

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA**

IN ADMIRALTY

In the Matter of The Complaint

of

Case No. 3:15-cv-1297-HES-MCR

**Sea Star Line, LLC, d/b/a TOTE Maritime
Puerto Rico, as Owners; and TOTE Services,
Inc., as Owner *pro hac vice* of the S.S. EL FARO
for Exoneration from or Limitation of Liability**

**ANSWER, AFFIRMATIVE DEFENSES AND CLAIMS OF LAURIE D. BOBILLOT
AND KENNETH W. RANDOLPH, INDIVIDUALLY AND AS PERSONAL
REPRESENTATIVES FOR THE ESTATE OF DANIELLE L. RANDOLPH**

COME NOW, LAURIE D. BOBILLOT AND KENNETH W. RANDOLPH, individually and as personal representatives for the estate of DANIELLE L. RANDOLPH (“Claimants”), and file this Answer, Affirmative Defenses and Claims in response to Plaintiffs/Petitioners Sea Star Line, LLC, d/b/a TOTE Maritime Puerto Rico and TOTE Services, Inc.’s (“Petitioners”) Verified Complaint for exoneration from or limitation of liability, and state as follows:

ANSWER

1. Admitted that this Federal Court action was filed pursuant to the Court’s admiralty and maritime jurisdiction.
2. Denied for lack of sufficient knowledge to justify a belief therein.
3. Denied for lack of sufficient knowledge to justify a belief therein.
4. Denied for lack of sufficient knowledge to justify a belief therein.
5. Denied for lack of sufficient knowledge to justify a belief therein.

6. Admitted.
7. Admitted.
8. Denied.
9. Denied for lack of sufficient knowledge to justify a belief therein.
10. Denied.
11. Denied.
12. Denied.
13. Denied for lack of sufficient knowledge to justify a belief therein.
14. Denied for lack of sufficient knowledge to justify a belief therein.
15. Admitted.
16. Denied.
17. Denied.
18. Denied.
 - a. Denied.
 - b. Denied.
 - c. Denied.
 - d. Denied.
 - e. Denied.

AFFIRMATIVE DEFENSES

1. The Complaint fails to state a claim upon which relief may be granted.
2. This Honorable Court lacks personal jurisdiction over Claimants.
3. Pursuant to the “Savings to Suitors” clause, 28 U.S.C. §1333, the Jones Act and all state law remedies, Claimants, in filing this Answer and Claim, reserve all rights to pursue all available claims in the forum of their choosing, including state court, for resolution of any and all issues beyond the exclusive jurisdiction of this Admiralty Court, and to have such claims and

related damages tried to a jury. The filing of this Answer and Claim in no way constitutes a waiver of these rights and defenses, and Claimants do not, through this filing, agree to join all issues in this proceeding.

4. Pursuant to the “Savings to Suitors” clause, 28 U.S.C. §1333, the Jones Act and all state law remedies, Claimants, in filing this Answer and Claim, reserve the right to move for bifurcation of this action so as to enable Claimants to select a court and/or forum of their choosing for all fact issues other than whether Petitioners were negligent, whether THE S.S. EL FARO (“the El Faro”) was unseaworthy, and whether such negligence and/or unseaworthiness were within Petitioners’ knowledge or privity.

5. The Limitation of Liability Act, 46 U.S.C. §30501 et seq., is unconstitutional, because it violates Claimants’ Fifth and Fourteenth Amendment rights under the United States Constitution to due process of and equal protection under the law.

6. Petitioners are not “vessel owners” entitled to seek exoneration from or limitation of liability under 46 U.S.C. §30501 et seq.

7. The limitation fund is inadequate, because Petitioners have deposited security only for the El Faro and not, as required by the flotilla doctrine, for additional vessels within the flotilla, which were under common control, supervision and enterprise. Rule F(1) of the Supplemental Rules for Certain Admiralty and Maritime Claims requires proper deposit at the time of filing of the limitation action. Petitioners failed to satisfy this requirement, and their Complaint must consequently be dismissed.

