

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-62200-CIV-COHN/SELTZER

LOUIS RAFAEL HURTADO,

Plaintiff,

v.

BALERNO INTERNATIONAL LTD., a British
Virgin Islands company,

Defendant.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE is before the Court following a nonjury trial that took place from May 28 to May 30, 2019. The Court has considered the evidence presented at trial and the parties' post-trial briefs [DE 207, 208], and is otherwise advised in the premises.

Plaintiff Louis Rafael Hurtado brings this action against Defendant Balerno International, Ltd., ("Balerno") to recover maintenance and cure under general maritime law. Balerno hired Hurtado in early 2017 to work as a chef aboard a private yacht for a two-and-a-half-month voyage through the Caribbean. During the trip, Hurtado suffered a strangulated hernia for which he received emergency surgery in Havana, Cuba. After his surgery, Balerno refused to pay maintenance and cure. Balerno claims it is not liable for maintenance and cure because Hurtado failed to disclose a preexisting hernia condition that led to his injury at sea. Following a nonjury trial and pursuant to Federal Rule of Civil Procedure 52(a), the Court finds that Balerno is liable for maintenance and cure and awards Hurtado \$780,415.65. This amount includes non-economic damages

for Hurtado's pain and suffering, punitive damages for Balerno's willful failure to pay maintenance and cure, and prejudgment interest.

I. FINDINGS OF FACT¹

1. Plaintiff Louis Rafael Hurtado is a professional chef who has worked aboard yachts since 1992.

2. Defendant Balerno International, Ltd. owns a 100-foot luxury motor yacht called the M/Y PICNIC ("the Picnic" or "the vessel"). The Picnic is registered in the Marshall Islands. Captain Pablo Gonzalez Parodi ("Captain Gonzalez") has been the captain of the Picnic since 2012 and is responsible for hiring and firing the crew.

3. In March 2017, Captain Gonzalez hired Hurtado to work aboard the Picnic for a two-and-a-half-month private voyage starting in Fajardo, Puerto Rico and ending in Fort Lauderdale, Florida. The voyage included two trips to Cuba and an intervening stop in Key West, Florida.

4. Balerno does not require its crewmembers to undergo pre-employment medical examinations or interviews. Balerno claims that it requires all crewmembers to present valid medical certificates to demonstrate their fitness to work at sea. The Court finds, however, that this was not the case for the voyage in March 2017. Captain Gonzalez did not ask Hurtado to bring his medical certificate with him when he hired Hurtado over the phone. After Hurtado boarded the vessel in Fajardo, Puerto Rico, a flag-state surveyor² for the Republic of the Marshall Islands came onboard to inspect each crewmember's documentation. Only two out of the five crewmembers had valid

¹ To the extent these Findings of Fact constitute Conclusions of Law, they are hereby adopted as both.

² The Marshall Islands flag-state surveyor performs "compliance verification surveys, surveying yachts specifically, to the regulations put forth in the Marshall Islands Yacht Code." DE 202 at 107:3-5 (Trial Tr. Day 2).

medical certificates. Both Hurtado's and Captain Gonzalez's medical certificates were expired at the time of the voyage. Hurtado informed both the flag-state surveyor and Captain Gonzalez that he had left his medical certificate at home in Fort Lauderdale. According to Hurtado, Captain Gonzalez "didn't make a big deal of it." DE 201 at 178:6 (Trial Tr. Day 1). The flag-state surveyor testified that under Marshall Islands regulations, yachts can sail on private voyages with temporary crewmembers who do not have valid medical certificates.

5. Hurtado obtained an ENG-1 (seafarer's medical certificate) in 2010. An ENG-1 is a special type of medical certificate required by British-flagged vessels that can only be obtained from certain physicians. Marshall Islands regulations do not require an ENG-1; they permit any doctor to issue a medical certificate. The Marshall Islands surveyor testified that the ENG-1 is the "gold standard in the industry because all of the flags recognize it." DE 202 at 113:22-23.

6. Hurtado received his ENG-1 from Dr. Eduardo Grenet, who specializes in maritime medicine and is one of the few doctors in the United States qualified to issue such certificates. Dr. Grenet diagnosed Hurtado with a "small, right inguinal (groin) reducible hernia" and placed two restrictions on Hurtado's ENG-1: Hurtado could not lift over 10 kg (25 lbs.) or work over 200 miles from the coast. DE 195-38 (Pl.'s Ex. 59). Dr. Grenet testified, however, that an asymptomatic hernia does not render someone unfit to work as a yacht chef. Hurtado's 2010 ENG-1 expired in 2012. Id.

7. Prior to his medical emergency aboard the Picnic in 2017, Hurtado had never experienced any symptoms from a hernia. Furthermore, Hurtado testified that

since 2010, he has worked for at least ten other vessels and none of them asked him to produce a medical certificate.

8. Hurtado was first hired by Balerno in 2015 to work aboard the Picnic for a seven-day commercial charter to Grenada. Hurtado testified that he did not provide his medical certificate for that voyage. But according to Captain Gonzalez, it was Balerno's policy in 2015 to require all crewmembers to produce medical certificates. Although he did not recall whether Hurtado produced his medical certificate in 2015, Captain Gonzalez testified that "in theory" he would have seen Hurtado's medical certificate and the hernia diagnosis therein. DE 201 at 11:8.

9. In January 2017, two months before his second voyage aboard the Picnic, Hurtado visited his primary care physician in the United States, Dr. Matthew Moretti. Dr. Moretti palpitated Hurtado's stomach and did not find any signs of an umbilical (stomach) hernia – the type of hernia he suffered aboard the Picnic in 2017. Dr. Moretti has treated Hurtado since 2015 and has never diagnosed him with an umbilical hernia. Both Dr. Moretti and Dr. Grenet testified that inguinal hernias and umbilical hernias are independent disorders affecting different parts of the body. The presence of one does not indicate the presence of another.

