

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
IN SEATTLE

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THE INSTITUTE OF CETACEAN)	
RESEARCH, et, al.,)	
)	No. C11-2043RAJ
Plaintiffs,)	
)	
v.)	
)	
SEA SHEPHERD CONSERVATION)	
SOCIETY, et al.,)	
)	
Defendants.)	

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE RICHARD A. JONES
UNITED STATES DISTRICT COURT JUDGE

February 16, 2012

APPEARANCES:

For the Plaintiff:	John F. Neupert M. Christie Helmer MILLER NASH
For the Defendant:	Daniel P. Harris Charles P. Moure Rachel Buker HARRIS & MOURE

1 THE CLERK: We are here in the matter of the
2 Institute of Cetacean Research et al. versus Sea Shepherd
3 Conservation Society, et al. cause number 11-2043,
4 assigned to the court. If counsel could please rise and
5 make your appearances.

6 MR. NEUPERT: John Neupert on behalf of the
7 plaintiffs, your Honor. Seated at counsel table with me
8 is Chris Helmer, also on behalf of the plaintiffs.

9 If I could introduce our guests from Japan
10 representing the plaintiffs here at this time.
11 Ms. Ohmagari is assistant director of ICR. Seated next to
12 her is Mr. Makoto Ito, the president of Kyodo Sempaku.
13 Seated next to him is Mr. Iwasaki, attorney for
14 plaintiffs, from Japan. And seated behind him is
15 Mr. Ishikawa, who has been a past cruise leader.

16 THE COURT: Thank you. Thank you all for being
17 here this morning.

18 MR. HARRIS: Good morning, your Honor. Dan Harris
19 here today on behalf of defendants Sea Shepherd and Paul
20 Watson. To the right of me is Ms. Rachel Buker,
21 co-counsel; Ms. Susan Hartland, who is the administrative
22 director of Sea Shepherd U.S.A.; Mr. Nicholas Makhani, who
23 is the Sea Shepherd U.S.A. CFO; Ms. Kim McCoy, Sea
24 Shepherd U.S.A.'s legal director. And standing on the end
25 is my co-counsel, Charles Moure.

1 THE COURT: Good morning to all of you. Thank you
2 for being here.

3 Before we begin, I believe a few words with
4 introductory remarks are appropriate to set the tone and
5 give the parties a little more clarity as to how this
6 proceeding will be conducted, and what the court will
7 expect from the parties by way of argument.

8 I will begin this proceeding, first of all, with an
9 admission. I have spent many years on the bench and I
10 have seen a lot of cases in my career on the bench. I can
11 tell you I have never seen a case like this. I can say
12 with a degree of certainty that I doubt few other judges
13 have considered issues like this in their careers as well.

14 I have never considered whether to interfere with
15 activities occurring tens of thousands of miles away on
16 the high seas. As near as I can tell, no United States
17 court has ever imposed an injunction under the
18 circumstances before me. The closest scenarios that I
19 have seen, from the few courts who have issued
20 injunctions, were dealing with circumstances to protect
21 salvage operations.

22 There are several factors that make this an extremely
23 complicated case. I think that listing all of them would
24 probably take most of the morning, and we don't have time
25 to do that, so I am going to focus on just a few of the

1 critical areas.

2 The first is that I am being asked to interpret
3 international law, to see if there are any norms against
4 the Sea Shepherd's conduct that are universally accepted
5 by the civilized nations of the world. That is the
6 inquiry under the Alien Tort Statute. And it is no simple
7 matter. I would note that every time a Court of Appeals
8 seems to address this question, they feel the compunction
9 to write a 100-page opinion.

10 Now, that kind of exhaustive analysis of the law is
11 something that is difficult for any trial court to
12 undertake, and it is especially difficult with the
13 expedited context of a preliminary injunction. This
14 matter was filed, I believe, on December 22nd, which was
15 really just a matter of a few weeks ago. So this court
16 has had an aggressive schedule to try and give the parties
17 the opportunity to get the matter before the court and
18 give the parties some answer as to the court's position
19 with respect to the issues presented.

20 The second issue is that the international law that
21 the parties are talking about, specifically international
22 law about free navigation on the open sea and piracy, has
23 never been the subject of a civil case. So I don't have
24 any help from other courts who have had to consider
25 questions like the ones before me.

1 Moreover, many of the cases the lawyers have cited as
2 helpful are distinguishable in many ways, and prove in
3 some cases to be of little value. To be honest with you,
4 it would be a stretch to apply some of their analysis to
5 the issues now before me.

6 Third, both parties agree on the criteria this court
7 must consider in granting a preliminary injunction. Now,
8 two of the criteria require this court to balance the
9 hardships upon the respective parties and to consider the
10 public interest.

11 Now, typically in the application of a preliminary
12 injunction that is a straightforward task. But it is
13 complicated here because, it seems plain to me, if I grant
14 the injunction that plaintiffs are requesting, then the
15 plaintiffs will, without a doubt, continue to engage in
16 their activity of killing whales.

17 The plaintiffs insist that I am not supposed to
18 consider the legality or illegality of the whaling
19 activities. In my assessment, I believe it would be
20 inappropriate for me to consider the balance of hardships
21 or the public interest without considering the
22 environmental consequences in this case.

23 Now, it is clear to me that a substantial portion of
24 the world believes it is very much not in the public
25 interest to continue killing whales in the southern ocean.

1 It is also clear to me that the environmental harms like
2 the killing of hundreds of whales are relevant in the
3 balance of hardships. So please understand in this
4 context I must consider this aspect of the facts.

5 Now, the legal questions I have to consider before I
6 can decide to issue the preliminary injunction are
7 extremely difficult and extremely complicated. By
8 contrast, the factual issues are not so complicated. The
9 parties have put together a very comprehensive collection
10 of videos and photographs, which I have seen, and I have
11 reviewed that evidence. And while the parties have many
12 disputes, I think they agree on what is happening between
13 them in the southern ocean. I think it is also abundantly
14 clear from the videos that have been presented to this
15 court that there is no question of the activities that are
16 taking place.

17 So with that, I believe I must comment on the factual
18 situation. I am doing that so the parties don't spend
19 much time in describing the factual background. Please
20 understand I have read your briefs. I can give you a word
21 of caution, and perhaps it is a word of advice, it is not
22 in your best interest to restate or read portions of your
23 briefing to the court. That is of very little value to
24 this court. I am familiar with the facts of this case, so
25 I am going to ask you to spend your time in perhaps a

1 different and more beneficial way to help educate the
2 court in other areas.

3 Now, it is clear to me what the Sea Shepherd is doing
4 in the southern ocean has the potential to be dangerous to
5 human life. The southern ocean is a dangerous place in
6 and of itself. I think everyone agrees that the Sea
7 Shepherd's tactics make it a little more dangerous under
8 the circumstances of what they are engaging in. I think
9 it is self-evident by the videos presented by the parties.

10 It is apparent to me the Sea Shepherd would prefer
11 that people not get hurt. I think that is restated over
12 and over again in the declarations and in the videos that
13 have been presented to this court. Also, there is no
14 evidence that they have ever done anything with the
15 intention of hurting anyone. I think, again, that is
16 borne out in the videos and declarations.

