No. 19-____

In the
Supreme Court of the United States

VICTOR ALLAN CLARK,

Petitioner,

v.

CELEBRITY CRUISES, INC., Etc., et al.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does the Jones Act, 46 U.S.C. §§ 30104, 30509 (adopting by reference 45 U.S.C. §§ 55, 56) render void a foreign forum selection clause in a Seaman's employment contract which calls for him to provide labor to a business incorporated in Michigan as a crewmember aboard ships carrying passengers to and from ports of the United States?

II. Do the substantive contract principals of the general maritime law allow the owners of those ships (both headquartered in Florida) to enforce a forum selection clause in a Seaman's employment contract as a "Third Party Beneficiaries" when they are not parties to or named in the contract?

PARTIES

Petitioner Victor Allan Clark is seaman who suffered injury twice while working as a crewmember aboard Respondent's ships. As Plaintiff and Appellant in courts of the State of Florida, he sought personal injury damages caused by Respondent's negligence, failure to provide seaworthy vessels and failure to provide maintenance & cure under the general maritime law.

Respondents Celebrity Cruises, Inc. ("Celebrity") and Royal Caribbean Cruises Ltd. ("RCCL") own(ed) the ships on which Mr. Clark suffered his injuries. They are both publicly traded foreign corporations having a joint principal place of business in Miami, Florida. RCCL owns 100% of Celebrity. As Defendants and Appellees in the Florida state court proceedings, they obtained and successfully defended dismissal of Mr. Clark's case on the basis of a forum selection clause in a contract to which they were neither parties, named entities nor intended beneficiaries.

Mr. Clark here seeks certiorari review of the orders of Florida's appellate courts which allowed that dismissal to stand.

RELATED PROCEEDINGS

Highest State Court Where a Decision Could be Had: Supreme Court of Florida; Docket No. SC19-866; *Victor Allan Clark v. Celebrity Cruises, Inc. etc., et al.* Its Order declining to accept jurisdiction to review the opinion of the intermediate appellate court was entered November 22, 2019.

Intermediate Appellate Court: Florida District Court of Appeal, Third District; Docket No. 3D18-1233, *Victor Allan Clark v. Celebrity Cruises, Inc. etc., et al.*; Opinion affirming dismissal issued April 24, 2019.

Trial Court: Eleventh Judicial Circuit in and for Miami-Dade County Florida; Docket No. 2017-24287-CA-01; *Victor Allan Clark v. Parkwest Galleries, Inc. et al.*; Order of Dismissal entered May 24, 2018.

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ORDERS & OPINIONS BELOW

The Florida Supreme Court declined to accept discretionary review jurisdiction by order which is reported unofficially. *See* 2019 WL 6248554. The intermediate appellate opinion which the Florida Supreme Court let stand is officially reported. *Clark v. Celebrity Cruises, Inc.*, 271 So. 2d 1169 (Fla. 3d DCA 2019). The order of the trial court was not reported.

JURISDICTIONAL STATEMENT

This Court's jurisdiction arises from 28 U.S.C. § 1257(a) (review of orders of State courts of last resort which decide federal questions). The order under review was entered November 22, 2019 and let stand an intermediate appellate opinion which both failed to address governing federal statutes and misapplied federal precedent established pursuant to this Court's Constitutional grant of admiralty & maritime jurisdiction. No motions for rehearing ensued. This Petition is timely pursuant to Rules 13.1 and 29.2.

STATUTES INVOLVED IN THE CASE

1. 45 U.S.C. § 55. Contract, rule, regulation, or device exempting from liability; set-off

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this

chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

2. 45 U.S.C. § 56. Actions; limitation; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

3. 46 U.S.C. § 30104. Personal injury to or death of seamen

A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States

regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section

4. 46 U.S.C. § 30509[(a)]. Provisions limiting liability for personal injury or death

(a) Prohibition. —

(1) In general.—The owner, master, manager, or agent of a vessel transporting passengers between ports in the United States, or between a port in the United States and a port in a foreign country, may not include in a regulation or contract a provision limiting—

(A) the liability of the owner, master, or agent for personal injury or death caused by the negligence or fault of the owner or the owner's employees or agents; or

(B) the right of a claimant for personal injury or death to a trial by court of competent jurisdiction.

(2) Voidness.—A provision described in paragraph (1) is void.

STATEMENT OF THE CASE AND SPECIFICATION OF FEDERAL QUESTIONS

A. THE ILLEGAL CONTRACT GIVING RISE TO THIS PETITION AND ITS CREATOR, PARK WEST GALLERIES, INC.

Petitioner Clark is a Nicaraguan national born and raised in the city of Bluefields. [R 98][1] The Central Intelligence Agency reports that Nicaragua is "second poorest country in the Western Hemisphere [with] widespread underemployment and poverty[.]" *The World Fact Book*, Nicaragua (September, 2018).[2] Bluefields, in turn, is possibly the poorest Nicaraguan city: as of 2014, up to eight out of ten residents were unemployed and its economy "depend[ed] fully on the drug trade. Eyder Peralta, *Nicaragua Follows Its Own Path In Dealing With Drug Traffickers*, published by National Public Radio (October 26, 2014).[3] Not surprisingly, Bluefields is widely known in maritime circles as prime recruiting grounds for seamen.

