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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-35485
D.C. No. 1:15-cv-00479-BLW

[Filed November 21, 2019]

ELI DUNN,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
BRYCE HATCH; et al.,	)
	)
Defendants-Appellees.	)
	)

No. 18-35511
D.C. No. 1:15-cv-00479-BLW

ELI DUNN; COLIN ALLEN,	)
	)
Plaintiffs-Appellees,	)
	)
v.	)
	)
BRYCE HATCH; HATCH	)

MARINE ENTERPRISE, LLC, in personam,

Defendants-Appellants.

MEMORANDUM[*]

Appeal from the United States District Court
for the District of Idaho
B. Lynn Winmill, District Judge, Presiding

Submitted August 27, 2019[**]

Seattle, Washington

Before: McKEOWN and BYBEE, Circuit Judges, and GAITAN,[***] District Judge.

Eli Dunn appeals the district court's judgment after a one-day bench trial in his action under maritime law to recover wages due for working as a deckhand on the F/V Silver Bullet, a salmon fishing boat operated by Bryce Hatch and Hatch Marine Enterprise, LLC ("Hatch Marine"). Hatch and Hatch Marine cross-appeal.

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[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[***] The Honorable Fernando J. Gaitan, Jr., United States District Judge for the Western District of Missouri, sitting by designation.

The district court concluded that Dunn, who had an oral contract, was entitled to an additional $1,905.45 in wages under 46 U.S.C. §§ 10601 and 11107. The district court also awarded Dunn costs and attorneys' fees as a sanction against Hatch and Hatch Marine for forgery of a written employment contract and failure to fully comply with discovery. Dunn asserts the district court erred in denying (1) punitive damages under general maritime law and for Hatch's forgery of a written contract, and (2) attorneys' fees for the entire case. In their cross-appeal, Hatch and Hatch Marine argue the district court erred in (1) awarding Dunn partial attorneys' fees and costs as a sanction, and (2) miscalculating the wages due to Dunn. We affirm.

1. Citing *Atlantic Sounding Co., Inc. v. Townsend*, 557 U.S. 404, 424 (2009), Dunn argues punitive damages should have been awarded to him under general maritime law and for Hatch's forgery. The district court, however, held that 46 U.S.C. § 11107 provides the exclusive penalty for fishermen who had not been paid their full wages in the absence of a written contract and thus denied punitive damages under general maritime law. This conclusion is supported by the Supreme Court's recent decision in *The Dutra Group v. Batterton*, 139 S.Ct. 2275 (2019), in which the Court held that punitive damages cannot be recovered on claims in admiralty where there is no historical basis for allowing such damages. *Id.* at 2278 (further finding that courts should depart from those policies found in detailed statutory schemes cautiously). Plaintiff has presented no evidence of a historical basis for allowing punitive damages in maritime wage disputes. Thus, we believe the same

analysis would preclude punitive damages under Sections 10601 and 11107.

Moreover, even if punitive damages were available to Dunn under Sections 10601 and 11107, such damages are limited to cases of "enormity, where a defendant's conduct is outrageous, owing to gross negligence, willful, wanton, and reckless indifference for the rights of others, or behavior even more deplorable." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 493 (2008) (internal citations and quotation marks omitted). In Dunn's case, the underlying facts do not support a claim that Hatch's conduct demonstrated a case of enormity or deplorable behavior. Instead, the mere statutory violation of having an oral contract rather than a written contract does not constitute "reckless indifference for the rights of others." *Id.*

The forgery claims were dismissed by the district court and that finding was not appealed by Dunn. We are aware of no authority supporting an award of punitive damages for dismissed claims. The district court did not err in determining that punitive damages were not available to Dunn.

2. Dunn requested an award of attorneys' fees for the entire case. The district court limited its award to fees and costs related to sanctionable behavior by Hatch and Hatch Marine. Attorneys' fees are not awarded as a matter of course in admiralty claims; instead, they are awarded, if at all, "when the shipowner acted arbitrarily, recalcitrantly, or unreasonably." *Madeja v. Olympic Packers, LLC*, 310 F.3d 628, 635 (9th Cir. 2002). Grants or denials of attorneys' fees are reviewed for abuse of discretion. *See*

Rodriguez v. W. Publ'g Corp., 563 F.3d 948, 967 (9th Cir. 2009). The district court's order limiting attorneys' fees to those issues where Hatch and Hatch Marine acted in bad faith is not an abuse of discretion.

3. Hatch and Hatch Marine argue the district court erred in awarding Dunn partial attorneys' fees and costs as a sanction. The district court found that Hatch and Hatch Marine used a forged document to support their claim that there had been a written contract. Defendants' use of this forged document resulted in higher costs and attorneys' fees for Dunn. Accordingly, the district court did not abuse its discretion in awarding attorneys' fees and costs related to use of that document. Similarly, the district court did not err in imposing discovery sanctions for failure to identify the total amount of profit-sharing/price adjustment during discovery, because Hatch and Hatch Marine ought to have identified the total amount of the profit-sharing/price adjustment in their response to interrogatories. A district court's grant of discovery sanctions is reviewed for abuse of discretion. *See Facebook, Inc. v. Power Ventures, Inc.*, 844 F.3d 1058, 1070 (9th Cir. 2016). Here, the district court did not abuse its discretion.

4. Hatch and Hatch Marine argue that the district court miscalculated the wages due to Dunn, concluding that the district court simply added 10% of $19,054.53 to the payments already made to Dunn, without making any offset for costs and money allegedly overpaid to Dunn. Findings of fact are reviewed for clear error. *See Crowley Marine Servs., Inc. v. Maritrans, Inc.*, 530 F.3d 1169, 1173 (9th Cir. 2008).

We find no clear error with the district court's calculations of the wages due, given the evidence presented to the court below.[1]

AFFIRMED.

[1] Dunn's Motion to Supplement the Record on Appeal (No. 18-35511 Dkt. 6, No. 18-35485 Dkt. 12) is denied as moot.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. 1:15-cv-479-BLW

[Filed May 23, 2018]

ELI DUNN and COLIN ALLEN,	)
	)
Plaintiffs,	)
	)
v.	)
	)
BRYCE HATCH and HATCH MARINE ENTERPRISE, LLC, in personam; the F/V SILVER BULLET, Official Number 991159, her engines, machinery, appurtenances and cargo, in rem;	)
	)
Defendants	)

MEMORANDUM DECISION AND ORDER

INTRODUCTION

The Court has before it plaintiff Dunn's request for attorney fees as a sanction for the conduct of defendant Hatch. For the reasons expressed below, the Court will award $5,025.25 in fees for Hatch's forgery of the employment contract, and an additional $5,000 in fees

for Hatch's failure to reveal in discovery the payment adjustment figure. The Court will explain these conclusions after reviewing the background of this litigation.

LITIGATION BACKGROUND

Plaintiff Dunn brought this lawsuit to recover wages due him from shipowner Hatch for the 2013 salmon season in Bristol Bay, Alaska. In a prior decision, the Court held that Hatch forged Dunn's signature on an employment contract, intentionally filed it with the Court, represented in at least two court filings that Dunn signed the contract, and procured two additional persons to lie, vouching for the authenticity of Dunn's forged signature. *See Memorandum Decision (Dkt. No. 110).* The Court held that this willful conduct satisfied the high threshold for finding that Hatch acted in bad faith, and warranted an award of sanctions. That award, the Court held, would consist of the following items: (1) The costs of the handwriting expert Hannah McFarland – that is, her fees for drafting her expert report and attending the deposition; and (2) The time Dunn's attorney spent in preparing for and taking the deposition of McFarland and in otherwise addressing the issue of the contract forgery. *Id.* at p. 11.

