ARBITRATOR: JUDGE JOEL SCHNEIDER (RET.)

IN THE MATTER OF THE ARBITRATION BETWEEN

AARON TREJO,
Claimant,

SAULO TREJO,
Claimant,

vs.

SEA HARVEST, INC.
Respondent.

BRIEF OF CLAIMANTS IN OPPOSITION TO COMPELLING ARBITRATION

Claimants, Aaron Trejo and Saulo Trejo ("Claimants"), by and through their attorneys, Schechter Shaffer & Harris, LLP, hereby submit this brief opposing Sea Harvest's attempt to compel Claimants to arbitrate their claims against their Jones Act employer, Respondent Sea Harvest, Inc. ("Sea Harvest").

I.
INTRODUCTION

The Claimants in this matter, Aaron Trejo and Saulo Trejo, have asserted claims under the Jones Act and U.S. General Maritime Law against their employer, Sea Harvest. The parties do not dispute the underlying facts. Both Claimants are Jones Act seamen who have asserted claims for personal injuries sustained while working as commercial fishermen for Sea Harvest aboard its vessels. As part of their employment with Sea Harvest, Claimants were required to sign a new contract at the beginning of each fishing voyage entitled "Crew Terms of Employment", which is hereinafter referred to as the employment contract. *See* Respondent's Brief, Exhibit 1.

The employment contract contains an arbitration provision, which has been reproduced in Respondent's Brief. The contract notes that if the agreement is "determined to be exempt from enforcement under the Federal Arbitration Act, the laws of the State of New York shall be applied in determining the validity and enforceability of this agreement." *See* Respondent's Brief at pp. 2-3.

Claimants contend that they should not be compelled to arbitrate their claims against Sea Harvest. Claimants stress that the arbitration provision in question is unenforceable under the Federal Arbitration and not should be upheld under state law as an alternative. Furthermore, Claimants contend the arbitration provision violates public policy and is an unconscionable contract of adhesion.

II.
THE ARBITRATION PROVISION IS UNENFORCEABLE UNDER THE FAA

The Federal Arbitration Act ("FAA"), 9 U.S.C. §§1-16, requires trial courts to enforce arbitration clauses in private arbitration agreements. *See New Prime, Inc. v. Oliveira*, 139 S.Ct. 532, 536 (2018). The FAA generally requires enforcement of an arbitration provision contained in a maritime contract. *See* 9 U.S.C. §2. However, the FAA carves out an exemption for certain types of employment agreements to which this requirement does not apply. *See* 9 U.S.C. §1-2; *see also New Prime, Inc.*, 139 S.Ct. at 537. Specifically, Section 1 of the FAA states that the FAA does not apply to a seaman's employment contract. *Id.* The FAA explicitly provides that "nothing herein shall apply to contracts of employment of seamen." 9 U.S.C. §1. Sea Harvest concedes that Claimants' employment contracts are exempt from enforcement under the FAA. *See* Respondent's Brief at p.3.

III.
THE ARBITRATION PROVISION IS UNENFORCEABLE UNDER STATE LAW

A. Turning to State Law

Sea Harvest contends that the employment contracts containing the underlying arbitration provision – while clearly unenforceable under the FAA – are instead governed by state law. *See* Respondent' Brief at p.3. In support, Sea Harvest cites to *In re Oil Spill by the Oil Rig DEEPWATER HORIZON in the Gulf of Mexico, on Apr. 20, 2010*, 2010 WL 4365478 at *1 (E.D. La. 2010). *Id.* Sea Harvest's reliance on this case is misplaced. The court in *In re Oil Spill* denied an employer's motion to compel a seaman to arbitrate his personal injury claim precisely because the employment contract containing the arbitration provision was unenforceable under the FAA. *Id.* at *11 ("[T]he court finds that plaintiff's arbitration agreement is a contract of employment of a seaman and therefore, pursuant to §1, the agreement is not enforceable under the FAA."). The court did not find that the seaman's employment contract was governed by state law, and in fact, the court did not turn to state law at all in considering whether the arbitration agreement was enforceable. *Id.*

