

603 F.Supp.2d 616, 2009 A.M.C. 1102
(Cite as: 603 F.Supp.2d 616)



United States District Court,
 S.D. New York.
 John PADILLA, Plaintiff,
 v.
 MAERSK LINE, LTD., Defendant.

No. 07 Civ. 3638 (PKL).
 March 12, 2009.

Background: Injured seaman sued his employer on behalf of himself and a proposed class of similarly-situated seamen under general maritime law, claiming unearned wages. Seaman moved to compel employer to pay overtime compensation.

Holdings: The District Court, [Leisure](#), J., held that:
 (1) summary judgment standard applied to the seaman's motion;
 (2) overtime pay was part of seaman's unearned wages; and
 (3) shipping articles did not modify or limit seaman's entitlement to overtime pay.

Motion granted.

West Headnotes

[1] Seamen 348 **26**

[348](#) Seamen
[348k15](#) Wages
[348k26](#) k. Actions. [Most Cited Cases](#)

Summary judgment standard, rather than a lesser standard, applied to injured seaman's motion to compel payment of overtime wages commensurate with

his entitlement to unearned wages.

[2] Federal Civil Procedure 170A **2533.1**

[170A](#) Federal Civil Procedure
[170AXVII](#) Judgment
[170AXVII\(C\)](#) Summary Judgment
[170AXVII\(C\)3](#) Proceedings
[170Ak2533](#) Motion
[170Ak2533.1](#) k. In general. [Most Cited Cases](#)

Generally, a pre-trial motion for determining the merits of a claim is treated as a motion for summary judgment.

[3] Seamen 348 **11(1)**

[348](#) Seamen
[348k11](#) Medical Treatment and Maintenance of Disabled Seamen
[348k11\(1\)](#) k. In general. [Most Cited Cases](#)

General maritime law of the United States provides seamen who have become ill or injured while in a ship's service with the right to maintenance and cure from his or her employer; "maintenance" is the right of an injured or ill seaman to food and lodging comparable to the kind and quality received aboard ship, while "cure" is such seaman's right to necessary medical services.

[4] Seamen 348 **11(1)**

[348](#) Seamen
[348k11](#) Medical Treatment and Maintenance of Disabled Seamen
[348k11\(1\)](#) k. In general. [Most Cited Cases](#)

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Seamen 348 15.1

[348](#) Seamen

[348k15](#) Wages

[348k15.1](#) k. In general. [Most Cited Cases](#)

Common law maintenance and cure remedy under general maritime law is comprised of three elements: (1) a living allowance during the recovery period, (2) reimbursement for medical expenses, and (3) unearned wages for a limited period.

[\[5\]](#) Seamen 348 11(6)

[348](#) Seamen

[348k11](#) Medical Treatment and Maintenance of Disabled Seamen

[348k11\(6\)](#) k. Extent and duration of liability.

[Most Cited Cases](#)

Shipowner's obligation to furnish maintenance and cure continues to the point where the maximum attainable [medical] cure has been reached; that is, the obligation to pay maintenance and cure continues until the seaman has recovered or his condition is declared permanent and incurable.

[\[6\]](#) Seamen 348 11(1)

[348](#) Seamen

[348k11](#) Medical Treatment and Maintenance of Disabled Seamen

[348k11\(1\)](#) k. In general. [Most Cited Cases](#)

Seamen 348 16

[348](#) Seamen

[348k15](#) Wages

[348k16](#) k. Right in general. [Most Cited Cases](#)

Maintenance, cure, and unearned wages obligation under general maritime law attaches regardless of fault, provided that a sailor's malady is not the result of his or her own gross misconduct.

[\[7\]](#) Seamen 348 16

[348](#) Seamen

[348k15](#) Wages

[348k16](#) k. Right in general. [Most Cited Cases](#)

Unlike maintenance and cure which may extend for a reasonable period beyond the expiration of the voyage until the point of maximum cure attainable has been reached, wages cease with the end of the voyage or the end of the engagement, whichever properly can be considered as the terminal point, and cannot extend beyond such period of time.

[\[8\]](#) Seamen 348 11(9)

[348](#) Seamen

[348k11](#) Medical Treatment and Maintenance of Disabled Seamen

[348k11\(9\)](#) k. Actions. [Most Cited Cases](#)

Seaman bears the burden of proving his or her right to maintenance and cure, but claims for maintenance and cure are construed expansively, and all ambiguities and doubts regarding a shipowner's liability for maintenance and cure are to be resolved in favor of the seaman.

[\[9\]](#) Labor and Employment 231H 1128

[231H](#) Labor and Employment

[231HXII](#) Labor Relations

[231HXII\(C\)](#) Collective Bargaining

[231Hk1123](#) Particular Subjects of Bargaining

[231Hk1128](#) k. Wages and hours. [Most](#)

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[Cited Cases](#)

Labor and Employment 231H  **1130**

[231H](#) Labor and Employment

[231HXII](#) Labor Relations

[231HXII\(C\)](#) Collective Bargaining

[231Hk1123](#) Particular Subjects of Bargaining

[231Hk1130](#) k. Medical benefits. [Most](#)

[Cited Cases](#)

Seamen 348  **11(1)**

[348](#) Seamen

[348k11](#) Medical Treatment and Maintenance of Disabled Seamen

[348k11\(1\)](#) k. In general. [Most Cited Cases](#)

Seamen 348  **15.1**

[348](#) Seamen

[348k15](#) Wages

[348k15.1](#) k. In general. [Most Cited Cases](#)

Appropriate accommodation between federal maritime common law and federal common law for the enforcement of collective bargaining agreements (CBA) is to allow unionized seamen to bargain for rights and privileges they prefer in exchange for limits on computing maintenance and unearned wages, so long as the CBAs are legitimately negotiated and the seamen's interests are adequately represented.

[10] Seamen 348  **18**

[348](#) Seamen

[348k15](#) Wages

[348k18](#) k. Extra wages. [Most Cited Cases](#)

Overtime pay is factored into unearned wage

calculations for purposes of an incapacitated seaman's entitlement to maintenance and cure under general maritime law to the extent that overtime compensation the seaman would have earned but for his or her injury is readily ascertainable.

[11] Labor and Employment 231H  **1279**

[231H](#) Labor and Employment

[231HXII](#) Labor Relations

[231HXII\(E\)](#) Labor Contracts

[231Hk1268](#) Construction

[231Hk1279](#) k. Wages and hours. [Most](#)

[Cited Cases](#)

Seamen 348  **18**

[348](#) Seamen

[348k15](#) Wages

[348k18](#) k. Extra wages. [Most Cited Cases](#)

Average overtime income seaman had earned prior to his injury had to be included in the unearned wage component of his maintenance and cure remedy; he reasonably expected to earn overtime pay, which prior to his injury amounted on average to over 100 percent of his regular earnings, and his replacement received overtime pay in excess of 100 percent of the base wage under a collective bargaining agreement (CBA).

