REPERCUSSIONS FOR FAILING TO SECURE AUTHORIZED USL&H ACT COVERAGE

The USL&H Act allows the Department of Labor to assess fines, penalties and imprisonment against employers and their corporate officers for failing to secure USL&H Act coverage. While such assessments are rarely imposed the USL&H Act also provides that an employer who fails secure coverage cannot limit the amount of the injured employee's claim to the Act's compensation schedule; the employee can sue for damages which can be much larger than compensation payments payable under the Act. Furthermore, the USL&H Act declares that a non-insured employer cannot assert affirmative defenses against the claimant. Affirmative defenses such as the claimant's comparative negligence and the claimant's assumption of the risk cannot be asserted to attempt to reduce the claimant's damages.

M/V SAHARA

In June of 2013, a jury in Seattle awarded a judgment against a non-insured employer and its vessel in the amount of $3,450,000, plus interest in excess of $600,000. Although the vessel owner filed a notice of appeal, the court ordered the vessel to be sold at a federal auction. *MacLay v. M/V SAHARA*, 926 F.Supp 2d 1209 (W.D. Wash., 2013) and *MacLay v. M/V SAHARA*, 2013 WL 2897960. Both decisions are attached.

The purchaser of the SAHARA intended to convert the vessel into a luxury floating hotel. The vessel was moored at a pier in Seattle while the conversion work took place. Lia Hawkins and several other workers were hired by the owner to assist in the conversion work but the owner failed to purchase USL&H Act coverage.

While throwing scrap metal from an unprotected upper deck, Lia Hawkins fell, hit her head and drowned. Her estate sued the vessel and its owner for the damages resulting from her death. The vessel was arrested by the federal marshal and all conversion work ceased.

Prior to trial, the court held that because the employer failed to purchase USL&H Act coverage, the vessel owner could not assert to the jury that the claimant was negligent.

The jury awarded damages in the amount of $3,450,000 along with prejudgment interest of more than $600,000. Although the vessel owner filed a notice of appeal, the court ordered the SARAHA to be sold by the federal marshal at a vessel auction. The proceeds of the sale will be paid to the claimant's estate.

If the owner of the SAHARA had purchased USL&H Act coverage, the benefits scheduled in the Act would have been paid by the insurer. The vessel owner would not have been subject to a large judgment and would not have forfeited its vessel.

H

United States District Court,
W.D. Washington,
at Seattle.
Julie MacLAY, as Personal Representative of the Estate of Lia Christine Hawkins, deceased, Plaintiff,
Lunde Marine Electronics, Inc., Plaintiff in Intervention,
v.
M/V **SAHARA**, Imo No. 6600826, her engines, tackle, rigging, equipment and other appurtenances, in rem; and G Shipping Ltd., Defendants.

Case No. C12–512–RSM.
Feb. 22, 2013.

Background: Personal Representative of the Estate of deceased employee of vessel owner brought maritime survival and wrongful death suit against vessel and vessel owner, and sought to foreclose a preferred maritime tort lien against the vessel in rem. The parties filed cross-motions for partial summary judgment.

Holdings: The District Court, Ricardo S. Martinez, J., held that:
(1) employee was not a seaman covered by the Jones Act;
(2) employee was a harbor worker covered by the Longshore and Harbor Workers' Compensation Act (LHWCA);
(3) court would not make factual findings concerning events of employee's death based on death certificate;
(4) vessel owner properly asserted as an affirmative defense that Occupational Safety and Health Administration (OSHA) investigation found no safety violations aboard the vessel;
(5) vessel owner improperly asserted as an affirmative defense that it breached no legal obligation to employee and was therefore not liable;
(6) vessel owner's failure to properly file its cross motion for partial summary judgment warranted denial of the motion;
(7) loss-of-society damages were available to employee's non-dependent parents under general maritime law; but
(8) employee's non-dependent siblings could not recover loss-of-society damages.

Motions granted in part and denied in part.

West Headnotes

[1] Seamen 348 ⚷2

348 Seamen
348k2 k. Who are seamen. Most Cited Cases

Shipping 354 ⚷1

354 Shipping
354I Regulation in General
354k1 k. What constitutes a vessel. Most Cited Cases

Vessel was not “in navigation” at the time of worker's death, and thus worker was not a “seaman” covered by the Jones Act; vessel was undergoing a major conversion from a decommissioned research vessel to a luxury hotel, the vessel was not seaworthy as it never endured stability trials, was not granted a stability letter, and was not classed by a vessel classification society, and the vessel's intensive conversion project remained substantially incomplete. 46 U.S.C.A. § 30104 et seq.

[2] Federal Civil Procedure 170A ⚷2512

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2512 k. Shipping and seamen, cases involving. Most Cited Cases

Seamen 348 ⚷29(5.16)

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348 Seamen
348k29 Personal Injuries
348k29(5.16) k. Questions for jury. Most Cited Cases

Seaman status under the Jones Act is a mixed question of law and fact, but summary judgment is appropriate if the facts and law support only one conclusion. 46 U.S.C.A. § 30104 et seq.

[3] Seamen 348 ⚷2

348 Seamen
348k2 k. Who are seamen. Most Cited Cases

A plaintiff has seaman status if both of the following prongs are satisfied: (1) his duties contribute to the function of the vessel or the accomplishment of its mission, and (2) he has a connection to a vessel in navigation that is substantial both in duration and nature. 46 U.S.C.A. § 30104 et seq.

[4] Shipping 354 ⚷84(1)

354 Shipping
354V Rights and Liabilities of Vessels and Owners in General
354k78 Torts
354k84 Injuries to Stevedores and Other Independent Contractors and Their Employees
354k84(1) k. In general; liability. Most Cited Cases

Workers' Compensation 413 ⚷262

413 Workers' Compensation
413V Employees Within Acts
413V(B) Particular Classes of Persons in General
413k262 k. Federal acts. Most Cited Cases

Worker killed after purportedly falling from moored vessel undergoing conversion from a decommissioned research vessel to a luxury hotel was a “harbor worker” covered under the LHWCA, and not a “crew member” excluded from LHWCA coverage; although worker was initially hired to perform clerical and administrative duties shore-side, she routinely engaged in the cleaning and demolition of areas of the vessel, the vessel was moored upon navigable waters, within the territorial waters of the State of Washington, worker's death occurred during her employment on the vessel, her body was recovered from the water under the adjacent dock, and vessel was not in navigation at the time of worker's death. Longshore and Harbor Workers' Compensation Act, §§ 2, 3(a), 33 U.S.C.A. §§ 902, 903(a); 29 C.F.R. § 1915.4(j).

[5] Shipping 354 ⚷84(1)

354 Shipping
354V Rights and Liabilities of Vessels and Owners in General
354k78 Torts
354k84 Injuries to Stevedores and Other Independent Contractors and Their Employees
354k84(1) k. In general; liability. Most Cited Cases

Workers' Compensation 413 ⚷262

413 Workers' Compensation
413V Employees Within Acts
413V(B) Particular Classes of Persons in General
413k262 k. Federal acts. Most Cited Cases

The LHWCA provides compensation for the disability or death of non-seamen maritime employees who satisfy both a geographic “situs” test and an occupational “status” test. Longshore and Harbor Workers' Compensation Act, § 1 et seq., 33 U.S.C.A. § 901 et seq.

[6] Federal Civil Procedure 170A ⚷2497.1

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2497 Employees and Employment Discrimination, Actions Involving
170Ak2497.1 k. In general. Most

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Cited Cases

It would be improper, at the summary judgment stage of action seeking relief under the LHWCA, for court to invade the province of the jury and make factual findings surrounding what happened to harbor worker when she died during her employment on moored vessel, based upon death certificate stating the mode/manner of worker's death was an accident, and the cause of death was drowning and skull fracture due to blunt force head injury; court would not weigh the evidence and evaluate witness credibility to establish, as a matter of law, facts that were favorable to worker's estate's case theory. Longshore and Harbor Workers' Compensation Act, § 1 et seq., 33 U.S.C.A. § 901 et seq.

