INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

International Arbitration Tribunal

In the Matter of the Arbitration between:

ADY GIL and EARTHRACE LIMITED,
Claimants,

v. ICDR Case No. 50 20 1300 0952

PAUL WATSON and SEA SHEPHERD CONSERVATION SOCIETY,
Respondents.

FINAL AWARD

THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement in a Demise Party Charter Agreement dated November 24, 2009 (the "Charter Agreement"), having been duly sworn, having previously rendered several Decisions as described further below; having received on behalf of the Parties written submissions, documentary evidence and witness testimony, and heard oral arguments, as described below; and having duly reviewed and considered all the Parties' submissions, documents, testimony and arguments, does hereby FIND and AWARD as follows:

I. NATURE OF CASE

1. This case arises out of the January 6, 2010 collision of the ship Ady Gil ("the Ady Gil") with a Japanese vessel, the Shonan Maru #2, while the Ady Gil was supporting an anti-whaling campaign organized by Respondent Sea Shepherd Conservation Society ("SSCS"). There is no dispute that the Ady Gil suffered significant damage from that collision, and that on January 8, 2010 it was abandoned to sink in the Southern Ocean. The key issue remaining in this case is whether that sinking was the natural and

inevitable result of the damage sustained in the collision (as Respondents contend), or whether it was the result of a secret scuttling of the vessel, notwithstanding the potential to save the vessel and later repair it (as Claimants contend).

2. As discussed further herein, at the time of the events in the Southern Ocean, the Ady Gil (previously named "Earthrace") was owned by claimant Earthrace Limited, a New Zealand entity that recently had been purchased from its prior owner (the ship's captain, Peter Bethune) by claimant Ady Gil (hereafter "Mr. Gil," to distinguish from the eponymously re-named ship). Mr. Gil had purchased Earthrace Limited for the express purpose of facilitating the Ady Gil's participation in SSCS's anti-whaling campaign. Following Mr. Gil's purchase of the company, Earthrace Limited chartered the Ady Gil to SSCS for US$1 per year, by means of the Charter Agreement.

3. Claimants Mr. Gil and Earthrace Limited ("Claimants") originally asserted five claims against Respondents SSCS and Paul Watson, SSCS's founder and former executive director ("Respondents"). These included claims for breach of contract, rescission, reformation, conversion and negligence). In their pre-hearing brief filed on February 6, 2014, however, Claimants advised that they had "elected to abandon many of the claims alleged in the pleadings," and were proceeding only with the claim for conversion.[1] During opening statements at the evidentiary hearing on February 16, 2015, Claimants confirmed that they were withdrawing the other claims with prejudice.[2] The evidentiary hearings proceeded on that basis, and this Final Award does so as well, deciding only Claimants' claim for conversion with respect to the sinking of the Ady Gil.

[1] Claimants' Arbitration Brief, February 6, 2015, at 4.

[2] Hearing Transcript, February 16, 2015, 19:1-20:4.

II. PROCEDURAL HISTORY

4. Claimants commenced this proceeding on October 3, 2013, by filing with the American Arbitration Association ("AAA") an online demand form that attached, and thereby incorporated by reference, a First Amended Complaint lodged in the California courts on June 4, 2013, against both Mr. Watson and SSCS. The AAA filing followed a July 25, 2013 ruling by Judge George H. Wu of the United States District Court, Central District of California, referring the matter to arbitration. As Judge Wu noted, the Charter Agreement contained a provision (Clause 23) stating that "[a]ny controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in accordance with the Rules of the American Arbitration, said arbitration to be held in the City of Annapolis, MD, unless another place is mutually agreed upon." Judge Wu expressly found that this clause encompassed disputes beyond the "four corners" of the Charter Agreement, including the Claimants' tort claims.[3]

5. In these arbitration proceedings, the Claimants' First Amended Complaint from the California courts was treated by the Parties as the operative Demand for Arbitration ("Demand"), and in late 2013, Respondents pleaded their Combined Answer ("Answer") based upon it. Since that time, and with the agreement of the Parties reflected in Procedural Order No. 1, this case has proceeded under the AAA Commercial Arbitration Rules as amended and in effect as of October 1, 2013 (the "AAA Rules"), supplemented

[3] Judge Wu also ruled that Mr. Gil (and not only his company Earthrace Limited) was bound by the agreement to arbitrate, even though Mr. Gil was a signatory only to paragraph 16 of the Charter Agreement. The court does not appear to have been asked to address arbitral jurisdiction over Mr. Watson personally, nor has Mr. Watson ever objected before this Arbitrator to the exercise of such jurisdiction, filing a Combined Answer with SSCS that did not contain any such objection. Accordingly, by consent, the Arbitrator treats all the Parties in this case caption as proper parties to these proceedings, and refers to them collectively as "Claimants" and "Respondents," except where the facts require distinctions among them.

by the AAA's Procedures for Large, Complex Commercial Disputes and its International Commercial Arbitration Supplementary Procedures, as amended and in effect April 1, 1999.

6. The procedural history has been described in several past Decisions rendered by this Arbitrator, including *inter alia* a Decision on Status of Arbitrability Issues, dated January 31, 2014; a Decision on Respondents' Motion to Dismiss, dated April 30, 2014; a Decision on Applicable Substantive Law, dated January 13, 2015; and a Decision on Claimant's Request to Amend Claims, issued on August 24, 2014. The contents of those Decisions are hereby incorporated by reference.

7. The Parties also communicated many times with the Arbitrator regarding procedural issues. Such issues were resolved in each instance following a full opportunity for the Parties to be heard, with the rulings communicated sometimes through formal Procedural Orders and sometimes informally through emails, which were confirmed to have the same status as Procedural Orders. The Parties also participated in a number of telephonic status conferences in which they reached agreements and the Arbitrator issued oral directions regarding certain procedural issues, without request by the Parties that such agreements and directions be incorporated into formal Procedural Orders.

8. In advance of the evidentiary hearing, the Parties filed witness lists and submitted bundles of hearing exhibits, as well as pre-hearing memoranda. All of the documents offered as hearing exhibits were admitted into evidence and have been considered by the Arbitrator.

9. Pursuant to the Parties' agreement (recorded in Procedural Order No. 1), to hold evidentiary hearings in Washington, D.C., notwithstanding the legal seat of this

arbitration remaining in Annapolis, Maryland, as specified in the Charter Agreement, the Arbitrator held five full days of hearings in Washington, D.C., between February 16 and 20, 2015. In addition to oral argument by counsel, the Arbitrator heard oral testimony from Claimant Mr. Gil (in person), Respondent Paul Watson (by video-conference), and witnesses Peter ("Pete") Bethune (by video-conference),[4] Malcolm Holland (by video-conference), Matthew Dean Kimura (by video-conference), Bonnie Schumaker (in person), and Charles ("Chuck") Swift (by video-conference), as well as by experts David Waller (in person) and Eric Greene (in person). By agreement of the Parties, The Arbitrator also admitted into evidence the full transcript of prior deposition testimony of Messrs. Gil, Watson, Bethune, Swift, Waller and Greene, as well as Peter Hammarstedt and Lockhart Maclean, and the expert reports of Mr. Bethune, Mr. Waller, Mr. Greene, and Mr. Grant Cool.

10. Following completion of the February 2015 hearings, the Parties also submitted certain supplemental information and exhibits, which were admitted into evidence. The Parties thereafter submitted simultaneous post-hearing submissions and post-hearing reply submissions on July 13, 2015 and July 24, 2015 respectively.

11. Given the size of the record and the intervening summer months, the Parties agreed that the time period for issuance of the Final Award could be extended beyond the period otherwise provided by the AAA Rules.

[4] Claimants designated Mr. Bethune as an expert witness with regard to the extent of damage to and the cost of repair of the Ady Gil, but he also offered extensive fact witness testimony regarding the events leading up to the sinking of the vessel.

III. BACKGROUND FACTS

12. The events at issue in this case unfolded in the course of the 2009-2010 anti-whaling campaign organized by Respondent SSCS, a non-profit entity whose stated mission, according to its website at the time of these events, was "to end the destruction of habitat and slaughter of wild life in the world's oceans."[5] To this end, SSCS employed what its 2010 website described as "innovative direct-action tactics to investigate, document, and take action when necessary to expose and confront illegal activities on the high seas."[6] Among the areas of SSCS's greatest concern is whaling activities in the Southern Ocean, conducted ostensibly for research purposes by Japanese vessels operating on behalf of the Institute of Cetacean Research ("ICR").

13. As noted, SSCS describes its work against Japanese whaling as involving "direct-action tactics." The Ninth Circuit Court of Appeals has described SSCS's activities differently, terming them "violent acts for private ends, the very embodiment of piracy."[7] Concluding that court action was warranted against "violent vigilantism by U.S. nationals in international waters,"[8] the Ninth Circuit in 2012 enjoined SSCS and Mr. Watson from physically attacking or coming within 500 yards of ICR's whaling and fueling vessels, a development that led *inter alia* to Mr. Watson's resignation as SSCS's executive

[5] Quotations from SSCS's 2010 website are taken from the Maritime New Zealand Investigation Report that was issued in the wake of the incident discussed herein. *See* Exhibit D to Ex. C-41, at 9).

[6] Ex. C-41, Exhibit D, at 9.

[7] Ex. C-57, *Institute of Cetacean Research et al. v. Sea Shepherd Conservation Society and Paul Watson*, Case No. 12-35266, Order and Amended Opinion (9th Cir. 2013), at 9. *See also id.* at 5 ("You don't need a peg leg or an eye patch. When you ram ships; hurl glass containers of acid; drag metal-reinforced ropes in the water to damage propellers and rudders; launch smoke bombs and flares with hooks; and point high-powered lasers at other ships, you are, without a doubt, a pirate, no matter how high-minded you believe your purpose to be").

[8] *Id.* at 13.

director.[9] The Ninth Circuit thereafter issued an order of contempt against both SSCS and Mr. Watson for the eventual violation of that injunction.[10]

14. The anti-whaling activities of SSCS have gained particular prominence in recent years by being featured on successive seasons of the cable television show "Whale Wars," shown on the Animal Planet network since 2007. Members of the Whale Wars production crew accompany the SSCS staff and volunteers on their sea-going campaigns, filming the efforts to block, delay or otherwise thwart the Japanese whaling activities. As one would expect, the film crew seeks to feature moments of high drama for the interest of the viewing public. "[B]asically, it's a reality show," Mr. Watson testified.[11]

15. During the 2009-2010 whaling season, SSCS organized a campaign entitled "Operation Waltzing Matilda" (hereafter the "Waltzing Matilda campaign"), which came to involve three vessels. Two of those vessels, SSCS's flagship vessel Steve Irwin and its newly acquired Bob Barker, were owned directly by SSCS. The third vessel was the Ady Gil, which was chartered for the season and is the subject of this dispute. Members of the Whale Wars production crew were on board all three SSCS vessels used in the Waltzing Matilda campaign, and there is dramatic footage available of the January 6, 2010 collision between the Ady Gil and the Shonan Maru #2, one of the vessels in the Japanese ICR fleet.

16. The Ady Gil was not a typical ship for use in SSCS's anti-whaling campaigns. By all accounts, it was a highly unusual vessel. Originally known as the Earthrace, Pete

[9] Watson Deposition, December 11, 2014 (hereafter "Watson Deposition"), 16:305.

[10] Ex. C-48, *Institute of Cetacean Research et al. v. Sea Shepherd Conservation Society and Paul Watson*, Case No. 12-35266, Opinion on a Motion for Contempt (9th Cir. 2014).

[11] Hearing Transcript, February 19, 2015, 711:6-9 (Watson).

Bethune designed and largely built it himself, for the express purpose of trying to break the speed record for circumnavigating the globe with a power boat, using only biodiesel from sustainable sources. Mr. Bethune successfully broke that record in 2008, completing the journey in roughly 60 days to beat the prior record by almost two weeks.

17. The Earthrace (later the Ady Gil) was a trimaran, with a stabilized monohull and two sponsons or pontoons connected (essentially as outriggers) to the central hull by spars. The hull was constructed with a sandwich composite carbon fiber, with an outer layer of Kevlar for protection; additional layers of Kevlar were added prior to the Waltzing Matilda campaign to strengthen the hull and protect it from potential contact with ice in the Southern Ocean. As befitting the purpose for which it was built, the vessel was light, capable of traveling at very high speeds, and designed to pierce (go under and through) waves rather than ride on top of ocean swells. Mr. Bethune built the Earthrace largely with his own funds (mortgaging his house in the process), but also drew heavily on equipment and labor donated by others. Mr. Bethune was the sole owner of the Earthrace, through the Earthrace Limited company he established for that purpose.

18. In 2009, following Mr. Bethune's successful breaking of the world record with the Earthrace, discussions commenced about SSCS's using the vessel for its anti-whaling campaigns. Although not designed for that purpose and far more fragile than the larger Steve Irwin and Bob Barker ships, the Earthrace had the advantage of speed. SSCS's 2010 website described it (by then known as the Ady Gil) as "a very fast interceptor vessel" which "has the speed and manoeuvrability to catch and block the fast Japanese harpoon ships."[12] The Japanese whaling fleet generally includes a factory vessel, the

[12] Ex. C-41, Exhibit D, at 9.

Nisshin Maru, which processes whales on board after they have been killed, as well as several faster spotter vessels and harpoon vessels. The idea was that the Earthrace/Ady Gil would be fast enough to locate and intercept the Japanese fleet, delaying it long enough for the slower vessels Bob Barker and Steve Irwin to draw near and commence their more focused anti-whaling activities. [13]

19. The fact that the Earthrace/Ady Gil had such a striking design and history as a world record-breaker was also considered valuable to SSCS, which depended in part for its fundraising on the notoriety achieved through stardom in the Whale Wars television show. SSCS's 2010 website described the vessel as "look[ing] more like a spaceship than a boat,"[14] and a witness in this case described it as "sleek, beautiful, fast. It looked like the batmobile."[15]

20. The original plan was for SSCS to find a sponsor to fund its purchase of the Earthrace from Pete Bethune for an agreed purchase price of US$1.5 million, following which Mr. Bethune would captain the vessel for SSCS during the Waltzing Matilda campaign.[16] It was at this point that Mr. Gil, a self-made millionaire in California and an avid supporter of animal-rights causes, entered the picture. Anxious to help SSCS's anti-whaling campaign and to achieve public recognition for his contribution, Mr. Gil initially agreed to donate US$1 million to SSCS towards its purchase of the Earthrace, on the understanding that the vessel would be renamed the Ady Gil and used for anti-whaling activities.

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[13] Ex. C-41, Exhibit D, at 9.

[14] Ex. C-41, Exhibit D, at 9.

[15] Hearing Transcript, February 18, 2015, 522:8-11 (Kimura).

[16] Bethune Deposition, December 18, 2014 (hereafter "Bethune Deposition"), 85:20-23.

21. It soon became clear, however, that a transfer of the vessel's ownership from Earthrace Limited to SSCS would involve administrative complications, delays and costs, including switching the vessel's registration (flag) from New Zealand. Given the press of time before the start of the Waltzing Matilda campaign, a new plan was devised over a very short period, which would obviate the need for a transfer of the vessel itself. Instead, Mr. Gil (not SSCS) would purchase the Earthrace Limited company from Mr. Bethune, as a result of which the vessel itself would not change ownership. Instead of a cash donation to SSCS, Mr. Gil then would charter the vessel (renamed the Ady Gil) to SSCS, for a nominal charter fee of US$1 per year.

22. The story of how this transaction evolved was briefed extensively by the Parties, in relation to the claims for breach of contract, rescission and reformation originally pleaded in the Demand. Given Claimants' withdrawal of those claims and decision to proceed only with the claim for conversion, the details of the story are no longer material to recite here. The outcome, however, was a set of three interrelated agreements executed the same day, November 24, 2009. The first was an Agreement for Sale and Purchase of Shares of Earthrace Limited between Mr. Bethune and Mr. Gil, for the transfer of Earthrace Limited, for the sum of US$1.5 million.[17] Since Mr. Gil originally had agreed to fund only US$1 million of the total US$1.5 million price Mr. Bethune had negotiated with SSCS, the sale of Earthrace Limited was structured in two parts: an immediate cash payment of US$1 million by Mr. Gil to Mr. Bethune, and a pledge of a further US$500,000 one year later, which was treated in the interim as a loan from Mr. Bethune

[17] Agreement for Sale and Purchase of Shares of Earthrace Limited, Ex. R-202.

to Mr. Gil, secured by a pledge of the vessel as collateral.[18] This arrangement was formalized through the second document executed that day, which was a Specific Security Agreement between Mr. Gil and Mr. Bethune to secure the balance of the purchase price of the Earthrace Limited shares, consistent with the terms of the sale agreement.[19]

23. The third document was the Charter Agreement between Earthrace Limited and SSCS, in which SSCS chartered the vessel to SSCS for a nominal sum of US$1 per year.[20] SSCS was given an option to purchase the Ady Gil, in return for assuming Mr. Gil's obligation under the Specific Security Agreement to pay Mr. Bethune the additional US$500,000 owed from Mr. Gil's purchase of the shares of Earthrace Limited. Although the Charter Agreement formally was only between SSCS and Earthrace Limited, Mr. Gil and Mr. Bethune both counter-signed for purposes of acknowledging this option arrangement, and consenting to the potential novation of the Specific Security Agreement to release Mr. Gil of (and substitute SSCS for) liability under its terms.[21]

24. The Charter Agreement provided as follows, regarding "Insurance; Damage to Vessel; Loss of Vessel" (Clauses 10-12, respectively):

> The Owner and the Charterer acknowledge and agree that the Vessel may not be insured against Fire, Marine and Collision nor any other risks for the term of this Charter. In case of any accident or disaster the Charterer shall give the Owner prompt notice of same.[22]

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[18] Agreement for Sale and Purchase of Shares of Earthrace Limited, Ex. R-202, Clause 4.2.

