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August 28, 2012

Via Electronic Mail and FedEx

Honorable William K. Suter
Clerk of the Court
Supreme Court of the United States
1 First Street, N.E.
Washington, DC 20543

Re: *Lozman v. The City of Riviera Beach, Florida*
Case No. 11-626
Oral Argument Scheduled for October 1, 2012

Dear General Suter,

This letter responds to the Court's supplemental briefing order of August 14, 2012. The answer to the Court's question is that neither the judicial sale nor the City's subsequent destruction of petitioner's floating home renders this case moot.

The City itself previously has explained as much. After petitioner's home was sold at the judicial auction, he filed an emergency motion in the Eleventh Circuit seeking to prevent confirmation of the sale. Lozman argued, among other things, that confirming the sale would cause him irreparable harm. The City responded that Lozman would suffer no such harm because the City had posted a security bond of $25,000 in the district court, which the City argued would be more than sufficient "compensation" if he prevailed on appeal. Appellee's Response to Appellant's Emergency Motion to Stay Sale and Confirmation of the Sale at 14 (copy attached as Appendix B; copy of the bond attached as Appendix A). The City further emphasized that the "sale will not moot this appeal" because the City's bond "remains in the registry of the District Court" and therefore "serve[s] as substitute security for the [home itself]." *Id.* at 16-17. Following that assurance, the Eleventh Circuit denied Lozman's motion to stop the sale.

The City's jurisdictional analysis in the Eleventh Circuit was correct. This Court repeatedly has held that "continuous presence of the [seized property] in the district" is not required to keep an *in rem* case from becoming moot. *Republic Nat'l Bank v. United States*, 506 U.S. 80, 85 (1992); *United States v. Ames*, 99 U.S. 35, 36 (1878); *The Rio Grande*, 90 U.S. 458, 463 (1875). In particular, where, as here, the plaintiff merely has sold it and placed the money (or a security bond for its equivalent) somewhere within reach of the district court, a live case or controversy persists over who is the rightful owner of that money. *Republic Nat'l Bank*, 506 U.S. at 92-93.

This Court applied that rule in *Republic Nat'l Bank* in the context of a seizure of a land-based home that was sold at a judicial auction while the case was pending. But this Court explained that its ruling was intended to "conform as near as may be to proceedings in admiralty." *Id.* at 84 (quotation marks and citation omitted). And federal courts of appeals sitting in admiralty have considered it "well established" both before and after *Republic Nat'l Bank* that this sale-and-guarantee-the-funds procedure keeps a case alive in the precise circumstances at issue here. *Inland Credit Corp. v. M/V Bow Egret*, 552 F.2d 1148, 1151 (5th Cir. 1977); *see also Ventura Packers, Inc. v. F/V Jeanine Kathleen*, 424 F.3d 852, 862-63 (9th Cir. 2005) (case was not moot following sale of vessel because "the security [was] substituted for the vessel[s] as the *res* subject to the court's jurisdiction") (internal alterations in original; quotation marks and citations omitted); *Isbrandtsen Marine Servs. v. M/V Iguana Tania*, 93 F.3d 728, 734 (11th Cir. 1996) (case was not moot because "[t]he vessel was sold at an interlocutory sale and the final rights of the original plaintiffs and the owner to proceeds have not yet been decided. The proceeds of the sale are in the registry of the Court as a substitute for the *res* of the vessel."); *Am. Bank of Wage Claims v. Registry of the Dist. Ct.*, 431 F.2d 1215, 1218 (9th Cir. 1970) (sale of vessel does not moot case because "[t]he proceeds from the judicial sale of a vessel, or security furnished in lieu thereof, are deemed a jurisdictional substitute for the vessel itself."); *The Charles D. Leffler*, 100 F.2d 759, 760 (3d Cir. 1938) (same).

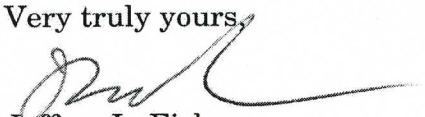
In short, the parties and the district court here followed an "often-used and legitimate practice" for maintaining jurisdiction on appeal following the judicial sale (and destruction) of petitioner's floating home. *United States v. An Article of Drug Consisting of 4,680 Pails*, 725 F.2d 976, 983 n.20 (5th Cir. 1984). That practice prevents the case from being moot.

Even if the City never had posted a bond, the case still would not be moot. As this Court explained in *Republic Nat'l Bank*, quoting with approval its prior holding in *Rio Grande*, "[w]hen [a] vessel was seized by the order of the court and brought within its control," jurisdiction is "complete" and secure on an ongoing basis. 506 U.S. at 85 (quoting *Rio Grande*, 90 U.S. at 463); *see also id.* at 86 n.4 ("An actual or constructive seizure provides jurisdiction in an admiralty forfeiture action. 'And, having once acquired regular jurisdiction, no subsequent irregularity can defeat it; or accident, as, for example, an accidental fire.'") (quoting 1 J. Wells, A Treatise on the Jurisdiction of Courts 275 (1880)). To be sure, this Court suggested that a federal court in this situation "might" lose jurisdiction over the case if "*the plaintiff* abandons" the vessel or otherwise "renounce[s] its claim" over the *res*. *Id.* at 87 (emphasis added). In such circumstances, a judgment in the plaintiff's favor might be "useless." *Id.* (quotation marks and citation omitted). But such a legal possibility does "not apply to any case where the judgment will have any effect whatever," *Republic Nat'l Bank*, 506 U.S. at 85 (quotation marks and citation omitted) – such as insulating the plaintiff's prior actions in the lawsuit from further legal challenge.

