No. 91-1282

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

CONNECTICUT BANK AND TRUST COMPANY, NATIONAL ASSOCIATION, *et al.*,

Petitioners,

vs.

WILMINGTON TRUST COMPANY,
and
UNITED STATES DISTRICT COURT FOR DISTRICT OF HAWAII, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION BY THE MARITIME LAW ASSOCIATION OF THE UNITED STATES TO FILE *AMICUS CURIAE* BRIEF AND BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

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Applicant, The Maritime Law Association of the United States ("MLA"), moves the Court for permission to file an amicus curiae brief in support of the Petition for a Writ of Certiorari filed by Connecticut Bank and Trust Company, National Association, and Wartsila Marine Industries, Inc. ("Petitioners"). Petitioners have given consent to the MLA to file an amicus brief, but Respondents have refused to consent. Accordingly, leave to file must be sought pursuant to Rule 37.2.

NATURE OF APPLICANT'S INTEREST

I. THE MLA'S INTEREST LIES IN THE UNIFORM AND WORKABLE ADMINISTRATION OF MARITIME LAW.

Applicant has a very strong interest in the disposition of this case, because it threatens to undermine traditions of admiralty practice which have been observed in this country since it was first

settled, and which have been recognized in the Constitution as well as statutes and rules of procedure enacted thereafter.

The MLA is a nationwide bar association founded in 1899, with a membership of about 3600 attorneys, federal judges, law professors and others interested in maritime law. It is affiliated with the American Bar Association and is represented in that Association's House of Delegates. Its attorney members, most of whom are specialists in admiralty law, represent all maritime interests - shipowners, charterers, cargo interests, port authorities, seamen, longshoremen, passengers, underwriters and other maritime claimants and defendants.

The purposes of the MLA, as stated in its Articles of Association, are to:

> . . . advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and interpretation . . . and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

In furtherance of these objectives, the MLA has sponsored a wide range of legislation dealing with maritime matters during its ninety-one years of existence, including the Carriage of Goods by Sea Act[1] and the Federal Arbitration Act[2]. The MLA has also

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[1] 46 U.S.C. §§ 1300-1315.

[2] 9 U.S.C. §§ 1-5.

cooperated with congressional committees in the formulation of other maritime legislation.[3]

The MLA is also participating in several projects of a maritime legal nature undertaken by agencies of the United Nations, including its commissions on trade law ("UNCITRAL") and trade and development ("UNCTAD"). The MLA works closely with the International Maritime Organization ("IMO"). The MLA has also participated actively, as one of some forty-nine national maritime law associations constituting the Comite Maritime International,[4] in the movement to achieve maximum international

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[3]E.g., 1972 Water Pollution Control Act Amendments, 33 U.S.C. §§ 1251-1376; implementation of the 1972 Convention For Preventing Collisions at Sea, 28 U.S.T. 3459, T.I.A.S. 8587, U.N.T.S. 15824, as amended, T.I.A.S. 10672, reprinted in 6 M.M. Cohen, BENEDICT ON ADMIRALTY, Doc. No. 3-4 at 3.35 to 3-78.2 (7th rev'd ed. 1990) (hereinafter "BENEDICT"), see 33 C.F.R. ch. 1, subch. D., Special Note at 160 (1987); United States Inland Navigation Rules, 33 U.S.C. §§ 2001-2073.

[4]These now include the national associations of Argentina, Australia and New Zealand, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Czechoslovakia, Denmark, Egypt, Finland, France, Federal Republic of Germany, German Democratic Republic, Greece, Hong Kong, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Korea, Mexico, Morocco, The Netherlands, Nigeria, Norway, Panama, Peru, Philippines, Poland, Portugal, Senegal, Spain, Sri Lanka, Sweden, Switzerland, Turkey, United Kingdom, United States, Uruguay, Union of Soviet Socialist Republics, Venezuela and Yugoslavia.

uniformity in maritime law through the medium of international conventions.[5]

II. THE MLA PARTICIPATES AS AMICUS CURIAE ONLY WHEN THE OPERATION OF MARITIME LAW, PRACTICE OR TREATIES IS SERIOUSLY THREATENED.

In furtherance of its objectives, the MLA has filed amicus briefs in a number of cases, including briefs accepted by this Court.[6] For example, in Offshore Logistics, Inc. v. Tallentire[7], this Court agreed with the position advocated by the MLA and

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[5]E.g., Assistance and Salvage (1910), 37 Stat. 1658 (1913), reprinted in 6 BENEDICT, Doc. No. 4-1 at 4-2 to 4-10; Ocean Bills of Lading (The Hague Rules) (1924), 120 L.N.T.S. 155, reprinted in 6 BENEDICT, Doc. No. 1-1 at 1-2 to 1-19; Collision (1910), reprinted in 6 BENEDICT, Doc. No. 3-2 at 3-11 to 3-19; Limitation of Liability of Owners of Sea-Going Ships (1957), reprinted in 6 BENEDICT, Doc. No. 5-2 at 5-11 to 5-29; Maritime Liens and Mortgages (1967), reprinted in 6A BENEDICT, Doc. No. 8-3 at 8-25 to 8-32; Civil Liability for Oil Pollution Damages (1969), U.N.T.S. 1409, reprinted in 6 BENEDICT, Doc. No. 6-3 at 6-62.103 to 6-76.3; and Limitation of Liability for Maritime Claims (1976), reprinted in 6 BENEDICT, Doc. No. 5-4 at 5-32.1 to 5-44.3.

