IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

SEACOR ISLAND LINES, LLC,
BALEARIA CARIBBEAN, LTD.,
CROWLEY LINER SERVICES, INC.,
KING OCEAN SERVICES, LTD., and
KING OCEAN AGENCY, INC.,

Appellants,

v.

DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION,
BOARD OF PILOT COMMISSIONERS,
PILOTAGE RATE REVIEW COMMITTEE, and
FLORIDA CARIBBEAN CRUSE ASSOCIATION,

Appellees,

and

PORT EVERGLADES PILOTS ASSOCIATION,

Appellee/Cross-Appellant.
_____/

DCA CASE NO.: 1D19-2226, 1D19-2241, 1D19-2248
L.T. CASE NO.: PRRC 2014-2

On appeal from the Pilotage Rate Review Committee

PORT EVERGLADES PILOTS ASSOCIATION'S
RESPONSE TO APPELLANTS' MOTIONS
FOR REHEARING, CERTIFICATION, AND REHEARING *EN BANC*

Appellee/Cross-Appellant Port Everglades Pilots Association (the "Pilots") pursuant to Florida Rules of Appellate Procedure 9.300, 9.330 and 9.331, files this response to (1) Appellants Crowley Liner Services, Inc., King Ocean Services, Ltd., and King Ocean Agency, Inc.'s (cumulatively, "Crowley") Motion for Rehearing and Certification of Question of Great Public Importance; and (2) Appellant Balearia

Caribbean, Ltd.'s ("Balearia") Motion for Panel Rehearing, Motion for Rehearing *En Banc*, and Motion for Certification.

INTRODUCTION

Despite economically benefiting from stagnant pilotage rates for more than 17 years, Appellants continue their quest to delay the resolution of pilotage rate applications initiated more than six years ago. Appellants' post-decision motions come with weighty burdens, yet they cite no case law in direct and express conflict with this Court's unanimous panel decision of November 20, 2020 (the "Panel Decision"),[1] nor any other case law or authority demonstrating error by the Panel. Instead, Appellants misconstrue the Panel Decision and sidestep this Court's binding case law to advance arguments this Court has already rejected.

The Panel Decision affects no other state agencies, persons, or entities beyond those who may be affected by the pilotage rate setting proceedings established by the Legislature in section 310.151, Florida Statutes. And one Appellant concedes that the remedy it seeks can "only" be provided by the Legislature, not this Court. Because nothing in the case law or the record supports their arguments, Appellants' motions should be denied.

[1] *Seacor Island Lines, LLC v. Dep't of Bus. & Prof'l Regulation*, Nos. 1D19-2226, 1D19-2241, 1D19-2248, 2020 WL 6815831 (Fla. 1st DCA Nov. 20, 2020).

ARGUMENT

I. Crowley's Motions for Rehearing and Certification are Without Merit.

A. *Crowley's Rehearing Motion fails to identify any points of law or fact which the Panel Decision overlooked or misapprehended*.

This Court should deny Crowley's Rehearing Motion because Crowley has failed to identify any points of law or fact that the Panel Decision has overlooked or misapprehended. *See* Fla. R. App. P. 9.330(a)(2)(A) (requiring the movant to "state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or misapprehended in its order or decision"); *see also State ex rel. Jaytex Realty Co. v. Green*, 105 So. 2d 817, 818–19 (Fla. 1st DCA 1958) ("Certainly it is not the function of a petition for rehearing to furnish a medium through which counsel may advise the court that they disagree with its conclusion, to reargue matters already discussed in briefs and oral argument and necessarily considered by the court, or to request the court to change its mind as to a matter which has already received the careful attention of the judges, or to further delay the termination of litigation."). Furthermore, a movant is prohibited from "present[ing] issues not previously raised in the proceeding." *Id.* R. 9.330(2)(a)(A). Crowley failed to meet its burden, and the Panel Decision was correct on the merits,.