10. During the first half of the voyage in 2017, Hurtado worked without experiencing any symptoms from his hernia. Then, on April 25, 2017, Hurtado began to feel nauseous and dizzy. His symptoms worsened the next day, and he told Captain Gonzalez that he needed to see a doctor. On April 27, 2017, the Picnic docked in Varadero, Cuba, and Hurtado disembarked to visit a local doctor. The doctor diagnosed Hurtado with an umbilical hernia and advised Hurtado that he needed to go to the

hospital for emergency surgery. The nearest hospital was in Havana, Cuba, about three hours away.

11. Hurtado returned to the boat and informed Captain Gonzalez of his medical emergency. Captain Gonzalez suddenly became angry with Hurtado. He demanded that Hurtado pay him \$1,000 in petty cash for “internet abuse.”³ Captain Gonzalez testified that he did not see a problem with asking Hurtado to pay for his internet use at this time because Hurtado “was not in an emergency. He was not urgent.” Id. at 45:21.

12. According to Captain Gonzalez, after Hurtado came back from the doctor in Varadero, he confessed to having lied about his hernia. In his affidavit, Captain Gonzalez stated: “Hurtado admitted to me that he had lied about having a current medical certificate; that he could not obtain one due to his hernias, and that he was told on his previous vessel, the M/Y Carson, that he needed to have surgery before he would be allowed to return to work on that yacht.” DE 42-1 ¶ 14. Captain Gonzalez further stated in his affidavit that Hurtado “explained to me at the time that he had no insurance coverage in the US but had learned that as a Venezuelan citizen he could obtain free surgery at the public hospital in Cuba to repair his hernia.” Id. ¶ 12.

13. Captain Gonzalez’s testimony regarding Hurtado’s “confession” was revealed at trial to be false. First, Captain Rosenberg, the captain of the M/Y Carson, testified that Hurtado was dismissed because of an extended leave of absence and not because of a medical condition. This is supported by a letter Hurtado received from the

³ Hurtado claims that he used the internet to download recipes, but Balerno contends that he also posted on social media, a claim which Hurtado does not explicitly deny. But while Balerno presented evidence of Hurtado’s “internet abuse” at trial, it has not suggested that this is relevant to whether he is entitled to maintenance and cure.

M/Y Carson stating that the cause of his dismissal was abandonment. See DE 195-32 (Pl.'s Ex. 46). Second, Hurtado did have insurance coverage in the United States at the time of the voyage through his previous employer, the M/Y Carson. Third, if Hurtado knew that he could receive free surgery in Cuba, he would not have initially gone to the International Hospital in Havana, where he waited for two days in agony because the doctors would not operate on him without a \$1,000 down payment, which he could not provide. And fourth, there is no mention of Hurtado's purported confession in any of the written communications between Captain Gonzalez and Hurtado after the incident.

14. Balerno also offered the testimony of Olena Potyeyeva, the Picnic's stewardess, who claimed that Hurtado told her that he wanted to visit Cuba to receive free surgery. The Court finds that her testimony also lacked credibility. For instance, she testified that the Picnic's "Standard Operating Procedures and Regulation Manual" required each crewmember to possess an ENG-1, which she said is "the same thing as a medical certificate." DE 203 at 120:11-12 (Trial Tr. Day 3). On cross-examination, Potyeyeva was shown the portion of the Manual that listed the requirements for crewmembers—one of which is not the ENG-1—and she could not identify a single term listed on the page. Potyeyeva also testified that early in the voyage (prior to Hurtado's hernia symptoms), she had occasion to see Hurtado without his shirt on at the beach and noticed a bulge in his stomach—"like in the movies when a baby's foot is coming out"—which she recognized as a hernia.⁴ Id. at 184:14-15. Finally, Potyeyeva testified that she overheard Captain Gonzalez remind Hurtado to retrieve his medical certificate

⁴ The Court does not find Potyeyeva's description of Hurtado's hernia to be credible. Also, it is important to note here that Balerno never ordered a medical examination of Hurtado or presented any medical evidence of its own, instead relying on the testimony of a lay witness who claims she saw Hurtado's hernia.

when the boat stopped in Key West, but Captain Gonzalez did not recall that conversation.

15. On April 27, 2017, Hurtado left the port in Varadero and traveled by taxi to the International Hospital in Havana. While Hurtado was on his way to the hospital, Captain Gonzalez emailed Balerno's home office to have Hurtado's wages stopped as of that day. Captain Gonzalez testified, "I was upset with him ... he should be immediately fired." DE 201 at 70:15-17. Captain Gonzalez did not inform Hurtado that he had been fired, however, stating, "I [didn't] think it [would have been] humane for me to tell him that he was going to get his wages cut." Id. at 69:14-15.

16. No one from the Picnic accompanied Hurtado to the hospital. When Hurtado arrived, he was informed that he needed to provide a \$1,000 deposit before he could receive surgery. Hurtado no longer had enough cash after paying Captain Gonzalez \$1,000 for his "internet abuse," and American credit cards were not accepted at the hospital. Hurtado informed the hospital that he was covered under the Picnic's insurance, but the hospital was unable to reach the insurer, so Hurtado did not receive the operation that day.

17. Hurtado left the hospital that night and returned the next day. He then sent the Picnic's insurer an urgent email, copying Captain Gonzalez, stating "please help I am in pain." DE 195-8 (Pl.'s Ex. 20). For reasons that are unclear, however, the insurer never made contact with the hospital. Meanwhile, Hurtado sat in the hospital waiting room in pain, unable to receive surgery to repair his hernia.

18. Eventually, one of the doctors noticed that Hurtado was a Venezuelan citizen and informed him that he could receive free surgery at the public hospital in

Havana. Hurtado was then transferred to the public hospital. Captain Gonzalez claims that he had arranged for the Picnic's agent to deliver the \$1,000 deposit to the International Hospital, but Hurtado had left before the agent could get there.

