No. 08-214

In The Supreme Court of the United States

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

Petitioners,

v.

EDGAR L. TOWNSEND,

Respondent.

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

BRIEF OF PORT MINISTRIES INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

May a seaman recover punitive damages for the Shipowner's failure to pay maintenance and cure?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

BRIEF OF PORT MINISTRIES INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*[1]

Port Ministries International ("PMI") has a great interest in protecting seafarers. PMI is a thirty-six (36) member association of seafarer's ministries and individuals serving international seafarers with locations in many ports in the United States. PMI's purpose is evangelism and to meet the physical, emotional and spiritual needs of seafarers.[2]

[1] Pursuant to Rule 37.6, *Amicus* discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than *Amicus Curiae*, its members, or its counsel make a monetary contribution to its preparation. Letters on file with the Clerk show that all parties consent to its submission.

[2] PMI's members meet the needs of seafarers by providing the following: free transportation to locations near the ports; serving free home cooked meals; providing recreation and relaxation activities such as games, television and reading material; providing free used clothes; providing free internet and e-mail and low cost phone cards so the seafarers can communicate with their families and friends so far away; bringing cell phones to ships for seafarers to use when they have no access ashore; connecting with the seafarers emotionally by spending time talking with and getting to know them; having chapel services for the seafarers and onboard ships by request; providing free Bibles, Jesus Christ videos and other material in over 50 languages; providing free and confidential counseling; sharing the gospel of Jesus Christ; and encouraging Christian seafarers in their walk with the Lord.

PMI's presence can be found across the United States[3].

PMI is fearful of an alarming trend. The plight of seafarers is getting worse day by day. Seafarers' ability to access the U.S. courts and enforce their rights has been severely limited by flags of convenience, sham unions and foreign arbitration clauses. Taking away the availability of punitive damages in maintenance and cure cases in light of the other assaults on seafarer's access to the U.S. system, would be one more step towards making it increasingly difficult, if not impossible, for seafarers to obtain justice.

The conditions and treatment of seafarers remain dangerous, grim and wholly counter to American ideals of morality and justice. In an interdependent world, where commerce between nations is the lifeline of civilization, seafarers are the vital component to the successful movement of goods across vast oceans. If trade is the heart that pumps life into world markets and shipping the arteries, seafarers are the nutrients that keep both working. They travel the globe with everything needed, from bananas, oil,

[3] The seafarers ministries are located in the following states and ports: Florida: Port Manatee, Cape Canaveral, Tampa, Jacksonville; Alabama: Mobile; Maryland: Baltimore; Indiana: Burns Harbor; Louisiana: New Orleans, Reserve; Mississippi: Gulfport, Pascagoula; Virginia: Portsmouth; South Carolina: Charleston, Georgetown; Texas: Freeport; Washington: Tacoma; Pennsylvania: Philadelphia.

gas and building materials to cloth, grain and frozen meat. They are also an invisible and vulnerable labor force.

Despite their importance, the combination of flags of convenience, sham unions, arbitration and the disallowance of punitive damages is a road map for shipowners to get away with abusing seafarers and to save money at the same time. After being abandoned by shipowners, sick, hungry, destitute seafarers are seeking help because the shipowners have not lived up to their maintenance and cure obligations. PMI is doing all that it can, but PMI does not have the resources to do all that is necessary to protect the seafarers.

PMI members have seen the suffering of seafarers who are refused maintenance and cure benefits. When a shipowner failed to adequately provide for a seriously injured crew member, a volunteer from a PMI seafarer's ministry took him in and provided him with food and lodging while on shore recovering. The threat of punitive damages is an important deterrent to a shipowner's willful refusal to provide a seafarer with maintenance and cure benefits. Removing that threat is a green light to shipowners to engage in an economic analysis pitting the obligation to provide maintenance and cure against the cost savings to them to not provide these benefits. It is only punitive damages that change the analysis because the shipowner can never be sure what improper conduct will cost them. Without the threat of punitive damages, the shipowner can quickly figure out that by denying

maintenance and cure to their injured seafarers, they have very little to lose and a lot to gain by denying the benefits legally due to seafarers.

SUMMARY OF ARGUMENT

Petitioners seek to change hundreds of years of jurisprudence and claim it is an "outdated stereotype that seafarer are 'wards of admiralty."[4] This could not be farther from the truth. There is nothing "outdated" about the long hours, low pay, insecurity, fear and exploitation that international seafarers face on a daily basis. Access to the United States Courts has become increasingly difficult for seafarers. Foreign arbitration clauses, sham unions and flags of convenience are effectively denying access to courts with an illusory remedy of arbitration that is incapable of being performed. The arbitration clauses signed by seaman, with no idea what they are signing, sends them to foreign locations that the seafarer cannot afford to get to, cannot afford to live in, cannot afford to hire an attorney and cannot afford to pay the associated costs. These arbitration clauses are clearly designed to make it economically impossible for a seafarer to seek enforcement of their legal rights. The right to maintenance and cure is becoming illusory as well. Without the threat of punitive damages, maintenance and cure will become even more likely to be

[4] *See* Petitioners' Brief On The Merits, page 28, footnote 6.

an illusory remedy in light of the other assaults on seafarer's access to the legal system.

