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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

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ANTHONY KOZUR,

Plaintiff,

-against-

F/V ATLANTIC BOUNTY, LLC, ATLANTIC CAPE FISHERIES, INC., and SEA HARVEST, INC.

Defendants,

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18 Civ. 08750 (JHR-JS)

OPPOSITION TO DEFENDANTS F/V ATLANTIC BOUNTY LLC AND SEA HARVEST, INC.'S MOTION TO DISMISS OR COMPEL ARBITRATION

The following is plaintiff's response to the motion by defendants to dismiss this case or stay the proceedings and compel arbitration.

RELEVANT FACTS - THE ALLEGED CONTRACT

Plaintiff, Anthony Kozur, was employed as a deckhand on the scallop boat F/V Atlantic Bounty on a voyage that commenced several days before August 18, 2017. He was injured on August 28, 2017 when he slipped and fell on the main deck while working, injuring his spine. Mr. Kozur was working under the command of Captain Tony Liel.

The defendants allege that, prior to his injury, Mr. Kozur executed an employment contract (which plaintiff describes as the "Manifest", a copy of which is annexed as Exhibit "A" to Mr. Kozur's certification) for work on the Atlantic Bounty. (See defendants' motion). Mr. Kozur denies the authenticity of this document and in any event denies that it contains an enforceable arbitration agreement relating to his employment on the vessel during his voyage

when he was injured.

Because the putative arbitration clause was not presented to him, Mr. Kozur could not have and did not agree to its terms. Mr. Kozur never "read the cover page or the second page before the signature pages" prior to signing the crew manifest page connected to the alleged "contract." (Kozur Certification at ¶10). "[At the time of signing], [t]he manifest was turned to the signature pages and was left on the table" and Mr. Kozur merely "signed the document... on the next open line." (Id.). This is the only part of the document that bears Mr. Kozur's handwriting- the writing on the first page is not Mr. Kozur's, (Id. at ¶8), and none of the other pages contain any handwriting (See Exhibit A). There is, in short, nothing suggesting that Mr. Kozur has seen any of the other pages. As manifests were typically "left on the table in the galley for everyone to sign," (Kozur Certification at ¶17), for the purpose of being "a listing of the crew for the office's purposes, including knowing who was on the boat, and their address and next of kin, etc. for purposes of getting paid," (Id. at ¶18), Mr. Kozur thought nothing of the document being open to the signature page and simply signed it as always. Mr. Kozur therefore never saw any part of the present Manifest but the signature pages.

Mr. Kozur was also never "directed to read the cover page or other pages," never had their contents explained to him, and was "absolutely... not told that by signing the manifest [he] was giving up a right to sue under the Jones Act and that [he] would have to arbitrate any claim for injury [he] sustained on the boat." (Id. at ¶10). Neither the captain nor anybody else ever read to Mr. Kozur or directed Mr. Kozur to read any part of the Manifest. (See Id. at ¶10-15). In fact, Mr. Kozur and his coworkers "thought [the] manifest document was simply a listing of the crew for the office's purposes, including knowing who was on the boat, and their address and next of

kin, etc. for purposes of getting paid." (Id. at ¶18). Mr. Kozur therefore had no knowledge of the document's other contents, nor could he have been expected to, never mind knowledge of the arbitration clause.

Moreover, the manifest differs from those that Mr. Kozur had previously signed. The manifests typically consisted of "something similar to the first piece of paper...in the exhibit," (Id.), although "not exactly the same," (Id. at ¶9), "to which were attached one or two signature pages for us to sign, similar to the last two pages of the exhibit." (Id. at ¶17). The first page of the document is not the same as those in the previous manifests he had signed. (Id. at ¶9). "[T]he first page to the manifests that [Mr. Kozur] had signed previously always had fewer paragraphs than what is on the first page of the papers in the exhibit." (Id.). The second and third pages of the document are alien to Mr. Kozur; he has never been directed to read, review or sign a document containing either page. (See Id. at ¶11, 14). Certainly, Mr. Kozur has never been advised in any way that, in signing the crew manifest, he was giving up his right under the Jones Act or otherwise, much less that he would have to submit to arbitration under New York law by an individual in Philadelphia. (See Id. at ¶22). Mr. Kozur thus could not have been expected to know the contents of the arbitration provision.

