ARBITRATOR: JUDGE JOEL SCHNEIDER (RET.)

IN THE MATTER OF THE ARBITRATION BETWEEN

AARON TREJO, *Claimant*

SAULO TREJO, *Claimant*

V.

SEA HARVEST, INC., *Respondent*

BRIEF OF RESPONDENT IN SUPPORT OF COMPELLING ARBITRATION

I. FAA's exemption of seaman's employment contracts does not prohibit enforcement of arbitration clause

The parties agree that a seaman's employment contract is exempt under Section 1 of the FAA. However, this exemption does not prohibit the enforcement of an arbitration clause. Section 1 of the FAA does not address the enforceability of employment contracts exempt from the statute. "It simply excludes these contracts from FAA coverage entirely." *Valdes v. Swift Transp. Co., Inc.*, 292 F. Supp. 2d 524, 529 (S.D.N.Y. 2003). When a contract is beyond the reach of the FAA, as is the case here, courts look to state law to decide arbitrability. *Palcko v. Airborne Express, Inc.*, 372 F.3d 588 (3d Cir. 2004) *cert. denied* 543 U.S. 1049 (2005) (enforcing FAA-exempt arbitration agreement under Washington state law); *Valdes, supra. See also Atwood v. Rent-A-Center East, Inc.*, No. 15-cv-1023, 2016 WL 2766656, at *3 (S.D. Ill. May 13, 2016) ("the fact that the [FAA] doesn't apply only means that its enforcement mechanisms aren't available, not that the whole dispute can't be arbitrated by enforcing the contract through another vehicle (like state law)."); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1472 (D.C. Cir. 1997)

("[W]e have little doubt that, even if an arbitration agreement is outside the FAA, the agreement still may be enforced....").

This very issue was raised in *Kozur v. F/V ATLANTIC BOUNTY*, which included an identical arbitration clause to the arbitration clause in Claimant's employment contracts. 2020 WL 5627019, No. 18-cv-08750 (slip copy) (D.N.J. August 18, 2020)(*appeal denied*). There, Judge Rodriquez noted that under both New Jersey and New York law, "[t]here is no language in the FAA that explicitly preempts the enforcement of state arbitration statutes." *Id*. at *6, *citing 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). Claimants cite to no case law that supports their argument that because the contract is exempt from the FAA, the arbitration clause is unenforceable. [1]

II. <u>Arbitration Clause is enforceable under state law</u>

As discussed in the previous section, the FAA exemption of seaman's employment contracts does not mean that the arbitration provisions therein are unenforceable or invalid. *Valdes v. Swift Transp. Co., Inc*., 292 F. Supp. 2d 524, 528 (S.D.N.Y. 2003) (*citing cases*). "[T]he effect of Section 1 is merely to leave the arbitrability of disputes in the excluded categories as if the Arbitration Act had never been enacted." *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 596 (3d Cir. 2004) *quoting Mason-Dixon Lines, Inc. v. Local Union No. 560, Intern. Broth. of Teamsters*, 443 F.2d 807, 809 (3d Cir. 1971).

[1] Claimants only authority for this proposition Section 1 of the FAA itself, which is cited in the Henderson article in Benedict's 2019 Maritime Bulletin. Henderson correctly states that that section "expressly excludes [seaman's employment contracts]from the FAA's purview," however misstates the law by leaping to the conclusion that these contracts cannot be enforced at all. *See* Brian McEwing, *Benedict's Maritime Bulletin*, Vol. 19, No. 2 (2021) which reaches the opposite conclusion. (Exhibit 1).

In re: DEEPWATER HORIZON is not to the contrary. 2010 WL 4365478 (E.D. La. Oct. 25, 2010). There, the defendant argued that the arbitration agreement was not a contract of employment, and thus could be enforced under the FAA. *Id*. at *2. The Court disagreed, and found that the "arbitration agreement is a contract of employment of a seaman and therefore, pursuant to §1, the agreement is **not enforceable under the FAA**." *Id*. at *4 (*emphasis added*). The state law issue was never raised, and was not before the Court.

The *Rittman* and *Waithaka* (Amazon cases) are also inapposite. In *Rittman*, Amazon argued that the plaintiff delivery driver was not an exempt transportation worker under Section 1 of the FAA, as the driver was not engaged in interstate commerce. *Rittmann v. Amazon.com, Inc.,* 971 F.3d 904, 909 (9th Cir. 2020) *cert. denied* 141 S. Ct. 1374 (2021). The Court disagreed, and found that the arbitration agreement was exempt from, and thus not enforceable under the FAA. *Id*. at 919. The Court declined to apply state law to enforce the arbitration clause, because agreement specifically stated that the arbitration clause was governed by the FAA and federal law, and not the law of the state of Washington. *Id.* at 920.

