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DISTRICT COURT OF GUAM
TERRITORY OF GUAM

ESTHER MARGARITA LIMA SUAREZ VIUDA DE YANG, <i>et al.</i>)	CIVIL CASE NO. 13-00015
)	
Plaintiffs,)	
)	
vs.)	REPORT AND RECOMMENDATION
)	
MAJESTIC BLUE FISHERIES, LLC, a Delaware Limited Liability Company, and DONGWON INDUSTRIES CO., LTD, a Corporation incorporated under the laws of Korea,)	
)	
Defendants.)	
_____)	

The court heard the Defendant Dongwon Industries Co., Ltd.’s Motion to Dismiss and Compel Arbitration and Majestic Blue Fisheries, LLC’s Joinder to Dongwon’s Motion to Dismiss and Compel Arbitration on October 7, 2014. At the conclusion of the hearing, the court took the motions under advisement. After having reviewed the memoranda in support and in opposition to the motions, the replies to the opposition, and the arguments by the parties, the court submits its decision in this Report and Recommendation.

BACKGROUND

On November 2, 2013, Defendant Dongwon Industries Co., Ltd. (hereinafter referred to as Dongwon) filed its Motion to Dismiss and Compel Arbitration. (*See* ECF No. 38). Plaintiffs filed their opposition on December 13, 2013. (*See* ECF No. 45). On January 10, 2014, Defendant Dongwon filed its Reply to the Opposition. (*See* ECF No. 51).

On August 8, 2014, the court, having previously issued its Findings of Fact and Conclusions of Law in *In the Matter of Majestic Blue Fisheries, LLC, as Owner of the F/V*

1 *Majestic Blue, Petitioning for Exoneration from or Limitation of Liability* (the “Limitation
2 Action”), Civil Case No. 11-00032, entered an order lifting the stay of the prosecution of
3 Plaintiffs’ claims against Majestic Blue Fisheries, Inc. in this case. (*See* ECF No. 221 in the
4 Limitation Action).

5 Subsequently, on August 25, 2014, Majestic Blue Fisheries, Inc. (hereinafter referred to
6 as “Majestic Blue”) filed its Joinder to Dongwon’s Motion to Dismiss and Compel Arbitration.
7 (*See* ECF No. 68). On September 10, 2014, Plaintiffs filed their Opposition to Majestic Blue’s
8 Joinder in Motion. (*See* ECF No. 75). Majestic Blue filed its Reply to the Opposition on
9 September 17, 2014. (*See* ECF No. 79).

10 Dongwon’s Motion to Dismiss and Compel Arbitration and Majestic Blue’s Joinder in
11 the Motion have been referred to the undersigned for a Report and Recommendation. (*See* ECF
12 Nos. 65 and 76).

13 **DISCUSSION**

14 **A. Dongwon’s Motion**

15 Chang Cheol Yang, a citizen of the Republic of Korea, executed an employment contract
16 with Majestic Blue on March 23, 2010. Under the employment contract, Yang was to serve as
17 Chief Engineer on board the fishing vessel, Majestic Blue. The contract was for a term of
18 eighteen (18) months. During the course of this employment, Yang perished on board the
19 Majestic Blue, along with Captain Hill, when the vessel sank on June 14, 2010.

20 Paragraph 8 of the employment agreement¹ provides as follows:

21 8. Arbitration/Choice of Law: It is specifically agreed that any and all disputes
22 or claims of any nature arising out of, or relating to, this employment agreement
23 or the employee’s employment aboard this Vessel shall be subject to mandatory
24 binding arbitration. Any such arbitration shall occur in and be subject to the rules
25 of arbitration of, the country of the Crew Member’s nationality as established by
26 his/her current passport. It is intended that this arbitration clause be construed
broadly to incorporate any and all claims that can conceivably be arbitrated,
including claims for death, personal injury, wages, discrimination, or harassment.
Any claims subject to this clause will be governed by the substantive law of the
country of the crew member’s nationality.

27 ¹ *See* Contract of Employment, attached as Exhibit B to Dongwon’s motion. (ECF
28 No. 38-2).

1 Any and all claims or lawsuits of any nature arising out of, or relating to, this
2 employment agreement or the employee's employment aboard this Vessel shall be
3 brought within six (6) months' time. This provision is intended to be all inclusive
4 and includes claims for wages, personal injury, death, discrimination, harassment,
5 or any such claims that employee may have arising out of, or related to, his
6 employment and this employment agreement.

7 Since the decedent Yang was a citizen of the Republic of Korea, all claims arising out of
8 his employment agreement must be arbitrated in and subject to the rules of arbitration of the
9 Republic of Korea.

10 Dongwon argues that federal law favors agreements to arbitrate, especially in
11 international commercial transactions. In *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), the
12 U.S. Supreme Court held that the agreement of the parties to arbitrate any dispute arising out of
13 their international commercial transaction was to be respected and enforced by federal courts in
14 accordance with the provisions of the United States Arbitration Act.