[6]Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (1988); Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986); Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978); Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973). For a more comprehensive listing, see MLA Report, MLA Doc. No. 671 at 8862-63 (1987).

[7]Id.

noted the MLA's role in relation to the matters at issue. The Court stated that:[8]

> The Maritime Law Association ("MLA"), an organization of experts in admiralty law and a prime force in the movement for a federal wrongful death remedy, drafted the bill that was enacted as DOHSA (the Death on the High Seas Act). . . . the MLA, an expert body of maritime lawyers, had reason to fear that absent a savings clause [such as Section 7 of DOHSA], specifically recognizing the continued viability of this type of action, state wrongful death remedies on territorial waters might be deemed beyond the competency of state courts.

However, it is the policy of the MLA to participate as amicus curiae only when important issues of maritime law or practice are involved, and only when the impact of the Court's decision may be substantial. The Bylaws of the MLA require that its participation as amicus curiae must be approved by the President, in consultation with the First and Second Vice-Presidents, and then submitted to the Executive Committee. The Bylaws provide that such approval must be given sparingly, and only when one or more of the following criteria are met:[9]

(a) The outcome of the litigation would adversely affect the uniformity of maritime law.

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[8] 477 U.S. at 223-224.

[9] Bylaws of the Maritime Law Association of the United States, Section 500-13.

(b) The outcome of the litigation would adversely affect traditional admiralty practice or procedure.

(c) The outcome of the litigation would adversely affect traditional admiralty jurisdiction.

(d) The outcome of the litigation would affect the meaning of a law or treaty advanced by the Association.

In the present case, the MLA is seeking to intervene because the Ninth Circuit's decision conflicts with the decisions of other circuit courts of appeal and threatens traditional admiralty practice as well as the uniform administration of maritime law.

III. THE NINTH CIRCUIT'S DECISION ADVERSELY AFFECTS TRADITIONAL ADMIRALTY PRACTICE AND THE UNIFORMITY OF MARITIME LAW.

In Merchant's National Bank of Mobile v. The Dredge Gen. G.L. Gillespie,[10] the Fifth Circuit recognized that admiralty is unique. It encompasses concepts and procedures which are separate from the common law. They date back as far as the middle ages and have evolved over the centuries to accommodate the needs of international trade.

Gillespie involved the question of whether the due process requirements of notice and hearing which had evolved in civil garnishment proceedings should apply in the same manner to admiralty actions in rem. The court recognized that:

> The Federal Courts have a great responsibility to speak consistently in maritime controversies because of their

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[10] 663 F.2d 1338, 1346-51 (5th Cir. 1980), cert. denied, 456 U.S. 966 (1982).

> recognized national and international significance. They must take care not to fashion rules and exceptions for a particular circumstance without assessing their impact in other situations. The rules and procedures in the maritime environment must apply equally to gigantic ocean-going oil tankers traveling from the Middle East to Japan and to small inland barges. . . 663 F.2d at 1347.

The federal courts have equal responsibility to speak consistently and uniformly with respect to non-jury trials in admiralty actions. The rules and procedures which they fashion must apply equally to vessels which travel between circuits and vessels which remain within the boundaries of a single circuit. The Ninth Circuit decision has breached the uniformity with which the federal courts have spoken regarding non-jury trials in admiralty actions, creating a conflict among the circuits. The Supreme Court must accept review of the Ninth Circuit's decision in order to remove the conflict.

Moreover, maritime law has been administered for literally hundreds of years according to the premise that actions in admiralty are tried to the court rather than a jury. Although the Saving to Suitors Clause in 28 U.S.C. § 1333 permits admiralty plaintiffs to sue on the law side of the court if the remedy sought is one which the common law is competent to give, the plaintiff has always had the election of bringing his action in admiralty for trial to the court. A great many actions are brought that way, resulting in a substantial savings of time and expense for litigants and courts alike. The Ninth Circuit's decision would erode the practice of non-jury trials in admiralty and the benefits derived therefrom.

Finally, like the court in Gillespie, this Court has often recognized the importance of uniformity in maritime matters.[11] Uniformity will become impossible to maintain if such uniquely maritime matters as ship arrests, salvage, general average, limitation of liability, collision and the carriage of goods become subject to the whim of jurors whose everyday experience provides no framework for dealing with such matters.

In order to preserve the uniform and effective administration of maritime law, this Court must vacate or reverse the decision of the Ninth Circuit.

