

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

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

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

Respondents/Cross-Appellants

v.

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

Appellants/Cross-Respondents

and

FRANK AND JANE DOE STEUART; and
STEUART INVESTMENT COMPANY,

Cross-Respondents.

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

**JOINT BRIEF OF APPELLANTS GLOBAL ENTERPRISES, LLC
AND MARITIME MANAGEMENT SERVICES, INC.**

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION AND SUMMARY.....	1
II. ASSIGNMENTS OF ERROR	6
III. ISSUES PRESENTED	8
IV. STATEMENT OF THE CASE	10
A. Statement Of The Facts	10
B. Summary Of Proceedings Below	20
V. ARGUMENT	23
A. Standard Of Review.....	23
B. The Trial Court’s Judgment Against Global For Breach Of Contract And Against Global And MMSI, Jointly And Severally, For Conversion Must Be Reversed	24
1. Breach Of Contract: EVYA Breached The Charter By Failing To Obtain Required Insurance And, Thus, Was Not Justified In Withholding Payment On Invoice 161	24
a. The Charter Required EVYA To Procure The Annex B Insurances, Which EVYA Failed To Do	25
b. Global Did Not Waive EVYA’s Obligation To Procure The Annex B Insurance Coverages.....	30

TABLE OF CONTENTS – CONTINUED

	<u>Page</u>
2. Breach of Contract: EVYA’s Election To Continue The Contract Required It To Pay The Undisputed Portion Of Invoice 161, Which It Failed To Do	34
3. Breach of Contract: Global Incurred Damages As A Result of EVYA’s Breach of The Charter	37
4. Conversion: EVYA’s Refusal To Take Back Possession Of Its Equipment Precludes A Finding Of Conversion.....	37
5. Conversion: MMSI Is Not Jointly And Severally Liable For Conversion As A Matter Of Law	42
C. The Trial Court’s Damages Awards For Breach of Contract And Conversion Must Be Vacated.....	44
1. Breach of Contract Damages: EVYA Contractually Waived Its Right To Recover Consequential Damages	44
2. Breach of Contract Damages: The Trial Court’s Award Was Not Supported By Substantial Evidence	49
a. EVYA Failed To Prove It Incurred Lost Profits With Reasonable Certainty	49
b. EVYA Failed To Prove That It Incurred Attorneys’ Fees As A Result of Global’s Breach.....	58

TABLE OF CONTENTS - CONTINUED

	<u>Page</u>
c. The Trial Court’s Findings Regarding Other Costs Were Not Supported by Substantial Evidence	61
3. Conversion Damages: The Trial Court’s Award Of Damages Was Not Supported By Substantial Evidence	65
a. EVYA Failed To Prove The Existence And Amount Of The Purported Judgment By SMT	66
b. EVYA Failed To Prove That It Paid Import Fees When Its Equipment Was Returned	69
c. EVYA’s Testimony Regarding The Value Of The Bracers Violated The Best Evidence Rule.....	70
D. The Trial Court’s Post-Judgment Interest Award Violated Federal Maritime Law And Must Be Reduced.....	71
VI. CONCLUSION	72

TABLE OF AUTHORITIES

CASES

	<u>Page</u>
<i>ADC Fairways Corp. v. Johnmark Constr., Inc.</i> , 343 S.E.2d 90 (Va. 1986)	56
<i>ARP Films, Inc. v. Marvel Entertainment Group, Inc.</i> , 952 F.2d 643 (2d Cir. 1991)	35
<i>B. & B. Farms, Inc. v. Matlock's Fruit Farms, Inc.</i> , 73 Wn.2d 146, 437 P.2d 178 (1968).....	50
<i>Bailie Commc'ns, Ltd. v. Trend Bus. Sys.</i> , 53 Wn. App. 77, 765 P.2d 339 (1988).....	29
<i>Barnard v. Compugraphic Corp.</i> , 35 Wn. App. 414, 667 P.2d 117 (1983).....	59
<i>Berg v. Hudesman</i> , 115 Wn.2d 657, 801 P.2d 222 (1990).....	24, 33
<i>Boat Owners Ass'n of U.S. v. Sea Ventures of Cal., Inc.</i> , 2000 WL 33179449 (C.D.Cal. 2000)	29
<i>Browder v. Phinney</i> , 37 Wash. 70, 79 P. 598 (1905)	38
<i>Cannon v. Oregon Moline Plow Co.</i> , 115 Wash. 273, 197 P. 39 (1921)	66
<i>Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc.</i> , 166 Wn.2d 475, 209 P.3d 863 (2009).....	26
<i>Colo. Structures, Inc. v. Ins. Co. of the West</i> , 161 Wn.2d 577, 167 P.3d 1125 (2007).....	35
<i>Dennis v. Southworth</i> , 2 Wn. App. 115, 467 P.2d 330 (1970).....	66

CASES – CONTINUED

	<u>Page</u>
<i>Dodson v. Economy Equip. Co.</i> , 188 Wash. 340, 62 P.2d 708 (1936)	42
<i>Farm Crop Energy, Inc. v. Old Nat'l Bank</i> , 109 Wn.2d 923, 750 P.2d 231 (1988)	57, 58
<i>4 H Const. Corp. v. Superior Boat Works, Inc.</i> , 659 F. Supp. 2d 774 (N.D.Miss. 2009).....	38
<i>Gary v. D. Agustini & Asociados, S.A.</i> , 865 F. Supp. 818 (S.D.Fla. 1994).....	38
<i>Gilmartin v. Stevens Inv. Co.</i> , 43 Wn.2d 289, 261 P.2d 73 (1953).....	54
<i>Golf Landscaping, Inc. v. Century Constr. Co.</i> , 39 Wn. App. 895, 696 P.2d 590 (1984).....	50
<i>Guaranty Nat. Ins. Co. v. Mihalovich</i> , 72 Wn.2d 704, 435 P.2d 648 (1967).....	38, 48
<i>Hegwine v. Longview Fibre Co., Inc.</i> , 132 Wn. App. 546, 132 P.3d 789 (2006).....	23, 24
<i>In re Glacier Bay</i> , 746 F. Supp. 1379 (D. Alaska 1990).....	71
<i>Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC</i> , 139 Wn. App. 743, 162 P.3d 1153 (2007)	59
<i>Jain v. J.P. Morgan Securities, Inc.</i> , 142 Wn. App. 574, 177 P.3d 117 (2008).....	59, 60
<i>Jones v. Best</i> , 134 Wn.2d 232, 950 P.2d 1 (1998)	31, 32, 33
<i>Kruger v. Horton</i> , 106 Wn.2d 738, 725 P.2d 417 (1986).....	37, 38

CASES – CONTINUED

	<u>Page</u>
<i>Larsen v. Walton Plywood Co.</i> , 65 Wn.2d 1, 390 P.2d 677 (1964).....	50, 56, 57, 64
<i>M.A. Mortenson Co., Inc. v. Timberline Software Corp.</i> , 140 Wn.2d 568, 998 P.2d 305 (2000).....	45
<i>Mahler v. Szucs</i> , 135 Wn.2d 398, 957 P.2d 632 (1998).....	59
<i>Markel Am. Ins. Co. v. Dagmar’s Marina, L.L.C.</i> , 139 Wn. App. 469, 161 P.3d 1029 (2007).....	44, 45
<i>Marshall Constr., Ltd. v. Coastal Sheet Metal & Roofing, Inc.</i> , 569 So.2d 845 (Fla. App. 1990)	55
<i>Militello v. Ann & Grace, Inc.</i> , 576 N.E.2d 675, 679 (Mass. 1991).....	71
<i>National School Studios, Inc. v. Superior Sch. Photo Service, Inc.</i> , 40 Wn.2d 263, 242 P.2d 756 (1952).....	54
<i>No Ka Oi Corp. v. Nat’l 60 Minute Tune, Inc.</i> , 71 Wn. App. 844, 863 P.2d 79 (1993).....	56
<i>NW Indep. Forest Mfrs. v. Dep’t of Labor & Indus.</i> , 78 Wn. App. 707, 899 P.2d 6 (1995).....	65
<i>Paul v. All Alaskan Seafoods, Inc.</i> , 106 Wn. App. 406, 24 P.3d 447 (2001).....	71
<i>Pearce v. G. R. Kirk Co.</i> , 92 Wn.2d 869, 602 P.2d 357 (1979)	66
<i>Pier 67, Inc. v. King County</i> , 89 Wn.2d 379, 573 P.2d 2 (1977).....	68
<i>R.C. Craig Ltd. v. Ships of the Sea, Inc.</i> , 401 F. Supp. 1051 (S.D.Ga. 1975)	29

CASES – CONTINUED

	<u>Page</u>
<i>Reefer Queen Co. v. Marine Const. & Design Co.</i> , 73 Wn.2d 774, 440 P.2d 448 (1968).....	66
<i>Royal Ins. Co. of Am. v. S.W. Marine</i> , 194 F.3d 1009 (9th Cir. 1999).....	45, 46
<i>Shaffer v. Walther</i> , 38 Wn.2d 786, 232 P.2d 94 (1951).....	38, 41
<i>Sprague v. Sumitomo Forestry Co., Ltd.</i> , 104 Wn.2d 751, 709 P.2d 1200 (1985).....	46
<i>Starrag v. Maersk, Inc.</i> , 486 F.3d 607 (9th Cir. 2007).....	26
<i>State v. Fricks</i> , 91 Wn.2d 391, 588 P.2d 1328 (1979).....	63, 70
<i>State v. Mahmood</i> , 45 Wn. App. 200, 724 P.2d 1021 (1986).....	63
<i>Steinman v. City of Seattle</i> , 16 Wn. App. 853, 560 P.2d 357 (1977).....	66
<i>Sunnyside Valley Irrigation Dist. v. Dickie</i> , 149 Wn.2d 873, 79 P.3d 369 (2003).....	23, 24
<i>Tinsley v. Sea-Land Corp.</i> , 979 F.2d 1382 (9th Cir. 1992).....	71
<i>Tetra Applied Tech., LP v. Henry's Marine Service</i> , 2007 WL 1239240 (S.D.Tex. 2007).....	29
<i>Torgerson v. One Lincoln Tower, LLC</i> , 166 Wn.2d 510, 210 P.3d 318 (2009).....	45

CASES – CONTINUED

	<u>Page</u>
<i>Wagner v. Wagner</i> , 95 Wn.2d 94, 621 P.2d 1279 (1980).....	31
<i>Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993).....	59
<i>Weathersby v. Conoco Oil Co.</i> , 752 F.2d 953 (5th Cir. 1984)	27

STATUTES, REGULATIONS AND COURT RULES

28 U.S.C. § 1961	71, 72
------------------------	--------

MISCELLANEOUS

Restatement (Second) of Contracts § 241 (1981).....	29
Restatement (Second) of Contracts, § 246 (1981).....	34
Restatement (Second) of Torts, § 233(3) (1965).....	42
5C K. Tegland, Wash. Practice: Evidence Law and Practice § 1000.4 (5th ed. 2007).....	63
14 Williston on Contracts § 39:32 (4th ed. 2000)	34

I. INTRODUCTION AND SUMMARY

This appeal arises from a commercial maritime charter agreement (the “Charter”) between Appellant Global Enterprises, LLC (“Global”), a Washington limited liability company, and Respondents Representaciones y Distribuciones Evya, S.A. de C.V. (“EVYA”) and Instalaciones Electromecanicas, Civiles y Electricas, S.A. de C.V. (“IECESA”), two Mexican companies, referred to collectively as EVYA. After a bench trial, the trial court found that Global breached the parties’ agreement when it terminated EVYA’s charter for cause. The court also found that Global and Appellant Maritime Management Services, Inc. (“MMSI”), the company Global hired to operate its vessel during the charter, converted EVYA’s equipment by purportedly delaying the return of the equipment following termination of the Charter. The judgment against Global and MMSI must be reversed, and the damages award vacated in its entirety.

Breach of Contract. EVYA chartered Global’s vessel, the M/V Global Explorer, in connection with its very first contract to perform underwater pipeline maintenance for the Mexican-owned oil company PEMEX. The Charter was a so-called “knock-for-knock” agreement, in which each party agreed to indemnify the other for all injuries suffered by its own personnel or damage sustained to its own property, regardless of cause. This indemnity obligation was especially critical in the context of

EVYA's charter, which involved the inherently dangerous activity of offshore diving in the Gulf of Mexico—where one accident could expose Global to millions of dollars in liability. To ensure that EVYA could fulfill its obligation to indemnify Global in the event of such an accident, the Charter required EVYA to obtain insurance for Global's benefit.

When Global became aware that EVYA had fired its experienced diving subcontractor and had engaged in unsafe diving practices that risked the safety of its divers, Global immediately asked EVYA to provide proof of insurance. The Charter expressly provided that either party could demand proof of insurance at any time. Further, out of a well-founded concern that it may be exposed to liability for which there was no coverage, Global refused to allow EVYA to continue diving operations until EVYA provided the required proof of insurance. It never did, because EVYA never had the insurance. Over the course of the next three weeks, Global worked in good faith to help EVYA to cure its breach, but to no avail. All the while, and even though EVYA continued to use the vessel as its base of operations, EVYA refused to pay its past-due charter hire, which ultimately forced Global to terminate the Charter.

The trial court found that Global could not terminate the Charter based on EVYA's failure to pay because EVYA had no obligation to pay once Global suspended diving operations. But that finding, upon which

Global's liability was predicated, ignores the fact that it was EVYA's own breach of the Charter that precipitated the suspension. The trial court's conclusion that Global was required to let EVYA continue its dangerous diving operations, subjecting Global to a risk of massive liability, without the insurance that Global bargained for and EVYA promised to obtain, defies the plain terms and purpose of the Charter and commercial reality. The court's alternative finding that Global's purported agent in Mexico waived EVYA's obligation to procure insurance by way of an ambiguous writing in Spanish (that is no more comprehensible in English), which Global knew nothing about, was likewise erroneous as a matter of law.

Conversion. There is no conversion if the plaintiff refuses to take back his or her property from the defendant when given the opportunity. That is exactly what happened here, but again the trial court ignored the law and facts. Once Global terminated the Charter, it took the vessel to Dos Bocas, Mexico and gave EVYA 48 hours to offload its equipment. It was undisputed at trial that EVYA simply refused to remove its equipment from the vessel. Worse yet, EVYA told the vessel's crew that it would prevent Global from removing the equipment itself, which it did; the port authorities repeatedly denied Global's requests for permission to offload. Left with no alternative, Global instructed MMSI to take the vessel to

Houston, where all of EVYA's equipment was professionally inventoried, warehoused, insured, packed and shipped back to EVYA in Mexico.

Even if Global's reasonable response to EVYA's unreasonable conduct somehow amounted to conversion, the trial court's conclusion that MMSI was jointly and severally liable was plainly wrong. MMSI was Global's agent, and simply navigated the vessel where Global instructed it to go. The trial court's finding that it was MMSI's suggestion to leave the port at Dos Bocas and divert the vessel to its final destination in Houston was unsupported by any evidence. The suggestion came from Global's marketing representative in Mexico, *Richard Stabbert*, not MMSI's owner, *Trevor Stabbert*. Neither Richard Stabbert nor his company was an agent of MMSI, and his conduct cannot be imputed to MMSI. MMSI played no role whatsoever in Global's decision to take the vessel to Houston.

Damages. The trial court awarded EVYA nearly \$5 million in lost profits and other consequential damages. The award was not based on substantial evidence, or any credible evidence, and was contrary to Washington law. To begin with, the court refused to enforce the Charter's unambiguous limitation of liability clause, in which EVYA waived its right to recover lost profits and consequential damages. The sole basis for doing so was an unsupported finding that Global *intentionally* breached the Charter so that it could replace EVYA with a higher paying charter.

The evidence was undisputed, however, that Global did not contact any potential charterer until weeks *after* the Charter was terminated. Although Global did find a short-term replacement, it ended up receiving less revenue than it would have, had it completed the Charter with EVYA. The suggestion that Global intentionally shot itself in the foot defies logic.

Beyond that, the trial court simply accepted EVYA's conclusory testimony regarding its purported lost profits and damages. Washington law requires a plaintiff to prove lost profits and consequential damages with reasonable certainty using the best evidence available. EVYA's evidence did not begin to satisfy that common sense standard. Without exaggeration, the court awarded millions of dollars based on nothing more than a single question and answer. There was no expert testimony. There were no exhibits. Amazingly, EVYA did not offer into evidence even a single document or business record to substantiate any item of alleged damage. For example, the court awarded more than \$1 million for a supposed judgment entered against EVYA in a Mexican court without seeing a copy of the judgment. The court awarded \$600,000 in attorneys' fees purportedly incurred by EVYA to mitigate its cancellation of the PEMEX contract without seeing a billing statement or invoice. And so on.

The \$3 million lost profit award was emblematic of the trial court's willingness to overlook EVYA's failure of proof and accept speculative

and self-serving testimony. The award was based entirely on EVYA's pre-bid estimate of the profit it hoped to make on the PEMEX contract. There was no evidence of profit history on similar contracts and, indeed, no evidence of EVYA's profit history on any contract. Moreover, the PEMEX contract was half done when the Charter was terminated, and yet EVYA failed to present any evidence of its actual costs on the PEMEX contract or, critically, how much it would have cost EVYA to complete the contract. Without that evidence, there was no way the trial court could ascertain whether EVYA's pre-bid estimate of profits was realistic. It was EVYA's burden to produce its own corporate records or other evidence to substantiate its lost profits and other damages, and it failed to do so.

II. ASSIGNMENTS OF ERROR

Global and MMSI make the following assignments of error:

1. The trial court erred when it concluded that Global breached the Charter and that EVYA was excused from its obligation to pay charter hire. CP 3778, 3786 (Findings of Fact ("FF"), at FF ¶ 38, 65-66) & CP 3788, 3790 (Conclusions of Law ("CL"), at CL ¶ 5, 12-13).¹

2. The trial court erred when it concluded that EVYA did not materially breach the Charter by failing to procure insurances required by

¹Global and MMSI have elected to comply with the requirements of RAP 10.3(g) and 10.4(c) by including a copy of the findings of fact and conclusions of law and final judgment as an appendix to this brief.

Annex B and/or that Global waived that requirement. CP 3771-3775 (FF ¶ 8(a), 9-10, 12, 17-22, 27-28) & CP 3788, 3790 (CL ¶ 5, 12-13).

3. The trial court erred when it did not award Global damages based on EVYA's breach of the Charter. CP 3795-3798 (final judgment).

4. The trial court erred when it concluded that Global and/or MMSI converted EVYA's property. CP 3780-84 (FF ¶ 47-51, 53, 56-57, 59-60) & CP 3788-90 (CL ¶ 9-11).

5. The trial court erred when it concluded that MMSI, as Global's agent, was independently and/or jointly and severally liable for conversion. CP 3780 (FF ¶ 48) & CP 3789 (CL ¶ 10).

6. The trial court erred when it concluded that the Charter's limitation of liability clause was unenforceable due to Global's intentional breach of the Charter. CP 3773 (FF ¶ 16) & CP 3790-3792 (CL ¶ 14, 20).

7. The trial court erred when it concluded that EVYA had incurred or proven lost profits and other damages as a result of Global's breach of contract. CP 3784-3786 (FF ¶ 61-64) & CP 3791 (CL ¶ 15).

