

No. 66812-9-I and ~~6813-7-I~~ ⁶⁶⁸¹³⁻⁷

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

REPRESENTACIONES DISTICUCIONES Y DISTICUIONES EVYA,
S.V. DE C.V., a Mexican Corporation; and INSTALACIONES
ELETROMECAIS, CIVILES Y ELETROMECAIS, S.A. DE
C.V, a Mexican Corporation,

Respondents/ Cross-Appellants,
v.

GLOBAL EXPLORER, LLC, a Washington LLC; GLOBAL
ENTERPRISES, LLC, a Washington LLC; MARITIME
MANAGEMENT SERVICES, INC.,

Appellants/Cross-Respondents,

And

FRANK AND JANE DOE STEWART; and STEWART INVESTMENT
COMPANY,

Cross-Respondents.

Hon. Laura Gene Middaugh

APPELLEES RESPONSE BRIEF

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A. INTRODUCTION AND SUMMARY

This case arises out of a maritime charter contract dispute between the Seattle based owner of the ship MV Global Explorer, Global Explorer, LLC¹ on one hand, and two Mexican construction companies, Evya and Iecesa on the other. The defendant Global is in the business of owning and chartering the MV Global Explorer in the Gulf of Mexico offshore oil platform servicing market. Evya needed a ship like that to undertake a \$24m PEMEX pipeline maintenance contract. Evya chartered the ship for \$26,500/day to use on the project. Both parties acquired insurance required by the contract but neither party completed all the requirements. For the next seven months, the Evya paid and Global happily accepted their \$5.5m in charter hire while Evya worked on the PEMEX project; that is until Global decided it could do better in the Hurricane Katrina cleanup process. So Global, clumsily as it turns out, engineered a scheme to extort Evya into increasing the contract rate by \$15,000 to \$30,000 per day, or if that failed, pull the ship from Evya

¹. Shortly after the charter dispute in this case, in 2006, Global Explorer, LLC dissolved and its owner, Steuart Investment Company transferred all its assets to a newly formed company successor, Global Explorer LLC. Steuart Investment Company and all, Global Explorer, LLC; Global Enterprises, LLC and Steuart Investment are managed by Frank Steuart. Frank Steuart is the “boss.”

and recharter it with someone working in the Hurricane Katarina cleanup fleet who would.²

Global started it off when it shut down Evya's diving operations, claiming Evya was in breach of the contract because it did not have the proper diving manual aboard ship. Evya quickly showed Global that it had the diving manual, but Global still kept the work shut down, alleging Evya had not provided a copy of its insurance policy to Global. Evya quickly showed Global the policy, which had been provided at the beginning of the contract, but Global still kept the work shut down, announcing that it would not resume unless Evya agreed to pay a massive, retroactive increase in the daily charter rate. Evya simply could not pay the increased daily rate or it would have wiped out all its profit on the PEMEX contract. Evya tried to get into court, quickly to try to get a resolution to the problem, but when Steuart got wind that there might be a court hearing, he fabricated a story about having to take the ship to another Mexican port so the harbormaster would let the ship sail, then

² He did get the windfall. The ship was promptly rechartered to a company called International Subsea, which lent it to another large oil services company for the most lucrative type of work available: maritime salvage. See 620 F. Supp. 2d 747, 749 (E.D. La 2009)(crewmember injury aboard the MV Global Explorer on August 29, 2006 during maritime salvage operation for to recover several oil platforms toppled by Hurricanes Katrina and Rita. Rowan is one of the world's largest owners, builders and operators offshore oil platforms. <http://www.rowancompanies.com/fw/main/Corporate-Overview-14.html>.)

when it was safely at sea he instructed the captain to fake an equipment breakdown and divert the ship to Houston. When the ship sailed out with millions of dollars of Evya and Iecesa diving equipment, it collapsed the \$24m PEMEX project, caused massive layoffs of all the Mexican project workers, untold harm to their families, company vendors, subcontractors and on down the line. But Steuart got his nose in the Katrina trough, immediately rechartering his ship on a Katrina oil platform salvage contract at \$40,000 per day.

Evya and Iecesa sued Global Explorer, LLC and the ship manager, Maritime Management Services, LLC at Seattle for breach of charter contract, conversion and other claims. The case was tried to the Admiralty Court from October 19, 2010 through November 29, 2010. Following a trial and extensive post-trial briefing where the Admiralty Court presented the parties opportunities to submit proposed revisions and challenges, the Court finally adopted a detailed twenty eight page set of findings and conclusions. (CP 3769 – 3794).³ The trial court listened to more than a month of testimony and hundreds of exhibits. It evaluated the credibility of the witnesses, the measure of the evidence and it

³ When referencing to the Findings of Fact and the Conclusions of Law Evya will cite to the clerks paper page and the relevant Conclusion of Law (CL) or Finding of Fact (FF).

explained its findings and conclusions in an extremely detailed and thoughtful Finding of Fact and Conclusions of Law (FFCL). (CP 3769 – 3794). The trial court found that Evya and Iecesa did not breach the contract by failing to provide the insurance. (CP 3787–3788-CL5). It found that that even if they were in breach, the breach was not repudiatory and would not have allowed Global to terminate the contact or the diving operations. (CP 3790-CL12). It further found that Global’s material breach in terminating diving excused Evya’s obligation to pay charger hire for the days May 13 forward. (CP 3790-CL 13). The trial court had previously entered an order on summary judgment, concluding that Global’s termination of diving operations materially breached the contract, and this was not challenged by Global on appeal. (CP 3787 & CP 567-571- CL 5). Nevertheless, they concluded that the Order on summary judgment was correct, after reviewing all the evidence at trial. (Id.). Further, the court concluded “Global’s conduct was a total breach of the contract.” (CP 3788-CL 8). The conduct was so egregious that it also found “If punitive damages were allowed, the Court would find that the defendants deliberate and planned conduct to terminate the charter contract in order to obtain a higher charter rate and to leave the area

where the plaintiffs could have recovered their property to warrant an award of punitive damages.” (CP 3792-CL 20).

Angered over the trial outcome, Global’s owner, Frank Steuart appealed the trial court judgment and took the unprecedented step of filing a Federal Court RICO case against the plaintiffs Evya, Iecesa, its principals and its witnesses at the Superior Court trial, pleading its case a second time in front of the USDC WD WA at Seattle.⁴

The only errors in this case were a) the trial court failed to include \$371,000 in the judgment for an item of damages it found, and b) the trial court denied the punitive damage award against Global on the incorrect basis that punitive damages are unavailable under maritime law.

B. STATEMENT OF THE CASE

1. STATEMENT OF FACTS

Plaintiffs Evya and Iecesa are Mexican companies headquartered at Ciudad del Carmen, Mexico. (CP 3770- FF). 1. Global Enterprises, LLC is the successor to Global Explorer, LLC is a cancelled Washington LLC that owned the vessel Global Explorer in 2005. The sole manager of both companies is Frank Steuart and both are wholly owned by Steuart

⁴ See *Global Enterprises, LLC; Frank Steuart and Steuart Investment Company v. Evya; Iecesa; Francisco Camargo; Juan Carlos Del Rios; Richard Stabbert*, USDC WDWA 10-cv 01769 JCC.

Investment Company, A Delaware Corporation. (Id.-FF) 2. MMS is owned by Trevor Stabbert and based in SeaTac, Washington. (CP 3770-3771-FF 3,7,8).

In 2005 Plaintiff's Evya and Iecesa formed a joint venture to bid a \$24m PEMEX contract for maintenance and repair of certain PEMEX underwater pipelines and offshore oil platforms. (CP 3770-3771 FF 4; RP 187-204). The project was scheduled to last from October 2005 through November 2006, at a cost of just over \$24m usd. (CP3771-at FF 5; RP 205; Tr. Ex. 119). The project required the use of a large servicing vessel to support diving operations on the underwater oil pipelines and platform legs. (FFCL 4; RP 207-209). The project had a projected profit of \$4.17m usd on the gross project amount of \$24.1m. (CP 3784-3785- FF 61; Tr. Ex. 119; RP. 204-206; 580-589). Though this was Evya's first offshore pipeline project, its had successfully completed many multi-million dollar PEMEX projects before and its business partner Iecesa had successfully completed 50-60 contracts with PEMEX since 1986. (RP 380).

Global Explorer, LLC through its legal representative in Mexico Mario May, marketed the MV Global Explorer to Evya and Iecesa Evya for the PEMEX contract. (CP 3771-3772- FF 9, 10,11,12; RP 209-211).

In October 2005 Evya and Iecesa signed a fixed term, 410 day charter contract with Global Explorer, LLC for the use of the MV Global Explorer on the PEMEX project, at \$26,200/day. (CP 3771-FF 5; Tr. Ex. 324). Global drafted the charter contract.(CP 3772-FF 14). Richard Stabbart signed (and initialed “RPS”) and Mario May (initial “M”) initialed each page of the charter contract, on behalf of the vessel owner, Global Explorer, LLC.⁵ (Tr. Ex. 324). Evya and Iecessa won the PEMEX contract and commenced work, with the MV Global Explorer, on October 13, 2005.

Insurance: Before the charter actually began with delivery of the ship, Global and Evya were obligated by the contract to go out and buy their respective insurance policies, naming each other as “additional insured’s” on the other’s policy. Both parties used the same people to get their insurance for the charter, Damon Nasman and Mario May. Global obtained its policy directly from its long time insurance broker; Damon Nasman of Seattle based Global Insurance services in acquiring its policy. Tr. Ex. 324, Annex B3. However, Global Explorer, LLC. failed

⁵ Global Explorer, LLC subsequently shelled its assets out to Global Enterprises, LLC shortly after the contract breach in May, 2006. Ownership remained the same, e.g. Frank Steuart and Steuart Investment Company and the new company accepted the liabilities of the old. The Judgment is secured by an LC so there are apparently no collection issues and for all practical purposes they are the same company for the issues on appeal.

to make Evya and Iecesa “additional insured’s” on their policies. (CP 3771-FF 6). The Global policy, dated October 3, 2005 is addressed to “Global Marine Logistics, Mario May Lopez.” (Tr. Ex. 315, p. 3). The May/Nasman/Global policy provided direct coverage to Global for \$24m property coverage on the ship, \$20m liability insurance under the SP-23 form (\$5m PI plus \$15m excess). (Tr. Ex. 315). Notably, however, this insurance package fails to include Evya as an “additional insured” as required by the charter. (CP 3773-FF 6. Tr. Ex. 315; RP 1422-1427). Global breached the charter’s insurance provisions, specifically clause B(3).⁶ (FF 6; RP 1426:6-1427:6).

