No. 11-626

IN THE
Supreme Court of the United States

FANE LOZMAN,
Petitioner,
v.
THE CITY OF RIVIERA BEACH, FLORIDA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT IN RESPONSE TO COURT'S AUGUST 14, 2012 ORDER

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August 28, 2012

QUESTION PRESENTED

On August 14, 2012, the Court ordered the parties to file letter briefs addressing the following question:

"The *res* in this putative *in rem* admiralty proceeding was sold at a judicial auction in execution of the district court's judgment on a maritime lien and a maritime trespass claim, Petn. App. 9a-10a, and subsequently destroyed, Petr. Br. 10-11. Does either the judicial auction or the subsequent destruction of the *res* render this case moot?"

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OTHER MATERIALS

On August 14, 2012, this Court ordered the parties to brief whether the case is moot. In respondent's view, the case is not moot. When the houseboat was sold at judicial auction, the sale proceeds became the substitute *res*. Although those proceeds were credited against the administrative expenses associated with the houseboat's arrest, respondent had posted a bond for $25,000 that now secures any obligation respondent may have to repay the sale proceeds. Under this Court's well-settled precedent and maritime practice, that bond is sufficient for the continued jurisdiction of the case as an *in rem* action.

STATEMENT

Shortly after petitioner's houseboat was arrested, the district court ordered respondent to "post a $25,000 bond to secure [petitioner's] value in the vessel." JA68. Respondent posted that bond, *see* D.C. Dkt. 46, and it remains in force today.

A substitute custodian took custody of the houseboat following its arrest. *See* D.C. Dkt. 8. The custodian charged more than $11,000 in conjunction with arresting the houseboat and towing it from Riviera Beach to Miami. That included the cost of the towboat and the two employees who rode on the houseboat during the voyage from Riviera Beach to Miami. *See* D.C. Dkt. 151-1 (attached as an Addendum to this brief). In addition, maintaining the houseboat cost approximately $2,800 per month for dockage and insurance. *See id.*

Arguing, *inter alia*, that "the expense of keeping the property [was] excessive or disproportionate," Fed. R. Civ. P. Supp. Rule E(9)(a)(i)(B), respondent moved for an interlocutory sale. *See* D.C. Dkt. 132. The district court denied the motion. *See*

D.C. Dkt. 134. As soon as the district court granted summary judgment, App. 33a-49a; *see* Resp. Br. 12, respondent renewed its motion. *See* D.C. Dkt. 151. The district court granted that motion when it entered final judgment. It also permitted respondent to "credit bid" at the sale. *See* D.C. Dkt. 157; Resp. Br. 13 & n.8.

Respondent, as the successful auction bidder for $4,100,[1] acquired title to the houseboat. The sale proceeds were credited against the amount for which the houseboat was responsible under the district court's judgment, which included the lien amounts and the administrative expenses. Because the administrative expenses, which dwarfed the $4,100 sale proceeds,[2] had priority over the liens, the sale proceeds were allocated entirely to reimbursing respondent for those expenses.

When respondent was unable to resell the houseboat or get a charity to accept it as a donation, the houseboat was destroyed. *See* Resp. Br. 13 & n.9.

ARGUMENT

I. Neither The Sale Of Petitioner's Houseboat Nor Its Subsequent Destruction, Standing Alone, Moots The Present Case

As leading commentators have long recognized, an *in rem* action in admiralty involves specialized rules. *See generally*, *e.g.*, GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 786-805 (2d ed. 1975) ("GILMORE & BLACK") (describing *in rem* actions). In an *in rem* action, the *res* is the defendant in the action. *See*, *e.g.*, *id.* at 589, 613. In this case, petitioner's houseboat was accordingly the defendant

[1] Respondent bid $4,100 for the houseboat at the judicial sale because that was the minimum amount necessary to outbid an obvious straw bidder who was acting in concert with petitioner.