In further support of turning to state law to enforce the arbitration provision, Sea Harvest cites to *Waithaka et al v. Amazon.com et al*, 966 F.3d 10 (1st Cir. 2020) and *Rittman v. Amazon.com, Inc.*, 971 F.3d 904 (9th Cir. 2020). *Waithaka* was a putative class action involving delivery workers pursuing claims for violations of the Massachusetts Wage Act and the Massachusetts Minimum Wage Law. 966 F.3d at 15. Likewise, *Rittman* involved a proposed class action for delivery workers with claims under the Fair Labor Standards Act of 1938, the California Labor Code, and Washington state and Seattle municipal wage and hour laws. 971 F.3d at 908. The *Waithaka* and *Rittman* claimants were delivery drivers with claims arising from state law. Unlike the claimants in *Waithaka* and *Rittman*, Aaron Trejo and Saulo Trejo are Jones Act seamen with claims based on federal law, including a Jones Act claim with a guaranteed right to a trial by

jury. As Jones Act seamen, Claimants are also wards of the admiralty subject to historical preferential treatment as set forth below.

B. Choice of Law

Defendant argues that the arbitration agreement is enforceable under the state law of either New York, New Jersey, or Massachusetts. First, the arbitration agreement drafted by Sea Harvest specifically states that the laws of the state of New York – and not New Jersey or Massachusetts – shall be applied to determine the validity and enforceability of the arbitration agreement. *See* Respondent's Brief, Exhibit 1. Sea Harvest provides no reason as to why this choice of law provision should be disregarded in favor of applying the law of New Jersey or Massachusetts. As the drafter of the employment agreement, the terms of the agreement should be held against Sea Harvest. Moreover, in the context of an arbitration agreement, an explicit and unambiguous choice of law provision must be given effect. *See Hackett v. Millbank, Tweed, Hadley & McCoy*, 86 N.Y.2d 146, 630 N.Y.S.2d 274, 654 N.E.2d 95 (1995). As the arbitration provision calls for the application of New York law, Sea Harvest is in no position to argue that the laws of another state should be applied to determine the enforceability of this employment contract.

C. New York Law

With respect to New York law, New York Civil Practice Law and Rules CVP §7501 provides, "a written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award." Claimants contend the arbitration agreement in question should not be upheld under New York law on grounds of public policy and unconscionability as set forth below. New York

courts recognize an exception to the enforcement of arbitration agreements where there is a "statutory, constitutional or public policy prohibition against arbitration of the grievance". *County of Chautauqua v. Civil Service Employees Assoc.*, 8 NY3d 513, 519 (2007)(quoting *Matter of City of Johnstown (Johnstown Police Benevolent Assn.), 99 N.Y.2d 273, 278 (2002)).*

Furthermore, the only New York case cited by Sea Harvest that actually involves a seaman's claim is *O'Dean v. Tropicana Cruises Int'l, Inc.*, 1999 U.S. Dist. LEXIS 7751 *1, 1999 WL 335381 (S.D.N.Y. 1999)[1]. Unlike the U.S.-based Claimants in the present case, the *O'Dean* plaintiff was a foreign seaman who was domiciled in Antigua. *Id.* at *1-2. In addition, the *O'Dean* plaintiff did not have a Jones Act claim for personal injury; rather, he filed a claim for lost wages, repatriation expenses, penalty wages, damages for wrongful arrest, damages for wrongful discharge, and breach of contract. *Id.* Moreover, the district court in *O'Dean* held that the plaintiff's claims for wages and penalty wages were not arbitrable precisely because a seaman has a statutory right to vindicate such wage claims in federal court if he so chooses. *Id.* at *5-6. The court in *O'Dean* cited to *Korinis v. Sealand Services, Inc.*, 490 F. Supp. 418-19 (S.D.N.Y. 1980) for the proposition that a "seaman may be required to arbitrate claims *for which there is no statutory right to proceed in federal court*." *Id.* at *9 (emphasis added). Because a seaman has a statutory right to pursue wage claims in federal court, said claims were not subject to arbitration. Thus, the *O'Dean* court's reasoning that a seaman may be required to arbitrate only those claims for which there is no statutory right to proceed in federal court only helps support the Claimants' position in this case. Because a seaman has a statutory right to a trial by jury in a Jones Act claim, he cannot be

[1] The other New York district case cited by Defendant, *Valdes v. Swift Transp. Co*.,292 F. Supp. 2d 524 (S.D.N.Y. 2003), involved sexual harassment and retaliation claims brought by a land-based driver hired by an interstate motor carrier.

compelled to pursue that claim in arbitration. *Id.* at *9.