Furthermore, there is strong evidence that the second and third pages were not part of the manifest that Mr. Kozur signed prior to the accident. The first page ends with a paragraph numbered "8", and the first numbered paragraph on the second page is also numbered "8". (Id. at ¶11; see also Exhibit A at both ¶8's). A similar inconsistency arises on the second and third pages, where the second page contains a paragraph "11", followed by a paragraph "12", and the third page consists of a paragraph "11"- coincidentally, the arbitration clause. (Kozur

Certification at ¶14; see also Exhibit A at ¶11, 12 and 11). The non-consecutive numbering between the second and third pages make the third particularly suspect. Consequently, logic dictates that the latter two pages were not part of the manifest Mr. Kozur signed. Mr. Kozur believes that the third piece of paper was not part of the document that he signed on the vessel. (Kozur Certification at ¶19). Assuming these statements are correct, and/or unrebutted, Mr. Kozur therefore did not agree to the third page's terms. It is not even entirely clear that the signature page included in the document is the signature page that Mr. Kozur signed prior to the injury voyage, as the page is undated. (Id. at ¶21; see also Exhibit A at P. 5). Additionally, the first page states that there was an NMFS Observer on the voyage that it pertains to, (Exhibit A at P.1), but there was no such observer on the voyage during which Mr. Kozur was injured. (Kozur Certification at ¶20). The entire document may be a makeshift, sloppily put together amalgamation of parts of other documents that defendant found convenient to spring on plaintiff in this litigation.

In addition, as the document reveals, Mr. Kozur was an at-will employee, with no enforceable contractual right to work for any particular period of time. (See Exhibit A at ¶2). The statement of Mr. Kozur's consideration is also vague in that there are no clearly defined or quantified guidelines as to what Mr. Kozur would have been compensated. (See Exhibit A at ¶3).

The defendants' papers are based solely on hearsay, and are improper as not based upon admissible evidence, as required by the Federal Rules of Civil Procedure. The attorney's affirmation attached to defendants papers is mere hearsay.

DISCUSSION

POINT I: THE AGREEMENT IS UNENFORCEABLE AS THERE WAS NO MEETING OF THE MINDS

For a contracted arbitration term to be enforced against a seaman, defendant must show: 1) that an arbitration clause existed, *see Newark Bay Cogeneration P'ship, LP v. ETS Power Grp.*, 2012 WL 4504475 (D.N.J. Sept. 28, 2012); *see also Sherer v. Green Tree Servicing LLC*, 548 F.3d 379, 381 (5th Cir. 2008); 2) the issue involved is subject to the clause, *see E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002); *see also Sherer*, 548 F.3d 379, 381(5th Cir. 2008); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938; 3) the party against whom the clause is sought to be enforced agreed to the provision, *see Angeles v. Norwegian Cruise Lines, Inc.*, 2002 WL 1997898, at *4 (S.D.N.Y. Aug. 29, 2002); and 4) the enforcement would not be unconscionable. *See Golden v. Mobil Oil Corp.*, 882 F.2d 490, 493 (11th Cir. 1989).

Here, there is no proof that a clause even existed, as revealed by Mr. Kozur's statements. The manifest which defendants claim Mr. Kozur signed has not been proven to be the document that Mr. Kozur signed prior to his trip. It appears the second and third pages are not from the same document as the first, as shown by the inconsistencies in the paragraph numbering, where both the first and second page contain a paragraph "8", (Id. at ¶11), and the second and third page, read consecutively, contain a paragraph "11" followed by a paragraph "12" followed by another paragraph "11", (Id. at 14; see also Exhibit A at ¶11, 12 and 11), all the facts betray the document's reliability. The latter inconsistency is particularly revealing in that it is hardly a mistake that can be explained away by careless numbering- the third page appears to be from a different document. Mr. Kozur does not believe the third piece of paper was part of the document

he signed on the vessel. (Kozur Certification at ¶19). The fact that it contains the arbitration clause, (Exhibit A at ¶11-2), is of no coincidence. Additionally, the first page states that there was an NMFS Observer on the voyage that it pertains to, (Exhibit A at P.1), but there was no such observer on the present voyage. (Kozur Certification at ¶20). The evidence is clear: that there is no reliable evidence that plaintiff entered into an arbitration agreement.

Furthermore, there is no proof that Mr. Kozur agreed to and had a meeting of the minds about the subject purported arbitration clause. Even assuming the document is authentic, Mr. Kozur was unaware of the arbitration terms of the manifest, if they were in the group of papers he saw on the table. Defendants never made him aware of its alleged terms (See Id. at ¶11-15). He never read any of its pages, (Id. at ¶10, 11, 14), nor was he ever directed to read their contents. (Id. at ¶10-15). He and his coworkers thought the document was "simply a listing of the crew for the office's purposes[.]" (Id. at ¶18). He was certainly never advised that he was, in signing the manifest, giving up his right under the Jones Act or otherwise, much less that he was agreeing to submit to arbitration under, illogically, New York law, and by, even less logically, a single, unknown man or woman in Philadelphia. (Id. at ¶22). Defendants can present no evidence that Mr. Kozur ever read any of the Manifest's pages, as Mr. Kozur's handwriting is present only on the signature page. (Id. at ¶8). Nor does plaintiff even know what "JAMS" is, which would purportedly conduct the arbitration. (Id. at ¶22).

