UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

IRA BOATNER	CIVIL ACTION
v.	NO. 18-10043
C&G WELDING, INC., ET AL.	SECTION "F"

ORDER AND REASONS

Before the Court is the motion of C&G Welding and Shore Offshore for partial summary judgment dismissing Ira Boatner's claim for maintenance and cure. For the reasons that follow, the motion is GRANTED.

Background

This is a Jones Act case that arises from a shoulder injury a rigger suffered while lifting a bundle of cable slings aboard a barge. The motion before the Court raises one question: Has the rigger forfeited his right to maintenance and cure by skipping over 75% of the physical therapy sessions his doctor deemed "absolutely critical" to his recovery? He has.

Ira Boatner worked as a rigger for C&G Welding aboard a derrick barge owned by Shore Offshore. He tore his left rotator cuff while lifting a bundle of cable slings. C&G Welding promptly paid him maintenance and cure.

Four months after his injury, Boatner visited a surgeon, Dr. Felix Savoie. Dr. Savoie recommended that Boatner undergo arthroscopic surgery. He noted that Boatner would "require 6 months of physical therapy to return to his heavy-duty occupation" after the surgery. It was "absolutely critical," he added, that "therapy once started some 6-8 weeks post-surgery not be interrupted."

Two months after that visit, Dr. Savoie performed arthroscopic surgery on Boatner's left shoulder. It succeeded. To ensure the shoulder kept improving, Dr. Savoie ordered Boatner to complete eighteen sessions of physical therapy. Boatner did not comply: He attended just six sessions, citing "transportation" issues. He says he relied on a friend for transportation because he wrecked his car; when his friend moved, he lost his ride to therapy. He did not tell anyone at C&G Welding about his transportation troubles.

Ten months after his surgery, Boatner saw Dr. Savoie for a follow-up. Dr. Savoie said Boatner's shoulder was "not quite as good as I had hoped because therapy was discontinued." By then, Dr. Savoie "thought [he] would be releasing" Boatner to return to

work. Instead, Boatner's shoulder health was deteriorating. To prevent further deterioration, Dr. Savoie again ordered Boatner to attend physical therapy. But Boatner—again—failed to attend. He skipped sixteen of the eighteen sessions prescribed this second round. In total, he has missed twenty-eight of thirty-six physical therapy sessions—over 75% of them

Boatner sued C&G Welding and Shore Offshore under the Jones Act and general maritime law. He says his shoulder injury was caused by the negligence of the defendants and the unseaworthiness of the barge. He asks for punitive and compensatory damages, attorneys' fees, and payments of maintenance and cure.

Now, C&G Welding and Shore Offshore move for partial summary judgment dismissing Boatner's claim for maintenance and cure.

I.

Summary judgment is proper if the record discloses no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a). A dispute is genuine if "the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). A fact is material if it "might affect the outcome of the suit." Id. at 248.

If the non-movant will bear the burden of proof at trial, the movant "may merely point to an absence of evidence, thus shifting

to the non-movant the burden of demonstrating by competent summary judgment proof that there is an issue of material fact warranting trial." In re La. Crawfish Producers, 852 F.3d 456, 462 (5th Cir. 2017) (citation omitted).

The mere argued existence of a factual dispute does not defeat an otherwise properly supported motion. See Anderson, 477 U.S. at 248. Nor do "[u]nsubstantiated assertions, improbable inferences, and unsupported speculation[.]" Brown v. City of Houston, Tex., 337 F.3d 539, 541 (5th Cir. 2003). Ultimately, to avoid summary judgment, the non-movant "must go beyond the pleadings and come forward with specific facts indicating a genuine issue for trial." LeMaire v. La. Dep't of Transp. & Dev., 480 F.3d 383, 387 (5th Cir. 2007).

In deciding whether a fact issue exists, the Court views the facts and draws all reasonable inferences in the light most favorable to the non-movant. See Midwest Feeders, Inc. v. Bank of Franklin, 886 F.3d 507, 513 (5th Cir. 2018). And the Court "resolve[s] factual controversies in favor of the nonmoving party," but "only where there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts." Antoine v. First Student, Inc., 713 F.3d 824, 830 (5th Cir. 2013) (citation omitted).

II.

C&G Welding and Shore Offshore move for summary judgment dismissing Boatner's claim for maintenance and cure. Their motion turns on the question whether Boatner has forfeited his right to maintenance and cure by "willfully rejecting" or "unreasonably refusing" medical care.

A.

A Jones Act employer owes an "absolute, non-delegable duty" to pay maintenance and cure to a seaman who "becomes ill or suffers an injury while in service of the vessel." In re 4-K Marine, L.L.C., 914 F.3d 934, 937 (5th Cir. 2019). "Maintenance" is "a per diem living allowance for food and lodging." Id. at 937. "Cure" is "payment for medical, therapeutic, and hospital expenses." Id.

A seaman forfeits his right to maintenance and cure in "well-defined and narrowly limited circumstances." Oswalt v. Williamson Towing Co., 488 F.2d 51, 53 (5th Cir. 1974). Two circumstances are relevant here.

The first is when the seaman "unreasonabl[y] refus[es] to accept medical care." Id. at 53 (citing Brown v. Aggie & Millie, Inc., 485 F.2d 1293 (5th Cir. 1973)). When the seaman "voluntarily stops short" of maximum medical improvement by "refusing medical attention," the "justification for the payments likewise ceases." Oswalt, 488 F.2d at 54 (citing Brown, 485 F.2d at 1293).

The second is when the seaman "willful[ly] reject[s]" the "recommended medical aid." Coulter v. Ingram Pipeline, Inc., 511 F.2d 735, 737 (5th Cir. 1975). This rule, though, is "not inexorably applied." Id. at 737. For example, a seaman does not forfeit his right to maintenance and cure if he has "reasonable grounds for refusing care." Id. Nor will forfeiture follow if "extenuating circumstances" make his "failure to follow the prescribed regimen either reasonable or something less than a willful rejection." Id. at 737-38.

B.

Invoking these authorities, C&G Welding and Shore Offshore contend that Boatner forfeited his right to maintenance and cure by failing to attend over 75% of the physical therapy sessions his surgeon ordered.

The Court agrees. Boatner knew that physical therapy was "absolutely critical" to his recovery yet skipped twenty-eight of thirty-six sessions. He claims his lack of "transportation" prevented him from attending, but the excuse is an unreasonable one. He revealed that transportation was a problem only when deposed; by then, he had missed twelve sessions. And he is still skipping sessions. As recently as July 9, 2020, while this motion was pending, Boatner no-showed for a session. His repeated failure to attend physical therapy amounts to an "unreasonable refusal to

accept medical care." Oswalt, 488 F.2d at 53. He has, in effect, "quit participation in a course of therapy already begun," id. at 53-54, and his truancy has harmed his shoulder health. Had he attended physical therapy, his doctor says, he would have recovered by October 2019. It is now July 2020.

Boatner does not dispute that he missed twenty-eight of thirty-six physical therapy sessions. Instead, he says that "extenuating circumstances" excuse his absenteeism. He is mistaken. To excuse the skipped sessions, the "extenuating circumstances" must make his "failure to follow the prescribed regimen reasonable or something less than a willful rejection." Coulter, 511 F.2d at 738. As noted, his "transportation" troubles do not render reasonable his failure to attend over 75% of the physical therapy sessions his surgeon ordered. Boatner offers no reasonable explanation for his failure to attend twenty-eight sessions; that is because there is but one reasonable explanation, and it is unfavorable to him: He deliberately failed to attend the sessions—that is, he "willful[ly] reject[ed]" them. Coulter, 511 F.2d at 738; see also "Willful," AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE at 1982 (5th ed. 2016) ("Said or done on purpose; deliberate").[1]

[1] A Justice of the United States Supreme Court and a leading lexicographer have said that the American Heritage Dictionary of the English Language is among "the most useful and authoritative

Boatner's second argument is as flawed as his first. Abandoning "extenuating circumstances," he says summary judgment is improper because no evidence shows that the sessions he missed were "significant enough." He is again mistaken. His surgeon, Dr. Savoie, said "lack of therapy" is *the* reason Boatner has not returned to work. According to Dr. Savoie, Boatner would have recovered by October 2019—over eight months ago—if Boatner had completed the scheduled sessions. The skipped sessions carry clear significance, and Boatner's contention to the contrary lacks merit.[2]

In skipping session after session, Boatner "voluntarily stop[ped] short" of maximum medical recovery. Oswalt, 488 F.2d at 54. Paying him maintenance and cure is no longer justified. See id. Because the justification for the payments no longer exists, the "interests and principles protected by the rule of forfeiture would be served . . . by its application" here. Coulter, 511 F.2d at 739. The Court thus holds that Boatner has forfeited his right to receive further payments of maintenance and cure. See, e.g.,

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for the English language" for the period of 2001 to the present. See Antonin Scalia & Bryan A. Garner, A Note on the Use of Dictionaries, 16 Green Bag 2d 419, 423, 427-28 (2013).

[2] Boatner says he missed some sessions "due to other issues including the physical therapy facility cancelling the remaining visits and requiring Mr. Boatner to get a new order." He cites no record evidence to support the assertion.

Atl. Sounding Co. v. Vickers, 782 F. Supp. 2d 280, 286 (S.D. Miss. 2011) (seaman forfeited right to further payments of maintenance and cure because he failed to complete the "physical therapy regimen" his doctor prescribed), aff'd, 454 F. App'x 343 (5th Cir. 2011).

III.

Boatner forfeited his right to maintenance and cure by failing to attend twenty-eight of the thirty-six physical therapy sessions his surgeon ordered. Accordingly, IT IS ORDERED: that C&G Welding and Shore Offshore's motion for partial summary judgment is GRANTED. Boatner's claim for maintenance and cure is DISMISSED with prejudice. No further payments need be made.

New Orleans, Louisiana, July 30, 2020

MARTIN L. C. FELDMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
March 26, 2020
Lyle W. Cayce
Clerk

No. 19-60027

MMR CONSTRUCTORS, INCORPORATED; ZURICH MUTUAL INSURANCE COMPANY,

Petitioners

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR; HENRY T. FLORES,

Respondents

Petition for Review of an Order
of the Benefits Review Board

Before DAVIS, HAYNES, and OLDHAM, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Petitioner MMR Constructors appeals the Benefits Review Board's order awarding benefits to claimant Henry Flores under the Longshore and Harbor Workers' Compensation Act. Concluding that Flores was on navigable waters at the time of injury and that his case is controlled by *Perini*,[1] we AFFIRM.

[1] *Dir., OWCP, U.S. Dep't of Labor v. Perini N. River Assocs.*, 459 U.S. 297, 299 (1983) (hereinafter "*Perini*").

I. BACKGROUND

The facts are straightforward and uncontested. Henry Flores worked for MMR Constructors ("MMR") as a quality assurance and control technician for electrical systems. He assisted with electrical wiring for the construction of Chevron's tension-leg platform named Big Foot.[2] While working on the platform on January 20, 2014, Flores's left foot got caught on a cable, and he tore his Achilles tendon. The parties do not dispute that the injury occurred during the course and scope of his employment.

While Big Foot is currently located at its permanent home in the outer Continental Shelf of the Gulf of Mexico, at the time of Flores's accident, it was under construction at a shipyard in Corpus Christi Bay. During construction of what would ultimately become Big Foot, the platform floated in the bay on pontoons, connected to land by steel cables and utility lines.

An Administrative Law Judge (ALJ) held a formal hearing to assess Flores's claim for benefits, both under the Longshore and Harbor Workers' Compensation Act[3] (LHWCA or the Act) and as extended by the Outer Continental Shelf Lands Act[4] (OCSLA). The ALJ initially found that, although there was "no question" Flores was injured on navigable waters, he was not a maritime employee and thus failed the LHWCA's status test under the 1972 amendments.[5] The Benefits Review Board (BRB) overturned the ALJ's order, relying on the Supreme Court's decision in *Perini* to conclude that Flores was

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[2] Big Foot is an offshore oil platform used for deep water drilling that currently sits 225 miles south of New Orleans. It is anchored to the sea floor by over sixteen miles of tendons. Some estimates have Big Foot as high as 30 stories tall.

[3] 33 U.S.C. § 901, et seq.

[4] 43 U.S.C. § 1333(b).

[5] The ALJ also found that Flores was not entitled to compensation under the LHWCA as incorporated by the OCSLA. Because we hold that Flores is covered under the LHWCA directly, we need not reach this issue.

covered under the LHWCA because he was injured on navigable waters.[6] MMR timely filed a petition for review.

II. DISCUSSION

A. Standard of Review

This court reviews the BRB's legal conclusions de novo.[7] Because the facts here are not in dispute, "whether LHWCA coverage exists is a question of statutory interpretation and thus is reviewed as a pure question of law."[8]

B. Injury on Navigable Waters

The LHWCA establishes a federal statutory workers' compensation scheme providing certain maritime workers with "medical, disability, and survivor benefits for work-related injuries and death."[9] Prior to 1972, the LHWCA's "situs" requirement only extended coverage to employees injured or killed on "navigable waters of the United States (including any dry dock)."[10] When Congress amended the LHWCA in 1972, it (1) expanded the situs requirement to include certain adjoining land areas and (2) added a "status" component in 33 U.S.C. § 902(3), requiring that employees be engaged in maritime employment within the meaning of the Act.[11]

We start with the Supreme Court's decision in *Perini*, decided after the LHWCA was amended in 1972. The facts in *Perini* bear some resemblance to the facts here: an employee was denied benefits after being injured on navigable waters because he was not engaged in maritime employment and, thus, could not satisfy the status test under the LHWCA as amended in 1972.[12]

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[6] *Flores v. MMR Constructors, Inc.*, 50 BRBS 47, 50–51 (2016).
[7] *B & D Contracting v. Pearley*, 548 F.3d 338, 340 (5th Cir. 2008).
[8] *Baker v. Dir., OWCP*, 834 F.3d 542, 545 (5th Cir. 2016).
[9] *Howlett v. Birkdale Shipping Co., S.A.*, 512 U.S. 92, 96 (1994).
[10] 33 U.S.C. § 903(a), 44 Stat. 1426; *see Perini*, 459 U.S. 297, 299 (1983).
[11] *Perini*, 459 U.S. at 299; 33 U.S.C. §§ 903(a), 902(3).
[12] *Perini*, 459 U.S. at 300–01.

The Supreme Court reversed.[13] It held that the 1972 amendments to the LHWCA sought to expand, not limit, coverage.[14] Before 1972, any claimant injured upon navigable waters in the course of his employment who satisfied the definition of "employee" would have been covered under the Act if employed by a statutory "employer."[15] The Court concluded that such claimants—"injured on the actual navigable waters in the course of [their] employment"—were still eligible under the amended LHWCA because the Court "consider[ed] these employees to be engaged in maritime employment."[16] Thus, these claimants satisfied the amended Act's status requirement, the other statutory provisions notwithstanding.[17]

Our first challenge is to determine whether Flores, injured on a floating platform, would have satisfied the "situs" test under the LHWCA prior to 1972. In short, if Big Foot was on navigable waters, then Flores would have been covered under the pre-1972 LHWCA, and *Perini* teaches that he would also be eligible for coverage under the amended Act, despite his inability to otherwise meet the "status" test.[18] If, however, Big Foot did not rest on navigable waters, then Flores's claim fails because he cannot satisfy the situs or the status test required by the post-1972 amendments to the LHWCA. Two pre-1972 Fifth Circuit cases are helpful in determining whether Flores was injured on navigable waters.

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[13] *Id.* at 325.

[14] *Id.* at 299.

[15] *Id.* at 305.

[16] *Id.* at 324; *see also Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 904 (5th Cir. 1999) (en banc).

[17] *Id.*

[18] Flores's presence on navigable waters may not be "transient or fortuitous," *Bienvenu*, 164 F.3d at 908, but that issue does not present itself here.

First, MMR contends that because this court previously held that Big Foot is not a vessel, it must be considered an extension of land.[19] But *Williams v. Avondale Shipyards, Inc.* reveals that this case does not hinge on whether Flores was injured on a vessel.[20] In *Williams*, a claimant was injured on a not-yet-commissioned Coast Guard cutter on its final sea trial.[21] The claimant filed multiple claims for relief under the Jones Act, general maritime law, and the LHWCA.[22] The court followed settled law and first held that the Coast Guard cutter was not a vessel since it was uncompleted, thereby barring coverage under the Jones Act.[23] Despite this fact, the court held that the claimant could still seek relief under the LHWCA if injured on navigable waters of the United States as opposed to international waters.[24] *Williams*, then, stands for the solid proposition that an injury on a non-vessel located on navigable waters of the United States satisfies the situs requirement for purposes of coverage under the pre-1972 LHWCA. MMR's attempt to distinguish *Williams* fails. MMR relies upon cases that deal with whether crafts in various forms are vessels for purposes of the Jones Act or general maritime law.[25] Those cases are irrelevant for our purposes in determining coverage under the LHWCA.

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[19] *See Baker v. Director, OWCP*, 834 F.3d 542, 545 (5th Cir. 2016).

[20] 452 F.2d 955 (5th Cir. 1971).

[21] *Id.* at 957.

[22] *Id.*

[23] *Id.* at 958.

[24] *Id.* at 959. It ultimately remanded the case to the district court to determine whether the accident occurred on navigable waters of the United States, as opposed to the high seas (since the LHWCA only extends to the former, whereas general maritime law extends to both). *Id.* at 960–61.

[25] *See, e.g., Lozman v. City of Riviera Beach, Fla.*, 568 U.S. 115, 122 (2013) (a house boat could not be considered a vessel because it was not designed for transportation on water); *Cope v. Vallette Dry-Dock Co*, 119 U.S. 625, 630 (1887) (a floating drydock cannot be considered a vessel); *Manuel v. P.A.W. Drilling & Well Serv., Inc.*, 135 F.3d 344, 352 (5th Cir. 1998) (a rig bolted to a barge was a vessel under the Jones Act); *Leonard v. Exxon Corp.*, 581 F.2d 522, 524 (5th Cir. 1978) (a floating work platform was not a vessel for purposes of the Jones Act); *Cook v. Belden Concrete Prod., Inc.*, 472 F.2d 999, 1002 (5th Cir. 1973) (a floating dry dock is not a vessel within the scope of the Jones Act or general maritime jurisdiction).

Travelers Insurance Co. v. Shea is also helpful in our effort to determine whether Flores was injured on navigable waters. It teaches us that, pre-1972, if an employee was injured on a floating structure permanently attached to land, he was not covered under the LHWCA.[26] In *Shea*, the claimant was injured on a floating outfitting pier, which was an extension of a ramp that had been permanently anchored to both the shore and seabed with steel pillars.[27] We determined the pier was not on navigable waters and should instead be considered an extension of land.[28] Indeed, "[i]ts permanent home was in the water, and the waters below it had been completely removed from navigation."[29] Despite the fact that it was floating, the court treated it as a pier or extension of land because it was "permanently anchored . . . for eighteen years" with no plans to ever move it from its fixed position.[30]

We have since followed this analysis, emphasizing that the extent to which a craft or pier is permanently attached to land is critical. In *Peytavin v. Government Employees Insurance Co.*, for example, the court held that a floating pontoon fastened to the shore by means of cables could not be considered an extension of land.[31] Structures typically deemed extensions of land, the court noted, "were in some manner firmly and permanently fastened to the land."[32] "A vessel moored to a dock does not become an extension of the

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[26] 382 F.2d 344, 349 (5th Cir. 1967).

[27] *Id.* at 345–46.

[28] *Id.* at 349.

[29] *Id. See also Nat'l Maint. & Repair v. Illinois Workers' Comp. Comm'n*, 395 Ill. App. 3d 1097 (2009). The Appellate Court of Illinois there held that the barge in question was an extension of land, because it had been affixed to the shore with mooring lines and a "spud" (essentially a temporary piling) for five or six years. *Id.* at 1102.

[30] *Shea*, 382 F.2d at 349.

[31] 453 F.2d 1121, 1126 (5th Cir. 1972).

[32] *Id.* at 1125.

land *nor do other structures secured to the shore by cables, or other temporary means*."[33]

From these cases, it is clear that if a craft resting on navigable waters is permanently attached to land, then the water underneath the craft is removed from navigation and is not navigable under the LHWCA.[34] While Big Foot was attached to land bordering Corpus Christi Bay, its attachment was not permanent. Big Foot was attached only temporarily while under construction—it was built to be moved offshore to drill for oil and gas in the Gulf of Mexico. Because it was not permanently attached to land, the water underneath it was not removed from navigation. Thus, Flores was injured on navigable waters and is entitled to benefits under the Act if MMR was a statutory "employer." We now turn to that question.

C. "Employer" Requirement

Both the original and amended LHWCA define "employer" as "an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States."[35] MMR argues that because neither Flores nor any other employee of MMR was engaged in "maritime employment" as defined by the post-1972 LHWCA's

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[33] *Id.* at 1126 (quoting *Hastings v. Mann*, 340 F.2d 910, 911 (4th Cir. 1965)). *See also Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 214–15 (1969) ("Since long before the Longshoremen's Act was passed, it has been settled law that structures such as wharves and piers, *permanently affixed to land*, are extensions of the land.") (emphasis added).

[34] The Second Circuit has adopted a different test. In *Lockheed Martin Corp. v. Morganti*, 412 F.3d 407, 414 (2d Cir. 2005), the court considered whether a research barge attached to a buoy rested on navigable waters. The court did not consider the permanence of the barge. *Id.* at 415. Instead, the court held that "a person on any object floating in actual navigable waters must be considered to be on actual navigable waters" for LHWCA coverage. *Id.* at 416. The test we have established in *Shea* and *Peytavin* is not as broad as the Second Circuit's test.

[35] Longshore Harbor Workers Compensation Act of 1927, Pub. L. No. 92-576, § 2(b), 86 Stat. 1251 (Oct. 27, 1972); § 903(2)(4). Congress amended the employer definition in 1972 to reflect the expanded situs requirements, but the definition otherwise remained unchanged. *Id.*

"status" test, MMR does not qualify as a statutory "employer" under § 902(4). As set forth below, we conclude that MMR was a statutory employer.

Because *Perini* teaches us that the 1972 amendments to the LHWCA did not intend to limit coverage, the definition of both "employee" and "employer" under the Act become relevant. Before the amendments, "employee" was defined negatively to read: "[t]he term 'employee' does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."[36] The amended LHWCA substantially changed the definition of "employee" from a negative definition to: "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker."[37] This new definition of "employee" became the "status" test.

It is noteworthy that the pre-1972 LHWCA definition of employee did not specify the type of maritime work that qualified as "maritime employment"; we read that definition to include anyone who met the situs test, subject to the two exceptions in the "employee" definition.[38] Our pre-1972 case law confirms that if the claimant qualified as an employee under the pre-1972 Act by being injured on navigable waters where he was regularly employed, the employer also qualified as a statutory "employer" under § 902(4): the employer had at least one employee engaged in maritime employment.[39]

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[36] 33 U.S.C. § 902(3) (1970).

[37] § 903(2)(3) (1972). The definition excludes certain employees, none of which is at issue here.

[38] § 902(3) (1970).

[39] *See Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d 750, 758 n.8 (5th Cir. 1981) ("We find no decision of this circuit which holds that 'employer' status may not be predicated upon the status of the injured claimant as a maritime employee under the Act.").

In 1965, this court addressed the definition of "employer" in *Nalco Chemical Corp. v. Shea.*[40] The claimant in that case was employed as a combination airplane pilot/salesman and was injured on navigable water.[41] The claimant's sales duties required him to call on customers on rigs located on navigable waters.[42] His injury on navigable waters satisfied the Act's situs requirement, and he was an "employee" under the pre-1972 Act.[43] Important for this discussion, the statutory "employer" requirement was also satisfied—we held that to be an "employer," the LHWCA merely required that at least one of the employer's employees be engaged in maritime employment "in whole or in part."[44] The court concluded that the employee's sales activities on navigable waters amounted to "maritime employment" under § 902(4).[45] Thus, the employer had at least one employee engaged in maritime employment and was an "employer" under the Act.