Evya went out to buy its insurance from a Mexican insurer, per the contract obligations. Mr. Steuart’s insurance people, Damon Nasman and Mario May were tasked by Steuart with helping Evya understand and acquire the acceptable insurance. (RP 1374:9-1375:17). On October 11, 2005 Richard Stabbert told Steuart there was some confusion with Evya about precisely what insurance would satisfy the “charterer’s legal” clause, Annex B subsection A. (CP 3773-FF 17; Tr. Ex. 27; RP 525, 530, 531). Specifically, the Zurich Policy Evya obtained with help from

⁶ Steuart even wrote to Evya during the termination phase, cynically complaining that Evya had failed to name Global as an additional insured on its insurance. Tr. Ex. 392. In fact, Evya did name Global as an additional insured on its policy; it was Global who failed to name Evya an additional insured on its policy.

Nasman and May, covered all the items included in a stand alone AIMU form “charter’s legal” policy, albeit in different amounts and through an amalgamation of other coverage’s, including separate property, liability and Mexican Workers compensation coverage that did not use the precise term “charterers legal liability.” (Tr. Ex. 333). The issue was resolved with May, Stabbert, Nasman and Evya all working together.

May/Nasman/Evya -Zurich policy specified the precise limits that Steuart’s broker, Damon Nasman requested. (RP 701; Tr. Ex.333). Then to make things absolutely clear at the outset, May even signed a waiver clarifying the issue, before the Zurich policy was accepted by Global. (CP 3773-FF 18; Tr. Ex. 325. RP 237-238; 518). Then just before the charter began, May sent the approved copy of the Zurich policy to Nasman, Steuart and the Captain of the ship. (CP 3773-FF 18; RP 1375:23-13777). The ship confirmed receipt of the Zurich policy, through an email from the captain. Evya provided proof of insurance before the charter ever even started with a full copy of the Zurich policy which was on board at the very beginning of the charter. (RP 1375-1378:7). Frank Steuart was fully aware of these facts as he was kept in the loop by emails. (RP 1374:6-24: Tr. Ex. 86). All the insurance issues

were resolved between the parties before the charter began, by October 14, 2005. (CP 3773-FF 18, 19).

Diving Procedures. As the parties were preparing the ship for charter, they jointly undertook an exhaustive checklist of certificates, equipment, licenses, etc. all of which were necessary to do the PEMEX work. (RP 947; Tr. 102). The diving procedures were on the ship at the beginning and they stayed on the ship. (RP 243, 383, 385, 619). They were kept in the engineering space in a binder. (RP. 619-620; Tr. Ex. 103). PEMEX would not have allowed them to initiate diving procedures if the procedures weren't on the ship. (RP. 383).

The project began in and generally went according to schedule. There was a short period where Evya and Iecesa fell behind the project schedule due to ship breakdowns and problems holding fixed position, but by May 2006 they were caught up on schedule and on PEMEX progress payments. (RP 418-419; 437-438). No issues were raised about insurance or diving procedures until May 10, 2006. (CP 3773-FF 20).

In March 2006 Richard Stabbert told Frank Steuart that the market demand for ships like the MV Global Explorer was taking off due to the Hurricane Katrina cleanup in the Gulf. Stabbert told Steuart that the spot market price had increased to as much as \$60,000/day for the

ship. (Tr. Ex. 343; RP 746). As a result, Steuart thought he could probably get \$40,000-60,000 per day for his ship, had it not been locked into the \$26,500 per day Evya contract for another 133 days. (CP 3772-3773-FF 15).

Contract Breach and Termination. Prior to May, 2006 the plaintiffs had paid all invoices. (CP 3778-FF 39). They were marginally behind on the performance of the PEMEX contract but there was no indication that the contract would not be completed. (Id.-FF 39).

On May 1, 2006 Steuart sent an invoice to Evya, No. 161, billing for \$415,000 for charter hire for the days May 12-May 28, 2006. (FF 40. Tr. Ex. 357). The bill was due May 16, 2006. (CP 3778- FF 40). Then on May 10, Steuart sent a letter declaring his intention to pre-emptively shut down diving operations in “48 hours” days on May 12, claiming the basis for the shutdown was that there was a recent “change in diving operations and Iecesa was no longer a subcontractor.” (CP3773-FF 20; Tr. Ex. 361). This was false. (CP 3779-FF 46). The letter asked for the proof of insurance, again, the same Zurich policy that he had sitting on the bridge of the ship, in Mr. Nasman’s office, in Mr. May’s office and even his own office since last October, 2005. (CP 3773-FF18, 19). On the same day Stabbert delivered the Steuart demand letter to Evya, he

wrote back to Steuart, gloating about their pre-emptive strike on their contract partner, their fiduciary, Evya:

“Subject: Evya..We fired full broadside from the portside..Gone on the starboard tack, fired a full broadside. I am shooting out the captain’s cabin with two stern guns. Next week, we will put the boarding party together and go alongside with knives and go through the breach. F Mario.” [Mario May]

(Tr. Ex. 370).

Then the next day, May 11, 2006, Steuart fired Mario May, the very person who worked out the insurance for both parties and who signed the “charter’s legal” clarification and waiver. (CP 3772-FF 11; Tr. Ex. 362). This was confusing to Evya, since they understood that all the insurance issues had been resolved at the beginning of the charter and a copy of the Zurich policy had been provided. (CP 3773-FF 20). Evya responded on the same day, May 11, 2006 that it did not understand the basis for Steuart’s demands. (CP 3774-FF 21). The English translation of the letter was confusing but it was made clear in subsequent communications that Evya did not “ignore” Steuart’s request, they just did not understand it. (Tr. Ex. 127; RP 1396-1398). From Evya’s perspective, they knew Steuart had the insurance policy already and they knew Steuart knew the dive procedures had to be on the ship in order for the ship to even be working. (CP 3773-FF 20). They had already paid

Steuart \$5.5m in charter, they were midway into a \$24m PEMEX contract ending, and Steuart was pre-emptively shutting down the entire operation for reasons which could not possibly be right. (RP 241-247).

Nevertheless, once Global raised the issues, Evya promptly communicated and tried to work with Global to resolve the matter. (CP 3774-FF 22). Even though Evya believed they had met the insurance requirements, they offered to obtain whatever additional insurance Stuart required. (Id. FF 22. Tr. Ex. 389. RP 509-531). On May 20, Evya brought in a marine insurance broker, Graciella Alvarez, who met with Global's attorney in Mexico and Mr. Steuart, by phone, to discuss the insurance issue. (CP 3774-FF 22). Alvarez explained she could get any necessary insurance within 48 hours of a request. (CP 3774-FF 22; RP 246; 509-531; Tr. Ex. 389, 397). Global refused to accept the offer as a resolution to the insurance issue it raised. (CP 3774- FF 22). Alvarez told Steuart that if he terminated the charter, it would be very difficult for Evya to obtain another ship to complete the PEMEX contract. (Id. FF 22).

By letter of May 22, 2006 Steuart offered to let the ship go back to work on the following terms:

1. Evya to pay an additional \$2,010,000 (\$15,000/day retroactively starting May 12, 2006 and continuing for 133 days), AND

2. Evya would provide either a) proof of insurance or b) another \$15,000 per day, for a total daily charter rate of \$55,600 per day.

(CP 3774-FF 24; Tr. Ex. 388).

That is a \$4,020,000 increase in the charter rate. To put it into perspective, the total annual premium cost of the entire Evya/Zurich policy was just \$34,452.00. (Tr. Ex. 333, p. 2). Global only had a profit of \$4,170,000 profit scheduled on the entire \$24m PEMEX project (FFCL 63) so Stuart's demand would have wiped that out entirely.

Global described the additional \$15,000 (total \$2,020,000) in lieu of proof of insurance as a "fund" it would keep in case any injury claims were made, but not a fund that would be returned to Evya if no claims were made. (CP 3775-FF 25). Mr. Stuart had no intention of giving the money back. (CP 3775-FF 25; RP 804-805; 935-938).

Evya rejected the proposal by letter of May 23, 2006. (CP 3775-FF 26). On May 24, 2006 Global told Evya that Mario May had no authority to execute the insurance waiver, which it was not valid and that Global was withdrawing the waiver. (CP 3775-FF 27). Global also demanded proof of insurance by May 24, 2006 or it would consider Evya's "refusal" a "repudiatory breach." (CP 3775-FF 27. Tr. Ex. 392).

Mr. Stuart gave conflicting stories at trial about whether he was aware of Evya's Zurich policy when he made this demand.

Stuart: "*I knew the Zurich policy was in place*, but that's a different insurance than what we have on our Annex B, and its required by PEMEX." (RP 753:2-4).

Stuart: "The Zurich policy is a PEMEX policy. *I was never aware of that policy*. They never once told me about that policy." (RP 773:4-5).

Stuart had the Evya-Zurich policy at the outset of the Charter. (Tr. Ex. 333). The charter contract did contain clauses setting forth financial alternatives where insurance was not provided by either one of the parties. (CP 3775-FF 28). These alternatives were set out in Annex B4 and D8. (CP 3775-FF 28; Tr. Ex. 324). The parties knew that if there was an insurance gap issue that cropped up, Stuart could simply contact Mr. Nasman to buy an additional cover and bill it to Evya. (Tr. Ex. 324, Annex D8; RP 368; RP 368-369).

Global knew that vessel was necessary for Evya to perform the work on the PEMEX contract. (CP 3775-FF 29). No reason was given for the shutdown in the official ship log, and the entry was curiously entered out of time sequence. (CP 3776-FF 32). There was no entry in the log indicating who made the decision to terminate the diving either. (CP 3776-FF 32). By letter of May 13, 2006, Stuart stated that *his* sole

reason for shutting down the diving operations was the lack of diving procedures aboard the ship, which he described as a breach of Section 12, Annex D of the contract. (CP 3776-FF 33; Tr. Ex. 371). By letter dated May 14, 2006, Evya responded, stating that the dive procedure book was and always had been in the engineering office of the vessel. (CP 3776-FF 33). On May 14, Evya had a person physically walk a set of the dive procedures up to the wheelhouse – the same place the Zurich policy had been sitting since October, and had the captain sign off on them. (Tr. Ex. 376, 377). By letter dated May 15, 2006, Global's attorney told Evya that he learned that Iecesa was no longer providing divers on the ship and asked for clarification. (CP 3777-FF 34). On May 18, 2006 Iecesa responded that Iecesa was no longer providing divers but the diving procedure book was left on board and was being used by Evya as their diving procedure book with Iecesa consent. (CP 3777-FF 34). Many of the divers that remained on board the ship were the same divers that had been employed by Iecesa. (CP 3777-FF 34).