THE MLA CAN MAKE A UNIQUE CONTRIBUTION ON RELEVANT ISSUES

The MLA's perspective, arising from its interest in the fair and effective administration of maritime law in the United States, is necessarily different from that of the parties to this particular suit, who are most interested in its outcome as it affects their individual positions. The MLA can comment objectively about the need for review by this Court in order to preserve traditional admiralty practice and insure national uniformity on the issues presented. The MLA will concentrate only on the nature of admiralty

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[11] See, for example, Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986); Moragne v. States Marine Lines, 398 U.S. 375 (1970); Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959); Pope & Talbot v. Hawn, 346 U.S. 406 (1953); London Co. v. Industrial Commission, 279 U.S. 109 (1929); Union Fish Co. v. Erickson, 248 U.S. 308 (1919); Chelentis v. Luckenback S.S. Co., Inc., 247 U.S. 372, 382 (1918); Southern Pacific Co. v. Jensen, 244 U.S. 205, 216-17 (1916); and Lord v. Goodall, 102 U.S. 541 (1881).

practice, the manner in which the Ninth Circuit's decision conflicts with decisions by this Court and other circuit courts of appeals, and upon the detriment to admiralty practice which would result if the Ninth Circuit's decision is allowed to stand.

DATED February 20, 1992.

RESPECTFULLY SUBMITTED:

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BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, *AMICUS CURIAE*, IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

The Maritime Law Association of the United States ("MLA") respectfully submits this brief as amicus curiae in support of the Petition for Certiorari by Connecticut Bank and Trust Company, National Association, and Wartsila Marine Industries, Inc. ("Petitioners").

QUESTION OF LAW PRESENTED

Whether a plaintiff's right to a non-jury trial under traditional admiralty practice, as preserved by Rules 9(h) and 38(e) of the Federal Rules of Civil Procedure, can be nullified by a defendant or intervening claimant who joins non-admiralty claims and demands a jury trial of the entire action.

INTEREST OF AMICUS CURIAE

This is stated in the Motion which precedes this brief.

SUMMARY OF REASONS FOR GRANTING THE WRIT

Federal Courts must speak uniformly and consistently in maritime matters, which have national and international significance. The rules and procedures in the maritime environment must apply in the same manner to vessels which operate nationally and internationally as to vessels which operate within the confines of a single circuit. The Ninth Circuit breached that uniformity and created a conflict among the circuits by holding that where a defendant or intervening claimant asserts a claim in an admiralty action which would be triable to a jury if brought separately, and demands a jury trial, the entire action must be tried to the jury despite the plaintiff's election to proceed under Rule 9(h) and have the action tried to the court. The Ninth Circuit's decision is erroneous as a matter of law, having been based upon faulty analysis and misinterpretation of prior decisions by the United States Supreme Court. It violates the time-honored practice of trying admiralty actions to the court rather than the jury, and disregards the mandate of Federal Rules of Civil Procedure 9(h) and 38(e) that

admiralty plaintiffs must be permitted to elect traditional admiralty procedures. If the Ninth Circuit's decision is allowed to stand, it will increase significantly the burden and expense to the parties and the courts of litigating admiralty actions. It will also undermine the uniformity of maritime law by subjecting such traditionally maritime matters as ship arrests, salvage, general average, limitation of liability, collision, and the carriage of goods to the whims of jurors who have no foundation in everyday experience for dealing with such matters. This Court must therefore accept review of the Ninth Circuit's decision in order to remove the conflict among the circuits and preserve the traditional maritime practice of trying admiralty actions to the court.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS.

The Ninth Circuit held that when a defendant or intervening claimant asserts a claim in an admiralty action which would be triable to a jury if brought separately, and demands a jury trial, the entire action must be tried to the jury. None of the other circuit courts of appeals have gone so far. Several of them have held to the contrary.

A. The Fifth Circuit. - The Fifth Circuit Court of Appeals follows a very clear rule that there is no right to a jury trial in an admiralty action. The case most directly on point is Fisher v. Danos, 671 F.2d 904 (5th Cir. 1982), which held that it is reversible error to order a jury trial when the plaintiff has elected

to proceed in admiralty under Rule 9(h). In Fisher, a passenger in a skiff brought an action against the skiff owner and an oil company under Rule 9(h) for injuries received when the skiff struck the oil company's jetty. When the skiff owner was dismissed, leaving complete diversity of citizenship, the trial court granted the oil company's demand for a jury trial. The court of appeals reversed and remanded because the district court had violated the plaintiff's "right to a non-jury trial." 671 F.2d at 906.

Fisher v. Danos followed Harrison v. Flota Mercante Grancolombiana S.A., 577 F.2d 968 (5th Cir. 1978), in which a longshoreman injured by fumes from spilled cargo brought an action against the shipowner under Rule 9(h). The shipowner impleaded the longshoreman's employer, who filed a fourth-party complaint against the shipper of the cargo. The longshoreman amended his complaint to assert a claim against the shipper under Rule 9(h). The trial court entered judgment solely against the shipper, who contended on appeal that because the longshoreman's claims were cognizable in diversity as well as admiralty, the trial court had deprived it of a constitutional right by denying its demand for a jury trial. 577 F.2d at 985. The Fifth Circuit rejected the shipper's contention, holding that "by electing to proceed under 9(h) . . . the plaintiff may preclude the defendant from invoking the right to trial by jury which might otherwise exist." 577 F.2d at 986. See also Romero v. Bethleham Steel Corp., 515 F.2d 1249, 1253 (5th Cir. 1979); Durden v. Exxon Corp., 803 F.2d 845, 848-50 (5th Cir. 1986); and T.N.T. Marine Service, Inc. v. Weaver Shipyards and Drydock, Inc., 702 F.2d 585, 587 (5th Cir. 1983) (per curiam).