[2] When respondent filed its successful Motion for Interlocutory Sale (D.C. Dkt. 151), the substitute custodian had already billed more than $32,000. *See* Addendum. The total administrative expenses, which also included the fee paid to the U.S. marshal for arresting the houseboat, were even higher.

in respondent's action to enforce maritime liens for "necessaries" (here, dockage fees) and maritime trespass.

In maritime practice, the original *res* in an *in rem* action (typically but not necessarily[3] a vessel) is almost always replaced by some other form of security – generally money or the promise to pay money. By statute, a shipowner is unilaterally entitled to recover its vessel by providing the U.S. marshal with a bond for twice the sum claimed by the plaintiff.[4] *See* 28 U.S.C. § 2464(a).[5] More commonly, the shipowner will propose some other form of substitute security and the vessel will be released by agreement of the parties under Supplemental Rule E(5)(a). For many decades, the normal practice has been for the shipowner's insurer to issue a "letter of undertaking" to stand as security in the vessel's stead. *See*, *e.g.*, *Crescent Towing & Salvage Co. v. Chios Beauty MV*, 610 F.3d 263, 266 (5th Cir. 2010); *see generally*, *e.g.*, Michael Marks Cohen, *Restoring the Luster to the P & I Letter of Undertaking*, 42 J. Mar. L. & Com. 255, 257-61 (2011). Other common forms of security have included bank guarantees and standby letters of credit. *See id*. at 256-57. In *Continental Grain Co. v. Barge FBL–585*, 364 U.S. 19 (1960), the shipowner issued its own letter of undertaking. *See id*. at 28-29 (Whittaker, J., dissenting) (describing and quoting shipowner's letter of undertaking).

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[3] An *in rem* action also may be brought, for example, against maritime cargo or pending freight. *See*, *e.g.*, GILMORE & BLACK 622 n.80. It also may be brought against a sunken shipwreck. *See*, *e.g.*, *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998).

[4] In this case, therefore, petitioner could have recovered his houseboat immediately after it was arrested (or at any subsequent time until the sale) if he had simply provided the necessary bond, which would have been for less than $7,000 – a modest sum for a multimillionaire such as petitioner (*see* Lozman Dep. 44:15-23 (D.C. Dkt. 98-1)). *See also* Supp. Rule E(5)(a). He chose not to do so.

[5] The statute still uses the term "libellant," which is the historic admiralty term for the plaintiff. *See*, *e.g.*, GILMORE & BLACK 35.

The parties almost always agree to the release of the vessel when alternate security is posted because neither has any incentive for the vessel to remain under arrest. The shipowner cannot profitably employ a vessel in the custody of the U.S. marshal (or a substitute custodian). The arrest is also expensive for the plaintiff, who must pay administrative expenses (at least in the first instance). *See*, *e.g.*, GILMORE & BLACK 796. Indeed, arresting a vessel is sufficiently expensive and complicated for the plaintiff, and sufficiently disruptive for the shipowner, that a shipowner will often arrange for a letter of undertaking to avoid a threatened arrest. *See*, *e.g.*, *Petroleos Mexicanos Refinacion v. M/T King A*, 554 F.3d 99, 101 (3d Cir. 2009) ("[i]n return for the issuance of the [letter of undertaking], Pemex agreed . . . to refrain from arresting the vessel"). Releasing a vessel when security is posted is so common that the federal rules expressly permit the interlocutory sale of an arrested vessel "if . . . there is an unreasonable delay in securing release of the property." Supp. Rule E(9)(a)(i)(C).

When a vessel is released on the posting of alternate security, that security becomes the substitute *res*. *See*, *e.g.*, *The Palmyra*, 25 U.S. (12 Wheat.) 1, 10 (1827) (Story, J.) ("the stipulation is deemed a mere substitute for the thing itself"); *Petroleos Mexicanos*, 554 F.3d at 104 ("the letter [of undertaking] becomes a complete substitute for the *res*"); GILMORE & BLACK 799 ("[T]he effect of release is to transfer the lien from the ship to the fund represented by the bond or stipulation. The lien against the ship is discharged for all purposes . . . ."). The vessel proceeds on its voyage, unaffected by anything that happens in the litigation, and the

litigation proceeds on its course, unaffected by anything that happens to the vessel.[6] Once there is a substitute *res*, the original *res* becomes irrelevant except as a matter of historical fact. So long as the original *res* served its purpose *at the time of the arrest* – the invocation of the appropriate jurisdictional and substantive rules on which the *in rem* action rests – it is no longer necessary for the court's jurisdiction. And, so long as there is a substitute *res*, the original *res* no longer provides security.

