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April 8, 2013

Senator John D. Rockefeller IV
Chairman, Committee on Commerce
Science and Transportation
United States Senate
254 Russell Senate Office Building
Washington, DC 20510-6125

RE: CRUISE SHIP PASSENGER SAFETY COMPROMISED BY CRUISE LINES' RECENT EFFORTS TO CUT OPERATING EXPENSES BY DENYING CREW ACCESS TO U.S. COURTS

Dear Senator Rockefeller:

As a law firm dedicated to issues concerning safety for passengers and crew serving aboard ships on the high seas, we applaud your attention and efforts to promote cruise ship safety. Our very successful law practice focuses almost exclusively on the representation of injured cruise ship passengers and crew. Throughout the decades of representing our clients amid a fast growing cruise industry[1], we have noticed many trends; perhaps, though, none more troubling than the present cruise environment.

While the cruise industry leaders, led by Carnival Corporation, have experienced tremendous growth, we see their more intense focus on increasing margins by cutting operational costs and expenses. Several years ago, amid launching larger capacity ships and expanding local ports in an effort to increase growth, we noticed a trend in deteriorating crewmember conditions aboard cruise ships. On the larger ships, crew to passenger ratios decreased, crewmembers are forced to work longer hours in dangerous conditions and, in many cases, while injured. **We strongly believe that this trend in deteriorating crew conditions is the principal cause for the recent increase in cruise ship incidents and casualties.**

1 The named principals of our firm have a combined experience of over 80 years of litigating maritime cases against the world's major cruise lines.

How, you may ask, have cruise lines only recently been able to cut costs resulting in a severely compromised crew? A few years ago, the cruise industry started placing foreign arbitration clauses in its crew contracts. The enforcement of these foreign arbitration clauses against crew have single-handedly turned the tide of almost two hundred years of maritime law and it is now resulting in the very troubling safety issues that have drawn your attention.

Historically, crew members were vigorously protected by the United States through its courts. In 1823, Justice Story explained the responsibility of the courts to protect crew:

> *Every court should watch with jealousy an encroachment upon the rights of seamen . . . . They are emphatically the wards of the admiralty; and though not technically incapable of entering into a valid contract, they are treated in the same manner, as courts of equity are accustomed to treat young heirs, dealing with their expectancies, wards with their guardians, and cestuis que trust with their trustees.*[2]

For close to two hundred years, and through the infancy of the modern cruise industry, the courts had successfully protected crew members from the harsh conditions which are now being imposed on them by the cruise industry. Before arbitration, crewmembers who were overworked and injured could avail themselves of the U.S. courts to protect them from the overreaching of their employers. Now, those crew are forced into secret arbitrations in foreign forums which have no interest in the greater implications that the prospect of an overworked crew presents to the safety of the United States consumer.

It is axiomatic that an overworked and unprotected crew, with little or no recourse, presents a very serious safety hazard to the passengers of a cruise ship. Studies have revealed that overworked employees, for practical purposes, are equivalent to drunks:

> *Many big industrial disasters – Exxon Valdez, Three Mile Island, Chernobyl – can be traced to mistakes by sleep-deprived workers; one in 20 first-year medical residents make fatal fatigue-related errors, and about one fifth of serious car accidents involve driver sleepiness.*[3]
>
> *One Australian study showed that 24 hours without sleep is equivalent to a blood alcohol content of 0.1% (0.08% is legally drunk in most U.S. states).*[4]

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2 Harden v. Gordon et al., 11 F. Cas. 480 (D. Maine, 1823).

3 Going to work sleepy: As bad as showing up drunk?, The Week, May 6, 2010.

4 Williamson AM, Feyer AM: Moderate sleep deprivation produces impairments in cognitive and motor performance equivalent to legally prescribed levels of alcohol intoxication. Occup Environ Med 2000; 57; 6349-655.

The cruise industry first successfully tested its scheme to deprive crew access to the U.S. courts with the *Bautista* decision[5] by the United States Eleventh Circuit[6] Court of Appeals in 2005. Starting with *Bautista*, the courts have held that the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards and its implementing legislation[7] requires enforcement of the foreign arbitration clauses the cruise lines' place in its crew contracts; even though Section 1 of the Federal Arbitration Act[8] clearly exempts seamen's employment contracts from the Act; and committee testimony in the legislative history of the Convention Act suggests that Congress intended section 202 of the Convention Act to incorporate the Federal Arbitration Act's seamen exception.[9] In 2011, the Eleventh Circuit Court of Appeals decided *Lindo*[10], which held that foreign arbitration clauses in crew contracts are enforceable and any defense of unconscionability of the arbitration clause or that the forced arbitration violates public policy is not available to the crewmember.[11]