Amazon lost a similar argument in *Waithaka*, which found that the agreement was exempt from the FAA. *Waithaka v. Amazon.com, Inc.,* 966 F.3d 10 (1st Cir. 2020). The Court then turned to Massachusetts law, but found that the Massachusetts Wage Act included an anti-waiver provision, invalidating the plaintiff's right to contractually waive his right to file a class action in court. *Id*. at 33. Nothing in either of the Amazon cases precludes the application of state law to arbitration agreements in general. *Neither* the Jones Act nor the FELA contain such an anti-waiver provision that would override an otherwise valid arbitration agreement.

Claimant's citation to the Supreme Court's decision in *Circuit City Stores v. Adams* is misplaced. 465 U.S. 1 (1984). The Court's focus in that case was on whether the non-transportation employee's arbitration agreement was exempt from the FAA, which the Court answered in the negative. Within the opinion, however, the Supreme Court reaffirmed its decision in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), which held that where the FAA applied, it preempted state anti-arbitration laws. *Id*. at 122. While not directly on point, these cases certainly suggest that where the FAA does not apply, it is appropriate to apply state law to arbitration agreements in exempt employment contracts.

O'Dean v. Tropicana actually supports Defendants' position. In that case the Court found that a seaman could not be forced to arbitrate his claim under the Seaman's Wage Act, which specifically provided that the remedy was recoverable in federal court. 1999 WL 335381 at *2 (S.D.N.Y. May 25, 1999) *citing Arguelles*, 400 U.S. (1971) Nothing in *O'Dean* suggests that Jones Act claims are not subject to arbitration. In fact, various federal courts have held that contracts providing for arbitration of U.S. statutory claims (including Jones Act) are generally enforceable. *Lindo v. NCL (Bahamas), Ltd*., 652 F.3d 1257 (11th Cir. 2011) (*citing cases*).

In other words, Claimants have cherry picked a few cases wherein an arbitration clause could not be enforced for a statutory claim, but fail to mention that the statutes at issue in those cases contained anti-arbitration clauses or otherwise stated that the claimant's only remedy was in a court of law.

III. **Choice of Law**

A. New York

Although Claimants' position on the choice of state law is unclear, they seem to argue that New York law must be applied. Claimants' Brief at 4, section 3(B). Claimants maintain that under New York law, an employee's agreement to arbitrate his statutory claims is invalid. *Id*. at 5, section 3(C). This is a misreading of the law. It is well settled that "federal statutory claims can be the subject of arbitration, absent a contrary Congressional intent… The burden of showing such legislative intent lies with the party opposing arbitration." *Ciago v. Ameriquest Mortgage Co*., 295 F. Supp. 2d 324, 331 (S.D.N.Y. 2003) *quoting Oldroyd v. Elmira Savings Bank*, 134 F.3d 72, 77 (2d Cir. 1998) (looking to text of statute in question for determination).

Claimants' attempts to distinguish *O'Dean* and *Valdes* are not based on the holdings in these cases. As discussed in the prior section, the District Court in *O'Dean* declined to enforce the arbitration clause with respect to his statutory penalty wage claim based on the specific language of the statute in question, and did **not** hold that all statutory claims were exempt from arbitration. 1999 WL 335381 at *2.

Likewise, the *Valdes* case does not stand for the proposition that, under New York law, a transportation employer cannot enforce an employee's agreement to arbitrate any claims arising under a federal statute. *Valdes v. Swift Transp. Co., Inc*, 292 F. Supp. 2d 524 (S.D.N.Y. 2003). After finding that the employment contract was exempt under the FAA, *Valdes* held that New York courts have repeatedly enforced arbitration agreements to compel arbitration of federal and state statutory claims. *Id*. at 530 (*citing cases*).

> Anticipatory or pre-dispute arbitrate agreements, such as that in this case, have repeatedly been enforced to compel arbitration of employment discrimination claims

> under not just Title VII but also the NYHRL… Moreover, "it is firmly established that the public policy of New York State favors and encourages arbitration and alternative dispute resolutions..."

Id.

Claimants have not, and indeed cannot, meet their burden of showing that New York state law prohibits enforcement of their Jones Act claims. In fact, an arbitration clause in the identical seaman's employment contract was determined to be enforceable under New York law. *See Kozur v. Sea Harvest, supra*. at 6.

