

NO. 79529-1

**SUPREME COURT  
OF THE STATE OF WASHINGTON**

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JACK OLTMAN, BERNICE OLTMAN and SUSAN OLTMAN  
Appellants/Petitioners,

v.

HOLLAND AMERICA CRUISE LINE USA, INC. and HOLLAND  
AMERICA LINE, INC.

Respondents.

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**BRIEF OF JACK OLTMAN, SUSAN OLTMAN AND THE ESTATE  
OF BERNICE OLTMAN (APPELLANTS/PETITIONERS)  
IN RESPONSE TO THE AMICUS CURIAE BRIEF OF:  
CRUISE LINE INTERNATIONAL ASSOCIATION**

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OLTMANS' RESPONSE TO CRUISE LINE  
INTERNATIONAL AMICUS CURIAE BRIEF  
(Oltman et al v. Holland America et al)  
//Appellants-Oltmans

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## 1. INTRODUCTION

This Brief is in direct response and opposition to the Amicus Curiae Brief filed by the Cruise Line International Association (“CLIA”). Although six broader issues are before the Washington Supreme Court in this Appeal, the CLIA has limited their brief to only one of these issues, which is highlighted below:

**Issue 4: Whether under the specific facts of this case, a cruise ship passenger ticket contract of adhesion, its forum selection clause and one year statute of limitation (reducing the state and federal three year limitations) is valid and enforceable under prevailing Washington State and United States Federal Law, when the passenger only receives the ticket at the time that he/she boards the cruise ship.**

However, in addressing this issue (relating to the enforceability of the forum selection clause), the CLIA has chosen not to address all of the associated issues and arguments, such as enforceability of under state law (in the case where a forum selection clause would effectively deny a plaintiff his day in court), except that the CLIA does briefly address the issue of whether or not having a right to a jury trial plays a part in the test. And, although the CLIA asserts the enforceability of the forum selection clause under the reasonable communicative test, and also pays particular attention to the case *Casavant v. Norwegian Cruise Lines*, 63 Mass.App.Ct 785, 829 N.E. 2d 1171 (2005), *review denied by* 445 Mass. 1102, 834 N.E.2d 256 (2005), *and certiorari denied by* 546 U.S. 1173, 126 S.Ct. 1337 (2006) (“Casavant”), the CLIA fails to include the most basic standard under *Carnival Cruise v. Shute*, 499 U.S. 585 (1991), that of

fundamental fairness, which the analysis of the forum selection clause must include.

## **2. RESPONSE**

### **a. Objection to Factual statements.**

At the outset, we feel it important to correct the statement in the CLIA's introductory paragraph in which the CLIA asserts that "[i]t is undisputed that the Petitioners had an opportunity to examine the contract but failed to do so." (CLIA Brief pg 1) First of all, as the CLIA must know, only Jack and Bernice Oltman traveled on the cruise, and therefore, only Jack and Bernice Oltman's claims are at issue with respect to notice (prior to embarking on the cruise).<sup>1</sup> Second, it was undisputed that Jack and Bernice Oltman received the cruise tickets at the time of boarding or just prior to boarding, and therefore, they assert that they did not have an opportunity to read nor learn of the terms contained therein (CP 232, Lines 9-12, CP 236, Lines 1-2). Taking the evidence in the light most favorable to the non-moving party (from the summary judgment below), the Oltmans have asserted that a basic factual premise underlying this appeal is the question of whether or not a forum selection clause is enforceable when the cruise line passenger receives the cruise line contract (with its

forum selection clause) at the time the passenger boards the sailing vessel – and not before.<sup>2</sup>

Also, with respect to the facts, the CLIA asserts that Jack Oltman admitted that he failed to read the ticket. However, that is not what Mr. Oltman states in his declaration at paragraph 10. (CP 232 ¶10). Instead Mr. Oltman states that he was not provided an opportunity to read the ticket as he received it either six days before boarding or at the time he boarded the cruise ship. (CP 232). Thus, (taking the evidence in the light most favorable to the non-moving party), the Jack and Bernice did not have an opportunity to review the contract terms because the cruise ship contract was provided only at the time of departure.