[19] Specific Security Agreement, Ex. R-203.

[20] Charter Agreement, Clauses 1, 3. The Charter Agreement was submitted twice as an exhibit, Ex. C-14 and R-201.

[21] Charter Agreement, Clause 16.

[22] Charter Agreement, Clause 10.

> The Charterer shall not be liable for damage to the Vessel unless the cost of repairs to the Vessel exceeds USD1,000,000 in which case the Charterer's liability shall be USD500,000 or the amount of the excess over USD1million whichever is the less and the amount of such liability shall be paid to the Owner. PROVIDED, where the shares in the Owner are subject to a certain specified security agreement between Peter James Bethune as Lender and Ady Gil as Debtor dated the same day as this agreement, any liability outlined above shall be paid to the Lender under such agreement whose receipt shall be full and sufficient discharge.[23]
>
> If the vessel is lost or destroyed, the liability of the Charterer shall be limited to USD500,000 which shall be paid to the Lender under the specified security agreement referred to in clause 11 or to the extent that the amount secured to the Lender is less than USD500,000 then as to the amount of such liability to the Lender and the balance to the Vendor.[24]

25. Clause 17 provided that SSCS would redeliver the Ady Gil, her equipment and furnishings to Earthrace Limited at the expiration of the Charter Term. Until that time, as per Clauses 20 and 21, respectively:

> It is mutually agreed that full authority regarding the operation and management of the Vessel is hereby transferred to the Charterer for the term thereof. In the event, however, that the Charterer wishes to utilize the services of a Captain and/or crew members in connection with the operation and management of the Vessel, it is agreed that said Captain and/or crew members are agents and employees of the Charterer and not the Owner ….[25]
>
> The Captain shall receive and obey orders from the Charterer as to ports to be called at and the general course of the voyage, but the Captain shall be responsible for the safe navigation of the Vessel, and the Charterer shall abide by his judgment as to sailing, weather, anchorages, and matters of safety. The Charterer assumes total control and liability (as outlined in Clauses 11 and 12) as if the Charterer were the owner of the Vessel during the term of the Charter.…[26]

[23] Charter Agreement, Clause 11.

[24] Charter Agreement, Clause 12.

[25] Charter Agreement, Clause 20.

[26] Charter Agreement, Clause 21.

26. The facts regarding the collision of the Ady Gil with the Shonan Maru #2 on January 6, 2010, are not in dispute in this case. The collision was captured on film by the Animal Planet videographers and was aired extensively on television, both on the Whale Wars series and in connection with various news reports and interviews with SSCS personnel, including an appearance on the Jay Leno show by Paul Watson and Pete Bethune. Following certain activities designed to engage with the whaling fleet's primary vessel, the Nisshin Maru, and slow her down long enough for the Bob Barker to draw near, the Ady Gil was low on fuel and standing down. Its crew were on top of the ship relaxing, having previously exchanged greetings with the crew of the Bob Barker, who were intending to continue pursuit of the whaling fleet. Unexpectedly, the Shonan Maru #2 approached the Ady Gil, deploying water monitors (high-pressure hoses) and long-range acoustic devices with high-volume noise, which were among the range of tools commonly used by the Japanese fleet to try to deter close quarters interference by the SSCS vessels. Suddenly, the Shonan Maru #2 made a hard turn to starboard, and struck the Ady Gil bow and port sponson, shearing approximately three meters off her bow and creating a wave of water that washed over other parts of the vessel. It was a miracle that no serious injuries were sustained.

27. The events following the collision, and leading to the ultimate decision to abandon the Ady Gil at sea, form the principal dispute in this case and will be discussed later in this Final Award. For present purposes, it suffices to say that the vessel was indeed abandoned, with the crew of the Ady Gil boarding the Bob Barker for safe return.

28. Later, pursuant to the Charter Agreement and related agreements discussed above, Pete Bethune made a claim on SSCS for US$500,000. SSCS refused to pay, alleging

negligence by Mr. Bethune as captain of the Ady Gil that contributed to loss of the vessel. Mr. Bethune thereafter took SSCS to arbitration (the "Bethune Arbitration"). In a Final Award issued on March 26, 2013, Arbitrator Peggie Chaplin Louie concluded that the Ady Gil was "lost or destroyed" as a result of events surrounding the collision at sea.[27] Although Pete Bethune alluded briefly in his testimony in that case to having opened seacocks on the damaged vessel on instructions from SSCS,[28] Ms. Chaplin Louie made no findings regarding this testimony, nor whether the Ady Gil otherwise could have survived the damage sustained from the collision and thereafter been rescued and returned for repair. These issues were not the principal focus of inquiry in the Bethune Arbitration, and neither Mr. Bethune nor SSCS apparently sought a ruling about them. Mr. Gil, as owner of Earthrace Limited and through it of the Ady Gil, was not a party to the Bethune Arbitration. Ms. Chaplin Louis simply determined, based on the evidence before her, that the vessel had been "lost or destroyed" for purposes of the Charter Agreement, and that SSCS accordingly was liable to pay Mr. Bethune US$500,000.

29. In June 2013, Claimants Mr. Gil and Earthrace Limited commenced California court proceedings alleging (*inter alia*) conversion of the Ady Gil through the deliberate actions of Respondents Paul Watson and SSCS. As discussed above, this filing eventually led to the referral of Claimants' claims to this arbitration.

[27] Final Award in *Bethune v. Sea Shepherd Conservation Society* arbitration, Ex. C-44 and R-214.

[28] Ex. R-297 (Transcript of hearing in *Bethune v. Sea Shepherd Conservation Society* arbitration, July 30, 2012), 76:15-78, 360:10-361:5, 386:12-387:6, 395:19-22 (Bethune).

IV. THE CLAIM FOR CONVERSION

30. The Fourth Cause of Action in Claimants' Demand, and the only one that Claimants have chosen to continue to pursue, is for conversion. Claimants allege that "[b]y sinking the Ady Gil without the permission and against the wishes of plaintiffs instead of repairing it as promised, defendants converted Plaintiffs' personal property. Defendants intentionally and substantially interfered with Plaintiffs' property by destroying or causing to be destroyed."[29] Claimants seek compensatory damages as well as punitive damages, attorneys' fees and costs.[30]

A. Applicable Law and Elements of Claim

31. Pursuant to the procedural orders entered in this case, the Parties filed briefs on the issue of applicable substantive law, given the silence of the Charter Agreement on that question. On January 13, 2015, the Arbitrator issued a Decision on Applicable Substantive Law that determined that both the contract and tort claims then being pursued in the case would be principally governed by federal maritime law, but that to the extent such law was silent on an issue, the Parties might supplement maritime principles by reference to Maryland law for the contract-related claims (at the time, breach of contract, rescission and reformation) and California law for the tort claims (at the time, conversion and negligence). The Arbitrator noted that state law may supplement maritime principles only to the extent it is not materially different from, or in conflict with, maritime law.[31]

32. By agreement of the Parties, the Decision on Applicable Substantive Law was in short-form, with further explanation of the reasoning for the ruling to be provided

[29] Demand, ¶ 48.

[30] Demand, ¶¶ 49-50 and Prayer for Relief, items 1-2, 4.

[31] Decision on Applicable Substantive Law, January 13, 2015, ¶ 2.

subsequently, within the Final Award. Pursuant to that agreement, the Arbitrator provides the explanation below with respect to the substantive law governing the conversion claim, which is the only claim Claimants ultimately opted to pursue through final hearings.

33. The choice of Maryland as the arbitral seat does not necessarily imply a choice of Maryland law to govern the substantive obligations of the Parties. But it does mean, according to the conventional understandings reflected in U.S. judicial practice[32] and in much of arbitral practice, that matters of *procedure* related to conduct of the arbitration presumptively are governed by the laws of the arbitral seat. The Arbitrator therefore looked in the first instance to Maryland law to determine the choice of law principles to apply to determine the substantive law to apply to this dispute.

34. Maryland follows the traditional principles of the Restatement (First) of Conflict of Laws. While for contract claims these point to the *lex loci contractus* (the law of the state where the contract was made), for tort claims, Maryland applies the rule of *lex loci delicti*, under which tort actions are governed by the place of wrong — which is considered to be "the state where the last event necessary to make an actor liable for an alleged tort takes place."[33] In most cases the last event is the causation of injury, so the

[32] *See generally* 2012 Federal Judicial Center International Litigation Guide for International Commercial Arbitration, at 34-35 ("[i]n the vast majority of cases, the procedural law of the arbitration is that of the arbitral seat"; "[n]umerous difficulties arise when the procedural law is not that of the arbitral seat"; and "[a]s a result, U.S. courts have adopted a strong presumption that parties intend the procedural law of the arbitration to be that of the arbitral seat…. Any deviation from this principle must be both clear and explicit").

[33] Restatement (First) of Conflict of Laws, § 377.

place of the wrong effectively will be the place in which the claimants sustained the injury alleged.[34]

35. However, Maryland also necessarily adheres to federal maritime law, under which a tort alleged to have occurred on navigable waters and that bears a significant relationship to a traditional maritime activity is governed by maritime law.[35] The alleged tortious sinking of a vessel in the high seas, following its charter for the specific purpose of conducting operations in the high seas, clearly meets these requirements.[36] The federal maritime law thus takes precedence in this case. Where maritime law is silent on an issue, state law may supplement it so long as it is not materially different from or in conflict with maritime law.[37] Applying the choice of law principles of the seat, the appropriate supplemental law for Claimants' conversion claim would be the law where the injury to Claimants occurred. While Claimant Earthrace Limited is a New Zealand entity, that company was created as a vehicle simply for Mr. Gil to own the Ady Gil and charter it to SSCS. The Arbitrator therefore considers California (where Mr. Gil is resident) to be the dominant place of injury, and therefore the most appropriate source of law to supplement federal maritime law to the extent necessary.

36. The Parties agree that under maritime law (as under the common law), the tort of conversion requires proof that on navigable waters, a party intentionally and wrongfully exercised dominion or control over property, seriously interfering with the owner's rights

[34] *See, e.g., Phillip Morris, Inc. v. Angeletti*, 358 Md. 698, 746 (2000).

[35] *See, e.g., Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995); *Taghadomi v United States* 401 F.3d 1080, 1084 (9th Cir. 2005); *Wells v. Liddy*, 186 F.3d 505, 524 (4th Cir. 1999) (applying Maryland choice of law rules to determine that "[a]ll cases involving a tort committed on navigable water … are governed by admiralty law").

[36] *See, e.g., Sperry Rand Corp. v. Radio Corp. of America*, 618 F.2d 319, 321 (5th Cir. 1980).

[37] *See, e.g., Persson v. Scotia Prince Cruises, Ltd.*, 330 F.3d 28, 32 (1st Cir. 2003).

in that property.[38] They also agree that the elements of a conversion claim are the claimant's ownership of property, the respondent's wrongful act depriving claimant of possession and use of the property, and injury.[39] In this case, there is no dispute over Claimants' ownership of the Ady Gil. The Arbitrator therefore proceeds below to consideration of the remaining elements, namely whether Respondents committed wrongful acts depriving Claimants of the Ady Gil, and whether Claimants suffered injury as a result of such acts.

B. Findings Regarding Allegedly Wrongful Acts

1. Preliminary Observations

37. As a preliminary matter, the Arbitrator notes that the reconstruction of a precise sequence of events from more than five years ago necessarily will be imperfect, as the recollections of witnesses fade or possibly evolve over time, even in the exercise of good faith. The inevitable imperfection of the exercise is heightened in this case by the circumstances in which the disputed events took place, namely at a moment of extreme stress involving a sudden, potentially life-threatening incident on the high seas. The witnesses to these events were operating with little sleep and substantial adrenalin. They were also performing a variety of duties that necessarily resulted in their experiencing the relevant events from different vantage points, and each essentially only in part, as their duties (and the demands of occasional sleep) pulled them away periodically. Reconstructing these events therefore resembles the assembly of a jigsaw puzzle from hundreds of different pieces, with some pieces simply unavailable to fill gaps in information, and other pieces

[38] *See Evergreen Marine Corp. v. Six Consignments of Frozen Scallops*, 4 F.3d 90, 94 (1st Cir. 1994) (cited by both Parties).

[39] *See* Respondents' Post-Hearing Brief at n.130 (citing case law); Claimants' Post-Arbitration Brief at 1.

conflicting in shape and size and therefore requiring choices to be made as to the better (if not completely perfect) fit.

38. Here, the realities of conflicting evidence and missing information are exacerbated by some serious credibility issues afflicting certain witnesses to the case. For example, and as discussed further below, the Arbitrator found Mr. Watson's testimony regarding certain events to be highly evasive, internally contradictory, or at odds with his own prior written statements, and in certain areas simply lacking the basic indicia of genuineness that instinctively inspires confidence and trust. Mr. Gil's testimony appeared genuine in intent if somewhat fuzzy in detail, and perhaps colored in hindsight by strong emotions of betrayal on the part of those in whom he had placed a perhaps naïve degree of trust. In any event Mr. Gil did not personally participate in the events in the high seas, and therefore could not add much to the weighing in value of the testimony of Mr. Watson, Mr. Bethune, Mr. Swift, and others who took part in the Waltzing Matilda campaign and in discussions between January 6-8, 2010 regarding the fate of the Ady Gil.

39. As for Mr. Bethune, there is no question that he was the person most intimately familiar both with the construction of the Ady Gil and with the damage it sustained from the collision at sea. On the other hand, his testimony in this case regarding that damage, and regarding events that led to abandoning the Ady Gil at sea on January 8, 2010, was in stark contrast to statements he made on camera for Whale Wars in 2010. On both occasions, his performance nonetheless appeared genuine, suggesting innate acting skills that challenge an observer to determine which occasions involved truth telling and which dissembling or simply spin. Mr. Bethune openly acknowledged the inconsistencies in

these renditions of events,[40] but as discussed below, he claimed that his earlier rendition was staged for purposes of the television audience, while his sworn testimony in this arbitration was accurate and truthful. Absent corroboration from other sources, the Arbitrator would have struggled more to determine whether the apparent switch in Mr. Bethune's story could be credited — even though, as also discussed below, Mr. Bethune's 2015 testimony in this arbitration was consistent with the sworn testimony he provided in 2012 in his own arbitration against SSCS. However, Mr. Bethune's 2012 and 2015 testimony was also corroborated in a number of important respects, and in a great degree of detail, by the sworn testimony of Chuck Swift, a former employee of SSCS and a longtime colleague and close friend of Paul Watson,[41] who served at the time as the captain of the Bob Barker.

40. Mr. Swift was highly credible in his testimony about matters he directly observed and that were within his area of knowledge and competence. He was an extremely reluctant witness, restricted initially from any discussion of events by strict confidentiality obligations contained in his severance agreement with SSCS. After the Arbitrator helped broker an agreement by SSCS to lift these restrictions to allow Mr. Swift to provide testimony in this case, Mr. Swift reached out directly to the Arbitrator to confirm that it was safe for him to testify freely, a conversation that the Arbitrator immediately reported to the Parties.[42] When Mr. Swift finally testified, first by videotaped deposition and thereafter by video-conference during the evidentiary hearings, he appeared genuinely

[40] *See, e.g.,* Bethune Deposition, 222:8-17.

[41] Swift Deposition, January 22, 2015 (hereafter "Swift Deposition"), 28:11-22.

[42] *See* Procedural Order No. 7; Arbitrator's email to counsel, dated January 20, 2015; *see also* Swift Deposition, 148:10-20.

pained (at one point, almost to tears) by his recounting of the decision to scuttle the Ady Gil and thereafter lie about it.[43] The Arbitrator ultimately credits much of Mr. Swift's testimony, and in light of that also credits significant portions of Mr. Bethune's testimony that Mr. Swift corroborated in convincing detail.

2. Severity of Immediate Damage from Collision

41. There is no dispute that the collision with the Shonan Maru #2 sheared off approximately 3 meters from the Ady Gil's bow, exposing the front of the vessel's sleeping quarters to the open sea, and created an initial wave that allowed some water to travel further inside.[44] There is also no dispute that the port-side sponson or pontoon incurred visible damage (deep scuffing and cracks, mostly on the top),[45] but the evidence suggests that it was not ruptured from beneath. Certainly, the photographs taken of the vessel in the many hours after the collision do not show significant listing to one side, as might be expected if the port-side pontoon had filled with water while the starboard one did not.[46]

42. The Parties dispute whether the spar (the tubular structure that connects the sponson to the central hull, and which is contained within an outer fairing and is thus not visible externally) would have been compromised by the pressure exerted on the sponson. Mr.

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[43] Swift Deposition, 147:2-148:20.

[44] Hearing Transcript, February 17, 2015, 159:13-160:19 (Bethune); 432:20-24, 433:2-6, 449:10-23 (Holland); Hearing Transcript, February 18, 2015, 545:25-546:18 (Kimura), 644:15-23, 645:13-22 (Schumaker)

[45] Hearing Transcript, February 17, 2015, 432:25-433:2 (Holland); Hearing Transcript, February 18, 2015, 547:13-19 (Kimura); Swift Deposition, 102:12-103:13. Respondent's expert Mr. Greene opines for purposes of a repair cost estimate that the "[t]he port sponson was destroyed," Expert Report of Eric Greene, February 4, 2014 ("Greene Report") at 7, but Mr. Bethune suggests that the port sponson incurred only "superficial damage to the bow section, and superficial damage to the fairing around the spar," which "damage was not structural and … [n]o water made it from the bow section of the sponson to its stern, suggesting no internal damage had occurred to the sponson bulkheads." Expert Report of Peter Bethune, July 7, 2014 ("Bethune Report"), at Section 2e.

[46] Swift Deposition, 102:21-103:13.