15 Our conclusion today is confirmed by international developments and domestic
16 legislation in the area of commercial arbitration On June 10, 1958, a special
17 conference of the United Nations Economic and Social Council adopted the
18 Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In
19 1970 the United States acceded to the treaty . . . and Congress passed Chapter 2 of
20 the United States Arbitration Act, 9 U.S.C. s 201 *et seq.*, in order to implement
21 the Convention.

22 *Id.* at 520, n.15.

23 In *Mitsubishi Motors Corp. V. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), an
24 automobile manufacturer brought suit against an automobile dealer for nonpayment of stored
25 vehicles and other damages. The dealer counterclaimed for violation of the Sherman Act. The
26 district court ordered arbitration of most of the issues raised in the complaint and counterclaim.
27 The First Circuit Court of Appeals reversed, holding that rights conferred by the antitrust laws
28 were inappropriate for enforcement by arbitration. The U.S. Supreme Court held:

29 We now turn to consider whether Soler's antitrust claims are nonarbitrable even
30 though it has agreed to arbitrate them. In holding that they are not, the Court of
31 Appeals followed the decision of the Second Circuit in *American Safety*
32 *Equipment Corp. v. J.P. Maguire & Co.*, 391 F. 2d 821 (1968). Notwithstanding
33 the absence of any explicit support for such an exception in either the Sherman
34 Act or the Federal Arbitration Act, the Second Circuit there reasoned that "the
35 pervasive public interest in enforcement of the antitrust laws, and the nature of the
36 claims that arise in such cases, combine to make . . . antitrust claims . . .
37 inappropriate for arbitration." . . . [W]e conclude that concerns of international

1 comity, respect for the capacities of foreign and transnational tribunals, and
2 sensitivity to the need of the international commercial system for predictability in
3 the resolution of disputes require that we enforce the parties' agreement, even
4 assuming that a contrary result would be forthcoming in a domestic context.

4 *Id.* at 628-29.

5 The Supreme Court's enunciated federal policy that requires arbitration of disputes in the
6 field of international commerce is illustrated in many cases within the Ninth Circuit Court.

7 In *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716 (9th Cir. 1999), the Ninth Circuit Court of
8 Appeals affirmed the district court's ruling which required Simula, Inc., plaintiff, an Arizona
9 corporation to arbitrate all its disputes with defendants, which were a Delaware corporation, a
10 Swedish corporation, a German corporation, and an Indiana corporation. The court stated:

11 The standard for demonstrating arbitrability is not high. The Supreme Court has
12 held that the FAA leaves no place for the exercise of discretion by a district court
13 but instead mandates that district courts direct the parties to proceed to arbitration
14 on issues as to which an agreement has been signed. Such agreements are to be
15 rigorously enforced. Under § 4 of the FAA, the district court must order
16 arbitration if it is satisfied that the making of the agreement for arbitration is not
17 an issue. Therefore, the district court can determine only whether a written
18 arbitration agreement exists, and if it does, enforce it in accordance with its terms.

16 *Id.* at 719-720 (internal citations omitted).

17 Simula, Inc. also argued that ordering arbitration would be against public policy in
18 relation to U.S. antitrust laws because there was a likelihood that the Swiss Arbitral Tribunal
19 would not apply American antitrust law "to the profound and irrevocable detriment of United
20 States automotive safety and national interest in open and competitive markets." *Id.* at 722. The
21 court further stated:

22 In *Richards*, we upheld a forum selection clause and transferred the dispute to a
23 British court, despite the fact that the plaintiffs' federal statutory claims would not
24 be available under British law. We held that the applicable standard should be
25 whether the law of the transferee court is so deficient that the plaintiffs would be
26 deprived of any reasonable recourse. . . . Applying that standard, we find that the
27 law applied by the Swiss Arbitral Tribunal would afford sufficient antitrust
28 remedies.

26 *Id.* at 723.

27 Simula, Inc. also argued against arbitration alleging that the arbitration agreement may
28 have been procured as a result of a fraudulent inducement. *Id.* at 726. The court responded by

1 saying that such a claim was a question for the arbitrator to decide. *Id.*

2 In determining the question of arbitrability, the district court must consider solely the
3 validity and scope of the arbitration clause and not consider the validity of the agreement as a
4 whole. *See Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469 (9th Cir. 1961).

5 A district court may issue “interim injunctive relief on arbitrable claims if interim relief is
6 necessary to preserve the status quo and the meaningfulness of the arbitration process – provided
7 . . . that the requirements for granting injunctive relief are otherwise satisfied.” *Toyo Tire*
8 *Holdings of Americas Inc. v. Continental Tire North America, Inc.*, 609 F.3d 975, 981 (9th Cir.
9 2010).

