No. 08-214

In The
# Supreme Court of the United States

ATLANTIC SOUNDING CO., INC.
and WEEKS MARINE, INC.,

*Petitioners,*

vs.

EDGAR L. TOWNSEND,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## BRIEF OF *AMICUS CURIAE* UNITED MARITIME GROUP, LLC IN SUPPORT OF PETITIONERS

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## INTEREST OF THE *AMICUS CURIAE*

*Amicus*, United Maritime Group, LLC, is engaged in the marine transportation industry and transports coal, petroleum coke, phosphate, grain and other bulk commodities domestically and internationally.[1] United Maritime Group, LLC, based in Tampa, Florida, and within the Eleventh Circuit, operates U.S. United Ocean Services, a U.S. flag oceangoing fleet which is the largest U.S. coastwise dry bulk carrier. United Maritime Group, LLC also operates U.S. United Barge Line, a river barge fleet consisting of twenty towboats and approximately 700 barges, on the inland waterways of the United States. In addition, United Maritime Group, LLC operates U.S. United Bulk Terminal, a dry bulk commodity and deep-water transfer and storage terminal and U.S. United Bulk Logistics which combines the resources of United Marine Group into a customized and integrated marine transportation and distribution system.

In connection with these operations, United Maritime Group, LLC and its subsidiaries employ

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief which is filed with the written consent of all parties pursuant to Sup. Ct. R. 37.2(a).

Jones Act seamen in various capacities from ordinary seamen to chief engineers and vessel masters. As such, United Maritime Group, LLC is required to handle and adjust claims of its seamen employees who fall ill or become injured while in the services of its respective vessels.

The particular issue in this case is whether punitive damages, in addition to attorney's fees, are available to a Jones Act seaman who alleges that he is entitled to maintenance and cure where his shipowner/employer has acted in an arbitrary and willful manner in refusing to provide maintenance and cure. The Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit seeks to resolve a conflict among the Eleventh Circuit, First Circuit and other United States Courts of Appeals on this very issue and to clarify this Court's decision in *Vaughan v. Atkinson,* 369 U.S. 527 (1962), which allowed recovery of attorney's fees but not punitive damages.

*Amicus*, United Maritime Group, LLC, does not have any direct exposure for the risks incurred by Petitioners as a result of the injuries allegedly sustained by Respondent. However, whether punitive damages may be imposed upon a shipowner/employer in addition to its obligation to provide maintenance and cure is of a vital interest to United Maritime Group. The unauthorized and erroneous rule announced by the Eleventh Circuit in the decision below, one based on procedural constraint rather than substantive analysis, unduly burdens the Petitioners

in this case and adversely affects other vessel operators in the maritime industry. A conflict between the Eleventh Circuit and the other Courts of Appeals interferes with the uniform application of maritime law throughout the United States and unduly prejudices shipowners, such as United Maritime Group, whose operations are based in the Eleventh Circuit.

*Amicus Curiae* seeks to bring to the attention of this Court relevant matters not specifically addressed which may be of considerable help to the Court in correcting the error below and resolving the conflict existing in the appellate courts.

## STATEMENT

Respondent, Townsend, allegedly sustained personal injury while employed by Petitioners, Atlantic Sounding Co., Inc. and Weeks Marine, Inc., as a seaman and member of the crew of Petitioners' vessel. Petitioners initiated a Declaratory Judgment action in the United States District Court for the Middle District of Florida seeking declaration of its maintenance and cure obligation to the Respondent who in turn brought suit against Petitioners for negligence under the Jones Act, unseaworthiness and maintenance and cure under the general maritime law, together with a claim for punitive damages for Petitioners' alleged arbitrary and willful failure to provide maintenance and cure. Respondent also brought a Counterclaim against Petitioners in the Declaratory

Judgment action asserting the very same causes of action.