17 I think the court has to take a practical
18 consideration of the evidence before me. When you throw
19 or launch glass bottles at a ship with people on deck you
20 put every one of them at risk of injury. This is
21 particularly so when you use large slingshot-type devices
22 to project bottles, with unpredictable results as to where
23 they will land or if they will cause injury to any other
24 person.

25 This is also true when you launch flares, intended to

1 start the netting covering the deck on fire.

2 You put people at risk of injury also when you point
3 laser beams at the bridge of a vessel.

4 You put people at risk of injury when you use thick
5 ropes in an attempt to disable the rudder or propeller of
6 a ship. You put people at risk of injury because they
7 will be unable to maneuver through storms and through ice
8 flows. One of the videos specifically shows a large
9 iceberg or large ice chunks in the ocean. I think it is
10 self-evident the potential harm that could cause if the
11 ship was unable to maneuver through that.

12 Also, when you pilot your boats too close to the
13 whaling boats there is a serious risk of injury, a lesson
14 I think that is abundantly clear from the collision with
15 the *Ady Gil* two seasons ago.

16 Now, to be honest, what the Sea Shepherd is doing, it
17 appears to me, some of it is closer to what I would
18 characterize as petty vandalism. I am talking now about
19 the paint bomb attacks and the smoke bombs. Most of what
20 they are doing does put people at risk of injury in that
21 ocean area.

22 Now, having said all that, no one has been hurt so
23 far, even after seven or eight seasons in this conflict.
24 Now, whether that is because the Sea Shepherd's efforts to
25 avoid injury have proven to be true, that they are careful

1 in trying to avoid injury, or just plain luck, or a
2 combination of the two, I can't say for certain. I can
3 only say that the plaintiffs have failed to show or
4 provide any specific evidence of a personal injury to
5 anyone. That doesn't mean that I shouldn't issue an
6 injunction, it is just an observation by the court at this
7 point in time.

8 I am going to open this up to oral argument. I will
9 have plaintiffs go first, since they are the parties
10 asking for the extraordinary relief.

11 Now, I am going to give you a few areas to steer clear
12 of. Again, I am going to give you some tentative rulings
13 in that regard that will help you in the argument.

14 First, I don't need to hear any more about subject
15 matter jurisdiction. It is pretty clear to the court that
16 I do have subject matter jurisdiction under the Alien Tort
17 Statute and admiralty jurisdiction as well. That does not
18 mean the plaintiffs have a case, it just means that I have
19 jurisdiction to decide whether or not they have a case.

20 Second, I don't need to hear any more about the First
21 Amendment. Even if this case were being conducted because
22 of activities in the Puget Sound area, as opposed to the
23 southern ocean, it is clear to me that the First Amendment
24 does not give the Sea Shepherd the right to throw things
25 at ships or interfere with their navigation. I don't need

1 to hear any more of that argument.

2 Other than those restrictions, I will leave it to the
3 parties to pursue the type of argument that you would like
4 to engage in.

5 Also, I am going to put a time restriction on your
6 argument before this court. I suspect the parties could
7 go on all morning, all afternoon, and continue through the
8 balance of the week. That is not going to take place.
9 You have an hour to make your arguments. Your time will
10 be recorded by the in-court deputy. If at any point in
11 time you would like to inquire of what is left or what is
12 available, please ask permission from the court to
13 inquire, and I will give you the chance to do so.

14 Again, counsel, a strong word of caution: I have read
15 your briefs. I have looked over your briefs a few times
16 as a matter of fact. And while I would like to hear the
17 parties make aggressive and strong advocacy on behalf of
18 their clients, again, I don't need to hear you read your
19 briefs. This is a complicated case. I need you to help
20 me understand your case in a different way. So please
21 keep those thoughts in mind.

22 Counsel for the plaintiff, I have given you the
23 court's preliminary thoughts. I have also indicated that
24 you have the opportunity to go first. So with those
25 thoughts, you may begin.

1 Counsel, I will have some questions. If they do fit
2 in the flow of your argument -- I will let you proceed
3 with your argument, but I may interrupt you and I may have
4 some questions at the conclusion of your argument.

5 Counsel, please proceed.

6 MR. NEUPERT: Thank you, your Honor. I appreciate
7 the court's introductory remarks and clarification on
8 issues that you don't need to have us address this
9 morning.

10 With respect to the three areas you identified as
11 creating some difficulty to the court, let me begin with
12 the last one. Perhaps I should conclude with that, but
13 let me begin with it, because I think it is very
14 important.

15 The balance of hardships. You indicated that you
16 thought it appropriate to take into account an
17 environmental considerations as to whether or not to grant
18 an injunction.

19 I think it is important to recognize that the taking
20 of whales is going to continue, whether or not this court
21 issues an injunction. So the court's grant or denial of
22 an injunction will not have any effect on the activities
23 of the plaintiffs with respect to what's permitted under
24 international law.

25 What the denial of an injunction will do will continue

1 to put seamen at risk of serious injury. That's what
2 should be considered in the balance of hardships. This
3 case is not about economic interests, this case is not
4 about whaling interests, this case is about one thing
5 only, and that is safety at sea.

6 I have some videos that I was going to display, and I
7 may during the course of the argument, but I think it is
8 important to keep the focus of what plaintiffs' case is
9 all about. The focus is protecting people at sea, people,
10 as you already have recognized, by going to the southern
11 ocean have put themselves in harm's way in some respect.
12 But defendants have no right to increase the risk of harm.

13 I will display one video. This is what has happened.

14 THE COURT: Counsel, if you are going to show a
15 video, it would be beneficial to identify it by exhibit.

16 MR. NEUPERT: This is, your Honor, Docket Number
17 72, Exhibit 2. This is events which occurred on
18 January 12 or 11, I believe, on the high seas, to the
19 Shonan Maru. Focus on the seamen in the front. They are
20 throwing bottles.

21 As you see the progression of the bottles, the person
22 throwing them throws them lower, throws them higher,
23 throws them higher yet still, and the last one, but for
24 the crewman having ducked, could have hit him in the head.

25 Now, they say they have no intent to injure, but you

1 cannot watch that sequence of video and conclude that the
2 person throwing the bottle was not trying to hit the
3 person who was on the bow of the ship.

4 That's Seaman Abe. There is no reason why Seaman Abe
5 should be put at risk of having his head hit by a bottle
6 flung by the defendant. So when you consider the balance
7 of hardships, consider Seaman Abe, because he is the one
8 being put at risk.

9 Yes, the defendants protest the taking of whales. And
10 you have indicated that you need to give some
11 consideration to that factor. I guess I don't understand
12 how the court can balance that issue against human safety,
13 because it is human safety that has always been put at the
14 top of the law's desire to provide protection. And that
15 is what we are seeking here.

16 So when you consider the public interest, I would ask
17 the court to focus on what is at stake, and that is the
18 safety and the security of over a hundred people on the
19 high seas. Those people are going to continue their
20 operations until the end of the season, regardless of what
21 this court does. They should be able to continue their
22 operations free from the risk of harm. That's the reason
23 we are here.

