

APPENDICES

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-56775
D.C. No. 2:14-cv-07667-PJW

CHRISTOPHER BATTERTON,
Plaintiff-Appellee,
v.

DUTRA GROUP,
Defendant-Appellant.

Appeal from the United States District Court
for the Central District of California
Patrick J. Walsh, Magistrate Judge, Presiding

Argued and Submitted February 8, 2017
Pasadena, California
Filed January 23, 2018

Before: Sidney R. Thomas, Chief Judge, and Andrew J.
Kleinfeld and Jacqueline H. Nguyen, Circuit Judges.

Opinion by Judge Kleinfeld

* * *

OPINION

KLEINFELD, Senior Circuit Judge:

We address the availability of punitive damages for
unseaworthiness.

This case comes to us on a 28 U.S.C. § 1292(b) certification for interlocutory appeal. The district court certified the appeal, and we granted permission for it. District courts within our circuit have divided on the substantive issue,¹ as have the circuits,² and the issue is of considerable importance in maritime law.

Facts

The case comes to us on the pleadings and nothing else. The district court denied a motion to strike the portion of the prayer seeking punitive damages for unseaworthiness. We therefore take our facts from the complaint. They are not proved, and we intimate no view as to whether punitive damages may ultimately turn out to be appropriate.

The plaintiff, Christopher Batterton, was a deckhand on a vessel owned and operated by the defendant, Dutra Group. While Batterton was working on the vessel in navigable waters, a hatch cover blew open and crushed his left hand. Pressurized air was being pumped into a compartment below the hatch cover, and the vessel lacked an exhaust mechanism to relieve the

¹ Compare, e.g., *Rowe v. Hornblower Fleet*, No. C-11-4979 JCS, 2012 WL 5833541, at *900 (N.D. Cal. Nov. 16, 2012) and *Wagner v. Kona Blue Water Farms, LLC*, 2010 A.M.C. 2469, 2483 (D. Haw. Sept. 13, 2010) with *Jackson v. Unisea, Inc.*, 824 F. Supp. 895, 897–98 (D. Alaska 1992) and *Complaint of Aleutian Enter., Ltd.*, 777 F. Supp. 793, 796 (W.D. Wash. 1991).

² Compare *Evich v. Morris*, 819 F.2d 256, 258 (9th Cir. 1987), overruling on other grounds acknowledged by *Saavedra v. Korean Air Lines Co.*, 93 F.3d 547, 553–54 (9th Cir. 1996) and *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1550 (11th Cir. 1987) with *McBride v. Estis Well Service*, 768 F.3d 382, 384 (5th Cir. 2014) (en banc) and *Horsley v. Mobil Oil Corp.*, 15 F.3d 200, 203 (1st Cir. 1994).

pressure when it got too high. The lack of a mechanism for exhausting the pressurized air made the vessel unseaworthy and caused permanent disability and other damages to Batterton.

Analysis

The only question before us is whether punitive damages are an available remedy for unseaworthiness claims. We answered it in *Evich v. Morris*.³ That would be the end of the case, except that Dutra contends, and the Fifth Circuit agrees,⁴ that the later Supreme Court decision in *Miles v. Apex Marine Corp.*⁵ implicitly overrules *Evich*.

In *Evich* we squarely held that “[p]unitive damages are available under general maritime law for claims of unseaworthiness, and for failure to pay maintenance and cure.”⁶ We distinguished Jones Act claims, where punitive damages are unavailable.⁷ The standard for punitive damages, we held, was “conduct which manifests ‘reckless or callous disregard’ for the rights of others ... or ‘gross negligence or actual malice [or] criminal indifference.’”⁸

³ 819 F.2d at 258.

⁴ See *McBride*, 768 F.3d at 384.

⁵ 498 U.S. 19 (1990).

⁶ 819 F.2d at 258 (citations omitted).

⁷ *Id.*

⁸ *Id.* at 258–59 (quoting *Protectus Alpha Nav. Co. v. N. Pac. Grain Growers, Inc.*, 767 F.2d 1379, 1385 (9th Cir. 1985)).

Evich was a wrongful death case, not an injury case.⁹ But we did not speak to whether there might be any distinction regarding the availability of punitive damages according to whether the seaman had died. Generally, the availability of damages is more restricted in wrongful death cases than in injury cases. So without authority to the contrary, we have no reason to distinguish *Evich* and limit its holding to wrongful death cases. No party has suggested that we do so.

Under *Miller v. Gammie*,¹⁰ we must follow *Evich* unless it is “clearly irreconcilable” with the Supreme Court’s decision in *Miles*.¹¹ *Miles* holds that loss of society damages are unavailable in a general maritime action for the wrongful death of a seaman and that lost future earnings are unavailable in a general maritime survival action.¹² That is because wrongful death damages are limited to “pecuniary loss”¹³ and because “[t]he Jones Act/[Federal Employers’ Liability Act] survival provision limits recovery to losses suffered during the decedent’s lifetime.”¹⁴

The Supreme Court’s more recent decision in *Atlantic Sounding Co. v. Townsend*¹⁵ speaks broadly: “Historically, punitive damages have been available and awarded in general maritime actions, including

⁹ *Id.* at 258.