On August 5, 2014, Mr. Clark executed a so-called "Independent Contractor Agreement" ("ICA") with a purported Turks & Caicos corporation, non-party Caribbean Staffing Solutions (the "Company"). [R 98-119] The ICA nominally called for Mr. Clark to

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[1] "R" as used herein refers to the record before the State of Florida District Court of Appeal, Third District, Case No. 3D18-1233.

[2] Available at (last accessed February 19, 2020): https://www.cia.gov/library/publications/the-world-factbook/docs/summary/NU_general_summary.pdf .

[3] Available at (last accessed February 19, 2020): https://www.npr.org/sections/parallels/2014/10/26/357791551/nicaragua-follows-its-own-path-in-dealing-with-drug-traffickers.

work as a seaman aboard cruise ships selling "fine art" and related products. [R 98, 105, 110] As the ICA's terms and history make clear, however, in reality the Company and its ICA were merely vehicles which Mr. Clark's actual shipboard employer – Park West Galleries, Inc. ("Park West") – used to evade United States laws for the benefit and protection of seamen.

According to its website, Park West has sold "fine art to more than 2 million customers since 1969." parkwestgallery.com/about (last accessed February 19, 2020).[4] Park West has been hosting art auctions aboard Celebrity and RCCL ships since 1995. *Id.* Its "world headquarters – and Park West Museum - are both located in Southfield, Michigan," while it "also has an 181,000 square-foot fulfillment center in Miami Lakes, Florida[.]" *Id.*; *see also Park West Galleries, Inc. v. Hochman*, 692 F. 3d 539, 541 (6th Cir. 2012).

According to the letterhead on each of its pages, the ICA which Mr. Clark signed came into circulation on May 5, 2013 ("Version #1"). [R 98-119] Curiously, Park West is one of the only two third parties which the ICA identified by name (the other being a related entity, Vista Fine Arts). [R 99, 106, 111] The ICA expressly required Mr. Clark to disavow any "legal relationship" with "Park West" and to waive all

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[4] www.parkwestgallery.com/about/. It boggles the mind to think that there are more than 2 million different pieces of "fine art" in the world, let alone that Park West has put its hands on all of them. Indeed, Park West has been subject to numerous suits and class actions alleging art fraud, *see, e.g., In re: Park West Galleries, Inc. Marketing and Sales Practices Litigation*, MDL Case No. 09-2076, [R 216, 288], and has filed numerous "SLAP" suits against those who criticize its practices. *See, e.g., In re: Park West Galleries, Inc., Litigation*, MDL Case No. 12-2378.

"claims of any type or nature against" Park West. [R 99, 103, 113, 115] However, the ICA also identified Park West as a "Third Party Auction Firm ('TPAF')" and required Mr. Clark to sell Park West's "fine art." [R 98, 105, 110] The ICA required him "to serve on one or more vessels designated by the Company (or [Park West])." [R 99] It required Mr. Clark to "comply with the policies, procedures, and regulations of" Park West upon pain of fines and termination; to use Park West's computers, software, databases and scanners; to inventory all of Park West's "fine art" inventory aboard ship; and to take grievances to "Park West's Director of Shipboard Operations" on land, in Miami Lakes, Florida. [R 102-4, 109-10, 117-18].

The ICA entirely prohibited Mr. Clark from working in any capacity in the art industry on any cruise ship (anywhere), in North America and on any Caribbean Island for a period of 24 months following the end of his employment with Park West. [R 105-6] It also imposed onerous confidentiality obligations, upon pain of $10,000 fine and criminal prosecution. [R 104-5] Once again, the only third parties specifically identified by name as having rights to enforce these obligations were Park West and its sibling. [R 106] In sum, Park West was Mr. Clark's actual employer aboard ship, even if only in a "borrowing" capacity.

While the ICA begrudgingly acknowledged Mr. Clark's right to maintenance & cure, it purported to limit his right to "Medical Coverage" to "a period of 16 weeks" and required him to waive his right to "found," i.e., living expenses aboard ship. [R 100]. In at least eight (8) locations, however, the ICA also required Mr. Clark to indemnify and hold Park West harmless from any "loss, claim, damage, expense or liability

including attorney fees)" which Park West might incur "arising out of [Mr. Clark]'s conduct, actions, or omissions[.]" [R 100, 101, 104, 105, 107, 109, 110].