In that decision, the Court also stated that "[i]f plaintiffs' counsel believes he is entitled to attorney fees generally, he shall file his motion within the same time frame, thirty days. The Court expresses no opinion whether plaintiffs are entitled to costs and attorney fees generally and, if so, whether those fees

should be supplemental, or in addition, to the costs and fees awarded as sanctions." *Id.*

Dunn has now responded with two filings. In the first, he details the fees and costs incurred in revealing the forgery. In the second – a motion for attorney fees generally – he seeks all the attorney fees his attorney incurred in this case. The Court will take up first the questions of the fees and costs for the forgery.

ATTORNEY FEES FOR FORGERY

Dunn's counsel submits his accounting showing the following: (1) the costs for the handwriting expert were $2,280.25; and (2) Dunn's counsel spent 6.1 hours on this issue at a rate of $450 an hour. Adding these amounts results in a sum of $5,025.25. *See Declaration of Merriam (Dkt. No. 111).*

Hatch argues that the rate of $450 is too high, and cites lower hourly rates in the Boise Idaho market. But Dunn's counsel practices in a specialized field in Seattle Washington, has done so for the past 36 years, and is a past chairman of the Maritime Section of the Washington State Trial Lawyers Association. The Court finds his hourly rate reasonable.

Hatch responds by speculating that Dunn had a contingent fee arrangement with his counsel, making it unlikely that Dunn "incurred" any fees. But Hatch cites no authority holding that fees cannot be awarded based on a finding of bad faith conduct in litigation whenever the victim has a contingency fee arrangement. Adopting Hatch's rule would promote bad faith conduct in contingency cases, an absurd result.

Hatch complains about that the number of hours spent by Dunn's counsel, but the 6.1 hours seems quite conservative given the importance of the issue in the litigation and the burden of proving a signature was forged. The Court cannot find the total hours unreasonable.

For these reasons, the Court will award $5,025.25 in attorney fees and costs for Hatch's conduct in forging the employment contract.

MOTION FOR ATTORNEY FEES GENERALLY

Legal Standard

An award of attorney's fees is appropriate in admiralty only when the shipowner acted arbitrarily, recalcitrantly, or unreasonably. *Madeja v. Olympic Packers, LLC,* 310 F.3d 628, 635 (2002). The district courts have discretion to award "punitive attorney fees" when shipowners are "intentionally dishonest or recalcitrant during the course of litigation." *Id.* at 636.

Analysis

Dunn argues that Hatch avoided service of process, went to "incredible" lengths to avoid paying Dunn's wages, and filed a "blizzard of motions" to harass Dunn. *See Brief (Dkt. No. 112-1)* at p. 4. Regarding the service of process, the Judge who transferred this case here from the Western District of Washington – Chief Judge Donohue – denied Dunn's request to impose on Hatch the expense of service of process. *See Order (Dkt. No. 30).* Chief Judge Donohue found that (1) Dunn's counsel failed to comply with the Rules regarding service; and (2) counsel's failure contributed to the

expenses that Dunn sought to recover. *Id.* Hatch may have avoided the service of process but Dunn's counsel made his own missteps – it looks like a wash for attorney fee purposes.

The Court will turn next to Dunn's allegation that Hatch's counsel Kim Trout filed a "blizzard" of harassing motions. A review of the arguments advanced in those motions shows that they were largely an attempt to apply strictly the Federal Rules of Civil Procedure, an entirely legitimate line of attack. Indeed, the motions were triggered by the failure of Dunn's counsel to follow the Rules: At one point the Court observed that although it would deny the motions, it was "certainly troubled by the failure of plaintiffs' counsel to follow the Rules." *See Memorandum Decision (Dkt. No. 102)* at p. 3. Here again, the Court can find no basis for an award of attorney fees.

This case was intensely contested, but that was due at least in part to Dunn's claim for punitive damages. That claim was in the case from 2014 until the Court struck the claim in 2016, and it was one factor that led to intense litigation over an otherwise small claim for unpaid wages.

Thus, much of the defense could be called zealous advocacy; nevertheless, part of it did cross the line into obstructionism. During the period of discovery, Dunn propounded interrogatories to Hatch asking for the "gross revenues" in 2013 and 2014. Hatch responded on February 5, 2016, by referring to a certain settlement sheet from the buyer of the salmon catch, Leader Creek Fisheries. That settlement sheet showed that Leader

Creek paid Hatch $184,274.52. *See Answers to Interrogatories (Dkt. No. 78-2).*

That response was highly misleading. Hatch knew when he answered those interrogatories (on February 5, 2016) that almost two years earlier (in April of 2014) Leader Creek had paid Hatch an additional sum of $19,504.53.[1] *See Exhibit B to Miller Declaration (Dkt. No. 78-2).* Dunn's interrogatories had asked for Hatch's gross revenues in 2013 and 2014, and the $19,504.53 was clearly a revenue that Hatch knew about when he answered those interrogatories but failed to reveal.

This was no small matter. From the very beginning of this lawsuit in 2014, Dunn was trying to uncover the fact and amount of that payment, despite Hatch's continual denials that it existed. So, Hatch's failure to reveal the extra payment in response to the interrogatory can only be characterized as a bad faith attempt to obstruct discovery.

Hatch had a chance to redeem himself. After he filed his misleading response, about a month remained in the discovery process for him to file a supplemental response revealing the payment. He failed to take advantage of that opportunity.

Instead, Hatch doubled down on his deception. He filed a motion for summary judgment alleging that the record showed no price adjustment. *See Motion for Summary Judgment Brief (Dkt. No. 50).* Dunn, skeptical of Hatch's discovery responses, filed a

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[1] Leader Creek paid a total of $19,504.53 in two payments; one in December of 2013 and the other in April of 2014.

subpoena on Leader Creek for the final settlement sheet, and asked the Court for an extension of time to respond to Hatch's motion for summary judgment. The Court granted that request for an extension.

In August of 2016, Leader Creek responded to Dunn's subpoena and produced the accurate settlement sheet showing the $19,504.53 extra payment. *See Notice Filed by Plaintiffs (Dkt. No. 66).* Thus, the $19,504.53 sum was finally revealed through Dunn's own digging, not with any help from Hatch.

Hatch acted in bad faith to hide the $19,504.53 payment from Dunn during discovery. His conduct was dishonest and recalcitrant. Under the authorities cited above, that conduct warrants an award of attorney fees.

The issue is the scope of those fees. While Dunn wants an award of all his fees for pursuing this lawsuit, the Court cannot find that Hatch's dishonesty affected every aspect of this case. As discussed above, Hatch often made legitimate arguments and pursued a vigorous defense, while Dunn's counsel at times failed to follow the Rules and caused his own harm. But in two significant areas, Hatch's dishonesty and bad faith resulted in direct harm to Dunn: Hatch forged the employment contract and he hid the payment adjustment from Leader Creek. For the former, the Court has already awarded $5,025.25. The latter warrants a similar award because the harm caused, and the effort necessary to uncover the truth, were comparable. Thus, an award of $5,000 in attorney fees is appropriate for hiding the payment adjustment in discovery.

CONCLUSION

Following up on the Court's prior award of attorney fees for the forged contract, the Court will award plaintiff from defendant the sum of $5,025.25. In addition, the Court will grant in part and deny in part Dunn's motion for attorney fees generally. The Court will award $5,000 in attorney fees for Hatch's bad faith and dishonesty in failing to reveal the payment adjustment of $19,504.53 in response to discovery requests. The motion will be denied to the extent it seeks an award of all the attorney fees incurred by plaintiff for this entire case.

The Court will therefore issue a separate judgment, as required by Rule 58(a), in the total sum of $10,025.25, representing the attorney fees awarded to plaintiff from defendant.

ORDER

In accordance with the Memorandum Decision set forth above,

NOW THEREFORE IT IS HEREBY ORDERED, that the plaintiff receive from defendant the sum of $5,025.25 as attorney fees and costs as a sanction for the bad faith conduct of defendant in submitting a forgery to the Court.

IT IS FURTHER ORDERED, that the motion for attorney fees generally (docket no. 112) be GRANTED IN PART AND DENIED IN PART. It is granted to the extent it seeks $5,000 in attorney fees as a sanction for the bad faith conduct in hiding during discovery a sum of money received. It is denied in all other respects.

