UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MICHAEL KOZAK,

Plaintiff,

-against-

LIBERTY MARITIME CORPORATION, LIBERTY GLORY CORPORATION as the owners of the M/V LIBERTY GLORY,

Defendants.

MEMORANDUM & ORDER

20-CV-3684 (MMH)

MARCIA M. HENRY, United States Magistrate Judge:

Plaintiff Michael Kozak sued Defendants Liberty Maritime Corporation and Liberty Glory Corporation, seeking damages under the Jones Act, 49 U.S.C. § 30104, and the general maritime law of the United States, for injuries suffered while employed on the M/V Liberty Glory (the "Vessel"). (*See generally* Compl., ECF No. 1.)[1] Trial is scheduled to begin on April 15, 2024. The parties filed an amended joint pretrial order ("JPTO") on January 5, 2024. (ECF No. 49.) Before the Court are the parties' motions *in limine* to preclude certain evidence listed in the JPTO.[2] For the reasons set forth below, the parties' motions are **granted in part** and **denied in part**, and the Court **reserves decision** until trial with respect to several issues.

[1] All citations to documents filed on ECF are to the ECF document number and pagination in the ECF header unless otherwise noted.

[2] Plaintiff submitted an omnibus motion *in limine* (Pl. Mot., ECF No. 58) with 34 exhibits (ECF Nos. 58-1 through 58-34); a supplemental motion *in limine* (Pl. Supp. Mot., ECF No. 59) and its one exhibit (ECF No. 59-1); a memorandum of law (Pl. Mem., ECF No. 60); a second supplemental motion *in limine* (Pl. 2d Supp. Mot., ECF No. 64) and three exhibits (ECF Nos. 64-1 through 64-3); a corrected memorandum in opposition to Defendants' motion in limine (Pl. Opp., ECF No. 65); and a third supplemental motion *in limine* (Pl. 3d Supp. Mot., ECF No. 64) and two exhibits (ECF Nos. 64-1 through 64-2.)

I. BACKGROUND

Plaintiff alleges that on July 8, 2019, while employed as a seaman for Defendants, he was injured while working in the mess hall pantry. (JPTO, ECF No. 49 at 2.) The Vessel's captain assigned Plaintiff to clean under the Vessel's salad bar. (*Id.* at 3.) Plaintiff alleges that the cleaning assignment was improper because, at that time, the Vessel was experiencing heavy weather and severe rolling as it passed through a monsoon. (*Id.* at 3.) Plaintiff further alleges that he advised the captain that the salad bar unit was not in compliance with the food service code because it was installed too close to the floor and thus, required moving the salad bar in order to perform the cleaning. (*Id.* at 3.) As a result, Plaintiff asked that the cleaning be deferred for six days until the Vessel reached its destination. (*Id.*) The request was denied. (*Id.*) Accordingly, to perform the cleaning, Plaintiff proceeded to move the salad bar. (*Id.*) When the ship rolled towards him, he ruptured his biceps tendon. (*Id.*)

Plaintiff visited the Vessel's medical officer and was declared not fit for duty. (*Id.*) Plaintiff alleges that, during the six days the Vessel was en route to its destination, he was not taken off the ship and continued in a non-duty status. (*Id.*) During this time, Plaintiff was ordered to scrub walls and floors. (*Id.*) Plaintiff alleges that these additional cleaning assignments and the delay in obtaining treatment after the Vessel arrived at its destination aggravated his injuries and led to further consequential injuries. (*Id.* at 3–4.)

Defendants submitted four motions *in limine* (Def. Mot., ECF Nos. 50, 52, 54, 56) and supporting declarations with exhibits (O'Donnell Decls., ECF Nos. 51, 53, 55, 57); a memorandum in opposition to Plaintiff's motions (Def. Opp., ECF No. 61); and a supporting declaration (O'Donnell Opp. Decl. ECF No. 62) with its three exhibits (ECF Nos. 62-1 through 62-3.)

Among the issues to be tried to the jury are Plaintiff's claims that Defendants were negligent under the Jones Act; that the conditions of the Vessel were unseaworthy when he was ordered to clean the salad bar; and the damages, if any, to be awarded for Plaintiff's maintenance and cure. (*Id.* at 4.) Specifically, Plaintiff seeks compensation for past lost earnings, future lost earnings, pain and suffering, and loss of enjoyment of life. (*Id.* at 7–8.) Defendants deny negligence, contend that the Vessel was seaworthy, and argue that Plaintiff cannot prove that his injury was caused by cleaning the salad bar. (*Id.* at 4–5.)

Both parties have filed motions *in limine*. The Court heard oral argument on the motions. (Feb. 6, 2024 Tr., ECF No. 76; Feb. 15, 2024 Tr.; Apr. 3, 2024 Tr.).

II. LEGAL STANDARDS

"The purpose of a motion in limine is to allow the trial court to rule in advance of trial on the admissibility and relevance of certain forecasted evidence." *Collins v. Long Island R.R. Co.*, No. 20-CV-5451 (JMW), 2023 WL 4163140, at *1 (E.D.N.Y. June 23, 2023) (quoting *Jean-Laurent v. Hennessy*, 840 F. Supp. 2d 529, 536 (E.D.N.Y. 2011)). "'Evidence should be excluded on a motion in limine only when the evidence is clearly inadmissible on all potential grounds.'" *Ashley v. Civil*, No. 14-CV-5559 (NGG)(SMG), 2019 WL 1441124, at *2 (E.D.N.Y. Apr. 1, 2019) (quoting *United States v. Paredes*, 176 F. Supp. 2d 179, 181 (S.D.N.Y. 2001)). "The court's ruling on a motion in limine is preliminary and 'subject to change when the case unfolds . . . .'" *Id.* (quoting *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984)).

Relevant evidence is admissible unless otherwise provided by the Constitution, federal statute, the Rules of Evidence, or the Supreme Court. Fed. R. Evid. 402. Evidence is relevant if: "(a) it has any tendency to make a fact more or less probable than it would be without the

evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401; *D.R. by Rodriguez v. Santos Bakery, Inc.*, 675 F. Supp. 3d 355, 358–59 (S.D.N.Y. 2023). However, the court may exclude relevant evidence "if its probative value is substantially outweighed by a danger of unfair prejudice, confus[ion of] the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. "A District Court has 'broad discretion' to admit or exclude evidence under Rule 403." *Collins,* 2023 WL 4163140, at *4 (quoting *United States v. Yousef*, 327 F.3d 56, 121 (2d Cir. 2003)).

III. DISCUSSION

A. Dr. Ann Jarris

Plaintiff seeks to preclude excerpts of Dr. Ann Jarris's deposition testimony as designated in the JPTO, as well as portions of her case management files offered as exhibits. (Pl. Mot., ECF No. 58 at 1–8; Joint Ex. 61, ECF No. 58-24.)

Dr. Jarris provided remote medical consultation to the Vessel's captain immediately after Plaintiff's alleged injury and while Plaintiff was still on board the Vessel. (Jarris Dep. Tr., ECF No. 58–32 at 3, 7:17–9:7.) Dr. Jarris is board-certified in emergency medicine with additional training in wilderness medicine, telemedicine, and occupational health. (*Id.* at 4–5, 12:6–13, 13:24–14:16.) Dr. Jarris is also the CEO of Discovery Health, the medical services contractor for Defendants' employees that specializes in the commercial and maritime industry. (Joint Ex. 61, ECF No. 58-24 at 3.)