19. On April 28, 2017, Hurtado received surgery to repair his umbilical hernia at the public hospital. Hurtado testified that when the anesthesia wore off, he awoke "in hell." DE 201 at 200:11. The public hospital had no air-conditioning or sheets on the bed. Id. at 199:3. Hurtado testified that he was in tremendous pain. Id. at 201:6. On April 30, 2017, Hurtado was discharged from the hospital with instructions to remain in Cuba for the next three weeks to recover.

20. While convalescing in Cuba, Hurtado repeatedly attempted to have Captain Gonzalez and the Picnic's insurer pay for his expenses. On April 30, 2017, Hurtado emailed Captain Gonzalez stating, "Just had the surgery at state hospital because the insurance did not go through. I need the boat [sic] cover the expenses!" DE 195-11 (Pl.'s Ex. 23). After receiving no response, Hurtado again messaged Captain Gonzalez on May 3, 2017, asking him to bring supplies to the hotel where Hurtado was staying. Captain Gonzalez told Hurtado he couldn't help because it was his day off. The next day, Captain Gonzalez agreed to give Hurtado \$1,000 to cover his expenses, but stated it was a loan. "I thought he should return the money because he was being dishonest" – not only about his hernia condition but about "many things." Id. at 60:19-23. Captain Gonzalez also believed that Hurtado was "dramatizing" his condition to elicit sympathy. Id. at 59:16.

21. On May 12, 2017, Hurtado emailed the Picnic's insurer explaining that he could not use his credit cards in Cuba and desperately needed money to cover his

expenses. DE 195-28 (Pl.'s Ex. 42). The insurer responded on May 15, 2017, stating, “[w]hen you arrive back home just send us everything you have. What would also be good is for you to provide us with a detailed list of expenses, with or without receipts.” Id. Hurtado said that when he received that email, it gave him peace of mind because he believed that “they were going to come through.” DE 201 at 219:8-9.

22. By mid-May 2017, Hurtado was ready to travel, but Captain Gonzalez refused to let him return home on the Picnic. In his affidavit, Captain Gonzalez initially claimed that it was Hurtado’s decision not to return aboard the Picnic because he “wanted to stay in Cuba with friends.” DE 42-1 ¶ 19. At trial, however, Captain Gonzalez admitted that this testimony was false, and that he refused to let Hurtado return on board the Picnic because he was angry with Hurtado. Captain Gonzalez also refused to allow Hurtado on board to retrieve his personal belongings and cooking tools. In addition, Captain Gonzalez did not pay for Hurtado’s flight back to the United States, despite testifying that he had offered to do so.

23. After arriving back in the United States, Hurtado continued, unsuccessfully, to seek maintenance and cure from Balerno’s insurer. On May 24, 2017, Hurtado sent the insurer an itemized list of his expenses in Cuba with attached receipts. DE 195-28 (Pl.'s Ex. 42). The insurer informed Hurtado that “we have forwarded your invoices to the claims department.” Id. After waiting several weeks, Hurtado wrote to the insurer again, pleading, “when am I going to get my reimbursement for my medical bills! Please I am in need of this money.” DE 195-34 (Pl.'s Ex. 48). The insurer finally responded that in order to reimburse Hurtado for his expenses, it needed a medical report from the Cuban hospital stating that he was not

allowed to travel after his surgery. Id. Hurtado testified that such a report was impossible to obtain because he had no way to get in touch with his Cuban doctors. The insurer also advised Hurtado that it would not provide maintenance and cure for his expenses incurred in the United States. Id.

24. At this time, Hurtado's feud with Captain Gonzalez escalated. On May 25, 2017, Captain Gonzalez sent Hurtado an email demanding that he repay the \$1,000 loan along with an additional \$870 for internet abuse. DE 195-27 (PI's Ex. 41). Hurtado responded, "Rest assured you'll have the money back when I get fully reimbursed from the insurance company." Id. Captain Gonzalez wrote back, "I don't think you are understanding ... I want the money today ... your Hernia problem was a pre-existing condition," adding, "you are committing a fraud with the insurance and I know it." Id. Hurtado responded, "I have no money to give you since I spent it all trying to stay afloat since you left me stranded in Cuba with no funds." Id.

25. On June 7, 2017, Hurtado again reached out to Captain Gonzalez, this time taking a softer tone. He advised Captain Gonzalez that he had retained an attorney to mediate the dispute, writing, "Pablo neither one of us have time for litigation, please let's move forward and settle as soon as possible.". DE 195-35 (PI's Ex. 49). Captain Gonzalez responded: "I know my times and I do have time for litigation and so did you until your lawyer said you have nothing to sue us for." Id. At trial, Captain Gonzalez claimed that what he really meant to say was, "I don't have time for litigation." DE 201 at 124:10. But as Hurtado's attorney pointed out, this explanation would make little sense in the context of the rest of the sentence.

26. On October 8, 2017, Hurtado visited his family physician in Venezuela, Dr. Lesbia Acevedo, complaining of persistent pain in his abdomen following his hernia repair. Dr. Acevedo observed that Hurtado's umbilical hernia had been repaired incorrectly in Cuba, causing it to reoccur. She recommended that Hurtado receive corrective surgery, at a cost of around \$7,000. To date, Hurtado has been unable to afford this surgery because he has not received any maintenance and cure from Balerno.

27. Hurtado filed this lawsuit on November 9, 2017, alleging one count in admiralty for failure to pay maintenance and cure. After Balerno failed to respond, Hurtado obtained a default judgment in the amount of \$232,386.17. Shortly thereafter, Balerno appeared and moved to set aside the default judgment, explaining that back-to-back hurricanes in the British Virgin Islands prevented its agent from forwarding the Summons and Complaint. Balerno also claimed that it had a defense to the lawsuit. Based upon Captain Gonzalez's affidavit, Balerno argued that Hurtado was not entitled to maintenance and cure because he had lied about a preexisting hernia condition. The Court credited Captain Gonzalez's affidavit and granted Balerno's motion to reopen the case. DE 60 at 12. On May 7, 2019, the Court denied the parties' cross-motions for summary judgment. DE 144. The Court held a three-day bench trial from May 28 to May 30, 2019.

