UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

COX OPERATING, L.L.C. **Plaintiffs,** ***v.*** **ATINA M/V, *et al*.,** **Defendants.**	**No. 20-2845 c/w 20-2871**

STATE OF LOUISIANA'S *AMICUS CURIAE* BRIEF

INTEREST OF AMICUS CURIAE
AND
SUMMARY OF THE ARGUMENT

Louisiana has an interest in ensuring that all operators in the Gulf of Mexico—whether they are operators of vessels or oil and gas operators—conduct their operations in a responsible manner. And when an accident occurs, the citizens of Louisiana have an interest in ensuring that the tortfeasor both takes responsibility and provides adequate financial security to address the harm. Louisiana supports Cox's position and agrees with *amicus curiae* the Louisiana Oil and Gas Association (LOGA). Louisiana writes separately to emphasize the strong State interests at play.

When a foreign vessel causes damage to an oil platform in the Gulf of Mexico, especially in Louisiana waters, one only need recall the BP oil spill to understand the risk to the State's economy and environment and to the safety of its citizens. Those risks are adequately mitigated only if the vessel's owner provides rock-solid financial security to address the damage caused by its vessel. In this case, a security bond provides that level of protection.

ARGUMENT

I. THE COURT CAN AND SHOULD REQUIRE THAT THE VESSEL'S OWNER PROVIDE A SECURITY BOND IN ADDITION TO THE LOU.

In a limitations proceeding, a court has authority to determine the form of the security and to require additional security. *See* Fed. R. Civ. Pro., Supp. R. E(5)(a) (allowing "the giving of security, to be approved by the court or clerk, or by stipulation of the parties"); Supp. R. E(5)(b) (allowing "a general bond or stipulation, with sufficient surety, to be approved by the court"); Supp. R. E(6) (stating that the court "may . . .require[]. . .new or additional sureties"). The Letter of Undertaking (LOU) at issue in this case also recognizes the Court's authority to request a security bond.

This Court should require that the vessel's owner provide a security bond in addition to the LOU in this case. Because the vessel caused damage to an oil platform, a security bond is needed to cover the significant financial obligations imposed by the legal framework governing the oil and gas industry. And the actions of the vessel's owner call for additional security.

A. The Legal Framework Governing the Oil and Gas Industry Imposes Significant Financial Obligations Requiring a Different Form of Security.

The LOU was invented to meet the admiralty industry's "economic" need for prompt resolution of claims. Paul Myburgh, *P & I Club Letters of Undertaking and Admiralty Arrests*, 24 J. Int'l Mar. L. 201–21 (2018) ("Shipowners have always been keen to avoid actual or threatened arrests of their ships in admiralty proceedings, or to secure the release of their ships as promptly as possible by posting alternative

security. The economic reasons for this are obvious."). And today, the admiralty industry commonly uses LOUs across the world. *See id.*

But the needs of the oil and gas industry are different, and the States' interests are too. The oil and gas industry has a different set of legal obligations that requires a different form of security. Take—for example—the industry's decommissioning obligations. Operators of offshore wells must decommission the equipment and platforms and plug and abandon the wells at the end of their useful lives to prevent subsequent environmental damage. *See* 30 C.F.R. § 250.1703. Oil and gas operators remain liable for any unfulfilled decommissioning obligations stemming from their operations as lessees, even if they sell their interest to another operator. As a result, federal regulators require operators to provide security for their decommissioning obligations. *See id.* § 556.900. An operator provides this security either through a surety bond or by placing cash or cash equivalents into a lease-specific abandonment account.

And when there is an oil spill, federal and state laws impose significant financial obligations on industry players. BP paid the U.S. Department of Justice $20 billion dollars to settle claims in the Deepwater Horizon oil spill, including a $5.5 billion civil penalty and $7.1 billion in claims under the federal Oil Pollution Act. Nathan Bomey, *BP's Deepwater Horizon Costs Total $62B*, USA Today (July 14, 2016), https://www.usatoday.com/story/money/2016/07/14/bp-deepwater-horizon-costs/87087056/. The settlement also required BP to undertake "a massive restoration effort for plant and wildlife habitats." *Id.*

To respond to these hefty legal and financial obligations, the owner of a vessel causing damage to an oil platform should ensure rock-solid financial security adequate to address the oil and gas industry's obligations. But LOUs do not provide rock-solid security. The Protection and Indemnity Clubs (P&I Clubs) that back LOUs often have significant financial resources, but they can overextend those resources. Just like banks, P&I Clubs are not too big to fail.

