

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

IN THE UNITED STATES DISTRICT COURT
FOR THE TERRITORY OF GUAM

AMY HILL, as Personal Representative of
the Estate of DAVID HILL, deceased, and in
AMY HILL's capacity as an Individual,

Plaintiff,

vs.

MAJESTIC BLUE FISHERIES, LLC, a
Delaware Limited Liability Company, and
DONGWON INDUSTRIES CO., LTD., a
Foreign Corporation incorporated under the
laws of Korea,

Defendants.

CIVIL CASE NO. 11-00034

**ORDER AND OPINION RE:
DEFENDANT DONGWON
INDUSTRIES CO., LTD'S RENEWED
MOTION TO DISMISS PLAINTIFF'S
COMPLAINT**

Before the court is a Renewed Motion to Dismiss Plaintiff's Complaint ("the Motion") filed by Dongwon Industries Co., Ltd. ("Dongwon"). *See* ECF No. 166. Defendant Dongwon moves to dismiss Plaintiff's Complaint ("the Complaint") pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. *See id.* at 3. Plaintiff Amy Hill ("Plaintiff") opposes the Motion, and, in the alternative, moves for leave to amend the Complaint. *See* ECF No. 168. After reviewing the parties' briefs, and relevant cases and statutes, and having heard argument from counsel on the matter, the court hereby **DENIES** the Motion for the reasons stated herein.

1 **I. RELEVANT FACTUAL BACKGROUND**

2 On October 13, 2009, Captain David Hill executed a contract with Majestic Blue
3 Fisheries, LLC (“Majestic”) to act as captain of the F/V *Majestic Blue* (“the Vessel”). Compl. ¶
4 48, ECF No. 1. The contract was for three months onboard the Vessel followed by three months
5 of vacation, after which Captain Hill would return for another three months on the Vessel. *Id.* ¶
6 51.

7 Majestic is a Delaware limited liability company and at all relevant times was the record
8 owner of the Vessel. *Id.* ¶ 9. Majestic was formed by Dongwon, a foreign corporation
9 incorporated under the laws of Korea. *Id.* ¶ 10. Dongwon acquired StarKist to expand its global
10 reach and penetrate the U.S. tuna market through a recognized brand. *Id.* ¶ 35. In furtherance of
11 this plan, Dongwon formed Majestic so that it could act as record owner of the Vessel. This
12 would allow the Vessel to fly a U.S. flag instead of a Korean flag, conferring certain benefits. *Id.*
13 ¶ 37(a). Dongwon then transferred the Vessel to Majestic for ten dollars. *Id.* ¶ 37(c).

14 Although Majestic was the record owner of the Vessel, the relationship between
15 Dongwon and Majestic continued after transfer of the Vessel. *Id.* ¶¶ 9, 37. Dongwon directly
16 paid all employees of Majestic at all relevant times, including Captain Hill when he was captain
17 of the Vessel.¹ *Id.* ¶¶ 37(d), 37(e). Dongwon employees also directly communicated with Captain
18 Hill regarding issues related to his employment with Majestic, and made travel and other
19 logistical arrangements for the crew. *Id.* ¶¶ 37(k), 37(o). Dongwon paid to provision and bunker
20 the Vessel. *Id.* ¶ 37(f). It also made major operational decisions regarding the Vessel, including
21 maintenance, onboard policies and procedures, its daily operations, and the disposition of the
22 entire catch. *Id.* ¶¶ 37(g), 37(h).

23 Aside from the captains and crewmembers of the Vessel, Majestic only had one
24

¹ The Complaint alleges, however, that Majestic also compensated Captain Hill for his employment. Compl. ¶ 28.
Page 2 of 14

1 employee, who reported directly to and took orders from Dongwon. *Id.* ¶¶ 37(l), 37(i). Upon
2 transferring the Vessel to Majestic, Dongwon had required Majestic to retain most of the
3 crewmembers who had worked onboard the Vessel prior to the transfer. *Id.* ¶ 37(n). Both
4 Majestic and Dongwon utilized employment websites to recruit American captains and
5 crewmembers for the Vessel. *Id.* ¶¶ 27(c), 43(b).