[12] Seamen 348  **7**

[348](#) Seamen

[348k7](#) k. Shipping articles. [Most Cited Cases](#)

Seamen 348  **18**

[348](#) Seamen

[348k15](#) Wages

[348k18](#) k. Extra wages. [Most Cited Cases](#)

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Shipping articles signed by seaman upon boarding a vessel and at his discharge, which allegedly imposed a contractual limit on his entitlement to unearned wages, did not modify his general maritime law right to recover reasonably expected overtime as part of his unearned wages; the articles were not the product of any negotiation or collective bargaining, but rather, merely referenced the base wage in fulfillment of statutory requirements. [46 U.S.C.A. § 10302\(b\)\(4\)](#).

[13] Seamen 348 

[348](#) Seamen

[348k7](#) k. Shipping articles. [Most Cited Cases](#)

Signing ship's articles makes a seaman subject to the rules and discipline of the ship. [46 U.S.C.A. § 10302\(b\)\(4\)](#).

[14] Seamen 348 

[348](#) Seamen

[348k7](#) k. Shipping articles. [Most Cited Cases](#)

Shipping articles, when in doubt, are most strongly construed against the ship. [46 U.S.C.A. § 10302\(b\)\(4\)](#).

[15] Labor and Employment 231H 

[231H](#) Labor and Employment

[231HXII](#) Labor Relations

[231HXII\(E\)](#) Labor Contracts

[231Hk1268](#) Construction

[231Hk1279](#) k. Wages and hours. [Most Cited Cases](#)

Seamen 348 

[348](#) Seamen

[348k15](#) Wages

[348k18](#) k. Extra wages. [Most Cited Cases](#)

Seaman's average weekly amount of overtime aboard a vessel prior to his injury was the proper measure of damages, since the amount of overtime a seaman could earn aboard the vessel was not predetermined under a collective bargaining agreement (CBA).

***617** O'Bryan Baun CohenKeubler Karamanian, [Dennis M. O'Bryan](#), Esq., Birmingham, MI, for John Padilla.

Freehill Hogan & Mahar, LLP, [John J. Walsh](#), Esq., [Daniel J. Fitzgerald](#), Esq., New York, NY, for Maersk Line, Ltd.

OPINION AND ORDER

[LEISURE](#), District Judge:

This matter is before the Court upon plaintiff John Padilla's ("Padilla") motion to compel his employer, defendant Maersk Line, Ltd. ("Maersk"), to pay overtime compensation to plaintiff as part of his entitlement to unearned wages. For the reasons stated below, this motion is GRANTED.

***618 BACKGROUND**

Padilla brings a complaint on behalf of himself and a proposed class of similarly-situated seamen against Maersk ^{FN1} under general maritime law for unearned wages. Padilla claims that he and other similarly situated seamen suffered illness and injury in the service of Maersk's vessels. (Compl. ¶ 3.) Furthermore, Padilla claims that Maersk paid him unearned wages until the end of voyage, along with maintenance and cure, but failed to pay overtime wages that Padilla otherwise would have earned in service aboard Maersk's vessel. (*See id.* ¶¶ 3-4.)

^{FN1}. On May 8, 2007, Padilla filed his

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complaint, naming the United States as sole defendant. On September 13, 2007, plaintiff filed an amended complaint, adding Maersk as defendant. On October 3, 2007, Padilla voluntarily dismissed the action against the United States. Thus, Maersk is the only remaining defendant in this action.

A. *Factual History*

The essential facts are undisputed. On October 30, 2006, Padilla was hired as Chief Cook aboard defendant's vessel, the Maersk Arkansas. (Def.'s Opp'n 1; O'Connell Decl. ¶ 1.) ^{FN2} Maersk and Padilla's union, the Seafarers International Union ("SIU"), are parties to a collective bargaining agreement known as the Standard Freightship Agreement (the "CBA"). ^{FN3} (O'Connell Decl. ¶ 2.) Pursuant to Article V, Section 1 ("Wages") of the CBA, a Chief Cook in the Steward Department is entitled to regular monthly wages of \$3,051.76. (Def.'s Opp'n 1; O'Connell Decl. Ex. A at 50.) In addition, the CBA provides that wages "will be paid on a day for day basis on all contracted vessels" (O'Connell Decl. Ex. A at 27.) Accordingly, the Particulars of Engagement and Discharge (the "shipping articles" ^{FN4}) that Padilla signed upon boarding the Maersk Arkansas list Padilla's regular daily wage rate as \$101.73, which Maersk calculated by dividing the monthly wage rate in the CBA by 30. (Def.'s Opp'n 1; O'Connell Decl. Ex. B.)

^{FN2}. Citations to "Def.'s Opp'n" refer to the Memorandum of Law in Opposition to Motion to Compel Payment of Overtime. Citations to "Pl.'s Mem." refer to the Memorandum in Support of Motion to Compel Payment of Overtime Re: Unearned Wages. Citations to "Pl.'s Reply" refer to Plaintiff's Reply to Defendant's Memorandum of Law in Opposition to Motion to Compel Payment of Overtime. Citations to "O'Connell Decl." refer to the Declaration of Catherine O'Connell, Jones Act Claims Manager for

Maersk, dated June 12, 2008 and attached as Exhibit 3 to Maersk's opposition brief. Citations to "Berger Decl." refer to the Declaration of Carol Berger, General Manager, Quality Environment, Safety and Security for Maersk, dated June 10, 2008 and attached as Exhibit 2 to Maersk's opposition brief. Citations to "Padilla Aff." Refer to the Affidavit of John Padilla, sworn to on February 25, 2008, attached as Exhibit 2 to plaintiff's moving brief.

^{FN3}. The CBA was executed June 16, 2006 and is in effect until June 30, 2011, and thus covers Padilla's employment aboard the Maersk Arkansas for the voyage commencing October 30, 2006. (Padilla Aff. Ex.; O'Connell Decl. Ex. A.)

^{FN4}. Plaintiff's Reply brief indicates that the Particulars of Engagement and Discharge constitute shipping articles between the master and each seaman. (Pl.'s Reply 1.)