8. The Limitation of Liability Act does not apply to this case, because, at all relevant times, the El Faro and/or other vessels within the flotilla were operated in a willful, wanton and

reckless manner, or, alternatively, the conduct and actions resulting in Claimants' injuries took place with the privity and knowledge of Petitioners.

9. To the extent that the Honorable Court determines that the Limitation of Liability Act applies to this case, this limitation proceeding should include any and all proceeds from insurance coverage on the El Faro insuring Petitioners for events such as those underlying this case.

10. To the extent that the Honorable Court determines that the Limitation of Liability Act applies to this case, the limitation fund should include any and all proceeds from any judgment, award or settlement which may be received by Petitioners from any third party in recompense of any losses or damages sustained herein to the property or interests of Petitioners as a result of the fault or alleged fault of said third party.

11. To the extent that the Honorable Court determines that the Limitation of Liability Act applies to this case, the limitation fund should include the value of the minerals and other appurtenances, attachments, freight and/or cargo aboard the vessel, subject to the control of the vessel and/or owned by Petitioners.

12. Claimants reserve the right to contest the appraisal value of the El Faro and/or of any additional vessels in the flotilla, their appurtenances, and the adequacy of the security thereof.

13. Claimants' right to maintenance and cure is unaffected by Petitioners' Complaint, and Petitioners' liability related to their refusal to provide maintenance and cure is not limited to the value of any of its vessels.

14. The Limitation of Liability Act does not apply to this case, because, at all relevant times, the El Faro and/or other vessels within the flotilla were known by Petitioners to be unseaworthy.

15. The Limitation of Liability Act is unavailable to Petitioners' insurer(s).

16. Petitioners have failed to make out a prima facie case establishing that they are entitled to avail themselves of the Limitation of Liability Act.

17. Petitioners are not entitled to exoneration from or limitation of liability with respect to wages due to Claimants.

18. The limited intended purpose of limitations proceedings renders such a proceeding inapposite for a case of this nature.

19. Petitioners are not entitled to exoneration from or limitation of liability, and the Complaint should therefore be denied, because the events culminating in the injuries of Claimants and/or decedent Danielle L. Randolph were the result of the negligence or fault of Petitioners, the negligence or fault of those for whom Petitioners are responsible, the unseaworthiness of the El Faro and/or the unseaworthiness of other vessels within the flotilla under common operational control, supervision and enterprise, all of which was within the privity and knowledge of Petitioners.

20. The events culminating in the injuries of Claimants and/or decedent Danielle L. Randolph were not the result of any negligence or fault of Danielle L. Randolph or of those for whom she was responsible.

AND NOW, specifically reserving all defenses asserted herein, Claimants file their Claim in the Complaint for exoneration from or limitation of liability of, and state that:

CLAIM

1. Claimants re-assert each and every defense and objection set forth above as if stated verbatim herein. As a result of the needless sinking of the El Faro on October 1, 2015, Decedent Danielle L. Randolph and/or Claimants, decedent's parents, suffered severe injuries and damages. At all pertinent times immediately prior to and during this needless tragedy, the El Faro was on navigable waters and Danielle L. Randolph was a Jones Act seaman of Petitioners in the service of the vessel. During the events culminating in the El Faro's sinking, Danielle L. Randolph sustained serious physical and mental injuries while within the zone of danger, and was ultimately killed. As a result of the loss of their daughter, Claimants have suffered loss.

2. The El Faro's final voyage—an intended 1,300 mile, 4-day course from Jacksonville, FL to Puerto Rico—began at approximately 8:15 p.m. on September 29, 2015, when Petitioners chose to ignore multiple National Weather Service and National Hurricane Center warnings that Tropical Storm Joaquin imminently would become a major marine hurricane in the vicinity of El Faro's intended course.

3. Upon its departure, the El Faro was a vessel with numerous defects that rendered it unseaworthy for even unremarkable weather and sea conditions, let alone hurricane winds and seas. Since just 2003, the United States Coast Guard had documented at least 23 deficiencies with the ship. The El Faro also had a recent history of losing power while at sea. On April 12, 2011, as reported to the U.S. Coast Guard, the El Faro was rendered disabled in open water, and the ensuing investigation determined that faulty equipment had caused the vessel's complete loss of power and propulsion. Accordingly, former El Faro crewmembers have stated that Petitioners were well known to defer needed repair work on the El Faro until it was overdue and, then, to

perform repair work below industry standards. Former crewmembers have further stated that even in favorable weather, the El Faro was well known to take on water in unintended ways.