6 Captain Hill commenced his second term as captain on or about May 9, 2010, when he
7 arrived in Guam to relieve Captain Thomas Ridenour and meet the Vessel before it departed on
8 the tuna fishing expedition during which the Vessel eventually sank. *Id.* ¶¶ 52, 73. Immediately
9 prior to Captain Hill's arrival in Guam, the Vessel had undergone maintenance work at a Chinese
10 shipyard. *Id.* ¶ 52. Captain Ridenour had directly observed the maintenance work performed on
11 the Vessel, and according to him, the maintenance work was below industry standard and would
12 not pass a detailed inspection. *Id.* ¶¶ 53, 54, 56. Captain Ridenour stated that lack of time,
13 planning, communication, and coordination on the part of Dongwon and Majestic, and the poor
14 quality of the shipyard's maintenance work all contributed to causing serious problems for the
15 Vessel. *Id.* ¶ 55.

16 On or about May 20, 2010, the Vessel departed Guam to begin a tuna fishing expedition.
17 *Id.* ¶ 73. Captain Hill was the only United States national onboard. *Id.* ¶ 61. All the other officers
18 were Korean nationals, and the remaining crewmembers were either nationals of Korea or of
19 Southeast Asian countries. *Id.* ¶ 62. Although only a handful of people onboard the Vessel spoke
20 English, no translator was provided as was standard practice on other similar vessels. *Id.* ¶ 61.

21 Other officers of the Vessel were unqualified and/or incompetent. For example, the
22 "Fishing Master" directed the Vessel in the wrong direction when leaving the port of Guam and
23 the Vessel was forced to turn back. *Id.* ¶ 63. The Radio Officer was unable to perform his
24 function properly, which resulted in Captain Hill having difficulty with transmitting required

1 reports about the Vessel's location and status to Majestic and Dongwon. *Id.* ¶ 65.

2 Furthermore, the other officers and crewmembers routinely and deliberately ignored the
3 orders of Captain Hill and violated international pollution treaties. *Id.* ¶ 67. Captain Hill's
4 attempts to exercise control over the other officers and crewmembers were futile. *Id.* ¶64. The
5 Fishing Master was treated as the de facto captain of the Vessel. Dongwon and Majestic were
6 aware of these violations as previous captains had reported these problems to them, and one even
7 filed suit,² alleging mutiny, abuse by crew, and violations of the International Convention for the
8 Prevention of Pollution from Ships (MARPOL). *Id.* ¶ 69.

9 On or about June 10 or 13, 2010, the Vessel sank in the West Pacific Ocean after it began
10 taking on water in calm seas and good weather. *Id.* ¶¶ 8, 74, 76. Twenty-two of the twenty-four
11 crewmembers onboard had abandoned ship and were later rescued by the F/V *Pacific Breeze*. *Id.*
12 ¶ 75. After two days of search and rescue by the United States Coast Guard, the two remaining
13 crewmembers, Captain Hill ("Decedent") and the Vessel's chief engineer, were not found. *Id.* ¶
14 77.

15 **II. RELEVANT PROCEDURAL BACKGROUND**

16 On October 26, 2010, Plaintiff filed the Complaint against Dongwon and Majestic
17 (collectively "Defendants") in the U.S. District Court for the Southern District of Florida. *See*
18 ECF No. 1. Plaintiff alleged six claims: (1) Survival Action for Negligence for Pre-Death Pain
19 and Suffering Under the Jones Act Against Majestic and Dongwon; (2) Claim for Wrongful
20 Death Under the General Maritime Law Against Dongwon and Majestic; (3) Claim for Wrongful
21 Death Under the Death on the High Seas Act ("DOHSA") Against Dongwon and Majestic; (4)
22 Claim for Negligence Causing Wrongful Death Under the Jones Act Against Dongwon and
23 Majestic; (5) Claim for Intentional Infliction of Emotional Distress Against Dongwon and

24 _____
² *Majestic Blue Fisheries, LLC v. Pine*, Civil Case No. 10-00004 (D. Guam).

