

**UNITED STATES DISTRICT COURT**

**DISTRICT OF MAINE**

**CAPTAIN HARTMUT RATHJE, et al.,** )

**Plaintiffs** )

**v.** )

**SCOTIA PRINCE CRUISES, LTD.,** )

**Defendant** )

**Civil No. 01-123-P-DMC**

**FINDINGS OF FACT AND CONCLUSIONS OF LAW<sup>1</sup>**

Hartmut Rathje, Kenth Persson and Rolf Sjöström (collectively, “Plaintiffs”), the former captain, chief engineer and superintendent, respectively, of the M/S SCOTIA PRINCE (“SCOTIA PRINCE”), filed suit against Scotia Prince Cruises, Ltd. (“SPC”) on May 1, 2001, setting forth a claim in admiralty for breach of contract/wrongful termination (“Count I”) and a pendent state-law wage claim pursuant to 26 M.R.S.A. § 626 (“Count II”). *See generally* Verified Complaint in Admiralty and Prayer for Rule (C) Arrest (“Complaint”).<sup>2</sup> SPC counterclaimed against each of the Plaintiffs for breach of fiduciary duty, alleging, *inter alia*, that they had failed to maintain the vessel properly and had engaged in self-dealing injurious to the interests of SPC. Answer, Affirmative Defenses and Counterclaim of Defendant, Scotia Prince Cruises, Limited f/k/a Prince of Fundy Cruises Limited (Docket No. 2) at 6-12 (“Answer/Counterclaim”).

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<sup>1</sup> Pursuant to 28 U.S.C. § 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order entry of judgment.

<sup>2</sup> The Complaint names three defendants: Prince of Fundy Cruises, Ltd. (“POF”) and SPC *in personam* and the SCOTIA PRINCE *in rem*. Complaint at 1. All parties agree that, despite this caption, the only defendant and counterclaimant is SPC, formerly known as POF. Report of Final Pretrial Conference and Order (Docket No. 26) at 1 n.1. The named defendant vessel was never served or  
(continued on next page)

In due course, SPC moved for summary judgment as to both counts of the Complaint. Defendant's Motion for Summary Judgment, etc. (Docket No. 7). I granted that motion as to Count II but denied it as to Count I, noting incidentally that I declined to consider the Plaintiffs' belated assertion of any claim pursuant to a federal wage statute, 46 U.S.C. § 10313. Memorandum Decision on Defendant's Motion for Summary Judgment ("Summary Judgment Decision") (Docket No. 44) at 13 n.17, 18.

A bench trial was held before me on February 11-15, 2002 as to the Plaintiffs' remaining claim (Count I) and SPC's counterclaims, following which the parties were afforded the opportunity to file post-trial briefs. Post-trial briefs were filed on March 11, 2002. *See* Plaintiffs' Post-Trial Brief (Docket No. 70); Defendant's Post-Trial Memorandum ("Defendant's Post-Trial Brief") (Docket No. 71). On the basis of the following findings of fact and conclusions of law, I now find for Sjöström, and against Rathje and Persson, on Count I of the Complaint, and for the Plaintiffs on SPC's counterclaims.<sup>3</sup>

### **I. Findings of Fact**

1. At all times relevant to this case, the SCOTIA PRINCE, a Panamanian-flag vessel, operated as a cargo and passenger ferry between Portland, Maine and Yarmouth, Nova Scotia approximately six months of the year.<sup>4</sup> The SCOTIA PRINCE is now approximately thirty years old.<sup>5</sup>

2. On July 1, 1983 Rathje commenced employment as captain of the SCOTIA PRINCE. He did so pursuant to a standard-form employment agreement provided by POF ("Rathje Contract")

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arrested. *Id.*

<sup>3</sup> At trial the Plaintiffs moved, over SPC's objection, to revive their pendent state-law claim for wages pursuant to 26 M.R.S.A. § 626 (Count II) and to amend their Complaint to add a federal wage claim pursuant to 46 U.S.C. § 10313. For the reasons stated in my order on summary judgment, these motions are denied.

<sup>4</sup> Although evidence was submitted for purposes of summary judgment concerning ownership of the SCOTIA PRINCE, *see, e.g.*, Summary Judgment Decision at 5, no such evidence was submitted at trial. Nonetheless, it is clear that SPC operates the SCOTIA PRINCE.

that stated, in relevant part: “Notice time for termination of employment is 3 months.” Plaintiffs’ Exh. 1.<sup>6</sup>

3. Rathje understood that if POF gave him notice, he would have three months’ remaining work or, conversely, if he gave POF notice, he would be entitled either to work three additional months or, if sent home early by POF, receive the pay he would have earned had he worked the entire three-month notice period. He also understood that if, in quitting, he walked off the ship or otherwise refused to work, he would not be entitled to termination pay.

4. On June 1, 1982 Persson joined the crew of the SCOTIA PRINCE in the capacity of third engineer. Effective January 10, 1984 he was promoted to second engineer, executing a standard-form employment agreement provided by POF (“Persson Contract”). *See* Plaintiffs’ Exh. 2. That contract, which remained in effect, as amended, through Persson’s promotions to first engineer in 1987 and chief engineer in 1998, stated in relevant part: “Notice time for termination of employment is 60 days.” *Id.*<sup>7</sup>

5. In a letter dated November 11, 1997 addressed “To Whom It May Concern,” POF president Pols wrote, in relevant part: “Mr. Persson’s employment is not limited in time and the parties have agreed to a 2 months mutual notice.” Plaintiffs’ Exh. 3.

6. Persson understood the notice provision of his contract to mean that he would be obligated to work his two months’ notice time, then leave. If he were relieved from duty early, he still would be entitled to two months’ pay. However, if he told SPC he was done, left the vessel and went home prior to the expiration of the notice period, SPC would not be obligated to pay him any additional compensation.

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<sup>5</sup> The SCOTIA PRINCE was enlarged in 1986 and, thus, contains some newer portions.

<sup>6</sup> In Rathje’s contract, the typed term “14 days” is crossed out and the notation “3 months” handwritten above it. Although this change is not initialed, I find that it was made by then-POF president Henk Pols and reflects the agreement of the parties.

7. The Rathje and Persson contracts also contained the following provision: “I also confirm that no oral promises than [sic] the terms and conditions of this contract has [sic] been given to me. Therefore, I cannot claim any additional benefits or wages of any kind (except) those which have been provided in this contract.” Plaintiffs’ Exhs. 1-2.

8. Sjöström commenced work as chief engineer with the SCOTIA PRINCE in 1982. He continued to serve in this capacity until January 1, 1998, when he began performing two separate jobs for POF, one as consulting superintendent and the other as relief chief engineer. This change was reflected in a contract executed on October 22, 1997 by Sjöström and POF (through Pols) covering “the services of RS [Sjöström] as ‘Consulting Superintendent’ for six months and as ‘Chief Engineer’ for six month [sic] during the year” (“Sjöström Contract”). Plaintiffs’ Exh. 7 at 2.