After his return to the United States, Plaintiff was scheduled for in-person treatment with a Discovery Health provider on or about July 25, 2019. Though he went to the provider's office for the scheduled appointment, he was not treated due to a problem with his insurance. (Joint Ex. 61, ECF No. 58-24 at 2.) According to Dr. Jarris's files, when Plaintiff was advised

about the insurance issue, he became verbally abusive to the staff. (Pl. Mot., ECF No. 58 at 1–8; Joint Ex. 61, ECF No. 58-24 at 2).

1. Deposition Testimony[3]

a. Jarris Dep. Tr. 61:19–62:15, 64:10–66:4, 67:11–68:2, 65:17

This disputed testimony relates to the July 25, 2019 office visit and efforts to obtain follow-up treatment for Plaintiff. Dr. Jarris testified that her personal knowledge regarding Plaintiff's case management in mid-July 2019 was based on discussions with ShaRonne Hanson, a Discovery Health nurse care manager and she learned from Hanson that a doctor with whom Plaintiff was scheduled for an appointment on July 25, 2019 "fired" him. Dr. Jarris testified that "she [Hanson] was told by the office" that Plaintiff screamed at office staff and that the treating doctor observed this behavior and "felt that there were grounds to fire him as a potential patient." That provider refused to schedule another appointment with Plaintiff.

Evidence of the delay in Plaintiff's treatment at Discovery Health's providers is relevant and probative to the issue of Defendants' negligence and specifically, whether Defendants' purported delay in providing Plaintiff treatment was the sole factor in aggravating Plaintiff's injury. However, these excerpts from Dr. Jarris's testimony are inadmissible hearsay under Rule 802, do not fall within any hearsay exceptions, and are unduly prejudicial to Plaintiff relative to their probative value under Rule 403.

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[3] Plaintiff also moves to exclude additional excerpts from Dr. Jarris's testimony that Defendants did not designate in the JPTO and do not intend to introduce. (*See* Pl. Mot., ECF No. 58 at 1–2, 6 (objecting to Jarris Dep. Tr. 60:2–15, 60:22–61:4, 69:2–8, 73:14–22); Def. Opp., ECF No. 61 at 1, 3 (agreeing not to introduce those excerpts); Feb. 15, 2024 Tr. at 13:17–14:9.) Accordingly, Plaintiff's motion *in limine* to preclude these portions of Dr. Jarris's testimony is **denied as moot**.

Accordingly, Plaintiff's motion to preclude the portions of Dr. Jarris's testimony describing Plaintiff as being "fired" and his conduct at the July 25, 2019 office visit (Jarris Dep. Tr. 61:19–62:15; 64:10–66:4; 67:11–68:2, 65:17) is **granted**.

b. Jarris Dep. Tr. 73:14–75:2

Plaintiff also seeks to preclude portions of Dr. Jarris's testimony regarding whether Dr. Pedro Monseratte, Plaintiff's treating orthopedic surgeon, would have recorded any concerns about delayed treatment in his treatment notes. (Pl. Mot., ECF No. 58 at 6–7.)

Plaintiff argues that this testimony should be excluded because there is no foundation to Dr. Jarris's experience, the testimony is speculative and may confuse the jury. (Pl. Mot., ECF No. 58 at 7.) Defendants do not object to withdrawing page 73, lines 14 through 22, but argue that the remaining testimony is admissible because Dr. Jarris is qualified to testify about the notations she would expect to see in another doctor's notes. (Pl. Opp, ECF No 61 at 3.)

Dr. Jarris's testimony regarding Dr. Monserrate's notes should be excluded. "In general, a treating physician may testify to 'opinions formed in the course of treatment without regard to the disclosure requirements of Rule 26(a)(2).'" *Olutosin v. Gunsett*, No. 14-CV-00685 (NSR), 2019 WL 5616889, at *5–7 (S.D.N.Y. Oct. 31, 2019) (quoting *Lewis v. Triborough Bridge*, No. 97- CIV-0607 (PKL), 2001 WL 21256, at *1 (S.D.N.Y. Jan. 9, 2001)). "In categorizing treating physicians' testimony as expert or lay, the key factor is not whether it is derived from the physician's treatment of the patient, but whether it is derived from the physician's specialized expertise." *Kaganovich v. McDonough*, 547 F. Supp. 3d 248, 276 (E.D.N.Y. 2021) (discussing amendments to FRE 701); *see also Ali v. Connick*, 11-CV-5297 (NGG)(VMS), 2016 WL 3002403, at *7 (E.D.N.Y. May 23, 2016) ("The key to what a treating physician can testify to without being declared an expert is based on his/her personal

knowledge from consultation, examination and treatment of the Plaintiff, 'not from information acquired from outside sources.'" (quoting *Motta v. First Unum Life Ins. Co.*, No. CV 09-3674(JS)(AKT), 2011 WL 4374544, at *3 (E.D.N.Y. Sept. 19, 2011)).

Here, Dr. Jarris's opinion about what Dr. Monseratte would or would not have written in his treatment notes is based on her specialized experience as a physician. As Plaintiff correctly notes, Dr. Jarris is trained in emergency medicine and wilderness medicine, not orthopedic surgery, and does not have the background or experience to know whether or how orthopedic surgeons would opine about delayed treatment. Second, Plaintiff did not timely disclose Dr. Jarris as an expert pursuant to Federal Rule of Civil Procedure 26(a)(2)(C), which requires Plaintiff to describe the subject matter on which Dr. Jarris is expected to testify and a summary of the facts and opinions to which Dr. Jarris is expected to testify. Fed. R. Civ. P. 26(a)(2)(C); *see also* Fed. R. Civ. P. 26 (a)(2)(D) (requiring such disclosure at least 90 days before trial).

Accordingly, Plaintiff's motion to preclude the portions of Dr. Jarris's testimony regarding her opinion of Dr. Monseratte's treatment notes is **denied as moot** (as to Jarris Dep. Tr. 73:14–22) and **granted** (as to Jarris Dep. Tr. 73:23–75:2).

2. Case Management File (Joint Ex. 61)

Plaintiff objects to six pages of documents from Dr. Jarris's case management file. (Pl. Mot., ECF No. 58 at 7.) Three documents (Bates DEF000145, DEF000146, and DEF000208) are emails between Dr. Jarris, Liberty's representative, and other Discovery Health employees discussing Plaintiff's conduct during the July 25, 2019 office visit. (Pl. Mot., Ex. 30, ECF No. 58–30 at 1–2, 4.) The remaining three documents (Bates DEF000205, DEF000207) are

case management notes summarizing the July 25, 2019 office visit. (Pl. Mot., Ex. 30, ECF No. 58–30 at 3, 5–6.)

Plaintiff argues that Dr. Jarris's notes stating that Plaintiff was "fired" when he was denied treatment, and that he was "screaming" and "threatening" are prejudicial. (Pl. Mot., ECF No. 58 at 7–8; Feb. 15, 2024 Tr. at 13:17–14:9) Plaintiff proposes redactions to these portions of the exhibit. (Joint Ex. 61A, ECF No. 58-25.) Defendants argue that these documents are an exception to the hearsay rule as business records pursuant to Rule 803(b)(6). (Def. Opp., ECF No. 61 at 4.)