On May 20, 2006 Evya asked Stuart for permission to make one dive so they could take pictures of the work they had done so they could provide them to PEMEX and get paid for the work. Stuart refused. (CP

3777-FF 35; Tr. Ex. 48). No explanation was provided by Global about exactly what Evya had to do to be able to dive again. (CP 3777-FF 35).

The trial court found that Steuart's termination of the diving on May 13, 2006 had nothing to do with unsafe diving or the captain's concern for diver's safety. (CP 3777-FF 37). The "safety issue" was a pretext. (CP 3787-CL 5). In fact, Steuart was the person who told Evya he was terminating diving operations because Evya was in breach of the part of the contract that required compliance with dive regulations, but Steuart admitted at trial that he did not even know what those were. (CP 3778-FF 38). Global's termination of the diving operations not a mere suspension in that Steuart had no intention of allowing Evya to dive. (CP 3778-FF 38).

At trial, Global was unable to identify any admissible evidence to support its allegations of unsafe diving practices or injuries. All its experts agreed that dangerous diving practices and incidents had to be noted in the ship log, yet there were none noted in the log. (CP 3777-FF 36). One MMS employee testified he saw one instance of unsafe diving, but there was no reference to this incident in the log. (CP 3777-FF 36).

Global billed Evya in advance for the charter fees. (CP 3778-FF 40). Invoice 161 for \$419,000 covered the ship rental for May 12

through May 28. (Id. FF 40). Payment on Invoice 161 was stated to be due on May 16, 2006, 3 days after the diving shutdown. Global demanded payment on May 17, 2006 and then again on May 24, 2006. (CP 3778-FF 40). But for the diving shutdown, Evya would have timely paid the invoice 161. (CP 3779-FF 45). However, Evya informed Global that the termination of their right to dive caused serious and irreparable damages. (CP 3778-FF 41). Global was aware that the Evya was unable to finalize work and get paid by PEMEX due to the lack of ability to dive. (Id. FF 41). Evya declared its intention to hold back charter hire for the days the vessel was shut down, as was its right under §10(e). (CL 5; Tr. Ex. 324, p. 23 line 246).

“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 position is reasonably disputed and the Charters specify such reason*. Interest will be chargeable at the rate stated in Box 24 on such disputed amounts where resolved in favor of Owners. Should the Owners prove the validity of the disputed portion of the invoice, balance payment shall be resolved by the Owners within 5 banking after the dispute is resolved. Should the Charters claim be valid, a corrected invoice shall be issued by the owners.”

(Tr. Ex. 324, p. 23 line 246-254).

Evya disputed the invoice, explained its reasons and withheld charter hire, as it was allowed to do under the contract. (CP 3787-3788,

3790-CL 5, 6, 13; RP 241-249; 764-766). Steuart was well aware of the dispute procedure under the contract; he just chose to ignore it because it didn't fit with his plan. (RP 767-770). Steuart declared Evya in breach of the charter and announced his intention to pull the ship out. (Tr. Ex. 383). By letter of May 30, 2006 Steuart stated that he was terminating the contract, solely based on Evya's failure to pay invoice 161, not due to any insurance or diving issues. (CP 3779-FF 46). Even though Evya still disputed invoice 161, it still paid it on June 5, 2006 and also provided a \$1.2m Letter of Credit to Global on June 2, 2006. (CP 3779-FF 43).

Since Evya was not in breach of the contract, it had no obligation to offload its equipment from the ship at Dos Bocas after it arrived on June 3, 2006, and Global had no right to require them to do so. (CP 3780-FF 47). Even if they had an obligation to remove their equipment, Global and MMS made it impossible for them to do so. (CP 3780-FF 48). From the time it arrived at Dos Bocas, the ship was put on Marsec level 2, which meant personnel and equipment were not free to leave the ship. (CP 3780-FF 48). Then on June 4, 2006 Steuart was made aware that Evya was seeking to get into court to address the charter termination and equipment removal issues. Global decided it wanted to avoid court

resolution of these issues so it planned to pretend to depart Dos Bocas towards a legally acceptable destination, Veracruz, then “divert” the ship to Houston. (CP 3780-3781-FF 48).

“Frank [Steuart], ... We can declare our next port as Veracruz— for shipyard moonpool installation. The ship can be legally diverted at SEA.... What we do not want is to give Javier [Camargo, Evya CEO] TIME to go to Federal Court.

(Tr. Ex. 70, 72. RP 1599-1604).

Steuart and MMS refused to let any of the Evya Iecesa personnel take anything off the ship except their personal belongings, clothes only. (RP. 621-622). Global and MMS personnel even prevented them from taking their personal computers and videos. (CP 3780-3781- FF 48; RP 622). Each Evya worker was personally searched by two MMS employees before being allowed off the ship. (CP 3780-3781-FF 48; RP 622). “...we were treated as if we were thieves that day.” (RP 622:3-4). Evya and Iecesa had millions of dollars of equipment on board which Global and MMS refused to set off. (CP 3782-FF 53). Much was in steel containers, or could have been put in steel containers, but MMS and Global refused to do that, claiming they were prevented by the Port Authority’s requirement of a “hot work permit.” (CP 3780-3781-FF 48. RP 623). However, on June 6, 2006 at 1:30 p.m. Global was informed by MMSI that their agent said *the port did not require* a hot work permit

and *did not refuse* permission to offload. (CP 3781-FF 48). Then half an hour later, at 2:00 pm, MMSI crew and Global wrote in the log that they *could not get* a hot work permit. (Id. FF 48). Then at 3:20 pm the ship picks up the pilot and at 6:00 pm departs for its declared destination of Veracruz. (Id. FF 48). Evya sent its personnel to Veracruz to pick up its equipment. (Id. FF 48). Then, 54 minutes later, Steuart called the captain and told him to change the destination to Houston. (Id. FF 48). Steuart admitted this at trial. (RP 1604). The log entry reflecting this phone call was only in the handwritten log, it was never transferred or it was deleted from the “smooth log.” (Id. FF 48). The rough log was handwritten, made contemporaneously with events and was more reliable. (CP 3772-FF 13). The smooth log continued to state the ships destination as Veracruz through the next day, June 7, while the rough log indicates it was sailing to Houston due to a problem with Generator #2, “change of orders.” (CP 3780-FF 48). At trial, Global and MMS testified that they intended to offload the equipment at Veracruz but damage to an engine made them divert to Texas for repairs. (CP 3782-FF 49). This was contradicted by the Captain’s affidavit dated June 28, 2006. (CP 3782-FF 50). The trial court found that Global did not intend to offload the equipment at either Dos Bocas or Veracruz, but they were

planning to get out of Mexican waters as fast as possible in order to avoid legal actions. (CP 3782-FF 53). The plan to submit a false declaration of destination and divert the ship was suggested by MMSI. (CP 3780-FF 48). The Global and MMS intention of the plan was to frustrate Evya's attempts to resolve the charter issues through the legal process. (FF 48).

Global intended to sail away with the Evya and Iecesa equipment while claiming a possessory lien over it. (Tr. Ex. 74; 75). Global even claimed to have confirmed the "seizure" of the equipment was valid, through legal counsel. (Tr. Ex. 74, p.2-3).

At trial, Stuart and Trevor Stabbert of MMS falsely testified that they were prevented from offloading the Evya equipment by the absence of a "hot work" permit. (RP 957). This was contradicted by an email from Richard Stabbert to Trevor Stabbert (owner of MMS) admitting the "no hot work permit" story wasn't going fly (Tr. Ex. 69) and trial testimony from Stuart's own maritime agent and expert, Manuel Reyes Galindo who testified that they didn't need a hot work permit to use the crane to pick up the equipment and set it on the dock at Dos Bocas. (CP 3782-FF 51; RP 1586). Stuart and MMSI's owner Trevor Stabbert affirmatively prevented Evya employees from removing equipment at Dos Bocas. (RP 623; 649-650).

After the ship left the project, Evya and Iecesa tried in vain to find another ship to complete the PEMEX contract. They were unable to do so. (RP 252, 443). The defendant's breach of contract and withdrawal of the ship caused Evya to be unable to complete the PEMEX contract. (CP 3784-FF 61). Evya and Iecesa faced a \$3.5m performance bond penalty from PEMEX for the shutdown and were only able to avoid it by spending six hundred thousand dollars on attorney's fees avoiding that penalty. (CP 3785-FF 62; RP 254). Nevertheless, the default caused a massive drop of in business with PEMEX. (Tr. Ex. 3).

On or about June 26, 2006, after the Global Explorer underwent repairs of the generators, Global executed a new charter at \$41,000 per day. (CP 3787-FF 55).

When the ship sailed away, it took a substantial amount of equipment Iecesa leased from third parties. One of the leasing companies sued Iecesa and obtained a judgment against Iecesa for \$1,016,628.00. (CP 3785-FF 62; RP 394). Iecesa received some of its equipment back, several months later, though it had to pay import costs of \$100,000. (CP 3784-FF 60; RP 395). At the time of the breach, Iecesa was owed payment on its invoices for work done, totaling \$28m pesos, or 2,250,000.00. (RP. 391-392; CP 3786-FF 63).

Global eventually got a pile of equipment back, rusted and dropped off in a shipyard in Mexico, virtually worthless. Defendant's damages expert, Neal Beaton testified that the value of this equipment loss was between \$404,335 and \$1.55m, depending on the method of calculation. (RP 2046-2055. The trial court found that Evya failed to prove its case about the value of the equipment, except as to the steel bracers. (CP 3784-FF 59-60).

At the time of the shutdown, Evya was midway into the contract with an expected profit of \$4,170,067. (CP 3784-FF 61. RP 589). Evya's project manager testified that as of the breach, Evya had realized \$1,170,368 profit. The trial court awarded the difference as lost profit. (CP 3784-FF 61). Evya was sued by contractors and suffered commercial claims of \$292,638.00. (RP 547-573; FF 63).