Although the employment contract in question calls for application of New York law in determining the enforcement of the arbitration provision, Claimants address potential enforcement of the arbitration agreement under the laws Massachusetts and New Jersey below.

D. Massachusetts Law

Claimants note enforcement of the arbitration provision under Massachusetts state law is not authorized or agreed to by the terms of the employment agreement. Nonetheless, should the Arbitrator choose to apply Massachusetts state law, Claimants acknowledge that valid arbitration agreements are generally enforceable under Massachusetts state law "save upon such grounds as exist at law or in equity for the revocation of any contract." M.G.L. Ch. 251 §1. As set forth herein, there are grounds upon which the Arbitrator should decline to enforce arbitration of Claimants' claims. The underlying claims arise under the Jones Act and U.S. General Maritime Law. As part of the statutory remedy under the Jones Act, Claimants are entitled to a trial by jury and courts have long refused to honor such devices or contracts that deprive U.S. seamen of the procedural rights and remedies provided to them under the Jones Act. Forcing Claimants to arbitrate their claims deprive them of their right to a jury trial and preclude them from the statutory compensation scheme set up by Congress. Furthermore, there is no direct precedent to persuade this Arbitrator to enforce arbitration of Claimants' Jones Act claims under Massachusetts state law. In its Brief, Sea Harvest fails to point to any case from a court in Massachusetts in which the court applied Massachusetts state law to uphold an arbitration provision in a seaman's employment contract.

E. New Jersey Law

With respect to New Jersey law, Claimants again note enforcement of the arbitration

provision under New Jersey state law is not authorized or agreed to by the terms of the employment agreement. Should the Arbitrator apply New Jersey law, Sea Harvest acknowledges that New Jersey courts recognize public policy exceptions to the enforcement of arbitration agreements. *See* Respondent's Brief at p.7. As noted below, arbitration of a seaman's Jones Act claim violates the long-standing public policy of the United States to allow seamen to try their Jones Act claims to a jury.

Sea Harvest relies heavily on a single case from the U.S. District Court of New Jersey in which an arbitration clause from a seaman's employment contract was enforced under New Jersey's Arbitration Act. *See Kozur v. F/V Atl. Bounty, LLC*, 2020 U.S. Dist. LEXIS 148633, 2020 WL 5627019 (D.N.J. August 18, 2020). In *Kozur*, the court found that the arbitration clause at issue was enforceable because it chose to apply the New Jersey Arbitration Act. *Id.* at *17, 24. The court chose to apply New Jersey state law because (despite the contract calling for application of New York state law) the contract was entered into between a New Jersey individual and New Jersey companies, and the contract was entered into in New Jersey. In contrast, the employment contract at issue in this case was entered into by Claimants (citizens of Virginia) and Sea Harvest (a citizen of New Jersey) and at least the Aaron Trejo's contract was entered into in Massachusetts, on the date the vessel departed from New Bedford.

More importantly, *Kozur* deviates from the long-standing interpretation regarding the enforceability of arbitration provisions in seamen's employment contracts. Until recently, federal courts have declined to enforce arbitration in Jones Act cases on the ground that arbitration agreements contained in an employment contract are subject to the exclusion of Section 1 of the FAA. *See Brown v. Nabors Offshore Corp.*, 339 F.3d 391 (5th Cir. 2003). In a recent industry

publication entitled "Avoiding a Jury Trial for Jones Act Seamen's Injury Claims: It Can Be Done!", attached hereto as **Exhibit A**, the writer wrote "indeed, caution is warranted *because an arbitration agreement for future claims as part of a seaman's employment contract is entirely unenforceable in the United States*." Marissa M. Henderson, Benedict's Maritime Bulletin, Vol. 17, No. 2, Second Quarter 2019, at p.82 (emphasis added). This new strategy – to ground the validity of an arbitration agreement in a seaman's employment contract on state law – is a complete workaround. It's a workaround to bypass Congress' intent to enact a statutory scheme for seaman and exclude seaman's personal injury and death claims from arbitration.