The Court finds that Dr. Jarris's case management file and emails constitute business records under Rule 803(6), which 'favors the admission of evidence rather than its exclusion if it has any probative value at all.'" *Accely v. Consol. Edison Co. of New York, Inc.*, No. 19-CIV-5984 (DC), 2023 WL 3045795, at *5 (S.D.N.Y. Apr. 20, 2023) (quoting *United States v. Kaiser*, 609 F.3d 556, 574 (2d Cir. 2010)); *see also Penberg v. HealthBridge Mgmt.*, 823 F. Supp. 2d 166, 188 (E.D.N.Y. 2011) (finding that emails constituted a business record under Fed. R. Evid. 803(6) when the witness testified that he communicated about business matters through email). The Court accepts Plaintiff's proposed redactions to Joint Exhibit 61 for the same reasons as the preclusion of Dr. Jarris's deposition testimony.

Accordingly, Plaintiff's motion to preclude portions of Dr. Jarris's case management file is **granted**. Joint Exhibit 61A (ECF No. 58-26) will be the operative trial exhibit.

B. Dr. Leon Sultan (Def. Expert)

Plaintiff seeks to preclude portions of the expert report from Dr. Leon Sultan, Defendants' orthopedic expert. (Pl. Mot. ECF No. 58 at 8–9.) Specifically, Plaintiff objects to the report's statements that, when Plaintiff presented for treatment on July 25, 2019, he was

"noted to be screaming and threatening office staff" and "was then 'fired'" from the provider's office. (Sultan Report, ECF No. 58-34 at 1.) Plaintiff further objects to the report's statement that Plaintiff "admits to the use of performance enhancing products in regard to body building." (*Id.* at 3.) Defendants expressed their intent not to elicit testimony from Dr. Sultan regarding either topic. (Def. Opp., ECF No. 61 at 4; Feb. 15, 2024 Tr. 14:18–15:7.)

Accordingly, Plaintiff's motion to exclude these portions of Dr. Sultan's report and testimony is **denied as moot**.

C. Plaintiff's Marital Relations

Plaintiff seeks to preclude Defendants from offering evidence about Plaintiff's marital relations and arguments regarding same. (Pl. Mot., ECF No. 58 at 10–13; Pl. Mem., ECF No. 60 at 4.) In his deposition, Plaintiff was asked "[i]s there anything else that your injuries prevented you from doing in the ten months that you are home?" (Pl. Dep. Tr., ECF No. 58-22 at 3, 121:14–16.) In response to detailed questions from Defendants' former counsel, Plaintiff testified that his injuries affected his sex life and the frequency and manner in which he engaged in sexual relations with his wife. (Pl. Dep. Tr., ECF No. 58-22 at 3, 121:17–125:4.) Defendants intend to question Plaintiff regarding these claims.[4]

Plaintiff argues that testimony about his marital relations is irrelevant, improper character evidence, and prejudicial. (Pl. Mot., ECF No. 58 at 10–13; Pl. Mem., ECF No. 60 at 4; Feb. 15, 2024 Tr. 25:9–26:8.) Defendants argue that the testimony is relevant to establish

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[4] Defendants do not seek to question Plaintiff's wife regarding her intimate relations with Plaintiff. (Feb. 15, 2024 Tr. 28:18–21.)

the severity and extent of Plaintiff's injury and disability and to explain Plaintiff's voluntary decision not to return to work. (Def. Opp. ECF No. 61 at 6; Feb. 15, 2024 Tr. 26:14–28:9.)

Testimony regarding Plaintiff's marital relations may be relevant to a jury's assessment of Plaintiff's claimed damages of pain and suffering, loss of life's enjoyment, and lost wages. *See Dumitrescu v. Gen. Mar. Mgmt., Inc.*, No. 08-CIV-5461 (PAC), 2009 WL 4823945, at *3 (S.D.N.Y. Dec. 15, 2009) (upholding Jones Act jury award for future pain & suffering damages, including inability to enjoy life's pleasures, based on plaintiff's testimony that his injury affected his marital relations). The testimony is also relevant to show that Plaintiff may have had an incentive not to seek new employment after his torn biceps healed, thereby failing to mitigate any lost wages. However, Plaintiff stated that he will not elicit testimony or offer arguments regarding his marital relations to support any claimed pain and suffering. (Pl. Mot. ECF No. 58 at 10; Feb. 15, 2024 Tr. 25:9–10, 18–20; 26:2-8.) The relevance of the testimony is significantly decreased given Plaintiff's intentions, and the probative value of such evidence would be substantially outweighed by the danger of unfair prejudice. Fed. R. Evid. 403.

Accordingly, Plaintiff's motion to preclude Defendants from offering evidence about Plaintiff's intimate relationships is **granted**. Notwithstanding this conclusion, if Plaintiff testifies that his injuries negatively affected his marital relations, thereby reintroducing the issue to support his damages claims, Defendants may cross-examine Plaintiff regarding same.

D. U.S. Coast Guard Certificate of Inspection (Def. Ex. D1)

Plaintiff seeks to preclude the United States Coast Guard's ("USCG") Certificate of Inspection for the Vessel (Def. Ex. D1). (Pl. Mot. ECF No. 58 at 13.) The Certificate, dated February 8, 2016 and renewed annually, states that the Vessel "has been inspected and

certificated in accordance with the terms and conditions specified in the [USCG]'s alternate compliance program (ACP)." (Def. Ex. 1, ECF 58-2 at 1.)

Plaintiff argues that the Certificate is irrelevant and would confuse the jury because it does not specifically state that the Vessel's pantry area was inspected, nor would a witness testify regarding the Certificate, and it is otherwise unrelated to this case. (*Id.;* Feb. 15, 2024 Tr. 29:1–30:2; 30:10–13.) Defendants argue that the Certificate is relevant and admissible to the issues on trial. (Def. Opp. ECF No. 61 at 7; Feb. 15, 2024 Tr. 30:3–9; 30:14–18.)

As a threshold matter, Defendants do not specify *how* the Certificate will be introduced into evidence. Defendants concede that no personnel from the USCG will testify regarding the Vessel's inspection. (*See* Feb. 15, 2024 Tr. 30:4–6.) In their opposition, Defendants rely on *Al Qari v. Am. Steamship Co.*, No. 21-CV-10650, 2023 WL 5628583, at *6 (E.D. Mich. Aug. 31, 2023), in which a court found defense witness Captain Brian Hall's observations that the vessel at issue there complied with its USCG certificate of inspection to be relevant. Captain Hall is also the defense witness in this case. But it is unclear from Defendants' motion papers or arguments whether they intend to introduce the Certificate through Captain Hall or any other defense witness.

Accordingly, the Court **reserves decision** on Plaintiff's motion to exclude the Certificate. By April 11, 2024, Defendants shall file a letter clarifying how they intend to introduce the Certificate into evidence.