C. RESPONSE TO APPELLANTS STATEMENT OF ISSUES

1. The trial court correctly found and concluded that Global breached the charter and that EVYA was excused from its obligation to pay charter hire. Global materially breached the charter by a) shutting down the Evya's use of the ship on the pretext that it did not have written dive procedures, when it did and b) on the pretext that Evya did not provide the Zurich insurance policy when it did. In addition, the Charter

contract had a provision allowing Evya to withhold charter hire that is disputed, pending resolution of the dispute. Global breached the contract by pulling the ship out of charter without resolving the hire dispute in this manner. This clause does not allow Global to summarily terminate the charter when the charterer exercises its right to withhold the disputed charter fee.

2. The trial court correctly found and concluded that Evya did not materially breach the charter contract by failing to obtain the Annex B insurance. Evya obtained the insurance through a Zurich Insurance Policy at the outset of the charter, provided a copy of the policy to Global; Global's agent even waived the part of the policy that was otherwise double covered (Legal Liability cover) and Global had the right and obligation under Annex D of the contract to cure any perceived insurance lapses by simply buying the allegedly missing insurance and bill it directly to Evya.

3. The trial court correctly found and concluded that Global was not entitled to breach of contract damages. Evya did not materially breach the contract.

4. The trial court correctly found and concluded that MMSI and Global converted Evya and Iecesa property. Both Global and MMSI

kicked the Evya and Iecesa crew off at Dos Bocas, Mexico. The captain of the ship, an MMSI employee, told port authorities that the ship was keeping the Evya and Iecesa property aboard to subject to Global's claimed lien for unpaid charter hire. They refused to allow the Evya people to take anything with them except their personal belongings. Then when caught out, both MMSI and Global falsely claimed that they were prevented from offloading the property at the dock because a fire permit was required to do the offload, and one was refused by local authorities.

5. The trial court correctly found and concluded MMSI was jointly and severally liable for the tort of conversion because both acted jointly through their agents to keep the equipment and it is no defense to a tort claim, by MMS, to simply say their principal told them to do it.

6. The trial court correctly concluded that the limitation of liability clause in the contract was not enforceable where Global intentionally, materially breached the contract by shutting down the diving and then completely ignored the dispute resolution procedure that was designed to keep consequential damages limited, if not eliminated in the first place. Global can't repudiate the contract in its entirety and then

come back and claim protection of the provisions of a subpart contract that it likes.

7. The trial court found that Global's material breach of contract caused Evya lost profits on the PEMEX contract and other damages based on the evidence presented at trial.

8. The trial court correctly found that Global and MMSI's conversion of Evya and Iecesa property caused Evya and Iecesa damages their principals testified to at trial.

9. The trial court correctly admitted testimony supporting Evya's damages from its employees and accountant and company documents supporting the damage claims.

12. The trial court correctly applied a 12% statutory post judgment interest rate. It is the rate required by statute on all Washington state judgments and it was the rate specified in the contract.

D. Evya's Assignments of Error:

1. The court erred by failing to include the \$371,000 overpayment on invoice 161 as an item of damages, in the Final Judgment. It found at (CP 3790-CL 13) that this was the net amount due, but it was not included in the judgment. The judgment should be

increased by this amount, plus the admitted prejudgment interest rate of 12% from the date it was paid, June 5, 2006.

2. The Trial court erred by failing to include the \$292,638.00 in it found as an item of damages caused by Global's breach, in the final judgment. (CP 3791-FF 63; CL 15).

3. The trial court erred by concluding that punitive damages are not allowed for breach of contract in maritime law. (CP 3791 at p.23:19-22). The trial court found that the defendants' conduct did warrant punitive damages but erroneously concluded that such were not available under the applicable maritime law. The matter should be remanded to the trial court solely for the purpose of determining the amount of punitive damages.

E. Issues Relating to Evya's Assignments of Error.

1. Whether damages for breach of contract are intended to put the aggrieved party in the position it would have been but for the breach, which in this circumstance means awarding both lost profits in addition to other costs that the victim would not have paid but for the breach. Yes.

2. Whether Costs incurred by the victim of a contract breach for commercial claims that would not have been brought against it but

for the breach, is entitled to recover those costs as contract damages.

Yes.

3. Whether the federal maritime law allows a court to award punitive damages for intentional misconduct. Yes.

F. LEGAL ARGUMENT

Standard of Review

1. Findings of fact made by maritime trial courts are subject to the “clearly erroneous” standard of review. *In re White Cloud Charter Boat Co.*, 813 F.2d 1513, 1517 (9th Cir. 1987); *Seattle-First Nat'l Bank v. Bluewater Partnership*, 772 F.2d 565, 568 (9th Cir. 1985); *Alkmeon Naviera S.A. v. M/V Marina L*, 633 F.2d 789, 796 (9th Cir. 1980); *Calvin v. State of Alaska*, 3 P.3d 323 (Alaska 2000). *Symeonides v. Cosmar Compania Naviera, S.A.*, 433 So. 2d 281, 288 (La.App. 1983); See *Adair v. N. P. R. Co.*, 64 Wn.2d 539, 541 (1964) (applying the federal “clearly erroneous” of review on findings in FELA case brought Washington Superior Court).⁷ “We review the factbound findings of the district court sitting without a jury in admiralty jurisdiction under the ‘clearly

⁷ *Zilko v. Golden Alaska Seafoods*, (Unpublished) 123 Wn. App. 1020, 2004 lexis 2205 (Division I 2004) also applied this standard on review of a maritime claim tried to the bench.

erroneous' standard of Fed. R. Civ. P. 52(a)." *Clauson v. Smith*, 823 F.2d 660, 661 (1st Cir. 1987) (citing *McAllister v. United States*, 348 U.S. 19, 20, 99 L. Ed. 20, 75 S. Ct. 6 (1954)). See also Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2587, at 584-85 (2d ed. 1995)

Under clearly erroneous standard, we must affirm an apportionment of liability unless, after a review of all the evidence, we are left with a "definite and firm conviction that a mistake has been committed." *Id.*, (citing *United States v. Standard Oil Co.*, 495 F.2d 911, 916 (9th Cir. 1974) (quoting *McAllister v. United States*, 348 U.S. 19, 20, 75 S. Ct. 6, 7, 99 L. Ed. 20 (1954))).

White Cloud Charter, 817 F.2d at 1517.

"While the federal rule is subject to some uncertainty concerning its ultimate scope, it is clear that it accords the jury a greater freedom in making factual determinations than that allowed under the Washington "substantial evidence" rule."

Adair v. N. P. R. Co., 64 Wn.2d 539, 541 (1964). The clearly erroneous standard of Rule 52(a) applies to documentary evidence as well, in a maritime case. *Alaska Foods, Inc. v. American Mfrs. Mut. Ins. Co.*, 482 P.2d 842, 845-46 (Alaska 1971).

The unchallenged findings of fact are "verities on appeal." *Robel v. Roundup Corp*, 148 Wn.2d 35, 42 (2002).

The trier of fact has discretion to award damages that are within the "range of relevant evidence." *Mason v. Mortgage America, Inc.*, 114

Wn.2d 842, 850 (1990). Mathematical exactness is not required. *Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp.*, 66 Wn.2d 469, 476 (1965).

“The court will not disturb a trial court's damage award unless it is outside the range of substantial evidence, shocks the conscience, or appears to have been arrived at as a result of passion or prejudice.”

Mason at 850.

“We are firmly committed to the rule that the findings of fact of the trial court will not be disturbed on appeal if evidence is present in the record to support the findings. “[T]he constitution does not authorize this court to substitute its findings for that of the trial court.”

Thorndike v. Hesperian Orchards, Inc., 54 Wn.2d 570, 575

(1959). On appeal, the court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, *review denied*, 119 Wn.2d 1011 (1992).

“A jury is free to believe or disbelieve a witness, since credibility determinations are solely for the trier of fact. Credibility determinations cannot be reviewed on appeal.”

State v. Camarillo, 115 Wn.2d 60, 71, (1990); “*Hoglund v.*

Meeks, 139 Wn. App. 854, 879 (Div.I 2007).

2. Breach of Contract.

Notably, Global does not challenge either the Summary Judgment order nor the trial court's findings and conclusions that Global materially breached the contract by shutting down the diving operations based on the false claim that Evya did not have diving procedures on board. (CP 3787-CL 5). Therefore, these facts and conclusions are taken as established verities on appeal. This shutdown breached the contract, and since it prevented Evya from using the ship to do its work on the PEMEX contract, which was the sole purpose of the charter in the first place, it was a material breach. Under the general maritime law, the repudiation by a party to a charter party, even if justified, "excuses the other party from further performance on his side." *The Eliza Lines*, 199 U.S. 119, 129 S.Ct. 8, 50 L.Ed. 115 (1905); *Wallace v Groves*, 72 Wn.App. 759, 772 (1994); *CKP w GRS Construction Co.*, 63 Wn. App. 601,620, 821 P.2d 63; review denied 120 Wn.2d 1010 (1992). A material breach is one which is so overwhelming that it "substantially defeats the purpose of the contract." *Mitchell v. Straith*, 40 Wn.App 405, 410-411 (Div. I 1985). "A material failure by one party gives the other party the right to withhold performance." Rest.2d Contracts §241 cmt.e (1981). "By the general principals of contract, and open cessation of performance, with an intent to do no more, even if justified, excused the other party from

further performance on the other side.” *The Eliza Lines*, 199 US 119, 129 S.Ct.8, 50 L.Ed.115 (1905).

Evya elected to continue in the contract and hold back the charter hire for the days during the shutdown, invoice # 161, as was its right under the law and the contract. Global argues Evya had no legal or contractual right to do this, so its withholding of charter hire materially breached the contract and repudiated the contract, allowing Steuart to pull the ship out entirely, without consequence. Both sides of the argument rely on the same provision of the contract, section 10(e) which is self explanatory.

“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 position is reasonably disputed and the Charters specify such reason.*** Interest will be chargeable at the rate stated in Box 24 on such disputed amounts where resolved in favor of Owners. Should the Owners prove the validity of the disputed portion of the invoice, balance payment shall be resolved by the Owners within 5 banking after the dispute is resolved. Should the Charters claim be valid, a corrected invoice shall be issued by the owners.”

(Tr. Ex. 324, p. 23 line 246-254).

Global ignores in its brief, as it ignored at trial, the fact that section 10(e) allows Evya to withhold *disputed* charter hire, write or wrong, so long as Evya specifies the reason for the dispute and its

reasonable. Evya did this. Once that was done, the contract and the legal duty of “good faith and fair dealing” obligated Global, to work to resolve the dispute and only after the dispute over the withheld amount is resolved, it is to reissue an invoice for the correct amount.