Accordingly, any "useless judgment" doctrine – if it even exists – would not apply here. The City never has renounced its claim against petitioner's home and indeed has collected money representing its value. If this Court reverses, the district could (and should) require it to compensate Lozman for his loss, measured at least by the proceeds of the judicial sale. *See Ventura Packers*, 424 F.3d at 863 n.7. Otherwise, the admiralty rules allowing plaintiffs to instigate judicial sales of purported vessels before final judgment would "provide a prevailing party with a means of defeating its adversary's claim for redress" on appeal from an erroneous district court ruling – exactly what this Court held in *Republic Nat'l Bank*

that jurisdictional rules governing *in rem* proceedings *cannot* do. 506 U.S. at 85.

Very truly yours,



Jeffrey L. Fisher
Counsel for Petitioner

cc: All Counsel

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

"IN ADMIRALTY"

The City of Riviera Beach,

Plaintiff,

vs. CASE NO.: 9:09-cv-80594-WPD

That certain unnamed gray, two-story vessel approximately fifty-seven feet in length, her engines, tackle, apparel, furniture, equipment and all other necessaries appertaining and belonging *in rem*.

Defendant.
_____/

NOTICE OF FILING ORIGINAL SECURITY BOND

NOTICE IS HEREBY GIVEN that the undersigned has filed with the Clerk of Court in the above-captioned matter the original Security Bond, a copy of which was previously filed under Docket No. 26.

ROBERT BIRTHISEL
Florida Bar No.: 906654
JULES V. MASSEE
Florida Bar No.: 0041554
Hamilton, Miller & Birthisel, LLP
100 S. Ashley Dr., Suite 1210
Tampa, Florida 33602
Telephone: 813.223.1900
Facsimile: 813.223.1933
jmassee@hamiltonmillerlaw.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent to Fane Lozman, pro se claimant, by e-mail at E-mail address sp500trd@yahoo.com, this May 12, 2009.

Attorney

Bond #285031203

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

"IN ADMIRALTY"

The City of Riviera Beach,

Plaintiff,

vs.

CASE NO.: 9:09-cv-80594-WPD

That certain unnamed gray, two-story vessel approximately fifty-seven feet in length, her engines, tackle, apparel, furniture, equipment and all other necessaries appertaining and belonging *in rem*.

Defendant.
_____/

PLAINTIFF'S SECURITY BOND

Recitals

1. A Verified Complaint was filed on April 20, 2009 praying that certain unnamed gray, two-story vessel approximately fifty-seven feet in length ("Defendant Vessel") and all her engines, tackle, furnishings, equipment, appurtenances, auxiliary vessels, and necessaries thereunto appertaining and belonging, be condemned and sold to pay Plaintiff's demands and claims and for other proper relief.

2. The U.S. Marshal Service arrested the Vessel on April 20, 2009, and subsequently delivered custody to this Court's appointed substitute custodian, National Maritime Services, Inc.

3. An order was entered in the above-captioned case on April 23, 2009 in the United States District Court for the Southern District of Florida, requiring the City of Riviera Beach ("Plaintiff") to post a bond in the amount of $25,000 on or before April 30, 2009.

Promise to Pay

4. As a result of the facts just recited, the Plaintiff and Liberty Mutual Insurance Company ("Surety"), each undertakes and promises to pay into the registry of the Court, or as otherwise directed by Court order, all damages, costs, and interest that may be adjudged and found due to the owner of the Defendant Vessel in an amount up to and not exceeding the sum of $25,000 in the event final judgment (after appeal, if any) is entered against Plaintiff.

5. If final judgment is entered for Plaintiff and against the Defendant Vessel, or if Plaintiff fulfills the obligations set forth above, then this obligation will become void. Otherwise, the obligation will remain in full force and effect.

Dated: _April 29, 2009

For the principal: CITY OF RIVIERA BEACH
By Pamela H. R [signature]
City Attorney [title of signer]

For the surety

LIBERTY MUTUAL INSURANCE COMPANY
By _____
Harold Miller Jr Attorney in Fact
2 Pierce Place
Itasca, IL 60143

SURETY ACKNOWLEDGMENT (ATTY-IN-FACT)

State of Illinois } SS:
County of Dupage

On this 29th day of April in the year two thousand nine before me, Christina Laurendi, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Harold Miller Jr.., known to me to be the duly authorized Attorney-in-fact of Liberty Mutual Insurance Company and the same person whose name is subscribed to the within instrument as the Attorney-in-fact of said Company, and the said Harold Miller Jr.., duly acknowledged to me that she subscribed the name of Liberty Mutual Insurance Company and thereto as Surety and her own name as Attorney-in-fact.
IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