10 International arbitration clauses are governed by the United Nations Convention on the
11 Recognition and Enforcement of Arbitral Awards (the “Convention”), which was implemented
12 by legislation now codified at 9 U.S.C. §§ 201-208. The Convention contains sixteen articles
13 which are numbered in roman numerals. Article II provides:

14 The court of a Contracting State, when seized of an action in a matter in respect of
15 which the parties have made an agreement within the meaning of this article,
16 shall, at the request of one of the parties to arbitration, refer the parties to
arbitration, unless it finds that the said agreement is null and void, inoperative or
incapable of being performed.

17 Convention, art. II, §3, attached to 9 U.S.C. § 201.

18 Article V provides:

19 1. Recognition and enforcement of the award may be refused, at the request, of
20 the party against whom it is invoked, only if that party furnishes to the competent
authority where the recognition and enforcement is sought, proof that:

21 (a) The parties to the agreement referred to in article II were, under the law
22 applicable to them, under some incapacity, or the said agreement is not valid
under the law to which the parties have subjected it or, failing any indication
thereon, under the law of the country where the award was made; . . .

23 2. Recognition and enforcement of an arbitration award may also be refused if the
24 competent authority in the country where recognition and enforcement is sought finds
that:

25 (b) The recognition or enforcement of the award would be contrary to the public
26 policy of that country.

27 Convention, art. V, attached to 9 U.S.C. § 201.

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1 Title 9, United States Code, Section 201 provides that “[t]he Convention on the
2 Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in
3 the United States in accordance with this chapter.”

4 Section 202 provides: “An arbitration agreement or arbitral award arising out of a legal
5 relationship, whether contractual or not, which is considered as commercial, including a
6 transaction, contract, or agreement described in section 2 of this title, falls under the
7 Convention.” 9 U.S.C. § 202.

8 Section 206 provides that “[a] court having jurisdiction under this chapter may direct that
9 arbitration be held in accordance with the agreement at any place therein provided for, whether
10 that place is within or without the United States.” 9 U.S.C. § 206

11 Section 207 provides:

12 Within three years after an arbitral award falling under the Convention is made, any party
13 to the arbitration may apply to any court having jurisdiction under this chapter for an
14 order confirming the award as against any other party to the arbitration. The court shall
confirm the award unless it finds one of the grounds for refusal or deferral of recognition
or enforcement of the award specified in the said Convention.

15 9 U.S.C. § 207.

16 When a court is asked to enforce an agreement under the Convention, the court performs
17 a very limited inquiry to answer four questions:

- 18 1. Is there an agreement in writing to arbitrate the subject of the dispute?
- 19 2. Does the agreement provide for the arbitration in the territory of the signatory of the
20 Convention?
- 21 3. Does the agreement arise out of a legal relationship, whether contractual or not, which
22 is considered as commercial?
- 23 4. Is a party to the agreement not an American citizen, or does the commercial
24 relationship have some reasonable relation with one or more foreign states?

25 *See Walker & Zanger (West Coast) Ltd. v. Stone Design S.A.*, 4 F. Supp.2d 931, 936 (C.D. Cal.
26 1997) (citing *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 959 (10th Cir. 1992)).

27 Dongwon argues that all four conditions have been met and the matter must be referred to
28 arbitration. Chang Cheol Yang, the deceased Chief Engineer, executed an employment contract

1 with Majestic Blue on March 23, 2010. The employment contained an arbitration clause in
2 paragraph 8 which required that all disputes between the parties be submitted to mandatory
3 binding arbitration. Further, the arbitration clause provided that the arbitration be subject to the
4 rules of arbitration of the Republic of Korea. The agreement arose out of the employment of
5 Yang as the Chief Engineer on board the fishing vessel, the Majestic Blue. The Majestic Blue
6 was engaged in commercial tuna fishing. Yang was not an American citizen and was a citizen of
7 the Republic of Korea.

8 Plaintiffs, who are generally represented by Esther Yang, the widow of the deceased
9 Chang Cheol Yang, oppose the motion and make the following objections:

10 1. No agreement to arbitrate exists because the alleged employment contract executed by
11 the decedent Yang had not been authenticated and no meeting of the minds occurred when it was
12 executed.

13 2. The arbitration clause is null and void because it is against public policy.

14 3. Dongwon was not a signatory to the employment agreement and equitable estoppel
15 does not apply because Dongwon has denied a close relationship with Majestic Blue, which was
16 a signatory to the agreement.

17 4. Dongwon has waived its right to seek arbitration because it has sought limitation of
18 liability in this court and because of its delay.

19 The court will address each of these objections by Plaintiffs.

20 Plaintiffs argue that there was no agreement to arbitrate because the alleged employment
21 contract executed by the decedent Yang was not authenticated and that no meeting of the minds
22 occurred when it was executed.