The district court denied Petitioners' motion to dismiss Respondent's punitive damage claim on the maintenance and cure count because of Eleventh Circuit precedent, *Hines v. J.A. LaPorte, Inc.*, 820 F.2d 1187 (11th Cir. 1987), but certified the issue for interlocutory appeal. The Eleventh Circuit affirmed but acknowledged that it was constrained to follow its prior decision in *Hines* by the Circuit's procedural rule that a later panel is duty bound to follow a previous panel decision unless that earlier decision conflicts with a later Supreme Court decision precisely on point even though the rationale of the later Supreme Court decision supports reversal. *Atlantic Sounding Co. v. Townsend,* 496 F.3d 1282 (11th Cir. 2007) (Carnes, J., concurring). Thus, the legal issue presented here is whether Respondent, a Jones Act seaman, may maintain an action for punitive damages against his shipowner/employer for its alleged arbitrary and willful failure to provide maintenance and cure. Stated otherwise, may the Eleventh Circuit, or any other lower court, permit a seaman's action for punitive damages on the allegation that his employer was arbitrary and willful in refusing to provide maintenance and cure based upon a minority, dissenting opinion in this Court's decision of *Vaughan v. Atkinson*, 369 U.S. 527 (1962), and, if so, whether a contrary result is compelled by this Court's subsequent decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). As amply demonstrated by Petitioners,

there is a split in the Circuit Courts of Appeals on the issue presented which prohibits the uniform application of federal maritime law and requires this Court's review.

## SUMMARY OF ARGUMENT

Constitutional principles dictate that federal admiralty law be developed and applied as a system of law coextensive with and operating uniformly throughout the country. In this context, *Vaughan v. Atkinson*, 369 U.S. 527 (1962), authorized the award of attorney's fees to a Jones Act seaman in a maintenance and cure case where the shipowner/employer's failure to provide maintenance and cure was described as callous, willful and persistent. The majority in *Vaughan* awarded counsel fees to compensate the seaman and make him whole for the expenses he was forced to incur in bringing the action to recover the maintenance and cure to which he was clearly entitled. In dissenting, the minority, though mindful that the purpose of maintenance and cure was to make the seaman whole, was troubled with the award of counsel fees because it could find no authority for that award as compensatory damages. Rather, the dissent suggested that exemplary damages, not necessarily measured by counsel fees, could be awarded as indirect compensation for such – litigation related – expenditures. That the *Vaughan* decision was limited to the award of attorney's fees and did not authorize punitive damages was confirmed

by the district court's damage award on remand. *Vaughan v. Atkinson*, 206 F.Supp. 575 (E.D.Va. 1962).

Subsequently, certain lower courts impermissibly ignored the precedent established by the majority in *Vaughan* and misinterpreted the minority's dissent as authorizing the recovery of punitive damages beyond the award of attorney's fees where the shipowner/employer arbitrarily and capriciously failed to investigate or refused to provide maintenance and cure in response to a seaman's claim. *Robinson v. Pocahontas, Inc.*, 477 F.2d 1048 (1st Cir. 1973); *Holmes v. J. Ray McDermott Co.*, 734 F.2d 1110 (5th Cir. 1984); *Hines v. J.A. LaPorte, Inc.*, 820 F.2d 1187 (11th Cir. 1987). Other courts continued to follow the Supreme Court precedent of *Vaughan v. Atkinson* and allowed recovery of attorney's fees only for the willful nonpayment of maintenance and cure. *Kraljic v. Berman Enterprises, Inc.*, 575 F.2d 412 (2nd Cir. 1978).

This Court's decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), effectively foreclosed any contention that punitive damages may be awarded based on the shipowner/employer's callous, willful and persistent refusal to provide maintenance and cure. In *Miles*, this Court held that non-pecuniary damages could not be recovered by the survivors of a Jones Act seaman in a wrongful death suit brought under the judicially recognized general maritime law unseaworthiness cause of action. The Court reasoned that admiralty principles of uniformity and the Congressional designation of pecuniary damage recovery through the Death on the High Seas Act

supported that result. The Court's decision in *Miles* was also based upon the Jones Act and its incorporation of the Federal Employers' Liability Act with its longstanding judicial interpretation as providing only for the recovery of pecuniary damages. In *Miles*, this Court concluded that the general maritime law may not be used to expand available damages where Congress has prescribed appropriate statutory relief. *Miles*, 496 U.S. at 36.

