No. 23-1246

IN THE

Supreme Court of the United States

SHELL OFFSHORE INC.,

Petitioner,

v.

PALFINGER MARINE USA, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondent Palfinger Marine USA, Inc. (hereinafter "Palfinger") must object to the question posed by Petitioner Shell Offshore, Inc. ("hereinafter "Shell").

The question before the district and appellate courts was not whether "oil and gas exploration from a fixed platform on the Outer Continental Shelf [can] qualify as 'maritime commerce.'" The question was whether Palfinger's contract with Shell to inspect, maintain, and repair Shell's fleet of ten lifeboats was a "maritime contract" in accordance with this Court's holding in *North Pacific S.S. Co. v. Hall Bros. Shipbuilding,* 249 U.S. 119 (1919) and its progeny.

RULE 29.6 DISCLOSURE STATEMENT

At the time of the Fifth Circuit's decision, Palfinger Marine USA, Inc. was a corporation domiciled in the state of Delaware, with its principal place of business in New Iberia, Louisiana.

Effective January 1, 2024, Palfinger Marine USA, Inc. was converted to a Delaware limited liability company and its name was changed to Palfinger Marine USA, LLC.

Palfinger Marine USA, LLC is currently wholly owned (100% as sole member) by Palfinger US Holdings, Inc., which is a wholly owned subsidiary (100%) of Palfinger Marine GmbH (Austria), which is a wholly owned subsidiary (100%) of the ultimate parent corporation, Palfinger AG (Austria).

Palfinger AG is listed on the Vienna Stock Exchange. Industries Holdings GmbH owns more than 10% of the stock of Palfinger AG but is not a publicly traded corporation.

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STATEMENT OF THE CASE

Respondent Palfinger submits this expanded statement of the case pursuant to Supreme Court Rule 15(2) to elucidate two points:

First, the Fifth Circuit's decision did not hold that oil and gas production from a fixed platform on the Outer Continental Shelf constitutes maritime commerce, in conflict with *Rodrigue v. Aetna Casualty and Surety Co.*, 395 U.S. 352, 360 (1969) and *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 422 (1985). It held that Palfinger's contract was a "classically maritime contract" in full accord with the principles governing the analysis of maritime contracts established in *North Pacific S.S. Co. v. Hall Bros. Shipbuilding,* 249 U.S. 119 (1919) ("*North Pacific*"), and its progeny, including *Norfolk Southern Railway Co. v. Kirby,* 543 U.S. 14 (2004) ("*Kirby*").

Second, Shell's petition is nothing more than its latest effort to escape its reciprocal indemnity obligations under the contract it knowingly and willingly negotiated with Palfinger. The petition presents a simple contract dispute, properly resolved by the Fifth Circuit, that is bereft of any larger issue of maritime law and is unworthy of this Court's time and attention.

1. The Facts

Shell's Auger, located on the Outer Continental Shelf ("OCS"), is a floating tension leg platform defined by Coast Guard regulations as a floating OCS facility (FOF).[1]

1. 33 C.F.R. § 140.10: "Floating OCS facility means a buoyant OCS facility securely and substantially moored so that it cannot be moved without a special effort. This term includes tension

An FOF is not a vessel, in contrast to mobile offshore drilling units ("MODUs"), which are defined as vessels.[2] As an FOF, the Auger must comply with MODU vessel regulations that require installation of lifeboats and their associated launching and retrieval mechanisms, including onboard davits.[3]

Coast Guard regulations require that all lifeboats, whether affixed to FOF's, MODUs, or other vessels within the Coast Guard's jurisdiction, be inspected annually and repaired when necessary.[4] Launching appliances, including davits, release gears, and onboard cables, must also be inspected and serviced every five (5) years.[5] Regulations further require quarterly function drills during which "each lifeboat must be launched with its assigned operating crew aboard and maneuvered in the water at least once every 3 months, during an abandonment drill."[6]

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leg platforms and permanently moored semisubmersibles or shipshape hulls but does not include mobile offshore drilling units and other vessels."

2. 33 C.F.R. § 140.10: "Mobile offshore drilling unit or MODU means a vessel, other than a public vessel of the United States, capable of engaging in drilling operations for exploration or exploitation of subsea resources."

3. 46 C.F.R. Subchapter I-A, Part 108, Subpart E, §§ 108.550 through 108.560. A davit is any of various crane-like devices used on ships for supporting, raising, and lowering equipment, in this case, Shell's lifeboats. *See* https://www.merriam-webster.com/dictionary/davit.

4. 46 C.F.R. § 109.301(f) (1) and (2).

5. 46 C.F.R. § 109.301(i).

6. 46 C.F.R. § 109.213(d) (3).

When placed in operation in 1994, the Auger was outfitted with ten lifeboats, or TEMPSC ("Totally Enclosed Motor Propelled Survival Craft") in Coast Guard nomenclature, each capable of navigating 30 workers over the Gulf's waters to safety during emergencies that require evacuation.

Palfinger is a marine contractor. The sole object of its contract with Shell, negotiated in 2018, was to maintain the seaworthiness and operational readiness of Shell's fleet of lifeboats and their associated launching mechanisms for use when needed during emergency evacuations. Palfinger agreed and undertook to perform all annual inspections, maintenance, and repairs of the lifeboats, and perform all five (5) year "reoccurring cable change outs" of the cables used for launching and retrieval. Palfinger's contractual obligations had nothing whatsoever to do with inspections, maintenance, or repair of the Auger itself or with any aspect of the production of oil and gas from that floating platform.

The contract contained reciprocal ("knock for knock") indemnity agreements, long upheld by the Fifth Circuit,[7] in which Shell agreed to assume sole responsibility for injuries or death to any persons within its defined "Company Group" and to indemnify Palfinger for such damages, without regard to who caused the injuries or how damages occurred. Palfinger agreed to the same indemnity obligations to Shell for injuries and death to any persons within its defined "Contractor Group."