9. Part A of the Sjöström Contract delineated Sjöström’s duties as consulting superintendent, including the execution of purchase orders from the deck and engine departments and the arrangement of drydocking and layup periods for the vessel. *Id.* For those services, the “compensation to RS” was to be “SEK [Swedish krona] 294,000 per year on a 12 month pay basis, including basic salary, social costs and taxes. Expenses for travel, office and miscellaneous will be debited once a month.” *Id.*

10. Part B of the Sjöström Contract, pertaining to Sjöström’s chief-engineer duties, stated: “On board assignment will be on a six month schedule – four month duty and two months vacation. Refer to attached vessel employment agreement for particulars.” *Id.* This portion incorporated by reference a second contract executed on October 22, 1997. *See id.*; Plaintiffs’ Exh. 7 at 1 (“Sjöström Engineer Contract”). The Sjöström Contract then concluded, “This agreement will be effective as of January 1, 1998 and may be renewed annually. 9 months notice of termination required by both

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<sup>7</sup> Although, in Persson’s contract, the term “60” is typed in and not initialed, I find it accurately reflects the agreement of the parties.

parties.” Plaintiffs’ Exh. 7 at 2. The Sjöström Contract contains no integration clause and no provision that modifications be in writing. *Id.*

11. Per the Sjöström Engineer Contract, as amended effective January 1, 2000, Sjöström was to receive six payments of \$6,705 annually. Plaintiffs’ Exh. 7 at 1.<sup>8</sup>

12. Sjöström’s work as consulting superintendent was performed shoreside from offices in Sweden. Because of the administrative difficulty inherent in having POF pay wages to an employee based in Sweden, POF arranged to pay a third party, Swedish company Marine Trading, sufficient funds to cover Sjöström’s wages, taxes, office costs and other administrative expenses. Marine Trading, in turn, paid Sjöström’s superintendent salary commencing January 1, 1998.

13. Sjöström continued to perform his duties as superintendent as of January 1, 1999 and January 1, 2000 without any affirmative steps on his part, or on the part of POF, to renew the Sjöström Contract.

14. On August 18, 2000 Pendle Shipping,<sup>9</sup> an enterprise associated with Canadian businessman Matthew Hudson, bought out the shares of POF. On that date Hudson became chairman of POF, the name of which was changed shortly thereafter to SPC.

15. The day after the sale, Hudson directed that all dealings with Marine Trading cease. As a result, Sjöström searched for a new arrangement for payment of his superintendent wages and expenses, ultimately proposing that this be done through another Swedish company, Plus 2 Ferryconsultation AB (“Plus 2”). *See* Defendant’s Exh. 33.<sup>10</sup> Pols concurred with the

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<sup>8</sup> Sjöström actually worked as a relief chief engineer only one month a year onboard the SCOTIA PRINCE, although he continued to receive the six annual payments contemplated in the Sjöström Engineer Contract.

<sup>9</sup> I have done my best to decipher the name of this enterprise from Hudson’s testimony at hearing, but cannot be certain that it is correct.

<sup>10</sup> In an e-mail to then SPC vice president for finance Gaston Lee, Sjöström stated, *inter alia*: “Going over to my new contract not using M.Trading but Klas Brogren’s company instead I have suggested to Henk via mail how to do it and the involved costs.” Defendant’s Exh. 33.

recommendation, and a contract between SPC and Plus 2 was executed on January 1, 2001 (“Plus 2 Contract”). *See* Plaintiffs’ Exh. 7 at 3. That contract stated in relevant part, “It is agreed that PFC [SPC] will pay the sum of SEK 42,000 per month for Rolf Sjöstrom’s [sic] salary, taxes, social costs, office space, insurance and administrative fees. PFC will be responsible for charges of telephone, fax, computer and any supplies ordered for the vessel.” *Id.* The Plus 2 Contract also provided, “Termination of this agreement will be subject to notice of 60 days.” *Id.* Sjöström was not a signatory to the Plus 2 Contract. *See id.*

16. Of the 42,000 krona paid by SPC to Plus 2 subsequent to January 1, 2001, compensation to Sjöström (net of rent, social costs and other administrative expenses) totaled 15,800 krona (approximately \$3,000) per month. After January 1, 2001, Sjöström continued to perform the same superintendent duties he had performed during the previous three years.

17. Hudson considered the Plaintiffs “an essential part of the asset I had paid a lot of money to purchase.” However, he had learned from Pols that the Plaintiffs planned to retire in 2001 or 2002. As a result, he commenced negotiations with Miami-based International Shipping Partners, Inc. (“ISP”) concerning its possible takeover of management of the vessel. Hudson made clear to ISP that he wanted to retain the Plaintiffs. However, it was equally clear that ISP would take over the purchasing function, effectively terminating Sjöström’s job as superintendent.

18. The SCOTIA PRINCE’s 2000 season ended in late October 2000, and the ship was laid up for the winter in Shelburne, Nova Scotia. The captain and most of the crew departed for vacation.

19. On March 19, 2001 Rathje returned to the SCOTIA PRINCE. Eventually Rathje, together with Persson, Sjöström and other crew, sailed the vessel to Portland harbor, arriving on April 3, 2001.

20. Shortly after the vessel's arrival in port, Rathje was asked to witness the firing of two longtime SPC employees, the hotel manager and chief purser. Rathje did so and was upset by what he perceived as the "mishandling" of the affair.

21. The following morning at 9 a.m. the Plaintiffs attended a meeting scheduled with Pols and Hudson at the Holiday Inn in Portland. Hudson discussed possible changes aboard the vessel, including enlargement of the casino area. Rathje was critical of Hudson's proposals – not only that pertaining to the casino but also (and particularly) a suggestion that the captain's cabin be moved. He had made this clear to Hudson in a two-hour phone call over the summer in which he told Hudson, among other things, "If you move me out of my cabin, I move off the ship." The Plaintiffs suggested to Hudson that he come aboard the vessel that evening to get a better feel for how his proposals would work in practice. Hudson agreed.

22. That evening at about 9 p.m. Hudson boarded the SCOTIA PRINCE. After some discussions with the Plaintiffs and others concerning the casino proposal, Hudson met alone with the Plaintiffs in the Casino Bar onboard. He informed them that he had more bad news: He had just fired two other longtime SPC employees (the treasurer and the marketing director). However, he remarked that these individuals had received severance pay in accordance with a new severance pay plan for SPC employees (one week's pay for every year worked) – a plan that it would be good for the Plaintiffs to know about.

23. News of the latest firings again upset Rathje. Hudson assured him that he wanted to see him happy, telling the Plaintiffs that their contracts, as well as that of chief electrician Lennart Bergstrom, were "ring-fenced."

24. As the evening wore on, there were at least three serious misunderstandings in the Casino Bar. Hudson informed the Plaintiffs that he was in the process of negotiating with a manning

company with the object of lightening the load on Rathje's shoulders. Hudson felt that he clearly communicated that he was negotiating not only for manning but also for management of the ship (including hiring, firing and purchasing). However, the plaintiffs came away with the contrary understanding: that the manning company would perform only one function – that of presenting deck and engine crew candidates to the captain for his consideration.

25. Hudson also thought that he had made known to Sjöström that the ring-fencing promise pertained only to Sjöström's officer (relief chief engineer) position and that, in fact, the purchasing/superintendent function was going to be absorbed by the manning company. However, neither Sjöström nor the other two plaintiffs understood this at all.

