

Nos. 66812-9-I & 66813-7-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

REPRESENTACIONES Y DISTRIBUCIONES EVYA, S.A. DE C.V.;
and INSTALACIONES ELECTROMECHANICAS, CIVILES Y
ELECTRICAS, S.A. DE C.V.,

Respondents/Cross-Appellants

v.

GLOBAL ENTERPRISES, LLC; and MARITIME
MANAGEMENT SERVICES, INC.,

Appellants/Cross-Respondents

and

FRANK AND JANE DOE STEUART; and
STEUART INVESTMENT COMPANY,

Cross-Respondents.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 NOV 10 PM 5:00

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Laura Gene Middaugh)

**JOINT REPLY BRIEF OF APPELLANTS/CROSS-RESPONDENTS
GLOBAL ENTERPRISES, LLC AND
MARITIME MANAGEMENT SERVICES, INC.**

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I. INTRODUCTION

EVYA resorts to emotionally charged rhetoric to defend the judgment below instead of pointing to the controlling legal standards or the evidence. It has to. EVYA does not or cannot defend several of the trial court's pivotal findings, mischaracterizes the record to defend others, and ignores several issues on appeal altogether. As explained in Global's opening brief and below, the trial court's liability findings were not supported by substantial evidence and were erroneous as a matter of law. Its damages findings were equally erroneous and, indeed, unprecedented given the lack of evidence offered at trial and EVYA'S wholesale failure to satisfy its burden of proof. Never afraid to gild the lily, EVYA goes so far as to cross-appeal, asking this Court to direct the trial court to award impermissible punitive damages. Needless to say, that request is likewise without merit, and must be rejected.

Breach of Contract. EVYA breached the Charter, not Global. The Charter obligated EVYA to obtain two different kinds of insurance: the Annex B insurances for Global's benefit, and the Annex D insurances for PEMEX's benefit. Only Annex B matters here. EVYA does not dispute that its insurance obligations under Annex B were a material part of the Charter, nor could it given the liability risks inherent in EVYA's dangerous undersea diving work. Thus, in a reversal of roles borne of

necessity, EVYA argues that trial court erred when it found that EVYA breached the Charter by failing to procure the Annex B insurance. EVYA argues that the so-called “Zurich policy” it purchased for PEMEX under Annex D satisfied its obligations to Global under Annex B. The trial court refused to make any such finding for two good reasons.

First, the Charter required EVYA to provide proof of insurance to Global upon demand. When Global made that demand after becoming concerned about EVYA’s diving operations, EVYA never once claimed that the Zurich policy satisfied Annex B, nor did it mention that policy during the weeks of negotiations that preceded Global’s termination of the Charter. EVYA did not point to the Zurich policy until after suing Global years later. *Second*, the trial court properly found that the Zurich policy did not provide all of the coverage required by Annex B and, even where there was overlap between Annex B and Annex D, EVYA concedes that the Zurich policy’s limits were millions of dollars too low. None of this was dispositive to the trial court, although it should have been.

Instead, the court excused EVYA’s breach based on Mario May’s purported “waiver” of EVYA’s Annex B obligations. EVYA devotes much of its argument to whether May had authority to bind Global—an issue that Global does not even challenge on appeal. EVYA ignores the only issue that matters: whether the document May signed was legally

sufficient to modify EVYA's obligations under Annex B. It wasn't. EVYA did not carry its burden of proving waiver because the document is unintelligible and does not evince Global's clear and unequivocal intent to waive EVYA's obligations under Annex B. Moreover, the document was not signed by anyone representing IECESA, a signatory to the Charter, as the Charter's integration clause expressly required. In short, neither the Zurich policy nor May's "waiver" excused EVYA's obligation to procure the Annex B insurance. Global's suspension of diving, and later termination of the Charter for nonpayment of charter hire, was justified.

Conversion. Here too, EVYA ignores the only issue that matters on appeal. The evidence was undisputed, and EVYA's principal admitted at trial, that EVYA refused to offload its own equipment the entire time the vessel was in port at Dos Bocas. That admission precludes EVYA's conversion claim as a matter of law. When Global finally did leave port, it was an involuntary bailee of EVYA's equipment—but even in that role it acted entirely properly. As the trial court found, Global promptly insured, inventoried, packaged and returned all of EVYA's equipment. Even if there was evidence of conversion on Global's part, MMSI is not jointly liable as Global's agent because EVYA cannot identify any evidence showing that MMSI knowingly participated in Global's decisions regarding the departure from Dos Bocas or diversion to Houston.

Damages. EVYA pays even less attention to the issue of damages on appeal than it did at trial—which was far too little to begin with. EVYA devotes the bulk of its effort defending the trial court’s refusal to enforce the Charter’s limitation of liability clause. Because the clause plainly waives all consequential damages, which were the only damages awarded, EVYA relies on its theory that Global intentionally breached the Charter so that it could replace EVYA with a higher paying charterer. EVYA can point to nothing in the record to support that theory. Global did not want to terminate the Charter, and when it learned that EVYA failed to obtain the Annex B insurances, it gave EVYA weeks to solve the problem. EVYA did not do so, and it likewise refused to pay even the “undisputed” portion of its charter hire. When Global reluctantly terminated the Charter, it had no substitute charterer waiting in the wings. Global was able to re-charter the vessel only weeks later on a short-term basis, but for far less than it would have received from EVYA’s charter.

When it comes to the actual evidence underlying the trial court’s damages award, EVYA’s terse response is understandable: there is no evidence for it to discuss; there is no authority which it can cite. EVYA relies exclusively on the purported veracity of its witnesses, and studiously ignores all references to the “reasonable certainty” test, the “new business rule,” the “best evidence rule,” and every other substantive aspect of its

burden of proof. It cannot, and does not, dispute that it failed to use or introduce at trial even a single business record to substantiate the fantastic damages described in the self-serving testimony of its lay witnesses. Indeed, EVYA does not even bother defending the award of damages on the conversion claim—effectively conceding that it was error for the trial court to award EVYA a million dollars for an alleged foreign “judgment” without even seeing a copy of the judgment or any other document to prove that the judgment actually existed or that Global was responsible.

The trial court awarded EVYA millions more in lost profits based on similar take-my-word-for-it testimony. EVYA concedes that the award was based solely on EVYA’s estimate of profits at the time it bid on the PEMEX contract. EVYA had no records to substantiate that estimate and, because this was EVYA’s first undersea pipeline maintenance contract, it had no profit history of its own or of any other company to establish the reliability of the estimate. Worse yet, EVYA was more than half way into the PEMEX contract when it was canceled, and therefore should have had actual records showing its actual costs to-date and, perhaps more important, the costs it would incur to complete the contract. Those records, not conclusory lay testimony regarding a bid-estimate, were the best evidence of whether EVYA would have made a profit—but, here too, EVYA concedes it offered nothing. In the absence of such evidence, the

lost profits award must be reversed, as must the entire damages award, which was based on equally speculative testimony.

II. STATEMENT OF ISSUES ON EVYA'S CROSS-APPEAL

1. Did the trial court properly find that EVYA cannot recover both its lost profits and damages for expenses it would have incurred had there been no breach of contract? **Yes.**

2. Did the trial court properly conclude that EVYA is not entitled to an award of punitive damages? **Yes.**

III. ARGUMENT

A. Standard of Review.

Going so far as to improperly characterize the superior court as an “Admiralty Court,” EVYA asks this Court to apply a federal “clear error” standard of review. EVYA’s Br. at 3, 29-30. The Washington Supreme Court and this Court, however, apply Washington’s “substantial evidence” test to review factual determinations in cases decided under federal maritime law. *See Miller v. Arctic Alaska Fisheries Corp.*, 133 Wn.2d 250, 268-69, 944 P.2d 1005 (1997); *Ugolini v. States Marine Lines*, 71 Wn.2d 404, 406, 429 P.2d 213 (1967); *Tuyen Thanh Mai v. Am. Seafoods Co., LLC*, 160 Wn. App. 528, 538, 249 P.3d 1030 (2011). This is to be expected. As the United States Supreme Court recognized, “state courts are not required to apply Rule 52(a)—a rule of federal civil procedure—to

their own appellate system for reviewing factual determinations of trial courts.” *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 712 (1986).