¹⁰ 335 F.3d 889 (9th Cir. 2003).

¹¹ *Id.* at 893.

¹² *Miles*, 498 U.S. at 37.

¹³ *Id.* at 32.

¹⁴ *Id.* at 36.

¹⁵ 557 U.S. 404 (2009).

some in maintenance and cure.”¹⁶ Unseaworthiness is a general maritime cause of action.¹⁷ *Townsend* reads *Miles* as limiting the availability of damages for loss of society and lost future earnings¹⁸ and holds that *Miles* does not limit the availability of punitive damages in maintenance and cure cases.¹⁹ By implication, *Townsend* holds that *Miles* does not limit the availability of remedies in other actions “under general maritime law,”²⁰ which includes unseaworthiness claims.

Arguably, *Townsend* leaves room for a distinction between maintenance and cure claims and unseaworthiness claims. The Court recognizes that “remedies for negligence, unseaworthiness, and maintenance and cure have different origins and may on occasion call for application of slightly different principles and procedures.”²¹ But nothing in *Townsend*’s reasoning suggests that such a distinction would mean that a limitation ought to be made on the availability of punitive damages as a remedy for general maritime unseaworthiness claims.

So far our discussion suggests that *Miles* does not overturn *Evich*, that *Evich* remains in force as controlling circuit law, and that *Evich*’s holding that punitive damages are available as a remedy for unseaworthiness

¹⁶ *Id.* at 407.

¹⁷ *See id.* at 419; *see also Miles*, 498 U.S. at 29.

¹⁸ *Townsend*, 557 U.S. at 419.

¹⁹ *Id.*

²⁰ *Id.* at 421.

²¹ *Id.* at 423 (quoting *Fitzgerald v. U.S. Lines Co.*, 374 U.S. 16, 18 (1963)).

claims is undisturbed and binding. Appellant’s arguments to the contrary, though, are given force by *McBride v. Estis Well Service*.²²

McBride, a sharply divided Fifth Circuit en banc decision, holds that “punitive damages are non-pecuniary losses”²³ and therefore may not be recovered under the Jones Act or under the general maritime law.²⁴ We held in another context in *Kopczynski v. The Jacqueline* that “[p]unitive damages are non-pecuniary” and so are not allowable under the Jones Act.²⁵ *McBride* has five extensive and scholarly opinions addressing all sides of the question. Six dissenters note that *Miles* “addressed the availability of loss of society damages to non-seamen under general maritime law, not punitive damages,”²⁶ and that “*Townsend* announced the default rule that punitive damages are available for actions under the general maritime law (such as unseaworthiness).”²⁷

Well before our decision in *Evich*, the Supreme Court addressed in *Moragne v. States Marine Lines, Inc.*²⁸ whether the general maritime law affords a cause of action for wrongful death. The Court overruled its 1886 decision that it did not.²⁹ Though *Moragne* con-

²² 768 F.3d 382 (5th Cir. 2014) (en banc).

²³ *Id.* at 384.

²⁴ *Id.*

²⁵ 742 F.2d 555, 561 (9th Cir. 1984).

²⁶ 768 F.3d at 408–09 (Higginson, J., dissenting).

²⁷ *Id.* at 413 n.16; *see id.* at 418.

²⁸ 398 U.S. 375 (1970).

²⁹ *Id.* at 409 (overruling *The Harrisburg*, 119 U.S. 199 (1886)).

cerns the availability of a wrongful death action under the general maritime law, it matters in our case, where the seaman did not die, because it bears on how we should understand *Miles*.

Moragne holds that the denial of a wrongful death remedy “had little justification except in primitive English legal history.”³⁰ Lord Ellenborough had held in *Baker v. Bolton* that in “a Civil court, the death of a human being could not be complained of as an injury.”³¹ The Court noted that there was no good reason to maintain this “barbarous” view,³² let alone extend it to the maritime law, the principles of which “included a special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages.”³³ In any event, the common law rule had been overturned in England by Lord Campbell’s Act, in American states by wrongful death statutes, and in our federal law by the Federal Employers’ Liability Act, the Death on the High Seas Act, and the Jones Act.³⁴ The Court noted that its “transformation of the shipowner’s duty to provide a seaworthy ship into an absolute duty not satisfied by due diligence” had made unseaworthiness doctrine “the principal vehicle for recovery by seamen for injury or death.”³⁵ It concluded that the limitations of the Death on the High Seas Act did

³⁰ *Id.* at 379.

³¹ *Id.* at 383 (quoting *Baker v. Bolton*, 1 Camp. 493, 170 Eng. Rep. 1033 (1808)).

³² *Id.* at 381.

³³ *Id.* at 387.

³⁴ *Id.* at 389–90, 394.