IV.
THE ARBITRATION PROVISION VIOLATES PUBLIC POLICY

A. Congress' Intent to Exclude Seamen's Employment Contracts from Arbitration

Section 1 of the FAA expressly excludes contracts for the employment of seamen and railroad employees from its scope. *See* 9 U.S.C. §1. As the Third Circuit observed, the exclusion of these employment contracts from the FAA is not random. *See Harper v. Amazon.com Servs.*, 12 F.4th 287, 301 (3d 2021). Seamen and railroad workers are "specific categories of workers already subject to complex dispute resolution schemes." *Id.* Both are workers over whom the commerce power is most apparent and over which Congress has undoubted authority to govern. *Id.*

In *Circuit City Stores v. Adams*, the U.S. Supreme Court recognized a "permissible inference" that the employment contracts of seaman and railroad employees were specifically excluded from the Federal Arbitration Act because of Congress' authority to govern these employment relationships by enactments of statutes specific to these categories of workers. 532 U.S. 105, 120-121 (2001). "It is reasonable to assume that Congress excluded 'seaman' 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 251.

However, in bypassing the FAA and enforcing arbitration agreements for seamen and railroad employees under state law, the disruptive effect over the statutory dispute resolution schemes that cover these workers is the same. Upholding an arbitration provision under state law has the same disruptive effect on the dispute resolution scheme passed by Congress to protect seamen who are injured or killed in the course of their employment in service of a vessel (i.e., the Jones Act). In upholding an arbitration agreement under state law, and thereby depriving the seaman of his right to a trial by jury, the resolution scheme established by Congress to govern this class of workers under its commerce power is disturbed. By carving out an exception for seamen's employment contracts in the FAA, it can reasonably be inferred that Congress did not want to disturb or invalidate the protections it gave to seamen under the Jones Act, which includes the right to a trial by jury.

Claimants acknowledge that the FAA creates "a strong federal policy" of resolving disputes through arbitration. *Puleo v. Chase Bank USA, N.A.*, 605 F.3d 172, 178 (3d Cir. 2010). However, the policy in favor of arbitration is not absolute. *See Shearson/American Express v. McMahon*, 482 U.S. 220, 226-27 (1987).

Moreover, to say that Congress spoke in favor of arbitration when it passed the FAA is an incomplete retelling of the history of the Act. In the same legislation, Congress spoke in favor of seamen when it explicitly carved out an exception to exclude the enforcement of seamen's employment contracts under the FAA. This action by Congress speaks to a federal policy of protecting the rights of Jones Act seamen in the statutory scheme established by Congress, including the right to a trial by jury. Thus, there is undoubtedly a public policy in favor of arbitration, but

there is also a public policy in favor of allowing Jones Act seaman to assert a claim for personal injury against their employers in a judicial forum and to have those claims tried before a jury.

The Supreme Court has previously held that if Congress intended protection given by a statute to include protection against waiver of the right to a judicial forum, that intention should be deducible from text or legislative history. *See Wilko v. Swan*, 346 U.S. 427, 434-35 (1953). Here, the Merchant Marine Act of 1920, known as the Jones Act, was passed in 1920 and provides a cause of action for seaman who are injured or killed in the course of their employment in service of a vessel. Congress specifically provided seamen a right to a trial by jury under the Jones Act. 46 U.S.C. §30104. The Federal Arbitration Act ("FAA") was passed five years later in 1925. In passing the Federal Arbitration Act to support the arbitration of disputes by contract, Congress specifically excluded contracts for employment of seamen from enforcement. 9 U.S.C.A. §1. Thus, a seaman's employment contract containing an arbitration provision is exempt from enforcement under the FAA. Thus, despite speaking in favor of enforcing arbitration agreements, Congress also spoke to its commitment to seamen and the statutory rights in guaranteed to seamen through the Jones Act a mere five years earlier.

In *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 355-56 (1971), the U.S. Supreme Court refused to enforce an arbitration clause in a collective bargaining agreement pursuant to the Labor Management Relations Act ("LMRA") because it found the LMRA to be in conflict with the seamen's statutory right to bring suit in federal court for unpaid wages. Similarly, the Jones Act provides a statutory right to bring a claim in federal court and before a jury. Thus, applying the reasoning of *Arguelles*, the employment contract at issue should not be enforced before it deprives Claimants, who are Jones Act seamen, the right to bring suit in federal court and before a jury.

B. Historical Preferential Treatment of Seamen and The Jones Act

In their arbitration demands, Claimants asserts claims based in federal law. Claimants assert negligence claims under the Jones Act, 46 U.S.C. §30104, claims for vessel unseaworthiness under the U.S. General Maritime Law, and claims for maintenance and cure under the U.S. General Maritime Law.