[7] Evidence 157 ⚷48

157 Evidence
157I Judicial Notice
157k48 k. Official proceedings and acts. Most Cited Cases

The court would take judicial notice of death certificate stating that the mode/manner of harbor worker's death was an accident, and that the cause of death was drowning and skull fracture due to blunt force head injury, in action seeking relief under the LHWCA. Longshore and Harbor Workers' Compensation Act, § 1 et seq., 33 U.S.C.A. § 901 et seq.

[8] Federal Civil Procedure 170A ⚷1104

170A Federal Civil Procedure
170AVII Pleadings
170AVII(N) Striking Pleading or Matter Therein
170Ak1104 k. Motion not favored. Most Cited Cases

Federal Civil Procedure 170A ⚷1108.1

170A Federal Civil Procedure
170AVII Pleadings
170AVII(N) Striking Pleading or Matter Therein
170Ak1108 Affirmative Defense or Avoidance
170Ak1108.1 k. In general. Most Cited Cases

Federal Civil Procedure 170A ⚷1138

170A Federal Civil Procedure
170AVII Pleadings
170AVII(N) Striking Pleading or Matter Therein
170Ak1138 k. Redundant, indirect or prolix matter. Most Cited Cases

Motions to strike affirmative defenses are generally disfavored, but the court may strike defenses that fail to comply with the pleading requirements of the Federal Rules of Civil Procedure or are redundant of matters raised in the defendant's denial. Fed.Rules Civ.Proc.Rules 8(a), 12(f), 28 U.S.C.A.

[9] Federal Civil Procedure 170A ⚷1108.1

170A Federal Civil Procedure
170AVII Pleadings
170AVII(N) Striking Pleading or Matter Therein
170Ak1108 Affirmative Defense or Avoidance
170Ak1108.1 k. In general. Most Cited Cases

Vessel owner properly asserted, and thus court would not strike, affirmative defense to maritime survival and wrongful death suit brought under the LHWCA by representative of estate of worker killed during her employment on moored vessel, that Occupational Safety and Health Administration (OSHA), in its investigation of worker's death, found no safety violations aboard the vessel or with owner's operations and procedures; although the defense could support an inference that owner denied liability, it also raised additional facts that were absent from the complaint, and the defense did not assert the effect of OSHA's investigation, but instead it put representative on notice that she should address the effect of the investigation on her claims. Longshore and Harbor Workers' Compensation Act,

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§ 1 et seq., 33 U.S.C.A. § 901 et seq.; Fed.Rules Civ.Proc.Rule 12(f), 28 U.S.C.A.

[10] Federal Civil Procedure 170A ⚷1108.1

170A Federal Civil Procedure
170AVII Pleadings
170AVII(N) Striking Pleading or Matter Therein
170Ak1108 Affirmative Defense or Avoidance
170Ak1108.1 k. In general. Most Cited Cases

Vessel owner improperly asserted, and thus court would strike, affirmative defense to maritime survival and wrongful death suit brought under the LHWCA by representative of estate of worker killed during her employment on moored vessel, that it carefully and thoroughly screened all of its crew for compliance, dutifully and fully maintained its vessel to all applicable standards, and did all that was required under the law to make the vessel fit for its intended voyage, and thus, it breached no legal obligation and was therefore not liable; this defense rebutted the elements of representative's prima facie case, owner denied paragraphs of the complaint that addressed its liability, and the defense added no additional information beyond the general denial of representative's allegations. Longshore and Harbor Workers' Compensation Act, § 1 et seq., 33 U.S.C.A. § 901 et seq.; Fed.Rules Civ.Proc.Rule 12(f), 28 U.S.C.A.

[11] Federal Civil Procedure 170A ⚷1113

170A Federal Civil Procedure
170AVII Pleadings
170AVII(N) Striking Pleading or Matter Therein
170Ak1108 Affirmative Defense or Avoidance
170Ak1113 k. Release, payment and accord and satisfaction. Most Cited Cases

Court would decline to strike vessel owner's affirmative defense to maritime survival and wrongful death suit brought under the LHWCA by representative of estate of worker killed during her employment on moored vessel, that owner had fully discharged its obligations to the worker for payment of funeral expenses and wages to the end of the voyage; although representative contended that owner had not discharged its payment obligations because she was entitled to damages beyond payment of funeral expenses and earned wage, the defense did not state that such payment was representative's only remedy, and it introduced additional factual information. Longshore and Harbor Workers' Compensation Act, § 1 et seq., 33 U.S.C.A. § 901 et seq.; Fed.Rules Civ.Proc.Rule 12(f), 28 U.S.C.A.

[12] Federal Civil Procedure 170A ⚷1108.1

170A Federal Civil Procedure
170AVII Pleadings
170AVII(N) Striking Pleading or Matter Therein
170Ak1108 Affirmative Defense or Avoidance
170Ak1108.1 k. In general. Most Cited Cases

Vessel owner's affirmative defense to maritime survival and wrongful death suit brought under the LHWCA by representative of estate of worker killed during her employment on moored vessel, that representative's claims were encompassed by the general maritime law and statutory federal maritime law of the United States, and that to the extent that the maritime law conflicted with any other jurisdiction's legal tenets, it superseded it, was not improper merely because the defense contemplated the governing law in the case, and thus court would not strike the defense. Longshore and Harbor Workers' Compensation Act, § 1 et seq., 33 U.S.C.A. § 901 et seq.; Fed.Rules Civ.Proc.Rule 12(f), 28 U.S.C.A.

[13] Federal Civil Procedure 170A ⚷1108.1

170A Federal Civil Procedure
170AVII Pleadings
170AVII(N) Striking Pleading or Matter

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Therein

170Ak1108 Affirmative Defense or Avoidance

170Ak1108.1 k. In general. Most Cited Cases

Vessel owner's failure to produce its purported employment contract with worker killed during her employment on moored vessel warranted striking owner's affirmative defense to maritime survival and wrongful death suit brought under the LHWCA by representative of worker's estate, that the rights and liabilities as between the parties were governed by the employment contract between worker and owner. Longshore and Harbor Workers' Compensation Act, § 1 et seq., 33 U.S.C.A. § 901 et seq.; Fed.Rules Civ.Proc.Rule 12(f), 28 U.S.C.A.

[14] Federal Civil Procedure 170A ⚷2497.1

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2497 Employees and Employment Discrimination, Actions Involving
170Ak2497.1 k. In general. Most Cited Cases

Vessel owner's failure to file its response brief as a cross motion for partial summary judgment or note it accordingly, as required by local rule, warranted denial of its cross-motion for partial summary judgment in maritime survival and wrongful death suit brought under the LHWCA by representative of worker's estate; owner's response brief merely included a request to grant summary judgment in its favor. Longshore and Harbor Workers' Compensation Act, § 1 et seq., 33 U.S.C.A. § 901 et seq.; U.S.Dist.Ct.Rules W.D.Wash., Civil Rule 7(k).

[15] Death 117 ⚷88

117 Death
117III Actions for Causing Death
117III(H) Damages or Compensation
117k80 Elements of Compensation
117k88 k. Loss of society. Most Cited Cases

Loss-of-society damages were available under general maritime law for wrongful death of harbor worker covered by the LHWCA, who died during her employment on moored vessel, where worker was a non-seaman, and she died in the territorial waters of Washington State. Longshore and Harbor Workers' Compensation Act, § 1 et seq., 33 U.S.C.A. § 901 et seq.