II. CONCLUSIONS OF LAW⁵

A. Maintenance and Cure Standard

“Maintenance and cure” is an ancient common-law maritime remedy for seamen who are injured while in the service of a vessel. Flores v. Carnival Cruise Lines, 47 F.3d 1120, 1127 (11th Cir.1995). “The shipowner’s obligation is deep-rooted in maritime law and is an incident or implied term of a contract for maritime employment.” McCorpen v. Cent. Gulf S. S. Corp., 396 F.2d 547, 548 (5th Cir. 1968). “Admiralty courts have been liberal in interpreting this duty for the benefit and protection of seamen who are its wards.” Vaughan v. Atkinson, 369 U.S. 527, 531–32, (1962). A shipowner’s liability for maintenance and cure is among the “most pervasive” of all, and is “not to be defeated by restrictive distinctions nor ‘narrowly confined.’” Id. Ambiguities or doubts in the application of the law of maintenance and cure are resolved in favor of the seaman. Gaspard v. Taylor Diving & Salvage Co., Inc., 649 F.2d 372, 374 (5th Cir.1981) (citing Vaughan, 369 U.S. at 532).

B. McCorpen Defense

There is a narrow defense to a shipowner’s strict liability for maintenance and cure known as the McCorpen defense. “Maintenance may be awarded by courts even where the seaman has suffered from an illness pre-existing his employment, but there is a general principle that it will be denied where he knowingly or fraudulently conceals his illness from the shipowner.” McCorpen, 396 F.2d at 548. To establish a McCorpen defense, a defendant must show that: (1) the plaintiff intentionally misrepresented or concealed medical facts; (2) the nondisclosed facts were material to the defendant’s

⁵ To the extent these Conclusions of Law constitute Findings of Fact, they are hereby adopted as both.

decision to hire him; and (3) a connection exists between the withheld information and the injury complained of in this lawsuit. Jackson v. NCL Am., LLC, 730 F. App'x 786, 789 (11th Cir. 2018) (per curiam) (citing Brown v. Parker Drilling Offshore Corp., 410 F.3d 166, 171 (5th Cir. 2005)).

Balerno argues that it is not liable for maintenance and cure because Hurtado lied about his preexisting hernia condition. As set forth below, however, Balerno's McCorpen defense is based largely on testimony that was controverted by the evidence at trial. Accordingly, Balerno has failed to prove a McCorpen defense and is liable for maintenance and cure.

1. Nondisclosure

McCorpen divides the misrepresentation prong into two categories: nondisclosure and concealment. "Concealment" occurs when "the shipowner requires a seaman to submit to a pre-hiring medical examination or interview and the seaman intentionally misrepresents or conceals material medical facts." McCorpen, 396 F.2d at 549. On the other hand, "nondisclosure" occurs when "the shipowner does not require a pre-employment medical examination or interview"; in that event, "the rule is that a seaman must disclose a past illness or injury only when in his own opinion the shipowner would consider it a matter of importance." Id. at 548. In the nondisclosure context, the shipowner will be liable for maintenance and cure "if it is found that there existed reasonable grounds for the seaman's good-faith belief that he was fit for duty." Id.

As this Court found on summary judgment, this case falls into the nondisclosure category rather than the concealment category under McCorpen because Balerno did

not require a pre-employment medical examination or interview. Although McCorpen was a concealment case, the McCorpen court addressed its earlier decision in Couts v. Erickson, 241 F.2d 499 (5th Cir. 1957), a nondisclosure case that is very instructive here. In Couts, the Fifth Circuit allowed maintenance to a seaman who had not voluntarily disclosed a history of tuberculosis. Because the shipowner did not require a pre-employment medical interview, the Fifth Circuit looked to the record to determine whether Couts had reasonable grounds for his good-faith belief that he was fit for duty. Id. The Fifth Circuit found that such grounds existed because five months prior to the voyage, Couts had been discharged from the hospital as fit for duty and his tuberculosis was in a “quiescent, inactive, recovered state” at the time of the voyage. Id. at 503. Although Couts had been hospitalized multiple times for tuberculosis, the Fifth Circuit found that he had reasonable grounds for not disclosing his illnesses because “five months before [the voyage], Couts was discharged as fit for duty. The fact that on admission to the hospital [] he was acutely ill does not disprove this in the least.” Id.

Here, Hurtado had significantly stronger grounds than the plaintiff in Couts for his good-faith belief that he was fit for duty. Just two months prior to the voyage aboard the Picnic, Hurtado visited his primary care doctor, Dr. Moretti, who testified that he palpitated Hurtado’s stomach and found no signs of an umbilical hernia. Moreover, Dr. Grenet, who specializes in maritime medicine, testified that Hurtado’s asymptomatic inguinal hernia did not render him unfit to work as a yacht chef. Unlike Couts, who had been hospitalized five times for tuberculosis, Hurtado had never experienced any symptoms from his hernia prior to his illness on board the Picnic in 2017. Perhaps most importantly, Hurtado previously worked for Balerno in 2015. Balerno insists that it

required him to produce his medical certificate then. If that is true, then Hurtado had reasonable grounds to believe that the hernia diagnosis written on his medical certificate was not a matter of importance to Balerno.

Perhaps recognizing the weakness of their defense, Balerno devised a story that Hurtado “confessed” that he had been dismissed from his last job because of his hernia condition. Balerno claims that Hurtado also confessed that he had no insurance coverage in the United States, so he wanted to travel to Cuba to receive free surgery to repair his hernia. This story, even if initially plausible, was revealed to be fabricated at trial. Hurtado had not been dismissed from his previous job because of a hernia condition, and he exhibited no signs of a hernia just two months prior to the voyage. Moreover, Hurtado did have insurance coverage in the United States, and it is implausible that he knew he could receive free treatment in Cuba because he waited for two days at the International Hospital in Havana before receiving the operation for free at the nearby public hospital. At trial, Captain Gonzalez conceded that the real reason he denied maintenance and cure to Hurtado was that he was angry at him for abusing the yacht’s internet, among “many things.” Accordingly, Balerno has failed to meet the nondisclosure prong and cannot maintain a McCorpen defense.