24 There are other places that are going to consider the
25 legal issue of whaling. From reading the materials, you

1 are aware of the International Court of Justice case which
2 is pending. The outcome of that case is far beyond the
3 scope of this proceeding to predict or even consider,
4 because those pleadings are not even public.

5 The issue in this case is not whether or not whaling
6 is legal or not. We cited the one case which stands for
7 the proposition that this court cannot consider the
8 validity of a sovereign act of Japan, having issued a
9 special permit in Japan. So it is assumed for purposes of
10 this proceeding that what is happening is valid, legal and
11 authorized. There is a legal way to challenge that.

12 Just because timber protesters protest clear-cutting,
13 and may challenge the right of a logging company to
14 clear-cut, doesn't give the timber protesters the right to
15 spike the trees. Courts in those contexts consider the
16 environmental factors, but what always comes out ahead is
17 the protection of human safety.

18 The same is true in all the other contexts in which
19 violence has been used to protest things that people have
20 strong beliefs about, whether it be the abortion
21 protesters, whether it be war protesters, whether it be
22 civil rights protesters. In all of those circumstances,
23 no matter what is in the balance, what always comes out in
24 the end is protection of human safety.

25 Now, protection of human safety can be done here

1 consistent with the defendants' rights to engage in
2 legitimate protest activities.

3 So in fashioning injunctive relief, what the court can
4 do is consider the defendants' desire to protest and the
5 plaintiffs' desire to protect human life and property.

6 What we have proposed by way of injunctive relief is
7 the 800-meter perimeter. That perimeter will allow the
8 defendants to film activities, to observe activities.
9 They can use that film for whatever publicity they seek to
10 bring to the question. They can engage in legitimate
11 protest activities from a distance. That will insure the
12 safety not only of the plaintiffs' crew, but will insure
13 the safety of the defendants' people.

14 Mr. Watson's desire to interfere with the operations
15 of plaintiffs has put his own people at risk on the high
16 seas. That is his choice. That is those people's choice.
17 But an injunction in this case, which would protect human
18 life at sea, can be granted consistent with the
19 defendants' lawful rights to observe, protest and
20 whatever.

21 In balancing the hardships, I think there is an easy
22 path for the court to balance the hardships in a manner
23 that is required by law, permitted by law, but still grant
24 the plaintiffs the relief that is necessary. It would be
25 very unfortunate if we left this courtroom today and

1 somebody be injured tomorrow. These activities, as I say,
2 are going to continue, but they need to be continued in a
3 way that assures that people do not suffer as a
4 consequence.

5 THE COURT: Let me ask you a question, counsel, at
6 this point that I think it is appropriate. What do you
7 envision by way of enforcement? In other words, if the
8 court were to grant your request and impose an 800-meter
9 restriction, and I am assuming that the defendants in this
10 case would continue in their activities and violate that
11 order, what does enforcement look like for you down the
12 road, in terms of what you would expect this court to do?

13 MR. NEUPERT: First, I would hope that the
14 defendants would abide this court's injunction. The rule
15 of law must mean something. But if the defendants choose
16 to disregard this court's order, given the fact that
17 defendants are residents of the state of Washington, they
18 have assets in the state of Washington, they have
19 personnel in the state of Washington, the court's powers
20 of contempt could be applied against those assets, could
21 be applied against the individuals here at counsel table.

22 There is a way, depending on the nature of the
23 violation, how serious it is, how repetitive it is, all of
24 the facts and circumstances -- The reason this case is
25 here is because the defendants are here. The defendants

1 have raised millions of dollars, and continue to raise
2 dollars to support their activities. This court's
3 injunctive power and contempt power can affect those
4 operations. I suspect that if the defendants were to
5 deliberately and flagrantly violate this court's order
6 that the donations of people would soon dry up.

7 This is a 501(c)(3) organization. There are
8 restrictions on their ability to engage in activities.
9 Disregard of a court order, I'm sure, would have some
10 impact on their 501(c)(3) charter, would have an impact on
11 their ability to raise money. And so I think there are
12 serious consequences that can be imposed on the defendants
13 and their assets if they were to violate the court order.

14 THE COURT: Counsel, that tees us into a different
15 area. What is your proof that the Sea Shepherd, a United
16 States corporation, is actually responsible for the
17 activity that is happening in the southern ocean? In
18 other words, you have a lot of allegations about funding,
19 but do you have any proof that money donated to the United
20 States Sea Shepherd entity is being used to support what
21 is happening in the southern ocean? Aren't there Sea
22 Shepherd entities around the planet?

23 MR. NEUPERT: There are, your Honor. At least
24 that's what defendants have asserted. We have not put
25 into this record the financial statement of Sea Shepherd

1 Australia, which they contend is one of the operations at
2 play here. I can tell the court, having seen the
3 financial statements of Sea Shepherd Australia, which we
4 secured from a public agency in Australia, Sea Shepherd
5 Australia does not have any assets of any significant
6 respect. I think they showed on their balance sheet
7 something less than 6,000 or \$60,000 in assets.

8 In the record, and I may not be able to find it at my
9 fingertips, I have put in a declaration, in which we
10 attached to that declaration a number of financial
11 statements -- excuse me, tax returns from public records
12 that we secured. Those tax returns show that Sea Shepherd
13 Seattle, I will call it, is the funding arm of the
14 activities.

15 In our brief -- Let me see if I can find it quickly.
16 I will look for it in a second, your Honor. But in my
17 declaration we put into the record tax returns filed, I
18 think, as late as October of 2011, in which those tax
19 returns itemized for the IRS the use of the millions of
20 dollars raised by the Sea Shepherd.

21 The statements in those returns are to the effect that
22 they have spent over \$6 million in their southern ocean
23 operations using what are described as "our ships." The
24 ships identified as "our ships" are the three ships that
25 have been at issue in the prior campaign, and that are at

1 issue in this campaign.

2 So in terms of a direct connection between Sea
3 Shepherd Washington and the activities in the southern
4 ocean is the declarations of the defendant themselves,
5 that say the \$6 million that they raise from tax-free
6 donations have been used to fund the southern ocean
7 operations, including "our ships." And they also take
8 depreciation under U.S. tax laws on those same ships.

9 THE COURT: It is a minor point, counsel, but some
10 of those ships almost look -- They look fairly exotic.
11 Just the purchase of some of those ships I see could have
12 cost a substantial amount of money without funding
13 specific activities. Is there a distinction between the
14 two? It is not a major issue, but how do you distinguish
15 between purchasing vessels and directing activities?

16 MR. NEUPERT: Mr. Watson, we must remember, is a
17 defendant. Mr. Watson is the president of Sea Shepherd
18 Washington. He is in the southern ocean, as we speak. He
19 is the person who you have seen on the various videos
20 directing the activities of crew and other people in the
21 southern ocean.

22 We put in videos from the Whale Wars in which
23 Mr. Watson is sitting in his room on the Steve Irwin
24 talking to the other captains and the other crew members,
25 trying to orchestrate how they are going to interfere

1 with -- the navigation of the Bob Barker, so Bob Barker
2 can escape the trailing ship. You can see Paul Watson
3 saying: "That's a good plan. Let's do that. Let's get
4 more boats out there. Where is this other dingy? Why
5 isn't that dingy out there with its ropes trying to foul
6 the props and rudders of the ship?"