4. On September 29, 2015, there were known problems related to electrolysis and corrosion of El Faro's steel, its electrical circuitry, and its boilers. In fact, immediately prior to departure, the El Faro was experiencing significant problems with its boilers, and five individuals aboard the ship during the final voyage were welders and machinists brought on to perform maintenance, repair and alteration work on the boilers during the trip.

5. The El Faro's safety deficiencies were typical of Petitioners' failure to properly maintain their fleet. The M/V El Yunque, the US-flagged ship also owned, operated and maintained by Petitioners, is the El Faro's sister ship. Built one year after El Faro, the M/V El Yunque, like its sister, measured greater than 700 feet and had accrued a history remarkable for safety deficiencies. According to the U.S. Coast Guard, since 2011, the M/V El Yunque has incurred at least 15 documented deficiencies, many of them for serious deficiencies in lifesaving equipment, including lifeboats.

6. Petitioners' history and pattern of disregarding rules and regulations in its quest for profits extends beyond its failure to properly maintain its fleet. In 2011, for example, Petitioners pled guilty to federal charges of price fixing and racketeering based on their history of fixing process of sea transport between the United States and Puerto Rico.

7. Though its numerous deficiencies rendered the El Faro unseaworthy even when unloaded, the 40-year-old, 700-foot freight ship was, upon its departure from Jacksonville on September 29, 2015, overloaded with more than 380 containers topside and more than 280 trucks, trailers and cars below deck. Even in the best of sailing conditions, this overloading

compromised the ship's ability to right itself after listing, a predictably life-threatening deficiency in heavy winds and rough seas.

8. At approximately 8:15 p.m. on September 29, 2015, Petitioners allowed the El Faro to leave the safety of its Jacksonville port and head directly into a predicted hurricane, despite their knowledge of the El Faro's unseaworthiness and its overloaded status, and despite the repeated warnings of the National Weather Service and National Hurricane Center.

9. At approximately 6:16 a.m. on September 30, the El Faro began deviating from its usual straight-line course to Puerto Rico and instead shifted closer to the Bahamas, but continued to head toward the storm at or near full speed.

10. At approximately 8:00 a.m. on September 30, the National Weather Service, as predicted, upgraded Tropical Storm Joaquin to a hurricane and forecast that the storm would continue to approach the El Faro's path near the Bahamas.

11. The El Faro's captain, Captain Michael Davidson, filed a noon report on September 30 indicating that he was monitoring the storm and that he believed that the weather conditions looked favorable enough to continue the intended course. Captain Davidson further conferred with the El Faro's sister ship, the M/V El Yunque, as it was returning to Jacksonville, FL. Once again, Petitioners determined that the weather was favorable enough for the El Faro to continue its course into Hurricane Joaquin's path.

12. At approximately 5:00 p.m. on September 30, the El Faro moved westward at or near full speed through a gap in the Bahamas archipelago known as the "Hole in the Wall." The ensuing report from the El Faro stated that the ship was on a "collision course" with Hurricane Joaquin.

13. At approximately 9:09 p.m. on September 30, 2015, the El Faro was travelling at or approaching the vessel's top speed into the projected path of Hurricane Joaquin.

14. At approximately 11:00 p.m. on September 30, Hurricane Joaquin was upgraded to a category three hurricane with winds exceeding 115 mph. Petitioners nevertheless allowed the El Faro to continue its trajectory into the storm.

15. After Hurricane Joaquin was upgraded, Danielle L. Randolph emailed Claimant Laurie D. Bobillot, "Not sure if you have been following the weather at all but there is a hurricane out here and we are heading straight into it. Category 3 last we checked. Winds are super bad and seas are not great. Love to everyone."

16. At approximately 2:09 a.m. on October 1, the El Faro was only about 50 miles from the eye of Hurricane Joaquin and continued toward the storm's center at nearly 17 knots.