26. Finally, Hudson believed that he had clarified, in response to a complaint from Rathje that everyone's contracts should be ring-fenced, that only the officer contracts of the Plaintiffs and Bergstrom would be protected. However, Rathje was under the impression that Hudson had agreed that new conditions should apply only to new hires, in effect ring-fencing the contracts of the entire existing deck and engine crew.

27. With these (mis)understandings, the evening meeting ended on a positive note. As Rathje put it, he left feeling that "we can finally go to work." Hudson left feeling confident enough of the Plaintiffs' approval of the manning-company deal that the following morning he executed the contract he had previously negotiated with ISP.<sup>11</sup>

28. Following Hudson's execution of the ISP contract, he met with the Plaintiffs, Pols and SPC attorney Leonard Langer at the Holiday Inn. Hudson announced the award of a "total management contract" to ISP, introducing three key ISP players: Jorg Walczak, Heinz Steinhauser and Sten Bergqvist. The Plaintiffs then learned that Walczak, who had himself served as captain of the

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<sup>11</sup> The ISP contract expressly provided for SPC's approval of the choice of captain and chief engineer.

SCOTIA PRINCE before Rathje's time, was placed in charge of vessel operations, Steinhauser was to be responsible for purchasing and Bergqvist was in charge of safety and personnel. Hudson encouraged the plaintiffs to meet further with the three representatives of ISP.

29. Rathje was stunned. At that moment all three Plaintiffs understood for the first time that Sjöström's job as superintendent (which entailed the purchasing function) was obsolete. At Rathje's urging, Pols asked Hudson what was to become of Sjöström. Hudson replied that he had not thought of that; he directed the plaintiffs to resolve the issue with ISP.

30. Later that morning, the Plaintiffs met aboard the vessel with Walczak, Steinhauser and Bergqvist. Rathje asked to see the new management contract between SPC and ISP. The ISP representatives refused, suggesting that Rathje ask Pols. The Plaintiffs immediately sought out Pols, who told them that he did not have, and had not even seen a copy of, the new contract.

31. After a lunch break, the Plaintiffs had one final, brief meeting with ISP. One of the ISP representatives showed the Plaintiffs a chart comparing ISP's compensation rates with those then paid by SPC. *See* Plaintiffs' Exh. 23. On the ISP side of the chart, Rathje and Persson were shown receiving significantly less compensation than provided for in their current contracts, while Sjöström was shown receiving no compensation at all. *See id.*<sup>12</sup> Rathje and Persson feared that, although neither Hudson nor ISP had ever stated that they were to be paid per the ISP wage scale, their compensation was about to be substantially cut. Sjöström was shocked to see a chart that, in his view, showed his employment terminated. Rathje abruptly concluded the meeting, informing the ISP

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<sup>12</sup> The value of Rathje's wages, vacation time and paid days off totaled \$11,812.67 monthly, versus ISP's gross wages of \$7,450 a month, for a difference of \$4,362.67 a month. Plaintiffs' Exh. 23. The value of Persson's wages, vacation time and paid days off totaled \$10,131.22, versus ISP's gross wages of \$7,350, for a difference of \$2,781.33 a month. *Id.* The \$6,705 in monthly wages shown as the difference in Sjöström's case, *id.*, confusingly reflected his compensation as relief chief engineer, not as superintendent. ISP merely intended this chart as a benchmark comparison rather than any reflection of what actually would become of the Plaintiffs. However, the chart was misleading not only because of the seeming cuts in Rathje's and Persson's compensation but also because ISP, per Hudson's wishes, actually planned to employ Sjöström six months a year in his chief engineer capacity. However, this was not made clear to Sjöström at the time.

representatives that, until clarification from Hudson was forthcoming, there was no point in continuing discussions.

32. That day Bergqvist, Walczak and Steinhauser sent Hudson (who was en route to his home in Miami) an e-mail transmitting a copy of the ISP wage comparison (Plaintiffs' Exh. 23) and describing their meetings with the Plaintiffs. They wrote, *inter alia*: "How the Master [meaning Rathje] ended the conversation was, although not in a hostile tone: 'Basically it is you or us.'" Plaintiffs' Exh. 38. The e-mail further noted: "An other [sic] problem is that Mr. Sjostrom [sic] does not feel that he has been relieved of his duties as superintendent – purchaser." *Id.*

33. The Plaintiffs, as well, hastened to send Hudson an e-mail that day, stating, *inter alia*:

Last night, April 4, during our meeting in the Casino Bar on board, among many other things, you made the following statements:

Rolf, Kent, Lennart and myself were fenced-in and protected, meaning that nobody could touch our contracts. But it was even stated, that remaining deck and engine personnel was to remain as is. To ease off some of the workload on my shoulders, you were thinking about usinf [sic] ISP as a manning company. When I asked you to be more specific, you said that when for instance I needed a third officer, I would just have to call them and they would then act in accordance with our instructions. . . .

Less than twelve hours later, we are faced with a complete [sic] different scenario. After arriving back on board, we had a meeting with ISP, as agreed. We were then and there informed by them, that they have a contract with you, saying that they are now totally responsible for manning as well as for the technical management. They also were not aware of our actual contractual conditions regarding pay, vacations, etc., which were "busting" their budget.

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As it stand [sic] now, we see only two options. We stick to the agreement you presented last night, i.e. ISP serves as a manning agency only and the current contracts and conditions are maintained, possible new conditions only applying to new hires. Alternatively, if ISP takes over both complete manning and technical management, we (Hartmut & Kent) accept the standard severance package (one week for every year of service) and Rolf gives the 9-month notice in accordance with his contract.

Plaintiffs' Exh. 6 at 1.

34. The next day (April 6), Hudson responded with the following e-mail to Pols:

Wednesday night I told H[artmut Rathje], K[enth Persson] and R[olf Sjöström] that:

1. Their officer contracts would be ring fenced this season as would Lennart's.
2. I hoped H[artmut] would be happy at the end of the season and would want to come again for next year.
3. All crew contracts other than theirs would be handled by ISP.
4. I hoped the other officers would stay.
5. All D&E purchasing would be done by ISP
6. All D&E administration would be done by ISP

Hartmut told me that “we” unclear whether the top 3 or 4 or all, should have a “raise of 5%”. I said that I wanted everyone to be treated fairly so I would ask ISP to prepare a benchmark comparison in the same way as had been done for shore based personnel. I asked them to do so Thursday morning. Here it is. If they are correct I can only say that I am shocked – shocked that we pay so much more than is normal; shocked that I was told differently; and shocked that H[artmut] was asking for a raise.

I suggest you provide this to H[artmut], K[enth], R[olf] and L[ennart Bergstrom] while I consider the email they sent to me via you.

*Id.* at 2.

35. The same day (April 6) the Plaintiffs responded point-by-point to the numbered paragraphs in Hudson's e-mail to Pols with the following e-mail to Hudson:

1. Please understand that ring-fencing four people's contracts, does not solve the problem and would be very unfair towards all the officers and engineers.
2. Had you left everything unchanged regarding our present contracts and conditions, everybody would have been happy, including H[artmut].  
Most likely for many more years to come.
3. This was never mentioned. Only help in finding personnel when needed.
4. Under the conditions suggested by ISP, hardly anybody will stay.
5. This was never mentioned to us.
6. Ditto.