The manifest alleged by defendant to apply here also differs materially from those that Mr. Kozur had signed on prior trips, as discussed above. This further explains why there was no 'meeting of the minds' regarding the clause. Even had Mr. Kozur had knowledge of the contents of prior manifests, Mr. Kozur had no reason to even think, much less know, that the document he

signed contained an arbitration clause.

Defendants, furthermore, discouraged Mr. Kozur and his coworkers from reading the Manifest by laying it out with its signature page first, (Id. at ¶10), so they allowed Mr. Kozur to believe that the Manifest was no more than a listing of the crew and purposefully neglected to inform him otherwise, and they withheld from Mr. Kozur essential information about the purported arbitration clause. (See Id. at ¶10-15).

Angeles v. Norwegian Cruise Lines, is directly on point. There, plaintiff, an employee on defendant's ship, signed a contract that included, as a term, an arbitration clause that plaintiff represented that she had never read, seen or been given. *Angeles v. Norwegian Cruise Lines, Inc.*, 2002 WL 1997898, at *4 (S.D.N.Y. Aug. 29, 2002). Defendants then moved to compel arbitration according to the clause and to dismiss the case. *Id* at *1. The Court concluded that, as plaintiff had sworn the contents of the arbitration clause had never been communicated to her and defendants had failed to present evidence to the contrary, it "[had] no basis on which to conclude that the contents of the [arbitration] clause were reasonably communicated to plaintiff and therefore, that it c[ould] be enforced as to her." *Id.* at *5.

The facts are identical here- even if the manifest signed was the document defendants have presented, which plaintiff contests, Mr. Kozur had never read or been told of the arbitration clause prior to signing it. Defendants have failed to present evidence to the contrary. Consequently, the Court has no basis on which to conclude that the arbitration clause can be enforced as to Mr. Kozur. *See Id.*

Furthermore, the enforcement of the present arbitration clause is also unconscionable. An employer's prohibiting a seaman from asserting his federal Jones Act claim, including the right

to a jury trial, is inherently unconscionable in that it would negate the heightened protections provided by Congress to the uneducated and friendless Jones Act seaman to the contractual inducements of his master.

POINT II: THE AGREEMENT IS UNENFORCEABLE AS A MATTER OF FEDERAL LAW

This action asserts a cause of action created by federal statutory law, the Jones Act, 46 USC § 30106. Assuming, without accepting, that the Court finds that an arbitration agreement existed and plaintiff agreed to it, it is still unenforceable under federal law. Federal law preempts state law. *See Chicago & Rock Island R.R. v. Devine*, 239 U.S. 52 (1915). There, the Supreme Court found that state regulation of railroad workers' causes of action was preempted by the FELA, 45 USC § 1 et seq. (FELA is fully incorporated into the Jones Act. *See Kernan v. American Dredging Co.*, 355 U.S. 426 [1958]).

Plaintiff's right to sue his employer arises out of a statutory right which cannot be abrogated by an arbitration agreement. The basis of recovery does not arise out of the employer/employee relationship nor arise from the contract of employment. As stated by the United States Supreme Court in *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 99 (1944), "[u]ntil the enactment of the Jones Act, 41 Stat. 1007, 46 U.S.C. § 688, the maritime law afforded no remedy by way of indemnity beyond maintenance and cure for the injury to a seaman caused by the mere negligence of a ship's officer or member of the crew." The Jones Act not only confers to seamen this vicarious liability with which to sue their employers for the negligence of their fellow crew members, the Act permits seamen direct negligence claims against the employers, and the Act additionally bestows access to a judicial forum and prohibits efforts to renounce its

protections via contract.

The passing of the Jones Act marked a fundamental change in the rights afforded to seamen and their protection. The Jones Act created protections that provided for:

> "The protection of seamen, who, as a class, are poor, friendless and improvident, from the hazards of illness and abandonment while ill in foreign ports; the inducement to masters and owners to protect the safety and health of seamen while in the service; and maintenance of a merchant marine for the commercial service and maritime defense of the nation by inducing the men to accept employment in an arduous and perilous service." Admiralty courts have been liberal in interpreting this duty "for the benefit and protection of seamen who are its wards."

Vaughan v. Atkinson, 369 U.S. 527, 531-532 (1962), *citing to Harden v. Gordon*, 141 F. Cas. 480, 485 (C.C.D. Me. 1823).

The arbitration clause in Mr. Kozur's alleged employment agreement purports to obligate him to resolve whatever claim he has, if any at all, in an arbitral forum. This conflicts with his statutory right to proceed in court with his Jones Act claim. This conflict has been resolved by the United States Supreme Court, which previously ruled that an arbitration agreement cannot divest a seaman of a statutorily created right to pursue a claim in Court.