The Jones Act provides a cause of action for a seaman injured or killed in the course of his employment by the negligence of the seaman's employer, the ship's master, or fellow crewmembers. *See* Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 4-20 (4th ed. 2004). The intended purpose of the Jones Act is to provide for "the benefit and protection of seamen who are peculiarly the wards of admiralty." *The Arizona v. Anelich*, 298 U.S. 110, 123 (1936). It should be liberally construed to for the protection afforded to seaman under the U.S. general maritime law. *Id.*

The "ward of the admiralty" doctrine can be traced back to Justice Story's written opinion in *Harden v. Gordon*, 11 F. Cas. 480, 485, F. Cas. No. 6047 (CC Me. 1823)[2]. In a recent maritime case involving products liability, the U.S. Supreme Court again reaffirmed its '"special solicitude for the welfare' of those who undertake to 'venture upon hazardous and unpredictable sea voyages.'" *Air & Liquid Sys. Corp. & Devries*, 203 L. Ed. 373, 383 (2019)(quoting *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 285 (1980)).

The Jones Act, applicable to seamen, and the Federal Employers' Liability Act (FELA),

[2] "[Seamen] are emphatically the wards of the admiralty; and though not technically incapable of entering into a valid contract, they are treated in the same manner, as courts of equity are accustomed to treat young heirs, dealing with their expectancies, wards with their guardians, and cestuis que trust with their trustees. They are considered as placed under the dominion and influence of men, who have naturally acquired a mastery over them; and as they have little foresight and caution belonging to persons trained in other pursuits of life, *the most rigid scrutiny is instituted into the terms of every contract, in which they engage*." (emphasis added)

applicable to railroad workers, embody a public policy, favoring "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." *Kernan v. American Dredging Co.*, 355 U.S. 426, 431 (1958).

Section 5 of FELA, which is effectively a part of the Jones Act,[3] provides:

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act shall to that extent be void . . . .
> 45 U.S.C., § 55.

Under section 5, "every variety of agreement or arrangement" intended to avoid liability under FELA or the Jones Act and substitute some other scheme of compensation for on-the-job injuries is void. *Philadelphia, B. & W. R. Co. v. Schubert*, 224 U.S. 603, 611 (1912).

Courts have applied 45 U.S.C., § 55 to strike down a wide variety of contracts or other legal arrangements designed to avoid or limit liability for injury to seamen or rail workers in the course of their employment. In *Stevens v. Seacoast Co.*, 414 F.2d 1032, 1038 (5th Cir. 1969), the Court struck down an arrangement whereby a vessel owner attempted to make the judgment-proof captain of a fishing vessel a seaman's "employer" under the Jones Act.

The reach of 45 U.S.C., § 55 is not limited to direct attempts to avoid liability. The Supreme Court has held that the statute voids any attempt to deprive an injured worker of important procedural rights under the statute. In *Boyd v. Grand T. W. R. Co.*, 338 U.S. 263, 265 (1949), an injured rail worker signed an agreement limiting his choice of forum in a subsequent

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[3]The Jones Act, 46 U.S.C., § 30104, affords a "seaman injured in the course of employment" a "civil action at law, with the right of trial by jury, against the employer." *Id.* The statute incorporates FELA: "Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section." *Id.* The Supreme Court has held that the Jones Act incorporates FELA's "entire judicially developed doctrine of liability." *Kernan*, 355 U.S. at 439.

suit under FELA. The agreement was contrary to the wide choice of forum provided by section 6 of FELA, 45 U.S.C., § 56. The Court held that the agreement was void:

> We hold that petitioner's right to bring the suit in any eligible forum is a right of sufficient substantiality to be included within the Congressional mandate of § 5 of the Liability Act: "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void . . . ." The contract before us is therefore void. . . .
>
> The right to select the forum granted in § 6 is a substantial right. It would thwart the express purpose of the Federal Employers' Liability Act to sanction defeat of that right by the device at bar.

338 U.S. at 265-266.

C. <u>A Seaman's Right to a Trial by Jury</u>

The Savings to Suitors Clause, part of the statute setting forth the original jurisdiction of federal district courts, protects a seaman's right to a trial by jury for their injury claim. *See* 28 U.S.C. § 1333.