In the post-1972 cases, we have followed the same analysis in our interpretation of "employer" under the LHWCA. We have held that if the injured employee meets the Act's amended definition of "employee," the employer is ipso facto a covered employer—it has at least one employee engaged in maritime employment.[46]

MMR disagrees with this analysis and contends that it is important that the post-1972 "employer" requirement of § 902(4) be enforced and Flores be required to show that MMR has at least one employee who can satisfy the post-

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[40] 419 F.2d 572, 574 (5th Cir. 1969) (per curiam).
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *See Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d 750, 758 (5th Cir. 1981) (holding the addition of an "employee" status requirement rendered the "employer" status requirement "largely tautological" since "the injured claimant himself must be engaged in maritime employment").

1972 definition of "employee." To make its argument, MMR points to language in *Perini*:

> In holding that we can find no congressional intent to affect adversely the pre-1972 coverage afforded to workers injured upon the actual navigable waters in the course of their employment, we emphasize that we in no way hold that Congress meant for such employees to receive LHWCA coverage merely by meeting the situs test, and without any regard to the "maritime employment" language. We hold only that when a worker is injured on the actual navigable waters in the course of his employment on those waters, he satisfies the status requirement in § 2(3), and is covered under the LHWCA, *providing, of course, that he is the employee of a statutory "employer,"* and is not excluded by any other provision of the Act.[47]

The Court clarified in a footnote that its holding "extends only to those persons 'traditionally covered' before the 1972 amendments."[48] It expressed "no opinion" on whether such coverage extended to workers injured while transiently or fortuitously on navigable water.[49] "Rather, our holding is simply a recognition that a worker's performance of his duties upon actual navigable waters is necessarily a very important factor in determining whether he is engaged in 'maritime employment.'"[50]

We read this language as leaving open the question of whether an employer of an employee injured after 1972 who is covered because of his injury on navigable waters (but who does not otherwise meet the status test) is an "employer" under the Act. In the footnote quoted above, the Court indicated concern about an employer unfairly being held responsible for LHWCA benefits when it had no notice its employee was working on navigable waters.

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[47] *Perini*, 459 U.S. 297, 323–24 (1983) (emphasis added).
[48] *Id.* at 324 n.34.
[49] *Id.*
[50] *Id.*

Indeed, this court has recognized the legitimacy of such a concern.[51] To address this issue, we held that a worker injured in the course of his employment on navigable waters is not covered by the LHWCA if his presence on the water is "transient or fortuitous," so that the employer may not have notice of its potential exposure under the LHWCA.[52] It is clear, however, that the facts here do not raise this concern, because Flores had been working on Big Foot for MMR on navigable waters for several months before his injury.

We therefore hold that because Flores was regularly employed by MMR on navigable waters and, under *Perini*, meets the "employee" definition, it follows that MMR had at least one employee engaged in maritime employment. Our conclusion that we should not read the "status" test as narrowing the definition of a statutory employer is consistent with both our holding in *Nalco Chemical Corp.* and the BRB's finding.[53] Our conclusion also follows the reasoning of the Supreme Court in *Perini*: Congress sought to expand, not limit, coverage under the LHWCA with the 1972 amendments.[54] MMR was thus an employer under the Act.

D. The Constitutionality of the LHWCA

MMR contends that applying the LHWCA to accidents with no connections to traditional maritime activity exceeds the constitutional limits of federal maritime jurisdiction.[55] To makes its argument that the Supreme

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[51] *See Carroll*, 650 F.2d at 757 ("Congress intended that liability should be imposed only where the employer had real or constructive notice of the likelihood of coverage.").

[52] *Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 908 (5th Cir. 1999) (en banc).

[53] *Flores v. MMR Constructors, Inc.*, 50 BRBS 47, 51 (2016).

[54] *See Perini*, 459 U.S. at 315–16 (1983) (quoting *Voris v. Eikel*, 346 U.S. 328, 333 (1953)) ("We are unable to find any congressional intent to withdraw coverage of the LHWCA from those workers injured on navigable waters in the course of their employment, and who would have been covered by the Act before 1972. As we have long held, 'This Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.'").

[55] *See* U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases . . . of admiralty and maritime Jurisdiction . . .").

Court abrogated *Perini*, it relies on *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*[56]

MMR has failed to show that the Court in *Grubart* sought to proscribe the reach of Congress's admiralty jurisdiction concerning the LHWCA. *Grubart* articulated a jurisdictional test for maritime torts for cases brought under 28 U.S.C. § 1333(1), which states that federal district courts have original and exclusive jurisdiction over civil cases of admiralty jurisdiction.[57] The Supreme Court has explained that the test for maritime tort jurisdiction is distinguishable. "Although the term 'maritime' occurs both in 28 U.S.C. § 1333(1) and in § 2(3) of the [LHWCA], these are two different statutes 'each with different legislative histories and jurisprudential interpretations over the course of decades.'"[58] *Grubart* also addressed the Extension of Admiralty Jurisdiction Act, which expanded maritime jurisdiction to injuries occurring on land or sea caused by a vessel on navigable water.[59] The Supreme Court held in *Nacirema Operating Co. v. Johnson* that Congress did not "intend[] to amend or affect the coverage of the Longshoremen's Act" in passing the Extension Act, and that "the Act has no bearing whatsoever on [claimants'] right to a compensation remedy under the Longshoremen's Act."[60] Thus, nothing in *Grubart* suggests that the Court sought to abrogate *Perini* and limit admiralty jurisdiction under the LHWCA.

In addition, when numerous cases from the Supreme Court seemingly speak to an issue, "the Court of Appeals should follow the case which directly

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[56] 513 U.S. 527 (1995).

[57] *See id.* at 534 ("a party seeking to invoke federal admiralty jurisdiction pursuant to 28 U.S.C. § 1333(1) over a tort claim must satisfy conditions both of location and connection with maritime activity").

[58] *Perini*, 459 U.S. at 320 n.29 (quoting *Boudreaux v. American Workover, Inc.*, 680 F.2d 1034, 1035, 1050 (5th Cir. Unit A 1982)).

[59] *Grubart*, 513 U.S. at 532; *see* 46 U.S.C.A. § 30101.

[60] 396 U.S. 212, 223 (1969).

controls, leaving to [the Supreme Court] the prerogative of overruling its own decisions."[61] Relying on *Parker v. Motor Boat Sales*, the Court in *Perini* made very clear: "when a worker is injured on the actual navigable waters in the course of his employment on those waters, he . . . is covered under the LHWCA."[62] In *Parker*, the injured worker, a janitor/porter, drowned while riding in a boat to look for hidden objects in muddy water.[63] One issue the Court had to consider was whether Congress had the authority to award compensation under the LHWCA for such a predominantly "non-maritime employee."[64] The Court held that "it is not doubted that Congress could constitutionally have provided for recovery under a federal statute in this kind of situation."[65] *Grubart*, which was decided twenty-five years ago and twelve years after *Perini*, made no mention of *Perini* or *Parker*, and the Supreme Court has not called either case into question since. Absent clear language abrogating *Perini*, we are bound by the Court's understanding of maritime jurisdiction in that case.

III. CONCLUSION

For the aforementioned reasons, we AFFIRM the BRB's award of compensation to Flores.

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[61] *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989).

[62] 459 U.S. 297, 310, 324 (1983).

[63] 314 U.S. 244, 246 (1941).

[64] *Id.* at 246, 248.

[65] *Id.* at 248. This court has similarly acknowledged the "long-standing judicial recognition of Congress' broad powers to expand the reach of admiralty jurisdiction" when discussing the constitutionality of the LHWCA. *Jacksonville Shipyards Inc. v. Perdue*, 539 F.2d 533, 545 (5th Cir. 1976), *aff'd, P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69 (1979) (intervening subsequent history omitted).

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ANTHONY KOZUR,	:	Hon. Joseph H. Rodriguez
	:	
Plaintiff,	:	Civil Action No. 18-08750
	:	
v.	:	**OPINION**
F/V ATLANTIC BOUNTY, LLC., et al,	:	
	:	
Defendants.	:	

This case comes before the Court on Defendants' Motion to Dismiss or Stay Plaintiff's Action and Compel Arbitration. [Dkt. Nos. 8]. The Court heard oral argument on this Motion, on September 30, 2019. Thereafter, the Court issued an Opinion, finding that questions of fact and credibility pertaining to the enforceability of the arbitration clause at issue precluded a determination on Defendants', F/V Atlantic Bounty, LLC and Sea Harvest, Inc., Motion to Compel Arbitration.[1] As a result, the Court ordered and conducted an evidentiary hearing on January 9, 2020, to determine whether the Plaintiff agreed to arbitrate his current claims.

The Court has considered the initial written submissions of the parties, the arguments presented at the hearings on September, 30, 2019 and January 9, 2020, as well as the parties' supplemental briefing. For the reasons stated on the record, as well as those that follow, the Motion to Dismiss or Stay Plaintiff's Action and Compel Arbitration will be granted.

[11] The Court's October 16th Opinion simultaneously addressed a second motion to dismiss in this matter [Dkt. No. 9], which the Court granted, thereby dismissing Atlantic Cape Fisheries as a Defendant in the case.

I. Background

The Court reincorporates the relevant factual background set forth in Kozur v. F/V Atlantic Bounty, LLC., et al, No. 18-08750 (D.N.J. Oct. 16, 2019).

Plaintiff, Anthony Kozur ("Plaintiff"), filed a Complaint with this Court on May 3, 2018, against Atlantic Cape Fisheries, Inc. and F/V Atlantic Bounty, LLC. On June 21, 2018, Plaintiff amended his complaint, adding Sea Harvest, Inc. as a Defendant. Plaintiff's Amended Complaint asserts claims for Jones Act Negligence (Count I), Unseaworthiness (Count II), and Maintenance and Cure (Count II). [Dkt. No. 5]. The basis of Plaintiff's seaman claims stem from events occurring on August 28, 2017. Specifically, Plaintiff claims that while in navigable waters, he slipped and fell on the "centerline stopper midship, twisting his back and causing serious injuries" in the course of his employment on Atlantic Bounty (the "Vessel"). (Compl. at ¶¶ 28-31).

Defendants F/V Atlantic Bounty and Sea Harvest filed a Motion to Dismiss or Stay Plaintiff's Action and Compel Arbitration pursuant to an arbitration clause contained in Plaintiff's employment contract, which Defendants argue is valid and enforceable against him. [Dkt. No. 8]. Defendant Atlantic Cape separately moved to Dismiss or Stay Plaintiff's Action and Compel Arbitration. [Dkt. No. 9]. The Court heard Oral Argument on September 30, 2019, and issued an Opinion and Order on October 16, 2020, (1) granting Atlantic Cape's Motion and dismissing Atlantic Cape from the case; and (2) dismissing without prejudice F/V Atlantic Bounty and Sea Harvest's Motion without prejudice, finding that the record before the Court, at that time, lacked sufficient information to determine the enforceability of the alleged arbitration agreement.

B. Enforcement of the Arbitration Clause under the Federal Arbitration Act

Under Section 2 of the FAA:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C.A. § 2. "Maritime Transactions," however, do not include "contracts of employment of seamen." Id. § 1. "[A] court should decide for itself whether § 1's 'contracts of employment' exclusion applies before ordering arbitration." New Prime Inc. v. Oliveira, 139 S. Ct. 532, 537, 202 L. Ed. 2d 536 (2019). The arbitration clause here, is undeniably a written provision in a seaman's employment contract, and therefore, exempt from enforcement under the Federal Arbitration Act ("FAA"). In fact, the parties do not dispute that the FAA does not apply in this case. [Dkt. No. 16, p. 1; Dkt. No. 34, p. 2]. Therefore, the issue before the Court is whether this seaman's agreement to arbitrate is enforceable as a matter of state law.

C. Enforceability of the Arbitration Clause under State Law

Plaintiff submits that the FAA prohibits enforcement of arbitration clauses against seamen under state law. More specifically, Plaintiff contends that the arbitration clause is unenforceable under state law because: (1) the FAA preempts state arbitration related laws; (2) N.J. Stat. Ann. 10:5-12.7 prohibits the pre-incident waiver of statutory or case law rights; and (3) state law cannot compel arbitration of a seaman's claim because admiralty law requires uniform application.

As an initial matter, Plaintiff focuses primarily on arguing that the arbitration clause is not enforceable under New Jersey law. According to that arbitration clause,

however, "the laws of the state of New York shall be applied in determining the validity and enforceability of this agreement." "[O]rdinarily, when parties to a contract have agreed to be governed by the laws of a particular state, New Jersey courts will uphold the contractual choice," unless:

> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
>
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which * * * would be the state of the applicable law in the absence of an effective choice of law by the parties.

Collins v. Mary Kay, Inc., 874 F.3d 176, 183 (3d Cir. 2017); Restatement (Second) of Conflicts of Laws § 187(2) (1969). Here, Plaintiff's contract was entered into in New Jersey, between a New Jersey individual and New Jersey companies. In fact, Defendant also appears to argue for the application of New Jersey law. [Dkt. No. 37, p. 14]. The parties provide no relationship between them or the transaction and the State of New York, and no other reasonable basis for the parties' choice in applying New York law. Neither party, however, has conducted a choice of law analysis or argued the applicable law in this case. Under such circumstances the Court will apply New Jersey law in determining the enforceability of the parties' arbitration agreement. Notably, the Court finds that no actual conflict between New Jersey law and New York law exits, with regard to compelling arbitration. See Westinghouse Elec. Corp. v. New York City Transit Auth., 82 N.Y.2d 47, 603 N.Y.S.2d 404, 407, 623 N.E.2d 531 (1993) ("It is firmly established that the public policy of New York State favors and encourages arbitration and alternative dispute resolutions. . . . Thus '[i]t has long been the policy of the law to interfere

as little as possible with the freedom of consenting parties to achieve that objective.' ").

Importantly, both New Jersey and New York Courts have held that "[t]here is no language in the FAA that explicitly preempts the enforcement of state arbitration statutes." Palcko v. Airborne Express, Inc., 372 F.3d 588, 595 (3d Cir. 2004); Pine Valley Prods. v. S.L. Collections, 828 F. Supp. 245, 248 (S.D.N.Y. 1993). Recently, the New Jersey Supreme Court has further held "that the NJAA may apply to arbitration agreements even if parties to the agreements are exempt under section 1 of the FAA." Arafa v. Health Express Corp., No. 083154, 2020 WL 3966956, at *13 (N.J. July 14, 2020); Volt Info. Scis., 489 U.S. at 477, 109 S. Ct. 1248 ("the FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration.").[3] Although Plaintiff concedes that there is no express preemption, he argues that Congress has occupied the field with respect to seamen's personal injury claims against their employers through the Jones Act, and state arbitration statues must defer to Congress' occupation. [Dkt. No. 34, at p. 16]. Specifically, Plaintiff contends that the rights afforded under the Jones Act cannot be contractually waived.

"[T]he legislative record on the § 1 exemption is quite sparse." Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 119 (2001). In Circuit City Stores, the Supreme Court of the United States explained:

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[3] Valdes v. Swift Transp. Co., 292 F. Supp. 2d 524, 527 (S.D.N.Y. 2003) (holding "that any inapplicability of the FAA would not preclude enforcing the arbitration agreement under state law")); O'Dean v. Tropicana Cruises Int'l, Inc., No. 98-cv-4543, 1999 WL 335381, at *1 (S.D.N.Y. May 25, 1999) ("The inapplicability of the FAA does not mean ... that arbitration provisions in seaman's employment contracts are unenforceable, but only that the particular enforcement mechanisms of the FAA are not available.")

> it is a permissible inference that the employment contracts of the classes of workers in § 1 were excluded from the FAA precisely because of Congress' undoubted authority to govern the employment relationships at issue by the enactment of statutes specific to them. By the time the FAA was passed, Congress had already enacted federal legislation providing for the arbitration of disputes between seamen and their employers, see Shipping Commissioners Act of 1872, 17 Stat. 262. . . . It is reasonable to assume that Congress excluded "seamen" and "railroad employees" from the FAA for the simple reason that it did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers.

Id. at 120–21.

In other words, the Supreme Court has suggested that "Congress might have limited § 1 to seamen and railroad employees because there were statutory dispute resolution schemes already in place for such workers" or in development. Singh v. Uber Techs. Inc., 939 F.3d 210, 224 (3d Cir. 2019). Plaintiff argues that "Congress has passed a dispute resolution system for seamen, [with] the Jones Act, and this must take preeminence over any state developed dispute resolution system.

Congress' general intent in enacting the Jones Act "was to provide liberal recovery for injured workers, and it is also clear that Congress intended the creation of no static remedy, but one which would be developed and enlarged to meet changing conditions and changing concepts of industry's duty toward its workers." Kernan v. Am. Dredging Co., 355 U.S. 426, 432, 78 S. Ct. 394, 398, 2 L. Ed. 2d 382 (1958) (citations omitted). The act states in pertinent part:

> A seaman injured in the course of employment . . . may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.

46 U.S.C. § 30104. The Jones act also incorporates the Federal Employers' Liability Act ("FELA"). " Garrett v. Moore-McCormack Co., 317 U.S. 239, 244, 63 S. Ct. 246, 250, 87 L. Ed. 239 (1942).

Under Section 5 of the FELA , "[a]ny contract . . . the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void." 45 USC § 55. FELA's Section 6 adds, in pertinent part:

> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

45 U.S.C. § 56. Pursuant to Section 5 and 6, the Supreme Court has held that "contracts limiting the choice of venue are void as conflicting with the Liability Act." Boyd v. Grand Trunk W. R. Co., 338 U.S. 263, 265, 70 S. Ct. 26, 27, 94 L. Ed. 55 (1949). Under this regime, some courts have held that seamen stand "in a position perfectly analogous to that of [a railroad worker under the FELA]," and that forum-selection causes in cases of domestic litigants, are unenforceable. Nunez v. Am. Seafoods, 52 P.3d 720, 723 (Alaska 2002); Boutte v. Cenac Towing, Inc., 346 F.Supp.2d 922 (S.D. Tex. 2004). Accordingly, Plaintiff submits that this rule equally applies to the Jones Act and, therefore, prohibits pre-dispute arbitration agreements to Jones Act claims. Boyd, however, did not consider the enforceability of arbitration clauses.

Additionally, most courts have noted that FELA's venue provision is inapplicable to the Jones Act. Terrebonne v. K-Sea Transp. Corp., 477 F.3d 271, 283 (5th Cir. 2007); see also Harrington v. Atl. Sounding Co., 602 F.3d 113, 121–22 (2d Cir. 2010) ("FELA § 6

therefore cannot reasonably be read to include a blanket prohibition on seamen arbitration agreements when, at the time of enactment, that provision did not contemplate, either in letter or spirit, the existence of an arbitral forum." (emphasis added)). "The Jones Act, in providing that a seaman should have the same right of action as would a railroad employee, does not mean that the very words of the FELA must be lifted bodily from their context and applied mechanically to the specific facts of maritime events." Cox v. Roth, 348 U.S. 207, 209, 75 S. Ct. 242, 99 L. Ed. 260 (1955).

New Jersey case law on this particular issue is scant. But having considered the rationale of the courts who have addressed whether FELA's venue provision applies to Jones Act cases and the history behind the enactment of the Jones Act, this Court finds that FELA's venue provision is not incorporated into the Jones Act. See Utoafili v. Trident Seafoods Corp., No. 09-2575 SC, 2009 WL 6465288, at *3 (N.D. Cal. Oct. 19, 2009); In the Matter of Nicholas Schreiber v. K–Sea Transportation Corp., 9 N.Y.3d 331, 340, 849 N.Y.S.2d 194, 879 N.E.2d 733 (N.Y. 2007) ("Predating the FAA by five years, the Jones Act contains no expression of intent to limit the pursuit of its remedies to the judicial forum.").[4] "Under federal maritime law, there is nothing inherently invalid or unenforceable about an agreement to arbitrate disputes relating to the employment of seamen." O'Dean v. Tropicana Cruises Int'l, Inc., No. 98 CIV. 4543 (JSR), 1999 WL 335381, at *2 (S.D.N.Y. May 25, 1999); Schreiber, 9 N.Y.3d at 340, 849

[4] See also Riley v. Trident Seafoods Corp., No. CIV. 11-2500 MJD/AJB, 2012 WL 245074, at *3 (D. Minn. Jan. 9, 2012), report and recommendation adopted, No. CIV. 11-2500 MJD/AJB, 2012 WL 245248 (D. Minn. Jan. 26, 2012) ("the majority of courts have found that FELA's prohibition against venue selection clauses is *not* incorporated into the Jones Act." (collecting cases)).

N.Y.S.2d 194, 879 N.E.2d 733 ("the doctrine that seamen are 'wards of admiralty' does not outweigh the policy favoring arbitration."); Lindo v. NCL (Bahamas), Ltd., 652 F.3d 1257, 1276 (11th Cir. 2011) ("The fact that [Plaintiff] asserts a statutory Jones Act claim does not affect the strong presumption in favor of enforcement of the choice clauses in his Contract." (citing Mitsubishi, 473 U.S. at 626)).

Here, Plaintiff relies heavily on the application of FELA Section 5 to the Jones Act, and provides no further evidence that Jones Act claims are exempt from arbitration. [Dkt. No. 35, Oral Argument Transcript, 16:16-18:11]. No language within the Jones Act leads to the conclusion that a Plaintiff may not waive the right to a jury trial. See Grooms v. Marquette Transportation Co., LLC, No. 14-CV-603-SMY-DGW, 2015 WL 681688, at *2 (S.D. Ill. Feb. 17, 2015) ("Congress did not express its intention that the rights afforded under the Jones Act be protected against waiver of the right to a judicial forum."). To the contrary, the Jones act permits a seaman to, in effect, waive the right to a Jones Act jury trial by providing a claimant the choice to file a claim under Federal Rule of Civil Procedure 9(h).[5] Importantly, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." Mitsubishi, 473 U.S. at 628. Plaintiff's arbitration clause does not restrict his right to bring a Jones Act claim against his employer, and further does not inherently force Plaintiff to forgo any of his substantive rights. Furthermore, courts have found "the modern rule is that a court enjoys the same power to grant equitable relief in an admiralty case as in an

[5] See Garza Nunez v. Weeks Marine, Inc., No. CIV.A. 06-3777, 2007 WL 496855, at *5 (E.D. La. Feb. 13, 2007).

ordinary civil action." O'Dean v. Tropicana Cruises Int'l, Inc., No. 98 CIV. 4543 (JSR), 1999 WL 335381, at *2 (S.D.N.Y. May 25, 1999) (citing Farrell Lines Inc. v. Ceres Terminals Inc., 161 F.3d 115, 116–17 (2d Cir.1998); Pino v. Protection Maritime Ins. Co., 599 F.2d 10, 15–16 (1st Cir.1979)).

Moreover, the New Jersey Arbitration Act, N.J.S.A. 2A:23B-1 to -36, is nearly identical to the FAA and enunciates the same policies favoring arbitration. Atalese, 219 N.J. at 440. The NJAA governs "all agreements to arbitrate made on or after January 1, 2003," and exempts from its provisions only "an arbitration between an employer and a duly elected representative of employees under a collective bargaining agreement or collectively negotiated agreement." N.J.S.A. 2A:23B-3(a). Arafa v. Health Express Corp., No. 083154, 2020 WL 3966956, at *10 (N.J. July 14, 2020). Therefore, the arbitration clause at issue is enforceable under the New Jersey Arbitration Act.

As to Plaintiff's argument regarding the 2019 amendment to the Law Against Discrimination, that amendment is inapplicable to this case. N.J. Stat. Ann. § 10:5-12.7 applies "to contracts and agreements entered into, renewed, modified, or amended on or after March 18, 2019." § 10:5-12.7. Here, Plaintiff's employment agreement was entered into in August 2017, almost 2 years before March 18, 2019. As the Amendment applies prospectively, it is inapplicable to this case. See Gaffney v. Levine, No. A-3464-18T2, 2020 WL 468005, at *5 (N.J. Super. Ct. App. Div. Jan. 29, 2020); Neith v. Esquared Hosp. LLC, No. CV1913545, 2020 WL 278692, at *6 (D.N.J. Jan. 16, 2020).[6]

[6] N.J. Stat. Ann. § 10:5-12.7 provides that

> a. A provision in any employment contract that waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment shall be deemed against public policy and unenforceable.