E. Prior Employment Records (Def. Exs. 2–6, 9, 11(a), 11(b))

Plaintiff seeks to preclude several letters related to Plaintiff's prior employment with other shipping companies. (Def. Exs. 2–6, 9, 11(a) & 11(b).)[5] Defense Exhibit 2 is a February 2013 letter from Maersk Lines, Ltd. ("Maersk"), Plaintiff's former shipping employer, to the Seafarers Appeals Board ("SAB") requesting a formal complaint against Plaintiff for improper conduct and deportment. Defense Exhibit 3 is an October 2013 letter from the SAB advising Plaintiff that the charges against him were sustained after an investigation and imposing sanctions. Defense Exhibits 4, 5, and 6 are warning letters from February 2013, June 2018, and April 2019, respectively, issued to Plaintiff from Maersk for complaints of inappropriate behavior. Defense Exhibit 9 consists of three documents: a 2011 written warning to Plaintiff from former employer Overseas Shipholding Group, Inc. ("OSG") regarding alleged incidents of Plaintiff's verbal abuse of fellow crewmembers; a 2012 letter terminating Plaintiff's employment at OSG for violation of company policy; and a 2012 determination from Florida's Unemployment System confirming that Plaintiff was discharged from OSG for violating company policy. Finally, Defense Exhibit 11(a) and 11(b) duplicate the 2011 written warning from OSG and the 2012 OSG termination letter in Defense Exhibit 9.

Plaintiff objects to these documents as hearsay, irrelevant, and improper character evidence. (Pl.'s Mot., ECF No. 58 at 14–15; Pl. Supp. Mot., ECF No. 59; Pl. 3d Supp. Mot., ECF No. 64 at 2; Feb. 15, 2024 Tr. 18:21–25; 31:7–32:22; 38:9–39:9). Defendants argue that

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[5] (Feb. 11, 2013 Maersk Ltr., ECF No. 58-4 (Def. Ex. 2); Oct. 24, 2013 SAB Ltr., ECF No. 58-6 (Def. Ex. 3); Feb. 6, 2013 Maersk Ltr., ECF No. 58-8 (Def. Ex. 4); June 12, 2018 Maersk Ltr., ECF No. 58-10 (Def. Ex. 5); Apr. 17, 2019 Maersk Ltr., ECF No. 58-12 (Def. Ex. 6); May 7, 2012 ADP Ltr., ECF No. 59-1 at 4 (Def. Ex. 9); Oct. 27, 2011 Overseas Ltr., ECF No. 64-1 (Def. Ex. 11(a); Apr. 8, 2012 Term Ltr., ECF No. 64-2 (Def. Ex. 11(b)).)

Exhibits 2–6, 11(a) and 11(b) are admissible business records and are relevant to rebut Plaintiff's claims for future lost wages. (Def. Opp. ECF No. 61 at 8–9; Feb. 15, 2024 Tr. 33:23–34:1; 39:10–25.) Defendants also argue that Exhibit 9 is admissible as a public record under Rule 803(8) and will be used for impeachment purposes only. (Def. Opp., ECF No. 61 at 14.)

The Court agrees with Plaintiff that the disciplinary letters in Exhibits 2–6, 11(a), and 11(b) are inadmissible in the defense case as character evidence under Rule 404(a) and that their "minimal relevance is substantially outweighed by the danger of prejudice, confusion of the issues, and undue delay." *Redd v. New York State Div. of Parole*, 923 F. Supp. 2d 393, 400 (E.D.N.Y. 2013) (citing Fed. R. Evid. 404(a) & 403). Plaintiff's character is not an essential element of any claims or defenses at issue in this case. *See id.* (citing *Zubulake v. UBS Warburg LLC*, 382 F. Supp. 2d 536, 541 (S.D.N.Y. 2005)). Further, Defendants appear to seek to admit the letters regarding Plaintiff's allegedly discriminatory, harassing, and verbally abusive behavior to show Plaintiff's propensity to commit such acts in future employment, which is also impermissible. Fed. R. Evid. 404(b) ("Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."). Defendants also attempt to offer the records to establish that Plaintiff's disciplinary history hindered his ability to find work, and even when he did work, his interpersonal relations with crewmembers decreased his quality of life and provided an incentive for him to return to shore. (Feb. 15, 2024 Tr. 39:10–25.) As noted, the records are more prejudicial than probative, and risk a mini-trial about the nature and circumstances of the disciplinary complaints and Plaintiff's responses to same. For these reasons, Defense Exhibits 2–6, 11(a), and 11(b) shall be excluded.

Because Defendants intend to produce Defense Exhibit 9 for impeachment purposes only, the Court reserves decision on Plaintiff's motion to preclude Exhibit 9. *Ashley,* 2019 WL 1441124, at *5.

Accordingly, Plaintiff's motion to preclude Defense Exhibits 2–6, 11(a) and 11(b) is **granted** and the Court **reserves decision** on Plaintiff's motion to preclude Defense Exhibit 9.

F. Boating Violations (Def. Exs. 7A, 7B)

Plaintiff seeks to preclude Defendants from offering two citations issued against Plaintiff on September 28, 2019 related to his use of his boat. (Pl. Mot., ECF No. 58 at 15–16; Def. Ex. 7A, ECF No. 58-14; Def. Ex. 7B, ECF No. 58-16.) Plaintiff argues that the exhibits are cumulative because he does not deny that he used the boat that day and asks the Court to defer ruling pending his testimony. (Feb. 15, 2024 Tr. 35:15–36:5; 36:25–37:8.) Defendants argue that the exhibits are relevant for impeachment purposes. (Def. Opp., ECF No. 61 at 11–13; Feb. 15, 2024 Tr. 36:7–17; 36:21–37:23.)

Plaintiff testified at his deposition that, after his injury, he was unable to perform the physical labor necessary to use his boat. (Kozak Dep. Tr., ECF No. 62–1 at 3, 117:5–22.) However, the boating citations issued three months after his injury reflect that he did use the boat. Defendants are entitled to impeach Plaintiff with evidence of his physical activity if he testifies that he never engaged in any such activity post-injury. And, unlike Plaintiff's marital relations, testimony about Plaintiff's use of his boat to rebut Plaintiff's inconsistent statements about the extent of his injury is highly probative and risks no unfair prejudice against him.

Accordingly, the Court **reserves decision** on Plaintiff's motion to preclude the introduction of the citations except for purposes of impeachment. *Ashley,* 2019 WL 1441124, at *5.

G. Dr. John King (Def. Ex. 8)

Plaintiff objects to Defendants' redactions to the expert report of Dr. John King, who performed an orthopedic evaluation of Plaintiff in August 2021. (Pl. Mot. ECF No. 58 at 16; King Report (Def. Ex. D8), ECF No. 58-18.) Defendants have agreed to withdraw the report. (Def. Opp., ECF No. 61 at 14; Feb. 15, 2024 Tr. 15:8–16:14.) Accordingly, Plaintiff's motion to preclude Dr. King's report is **denied as moot**.

H. Non-Maritime Industry Regulations and Standards (Pl. Exs. 2, 3, 4)

Defendants seek to preclude Plaintiff's proffered evidence of non-maritime regulations and standards. (Def. Mot., ECF No. 50 at 2–3.) Specifically, Plaintiff seeks to introduce: (1) excerpts from the ServSafe Manager Manual ("ServSafe Manual") published by the National Restaurant Association (Pl. Ex. 2, ECF No. 50-1); (2) excerpts from the 2017 U.S. Food and Drug Administration ("FDA") Food Code (Pl. Ex. 3, ECF No. 50-2); and (3) provisions from the New York State Department of Health ("NYSDOH") Sanitary Code, 10 N.Y.C.R.R § 14-1.101, related to installing equipment in food establishments (Pl. Ex. 4, ECF No. 50-3).