Crowley's Rehearing Motion cites the part of the Panel Decision which concludes that "'the remaining issues raised in Appellants' petitions do not constitute disputed issues of material fact.'" Crowley's Rehearing Motion, p. 4

(quoting 2020 WL 6815831, at *2). Crowley argues that the Panel Decision overlooked a legal principle that requires this Court to accept as true Crowley's factual allegations, specifically, Crowley's contention that it disputed that the Pilots' incurred a $721 cost-per-handle.[2] Crowley's Rehearing Motion, p. 4 (citing *Save Our Creeks v. State of Fla. Fish & Wildlife Conservation Comm'n*, 112 So. 3d 128, 130 (Fla. 1st DCA 2013)). The argument is without merit.

To begin, Crowley's Rehearing Motion ignores the Panel Decision's holding, which concluded that Crowley's alleged disputed issues of material fact were not facts but rather disputes about the legal conclusions made by the Pilotage Rate Review Committee (the "Committee"). 2020 WL 6815831, at *2. The Panel Decision was clear that the alleged issues listed in the Panel Decision as well as "the remaining issues raised in Appellants' petitions do not constitute disputed issues of material fact. Rather, they are challenges to the PRRC's legal conclusions, reiterations of the statutory factors to be considered in pilotage rate-setting, or simply undisputed facts." *Id.*

[2] Though Crowley complains that the Panel Decision did not "specifically reference" the $721 cost-per-handle issue, Crowley concedes that it should not conclude that the Panel did not consider Crowley's arguments that it raised disputed issues of material fact. Crowley's Rehearing Motion, pp. 3-4 (citing *Green*, 105 So. 2d at 819). The Panel Decision was also clear that the Panel considered *all* the alleged disputed issues of material fact raised by petitioners, not just the ones specifically identified in the Panel Decision. 2020 WL 6815831, at *2.

Arguments about legal issues do not raise disputed issues of material fact. *See id. (*citing *Cabezas v. Corcoran*, 293 So. 3d 602, 603-04 (Fla. 1st DCA 2020), and *Unisource Pharm. Grp., Inc. v. State, Agency for Health Care Admin.*, 799 So. 2d 333, 333 (Fla. 1st DCA 2001)). Crowley's Rehearing Motion does not explain why or how the Panel Decision was wrong in holding that a legal argument cannot be a disputed issue of material fact. An argument on the law is not an issue of material fact, and an issue of material fact is not an argument of law.

Crowley also misinterprets the case law with regard to an agency's authority when presented with a petition for administrative hearing. As argued in the Pilots' Answer/Cross-Initial Brief, p. 34, Crowley is not entitled to an administrative hearing simply because Crowley alleges that some facts are material and disputed. *See Hadi v. Liberty Behavioral Health Corp.*, 927 So. 2d 34, 39 (Fla. 1st DCA 2006) ("Liberty's assertions that disputed issues of material fact exist, do not create disputed issues of material fact."). Rather, the Committee has the authority to determine whether a petition for hearing raises disputed issues of material fact. *Id.* Crowley, however, ignores case law like *Hadi* when it claims in its Rehearing Motion that Crowley's allegations that disputed issues of material fact exist must be accepted as true.

Finally, it appears, though it is not clear, that Crowley's Rehearing Motion attempts to impermissibly re-litigate, and in fact, change the allegations and

arguments that Crowley raised in its petition for administrative hearing about the $721 issue. *See* Crowley's Rehearing Motion, p. 4. As the Pilots argued in their Initial/Cross-Appellant Brief, pp. 35-36, Crowley's dispute about the $721 per-handle cost was not a dispute about the calculations, but rather, a dispute that the Committee should not consider salaries and benefits as part of the Pilots' total operating expenses (R. 207-16).