Finally,<sup>3</sup> with respect to the facts, the CLIA asserts that

[m]illions of cruise ship passenger ticket contracts issued by CLIA member cruise lines contain prominent forum selection and time limitation provisions like those at issue here.

[CLIA Brief at pg 3]

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<sup>1</sup> The CLIA does not address the issue of whether or a non-traveling spouse may be bound to a forum selection clause contained in the cruisetour contract.

<sup>2</sup> Of course, this is not the only fact or factor involved in the overall environment and context for the challenge under fundamental fairness.

<sup>3</sup> Also, with respect to the facts, the CLIA states that the forum selection clause “require[d] all suits arising from or related to the cruise to be brought in federal court in Washington if such court had subject matter jurisdiction, or, if not, in Washington state court.” But the forum selection clause instead attempts to limits the fora even more.

Thus, it is much stricter, in the sense of requiring that suits be brought in the United States District Court for Seattle, or state court in King County Washington.

However, not only was it disputed that the cruise ship forum selection clause at issue here was not prominently displayed (due to lack of notice and the location of the clause), but also that the forum selection clause is not similar to the clause that was reviewed and accepted in *Shute v. Carnival Cruise Lines*, which limits suits to a particular state (any court in that state!)<sup>4</sup> Whereas here, the forum selection clause attempts to limit potential plaintiffs even more by not only limiting claimants to a particular county, but by also adding in the confusing language about a party having to make a determination and choice with respect to whether the federal court would have subject matter jurisdiction.<sup>5</sup>

**b. The Issue of Advance Notice (of the terms and conditions of the Cruisetour Contract)**

The CLIA asserts, at page 3 of their brief, that the contractual limitations contained in the cruise line contracts “are published in countless cruise lines’ brochures and websites and, each line makes its contract terms available upon request.” Yet the CLIA is unable to show where these contractual limitations are published, and more important, that a traveler would even be aware of such limitations. On the contrary, while airlines ferry passengers internationally (just like cruise lines), the air

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<sup>4</sup> This is discussed in more detail below.

<sup>5</sup> Noting of course that the Parties cannot contractually confer jurisdiction on the federal court where none would otherwise exist.

travel industry has no such contractual limitation relating to forum selection clauses, and a passenger is not required to enter into such a contract. If this is the case, which it is, then why would a passenger be aware that he/she would have to enter into a forum selection clause (and shortened statute of limitations) with respect to cruise travel but not air travel when the ultimate object of his/her intention (in this case at least) is the same as with air travel (i.e. to reach a particular destination).

Thus, what notice were Jack and Bernice Oltman ever put under that such contractual terms (as the forum selection clause and shortened time bar) existed. And why is the cruise industry's assertion here that the contract terms were available on its website able to escape the type of notice requirements that the law requires – notice of terms (such as in other contexts, i.e. shrink or click wrap).

**c. The Enforceability of Cruise Line Forum Selection Clauses generally.**

This case is not about the enforceability of cruise line forum selection clauses generally. But instead, this case is about the enforceability of the cruise line forum selection clause employed in this case, under the very specific facts of this particular case.

Chiefly, those facts include that: the contractual terms were not provided until the time that Jack and Bernice Oltman boarded the ms

Amsterdam in Chile (and therefore not reasonably communicated to the Plaintiffs) (CP 232 Lines 9-12, CP 236, Lines 1-2); the forum selection clause is unclear as to where a Plaintiff may file and under what circumstances (federal or state court); the forum selection clause here was not the type of clause that was accepted in *Carnival Cruise v. Shute*, 499 U.S. 585 (1991) (as the present clause is more detailed and limiting than *Shute*); and enforcement of the forum selection clause would be “fundamentally unfair” – where the cruise line has not set forth any reasoning or rationale for having to limit claims to a federal forum and where the Oltmans would effectively and actually be deprived their day in court. It is under these facts, in this case, that the forum selection clause should not be held enforceable. Cf. *Dix v. ICT Group Inc.*, 160 Wash.2d 826 (2007)