In *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351 (1971), the plaintiff seamen were parties to a collective bargaining agreement which contained provisions relating to the payment of wages, and an arbitration provision to settle disputes. Notwithstanding such agreement, plaintiff instituted suit in U.S. Court under U.S. maritime law. The Supreme Court held that an arbitration provision cannot abrogate statutory rights and found arbitration to be only an alternate method of resolving the dispute at the option of the seamen, stating:

> While an arbitrator in the area may have expertise, for 180 years federal courts have been protecting the rights of seamen and are not without knowledge in the area.
> . . .
> We know that this employee has a justiciable claim. We know it is the kind of claim that is grist for the judicial mill. We know that in § 596, Congress allowed it to be recoverable when made to a court. We know that this District Court has the case properly before it under the head of maritime jurisdiction. We hesitate to route this claimant through the relatively new administrative remedy of the collective agreement and shut the courthouse door on him when Congress, since 1790, has said that it is open to members of his class.

Id. at 356-357.

Mr. Kozur is before this Court seeking relief for his statutory Jones Act claim. His right to be here does not arise from a contract, but rather out of a Jones Act right entitling him to his day in court. While federal policy may bestow a favored status on arbitration, such policy is not absolute. [1]As stated in *Shearson/ Am. Express v. McMahon*, 482 U.S. 220, 226-227 (1987), "The Arbitration Act, standing alone, therefore mandates enforcement of agreements to arbitrate statutory claims. Like any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command."

The Jones Act contains such a contrary congressional mandate exempting Mr. Kozur from arbitration. "Federal courts have generally declined to enforce arbitration agreements in cases brought pursuant to the Jones Act on the ground that the relevant arbitration provision was contained in the governing contract of employment and, thus, subject to the exclusion of 9 U.S.C. §1." *Matter of Schreiber v. K-Sea Transportation Corp.*, 814 N.Y.S.2d 124 (N.Y. App. Div. April 26, 2006); *aff'd*, 9 N.Y.3d 331 (Ct. App. 2007).

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[1]Indeed, seamen also bear a "protected" status requiring the Courts to read contracts and legislation in the light most favorable to its wards. *See Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 782 (1952), *supra* page 3.

Congress, in enacting the Jones Act, specifically prohibited the use of arbitration clauses to divest a seamen from his day in court. "A reading of 45 U.S.C. § 55 indicates that Congress intended to remove the ability of employees to sell off their FELA rights in exchange for short term gains as well as the ability of employers to pressure or defraud their employees into signing away those same rights." *Damron v. Norfolk and Western Railway Co.*, 925 F.Supp. 520 (N.D. Ohio 1995). The Jones Act was created to extend the same protections to seamen as railway workers received under Federal Employer's Liability Act ("FELA"). As stated in the Jones Act, 46 U.S.C. §688:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply....

FELA, 45 U.S.C. §55, states, "Any contract, rule, regulation, or device whatsoever, the purpose of which shall be to enable any common carrier to exempt itself from liability created by this chapter, shall to that extent be void." Additionally, Section 6 of FELA, 45 USC § 56, provides: "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 arbitration clause here seeks to substitute an arbitral forum in lieu of the plaintiff's selected judicial forum. The United States Supreme Court has held that forum selection clauses (of which arbitration clauses are a subset) are invalid in cases, as the instant one, involving Jones Act claims. *See Boyd v. Grand Trunk W. R. Co.*, 338 U.S. 263 (1949). "An arbitration agreement is a species of forum-selection clause: Without laying down any rules of decision, it identifies the

adjudicator of disputes." *Allied-Bruce Terminix Cos. V. Dobson*, 513 U.S. 265 (1995). *See also Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974).

In *Boyd,* the petitioner was injured in the course of employment with a railroad company. The petitioner signed a forum selection clause that only allowed him to proceed in Michigan. The petitioner instead filed suit in Illinois. The United States Supreme Court noted that FELA prohibits any forum selection clause in an employment contract. The Court stated, "contracts limiting the choice of venue are void as conflicting with the Liability Act." Id. at 265. The Court further stated, "The right to select the forum granted in § 6 is a substantive right. It would thwart the express purpose of the Federal Employers' Liability Act to sanction defeat of that right by the device at bar." Id. at 266. Forum selection clauses in Jones Act claims are therefore void as conflicting with or contradicting the Jones Act. The Supreme Court has interpreted FELA's language liberally in light of its humanitarian purposes. *See Metro -North Commuter R.R. v. Buckley*, 521 U.S. 424 (1997).

Courts that have enforced forum selection or arbitration clauses in seamen personal injury cases have utterly failed "to apply -- or even to meaningfully consider -- the Jones Act or the continued vitality of *Boyd* [and *Rhoditis*]." *Nunez v. American Seafoods*, 52 P.3d 720, 723 (Alaska 2002). *See also Boutte v. Cenac Towing, Inc.*, 346 F. Supp. 2d 922 (S.D. Tex. 2004). Some of the courts that have enforced forum selection clauses in seaman personal injury cases have misplaced their reliance on *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) and/or *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991). *Bremen* involved a dispute over carriage of goods and Carnival involved a passenger claim. Neither case invoked the statutory protections of the Jones Act. However, as pointed out by the Court in *Nunez v. American Seafoods*:

> [N]othing in *Carnival* [*v. Shute*] or *M/S Bremen* [*v. Zapata*] undermines *Boyd* [or *Rhoditis*]. As already indicated, *Carnival* and *M/S Bremen* establish the presumptive validity of forum selection clauses under general maritime law, whereas Nunez [the Jones Act Plaintiff] brings his action under maritime law as modified by the Jones Act, which incorporates FELA.