Despite the revisionist history present in Crowley's Rehearing Motion, Crowley raised no material factual dispute below. Rather, Crowley's petition for administrative hearing argued that the Committee affirmatively decided to include certain items as an "expense" that Crowley believes should not be considered "expenses." (R. 210-14). The Panel agreed that Crowley raised a legal argument about the items that can be included as "expenses" under Section 310.151(5)(b)3., Florida Statutes, not a factual dispute that could be determined through fact-finding by an administrative law judge. Crowley's efforts to skirt the legal arguments in its petition for administrative hearing should be rejected.

B. *Crowley's Certification Motion fails to identify an issue in the Panel Decision that should be certified as one of great public importance*.

Crowley also fails to raise an issue that should be certified as one of great public importance. *See* Fla. R. App. P. 9.330(a)(2)(C) (requiring that the movant "set forth the case(s) that expressly and directly conflicts with the order or decision or set forth the issue or question to be certified as one of great public importance").

Crowley's Certification Motion does not identify any cases that expressly and directly conflict with the Panel Decision and instead requests certification based on an alleged question of "great public importance."

No clear definition exists of what constitutes a question of great public importance. Florida's appellate courts routinely reject claims that an issue is a question of great public importance, warning that such certification should be used in extremely limited circumstances. *See, e.g., Rosa v. Beracha*, 996 So. 2d 958, 959-60 (Fla. 4th DCA 2008) (rejecting the rationale that absence of an appellate decision on the issue or large numbers of affected individuals was sufficient); *Everard v. State*, 559 So. 2d 427, 427 (Fla. 4th DCA 1990) (rejecting the argument that the case presented an issue of great public importance because the case did not involve complex or difficult statutory interpretation issues nor have widespread ramifications). "[O]ne general guide is that a question should be certified where our decision will affect a large segment of the public and the extant decisional law may not coalesce around a single answer to the question posed." *Star Cas. v. U.S.A. Diagnostics, Inc.*, 855 So. 2d 251, 252 (Fla. 4th DCA 2003).

Indeed, certification should be reserved for the rarest of occasions. *See, e.g., Pino v. Bank of N.Y.*, 76 So. 3d 927, 927-28 (Fla. 2011) (accepting jurisdiction because the certified question "has the potential to impact the mortgage foreclosure crisis throughout this state and is one on which Florida's trial courts and litigants

need guidance" and "has implications beyond mortgage foreclosure actions"); *see also* Betsy Ellwanger Gallagher, Amy Miles, The Appellate Opinion Is Out - Now What Do I Do?, 82 Fla. B.J. 29, 32 (May 2008) (noting that the Fourth District Court of Appeal in 2006 certified only two questions of great public importance in civil cases).

But Crowley's Motion would turn this Court into an intermediate court of appeal. *Cf. Ansin v. Thurston*, 101 So. 2d 808, 810 (Fla. 1958) (making the district court's intermediate appellate courts "would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the [Supreme Court's limited jurisdiction] was designed to remedy"). Crowley requests that the Court certify the following question:

> May an administrative agency approve a settlement entered into during the agency's investigation and preliminary to agency action, absent express or implicit authority in the agency's statutes or rules?

Crowley's Certification Motion, p. 5. Crowley's Motion argues that the Panel Decision created a "settlement exception" to the statutory and regulatory process for processing pilotage rate applications. *Id.* Crowley is wrong for numerous reasons.

First, Crowley's question is disconnected from and misconstrues the Panel Decision. Crowley argued on appeal that the Pilots and Florida Caribbean Cruise Association (the "FCCA") could not ask the Committee to consider alternative rate structures without filing completely new applications and starting the rate-setting

process anew. *See* Crowley's Initial Brief, pp. 12-17 (citing Fla. Admin. Code R. 61G14-22.007). The Court rejected Crowley's argument, ruling that the Pilots and the FCCA's request that the Committee consider the "joint proposal," or alternative rate structure, was "more akin to a settlement agreement than an amendment or addition to either party's original application." 2020 WL 6815831, at *1. Furthermore, the Panel Decision noted that neither the Pilots nor FCCA abandoned their original applications. Thus, the narrow holding of the Panel Decision is solely that applicants for pilotage rate increases can propose alternative rates for consideration by the rate-setting Committee in an effort to resolve litigation, and Rule 61G14-22.007 does not require applicants in this situation to start the entire process over from the beginning.