Requiring crew to submit exclusively to foreign arbitration to address wrongdoing which led to their injuries means that cruise lines escape responsibility for decisions which lead to dangerous conditions for crew. This is because foreign arbitration awards, even when rendered in favor of crew, are generally completely inadequate and provide no real potential exposure to a shipping company. Consider the recent arbitration decision rendered in the case of Lito M. Asignacion who, while assigned to a vessel which was in the port of New Orleans, was badly burned when during a pressure test of water tubes, the cascade tank overflowed and hot water splashed over the abdomen and lower extremities requiring him to undergo skin grafts to 35% of his body. Pursuant to an arbitration clause in his contract, he was required to arbitrate his claim in the Philippines under the law of the Philippines. Although Mr. Asignacion presented evidence that his past and future loss of wages alone amount to $353,006 (without consideration of past and future medical expense, maintenance and cure, and compensatory damages), the arbitral panel awarded Mr. Asignacion $1,870.00 in total damages. Awards like this provide no deterrent to a shipping company or cruise

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5 396 F.3d 1289 (11th Cir. 2005).

6 The Eleventh Circuit includes Florida, where most of the world's largest cruise lines are headquartered.

7 9 U.S.C. §§ 202-208.

8 9 U.S.C. §§ 1-16

9 Ambassador Richard Kearney, Chairman of the Secretary of State's Advisory Committee on Private International Law, testified before the Senate Foreign Relations Committee that "the definition of commerce contained in section 1 of the original Arbitration Act is the national law definition for the purposes of the declaration. A specific reference, however, is made in section 202 to section 2 of title 9; which is the basic provision of the original Arbitration Act." S. Comm. On Foreign Relations, Foreign Arbitral Awards, S.Rep. No. 91-702, at 6 (1970).

10 652 F.3d 1257 (11th Cir. 2011)

11 Judge Barkett wrote a dissenting opinion in Lindo: "Among the special remedies afforded to seamen is the Jones Act, which provides a statutory cause of action in negligence to any seaman injured in the course of employment. . . . Enforcing the arbitration agreement in this case directly contravenes that public policy. The agreement unambiguously requires Lindo to submit his Jones Act claim to arbitration under Bahamian law. But there is no Jones Act in the Bahamas. . . . The result is that the arbitral tribunal will neither take cognizance of the statutory cause of action nor actually decide a claim under the Jones Act, making the prospect of recovery substantially more difficult and unlikely. In short, the agreement results in the evisceration, not the vindication, of Lindo's statutory right under the Jones Act. . . . Accordingly, I would hold that the arbitration agreement in Lindo's contract is null and void and thus unenforceable."

line against subjecting its crew to harsh conditions, including extreme fatigue, in an effort to increase profit margins.

Regardless of whether the courts are correct in their enforcement of these arbitration clauses (we think they are not), we have witnessed in the years following 2005, a trend in cruise lines imposing harsh and dangerous conditions on its crew in an effort to gain an economic advantage in the market in the form of lower operating expense. This trend in deterioration of crew conditions has reached new heights following the 2011 *Lindo* decision and the Eleventh Circuit's affirmation that it will enforce the cruise lines' arbitration clauses to deprive crew of a right of redress in U.S. courts. **This recent marked deterioration in crew conditions as a result of the cruise lines no longer threatened with having to directly answer for their actions in U.S. courts, we believe, directly coincides with an increase in incidents which have risked the safety of the U.S. cruising consumer.**

We request that you further explore the impact of foreign arbitration clauses in cruise lines' crew contracts before they lead to a disaster of devastating consequences. We would welcome the opportunity to further speak with you and the Senate Committee on Commerce, Science and Transportation. Thank you.

Very truly yours,

JASON R. MARGULIES
for the firm

Attachments:

1. Seafarer's Agreement, Carnival Cruise Lines (arbitration clause, paragraph 7);
2. Williamson AM, Feyer AM: Moderate sleep deprivation produces impairments in cognitive and motor performance equivalent to legally prescribed levels of alcohol intoxication. Occup Environ Med 2000; 57; 6349-655;
3. *Bautista v. Star Cruises*, 396 F.3d 1289 (11th Cir. 2005);
4. *Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257 (11th Cir. 2011).

cc: Senator Charles E. Schumer
322 Hart Senate Office Building
Washington, D.C. 20510