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IN THE SUPREME COURT OF
THE REPUBLIC OF THE MARSHALL ISLANDS

SUPREME COURT NUMBER

VIRGILIO T. DIERON, JR. (APPELLANT)

VERSUS

STAR TRIDENT XII, LLC and

STAR BULK SHIPMANAGEMENT COMPANY (CYPRUS) LIMITED (APPELLEES)

APPEALED FROM THE

HIGH COURT OF THE
REPUBLIC OF THE MARSHALL ISLANDS

CIVIL ACTION NUMBER 2017-245

CHIEF JUSTICE CARL B. INGRAM

THIS CASE IS BEFORE THE COURT ON APPEAL

APPELLANT VIRGILIO T. DIERON, JR.'S ORIGINAL BRIEF

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JURISDICTIONAL STATEMENT

The Supreme Court has jurisdiction over this Appeal by virtue of Article VI, Section 2(2)(a) of the Constitution of the Republic of the Marshall Islands and Section 207(a) of the Judiciary Act 27 MIRC Ch.2. The Judgment of the High Court was filed on November 23, 2018. Appellant timely filed the Notice of Appeal on December 21, 2018, and by Order of the Supreme Court of August 29, 2019, Appellant files this Opening Brief.

STATEMENT OF POINTS

I. The High Court erred in allowing SBSC to intervene and interpose the POEA Contract into the litigation. SBSC and Trident are separate legal entities and SBSC has no significantly protectable interest of its own that supports intervention. The sole purpose of SBSC's intervention was to insert the terms of its POEA Contract with Dieron into the litigation to shield Trident from liability, which is not a significantly protectable interest that supports intervention. The High Court erred by permitting SBSC to intervene.

II. The High Court's order compelling arbitration of Appellant's claims against SBSC was erroneous, as Appellant Dieron has no claims against SBSC.

III. The High Court's order compelling Appellant Dieron to arbitrate his claims against Trident was in error. The doctrine of equitable estoppel, properly applied, does not support the High Court's order. The test for equitable estoppel enunciated in *Mongaya,* attributable to *DuPont,* has been repudiated by its issuing court. No U.S. court has ever applied *DuPont* to seafarer litigation and "defensive" equitable estoppel, and the RMI stands alone. *MS Dealer* is the test used by U.S. Courts in defensive equitable estoppel, when a non-signatory defendant seeks to compel a signatory plaintiff to arbitration, and is the test used in seafarer arbitration cases in U.S. federal courts, not *DuPont.* Under either test, the requirements for equitable estoppel were not met and the High Court was in error.

IV. The High Court erred when it applied the Philippine's contracted compensation scheme instead of the RMI general maritime law to a vessel owner in violation of U.S. Supreme Court precedent, which prohibits the contractual derogation of a vessel owner's obligations to provide a seaworthy vessel under the general maritime law.

V. Appellant Dieron respectfully requests this Honorable Court revisit its ruling in *Mongaya* by recognizing the public policies of the RMI, as expressed through its statutory law, are not absurd and require the application of RMI law to seafarers on its flagged vessels when sought by those seafarers.

STATEMENT OF THE CASE

Appellant Virgilio T. Dieron, Jr., a citizen of the Philippines, sued Star Trident XII, LLC ("Trident") for damages due to severe personal injuries, including multiple amputations, loss of vision, and brain injury he suffered while a seafarer aboard Trident's vessel, the M/V STAR MARKELLA. Dieron was injured when a mooring windlass broke from the deck of the vessel. The M/V STAR MARKELLA is registered under the laws of the Republic of the Marshall Islands ("RMI"). Dieron brought suit against Trident in the High Court of the RMI, alleging Trident was liable under the general maritime law for negligence and for breach of its obligation to provide a seaworthy vessel. Dieron did not file any claims against his employer, Star Bulk Shipmanagement Company (Cyprus) Limited ("SBSC").

SBSC was Dieron's employer pursuant to a standard Philippine Overseas Employment Administration Contract of Employment ("POEA Contract") executed by Dieron and SBSC. Trident did not sign and was not named as a party in any capacity in the POEA Contract.

SBSC filed a *Motion for Leave to Intervene and to Compel Arbitration* on December 6, 2017 which was opposed by Dieron. Trident filed motions to compel arbitration, including an *Amended Motion to Compel Arbitration filed October 29, 2018,* based on the terms of the POEA Contract between SBSC and Dieron, which was opposed. On November 15, 2018, the High Court issued an *Order Granting SBSC's Motion to Intervene*[1] and on November 23, 2018, the High Court issued an *Order Granting Motions to Compel Arbitration.*[2] Dieron respectfully appeals these *Orders.*

I. Permitting intervention by SBSC and imposition of its POEA Contract into the litigation was erroneous.

Dieron submits the High Court erred in allowing SBSC to intervene, as SBSC did not meet its burden of proof that it had a "significant protectable interest" in the litigation as required by Rule 24. SBSC's only interest in the litigation was to limit the liability of Trident by inserting the terms of its POEA Contract with Dieron into the litigation. SBSC and Trident are affiliates, and SBSC's "significant protectable interest" is Trident's interest in minimizing its exposure to damages.

Plaintiff submits the High Court's ruling permitting intervention by SBSC is unprecedented and overly expansive, one which allows POEA Contract signatories to insert themselves and their POEA Contracts into Filipino seafarer's litigation in complete disregard of corporate boundaries.

[1] See Attachment 1.
[2] See Attachment 2.

Appellant is not aware of any other court that has allowed a POEA Contract signatory, like SBSC, to intervene in litigation by a seafarer against a vessel owner in order to interpose the terms of the POEA for use as a defense by the nonsignatory. If this is permitted, no Filipino seaman, who must sign a POEA Contract to work, can ever sue a vessel owner for injuries caused by an unseaworthy vessel under the general maritime law. Instead, by insertion of his POEA Contract with a non-party, he is limited to the terms of his POEA Contract – arbitration, Philippine law, and its compensation scheme. SBSC should not have been allowed to intervene and the High Court erred.

II. The High Court erred when it ordered Dieron to arbitrate his claims against SBSC.

The High Court ordered Dieron to arbitrate his claims against SBSC. SBSC interjected itself into the litigation. There are no claims against SBSC to arbitrate. Dieron made no claims against SBSC and this High Court erred.

III. The High Court erred when it ordered Dieron to arbitrate his claims against Trident.

Trident is not a party to the POEA Contract between SBSC and Dieron. However, the High Court ordered Dieron to arbitrate his claims against Trident by application of the doctrine of equitable estoppel. The High Court's application of the test for equitable estoppel very recently recognized by this Honorable Court in *Mongaya*[3] was improperly applied. The test in *Mongaya* is attributable to *DuPont.*[4] The Third Circuit, who issued the *DuPont* opinion, has recently held[5] that the factors of *DuPont* are **not** a test or standard to be used for equitable estoppel.

DuPont considered a line of cases involving **parent and subsidiary relationships**, which is not the corporate relationship between SBSC and Trident, who are simply affiliates. Moreover, as expressly declared by the Ninth Circuit in *Mundi,*[6] *DuPont* is only relevant when equitable estoppel is used offensively – that is, when a nonsignatory plaintiff seeks to compel a signatory defendant to arbitration – the inverse of the case at bar, where a nonsignatory defendant, Trident, seeks to compel a signatory plaintiff, Dieron, to arbitration.

The correct test for use in defensive arbitration, which is the situation at bar, is the test used by federal and state courts in the U.S. based on *MS Dealer.*[7] *MS Dealer,* not *DuPont,* was used as the test for equitable estoppel in **every single case** where nonsignatory defendants sought to compel

[3] *Mongaya v. AET MCV BETA LLC et al.,* S.Ct. No. 2017-003 (Aug. 10, 2018), rec. den. (Sep. 5, 2018)("*Mongaya*").
[4] *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.,* 269 F.3d 187, 201–02 (3rd Cir. 2001)("*DuPont*").
[5] *White v. Sunoco, Inc.*, 870 F.3d 257, 263 (3rd Cir. 2017)(*"White"*).
[6] *Mundi v. Union Sec. Life Ins. Co.,* 555 F.3d 1042, 1045–46 (9th Cir. 2009)("*Mundi*").
[7] *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir.1999)("*MS Dealer*").

a POEA Contract signatory to arbitration – *DuPont* has **never** been used by any court in the U.S. in this situation, and the RMI stands completely alone in its application of *DuPont.* To the extent *DuPont* even remains a viable test, Dieron submits the High Court's application to the case at bar, where Trident asserts defensive equitable estoppel, was erroneous.