Second, Crowley's question is also disconnected from and misconstrues the record evidence. The Committee evaluated the evidence gathered by the Investigative Committee and provided by the parties, examined the statutory factors under section 310.151, Florida Statutes, and determined the appropriate pilotage rates in Port Everglades. (R. 2-16). As a part of this process, the Committee considered, *inter alia*, the Pilots' and FCCA's original applications, the proposed alternative rates in the joint proposal, the Investigative Committee Report, and alternative rate proposals that Crowley urged the Committee to consider. (*Id.* 4-6).

It is not accurate for Crowley to claim that the Committee simply approved a settlement, nor did the Panel Decision conclude as much.

Third, Crowley's Motion is heavy on hyperbole and wholly without foundation. For example, Crowley argues that the Panel Decision authorizes an applicant to file "a misleading application for a rate change" and subsequently "settle . . . in an undisclosed and unexpected way to the detriment of third parties, and bar those third parties from exercising their rights." Crowley's Certification Motion, p 7. But Crowley ignores that following the receipt of any application, the Committee is obligated to publish a notice advising "all interested parties that they may file an answer, an additional or alternative application, or any other applicable pleading or response, including all documentation in support thereof submitted within 30 days after the date of publication of the notice," making those interested parties participants to the proceedings. Fla. Admin. Code R. 61G14-22.007(5).

Moreover, despite Crowley's farfetched assertions that third parties will be denied the opportunity to exercise their rights in the future, Crowley does not specify what those denied rights will be, nor does it identify any rights that Crowley was allegedly denied in these proceedings. Crowley also does not dispute the Panel Decision's holding that the Committee provided Crowley and the other appellants with numerous opportunities to participate in the proceedings as well as all the due

process that was required. 2020 WL 6815831, at *1. Crowley simply disagrees with the Panel Decision and wants a redo.

Crowley claims that the question it has manufactured "transcends the particular facts of this case," but Crowley fails to put forth any support for this assertion. Crowley's Certification Motion, p. 8. Rather, Crowley merely argues that pilotage rates affect pilots and cargo rates, which in turn might affect the price of consumer goods, and lots of people purchase consumer goods. *See id.* If such a tenuous argument were all that were required, this Court would be compelled to conclude that every case has implications beyond its holding.

Regardless, it is immaterial whether Crowley can create a question that transcends the facts of this case. What is important is whether the Panel Decision's holding has broad implications, and here, it does not. Rather, the Panel Decision's holding is limited to pilotage rate applications processed according to section 310.151 and Rule 61G14-22.007. And although Crowley cites *Star Casualty*'s "general guide" for certifying questions, *see* Crowley's Certification Motion, pp. 8-9, Crowley does not make (nor can it) any argument that Florida's district courts have failed to provide a uniform answer to the disconnected question Crowley poses. Indeed, the Panel Decision is the only appellate decision dealing with these narrow regulatory provisions.

For the above reasons, Crowley's Certification Motion should be denied.

II. Balearia's Motions for Rehearing, Rehearing *En Banc*, and Certification are Without Merit.

A. *Balearia's Rehearing Motion fails to identify any points of law or fact which the Panel Decision overlooked or misapprehended*.

Like Crowley, Balearia has not identified any points of law or fact that the Panel overlooked or misapprehended in its order or decision. *See* Fla. R. App. P. 9.330(a)(2)(A).