H[artmut] never asked for a raise and in [sic] confused wondering where you got this from.

ISP benchmark comparison was never mentioned either. We are all in shock, not only yourself. Please focus on the very last sentence of our email to you dated April 5, 2001[,] starting with “as it stands now” and let us know of your decision as soon as possible so we can concentrate on our jobs or go home.

Nobody around here is asking for a raise, just freeze existing conditions and send ISP back to where they came from.

*Id.* at 3. In effect, the two options given Hudson were (as Rathje later described them): “Either you stick to your verbal agreement or you go with ISP and we go.”

36. The next day, April 7, Hudson sent an e-mail to Pols responding, in relevant part:

The ultimatum given is that I must choose between ISP managing the ship in accordance with my wishes utilizing the combined skills of ISP; or that I permit Hartmut and Rolf to manage the ship in accordance with their wishes utilizing their combined skills.

I am obligated to ISP, a situation brought about in large measure by the comments recently from HRK (via you [Pols] and then confirmed this week to me) that they might not stay, and if they did stay it would only be for this season.

Even if I were not obligated to ISP the choice although difficult would be nonetheless straightforward. . . .

I consider that the three signatories of the two letters below have effectively resigned and I accept those resignations on behalf of POFC. Lennart Bergstrom and all of the others can make their own decisions after speaking with ISP. As HRK have resigned there seems to be no requirement to pay termination. On the other hand I believe the Hartmut and Kenth contracts would normally provide for termination of two or three months if the Company had terminated their employment. I am prepared to pay this sum to each on an ex gratia basis, given a proper and fully cooperative handover to the satisfaction of ISP during the next 14 days.

Hartmut’s suggestions regarding severance (this new policy is now 72 hours old and is only for landside personnel without contractual protection) and Rolf’s “9 months” are unsupportable and merely represent more of the same self dealing that has plagued the company.

A sad and unnecessary affair for all concerned. By copy of this letter I am providing Rolf and I ask that you also provide Rolf with formal notice that his arrangements in Sweden are terminated with immediate effect (the current contract provides 60 days termination) . . . . His work as Chief Engineer is covered in the preceding paragraph. Note that his Superintendent contract of 1997 appears to have been superceded [sic] by that of January 2001 which provides for 60 days notice of termination. . . . .

*Id.* at 4-5.<sup>13</sup> To this response, Hudson appended copies of the Plaintiffs' April 5 and April 6 e-mails in the body of which he interpolated specific comments, *id.* at 5-7, including, "not sure what you mean by standard severance package," and "You have termination provisions in your contracts I presume," *id.* at 7.<sup>14</sup>

37. The Plaintiffs replied by letter faxed the same day:

1/ HKR have not resigned, but consider ourselves terminated.

2/ We are fully prepared to cooperate and to do the transfer in the professional manner we are accustomed to. However, it is essential that you let us know immediately and specifically how you propose to finalize the financial arrangements as specified in our employment contracts.

*Id.* at 8.<sup>15</sup>

38. Negotiations between Hudson and the Plaintiffs concerning his offered "ex gratia" payments broke down. On April 13, 2001 Rathje formally handed over the vessel to a new captain. The plaintiffs remained onboard until April 20, 2001, when they departed the SCOTIA PRINCE. Rathje and Persson acknowledged receiving all sums due and owing through April 20, the last day of their employment by SPC. *See, e.g.*, Defendant's Exhs. 30, 34. Sjöström acknowledged that he was

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<sup>13</sup> At trial, SPC objected to admission of the entire bottom portion of Hudson's April 7, 2001 e-mail, commencing "On the other hand I believe the Hartmut and Kenth contracts would normally provide for termination of two or three months," on the ground that the contents constituted settlement negotiations inadmissible pursuant to Fed. R. Evid. 408. This portion of Hudson's e-mail, which I accepted *de bene*, is now ruled admissible. Rule 408 precludes the admission of evidence concerning the offer or acceptance of "a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount[.]" Fed. R. Evid. 408. The rule "does not exclude use of compromise evidence when it is offered to prove something other than liability for, or invalidity of, a claim or its amount." *United States v. J.R. LaPointe & Sons, Inc.*, 950 F. Supp. 21, 23 (D. Me. 1996). To the extent that Hudson discusses Sjöström, the e-mail bears on termination of Sjöström's superintendent contract, not on settlement discussions. To the extent that Hudson discusses Rathje and Persson, the e-mail is admitted for the purpose of completeness of the story of the parties' ongoing dealings rather than as proof of SPC's liability for, or the invalidity of, a claim or its amount.

<sup>14</sup> At trial, Hudson recalled that he interpolated comments into the Plaintiffs' April 5 e-mail as soon as he read it upon his return home to Miami in the early morning hours of April 6. Nonetheless, the documents themselves indicate that Hudson did not send those interpolated responses to either Pols or the Plaintiffs until he appended them to his e-mail of April 7.

<sup>15</sup> At trial, SPC objected to admission of the second paragraph of the Plaintiffs' April 7 fax on Rule 408 grounds. This paragraph, which I accepted *de bene*, is admitted for the purpose of completeness of the story of the parties' ongoing dealings rather than as proof of SPC's liability for, or the invalidity of, a claim or its amount.

paid in full through April 30, 2001, notwithstanding that the last day of his employment was April 20. *See, e.g.*, Defendant's Exh. 32.<sup>16</sup> SPC made no further payments to Rathje, Persson or Sjöström.

39. Persson construed Hudson's comment, "You have termination provisions in your contracts I presume," to mean that "either we or Prince of Fundy had to give notice." Neither Rathje nor Persson ever gave notice.<sup>17</sup> In response to the question, "Did Professor Hudson ever tell you that your contract on board the Scotia Prince had been terminated?" Persson testified at deposition, "No. He accepted our resignation."

40. Persson acknowledges that each time he spoke to or corresponded with Hudson, Hudson confirmed that Persson's contract was ring-fenced; at no time did Hudson tell him his contract would be anything but ring-fenced.

41. The employment contract of Carsten Brueninghaus, who worked as an officer aboard the SCOTIA PRINCE from June 1997 to May 2001, contained the following notice of termination provision: "[N]otice time for termination of employment is 30 days." Plaintiffs' Exh. 28C.<sup>18</sup>

42. ISP, acting on behalf of SPC, sent Brueninghaus a written notice of termination stating, "Notice time of termination of your employment is 30 days and therefore your last day of employment will be May 11, 2001 during which time conditions of the aforementioned contract will be in effect."

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<sup>16</sup> At trial, SPC offered Defendants' Exhibits 30, 32 and 34 on a *de bene* basis, given its Rule 408 concerns. I now admit them for the purpose of completeness of the story of the parties' ongoing dealings rather than as proof of SPC's liability for, or the invalidity of, a claim or its amount.

<sup>17</sup> Rathje and Persson testified at trial that they were at all times willing to work their respective notice periods and that they did not give notice in their April 5 e-mail to Hudson because they understood him to have suggested in the Casino Bar the previous night that the new severance plan applied to them. They also testified that they did not thereafter give notice because Hudson (in his April 7 e-mail) offered to pay them their full notice-period compensation. Rathje stated that what the Plaintiffs meant by "go home" in their April 6 e-mail to Hudson was give notice and go home, and Sjöström testified that the phrase "go home" is understood by sailors to mean give notice of termination – not leave on the spot. However, Bergqvist convincingly testified that "go home" has no such special nautical meaning.