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7. *See, e.g., Theriot v. Bay Drilling Corp.* 783 F.2d 527, 540 (5th Cir. 1986); *Fontenot v. Mesa Petroleum Co.*, 791 F.2d 1207 (5th Cir. 1986).

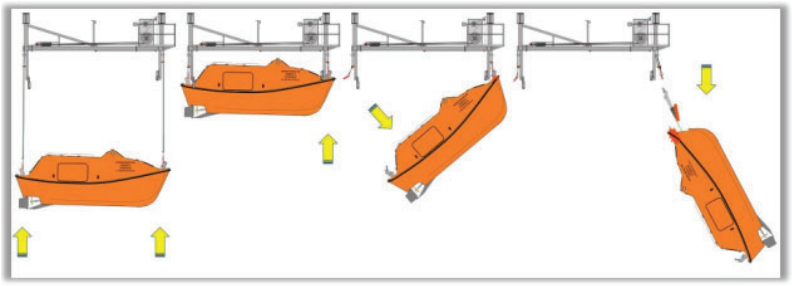
Palfinger's first annual inspection of six of the lifeboats in June 2019 revealed that the aft hook control cable for Lifeboat No. 6 though operational was corroded. Palfinger's lead service engineer reported the condition to Shell's marine supervisor, showed him a photograph of the corroded cable, and recorded the recommendation to replace the cable in the report that Shell's supervisor signed. Shell's supervisor later denied that conversation and denied seeing the photograph.

Despite Palfinger's recommendation, the lifeboat was placed back in service and Shell elected to conduct the quarterly function drill of the lifeboats three weeks later without replacing the corroded cable.

Lifeboat No. 6 was successfully launched and operated in open water for fifteen minutes. During retrieval, when the lifeboat reached the limit switches, the winch motor cut off, leaving the lifeboat 6 to 12 inches short of the davit bumpers and had to be manually winched into place.

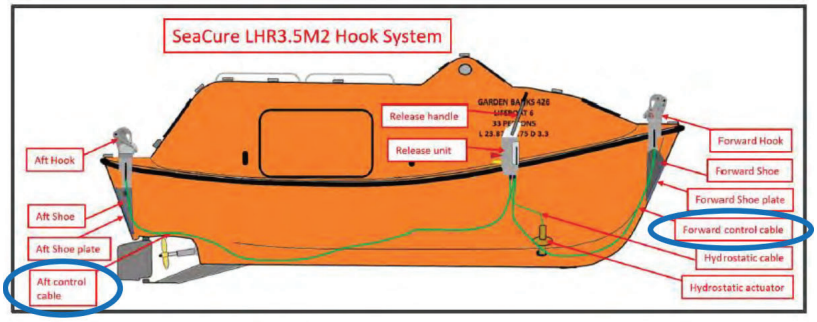
Upon exiting the lifeboat, the coxswain rocked the lifeboat with his foot to ensure it was properly seated. The aft hook suddenly opened. The lifeboat swung down in a pendulum arc and briefly hung, suspended by the forward hook connected to the forward lift ring, before falling eighty or so feet, landing upside down in the waters below. Two crewmen still onboard were killed. The coxswain fell into the water and sustained injuries but survived.

A diagram of the boat and swing are shown below:



Subsequent investigations concluded that the corrosion had compromised the integrity of the aft hook control cable, resulting in loss of tensile strength along the cable's length that prevented the aft hook's cam from fully closing. The aft hook thus remained partially open when the boat was retrieved and then fully re-opened when additional loads were applied to the boat at the davit– whether caused by the foot movement or some other mechanism.

A schematic of the lifeboat's control cable system is shown below:



2. The Proceedings

a. The District Court ruled that Shell's lifeboats were safety equipment not marine vessels.

Both Shell and Palfinger were sued for their alleged fault in causing the injuries and deaths of the crewmen. Because plaintiffs were all members of Shell's "Company Group," Palfinger asserted claims against Shell and moved for summary judgment for the contractual defense and indemnity it was owed under the reciprocal indemnity provisions.

Shell cross-moved for summary judgment. It argued that Palfinger's contract was not maritime under the two-part test the Fifth Circuit had recently adopted in *In re Larry Doiron, Inc.*, 879 F.3d 568 (5th Cir. 2018) (*en banc*), *cert. den'd*, 584 U.S. 994 (2018) ("*Doiron*").[8]

Under *Doiron*'s two-part test, a contract to repair or maintain offshore platforms[9] is a maritime contract if it satisfies the following two questions or factors:

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8. *Doiron*'s new test was adopted to align the Fifth Circuit's analysis of maritime contracts in offshore drilling contracts with the conceptual analysis of maritime contracts employed by this Court in *Norfolk Southern Railway Co. v. Kirby,* 543 U.S. 14 (2004). *Doiron* replaced the six-factor test previously adopted in *Davis & Sons, Inc. v. Gulf Oil Corporation,* 919 F.2d 313 (5th Cir. 1990) to eliminate certain factors appropriate only for maritime torts, not maritime contracts.

9. *Doiron*'s test was later modified by *Barrios v. Centaur, L.L.C.*, 942 F.3d 670 (5th Cir. 2019) to include any service contract, not just service contracts for oil and gas platforms, which required a vessel's substantial use.

> First, is the contract one to provide services to facilitate the drilling or production of oil and gas on navigable waters?
>
> Second, if the answer to the above question is 'yes,' does the contract provide or do the parties expect that a vessel will play a substantial role in the completion of the contract?

The gist of Shell's argument was that Palfinger's contract was not a maritime contract because Palfinger performed its lifeboat inspections from or on the Auger itself, which is not a vessel, and because no vessel was "used" in performing that work. Given the Auger's OCS situs, Shell insisted OCSLA's choice of law provision mandated the application of Louisiana law, as the law of the adjoining state, rendering the defense and indemnity provisions unenforceable.