The Jones Act also provides, by statute, an injured employee with the right to a trial by jury. 46 U.S.C., § 30104. This right is part of the essence of the statute and even limits a court's power to grant a summary judgment or direct a verdict. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 360 (1962) (in Jones Act cases "trial by jury is part of the remedy."); *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 523 (1957) (the jury "plays a pre-eminent role in these Jones Act cases").

In place of the jury trial that is central to the Jones Act, Sea Harvest attempts by the arbitration provision to substitute the decision of a jury by that of a single arbiter. The Supreme Court in *Boyd* referred to section 6 of FELA, 45 U.S.C., § 56, as a forum-selection statute, not

merely as a venue statute. The statute gives an injured worker the right to choose a variety of venues in either state or federal court. In the words of the Supreme Court, this is "a right of sufficient substantiality to be included within the Congressional mandate" prohibiting: "Any contract, rule, regulation, or device whatsoever . . ." to deprive an injured worker of rights under FELA or the Jones Act. *Boyd*, 338 U.S. at 265.

The present arbitration provision operates as a prospective water of Claimants' right to pursue statutory remedies. The arbitration provision of Claimants' employment contract functions as a "contract, rule, regulation, or device" intended to avoid the Jones Act in violation of 45 U.S.C., § 55, and, therefore, the arbitration provision should not be enforced.

V.
THE ARBITRATION AGREEMENT IS UNCONSCIONABLE

Under New York law, the doctrine of unconscionability as applied to contracts contains both procedure and substantive aspects. *See Sablosky v. Edward S. Gordon Co.*, 73 N.Y.2D 133, 538 N.Y.S.2d 513, 535 N.E.2d 643 (1989). Unconscionability is decided against the background of the contract's commercial setting, purpose and effect. *Id.*

The employment contract presented to Claimants is a contract of adhesion. "Typical contracts of adhesion are standard-form contracts offered by large, economically powerful corporations to unrepresented, uneducated, and needy individuals on a take-it-or-leave-it basis, with no opportunity to change any of the contract's terms. *Aviall, Inc. v. Ryder Sys.*, 913 F. Supp. 826, 831 (S.D.N.Y. 1996). Under New York law, a contract of adhesion may be rendered unenforceable if the other party used high pressure tactics, deceptive language, or if the contract was the product of a gross inequality in bargaining power. *Morris v. Snappy Car Rental, Inc.*, 84 N.Y.2d 21, 30, 614 N.Y.S.D. 2d 362, 365, 637 N.E.2d 253 (1994).

Seaman such as Aaron Trejo and Saulo Trejo are in a particularly vulnerable position when faced with an employment contract containing an arbitration provision. At the beginning of a voyage, Claimants Aaron Trejo and Saulo Trejo would be presented with a document entitled "Crew Terms of Employment", which containing the arbitration provision. *See* Exhibit 1 to Respondent's Brief. The document also constituted the vessel's manifest for the voyage. *Id.* The Claimants were not represented by counsel and were not otherwise made aware of their rights under the Jones Act and General Maritime Law to understand the effect of the arbitration provision. Moreover, as seamen taking off on a voyage, the Claimants had no barging power and were not in a position to negotiate the terms of the agreement. The economic pressures and the context in which these agreements were signed should not be ignored. As commercial fishermen, Claimants make a living on these voyages. When being presented with the employment contract, their only options were to either sign the employment contract as is or leave the vessel and forego the expected wages from the voyage. Few fishermen like Claimants Aaron and Saulo Trejo are in a position to refuse a job because of an arbitration agreement.

More importantly, there is no question as to why Sea Harvest chose to insert an arbitration provision in its employment contracts for seamen such as Aaron Trejo and Saulo Trejo. The advantage to be gained by a Jones Act employer is well-known in the industry. By forcing a seaman to arbitrate a Jones Act claim, the employer prevents a seaman from exercising his statutory right to have his claim heard by a jury. In the publication entitled "Avoiding a Jury Trial for Jones Act Seamen's Injury Claims: It Can Be Done!", attached hereto as **Exhibit A**, the writer describes it as follows:

> How could having seamen elect an arbitration forum for their injury claims be so beneficial to the vessel operator/Jones Act employer? *Two words – no jury*… Let

> me be clear (and a bit repetitive) – *vessel operators can save millions of dollars in Jones Act exposure* and (sorry, fellow defense attorneys) a ton in Jones Act defense costs by effectively implementing post-injury arbitration agreements as part of their risk management strategy.