Punitive damages are one of the few weapons available to seafarers to get shipowners to do what they are supposed to do and without such a threat, things will get worse for seafarers. PMI is fearful that there will be a dramatic increase of seafarers not getting medical care from shipowners. This Honorable Court's ruling in this matter will decide whether or not injured or sick seafarers can be discarded at will. It is only the threat of punitive damages that will keep the shipowners in line and convince them to follow the law. The failure to recognize this fact will have dangerous repercussions.

ARGUMENT

I. THE LETHAL COMBINATION OF ARBITRAL PROVISIONS, SHAM UNIONS, FLAGS OF CONVENIENCE AND THE REMOVAL OF PUNITIVE DAMAGES WILL EFFECTIVELY CLOSE THE COURTHOUSE DOORS TO SEAFARERS, THE WARDS OF ADMIRALTY.

This Court should look at this punitive damages issue in light of what U.S. District and Circuit Courts have done with foreign arbitration clauses because access to Courts for seafarers has been severely limited. Taking away punitive damages, in connection with these arbitration provisions, as well as sham

unions and flags of convenience creates a dangerous and unfair situation for the seafarer. The closing of the doors to the admiralty Courts is wholly contrary to the long-standing precedent that Seafarers are wards of the admiralty Courts.

A. SEAMAN ARE EMPHATICALLY THE WARDS OF THE ADMIRALTY COURTS AND TREATED AS A FAVORED CLASS BY CONGRESS.

"**Seafarer from the start were wards of admiralty**." *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 355 (1971) *citing Robertson v. Baldwin*, 165 U.S. 275, 287 (1897). In 1823, Justice Story declared:

> Every Court should watch with jealousy an encroachment upon the rights of a seaman, because they are unprotected and need counsel; because they are thoughtless and require indulgence; because they are credulous and complying; and are easily overreached. But Courts of maritime law have been in the constant habit of extending towards them a peculiar, protecting favor and guardianship. They are emphatically the wards of the admiralty . . . *Harden v. Gordon*, 11 F. Cas. 480 (No. 6047) (C.C. Me. 1823).

As this Court later stated "[f]rom the earliest times maritime nations have recognized that unique hazards, emphasized by unusual tenure and control, attend the work of seafarer." *See Aguilar v. Standard Oil Co. of New Jersey*, 318 U.S. 724 (1943). The

Aguilar Court further held: "the restrictions which accompany living aboard ship for long periods at a time combine with the constant shuttling between unfamiliar ports to deprive the seaman of the comforts and opportunities for leisure, essential for living and working that accompany most land occupations." *Id*., at 728.

In *Chandris, Inc. v. Latsis*, 515 U.S. 347, 355 (1995) (internal citations omitted), this Court reaffirmed this longstanding principle that seafarers are wards of the Admiralty Courts as a "feature of the maritime law compensating or offsetting the special hazards and disadvantages to which they who go down to sea in ships are subjected." The Fifth Circuit Court of Appeals explained the rationale for affording seafarers special protections in *Castillo v. Spiliada Maritime Corp.,* 937 F.2d 240, 243 (5th Cir. 1991):

> [Seafarers] enjoy this status because they occupy a unique position. A seaman isolated on a ship on the high seas is often vulnerable to the exploitation of his employer. Moreover, there exists a great inequality in bargaining position between large shipowners and unsophisticated seafarers. Shipowners generally control the availability and terms of employment.

Accordingly, the Admiralty Courts have a rich tradition of protection of seafarers, which flowed from the uniquely abhorrent conditions workers face at sea.

It is not just the Courts which recognize the need to protect seafarers, as "[t]he policy of Congress, as evidenced by its legislation, has been to deal with [seafarers] as a favored class." *Bainbridge v. Merchants' & Miners' Transp. Co.,* 287 U.S. 278 (1932). A recent example of Congress's intent to protect seafarers is shown through the 2008 amendment of the Jones Act venue provision.[5] Congress made its reasons for deleting the Jones Act venue provision clear: "[t]his subsection is being repealed to make clearer that the prior law regarding venue, including the holding in *Pure Oil Co. v. Suarez*, 384 U.S. 202 (1966) and cases following it, remains in effect, so that the action may be brought ***wherever*** the seaman's employer is doing business."[6] This amendment evidences Congress's intent to open the doors of the Admiralty Courts to seafarers, and in fact expand seafarers' access to Courts.

The Courts, like Congress, should continue to preserve seafarers' rights by ensuring their ability to access U.S. Courts and obtain a remedy for all their legal rights including punitive damages. Otherwise, as made clear by the following paragraphs, unscrupulous shipowners will not rest until they eviscerate seafarer's ancient rights in their rush to save money and increase profits.

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[5] *See* 46 U.S.C. § 30104.

[6] *See* 110th Congress, Report 110-437. (Emphasis added).