Padilla's sworn testimony is that his regular shift lasted from 6:30 a.m. to 6:30 p.m. (Pl.'s Dep. 29:2, Mar. 26, 2008) ^{FN5}, with a coffee break from 9:30-10:30 a.m. and a longer break from 1:00 p.m. to 4:00 p.m. (*Id.* 29:13-18.) This testimony is consistent with the terms of the CBA, which states that a Chief Cook is required to work eight (8) hours between 6:30 a.m. and 6:30 p.m. (O'Connell Decl. Ex. A at 50.) Pursuant to Article II, Section 21 ("Overtime***619** Rates and Penalty Rates") of the CBA, a Chief Cook in the Steward Department earns \$21.06 per hour for all work in excess of eight (8) hours Monday through Friday and any work performed on Saturdays, Sundays, or holidays. (O'Connell Decl. Ex. A at 10, 50.) Although the head of each department must authorize overtime work (*id.* at 14; *see also* Pl.'s Dep. 91:17-18), Padilla swears that, on a weekly basis prior to his injury, he performed three (3) overtime hours each weekday and eleven (11) overtime hours each Satur-

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day, Sunday, and holiday. (Padilla Aff. ¶¶ 2-3.) This testimony is consistent with the payroll vouchers for Padilla that Maersk submitted. (See O'Connell Decl. Ex. C.) In addition, at his deposition, Padilla explained that some duties essential to maintaining a well-run ship, such as sougeeing the galley and working the stores, automatically required him to work overtime each week. (Pl.'s Dep. 88, 91:23-92:8, 93-94.) This testimony is also consistent with the CBA, which contemplates that, for members of the Steward Department, certain "non-routine" work, such as preparing and serving night lunches, sougeeing, or any work not specifically designated in the CBA will automatically be paid at the applicable overtime rate. (See O'Connell Decl. Ex. A at 52-55; see also Pl.'s Dep. 94:16-17.)

[FN5](#). Pages from Padilla's March 26, 2008 deposition are attached to Padilla's moving brief as Exhibit 3 and to Maersk's opposition brief as Exhibit 1.

After eight days of service aboard the MV Arkansas, Padilla was discharged and repatriated at the Port of Salalah, Oman, on November 6, 2006. (See Def.'s Opp'n 2; Berger Decl. ¶ 7; O'Connell Decl. Ex. B.) At that time, Padilla signed off the ship's articles, which indicated that he was "unfit for duty." (Def.'s Opp'n 2; O'Connell Decl. Ex. B.) In addition, the shipping articles indicate that the balance of earned wages owed to Padilla [FN6](#) at discharge totaled \$1,090.00 and included six days of regular wages plus 34 hours of overtime wages. [FN7](#) (O'Connell Decl. Exs. B & C.)

[FN6](#). Pursuant to Article II, Section 14 ("Repatriation, Upkeep, and Transportation"), when "a seaman leaves the vessel due to illness or injury and such illness or injury has been known prior to his leaving, he shall receive a full statement of his account showing wages due him." (O'Connell Decl. Ex. A at 7.)

[FN7](#). According to his first payroll voucher, Padilla also earned two days of regular wages plus three (3) hours of overtime wages for the period of October 30-31, 2006. (O'Connell Decl. Ex. C.)

The Maersk Arkansas's voyage ended on February 26, 2007. (Berger Decl. ¶ 8; O'Connell Decl. ¶ 9.) Maersk paid Padilla unearned wages at a daily rate of \$101.73, along with maintenance payments of \$16 per day, [FN8](#) from Padilla's discharge until February 26, 2007. (Def.'s Opp'n 2.) Carol Berger, General Manager, Quality Environment, Safety and Security for Maersk, attests that it is not her practice to factor overtime wages into any calculation of unearned wages, and she is unaware of any company in the industry that includes overtime wages in its unearned wage calculations. (Berger Decl. ¶¶ 6, 9.) However, Catherine O'Connell, Maersk's Jones Act Claims Manager, attests that when Maersk enters into negotiations with a seaman to settle a Jones Act claim, she will recommend that Maersk include overtime in unearned wages to induce the seaman to settle his claim. (O'Connell Decl. ¶ 6.)

[FN8](#). Section II, Article 13 ("Maintenance and Cure") of the CBA states that "[w]hen a member of the Unlicensed Personnel is entitled to Maintenance and Cure under Maritime Law, he shall be paid maintenance at the rate of sixteen dollars (\$16.00) per day for each day or part thereof of entitlement." (O'Connell Decl. Ex. A at 6.)

Padilla testified at his deposition that he contacted Maersk to request payment of overtime wages that he would have earned but for his injury, but Maersk denied his request, stating that it did not pay overtime*620 as unearned wages. (Pl.'s Dep. 62:2-17.) In addition, Padilla's testimony indicates that at least one other company has paid him unearned wages con-

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sisting of his daily base wage plus overtime he would have earned but for injury or illness. (*Id.* 63:3-15.) Maersk indicates that Padilla's replacement man aboard the Maersk Arkansas earned \$15,103.52 in overtime wages during his 108 days of service on the Maersk Arkansas. (Pl.'s Reply 3 & Ex. A.)

B. *Procedural History*

At a December 13, 2007 pre-trial conference before this Court, the parties agreed to have the Court determine defendant's liability for overtime wages as unearned wages prior to addressing whether the action is suitable for class action status. Now before the Court is Padilla's motion for judgment on the merits with respect to Maersk's liability for payment of overtime wages.

DISCUSSION

Padilla argues that overtime wages are payable as unearned wages. (Pl.'s Mem. 2.) Padilla relies on [Lamont v. United States, 613 F.Supp. 588, 592-93 \(S.D.N.Y.1985\)](#) (Duffy, J.) for the proposition that a seaman may recover overtime as a component of unearned wages where it was the "apparent custom and practice ... of the seamen working a substantial amount of overtime" such that overtime was a "common expectation" of the seamen's remuneration and where "such an assessment [of overtime wages] can be made without speculation." (*Id.* 6-8 (quoting [Lamont, 613 F.Supp. at 593](#)) (internal quotation marks removed).) Similarly, in this action, Padilla asserts that an overtime assessment can be made without speculation based on Padilla's testimony regarding the average overtime he worked prior to his injury. (*Id.* 8-9.) In this vein, Padilla asserts that, at an average overtime of three (3) hours per weekday and eleven (11) hours each weekend day and holiday, paid at the applicable rate of \$21.06, the amount of overtime wages Padilla is owed total \$12,972.96. (Pl.'s Mem. 9.) In the alternative, Padilla argues the amount of overtime wages he is owed can be readily ascertained based on the overtime wages paid to Padilla's replacement man until the end of the ship's voyage,

which total \$15,103.52. (*Id.* 9; Pl.'s Reply 3 & Ex. A.)

Maersk does not dispute that Padilla is entitled to payment of unearned wages until the end of the ship's voyage. (Def.'s Mem. 4.) In fact, Maersk asserts that it paid Padilla unearned wages at the wage rate specified for a Chief Cook in the Steward Department in Article V, Section 1 ("Wages") of the CBA, and in the shipping articles, from the onset of Padilla's injury until the voyage ended. (*Id.* 12.) Although Maersk does not agree that overtime wages should be included in unearned wage calculations, Maersk contends that even if a seaman's right to unearned wages includes overtime wages, Padilla's entitlement to unearned wages was contractually modified. (*Id.* 5, 9-10.) Maersk argues that the wage rate indicated in the shipping articles is the rate at which Maersk is obligated to pay Padilla's unearned wages, and overtime pay is not factored into that applicable wage rate. (*Id.* 8, 11-12.) Furthermore, Maersk contends that even if Padilla is entitled to receive unearned overtime pay, summary judgment must be denied because there is a genuine issue of material fact as to the amount of overtime Padilla would have earned but for his injury. (*Id.* 3-4.)