It is therefore unsurprising that EVYA fails to find a controlling state court decision that applies the federal standard in a maritime case. It improperly cites an unreported Washington opinion that applies the wrong standard given the above authority. See GR 14.1(a). It cites an Alaska case, *Calvin v. State of Alaska*, 3 P.3d 323 (Alaska 2000), that was decided under Alaska Rule of Civil Procedure 52(a). *Id.* at 326 n. 7. And it cites a Louisiana appellate case, *Symeonides v. Cosmar Compania Naviera, S.A.*, 433 So.2d 281 (La. App. 1983), that was overruled by the Louisiana Supreme Court in *Milstead v. Diamond M Offshore*, 676 So.2d 89 (La. 1996). Indeed, on this very issue, the Louisiana Supreme Court held:

[I]t is clear that standards of appellate review are not characteristic features of general maritime law, and application of Louisiana’s state standards of appellate review would in no way interfere with the proper harmony and uniformity of general maritime law. Thus, we find ... that Louisiana courts of appeal should apply the state ... standard of review in general maritime and Jones Act cases.

Id. at 96 (citing *Maxwell v. Olsen*, 468 P.2d 48, 52-53 (Alaska 1970)).

The same is true here. The state, not federal, standard of review applies.

B. EVYA Materially Breached The Charter, Not Global.

EVYA concedes that if this Court concludes that EVYA materially breached the Charter’s insurance requirements, then it must also conclude

that Global was entitled to suspend EVYA's diving operations and, ultimately, terminate the Charter when EVYA refused to pay Invoice 161. This Court should reject EVYA's arguments that (1) it did not breach the Charter's insurance requirements or, even if it did, (2) it was still entitled to withhold payment of charter hire. Also, because EVYA, not Global, breached the Charter, Global is entitled to recover on its counterclaims.

1. EVYA Materially Breached The Charter By Failing To Procure The Annex B Insurances.

Annex B of the Charter required EVYA to obtain insurance for Global's benefit. Annex D required EVYA to separately obtain insurance for PEMEX's benefit as required by PEMEX and/or Mexican law. *See* Tr. Ex. 324. EVYA does not dispute that its contractual obligation to procure and maintain the Annex B insurances for Global's benefit was a material component of the parties' high-risk underwater diving Charter. As a result, EVYA is forced to argue that (a) the "Zurich policy" it procured for PEMEX's benefit under Annex D somehow satisfied its obligations to Global under Annex B or, if not, (b) Global "waived" the Annex B requirements altogether. Neither argument has merit.

The Zurich Policy Did Not Satisfy Annex B. To begin with, even if the Zurich policy EVYA procured for PEMEX under Annex D satisfied its duty to procure insurance for Global under Annex B (it did not), the record is unequivocal that EVYA never said so at the time. The Charter

provided that, “[u]pon request, each party shall provide the other with certificates of insurance and/or copies of policies confirming that the foregoing insurances have been procured and maintained as set forth herein.” Tr. Ex. 324 (Annex B(3)).¹ Global made that request on May 10 and, having heard nothing, again on May 12, 2006. RP (11/01/10) at 1062-67; Tr. Exs. 361 & 366. Over the next three weeks, EVYA never once mentioned the Zurich policy, much less did EVYA take the position that the Zurich policy satisfied its obligations under Annex B. It pointed to the Zurich policy only after this lawsuit began. *Id.* at 1175-76.

EVYA claims that “Graciela Alvarez [EVYA’s insurance broker] explained to Steuart that the Zurich policy had all the coverage necessary under the charter.” EVYA’s Br. at 41. That is false. Alvarez testified she told Steuart that she thought Global “deleted” EVYA’s obligations under Annex B because of Mario May’s October 11, 2005 “waiver” document.

¹ EVYA argues at length that there was no evidence that divers were injured during the charter. EVYA’s Br. at 41-44. This argument is not only factually incorrect—EVYA’s director admitted that there had been diver injuries (RP (10/20/10) at 264, 275-76—it is a red herring. As Global explained, the issue is whether Global justifiably suspended EVYA’s diving privileges based on EVYA’s failure to procure insurance, not diver safety. Whether or not there was a safety problem, it is undisputed that Global’s Frank Steuart asked EVYA to provide proof of insurance immediately after he learned that a PEMEX inspection of EVYA’s operations had uncovered serious safety concerns, including reports that divers under EVYA/IECESA’s control had suffered the bends. RP (11/01/10) at 1051-55, 1062-66; Tr. Exs. 360 & 361.

RP (10/25/10) at 515-20. She did not tell Steuart that EVYA's obligations were satisfied because of the Zurich policy. Alvarez admitted that she knew nothing about the Zurich policy until she was deposed years later:

Q. (By Mr. Moran) Now, at your deposition, Mr. Crane brought an insurance policy to your attention. Do you recall that? The Zurich insurance policy?

A. Yeah. I had never seen it until I met the lawyer the last time I was here.

Id. at 523-24. EVYA's claim that it "provided Mr. Steuart a copy of the Zurich policy" is similarly misleading. EVYA's Br. at 35.² Mario May sent a copy of the Annex D Zurich policy to the ship's wheelhouse in October 2005, at the beginning of the Charter. CP 3773 (FF ¶ 18). But no one sent Global the Zurich policy in May 2006, when Global asked for proof of insurance. RP (11/01/10) at 1175-76. Even if Global had remembered the Annex D Zurich policy all those months later, there is no

² EVYA further implies that Global, Mario May, Richard Stabbert, Damon Nasman (Global's insurance broker), and EVYA "all work[ed] together" to ensure that the Zurich policy obtained under Annex D would satisfy EVYA's obligations under Annex B. EVYA's Br. at 8-9. No facts support that implication. Global did help EVYA procure the Zurich policy, but it never represented that the Zurich policy addressed, let alone satisfied, Annex B. On the contrary, on the very same day Mario May signed the alleged "waiver" document without Global's knowledge, Richard Stabbert sent an email to Global's Steuart and Damon Nasman recounting a conversation he had with EVYA regarding Annex B: "I have explained this to EVYA and they say they now understand but will need to follow through and make sure we have evidence of the actual policy." Tr. Ex. 27. Of course, EVYA admits it never did procure an "actual policy."

reason it would have known that EVYA believed it satisfied Global's request for proof of an Annex B policy. After all, the two obligations were wholly separate, and called for different types of insurance.

In any event, the trial court did not find, as EVYA asserts, "that the Zurich policy satisfied the contract." EVYA's Br. at 36. The court found just the opposite. CP 3771 (FF ¶ 6); CP 3788 (CL ¶ 5) ("Plaintiffs did not have the insurance required under the [Charter]").³ That finding was supported by substantial evidence. All the insurance experts agreed that EVYA's obligation to obtain insurance for PEMEX's benefit under Annex D was separate from its obligation to obtain insurance for Global's benefit under Annex B. RP (10/25/10) at 526; RP (11/15/10) at 1957. Moreover, while the insurance required by Annex B and D may have overlapped in some respects, the overlap was not total, as EVYA's one-sided description of Camacho's testimony implies. EVYA's Br. at 38. Indeed, Camacho confirmed that the Zurich policy did not cover every item required by Annex B and, even where there was overlap, the policy's coverage limits were millions of dollars too low. RP (11/01/10) at 1119-28, 1131, 1153-

³ EVYA confuses the issue by arguing that Global breached the Charter's insurance obligations by failing to name EVYA as an additional insured. EVYA's Br. at 8, 46-47. This is another red herring. As the trial court found, EVYA did not raise the additional insured issue until trial (CP 3771, FF ¶ 6), but more importantly, EVYA never argued that this issue justified its own failure to obtain the Annex B insurances or pay any portion of Invoice 161, and the trial court made no such finding.