B. LONG HOURS, LOW PAY, INSECURITY, FEAR AND EXPLOITATION . . . , NOTHING HAS CHANGED FOR SEAFARERS.

The working conditions for seafarers remain largely unchanged since Justice Story's time. For thousands of today's international seafarers life at sea is modern slavery and their work place is a slave ship.[7] Poor or unsafe living conditions, unpaid wages, long hours of work without breaks, abusive employers, abandonment of entire crews, little or no job security, the suppression of legitimate union activity and blacklisting seafarers that participate in union activities are all frequent occurrences on ships.[8] Most seafarers work seven days a week with long hours each day for months on end.

Far away from home in distant seas and out of the sight of regulators, shipowners can – and in many instances do – get away with abusing seafarer's rights without detection. Poor safety practices and unsafe ships make seafaring one of the most dangerous of all occupations and it is estimated there are over 2,000 deaths a year at sea.[9] In a 2002 study,

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[7] International Commission on Shipping, *Ships, Slaves and Competition*, NeatCorp Group (2000).

[8] Shayna Frawley, *The Great Compromise: Labor Unions, Flags of Convenience, and the Rights of Seafarers*, Windsor Review of Legal and Social Issues. 19 W.R.L.S.I. 85 (2005).

[9] Source: International Transport Workers Federation ("ITF"). The ITF has been helping seafarers since 1895 and today represents the interests of seafarers worldwide, of whom over 600,000 are members of ITF affiliated unions.

researchers at Oxford University found that seafarers are up to 50 times more likely to die while working compared to those in other jobs.[10]

Life at sea for many seafarers involves much abuse. Physical abuses include beatings and sexual assault, inadequate medical treatment, sub-standard accommodation, and inadequate food. Mental abuse arises from isolation, cultural insensitivity and a lack of amenities for social interaction.[11] Non-payment of wages, delays in paying entitlements to families, and even abandonment are additional abuses that contribute to the suffering of a large proportion of seafarers. There are few major ports in the world that have not played host to one or more abandoned ships and their crews in recent years. The crews can go for many months, sometimes years, with no pay and little hope of repatriation. Unless these seafarers receive the assistance of unions or special services of seafarers' missions, they will usually lack the means or ability to seek redress through the flag States' Courts or administrative systems, and are, therefore, wholly reliant on charity for their subsistence.[12]

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[10] Dr. Stephen Roberts, Oxford University. *The Lancet*, Volume 360, Issue 9332, Pages 543-544, August 17, 2002.

[11] International Commission on Shipping, *Ships, Slaves and Competition*, NeatCorp Group (2000).

[12] *Id.*

Here are just a few of examples of the harsh reality of life and work at sea:[13]

- The condition of the first mate on one vessel was comparable to someone with a blood alcohol level of 0.05% because he was so sleep deprived and overworked.

- A scuffle aboard a vessel ended with a casualty after several members of the crew were beaten and thrown overboard.

- On a ship registered in Colombia, death threats were made to crew members when they expressed concern over their safety on a ship that was far below par.

- An entire crew of 27 seafarers were killed in 2001 after the poorly maintained *Christopher,* an 18 year old vessel registered in Cyprus and owned by a Greek company, sank en route to the United Kingdom.

- Between 1996 and 2000, 3,500 seafarers on 210 ships contacted the International Transport Workers Federation ("ITF").

- In the year 2002, the ITF recovered 32.4 million dollars in unpaid wages for seafarers working on Flag of Convenience vessels.

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[13] Shayna Frawley, *The Great Compromise: Labor Unions, Flags of Convenience, and the Rights of Seafarers*, Windsor Review of Legal and Social Issues. 19 W.R.L.S.I. 85 (2005).

• When a seafarer and his twelve colleagues decided to strike over the $147,000 owed to the crew in back wages, those involved in the strike were replaced and their leader was blacklisted.[14]

The need for the Admiralty Courts ward ship over seafarers has never been greater. Despite this overwhelming need, the lower Admiralty Courts have begun closing their doors to seafarers, leaving them at the mercy of unscrupulous shipowners, who place corporate profit above the law.

C. FOREIGN ARBITRATION CLAUSES PLACED IN SEAFARER'S CONTRACTS IMPROPERLY TAKE AWAY ACCESS TO AMERICAN COURTS AND LEAVE SEAFARERS WITH AN ILLUSORY REMEDY.

Courts are denying access to U.S. Courts for seafarers at an alarming frequency and under draconian circumstances. Foreign arbitration provisions contained in seafarer's contracts which require the seafarer to arbitrate in remote international locations are being uniformly enforced despite the undeniable fact that destitute, injured seafarers cannot afford to arbitrate these claims. These lower courts follow federal policy in favor of arbitration[15], and

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[14] Shayna Frawley, *The Great Compromise: Labor Unions, Flags of Convenience, and the Rights of Seafarers*, Windsor Review of Legal and Social Issues. 19 W.R.L.S.I. 85 (2005).