2. Materiality

Because Balerno cannot satisfy the first prong of McCorpen, the Court need not address the remaining two. But, for the sake of thoroughness and because the parties presented evidence concerning the other two prongs at trial, the Court will address them. Also, as discussed *infra*, the strength of Balerno’s McCorpen defense bears on the measure of damages.

In the nondisclosure context, the materiality prong and the nondisclosure prong necessarily overlap; if the court finds that the seaman had a reasonable, good-faith belief that he was fit for duty, the court has necessarily found that he had reasonable grounds to believe that his preexisting condition was immaterial to his employer. As discussed above, Hurtado had a reasonable, good-faith belief that Balerno would not have considered his 2010 hernia diagnosis material to its decision to hire him. Moreover, Balerno has the burden of proving each element of its McCorpen defense, and it has offered no evidence to suggest that it would not have hired Hurtado had it known about his hernia diagnosis. Accordingly, Balerno has failed to establish the materiality prong of McCorpen.

3. Connection

Finally, “the defense that a seaman knowingly concealed material medical information will not prevail unless there is a causal link between the pre-existing disability that was concealed and the disability incurred during the voyage.” McCorpen, 396 F.2d at 549. At trial, Balerno failed to establish a connection between the inguinal (groin) hernia that was diagnosed in 2010 and the umbilical (stomach) hernia Hurtado suffered during the voyage in 2017. All three of Hurtado’s doctors stated unequivocally that umbilical hernias are not connected to inguinal hernias because they affect different parts of the body. In Jackson, the Eleventh Circuit held that “[b]ecause Norwegian failed to show a connection between Jackson’s degenerative disk issues at L2-L3 and L3-L4 and her disk herniation at L4-L5 and L5-S1, the district court did not err in concluding that Norwegian failed to satisfy the third element of the McCorpen defense.” 730 F. App’x at 790. Although the two injuries in Jackson both involved spinal disk

injuries, the Eleventh Circuit held that simply showing that the two injuries “affect the same body part without more specificity does not suffice.” Id. The same goes for Hurtado’s umbilical hernia, which does not even affect the same body part as his inguinal hernia.

Nevertheless, Balerno contends that Hurtado is bound by his admissions prior to trial that he had previously been diagnosed with an umbilical hernia. Hurtado did indeed state in both his interrogatory answers and at his deposition that the hernia he suffered at sea in 2017 was first diagnosed by Dr. Grenet in 2010. But at trial, Hurtado explained that he was unaware that there were different types of hernias until three days before trial. He claimed that he was confused during his deposition and conflated Dr. Grenet’s examination of him with the examination by the Cuban doctors in 2017.

Balerno argues, however, that Hurtado cannot retract his interrogatory answers and deposition statements because they are “judicial admissions.” Balerno is incorrect. Courts have held that deposition testimony and interrogatory answers do not rise to the level of judicial admissions and thus can be retracted by trial testimony. See, e.g. Collins v. Wayne Corp., 621 F.2d 777, 782 (5th Cir. 1980) (holding that deposition testimony does not constitute a binding judicial admission and a party is free to explain why its position at trial is inconsistent with its deposition testimony); Fidelity & Deposit Co. of Maryland v. Hudson United Bank, 653 F.2d 766, 777 (3d Cir. 1981) (holding that interrogatory answers are not judicial admissions); see also 1970 Advisory Committee Note to Fed. R. Civ. P. 33 (explaining that “[t]he general rule governing the use of answers to interrogatories is that under ordinary circumstances they do not limit proof.”) The evidence at trial conclusively established that Hurtado had not been diagnosed with

an umbilical hernia prior to his voyage aboard the Picnic in 2017. Dr. Grenet testified that he was “close to one hundred percent certain” that when he saw Hurtado in 2010, he only diagnosed him with an inguinal hernia. DE 202 at 171:7. Accordingly, Balerno cannot show a connection between Hurtado’s preexisting injury and the injury he suffered at sea.

C. Maximum Medical Improvement

A shipowner’s obligation to pay maintenance and cure continues until the seaman has reached maximum cure. Nichols v. Barwick, 792 F.2d 1520, 1524 (11th Cir. 1986); Farrell v. United States, 336 U.S. 511, 517 (1949). Maximum cure is the date on which further treatment will result in no betterment of the seaman’s condition. Pelotto v. L & N Towing Co., 604 F.2d 396, 400 (5th Cir. 1979). “Once the seaman establishes his right to maintenance and cure, the burden of persuasion shifts to the shipowner to prove that the seaman has reached the point of maximum medical improvement.” Costa Crociere, S.p.A. v. Rose, 939 F. Supp. 1538, 1548 (S.D. Fla. 1996).

Because Balerno failed to request an independent medical examination or to otherwise investigate Hurtado’s claim, the Court is left with the uncontroverted testimony of Hurtado’s treating physician, Dr. Acevedo. She testified that Hurtado’s umbilical hernia was improperly repaired in Cuba, causing it to reoccur. She also stated that the surgical incision was made in the wrong direction, causing Hurtado’s post-surgical scar to heal incorrectly. As a result, Hurtado has experienced continuous pain and discomfort in his abdomen since his surgery. Dr. Acevedo testified that Hurtado requires a second surgery to repair his hernia in order to reach maximum medical

improvement (“MMI”). Hurtado has been unable to afford this surgery because Balerno has refused to provide maintenance and cure.

Balerno argues, however, that Dr. Acevedo’s testimony cannot establish that Hurtado requires additional surgery because Dr. Acevedo is not a surgeon. But the Court found at trial that Dr. Acevedo is Hurtado’s treating physician, and therefore she is qualified to opine about Hurtado’s condition and her recommended course of treatment. Balerno suggests that Hurtado actually reached MMI on June 2, 2017, the date on which Dr. Moretti examined him and did not recommend any further treatment for his hernia. But the medical record from that visit indicates that it was a “cholesterol follow-up” and not a post-surgical examination. DE 195-42 at 5. In any event, Balerno bears the burden of proving when Hurtado reached MMI. Absent any evidence to refute Dr. Acevedo’s testimony, Balerno cannot establish that Hurtado has reached MMI.