8. The trial court erred when it concluded that EVYA had incurred or proven damages as a result of Global's conversion. CP 3784-3785 (FF ¶ 59-60, 62) & CP 3789-3790 (CL ¶ 11).

9. The trial court erred when it admitted testimony regarding EVYA's purported damages in violation of the "best evidence rule." RP

(10/25/10) at 557-558, 560-566.

10. The trial court erred when it imposed a 12% post-judgment interest rate. CP 3792 (FF ¶ 23) & CP 3795-3798 (final judgment).

III. ISSUES PRESENTED

1. Did EVYA's failure to provide proof of or obtain the insurance required by the parties' "knock-for-knock" Charter constitute a material breach of contract and, if so, did that breach justify Global's continued suspension of EVYA's diving operations and termination of the Charter based on EVYA's failure to pay the charter-hire rate owed?

2. Did Global agree to modify the Charter or waive EVYA's obligation to obtain insurance where Global's apparent agent executed a document without Global's knowledge that (a) was not signed or agreed-upon by all parties to the Charter, (b) was ambiguous in scope and effect, (c) did not address all the insurances required by the Charter, and (d) required EVYA to obtain alternative insurance, which EVYA did not do?

3. Even if Global breached the Charter when it suspended diving operations because of EVYA's failure to obtain insurance, did EVYA elect to continue with the Charter and, therefore, materially breach the Charter when it refused to pay or dispute any portion of Invoice 161?

4. Did Global prove that it incurred damages as a result of EVYA's material breach of the Charter?

5. Did Global willfully convert EVYA's equipment when (a) EVYA actively refused to take back the equipment when the vessel was in port at Dos Bocas, Mexico despite repeated requests and opportunity to do so, and (b) Global promptly inventoried, insured, packed and shipped the equipment back to EVYA after the vessel arrived in Houston?

6. If Global is liable for conversion, is MMSI jointly and severally liable, as Global's agent, when MMSI did not independently or actively participate in any act of conversion, but merely followed Global's instructions to take the vessel from Dos Bocas to Houston?

7. Did the Charter's limitation of liability clause preclude an award of consequential damages when (a) the clause was clear and agreed upon by sophisticated parties in an arm's length agreement, and (b) Global did not intentionally breach the Charter, but rather reluctantly terminated it after weeks of good faith negotiations and accommodations to EVYA?

8. Did EVYA prove lost profits to a reasonable certainty based on lay testimony regarding EVYA's pre-bid estimate of the profit it hoped to make on the PEMEX contract, without (a) any business records or data to substantiate that estimate, (b) evidence of EVYA's actual costs in partially performing the PEMEX contract or the costs it would have had to incur to complete the contract, or (c) evidence of profits by other companies in similar contracts or profit history of its own?

9. Did EVYA prove its other purported damages to a reasonable certainty with the best evidence available where its only evidence of damages was conclusory lay testimony without even a single document to substantiate the existence, cause or amount of the various judgments, claims, costs, fees and other losses EVYA allegedly incurred?

10. Is the federal post-judgment interest rate mandatory where, as here, the parties' Charter states that federal maritime law applies?

IV. STATEMENT OF THE CASE

A. Statement Of The Facts.

The Charter. This case arises out of a maritime charter party agreement between EVYA and IECESA, on the one hand, and Global, on the other. EVYA and IECESA jointly contracted with PEMEX to inspect, repair and maintain platforms and underwater pipelines used to extract oil and gas from the Gulf of Mexico. CP 3770-3771 (FF ¶ 4); RP (10/19/10) at 191-198. It was EVYA's first offshore diving contract (RP (10/21/10) at 355-357), and the parties intended IECESA, which had experience on offshore contracts, to handle day-to-day diving operations. RP (10/21/10) at 379-382. On October 6, 2005, EVYA and IECESA entered into a Master Time Charter (the "Charter") with Global to use Global's 280 foot vessel M/V Global Explorer to carry out the PEMEX contract. Tr. Ex.

324; CP 3770-3771 (FF ¶ 4). Global retained MMSI and its crew to operate the vessel during the term of the Charter. CP 3771 (FF ¶ 7, 8(b)).

The Charter is known as a “knock-for-knock” agreement. In a “knock-for-knock” agreement, each party agrees to assume responsibility, and indemnify the other, for all damage to its own property or injuries to its own employees. RP (11/01/10) at 990-992, 1012; RP (11/15/10) at 1946; Tr. Ex. 324 (Annex C(1)). To ensure each party could indemnify the other in the event of a loss—which can be substantial in the maritime industry (RP (11/01/10) at 992)—Annex B of the Charter required both parties to obtain insurance. Tr. Ex. 324 (Annex B). In particular, Annex B required EVYA to procure five different kinds of insurance for the benefit of Global above and apart from any insurance it was required to procure for the benefit of PEMEX pursuant to EVYA’s separate contract with PEMEX. *Id.* RP (11/01/10) at 1011-1012. Global viewed Annex B as a “backbone” of parties’ relationship, and relied upon it when agreeing to the Charter. RP (11/01/10) at 991-992, 1014-1015.

Unsafe Diving Operations and Suspension of Diving Operations.

Almost immediately after the charter began, Global began to encounter a host of significant problems with EVYA. RP (11/01/10) at 1017; 1020-1021. Among other things, EVYA was routinely delinquent on its charter hire payments; in the first seven months of the charter, Global was forced

to send EVYA ten late payment notices and several termination warning letters—although Global always gave EVYA more time to pay. *Id.* at 1032-1033; 1038-1043; Tr. Ex. 344. EVYA also repeatedly failed to maintain a sufficient amount of fuel on board, which was its responsibility, and that, in turn, reduced the vessel’s operating window during certain sea and wind conditions. *Id.* at 1034-1038.

Most disturbing of all, however, were issues related to diver safety. Around the beginning of May 2006, EVYA replaced the experienced company that IECESA had hired to run diving operations. RP (10/21/10) at 363-364, 403-404. EVYA’s inexperience showed. At trial, members of the vessel’s crew testified that they witnessed various dangerous diving practices—including an instance where a diver jumped off the vessel near its thrusters without a diving helmet, rather than being lowered into the water in a diving bell. RP (11/03/10) at 1454-66; RP (11/04/10) at 1546-49. Global’s diving expert testified that these kinds of incidents violated applicable diving and safety standards. RP (11/15/10) at 1915-1921. Although it was EVYA’s responsibility to report injuries and accidents to the crew so they could be entered in the vessel’s log, EVYA failed to do so. RP (10/27/10) at 949; RP (11/02/10) at 1236-1237.

Global’s concerns came to a head on May 10, 2006. On that day, Global’s manager Frank Steuart received a report from Richard Stabbert,

Global's representative in Mexico, regarding serious safety issues that PEMEX discovered during a recent inspection of EVYA's operations. RP (11/01/10) at 1051-1055; CP 3775 (FF ¶ 30). The items listed included "no current diving procedures on the vessel," "Divers ... have been 'bent'" (referring to the "bends," a serious and potentially fatal diving injury), "EVYA Divers are at risk," "safety rules for Diving have been broken." Tr. Ex. 360. Deeply concerned that Global could be exposed to significant liability for past or future injuries to EVYA's divers, that very same day, Steuart requested EVYA in writing to provide proof that it had procured the Annex B insurances. RP (11/01/10) at 1062-1066; Ex. 361. When EVYA did not immediately respond, Steuart wrote another letter on May 12, again requesting proof of insurance. *Id.* at 1066-1067; Ex. 366.

Global received EVYA's response on May 12, which bluntly stated that EVYA "ignore[d] the basis you have to formulate that request." Tr. Ex. 364; RP (11/01/10) at 1068-1069. The next day, May 13, Steuart talked to the vessel's captain, Captain Deckard (who died before trial), who echoed the concerns stated in Stabbert's May 10 report. The captain said he was extremely concerned because EVYA's new diving company did not have written diving procedures and had been operating in an unsafe manner. He told Steuart that he was suspending EVYA's diving operations, which he did the same day. *Id.* at 1069-1070; Tr. Ex. 382

(May 13, 2006 daily log). Steuart testified, and the vessel's first officer confirmed, that the decision was Captain Deckard's alone. RP (10/26/10) at 748-749; 754; RP (11/01/10) at 1070; RP (11/03/10) at 1453, 1457.²

EVYA Fails To Provide Proof of Insurance. When he learned that Captain Deckard had suspended EVYA's diving operations, Frank Steuart immediately sent a letter to EVYA, also dated May 13, confirming the suspension and notifying EVYA that its failure to provide proof of insurance was a repudiatory breach that would result in termination of the Charter if not cured within three days:

This letter is to provide written notice to [EVYA] that the failure of EVYA to procure insurance as required under Annex B ... constitutes a repudiatory breach of the [Charter]. ...

* * *

... EVYA's desire to conduct dive operations from the vessel without established dive procedures ... is unacceptable. This, combined with EVYA's failure to procure the requisite insurance coverages significantly increases the risk of operations and places Global in an untenable position. Regretfully, this leaves Global no choice but to prohibit dive operations and, if the breach is not cured within three days, terminate the [Charter].

Tr. Ex. 371. Global's Mexican attorney sent a follow-up letter to EVYA on May 15 regarding its obligations under Annex B. Tr. Ex. 378.

² All the parties agreed, and Global's expert confirmed, that under the Charter and maritime law, Captain Deckard had authority to suspend EVYA's diving if he believed it was necessary to ensure the safety of the vessel and personnel on it. Tr. Ex. 324 (PART II, ¶ 6(d)); RP (10/20/10) at 280; RP (11/01/10) at 1006-1008, 1015; RP (11/15/10) at 1918-1919.

EVYA did not respond to Global's May 13 letter within three days. Instead, EVYA's director Javier Camargo asked Steuart for three more days to come up with proof of insurance. In the hopes that the parties could resolve the insurance issue and avoid termination, Steuart agreed. RP (11/01/10) at 1090-1091. In a May 18 letter, Global wrote in part:

Due to the fact that Charterers have breached their obligations under the [Charter], Owners are now entitled to terminate the [Charter]; however, as per Charterer's request Owners grant Charterers an additional 3 day period to produce the requested insurance under the [Charter].

Tr. Ex. 385. During a conference call on May 20, EVYA's insurance broker told Global that she could obtain the Annex B insurances—at least prospectively—within 48 hours. Global offered the assistance of its own insurance broker, but neither Global nor its broker ever heard from her again. RP (11/01/10) at 1159-1163. Global likewise asked its attorney in Mexico to follow up with EVYA on the insurance issue, but that too produced no results. *Id.* at 1163-1164; CP 3774 (FF ¶ 23); Tr. Ex. 390.

In a last ditch effort, Global proposed increasing EVYA's charter rate as an alternative to insurance and to protect Global against potential liability. RP (10/27/10) at 936-937. Under the Charter, when a party fails to procure the required insurance, it is deemed a self-insurer and must pay for, indemnify and hold the other party harmless from all claims that otherwise would have been covered. Tr. Ex. 324 (Annex B(4)). Global's

broker recommended coverage of at least \$2 million and, based on that advice, in a May 22 letter, Global offered to forego termination if EVYA agreed to a charter rate increase of \$15,000 per day. RP (11/01/10) at 1161-1162; Tr. Ex. 388; CP 3774 (FF ¶ 24). Global lowered the offer to \$10,500 the next day. RP (10/21/10) at 348-353; RP (10/27/10) at 940-941. EVYA rejected Global's proposal. CP 3775 (FF ¶ 26). Global wrote again on May 24 warning EVYA that failure to provide proof of insurance would result in termination, but EVYA still did nothing. Tr. Ex. 392. In the end, EVYA never provided proof of insurance and, at trial, conceded that neither it nor IECESA had the Annex B insurances at any point during the charter. RP (10/20/10) at 237; RP (10/21/10) at 408.

Instead, EVYA claimed that one of Global's agents in Mexico, Mario May, waived Global's rights under Annex B in a document dated October 11, 2005. EVYA did not raise the purported "waiver" in response to Global's May 10, 12, 13, 15 or 18 requests for proof of insurance; EVYA first mentioned the purported waiver during the May 20 conference call, and did not send Global a copy of it until May 24. RP (11/01/10) at 1166-1167. The document, which is highly ambiguous even when translated into English, was signed by May on behalf of Richard Stabbert's company and by a representative of EVYA; no one signed it on behalf of IECESA, a co-party to the Charter. Tr. Ex. 325. Global had

never seen the October 11 document before, had not authorized May to modify or waive Global's rights under Annex B, and immediately informed EVYA that the purported waiver had no effect. RP (11/01/10) at 1173-1174; RP (10/26/10) at 760-762; Tr. Ex. 392.

EVYA Refuses To Pay Invoice 161. At the same time Global was insisting that EVYA procure insurance as a condition to resumption of diving operations, Global also insisted that EVYA continue to pay its charter hire. Under the terms of the Charter, in the event of default or termination, EVYA's obligation to pay charter hire continued. Tr. Ex. 324 (PART II, § 10(e) & § 26(b)). Global reminded EVYA of this from the beginning. In its May 13 letter warning EVYA that its failure to procure the Annex B insurances constituted a repudiatory breach, Global also informed EVYA that it "remain[ed] obligated to pay charter hire during the suspension of diving operations." Tr. Ex. 371.

Indeed, EVYA's charter hire payment for the period between May 12 and May 26, 2006 and other expenses in the amount of approximately \$419,000 became due on May 16, 2006. CP 3778 (FF ¶ 40); Tr. Ex. 357. EVYA did not pay. Thus, on May 17, Global notified EVYA in writing—as permitted by the Charter—that if payment of Invoice 161 was not received within five business days, Global would withdraw the vessel from service. Tr. Exs. 383 & 324 (PART II, § 10(e)). EVYA still did not

pay, apparently believing it had no obligation to do so as long as diving operations remained suspended. RP (10/20/10) at 248-249. On May 24, Global made a final demand, and—also as permitted by the Charter—warned EVYA that if payment were not received in three days, it would terminate the Charter. Tr. Ex. 391; Tr. Ex. 324 (PART II, § 26(b)).

Meanwhile, EVYA continued to use the vessel 24 hours a day, 7 days a week. Even though diving off the vessel was suspended, the vessel continued to serve as EVYA’s base of operations, and EVYA directed the crew to ferry its personnel between PEMEX platforms, from which EVYA was able to continue its platform work and some diving operations. RP (10/26/10) at 640-642; RP (11/03/10) at 1454-1458, 1470. At no point, however, did EVYA pay even a portion of Invoice 161 or formally dispute its obligation to pay. RP (11/01/10) at 1179. To the contrary, on May 30 EVYA asked Global for more time to “cure [its] failures.” Tr. Ex. 395. But after nearly three weeks, Global could not excuse EVYA’s breach any longer. On May 30, 2006, Global notified EVYA that it had decided to terminate the Charter. RP (11/01/10) at 1175-77; Tr. Ex. 54.

EVYA Refuses to Offload Its Equipment In Dos Bocas. The next day, Global notified EVYA that the vessel was in transit to the port in Dos Bocas, Mexico and, upon its arrival, EVYA would be required to remove all of its equipment and property from the vessel, as was its obligation

under the Charter. Tr. Ex. 396; Tr. Ex. 324 (PART II, § 2(d)). When the vessel arrived in Dos Bocas on June 3, Global promptly issued a “Notice of Readiness to Unload,” giving EVYA 48 hours to remove its equipment from the vessel, at which time Global would do so at EVYA’s expense. Tr. Ex. 403; RP (11/01/10) at 1179-1182; RP (11/02/10) at 1316-1317. Global offered EVYA the assistance of the vessel’s crew and crane to facilitate the removal of EVYA’s equipment. RP (10/27/10) at 953-957.

EVYA ignored Global’s notices, and specifically ordered its personnel in Dos Bocas not to remove EVYA’s equipment and property from the vessel. RP (10/20/10) at 325-326; RP (10/27/10) at 956, 979; RP (11/03/10) at 1475-1776; RP (11/08/10) at 1789-1792. Indeed, EVYA told the crew it would prevent Global from removing EVYA’s equipment (RP (10/27/10) at 979; RP (11/02/10) at 1258-59), and that is precisely what happened. After the initial 48 hour period expired, Global asked the port authorities for permission to offload EVYA’s equipment, but was refused. RP (10/27/10) at 957-61; RP (11/02/10) at 1259; 1317-1319; RP (11/03/10) at 1475-1476. The vessel’s log reflects both EVYA’s refusal to offload its equipment and the port authorities’ refusal to allow Global to do the same. Tr. Ex. 123 (June 5 and June 6, 2006 entries).

Thwarted by EVYA from offloading EVYA’s equipment in Dos Bocas, Global initially directed the vessel to head for Veracruz, Mexico.

RP (10/27/10) at 966. Shortly after leaving port, Global instructed MMSI to divert to Houston. Global had learned that it would take three or four days to enter the port at Veracruz and, given the mechanical issues the vessel had experienced during the charter, Global decided it was best to take vessel directly to Houston for repairs. *Id.* at 967-968; RP (11/02/10) at 1306-07; RP (11/04/10) at 1550. On its way to Houston, at PEMEX's request, the vessel offloaded certain metal clamps called "bracers" to another ship so that they could be returned to PEMEX. RP (10/27/10) at 966-967; RP (11/02/10) at 1319-1320.

Upon arrival in Houston, Global acted promptly to return all of EVYA's equipment. Global had the equipment warehoused, insured, professionally inventoried, carefully packed and shipped back to EVYA and IECESA in Mexico. RP (11/02/10) at 1301-1303; 1320-23; RP (11/03/10) at 1479-1494; RP (11/04/10) at 1551-1553; CP 3782-3783 (FF ¶ 54, 58). In the three years following the return of EVYA's equipment, up until the filing of EVYA's complaint, EVYA never claimed that Global failed to return its equipment or that the equipment was not returned in good condition. RP (10/02/10) at 1321, 1342-43.

B. Summary of Proceedings Below.

EVYA sued Global and MMSI for, among other things, breach of contract and conversion. CP 7-22; CP 409-424. EVYA also named, as

additional defendants, MMSI's owner Trevor Stabbert, Global's manager Frank Steuart, and Steuart Investment Company. *Id.* EVYA's claims against all the parties except Global and MMSI were dismissed either before or during trial. CP 2111-2114; CP 3319.³ Other than breach of contract and conversion, EVYA's other claims were dismissed on summary judgment (CP 3317-3318), or abandoned at trial.

Before trial, Global moved for partial summary judgment on the grounds that it was entitled to terminate the Charter based on EVYA's failure to pay Invoice 161. CP 39-63. In response, EVYA opposed and cross-moved, arguing that Global breached the Charter when Captain Deckard suspended diving operations on May 13, 2006 and that, as a consequence, EVYA was not obligated to make payments after that date. CP 220-237; CP 238-262. The trial court, Judge Washington at the time, denied Global's motion and granted EVYA's in part. CP 567-571.