23 The first question the court must determine is whether or not there was an agreement to
24 arbitrate the subject of the dispute. Dongwon has provided such an agreement. It is attached as
25 Exhibit B to its motion. In fact, when Plaintiffs filed their Complaint on June 11, 2013, they
26 alleged in paragraph 15 that "On March 23, 2010, Mr. Yang executed an employment contract
27 with Dongwon Industries Co., Ltd. to act as Chief Engineer of the F/V/ MAJESTIC BLUE." The
28 employment agreement attached as Exhibit B shows an agreement that is dated March 23, 2010

1 and signed by a Yang Cheol Yang. It is also signed by a representative of Dongwon on behalf of
2 Majestic Blue Fisheries, LLC. and is also dated March 23, 2010.

3 Plaintiffs question the authenticity of the contract and whether in fact it was signed by the
4 decedent. They argue that Dongwon has not produced any declaration that the decedent actually
5 was the signatory on the contract because it lacked an apostille, witness signatures, and it was not
6 notarized. They also argue that no meeting of the minds occurred regarding any of the contract's
7 terms and especially the provision regarding arbitration.

8 The court does not find Plaintiffs' arguments in this regard to be persuasive. They have
9 already acknowledged in paragraph 15 of their Complaint the existence of an employment
10 contract that was executed by the decedent on March 23, 2010. Plaintiffs argue that the decedent
11 did not sign the agreement produced in Exhibit B, but at the same time they have not produced an
12 employment agreement that bears the contractual relationship between the parties that they allege
13 in paragraph 15 of the Complaint. Moreover, Guam law does not require a contract to be
14 notarized or witnessed or contain an apostille to be binding upon the parties who have executed
15 it. Guam law recognizes the contract executed by decedent as an express contract. An express
16 contract is one where its terms are stated in writing. 18 G.C.A. § 86102. An agreement that by
17 its terms is not to be performed within a year from its making must be in writing.² 18 G.C.A.
18 § 86106 (1). The execution of a written contract supercedes all negotiations or stipulations
19 concerning its matter which preceded or accompanied the execution of the instrument. 18
20 G.C.A. § 86107. A written contract takes effect upon its delivery to the party in whose favor it is
21 made, or his agent. 18 G.C.A. § 86108.

22 Plaintiffs also question the validity of the produced employment agreement alleging that
23 there was no meeting of the minds regarding any of the contract's terms when it was allegedly
24 executed by the decedent. Plaintiffs appear to be questioning the validity of the entire contract
25 alleging that it lacked an essential element for the formation of a valid contract. Plaintiffs claim
26 that the employment agreement was an adhesion contract (*see* Opposition at p. 19, ¶51, ECF No.
27

28 ² Decedent Yang's term of employment on board Majestic Blue was for 18 months.

1 75); that the decedent had little or no time to consider the agreement, have it translated to his
2 Korean language or negotiate its terms (*id.* at ¶53); that the agreement was in English and
3 decedent could not read or understand English (*id.* at ¶55); that the agreement called for the name
4 of the translator to be inserted for the translation rather than the word “KOREAN (*id.* at ¶62);”
5 and that there was no translation of the agreement into Korean by Dongwon or Majestic Blue.

6 The court notes that Plaintiffs’ action seeks damages for the wrongful death of the
7 decedent. They have alleged an employment relationship with Defendants. Decedent worked for
8 approximately three months on board Majestic Blue before he perished when the vessel sank.
9 Plaintiffs do not contest that decedent worked as the Chief Engineer for Majestic Blue. His
10 position within the vessel would have been an essential term of a contract that would presumably
11 have resulted in a meeting of the minds. The employment agreement produced by Dongwon lists
12 in paragraph 9.1 that decedent was employed as “CE.” Likewise, his salary with Majestic Blue
13 would have been an essential term of any contractual relationship which presumably would have
14 required some meeting of the minds. Paragraph 9.2 lists his monthly salary (cash advance) as
15 \$1,963.00. It appears that Plaintiffs do not dispute decedent’s salary or that decedent received
16 during the term of his employment with Majestic Blue the salary called for in the employment
17 agreement because Plaintiffs do not bring an action for any unpaid wages. The court also notes
18 that decedent was a seasoned employee in engineering since his employment with Majestic Blue
19 was as its Chief Engineer. It appears quite likely that decedent may have signed similar contracts
20 with his other terms of employment with Defendants. The court also notes that Plaintiff Esther
21 Yang in her affidavit states that she has received money from Majestic Blue for the decedent’s
22 death which resulted from decedent’s employment with Majestic Blue. It is alleged that this
23 payment may have been a mandatory payment under Korean law. The receipt of such monies
24 would necessarily have required some valid and legal employment contract by decedent with
25 Majestic Blue. Based upon the above, the court finds that Plaintiffs’ first objection is insufficient
26 to prevent the arbitration.