D. Calculation of Damages

1. Maintenance, Cure, and Unearned Wages

“The cause of action for maintenance and cure includes three specific items of recovery: (1) maintenance, which is a living allowance; (2) cure, which covers nursing and medical expenses; and (3) wages.” Flores, 47 F.3d at 1122 (citation omitted). As mentioned above, the obligation to pay maintenance and cure continues until the seaman has reached maximum cure. See Nichols, 792 F.2d at 1523. Additionally, a seaman is not barred from recovering maintenance and cure when he is “forced by financial necessity to return to his regular employment.” Vaughan, 369 U.S. at 537 n.6.

a. Maintenance. A seaman is “entitled to the reasonable cost of food and lodging, provided he has incurred the expense.” Hall v. Noble Drilling (U.S.) Inc., 242

F.3d 582, 587 (5th Cir. 2001). The seaman's "burden of producing evidence of expenses is 'feather light,' and a court may award reasonable expenses, even if the precise amount of actual expenses is not conclusively proved." Id. at 588 (quoting Yelverton v. Mobile Labs., Inc., 782 F.2d 555, 558 (5th Cir. 1986)). If the seaman presents evidence of his expenses, the Court must then estimate both the seaman's "actual costs of food and lodging" and the "reasonable cost of food and lodging for a single seaman in the locality of the plaintiff." Id. at 590. In determining reasonable costs, the Court may consider maintenance rates awarded in other cases. Id. However, a seaman "need not present evidence of the reasonable rate; a court may take judicial notice of the prevailing rate in the district." Id.

At trial, Hurtado testified that during the three-week period he was convalescing in Cuba, his expenses were "a little short of \$10,000." DE 201 at 232:1-2. In his email to Balerno's insurer, however, Hurtado provided an itemized list of his expenses in Cuba, which totaled \$4,166.16. DE 195-34 (Pl.'s Ex. 48). The Court finds the latter amount to be reasonable and will award Hurtado \$4,166.16 for his three weeks in Cuba.

The much larger amount, however, is the maintenance Hurtado is owed for his expenses in the United States. Hurtado returned to the United States on May 18, 2017, and he has not yet reached MMI. Therefore, Hurtado is owed maintenance up to the present, a total of 872 days. Hurtado testified at trial that his expenses have averaged \$150 per day in the United States, including "food [at] an average of \$65 to \$70 a day." DE 201 at 232:11-12. Although Hurtado has not provided evidence of maintenance rates awarded in other cases, the Court notes that on default judgment, it awarded Hurtado maintenance at the rate of \$50 per day. However, "ambiguities and

doubts [] are resolved in favor of the seaman.” Flores, 47 F.3d at 1123. Therefore, the Court will depart upward slightly and award maintenance at the rate of \$60 per day, resulting in a total of \$52,320 in maintenance for Hurtado’s 872 days in the United States. Adding that total to \$4,166.16, the Court finds that Hurtado is owed **\$56,486.16** in maintenance.

b. Cure. With respect to cure, Hurtado did not pay for the hernia repair surgery he received in Cuba. However, Hurtado’s treating physician, Dr. Acevedo, testified that Hurtado requires additional surgery at a cost of approximately \$7,000 to reach MMI. Balerno contends, however, that it is not liable for Hurtado’s additional surgery because it was never put on notice of his hernia recurrence or given an opportunity to investigate Hurtado’s claim. This argument is difficult to comprehend. It has been over two years since Hurtado’s injury, and almost two years since he filed this lawsuit. Balerno had notice of Hurtado’s need for additional surgery as soon as it appeared in this case. In its order granting default judgment, the Court explicitly stated: “Plaintiff has indeed not yet reached maximum medical improvement,” and “would improve from further treatment, namely, an additional surgery recommended to him by a Venezuelan doctor.” DE 26 at 6. Balerno had every opportunity to investigate Hurtado’s claim during the discovery period, yet it failed to do so. Balerno bears the burden of proving when Hurtado reached MMI. Rose, 939 F. Supp. at 1548. Balerno cannot credibly argue that it lacked notice that Hurtado required additional surgery to reach MMI. Accordingly, the Court will award Hurtado **\$7,000** in cure.

c. Unearned Wages. For purposes of maintenance and cure, a seaman’s unearned wages “are measured from the time of the seaman’s incapacity until the end

of his employment contract.” Flores, 47 F.3d at 1122. The evidence at trial showed that Captain Gonzalez stopped Hurtado’s wages as of May 1, 2017, and the Picnic’s voyage ended in Fort Lauderdale on May 23, 2017. The parties agree that Hurtado was paid \$450 per day with guests on board. Accordingly, Hurtado is owed 23 days of wages at \$450 per day, totaling **\$10,350** in unearned wages.

2. Pain and Suffering

“Seamen have a claim for compensation for the suffering and for the physical injury which follow when the failure to give maintenance and cure aggravates the illness.” Hines v. J.A. LaPorte, Inc., 820 F.2d 1187, 1190 (11th Cir. 1987) (per curiam). In Brown v. Parker Drilling Offshore Corp, the court explained:

[T]here is an escalating scale of liability: a shipowner who is in fact liable for maintenance and cure, but who has been reasonable in denying liability, may be held liable only for the amount of maintenance and cure. *If the shipowner has refused to pay without a reasonable defense, he becomes liable in addition for compensatory damages.* If the owner not only lacks a reasonable defense but has exhibited callousness and indifference to the seaman's plight, he becomes liable for punitive damages and attorney's fees as well.

410 F.3d 166, 177 (5th Cir. 2005) (citing Morales v. Garijak, Inc., 829 F.2d 1355, 1358 (5th Cir. 1987)) (emphasis in original).