1 Majestic for Amy Hill; and (6) Claim for Invasion of Privacy Against Dongwon and Majestic for
2 Amy Hill.³

3 On November 22, 2010, Majestic filed a motion to dismiss the Complaint for lack of
4 jurisdiction. *See* ECF No. 4. On November 30, 2010, Majestic filed an alternative motion for
5 change of venue. *See* ECF No. 5. On January 18, 2011, Dongwon filed its motion to dismiss for
6 lack of jurisdiction, or in the alternative, motion for change of venue. *See* ECF No. 41.

7 On September 6, 2011, the U.S. District Court for the Southern District of Florida issued
8 an order transferring the case to the District of Guam. *See* ECF No. 149. The order noted that by
9 filing a Notice of Filing Agreed Order, Defendants Majestic and Dongwon consented to
10 jurisdiction of this action in the District Court for the District of Guam and waived any
11 objections to personal jurisdiction. *Id.*

12 On February 21, 2012, Defendant Dongwon filed the present Motion. ECF No. 166. On
13 March 6, 2012, Plaintiff filed her opposition to the Motion, and, in the alternative, requested
14 leave to amend the Complaint. ECF No. 168. Dongwon filed its reply to Plaintiff's opposition on
15 March 30, 2012. ECF No. 176. Plaintiff filed a supplement to her response on February 19, 2013.
16 ECF No. 239. Dongwon filed its response to the supplement on February 26, 2013. ECF No.
17 243. On March 1, 2013, Plaintiff filed her reply to Dongwon's response to the supplement. ECF
18 No. 245. Defendant Majestic is not a party to the present Motion.

19 **III. JURISDICTION AND VENUE**

20 Jurisdiction is proper. All four of the remaining counts in the Complaint are within the
21 court's federal question jurisdiction. *See* 28 U.S.C. § 1331. This action is also within the court's
22 diversity jurisdiction. *See* 28 U.S.C. § 1332.

23 _____
24 ³ On September 6, 2011, Plaintiff consented to voluntary dismissal of Count V (Intentional Infliction of Emotional
Distress) and Count VI (Invasion of Privacy) of the Complaint. *See* ECF No. 148. On the same day, the court issued
an order dismissing Counts V and VI. *See* ECF No. 149.

1 All parties have consented to venue in the District of Guam. *See* ECF No. 149; 28 U.S.C.
2 § 1404(a).

3 **IV. APPLICABLE STANDARDS**

4 **A. MOTION TO DISMISS**

5 Federal Rule of Civil Procedure 12(b)(6) provides that, in response to a claim for relief, a
6 party may assert a defense of “failure to state a claim upon which relief can be granted” by way
7 of motion. FED. R. CIV. P. 12(b)(6). Whether a party has sufficiently stated a claim for relief is
8 viewed in light of Federal Rule of Civil Procedure 8. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
9 555 (2007). Pursuant to Rule 8, a claim for relief must include “a short and plain statement of the
10 claim showing that the pleader is entitled to relief.” FED. R. CIV. P. 8(a)(2). The pleading
11 standard under Rule 8 “does not require detailed factual allegations, but it demands more than an
12 unadorned, the-defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 555 U.S. 662,
13 678 (2009) (internal quotation marks omitted).

14 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
15 accepted as true, to state a claim to relief that is plausible on its face.” *Id.* (citing *Twombly*, 550
16 U.S. at 570) (internal quotation marks omitted). The court must engage in a two-step procedure
17 to determine the plausibility of a claim. *Id.* at 678–79. First, the court must weed out the legal
18 conclusions—that is “threadbare recitals of the elements of a cause of action, supported by mere
19 conclusory statements”—in the pleading that are not entitled to a presumption of truth. *Id.* at 678.
20 Second, the court should presume the remaining factual allegations are true and determine
21 whether the claim is plausible. *Id.* at 679.

22 A claim is facially plausible if “the plaintiff pleads factual content that allows the court to
23 draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* at 678
24 (citing *Twombly*, 550 U.S. at 556). The court must “draw on its judicial experience and common

1 sense” to determine the plausibility of a claim given the specific context of each case. *Id.* at 679.