**d. The Issue of Enforceability of the Cruise Tour Contract (Forum Selection Clause and Time Bar provisions) as applied to the Specific Facts of this Case**

**i. The Reasonable Communicative Test**

The CLIA argues that the simple fact that Jack and Bernice Oltman received the ticket and cruisetour contract before boarding alone satisfies the reasonable communicative test. However, this does seem to comport

with a fair review of cases considering the two-part reasonable communicative test.<sup>6</sup>

[The Ninth Circuit] employ[s] a two-pronged ‘reasonable communicativeness’ test . . . to determine under federal common law and maritime law when the passenger of a common carrier is contractually bound by the fine print of a passenger ticket. . . . ‘[T]he proper test of reasonable notice is an analysis of the overall circumstances on a case by-case basis, with an examination not only of the ticket itself, but also of any extrinsic factors indicating the passenger’s ability to become meaningfully informed of the contractual terms at stake.’ . . . Whether the ticket provides reasonable notice is a question of law. . . .

The **first prong** of the reasonable communicativeness test focuses on the physical characteristics of the ticket. Here we assess “[f]eatures such as size of type, conspicuousness and clarity of notice on the face of the ticket, and the ease with which a passenger can read the provisions in question.” \* \* \*

The **second prong** of the reasonable communicativeness test requires us to evaluate “the circumstances surrounding the passenger’s purchase and subsequent retention of the ticket/contract.” ‘The surrounding circumstances to be considered include the passenger’s familiarity with the ticket, the time and incentive under the circumstances to study the provisions of the ticket, and any other notice that the passenger received outside of the ticket.’ This prong allows us to examine more subjective, “extrinsic factors indicating the passenger’s ability to become meaningfully informed.’

*Bobbie Jo Wallis v. Princess Cruises, Inc.*, 306 F.3d 827, 835-836 (9<sup>th</sup> Cir. 2002) (emphasis added) (hereinafter “*Bobbie Jo Wallis*”) (internal citations omitted).

Just as they had in the trial court (and before the court of appeals), the Plaintiffs asserted that the cruisetour contract also failed

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<sup>6</sup> *Barkin v. Norwegian Caribbean Lines*, 1988 AMC 645, 650 (D. Mass 1987) (noting

the first prong of the reasonable communicative test (CP 205-307 and Brief of Appellant in Court of Appeals; see also Petition for Review, page 16), the CLIA does not address this issue. But the Oltmans do continue to maintain that the contract terms were not conspicuous and that this issue will arise in the Court's de novo review, as well as consideration of all of the tests to be applied to the forum selection clause.<sup>7</sup>

For this response, the focus is on the second prong – whether the surrounding circumstances, including the passenger's familiarity with the ticket, the time and incentive under the circumstances to study the provisions of the ticket, and any other notice that the passenger received outside of the ticket, served to allow Jack and Bernice Oltman to become meaningfully informed of the terms contained therein.

In this case, there was a true lack of a meaningful choice, as Jack and Bernice were provided a copy of the ticket only at the time they were boarding and at no time prior. And, at the time of boarding they needed only provide the actual ticket form (and not the remaining

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that the proper focus is on whether a plaintiff had the opportunity to read the cruise ticket contract)

<sup>7</sup> In their Appellate Brief and Motion for Reconsideration (to the Court of Appeals, pp 7-8), the Appellants go into detail as to the difficulties with the inconspicuous nature of the ticket.

contract terms embedded farther within the then just received packet of information). As a result, they were not provided a chance to review the contract terms, nor were they required to first accept any of the contract terms. (CP 232, Lines 9-12, CP 236, Lines 1-2) Thus, at the time Jack and Bernice Oltman received their travel documents they had no time for review, much less a detailed and thorough one that a 30 page travel document requires. (CP 232, Lines 9-12, CP 236, Lines 1-2 Decls. of J. Oltman and B. Oltman). Furthermore, had the Oltmans tried to cancel the tickets, they would have suffered forfeiture of the monies paid to the Defendants, as there was no opportunity for a refund. (CP 205-237, Opposition to S.J., cruisetour terms and conditions, Exhibit I).