Thus, the first issue before the Court is whether, as a matter of law, overtime pay is factored into unearned wage calculations for purposes of an incapacitated seaman's entitlement to maintenance and cure under general maritime law. For the reasons *621 stated below, we conclude that it is, to the extent that overtime compensation the seaman would have earned but for his or her injury is readily ascertainable. In addition, the Court must determine whether Padilla's general maritime right to unearned wages was contractually modified so as to preclude Padilla's recovery of overtime benefits as a matter of law. As discussed below, the Court finds that Padilla's general maritime right to overtime pay as part of his unearned wages was not contractually modified, and can be reasonably ascertained based on his average overtime earned prior to injury.

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I. Applicable Law

A. Standard of Review

[1] At the outset, the Court must determine under what standard it should consider plaintiff's motion. Plaintiff has styled his motion as one to compel payment of overtime wages commensurate with his entitlement to unearned wages. Plaintiff argues that the Court can consider his motion under a lesser showing than required for summary judgment, and primarily relies on cases outside the Second Circuit in support of this proposition. (See Pl.'s Mem. 4-5.) ^{FN9} Plaintiff acknowledges that a summary judgment standard would otherwise apply. (*Id.* 5.) Defendant's opposition to the instant motion assumes the application of a summary judgment standard. (Def.'s Opp'n Mem. 2-3.)

^{FN9}. The Court notes that the only case in this district that plaintiff cites where a court ordered payment of maintenance and cure without applying a summary judgment standard involves reinstatement of maintenance and cure payments that an employer admittedly owed. See *Seri v. Queen of Hearts Cruises, Inc.*, No. 01 Civ. 6985, 2003 WL 21835736, at *1 (S.D.N.Y. Aug. 6, 2003). Because liability for such payments was not at issue, *Seri* is distinguishable from plaintiff's instant request for pre-trial determination of liability on the merits. Another case in this district that plaintiff cites in support of his contention that the court should apply a lesser standard of review than summary judgment, *Durfor v. K-Sea Transp. Corp.*, No. 00 Civ. 6782, 2001 WL 856612 (S.D.N.Y. July 30, 2001), was abrogated by the Second Circuit in *Ammar v. United States*, 342 F.3d 133 (2d Cir.2003).

[2] Some district courts that are hesitant to apply a summary judgment standard find that, where a seaman is the moving party on summary judgment, the Supreme Court's instruction that ambiguities in the area

of maintenance and cure are to be resolved in favor of seamen, see *Vaughan v. Atkinson*, 369 U.S. 527, 532, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962), is somewhat at odds with the requirement that, on summary judgment, courts resolve reasonable doubts against the moving party and draw all inferences in the light most favorable to the non-moving party. See, e.g., *Best v. Pasha Haw. Transp. Lines, L.L.C.*, No 06-00634, 2008 WL 1968334, at *1 (D.Haw. May 6, 2008) (noting that some district courts in the Ninth Circuit "have found that the summary judgment standard is inappropriate [where the seaman is the moving party] because it does not account for the flexible approach courts should take in admiralty law cases and the deference courts should provide to seamen," but declining to determine the appropriate standard of review because there was no factual dispute that plaintiff was entitled to maintenance and cure); *McCart v. Prysmian Power Cables and Sys. USA, LLC*, No. C06-1062RSM, 2007 WL 2257149, at *1 (W.D.Wash. Aug. 3, 2007) ("On motions to compel maintenance, courts do not traditionally employ the strict summary judgment standard of review."); *Connors v. Iqueque*, No. C05-334JLR, 2005 WL 2206922, at *1 (W.D.Wash. Aug. 25, 2005) (noting that, where seaman is moving party on summary judgment, drawing all inferences in the light most favorable to the non-moving party "squares awkwardly with the Supreme Court's instructions to defer to seamen*622 in determining maintenance and cure questions"). Generally, however, a pre-trial motion for determining the merits of a claim is treated as a motion for summary judgment. See *McNeil v. Jantran, Inc.*, 258 F.Supp.2d 926, 930 (W.D.Ark.2003) (stating that "[o]ther than a motion for summary judgment, we are aware of no procedure for obtaining pre-trial judgment on the merits of a claim" and applying summary judgment standard to motion for retroactive and future maintenance and cure). Because courts in this district routinely analyze motions to compel maintenance under a summary judgment standard, see, e.g., *Covella v. Buchanan Marine*, No. 95 Civ. 6514, 1996 WL 164482 (S.D.N.Y. Apr. 9, 1996); *Maloney v. Bou-*

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chard Transp. Co., Inc., No. 89 Civ. 6254, 1990 WL 96988 (S.D.N.Y. July 2, 1990) (Keenan, J.), and the issue is one that can properly be resolved on summary judgment, the Court will apply a summary judgment standard to the instant motion.

Rule 56 of the Federal Rules of Civil Procedure allows for the entry of summary judgment where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed.R.Civ.P. 56(c). The party moving for summary judgment bears the “heavy burden” of demonstrating that no genuine issue as to any material fact exists and that it is therefore entitled to judgment as a matter of law. Nationwide Life Ins. Co. v. Bankers Leasing Ass'n, Inc., 182 F.3d 157, 160 (2d Cir.1999); accord Atl. Mut. Ins. Co. v. CSX Lines, L.L.C., 432 F.3d 428, 433 (2d Cir.2005) (“The burden of showing that no genuine factual dispute exists rests on the party seeking summary judgment” (quoting Sec. Ins. Co. of Hartford v. Old Dominion Freight Line Inc., 391 F.3d 77, 83 (2d Cir.2004))); Chambers v. TRM Copy Ctrs. Corp., 43 F.3d 29, 36 (2d Cir.1994) (Kearse, J.). Nonetheless, summary judgment “is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action.” Celotex Corp. v. Catrett, 477 U.S. 317, 327, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

A district court “must resolve all ambiguities and draw all inferences in favor of the non-moving party,” such that “[i]f there is any evidence in the record from which a reasonable inference could be drawn in favor of the non-moving party on a material issue of fact, summary judgment is improper.” Westinghouse Credit Corp. v. D'Urso, 278 F.3d 138, 145 (2d Cir.2002); accord Brown v. Cara, 420 F.3d 148, 152 (2d Cir.2005). Of course, “the mere existence of some alleged factual dispute between the parties will

not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.’ ” Lang v. Ret. Living Publ'g Co., 949 F.2d 576, 580 (2d Cir.1991) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). “A dispute as to a material fact is ‘genuine,’ and hence summary judgment is not appropriate, under this standard, only ‘if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.’ ” Id. (quoting Anderson, 477 U.S. at 248, 106 S.Ct. 2505); accord N.Y. Stock Exch., Inc. v. New York, N.Y. Hotel LLC, 293 F.3d 550, 554 (2d Cir.2002). “[T]he law provides no magical talisman or compass that will serve as an unerring guide to determine when a material issue of fact is presented. As is so often true in the law, this is a matter of informed and properly reasoned judgment.” Am. Mfrs. Mut. Ins. Co. v. Am. Broadcasting-Paramount Theatres, Inc., 388 F.2d 272, 279 (2d Cir.1967).