54. Thus, even had EVYA pointed Global to the Zurich policy at the time, which it did not, it did not satisfy EVYA's obligations under Annex B.

Lastly, EVYA argues that, even if the Zurich policy did not satisfy its obligations under Annex B, the Charter "required the Owner to pick up the insurance and bill the charterer for it." EVYA's Br. at 39-40; *id.* at 36 ("the contract itself provided for a process for filling the coverage gaps"). Here too, EVYA deliberately confuses the parties' separate obligations under Annex B and Annex D. With respect to insurance required by PEMEX, Annex D stated in relevant part:

Insurance. If Charterer does not procure at Charterer's expense insurance related to the Vessel or this Charter ... in compliance with PEMEX or Mexican government regulations Owner shall procure such insurance.

Tr. Ex. 324 (Annex D(8)). In other words, if EVYA had not secured the *Zurich policy* for PEMEX, then Annex D would have required Global to purchase the insurance and pass the cost on to EVYA. Critically, Annex B does not contain a similar "cover" requirement. *Id.* (Annex B(4)).⁴

⁴ Annex B states only that, "[i]n the event a party fails to procure a required insurance ..., the party required to procure and maintain such insurance shall be deemed the insurer or self-insurer, shall accept and pay all claims which would otherwise be covered ... and shall indemnify and hold harmless (including legal fees and costs) the other party ..." Tr. Ex. 324 (Annex B(4)). It was for this reason that Global offered to forego termination if EVYA agreed to a higher charter rate as a means of protecting Global for its increased exposure. RP (11/01/10) at 1161-62; Tr. Ex. 388. EVYA rejected Global's offer. CP 3775 (FF ¶ 26).

Under Annex B, EVYA remained solely responsible to procure and maintain the five kinds of insurance specified therein. Global was perfectly entitled to insist that EVYA comply with Annex B, and was under no compulsion to purchase the insurance itself.

Global Did Not Waive EVYA's Insurance Obligations. EVYA's material breach of the Charter's Annex B insurance requirements was not "waived" by the October 11, 2005 document signed by Mario May—as the trial court erroneously found. CP 3772-73 (FF ¶ 10, 18); CP 3787 (CL ¶ 5); Tr. Ex. 325. Here, EVYA makes a perfunctory effort to defend a critical component of the trial court's liability ruling. EVYA devotes its entire argument to whether May had actual or apparent authority to act as Global's agent when he signed the document. EVYA's Br. at 44-47. But Global does not challenge the findings regarding May's authority, despite its disagreement with them, nor is that the issue presented on appeal. The issue is whether the October 11 document was legally sufficient to waive or modify Global's rights under the Charter and, if so, whether it excused all of EVYA's obligations under Annex B. Global's Br. at 31-34. Inexplicably, EVYA fails to address this key issue anywhere in its brief.

There was little EVYA could say. The document was not a valid waiver because it did not manifest Global's unequivocal and clear intent to excuse EVYA's obligations under the Charter. *Jones v. Best*, 134 Wn.2d

232, 241, 950 P.2d 1 (1998). The document is unintelligible and, at best, addressed only one of the five insurances required by Annex B. Even as to that one, the document still required EVYA to obtain “full coverage” elsewhere, which it never did. *See* Global’s Br. at 32. Nor was the document an enforceable amendment to the Charter because it was not signed by IECESA, a signatory to the Charter, as the Charter’s integration clause expressly required. Tr. Ex. 324 (PART II, § 32). In short, the trial court’s conclusion that Global waived EVYA’s duty to procure the Annex B insurance is indefensible, and EVYA makes no effort to defend it. The judgment must be reversed for this reason as well.

2. EVYA’s Duty To Pay Charter Hire Was Not Excused.

As Global explained in its opening brief, as an independent basis for reversal, even if EVYA’s failure to provide proof of insurance was not a breach of the Charter—and Global’s suspension of EVYA’s diving privileges was—EVYA still had a duty to pay Invoice 161. Global’s Br. at 34-37. This is so because, instead of declaring a total breach and terminating the parties’ contract, EVYA elected to continue on with the Charter. In making that election, EVYA had to make good on its own obligations under the Charter, including its duty to timely pay the charter hire. *See Colo. Structures, Inc. v. Ins. Co. of the West*, 161 Wn.2d 577, 167 P.3d 1125 (2007). EVYA does not dispute this law, nor its own

election of remedies, which it expressly confirms on appeal. EVYA's Br. at 33 ("Evyia elected to continue the contract").

EVYA likewise does not dispute that it failed to pay Invoice 161 when it became due on May 12, 2006, after receiving Global's numerous default notices and warnings, or at any time before Global terminated the Charter on May 30, 2006. RP (11/01/10) at 1174-77; Tr. Exs. 54, 383 & 391. EVYA's sole refuge is Section 10(e) of the Charter, which states:

Where an invoice is disputed, the Charterers ***shall in any event pay the undisputed portion of the invoice*** but shall be entitled to withhold payment of the disputed portion ***provided that such portion is reasonably disputed and the Charterers specify such reason. ...***

Tr. Ex. 324 (PART II, § 10(e)) (emphasis added). EVYA argues that the trial court properly concluded that it satisfied this provision (CP 3790, CL ¶ 13), but that is wrong for two separate and independent reasons.

First, while EVYA may have disputed its obligation to pay charter hire after its diving operations were suspended, it never invoked Section 10(e), much less did it "specify" reasons for withholding payment. EVYA claims that it "declared its intention to hold back charter hire" and "specifie[d] the reason for the dispute," but nothing in the record supports these assertions. EVYA's Br. at 18-19, 33-34. EVYA never informed Global—verbally or in writing—that it disputed Invoice 161 or intended to withhold payment, in what amount or why. RP (11/01/10) at 1179;

RP (11/02/10) at 1314. On the contrary, EVYA informed Global that it was trying to line up a letter of credit so it could pay Invoice 161 *in full* (Tr. Ex. 395) and, indeed, it eventually paid Invoice 161 *in full*—just too late; when it finally sent the payment, the invoice had been overdue for weeks and the Charter had been terminated. RP (10/26/10) at 782-83.

Second, even had EVYA properly invoked Section 10(e), EVYA failed to “pay the undisputed portion of the invoice.” EVYA incurred at least \$46,000 of Invoice 161 *before* Global suspended EVYA’s diving operations. CP 3786 (FF ¶ 65). And, even after diving was suspended, EVYA continued to use the vessel non-stop for the next 17 days to carry out all the other aspects of its work for PEMEX. RP (11/03/10) at 1454-58. EVYA paid nothing for that period either. EVYA argues that the undisputed portion was too “minor” to matter. EVYA’s Br. at 47-48. \$46,000 is not minor and, in any event, EVYA misses the point. Because it refused to pay the “undisputed” portion of Invoice 161, EVYA cannot rely on Section 10(e) to excuse its obligation to pay the “disputed” portion. EVYA’s failure to pay was a material breach of the Charter that, under its plain terms and established maritime law, entitled Global to terminate. *Cardinal Shipping Corp. v. M/S Seisho Maru*, 744 F.2d 461 (1984). In sum, Global did not breach the Charter; EVYA did.

3. EVYA Does Not Contest Global's Counterclaims.

Global established in its opening brief that, if this Court reverses the trial court's finding that EVYA did not breach the Charter, then Global is entitled to the counterclaim damages on remand. Global's Br. at 37. EVYA did not dispute the amount of those damages at trial, and it does not dispute it on appeal. Global is entitled to an award of \$731,046.

C. Neither Global Nor MMSI Are Liable For Conversion.

As explained in their opening brief and below, neither Global nor MMSI is liable for conversion because EVYA's refusal to take back its own property precludes a finding of "willful interference" as a matter of law. Regardless, MMSI cannot be liable for conversion as Global's agent because all it did was passively carry out Global's instructions.