Balearia claims that it "challenged only the constitutionality of Section 310.151(4)(a)," and thus, the Panel Decision's statement that Balearia was challenging the constitutionality of section 310.151 was "incorrect" and "overlooked or misapprehended the position of Balearia and the points of law and fact set forth by Balearia." Balearia's Rehearing Motion, p. 6. Balearia then uses this manufactured distinction as an opportunity to spend 14 pages "reargu[ing] matters already discussed in briefs and oral argument and necessarily considered by the court," and "request[ing] the court to change its mind as to a matter which has already received the careful attention of the judges." *Green*, 105 So. 2d at 818–19. A review of Balearia's argument exposes that it is belied by the express words of the Panel Decision and contradicted by Balearia's own arguments.

First, it is unclear how the Panel Decision overlooked or misapprehended any issues of law or fact. Balearia's argument is that the Panel Decision analyzed the constitutionality of the entirety of section 310.151, which necessarily includes

Balearia's challenge to the provisions of sub-section 310.151(4)(a). Thus, the Panel ruled upon the facial constitutionality of Balearia's sub-section as well as the remainder of section 310.151. One must wonder how the Panel could have overlooked or misapprehended any points of law or fact when an analysis of section 310.151(4)(a) is necessarily encompassed within the Panel Decision's analysis of the constitutionality of the entirety of section 310.151. Indeed, the Panel Decision expressly identifies section 310.151(4)(a) with regard to Balearia's as applied challenge. 2020 WL 6815831, at *2.

Balearia also appears to take issue with the Panel Decision's holding that rational basis review applies because section 310.151 does not concern fundamental rights. *See* Balearia's Rehearing Motion, pp. 6-7; *see also* 2020 WL 6815831, at *2. Balearia claims that it argued on appeal that section 310.151(4)(a) "directly concerns fundamental rights on a substantive as well as a procedural basis." Balearia's Rehearing Motion, pp. 6-7. But Balearia makes no argument supporting the application of strict scrutiny here, nor cites any case law showing that the Panel Decision overlooked or misapprehended any point of law. Rather, Balearia appears to be arguing that a denial of procedural due process supplies the fundamental right necessary for strict scrutiny review in a substantive due process challenge. This is patently wrong. The case law cited by Balearia and the Panel Decision shows that substantive and procedural due process claims require different analyses.

The gist of Balearia's Rehearing Motion appears to be a rehash of Balearia's argument on appeal that the Committee violated procedural due process when it denied Balearia a section 120.57(2) hearing. Balearia complains that the Panel Decision has construed section 310.151(4)(a) "to mean that the challenger of modified rates has no right to challenge the legal conclusions of the agency's Final Order." Balearia's Rehearing Motion, pp. 11-12 (quoting section 310.151(4)(a)). Again, Balearia misses the mark.

As the Pilots argued on appeal (and a point that Balearia continues to ignore), *see* Pilots' Answer/Cross-Initial Brief, pp. 49-51, Balearia has always had the opportunity to challenge the legal decisions or conclusions of the Committee—but those opportunities are available during judicial review of the Final Order under section 120.68, Florida Statutes. *See*, *e.g.*, § 120.68(7)(c), Fla. Stat. (authorizing judicial review where the fairness of the proceedings or the correctness of the action was impaired by a material error in procedure); *id.* § 120.68(7)(d) (authorizing judicial review where "[t]he agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action"); *id.* § 120.68(7)(e) (authorizing judicial review where the agency's exercise of discretion was outside the agency's range of discretion, inconsistent with agency rule or officially stated agency policy or practice, or "[o]therwise in violation of a constitutional or statutory provision").

The import of the Panel Decision is simply that, pursuant to the Legislature's policy decision in section 310.151(4)(a), Balearia cannot bring challenges to the Committee's legal decisions or policy conclusions in a section 120.57(2) hearing. Balearia notably cites no case law showing that Balearia has the right to demand a section 120.57(2) hearing in a section 310.151 proceeding.