Finally, Plaintiff argues, that a requirement for the uniform application of admiralty laws precludes state law from compelling arbitration of a seaman's claim. To be sure, the Supreme Court has held that "the Jones Act is to have a uniform application throughout the country unaffected by 'local views of common law rules." Garrett v. Moore-McCormack Co., 317 U.S. 239, 244, 63 S. Ct. 246, 250, 87 L. Ed. 239 (1942) (internal quotation marks omitted) (citing Panama R. Co. v. Johnson, 264 U.S. 375, 392, 44 S. Ct. 391, 396, 68 L. Ed. 748). This "requirement of uniformity is not, however, absolute." Am. Dredging Co. v. Miller, 510 U.S. 443, 451, 114 S. Ct. 981, 987, 127 L. Ed. 2d 285 (1994).

> It is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system [,] [b]ut this limitation still leaves the States a wide scope. . . . State rules for the partition and sale of ships, state laws governing the specific performance of arbitration agreements, state laws regulating the effect of a breach of warranty under contracts of maritime insurance—all these laws and others have been accepted as rules of decision in admiralty cases, even, at times, when they conflicted with a rule of maritime law which did not require uniformity.

Romero v. International Terminal Operating Co., 358 U.S. 354, 373–374, 79 S. Ct. 468, 480–481, 3 L.Ed.2d 368 (1959) (footnotes omitted). According to the Third Circuit, "the thrust of [] cases suggests that the concept of uniformity has a good deal less weight than has been thought." Calhoun v. Yamaha Motor Corp., U.S.A., 40 F.3d 622, 636 (3d Cir. 1994), aff'd, 516 U.S. 199, 116 S. Ct. 619, 133 L. Ed. 2d 578 (1996). Most notably,

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> b. No right or remedy under the "Law Against Discrimination," P.L.1945, c. 169 (C.10:5-1 et seq.) or any other statute or case law shall be prospectively waived.

(emphasis added). Notably, "courts have not yet ruled on the applicability of Section 12.7 to arbitration agreements," let alone found that Section 12.7 restricts the use of arbitration clauses for claims other than those of discrimination. New Jersey Civil Justice Inst. v. Grewal, No. CV 19-17518, 2020 WL 4188129, at *5 (D.N.J. July 21, 2020). Because the Amendment does not have an effect on Plaintiff's Contract, the Court need not address this particular issue.

precedent provides that the uniformity requirement is relaxed when dealing with procedural doctrines—distinguishing substantive doctrines as those "upon which maritime actors rely in making decisions about primary conduct—how to manage their business and what precautions to take." Am. Dredging Co., 510 U.S. at 454, 114 S. Ct. at 988–89.

Therefore, the Court finds that the general requirement of uniformity with regard to maritime law does not preclude application of state law to the issue of arbitration. Accordingly, the Court finds no reason to preclude enforcement of the arbitration clause at issue against Plaintiff, under state arbitration law.

IV. Conclusion

For the foregoing reasons, the Court will grant Defendants' Motion to stay the present action, and compel arbitration.

An appropriate Order shall issue.

Dated: August 18, 2020

/s/ Joseph H. Rodriguez
Hon. Joseph H. Rodriguez,
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ACO-063

No. 20-2911

ANTHONY KOZUR,
Appellant

v.

F/V ATLANTIC BOUNTY LLC;
ATLANTIC CAPE FISHERIES INC;
SEA HARVEST INC

(D.N.J. No. 1-18-cv-08750)

Present: MCKEE, GREENAWAY JR. and BIBAS, Circuit Judges

1. Clerk's Listing for Possible Dismissal due to Jurisdictional Defect;

2. Response filed by Appellees to Listing for Possible Dismissal due to Jurisdictional Defect;

3. Response filed by Appellant to Listing for Possible Dismissal due to Jurisdictional Defect.

Respectfully,
Clerk/pdb

ORDER

The plaintiff has appealed an interlocutory order compelling arbitration and staying his Jones Act and maritime tort claims. This type of order is ordinarily not immediately appealable. See Zosky v. Boyer, 856 F.2d 554, 557–562 (3d Cir. 1988).

The parties' reliance on 28 U.S.C.§ 1292(a)(3) is unavailing. Even if this is an "admiralty case[]" for the purpose of that statute, see Fed. R. Civ. P. 9(h), the order did not "determin[e] the rights and liabilities of the parties." See Schoenamsgruber v. Hamburg Am. Line, 294 U.S. 454, 455 (1935); Psara Energy, Ltd., v. Advantage Arrow Shipping, L.L.C., 946 F.3d 803, 809 (5th Cir. 2020); Ibeto Petrochem. Indus. Ltd. v. M/T Beffen, 475 F.3d 56, 62 n.1 (2d Cir. 2007); State Establishment for Agric. Prod. Trading v. M/V Wesermunder, 770 F.2d 987, 990 (11th Cir. 1985); Gave Shipping Co. v. Parcel Tankers, Inc., 634 F.2d 1156, 1157 (9th Cir. 1980).

Neither does the Federal Arbitration Act give appellate jurisdiction as the parties claim. The district court's order resolved a motion to compel arbitration under state law, and the FAA does not "cover our review of a non-FAA, state-law arbitration claim in an otherwise nonappealable interlocutory order." See Palcko v. Airborne Express, Inc., 372 F.3d 588, 594 (3d Cir. 2004); see also Kum Tat Ltd. v. Linden Ox Pasture, LLC, 845 F.3d 979, 982–83 (9th Cir. 2017); Sherwood v. Marquette Transp. Co., 587 F.3d 841, 843 (7th Cir. 2009). Even if the FAA were implicated, it prohibits appeals from interlocutory orders compelling arbitration and staying litigation. See 9 U.S.C. § 16(b).

This appeal is therefore DISMISSED for lack of appellate jurisdiction.

By the Court,

s/Joseph A. Greenaway, Jr.
Circuit Judge

Dated: May 21, 2021
PDB/cc: All Counsel of Record

A True Copy:

Patricia A Dodszuweit

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

United States Court of Appeals for the Fifth Circuit

No. 19-20506

GILBERT SANCHEZ,

Plaintiff—Appellant,

versus

SMART FABRICATORS OF TEXAS, L.L.C.,

Defendant—Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:19-CV-00110

Before OWEN, *Chief Judge*, DAVIS, JONES, SMITH, STEWART, DENNIS, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, COSTA, WILLETT, HO, DUNCAN, ENGELHARDT, OLDHAM, and WILSON, *Circuit Judges*.

W. EUGENE DAVIS, *Circuit Judge*.

We took this case en banc to attempt to define for this Circuit a more definitive test, consistent with Supreme Court caselaw, to distinguish seamen entitled to benefits under the Jones Act from other maritime workers generally covered under the Longshore and Harbor Worker's Compensation Act.

We conclude that the plaintiff in this case, Gilbert Sanchez, a land-based welder directed by his employer to work on two discrete short-term transient repair jobs on two vessels, was not a seaman. Because Sanchez was not engaged in sea-based work that satisfied the requirement that he be substantially connected to a fleet of vessels in terms of the nature of his work, we AFFIRM the judgment of the district court.

I. FACTUAL BACKGROUND

The material facts in this case are not in dispute. The plaintiff, Gilbert Sanchez,[1] was employed as a land-based welder by Smart Fabricators of Texas, LLC ("SmartFab"), a contract welding firm engaged in steel fabrication, repairs to drilling equipment, and general contract welding work. SmartFab's work is performed to meet the demands of its customers on land and sometimes on jack-up drilling barges. The issues in this case revolve around Sanchez's work for SmartFab on two jack-up barges owned by SmartFab's customer, Enterprise Offshore Drilling LLC ("Enterprise").

Sanchez worked for SmartFab for a total of 67 days between August 2017 and August 2018. Six of those days were spent working on welding jobs either on land or vessels that are irrelevant to his status as a seaman because they were not owned or controlled by Enterprise. Sanchez spent the remaining 61 days—those pertinent to our inquiry—on two different jack-up drilling rigs owned by Enterprise: the Enterprise WFD 350 and the Enterprise 263.

A. Enterprise WFD 350

Sanchez worked on the Enterprise jack-up barge WFD 350 for 48 days doing welding work on a discrete repair job. The entire time he worked on this vessel, it was jacked-up so that the deck of the barge was level with

[1] Payroll records indicate that Sanchez worked for SmartFab using the name Jorge Cruz.

Gabby's Dock in Sabine Pass, Texas, and separated from the dock by a gangplank. Sanchez could take two steps on the gangplank, and he was ashore. He commuted from his home to the vessel daily. His time on the WFD 350 comprised approximately 72 percent of his total work time with SmartFab.

B. Enterprise 263

Sanchez worked 13 days on one other Enterprise vessel, the Enterprise jack-up barge 263. His work on this vessel comprised approximately 19 percent of his time in SmartFab's employment. When Sanchez was dispatched to the Enterprise 263 in July 2018, it was located in West Cameron Block 38 on the Outer Continental Shelf ("OCS"). He was sent as part of a SmartFab crew that was contracted to perform repairs necessary to get the vessel in condition to satisfy requirements of the American Bureau of Shipping ("ABS"), the Bureau of Safety and Environmental Enforcement ("BSEE"), and the Coast Guard, so that the rig could begin drilling operations at a new drilling site on the OCS. Sanchez was aboard the rig when it was moved by tugboats to the new drilling location, South Timbalier Block 125 on the OCS.

Sanchez performed welding and related work on the deck of the Enterprise 263. On August 8, 2018, he fell and sustained the injury that is the subject of this suit. Because Sanchez was sent ashore on August 9, 2018, following his injury, he was unable to complete his assignment and remain with the SmartFab crew until the repairs were completed on August 10, 2018. The rig began drilling on August 11, 2018.[2] Sanchez left the employ of

[2] Counsel for Sanchez confirmed during oral argument that the SmartFab work was completed on August 10 and drilling began on August 11, 2018 (Oral Argument Recording at 15:33-15:39), which is consistent with the affidavit of Glen Whitman, Rig Manager of the Enterprise 263.

SmartFab after his injury and, as far as the record shows, did no more work on Enterprise vessels.

II. PROCEDURAL HISTORY

After his accident, Sanchez sued SmartFab in state court under the Jones Act. SmartFab promptly removed the case, but Sanchez moved to remand, arguing that the Jones Act precluded removal. The district court denied Sanchez's motion to remand and granted SmartFab's motion for summary judgment, both for the same reason: Sanchez did not qualify as a Jones Act seaman.[3]

A. District Court Rulings

The district court concluded that Sanchez failed to establish a substantial connection in terms of the nature of his work to the Enterprise fleet of jack-up barges he worked aboard.[4] The district court held that Sanchez spent more than 30 percent of his work time with SmartFab working on the Enterprise WFD 350 and 263, and that his repair work on those barges contributed to the function of these vessels.[5] Because he contributed to the function of the vessels, he satisfied prong one of the seaman-status test.[6] The court also held that because Sanchez spent more than 30 percent of his work time with SmartFab working on those two barges, he met the substantial connection requirement as to duration.[7] However, the district court concluded that because less than 30 percent of his work on the two vessels

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[3] *See Sanchez v. Enter. Offshore Drilling LLC*, No. CV H-19-110, 2019 WL 2515307, at *4 (S.D. Tex. June 18, 2019); *Sanchez v. Enter. Offshore Drilling LLC*, 376 F. Supp. 3d 726, 733 (S.D. Tex. 2019).

[4] *Sanchez*, 376 F. Supp. 3d at 732.

[5] *Id.*

[6] *Id.*

[7] *Id.*

was performed away from the dock, he did not satisfy the nature element of the substantiality requirement and therefore Sanchez was not a seaman.[8] For this reason, the district court denied Sanchez's motion to remand the case to state court.[9] For the same reason, the district court granted SmartFab's motion for summary judgment.[10] Sanchez timely appealed both rulings.

B. Panel Opinion and En Banc Review

On appeal, the panel originally held that based upon binding Circuit precedent, Sanchez satisfied the requirements for seaman status. We based this on two of our earlier cases: *In re Endeavor Marine, Inc.*,[11] and *Naquin v. Elevating Boats, L.L.C.*[12] One member of the panel filed a concurring opinion, joined by the other members of the panel, questioning whether our precedent was in line with Supreme Court caselaw and proposing that we take the case

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[8] *Id.*

[9] *Id.* at 733.

[10] *Sanchez*, 2019 WL 2515307, at *3–4.

[11] 234 F.3d 287 (5th Cir. 2000) (per curiam).

[12] 744 F.3d 927 (5th Cir. 2014). Most of the scholarship discussing our two earlier cases is critical of our holdings. *See* Kenneth G. Engerrand, *Escape from the Labyrinth: Call for the Admiralty Judges of the Supreme Court to Reconsider Seaman Status*, 40 HOUS. J. INT. L. 741, 763–74, 795 (2018); Timothy M. O'Hara, Comment, Naquin v. Elevating Boats, LLC: *The Fifth Circuit's Improper Expansion of Jones Act "Seaman Status" Qualification*, 36 PACE L. REV. 263, 286 (2015); Matthew H. Frederick, Note, *Adrift in the Harbor: Ambiguous-Amphibious Controversies and Seamen's Access to Workers' Compensation Benefits*, 81 TEX. L. REV. 1671, 1705 (2003); L. Taylor Coley, Note, *The "Perils of the Sea"- Man Status Question: The Fifth Circuit Falls Behind FELA's Advancements in Remedies in Favor of the Continued Confusion Surrounding the Seaman Definition*, 39 TUL. MAR. L. J. 371, 380–81 (2014). *But see* John R. Hillsman, *Still Lost in the Labyrinth: The Continuing Puzzle of Seaman Status*, 15 U.S.F. MAR. L. J. 49, 73–75 (2003). For a general discussion of these cases, see 1 Robert Force & Martin J. Norris, *The Law of Seamen* § 2:8 Westlaw (database updated Nov. 2020).

en banc to consider this question.[13] The case was voted en banc, and, for the reasons set forth below, the en banc court agrees that Supreme Court precedent requires us to affirm the judgment of the district court.

III. APPLICABLE LAW

We review both the denial of a motion to remand and the grant of summary judgment de novo.[14]

A. Jones Act and LHWCA

The Jones Act grants "a seaman" a cause of action against his employer in negligence.[15] Only seamen may sue under the Jones Act and Jones Act claims are "not subject to removal to federal court."[16] Sanchez argues that because he was a seaman who brought his negligence action under the Jones Act in state court, the district court erred both in denying his motion to remand and in granting summary judgment for SmartFab. So, the only issue for us to decide to resolve this appeal is whether Sanchez is a seaman (or entitled to have a jury resolve the issue) entitled to the benefits of the Jones Act.

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[13] *Sanchez v. Smart Fabricators of Texas, L.L.C.*, 970 F.3d 550, 555–56 (5th Cir.), *reh'g en banc granted, opinion vacated*, 978 F.3d 976 (5th Cir. 2020).

[14] *Holmes v. Atl. Sounding Co.*, 437 F.3d 441, 445 (5th Cir. 2006), *abrogated on other grounds by Lozman v. City of Riviera Beach, Fla.*, 568 U.S. 115 (2013).

[15] "A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section." 46 U.S.C. § 30104.

[16] *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 455 (2001) (noting that 28 U.S.C. § 1445(a), which bars removal of certain suits involving railroads, is incorporated into the Jones Act).

In addition to the Jones Act, another important statute is relevant to our inquiry. Congress enacted the Longshore and Harbor Worker's Compensation Act (LHWCA) in 1927 to establish a federal compensation remedy for injuries to certain land-based workers occurring on navigable waters.[17] Generally, coverage under this compensation act excluded from its coverage "a master or member of a crew of any vessel."[18] The LHWCA, therefore, limits the definition of "seaman" in the Jones Act so as "to confine the benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters and to substitute for the right of recovery . . . only such rights to compensation as are given by the LHWCA."[19] Thus, the seaman's remedy is limited to rights granted by the Jones Act, and rights granted to other maritime workers are provided exclusively by the LHWCA. The two remedies are mutually exclusive.[20]

Because Congress has not defined the term "seaman," the definition of and distinction between the two groups have been the subject of extensive litigation, and courts have struggled to establish workable tests to define the word "seaman."

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[17] 33 U.S.C. § 903(a).

[18] 33 U.S.C. § 902(3)(G).

[19] *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 347 (1991) (quoting *Swanson v. Mora Brothers, Inc.*, 328 U.S. 1, 7 (1946)).

[20] *See id.*

B. Supreme Court Trilogy

In the 1990s, the Supreme Court decided three cases that were enormously helpful in giving meaning to the term "seaman."

1. *Wilander*

First was *McDermott International, Inc. v. Wilander*.[21] The Court took this case primarily to resolve a split among the circuits on the question of whether a plaintiff, to establish seaman status, was required to show that he aided in the navigation of a vessel.[22] The Court rejected the circuit cases imposing this requirement and adopted the test set forth in Judge Wisdom's landmark decision in *Offshore Co. v. Robison*, requiring proof that the seaman "contributed to the function of the vessel or to the accomplishment of its mission" and have an employment-related connection to a vessel.[23] The *Wilander* Court emphasized, "The key to seaman status is employment-related connection to a vessel in navigation."[24]

In order to give effect to the land-based/sea-based distinction, the Court "believe[d] the better rule is to define 'master or member of a crew' under the LHWCA, and therefore 'seaman' under the Jones Act, solely in terms of the employee's connection to a vessel in navigation."[25] The Court was persuaded that the connection requirement was consistent with "Congress' land-based/sea-based distinction," explaining: "All who work

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[21] 498 U.S. 337 (1991).

[22] *Id.* at 340.

[23] 266 F.2d 769, 779 (5th Cir. 1959).

[24] *Wilander*, 498 U.S. at 355.

[25] *Id.* at 354.

at sea in the service of a ship face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed."[26]

2. ***Chandris***

The Supreme Court's next decision on seaman status came four years later in *Chandris, Inc. v. Latsis*.[27] In this case, the plaintiff, Latsis, was a supervising engineer who oversaw an engineering department for a fleet of six passenger cruise ships.[28] Latsis developed a detached retina while sailing on one of the vessels and sued because of an alleged delay by the employer in providing medical care.[29] Latsis's duties required him to divide his work between the office and aboard ship when he sometimes sailed for inspection and supervision of engineering work.[30] The Court was therefore asked to define the "relationship a worker must have to the vessel, regardless of the specific tasks the worker undertakes in order to obtain seaman status."[31] After discussing the judicial and legislative history of the passage of the LHWCA, the *Chandris* Court stated: "With the passage of the LHWCA, Congress established a clear distinction between land-based and sea-based maritime workers. The latter who owe their allegiance to a vessel and not solely to a land-based employer, are seamen."[32] The Court also pointed out that Congress, by enacting the LHWCA, had twice overturned the Supreme Court's extension of seamen's remedies to other maritime workers doing

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[26] *Id.*

[27] 515 U.S. 347 (1995).

[28] *Id.* at 350.

[29] *Id.* at 350–51.

[30] *Id.* at 350.

[31] *Id.*

[32] *Id.* at 359.

seamen's work and incurring seamen's hazards.[33] Justice O'Connor summed up the effect of these two congressional acts: "Whether under the Jones Act or general maritime law, seamen do not include land-based workers."[34]

In explaining the importance of the requirement that a seaman have a substantial, enduring relationship to a vessel, the Court rejected a snapshot test for seaman status, denouncing a test that inspected "only the situation as it exists at the instance of injury" and noting that "a more enduring relationship is contemplated in the jurisprudence."[35] The Court emphasized that "a worker may not oscillate back and forth between Jones Act coverage and other remedies depending on the activity in which the worker was engaged while injured."[36] The Court also recognized that "[s]eaman status is not co-extensive with seamen's risk."[37] "Some workers who unmistakably confront the perils of the sea, often in extreme form, are thereby left out of the seamen's protections."[38]

The Court then turned to apply these principles to the sufficiency of plaintiff's relationship to his employer's fleet of vessels to qualify for seaman status. It defined the substantial-connection test with two elements: "a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its

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[33] *Id.*

[34] *Id.* at 358.

[35] *Id.* at 363.

[36] *Id.*

[37] *Id.* at 361.

[38] *Id.* at 362. For example, Mississippi River pilots who do nothing but pilot ocean-going vessels through dangerous sections of the river are not seaman because the ships have no common ownership or control. *See Bach v. Trident S.S. Co., Inc.*, 947 F.3d 1290 (5th Cir. 1991).

nature."[39] In discussing the duration element, the Court stated that "the total circumstances of an individual's employment must be weighed."[40] The *Chandris* Court approved our rule of thumb as a guide to the degree of permanence required to satisfy the duration element. "A worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act."[41]

Because the record was unclear regarding how much of plaintiff's time was spent working on the employer's vessels as opposed to his land-based work, the Court remanded the case for application of the stated principles to the facts.[42]

3. *Papai*

The Supreme Court provided more guidance on the nature element of the substantiality requirement in *Harbor Tug and Barge Co. v. Papai* – the third case in this trilogy.[43] This case is closely analogous to the facts of the present case. In *Papai*, the shipowner, Harbor Tug, was one of several tugboat operators operating in San Francisco Bay that obtained workers through a union hiring hall.[44] Papai was engaged through the union hall to paint the housing of a Harbor Tug, the Pt. Barrow.[45] The entire time Papai worked on the Pt. Barrow, it was located dockside.[46]

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[39] *Chandris*, 515 U.S. at 368.

[40] *Id.* at 370 (quoting *Wallace v. Oceaneering Int'l*, 727 F.2d 427, 432 (5th Cir. 1984)).

[41] *Id.* at 371.

[42] *Id.* at 374–75.

[43] 520 U.S. 548 (1997).

[44] *Id.* at 551.

[45] *Id.*

[46] *Id.* at 559.

The Court stated that "[f]or the substantial connection requirement to serve its purpose, the inquiry into the nature of the employee's connection to the vessel must concentrate on whether the employee's duties take him to sea."[47] It further explained that "[t]his will give substance to the inquiry both as to duration and nature of the employee's connection to the vessel and be helpful in distinguishing land-based from sea-based employees."[48] The Court then considered Papai's actual duties and whether they satisfied the nature element. It determined, "[h]is actual duty on the Pt. Barrow throughout the employment did not include any seagoing activity; he was hired for one day to paint the vessel at dockside and he was not going to sail with the vessel after he finished painting it."[49]

Papai contended that the entire group of vessels he worked on through the union hiring hall constituted an identifiable group of vessels and his connection to this "fleet" should be considered.[50] The Supreme Court rejected such a broad definition of "fleet." The Court stated: "In deciding whether there is an identifiable group of vessels of relevance for a Jones Act seaman-status determination, the question is whether the vessels are subject to common ownership or control."[51]

Papai then also argued that he qualified as a seaman if his jobs over the past two and a half months working on Harbor Tug's vessels were considered.[52] The Court answered,

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[47] *Id.* at 555.

[48] *Id.*

[49] *Id.* at 559.

[50] *Id.* at 555.

[51] *Id.* at 557.

[52] *Id.* at 559.

> Papai testified at his deposition that he worked aboard the Pt. Barrow on three or four occasions before the day he was injured, the most recent of which was more than a week earlier. Each of these engagements involved only maintenance work while the tug was docked. The nature of Papai's connection to the Pt. Barrow was no more substantial for seaman-status purposes by virtue of these engagements than the one during which he was injured.... In any event these discrete engagements were separate from the one in question, which was the sort of "transitory or sporadic" connection to a vessel or a group of vessels that, as we had explained in *Chandris*, does not qualify one for seaman status.[53]

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[53] *Id.* at 559–60. The Second Circuit applied the previous Supreme Court cases to determine whether a maritime worker had a substantial connection in terms of duration and nature to satisfy the test for seaman's status in *Matter of Buchanan Marine, L.P.*, 874 F.3d 356 (2d Cir. 2017). In that case, the plaintiff, Volk, worked at a quarried rock processing facility on the Hudson River, inspecting and maintaining barges used to transport rock down the river. *Id.* at 360. Volk was injured when he slipped from the narrow deck of one of the barges and sustained injuries. *Id.* The Second Circuit concluded that as a matter of law, Volk did not qualify as a seaman under the Jones Act. *Id.* at 368. The court held that Volk "did not derive his livelihood from sea-based activities" and "Volk never operated a barge and only worked aboard the barges when they were secured to the dock." *Id.* at 366 (internal quotation marks and citation omitted).