“There is in every contract an implied duty of good faith and fair dealing. This duty obligates the parties to cooperate with each other so that each may obtain the full benefit of performance.”

Badgett v. Security State Bank, 116 Wash.2d 563, 568 807 P.2d 356 (1991); *Metropolitan Park Dist. of Tacoma v. Griffith*, 106 Wash.2d 425, 437, 723 P.2d 1093 (1986); *Lonsdale v. Chesterfield*, 99 Wash.2d 353, 357, 662 P.2d 385 (1983); *Miller v. Othello Packers, Inc.*, 67 Wash.2d 842, 844, 410 P.2d 33 (1966).

Global never did any of this, as it was not Global’s intention to deal with Evya in a manner that allowed it to get the benefit of the contract, Global’s intention was to either a) extort Evya into paying \$15,000 to \$30,000 per day more than the contract or b) pull the ship from Evya and give it to somebody who would.

Evya tried to get them into court to resolve the matter in Mexico, but when Global got wind of it and responded by getting the heck out of town rather than try to resolve the dispute over the invoice, *as the*

contract required. Therefore, regardless of whether Evya was right or wrong about withholding the hire due to the shutdown, Global was obligated to resolve the dispute first. Global was not free to simply pull the ship out of the contract. When it did so, it repudiated the contract and eliminated its right to benefit from any and all liability limitation clauses therein.

Global challenges the trial court on its failure to find and conclude that Evya breached the contract by failing to procure the correct insurance or that that breach was material. This argument has two parts implicitly. The first is whether Evya provided Mr. Steuart a copy of the Zurich policy. There was substantial evidence in the record that it did, that it was provided directly to Mr. Steuart, to the wheelhouse of his ship, to his own insurance broker Nasman and his agent Mario May. Therefore, using this false claim as a retroactive basis for shutting down the diving operations fails at the outset. Steuart can't claim, now, that he shut down the diving because he didn't have a copy of the insurance policy he had.

The second is whether the policy he had satisfies the contract, or constitutes a breach of the contract. If so, then it begs the question of whether the difference in the policies was material, what are the remedies

for that breach, and it would be hard to imagine that immediate shutdown would be one of them, especially in light of the facts that the contract itself provided for a process for filling the coverage gaps (Tr. Ex. 324, Annex D8).

Nevertheless, the court was absolutely correct in finding that that the Zurich policy satisfied the contract, and Global's own Mexican marine insurance expert witness proved it at trial.

The insurance admittedly can be a complicated issue, especially on the issue involving the issuance of a policy out of Mexico City and with the inclusion of Mexican, maritime, Washington law and overlapping coverage's all bundled up therein. Here, however, it was vastly simplified by Global's own Mexican insurance expert, Hector Camacho. Mr. Camacho explained, to the apparent surprise of Global's counsel, that Evya had satisfied all the insurance obligations of Annex B, save some minor differences in the top end of the coverage limits, which were inconsequential in the context of the operation.

Annex B included four subsections, A-E. Subsection A dealt with charter's legal liability coverage. Mr. Camacho explained that sometimes companies will purchase insurance packages which include overlapping, or double coverage, so in order to avoid paying double two

premiums for the same coverage, they buy one policy that covers everything. (RP 1148:7-13). That's what Evya did. Evya's broad Zurich policy included coverage for all the things that are included in a standalone "charter's legal" policy, it just wasn't titled that way. (Tr. Ex. 333).

Mr. Camacho explained that when a maritime charter contract calls for a coverage called "charterer's legal liability" cover, it is the trade and custom in the industry to mean coverage consistent with that specified in the American Institute of Marine Underwriters form SP-43A titled Charterer's Legal Liability (AIHU SP-43A). (Tr. Ex. 122. RP 1134:10-1137:20; RP 1148:2-1149:4). Mr. Camacho explained that SP-43A "charterer's legal" was comprised of three different coverage's: Subsection A- first party property coverage for the ship; Subsection B- liability insurance; Subsection C- legal fees. (RP 1149:5-1152:13; Tr. Ex. 122 paragraph 1), "a-c." Global's expert went on to explain *and agree* that the Zurich policy Evya obtained did indeed included coverage, to Global, for all the coverage's specified in the Charterer's Legal, AIHU SP-43A form.

Q. So, can't we finish up and say that the combination of the Zurich with the SP-23 [Tr. Ex. 121] incorporation did provide the coverage of the charter's legal on the SP 43, 100% on

Coverage C, 7 of 10 Million on Coverage B, and 5 of 10 on Coverage A, right?

A. Yes.

(RP 1153-17-22).

Mr. Camacho explained that, in the context of Mexican operations, Evya's insurance package provided all the other insurance required by Annex B of the charter contract too. (RP 1133-1153).

Taking the annex B subsections in reverse order:

Mr. Camacho agreed that Evya's insurance was in compliance with Annex B, Subsection E, principally because of the coverage scope of the Zurich policy and the Mexican national workers compensation insurance scheme and how it applied to the operation. (RP 1145:20-22). All Evya and Iecesa workers were covered by the Mexican Worker's compensation system, in addition to coverage under the Zurich policy. (RP 376).

Mr. Camacho also agreed that Evya was also in compliance with, Subsections C and D, both of which relate to other ships that Evya might have on the operations. Since Evya did not have other ships or cargo, there was no breach of C or D for the simple reason that it can't buy insurance for ships, cargo or other things that don't exist. (RP 1146:4-1148:1).

Furthermore, even if there were any insurance gaps of consequence, the charter contract Annex D, paragraph required the Owner to pick up the insurance and bill the charterer for it. This requires a little contract interpretation. Washington follows the objective manifestation theory of contracts. *Hearst Communications v. Seattle Times*, 154 Wn.2d 493, 503-504 (2005). That means the court determines the parties intent by focusing on the objective manifestations of the agreement, rather than the unexpressed subjective intent of the parties. *Id.* Absent extrinsic evidence pertain got a specific term, the court must give the words in the contract their ordinary, usual and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent. *Hearst*, 154 Wn.2d at 504. Extrinsic evidence cannot be considered when offered to vary, contradict or modify a written word. Extrinsic evidence cannot be considered when offered to vary, contradict or modify the written word. *Spectrum Glass Co. Inc., v. Public Utility of Snohomish County*, 129 Wn.App 303, 311 (2005).⁸

⁸ Global frequently uses this term “knock for knock” contract, as though it were meaningful to this case. Nowhere in the charter contract is the term “Knock for Knock” ever even used in this charter contract, let alone translated into Spanish in a manner that would suggest there was an objective manifestation of the meeting of the minds with Evya on the topic.

8. Insurance. If Charter does not procure at Charters expense insurance related to the Vessel or this Charter through a Mexican insurer in compliance with PEMEX or Mexican government regulations ***Owner shall procure such insurance.*** Charter shall reimburse Owner any additional cost or expense whatsoever....

Charter Contract Annex D, (Tr. Ex. 324, p. 17).

This clause along with the charter contract was drafted by Global's attorneys. (RP 743-744). Read according to its ordinary language, it sets out a fairly binary set of options: Either a) the *Charterer does not* procure insurances related to the Vessel or the Charter through a Mexican insurer, in which case the *Owner shall* procure such insurance and Charter shall reimburse owner...or b) *Charter does* procure insurances related to the Vessel or the Charter through a Mexican Insurer, in which case nobody needs to do anything. If that's not clear, if there is any ambiguity in the application or interpretation of this clause, it is construed against the drafter, Global. *Wilson Court Ltd. P'ship v. Tony Maroni's*, 134 Wn.2d 692, 705 (1998); *See Naviros Ocianikos v. S.T. Mobil Trade*, 554 F.2d 43, 47 (2d. Cir. 1977) cited in *Bohemia Inc. v. Home Insurance Company*, 725 F.2d 506, 509 n2 (9th Cir. 1984). Global was not free to repudiate the charter or shut down diving operations even if there was a hole in the insurance. In fact, after the issue erupted, Evya promptly asked a local Mexican insurance broker

to step in and help with Mr. Steuart, still believing that Steuart was working in good faith. A fools errand in retrospect. Graciela Alvarez explained to Steuart that the Zurich policy had all the coverage necessary under the charter and she could easily go out and get any additional coverage Mr. Steuart wanted, regardless of whether it was required by the contract. (RP 514-532). Steuart refused. (RP 522:5-10).

Steuart argues on appeal that the trial court erred by essentially disbelieving his phony factual presentation about the insurance issue, and it seems that Global is making essentially the same factual presentation on appeal. For example, Steuart obviously told conflicting stories about things as basic as *whether he had the Zurich policy in the first place*. See above. Then there was the fundamental issue of whether or not there even were any diver injuries – where Steuart and his team simply made it up. For example, Steuart was never on the ship himself, so he testified that he was made aware of all these mysterious divers injuries by looking at the daily vessel log. When he said that, the vessel log was brought up at trial and Steuart was point to where that was. However, the vessel log had absolutely no reference, not a single recorded diving injury in the entire log, his alleged source for this information. (RP 1423; 1922-1925). Even Trevor Stabbert, ship manager and owner of MMS had no

knowledge or evidence of any unsafe diving practices or diving injuries. (RP 949-951, 1288:3-12). Trevor admitted that Steuart *didn't even ask* if there were any divers injuries, before making this claim. (RP 1291:9-17). Then Steuart tried to explain away his false testimony by simply saying he “misspoke.” (RP 1384: 7). Steuart claimed that the divers were all fired and replaced, but that was a lie too. (RP 404). Even Global’s own operation’s safety expert testified at trial that there wasn’t a single, not even one reference in the vessel log to any safety problems or issues, despite the fact that it is mandatory to document such things when they occur aboard a US flagged vessel. (RP 1922-1925).

What really put the lie to this “diver injury” pretext was the fact that, at the very same time in May 2006 when Steuart was supposedly complaining about all this liability exposure because of the nonexistent divers injuries, Steuart was telling his liability insurers, through his attorney Gary Haugen, that the Global Explorer operation had absolutely no injury claims, the operation was extraordinarily safe and he should get a reduction in his insurance premiums as a result. (Tr. Ex. 93; RP 807-810).

“How is it, Mr. Steuart, that your lawyer and your insurance broker are out telling people that there’s no injuries, where, at the very same time, you’re telling us that you were told of all these injuries and this horrible danger that was so significant

that you had to shut down the diving procedure and terminate the contract?”