In summary, the Fifth Circuit follows a very clear rule that if the plaintiff designates the action as an admiralty action under Rule 9(h), or if the action is one which can only be brought in admiralty, it must be tried to the court. Intervening claims must also be tried to the court unless they are severed and supported by an independent basis for federal jurisdiction. Neither of those conditions have been met in the present case.

B. The Second, Third and Seventh Circuits. - Prior to the 1966 merger of the civil and admiralty rules, the Second, Third, and Seventh Circuit Courts of Appeals had held that a seaman's maintenance and cure claim could not be joined with a Jones Act claim and tried to a jury in an action at law. Instead, the maintenance and cure claim had to be brought in admiralty and tried to the court. Fitzgerald v. United States Lines Co., 306 F.2d 461, 468-474 (2d Cir. 1972); Jordine v. Walling, 185 F.2d 662, 666 n. 4, 671 (3d Cir. 1950); Mullen v. Fitz Simons & Connell Dredge and Dock Co., 191 F.2d 82, 85-86 (7th Cir. 1951). In Fitzgerald v. United States Lines Co., 374 U.S. 16 (1963), the Supreme Court reversed that rule with respect to maintenance and cure claims which are sought to be joined with a Jones Act claim in an action at law. However, the Supreme Court's decision did not disturb the premise underlying the Second, Third and Seventh Circuit decisions that actions in admiralty were tried to the court rather than a jury. The Second Circuit has held on two subsequent occasions that even after the merger, admiralty actions remain distinct from civil actions and are subject to traditional rules of admiralty practice. See Penoro v. Rederi A/B Disa, 376 F.2d 125 (2d Cir. 1967), cert.

denied, 389 U.S. 852 (1968), and Tradax Ltd. v. Holendrecht, 550 F.2d 1337 (2d Cir. 1977), holding that the availability of interlocutory appeal from a stay pending arbitration is governed by the admiralty rule rather than the civil rule when the action is brought in admiralty. Accord, O'Donnell v. Latham, 525 F.2d 650 (5th Cir. 1976); J.M. Huber and Co. v. M/V Plym, 468 F.2d 166 (4th Cir. 1972).

C. The Eighth Circuit. - In Koch Fuels, Inc. v. Cargo of 13000 Barrels of No. 2 Oil, 705 F.2d 1038 (8th Cir. 1983) (rehearings and rehearing en banc denied May 27, 1983), the Eighth Circuit held that when the defendant in an admiralty action demands a jury trial for a counterclaim which would be triable to a jury if brought separately, the plaintiff's right to a non-jury trial should be protected by severing the counterclaim. Koch involved a Kansas shipper which brought an action in rem for possession of oil on a barge operated by a Missouri corporation and asserted an in personam claim against the barge operator under Rule 9(h) for conversion of the cargo. The barge operator asserted a counterclaim in diversity for breach of contract and demanded a jury trial. The shipper's in rem and in personam claims were tried to the court, but the counterclaim was severed for trial to a jury. The court of appeals affirmed on the ground, inter alia, that the trial court had preserved the plaintiff's right to a nonjury trial of its admiralty claim. 702 F.2d at 1042. The Ninth Circuit ruled in the present case that the intervening claims must be tried to a jury even if the plaintiffs are precluded from having their admiralty action

to the court, thereby depriving the plaintiffs of their right to a non-jury trial.

Thus, the Ninth Circuit's decision conflicts with other decisions in the Second, Third, Fifth, Seventh and Eighth Circuit Courts of Appeals.

II. THE NINTH CIRCUIT'S DECISION MISCONSTRUES PRIOR DECISIONS OF THE SUPREME COURT.

The Ninth Circuit based its decision on two lines of authority. The first line of authority consists of Fitzgerald v. United States Lines, supra, which held that when a seaman brings a negligence action at law under the Jones Act, and demands a jury trial, the seaman's maintenance and cure claim arising out of the same facts may be joined and tried to the same jury. The second line of authority consists of Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959), and Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962), which involved the right to jury trial under the Seventh Amendment.

The Ninth Circuit construed Fitzgerald to permit a jury trial in an admiralty action when the action includes a civil claim which would be triable to a jury if brought separately. 934 F.2d at 1030. To be sure, the Fitzgerald opinion contains language which lends support to the Ninth Circuit's construction when taken out of context. The Court states at pp. 20-21 of Fitzgerald that there is no Constitutional or statutory provision which forbids jury trials in "admiralty cases", and when a maintenance and cure "claim" is joined with a Jones Act "claim" for which a jury trial is mandated by statute, then both "claims" must be submitted to the jury when they arise out of the same set of facts. The Ninth Circuit combined

the aforementioned reference to "admiralty cases" with the holdings in Beacon Theatres and Dairy Queen to conclude that permissive joinder of non-maritime claims in an admiralty action necessitates a jury trial of the entire action. The Ninth Circuit's decision is erroneous as a matter of law, because its underlying premises are completely wrong.