To the extent relevant here, the judicial sale of the *res* is comparable to the posting of security. The sale proceeds become the new *res* (while the purchaser takes free of all prior claims against the *res*). This Court recognized as much in *Republic National Bank v. United States*, 506 U.S. 80 (1992), when it consistently referred to the sale proceeds in an *in rem* action as the new *res*. *See*, *e.g.*, *id.* at 82 (referring to "the res, then in the form of cash"), 84 (referring to "the transfer of the res" when it was the sale proceeds that were transferred). If the plaintiff prevails, its claims are paid from the sale proceeds (after administrative expenses have been paid). If the sale proceeds exceed all the claims on the vessel, the excess is returned to the owner. *See*, *e.g.*, GILMORE & BLACK 37, 791-92.

Republic National Bank also implicitly recognized that a sale of the original *res* does not moot an *in rem* action.[7] In that case, the original *res* was sold while the

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[6] Letters of undertaking recognize that the subsequent destruction of a previously arrested vessel has no impact on the security. Most contain a clause recognizing the insurer's obligation to pay any final judgment (after appeal), "ship lost or not lost." *See*, *e.g.*, Cohen, 42 J. Mar. L. & Com. at 273 (sample letter of undertaking).

[7] *Republic National Bank* was "an *in rem* civil forfeiture proceeding," 506 U.S. at 81-82, that was required to "'conform as near as may be to proceedings in admiralty,'" *id.* at 84 (quoting 28 U.S.C. § 2461(b)). Moreover, the Court relied (in relevant part) primarily on admiralty precedents. Thus the decision is applicable in this admiralty action.

case was still pending. After final judgment, the sale proceeds were transferred to the Treasury (because the government was the successful plaintiff). Only then did the government claim that the case had become moot and persuade the court of appeals to dismiss the appeal. This Court reversed. It was sufficient that the district court had jurisdiction when the original *res* was arrested. *See* 506 U.S. at 84-89. The case was not moot because the government could still transfer the sale proceeds (or a portion of them) to the claimant (if it succeeded on appeal). *See id.* at 95-96. Even under the government's rejected theory, the sale of the original *res* standing alone would not have mooted the case; the government instead relied on the transfer of the sale proceeds out of the district. *See id.* at 83. This Court's conclusion that the case was not moot after the sale and transfer of the proceeds implicitly (but necessarily) recognized that the sale alone would not moot the case.

The subsequent destruction of the original *res* in an *in rem* action after a judicial sale is irrelevant. When the original *res* is sold, the sale proceeds become the substitute *res*, *see id.* at 82, 84, and the purchaser at the judicial sale acquires a clear title to the original *res*, *see*, *e.g.*, GILMORE & BLACK 622, 787-88. The purchaser is accordingly free to do anything it wants with its newly acquired property – including destroy it – without adversely affecting the litigation.

As soon as it was arrested, petitioner's houseboat became the *res* in the present action. Petitioner had the unilateral power to provide a substitute *res* if he had chosen to post a modest bond, *see supra* note 4, but he decided not to do so. The houseboat thus continued to be the *res* until the judicial sale. If it had actually been

incapable of being towed over water, and had sunk during the 80-mile voyage from Riviera Beach to Miami, that destruction of the *res* might have mooted the case. Once the U.S. marshal sold the houseboat, however, the sale proceeds became the new *res* and the houseboat was freed of all claims. Its subsequent destruction was accordingly irrelevant. That action did not moot the present controversy.[8]