<sup>18</sup> Brueninghaus' testimony and related exhibits were admitted *de bene* at trial over SPC's relevancy objection. Inasmuch as I find the underlying notice provision ambiguous, I now deem this extrinsic evidence relevant and admissible. Although I note that Brueninghaus dealt with ISP, whereas the plaintiffs dealt directly with SPC chairman Hudson, I do not find that a significant difference inasmuch as both ISP and Hudson acted on behalf of SPC.

Plaintiffs' Exh. 28D. Brueninghaus was permitted to work his notice period and was paid in accordance with the terms of his existing contract.

43. Brueninghaus understood that the notice provision of his employment contract obliged him to work thirty days for ISP and that he could not "just walk off" and receive a termination payment.

44. Subsequent to its takeover of management of the SCOTIA PRINCE, ISP discovered a number of problems arising from the way in which the vessel had been maintained and/or managed.

45. Idar Hofseth, a senior surveyor for Bureau Veritas ("BV") classification society who inspected the SCOTIA PRINCE in mid-April 2001, noted several deficiencies bearing on safety.

46. BV and other competing classification societies, such as Det Norske Veritas ("DNV"), annually inspect vessels on behalf of flagship nations for compliance with statutory and other requirements, including the provisions of the International Convention for the Safety of Life at Sea ("SOLAS").

47. Without certification from a classification society such as DNV or BV that a vessel is in compliance with SOLAS, a passenger ship such as the SCOTIA PRINCE cannot legally operate.

48. Hofseth found the following violations of SOLAS: (i) some misnumbering of a bridge panel designed to show the location of all fire doors and indicate whether they are opened or closed; (ii) lack of permanent marking on the doors themselves; (iii) malfunctioning of some of the vessel's fire dampers, which are designed to close off air circulation in the case of a fire; and (iv) inoperability of certain fire doors. In addition, the crew maintained no accurate checklist of doors – something that, although not a SOLAS requirement, is good marine practice.

49. The foregoing deficiencies all were corrected before Hofseth issued an interim SOLAS certificate on April 21, 2001. *See* Plaintiffs' Exh. 18. In issuing this certificate, Hofseth noted the

existence of two additional problems that, while not constituting SOLAS violations, required correction within the ensuing three months: (i) the underside of the engine (bilges) was dirty, and (ii) the electrical switchboard had built up excess deposits of dust. In Hofseth's opinion, these conditions should have been dealt with when the vessel was laid up.

50. It is not unusual for a surveyor to find deficiencies. In fact, in some cases, if deficiencies arising to the level of SOLAS violations are not correctable by the time of completion of a survey, a conditional certificate is issued for a one- to two-month period. DNV, the classification society that inspected the SCOTIA PRINCE prior to April 2001, had certified the vessel as compliant with SOLAS in April 2000 after certain deficiencies were corrected. Kenneth Luther, the DNV surveyor who inspected the SCOTIA PRINCE at that time, testified that “[f]or a ship of this size, nature and age, I would expect to find some things wrong.” Plaintiffs’ Exh. 31 at 19.

51. Apart from the deficiencies disclosed in Hofseth's report, ISP learned the following:

(i) The vessel's safety plan had not been updated, although DNV had been noting a need for corrections for the past two to three years. ISP contracted Delta Marine in Finland to update the safety plan; that task was completed in three months.

(ii) On Sjöström's recommendation, the vessel had been sailed to Germany during the winter of 1999-2000 for drydocking. The shipyard at which the vessel was drydocked was chosen because it was reputable and because the SCOTIA PRINCE is European-made. However, in the opinion of ISP executive vice-president Kenneth Engstrom, the SCOTIA PRINCE could have been sailed a much shorter distance for drydocking in the United States at a savings of approximately \$275,000 in fuel, crew and maintenance costs.<sup>19</sup> POF, through its president Pols, approved of the choice of Germany for drydocking. *See* Plaintiffs’ Exh. 35.

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<sup>19</sup> This opinion was based on Engstrom's assumption that the round-trip to Germany and back would take twenty days. Sjöström (*continued on next page*)

(iii) Under Sjöström's supervision, the bottom of the vessel had been repainted with tin-based paint following sandblasting in Germany, even though tin-free paint was then available and it was widely known that tin-based paint must be completely removed from the bottom of vessels by 2008. As a result, even though such a paint job normally should last for at least twelve years, SPC will be obliged either to coat the bottom of the vessel with an approved sealer, if available (none has to date been approved), or redo the paint job at an expense of approximately \$67,000 by 2008. Although tin-free paint was available, Jotun, a reputable marine-paint manufacturer whose paint was used by the German shipyard in which the SCOTIA PRINCE was drydocked, did not then manufacture tin-free paint, and tin-free paint was not then required to be used on the underside of vessels.

(iv) During the winter of 2000-01, after the ship's air-conditioning compressors were removed from the vessel for overhaul by the manufacturer, the original freon, which is now listed as ozone-unfriendly, was reused. In ISP's view, it would have been good marine practice to modify the compressors to accept an ozone-friendly freon, a job that would now cost approximately \$70,000. However, reuse of the old freon was not then impermissible.

(v) The vessel's air-conditioner cooling batteries were in poor condition and had to be replaced. However, batteries must from time to time be replaced as part of regular maintenance.

(vi) The vessel's cooling coils were dirty and had to be professionally cleaned.

(vii) The vessel's duct system was so dirty that it affected the balance of the air-flow aboard the ship; indications were that it had not been cleaned in many years, although it should be professionally cleaned every five to seven years. ISP had it cleaned at a cost of approximately \$40,000. *See* Defendant's Exh. 22.

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disagreed, testifying credibly that the trip took as little as nine days each way and that, in addition, \$30,000 in winter layup costs that otherwise would have been incurred were avoided.

(viii) The vessel's teak-wood railings were in poor shape as the result of use of an inappropriate sealant (epoxy lacquer) and the use of plastic-foil wrap during winter layup, locking condensation inside the wood. *See* Defendant's Exhs. 1-9, 36. ISP expended 800 man-hours to restore most of the railings to good shape, an estimated \$3,000 beyond normal maintenance costs. *See* Defendant's Exh. 36.

(ix) Approximately seventy percent of the vessel's wooden weather doors were in poor shape as the result of use of epoxy lacquer. *See id.*; Defendant's Exhs. 11-12. ISP expended 600 man-hours to restore most of them to good shape, an estimated \$2,000 beyond normal maintenance costs. *See* Defendant's Exh. 36.