DATED: May 23, 2018

[SEAL] /s/B. Lynn Winmill
B. Lynn Winmill
Chief U.S. District Court Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. 1:15-cv-479-BLW

[Filed May 23, 2018]

ELI DUNN and COLIN ALLEN,	)
	)
Plaintiffs,	)
	)
v.	)
	)
BRYCE HATCH and HATCH MARINE ENTERPRISE, LLC, in personam; the F/V SILVER BULLET, Official Number 991159, her engines, machinery, appurtenances and cargo, in rem;	)
	)
Defendants	)

JUDGMENT

In accordance with the Memorandum Decision set forth above,

NOW THEREFORE IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, that the plaintiff receive from defendant the sum of $5,025.25 as attorney fees and costs as a sanction for the bad faith conduct of defendant in submitting a forgery to the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that the motion for attorney fees generally (docket no. 112) be GRANTED IN PART AND DENIED IN PART. It is granted to the extent it seeks $5,000 in attorney fees as a sanction for the bad faith conduct in hiding during discovery a sum of money received. It is denied in all other respects. The Clerk shall close this case.

DATED: May 23, 2018

[SEAL] /s/B. Lynn Winmill
B. Lynn Winmill
Chief U.S. District Court Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. 1:15-cv-479-BLW

[Filed January 4, 2018]

ELI DUNN and COLIN ALLEN,	)
	)
Plaintiffs,	)
	)
v.	)
	)
BRYCE HATCH and HATCH MARINE ENTERPRISE, LLC, in personam; the F/V SILVER BULLET, Official Number 991159, her engines, machinery, appurtenances and cargo, in rem;	)
	)
Defendants	)

FINDINGS OF FACT & CONCLUSIONS OF LAW & ORDER

INTRODUCTION

Plaintiffs Dunn and Allen brought this action to recover wages due to them for working as deckhands on a fishing boat operated by defendant Hatch. The Court held a bench trial on November 13, 2017, and

requested further briefing that was received on December 7, 2017. The matter is now at issue. For the reasons set forth below, the Court will award plaintiff Dunn the sum of $1,905.45 and sanctions as set forth below, and will dismiss the claims of plaintiff Allen.

FINDINGS OF FACT

Plaintiff Dunn

Plaintiff Dunn was employed by defendant Hatch as a deckhand aboard the F/V Silver Bullet for the 2013 Bristol Bay (Alaska) salmon season during the months of June and July. He was verbally promised a wage equal to 10% of the value of the catch minus certain expenses.

The Silver Bullet completed its fishing operations in early July of 2013, and Hatch sold all those fish to Leader Creek Fisheries, receiving a payment of $184,274.52 based on the market price for salmon at that time. To calculate Dunn's wage, Hatch started with a figure equal to 10% of $184,274.52, and then deducted the agreed-upon expenses, ultimately paying Dunn $14,946.73.

At the end of each year, Leader Creek Fisheries calculates its profits and pays boat owners a share of those profits as an incentive to keep them as suppliers. The profit sharing sum is distributed by increasing the price-per-pound paid for the Red Salmon. For the 2013 season, Leader Creek Fisheries increased the price per pound paid to Hatch by 18 ½ cents, and made two profit-sharing payments to Hatch – one in late December 2013, and the other on April 1, 2014. Those two payments totaled $19,054.53.

This payment was described by plaintiffs as a "price adjustment" and by the defendants as "profit-sharing." Actually, it was both: Profits were shared by adjusting the price. But the label is unimportant because the testimony was consistent that this money was often shared with deckhands, if they were returning for the next fishing season, making it part of the "highest wage in the port," a finding that will be explained in the Conclusions of Law section of this decision.

For example, Dunn testified that he had been a deckhand on Bristol Bay fishing boats for one season prior to the 2013 season, and that it was commonly understood that the 10% wage due experienced deckhands like himself would include the final price-adjusted payments that were typically made in December and April, whether called price adjustments or profit sharing. Steve Kurian, a fishing boat owner who has operated for many years in Bristol Bay, testified that he paid his experienced deckhands a 10% wage, and that he shared Leader Creek's profit-sharing payment in 2013 with his crew members who agreed to return the next year.

Therefore, the highest wage in the Bristol Bay port was equal to 10% of the value of the catch, including the profit-sharing/price adjustment payment received in December and April. The Leader Creek profit sharing/ price adjustment payment to Hatch for the fish sold from the Silver Bullet for the 2013 salmon season was $19,054.53. Ten percent of $19,054.53 is $1,905.45.

Plaintiff Allen

Plaintiff Allen did not attend the trial, and no testimony was elicited from him either by video or through a trial deposition. Consequently, defendant Hatch had no opportunity to cross-examine Allen regarding the allegations he made in pre-trial submissions, such as the complaint and affidavits.

Allen's counsel asks the Court to take judicial notice of Allen's pre-trial filings in this case that, he argues, establish Allen's right to a wage equal to 10% of the catch as an experienced deckhand. But throughout this case, Hatch has disputed Allen's claims, and argued that Allen was not experienced and worked only as a "bleeder," meaning that his wage would be lower than even the 5% allowed to inexperienced deckhands. Hatch claims to have paid that smaller wage in full in July of 2013.

If the Court were to take judicial notice of Allen's allegations, fairness would require taking judicial notice of Hatch's contrary allegations – the resulting stalemate would do nothing to advance Allen's case. But more importantly, making any factual findings in favor of Allen – and ignoring the fact that he skipped trial and avoided cross-examination – would be fundamentally unfair to Hatch. Moreover, judicial notice is only allowed for facts "not subject to reasonable dispute," and that condition does not apply to the disputed duties performed by Allen on board the ship. *See Rule of Evidence 201(b).*

Allen's counsel argues that Dunn's testimony at trial established that Allen had the experience

necessary to be considered an experienced deckhand and be entitled to the 10% wage. But once again it would be entirely unjust to allow Dunn to be a surrogate for Allen and deprive Hatch of his right of cross-examination.

Finally, on the eve of trial, Allen's counsel moved for a partial summary judgment that Allen be entitled to a 5% wage based on an affidavit of Steve Kurian submitted by the defense about 19 months earlier. *See Kurian Affidavit* (stating that as a boat owner he paid inexperienced crew members a wage equal to 5% of the value of the catch). Allen's motion was filed more than a year after the deadline for dispositive motions and should be rejected for that reason alone. But as discussed above, the dispute over Allen's duties precludes any summary judgment on this issue, and requires that Allen attend trial and be subject to cross-examination.

For all the reasons stated above, the Court cannot make any factual findings relating to plaintiff Allen. Accordingly, his claims must be dismissed.

CONCLUSIONS OF LAW

A seaman who is cheated on his wages has three options. If his contract was not in writing, he can obtain his wages and, in some instances an additional

sum, pursuant to 46 U.S.C. §§ 10601[1] and 11107.[2] If his contract was in writing, he has two options. First, he can proceed *in rem*, to obtain a lien against – and ultimately sell – the vessel as provided in 46 U.S.C. § 10602(a)[3], or he can proceed *in personam* against his employer under § 10602(c)[4] and receive damages under general maritime law.

Dunn had only an oral contract. His remedy is therefore set by §§ 10601 & 11107. To protect seamen, Congress declared under § 10601 that all contracts for hire must be in writing. To add teeth to this requirement, Congress declared in § 11107 that an oral contract is void, allowing a seaman to quit at any time and still be able to "recover the highest rate of wages at the port from which the seaman was engaged or the

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[1] Section 10601 states in part as follows: "Before proceeding on a voyage, the owner . . . of a fishing vessel . . . shall make a fishing agreement in writing with each seaman employed on board."

[2] Section 11107 states in part as follows: "An engagement of a seaman contrary to a law of the United States is void. A seaman so engaged may leave the service of the vessel at any time and is entitled to recover the highest rate of wages at the port from which the seaman was engaged or the amount agreed to be given the seaman at the time of engagement, whichever is higher."