[16] Death 117 ⚷88

117 Death
117III Actions for Causing Death
117III(H) Damages or Compensation
117k80 Elements of Compensation
117k88 k. Loss of society. Most Cited Cases

Washington's wrongful death statute, which did not permit loss-of-society damages for non-dependent parents, did not apply to preclude non-dependent parents of harbor worker, who died during her employment on vessel moored in Washington State, from obtaining loss-of-society damages under general federal maritime law. Longshore and Harbor Workers' Compensation Act, § 1 et seq., 33 U.S.C.A. § 901 et seq.; West's RCWA 4.20.020.

[17] Death 117 ⚷81

117 Death
117III Actions for Causing Death
117III(H) Damages or Compensation
117k80 Elements of Compensation
117k81 k. In general. Most Cited Cases

State wrongful death remedies may supplement the general maritime law to enlarge damages.

[18] Death 117 ⚷32

117 Death
117III Actions for Causing Death
117III(A) Right of Action and Defenses
117k32 k. Persons for whose benefit suit

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may be maintained. Most Cited Cases

Death 117 ⚷88

117 Death
117III Actions for Causing Death
117III(H) Damages or Compensation
117k80 Elements of Compensation
117k88 k. Loss of society. Most Cited Cases

Non-dependent siblings of harbor worker, who died during her employment on moored vessel, were improper beneficiaries for maritime wrongful death and thus could not recover loss-of-society damages. Longshore and Harbor Workers' Compensation Act, § 1 et seq., 33 U.S.C.A. § 901 et seq.

***1213** John David Stahl, Mundt MacGregor, Mark A. Wilner, Susannah Carr, Gordon Tilden Thomas & Cordell LLP, Seattle, WA, for Plaintiff.

Robert Alan Green, Seattle, WA, for Plaintiff in Intervention.

Joseph J. Perrone, Bennett Giuliano McDonnell & Perrone, New York, NY, Kevin Beauchamp Smith, Seattle, WA, for Defendants.

ORDER ON PARTIAL SUMMARY JUDGMENT MOTIONS

RICARDO S. MARTINEZ, District Judge.

This matter comes before the Court on Plaintiff's motion for partial summary judgment (Dkt. # 69), and Defendants' motion for partial summary judgment (Dkt. # 71). Plaintiff brought this maritime survival and wrongful death suit against the M/V **SAHARA** and G Shipping after the death of her daughter, Lia Hawkins. Ms. Hawkins was an employee of G Shipping, the owner of the M/V **SAHARA** (the Vessel). The Vessel is a former oceanographic research vessel that G Shipping purchased for conversion into a luxury floating hotel. Plaintiff alleges that Ms. Hawkins died after falling from the Vessel. Plaintiff now moves for summary judgment on Ms. Hawkins' maritime worker status; the mode, manner, and cause of her death; and moves to strike Defendants' affirmative defenses. Defendants move for a summary judgment determination that Ms. Hawkins' family members are barred from recovering loss-of-society damages under applicable law. For the reasons stated below, Plaintiff's motion is GRANTED in PART and DENIED in PART, and Defendants' motion is GRANTED in PART and DENIED in PART.

BACKGROUND

G Shipping is a foreign corporation organized under the laws of Malta. Its principal, Emanuele Garosci, is an Italian national and developer and designer of luxury hotels. Mr. Garosci acquired ownership of the 300–foot, former research Vessel in 2009, intending to convert it to a luxury floating hotel. He hired Ms. Hawkins and a handful of other individuals to pursue the conversion project. Ms. Hawkins was initially hired to perform clerical and administrative duties shore-side, but her office was moved onto the Vessel a short time later. Ms. Hawkins routinely engaged in general labor to assist in the conversion process. She engaged in heavy cleaning and disposing of scrap metal. Plaintiff contends that roughly fifty percent of Ms. Hawkins' daily activities concerned general labor.

On October 21, 2010, Ms. Hawkins disappeared from the Vessel. The next day, divers discovered her body under the adjacent dock. She was clothed in work coveralls and had a work glove on one hand. Plaintiff contends that Ms. Hawkins was throwing scrap metal off of an unprotected area of the Vessel's upper deck when she fell, hit her head, and then drowned a conscious death.

At the time of Lia's death, the conversion project was substantially incomplete. ***1214** The Vessel had not received stability letters nor had it been classed by a society. Millions of dollars worth of work remained to be conducted before the Vessel could be returned to service.

Plaintiff Julie MacLay, Lia's mother, filed suit on behalf of Lia's estate to foreclose a preferred

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maritime tort lien against the Vessel *in rem,* and against both the Vessel and G Shipping for compensatory and punitive damages. The Court granted Plaintiff's motion to arrest the vessel and appointed a substitute custodian on March 26, 2012. Dkt. 6, 7. On October 17, 2012, 2012 WL 5034422, the Court granted three discovery-related motions made by Plaintiff and sanctioned G Shipping for discovery-related abuse. Dkt. # 48. Trial is set for April 8, 2013.

DISCUSSION

A. Legal Standard

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In ruling on summary judgment, a court does not weigh evidence to determine the truth of the matter, but "only determine[s] whether there is a genuine issue for trial." *Crane v. Conoco, Inc.,* 41 F.3d 547, 549 (9th Cir.1994) (*citing Federal Deposit Ins. Corp. v. O'Melveny & Myers,* 969 F.2d 744, 747 (9th Cir.1992)). Material facts are those which might affect the outcome of the suit under governing law. *Anderson,* 477 U.S. at 248, 106 S.Ct. 2505.

The Court must draw all reasonable inferences in favor of the non-moving party. *See O'Melveny & Myers,* 969 F.2d at 747, *rev'd on other grounds,* 512 U.S. 79, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994). However, the nonmoving party must make a "sufficient showing on an essential element of her case with respect to which she has the burden of proof" to survive summary judgment. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

B. Plaintiff's Motion for Partial Summary Judgment

Plaintiff moves for summary judgment on Ms. Hawkins' maritime worker status; the mode, manner, and cause of her death; and moves to strike Defendants' affirmative defenses. The Court addresses each issue in turn.

1. *Ms. Hawkins' Maritime Worker Status*

[1][2] Plaintiff seeks a determination on summary judgment that Lia Hawkins was a harbor worker covered under the United States Longshore & Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901 et seq., and not a "seaman" under the Jones Act. Defendant, however, contends she was a Jones Act seaman. The Jones Act provides a remedy for any "seaman" injured "in the course of his employment." 46 U.S.C.App. § 688. Seaman status is a mixed question of law and fact, but summary judgment is appropriate if the facts and law support only one conclusion. *Delange v. Dutra Const. Co., Inc.,* 183 F.3d 916, 919 (9th Cir.1999).