The Ninth Circuit applied the same Supreme Court cases in *Cabral v. Healy Tibbits Builders, Inc.*, 128 F.3d 1289 (9th Cir. 1997) to determine whether a barge-crane operator had a substantial connection in terms of duration and nature in order to be a seaman. The plaintiff crane operator was working in a quiet harbor with limited movement of the crane barge. *Id.* at 1293. Notably, the plaintiff was assigned to the barge for a specific project, and no evidence was presented that he would continue to work on the barge after the project was completed. *Id.* The Ninth Circuit concluded that the crane operator was not a seaman because he was "a land-based crane operator who happened to be assigned to a project which required him to work aboard [a crane barge]." *Id.*

In *Delange v. Dutra Const. Co., Inc.*, 183 F.3d 916, 920 (9th Cir. 1999), the Ninth Circuit concluded that a reasonable juror could find that the plaintiff carpenter was a seaman. Although the plaintiff's job as a carpenter was a land-based trade, the facts in the record

C. Fifth Circuit Precedent

As stated above, the panel concluded that based on two of our cases, *Endeavor Marine* and *Naquin*, it was bound to hold that Sanchez was entitled to proceed with his Jones Act suit as a seaman.[54] The panel in a unanimous concurring opinion, however, concluded that those two cases were probably not consistent with the Supreme Court cases discussed above, namely *Wilander*, *Chandris* and *Papai*, and urged this Court to take the case en banc so that we could reconsider our circuit law on this question.[55]

In *Naquin*, the plaintiff, a vessel repair supervisor, was injured in a shipyard while working on a fleet of lift boats.[56] The lift boats he worked on were either moored, jacked-up, or docked in the shipyard canal.[57] We rejected the argument that this work did not expose the plaintiff to the perils of the sea and permitted him to pursue his suit under the Jones Act.[58] Because all of Naquin's work was performed on or near the dock, and we erred in analyzing *Naquin* based solely on the "perils of the sea" test, we must overrule it.

In *Endeavor Marine*, the plaintiff, a crane operator, was assigned to work aboard a derrick barge on the Mississippi River that was usually moored to the dock, where he loaded and unloaded cargo and helped to maintain the

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indicated that carpentry comprised only ten percent of the plaintiff's work. *Id.* The rest of the plaintiff's work "involved crewman and deckhand duties" where he was a lookout, cargo stower, line handler, and occasional pilot on a construction barge that moved to various construction sites. *Id.* Thus, facts clearly indicated that the plaintiff was a sea-based worker who did not have a "transitory or sporadic" connection to the vessel.

[54] *Sanchez*, 970 F.3d at 555.

[55] *Id.* at 555–56.

[56] 744 F.3d 927, 931 (5th Cir. 2014).

[57] *Id.* at 930.

[58] *Id.* at 935.

crane.[59] Sometimes, the barge was moved from its base wharf to other wharfs for loading and unloading ships. On at least one occasion during the 18 months he worked on the barge, the plaintiff rode the barge from one location to another to operate and perform maintenance on the crane.[60] On other occasions, he drove his automobile to the new location where the barge was moved.[61] We reversed the district court and held that because the plaintiff was exposed to the perils of the sea, he was a seaman.[62]

Based on the fact that (1) plaintiff was permanently assigned to and worked on the same barge during his entire employment, (2) the barge was moved on occasion to different wharfs on the Mississippi River and the plaintiff moved to whatever new location the vessel was moved to, we cannot say the *Endeavor Marine* panel erred in holding the plaintiff was a seaman. However, as we explain below, we do not endorse the panel's rationale.

The panels in *Endeavor Marine* and *Naquin* asked whether those plaintiffs were subject to the "perils of the sea" as the primary test of their satisfaction of the nature element.[63] While this is one of the considerations in the calculus, it is not the sole or even the primary test.

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[59] 234 F.3d 287, 289 (5th Cir. 2000).

[60] *In re Complaint of Endeavor Marine, Inc.*, No. CIV.A. 98-0779, 1999 WL 76586, at *4 (E.D. La. Feb. 11, 1999).

[61] *Id.* at *1.

[62] *Endeavor Marine*, 234 F.3d at 292.

[63] Much of the scholarship addressing seaman status emphasizes that "perils of the sea" alone is a problematic test for making the land-based and sea-based distinction. *See, e.g.*, Matthew H. Frederick, Note, *Adrift in the Harbor: Ambiguous-Amphibious Controversies and Seamen's Access to Workers' Compensation Benefits*, 81 TEX. L. REV. 1671, 1704 (2003).

D. Distilling the Principles from the Supreme Court Trilogy

In *Chandris*, the Court made clear that seamen and non-seamen maritime workers may face similar risks and perils, and that this is not an adequate test for distinguishing between the two.[64] We therefore conclude that the following additional inquiries should be made:

> (1) Does the worker owe his allegiance to the vessel, rather than simply to a shoreside employer?[65]
>
> (2) Is the work sea-based or involve seagoing activity?
>
> (3) (a) Is the worker's assignment to a vessel limited to performance of a discrete task after which the worker's connection to the vessel ends, or (b) Does the worker's assignment include sailing with the vessel from port to port or location to location?

Simply asking whether the worker was subject to the "perils of the sea" is not enough to resolve the nature element. Consider the captain and crew of a ferry boat or of an inland tug working in a calm river or bay, or the drilling crew on a drilling barge working in a quiet canal. No one would question whether those workers are seamen. Yet, their risk from the perils of the sea is minimal. Considering the more definitive inquiries set forth above by the Supreme Court, we now examine whether Sanchez was a seaman under the Jones Act during his employment with SmartFab.

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[64] *See Chandris v. Latsis*, 515 U.S. 347, 361–62 (1991).

[65] *See id.* at 359 (citing *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 347 (1991)) ("Congress established a clear distinction between land-based and sea-based maritime workers. The latter, who owe their allegiance to a vessel and not solely to a land-based employer, are seamen.").

IV. DISCUSSION

As indicated above, Sanchez worked on two vessels during his 67 days of employment with SmartFab that are relevant to his seaman status. He worked aboard the Enterprise WFD 350 for 48 of his 67 days and 13 days aboard the Enterprise 263. His entire time aboard these two vessels was spent doing discrete welding jobs as part of repairs to the two vessels. This work certainly contributed to the function of these two vessels because that work was necessary to keep the vessels in condition to drill for oil and gas. Thus, Sanchez satisfied the first prong of the seaman-status test.[66]

Sanchez spent approximately 90 percent of his total employment time with SmartFab aboard the two Enterprise vessels. He therefore satisfied the duration prong of the substantiality test. As the Court stated in *Chandris*, generally if a worker spends at least 30 percent of his time aboard a vessel or a fleet of vessels, then he establishes the duration prong. The question narrows to determine whether Sanchez spent at least 30 percent of his time aboard these two vessels doing work that satisfies the nature prong of that test.

As to the work Sanchez did aboard the WFD 350, the Supreme Court's decision in *Papai* makes it clear that this work was not "sea-based" and therefore did not satisfy the nature test. All of Sanchez's work on that

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[66] While Sanchez was working aboard the Enterprise WFD 350 and Enterprise 263, both vessels were "in navigation" as that term has been defined by the Supreme Court. *See Chandris*, 515 U.S. at 374 (noting that a vessel is "in navigation" even though "moored to a dock, if it remains in readiness for another voyage" and recognizing general rule that "vessels undergoing repairs or spending relatively short period of time in drydock are still considered to be 'in navigation'") (internal quotation marks and citations omitted); *see also Stewart v. Dutra Const. Co.*, 543 U.S. 481, 495 (2005) (noting that "in navigation" requirement is "relevant to whether the craft is 'used, or capable of being used' for maritime transportation"); 1 Robert Force & Martin J. Norris, *The Law of Seamen* § 2:18 Westlaw (database updated Nov. 2020); 1B *Benedict on Admiralty* § 11b (2020).

vessel was performed while it was jacked-up with the barge deck level with the dock and a gangplank away from shore. Just as Papai's actual duties on the Pt. Barrow moored at the dock did not include any "seagoing activity," neither did Sanchez's work on the WFD 350. The *Papai* Court explicitly stated that "maintenance work while the tug was docked" did not satisfy the nature test.[67] The Court also found significant the fact that there was no reason to assume that any particular percentage of Papai's work would be of a "seagoing nature" subjecting him to the "perils of the sea."[68] The *Papai* Court also found significant that Papai's "actual duty on the Pt. Barrow throughout the employment in question did not include any seagoing activity; he was hired for one day to paint the vessel at dockside, and he was not going to sail with the vessel after he finished painting it."[69]

It is clear from the above Supreme Court cases, that Sanchez, like Papai, who was working on a vessel at the dock, was not engaged in "seagoing activity." His duties on the WFD 350 did not "take him to sea;" his work on the docked vessel was not "of a seagoing nature;" and after he finished his

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[67] *Harbor Tug and Barge Co. v. Papai*, 520 U.S. 548, 559 (1997).

[68] *Id.* at 560.

[69] *Id.* at 559. Sanchez argued that *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991) supports his view that as a ship repairman, he should be considered a seaman. We disagree. The Court granted review in that case to consider whether a ship repairman is ineligible for seaman status because "ship repairmen" is one of the enumerated occupations under the term "employee" as defined in the LHWCA. The Court, without considering the merits of the plaintiff's claim to seaman status, stated: "While in some cases a ship repairman may lack the requisite connection to a vessel in navigation to qualify for seaman status, not all ship repairmen lack the requisite connection as a matter of law. This is so because '[i]t is not the employee's particular job that is determinative, but the employee's connection to a vessel." *Gizoni*, 502 U.S. at 492 (citations and footnote omitted). Therefore, Sanchez is clearly not barred from obtaining coverage under the Jones Act as a seaman simply because he was a ship repairer. If he could establish the requisite connection to the Enterprise fleet, he would be entitled to that protection. We hold he is not entitled to that protection because he failed to establish that required connection.

work at the dock, "he was not going to sail with the vessel" after he finished his work.

With respect to Sanchez's work on the Enterprise 263, the record reveals that he reported to that vessel located in the Gulf of Mexico on the OCS in July 2018, as part of a SmartFab crew engaged to make discrete repairs on the vessel for a specific reason: to satisfy requirements of the ABS, BSEE, and Coast Guard, so that the rig could begin drilling at a new location on the OCS. It is undisputed that Sanchez worked for 13 days on the Enterprise 263 and that he was injured when he fell on the deck of the rig on August 8, 2018. After his injury, Sanchez was sent ashore for medical assistance.

The remainder of the SmartFab crew worked until August 10 or 11, 2018, when the repairs SmartFab agreed to perform were completed. The vessel began drilling on August 11, 2018, as planned at the new location.[70] No evidence was presented that Sanchez planned to remain after the SmartFab crew completed their job, and there is no suggestion of any reason he would plan to do that.

Sanchez worked on the Enterprise 263 only 13 days, which would amount to less than 20 percent of his total time of his employment with SmartFab – well short of the 30 percent required for satisfaction of the duration prong of the substantiality test. Sanchez's work on the Enterprise 263, even though it was located on the OCS, was work performed on a discrete, individual job. When he and the SmartFab crew were finished, Sanchez would have no further connection to the vessel.

[70] As previously noted, Counsel for Sanchez confirmed during oral argument that the SmartFab work was completed on August 10 and drilling began on August 11, 2018.

Our case law reveals generally that two types of workers are found on drilling rigs. First, we have the drilling crew, who conduct the drilling operations (and workers who support that activity) and stay with the vessel when it moves from one drilling location to another.[71] These workers are the members of the crew of the vessel and are seamen. The second group are specialized transient workers, usually employed by contractors. These workers are engaged to do specific discrete short-term jobs.[72] Discrete transient jobs are like the work done by longshoremen when a vessel calls in port. As stated in *Papai*, these workers have only a "transitory or sporadic" connection to a vessel or group of vessels and do not qualify for seaman status.[73] Sanchez, as a transitory worker, falls into the second group, and thus does not satisfy the nature test.

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[71] *See Offshore Co. v. Robison*, 266 F.2d 769, 771–72 (5th Cir. 1959) (holding that an oilfield worker was a member of the crew that remained aboard the rig when it was moved to different well locations was a seaman); *Rogers v. Gracey-Hellums Corp.*, 331 F. Supp. 1287, 1288 (E.D. La. 1970), *aff'd*, 442 F.2d 1196 (finding that a roughneck permanently attached to a barge was a member of the crew); *Producers Drilling Co. v. Gray*, 361 F.2d 432, 436–37 (5th Cir. 1966) (finding that a roustabout who maintained a barge and its equipment as well as helped drill a well was a seaman).

[72] *See, e.g., Lirette v. N.L. Sperry Sun, Inc.*, 831 F.2d 554, 557 (5th Cir. 1987) (holding that a wireline worker was a "transitory maritime worker" and not a seaman). Lirette was a land-based wireline operator who performed "one specialized job for many different vessels." *Id.* We stated: "His duties closely resembled those of a transitory maritime worker. As we stated in *Barrett*, the distinction between seamen and transitory workers may not be blurred." *Id. See also Roberts v. Cardinal Serv., Inc.*, 266 F.3d 368, 378 (5th Cir. 2001) (discussing that a plugging and abandonment worker injured by a perforation gun attached to a wireline was not a seaman); *Ardleigh v. Schlumberger Ltd.*, 832 F.2d 933, 934 (5th Cir. 1987) ("[I]tinerant wireline workers are not Jones Act seamen."); *Wilcox v. Wild Well Control, Inc.*, 794 F.3d 531, 538–39 (5th Cir. 2015) (holding that a welder was not a seaman because he was only assigned for one specific project which had a clear two month end date). *See also* 1B *Benedict on Admiralty* § 11e (2020) (collecting cases in Table 4).

[73] *Papai*, 520 U.S. at 559–60.

V. CONCLUSION

We conclude that Sanchez failed to create a genuine issue of material fact that he had a substantial connection to the Enterprise fleet of vessels as it related to the nature of his work. We therefore agree with the district court that Sanchez failed to meet the requirements for seaman status, and we AFFIRM the judgment of the district court.

JAMES L. DENNIS, *Circuit Judge*, concurring:

I concur in the majority opinion because it decides the present case consistently with the Supreme Court's decisions in *McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991), *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), and *Harbor Tug and Barge Co. v. Papai*, 520 U.S. 548 (1997). I write to note that in future, perhaps more challenging, cases concerning contours of the Jones Act's coverage of maritime workers, I would look, in addition to the majority's authorities and reasoning, to the enduring writings of the late Professor David W. Robertson, a leading scholar and practitioner of maritime law.[1] As the majority endeavors to do here, in his article, *The Supreme Court's Approach to Determining Seaman Status: Discerning the Law Amid Loose Language and Catchphrases*, Prof. Robertson "provides a template for translating the U. S. Supreme Court's controlling seaman status cases" under the Jones Act. 34 J. MAR. L. & COM. 547, 548 (2003). This article remains, in my view, a pinnacle of scholarship synthesizing the Court's jurisprudence on the seaman status issue and serves as a useful guide for future cases.

[1] In addition to benefitting over the years from Prof. Robertson's outstanding body of scholarship on maritime and tort law, I also consider myself fortunate to have counted Prof. Robertson as a friend dating back to our service together on the LOUISIANA LAW REVIEW. I was indeed lucky to have David serve as my first student editor.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

STERGEY STEFANETS,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**CASE NO. 4:19-CV-4352**
	§	
M/V KALAMAS, *in rem*, her engines, tackle, apparel, etc.	§	
	§	
Defendant.	§	

ORDER

Pending before the Court is the Motion to Dismiss for *Forum Non Conveniens* filed by Priscilla Enterprises Inc., as Claimant of *in rem* Defendant M/V KALAMAS. **(Instrument No. 21).**

I.

A.

This case arises from a personal injury aboard M/V KALAMAS. Plaintiff Stergey Stefanets ("Plaintiff") was employed as an oiler on M/V KALAMAS, a crude oil tanker. (Instrument No. 1 at 2). Priscilla Enterprises Inc. ("Priscilla") is the Claimant of *in rem* M/V KALAMAS (collectively, "Defendant").

Plaintiff is a Russian citizen and resident. (Instrument No. 21 at 2). M/V KALAMAS sails under the flag of Liberia. *Id.* Plaintiff was employed by Priscilla, a Liberian corporation, which operates and manages its vessels through Pleiades Shipping Agents S.A. ("Pleiades"), a Greek corporation. *Id.*

On March 29, 2019, Plaintiff received orders from the chief engineer to go to the engine room and retrieve a metal chain for an engine repair. (Instrument No. 1 at 2). Plaintiff entered the

engine room and climbed onto a metal box in order to reach the chain hanging on the wall. *Id.* The cover of the metal box gave way, which resulted in Plaintiff's leg falling into the box. *Id.* Plaintiff's foot landed on a plastic bottle that contained a highly concentrated alkaline solution. *Id.* The bottle opened and shot the solution into Plaintiff's eyes, which resulted in Plaintiff sustaining chemical burns to his eyes. *Id.*

Plaintiff was treated onboard and then provided shoreside medical treatment in Turkey the following day. (Instrument No. 21 at 3). Approximately a day later, Plaintiff was repatriated to Russia for medical treatment. *Id.*

B.

Plaintiff filed his Complaint on November 5, 2019 against M/V KALAMAS for negligence. (Instrument No. 1).

On February 12, 2021, Defendant filed its Motion to Dismiss for *forum non conveniens*. (Instrument No. 21). On March 19, 2021, Plaintiff filed his Response. (Instrument No. 22). On March 31, 2021, Defendant filed its Reply. (Instrument No. 25).

II.

District courts have discretion to address motions to dismiss for *forum non conveniens* before addressing any other issues. *Sinochem Int'l Co., Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007). The court may dismiss a case for *forum non conveniens* without determining its own authority over the litigation. *Id.* at 436 (declining to decide whether a court must first determine its own authority to adjudicate the case when determining a *forum non conveniens* dismissal).

"The doctrine of forum non conveniens rests upon a court's inherent power to control the parties and cases before it and to prevent its process from becoming an instrument of abuse or

injustice." *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1153-54 (5th Cir. 1987) (en banc), *vacated on other grounds sub nom. Pan Am. World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989), *opinion reinstated on other grounds*, 883 F.2d 17 (5th Cir. 1989). "To obtain dismissal on the basis of *forum non conveniens*, the defendant must show (1) the existence of an available and adequate alternative forum and (2) that the balance of relevant private and public interest factors favor dismissal." *Moreno v. LG Elecs., USA Inc.*, 800 F.3d 692, 696 (5th Cir. 2015) (internal quotation omitted).

A defendant invoking *forum non conveniens* ordinarily bears a heavy burden in opposing a plaintiff's preferred forum. *See Sinochem Int'l Co.*, 549 U.S. at 430. "When the plaintiff's choice is not its home forum, however, the presumption in the plaintiff's favor applies with less force, for the assumption that the chosen forum is appropriate is then less reasonable." *Id.* (internal quotations and citations omitted).

III.

Defendant moves to dismiss Plaintiff's case for *forum non conveniens*. (Instrument No. 21).

Defendant contends that, before the court determines whether a case should be dismissed on *forum non conveniens* grounds, the court must conduct a choice of law analysis. (Instrument No. 21 at 3). However, the Fifth Circuit has held that "all cases, including Jones Act and maritime cases, are governed by the dictates of *Reyno*[,]" which holds that federal courts should avoid choice-of-law analyses when addressing *forum non conveniens* issues. *See In re Air Crash Disaster*, 821 F.2d at 1164 n.25. Accordingly, the Court proceeds with its *forum non conveniens* analysis.

A.

Defendant proposes Russia as an adequate and available alternative forum. (Instrument No. 21 at 7). Defendant proposes this alternative forum because it is where Plaintiff resides, where he received medical treatment, and where he signed his employment contract. (Instrument No. 21 at 5).

As to the first element in the forum non conveniens analysis, "[a]n alternative forum exists when it is both available and adequate." *Saqui v. Pride Cent. Am., LLC*, 595 F.3d 206, 211 (5th Cir. 2010). "An alternative forum is considered available if the entire case and all parties can come within its jurisdiction." *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 671 (5th Cir. 2003). An alternative forum is adequate if "there is no danger that they will be deprived of any remedies or treated unfairly" *Piper Aircraft Co. v. Reyno*, 454 U.S. 255 (1981) ("for example, dismissal [on grounds of *forum non conveniens*] would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute."). Inadequacy of the alternative forum is rarely a barrier to a *forum non conveniens* dismissal. *See Reyno*, 454 U.S. at 254 n.22. The law of the foreign forum is "presumed to be adequate unless the plaintiff makes some showing to the contrary, or unless conditions in the foreign forum made known to the court, plainly demonstrate that the plaintiff is highly unlikely to obtain basic justice there." *DTEX, LLC v. BBVA Bancomer, S.A.*, 508 F.3d 785, 796 (5th Cir. 2007) (internal citations and quotations omitted).

Defendant proffers the declaration of Anastasiia Meshcheriakova ("Meschcheriakova"), a lawyer and resident of Moscow, Russia. (Instrument No. 21-4 at 1). Meschcheriakova testified that Russian courts of general jurisdiction "may consider and resolve cases on claims of citizens, organizations, state authorities etc. related to disputes arising out of civil, family, labor and other

relations." *Id.* She testified that "Russian courts may consider and resolve cases involving foreign citizens, foreign organizations, organizations with foreign investments and international organizations." *Id.* Meschcheriakova further testified that the Russian Code of Civil Procedure authorizes Russian courts to consider cases "involving foreign persons and entities if the said cases are related to the compensation of damage caused by injury or any other damage to health," and if the injury was inflicted on a claimant that permanently resided in Russia. *Id.* at 1-2. Defendant also contends that Russia is an available alternative forum as Plaintiff's claims would not be time-barred by Russia's three-year statute of limitations for personal injury claims. (Instruments No. 21 at 7; No. 21-4 at 4).

Plaintiff contends that Russian law might not permit a purely *in rem* claim against the vessel and further asserts that not all nations recognize *in rem* claims. (Instrument No. 22 at 5-6). Plaintiff additionally argues that Defendant has failed to provide the Court with sufficient evidence that Plaintiff will not be deprived of all the remedies he might receive in an American court. However, "a difference in substantive law governing the action should not be given conclusive or even substantial weight in the forum non conveniens inquiry." *Syndicate 420*, 796 F.2d at 829 (internal citations and quotations omitted). Dismissal is not in the interest of justice, and is clearly inadequate, when a party is "deprived of any remedy or [will be] treated unfairly" by the alternative forum. *Syndicate 420*, 796 F.2d at 829 (quoting *Reyno*, 454 U.S. at 255). Here, even if an *in rem* claim cannot be made, it is apparent that Russia courts can consider personal injury cases involving foreign persons and entities and can afford Plaintiff a remedy. Thus, the alternative forum is adequate and available.

B.

Defendant contends that the private and public interest factors weigh in favor of trying this case in Russia. (Instrument No. 21 at 7).

Once a court determines that there is an available and adequate alternative forum, it must balance the relevant private and public interest factors to determine if dismissal is inappropriate. *Vasquez*, 325 F.3d at 672. "The factors pertaining to the private interests of the litigants include: (1) the ease of access to evidence; (2) the availability of compulsory process for the attendance of unwilling witnesses; (3) the cost of obtaining attendance of willing witnesses; (4) the possibility of a view of the premises, if appropriate; and (5) any other practical factors that make trial expeditious and inexpensive." *Saqui*, 595 F.3d at 213.

The public interest factors include: "(1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized controversies decided at home; (3) the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; (4) the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and (5) the unfairness of burdening citizens in an unrelated forum with jury duty." *Saqui*, 595 F.3d at 214.