[3] Section 10602(a) states in part as follows: "When fish caught under an agreement under section 10601 . . . are . . . sold, the vessel is liable in rem for the wages and shares of the proceeds of the seamen. An action under this section must be brought within six months after the sale of the fish."

[4] Section 10602(c) states as follows: "This section does not affect a common law right of a seaman to bring an action to recover the seaman's share of the fish or proceeds."

amount agreed to be given the seaman at the time of engagement, whichever is higher." In other words, these statutes were designed to penalize ship owners who failed to offer written contracts for hire. *See Seattle-First Nat. Bank v. Conway,* 98 F. 3d 1195, 1198 (9th Cir. 1996) (agreeing that "§ 11107 provides *a penalty* against vessel owners who employ seamen without written agreements in violation of § 10601") (emphasis added). The Ninth Circuit has interpreted those statutes to award to a seaman with an oral contract "either the wages he orally agreed to, or the highest rate of wages that could be earned by a seaman at the port of hire who has the same rating as the complainant." *TCW Special Credits v. Chloe Z Fishing Co., Inc.,* 129 F.3d 1330, 1333 (9th Cir. 1997).

Dunn was rated as an experienced deckhand. As discussed above, the highest wage in the Bristol Bay port for an experienced deckhand was equal to 10% of the catch, including the profit-sharing/price adjustment payment received in December and April. It is true that the testimony established that the profit-sharing money is only shared with crew members who agree to return the next season, and Dunn did not agree to return. But § 11107 imposes a penalty equal to the highest wage in the port for a seaman of Dunn's rating, and says nothing about eliminating that penalty to comply with various conditions that ship captains impose at their whim. Applying such conditions would emasculate the statutory penalty and ignore the rule that "legislation for the benefit of seamen is to be construed liberally in their favor." *McMahon v. U.S.*, 342 U.S. 25, 27, (1951).

The Court therefore finds that plaintiff Dunn is entitled to an additional $1,905.45 (10% of $19,054.53).

Hatch's Motion for Judgment

After plaintiffs' case-in-chief, Hatch moved for judgment under Rule 52(c), arguing that plaintiffs failed to prove the elements of their case. The Court will grant the motion regarding plaintiff Allen, for the reasons stated above.

Regarding plaintiff Dunn, plaintiffs' counsel failed to call any witness at trial to establish the amount of the profit sharing/price adjustment paid by Leader Creek. But Hatch had earlier filed – in this case – the affidavit of David Miller, the General Manager of Leader Creek, showing that the sum was $19,054.53. *See Miller Affidavit (Dkt. No. 78-2)(Exhibits A & B).* Hatch filed that affidavit in support of his motion for summary judgment.

While the parties argued over whether the Court could take judicial notice of the Miller Affidavit, the real issue is whether the facts contained in the affidavit, submitted by Hatch in support of his motion, are deemed admitted by Hatch. They are. Factual assertions in pleadings are considered judicial admissions conclusively binding on the party who made them. *See American Title Ins. v. Lacelaw Corp*., 861 F.2d 224, 226 (9th Cir.1988). Because Hatch submitted proof of the sums paid by Leader Creek – and there was no dispute over the accuracy of those figures – that submission was binding on Hatch, and Dunn was not required to prove those sums separately at trial. The motion is accordingly denied as to plaintiff Dunn.

Litigation Fraud

Dunn alleges that Hatch committed litigation fraud by submitting a Crew Contract containing Dunn's signature that had been forged. Hatch submitted that Crew Contract as part of a motion to dismiss early in this case. In his brief accompanying the motion, counsel stated that "Dunn signed an employment contract with Hatch Marine," *see Brief (Dkt. No. 16)* at p. 5. In support, the brief cites an attached affidavit of Hatch. That affidavit had been originally filed in another case in this District (*Hatch v. Dunn, 1:14-CV-518-REB),* and a copy of that affidavit was attached to Hatch's affidavit in this case. Hatch states in the affidavit that "Dunn signed an employment contract to work for me, Bryce Hatch, the owner of the Silver Bullet, for the June 1, 2013, through August 1, 2013, salmon season." *See Hatch Affidavit (Dkt. No. 16-1)* at ¶ 5. Hatch attached a "Crew Contract" to his affidavit containing a signature of Dunn, and accompanied by the affidavits of Phillips Hayman and Roy Gartner, who swore that "Eli Dunn was one of the other crewmembers who signed crew contracts at this time." *See Gartner Affidavit (Dkt. No. 16-1)* at ¶ 2.

Dunn immediately declared the contract a forgery. *See Response Brief (Dkt. No. 20).* Hatch responded not by admitting the forgery or by forswearing all use of the Crew Contract but instead by arguing that forgery cannot form the basis for a civil action. *See Reply Brief (Dkt. No. 23).* In April of 2016, Hatch was still arguing that "Dunn signed an employment contract to work for me . . . .", and arguing that forgery cannot form the basis for a civil action. *See Reply Brief (Dkt. No. 58).*

On August 8, 2016, the Court ruled that submitting a forged document to the court could constitute litigation fraud, and could subject the party submitting the forgery to sanctions by the court. *See Sun World, Inc. v. Olivarria*, 144 F.R.D. 384 (E.D. Cal. 1992) (court awarded sanctions to plaintiff after finding defendant fabricated documents and gave perjured testimony). At this point, quite predictably, plaintiffs pursued the fraud-on-the-court charge, and retained a handwriting expert, Hannah McFarland, whose deposition was taken on September 25, 2017. McFarland is certified with the National Association of Document Examiners and has been qualified as an expert in document examination in at least 75 legal proceedings. *See Deposition* at p. 7. At trial, the Court admitted the deposition into evidence.

Dunn testified at trial that he never signed that contract. In her deposition, McFarland testified that she compared the signature on the Crew Contract submitted by Hatch with an earlier contract actually signed by Dunn, and found that the two signatures were identical in every aspect, something that would be "virtually impossible" to do "manually with the hand." *Id.* at p. 14. She concluded that "one or more of the signatures and initials had to have been artificially placed on one or both of the documents." *Id.* at p. 12. In other words, forged. There is no contrary evidence in the record. And the Court can only conclude that Phillips Hayman and Roy Gartner must have been lying when they said they saw Dunn sign the Crew Contract.

Hatch argues that the Crew Contract is irrelevant because he is not relying on it in any way. But this is not a case where a forged document was filed unintentionally and could easily be ignored. Hatch deliberately filed the document, represented in at least two court filings that Dunn signed it, and filed the false affidavits of Hayman and Gartner doubling down on his own lie.

What did Hatch expect Dunn to do, ignore this fraud? That is simply preposterous. Even if Hatch was not relying on the Crew Contract for any legal defense, it was quite predictable and legitimate for Dunn to expend time and resources to reveal the fraud and challenge Hatch's credibility, if for no other reason.

Under its inherent powers, a court may impose sanctions where a party has "acted in bad faith, vexatiously, or for oppressive reasons." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S.Ct. 1749, 1758 (2014). These powers, however, "must be exercised with restraint and discretion." *Chambers v. NASCO, Inc.,* 501 U.S. 32, 44 (1991). Accordingly, the bad-faith requirement sets a "high threshold," *Primus Auto. Fin. Servs., Inc. v. Batarse*, 115 F.3d 644, 649 (9th Cir.1997), which may be met by willful misconduct, or recklessness that is coupled with an improper purpose. *Fink v. Gomez*, 239 F.3d 989, 993–94 (9th Cir.2001).

Hatch has had many opportunities to rebut or explain the charge of forgery, but has not done so. Based on the discussion above, the Court finds that Hatch forged Dunn's signature, intentionally filed it with the Court, represented in at least two court filings

that Dunn signed the contract, and procured two additional persons to vouch for the authenticity of Dunn's forged signature. This willful conduct satisfies the "high threshold" for finding that Hatch acted in bad faith, and warrants an award of sanctions.