Nunez, 52 P.3d at 723. *See also Boutte v. Cenac Towing, Inc.*, 346 F.Supp.2d 922 (S.D. Tex. 2004) (In which the Court correctly observed, "*Boyd*'s holding, that forum selection clauses are unenforceable in FELA claims, must apply in some manner to Jones Act claims").

FELA clearly precludes arbitration clauses, as a subset of forum selection clauses, in Jones Act cases over pre-incident arbitration agreements. As stated previously, although arbitration clauses are favored, the right is not absolute. There is, in fact, a contrary Congressional mandate coupled with a strong public policy which forbids any venue transfer, be it in the form of a forum selection clause or arbitration clause. Otherwise, the protections created by Congress to defend seamen from the "inducement to masters and owners to protect the safety and health of seamen while in the service" bears no significance and effectively closes the Court house doors for wards which have borne this Court's highest protections since 1790. Cases interpreting FELA and the Jones Act show Congress was distrustful of the transportation segments' willingness to protect their interests at the expense of all others and their willingness to use any artifice to do so. The case of *Pappalardo v. Long Island Railroad Co.*, 813 N.Y.S.2d 883 (Sup. Ct. 2006), *aff'd*, 36 A.D.3d 878 (2d Dept. 2007), for instance, analyzes the background in which FELA was passed:

> FELA was enacted in 1908, during the Progressive Era, to address the large number of work -related injuries in the railroad industry. In *Kernan v. American Dredging Co.,* 355 U.S. 426, 431 -432, 78 S.Ct. 394, 2 L.Ed.2d 382 (1958), the Court stated that:

> it came to be recognized that ... the industrial employer had a special responsibility toward his workers, who were daily exposed to the risks of the business and who were largely helpless to provide adequately for their own safety. Therefore, as industry and commerce became sufficiently strong to bear the burden, the law, the reflection of an evolving public policy, came to favor compensation of employees and their dependents for the losses occasioned by the inevitable deaths and injuries of industrial employment, thus shifting to industry the 'human overhead' of doing business. For most industries this change has been embodied in Workmen's Compensation Acts. In the railroad and shipping industries, however, the FELA and Jones Act provide the framework for determining liability for industrial accidents. But instead of a detailed statute codifying common-law principles, Congress saw fit to enact a statute of the most general terms, thus leaving in large measure to the courts the duty of fashioning remedies for injured employees in a manner analogous to the development of tort remedies at common law. But it is clear that the general congressional intent was to provide liberal recovery for injured workers ...

See Atchison, Topeka & Santa Fe Ry. Co. v. Buell, 480 U.S. 557 (1987); *Rogers v. Missouri Pac. R. Co.,* 352 U.S. 500 (1957); *Urie v. Thompson,* 337 U.S. 163 (1949). Justice William O. Douglas, in analyzing FELA, observed in his concurring opinion in *Wilkerson v. McCarthy,* 336 U.S. 53, 68 (1949), that:

> [t]he Federal Employers' Liability Act was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations ... The purpose of the Act was to change that strict rule of liability, to lift from employees the "prodigious burden" of personal injuries which that system had placed upon them, and to relieve men "who by the exigencies and necessities of life are bound to labor" from the risks and hazards that could be avoided or lessened "by the exercise of proper care on the part of the employer in providing safe and proper machinery and equipment with which the employee does his work." H.R. Rep. No. 1386, 60th Cong., 1st Sess., 2 (1908).

Pappalardo, supra.

Congress perceived the need to "change the common-law liability of employers of [railroad] labor ... for personal injuries received by employees in the service," H.R. Rep. No. 1386, 60th Cong., 1st Sess. 2 (1908), and, "[c]ognizant of the physical dangers of railroading that

resulted in the death or maiming of thousands of workers every year, Congress crafted a federal remedy [FELA] that shifted part of the 'human overhead' of doing business from employees to their employers," *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 58 (1943). *See also Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135, 145 (2003); *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 542 (1994); *Hess v. Norfolk Southern Railway Co.*, 835 N.E. 2d 769 (Ohio 2005), and "put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations." *Wilkerson v. McCarthy*, 336 U.S. 53, 68 (1949) (Douglas, J., concurring).