The trial court concluded that Global breached the Charter when it suspended EVYA's diving operations, but "reserve[d] the issues relating to charter contract insurance obligations," and struck out that portion of EVYA's proposed order finding EVYA discharged from its obligation to pay charter hire after May 13, 2006. *Id.* In other words, the trial court did

³ EVYA also sued Global Explorer, LLC, the predecessor of Global. CP 3770 (FF ¶ 2). EVYA's claims against Global Explorer were dismissed prior to trial. CP 3318.

not reach the issue of whether EVYA's failure to procure insurance was itself a breach of the Charter that justified Global's suspension of diving operations and/or whether EVYA was excused from paying Invoice 161—which were the issues that the parties ultimately tried to the court.⁴

Later, the trial court, Judge Hayden at the time, denied various other motions for summary judgment (CP 1968-1976), and the case was tried to Judge Middaugh between October 19 and November 18, 2010. After the close of EVYA's evidence, Global and MMSI moved to dismiss on sufficiency grounds and because EVYA failed to prove its alleged damages with reasonable certainty (CP 3259-3279), which the trial court denied. CP 3319. The parties gave closing arguments on November 29, and filed extensive post-trial briefs on a various issues, including the post-judgment interest rate. CP 3647-3660; CP 3671-3679; CP 3698-3707.

The trial court entered its Findings of Fact and Conclusions of Law on March 4, 2011, which it amended on March 25, 2011. CP 3769-3794. An amended final judgment was entered the same day. CP 3795-3798. The court concluded that Global breached the Charter when it suspended diving operations on May 13, 2006, and that EVYA had no obligation to

⁴ In denying discretionary review of Judge Washington's order, this Court's commissioner likewise concluded that the "[t]rial court has not resolved the other asserted basis for Global's suspension of dive operations, specifically EVYA/IECESA's alleged failure to obtain or provide evidence of liability insurance." CP 1652-1653.

pay the charter hire after that date. The court rejected Global's contention that EVYA's failure to procure insurance was a material breach that justified Global's suspension of diving operations. CP 3787-3788. The court also concluded that Global and MMSI were jointly and severally liable for conversion of EVYA's equipment. CP 3788-3790.

The trial court awarded EVYA more than \$5 million in damages and pre-judgment interest for breach of contract, and more than \$1.4 million in damages and pre-judgment interest for conversion. CP 3795-3798. The court rejected EVYA's request for punitive damages and attorneys' fees. CP 3791-3791. In its final judgment, the court set both the pre-and post-judgment interest rate at 12%. CP 3795-3798. Global and MMSI filed separate appeals (CP 3745-3755), which this Court consolidated. EVYA and IECESA have cross-appealed. CP 6634-6640.

V. ARGUMENT

A. Standard Of Review.

This Court reviews findings of fact following a bench trial to determine whether they are supported by substantial evidence and, if so, whether the findings support the conclusions of law. *Hegwine v. Longview Fibre Co., Inc.*, 132 Wn. App. 546, 555, 132 P.3d 789 (2006). Substantial evidence is the quantum of evidence sufficient to persuade a rational, fair-minded person that the premise is true. *Sunnyside Valley*

Irrigation Dist. v. Dickie, 149 Wn.2d 873, 879, 79 P.3d 369 (2003). Conclusions of law, and conclusions of law erroneously labeled as findings of fact, are reviewed *de novo*. *Id.* at 880; *Hegwine*, 132 Wn. App. at 556. Contract interpretation is a question of law that is also reviewed *de novo*. *Berg v. Hudesman*, 115 Wn.2d 657, 668, 801 P.2d 222 (1990).

B. The Trial Court’s Judgment Against Global For Breach Of Contract And Against Global And MMSI, Jointly And Severally, For Conversion Must Be Reversed.

This Court should reverse the trial court’s conclusions of law and judgment (1) for breach of contract (CP 3787-88 (CL ¶ 5-8)), and (2) for conversion (CP 3788-3789 (CL ¶ 9-11)). Further, if the conversion judgment is affirmed as to Global, this Court should still reverse the trial court’s conclusion of law and judgment (3) that MMSI, as Global’s agent, is jointly and severally liable for conversion. CP 3789 (CL ¶ 10).

1. Breach Of Contract: EVYA Breached The Charter By Failing To Obtain Required Insurance And, Thus, Was Not Justified In Withholding Payment On Invoice 161.

The Charter provides that in the event of “default of payment, the Owners may require the Charters to make payment of the amount due within 5 banking days ...; failing which the Owners shall have the right to withdraw the Vessel,” and terminate the Charter for cause. Tr. Ex. 324 (PART II, §§ 10(e) & 26(b)(vii)). There was no dispute at trial that, despite proper written notice and repeated warnings, EVYA failed to pay

Invoice 161 when it became due on May 16, 2006 and that, under the terms of the Charter and absent the trial court's other findings, Global had the right to terminate the parties' contract on May 30, 2006. CP 3778 (FF ¶ 40); Tr. Exs. 54, 383, 391 & 396. The trial court found, however, that Global's suspension of diving operations was a breach of the Charter that excused EVYA's obligation to pay. CP 3787-3788 (CL ¶ 5-6, 8).

That finding, in turn, was premised on the trial court's conclusion that EVYA did not itself materially breach the Charter by failing to obtain the insurances required by Annex B—a breach that would have justified Global's suspension of diving operations. The court concluded (a) that EVYA's failure to provide insurance was not a breach of the Charter and, even if it was a breach, that (b) Global “waived” EVYA's obligation to provide insurance under Annex B. CP 3773-3774 (FF ¶ 18-21); CP 3787, 3790 (CL ¶ 5, 12). Those determinations are not supported by substantial evidence and are erroneous as a matter of law. EVYA breached the Charter when it failed to provide proof of insurance and Global was justified in suspending diving operations. Because EVYA's obligation to pay Invoice 161 was not excused, Global properly terminated the Charter.

a. The Charter Required EVYA To Procure The Annex B Insurances, Which EVYA Failed To Do.

The Charter is governed by U.S. maritime law “where applicable,” but Washington law otherwise controls. Tr. Ex. 324 (Section 1(33)).

Courts interpret and resolve disputes concerning maritime contracts according to federal law. *Starrag v. Maersk, Inc.*, 486 F.3d 607, 616 (9th Cir. 2007). Contract terms must be given their ordinary meaning. *Id.* “A basic principle of contract interpretation in admiralty law is to interpret, to the extent possible, all the terms in a contract without rendering any of them meaningless or superfluous.” *Id.* (citation omitted). Washington law is the same. *Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc.*, 166 Wn.2d 475, 487, 209 P.3d 863 (2009) (“Words in a contract should be given their ordinary meaning,” and “[c]ourts should not adopt a contract interpretation that renders a term ineffective or meaningless”).

EVYA’s Failure To Obtain Insurance Was a Material Breach.

EVYA’s obligation to procure the insurance was a material aspect of the Charter, and the trial court did not find otherwise. Annex B of the Charter required EVYA to “procure and maintain” five types of insurance: (A) legal liability insurance, (B) all risk cargo and cargo legal liability insurance, (C) full form hull and machinery insurance, (D) protection & indemnity insurance and (E) workers compensation and employer liability insurance. Tr. Ex. 324 (Annex B(2)); RP (11/01/10) at 1011-1012; RP (11/15/10) at 1941-1948. The Charter provided that, “[u]pon request, each party shall provide the other with certificates of insurance and/or copies of

policies confirming that the foregoing insurances have been procured and maintained as set forth herein.” Tr. Ex. 324 (Annex B(3))

The insurances required by Annex B were designed to ensure that EVYA could fulfill the risk allocation and indemnity obligations that were a fundamental underpinning of the parties’ “knock-for-knock” Charter. Effectively, each party agreed to assume responsibility for all damage to its own property or injuries to its own employees and subcontractors, regardless of the cause. RP (11/01/10) at 990-992, 1012; RP (11/15/10) at 1946; *Weathersby v. Conoco Oil Co.*, 752 F.2d 953, 957 (5th Cir. 1984) (in “knock-for-knock” agreements, each party must “indemnify the other for claims brought by its employees”). That basic premise was reflected in the mutual indemnity provisions of Annex C, which provided:

... each Signatory shall hold harmless, defend, indemnify and waive all rights of recourse against the other Signatories ... from any and all claims, demands, liabilities or causes of action of every kind and character ... for injury to, illness or death of any employee of or for damage to or loss of property owned by a Signatory ..., which injury, illness, death, damage or loss arises out of the Operations, and regardless of the cause of such injury, illness, death, damage or loss ...

Tr. Ex. 324 (Annex C(1)); *also id.* (PART II, § 12 (b)). The obligation to have insurance gave this “knock-for-knock” indemnity agreement teeth. Global viewed Annex B as a “backbone of the charter,” and it relied upon it. RP (11/01/10) at 991-992, 1014-1015. Indeed, the Charter expressly

states that the parties “shall rely on the insurances identified above to address loss, damage, claim, liability and/or suit relating to this charter and/or performance hereunder.” Tr. Ex. 324 (Annex B(4)).

The trial court properly found that EVYA did not comply with its obligations under Annex B. CP 3771 (FF ¶ 6). When Global learned that EVYA had replaced IECESA’s experienced divers and was not operating safely, Global promptly asked for proof that EVYA did in fact “procure and maintain” the Annex B insurances. RP (11/01/10) at 1062-1071; Tr. Exs. 361 & 366. At first, EVYA told Global that it would “ignore” the request. Tr. Ex. 364. Global insisted, informed EVYA that its refusal was “a repudiatory breach” of the Charter and gave it three days to cure. Tr. Ex. 371. The three days came and went. When EVYA asked for more time, Global agreed to three more days. Tr. Ex. 385. Those three days came and went too, and EVYA still provided nothing. Global ultimately terminated the Charter after three weeks of asking EVYA to comply with Annex B and receiving nothing in return. RP (11/01/10) at 1169-1173. EVYA had nothing to give. EVYA and IECESA conceded that they never procured or maintained the Annex B insurances at any point over the 7 months of the charter. RP (10/20/10) at 237; RP (10/21/10) at 408.

EVYA’s failure to obtain any of the insurances required under Annex B was a material breach because it undermined the risk allocation

central to the parties' knock-for-knock Charter. *Bailie Commc'ns, Ltd. v. Trend Bus. Sys.*, 53 Wn. App. 77, 83, 765 P.2d 339 (1988) (a material breach, among other factors, "deprives the injured party of a benefit he or she reasonably expected") (*quoting* Restatement (Second) of Contracts § 241 (1981)). This is especially so given the significant risk inherent in EVYA's diving operations. Indeed, Global asked EVYA for proof of insurance the same day it received a report that "Divers ... have been 'bent'," "EVYA Divers are at risk," and "safety rules for Diving have been broken." RP (11/01/10) at 1051-1055; Tr. Ex. 360. Courts regularly find material breach for failure to procure insurance in maritime contracts. *R.C. Craig Ltd. v. Ships of the Sea, Inc.*, 401 F. Supp. 1051 (S.D.Ga. 1975); *Tetra Applied Tech., LP v. Henry's Marine Service*, 2007 WL 1239240 (S.D.Tex. 2007); *Boat Owners Ass'n of U.S. v. Sea Ventures of Cal., Inc.*, 2000 WL 33179449 (C.D.Cal. 2000). This Court should too.

Finally, EVYA argued at trial that the insurance policy it obtained under its separate contract with PEMEX (the "Zurich policy"), referenced in Annex D, fulfilled EVYA's Annex B obligations. The trial court made no such finding—for good reason. The Charter required EVYA to provide Global with proof of insurance "[u]pon request." Tr. Ex. 324 (Annex B). But EVYA never mentioned the Zurich policy in response to Global's many requests for proof of insurance prior to termination, or at any time

before this litigation. RP (11/01/10) at 1175-1176. Moreover, although there was some overlap, the Zurich policy did not provide all of the insurances required by Annex B, nor were its policy limits adequate. *Id.* at 1119-1128, 1153-1154; RP (11/15/10) at 1956-1957. In sum, EVYA breached the Charter, and was not justified in refusing to pay Invoice 161 based on Global's suspension of diving operations or otherwise.

b. Global Did Not Waive EVYA's Obligation To Procure The Annex B Insurance Coverages.

The trial court found that, even if EVYA's failure to procure the Annex B insurance breached the Charter, Global had no right to rely on that breach to suspend diving because Global's agent Mario May had waived that requirement in a document dated October 11, 2005. CP 3772-3773 (FF ¶ 10, 12, 18-21); CP 3787 (CL ¶ 5). The evidence is clear that Global did not give May actual authority to waive anything, knew nothing about the purported waiver, and did not see the document until EVYA sent it to Global two weeks *after* Global first requested proof of insurance. RP (10/26/10) at 760-762; RP (11/01/10) at 1166-1167. Global immediately informed EVYA that May had no authority to waive EVYA's insurance obligations. RP (11/01/10) at 1174; Ex. 392. Even assuming May had *apparent* authority to act as Global's agent on insurance issues, the October 11 document did not waive EVYA's obligations for two reasons.

First, a waiver must demonstrate “an intentional and voluntary relinquishment of a known right.” *Jones v. Best*, 134 Wn.2d 232, 241, 950 P.2d 1 (1998). Where, as here, there is no express agreement between the parties, the intent to waive must be unequivocal; waiver will not be inferred from doubtful or ambiguous factors. *Id.* (citing *Wagner v. Wagner*, 95 Wn.2d 94, 621 P.2d 1279 (1980)). As an affirmative defense, EVYA had the burden to prove waiver. *Id.* at 242. EVYA did not satisfy that burden because the October 11 document is ambiguous and its meaning wholly equivocal, especially given the fundamental and material function insurance played in the parties’ “knock-for-knock” Charter.

The document is characterized only as a “work summary” relating to the insurances identified in Annex B. It states (translated) in full:

In exhibit “B” referring to insurances, page 12 of the Supplytime 89, I am clarifying that in regards to the request made by us of an insurance of US \$10,000,000.00 the same is void provided that you have a full coverage insuring Personnel, Tools and Equipment, and the only requirement is to have liability insurance on behalf of EVYA of IEESCSA, and, indirectly, on the vessel, in accordance with the response from Robert Camargo, Esq.

Tr. Ex. 325. This confusing language does not remotely manifest an unequivocal intent to waive all the insurances required by Annex B—as EVYA claimed after the fact. RP (10/20/10) at 237-239. At best, the reference to “insurance of US \$10,000,000.00” referred only to Annex B(2)(A)’s requirement that EVYA procure “legal liability insurance with

minimum limits of USD 10,000,000 per occurrence.” Tr. Ex. 324 (Annex B(2)(A)). If so, the document does not even address EVYA’s obligation to procure the separate insurances identified in Annex B(2)(B) through (E) which, as described above, EVYA admittedly did not obtain.

Even as to Annex B(2)(A), the document says that this requirement is “void” only if EVYA obtained, as an alternative, “full coverage” insurance for personnel, tools and equipment. Tr. Ex. 325. The October 11 document does not say what “full coverage” means, but it must mean at least \$10 million in coverage, if not more. Regardless, the record is clear that, when Global asked for proof of insurance, EVYA never provided Global with evidence that it had “full coverage,” or any insurance at all, for personnel, tools and equipment, and never suggested that the Zurich policy was the alternative contemplated by the document. RP (11/01/10) at 1169-1176; RP (11/02/10) at 1310. Besides, the Zurich policy did not provide “full coverage.” The document is simply too ambiguous to be considered an unequivocal waiver and, even if it was, at a minimum it required EVYA to obtain equivalent coverage, which EVYA did not do.⁵

⁵ Neither signatory to the October 11 document testified, and there was no contemporaneous evidence regarding their intent. Because it was EVYA’s burden to prove waiver (*Best*, 134 Wn.2d at 242), the document’s ambiguity should have been construed against a finding of waiver.

Second, although the court characterized the October 11 document as a “waiver,” it actually purports to be an agreed-upon mutual modification of the Charter. But it fails on these terms as well. “Mutual modification of a contract by subsequent agreement arises out of the intentions of the parties and requires a meeting of the minds.” *Best*, 134 Wn.2d at 240. Here, the parties expressly agreed that Charter “may not be modified *except by a written amendment signed by both parties.*” Tr. Ex. 324 (PART II, § 32) (emphasis added). Even putting aside its patent ambiguity, the October 11 document was not signed by all parties to the Charter and, thus, was not an enforceable agreement as a matter of law. *Berg*, 115 Wn.2d at 668 (contract interpretation is a question of law).

The parties to the Charter were Global, EVYA and IECESA. All three companies signed the Charter separately. Tr. Ex. 324. The October 11 document, however, wrongly identifies the parties as “Global Marine Logistics LLC and Representaciones y Distribuciones Evya, S.A. de CV,” and it was signed by Roberto Camargo Salinas on behalf of “EVYA” and Mario May on behalf of “GML.” Tr. Ex. 325.⁶ May did not sign the document on behalf of Global and, as noted above, no one at Global knew anything about the document. No one from IECESA signed the document

⁶ “GML” is short for Global Marine Logistics, the company owned by Richard Stabbert that served as Global’s marketing representative in Mexico. RP (10/26/10) at 739-741.

either. When asked about the document, IECESA's owner Juan Carlos Del Rio Gonzales testified he had no memory of it and doubted whether its references to "IEECESA" and "IEECSA" referred to his company. RP (10/21/10) at 409-410. In short, the October 11 document does not manifest either Global's or IECESA's signed agreement or mutual assent.

2. Breach of Contract: EVYA's Election To Continue The Contract Required It To Pay The Undisputed Portion Of Invoice 161, Which It Failed To Do.

Even if Global did not have the right to suspend EVYA's diving operations when EVYA failed to procure the Annex B insurances, and/or Global's suspension of diving operations was a breach of the Charter, EVYA could not simply withhold all charter hire payments and continue to use the vessel for free. It is black-letter contract law that:

When one party commits a material breach of contract, the other party has a choice between two inconsistent rights—he or she can either elect to allege a total breach, terminate the contract and bring an action, or, instead, elect to keep the contract in force, declare the default only a partial breach, and recover those damages caused by that partial breach—but the nonbreaching party, by electing to continue receiving benefits pursuant to the agreement, cannot then refuse to perform his or her part of the bargain.

14 Williston on Contracts § 39:32 (4th ed. 2000); *also* Restatement (Second) of Contracts, § 246 (1981) (election to continue a contract, despite knowledge that the other party failed to perform, "operates as a promise to perform in spite of that non-occurrence"). Both federal and

Washington cases follow this principle. *See ARP Films, Inc. v. Marvel Entertainment Group, Inc.*, 952 F.2d 643 (2d Cir. 1991); *Colo. Structures, Inc. v. Ins. Co. of the West*, 161 Wn.2d 577, 167 P.3d 1125 (2007).

If Global's suspension of diving was a breach, it is undisputed that EVYA elected to continue the Charter, and EVYA admitted that election to the trial court. During closing argument, EVYA's counsel stated:

The case starts from the proposition [that] the defendants breach the contract as a matter of law by shutting down the diving operations. [¶] Now, what does that trigger? That triggers the plaintiff with a legal right to choose: Continue, sue for damages, sort out the damages, or terminate the contract and move on. Here the plaintiff chose very clearly to continue, try to continue. They had a legal right to continue, wanted to continue.