Under the correct test of *MS Dealer,* used by all U.S. courts in like cases, Trident may not compel Dieron to arbitrate his claims against it. Dieron's claims against Trident do not rely on the terms of the POEA Contract but arise instead from the obligations imposed on vessel owners by the general maritime law. Nor has Dieron alleged any concerted misconduct between SBSC and Trident, as Dieron has made no claims against SBSC at all.

The High Court's finding that Dieron must arbitrate his claims against Trident based on the doctrine of equitable estoppel was in error.

IV. The High Court's application of the choice of law clause and compensation scheme of the POEA Contract is violative of general maritime law and U.S. Supreme Court precedent.

The POEA Contract between Dieron and SBSC contains multiple provisions and "includes an arbitration clause, a choice of law clause, and an elaborate scheme of compensation for personal injuries and illness," as properly noted by the High Court.[8] However, the High Court improperly conflated its analysis of Dieron's objections to application of the choice of law and compensation scheme of the POEA Contract[9] with public policy objections to the arbitration clause.[10]

Dieron's objections to the choice of law clause and the compensation scheme are not public policy objections to arbitration. Instead, Dieron's objection is that these provisions of the POEA Contract, as applied in this particular litigation against a vessel owner for an unseaworthy vessel, violate RMI and U.S. general maritime law. U.S. Supreme Court precedent prohibits contractual limitation of a vessel owner's obligations under general maritime law to provide a seaworthy vessel. See *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 94–95, 66 S.Ct. 872, 90 L.Ed. 1099 (1946), *Reed v. S.S. Yaka,* 373 U.S. 410, 414–15, 83 S.Ct. 1349, 10 L.Ed.2d 448 (1963). The POEA Contract's compensation clause, applied to Trident, limits Trident's obligations to provide a seaworthy vessel. A lower remedy is a lesser obligation. See *Brown v. State,* 816 P.2d 1368, 1374–75 (Alaska 1991)(citing U.S. Supreme Court cases).

[8] *Order Granting Motions to Compel Arbitration,* p. 2.
[9] Sections 31 and 32 of the POEA Contract. See *Order Granting Motions to Compel Arbitration,* p. 5.
[10] Section 29 of the POEA Contract. *Id.*

U.S. Supreme Court precedent holds that forum selection clauses should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought. *M/S Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 15, 92 S. Ct. 1907, 1916, 32 L. Ed. 2d 513 (1972). The RMI in its Merchant Seafarers Act has declared the RMI's strong public policy against the application of choice of law clauses to seafarers on RMI flagged vessels, especially when application of those provisions results in lesser remedies. The choice of law and compensation scheme in the POEA Contract (Sections 31 and 32) which provide for the application of Philippine law and compensation scheme are, as applied in this case, unenforceable under U.S. Supreme Court precedent of *M/S Bremen,* as well as *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 94–95, 66 S.Ct. 872, 90 L.Ed. 1099 (1946), and *Reed v. S.S. Yaka,* 373 U.S. 410, 414–15, 83 S.Ct. 1349, 10 L.Ed.2d 448 (1963).

Another seminal U.S. Supreme Court precedent, *Lauritzen v. Larsen*, 345 U.S. 571, 588–89, 73 S. Ct. 921, 931–32, 97 L. Ed. 1254 (1953), explicitly warned against application of choice of law clauses in seaman's employment contracts that avoided the law of the ship's flag:

> The practical effect of making the lex loci contractus govern all tort claims during the service would be to subject a ship to a multitude of systems of law, to put some of the crew in a more advantageous position than others, and not unlikely in the long run to diminish hirings in ports of countries that take best care of their seamen.
>
> * * *
>
> We think a quite different result would follow [the choice of law clause would not be upheld] if the contract attempted to avoid applicable law, for example, so as to apply foreign law to an American ship.
>
> *Lauritzen v. Larsen*, 345 U.S. 571, 588–89, 73 S. Ct. 921, 931–32, 97 L. Ed. 1254 (1953).

The Philippine choice of law clause in the POEA Contract is a blatant attempt to avoid RMI and U.S. general maritime law by applying Philippine law and the POEA Contract's compensation scheme to seafarers on an RMI flagged ship.

The High Court's application of the POEA Contract's choice of law and compensation scheme to Trident's RMI flagged vessel runs contrary to U.S. Supreme Court precedent *M/S Bremen, Sieracki, Reed,* and *Lauritzen* and should be reversed.

Dieron notes lower U.S. federal courts have frequently conflated arguments made against application of the Philippine choice of law and compensation scheme of the POEA Contract with

"public policy" arguments against arbitration.[11] Dieron respectfully submits the intersection of the terms of the POEA Contract with arbitration and general maritime law is a developing area of law and in none of the frequently cited federal court cases in the U.S. were the vessels flagged in the U.S.; i.e., the forum court had no interest in applying its owns laws to its own vessel. In the case at bar, the forum court, the RMI, is being asked to forfeit application of its own laws and instead apply, through the terms of the POEA Contract, Philippine law to an RMI flagged vessel.

V. The RMI has a strong public policy against application of choice of law and forum clauses to seafarers on RMI vessels that replace and are less favorable that RMI law.

The High Court determined *Mongaya* barred Dieron's argument that the RMI Merchant Seafarer's Act, 47 MIRC Ch. 8, required application of RMI law to seafarers on RMI flagged vessels. Dieron respectfully requests this Honorable Court reconsider the effect of the Merchant Seafarer's Act on the choice of law available to seafarer's who are injured on RMI flagged vessels. The RMI, as the flag state, has ultimate responsibility for the seaworthiness of its vessels and the well-being of seafarers, of all nationalities, on those vessels. This flag state duty is recognized by the RMI Merchant Seafarer's Act. Dieron respectfully asks this Honorable Court to reconsider whether it is indeed "absurd" for an RMI court to apply RMI law to an RMI flagged vessel, when requested by a seafarer catastrophically injured on that vessel.

Dieron submits the High Court erred in allowing the application of the POEA Contract's choice of law and compensation scheme to Dieron's claims against Trident as the owner of an unseaworthy vessel flagged in the RMI. Instead, arbitration or no, RMI law should have been applied to Trident instead.

STANDARD OF REVIEW

Plaintiff suggests the errors of the High Court involve primarily interpretation of legal issues, and purely or predominately legal issues are reviewed de novo. *Dribo v. Bondrik, et al*., 3 MILR 127, 135 (2010).

LIST OF QUESTIONS PRESENTED

[11] While lower U.S. courts have frequently conflated the choice of law clause into the arbitration clause, arbitration clauses are severable from choice of law clauses. See *Alcalde v. Carnival Cruise Lines*, 798 F. Supp. 2d 1314, 1321 (S.D. Fla. 2011)("By merely striking the stand-alone choice-of-law paragraph and agreeing to U.S. law, Carnival cures the deficiency in the original Agreement."); *Krstic v. Princess Cruise Lines*, 706 F.Supp.2d 1271, 1280–81 (S.D.Fla.2010) (severing choice-of-law clause yet compelling arbitration of all claims).

I. Did the High Court properly allow SBSC to intervene and interpose the terms of its POEA Contract into this litigation?

II. Did the High Court properly compel Dieron to arbitrate his non-existent claims against SBSC?

III. Did the High Court properly compel Dieron to arbitrate his claims against Trident?

IV. Did the High Court properly apply the POEA Contract's choice of law and compensation scheme to Dieron's claims against Trident?