7 So there is no question on this record, as a
8 preliminary matter anyway, that Mr. Watson directs the
9 activities on the southern ocean, that Sea Shepherd
10 Washington funds those operations, and that the ships
11 which are owned -- at least as declared on the tax
12 records, are owned by Sea Shepherd Washington, are the
13 vehicles for achieving the interference which puts people
14 at risk.

15 THE COURT: Thank you, counsel. Please continue.

16 MR. NEUPERT: I was talking about the balance of
17 hardships. I think I have covered that point, unless the
18 court has other questions in that regard.

19 Working back up the order that you provided as issues,
20 which is the juror being required or asked to interpret
21 international law of freedom of navigation and piracy, and
22 that those matters have never been the subject of a civil
23 case, and that many of our cases are distinguishable.

24 I guess let me begin addressing that matter. Let me
25 do it this way: You said at the outset that you have

1 admiralty jurisdiction, which you do. Admiralty
2 jurisdiction is centuries old. One of the fundamental
3 principles of admiralty jurisdiction is dealing with the
4 consequences of collisions. There are rules and
5 regulations that have been adopted over those many
6 centuries with respect to freedom of navigation on the
7 high seas and the duty -- the absolute duty to avoid the
8 risk of collision.

9 So whether this court were going to be called on to
10 interpret the COLREGS, or the High Seas Convention, or any
11 of the other treaties which we have cited, the court need
12 not go that far. The court could issue an injunction in
13 this case at this time simply on the premise that the
14 fundamental law of the sea, as recognized for hundreds of
15 years, is that there is a duty to avoid collision. And
16 that duty means you must navigate your vessel and not put
17 the other vessel at risk.

18 And if that were the scope of the court's injunction,
19 and the 800 meters -- make it 800 meters, make it some
20 other distance, that would prevent them from being able to
21 launch the projectiles that you have seen them launch with
22 their devices.

23 Now, we have never had to deal with whether they can
24 launch them from 800 meters or 400 meters or 200 meters,
25 but my suspicion is that a distance of 800 meters would

1 assure not only freedom from risk of collision but it
2 would erase any ability to launch glass projectiles
3 against the ship and crew.

4 So if you look at just the simple law of the sea, the
5 absolute, unmistakable century's old duty to avoid
6 collision, this court could base its injunction on that
7 simple legal principle.

8 THE COURT: Why wouldn't damages be the remedy, as
9 opposed to injunctive relief?

10 MR. NEUPERT: Well, damages may be a remedy for
11 paint damage to a ship, having to repaint it. But damages
12 is not a remedy for losing propulsion on the high seas
13 when there are icebergs on the horizon. That is the most
14 serious -- that is one of the most serious risks.

15 We have put in the record pictures of the propeller
16 intertwined with wire ropes. So far a ship has not
17 permanently lost propulsion and navigation, but Captain
18 Miller's declaration has pointed out should a ship in
19 those waters lose propulsion and navigation, because they
20 are so distant from ocean-going tug assistance, the ship
21 would be basically at mercy on the high seas for several
22 days.

23 Given that weather can change dramatically in that
24 part of the world, that in and of itself puts the ship at
25 serious risk of injury, along with everybody aboard. That

1 is not the nature of an injury that is compensable by a
2 monetary award.

3 While we have not cited any case that says the court
4 exercising admiralty jurisdiction can enter injunctions to
5 avoid the risk of future collisions, what we have put in,
6 and I don't think it is seriously disputed, is that a
7 fundamental principle of admiralty law is the duty to
8 avoid collision.

9 Well, it is not too far of a stretch or leap to say if
10 there is a duty to avoid collision, and the defendants
11 have engaged in a repeated pattern of risking collision,
12 that a proper remedy to enforce the legal obligation to
13 avoid the risk of collision is to avoid risk of collision,
14 and to conduct yourselves accordingly.

15 Because the defendants in this case have proven that
16 they will continue to resist all means by which we have
17 been able to keep them at bay, an 800-meter safety
18 perimeter is the way to do it.

19 Given that, Captain Miller, who has over 40 years of
20 experience in this area, says that is something that is
21 appropriate under these circumstances.

22 Going back to what is an undisputable, if you will,
23 legal basis to grant injunctive relief, I would submit
24 that one of them, very simple, centuries old duty to avoid
25 collision.

1 Now, if you want to go a step beyond that, we have
2 cited to the court several treaties, all of which have
3 within them -- the COLREGS explicitly, the others
4 implicitly, all of them have within them the same
5 fundamental obligation, which is, ships have the right of
6 free and safe passage on the high seas, with certain
7 exceptions. The certain exceptions are primarily
8 exceptions granted in favor of warships, not private
9 militiamen.

10 International law has recognized what has been
11 admiralty law forever. International law has codified
12 what is recognized admiralty law in the various treaties
13 and conventions that we have cited. Like I say, all of
14 them have, either explicitly or implicitly, this
15 fundamental obligation to abide free and safe navigation
16 on the high seas. Unless you are a warship, and then you
17 have grounds as a warship to intercept another vessel.

18 The defendants are not warships, nor do they have
19 rights of state, despite their citation to the UN World
20 Charter and so forth.

21 So admiralty, duty to avoid collision, is a basis for
22 the injunctive relief. That doesn't really, I don't
23 think, require much interpretation of international law.

24 Piracy, that is something that is presented by the
25 papers, and is new and different. The criminal cases

1 which the parties have cited are cited because there is no
2 other law to cite. U.S. law criminalizes piracy against
3 The Law of Nations. Because Congress has incorporated The
4 Law of Nations as the definition of piracy, that brings in
5 The Law of Nations. And over the last 100 or 200 years
6 courts haven't had much obligation or responsibility for
7 interpreting what is piracy.

8 With the Somalia situation, that has now been brought
9 front and center, and the courts are dealing with it. And
10 the courts deal with these issues as common law courts
11 have from the beginning.

12 You have the 1820 decision of the U.S. Supreme Court,
13 the Smith decision, in which the court went on about what
14 was piracy then. Courts have not been called upon, as the
15 two Virginia judges noted, since then.

16 But the two Virginia judges in the cases cited, one
17 ruled that conduct, which we have pleaded and demonstrated
18 in this case, constitutes piracy against The Law of
19 Nations. The other court said, no, you have to have
20 robbery in order to have piracy. And now that issue is on
21 appeal.

22 What is different in our case from the two Virginia
23 cases is that in our case the defendants have actually
24 physically boarded the ship. In January, as we put into
25 the record, the Steve Irwin facilitated three people from

1 Australia boarding the Shonan Maru No. 2 in an effort to
2 have the Shonan Maru No. 2 have to turn back to Australia
3 to put those people ashore. That was intended solely for
4 the purpose of affecting the navigation of the Shonan Maru
5 No. 2, so the Shonan Maru No. 2 could no longer follow the
6 ship, and they could escape their tail, and then go find
7 the Nisshan Maru, which is what their objective is.