Most outrageously, ICA includes no less than nine (9) separate waivers and releases which purport to deny Mr. Clark of his rights to bring any claim he could ever possibly have against Park West, including "personal injuries, medical malpractice, wages, or compensation, workers compensation, any fringe benefits not explicitly provided under this Agreement, claims under the Jones Act, claims under the Longshore Act, claims for maintenance and cure, claims for unseaworthiness... or any other claims of any type or nature." [R 99, 101, 103, 107, 108, 111, 112, 115]. It even purported to deprive Mr. Clark of his right to a jury trial for claims against his employer. [R 112-13]

Congress has rendered the foregoing waivers, limitations, indemnities, and releases illegal and void. *See* 45 U.S.C. § 55[5] ("Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void"); 46 U.S.C. § 30509 ("The owner... of a vessel transporting passengers between... a port in the United States and a port in a foreign country, may not include in a regulation or contract a provision limiting (1) [its] liability... for personal injury[;]" and such "provision... is void."). Given that:

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[5] § 55 applies to Park West, Mr. Clark's "borrowing" employer, by virtue of the Jones Act's extension of "Laws of the United States regulating recovery for personal injury to... a railway employee" to seamen. 46 U.S.C. § 30104. *See American Dredging Co. v. Miller*, 510 U.S. 443, 455-56 (1994).

- Park West is the actual employer of the seamen who sell its art;
- Park West maintains its headquarters in Michigan and its "fulfillment center" in Florida;
- Respondents are both headquartered in Miami;
- Respondents are both United States maritime employers subject to the Jones Act, *see Royal Caribbean Cruises Ltd. v. Payumo*, 608 So. 2d 682, 682-83 (Fla. 3d DCA 1992);
- Park West has been selling its "fine art" aboard Respondent's ships since 1995;
- The ICA only came into existence in 2013;
- The only entities identified by name in the ICA are Park West and its sibling;
- The overwhelming concern of the ICA is to force Mr. Clark to give up any and all claims of any kind which could ever possibly have against Park West and to otherwise protect Park West from "loss";
- The ICA prohibits Caribbean Staffing from placing former Park West seamen into almost any other art industry position whatsoever; and
- The ICA is replete with terms patently illegal under United States law,

it is obvious that both Caribbean Staffing and the ICA are shams, parts of a scheme Park West concocted to

evade its obligations to its seaman employees under United States law.

B. THE VENUE PROVISIONS ON WHICH RESPONDENTS WOULD RELY IS VOID, WHILE THE ICA DEMONSTRATES THAT RESPONDENTS WOULD HAVE NO RIGHTS UNDER IT ANYWAY.

The issue for resolution here is whether Respondents, Florida residents, can invoke a foreign forum selection clause in the ICA which would send Mr. Clark to Turks & Caicos to litigate against them. They cannot.

Foremost, the Turks & Caicos clause is void under federal statutes. Paragraph 18 of the ICA provided:

> 18. JURISDICTION AND VENUE
>
> A. *The parties agree* that, except as provided in section 18(8) below, any and all legal proceedings arising from or relating in any way to [Mr. Clark]'s services for Company or for any TPAF, or arising from or relating to this Agreement or any alleged breach thereof, shall be brought only in a court in the Turks & Caicos Islands. For that purpose, [Mr. Clark] irrevocably consents to the jurisdiction of the courts of the Turks & Caicos Islands and waives any right [he] may have to contest such jurisdiction or initiate legal proceedings in any other forum.
>
> B. *The Company or any TPAF may*, at their discretion, initiate legal proceedings against [Mr. Clark] *in a forum other than the Turks*

> *& Caicos Islands* for the purpose of seeking injunctive relief to restrain [him] from breaching any of the confidentiality or noncompetition provisions of this Agreement. In the event such a proceeding is brought, *the Company or any TPAF may also assert, in conjunction with such claim, any money damage claim against [him].* Further, in the event such an action is brought, the applicable law shall be the law of the jurisdiction in which the action is filed.

[R 111-12] [e.s.] On their face, these provisions and the jury trial waiver violate Mr. Clark's right to bring a jury trial against his employer in his choice of the district where Park West resides, where it does business, or where his cause of action arose. *See* 45 U.S.C. § 56 (venue is had "in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business"); 46 U.S.C. § 30104. ("the seaman may elect to bring a civil action at law, *with the right of trial by jury*, against the employer.") [e.s.] Thus, they are void. 45 U.S.C. § 56; 46 U.S.C. § 30509.

Congressional policy providing seamen the right to trial in courts of law in the venue of their choosing is overwhelming. "The Jones Act provides injured seamen with a cause of action and a right to a jury. 46 U.S.C. § 30104." *The Dutra Group v. Batterton*, 588 US _, 139 S.Ct. 2275, 2281 (2019). "We hold that petitioner's right to bring the suit in any eligible forum is a right of sufficient substantiality to be included within the Congressional mandate of § 5 of the Liability Act. [***] The right to select the

forum... is a substantial right." *Boyd v. Grand Trunk Western R. Co.*, 338 US 263, 265, 266 (1949). While the "Saving-to-Suitors" clause of 28 U.S.C. §1333(1) allows most maritime plaintiffs to file in a state court, seamen's and railroad workers' actions are not removable, "even the event of diversity of the parties." *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 455 (2001) (*citing* "28 U. S. C. §1445(a) (incorporated by reference into the Jones Act")).