V. Is the application of RMI law under the provisions of the RMI Merchant Seafarers Act to RMI flagged vessels by RMI courts proper?

APPLICABLE LAW AND ARGUMENT

I. The High Court erred in allowing SBSC to intervene and interpose the terms of its POEA Contract with Dieron.

Both SBSC and Trident are wholly owned (directly or indirectly) subsidiaries of Star Bulk Carriers Corp.[12] However, SBSC and Trident are separate legal entities. SBSC and Dieron were parties to the POEA Contract – Trident was not.

SBSC sought to intervene pursuant to MIRCP Rule 24(a)(2), citing authority interpreting Fed. Rule Civ. P. Rule 24(a)(2).[13] MIRCP Rule 24(a)(2) provides in relevant part as follows:

> Intervention of Right. On timely motion, the court must permit anyone to intervene who: … (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the moving party's ability to protect its interest, unless existing parties adequately represent that interest.

To intervene as a matter of right under Rule 24(a), SBSC must have established the following:

> (1) the application for intervention must be timely; (2) the applicant must have a "significantly protectable" interest relating to the property or transaction that is the subject of the action; (3) the applicant must be so situated that the disposition

[12] *Order Granting Motions to Compel Arbitration,* p. 2, referencing Declaration of Georgia Mastagaki.

[13] Likewise, Fed. Rule Civ. P. Rule 24(a)(2) provides for intervention as of right, as follows:
Upon timely application anyone shall be permitted to intervene in an action: ... (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

> of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest; and (4) the applicant's interest must not be adequately represented by the existing parties in the lawsuit.
>
> *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 817 (9th Cir. 2001), citing *Northwest Forest Resource Council* ("*NFRC*") *v. Glickman,* 82 F.3d 825, 836 (9th Cir.1996).

A. The High Court erred in finding SBSC had a significantly protectable interest in the litigation.

To demonstrate a "significantly protectable" interest, "an applicant must establish that the interest is protectable under some law and that there is a relationship between the legally protected interest and the claims at issue." *Citizens for Balanced Use v. Mont. Wilderness Ass'n,* 647 F.3d 893, 897 (9th Cir. 2011). SBSC's interest in the litigation is simply to reduce Trident's financial exposure. The High Court's ruling permits separate corporate entities, who may share financial interests, to run to each other's aid and to intervene in litigation to insert favorable contractual provisions – this is not a legally protected interest that supports intervention under Rule 24.

Appellant Dieron has found not **a single case** where a signatory to a POEA Contract was allowed to intervene in an action to insert the terms of its POEA Contract with a Plaintiff seafarer to be used as a defense by a non-signatory, such as Trident. In *Insperity,*[14] cited by the High Court, the signatory intervenor was not simply an affiliate, but a subsidiary of the parent corporation defendant. Moreover, the plaintiff's claims in *Insperity* were based solely on and relied on the terms of the contract between the plaintiff and the subsidiary intervenor. SBSC is not a subsidiary of Trident – they are simply affiliates. Likewise, Dieron's claims against Trident are not based on and do not rely on the terms of the POEA Contract, but instead arise solely from the general maritime law.

The High Court's reasoned SBSC had a significant protectable interest in the litigation, as follows:

> [U]nder Section 20.J of the POEA Contract, SBSC's liability covers not just **claims** arising under the contract, but "all **claims** in relation with or in the course of the seafarer's employment, including but not limited to damages arising from the contract, tort, fault or negligence under the laws of the Philippines or any other country." Under Section 20.J., SBSC, as the employer, is liable not just for **claims** arising under the POEA Contract but for all **claims** arising under "contract, tort, fault or negligence." These **claims** include Dieron's **claims** under general maritime law

[14] *Tech. & Intellectual Prop. Strategies Grp. PC v. Insperity, Inc.,* No. 12-CV-03163-LHK, 2012 WL 6001098, at *7 (N.D. Cal. Nov. 29, 2012).

> for unseaworthiness, negligence and maintenance and cure, arising from a personal injury is [sic] suffered while serving as an employee on board the Vessel.[15]

The flaw in this reasoning is there are no **claims** against SBSC. Unlike a worker's compensation intervenor who has paid claims to its employee, SBSC is not seeking to intervene to recover from Trident any sums it may have paid to Dieron, but to prevent Dieron from receiving any sums from Trident in the first instance.

Dieron submits the High Court has impermissibly allowed affiliated companies to destroy their corporate boundaries when it is beneficial to them. Nowhere in Rule 24 and nowhere discernable in the jurisprudence is a desire to protect an affiliate's financial interest a "significant protectable interest" meriting intervention. As previously noted, Dieron has not been pointed to nor with diligent effort discovered **a single case** where a signatory to a POEA Contract, like SBSC, has been allowed to intervene in litigation and to interpose the POEA Contract's clauses into the litigation for use by a nonsignatory affiliate. If any such case exists, Dieron apologizes and welcomes being apprised of same.

B. The remaining requirements for Rule 24 were not met because SBSC had no significantly protectable interest.

Because SBSC has no significantly protectable interest in this litigation, the remaining requirements for intervention, that the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest, and the applicant's interest must not be adequately represented by the existing parties in the lawsuit were not met.

II. The High Court erred when it compelled Dieron to arbitrate his claims against SBSC.

The High Court ordered Dieron to "arbitrate his claims against Trident and SBSC in the Philippines under Philippine law in accordance with the POEA Contract…."[16] Dieron brought no claims against SBSC and therefore the High Court's order compelling Dieron to arbitrate his claims against SBSC was in error. While this assignment of error may appear petty, it is included to demonstrate the High Court's erroneously expansive application of *Mongaya* and imprecise analysis.

In *Mongaya,* plaintiff made claims against both signatories and nonsignatories to the POEA Contract, which this Honorable Court determined resulted in Mongaya's being equitably estopped to

[15] *Order Granting Motions to Compel Arbitration*, p. 6, 7.
[16] *Order Granting Motions to Compel Arbitration*, p. 14.

deny arbitration. In this matter, plaintiff made no claims against SBSC, the signatory to the POEA Contract, at all – there was no chance in this matter of claims against a signatory being sent to arbitration and the claims against the non-signatory remaining in the court, as in *Mongaya.* There are and will be no claims made against SBSC -- the true intervenor is the POEA Contract itself.

SBSC's lack of a true protected interest in the litigation is magnified by the High Court's order compelling Dieron to arbitrate his imaginary claims against it. Dieron respectfully submits the High Court erred when it ordered Dieron to arbitrate his claims against SBSC.

III. <u>The High Court erred when it ordered Dieron to arbitrate his claims against Trident.</u>

The High Court, in analyzing whether Dieron was compelled to arbitrate his claims, applied an estoppel test adopted in *Mongaya v. AET MCV BETA LLC, et al.,* S.Ct.No. 2017-003 (Aug. 10, 2018), rec. den. (Sep. 5, 2018) ("*Mongaya").* Although this Honorable Court in *Mongaya* erroneously nominated this test the "*Mundi"* test, referencing the Ninth Circuit's decision in *Mundi v. Union Sec. Life Ins. Co.,* 555 F.3d 1042, 1045–46 (9th Cir. 2009)("*Mundi"*), it later attributed it to *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.,* 269 F.3d 187, 201–02 (3d Cir. 2001)("*DuPont")*("The 'equitable estoppel' test quoted from *Mundi v. Union Sec. Life Ins. Co.,* 555 F.3d 1042 (9th Cir. 2009), while attributable to *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.,* 269 F.3d 187 (3rd Cir. 2001), is the law we adopt.").[17]

The High Court in the case at bar ordered Dieron to arbitrate his claims against Trident after application of the *DuPont/Mongaya* test:

> In summary, under the common law, Trident needs only to prove, and has proved, a close relationship between the entities involved, a relationship between the alleged wrongs and the nonsignatory's obligations and duties in the contract, and that the claims are intertwined with the underlying obligations….For these reasons, the Court concludes that under the *Mongaya* test Trident can compel Dieron to arbitrate its claims against Trident under the POEA Contract.[18]

Dieron respectfully submits the High Court's application of *DuPont/Mongaya* in the case at bar was improperly applied where, as here, equitable estoppel is sought to be used *defensively,* i.e., by a nonsignatory defendant to compel a signatory plaintiff to arbitrate claims made against it.