A. Fitzgerald Does Not Apply to Admiralty Actions. - Rule 9(h) has superseded the statement in Fitzgerald that nonjury trials are not required by statute in admiralty actions. Moreover, it is necessary to distinguish between admiralty claims and admiralty actions when considering the right of jury trial. An admiralty claim is one which supports admiralty jurisdiction, but may not have to be brought in an admiralty action if other grounds for jurisdiction are available. (Certain admiralty claims, such as claims in rem, can only be brought in admiralty actions.) An admiralty action is one in which admiralty claims, which may or may not be joined with civil claims, are tried on the admiralty side of the court under traditional admiralty procedures as preserved by Rules 9(h) and 38(e).

The Ninth Circuit construed Fitzgerald as holding "that the plaintiff had a right to have all claims tried to a jury on the admiralty side of the court." 934 F.2d at 1030. The Ninth Circuit's reading of Fitzgerald is completely incorrect. Fitzgerald was a pre-merger action on the law side of the court, not on the admiralty side.

Fitzgerald involved a claim under the Jones Act, which gave seamen a cause of action for negligence and permitted the seamen

to bring their negligence claims "at law, with the right of trial by jury." 46 U.S.C. § 688. However, the Jones Act did not give seamen a right of jury trial in an admiralty action. That point was made clear by the decision of the Supreme Court in Panama R.R. Co. v. Johnson, 264 U.S. 375 (1924).

In Panama R.R. Co. v. Johnson, the Jones Act was claimed to be unconstitutional because it withdrew a subject matter, namely seamen's negligence claims, from admiralty jurisdiction as preserved in Article III of the Constitution. Implicit in the constitutional challenge was the notion that seamen's negligence claims were thereafter to be brought exclusively on the law side of the court. The Supreme Court could have resolved the constitutional challenge by simply holding that the action created by the Jones Act, with the right of jury trial, was to be brought in admiralty. However, the rule against jury trials in admiralty forbade such a facile solution. The Court held instead that Jones Act claims could be brought either in admiralty or on the law side of the court and would be tried to a jury only on the law side. The Court stated that:

> [T]he statute leaves the injured seaman free . . . to assert his right of action under [the Jones Act] on the admiralty side of the court. On that side the issue will be tried to the court, but if he sues on the common-law side there will be a right to trial by jury. So construed, the statute does not encroach on the admiralty jurisdiction intended by the Constitution, but permits that jurisdiction to be invoked and exercised as it has been from the beginning. 264 U.S. at 395 (emphasis added).

The Supreme Court repeated in several subsequent decisions that Jones Act claims must be tried to the court when brought in admiralty. See, for example, Panama R.R. v. Vasquez, 271 U.S. 557, 560 (1925), and Pacific Steamship Co. v. Petterson, 278 U.S. 130, 134-35 (1928).

Panama R.R. Co. v. Johnson was followed by Romero v. Int'l Terminal Op. Co., 358 U.S. 354 (1959), in which a seaman brought an action against his employer under the Jones Act and joined general maritime claims against other defendants. The seaman elected to proceed at law rather than in admiralty, and demanded a jury trial. Jurisdiction was invoked under the Jones Act and 28 U.S.C. § 1331, which creates subject matter jurisdiction for cases "arising under the. . . laws . . . of the United States." The Supreme Court held that since the claim against the employer was pled properly under the Jones Act, it supported "arising under" jurisdiction under 28 U.S.C. § 1331. The Court then held that the general maritime claims against the other defendants were not actions at law within the meaning of 28 U.S.C. § 1331. Since the seaman had refrained from pleading admiralty jurisdiction, and the maritime claims were not actions at law, the Court was required to consider whether there was some other basis for jurisdiction over those claims. The Court held that the district court could entertain the maritime claims pendent to its "arising under" jurisdiction over the Jones Act claim. The Court also held that since the Jones Act claim was supported by 28 U.S.C. § 1331, the citizenship of the employer did not have to be considered for purposes of diversity jurisdiction with respect to the maritime claims. Since diversity was

complete between the seaman and the maritime defendants, the maritime claims were also supported by 28 U.S.C. § 1332.

Thus, Romero held that when a seaman brings an action "at law" under the Jones Act and demands a jury trial, he is not proceeding in admiralty. Panama R.R. Co. v. Johnson and Romero were followed by McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958), which held that the seaman's claims for unseaworthiness and negligence must be brought in the same proceeding.