27 Plaintiffs next argue that the arbitration agreement is null and void because it is against
28 public policy.

1 International arbitration clauses are governed by the Convention, codified at 9 U.S.C.
2 §§ 201-208, and the United States is a signatory to the Convention. Under Article II of the
3 Convention, if an international commercial transaction contains an arbitration provision, the
4 court must refer the parties to arbitration, unless it finds that the agreement is null and void. It
5 has been held that the null and void defense is limited to the standard breach of contract defenses
6 such as fraud, mistake, duress, and waiver. *See Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257,
7 1272 (11th Cir. 2011). Plaintiffs, however, argue that the arbitration agreement is null and void,
8 not because it was procured by fraud, mistake, or duress, but because it is against public policy.
9 However, the public policy defense has been rejected as a proper defense under the Convention
10 before arbitration. *See Ballesteros v. NCL (Bahamas) Ltd.*, 925 F. Supp.2d 1303, 1305-06 (S.D.
11 Fla. 2013) (citing *Lindo*, 652 F.3d at 1269) (“time to challenge foreign arbitration as void against
12 public policy is after the arbitrator’s final decision has been made”). Plaintiffs’ objection that the
13 arbitration agreement is null and void because it is against public policy is premature at this
14 point. Such an objection would be proper only after an arbitration award is made against
15 Plaintiffs and its enforcement against Plaintiffs would violate United States public policy.

16 Plaintiffs also argue that the arbitration agreement cannot be enforced against them
17 because Dongwon was not a signatory to decedent’s employment agreement and that equitable
18 estoppel does not apply because Dongwon has denied a close relationship with Majestic Blue,
19 which was a signatory to the agreement.

20 Decedent Yang entered into an employment agreement with Majestic Blue on March 23,
21 2010. Paragraph 8 of the employment agreement required that all disputes relating to the
22 employment agreement be subject to mandatory binding arbitration. Plaintiffs point out that
23 Dongwon was not a signatory to the agreement.

24 Dongwon, recognizing that it was not a signatory to the agreement, nevertheless,
25 contends that it may compel Plaintiffs to arbitrate their claims under general contract and agency
26 principles. Dongwon cites *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042 (9th Cir. 2009) in
27 support of its position.

28 In *Mundi*, Union Security Life Insurance Company (“USLIC”) appealed a decision of the

1 district court denying its motion to compel arbitration with Mundi, the widow of decedent,
2 Harnam Mundi. USLIC had issued a life insurance policy to cover a loan taken out by the
3 decedent. The life insurance policy did not contain an arbitration agreement, but the loan
4 agreement did. USLIC was not a party to the loan agreement. The question before the court was
5 whether USLIC could enforce the arbitration agreement even though it was not a signatory to the
6 agreement. In deciding the issue, the Ninth Circuit looked to a similar case from the Second
7 Circuit, *Sokol Holdings, Inc. V. BMB Munai, Inc.*, 542 F.3d 354, (2d Cir. 2008). In examining all
8 the cases which allowed a nonsignatory to compel a signatory to arbitrate based upon estoppel,
9 the Second Circuit found that in all cases it was essential that “the subject matter of the dispute
10 was intertwined with the contract providing for arbitration.” *Sokol*, 542 F.3d at 361. The cases
11 also required “a relationship among the parties of a nature that justifies a conclusion that the
12 party which agreed to arbitrate with another be estopped from denying an obligation to arbitrate a
13 similar dispute with the adversary which is not a party to the arbitration agreement.” *Id.* at 359.
14 Finding the two requirements lacking in the case before it, the Ninth Circuit affirmed the district
15 court’s denial of the motion to compel arbitration. *Mundi*, 555 F.3d at 1047.

16 Plaintiffs contend that arbitration is inappropriate herein because Dongwon has denied a
17 close relationship with Majestic Blue, which was a signatory to the agreement. The court notes,
18 however, that Plaintiffs have sued Dongwon for damages for the wrongful death of Chief
19 Engineer, Chang Cheol Yang, in relation to decedent’s employment on board the Majestic Blue.
20 Plaintiffs have alleged in the Complaint that Dongwon “was the legal owner, operator, and/or
21 manager of, and/or maintained and/or controlled the F/V MAJESTIC BLUE” and did business in
22 Guam “through its wholly owned subsidiary and/or agent Majestic Blue Fisheries, LLC.”³
23 Plaintiffs further allege that Majestic Blue was Dongwon’s agent and alter ego and that Dongwon
24 was the *de facto* owner of and had complete control and domination over Majestic Blue.⁴
25 Plaintiffs have also alleged Dongwon and Majestic Blue were both the employers of the decedent
26

27 ³ See Compl. at ¶8, ECF No. 1.

28 ⁴ See Compl. at ¶10, ECF No. 1.

1 Yang.⁵ Plaintiffs have also alleged that decedent Yang executed an employment contract with
2 Dongwon to serve as Chief Engineer on board the Majestic Blue.⁶

3 For the court to compel Plaintiffs to arbitrate their claims against Dongwon based upon
4 equitable estoppel, it must be satisfied that (1) "the subject matter of the dispute was intertwined
5 with the contract providing for arbitration," *Sokol*, 555 F.3d at 361, and (2) "a relationship among
6 the parties of a nature that justifies a conclusion that the party which agreed to arbitrate with
7 another be estopped from denying an obligation to arbitrate a similar dispute with the adversary
8 which is not a party to the arbitration agreement." *Id.* at 359.