[17] *Order Denying Motion for Reconsideration, Mongaya v. AET MCV BETA LLC, et al.,* S.Ct.No. 2017-003 (Aug. 10, 2018), rec. den. (Sep. 5, 2018).
[18] *Order Granting Motions to Compel Arbitration,* p. 11.

Instead, the *DuPont* test by its own terms, and according to the Ninth Circuit in *Mundi*,[19] applies only when equitable estoppel is sought to be used *offensively*, i.e., by a nonsignatory plaintiff to compel a signatory defendant to arbitrate claims made against it.

The actual language from *DuPont* containing the "*DuPont* test," applied by this Honorable Court in *Mongaya* and the High Court in the case at bar, is as follows:

> With reference to the second theory of equitable estoppel, appellants rely on a series of cases in which signatories were held to arbitrate related claims against **parent companies who were not signatories** to the arbitration clause. In each of these cases, a signatory was bound to arbitrate claims **brought by a non-signatory** because of the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the non-signatory's obligations and duties in the contract and the fact that the claims were intertwined with the underlying contractual obligations. *Thomson–CSF, S.A.,* 64 F.3d at 779. In essence, a **non-signatory voluntarily pierces its own veil to arbitrate claims against a signatory that are derivative of its corporate-subsidiary's claims against the same signatory.**
> *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.,* 269 F.3d 187, 201–02 (3rd Cir. 2001)(Emphasis added), referencing *inter alia, J.J. Ryan & Sons*, 863 F.2d at 320–21, *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.,* 10 F.3d 753, 757 (11th Cir.1993), *Hughes Masonry Co., Inc. v. Greater Clark County Sch. Bldg. Corp.,* 659 F.2d 836, 840–41 (7th Cir.1981).

In *DuPont* itself, the court refused to apply the doctrine of equitable estoppel where a signatory defendant sought to compel a nonsignatory plaintiff to arbitration. Instead, in the cases cited by *DuPont,* nonsignatory plaintiffs were allowed to pierce their own corporate veils to compel signatory defendants to arbitrate the nonsignatory plaintiffs' claims against them, which claims were derivative of their corporate signatory subsidiary's claims against the same signatory defendants. In other words, "offensive" equitable estoppel.

The Third Circuit (who authored *DuPont*) in a recent 2017 opinion, *White v. Sunoco, Inc.*, 870 F.3d 257, 263 (3rd Cir. 2017), expressly rejected *DuPont* as adopting any standard for equitable estoppel and stated, again, that *DuPont* was relevant only when a non-signatory corporate parent plaintiff pierces its own corporate veil to compel arbitration of its claims that are derivative of its corporate subsidiary's claims against a signatory defendant. In *White,* the Third Circuit stated as follows:

> The parties appear to rely on *DuPont,* 269 F.3d 187, for a federal rule of equitable or "alternative" estoppel that binds a signatory to arbitrate against its will with a non-signatory. See White Br. 24; Sunoco Br. 30; J.A. 17 (citing *DuPont* for the principle

[19] *Mundi v. Union Sec. Life Ins. Co.,* 555 F.3d 1042, 1045–46 (9th Cir. 2009).

> that, "Under the 'alternative estoppel' theory, a nonsignatory may seek enforcement [of an arbitration clause against a non-signatory] when it can show: 1) there is a close relationship between it and a signatory; and 2) the alleged wrongs are related to a non-signatory's contractual obligations and duties."). This reliance is ill-placed, **as we did not adopt a rule regarding alternative estoppel in *DuPont*.** We decline to do so here because the Supreme Court in *Arthur Andersen* has rejected the analysis referenced in *DuPont,* which rested on federal law. **In *DuPont,* we had no occasion to adopt or reject a standard,** but merely observed that other Courts of Appeals have employed an "alternative estoppel" theory when **"a nonsignatory voluntarily pierces its own veil to arbitrate claims against a signatory that are derivative of its corporate-subsidy's claims against the same signatory."** *DuPont,* 269 F.3d at 201….
> *White v. Sunoco, Inc.*, 870 F.3d 257, 263 (3d Cir. 2017)(Emphasis added).

Dieron respectfully submits there is no *DuPont* "test" for equitable estoppel as the Third Circuit expressly refuted same in *White.* Even if there were such a "test," the cases cited in *DuPont* and their requirements are simply not applicable to the case at bar, where a non-signatory defendant attempts to compel a signatory plaintiff to arbitration. As explained by the Ninth Circuit in *Mundi:* "Although DuPont addressed the issue of a nonsignatory seeking to enforce an arbitration agreement against a signatory, in that case, it was a nonsignatory who brought claims against the signatory, rather than the signatory bringing claims against a nonsignatory." *Mundi v. Union Sec. Life Ins. Co.,* 555 F.3d 1042, 1045–46 (9th Cir. 2009). *Mundi* is the correct test for "defensive" equitable estoppel, which is being asserted in the case at bar, not *DuPont.*

If this Honorable Court insists that *Mongaya's* application of the *DuPont* test holds, in spite of *White's* repudiation of any such standard for equitable estoppel and the inapplicability of this line of cases given the relationships and positions of the parties in the litigation, Dieron submits the High Court ignored the primary requirement of the *DuPont* line of cases – that the plaintiff's claims against the defendant must **rely on** the terms of the contract (which is also required under *Mundi*/*MS Dealer*). In *Sunkist,* cited by *DuPont,* the court explained the critical factor in the *J.J. Ryan, Hughes Masonry,* and *McBro* cases, also cited by *DuPont,* was that "these decisions rest on the foundation that ultimately, each party **must rely on the terms of the written agreement in asserting their claims**." *Sunkist,* 10 F.3d at 758. (Emphasis added). Dieron's claims against Trident do not rely on the terms of the POEA Contract.

The RMI is the lone court using *DuPont* to evaluate equitable estoppel in POEA Contract cases. Despite diligent search, Dieron cannot locate a single federal court in the U.S. that used *DuPont* to determine whether a seafarer was required to arbitrate his claims against a nonsignatory

defendant. Instead, the few cases that have compelled, or refused to compel, seafarers to arbitrate their claims against nonsignatories to POEA Contracts on grounds of equitable estoppel have used the test of *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir.1999)("*MS Dealer"*), which was applied in *Mundi.* The *MS Dealer* test was used to compel arbitration in *Aggarao v. MOL Ship Mgmt. Co.,* 675 F.3d 355, 373 (4th Cir. 2012), which *Mongaya* relied heavily upon. The *MS Dealer* test was also used in *Navarette v. Silversea Cruises Ltd.,* No. 14-CV-20593, 2014 WL 11444106, at *2 (S.D. Fla. July 18, 2014) to successfully compel arbitration. *MS Dealer* was also applied to motions to compel arbitration by nonsignatories, albeit unsuccessfully, in *Pineda v. Oceania Cruises, Inc.,* 283 F. Supp. 3d 1307, 1310–11 (S.D. Fla. 2017); *Voces v. Energy Res. Tech.,* No. CV H-14-525, 2014 WL 12642574, at *2–3 (S.D. Tex. Dec. 16, 2014); and *Yang v. Majestic Blue,* 876 F.3d 996, 1003 (9th Cir. 2017), citing *Goldman v. KPMG LLP*, 173 Cal.App.4th 209, 92 Cal.Rptr.3d 534, 550, 555 (2009), which in turn was quoting *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir.1999).

Dieron notes this Honorable Court in *Mongaya* relied heavily upon *Aggarao v. MOL Ship Management Co.,* 675 F.3d 355, 373 (4th Cir. 2012),[20] which applied the *MS Dealer* test. The *Mongaya* court mistakenly attributed *Yang's* analysis of equitable estoppel as one *"*applying California law," when *Yang's* analysis was actually based on *MS Dealer*, which as was adopted by California state courts.[21] *Mongaya* further stated "[i]n our view, *Yang* applied an overly restrictive view of equitable estoppel, one inconsistent with general common law."[22] To the contrary, the *MS Dealer* test used in *Yang* is the well-established general common law test set out and used throughout the U.S. in state and federal courts for equitable estoppel, where, as here, a nonsignatory defendant seeks to compel a signatory plaintiff to arbitrate his claims made against him.