My Commission Expires
6/25/2012

Notary Public in and for Christina Laurendi
County, State of Dupage, Illinois

OFFICIAL SEAL
CHRISTINA LAURENDI
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES:06/25/12

UNITED STATES DISTRICT COURT • SOUTHERN DISTRICT OF FLORIDA

ATTACHMENT(S) NOT SCANNED/SCANNED and are available in the SUPPLEMENTAL PAPER FILE

PLEASE REFER TO COURT FILE MAINTAINED IN THE OFFICE WHERE THE JUDGE IS CHAMBERED

CASE NO. 09-cv-80594

Date _____

- ☐ **DUE TO POOR QUALITY**
- ☐ VOLUMINOUS (exceeds 999 pages = 4 inches)
  consisting of (boxes, notebooks, etc.)_____
- ☐ BOUND EXTRADITION PAPERS
- ☐ ADMINISTRATIVE RECORD (Social Security)
- ☐ ORIGINAL BANKRUPTCY TRANSCRIPT
- ☐ STATE COURT RECORD/TRANSCRIPT (Habeas Cases)
- ☐ SOUTHERN DISTRICT TRANSCRIPTS
- ☐ LEGAL SIZE
- ☐ DOUBLE SIDED
- ☐ PHOTOGRAPHS
- ☒ SURETY BOND (original or letter of undertaking)
- ☐ CD's, DVD's, VHS Tapes, Cassette Tapes
- ☐ OTHER = _____

2442988

THIS POWER OF ATTORNEY IS NOT VALID UNLESS IT IS PRINTED ON RED BACKGROUND.

This Power of Attorney limits the acts of those named herein, and they have no authority to bind the Company except in the manner and to the extent herein stated.

LIBERTY MUTUAL INSURANCE COMPANY
BOSTON, MASSACHUSETTS
POWER OF ATTORNEY

KNOW ALL PERSONS BY THESE PRESENTS: That Liberty Mutual Insurance Company (the "Company"), a Massachusetts stock insurance company, pursuant to and by authority of the By-law and Authorization hereinafter set forth, does hereby name, constitute and appoint

SHARON A. SONDERMAN, KAREN E. SOCHA, WILLIAM T. KRUMM, THERESA M. ADAMS, JON A. SCHROEDER, ARLENE M. FILIPSKI, HAROLD MILLER, JR., MARK R. MALLEY, RANDALL K. MOON, GARY ALAN DIENHART, ALL OF THE CITY OF ITASCA, STATE OF ILLINOIS

, each individually if there be more than one named, its true and lawful attorney-in-fact to make, execute, seal, acknowledge and deliver, for and on its behalf as surety and as its act and deed, any and all undertakings, bonds, recognizances and other surety obligations in the penal sum not exceeding **FIFTY MILLION AND 00/100********** DOLLARS ($ **50,000,000.00*****) each, and the execution of such undertakings, bonds, recognizances and other surety obligations, in pursuance of these presents, shall be as binding upon the Company as if they had been duly signed by the president and attested by the secretary of the Company in their own proper persons.

That this power is made and executed pursuant to and by authority of the following By-law and Authorization:

ARTICLE XIII - Execution of Contracts: Section 5. Surety Bonds and Undertakings.
Any officer of the Company authorized for that purpose in writing by the chairman or the president, and subject to such limitations as the chairman or the president may prescribe, shall appoint such attorneys-in-fact, as may be necessary to act in behalf of the Company to make, execute, seal, acknowledge and deliver as surety any and all undertakings, bonds, recognizances and other surety obligations. Such attorneys-in-fact, subject to the limitations set forth in their respective powers of attorney, shall have full power to bind the Company by their signature and execution of any such instruments and to attach thereto the seal of the Company. When so executed such instruments shall be as binding as if signed by the president and attested by the secretary.

By the following instrument the chairman or the president has authorized the officer or other official named therein to appoint attorneys-in-fact:

Pursuant to Article XIII, Section 5 of the By-Laws, Garnet W. Elliott, Assistant Secretary of Liberty Mutual Insurance Company, is hereby authorized to appoint such attorneys-in-fact as may be necessary to act in behalf of the Company to make, execute, seal, acknowledge and deliver as surety any and all undertakings, bonds, recognizances and other surety obligations.

That the By-law and the Authorization set forth above are true copies thereof and are now in full force and effect.

IN WITNESS WHEREOF, this Power of Attorney has been subscribed by an authorized officer or official of the Company and the corporate seal of Liberty Mutual Insurance Company has been affixed thereto in Plymouth Meeting, Pennsylvania this 18th day of November, 2008.

LIBERTY MUTUAL INSURANCE COMPANY

By Garnet W. Elliott
Garnet W. Elliott, Assistant Secretary

COMMONWEALTH OF PENNSYLVANIA ss
COUNTY OF MONTGOMERY

On this 18th day of November, 2008, before me, a Notary Public, personally came Garnet W. Elliott, to me known, and acknowledged that he is an Assistant Secretary of Liberty Mutual Insurance Company; that he knows the seal of said corporation; and that he executed the above Power of Attorney and affixed the corporate seal of Liberty Mutual Insurance Company thereto with the authority and at the direction of said corporation.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my notarial seal at Plymouth Meeting, Pennsylvania, on the day and year first above written.