The district court agreed. It ruled that Palfinger's contract failed *Doiron*'s second factor because no vessel was "used" in performing Palfinger's work. It concluded that Shell's lifeboats were not "functioning as maritime vessels but rather functioned as safety equipment supporting the oil and gas exploration" of the Auger. [Pet. App. B, p. 33a.]

It also ruled that Palfinger's contract did not satisfy what it interpreted was *Kirby*'s requirement that the "principal objective" of a maritime contract must be the protection of maritime commerce. Despite the commercial nature of Palfinger's contract, the district court concluded the contract was not maritime because the lifeboats themselves "did not engage in maritime commerce, nor did they support maritime commerce." [Pet., App. B, p. 33a.]

b. Shell and Palfinger stipulated a Settlement on Record.

Following resolution of the summary judgment motions, Palfinger and Shell negotiated a settlement of plaintiffs' claims, the broad terms of which were stipulated in a written Settlement of Record, recorded before the magistrate judge.

Palfinger contributed $14,925,000 toward that settlement, in exchange for Shell's stipulation to the reasonableness of the settlement amounts and a reservation of Palfinger's right to appeal the district court's adverse ruling on the maritime nature of its contract. The Settlement of Record contained what Palfinger understood was Shell's agreement to the following stipulation: "[T]hat Shell understands and agrees that if Palfinger and Zurich [Palfinger's insurer] win on appeal, Shell reimburses Palfinger and Zurich the full share of the settlement and defense costs. And of course, if Palfinger and Zurich lose, the settlement contributions will be remaining the same." A copy of the Settlement of Record is attached as Opposition Appendix A.

c. The Fifth Circuit determined that Palfinger's contract was a "classically maritime contract."

Palfinger obviously prevailed on appeal. The Fifth Circuit agreed that Palfinger's contract, analyzed under *Doiron*'s two-part test, was a "classically maritime contract," in full accord with this Court's decisions in both *North Pacific* and *Kirby*.

The panel's analysis began with the "bedrock principle," articulated in *North Pacific*, that determining whether a contract is maritime depends on "the nature and character of the contract" and on whether it references "maritime service or maritime transactions." *North Pacific*, 249 U.S. at 125. As confirmed in *Kirby*, that determination involves a purely "conceptual rather than a spatial approach," regardless of where the work is performed, or even if a vessel is involved. *Kirby*, 543 U.S. at 22-23. [Pet. App. B, ps. 10a-11a.]

The Fifth Circuit acknowledged that "classical maritime contracts" encompass a variety of maritime transactions and services that are not restricted to a ship's direct engagement in maritime commerce:

> In general, a contract relating to a ship in its use as such, or to commerce *or navigation*, *on navigable waters*, or to *transportation by sea* or to maritime employment is subject to maritime law and the case is one of admiralty jurisdiction, whether the contract is to be performed on land or water.

[Pet. App. B, p. 11a, quoting in BENEDICT ON ADMIRALTY § 182 (Force & Friedell eds., 2023) (emphasis added).] What is required is "a direct and substantial link between the contract and the operation of the ship, *its navigation, or its management afloat, taking into account the needs of the shipping industry*." [*Id.* (emphasis added.)] Thus, as *North Pacific* held, "a contract to repair or to insure a ship is maritime, but a contract to build a ship is not." *Id.*

Based on those precedents, the Fifth Circuit concluded that Palfinger's contractual obligations to conduct annual inspections and identify needed repairs of Shell's lifeboats – not the Auger – constituted "services" that facilitated Shell's drilling and production of oil and gas on navigable waters, thus fulfilling the first factor of *Doiron*'s test. [Pet. App. B, p. 15a.]

In the Fifth Circuit's analysis, the district court's principal error was its misunderstanding and misapplication of the second factor in *Doiron*'s test. The district court focused on whether Palfinger "used" a vessel to perform its work, when the second factor requires only that the contract require, or the parties expect, that "a vessel will play a *substantial* role in the completion of the contract." (Emphasis in original.)

The panel explained that *Doiron*'s test "allows a finding that a contact is maritime when a vessel is not the object of the contract," but it does "not require the opposite finding when the maintenance and repair of vessels are the purposes of the contract." [Pet. App. B, p. 15a.] By requiring that a vessel play a "substantial role" in completing the contract, the second factor of *Doiron*'s test "incorporates the traditional view that 'a contract relating to a ship in its use as such' is a maritime contract if 'there [is] a direct and substantial link between the contract and the operation of the ship, its navigation, or its management afloat.'" *Id.*, p. 17a. [10]

10. As this Court no doubt will recognize, the traditional view has been the prevailing understanding of maritime contracts for over 200 years. *DeLovio v. Boit*, 7 F.Cas. 418, 444, 2 Gall. 398 (C.C.D. Mass. 1815) (Story, J.) (The broad reach of admiralty jurisdiction "extends over all contracts (wheresoever they may

The panel observed that "[i]n none of our cases have we required that the vessel itself be engaged in maritime commerce." [Pet. App. A, p. 18a.] *Doiron*'s second factor does not require that the vessel in question earn money during its operation, only that it plays a "substantial role" in the contract's completion.

Because lifeboats quite obviously qualify as "vessels," as defined in 1 U.S.C. § 3, and within the test established by this Court in *Lozman v. City of Riviera Beach*, 568 U.S. 115, 121 (2013), the Fifth Circuit rejected Shell's argument and the district court's holding that Palfinger's contract was not maritime simply "because the lifeboats themselves were not engaged in maritime commerce."

d. Shell's petition seek to evade its indemnity obligations and Palfinger's motion to enforce settlement.

On April 17, 2024, following the denial of Shell's petition for rehearing *en banc* on February 26, 2024, [Pet. App. D, p. 41a], Palfinger moved to enforce Shell's stipulated agreement in the Settlement on Record for reimbursement of Palfinger's settlement contribution, in accordance with Shell's contractual indemnity obligations. Shell opposed, disavowing the settlement stipulation reflected in the Settlement on Record.