Dieron submits the RMI's application of the *DuPont* "test" to evaluate equitable estoppel is in violation of the *DuPont* circuit's own instruction and the RMI stands alone in doing so. The RMI's use of *DuPont* is not in accord with prevailing jurisprudence of the U.S. federal courts, which consistently apply the *MS Dealer* test for equitable estoppel.

Under the *MS Dealer* test, equitable estoppel is available to allow a nonsignatory to compel arbitration in two circumstances: (1) "when the signatory to a written agreement containing an

[20] *Mongaya,* p. 15-17.
[21] *Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996, 1003 (9th Cir. 2017), citing *Goldman v. KPMG LLP*, 173 Cal.App.4th 209, 92 Cal.Rptr.3d 534, 550, 555 (2009), in turn citing and using the test of *MS Dealer.*
[22] *Mongaya*, p. 15, FN4.

arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory"; and (2) "when the signatory to the contract containing the arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract." *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999)(quotations and alterations omitted).

Dieron's claims against Trident do not rely on the terms of the POEA Contract. Dieron's claims against Trident are founded on Trident's obligations to Dieron as a vessel owner under the general maritime law and equitable estoppel under the first prong of *MS Dealer* is not available. See *Yang v. Majestic Blue Fisheries, LLC,* 876 F.3d 996, 1003 (9th Cir. 2017) ("Because Yang's claims against Dongwon rely on its acts and omissions—furnishing an unseaworthy vessel and crew—and not on any obligations created by the employment agreement, Dongwon cannot compel arbitration under an equitable estoppel theory."); *Pineda v. Oceania Cruises, Inc.,* 283 F. Supp. 3d 1307, 1311 (S.D. Fla. 2017)("Toruno Pineda's complaint is clear: she bases her claim of Defendants' liability on …Nautica's status as the vessel owner… her claims arise under general maritime law."); *Voces v. Energy Res. Tech.,* No. CV H-14-525, 2014 WL 12642574, at *3 (S.D. Tex. Dec. 16, 2014)("Plaintiff's tort claims against Defendants…are not based on Voces's employment agreement with Offshore, and this is not a case where Plaintiff "must rely on the terms of the written agreement in asserting its claims against the nonsignatory."). That the POEA extracted obligations and principles of general maritime law and wrote them down in contract form as part of the POEA Contract's Standard Terms does not transform them into contractual obligations that Dieron's claims must then rely on.

Dieron's claims do not meet the second prong of *MS Dealer* either, "when the signatory to the contract containing the arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract." Dieron has made no claims whatsoever against the signatory SBSC, much less alleged any "substantially interdependent and concerted misconduct" between Trident and SBSC. In *Aggarao,* the plaintiff made claims made against signatories and nonsignatories to the POEA Contract, which the *Aggarao* court determined alleged "concerted misconduct." Although there was no concerted misconduct alleged in *Mongaya,* in that case claims existed against both signatory and nonsignatories, unlike the case at bar.

The RMI is alone in applying *DuPont* when a nonsignatory defendant seeks to compel a signatory plaintiff to arbitration. Instead, the U.S. courts uniformly apply *MS Dealer* when evaluating such efforts to compel arbitration by nonsignatory defendants. As explained above, *DuPont* has, at best, a very limited application: where a nonsignatory parent brings claims derivative of its subsidiary against a signatory defendant. *MS Dealer,* not *DuPont,*is the test used in every known POEA Contract case where a nonsignatory defendant urged equitable estoppel against a signatory seafarer's claims against it, except in the RMI in *Mongaya* and in the case at bar.

Dieron respectfully submits this Honorable Court should recognize *DuPont's* limited application, and its erroneous application to the case at bar. Dieron respectfully submits the applicable test for equitable estoppel in the case at bar is that of *MS Dealer,* and submits under *MS Dealer,* the High Court's order compelling Dieron to arbitrate his claims against Trident was in error.

IV. The High Court erroneously applied the POEA Contract's choice of law and compensation scheme in violation of RMI and U.S. general maritime law as interpreted by the U.S. Supreme Court.

The High Court correctly noted the POEA Contract between Dieron and SBSC contains multiple provisions and "includes an arbitration clause, a choice of law clause, and an elaborate scheme of compensation for personal injuries and illness."[23] However, the High Court erred by analyzing Dieron's objections to application of the choice of law clause (Section 31) and the compensation scheme (Section 32) as objections to the arbitration clause (Section 29).[24] The High Court made several findings: "a lesser recovery under the POEA Contract's arbitration and compensation scheme is not grounds for avoiding arbitration";[25] "RMI public policy does not necessarily disfavor lesser or different remedies under foreign law";[26] and, "Dieron's assertion of public policy at this stage is premature."[27]

Dieron's objections are not to arbitration or simply to the more limited amounts he is likely to receive thereby. Instead, Dieron's objections are that the choice of law and compensation scheme of the POEA Contract contractually derogate a vessel owner's obligations to provide a seaworthy vessel, all in violation of U.S. Supreme Court precedent and RMI and U.S. general maritime law.

[23] *Order Granting Motions to Compel Arbitration,* p. 2.
[24] *Id.,* pgs. 11, 12.
[25] *Id.,* p. 12.
[26] *Order Granting Motions to Compel Arbitration*, p. 12.
[27] *Id.*, p. 13.

The High Court noted that "United States federal courts have enforced the POEA Contract's arbitration cause [sic], referencing in its discussion *Bautista v. Star Cruises,* 396 F.3d 1289 (11th Cir. 2005); *Lindo v. NCL (Bahamas),* 652 F.3d 1257, 1276 (11th Cir. 2011). *Lindo* did not involve a POEA Contract at all. *Bautista* did address the POEA Contract, but only its arbitration clause and the defenses raised thereto:

> The Convention requires that courts enforce an agreement to arbitrate unless the agreement is "null and void, inoperative or incapable of being performed." Convention, art. II(3). Plaintiffs do not articulate their defenses in these terms, claiming instead that the arbitration provision is unconscionable and the underlying dispute is not arbitrable. For purposes of analysis, we style the former as a "null and void" claim and the latter as an "incapable of being performed" claim.
> *Bautista v. Star Cruises,* 396 F.3d 1289, 1301–02 (11th Cir. 2005).

Dieron is not challenging the arbitration clause as null and void, inoperative or incapable of being performed, in and of itself, although he does challenge the application of the equitable estoppel doctrine to bind him to the terms of the POEA Contract at all, including its arbitration clause. Instead, Dieron is challenging the POEA Contract's choice of law and compensation scheme as being in violation of U.S. Supreme Court precedent and the general maritime law as a contractual derogation of Trident's obligation to provide him with a seaworthy vessel.