Second, the ICA itself demonstrates that Respondents have no rights under the forum selection clause. The ICA mentions "cruise lines" generally (though never Respondents specifically) in numerous provisions. However, both are conspicuously absent from the reach of ¶18's illegal forum selection clause. On its face, ¶18 binds only "the parties," i.e., Mr. Clark and Caribbean Staffing.[6] Moreover, ¶14 of the ITA expressly defines which third-parties have rights to enforce it: limits them to only Park West and Vista:

> This Agreement requires the personal services of [Mr. Clark] and shall not be assignable by [him]. The Company may assign this Agreement. [Mr. Clark]'s agreements herein shall run in favor of the Company, and *any TPAF (including Park West and Vista Fine Arts) to which [his] services are made available shall be entitled to the benefits of this Agreement.*

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[6] In fact, if legal the forum selection clause would bind ***only Mr. Clark***. Park West is not "a party" and while ¶ 18.A nominally binds "the Company," ¶ 18.B. allows both the Company and Park West to sue Mr. Clark anywhere, for anything, so long as they also allege a breach of the ICA's confidentiality provisions.

[R 110-11] [e.s.] Again, neither "cruise lines" generally nor Respondents specifically are included. Under the familiar federal rule of construction "*expressio unius est exclusio alterius,*" their omission must be construed as intentional. In light of these intentional omissions, and as a matter of law, Respondents simply cannot demonstrate that the forum selection clause was intended for their direct benefit and therefore cannot invoke it.

C. PROCEEDINGS BELOW AND FEDERAL QUESTIONS RAISED

Mr. Clark originally sued Celebrity, RCCL and Park West. [R 7-31] He alleged that he had been hired to work as a seaman and crewmember, first aboard the *M/V Celebrity Silhouette* and second aboard the *M/V Navigator of the Seas*. [R 2] He further alleged that Celebrity and RCCL owned each ship respectively, and that Park West had become his borrowing employer aboard each ship. [R 8-11] He alleged that he suffered personal injuries on September 14, 2014 aboard the *Silhouette*, and that he sustained additional injuries on January 2, 2015 as a crewmember of the *Navigator*. [R 8]

Mr. Clark demanded trial by jury on all of his claims. [R 17, 22, 23, 24, 27, 28, 30, 31].

Park West moved to dismiss the Complaint "in its entirety." [R 34, 38]. Park West invoked a forum selection clause governing "the parties" to the ICA [R 40-62] and precedent form the Florida Third District Court of Appeal, *Durkovic v. Park West Galleries, Inc.*, 217 So. 3d 159 (Fla. 3d DCA 2017) to argue that the Turks & Caicos was the exclusive and mandatory venue for the claims against it. [R 34-36] It further

argued that Celebrity and RCCL were indispensable parties, such that they too should be dismissed. [R 37]

Mr. Clark then amended his complaint to drop Park West as a party Defendant. [R 67-84] He renewed allegations against Celebrity and RCCL as the owners of the respective ships [R 67-73] and asserted three (3) general maritime law claims against each: negligence, unseaworthiness and failure to pay maintenance & cure. [R, 73-78, 78-84]. Mr. Clark again demanded trial by jury. [R 75, 77, 78, 81, 83, 84]

Celebrity and RCCL responded by moving to dismiss on the same grounds as Park West had, i.e., that *Park West* was an indispensable party and that *Durkovic* mandated venue in Turks & Caicos. [R 87-95] However, admitting that neither was a party to or even named in the ICA [R 98-119], Respondents argued (without explanation) that they could enforce the forum selection clause *under Florida law* because they somehow had "a close relationship" with Park West and the claims *against them* somehow "arose from" the ICA. [R 91-92].

Mr. Clark opposed the motion to dismiss by raising the federal questions now at bar. [R 122-133]. He first argued that his claims against Celebrity or RCCL arose from their breaches of duties imposed by the general maritime law upon shipowners, without relying upon or even implicating any terms of the ICA. [R 123, 125]. He argued that the entire ICA was void under *federal law*, quoting 46 U.S.C. § 30509(a) entirely:

(a) Prohibition. —

> (1) In general.—The owner, master, manager, or agent of a vessel transporting passengers between ports in the United States, or between a port in the United States and a port in a foreign country, may not include in a regulation or contract a provision limiting—
>
> > (A) the liability of the owner, master, or agent for personal injury or death caused by the negligence or fault of the owner or the owner's employees or agents; or
> >
> > (B) the right of a claimant for personal injury or death to a trial by court of competent jurisdiction.
>
> (2) Voidness.—A provision described in paragraph (1) is void.