Therefore, the Court will award to Dunn as sanctions the following: (1) The costs of the handwriting expert Hannah McFarland – that is, her fees for drafting her expert report and her fees for attending the deposition; and (2) The attorney fees Dunn incurred for his attorney's time in preparing for and taking the deposition of McFarland and in otherwise addressing the issue of whether Dunn had signed and employment contract.

Conclusion

Plaintiff Allen's claims are dismissed. Plaintiff Dunn is awarded (1) additional wages in the sum of $1,905.45; (2) The costs of the handwriting expert Hannah McFarland – that is, her fees for drafting her expert report and her fees for attending the deposition; and (3) The attorney fees Dunn incurred for his attorney's time in preparing for and taking the deposition of McFarland, and otherwise addressing the issue of whether Dunn had signed an employment contract. Regarding items (2) and (3) on this list, plaintiffs' counsel shall submit an affidavit to the Court within thirty days from this decision detailing the costs and fees awarded here. If plaintiffs' counsel believes he is entitled to attorney fees generally, he shall file his motion within the same time frame, thirty days. The Court expresses no opinion whether plaintiffs are entitled to costs and attorney fees generally and, if so,

whether those fees should be supplemental, or in addition, to the costs and fees awarded as sanctions.

The Court will enter a separate Judgment as required by Rule 58.

ORDER

In accordance with the Findings of Fact and Conclusions of Law set forth above,

NOW THEREFORE IT IS HEREBY ORDERED, that Plaintiff Allen's claims are dismissed.

IT IS FURTHER ORDERED, that Plaintiff Dunn is awarded (1) additional wages in the sum of $1,905.45; (2) The costs of the handwriting expert Hannah McFarland – that is, her fees for preparing and drafting her expert report, and her fees for attending the deposition; and (3) The attorney fees Dunn incurred for his attorney's time in preparing for and taking the deposition of McFarland.

IT IS FURTHER ORDERED, that plaintiffs' counsel shall file within thirty days from the date of this decision (1) any motion for attorney fees, and (2) an affidavit detailing the amount of costs and fees awarded here.

DATED: January 4, 2018

[SEAL] /s/B. Lynn Winmill
B. Lynn Winmill
Chief Judge
United States District Court

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. 1:15-cv-00479-BLW

[Filed May 8, 2017]

ELI DUNN and COLIN ALLEN,	)
	)
Plaintiffs	)
	)
v.	)
	)
BRYCE HATCH, an individual; HATCH MARINE ENTERPRISE, LLC, et al,	)
	)
Defendants.	)
	)

MEMORANDUM DECISION AND ORDER

INTRODUCTION

The Court has before it a second motion to dismiss and strike filed by defendants, Bryce Hatch and Hatch Marine Enterprise, LLC. The motion is fully briefed and at issue. For the reasons explained below, the Court will grant the motion to dismiss the fraud claim and strike any references to punitive damages and claims previously dismissed. Remaining are claims for

breach of contract, and a potential claim for sanctions if a forged signature was submitted to the Court.

BACKGROUND

Plaintiffs were employed by defendants as deckhands aboard the F/V Silver Bullet for the 2013 Bristol Bay (Alaska) salmon season during the months of June and July. They allege that defendant Hatch verbally promised them a ten percent share of the catch.

While the value of the catch is estimated at the time of the vessel's return, buyers typically pay more than the estimate, and the crew is entitled to have this upward "adjustment" added to the value of the catch for purposes of computing the ultimate share due each seaman. The plaintiffs' original complaint alleged that Hatch failed to pay them the full amount due by not including the adjustment in the valuation computation, by falsifying the value of the catch, and by not providing an accurate accounting as required by statute.

Both plaintiffs allege that their agreements were oral in nature and never reduced to writing. This is important because maritime law penalizes ship owners for failing to enter into written contracts by awarding deck hands enhanced damages when they prove that they had only an oral contract, and that it was breached. *See* 46 U.S.C. § 10601; *Seattle-First Nat. Bank v. Conway,* 98 F. 3d 1195, 1198 (9th Cir. 1996) (holding that maritime law "provides a penalty against vessel owners who employ seamen without written agreements in violation of § 10601").

Hatch originally claimed that both plaintiffs had written contracts, but later conceded that plaintiff Allen had only an oral agreement. Hatch continues to allege that plaintiff Dunn has a written agreement, and proffered a contract to plaintiffs' counsel with Dunn's signature affixed. Dunn counters that his signature was forged.

To recover their full wages, plaintiffs originally brought claims for breach of contract and fraud, seeking recovery for (1) wages equal to the highest crew-share paid out of the port of engagement; (2) double wage penalties under state law; (3) punitive damages under the general maritime law; (4) the sale of the vessel *Silver Bullet* to satisfy the wages and penalties due to plaintiffs; and (5) attorney fees. *See Complaint (Dkt. No. 1).*

In an earlier decision, the Court (1) dismissed all claims against Bryce Hatch individually; (2) dismissed claims for punitive damages under maritime law – and wage penalties under state law – sought under a breach of contract claim brought under § 10601, § 11107, and §§ 10602(a), (b) & (c); (3) required plaintiffs to amend their complaint to allege the fraud claim with particularity; and (4) granted plaintiffs time to conduct discovery on whether Hatch concealed the payment of an adjustment by the buyer and understated the amount the buyer paid for the catch. *See Memorandum Decision (Dkt. No. 64).*

After conducting discovery, plaintiffs claim that (1) they found evidence that Hatch understated the amount the buyer paid for the catch; and (2) found no

evidence that Hatch concealed the payment of an adjustment by the buyer. *See Notice (Dkt. No. 66).*

Plaintiffs have now filed their Amended Complaint, and Hatch responded by filing a second motion to dismiss. Hatch seeks to dismiss (1) the fraud claim; and (2) the allegations in the amended complaint that continue to allege claims against Bryce Hatch personally and continue to seek punitive damages for violation of the statutory wage claims. The motions do not affect the breach of contract allegations.

ANALYSIS

Fraud

The Amended Complaint contains a single allegation of fraud. It alleges that Hatch forged plaintiff Dunn's signature on a written contract and "mailed the fraudulently altered contract of employment to counsel for the plaintiff in an effort to avoid the consequences of failing to have a written contract of employment as required by 46 U.S.C. § 10601." *See Amended Complaint (Dkt. No. 65)* at ¶ 10. The record contains Hatch's representation to the Court that Dunn "signed an employment contract." *See Hatch Declaration (Dkt. No. 51-2)* at ¶ 5; *Exhibit C - Crew Contract (Dkt. No. 55-4).* Dunn responds that Hatch forged his signature, and that he never signed that contract. *See Dunn Declaration (Dkt. No. 54-1).* In support, Dunn submitted a report by a handwriting expert concluding that the signature on the written contract proffered by Hatch was "artificially reproduced" – essentially copied and pasted from

another contract that Dunn actually did sign. *See Report (Dkt. No. 55-3).*

Submitting a forged document to a court or to counsel constitutes litigation fraud, and subjects the party submitting the forgery to sanctions by the court. *Sun World, Inc. v. Olivarria*, 144 F.R.D. 384 (E.D. Cal. 1992) (court awarded sanctions to plaintiff after finding defendant fabricated documents and gave perjured testimony). But the forgery does not constitute a cause of action for fraud under Idaho law because it arose after the work for which Dunn seeks wages, and Dunn did not rely on it in any way. *Dengler v. Hazel Blessinger Family Trust*, 106 P.3d 449, 453–54 (2005) (identifying the elements of fraud). Thus, the fraud claim must be dismissed. The issue of forgery remains, however, in two respects. First, if Dunn's written contract was forged, he had a mere oral contract and is entitled to enhanced damages under maritime law. Second, if Dunn's contract was forged, Hatch and/or defense counsel will be subjected to substantial sanctions. Thus, while the dismissal of the fraud claim takes away plaintiffs' last opportunity to collect punitive damages, the forgery issue remains alive in the case and, if proven, would result in enhanced damages and sanctions.