2 **B. LEAVE TO AMEND**

3 Federal Rule of Civil Procedure 15(a)(2) provides that “[t]he court should freely give
4 leave [to amend] *when justice so requires.*” FED. R. CIV. P. 15(a)(2) (emphasis added). In
5 deciding whether justice requires granting leave to amend, factors to be considered include “the
6 presence or absence of undue delay, bad faith, dilatory motive, repeated failure to cure
7 deficiencies by previous amendments, undue prejudice to the opposing party, and futility of the
8 proposed amendment.” *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 538 (9th Cir.
9 1989) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

10 While leave to amend should be granted liberally, there are some limitations. *See Ascon*
11 *Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989) (citing *DCD Programs, Ltd. v.*
12 *Leighton*, 833 F.2d 183, 186 (9th Cir. 1987)). For instance, leave to amend need not be granted if
13 it “constitutes an exercise in futility.” *Id.*; *see also Klamath-Lake Pharm. Ass’n v. Klamath Med.*
14 *Serv. Bureau*, 701 F.2d 1276, 1293 (9th Cir. 1983) (holding that, while leave to amend shall be
15 freely given, the court need not grant leave for futile amendments). Additionally, the court has
16 particularly broad discretion to deny leave to amend if a plaintiff has previously amended the
17 complaint. *Ascon Props., Inc.*, 866 F.2d at 1160.

18 **V. ANALYSIS**

19 Defendant Dongwon moves the court to dismiss Counts I and IV under Federal Rule of
20 Civil Procedure 12(b)(6). It also moves the court to strike Plaintiff’s demands for nonpecuniary
21 damages (Count II), punitive damages (Count II), and attorneys’ fees (Counts I–IV). *See* ECF
22 No. 166. Plaintiff opposes the Motion and, in the alternative, requests leave to amend. *See* ECF
23 No. 168.

1 **A. COUNTS I & IV: JONES ACT SURVIVAL AND WRONGFUL DEATH**
2 **CLAIMS**

3 Plaintiff asserts two counts against both Dongwon and Majestic pursuant to the Jones
4 Act, 46 U.S.C. § 30104. Compl. 21, 26. The court discusses the merits of both counts herein.

5 The Jones Act provides:

6 A seaman injured in the course of employment or, if the seaman dies from the injury, the
7 personal representative of the seaman may elect to bring a civil action at law, with the
8 right of trial by jury, against the employer. Laws of the United States regulating recovery
9 for personal injury to, or death of, a railway employee apply to an action under this
10 section.

11 46 U.S.C. § 30104. The Federal Employers’ Liability Act (“FELA”) sets forth the recovery for
12 personal injury to, or death of, railway employees. 45 U.S.C. § 51 et seq. It provides a remedy
13 for wrongful death and a survival action upon a showing of the employer’s negligence. 45 U.S.C.
14 §§ 51, 59. “To prevail on a Jones Act negligence claim *against his employer*, a seaman must
15 show (1) that the is a seaman under the Act; (2) that he suffered injury in the course of
16 employment; (3) that this employer was negligent; and (4) that his employer’s negligence caused
17 his injury at least in part.” *Martin v. Harris*, 560 F.3d 210, 216 (4th Cir. 2009) (emphasis added).

18 **1. An Action Under the Jones Act Can Proceed Against Multiple**
19 **Defendants, but Only One Defendant Ultimately Can Be Deemed the**
20 **Jones Act Employer and Held Liable.**

21 Defendant Dongwon argues that only one employer may be sued under the Jones Act. It
22 argues that since Plaintiff has sued both Dongwon and Majestic, asserting that both were
23 Decedent’s Jones Act employers, and has failed to plead in the alternative, the Jones Act claims
24 against Dongwon must be dismissed. In Counts I and IV, Plaintiff “demands judgment against
Defendants Dongwon *and* Majestic Blue” for breach of their duty of reasonable care pursuant to
the Jones Act. Compl. ¶¶ 91, 107 (emphasis added).