***623 B. A Seaman's Traditional Maritime Remedies**

[3][4] The general maritime law of the United States provides seamen who have become ill or injured while in a ship's service with the right to “maintenance and cure” from his or her employer. Ammar v. United States, 342 F.3d 133, 142 (2d Cir.2003). “Maintenance” is the right of an injured or ill seaman to food and lodging comparable to the kind and quality received aboard ship, while “cure” is such seaman's right to necessary medical services. See Wills v. Amerada Hess Corp., 379 F.3d 32, 52 (2d Cir.2004) (citation omitted); Thomas J. Schoenbaum, Admiralty and Maritime Law § 4-28, at 303 (4th ed. 2004). In addition, a seaman is entitled to recover wages he would have earned if not for the onset of injury or illness (“unearned wages”). See The Osceola, 189 U.S. 158, 175, 23 S.Ct. 483, 47 L.Ed. 760 (1903), superseded on other grounds by Jones Act, 46 U.S.C. § 30104; Rodriguez Alvarez v. Bahama Cruise Line, Inc., 898 F.2d 312, 315 (2d Cir.1990) (“When a seaman is injured during his employment on a ship, the ship operator is liable not only for the seaman's

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maintenance and cure, but also for lost wages.” (citations omitted)); *McMillan v. Tug Jane A. Bouchard*, 885 F.Supp. 452, 459 n. 9 (E.D.N.Y.1995) (“In addition to maintenance, an injured seaman is entitled to receive unearned wages until the scheduled end of his or her voyage or term of employment.” (citation omitted)); see also *Lamont*, 613 F.Supp. at 591 (“The right to unearned wages is ‘ancient’....”); *Ladzinski v. Sperling S.S. & Trading Corp.*, 300 F.Supp. 947, 949 (S.D.N.Y.1969) (“Even if the contract between the seaman and the shipowner makes no provision for maintenance and cure and unearned wages, they are recoverable under the general maritime law.”). Therefore, the common law maintenance and cure remedy is comprised of three elements: (1) a living allowance during the recovery period, (2) reimbursement for medical expenses, and (3) unearned wages for a limited period. *Gardiner v. Sea-Land Serv., Inc.*, 786 F.2d 943, 946 (9th Cir.1986); see also *Flores v. Carnival Cruise Lines*, 47 F.3d 1120, 1122 (11th Cir.1995) (“Although the recovery of unearned wages technically is a separate element of recovery from those for maintenance expenses or cure expenses, ‘it is settled law that wages is a basic component of an award of maintenance and cure.’ ” (citation omitted)).

[5][6][7] A shipowner's obligation to furnish maintenance and cure continues “to the point where the maximum attainable [medical] cure has been reached.” *Taylor v. Bouchard Transp. Co., No. 89 Civ. 5965*, 1991 WL 107279, at *4 (S.D.N.Y. June 12, 1991) (Leisure, J.) (citing *Rodriguez Alvarez*, 898 F.2d at 314-15). That is, the obligation to pay maintenance and cure “continues until the seaman has recovered or his condition is declared permanent and incurable.” *Ammar*, 342 F.3d at 142 (citations omitted); see *McMillan*, 885 F.Supp. at 459 (stating that obligation continues “until the seaman recovers from the injury, the condition permanently stabilizes, or cannot be improved further”). In addition, a shipowner is obligated to pay an injured or ill seaman unearned wages until the ship's voyage ends or until the seaman

reaches maximum cure, whichever is sooner.^{FN10} *624 *Berg v. Fourth Shipmor Assocs.*, 82 F.3d 307, 310 (9th Cir.1996). “Th[e] [maintenance, cure, and unearned wages] obligation attaches regardless of fault, provided that a sailor's malady is not the result of his or her own gross misconduct.” *Calo v. Ocean Ships, Inc.*, 57 F.3d 159, 162 (2d Cir.1995); see *Berg*, 82 F.3d at 309; see also *Ammar*, 342 F.3d at 142 (“The duty to pay maintenance arises regardless of whether the shipowner was negligent and regardless of whether the illness or injury was job-related....”); *McMillan*, 885 F.Supp. at 459 (“[T]ort law rules of contributory negligence, comparative fault, assumption of risk, and unseaworthiness do not apply.”).

FN10. “Unlike maintenance and cure which may extend for a reasonable period beyond the expiration of the voyage until the point of maximum cure attainable has been reached, wages cease with the end of the voyage or the end of the engagement (whichever properly can be considered as the terminal point) and cannot extend beyond such period of time.” *Blainey v. Am. S.S. Co.*, 990 F.2d 885, 890 (6th Cir.1993) (internal quotation marks and citation omitted).

[8] The seaman bears the burden of proving his or her right to maintenance and cure. *Seri v. Queen of Hearts Cruises, Inc., No. 01 Civ. 6985*, 2003 WL 21835736, at *1 (S.D.N.Y. Aug. 6, 2003); *McMillan*, 885 F.Supp. at 459. However, claims for maintenance and cure are construed expansively, and all ambiguities and doubts regarding a shipowner's liability for maintenance and cure are to be resolved in favor of the seaman. *Vaughan*, 369 U.S. at 532, 82 S.Ct. 997; see also *Seri*, 2003 WL 21835736, at *1 (stating that a presumption of entitlement exists in the seaman's favor (citing *Breese v. AWI Inc.*, 823 F.2d 100, 104 (5th Cir.1987))).

C. Provisions in Collective Bargaining Agreements for Computing Maintenance, Cure, and Wages

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[9] Although the Court has found no binding precedent in this Circuit regarding whether a CBA may limit a seaman's recovery of unearned wages, *cf. Cabrera Espinal v. Royal Caribbean Cruises, Ltd.*, 253 F.3d 629, 632 (11th Cir.2001) (concluding that “nothing in maritime law” prevents a CBA from limiting the amount of unearned wages, even where such amount may be below a seaman's average earned wages); *Lipscomb v. Foss Mar. Co.*, 83 F.3d 1106, 1108 (9th Cir.1996) (explaining that the “general maritime law right to maintenance, cure, and unearned wages ... is imposed by law and cannot be abrogated by contract, ... although the method for calculating the amount of maintenance, cure, and wages may be determined by the collective bargaining process” (citations omitted)), the Second Circuit has joined the majority of Circuit Courts of Appeals in holding that union-negotiated CBA's may limit-but not abrogate-the maritime remedy of maintenance. See *Ammar*, 342 F.3d at 146-47; see also *Frederick v. Kirby Tankships, Inc.*, 205 F.3d 1277, 1292 (11th Cir.2000); *Baldassaro v. United States*, 64 F.3d 206, 212-13 (5th Cir.1995); *Al-Zawkari v. Am. S.S. Co.*, 871 F.2d 585, 588 (6th Cir.1989); *Macedo v. F/V Paul & Michelle*, 868 F.2d 519, 522 (1st Cir.1989); *Gardiner*, 786 F.2d at 949-50. But see *Barnes v. Andover Co., L.P.*, 900 F.2d 630, 640 (3d Cir.1990) (“[A] union cannot bargain away the individual seaman's common law right to maintenance by agreeing to a wholly inadequate figure as a daily maintenance rate.”). The Second Circuit in *Ammar* noted that seamen now have large and powerful unions to represent their interests, which undercuts the traditional notion that seamen are a “friendless” class and, accordingly, there is less “need for judicial intervention to protect seamen” 342 F.3d at 146. “[I]n light of the reality of modern circumstances, the appropriate accommodation between federal maritime common law and federal common law for the enforcement of collective bargaining agreements is to allow unionized seamen to bargain for rights and privileges they prefer in exchange for” limits on computing maintenance, so long as the CBA's are legitimately negotiated and the seamen's