The High Court supported its holding that "RMI public policy does not necessarily disfavor lesser or different remedies under foreign law" by citing *Asignacion v. Rickmers Genoa Schiffahrtsgesellschaft mbH & Cie KG,* 783 F.3d 1010, 1020 (5th Cir. 2015), which upheld a Philippine arbitration award. The High Court selectively quoted *Asignacion*: "[w]ere he to prevail in a suit under United States general maritime law, we have little doubt his recovery would be greater…[but]….with regard to foreign seamen, United States public policy does not necessarily disfavor lesser or different remedies under foreign law.[28] *Asignacion* was a post-arbitration decision evaluating the adequacy of the award and whether it was against public policy, and the defendant vessel was foreign flagged. The *Asignacion* decision did not speak to the application of the POEA Contract's choice of law and compensation scheme in the first instance. Moreover, *Asignacion* relied on *Romero v. International Terminal Operating Co.,*358 U.S. 354, 383–84, 79 S. Ct. 468, 486, 3 L. Ed. 2d 368 (1959), which was concerned with application of the rule of *lex loci delicti* for choice of law in maritime cases. There was no contractual choice of law or compensation provision

[28]*Order Granting Motions to Compel Arbitration,* p. 12.

to examine in *Romero*. The complete quote from *Romero,* relied on by *Asignacion,* is as follows and supports Dieron's argument that the law of the flag, the RMI, is properly applicable in this litigation:

> In this case, as in *Lauritzen v. Larsen*, the ship is of foreign registry and sails under a foreign flag. Both the injured seaman and the owner of the ship have a Spanish status: Romero is a Spanish subject and Compania Trasatlantica a Spanish corporation. Unlike the contract in *Lauritizen,* Romero's agreement of hire was entered into in Spain. **By noting this fact, we do not mean to qualify our earlier view that the place of contracting is largely fortuitous and of little importance in determining the applicable law in an action of marine tort….** Discussing the significance of the place of the wrongful act, we pointed out in *Lauritzen* that '(t)he test of location of the wrongful act or omission, however sufficient for torts ashore, is of limited application to shipboard torts, because of the varieties of legal authority over waters she may navigate. * * * **the territorial standard is so unfitted to an enterprise conducted under many territorial rules and under none that it usually is modified by the more constant law of the flag.'** 345 U.S. at pages 583—584, 73 S.Ct. at page 929. Although the place of injury has often been deemed determinative of the choice of law in municipal conflict of laws, such a rule does not fit the accommodations that become relevant in fair and prudent regard for the interests of foreign nations in the regulation of their own ships and their own nationals, and the effect upon our interests of our treatment of the legitimate interests of foreign nations. **To impose on ships the duty of shifting from one standard of compensation to another as the vessel passes the boundaries of territorial waters would be not only an onerous but also an unduly speculative burden, disruptive of international commerce and without basis in the expressed policies of this country. The amount and type of recovery which a foreign seaman may receive from his foreign employer while sailing on a foreign ship should not depend on the wholly fortuitous circumstance of the place of injury.**
> *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 383–84, 79 S. Ct. 468, 486, 3 L. Ed. 2d 368 (1959)(Emphasis added).

Romero reasserts the law of the flag as a preferred constant and dismisses the law of the place of injury as viable in maritime law, while reasserting *Lauritzen's* rule that the place of contract should also not control. *Romero* does not stand for the broad public policy of disinterest by the U.S. in remedies under foreign law that *Asignacion* cited it for, and neither *Asignacion* nor *Romero* support the High Court's finding that "RMI public policy does not necessarily disfavor lesser or different remedies under foreign law." A review of the decision in *Aggarao* voiding the Philippine arbitral award is a case in point that U.S. public policy does indeed disfavor inadequate foreign awards and foreign laws that strip seafarers of their rights against vessel owners under the general maritime law. Dieron requests this Honorable Court review the opinion of the district court in *Aggarao,* No. CIV. CCB-09-3106, 2014 WL 3894079 (D. Md. Aug. 7, 2014), issued when *Aggarao,*

after having been sent to the Philippines to arbitrate his maritime law claims, sought to have his arbitration award of $89,100 in disability benefits and 240 days of sick pay under the "elaborate compensation scheme" of the POEA Contract voided. The *Aggarao* court recognized its grievous error in allowing the vessel owner, World Car, and charterer, Nissan, to compel *Aggarao* to arbitrate his claims against them on the basis of "intertwined claims" and "equitable estoppel." The district court determined Aggarao's maritime law claims for negligence and unseaworthiness against the vessel interests were completely disregarded and dismissed by the Philippine arbitrator as unavailable under Philippine law:

> The POEA Contract destroyed Mr. Aggarao's right to maintenance and cure, and cut off any potential cause of action against Nissan and World Car. In limiting Mr. Aggarao's remedies to those allowed by the POEA Contract, the arbiter transgressed this country's strong and longstanding policy of protecting injured seafarers and providing them special solicitude. *See, e.g., Am. Export Lines, Inc. v. Alvez*, 446 U.S. 274, 285 1980 AMC 618, 627 (1980) (quoting *Moragne v. States Marine Lines*, 398 U.S. 375, 387, 1970 AMC 967, 977 (1970)) (explaining that "[a]dmiralty jurisprudence has always been inspirited with a "special solicitude for the welfare of those men who under[take] to venture upon hazardous and unpredictable sea voyages'.")
> *Aggarao v. MOL Ship Mgmt. Co.*, No. CIV. CCB-09-3106, 2014 WL 3894079 (D. Md. Aug. 7, 2014).

The district court vacated the Philippine arbitration award and the case settled before appeal.

Dieron respectfully suggests the High Court's finding that United States public policy "does not necessarily disfavor lesser or different remedies under foreign law," as was its like finding regarding RMI law, were without foundation and erroneous.

The interaction between the POEA Contract's choice of law and compensation scheme were discussed in *Asignacion,* in conjunction with its public policy examination of the amount of the arbitral award. The Fifth Circuit emphasized its uncertainty as to whether the POEA Contract's choice of law clause and compensation scheme were in violation of the general maritime law in the first instance, as challenged herein:

> The seminal maritime-injuries choice-of-law case is *Lauritzen v. Larsen.* In *Lauritzen,* a Danish seaman injured in Cuba aboard a Danish-owned and flagged ship brought suit in the United States. The seaman's contract provided that Danish law applied. Unlike United States law, Danish law fixed maintenance and cure to a twelve-week period and provided a no-fault compensation scheme "similar to [American] workmen's compensation." The Court enumerated a seven-factor test to determine choice of law[41] but also commented that "[e]xcept as forbidden by some public policy, the tendency of the law is to apply in contract matters the law which

> the parties intended to apply." The Court then cautioned that "a different result would follow if the contract attempted to avoid applicable law," such as applying foreign law to a United States flagged ship. The Court thus had little hesitation applying the contracted-for Danish law, as the law of the ship's flag.
>
> *Lauritzen's* rule—that contractual choice-of-law provisions for foreign seamen are generally enforceable—favors Rickmers. However, the reach of the exception—which condemns a choice-of-law provision that attempts to "avoid applicable law"—is less clear. On one hand, Rickmers did little, if anything, to avoid applicable law through its contract with Asignacion. Rickmers had no say in the choice-of-law provision; POEA's Standard Terms mandated Philippine law. On the other hand, the Philippine government has arguably attempted to avoid the application of foreign law to its seamen. But it is far from certain that the *Lauritzen* Court condemned such choice-of-law clauses mandated by a foreign sovereign rather than a party to the contract.
> *Asignacion v. Rickmers Genoa Schiffahrtsgesellschaft mbH & Cie KG*, 783 F.3d 1010, 1018–19 (5th Cir. 2015)(Internal citations omitted).

In none of the U.S. federal court cases cited by the High Court as authority for its findings that "a lesser recovery under the POEA Contract's arbitration and compensation scheme is not grounds for avoiding arbitration,[29] "RMI public policy does not necessarily disfavor lesser or different remedies under foreign law,"[30] and "assertion of public policy at this stage is premature,"[31] was the vessel in question flying the flag of the forum, that is, the United States. The U.S. federal courts have never addressed a case where Philippine laws, through the terms of the POEA Contract's choice of law clause and compensation scheme, were sought to be enforced on a U.S. flagged vessel.[32]

In *Mongaya,* this Honorable Court permitted the application of Philippine law and a contracted compensation scheme to an RMI flagged vessel. Dieron respectfully suggests the intersection of arbitration law, maritime law, and the POEA Contract's terms are a developing area of law and requests this Honorable Court revisit the issue.