[15] *Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974).

erroneously disregard the precedent that seafarers are the wards of the Court and Justice Story's charge that their contracts should be watched closely for overreaching.[16]

Further, these foreign arbitration provisions are being enforced by District Courts despite valid, recognized defenses to enforcement. The Convention on the Recognition And Enforcement of Foreign Arbitral Awards expressly states that these contracts should be enforced "**unless [the Court] finds that the said agreement is null and void, inoperative or *incapable of being performed*.**"[17] In nearly every single case where a seafarer is compelled to arbitrate in some far flung foreign jurisdiction, the

[16] In *Harden v. Gordon*, 11 F. Cas. 480 (No. 6047) (C.C. Me. 1823) Justice Story stated: "[Seamen] are emphatically wards of the admiralty; and though not technically incapable of entering into a valid contract, they are treated in the same manner as courts of equity are accustomed to treat young heirs, . . . wards with their guardians, and . . . If there is any undue inequality in the terms, any disproportion in the bargain, any sacrifice of rights on one side, which are not compensated by extraordinary benefits on the other, the judicial interpretation of the transaction is that the bargain is unjust and unreasonable, that advantage has been taken of the situation of the weaker party, and that *pro tanto* the bargain ought to be set aside as inequitable. . . . And on every occasion the court expects to be satisfied that the compensation for every material alteration is entirely adequate to the diminution of right or privilege on the part of the seamen."

[17] *See* Article II, § 3 1958 Convention on the Recognition And Enforcement of Foreign Arbitral Awards (New York Convention) (Emphasis added).

arbitration is incapable of being performed because the injured, destitute seafarer cannot afford the prohibitive associated costs of arbitration (round-trip airfare to a destination thousands of miles away from their home country; lodging; food; legal representation; translation of documents; and/or other associated costs). This high hurdle makes foreign arbitration incapable of being performed.[18]

To make matters worse, after a District Court compels foreign arbitration, the seaman is often unable to obtain appellate review. The Circuit Courts of Appeal often find that an order compelling arbitration is an interlocutory order not immediately appealable.[19] Thus, seafarers are not only left with an illusory remedy they cannot afford, but they are precluded from appellate review of the order. Therefore, the seafarers are ultimately left without redress for their injuries.

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[18] This Court recognizes a "prohibitive cost" defense to a demand to enforce arbitration of federal statutory claims. *See Green Tree Financial Corp. v. Randolph,* 531 U.S. 79, 90, 148 L. Ed. 2d 373, 121 S. Ct. 513 (2000). When federal rights are at issue (as they are herein), the Court recognized that "the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum." *Green Tree*, 531 U.S. at 90. This is exactly what is occurring because when district courts compel these foreign arbitrations, the seamen are stuck with an illusory remedy.

[19] *See Reshma Harilal v. Carnival Corp.*, Appeal Number 08-14524-HH; *Mohan Rao Koda v. Carnival Corp.*, Appeal Number 07-14718.

Enforcement of these foreign arbitration clauses has made the conduct of unscrupulous shipowners even more brazen and taken to dangerous extremes where they can now commit crimes with impunity. Shipowners now have confidence they will not be held accountable in U.S. Courts and are not likely to be held accountable in the foreign arbitrations. This "confidence" has quickly escalated to levels which constitute forced labor, slavery and/or human trafficking of the seafarer.

An example of the danger of these arbitration provisions is *Reshma Harilal v. Carnival Corp*., District Court Number: 08-20355 CV-WMH. Seafarer Reshma Harilal filed suit against her employer Carnival Corporation in the United States District Court for the Southern District of Florida, for modern day slavery and/or forced labor in violation of multiple federal statutes. Harilal was lured from her home in South Africa with the promise of a job as stateroom stewardess. When she arrived in Florida she was forced[20] to sign a seafarer's contract indicating her position was such. Soon thereafter, Carnival informed her she would in fact be working as an *assistant* stateroom stewardess making **one fifth** what she

[20] There was record evidence Harilal was not provided the time or opportunity to read the contract and signed it under duress. Plaintiff was never made aware that this contract included an arbitration provision because she was not allowed to read the page on which the arbitration provision was contained.

would make as stateroom stewardess.[21] Harilal refused to work in this lower position and requested Carnival to return her passport so she could leave the ship and return home. Carnival refused to return Harilal's passport in direct violation of 18 U.S.C. § 1592, refused to let her leave the ship, and forced and/or psychologically coerced her to stay onboard and work. This occurred while the ship was still in a Florida port with plenty of time for Harilal to leave the ship.

The seafarer's agreement Harilal was forced to sign contained a foreign arbitration provision. This arbitration clause required Harilal to arbitrate in Monaco, which is **5,295** miles away from her home in Durban, South Africa. Harilal set forth extensive evidence of the prohibitive costs of arbitrating in Monaco.[22]

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[21] Harilal was just one of fifteen or sixteen crew members onboard this single ship that the identical "bait and switch" tactic was used.