(x) Portions of the vessel's Oregon-pine wooden decks were either rotten or in the process of rotting, in part because of years of use of a high-pressure washing machine that blew some of the caulking and plugs away, permitting water to seep underneath the planks. *See id.*; Defendant's Exhs. 13-18. In certain spots in which planks were taken up, the steel underlayment also showed signs of rust, although there was no evidence that the underlayment as a whole lacked strength. *See* Defendant's Exhs. 17-18. ISP expended at least 800 man-hours refurbishing the decks, an estimated \$5,000 beyond normal maintenance costs. *See* Defendant's Exhs. 19, 36. If properly maintained, an Oregon-pine deck can last the lifetime of a ship. The deck of the SCOTIA PRINCE may have to be entirely replaced, at a cost of approximately \$178,000. *See* Defendant's Exh. 21. It is difficult, although not impossible, to repair caulking in foggy, wet weather and to perform rail, door and deck maintenance while the ship (which, during the season is almost continuously in transit, carrying passengers) is in operation.

(xi) The canvas covers for the vessel's lifeboats were falling apart and had to be replaced. *See* Defendant's Exhs. 20, 36.

(xii) The freshwater pump for deck and superstructure washing was worn out and beyond repair, although with proper maintenance it could have had an unlimited lifetime. *See* Defendant's Exh. 36. The new pump cost approximately \$3,600.

(xiii) SPC was warehousing an excessive inventory of paint (approximately \$42,000 worth), which was considered by ISP (although there was conflicting evidence on this point) to be unusable. However, Pols approved the budget for paint.

52. Prior to the ISP takeover, the captain, officers and crew of the SCOTIA PRINCE undertook regular maintenance and repair efforts. *See* Plaintiffs' Exhs. 24C & 33. Klaus Poneleit, who served as boatswain onboard the SCOTIA PRINCE since April 1982 and was directly responsible throughout that time for maintenance of the vessel's wood appurtenances, used the same maintenance methods in April 1982, when Walczak was captain of the vessel, that he used after Rathje took over.

53. In his capacity as president of POF, Pols visited the SCOTIA PRINCE approximately once a month to meet with people and inform himself of the status of the ship. In a performance review dated October 25, 1999, Pols rated Rathje's performance as "excellent" in all categories, commenting "continuous outstanding performance." *See* Plaintiffs' Exh. 22.

54. While the chief engineer and superintendent are responsible for various aspects of maintenance and management of a vessel, with the captain having overall responsibility, Engstrom acknowledged that the owner "ultimately" is responsible for conformance of a vessel with SOLAS requirements. While Pols relied on the Plaintiffs for technical matters, including recommended budgets, Sjöström sought guidance from Pols in 1999 on the standard to which the SCOTIA PRINCE should be maintained. *See* Plaintiffs' Exh. 24A.

## **II. Conclusions of Law**

## A. Plaintiffs' Claim

1. The Plaintiffs assert, in relevant part, that SPC “breached [its] employment contract with [them] for wrongfully terminating them without cause, [and] for failing to pay them their wages, vacation and days off although duly demanded.” Complaint ¶ 14. They seek, in the main, compensation equaling the value of the wages they would have earned, and vacation days and time off they would have accrued, had they worked for the notice periods contained in their respective contracts. *Id.* ¶¶ 13-14.

2. In admiralty, as elsewhere, “the parol evidence rule renders legally inoperative . . . evidence of prior understandings and negotiations which contradicts the unambiguous meaning of a writing which completely and accurately integrates the agreement of the parties.” *Federal Marine Terminals, Inc. v. Worcester Peat Co.*, 262 F.3d 22, 28 (1st Cir. 2001) (citation and internal quotation marks omitted). However, “parol evidence has always been allowed, even in admiralty cases, to explain ambiguous terms of a contract.” *Talen’s Landing, Inc. v. M/V Venture, II*, 656 F.2d 1157, 1159 (5th Cir. Unit A Sept. 1981) (citation and footnote omitted).

3. “A contract term is ambiguous if reasonably susceptible to more than one interpretation.” *Atlantic Dry Dock Corp. v. United States*, 773 F. Supp. 335, 338 (M.D. Fla. 1991) (citation and internal quotation marks omitted) (admiralty context).

4. At trial, both Sjöström and his counsel reaffirmed that he presses no claim against SPC for chief-engineer pay. However, counsel for Sjöström suggested that a portion of the monies paid pursuant to the Sjöström Engineer Contract were, *de facto*, paid for Sjöström’s superintendent work (and hence should be taken into account in Sjöström’s claim for superintendent pay). As regards Sjöström’s chief-engineer position, the terms of the Sjöström and Sjöström Engineer contracts are unambiguous: Sjöström was to be paid six payments annually of \$6,705 each for that work. I therefore

decline to consider extrinsic evidence concerning whether the parties intended that some of Sjöström's compensation as superintendent be derived from his chief-engineer pay. Any claim for payments pursuant to the Sjöström Engineer Contract (six payments annually of \$6,705 each) is waived.

5. The phrase, "Notice time for termination of employment is [3 months/60 days]," in the Rathje and Persson contracts, and the provision, "9 months notice of termination required by both parties," in the Sjöström Contract, are in certain respects ambiguous. One cannot tell, with respect to the Rathje and Persson contracts, whether the notice requirement is mutual; nor can one discern, with respect to any of the contracts, under what circumstances (if any) an employee is entitled to work his notice time or receive pay in lieu thereof. As a result, parol evidence is admissible to illuminate the parties' intent.

6. Based on the testimony of Rathje, Persson and Brueninghaus, I am satisfied that in the case of all three Plaintiffs (i) the obligation to give notice was understood to be mutual (*i.e.*, the terminating party, whether employer or employee, was obligated to give notice to the non-terminating party); (ii) regardless of whether SPC fired the employee or the employee gave notice, the employee was entitled to work through his notice period or, if obliged by SPC to leave sooner, to receive an equivalent amount of pay in lieu thereof (essentially, severance pay); however, (iii) an employee who simply quit and walked away, or otherwise indicated unwillingness to work his notice period, would not be entitled to such severance pay.

7. SPC breached the notice provision of the Sjöström Contract by terminating Sjöström's job as superintendent without either permitting him to work the relevant notice period (nine months) or paying him in lieu thereof. In reaching this conclusion, I reject SPC's contention that the Plus 2 Contract superseded the Sjöström Contract as the operative document controlling Sjöström's superintendent work. I find, instead, that (i) the Sjöström Contract did not clarify the manner in which

it was to be renewed; (ii) the Sjöström Contract made no provision that future amendments be in writing; (iii) both the Marine Trading and the Plus 2 arrangements were intended merely to facilitate Sjöström's work for POF/SPC shoreside in Sweden, given the administrative difficulty inherent in direct payments by POF/SPC; (iv) the parties annually renewed the Sjöström Contract through course of dealing – *i.e.*, Sjöström's uninterrupted continuation of performance of the superintendent duties set forth therein; (v) Sjöström continued to perform his superintendent duties pursuant to the Sjöström Contract subsequent to January 1, 2001, with the unwritten amendment that total payments were increased from 24,500 to 42,000 krona per month; (vi) the Plus 2 Contract, to which Sjöström was not a party, superseded the Marine Trading arrangement, not the Sjöström Contract; and (vii) in his April 7, 2001 e-mail, Hudson mistakenly gave formal notice to Sjöström terminating his superintendent work pursuant to the sixty-day notice period of the Plus 2 Contract, rather than the applicable nine-month notice period of the Sjöström Contract.