The U.S. Supreme Court cautioned in *Lauritzen v. Larsen* against allowing choice of law provisions in contracts to govern seafarer's tort claims, recognizing the inequitable effect on the

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[29] *Order Granting Motions to Compel Arbitration*, p. 12.
[30] *Order Granting Motions to Compel Arbitration*, p. 12.
[31] *Id.,* p. 13. *Lindo v. NCL (Bahamas),* 652 F.3d 1257, 1276 (11th Cir. 2011); *Bautista v. Star Cruises,* 396 F.3d 1289 (11th Cir. 2005); *Asignacion v. Rickmers Genoa Schiffahrtsgesellschaft mbh & Cie, KG,* 783 F.3d 1010 (5th Cir. 2015), *Romero v. Int'l. Terminal Operation Co.,* 358 U.S. 354, 384 (1959); *Aggarao v. MOL Ship Mgmt. Co.,* No. CIV CCB-09-3106, 2014 WL 3894079 (D.Md. Aug. 7, 2014) and *Aggarao v. MOL Ship Management Co., Ltd.,* 675 F.3d 355 (4th Cir. 2012).
[32] Counsel for Appellant has been unable to locate such a case and apologizes if any such case exists.

crew and the effect on hiring. *Lauritzen* also cautioned against the application of foreign law by contract to avoid the law of the flag state:

> A seaman takes his employment, like his fun, where he finds it; a ship takes on crew in any port where it needs them. The practical effect of making the lex loci contractus govern all tort claims during the service would be to subject a ship to a multitude of systems of law, **to put some of the crew in a more advantageous position than others, and not unlikely in the long run to diminish hirings in ports of countries that take best care of their seamen**.
>
> ***
>
> We are aware of no public policy that would prevent the parties to this contract, which contemplates performance in a multitude of territorial jurisdictions and on the high seas, from so settling upon the law of the flag-state as their governing code. This arrangement is so natural and compatible with the policy of the law that even in the absence of an express provision it would probably have been implied. *The Belgenland*, 114 U.S. 355, 367, 5 S.Ct. 860, 865, 29 L.Ed. 152; The Hanna Nielsen, 2 Cir., 273 F. 171. **We think a quite different result would follow if the contract attempted to avoid applicable law, for example, so as to apply foreign law to an American ship.**
> *Lauritzen v. Larsen*, 345 U.S. 571, 588–89, 73 S. Ct. 921, 931–32, 97 L. Ed. 1254 (1953)(Emphasis added).

The ship upon which Mongaya was injured was flying the RMI flag and as such is subject to the laws of the RMI:

> Perhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag. Each state under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it. Nationality is evidenced to the world by the ship's papers and its flag.
> *Lauritzen v. Larsen*, 345 U.S. 571, 584, 73 S. Ct. 921, 929, 97 L. Ed. 1254 (1953).

Trident, by application of the choice of law clause in the POEA Contract, is attempting to apply Philippine worker's compensation laws to an RMI flagged vessel in violation of *Lauritzen.*

In *M/S Bremen,* the U.S. Supreme Court specifically held that a forum's public policy against choice of forum clauses is an exception to the general rule in favor of enforcement of such clauses:

> A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision. See, e.g., *Boyd v. Grand Trunk W.R. Co*., 338 U.S. 263, 70 S.Ct. 26, 94 L.Ed. 55 (1949).
> *M/S Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 15, 92 S. Ct. 1907, 1916, 32 L. Ed. 2d 513 (1972).

The RMI's Merchant Seafarer's Act, 47 MIRC Ch. 8, expressly states the RMI's strong public policy against forum selection clauses that seek to avoid the application of RMI law to seafarer's on RMI flagged vessels. Dieron respectfully requests this Honorable Court reconsider *Mongaya* to the extent it held otherwise. The provisions of the Act expressive of this strong public policy of the RMI against choice of law and forum provisions are as follows:

> All contracts relating to service aboard a vessel registered under this Title shall be governed in interpretation and application by the Laws of the Republic, Including this Chapter and any Regulations thereunder.
> 47 MIRC §853.
>
> * * *
>
> "The parties to this contract hereby stipulate that the terms and conditions laid down herein shall be subject to the applicable provisions of the Maritime Law and Regulations of the Republic of the Marshall Islands. Any dispute as to terms and conditions of this contract shall be resolved in accordance with the Maritime Law and Regulations of the Republic of the Marshall Islands".
> 47 MIRC §853.
>
> * * *
>
> It shall be lawful for any employer or employer organization and any labor organization representing seafarers to bargain and enter into a labor contract concerning wages and other terms and conditions of employment; provided, that no labor contract provisions may be contrary to the laws of the Republic or deprive the Republic of <u>any</u> jurisdiction over labor relations.
> 47 MIRC §856.
>
> * * *
>
> It shall be unlawful for any employer … to enter into, any labor contract containing any provision, which attempts to set aside the application of or is inconsistent with or is violative of the laws of the Republic or which prescribes terms or conditions of employment less favorable to seafarers than those set forth in this Chapter… and any such prohibited provisions shall be deemed null and void.
> 47 MIRC § 858.

The RMI has statutorily declared its strong public policy against choice of law and compensation clauses applied to seafarers serving on its flagged vessels.

This Honorable Court in *Mongaya* did not disagree that the RMI had a strong policy against application of foreign law to seafarers on its ships. However, it stated "if we were to follow this interpretation, every RMI flag vessel could be compelled to arbitrate under RMI law, no matter whether the parties had agreed to a choice of law provision that said otherwise…,"[33] and determined application of RMI law would lead to results incompatible with international commercial contracts:

[33] *Mongaya,* p. 19.

> Choice of law provisions "in international commercial contracts are 'an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction,' and should be enforced absent strong reasons to set them aside."
> *Mongaya, p. 19-10,* citing, *inter alia, Northrop Corp. v. Triad Int'l Mktg. S.A.,* 811 F.2d 1265 (9th Cir. 1987) and *M/S Bremen v. Zapata OffShore Co.,* 407 U.S. 1, 15 (1972).

Dieron notes neither of these cases cited in *Mongaya, Northrop* or *Bremen,* involved personal injuries to a seafarer upon an unseaworthy vessel, and *Bremen* expressly recognized the strong public policy of the forum against such clauses as an exception to their application.

In addition to violating the strong public policy of the RMI as expressed in the Merchant Seafarer's Act, application of the POEA Contract's choice of law and compensation clauses violate long-standing general maritime law principles, which Dieron suggests the Merchant Seafarer's Act attempted to codify. The U.S. Supreme Court, in general maritime law cases issued well before the developing jurisprudence in seafarer arbitration, forbids contractual derogation of a vessel owner's obligations to provide a seaworthy vessel and maintenance and cure. *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 94–95, 66 S.Ct. 872, 90 L.Ed. 1099 (1946); *Reed v. S.S. Yaka,* 373 U.S. 410, 414–15, 83 S.Ct. 1349, 10 L.Ed.2d 448 (1963).

More recently, in *Brown v. State,* 816 P. 2d 1368 (Alaska 1991), the Alaska Supreme Court explicitly rejected the imposition of a workers' compensation program very similar to the compensation scheme of the POEA Contract onto seafarers as being in violation of U.S. Supreme Court precedent. The High Court in the case at bar mistakenly cited and dismissed the *Brown* opinion as based on "Alaska State law," when it was in fact *Brown* was based exclusively on decisions by the U.S. Supreme Court. The *Brown* court stated as follows:

> As noted above, the Supreme Court long ago emphasized that the shipowner's liability for the seaworthiness of its vessel "is neither limited by conceptions of negligence nor contractual in character." *Sieracki,* 328 U.S. at 94, 66 S.Ct. at 877. The Court subsequently concluded that necessary consequences of this "absolute duty," *id.* at 95, 66 S.Ct. at 877, are that the "obligation of seaworthiness cannot be shifted about, limited, or escaped by contracts or by the absence of contracts and that the shipowner's obligation is rooted, not in contracts, but in hazards of the work." *Reed v. Steamship Yaka,* 373 U.S. 410, 414-15, 83 S.Ct. 1349, 1352-53, 10 L.Ed.2d 448 (1963). Section 9.03 limits the state's obligation to provide a seaworthy vessel by substantially limiting liability should the state breach its duty… **One might argue that the *obligation* still remains, merely the *remedy* has been limited... Such an argument misses the point: A legal obligation without legal liability would be no obligation at all; similarly, an obligation with limited liability is a limited**

> **obligation**. We therefore find section 9.03 to be an impermissible limitation of the state's obligations under the doctrine of unseaworthiness.
> *Brown v. State,* 816 P.2d 1368, 1374–75 (Alaska 1991)(Emphasis added).