[R 123] He cited this Court's binding precedent holding that shipowners cannot contractually circumvent their duties to provide seaworthy vessels, maintenance and cure. [R 124, 125] *citing Reed v. S.S. Yaka*, 373 U.S. 410, 413 (1963), *Vaughn v. Atkinson*, 369 U.S. 527, 532-33 (1962) ("no agreement is competent to abrogate" the duty to provide maintenance & cure) and *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946). He demonstrated that the express terms of the forum selection preclude enforcement by Respondents because it expressly

limited its reach to "the Parties" (Caribbean Staffing and Mr. Clark). [R 127-28] He argued that only parties to a contract can enforce its terms and that Respondents did not satisfy any known exception to this rule (such as third-party beneficiary status). [R 128-132] (*citing In re Majestic Blue Fisheries, LLC,* No. CV 11-00032, 2014 WL 3728556 (D. Guam 2014), *aff'd sub nom. Yang v. Majestic Blue Fisheries, LLC*, 876 F. 3d 996 (9th Cir. 2017)).

In reply, Respondents claimed, again without explanation, to have a "direct and close contractual relationship with Caribbean Staffing and Park West." Once again relying exclusively on *Florida law*, they claimed without explanation that the ICA itself demonstrated their "close relationship" with Park West, whereas neither Park West nor either Respondent is a party to the ICA, which never mentions either Respondent by name. [R 136-37, 138-40] Respondents also produced an utterly unauthenticated "Art Auction Concession Agreement Between Celebrity Cruises, Inc. and Vista RC, LLC" effective September 1, 2015 (eight months after Mr. Clark was last injured) [R 148, 153]. Lastly, Respondents invoked a second unauthenticated "Art Auction Concession Agreement Between Royal Caribbean Cruises Ltd. and Vista RC, LLC" effective January 20, 2013. [R 220, 225]. Respondents never shed light on how either contract with a non-party illuminated the nature of their relationship with Park West, let alone as that relationship pertains to Mr. Clark's claims against Respondents them for their

own breaches of maritime duties as shipowners.[7]

In the end the trial court announced simply that "[t]he Third DCA has spoken," referring to the *Durkovic v. Park West* opinion, and dismissed the case. [R 295, 298-99].

Mr. Clark appealed to the Florida District Court of Appeals, Third District (his *Initial Brief* is available at 2018 WL 5981798 and *Reply Brief* at 2019 WL 1212659). Therein he renewed his federal arguments that the forum selection clause was void:

- Under federal contract law, non-party, non-signatories cannot enforce forum selection clauses under a "close relationship" rational or as third-party beneficiaries, 2018 WL 5981798 at *10 & 2019 WL 1212659 at *2; 4-6;

- Mr. Clark's general maritime law claims against Respondents do not arise from the ICA, 2018 WL 5981798 at *11-12 and 2019 WL 1212659 at *2-4; and

- The ICA was void as repugnant to federal statutes and this Court's

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[7] Instead, at oral argument in the trial court, Respondents claimed that the Concession Agreements were between themselves and "Park West." [R 293-94]. That claim was incorrect - former defendant "Park West Galleries, Inc." is ***not*** Vista RC, LLC. *See Hochman*, *supra*, 692 F. 3d at 540; *see also search.sunbiz.org/Inquiry/CorporationSearch/ByNamesearch* (last accessed February 18, 2020) (providing access to the Florida Department of State's "Annual Reports" and other records for "Park West Galleries, Inc." of "Southfield, Michigan" going back to 1978).

precedents, 2018 WL 5981798 at *17-19.

However, Florida's Third District refused to consider the federal questions presented. Instead, it affirmed holding that Respondents "were intended third-party beneficiaries" of the ICA, 217 So. 3d at 1170. In so holding, it relied upon one of the illegal indemnification clauses (which referenced "cruise ships") and an illegal release clause, which covered "personal injuries," etc. *Id.*, n. 3. It never considered either the actual language of the ICA's forum selection clause itself or ¶14's express limitation of third-party beneficiaries to Park West (and Vista). As such, it further held that, *Durkovic* controlled, and affirmed the order of dismissal. *Id.* at 1171.

No motions for rehearing ensued. Mr. Clark instead petitioned the Supreme Court of Florida for review under its discretionary certiorari jurisdiction. *See* Art. V, § 3(b)(3), Fla. Const. Const.; Fla.R.App.P. 9.030(a)(2)(A)(iv). That jurisdiction, however, is limited to review of intermediate decisions which affect statewide interests (state statutes, constitutional provisions, state officers as a class or certified questions of great public importance), Rule 9.030(a)(2)(A)(i-iii, v) or which directly conflict with opinions from other intermediate courts. Rule 9.030(a)(2)(A)(iv, vi).

Mr. Clark's only avenue of attack was thus to assert that intermediate opinion in this case directly conflicted with *Turnkey Projects Resources v. Gawad*, 198 So. 3d 1029 (Fla. 5th DCA 2016) on the question of when and how non-parties can invoke forum selection clauses. *Turnkey* held that one necessary element is that "the claims involving the non-signatories arise directly out of the agreement." 198

So. 3d at 1031. On this basis, Mr. Clark argued that this case conflicted with *Turnkey* because his three (3) general maritime law claims (negligence, unseaworthiness and maintenance & cure) do not "arise directly out of" the ICA, but instead arise from Respondents' breaches of their own legal duties as shipowners. *Jurisdictional Brief of Petitioner*, at 6-8.