Shell filed its Petition for Certiorari to this Court on May 23, 2024. Palfinger's enforcement motion was set

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be made or executed, or whatsoever may be the form of the stipulations,) which relate to the navigation, business or commerce of the sea.")

for hearing on June 11, 2024. Following that hearing, the magistrate judge issued its Order on June 14, 2024, denying Palfinger's motion without prejudice, "in the interest of judicial economy," pending this Court's decision on Shell's Petition. [Opp. App. B.]

REASONS FOR DENYING THE PETITION

Respondent understands Shell's hope to attract this Court's attention with an important-sounding issue. But the contract dispute between Petitioner Shell and Respondent Palfinger does not turn on whether oil and gas exploration from a fixed platform on the OCS qualifies as "maritime commerce," and the Fifth Circuit did not hold that it does.

1. The Fifth Circuit did not use "oil and gas drilling" as the hook to apply maritime law.

The Fifth Circuit's decision is a lucid analysis and careful application of its *en banc* test that is fully consistent with this Court's decisions in *North Pacific* and *Kirby*. The object of Palfinger's contract was the lifeboats, which are vessels, not "platform activities" on the Auger, as Shell wrongly asserts in its petition as the basis for this Court's review.

Shell asserts that the Fifth Circuit used "offshore oil and gas drilling" as the "hook to apply maritime law," with platform activities satisfying "the contract's purpose [] to effectuate maritime commerce," to argue that the panel's decision conflicts with the holding in *Herb's Welding* that oil and gas production on fixed platforms "is not even suggestive of traditional maritime affairs." [Pet., p. 6.]

In support, Shell quotes from the panel's decision the following clause: "Regardless of whether employing a lifeboat as a lifeboat means its passengers are engaged in maritime activity…." [Pet., App. A, p. 18a] – omitting the rest of the sentence.

Whether deliberate or not, Shell's elision mischaracterizes the Fifth Circuit's decision. In full, the sentence reads:

> Regardless of whether employing a lifeboat as a lifeboat means its passengers are engaged in maritime activity, the lifeboats are a required component of "drilling and production of oil and gas on navigable waters from a vessel [, which] is commercial maritime activity."

The text in quotation marks is a direct quote from the following italicized passage in *Doiron*, 879 F.3d at 575:

> Our cases have long held that the *drilling and production of oil and gas on navigable waters from a vessel is commercial maritime activity.* For example, in *Theriot v. Bay Drilling Corp.*, we considered a contract for supplying a submersible drilling barge and concluded that the contract was clearly maritime, noting that "[o]il and gas drilling on navigable waters aboard a vessel is recognized to be maritime commerce." We recently affirmed this understanding of commercial maritime activity in *In re Deepwater Horizon*, where we concluded that maritime law applied in reference to the oil spill that "occurred while

> the vessel[, Deepwater Horizon,] was engaged in the maritime activity of conducting offshore drilling operations."

Id. (footnotes omitted) (emphasis added.) *Theriot* was decided in 1986; *Deepwater Horizon*, in 2014.

The Fifth Circuit's quotation from *Doiron*'s *en banc* decision was merely citing long-standing Fifth Circuit precedent – never overruled by this Court – that recognizes the commercial maritime nature of oil and gas production on navigable waters when the work is done by, with, or from a vessel – vessels such as MODUs,[11] floating barges,[12] jack-up rigs,[13] or submersible drilling rigs.[14]

The panel used that cited quotation to explain its application of *Doiron*'s first factor to Palfinger's contract in relation to the second:

> This factor asks, "is the contract one to provide services to facilitate the drilling or production of oil and gas on navigable waters?" *Id.* at 576. In the oil and gas context, the first factor considers whether the contract's purpose is to

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11. *In re Deepwater Horizon*, 808 F. Supp. 2d 943 (E.D. La. 2011), *aff'd* 745 F.3d. 157 (5th Cir. 2014).

12. *Corbitt v. Diamond M. Drilling Co.*, 654 F.2d 329 (5th Cir. 1981).

13. *Campbell v. Sonat Offshore Drilling, Inc.*, 979 F.2d 1115 (5th Cir. 1992) (applying the *Davis & Sons* factors to a drilling contract for a jack-up rig).

14. *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959).

> effectuate maritime commerce and the second ensures that the use of a vessel to do so is substantial instead of merely incidental.

[Pet. App. A, p. 18a.] The panel then made two observations about *Doiron*'s newly adopted two-part test relevant to the contract at issue here.

First, it observed that "*Doiron* itself assumed the crane barge [the vessel at issue] satisfied the first factor because its application was not even discussed. The offshore oil and gas drilling is what satisfied the first factor." [*Id.*] Second, it observed that "the *en banc* court reasonably found no need even to discuss the first factor – even though the second factor [substantial role of the vessel] is relevant only after the answer to the first is 'yes.' " [*Id.*]

In other words, it is the substantial use of a vessel in the production of oil and gas that renders that activity both commercial and maritime, even on the OCS. That is the purpose of *Doiron*'s simplified two-part test when analyzing maritime contracts related to oil and gas production. It was because the use of the crane barge in *Doiron* was not substantial that the repair contract to restore flow back services on a fixed platform in Louisiana's territorial waters was held to be non-maritime and the indemnity provisions unenforceable under Louisiana law. *Doiron*, 879 F.3d at 577.

Shell profoundly misreads and misrepresents the Fifth Circuit's cited quotation from *Doiron* to argue in its petition that the panel's decision holds that oil and gas exploration from fixed platforms on the OCS constitutes maritime commerce when it holds no such thing.

2. The Fifth Circuit's decision does not conflict with *Herb's Welding* or *Rodrigue*.

It bears repeating that the question before the lower courts was whether Palfinger's contract to inspect, maintain, and repair Shell's fleet of lifeboats is a maritime contract with reciprocal indemnity obligations enforceable under maritime law. That is a question of maritime contract law, not maritime tort law. Shell's assertion of a conflict – between the Fifth Circuit's contract analysis and this Court's tort analyses in *Herb's Welding* and *Rodrigue* – like Hamlet's eggshell finds quarrel in a straw.[15]

Herb's Welding and *Rodrigue* had nothing whatsoever to do with maritime contracts. Both were tort cases involving claims for federal benefits for injuries sustained on fixed platforms, without any vessel involvement.