Balearia's argument that it is forever denied the right to challenge the Committee's legal decisions is far from true. All the Legislature has done is specify the place where Balearia can raise those arguments: on judicial review under 120.68. Balearia could have chosen to raise on appeal its arguments about the legal validity of the Committee's decisions, but it did not. Because Balearia waived its opportunity to challenge the Committee's legal decisions, it is Balearia's own actions, and not the Panel, that have denied Balearia the right to raise these legal arguments involving the Port Everglades proceedings.

Balearia concedes in multiple places that "[o]nly the Florida Legislature can fix this issue." Balearia's Rehearing Motion, pp. 3, 14. If Balearia wants a policy "fix," it can take it up with the Legislature. As such, it is unclear how Balearia expects this Court to provide relief that even Balearia admits rests firmly within the province of the Florida Legislature.

Because Balearia has failed to identify any points of law or fact that the Panel Decision overlooked or misapprehended, Balearia's Rehearing Motion should be denied.

B. Balearia's En Banc *Motion Should be Denied.*

Balearia's *En Banc* Motion, based upon the same issue raised in its Rehearing Motion, should also be denied. Balearia claims that its alleged denial of due process is of exceptional importance. But again, Balearia's argument misstates the Panel Decision's holding and Florida law.

A party wishing to challenge the legal decisions of the Committee has the opportunity to do so on judicial review under section 120.68. Balearia cites no case law showing that it is constitutionally entitled to a section 120.57(2) hearing. And Balearia again concedes that, despite the magnitude of its request, "[o]nly the Florida [L]egislature can make the needed changes." Balearia's En Banc Motion, p. 16. For the reasons stated in the Pilots' response to Balearia's Rehearing Motion, Balearia's *En Banc* Motion should be denied.

C. *Balearia's Certification Motion fails to identify an issue in the Panel Decision that should be certified as one of great public importance*.

Balearia fails to raise an issue that should be certified as one of great public importance. *See* Fla. R. App. P. 9.330(a)(2)(C). Like Crowley, Balearia seeks to turn this Court into an intermediate court of appeal, which would result in "a condition . . . detrimental to the general welfare and the speedy and efficient

administration of justice." *Cf. Ansin*, 101 So. 2d at 810. Balearia requests that the Court certify the following question:

> Is Section 310.151(4)(a), Florida Statutes, providing for the procedures for a party substantially affected by final agency action of [the] PRRC, unconstitutional under Article I, Section 9, of the Florida Constitution and under Section I of the 14th Amendment to the U.S. Constitution, because Section 310.151(4)(a), Florida Statutes, precludes the substantially affected party from challenging the legal conclusions of the agency's Final Order modifying pilotage rates.

Balearia's Certification Motion, p. 16. Balearia's request should be rejected for numerous reasons.

First, Section 310.151(4)(a) does not preclude any parties from challenging the Committee's legal conclusions in the Final Order. Section 310.151(4)(a) simply requires Balearia to raise those legal challenges before a district court of appeal pursuant to section 120.68. Balearia has cited no case law even remotely suggesting that this policy decision by the Legislature is unconstitutional.

Second, like Crowley, Balearia cannot demonstrate that this is one of those rare and monumental occasions where the entire state is impacted by the legal issues in this case, or where the district courts of appeal need guidance from the Florida Supreme Court. *See Pino*, 76 So. 3d at 927-28; *Star Cas.*, 855 So. 2d at 252. Rather, the statutes and case law are squarely and decidedly against Balearia's claim of entitlement to a section 120.57(2) hearing. *See, e.g.*, 2020 WL 6815831, at *2 (citing

Survivors Charter Sch., 3 So. 3d at 1235); Pilots' Answer/Cross-Initial Brief, pp. 49-51.

