by U.S. courts than their home countries, courts have granted dismissal on the grounds of *forum non conveniens*. The Eleventh Circuit upheld such a dismissal in *Sigalas v. Lido Maritime, Inc.*, 776 F.2d 1512 (11th Cir. 1985), describing the plaintiff as "the archetypal foreign plaintiff bringing her foreign tort claim to American courts to secure relief more generous than she would get under the law of her homeland [Greece]." *Id.* at 1520.

Should this Court decide that punitive damages are available for a willful failure to pay maintenance and cure, foreign plaintiffs will continue to bring suit in the U.S., even where there is little connection to or interest in the United States resolving the foreign

dispute, because punitive damages are widely disapproved and not recognized in most of the world.[20] Foreign crewmembers injured abroad continue to file suit in the U.S. in light of the specter of punitive damages even though, under *Vaughan,* such damages are not even available. The *Townsend* case presents a timely opportunity for this Court to reestablish *Vaughan*'s holding and discourage transoceanic forum shopping.

III. ALLOWING PUNITIVE DAMAGES FOR A WILLFUL FAILURE TO PAY MAINTENANCE AND CURE WILL HAVE A CHILLING EFFECT ON A SHIPOWNER'S ABILITY TO DEFEND AGAINST INAPPROPRIATE MAINTENANCE AND CURE CLAIMS.

It is an ancient duty of a shipowner to provide maintenance and cure to a seaman who becomes ill or injured while in the service of the vessel. *See Calmar S.S. Corp. v. Taylor*, 303 U.S. 525 (1938). However, the duty to provide maintenance and cure is not without defenses. For example, maintenance and cure

[20] This Court, citing to an international law scholar, recently noted that "punitive damages are higher and more frequent in the United States than they are anywhere else." *Baker, supra*, 128 S.Ct. at 2623. *See also* footnote 7. The Court described the extremely limited circumstances in which punitive damages are awardable in the U.K. and the absence of punitive damages awards in countries like Italy, France, Germany, Austria, Switzerland, and Japan. *Id.*

may not be owed in the case of willful disobedience of a lawful order (*Van Dinter v. American S.S. Co.*, 387 F.Supp. 989 (E.D.N.Y. 1984); willful misconduct such as "gross inebriation" (*Aguilar v. Standard Oil Co.*, 318 U.S. 724 (1942)); fighting where the plaintiff was the aggressor (*Gulledge v. United States*, 337 F.Supp. 1108 (E.D.Pa. 1972), *aff'd*, 474 F.2d 1340 (3d Cir. 1973)); self-inflicted injuries (*Discovery Sun Partnership, Ltd. v. Kapsomenakis*, 2000 AMC 2402 (S.D. Fla. 2000)); and venereal disease (*Ressler v. State Marine Lines, Inc.,* 517 F.2d 579 (2d Cir. 1975), *cert. denied*, 423 U.S. 894 (1975)). A common issue arising in the cruise line industry is a crew member's waiver of the right to maintenance and cure where the crew member failed to disclose prior material medical facts or made misrepresentations during a required pre-sign on or periodic medical fitness exam. *See, e.g., Brown v. Parker Drilling Offshore Corp.*, 410 F.3d 166, *cert. denied*, 127 S.Ct. 382 (2006). A failure to follow physician recommendations can also be a defense to continued maintenance and cure. *See Diddlebrook v. Alcoa S.S. Co.*, 234 F.Supp. 811 (E.D.Pa. 1964).

However, a rule permitting punitive damages for a mere "willful"[21] failure to pay maintenance and cure has a chilling effect on the assertion of such valid defenses. For example, if a cruise line has evidence that a crew member's injury was as the result of

[21] *I.e.*, the shipowner "intended" his conduct, even after a fair investigation.

willful misconduct (likely a factual question), it can rightfully deny maintenance and cure benefits and might *willfully* do so, without any intent to harm the crewmember. If the injured crewmember sues for recovery of maintenance and cure benefits, such crew member will argue that the withholding of maintenance and cure was willful and thus seek recovery of punitive damages. Despite a valid defense to the crewmember's claim, the cruise line is therefore discouraged from raising such defense with the threat of punitive damages being imposed on the slight standard of willful denial. As a result, maritime employers will choose to pay maintenance and cure claims even where valid defenses exist to avoid the risk of a punitive damage award. This chilling effect results in a higher number of uncontested maintenance and cure claims, and ultimately, increased but unjustified costs to cruise line consumers.

On the other hand, this Court must also reestablish the degree of culpable conduct required by *Vaughan* for even an award of attorneys' fees. That a shipowner "willfully" or "intentionally" denied maintenance and cure benefits should not be enough to award attorneys' fees when the shipowner was merely exercising its right to dispute an award of benefits based on a potentially available defense. Rather, as intended in *Vaughan*, the shipowner must be "callous," "recalcitrant," or "willful and persistent" to warrant even an award of attorneys' fees.

CONCLUSION

This Court recently spoke to its responsibility to clarify confusion generated by its judicially-created law. In limiting punitive damages to a 1:1 ratio in *Baker*, this Court noted that the remedy of punitive damages "is itself entirely a judicial creation" and concluded that it "may not slough off [its] responsibilities for common law remedies because Congress has not made a first move. . . ." 128 S.Ct. at 2630. Although the *Vaughan* decision clearly awarded attorneys' fees as a compensatory measure, the circuit courts have nevertheless become confused, primarily as the result of the dissent's characterization of the majority's award as "exemplary." In granting certiorari in *Townsend*, this Court can now exercise its authority to undo the circuit courts' distortion of *Vaughan* and reestablish the intention of the *Vaughan* majority which was to award attorneys' fees as a compensatory measure upon a callous, recalcitrant, willful, and persistent failure to pay maintenance and cure.

As maritime law must be fashioned in light of both its national and international ramifications, this Court should consider the effect of permitting the award of punitive damages in maintenance and cure cases. Primarily, such a rule will entice foreign seamen with no connection to the U.S. to bring suit here to benefit from the U.S.'s generous laws, and in effect, making the U.S. the courthouse of the world for all injured seamen. Such a rule equally discourages maritime employers from raising valid defenses to

maintenance and cure claims, thus increasing the costs of business which are ultimately passed along to consumers.

For the foregoing reasons, the decision of the Eleventh Circuit should be reversed with instructions that respondent's claim for punitive damages be dismissed.

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Respectfully submitted,

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