[3] A plaintiff has seaman status if (1) his duties contribute to the function of the vessel or the accomplishment of its mission, and (2) he has a connection to a vessel *in navigation* that is substantial both in duration and nature. *Id.* (citations omitted) (emphasis added). Both prongs must be satisfied to support a finding of seaman status. Here, the dispositive issue is whether the M/V **SAHARA** was a vessel ***1215** "in navigation" at the time of Lia's death. In *McKinley v. All Alaskan Seafoods, Inc.,* the court held that a ship idled for major repairs and unusable for its intended purpose is not "in navigation." 980 F.2d 567, 571–72 (9th Cir.1992). There, the vessel was undergoing an extensive conversion from an oil drill ship to a seagoing fish and crab processing ship when Mr. McKinley was killed in a fire. Although the vessel had undergone stability testing, it was never granted a stability letter. Thus, the vessel was "not seaworthy at the time of [his] death." *Id.* at 569. In upholding the district court's grant of summary judgment, the court discussed three factors relevant to whether the vessel was "in navigation." First, courts evaluate the purpose for which the vessel has been idled. Second, courts may consider the status of the vessel and the work to be completed. Last, courts may look to the extent of the repairs and who controls them. The court also noted that control of the vessel is not dispositive when the "work is so extensive as to constitute

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conversion." *Id.* at 571. It determined that although the vessel remained under the control of its owner, the vessel was not in navigation because it was undergoing a substantial conversion project and was not in commerce for its new intended use at the time of McKinley's death. *Id.*

Here, the Vessel was not in navigation at the time of Lia's death. It is undisputed that the Vessel was undergoing a major conversion from a scientific research vessel to a luxury floating hotel. Although several elements of the Phase One conversion were completed, none of the Phase Two work had been initiated. *See* Dkt. # 59–4, pp. 9–12. It is undisputed that the Vessel never endured stability trials, nor was it granted a stability letter, nor was it classed by a vessel classification society. Dkt. # 59–6, pp. 16, 18. Plaintiff supplied uncontroverted evidence concerning the nature and extent of repairs necessary to convert the ship to its new intended purpose, the majority of which remained substantially incomplete at the time of Lia's death. *See* Dkt. # 59–4, pp. 9–12. Moreover, it is undisputed that the Vessel was not in a condition to be used in commerce as a luxury floating hotel. Dkt. # 59–6, p. 17. In sum, Defendants fail to rebut Plaintiff's evidentiary showing that the ship was undergoing a major conversion from a decommissioned research vessel to a luxury hotel; that the vessel was not seaworthy because it had not received stability letters or been classed; and that although in the control of G Shipping, the Vessel's intensive conversion project remained substantially incomplete. Each of the factors discussed in *McKinley* favor Plaintiff's argument that the Vessel was not in navigation. Because Defendants fail to satisfy the in navigation requirement, Ms. Hawkins was not a Jones Act seaman.

[4][5] The Court next addresses whether Ms. Hawkins was a harbor worker under the LHWCA. The LHWCA provides compensation for the disability or death of non-seamen maritime employees. *Coloma v. Director, OWCP,* 897 F.2d 394, 397 (9th Cir.1990). The act covers claimants who satisfy both a geographic "situs" test and an occupational "status" test. *See Chesapeake & Ohio R.R. Co. v. Schwalb,* 493 U.S. 40, 45, 110 S.Ct. 381, 107 L.Ed.2d 278 (1989); *Coloma,* 897 F.2d at 397–98. Geographic situs is met when the employee's injury occurred "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." 33 U.S.C. § 903(a). The occupational status test is met when the injured employee is a "person engaged in maritime employment, including***1216** any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker." 33 U.S.C. § 902. However, the definition of "maritime employee" excludes "individuals employed exclusively to perform office clerical, secretarial, security, or data processing work," and "a master or member of a crew of any vessel." 33 U.S.C. § 902(3)(A) & (G).

Here, Ms. Hawkins meets both the situs and status tests required for coverage under the LHWCA. As to geographic situs, the Vessel was moored at the Ballard Mill Marina, upon navigable waters, within the territorial waters of the State of Washington.[FN1] Ms. Hawkins' death occurred during her employment on the moored vessel, and her body was recovered from the water under the adjacent dock. The situs test is accordingly met. The status test is also met. Although G Shipping contends that Ms. Hawkins was hired exclusively to work aboard the ship "as its pursor" and "for no other reason," no employment contract was produced to support such statements. Conversely, Plaintiff presents uncontroverted evidence that Ms. Hawkins routinely engaged in the cleaning and demolition of areas of the Vessel. Dkt. # 59–4, pp. 22–27; Dkt. # 59–6, pp. 2–4; 7–9. The terms "ship repair" and "ship repairing" mean "any repair of a vessel including, but not restricted to, alterations, conversions, installations, cleaning, painting, and maintenance work." 29 C.F.R. § 1915.4(j). Thus, the definition of ship

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repair includes the work performed by Ms. Hawkins on a regular basis. Defendants fail to show that her duties were solely administrative or clerical to fall under the administrative exclusion to § 902(3). Nor have Defendants shown that Ms. Hawkins falls into the "crew member" exclusion. A "crew member," as opposed to a harbor worker, is a worker aboard a ship for the primary purpose of aiding in navigation. *Pac. Emp. Ins. Co. v. Pillsbury,* 130 F.2d 21, 24 (9th Cir.1942). As discussed above, the Vessel was not in navigation at the time of Ms. Hawkins' death. Because the Vessel was not in navigation, Ms. Hawkins was not a crew member. *See Carumbo v. Cape Cod S.S. Co.,* 123 F.2d 991, 995 (1st Cir.1941) ("One cannot be a 'member of a crew' if the ship is not in navigation."). Ms. Hawkins is accordingly entitled to coverage under the LHWCA.

> FN1. Defendant argues that the Death on the High Seas Act ("DOHSA") may apply. To be on the "high seas," a vessel must be three miles from the shoreline. Here, the Vessel was moored in the Ballard Mill Marina. Accordingly, that act cannot apply.

The parties do not dispute that G Shipping failed to purchase the compensation coverage required by the LHWCA under § 904(a). Dkt. # 59–6, p. 13. Should an employer fail to purchase coverage, § 905(a) permits the legal representative of the decedent to "maintain an action at law or in admiralty for damages on account of such injury or death." 33 U.S.C. § 905(a). The Court finds the LHWCA applicable to Ms. Hawkins, and that G Shipping failed to procure the necessary compensation coverage. Accordingly, Plaintiff's claims may be maintained under § 905(a). Plaintiff's motion is GRANTED on this issue.

2. *Mode, Manner, and Cause of Ms. Hawkins' Death*

[6][7] Plaintiff asks the Court to grant summary judgment on the facts of Ms. Hawkins' death. She seeks not only a finding by the Court as to the legal effect of the death certificate, which established the manner (or mode) and cause of death, but also factual findings surrounding what happened to Ms. Hawkins when she died. ***1217** Plaintiff's motion is untethered to a motion for summary judgment on liability. Although summary judgment may be used as a tool to narrow the real issues in dispute, this request is improper. The Court declines to weigh the evidence and evaluate witness credibility to establish, as a matter of law, facts that are favorable to Plaintiff's case theory. Such determinations are the province of the jury. To the extent Plaintiff asks the Court to take judicial notice of the death certificate, this request is granted. The Court takes judicial notice of the mode/manner of Ms. Hawkins' death as "accident," and the cause of death as "drowning and skull fracture due to blunt force head injury." Dkt. # 63–1, p. 7; RCW 70.58.180.

3. *Motion to Strike Affirmative Defenses*

[8] Plaintiff moves to strike each of Defendants' affirmative defenses, or asks the Court to dismiss them as a matter of law. Dkt. # 69, p. 23. Under Fed.R.Civ.P. 12(f), "the court may strike from a pleading an insufficient defense." Motions to strike affirmative defenses are generally disfavored, but the court may strike defenses that fail to comply with the pleading requirements of Fed.R.Civ.P. 8(a) or are redundant of matters raised in the defendant's denial. *Renalds v. S.R.G. Restaurant Group,* 119 F.Supp.2d 800, 802 (N.D.Ill.2000). Furthermore, affirmative defenses must meet the standards of Fed.R.Civ.P. 12(b)(6). Thus, when viewed in the light most favorable to the pleader, if the affirmative defense fails to state a claim upon which relief can be granted, it shall be dismissed. *Id.*

As an initial matter, Defendants agree to withdraw Affirmative Defenses 3, 14, 15, and 17. Accordingly, these defenses are STRICKEN. In addition, Plaintiff did not address Affirmative Defense 9. Defense 9 will be permitted.