interests are adequately represented. *Id.* Even though not specifically addressed in *Ammar*, this Court would extend the same deference to CBA *625 limits on the computation of unearned wages. See *Aldahe v. Matson Navigation Co., Inc.*, 06-CV-11125, 2006 WL 2069419, at *3 (E.D.Mich. July 26, 2006) (“Because the rights to cure and to unearned wages are equally predicated on the contours of vague common law, those rights are also susceptible to modification by contract.”); see also *Dowdle v. Offshore Express, Inc.*, 809 F.2d 259, 263 (5th Cir.1987) (finding unearned wages inseparable from maintenance and cure).

The Second Circuit has instructed district courts to view union-negotiated packages of compensation and benefits in the maritime context as a whole and accord deference to the entire package, even where certain limitations, viewed in isolation, may appear inadequate. *Ammar*, 342 F.3d at 146. Yet, the Second Circuit has also advised district courts to “be careful to determine what were the actual terms agreed to by the parties to a CBA, and not impose a limitation ... where none was intended or agreed to.” *Marcic v. Reinauer Transp. Cos.*, 397 F.3d 120, 131 (2d Cir.2005); accord *Lipscomb*, 83 F.3d at 1109 (“Only if the [CBA] ‘express[ly]’ provides for a different computation of maintenance, cure, and wages does it modify the general maritime law.” (quoting *Gardiner*, 786 F.2d at 949)). Such a view accords with the traditional nature and breadth of the maintenance and cure remedy. *Lipscomb*, 83 F.3d at 1110; see also *Vaughan*, 369 U.S. at 532, 82 S.Ct. 997 (declaring that “th’ ship-owner's liability for maintenance and cure was among ‘the most pervasive’ of all and that it was not to be defeated by restrictive distinctions nor ‘narrowly confined’ ” (quoting *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 730, 63 S.Ct. 930, 87 L.Ed. 1107 (1943))); *Farrell v. United States*, 336 U.S. 511, 516, 69 S.Ct. 707, 93 L.Ed. 850 (1949) (“It has been the merit of the seaman's right to maintenance and cure that it is so inclusive as to be relatively simple, and can be understood and administered without technical considerations.”).

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D. Payment of Unearned Overtime Wages

[10] The Second Circuit has not directly addressed whether a seaman may recover reasonably expected overtime wages as part of his entitlement to unearned wages. However, Judge Duffy's decision in *Lamont v. United States* is persuasive on this point. 613 F.Supp. at 588 (cited in Schoenbaum, *supra*, at 309 n. 7). In *Lamont*, Judge Duffy was presented with the question of whether “‘overtime’ normally paid to a healthy seaman [is] to be included in calculating the benefits due to a seaman who becomes ill or is injured while in service of a ship.” *Id.* at 589. The plaintiff seaman in *Lamont* had earned overtime benefits amounting to ninety-one (91) percent of his base wages prior to his injury.^{FN11} *Id.* at 593. In light of the “custom and practice” of the seaman's ship to pay overtime in an amount nearly equal to the base wages paid, Judge Duffy reasoned that overtime was a “common expectation” of the seamen who signed the ship's articles. *Id.* Because much of the seaman's income was derived from overtime compensation, Judge Duffy awarded the seaman overtime pay as part of his unearned wages, reasoning that the seaman was “entitled to recover, in full, the compensation that he would have earned but for his illness or injury as such assessment can be made without speculation.” *Id.*

^{FN11}. In *Lamont*, the parties stipulated to the average overtime earnings for a seaman such as plaintiff aboard defendant's vessel. 613 F.Supp. at 593.

Other courts outside this Circuit have also adopted “but for” tests and concluded that benefits such as tip income and vacation*626 pay constitute “unearned wages” for purposes of a seaman's entitlement to maintenance, cure, and unearned wages. See *Aksoy v. Apollo Ship Chandlers, Inc.*, 137 F.3d 1304, 1306 (11th Cir.1998) (per curiam) (calculating unearned wages as average tip income plus guaranteed minimum wage); *Lipscomb*, 83 F.3d at 1109 (concluding accumulated time off (“ATO”) is part of

seaman's unearned wages under general maritime law); *Flores*, 47 F.3d at 1123 (holding that measure of seaman's unearned wages should include tip income); *Morel v. Sabine Towing & Transp. Co.*, 669 F.2d 345, 346 (5th Cir.1982) (concluding “[a]ccumulated leave time, paid vacation, is part of a seaman's total wages” and payable under general maritime law in addition to maintenance); *Shaw v. Ohio River Co.*, 526 F.2d 193, 199 (3d Cir.1975) (same). Some of these cases have followed Judge Duffy's reasoning in *Lamont* that where it is the custom, practice, and expectation of the parties that a seaman will receive certain benefits as compensation during his service aboard the ship, such benefits are recoverable as unearned wages in order to place the seaman in the same position he would have been in had he continued to work. See, e.g., *Lipscomb*, 83 F.3d at 1109; *Aksoy*, 137 F.3d at 1306; *Flores*, 47 F.3d at 1125-26.

For example, plaintiff in *Lipscomb* earned ATO in addition to a base wage while in the service of defendant's ship. 83 F.3d at 1108. The CBA between defendant and plaintiff's union was silent as to the amount to be provided an ill or injured seaman as unearned wages. *Id.* at 1109. The Ninth Circuit reasoned that ATO was “a benefit directly attributable to the seaman's work on the vessel and is an inherent part of his wage agreement.” *Id.* Accordingly, the Ninth Circuit found that “[t]he purposes behind the right to maintenance and cure are best served by paying an injured seaman the compensation he would have earned but for his injury,” *id.* at 1110, and awarded plaintiff ATO as part of his unearned wages under the general maritime law. *Id.* at 1111.