Marissa M. Henderson, Benedict's Maritime Bulletin, Vol. 17, No. 2, Second Quarter 2019, at pp. 82-83 (emphasis added).

An arbitration agreement in a seaman's employment contract is clearly one-sided. Its goal is to limit the Jones Act employer's risk of a high jury verdict. There is nothing to be gained by the seaman in signing off on an arbitration agreement. The agreement gets signed only because it's a condition of the job and the seaman lacks any real bargaining power.

VI.
UPHOLDING THE ARBITRATION PROVISION CREATES LACK OF UNIFORMITY IN FEDERAL MARITIME LAW

Sea Harvest's reasoning, in relying on state law to uphold the arbitration provision, supports a lack of uniformity in federal maritime law.

The U.S. Supreme Court has long held that federal law preempts state law where there is an interest in maintaining uniformity. As the Supreme Court proclaimed in *The Lottawanna*:

> One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.

88 U.S. 558, 575 (1874).

By reason of this principle supporting uniformity and consistency in maritime law, the U.S. Supreme Court has held that "not even Congress itself" could permit the application of state workers' compensation statutes to injuries covered under admiralty jurisdiction and sanctioned

the "destruction of the constitutionally prescribed uniformity". *See American Dredging Co. v. Miller*, 510 U.S. 443, 451 (1994)(citing *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 163-164 (1920)). The Supreme Court has also relied on this principle in holding that a state may not require a maritime contract to be in writing where admiralty law recognizes the validity of oral contracts. *See Kossick v. United Fruit Co.*, 365 U.S. 731 (1961).

It would be inconsistent for Congress, which enacted the Jones Act with the right to a trial by jury, to intend to forbid federal arbitration of a seaman's employment contract through Section 1 of the FAA but simultaneously allow arbitration of a seaman's employment contract in a state proceeding pursuant to state law.

Sea Harvest is asking the Arbitrator to hold that the arbitrability of a seaman's employment contract and his ability to pursue statutory remedies under the Jones Act should be decided on a state-by-state basis. This wholly disregards the historical emphasis on uniformity in admiralty law and would result in a clear lack of uniformity across the country on one of the most important and defining characteristics of a federal Jones Act claim – the right to a trial by jury. As the Supreme Court has held, "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 (1942).

Upholding Sea Harvest's employment contract has the potential of creating a compensation scheme that would be, at best, inconsistent and, at worst, difficult to apply. Some seamen will still be immune from arbitration orders. Others will not. A seaman whose employment contract is interpreted under the laws of a state with strong public policy defenses to arbitration agreements may be protected from arbitration while a fellow seaman performing the same duties, perhaps even

in the same body of water, may be forced to arbitrate his claim if the laws of a different state are applied to his contract. Sea Harvest offers no explanation as to why Congress would have intended this inconsistent and unprecedented result.

VII.
CONCLUSION

In summary, for over one-hundred years, American seamen injured in the course of their employment have enjoyed a reduced burden of proof on causation, a choice of forums in which to litigate, and the right to submit disputes arising from on-the-job injuries to juries quite likely to include working men and women with sympathy for an injured seaman's claims. Congress created this compensation system for strong reasons of public policy, and it specifically prohibited contracts or "devices" to avoid the system. The arbitration provision in Sea Harvest's employment contract is an undisguised attempt by Sea Harvest to contract itself out of the strict liabilities Congress has imposed on employers through the Jones Act.

Congress spoke when it gave Jones Act seamen the right to a trial by jury. Congress also spoke when it passed the Federal Arbitration Act and chose – within the same legislation - to specifically exclude contracts for the employment of seamen from the scope of the Act. Aaron Trejo and Saulo Trejo belong to a class of workers engaged in interstate commerce who have historically received preferential treatment from courts throughout this country and for which Congress has provided a specialized compensation scheme. To disregard this treatment and federal legislation in favor of applying New York law is nothing but an attempt to circumvent the FAA for the sole advantage of employers like Sea Harvest. Such a result disrupts the uniformity of maritime law on an issue critical to the Jones Act claim of every seaman – the right to a trial by jury.

For these reasons, the Claimants respectfully request that the arbitration provision of Sea

Harvest's employment contracts be deemed unenforceable. Claimants, Aaron Trejo and Saulo Trejo, should not be compelled to arbitrate their claims.

Respectfully submitted,

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