[22] Harilal presented record evidence of the following estimated costs: A round trip flight from South Africa to Monaco cost approximately $6,430.00. The total estimated expense for lodging would be approximately $5,000.00 for ten nights. The total estimated expense for food would be approximately $1,000.00 for ten days. Plaintiff's total estimated expenses would be approximately $12,430.00 for airfare, food and lodging necessary for her to arbitrate in Monaco. In addition, Plaintiff would need to pay for legal representation estimated to cost 17,000 euro.

Notwithstanding these egregious facts, Harilal was ordered to arbitrate. Harilal timely appealed the order compelling arbitration but the Eleventh Circuit Court of Appeals *sua sponte* dismissed the appeal for lack of jurisdiction.[23] Therefore, this modern day slave, who was forced to sign a contract which she did not know contained an arbitration clause was compelled to a foreign arbitration which is incapable of being performed.[24] This was done even though multiple statutes on human trafficking/slavery were alleged to have been violated.

Reshma Harilal's story makes clear that seafarers who endure the most difficult of conditions are being wrongly deprived of access to U.S. Courts and are no longer being recognized as wards of the admiralty Courts. "In other words, American maritime employers are free to hire third world labor to work in deplorable conditions but, because arbitral clauses permit removal, they can in effect, immunize themselves from the unique safeguards American general maritime law provides to ameliorate the harshness of the realities of maritime employment."[25] These

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[23] *Reshma Harilal v. Carnival Corp.*, Appeal Number 08-14524-HH.

[24] After being compelled to arbitration, Harilal filed the arbitration in Miami, Florida and sought to have the arbitration take place in Miami, but such relief was denied.

[25] Rory Bahadur, *Constitutional History, Federal Arbitration And Seamen's Rights Sinking In A Sea Of Sweatshop Labor.* Journal of Maritime Law and Commerce, April 2008.

arbitration provisions and their interpretation have abruptly closed the door to the District and Appellate Courts. Taking away the risk of a punitive damage award coupled with arbitration provisions will only make the shipowners bolder in their violation of the rights of seafarers. These punitive damages only arise in a situation where a seafarer is sick or injured and therefore at their lowest point, economically speaking. This is a blueprint to allow shipowners to run rampant, deny medical care to their seafarers and shift the costs to charities or governments. Why should the United States government or state governments or charities pay the costs of food, shelter, transportation, and medical care that are the obligations of these shipowners?

D. SHAM UNIONS: COLLUDING WITH SHIPOWNERS TO BARGAIN AWAY SEAFARER'S RIGHTS TO MAINTENANCE AND CURE

In the unregulated world of flag of convenience shipping and cruise lines, one of the few remaining American laws that apply to *all* shipowners using U.S. ports is the right to maintenance and cure. As illustrated by Petitioner, under the General Maritime Law of the United States, when a seaman, while in the service of a ship, becomes sick and/or injured; the shipowner is required to provide food, lodging, transportation, and medical treatment.

To circumvent this ancient right, shipowners have teamed up with *sham* unions claiming to represent and protect seafarers. The practice is common in the cruise line industry. Take for example the case of Christine Gheorghita,[26] a cabin stewardess who became sick while working aboard the ship *Enchantment of the Seas*. Her sick pay ($12.50 per day) was set under a Collective Bargaining Agreement ("CBA") between the shipowner and the Norwegian Seafarer's Union ("NSU"). Pursuant to the agreement, the company was able to stop her sick pay after the end of a seven day voyage rather than at the end of her six month contract – as is provided under the General Maritime Law. Thus, in essence, the union bargained away the benefits Ms. Gheorghita and all the other similarly situated cabin stewardesses were entitled to under law.

Although the NSU referred to itself as a labor *union*, its conduct and day-to-day operations did not fit the definition of a traditional labor organization. Ms. Gheorghita did not know she was working under a Collective Bargaining Agreement.[27] She never voted for or against the terms of the agreement; never voted

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[26] *Gheorghita v. Royal Caribbean Cruises, Ltd.,* 93 F. Supp. 1237 (S.D. Fla. 2000).

[27] Remarkably, this lack of knowledge is not limited to lower level workers aboard ships, as Captain Steinmoen, captain of Royal Caribbean vessels also did not know that he was a member of the NSU. *See Svein Steinmoen v. Royal Caribbean Cruises Ltd*., District Court Number: 1-07-CIV-21235 GRAHAM.

in any union election; never heard about or attended a union meeting; and never paid any union fees.[28] It is typical that most cruise line workers are wholly ignorant about these foreign unions.[29]

As reported by the New York Times,[30] by forming "offshore" affiliates with radically lower wages and conditions than the home union, the NSU and other unions, have perverted the foundations of trade unionism by colluding with the shipowner. As evidenced by their agreements, accepting benefits lower than those required by law, and shunning even the most basic of democratic processes, these sham unions have established that their allegiances lie with the shipowner rather than the seafarers they purportedly represent.[31]

E. FLAGS OF CONVENIENCE: ESCAPING THE ARMS OF U.S. REGULATORS.

Shipowners, both cruise lines and shipping companies, fly "flags of convenience" aboard their

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[28] *Gheorghita*, 93 F. Supp. 1237 (S.D. Fla. 2000).