TERESA PASTELLA COMMONWEALTH OF PENNSYLVANIA NOTARY PUBLIC

COMMONWEALTH OF PENNSYLVANIA
Notarial Seal
Teresa Pastella, Notary Public
Plymouth Twp., Montgomery County
My Commission Expires Mar. 28, 2009
Member, Pennsylvania Association of Notaries

By Teresa Pastella
Teresa Pastella, Notary Public

CERTIFICATE

I, the undersigned, Assistant Secretary of Liberty Mutual Insurance Company, do hereby certify that the original power of attorney of which the foregoing is a full, true and correct copy, is in full force and effect on the date of this certificate; and I do further certify that the officer or official who executed the said power of attorney is an Assistant Secretary specially authorized by the chairman or the president to appoint attorneys-in-fact as provided in Article XIII, Section 5 of the By-laws of Liberty Mutual Insurance Company.

This certificate and the above power of attorney may be signed by facsimile or mechanically reproduced signatures under and by authority of the following vote of the board of directors of Liberty Mutual Insurance Company at a meeting duly called and held on the 12th day of March, 1980.

VOTED that the facsimile or mechanically reproduced signature of any assistant secretary of the company, wherever appearing upon a certified copy of any power of attorney issued by the company in connection with surety bonds, shall be valid and binding upon the company with the same force and effect as though manually affixed.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the corporate seal of the said company, this 29 day of April, 2009.

By David M. Carey
David M. Carey, Assistant Secretary

Not valid for mortgage, note, loan, letter of credit, bank deposit, currency rate, interest rate or residual value guarantees.

To confirm the validity of this Power of Attorney call 1-610-832-8240 between 9:00 am and 4:30 pm EST on any business day.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 10-10695J

That certain unnamed gray, two-story vessel approximately fifty-seven feet in length, her engines, tackle, apparel, furniture, equipment and all other necessaries appertaining and belonging *in rem*,	)	
Appellant,	)	Appeal from the United States District Court for the Southern District of Florida
vs.	)	
	)	Lower Tribunal No. 09-80594-CIV-DIMITROULEAS/SNOW
City of Riviera Beach,	)	
Appellee.	)	

/

APPELLEE'S RESPONSE IN OPPOSITION TO APPELLANT'S EMERGENCY MOTION TO STAY SALE AND CONFIRMATION OF SALE

Appellee, City of Riviera Beach ("Appellee"), by and through its undersigned counsel and pursuant to Federal Rule of Appellate Procedure 8 and 11th Circuit Rule 27, hereby responds in opposition to Appellant's Emergency Motion to Stay Sale, and Confirmation of Sale of the Floating Residential Structure

and Appellant's Motion to Stay Enforcement of the District Court's January 6, 2010 Order and Judgment.[1]

I. Preliminary Statement

The relief requested by the Claimant, Fane Lozman ("Lozman"), was sought at the District Court level and denied. On January 19, 2010, Lozman filed a Rule 62 Motion to Stay Enforcement of the District Court's January 6, 2010, Order and Judgment (DE 161, see Composite Ex. "A"), and once again, on February 5, 2010, similarly moved to stay the District Court's January 6, 2010, Order and Judgment and also moved to postpone or continue the sale of the vessel (DE 167, Composite Ex. "A"). As in the Motion currently before this Court, Lozman sought a stay essentially arguing that the court lacked subject matter jurisdiction.

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1. The Appellant's Motion is improperly styled as an "emergency" motion. Rule 27-1(b)(1) of the Eleventh Circuit Court of Appeals provides that:

> (1) [e]xcept in capital cases in which execution has been scheduled, a motion will be treated as an emergency motion only when **both** of the following conditions are present:
>
> 1. The motion will be moot unless a ruling is obtained with seven calendar days; and
>
> 2. If the order sought to be reviewed is a district court order or action, the motion is being filed within seven calendar days of the filing of the district court order or action sought to be reviewed.

Appellant failed to move this Court within seven calendar days from the District Court's Order of January 6, 2010. (DE 159, Composite Ex. "A").

On February 9, 2010, the District Court denied Lozman's multiple motions to stay. (DE 168 – 170, see Composite Ex. "B"). The District Court noted it had previously found that Lozman's vessel was a vessel for purposes of subject matter jurisdiction because Eleventh Circuit precedent clearly established the court had jurisdiction, and thus, Lozman failed to establish any likelihood of success on the merits.

After denial of his various motions to stay, on February 10, 2010, Lozman filed an Emergency Motion to Deny Confirmation of Defendant's Sale, which is currently pending before the District Court. (DE 171, see Ex. "C").[2] Although that Emergency Motion remains pending before the District Court, Lozman elected to seek identical relief by filing the Emergency Motion at issue here.