Bethune, the vessel's builder, testified that this was highly unlikely, because "the spar is designed to flex when it gets under a large amount of load," so either it "breaks catastrophically, or it doesn't break" at all. According to Mr. Bethune, while the photographs show some cracking along the top of the outer fairing, that was "superficial damage" caused by the flexing of the spar, and is not an indication of major structural damage.[47] By contrast, Respondents' expert Eric Greene, a naval architect, opined that "the catastrophic nature of the event would suggest extensive secondary damage" to the "very stiff" internal framing systems of the vessel, although the strength of this contention was reduced somewhat by his caveat that "[i]t is possible that the port sponson spar could be repaired rather than replaced in its entirety."[48] Mr. Greene of course had no opportunity to inspect the vessel personally, but offered his views based on the materials he reviewed and his broader experience with ship design.[49] Mr. Bethune by contrast had the opportunity to inspect the vessel from the inside and outside immediately following the collision — going onboard the Ady Gil five or six times after the collision, including once where he purportedly spent two-and-a-half hours and "went right through the whole boat to evaluate the damage.[50] Of course, this inspection still was limited to what could be seen with the naked eye. Neither Party had the opportunity to subject the vessel to tests for possible internal structural damage.

43. The Parties hotly dispute whether there was damage to the hull further back from the bow, including damage to the underside of the main fuel tank. The Ady Gil had a smaller

[47] Hearing Transcript, February 17, 2015, 152:19-157:15 (Bethune).

[48] Greene Report at 7.

[49] Greene Deposition, January 20, 2015 (hereafter "Greene Deposition"), 18:22-19:22.

[50] Hearing Transcript, February 17, 2015, 158:7-159:12, 252:18-253:16 (Bethune).

ballast tank in the bow which the Parties agree was demolished in the collision,[51] as well as a much larger main tank and a day tank in the stern. The Parties agree that the main tank suffered some sea water ingress; when the fuel eventually was pumped out in preparation for towing, it was contaminated with sea water. They dispute, however, the reason for that ingress, with Claimants contending (based on Mr. Bethune's testimony) that this was simply leakage from a severed tube that connected the main tank to the ballast tank,[52] and Respondents contending (based on other testimony) that the main tank itself had ruptured, which necessarily must mean a breach in the hull itself, since the fuel tank was contained inside the hull of the vessel. In general, the witnesses who opined about a ruptured fuel tank had far less knowledge of the fuel system than did Mr. Bethune, and either were testifying as to what they heard second-hand without even boarding the Ady Gil,[53] or were drawing inferences about the state of the hull and the main fuel tank from the fact that sea water eventually was pumped from the tank along with fuel, without knowing the structure of the Ady Gil's fuel system or about the existence or severing of a connecting fuel line.[54] That said, Mr. Bethune himself signed a police report that the SSCS crew collectively submitted to authorities in 2010, which stated the "[m]ain fuel tank and day tank were both ruptured" and eventually filled with

[51] Hearing Transcript, February 17, 2015, 152:20-21 (Bethune).

[52] Hearing Transcript, February 17, 2015, 159:20-160:1, 160:20-162:5 (Bethune); Bethune Report, Section 2e.

[53] *See, e.g.,* Hearing Transcript, February 18, 2015, 654:1-16 (Schumaker); Swift Deposition, 101:5-23, 111:14-19.

[54] See, e.g., Hearing Transcript, February 18, 2015, 537:12-23, 564:3-17, 575:11-577:4 (Kimura); Swift Deposition, 111:4-7, 19-21; Hammarstedt Deposition, October 21, 2014 (hereafter "Hammarstedt Deposition"), 20:9-13, 21:19-21.

water, along with the engine room.[55] Mr. Bethune now explains that this was part of a concerted plan to suggest to authorities and the viewing public that the vessel was more damaged than it actually was from the collision, and that it ultimately sank as a direct result of the actions of the whaling fleet, rather than as a result of the alleged secret, deliberate scuttling of the vessel discussed further below.

44. The dispute over whether the main fuel tank was breached is significant, as there was testimony that the integrity of this structure was a key predictor of whether the vessel could remain (and would have remained) afloat for a period of time long enough to organize a potential rescue, in the absence of the steps allegedly taken to scuttle her. The composite material with which the Ady Gil was built was very light and likely to float for some time, unless the vessel suffered particular forms of catastrophic damage.[56] Chuck Swift testified that he overheard a call from the bridge of the Bob Barker, in which Pete Bethune was advised by consulting engineers that the vessel would remain afloat unless three things each happened: the pontoons ruptured and filled with water, the main fuel tank was breached, and the engine room flooded.[57] As noted above, there was no evidence of a rupture in the bottom of the port-side pontoon, and Mr. Swift categorically denied that the engine room was ruptured or flooded,[58] a position that was consistent with

[55] Ex. C-23. By contrast, a far more detailed Investigation Report issued by New Zealand authorities in November of 2010, with the cooperation of various SSCS witnesses, states that the fuel lines from the main and day tanks had been severed during the collision and sea water had leaked into the tanks through those fuel lines. *See* Maritime NZ Investigation Report, submitted as Exhibit D to Ex. C-41, at 23.

[56] Bethune Deposition, 14:8-13.

[57] Swift Deposition, 99:13-20.

[58] Swift Deposition, 103:14-22, 104:20-21.

other reports.[59] In these circumstances, the SSCS crew understood that despite damage from the collision, "that boat was not going to sink as it was in the hours following that impact."[60]

45. The best evidence that the Ady Gil could have survived the collision with the Japanese whaling vessel, based on a wide range of photographs as well as witness testimony, was that it in fact *did* so, for quite some considerable time. The evidence shows that the Ady Gil settled slightly in the water immediately following the collision, but then quickly reached a state of neutral buoyancy or stability, in which it apparently did not sinking any further for at least a full day after the collision, and until partway through the efforts to tow her (described further below).[61] This enabled the crew to make several trips back and forth to the disabled vessel, first to remove personal items, electronics, and other items of value, and later to drain fuel from the tanks and remove all other salvageable items.

46. In other words, the evidence suggests that the Ady Gil was unlikely to sink for any appreciable period of time, notwithstanding the damage she incurred from the collision with the Japanese fleet. The challenge in any salvage effort was to organize a plan to retrieve her, given the remote location and inhospitable circumstances. These issues are discussed further below.

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[59] *See, e.g.,* Ex. C-56, Maritime New Zealand interview with Jason Stewart. January 28, 2010, at 36.

[60] Swift Deposition, 104:22-105:8.

[61] Hearing Transcript, February 17, 2015, 2:249:18-250:1 (Bethune); Swift Deposition, 105:10-23.

3. The Initial Plan to Try to Tow the Ady Gil to a French Research Base

47. There is no dispute that the crews of the Bob Barker and Ady Gil set up a rig between the two vessels — consisting of a bridle connecting two cleats on the stern of each of the Ady Gil's pontoons, connected to a longer tow rope stretching to the Bob Barker — and tried for a time to tow the disabled Ady Gil from the stern, behind the Bob Barker. Recollections differ as to whether this involved two completely separate tow attempts, with a significant break in between, or one basic tow attempt with one or more short halts after ropes failed and were reattached. Many of the witnesses took breaks to sleep, and therefore did not observe the full range of events.

48. The witnesses who do not claim (and are not alleged by others) to have been privy to any attempted scuttle describe the events as a genuine effort to tow the Ady Gil, and generally agree that initially it seemed to be working, but eventually failed as the Ady Gil took on more water, sank lower, and therefore increased resistance on the tow ropes which led to their repeated snapping. Matthew Kimura, the Bob Barker's bosun, describes the group as having "made a good best attempt that we could to tow the Ady Gil."[62] Despite having to improvise the tow with limited equipment on board the Bob Barker, Mr. Kimura testified that the tow appeared to be working, after one false start using a manila line that parted almost immediately at the junction between the two lines, and which then was replaced with a stronger synthetic line.[63] Mr. Kimura describes the parting of the first line as occurring almost immediately, while Mr. Bethune was still riding on the Ady Gil after rigging the attachment, but then the stronger reattached line "seemed like it held,"

[62] Hearing Transcript, February 18, 2015, 551:2-3 (Kimura).

[63] Hearing Transcript, February 18, 2015, 558:15-563:25 (Kimura).

Mr. Bethune rejoined the Bob Barker, "it seemed like [the Ady Gil] was being successfully towed," and "we continued on probably [at] about 3 knots or so."[64] During this time, Mr. Kimura "did not see [the Ady Gil] go lower in the water"; "we were towing under one of those rare times out there where it was absolutely flat glass, no wind," and "it was towing smoothly at that time."[65] Mr. Kimura testified that "after we were underway for a little while and seemed good," he went to bed for several hours.[66] When he awoke, the Ady Gil was gone and the Bob Barker was underway at higher speeds; he was told that the line had parted in the middle of the night and the tow efforts were abandoned.[67]

49. Other witnesses tell a fairly similar story about the progression of events. Malcolm Holland, the Bob Barker's sailing master, observed the tow from the Bob Barker's bridge. He described the rigging of the bridle on the stern of the Ady Gil and its connection to the Bob Barker by a mooring line; he confirmed that the tow initially was working at a slow speed, which he describes as less than three knots, in very calm sea conditions, in a stage he describes as "testing the tow."[68] He described "tow[ing] for a period of time," reattaching the bridle and towing it again, but the rope thereafter breaking again.[69] He stated that some of the towing, prior to the last break, occurred while he was asleep.[70]

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[64] Hearing Transcript, February 18, 2015, 561:13-563:33 (Kimura).
[65] Hearing Transcript, February 18, 2015, 563:16-25, 579:13-20 (Kimura).
[66] Hearing Transcript, February 18, 2015, 565:24-567:13 (Kimura).
[67] Hearing Transcript, February 18, 2015, 567:21-568:3 (Kimura).
[68] Hearing Transcript, February 17, 2015, 435:23-439:9 (Holland).
[69] Hearing Transcript, February 17, 2015, 440:1-441:9 (Holland).
[70] Hearing Transcript, February 17, 2015, 482:4-6 (Holland).

50. The Bob Barker's first mate, Peter Hammarstedt, likewise described the setting up of the bridle and towline as involving a "best effort attempt" to try to tow the Ady Gil, after which he went to sleep. He learned upon waking that the towline had broken, and at Chuck Swift's request, went to wake up Pete Bethune, who was also sleeping. Mr. Bethune at that point purportedly stated that the vessel should be left, as it was just a matter of time before it would sink. This conversation occurred after the Ady Gil already had sunk much lower in the water, with the pontoons now submerged.[71]

51. For Chuck Swift and Pete Bethune, the two witnesses who both testified (as discussed further below) about a secret decision to scuttle the boat rather than continue efforts to tow it, there is a difference in recollection as to the timing of this decision in relation to the various tow attempts. Mr. Swift describes a first genuine effort to tow, which was working, followed by a faux tow attempt after the scuttling that was designed to fail. He explains that "I wanted to save that vessel, and it was my intention to try to save that vessel."[72] Similar to Mr. Kimura, Mr. Swift describes an initial tow of at least several hours that was successful, with the Ady Gil not sinking appreciably as it was towed.[73] Swift's recollection was that only after several hours of a successful and "genuine effort to tow" did the line break for the first time, and was reattached to resume the tow at a slower rate.[74] From that point on, he testified, the tow lines did not snap again until after the sea valves on the Ady Gil were deliberately opened in order to scuttle it.[75]

[71] Hammarstedt Deposition, 22:12-25:7, 80:25-81:7.
[72] Hearing Transcript, February 20, 2015, 1066:5-7 (Swift).
[73] Swift Deposition, 115:14-16, 123:12-15, 125:18-126:15.
[74] Swift Deposition, 126:10-18, 171:4-19.
[75] Swift Deposition, 171:20-172:10.

52. By contrast, Mr. Bethune does not recall an initial genuine tow effort prior to the alleged scuttling, but rather describes all of the towing as occurring after that alleged scuttling, with a slow, progressive lowering in the water of the Ady Gil as it was towed (which may have appeared to others as a successful initial tow, since it took time for the Ady Gil to take on water after the scuttling).[76] He testified that the physical set-up for the tow was sound, but that "[o]nce we set up the tow, I went to bed. And I knew that the vessel was going to sink through the night, and I didn't want to be woken up, because I didn't want to go seeing the boat left behind."[77] His understanding was that the Ady Gil remained under tow for four to six hours after the scuttling,[78] but sometime while he was sleeping, the tow rope broke as the vessel took on water (which was "expected when you've got a vessel that is … sinking into the water"); the rope was replaced and then broke a second time, at which point the Ady Gil was abandoned.[79]

53. It is not necessary to resolve the discrepancy about whether there was an initial good faith attempt to tow, or simply a belief by many of the good faith in that attempt, because they were unaware of the alleged scuttling that had taken place already and was leading the Ady Gil gradually to settle deeper into the water. The consistent recollection of all witnesses was that so long as the Ady Gil was sitting fairly high in the water, the tow appeared to be working, albeit at slow speeds; the tow failed only after she began to sink lower in the seas, increasing the drag on the tow lines.

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[76] Hearing Transcript, February 17, 2015, 214:10-14 (Bethune). Mr. Bethune thought it possible but highly unlikely that an earlier tow attempt had been set up by others without his knowledge. *Id.*, 214:15-215:2, 239:3-241:9, 242:2-17 (Bethune).

[77] Hearing Transcript, February 17, 2015, 210:23-211:8 (Bethune).

[78] Bethune Deposition, 149:24-150:7.

[79] Hearing Transcript, February 17, 2015, 211:9-19, 239:21-240:7 (Bethune).

54. It is also undisputed that the crew of both vessels understood at the time that the goal of any tow was to reach a French Antarctic research station at Dumont d'Urville, where it was hoped that the Ady Gil could be lifted out of the water and stored in some fashion until further arrangements were made for her return for repairs.[80] The French base had previously hosted the crew of the Steve Irwin, and its personnel were supportive of SSCS's mission.[81] Although there was a dispute during the hearing (discussed below) about whether that base might have been blocked by ice and therefore ultimately unreachable, no one at the time seems to have condemned the tow efforts as futile from the start because there was no feasible destination even at the end of the process.[82] While no one on the Bob Barker seems to have personally spoken to the French base to confirm their eventual welcome,[83] at least some of the crew believed that appropriate efforts were being made by SSCS personnel on the Steve Irwin and back on land.[84] As a result of those efforts, Pete Bethune was under the impression that "[w]e had already spoken to the French, and they had said we were welcome to take the boat in there," from which "we knew that the way to the French base was clear."[85] Chuck Swift testified similarly that:

> I was told that the French — okay, A, we contacted them and had established contact; B, that they were receptive to receiving the Ady Gil;

[80] Hearing Transcript, February 18, 2015, 564:508 (Kimura), 673:6-11 (Schumaker); Hearing Transcript, February 20, 2015, 1110:5-22, 1112:21:1113:1 (Swift); Hammarstedt Deposition, 23:11-12.

[81] *See* Ex. R-206, Maritime New Zealand interview with Pete Bethune, January 29, 2010, at 33.

[82] Hearing Transcript, February 18, 2015, 596:12-20 (Kimura).

[83] Hearing Transcript, February 17, 2015, 206-9-11 (Bethune), 473:19-24, 491:7-9 (Holland); Hearing Transcript, February 18, 2015, 683:18-23 (Schumaker); Hearing Transcript, February 20, 2015, 1118:22-24 (Swift).

[84] Hearing Transcript, February 20, 2015, 1111:15-19 (Swift); Maclean Deposition, November 8, 2014 (hereafter "Maclean Deposition"), 25:20-26:7.

[85] Hearing Transcript, February 17, 2015, 139:17-21 (Bethune); *see also* Bethune Deposition, 141:13-18 (same).

> C, that they had a crane that — that could, in their estimation, remove the … damaged.. remainder of the Ady Gil and put it up on the ice. … And they said it was fine for us to leave it there until we could … get some kind of recovery effort going after … the winter season.[86]

The Bob Barker's second mate Bonnie Schumaker explained, when asked whether the crew thought there was at least a good possibility of reaching the French base, that "[w]e wouldn't have even tried it unless we thought maybe we could do this."[87]

4. The Change in Plan, Involving Alleged "Scuttling" of the Ady Gil

55. Notwithstanding the perception by most on board that genuine tow efforts remained underway with the goal of reaching the French research station, Chuck Swift and Pete Bethune both testified that they (and the Bob Barker's communications officer, Luke Van Horn) eventually boarded the Ady Gil and secretly opened a number of seacocks, with the goal of ensuring that it would take on water gradually during the tow and ultimately have to be abandoned at sea. As this testimony is the core of Claimants' conversion claim, it is worth recounting it in some detail. The Arbitrator considers Mr. Swift's testimony to be particularly credible, and that testimony corroborates in significant detail the story told by Mr. Bethune.

56. Beginning with Mr. Bethune, he testified that initially he "was called into a meeting with Chuck Swift and Luke Van Horn and that was where … I was first asked the question about scuttling the vessel. No decision at this time was made. It was just suggested that

[86] Hearing Transcript, February 20, 2015, 1117:20-1118:14 (Swift); *see similarly* Swift Deposition, 121:13-24 (stating his understanding that the French base had been contacted and indicated their willingness to remove the Ady Gil from the water with a hoist and place it on land for the winter).