In weighing the private and public interests, no one factor is given conclusive weight. *See Dickson Marine Inc. v. Panalpina, Inc.*, 179 F.3d 331, 342 (5th Cir. 1999). The "central focus" of the *forum non conveniens* inquiry is on convenience. *Id.* "There is ordinarily a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public factors clearly point towards trial in the alternative forum." *Reyno*, 454 U.S. at 255. However, when plaintiffs are residents of a foreign country, their forum choice is given less

deference. *See id.* at 255-56; *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 672 (5th Cir. 2003).

Turning to the private interest factors first, Defendant argues that the "ease of access to evidence" element favors Russia. Plaintiff received most of his medical treatments in Russia and the medical records are in Russian. (Instrument No. 21 at 8). Because Plaintiff was born in Russia and has resided there, Defendant contends that all past medical records of prior injuries would be located in Russia and are in Russian, requiring translations. *Id.* Plaintiff contends that there would be no greater access to M/V KALAMAS if the lawsuit were dismissed and refiled in Russia. (Instrument No. 22 at 6). Plaintiff further asserts that the scene of the incident was photographed at the time of the incident so there is no need to access the vessel. *Id.* Consequently, because most of Plaintiff's medical records relevant to his personal injury claim are located in Russia and access to the vessel is unnecessary, this factor favors Russia.

Defendant contends that the second and third factors, related to accessing willing and unwilling witnesses, favors Russia as the forum. (Instrument No. 21 at 8). Defendant states that there are no relevant witnesses residing in the United States. *Id.* at 8-9. Defendant also notes that the crewmembers and shipboard personnel who investigated the incident and provided medical care to Plaintiff are residents of Russia and Ukraine. *Id.* Plaintiff was then disembarked for shoreside medical treatment at a private hospital in Turkey and subsequently returned to Russia to continue receiving medical attention to his eyes. *Id.* Because most of the witnesses that would be called to testify reside in Russia, Defendant asserts that this factor favors Russia. *Id.* Plaintiff asserts that Defendant has failed to provide evidence that, under Russian civil law, witnesses can be compelled to appear for depositions. (Instrument No. 22 at 6). Plaintiff further argues that there is no evidence that witnesses would be more accessible in Russian than in Texas. *Id.* While

Defendant does not proffer whether Russian civil law is able to compel witnesses to testify, the Court finds that most witnesses will be more accessible in Russia than in Texas since they are citizens or residents of Russia. Thus, these factors ultimately weigh in favor of Russia.

The fourth factor is inconsequential here, as the vessel flew the Liberian flag at the time of the incident and has since been reflagged under the laws of the Marshall Islands. (Instrument No. 21 at 4). Plaintiff also notes, as stated above, that the scene of the incident was photographed, which reduces the need to access the vessel.

Lastly, the fifth factor looks at the expenses and expeditious nature of litigation. Defendant contends that a consideration of the "practicalities and expenses" renders the United States impractical since Plaintiffs and the witnesses have had no contact with the United States. (Instrument No. 21 at 9). Defendant also notes that a majority of relevant evidence and witnesses are more readily available in Russia than in the United States. *Id.* Plaintiff contends that there is no evidence that litigation in the United States would be impractical and Plaintiff argues that he would lose his current counsel. (Instrument No. 22 at 7). Considering both parties' arguments, the Court finds that this factor favors Russia.

Turning to the public interest factors, Defendant contends that the current COVID-19 pandemic might make it difficult to seek discovery from multiple countries. (Instrument No. 21 at 10). Defendant further argues that, while this case would be tried as a bench trial, it is unnecessary to burden the United States judiciary with a case arising from facts that have no connection to the United States. *Id.* Defendant additionally asserts that Russia has a strong interest in resolving a dispute involving a Russian seaman and citizen. *Id.* Conversely, Plaintiff argues that the burden on this Court would be limited as there is no evidence that this Court's docket is more congested than a Russian court. (Instrument No. 22 at 7). Plaintiff also asserts

that there will be minimal burden to this Court because the trial would be a bench trial not a jury trial. *Id.* Lastly, Plaintiff contends that there will inevitably be difficulties in obtaining evidence and securing witnesses, regardless of the forum, because evidence and witnesses are scattered across multiple countries. *Id.* at 8.

Considering the parties' arguments, the Court finds that the public interest factors weigh in favor of Russia. The Court has no connection to the case: the alleged personal injury occurred to a Russian seaman aboard a Liberian-flagged vessel off the coast of Turkey. This controversy is more at home in Russia than it is in the United States given that it is where Plaintiff resides and where he received most of his medical treatment. Also, without conducting a choice-of-law analysis, the Court is unable to determine the law that must govern the action. However, it is more plausible that Russian civil law would govern the action than United States law, considering Russia's connection to the case. Thus, altogether, the public interest factors favor Russia.

After balancing the private and public interest factors, the Court finds dismissal is appropriate. Accordingly, Defendant's Motion to Dismiss is GRANTED. (Instrument No. 21).

IV.

For the foregoing reasons, **IT IS HEREBY ORDERED** that the Defendant's Motion to Dismiss for *forum non conveniens* is **GRANTED. (Instrument No. 21).**

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this the 21st day of May, 2021, at Houston, Texas.

VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

983 F.3d 811
United States Court of Appeals, Fifth Circuit.

Jay RIVERA, Plaintiff-Appellee,

v.

KIRBY OFFSHORE MARINE, L.L.C., In Personam, Defendant-Appellant.

No. 19-40799

FILED December 22, 2020

Synopsis

Background: Harbor pilot who was injured when he tripped aboard vessel brought action against entity that hired him to pilot the vessel, alleging his injuries prevented him from continuing to work as a harbor pilot, and seeking lost wages. Following bench trial, the United States District Court for the Southern District of Texas, George C. Hanks, Jr., J., ruled in favor of harbor pilot and awarded him damages. Entity appealed.

Attorneys and Law Firms

Paxton N. Crew, Attorney, Crew Law Firm, P.C., League City, TX, Marie Roach Yeates, Esq., Parker Cragg, Vinson & Elkins, L.L.P., Houston, TX, William Robert Hand, Esq., John W. Stevenson, Jr., Stevenson & Murray, Houston, TX, for Plaintiff-Appellee

John A. V. Nicoletti, Esq., Nooshin Namazi, Esq., Kevin John Byron O'Malley, Nicoletti, Hornig & Sweeney, New York, NY, John Kevin Spiller, Clark Hill Strasburger, Houston, TX, for Defendant-Appellant

Before King, Stewart, and Southwick, Circuit Judges.

Opinion

Carl E. Stewart, Circuit Judge:

Captain Jay Rivera was hired by Kirby Offshore Marine, L.L.C. ("Kirby") to pilot the M/V TARPON ("Tarpon"), a 120-foot seagoing vessel. While aboard the Tarpon, Captain Rivera injured his foot when he tripped over a stair inside a hatch door. Captain Rivera's injuries prevented him from continuing to work as a harbor pilot, and he sued Kirby for his lost wages. The district court held a seven-day bench trial on Captain Rivera's claims. At the end of trial, the court determined that Kirby was liable to Captain Rivera on his claim of *Sieracki* seaworthiness and that Kirby was alternatively liable under the Longshore and Harbor Workers' Compensation Act ("LHWCA"). The court awarded Captain Rivera $11,695,136.00 in damages. Kirby appealed. We AFFIRM.

*815 I. FACTS AND PROCEDURAL HISTORY

From June 2007 to July 2018, Captain Rivera was a state-commissioned Branch Pilot for the Port Aransas Bar and Corpus Christi Bay. As a Branch Pilot, he assisted vessels in navigating the Port Corpus Christi Ship Channel and the LaQuinta Channel.

Through July 2018, Captain Rivera was a member of the Aransas-Corpus Christi Pilots Association ("Association"), an unincorporated pilots association. The Association regulates the rules and procedures of licensed pilots practicing on the Port Aransas Bar, the Corpus Christi Bay, and the surrounding tributaries. The Association collects pilotage fees earned by the members, uses the fees in a common fund, and makes pro rata distributions to its members.

Captain Rivera was also the sole owner and officer of Riben Marine, Inc., an S-Corporation. Captain Rivera incorporated Riben Marine to receive his various forms of revenue. In addition to his pilot earnings, Captain Rivera also earned money as an expert witness and as a charter service provider.

On August 19, 2016, Captain Rivera was dispatched to pilot the Tarpon from the Port Aransas sea buoy to Oil Dock # 11 in the Corpus Christi Harbor. The Tarpon was indirectly owned and operated by Kirby. The Tarpon was attached to a tug and barge unit, [1] and Captain Rivera could not board the Tarpon without first boarding the barge. Captain Rivera traveled to the Tarpon by pilot boat and boarded the Tarpon using a ladder affixed to the barge. Having just come from outside, Captain Rivera continued to wear his sunglasses while on the Tarpon.

After boarding, Captain Rivera was greeted by David Hudgins, a Kirby employee who was assigned to escort him to the Tarpon's wheelhouse. [2] Hudgins had only been working aboard the Tarpon for two days, and he had not been formally trained on how to escort pilots. Hudgins and Captain Rivera "transited to the stern of the barge where they both climbed down onto the deck" of the Tarpon. As they headed toward the Tarpon's wheelhouse, Captain Rivera slowed down and lost sight of Hudgins. Captain Rivera continued his journey to the Tarpon's wheelhouse without Hudgins escorting him.

To enter the wheelhouse, Captain Rivera had to climb over a two-foot-high bulkhead and through a watertight door. From the door, he had to use another step inside the engine-room hatch access door to step down to the interior deck area. The area was not well illuminated. When Captain Rivera reached the inside step, he stepped down toward the deck with his left foot. He landed on the hatch cover, rolled his ankle, and fell. Captain Rivera lay on the deck after his injury, and Hudgins eventually found him. Hudgins helped Captain Rivera the rest of the way to the wheelhouse. Once inside the wheelhouse, Captain Rivera requested ice and ibuprofen and reported his injury to Captain Crossman, the Tarpon's captain. Captain Rivera then piloted the Tarpon to its intended destination.

After exiting the Tarpon, Captain Rivera sought medical attention for his injury. Doctors confirmed that Captain Rivera fractured his fifth metatarsal of his left *816 foot and placed his foot in an air cast. Captain Rivera experienced lingering injuries during his recovery, and doctors eventually diagnosed

him with Complex Regional Pain Syndrome ("CRPS"). Captain Rivera was declared medically unfit for his mariner certification due to his condition and lingering injuries. On recommendation from the Board of Pilot Commissioners, the Governor of Texas revoked Captain Rivera's state harbor commission. After his commission was revoked, Captain Rivera lost his Association membership as well.

Captain Rivera sued Kirby under various maritime laws for negligence and vessel seaworthiness. Captain Rivera sought relief on alternative grounds for: Kirby's negligence under the common law, Kirby's breach of the duty of a seaworthy ship under *Seas Shipping Co., Inc. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946), and Kirby's negligently maintained vessel under § 905(b) of the LHWCA.

After a seven-day bench trial, the district court issued a Findings of Fact and Conclusions of Law order that concluded that the Tarpon was unseaworthy under *Sieracki* and that, in the alternative, Kirby was negligent under § 905(b) of the LHWCA. The district court also concluded that Captain Rivera was not contributorily negligent for wearing sunglasses aboard the Tarpon.

Because Captain Rivera's injuries prevented him from working as a harbor pilot, the district court awarded him damages for his past and future harbor pilot wages. Captain Rivera did not seek damages for his chartering or expert work because his injuries did not prevent him from working in these roles. The district court relied on Captain Rivera's economic expert's calculations and entered a judgment for Captain Rivera in the amount of $11,695,136.00. Kirby now appeals.

II. STANDARD OF REVIEW

[1] [2] [3] [4] "We review legal conclusions and mixed questions of law and fact following a bench trial de novo." *In re Luhr Bros. Inc.*, 325 F.3d 681, 684 (5th Cir. 2003). The district court's factual findings are binding unless clearly erroneous. *Id.* "Questions concerning the existence of negligence and causation are treated as factual issues subject to the clearly erroneous standard." *Id.* (quoting *Avondale Indus. v. Int'l Marine Carriers, Inc.*, 15 F.3d 489, 492 (5th Cir. 1994)). We review the district court's finding of contributory negligence for clear error. *See Fisher v. Agios Nicolaos V*, 628 F.2d 308, 311–312 (5th Cir. 1980).

[5] [6] We review the district court's evidentiary rulings for abuse of discretion. *Am. Int'l Specialty Lines Ins. Co. v. Res-Care, Inc.*, 529 F.3d 649, 656 (5th Cir. 2008). We review damages calculations for clear error. *Deperrodil v. Bozovic Marine, Inc.*, 842 F.3d 352, 361 (5th Cir. 2016).

III. DISCUSSION

On appeal, Kirby argues that the district court committed five errors. First, it argues that Captain Rivera is a proper plaintiff under § 905(b) of the LHWCA and is therefore ineligible to bring a claim under *Sieracki*. Second, it argues that it was error to hold it liable under § 905(b). Third, it asserts that the district court erred in holding that Captain Rivera was not contributorily negligent. Fourth, it asserts that the district court erred by permitting Captain Rivera to introduce evidence of Kirby's subsequent remedial measures. Lastly, it argues that even if it is liable for Captain Rivera's injuries, the district court improperly calculated damages because it overestimated his future earnings.

*817 *1. Captain Rivera's Status Under the LHWCA*

Kirby argues that Captain Rivera is an employee of Riben Marine and is therefore an eligible plaintiff under 33 U.S.C. § 905(b). Kirby further argues that if Captain Rivera is eligible to bring a claim under the LHWCA, he is ineligible to bring a claim under *Sieracki*. Captain Rivera argues that he is not an employee of Riben Marine and therefore is not eligible to sue under § 905(b). We agree with Captain Rivera.

[7] The district court concluded that Captain Rivera was not covered by the LHWCA because it was not clear "that [he] was the employee of anyone." *Bach v. Trident Steamship Co., Inc.* 920 F.2d 322, 327 n.5 (5th Cir. 1991), *vacated* 500 U.S. 949, 111 S.Ct. 2253, 114 L.Ed.2d 706 (1991), *reinstated* 947 F.2d 1290 (5th Cir. 1991). Having determined that the record was unclear as to Captain Rivera's status as an LHWCA-covered employer, the district court analyzed his *Sieracki* unseaworthiness claim. *See id.* We review the district court's conclusion about Captain Rivera's status under

the LHWCA de novo. *See New Orleans Depot Servs. Inc. v. Dir., Off. of Worker's Comp. Programs*, 718 F.3d 384, 387 (5th Cir. 2013) (en banc).

[8] Captain Rivera's potential LHWCA claim falls under 33 U.S.C. § 905(b). Section 905(b) states that "[i]n the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel...." 33 U.S.C. § 905(b). To be "a person covered under this chapter," Captain Rivera must be the employee of someone. *See Bach*, 920 F.2d at 327 n.5. Since there is no evidence that Captain Rivera was an employee while aboard the Tarpon, he cannot be covered by the LHWCA.

Kirby argues that Captain Rivera was employed by Riben Marine when he was injured upon the Tarpon. But the facts do not support such a conclusion. Captain Rivera was requested, hired, and paid through his affiliation with the Association. Kirby does not argue that Captain Rivera is an employee of the Association,[3] and we consider harbor pilots akin to independent contractors. *See, e.g., Steinhort v. Comm'r of Internal Revenue*, 335 F.2d 496, 499 (5th Cir. 1964).

Our holding is consistent with *Manuel v. Cameron Offshore Boats, Inc.*. In *Manuel v. Cameron Offshore Boats, Inc.*, we analyzed a § 905(b) claim brought by an employee of an independent contractor. 103 F.3d 31, 32–33 (5th Cir. 1997). Because Manuel was an employee of a contractor, he was a proper plaintiff under the LHWCA. *See id.* at 33.

[9] Captain Rivera is an independent contractor rather than someone's employee, and he is thus not covered by the LHWCA. Since he is also not a Jones Act seaman[4], he may proceed on a seaworthiness claim under *Sieracki*. *See* ***818** *Aparicio v. Swan Lake*, 643 F.2d 1109, 1110 (5th Cir. Unit A 1981) ("If the harbor worker is not covered by the LHWCA, the Sieracki cause of action and the concomitant indemnification action afforded the vessel owner are both still seaworthy."). We therefore affirm the district court's conclusion that Captain Rivera is a *Sieracki* seaman.

2. Captain Rivera's Sieracki seaworthiness claim

Having determined that Captain Rivera is a *Sieracki* seaman, we next turn to analyze his seaworthiness claim under *Sieracki*. Kirby reiterates its argument that Captain Rivera is covered by the LHWCA and thus ineligible to bring a claim under *Sieracki*. As we have already shown, that argument fails.

The district court determined that Captain Rivera's seaworthiness claim was meritorious. We review the district court's finding of unseaworthiness for clear error. *Jackson v. OMI Corp.*, 245 F.3d 525, 528 (5th Cir. 2001).

[10] **[11]** **[12]** To prevail on his *Sieracki* unseaworthiness cause of action, Captain Rivera must prove that Kirby "failed to provide a vessel, including her equipment and crew, which is reasonably fit and safe for the purposes for which it is to be used." *Id.* at 527. He must also "establish a causal connection between his injury and the breach of duty that rendered the vessel unseaworthy." *Id.* at 527–28. "To establish the requisite proximate cause in an unseaworthiness claim, a plaintiff must prove that the unseaworthy condition played a substantial part in bringing about or actually causing the injury and that the injury was either a direct result or a reasonably probable consequence of the unseaworthiness." *Johnson v. Offshore Exp., Inc.*, 845 F.2d 1347, 1354 (5th Cir. 1988).

[13] We cannot conclude that the district court committed clear error in concluding that the Tarpon was unseaworthy. Captain Rivera sufficiently demonstrated that his injuries were caused by his fall over the unmarked hatch door and that the door was a tripping hazard. Tripping hazards may render a vessel unseaworthy. *See Jussila v. M/T La. Brimstone*, 691 F.2d 217, 219–20 (5th Cir. 1982). We therefore affirm the district court's finding that the Tarpon was unseaworthy.

3. Captain Rivera's Contributory Negligence

Kirby next argues that Captain Rivera was contributorily negligent by wearing sunglasses aboard the Tarpon. In the alternative, Kirby argues that the district court made

insufficient findings on the contributory negligence issue. We disagree in both regards.

[14] The district court concluded that Captain Rivera was not contributorily negligent. We review the district court's finding on the issue of contributory negligence for clear error. *See In re Luhr Bros. Inc.*, 325 F.3d at 684. "[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Hobbs v. Petroplex Pipe and Constr., Inc.*, 946 F.3d 824, 829 (5th Cir. 2020) (alteration in original) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985)).

[15] Here, the district court did not err in determining that Captain Rivera was not contributorily negligent. The district court determined that Captain Rivera did not act unreasonably when he wore sunglasses aboard the Tarpon on a sunny August day. The district court also determined that the hazardous condition that caused Captain Rivera's injuries was not *819 open and obvious. Even if he had not been wearing the sunglasses, it is not clear that he could have seen the hatch doorstep and avoided his injury. Kirby has failed to demonstrate that the district court's contributory negligence determination was clearly erroneous.

Kirby also argues that the district court made insufficient factual findings on the contributory negligence question. We again disagree.

[16] Federal Rule of Civil Procedure 52 requires that the district court "find the facts specially and state its conclusions of law separately." FED. R. CIV. P. 52(a). The district court's findings of fact and conclusions of law must be "sufficient in detail and exactness to indicate the factual basis for the ultimate conclusion reached by the court." *Lettsome v. United States*, 434 F.2d 907, 909 (5th Cir. 1970).

[17] The record indicates that the district court gave Kirby's contributory negligence argument full consideration. The district court's findings of fact and conclusions of law on the contributory negligence question are well within the specificity required by Rule 52. Beyond its legal conclusions, the district court also made several factual findings that indicate the basis for its determination. The district court determined that the edges of the hatch cover were not marked, that the hatch was unusually placed, and that the hatch cover was oddly positioned and difficult to see. We conclude that the district court's findings of fact were sufficient to indicate the basis for its ultimate conclusion that Captain Rivera was not contributorily negligent.

4. Subsequent Remedial Measures

Kirby next argues that the district court erred by allowing Captain Rivera to introduce evidence of a subsequent remedial measure. We disagree.

[18] We review evidentiary rulings during a bench trial for abuse of discretion. *Am. Int'l Specialty Lines Ins. Co.*, 529 F.3d at 656. Even where the district court committed an error, we reverse only where the error affects a party's substantial rights. *See* FED. R. EVID. 103(a).

The district court allowed Captain Rivera to admit evidence of a photo showing that Kirby later placed reflective tape near the area where Captain Rivera was injured. Though the district court initially precluded Captain Rivera from introducing the evidence, it eventually let him after determining that Kirby opened the door.

Assuming *arguendo* that the district court erroneously admitted evidence of a subsequent remedial measure, Kirby has not demonstrated that the error affected its substantial rights.

[19] Kirby points to the district court's mention of the photo as evidence that its substantial rights were violated. Even without the photograph, there was evidence from which the court could conclude that Kirby was negligent. The district court's findings that the hazard was not visible and that the hatch was in an unusual place support a ruling for Captain Rivera, and this evidence exists independent of the photograph that Kirby takes issue with. We therefore hold that the district court did not abuse its discretion by admitting evidence of Kirby's subsequent remedial measures.

5. Damages

Kirby's final argument is that the district court erred in assessing Captain Rivera's lost future earnings. We disagree here as well.

*820 [20] The district court determined that Captain Rivera was entitled to damages for his lost future earnings.

Using Captain Rivera's expert's calculations, the district court awarded him damages of $11,695,136.00. We review the district court's calculation of damages for clear error. *Depenrodil*, 842 F.3d at 361.

[21] To determine lost future earnings in a maritime case, we (1) estimate the plaintiff's loss of work-life or expected remaining work-life; (2) calculate the lost income stream; (3) compute the total damage; and (4) discount that total to present value. *Culver v. Slater Boat Co.*, 722 F.2d 114, 117 (5th Cir. 1983). Kirby disputes the second step of the *Culver* analysis, the district court's calculation of Captain Rivera's lost income stream.

[22] The district court adopted the recommendation of Captain Rivera's economic expert. Captain Rivera's expert used Riben Marine's Schedule K-1 tax forms to gauge his income rather than his personal tax returns. Riben Marine received Captain Rivera's pilot income as well as the income from his work as an expert and a charterer. Riben Marine's K-1 documents reflected the income that he earned from his pilot earnings. Captain Rivera's personal tax returns reflected the total income from his various income streams.

Had the district court relied on Captain Rivera's personal tax returns as Kirby suggests, the damages calculation would have been in error. Captain Rivera sought damages for his lost future wages as a harbor pilot. He did not seek damages for his work as an expert or a charterer because he was able to continue working in those roles after he was injured. His personal tax returns reflected his income from all three roles whereas Riben Marine's K-1 forms reflected his pilot earnings separately. Had the district court actually relied on his personal tax returns, the returns would have inflated his pilot income. The district court did not err when it used Riben Marine's K-1 forms.

Lastly, Kirby cites *Tran v. Abdon Callais Offshore, LLC*, No. 12-0999, 2014 WL 12538905, at *2 (E.D. La. Sept. 22, 2014) for the proposition that tax returns should be used as evidence of earnings. *Tran* says that tax returns can be used to estimate earnings, but it does not say that using tax returns to estimate earnings is required. Kirby has thus not demonstrated that the use of tax returns was clearly erroneous.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's conclusion that Captain Rivera was a *Sieracki* seaman and prevails on his unseaworthiness claim. We also AFFIRM the court's conclusions as to Captain Rivera's lack of contributory negligence, the admission of the photo evidence, and Captain Rivera's damages.

All Citations

983 F.3d 811

Footnotes

1 In a tug and barge unit, the tug fits into a notch on the barge's stern and is connected to the barge by a set of pins.