Rodrigue held that two workers killed on fixed platforms on the OCS were not entitled to benefits under DOSHA ("Death on the High Seas Act"), because tort injuries on fixed platforms located on the OCS, as noted, are governed by OCSLA, which mandates application of the law of adjacent states, unless federal maritime law applies of its own force. This Court concluded that DOSHA, applicable to deaths on the high seas, did not apply of its own force because OCSLA defines fixed platforms as artificial islands, not vessels. In this Court's view, accidental deaths on fixed platforms under OCSLA "had no more connection with the ordinary stuff of

15. *Hamlet*, 4.4.53-56: "Even for an eggshell. Rightly to be great / Is not to stir without great argument, / But greatly to find quarrel in a straw / …."

admiralty than do accidents on piers." *Id.*, 395 U.S. at 360.

Herb's Welding was a tort case for compensation benefits under 1972 Amendments to the Longshoremen and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901 *et seq.*, that extends benefits to workers engaged in "maritime employment" who are injured on adjoining piers or docks, in addition to loading and unloading vessels, but not if injured on platforms. A welder, assigned to work exclusively on well platforms in territorial waters, was injured while working on one of those platforms. His work did not involve docks, piers or a vessel and had nothing to do with loading or unloading vessels or maintaining equipment used in those tasks.

Based on the Court's earlier decision in *Rodrigue* (both written by Justice White), *Herb's Welding* employed similar reasoning to conclude that Gray's work on the platform, though not located on the OCS, was nonetheless insufficiently related to maritime activity to warrant coverage under the LHWCA and denied his claim for benefits.

The Fifth Circuit distinguished *Herb's Welding* the very next year in *Theriot v. Bay Drilling Corp.*, 783 F.2d 527 (5th Cir. 1986) precisely because the oil and gas production in that case was achieved with the use of a submersible drilling barge, a vessel, to drill and complete a well on the OCS:

> Our view that the production of oil and gas from a vessel in navigable waters is a maritime activity is not affected by the recent Supreme Court case of *Herb's Welding, Inc. v. Gray,* 470

> U.S. 414, 105 S.Ct.1421, 84 L.Ed.2d 406 (1985). The Supreme Court did not hold therein that oil and gas production from a vessel can no longer be termed maritime commerce but held instead that not every worker performing a task in oil and gas production from fixed platforms is engaged in maritime employment for purposes of the 1972 amendments to the LHWCA.

Theriot, 783 F.2d at 539, n. 11. That has been the law in the Fifth Circuit for nearly forty years.

Just as contracts for the use of submersible drilling barges or other vessels to drill wells on the OCS are maritime contracts, so too have contracts to repair vessels long been held to be maritime contracts, at least since 1919 when this Court decided *North Pacific,* a case Shell ignored below and studiously ignores in its petition to this Court.

As the Fifth Circuit's decision recognizes, it was *North Pacific* that articulated the principle that determining whether a contract is maritime depends not on the location of the work, but on the "nature and character of the contract" and whether it has "reference to maritime service or maritime transactions." *Id.*, 249 U.S. at 125, 128.

North Pacific is the cited source of this Court's "conceptual analysis" of maritime contracts that underpins the explicit rejection in *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 352 (2004), of using any "spatial analysis" concerning where the contract work is performed or even whether a vessel is used in carrying out that work. *Kirby*, 543 U.S. at 23-24.

Shell's lifeboats are vessels. Using lifeboats to rescue persons is a traditional maritime "activity" that is obviously needed, indeed required by federal Coast Guard regulations, in times of peril when mishaps or disasters occur on OCS platforms that require evacuation. Neither the status of lifeboats as vessels nor their safety function as survival craft to navigate people over open seas are changed or determined by where the lifeboats are docked when not needed – whether on fixed or floating platforms, such as the Auger, or on vessels, such as MODUs or drilling barges.

Palfinger's obligation to maintain the seaworthiness and operational readiness of Shell's lifeboats easily falls within *North Pacific*'s requirement that the contract provide or reference a "maritime service." It is equally obvious that Palfinger's contract to provide that service for an agreed upon price qualifies as a "maritime commercial" transaction. That lifeboats themselves do not earn money is not a disqualifying feature, as the Fifth Circuit recognized: "In none of our cases have we required that the vessel itself be engaged in maritime commerce." [Pet. App. A, p. 18a.]

Were that in fact the rule, no marine contractor engaged to repair a pleasure yacht, [16] a sailboat,[17] or a

16. *See, e.g., Sweet Pea Marine, Ltd. v. APJ Marine, Inc.*, 411 F.3d 1242, 1249 (11th Cir. 2005) (pleasure yacht), citing *Exxon Corp. v. Cent. Gulf Line.*, 500 U.S. 603, 605-06 (1991); *see also The Owyhee*, 66 F.2d 399 (2d Cir. 1933) (contract to repair the hull of a pleasure yacht subject to maritime lien under the Merchant Marine Act, 46 USCA § 971).

17. *Jones Superyacht Miami, Inc. v. M/Y Waku*, No. 19-20735 (S.D. Fla. 2021), 2021 WL 4377260 (yacht); *Armstrong v.*

recreational fishing boat capable of navigating in the Gulf of Mexico, on Lake Michigan, or on Lake Pontchartrain, would ever qualify for a maritime lien for any of its unpaid invoices under 46 U.S.C. § 31342(a). Yet, cases are replete that recognize maritime liens over those types of vessels,[18] none of which engage in maritime commerce. The only requirements for a maritime lien are that the repair services, as "necessaries," be furnished to the "vessel" at the owner's direction, at a reasonable price.[19] *North Pacific* was a maritime lien case.