1. EVYA Refused To Take Back Its Own Property.

EVYA does not dispute that there is no claim for conversion under Washington law where the defendant tenders the property to the plaintiff, and the plaintiff refuses to take it back. *Shaffer v. Walther*, 38 Wn.2d 786, 791-94, 232 P.2d 94 (1951). To distance itself from this law, EVYA badly distorts the timeline of events and evidence. The undisputed evidence shows that Global tried to return EVYA's equipment, but EVYA instructed its personnel to thwart Global's efforts. EVYA's brief admits why it did this: it wanted to delay the vessel's departure from Dos Bocas

long enough to convince Global to rescind termination of the Charter or, perhaps, get an order from a Mexican court to enjoin the termination.

When the vessel arrived in Dos Bocas, pursuant to the Charter, Global gave EVYA 48 hours to offload its equipment and, only then, would Global offload the equipment on its own. RP (10/27/10) at 955-56; RP (11/02/10) at 1316-1317; Tr. Ex. 403. EVYA wholly ignores this initial 48 hours—for obvious reasons. The evidence was *undisputed* that Global gave EVYA every opportunity to offload its equipment, but EVYA simply refused to do so. EVYA's director Javier Camargo admitted:

Q. And so you didn't want to offload your people or your equipment, right?

A. No. What we wanted was for the boat to return and continue to work with all of the equipment and all of the people on a contract that I hadn't terminated ...

Q. And you made the decision, though, not to offload your people or your equipment?

A. I gave no instructions for them to get off.

* * *

Q. And Mr. Steuart had, by his letter, requested your equipment to be offloaded but you did not accept his offer. Is that true?

A. Yes.

RP (10/20/10) at 325-326. Camargo's admission was amply corroborated by the MMSI personnel in Dos Bocas. The vessel's second mate testified:

I was on the bridge when the [EVYA] representative went up there and he told the captain that following his

company's instructions, he was not going to allow them to unload the material.

RP (11/08/10) at 1791-1792. The vessel's contemporaneous log confirms that conversation. Tr. Ex. 123 (June 5, 2006 @ 1540: "Carlos Hernandez (EVYA rep on board) informed Capt. Deckard/Trevor Stabbert that he will not permit any of EVYA's equipment to be removed ..."). MMSI's owner Trevor Stabbert and chief officer likewise testified that EVYA personnel told them they would not offload EVYA's equipment.⁵

EVYA misrepresents the evidence when it argues that "Steuart and MMSI's owner Trevor Stabbert affirmatively prevented Evya employees from removing equipment at Dos Bocas." EVYA's Br. at 22, 49.⁶ EVYA cites to the testimony of Carlos Hernandez to support this assertion, but Hernandez said no such thing. He testified only that Global did not offload EVYA's equipment. RP (10/25/10) at 623; RP (10/26/10) at

⁵ RP (10/27/10) at 1259 (EVYA's Wood "said that they were not going to unload that equipment"); RP (11/03/10) at 1475-76 ("EVYA group managers and people from their office were on the quayside and saying ..., 'Nothing. Don't offload anything'")

⁶ EVYA further distorts the record when it suggests that "Steuart and MMS refused to let any of the [EVYA] personnel take anything off the ship except their personal belongings." EVYA's Br. at 20. This incident simply has nothing to do with the tons of equipment that EVYA refused to offload the vessel. When EVYA's personnel left the vessel after the initial 48 hour period, the vessel was subject to Maritime Security ("MARSEC"), Level 2. As permitted by the International Ship and Port Security code, the ship's master required every individual's personal luggage to be searched for safety reasons. RP (10/27/10) at 954-56.

649-50. That's true because, as noted, EVYA and the port authorities would not allow it. Indeed, on cross-examination Hernandez testified:

Q. [D]id you, yourself, observe any actions by the Global Explorer stopping the offload of the equipment from EVYA?

A. No.

RP (10/26/10) at 647. Simply put, there is no evidence in the record to show that EVYA ever asked Global to return its equipment, much less that Global "affirmatively prevented" EVYA from taking its equipment back.

EVYA's refusal to take back its equipment forecloses liability for conversion as a matter of law because it proves that Global and MMSI did not "exercise[] any dominion over these articles ... inconsistent with, or in denial of, [EVYA's] right of ownership." *Shaffer*, 38 Wn.2d at 790. The trial court ignored this law, apparently on the erroneous belief that "[s]ince the plaintiffs were not in breach of contract they had no obligation to offload their equipment[.]" CP 3780 (FF ¶ 47). The premise that EVYA did not breach the Charter is wrong for the reasons stated above. But even if Global unjustifiably terminated the Charter, EVYA could not shirk its duty to offload the equipment. The Charter stated: "The Vessel shall be redelivered on the expiration *or earlier termination* of this Charter ... free of cargo[.]" Tr. Ex. 324 (PART II, § 2(d)) (emphasis added). Whether Global's early termination of the Charter was right or wrong, EVYA could

not manufacture a conversion claim by refusing to take back its own property when it had the opportunity and obligation to do so.

Nothing occurring after that 48 hours matters, but even if it did, the facts do not support a finding of conversion. The issue of the “hot-work” permit arises during this period, and only then because Global was still trying to find a way to return EVYA’s equipment. MMSI’s Trevor Stabbert testified that he personally spoke with port authorities and was refused a permit to offload EVYA’s equipment. RP (10/27/10) at 957-61; RP (11/03/10) at 1475-76. The only contrary evidence EVYA cites is an email containing *double* hearsay, and the testimony of Manual Reyes. EVYA’s Br. at 22, 49.⁷ The email was admitted for impeachment only. RP (11/02/10) at 1278. And Reyes did not refute Stabbert’s testimony; he testified that he thought a hot-work permit was only needed if there was flammable cargo. RP (11/4/10) at 1586-87. He did not participate in the discussions between Global and port authorities, and did not know why those authorities denied Global permission to offload. *Id.* at 1584.

The diversion to Houston is equally irrelevant. Whether the next destination was Veracruz or Houston, EVYA had three days to offload its

⁷ The email was sent by Richard Stabbert, and stated that Richard had heard from someone named Aron that Aron, in turn, had heard from someone working for the port authority that Global did not need a hot-work permit. Tr. Ex. 69. Other than Trevor Stabbert’s first-hand account, no one testified about Global’s communications with the port authority.

equipment in Dos Bocas. Indeed, the vessel did not depart for Dos Bocas until June 6, 2006—two days *after* Richard Stabbert suggested that Global declare the vessel for Veracruz and divert to Houston. Tr. Ex. 70.⁸ If “Global did not intend to offload Plaintiffs’ equipment in Dos Bocas” as the trial court found (CP 3782 (FF ¶ 53)), then Global would not have kept the vessel in Dos Bocas for three days for the sole purpose of allowing EVYA to offload its equipment. Global’s conduct in Dos Bocas was patently inconsistent with a desire to “willfully interfere” with EVYA’s property, as was its subsequent conduct: Global had the equipment promptly insured, surveyed, packed and shipped to EVYA. RP (11/02/10) at 1301-03; RP (11/03/10) at 1479-94; RP (11/04/10) at 1551-53. The trial court agreed (CP 3783 (FF ¶ 58)), but ignored these facts too. There is no substantial evidence to support a finding of conversion.