[29] This is particularly true, since in *Gheorghita*, the Company paid directly to the Union close to $300,000 per year. Other shipowners, such as Celebrity Cruises, follow this practice.

[30] Douglas Frantz, *Sovereign Islands/A Special Report: For Cruise Ship's Workers, Much Toil, Little Protection.* New York Times, December 24, 1999.

[31] Sailors Union of the Pacific, *Floating Sweatshops, Foreign-flag cruise ship working conditions exposed.* Volume LXIII, No. 1, January 21, 2000.

ships. In doing so, shipowners are placed under the jurisdiction of the flag state. Cheap registration fees, low or no taxes and freedom to employ cheap labor are some of the motivating factors behind a shipowner's decision to fly a flag of convenience. Most flag of convenience states such as Panama, Liberia and the Bahamas are renowned for lax enforcement of permissive laws. Remarkably, even though ninety (90) percent of the nearly six million cruise line passengers that sailed out of United States ports in 1999 were American, *and* most cruise lines have their headquarters in the United States, these companies escape American minimum wage requirements and other labor laws the same way they avoid corporate income taxes and criminal and environmental laws.[32]

F. REMOVAL OF THE THREAT OF PUNITIVE DAMAGES FOR THE WILLFUL FAILURE TO PAY MAINTENANCE AND CURE WILL BE THE PROVERBIAL NAIL IN THE COFFIN OF SEAFARERS' RIGHTS.

Without the threat of punitive damages for the willful failure to pay maintenance and cure, seafarers will be left with an empty quiver. Punitive damages are one of the few weapons available to get shipowners to do what they are supposed to do and

[32] Douglas Frantz, *Sovereign Islands/A Special Report: For Cruise Ship's Workers, Much Toil, Little Protection.* New York Times, December 24, 1999.

without such a threat, things will get worse for seafarers. Penalties are important for those shipowners who repeatedly withhold maintenance and cure from injured crew members because some employers willfully withhold these payments as a method to force settlements at an early stage.[33] Seafarers have scant resources to sustain themselves adequately after an injury or sickness, or to pay for proper medical attention and therapy. Unless the Courts place a significant penalty on the willfully improper actions of these employers, the crew members will continue to be victimized.

The right of maintenance and cure created a serious responsibility, and the potential legal penalties in the event of a violation required masters, employers, and vessel owners to protect the health and safety of seafarers in their service. Further, the right provided inducement for seafarers to undertake perilous journeys and endure the hardships of life at sea.[34] Make no mistake; removal of these penalties will be taken full advantage of by unscrupulous shipowners. Unfortunately, even scrupulous shipowners will be forced to take advantage of the absence of punitive damages in order to stay competitive

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[33] Paul S. Edelman, *Guevara v. Maritime Sea Corp.: Opposing the Decision*, Tulane Maritime Law Journal, 20 TLNMLJ 349 (1996).

[34] Eugene Brodsky, *From Subsistence to Starvation: A Call For Judicial Reexamination of Gardiner v. Sea Land Service, Inc.*, 9 U.S.F. Mar. L.J. 71 (1996).

against the unscrupulous ones. Accordingly, the removal of punitive damages for the willful failure to pay maintenance and cure will place a nail in the coffin of seafarers' rights.

G. WITHOUT PUNITIVE DAMAGES, SEAFARER'S CLAIMS BASED ONLY ON A SHIPOWNER'S FAILURE TO PAY MAINTENANCE AND CURE WILL FIND IT VERY DIFFICULT TO OBTAIN REPRESENTATION, FURTHER FORECLOSING THEIR ACCESS TO COURTS.

For a profession that requires people to work for long periods of time without proper rest, seafarers make meager wages. With limited financial means they attempt to feed themselves and their families. It is not surprising, therefore, that a seaman is unable to afford legal representation in the United States, where an attorney's billable *hours* might be as much as a month's wages for a seafarer.

As a result of the availability of different payment arrangements – most prevalent among them the Contingency Fee – seafarers have gained access to counsel where they would have otherwise not been able to. The typical arrangement requires the attorney to make a substantial time and financial investment in the seafarer's case. The attorney is willing to take this risk because if the client recovers damages from a settlement or favorable verdict, the attorney gets a fee from the recovery and their litigation

expenses reimbursed. It is key therefore that the potential attorney's fee from the recovery is enough to a) recover the initial investment and b) reasonably compensate the attorney for his or her services. Attorneys, like all business owners, must make wise business decisions to cover their expenses and keep their doors open.