B. Massachusetts

Claimants cite absolutely no authority to support their argument that Massachusetts law would invalidate this arbitration agreement, instead falling back on the fallacious argument that statutory claims and their right to a jury trial preclude arbitration. As will be discussed in greater depth later in this brief, it is well settled that Jones Act seamen and other employees can waive their right to a jury trial. *Harrington v. Atlantic Sounding Co, Inc*. 602 F.3d 113, 126 (2d Cir. 2010) *citing* 500 U.S. 20 (1991) *cert. denied* 562 U.S. 1207 (2011). A*llied Home Mortg. Capital Corp. v. Grant*, 2005 WL 3721194 at *5, fn. 5 (Mass. Super. Dec. 6, 2005).

C. New Jersey

Irrespective of the law applied, these claims are governed by *Kozur v. F/V ATLANTIC BOUNTY*, which is directly on point, and addressed an arbitration clause identical to the clause in the instant case. 2020 WL 5627019 (D.N.J. Aug. 18, 2020). After two hearings and several rounds of briefing, Judge Rodriquez found that the arbitration agreement in question was enforceable under state law of both New York or New Jersey. *Id*. at 1. In reaching its decision,

the Court considered and rejected all of the arguments now made by Claimants in this case, including those concerning the Jones Act and the seaman's right to a jury trial. *Id.*

IV. Enforcing the Arbitration Provision Does Not Violate Public Policy

Enforcement of the arbitration provision does not violate public policy, as nothing in the statutory scheme of the Jones Act supports the argument that a seaman cannot waive their right to a jury trial. As Claimants highlight, courts have a long history of enforcing arbitration agreements in contracts. *See Puelo v. Chase Bank US, N.A*. 605 F.3d 172, 178 (3d Cir. 2010).

Claimants cite *U.S. Bulk Carries Inc. v. Arguelles*, 400 U.S. 351 (1971) in support of their argument, however, similar to *O'Dean*, *U.S. Bulk* is misplaced. At issue in *U.S. Bulk* was an unpaid wage claim. There the statutory remedy for unpaid wages specifically stated: "… shall be recoverable as wages in any claim **made before the court**" (emphasis added). *Id.* at 353. While the court found that this right to a "judicial remedy" is not waivable, nothing in the Jones Act suggests the right to a bench or jury trial cannot be waived.

In fact, Claimants Exhibit A suggests the opposite. As noted in the Henderson Article, *supra*, post-injury seamen arbitration agreements are not contrary to public policy. *See also Terrebone v. K-Sea Transp. Corp*., 477 F3d 271, 285 (5th Cir. 2007) (enforcing post-injury seaman's arbitration agreement under the FAA). Further, Claimant has the burden of proving that the statutory scheme of the Jones Act would be violated by enforcing an arbitration agreement, a burden they fail to meet. *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth,* 473 U.S. 614, 627 (1985)("Just as it is the congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some other statute on which the courts

must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable."). If a seaman is free to waive their right to a jury trial post-injury, he or she may also waive their right via an employment contract, which cannot be said to violate public policy.

V. Arbitration Agreement is not rendered unconscionable because of Claimants' seaman' status

Claimants only support for this theory is the historical view of seamen as "particularly vulnerable" or wards of admiralty. This view harkens back to the days when so-called "blue water" seamen spent months or even years living onboard their ships, at the mercy of the vessel's owner, and thus were treated like children who were in no position to protect themselves. *See, generally Vaughan v. Atkinson*, 369 U.S. 527, 531-32 (1962). Today's American seamen are quite different, especially commercial fishermen who are independent contractors who partner with the vessel owner and receive a share of the vessel's catch in compensation. Thus, "the need for judicial intervention to protect seamen has been substantially lessened." *Joyce v. Maersk Line Ltd*., 876 F.3D 502, 509 (3d Cir. 2017) (daily maintenance rate in collective bargaining agreement was enforceable).

In fact, the Supreme Court recently addressed the historical "wards of admiralty" doctrine in a seaman's case:

> … the maritime doctrine that encourages special solicitude for the welfare of seamen … has its roots in the paternalistic approach taken toward mariners by 19th century courts. [*citations omitted*]. The doctrine has never been a commandment that maritime law must favor seamen whenever possible. Indeed, the doctrine's apex coincided with many of the harsh common-law limitations on recovery that were not set aside until the passage of the Jones Act. And, while sailors today face hardships not encountered by those who work on land, neither are they as isolated nor as dependent on the master as their predecessors from the age of sail. **In light of these changes and of the roles now**

> **played by the Judiciary and the political branches in protecting sailors, the special solicitude to sailors has only a small role to play in contemporary maritime law.**

Dutra Group v. Batterton, 139 S. Ct. 2275, 2287 (2019) (*emphasis added*).

VI. Conclusion

For the foregoing reasons, the arbitration clause in these contracts are fully enforceable under state law, and do not contravene federal or state public policy.

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