The rationale of *Miles*, which limits recovery to pecuniary loss, is equally applicable to the factual context of a general maritime law maintenance and cure damage claim which necessarily implicates the Jones Act – the statute specifically regulating the rights and liabilities of a seaman and his employer. For this reason, the Fifth Circuit reversed its decision in *Holmes* and held that punitive damages are not recoverable in a seaman's suit to recover damages for his employer's alleged arbitrary and capricious refusal to provide maintenance and cure. *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995). This decision followed on the heals of the Ninth Circuit's rejection of the *Pocahontas* decision based on that Court's conclusion that the majority rule in *Vaughan v. Atkinson* limited recovery to counsel fees for the employer's callous, willful and persistent refusal to provide maintenance and cure and was in all respects consistent with *Miles*. *Glynn v. Roy Al Boat Mgmt. Corp.*, 57 F.3d 1495 (9th Cir. 1995). More recently, the Third Circuit followed *Miles* and sided with a majority of courts holding that

punitive damages are not available in a seaman's maintenance and cure damage claim. *Kopacz v. Delaware River and Bay Authority*, 248 Fed. App'x 319 (3d Cir. 2007). The Eleventh Circuit, whose decision is the subject of this writ application, has declined to reconsider its precedent notwithstanding this Court's intervening decision in *Miles*.

To maintain uniformity in this area of the general maritime law, this Court should grant Petitioner's writ, reverse the Eleventh Circuit decision in *Atlantic Sounding Co. v. Townsend* and confirm the holding of *Vaughan*, reinforced by *Miles*, that punitive damages are not available to a Jones Act seaman who seeks damages for his employer's callous, willful and persistent refusal to provide maintenance and cure.

## ARGUMENT

Judicially fashioned admiralty law is not created in a vacuum and appropriate federal legislation has routinely provided policy guidance for the refinement of such laws. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). *Amicus* United Maritime Group is cognizant of this Court's in-depth knowledge of the general maritime law obligation of a shipowner who employs seamen to provide maintenance and cure to its seamen who fall ill or become injured while in the service of the ship. The duty to provide maintenance and cure originated in ancient sea codes, was recognized by Justice Story in 1823 and was the first of the

four propositions concerning the legal rights of seaman arising from their employment as recognized by this Court in *The Oceola*, 189 U.S. 158 (1903). The second proposition acknowledged a seaman's right to recover for injuries caused by the unseaworthiness of the ship. The third and fourth propositions of *The Oceola* embodied the fellow servant rule and the prohibition against a seaman's recovery of damages for the negligence of the master or members of the crew. Congress passed the Jones Act in 1920 to override the latter two propositions and afforded a seaman a cause of action to recover damages caused by his employer's negligence. 46 U.S.C. § 30104-30105. As a result, the causes of action available to a seaman arising out of his employment by a shipowner are for maintenance and cure, unseaworthiness, and negligence under the Jones Act.

This Court's decision in *Vaughan v. Atkinson*, 369 U.S. 527 (1962) involved an admiralty action brought by a seaman to recover maintenance and cure and damages for the employer's failure to provide maintenance and cure. The Court described the employer's conduct as follows:

> 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 the 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 530-531. Accordingly, the Court authorized the seaman's recovery of counsel fees to compensate the seaman for "damages suffered" – the legal expenses he was forced to incur. The *Vaughan* majority neither considered nor awarded punitive damages.

The dissent recognized that a seaman is entitled to recover compensatory damages for physical injuries sustained as a result of his employer's unreasonable refusal to provide maintenance and cure but was of the view that counsel fees could not be recovered as compensatory damages. Accordingly, the dissent was of the view that if the shipowner's refusal to pay maintenance and cure was wanton and intentional, the seaman could recover exemplary damages as indirect compensation for his litigation expenses. 369 U.S. at 539.