The Federal Rules of Appellate Procedure provide:

> A motion [to stay the judgment or order of a district court pending appeal] may be made to the court of appeals or to one of its judges. (A) The motion must: (i) show that moving first in the district court would be impracticable; or (ii) state that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action.

Fed. R. App. P. 8(a)(2). Lozman's instant Motion fails to show that moving for the stay of the sale and confirmation of the same was impracticable or that the motion having been made, the District Court failed to afford the relief requested. Moving

2. A confirmation was erroneously entered in error by the Clerk of Court at Docket 172, which was restricted by the Clerk at Docket 182.

the lower court was clearly practicable; as discussed above, Lozman in fact already requested this relief. Further, the District Court has not yet denied or "failed" to afford Lozman the requested relief. On the contrary, Lozman only filed his reply brief on February 19, 2010 (DE 181), only three days before filing a motion for identical relief with this Court. Lozman simply did not afford the District Court a reasonable opportunity to consider his submissions before bringing the issue to the Eleventh Circuit Court of Appeals. Accordingly, Lozman's Motion is not ripe and should be denied on this ground alone.

II. Applicable Standards of Review

A stay is an "intrusion into the ordinary processes of administration and judicial review," *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958), and accordingly "is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Virginia Railway Company v. United States*, 272 U.S. 658, 672 (1926). The party requesting a stay bears the burden of showing that circumstances warrant an exercise of the court's judicial discretion. *See Clinton v. Jones*, 520 U.S. 681, 708 (1997). As outlined herein, and as already determined by the District Court, Lozman cannot meet his burden.

The court to which a motion for a stay is addressed must engage in the familiar process of weighing (1) whether the stay applicant has made a strong

showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). Given the unavoidable facts of this case—and the lack of any real issue about them—this Court should deny Lozman's Motion to Stay.

III. Argument

A. Appellant Will Not Prevail on the Merits

1. The District Court Had Admiralty Jurisdiction Over the Appellant and Properly Ordered Sale of the Appellant Following Its Grant of Partial Summary Judgment and Trial on the Merits

The District Court's Order of Sale should be approved because the Court had admiralty jurisdiction over the subject matter. Under Supplemental Rule C and 46 U.S.C. § 31342, Appellee instituted this action in the District Court to foreclose its maritime lien for trespass and necessaries. In both its November 19, 2009 Order Granting Partial Summary Judgment (DE 150, Composite Ex. "D") and its January 6, 2010 Findings of Fact and Conclusions of Law (DE 158, Composite Ex. "D"), the District Court applied *Board of Com'rs of Orleans Levee Dist. v. M/V BELLE OF ORLEANS*, 535 F.3d 1299, 1310 (11th Cir. 2008) and concluded the Appellant was a "vessel" under the general maritime law. Therefore, it had admiralty subject matter jurisdiction over the action.

Mr. Lozman argues the District Court lacked subject matter jurisdiction over the vessel *in rem* and that the District Court should have applied Florida state law to define "vessel" for purposes of its jurisdictional inquiry. In particular, Lozman argues the Appellant is not a vessel at all, but rather a "floating structure" as that term is defined in § 327.02, Fla. Stat. Mr. Lozman also argues the Appellant never had propulsion, steering, fuel tanks, navigation gear, or other equipment customarily found on vessels and that the watercraft is neither titled nor registered as a vessel in the state of Florida. These arguments are without merit, and the District Court, sitting in admiralty, was constrained to apply federal maritime law to determine whether the houseboat is a "vessel" subject to a maritime lien under the Commercial Instruments and Maritime Liens Act, 46 U.S.C. § 31341 *et seq*.

The United States Code provides that a vessel "includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3. The true focus of the inquiry is "whether the watercraft's use 'as a means of transportation on water' is a practical possibility or merely a theoretical one." *Stewart v. Dutra Const. Co.*, 543 U.S. 481, 496 (2005). Thus, courts concentrate on the watercraft's capability of being used as a means of transportation, and "not [just] its present use or station." *Bd. of Com'rs of Orleans Levee Dist. v. M/V BELLE OF ORLEANS*, 535 F.3d 1299, 1310 (11th Cir. 2008) (citing *Stewart*, 543 U.S. at 496) (applying *Stewart* "vessel" test to

determine *in rem* jurisdiction). However, "a watercraft is not 'capable of being used' for maritime transport in any meaningful sense if it has been permanently moored or otherwise rendered practically incapable of transportation or movement." *Stewart*, 543 U.S. at 494. The intentions of the owner regarding the watercraft are irrelevant. *Bd. of Com'rs of Orleans Levee Dist*., 535 F.3d at 1311.

Moreover, several courts have determined that a houseboat is "a vessel capable of being subjected to a maritime lien." *Miami River Boat Yard, Inc. v. 60' Houseboat, Serial No. SC-40-2860-3-62*, 390 F.2d 596, 597 (5th Cir. 1968)[3] ("A houseboat is nonetheless a boat because . . . it affords a water-borne place to live with the added advantage of at least some maritime mobility. That she has no motive power and must, as would the most lowly of dumb barges, be towed does not deprive her of the status of a vessel); *Hudson Harbor 79th Street Boat Basin, Inc. v. Sea Casa*, 469 F. Supp. 987, 989 (S.D.N.Y. 1979) ("floating houseboat capable of being towed from one location to another is a vessel within the admiralty and maritime jurisdiction"); *The Ark*, 17 F.2d 446, 448 (S.D. Fla. 1926) (houseboat, not permanently moored, is a vessel subject to maritime liens).