RP (11/29/10) at 2095. Although counsel was wrong about Global's breach, he was right about EVYA's election. At no point from May 13 until May 30 did EVYA ever notify Global in writing that it intended to terminate the Charter, as it was required to do if that was its intent. Tr. Ex. 324 (PART II, § 26(b)). On the contrary, while Captain Deckard refused to allow EVYA to dive from the ship, EVYA used the vessel non-stop for those two weeks so that it could continue its work for PEMEX, including directing the vessel to transport EVYA divers to PEMEX platforms from which they were able to continue diving. RP (10/26/10) at 640-642; RP (11/03/10) at 1454-1458, 1470. Because EVYA elected to continue, to the extent Global breached the Charter at all, it was a partial breach and not a

total breach as the trial court erroneously concluded. CP 3788 (CL ¶ 8).

Having elected to continue with the Charter, EVYA could not then “refuse to perform [its] part of the bargain” which included payment of charter hire as it became due. But that is what happened. EVYA refused to pay Invoice 161 despite proper notice that failure to do so would result in termination. Tr. Exs. 383 & 391. Thus, even if Global’s suspension of diving was a breach of the Charter, its later termination of the Charter was not. The Charter’s payment dispute provision requires the same result:

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

Tr. Ex. 324 (PART II, § 10(e)) (emphasis added). EVYA never informed Global it disputed Invoice 161 or invoked this provision. RP (11/01/2010) at 1179. It would not have helped EVYA anyway. Invoice 161 covered the period from May 12 to May 26, plus costs incurred in prior months. Tr. Ex. 357. Diving was suspended late on May 13. Even if EVYA had disputed paying charter hire after that date, a significant portion of Invoice 161 was therefore “undisputed.” CP 3786 (FF ¶ 65). Both by reason of its election, and the terms of the Charter, EVYA was required to pay that amount, and its failure to do so was proper grounds for termination—regardless of how the Court resolves the insurance issue.

In conclusion, EVYA's failure to procure the Annex B insurances exposed Global to an unacceptable risk of liability, and its breach of that core component of the Charter justified Global's suspension of diving operations. Regardless, EVYA's election to continue the Charter required it to pay at least the undisputed portion of the charter hire, which it did not do. EVYA had no basis to withhold payment on Invoice 161, and its refusal to pay even a portion of it entitled Global to terminate. The trial court's conclusion that Global breached the Charter must be reversed.

3. Breach of Contract: Global Incurred Damages As A Result Of EVYA's Breach Of The Charter

Because the trial court erroneously concluded that Global, and not EVYA, breached the Charter, it did not consider nor award damages on Global's breach of contract counterclaim. CP 835-842 (counterclaim). The evidence, however, was undisputed that—as a result of EVYA's breach and Global's early termination of the Charter—Global incurred expenses totaling approximately \$731,046, which EVYA never paid. RP (11/02/10) at 1345, 1349-1360; Tr. Ex. 466. On remand, this Court should direct the trial court to enter judgment in Global's favor in that amount.

4. Conversion: EVYA's Refusal To Take Back Possession Of Its Equipment Precludes A Finding Of Conversion.

A person converts property by willfully interfering, without lawful justification, with the possession of the person entitled to it. *Kruger v.*

Horton, 106 Wn.2d 738, 743, 725 P.2d 417 (1986).⁷ “The refusal of a demand to surrender possession is a customary way of proving conversion, because it establishes a moment at which the bailment or other relationship terminated and a conversion occurred.” *Guaranty Nat. Ins. Co. v. Mihalovich*, 72 Wn.2d 704, 710, 435 P.2d 648 (1967). Where the evidence shows that the defendant tendered the property to the plaintiff, but the plaintiff refused to take it back, there is no conversion. *Shaffer v. Walther*, 38 Wn.2d 786, 791-94, 232 P.2d 94 (1951); *Browder v. Phinney*, 37 Wash. 70, 74-75, 79 P. 598 (1905). There was no conversion here because the evidence proved that Global wanted EVYA to take back its equipment, gave EVYA the opportunity to take back its equipment, and was prevented by EVYA from offloading the equipment itself.⁸

It was EVYA’s responsibility to offload its equipment upon early termination of the charter. Tr. Ex. 324 (PART II, § 2(d) (“Vessel shall be

⁷ To the extent the Charter’s choice-of-law provision might be construed to extend to EVYA’s conversion claim, Washington law would apply because there is no uniform U.S. maritime law applicable to conversion and federal courts sitting in admiralty uniformly apply state law to conversion claims. *See 4 H Const. Corp. v. Superior Boat Works, Inc.*, 659 F. Supp. 2d 774, 780 (N.D.Miss. 2009); *Gary v. D. Agustini & Asociados, S.A.*, 865 F. Supp. 818, 826 (S.D.Fla. 1994).

⁸ Indeed, in denying Global’s motion for summary judgment, Judge Hayden held that he would dismiss EVYA’s conversion claim on this exact basis: “It’s your property, we offered it up to you. If you say, we’re not taking it and we’re going to block you from giving it back, I’m going to say as a matter of law there is no conversion. I don’t care what happens after that. There is no conversion.” CP 3287 (July 23, 2010 Tr.).

redelivered on the ... earlier termination of this Charter ... free of cargo”). After terminating the charter, Global notified EVYA in writing that it had 48 hours to offload its equipment in Dos Bocas or Global would do so at EVYA’s expense, and similar notice was given to EVYA personnel on the vessel. CP 3782 (FF ¶ 52); RP (11/01/10) at 1179-1182; RP (11/02/10) at 1316-1317; RP (11/08/10) at 1787-1793; Tr. Ex. 396 (May 31, 2006 letter re: “Removal of Crew and Equipment”); Tr. Ex. 403 (June 3, 2006 letter re “Notice of Readiness to Unload”). Global, through MMSI, repeatedly offered to provide its crane and crane operator to EVYA, and to help offload the equipment in every way possible. RP (10/27/10) at 953-957.

Once the vessel was in port, however, EVYA refused to offload its equipment. RP (10/27/10) at 956, 979; RP (11/08/10) at 1789. Critically, numerous witnesses testified that EVYA managers instructed EVYA personnel not to offload, and informed the vessel’s crew of that fact. RP (10/27/10) at 979; RP (11/03/10) at 1475-1476; RP (11/08/10) at 1789-1792. The vessel’s log confirms that EVYA “will not permit any of EVYA’s equipment to be removed.” Tr. Ex. 123 (June 5, 2006 entry). No EVYA witness refuted this testimony. On the contrary, EVYA’s director Javier Camargo admitted that he rejected Global’s requests that EVYA remove its equipment and ordered his employees to do nothing. RP (10/20/10) at 325-326. More than that, EVYA’s assistant general manager

Martin Wood told MMSI's crew that he would *prevent* the equipment from being offloaded. RP (10/27/10) at 979; RP (11/02/10) at 1258-1259.

The evidence is equally one-sided that, after the 48 hours expired, Global could not remove EVYA's equipment itself, as it planned if EVYA refused to do so. In Mexican ports, to offload equipment from a vessel, the port authority must give permission. RP (11/09/10) at 1861-1863. Just as Wood threatened, when Global requested permission to offload EVYA's equipment, the port authority refused. RP (10/27/10) at 957-959; RP (11/02/10) at 1259; 1317-1319; RP (11/03/10) at 1475-76. MMSI's Trevor Stabbert spoke with the dockmaster, with EVYA's Wood present, and was denied permission to offload EVYA's equipment. RP (10/27/10) at 959-961. The vessel's log for June 6, 2006 confirms that port officials informed PEMEX that they "would not allow them to offload any equipment." Tr. Ex. 123 (June 6, 2006 entry).

Left with no other option, Global acted promptly to return EVYA's equipment: when the vessel reached Houston, Global had the equipment insured and professionally surveyed, and then carefully packed and shipped it back to EVYA and IECESA in Mexico. RP (11/02/10) at 1301-1303; 1320-23; RP (11/03/10) at 1479-1494; RP (11/04/10) at 1551-1553; Tr. Ex. 446 (survey report); Tr. Ex. 451 (MMSI inventory); CP 3782 (FF ¶ 54) (insurance). The court found that "[t]he documentation provided by

the defendants as to the specifics of the equipment taken, the care taken of the equipment and the specifics of the equipment returned was thorough and professional.” CP 3783 (FF ¶ 58). Indeed, in the 3 years prior to the filing of this lawsuit, EVYA never once complained to Global about its handling or return of the equipment. RP (10/02/10) at 1321, 1342-1343.⁹

Global’s tender of the equipment, and EVYA’s admitted refusal to take it back, negates a finding of conversion. *Shaffer*, 38 Wn.2d at 791-94. The facts are nearly identical to *Shaffer*. There, after being evicted from his place of business, the plaintiff refused to take his inventory and property. The defendant then wrote the plaintiff two letters demanding removal of the inventory, but the plaintiff again refused to act. 38 Wn.2d at 788-90. The Supreme Court reversed the jury’s finding of conversion because, “there was no showing that [defendant] exercised any dominion over these articles of personal property inconsistent with, or in denial of, [plaintiff’s] right of ownership.” *Id.* at 790. The same is true here. Global did not interfere with EVYA’s right to possess its equipment as a matter of

⁹ As discussed below, with the exception of certain metal clamps called “bracers,” the trial court found no credible evidence to suggest that Global did not return all of EVYA’s and IECESA’s property in good condition. CP 3783-84 (FF ¶ 56, 58-60). As to the bracers, the parties disputed whether they belonged to EVYA or PEMEX, but there was no dispute that Global returned the bracers to PEMEX by transferring them to another ship during Global’s return voyage to Houston. RP (10/25/10) at 576; RP (11/02/10) at 1319-1320; Tr. Ex. 123 (June 7, 2006 log entry).

law because EVYA did not want or take the equipment when it had the chance. The finding of conversion must be reversed on this basis alone.

5. Conversion: MMSI Is Not Jointly And Severally Liable For Conversion As A Matter Of Law.

Even if the facts supported a finding that Global converted EVYA's property when it ordered the vessel to depart from Dos Bocas, the trial court's conclusion that MMSI was independently liable must be reversed. CP 3789 (CL ¶ 10). An agent is not liable for his principal's conversion unless the agent knowingly and actively participated in the conversion. *Dodson v. Economy Equip. Co.*, 188 Wash. 340, 343, 62 P.2d 708 (1936); Restatement (Second) of Torts, § 233(3) (1965) ("agent ... who merely delivers a chattel ... is not liable for a conversion ... if the agent ... neither knows nor has reason to know that his principal ... is not authorized so to dispose of it"). There was no evidence whatsoever that MMSI played an "active role" in the decision to depart from Dos Bocas or in any other way willfully interfered with EVYA's right to possession.

MMSI operated the vessel as Global's agent. CP 3771 (FF ¶ 7); RP (10/26/10) at 744-745; RP (10/27/10) at 943-944. To that end, MMSI put the vessel in at Dos Bocas at Global's instructions and made every effort to facilitate the removal of EVYA's equipment while it was there. If leaving Dos Bocas constituted conversion, it was not MMSI's decision. It is undisputed that, after all efforts to offload the vessel failed, Global—

as owner of the vessel and MMSI's principal—instructed MMSI to depart for Veracruz, drop the “bracers” off at the PEMEX platform and, then, to divert to Houston. RP (10/27/10) at 965-973; RP (11/04/10) at 1603-1604; Tr. Ex. 123 (June 6, 2006 daily log). In short, MMSI navigated the vessel, and the equipment on it, where Global instructed it to go.

In concluding that MMSI “went beyond acting as agent and just obeying the reasonable orders of Global,” the trial found—as the sole basis for holding MMSI liable for conversion—that:

... it was MMSI's suggestion that the ship leave the port of Dos Bocos [sic] with the stated intent of going to Vera Cruz, while its actual intent was to reach international waters to avoid legal action and then head to the United States without returning plaintiffs' property.

CP 3789 (CL ¶ 10); *also* CP 3780 (FF ¶ 48) (“This suggestion/plan ... as suggested by MMSI.”). This finding is supported by no evidence in the record and stems from a single email written by Richard Stabbert to Global's Frank Steuart on June 4, 2006. *Id.*; Tr. Ex. 70.

Richard Stabbert owned Global Marine Logistics. RP (10/26/10) at 739-741. Richard Stabbert acted as *Global's* representative in Mexico. *Id.* Richard Stabbert is not the same person as Trevor Stabbert, and Richard Stabbert had no relationship with MMSI. Trevor Stabbert, by contrast, owns and is the president of MMSI, the company that Global hired to operated the M/V Global Explorer. *Id.* at 744-745; RP (10/27/10)

at 943-944. Contrary to the court's finding (CP 3771 (FF ¶ 8(a)), there is no evidence that Richard Stabbert was MMSI's agent or ever acted on MMSI's behalf. Indeed, there is no evidence that MMSI knew anything about Richard Stabbert's June 4 email, much less authorized it. Since neither the June 4 email nor Richard Stabbert's actions can be imputed to MMSI, there is no basis in fact or law to hold MMSI liable for conversion.

C. The Trial Court's Damages Awards For Breach Of Contract And Conversion Must Be Vacated.

Even if this Court upholds the trial court's conclusions on liability, it must vacate the trial court's damages award. Most of the award is precluded by the Charter's limitation of liability clause and, in any event, the evidence was factually and legally insufficient to prove the existence and amount of EVYA's damages. As explained below, the court awarded EVYA millions of dollars in lost profits and other damages based on the scant and conclusory lay testimony of EVYA's self-interested witnesses, unsupported by expert opinion or any documentary corroboration.

1. Breach of Contract Damages: EVYA Contractually Waived Its Right To Recover Consequential Damages.

The trial court erred as a matter of law when it refused to enforce the Charter's limitation of liability clause. CP 3790 (CL ¶ 14). Under maritime law, "exculpatory clauses are enforceable even when they completely absolve parties from liability for negligence." *Markel Am. Ins.*

Co. v. Dagmar's Marina, L.L.C., 139 Wn. App. 469, 474, 161 P.3d 1029 (2007) (quoting *Royal Ins. Co. of Am. v. S.W. Marine*, 194 F.3d 1009 (9th Cir. 1999)). The clause must be enforced “as long as the parties’ intent ... is clear and the clause is not the result of overreaching.” *Id.*¹⁰

The Charter Precludes EVYA’s Consequential Damages. EVYA did not argue, and the trial court did not find, that the limitation of liability clause was ambiguous. Indeed, the parties’ intent was clear:

... in no event shall a Signatory be liable to another Signatory for any consequential damages whatsoever arising out of or in connection with the performance or non-performance of this Agreement, including, but not limited to ... loss of profits ...[.]

Tr. Ex. 324 (Annex C(2)); *also id.* (PART II, § 12(c)). Likewise, the trial court did not find that the clause was the product of unfair surprise or overreaching; the Charter was a ten million dollar contract negotiated at arm’s length by sophisticated parties, and the pages containing the clause were reviewed and initialed by EVYA and IECESA. *Id.* This Court should find the clause valid as a matter of law. *M.A. Mortenson Co., Inc. v. Timberline Software Corp.*, 140 Wn.2d 568, 585, 998 P.2d 305 (2000) (conscionability of limitation of liability clause is a question of law).

¹⁰ Washington law is the same. *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 518-19, 210 P.3d 318 (2009). The key inquiry is whether the parties “in an arm’s-length transaction, negotiated and entered into a contract with no indicia of unfair surprise.” *Id.* at 521.

Nor can there be any dispute that EVYA's purported damages fell within the scope of the clause. The trial court found that Global's breach of contract caused EVYA to (a) lose profits on its separate contract with PEMEX, (b) pay attorneys' fees to mitigate penalties for cancellation of the PEMEX contract, and (c) owe money on commitments it made with third-parties because of the PEMEX contract. CP 3784-86 (FF ¶ 61-63); CP 3791 (CL ¶ 15). These are all classic consequential damages because they stem from EVYA's separate dealings with PEMEX and third-parties, not Global. *Sprague v. Sumitomo Forestry Co., Ltd.*, 104 Wn.2d 751, 761, 709 P.2d 1200 (1985) ("consequential damages do not arise within the scope of the immediate ... transaction, but rather stem from losses incurred by the non-breaching party in its dealings, often with third parties"). In sum, the limitation of liability clause was clear, conscionable and covered all the damages awarded for breach of contract.

There Was No Intentional Breach. The trial court refused to enforce the clause on the grounds it would "excuse intentional and wrongful conduct, such as that done by Global." CP 3790 (CL ¶ 14). It is true that an exculpatory clause is not enforceable to the extent it shields a party from intentional misconduct. *Royal Ins. Co.*, 194 F.3d at 1016. But there was no such misconduct here. The findings that Global refused to "work with plaintiffs ... in good faith" (CP 3788 (CL ¶ 5)) and

intentionally breached the Charter to obtain a higher rate (CP 3792 (CL ¶ 20)) were not supported by substantial evidence. Global's termination of the Charter, if it breached the contract at all, was an effort to protect itself from potentially devastating liability, and was done in accordance with the terms of the Charter after weeks of good faith negotiation.

As explained above, Global requested EVYA to produce proof of insurance out of a well-founded concern that EVYA's operations would expose Global to the kind of liability it had bargained to avoid and EVYA had agreed to assume. Global's Frank Steuart made the request on May 10 and again on May 12, 2006, immediately after he received reports that EVYA removed IECESA as its diving company and was not following safe diving protocols, and before Captain Deckard, on his own initiative, suspended diving operations. RP (11/01/10) at 1051-1055, 1062-1071; Tr. Exs. 360, 361 & 366. In response, EVYA wrote Steuart that it would "ignore the basis you have to formulate that request." Tr. Ex. 364. Despite EVYA's rebuke, Global did not hastily terminate the Charter precipitously or refuse to work with EVYA reasonably and in good faith.

The opposite is true. Instead of terminating the Charter based on EVYA's "repudiatory breach," as was its right, Global gave EVYA three days to procure the insurance. Tr. Ex. 371. When EVYA asked for three more days, Global agreed. Tr. Ex. 385. When EVYA's insurance broker

told Global she could get the insurance within 48 hours, Global offered to have its broker help and “instructed its attorneys to work with EVYA to try and resolve the issue.” CP 3774 (FF ¶ 23); RP (11/01/10) at 1159-1164. Global never heard back. *Id.* at 1162-1163. When EVYA still did not provide the insurance, Global offered EVYA the alternative of a higher charter rate as a way to self-insure for potential liability. CP 3774 (FF ¶ 24); Tr. Ex. 388. All the while, Global reminded EVYA that it was obligated to pay Invoice 161 (Tr. Exs. 371, 383, 391, 392), which EVYA did not do. When Global reluctantly terminated the Charter after weeks of good faith negotiation, it did so based on a reasonable interpretation of its rights and only after affording EVYA multiple chances to cure.

Global did not use its legitimate concerns over EVYA’s lack of insurance as pretext to oust EVYA for a higher paying charter. On the contrary, Global *wanted* EVYA to cure because there was no other charter waiting in the wings, and no guarantee that Global could find one, much less a long-term one like EVYA. RP (11/01/10) at 1023, 1175. There was no evidence that Global contacted anyone regarding charter of the vessel prior to termination. Global did not charter the vessel to International Subsea Inc. (“Subsea”) until June 30, 2006. Tr. Ex. 108. Subsea’s CFO confirmed at trial that Subsea was not contacted by Global until mid-June—weeks *after* Global terminated the Charter. RP (11/01/10) at 1177-

1178; RP (11/08/10) at 1747-1748, 1759. Sure enough, the Subsea charter had a higher rate, but it was short-term and resulted in less income to Global in the end. RP (11/02/10) at 1363-1365; RP (11/08/10) at 1756, 1759.¹¹ Because there was no evidence that Global intentionally breached the Charter, the limitation of liability clause is enforceable.