The Fitzgerald Court was therefore confronted with a situation in which the seaman had exercised his statutory right to bring his Jones Act claim at law before a jury. The seaman was required under McAllister to join the maritime claim of unseaworthiness. The seaman also joined the maritime claim for maintenance and cure. The Supreme Court held in those limited circumstances that:

> [S]ince Congress in the Jones Act has declared that the negligence part of the claim shall be tried to a jury, we would not be free, even if we wished, to require submission of all the claims to the judge alone. . . . Accordingly, we hold that a maintenance and cure claim joined with the Jones Act claim must be submitted to the jury when both arise out of one set of facts. 374 U.S. at 21 (emphasis added).

It is clear from the foregoing that Fitzgerald does not apply to admiralty actions. It was a pre-merger action on the law side of the court. The Supreme Court had already established in Panama R.R. Co. v. Johnson, Panama R.R. Co. v. Vasquez, Pacific Steamship Co. v. Petterson, and Romero, supra, that admiralty actions are distinct from actions at law and must be tried to the

court even when they involve Jones Act claims. Moreover, it has been commonplace since the enactment of the Jones Act for negligence, unseaworthiness, and maintenance and cure claims to be brought in admiralty and tried to the court. When the Supreme Court stated in Fitzgerald that the Jones Act and maintenance and cure claims were required to be submitted to a jury, it was necessarily talking about actions at law rather than admiralty actions. This Court has never held that admiralty actions, as distinguished from admiralty claims in civil actions, can be tried to a jury. Since the present case involves an admiralty action, and not merely an admiralty claim, the holding in Fitzgerald is irrelevant.

B. The Intervening Claimants Are Not Entitled to a Jury Trial as a Matter of Right. - The Ninth Circuit assumed in the present case that the intervening claimants have a right to a jury trial under the Seventh Amendment. That assumption was based upon Beacon Theatres, Inc. v. Westover, supra, and Dairy Queen, Inc. v. Wood, supra, which held that when claims at law are joined with claims in equity in an action at law, the issues determinative of the claims at law must be tried to a jury. The Ninth Circuit's reliance on Beacon Theatres and Dairy Queen is misplaced. Those decisions were based upon the fact that the Seventh Amendment guarantees a jury trial in common law actions. Beacon Theatres, supra, 359 U.S. at 509-510. However, admiralty actions have never been recognized as common law actions. They have a completely separate history and jurisdictional basis under Article III, Section 2 of the Constitution and Title 28 of the United States Code.

Romero, supra. The Supreme Court held in Waring v. Clarke, 46 U.S. 441 (1847) that the Seventh Amendment does not apply to admiralty actions.

Waring v. Clarke involved a suit between the owners of vessels which collided in the Mississippi River upriver from New Orleans. The defendant challenged admiralty jurisdiction on the ground, inter alia, that it could not be exercised with respect to actions triable to a jury. The defendant contended that since the common law courts would have exercised jurisdiction over a tort on inland waters, and the Seventh Amendment guaranteed the right of jury trial in "suits at common law," the district court could not exercise admiralty jurisdiction. The Supreme Court could have sustained admiralty jurisdiction on the ground adopted by the Ninth Circuit in the present case, that claims triable to a jury at common law remain triable to a jury when brought in admiralty. However, as in Panama R.R. Co. v. Johnson, supra, the principle of trying admiralty cases to the court was too strong for such a facile solution, particularly since the drafters of the Seventh Amendment were well aware of that principle. The Supreme Court therefore held that the Seventh Amendment does not apply to actions in admiralty, even when they include claims within the concurrent jurisdiction of the common law. The Court stated that:

> There is no provision . . . from which it can be inferred that civil causes in admiralty were to be tried by a jury, contrary to what the framers of the Constitution knew was the mode of trial of issue of fact in admiralty. We confess, then, we cannot see how they are to be embraced in the Seventh Amendment of the Constitution, providing that in

> suits at common law the trial by jury should be preserved.
> . . .
> Suits at common law are a distinct class, so recognized in the Constitution. . . cases in admiralty another class distinguishable. . . as well as to the system of laws determining them as the manner of trial. . . . 46 U.S. at 460.

See also The Sarah, 21 U.S. 391, 394 (1823), in which Chief Justice Marshall stated for the Court that "Although [common law and admiralty jurisdiction] are vested in the same tribunal, they are as distinct from each other as if they were vested in different tribunals." The Court stated further in Waring v. Clarke that:

> [T]he ninth section of the Judiciary Act countenances all the conclusions which have been announced in this opinion. . . It declares that issues of fact in civil causes of admiralty and maritime jurisdiction shall not be tried by a jury, and makes so clear an assignment to the courts of jurisdiction in criminal, admiralty, and common law suits that the two last cannot be so confounded as to place both of them under the Seventh Amendment of the Constitution. . . . (emphasis added) 46 U.S. at 464.

The Supreme Court has held in other cases as well that the Seventh Amendment does not apply to admiralty actions. In Crowell v. Benson, 285 U.S. 22, 45 (1932), the Supreme Court held that a jury trial was not required when the district court conducted a de novo review of a compensation award under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901-950, because the action was in admiralty and the Seventh Amendment was therefore inapplicable. See also Parsons v. Bedford, 28 U.S. 433, 446-47 (1830).