 In *Cosmopolitan Shipping Co. v. McAllister*, the Supreme Court stated that there is “no

1 doubt that under the Jones Act only one person, firm, or corporation can be sued as employer.”
2 337 U.S. 783, 791 (1949). The Ninth Circuit noted that “[o]f the relatively few courts since
3 *Cosmopolitan* to consider the issue, most have interpreted this language to mean that a plaintiff
4 can hold only one employer liable under the Jones Act.” *Glynn v. Roy Al Boat Mgmt. Corp.*, 57
5 F.3d 1495, 1500 (9th Cir. 1995), abrogated on other grounds by *Atl. Sounding Co., Inc. v.*
6 *Townsend*, 557 U.S. 404 (2009) (emphasis added). In *Glynn*, the plaintiff sued both the vessel
7 owner and the captain under the Jones Act. The district court had determined that the vessel
8 owner was the employer as a matter of law, but left to the jury to determine whether the captain
9 was also an employer. 57 F.3d at 1497. The Ninth Circuit held that submitting the captain’s
10 employer status to the jury was error because a plaintiff can hold only one employer liable under
11 the Jones Act. Since the district court had already determined as a matter of law that the vessel
12 owner was the Jones Act employer, the captain could not also be deemed an employer and held
13 liable. *Id.* at 1500.

14 Here, like in *Glynn*, Plaintiff is suing two entities under the Jones Act. The Ninth Circuit
15 did not reverse the district court on the basis that *Glynn* proceeded against two defendants, but
16 rather because the district court had already held as a matter of law that the vessel owner was
17 *Glynn*’s employer. Thus, at this stage of the proceeding, the Jones Act claims against Defendant
18 Dongwon should not be dismissed merely because Plaintiff asserts that both Dongwon and
19 Majestic were Decedent’s employers. The Ninth Circuit has “long held that whether an
20 employer/employee relationship exists is usually a question of fact for the jury, so long as there
21 is an evidentiary basis for its consideration.” *Glynn*, 57 F.3d at 1498. The issue that there can
22 only be one Jones Act employer can be addressed adequately at the summary judgment stage or
23 at trial with jury instructions and a special verdict form. Consequently, the Motion to dismiss
24 Plaintiff’s Jones Act claims against Dongwon in Counts I and IV on this ground is **DENIED**.

1 **2. Plaintiff Has Alleged Sufficient Facts to Support a Jones Act**
2 **Employer-Employee Relationship.**

3 Defendant Dongwon’s second ground for dismissal of Plaintiff’s Jones Act claims is that
4 Plaintiff has failed to allege sufficient facts demonstrating that Dongwon was Decedent’s
5 employer. As stated, a Jones Act action may only be brought against the seaman’s employer. In
6 *Cosmopolitan*, the Supreme Court indicated that in determining the Jones Act employer “[o]ne
7 must look at the venture as a whole. Whose orders controlled the master and the crew? Whose
8 money paid their wages? Who hired the crew? Whose initiative and judgment chose the route
9 and the ports?” 337 U.S. at 795. *See Glynn*, 57 F.3d at 1499 (applying the *Cosmopolitan* factors
10 to determine “whether a Jones Act employment relationship exists”). The court will examine
11 each question in turn.

12 Whose orders controlled the master and the crew? Plaintiff asserts that Dongwon made
13 Majestic’s major operational decisions, including those regarding maintenance, onboard policies
14 and procedures, and the daily operations of the Vessel. Compl. ¶¶ 37(g), 37(h). Dongwon’s
15 employees communicated directly with the captains of the *Vessel* regarding their employment.
16 *Id.* ¶ 37(k). Dongwon also determined the disposition of the entire catch brought in by the
17 Vessel. *Id.* ¶ 37(j).

18 Whose money paid their wages? Plaintiff alleges that Dongwon directly paid all the
19 employees of Majestic, including Captain Hill. *Id.* ¶¶ 37(d), 37(e). She also asserts that Majestic
20 compensated Decedent for his services as well. *Id.* ¶ 28.

21 Who hired the crew? When Dongwon transferred the Vessel to Majestic, it required that
22 Majestic retain most, if not all, of the crewmembers who had worked on board the Vessel before
23 the transfer. *Id.* ¶ 37(n). Both Dongwon and Majestic utilized employment agencies to recruit
24 officers and crewmembers for the *Vessel*. *Id.* ¶¶ 37(p), 27(c). In the case of Captain Hill, Plaintiff

1 alleges that the employment contract was negotiated and executed by Majestic. *Id.* ¶ 28.