Mr. Steuart could not explain the contradiction. (RP 810:21-811:4). Which was it, either a) Steuart’s team was lying to their insurance underwriters by falsely telling them that there were no injuries so they could get cheaper insurance, or b) Steuart was lying on the stand about all these divers injuries identified in the vessel log, of which there were none, in order to make up a clumsy yet colorable explanation (which included him lying about not having a copy of the insurance policy) for why he materially breached the contract by shutting down the Evya diving operation. Of course the entire ruse falls apart when it became understood that Steuart had more than \$30m in combined coverage on the ship so there could never, ever have been any kind of immediate concern for uninsured liability exposure- even if there were injuries occurring- which there weren’t.

Apart from that, the only evidence Steuart offered to support his false claim of divers injuries was a) the testimony of his crew while Steuart sat in court, each knowing the consequences if they failed to testify right, and b)(Tr. Ex. 360), a self-serving email from Richard Stabbert (the guy who wrote the May 10 pirate attack email) to Steuart’s lawyer Gary Haugen (the guy who wrote the memo to the insurers saying

there were no injuries), dated **May 10, 2006**. That's five days before Mr. Haugen wrote his letter to the insurers on **May 15, 2006** saying there were no injuries and asking for the premium reduction. (Tr. Ex. 93). Global argues that this proved that there were diving injuries and Stuart's shutdown was not a pretext. The trial court was certainly justified in thinking that all this proved was that the people who work for Stuart will say whatever he wants them to say regardless of the truth or even consistency.⁹

Global argues on appeal that the Mario May insurance clarification and waiver was not viable because, apparently, May had no authority. That argument fails on the facts and the law. The court found that through Mario May the parties agreed the coverage through the Zurich policy along with the Mexican national insurance program, satisfied the contract and executed a waiver to manifest that agreement. (CP-FFCL 5). Global does not challenge the fact that May executed the waiver, nor the fact that May was an authorized agent for Global. Instead, Global appears to deny that May, an admitted agent and officer of Global, did not have the actual or apparent authority to execute the

⁹ Stuart got his premium reduction, by the way. Tr. Ex. 94.

document on behalf of Global, in addition to denying that Global's conduct in receiving the Zurich policy and conducting operations with it in their hands along with the waiver, does not constitute a ratification of that agreement.

Mario May was an admittedly an officer of Global Explorer, LLC. (RP 1369:13-20). Evya reasonably understood him to be the legal representative of Global. (RP 355-356). May was formally appointed by Frank Steuart as an "officer" of Global Explorer, LLC. (Tr. Ex. 79 and RP 1369; Tr. Ex. 126 and RP 1369-1371). (Though Steuart denied this fact at trial while holding the document in his hand at trial- an event that went to his general lack of candor or credibility, from which the court could certainly conclude Steuart was lying when he said he was unaware of the waiver- if that even mattered (RP 1369:7-20). May had actual authority to act on behalf of Global to market the Global Explorer to Evya and PEMEX. (RP. 210-213; 326-238; TR. Ex. 325; RP 1371). May's initials are on the charter contract on every page adjacent to those of Richard Stabbert in the section for "owner's initials." (Tr. Ex. 324). May had the authority to bind Global Explorer under either actual or apparent agency theories. *DLS v. Maybin*, 130 Wn.App 94, 98-99 (Div.I 2005)(An express or implied agency relationship may exist when one

party acts at the instance of and, in some material degree, under the direction and control of another.) *Hewson Constr., Inc. v. Reintree Corp.*, 101 Wn.2d 819, 823, 685 P.2d 1062 (1984). May was authorized and instructed to by Frank Steuart to assist Evya with its acquisition of the insurance for the charter at the time he signed the insurance waiver. (RP 1371:12-19). Mario May even sent the Evya Zurich policy to the ship at the beginning of the charter on October 19, 2005, to be kept on the bridge of the ship through the charter. (Tr. Ex. 333; RP 1376:5-25; Tr. Ex. 84). Frank Steuart was fully aware of these facts as he was kept in the loop by emails. (RP 1374:6-24; Tr. Ex. 86). Mario May also arranged for and received the insurance policy for the Global Explorer, LLC, per the requirements of the contract that obligated Global to provide this to (Evya. Tr. Ex. 315). The certificate of insurance is dated October 3, 2005 and is addressed to “Global Marine Logistics, Mario May Lopez.” That’s the same individual and company designation Mr. May used to execute the waiver. The policy provided direct coverage to Global for \$24m property coverage on the ship, \$20m liability insurance under the SP-23 form (\$5m PI plus \$15m excess). Notably, however, this insurance package fails to include Evya as an “additional insured” as required by the charter. (RP 1422-1427). Global failed to provide Evya

the benefit of this insurance policy, as it was contractually obligated to do. It was Global who breached the charter's insurance provisions, specifically clause B(3). (RP 1426:6-1427:6). Moreover, the presence of this massive insurance policy causes Mr. Steuart's claim of exigency requiring shutdown due to insurance exposure to ring especially hollow, regardless of the Zurich policy.

Finally, Global argues that Global was justified in repudiating the contract because not all of the items in Invoice were properly disputed by Evya under section 10(e). Apparently Global demands 100% compliance with 10(e) from others but feels completely free to ignore 100% 10(e) compliance itself, without consequence. In any event, Invoice 161 billed for the days May 12, 2006 forward (with some small additional expenses), whereas the shutdown began on May 13. There are 2 points here. First, Mr. Steuart repudiated the contract when he declared his intention to terminate diving operations, demanding insurance documents and diving procedures, which were already aboard the ship occurred on May 10, which predates May 12 and thus the repudiation itself excused Evya from the obligation to pay for May 12. Second, to the extent there is some small amount due which predates the May 13 shutdown, in the context of this dispute and the amounts at issue these are minor (as

demonstrated by the fact that Mr. Steuart did not demand their payment separately) and they are subject to setoff by Evya against the damages caused by defendants' material breach.

“..the amount found to be due on a liquidated or determinable claim may be reduced by the amount found to be due on an unliquidated counterclaim or setoff, and that interest will be allowable only on the balance remaining after the reduction has been made.”

Mall Tool v. Far West Equipment, 45 Wn.2d 158, 177 (1954).

That's exactly what the trial court did. It setoff the charter and incidental expenses Evya owed against the damages Global owes Evya. FF 65. Thus, it did not award the entire amount of the invoice 161 which Evya paid under protest, it deducted the \$46,000 setoff from it. CL 13.

3. Conversion.

Conversion occurs when a bailee refuses to return property to its rightful owner except upon satisfaction or some improper condition.

Schwartz v. Atlas Van Lines, 95 Wn. App 202, 215 (Div. 1 1999). W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 100, 100 n. 22 (5th ed.1984); *Charles F. Curry & Co. v. Hedrick*, 378 S.W.2d 522 (Mo.1964) (improper demand for waiver of all claims before release of property); *Boiseau v. Morrissette*, 78 A.2d 777 (D.C.1951) (improper demand for dismissal of pending suit). The burden of proof in bailment

cases where property is lost or damaged while in the bailee's possession, is that a prima facie case, or presumption, is raised when the bailor shows non-return, loss, damage or destruction to bailed property. *Chaloupka v. Cyr*, 63 Wn.2d 463, 466 (1964) (citing numerous cases).

Global argues that the court erred in failing to find, as fact, that Evya refused to take back the equipment that Global and MMS offered.

However, this is Global's argument, and the facts supporting it inadequate and contradictory to say the least. There was overwhelming for the court to conclude that MMS and Global put on a charade a trial about the equipment. Steuart and Trevor Stabbert falsely testified that they were prevented from offloading the Evya equipment by the absence of a "hot work" permit. (RP 957). The lie was betrayed by an email from Richard Stabbert to Trevor, (Tr. Ex. 69) and trial testimony from Steuart's own maritime agent and expert, Manuel Reyes. (RP 1586). Steuart and MMSI's owner Trevor Stabbert affirmatively prevented Evya employees from removing equipment at Dos Bocas. (RP 623; 649-650). They just lied about it at trial. (RP 957).

Global and MMS intended to keep the equipment, and they said so. Evidence supporting this included the fact that the Evya witnesses testified that they were prevented from leaving the ship with their

equipment, a fact Global and MMS denied. Global and MMS claimed that they were prevented from putting off the Evya and Iecesa equipment at the dock at Dos Bocas because they did not have a fire permit. That was false. The evidence showed that they had a crane they could have used to set the containers at dockside if they chose, and their own witness, Mr. Reyes testified that they didn't need a fire permit. That was a hoax that Richard Stabbert saw was not going to work back when he wrote his email acknowledging the fake reason. (Tr. Ex. 69). Further, Global, MMS and the Captain manifested a contrary intent their claim of lien over the equipment. Then came the charade of pretending to go to Veracruz, without any intention of actually going there. (Tr. Ex. 70). They flat out doctored the log books to try to pull this one off. (FFCL 48). The email traffic and timing of the diversion, the two different log books and missing time entry on the smooth log about the Steuart phone call, all make it clear that Mr. Steuart never had any intention of depositing the equipment at Veracruz either, because they never intended to go to Veracruz. The intention was to sail away with it, set it off in Houston and even insure it with, who else but Zurich, while claiming a possessory lien over it. (Tr. Ex. 74; 75). Global even confirmed the "seizure" of the equipment was valid, through legal counsel. (Tr. Ex. 74,

p.2-3). Having their lawyer confirm that their “seizure” of equipment to secure their charter lien is legal and valid, is not the kind of conduct that’s consistent with their claim of an innocent bailee just trying to give the stuff back but who was refused by Evya. The court was perfectly justified in seeing through this.

Next, MMS argues that it is not jointly and severally liable for the tort of conversion, claiming it was only acting under orders. However, as agents for Global, MMS is liable to plaintiffs for their acts of conversion:

If the agent of a corporation, of an individual, commits a tort, the agent is clearly liable for the same; and it matters not what liability may attach to the principal for the tort, the agent must respond to damages if called if called on to do so. This principle is absolutely without exception, is founded upon the soundest legal analogies and the wisest public policy.