An examination of the POEA Contract's choice of law and compensation scheme illustrates the attempt by Trident to impermissibly minimize its obligations as a ship owner under the general maritime law by limiting Dieron's remedy.

Section 1.A.4 of the POEA Contract reiterates the general maritime law's requirement of providing a seaworthy ship;[34] Section 20.A.2, 3 & 6 of the POEA Contract covers the obligations of maintenance and cure and recovery for permanent total or partial disability.[35] A review of Section 20.A.2 &3 shows the POEA Contract's "maintenance and cure" covers only "work-related injury or illness,"[36] while true maintenance and cure covers injuries and illnesses, whether work-related or not. Section 20.A.6, covering permanent total or partial disability, provides these injuries are to be compensated in accordance with the schedule of benefits in Section 32 of the Contract.[37] Section 20.J provides payment for injury under the contract shall cover all claims in relation to his employment, including damages arising from … tort, fault or negligence under the laws of the Philippines or any other country.[38] Under the terms of the POEA Contract, breach of the obligations of negligence and seaworthiness may be remedied only by the "elaborate compensation scheme" of Section 32,[39] under which the maximum recovery is 120% of $50,000. The application of these provisions of the POEA Contract in this litigation, where Dieron has sued Trident as a vessel owner for compensation for, *inter alia,* breach of its obligations to provide a seaworthy vessel and for negligence, is an impermissible contractual limitation on Trident's obligation as vessel owner to provide a seaworthy vessel. See *Sieracki,* 328 U.S. at 94, 66 S.Ct. at 877; *Reed v. Steamship Yaka,* 373 U.S. 410, 414-15, 83 S.Ct. 1349, 1352-53.

The RMI, as the flag state of Tridents' vessel, has an obligation to monitor the seaworthiness of ships flying its flag, and the RMI has promulgated its own laws to protect seafarers on its flagged ships. The RMI has, in its Merchant Seafarer's Act, declared its strong public policy in favor of

[34] *Order Granting Motions to Compel Arbitration,* p. 3, #12.
[35] *Id.,* p. 4, #13.
[36] *Id.*
[37] *Order Granting Motions to Compel Arbitration*, p. 4, #13.
[38] *Order Granting Motions to Compel Arbitration*, p. 4, 5, #14.
[39] *Id.,* p. 5, #17.

application of the laws of the Republic to vessels registered in the RMI, particularly when, as here, Philippine law is less favorable than the laws of the RMI.

The POEA Contract's choice of law and compensation clauses are properly applied in actions by seafarer's against their employers. However, when applied to actions by seafarers against vessel owners, particularly as here in the vessel's flag forum, their application runs contrary to U.S. Supreme Court law and the concerns of *Lauritzen* materialize before us:

> The practical effect of making the lex loci contractus govern all tort claims during the service would be to subject a ship to a multitude of systems of law, to put some of the crew in a more advantageous position than others, and not unlikely in the long run to diminish hirings in ports of countries that take best care of their seamen. *Lauritzen v. Larsen*, 345 U.S. 571, 588–89, 73 S. Ct. 921, 931–32, 97 L. Ed. 1254 (1953).

As early as 2009, the Third Circuit affirmed a district court decision remanding a seafarer's claims against a vessel owner who sought arbitration based on an employment contract between the seaman and his employer, finding the vessel owner could not "dodge potential liability through contractual provisions." *Razo v. Nordic Empress Shipping Ltd.*, 362 F. App'x 243, 246 (3d Cir. 2009). The Third Circuit stated as follows:

> With regard to Nordic's appeal of the District Court's remand of Razo's unseaworthiness claims against Nordic, we agree with the District Court's analysis that, as owner of the ship, Nordic cannot dodge potential liability through contractual provisions. Moreover, the District Court was correct in determining that Nordic cannot rely upon the arbitration agreement that binds Royal Caribbean and Razo as a defense here. The District Court properly remanded this claim. *Razo v. Nordic Empress Shipping Ltd.,* 362 F. App'x 243, 246 (3d Cir. 2009).

U.S. Courts have stricken choice of law clauses from employment contracts. See *Alcalde v. Carnival Cruise Lines,* 798 F. Supp. 2d 1314, 1321 (S.D. Fla. 2011)("By merely striking the stand-alone choice-of-law paragraph and agreeing to U.S. law, Carnival cures the deficiency in the original Agreement."); *Krstic v. Princess Cruise Lines,* 706 F.Supp.2d 1271, 1280–81 (S.D.Fla.2010) (severing choice-of-law clause yet compelling arbitration of all claims)." Dieron suggests the application of the POEA Contract's choice of law and compensation clauses in this particular litigation by a seafarer against a vessel owner is in violation of the U.S. general maritime law as interpreted by the U.S. Supreme Court.

CONCLUSION

Dieron brought his claims against Trident as a seafarer on Trident's vessel, when a mooring windlass broke loose from the vessel's deck, causing Dieron to suffer catastrophic injuries. Dieron

brought no claims against his employer SBSC. Nevertheless, the High Court erroneously allowed SBSC to intervene, and insert the terms of its POEA Contract with Dieron. The High Court then allowed Trident, through a misapplied doctrine of equitable estoppel, to compel Dieron to arbitrate his claims against it through use of SBSC's POEA Contract.

SBSC has no significantly protectable interest in the litigation. The only interest was to minimize its affiliate's financial exposure by inserting the terms of the POEA Contract into the litigation for use by Trident. The intervention was erroneous and should be reversed.

Even if the terms of the POEA Contract, including the arbitration clause, are allowed in the litigation, under the correct test for equitable estoppel used in *Mundi* and in *MS Dealer,* Dieron should not have been compelled to arbitrate his claims against Trident. Dieron does not rely on the terms of the POEA Contract in asserting his claims against Trident, nor has he alleged any substantially interdependent and concerted misconduct by both Trident and SBSC. He has made no allegations at all against SBSC. The High Court was in error when it compelled Dieron to arbitrate his claims against Trident.

In addition to allowing Trident to take advantage of the arbitration clause in SBSC's POEA Contract, the High Court also allowed Trident to apply its choice of law and compensation scheme. The application of these clauses in this litigation effectively allowed Trident to contractually limit his general maritime law obligations as a vessel owner, which is prohibited by the U.S. Supreme Court decisions of *Sieracki* and *Reed,* as more recently reexamined and reiterated in *Brown.* U.S. Supreme Court precedent in *Bremen* permits the application of RMI law, as the RMI has a strong public policy against the application of choice of law clauses to seafarers on its flagged vessels. The RMI policy of requiring RMI law and jurisdiction to apply to RMI flagged vessels vis a vis the employment of seafarers on those vessels is not absurd and is clearly supported by *Bremen* and *Lauritzen* and is required by *Sieracki* and *Reed*. The application of the POEA Contract's choice of law and compensation clauses has worked exactly as the U.S. Supreme Court predicted and warned against in *Lauritzen.* RMI flagged vessels are subjected to multiple systems of law, and some of their crew, not Filipinos, are put in better positions than others. As seen today, the hiring of seafarers from countries that take best care of their seamen is diminished.

Dieron respectfully requests this Honorable Court to reverse the orders of the High Court granting *SBSC's Motion for Leave to Intervene and to Compel Arbitration* and Trident's *Motion to*

Compel Arbitration and permit Dieron to continue his action against Trident in the courts of the RMI.

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IN THE HIGH COURT

OF THE

REPUBLIC OF THE MARSHALL ISLANDS

VIRGILIO T. DIERON, JR., Plaintiff, v. STAR TRIDENT XII, LLC Defendant	H.Ct. Civil No. 2017 - 245 **CERTIFICATE OF SERVICE**

I hereby certify that on 04 October 2019, a true and correct copy of **PLAINTIFF'S OPENING BRIEF** was served upon the following by email attachment in PDF format to:

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