2. Breach Of Contract Damages: The Trial Court's Award Was Not Supported By Substantial Evidence.

Further, EVYA did not sufficiently prove the existence or amount of its contract damages. As noted, the trial court found that Global's breach caused EVYA to incur (a) \$2,999,698 in lost profits and (b) \$600,000 in attorneys' fees. CP 3784-85 (FF ¶ 61-62); CP 3791 (CL ¶ 15). The court also found that EVYA incurred other costs due to Global's breach, but did not award them as damages because EVYA would have incurred these costs had the contract been completed (*i.e.*, they were subsumed in the lost profits award). *Id.* All of these damages were unsupported by substantial evidence and must be vacated.

a. EVYA Failed To Prove It Incurred Lost Profits With Reasonable Certainty.

EVYA did not call an expert to testify about lost profits. Rather, the only evidence on the issue came from the lay testimony of Martin

¹¹ For this reason too, the trial court's suggestion that Global was "unjustly enriched" (CP 3786 (FF ¶ 64) is demonstrably untrue. Global lost money as a result of the termination of EVYA's charter.

Wood, EVYA's assistant general manager, who prepared EVYA's bid for the PEMEX contract. RP (10/21/10) at 452-53. Wood described his lost profits analysis as a "simple arithmetic operation" of subtracting EVYA's "projected direct costs," which EVYA estimated when the bid was prepared, from the amount awarded by PEMEX on its contract with EVYA. RP (10/25/10) at 584-86, 588-89. The difference yielded a "forecasted" profit, most of which EVYA had not yet realized when the PEMEX contract was canceled. *Id.* at 592-594. According to Wood's simple pre-bid estimate, EVYA would have made \$2,999,698 more in profits had the PEMEX contract been completed. *Id.* at 594. EVYA did not introduce a single exhibit to substantiate Wood's lost profit testimony.

EVYA's Evidence of Lost Profits Was Speculative. Lost profits may be recovered only if proven with "reasonable certainty" using the "best evidence available." *Larsen v. Walton Plywood Co.*, 65 Wn.2d 1, 15, 17, 390 P.2d 677 (1964); *B. & B. Farms, Inc. v. Matlock's Fruit Farms, Inc.*, 73 Wn.2d 146, 151, 437 P.2d 178 (1968) ("the plaintiff must produce the best evidence available and it must be sufficient to afford a reasonable basis for estimating his loss"). Lost profits cannot be awarded where the evidence is speculative or conjectural. *Golf Landscaping, Inc. v. Century Constr. Co.*, 39 Wn. App. 895, 903, 696 P.2d 590 (1984). Wood's speculative testimony regarding EVYA's lost profits was not the

“best evidence available” and was inadequate to show both the fact and amount of EVYA’s lost profits with “reasonable certainty.”

The trial court’s lost profit award was based entirely on Wood’s testimony regarding EVYA’s pre-bid *estimate* of how much profit EVYA *hoped* to make on the PEMEX contract. Because the amount awarded on the PEMEX contract was fixed, that estimate rested entirely on the ultimate accuracy of EVYA’s projected costs. Yet Wood testified about EVYA’s projected costs in generalities without any specificity:

Q. How was that done?

A. Okay. The way you do it is -- so the way we do it is based on the experience of the company and also based on what we get from the operational staff. What they do is they give us the figures and the quantities that are going to be needed as far as supplies, like material, also labor and the equipment that will be required for the job. And that’s how we get to a unit cost. And what we do is we multiply that by the volume of work for each one of the concepts. And we do that process for each one of the accounts. And that’s how we come up with the cost of the project.

RP (10/25/10) at 580-81. No underlying worksheets, subcontract bids, vendor price sheets or other document and data reflecting the actual information or calculations used by EVYA to estimate its costs or bid was offered into evidence. Nor, as discussed below, did EVYA produce any evidence regarding the accuracy of its estimates or profitability on prior contracts. Wood simply threw out two numbers (the bid amount and an

estimated cost amount) without any factual support, took their difference, and asked the court to accept that figure as proof of EVYA's lost profit.

But it gets worse. EVYA was more than half-way done with the PEMEX contract when it was canceled. RP (10/21/10) at 418. It was incumbent on EVYA to show that its pre-bid estimates were accurate and that, given the work left to be done, EVYA would have made the profit it "forecasted." Here too, Wood's testimony was wholly conclusory. Wood testified, without any documentary support, that EVYA had earned \$6,679,620 in revenues, as against only \$5,509,259 in costs, when the PEMEX contract was canceled—suggesting EVYA was on target to make a profit. RP (10/25/10) at 591-592. But, when pressed, Wood admitted that he had no personal knowledge of EVYA's actual costs whatsoever:

Q. All right. So tell me the components of this \$5,509,259. What did [it] consist of? What kind of costs?

A. Materials, labor, tools, and equipment.

* * *

Q. All right. How much of the \$5,509,259 was materials?

A. I can't tell you right now.

Q. You don't know. How much for labor? What was the labor portion of this amount? You don't know?

A. I don't have that right now.

Q. What about equipment? Do you know that one?

A. I don't have that in my - -

RP (10/25/10) at 611-612. Indeed, Wood eventually admitted that the \$5,509,259 figure was wrong.¹² EVYA had spent more than that on the charter hire alone by the time the PEMEX contract was canceled, and that did not even include the seven months worth of expenses it had also paid for divers, fuel, food, materials, labor and equipment. *Id.* at 613-615.

Not only did EVYA fail to prove its actual costs or profitability at the point the PEMEX contract was canceled, EVYA offered no testimony or documents to show how much it would have cost EVYA to complete the PEMEX contract. The evidence was undisputed that EVYA was far behind schedule; when the PEMEX contract was terminated, 55% of the time given to complete the project had lapsed, but only 27% of the work had been done. RP (10/21/10) at 362, 418. The trial court was left to speculate how EVYA could accomplish more work in less time with fewer costs—and still make the exact same profit it estimated seven months earlier before any work had been done. The rule requiring EVYA to prove lost profits to a “reasonable certainty” with the best evidence available—including expert testimony or, at least, contemporaneous records—was designed to eliminate just that kind of speculation.

¹² In an ironic and telling effort to rehabilitate Wood’s testimony during closing argument, EVYA’s counsel argued that Wood “was just wrong” regarding EVYA’s interim profitability, claiming that “Mr. Wood got messed up on the expenses and costs from April and May is where it happened.” RP (11/29/10) at 2121.

Washington courts have rejected lost profits on nearly identical conclusory testimony. In *National School Studios, Inc. v. Superior Sch. Photo Service, Inc.*, 40 Wn.2d 263, 242 P.2d 756 (1952), an employer sued a former employee for violating a covenant not to compete. The employer's only evidence of lost profits was a "bare, oral statement by [its] president that it made ten per cent profit" on the employee's business. The Supreme Court found the testimony insufficient as a matter of law:

It is common knowledge that such a corporation ... must keep detailed books of account from which its net income can be ascertained. It would have been a simple matter to have computed such income with respect to the portion of its business obtained by [the employee]. ... [¶] ... In the absence of reasonably certain proof as to what [the plaintiff's] net profit would have been had it continued to enjoy this business, there is no competent evidence upon which a judgment can be based. The burden was upon [the plaintiff] to furnish such proof and this it failed to do.

Id. at 275-76; also *Gilmartin v. Stevens Inv. Co.*, 43 Wn.2d 289, 294, 261 P.2d 73 (1953) (if "a plaintiff, in attempting to prove loss of profits, fails to produce available records relevant to that question, he fails to meet this standard of reasonable certainty."). Wood testified that he had reviewed EVYA's records. RP (10/25/10) at 591-592.¹³ Like in *National School*,

¹³ Throughout his testimony, Wood repeatedly "refreshed his recollection" by reviewing a "summary" that listed the amounts of lost profits and other figures to which he testified. RP (10/25/10) at 587-588, 591-592. The summary was not introduced into evidence, nor were any underlying documents from which the summary may have been derived.

EVYA did not satisfy its burden to furnish those records to substantiate any aspect of Wood's testimony on EVYA's estimated profits.

Other courts have found similarly unsupported testimony regarding pre-bid estimates insufficient to prove lost profits. For example, in *Marshall Constr., Ltd. v. Coastal Sheet Metal & Roofing, Inc.*, 569 So.2d 845 (Fla. App. 1990), a subcontractor brought a breach of contract action against the contractor, claiming the contractor wrongfully terminated the subcontract before it was completed. *Id.* at 846-847. The Florida appellate court reversed the trial court's award of lost profits, which was based solely on conclusory testimony of the subcontractor's president:

- Jones also testified that the company would have received a profit consisting of 10 percent of the contract price based upon its bid. This evidence standing alone is legally insufficient to support an award of lost profits. Without evidence of [the subcontractor's] expenditures up to the time it left the job, and an amount for reasonably expected expenditures had the job been completed, there is no way for a prudent impartial person to determine whether [the subcontractor] would have earned any profit. ...

Id. at 847-48 (citations omitted). Similarly, EVYA presented no evidence of its costs up to the time the PEMEX contract was canceled, and no evidence of the amount it would cost to complete the contract. There was no way the trial court could determine whether EVYA would have earned any profit at all, let alone one that exactly equaled EVYA's exorbitant

estimate.¹⁴ Indeed, given that EVYA was far behind schedule, Wood's pre-bid estimate was not only speculative, it was highly doubtful.

EVYA's Evidence Violated The New Business Rule. For similar reasons, the lost profit award failed to satisfy the "new business rule." The usual method of proving lost profits is profit history, but where "a plaintiff is conducting a new business with labor, manufacturing and marketing costs unknown, prospective profits cannot be awarded. This is the so-called new business rule and has long been the law of Washington." *Larsen*, 65 Wn.2d at 16. An exception exists "if a reasonable estimation of damages can be made based on an analysis of the profits of identical or similar businesses operating under substantially the same market conditions." *No Ka Oi Corp. v. Nat'l 60 Minute Tune, Inc.*, 71 Wn. App. 844, 849, 863 P.2d 79 (1993). That analysis is usually provided by an expert, but, regardless, must be "supported by tangible evidence with a 'substantial and sufficient factual basis' rather than by mere 'speculation and hypothetical situations.'" *Id.* (quoting *Larsen*, 65 Wn.2d at 19).

¹⁴ See *ADC Fairways Corp. v. Johnmark Constr., Inc.*, 343 S.E.2d 90 (Va. 1986), where the only evidence of lost profits was the contractor's own testimony that he projected a profit of "[a]pproximately 15 percent." The testimony was based on "estimated expenses," with "no documents or records" to show the contractor's actual expenses. *Id.* at 92-93. The Virginia Supreme Court vacated the award: "The figure was nothing more than the profit [the contractor] hoped to make at the time of the bid. There was no evidence to establish that this is the profit that would have been made had [the contractor] completed the project." *Id.* at 93.

Prior to the PEMEX contract, EVYA had never had an offshore pipeline maintenance contract. RP (10/21/10) at 356-357. Thus, EVYA had to bring forward “tangible evidence” with a “substantial and sufficient factual basis” to show how much profits other businesses had made on similar contracts. *Larsen*, 65 Wn.2d at 19. There was no such evidence and, indeed, there was no evidence of EVYA’s profit history on any contract. EVYA’s director, Javier Camargo, testified about the *revenues* EVYA received from onshore PEMEX contracts over the years, but did not testify whether EVYA had made a *profit* on any of these contracts. RP (10/20/10) at 256-57 (“It’s the amount of contracts we won every year.”). Thus, the trial court’s finding that Wood’s testimony regarding estimated profits “was in line with profits [EVYA] made the prior year and in subsequent years” (CP 3785 (FF ¶ 61)) was wholly unsupported and, given the novelty of EVYA’s offshore operations, ultimately irrelevant.

The Supreme Court’s decision in *Farm Crop Energy, Inc. v. Old Nat’l Bank*, 109 Wn.2d 923, 931, 750 P.2d 231 (1988), is instructive. There, the defendant’s breach of a loan agreement prevented the plaintiff from building a new ethanol plant. The plaintiff had no profit history. The plaintiff’s expert “testified in generalities, without dollar amounts or percentages, as to construction and operation costs” and made assumptions without any factual basis. *Id.* at 928-29. His analysis was based entirely

on a pro forma projection; he could not identify a single comparable plant that produced the output he predicted for the plaintiff's nonexistent plant, nor did he know the profit margins for any operating plant. *Id.* at 929-30.

The Supreme Court reversed the jury's award of lost profits, holding that it was not supported by substantial evidence:

To summarize, the opinion as to anticipated profits came from a former bank employee who had no technical knowledge of ethanol plants. ... He knew nothing of their profitability. The only plant with which he was associated had never produced that level. In fact, it was shut down after being plagued with numerous production problems, all of which he assumed would be solved in the plaintiff's unbuilt plant. He never calculated profits based upon production less than his *assumed* 1 million gallons. He candidly admitted that his pro-forma estimate of future profits was "an *uneducated* judgment."

Id. at 931. The evidence of lost profits is even more scant here than it was in *Farm Crop*. There was no expert, and EVYA offered no testimony or exhibits showing the typical profits on a PEMEX contract, much less an commercial diving contract similar to the contract at issue. EVYA's bare testimony regarding its own pre-bid estimate is not the tangible evidence with a "substantial and sufficient factual basis" demanded by the new business rule. The lost profits award must be vacated for this reason too.

b. EVYA Failed To Prove That It Incurred Attorneys' Fees As A Result Of Global's Breach.

The trial court's award of \$600,000 in attorneys' fees is equally unsupported by substantial evidence and fails the substantive threshold of

proof for damages of this sort. Although attorneys' fees can be awarded as consequential damages, *Jain v. J.P. Morgan Securities, Inc.*, 142 Wn. App. 574, 587, 177 P.3d 117 (2008); *Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 760, 162 P.3d 1153 (2007), the circumstances allowing for such an award are limited and EVYA failed to show any right to recover them here. Even if a right to recover attorneys' fees existed, like any element of consequential damages, evidence is sufficient only "if it is the best evidence available and affords a reasonable basis for estimating the loss." *Barnard v. Compugraphic Corp.*, 35 Wn. App. 414, 418, 667 P.2d 117 (1983). Further, where the consequential damages are attorneys' fees, "[t]he party seeking recovery ... bears the burden of presenting evidence as to the reasonableness of the amount of fees claimed." *Jacob's Meadow*, 139 Wn. App. at 761.

The test for reasonableness is the same as that used by Washington courts when awarding attorneys' fees as an element of costs. *Id.* (citations omitted). Under that well-settled standard, the party seeking fees must provide "reasonable documentation of work performed," *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 335, 858 P.2d 1054 (1993), including "contemporaneous records documenting the hours worked." *Mahler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632 (1998). Moreover, proof of causation is a "critical inquiry" to ensure that

the attorneys' fees sought were incurred exclusively due to the defendant's breach of contract, and not other factors. *Jain*, 142 Wn. App. at 587 (citation omitted). None of these standards were met here.

The only evidence that EVYA purportedly incurred \$600,000 in attorneys' fees to extricate itself from the PEMEX contract came from EVYA's Camargo, whose entire testimony on the issue was:

A. ... So now, I explained all this to the attorneys, and they went and litigated before PEMEX -- well, this is more or less the way they told it to me: That no one's required to do the impossible. And then, so all of the things that were to be managed, the items within the contract, which is called an act of God or in superior courts -- and that's where it -- they were able to get us an early termination.

Q. Okay. By getting that early termination, were you able avoid the bond penalty from PEMEX?

A. Yes.

* * *

Q. Okay. How much did it cost Evya to avoid this bond penalty, in attorneys' fees and costs and other matters, for that process you just described?

A. Six hundred thousand dollars --

Q. Okay.

A. -- give or take.

RP (10/20/10) at 253-254. EVYA did not provide or produce a single statement, billing record, invoice or other document to show that EVYA had incurred the purported attorneys' fees, for how much or whether they

were related to Global's termination of the Charter. Indeed, evidence of causation was critical because, even before termination, PEMEX had penalized EVYA for its work on the PEMEX contract. RP (10/21/10) at 365-366, 437-438. Camargo's vague testimony that EVYA incurred "give or take" \$600,000 in fees is not the best evidence available, is inadequate to show the reasonableness of the fees, and fails to prove the existence, cause and amount of the purported fees by substantial evidence.

c. The Trial Court's Findings Regarding Other Costs Were Not Supported By Substantial Evidence.

The trial court found that Global's breach left EVYA unable to pay expenses in the amount of (1) \$292,638 for pending commercial claims, and (2) \$2,250,000 for unpaid invoices owed to IECESA, but concluded these expenses were subsumed in EVYA's lost profits award. CP 3791 (CL ¶ 15). Reversal of the erroneous lost profits award, however, will not resurrect these other damages because they are equally unsupported by substantial evidence and are otherwise impermissible as a matter of law.

Commercial Claims. EVYA's CPA Carlos Bastarrachea testified about various alleged commercial claims submitted by vendors to recover amounts EVYA owed them, but could not pay, because the PEMEX contract had been canceled. RP (10/25/10) at 553-572. Bastarrachea conceded that his knowledge of the basis and amount of these purported claims was derived wholly from corporate documents he had seen:

Q. Okay. Would you describe for the Court how you know about all these claims. You're the company accountant. How do you know these claims were made? How do you know the value?

A. Accounting is based on documents that we get in our departments. What I'm saying today is, ***based on the document that I had in my hands that guarantee what I'm saying***, both as far as the labor aspect and the commercial claims.

Id. at 553-554 (emphasis added). When the trial court specifically asked how Bastarrachea could testify that the claims were company losses, EVYA's counsel reported that if EVYA got sued, Bastarrachea "got a copy of a lawsuit and there is a demand in there ..., it goes into the company books and he knows about it." *Id.* at 559-60. EVYA did not, however, offer into evidence a copy of any such purported claim, or the financial statements or "books of the company" that provided the sole basis for Bastarrachea's knowledge and testimony regarding the claims.