"The purpose of 45 U.S.C. § 55 is to prevent employers from undermining the liability scheme created by FELA for their negligence," *Sea-Land Services, Inc. v. Sellan*, 231 F.3d 848, 851 (11th Cir. [Fla.] 2000)(Jones Act case analyzing FELA), and "[i]t prevents employers from restricting FELA rights as a condition of employment." *Id. citing Philadelphia, Baltimore & Washington R.R. Co. v. Schubert*, 224 U.S. 603, 612 -13 (1912), and *Wicker v. Consolidated Rail Corp.*, 142 F.3d 690, 697 (3rd Cir. 1998). In fact, efforts to substitute rights other than the full panoply of Jones Act, FELA, unseaworthiness and maintenance and cure through the "swap" provisions of a collective bargaining agreement violate FELA's Section 5 by "impermissibly limiting the shipowner's liability under the Jones Act," *Abbott v. State*, 979 P.2d 994, 995 (Alaska 1999), *citing Brown v. State*, 816 P.2d 1368, 1375 (Alaska 1991). *See also Boutte v. Cenac Towing, Inc.*, 346 F.Supp.2d 922 (S.D. Texas 2004); *Forrest v. Omega Protein Corp.*, 2006 WL 1371082 (S.D. Tex. 2006) and *Ducote v. Cenace Towing Co.*, 2006 WL 2022900 (S.D. Tex. 2006). Efforts to process injury claims under a state worker's compensation procedure, similarly, were held void as a "device," the purpose or intent of which was to enable defendant to

avoid the full scope of its liability under FELA. *Apitsch v. Patapsco & Back Rivers R. Co.*, 385 F.Supp. 495 (D.C.Md.1974).

POINT III: THE FAA AND FELA PROHIBIT ENFORCEMENT OF ARBITRATION CLAUSES IN THE CONTRACTS OF SEAMEN, AND THIS PRONOUNCEMENT PREVENTS ANY CONTRARY ENFORCEMENT UNDER STATE LAW

Congress has occupied the field of seamen's and railroad workers' legal rights with respect to pre-incident arbitration clauses by expressly forbidding enforcement of arbitration clauses in those workers' employment contracts. Under the Federal Arbitration Act ("FAA") transportation workers' contracts are expressly stated not to be commercial agreements within the meaning of the FAA and thus not arbitrable. 9 U.S.C. § 101, entitled "'Maritime transactions' and 'commerce' defined; exceptions to operation of title," defines what is commercial (and thus arbitrable):

> '[C]ommerce', as herein defined, means commerce among the several states or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, ...but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

It would be wholly anomalous for the U.S. Congress, which enacted the Jones Act, on the one hand to forbid federal arbitrations pursuant to agreements in their employment contract but then to allow them in a state proceeding. The Court should find that state regulation of seamen's contractual-related claims including arbitration devices is preempted.

Thus, pursuant to binding United States Supreme Court authority, the arbitration provision here is null and void under United States and state law as it violates U.S. public policy.

There are only two situations where arbitration clauses have been upheld against a seaman. The first is where there is a post-injury agreement where the vessel owner agrees to pay money to the seaman now in exchange for the seaman agreeing to arbitrate his personal injury claim, and it is thus not an employment agreement. *Schreiber v. K-Sea Transportation Corp.*, 9 N.Y.3d 331 (Ct. App. 2007). The second area where enforcement against seamen may occur is where a foreign seaman or any seaman on a foreign vessel has an arbitration clause enforced against him or her pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"). The United States acceded to the Convention in 1970, and Congress implemented it by enacting Chapter 2 of Title 9 of the United States Code ("the Convention Act"). Title 9 is, generally, the Federal Arbitration Act. *See, generally, Razo v. Nordic Empress Shipping Ltd.*, 362 Fed. Appx. 243 (3d Cir. 2009).

The first exception is exemplified in *Harrington v Atl. Sounding Co., Inc.*, 602 F3d 113, (2d Cir 2010). There, after Mr. Harrington was injured working on defendant's tug boat, he entered into a post-injury agreement whereby,

> in exchange for Harrington's undertaking to arbitrate his claims, defendants "agree[d] to advance sixty percent (60%) of the gross wages [Harrington] would have otherwise earned based upon [his] earnings history ... as an advance against settlement until [Harrington was] declared fit for duty, and/or at maximum medical improvement, and/or October 10, 2005, whichever occurs first." The Agreement further "credited [the advance] against any settlement [Harrington] might eventually reach with [Defendants] or against any future arbitration award [he] might receive." Pursuant to the Agreement, Defendants also agreed to advance "up to $750.00 and any deposit for compensation of the arbitrators ..., subject to subsequent allocation."

Harrington v Atl. Sounding Co., Inc., 602 F3d 113, 116 (2d Cir 2010).

That sort of post-injury arbitration agreement is just that, an agreement for monetary

consideration post-accident which *is not part of prohibited employment agreement terms*, unenforceable under FELA § 6 (45 USC § 56). The court found that provision enforceable, but was careful to explain that if the arbitration provisions had been part of the seafarer's employment agreement, pre-injury, then it would have been unenforceable.