Marsh v USJJ Hardware Co., 73 Wash. 543, (1913). See also, *Johnson v Harrigan-Peach Land Development*, 79 Wn.2d 745, 753, 489 P.2d 923 (1971) (agent liable for acts constituting conversion even if acts performed for the benefit of his principal and without profit to himself personally); *Dodson v Economy Equip. Co.* 188 Wash. 340,343, 63 P.2d 708 (1936); *Lasman v Calhoun*, 111 Wash. 467, 470, 191 P. 409 (192); *Messenger v Frey*, 176 Wash. 291, 295, 29 P.2d 1023 (1934).

MMS cites *Dodson* as an *exception* to the general rule. *Dodson* holds just the opposite, however, and supports the conversion liability for MMS under the facts of this case.

Where the officer performs an act or a series of acts which would amount to conversion if he acted for himself alone, he is personally liable, even though the acts were performed for the benefit of his principal and without profit to himself personally. (citing cases).

Dodson, 188 Wn.at 343.

Trevor Stabbert, owner of MMS and his employee the captain were instrumental in refusing to let the crew leave with any equipment whatsoever, including laptops. As the vessel manager, MMS set up and operated the gangway search system, MMS had the ability to instruct its crew to use the crane to set off the equipment at Dos Bocas dock and it refused to do it, going so far as to assist with the phony excuse about how they weren't allowed because they didn't have a fire permit. Then MMS worked up and went along with the fake diversion, fake breakdown and escape from the Mexican federal court that Stabbert and Steuart set up. Stabbert, the captain and crew all performed a series of acts that amounted to conversion. That's precisely what they did and the court was justified in finding it based on the substantial evidence in the record.

4 **Damages.**

Evya's Damage Issues on Appeal:

The Final Judgment should be increased to reflect the \$371,000 and \$292,368 as damages, in addition to the lost profit damages, the court found were caused by Global's breach.

Evya's issues arise out what appear to be logical errors in the transferring the conclusions of law into the final judgment award.

The rule of contract damages is fairly straightforward.

“Contract damages are ordinarily based on the injured party's expectation interest and are intended to give that party the benefit of the bargain by awarding him or her a sum of money that will, to the extent possible, put the injured party in as good a position as that party would have been in had the contract been performed”

Mason v. Mortgage America, Inc., 114 Wn.2d 842, 849 (1990).

Here, the error occurred where the trial court properly found that Evya suffered two specific damages, but then failed to transfer them over to the final judgment. The first, the invoice 161 refund, appears to have no explanation. The second, the commercial claims damage, appears to have been incorrectly subsumed inside the lost profit award.

With respect to the invoice 161 award, the court clearly found it as a proper item of damages. (CP 3790-CL 13). It also found and awarded lost profits of \$2,999,698 for net lost profits on the PEMEX contract. (CP 3791-CL 15). However, it failed to include, in the final judgment amount, the \$371,000 net due to Evya on the refund of invoice

161 for the overpayment. (CL. 13). This should have been included. It is logically separate from, and in addition to, a lost profit award on a contract. Further, no reason was provided for leaving it out (as opposed to the item below), so it stands to reason that it was a logical error.

Additionally, trial court found but did not award the damages specified at CL 15, namely \$2,250,000 for unpaid Iecesa invoices and \$292,368.00 for commercial claims. The court explained that these would have been paid by Evya if Evya had been by PEMEX. It stands to reason that this money would come to Evya out of the gross PEMEX paid, treated as a pass through and therefore not additive to the lost profits loss. While this logic may apply to the Iecesa invoices, it would not apply to the commercial claims, \$292,368.00. But for the breach, Evya would have earned its lost profit and it would not have had to pay the commercial claims. Therefore this should have been added to, not included in, the lost profit award.

5. Consequential Damages.

The Court was also perfectly correct in rejecting the consequential damage limitation where it essentially gutted or negated the contract, under the circumstances where Steuart intentionally refused to follow the dispute protocol in the contract and repudiated it in its

entirety. CL 14. When a Washington court examines a consequential damage limitation clause, it has to be analyzed on a contract by contract basis where the exclusive remedy provision and consequential damage provisions are viewed together. *Fiorito Brothers v. Fruehauf Corp*, 747 F.2d 1309, 1314-1315 (9th Cir. 1984).

“It cannot be maintained that it was the parties’ intention that Defendant be enabled to avoid all consequential liability for breach by first agreeing to an alternative remedy provision designed to avoid consequential harms, and then scuttling that alternative remedy through its recalcitrance in honoring the agreement.

(Id. at 1315).

The charter contract provided on one hand a dispute resolution process that allowed Evya to withhold disputed charter hire where there was a legitimate dispute, then required Global to get a resolution of the dispute before the disputed hire became due, then if Global was correct, Global could invoice the difference and Evya would have to pay, but if Evya was right then the hire would not be due. However, where Global completely ignored the dispute resolution procedure, where its intention was to force a breach and pull the ship off contract and that caused consequential damages massively greater than otherwise would have occurred if Global had followed the contract resolution process, then it’s not reasonable to enforce the limitation. Under those circumstances, it

would as the court ruled, completely negate the contract. Global, knowing Evya was stuck in the PEMEX contract it was obligated to perform, could wait until mid-contract after Evya spent millions mobilizing and paying Global charter, then simply shut down and extort anything they wanted without consequence. That's the effect of what Global wants and that would essentially negate the entire contract.

Global challenges the consequential damage award on the basis of fact, not of law. Specifically, Global concedes "It is true that an exculpatory clause is not enforceable to the extent it shields a party from intentional misconduct." (Brf. 46). Then it challenges the Trial Court's finding of intentional breach, alleging it is not supported by "substantial evidence." This vastly simplifies the argument because the standard is "clearly erroneous" and there is an overwhelming amount of evidence supporting this finding. The evidence is that Steuart was made aware of the fact he was missing out on the Katrina windfall, by being stuck in the Evya Charter. His agent, Stabbert declared his attack on Evya in his pirate email. Steuart made a 2 day demand for material he already had. Then he shut down the diving operation, knowing that Evya would probably withhold charter hire as a result, and then disregarding his obligations under the contract, as he did, he declared the contract in

breach and pulled the ship. He refused to work in good faith to help his contract partner get the benefit of the contract and all the normal accommodations a reasonable person intent on keeping the contract in place would accept, demanding only one thing- more money. Steuart wanted another \$15,000 per day on the contract and he had no intention of completing the contract unless he got it.

Then he took the money Evya offered in the spirit of accommodation, after he hatched his plan to get the heck out of Mexico before the court could act, taking with him all the Evya and Iecesa equipment, lying and having people lie for him about the things like their fake intended destination, the fire permit, etc. Then, surprise, he put the ship right back into a charter with Subsea and got his Katrina windfall, which was his objective all along. Under the substantial evidence test, there is plenty of evidence to show intentional conduct here.

Global's arguments are simply disagreements with the trial court about how it viewed the evidence. Though it probably came as a surprise to someone as wealthy and powerful as Frank Steuart, the Court was not legally obligated to believe everything and anything that came out of his mouth. It was perfectly appropriate for the court to disbelieve Mr. Steuart and Mr. Stabbert, their testimony and the arguments of their

lawyers about Steuart's intent. Captain Deckard was not there to testify and the court was certainly free to disregard what Steuart said Deckard said, in its entirety, especially where it conflicted with the contemporaneous written records of something so precise as a daily vessel log, or Steuart's own attorneys letter to his insurance underwriter. Indeed, the intentional conduct was established by the evidence at trial.

Further, Global's own repudiation of the contract prevents Global from making any for the benefit of a damage limitation in that very same contract. The law regarding repudiation of contract is well settled. Repudiation occurs when a party to a contract states that he will not perform except on conditions which go beyond the terms of the contract. Comment b of Restatement (Second) Contracts §250 provides "[Language that under a fair reading "amount to a statement of intention not to perform except on conditions which go beyond the contract" constitutes a repudiation. Further, "[W]here a party wrongfully states tha the will not perform at all unless the other party consents to a modification of his contract rights, the statement is a repudiation even though the concession that he seeks is a minor one, because the breach that he threatens in order to exact it is a complete refusal of performance." (Rest. 2d comment b). The same rule has been adopted

by courts applying the maritime law of contracts. For example in *Maristella Compania Naviera v. Boyd*, 349 F.Supp 845 (SDNY 1971) the court ruled that the vessel owner breached by repudiation the charter party where it refused to perform the agreement without insertion of additional terms and freight. In *Mitsubishi Shoji Kaish v. Nicolaou*, 38 F.Supp 156 (E.D.La. 1941) the court found that a vessel owner repudiated the charter when it refused to perform the agreement unless the charterer provided an irrevocable guarantee to which the owner was not entitled under the charter party.

The same principal is adopted by the courts of Washington. For example, in *CPK, Inc. v. GRS Construction*, 63 Wn.App 601, 620 (Div.I 1992) the court held that a party repudiated the contract when it threatened to withhold payment on the contract unless the other party signed a contract modification. “Repudiation of a contract by one party may be treated by the other as a breach which will excuse the other’s performance. Whether facts have been established showing repudiation is a question for the finder of fact. An Intent to repudiate may be expressly asserted or circumstantially manifested by conduct.” *CPK v. GRS* at 620. Here, as there is substantial evidence to support a finding of material breach.

Additionally, the language of the limitation clause itself does not support application in this case because it is construed narrowly and the clause does not “clearly and unequivocally” exclude consequential damages for repudiation or intentional breach. Exculpatory clauses are construed narrowly against the drafter. *Markel Am. Ins. Co. v. Dagmar's Marina, LLC*, 139 Wn. App. 469, 475 (Div.I 2007) citing *United States v. Seckinger*, 397 U.S. 203, 216, 90 S. Ct. 880, 25 L. Ed. 2d 224 (1970). In *Dagmar*, Division I relied upon the federal maritime law in concluding that an exculpatory clause was not enforceable to disclaim claims for negligence because it did not “clearly and unequivocally” disclaim such claims. *Dagmar* at 476. The *Dagmar* liability limitation included a much longer laundry list of things that the marina would not be liable for a whole laundry list of damages, but it failed to specifically, clearly and unequivocally exculpate it from its own negligence. (*Id* at 475). The court cited other examples of where the disclaimer was seemingly broad but unenforceable because it did not specifically disclaim the damage at issue. Here, Global seeks protection of the clause disclaiming consequential damages “arising out of or in connection with *the performance or non-performance* of the Charter Party, ..” (Tr. Ex. 324, lines 259-360). It notably *does not* specifically excuse consequential

damages for breach, intentional breach or repudiation of the contract itself, which the court found as a matter of fact. Such a construction would be unreasonable because it would leave the charterer with essentially no remedy whatsoever. (FFCL p.22:18-20). “..It would essentially negate the entire contract by allowing a party to breach the contract with no consequences.” “[C]ontract clauses which result from overreaching will not be enforced.” *Morton v. Zidell Explorations, Inc.*, 695 F.2d 347, 351 (9th Cir. 1982).