On November 22, 2019 the Supreme Court of Florida declined to exercise its conflict jurisdiction, further prohibiting any motions for rehearing. [Appx. 1]. This Petition for Certiorari timely follows.

WHY THE WRIT SHOULD BE GRANTED

Seamen's employment agreements are maritime contracts. *See Claimant ID XXXXXXXXX v. BP Exp. & Prod., Inc.*, 941 F.3d 801, 812, n. 20 (5th Cir. 2019). Federal law controls the interpretation of such "salty flavor[ed]" contracts. *Norfolk S. Ry. Co. v. Kirby,* 543 U.S. 14, 22-23 (2004).

A. THE DECISION OF THE FLORIDA COURTS CONFLICTS WITH THIS COURT'S PRECEDENT REGARDING THE EFFECT OF 45 U.S.C. § 55.

The intermediate state appellate court below, which had the last word in this case, declined to address the federal questions raised before it. Instead it followed *Durkovic v. Park West Galleries, Inc.*, 217 So. 3d 159 (Fla. 3d DCA 2017), wherein the same court "decline[d] to adopt the [seaman]'s position that the Jones Act per se prohibits" enforcement of "a contract provision mandating a specific foreign forum[.]" It cited *Ramirez v. NCL (Bahamas), Ltd.*, 991 F.Supp.2d 1187 (S.D.Fla. 2013) for the proposition that "the

parties' forum-selection and choice-of-law provisions are enforceable" in a seaman's arbitration dispute. The court did not explain the relevance of the seaman's nationality, nor did it address the fact that that *Ramirez* never analyzed 45 U.S.C. § 55 or 46 U.S.C. § 30509 (*Ramirez* decided an international arbitration dispute under 9 U.S.C. § 201 et seq.). *Id.* at 1190.

"The Jones Act incorporates by reference all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees." *American Dredging, supra* n. 510 U.S. at 455-56. "Accordingly, we have held that the Jones Act adopts 'the entire judicially developed doctrine of liability' under the Federal Employers' Liability Act (FELA),.. 45 U.S.C. § 51 *et seq. Kernan* v. *American Dredging Co.,* 355 U. S. 426, 439 (1958)." *Id.* Thus, this Court itself has held that 45 U.S.C. §§ 55 & 56 apply to Jones Act cases. Further, 'the entire judicially developed doctrine of liability' under FELA includes *Boyd, supra*, which expressly held that the right to select venue provided by 45 U.S.C. § 56 is "substantial" and that a conflicting forum selection clause is therefore void under 45 U.S.C. § 55. 338 US at 265, 266.

The rules of decision established by this Court mandate that forum selection clauses in seamen's employment contracts be deemed void. The *Durkovic* court's contrary holding conflicts with this Court's precedent, as does the opinion of intermediate court below in adhering to *Durkovic*.

B. THE EFFECT OF 45 U.S.C. § 55 ON FORUM SELECTION CLAUSES IN SEAMEN'S CONTRACTS PRESENTS AN IMPORTANT QUESTION.

As noted, 45 U.S.C. § 55 voids forum selection clauses in seamen's employment contracts by virtue of the Jones Act's adoption of "laws regulating" personal injury claims for rail workers. *See Boyd*, *supra*. Moreover, as noted, both the Jones Act and FELA guarantee seamen the right to trial by jury. Further, the Jones Act is "remedial, for the benefit and protection of seamen who are peculiarly the wards of admiralty. Its purpose was to enlarge that protection, not to narrow it." *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 417 (2009), *quoting The Arizona v. Anelich,* 298 U.S. 110 (1936). "[F]oreign arbitration clauses are but a subset of foreign forum selection clauses in general." *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer,* 515 U.S. 528, 534 (1995), *citing Scherk* v. *Alberto-Culver Co.,* 417 U. S. 506, 519 (1974). As such, and on its face, 45 U.S.C. § 55 voids foreign arbitration clauses in seamen's employment contracts as well.

Despite this, in the modern fervor to embrace all-things-arbitration, several United States courts of appeal have held that § 55 *does not* apply to seamen's arbitration cases. *Lindo v. NCL (Bahamas) Ltd.*, 652 F.3d 1257, 1287 (11th Cir. 2011); *Harrington v. Atlantic Sounding Co. Inc.*, 602 F.3d 113, 124 (2d Cir. 2010) (relying on state court opinions); *Terrabonne v. K-Sea Transp. Corp.* 477 F.3d 271, 280-286 (5th Cir. 2007).