A similar situation occurred in *Ward v. Cross Sound Ferry*, 273 F.3d 520; 2002 AMC 428 (2d Cir. 2001) in which the Second Circuit adopted the reasonable communicative test and applied it to the facts of the case before it to find that the terms of the passenger contract (including the one year time bar) were not reasonably communicated when the ticket was provided to the ferry passenger only at the time of boarding and the passenger did not have a reasonable opportunity to accept its terms. The *Ward* court reviewed a number of cases which the CLIA and HAL Defendants would argue apply to the present case and

the *Ward* court rightly rejected those cases as distinguishable in that each plaintiff in those cases had advance notice of the contractual terms, whereas in *Ward*, the plaintiff received the ticket and its terms only at the time of boarding.

The CLIA also seems to assert that Jack and Bernice Oltman somehow intentionally failed to read the terms of the cruise tour contract at the time they boarded the cruise ship. However, this was not the case and there is no evidence to support that assertion, instead, Jack and Bernice simply did not have an opportunity to review the tickets before boarding, as they received the cruisetour contract only at the time they boarded (CPs 232, 236). Thus, there was no intentional conduct by either Jack or Bernice to ignore the provisions of the contract. Thus the argument by Jack and Bernice is not that a party may invalidate contractual terms by their failure to read them; but to the contrary, the position taken by Jack and Bernice is that a passenger must be given an opportunity to review and accept or reject the terms, and in this case, they were not.

1. **Whether a passenger's booking through an online agent binds a party to cruise tour contract through constructive notice.**

This is a non-issue as there is no proof in the record that Vacations to Go Travel received a copy of the cruisetour contract prior to Jack and

Bernice Oltman boarding the ms Amsterdam, or that the agent that Jack and Bernice used at Vacations to Go Travel was aware of the terms and conditions of cruisetour contract. Thus this argument should not be considered.

Should the court still consider this argument, and the very limited case authority cited by CLIA, then even then, after analyzing the cases involving this issue, it is clear that only in exceptional cases has a court held that a travel agent's possession of the cruise tour contract acts as constructive knowledge of the terms therein on the passengers (who had yet to receive the contract). In all other cases, it appears that the court found the plaintiffs to have intentionally not read the terms even though a family member or agent had the terms and the passenger was aware of this (though did not seek to review them).

In addition, that fact alone would not satisfy the reasonable communicative test unless there was an opportunity to be meaningfully informed of the terms such as their being evidence that the Oltmans knew that their agent had the contract terms, or that the agent had contacted the Oltmans and the Oltmans had not returned those calls. This issue would also seem to be a matter of state law application, since federal maritime

does not seem to control the area of state law agency in the context of cruise ship law contracts. *Cf Casavant*, 63 Mass.App.Ct. 785 (2005).

**2. Does the period of time following the cruise and injury have any impact on the reasonable communicativeness test's notice and opportunity to be meaningfully informed prong?**

CLA argues that because the Oltmans must have had the cruise tour ticket in their possession prior to filing suit, that they had nearly one year to become reasonably apprised of its terms post-injury. This does not satisfy the reasonable communicative test which is a test relating to contract formation – that is whether Jack and Bernice Oltman had an opportunity to accept the terms of the contract prior to traveling such as to make a valid contract. And, the act of speaking with an attorney after the injury and before filing a lawsuit does not override the requirement that the terms of the contract have first been reasonably communicated to the passenger before traveling. As discussed in *Ward v. Cross Sound Ferry*, 273 F.3d 520, which analyzes this very issue.

The district court relied on several cases for the proposition that *Ward* had ample opportunity to obtain a duplicate ticket after the trip. We find those cases to be distinguishable because in each of them the passengers had received their original tickets well in advance of the trip, and thus the carrier had satisfied its burden of providing notice.