The proper interpretation accorded *Vaughan*'s holding is set forth in the district court's decision on remand. There, Chief Judge Walter E. Hoffman stated:

> As this court interprets the language of the Supreme Court, the intent and purpose of the same is that the trial court should make the seaman "whole", i.e., he should not be required to pay money out of his pocket to collect maintenance lawfully due to him. To accomplish this fact, the respondents are

> required to pay, by way of damages, a reasonable attorney's fee to libellant's proctor for prosecuting the proceeding made necessary to collect the seaman's maintenance claim. . . .
>
> We do not read the majority opinion of the Supreme Court as suggesting that punitive damages are in order.

*Vaughan v. Atkinson,* 206 F.Supp. 575, 576 (E.D.Va. 1962). Accordingly, *Vaughan* did not furnish a precedential basis for the award of punitive damages in a maintenance and cure case and the Petitioner's writ herein should be granted for that reason alone.

Eleven years after the *Vaughan* decision, the Third Circuit Court of Appeals affirmed an award of punitive damages to a seaman whose employer had been arbitrary and capricious in refusing to provide maintenance and cure. *Robinson v. Pocahontas, Inc.*, 477 F.2d 1048 (3d Cir. 1973). The Third Circuit disregarded the majority's holding in *Vaughan* and not only followed the dissent in *Vaughan* but quoted from Justice Stewart's dissenting opinion which the Third Circuit viewed as "seemingly in agreement with the majority's fundamental premise,. . . . " Of course, the Third Circuit's view would only be accurate if it limited the seaman's award to the recovery of attorney's fees. This was precisely the holding of the Second Circuit which adhered to the majority decision in *Vaughan* and allowed only recovery of attorney's fees for the willful nonpayment of maintenance and cure. *Kraljic v. Berman Enterprises, Inc.*, 575 F.2d 412

(2d Cir. 1978). Thus began the obvious conflict between the Circuits which is appropriately traced in Petitioners' brief and will not be repeated here.

The Fifth Circuit Court of Appeals was the next to erroneously rely on the dissent in *Vaughan* to sustain a seaman's damage award under the guise of punitive damages where the seaman offered no proof of further injury in his claim for damages as a result of his employer's arbitrary and capricious refusal to reinstate maintenance and cure. *Holmes v. J. Ray McDermott Co.*, 734 F.2d 1110 (5th Cir. 1984). The Fifth Circuit in *Holmes* relied on the *Pocahontas* and its more recent decision in *Complaint of Merry Shipping Co.*, 650 F.2d 622 (5th Cir. Unit B 1981) which allowed recovery of punitive damages under the general maritime law to the widow of a deceased seaman who brought a wrongful death action based both on the Jones Act and the unseaworthiness doctrine.

Shortly thereafter, a panel of the newly created Eleventh Circuit held that both reasonable attorney's fees and punitive damages could be awarded in a maintenance and cure case where the shipowner was willful and arbitrary in refusing to provide maintenance and cure. *Hines v. J.A. LaPorte, Inc.*, 820 F.2d 1187 (11th Cir. 1987). In reaching this result, the court in *Hines* primarily relied on the dissent in *Vaughan*, its predecessor's decisions in *Merry Shipping* and *Holmes* and the First Circuit's decision in *Robinson v. Pocahontas*.

The inappropriate award of punitive damages in maintenance and cure cases escaped scrunity, for the most part, until this Court's decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). In *Miles*, this Court considered whether non-pecuniary damages, specifically loss of society, could be recovered by the survivors of a seaman in a wrongful death general maritime law unseaworthiness action. In addressing this question, the Court referenced its decision in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), which created a general maritime wrongful death cause of action. The *Miles* Court noted that the decision in *Moragne* served a two-fold purpose: (1) to maintain consistency of the general maritime law with the policy considerations of applicable federal legislation, the Jones Act and the Death on the High Seas Act (DOHSA), favoring wrongful death recovery; and (2) to adhere to the principle that federal admiralty law should be a system of law co-extensive with and operating uniformly in the whole country. *Moragne*, 398 U.S. at 402. Next, *Miles* focused on the Jones Act and the Death on the High Seas Act, and stated:

> In this era, an admiralty court should look primarily to these legislative enactments for policy guidance. We may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress. Congress retains superior authority in these matters,

> and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation. These statutes both direct and delimit our actions.