8 So you have a physical boarding in this situation.
9 You didn't have that in the two cases in Virginia.

10 And we put into the record, and I could show the
11 court, if you like, where just within the last month they
12 have attempted to attach physical devices to the Shonan
13 Maru No. 2 in an effort to affect the navigation of the
14 vessel.

15 These were what they call Shepherd's crooks, with long
16 wire ropes that trail from the -- They hook it on to the
17 rail, and it trails behind the ship, and they hope when the
18 ship turns those will get in the rudder or propeller.

19 And so we have physical attachment, if you will, to
20 the vessel. We have physical boarding of the vessel. And
21 while there may not be an intent to rob, there certainly
22 is an intent to affect the navigation of the ship. That
23 is piracy. That is modern day piracy.

24 While there is not a lot of precedent to guide the
25 court, there are these two decisions from Virginia which

1 go into the history of all of this in great depth. The
2 Hasan case applied the treaty to conclude this was modern
3 day piracy.

4 THE COURT: Counsel, if you had to compare the
5 activities -- the two Virginia cases to the activities in
6 this case, don't we find ourselves in a remarkably
7 different set of factual circumstances, compared to the
8 degree of activity, force and violence, compared to what
9 was done in this particular case?

10 MR. NEUPERT: In a manner of degree, yes. But it
11 is not matters of degree that are important. It is
12 whether or not you have fundamental, underlying facts
13 which satisfy the elements, if you will, of the tort of
14 piracy. The elements, as stated in the convention, are
15 illegal acts of violence, detention, or any act of
16 depredation committed for private ends by the crew or the
17 passengers of a private ship.

18 We have acts of detention. We have acts of violence.
19 We have acts of depredation, which may differ as a matter
20 of degree from shooting an AK 47. But when you launch,
21 with a high speed launcher, bottles at the heads of
22 crewmen, while you approach them violently with a fast
23 ship, that is akin to what the Somali pirates do in their
24 waters. Some the acts of violence, detention or
25 depredation are present in this case.

1 THE COURT: Counsel, don't you see a remarkable
2 difference between someone approaching you with an AK 47
3 and someone throwing beer bottles with butyric acid?

4 MR. NEUPERT: Yes. It is a matter of degree.
5 Does it satisfy the underlying act of violence? Yes, it
6 does.

7 I grant the court that there is a difference. Is it a
8 difference of a sufficient kind to make a legal
9 difference? I would argue that it is not. Because what
10 the law of piracy is intended to do is to protect ships in
11 navigation on the high seas from having their navigation
12 interfered with by violence, whatever kind of violence may
13 be necessary under the circumstances, for private
14 purposes. One of the arguments the defendants have made
15 in response to the motion for preliminary injunction is
16 that if you enjoin us we won't be able to raise money.

17 Well, what private end -- I mean, that satisfies the
18 proof of the private end if you need proof further than
19 the private end of trying to interfere with the navigation
20 of the ship. But the proof of the private end, one of the
21 elements of the treaties and conventions, is present in
22 this case in spades. And that is, they engage in this
23 conduct, interfere with the operations, to achieve their
24 private goal of ending the taking of whales. They engage
25 in this conduct for the private end of raising millions of

1 dollars so they can go out and buy more ships and carry on
2 more campaigns, whether it be a campaign against whales, a
3 campaign against dolphins, a campaign against any sort of
4 activity they dislike.

5 The elements of the tort, the elements of a violation
6 of what dozens of countries have defined as piracy, are
7 present in this case.

8 I can't argue that -- These aren't AK 47s. I can't
9 argue that they don't do this with the intent of taking
10 over the vessel and going off like a privateer in the old
11 days. But they do engage in this conduct with the intent
12 of interfering with the navigation of a vessel on the high
13 seas who has the absolute right to engage in navigation
14 free of the risk of people boarding them at night.

15 When you have people approaching your ship at high
16 speed, with weapons, you don't know what is going to
17 happen. That's one of the reasons why we have this law of
18 piracy.

19 And, yes, there is butyric acid in one bottle. What's
20 in the next bottle? There is no guarantee these
21 defendants in order to achieve their objectives won't
22 ratchet up the risk of harm to the plaintiffs.

23 So Seaman Abe, who is on the bow of the ship doing his
24 job, he doesn't know what is in that bottle. He shouldn't
25 have to worry about what is in that bottle, your Honor,

1 because the defendants have absolutely no right to throw
2 it. And that's the issue here, do they have a right to
3 engage in violence? Will the rule of violence trump the
4 rule of law? And it should not.

5 So we have the right of free navigation, the right to
6 be free from piracy.

7 Let me just say, while we haven't gone to great
8 lengths to explicate our state law claims, I believe that
9 at trial we would be entitled to the same
10 relief, permanent injunctive relief, and preliminary
11 injunctive relief for that matter, under basic state law
12 that says you cannot in the state of Washington raise
13 money, engage in planning to commit torts against vessels
14 on the high sea.

15 Clearly they couldn't do it to commit a tort in Puget
16 Sound. Clearly they couldn't do it to commit a tort three
17 or 12 miles off the state of Washington. Is it really any
18 different if they do it 5,000 miles from here?

19 The state law of Washington is that people in
20 Washington must abide Washington law, and Washington law
21 does not permit people to engage in assaults, batteries or
22 trespass, or to conspire to commit assaults, batteries or
23 trespass. And that is pleaded in our case, because all of
24 those elements are in the complaint. And Washington State
25 law would permit this court to grant the same injunctive

1 relief.

2 If this was an abortion protest case, they wouldn't be
3 entitled to engage in the physical conduct -- in the
4 physical contact in order to prevent an abortion protester
5 from visiting an abortion clinic. They can't do that
6 against a seaman who is just doing his job on a ship,
7 wherever that ship is. They can't use the state of
8 Washington as a haven for launching violence on the high
9 seas. That is the basic predicate of the state law claim.
10 It is a basic predicate basically of all the claims, but
11 it is one that is connected to the state of Washington.

12 Going to the question of the Alien Tort Statute, you
13 indicated you do have jurisdiction under the Alien Tort
14 Statute. I grant you that every -- it seems like every
15 judge that has to address the Alien Tort Statute does have
16 to write a 100-page opinion. At least the appellate
17 courts do. But they have disinterest, and that's why they
18 get to be 100 pages.

19 The Alien Tort Statute is evolving. It does allow the
20 court the right to enforce what is internationally
21 accepted norms, provided they have a sufficiently detailed
22 obligation associated with it. I think that we have, at
23 least on the freedom of navigation and the piracy claims,
24 established that there is a well accepted body of
25 international law -- customary international law that

1 recognizes that individuals cannot do the things that
2 these individuals are doing.

3 Like I said a little bit earlier, under the law of
4 admiralty, I think this court could clearly grant the
5 injunctive relief that we are asking in this case. That
6 being: Please, just avoid the risk of collision. Please
7 don't put our crew at risk. Film us all you want. Take
8 your helicopter from the Steve Irwin, or the Bob Barker,
9 do your flyovers, film whatever you want, use the film for
10 whatever you want to use it for, but don't put people at
11 risk. It is just not acceptable.