Similarly, in *Flores*, plaintiff claimed that, upon becoming injured, his entitlement to unearned wages included tips he could have earned had he been able to complete his employment contract. 47 F.3d at 1121-22. The Eleventh Circuit agreed with plaintiff and mandated that the calculation of unearned wages include unearned tips. *Id.* at 1127. The Eleventh Circuit reasoned that although plaintiff's employment

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contract did not guarantee any amount of tips and was silent as to how unearned wages would be calculated, the custom, practice, and expectations of the parties were that tip earnings would constitute the majority of plaintiff's salary. *Id.*

Likewise, in *Aksoy*, another tip income case before the Eleventh Circuit, plaintiff's "contract did not purport to place a limit on the amount of unearned wages [plaintiff] was entitled to receive" [137 F.3d at 1306](#). ^{FN12} Because the custom, practice, and expectations of the parties were that a substantial portion of plaintiff's income would derive from tip income, the *Aksoy* court concluded that the only way to place plaintiff "in the same position he would have been in had he continued to work" was to allow plaintiff to recover as unearned wages the amount of his average weekly tip income in addition to his guaranteed minimum wage. *Id.*

^{FN12}. Because plaintiff's contract was silent as to the amount of unearned wages plaintiff was entitled to receive, the *Aksoy* court left for another day the question of "whether the right to unearned wages may be modified by contract" [137 F.3d at 1306](#).

*627 II. Application

A. Whether Padilla is Entitled to Include Overtime Wages in the Measure of Unearned Wages

[11] This Court follows *Lamont*, and subsequent Circuit Court cases following Judge Duffy's reasoning in *Lamont*, and concludes that an injured seaman is entitled to include his average overtime earnings in the unearned wage component of his maintenance and cure remedy. In this case, Padilla reasonably expected to earn overtime pay, which prior to his injury amounted on average to over 100 percent of his regular earnings. ^{FN13} Moreover, Padilla's replacement man received overtime pay in excess of 100 percent of

a Chief Cook's base wage under the CBA. ^{FN14} Thus, the custom and practice aboard defendant's vessel was to pay seamen such as Padilla overtime in excess of amounts paid as base wages. To recover in full the compensation that he would have earned but for his injury, this Court finds that the average overtime income Padilla had earned prior to his injury must, as a matter of law, be included in the measure of his unearned wages.

^{FN13}. For example, Padilla's payroll voucher for the period November 1, 2006 through November 6, 2006 reflects \$610.38 in base wages and \$716.04 in overtime wages. (*See* O'Connell Decl. Ex. C.)

^{FN14}. For example, Padilla's replacement man's payroll vouchers for the periods December 1, 2006 through December 31, 2006 and January 1, 2007 through January 31, 2007 each reflect base wages of \$3,153.63 and overtime wages of \$4,654.26.

B. Whether Padilla's Rate of Unearned Wages Was Contractually Modified

[12] Unless contractually modified, Padilla is entitled to recover, as part of his unearned wages, unearned overtime pay from the onset of his injury until the voyage ended on February 26, 2006. Since Maersk concedes that the CBA is silent as to a seaman's unearned wage rate (*see* Def.'s Opp'n 9), the CBA governing Padilla's employment with Maersk does not modify Padilla's general maritime law right to unearned wages. *See* [Lipscomb, 83 F.3d at 1109](#). Accordingly, the CBA does not purport to limit the inclusion of overtime pay in the calculation of Padilla's unearned wages.

However, Maersk argues that the shipping articles signed by Padilla upon boarding the vessel on October 30, 2006 and at his discharge on November 6, 2006 contractually limit Padilla's entitlement to unearned

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wages to \$101.73 per day. (Def.'s Opp'n 9, 11-12; O'Connell Decl. Ex. B.) Therefore, the Court must next determine whether, as a matter of law, the shipping articles modified Padilla's general maritime law right to recover reasonably expected overtime as part of his unearned wages.

[13][14] On foreign voyages, written shipping articles are required by statute. *See* [46 U.S.C. § 10302](#). Traditionally, shipping articles are engagement agreements between “the crew members and the employer shipowner, in which the employer agrees to pay wages for services rendered by the seamen.” *Blainey v. Am. S.S. Co.*, 990 F.2d 885, 888 (6th Cir.1993); *see also* [46 U.S.C. § 10302\(b\)](#) (4) (requiring the articles to contain “the amount of wages each seaman is to receive”). In addition, “[s]igning ship's articles makes a seaman subject to the rules and discipline of the ship ...” *Mahramas v. Am. Export Isbrandtsen Lines, Inc.*, 475 F.2d 165, 171 n. 9 (2d Cir.1973). “The articles, when in doubt, are most strongly construed against the ship.” *The Thomas Tracy*, 24 F.2d 372, 374 (2d Cir.1928); *see* *628*Mason v. Tex. Co.*, 76 F.Supp. 318, 321 (D.Mass.1948) (“Since [shipping articles] are prepared by the master of the ship, any ambiguity in the language used should be construed liberally in favor of the seaman.”); *The Catalonia*, 236 F. 554, 556 (E.D.Va.1916) (“[A]s between [seamen] and the master, the articles should be construed liberally in their favor, since the same were the product of the master, and not of themselves.”).

Maersk has not cited any case law that stands for the proposition that shipping articles can alter the remedies provided for under general maritime law. Instead, Maersk relies on case law where courts have deferred to limits imposed by union-negotiated CBA's on an incapacitated seaman's rate of maintenance or sick wages. (*See* Def.'s Opp'n 5-8.) In doing so, Maersk appears to argue for an extension of such case law to limits on wage rates purportedly imposed by shipping articles. (*See id.* 8 (“Here, [p]laintiff's compensation package was negotiated and the wage rate

expressly set forth in the signed Particulars of Engagement and Discharge controls.”).)

Padilla argues that the shipping articles “have nothing to do with overtime, and should not be used as a vehicle for disenfranchisement of general maritime law rights.” (Pl.'s Reply 1.) Padilla also argues that Maersk has not shown the articles are the product of “any negotiation or collective bargaining [;]” rather, Padilla contends the articles merely reference the base wage in fulfillment of statutory requirements. (*Id.* 2.) The Court agrees. It appears that shipping articles do not have the same import as a CBA. Although intended to protect the rights of seamen, shipping articles are statutorily required and, unlike a CBA, do not constitute a union-negotiated package of benefits. The CBA in this case is quite expansive, covering the terms and conditions of the seamen's employment, and, while silent on the calculation of unearned wages, sets the rate at which Maersk paid Padilla's maintenance. In contrast, the shipping articles here appear to function more like a roster of crew members. *See Blainey*, 990 F.2d at 888.