The Fifth Circuit's determination that Palfinger's contract to inspect, maintain, and repair Shell's lifeboats is a "classically maritime contract" is fully consistent with the conceptual analysis required by *North Pacific* and *Kirby*. That Palfinger performed portions of its work on

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Manhattan Yacht Club, Inc., No. 12-4242 (E.D.N.Y. 2013), 2013 WL 1819993 (*held*, fleet of sailboats owned by club for recreational use by members subject to maritime lien).

18. *See, e.g., Sweet Pea Marine, supra*, *op. cit.*, n. 16*; Crimson Yachts. v. Betty Lyn II Motor Yacht*, 603 F.3d 863, 873 (11th Cir. 2010) (*held*, pleasure yacht was a vessel, citing to *North Pacific* and other cases for determining "vessel" status subject to federal maritime liens); *accord Mike Evans Crane Services, LLC v. Cashman Equipment Corp.*, C.A. No. 11-1525, p. 2 (E.D. La. 2013) (unreported), 2013 WL 5348426; *RSDC Holding, LLC v. M.G. Mayer Yacht Services, Inc.*, C.A. No. 16-3573, p. 7 (E.D. La. 2018) (unreported), 2018 WL 6169265, noting, with citation to *North Pacific*, a "contract for ship repairs is indeed a maritime contract."

19. *Sweet Pea Marine*, 411 F.3d at 1249; *see generally Central Boats Rentals, Inc. v. M/V Nor Goliath*, 31 F.4th 320 (5th Cir. 2022).

both the lifeboats and from the Auger is simply a "spatial" question of location, irrelevant to a conceptual analysis of the contract.

There simply is no conflict or friction between the Fifth Circuit's decision in this case and this Court's tort decisions in *Rodrigue* and *Herb's Welding.*

3. There is no conflict between the Circuits.

Shell's petition makes no effort to identify any conflict between the Fifth Circuit's decision and that of any other United States court of appeals on the same important matter, nor has it shown a conflict with a decision of a state court of last resort, as reason for granting its petition under Supreme Court Rule 10(a).

This case presents nothing more than a dispute between parties over their respective contractual obligations. At best, the case involves factual findings and legal conclusions specific to that dispute. Any errors of fact or law in the Fifth Circuit's decision – and there are none – present insufficient grounds to warrant review by this Court. The petition therefore presents no compelling reason for exercising this Court's judicial discretion to grant the petition.

CONCLUSION

The Fifth Circuit's decision displays remarkable analytical dexterity in deftly synthesizing *Doiron*'s *en banc* test with *North Pacific*'s classic holding that contracts to repair vessels are maritime contracts, even

when the vessels are mere lifeboats whose only function is to save human lives, free of charge. A swift denial of Shell's petition would be fitting affirmation.

As indicated in the introductory paragraph to this opposition, Shell's petition presents nothing more than an effort to escape or delay its contractual indemnity obligations and its stipulated agreement in the Settlement of Record to reimburse Palfinger's settlement contribution and defense costs in the event of Palfinger's successful appeal. Palfinger's appeal was successful, but its motion to enforce Shell's indemnity obligation has been deferred pending disposition of Shell's petition to this Court. It is time for Shell to honor its maritime contract.

Palfinger prays that Shell's petition be denied.

Respectfully submitted,

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June 27, 2024

APPENDIX

TABLE OF APPENDICES

APPENDIX A — TRANSCRIPT OF PROCEEDINGS OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, LAFAYETTE DIVISION, FILED NOVEMBER 15, 2022

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

Civil Action No. 6:20-cv-00685 (Lead)
(c/w 6:20-cv-0773; 6:20-cv-0756)

JEREMY EARNEST, *et al.*,

Plaintiffs,

Vs.

PALFINGER MARINE USA, INC., *et al.*

Defendants.

SETTLEMENT ON RECORD
OFFICIAL TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE
CAROL B. WHITEHURST
UNITED STATES MAGISTRATE JUDGE
6 SEPTEMBER 2022
LAFAYETTE, LOUISIANA
(VIA AUDIO CONFERENCE/ZOOM)

[2] [APPEARANCES INTENTIONALLY OMITTED]

Appendix A

[3] 6 SEPTEMBER 2022

(Transcription completed without a speaker identification log; therefore, where speaker identifications were made, they were made on a contextual or best-guess basis where possible.)

UNIDENTIFIED SPEAKER: Good morning.

UNIDENTIFIED SPEAKER: Good morning.

UNIDENTIFIED SPEAKER: Good morning.

UNIDENTIFIED SPEAKER: I hope I did it right.

THE COURT: Yes. I can hear you.

UNIDENTIFIED SPEAKER: Thank you, ma'am.

THE COURT: All right. And –

UNIDENTIFIED SPEAKER: You can't see me?

THE COURT: Who – remind me who "J.L.M." is.

MS. REYNOLDS: Joe McReynolds.

THE COURT: McReynolds? Okay. Gotcha.

I can't see you but – okay; there you are. Now I can tell who you are.

UNIDENTIFIED SPEAKER: And we're waiting on Chris Zaunbrecher.

THE COURT: Okay.

UNIDENTIFIED SPEAKER: And I think Jim Gaidry?

MR. GAIDRY: Yeah, I'm here.

UNIDENTIFIED SPEAKER: Okay. I see you now.

THE COURT: Yeah. I don't see Chris waiting to be admitted. I have everybody so far.

[4] And we are being recorded and I will just say, for the record, it's not a video recording; it's an audio recording, so I'm just going to put on the record that we have Noah Wexler, Hunt Downer, and Jim Gaidry for the plaintiffs.

We have Tom Diaz for Shell. And we have Mr. McReynolds and Mr. Garrot for Palfinger. And we're waiting on Mr. Zaunbrecher.

MR. McREYNOLDS: And we're actually here for Palfinger and Zurich.