The Second Circuit in *Harrington*, explained:

> The FAA broadly applies to "maritime transaction[s]" and "commerce," and provides that "an agreement in writing to submit to arbitration an existing controversy arising out of" maritime transactions or commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or equity for the revocation of any contract." 9 U.S.C. § 2. Although the FAA exempts from its coverage "contracts of employment of seamen," id. § 1, the Supreme Court has strongly suggested that arbitration agreements such as the one at issue in this case do not constitute "contracts of employment" where the arbitration agreement is "not contained" in a broader employment agreement between the parties, *Gilmer*, 500 U.S. at 25 n. 2, 111 S.Ct. 1647; see also *Terrebonne*, 477 F.3d at 279 (holding that the "maintenance and cure" provisions of an arbitration agreement, though "an intrinsic part of the employment relationship, [are] separate from the actual employment contract ").

Harrington v Atl. Sounding Co., Inc., 602 F3d 113, 121 (2d Cir 2010).

In the second exception, "the goal of the Convention Act... was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Scherk v. Alberto–Culver Co.*, 417 U.S. 506, 520 n. 15 (1974); *see also Razo v. Nordic Empress Shipping Ltd.*, 2008 WL 2902184, at *5 (D.N.J. July 24, 2008), aff'd, 362 Fed. Appx. 243 (3d Cir. 2009).

In deciding whether to enforce a foreign arbitration clause implicating the Convention Act, courts have emphasized four jurisdictional factors: that (1) there is an agreement in writing within the meaning of the Convention; (2) the agreement provides for arbitration in the territory

of a signatory of the Convention; (3) the agreement arises out of a legal relationship, whether contractual or not, which is considered commercial; and (4) a party to the agreement is not an American citizen, or that the commercial relationship has some reasonable relation with one or more foreign states.

However, whereas a seaman's contract under Title 9, Chapter 1 is specifically described by Congress as being not commercial, an employment agreement in the international venue under Chapter 2, the Convention Act, is considered differently. *Razo v. Nordic Empress Shipping Ltd.*, 362 Fed. Appx. 243 (3d Cir. 2009).

In that neither of these two exceptions applies to Mr. Kozur's situation, the rule to be applied is that the arbitration agreement in his pre-injury employment contract cannot be enforced.

POINT IV: NEW JERSEY LAW SHOULD DETERMINE THE VALIDITY OF THE AGREEMENT BUT THE AGREEMENT WOULD BE VOID UNDER NEW JERSEY AND NEW YORK LAW

Plaintiff contends that a seaman can never have enforced against him/her a pre-injury employment contract term compelling the seaman to arbitrate a personal injury claim he brings under the Jones Act, 46 USC § 30106. However, to the extent that some courts have held that a seaman with a Jones Act claim have been compelled to arbitrate that claim under applicable state law, plaintiff will address whether New Jersey law, in this case, would provide the basis for forcing Mr. Kozur to arbitrate his Jones Act claim without the benefit of a court proceeding before a jury.

As discussed above, federal law and congressional pronouncement govern the issues

presented here. However, if a state law were to be considered operative, then it should be New Jersey law determining the validity and enforceability of the agreement. The Vessel was at all relevant times in the State of New Jersey and was home ported there. Plaintiff resides in New Jersey. Defendants are all based in New Jersey. The events of the present cause of action all took place in New Jersey on a voyage commencing and ending in Cape May. Defendant was conducting business in New Jersey at the time said events took place. The purported agreement was entered, if at all, in New Jersey. New York law has no rational relation to any of the parties or the present cause of action. Consequently, New Jersey law, and not New York law, should be applied to determine the validity and enforceability of the agreement.

The law in New Jersey would hold that the putative arbitration document in issue here would be deficient, even if authentic, which it was the defendants' burden to prove, which they fail to do.

A: THE PUTATIVE AGREEMENT IS UNENFORCEABLE BECAUSE IT IS DEFECTIVELY VAGUE IN ESSENTIAL TERMS

In New Jersey, not every putative arbitration clause is enforceable. Such clauses are unenforceable if there exists grounds at law or in equity for finding that no contract exists or that the agreement is revocable. N.J.S.A. 2A:23B-6.

A putative contract (and arbitration agreements are contracts) will be found unenforceable if it is defectively vague in essential terms. *Baer v. Chase*, 392 F.3d 609, 619 (3d Cir. 2004) ("Under New Jersey law, an agreement so deficient in the specification of its essential terms that the performance by each party cannot be ascertained with reasonable certainty is not a contract, and clearly is not an enforceable one"). Among other terms, New Jersey law deems essential (1) the duration of the contract and (2) the amount of compensation to be paid. *Id.* If a contract's

terms are open to at least two different interpretations, those terms are vague and ambiguous and the contract is unenforceable. *A.D.L. v. Cinnaminson Tp. Bd. Of Educ.*, 975 F.Supp.2d 459, 464 (D.N.J. 2013) (citing *Chubb Custom Ins. Co. V. Prudential Ins. Co. of Am.*, 948 A.2d 1285 (2008). If no enforceable contract exists, a court may not order the parties to arbitrate. N.J.S.A. 2A:23B-7.