³⁵ *Id.* at 399.

not preclude the availability of a wrongful death remedy under the general maritime law where the Act did not apply.³⁶

Three years after our decision in *Evich*, the Supreme Court decided *Miles v. Apex Marine Corp.*³⁷ *Miles* was a wrongful death case.³⁸ The immediate issues before the Court were whether the parent of a deceased seaman could recover under the general maritime law for loss of society and whether a seaman's lost future earnings claim survived his death.³⁹ A fellow crew member had stabbed a seaman to death.⁴⁰ His mother brought a Jones Act negligence claim for failure to prevent the deadly assault and a general maritime unseaworthiness claim for hiring an unfit crew member.⁴¹ Among other things, she sought loss of society, lost future income, and punitive damages.⁴² The jury, though it found negligence, rejected the unseaworthiness claim, returning a verdict that the ship was seaworthy.⁴³ The Fifth Circuit reversed, holding that because of the extraordinarily violent disposition of the

³⁶ *Id.* at 402.

³⁷ 498 U.S. 19 (1990).

³⁸ *Id.* at 21.

³⁹ *Id.* at 23.

⁴⁰ *Id.* at 21.

⁴¹ *Id.*

⁴² *Id.* at 21–22.

⁴³ *Id.* at 22.

fellow crewman, the ship was unseaworthy as a matter of law.⁴⁴

Miles declined to limit *Moragne* to its facts.⁴⁵ The Court noted that the “Jones Act evinces no general hostility to recovery under maritime law.”⁴⁶ It does not “disturb seamen’s general maritime claims for injuries resulting from unseaworthiness.”⁴⁷ Nor does it “preclude the recovery for wrongful death due to unseaworthiness.”⁴⁸ The permissibility of a punitive damages award was not before the Court, just loss of society and of future earnings.⁴⁹

The basis for Dutra’s argument that *Miles* implicitly overturns *Evich* is *Miles*’s discussion of damages. Noting that the Death on the High Seas Act limited the availability of damages for wrongful death to “*pecuniary* loss sustained by the persons for whose benefit the suit is brought,”⁵⁰ the Court held that damages “for non-pecuniary loss, such as loss of society, in a general maritime action” are barred.⁵¹ Likewise, Lord Campbell’s Act, which is the basis for most state and federal statutes for wrongful death recovery, had long been in-

⁴⁴ *Id.*

⁴⁵ *Id.* at 27.

⁴⁶ *Id.* at 29.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *See id.* at 23.

⁵⁰ *Id.* at 31 (quoting then 46 U.S.C. App. § 762, now 46 U.S.C. App. § 30303).

⁵¹ *Id.*

terpreted to provide recovery only for pecuniary loss.⁵² And so the Court concluded that the Jones Act, too, having inherited the Supreme Court's interpretation in *Vreeland* of Lord Campbell's Act and the Federal Employers' Liability Act, also limited recovery to "pecuniary loss."⁵³ The Court therefore held that "there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman."⁵⁴

But it is not apparent why barring damages for loss of society should also bar punitive damages. *Miles* itself suggests no such broad interpretation of "pecuniary loss"—it expressly notes that the Jones Act "evinces no general hostility to recovery under maritime law" and "does not disturb seamen's general maritime claims for injuries resulting from unseaworthiness."⁵⁵ Lord Campbell's Act and its progeny provide an opportunity for a sailor's widow and children to recover the money that they were deprived of by his death. That is what "pecuniary loss" means: loss of money.⁵⁶ Non-pecuniary damages have long been understood to mean claims for such injuries as physical pain, mental anguish, or humiliation,⁵⁷ as well as loss of consortium. Punitive damages, allowed by *Evich*, are not "pecuni-

⁵² *Id.* at 32.

⁵³ *Id.* (citing *Michigan Cent. R. Co. v. Vreeland*, 227 U.S. 59, 69–71 (1913)).

⁵⁴ *Id.* at 33.

⁵⁵ *Id.* at 29.

⁵⁶ See *Pecuniary and Pecuniary Damages*, BLACK'S LAW DICTIONARY (10th ed. 2014).

⁵⁷ CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 105 (West 1935).

ary loss.” Though they are pecuniary, that is, like all damages, for money, they are not for loss. They are punitive, not compensatory. Their relationship to loss is that they may not exceed some multiple of the compensatory damages.⁵⁸

That a widow may not recover damages for loss of the companionship and society of her husband has nothing to do with whether a ship or its owners and operators deserve punishment for callously disregarding the safety of seamen. One might reasonably argue that loss of society is more important than such punishment, or that such punishment is more important than loss of society. However, it cannot reasonably be argued that they are both compensation for “loss.” If they were, they would fall within the rubric of compensatory damages, not punitive damages.

Following *Miles*, we held in *Smith v. Trinidad Corp.* that loss of consortium damages are unavailable to the wives of injured mariners in their own actions under the Jones Act or general admiralty law.⁵⁹ And we noted in *Chan v. Society Expeditions, Inc.* that neither the general maritime law nor the Jones Act permits recovery for loss of society for the wrongful death of a seaman, nor does the Jones Act permit it for injury.⁶⁰ Neither speaks to punitive damages.