For these reasons the Court will dismiss the fraud claim set forth in paragraph 10 of the Amended Complaint.

Dismissed Claims

The Amended Complaint carries forward claims dismissed by the Court in its earlier decision, and it

refers to punitive damages in several paragraphs although no claim remains that could support an award of punitive damages. Therefore, the Court will order stricken (1) the reference to personal liability of defendant Bryce Hatch in ¶ 2; and (2) the reference to punitive damages in ¶ 4, 5 & 8

Conclusion

The Court will (1) grant the motion to dismiss the fraud claim set forth in paragraph 10 of the Amended Complaint; (2) strike the reference to personal liability of defendant Bryce Hatch in ¶ 2; and (2) strike the reference to punitive damages in ¶ 4, 5 & 8. The breach of contract claims remain, and the issue regarding the forged signature remains as discussed above.

The deadline for dispositive motions and discovery have past, and it appears to the Court that this case is ready for trial on all remaining issues. The Court will order the Clerk to send out a notice of trial setting telephone conference.

ORDER

In accordance with the Memorandum Decision above,

NOW THEREFORE IT IS HEREBY ORDERED, that the motion to dismiss and to strike (docket no. 67) is GRANTED and that (1) the fraud claim contained in paragraph 10 of the Amended Complaint (docket no. 65) is stricken; (2) the reference to personal liability of defendant Bryce Hatch in ¶ 2 is stricken; and (3) the reference to punitive damages in ¶¶ 4, 5 & 8 is stricken.

IT IS FURTHER ORDERED, that the Clerk shall send out a notice of trial setting telephone conference.

DATED: May 8, 2017

DATED: May 8, 2017

[SEAL] /s/B. Lynn Winmill
B. Lynn Winmill
Chief Judge
United States District Court

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. 1:15-cv-00479-BLW

[Filed August 2, 2016]

ELI DUNN and COLIN ALLEN,	)
	)
Plaintiffs	)
	)
v.	)
	)
BRYCE HATCH, an individual; HATCH MARINE ENTERPRISE, LLC, et al,	)
	)
Defendants.	)
	)

INTRODUCTION

The Court has before it (1) motions to dismiss, for summary judgment, and to strike filed by defendants, Bryce Hatch and Hatch Marine Enterprise, LLC, and (2) a motion for additional discovery filed by plaintiffs Dunn and Allen. The Court held oral argument on June 16, 2016, and took the motions under advisement. For the reasons explained below, the Court will grant the defense motions only in part, and grant the plaintiffs' motion for additional discovery.

BACKGROUND

Plaintiffs were employed by defendants as deckhands aboard the F/V Silver Bullet for the 2013 Bristol Bay (Alaska) salmon season during the months of June and July. They allege that defendant Hatch verbally promised them a ten percent share of the catch. While the value of the catch is estimated at the time of the vessel's return, buyers typically pay more than the estimate, and the crew is entitled to have this upward "adjustment" added to the value of the catch for purposes of computing the ultimate share due each seaman. The plaintiffs allege that defendants failed to pay them the full amount due by not including the adjustment in the valuation computation, by falsifying the value of the catch, and by not providing an accurate accounting as required by statute.

Both plaintiffs allege that their agreements were verbal in nature and never reduced to writing. Defendants originally disputed this for both plaintiffs but conceded in oral argument that plaintiff Allen had only a verbal agreement. Defendants continue to allege that plaintiff Dunn had a written agreement, and have proffered a contract with Dunn's signature affixed. Dunn counters that his signature was forged. Whether the contracts for hire are in writing or merely verbal makes a big difference in terms of the remedies available.

As remedies, plaintiffs seek recovery for (1) wages equal to the highest crew-share paid out of the port of engagement; (2) double wage penalties under state law; (3) punitive damages under the general maritime law; (4) the sale of the vessel *Silver Bullet* to satisfy the

wages and penalties due to plaintiffs; and (5) attorney fees.

ANALYSIS

A seaman who is cheated on his wages has three options. If his contract was not in writing, he can obtain his wages and, in some instances an additional sum, pursuant to 46 U.S.C. §§ 10601[1] and 11107.[2] If his contract was in writing, he has two options. First, he can proceed *in rem*, to obtain a lien against – and ultimately sell – the vessel as provided in 46 U.S.C. § 10602(a)[3], or he can proceed *in personam* against his employer under § 10602(c)[4] and receive damages under general maritime law.

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[1] Section 10601 states in part as follows: "Before proceeding on a voyage, the owner . . . of a fishing vessel . . . shall make a fishing agreement in writing with each seaman employed on board."

[2] Section 11107 states in part as follows: "An engagement of a seaman contrary to a law of the United States is void. A seaman so engaged may leave the service of the vessel at any time and is entitled to recover the highest rate of wages at the port from which the seaman was engaged or the amount agreed to be given the seaman at the time of engagement, whichever is higher."

[3] Section 10602(a) states in part as follows: "When fish caught under an agreement under section 10601 . . . are . . . sold, the vessel is liable in rem for the wages and shares of the proceeds of the seamen. An action under this section must be brought within six months after the sale of the fish."

[4] Section 10602(c) states as follows: "This section does not affect a common law right of a seaman to bring an action to recover the seaman's share of the fish or proceeds."

Plaintiffs are pursuing all of these avenues of relief. Under each, they seek punitive damages. The defendants have filed a motion to dismiss arguing that plaintiffs are not entitled to punitive damages under any of these three options. The Court will consider each option and whether plaintiffs are entitled to punitive damages under that option.

Motion to Dismiss – Punitive Damages for Breach of an Oral Contract

Defendants seek to dismiss plaintiffs' claims for punitive damages and double wages under § 11107. The Court will use the single phrase "punitive damages" to refer to (1) punitive damages that are available under general maritime law, *Atlantic Sounding Co., Inc. v. Townsend*, 557 U.S. 404, 411 (2009), and (2) double wage penalties that are available under various state laws.

Section 11107 contains the remedy due to a seaman for breach of an oral contract for hire. While plaintiff Allen is clearly suing under an oral contract, it remains to be determined whether plaintiff Dunn is proceeding under a written or oral contract.

Whether the contract was oral or written makes a difference. To protect seamen, Congress declared under § 10601 that all contracts for hire must be in writing. To add teeth to this requirement, Congress declared in § 11107 that an oral contract is void, allowing a seaman to quit at any time and still be able to "recover the highest rate of wages at the port from which the seaman was engaged or the amount agreed to be given the seaman at the time of engagement, whichever is

higher." In other words, these statutes were designed to penalize ship owners who failed to offer written contracts for hire. *See Seattle-First Nat. Bank v. Conway,* 98 F. 3d 1195, 1198 (9th Cir. 1996) (agreeing that "§ 11107 provides *a penalty* against vessel owners who employ seamen without written agreements in violation of § 10601") (emphasis added).

Plaintiffs seek punitive damages under § 11107. Yet the statute already provides for a potential penalty by allowing a seaman to quit early and receive the highest rate of wages at his port as if he worked for the full duration of the contract. Punitive damages are not typically piled onto a statutory recovery that is already punitive in nature. *Priyanto v M/S/ Amsterdam,* 2009 WL 1202888 (C.D.Cal. April 30, 2009) (holding that "[t]o allow the recovery of punitive damages in addition to this statutory penalty [under the Seaman's Wage Act] would permit an unlawful double recovery of punitive damages for the same act"). This is especially true where the statute says nothing about punitive damages generally, is "precisely drawn [and] detailed," and was enacted to provide a specific remedy where "no remedy was previously recognized, or when previous remedies were problematic. . . ." *See Hinck v. U.S.,* 550 U.S. 501, 506 (2007). In that case, the statutory remedy becomes exclusive and preempts any remedies available elsewhere in the law. *Id.*

Those circumstances exist here. Section 11107 was "precisely drawn" by Congress to protect seamen from the "problematic" remedies associated with oral contracts. Hence, under *Hinck,* the remedies set forth in § 11107 are exclusive. That statute says nothing

about punitive damages generally, and so any claim by Allen for punitive damages under § 11107 must be dismissed. Likewise, if Dunn's contract is ultimately found to be oral in nature, his claim for punitive damages under § 11107 must be dismissed.