Mr. Lozman's reliance on Florida state law is misplaced because this Court, sitting in admiralty, does not apply state law, but federal maritime law to determine

3. Decisions of the former Fifth Circuit rendered prior to October 1, 1981, constitute binding authority in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc).

whether the watercraft is a vessel. *See Stewart*, 543 U.S. at 494; *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 215-16 (1917) (general maritime law governs maritime occurrences and state law must yield to the required uniformity of maritime law); *Bd. of Com'rs of Orleans Levee Dist*., 535 F.3d at 1311. Thus, for purposes of its jurisdictional inquiry Florida's definition of a vessel or "floating structure" should not be considered.

Further, viewing the facts in a light most favorable to Appellant, the District Court found that the Appellant was a "vessel" subject to a maritime lien under federal maritime law. It is undisputed that the watercraft was arrested while floating in her slip on navigable waters at the Riviera Beach Municipal Marina. She was moored to the dock with ordinary dock lines and was not otherwise "permanently" affixed to the dock or rendered incapable of movement. In fact, she was removed from her boat slip with relative ease and towed by a motor vessel to her present location in Miami. Considering these facts, it is clear that it is "practically possible" and not merely a theoretical possibility, that the watercraft could be used as a means of transportation on water.

Mr. Lozman's argument that the watercraft never had propulsion, steering, fuel tanks or navigation gear is of no moment, since courts have found that a watercraft is a "vessel" even though it is not fitted with this type of equipment. *See Stewart*, 543 U.S. at 484,496; *Miami River Boat Yard, Inc.*, 390 F.2d at 597;

Pleason v. Gulfport Shipbuilding Corp., 221 F.2d 621 (5th Cir. 1955) (watercraft without motive power or steering, but capable of being towed, can still be used as a means of transportation on water). Moreover, the presence or absence of vessel registration is wholly irrelevant. As the District Court has already recognized, documentation and legal navigability is not the test for whether a vessel is subject to admiralty jurisdiction. (DE 150 at 8, See Composite Ex. "D") (*citing Bd. of Comm'rs of the Orleans Levee Dist.* 535 F.3d at 1311-12.

It is likewise irrelevant that Lozman considers the watercraft his primary residence, since an owner's intentions or purpose for using the vessel should not be considered by the Court. *See Bd. of Com'rs of Orleans Levee Dist*., 535 F.3d at 1311. And Lozman's actual use of the vessel as his primary residence is equally irrelevant because the test is the watercraft's "capability" of being used as a means of transportation on water and not its present use or station.

2. Federal Law Preempts Florida Law and the Appellant Is Not Protected by the Homestead Exemption

Mr. Lozman also argues the Appellant is not subject to a federal maritime lien and forced sale because it is homestead property under Florida law. However, Lozman's arguments are without merit as federal law, in particular the general maritime law, preempts Florida state law.

An *in rem* suit against a vessel is distinctively an admiralty proceeding, and is within the exclusive province of the federal courts. *American Dredging Co. v.*

Miller, 510 U.S. 443, 446-47 (1994) (citing *The Moses Taylor,* 4 Wall. 411, 431(1867)). "The Constitution provides that the Judicial Power shall extend 'to all cases of admiralty and maritime jurisdiction. This constitutional grant of jurisdiction has been construed to mean that general maritime law is to be placed under national control in 'its substantive as well as its procedural features.'" *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841, 846-847 (5th Cir. 1978) (quoting *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953)). "While states may sometimes supplement federal maritime policies, *a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court*. These principles have been frequently declared and we adhere to them." *Pope & Talbot, Inc.*, 346 U.S. at 409-410 (emphasis added).

In this case, federal maritime law preempts state law regarding homestead protection under Article X, § 4(a), Florida Constitution.[4] The homestead protections raised on behalf of the Appellant directly conflict with substantive admiralty law and would act to deprive Appellee of its substantial right to a maritime lien.[5]

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4. Likewise, the definition of the term "vessel" under federal law would trump any definition found within the Florida statutes for purposes of this action.

5. It is not unprecedented for Florida's constitutional homestead exemption to be superseded by federal law. *See, e.g., United States v. Fleet*, 498 F.3d 1225, 1227, 1230-1231 (11th Cir. 2007) (holding that the substitute property

Here, the general maritime law and 46 U.S.C. §§ 31301(5)(B) and 31342 preempt Florida's homestead laws. The general maritime law preempts state law where the state law "works material prejudice to the characteristic features of the general maritime law *or* interferes with the proper harmony and uniformity of that law in its international and interstate relations." *American Dredging Co.*, 510 U.S. at 447 (quoting *Southern Pacific Co. v. Jensen,* 244 U.S. 205, 216 (1917)) (emphasis added). A creditor's right to arrest a vessel and foreclose a maritime lien is a longstanding characteristic feature of maritime law and generally preempts state statutes attempting to occupy the same field. *See, e.g., The Moses Taylor,* 4 Wall. at 427; *American Dredging Co.*, 510 U.S. at 446 (state courts may not provide a remedy *in rem* for any cause of action within the admiralty jurisdiction).