[87] Hearing Transcript, February 18, 2015, 673:17-18 (Schumaker).

one option for Sea Shepherd was to scuttle the vessel."[88] For a while, though, discussions on board the Bob Barker focused instead on towing it to the French base. However, "the next morning, I was called back into a meeting with [Messrs. Swift and Van Horn] and that was told that Sea Shepherd wanted the vessel scuttled. … So I was given the instruction to scuttle it."[89] Mr. Bethune explains why he went along with the instruction:

> Keep in mind at this stage, … I'm there as a Sea Shepherd person. I'm a Sea Shepherd volunteer and I've signed an agreement to say that I will follow orders. It's difficult for people who are not mariners or who are not military to sometimes understand this, but you follow orders. And I was under order from Paul Watson.
>
> At this time, I considered I'm a Sea Shepherd person. My boss has given me instruction to sink the boat and that's what I did. And in hindsight, I made a bad call. I should have said I'm not any party to this, but I went along with it. I scuttled the vessel. And I think it was the wrong thing to do.[90]

57. Specifically, Mr. Bethune "went about figuring out how best to scuttle the vessel.… [I]t was to be scuttled covertly."[91] Mr. Bethune recalls the details of what came next:

> I was asked if the boat would actually sink and I said probably not, but it will get very low in the water. So we then determined to drain the engines, pull out the batteries, pull out pretty much everything on that vessel that could be salvaged in any way. We spent a full day pulling everything off that boat and preparing it for what eventuated to be our fake towing towards the French base.
>
> The final bit of it was we opened up all the hatches through the vessels. We opened up the rear hatches on the two sponsons. We opened up the hatch between the lazarette and the engine bay. We made no attempt to

[88] Bethune Deposition, 141:4-9; *see also* Hearing Transcript, February 17, 2015, 246:19-247:9, 247:18-249:17 (Bethune).

[89] Bethune Deposition, 141:18-21, 142:5-6; *see also* Hearing Transcript, February 17, 2015, 244:23-245:1, 250:5-15 (Bethune).

[90] Bethune Deposition, 147:4-18.

[91] Bethune Deposition, 141:22-24; *see also* Hearing Transcript, February 17, 2015, 250:14-251:19 (Bethune).

> close off the pipe that went from the main hull forward because we knew that would allow water to get in there.
>
> We lifted off the lids of the fuel tanks. I was aware if water started to get into the day tank it would help it sink. And then Chuck Swift and myself went into the engine bay and we — we didn't want the vessel to sink too quickly. We were worried that it would look suspicious. I was given a target of eight hours. They wanted the vessel to take eight hours to sink. And the key to it is the engine bay.
>
> If the engine bay remains intact, the vessel was never going to get very low in the water. So I knew I had to get water into the engine bay and from there it would flow into the lazarette and the rear storage compartment. And as that went down, I knew eventually it would pull the main fuel tank down and that would fill through the pipe in the front.
>
> And so I knew it would — the boat would eventually get very low in the water, but I didn't expect it would actually fully sink. The final piece of it was the opening of the seacocks. And I unscrewed the lids on top of the seacocks that allow raw water into the main hull. And Chuck Swift stood there watching me. I believe Luke Van Horn came in and he might have seen the last sort of five minutes.
>
> I was trying to work out — I needed it to take a certain amount of time to sink. I didn't want it to sink too fast. But I didn't want it to take three or four days. So we just sat there watching the amount of water coming out of the seacocks. And once I was happy with the flow, we climbed off the boat, connected up the tow rope, went back on to the Bob Barker. …[92]

58. Mr. Bethune testified that he then went downstairs to dinner and to bed, instructing Mr. Swift that "when the vessel sank through the night, I didn't want to be woken. And then the next thing I knew when I got up the following morning, went into the helm and was informed that the vessel had — the tow rope had broken through the night and they decided that the best thing was to continue on."[93]

59. Mr. Bethune's story of the alleged scuttling has been largely consistent since he first articulated it in October 2010. At that time, he wrote Paul Watson that he was

[92] Bethune Deposition, 142:7-144:6; *see also* Hearing Transcript, February 17, 2015, 257:1-259:8 (Bethune).

[93] Bethune Deposition, 144:12-20.

considering going public with the truth about the "[d]eliberate [s]cuttling of Ady Gil," and contended that (a) after the collision Chuck Swift had conveyed to him Mr. Watson's desire to scuttle the Ady Gil, (b) he subsequently did scuttle the vessel, together with Mr. Swift and Mr. Van Horn, and (c) he and others were willing to sign affidavits testifying to this, as well as undergo lie detector tests to verify the truth of the affidavits. He stated in one email that "I felt horrid after the scuttling and I have felt terrible about it ever since. It broke m[y] heart to sink a vessel that had been such a big part of my life, and I also felt we had betrayed SSCS sponsors, SSCS supporters, Ady Gil, and the public by lying about it."[94]

60. Mr. Bethune testified to similar effect in July 2012, in the course of his own arbitration against Sea Shepherd. Although Respondents in this case tried to suggest Mr. Bethune had altered his position since the Bethune Arbitration — claiming recovery in that case on account of the vessel's "loss or destr[uction]" within the meaning of the Charter Agreement but in this case insisting that the vessel was lost only as a result of Respondents' decision to scuttle it — the transcripts reveal that Mr. Bethune testified consistently in both cases. In July 2012, he stated that pursuant to "instruction from Paul Watson and Chuck Swift to deliberately scuttle the vessel,"

> I went back on board with Chuck Swift and Luke Van Horn. We opened the seacocks. We opened all the hatches so that it would sink. We were expected to keep this a secret from media and other crew. …
>
> We opened the seacocks up a small amount so it would take — Paul wanted to take six to eight hours to sink. He didn't want it to sink straight away to look suspicious. So we opened the seacocks and left the boat. We then started to tow it, and albeit knowing through the night the vessel would be lost.

[94] Ex. R-270, Email from Pete Bethune to Paul Watson and others, October 3, 2010.

> Then we got up the following morning. The vessel had been left a couple of hours earlier. It started to get low in the water, and the tow rope eventually broke. Paul Watson and Chuck Swift had a conversation and decided to leave it where it was, and we just — we started on to look for the Japanese whaling fleet.[95]

61. Mr. Bethune's testimony was closely corroborated in this case by that of Chuck Swift. He testified that beginning about twelve hours after the accident, Paul Watson "started telling … me to leave the boat behind …. And this is an area where Paul and I had some pretty rough discussions and arguments, because I had originally been asked by him to save the vessel. And I was trying to save the vessel."[96] Mr. Swift further explained:

> I was trying to respectfully, because I worked for him, again, going back to, to we were like brothers for a long time, but we were … yelling, and I was saying … "this is an organizational asset, we can recover it. We are recovering it. We have a plan. We've already lost the Japanese fleet. Our mission is to try to save the whales, but saving this organizational asset might help us save the whales. We can park it. The fleet's already off our radar, we know the general direction in. This day and a half that it's going to take to go and park that vessel is not going to be the end of the world, it's not going to be too extremely impactful on our mission, and it, it's the right thing to do, because that represents value for Sea Shepherd," or whoever. And, and, he pushed. And he kept pushing. And over a 12 or 24, 36-hour period I was getting calls on the bridge, I was getting calls on the phone, I was getting calls on the radio from Paul, and also from his first mate Locky, Lockhart Maclean, and from helicopter pilot Chris Aultman, and I was being told, "Play the game. How come you are not following Paul's orders? You need to get with the program and do what needs to be done." And after however many times and after all of those hours without sleep, and out of respect for Paul, because remember, I'm

[95] Ex. R-297 (Transcript of hearing in *Bethune v. Sea Shepherd Conservation Society* arbitration, July 30, 2012), 76:15-78:4 (Bethune); *see also id.*, 360:10-361:5 (testifying that "[t]he decision to scuttle the ship was made before we had done any towing," based on an "instruction from Paul and Chuck"). Mr. Bethune also testified that those involved with the scuttling subsequently lied about these events to the Maritime New Zealand authorities, because "Sea Shepherd was extremely worried about that getting in the public domain. So … we basically testified … that we tried our best to tow the vessel, and it got too low in the water, and the tow rope broke, and there was nothing we could do, which was false." *Id.*, 386:20-387:6; 395:19-22.

[96] Swift Deposition, 120:20-121:3.

> the captain, he's the admiral, I still love and respect him, he's done a lot of good things, so I followed his order, and did what I did.[97]

62. Specifically, Swift explained, "once I had my say and shared all of my arguments, and … kind of acceded to him, Paul said 'Go, go and … get Pete, take Pete onto the boat, and have him open the sea valves, and put it down. … We did."[98] But before acceding to Mr. Watson's demands, Mr. Swift recalls that he asked Mr. Watson, "Why is this so important to you?", and Mr. Watson responded, "Our audience needs closure."[99] Mr. Swift recalls:

> Which, which incensed me and resulted in about another half an hour of argument before I finally just kind of threw my hands up and said, "Okay." … [A]s I was getting into the small boat with Luke and Pete to go and scuttle the Ady Gil, I was still getting calls with — and I had the crew yelling out the bridge, "Paul's still on the phone and he's all angry and he wants to talk to you."
>
> And I … just yelled, I said — and this is as indiscreet as I ever got about this entire episode — I said, "Tell him I'm doing it. Tell him it's going to happen right now, and just leave me the fuck alone." And I went, and I did it. … Opening the sea valves in the engine room.[100]

63. Afterwards, Mr. Swift testified, "we knew what was going to happen":

> We knew when we opened those sea valves and the water came in and the vessel started slowly sinking that would create resistance. And this time instead of it happening naturally, if you will, this was engineered so that it would go slowly down. And hours after we had come back on from our final salvage operation, which was really to allow Pete to open the valves, that we would have had enough hours that hopefully people would[n't] connect the dots. And so when those lines snapped, that was the time that we were going to call it good and abandon the vessel and let it sink.[101]

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[97] Swift Deposition, 126:24-128:5.

[98] Swift Deposition, 128:15-24.

[99] Swift Deposition, 129:9-12.

[100] Swift Deposition, 129:13-130:3.

[101] Swift Deposition, 171:21-172:10.

64. Mr. Swift's testimony in this case was not the first time he had confirmed Mr. Bethune's story that Mr. Watson requested the scuttling of the Ady Gil. In an email to Mr. Watson in October 2010, shortly after Mr. Bethune first came forward with his allegations, Mr. Swift wrote that while he "never ordered Pete to do anything," he did "share[] with him that you and I discussed sinking the vessel, and that you had requested we do it." Thereafter, Mr Swift wrote in 2010, he boarded the vessel with Mr. Bethune and Mr. Van Horn, and "[a]s previously agreed, Pete entered the engine room and opened the sea valves," exiting the engine room and saying "something to the effect [o]f 'Job well done!'" According to the email, it was only after the seacocks were opened that the Ady Gil sunk "lower in the water than ever before … with its pontoons, engine room, and fuel tank clearly under."[102]

65. The third individual who allegedly participated in the scuttling, Luke Van Horn, was not available to testify in this case, but between October 8 and 10, 2010, he sent Mr. Gil several private messages through Mr. Gil's Facebook page. While the veracity of these postings could not be tested by later cross-examination, they do tend to corroborate the stories offered by Mr. Swift and Mr. Bethune. The postings included the following statements:

> As you may now be aware, I was present during the actions taken to scuttle your ship. To be honest, I assumed you would have been made aware of what happened after the fact. That said, I still want to offer my apology for the deception that has taken place. ….
>
> I know that Chuck was under a lot of pressure from Paul to scuttle the ship. … Chuck made the decision to discuss this with Pete, expressing Paul's desires. I was present during this conversation and it was decided to go ahead with the operation. My role was to serve as an excuse for the

[102] Ex. R-273, Email from Chuck Swift to Paul Watson and others, October 6, 2010.

> trip back over to the AG — that being to salvage a few remaining pieces of equipment. ….
>
> We sealed her fate before we started towing the vessel. That's why it was taking on water and breaking the tow lines.
>
> Bonny's [Schumaker's] assessment of why it was sinking is an assumption based on what she knew — she had no idea that we'd scuttled the vessel.[103]

66. By contrast, Paul Watson's position on this issue has shifted numerous times. In his deposition, he denied being aware at any point in time that seacocks on the Ady Gil had been opened, thereby flooding the engine compartment.[104] He invoked the Whale Wars video segment in which he was recorded as telling Mr. Swift that the decision what to do with the Ady Gil was entirely Mr. Bethune's to make: "It's Pete's boat; it's Pete's decision."[105] Mr. Watson claimed that this segment was recorded prior to the decision to abandon the vessel, and not taped after the fact as others claimed (discussed further below).[106]

67. This denial directly contradicted Mr. Watson's own prior rendition of events. In October 2010, after Pete Bethune offered to forgo his claim for US$500,000 from SSCS if Paul Watson would take a lie detector test answering the question, "did you ask Chuck/Pete to sink the Ady Gil," Paul Watson responded by email. At that time, he acknowledged that the scuttling occurred on his orders, but attempted to justify it as necessary to minimize a navigational hazard once it became clear that the tow could not continue. Specifically, Mr. Watson stated as follows:

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[103] Ex. C-63, Facebook page of Ady Gil, postings by Luke Van Horn, October 8-9, 2010.

[104] Watson Deposition, 73:2-9, 74:24-75:2, 89:17-20.

[105] *Id.*, 73:18-22.

[106] *Id.*, 75:3-9.

> I would be delighted to take such a test in return for US$500,000. In fact the question of did I ask Chuck and Pete to scuttle the Ady Gil. The answer is yes I did. There was no other choice. The ship was unsalvageable and was sinking slowly and was a navigational hazard while afloat so we assisted the sinking notified Australian Maritime Safety that we did so. No big conspiracy here.[107]

Further in the same email chain, Mr. Bethune indicated that he has "felt terrible about" opening compartments in the sponsons and rear hatches, as he "felt we had betrayed SSCS sponsors, SSCS supporters, Ady Gil and the public by lying about it." Mr. Watson responded in bold, "Yes I ordered the scuttling of the Ady Gil."[108] Mr. Watson then forwarded this exchange to a potential new SSCS donor, attributing the scuttling decision to Pete Bethune in the first instance but stating that he, Mr, Watson, contemporaneously agreed with it: "my crew worked long and hard to save that vessel and in the end they had no choice to scuttle and that was at the suggestion of the Ady Gil's captain Pete Bethune. Chuck Swift and I agreed with that decision."[109]

68. At the hearing, Mr. Watson took a different position, claiming that he was not involved at all in the decision: "my understanding, and … I'm quite a ways away, my understanding was that Pete Bethune made the decision to abandon the vessel."[110] He claimed that it was not until "[m]uch later" that he learned Mr. Bethune and Mr. Swift had made an attempt to sink the vessel by opening up seacocks to allow water to flood it. He claimed not to see the logic of this decision: "I didn't see how that would even have been possible. The vessel was — you know, you couldn't really sink it. The only thing that would have been wise to do is to have put a tracker on it so that any ship navigation

[107] Ex. C-40.

[108] Ex. C-40.

[109] Ex. C-40.

[110] Hearing Transcript, February 19, 2015, 746:22-25 (Watson).

would be aware of its presence."[111] When confronted with his discrepant statement from October 2010, Mr. Watson then claimed he had written this in mistake, and attempted to pin the decision wholly on Mr. Bethune:

> Well, I didn't know anything about [the decision to open up seacocks] at the time. I did know about it after the time. And I remember discussing with Locky Maclean how that it didn't make sense to try and sink a vessel that was really, because of what it was made of, unsinkable. But I know that there was one e-mail in there where it says that I ordered it, but that was a mistake.
>
> What I meant to say was that I would have ordered, if I was there, because it was the thing to do. I think that Pete Bethune, in ordering or trying … to sink the Ady Gil was actually doing the right thing…. That vessel should have been sunk, because it was unsalvageable and presented a navigational hazard….
>
> [But] I wasn't aware that they had gone onboard and … that they had attempted to scuttle it until much later.[112]

Mr. Watson reiterated that "[i]t made sense. But I certainly didn't order them to do that. I had no idea they were even on [the Ady Gil]" again after the collision.[113]

69. The Arbitrator concludes that Mr. Watson's testimony on this point was not credible. It was inconsistent internally, with his own prior writings, and with the testimony of two other witnesses. His demeanor was evasive. It was accompanied by other assertions that were not believable, such as the insistence in his deposition that Pete Bethune was reporting at the time of the accident to Mr. Gil,[114] whom the evidence clearly demonstrated (as discussed further below) was largely disconnected from the events unfolding half a world away.

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[111] Hearing Transcript, February 19, 2015, 749:6-17 (Watson).

[112] Hearing Transcript, February 19, 2015, 792:22-794:3 (Watson).

[113] Hearing Transcript, February 19, 2015, 801:9-12 (Watson).

[114] Watson Deposition, 54:7-55:10.

70. Completely aside from the fact that the Charter Agreement placed responsibility for the vessel and for decisions of its captain on SSCS as Charterer (and not on Mr. Gil as the ultimate owner),[115] the reality of the SSCS command structure was such that no one — including Mr. Swift — would have taken this kind of executive decision without the command, or at least the express blessing, of Paul Watson. As Mr. Swift testified, "for all operational intents and purposes [the Ady Gil] and that crew reports to [SSCS] and follows our orders. And that was explicitly agreed to and discussed between me and Paul [Bethune]" prior to the mission.[116] More generally, while Mr. Swift was supposed to be responsible for certain operational decisions within SSCS, the reality was that "often Paul would — we would agree to a plan and set on a course of action, and then kind of midstream sometimes we would end up going in another direction. And it would be frustrating, but , but it's Paul's organization, and Paul's the boss. So everybody just kind of acknowledged that and … did our best to, to realize his vision, for lack of a better term."[117] Mr. Swift likened Mr. Watson's role to that of an admiral, noting that while "captains are in charge of the boat" (*i.e.*, Mr. Swift with the Bob Barker and Mr. Bethune with the Ady Gil), "the admiral's in charge of the fleet. Captains follow the orders of the admiral. And it was that way operationally on the ships and organizationally as well."[118]

[115] *See* Charter Agreement, Clause 20 (transferring "full authority regarding the operation and management" of the Ady Gil to SSCS and providing that its Captain and crew would be "agents and employees of the Charterer and not the Owner") and Clause 21 (providing that the Captain was to "receive and obey orders" from SSCS as to the "general course of the voyage," while remaining responsible for the sailing and safe navigation of the Ady Gil).