2 Whose initiative and judgment chose the route and the ports? There are no specific
3 allegations regarding who decided the routes and the ports. Plaintiff asserts, however, that
4 Dongwon made all of Majestic’s major operational decisions and decisions regarding the daily
5 operations of the Vessel. *Id.* ¶¶ 37(g), 37(h).

6 The allegations show that Dongwon exercised operational control over the Vessel and its
7 crew, that it paid the wages of the crew, and played a role in hiring and retaining crewmembers
8 for the Vessel. Taking the allegations of the Complaint as true, as the court must at this stage of
9 the proceeding, and “look[ing] at the venture as a whole,” the court can reasonably infer that an
10 employer-employee relationship existed between Captain Hill and Defendant Dongwon
11 according to the factors set forth in *Cosmopolitan*. 337 U.S. at 795. The court finds that Plaintiff
12 has pled “sufficient factual matter, accepted as true, to state a claim to relief that is plausible on
13 its face.” *Iqbal*, 555 U.S. at 678 (internal quotation marks omitted). Thus, the Motion to dismiss
14 Plaintiff’s Jones Act claims against Dongwon in Counts I and IV on this ground is **DENIED**.

15 **B. COUNT II: GENERAL MARITIME LAW WRONGFUL DEATH CLAIM**

16 As stated above, Plaintiff’s Complaint includes claims for wrongful death under general
17 maritime law, DOHSA, and the Jones Act. *See* Compl., ECF No. 1. As part of her damages
18 claims in Count II, Plaintiff’s demands include pain and suffering and punitive damages. *Id.* ¶
19 96. Dongwon requests the court strike her claims for such damages.⁴

20 Under DOHSA, recovery “shall be a fair compensation for the *pecuniary* loss sustained

21 _____
22 ⁴ In the Motion, Dongwon requested the court dismiss Count II of the Complaint because Plaintiff “may not bring a
23 *cause of action* under general maritime law” when DOHSA applies. Def.’s Mot. at 6, ECF No. 166 (emphasis
24 added). However, at the hearing on the Motion, Attorney Hector Ramirez stated that Dongwon is *not* arguing that
Plaintiff cannot proceed with a general maritime law claim. Rather, Dongwon is arguing only that Plaintiff cannot
obtain nonpecuniary damages under the general maritime law claim. The court construes this as Dongwon
abandoning its initial argument that Count II of the Complaint should be dismissed in its entirety. Therefore, the
court’s analysis will only focus on the more limited issue of whether the claims for nonpecuniary damages in Count
II should survive the motion to dismiss.

1 by the individuals for whose benefit the action is brought.” 46 U.S.C. § 30303 (emphasis added).
2 In *Mobil Oil Corp. v. Higginbotham*, the Supreme Court held that when DOHSA applies, a
3 decedent’s survivors may not also recover nonpecuniary damages, such as loss of society, under
4 general maritime law. 436 U.S. 618, 624–25 (1978). In finding that Congress’ judgment controls
5 the availability of remedies for wrongful death actions involving death on the high seas, the
6 Court stated:

7 Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in
8 order to encourage the creation of nonpecuniary supplements. There is a basic difference
9 between filling a gap left by Congress’ silence and rewriting rules that Congress has
10 affirmatively and specifically enacted. In the area covered by the statute, it would be no
11 more appropriate to prescribe a different measure of damages than to prescribe a different
12 statute of limitations, or a different class of beneficiaries.

13 *Id.* at 625 (internal citations omitted). Similarly in *Miles v. Apex Marine Corp.*, the Supreme
14 Court reaffirmed the reasoning in *Higginbotham* and held that when the Jones Act applies, it
15 precludes recovery of nonpecuniary damages under a general maritime law wrongful death
16 claim. 498 U.S. 19, 31–33 (1990).