II. A Judgment In The Present Case Would Not Be "Useless"

As this Court recognized in *Republic National Bank*, an *in rem* case may become moot when "the release of the property would render the judgment 'useless' because 'the thing could neither be delivered to the libellants [*i.e.*, the plaintiffs, *see supra* note 5], nor restored to the claimants.'" 506 U.S. at 85 (quoting *United States v. The Little Charles*, 26 F. Cas. 979, 982 (C.C.D. Va. 1818) (No. 15,612) (Marshall, C.J.)). The *Republic National Bank* Court continued, still quoting Chief Justice Marshall, to note that such a case would not become moot if "'the judgment will have any effect whatever.'" *Id.* (quoting *The Little Charles*, 26 F. Cas. at 982). In the present action, this Court's judgment will have an effect whichever way the case

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[8] Respondent has consulted with counsel for the maritime *amici* that filed briefs in support of respondent. All agree that the present case is not moot. The Maritime Law Association is particularly concerned with the potential disruption of maritime law and practice that would occur if this Court were to find the present case moot on the basis of either the sale or the subsequent destruction of the vessel. Failing to recognize that money or the promise to pay money can become a substitute *res* would call into question the most fundamental principles governing *in rem* actions. And, if the subsequent destruction of the original *res* were to assume any relevance after a substitute *res* has been provided, the value of any security would become questionable. Plaintiffs would be unwilling to release vessels, thus exposing them to the perils of navigation, unless they can rely on the security of the substitute *res* regardless of what happens to the vessel.

The present system operates on the assumption that arrested vessels will generally be released quickly when their owners provide adequate security. Interfering with that system would disrupt not only maritime law and practice but also maritime commerce itself.

is decided. Although the original *res* has been destroyed, its substitute is still available and is more than adequately secured by respondent's $25,000 bond.

To appreciate the effect of this Court's potential judgment, it is first essential to understand what currently remains at issue on the pending "vessel" status question – particularly because the analysis changed somewhat on appeal. The district court had three distinct options on the "vessel" status question: (1) It could have agreed entirely with petitioner and held that his houseboat was not a "vessel" even under the standard appropriate for establishing jurisdictional facts that overlap with the merits. *See* Resp. Br. 57; Clermont *Amicus* Br. 4-11; Kevin M. Clermont, *Jurisdictional Fact*, 91 Cornell L. Rev. 973, 978-84, 1006-08 (2006). In that event, the district court would have lacked jurisdiction to decide the merits of the asserted maritime liens. (2) The district court could have held that respondent made a sufficient case for "vessel" status, thus establishing subject-matter jurisdiction in the federal courts, *see* Resp. Br. 56-57; Clermont *Amicus* Br. 4; Clermont, 91 Cornell L. Rev. at 992-96, but also held that respondent did not prove "vessel" status by a preponderance of the evidence, with the result that petitioner won the case on the merits because there could be no maritime lien, *see* Clermont *Amicus* Br. 9-10 & n.2, 13; Clermont, 91 Cornell L. Rev. at 982-83. (3) Finally, the district court could have held – as it actually did – that respondent demonstrated "vessel" status both for jurisdictional purposes and for the purpose of establishing maritime liens, with the result that respondent won the case on the merits.

In this Court, only two substantive options remain: the district court's second option (accepting jurisdiction but ruling for petitioner on the merits) is no longer open. Petitioner appealed only the jurisdictional aspect of the "vessel" status question to the Eleventh Circuit, not the underlying merits of the dispute that also turned on "vessel" status. *See* Resp. Br. 56 n.28. Petitioner's Question Presented is similarly limited to the jurisdictional issue. *See id.* at 56 & n.28. Significantly, petitioner does not disagree. *Cf.* Reply Br. 16 n.7 (challenging on multiple grounds respondent's analysis of the appropriate standard for establishing jurisdictional facts that overlap with the merits, but not disagreeing with respondent's observation that subject-matter jurisdiction is the sole issue before this Court).