12 I think I have addressed the court's questions so far.
13 If there are other questions, I would be happy to address
14 those.

15 THE COURT: I do have a few other questions,
16 counsel, if you have finished your presentation.

17 MR. NEUPERT: I have finished my presentation.

18 THE COURT: Let me ask you a few questions,
19 counsel. I have identified that balancing hardships as an
20 issue for this court. If the purpose of the Institute of
21 Cetacean Research is truly research, why have I not seen
22 any documented evidence of how defendants' activities are
23 interfering or disrupting your ability to conduct
24 research?

25 MR. NEUPERT: Well, the objective of the

1 injunction, your Honor, is to protect property and life.
2 That is the objective. We didn't bring this case under a
3 theory of, if you want, tortious interference with
4 business opportunity. We could have easily pleaded a case
5 of tortious interference with business opportunity. We
6 have the opportunity to engage in legal research -- or
7 research on the high seas, you are interfering with that.
8 That is not the predicate of the case. You haven't seen
9 any evidence from us on that subject because that is not
10 the predicate of the case. The predicate of the case is
11 we have crew and passengers who are put at daily risk of
12 serious harm that must stop. That's what is at risk. We
13 have put ample evidence of that before you.

14 So I don't think this scientific research is -- In
15 our view it is a red herring. They would like to turn
16 this case into a case about the validity of the permit,
17 about the validity and value of scientific research on
18 whales. But the court should not wade into that quagmire
19 in a situation in which the court is being asked to do one
20 thing, and one thing only, and that is to protect property
21 and life.

22 The balance that one strikes in property and life at
23 risk cases are usually the First Amendment, or a
24 constitutional right. In those cases, as you noted from
25 the outset, the balance is easily struck. The First

1 Amendment is highly valued and highly protected.

2 But even when there is an established, fundamental
3 constitutional right at issue, courts never say in the
4 name of freedom of speech you can put human life at risk.
5 There is no case that has been cited to this court, and
6 there is no case which could be cited to this court, that
7 says because I strongly believe in something, and because
8 I believe I have a right to make my belief known to the
9 world, that I can use violence in order to persuade
10 everybody that my belief is better than your belief.

11 Even in those situations where recognized
12 constitutional rights are at stake, courts always find the
13 balance of hardship tips in favor of human life and
14 property. That's why I think the balance is fairly easily
15 struck in this case.

16 THE COURT: Counsel, I'm not sure if you are
17 prepared to answer this question. Are any of your whaling
18 activities this year taking place in the Australian
19 whaling sanctuary?

20 MR. NEUPERT: I can't answer that factually. I
21 would suspect -- Let's assume that it did. I can't say
22 that it did, and I am not saying that it did. Because
23 these ships move, and I have not gone to the trouble of
24 trying to figure out where the Nisshan Maru is or has
25 been. So I can't answer the court's question. We can get

1 an answer to the court's question if the court believes it
2 is necessary.

3 THE COURT: Counsel, here is where I'm going: It
4 appears to the court, from what has been submitted, that
5 the Australian federal court has issued an injunction
6 against your clients from hunting whales in the Australian
7 whale sanctuary. It does not appear that they are abiding
8 by that injunction, perhaps, by what you have represented
9 to the court.

10 So my question to you is, why should your clients be
11 able to ask a different court for an injunction that helps
12 them in light of a decision of that type? Again, I am
13 getting into the balancing of the equities in this case
14 and the unclean hands argument.

15 MR. NEUPERT: I understand the court's question.
16 I guess my first comment is, that order from the federal
17 court in Australia was an order taken by way of default.
18 The issue presented by that case, as to whether or not
19 Australia law was applicable under the circumstances, was
20 answered by that court in the positive, but without the
21 benefit of actual litigation of the issue. Kyodo Sempaku,
22 who was the defendant in that case, did not appear.

23 THE COURT: That was a voluntary choice?

24 MR. NEUPERT: A voluntary choice, yes. Under well
25 established principles of collateral estoppel, a judgment

1 from the court, taken by way of default, does not have any
2 claim or issue preclusive effect because the issue was not
3 actually litigated. So while there is that decision, as a
4 matter of U.S. law, in terms of applying well established
5 principles of issue and claim preclusion, the judgment by
6 default is for all intents and purposes a legal nullity.
7 So that is point number one.

8 Point number two is, even if that issue were to be
9 present in this case, and I submit that it is not,
10 Australia domestic law is not at issue. The question is
11 international law, the right of people and property to be
12 free of the risk of harm. That issue was not present in
13 the Australian case.

14 There has been no law cited to this court which would
15 suggest that, even in Australia, if this sort of action
16 was brought, whether -- an Australian judge would say,
17 well, this may be the Australian whale sanctuary, but I am
18 not going to let you throw bottles at people's heads just
19 because you don't like what they are doing.

20 If the prosecuting people in Australia want to enforce
21 their domestic law, they can do that.

22 But the principal response to the court's question is
23 twofold: There is no issue or claim preclusion by reason
24 of that judgment. This is about human safety, free
25 passage at sea, not whether or not there is a right to

1 take whales, whether it be in the southern ocean or the
2 southern ocean sanctuary, or any other place.

3 Again, the defendants would like to turn this case
4 into a whaling case. The way the case is presented to the
5 court, it is not a whaling case. It is a case about
6 people not being put in harm's way.

7 THE COURT: Let me ask you another question,
8 counsel. Preliminary injunctions usually involve some
9 urgency to address the issue. Now, it appears to this
10 court that there has actually been many years since there
11 has been any specific application to any court for
12 specific intervention or relief, and certainly for
13 injunctive relief. Now, if you truly believe that
14 irreparable harm was going to take place, doesn't it seem
15 logical that the pursuit of the type of relief that you
16 are seeking from this court would have occurred sooner?
17 From what I have seen from the documentation and the
18 videos presented to this court, while the vessels may have
19 improved in quality, to look closer to the James Bond or
20 Jules Verne type vessel, to disrupt the activities, it
21 appears that there has been a fair amount of consistency
22 to the activities which have been the same type of
23 throwing of beer bottles with acid, the flour projections,
24 the laser lights. Some of the activities seems to be
25 fairly consistent, counsel. Why should the court treat

1 this with the -- I am mostly talking about the
2 irreparable harm and the urgency component, counsel.

3 MR. NEUPERT: Let me show you this, your Honor.

4 THE COURT: Tell me what you are showing me,
5 counsel, by way of an exhibit.

6 MR. NEUPERT: This is Docket Number 14,
7 Exhibit 132, your Honor.

8 Let me finish with this, your Honor. This is from
9 Docket 38, Exhibit 18. This is from the perspective of
10 Gojira, which is one of the defendants' vessels, now the
11 Bridget Bardot. We can't edit this stuff out from the
12 Whale Wars.

13 "That's what you get for trying to run us over." That
14 ship placed itself in front of the Nisshan Maru
15 intentionally so that it could launch flares against the
16 netting in order to burn a hole to make it possible for
17 the next flare to come through the hole. That is
18 intentional conduct that puts a ship at sea at very high
19 risk of fire or explosion.