Ward at 526.<sup>8</sup>

## ii. Fundamental Fairness

In addition, assuming arguendo that the terms were in fact reasonably communicated to the Plaintiffs (which they were not), this would still not validate the forum selection clause under the seminal case of *Carnival Cruise Lines, Inc. v. Shute*, 113 L.Ed. 2d 622, 111 S.Ct. 1522 (1991) (“Shute”).<sup>9</sup> In *Shute*, 113 L.Ed. 2d 622, 111 S.Ct. 1522, the U.S. Supreme Court did not hold that forum selection clauses in all cruise ship passenger adhesion contracts are automatically valid;<sup>10</sup> instead, the Supreme Court recognized that forum selection clauses must be reviewed under a standard of reasonableness and fairness. *Shute*, 499 U.S. at 595. Through *Shute*, the Supreme Court called on

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<sup>8</sup> Citing *Ames v. Celebrity Cruises, Inc.*, 1998 U.S. Dist. LEXIS 11559, 1998 WL 42794 (S.D. N.Y. 1998) and noting pre-boarding notice in each *Effron v. Sun Line Cruises, Inc.* 67 F.3d 7 (2d Cir. 1995); *Foster v. Cunard White Star*, 121 F.2d 12 (2d Cir. 1941); *Colby v. Norwegian Cruise Lines, Inc.* 921 F. Supp 86 (D. Conn. 1996); *Murray v. Cunard S.S. Co.*, 235 N.Y. 162 (1923); *CF Hodes v. S.N.C. Achille Lauro*, 858 F.2d 905 (3<sup>rd</sup> Cir. 1988) (“The essential inquiry remains whether the ticket reasonably communicated to the passenger the conditions of the contract of passage before the passenger boarded the vessel.”)

<sup>9</sup> *Shute*, 499 U.S. 585, was premised in large part on *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S.1, 15, 32 L.Ed 2d 513, 92 S.Ct. 1907 (1972), where the *Bremen* Court concluded that forum selection clauses “control absent a strong showing [that] enforcement would be unreasonable and unjust.” The clause may be held unenforceable if “enforcement would contravene a strong public policy of the forum in which suit is brought”, *Id.* at 15, or if “the contractual forum [is] so gravely difficult and inconvenient that [a party] will for all practical purposes be deprived of his day in court.” *Id.* at 18.

<sup>10</sup> Quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), the *Carnival* Court did state that although forum-selection clauses, are not “‘historically . . . favored,’ [they] are ‘prima facie valid.’” *Shute* at 589.

courts to conduct an exacting review of cruise line tickets to determine the validity of the terms and conditions contained therein.

**It bears emphasis that forum-selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness.**

*Shute* at 633. (emphasis added).

In conducting this review for fundamental scrutiny, it is also helpful to place into context the three reasons behind the Supreme Court's decision to uphold these types of contracts of adhesion in the first place (since they been historical disfavored).<sup>11</sup>

- 1) First, the Court rationalized that cruise lines carry passengers from many locales, thus would be subject to suits in multiple forums if not for the forum selection clause;
- 2) Such clauses have the practical effect of dispelling any confusion about where suits must be brought and defended, thereby sparing time and expense of pre-trial motions on this issue; and
- 3) Passengers who purchase tickets containing these clauses benefit in the form of reduced fares in the savings that cruise lines enjoy by limiting the forums.

*Carnival*, 499 U.S. at 632.

It is apparent that the Defendants have failed the *Shute* Court's reasoning for all three rationales. First, regarding rationale #1, by its employ of two particular forums in King County (one Federal and one state) and its utilization of ambiguous language, Holland America is

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<sup>11</sup> *Id.*

actually **encouraging** multiple suits by requiring parties to file in both federal and state court simultaneously to ensure that a suit is filed prior to the running of shortened statute of limitations. Thus, there is no predictability at all, and there is also no argument advanced at any stage of these proceedings as to why the forums must be limited to King County or state or federal.