[116] Smith Deposition, 88:3-6.

[117] Swift Deposition, 48:14-49:13.

[118] Swift Deposition, 50:17-51:5.

71. The Arbitrator concludes, from the evidence and particularly from the credible testimony of Chuck Swift, that Mr. Watson did order the scuttling of the Ady Gil, and did direct that this scuttling be kept secret to all but a small group of participants. This desire for secrecy affected when the scuttling took place, who participated, and what was said (or not said) to other members of the crew. As discussed below, it also led to the staging of false, after-the-fact conversations involving Mr. Watson, Mr. Swift and Mr. Bethune, for purposes of presenting a different narrative to the viewing public of the Whale Wars "reality show."

72. The Arbitrator notes that this conclusion — that the Ady Gil was deliberately scuttled and that this scuttling occurred on the orders of Paul Watson for SSCS — does not itself end the analysis of Claimants' claim for conversion. As noted above, conversion requires that an act be "wrongful" and deprive the claimant of possession and use of property that it otherwise would enjoy, thereby causing injury.[119] Analysis of *wrongfulness* in this case depends on the further assessment of Respondents' motives for the scuttling and their conduct vis-à-vis Claimants; analysis of *injury* depends on an assessment of whether absent the scuttling, it would have been possible to complete the tow to the French base, from whence any further rescue and repair operations could have been organized. These elements are discussed further below.

5. The Reasons for the Decision to Scuttle the Ady Gil

73. As noted above, Respondents' explanation for the scuttling is that it was necessary to reduce dangers to navigation, given that the Ady Gil was unlikely to sink on her own. Chuck Swift contends that he formulated this explanation as an excuse after-the-fact,

[119] *See* Respondents' Post-Hearing Brief at n. 130 (citing case law); Claimants' Post-Arbitration Brief at 1.

when Mr. Bethune in October 2010 challenged Respondents publicly to a lie detector face-off. As he explains:

> Paul was freaking out. At some point Pete offered to forfeit his half a million dollars if Paul would undergo a[] lie detector test, and Paul was kind of terrified. So I … asked him to let me think of something. And I spent five or six hours pacing back and forth in my apartment and formulated Sea Shepherd's public response, which was that we needed to sink the boat because it would be a hazard if it was floating around.[120]

74. Reflecting this position, Mr. Swift recorded in an email at that time that "[t]he reality, and our whole premise for sinking the Ady Gil, was the fact that it was going to sink anyway…. We simply attempted to accelerate the process to reduce the navigational hazard and get back to our mission."[121]

75. For purposes of these proceedings, Mr. Swift contended otherwise. He explained that the disabled Ady Gil was not a substantial hazard to navigation, given the size and strength of the type of vessels found in the Southern Ocean: "an ice-class boat would probably feel a bump and a hear a thud and maybe some scrapes as they went over it."[122] Other witnesses and experts agreed that the Ady Gil was so small in comparison to the ships traveling these waters that they could run over it without suffering any damage at all, unless the Ady Gil somehow became tangled in a propeller.[123] Even so, as Malcolm

[120] Swift Deposition, 142:9-18.

[121] Ex. C-38.

[122] Swift Deposition, 145:19-21.

[123] Hearing Transcript, February 17, 2015, 460:6-14, 461:16-462:2 (Holland); Hearing Transcript, February 20, 2015, 1099:6-21 1200:15-19 (Greene) (describing it as "a minor navigational hazard …. [M]ost ships that would be in the area wouldn't be impacted if they collided with it").

Holland stated, "it goes without saying that, if [the Ady Gil] was visible, it would be less a hazard than if it was not,"[124] *i.e.,* sitting lower in the water but still not fully sinking.

76. Moreover, if the desire at the time really was to reduce dangers (however small) to other vessels from inadvertently striking the drifting Ady Gil, there would be no basis for maintaining the veil of secrecy that was imposed on the scuttling, not only vis-à-vis other crew members and the Ady Gil's owner, but also maritime authorities and the general public. There would be no explanation for certain pages from the Bob Barker's log book having been ripped out, a striking development that Mr. Watson testified resulted from Chuck Swift's taking the need for secrecy to extremes.[125] There also would be no justification for having removed the GPS transponder on the Ady Gil that had previously allowed a base crew to track the Earthrace's location during its round-the-world record-setting attempt, and that presumably would have continued to emit signals enabling others to pin-point the Ady Gil's location, at least until its battery expired.[126] By removing the transponder, Mr. Bethune testified, the Ady Gil was rendered even more of a hazard to navigation than it would have been before.[127] In fact, it would have been far more logical to attach a marking buoy to the Ady Gil, as one of the crew members suggested at the time to enable rescuers to return to it; this meanwhile would make its location more visible to any passing vessels. Mr. Swift testified that he did not do so because "we didn't want to come back and find it."[128] For the same reason. Mr. Bethune

[124] Hearing Transcript, February 17, 2015, 462:15-17 (Holland).

[125] Hearing Transcript, February 19, 2015, 732:9-733:8 (Watson).

[126] Bethune Deposition, 194:7-17; Hearing Transcript, February 17, 2015, 233:13-234:10, 234:19-22 (Bethune).

[127] Bethune Deposition, 194:3-6, 194:24-195:3; *see also* Swift Deposition, 142:20-24.

[128] Swift Deposition, 117:10-18.

testified, "we made the decision to remove [the GPS transponder] because we were worried that if anyone found that vessel and saw that the seacocks were open, they would realize we deliberately scuttled the vessel and that would make things very difficult for myself and Sea Shepherd."[129]

77. If the "reducing navigational hazards" explanation does not ring true, what other explanations are there for the decision to abandon tow efforts and instead secretly scuttle the Ady Gil? It seems clear that SSCS had two priorities driving its operations at the time: in the words of Luke Van Horn, "it was a combination of wanting the publicity and not wanting the Barker to be delayed for those days."[130] Taking the second (more charitable) factor first, there is no question that the SSCS crew had an overriding devotion to the mission, which was following the Japanese whaling fleet and interfering with its activities. Mr. Van Horn wrote that "Paul wanted … us to keep pressure on the fleet and hopefully reduce their ability to operate. … [T]he pressure was on us to get back after the fleet."[131] Although unaware of any scuttling activities, Ms. Schumaker likewise testified about the crew's genuine concern about losing the Nisshin Maru[132] — whereas immediately after abandoning the tow, SSCS was able to return its full attention to the Japanese fleet, and as a result "didn't lose the Nisshin Maru."[133] This would have been far more difficult had the Bob Barker continued the tow; the estimate was that it could

[129] Bethune Deposition, 194:18-23; *see also* Hearing Transcript, February 17, 2015, 234:11-23 (Bethune).

[130] Ex. C-63 (Luke Van Horn post on Ady Gil's Facebook page, October 9, 2010).

[131] *Id.*

[132] Hearing Transcript, February 18, 2015, 658:18-19 ("I'm constantly watching the Nisshin Maru, and we're losing them. We're losing them fast."), 670:21-23 (Schumaker).

[133] Hearing Transcript, February 18, 2015, 684:10-12 (Schumaker).

take two days traveling at reduced speed to deliver the Ady Gil to the French base, plus return time at a faster speed. By this time, the Japanese fleet would have moved on, and the Bob Barker and Steve Irwin (which were slower than the Japanese vessels) would not have located them again.[134] By abandoning efforts to tow the Ady Gil, SSCS was able to pick up quickly on its efforts to tail and confront the Japanese fleet.

78. While devotion to the cause may explain the crew's loss of patience with continuing an inevitably slow-paced tow, it cannot explain the deliberate scuttling of the Ady Gil, particularly in a fashion that would result in only gradual subsiding, while the Bob Barker continued ostensible efforts to tow her to safety. It would have been quicker simply to cut the Ady Gil loose at the outset and continue to tail the Japanese fleet. Rather, the crew's thinking seems to have been directly influenced by the presence of the Animal Planet film crew, which gave SSCS unparalleled public exposure and greatly expanded its fundraising possibilities. Certainly, a plodding tow operation to deliver a damaged vessel to shore would not have made for interesting television viewing, nor would extended and probably fruitless efforts thereafter to relocate the Japanese fleet. Indeed, if the fleet could not be relocated, the entire remaining season of Whale Wars could have been in jeopardy, along with the success (however defined) of the Waltzing Matilda campaign.

79. By contrast, the collision of the Shonan Maru #2 with the Ady Gil already had captured unparalleled media attention, with Mr. Watson giving interviews from the Steve Irwin and Pete Bethune taking non-stop media calls on board the Bob Barker. The crew was

[134] Hearing Transcript, February 18, 2015, 658:22-25 ("It's not like I can catch them again because they go faster than we do. If they don't go sideways and they continue north we'll never find them. We'll never catch them.") (Schumaker).

acutely aware that the sinking of the Ady Gil would create the occasion for more dramatic reality television — if not through filming the moment of sinking itself (because the vessel, even with scuttling, was descending slowly and was unlikely to fully submerge), then in the form of extended coverage of the crew's "decision" to abandon the tow and their emotional reactions to that decision. Chuck Swift's testimony that Paul Watson told him "our audience needs closure"[135] thus rings true, as does his testimony that the meaning of that statement was "obvious to me," namely that the sinking would make for good television drama.[136] Indeed, Mr. Swift testifies that "during our discussions/arguments leading up to my capitulation to Paul's order to sink the Ady Gil, he was telling me … 'Oh, the media on this would be great.'"[137] Swift went on to explain, in regards to this media strategy:

> Paul's a genius, and he's a media genius especially. And sometimes he's open-minded, and sometimes, he's not. And, when he sets his mind on something he's like a pit bull getting lock jaw, and I was unable to change his mind, which is why I eventually executed his orders.[138]

80. Mr. Swift's testimony about Mr. Watson's contemporaneous preoccupation with media spin is corroborated by the directions the crew was given to capture the Ady Gil's eventual sinking on film. On January 7, 2010 (the day after the collision but before the Ady Gil was abandoned), SSCS's CEO Steve Roest reminded the crew from shore that "[b]efore leaving the Ady Gil to sink, get a picture/video of it going down -- gold for media."[139] The Bob Barker crew was careful to do "a slow circle around the vessel to

[135] Swift Deposition, 129:8-12.
[136] Swift Deposition, 130:4-19.
[137] Swift Deposition, 137:13-16.
[138] Swift Deposition, 138:14-19.
[139] Ex. C-21.

film it. This was so that we could get the video and pictures out to the media. These were going to be the last images of the Ady Gil."[140]

81. The Arbitrator concludes that this desire to maximize media attention ultimately led to the decision both to abandon tow efforts and to actively scuttle the Ady Gil, albeit in a shroud of secrecy. It also led those in the know to double-down on the lie, by staging for the Animal Planet film crew a false discussion of options followed by a purportedly spontaneous decision, made after the real decision (and the scuttling of the Ady Gil) both already had occurred.[141] As Mr. Swift explained, the various statements he was recorded on television as making, regarding the failure of the tow and the need to cut the Ady Gil loose,[142] were all made:

> after Paul and I had had it out. After I bowed my head in deference to him and followed out his orders, and … it was done within the context of creating the alternate reality that we were sharing with the world about what really happened. … [W]hen I was talking to Paul … about watching the Ady Gil sink, I did that knowing that we had gone on there and opened the sea valves. That was … for show and for the record, or for the television record.[143]

82. Pete Bethune tells a similar story about putting media spin ahead of truth, in explaining what happened after he woke up and found the Ady Gil had been cut loose and abandoned during the night:

> The crew from Animal Planet came and saw me and they asked me to effectively recreate me making the decision to abandon the vessel. And that's when I say words such as "if the engine room is flooded, the boat is gone." So that scene was all recreated in the morning after the vessel had

[140] Hammarstedt Deposition, 24:25-25:3.

[141] Swift Deposition, 156:20-157:19.

[142] Swift Deposition, 177:11-180:12.

[143] Swift Deposition, 191:7-23.

> been left. ... I wasn't present when the tow rope broke and when the vessel was abandoned.[144]

The decision to stage this scene for the cameras was the result of discussions between Mr. Bethune and Mr. Swift, in the presence of the Animal Planet crew:

> they said we need to just create the scene that makes it look like you were making the decision to abandon the boat. And I knew from Whale War's perspective, … the decision to abandon a boat by the captain is a pretty powerful scene. I went along with it.[145]

6. The Deception of Mr. Gil as the Ady Gil's Owner

83. Of course, whatever the rationale for deceiving the viewing public (which might be presumed to understand that "reality shows" do not actually reflect reality), there was no legal or moral justification for deceiving Claimants, the owners of the Ady Gil. The Charter Agreement obligated SSCS to give Earthrace Limited "prompt notice" of any "accident or disaster,"[146] the purpose of which self-evidently is to allow participation in decisions about next steps, based on accurate information provided in real time. In this case, compliance with that obligation would have meant giving prompt notice not just of the fact of the collision (which Respondents did), but also an accurate assessment of the damage and the options for salvage, as well as SSCS's objective recommendations for which options should be pursued.

84. Mr. Swift testified that in two satellite phone calls he had with Mr. Gil shortly after the accident, Mr. Gil stated that he would pay for the cost to recover the vessel eventually

[144] Bethune Deposition, 144:21-145:2.

[145] Bethune Deposition, 226:14-227:10.

[146] Charter Agreement, Clause 10.

from the French base and thereafter repair it.[147] Whether Mr. Gil would have insisted on a tow to the French base had he been made aware of the potential consequences of losing the Japanese fleet is another matter. To his credit, Mr. Gil acknowledged under questioning from the Arbitrator that it is difficult to know with certainty how he would have weighed all of the various considerations, had they been properly laid before him at the time.[148]

85. The real misconduct by Respondents is that they did not provide Mr. Gil the opportunity to participate in the decision regarding the ultimate fate of the vessel they had chartered from him. It is possible that they instinctively viewed the Ady Gil as (for all intents and purposes) actually Sea Shepherd property, since the plan originally had been for SSCS to purchase it directly with Mr. Gil's donation, and Mr. Gil later was persuaded to charter it to SSCS for a nominal fee. It is equally possible that they viewed Mr. Gil as such a dedicated and somewhat naïve supporter of their mission that they considered him likely to defer, reflexively, to whatever decision they made. Certainly, the evidence suggests that SSCS itself had no interest in retaining access to the Ady Gil after using it for the Waltzing Matilda campaign and the current season of Whale Wars,[149] and therefore

[147] Swift Deposition, 122:2-13, 123:19-25; *see also* Hearing Transcript, February 17, 2015, 306:20-307:7, 309:1-19, 311:19-25 (Gil).

[148] Hearing Transcript, February 20, 2015, 1225:2-1227:10 (Gil).

[149] *See, e.g.,* Ex. C-2 (Mr. Swift expressing doubt, in September 2009, about the "value over the long haul" of the vessel to SSCS, and suggesting a preference to use the vessel for the Waltzing Matilda campaign and then "separate SSCS from the Earthrace immediately after that campaign"); Ex. C-15 (SSCS's CEO Mr Roest indicating in November 2009 that he had "completely re-designed" the legal structure to "give SSCS time to assess the strategic and fundraising benefit of the vessel before accepting it" for further use after the Waltzing Matilda campaign, so that "this way, should Paul not want the vessel after a couple months," SSCS could "simply remove ourselves from the deal without loss"); Ex. C-18 (Mr. Roest stating in December 2009 that the "[m]ore reasons we have to drop that boat and ady/pete after campaign the better").

presumably had limited motivation for prioritizing Claimants' interest in rescuing the vessel above their own interests in the campaign and the television series.

86. Whatever the reason, however, Mr. Gil (through his company Earthrace Limited) remained the legal owner of the vessel. It is abundantly clear that Respondents nonetheless prioritized their self-interest over their duties to Mr. Gil, and as a result, treated Mr. Gil the same way they treated the Whale Wars audience — namely, as someone not entitled to the full truth, and certainly not entitled to meaningful real-time consultation. The evidence demonstrates that between the time Mr. Gil told Mr. Swift that he was willing to pay the costs of retrieving the Ady Gil from the French base and making repairs, and when SSCS subsequently reported to Mr. Gil that they had "lost" the Ady Gil,[150] the SSCS personnel had substantial and important discussions about his vessel on board the Bob Barker, and with Paul Watson on the Steve Irwin, which they concealed from Mr. Gil.

87. Mr. Gil quite reasonably testified that at a minimum, he expected that he would hear the truth from the parties involved, but critical information was actively hidden from him regarding the fate of the vessel that he owned.[151] That impression was substantiated by the evidence. Indeed, Mr. Bethune testified that during the initial conversation he had with Messrs. Watson and Swift about options for the Ady Gil (including whether to try to tow or simply scuttle it), "[Mr. Gil's] name did not come up."[152] Apparently the SSCS participants did not consider the views of the vessel owner on this question even to be relevant for purposes of their discussions and decisions. The SSCS crew had the

[150] Hearing Transcript, February 17, 2015, 313:13-18 (Gil).

[151] Gil Deposition, November 4, 2014, 221:2-11.

[152] Hearing Transcript, February 17, 2015, 252:4-11 (Bethune).

technology and the time, on board the Bob Barker and the Steve Irwin, to manage to give multiple media interviews between January 6th and 8th about the collision with the Japanese fleet, but they chose not to use the same technology and time to keep Mr. Gil honestly in the loop regarding developments and discussions about the valuable property he had entrusted to their care.

88. As a result, Mr. Gil learned the truth about the scuttling of his vessel only nine months later, in early October of 2010, when Pete Bethune sent him an email as follows:

> Ady: There is something you should know. I was ordered by Paul and Chuck to scuttle the Ady Gil after she was rammed. I am so sorry for this. It has been dragging me down for months. Today I am coming clean about it. … It was a gross error in judgement on my part to do the bidding of Paul and Chuck….[153]

This email was followed soon thereafter by Luke Van Horn's private Facebook message to Mr. Gil, containing a similar confession.[154]

89. Based on this evidence, the Arbitrator concludes that Respondents intentionally and wrongfully exercised dominion or control over Claimants' property, within the meaning of the second element of the test for conversion. The analysis turns below to the third element, namely whether Claimants were injured by Respondents' wrongful conduct.