With respect to the remaining thirteen defenses, Defendants concede that Affirmative Defenses 4, 5, 6, 7, and 8 are legally insufficient based

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on the Court's finding that 33 U.S.C. § 905(a) applies in this case.[FN2] Dkt. # 73, p. 15. Thus, these defenses are STRICKEN for failure to state a claim. This leaves only Affirmative Defenses 1, 2, 10, 11, 12, 13, and 16. Defendants offer no response to Plaintiff's request to strike Defense 1. Affirmative Defense 1 states: "Plaintiff has failed to state to state a claim for which relief can be granted." Dkt. # 29, p. 4. Defendants have not challenged Plaintiff's claims under Fed.R.Civ.P. 12(b)(6) nor has it responded to Plaintiff's request to strike. Therefore, Affirmative Defense 1 is STRICKEN for failure to state a claim.

FN2. If an employer fails to secure payment of compensation coverage under the LHWCA, section 905(a) bars employers from pleading as a defense (1) that the injury was caused by the negligence of a fellow servant; (2) that the employee assumed the risk of employment; or (3) that the injury was due to the employee's contributory negligence. 33 U.S.C. 905(a).

Plaintiff contends that Affirmative Defenses 2 and 12 are not affirmative defenses because they are improper attempts to rebut Plaintiff's *prima facie* case. Defendants contend each is properly asserted by stating only that "they fall outside of rebutting the allegations of plaintiff's prima facie case." Dkt. # 73, p. 15. "An affirmative defense raises matters extraneous to the plaintiff's *prima facie* case; as such, they are derived from the common law plea of 'confession and avoidance.' " *Ford Motor Co. v. Transp. Indem. Co.,* 795 F.2d 538, 546 (6th Cir.1986) (quoting 5 C. Wright & A. Miller, Federal Practice & Procedure § 1270, at 289 (1969)). Affirmative***1218** defenses generally do not include defenses that negate an element of a plaintiff's *prima facie* case. *Id.* (citing 2A J. Moore & J. Lucas, Moore's Federal Practice ¶¶ 8.27[1], 8.27[4] (2d ed. 1985)). The line between the two types of defenses, however, may not be clear. *Id.* But, "if permitting the defendant to interpose the defense will force the plaintiff to perform additional discovery or develop new legal theories, these considerations will militate heavily in favor of terming the defense affirmative." *Id.*

[9] Affirmative Defense 2 states: "OSHA in its investigation of Ms. Hawkins death found no safety violations aboard the vessel or with G Shipping's operations and procedures." Dkt. # 29, p. 4. Although Defense 2 could support an inference that G Shipping denies liability, it also raises additional facts that are absent from Plaintiff's complaint. The Defense does not assert the effect of OSHA's investigation, but it puts Plaintiff on notice that she should address the effect of the investigation on her claims. Fairness weighs in favor of characterizing Defense 2 as an affirmative defense. Accordingly, the Court finds Defense 2 properly asserted.

[10] Affirmative Defense 12 states: "This defendant as owner and operator of the vessel M/V **SAHARA**, carefully and thoroughly screened all of its crew for compliance, dutifully and fully maintained its vessel to all applicable standards and did all that is required under the law to make said vessel fit for its intended voyage; as a result thereof, defendant has breached no obligation to plaintiff under applicable law and is therefore not liable." Dkt. # 29, p. 5. Unlike Defense 2, this Defense rebuts the elements of Plaintiff's *prima facie* case and is an improper affirmative defense. Moreover, Defendants denied ¶¶ 25 and 30 of the Verified Complaint, paragraphs that address Defendants' liability. Defense 12 adds no additional information beyond Defendants' general denial of Plaintiff's allegations. The Court STRIKES Affirmative Defense 12 as redundant.

[11] Plaintiff challenges Affirmative Defense 10, which states: "Defendant has fully discharged its obligations to the plaintiff-decedent for payment of funeral expenses and wages to the end of the voyage." Plaintiff contends that G Shipping has not discharged its payment obligations because she is entitled to damages beyond payment of funeral expenses and earned wages. The defense, however, does not state that such payment is Plaintiff's only

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remedy and introduces additional factual information. The Court declines to strike Affirmative Defense 10.

Plaintiff challenges Affirmative Defense 11, failure to mitigate damages, on the basis that Ms. Hawkins' injury was fatal, and thus afforded no opportunity to mitigate loss. Defendants respond that the mitigation of damages defense does not target Plaintiff's tort remedies; rather, the defense targets the “unnecessary and expensive” damages incurred by arresting the Vessel. Plaintiff filed a verified complaint against the Vessel *in rem* and a motion to arrest the Vessel to enforce a maritime tort lien. The Court granted that motion and Defendants did not challenge the legal sufficiency of the Order. Because the Court granted Plaintiff's motion to arrest the Vessel, Affirmative Defense 11 is STRICKEN as moot.

[12] Plaintiff next contests Affirmative Defense 13 as improper because it raises a choice of law issue. The defense states: “The claims plaintiff has asserted are encompassed by the general maritime law and statutory federal maritime law of the United States, and to the extent that the aforesaid maritime law conflicts with any other jurisdiction's legal tenets, it supersedes***1219** it.” Dkt. # 29, p. 5. Plaintiff fails to show that this defense is improper merely because it contemplates the governing law in this case. Accordingly, the Court declines to strike Defense 13.

[13] Last, Plaintiff challenges Affirmative Defense 16 on the basis that no employment contract was produced during discovery. The defense states: “The rights and liabilities as between the parties are governed by the employment contract between plaintiff-decedent and defendant as memorialized in the shipping articles signed by both plaintiff and defendant.” Dkt. # 29, p. 6. Defendants respond that although no hard-copy of the document has been found, an implied contract exists. However, the affirmative defense specifically refers to an employment contract memorialized in the shipping articles, not an implied contract. Because Defendants concede that no contract was produced in this case, the defense is STRICKEN for failure to state a claim.

4. *G Shipping's Request to Strike the Cummins and Williams Declarations*

G Shipping contends that the Cummins declaration is improper because the expert report it references was unsigned, and that the Williams declaration should be stricken because Dr. Williams was not properly disclosed during discovery, to Defendants' detriment. The Court need not evaluate the merits of these arguments because it declined to grant summary judgment on Plaintiff's “Mode, Manner, and Cause of Death” contentions, to which the Cummins and Williams declarations pertain. G Shipping's request to strike is therefore MOOT.

5. *G Shipping's Cross Motion for Partial Summary Judgment*

[14] Under Local Civil Rule 7(k), “[a] party filing a cross motion must note it in accordance with local rules.” Moreover, parties contemplating filing cross motions “are encouraged to agree on a briefing schedule and to submit it to the court for approval through a stipulation and proposed order.” *Id.* Here, Defendants filed a Response brief to Plaintiff's motion for partial summary judgment that includes a request to grant summary judgment in favor of Defendants, but Defendants did not properly file the brief as a cross motion for partial summary judgment or note it accordingly. Dkt. # 73, p. 15. As Defendants' cross motion failed to comply with the local rules, it shall be DENIED.

C. Defendants' Motion for Partial Summary Judgment

G Shipping and the Vessel, *in rem,* move for partial summary judgment to dismiss Plaintiff's claim for non-pecuniary damages. In the Verified Complaint, Plaintiff asserts a maritime wrongful death damages claim on behalf of Ms. Hawkins' parents and siblings for their loss of society with the decedent. Defendants contend that (1) loss-of-society damages are unavailable under general maritime law, and (2) even if loss-of-society claims are generally permissible, claims benefitting Ms.

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Hawkins' parents and siblings are precluded because none were dependents of Ms. Hawkins. The Court first addresses whether the relevant law permits recovery for loss of society, and then turns to whether loss-of-society claims require that the beneficiary be a dependant of the decedent.