Global objected to Bastarrachea's testimony on best evidence rule grounds, which the trial court overruled. RP (10/25/10) at 557-558, 560-566.¹⁵ Under the rule, to prove the content of a writing, the original or duplicate is required unless it cannot be obtained. ER 1002-1004. If a

¹⁵ The trial court overruled Global's objection because Global could not verify immediately whether it had asked for the relevant EVYA writings in discovery. RP (10/25/10) at 566 ("If you didn't ask for it, I don't think they're required to produce it."). This was error. The best evidence rule is not a discovery rule, but a rule of evidence that required EVYA to produce at trial the corporate records at issue, regardless of whether they had been asked for or produced in discovery.

witness has personal knowledge of a corporate event, he or she can testify about it; but if the witness's knowledge is derived solely from the contents of a corporate record, then the best evidence rule applies and the testimony is inadmissible. *State v. Mahmood*, 45 Wn. App. 200, 203, 724 P.2d 1021 (1986) (citing *State v. Fricks*, 91 Wn.2d 391, 588 P.2d 1328 (1979)). Since Bastarrachea admitted that his knowledge of the claims came from writings and EVYA's business records, Bastarrachea's testimony could not substitute for the records themselves and was inadmissible.¹⁶

The circumstances in *State v. Fricks*, are analogous. There, Fricks was found guilty of stealing money from a gas station. 91 Wn.2d at 392-94. To prove the amount stolen, the manager of the gas station testified that employees kept a tally sheet where they recorded the day's receipts. The manager testified about the tally sheet, but the document itself was not produced at trial. *Id.* at 393. The Supreme Court held that the best evidence rule required the State to provide a copy of the tally sheet and, because it did not, the manager's testimony was inadmissible and the conviction was reversed. *Id.* at 397-98. The same must be true here. The

¹⁶ Even if Bastarrachea's testimony were not inadmissible, it would not satisfy the substantive standard of proving damages by the best evidence available. 5C K. Tegland, Wash. Practice: Evidence Law and Practice § 1000.4 at 355 (5th ed. 2007) (common-law rule "operates independently of the rules codified in Rule 1001 to Rule 1008"). EVYA's own corporate records, which EVYA did not produce, would be the best evidence available to prove the existence and amount of the claims.

trial court erred in refusing to exclude Bastarrachea's hearsay testimony on best evidence grounds. In the absence of any admissible evidence to prove the fact or amount of the purported commercial claims, there simply is no evidence to support the trial court's award.

IECESA Invoices. Both EVYA and IECESA were parties to the PEMEX contract, but PEMEX made periodic payments only to EVYA. RP (10/21/10) at 389, 402. When PEMEX made a payment to EVYA, EVYA would pay IECESA for expenses it had incurred up to that point. *Id.* at 392. IECESA's owner, Juan Carlos Del Rio Gonzales testified that, once Global withdrew the vessel and the PEMEX contract was canceled, EVYA did not pay IECESA on three invoices totaling approximately 27,000,000 pesos. *Id.* at 391-392. Based on Del Rio's testimony, the trial court adopted EVYA's proposed finding that, but for Global's breach, IECESA would have been paid \$2.25 million. CP 3786 (FF ¶ 63).

That finding cannot stand. Like virtually all of its claimed damages, EVYA failed to prove both the existence and amount of the invoices by a "reasonable certainty" with the "best evidence available." *Larsen*, 65 Wn.2d at 17. The invoices were the best evidence of the invoices and, inexplicably, EVYA failed to offer them into evidence. Without them, or any evidence other than Del Rio's naked assertion, there was no credible way for the trial court to ascertain the amount of the

invoices or, critically, whether EVYA's failure to pay them was truly due to Global's breach or some other cause. *NW Indep. Forest Mfrs. v. Dep't of Labor & Indus.*, 78 Wn. App. 707, 712, 899 P.2d 6 (1995) (breach of contract is actionable only where breach proximately causes damage).

Indeed, the evidence showed the opposite. On cross-examination, Del Rio admitted that PEMEX had paid EVYA for all work that had been done on the contract prior to cancellation. RP (10/21/10) at 414. If IECESA's invoices related to that work, as Del Rio testified they did, then EVYA should have and could have paid IECESA's invoices with the substantial revenues it had received from PEMEX to date. Indeed, at least according to Wood, EVYA had already made more than a million dollars of profit by that point. RP (10/25/10) at 591-592. To the extent EVYA did not pay IECESA, it had nothing to do with Global's breach; IECESA's recourse is against EVYA, not Global. In sum, both the source and substance of Del Rio's testimony are deficient, inconsistent with the evidence and cannot support the trial court's finding on this issue.

3. Conversion Damages: The Trial Court's Award Of Damages Was Not Supported By Substantial Evidence.

The trial court found EVYA's evidence that Global did not return some of EVYA's equipment to be "contradictory and not credible." CP 3783 (FF ¶ 56-58). Thus, other than \$34,790 awarded for the "bracers," the court refused to award EVYA damages based upon "bare assertions

that property was not returned.” CP 3784 (¶¶ 59-60); CP 3789 (CL ¶ 11). Yet, on equally flimsy testimony and with no documentary support the court found that Global’s purported delay in returning EVYA’s equipment (some of which it had leased) caused EVYA to incur a \$1,016,628 judgment “for late return of equipment,” and a \$100,000 import fee “for equipment returned from Texas.” CP 3784-85 (FF ¶¶ 60, 62); CP 3789-3790 (CL ¶ 11(a) & (c)). These awards, as well as the award for the bracers, are unsupported by substantial evidence and must be vacated.

a. EVYA Failed To Prove The Existence And Amount Of The Purported Judgment By SMT.

Washington courts recognize that a plaintiff may be entitled to consequential damages in a conversion action “where the proof shows that such damages have been sustained.” *Pearce v. G. R. Kirk Co.*, 92 Wn.2d 869, 874, 602 P.2d 357 (1979); *Dennis v. Southworth*, 2 Wn. App. 115, 467 P.2d 330 (1970). Consequential damages may be recovered, however, only if the best available evidence proves the fact and amount of damages with reasonable certainty. *Cannon v. Oregon Moline Plow Co.*, 115 Wash. 273, 197 P. 39 (1921); *Steinman v. City of Seattle*, 16 Wn. App. 853, 856-57, 560 P.2d 357 (1977); also *Reefer Queen Co. v. Marine Const. & Design Co.*, 73 Wn.2d 774, 781, 440 P.2d 448 (1968) (“best available evidence” rule applied to tort action for consequential damages).

EVYA's evidence of a million dollar "judgment" in favor of SMT falls well short of this standard. The only evidence of this supposed judgment came from the testimony of IECESA's Del Rio, who testified:

Q. Okay. Did you incur any other damages as a result of the ship leaving prematurely?

A. Of course.

Q. And would you describe those for the Court?

A. When the ship make the unilateral decision to leave, there were equipments on board. Some belonged to me and other equipment was rented from different companies. I had signed some leases with these companies where it said that once I returned that equipment, then costs would stop being charged. So as long as I wasn't able to have the equipment back, the cost kept accumulating. That caused one company to sue me, and I basically lost that and I had to pay for the costs that were related to the contract.

* * *

Q. And how much did you lose in the court case?

* * *

A. The total amount is a million dollars plus 29 million pesos, approximately. And this refers to unpaid costs and costs related to not paying for something.

Q. Well, let's be precise with the amount. Is the precise amount \$1,016,628.31?

A. Yes.

RP (10/21/10) at 393-394. That was it. There was no copy of the judgment, or any record corroborating Del Rio's testimony, produced at trial or offered into evidence. There was no evidence regarding the date of

the judgment. There was no evidence showing the basis or scope of the lawsuit, or that it was related to any delay in the return of the equipment. There was no testimony or evidence showing that IECESA actually paid the judgment.¹⁷ Indeed, according to Del Rio, IECESA disputed SMT's claim, and appealed the purported judgment. RP (10/21/10) at 415.

Del Rio's naked testimony does not prove the existence or amount of the purported judgment with reasonable certainty, much less does it do so with the best available evidence. The best available evidence, of course, would be a copy of the judgment itself. That record belongs to EVYA and IECESA, and it was their burden to produce it to prove their claim, which they did not do. As the Supreme Court has recognized:

We have previously held on several occasions that where relevant evidence which would properly be a part of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so, without satisfactory explanation, the only inference which the finder of fact may draw is that such evidence would be unfavorable to him.

Pier 67, Inc. v. King County, 89 Wn.2d 379, 385-86, 573 P.2d 2 (1977).

But instead of drawing an adverse inference against EVYA, the trial court inexplicably adopted Del Rio's uncorroborated testimony wholesale.

¹⁷ In an effort to determine if a judgment actually existed, Global asked Del Rio if he had provided a copy of the judgment to counsel during this litigation, but the trial court sustained counsel's objection on attorney-client privilege grounds. RP (10/21/10) at 415-416.

Worse yet, the amount of the court's award was derived wholly from counsel's leading question, not the witness's own memory. Because there is no substantial evidence to support to trial court's finding regarding the purported SMT judgment, its award of \$1,016,628 must be vacated.

b. EVYA Failed To Prove That It Paid Import Fees When Its Equipment Was Returned.

The trial court's award of \$100,000 in "import fees" was based on even flimsier oral testimony. Again, the evidence underlying this finding came from Del Rio, whose total testimony on the issue was:

A. ... So I had to pay an amount of money that reflected me importing [IECESA's equipment] again, because most of the equipment is American made.

Q. Do you recall how much you had to pay for the import costs?

A. Approximately a million pesos?

Q. Is that amount \$100,000? Eighty?

A. Back then I think that was the exchange, yes.

RP (10/21/10) at 395. EVYA made no effort to substantiate Del Rio's claim, or to prove exactly how much was supposedly paid. There was no record reflecting the fee; no copy of a check or other payment; no business record recording the loss on IECESA's books. Yet, from the very fuzzy testimony that IECESA may have paid around \$80,000, the trial court awarded EVYA a very concrete \$100,000. Here too, Del Rio's bare

testimony was insufficient, and not the best available evidence, to prove the existence or amount of the “import fee” with reasonable certainty.

c. EVYA’s Testimony Regarding The Value Of The Bracers Violated The Best Evidence Rule.

Finally, the trial court’s award of \$34,790 for the “unreturned bracers” (CP 3784 (FF ¶ 59); CP 3789 (CL ¶ 11 (b))) was based wholly on inadmissible testimony that violated the best evidence rule, and therefore is not supported by substantial evidence. The only evidence regarding the value of the bracers came from EVYA’s CPA Bastarrachea, who testified:

Q. What was the internal Evya value *stated on the Evya books* for the bracers that Evya fabricated for this contract that Evya lost?

* * *

A. The cost of the bracers that were fabricated that were taken away with the boat when it left the job was thirty-four - - correction, thirty-four thousand seven hundred and ninety dollars fifty-four cents.

RP (10/21/10) at 574 (emphasis added); *id.* at 560 (“THE COURT: And are the cost of the bracers on the books of the company? MR. MORAN: Yes.”). As discussed above, Bastarrachea had no personal knowledge of this fact, yet the trial court improperly allowed EVYA to elicit his testimony about the contents of EVYA’s corporate records without having to produce the records themselves. RP (10/25/10) at 554-566; *Fricks*, 91 Wn.2d at 397. There was no admissible evidence proving the value of the bracers and, thus, the court’s \$34,790 award must be vacated as well.

D. The Trial Court's Post-Judgment Interest Award Violated Federal Maritime Law And Must Be Reduced.

As noted, the Charter's choice of law provision states that, where it applies, federal maritime law prevails over Washington state law. Tr. Ex. 324 (Section 1(33)). Similarly, with respect to judgment interest rates, Washington courts recognize that, where federal maritime law applies and is inconsistent with state law, a Washington court must apply the federal rate. *Paul v. All Alaskan Seafoods, Inc.*, 106 Wn. App. 406, 427, 24 P.3d 447 (2001). Here, the trial court imposed a 12% pre- and post-judgment interest rate. CP 3795-3798. Global believes that a 12% pre-judgment interest rate is punitive, but recognizes that the issue is one of discretion for the court under federal maritime law (*Paul*, 106 Wn. App at 429-30) and, therefore, does not challenge the pre-judgment interest rate on appeal.

Federal maritime law, however, recognizes no such discretion with respect to post-judgment interest rates. Under well-established maritime principles, post-judgment interest is determined by federal law at the statutory rate set forth in 28 U.S.C. § 1961. *Tinsley v. Sea-Land Corp.*, 979 F.2d 1382, 1383 (9th Cir. 1992); *In re Glacier Bay*, 746 F. Supp. 1379, 1395 (D. Alaska 1990). State cases recognize this as well. *Militello v. Ann & Grace, Inc.*, 576 N.E.2d 675, 679 (Mass. 1991). The federal statute states that post-judgment interest is "equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of

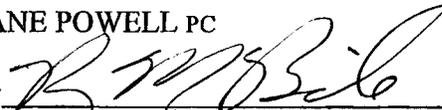
Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment.” 28 U.S.C. § 1961(a).¹⁸ If any portion of the trial court’s judgment survives this appeal, this Court must remand for a recalculation of the proper post-judgment interest rate.

VI. CONCLUSION

The judgment against Global and MMSI must be reversed, EVYA’s claims dismissed, and judgment entered in Global’s favor on its counterclaim. If, however, this Court affirms Global’s and/or MMSI’s liability, then it must vacate the trial court’s damages award in its entirety.

RESPECTFULLY SUBMITTED this 11th day of August, 2011.

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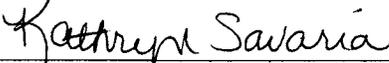
¹⁸ The one year Treasury bill rate in effect when the court was considering post-judgment interest rates was .30%, a far cry from the 12% the trial court awarded. *See* CP 3708-3714.

CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2011, I caused to be served a copy of the foregoing JOINT BRIEF OF APPELLANTS on the following person(s) in the manner indicated below at the following address(es):

Dennis M. Moran
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- by **Electronic Mail**
- by **Facsimile Transmission**
- by **First Class Mail**
- by **Hand Delivery**
- by **Overnight Delivery**



Kathryn Savaria

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APPENDIX

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MAR 28 2011

BAUER MOYNIHAN & JOHNSON LLP

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

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

Plaintiffs,

v.

GLOBAL EXPLORER, LLC, a Washington LLC;
GLOBAL ENTERPRISES, LLC, a Washington
LLC; MARITIME MANAGEMENT SERVICES,
INC., a Washington Corporation; TREVOR and
JANE DOE STABBERT, and the marital
community composed thereof; JUAQUIN
PERRUSQUIA, a citizen of Mexico, FRANK AND
JANE DOE STEUART, and the marital community
composed thereof, STUEUART INVESTMENT
COMPANY, a Maryland corporation.

Defendants.

No. 09-2-04833-9 SEA

**Amended
FINDINGS OF FACT AND
CONCLUSIONS OF LAW
Correcting scrivener's error**

This case was tried beginning on Tuesday, October 19, 2010 and ending on Monday, November 29, 2010, before this Court. The plaintiffs were represented by Moran, Windes & Wong, PLLC, defendants Global Explorer, LLC, Global Enterprises, LLC and Frank and Jane Doe Steuart were represented by Bauer, Moynihan & Johnson, LLP and Montgomery, and defendants Maritime Management Services, Inc. and Trevor and Jane Doe Stabbert were

**FINDINGS OF FACT
AND CONCLUSIONS OF LAW**
Page 1 of 2824

MORAN WINDES & WONG
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1 represented by Purdue, Blankinship & Austin, and PLLC. This Court heard the testimony, and
2 considered all the exhibits admitted at trial, except those documents which were admitted but
3 were written in Spanish with no translation provided, and briefing, argument of counsel, and
4 the parties' pre- and post-trial briefs and authorities cited therein, makes the following
5 findings of facts and conclusions of law.

6 FINDINGS OF FACT

7 I. UNDISPUTED FINDINGS

8 1. Plaintiffs Representaciones districuciones Y Districuciones Evya, S.V.
9 ("EVYA") and Instalaciones Electromecanais, Civiles Y Electromecanais, S.A. DE C.V.
10 ("IACESA") are all Mexican companies headquartered and doing business in Ciudad del
11 Carmen, Mexico (herein after "Plaintiffs" unless otherwise stated).

12 2. Defendant Global Explorer, LLC is a cancelled Washington limited liability
13 company, whose successor in interest is Global Enterprises, LLC, a Washington limited
14 liability company, with its principle place of business in Seattle, Washington (hereinafter
15 Global). The sole manager of both companies is defendant Frank Steuart, and both companies
16 are wholly owned companies of Steuart Investment Company, a Delaware corporation.
17 Defendants Frank and Jane Doe Steuart are residents of the State of Colorado.

18 3. Defendant Maritime Management Services, Inc. (hereinafter "MMSI") is a
19 Washington corporation based in SeaTac, Washington, the president of which is Trevor
20 Stabbert. The defendants Trevor and Joyce Stabbert are residents of the State of Washington.

21 4. On October 6, 2005, Global and plaintiffs entered into a written contract called
22 a Master Time Charter (MTC) for use of the vessel of the vessel M/V GLOBAL EXPLORER,
23 a US flagged vessel. The vessel was chartered by plaintiffs to perform their separate contract

1 with PEMEX, the Mexican national oil and gas enterprise, to inspect, maintain and repair
2 pipelines and risers in the Bay of Campeche, Mexico.

3 5. The MTC started with delivery of the vessel on October 14, 2005. The period
4 of hire was 410 days through November 18, 2006. The agreed daily charter rate was \$USD
5 26,500.00 per day. The purpose of the MTC was to enable Plaintiffs to complete a PEMEX
6 pipeline and platform maintenance contract. The MTC contained a clause that venued
7 disputes at Seattle and a choice of law clause that applied Washington State and federal
8 maritime law.

9 6. Under the MTC contract executed on October 5, 2005 both parties were
10 required to have insurance in certain specified amounts and with certain specified coverage.
11 Neither party complied with the requirements as written in the October 5, 2005 MTC.
12 Plaintiffs did not raise an issue as to Global's failure to comply until trial.

13 II. GENERAL FINDINGS, NOT AGREED

14 7. Global retained MMSI to act as its agent in management of the ship. The
15 ship's crew, including the captain/master, was employees of MMSI.

16 8. At all times relevant herein

17 a. Trevor Stabbert and Richard Stabbert were acting on behalf of and as
18 agents of MMSI;

19 b. Captain Decker was acting on behalf of and as an agent of MMSI

20 c. Frank Steuart was acting as agent and on behalf of Global.

21 9. Mario May was represented by Global to be an officer and legal representation
22 of Global Explorer LLC as of July 7, 2005.

1 10. In October, 2005 he presented himself to plaintiffs as a legal representation of
2 Global in Mexico. He was involved with plaintiffs and other agents of Global in contract
3 negotiations. He was involved with insurance issues related to the contract in October, 2005.
4 It is undisputed that plaintiffs worked with Mr. May to provide the insurance required under
5 the MTC and that Mr. May executed a waiver which purported to waive additional insurance
6 requirements.

7 11. By letter dated May 11, 2006 Mr. May was fired by Global from his position as
8 "legal representative with EVYA and/or its owners."

9 12. No evidence was presented as to Mr. May's actual authority in Mexico in
10 regards to the MTC. However, he had apparent authority to act as Global's agent with
11 plaintiffs in regard to the MTC and insurance requirements. Plaintiffs had the right to rely
12 upon Mario May's representations.

13 13. Two ships logs were admitted into evidence. Exhibit 123 is the "rough" log.
14 This is a handwritten log kept contemporaneously with the events. However, out of sequence
15 entries may be made with the consent or at the direction of the master of the ship. Exhibit 124
16 is the "smooth" log. This is a typewritten log apparently made from the rough log. It does not
17 contain all the entries that were made in the rough log. Given that the rough log was written
18 contemporaneously with the event and in more detail, the Court finds it more credible than the
19 smooth log.

20 14. The MTC was drafted by Global.