THE COURT: And Zurich; I should have said that, yes.

UNIDENTIFIED SPEAKER: There's Chris.

THE COURT: All right. Looks like he is still trying to connect. There he is.

Okay, Chris. I had just – we were waiting on you, but I let everybody know that this is being recorded. It's an audio recording; it's not a video recording. But we will have the audio available, if necessary, if anyone needs it in the future. And I've kind of called roll and said who all is on the recording. And now we have Mr. Zaunbrecher on the recording also.

This is the case of – it's consolidated cases of Earnest, Dupre, and Marcel versus Palfinger, Shell, and Zurich. And the case numbers are 20-685, 20-773, and 20-756. And we engaged in a settlement conference last week and were able to make a lot of headway last Tuesday. And throughout the week the parties [5] continued to get authority for the proposed settlement. And we were able to get confirmation on Friday that the case had settled.

So the plaintiffs had asked that we put the settlement, the terms of the settlement on the record, and that is what we were here to do today.

Do y'all want to do it – how do y'all want to do this? Mr. Wexler?

MR. WEXLER: I'm happy to attempt to go through them as they have been communicated to me by the defendants in a letter. And if I miss a term or if somebody wants to correct me, I'm happy for them to do so.

THE COURT: Any problem putting them all on the record at the same time, or do we need to break – I don't know if there's any confidentiality issues that anyone has a problem with?

(No audible response.)

THE COURT: No? Everybody happy –

UNIDENTIFIED SPEAKER: I'm happy to put it all on together.

THE COURT: Yeah, I figured that. All right. Let's go ahead and put it on the record, then.

MR. WEXLER: Thank you, Your Honor. And good morning. Noah Wexler on behalf of Jeremy Earnest.

The parties have reached a settlement of this matter. The [6] terms which have been communicated to me and accepted by the plaintiffs are that the total gross amount of the settlement is sixteen million, four hundred and twenty-five thousand, zero dollars, zero cents. And from that, Palfinger and its insurers will be paying 14,925,000, and the Shell entities will be paying 1.5 million.

The total gross amount has been allocated amongst the plaintiffs: 5 million to the Marcel plaintiffs, $5,712,500 to the Dupre plaintiffs, $5,712,500 to Mr. Earnest.

In exchange, the plaintiffs will release and dismiss their claims against the defendants.

Appendix A

Shell has agreed to waive any and all comp liens with respect to Dupre and Earnest. Shell has agreed to continue to pay the death benefits for Mr. Dupre's family, and continue to pay all benefits for Mr. Earnest, moving forward.

Plaintiffs agree to satisfy all the liens or any other kind or character which may exist, out of the settlement funds. Shell has stipulated to the reasonableness of the settlements. And Palfinger reserves all rights to pursue its defense and indemnity claim against Shell.

The defendants have agreed to split the mediation cost incurred with respect to Mr. Perry's private mediation and ongoing efforts to help resolve this.

And I believe both defendants have agreed to fund within 45 days of the settlement, which was Friday, which I think runs [7] to October 17th. And I believe – I know I spoke to Jason about this, but if the defendants can provide the plaintiffs with draft release language within 10 days of the settlement date, that would be excellent.

Those are the terms as I understand them. If anybody has any others, please let me know.

THE COURT: All right.

Mr. Gaidry, do you agree with the terms as set forth by Mr. Wexler?

MR. GAIDRY: (Inaudible.)

THE COURT: I'm sorry? Did you say "yes"?

MR. GAIDRY: Yes, ma'am.

THE COURT: Okay.

Mr. Downer?

MR. DOWNER: Yes, ma'am.

THE COURT: All right. Mr. Diaz, you were going to speak?

MR. DIAZ: Yes. There's just only one variation from what Mr. Wexler had described, and that is with respect to Shell and the LHWCA benefits.

The agreement at the settlement conference – and I confirmed that in an email last Friday – is that Shell would consent to the settlements, for LHWCA purposes, for Mr. Dupre coming for the Dupre family, and Mr. Earnest.

How that affects the payment of the LHWCA benefits that [8] have been paid to date is an operation of law based on the settlement, so it may not result in the continued, current continuation of the benefits being paid to both. I don't know how the LHWCA operates. But our agreement was to consent, for LHWCA purposes, and then how that affects the benefits payment is just an operation of the LHWCA.

THE COURT: All right. Mr. Wexler?

MR. WEXLER: Yeah, I mean, I'd just like some clarity on that. I don't know who I need to talk to on Tom's side. But I understand how it works. Mr. Earnest is still entitled to the benefits and receiving them. And so as long as Shell is taking no action to discontinue them, I don't foresee any issues. But I need to know who I need to communicate with to make sure he gets, you know, his benefits moved forward, to the extent he's entitled to them.

MR. DIAZ: Correct. No, and I'm happy to do that and make sure you have a point of contact on that –

MR. WEXLER: That's all I need.

MR. DIAZ: – and certainly that's fine by me.

MR. GAIDRY: I need the same information because presently she is receiving that, and the children are covered by health insurance through that same entity, I guess, until they're 28, she is told. And it continues on by law, according to the statutes, until she remarries or dies, is what the statutes say.

[9] I don't know – unless you're saying something contrary to that, then I'm okay with it, but I might need clarification if that's not a fact.

MR. DIAZ: Well, and what I'm saying is that at least in terms of the settlement, that Shell provided its consent to the settlements for LHWCA purposes. How that is impacted by the payment of the settlements and any credits associated with it, I'm not conversant on it. And

just like Mr. Wexler just said, it's an operation of the law for which I am more than happy to make sure that the Dupre family and Mr. Earnest and their lawyers have the appropriate contact to ensure that the statutory benefits are being paid in accordance with the LHWCA.