Whatever room might be left to support broadening *Miles* to cover punitive damages was cut off by the Supreme Court’s decision in *Atlantic Sounding Co. v.*

⁵⁸ See, e.g., *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 513–15 (2008).

⁵⁹ 992 F.2d 996 (9th Cir. 1993).

⁶⁰ 39 F.3d 1398, 1407 (9th Cir. 1994).

Townsend.⁶¹ The shipowner in *Townsend* argued that *Miles* barred punitive damages for willful failure to pay maintenance and cure.⁶² The Court noted that “[h]istorically, punitive damages have been available and awarded in general maritime actions.”⁶³ It found “that nothing in *Miles* or the Jones Act eliminates that availability.”⁶⁴ Unseaworthiness is a general maritime action long predating the Jones Act.⁶⁵

It is true, as Dutra contends, that *Miles*, taken alone, might arguably be read to suggest that the available damages for a general maritime unseaworthiness claim by an injured seaman should be limited to those damages permissible under the Jones Act for wrongful death. But that is a stretch. The remark upon which Dutra relies is *Miles*’s justification for its narrower conclusion: “that there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman.”⁶⁶ Dutra takes that narrow remark out of context and reads it expansively.⁶⁷ *Miles*’s jux-

⁶¹ 557 U.S. 404 (2009).

⁶² *Id.* at 418–19.

⁶³ *Id.* at 407.

⁶⁴ *Id.*

⁶⁵ *See id.* at 419; *see also Miles*, 498 U.S. at 29; *Tabingo v. Am. Triumph LLC*, 391 P.3d 434, 438–40 (Wash. 2017).

⁶⁶ *Miles*, 498 U.S. at 33.

⁶⁷ *Miles* states:

The Jones Act also precludes recovery for loss of society in this case. The Jones Act applies when a seaman has been killed as a result of negligence, and it limits recovery to pecuniary loss. The general maritime claim here alleged that Torregano had been killed as a result of the

taposition of the terms “pecuniary” and “non-pecuniary loss” was with reference to loss of society, not punitive damages.⁶⁸ *Miles* did not address punitive damages. It expressly noted that the Jones Act “evinces no general hostility to recovery under maritime law” and “does not disturb seamen’s general maritime claims for injuries resulting from unseaworthiness.”⁶⁹ *Miles* further holds that lost future earnings are unavailable in a general maritime survival action.⁷⁰ But that is because “[t]he Jones Act/[Federal Employers’ Liability Act] survival provision limits recovery to losses suffered during the decedent’s lifetime.”⁷¹

It is also true, as Dutra argues, that if we were to interpret *Miles* broadly and *Townsend* narrowly, as the Fifth Circuit has in *McBride*, then we might infer that *Miles* implicitly overruled *Evich*. But we would then have to disregard *Miles*’s statement that the Jones Act “does not disturb seamen’s general maritime claims for injuries resulting from unseaworthiness.”⁷² The Fifth

unseaworthiness of the vessel. It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence. We must conclude that there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman.

Id. at 32–33.

⁶⁸ *See id.* at 31–33.

⁶⁹ *Id.* at 29.

⁷⁰ *Id.* at 36.

⁷¹ *Id.*

⁷² *Id.* at 29.

Circuit's leading opinions in *McBride* are scholarly and carefully reasoned, but so are the dissenting opinions, which to us are more persuasive.

Starting with Lord Campbell's Act, and continuing through the Federal Employers' Liability Act, the Death on the High Seas Act, and the Jones Act, wrongful death is a statutory cause of action.⁷³ There is no way to compensate a dead seaman for the wrong done to him. Compensation for his survivors is generally limited by statute to their resulting "pecuniary loss."⁷⁴ These limitations, based on the restrictive recoveries permitted for wrongful death, have no application to general maritime claims by living seamen for injuries to themselves. The *Townsend* Court made this distinction when addressing maintenance and cure actions,⁷⁵ and there is no persuasive reason to distinguish maintenance and cure actions from unseaworthiness actions with respect to the damages awardable. The purposes of punitive damages, punishment and deterrence,⁷⁶ apply equally to both of these general maritime causes of action. Nor are punitive damages compensation for a pecuniary or non-pecuniary "loss," as described in *Miles*.⁷⁷ They are not compensation for loss at all. One might argue for or against the desirability of punitive damages, but unless Congress legislates on the matter, their availability is clearly established not only in

⁷³ *Id.* at 31–32.

⁷⁴ *Id.* at 31, 32 (citing *Vreeland*, 227 U.S. at 69–71).

⁷⁵ 557 U.S. at 419–20.

⁷⁶ See *Exxon Shipping Co.*, 554 U.S. at 492–93.

⁷⁷ See 498 U.S. at 30–33.