In addition, the wage rate in the shipping articles is predicated upon the wage rate provided for in the CBA, which Maersk concedes is silent on the calculation of unearned wages. The Court thus presumes that unearned wages were not a topic of collective bargaining, and that the SIU did not negotiate a limitation on seamen's right to recover overtime pay as part of unearned wages in exchange for other benefits. *See Marcic*, 397 F.3d at 131. It is unclear, therefore, why the shipping articles would purport to set such a limit. And since seamen bargain most effectively as a group through their chosen union, *see Ammar*, 342 F.3d at 146, it would defeat the purpose of having a union-negotiated contract if its provisions could be modified or limited in an agreement between an individual seaman and his ship's master. (*See* O'Connell Decl. Ex. A. at 1 (stating in CBA that SIU is “the sole and exclusive bargaining representative of all Unlicensed Personnel employed on board American-flag

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vessels owned or operated by [each member Company of the American Maritime Association] or its subsidiaries.”.)

Moreover, the Court discerns no limitation on unearned wages in the shipping articles. The \$101.73 daily wage rate in the shipping articles appears in an upper section titled “Seaman's Identification and Acceptance of Employment” under the subheading “Seaman's Rate and Wage Information.” (O'Connell Decl. Ex. B.) During the course of his employment aboard the Maersk Arkansas, Padilla earned daily wages at the rate indicated in the shipping articles, and overtime wages. (O'Connell *629 Decl. Ex. C.) Below “Seaman's Identification and Acceptance of Employment” is a section titled “Voyage Discharge/Release Information” that lists the seaman's “Regular Wages Earned” through discharge, applicable “Deductions,” and “The Balance of Wages Paid at Discharge.” (O'Connell Decl. Ex. B.) This lower section of the shipping articles makes no reference to unearned wages owed to an incapacitated seaman. (*Id.*) Thus, the section on “Wages” in the upper half of the shipping articles clearly refers to *earned* wages and does not purport to limit the measure of *unearned* wages. Even if, at best, the articles were deemed ambiguous, they would be construed against the master and in favor of the seaman as a matter of law. See [The Thomas Tracy](#), 24 F.2d at 374. Thus, the shipping articles do not modify or limit Padilla's entitlement under general maritime law to overtime pay as part of his unearned wages.

C. Determining the Amount of Unearned Overtime Wages

Maersk argues that because “overtime was not guaranteed or required on the Maersk Arkansas, [Padilla] cannot prove the amount of overtime he would have earned” and summary judgment must be denied. (Def.'s Mem. 3-4.) However, Maersk's admission that it will include overtime in unearned wage calculations as an inducement for a seafarer to settle a Jones Act claim belies its contention that an assessment of rea-

sonably expected overtime is too speculative to make on summary judgment.^{FN15}

FN15. Maersk relies on two cases outside this Circuit for the proposition that overtime earnings are too uncertain for plaintiff to prove on summary judgment: [Griffin v. Oceanic Contractors, Inc.](#), 664 F.2d 36, 39-40 (5th Cir.1981), rev'd on other grounds, 458 U.S. 564, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982) (affirming district court's denial of plaintiff's request to include overtime as unearned wages because “[t]he actual amount of overtime was uncertain, and hence any inclusion of such would have been purely speculative”), and [Keefe v. American Pac. S.S. Co.](#), 110 F.Supp. 853, 856 (S.D.Cal.1953) (finding plaintiff not entitled to overtime he would have earned had he actually gone on voyage because “[a]ctual earning of overtime was an event which might or might not occur”). The Court finds these cases unpersuasive because an assessment of overtime earnings in this case is not unduly speculative.

[15] The Court finds that the amount of overtime is readily ascertainable and appropriately resolved on summary judgment. “Although the amount of recoverable damages is a question of fact, the measure of damages upon which the factual computation is based is a question of law.” [Oscar Gruss & Son, Inc. v. Hollander](#), 337 F.3d 186, 196 (2d Cir.2003) (McLaughlin, J.) (internal quotation marks and citation omitted). Therefore, the Court must first determine, as a matter of law, how to measure damages. Padilla argues that either (i) his average amount of overtime prior to injury or (ii) the amount of overtime pay his replacement man actually received until the end of voyage would be a proper measure of damages. The Court finds that Padilla's average weekly amount of overtime aboard the Maersk Arkansas prior to his injury is the proper measure of damages, since the

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amount of overtime a seaman can earn aboard the Maersk Arkansas is not predetermined under the CBA. Cf. [Flores, 47 F.3d at 1127](#) (finding that, since unearned tips were not predetermined and not paid by the employer, “the most principled way to calculate the tips [plaintiff] would have earned is to assume that [plaintiff]’s average weekly tips for the work he performed on each ship was the amount of tips he would have earned each week had he stayed on each ship”).

*630 Here, there is no genuine issue of fact as to the amount of overtime that Padilla performed prior to the onset of his injury. (See Pl.’s Mem. 8; O’Connell Decl. Ex. C.) There is also no factual dispute as to the date of Padilla’s discharge and the date the Maersk Arkansas’s voyage ended. (See Def.’s Opp’n 2; Berger Decl. ¶ 7; O’Connell Decl. Ex. B.) Therefore, there is no factual dispute as to the computation of damages in this case.

Padilla is entitled to recover the average weekly amount of three (3) hours of overtime each weekday and eleven (11) hours of overtime each weekend day and holiday at the applicable overtime rate of \$21.06 per hour from the date after his discharge until the ship’s voyage ended. For the period of November 7, 2006 until February 26, 2007, Padilla would have worked seventy-four (74) weekdays and thirty-eight (38) weekends/holidays but for his injury.^{FN16} This calculates to 222 hours of weekday overtime and 418 hours of weekend/holiday overtime. At \$21.06 per hour, Padilla would have earned a total of \$13,478.40 in overtime pay but for his injury. (See Pl.’s Mem. Ex. lb.)^{FN17} As Maersk has already paid Padilla base wages for this period at the rate set forth in the CBA and shipping articles, Padilla is entitled to recover an additional \$13,478.40 as unearned wages.

^{FN16}. Pursuant to Article II, Section 20, the Maersk Arkansas would have observed the following holidays: Veterans Day, Thanksgiving Day, Christmas, New Year’s Day, Martin Luther King, Jr. Birthday, and Presi-

dent’s Day. (O’Connell Decl. Ex. A. at 8.)

^{FN17}. Inexplicably, plaintiff’s moving brief sets forth a calculation of average overtime pay inconsistent with the Court’s assessment and with the amount that plaintiff initially requested from Maersk pursuant to a March 28, 2007 letter. (Compare Pl.’s Mem. 8-9 with Pl.’s Mem. Ex. lb.) Although the Court’s calculation of the number of weekdays, weekend days, and holidays during the relevant period, and average overtime for that period, differs from that set forth in plaintiff’s moving brief, the Court can discern no reason other than clerical error on the part of plaintiff’s counsel for this discrepancy. In addition, the Court notes that the amount calculated by the Court is within the amount of overtime paid to the replacement Chief Cook for the same period of time. (See Pl.’s Reply Ex.)

CONCLUSION

For the foregoing reasons, Padilla’s motion for summary judgment is GRANTED. The parties are ordered to appear before this Court for a pre-trial conference in courtroom 18B on June 25, 2009 at 10:00 a.m.

SO ORDERED.

S.D.N.Y., 2009.

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