2 The wheelhouse or house is the vessel's enclosed area that normally contains the vessel's navigation quarters or engine room. See *St. Philip Offshore Towing Co. v. Wis. Barge Lines*, 466 F. Supp. 403, 406 (E.D. La. 1979).

3 Even if Kirby raised the argument that Captain Rivera is an employee of the Association, we would reject that argument. Associations are generally not liable for the actions of pilots. See *Steinhort v. Comm'r of Internal Revenue*, 335 F.2d 496, 499 (5th Cir. 1964). Beyond that, an association "does no business except as an agent of its individual members." *Mobile Bar Pilots Ass'n v. Comm'r of Internal Revenue* 97 F.2d 695, 697 (5th Cir. 1938).

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
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No. 23-20095

SHANON ROY SANTEE,

Plaintiff—Appellant,

versus

OCEANEERING INTERNATIONAL, INCORPORATED; TRANSOCEAN OFFSHORE DEEPWATER DRILLING, INCORPORATED; CHEVRON USA, INCORPORATED,

Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:21-CV-3489

Before STEWART, DUNCAN, and ENGELHARDT, *Circuit Judges*.

CARL E. STEWART, *Circuit Judge*:

In this maritime personal injury case, Plaintiff Shanon Roy Santee ("Santee") appeals the district court's denial of his motion to remand and grant of summary judgment in favor of Defendants Oceaneering International, Inc. ("Oceaneering"), Transocean Offshore Deepwater Drilling, Inc. ("Transocean"), and Chevron USA, Inc. ("Chevron") (collectively, "Defendants"). Because Santee has at least some possibility of proving his Jones Act claims on the facts alleged, we conclude that the district

court erred in denying his motion to remand. Thus, we REVERSE and REMAND to the district court, with instructions to remand this matter back to state court.

I. Facts & Procedural History

From 1999 to 2021, Santee worked in the offshore drilling industry as a remote-operated vehicle ("ROV") technician. ROVs are submersible machines that provide underwater visibility for offshore drilling operators and service areas unreachable by human divers. ROV technicians operate ROVs from a command center aboard a vessel and typically service the vessel for a twenty-one-day or twenty-eight-day period. During his career, Santee worked primarily for Oceaneering, a company that provides subsea engineering and exploration services. After 2016, he worked mostly aboard the *M/V Deepwater Conqueror*, a drillship serviced by Transocean, an offshore drilling contractor.[1] Chevron contracted with Oceaneering and Transocean to provide underwater exploration and drilling services.

In January 2021, Santee allegedly sustained a severe injury to his shoulder and neck while servicing an ROV onboard the *Deepwater Conqueror* in service to the Chevron contract. Santee's injury occurred while he was replacing a thirty-pound cursor pin on a launch and recovery system ("LARS"), a device that releases and recaptures ROVs from the water. The cursor pins hold the ROV in place during the ROV repair process. To conduct this routine maintenance, ROV technicians raise the LARS device with a hydraulic power unit, then climb a ladder to reach the port for the cursor pins. From that position, the technician then reaches up with one hand

[1] The drillship's owner and operator, Triton Conqueror GmbH, was not a named party in this suit.

to install the pin. During this motion, Santee alleged that he felt a "pop" and sharp pain in his right shoulder. Santee averred that his condition worsened after his injury and required surgical fusion of the vertebrae in his neck.

In September 2021, Santee filed suit against Defendants in Texas state court. He brought claims under the Jones Act,[2] general maritime law, and the Saving to Suitors Clause,[3] under theories of negligence and unseaworthiness against Defendants. Defendants then removed the action to the Southern District of Texas, asserting that federal question jurisdiction, general admiralty jurisdiction, and original jurisdiction under the Outer Continental Shelf Lands Act ("OCSLA")[4] governed Santee's claims.

Santee moved to remand the case to state court, arguing that his claims were not removable because he is a "seaman" under the Jones Act. Defendants countered that Santee fraudulently pleaded his Jones Act claims, thus providing the district court with exclusive jurisdiction under OCSLA. In his reply, Santee asserted that Defendants waived their fraudulent pleading argument because it was not raised in their notice of removal. The district court denied Santee's motion and held that he had fraudulently pleaded his Jones Act claim to avoid removal because he was not a seaman at the time of his injury. It further held that it had original jurisdiction under OCSLA because the *Deepwater Conqueror* was attached to a seabed of the Outer Continental Shelf ("OCS") at the time Santee was injured. The district court denied Santee's motion for reconsideration.

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[2] 46 U.S.C. § 30104.

[3] 28 U.S.C. § 1333.

[4] 43 U.S.C. § 1333.

After the close of discovery, Defendants moved for summary judgment. The district court granted Oceaneering's motion for summary judgment on the basis that Santee could not maintain a claim for negligence against his employer as a matter of law because he was not a Jones Act seaman. Santee then filed motions to compel discovery and for a continuance of the summary judgment submission date. The district court denied both requests. The district court granted summary judgment in favor of Transocean and Chevron because it had determined that Santee was not a seaman, and thus was bound to the exclusive remedy provisions of the Longshore and Harbor Workers' Compensation Act ("LHWCA").[5] It further held that Santee's unseaworthiness claim against Transocean was barred under the LHWCA because he was not a Jones Act seaman. The district court also granted summary judgment in favor of Chevron on Santee's negligence and unseaworthiness claims due to the lack of evidence of operational control and ownership of the drillship. Santee timely appealed.

II. Standard of Review

This court reviews "both the denial of a motion to remand and the grant of summary judgment de novo." *Sanchez v. Smart Fabricators of Tex., L.L.C.*, 997 F.3d 564, 568 (5th Cir. 2021) (en banc). Summary judgment is appropriate if the record evidence shows that there is no genuine dispute of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "Unsubstantiated assertions, improbable inferences, and unsupported speculation are not sufficient to defeat a motion for summary judgment." *See Brown v. City of Houston*, 337 F.3d 539, 541 (5th Cir. 2003). "[R]easonable inferences are to be drawn in favor of the non-

[5] 33 U.S.C. § 901.

moving party." *Robinson v. Orient Marine Co.*, 505 F.3d 364, 366 (5th Cir. 2007).

III. Discussion

On appeal, Santee raises five assignments of error. He challenges the district court's denial of his motion to remand and each of its summary judgments in favor of Oceaneering, Transocean, and Chevron. In the alternative, Santee asserts that the district court abused its discretion in denying his motion for a continuance to collect more evidence to oppose Transocean's and Chevron's motions for summary judgment. Because we conclude that Santee did not fraudulently plead his Jones Act claim, we hold that the district court improperly denied his motion to remand. Thus, our discussion is limited to this threshold removal issue.

A. Governing Law

The Jones Act provides "a seaman" a cause of action for negligence against his seafaring employer. 46 U.S.C. § 30104. However, only seamen may bring Jones Act claims. Such claims filed in state court generally are "not subject to removal to federal court." *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 455 (2001). We have stated that "[i]t is axiomatic that Jones Act suits may not be removed from state court because [46 U.S.C. § 668] incorporates the general provisions of the Federal Employers' Liability Act, including 28 U.S.C. § 1445(a), which in turn bars removal." *Lackey v. Atl. Richfield Co.*, 990 F.2d 202, 207 (5th Cir. 1993).

However, a Jones Act claim that is "fraudulently pleaded," or pleaded where there is no possibility that the plaintiff can prove seaman status, may be removed if there is an independent basis of federal jurisdiction. *Hufnagel v. Omega Serv. Indus., Inc.*, 182 F.3d 340, 345 (5th Cir. 1995). Thus, remand is inappropriate where "resolving all disputed facts and ambiguities in current substantive law in plaintiff's favor, the court determines that the

plaintiff has *no possibility* of establishing a Jones Act claim on the merits." *Holmes v. Atl. Sounding Co.*, 437 F.3d 441, 445 (5th Cir. 2006) (emphasis added) (citation omitted), *abrogated on other grounds by Lozman v. City of Riviera Beach*, 568 U.S. 115 (2013). But where a party does not fraudulently plead a Jones Act claim, a district court's denial of a motion to remand constitutes reversible error. *See Lackey*, 990 F.2d at 208 (reversing and remanding to the district court and instructing it to "remand the case back to state court where it belongs").

The Supreme Court has established a two-pronged test to determine whether a party is a seaman under the Jones Act. *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 354–55 (1991). To be a seaman: (1) the plaintiff's duties must contribute to the function or mission of the vessel, and (2) the plaintiff must have a connection to the vessel or fleet of vessels that is substantial in duration and in nature. *See id.*; *Chandris, Inc. v. Latsis*, 515 U.S. 347, 368 (1995). In *Sanchez v. Smart Fabricators of Texas, L.L.C.*, our en banc court enumerated additional factors relevant to the second prong of the seaman test. 997 F.3d at 574. We have set out four inquiries relevant to this question: (1) whether the plaintiff is subject to "the perils of the sea," (2) whether the plaintiff owes "his allegiance to the vessel, rather than simply to a shoreside employer," (3) whether the plaintiff's work is sea-based or involves seagoing activity, and (4) whether the plaintiff's "assignment to [the] vessel is limited to a discrete task after which [his] connection to the vessel ends." *Id.* (citing *Chandris*, 515 U.S. at 359).

B. Santee's Jones Act Claims

Here, the district court did not discuss the "perils of the sea" inquiry. Instead, it concluded that two of the other three factors weighed against Santee. It posited that Santee owed allegiance to Oceaneering, a land-based employer that did not own or operate the *Deepwater Conqueror*. It further held

that Santee's assignment was discrete or limited because he was not permanently assigned to the *Deepwater Conqueror* or to any fleet of vessels to which it belonged. The district court then noted that "[t]he only factor weighing in favor of finding Santee satisfies the nature requirement is the fact [that] his work was sea-based." Thus, it concluded that Santee was not a seaman under the Jones Act and denied remand based on his fraudulent pleading because he has "no reasonable possibility of establishing a Jones Act claim." Our review of the record leads us to a different conclusion.

At the outset, the first prong of the seaman test is easily satisfied because Santee's work clearly contributed to the function or mission of the vessel, as the ROV operations supported the *Deepwater Conqueror*'s underwater drilling efforts. With respect to the *Sanchez* factors for the second prong of the seaman test, it is also uncontested that the ROV work was sea-based and that Santee was subjected to the perils of the sea. With respect to the remaining *Sanchez* factors, Santee asserts that he has pleaded a classic dual allegiance case and argues that his assignment was not limited to discrete functions suggesting a limited connection with the vessel. He contends that Defendants failed to demonstrate that he "ha[d] *no possibility* of establishing his claim on the merits" because he is a Jones Act seaman. We agree.

In *Sanchez*, the en banc court addressed whether a welder that spent most of his career servicing one fleet of vessels was a Jones Act seaman. 997 F.3d at 576. The welder was working for a contractor to repair a docked vessel when he sustained a severe injury. *Id.* at 567. We noted that there are "two types of workers . . . found on drilling rigs": the "drilling crew" or "workers who support" drilling operations and the "specialized transient workers, usually employed by contractors." *Id.* at 576. The welder in *Sanchez* easily satisfied the first prong of the seaman-status test but was held to not be a seaman because most of the factors of the nature element of the second prong weighed against him. *Id.* at 575–76 (failing to satisfy exposure to perils of the

sea, assignment, and seagoing nature factors). The court determined that, based on the record, the welder did not satisfy the assignment factor because his assignments were limited to two specific repair jobs on vessels within the same fleet. The court concluded that the transient, specialized nature of his work weighed against a determination that the welder was a Jones Act seaman. *Id.*

Unlike the welder in *Sanchez*, Santee satisfies the "sea-based" work and perils of the sea factors. The record shows that he was exposed to the perils of the sea, his work was sea-based, his allegiance lied with both his shoreside employer *and* the *Deepwater Conqueror*, and that his assignments were not limited to the performance of a discrete task after which his connection to the vessel ended. The allegiance factor contemplates that a worker may have allegiance to both the vessel and his shoreside employer. *Id.* at 574 (examining whether the worker's allegiance was "to the vessel, *rather than simply to* [*his employer*]"). Defendants argue that Santee's allegiance is not to any vessel because his "record of work locations show[s] he was never permanently assigned to work aboard any one vessel or fleet of vessels." They further assert that allegiance solely to Oceaneering can be gleaned from "the fact that Santee recognized he could 'pick up extra jobs' [on other vessels] in between hitches on the" *Deepwater Conqueror*. But these arguments advance a restrictive view of the allegiance factor that neither this court nor the Supreme Court has adopted.

Binding jurisprudence demonstrates that a maritime worker may possess allegiance to both a vessel on which he has had longstanding employment *and* his shoreside employer. In *McDermott International, Inc. v. Wilander*, the Supreme Court held that the Jones Act "established a clear distinction between land-based and sea-based maritime workers" and that those "who owe their allegiance to a vessel *and not solely to a land-based employer, are seamen.*" 498 U.S. at 347 (emphasis added). Here, Santee has

spent over 96% of his employment time in the last five years with Oceaneering (specifically assigned to the *Deepwater Conqueror*), reported to Chevron's project leader, and took orders from both Chevron and the captain of the vessel. The record evidence from Santee's affidavit and work history documents is sufficient to create at least some fact issue that survives the limited summary determination in a fraudulent pleading inquiry. *See Great Plains Tr. Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 311–12 (5th Cir. 2002) (noting that a court "can employ a summary judgment-like procedure that allows it to pierce the pleadings and examine affidavits and deposition testimony for evidence of fraud or the possibility that the plaintiff can state a claim" under the relevant law); *Lackey*, 990 F.2d at 208 (applying the same procedure to the fraudulent pleading inquiry in Jones Act cases). For the purposes of this inquiry, the allegiance factor weighs in favor of Santee here.

With respect to the assignment factor, we conclude that Santee's assignment was not a discrete, transient job like the work done by longshoremen when a vessel calls in port. In *Sanchez*, this court noted that this consideration derives from the Supreme Court's decision in *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548 (1997), where it concluded that a plaintiff's work, limited to discrete repair engagements while the boat had been docked, did not support a determination that he was a seaman. *See* 997 F.3d at 571–72 (discussing 520 U.S. at 559–60). The *Sanchez* court noted that the welder's assignment was discrete because following the completion of his two welding assignments, the welder "would have no further connection to the vessel." *Id.* at 576. It also noted that a plaintiff's work on a vessel limited to a term was further evidence that the plaintiff's assignment did not weigh in favor of seaman status. *Id.* & n.72 (collecting cases); *see also Wilcox v. Wild Well Control, Inc.*, 794 F.3d 531, 538–39 (5th Cir. 2015) (holding that the plaintiff

had a discrete assignment aboard the vessel and was not a seaman because he was only assigned for one specific project for a clear two-month term).

Here, Santee averred that he never had an end date to his assignment, and that he surmised that he was indefinitely assigned to the *Deepwater Conqueror*. His work record supports that he was not assigned to a short-term, transitory task on the vessel. The fact that Santee could have picked up extra jobs between hitches and that he was never formally assigned to work aboard a specific vessel do not factor into whether he was substantially connected to the vessel and integral to its drilling operations. Furthermore, Santee stated in his affidavit that the nature of the ROV work was critical to the vessel's mineral exploration and drilling operations and was conducted for an indefinite period of time. This is sufficient to set out a Jones Act claim under the limited inquiry we conduct here.

We have previously stated that a court conducting a fraudulent pleading analysis "must resolve all disputed questions of fact from the pleadings and affidavits in favor of the plaintiff, and then determine whether there could possibly be a valid claim against the defendant[s] in question." *Lackey*, 990 F.2d at 208. Reading any conflicts of fact as to Santee's assignment and allegiance in his favor, we cannot say that his Jones Act claims "are baseless in law and in fact and serve[] only to frustrate federal jurisdiction." *Id.* at 207 (quoting *Dodd v. Fawcett Publ'ns, Inc.*, 329 F.2d 82, 85 (10th Cir. 1964) (internal quotation marks omitted)). In its denial of Santee's motion to remand, the district court omitted one of the *Sanchez* factors and failed to view the facts and pleadings in the light most favorable to Santee. This constitutes reversible error because, under our jurisprudence, Santee has a possibility of proving that he is a Jones Act seaman on this record. Because we have identified error in the district court's seaman status determination, we conclude that this case was improperly removed. *See* 28 U.S.C. § 1445(a). Where the removing defendants fail to demonstrate that a

plaintiff has fraudulently pleaded his Jones Act claim, the matter must be remanded back to state court. *Lackey*, 990 F.2d at 207–08 (reversing and remanding because the Jones Act provides seamen with the "right to choose a state court forum"). Thus, we need not address Santee's other arguments regarding jurisdiction or his alternative claims under 33 U.S.C. § 905(b).[6]

IV. Conclusion

The district court erred in holding that Santee fraudulently pleaded his Jones Act claim, and thus this case was improperly removed. For the aforementioned reasons, we REVERSE the district court's denial of Santee's motion to remand and REMAND with instructions for the district court to remand this matter back to state court.

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[6] If a party is not a Jones Act seaman, then his only remedy lies in the form of compensation benefits under the LHWCA. *Becker v. Tidewater, Inc.*, 335 F.3d 376, 386 (5th Cir. 2003); 33 U.S.C. §§ 904, 905(a).

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
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Clerk

No. 23-20095

SHANON ROY SANTEE,

Plaintiff—Appellant,

versus

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Defendants—Appellees.

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USDC No. 4:21-CV-3489

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CARL E. STEWART, *Circuit Judge*:

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court erred in denying his motion to remand. Thus, we REVERSE and REMAND to the district court, with instructions to remand this matter back to state court.

I. Facts & Procedural History

From 1999 to 2021, Santee worked in the offshore drilling industry as a remote-operated vehicle ("ROV") technician. ROVs are submersible machines that provide underwater visibility for offshore drilling operators and service areas unreachable by human divers. ROV technicians operate ROVs from a command center aboard a vessel and typically service the vessel for a twenty-one-day or twenty-eight-day period. During his career, Santee worked primarily for Oceaneering, a company that provides subsea engineering and exploration services. After 2016, he worked mostly aboard the *M/V Deepwater Conqueror*, a drillship serviced by Transocean, an offshore drilling contractor.[1] Chevron contracted with Oceaneering and Transocean to provide underwater exploration and drilling services.

In January 2021, Santee allegedly sustained a severe injury to his shoulder and neck while servicing an ROV onboard the *Deepwater Conqueror* in service to the Chevron contract. Santee's injury occurred while he was replacing a thirty-pound cursor pin on a launch and recovery system ("LARS"), a device that releases and recaptures ROVs from the water. The cursor pins hold the ROV in place during the ROV repair process. To conduct this routine maintenance, ROV technicians raise the LARS device with a hydraulic power unit, then climb a ladder to reach the port for the cursor pins. From that position, the technician then reaches up with one hand

[1] The drillship's owner and operator, Triton Conqueror GmbH, was not a named party in this suit.

to install the pin. During this motion, Santee alleged that he felt a "pop" and sharp pain in his right shoulder. Santee averred that his condition worsened after his injury and required surgical fusion of the vertebrae in his neck.

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[3] 28 U.S.C. § 1333.

[4] 43 U.S.C. § 1333.

After the close of discovery, Defendants moved for summary judgment. The district court granted Oceaneering's motion for summary judgment on the basis that Santee could not maintain a claim for negligence against his employer as a matter of law because he was not a Jones Act seaman. Santee then filed motions to compel discovery and for a continuance of the summary judgment submission date. The district court denied both requests. The district court granted summary judgment in favor of Transocean and Chevron because it had determined that Santee was not a seaman, and thus was bound to the exclusive remedy provisions of the Longshore and Harbor Workers' Compensation Act ("LHWCA").[5] It further held that Santee's unseaworthiness claim against Transocean was barred under the LHWCA because he was not a Jones Act seaman. The district court also granted summary judgment in favor of Chevron on Santee's negligence and unseaworthiness claims due to the lack of evidence of operational control and ownership of the drillship. Santee timely appealed.

II. Standard of Review

This court reviews "both the denial of a motion to remand and the grant of summary judgment de novo." *Sanchez v. Smart Fabricators of Tex., L.L.C.*, 997 F.3d 564, 568 (5th Cir. 2021) (en banc). Summary judgment is appropriate if the record evidence shows that there is no genuine dispute of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "Unsubstantiated assertions, improbable inferences, and unsupported speculation are not sufficient to defeat a motion for summary judgment." *See Brown v. City of Houston*, 337 F.3d 539, 541 (5th Cir. 2003). "[R]easonable inferences are to be drawn in favor of the non-

[5] 33 U.S.C. § 901.

moving party." *Robinson v. Orient Marine Co.*, 505 F.3d 364, 366 (5th Cir. 2007).

III. Discussion

On appeal, Santee raises five assignments of error. He challenges the district court's denial of his motion to remand and each of its summary judgments in favor of Oceaneering, Transocean, and Chevron. In the alternative, Santee asserts that the district court abused its discretion in denying his motion for a continuance to collect more evidence to oppose Transocean's and Chevron's motions for summary judgment. Because we conclude that Santee did not fraudulently plead his Jones Act claim, we hold that the district court improperly denied his motion to remand. Thus, our discussion is limited to this threshold removal issue.

A. Governing Law

The Jones Act provides "a seaman" a cause of action for negligence against his seafaring employer. 46 U.S.C. § 30104. However, only seamen may bring Jones Act claims. Such claims filed in state court generally are "not subject to removal to federal court." *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 455 (2001). We have stated that "[i]t is axiomatic that Jones Act suits may not be removed from state court because [46 U.S.C. § 668] incorporates the general provisions of the Federal Employers' Liability Act, including 28 U.S.C. § 1445(a), which in turn bars removal." *Lackey v. Atl. Richfield Co.*, 990 F.2d 202, 207 (5th Cir. 1993).

However, a Jones Act claim that is "fraudulently pleaded," or pleaded where there is no possibility that the plaintiff can prove seaman status, may be removed if there is an independent basis of federal jurisdiction. *Hufnagel v. Omega Serv. Indus., Inc.*, 182 F.3d 340, 345 (5th Cir. 1995). Thus, remand is inappropriate where "resolving all disputed facts and ambiguities in current substantive law in plaintiff's favor, the court determines that the

plaintiff has *no possibility* of establishing a Jones Act claim on the merits." *Holmes v. Atl. Sounding Co.*, 437 F.3d 441, 445 (5th Cir. 2006) (emphasis added) (citation omitted), *abrogated on other grounds by Lozman v. City of Riviera Beach*, 568 U.S. 115 (2013). But where a party does not fraudulently plead a Jones Act claim, a district court's denial of a motion to remand constitutes reversible error. *See Lackey*, 990 F.2d at 208 (reversing and remanding to the district court and instructing it to "remand the case back to state court where it belongs").

The Supreme Court has established a two-pronged test to determine whether a party is a seaman under the Jones Act. *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 354–55 (1991). To be a seaman: (1) the plaintiff's duties must contribute to the function or mission of the vessel, and (2) the plaintiff must have a connection to the vessel or fleet of vessels that is substantial in duration and in nature. *See id.*; *Chandris, Inc. v. Latsis*, 515 U.S. 347, 368 (1995). In *Sanchez v. Smart Fabricators of Texas, L.L.C.*, our en banc court enumerated additional factors relevant to the second prong of the seaman test. 997 F.3d at 574. We have set out four inquiries relevant to this question: (1) whether the plaintiff is subject to "the perils of the sea," (2) whether the plaintiff owes "his allegiance to the vessel, rather than simply to a shoreside employer," (3) whether the plaintiff's work is sea-based or involves seagoing activity, and (4) whether the plaintiff's "assignment to [the] vessel is limited to a discrete task after which [his] connection to the vessel ends." *Id.* (citing *Chandris*, 515 U.S. at 359).

B. Santee's Jones Act Claims

Here, the district court did not discuss the "perils of the sea" inquiry. Instead, it concluded that two of the other three factors weighed against Santee. It posited that Santee owed allegiance to Oceaneering, a land-based employer that did not own or operate the *Deepwater Conqueror*. It further held

that Santee's assignment was discrete or limited because he was not permanently assigned to the *Deepwater Conqueror* or to any fleet of vessels to which it belonged. The district court then noted that "[t]he only factor weighing in favor of finding Santee satisfies the nature requirement is the fact [that] his work was sea-based." Thus, it concluded that Santee was not a seaman under the Jones Act and denied remand based on his fraudulent pleading because he has "no reasonable possibility of establishing a Jones Act claim." Our review of the record leads us to a different conclusion.