*Miles*, 498 U.S. at 27. The *Miles* Court then observed that the Death on the High Seas Act explicitly provided for the recovery of pecuniary damages and that the Jones Act incorporated the provisions of the Federal Employer's Liability Act which had been judicially interpreted to provide only for the recovery of pecuniary damages. *Miles*, 498 U.S. at 31. Accordingly, neither Act authorized the recovery of non-pecuniary damages. Guided by these legislative acts and the desire to achieve uniformity, the Court held that non-pecuniary damages could not be recovered under a general maritime law cause of action. In so holding, the Court stated:

> Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them.

*Miles*, 498 U.S. at 36. Accordingly, *Miles* instructs that the general maritime law may not be used to expand the available damages where Congress has provided the statutory relief it deems appropriate.

The principle of uniformity with respect to the recovery of damages under the general maritime law, as reinforced by *Miles*, has received widespread

application in an overwhelming majority of federal maritime law decisions. The *Miles* prohibition against recovery of non-pecuniary damages has been applied to personal injury actions brought pursuant to the general maritime law; the rationale of *Miles* has precluded recovery of loss of society and consortium to the spouses and children of injured seamen. *See, for example, Murray v. Anthony J. Bertucci Constr. Co.*, 958 F.2d 127 (5th Cir. 1992); *Michel v. Total Transp., Inc.*, 957 F.2d 186 (5th Cir. 1992); *see also Smith v. Trinidad Corp.*, 992 F.2d 996 (9th Cir. 1993) and *Lollie v. Brown Marine Serv., Inc.*, 995 F.2d 1565 (11th Cir. 1993).

In keeping with the mandate of *Miles*, the U.S. Sixth Circuit articulated a uniform rule denying recovery of punitive damages in an action brought under the general maritime law for the alleged wrongful death of a seaman. *Miller v. American President Lines, Ltd.*, 989 F.2d 1450 (6th Cir.), *cert. denied*, 510 U.S. 915, (1993). It is universally accepted that punitive damages, regardless of purpose, are non-pecuniary in nature. The U.S. First Circuit performed the analysis required by *Miles* in *Horsley v. Mobil Oil Corp.*, 15 F.3d 200 (1st Cir. 1994), and concluded that punitive damages are not available to an injured seaman in an unseaworthiness action under the general maritime law.

In 1995 the U.S. Fifth Circuit reviewed the developments in the maritime law following *Miles* when reconsidering, *en banc*, whether punitive damages could lawfully be awarded in a general maritime

law maintenance and cure action. *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995). The *en banc* court held that in view of the uniformity principle of *Miles*, its prior decision in *Complaint of Merry Shipping, Inc.*, 650 F.2d 622 (5th Cir. 1981) – which held that punitive damages could be recovered in a general maritime law unseaworthiness action – was no longer good law and had been overruled. Because of the potential Jones Act/general maritime law overlap in the factual circumstances giving rise to the claim for maintenance and cure, the Fifth Circuit concluded that the *Miles* uniformity principle precluded a general maritime law action for punitive damages. *Guevara*, 59 F.3d at 1512. Accordingly, the *en banc* Fifth Circuit reversed its earlier decision in *Holmes v. J. Ray McDermott & Co.*, 734 F.2d 1110 (5th Cir. 1984).