Regarding point two above, comparing the forum selection clauses in *Shute* with the one at issue in the present case, it is clear that the Defendants' forum selection clause is even more onerous, limiting and confusing than the forum selection clause contained in *Shute*, 113 L.Ed. 2d 622, 111 S.Ct. 1522, as Defendants here have attempted to limit the Oltmans to one area, or even, one county (King – whether in Federal or District Court); and, unbeknownst to anyone at the time of entering this contract, are arguing that the clause requires claimants to file first in federal court, and then, if the federal court lacks jurisdiction, to incur additional expense and re-file in state court and hope that somehow, through all of this time and effort, that the one year statute of limitation hasn't been missed. Talk about confusing, and time and expense being wasted, this is it, as this case and this forum selection clause run absolutely counter to the rationale espoused by the Supreme Court in *Shute*, 113 L.Ed. 2d 622, 111 S.Ct. 1522.

Regarding rational number three above, due to Holland America's motions for summary judgment (in both state and federal court), Holland America cost the Oltmans, Holland America, the judiciary and the public thousands of dollars in litigation fees when the whole purpose behind the Supreme Court's rationale and the forum selection clause was to reduce costs and limit the litigation forums. By filing in King County (WA) court, their right under the contract, the Savings to Suitors clause – 28 U.S.C. 1333, the VII and XIV amendments to the U.S. Constitution (providing Plaintiffs the right to a jury trial), the Washington Constitution (Art. 1 sec. 21), and Washington (public policy) law, the Plaintiffs seek to comply with the contract, keep the cruise line's costs down and yet secure a jury trial. But it was Holland America who sought to increase the costs of cruise line tickets by bringing the procedural motions they did for the purpose of attempting to frustrate the Oltmans from ever having their day in court, and along the way, costing the Parties and public thousands of unnecessary dollars in opposition by the Oltmans to keep their otherwise valid claims alive.

In addition, the present case before the Washington Supreme Court is factually much different than that which was before the U.S. Supreme Court in *Shute*, 113 L.Ed. 2d 622, 111 S.Ct. 1522. By comparing the two cases, a number of distinctions are revealed, including, a much different

forum selection clause. In *Carnival*, the forum selection clause is much broader and more inclusive, permitting suit to be filed anywhere in the State of Florida. Whereas here, the CLIA (and Holland America) are attempting to argue that the U.S. District Court for the Western District of Washington was the only situs where Plaintiffs had to file first (although, that is, of course not what the ticket reads).<sup>12</sup>

Also, in *Shute*, the forum selection clause at issue required the plaintiffs to file suit away from their domicile, in a forum more convenient for the defendant, whereas here, the Oltmans have filed in the cruise line's chosen domicile (King County Washington) and the Defendants are attempting to enforce a forum selection clause requiring a forum change to a venue approximately two kilometers away – a forum that Defendant has not proven to the court offers any more convenience than the one that the case now resides. Finally, in *Shute*, a change in forum would not have

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<sup>12</sup> What the Defendants are attempting to have their ticket read is: All lawsuits arising out of this contract must be litigated, if at all, by filing first in the Western District of Washington, and if that forum determines that it lacks subject matter jurisdiction, then, and only then, by re-filing in the King County district or superior court.

Of course, if the Defendants wish to place so much reliance on *Carnival*, then perhaps the Defendants should be held to the same forum selection clause that was at issue in *Carnival*. There, the passenger contract read,

“8. It is agreed by and between the passenger and the Carrier that all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida., U.S.A., to the exclusion of the Courts of any other state or country.” *Shute* at 628.

forever barred Plaintiffs' claims,<sup>13</sup> whereas here, the Defendants are seeking to forever bar Plaintiffs' claims through a non-negotiated, non-communicated one year limitation clause contained in the passenger ticket's terms and conditions.

The Defendants seek to enforce this vaguely drafted forum selection clause to simply try and avoid litigation, and not, for the reason cited in *Shute* – which was to reduce costs.