This Court often grants certiorari to ensure the consistent enforcement of arbitration agreements. *See, e.g., BG Grp., PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1205 (2014). This Court also seeks to ensure the accurate and uniform application of both the Jones Act and FELA. *See Dutra*, *supra*, 139 S.Ct. at 2278. Thousands of seamen across the United States have been deprived of jury trials through then use of tactical arbitration clauses; many believe this to be both unjust and contrary to law. *See e.g., New Prime Inc. v. Oliviera,* __U.S.__, 139 S.Ct. 532, 537 (2019) ("While a court's authority... to compel arbitration may be considerable, it isn't unconditional. [***] But this authority doesn't extend to *all* private contracts, no matter how emphatically they may express a preference for arbitration."). Moreover, this Court is charged under its admiralty jurisdiction with protecting seamen from precisely the type of contractual overreaching and abuse which has befallen Mr. Clark. *Garrett v. Moore-McCormack Co.*, 317 US 239, 246-47 (1942).[8]

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[8] If there is any undue inequality in the terms, any disproportion in the bargain, any sacrifice of rights on one side, which are not compensated by extraordinary benefits on the other, the judicial interpretation of the transaction is that the bargain is unjust and unreasonable, that advantage has been taken of the situation of the weaker party, and that *pro tanto* the bargain ought to be set aside as inequitable... And on every occasion the court expects to be satisfied, that the compensation for every material alteration is entirely adequate to the diminution of right or privilege on the part of the seamen.

Garrett, 317 U.S. at 247.

The question of § 55's impact is before the Court, and undoubtedly will come again. Mr. Clark respectfully submits that now is time to address it.

C. THE OPINION BELOW CONFLICTS WITH PRECEDENT FROM BOTH THIS COURT AND UNITED STATES COURTS OF APPEAL REGARDING CONTRACT INTERPRETATION AND THE PARAMETERS OF THE THIRD-PARTY BENEFICIARY DOCTRINE OF STANDING.

The intermediate state appellate court below held that Respondents "were intended third-party beneficiaries" of the ICA. 217 So. 3d at 1170 & n. 3. To accomplish this the court ignored federal rules of contract construction and third-party beneficiary standing. As described above, the intermediate court did not address the omission of Respondents and "cruise lines" from both ¶ 18 (the actual forum selection clause) and ¶ 14 (delineating the ICA's intended beneficiaries). Instead, it looked to *other* provisions of the ICA in order fill in that omission.

In doing so, the opinion below conflicts directly with precedent from this Court regarding rules of legal construction: when a legal document includes items in one section and omits them from another, that omission must be considered intentional. *Jennings v. Rodriguez*, __ U.S. __, 138 S. Ct. 830, 844 (2018) (an exception set forth in one statutory clause cannot be read into another, even if the clauses are similar); A. Scalia & B. Garner, *Reading Law*, 107 (2012) ("Negative-Implication Canon[:] The expression of one thing implies the exclusion of others

(*expressio unius est exclusio alterius*)"). The court below was required to construe the ICA as having intentionally omitted Respondents from ¶¶ 14 & 18.

In this light the opinion below further conflicts with precedent from United States courts of appeal regarding federal requirements for third-party beneficiary standing. "Under settled principles of federal common law, a third party may have enforceable rights under a contract if the contract was made for his direct benefit." *Holbrook v. Pitt*, 643 F.2d 1261, 1270 (7th Cir. 1981). "Contracts bind only named parties unless both parties to the contract clearly express an intent to benefit a third party." *Polo Ralph Lauren, L.P. v. Tropical Shipping & Constr., Ltd.*, 215 F.3d 1217, 1222 (11th Cir. 2000) (interpreting a marine bill of lading under federal common law). Given that that Respondents were intentionally omitted from the scope of the forum selection clause, it was not intended for their "direct benefit." The lower court's opinion thus conflicts with *Holbrook* and *Polo* (and numerous other federal circuit opinions).

CONCLUSION

WHEREFORE, Petitioner Clark submits that the writ of certiorari should issue.

April 20, 2020;

(originally filed

February 20, 2020) Respectfully submitted,

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Supreme Court of Florida

FRIDAY, NOVEMBER 22, 2019

Victor Allan CLARK	)	CASE NO.:SC19-866
Petitioner(s)	)	Lower Tribunal No(s).:
vs.	)	3D18-1233
	)	132017CA24287000001
CELEBRITY CRUISES, INC., Etc., et al.,	)	
	)	
Respondent(s)	)	

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d)(2).

CANADY, C.J., and POLSTON, LABARGA, LAGOA, and MUÑIZ, JJ., concur.

A True Copy
Test:

/s/
John A. Tomasino
Clerk, Supreme Court

Third District Court of Appeal
State of Florida

Opinion filed April 24, 2019

Victor Allan CLARK Petitioner(s)	)	No.: 3D18-1233
vs.	)	Lower Tribunal No. 17-24287
CELEBRITY CRUISES, INC., etc., et al., Respondent(s)	)	

An Appeal from the Circuit Court for Miami-Dade County, Rodney Smith, Judge.