1. *Loss of Society*

[15] The Court determined that Ms. Hawkins was a harbor worker under the LHWCA. As discussed above, the Jones Act does not apply because the Vessel was ***1220** never in navigation as required by the Act. Nor does the Death on the High Seas Act ("DOHSA") apply in this case as the Vessel was moored in the territorial waters of Washington State. The Court also determined that 33 U.S.C. § 905(a) governs. Section 905(a) permits a LHWCA plaintiff to bring suit in law or admiralty without concern for the limitation of remedies imposed by the Act. Plaintiff chose to bring suit under the general maritime law for survival and wrongful death. She does not assert any claims under state law.

Defendants contend that loss-of-society damages are not available under general maritime law for wrongful death. The Supreme Court first recognized a right of recovery for wrongful death under general maritime law in *Moragne v. States Marine Lines,* 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970). While *Moragne* established the cause of action, it left to other federal courts the task of defining the nature of damages. *Id.* at 408, 90 S.Ct. 1772. In *Sea–Land Services, Inc. v. Gaudet,* 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974), the Supreme Court confronted the damages issue and held that *Moragne* plaintiffs, as beneficiaries for the wrongful death of a longshoreman, could recover both pecuniary and loss-of-society damages FN3 under general maritime law. The Supreme Court then cabined *Gaudet* by limiting its application to longshoremen who died in state territorial waters. *Miles v. Apex Marine Corp.,* 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990). The Ninth Circuit, however, held that while *Miles* restricted the reach of *Gaudet,* it permitted loss-of-society damages for wrongful death claims asserted by beneficiaries of non-seamen in territorial waters. *Sutton v. Earles,* 26 F.3d 903 (9th Cir.1994). Thus, in the Ninth Circuit, whether loss-of-society damages for maritime wrongful death are recoverable depends on whether statutory or general maritime law applies. Although neither the Jones Act nor DOHSA permit loss-of-society damages, *Sutton* makes clear that beneficiaries of non-seamen in territorial waters may nonetheless recover for loss of society under general maritime law. Therefore, under *Sutton,* loss-of-society damages are recoverable because Ms. Hawkins was a non-seaman who died in the territorial waters of Washington State.

FN3. Loss of society encompasses "a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection." *Gaudet,* 414 U.S. 573, 585, 94 S.Ct. 806 (1974).

2. *Dependency*

[16][17] Sutton also held that non-dependent parents may recover loss-of-society damages as beneficiaries of the decedent. *Id.* at 916 ("Parents, dependent or not, are therefore entitled to loss-of-society damages."). Contrary to Sutton, Defendants contend that Washington's wrongful death statute, RCW 4.20 et seq., applies and that RCW 4.20.020 limits wrongful death beneficiaries to dependent parents and siblings of the decedent. Notwithstanding that Plaintiff brought claims under general maritime law and Defendants affirmatively pleaded for application of maritime law in their Answer and Amended Answer, Washington's wrongful death statute does not limit the general maritime law. Although state wrongful death remedies may be applied to enlarge the range of recoverable damages available, Defendants have not shown that, in this Circuit, such statutes limit the nature of damages otherwise available under federal maritime law. In *Yamaha Motor Corp., U.S.A. v. Calhoun,*

516 U.S. 199, 133 L.Ed.2d 578 (2001), the Supreme Court held that state remedies may supplement ***1221** the general maritime law to enlarge damages; it did not hold that state remedies supplant the general maritime law when state law remedies otherwise limit the extent of recovery. *See id.* at n. 8 ("We attempt no grand synthesis or reconciliation of our precedent today, but confine our inquiry to the modest question whether it was *Moragne's* design to terminate recourse to state remedies when nonseafarers meet death in territorial waters."); *see also Bratteli et al. v. United States,* Case No. J95–003 CV (JWS), 1996 A.M.C. 1980, 1984–85, 1996 WL 549216 (D.Alaska May 16, 1996) (interpreting *Yamaha* and rejecting argument that state law remedies displace general maritime remedies in state territorial waters). Although the Washington statute does not permit loss-of-society damages for non-dependent parents, *Sutton* expressly holds that such damages are permitted under general maritime law. Accordingly, Ms. Hawkins' parents may maintain a claim for loss-of-society damages.

[18] For Ms. Hawkins' siblings, however, *Sutton* is silent. Defendants contend that Ms. Hawkins' siblings were not her dependents and may not recover loss-of-society damages. Defendants provided deposition testimony from Ms. Hawkins' twin brother, Theron, stating that he was not a financial dependent of his sister. Dkt. # 72–3, p. 31. Plaintiff offered no factual evidence rebutting the non-dependent status of Ms. Hawkins' siblings. While Ms. Hawkins' non-dependent parents may recover loss-of-society damages under *Sutton,* the *Sutton* court's reasoning informs whether recovery should be available to non-dependent siblings. Discussing *Wahlstrom v. Kawasaki Heavy Indus., Ltd.,* 4 F.3d 1084 (2nd Cir.1993) the court stated:

> In *Wahlstrom,* the court first ruled that the district court erred in adopting a parental dependency requirement for *any* type of recovery in *Moragne* actions. 4 F.3d at 1090–91. In rejecting the district court's blanket dependency requirement, the court relied upon the DOHSA schedule of beneficiaries found at 46 U.S.C.App. § 761. *Id.* (noting *Moragne's* admonition that lower courts use DOHSA as a guide in fashioning the newly established general maritime wrongful death cause of action). The court stated that DOHSA's authorization of suits " 'for the exclusive benefit of the decedent's wife, husband, parent, child or dependent relative' ... indicat[es] that a parent need not be a dependent of the decedent to have standing to recover some damages." *Id.* at 1090.
>
> With this reasoning, we agree.[15] Indeed, we would stop there because: (1) *Gaudet* instructs that loss-of-society damages are available for *Moragne* wrongful death actions not covered by either DOHSA or the Jones Act; (2) **Federal courts typically rely upon the DOHSA schedule of plaintiffs in determining standing to bring a *Moragne* wrongful death action.** Parents, dependent or not, are therefore entitled to loss-of-society damages.
>
> *Id.* (emphasis added).

The *Sutton* court relied on the DOHSA schedule of plaintiffs to determine that dependency is not required for parents. DOHSA's schedule limits a right of action for wrongful death to the "decedent's wife, husband, parent, child, or dependent relative." 46 U.S.C.App. § 761. Facially, DOHSA does not require dependency status for parents, but it does require dependency for siblings as a class of non-specified "dependent relatives." While discussion of the DOHSA schedule is absent from the parties' briefing, the Court found two cases specifically addressing whether non-dependent siblings may ***1222** maintain a wrongful death cause of action under general maritime law. In *Glod v. American President Lines, Ltd.,* 547 F.Supp. 183 (N.D.Cal.1982), the court looked to DOHSA's schedule of beneficiaries to determine which family members may maintain a cause of action. *Id.* at 185. In light of DOHSA, the court found that the decedent's non-dependent siblings were not entitled to maintain an action for maritime wrongful death.

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Glod, 547 F.Supp. at 186. Similarly, in *Evich v. Connelly,* 759 F.2d 1432 (9th Cir.1985), the court held that non-dependent brothers of the decedent could not maintain an action for maritime wrongful death after consideration of both DOHSA and the Alaska wrongful death statute. *Id.* at 1434 ("Recovery for maritime wrongful death would require Connelly's brothers to be dependent relatives."). As discussed by both *Glod* and *Evich,* the DOHSA schedule does not permit recovery by non-dependent siblings. Because Plaintiff failed to show that Ms. Hawkins' siblings were dependent relatives, they are improper beneficiaries for maritime wrongful death and may not recover loss-of-society damages. Accordingly, partial summary judgment is GRANTED in PART and DENIED in PART.