Motion to Dismiss – Punitive Damages for Breach of a Written Contract

If Dunn loses his forgery claim, he will be suing for breach of a written contract governed by § 10602. Defendants seek to dismiss his claim for punitive damages under § 10602.

That statute governs wage claims for seaman suing on a written contract. It states that the "the vessel is liable in rem for the wages and shares of the proceeds of the seamen." *See* § 10602(a). That *in rem* action must be "brought within six months after the sale of the fish." *Id.* The statute also requires the employer to "produce an accounting of the sale and division of proceeds under the agreement" and in the event the employer fails to do so, "the vessel is liable for the highest value alleged for the shares." *See* § 10602(b)(1).

This statute – like §§ 10601 & 11107 – sets forth a comprehensive and precisely drawn remedy designed to protect seaman from being shorted on their wages. Accordingly, under *Hinck's* analysis, § 10602 contains the exclusive remedy for a seaman proceeding *in rem* against the vessel on a breach of written contract claim. *Seattle-First Nat. Bank*, 98 F. 3d at 1197 (stating that § 10602 provides "the exclusive remedy for seamen with written fishing agreements" proceeding *in rem*).

While § 10602 contains the exclusive remedy for *in rem* actions, it also contains a savings clause allowing *in personam* actions. Specifically, § 10602(c) states that "[t]his section does not affect a common law right of a seaman to bring an action to recover the seaman's share of the fish or proceeds." *See* § 10602(c). In interpreting this savings clause, the Ninth Circuit has held that the common law right it preserves does not include the right to proceed *in rem* against the vessel for unpaid wages when the seaman's claim is for breach of a written contract. *Fuller v. Golden Age Fisheries,* 14 F.3d 1405, 1407-08. The Circuit in *Fuller* held that § 10602 preempts all *in rem* claims based on a written contract – at most, *Fuller* left open a seaman's right to proceed *in personam* against his employer for breach of the written contract.[5] *Id.*

Plaintiff Dunn argues that (if he loses his forgery claim) he is proceeding here *in personam* against his employer for breach of a written contract. It is undisputed that plaintiffs' employer was defendant Hatch Marine Enterprise LLC. Plaintiffs argue that they are pursuing an *in personam* breach of contract claim against Hatch Marine and are entitled to punitive damages under general maritime law if successful on that contract claim.

However, punitive damages are not available under general maritime law for breach of contract claims. *Gamma-10 Plastics, Inc. v. American President Lines, Ltd.*, 32 F.3d 1244, 1257 (8th Cir. 1994); *Guevara v.*

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[5] The plaintiffs in *Fuller* had written contracts and were proceeding *in rem* against the vessel.

Maritime Overseas Corp., 59 F.3d 1496, 1513 (5th Cir. 1995) (en banc); *Ellenwood v. Exxon Shipping Co.*, 984 F.2d 1270, 1283-84 (1st Cir.1993); *Thyssen, Inc. v. S.S. Fortune Star,* 777 F.2d 57, 62-64 (2d Cir. 1985).

These cases do, however, support a claim for punitive damages under maritime law for torts. *Id.* Here, plaintiffs have alleged the tort of fraud, both in the concealing of the value of the catch and in the forgery of Dunn's signature on the written contract. While plaintiffs cannot, under general maritime law, obtain punitive damages for breach of contract, they can obtain them for the tort of fraud.

Therefore, the Court will grant in part and deny in part the motion to dismiss the punitive damages claims. The Court will grant the motion to the extent it seeks to dismiss punitive damages as a remedy for plaintiffs' breach of contract claims under § 11107 (oral contracts), § 10602 (written contracts & *in rem* action), and general maritime law (written contract & *in personam* action), but will deny the motion to the extent it seeks to dismiss punitive damages as a remedy for the fraud claim.

Motion for Summary Judgment – Statute of Limitations

Defendants seek summary judgment on the ground that plaintiffs failed to file their lawsuit within the six-month statute of limitations set forth in § 10602. The statute states that "[a]n action under this section must be brought within six months after the sale of the fish." Plaintiffs filed their lawsuit more than a year after the fish were sold.

The limitations period does not apply to Allen's claim – it applies only to claims based on written contracts. *Seattle-First Nat. Bank*, 98 F. 3d at 1197. If Dunn's claim is ultimately found to be based on a written contract, it would be dismissed to the degree he is proceeding *in rem* under § 10602, unless he can show that defendants fraudulently concealed the true value of the catch. *See Key Bank of Washington v. F/V Highland Light,* 1995 WL 415296 (W.D.Wash. Feb. 13, 1995). Dunn has alleged that defendants concealed the value of the catch, an issue that will be discussed further below.

But proceeding *in rem* is not Dunn's only option – he could also proceed *in personam* against Hatch Marine. The defendants do not cite the limitations period applicable to an *in personam* action under general maritime law.

Because questions exist about whether Dunn's claim is timely, and because the limitations period clearly does not apply to Allen's claim, the Court will deny the motion for summary judgment to the extent it is based on the limitations period.

Motion for Summary Judgment – Fraud Claim

Defendants move for summary judgment dismissing any claim for fraud or forgery. Defendants claim that forgery is not a cause of action, and that the record contains no evidence of fraud.

But the record does contain defendant Hatch's representation to the Court that Dunn "signed an employment contract" and that "[t]here was no price adjustment for the 2013 salmon catch." *See Hatch*

Affidavit (Dkt. No. 51-2) at ¶¶ 5 & 15. Dunn responds that Hatch forged his signature, and that he never signed that contract. *See Dunn Declaration (Dkt. No. 54-1).* In support, Dunn submitted a report by a handwriting expert concluding that the signature on the written contract proffered by defendants was "artificially reproduced" – essentially copied and pasted from another contract that Dunn actually did sign. *See Report (Dkt. No. 55-3).* In addition, Dunn alleges that once he told Hatch that he was not returning for the next year, Hatch told him that "he only paid [adjustments] to guys who returned for the next year." *See Dunn Declaration, supra,* at p. 2. Dunn also claimed that in his experience, the buyer in this case (Leader Creek Fisheries) "customarily" pays an adjustment. *Id.*

Dunn is claiming Hatch has lied to him and this Court about the contract for hire and the adjustment. These conflicting allegations at least raise questions of fact.

Defendants argue, however, that the forgery claim cannot constitute a cause of action. But submitting a forged document to a court would constitute litigation fraud, and subject the party submitting the forgery to sanctions by the court. *Sun World, Inc. v. Olivarria*, 144 F.R.D. 384 (E.D. Cal. 1992) (court awarded sanctions to plaintiff after finding defendant fabricated documents and gave perjured testimony). But plaintiffs' are also alleging a more traditional fraud with their allegations that defendants concealed the buyer's payment of an adjustment. So the Court rejects the argument that the fraud claim is limited to the

forgery allegation and that forgery is not a cause of action.

The defendants raise two additional objections to the fraud allegations. First, they point out that plaintiffs' amended complaint fails to explain this fraud with the particularity required by Rule 9(b). The Court agrees. Although plaintiffs' counsel has explained his fraud claim with the necessary detail as he has responded to the defendants' motions, the fact remains that plaintiffs' complaint is completely insufficient. Plaintiffs are entitled to one opportunity to amend their complaint to provide the necessary specificity required by Rule 9(b). *See Vess v. Ciba-Geigy Corp. U.S.,* 317 F. 3d 1097, 1107 (9th Cir. 2003) (holding that "leave to amend should be granted if it appears at all possible that the plaintiff can correct the defect" under Rule 9(b)).