“Awards of pain and suffering are fact-specific and depend to a great extent on the factfinder's observation of the plaintiff and its subjective determination of the amount needed to achieve full compensation.” Baucom v. Sisco Stevedoring, LLC, 560 F. Supp. 2d 1181, 1206 (S.D. Ala. 2008) (quoting Gautreaux v. Scurlock Marine, Inc., 84 F.3d 776, 783 (5th Cir.1996)). In estimating an award for pain and suffering, however, the Court may derive “rough guidance” from past awards in other cases. Id.

Hurtado has presented considerable evidence that Balerno's failure to provide maintenance and cure compounded and prolonged his pain and suffering. To begin with, Balerno failed to provide the \$1,000 deposit so Hurtado could receive surgery at the International Hospital in Havana. In fact, Captain Gonzalez took that exact amount from Hurtado right before he left for the hospital, preventing Hurtado from paying the deposit himself. As a result, Hurtado was stuck at the International Hospital for two days, unable to receive surgery to repair his hernia. During that time, Hurtado repeatedly contacted Captain Gonzalez and Balerno's insurer asking for funds for the operation. Dr. Moretti testified that a strangulated hernia can become life-threatening if left untreated. Balerno's failure to pay for the operation quite possibly put Hurtado's life in danger. Fortunately for Hurtado, because he was a Venezuelan citizen, he was able to receive free surgery at the public hospital nearby. But Hurtado testified that the public hospital was significantly inferior to the International Hospital. According to Dr. Acevedo, the surgeons at the public hospital botched Hurtado's hernia surgery, resulting in a recurrence of the condition. Because Balerno has refused to pay maintenance and cure, Hurtado has been unable to obtain the surgery he needs to alleviate his pain and discomfort. He still has not reached maximum cure more than two years later. He testified that for the past two years, he has relied on oral analgesics to relieve his persistent pain and discomfort. In addition, Hurtado fell behind on his child support payments due to his lost income and had to retain an attorney to represent him in the matter. Therefore, it is clear that Balerno's failure to provide maintenance and cure "aggravated [Hurtado's] condition, prolonged his pain and suffering, and lengthened the time required for him to reach maximum cure." Hines, 820 F.2d at 1190.

Moreover, Balerno has “refused to pay without a reasonable defense.” Brown, 410 F.3d at 177. Although Balerno has put forth a McCorpen defense, that defense collapsed at trial. As discussed *supra*, Balerno’s key witnesses lacked credibility and their testimony was refuted by the evidence. In fact, much of the testimony Balerno relied on to support its McCorpen defense was shown to be fabricated. Accordingly, Balerno does not have a reasonable defense and it is liable for Hurtado’s pain and suffering.

Hurtado has not suggested an amount that would reasonably compensate him for his pain and suffering. But “[g]uidance may be derived from the verdicts of other juries in similar cases.” Varela v. Dantor Cargo Shipping, Inc., No. 17-23127-CIV, 2017 WL 7184605, at *4 (S.D. Fla. Nov. 14, 2017). Although it was a nonjury trial, Varela provides helpful guidance. There, the injured seaman, Acosta, “developed a severe ulcer on his foot, which became necrotic, and ultimately required hospitalization.” Id. at *2. “Acosta was ultimately denied his wages aboard the vessel and given a plane ticket to return home to Honduras, completely abandoned by the Defendants.” Id. Due to his injuries, Acosta’s foot “became completely deformed and, as a result, Acosta [became] totally disabled and [] unable to work.” Id. Judge Scola awarded Acosta \$250,000 for his past pain and suffering and \$2,000,000 for his future pain and suffering. Id.⁶

⁶ The Court takes judicial notice of other awards for pain and suffering in similar nonjury trials. *See, e.g. AVECILLAS v. RONBACK MARINE CONTRACTING CORP.*, No. 14-CV-4552 SJF SIL, 2015 WL 4162769 (E.D.N.Y. July 8, 2015) (awarding \$500,000 for severe pain and disability resulting from ankle fractures); *NEVOR v. MONEYPENNY HOLDINGS, LLC*, 842 F.3d 113, 117 (1st Cir. 2016) (affirming an award of \$750,000 for injury to sailor’s right arm that caused his bicep to tear from the bone); *BENSON v. DIAMOND OFFSHORE DRILLING, INC.*, No. CIV.A. 00-591-JJB, 2011 WL 3794908, at *8 (M.D. La. Aug. 26, 2011) (awarding \$100,000 for past pain and suffering where the plaintiff testified that “he has back pain, back spasms, cannot rest, and does not fall asleep until early morning”).

To be sure, Hurtado has not endured quite as much pain and suffering as Acosta. But he has nonetheless suffered significant hardship as a result of Balerno's failure to pay maintenance and cure. As in Varela, "the ordeal that [Hurtado] has endured started with the inhumane denial of his most basic medical needs." Id. at *4. On default judgment, this Court awarded Hurtado \$60,000 in damages for pain and suffering. But in light of the evidence presented at trial, the Court finds that amount to be significantly low. Accordingly, the Court will award Hurtado **\$300,000** for pain and suffering.

3. Punitive Damages and Attorneys' Fees

Punitive damages and attorneys' fees may be awarded under general maritime law "for the willful and wanton disregard of the maintenance and cure obligation." Atl. Sounding Co. v. Townsend, 557 U.S. 404, 424 (2009); see also Flores, 47 F.3d at 1127 (to recover punitive damages in admiralty law, a plaintiff must show that the defendant acted willfully and wantonly); Hines, 820 F.2d at 1188–90 (both punitive damages and attorneys' fees may be awarded in a case of arbitrary and willful withholding of maintenance and cure benefits). The Eleventh Circuit has identified several examples of willfulness: "(1) laxness in investigating a claim; (2) termination of benefits in response to the seaman's retention of counsel or refusal of a settlement offer; [and] (3) failure to reinstate benefits after diagnosis of an ailment previously not determined medically." Hines, 820 F.2d at 1190 (quoting Tullos v. Res. Drilling, Inc., 750 F.2d 380, 388 (5th Cir. 1985)).