9 The subject matter of the Complaint before the court is a wrongful death claim by the
10 heirs of decedent Yang which was based upon decedent's employment on board the Majestic
11 Blue. Decedent entered into a written employment contract with Majestic Blue and agreed to
12 work on the Majestic Blue as its Chief Engineer. The employment contract had a provision for
13 arbitration. Therein, decedent Yang agreed "that any and all disputes or claims arising out of, or
14 relating to, this employment agreement or the employee's employment" aboard the Majestic Blue
15 shall be subject to mandatory binding arbitration. The claim against Dongwon arises out of
16 decedent Yang's employment aboard the Majestic Blue. The claim against Majestic Blue also
17 arises out of decedent Yang's employment aboard the Majestic Blue agreement. The claims
18 necessarily intertwine with decedent's employment contract which contains an arbitration
19 provision. Thus, the court finds that the first part of a two-part test established by the Second
20 Circuit and adopted by the Ninth Circuit has been met.

21 The court must next decide whether there is a relationship among the parties of such
22 nature that justifies a conclusion that the party which agreed to arbitrate with another be estopped
23 from denying an obligation to arbitrate a similar dispute with the adversary which is not a party
24 to the arbitration agreement.

25 Plaintiffs have filed suit against Dongwon and Majestic Blue alleging that Defendants
26

27 ⁵ See Compl. at ¶12, ECF No. 1.

28 ⁶ See Compl. at ¶15, ECF No. 1.

1 were the employers of decedent Yang. While the employment agreement was signed between
2 decedent Yang and Majestic Blue, a representative of Dongwon signed the agreement on behalf
3 of Majestic Blue. Indeed, Dongwon acknowledged itself as the Owner's Representative when it
4 signed the employment agreement with decedent Yang. Plaintiffs have alleged that Majestic
5 Blue was the agent and alter ego of Dongwon. More importantly, Plaintiffs have alleged that
6 decedent Yang executed an employment agreement with Dongwon. Plaintiffs have alleged that
7 Majestic Blue and Dongwon were both the employers of decedent Yang and that Dongwon was
8 the legal owner of Majestic Blue. These allegations by Plaintiffs suggest a close relationship
9 between Defendants, a relationship that is not affected by Dongwon's denial of such relationship.

10 Plaintiffs point out that Dongwon has entered into certain contracts with Majestic Blue.
11 Dongwon did enter into two service contracts with Dongwon. These contracts were executed in
12 May, 2008 around the time in which Dongwon transferred ownership of the vessel. The first
13 contract was a Ship's Maintenance, Supply and Insurance Service Agreement. Under this service
14 contract, Dongwon would arrange and supervise dry docking and repairs and maintain the
15 Majestic Blue to classification or U.S.C.G. standards. Dongwon would also supply equipment
16 and parts upon Majestic Blue's request. *Amy Hill v. Majestic Blue Fisheries, LLC, et al.*, Civil
17 Case No. 11-00034, ECF No. 328-8. The second contract with Majestic Blue was a "Crew
18 Manning Agreement." Under this agreement, Dongwon agreed to supply the crew to man the
19 Majestic Blue. *Amy Hill v. Majestic Blue Fisheries, LLC, et al.*, Civil Case No. 11-00034, ECF
20 No. 328-9. These contracts also illustrate a close relationship between the Defendants, a
21 relationship that is not affected or minimized in degree by Dongwon's denial of such close
22 relationship.

23 Plaintiffs also point out in their Complaint that Dongwon was the previous record owner
24 of Majestic Blue. They further allege that Dongwon formed Majestic Blue Fisheries, LLC, as a
25 Delaware company, to act as record owner, in order to take advantage of certain benefits of
26 operating a U.S. registered fishing vessel as opposed to a Korean registered fishing vessel.
27 Dongwon then transferred the F/V Majestic Blue, a multimillion dollar asset, to Majestic Blue
28

1 Fisheries, LLC for a nominal amount.⁷ These allegations further signify a close relationship
2 between the Defendants regardless of the denial by Dongwon of such close relationship.

3 If Plaintiffs were to succeed in showing that Dongwon was the alter ego of Majestic Blue
4 or that Dongwon was the employer of decedent Yang, it should then be held accountable to the
5 employer of decedent to arbitrate all of decedent's claims against that employer pursuant to
6 decedent's contract of employment.

7 Lastly, citing *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691 (9th Cir. 1986), Plaintiffs
8 argue that Dongwon has waived its right to compel arbitration herein because it has sought
9 limitation of its liability in Civil Case No. 11-00034.