At the outset, the first prong of the seaman test is easily satisfied because Santee's work clearly contributed to the function or mission of the vessel, as the ROV operations supported the *Deepwater Conqueror*'s underwater drilling efforts. With respect to the *Sanchez* factors for the second prong of the seaman test, it is also uncontested that the ROV work was sea-based and that Santee was subjected to the perils of the sea. With respect to the remaining *Sanchez* factors, Santee asserts that he has pleaded a classic dual allegiance case and argues that his assignment was not limited to discrete functions suggesting a limited connection with the vessel. He contends that Defendants failed to demonstrate that he "ha[d] *no possibility* of establishing his claim on the merits" because he is a Jones Act seaman. We agree.

In *Sanchez*, the en banc court addressed whether a welder that spent most of his career servicing one fleet of vessels was a Jones Act seaman. 997 F.3d at 576. The welder was working for a contractor to repair a docked vessel when he sustained a severe injury. *Id.* at 567. We noted that there are "two types of workers . . . found on drilling rigs": the "drilling crew" or "workers who support" drilling operations and the "specialized transient workers, usually employed by contractors." *Id.* at 576. The welder in *Sanchez* easily satisfied the first prong of the seaman-status test but was held to not be a seaman because most of the factors of the nature element of the second prong weighed against him. *Id.* at 575–76 (failing to satisfy exposure to perils of the

sea, assignment, and seagoing nature factors). The court determined that, based on the record, the welder did not satisfy the assignment factor because his assignments were limited to two specific repair jobs on vessels within the same fleet. The court concluded that the transient, specialized nature of his work weighed against a determination that the welder was a Jones Act seaman. *Id.*

Unlike the welder in *Sanchez*, Santee satisfies the "sea-based" work and perils of the sea factors. The record shows that he was exposed to the perils of the sea, his work was sea-based, his allegiance lied with both his shoreside employer *and* the *Deepwater Conqueror*, and that his assignments were not limited to the performance of a discrete task after which his connection to the vessel ended. The allegiance factor contemplates that a worker may have allegiance to both the vessel and his shoreside employer. *Id.* at 574 (examining whether the worker's allegiance was "to the vessel, *rather than simply to* [*his employer*]"). Defendants argue that Santee's allegiance is not to any vessel because his "record of work locations show[s] he was never permanently assigned to work aboard any one vessel or fleet of vessels." They further assert that allegiance solely to Oceaneering can be gleaned from "the fact that Santee recognized he could 'pick up extra jobs' [on other vessels] in between hitches on the" *Deepwater Conqueror*. But these arguments advance a restrictive view of the allegiance factor that neither this court nor the Supreme Court has adopted.

Binding jurisprudence demonstrates that a maritime worker may possess allegiance to both a vessel on which he has had longstanding employment *and* his shoreside employer. In *McDermott International, Inc. v. Wilander*, the Supreme Court held that the Jones Act "established a clear distinction between land-based and sea-based maritime workers" and that those "who owe their allegiance to a vessel *and not solely to a land-based employer, are seamen.*" 498 U.S. at 347 (emphasis added). Here, Santee has

spent over 96% of his employment time in the last five years with Oceaneering (specifically assigned to the *Deepwater Conqueror*), reported to Chevron's project leader, and took orders from both Chevron and the captain of the vessel. The record evidence from Santee's affidavit and work history documents is sufficient to create at least some fact issue that survives the limited summary determination in a fraudulent pleading inquiry. *See Great Plains Tr. Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 311–12 (5th Cir. 2002) (noting that a court "can employ a summary judgment-like procedure that allows it to pierce the pleadings and examine affidavits and deposition testimony for evidence of fraud or the possibility that the plaintiff can state a claim" under the relevant law); *Lackey*, 990 F.2d at 208 (applying the same procedure to the fraudulent pleading inquiry in Jones Act cases). For the purposes of this inquiry, the allegiance factor weighs in favor of Santee here.

With respect to the assignment factor, we conclude that Santee's assignment was not a discrete, transient job like the work done by longshoremen when a vessel calls in port. In *Sanchez*, this court noted that this consideration derives from the Supreme Court's decision in *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548 (1997), where it concluded that a plaintiff's work, limited to discrete repair engagements while the boat had been docked, did not support a determination that he was a seaman. *See* 997 F.3d at 571–72 (discussing 520 U.S. at 559–60). The *Sanchez* court noted that the welder's assignment was discrete because following the completion of his two welding assignments, the welder "would have no further connection to the vessel." *Id.* at 576. It also noted that a plaintiff's work on a vessel limited to a term was further evidence that the plaintiff's assignment did not weigh in favor of seaman status. *Id.* & n.72 (collecting cases); *see also Wilcox v. Wild Well Control, Inc.*, 794 F.3d 531, 538–39 (5th Cir. 2015) (holding that the plaintiff

had a discrete assignment aboard the vessel and was not a seaman because he was only assigned for one specific project for a clear two-month term).

Here, Santee averred that he never had an end date to his assignment, and that he surmised that he was indefinitely assigned to the *Deepwater Conqueror*. His work record supports that he was not assigned to a short-term, transitory task on the vessel. The fact that Santee could have picked up extra jobs between hitches and that he was never formally assigned to work aboard a specific vessel do not factor into whether he was substantially connected to the vessel and integral to its drilling operations. Furthermore, Santee stated in his affidavit that the nature of the ROV work was critical to the vessel's mineral exploration and drilling operations and was conducted for an indefinite period of time. This is sufficient to set out a Jones Act claim under the limited inquiry we conduct here.

We have previously stated that a court conducting a fraudulent pleading analysis "must resolve all disputed questions of fact from the pleadings and affidavits in favor of the plaintiff, and then determine whether there could possibly be a valid claim against the defendant[s] in question." *Lackey*, 990 F.2d at 208. Reading any conflicts of fact as to Santee's assignment and allegiance in his favor, we cannot say that his Jones Act claims "are baseless in law and in fact and serve[] only to frustrate federal jurisdiction." *Id.* at 207 (quoting *Dodd v. Fawcett Publ'ns, Inc.*, 329 F.2d 82, 85 (10th Cir. 1964) (internal quotation marks omitted)). In its denial of Santee's motion to remand, the district court omitted one of the *Sanchez* factors and failed to view the facts and pleadings in the light most favorable to Santee. This constitutes reversible error because, under our jurisprudence, Santee has a possibility of proving that he is a Jones Act seaman on this record. Because we have identified error in the district court's seaman status determination, we conclude that this case was improperly removed. *See* 28 U.S.C. § 1445(a). Where the removing defendants fail to demonstrate that a

plaintiff has fraudulently pleaded his Jones Act claim, the matter must be remanded back to state court. *Lackey*, 990 F.2d at 207–08 (reversing and remanding because the Jones Act provides seamen with the "right to choose a state court forum"). Thus, we need not address Santee's other arguments regarding jurisdiction or his alternative claims under 33 U.S.C. § 905(b).[6]

IV. Conclusion

The district court erred in holding that Santee fraudulently pleaded his Jones Act claim, and thus this case was improperly removed. For the aforementioned reasons, we REVERSE the district court's denial of Santee's motion to remand and REMAND with instructions for the district court to remand this matter back to state court.

[6] If a party is not a Jones Act seaman, then his only remedy lies in the form of compensation benefits under the LHWCA. *Becker v. Tidewater, Inc.*, 335 F.3d 376, 386 (5th Cir. 2003); 33 U.S.C. §§ 904, 905(a).

1.0CAUSE NO. 21-DCV-28727●

ERIC WHEELER, Plaintiff,	§	IN THE DISTRICT COURT OF
v.	§	FORT BEND COUNTY, TEXAS
NOBLE DRILLING (U.S.) LLC., Defendant.	§	434TH JUDICIAL DISTRICT

JURY CHARGE, INSTRUCTIONS AND QUESTIONS

LADIES AND GENTLEMEN OF THE JURY:

After the closing arguments, you will go to the jury room to decide the case, answer the questions that are attached, and reach a verdict. You may discuss the case with other jurors only when you are all together in the jury room.

Remember my previous instructions: Do not discuss the case with anyone else, either in person or by any other means. Do not do any independent investigation about the case or conduct any research. Do not look up any words in dictionaries or on the Internet. Do not post information about the case on the Internet. Do not share any special knowledge or experiences with the other jurors. Do not use your phone or any other electronic device during your deliberations for any reason.

Any notes you have taken are for your own personal use. You may take your notes back into the jury room and consult them during deliberations, but do not show or read your notes to your fellow jurors during your deliberations. Your notes are not evidence. Each of you should rely on your independent recollection of the evidence and not be influenced by the fact that another juror has or has not taken notes.

You must leave your notes with the bailiff when you are not deliberating. The bailiff will give your notes to me promptly after collecting them from you. I will make sure your notes are kept in a safe, secure location and not disclosed to anyone. After you complete your deliberations, the bailiff will collect your notes. When you are released from jury duty, the bailiff will promptly destroy your notes so that nobody can read what you wrote.

Here are the instructions for answering the questions.

1. Do not let bias, prejudice, or sympathy play any part in your decision.

2. Base your answers only on the evidence admitted in court and on the law that is in these instructions and questions. Do not consider or discuss any evidence that was not admitted in the courtroom.

3. You are to make up your own minds about the facts. You are the sole judges of the credibility of the witnesses and the weight to give their testimony. But on matters of law, you must follow all of my instructions.

4. If my instructions use a word in a way that is different from its ordinary meaning, use the meaning I give you, which will be a proper legal definition.

5. All the questions and answers are important. No one should say that any question or answer is not important.

6. Answer "yes" or "no" to all questions unless you are told otherwise. A "yes" answer must be based on a preponderance of the evidence unless you are told otherwise. Whenever a question requires an answer other than "yes" or "no," your answer must be based on a preponderance of the evidence unless you are told otherwise.

The term "preponderance of the evidence" means the greater weight of credible evidence presented in this case. If you do not find that a preponderance of the evidence supports a "yes" answer, then answer "no." A preponderance of the evidence is not measured by the number of witnesses or by the number of documents admitted in evidence. For a fact to be proved by a preponderance of the evidence, you must find that the fact is more likely true than not true.

A fact may be established by direct evidence or by circumstantial evidence or both. A fact is established by direct evidence when proved by documentary evidence or by witnesses who saw the act done or heard the words spoken. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.

7. Do not decide who you think should win before you answer the questions and then just answer the questions to match your decision. Answer each question carefully without considering who will win. Do not discuss or consider the effect your answers will have.

8. Do not answer questions by drawing straws or by any method of chance.

9. Some questions might ask you for a dollar amount. Do not agree in advance to decide on a dollar amount by adding up each juror's amount and then figuring the average.

10. Do not trade your answers. For example, do not say, "I will answer this question your way if you answer another question my way."

11. Unless otherwise instructed, the answers to the questions must be based on the decision of at least 10 of the 12 jurors. The same 10 jurors must agree on every answer. Do not agree to be bound by a vote of anything less than 10 jurors, even if it would be a majority.

As I have said before, if you do not follow these instructions, you will be guilty of juror misconduct, and I might have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial. If a juror breaks any of these rules, tell that person to stop and report it to me immediately.

General Instructions

Consider these instructions as a whole in context. Do not consider any instruction to be more important than others, and do not take any instruction out of context. Your duty as jurors is to follow the law that I give you in these instructions. You, the jurors, are the sole finders of fact. But in finding those facts, you must apply the law as I give it to you in these instructions, regardless of any opinion you may have as to what the law ought to be. If I have given you the impression during the trial that I favor either party or that I have an opinion about the facts of this case you must disregard that impression.

All parties are equals before the law and must be treated as equals before the law in a court of justice. Your duty is to make fair impartial decisions based only on the evidence and law presented to you here. Our system does not permit jurors to be influenced by bias, prejudice, sympathy, or public opinion. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as it is given to you, and reach a just verdict, regardless of the consequences.

The verdict form, which I will explain in detail later, tells you to answer specific questions about the factual disputes in the case. Base your answers on the facts as you find them. Do not first decide who you think should win and then answer questions accordingly.

The evidence for you to consider consists of the witnesses' testimony and the exhibits that I have admitted into evidence. You may consider fair inferences you choose to draw from the facts you find to be proven. Lawyer statements and argument are not evidence and are not instructions on the law. Although what the lawyers say is not

evidence, you may consider their statements and arguments in the light of the evidence and determine whether it supports the argument.

Juror notes taken during a trial are not evidence. They are only aids to a juror's memory of the evidence. If you took notes and your memory of the evidence differs from your notes, rely on your memory and not the notes. If you did not take notes, rely on your own independent memory of the evidence and do not be unduly influenced by any other juror's notes.

Your fact findings and your answers to the questions you are asked must be based on a preponderance of the evidence. This means the greater weight and degree of credible evidence before you. To establish a fact by a preponderance of the evidence means to prove that fact is more likely true than not true. In determining whether a fact has been proven by a preponderance of the evidence, you may consider all of the evidence, regardless of which party brought it to you. Pay close attention to the instructions and questions on which party has the burden of proof.

Facts may be proven by direct evidence, such as testimony of eyewitnesses. Facts may also be proven by indirect or circumstantial evidence, which is evidence that proves a fact from which you can logically conclude that another fact exists. Consider both direct and circumstantial evidence in finding the facts and arriving at your answers from all the evidence.

Witness credibility and truthfulness is for you to decide. In determining credibility, you may consider a wide range of factors, including each witness's demeanor, the consistency or inconsistency of the witness's answers to questions, and the witness's feelings, prejudices, or biases. In determining the weight to give a witness's testimony, consider whether there was evidence that at some other time the witness said or did something, or failed to say or do something, that was different from the testimony given at trial. A simple mistake by a witness does not mean that the witness did not tell the truth as he or she remembers it. People may forget some things or remember other things inaccurately. If a witness made a misstatement, consider whether that misstatement was an intentional falsehood or simply an innocent mistake. The significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

Even though a witness may be a party to the action and therefore interested in its outcome, the testimony may be accepted if it is not contradicted by direct evidence or by any inference that may be drawn from the evidence, if you believe the testimony.

Do not decide this case by counting the number of witnesses who have testified about a fact. The testimony of a single witness is sufficient to prove any fact, if after considering all of the other evidence, you believe that witness.

The fact that a person brought a lawsuit and is in court seeking damages creates no inference that the person is entitled to a judgment. Anyone may make a claim and file a lawsuit. The act of making a claim in a lawsuit, by itself, does not in any way tend to establish that claim and is not evidence.

PLAINTIFF ERIC WHEELER'S CLAIMS

Eric Wheeler, a seaman, is asserting three separate and independent claims against Noble.

Plaintiff Eric Wheeler's first claim, under the federal law known as the Jones Act, is that his employer, Defendant Noble, was negligent, and that Noble's negligence was a cause of his injuries.

Plaintiff Eric Wheeler's second claim is that unseaworthiness of a vessel was a proximate cause of his injuries.

Plaintiff Eric Wheeler's third claim is for "Maintenance" and "Cure".

You must consider each of these claims separately. Plaintiff Eric Wheeler is not required to prove all of these claims. He may recover if he proves any one of them.

However, he may recover only those damages or benefits the law provides for the claims that he proves, and he may not recover the same damages or benefits more than once.

JONES ACT—NEGLIGENCE

Under the Jones Act, Plaintiff Eric Wheeler must prove that his employer was negligent. Negligence is doing an act that a reasonably prudent person would not do, or failing to do something that a reasonably prudent person would do, under the same or similar circumstances. The occurrence of an accident, standing alone, does not mean that anyone was negligent or that anyone's negligence caused the accident.

In a Jones Act claim, the word "negligence" is liberally interpreted. It includes any breach of duty that an employer owes to its employees who are seamen, including the duty of providing for the safety of the crew. Under the Jones Act, if the employer's negligent act was the cause, in whole or in part, of an injury to a seaman employee, then you must find that the employer is liable under the Jones Act. In other words, under the Jones Act, Defendant Noble bears the responsibility for any negligence that played a part, however slight, in causing Plaintiff Eric Wheeler's injuries. Negligence may be a cause of injury even though it operates in combination with another's act or with some other cause, if the negligence played any part in causing such injury.

Negligence under the Jones Act may consist of a failure to comply with a duty required by law. Employers of seamen have a duty to provide their employees with a reasonably safe place to work. If you find that Plaintiff Eric Wheeler was injured because Defendant Noble failed to furnish him with a reasonably safe place to work, and that Plaintiff Eric Wheeler's working conditions could have been made safe through the exercise of reasonable care, then you must find that Defendant Noble was negligent.

The fact that Defendant Noble conducted its operations in a manner similar to that of other companies is not conclusive as to whether Defendant Noble was negligent or not.

You must determine if the operation in question was reasonably safe under the circumstances. The fact that a certain practice had been continued for a long period of time does not necessarily mean that it is reasonably safe under all circumstances. A long-accepted practice may be an unsafe practice. A practice is not necessarily unsafe or unreasonable, however, merely because it injures someone.

A seaman's employer is legally responsible for the negligence of one of its employees while that employee is acting within the course and scope of his employment.

If you find from a preponderance of the evidence that Defendant Noble assigned Plaintiff Eric Wheeler to perform a task that the Plaintiff Eric Wheeler was not adequately trained to perform, you must find that Defendant Noble was negligent.

UNSEAWORTHINESS

Plaintiff Eric Wheeler seeks damages for personal injury that he claims was caused by the unseaworthiness of Defendant Noble's vessel, the NOBLE GLOBETROTTER I.

A shipowner owes every member of the crew employed on its vessel the absolute duty to keep and maintain the vessel and all its decks and passageways, appliances, gear, tools, parts and equipment in a seaworthy condition at all times.

A seaworthy vessel is one that is reasonably fit for its intended use. The duty to provide a seaworthy vessel is absolute because the owner may not delegate that duty to anyone. Liability for an unseaworthy condition does not in any way depend on negligence or fault or blame. If an owner does not provide a seaworthy vessel—a vessel that is reasonably fit for its intended use—no amount of care or prudence excuses the owner.

The duty to provide a seaworthy vessel includes the duty to supply an adequate and competent crew. A vessel may be unseaworthy even though it has a numerically adequate crew, if too few persons are assigned to a given task.

However, the vessel owner is not required to furnish an accident-free ship. It need only furnish a vessel and appurtenances that are reasonably fit for the intended use and a crew that is reasonably adequate for the assigned tasks.

The vessel owner is not required to provide the best appliances and equipment, or the finest crews, on its vessel. It is required to provide only gear that is reasonably proper and suitable for its intended use and a crew that is reasonably adequate.

In summary, if you find that the vessel owner did not provide an adequate crew of sufficient number to perform the tasks required, or if you find that the vessel was in any manner unfit under the law as I have explained it to you and that this was a proximate cause of the injury, a term I will explain to you, then you may find that the vessel was unseaworthy and the vessel owner liable, without considering any negligence on the part of the vessel owner or any of its employees.

However, if you find that the owner had a capable crew, and had appliances and gear that were safe and suitable for their intended use, then the vessel was not unseaworthy and Defendant Noble is not liable to Plaintiff Eric Wheeler on the claim of unseaworthiness.

CAUSATION

Not every injury that follows an accident necessarily results from it. The accident must be the cause of the injury. In determining causation, different rules apply to the Jones Act claim and to the unseaworthiness claim.

Under the Jones Act, for both the employer's negligence and the seaman's contributory negligence of an injury or damage is considered caused by an act or failure to act if the act or omission brought about or actually caused the injury or damage, in whole or in part. In other words, under the Jones Act, Defendant Noble and Plaintiff Eric Wheeler each bear the responsibility for any negligence that played a part, however slight, in causing Plaintiff Eric Wheeler's injuries.

For the unseaworthiness claim, Plaintiff Eric Wheeler must show not merely that the unseaworthy condition was a cause of his injuries, but that such condition was a proximate cause of his injuries. This means that Plaintiff Eric Wheeler must show that the condition in question was a substantial factor in bringing about or actually causing his injuries, and that his injuries were either a direct result or a reasonably probable consequence of the condition.

CONTRIBUTORY NEGLIGENCE

Noble contends that Eric Wheeler was negligent, and that Eric Wheeler's negligence caused or contributed to causing his injuries. This is the defense of contributory negligence. Eric Wheeler's negligence will be considered a cause of the injury if it played a part – no matter how slight – in bringing about his injury. Noble has the burden of proving that Eric Wheeler was contributorily negligent. If Eric Wheeler's negligence contributed to his injuries, he may still recover damages, but the amount of his recovery will be reduced by the extent of his contributory negligence.

A seaman is obligated under the Jones Act to act with ordinary prudence under the circumstances. The circumstances of a seaman's employment include not only his reliance on his employer to provide a safe work environment, but also his own experience, training and education. Under the Jones Act, a seaman has the duty to exercise that degree of care for his own safety that a reasonable seaman would exercise in like circumstances.

If you find that Noble was negligent and that negligence was a proximate cause of Eric Wheeler's injury, but you also find that the accident was due partly to the contributory negligence of Eric Wheeler, then you must determine the percentage Eric Wheeler's contributory negligence contributed to the accident. You will provide this information by filling in the appropriate blanks in the following questions. Do not make any reduction in the amount of damages that you award to Eric Wheeler. It is my job to reduce any damages that you award by any percentage of contributory negligence that you assign to Eric Wheeler.

MAINTENANCE AND CURE CLAIMS AND THEIR RELATIONSHIP TO JONES ACT AND UNSEAWORTHINESS CLAIMS AND WILLFUL WITHHOLDING OF MAINTENANCE AND CURE

Plaintiff Eric Wheeler's third claim is that, as a seaman, he is entitled to recover "Maintenance" and "Cure". This claim is separate and independent from both the Jones Act and the unseaworthiness claims of the Plaintiff Eric Wheeler. You must decide these claims separately from your determination of his Jones Act and unseaworthiness claims.

Maintenance and Cure provides a seaman who is disabled by injury or illness while in the ship's service with medical care and treatment and the means of maintaining himself while he is recuperating.

Maintenance and Cure is a seaman's remedy. Plaintiff Eric Wheeler is a seaman; therefore, you must determine whether he is entitled to maintenance and cure. When there are ambiguities or doubts about a seaman's right to maintenance and cure, you should resolve those ambiguities or doubts in the seaman's favor.

A seaman is entitled to Maintenance and Cure even though he was not injured as a result of any negligence on the part of his employer or any unseaworthy condition of the vessel. To recover Maintenance and Cure, Plaintiff Eric Wheeler need only show that he suffered injury or illness while in the service of the vessel on which he was employed as a seaman, without willful misbehavior on his part. The injury or illness need not be work-related; it need only occur while the seaman is in the ship's service. Maintenance and Cure may not be reduced because of any negligence on the seaman's part.

"Maintenance" is the cost of food and lodging.

The "Cure" to which a seaman may be entitled includes the costs of medical attention, including the services of physicians and nurses as well as hospitalization, medicines and medical apparatus.

A seaman is entitled to receive Maintenance and Cure from the date he leaves the vessel until he reaches what is called "Maximum Cure" or "Maximum Medical Improvement". Maximum Cure is the point at which no further improvement in the seaman's medical condition is reasonably expected. If it appears that a seaman's condition is incurable, or that the treatment will not improve a seaman's physical condition, but will only relieve pain, he has reached maximum cure. The obligation to provide Maintenance and Cure usually ends when qualified medical opinion is to the effect that maximum possible Cure has been accomplished.

If you decide that Plaintiff Eric Wheeler is entitled to Maintenance and/or Cure, you must determine when the employer's obligation to pay Maintenance and Cure began, and when it ends. One factor you may consider in determining when the period ends is when the seaman resumed his employment if he did so. If, however, the evidence supports a finding that economic necessity forced the seaman to return to work before reaching Maximum Cure, you may take that finding into consideration in determining when the period for Maintenance and Cure ends.