17 The Ninth Circuit has directly addressed whether punitive damages are available under a
18 general maritime law wrongful death claim when it is joined by actions under DOHSA and the
19 Jones Act in *Bergen v. F/V St. Patrick*, 816 F.2d 1345 (9th Cir. 1987). In *Bergen*, a storm arose
20 while a fishing vessel was thirteen miles from shore, outside territorial waters. The vessel rolled
21 onto its side and the crew abandoned ship. Ten crewmembers died; two survived but were
22 seriously injured. *Id.* at 1347. The estates of the decedents brought claims under the Jones Act,
23 DOHSA, and general maritime law, and the district court awarded the estates punitive damages
24 in addition to damages for pre-death pain and suffering, and for loss of support, services, and
inheritance. *Id.* at 1347–48. However, the Ninth Circuit noted it had previously held that
“[p]unitive damages are non-pecuniary damages unavailable under the Jones Act. Punitive

1 damages are therefore also unavailable under DOHSA.” *Id.* at 1347 (citing *Kopczynski v. The*
2 *Jacqueline*, 742 F.2d 555, 561 (9th Cir. 1984)). The court went on to hold that “pecuniary
3 remedies available under DOHSA therefore cannot be supplemented by punitive damages under
4 the general maritime law” and “that where an action under DOHSA is joined with a Jones Act
5 claim, neither statutory scheme may be supplemented by the general maritime law or by state
6 law.” *Id.* at 1349.

7 Based on these precedents, it is clear that nonpecuniary damages, such as pain and
8 suffering and punitive damages, are not available under general maritime law when DOHSA
9 and/or the Jones Act apply. However, at this point in the proceeding it is premature to determine
10 first, Defendants’ liability under DOHSA or the Jones Act, and second, what impact that
11 determination may have on the general maritime law claim and recoverable damages.

12 Accordingly, the request to strike the Plaintiff’s claim for pain and suffering and punitive
13 damages in Count II is **DENIED**.

14 **C. ATTORNEY’S FEES**

15 In Counts I–IV, Plaintiff demands “attorney’s fees as permitted.” Compl. ¶¶ 91, 96, 102,
16 107. Generally, the prevailing party in an admiralty case is not entitled to attorney’s fees absent
17 statutory authorization. *B.P. America Trading, Inc. v. Vessel Panamax Nova*, 784 F.2d 975, 977
18 (9th Cir. 1986). However, courts sitting in admiralty have carved out exceptions to this general
19 rule pursuant to their power to grant equitable relief. *Id.*; *Vaughan v. Atkinson*, 369 U.S. 527, 530
20 (1962). Thus, to state a claim for attorney’s fees, Plaintiff must allege either statutory
21 authorization for attorney’s fees or entitlement to equitable relief.

22 Neither DOHSA nor the Jones Act provides for attorney’s fees. *See* 46 U.S.C. §§ 30301
23 et seq.; 46 U.S.C. § 30104. In *Vaughan, supra*, the Supreme Court awarded attorney’s fees in a
24 claim for maintenance and cure where defendants were “callous in their attitude” and the

1 “default was willful and persistent,” forcing the plaintiff “to hire a lawyer and go to court to get
2 what was plainly owed him under laws that are centuries old.” 369 U.S. at 530–31. Admiralty
3 courts have also awarded attorney’s fees for failure to pay wages and bad faith in commencing or
4 conducting an action. *See Su v. M/V Southern Aster*, 978 F.2d 462, 475 (9th Cir. 1992); *Dow*
5 *Chem. Pac. Ltd. v. Rascator Maritime S.A.*, 782 F.2d 329, 344 (2d Cir. 1986).

6 Although neither DOHSA nor the Jones Act provides for attorney’s fees, the court finds
7 that Plaintiff’s demands for attorney’s fees in Counts I–IV should not be stricken at this juncture.
8 In light of Plaintiff’s request of attorney’s fees only as permitted by law and precedent that a
9 court sitting in admiralty can award attorney’s fees pursuant to its power to grant equitable relief,
10 the Motion is **DENIED** on this ground.

11 **VI. CONCLUSION**

12 Based on the foregoing discussion, the court hereby **DENIES** the Motion in all respects.

13 **SO ORDERED.**



/s/ Frances M. Tydingco-Gatewood
Chief Judge
Dated: Apr 12, 2013