When the Court decided Fitzgerald in 1963, it considered the question of jury trials not because of any requirement regarding jury trials in admiralty actions, but rather because the Jones Act had created an action outside of admiralty jurisdiction to which certain maritime claims had to be joined. The Court reiterated in Fitzgerald that:

> [T]he Seventh Amendment does not require jury trials in admiralty cases. . . . 374 U.S. at 20.

Thus, it has been understood since the framing of the Seventh Amendment and the Judiciary Act of 1789 that jury trials are not required in admiralty actions, regardless of whether they include claims within the concurrent jurisdiction of the common law.

III. ADMIRALTY ACTIONS HAVE TRADITIONALLY BEEN TRIED TO THE COURT WITHOUT A JURY.

The practice of non-jury trials is one of the most fundamental aspects of traditional admiralty practice. It is based upon the historical realization that judges, rather than juries, are best suited to decide such uniquely maritime matters as salvage, limitation of liability, collision, maritime liens and general average cases, which lay far outside the domain of the average juror. See, e.g., McCann v. Falgout Boat Co., 44 F.R.D. 34, 43 (S.D. Tex. 1968) (citing 2 Benedict, Admiralty, Section 224 (1940)).

When the Constitution was adopted, it preserved the historical separation between admiralty and the common law by creating a separate jurisdictional grant for admiralty actions. U.S. Const., Art. III, Sec. 2. As indicated in Waring v. Clarke, supra, the Judiciary Act of 1789, 1 Stat. 73, 77, preserved traditional admiralty practice by specifically excepting cases brought in

admiralty from the practice of jury trials. The practice of trying admiralty actions to the court has been observed from that time onward. See, generally, The Sarah, 21 U.S. 391, 394 (1823), in which Chief Justice Marshall wrote that "[i]n cases of admiralty and maritime jurisdiction, it has been settled that trial is to be by the Court (citing cases)." See also 9 Wright & Miller, Federal Practice and Procedure § 2315, at 76 (1971) ("If the plaintiff chooses to identify its claim as an admiralty claim under Rule 9(h) there will ordinarily be no jury trial."); 2 Moore's Federal Practice, Vol. 2A, ¶ 9.09 at 9-98 (1991) ("A defendant in a case brought within admiralty jurisdiction loses the right he would have had in an ordinary civil action at 'law' to demand a jury trial. . . .").

Congress has the power to make jury trials available in admiralty. However, the only time Congress has done so is when it passed the Great Lakes Act of 1845, Ch. 20, 5 Stat. 726. The Great Lakes Act was intended to extend admiralty jurisdiction to the Great Lakes and their connecting navigable waters. A principal objection to the Act was the absence of jury trials in admiralty actions. Congress met that objection by providing a right of jury trial in actions arising on the Great Lakes. 28 U.S.C. § 1873. In The Genesee Chief, 53 U.S. 443 (1851), the Supreme Court held that the purported extension of admiralty jurisdiction to the Great Lakes was a nullity, because such jurisdiction already existed under Article III of the Constitution and could not be altered by Congress. However, the provision for jury trial of actions arising on the Great Lakes has never been stricken from the U.S. Code. Texas Menhaden Co. v. Palermo, 329 F.2d 579, 580 (5th Cir. 1964).

That anomalous provision has been called a "discriminatory and illogical excrescence upon admiralty law." 50 Harv. L. Rev. 350.

There have been only two subsequent occasions on which Congress has considered permitting a jury trial in admiralty. In 1939 a bill was introduced to accomplish this, but the bill died in committee. House Committee on the Judiciary, H.R. 2723, 76th Cong., 1st Sess. See MLA Doc. 248 at 2601. In 1954, the Senate Committee on the Judiciary introduced a bill to expand the right of jury trial to all admiralty cases. The Department of Justice opposed the bill, and it was not enacted. S. Rep. 2351, 83rd Cong., 2d Sess. (1954).

When the Civil and Admiralty Rules were merged in 1966, the non-jury aspect of admiralty procedure was expressly preserved by means of Rules 9(h) and 38(e) of the Federal Rules of Civil Procedure. Rule 9(h) provides that when a plaintiff brings an action which has some basis for subject matter jurisdiction in addition to admiralty, the plaintiff can designate the action as an admiralty action. Rule 38(e) provides that the Rules shall not be construed to require jury trials in actions so designated. The purpose of those rules was explained as follows by the United States Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure:

> Certain distinctive features of the admiralty practice must be preserved. . . . One of the important procedural consequences is that. . . in the suit in admiralty there is no right to jury trial except as provided by statute (emphasis added).
>
> It is no part of the purpose of unification to inject a right to jury trial into those admiralty cases in which that right

> is not provided by statute.... The unified rules must therefore provide some device for preserving the present power of the pleader to determine whether these historically maritime procedures shall be applicable to his claim or not. Notes of Advisory Committee on Rules, 1966 Amendment, Federal Civil Judicial Procedure and Rules (West 1991 Rev. Ed., p. 34).