Defendants argue that the ServSafe Manual, the Food Code, and the NYSDOH Sanitary Code are land-based restaurant standards and regulations that the USCG has not adopted and thus, are irrelevant and will confuse the jury. (Def. Mot., ECF No. 50 at 2–3; Feb. 15, 2024 Tr. 49:1–18.) Defendants also argue that while these standards and regulations purportedly show that Defendants were obligated to raise all floor-mounted appliances six inches above the floor—the so-called "six-inch rule"—no such requirement exists. (Feb. 15, 2024 Tr. 42:2–43:22.)

Plaintiff argues, and the Court agrees, that the ServSafe Manual is relevant to establish Plaintiff's knowledge of the safety standards based on his training and experience and his

experience with the Vessel's adherence to the standards. (Pl. Opp., ECF No. 65 at 3; Feb. 15, 2024 Tr. 45:3–24.) Specifically, Plaintiff testified that he learned the "six-inch rule" from his training on ServSafe management and that this requirement is stated in the ServSafe Manual. (Kozak Dep. Tr., ECF No. 63-8 at 6, 40:5–41:6; Pl. Ex. 2, ECF No. 50-1 at 13 ("Put floor-mounted equipment on legs at least six inches (15 centimeters) high, as shown in the photo below. Another option is to seal it to a masonry base.").) While Defendants argue that the ServSafe Manual is not binding on the Vessel or the industry generally, "the Court may consider non-mandatory authorities for the purpose of determining negligence." *Goss v. Sealift Inc.*, No. 19-CV-5123 (CLP), 2024 WL 670405, at *15 (E.D.N.Y. Jan. 17, 2024) (citing *Matzkow v. United New York Sandy Hook Pilots Ass'n*, No. 18-CV-2200 (RER), 2022 WL 79725, at *8 (E.D.N.Y. Jan. 7, 2022)). Accordingly, the ServSafe Manual is admissible.

However, the Court also agrees with Defendants that the exhibit's probative value is substantially outweighed by the risk of confusing the issues in this case, at least as Plaintiff intends to introduce it—in other words, as an entire chapter from the ServSafe Manual. Plaintiff need not present the jury with the entire contents of the Manual; the relevant provision is three lines long and is accompanied by two photographs that Defendants do not seriously contest. Therefore, assuming that Plaintiff proffers the ServSafe Manual at trial,[6] Plaintiff shall limit Exhibit 2 to the identifying cover pages and the page containing the relevant provision regarding the "six-inch rule."

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[6] Neither party raises the question of how Plaintiff intends to overcome the prohibition against admitting hearsay evidence, as the ServSafe Manual is being offered for its truth. *See* Fed. R. Evid. 801, 802. The parties shall be prepared to discuss this issue at a pretrial conference.

Finally, while the Court makes similar relevance findings as to the FDA Food Code and the NYSDOH Sanitary Code, the exhibits' probative value is substantially outweighed by the risk of needlessly presenting cumulative evidence. *See Carmody v. ProNav Ship Mgmt., Inc.*, 224 F.R.D. 111, 115–16 (S.D.N.Y. 2004) (excluding one doctor's letter as cumulative where another doctor's letter included same information). For example, the ServSafe manual incorporates the FDA Food Code, which states in relevant part: "floor-mounted equipment that is not easily movable shall be sealed to the floor or elevated on legs that provide at least a 15 centimeter (6 inch) clearance between the floor and the equipment." (Pl. Ex. 3, ECF No. 50-1 at 2.) The NYSDOH similarly states, "Equipment, unless easily movable, is to be . . . (1) sealed to the floor; (2) installed on a raised platform of concrete or other smooth masonry, in a way that meets all the requirements for sealing or floor clearance; or (3) elevated on legs to provide at least a six-inch (15.2-centimeter) clearance between the floor and the equipment." (Pl. Ex. 4, ECF No. 50-3 at 2 (10 N.Y.C.R.R § 14-1.101(a)).) Because the Court will admit the ServSafe Manual containing substantially similar language, the FDA Food Code and the NYSDOH Sanitary Code are unnecessary.

Accordingly, Defendants' motion in limine to exclude evidence of non-maritime industry regulations and standards is **granted in part and denied in part**. Assuming other evidentiary hurdles are overcome, the ServSafe Manual (Pl. Ex. 2) is admitted and the FDA Food Code and NYSDOH Sanitary Code (Pl. Exs. 3–4) are excluded.

I. Dr. Thomas LaPorta

Defendants seek to preclude the testimony of Dr. Thomas LaPorta, Plaintiff's treating orthopedist, regarding Dr. Monserrate's treatment on Plaintiff's injured bicep. (Def. Mot. ECF No. 52 at 6–9; Feb. 15, 2024 Tr. 51:2–15.)

Defendants argue that the testimony is improper because Dr. LaPorta treated Plaintiff 2.5 years after the incident, did not issue an expert report, and did not treat the bicep himself. (Def. Mot., ECF No. 52 at 2–3.) Defendants further argue that Plaintiff's Rule 26(a)(2) disclosures for Dr. LaPorta list only general areas of expected testimony and do not mention biceps at all. (*Id.* at 4; Pl. R. 26 Discl. (LaPorta), ECF No. 57-3.) Defendants also argue that Dr. LaPorta's testimony would be cumulative because Dr. King, Plaintiff's orthopedic expert, will offer expert opinion testimony about Plaintiff's injuries including his left biceps tendon. (Def. Mot., ECF No. 52 at 9.)

Plaintiff argues that Dr. LaPorta treated Plaintiff's additional consequential injuries to his elbow, shoulder, and wrist and learned about Plaintiff's medical history and how the incident at issue affected his current conditions. (Pl. Opp., ECF No. 65 at 11; Feb. 15, 2024 Tr. 51:25–52:14; 53:4–8.) Plaintiff also asserts that Dr. LaPorta will not criticize previous treatments or surgeries. (Pl. Opp., ECF No. 65 at 12; Feb. 15, 2024 Tr. 51:16–24.)

"'Where the Rule 26 disclosure is lacking, [a treating] physician may still testify in limited fashion, solely as to that information the physician acquired through observation during treatment and limited to the facts obtained during treatment.'" *Rodriguez v. Vill. of Port Chester*, 535 F. Supp. 3d 202, 214 (S.D.N.Y. 2021) (quoting *Manzone v. Wal-Mart Stores*, Inc., No. 17-CV-277 (SIL), 2020 WL 5411483, at *7 (E.D.N.Y. Sept. 9, 2020)). As stated in the JPTO and at the pretrial conference, Plaintiff intends to present Dr. LaPorta's entire videotaped deposition testimony. (JPTO, ECF No. 49 at 16; Apr. 5, 2024 Tr. 14:22–24.) Defendants' motion attaches one page of Dr. LaPorta's deposition testimony and fails to object to specific lines of deposition testimony. (O'Donnell Decl. Ex. B, ECF No. 53-2; *see generally* Def. Mot., ECF No. 52.) No party offers the full transcript for the Court's review. The limited

testimony described in Defendants' brief makes it difficult for the Court to determine on the papers the scope of the testimony to which Defendants object and whether that testimony is cumulative to Dr. King's testimony.