***I. Casavant & Another v. Norwegian Cruise Line, LTD., 63 Mass.App.Ct. 785 (2005).***

The CLIA asserts that *Casavant & Another v. Norwegian Cruise Line, LTD., 63 Mass.App.Ct. 785 (2005)* (“Casvant”) does not bolster the Oltmans position because, the CLIA argues, the Oltmans having received their cruisetour contract within the cancellation penalty period does not invalidate the contractual provisions (if otherwise reasonably communicated). Of course, the cruisetour contract was not reasonably communicated to Jack and Bernice Oltman as they did not receive the ticket until the time of boarding, so that issue itself would take the carpet out from the CLIA’s argument; but had the cruisetour contract been “reasonably communicated”, how does issuance of the contract without

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<sup>13</sup> The record does reflect that this was the case in *Shute*.

any chance affect the Court's consideration under the *Shute* fundamental fairness test?

The CLIA would like to focus on the "bad" conduct of the cruise line in *Casavant* case where the cruiseline did not send the ticket terms until only 13 days before the cruise, despite the plaintiffs in that case (the Casavants) having paid for their cruise nearly two months prior. However, neither the Massachusetts appellate court's opinion, nor the Oltmans' citation to *Casavant* were based entirely on the non-cancellation issue.<sup>14</sup> Instead both are based on a state court's application of state and federal law to a forum selection clause (under the fundamental fairness test) that was received by the Casavants only 13 days prior to travel and which under the circumstances did not provide a meaningful opportunity to accept the cruise ship contract (or reject its terms with impunity).

## 2. Right to Jury Trial.

The issue of the Oltmans assertion of the right to a jury trial implicates the fundamental fairness test, the Savings to Suitors Clause (28 U.S.C. 1333), the United States and Washington State Constitutions and the public policy of Washington state. Because an admiralty law claimant

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<sup>14</sup> Though, the cancellation without refund, coupled with very little advance notice of the terms has led to courts' refusal to enforce a forum selection clause. See *Corna v. American Hawaii Cruises*, 794 F. Supp. 1005 (D. Haw. 1992).

cannot be assured of a jury trial in a federal court sitting in admiralty,<sup>15</sup> one of the most fundamental reasons why the Oltmans chose the state court forum (pursuant to 28 U.S.C. §1333 – the savings to suitors clause) was to ensure a trial by jury. On the other hand, the only way that the Oltmans could ensure a jury trial in federal court was by having some alternative ground for federal jurisdiction, such as diversity, which did not exist in this case due to the failure to meet the \$75,000 amount in controversy requirements under 28 U.S.C. §1332 (that each party must satisfy).<sup>16</sup> (VR, page 19, Lines 15-25; page 20, Lines 1-13 K.C Superior Court transcript – confirming that the amount in controversy did not exist). The Oltmans believe this to be a fundamental concern to be addressed by the Court under both fundamental fairness and the Oltmans right to proceed under the Savings to Suitors Clause (28 U.S.C. 1333).

### 3. CONCLUSION

For these reasons, the Oltmans respectfully disagree with the amicus brief filed by the Cruise Line International Association.

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<sup>15</sup> Generally, there is no common law trial by jury in admiralty cases. *Craig v. Atlantic Richfield, Co.*, 19 F.3d 472 (9<sup>th</sup> Cir., 1994).

<sup>16</sup> “General maritime law” itself does not grant subject matter jurisdiction under 28 U.S.C. §1333 (the savings to suitors clause), in order for a case to be removed to federal court, or for the federal court to have had jurisdiction (in a maritime case filed in state court pursuant to §1333), there must be an alternative ground for federal court jurisdiction. *Lewis v. Lewis & Clark Marine, Inc.*, 121 S.Ct. 993, 531 U.S. 438 (2001);

DATED this 20<sup>th</sup> day of November 2007.

IN PACTA, PLLC  
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**Certificate of Service**

I certify that on 11/20 at 5pm, that I served each of the Parties entitled to a copy of this brief, by emailing a PDF copy of the same and by offering to provide a hard copy in addition to the electronic version.

November 11, 2007

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/S/

Noah Davis

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*Romero v. International Terminal Operating Co.*, 358 U.S. 354, 371, 79 S.Ct. 468, 3 L.Ed.2d 368 (1959); *Alleman v. Bunge Corp.*, 756 F.2d 344, 345-46 (5<sup>th</sup> Cir. 1984).