17. At some point between 3:56 a.m. and approximately 7:00 a.m. on the morning of October 1, the El Faro experienced complete engine failure. Captain Davidson called Petitioners and left a message stating that the ship had lost power and propulsion, the ship was listing at fifteen degrees, that the engine was disabled, and that water had infiltrated the ship through a hatch that had burst open.

18. At 7:15 a.m. on October 1, 2015, the El Faro sent out a final distress alert to the United States Coast Guard from thirty-six nautical miles northeast of the Crooked Islands in the Bahamas, near the eye of Hurricane Joaquin. Listing, powerless, and taking on water as Hurricane Joaquin pummeled it mercilessly from all sides, the El Faro and its thirty-three crew were swallowed by the sea, never to be heard from again.

Unseaworthiness of El Faro

19. Claimants repeat, re-allege, and incorporate paragraphs 1-18 above, as if stated herein and further allege:

20. Throughout the El Faro's final voyage until her death, Danielle L. Randolph was acting within the course and scope of her employment as the second mate and was performing her normal duties on board the S.S. El Faro while the vessel was under way.

21. As owner/operator of the El Faro, Petitioners owed Danielle L. Randolph an absolute and non-delegable duty to provide a seaworthy vessel, equipment, and appurtenances including tools, equipment, and crewmembers themselves reasonably fit for their intended use. Petitioners breached this duty by virtue of one or more of the following:

- a. The El Faro was not properly maintained, inspected or repaired prior to or after September 29, 2015, thereby rendering it dangerous and unfit for its intended purpose;
- b. The El Faro lacked adequate lifesaving equipment, including enclosed lifeboats and/or other measures necessary for crew safety, thereby rendering it dangerous and unfit for its intended purpose;
- c. The El Faro contained a propulsion system unable to sustain rough waters and did not contain a backup propulsion system for emergency use in the event the ship lost its primary propulsion system, thereby rendering it dangerous and unfit for its intended purpose;
- d. The El Faro lacked adequate structural fitness, thereby rendering it dangerous and unfit for its intended purpose;

e. Petitioners failed to create or enforce sound operations and management practices necessary to provide its crew with a safe place to work, thereby rendering El Faro dangerous and unfit for its intended purpose.

22. The unseaworthiness of the vessel was within the privity and knowledge of Petitioners.

23. Danielle L. Randolph was injured and killed as a direct and proximate result of the El Faro's unseaworthiness. Petitioners are therefore liable for all damages allowed under the General Maritime Law of the United States, including but not limited to compensatory damages, pecuniary damages, loss of support, past and future earnings, loss of services, loss of nurture and guidance of dependent children and family, pre-death pain and suffering, funeral expenses, punitive damages, and all other damages recoverable by law.

24. Claimants have been damaged in a sum far in excess of the minimum jurisdictional limits of this Honorable Court.

25. Claimants demand a trial by jury on all issues so triable.

Negligence of Petitioners

26. Claimants repeat, re-allege, and incorporate paragraphs 1- 18 above, as if stated herein and further allege:

27. This is an action for negligence under the Jones Act, 46 U.S.C. § 30104 and/or general maritime law.

28. Petitioners owed Danielle L. Randolph an absolute duty to act reasonably in the operation and maintenance of the El Faro and to provide a safe working environment. Petitioners breached their duties and are negligent, negligent per se, grossly negligent and/or reckless for reasons including but not limited to the following:

- a. Failing to provide the El Faro's crew with a safe place to work that contained proper and adequate machinery, crew, and equipment;
- b. Failing to promulgate and enforce reasonable rules and regulations necessary to ensure the safety and well-being of the crew of the El Faro;
- c. Failing to reasonably inspect, maintain and/or repair the vessel, its equipment, and its cargo;
- d. Failing to properly train and/or supervise their employees, agents and/or contractors;
- e. Failing to exercise due care and caution;
- f. Failing to provide adequate safety equipment;
- g. Permitting the El Faro to embark on its final voyage despite repeated warnings of life-threatening weather conditions;
- h. Operating and/or permitting operation of the vessel into a predicted hurricane;
- i. Failing to avoid the demise of El Faro and its crew;
- j. Failing to adequately monitor the vessel and/or its captain;
- k. Violating applicable Coast Guard regulations;
- l. Failing to conduct a proper search and rescue effort; and
- m. Placing concerns about money and profits of the business ahead of safety of the crew and vessel.