2. MMSI Did Not Knowingly Convert EVYA’s Property.

EVYA cites the rule that an agent who commits a tort on behalf of a principal may himself be held liable. EVYA’s Br. at 51. That may be true, but it is subject to an exception that EVYA fails to cite. The agent is

⁸ To be sure, there were no “doctored log books.” EVYA’s Br. at 50. As accurately reflected in the vessel’s contemporaneous rough log, Global instructed MMSI to depart for Veracruz, but later instructed MMSI to divert to Houston. Tr. Ex. 123; RP (10/27/10) at 966-68. The log also accurately reflects that the decision to divert was motivated by Global’s desire to address the vessel’s persistent mechanical problems—something that could not be done in Veracruz. *Id.*; RP (10/27/10) at 971-73.

liable only if he “knowingly participated in, cooperated in the doing of, or directed” the tort. *Johnson v. Harrigan-Peach Land Dev. Co.*, 79 Wn.2d 745, 753, 489 P.2d 923 (1971). The trial court correctly recognized the exception, but erroneously held MMSI liable based on a finding that MMSI was somehow responsible for Richard Stabbert’s June 4, 2006 email to Global regarding diversion of the vessel to Houston. CP 3780 (FF ¶ 48); CP 3789 (CL ¶ 10); Tr. Ex. 70. As Global showed in its opening brief, that finding was erroneous because there was no evidence that Richard Stabbert was MMSI’s agent (Global’s Br. at 42-44) and, indeed, EVYA makes no real effort to defend that finding on appeal.

Instead, EVYA points to conduct that the trial court did not identify as grounds for MMSI’s liability. EVYA first argues that MMSI was “instrumental” in refusing to allow EVYA offload its equipment. EVYA’s Br. at 52. But, as discussed above, there was no evidence to support such a finding; it was EVYA that rebuffed MMSI’s attempts to offload. EVYA next argues that MMSI “worked up and went along” with a “fake” diversion and breakdown that “Stabbert and Steuart set up.” *Id.* Yet MMSI never even saw Richard Stabbert’s June 4 email, and there was no evidence that MMSI did anything other than carry out Global’s directives. *Global* ordered MMSI to depart for Veracruz; soon thereafter, *Global* learned that there would be a three-to-four day delay to enter

Veracruz, which was the same amount of time it would take to transit to Houston; given that delay, *Global* decided it would be best to take the vessel directly to Houston where long-needed repairs could be made; *Global* ordered MMSI to divert the vessel to Houston. RP (10/27/10) at 971-73. EVYA cites to no contrary evidence, and there is none. The trial court's conclusion that MMSI is liable for conversion must be reversed.

D. EVYA Is Not Entitled To Any Damages.

Even if this Court affirms liability, it must vacate the trial court's damages award. Given the multi-million dollar amounts at stake, EVYA spends surprisingly little energy defending the damages award. And what little EVYA has to say on the issues is contrary to the law and facts. Indeed, EVYA does not defend the trial court's damages award for conversion at all. For the reasons that follow, this Court should conclude that (1) the Charter's limitation of liability clause is enforceable as a matter of law and/or (2) EVYA failed to carry its burden of proving lost profits and other consequential damages with reasonable certainty.

1. The Limitation Of Liability Clause Is Enforceable.

EVYA does not dispute that it knowingly agreed to the Charter's limitation of liability clause; that the clause expressly waived EVYA's right to recover "any consequential damages whatsoever"; and that all the damages awarded by the trial court were "consequential." EVYA instead

argues the clause cannot be enforced because it would “negate the entire contract” and/or Global’s breach was “intentional.” EVYA’s Br. at 55-58. The first argument can be rejected out-of-hand. The clause does not limit recovery of direct damages, only “consequential” ones. Under established maritime law, enforcing the limitation would not violate public policy. *La Esperanza De P.R., Inc. v. Perez y Cia. De Puerto Rico, Inc.*, 124 F.3d 10, 19 (1st Cir. 1997) (courts enforce limitation clauses “provided that the clause does not provide for a total absolution of liability”).

The second argument is also untenable. EVYA claims that Global fabricated an excuse to terminate the Charter to avoid “missing out on the Katrina windfall,” and thwarted EVYA’s good faith efforts to resolve the dispute. There is no evidence to support that theory. EVYA relies on a single email sent by Richard Stabbert to Global’s Frank Steuart in March 2006—two months before reports of divers suffering from the “bends” and other safety concerns caused Global to ask EVYA for proof of insurance, and nearly three months before the Charter was terminated.⁹ The email itself is innocuous. Richard Stabbert did not recommend termination of

⁹ EVYA’s reference to the May 13, 2006 “pirate” email is even more disingenuous. EVYA’s Br. at 12, 56. The email was sent by Richard Stabbert to Trevor Stabbert; neither Frank Steuart nor anyone else at Global saw the email until trial. RP (10/26/10) at 747-48. The email had nothing to do with Global’s dispute with EVYA, but rather Richard Stabbert’s dispute with Mario May, who had been terminated two days earlier—ergo the “F Mario” exclamation. *Id.*; CP 3772 (FF ¶ 11).

the Charter, but merely noted that Global would likely be able to find a new charterer if EVYA's failure to pay the then-due charter hire resulted in immediate termination, which it did not. Tr. Ex. 343.¹⁰

Not only was Stabbert's email unrelated to the dispute that erupted months later, when Global did eventually terminate the Charter, it did so without any expectation it would receive a "windfall." EVYA does not, and cannot, dispute the fact that Global had no substitute charterer lined-up when it terminated the Charter and, indeed, there was no evidence whatsoever that Global contacted even a single potential charterer at any point during the weeks it gave EVYA to cure its defaults. Global's Br. at 48-49. Global did not make contact with Subsea—the next charterer—until weeks *after* termination of the Charter. RP (11/08/10) at 1747-48, 1759. Nor was there any actual "windfall," despite EVYA's refrain to the contrary. EVYA's Br. at 2, 56, 57. The evidence showed that Global received less money from the short-term Subsea charter than it would have received from the long-term EVYA charter. RP (11/02/10) at 1363-65. EVYA does not and cannot dispute that fact either.

¹⁰ This was a very real possibility. EVYA was chronically late in making its charter hire payments; in the first seven months of the charter, Global was forced to send EVYA ten late payment notices and several default notices. RP (11/01/10) at 1032-33; 1038-43; Tr. Ex. 344.

EVYA's argument that Global "ignored the dispute resolution procedure" and "refused to work in good faith" is contrary to the terms of the Charter and the facts. There was no "dispute resolution procedure" that required the parties to resolve their disputes prior to termination. The Charter expressly gave Global the right to terminate on 3 days' notice if EVYA's conduct constituted a "repudiatory breach of its obligations," and/or on 5 days' notice if EVYA failed to pay charter hire. Tr. Ex. 324 (Part II, ¶ 10(e), 26(b)). Global gave notice under both provisions. Tr. Ex. 371 (3-day notice for failure to provide insurance); Tr. Ex. 383 (5-day notice for failure to pay charter hire). To the extent EVYA means Section 10(e), as discussed above, it was EVYA, not Global, that ignored the contract; EVYA never specified a reason for withholding payment, nor did it pay the "undisputed" portion of Invoice 161. Global could not ignore a "dispute resolution procedure" that EVYA never even invoked.

As explained in its opening brief, Global did not want to terminate the Charter. Global's Br. at 46-49. Global did not ask for proof of insurance in March 2006, when it received Stabbert's "Katrina" email; it did so on May 10, 2006, only after it learned that PEMEX had uncovered serious safety issues with EVYA's diving operations. Tr. Exs. 360 & 361. Even then, Global gave EYVA every chance to cure. Global did not terminate the Charter within a matter of days, as the Charter allowed; it

gave EVYA nearly three weeks to obtain insurance and pay Invoice 161— all the while allowing EVYA to use the vessel. Had the termination been “deliberate and planned” as the trial court concluded (CP 3792 (CL ¶ 20), Global would have terminated the Charter months earlier and without the weeks of accommodation it gave EVYA. Global did not breach the Charter, but even if this Court finds that it did, there is no evidence that the breach was intentional. The limitation clause is enforceable.¹¹

2. EVYA Failed To Prove Its Contract Damages.

The few paragraphs EVYA spends attempting to defend the trial court’s damages findings ignore the controlling legal standards and the actual evidence presented at trial. At bottom, EVYA confuses witness credibility with its own burden of proof. The former does not equal the latter, and it did not here. As a matter of law, EVYA failed to present the type of evidence uniformly required by the Washington courts— contemporaneous documentary evidence in EVYA’s possession and

¹¹ EVYA also argues that Global cannot avail itself of the limitation of liability clause because it “repudiated” the Charter. EVYA’s Br. at 58-60. EVYA provides no authority, and Global knows of none, that holds that “repudiation” of a contract, as opposed to an ordinary breach of contract, invalidates an otherwise enforceable limitation clause. Moreover, while one party’s repudiation may allow the other to terminate the contract, as discussed above, EVYA admittedly chose to continue on with the Charter, and thus remained bound by all its terms including the limitation of liability clause. EVYA cannot pick and choose which parts of the Charter it wanted to observe and those it did not.

control—to support the trial court’s findings with respect to (a) lost profits, (b) consequential attorneys’ fees, (c) the “commercial claims,” and (d) the IECESA invoices. EVYA’s cross-appeal is also without merit.