A seaman that becomes sick or injured while in the service of a vessel, regardless of fault of the shipowner or operator, is entitled to maintenance and cure as a matter of right.[35] A seaman's maintenance and cure claim, by itself, generally has a relatively small value as compared to a seaman's claims of Jones Act Negligence or Unseaworthiness. The maintenance and cure claim consists merely of the cost of food, lodging, transportation, and/or medical care the shipowner failed to provide to the seaman. Whereas, the Jones Act Negligence and Unseaworthiness claims consist of the larger value claims including pain and suffering, future medical expenses, and lost wages/diminished earning capacity, etc. If a seafarer has a Jones Act Negligence and/or an Unseaworthiness claim along with a maintenance and cure claim, they are more likely to be able to obtain contingency fee representation due to the larger potential value of their overall case which justifies an attorney to invest the time and money in the case. If a seafarer only has a maintenance and cure claim, it will be very difficult

[35] *See Couts v. Erikson*, 141 F. 2d 499 (5th Cir. 1957).

(if not impossible) for him or her to obtain adequate legal representation due to the smaller value of the claim if the availability of punitive damages are taken away.

The Petitioner argues punitive damages are unnecessary to properly motivate shipowners to provide maintenance and cure benefits because compensatory damages and attorney's fees can be awarded in certain circumstances to protect the seafarer.[36] Unfortunately, Court awarded attorney fees alone are not sufficient incentive to take these case because the awards are usually low. If there is no finding of willfulness, then the attorney essentially works for free, and even if the attorney does prove willfulness, then they receive a minimal fee. This is the reality of the real world with respect to seafarers' attorneys. That is not to say that many seafarers' attorneys will not take a maintenance and cure case based on compassion rather than economics. However compassion does not pay the bills and these attorneys are limited in the number of money losing cases they can handle. Thus, Petitioner's argument is without merit.

Furthermore, compensatory damages and attorney's fees do nothing to protect the seafarer if he/she cannot obtain legal representation to even get in the Courthouse door. Take as an example, a seaman's claim for $1,500 for necessary medical care

[36] Petitioner's Brief, Page 30.

recommended by a doctor, but refused by the shipowner. Most attorneys would not be able to accept a $1,500 maintenance and cure claim on a contingency fee basis, regardless of the seaman's entitlement. Practically, the amount of time and expense of pursuing this seaman's claim prohibits an attorney from accepting the case on a contingency fee. The injured/ill seaman, who earns less than $1,500 a month and is unable to return to work until the necessary medical care is provided, cannot afford to pay for the recommended medical care himself. The seaman cannot afford to hire an attorney on an hourly basis to enforce his legal right to that benefit. To make matters worse, the injured/ill seaman cannot work to earn the money to pay for the medical care or the legal representation because he needs the medical care that was refused by the shipowner to be fit for duty. This seafarer is left without options. Quite clearly, in this scenario, the shipowner wins. The shipowner did not have to pay the $1,500 for the seaman's medical care, compensatory damages or attorney's fees because the seaman was unable to pursue his claim. Therefore, without the possibility of punitive damages, the shipowner can and will get away with willfully refusing seafarers' maintenance and cure benefits.

If, however, a seafarer is able to claim punitive damages for the willful failure of the shipowner to pay maintenance and cure, the seafarer dramatically increases the likelihood of an attorney taking on their case. Therefore, maintaining the availability of

punitive damages provides access to the Courts for seafarers who cannot afford to pay the attorney's fees and costs for actions consisting solely of maintenance and cure claims. Whereas the removal of punitive damages for the failure to pay maintenance and cure is not only closing the Courthouse doors, it is also closing the seafarer's access to legal representation as well. When the shipowner does a financial analysis of not paying maintenance and cure claims, the availability of punitive damages makes it impossible for the shipowner to safely figure out that not paying maintenance and cure is more profitable. The element of punitive damages adds an unknown variable to the equation that a corporate bean counter cannot rely on. Therefore, the possibility of punitive damages greatly increases the chance that the shipowner is more likely to do the right thing and follow the law.

II. RESPONSE TO *AMICUS* CLIA'S ARGUMENTS

Amicus CLIA argues there will be a flood of unnecessary litigation if punitive damages are allowed.[37] There is no danger of "a flood of unnecessary litigation" occurring unless the shipowners willfully refuse valid claims. Maintenance and cure claims are self-effectuating. If the cruise line provides the seafarer with the maintenance and cure benefits that

[37] Brief of *Amicus Curiae* Cruise Lines International Association In Support of Petitioners, Page 5.

they are entitled to by law, then there would not be any claims. A claim can only arise if the shipowner willfully denies a seafarer necessary medical care and/or food and lodging while on shore recovering from the injury or illness. Thus, it is the shipowner who controls the floodgates to the amount and frequency of these claims.

Amicus CLIA also argues that more seafarers will seek recoveries in the U.S. if punitive damages are allowed, thereby causing the U.S. to become the Courthouse to the world.[38] This argument is meritless because Congress already decided that a foreign seafarer can bring their claims wherever the seafarer's employer is doing business.[39] Therefore, shipowners doing business in the U.S. will be subject to claims in the U.S. as mandated by Congress regardless of the outcome of this case.