Here, the contract's duration is defectively deficient. First, the signature pages are undated. (See Exhibit A at P. 4-5). There is therefore no way to determine on what date the Manifest became effective. Second, Mr. Kozur was apparently subject to "be[ing] dismissed by the owner at any time at its sole discretion for any reason and without the necessity of advanced notice." (See Exhibit A at ¶2). Mr. Kozur therefore had no idea how long he would be in defendants' employ, and neither could have defendants. Mr. Kozur might have interpreted the clause to mean that the owner would not dismiss him without good cause, while the defendants might have planned to dismiss him at the slightest infraction- the term is, in other words, open to a myriad of interpretations, and therefore ambiguous. As the term is vague and ambiguous, there is no enforceable contract, and arbitration may not be forced.

Second, the statement of consideration due Mr. Kozur as compensation for his work is impermissibly vague. Mr. Kozur's "full, or part, share" was to be compensated in an amount "determined solely by the Captain at the time of settlement" based on vague, uncertain, unquantifiable and completely subjective factors. (See Id. at ¶3). As with the duration term, Mr. Kozur might have interpreted the clause to mean he would be compensated in an amount proportionate to his work, while defendants might have meant to give him anything between a farthing and the entire bounty. The term is therefore ambiguous. As such, there is no enforceable

contract, and arbitration may not be forced.

Because the writing is vague and ambiguous as to the contract's duration and also as to Mr. Kozur's consideration, the putative "contract" is vague, invalid and unenforceable under New Jersey law. Additionally, the contract is also unenforceable under New Jersey law for those reasons that it would be unenforceable under federal law. *See* Point I, *supra*. Under New Jersey law, not every putative arbitration clause is enforceable. Such clauses are unenforceable if there exists grounds at law or in equity for finding that no contract exists or that the agreement is revocable. N.J.S.A. 2A:23B-6.

Further, a putative arbitration agreement which fails to advise it acts to waive a statutory right to relief in a court of law is not enforceable. *Atalese v. U.S. Legal Services Group, L.P.*, 219 N.J. 430 (2014), *Fawzy v. Fawzy*, 199 N.J. 456, 462 (2009). That is the case here. The putative arbitration agreement does not advise that the Jones Act itself provides for a right to jury trial and the selection of a claim's venue. Because the alleged arbitration clause here fails to advise the seaman that the Jones Act gives him his jury trial right, and the defendant is attempting to thwart his right to that federal statutory entitlement, enforcement of the arbitration clause would fail under New Jersey law.

Additionally, the arbitration clause would fail under New York law. In *Schreiber v. K-Sea Marine, Inc.*, 9 N.Y.3d 331 (Ct. App. 2007) the New York Court of Appeals held that only post-injury arbitration agreements with specified consideration paid are upheld against a seaman, and pre-injury arbitrations agreements may not be.

POINT V: ATLANTIC CAPES' MOTION TO ENFORCE THE ALLEGED ARBITRATION CLAUSE MUST BE DENIED AS TO IT BECAUSE IT IS NOT A PARTY TO SAID CLAUSE

Atlantic Capes' motion to enforce the arbitration clause must be denied as to it because it is not a party to said clause. In *Razo v. Nordic Empress Shipping Ltd.*, defendant Nordic, the vessel owner, was not a party to the signed arbitration agreement which plaintiff had entered with his employer. Plaintiff brought suit against defendant for unseaworthiness. *Razo v. Nordic Empress Shipping Ltd.*, 362 Fed. Appx. 243, 246 (3d Cir. 2009). Nordic asserted it could benefit from the arbitration agreement with the employer. The court ruled that defendant Nordic could not enforce against plaintiff an arbitration agreement that it had not signed, though one existed between plaintiff and other defendants. *Id.*

Atlantic Capes' is not a named party to the alleged agreement under the Manifest. (See Exhibit A). There is no indication whatsoever that Atlantic Capes was a party to the Manifest, and therefore, no evidence that they were a party to the clause. Consequently, Atlantic Capes' motion to enforce the agreement as to itself must be denied. *See Razo v. Nordic Empress Shipping Ltd.*, 362 Fed. Appx. 243, 246 (3d Cir. 2009); *Sokol Holdings, Inc. v. BMB Munai, Inc.*, 542 F.3d 354 (2d Cir. 2008).

CONCLUSION

For the reasons stated herein as a matter of law the motion should be denied.

Dated: Raritan, New Jersey
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