Lost Profits. EVYA refuses to acknowledge the high burden of proof on a lost profit claim. This is not surprising, considering that EVYA did not use a single document to support its lost profits claim at trial and, instead, relied exclusively upon the conclusory testimony of a lay witness. That testimony was insufficient. It was EVYA’s burden to prove lost profits with “reasonable certainty” using the “best evidence available.” *Larsen v. Walton Plywood Co.*, 65 Wn.2d 1, 15, 17, 390 P.2d 677 (1964). Indeed, EVYA improperly argues that it is entitled to lost profits because Global did not offer its own contrary evidence on the issue.¹² Of course, that is not the law; the burden of proof was EVYA’s, not Global’s. *Gilmartin v. Stevens Inv. Co.*, 43 Wn.2d 289, 294, 261 P.2d 73 (1953) (if “a plaintiff, in attempting to prove loss of profits, fails to produce available records relevant to that question, he fails to meet this standard of

¹² EVYA’s Br. at 62 (“Global presented no evidence”); *id.* at 63 (“Global was also free to present contrary evidence”). In the same vein, EVYA implies that the award was just desserts for Global’s decision to “withdraw” its damages expert. EVYA’s Br. at 63. EVYA ought to know better. Global “withdrew” the testimony of its expert only after the trial court ruled, at EVYA’s request, that he would be precluded from testifying because of an untimely disclosure. RP (10/17/10) at 2008, 2011.

reasonable certainty”). Further, as a practical matter, Global did not need to disprove something that EVYA was unable to prove in the first place.

EVYA concedes that the trial court based its lost profit award solely on the testimony of EVYA’s assistant general manager Martin Wood, who testified that, when EVYA bid on the PEMEX project, he estimated that EVYA could complete the \$24.1 million contract for \$19.9 million, leaving a predicted profit of \$4.17 million. EVYA’s Br. at 62. EVYA is also correct that, because the PEMEX contract was a fixed price contract, Wood’s prediction was only as good as his estimate of EVYA’s costs. *Id.* On that issue, as Global previously explained (Global’s Br. at 51), Wood testified briefly and in generalities. RP (10/25/10) at 580-84. Although EVYA claims it produced “backup project documents” in discovery (EVYA’s Br. at 63), it did not use a single document at trial to substantiate Wood’s testimony regarding a \$19.9 million cost estimate. Yet, the trial court credited Wood’s testimony totally, finding that EVYA would have made every cent of predicted profit. CP 3791 (CL ¶ 15).

The trial court’s acceptance of Wood’s vague testimony regarding EVYA’s *estimated* costs was bad enough, but it was even worse because EVYA had *actual* cost data that was the “best evidence available” to determine lost profits. EVYA was seven months into the PEMEX contract when it was cancelled. It was therefore possible for EVYA to validate the

accuracy of Wood's estimates and, more importantly, to show how much in actual costs EVYA would incur to complete the contract given the work that remained. Wood gave no testimony on either issue, nor was a single EVYA business record used or introduced at trial on the topic. Indeed, although EVYA generously describes Wood's testimony as "confused" (EVYA's Br. at 63-64), Wood's own testimony shows he had no personal knowledge of EVYA's actual costs. RP (10/25/10) at 611-615.

In an effort to find some evidence to support Wood's speculative testimony, EVYA repeatedly cites Exhibit 119. EVYA's Br. at 6, 62 & 63. EVYA goes so far as to call the document an "ER 1006 Summary" of the purported "four thousand pages of PEMEX project documents" that EVYA says exist, but did not to use at trial. *Id.* at 63.¹³ Exhibit 119 purports to list EVYA's estimated and actual *income* on the PEMEX contract—not *its costs*. RP (10/19/10) at 206. If anything, the document shows only that Wood's original estimates were far off the mark. In April 2006, *before* the diving was suspended and the Charter was terminated, Wood had originally estimated income from PEMEX of \$3,248,889, but, in reality, EVYA had actually received only \$1,067,177. Tr. Ex. 119.

¹³ EVYA's characterization of Trial Exhibit 119 as a summary is entirely *post hoc*. EVYA never sought to use the exhibit as an ER 1006 summary at trial, made no effort to lay the foundation to do so, and the trial court did not admit the exhibit as such. It was not a summary.

Regardless, Wood never even referenced Exhibit 119 in his testimony. RP (10/25/10) at 577-597. EVYA's director, Javier Camargo, was asked one question about the exhibit on the very first day of trial, and that was it. RP (10/19/10) at 206. No one testified that the document was accurate or, more critically, how EVYA could bring its actual costs in line with its pre-bid estimates in the short time remaining on the contract.

EVYA argues that the lack of contemporaneous evidence does not matter, because another witness (not Wood) testified that, despite the fact that it was behind schedule, EVYA could have completed the PEMEX on budget. EVYA's Br. at 61-62. But, as Global pointed out, courts have repeatedly rejected conclusory testimony predicting a rosy outcome where corporate records and other hard facts are available. *Nat. Sch. Studios, Inc. v. Superior Sch. Photo Service, Inc.*, 40 Wn.2d 263, 242 P.2d 756 (1952); *Marshall Constr., Ltd. v. Coastal Sheet Metal & Roofing, Inc.*, 569 So.2d 845 (Fla. App. 1990); *ADC Fairways Corp. v. Johnmark Constr., Inc.*, 343 S.E.2d 90 (Va. 1986). EVYA fails to distinguish this authority, nor can it find even a single case that approved an award of lost profits based solely on speculative lay testimony.

The absence of contemporaneous evidence to support the accuracy of Wood's profit forecast, or to ascertain the actual costs EVYA would incur to complete the PEMEX contract, is all the more deficient because

EVYA had no prior experience on an underwater pipeline maintenance contract, much less one in which it was required to spend millions to charter a vessel. RP (10/21/10) at 356-57. Not only does EVYA concede that fact on appeal (EVYA's Br. at 6 ("this was Evya's first offshore pipeline project")), it makes no effort to defend the trial court's erroneous finding that Wood's forecast was "in line" with EVYA's profits from prior years. CP 3785 (FF ¶ 61). It can't. As Global explained in its opening brief (Global's Br. at 57), there was no evidence at trial regarding EVYA's or IECESA's profitability, or lack thereof, on prior PEMEX contracts. RP (10/20/10) at 255-57 (Camargo); RP (10/21/10) at 380 (Del Rio).

The fact that the PEMEX contract was a new venture for EVYA—for which it had no profit history—plainly triggered the "new business rule." EVYA does not dispute the applicability of the rule; instead, it ignores it. Under the new business rule, EVYA cannot recover lost profits without an analysis, based on "tangible facts," showing profits made by "similar businesses ... operating under substantially the same conditions"; anything less falls within "the realm of uncertainty and speculation." *Larsen*, 65 Wn.2d at 17; *Farm Crop Energy, Inc. v. Old Nat'l Bank*, 109 Wn.2d 923, 927, 750 P.2d 231 (1988). There was no analysis here; no expert opinion; and no track record of profits made by other companies on similar contracts. Wood's one-off, pre-contract, prediction of profits

on EVYA's inaugural underwater diving contract did not remotely satisfy the test for proving lost profits with "reasonable certainty," much less the "new business rule." EVYA is not entitled to lost profits.