29. Petitioners are vicariously liable for their employees' and/or agents' acts and/or omissions.

30. The negligent acts causing the loss occurred within the privity and knowledge of Petitioners.

31. As a direct and proximate result of Petitioners' breach, Danielle L. Randolph was injured and killed. Petitioners are therefore liable for all damages recoverable under the Jones Act 46 U.S.C. § 30104 and/or general maritime law, including but not limited to loss of support, past and future earnings, loss of services, loss of nurture and guidance of dependent children and family, pre-death physical and mental pain and suffering, funeral expense, punitive damages, and all other damages allowable by law and any other relief deemed proper by this Honorable Court. Claimants have been damaged in a sum far in excess of the minimum jurisdictional limits of this Honorable Court.

32. Claimants demand a trial by jury for all issues so triable.

Punitive Damages

33. Claimants repeat, re-allege, and incorporate the above paragraphs, as if stated herein and further allege:

34. Claimants are entitled to punitive damages for their claims because Petitioners' conduct was grossly negligent, reckless, willful, wanton, arbitrary and/or capricious. Petitioners were subjectively aware of the extreme danger posed to Danielle L. Randolph by the reckless planning of the vessel's voyage, the reckless navigation of the vessel in that voyage, and the failure to rectify safety deficiencies before sending a 40-year-old ship into a hurricane. Despite Petitioners' awareness of these life-threatening risks, they flagrantly, maliciously and consciously disregarded them, thereby condemning Danielle L. Randolph and the entire crew of El Faro to mental and physical suffering and death.

35. Claimants are also entitled to punitive damages under general maritime law by virtue of El Faro's unseaworthiness.

36. All of the conduct warranting punitive damages was within the knowledge and privity of Petitioners.

Prayer for Relief

WHEREFORE, Claimants pray that, after due proceedings, this Honorable Court:

- a. Dismiss Petitioners' Complaint seeking Exoneration From or Limitation of Liability and lift the injunction or restraining order currently in place in this matter;
- b. Alternatively, require Petitioners to deposit additional security in the form of a cash deposit into the registry of the Court, so that the total amount deposited, determined by appraisal of a commissioner appointed by the Court, reflects the full value of all vessels in the flotilla which were under common operation, control, and enterprise of Petitioners;
- c. Permit Claimants to proceed and prosecute their claims without prepayment of costs;
- d. Render judgment herein in favor of Claimants, and against Petitioners, both jointly and severally, for all damages as are warranted, interest accrued on such damages since October 1, 2015, and for all costs of these proceedings;
- e. Order all other relief to which Claimants are entitled under law and equity.

Demand for Jury Trial

37. Claimants demand a trial by jury. *See Luera v. M/V Alberta*, 635 F.3d 181 (5th Cir. 2011).

Dated: December 15, 2015

Respectfully submitted,

**MOMBACH, BOYLE, HARDIN &
SIMMONS, P.A.**

/s/ Michael P. Hamaway
MICHAEL P. HAMAWAY
Florida Bar No. 081302
mhamaway@mbhlawyer.com
100 N.E. Third Avenue, Suite 1000
Fort Lauderdale, Florida 33301
Telephone: (954) 467-2200
Facsimile: (954) 467-2210

and

BEN GIDEON
(to be admitted *Pro Hac Vice*)
Maine State Bar No. 9419
bgideon@bermansimmons.com
DOV SACKS
(to be admitted *Pro Hac Vice*)
Maine State Bar No. 5500
dsacks@bermansimmons.com
Berman & Simmons, P.A.
P.O. Box 961
Lewiston, ME 04243-0961
(207) 784-3576

ATTORNEYS FOR CLAIMANTS

1220786

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF on December 15, 2015, which will provide a copy of the foregoing document to all counsel of record by CM/ECF and/or another means in accordance with the Federal Rules of Procedure.

/s/ Michael P. Hamaway
MICHAEL P. HAMAWAY