The Court therefore **reserves decision** on Defendant's motion related to Dr. LaPorta's testimony. If Defendants seek to supplement this motion with more specific objections for the Court's decision, they must do so by April 11, 2024.

J. Captain Joseph Ahlstrom (Pl. Expert)

Captain Joseph Ahlstrom is Plaintiff's marine liability expert. (JPTO, ECF No. 49 at 13.) Both parties make motions *in limine* regarding the scope of Captain Ahlstrom's trial testimony. (Def. Mot., ECF No. 54; Pl. Notice, ECF No. 68.)

Federal Rule of Evidence 702 provides that "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise" if a proponent demonstrates by a preponderance that:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is product of reliable principles and methods; and (d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

Fed. R. Evid. 702. The Court must ensure that the expert testimony is both reliable and relevant. *Goss*, 2024 WL 670405, at *5 (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999)). "The expert may not 'invade the province of the court to determine the applicable law' nor may the expert 'usurp the role of the jury in applying that law to facts' through his expert opinions." *Id.* (quoting *FAA v. Landy*, 705 F.2d 626, 632 (2d Cir. 1988). *cert denied*, 464 U.S. 895 (1983) and *United States v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991)). "Prior to permitting a person to testify

as an expert under Rule 702, the court must make the following findings: (1) the witness is qualified to be an expert; (2) the opinion is based upon reliable data and methodology; and (3) the expert's testimony on a particular issue will "assist the trier of fact." *Lane v. Am. Airlines, Inc.*, No. 18-CV-6110 (MKB), 2024 WL 1200074, at *4 (E.D.N.Y. Mar. 20, 2024) (citing *Nimely v. City of New York*, 414 F.3d 381, 396–97 (2d Cir. 2005)).

1. Testimony Regarding Plaintiff's Intentions

Defendants seek to preclude Captain Ahlstrom's testimony regarding his characterizations of Plaintiff's intentions and the sequence of events when Plaintiff lifted the salad bar immediately before his injury. (Def. Mot., ECF No. 54 at 1; Feb. 15, 2024 Tr. 53:22–54:1.)

Captain Ahlstrom is a retired United States Navy Reserve Captain (Ahlstrom C.V., ECF No. 55-1 at 6) and has commanded six separate merchant ships (Ahlstrom Report, ECF No. 55-1 at 9). He graduated with his Bachelor of Science in Marine Transportation from State University of New York ("SUNY") Maritime in 1982 and with his Master of Science in Transportation Management from SUNY Maritime in 2000. (Ahlstrom C.V., ECF No. 55-1 at 6.) Captain Ahlstrom is a professor at SUNY Maritime in the Marine Transportation department and has been teaching for 20 years. (Ahlstrom Report, ECF No. 55-1 at 9.) Captain Ahlstrom created a course where he "teache[s] the elements of Safety Management, review[s] the [International Safety Management] Code, and discuss[es] Case Studies to identify Non Conformities and probable Corrective Action." (*Id.*)

In preparing his report, Captain Ahlstrom reviewed Plaintiff's deposition testimony, Captain John Merrone's depositions, Plaintiff's medical summary case, and the International Safety Management Code 2018, among other documents. (*Id.* at 9–10.) Upon this review, he

concludes that "the injury sustained by Mr. Kozak . . . was not due to his negligence." (*Id.* at 10.) In the Report, Captain Ahlstrom narrates the sequence of events leading up to Plaintiff's injury and opines on Plaintiff's state of mind. For example, Captain Ahlstrom states that "[b]efore moving the salad bar [Plaintiff] was performing a risk analysis to determine if the appliance was bolted down and determine its weight." (*Id.*) He also asserts that "It appears to me that [] Kozak was ascertaining" if it would have been safer and easier to slide the salad bar coolers when he got injured. (*Id.* at 12.) Captain Ahlstrom further says that "[t]here was no intention by [] Kozak to lift the salad bar alone, only move it for cleaning purposes." (*Id.* at 13.)

Defendants argue that it is the jury's role to determine what happened when Plaintiff was moving the salad bar and experts cannot opine about an individual's state of mind. (Def. Mot., ECF No. 54 at 3.) Plaintiff argues that Captain Ahlstrom's testimony was based upon his review of the evidence in the record and that he will only rely on evidence in the record. (Pl. Opp. ECF No. 65 at 14; Feb. 15, 2024 Tr. 54:5–55–1.)

The Court excludes Captain Ahlstrom's testimony regarding Plaintiff's state of mind or intentions when he moved the salad bar immediately before his injury. "Opinions concerning state of mind are an inappropriate topic for expert opinion," *Sec. & Exch. Comm'n v. Am. Growth Funding II, LLC*, No. 16-CV-828 (KMW), 2019 WL 1772509, at *1 (S.D.N.Y. Apr. 23, 2019), and "[n]o expert can opine on an actor's subjective intent," *In re Terrorist Attacks on Sept. 11, 2001*, No. 03-MD-01570 (GBD)(SN), 2023 WL 3116763, at *6 (S.D.N.Y. Apr. 27, 2023). This is because "experts are not percipient witnesses to facts, and they cannot offer factual narratives in the form of expert opinion that would displace the role of the

factfinder." *In re M/V MSC FLAMINIA*, No. 12-CV-8892 (KBF), 2017 WL 3208598, at *2 (S.D.N.Y. July 28, 2017).

Similarly, the Court excludes the portions of Captain Ahlstrom's report that merely recite Plaintiff's actions in conducting the deep cleaning that allegedly led to his injury. These recitations are "inappropriate for experts to act as a vehicle to present a factual narrative of interesting or useful documents for a case, in effect simply accumulating and putting together one party's story" and expressly prohibited. *Hart v. BHH, LLC*, No. 15-CV-4804, 2018 WL 3471813, at *6 (S.D.N.Y. July 19, 2018) (citing *Scentsational Techs., LLC v. Pepsi, Inc.*, 2018 WL 1889763, at *4 (S.D.N.Y. Apr. 18, 2018)).

Accordingly, Defendants' motion to preclude Captain Ahlstrom from testifying about Plaintiff' state of mind and what happened when he lifted the salad bar, as set forth in Defendants' motion (ECF No. 54 at 2), is **granted**.

2. Testimony Regarding Safety Regulations

Plaintiff requests to supplement the JPTO to permit Captain Ahlstrom to testify that Defendants' alleged failure to meet safety standards in the Vessel's gallery kitchen and to implement such measures in its safety management system ("SMS") is a violation of 33 C.F.R. § 96.230. (Pl. Notice, ECF No. 68.)

Plaintiff argues that the SMS and 33 C.F.R. § 96.230 are relevant regulations to the establish Defendants' negligence and the Vessel's seaworthiness. (Feb. 6, 2024 Tr. 6:3–12.) Defendants argue that Captain Ahlstrom may not testify that Defendants violated any regulations because his expert report does not disclose any such opinion or even mention regulations. (ECF No. 69 at 2; Feb. 6, 2024 Tr. 9:13–25.) The Court agrees.