Attorneys' Fees. The trial court awarded EVYA \$600,000 in attorneys' fees allegedly incurred "mitigating" the penalties PEMEX charged EVYA for early cancellation of the contract. CP 3785 (FF ¶ 62); CP 3791 (CL ¶ 15). As Global explained in its opening brief, the award was erroneous because—like everything else it seems—it was predicated on a single question-and-answer from the self-serving testimony of EVYA's principal, Javier Camargo, without any corroborating invoice, billing record or other document from EVYA's files to prove that EVYA actually incurred the attorneys' fees or, if it did, that they were related to Global's conduct. Global's Br. at 58-61. EVYA again argues that the trial court was entitled to believe Camargo's testimony (EVYA's Br. at 64-65) but, here too, EVYA confuses witness credibility with its substantive burden to prove damages to a reasonable certainty using the "best evidence available." *Barnard v. Compugraphic Corp.*, 35 Wn. App. 414, 418, 667 P.2d 117 (1983). The former cannot substitute for the latter.

This is particularly so for attorneys' fees because, in that case, the plaintiff must prove that its fees were "reasonable" by "contemporaneous records." *Mahler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632 (1998).

EVYA argues that this high standard applies in “first person fee claims,” but not where a plaintiff seeks fees incurred litigating against a third-party, such as PEMEX. EVYA’s Br. at 65. EVYA ignores the law. In *Jacob’s Meadow Owners Ass’n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 758, 162 P.3d 1153 (2007), this Court analyzed “the distinction between attorney fees awardable as costs of maintaining or defending an action against an adverse party, and attorney fees recoverable as damages, generally incurred as a result of prior actions by the adverse party which have exposed the claimant to litigation with a third party.” This Court held that the same burden of proving “reasonableness” applies to both:

The party seeking recovery of attorney fees as damages bears the burden of presenting evidence as to the reasonableness of the amount of fees claimed. Those factors bearing upon the reasonableness of attorney fees awardable as costs also bear upon the reasonableness of attorney fees recoverable as damages.

Id. at 761-62 (citations omitted). In sum, not only were the non-existent billing records or fee statements the “best evidence available” to prove that EVYA actually incurred attorneys’ fees and in what amount, those records were also a necessary predicate to a finding of reasonableness. The attorneys’ fee award must be vacated for this reason as well.

Commercial Claims. The trial court found that EVYA incurred \$292,638 on “commercial claims” owed to third-parties, but did not award these damages because they were subsumed in EVYA’s lost profit award.

CP 3786 (FF ¶ 63); CP 3791 (CL ¶ 15). As Global argued in its opening brief, reversal of the lost profits award will not “revive” these damages because they are unsupported by substantial evidence in their own right. Global’s Br. at 61-64. The sole evidence of the purported “commercial claims” was the testimony of EVYA’s CPA, Carlos Bastarrachea, who admitted that his knowledge of the claims came solely from his review of EVYA’s business records. RP (10/25/10) at 553-54. Because EVYA did not introduce copies of those records into evidence, Bastarrachea’s testimony was plainly barred by the best evidence rule. *See* ER 1002-1004; *State v. Fricks*, 91 Wn.2d 391, 397-98, 588 P.2d 1328 (1979).

EVYA does not argue that Bastarrachea had personal knowledge of the “commercial claims,” nor does it deny the applicability of the best evidence rule to Bastarrachea’s testimony. EVYA’s Br. at 65-66. Instead, EVYA suggests without authority that Bastarrachea’s use of a document to refresh his memory satisfies the rule. No so. When documents are used to refresh recollection, they are not admitted into evidence, but are used to trigger the witness’s memory of past events. *State v. Little*, 57 Wn.2d 516, 520, 358 P.2d 120 (1961). “The testimony is the evidence, the writing is not.” *Id.* The point of the best evidence rule is just the opposite, however; the writing must be the evidence, not the testimony. ER 1002.

In any event, Bastarrachea did not refresh his memory with the original “backup documentation,” as EVYA states. EVYA’s Br. at 65. He was looking at a “report” he prepared “based on documents that I had in my hands.” RP (10/25/10) at 556. But it was those documents he “had in his hands” as EVYA’s CPA, not his own *post-hoc* summary, that were necessary to prove the amount of the “commercial claims.” Thus, even had it been Global’s burden to disprove what EVYA did not prove, Global had no opportunity to cross-examine Bastarrachea with the originals. Whether or not the lost profits award is vacated, there is no admissible evidence to support an award of damages for these “commercial claims.”

Invoices. Like the “commercial claims,” the trial court found that, but for its lost profits award, it would have awarded IECESA \$2,250,000 on “unpaid invoices.” CP 3786 (FF ¶ 63); CP 3791 (CL ¶ 15). Also like Bastarrachea’s testimony regarding the commercial claims, Del Rio’s self-serving testimony regarding the invoices was wholly inadequate because it was not the best available evidence regarding the existence or amount of IECESA’s purported damages. The invoices, of course, would be the best evidence that IECESA actually incurred unpaid expenses related to the contract, and in what amount. EVYA concedes that, while Del Rio looked at documents to “refresh his recollection,” the invoices themselves were never introduced into evidence at trial. EVYA’s Br. at 66.

EVYA also ignores the other fundamental flaw regarding the “unpaid invoices.” As Global explained in its opening brief (Global’s Br. at 65), EVYA’s own witnesses claimed that, prior to termination of the Charter, EVYA had received more than sufficient revenue from PEMEX to cover all its costs to date, including expenses incurred by IECESA. RP (10/25/10) at 591-92. To the extent the invoices truly reflected costs incurred prior to termination as Del Rio claimed, EVYA had received sufficient funds from PEMEX to pay the invoices, and EVYA could have and should have paid IECESA. RP (10/21/10) at 414. EVYA made no effort to explain at trial why it did not do so, and makes no such effort on appeal. The finding that IECESA incurred “unpaid invoices” traceable to Global’s termination of the Charter must be reversed for this reason too.

EVYA’s Cross-Appeal. EVYA asks the Court to reinstate two items of damages that the trial court refused to award. EVYA’s Br. at 52-54. There was no error. With respect to the “commercial claims,” the court found that the claims arose from subcontracts EVYA had with suppliers in connection with the PEMEX contract. CP 3786 (FF ¶ 63); RP (10/25/10) at 569 (“these guys ... are providers of ours ..., which means that they can give us all the parts or supplies that we need to comply with the different contracts”). EVYA would have paid these claims even had it completed the PEMEX contract and, thus, they were

properly subsumed in the lost profits award. CP 3791 (CL ¶ 15). Further, as explained above, if the lost profits award is vacated, as it must, EVYA still cannot recover these damages because Bastarrachea's testimony about the "commercial claims" was barred by the best evidence rule.

For the same reasons, the trial court recognized that EVYA could not recover both its purported lost profits and the \$371,000 it "overpaid" on Invoice 161. The lost profit award is based on the assumption that, had there been no breach, EVYA would have paid Invoice 161 and all its other estimated expenses in full. To award an incurred expense and lost profits would result in double recovery. It should be noted, moreover, that if this Court affirms liability but vacates the lost profit award, EVYA is still not entitled to recover this \$371,000. As discussed in Global's opening brief, even after Global suspended EVYA's diving privileges, EVYA continued to use the vessel as its base of operations 24 hours a day, 7 days a week for the next 17 days to carry on its work for PEMEX. Global's Br. at 18. Clearly, Global is entitled to the monies paid in light of EVYA's election.