CONCLUSION

Having reviewed the motions, the responses and replies thereto, all attached exhibits and declarations, and the remainder of the record, the Court hereby finds and ORDERS:

(1) Plaintiff's motion for partial summary judgment (Dkt. # 69) is GRANTED in PART and DENIED in PART;

(2) Affirmative Defenses 1, 3, 4, 5, 6, 7, 8, 11, 12, 14, 15, 16, and 17 are STRICKEN;

(3) Defendant G Shipping's request to strike is MOOT;

(4) Defendants' cross-motion for partial summary judgment is DENIED for failure to comply with the local rules;

(5) Defendants' motion for partial summary judgment (Dkt. # 71) is GRANTED in PART and DENIED in PART;

The Clerk is directed to send this Order to all counsel of record.

W.D.Wash.,2013.
MacLay v. M/V SAHARA
926 F.Supp.2d 1209, 2013 A.M.C. 1017

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Only the Westlaw citation is currently available.

United States District Court, W.D. Washington, at Seattle.
Julie MacLAY, as Personal Representative of the Estate of Lia Christine Hawkins, deceased, Plaintiff,
Lunde Marine Electronics, Inc., Plaintiff in Intervention,
v.
M/V **SAHARA** (ex Oceanographer), IMO No. 6600826, her engines, tackle, rigging, equipment and other appurtenances, in rem; and G Shipping Ltd., a foreign corporation organized and existing under the Laws of Malta, Defendants.

No. C12–512 RSM.
June 12, 2013.

John David Stahl, Mundt MacGregor, Seattle, WA, Mark A. Wilner, Susannah Carr, Gordon Tilden Thomas & Cordell LLP, Seattle, WA, for Plaintiff.

Kevin Beauchamp Smith, Seattle, WA, Joseph J. Perrone, Bennett Giuliano McDonnell & Perrone, New York, NY, for Defendants.

ORDER AWARDING PREJUDGMENT AND POST–JUDGMENT INTEREST, ENTERING JUDGMENT *IN REM,* AND ORDERING FORECLOSURE SALE OF VESSEL
RICARDO S. MARTINEZ, District Judge.

I. INTRODUCTION

***1** This matter comes before the Court on Plaintiff's Motion for Award of Prejudgment and Post–Judgment Interest, Entry of Judgment *In Rem,* and Order of Sale. Dkt. # 130. On April 5, 2013, the Court entered a Pretrial Order providing, *inter alia,* that the calculation and award of prejudgment interest, the status and priority of Plaintiff's maritime tort lien, and issues relating to foreclosure and sale of the M/V **SAHARA** (the "Vessel") are reserved for resolution post-trial. Dkt. # 112, p. 11. On April 19, 2013, the jury rendered a verdict in favor of Plaintiff for compensatory damages in the amount of $3,450,000.00. Dkt. # 26. The Court then entered judgment in favor of Plaintiff and against Defendants for the same amount on that date. Dkt. # 127. Defendants appealed. Dkt. # 136.

Plaintiff now seeks (1) an award of prejudgment interest in the amount of 8% per annum, (2) an award of post judgment interest at the statutory rate of .12%, (3) an award of judgment *in rem* against the M/V **SAHARA**, IMO No. 66000826, its engines, tackle, rigging, equipment and other appurtenances in the full amount of Plaintiff's verdict, plus prejudgment and post judgment interest as provided by law, (4) a declaration that Plaintiff's judgment *in rem* constitutes a preferred maritime tort lien against the Vessel, superior in rank and priority to all other liens, claims, and encumbrances against the Vessel whatsoever, with the exception of *custodia legis expenses,* (5) an order that Plaintiff's preferred maritime lien be foreclosed and the Vessel condemned and sold by the U.S. Marshal, with the proceeds to be applied first to pay or reimburse expenses of *custodia legis* and then to pay Plaintiff's judgment in rem, and (6) an order granting Plaintiff the right to establish a minimum bid price for the Vessel at the Marshal's sale, at its discretion, and further granting Plaintiff the right to bid all or any portion of its judgment *in rem* as a credit bid in lieu of cash at the sale. Dkt. # 130, pp. 1–2.

Defendants oppose Plaintiff's motion only with respect to an award of prejudgment interest and execution of the judgment. They contend that Plaintiff is not entitled to prejudgment interest and they request, pursuant to Fed.R.Civ.P. 62(d), that the Court stay execution of the judgment pending appeal and accept the Vessel as alternative security to the Rule 62(d) supersedeas bond requirement. Dkt. # 133. For the reasons set forth below, the Court shall GRANT Plaintiff's motion in its entirety.

II. DISCUSSION

A. Prejudgment Interest

Plaintiff requests an award of prejudgment interest at a rate of 8% per annum. Defendants contend that Plaintiff is not entitled to prejudgment interest under admiralty law. Alternatively, Defendants request that the rate be set at the .12% statutory rate ordinarily applied to postjudgment interest. 28 U.S.C. § 1961 ;http://federalreserve.gov/releases/h15/current/.

Under the general maritime law, "prejudgment interest must be granted unless peculiar circumstances justify its denial." *Evich v. Morris,* 819 F.2d 256, 259 (9th Cir.1987) (quoting *Vance v. American Hawaii Cruises, Inc.,* 789 F.2d 790, 795 (9th Cir.1986)). The Court has broad discretion to set the rate of prejudgment interest to provide just restitution for the injured party. *Columbia Brick Works, Inc. v. Royal Ins. Co.,* 768 F.2d 1066, 1068 (9th Cir.1985). This Court has found that "[i]n admiralty, an injured [party] is entitled to prejudgment interest not only on his fixed costs, but also on the amount awarded for pain and suffering, and any other intangible losses." *Moore v. The Sally J.,* 27 F.Supp.2d 1255, 1262 (W.D.Wash.1998). In addition, although the interest rate prescribed by 28 U.S.C. § 1961 for post-judgment interest (the "statutory rate") is usually applied, equitable considerations may demand a different rate. *Id.*

***2** Here, Plaintiff's requested rate of 8% is justified. First, Defendants have failed to show that peculiar circumstances justify denial of an award of prejudgment interest. Second, the current statutory rate of .12% is extraordinarily low. Prejudgment interest is intended "to compensate the wronged party for being deprived of the monetary value of the loss from the time of the loss to the payment of judgment." *Vance,* 789 F.2d at 794. This is a case where a young woman lost her life, and the jury found in favor of Plaintiff and against Defendants. They awarded a substantial amount of compensatory damages. The negligible statutory rate does not wholly compensate the decedent's family or estate for the time that lapsed between Lia Hawkin's death until the entry of judgment. Third, although 8% is certainly higher than the statutory rate, it is well lower than the applicable Washington statutory rate, which is set at 12%. R.C.W. 19.52. The Court may, in its discretion, apply the local rate if warranted by the equities in the case. *See Columbia Brick Works,* 768 F.2d at 1071 (recognizing that a court may choose the state rate at its discretion, but holding that the then higher federal rate of 12.801 % applied); *see also The Sally J.,* 27 F.Supp.2d at 1262 (setting rate at 12%). Accordingly, the Court finds Plaintiff's requested 8% rate, which is lower than the local Washington statutory rate, warranted here. The Court shall apply the 8% rate to the full judgment for a total award of prejudgment interest in the amount of $688,865.75.[FN1]

> FN1. The math is as follows: $3,450,000.00 (principal judgment amount) times .08 (rate) divided by 365 (days per year) times 911 (number of days between Ms. Hawkins' death (Oct. 21, 2010) and the date of judgment (April 19, 2013)) equals $688,865.75.