21 15. Following execution of the MTC, the market price for same or similar vessels
22 spiked significantly due to the Hurricane Katrina cleanup effort. As a result, in March, 2006
23 the defendants became aware that they could probably get \$40,000 - \$60,000 per day for their

1 ship, had they not already been in the \$26,500/day EVYA charter which lasted for more than
2 133 more days.

3 16. Annex C AGREEMENT FOR MUTUAL INDEMNITY AND WAIVER OF
4 SUBROGATION, paragraph 2 and PART II paragraph 12(c) both state, essentially, that no
5 party shall be liable to another party for any consequential damages, including, but not
6 limited to, loss of use, loss of profits, shut-in or loss of production and cost of insurance.
7 These clauses conflict with other clauses in the contract.

8 III. INSURANCE

9 17. At the beginning of the charter in October, 2005, plaintiffs were unclear about
10 the insurance requirement under the MTC. Plaintiffs and Global discussed this matter and
11 evidence of this was provided in email exchanges.

12 18. Through Mario May the parties agreed that the coverage that the plaintiffs had
13 through the Zurich Insurance policy and the Mexican National Insurance Workers
14 Compensation System would suffice and Global would waive any further insurance
15 requirements. A copy of the Zurich Insurance policy was provided to Mario May and to the
16 captain of the Global ship.

17 19. By email dated 10/14/05 it appeared that all issues regarding insurance were
18 resolved.

19 20. No issues were raised to plaintiffs regarding plaintiffs' requirements for
20 insurance coverage until around May 10, 2006. At that time Global demanded that plaintiffs
21 provide proof of "proper insurance," stating that Global had not received any documents.
22 This was confusing to plaintiffs since they understood this issue had been resolved at the
23 beginning of the charter and a copy of the insurance policy had been provided.

1 21. Plaintiffs responded by letter on or around May 11, 2006. The translation of
2 this letter was confusing but subsequent communications made clear to Global that plaintiffs
3 believed they had complied with the insurance requirement based on the communications at
4 the start of the charter and the waiver executed by Mr. May.

5 22. Once the issue was raised, plaintiffs communicated promptly with Global to try
6 and resolve the matter. Even though Plaintiffs believed they had met the insurance
7 requirements, plaintiffs offered to obtain whatever additional insurance was required. On May
8 20, 2006 plaintiffs brought in an insurance broker, Graciella Alvarez, and met with Global's
9 attorney in Mexico to discuss the insurance issue. Frank Steuart participated in the meeting
10 by phone. Global was informed by insurance agent Graciella Alvarez that she could obtain
11 any necessary insurance required from plaintiff within 48 hours of request. Global refused to
12 accept the offer as a resolution to the problems it felt existed. In that meeting Ms. Alvarez
13 informed Global that if the MTC was terminated one of the consequences would be that it
14 would be very difficult for Plaintiffs to obtain another contract.

15 23. After the May 20, 2006 meeting Global instructed its attorney to continue to
16 work with Plaintiffs to try and resolve the issue.

17 24. By letter dated May 22, 2006 Global offered to resolve the insurance issue as
18 follows:

19 Plaintiffs would pay an additional \$2,010,000 (\$15,000 per day
20 starting May 12, 2006 and continuing for an additional 133 days); and

21 Plaintiff would obtain and provide proof of insurance under the
22 MTC no later than 11:50 p.m. May 30, 2006 or pay an additional \$15, 000
23 per day for the remainder of the charter.

**FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

Page 6 of 28 24

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1 25. Global described this as a "fund" to have on hand should claims be made
2 against it that would have been covered by the insurance Plaintiff should have had. However,
3 no provision or suggestion was made that this "fund" would be returned to Plaintiffs if no
4 claims were in fact made.

5 26. By letter dated May 23, 2006 plaintiffs rejected Global's proposal.

6 27. By letter dated May 24, 2006 Global informed plaintiffs that Mario May had
7 no authority to execute the waiver, and for that and other reasons, the waiver was not valid;
8 that even if the waiver was valid, Global was now withdrawing the waiver. Global demanded
9 proof of required insurance by May 24, 2006 at 6:00 p.m. or Global would consider the
10 "refusal" as a "repudiatory breach." By email dated May 28, 2006 Global's attorney,
11 Fernando Escamilla, who was still working with plaintiffs to resolve the insurance issues,
12 indicated in an email to Global that there was confusion about the insurance requirements and
13 requested a clarification. A reply to his letter was not sent until June 5, 2006.

14 28. If insurance was not provided as required, the MTC provided financial
15 alternatives in Annex B.4. and Annex D.8.

16 III. DIVING

17 29. Global was aware that use of the ship for diving was necessary for plaintiffs to
18 complete their contract with PEMEX.

19 30. Starting around May 10, 2006 Global began exchanging internal emails
20 indicating that it had become aware of diving issues from PEMEX representatives on board
21 the ship.

22 31. An inspection of the ship appears to have been done on May 12, 2006 by an
23 apparently neutral third party. The report of the inspection stated that EVYA needed to issue

1 a copy of the diving procedures and do a "working plan previous to the initial of the diving
2 operations with the dynamic position, before the diving operations." It is unclear whether this
3 refers to actions to be taken before every dive is started or whether this was a general
4 requirement before any diving occurred again. It is unclear when this report was issued and
5 signed by representatives of the parties and the captain of the ship, though an exhibit of a
6 letter from the evaluator seems to indicate that the report was transmitted on May 17, 2006.
7 It is unclear what authority the evaluator had over the ship or diving operation. No evidence
8 was provided that attempted to explain the importance, if any, of this report.

9 32. Diving from the ship was terminated May 13, 2006 at around 10:00 p.m. An
10 entry to this effect was made in the ship's rough (handwritten) log out of sequence. No reason
11 for the termination was given in the log. There is nothing written from the ship's
12 captain/master indicating the reason for the termination of diving or who made the decision to
13 terminate diving. Captain Decker died prior to trial but his affidavit was admitted. This
14 affidavit does not contain any reference to the termination of diving.

15 33. By letter dated May 13, 2006 Global stated that the reason for termination of
16 the diving was because EVYA was conducting dive operations from the vessel "without
17 established dive procedures in compliance with applicable regulatory requirements and
18 compliance with all jurisdictional...certificates and statutes" combined with "EVYA's failure
19 to procure the requisite insurance coverages..." At trial Global presented hearsay testimony
20 that the diving was discontinued by the captain because of unsafe diving practices and failure
21 to provide the dive procedure book. By letter dated May 14, 2006 EVYA responded to an
22 inquiry from Global stating that the dive procedure book was and always had been in the
23 engineering office of the vessel.

1 34. In a letter dated May 15, 2006 from Global's "attorney-in fact" Fernando
2 Escamilla communicated Global's concerns and stated that he learned that plaintiff IACESA
3 was no longer providing divers on the ship and asked for clarification. On May 18, 2006
4 plaintiff IACESA responded that IACESA was no longer providing divers but the diving
5 procedure book was left on board and was being used by EVYA as their diving procedure
6 book with IACESA's consent. Many of the divers that remained on board the ship were the
7 same divers that had been employed by IASCSA.

8 35. On May 20, 2006 EVYA asked Global if they could do one short dive in order
9 to could take pictures of the work they had done so they could provide them to PEMEX and
10 get paid for their work. Global refused. No explanation was provided to Plaintiffs about
11 exactly what they had to do to be able to dive again.

12 36. The expert witnesses agree that a dangerous diving incident should be written
13 down in the daily log. There are no references to dangerous diving practices in the logs of the
14 ship. Only one eyewitness account of an alleged dangerous incident (diving off the boat
15 without proper equipment and swimming to the platform) was testified to by one of the
16 crewmembers of the ship, all other reports appear to have been hearsay. The one event that
17 was witnessed was not written in the log book. The crew member testified that the other
18 incidents mentioned, such as the on board diver leaving his post and tools being passed
19 unsafely, would have been dealt with just by a casual conversation.

20 37. The captain or master of a ship does have the authority to terminate unsafe
21 activities on the ship, such as unsafe diving. However, given the evidence produced at trial,
22 the Court finds that diving was terminated because of Global's concern for liability given the
23 insurance dispute, not because of concerns the Captain had for safety.

1 38. The refusal to allow plaintiffs to dive from the ship was not a "suspension" but
2 was clearly a "termination" in that there did not appear to be any way that the plaintiffs could
3 have regained the right to dive. In fact, Mr. Steuart, who was the person who informed
4 Plaintiffs that they were in breach of the portion of the contract that required them to be in
5 compliance with applicable diving laws and regulations, testified that he did not even know
6 what those regulations were.

7 IV. NON-PAYMENT

8 39. Prior to May, 2006 the Plaintiffs had paid all invoices, though their payments
9 were sometimes late. Plaintiffs were behind in their performance of the contract but there is
10 no indication that the contract would not have been performed.

11 40. Invoices were billed for advance payment of the charter fee and for past
12 expenses and costs incurred. Invoice 161 covered rental of the ship for the period May 12,
13 2006 through May 26, 2006 as well as payment for supplies and services for April and March,
14 2006. Payment for invoice 161 in the amount of \$419,006.56 was stated to be due on May 16,
15 2006. Global sent the first letter demanding payment on May 17, 2006, and a second on May
16 24, 2006. On May 30, 2006 Global sent a letter terminating the charter for non-payment. It is
17 obvious that these are form letters as there is no mention in the letters of the continuing
18 negotiations between the parties to attempt to resolve issues between them.

19 41. Plaintiffs informed Global that the termination of their right to dive from the
20 ship caused them serious and irreparable damages. Global was aware that plaintiffs were
21 unable to finalize work and get paid by PEMEX due to the lack of inability to dive.

22 42. After Global terminated the ability of plaintiffs to dive from the ship, plaintiffs
23 were still allowed to perform surface work on the platforms and dive from the platforms.

1 Plaintiffs continued to do this work, using the ship as a base of operations. This was relatively
2 minor work under the contract which plaintiff continued to perform while it tried to resolve
3 the issues raised by the defendant's actions.

4 43. While Global does not remember the conversation, plaintiffs stated that they
5 were asked to get a letter of credit during the period of these discussions. Plaintiffs' written
6 communications with Global confirm their statements. The letter of credit was mentioned in
7 the MTC as an alternate means to provide security instead of payment in advance. Plaintiffs
8 obtained the letter of credit as asked, which would have assured payment of the current and
9 future invoices. The availability of the Letter of Credit was confirmed by letter from plaintiffs
10 dated May 30, 2006 and the letter of credit was available on June 2, 2006.

11 44. Even though plaintiffs disputed their obligation to pay the invoice, they paid
12 the invoice on June 5, 2006.

13 45. While the plaintiffs had some delays in payment in the past the evidence
14 establishes that but for the cessation of diving they would have been able to pay Invoice 161
15 within the required time period.

16 46. Even though Global had been threatening to terminate the contract for failure
17 to provide insurance, calling that failure a "repudiatory" breach, the letter terminating the
18 contract as of May 30, 2006 stated that the reason for terminating the contract was the failure
19 to pay Invoice 161. By letter dated June 1, 2006 Global confirmed that the sole basis for
20 termination of the contract was the failure to pay Invoice 161, not failure to provide insurance
21 or diving irregularities

22 V. Equipment
23

1 47. Since the plaintiffs were not in breach of contract they had no obligation to off
2 load their equipment from the ship and Global had no right to require them to do so.

3 48. Even if they had such an obligation, under the circumstances as created by
4 Defendants and as set out below, made it was impossible for them to do so.

5 - On May 30, 2006: Global had the plaintiffs notified that it terminated the MTC

6 - On *May 31, 2006

7 - around 5:17 p.m., the ship heads to Dos Bocas on orders from the owner.

8 - evidently some of Plaintiffs diving equipment was left on the platform and
9 around 7:00 p.m. the captain refused to sign a documents saying the MMSI was
10 responsible for the equipment

11 - On June 2, 2006 the ship arrived outside the port and docked on June 3, 2006 in Dos
12 Bocas. The Ship was informed by the port authority that the ship is on security level 2, which
13 meant that personnel and equipment were not free to leave the ship.

14 -On June 4, 2006 Global was aware that there was a dispute about the MTC
15 termination and of its requirement that plaintiffs remove their equipment. Global apparently
16 decided not to seek assistance through the courts to resolve issues surrounding the contract
17 termination and equipment, but decided that it needed to head for international waters;
18 perhaps declare the ship was headed for Veracruz and then "divert" the ship to Houston. This
19 suggestion /plan as to how to frustrate plaintiffs attempts to resolve issues through legal
20 actions was suggested by MMSI.

21 -On June 5, 2006 the ship continued to be at security level 2 until around 6:00 p.m.
22 when the security level is decreased to security level 1. Plaintiffs' employees are allowed to
23 depart with their personal gear. They are searched as they leave the ship to make sure they are

1 not removing anything else other than their personal gear. The plaintiffs are allowed to bring
2 personnel on board and they bring on board a videographer and a notary. For around 3 hours
3 the plaintiffs record video and take notes about their equipment on board the ship. They
4 leave the ship around 9:00 p.m. as does the notary from Global, the people hired by Global to
5 remove equipment, and the representative of PEMEX.

6 - On June 6, 2006 at around 1:30 P.M. Global is informed by MMSI that their agent
7 says the port did not require a hot permit and did not refuse permission to offload. At 2:00
8 p.m. the ship puts its generators and thrusters on line; indicates in the log that they could not
9 get a "hot work " permit and that PEMEX was not allowed to offload its equipment. Around
10 3:20 p.m. the ship makes contact with a pilot in order to leave the port and at 6:00 p.m. starts
11 transit to Vera Cruz. Global had been told that the ship was heading to Vera Cruz and sent
12 personnel there to pick up their equipment. At 6:54 p.m. the log reports that the captain
13 received a call to change destination to Texas. This order is not in the smooth log, just the
14 rough log. The log also shows that the ship received orders to go to the ECO-1 area where
15 equipment purportedly belonging to PEMEX would be off-loaded.

16 -On June 7, 2006 the ship arrives at the ECO-1 area and offloads "PEMEX"
17 equipment to another boat, the Don Eduardo. Testimony from Global was that "everyone
18 knew" this equipment belonged to PEMEX. Around 5:00 p.m. the rough log indicates the
19 ship resumed transit to Veracruz and then at midnight the ship's rough log indicates it was
20 "sailing to Huston(sic) ... Problems c(with) Gen #2 change of orders." The smooth log just
21 states continue to Vera Cruz

22 - June 8, 2006 the log indicates the ship is proceeding to the Galveston area.
23

1 49. Global represented that it intended to offload Plaintiffs equipment in Vera
2 Cruz, but that damage to an engine made them divert to Texas for emergency repairs.

3 50. An affidavit written by Captain Decker on June 28, 2006 about the alleged
4 emergency repairs needed to the engine that cause the ship to be diverted to Texas contradicts
5 the rough log and is not confirmed by the smooth log.

6 51. Global asserts that Plaintiffs refused to unload their equipment and prevented
7 Global from unloading it. However, Manuel Reyes Galindo, the agent that Global hired to
8 arrange for a crew to offload the equipment and coordinate with the port testified that no "hot
9 work" permit was required, that he hired a crew to off-load the equipment but they were not
10 used, and that and there was evidently no impediment if Global wanted to off-load the
11 equipment.

12 52. Global's communications with the Dos Bocas Harbor and plaintiffs on May
13 31, 2006, and again to plaintiffs on June 3, 2006, were that Global would give Plaintiffs 48
14 hours to unload their equipment and if plaintiffs did not do so, Global would unload the
15 equipment at plaintiffs' expense.

16 53. A reasonable inference from the actions and communications between the
17 various Global employees and agents is that Global did not intend to offload Plaintiffs'
18 equipment in Dos Bocas or in Vera Cruz but was planning to get out of Mexican waters as
19 soon as possible so that they could avoid legal actions.

20 54. On or about June 10, 2006 the ship arrived in Port Arthur, Texas. The
21 defendants advised their insurance broker that they had seized Euya and Iecessa equipment
22 pursuant to their valid lien for charter hire and requested their broker get property insurance
23 coverage on that basis. The broker complied.

1 55. On or about June 26, 2006, after Global Explorer underwent repairs to the
2 ships generators, the defendants executed the new charter for \$41,000 per day for 50 days
3 with at 10 day extension (60 days total).

4 56. In August, 2006 the defendants arranged for the return of some of the Evya
5 equipment, which was ultimately returned to a port at Seba Playa, Mexico. IACESA testified
6 that the returned equipment was virtually worthless, scrap value. The Plaintiffs testified the
7 defendants never returned the balance of the Evya equipment. However, plaintiffs never
8 provided any inventory or photographs of the equipment that was returned or provided any
9 evidence as to what happened with the equipment that was returned.

10 57. The defendants returned some equipment to Evya vendors and some equipment
11 to defendant IACESA, but only on condition that IACESA executed documents absolving the
12 defendants of liability including liability for taking it in the first place. These waivers were
13 not valid as they were not negotiated in good faith but were required to be signed before the
14 defendants returned equipment to the plaintiffs that they had wrongfully taken.

15 58. The documentation provided by the defendants as to the specifics of the
16 equipment taken, the care taken of the equipment and the specifics of the equipment returned
17 was thorough and professional. Plaintiff EVYA's evidence regarding the equipment that was
18 taken and not returned was contradictory and not credible. No one testified as to what
19 happened to the equipment left on the platform. IACESA's evidence as to the status of the
20 equipment when it was returned was insufficient. While the equipment was wrongfully taken
21 by the defendants and the plaintiffs did not have the time necessary to do a complete
22 inventory, they did have the video they took of the equipment on the ship on June 5, 2006, the
23 list of equipment that was originally put on the ship, the ability to take pictures or otherwise

1 do an accounting of the equipment that was returned to them or third parties. From this they
2 could have presented some credible and specific evidence as to what equipment was taken and
3 not returned, or returned in defective condition, and the value, or loss of value, thereof.

4 59. There was credible testimony that a set of "bracers" that belonged to EVYA
5 was not returned to EVYA, but was given to PEMEX by Global. The value of this piece of
6 equipment was \$34,790.

7 60. Other than the \$100,000 that the plaintiff was required to pay as duty on the
8 equipment returned from Texas, the plaintiffs have failed to establish any amount on which a
9 damage award can be based for conversion.

10 VI. Proof of other damages

11 61. The defendant's withdrawal of the vessel from the charter caused Plaintiffs to
12 be unable to complete the PEMEX contract. While the defendant implied that the plaintiffs'
13 would not have made the profit they had anticipated, the testimony of the plaintiffs was
14 consistent that their costs were in line with their expectations as was the completion of the
15 contract. The Plaintiffs testified and, there was no admissible evidence to rebut their
16 testimony, that the contract was started in the bad weather months and therefore started slow;
17 also that the upfront costs were much higher than the remaining costs since the equipment had
18 to be purchased at the start of the contract. Therefore, plaintiffs were confident that they
19 could have completed the contract on time and on budget. Prior to the repudiation of the
20 contract by Global, which caused the plaintiffs to be unable to complete their contract with
21 PEMEX. Plaintiffs had received the sum of \$1,170,368 in profits under the PEMEX contract.
22 They anticipated periodic payments, which would include profits, throughout the term of the
23 PEMEX contract. Had the contract been completed as planned the plaintiffs would have

1 realized a gross profit of \$4,170,000. This amount of profit was in line with profits they made
2 the prior year and in subsequent years after the company recovered from the damage done
3 from this breach of contract.