A shipowner's duty to pay maintenance and cure is "deep-rooted in maritime law." McCorpen, 396 F.2d at 548. In Vaughan v. Atkinson, the Supreme Court

explained that this duty is “among ‘the most pervasive’ of all and that it was not to be defeated by restrictive distinctions nor ‘narrowly confined.’” 369 U.S. at 532 (quoting Aguilar v. Standard Oil Co. of N.J., 318 U.S. 724, 730 (1943)). Applying that principle, the Supreme Court held in Vaughan that a seaman had the right to recover attorneys’ fees where the shipowner made no effort to investigate his claim. The Court observed:

In the instant case respondents were callous in their attitude, making no investigation of libellant's claim and by their silence neither admitting nor denying it. As a result of that recalcitrance, libellant was forced to hire a lawyer and go to court to get what was plainly owed him under laws that are centuries old. The default was willful and persistent. It is difficult to imagine a clearer case of damages suffered for failure to pay maintenance than this one.

369 U.S. at 530–31.

In this case, not only did Balerno make no effort to investigate Hurtado’s claim, but it displayed a shocking disregard for his well-being. From the moment Hurtado became ill, Captain Gonzalez showed not just indifference to Hurtado’s medical emergency, but outright cruelty. Among the many facts that illustrate this point: (1) right after Hurtado informed Captain Gonzalez of his medical emergency, Captain Gonzalez demanded \$1,000 from Hurtado for “internet abuse”; (2) he fired Hurtado and cut off his wages moments after Hurtado left for the hospital; (3) he refused to bring food and medical supplies to Hurtado while he was stranded in Cuba after his surgery, telling Hurtado that it was his day off; (4) he refused to allow Hurtado to return home on the boat, and even refused to let Hurtado retrieve his personal belongings; and (5) he insisted that Hurtado was “dramatizing” his condition and that it “was not an emergency.” This list could go on.

Despite all this, Hurtado attempted in good faith to resolve this dispute early on. When it became clear that Balerno was unwilling to provide maintenance cure, Hurtado reached out to Captain Gonzalez to explain that he had hired an attorney to mediate, stating “Pablo neither one of us have time for litigation.” DE 195-35 (Pl.’s Ex. 49). Captain Gonzalez rejected Hurtado’s offer, insisting, “I do have time for litigation,” and “you have nothing to sue us for.” Id. Balerno’s refusal to pay maintenance and cure is all the more inexplicable in light of the fact that Hurtado initially requested only \$4,166.16.

Furthermore, Balerno exhibited bad faith throughout this litigation. It manufactured a McCorpen defense based on Captain Gonzalez’s fabricated testimony that Hurtado “confessed” to having lied about his hernia condition. At trial, Captain Gonzalez did not even try to hide the fact that his refusal to provide maintenance and cure was motivated by personal animus towards Hurtado. Yet even if Balerno could have maintained a good-faith McCorpen defense, it never investigated Hurtado’s injuries to determine whether such a defense existed. Instead, Balerno argued that it never had an opportunity to investigate Hurtado’s claim, despite having almost two years from the time Hurtado became ill until the close of discovery to do so. Balerno’s refusal to investigate Hurtado’s claim is further evidence of its bad faith.

In sum, it is hard to imagine a clearer case of a shipowner’s willful and wanton refusal to pay maintenance and cure. Therefore, the Court finds that Balerno is liable for punitive damages and attorneys’ fees. In light of the foregoing facts, the Court concludes that a reasonable award of punitive damages is an amount equal to the total sum of Hurtado’s compensatory damages. Accordingly, the Court will award Hurtado

\$373,836.16 in punitive damages. The Court will also allow Hurtado to move for attorneys' fees pursuant to S.D. Fla. L.R. 7.3.

4. Prejudgment Interest

“As a general rule, pre-judgment interest should be awarded in admiralty cases.” St. Paul Fire & Marine Ins. Co. v. Lago Canyon, Inc., 561 F.3d 1181, 1191-92 (11th Cir. 2009) (internal quotation marks omitted). “Pre-judgment interest is not a penalty, but compensation to the plaintiff for the use of funds that were rightfully his.” Id. “A district court has discretion to deny prejudgment interest when there are peculiar circumstances that make it inequitable for the losing party to pay prejudgment interest.” Id. (internal quotation marks omitted).

Here, there are no “peculiar circumstances” that would render an award of prejudgment interest inappropriate. Accordingly, Hurtado is entitled to an award of prejudgment interest. Pre-judgment interest begins to accrue from the date a plaintiff sustained his injury. See id. The rate of prejudgment interest is “the prime rate during the relevant period.” Id. “In the absence of a controlling statute, the choice of a rate at which to set the amount of prejudgment interest is also within the discretion of a federal court.” Werner Enterprises, Inc. v. Westwind Mar. Int'l, Inc., 554 F.3d 1319, 1328 (11th Cir. 2009).

Hurtado sustained his injury on April 27, 2017. To determine the prejudgment interest rate, the Court will compute the average weekly rate under 28 U.S.C. § 1961 from the date of Hurtado's injury to present, which comes out to 1.79% per annum. Accordingly, the Court will award prejudgment interest at the rate of **1.79% per annum**, to run from April 27, 2017 to the date of final judgment.

* * *

In light of the foregoing, the Court calculates Hurtado's damages as follows:

Maintenance	\$56,486.16
Cure	\$7,000
Unearned Wages	\$10,350
Pain and Suffering	\$300,000
Punitive Damages	\$373,836.16
Total Damages	\$747,672.32
Prejudgment Interest	32,743.33
Total	\$780,415.65

III. CONCLUSION

For the foregoing reasons, it is **ORDERED AND ADJUDGED** that a separate Final Judgment will be entered in favor of Plaintiff Louis Rafael Hurtado, and against Defendant Balerno International, Ltd., consistent with the Court's Findings of Fact and Conclusions of Law.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida on this 4th day of October, 2019.



JAMES I. COHN
United States District Judge

Copies provided to counsel of record via CM/ECF