B. Defendants' Request for Alternative Security

Federal Rule of Civil Procedure 62(a) provides that a district court's judgment becomes final and enforceable fourteen days after the court enters judgment. Fed.R.Civ.P. 62(a). The prevailing plaintiff may then execute the judgment. *Columbia Pics. Tel., Inc. v. Krypton Broad. of Birmingham, Inc.,* 259 F.3d 1186, 1197 (9th Cir.2001). Rule 62(d), however, permits the appellant, once an appeal is taken, to obtain a stay of execution by posting a supersedeas bond. Fed.R.Civ.P. 62(d). A party "must ordinarily move first in the district court for the following relief: (A) a stay of the judgment or order of the district court pending appeal; (B) approval of a supersedeas bond; or an order suspending, modifying, reinstating, or granting an injunction while an appeal is pending." Fed. R.App. P. 8(1).

As an initial matter, Defendants' "request" to

use the Vessel as alternative security to stay the execution of judgment is not a motion filed in accordance with the Local Civil Rules. In any event, the request fails on the merits. Defendants' request and supporting argument is reproduced from its brief in its entirety below.

> The Defendants do not seek to have the supersedeas bond requirement waived, but rather do request that the Court accept the Vessel as alternative security for the appeal. The Vessel should be utilized as alternative security because it is already in the custody of the Court and provides the Plaintiff with more than adequate security. As testified to at trial, G–Shipping has over $8,000,000.00 invested in the **Sahara**, more than double the judgment. Further, the Defendants would continue to make all of the required payments to keep the Vessel in the Court's custody. In fact, the Plaintiff's motion seeking to foreclose the Vessel to recoup the judgment is a tacit admission by the Plaintiff that the Vessel will in fact adequately secure the judgment.

***3** Dkt. # 133, pp. 6–7.

While it is true that courts may approve the posting of alternative security, Defendants have failed to offer any reason why the Court should depart from the supersedeas bond requirement, assuming of course, that they properly moved for stay of execution in the first place. "[A] supersedeas bond is a privilege extended the judgment debtor as a price of interdicting the validity of an order to pay money." *In re Wymer,* 5 B.R. 802, 807 (9th Cir.1980) (citation omitted). The judgment debtor has the burden "to objectively demonstrate the reasons for such departure." *Id.* Moreover, departure is not justified when the judgment debtor offers only its unsubstantiated word that the property has value. *See Skydive Arizona, Inc. v. Quattrocchi,* 2010 WL 2534200, at * 3 (D.Ariz. June 18, 2010). Here, Defendants have produced **no objective reason** warranting departure from the supersedeas bond requirement.

The Court also notes that Defendants have consistently, throughout motion practice and jury trial, paid little respect to the Court's orders. Notwithstanding Defendants' general pattern of misconstruing relevant law and mischaracterizing the evidence in this case, Defendants failed to timely answer the Verified Complaint (*see* Dkt. # 25), failed to timely comply with the Court's sanctions Order (*see* Dkt. # 78), and failed to even file a trial brief in violation of the Pretrial Order (Dkt.# 112). The final insult, however, arises from Defendants' claim that they "would continue to make all of the required payments to keep the Vessel in the Court's custody." Dkt. # 133, p. 7. Plaintiff filed a declaration by the Court-appointed substitute custodian, Jeff Osborn, which states that despite G Shipping's agreement to pay the ongoing monthly moorage costs while the Vessel was under arrest, "G Shipping has paid only $27,000 (six months) of the total $63,126.96 in moorage costs and corresponding late fees incurred through May 2013. *The remaining $36,126.96 in moorage costs have been advanced by my company (Dock Street Custodial), which then has had to invoice Plaintiff for reimbursement."* Dkt. # 135, ¶ 4 (emphasis added). Thus, the Court is without confidence that Defendants have any intention of complying with the terms of the alternative security they seek. The request is accordingly denied and Plaintiff's motion shall be granted in its entirety.

II. CONCLUSION

Having duly considered the motion and supporting declaration, the response and reply thereto, and the balance of the files and records herein, the Court makes and enters the following order.

IT IS HEREBY ORDERED as follows:

1. Plaintiff's Motion for Award of Prejudgment and Post–Judgment Interest, Entry of Judgment *In Rem,* and Order of Sale is GRANTED.

2. Plaintiff is entitled to prejudgment interest on her judgment herein under governing maritime law. *See, e.g. Evich v. Connelly,* 819 F.2d 256, 259 (9th Cir.1985). In the exercise of its discretion un-

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der the maritime law, the Court concludes that 8.00% per annum is an appropriate prejudgment interest rate under the equities of this case and prior precedent in this district and the Ninth Circuit. *See Vance v. American Hawaii Cruises, Inc.,* 789 F.2d 790 (9th Cir.1986); *Columbia Brick Works, Inc. v. Royal Ins. Co.,* 768 F.2d 1066 (9th Cir.1985); *Mabrey v. Wizard Fisheries, Inc.,* C05–1499RSL, 2007 WL 2570303 (W.D.Wash. Aug.30, 2007); *Montaperto v. Foss Mar. Co.,* No. C98–1594Z, 2000 WL 33389209 (W.D.Wash. Oct.17, 2000); *Moore v. The Sally J.,* 27 F.Supp.2d 1255 (W.D.Wash.1998); *Elms v. Crowley Marine Servs.,* No. C95–363Z, 1996 WL 881928 (Sept. 16, 1996); *Prosser v. F/V CRYSTAL VIKING,* No. C89–850Z, 1993 WL 668292 (W.D.Wash. May 13, 1993). Plaintiff is therefore awarded prejudgment interest on her $3,450,000 judgment herein at the rate of 8.00% per annum, calculated from the date of Lia Hawkins' death on October 21, 2010 through the April 19, 2013 judgment entered herein, which prejudgment interest amount totals $688,865.75.

***4** 3. Plaintiff is awarded post judgment interest on the $3,450,000 principal amount of her judgment herein at the post judgment interest rate of 0.12% pursuant to 28 U.S.C. § 1961(a).

4. Plaintiff is awarded judgment *in rem* against the M/V **SAHARA**, IMO No. 6600826, its engines, tackle, rigging, equipment and other appurtenances (the "Vessel") for the $3,450,000 principal amount of its judgment herein, plus $688,865.75 in prejudgment interest as awarded in Paragraph 2 above, plus post judgment interest as may accrue on the principal amount of the judgment in accordance with Paragraph 3 above.

5. Plaintiff's judgment *in rem* represents a preferred maritime tort lien against the Vessel superior in rank and priority to all other liens, claims and encumbrances against the Vessel whatsoever, with the exception of *custodia legis* expenses.

6. Plaintiff's preferred maritime tort lien against the Vessel shall be foreclosed, and the Vessel condemned and sold by the U.S. Marshal, with the proceeds of the sale to be applied first to pay or reimburse expenses of *custodia legis* and then to pay Plaintiff's judgment *in rem.*

7. The sale of the Vessel shall be scheduled on a date mutually acceptable to Plaintiff and the U.S. Marshal and shall be conducted in accordance with LAR 145. Notice of the sale shall be published in accordance with LAR 145 and 150. At its discretion, Plaintiff shall be entitled to instruct the U.S. Marshal what, if any, minimum bid amount to require as a condition of the sale, in an amount not to exceed Plaintiff's judgment *in rem.*

8. As holder of the senior maritime lien against the Vessel, Plaintiff shall be entitled to bid all or any portion of its judgment *in rem* as a credit bid in lieu of cash at the sale.

9. If the Vessel is sold to a purchaser for cash, the cash proceeds of the sale shall be deposited into the Registry of the Court pending confirmation of the sale and a subsequent disbursement order from the Court. All liens upon the Vessel shall attach to the proceeds of the sale of the Vessel with the same priorities such liens enjoyed against the Vessel.

10. The Clerk of the Court is directed to enter a supplemental judgment herein in accordance with the terms of this Order.

W.D.Wash.,2013.
MacLay v. M/V SAHARA
Slip Copy, 2013 WL 2897960 (W.D.Wash.)

END OF DOCUMENT

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