The Ninth Circuit's decision emasculates Rules 9(h) and 38(e), in derogation of the clear intention of the Advisory Committee, by taking away the right of the admiralty plaintiff to elect traditional admiralty procedures, including trial to the court.

IV. THE NINTH CIRCUIT'S DECISION WILL ERODE TRADITIONAL ADMIRALTY PRACTICE AND THE UNIFORM ADMINISTRATION OF MARITIME LAW.

The consequences of the Ninth Circuit's decision will be extremely detrimental for admiralty litigants and courts alike. If the plaintiff's Rule 9(h) election is rendered inoperative to preclude a jury trial, a great many admiralty cases now tried to the court will have to be tried to a jury. As a result, district courts, practitioners and parties will be confronted with many more costly and time-consuming trials.

For example, the maritime supplier's lien arose for the specific purpose of enabling the ship to function as a "floating credit card," so that necessary supplies can be obtained in locations where the shipowner has no presence. As a result, there are many lien foreclosures which meet the requirements of diversity jurisdiction. The Panel's decision would require such cases to be tried to a jury upon the demand of the defendant whenever an in rem claim is joined with an in personam claim arising out of the supply contract,

or whenever the defendant asserts a counterclaim which would be triable to a jury if brought separately.

Similarly, the very nature of maritime commerce necessitates that collision, salvage and general average cases are likely to involve diverse parties and counterclaims or intervening claims which would be cognizable at common law. Such claims are the very types of claims which for centuries have been regarded as more suitable for trial to the court than to a jury. Yet the Ninth Circuit's decision would require all such cases to be tried to a jury on the demand of a counterclaimant, cross-claimant or claimant in intervention. The consequences would be similar in actions such as mortgage foreclosures, which typically involve numerous intervening claimants. The Ninth Circuit's decision would require a jury trial upon the demand of any claimant who asserts a claim which would be triable to a jury if brought in a separate action.

The ultimate result of the Ninth Circuit's decision will be to erode the practice of non-jury trials in admiralty, against the best interests of the maritime industry and the courts, and contrary to the will of Congress and the Advisory Committee as expressed in the Judiciary Act of 1789 and Rules 9(h) and 38(e) of the Federal Rules of Civil Procedure.

CONCLUSION

The Panel's decision is contrary to traditional admiralty practice as preserved in the Judiciary Act of 1789 as well as Rules 9(h) and 38(e) of the current Rules of Civil Procedure. It is also inconsistent with a substantial line of decisions by the United States Supreme Court and various circuit courts of appeal. In order to eliminate

a conflict among the circuits, preserve the traditional admiralty practice of non-jury trials, and protect uniformity in the administration of maritime law, this Court must vacate or reverse the Ninth Circuit's decision and rule that petitioners' admiralty action must be tried to the court. Respondents' intervening claims cannot be tried to a jury unless they are tried separately from petitioners' admiralty action.

DATED: February 28, 1992.

RESPECTFULLY SUBMITTED:

/s/ JEROME C. SCOWCROFT

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CERTIFICATE OF SERVICE

Pursuant to Rule 29 of the Rules of this Court, I hereby certify that three copies of the Motion by the Maritime Law Association of the United States to File Amicus Curiae Brief, and Brief in Support of a Petition for a Writ of Certiorari, were mailed by first-class mail, postage prepaid, this 4th day of March, 1992, to the following parties and counsel:

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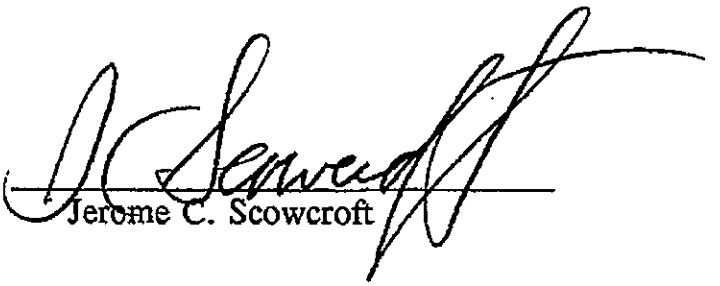

Jerome C. Scowcroft

APPENDIX

PETITIONER'S CONSENT TO PARTICIPATION OF MARITIME LAW ASSOCIATION AS AMICUS CURIAE

Arent Fox Kintner Plotkin & Kahn

Michael Evan Jaffe
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February 28, 1992

VIA FASCIMILE

Jerome C. Scowcroft, Esquire
SCHABE, WILLIAMSON AND WYATT
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Re: In the Supreme Court of the United States
October Term, 1991,
Connecticut Bank and Trust Company, National Association, et al., Petitioners, v. Wilmington Trust Company, and United States District Court for the District of Hawaii, et al., Respondents,
Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit,
Docket No. 91-1282

Dear Mr. Scowcroft:

As counsel for Petitioners in connection with the above-referenced Petition for Writ of Certiorari, we hereby consent to the filing of an amicus curiae brief in support of the Petition by the Maritime Law Association pursuant to Supreme Court Rule 37.2.

Very truly yours,

Michael Evan Jaffe
Counsel of Record

MEJ:bah

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