The above preemptive principles apply equally to Appellee's statutory maritime rights. Even "in the absence of an express congressional command, state

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provision of the federal criminal forfeiture statute preempted Florida's constitutional homestead protection); *United States v. Lot 5, Fox Grove, Alachua County, Fla.*, 23 F.3d 359, 363 (11th Cir. 1994) (holding that the federal civil forfeiture statute, 21 U.S.C. § 881(a), which has no express preemption clause, nonetheless preempts the homestead exemption contained in Florida's Constitution). *United States v. One Parcel of Real Estate at 3262 S.W. 141 Ave., Miami, Dade County, Fla.*, 33 F.3d 1299, 1301 n. 6 (11th Cir. 1994) ("We have held that federal forfeiture law preempts the Florida homestead exemption from forfeiture"); *Wang v. Wang*, No. 8:07-cv-102-T-30MSS, 2007 WL 2460729, at *4 (M.D. Fla. Aug. 24, 2007) ("[p]ursuant to the Supremacy Clause, the right of the United States to enforce its lien on the Tocobaga Property supersedes any homestead rights [the owner] may have in the property," thus voiding any homestead protection)).

law is pre-empted if that law actually conflicts with federal law." *Dietrich v. Key Bank, N.A.*, 72 F.3d 1509, 1513 (11th Cir. 1996) (holding that Ship Mortgage Act did not pre-empt Florida self-help repossession law where parties contracted to use a state law remedy, the act did not expressly pre-empt state law, *and state law did not directly conflict with federal statute*).

> Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," . . . or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress . . .

Id. at 1513-14 (quoting *Hillsborough County. Fla. v. Auto. Med.*, 471 U.S. 707, 713 (1985)). *See also Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 27 (2004) ("when state interests cannot be accommodated without defeating a federal interest . . . then federal substantive law should govern").

i. Appellee's Suit Was Against the Appellant Vessel Not Lozman

Lozman also argues that his houseboat is homestead property and therefore exempt from forced sale by the Florida Constitution. "The purpose of the homestead exemption is to protect the family home from forced sale for debts *of the owner and head of the family . . .*" *Hospital Affiliates of Florida, Inc. v. McElroy*, 393 So. 2d 25 (Fla. 3d Dist. Ct. App. 1981) (emphasis added) (citing *Tullis v. Tullis*, 360 So. 2d 375 (Fla. 1978); *In re Noble's Estate*, 73 So. 2d 873 (Fla. 1954)). Here, however, Lozman was not sued *in personam*, and Appellee is

not attempting to recover a debt that Lozman has incurred personally, but rather a debt that the vessel itself has incurred. *See Riffe Petroleum Co. v. Cibro Sales Corp.*, 601 F.2d 1385, 1389 (10th Cir. 1979) ("The vessel is considered a distinct entity responsible for its own debts. The lien is a proprietary right in the vessel itself as distinct from any personal liability"); *accord Foss Launch & Tug Co. v. Char Ching Shipping U.S.A., Ltd.*, 808 F.2d 697 (9th Cir. 1987); *In re Marine Transit Corp.*, 94 F.2d 7, 9 (2d Cir. 1938).

Appellee's claims of maritime lien are based on the Appellant's trespass, and its provision of "necessaries," in particular dockage, to the Appellant *in rem*. Expenses incurred by avessel for wharfage or dockage are "necessaries" for purposes of the Maritime Liens Act and give rise to a maritime lien on the vessel should they not be paid. *See The Western Wave*, 77 F.2d 695 (5th Cir. 1935). Since the Appellant is deemed to be its own legal entity which is responsible for its own debts, Appellee's suit against the vessel and its claim of maritime lien are entirely valid and not precluded by Lozman's homestead exemption.

Given the foregoing, Appellant is not likely to succeed on the merits of this case and Lozman's motion should be denied.

B. Appellant Will Not Be Irreparably Harmed

Lozman argues he will be irreparably injured if the stay is not granted because he will lose the chance to recover his asset before his arguments are

considered by this Court. To satisfy Claimant's burden of proof, the threat of harm must be irreparable; indeed, "[t]he possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *United States v. Jefferson County,* 720 F.2d 1511, 1520 (11th Cir. 1983). An irreparable injury "must be neither remote nor speculative, but actual and imminent." *Siegel v. LePore,* 234 F.3d 1163, 1176 (11th Cir. 2000). As discussed previously, Lozman moved the District Court to deny confirmation of the sale. *The District Court has not yet ruled on this motion.* Accordingly, Lozman's injury, if there is one, is not actual and imminent and his motion should be denied. Further Lozman has failed to show why a monetary award would be insufficient compensation for the vessel's sale. The cases cited in support of Lozman's irreparable harm are wholly inapposite: one deals with staying discovery in a patent case, and the other with staying an injunction brought by prisoners against the Texas Department of Corrections.