Balearia claims without foundation that "[a]ny person with business before an agency or that is licensed or regulated in any way by an agency in Florida is affected by this Court's ruling." Balearia's Certification Motion, p. 17. But the Panel Decision expressly construes a provision of section 310.151, which is limited to pilotage rate applications. There is no impact to agencies or substantially affected parties in agency action that is not governed by section 310.151. To the extent Balearia is asking this Court to certify a question based on whether the Legislature *could* pass a law with broader application, such a request is merely speculative and would amount to an impermissible advisory opinion. *See MacNeil v Crestview Hosp. Corp.*, 292 So. 3d 840, 845 (Fla. 1st DCA 2020) (holding that any declaratory judgment would constitute an improper advisory opinion because no justiciable controversy existed); *Winddancer v. Stein*, 765 So. 2d 747, 748-49 (Fla. 1st DCA 2000) (quashing the portion of the trial court's order that "fashion[ed] remedies that are purely hypothetical").

CONCLUSION

For the above reasons, all post-decision motions should be denied.

Respectfully submitted on December 21, 2020.

/s/ *George N. Meros, Jr.* .

George N. Meros, Jr., FBN 263321
Shutts & Bowen
215 S. Monroe Street, Suite 804
Tallahassee, FL 32301
(850) 241-1717
gmeros@shutts.com

Tara R. Price, FBN 98073
Holland & Knight
315 S. Calhoun Street, Suite 600
Tallahassee, FL 32301
(850) 224-7000
tara.price@hklaw.com

Attorneys for Appellee/Cross-Appellant Port Everglades Pilot Association

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 21, 2020, this brief was filed with the Florida First District Court of Appeal by using the Florida Courts e-Filing Portal and a true and correct copy of the foregoing was served by email to:

Amanda Ackermann
Executive Director
Board of Pilot Commissioners
2601 Blair Stone Road
Tallahassee, Florida 32399-0783
amanda.ackermann@myfloridalicense.com

Ronda L. Bryan
Department of Business and Professional Regulations
Agency Clerk's Office
2601 Bair Stone Road
Tallahassee, Florida 32399-2202
agc.filing@myfloridalicense.com

Marlene K. Stern
Assistant Attorney General
Donna McNulty
Senior Assistant Attorney General
Ed Tellechea
Chief Assistant Attorney General
PL-01 The Capitol
Tallahassee, Florida 32399-1050
marlene.stern@myfloridalegal.com
donna.mcnulty@myfloridalegal.com
ed.tellechea@myfloridalegal.com

Counsel for Florida Department of Business and Professional Regulation Pilotage Rate Review Committee

Thomas F. Panza
Jennifer K. Graner
Panza, Maurer & Maynard, P.A.
Coastal Towers
2400 E. Commercial Blvd.,
Suite 905
Fort Lauderdale, Florida 33308
Telephone: 954-390-0100
tpanza@panzamaurer.com
jgraner@panzamaurer.com

Counsel for Florida-Caribbean Cruise Association

J. Riley Davis
Michael J. Larson
Akerman LLP
106 E. College Ave., Suite 1200
Tallahassee, Florida 32301
Phone: (850) 224-9634
Fax: (850) 222-0103
riley.davis@akerman.com
michael.larson@akerman.com

Counsel for Balearia Caribbean, Ltd.

Jordan S. Cohen
Brandon J. Hechtman
Ethan A. Arthur
Wicker Smith O'Hara McCoy & Ford, P.A.
515 E. Las Olas Blvd., Suite 1400
Ft. Lauderdale, Florida 33301
Telephone: 954-847-4800
jcohen@wickersmith.com
bhechtman@wickersmith.com
earthur@wickersmith.com

Counsel for Crowley Liner Services, Inc. and King Ocean Services, LTD

Daniel R. Russell
William D. Hall
Dean, Mead & Dunbar
215 South Monroe Street, Suite 130
Tallahassee, Florida 32301
Telephone: 850-999-4100
drussell@deanmead.com
whall@deanmead.com
bgsanders@deanmead.com

Counsel for Seacor Island Lines, LLP

/s/ *George N. Meros, Jr.*

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