*Townsend*⁷⁸ but also in *Baker*.⁷⁹ They have been recognized as proper in appropriate circumstances since *The Amiable Nancy*.⁸⁰

Conclusion

The district court correctly denied Dutra’s motion to strike the prayer for punitive damages. They are indeed awardable to seamen for their own injuries in general maritime unseaworthiness actions. Under *Miller v. Gammie*,⁸¹ we cannot treat *Evich* as overruled by *Miles* unless *Miles* is “fundamentally inconsistent with the reasoning”⁸² of *Evich* and *Evich* is “clearly irreconcilable”⁸³ with *Miles*. It is not. Under the *Miller* standard, *Evich* remains good law. And under *Townsend*, we would reach the same conclusion *Evich* did, even if we were not bound by *Evich*.

AFFIRMED.

⁷⁸ 557 U.S. at 407 (“Historically, punitive damages have been available and awarded in general maritime actions We find that nothing in *Miles* or the Jones Act eliminates that availability.”).

⁷⁹ 554 U.S. at 489–90, 515 (noting that the issue of punitive damages in maritime law “falls within a federal court’s jurisdiction to decide in the manner of a common law court, subject to the authority of Congress to legislate otherwise if it disagrees with the judicial result,” and allowing an award of punitive damages).

⁸⁰ 16 U.S. (3 Wheat.) 546 (1818).

⁸¹ 335 F.3d 889 (9th Cir. 2003).

⁸² *Id.* at 892.

⁸³ *Id.* at 893.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 14-CV-7667-PJW

CHRISTOPHER BATTERTON,
Plaintiff,

v.

THE DUTRA GROUP,
Defendant.

December 15, 2014

**ORDER DENYING DEFENDANT’S MOTION
TO STRIKE PUNITIVE DAMAGES FROM THE
COMPLAINT OR IN THE ALTERNATIVE TO
DISMISS FOR FAILURE TO STATE A CLAIM**

I.

INTRODUCTION

Before the Court is Defendant The Dutra Group’s motion to strike Plaintiff’s punitive damages claim. Alternatively, Defendant moves to dismiss that claim for failure to state a claim upon which relief may be granted. For the following reasons, the motion is denied.

II.

STATEMENT OF FACTS

Plaintiff Christopher Batterton is a former employee of The Dutra Group. (First Amended Complaint (“FAC”) at ¶ 1.) He worked as a deckhand and crew

member on a number of vessels that were owned and operated by Defendant. (FAC at ¶ 2.) In August 2014, he was working aboard the SCOW 3 near Newport Beach, California, when a hatchcover blew open as a result of too much pressure in a compartment below the hatch and crushed his left hand. (FAC at ¶ 5.) Plaintiff sustained serious injuries and believes that he will be permanently disabled as a result. (FAC at ¶ 11.)

Following the accident, Plaintiff brought this action for negligence, unseaworthiness, maintenance and cure, and unearned wages. He seeks general and punitive damages. (FAC at 7.) Defendant moves to dismiss Plaintiff's punitive damages claim under Federal Rule of Civil Procedure 12(b)(6) on the ground that, as a matter of law, punitive damages are not available in a maritime action. For the following reasons, the motion is denied.¹

III.

ANALYSIS

A. Standard of Review

In ruling on a motion to dismiss, the Court accepts as true the factual allegations contained in the complaint and views all inferences in a light most favorable to the plaintiff. *See Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir. 2001). Dismissal for failure

¹ Defendant also argues that the punitive damages claim should be stricken under Federal Rule of Civil Procedure 12(f) on the ground that it is “redundant, immaterial, impertinent, or scandalous.” (Motion at 4.) The Court finds that Rule 12(f) does not apply, *see Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, (9th Cir. 2010) (holding “Rule 12(f) does not authorize district courts to strike claims for damages on the ground that such claims are precluded as a matter of law”), and analyzes the motion under Rule 12(b)(6).

to state a claim is appropriate if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Id.* Dismissal is appropriate only if there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

B. The Law of this Circuit Holds that Punitive Damages are Available in Unseaworthiness Claims

Defendant moves to dismiss Plaintiff's punitive damages claim, arguing that under "controlling, unequivocal, and settled legal authority ... punitive damages are *not* available for personal injury actions based on claims of unseaworthiness." (Motion at 3.) In support of its motion, it relies primarily on the Supreme Court's decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), and the Fifth Circuit's decision in *McBride v. Estis Well Service, LLC*, 768 F.3d 382 (5th Cir. 2014) (en banc). In *Miles*, the Supreme Court held that the family of a seaman who had died on a ship could not recover non-pecuniary damages for loss of society because such damages were barred by the Jones Act, which governed, and the family could not sidestep that bar by bringing a claim for unseaworthiness under general maritime law. In *McBride*, decided by an en banc panel of the Fifth Circuit in September of this year, the court held that punitive damages were barred in unseaworthiness actions under general maritime law.

Plaintiff contends that *Miles* was limited to wrongful death suits and does not bar punitive damages here. In support of his argument, he cites *Atlantic Sounding Co., Inc. v. Townsend*, 557 U.S. 404, 419 (2009), wherein the Supreme Court held that punitive damages were

available in maintenance and cure actions because they were available before the Jones Act and the Jones Act did not purport to change that law. As to *McBride*, Plaintiff argues that it is not binding on this Court and that *Evich v. Morris*, 819 F.2d 256, 258 (9th Cir. 1987) (overruled on other grounds), which is, specifically holds that punitive damages are available in unseaworthiness claims.