Because the sole remaining issue is the existence of subject-matter jurisdiction, two outcomes are possible for this litigation: (1) this Court (or the court below on remand) could hold that the district court had subject-matter jurisdiction because the houseboat was a "vessel" under whatever standard the Court considers appropriate for establishing jurisdictional facts that overlap with the merits[9] (thus affirming the judgment below); or (2) the judgment below could ultimately be reversed if it were held that the district court lacked subject-matter jurisdiction because petitioner's houseboat was not a "vessel" under the standard that this Court finds appropriate.

Neither judgment would be "useless." Either "'judgment [would] have [an] effect.'" *Republic National Bank*, 506 U.S. at 85 (quoting *The Little Charles*, 26 F.

[9] If the Court holds that respondent established vessel status by a preponderance of the evidence, of course, it need not decide the appropriate standard for establishing jurisdictional facts that overlap with the merits.

Cas. at 982). If this Court affirms the judgment below, respondent would retain the proceeds of the sale of the houseboat.[10] Respondent may also have additional rights, such as the right to seek an *in personam* judgment against petitioner (because the sale proceeds were insufficient to pay even the administrative expenses, *see supra* note 2, let alone the unpaid dockage fees for which petitioner is responsible). If the judgment below were ultimately reversed, on the other hand, respondent would be required to pay the sale proceeds to petitioner. That obligation is secured by respondent's $25,000 bond. At the very least, therefore, this case will determine the ultimate disposition of the sale proceeds.[11]

CONCLUSION

The present case is not moot and the judgment below should be affirmed.

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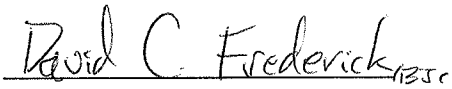
[10] As respondent obtained the houseboat with a credit-bid at the auction, *see* Resp. Br. 13 & n.8, no money changed hands. But the effect was the same as if respondent had paid $4,100 in cash and then received back the same amount (to pay some of the administrative expenses). If the sale proceeds had exceeded the administrative expenses, the excess would have been applied next to satisfy the liens (and the remainder would have been paid to petitioner).

[11] The present case is superficially similar to two *in rem* actions in which the Fifth Circuit dismissed appeals under the useless-judgment doctrine because the original *res* had been sold and the sale proceeds distributed. *See Eurasia Int'l, Ltd. v. Holman Shipping, Inc.*, 411 F.3d 578 (5th Cir. 2005); *Newpark Shipbuilding & Repair, Inc. v. M/V Trinton Brute*, 2 F.3d 572 (5th Cir. 1993) (per curiam). Those cases, even if correctly decided, are readily distinguishable. Most obviously, respondent's obligation to pay the sale proceeds to petitioner if the judgment below were to be reversed is secured by a bond whereas the Fifth Circuit in both those cases believed that it had no way to enforce repayment of the sale proceeds if the appeals in those cases had succeeded.

Respectfully submitted,



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August 28, 2012

ADDENDUM

Date

NATIONAL MARITIME SERVICES
1915 SOUTHWEST 21ST AVENUE
FORT LAUDERDALE, FLORIDA 33312
TELEPHONE: (954) 791-9601 FACSIMILE: (888) 611-4626
WATS: 800-633-7172

Date of Charges: 4/20/09-11/19/09

Type of Vessel: Houseboat

Size/NL Stock#: 60' 21208

Vessel Name: N/A

Bill To: Riviera Beach Marina
c/o Jules V. Massee
Hamilton, Miller & Birthisel, LLP
100 S. Ashley Drive Suite 1210
Tampa, FL 33602
813-223-1900 TEL
813-223-1933 FAX
Location: Mirage Yachts Miami, FL