Captain Ahlstrom's expert report discusses the ISM Code and states that in reaching his opinion "it is necessary to be familiar with 2 sections of the [ISM] Code that are involved in this injury". (Ahlstrom Report, ECF No. 55-1 at 13–14.) "The ISM was adopted as part of the International Convention for the Safety of Life at Sea (SOLAS) and was implemented in the United States through 42 U.S.C. §§ 3201–3205, and by the U.S. Coast Guard regulations set out in 33 C.F.R. Part 96." *Goss*, 2024 WL 670405, at *15. The ISM requires each vessel to create and implement an SMS to "[p]rovide for safe practices in vessel operation" and "establish and implement safeguards against all identified risks." *Id.* (quoting 33 C.F.R. §§ 96.230(a)(b)). "The ISM does not impose additional duties in this case, but it can help the court or a jury to understand an existing duty under the law; the Court may consider non-mandatory authorities 'for the purpose of determining negligence.'" *Matzkow*, 2022 WL 79725, at *8 (quoting *Soliman v. Maersk Line Ltd.*, 235 F. Supp. 3d 410, 420 (E.D.N.Y. 2017)).

However, Captain Ahlstrom may not testify that Defendants' SMS is a violation of 33 CFR § 96.230. "The expert's report operates to limit the scope of the testimony that can be elicited from the expert[] [and] opinions that are not disclosed in the expert's report cannot be offered." *Camarata v. Experian Info. Sols., Inc.*, No. 16-CIV-0132 (AT)(HBP), 2018 WL 1738335, at *1 (S.D.N.Y. Mar. 5, 2018) (collecting cases). Captain Ahlstrom's report does conclude or state any opinions about whether Defendants' failure to meet safety standards on the Vessel and to implement such measures in its SMS is a violation of 33 C.F.R. § 96.230. Even if Captain Ahlstrom's report contained those opinions, "[i]t is not for witnesses to instruct the jury as to applicable principles of law, but for the judge." *Golden v. OSG Ship Mgmt., Inc.*, No. 14-CV-06636 (CRK), 2017 WL 11454726, at *2 (S.D.N.Y. Oct. 12, 2017) (quoting *Marx & Co., Inc. v. Diners' Club Inc.*, 550 F.2d 505, 509–10 (2d Cir. 1977)). Further,

"[s]tatements opining on a causal connection between Defendants' acts or omissions and Plaintiff's injury would encroach on the role of the jury to apply fact to law." *Id.* at *3; *see also U.S. Commodity Futures Trading Comm'n v. Moncada*, No. 12-CIV-8791 (CM), 2014 WL 2945793, at *4 (S.D.N.Y. June 30, 2014) (quoting *Highland Capital Mgmt. L.P. v. Schneider*, 551 F. Supp. 2d 173, 182–83 (S.D.N.Y. 2008)) (expert cannot give testimony stating ultimate legal conclusions).

Accordingly, Plaintiff's motion to permit Captain Ahlstrom to testify about whether Defendants violated the ISM Code or related federal regulations is **denied**.

K. "Speculative" Theories

Defendants seek to preclude Plaintiff from advancing three "speculative" theories asserted in the JPTO. (Def. Mot., ECF No. 56.) First, Plaintiff asserts that the rolling of the ship placed undue stress on his arm, rupturing his biceps tendon. (Def. Mot., ECF No. 56 at 1.) Second, Plaintiff argues that the captain's order for Plaintiff to scrub walls and floors after lifting the salad bar aggravated his injured arm. (Def. Mot., ECF No. 56 at 1.) Third, Plaintiff asserts that the ship could have and should have been put into port much sooner than it did, which would have reduced the extent of Plaintiff's injury. (Def. Mot., ECF No. 56 at 1.)

Defendants argue that Plaintiff should not be able to advance any of these theories because they each require expert testimony to establish causation and are speculative and prejudicial. (Def. Mot., ECF No. 56 at 3; Feb. 15, 2024 Tr. 56:6–21, 58:8–20.) Plaintiff argues that he will testify about how he injured his arm and aggravated the injury, and about his beliefs on what could have delayed his treatment. (Pl. Opp. ECF No. 65 at 16, 22; Feb. 15, 2024 Tr. 57:22–58:2, 59:4–21, 60:4–61:2.)

"If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701. "In other words, layperson testimony is not permitted when the subject-matter 'is presumed not to be within the common knowledge and experience' of the jury." *Duchnowski v. Cnty. of Nassau*, 416 F. Supp. 3d 179, 181 (E.D.N.Y. 2018) (quoting *Fane v. Zimmer, Inc.*, 927 F.2d 124, 131 (2d Cir. 1991)). Further, a fact witness may testify to matters which the witness has personal knowledge and for which a foundation has been laid. Fed. R. Evid. 602. "Where the causal relationship between the defendant's act and the injury suffered by the plaintiff is within the knowledge, experience, and observation of a layperson, expert testimony is not required." *Duchnowski*, 416 F. Supp. 3d at 181 (quoting *Jimenez v. Supermarket Serv. Corp.*, No. 01-CV-3273, 2022 WL 662135, at *4 (S.D.N.Y. Apr. 22, 2002) (collecting cases)).

Plaintiff certainly has sufficient personal knowledge to testify about the effects on his body when he attempted to conduct specific activities while onboard the Vessel. For example, he testified that "I was beginning to lift the machine, and just as I was moving it, the ship took a hard roll . . . and that's when I felt my arm shred and I just jumped up like, you know, in pain and went to get ice." (Pl. Dep. Tr., ECF No. 63-8 at 14, 131:19–25.) Plaintiff's testimony includes his "'own perceptions, including the physical and emotional effect' Plaintiff experienced at certain times." *Mercado v. Dep't of Corr.*, No. 16-CV-01622-VLB, 2019 WL 625697, at *2 (D. Conn. Feb. 14, 2019) (citing *Coleman v. Tinsley*, No. 1:10-cv-327, 2012 WL 728210, at *6 (N.D. Ind. Mar. 6, 2012)). Plaintiff similarly has personal knowledge of the physical effect of scrubbing the walls and floor after his injury, including any pain or

discomfort he may have felt at the time. *Duchnowski*, 416 F. Supp. 3d at 182 ("Certainly, some of the injuries and limitations alleged by Plaintiff are of the sort that are within the common knowledge of the jury and are appropriate subject of Plaintiff's testimony.") Importantly, Plaintiff states he will not argue that being ordered to scrub the walls and floors *caused* his injury; rather, he will testify that performing the tasks were painful. (Pl. Opp. ECF No. 65 at 21–22.) Plaintiff therefore may testify regarding the facts of his injury and any effects he may have felt on his injured arm from further activity on the Vessel.

Plaintiff may not, however, testify about causation—*i.e.*, whether the forces during the rolling of the ship *caused* his injury and whether porting the vessel sooner could have reduced his injury. Plaintiff's testimony regarding causation is improper because these issues require scientific, technical or other specialized knowledge which Plaintiff lacks. *Mercado*, 2019 WL 625697, at *3. Additionally, only an expert can opine on whether a delay in porting worsened symptoms. *See Kaganovich*, 547 F. Supp. 3d at 277.

Accordingly, Defendants' motion *in limine* is **granted in part**. Plaintiff may testify about the effect on his body when the shipped rolled while he lifted the salad bar, and later when he scrubbed the walls and floors. Plaintiff may not testify about whether the rolling of the ship caused his injury or whether the delay in porting could have aggravated his injury.