Having closely read all of these cases and a host of others on point, the Court is certain of one thing: the law on this issue is not unequivocal or settled as urged by Defendant. In fact, the Court would characterize the law as equivocal and unsettled. To begin with, the United States Supreme Court has never decided whether punitive damages are available in an unseaworthiness claim like the one at bar. And, though the Fifth Circuit took a stab at the issue in September, the majority garnered only eight of 15 votes. Thus, seven of the 15 appellate judges who decided this issue three months ago believed that punitive damages were available in unseaworthiness claims under general maritime law.

The Court then turns to the Ninth Circuit law. In *Evich*, decided in 1987, the Ninth Circuit made clear that punitive damages are available in unseaworthiness claims under general maritime law. *Evich*, 819 F.2d at 258. Interestingly, the Court relied on a Fifth Circuit case, *In re Merry Shipping, Inc.*, 650 F.2d 622, 625 (5th Cir. 1981), to reach this conclusion. In 1990, the Supreme Court decided *Miles*, holding that non-pecuniary damages were not available in wrongful death suits by family members because they were not available under the governing Jones Act and the family members were not allowed to sidestep this bar by suing under general maritime law. In the wake of *Miles* it was uncertain whether *Evich* was still good law. In 1994, in *Sutton v.*

Earles, 26 F.3d 903, 919-20 (9th Cir. 1994) and *Davis v. Bender Shipbuilding & Repair Co.*, 27 F.3d 426, 427 (9th Cir. 1994), the circuit explained that it was, holding that *Miles* only called into doubt *Evich*'s holdings as to survival actions asserted by seamen's estates in wrongful death suits. Nothing from the Ninth Circuit since then has suggested that the law is otherwise.

Thus, as the Court sees it, *Evich*'s holding that punitive damages are available in unseaworthiness claims under general maritime law has never been expressly or impliedly overruled. Nor is it clearly irreconcilable with *Miles* or any of the Supreme Court's other decisions since 1987. As such, it is still good law in this circuit. See, e.g., *Wagner v. Kona Blue Water Farms, LLC*, No. 9-600 JMS/BMK, 2010 WL 3566731, at *6-7 (D. Hi. Sept. 13, 2010) (holding *Evich*'s holding that punitive damages are available in general maritime suit still good law in the Ninth Circuit despite *Miles*); *Rowe v. Hornblower Fleet*, No. C-11-4979 JCS, 2012 WL 5833541 (N.D. Cal. Nov. 16, 2012) (denying motion to dismiss punitive damages claim in unseaworthiness action as "[t]here are no provisions in the Jones Act that limit the right to seek punitive damages on a claim for unseaworthiness ... [and] *Evich* is not clearly irreconcilable with *Miles* and *Atlantic Sounding*."). For these reasons, Defendant's motion to dismiss Plaintiff's punitive damages claim is denied.

IT IS SO ORDERED.

DATED: December 15, 2014

/s/ Patrick J. Walsh

PATRICK J. WALSH

UNITED STATES MAGISTRATE JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-56775
D.C. No. 2:14-cv-07667-PJW
Central District of California, Los Angeles

CHRISTOPHER BATTERTON,
Plaintiff-Appellee,

v.

DUTRA GROUP,
Defendant-Appellant.

Filed May 2, 2018

ORDER

Before: THOMAS, Chief Judge, and KLEINFELD and NGUYEN, Circuit Judges.

The panel has voted to deny the petition for rehearing. Chief Judge Thomas and Judge Nguyen have voted to deny the petition for rehearing en banc, and Judge Kleinfeld has recommended the same.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and petition for rehearing en banc are DENIED.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 14-7667-PJW

CHRISTOPHER BATTERTON,

Plaintiff,

v.

THE DUTRA GROUP,

Defendant.

Filed: February 6, 2015

**ORDER GRANTING IN PART
AND DENYING IN PART DEFENDANT'S MOTION
TO CERTIFY INTERLOCUTORY APPEAL AND
STAY PROCEEDINGS**

On January 5, 2015, Defendant The Dutra Group filed a motion to certify an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and to stay proceedings in the district court pending resolution of the appeal in the Ninth Circuit. Defendant seeks to immediately appeal the Court's December 15, 2014 order denying its motion to dismiss Plaintiff's claim for punitive damages. Plaintiff opposes the motion. For the reasons discussed below, the motion is granted in part and denied in part.

I.

BACKGROUND

In August 2014, Plaintiff Christopher Batterton was injured while working aboard the SCOW 3 when a hatchcover blew open, crushing his hand. He sues the owner and operator of the vessel, The Dutra Group, for negligence, unseaworthiness, maintenance and cure, and unearned wages. He seeks both general and punitive damages.