Global challenges the court finding as to the amount of damages in several respects, all on the evidence. First, Global challenges the evidence on lost profits, incorrectly suggesting that no documents or evidence was presented. However, the trial court specifically found that “the testimony of the plaintiffs was consistent that their costs were in line with their expectations as was the completion of the contract.” Further, “there was *no admissible evidence to rebut* their testimony, that the contract was started in bad weather months and therefore started slow, also that the upfront costs were much higher than the remaining costs since the equipment had to be purchased at the start of the contract.” (FF 61). The trial testimony presented, which was unchallenged by defendants, was that the vessel was intended to work on the PEMEX

which had a gross value of \$24.1m (RP 205, 580); that project had an expense overhead of \$19.9m (RP 587) thus an expected profit of \$4,170 usd (RP 589); there was a specific project schedule prepared prior to the work, by Evya, detailing the month by month work progress and payment progress (Tr. Ex. 119); and the project was on schedule in May, 2006 when Steuart pulled the ship from project. (RP 437). The court was certainly free to consider this substantial evidence in coming up with its finding on lost profits, which it did by doing its own math and coming up with the number it did.

On appeal, Global does not challenge the fact that the PEMEX project had a gross value of \$24m. That is fixed in the PEMEX contract. Instead, Global's complaint on appeal seems to focus on Evya's calculation of operational overhead costs. Specifically, Global not even challenge the original budget overhead of \$19.9m which was prepared at the outset of the project by Mr. Wood; nor does Global challenge the project schedule he prepared, (Tr. Ex. 119) st the outset of the project. What Global seems to challenge is whether the project was on schedule or not. Evya presented evidence that it was, and as the court noted, Global presented no evidence that it was not, other than cross examination and the court was free to evaluate and weight the quality of

the evidence in cross examination and come to its own conclusion.

Global was also free to present contrary evidence based on the voluminous backup project documents which Evya had provided in discovery to support its testimony and project schedule. (Tr. Ex. 119).

Global had an opportunity to submit evidence through its damage expert, Neal Beaton, to challenge Evya's operational overhead and project costs, but it decided to withdraw that witness from testifying on these items at trial. (RP 2011). Previously, Evya had provided the entire four thousand pages of PEMEX project documents, worksheets, schedules, budgets, etc. in their original Spanish, to Global in discovery. (RP 1965, 1988). Global gave them to their Spanish speaking damages expert team, including Mr. Beaton to evaluate so as to be able to present their case challenge to the operational overhead aspects of the PEMEX project and challenge Evya's damages claim. (RP 1963). This specifically included (Tr. Ex. 119), the project schedule, essentially an ER 1006 Summary, which Evya produced more than a year earlier in discovery along with all the other backup documents. (RP 1993).

Global makes much of its cross examination of Martin Wood and its counsel's clever ability to confuse him on the stand. The import of that was for the trial court to weigh. *State v. Walton*, 64 Wn. App. 410,

415-16, 824 P.2d 533, review denied, 119 Wn.2d 1011 (1992)(witness credibility is for the trial court). Working through the translator is difficult for witnesses, and Global was able to confuse Mr. Wood to the point that he couldn't pick out some specific costs for specific items off the top of his head, on the stand, through a translator and without the aid of the \$4,000+ project documents. Again, the import of that in the overall context of the case was for the trial court to weigh. Global made its arguments on that point and convinced the trial court to reduce the lost profits claim by more than a million dollars. Otherwise, Global's own failure to challenge the project overhead costs with its own witness is not a basis for appeal. There was substantial evidence to support the lost profits award at the number the court found.

With respect to the attorneys' fee component of damages, Global concedes that they are allowed consequential damages under the law. (Brf. at p.59). Evya presented testimony from its CEO Mr. Camargo explaining how it avoided the \$3.5m bond penalty by paying \$600,000 for fees to avoid that. (RP 254). Evya's chief executive testifying under oath about what he paid is sufficient evidence for the court to find that he was telling the truth about it. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, review denied, 119 Wn.2d 1011 (1992)(witness credibility

is for the trial court) It was essentially a judgment by the court about the veracity of the witness, Mr. Camargo and the court obviously found him and his explanation, in sworn testimony, credible and persuasive in the context of the case.

Global's argument that this element of damages has to look like an attorneys fee petition has no support in the law. The cases cited by Global, namely *Fisons*, *Mahler*, etc. are first party fee claims where fees are awarded directly under the contract. This court declined to award Evya its attorney's fees under the contract. Had it ruled otherwise, Evya would have presented a fee bill from its attorneys and the award would have been very substantially increased.

Similarly with respect to the commercial claims award and the Evya company accountant testified through the translator about how Evya was sued in the commercial claims, the reasons for that, the resulting liability and the causal connection between the vessel shutdown and these claims. His sworn testimony, subject to vigorous cross examination was found credible by the court. Again, his testimony was also supported by the admitted fact that all the backup documentation had been produced to Global in discovery; in the original Spanish he refreshed his recollection with that material on the stand. (ER. 612; RP.

554-557; 567-577). Global had an opportunity to use any or all of those documents to cross examine or refute the accountant's sworn testimony. Global just chose not to do so. Global's argument goes to the weight of the evidence, which was evaluated by the trial court when that evidence was presented.

With respect to the invoices damages claim, Iecesa provided sworn testimony from its owner, Mr. Del Rios on the topic and even referred to the precise documents on the stand. (RP 390-395). On all these points Global incorrectly claims that the damage claims were "naked assertions" but that characterization is not borne out in the trial record. Sworn testimony by the owner of the company, specifically referencing the invoices and the work, detailing the structure of the project and explaining to the trier of fact the details of the operation including payment, scheduling and loss, is not a "naked assertion." All these witnesses were testifying from their own personal knowledge, relying on the original documents to refresh their recollections when necessary. (ER. 612; RP. 391, 554-557). All the documents these witnesses used to refresh their recollection on the stand, and many more, were basically the entire project file that had been provided to Global in discovery, that Global had reviewed in detail with its Spanish speaking

expert team headed by Mr. Beaton of Grant Thornton, and all were available for cross examination, at trial, by Global.

And the trial court held Evya to a tough standard of proof overall, concluding for example that it did not carry its burden on the value of the equipment dropped of on the beach at Seba Playa, despite the fact that Mr. Beaton even agreed it should have been valued at \$404,000. (RP. 2033).

6. Prejudgment Interest.

The trial court has the discretion to set the prejudgment rate and 12% is within the courts discretion according to controlling case law. *Paul v. All Alaskan*, 106 Wn. App 406, 459-460 (Division I 2001). Global does not challenge the 12% prejudgment interest. (Brf. at p. 71). However, Global challenges the post judgment interest rate, for the first time on appeal.¹⁰ Global suggests that the Federal Statutory rate applicable to all judgments in federal courts (28 USC 1961) applies to a final judgment in Washington State court, rather than the Washington final judgment rate specified at RCW 4.56.110 and 19.52.020 (12%), or the 12% rate specified in the charter contract. (Tr. Ex. 324, p. 6 paragraph 24 (1% per month)). At the outset, the argument seems

¹⁰ Global did, at one time, claim that the RCW 4.56.110(3b) tort rate should apply.

contrary to the plain language of the federal interest rate statute itself, which prohibits its application beyond the federal district courts.

“(4) This section [28 USC 1961] **shall not** be construed to affect the interest on **any judgment of any court not specified in this section.**”

(28 USC 1961(4)).

The King County Superior court is not a court specified in the section. (RCW 4.56.110), by contrast, requires the Superior Court to apply the state post judgment rate: “ Interest on judgments **shall accrue as follows...**” (RCW 4.56.110). Thus, Global’s argument about post judgment interest is contrary to the plain language of two statutes.

Further, *Paul v. All Alaaskan Seafoods*, 106 Wn.App 406, 427 (Div. I 2001) does not apply the federal statutory rate for post judgment interest, nor does engage in a discussion about whether post judgment interest rates are substantive or procedural. It only dealt with prejudgment rates, and whether the application of prejudgment interest was substantive or procedural. Paul held it was substantive, so the state court was required to award it under the maritime standard (presumed in all cases), rather than the state standard (applied only in cases with liquidated damages).

The two federal court’s apply the federal statutory rate, as they are required to do by the plain language of 28 USC 1961 because they

are “courts specified in the section.” (28 USC 1961). The *Militello* case out of Massachusetts is the only state court in the country which seems to have applied the federal rate on a maritime action in a state court, in 1991 at a time when the federal and state rates were pretty much the same, and seems to be wrongly decided at a time when it didn’t much matter to argue the issue, since the rates were roughly the same. Now, however, there is a significant divergence. The federal post judgment statutory rate is about .02% whereas our state’s post judgment rate is 12%.

7. Punitive Damages.

Federal courts sitting in admiralty have the power, at least in some circumstances, to award common-law punitive damages to supplement statutory remedies. *Atlantic Sounding Co., Inc. v. Townsend*, 129 S. Ct. 2561, 2567, 174 L. Ed. 2d 382 (2009); *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 128 S. Ct. 2605, 2619-21, 171 L. Ed. 2d 570 (2008). At the same time, however, “[t]he prevailing rule in American courts also limits punitive damages to cases . . . of enormity, where a defendant’s conduct is outrageous, owing to gross negligence, willful, wanton, and reckless indifference for the rights of others, or behavior even more deplorable.” (*Baker*, 128 S. Ct. at 2621). The trial court found that the defendant’s intentional conduct was sufficiently egregious,

outrageous and *willful* as to merit an award of punitive damages. It just erroneously concluded that the remedy was not legally available.

Therefore, the case should be remanded with instructions to the trial court to determine the amount of punitive damages which is appropriate within the framework and guidelines of *Exxon Shipping v. Baker*.

CONCLUSION

Based upon the foregoing, EVYA requests that the judgment be affirmed, and it be awarded the damages that were found as a matter of law but left out of the Judgment, and that the case be remanded solely for the purposes of awarding punitive damages

DATED this 12 th day of October 2011.

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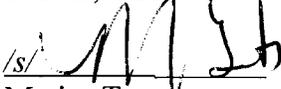
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