Date	Description	Units	Unit cost	Amount	Handling Fees	Amount Billed
4/20/2009	Mobilization, coordination & execution of arrest	1	$750.00	$750.00		$750.00
4/20/2009	Captain onboard during tow	2	$425.00	$850.00		$850.00
4/20/2009	Mate on onboard during tow	2	$425.00	$850.00		$850.00
4/20/2009	Towboat US towing	1	$6,231.25	$6,231.25	$934.69	$7,165.94
4/24/2009	Escort for Fane	2	$75.00	$150.00		$150.00
4/28/2009	Escort for surveyor	5	$75.00	$375.00		$375.00
4/29/2009	Escort for Fane, Guns returned	1.5	$75.00	$112.50		$112.50
5/6/2009	Escort for Fane, personal property	3	$75.00	$225.00		$225.00
5/9/2009	Reorganize mooring of vessel, 4 point tie up, uthilizing 1" nylon line. 4 linehandlers @ 1.75 hours.	1	$720.00	$720.00		$720.00
5/19/2009	Escort for Fane, personal property	3	$75.00	$225.00		$225.00
6/30/2009	Escort for Fane, personal property	2	$75.00	$150.00		$150.00
9/24/2009	Escort for Fane, personal property	3.5	$75.00	$262.50		$262.50
TOTAL						**$11,835.94**
Recurring Expenses						
4/20-4/30/09	Dockage @ $1.25 per/ft/day = $75.00	11	$75.00	$825.00		$825.00
5/1/09-5/31/09	Dockage @ $1.25 per/ft/day = $75.00	31	$75.00	$2,325.00		$2,325.00
6/01/09-6/30/09	Dockage @ $1.25 per/ft/day = $75.00	30	$75.00	$2,250.00		$2,250.00
7/1/09-7/31/09	Dockage @ $1.25 per/ft/day = $75.00	31	$75.00	$2,325.00		$2,325.00
8/1/09-8/31/09	Dockage @ $1.25 per/ft/day = $75.00	31	$75.00	$2,325.00		$2,325.00
9/1/09-9/30/09	Dockage @ $1.25 per/ft/day = $75.00	30	$75.00	$2,250.00		$2,250.00
10/1/09-10/31/09	Dockage @ $1.25 per/ft/day = $75.00	31	$75.00	$2,325.00		$2,325.00
11/01/09-11/19/09	Dockage @ $1.25 per/ft/day = $75.00	19	$75.00	$1,425.00		$1,425.00
4/20/2009	Liability insurance	1	$520.00	$520.00		$520.00

tabbies
EXHIBIT
A

Revised 11/19/2009

Date

NATIONAL MARITIME SERVICES
1915 SOUTHWEST 21ST AVENUE
FORT LAUDERDALE, FLORIDA 33312
TELEPHONE: (954) 791-9601 FACSIMILE: (888) 611-4626
WATS: 800-633-7172

Date of Charges: 4/20/09-11/19/09

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c/o Jules V. Massee
Hamilton, Miller & Birthisel, LLP
100 S. Ashley Drive Suite 1210
Tampa, FL 33602
813-223-1900 TEL
813-223-1933 FAX
Location: Mirage Yachts Miami, FL

5/1/2009	Liability insurance	1	$520.00	$520.00		$520.00
6/1/2009	Liability insurance	1	$520.00	$520.00		$520.00
7/1/2009	Liability insurance	1	$520.00	$520.00		$520.00
8/1/2009	Liability insurance	1	$520.00	$520.00		$520.00
9/1/2009	Liability insurance	1	$520.00	$520.00		$520.00
10/1/2009	Liability insurance	1	$520.00	$520.00		$520.00
11/1/2009	Liability insurance	1	$520.00	$520.00		$520.00
Recurring Total						**$20,210.00**
Combined Total						
Balance						**$32,045.94**
						$32,045.94
	Finance charge	0.000	0.000	**1.5%**		**$0.00**
Sub Total						**$32,045.94**
Payment						
4/20/2009	Initial Payment	-1	$8,870.00	$8,870.00		($8,870.00)
6/25/2009	Payment by City of Riveria Beach	1	($6,743.44)	($6,743.44)		($6,743.44)
9/3/2009	Payment by City of Riveria Beach	1	($5,765.00)	($5,765.00)		($5,765.00)
Grand Total						**$10,667.50**