10 Civil Case No. 11-00034 was filed herein on October 26, 2010. It was a claim filed by
11 Amy Hill, as Personal Representative of the Estate of David Hill, against Majestic Blue and
12 Dongwon. Plaintiff Hill sought damages for the wrongful death of Captain David Hill, who was
13 lost at sea on board the Majestic Blue, along with decedent Yang. In her complaint, Plaintiff Hill
14 alleged that Dongwon operated, managed, maintained, controlled, and was the legal owner of
15 Majestic Blue.⁸ Plaintiff Hill also alleged that Majestic Blue was the agent and alter ego of
16 Dongwon and owned or *de facto* owned and completely controlled and dominated Majestic
17 Blue.⁹

18 In its answer to Plaintiff Hill's complaint, Dongwon asserted that if it were found to be
19 the owner or de facto owner of the Majestic Blue, then it would be entitled to exoneration or
20 limitation of its liability pursuant to 46 U.S.C. § 30501 *et. seq.*

21 Pursuant to *Fisher*, in order to show that Dongwon has waived its right to compel
22 arbitration, Plaintiffs herein must demonstrate: (1) knowledge of an existing right to compel
23 arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the Plaintiffs
24 resulting from such inconsistent acts. *Fisher*, 791 F.2d at 694.

25
26 ⁷ See Compl. at ¶11, ECF No. 1.

27 ⁸ See Civil Case No. 11-00034, Compl. at ¶10, ECF No. 1.

28 ⁹ See Civil Case No. 11-00034, Compl. at ¶36, ECF No. 1.

1 *Fisher* also reminds the court that in conducting its inquiry, it must be mindful that a
2 waiver of a contractual right to arbitrate is disfavored and that any examination whether that right
3 has been waived must be conducted in light of the strong federal policy favoring enforcement of
4 arbitration agreements. *Id.*

5 Plaintiffs contend that Dongwon has waived its right to compel arbitration in this case
6 because it claimed a right to benefit from the Limitation Action pending in this court. The court
7 notes, however, that the Limitation Action in this court was filed by Majestic Blue in Civil Case
8 No. 11-00032. Dongwon was not a party to that proceeding. Dongwon is a party in Civil Case
9 No. 11-00034, but the latter case is not a limitation action case. Moreover, Plaintiffs herein are
10 not parties to the action in Civil Case No. 11-00034.

11 Dongwon's first court encounter with Plaintiffs herein stem from the present court case
12 before it. Plaintiffs have sued for damages for the wrongful death of decedent Yang. Rather than
13 answering the Complaint, Dongwon has moved to dismiss the Complaint and compel arbitration.
14 Prejudice must be measured based upon the encounters between the parties as it relates to this
15 case. There has been no prejudice to Plaintiffs stemming from Dongwon's actions herein
16 because Dongwon moved to compel arbitration at the very first opportunity it had against
17 Plaintiffs herein.

18 Based upon the reasons set forth above, the court finds that Dongwon's motion to compel
19 arbitration herein be granted and the court will recommend the granting of the said motion.

20 **B. Majestic Blue's Joinder in Dongwon's Motion.**

21 Majestic Blue has also joined in Dongwon's motion to dismiss the case and compel
22 arbitration. The issues raised by Plaintiffs in opposition to the motion are basically the same as
23 the issues they raised in opposition to Dongwon's motion. The court has responded to those
24 issues in its analysis above, except for Plaintiffs' argument that Majestic Blue waived its right to
25 compel arbitration by proceeding against the Plaintiff Esther Yang in the limitation action.

26 Majestic Blue filed a complaint¹⁰ for exoneration and limitation of liability in this court,
27

28 ¹⁰See Civil Case No. 10-00032 filed on December 9, 2010.

1 seeking to limit its liability under 46 U.S.C.A. § 30505, for all damages occasioned by the
2 sinking of its vessel, the Majestic Blue, on June 14, 2010. Two of the crew members, Captain
3 David Hill and Chief Engineer Yang, lost their lives when the vessel sank.

4 On February 24, 2012, the Clerk of Court gave Notice to all parties of the action brought
5 by Majestic Blue for exoneration from or limitation on its liability.¹¹ The Notice directed all
6 claimants desiring to contest the right to exoneration or limitation of liability to file an answer to
7 the petition by March 30, 2012. Claimant Amy Hill filed an answer on March 30, 2012 and
8 claimed her right to the limitation fund.¹² Claimant Esther Yang filed her answer on June 14,
9 2013.¹³ On September 19, 2013, while hearing an emergency motion in the Limitation Action,
10 the court advised the parties that it was concerned that the claim filed by Esther Yang was filed
11 after the March 30, 2012 deadline and was thus filed in derogation of the court's order. The
12 court echoed its belief that claimant Yang had no standing to assert or argue any issue before the
13 court. The court further stated that Claimant Yang needed to file a motion to allow the filing of a
14 late claim or obtain a stipulation from Majestic Blue allowing the filing of a late claim. On
15 October 1, 2013, Yang and Majestic Blue stipulated to the filing of a late claim by Yang.¹⁴ The
16 stipulation was approved by the Chief Judge on October 21, 2013.¹⁵ The limitation action went
17 to trial on November 18, 2013.