3. EVYA Does Not Defend The Trial Court's Award Of Damages For Conversion.

In its opening brief, Global carefully explained that the trial court's award of damages for conversion was equally erroneous. EVYA failed to prove that IECESA had incurred a \$1,016,628 "judgment" or \$100,000 "import fee" with the best available evidence given the absence of a copy

of the judgment, fee statement or any other business or public record to corroborate Del Rio's self-serving testimony. Global's Br. at 66-70. EVYA likewise failed to prove the \$34,790 value of the "unreturned bracers" because Bastarrachea's testimony on the issue was inadmissible under the best evidence rule. *Id.* at 70. EVYA apparently concedes both points. EVYA makes no effort to refute Global's arguments or otherwise defend the trial court's conversion award anywhere in its 70-page brief. For the reasons previously stated, if this Court affirms liability for conversion, it must nonetheless vacate the trial court's award of damages.

E. The Federal Post-Judgment Interest Rate Applies.

By the plain terms of the Charter, the trial court had no discretion to apply Washington's 12% post-judgment interest rate.¹⁴ The Charter's choice-of-law clause required the court to apply federal maritime law over state law "where applicable." Tr. Ex. 324 (Section 1(33)). As Global explained, federal maritime law does provide an "applicable" standard on judgment interest rates. Under maritime law, a trial court has discretion to apply state law to determine *pre-judgment* interest, but no discretion when it comes to *post-judgment* interest; the post-judgment interest rate is fixed

¹⁴ EVYA erroneously states that Global raised the issue of post-judgment interest "for the first time on appeal." EVYA's Br. at 67. Not so. Global repeatedly argued to the trial court that it had no discretion to deviate from the federal interest rate. CP 3648; CP 3702-3705.

exclusively by 28 U.S.C. § 1961(a). Global's Br. at 71-72. Indeed, even in the absence of a choice-of-law clause, federal preemption analysis requires the same result. In *Paul v. All Alaskan Seafoods, Inc.*, 106 Wn. App. 406, 24 P.3d 447 (2001), this Court held, with respect to pre-judgment interest, that where the federal interest rate conflicts with the Washington rate, the federal rate controls. *Id.* at 427. So it is here.

EVYA ignores the choice-of-law clause entirely, and seeks to distinguish *Paul* on the grounds that it addressed pre-judgment interest only. EVYA's Br. at 68. But there is no distinction between pre- and post-judgment interest rates in this context. Where a claim is premised on federal maritime law, the only issue is whether the federal rate conflicts with the state rate—by virtue of preemption analysis (*Paul*, 106 Wn. App. at 427-28) or contractual choice-of-law. Not surprisingly, state courts can and do apply Section 1961(a)'s post-judgment interest rate where federal law provides the substantive basis for decision. *See Albuquerque Commons P'ship v. City Council of City of Albuquerque*, 248 P.3d 856, 861-62 (N.M. 2011); *Municipality of Anchorage v. Gregg*, 101 P.3d 181, 195 (Alaska 2004); *Turner v. CSX Transp., Inc.*, 878 N.Y.S.2d 543, 545 (Sup.Ct. 2009). The trial court should have done the same thing here.

Finally, as EVYA concedes, the only courts to consider this precise issue held that Section 1961(a)'s federal post-judgment interest rate should

apply to state court judgments rendered on maritime claims. *See Militello v. Ann & Grace, Inc.*, 576 N.E.2d 675, 679 (Mass. 1991); *Curcuru v. Rose's Oil Service, Inc.*, 868 N.E.2d 1266, 1268 (Mass. App. 2007) (following *Militello* in maritime case). EVYA asks the Court to ignore this precedent, but provides no sound reason or authority to do so—other than pointing out the “significant divergence” in federal and state rates. EVYA’s Br. at 69. It is that “significant divergence,” however, that matters most. Federal law preempts conflicting state law on the issue of post-judgment interest rate and, even if it didn’t, the Charter’s choice-of-law clause requires application of the federal standard. If any aspect of the judgment is affirmed, the award of post-judgment interest must be reversed and remanded for recalculation pursuant to Section 1961(a).¹⁵

F. EVYA Was Not Entitled To An Award Of Punitive Damages.

EVYA cursorily argues that the trial court erred when it concluded that EVYA could not recover punitive damages as a matter of law. CP 3792 (CL ¶ 20). There was no error. As noted, the Charter states that

¹⁵ The federal standard would govern the post-judgment interest rate for the entirety of EVYA’s judgment—even though EVYA’s conversion claim is governed by Washington law. *See Woo v. Fireman’s Fund*, 150 Wn. App. 158, 164-65, 208 P.3d 557 (2009) (in cases of “mixed judgments,” only one post-judgment interest applies). The breach of contract claim was the predominant claim in this case, and the source of the largest portion of damages. Indeed, EVYA conceded below that the interest rate applicable to the contract claim controls. CP 3677-78.

federal maritime law applies only if “applicable”; otherwise, Washington law controls. Tr. Ex. 324 (Section 1(33)). There is no federal maritime law of conversion and, thus, state courts presiding over maritime claims, and federal courts sitting in admiralty, apply state tort law to conversion claims. *M.C. Mach. Sys., Inc. v. Maher Terminals, Inc.*, 753 A.2d 617, 623-24 (N.J. 2000); *Metro. Wholesale Supply, Inc. v. M/V Royal Rainbow*, 12 F.3d 58, 61 (5th Cir. 1994); *4 H Const. Corp. v. Superior Boat Works, Inc.*, 659 F. Supp. 2d 774, 780 (N.D.Miss. 2009). Under Washington law, there can be no punitive damages for conversion. *Barr v. Interbay Citizens Bank of Tampa, Fla.*, 96 Wn.2d 692, 697, 635 P.2d 441 (1981).

To the extent maritime law applies to EVYA’s breach of contract claim, punitive damages are likewise unavailable. Federal courts applying maritime law uniformly hold that punitive damages cannot be recovered in breach of contract cases. *See Gamma-10 Plastics, Inc. v. American President Lines, Ltd.*, 32 F.3d 1244, 1257 (8th Cir. 1994); *Ellenwood v. Exxon Shipping Co.*, 984 F.2d 1270, 1283-84 (1st Cir. 1993); *Thyssen, Inc. v. S.S. Fortune Star*, 777 F.2d 57, 62-64 (2d Cir. 1985).¹⁶ Because

¹⁶ Even where punitive damages are permitted in maritime cases, the standard is exceedingly high. Punitive damages may be imposed only for “conduct which manifests reckless or callous disregard for the rights of others or for conduct which shows gross negligence or actual malice or criminal indifference.” *Churchill v. F/V Fjord*, 892 F.2d 763, 772 (9th Cir. 1988). Even if that standard somehow applied here, for the reasons (continued . . .)

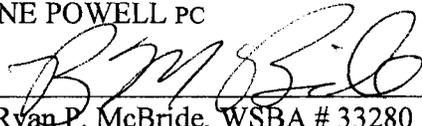
neither of EVYA's claims permitted the trial court to award punitive damages in this case, EVYA's cross-appeal must be denied.

IV. CONCLUSION

For the reasons stated above and in Global's and MMSI's opening brief, the judgment against Global and MMSI should be reversed, and judgment entered in favor of Global on its counterclaims. In the alternative, if the Court affirms judgment against Global and/or MMSI on any basis, then the trial court's award of damages must be vacated in its entirety and EVYA's cross-appeal rejected.

RESPECTFULLY SUBMITTED this 10 day of November, 2011.

LANE POWELL PC

By 

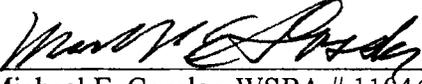
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(. . . continued)

explained above in connection with the enforceability of the limitation of liability clause, the trial court erred in concluding that Global engaged in "deliberate and planned conduct to terminate the contract."

CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2011, I caused to be served a copy of the JOINT REPLY BRIEF OF APPELLANTS/CROSS-RESPONDENTS on the following person in the manner indicated below at the following address:

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- by **Electronic Mail**
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- by **First Class Mail**
- by **Hand Delivery**
- by **Overnight Delivery**



Patricia King