The defendants' second objection is that the record contains no evidence that they concealed an adjustment or committed any other fraud regarding the value of the catch. Defendants are correct – the record contains no such evidence. Plaintiffs have, however, filed a motion under Rule 56(d) asking for more time to do discovery on the adjustment issue.

That motion was filed about 3 months after the discovery period was over. Plaintiffs' excuse is that they were not alerted to the issue until April 1, 2016, when Hatch filed his Declaration in support of his summary judgment motion denying that any adjustment had been paid. Up until that time, plaintiffs were assuming Hatch got an adjustment but just refused to pay Dunn's share. *See Dunn*

Declaration, supra, at p. 2 (stating that Hatch told Dunn "he only paid [adjustments] to guys who returned for the next year"). Skeptical about Hatch's denial, plaintiffs' counsel served a subpoena duces tecum on the buyer (Leader Creek Fisheries) for records relating to the price paid for the salmon and any adjustment, but the buyer has never responded. *See Merriam Declaration (Dkt. No. 60-2)* at ¶ 2. Plaintiffs now seek additional time to determine from Leader Creek Fisheries whether any adjustment was paid.

The Court finds good cause to allow this very narrow discovery, and will therefore grant the Rule 56(d) motion. The Court will grant plaintiffs 30 days to do discovery limited to whether Leader Creek Fisheries paid any adjustment to defendants concerning the salmon catch at issue here.

Motion for Summary Judgment – Bryce Hatch Individual Liability

Defendants moved for summary judgment on the claims against Bryce Hatch individually, arguing that he acted at all times as the owner of defendant Hatch Marine Enterprise LLC. The plaintiffs did not object, and the Court will grant the motion for summary judgment to that extent.

Motion for Summary Judgment – Full Payment

Defendants argue that they have paid the plaintiffs their full share. But resolution of this issue must await the discovery on the adjustment. The Court will therefore deny the motion at this time without prejudice to the rights of defendants to refile the

motion depending on the outcome of the further discovery.

Motion to Strike

Defendants moved to strike the Declaration of Greg Smith that was filed by plaintiffs only after all briefing was completed. Plaintiffs have not explained why they could not have filed this Declaration in a timely fashion to allow defendants a fair opportunity to respond. The Declaration will be struck.

Defendants also seek to strike statements made by Dunn and Allen regarding what other seamen told them they received as a crew-share. *See Dunn Declaration, supra* (stating that "I know other similarly-situated deckhands who hired out of Naknek Alaska and who received a crewshare of between 12% and 17% for the salmon season"); *Allen Declaration, supra* (stating that "12% is not uncommon as the crewshare for an experienced deckhand similarly-situated out of Naknek Alaska during the salmon season"). These statements are clearly hearsay, and plaintiffs have not offered any exception to allow their admission. The statements will be struck.

Conclusion

The Court will grant the motion to dismiss in part by dismissing any claim for punitive damages under maritime law – and wage penalties under state law – sought under a breach of contract claim brought under § 10601, § 11107, and §§ 10602(a), (b) & (c). Plaintiffs retain, however, their right to seek punitive damages for fraud if they properly amend their fraud claim as

discussed above. The motion to dismiss will be denied in all other respects.

The Court will grant the motion for summary judgment to the extent it seeks dismissal of (1) all claims against Bryce Hatch individually; and (2) the fraud claim unless plaintiff cures the pleading insufficiency under Rule 9(b) within 10 days.

The Court will grant the motion to strike the statements of Dunn and Allen and the Declaration of Greg Smith, as explained above. The Court will also grant the motion for additional discovery under Rule 56(d), allowing plaintiffs to do discovery within the next 30 days limited to (1) the purchase price paid by Leader Creek Fisheries for the catch at issue here, and (2) whether Leader Creek Fisheries paid to Hatch any adjustment concerning the salmon catch at issue here.

When the discovery is completed, the parties shall contact the Court's Law Clerk David Metcalf (dave_metcalf@id.uscourt.gov) about scheduling the next phase of this litigation.

ORDER

In accordance with the Memorandum Decision above,

NOW THEREFORE IT IS HEREBY ORDERED, that the motion to dismiss (docket no. 49) shall be GRANTED IN PART AND DENIED IN PART as set forth above.

IT IS FURTHER ORDERED, that the motion for summary judgment (docket no. 50) is GRANTED IN PART AND DENIED IN PART as set forth above.

IT IS FURTHER ORDERED, that plaintiffs shall amend their fraud claim to comply with Federal Rule of Civil Procedure 9(b) within 30 days from the date of this decision or have the claim dismissed without further notice.

IT IS FURTHER ORDERED, that the motion for discovery (docket no. 60) is GRANTED. The plaintiffs shall be granted 30 days to do discovery limited to (1) the purchase price paid by Leader Creek Fisheries for the catch at issue here, and (2) whether Leader Creek Fisheries paid to Hatch any adjustment concerning the salmon catch at issue here. When the discovery is completed, the parties shall contact the Court's Law Clerk David Metcalf (dave_metcalf@id.uscourt.gov) about scheduling the next phase of this litigation.

IT IS FURTHER ORDERED, that the motion to strike the Declaration of Greg Smith (docket no. 62) is GRANTED.

IT IS FURTHER ORDERED, that the motion to strike the statements of Dunn and Allen (docket no. 57) is GRANTED.

DATED: August 2, 2016

[SEAL] /s/B. Lynn Winmill
B. Lynn Winmill
Chief Judge
United States District Court

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-35485
D.C. No. 1:15-cv-00479-BLW
District of Idaho, Boise

[Filed January 8, 2020]

ELI DUNN,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
BRYCE HATCH; et al.,	)
	)
Defendants-Appellees.	)
	)

No. 18-35511
D.C. No. 1:15-cv-00479-BLW
District of Idaho, Boise

ELI DUNN; COLIN ALLEN,	)
	)
Plaintiffs-Appellees,	)
	)
v.	)
	)
BRYCE HATCH; HATCH	)

MARINE ENTERPRISE, LLC, in personam,

Defendants-Appellants.

Before: McKEOWN and BYBEE, Circuit Judges, and GAITAN,* District Judge.

The panel has voted to deny the petitions for panel rehearing.

The full court has been advised of the petition for rehearing and rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for panel rehearing and the petition for rehearing en banc (No. No. 18-35485 Dkt. 47, No. 18-35511 Dkt. 41) are denied.

* The Honorable Fernando J. Gaitan, Jr., United States District Judge for the Western District of Missouri, sitting by designation.

APPENDIX G

46 U.S. Code § 10601 Fishing Agreements

(a) Before proceeding on a voyage, the owner, charterer, or managing operator, or a representative thereof, including the master or individual in charge, of a fishing vessel, fish processing vessel, or fish tender vessel shall make a fishing agreement in writing with each seaman employed on board if the vessel is –

(1)

at least 20 gross tons as measured under section 14502 of this title, or an alternate tonnage measured under section 14302 of this title as prescribed by the Secretary under section 14104 of this title; and

(2)

On a voyage from a port in the United States.

(b) The agreement shall-

(1)

state the period of effectiveness of the agreement;

(2)

include the terms of any wage, share, or other compensation arrangement peculiar to the fishery in which the vessel will be engaged during the period of the agreement; and

(3)

include other agreed terms.

(Pub. L. 100–424, § 6(a), Sept. 9, 1988, 102 Stat. 1591; Pub. L. 104–324, title VII, § 739, Oct. 19, 1996, 110 Stat. 3942; Pub. L. 107–295, title IV, § 441(a), (b), Nov. 25, 2002, 116 Stat. 2131.)

APPENDIX H

46 U.S. Code § 11107 Unlawful Engagements Void

An engagement of a seaman contrary to a law of the United States is void. A seaman so engaged may leave the service of the vessel at any time and is entitled to recover the highest rate of wages at the port from which the seaman was engaged or the amount agreed to be given the seaman at the time of engagement, whichever is higher.

(Pub. L. 98-89, Aug. 26, 1983, 97 Stat. 580.)