4 62. Due to the loss of the vessel and Plaintiffs consequent inability to complete the
5 PEMEX contract, Plaintiffs were sued by vendors and workers for moneys owed for
6 equipment leases and workers wage claims for work structured under the PEMEX contract.
7 Plaintiffs did not produce documentary evidence at trial of these amounts. However, the
8 testimony of plaintiffs witnesses was unchallenged and sufficiently specific that the court
9 finds the following were incurred solely as a result of the early termination of the MTC and
10 would not have been incurred but for Global's actions:

11 \$600,000 attorney's fees incurred to mitigate the penalties charged by PEMEX for
12 plaintiffs' failure to complete their contract (No testimony was given as to the actual date for
13 this payment. However, it was referenced in the Complaint which was filed and served by
14 2/1/09, so at least as of that date the amount was known and certain);

15 \$1,016,628: Judgment against SMT for late return of equipment (No testimony was
16 given as to the actual date for this payment. However, it was referenced in the Complaint
17 which was filed and served by 2/1/09, so at least as of that date the amount was known and
18 certain);

19 \$100,000: Importation costs paid for equipment returned from Texas.(Testimony was
20 that the equipment was put on a ship for return to Mexico in early August, 2006 and returned
21 sometimes that month. Thus, while there was no testimony as to the actual date of return and
22 payment of the importation costs due when the equipment was returned, the date was at least
23 by August 31, 2006);

1 63. In addition the following amounts were proven to have been incurred but
2 would have been paid but for the breach and early termination of the MTC:

3 \$2,250,000 for unpaid invoices owed to IACESA;

4 \$292,638 for pending commercial claims which EVYA admits it owes for obligations
5 to others arising out of commitments it made because of its contract with PEMEX, which it
6 could not complete because of the breach of the MTC.

7 64. The defendant's breach of contract unjustly enriched the defendants \$14,500
8 per day through the balance of the contract. This amounts to \$1,995,000 (133 days x
9 14,500/day) total, and includes the 60 days of the Subsea charter beginning June, 2006
10 (\$14,500 x 60 days = \$870,000).

11 65. The plaintiffs paid the full amount of invoice #161, which was \$419,006.56
12 even though the full amount was not owed because Global materially breached the contract.
13 Of that invoice \$46,000 was owed for costs incurred prior to the breach by Global.

14 66. Plaintiffs never repudiated the MTC. Under Part II. 26(b) of the MTC the
15 Plaintiffs could have declared Global in repudiatory breach and terminated the MTC. The
16 plaintiffs never asked for the MTC to be terminated but always wanted the MTC to continue.

17 VI. Miscellaneous re Damages:

18 67. \$276,307.92 Oil, Lube and Water aboard the ship purchased by EVYA at the
19 time the ship was withdrawn from service was to be offset against the oil, fuel and water on
20 the ship at the start of the charter. The amount at the start of the charter was greater than the
21 amount at the end of the charter.

22 ///

23 ///

CONCLUSIONS OF LAW

Breach of Contract.

1. In order to prevail on a breach of contract action, a plaintiff must prove each of the following: Contract, Duty, Breach, Proximate Cause and Damages.

2. 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

3. Repudiation of a contract occurs when a party to a contract states that he will not perform the contract or will not perform except on conditions which go beyond the terms of the contract. This rule of contract law has been applied by Washington state courts as well as by the courts applying the maritime law of contracts.

4. A "material breach" is one which must be so overwhelming that it "substantially defeats the purpose of the contract. Here, the "substantial purpose" of the charter contract was to provide Evya a work vessel to complete the Pemex project, and for Evya to pay the daily charter rate.

5. In its order entered after a summary judgment hearing, the Court found, as a matter of law, that the defendants Global materially breached the charter contract when it terminated the plaintiff's diving operations from the ship on May 13, 2006. Specifically, the court order dated 12/22/09 stated in pertinent part:

"2. The Court finds that Global Explorer, LLC, suspended the plaintiffs' diving operations aboard the M/V GLOBAL EXPLORER beginning May 13, 2006, which was during the period of the Charter Contract.

3. The Court concludes as a matter of law that the suspension of the diving operations was wrongful and constituted a material breach of the Charter Contract."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1 After hearing all of the evidence at trial this Court concludes that the court's order on
2 Summary Judgment was correct. The right to dive off the ship was "suspended" not because
3 of safety reasons or lack of a dive procedure book but because of Global's concerns about
4 insurance. While Plaintiffs' did not have insurance required under the original MTC, they had
5 provided proof of some insurance and Global's agents waived any further requirement or led
6 them to believe that no additional insurance was required. When Global raised the issue
7 plaintiffs offered, and attempted, to get the insurance that Global wanted. Global's refusal to
8 work with plaintiffs on this issue was not reasonable and not done in good faith. Global may
9 not create a situation by their own actions then use that situation as the basis for denying vital
10 services. And, as found above, the reasons given based on a "safety" issue were a pretext and
11 the suspension was in fact a termination.

12 6. The defendants' material breach of the charter on May 13, 2007 terminated
13 EVYA's obligation to pay charter hire for the duration of the breach. Therefore, no charter
14 hire obligation accrued after May 13, 2006.

15 7. Plaintiffs continued operating under limited circumstances after the termination
16 of diving from the ship. This did not act as an acceptance of the actions of Global as a partial
17 breach. Plaintiffs were consistent in communication to Global that by terminating diving from
18 the ship it had made it impossible for Plaintiff to receive the benefit of the contract. Plaintiff
19 acted at all time in a manner consistent with requesting the contract proceed in full.

20 8. Global's conduct was a total breach of the contract
21 **Conversion.**

22 9. Federal maritime law regarding conversion, as well as Washington law, turns
23 on the party's intent in taking the property which is not owned by her/him. Conversion occurs

1 when a bailee refuses to return property to its rightful owner or fails to return property except
2 upon satisfaction or some improper condition. Under the facts of this case, Global is liable for
3 conversion of Plaintiffs' property.

4 10. MMSI has argued that it has no independent liability for damages due to
5 conversion of plaintiffs' equipment because it was merely acting as the agent of Global.
6 However, MMSI went beyond acting as agent and just obeying the reasonable orders of Global.
7 MM took an active role in planning the departure of the ship without making reasonable
8 attempts to return the plaintiffs' property and, in fact, helped to perpetrate a fraud upon the
9 plaintiffs by making them believe the equipment was to be returned to them in Vera Cruz when
10 it was MMSI's suggestion that the ship leave the port of Dos Bocos with the stated intent of
11 going to Vera Cruz, while its actual intent was to reach international waters to avoid legal
12 action and then head to the United States without returning plaintiffs' property. MMSI is
13 independently liable for the conversion of plaintiffs' property.

14 11. The burden of proof in bailment cases where property is lost or damaged while
15 in the bailee's possession, is that a prima facie case, or presumption, is raised when the bailor
16 shows non-return, loss, damage or destruction to bailed property. However, even excluding the
17 invalid release signed, the defendants did establish that the property that they took (with the one
18 exception of the bracers as noted above) was safely kept and returned to plaintiffs. Plaintiffs
19 bare assertions that property was not returned, or that property was returned damaged was
20 insufficient to establish damages, except for the following damages which have been
21 established by sufficient evidence:

- 22 a. \$100,000 that IACESA had to pay as duty or tax when the property was
23 returned to them in Mexico

- 1 b. \$34, 790 for unreturned bracers;
2 c. \$1,016,628.00 judgment against IACESA by SMT for late return of equipment.

3
4 **Insurance.**

5 12. Under the facts of this case, Plaintiffs did not breach the contract by failing to
6 provide the insurance as required under the original MTC. Even if Plaintiffs had, the failure to
7 provide insurance was not a "repudiatory breach" which would have allowed for termination of
8 the contract or the diving operations off the ship.

9 **Damages Caused by Global's Breach.**

10 13. Global's material breach in terminating diving from the ship excused
11 Plaintiffs' obligation to pay charter hire for the days diving was wrongfully
12 suspended/terminated, namely May 13 forward. Therefore, plaintiffs' were not obligated to
13 pay Invoice 161 in its entirety, but only those portions that were for charges due for the ship
14 and hire prior to May 13, 2006. Plaintiffs overpaid by \$371,000.00.

15 **POTENTIAL EXCULPATORY CLAUSE**

16 14. Annex C paragraph 2 and Part II, paragraph 12(c) might be argued to be
17 interpreted as an agreement not to allow any damages for breach of contract. Defendants did
18 not argue this or propose it in their Findings and Conclusions. However, even if it had been
19 argued, the Court rejects that interpretation as it would essentially negate the entire contract by
20 allowing a party to breach the contract with no consequences. In addition, exculpatory clauses
21 can be used to excuse negligence, but cannot be used to excuse intentional and wrongful
22 conduct, such as that done by Global.

1 Further, Admiralty law, which incorporates Washington law, does not permit the enforcement of
 2 overly broad exculpatory contractual provisions, which on their face disallow damages for culpable
 3 conduct beyond negligence.

4 **Damages due to breach**

5 15. The defendants' breach of contract directly and proximately caused the
 6 following expenses to be incurred or unpaid:

7
 8 \$600,000.00 Attorneys fees to mitigate Pemex penalty.
 9 \$2,250,000.00 IACESA unpaid invoices (27m pesos at 12.5 P/dollar)
 10 \$292,638.00 Commercial claims totaling 3,657,976 pesos at 12.5 P/\$
 11 \$3,513,638 Total

12 Had the contract not been breached by Global, Plaintiffs would have made a profit of around
 13 \$4,170,000.00. From this profit all of the above listed expenses, except the \$600,000.00 in
 14 attorney's fees to mitigate the PEMEX penalty would have been incurred and paid. Therefore,
 15 Plaintiffs damages due to the breach of contract are \$2,999,698 in lost profits and \$600,000 in
 16 costs to mitigate damages.

17 16. Plaintiffs are not due any money as a result of the oil, and fuel in the ship at the
 18 time of the termination of the contract.

19 **Punitive damages:**

20 17. In general no punitive damages are allowed under maritime law for breach of
 21 contract. However, punitive damages can be awarded if punitive damages are allowed under
 22 applicable state law.

23 18. In general, no punitive damages are allowed under Washington law unless
 specifically allowed by statute.

1. 19. Parties can choose the law venue under which a contract will be interpreted.
 2 They chose Washington and maritime law

3 20. Plaintiffs did not plead or argue and Washington statute that allows for the
 4 award of punitive damages. Therefore, punitive damages cannot be awarded. If punitive
 5 damages were allowed, the Court would find that the defendants deliberate and planned conduct
 6 to terminate the contract in order to obtain a higher charter rate and to leave the area where
 7 plaintiffs could have recovered their property to warrant an award of punitive damages

8 **Attorneys Fees, Costs and Interest**

9 21. Under federal maritime as well as Washington law, attorney's fees may only be
 10 awarded if allowed by contract or statute. There is no provision in in the contract that allows
 11 for an award of attorneys fees nor has the plaintiff cited an applicable statute that would allow
 12 for the award of attorneys fees, other than the statutory attorney's fees allowed by statute.

13 22. Plaintiffs are entitled to their statutory attorney's fees in the sum of \$200, filing
 14 fee of \$1,217.00, process service fees of \$220 and costs of \$1848.00 as prevailing party.

15 23. Plaintiffs' damages are liquidated in that they are based on objective data.
 16 Therefore, the Plaintiffs are entitled to pre-judgment interest on their damages. The court has
 17 discretion at which rate to award interest in this type of case. The court may consider relevant
 18 information including the rate charged in federal court, the rate charged in the state in which the
 19 litigation occurs, and relevant contract provisions. Under the circumstances of this case it is
 20 appropriate to award interest at the rate of 12% per annum, which is the rate charged in
 21 Washington State, from the date the damages are fixed and certain be ascertained to have
 22 actually been incurred until paid. Damages for lost profits were fixed at around the time the
 23 contract with Pemex would have been finished and all the profits realized. In fact damages for

1 lost profits probably accrued earlier than the end of the contract because plaintiffs provided
2 evidence that they received profits during the contract and they would have had the use of this
3 money during the contract, not just after the end of the contract. However, no testimony was
4 provided as to any specific dates at which the plaintiffs would have been receiving profits, so
5 loss of use of profits must be compensated by interest that runs from the end of the entire
6 contract with PEMEX. Interest on the mitigation costs and damages from the lawsuit against
7 plaintiff for late return of equipment could have run from the date the amount was paid or
8 judgment entered, but no evidence was provided as to those specific dates. The file does
9 establish a date by at least the date of filing and service of the complaint, so interest should run
10 from that date. Interest on the court fees paid from August, 2006 during which month the
11 fees were paid. Interest on the retained braces should run from the time they were not returned,
12 which was around June, 2006 when they were left on the platform and then appear to have
13 been transferred to Pemex.

14 **ORDER and JUDGMENT**

15 Based on the above Findings of fact and Conclusions of Law the Court orders that judgment
16 shall be entered according to the above; i.e.

17 Against Global and MMSI jointly and severally for \$1,016,628, \$100,000 for fee paid
18 in Mexico to obtain equipment and \$34,797 for braces, plus interest plus statutory attorneys
19 fees and costs associated with this claim;

20 Against Global for 2,999,698 lost profits and \$600,000 attorneys fees to PEMEX for
21 mitigation plus interest and costs associated with this claim.

22 ///

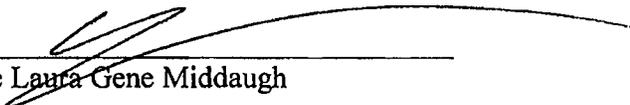
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A separate Judgment Summary and Order of Judgment are entered.

These Amended Findings have been entered to correct a scrivener's error on page 25, line 17 and to correct the footnote page indicator. In all other respect they are the same as those signed by the court on 3/3/11. The Court has also entered an Amended Judgment that corrects a scrivener's error on page 2, line 1 and mathematical errors on page 1, line 26 and page 2, line 8. In all other respects the Final Judgment is the same as that signed by the Court on 3/31/11

Dated 3/24/11



Judge Laura Gene Middaugh



wlc
MEG

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THE HON. LAURA GENE MIDDAUGH

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

REPRESENTACIONES Y
DISTRIBUCIONES EVYA, S.A. de
C.V., et al.,

Plaintiffs,

v.

GLOBAL EXPLORER, LLC, et al.

Defendants.

No. 09-2-04833-9 SEA

**AMENDED FINAL JUDGMENT
(Clerk's Action Required)**

JUDGMENT SUMMARY

1. Judgment Creditors: Representaciones y Distribuciones EVYA, S.A. de C.V., ("Evyva");
and Instalaciones, Electromecanicas, Civiles y Electricas, S.A. de
C.V. ("Iecesa").

2. Judgment Debtors: Global Enterprises, LLC, ("Global"); and Maritime Management
Services, Inc. (MMS).

3. Principal Judgment Amounts: **Solely Against Global: \$3,599,698** composed
of the following items:

\$2,999,698 (lost profits); plus

\$600,000 (mitigation costs paid by
plaintiffs)

**Against Global and MMS jointly and
severally: \$1,154,418**, composed of the
following items: ✓

1		\$1,016,628 (lawsuit for late return of equipment); plus
2		\$100,000 (import "fees" paid by plaintiffs), plus
3		\$34,790 (braces not returned)
4	4. Pre-judgment interest at 12% per annum from dates indicated:	Solely Against Global
5		\$1,529,812.30 (on \$2,999,632 from 12/1/06 through 2/28/11)
6		\$150,000 (on \$600,000 from 2/1/09 through 2/28/11)
7		Against Global and MMS jointly and severally:
8		\$254,157 (on \$1,016,628 from 2/1/09 through 2/28/11)
9		\$54,000 (on \$100,000 from 9/1/06 through 2/28/11)
10		\$19,482.40 (on \$34,790 from 6/1/06 through 2/28/11)
11		
12		
13		
14	5. Taxable costs and attorney fees:	Against Global and MMS jointly and severally:
15		\$200 attorney's fees;
16		Taxable costs: \$3695
17		
18	6. Attorneys for Judgment Creditors:	Dennis Moran
19		Moran, Wong and Keller
20		5608 17 th Avenue NW, Seattle WA 98107
21	7. Attorneys for Judgment Debtor Global Enterprises, LLC:	Matthew Crane, Gary Haugen, Marcin Grabowski, Susan Kaplan,
22		Bauer, Moynihan & Johnson
23		2101 Fourth Avenue, Suite 2400
24		Seattle, Washington 98121
25	8. Attorneys for Judgment Debtor Maritime Management Services, Inc:	Michael Gossler,
26		Mongtgomery, Purdue, Blankenship & Austin.

5500 Columbia Center
701 Fifth Avenue
Seattle, WA 98104

9. Post Judgment Interest Rate: 12% APR.

FINAL JUDGMENT

The Court has entered Findings of fact, Conclusions of Law and Order. Final Judgment shall be entered as follows:

A. Judgment is awarded in favor of the plaintiffs Representaciones y Distribuciones EVYA, S.A. de C.V., (“Evya”) and Instalaciones, Electromecanicas, Civiles y Electricas, S.A. de C.V. (“Iecesa”), severally against defendant Global Enterprises LLC, a Washington LLC, UBI# 602652637, in the amount of:

\$2,999,698 (lost profits); plus

\$600,000 (mitigation costs paid by plaintiffs)

Plus pre-judgment interest for the periods and in the amounts as specifically set out in the Judgment Summary above, which is incorporated in this order,

B. Judgment is awarded in favor of plaintiffs Evya and Iecesa, jointly and severally against defendants Global Enterprises, LLC and Maritime Management Services, Inc. (MMS) a Washington Corporation UBI# 60292328, in the amount of

(i) \$1,016,628 (lawsuit for late return of equipment); plus

\$100,000 (import “fees” paid by plaintiffs), plus

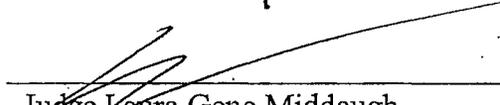
\$34,790 (braces not returned)

Plus pre-judgment interest for the periods and in the amounts as specifically set out in the Judgment Summary above, which is incorporated in this order, plus

(ii) Taxable attorney’s fees in the amount of \$200 and costs in the amount of \$3695.00.

1 C. Post judgment interest shall accrue at 12% APR (twelve percent annual
2 percentage rate) on the all Judgment Amounts from 3/1/11 until satisfied.

3
4 It is so ORDERED, this 29 Day of March 2011.

5
6 
7 Judge Laura Gene Middaugh
8 King County Superior Court Judge

9 Presented by:

10 BAUER MOYNIHAN & JOHNSON LLP

11 /s/ Marcin Grabowski

12 Matthew C. Crane, WSBA No. 18003

13 Marcin Grabowski, WSBA No. 36339

14 Susan K. Kaplan, WSBA No. 40985

15 Attorneys for Defendants Global Explorer, LLC, Global Enterprises, LLC, Frank and Jane
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