20 In the past we have not sought injunctive relief. In
21 the past we have tried other avenues to address the
22 situation. As the supplemental Ito declaration
23 establishes, it was with great reluctance that the
24 plaintiffs came into the U.S. courtroom in order to try to
25 secure some relief that puts their crew and ships at harm.

1 The statement by the Sea Shepherd person that, "We
2 need to flare them up, let's have a little barbecue," that
3 attitude, your Honor, is what puts people at risk of
4 serious injury. At some point a person confronted with
5 this kind of conduct on a repetitive basis says enough is
6 enough.

7 And while the plaintiffs have tried other avenues to
8 obtain the relief that is necessary under these
9 circumstances, those other avenues were exhausted this
10 fall, as the supplemental Ito declaration demonstrates.

11 In the last season the defendants were successful in
12 driving the defendants (sic) off the southern ocean
13 because of the substantial risk of harm that the crew was
14 being put to.

15 This season, after the diplomatic efforts were
16 exhausted, they chose the only path open to them, which is
17 to sue the defendants where they are, where they have
18 assets and people at risk, to try to get what should be a
19 fundamental right recognized, that you don't put people in
20 harm's way over a strongly-held belief.

21 That fundamental premise exists in all of these
22 treaties and conventions. It exists in all of the law
23 that has been cited to this court. It is the court's
24 obligation and duty is to protect human life and property,
25 balancing what is in the balance.

1 But when what's in the balance is a claim of unlawful
2 whaling, not any establishment of unlawful whaling, but
3 when it is just a claim of unlawful whaling, that claim
4 has little in its favor, when on the other side of the
5 scale is human life and property.

6 THE COURT: Counsel, you continue to present that
7 point to the court. As I go through the documentation
8 that has been provided regarding the concern for potential
9 injury, there have been some broad claims of injury, broad
10 representations of harm to crew. If you claim that you
11 have crew members who have been injured by Sea Shepherd
12 tactics, then this court has not seen a single picture of
13 an injury or medical record of any specific injury to any
14 crew member. Can you explain why, counsel?

15 MR. NEUPERT: Let me just see if I can do this,
16 your Honor. This is in the record. That is crewman
17 Kumung (phonetic).

18 THE COURT: Exhibit, counsel?

19 MR. NEUPERT: Docket 45, Exhibit 3. This is
20 another picture of the same person. This is after a
21 butyric acid bottle was thrown. That is in the record.
22 We have not put more in the record because, frankly, is
23 this really down to how many people have been injured, how
24 seriously have they been injured, or is this about trying
25 to prevent a serious future injury?

1 The incendiary device establishes without a doubt that
2 there is a serious risk of serious harm to the plaintiffs
3 and their ships.

4 Butyric acid, again, is it harmful? We haven't
5 conducted discovery as to what the concentration levels
6 they use are and so forth. Can I tell you that we have
7 dozens of injured crewmen? No, I can't tell you that.
8 But that should not matter, your Honor. That should not
9 matter one whit.

10 What is at issue is whether or not future conduct is
11 going to be allowed to occur that does put people at
12 serious risk. You noted at the outset, using glass
13 projectiles with high powered launchers -- The only
14 reason you would use glass is because it will break. And
15 when it breaks, all kinds of bad things happen, or can
16 happen. Whether a crewman gets hit in the head with a
17 bottle because he didn't see it coming or he didn't duck
18 fast enough, or whether the next bottle has too much
19 butyric acid in it, too high of a concentration and it
20 gets in somebody's eyes, that's what we are trying to
21 prevent, something happening in the future. We are not
22 here for damages for something that happened in the past.
23 We are here to try to prevent somebody from getting hurt.
24 That's all we ask.

25 THE COURT: Okay. Two more questions, counsel.

1 One is, piracy is supposed to be one of the well
2 established norms of international law. And we have
3 already addressed this to some extent. But do you have
4 any example of any court actually issuing an injunction to
5 stop or prevent piracy?

6 MR. NEUPERT: No.

7 THE COURT: My last question, counsel. It seems
8 to me the nation with the greatest interest to putting a
9 stop to the Sea Shepherd's activity is Japan. As far as I
10 know, and from what has been provided to this court,
11 neither Japan's courts, nor its military, nor any other
12 part of its government has done anything about this. Why
13 should the United States courts be intervenors in this
14 type of activity?

15 MR. NEUPERT: Because these defendants are subject
16 to this court's jurisdiction in the state of Washington,
17 and these defendants are not subject to the jurisdiction
18 of the courts in Japan.

19 THE COURT: Thank you, counsel. Counsel, thank
20 you for answering the court's questions, and your
21 presentation.

22 Counsel, I will let you go a few minutes, but we will
23 take a morning recess probably in about 15, 20 minutes. I
24 will give you advance warning so you won't think I'm rude.
25 But we will take a morning recess for all parties

1 involved.

2 MR. HARRIS: That's fine, your Honor.

3 The vessels at issue in this case are flagged in the
4 Netherlands and in Australia, and they are owned by Dutch
5 and Australian entities. And they are staffed by a mostly
6 volunteer crew that come from all around the world.

7 The Sea Shepherd itself is really four entities, Sea
8 Shepherd U.S.A., Sea Shepherd Australia, Sea Shepherd
9 England and Sea Shepherd Netherlands. Sea Shepherd U.S.A.
10 does not own any of the vessels at issue in this case.

11 Sea Shepherd U.S.A. has helped fund those vessels, but
12 there is no evidence in this case that the actions that
13 have gone on out on the southern ocean are directed from
14 Sea Shepherd U.S.A.'s office.

15 Sea Shepherd U.S.A. is a 501(c)(3) entity, and for the
16 last 30 years there have been a number of entities,
17 including plaintiffs, who have tried to get that 501(c)(3)
18 status lifted from Sea Shepherd, by arguing that Sea
19 Shepherd engages in violent activities, and nobody has
20 ever succeeded.

21 Paul Watson is a Canadian citizen who resides in
22 Washington, that is true, but the activities that he
23 engages in out on the southern ocean have their
24 formulation and their genesis in Australia where the
25 vessels take off from.

1 We are here today because plaintiffs want this court
2 to referee what goes on between Australian and Dutch and
3 Japanese vessels in the southern ocean. We are here today
4 because plaintiffs want this court to sanction their
5 killing of whales.

6 We are here, rather than in Australia, which is a more
7 appropriate forum, because plaintiffs know they would lose
8 in Australia.

9 Plaintiffs claim to need an injunction to protect the
10 safety of their crew and to protect their vessel from
11 damages. As for the alleged safety of the crew, I note as
12 a preliminary matter that the crew are not plaintiffs in
13 this case, and that plaintiffs have not cited any case law
14 that would entitle them to sue on their crew's behalf.

15 As for alleged damaged to plaintiffs' vessels, that is
16 a classic case of what can be covered by monetary remedy.
17 Plaintiffs' damages in that situation are the costs of
18 their vessel repairs. They have even submitted receipts
19 showing those exact costs.

20 Even if we assume that these plaintiffs here today can
21 seek a preliminary injunction on behalf of the crew, there
22 is no strong evidence of a safety risk.