18 Under *Fisher*, in order to show that Majestic Blue has waived its right to compel
19 arbitration herein because it proceeded against Claimant Yang in the limitation action, Plaintiffs
20 must demonstrate: (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent
21 with that existing right; and (3) prejudice to the Plaintiffs resulting from such inconsistent acts.
22 *Fisher*, 791 F.2d at 694.

23 *Fisher* also reminds the court that in conducting its inquiry, it must be mindful that a
24

25 ¹¹ See Limitation Action, Civil Case No. 11-32, ECF No. 40.

26 ¹² See Limitation Action, Civil Case No. 11-32, ECF No. 45.

27 ¹³ See Limitation Action, Civil Case No. 11-32, ECF No. 76.

28 ¹⁴ See Limitation Action, Civil Case No. 11-32, ECF No. 112.

¹⁵ See Limitation Action, Civil Case No. 11-32, ECF No. 127.

1 waiver of a contractual right to arbitrate is disfavored and that any examination whether that right
2 has been waived must be conducted in light of the strong federal policy favoring enforcement of
3 arbitration agreements. *Id.*

4 The Limitation Action was filed by Majestic Blue in Civil Case No. 11-00032. As the
5 court has noted above, Claimant Yang made a late entry when she filed her claim on June 14,
6 2013. At that point, the Limitation Action had already been set for trial for November 18, 2013
7 and discovery between the then existing parties had generally been completed. Because she filed
8 late, the court deemed her to have no standing in the Limitation Action until she filed a motion to
9 file a late claim which would be approved by the court or until she obtained a stipulation from
10 Majestic Blue to file her claim late. The parties did stipulate to the late filing which was
11 subsequently approved by the Chief Judge on October 21, 2013. Thus, Claimant Yang's ability
12 to assert any issues with regard to the Limitation Action did not commence until October 21,
13 2013.

14 The court notes that Claimant Yang had no meaningful participation in the Limitation
15 Action prior to trial. She was not a party to the stipulation which allowed the court to consider
16 motions, exhibits and other documents as evidence for trial rather than the live presentation of
17 evidence. She did not proffer any exhibits or documents for review by the court. She, however,
18 did submit a joint proposed findings of fact and conclusions of law for the court to consider
19 together with Claimant Hill. The limited participation by Claimant Yang in the limitation action
20 makes it difficult to perceive prejudice to her from acts by Majestic Blue arising in that
21 proceeding.

22 The court also notes that a limitation action by its terms is a limited proceeding. It is a
23 right given to an owner of vessel to limit liability with respect to all claim or debts to the value of
24 the vessel and pending freight. 46 U.S.C. § 30505.

25 In its complaint for exoneration from and limitation of liability, Majestic Blue sought to
26 limit its liability to the sum of \$33,500.00 which represented the value of the Main Skiff and life
27 jackets as the Majestic Blue sank with all its appurtenances and equipment in the Western Pacific
28 and was not recovered. The limitation action involved a two-step process. There had to be (1) a

1 determination of what acts of negligence or unseaworthiness caused the Majestic Blue to sink,
2 and (2) whether Majestic Blue had knowledge or privity of those acts.

3 The Plaintiffs herein are asserting a claim for damages for the wrongful death of decedent
4 Yang on board the Majestic Blue. The cause of action Plaintiffs have asserted herein is
5 completely different from the cause of action pursued by Majestic Blue in the Limitation Action.
6 It would thus appear that Claimant Esther Yang's ability to participate in the limitation action
7 could not have been prevented and a motion to compel arbitration filed within that proceeding by
8 a vessel owner would appear to be inappropriate in such a circumstance.

9 Based upon the above, the court thus finds that Majestic Blue did not waive its right to
10 compel arbitration by proceeding against Claimant Yang in the limitation action. The court also
11 finds that Majestic Blue's joinder in Dongwon's motion to compel arbitration should be granted.

12 CONCLUSION

13 Based upon the reasons stated herein above, the court recommends the following in
14 relation to the motions filed by Dongwon to dismiss the Complaint and compel arbitration and
15 the joinder of the said motion by Majestic Blue:

16 1. The court recommends that Dongwon's Motion to Dismiss the Complaint and Compel
17 Arbitration be granted in part and denied in part. Dongwon's Motion to Dismiss should be
18 denied but its Motion to Compel Arbitration should be granted. The court further recommends
19 that the present action be stayed pending arbitration.

20 2. The court recommends that Majestic Blue's Joinder in Dongwon's Motion to Dismiss
21 the Complaint and Compel Arbitration be also granted in part and denied in part. Majestic
22 Blue's Joinder in Dongwon's Motion to Dismiss the Complaint should be denied but its Joinder
23 in the Motion to Compel Arbitration should be granted. The court further recommends that the
24 present action be stayed pending arbitration.

25 IT IS SO RECOMMENDED.



26 /s/ Joaquin V.E. Manibusan, Jr.
27 U.S. Magistrate Judge
28 Dated: Jan 14, 2015