If you find that Plaintiff Eric Wheeler is entitled to an award of damages under either the Jones Act or unseaworthiness claims, and if you award him either lost wages or medical expenses, then you may not award him Maintenance and Cure for the same period. That is because Plaintiff Eric Wheeler may not recover twice for the same loss of wages or medical expenses. However, Plaintiff Eric Wheeler may also be entitled to an award of damages if Defendant Noble failed to pay Maintenance and Cure when it was due.

An employer who has received a claim for Maintenance and Cure is entitled to investigate the claim. If, after investigating the claim, the employer unreasonably rejects it, it is liable for both the Maintenance and Cure payments that it should have made, and for any compensatory damages caused by its unreasonable failure to pay. Compensatory damages may include any aggravation of Plaintiff Eric Wheeler's condition because of the failure of Noble to provide Maintenance and Cure.

You may award compensatory damages because the employer failed to provide Maintenance and Cure if you find by a preponderance of the evidence that:

1. Plaintiff Eric Wheeler was entitled to Maintenance and Cure;
2. Maintenance and Cure was not provided;
3. Defendant Noble acted unreasonably in failing to provide Maintenance and Cure; and
4. the failure to provide the Maintenance and Cure resulted in some injury to Plaintiff Eric Wheeler.

DAMAGES

If you find that Defendant Noble is liable, you must award the amount you find by a preponderance of the evidence is full and just compensation for all of Plaintiff Eric Wheeler's damages.

Compensatory damages are not allowed as punishment against a party. Such damages cannot be based on speculation because compensatory damages must be actual damages to be recoverable. But compensatory damages are not restricted to out-of-pocket losses of money or lost time. Instead, compensatory damages may include mental and physical aspects of injury, tangible and intangible. Compensatory damages are intended to make Plaintiff Eric Wheeler whole, or to restore him to the position he would have been in if the incident had not happened.

In determining compensatory damages, you should consider only the following elements, to the extent you find that Plaintiff Eric Wheeler has established them by a preponderance of the evidence: past and future physical pain and suffering, including physical disability, impairment, and inconvenience, and the effect of Plaintiff Eric Wheeler's injuries and inconvenience on the normal pursuits and pleasures of life; past and future mental anguish and feelings of economic insecurity caused by disability; income loss in the past; impairment of earning capacity or ability in the future, including impairment of Plaintiff Eric Wheeler's earning capacity due to his physical condition; past medical expenses; and the reasonable value, not exceeding actual cost to Plaintiff Eric Wheeler, of medical care that you find from the evidence will be reasonably certain to be required in the future as a proximate result of the injuries in question.

If you find that Plaintiff Eric Wheeler is entitled to an award of damages for loss of past or future earnings, there are two particular factors you must consider. First, you should consider loss after income taxes; that is, you should determine the actual or net income that Plaintiff Eric Wheeler has lost or will lose, taking into consideration that any past or future earnings would be subject to income taxes. You must award Plaintiff Eric Wheeler only his net earnings after tax. This is so because any award you may make here is not subject to income tax. The federal or state government will not tax any amount that you award on this basis.

Second, an amount to cover a future loss of earnings is more valuable to Plaintiff Eric Wheeler if he received the amount today than if he received the same amount in the future. If you decide to award Plaintiff Eric Wheeler an amount for lost future earnings, you must discount that amount to present value by considering what return would be realized on a relatively risk-free investment and deducting that amount from the gross future earning award.

However, some of these damages, such as mental or physical pain and suffering, are intangible things about which no evidence of value is required. In awarding these damages, you are not determining value, instead determining what amount that will fairly compensate Plaintiff Eric Wheeler for his injuries.

It is now your duty to deliberate and to consult with one another in an effort to reach a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. During your deliberations, do not hesitate to reexamine your own opinions and change your mind if you are convinced that you were wrong. But do not give up on your honest beliefs because the other jurors think differently, or just to finish the case.

When you go into the jury room to deliberate, you may take with you a copy of this charge, the exhibits that I have admitted into evidence, and your notes. You must select a jury foreperson to guide you in your deliberations and to speak for you here in the courtroom. Your verdict must represent the considered judgment of each juror. A verdict form has been prepared for your convenience. The form has space for your answers to the specific jury questions. You will take the verdict form to the jury room. When you have reached an agreement as to your unanimous answer to each of the questions, your foreperson will fill the answers in on the verdict form, sign and date it, and the jury will return to the courtroom. After you have concluded your service and I have discharged the jury, you are not required to talk with anyone about the case.

If you need to communicate with me during your deliberations, the jury foreperson should write the inquiry and give it to the court security officer. After consulting with the attorneys, I will respond either in writing or by meeting with you in the courtroom. Keep in mind, however, that you must never disclose to anyone, not even to me, your numerical division on any question.

You may now proceed to the jury room to begin your deliberations.

Question No. 1

Was Eric Wheeler injured on or about July 28, 2021, while working in the Sack Room of the Noble GLOBETROTTER I?

Answer "Yes" or "No": _____

11-7

If you have answered "yes" to Question No. 1, then answer the following question. Otherwise, do not answer the following question.

Question No. 2
Jones Act Negligence

Did the negligence, if any, of any of those named below bring about or actually cause the injuries to Eric Wheeler on or about July 28, 2021?

When considering the negligence, if any, of those named below, consider the acts or omissions of their respective agents, employees, representatives, or servants.

Answer "Yes" or "No" for each of those named below.

A. Noble Drilling (U.S.) LLC Yes 11-1

B. Eric Wheeler No 11-1

D'

Question No. 3
Unseaworthiness

Do you find that the NOBLE GLOBETROTTER I, owned by Defendant Noble, was unseaworthy on or about July 28, 2021?

Answer "Yes" or "No": _____

11-1

If you have answered "yes" to Question 3, then answer the following question. Otherwise, do not answer the following question.

Question No. 4

Do you find that the unseaworthy condition of the NOBLE GLOBETROTTER I, owned by Defendant Noble, was a proximate cause of the injuries to Eric Wheeler on or about July 28, 2021?

Answer "Yes" or "No": _____

12-2

If you have answered "yes" ~~to Eric Wheeler~~ in response to Question No. 2, then answer the following question. Otherwise, do not answer the following question.

Assign percentages of responsibility only to those you found caused or contributed to cause the injuries. The percentages you find must total 100 percent. The percentages must be expressed in whole numbers. The percentage of responsibility attributable to any one is not necessarily measured by the number of acts or omissions found. The percentage attributable to anyone need not be the same percentage attributed to that one in answering another question.

Question No. 5

For each person you found caused or contributed to cause the injury, find the percentage of responsibility attributable to each:

A.	Noble Drilling (U.S.) LLC	88 %
B.	Eric Wheeler	12 %
	TOTAL	100 %

If you have answered "yes" to one or more of the previous Questions: Question 1 through Question 4, then answer the following question. Otherwise, do not answer the following question.

Question No. 6

What sum of money, if paid now in cash, would fairly and reasonably compensate Eric Wheeler for his injuries, if any, that resulted from the incident that occurred on or about July 28, 2021?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

Answer separately, in dollars and cents, for damages if any. Do not reduce the amounts, if any, in your answers because of the comparative negligence, if any, of Eric Wheeler. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment.

A. Loss of earning capacity sustained in the past.

ANSWER: $309,724

B. Loss of earning capacity that, in reasonable probability, Eric Wheeler will sustain in the future.

ANSWER: 750,000

C. Physical pain and mental anguish sustained in the past.

ANSWER: 5 mm

D. Physical pain and mental anguish that, in reasonable probability, Eric Wheeler will sustain in the future.

ANSWER: 5 mm

E. Disfigurement sustained in the past.

ANSWER: 0

F. Disfigurement that, in reasonable probability, Eric Wheeler will sustain in the future.

ANSWER: Ø

G. Physical impairment sustained in the past.

ANSWER: 1 mm

H. Physical impairment that, in reasonable probability, Eric Wheeler will sustain in the future.

ANSWER: 2 mm

Question No. 7
Maintenance and Cure

Do you find that Eric Wheeler was entitled to receive Maintenance and Cure benefits, but did not receive all such benefits?

Answer "Yes" or "No": _____

17

If you have answered "yes" to Question 7 then answer the following question. Otherwise, do not answer the following question.

Question No. 8
Maximum Cure

When did or will Eric Wheeler reach Maximum Cure or Maximum Medical Improvement?

ANSWER: 12.19.24 (date)

(12)

If you have answered "Yes" to Question 7, then answer the following question. Otherwise, do not answer the following question.

Question No. 9

What amount of money, in dollars and cents, do you find due to Eric Wheeler as Maintenance (per day)?

Answer in dollars and cents, if any.

Maintenance, Per Day: $ $99.79

Question No. 10

Was Defendant Noble unreasonable in providing all Maintenance and Cure benefits owed to Plaintiff Eric Wheeler?

Answer "Yes" or "No": _____

If you answered "yes" to Question 10, then answer the following question. Otherwise, do not answer the following question.

Question No. 11

What amount, if any, do you award as compensatory damages caused by the unreasonable failure to pay maintenance and cure? You are instructed that additional compensatory damages must pertain to a new or exacerbated injury that resulted from the unreasonable failure to pay maintenance and cure.

Answer in dollars and cents, if any. 300,000

(12)

If you answered "yes" to Question 10, then answer the following question. Otherwise, do not answer the following question.

Question No. 12

Do you find that Noble has acted willfully and wantonly in its payments of maintenance and cure to Eric Wheeler? You are instructed that Noble's action is willful or wanton if it is reckless or in callous disregard of, or with indifference to, the rights of Eric Wheeler. An actor is indifferent to the rights of another, regardless of the actor's state of mind, when it proceeds in disregard of a high and excessive degree of danger that is known to the actor or was apparent to a reasonable person in the actor's position.

You are instructed that your answer to this question must be unanimous.

Answer "Yes" or "No": Yes

12

Presiding Juror:

1. When you go into the jury room to answer the questions, the first thing you will need to do is choose a presiding juror.

2. The presiding juror has these duties:

   a. have the complete charge read aloud if it will be helpful to your deliberations;

   b. preside over your deliberations, meaning manage the discussions, and see that you follow these instructions;

   c. give written questions or comments to the bailiff who will give them to the judge;

   d. write down the answers you agree on;

   e. get the signatures for the verdict certificate; and

   f. notify the bailiff that you have reached a verdict.

Do you understand the duties of the presiding juror? If you do not, please tell me now.

Instructions for Signing the Verdict Certificate:

1. Unless otherwise instructed, you may answer the questions on a vote of ten jurors. The same ten jurors must agree on every answer in the charge. This means you may not have one group of ten jurors agree on one answer and a different group of ten jurors agree on another answer.

2. If ten jurors agree on every answer, those ten jurors sign the verdict.

   If all twelve of you agree on every answer, you are unanimous and only the presiding juror signs the verdict.

3. All jurors should deliberate on every question. You may end up with all twelve of you agreeing on some answers, while only ten of you agree on other answers. But when you sign the verdict, only those ten who agree on every answer will sign the verdict.

Do you understand these instructions? If you do not, please tell me now.

_____
JUDGE PRESIDING

CERTIFICATE

We, the jury, have answered the above and foregoing questions as herein indicated, and herein return same into court as our verdict.

Check one:

A) _____ Our verdict is unanimous. All twelve of us have agreed to each and every answer. The presiding juror has signed the certificate for all twelve of us.

_____ _____
Signature of Presiding Juror Printed Name of Presiding Juror

B) _____ Our verdict is unanimous as to Question 12. Our verdict is not unanimous as to all other Questions. As to those other Questions, Ten or eleven of us have agreed to each and every answer and have signed the certificate below.

C) _____ Our verdict is not unanimous. Ten or eleven of us have agreed to each and every answer and have signed the certificate below.

Jurors' Signatures Jurors' Printed Names

1. _____
2. _____
3. _____
4. _____
5. _____
6. _____
7. _____
8. _____

9. _____ _____

10. _____ _____

11. _____ _____

12 - 4/10

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SUSAN GARNER, et al.,

Plaintiffs,

v.

PHOENIX AIR GROUP, INC.,

Defendant.

Case No. 24-cv-07720-AGT

ORDER ON MOTION TO DISMISS

Re: Dkt. No. 12

Under a contract with the U.S. Department of the Interior, Phoenix Air Group, Inc., provided the U.S. Navy with several aircraft and flight crews for naval training exercises. In 2023, one of those planes crashed off the coast of California, killing all three crew members. The plane departed from Point Mugu Naval Air Station, near Oxnard, California, and was supposed to return there. Instead, the plane crashed at sea after a fire erupted. The crash occurred during training exercises that were designed "to sharpen the defensive capabilities of United States naval vessels." Compl. ¶ 14. The exercises were "conducted entirely over the navigable waters of the Pacific Ocean" and within California territorial limits. *Id.*

The flight crew's families are suing Phoenix Air for wrongful death and survival damages, under general maritime law. Phoenix Air has moved to dismiss, arguing that

admiralty jurisdiction doesn't apply and that state workers' compensation laws provide the only remedy. Below, the Court considers the two questions presented. Does admiralty jurisdiction apply? And even if it does, do state workers' compensation laws displace admiralty law and provide plaintiffs' exclusive remedy?[1]

I.

Admiralty jurisdiction applies to airplane crashes when:

(1) the crash occurs in navigable waters;

(2) the crash could have disrupted maritime commerce; and

(3) the flight bears a substantial relationship to traditional maritime activity.

See U.S. Aviation Underwriters, Inc. v. Pilatus Bus. Aircraft, Ltd., 582 F.3d 1131, 1139 (10th Cir. 2009); *see also In re Mission Bay Jet Sports, LLC*, 570 F.3d 1124, 1126 (9th Cir. 2009) (applying the same three-part test to other maritime torts).

For purposes of its motion to dismiss, Phoenix Air concedes that the first two prongs are satisfied. Its motion turns on prong three. There wasn't a substantial relationship between the flight in question and traditional maritime activity, Phoenix Air argues, because the flight began at Point Mugu Naval Air Station and was supposed to return there without stopping. It was "a land-based plane flying from one point in the continental United States to another," with only a "fortuitous[] and incidental[] connect[ion] to navigable waters." *Exec. Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 272–73 (1972).

Phoenix Air relies heavily on *Executive Jet*, 409 U.S. 249, but the facts of that case are materially distinguishable. In *Executive Jet*, a charter plane "struck a flock of seagulls as

[1] The Court grants Phoenix Air's request for judicial notice of the National Transportation Safety Board's preliminary accident report, which is referenced in plaintiffs' complaint and is a matter of public record. *See* Dkt. 12-1, RJN, Ex. 1; Compl. ¶ 19.

it was taking off" in Cleveland, Ohio, en route to Portland, Maine, and "sank in the navigable waters of Lake Erie, a short distance from the airport." *Id.* at 250. The flight "would have been almost entirely over land" and bore "no relationship to traditional maritime activity." *Id.* at 272–73. The crash was "only fortuitously and incidentally connected to navigable waters." *Id.* at 273. Admiralty jurisdiction thus didn't apply.

Here, unlike *Executive Jet*, the crash that killed plaintiffs' decedents wasn't fortuitously connected to navigable waters. Phoenix Air's aircraft crashed during naval training exercises "conducted entirely over the navigable waters of the Pacific Ocean." Compl. ¶ 14. Given the location of the exercises, a crash in navigable waters was entirely predictable.

Also unlike *Executive Jet*, Phoenix Air's flight related "to traditional maritime activity." 409 U.S. at 273. On this point, *T.J. Falgout Boats, Inc. v. United States*, 508 F.2d 855 (9th Cir. 1974), is instructive. The Ninth Circuit held there that a Navy jet's "activity over water," which included firing a missile at a ship and crashing into the ocean, "bore a significant relationship to traditional maritime activity." *Id.* at 857–58. The court emphasized that "the subject aircraft [was] by its very nature maritime." *Id.* at 857. The jet was serving the Navy, and the Navy is intrinsically engaged in traditional maritime activity.

> The United States Navy exists, in major part, for the purpose of operating vessels and aircraft in, on, and over navigable waters. Its aviation branch is fully integrated with the naval service and, whether land-based or sea-based, functions essentially to serve in sea operations.

Id.

Here, too, the aircraft served the U.S. Navy's sea operations. Phoenix Air's airplane crashed while participating in training exercises "designed . . . to sharpen the defensive capabilities of United States naval vessels." Compl. ¶ 14. Designated as it was for naval activity, "the subject aircraft [was] by its very nature maritime." *T.J. Falgout*, 508 F.2d at 857.

Phoenix Air attempts to distinguish *T.J. Falgout* on the basis that the Ninth Circuit also observed that the Navy jet's activity—"firing . . . explosive projectiles" at sea—used to be performed "by waterborne vessels" before "the birth of aviation." *Id.* The court viewed this pre-aviation history as another reason why the jet's activity "bore a significant relationship to traditional maritime activity." *Id.* at 858. Phoenix Air insists that the same pre-aviation test weighs against admiralty here. "Without the advent of aviation," the company says, "there would be no need for Navy vessels to sharpen their defensive capabilities as to airborne threats." Reply, Dkt. 36 at 5 (citation modified).

T.J. Falgout didn't hold that an aircraft's activities can only be categorized as traditionally maritime if they would have been performed by waterborne vessels before the advent of aviation. Irrespective of pre-aviation history, *T.J. Falgout* emphasized that naval aircraft are "fully integrated with the naval service" and maritime by nature. 508 F.2d at 857.

Even so, the pre-aviation test, if applied, doesn't clearly favor Phoenix Air. When courts evaluate whether conduct bears "a substantial relationship to a traditional maritime activity," they consider the conduct's "general character," not "the particular circumstances of the incident." *Sisson v. Ruby*, 497 U.S. 358, 364–65 (1990). Here, the general character of Phoenix Air's conduct was that the company's aircraft supported the Navy's efforts "to sharpen [its vessels'] defensive capabilities." Compl. ¶ 14. Before aviation, a similar supportive role presumably would have been played by other vessels, simulating enemy ships.

At a minimum, the pre-aviation test doesn't clearly weigh against a finding that Phoenix Air's aircraft was engaged in traditional maritime activity. And more importantly, because the aircraft was assisting the Navy with naval training exercises, "the subject aircraft [was] by its very nature maritime." *T.J. Falgout*, 508 F.2d at 857.

Taking plaintiffs' allegations as true, *Fort v. Washington*, 41 F.4th 1141, 1144 (9th Cir. 2022), the Court concludes that admiralty jurisdiction applies. Plaintiffs' decedents died in a plane crash in navigable waters, which could have disrupted maritime commerce and which bore a substantial relationship to traditional maritime activity.

II.

The Court has admiralty jurisdiction, but Phoenix Air argues that plaintiffs' claims—for wrongful death and survival damages under general maritime law—still fail. Plaintiffs' claims are barred by state workers' compensation laws, Phoenix Air maintains.

Phoenix Air is based in, and the decedents resided in, Georgia. Compl. ¶¶ 3, 11. Georgia's workers' compensation statute provides remedies for dependents of workers who die from accidents on the job. *See* Ga. Code Ann. § 34-9-265(b) (2015). These remedies, however, "exclude . . . all other rights and remedies . . . at common law or otherwise, on account of such injury, loss of service, or death." *Id.* § 34-9-11(a). Citing this exclusivity provision, Phoenix Air insists that plaintiffs cannot pursue their maritime claims.

When non-seamen die in state territorial waters, as happened here, general maritime law provides their survivors with the right to bring wrongful death and survival actions. *See Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 409 (1970); *Sutton v. Earles*, 26 F.3d 903, 914–15, 919 (9th Cir. 1994).[2]

States may supplement general maritime law, "a species of judge-made federal common law," *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 206 (1996), but cannot "deprive a person of any substantial admiralty rights." *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406,

[2] Other sources of federal law provide for wrongful death claims for seamen, 46 U.S.C. § 30104(a); *Davis v. Bender Shipbuilding & Repair Co.*, 27 F.3d 426, 428 (9th Cir. 1994), and workers killed "on the high seas," 46 U.S.C. § 30302; *Yamaha*, 516 U.S. at 212.

410 (1953); *see also American Dredging Co. v. Miller*, 510 U.S. 443, 447 (1994) ("A state court may adopt such remedies . . . as it sees fit so long as it does not attempt to make changes in the substantive maritime law.") (citation modified).

Based on *Pope*, the Supremacy Clause, or both, courts have held that exclusive-remedy provisions in state workers' compensation statutes cannot preclude non-seamen's survivors from pursuing general maritime claims for wrongful death. *See Purnell v. Norned Shipping B.V.*, 801 F.2d 152, 155–56 (3d Cir. 1986); *Thibodaux v. Atl. Richfield Co.*, 580 F.2d 841, 845–47 (5th Cir. 1978); *Flying Boat, Inc. v. Alberto*, 723 So. 2d 866, 868–69 (Fla. Dist. Ct. App. 1998); *In re Holoholo Litig.*, 557 F. Supp. 1024, 1027–29 (D. Haw. 1983).

In *Purnell*, 801 F.2d 152, for example, the Third Circuit held that general maritime law took precedence over Delaware's exclusive-remedy provision. "[F]ederal maritime law affords a federal remedy for wrongful deaths occasioned in state territorial waters," the court noted. *Id.* at 155. "Having recognized the existence of such a federal claim, we are constrained to hold that, under the supremacy clause, that claim cannot be preempted or impaired by state law." *Id.* at 156.

Similarly, in *Thibodaux*, 580 F.2d 841, the Fifth Circuit held that the widow of a non-seaman who drowned when his boat sank on the way to a worksite could pursue a wrongful death claim, despite Louisiana's exclusive-remedy provision. A state's "exclusive remedy provision . . . cannot be applied when it will conflict with maritime policy and undermine substantive rights afforded by federal maritime law," the court explained. *Id.* at 847.

The Ninth Circuit has not held otherwise. Phoenix Air, meanwhile, relies principally on *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), where the court considered the comparative interests of general maritime law and Georgia's exclusive-

remedy provision and held, in a case in which an electrician hurt his back while traveling on a boat to a worksite, that the latter interest was greater. *See id.* at 1529–33. *Brockington*, however, only involved claims for personal injury. The court emphasized that if the plaintiff had sued for wrongful death, as here, general maritime law would control. *See id.* at 1531 (noting that "the Supreme Court specifically created a cause of action [for wrongful death] in general maritime law," and reasoning that a state law preventing such a claim "would intrude upon the uniformity of the general maritime law").

Even in cases factually analogous to *Brockington*, courts have declined to follow its balancing approach, reasoning that under the Supremacy Clause, a balancing test is inappropriate. *See, e.g.*, *Ranger v. Alamitos Bay Yacht Club*, 17 Cal. 5th 532, 547 (2025) ("Tensions between [federal and state law] are resolved . . . by the supremacy clause and preemption principles. . . . We therefore do not find *Brockington* . . . persuasive.") (citation modified); *Morrow v. Marinemax, Inc.*, 731 F. Supp. 2d 390, 399 (D.N.J. 2010) ("Plaintiff's general maritime negligence claim must be preserved, despite the exclusivity provision of the New Jersey Workmen's Compensation Act."); *Moore v. Capital Finishes, Inc.*, 699 F. Supp. 2d 772, 783 (E.D. Va. 2010) ("[T]his court cannot allow the Virginia Act to preclude plaintiff's federal maritime tort claim . . . .").

The Court agrees with these decisions. Under *Pope*, 346 U.S. 406, and the Supremacy Clause, state workers' compensation laws must yield to federal maritime law, assuming they conflict. In such circumstances, a balancing of competing interests isn't warranted.

Here, plaintiffs have a right to sue for wrongful death and survival damages under general maritime law. Georgia law cannot deprive them of that right.

III.

Admiralty jurisdiction applies, and Georgia's workers' compensation laws don't displace general maritime law. Plaintiffs' claims—for wrongful death and survival damages under general maritime law—can proceed. Phoenix Air's motion to dismiss is denied.

An initial case management conference will be held on August 8, 2025. The parties must file a joint case management statement by August 1, 2025.

IT IS SO ORDERED.

Dated: July 16, 2025

Alex G. Tse
United States Magistrate Judge