Defendant does not believe that punitive damages are available in unseaworthiness actions and filed a motion asking the Court to strike the punitive damages claim from the suit. The Court denied the motion. Defendant now asks the Court to allow it to immediately appeal the Court's ruling to the Ninth Circuit Court of Appeals and to stay the action while that is being done.

II.

DISCUSSIONA. The Governing Standard

Under Title 28 U.S.C. § 1292(b), the Court may certify a nonfinal order for interlocutory appeal where the order (1) involves a controlling question of law, (2) as to which there is substantial ground for a difference of opinion, and (3) an immediate appeal might materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b). Generally speaking, § 1292(b) certification is reserved for exceptional cases. *See Caterpillar Inc. v. Lewis*, 519 U.S. 61, 74 (1996) (“Routine resort to § 1292(b) requests would hardly comport with Congress’ design to reserve interlocutory review for ‘exceptional’ cases while generally retaining for the federal courts a firm final judgment rule.”). In evaluating

whether there is a “substantial ground for difference of opinion,” the Court examines the extent to which the controlling law is unclear. *Couch v. Telescope, Inc.*, 611 F.3d 629, 633 (9th Cir. 2010). In general, this exists where the circuits are in conflict on an issue and the court of appeals for the circuit where the case was filed has not spoken on it. *Id.*

B. Defendant’s Motion to Certify an Interlocutory Appeal

Defendant argues that certification is appropriate because the controlling legal question, i.e., whether punitive damages are recoverable in a maritime personal injury action based on unseaworthiness, is subject to substantial grounds for difference of opinion. It points out that just last year the Fifth Circuit decided in *McBride v. Estis Well Service*, 768 F.3d 382 (5th Cir. 2014), that punitive damages were not available in such an action, relying on the Supreme Court’s 1990 decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). It further points out that, though the Ninth Circuit has not addressed the issue since the Supreme Court’s decision in *Miles*, other circuits have and have determined that punitive damages are not available. Defendant also argues that the issue is a controlling question of law that can be answered independently of the facts of the case and that an interlocutory appeal would avoid protracted, expensive, and unnecessary litigation. For the following reasons, the Court agrees.

In 1987, the Ninth Circuit held that punitive damages are available in unseaworthiness claims. *See Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987) (overruled on other grounds). In *Miles*, decided three years later, the Supreme Court ruled that the family of a deceased seaman could not recover non-pecuniary damages in a

wrongful death action under the Jones Act, which barred such damages, nor could it sidestep that bar by bringing a general maritime claim for wrongful death resulting from unseaworthiness.

After *Miles*, lower courts across the country reached different conclusions as to whether punitive damages were still available in unseaworthiness claims. In 2009, the Supreme Court decided *Atlantic Sounding Co., Inc. v. Townsend*, 557 U.S. 404 (2009), which many interpreted as a substantial narrowing of *Miles*. There, the Supreme Court held that, in a maintenance and cure action, punitive damages *were* allowed, noting that such damages were well established before the Jones Act was passed and that the Jones Act did not “eliminate pre-existing remedies available to seamen for the separate common-law cause of action based on [their] right to maintenance and cure.” *Id.* at 415-16. Although that case involved maintenance and cure, not unseaworthiness, some lower courts interpreted *Atlantic Sounding* to mean that punitive damages were available in unseaworthiness actions. *See, e.g., Wagner v. Kona Blue Water Farms, LLC*, No. 9-600-JMS/BMK, 2010 WL 3566731 (D. Haw. Sept. 13, 2010) (holding punitive damages available in unseaworthiness claims and explaining *Evich* still good law).

By contrast, the Fifth Circuit ruled en banc in 2014 that, under *Miles*, punitive damages were barred in unseaworthiness actions under general maritime law. *McBride*, 768 F.3d 382. Of the 15 Fifth Circuit judges on the en banc panel, however, only eight of them supported that view, the other seven disagreed.

Given the foregoing, the Court finds that there is substantial ground for difference of opinion on the issue of whether punitive damages are available in unsea-

worthiness claims. *See Hart v. Bechtel Corp.*, 90 F.R.D. 104, 107 (D. Ariz. 1981) (“[G]iven the above-mentioned conflict between the Ninth Circuit and the Second and Fifth Circuits, this Court finds that there is substantial ground for difference of opinion”); *see also Klamath Irr. Dist. v. U.S.*, 69 Fed. Cl. 160, 163 (2005) (noting substantial ground for difference of opinion often “manifests itself as splits among the circuit courts, an intra-circuit conflict or a conflict between an earlier circuit precedent and a later Supreme Court case”) (internal citations omitted).