And in any event, P&I Clubs often do not guarantee coverage under LOUs. *See, e.g.*, Standard Club, Rule Book 2021-22, Coastal & Inland Rules, Section E: Excluded Losses § 5.12.1, (*excluding* "[l]iabilities incurred in respect of . . . any other . . . unit constructed or adapted for the purpose of carrying out drilling operations in connection with oil or gas exploration or production"), https://www.standard-club.com/fileadmin/uploads/standardclub/Documents/Import/publications/rules/2021/3392973-35881_coastalinlandrules_final.pdf.

And there are numerous conditions that attach to LOU coverage. *See, e.g.*, *id.* Section F: Scope of Recovery and Limits § 6.2.4 ("Where a guarantee, undertaking or certificate provided for in rule 4.5 has been issued and, *in the opinion of the managers*, the claims of all insured parties in the aggregate exceed or may exceed any limit set out in the rules or in the certificate of entry, the managers . . . may defer payment of a claim or any part thereof *as they see fit* . . . ." (emphasis added)); *id.* § 6.4 ("The club shall not be liable to any insured party in respect of any liabilities except to the extent of the funds which the club is able to recover from the members or other persons liable for the same.").

In sum, a default or denial of coverage would not only hurt the oil and gas operator but also the citizens of Louisiana who face the loss of revenue from a shut-in production platform, the environmental risks posed by a damaged platform (and any activities necessary to repair it), and the ultimate risk of insufficient capital to ensure the platform is safely put back in service or decommissioned. This Court should require the owner of the vessel to provide a security bond in addition to the LOU.

B. The Facts of this Case Call for Additional Security.

Here, where the vessel was operating outside its United-States-Coast-Guard-approved anchorage area and the owner has taken actions that limit the factual development of the record (*i.e.,* relieving the Captain of duty and failing to ensure his presence for depositions), the oil and gas operator's security preferences align with those of the State and should be prioritized over those of the foreign vessel owner.

An LOU may be acceptable where it's *negotiated* and *accepted* by both parties, but here it was not. And the costs are high. The vessel's allision caused significant but as-yet undetermined damage to the oil platform. The costs and activities necessary to repair it also pose risks. The value of the vessel, though large, may not cover that damage.

And, importantly, the P&I Club has *not* conceded either liability or coverage. Moreover, according to Cox, the owner of the vessel relieved the Captain of duty, and the Captain left the country after the LOU was issued but *before* he could be deposed.

Under the circumstances, the Court should require the owner to provide a security bond in addition to the LOU.

A State has clear interests in ensuring the fiscal responsibility of foreign vessel owners whose vessels find themselves inside the territorial waters controlled by the State. State interests include ensuring that foreign vessels do not interrupt, impede, or otherwise injury the State's economic or environmental security. *See, e.g.,* La. Const. Art. IX, §1, §6. Federal policy also embraces such concerns. The Outer Continental Shelf Lands Act (OCSLA) mandates:

> Management of the outer Continental Shelf shall be conducted in a manner which considers economic, social, and environmental values of the renewable and non-renewable resources contained in the outer Continental Shelf, and the potential impact of oil and gas exploration on other resource value of the outer Continental Shelf and the marine, coastal, and human environments.

43 U.S.C. § 1344(a)(1).

As LOGA pointed out in its proposed Amicus Brief, an allision with an oil and gas platform can result in substantial damages to the platform. *See* LOGA Br. 3, Dckt. No. 97-2. Foreign vessels operating in the Gulf of Mexico operate within this intersection of interests, but States and oil and gas operators have little control over vessels' actions or their owners, particularly foreign-flagged vessels.

In other words, in some circumstances, the security instruments common to oil and gas operations should be prioritized over those used in admiralty. While an LOU may be an appropriate instrument under some circumstances, under these it is not.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically with the Clerk of Court on the 8th day of June, 2021 using the United States Eastern District's CM/ECF system, which will send notification of such filing to all participating attorneys.

/s/ Elizabeth B. Murrill
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