7. The Issue of Injury

90. In order to complete a showing of conversion, a claimant must demonstrate not only a wrongful act in relation to his property, but also that this act seriously interfered with the owner's rights in that property, with the effect of causing injury. This final element requires some assessment of whether there was a reasonable possibility of saving the Ady

[153] Ex. C-37; *see also* Hearing Transcript, February 17, 2015, 315:4-17 (Gil).

[154] Ex. C-63; Hearing Transcript, February 17, 2015, 316:6-14 (Gil).

Gil, or alternatively whether it was doomed to sink anyway in the Southern Ocean (even had Respondents not taken active steps to scuttle it), as a result of the damage it suffered in the collision with the Shonan Maru #2. If Respondents simply hastened a result that was inevitable anyway, they may have violated certain obligations to keep Claimants fully informed, but it cannot be said that they converted Claimants' property or subjected Claimants to an injury they had not already suffered at the hands of the Japanese fleet.

91. The question of whether the Ady Gil reasonably could have been saved is to some extent separate from the question of what its residual value was from the moment of the collision, and the relationship between that value and the likely cost to recover and thereafter repair it. That latter inquiry is directly relevant to an assessment of quantum, namely whether and to what extent Claimants are entitled to monetary recovery in addition to declaratory relief. However, before reaching these issues of economic value, it is first necessary to determine whether the Ady Gil could have been recovered for repair at all. If it could not have been, then Claimants have suffered no injury,[155] other than perhaps the psychic one of betrayal from Respondents' decision to secretly scuttle the vessel in advance of an inevitable sinking from its own injuries.

92. Determining what would have happened in the Southern Ocean but for the scuttling is necessarily a difficult exercise, because it depends on assessing a series of cascading scenarios. Would the Ady Gil have continued to take on water anyway, either based on

[155] In this scenario, the two inquiries — into the qualitative existence of an injury (relevant to the claim of conversion) and the quantification of injury (relevant to monetary damages) — collapse into one, pursuant to the doctrine of constructive total loss. *See, e.g., Ryan Walsh Stevedoring Co. Inc. v. James Marine Services Inc.*, 792 F.2d 489 (5th Cir. 1986) ("A vessel is considered a constructive total loss when the cost of repairs is greater than the fair market value of the vessel immediately before the casualty."); *U.S. Rubber Co. v. Union Bank & Trusts Co.* 194 Cal. App. 2d 703, 709 (1961) ("an action for conversion cannot be maintained unless it appears that the personal property involved was of some value").

the damage she sustained in the collision or as a result of weather conditions causing an increase in swells? Would the tow ropes have held sufficiently to enable the linked vessels to traverse the distance to the French base, even without the Ady Gil taking on any additional water? Would the French base have been accessible at the end of the tow, or would SSCS have found that base to be iced in? Would equipment have been available at the French base to lift the damaged Ady Gil out of the water, and could the vessel then have survived wintering in harsh conditions, before arrangements could be made to return it, the following austral summer, to a port where repairs could be made? None of these questions can be answered to an absolute certainty, but that does not make the exercise prohibitively speculative; it simply requires a close assessment of the evidence presented regarding the relevant probabilities.

93. The first set of questions concerned the feasibility of continuing a tow, had the seacocks and other valves on the Ady Gil not been deliberately opened. This in turn depends on whether the vessel would have taken on water for some other reason, as it seems apparent that (a) the tow in fact *was* working for some time at a slow speed, prior to the vessel's taking on water,[156] and (b) it was the increased drag on the tow lines from the additional water weight that eventually caused the tow lines to snap.[157] Respondents' expert in marine salvage, David Waller, testified that "the chances [of completing a tow to the

[156] *See, e.g.,* Hearing Transcript, February 17, 2015, 435:23-439:9 (Holland); Hearing Transcript, February 18, 2015, 579:14-20, 558:15-563:25, 561:13-563:33, 579:13-20 (Kimura); Swift Deposition, 115:14-16, 123:12-15, 125:18-126:18; 171:4-19.

[157] *See, e.g.,* Hearing Transcript, February 18, 2015, 579:21-582:14 (Kimura).

French base] in that sort of weather might have been reasonable,"[158] if the Ady Gil did not continue to take on water during the journey.

94. The evidence suggests that there were two main variables that could have caused the Ady Gil to take on additional water during a tow, absent tampering with her seacocks and other valves. The first was if the main fuel tank had been ruptured or otherwise remained open to the sea, so that pumping its contents out prior to a tow would not be sufficient to maintain its buoyancy thereafter. As discussed above, the better evidence is that the reason there was some salt water ingress after the collision was not a rupture in the tank itself, but a severing of a fuel line connecting the main tank to the ballast tank. Mr. Bethune testified that for a proper tow attempt, he first would have sealed this pipe, and that had this been done, there was no reason in his opinion that the Ady Gil would have sunk lower during the tow.[159]

95. The second variable that could have caused the Ady Gil to take on additional water during a tow would be a worsening of the weather. Respondents' expert Eric Greene, a naval architect, testified that if swells increased enough to wash over the swim platform at the vessel's stern, the lip of that platform essentially would act like a scoop as the Ady

[158] Hearing Transcript, February 19, 2015, 897:21-898:4 (Waller); *see also id.,* 903:20-22 (Waller) ("the chances of getting there were reasonable, if there wasn't any ice" blocking the base). Mr. Waller explained that the seemingly contrary conclusion in his written report, namely that the Ady Gil could not have remained afloat long enough for salvage operations to be carried out (Waller Report at 11), was based on the fact that she eventually did get lower in the water — but he admitted that he "would have no idea" if that occurred because of the underlying collision or because of a later intentional act. Waller Deposition, January 20, 2015, 19:7-16, 23:20-24:11. Mr. Waller did not formulate any opinion about the length of time the Ady Gil could have remained afloat assuming the seacocks were never opened, considering that impossible without knowing the extent of the damage from the collision itself, a matter on which he considered Mr. Bethune, on the scene, would have had "the best opportunity to make [the] determination." *Id.*, 30:14-31:7.

[159] Hearing Transcript, February 17, 2015, 241:10-242:1 (Bethune); Bethune Deposition, 198:15-199:5.

Gil was towed from the stern, funneling more water inside than could be drained by the vessel's movement, and thereby increasing drag on the tow rope.[160] However, all the witness evidence was that the weather was fortuitously favorable for a tow. Mr. Bethune described the 48 hours after the collision as "probably close to the best conditions that we actually had down there in Antarctica," with the good conditions lasting roughly two days from the start of the tow, before eventually deteriorating.[161] Ms. Schumaker confirmed that weather conditions were good,[162] as did Mr. Hammarstedt, who described conditions as "unusually calm for being in the Southern Ocean."[163] Mr. Swift testified that the SSCS crew knew they had a window of opportunity with respect to the weather: "as regards to towing, we had looked at the weather forecast, and we had fair sailing between us and that French base that we had contacted."[164] The tow was not expected to require more than two days to complete.[165]

96. In short, there were reasonable prospects that the tow could have continued working but for the scuttling, at a slow pace but under favorable weather conditions, for the time considered necessary to reach the French base. The real question is whether upon *approaching* the French base, the Bob Barker might have encountered such a substantial concentration of ice as ultimately to block it from reaching its destination.

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[160] Hearing Transcript, March 20, 2015, 5:1032:18-1033:9, 1047:17;1048:22 (Greene).

[161] Hearing Transcript, February 17, 2015, 138:16-139:2, 146:16-147:7 (Bethune).

[162] Hearing Transcript, February 18, 2015, 657:8-10 (Schumaker).

[163] Hammarstedt Deposition, 65:3-4.

[164] Swift Deposition, 176:19-22.

[165] Swift Deposition, 123:11-15 (estimating that the French base was one and a half days away, from the point after an initial successful tow of several hours); *see also* Ex. C-63 (Luke Van Horn estimating that the tow would have taken "a few days. We were making 2-3 knots.").

97. As to the ice issue, it does not appear that the risk of a complete blockage of the French base was seriously on anyone's mind at the time, as a reason whether or not to attempt the tow. The question seems to have arisen afterwards, invoked by Respondents upon further thought to explain why a fair tow attempt would have been destined to failure anyway. For example, Paul Watson testified in 2015, after being shown an ice analysis map (discussed further below) that was introduced into the record mid-way through the final hearings, that he believed ice conditions near the French base were "[p]retty much as tough as you can get before you get into shore-fast ice that's permanent."[166] He admitted, however, that he did not raise these forgivings at the time with the Bob Barker's captain Chuck Swift, though he claims he "briefly" raised the issue with Lockhart Maclean, who was with Watson on the Steve Irwin several hundred kilometers away.[167] This appears unlikely, as Mr. Maclean in turn was directly involved in asking SSCS personnel on land to explore options for getting the Ady Gil to and from the French base, and there is no reference to ice in the various SSCS emails discussing questions to explore. Mr. Watson also claimed that the French base was surrounded "*around the year*" by what he called "shore-fast" ice,[168] testimony that was contradicted by the base's own website.

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[166] Hearing Transcript, February 19, 2015, 734:4-737:12 (Watson).

[167] Hearing Transcript, February 19, 2015, 741:25-742:4 (Watson). Malcolm Holland also testified that "I don't actually think it would be possible" to reach the French base "at that time" because of ice, *see* Hearing Transcript, February 17, 2015, 443:5-19 (Holland), but did not indicate any recollection of raising these misgivings at the time, although he imagined with hindsight that he "would have mentioned it to Chuck," *id.* at 487:12-22. He acknowledged that the Bob Barker nonetheless was towing towards these supposed ice packs for hours, *id.* at 453:2-4, a reality that is inconsistent with a genuine belief at the time that the way was blocked. For his part, Mr. Swift denied that Mr. Holland ever suggested the possibility of ice blockage to him at the time. Hearing Transcript, February 20, 2015, 1107:16-22 (Swift).

[168] Hearing Transcript, February 19, 2015, 743:8-24 (Watson) (emphasis added).

98. According to that website, the French base was located on Petrel Island, five kilometers from the Antarctic mainland, and is "cut off from the world *in winter* ice hundreds of kilometer," and therefore "is accessible *only during the austral summer*."[169] The website indicates that the Antarctic supply ship Astrolabe performs four rotations to the base each year. It contains a reference to the Astrolabe having been "stopped by the ice several dozen kilometers from the coast" and therefore having to unload by helicopter during "the first rotation (R0) in early November," but it is not clear if this was a one-time occurrence, or a general feature of the November supply run. Be that as it may, the website goes on to state that "[i]n subsequent rotations (R1 R2, R3, R4) the Astrolabe can dock at Dumont d'Urville and heavy equipment is unloaded by conventional means."[170]

99. Respondents' salvage expert David Waller reproduced in his report several photographs of summer conditions at the Dumont d'Urville base, showing the shore essentially clear of ice, with only a few small floes floating offshore.[171] It is not clear when in the summer these photographs were taken, but Mr. Waller's interpretation was that "[t]he photos suggest that had ADY GIL reached Dumont D'Urville Station there would have been the opportunity for the vessel to be removed from the water."[172]

100. Nonetheless, after the ice issue arose in the hearings, Respondents introduced into evidence an Ice Analysis map prepared by Wilkesland East National/Naval Center, which

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[169] Ex. R-301 (emphasis added).

[170] Ex. R-301.

[171] Waller Report, at 5-6 ("Photos of the Dumont D'Urville Station in Summer depict the L'ASTROLABE moored along a flat, solid stretch of land where parked motor vehicles can be seen…. Another photo depicts a Greenpeace vessel anchored a short distance from a relatively smooth beach-like shore, free of ice.").

[172] Waller Report, at 6.

indicated it was based on data gathered on January 10-11, 2010,[173] *i.e.,* several days after the collision and ensuing tow attempts on January 6-7, 2010. The map shows most of the water between the site of the Ady Gil collision and the coast as ice-free, but also a significant area of ice closer to the coast. Mr. Waller testified that someone in his office had marked an X on the map as reflecting the location of the French base.[174] The ice in this area was described as "9/10 concentration," which does not refer to the thickness of ice, but rather refers to the concentration of ice floes in the area, meaning that "one-tenth of [the area] is open water."[175] The map itself defined "[f]ast ice" as a "10/10 concentration,"[176] presumably meaning that in such areas there are no patches of water interspersed around floating ice. If the marking on the map by Mr. Waller's office is to be taken as accurate regarding the location of the French base, it would certainly suggest a large concentration of ice floes around the base on the dates in question, such that navigation between and around such floes would be very tricky, if possible at all.

101. That said, there was no evidence introduced to buttress the accuracy of the placement of the X by the unknown back-office person in Mr. Waller's office in the middle of the hearings, nor to explain why conditions at the base purportedly were so different on those days than the conditions pictured in the typical-summer condition photographs in Mr. Waller's own report. If the X was not accurately placed, the whole value of the map is called into question. Moreover, the data on the chart was gathered several days after the tow attempts were abandoned (apparently sometime during the night between January 7th

[173] Ex. R-300.

[174] Hearing Transcript, February 19, 2015, 899:1-21 (Waller).

[175] Hearing Transcript, February 19, 2015, 914:6-22 (Waller).

[176] Ex. R-300.

and 8th), and SSCS's witness Peter Hammarstedt testified that that "ice conditions [in the area] changed on a daily basis. The ice charts down in Antarctica from my experience of having spent ten years down there are unpredictable. They can move by as much as 20 to 30 miles a day."[177] Mr. Swift similarly testified that ice floes in the area change "from week to week, and even from day to day," and compared conditions to those he had personally witnessed in the northern ocean during baby harp seal campaigns, where "the ice is very, very close together and compacted, and the next morning it's loose and … relatively easy to sail through again."[178] He testified that "[a]s we had gotten near the French base, [if] the bay was full of ice, we probably would have done circles or loop-de-loops until it cleared, and then gone in."[179]

102. In addition, while Mr. Waller initially testified that "I don't think the Bob Barker could have gotten through" ice with the concentration shown on the map,[180] it became clear that he was not familiar with the ice capabilities of the vessel and had not looked at that question for purposes of his report.[181] He also testified that he did not believe a vessel necessarily would have to be an ice-class vessel to get through a 9/10 concentration of ice-to-water.[182] According to Mr. Watson, the Bob Barker apparently was rated as an Ice Class C vessel,[183] which meant it was strengthened enough to "operate in ice and survive

[177] Hammarstedt Deposition, 23:15-19.

[178] Hearing Transcript, February 20, 2015, 1113:9-18 (Swift).

[179] Hearing Transcript, February 20, 2015, 1113:3-7 (Swift).

[180] Hearing Transcript, February 19, 2015, 900:12-13 (Waller).

[181] Hearing Transcript, February 19, 2015, 919:18-920:2 (Waller).

[182] Hearing Transcript, February 19, 2015, 910:18-23 (Waller).

[183] Hearing Transcript, February 19, 2015, 738:4-8 (Watson). The Ady Gil was not similarly strengthened, although there was some suggestion that with a short enough tow, it could simply follow behind the Bob Barker in whatever channel in the icy water the Bob Barker opened ahead

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in ice" without being crushed,[184] but the Bob Barker was not an ice-breaking vessel, as was the Astrolabe. Assuming that to be the case, Mr. Waller "would not agree" that a Class C ice-rated vessel "shouldn't have any problem passing through ice" of the concentration shown on the map, but nor did he testify about the extent or likelihood of any problems it might encounter.[185] In general, this topic appeared to be beyond the scope of Mr. Waller's expertise, or at least the work he performed for this case.

103. There was also evidence that suggested the way to the base may have been more clear at the time of the initial tow attempt than the ice chart, based on data gathered several days later, would seem to suggest. As noted above, both Mr. Swift and Mr. Bethune were under an impression that someone in the SSCS had already communicated with the French base, which in turn had indicated its willingness to receive the Ady Gil for the winter. Mr. Swift was unable to recall who from SSCS made the contact, but testified that "someone had been in touch with them…. [W]e wouldn't have changed course and … headed that way on a whim."[186]

104. While this evidence on its own is so vague as to be not terribly probative, it is corroborated by at least one contemporaneous document, discussing communications that SSCS apparently had with the Astrolabe. At that point, the option under consideration was whether the Astrolabe might be able to rendezvous with the disabled Ady Gil and lift it out of the water, to transport it back to the French base onboard the Astrolabe rather

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of it. There was no expert testimony regarding the length of such a channel or the time it would take for ice to gather again behind the Bob Barker.

[184] Hearing Transcript, February 19, 2015, 919:1-17 (Waller).

[185] Hearing Transcript, February 19, 2015, 914:19-915:2 (Waller).

[186] Hearing Transcript, February 20, 2015, 1116:5-22 (Swift).

than in tow behind the Bob Barker.[187] In the context of exploring this option, there is a January 6, 2010 email from Lockhart Maclean (aboard the Steve Irwin) to SSCS's CEO Steve Roest (back on land), indicating that SSCS personnel had spoken directly to the crew of the Astrolabe. The email indicates an understanding that the Astrolabe had itself just arrived at the French base. Further, its crew apparently indicated that they would like to help SSCS with the salvage operation, but first needed authorization from the Astrolabe's owners back in New Zealand:

> [T]he astrolabe tel. is a private number. [T]he astrolabe crew would like to help BUT cannot do anything without orders from P and O in Hobart. … the astrolabe is engaged in unloading operations *as they only arrived last night to the French base*.[188]

105. This communication suggests that ice conditions at the French base were not in fact prohibitive of a potential salvage operation. While the Astrolabe had greater capabilities than the Bob Barker in extreme ice conditions, there is nothing in this contemporaneous communication[189] to suggest that the Astrolabe's crew had been forced to resort to ice-breaking operations in order to reach the French base the night before, nor that they would have to resort to it in order to leave the base and try to rendezvous with the Bob Barker and the Ady Gil. Certainly, if the Astrolabe's crew had considered the ice conditions to be so extreme, they would have said more to SSCS to discourage further

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[187] Ex. R-241.