8. SPC accordingly owes Sjöström \$24,750, representing the \$3,000 monthly value in U.S. currency of compensation (net of administrative expenses) to Sjöström pursuant to the Sjöström Contract, as amended, times nine, minus approximately three weeks' worth of compensation (totaling \$2,250) paid to Sjöström for the period from April 7, 2001 (when Hudson gave notice) through April 30, 2001.

9. Sjöström's right either to be permitted to work his notice period or to receive compensation in lieu thereof was absolute. I therefore decline to offset Sjöström's recovery on a theory of failure to mitigate damages. *See, e.g., Royal Crown Cos. v. McMahon*, 359 S.E.2d 379, 382 (Ga. Ct. App. 1987) (“Because under the contract [plaintiff's] right to severance pay was absolute . . . we find no merit in [Royal Crown's] additional argument that [plaintiff's] damages should have been reduced under the ‘mitigation theory.’” (citation and internal quotation marks omitted); *see also, e.g.,*

*Dillingham v. University of Colorado*, 790 P.2d 851, 855 (Colo. Ct. App. 1989) (noting that the “proper measure of damages for ineffective notice of termination under the terms of an employment contract is compensation for the stipulated notice period”) (citation omitted).

10. SPC never terminated the employment of either Rathje or Persson. Hudson consistently made clear to both (including via his April 6, 2001 e-mail) that the contracts of both were ring-fenced. The confusing and unfortunate ISP wage-comparison chart notwithstanding, neither Rathje nor Persson reasonably could have understood, after reading Hudson’s April 6 e-mail, that their employment was about to be terminated or their pay substantially cut.

11. In his April 6 e-mail, Hudson clarified that ISP was there to stay. However, Rathje and Persson chose even then not to give notice, instead responding in their April 6, 2001 e-mail to Hudson: “Please focus on the very last sentence of our email to you dated April 5, 2001[,] starting with ‘as it stands now’ and let us know of your decision as soon as possible so we can concentrate on our jobs or go home.”

12. Under the circumstances – including the Plaintiffs’ understandably mounting sense of frustration, Rathje’s open hostility toward the concept of the ISP takeover (“it is you or us”) and the April 5 breakdown in face-to-face communications between the Plaintiffs and ISP – this response could not reasonably be construed as conveying a willingness on the part of Rathje and Persson to work their two- and three-month notice periods under the direction of ISP. To the contrary, it conveyed an intention – or perhaps, more accurately, a threat – to quit on the spot if (as the Plaintiffs by then well knew) the ISP deal could not be undone.

13. Hudson, acting on behalf of SPC, correctly perceived this as a resignation and accepted it via his e-mail of April 7, 2001. However, inasmuch as prior thereto neither Rathje nor Persson

gave notice pursuant to his contract or otherwise signaled a willingness to work his notice period, neither is entitled to receive compensation in lieu thereof pursuant to the Rathje and Persson contracts.

14. In so finding, I reject any suggestion that Hudson was responsible for Rathje's and Persson's failure to give notice on grounds that (i) he signaled on the evening of April 4, 2001 in the Casino Bar that the severance plan was applicable to them and (ii) he offered in his e-mail of April 7, 2001 to pay them "ex gratia" for their notice periods. There is no evidence that Hudson told Rathje and Persson, who were entitled only to such benefits as were provided via contract, that they personally qualified for severance (arguably effectuating an oral modification of their contracts). Instead, Rathje and Persson merely testified that Hudson told them it would be good for them to "know about" the severance plan. The two officers thus took a calculated risk that the plan (which they perceived would provide a more generous payment without requiring them to work under the supervision of ISP) might be applicable to them. Nor can Hudson's April 7 offer of "ex gratia" payment for the notice periods reasonably be blamed. By then the damage was done: Rathje and Persson had effectively quit without signaling any intention to work their notice periods by urging Hudson on April 6 to "let us know of your decision as soon as possible so we can concentrate on our jobs or go home." Nor, finally, does it avail Rathje and Persson that they may, subjectively, have been willing to work their notice periods (as they testified at trial) inasmuch as they never conveyed this willingness in a timely fashion to SPC – in fact, conveying quite the opposite.

#### **B. Defendant's Counterclaims**

15. SPC counterclaims against each of the Plaintiffs for compensatory, punitive and other damages, contending that each "consistently and repeatedly breached his duty of utmost fidelity and good faith, by, *inter alia*, failing to properly maintain and repair the vessel, by engaging in self

dealing, and by failing to properly handle the Vessel's accounts, all in breach of his said duty.”  
Answer/Counterclaim ¶¶ 5, 18, 29.

16. At trial, SPC adduced no evidence of either failure to properly maintain the vessel's accounts or of self-dealing (or any other willful malfeasance) on the part of any of the Plaintiffs. In fact, it is difficult to see how some of the conduct of which SPC complains could be actionable under any theory. For example, the choice of Germany for drydocking, the selection of tin-based paint and the decision to avoid the cost of overhauling the air compressors to use ozone-friendly freon fall within the broad spectrum of permissible professional judgments as to the wisdom of which reasonable people could disagree. Certain other conditions – for example, the failing air-conditioner cooling batteries and the dirty cooling coils – could be expected to be encountered in a vessel of the age, size and scope of operations of the SCOTIA PRINCE. In fact, as to a majority of the expenses in question – duct cleaning, freon replacement, renewal of batteries, fire-damper repairs and renewals and the labeling of doors and dampers, *see* Defendant's Post-Trial Brief at 13-14 – SPC incurred not “damages” for which the Plaintiffs might be held liable but rather deferred expenses, there being no evidence that the defendant will incur, or has incurred, greater costs to address these items subsequent to the change in management than it would have incurred had these maintenance and repair tasks been attended to in what it (now) says would have been a timely fashion.

17. On the other hand, in some respects – notably with regard to the SCOTIA PRINCE's wood railings, doors and deck – SPC has incurred, and may yet incur, additional costs as a result of negligent maintenance. Nonetheless, I find no precedent in admiralty for holding the officers of a vessel – including the captain, or “master” – liable in damages to an employer or owner for general negligent maintenance. Nor do the cases cited by SPC in its trial and post-trial briefs give comfort that the recognition of such a cause of action is appropriate or wise.

18. SPC cites *Isbrandtsen Co. v. Johnson*, 343 U.S. 779 (1952), and *Offer v. Basic Towing, Inc.*, Civil No. 95-0210, 1996 WL 748437 (E.D. La. Dec. 30, 1996), *aff'd*, 136 F.3d 138 (5th Cir. 1998), for the proposition that “[a] vessel owner can seek damages for breach of a seaman’s contract of engagement.” Defendant’s Trial Brief (Docket No. 62) at 6; Defendant’s Post-Trial Brief at 12.

19. Even assuming *arguendo* that SPC is the vessel’s “owner” – a proposition as to which no evidence was adduced at trial – these cases are readily distinguishable. In *Isbrandtsen*, the Supreme Court held that an employer could not set off against a seaman’s wages expenditures it incurred in hospitalizing a crew member attacked by that seaman, “assum[ing], without deciding, that respondent [seaman] owed petitioner [employer] an obligation to reimburse petitioner for the expense which he thus thrust upon it by his unjustified attack upon a fellow seaman.” *Isbrandtsen*, 343 U.S. at 780, 782. In *Offer*, the United States District Court for the Eastern District of Louisiana, on the strength of *Isbrandtsen*, held three seamen liable to their employer (the vessel’s owner) for damages arising from breach of their employment contracts – specifically, their abrupt and unjustified departure from the vessel. *Offer*, 1996 WL 748437, at \*8. Here, there is no evidence of commission of an intentional tort, and SPC frames its counterclaims as arising from breach of fiduciary duty, not breach of the Plaintiffs’ employment contracts.