MR. GAIDRY: Well, for clarification from the Dupres' perspective, if Counsel is suggesting that they get some kind of credit for the waiver of the lien, a 200 or $300,000 waiver and that somehow allows them not to pay her until that money is used up –

MR. DIAZ: Those are two different things –

MR. GAIDRY: – perspective, that's not what we are agreeing to. We want it continued on with the waiver and with no stopping of current –

THE COURT: I think that's what –

MR. GAIDRY: – or whatever it is that Tom may be alluding to.

MR. DIAZ: So those are two separate issues. So at [10] least from Shell's perspective, we have the $1.5 million payment. The waiver of the lien, which is a waiver free and clear, so that Shell is not seeking, by credit or otherwise, the lien which is approximately $250,000 for the Dupre family and for Earnest. The agreement to the reasonableness of the amount for the purposes of Palfinger's appeal. And then the last component is a consent to the settlement by Shell, which has its own

operation of law for which Mr. Gaidry, and I will provide to Mr. Wexler a contact to ensure that those statutory benefits are being appropriately recognized and paid, in light of the settlement and the consent to it.

THE COURT: All right. I think he's clarified his position on that.

Other than that caveat, Mr. Diaz, do you agree with the terms of the settlement as stated by Mr. Wexler?

MR. DIAZ: I do, Your Honor.

THE COURT: All right. On behalf of Palfinger and Zurich, who wants to affirm? Mr. Garrot?

MR. GARROT: Yes, Your Honor. We just want to make sure that in our correspondence to plaintiff counsel that they – regarding other liens, that they will agree to defend and indemnify Palfinger and Zurich from any future claims. I don't believe there's an issue on that. We're not talking about the comp liens; we're talking about if there's any other liens that exist out there that we're not aware of.

[11] And that the final judgment will preserve Palfinger's and Zurich's appeal of the indemnity claims and issues. And that Shell understands and agrees that if Palfinger and Zurich win on appeal, Shell reimburses Palfinger and Zurich the full share of the settlement and defense costs.

And of course, if Palfinger and Zurich lose, the settlement contributions will be remaining the same.

And to the extent, Noah, I didn't mark down that you said it: Each party is to bear their own court costs in this.

MR. WEXLER: That's my understanding of the terms, with the exception of the mediation cost, which defendants have agreed.

MR. GARROT: Yes. We agreed Shell and Zurich will split the mediation cost.

MR. DIAZ: Agreed.

THE COURT: All right. Anything else? It sounds like everybody has agreed to the terms of the settlement, and it's on the record. It is available, if necessary, to be pulled up.

This recording is – I don't know how, but it's somewhere in the cloud; and if we need it, we can get it.

UNIDENTIFIED SPEAKER: Thank you, ma'am.

UNIDENTIFIED SPEAKER: Thank you, Your Honor.

UNIDENTIFIED SPEAKER: Thank you so much.

UNIDENTIFIED SPEAKER: I have a question. When do [12] we, can we expect there to be a final judgment entered on this case so that it can go up?

THE COURT: Well, the Court – I notified Judge Summerhays on Friday that the case had settled; he could

take it off and – cancel the jury and take it off his docket. They're going to issue a 60-day order of dismissal, and then y'all will need to notify the Court when settlement is finalized. And then at that point, I think that would be – that would be it.

UNIDENTIFIED SPEAKER: Will the order of dismissal include the reservation of the appeal rights concerning the indemnity claim between Palfinger and Shell?

THE COURT: I will make sure that they know to put that in there.

UNIDENTIFIED SPEAKER: Thank you. That's all.

THE COURT: All right. Thank you, everyone.

UNIDENTIFIED SPEAKER: Thank you, Judge.

UNIDENTIFIED SPEAKER: Thank you.

THE COURT: Y'all have a good day.

UNIDENTIFIED SPEAKER: Thank you.

(End of proceedings.)

[13] [TRANSCRIBER'S CERTIFICATE INTENTIONALLY OMITTED]

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, LAFAYETTE DIVISION, FILED JUNE 14, 2024

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

Case No. 6:20-CV-00685 Lead
Judge Robert R. Summerhays
Magistrate Judge Carol B. Whitehurst

JEREMY EARNEST

Versus

PALFINGER MARINE USA, INC. *et al.*

ORDER

Before the Court is the Motion for Enforcement of Settlement Agreement and for Entry of Final Judgment filed by Defendant/Third Party Plaintiff Palfinger Marine USA, Inc. ("Palfinger") and Defendant Zurich American Insurance Company ("Zurich") requesting an Order enforcing the terms of a Settlement Agreement between Movers and Shell Offshore, Inc. ("Shell"). (Rec. Doc. 176). Shell opposed the Motion (Rec. Doc. 178), and Movers replied. (Rec. Doc. 181).

On August 12, 2022, the Court found that the parties' contract was not a maritime contract rendering the indemnity provisions unenforceable and dismissed

Palfinger's claims for contractual and/or tort indemnity against Shell. (Rec. Docs. 132 & 133). On September 9, 2022, Palfinger filed a Notice of Appeal. (Rec. Doc. 162). On January 11, 2024, the Fifth Circuit found that the contract was in fact a maritime contract and reversed and remanded the matter noting that "[f]urther proceedings are necessary to determine whether indemnity must be paid." *Earnest v. Palfinger Marine U S A, Inc.*, 90 F.4th 804, 806 (5th Cir. 2024). On March 5, 2024, the case was reopened (Rec. Doc. 173), and, on April 17, 2024, Palfinger filed the motion presently before the court requesting that Shell indemnify Palfinger.

On May 23, 2024, Shell filed a petition for writ of certiorari with the United States Supreme Court re: the Fifth Circuit's January 11, 2024 decision. The issue raised in Palfinger's motion turns on whether indemnity must be paid. Accordingly, in the interest of judicial economy, Palfinger's motion (Rec. Doc. 176) is DENIED WITHOUT PREJUDICE subject to the right to re-urge once certiorari is decided.

Signed at Lafayette, Louisiana, this 14th day of June, 2024.

/s/ Carol B. Whitehurst
CAROL B. WHITEHURST
UNITED STATES MAGISTRATE JUDGE