The statutory overlap between the Jones Act and the maintenance and cure doctrine of the general maritime law exists as a matter of law and federal admiralty practice. Only a seaman within the meaning of the Jones Act is entitled to the recovery of maintenance and cure and resulting damages for his employer's wrongful refusal to pay. *Hall v. Diamond M Co.*, 732 F.2d 1246 (5th Cir. 1984). A seaman's claim for damages based upon his employer's unreasonable refusal to provide maintenance and cure gives rise to both a cause of action under the general maritime law and the Jones Act. *The Iroquois*, 194 U.S. 240 (1904); *Cortes v. Baltimore Insular Lines*, 287 U.S. 367 (1932). A seaman's suit for the recovery

of personal injury sustained in the course and scope of his employment is routinely brought in a combined Jones Act, unseaworthiness and maintenance and cure action. *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958). In such cases, a seaman is afforded a jury trial on his general maritime law claims by virtue of their combination with his Jones Act claim. *Fitzgerald v. United States Lines Co.*, 374 U.S. 16 (1963). It must be remembered that the Jones Act was enacted specifically to modify the general maritime law applicable to seamen as expressed in *The Oceola*.

Therefore, the removal of a punitive damage award from a maintenance and cure action promotes harmony between the general maritime law and the Jones Act, the foremost enactment in the field of maritime tort law. *American Dredging Co. v. Miller*, 510 U.S. 443 (1994). That harmony is best demonstrated by the Ninth Circuit's decision in *Glynn v. Roy Al Boat Mgmt. Corp.*, 57 F.3d 1495 (9th Cir. 1995), which rejected the holding of *Robinson v. Pocahontas, Inc.* and dutifully followed the majority's decision in *Vaughan v. Atkinson* and held that attorney's fees, but not punitive damages, could be recovered for the employer's arbitrary and capricious refusal to provide maintenance and cure. In so holding, the Ninth Circuit observed that its decision in *Glynn* was entirely consistent with the reasoning of *Miles*.

Just last year, the Third Circuit followed *Miles* and joined the majority of courts holding that punitive

damages are not available in a seaman's maintenance and cure damage claim. *Kopacz v. Delaware River and Bay Authority*, 248 Fed. App'x 319 (3d Cir. 2007). Notwithstanding the abundance of authority, the Eleventh Circuit in *Atlantic Sounding Co. v. Townsend*, 496 F.3d 1282 (11th Cir. 2007), refused to reconsider its questionable precedent of *Hines v. J.A. LaPorte, Inc.*, 820 F.2d 1187 (11th Cir. 1987), which was decided prior to this Court's decision in *Miles*. The obvious split in the Circuits and the Eleventh Circuit's refusal to consider *Miles* also requires this Court's review.

This Court's recent decision in *Exxon v. Baker*, ___ U.S. ___, 128 S.Ct. 2605 (2008), does not warrant a different result. In *Exxon*, the Court was evenly divided on whether maritime law recognizes derivative corporate liability for punitive damages based on the actions of managerial agents; accordingly, this decision is not precedential on that issue. Moreover, in its analysis of the Clean Water Act, this Court found "no clear indication of Congressional intent to occupy the entire field of pollution remedies . . . nor for that matter do we perceive that punitive damages for private harms will have a frustrating effect on the CWA remedial scheme,. . . . " 128 S.Ct. at 2619. To the contrary, this Court has previously held that with respect to the non-pecuniary measure of damages provided through the Jones Act and the Death on the High Seas Act, "when Congress has prescribed a comprehensive tort recovery regime to be uniformly applied, there is . . . no cause for enlargement of the

damages statutorily provided." *Yamaha Motor Corp., USA v. Calhoun*, 516 U.S. 199 (1996) (citing *Miles v. Apex Marine*).

## CONCLUSION

For the foregoing reasons and those stated in the Brief of Petitioners, the Petition for a Writ of Certiorari should be granted. To maintain uniformity in this area of the general maritime law, this Court should reverse the Eleventh Circuit decision in *Atlantic Sounding Co. v. Townsend* and confirm the holding of *Vaughan*, reinforced by *Miles*, that punitive damages are not available to a Jones Act seaman who seeks damages for his employer's alleged callous, willful and persistent refusal to provide maintenance and cure.

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