Alvarez, Feltman, & DaSilva, PL, and Paul B. Feltman, for appellant.

Coffey Burlington, P.L., and Jeffrey B. Crockett and Paul J. Schwiep, for appellees.

Before SCALES, LINDSEY and HENDON, JJ.

SCALES, J.

Victor Allan Clark, the plaintiff below, appeals a non-final order[1] granting Celebrity Cruises, Inc. and Royal Caribbean Cruises Ltd.'s, the defendants below, motion to dismiss Clark's First Amended Complaint. Because we conclude the trial court did not err, as a matter of law, in finding that venue lies in the Turks and Caicos Islands based on the mandatory forum selection clause contained within Clark's independent contractor agreement, we affirm. See Antoniazzi v. Wardak, 259 So. 3d 206, 209 (Fla. 3d DCA 2018) ("The

trial court's construction of the forum selection clause is subject to de novo review.").

Clark was employed by a staffing agency (Caribbean Staffing Solutions) to work – on an independent contractor basis – as an art auctioneer for Park West Galleries, Inc. on cruise ships. Clark alleges that he was injured, on two separate occasions, while moving artwork on cruise ships separately owned and operated by the two appellee cruise lines. The First Amended Complaint alleges claims against the cruise lines for general maritime law negligence (counts I and IV); general maritime law unseaworthiness (counts II and V), and general maritime law failure to provide maintenance and cure (counts III and VI).

Citing this Court's decision in Durkovic v. Park West Galleries, Inc., 217 So.3d 159 (Fla. 3d DCA 2017), the appellees moved to dismiss the instant action basedon the mandatory forum selection clause[2] contained within Clark's independent contractor agreement with the staffing agency, of which the appellees were intended third-party beneficiaries.[3] At the hearing on the appellees' motion, the trial court found that, based on Durkovic, venue lies in the courts of the Turks and Caicos Islands. We agree.

In Durkovic, this Court considered similar independent contractor agreement with the same staffing agency, containing the same mandatory forum selection clause and the same release provision at issue here. There, this Court affirmed the dismissal of the plaintiff's personal injury action against Park West Galleries, Inc. (also an intended third-party beneficiary of the independent contractor agreement), holding that the action must be brought in the Turks and Caicos Islands. Id. at 159-60. That the instant

action alleges claims against the appellee cruise lines only[4] is of no matter. We find that, under Durkovic, the trial court correctly dismissed the instant action because venue lies in the Turks and Caicos Islands.[5]

Affirmed.

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[1] Because the subject order is a non-final order that "concern[s] venue," we have jurisdiction. Fla. R. App. P. 9.130(a)(3)(A).

[2] The independent contractor agreement's mandatory forum selection clause provides, in relevant part, that "any and all legal proceedings . . . arising from or relating to this Agreement . . . shall be brought only in a court in the Turks & Caicos Islands."

[3] The independent contractor agreement's "Indemnification, Hold Harmless, and Release" provision ("release provision") provides, in relevant part, that Clark "irrevocably and unconditionally releases . . . all cruise ships and cruise lines on which [Clark] performs services . . . from and against any past, present or future loss, claim, damage, or liability of any kind or nature whatsoever arising from [Clark's] activities in connection with this Agreement." The release provision further provides that the release includes "claims for personal injuries," "claims under the Jones Act," "claims for maintenance and cure," and "claims for unseaworthiness." The release provision supports the trial court's conclusion that the appellees are intended third-party beneficiaries of the independent contractor agreement. The trial court did not reach the issue of, and we express no opinion on, whether

the release provision exculpates the appellees. See footnote 5, *infra*.

[4] Clark filed his original complaint against the appellee cruise lines and Park West Galleries, Inc. When Park West Galleries, Inc. moved to dismiss the complaint against it based on Durkovic, Clark filed the First Amended Complaint against the appellee cruise lines only.

[5] We express no opinion as to the merits of, or defenses to, Clark's claims. This includes, as noted in foonote 3, supra, the validity and enforceability of the subject release provision. As we stated in Durkovic, "the courts of the Turks and Caicos Islands are capable of deciding the choice of law issues, determining whether the contractual provisions limiting liability and recovery are operative, and applying the Jones Act, if appropriate." 217 So. 3d at 160.

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CIRCUIT CIVIL DIVISION

Victor Allan CLARK	)	Case No.
Petitioner(s)	)	2017-024287-CA (34)
vs.	)	
	)	
CELEBRITY CRUISES, INC., etc., et al.,	)	
	)	
Respondent(s)	)	

ORDER ON DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

THIS CAUSE coming to be heard on May 21, 2018, upon Defendants' Motion to Dismiss Plaintiff's First Amended Complaint ("Motion"), the Court having heard argument of counsel and being fully advised in the premises, it is hereby

ORDERED and ADJUDGED that Defendants' Motion is hereby GRANTED.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, on 05/24/18.

/s/
RODNEY SMITH CIRCUIT COURT JUDGE