In addition, *Amicus* CLIA argues shipowners will be exposed to punitive damages for mistakes in choosing the right maintenance and cure scheme; applying the domestic scheme improperly; and/or asserting a defense.[40] As stated by CLIA, the cruise industry employs over 140,000 crew members from all over the world.[41] The cruise industry, as the

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[38] Brief of *Amicus Curiae* Cruise Lines International Association In Support of Petitioners, Page 9.

[39] 46 U.S.C. 30104 (2008).

[40] *Id.*, at 4, 9.

[41] *Id.*, at 5.

employer of that many foreign seafarers, should certainly know what maintenance and cure scheme to apply and how to apply it to each seafarer they hire. They should not hire foreign seafarers if they are unable to determine how to provide them with the ancient, basic obligations of maintenance and cure.

Furthermore, CLIA's members would not be subject to punitive damages under any "mistake" scenarios unless there was a finding of willfulness because punitive damages are not awarded for a mere mistake. If the shipowner had a reasonable basis for choosing the scheme, the application of the domestic scheme, and/or asserting a defense, then there would be no finding of the requisite willfulness needed to award a punitive damage award.

Also, *Amicus* CLIA argues that because the cruise industry substantially benefits the U.S. economy they should not be responsible for punitive damages if they willfully refuse maintenance and cure benefits.[42] This argument is best described as disingenuous. The cruise industry does not support the U.S. economy and is, in reality, a burden on the U.S. The cruise industry, as well as most shipowners, flag their ships in foreign countries despite many of them being based in the U.S. and/or doing substantial business in the U.S. The flag of convenience allows the shipowners to avoid paying U.S. taxes and to avoid U.S. laws and responsibilities. The shipowners

[42] *Id*.

employ mostly foreign citizens to work aboard their vessels for a substantial labor cost savings and avoidance of compliance with U.S. labor laws. This practice wholly precludes the hiring of ready, willing, and able U.S. workers that are desperately seeking jobs in this dire economy. Furthermore, the cruise industry has demonstrated its callous disregard of American law, as Carnival, Royal Caribbean, Regency Cruises, Ulysses Cruises of Miami and Seaway Maritime of Greece, Holland America, Princess Cruises, Palm Beach Cruises, American Global Lines, and Norwegian Cruise Lines are all convicted corporate felons.[43]

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[43] *Cruise Line Dumping Convictions Add Up*, USA Today, November 7, 2002. For instance, in 1999 Royal Caribbean Cruises Ltd., one of the world's largest passenger cruise lines, agreed to pay a record $18 million criminal fine and agreed to a 21 federal felony count plea agreement for dumping waste oil and hazardous chemicals and lying to the U.S. Coast Guard. In a plea agreement, filed in U.S. District Court in six cities, Royal Caribbean admitted that it routinely dumped waste oil from its fleet of cruise ships, such as the environmentally sensitive Inside Passage of Alaska. It also pleaded guilty to the unprecedented charge that it deliberately dumped into U.S. harbors and coastal areas many other types of pollutants, including hazardous chemicals from photo processing equipment, dry cleaning shops and printing presses. Similarly, in 2008, Norwegian Cruise Line entered a guilty plea in U.S. District Court in Miami in connection with the May 25, 2003 boiler explosion aboard the S.S. NORWAY in the Port of Miami. NCLL pled guilty to a single charge brought under federal shipping laws alleging grossly negligent operation of the *S.S. NORWAY*, which placed the lives and property of persons on board the vessel at risk and led to the death of at least one individual, in violation of Title 46, United States Code, Section 2302(b).

Accordingly, these shipowners provide little benefit to the American economy.

These shipowners are now seeking to limit their responsibility under U.S. law with regard to seafarers. The significance of this case extends beyond seafarers' rights; it also has major social and ecological implications.[44]

III. CONCLUSION

PMI respectfully requests this Honorable Court continue the tradition of protection of seafarers by ensuring their ability to access U.S. Courts and maintaining the availability of punitive damages for

[44] Thousands of vessels come to America's shores each year. While cruise lines have hundreds of crew on each vessel, most large cargo ships are manned with somewhere from ten to twenty crew members. The negative impact of these vessels upon American ports, beaches, estuaries, aquifers, and reefs is enormous. This Court must recognize that the immeasurable damage caused by catastrophic maritime accidents (*see* Exxon Valdez, SS Norway) is inextricably related to the manner in which the vessel is operated, maintained and staffed. Without a strong impetus to maintain a seaworthy vessel, properly manned and equipped, and compelled to care for its crew, shipowners will succumb to the desire for corporate profits and expediency. The shipowner will allow the crew to work sick and injured, making the vessel (whether a container ship, a liquefied natural gas carrier, an oil tanker or a cruise liner) a danger to all around it. Shipowners have consistently proven they are willing to transfer the cost of their short term gain to those unfortunate enough to be present when disaster strikes, be it seafarer, port, beach, reef or American taxpayer.

the willful failure to provide maintenance and cure benefits to seafarers. There is no valid reason to abandon seafarers at this point in our history and to ignore hundreds of years of tradition that has led our courts to proclaim that seafarers are the wards of admiralty.

Respectfully submitted,

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