[188] Ex. R-239, Email from Lockhart Maclean to Steve Roest and Alex Earl, January 6, 2010 (emphasis added).

[189] Mr. Maclean did state in his deposition that he understood the Astrolabe "was down engaged in helicopter operations blocked in the ice near the Dumont d'Urville Antarctic base," Maclean Deposition 26:14-19, but this testimony is inconsistent with his contemporaneous email, suggesting that the Astrolabe crew considered themselves able and willing to assist, subject only to company authorization. Had the crew stated at the time that they themselves were blocked in the ice and unable to access the base, one would expect such discouraging news to have been referenced in the contemporaneous emails describing the contact.

exploration of the issue, including that it was possibly dangerous and inevitably futile. The fact that they instead simply urged SSCS to seek company authorizations suggests the Astrolabe crew did not view the French base as patently inaccessible.

106. Respondents also suggested that the cranes at the French base or on the Astrolabe might not have been sufficiently strong to lift the disabled Ady Gil from the water and place it on land. The Arbitrator discounts this possibility, not least because Respondents' own salvage expert, David Waller, stated in his report that "[t]he L'ASTROLABE has crane capacity in the amount of 32 tonnes as well as a stern A-frame of 20 tonnes capacity," that "it appears cargo is unloaded from L'ASTROLABE with the 32 tonne-capacity crane" depicted in one of his photographs, and therefore "[t]he L'ASTROLABE has the capacity to lift the ADY GIL clear of the water."[190]

107. The final variable in any salvage of the Ady Gil is whether the vessel could have survived sitting on the ice for an Antarctic winter, given the clear lack of indoor storage space at the French base, and then could have been transported in some fashion back to Australia or New Zealand for proper repairs. As to the first question, the evidence was that the Ady Gil could have been sealed up on shore to survive the wintry conditions.[191] As to the second, while it is clear that a tow all the way back to Australia or New Zealand was not realistic, it was not unrealistic to believe that with enough time to explore options (and with Mr. Gil's substantial resources backing the effort), the Ady Gil could have been

[190] Waller Report, at 4-5. The Ady Gil herself weighed 18 tons, prior to losing her bow in the collision. Hearing Transcript, February 19, 2015, 923:21-22 (Waller). Mr. Waller did not believe that a separate crane that was shown on shore in one of the photographs would itself be capable of lifting the Ady Gil. *Id.*, 887:21-889:2, 920:3-8.

[191] Hearing Transcript, February 17, 2015, 144:24-125:8 (Bethune) (testifying that "[y]ou'd put a tarp on over the bow section where you had lost integrity, and then all of the rest of the boat is sealable through normal hatches"); Swift Deposition, 124:25-125:3 (testifying that he understood the Ady Gil would "survive the weather" once being placed on shore).

loaded onto a larger vessel for the return journey, essentially hitching a ride.[192] The Astrolabe itself has been making regular voyages between Hobart and the French base for years, delivering personnel and supplies,[193] and other vessels conceivably could have been chartered for this purpose. As Mr. Bethune testified, "I figured if we took it to the French base, there was plenty of time for Ady Gil or Sea Shepherd to work out how to go getting it back to Hobart or back to New Zealand."[194]

108. In short, it does not appear that any particular factor would have been prohibitive of the ability to successfully salvage the Ady Gil, had the SSCS crew not taken events into their own hands and decided to secretly scuttle it. There is enough possibility of success to support a finding that by scuttling the vessel, Respondents deprived Claimants of a meaningful chance of success, which is sufficient to constitute an injury for purposes of completing the required elements of the tort of conversion.

109. At the same time, because success ultimately would have depended on a series of probabilities continuing to align in favorable fashion, it is appropriate to take the uncertainty of the outcome into consideration for quantum purposes. As discussed below, in the exercise of discretion granted to the Arbitrator in quantifying Claimants' damages for the tort of conversion, the Arbitrator discounts the residual value of the Ady Gil (of which Claimants were wrongfully deprived) by a factor designed to reflect the risk involved in otherwise realizing this value. Applying this discount factor, in the exercise of discretion, may be analogized to cases involving claims for "loss of a chance," where the value of the chance itself is calculated with reference to the probabilities of success embedded in that chance.[195]

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[192] Waller Report at 4 (opining that "it may have been feasible to load ADY GIL aboard the l'ASTROLABE to transport her to Hobart, New Zealand"); Hearing Transcript, February 19, 2015, 974:22-976:18 (Waller).

[193] Ex. C-66.

[194] Bethune Deposition, 152:24-153-2.

[195] *See generally* M. Kantor, VALUATION FOR ARBITRATION: COMPENSATION STANDARDS, VALUATION METHODS AND EXPERT EVIDENCE 74-75 (Kluwer Law International 2008) (discussing UNIDROIT Principle 7.4.3, providing that compensation may be due for the loss of a

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8. Conclusion Regarding Claim of Conversion

110. The Arbitrator has carefully considered all of the evidence and arguments presented regarding Claimants' claim for conversion. For the reasons stated above, the Arbitrator finds that while the Ady Gil was disabled by its collision with the Shonan Maru #2, it was not sinking on its own. Respondents nonetheless concocted and implemented a secret plan to scuttle the vessel, for their own reasons and without consulting the vessel's owner. This decision was not made for the primary reason of reducing navigational hazards, as Respondents later claimed when their actions were brought to light, but for purposes of continuing their mission and more fundamentally maintaining the high drama that they believed the Whale Wars audience had come to expect, and on which SSCS's own popularity (and potential future fundraising) in part depended. The decision was wrongful, and it resulted in an injury to Claimants, who were thereby deprived of a meaningful opportunity to try to salvage the Ady Gil. While the success of such an endeavor cannot be proven with certainty, it was not so obviously doomed to failure as to justify SSCS taking matters entirely into its own hands, and thereby condemning Claimants to the irrevocable loss of their property. The tort of conversion is therefore established.

V. THE CLAIM FOR RELIEF

111. As noted, Claimants seek compensatory damages as well as punitive damages, attorneys' fees and costs.[196] These claims are addressed separately below.

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chance in proportion to the probability of its occurring, and noting that arbitrators are not to forgo the effort to compute quantum in such circumstances, but rather to exercise judgment in determining the probability of the contingency).

[196] Demand, ¶¶ 49-50 and Prayer for Relief, items 1-2, 4.

A. Compensatory Damages

112. As a threshold issue, Respondents argue that Clauses 11 and 12 of the Charter Agreement, set out earlier in this Final Award, limit their liability to US$500,000 in any circumstances, and that the payment of that US$500,000 to Mr. Bethune pursuant to the arbitration award in the Bethune Arbitration legally extinguishes any possibility of additional liability to Claimants. However, while a set-off is appropriate for amounts already paid to Mr. Bethune (see discussion below), Clauses 11 and 12 do not apply to limit liability in the context of conversion. Aside from the fact that the Parties when negotiating the Charter Agreement apparently never discussed or even contemplated that the limitation on liability would apply to any intentional sinking of the Ady Gil,[197] a contractual provision addressing the consequences of accidental loss is not generally taken as excluding liability for intentional destruction of property. This is both because the tort of conversion regulates conduct independently of whether parties undertake contractual duties to one another, and also because public policy frowns on the contractual limitation of liability for intentional wrongdoing, even where there is an explicit clause purporting to do so.[198] In this case, the Charter Agreement did not provide Respondents the right to destroy Claimants' property by deliberately scuttling a vessel that had a reasonable possibility of being salvaged, for their own purposes and without consulting Claimants about the decision — nor did it purport to address the consequences of such conduct.

[197] Hearing Transcript, February 17, 2015, 235:4-9 (Bethune).

[198] *See generally* Restatement (Second) of Contracts, § 195(1) (1981) (a term exempting a party from tort liability for harm caused intentionally is unenforceable on grounds of public policy); *Seigneur v. National Fitness Inst., Inc.*, 132 Md. App. 271 (Md. Ct. Spec. App. 2000) (Maryland law invalidates exculpatory clauses that seek to limit a contracting party's liability for intentional conduct).

113. Aside from this issue, the Parties largely agreed on the essential formula for measuring damages in this case, although they disagreed on the mechanisms and evidence for quantifying certain elements in that formula. The damages for conversion of any asset should be the value of that asset at the moment of conversion, so as to put the owner back in the position he would have enjoyed but for the wrongful act. In this case, that exercise involves (a) ascertaining with the value of the Ady Gil in an intact state, *i.e.,* its value as of when it was entrusted into Respondents' care, and (b) adjusting that value for the effects of the collision with the Shonan Maru #2, since the collision pre-dated the wrongful act of scuttling the vessel. As to element (a) — the intact value of the Ady Gil — the Parties disagree whether market value or replacement value should be the proper measure. As to element (b) — adjustments to the value on account of the collision — the Parties agree that a downward adjustment is required for damage sustained in the collision, since that damage cannot be laid to Respondents' account. Claimants assert that an upward adjustment is also warranted, however, because the notoriety of the collision allegedly increased the value of the vessel thereafter. Respondents contest this point. The Arbitrator addresses each of these issues in turn below.

114. The first question is how to measure the value of the Ady Gil herself, prior to the collision with the Shonan Maru #2. Where a vessel is lost as a result of wrongful action, the measure of damages normally is the market value at the time of the loss, so as to put the owner "in as good [a] position pecuniarily as if his property has not been destroyed."[199] However, where there is insufficient evidence to establish market value,

[199] *Standard Oil Company v. Southern Pacific Company*, 268 U.S. 146, 155 (1924).

other evidence (such as replacement cost, expert opinion, etc.) can also be considered to determine the value of the lost vessel.[200]

115. In this case, Respondents' expert (Mr. Greene) attempted to determine a market value for the Ady Gil by reference to comparables, looking at reported sale prices of round-the-world racing sailboats (high-technology racing yachts), then adjusting downwards for lack of on-deck accommodations on the Ady Gil that limited its post-racing potential for tourism or pleasure use. He observed that while "[t]he dramatic styling of the Ady Gil and its ability for high-speed operation in an oceangoing environment made the boat attractive for a reality television series," there are "not many other potential customers that would be willing to pay a premium" on that basis. He concluded that a reasonable estimated value for an intact Ady Gil would be US$500,000.[201]

116. Claimants contested this approach, contending that Mr. Greene's purported comparables were not analogous and that the Ady Gil was a unique vessel without a defined market, so her value should be measured instead by replacement cost.[202] They emphasized Mr. Bethune's testimony that the original Earthrace had cost approximately US$3 million to build, including both cash outlays of roughly US$1.5 million and substantial volunteer labor and donated equipment that Mr. Bethune estimated were worth another US$1.5 million.[203] Mr. Bethune no longer had access to his receipts from the original build, so these figures were largely drawn from his memory, although as the project manager for

[200] *See, e.g., King Fisher Marine Service Inc. v. Np Sunbonnet*, 724 F.2d 1181 (5th Cir. 1984), citing *Greer v. United States*, 505 F.2d 90, 93 (5th Cir. 1974).

[201] Greene Report at 9.

[202] Mr. Greene was not asked to opine in the alternative as to the cost of building a replacement vessel, and offered no opinion on this topic. Hearing Transcript, February 20, 2015, 1194:25-1195:3 (Greene).

[203] Bethune Deposition, 77:14-18, 216:4-18; Hearing Transcript, February 17, 2015, 192:4-17.

the build he did have a detailed understanding of the vessel's structure and components. Claimants argued that the inherent value of the Ady Gil (even pre-collision) was actually higher than the original build cost, because of her subsequent achievement at setting the world speed record for circumnavigating the globe.

117. The Arbitrator concludes that neither of the Parties' estimates are appropriate for assessing the value of the Ady Gil as she was entrusted to Respondents' care immediately prior to the Waltzing Matilda campaign. Mr. Greene's analogies to racing yachts are not terribly probative, as it was agreed by virtually everyone (including Mr. Greene) that the Ady Gil was a unique vessel. [204] As for Mr. Bethune's estimate of the original build cost, while it seems clear that this exceeded the pure cash outlay, there was no documentary evidence to corroborate his recollection either regarding the amount of that outlay nor the value of the donated labor and equipment, rendering the US$3 million estimate somewhat speculative. Moreover, the extensive use of volunteer labor may have made the original build less efficient than optimal.

118. The Arbitrator concludes that the best estimate of the vessel's value as entrusted to Respondents' care was the US$1.5 million price that Mr. Bethune (as her prior owner) was willing to accept for her sale, and that SSCS itself had negotiated with Mr. Bethune to pay for her purchase, prior to the structure of the transaction changing to involve Mr. Gil's acceptance of the same price in a combination of cash payment (US$1 million) and loan (US$500,000). It is not credible that Respondents themselves believed in 2009 that

[204] *See, e.g.*, Greene Report at 8-9 (referring to the vessel's "unique styling and publicity potential," describing the boat as "so unique," and describing her as a "unique vessel"); Hearing Transcript, February 20, 2015, 1089:10-12 ("there's no sister ships. This is a very unique boat."), 1097:25-1098:9 (agreeing that the fact that it was unique and recognizable "would add … somewhat to its value," and the fact that it was a world record holder would add "[v]ery slightly to its value") (Greene).

the vessel was worth only US$500,000, when they were the ones who originally negotiated a US$1.5 million purchase from Mr. Bethune. On the other hand, while the Arbitrator credits Mr. Bethune's testimony that he asked only US$1.5 million for the Earthrace because he felt uncomfortable seeking to profit from the labor and equipment donated by others, there is no credible evidence that either Respondents or an alternate buyer would have been willing to pay a higher price, had Mr. Bethune chosen to demand it. Accepting the US$3 million as the value of the Ady Gil would also risk providing Claimants with a windfall, since it is double the amount they actually paid for the vessel, just months before the act of conversion. By contrast, the US$1.5 million figure demonstratively is one that was acceptable in 2009 to both a willing buyer and a willing seller. It is accordingly the least speculative figure in the record, from which to posit the value of the Ady Gil prior to the collision. Further, because the negotiation of this figure post-dated the vessel's setting of the world speed record, no uplift is required for purported added value resulting from its status in the record books.[205]

119. Starting with the US$1.5 million transaction price as the pre-collision value of the Ady Gil, the next step (as per the formula above) is to adjust the value for the impact of the collision with the Shonan Maru #2. The Parties both agreed that the cost of necessary repairs was a proxy for the damage sustained in the collision, and presented budgets for repair, compiled by Mr. Bethune for Claimants and Mr. Greene for Respondents. Their expertise for compiling these budgets was quite different. Mr. Greene is an accomplished

[205] Subsequent to the abandonment of the Ady Gil, SSCS apparently purchased for similar use the vessel that had held the world record prior to Earthrace — a somewhat larger composite-material trimaran then called the Cable & Wireless, and later renamed the Brigitte Bardot. SSCS paid US$1 million for this by-then older vessel which no longer had the status of world record holder. Hearing Transcript, February 19, 2015, 725:18-726:25 (Watson).

naval architect with substantial experience in the field, but his views on the extent of damage to the Ady Gil were formed largely on the basis of long-distance photographs and review of other testimony. By contrast, Mr. Bethune did not have equivalent academic credentials, but he had substantial personal knowledge of the Ady Gil (having project managed its original build and three major refits, overseen prior repairs on several voyages prior to the Waltzing Matilda campaign, captained her around the world on four occasions, and closely inspected the damage to the vessel shortly after the collision).[206] The Arbitrator finds both Mr. Greene's and Mr. Bethune's qualifications suitable for rendering opinions on repair budgets, and therefore examines them equally, based on the degree of evidentiary support for their differing contentions.

120. Messrs. Greene and Bethune differed on the extent of internal (non-visible) damage the vessel sustained, and therefore the extent of material that would be required in a repair; in consequence, they also differed on the number of man-hours needed for a repair, as well as on the applicable labor rates. Mr. Greene assumed "extensive secondary damage" to the internal framing systems and extensive water damage to the sandwich composites used to form the hull, in large part because he assumed that the bottom of the hull had been compromised, allowing water into both the main tank and the engine room. He also assumed the port sponson spar might need to be replaced, although he conceded it is possible it could be repaired. Mr. Greene recommended thorough testing prior to any repair, involving advanced methods such as laser shearography and infrared thermography, to determine the extent of delamination and water intrusion into the foam core. He also assumed the engines would need replacement because "the engine room

[206] Bethune Report, Section 1b.

flooded for an extended period of time." Mr. Greene estimated material repair costs of US$150,000 (US$100,000 for the laminate materials on the central hull and an additional US$50,000 for materials on the sponsons); an additional US$75,000 for advanced testing; US$424,000 for labor (based on 5300 man-hours at a presumed labor rate of US$80); and US$100,000 to replace the engines — for a total repair cost of US$749,000.[207] He did not attach any further breakdown or back-up for these figures.

121. For his part, Mr. Bethune assumed far less internal and structural damage to the vessel (including no internal damage to the spar) and no need to replace the engines, because they were not exposed appreciably to water until *after* the scuttling. Mr. Bethune contested that laser shearography would be needed, noting that this technology was not even available in New Zealand where it is presumed the repairs would be made. Mr. Bethune also took issue with Mr. Greene's labor rates, which were based on those paid at facilities in the U.S. for high-technology vessel repairs; he contended that costs were significantly lower in New Zealand, and used a rate of NZ$65, which as of January 8, 2010 was equivalent to US$48. Based on detailed schedules of budget pricing appended to his report, Mr. Bethune concluded that the maximum rebuild cost would be NZ$193,370 (approximately US$143,000 as of January 8, 2010).[208]

122. As a threshold matter, the Arbitrator refers to the findings earlier in this Final Award about damage to the vessel from the collision, including the evidence that the main hull most likely was not ruptured from beneath, and that the engine room was not flooded as a

[207] Greene Report at 7-8; Hearing Transcript, February 20, 2015, 1062:12-1068:18, 1071:20-1075:5, 1079:14-1083:1, 1182:17-1185:5 (Greene); Greene Deposition, 31:12-25.