L. Corrective Action Request Form (Joint Ex. JT-19S)[7]

Defendants seek to redact portions of a July 9, 2019 Corrective Action Request Form describing the circumstances that led to Plaintiff's injury—i.e., that he lifted the salad bar

[7] Defendants filed a supplemental motion in limine regarding Joint Exhibit 19 (Def. 2d Mot., ECF No. 81) and its two exhibits (ECF Nos. 81–1 through 81–2.) Plaintiff filed their opposition to this

cooler alone. (Def. 2d Mot., ECF No. 81 at 1; Joint Ex. 19, ECF No. 81–1). In addition to describing the incident and injury, the form also lists corrective actions taken on the Vessel to avoid similar incidents, such as lifting the salad bar cooler six inches from the floor. (Joint Ex. 19, ECF No. 81–1.)

Defendants argue that the Corrective Action Request Form contains inadmissible evidence of subsequent remedial measures pursuant to Rule 407 and propose a version of the form which redacts these measures. (Def. Joint Ex. 19a (proposed), ECF No. 81–2.) Plaintiff argues that Rule 407 does not apply because the exhibit is a work order and not a measure that was actually taken. (Pl. 2d Opp., ECF No. 83 at 5.) Plaintiff further argues that the document will be used for impeachment purposes, to refute the claim that Plaintiff was contributorily negligent, and is relevant towards Defendants' claim of due care. (*Id.* at 7–9.) Plaintiff further argued that the document will be used to rebut the USCG Certificate of Inspection (Def. Ex. D1) and Defendants' theory that the Vessel passed inspection and therefore was seaworthy. (Apr. 3, 2024 Tr. 34:19–35:12.) Regardless of the Court's ruling on Defendants' proposed redactions, Plaintiff proposes his own redacted version of the exhibit. (Pl. 2d Opp., ECF No. 83 at 11; Pl. Joint Ex. 19 (proposed), ECF No. 83-1.) Plaintiff further argues that additional photos of the salad cooler and ice cream cooler, which are depicted as six inches off the floor, should be included as examples of the corrective measures described in the corrective action form. (Pl. 2d Supp. Opp., ECF No. 85.)

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motion (Pl. 2d Opp., ECF No. 83) and its two exhibits (ECF Nos. 83-1 & 83-2) and a supplemental opposition (Pl. 2d Supp. Opp., ECF No. 85). Defendants filed a reply (Def. Reply, ECF No. 87.)

"When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove . . . negligence; culpable conduct; a defect in a product or its design; or a need for a warning or instruction." Fed. R. Evid. 407. "The prohibition against using evidence of subsequent remedial measures is based on the policy of not wanting to discourage people from taking steps to improve safety." *D'Nelson v. Costco Wholesale Corp.*, No. 03-CV-219 (CLP), 2007 WL 914311, at *4 (E.D.N.Y. Mar. 23, 2007) (citing *Dusenbery v. United States*, 534 U.S. 161, 172 (2002)). The Court may, however, admit evidence of subsequent remedial measures "for another purpose, such as impeachment or—if disputed—proving ownership, control, or the feasibility of precautionary measures." Fed. R. Evid. 407.

Here, the Corrective Action Request Form clearly recommends remedial measures to address the conditions that existed in the Vessel's gallery area before Plaintiff's injury. Specifically, the exhibit states that "work has been scheduled to raise the cooler and the ice cream freezer off the deck," that "the salad bar cooler and ice cream coolers were raised off the deck," and that with "the new raised platforms . . . the crew will be able to clean underneath the coolers without moving them." (Joint Ex. 19, ECF No. 81–1.) These statements "can be considered evidence of subsequent remedial measure since [they speak] to corrective action that should be taken following the incident." *Collins,* 2023 WL 4163140, at *2. As a result, such evidence may likely lead to prejudice and confusion under Rule 403. *Bak v. Metro-N. R. Co.*, No. 12-CIV-3220 (TPG), 2015 WL 2213569, at *1 (S.D.N.Y. May 8, 2015).

The Court has reviewed both parties' proposed redactions to the exhibits and finds that Defendants' proposed redactions remove the language about the remedial and corrective

actions and will limit any potential prejudice or confusion by the jury.[8] The Court also agrees with Plaintiff that the phrase "Root cause: crew negligence" should be redacted from the exhibit because the language may confuse the jury, an outcome that Rule 407 was enacted to prevent. *D'Nelson,* 2007 WL 914311, at *5. "Rule 407, however, does not preclude the admission of evidence . . . for the purposes of impeachment or to rebut an affirmative defense of contributory negligence." *Baumgart v. Transoceanic Cable Ship Co.*, No. 01-CIV-5990 (LTS)(HBP), 2003 WL 22520034, at *3 (S.D.N.Y. Nov. 7, 2003) (quoting *Pitasi v. Stratton Corp.*, 968 F.2d 1558, 1560–61 (2d Cir. 1992)). Therefore, the Court reserves ruling for trial on the admissibility of the unredacted exhibit for the purposes of impeachment or rebuttal purposes. *Id.*

Accordingly, Defendants' motion to redact Joint Exhibit 19 is **granted in part** and the exhibit shall be redacted consistent with this Order. The Court **reserves decision** on the exhibit's admissibility for impeachment or rebuttal purposes. *Baumgart,* 2003 WL 22520034, at *3.

M. Prejudgment Interest

The parties jointly seek a ruling whether the Court or the jury should determine pre-judgment interest if the jury awards compensation to Plaintiff. (ECF Nos. 77, 84.) The parties agree that as a matter of sound trial management, their preference is for the Court to decide. (ECF No. 84.) The Court agrees. "To make an injured party whole, pre-judgment interest should be awarded in admiralty cases absent exceptional circumstances." *Jones v.*

[8] Therefore, Plaintiff's motion to admit the photographs referenced in the 'Corrective Action' section is **denied** because they depict the remedial measures described in the Corrective Action Request Form.

Spentonbush-Red Star Co., 155 F.3d 587, 593 (2d Cir. 1998) (citing *City of Milwaukee v. Cement Div., Nat'l Gypsum Co.*, 515 U.S. 189, 195 (1995)). "Where a plaintiff has recovered a single, non-apportioned award under the Jones Act and the doctrine of unseaworthiness, a court may award prejudgment interest on the award of past damages." *Golden*, 2018 WL 9945194, at *1 (collecting cases). Based on the claims in this action, the Court **grants** the parties' request and will schedule briefing for any pre-judgment interest award only if the jury awards damages for lost wages.

IV. CONCLUSION

For the foregoing reasons, the parties' motions in limine are **granted in part** and **denied in part**, with rulings on certain questions **reserved** until trial. The Court's prior directive regarding the joint pretrial order at ECF No. 49 is amended as follows: by Thursday, April 11, 2024 at 5:00 p.m., the parties shall confer and shall file an amended joint pretrial order consistent with the rulings in this Order.[9] The Court will address any remaining issues at the telephone conference scheduled for Friday, April 12, 2024 at 12:00 p.m.

SO ORDERED.

Brooklyn, New York
April 10, 2024

/s/Marcia M. Henry
MARCIA M. HENRY
United States Magistrate Judge

[9] For example, the parties shall clearly delineate which exhibits are being offered solely for impeachment purposes.