20. In any event, even assuming *arguendo* that, under some circumstances, officers of a vessel may be liable to an employer or an owner for negligent maintenance, I am greatly troubled by the prospect of holding any of the three Plaintiffs liable to SPC on the facts of this case. Here, the very matters as to which the Plaintiffs’ conduct arguably was derelict (notably, the integrity of the vessel’s wood appurtenances) intersected with, and implicated, the counterclaimant’s own responsibilities and duties, including potentially (assuming *arguendo* it is the owner) its nondelegable duty to provide a

seaworthy ship. *See McAleer v. Smith*, 57 F.3d 109, 114 (1st Cir. 1995) (“The fact that the Ship’s Regulations provided that the captain was solely responsible for the safety of the ship and those on board does not make Finlay [the captain] liable for the ship’s unseaworthiness, because a shipowner’s duty to provide a seaworthy ship is nondelegable.”). ISP executive vice-president Engstrom tacitly acknowledged as much in testifying that an owner “ultimately” is responsible for the compliance of a vessel with SOLAS requirements.

21. Viewed another way (from the vantage of concepts of principal/agent liability), SPC fairly can be described as having either authorized or acquiesced in the very conduct of which it now complains. *See CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 704-05 (1st Cir. 1995) (applying principal/agent precepts in admiralty context). Pols, in his capacity as president and representative of SPC, expressly approved some of the complained-of conduct, including the choice of Germany for drydocking and the level of maintenance budgets. To the extent SPC did not expressly approve the conduct in issue, it impliedly did so by virtue of Pols’ regular visits to the vessel and monitoring of the performance of the captain, whom Pols commended in 1999 for his “continuous outstanding performance.” There is no evidence that the Plaintiffs, or any other crew for that matter, hid any condition or portion of the vessel from Pols’ view; indeed, the condition of the wooden appurtenances was open and obvious, and the wood had been maintained by the same person, using the same methods, for almost twenty years. Under such circumstances, a principal seeks in vain to recover damages for the asserted defaults of its agents. *See, e.g., Inn Foods, Inc. v. Equitable Coop. Bank*, 45 F.3d 594, 597 (1st Cir. 1995) (“Under Massachusetts law, ratification of an agent’s acts may be express or implied and, as a general proposition, the principal must have full knowledge of all material facts. Massachusetts courts, however, do not always require that the principal have actual knowledge. There may be ratification when the principal purposely shut[s] his eyes to means of

information within his own possession and control.”) (citations and internal quotation marks omitted); *Barta v. Kindschuh*, 518 N.W.2d 98, 100 (Neb. 1994) (“[I]f the principal authorized the agent’s acts, or otherwise acquiesced in or ratified such acts, the agent will not be held liable to the principal for the losses resulting from those acts.”).

In light of the foregoing, judgment shall enter (i) in favor of Sjöström and against SPC for the sum of \$24,750, and in favor of SPC and against Rathje and Persson, on the Plaintiffs’ claim surviving summary judgment (Count I), and (ii) in favor of the Plaintiffs, and against SPC, on all of SPC’s counterclaims.<sup>20</sup>

So ordered.

Dated this 13th day of March, 2002.

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David M. Cohen  
United States Magistrate Judge

STNDRD

U.S. District Court  
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 01-CV-123

RATHJE, et al v. SCOTIA PRINCE CRUISE, et al                      Filed: 05/01/01  
Assigned to: MAG. JUDGE DAVID M. COHEN  
Demand: \$300,000    Nature of Suit: 120  
Lead Docket: None    Jurisdiction: Federal Question  
Dkt# in other court: None

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<sup>20</sup> I do not here address the Plaintiffs’ (or more precisely, Sjöström’s) request for attorney fees and costs, the subject matter of which is covered in Local Rules 54.2 and 54.3. The Complaint also sought interest. To the extent Sjöström seeks prejudgment interest, the award of which is in the discretion of the trial court, *see, e.g., City of Milwaukee v. Cement Div.*, 515 U.S. 189, 194-99 (1995) (admiralty context); *Criado v. IBM Corp.*, 145 F.3d 437, 446 (1st Cir.1998), any such request shall be addressed in the same manner specified in Local Rule 54.2.

Cause: 28:1333 Admiralty

KENTH PERSSON                      MICHAEL X. SAVASUK  
    plaintiff                      [COR LD NTC]  
   BRADLEY & SAVASUK  
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   (207)773-0788

ROLF SJOSTROM                      MICHAEL X. SAVASUK  
    plaintiff                      (See above)  
   [COR LD NTC]

HARTMUT RATHJE, CAPTAIN                      MICHAEL X. SAVASUK  
    plaintiff                      (See above)  
   [COR LD NTC]

v.

PRINCE OF FUNDY CRUISES, LTD                      WILLIAM D. ROBITZEK  
    defendant                      [term 11/07/01]  
[term 11/07/01]                      784-3576  
   [COR NTC]  
   BERMAN & SIMMONS, P.A.  
   P. O. BOX 961  
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   784-3576

LEONARD W. LANGER  
    [term 11/07/01]  
    [COR LD NTC]  
MARSHALL J. TINKLE

[term 11/07/01]  
[COR]  
TOMPKINS, CLOUGH, HIRSHON &  
LANGER  
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THREE CANAL PLAZA  
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207-874-6700

SCOTIA PRINCE CRUISES LTD, WILLIAM D. ROBITZEK  
f/n/a PRINCE OF FUNDY CRUISES (See above)

LTD [COR]  
defendant

LEONARD W. LANGER  
(See above)  
[COR LD NTC]  
MARSHALL J. TINKLE  
(See above)  
[COR]

SCOTIA PRINCE M/V, Official NO WILLIAM D. ROBITZEK  
10917-ES, in rem (See above)

defendant [COR LD NTC]

LEONARD W. LANGER  
(See above)  
[COR LD NTC]

-----  
  
HENK POLS  
movant

LEONARD W. LANGER  
(See above)  
[COR LD NTC]  
MARSHALL J. TINKLE  
(See above)  
[COR]

=====

PRINCE OF FUNDY CRUISES, LTD WILLIAM D. ROBITZEK

counter-claimant [term 11/07/01]

[term 11/07/01] 784-3576

[COR]

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LTD [COR]

counter-claimant

LEONARD W. LANGER

(See above)

[COR LD NTC]

MARSHALL J. TINKLE

(See above)

[COR]

v.

KENTH PERSSON                      MICHAEL X. SAVASUK  
counter-defendant                      [COR LD NTC]  
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ROLF SJOSTROM                      MICHAEL X. SAVASUK  
counter-defendant                      (See above)  
[COR LD NTC]

HARTMUT RATHJE, CAPTAIN                      MICHAEL X. SAVASUK  
counter-defendant                      (See above)  
[COR LD NTC]