[208] Bethune Report, Sections 2e, 3a, 4; Bethune Deposition, 237:7-244:19. Mr. Bethune's pricing was entirely in New Zealand dollars; the historic currency conversions above are based on the tools available at http://finance.yahoo.com/currency-converter/.

result. These findings suggest that the scope of required repairs would be less than Mr. Greene assumed. As to the cost of repairs, the Arbitrator notes that Mr. Bethune's budget pricing was far more detailed about its assumptions than Mr. Greene's, and he was more knowledgeable than Mr. Greene about labor conditions and tools available in New Zealand, where it is most likely the repairs would have been made. While Mr. Greene clearly has superior expertise in vessel repair using state-of-the-art technology and facilities, it is unlikely that the repairs would have been made using these advanced techniques. On the other hand, Mr. Bethune's estimates may have somewhat understated the man-hours required, particularly in the event additional damage was discovered upon closer inspection. He did not include a contingency for the possibility of additional material failure based on lower-tech inspection of the foam composites, or for the possibility of significant engine repairs short of full replacement. Taking all of these factors into account, the Arbitrator concludes that a repair figure of US$250,000 is appropriate.

123. Subtracting this figure from the Ady Gil's pre-collision value of US$1.5 million results in a finding of US$1,250,000 million as the value of the damaged Ady Gil after the collision. The next issue is whether and how to adjust this figure for the uncertainties and cost of returning the Ady Gil to a port where repairs could be made. As discussed above, the Arbitrator considers that a moderate discount is appropriate for the risk that the Ady Gil would not have safely reached the French base, because the salvage plan depended on several variables that would have had to align in order to complete the tow and reach the base successfully. While assessing these risks is not a scientific exercise, based on the evidence presented and in the exercise of discretion, the Arbitrator considers it

appropriate to discount the value of the damaged Ady Gil by a factor of 20%, resulting in an risk-adjusted value of US$1,000,000.

124. By contrast, the Arbitrator does not consider it appropriate to further deduct from this figure the likely out-of-pocket cost of returning the Ady Gil first to the French base, and thereafter to a port in New Zealand or Australia where repairs could be undertaken. While the Bob Barker undoubtedly would have expended additional fuel towing the Ady Gil to the French base and returning to the area of the Waltzing Matilda campaign,[209] and the Astrolabe conceivably might have charged SSCS for transporting the Ady Gil on her deck during one of her regular runs to Hobart rather than allowing the vessel to "hitch a ride" at no extra charge,[210] the fact remains that Clause 17 of the Charter Agreement obligated SSCS to return the Ady Gil to "such port as shall be mutually agreed or failing agreement at the Port of Auckland" at the end of the charter term. As this obligation was contractually allocated to SSCS, there is no basis for shifting the cost of fulfilling this obligation to Claimants' account.[211]

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[209] Mr. Waller estimated these additional fuel costs at approximately US$60,000. Waller Report at 10.

[210] Mr. Waller attempted to find out how much the Astrolabe hypothetically might have charged for this service, but was unable to obtain a reply from the Astrolabe's owners; Claimants contended that the Astrolabe more likely would have carried the Ady Gil at no additional charge. If the Astrolabe were unwilling to transport the Ady Gil on any terms, Mr. Waller estimated that it would cost from US$290,000 to US$379,000 to charter a barge from Auckland or Sydney to pick up the Ady Gil from the French base and return it for repairs. Waller Report at 10. Claimants' expert Mr. Cool suggested that supply vessels already making the trip to the area might be willing to pick up the Ady Gil and transport it back for between US$100,000 to US$200,000, or a round-trip charter could be arranged for between US$300,000 and US$350,000. Cool Report at 1. Mr. Cool was neither deposed nor called to testify about the source of these figures.

[211] The Arbitrator does not accept Respondents' contention that it may be held responsible under the Charter Agreement's redelivery clause only if it is also exempted from any liability beyond the $500,000 referenced in Clauses 11 and 12. *See* Respondent's Memorandum in Opposition to Claimants' Post-Arbitration Brief, at 21. As previously noted, tort liability for intentional wrongdoing is not excluded by the contract's allocation of risk and liability for accidental loss.

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125. Finally, the Arbitrator declines Claimants' invitation to adjust the value of the damaged Ady Gil upwards because of the increased notoriety of the vessel occasioned by the collision with the Shonan Maru #2. While these events certainly splashed the vessel's name and image over the news for a time, the reality is that fame is fleeting. Conceivably, Claimants might have been able for a short time to capitalize on the increased fame of the Ady Gil by finding alternate uses for her in reality television, other animal rights campaigns, or as a promotional tool for advertising various products, all of which Claimants speculated might have been fruitful avenues to pursue. But Claimants presented no evidence, expert or otherwise, from which the Arbitrator could assess either the likelihood or the value of such future uses. In these circumstances, the Arbitrator concludes that the notion of a fame-uplift is unduly speculative and cannot support an increase in the damages awarded on account of conversion.

126. Taking all of the above factors into account, the Arbitrator concludes that the residual value of the damaged Ady Gil after the collision, but before Respondents' decision to scuttle her without Claimants' consent, was US$1,000,000. This is the appropriate figure for compensatory damages to Claimants for conversion, prior to any set-off for amounts already paid by SSCS.

127. As to the issue of set-off, however, the Parties agree that the residual liability to Claimants must be offset by the US$500,000 that SSCS already paid Mr. Bethune, in

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Further, but for Respondents' conversion of Claimants' property, SSCS would have had to return that property to port at the conclusion of the charter term. Respondents cannot invoke their own loss of that property through conversion to shift the cost of returning the vessel to port to Claimants, for purposes of a but-for damages analysis.

consequence of the arbitration award rendered in the Bethune Arbitration.[212] Those sums were paid to Mr. Bethune as a function of Claimants' agreement in the Charter Agreement effectively to assign to Bethune this amount of any compensation for the vessel's loss or destruction, to satisfy Mr. Gil's outstanding loan obligations. With respect to their conversion claim in this arbitration, Claimants therefore are entitled to collect only the residual value of their converted asset, beyond the US$500,000 SSCS already paid Mr. Bethune on account of the loss of the same property.

128. For the reasons stated above, the Arbitrator awards compensatory damages to Claimants of US$500,000, after the set-off of US$500,000 already paid to Mr. Bethune, but before any interest or arbitration costs, addressed below.

B. Interest on Compensatory Damages

129. Rule 47(d)(i) of the AAA Rules authorizes the award of "interest at such rate and from such date as the arbitrator(s) may deem appropriate." Under maritime law, interest is usually awarded from the date of the loss of a vessel, not as a penalty but as a component of compensation.[213] The Arbitrator concludes that an award of prejudgment interest is appropriate in this case,[214] as to the amount of compensatory damages due to Claimants

[212] *See, e.g.,* Answer, ¶ 75 (Respondents' assertion that damages must be offset by the arbitration award in the Bethune Arbitration); Claimants' Post-Arbitration Brief at 30 ("Claimants acknowledge that the Award in this case must take into account that SSCS paid the $500,000 balance due Mr. Bethune. Had Mr. Gil recovered the vessel, he would have had to pay Mr. Bethune the balance due.").

[213] *See, e.g., Ryan Walsh Stevedoring Co. Inc. v. James Marine Services Inc.*, 792 F.2d 489 (5th Cir. 1986) (terming prejudgment interest "the rule rather than the exception" in maritime law, such that it "must be awarded unless unusual circumstances make an award inequitable"); *King Fisher Marine Service Inc. v. Np Sunbonnet*, 724 F.2d 1181 (5th Cir. 1984) (explaining that "the owner is made whole by receiving the value for the boat at the time of its loss and interest compensates for the owner's time value of money").

[214] The Arbitrator does not accept Respondents' argument that prejudgment interest should be denied because of Claimants' delay in bringing their claims or the manner in which they have litigated them. *See* Respondents' Memorandum in Opposition to Claimants' Post-Arbitration

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(US$500,000), after the set-off of the US$500,000 already paid to Mr. Bethune in consequence of the award rendered in the Bethune Arbitration. Claimants are not entitled to collect prejudgment interest on the component of compensatory damages paid to Mr. Bethune, as any delay in SSCS's payment of that sum did not harm Claimants themselves.

130. As to the appropriate rate of interest, Claimants suggest use of the average prime rate, which is currently 3.25%, from the date of January 8, 2010.[215] Respondents do not comment on this proposed rate, nor offer any alternative proposed rate in the event that prejudgment interest is awarded. Since the rate proposed appears reasonable, and in any event is well below the maximum rate of interest permitted in Maryland (the arbitral seat),[216] the Arbitrator accepts Claimants' proposal as to the rate.

C. Punitive Damages

131. The AAA Commercial Rules which govern this arbitration are silent on the Arbitrator's authority to award punitive damages, stating simply (in Rule 47(a)) that "[t]he arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties …." Respondents invoke Article 31(5) of the ICDR's International Dispute Resolution Procedures, which are not directly applicable to this dispute, but which (for comparison purposes) state that "[u]nless the parties agree

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Brief, at 41-42. These issues are potentially relevant to claims for shifting of arbitration costs or attorneys' fees, as discussed below, but are not equally relevant to prejudgment interest, which is a component of compensation for loss of the vessel itself.

[215] Claimants' Post-Arbitration Brief, at 44.

[216] Md. Const. art. III, § 57 (the legal rate of interest is 6% unless otherwise provided by the Maryland General Assembly). Prejudgment interest in Maryland accrues as non-compounding interest, *i.e.*, simple interest. *See Quesinberry v. Life Ins. Co. of North America,* 987 F.2d 1017, 1031 n.13 (4th Cir. 1993).

otherwise, the parties expressly waive and forego any right to punitive, exemplary, or similar damages …." Respondents also oppose the application on its merits, arguing that Claimants have not demonstrated malice or other conduct that is so oppressive as to justify an award of punitive damages.

132. The Arbitrator agrees. The tort of conversion has embedded within it an element of wrongful conduct (the wrongful deprivation of another's property) which the Arbitrator has found existed in this case. In order to justify punitive damages over and above normal compensatory damages for conversion, the party seeking such relief must demonstrate a degree of wrongfulness that goes *well beyond* the element of wrongfulness embedded within the tort itself, including for example showing maliciousness or willful, reckless and wanton conduct.[217] Here, Claimants have not met that additional burden. While Respondents' decision to scuttle the Ady Gil may have been primarily for selfish purposes — prioritizing the Waltzing Matilda campaign and the opportunities for reality television drama, with the attendant benefits to SSCS, rather than continuing a slow, non-photogenic tow of a crippled vessel to a drop-site to fulfill obligations to the vessel's owner — this decision was not made with wantonness or malice. As for the subsequent deception of Claimants regarding first the fact of and later the reasons for the scuttling, this conduct is extraneous to the tort of conversion which is the only claim before the Arbitrator. The tort of conversion concerns the destruction of Claimants' property, and

[217] *See generally Exxon Shipping Co. v. Baker*, 554 U.S. 471, 493 (2008) (punitive damages available under maritime law, but generally reserved for instances of outrageous conduct, variously defined); *Protectus Alpha Navigation Co. v. North Pacific Grain Growers, Inc.*, 767 F.2d 1379, 1385 (9th Cir. 1985) (punitive damages available under maritime law for reckless, willful and wanton conduct); *CEH, Inc. v. FV "Seafarer"*, 70 F.3d 694, 699 (1st Cir. 1995) (though punitive damages are "rarely imposed" in maritime cases, they are available as a matter of law in cases of intentional, wanton or reckless conduct amounting to a conscious disregard of the rights of others).

not the interpersonal dealings between Claimants and Respondents that followed that event. Accordingly, the claim for punitive damages is denied.

D. Cost of Proceedings and Attorneys' Fees

133. AAA Rule 47(c) provides that "[i]n the final award, the arbitrator shall assess the fees, expenses, and compensation provided in Sections R-53, R-54, and R-55. The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate." AAA Rule 47(d) provides that "[t]he award of the arbitrator(s) may include … an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement." In this case, the Charter Agreement was silent on the issue of attorneys' fees, but both Parties sought recovery of such fees, in their respective Demand and Answer. Pursuant to Article 47(d), this mutual request in the pleadings for attorneys' fee shifting is considered to constitute a mutual agreement to the Arbitrator's authority and discretion to grant such relief, should the circumstances warrant.

134. In this case, the Arbitrator considers it appropriate for Respondents to bear two-thirds and Claimants to bear one-third of the costs of the arbitral proceeding (*i.e.,* the institutional fees of the AAA and the compensation and expenses of the Arbitrator). Claimants prevailed ultimately on their conversion claim, and it was Respondents' conduct in denying all responsibility for the fate of the Ady Gil that required Claimants in the first place to pursue the conversion claim to completion. On the other hand, Claimants also pursued several other claims up until the eve of the final hearings, only to abandon them at the last minute; Claimants also raised early challenges to the arbitrability of their various claims, which were denied. These choices necessarily expanded the scope of work required by the Arbitrator, beyond that which would have been required simply to

adjudicate the conversion claim, and it is only appropriate that Claimants accordingly bear some portion of the costs of the proceeding.

135. The Arbitrator denies requests for recovery of attorneys' fees. Both Claimants and Respondents come out of the American tradition where such fees generally remain where they are, rather than the English or Continental systems where costs generally "follow the event," *i.e.* are shifted based on the outcome of the action. While the Parties' requests in their pleadings certainly provide the Arbitrator the authority to shift attorneys' fees, the fact remains that neither Claimants nor Respondents probably anticipated such fee shifting at the time of the Charter Agreement. Moreover, as noted above, both Parties bear some responsibility for the length and scope of these proceedings, and also for the way in which they have chosen to litigate it. In these circumstances, the Arbitrator declines to shift attorneys' fees as between the Parties; each side shall remain responsible for such fees, as they were in the first instance.

VI. RECOURSE AGAINST MR. WATSON PERSONALLY

136. Respondents argued in their Pre-Hearing Memorandum that Claimants should have no recourse against Mr. Watson personally, as Claimants themselves allege that "at all times" Mr. Watson was acting as an agent of SSCS, and Claimants do not identify any acts taken by Mr. Watson on his personal behalf.[218] Claimants did not address this issue in their post-hearing submissions, nor did Respondents return to it in theirs.

137. There is no evidence in the record as to the scope of Mr. Watson's authority as SSCS's Executive Director, and ordinarily, the Arbitrator would simply presume joint and several liability to Claimants, leaving it to Respondents thereafter to sort out between themselves

[218] Respondents' Pre-Hearing Memorandum at 20 (citing Demand, ¶ 14).

any subsequent reallocation of responsibility. Certainly, it is an open issue whether Mr. Watson's authority extended to the tort in question here, namely directing other SSCS personnel (Mr. Swift and Mr. Van Horn) and the captain of a chartered vessel operating as an "agent and employee" of SSCS under Clause 20 of the Charter Agreement (Mr. Bethune) to scuttle that vessel, without consultation with or consent by the vessel's owner. However, the fact remains that Claimants' own operative pleading asserts that Mr. Watson was "at all times acting as an agent of Sea Shepherd" and "at all times … performed the acts as described … while acting within the scope of his … authority and with the consent" of SSCS.[219] In the absence of any apparent dispute between the Parties as to this issue, the Arbitrator accepts Respondents' request that the Award be styled as a finding against SSCS, and not as one directing Mr. Watson personally to pay damages, notwithstanding any references above to "Respondents" collectively.

VII. AWARD

138. Accordingly, based on the foregoing findings, I the undersigned Arbitrator hereby AWARD Claimants, from SSCS, as follows:

a. Compensatory damages of $500,000;

b. Pre-judgment interest on the sum above, at the rate of 3.25% from January 8, 2010 to the date of this Award;

c. The claim for punitive damages is hereby denied;

d. The administrative fees and expenses of the International Centre for Dispute Resolution ("ICDR"), totaling US$11,450.00, as well as the compensation and expenses of the Arbitrator, totaling US$115,797.50, shall be borne one-third by

[219] Demand, ¶¶ 14, 16.

Claimants and two-thirds by SSCS.[32] Therefore, SSCS shall reimburse Claimants the sum of US$26,932.92, representing that portion of said fees, expenses, and compensation in excess of the apportioned costs previously incurred by Claimants, upon demonstration by Claimants that these incurred costs have been paid in full.

e. The Parties shall continue to bear their own attorneys' fees and expenses for presentation of their respective claims and defenses.

139. This Final Award is in full settlement of all claims submitted to this Arbitration.

140. I hereby certify that, for the purposes of Article 1 of the New York Convention of 1958, on the Recognition and Enforcement of Foreign Arbitral Awards, this Final Award is deemed made in Annapolis, Maryland.

9/18/15
Date

Jean E. Kalicki
Jean E. Kalicki (Sole Arbitrator)

I, Jean E. Kalicki, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Final Award.

9/18/15
Date

Jean E. Kalicki
Jean E. Kalicki

State of New York }
SS:
County of New York }

On this 18th day of September, 2015, before me personally came and appeared Jean E. Kalicki, to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed the same.

Rodney Ellis
Notary Public

RODNEY ELLIS
Notary Public, State of New York
No. 01EL6127855
Qualified in Kings County
Commission Expires May 31, 2017
Certificate Filed in Bronx County
Certificate Filed in New York County
Certificate Filed in Queens County
Certificate Filed in Richmond County