C. Issuance of Stay Will Substantially Injure the Appellee

Lozman also argues Appellee will not be injured by the stay. However, Appellee submits it will be injured as Lozman has failed to post a supersedeas bond to provide security for Appellee's judgment and Appellee will continue to incur daily *custodia legis* fees as this appeal progresses. *See Peacock v. Thomas,*

516 U.S. 349, 359 n. 8. (1996) ("The district court may only stay execution of the judgment pending the disposition of certain post-trial motions or appeal if the court provides for the security of the judgment creditor."). Accordingly, granting the stay will substantially injure Appellee and Lozman's motion should be denied.

D. Issuance of Stay Will Not Serve the Public Interest

Lozman asserts staying the Appellant's sale is a matter of great public concern for owners of "floating residential structures" around the United States. However, contrary to Lozman's novel assertions regarding state rights, such a stay actually disserves the public interest because it would potentially "muddy the waters" of the general maritime law and would encroach on its uniformity throughout the United States.

The underlying landlord-tenant issues raised by Lozman are not interests of purely "local" concern, which beckon the application of Florida law. *See Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 22-23 (2004). And "[e]ven though a particular admiralty case might involve the rights and obligations of [a landlord and tenant] in a port, general maritime law should be uniform so that vessels in different ports would not have to subject themselves to the vagaries of local law." *Nissan Motor Corp. in U.S.A. v. Maryland Shipbuilding & Drydock Co.*, 544 F. Supp. 1104, 1111 (D. Md. 1982). The position espoused by Lozman offends the uniformity of the federal maritime law by carving out a defense through which vessels could

potentially evade the enforcement of substantive rights of admiralty law. Indeed, if other states were to extend homestead protections to vessels on the navigable waters of the United States in the manner Lozman suggests, the federal maritime law would be substantially undermined.

This dispute concerns the rights and liabilities of a wharfinger and a vessel on the navigable waters of the United States, and not just a wharfinger and vessel in the State of Florida. Many vessels, whether they are from Florida, other states, or other countries, transit the navigable waters of Florida in commerce and recreation. Given the national—indeed international—character of maritime commerce in Florida, uniformity is desired, if not mandatory.

E. Sale Will Not Moot This Appeal

Lozman contends that confirmation of the sale will render an appeal moot. This Court, however, found to the contrary in *Isbrandtsen Marine Services, Inc. v. M/V Inagua Tania*, 93 F.3d 728 (11th Cir. 1996). The Court held that although the vessel had been sold at auction, the Court had "jurisdiction in the *in rem* action since the proceeds of the sale remain[ed] in the Court's registry in lieu of the *res*. *Id*. at 733. The court reasoned:

> Furthermore, we do not view this case as moot. The vessel was sold at an interlocutory sale and the final rights of the original plaintiffs and the owner to proceeds have not yet been decided. The proceeds of the sale are in the registry of the Court as a substitute for the *res* of the vessel.... "*The proceeds from the judicial sale of a*

> *vessel, or security furnished in lieu thereof, are deemed a jurisdictional substitute for the vessel itself.*" (citations omitted) (emphasis added).

Id. at 734. Here, although Appellee was permitted to credit bid on its judgment, it previously submitted a bond in the amount of $25,000.00 which remains in the registry of the District Court. (DE 26-2, see Exhibit "E"). This amount vastly exceeds Appellee's winning bid at the sale. Accordingly, the Appellee's bond may serve as substitute security for the Appellant and the sale of the Appellant will therefore not moot this appeal.[6]

IV. Conclusion

Appellee respectfully requests Appellant's Emergency Motion to Stay be denied and confirmation of the sale be allowed to go forward, and such other relief as this Court deems proper.

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6. Appellee would, however, request this Court, or the District Court as appropriate, to reduce the bond amount to reflect the Appellant Vessel's sale price of $4,100. Further, the relief Lozman requests should be conditioned on his posting of an adequate bond in the District Court pursuant to Federal Rule of Appellate Procedure 8(a)(2)(E) and Federal Rule of Civil Procedure 62(d).

Dated February 24, 2010 Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this February 24, 2010, a true and correct copy of the foregoing has been furnished via e-mail and U.S. Mail to Philip J. Nathanson, THE NATHANSON LAW FIRM, 120 N. LaSalle Street, Suite 1000, Chicago, IL 60602, philipj@nathansonlawfirm.com.

/s/ Michael J. Bradford
Michael J. Bradford

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

CERTIFICATE OF SERVICE

The undersigned certifies that he has this 28th day of August 2012 caused one copy of the foregoing **Letter Brief for Petitioner** to be served on the below-named counsel by first-class mail, postage prepaid, and further certifies that all persons required to be served have been served:

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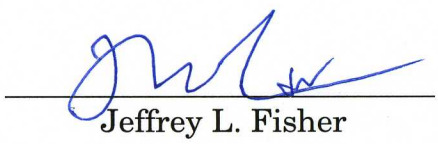

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