Plaintiff contends that a circuit split is not enough to warrant an interlocutory appeal and that Defendant must show, instead, that there is a conflict between the district courts in the Ninth Circuit and/or the appellate courts in California. (Opposition at 5.) Even assuming that that were true, an interlocutory appeal would still be appropriate in this case because there is a split in this circuit among the district courts regarding this issue. *See, e.g., Complaint of Aleutian Enterprise, Ltd.*, 777 F. Supp. 793, 795-96 (W.D. Wash. 1991) (“The remedies provided by Congress under the Jones Act do not encompass punitive damages. The claimants ask this Court to supplant Congress’ judgment in this regard by awarding punitive damages under general maritime law. That is not the proper function of this Court within our system of governance.”); *Ortega v. Oceantrawl, Inc.*, 822 F. Supp. 621, 623 (D. Alaska 1992) (“At one time punitive damages were available for claims brought under the Jones Act and general maritime law. However, under a recent Supreme Court case, this view has changed.”); *Jackson v. Unisea, Inc.*, 824 F. Supp. 895, 897 (D. Alaska 1992) (“It appears clear, however, that the [*Miles*] decision precludes the supplementation of a Jones Act claim with a punitive damage

recovery under general maritime law.”); *La Voie v. Kualoa Ranch and Activity Club, Inc.*, 797 F. Supp. 827, 831 (D. Haw. 1992) (“This court finds that punitive damages are unavailable to plaintiff in the present case under the general maritime law of unseaworthiness based on *Miles*.”). In light of the conflict both inside and outside the circuit and the fact that this issue concerns a controlling issue of law, the Court finds that an interlocutory appeal is warranted.

C. Defendant’s Motion to Stay the Litigation Pending Appeal

Defendant has also requested that the Court stay the case under 28 U.S.C. § 1292(b) until the Ninth Circuit has resolved the punitive damages issue. For the following reasons, the Court grants Defendant’s request in part and will stay the punitive damages issues until after the Ninth Circuit has spoken.

Generally speaking, a stay is appropriate where resolution of the issue on appeal would alter the direction of the proceedings and promote efficiency and economy of time for the Court and the parties. *Beaver v. Tarsadia Hotels*, 29 F. Supp. 3d 1323 (S.D. Cal. 2014); *Lakeland Village Homeowners Ass’n v. Great American Ins. Group*, 727 F. Supp. 2d 887, 897 (E.D. Cal. 2010).

The resolution of the punitive damages issues may alter the direction of this case. Further, it may prove to be more efficient and economical if the issue is decided before significant amounts of time and energy are spent addressing it and it is later determined that the Court was wrong. For that reason the Court concludes that the punitive damages issues should be stayed pending the appeal.

That being said, however, there is no reason to stay the rest of the case. The punitive damages do not impact whether Defendant was negligent or whether Plaintiff suffered injuries as a result of the accident. Further, delaying discovery on the other issues in the case until the issue of punitive damages is resolved could prove to be prejudicial. To begin with, witnesses' memories typically fade over time. The Court understands that the average period that a case is on appeal in the Ninth Circuit is about 24 months. It is not unreasonable to assume that the witnesses would have trouble recalling details of the incident twenty-four months from now that they may now remember. And, assuming the circuit agrees with the Court that punitive damages are available, it stands to reason that Defendant may want to appeal the Ninth Circuit's decision to the United States Supreme Court since obviously there would be a split among the circuits on the issue at that point. That would likely add another year or two to the appellate process. Plaintiff should not be forced to sit on his hands for two or three or four years while the punitive damages issue is resolved and then try to gather the evidence from witnesses who may not remember what happened. In addition, a delay will likely make it more difficult for Plaintiff and his counsel to find the witnesses two or three years from now as people tend to be mobile in this day and age.

Another consideration is the fact that the vessel is moveable. Defendant has no obligation to leave it here and, if Defendant elects to move it or sell it, Plaintiff will have a more difficult time gathering the evidence he needs from the vessel. The Court further notes that nature has a way of altering ships and over the course of the next two or three years it is possible that the ship could be altered by natural causes. It could also be

altered by man in that interim and there is always a risk that it could sink. Further, regardless of how the Ninth Circuit rules on the punitive damages issue, Plaintiff has a negligence claim that must be resolved in the district court. Thus, the case will not be stayed for issues not related to the punitive damages.

FOR THESE REASONS, IT IS HEREBY ORDERED that Defendant's request for certification for interlocutory appeal of the Court's December 15, 2014 Order Denying Motion to Dismiss is granted. Defendant's motion to stay the action is granted in part and denied in part. Discovery on Plaintiff's claim for punitive damages is stayed pending the Ninth Circuit's decision on the appeal. Plaintiff may, however, proceed on his other claims.¹

DATE: 2/6/15

/s/ Patrick J. Walsh

PATRICK J. WALSH

UNITED STATES MAGISTRATE JUDGE

¹ The Court envisions that the parties will be able to conduct wide-ranging discovery on liability and non-punitive damages over the next several months. Obviously, there may be some overlap in the discovery process. For instance, when Plaintiff's counsel deposes the management of the SCOW 3 about the accident, he may ask them about what happened and why. Assuming, hypothetically, that their response is, "We acted intentionally, deliberately, and recklessly to harm Plaintiff by failing to repair a clearly dangerous condition," Plaintiff's counsel will be able to follow up on that questioning and will not be foreclosed from inquiring about the managers' conduct even though it may go to punitive damages. Defendant will not, however, have to produce its financials and other documents relevant only to the issue of punitives until after the Ninth Circuit has ruled.