23 We respectfully disagree with this court's view that
24 there is a risk. Plaintiffs say that defendants engage in
25 violence, but that is not the case. Sea Shepherd has been

1 using the same methods for 30 years, and they have never
2 injured anyone.

3 Mr. Neupert is up here talking about, well, what if
4 Sea Shepherd puts something new in the bottles? Well,
5 what if Sea Shepherd starts bombing these vessels with
6 F-16s? That is not what we are here to discuss. We are
7 here to discuss past performance and how that indicates
8 future performance. Past performance is no guarantee of
9 future performance, but it is the only indicator that we
10 have. Sea Shepherd has been using the same methods
11 against plaintiffs for the last eight years, and no whaler
12 has ever been injured.

13 The plaintiffs put on a couple of videos, and a
14 picture of a crew member, right in front of me right now,
15 who was allegedly injured by butyric acid. He looks quite
16 healthy to me.

17 When this case was first brought plaintiffs kept
18 talking about how they would give us medical evidence.
19 They have given us none. The videos that they showed, one
20 was unclear, it appeared to be someone throwing a bottle.
21 It is not clear that someone threw a bottle. If someone
22 threw a bottle, that clearly goes against Sea Shepherd's
23 policies. They are not to throw anything directly at
24 anyone.

25 The barbecue quote, that was years ago. And that is

1 also not condoned by Sea Shepherd. That's what we are
2 talking about here. It is what Sea Shepherd does, not
3 what one rogue volunteer may have done three or four years
4 ago.

5 THE COURT: Wasn't the videotape counsel showed
6 the court activities that took place just last year?

7 MR. HARRIS: I don't believe that's correct, your
8 Honor. In fact, I believe the videotape showing the flare
9 must have been at least two or three years old, because it
10 is my understanding that all of the video that plaintiffs
11 presented to this court came from either the first or the
12 second season of Whale Wars, which I believe is now -- the
13 next season, which will be starting very soon, will be its
14 fifth season.

15 THE COURT: How about the bottle that was
16 thrown, where the gentleman had the hose, and he had to
17 duck in order to avoid being hit by a projectile, wasn't
18 that last year?

19 MR. HARRIS: I don't know when that was. Let me
20 talk briefly about the bottle. Mr. Neupert talks about
21 the butyric acid being in glass bottles to injure people.
22 He made that up. They are in glass bottles because if
23 they were in plastic bottles it would injure the ocean and
24 injure the fish.

25 The reality is the Sea Shepherd strives not to injure

1 anyone or any creature. If that bottle was thrown
2 directly at someone, that goes against Sea Shepherd's
3 policy. Can I stand here today and tell you if Sea
4 Shepherd goes out there for the next five years one bottle
5 will not be thrown at one whaler? No, I cannot tell you
6 that. But what I can tell you is, if one bottle is thrown
7 at one whaler, the person who throws that bottle will be
8 instantly terminated as a Sea Shepherd volunteer. Every
9 single policy manual that Sea Shepherd has makes it very
10 clear that sort of thing is to be avoided.

11 THE COURT: Counsel, was that person terminated?

12 MR. HARRIS: I have no idea. I am not even sure
13 that Mr. Neupert's testimony regarding that video is
14 accurate.

15 What we are really dealing with here is a situation
16 where Sea Shepherd is out at sea doing what it can to stop
17 the killing of whales. If that includes throwing a bottle
18 at someone, that is not okay. We would have no problem
19 with an injunction against my clients saying don't throw
20 bottles at anyone.

21 Plaintiffs talk about the bottles being dangerous, and
22 the bottles being thrown, but if I were to take a bottle
23 in this courtroom right now, and throw it at that window
24 over there, it wouldn't be dangerous. Nobody would get
25 hurt. That's really what is going on. These bottles are

1 not to be thrown when anyone is on board the deck.

2 THE COURT: Counsel, how do you control that? If
3 you have a slingshot, a device you guys have used, or your
4 clients have used, once that slingshot tosses that
5 projectile, there is no aiming that appears to be
6 involved. It is just shooting up in the air. Where it
7 lands, it lands.

8 MR. HARRIS: Well, that may be true, but that
9 slingshot should not be pulled back if there are people on
10 the deck of the Japanese whaling vessels.

11 I think what is really important here, and I am going
12 to come back to it time and time again, is that Sea
13 Shepherd has been out there doing this for 30 years, and
14 no one has been injured. Sea Shepherd has been out there
15 doing this against the Japanese whalers for eight years,
16 and no one has been injured.

17 In fact, this picture of this person who was allegedly
18 injured by butyric acid, I don't believe it. The reason I
19 don't believe it, your Honor, is because I have been
20 through a trial against these people already. I helped
21 oversee the defense of Peter Bethune, who was charged
22 originally with terrorism in Japan. They dropped that
23 claim, I might add. In that case the prosecutor and the
24 plaintiffs, who were working hand-in-glove with the
25 prosecutor, kept talking about injury to the Japanese

1 whalers. In the end they had nothing.

2 The evidence seemed to show that the injury they
3 claimed had been caused by Sea Shepherd had actually been
4 caused by something that a Japanese crew member had tried
5 to throw at the Sea Shepherd crew and the wind had blown
6 it back in his face.

7 I think that highlights the situation we are facing
8 right here, which is that the plaintiffs are before this
9 court asking for a preliminary injunction, putting forth
10 what is, frankly, rather bizarre and unsubstantiated
11 evidence. Some picture of some guy and an American lawyer
12 saying this person was injured due to butyric acid? That
13 is not evidence. That is not enough for this court to
14 jump into an international political matter and issue an
15 injunction against a defendant here for actions that are
16 going on 3,000, 4,000 miles away.

17 Let's very briefly talk about that injunction. What
18 is that injunction going to be, stay 800 meters away? The
19 plaintiffs claim they want it to be 800 meters away
20 because defendants can still film from that distance. No,
21 they want it to be 800 meters away so they can keep
22 killing the whales.

23 And how will that be enforced? Will it be enforced
24 against Sea Shepherd Australia? Is it going to be
25 enforced against Sea Shepherd UK? Is it going to be

1 enforced against Sea Shepherd Netherlands? I don't see
2 how that can happen.

3 Plaintiffs keep talking about legality not being an
4 issue here. Plaintiffs try to equate what they are doing
5 with clear-cutting and with abortion. Wrong.
6 Clear-cutting is clearly legal in this country. Abortion
7 is clearly legal in this country. So interfering with
8 those two things is very different from what Sea Shepherd
9 does.

10 Plaintiffs, rather than being clear-cutters, are
11 really essentially heroin dealers. If they were coming
12 before this court asking this court to help protect their
13 turf so they could continue dealing in heroin, I think the
14 legality would be at issue. I don't even think that would
15 be a close call. That is why your Honor has raised the
16 issue of legality.

17 So returning now to what Sea Shepherd has been doing
18 for the last 30 years. I think it is important that we
19 talk about it. Sea Shepherd has thrown stink bombs and
20 paint bombs, and every once in a while it seeks to foul
21 the poachers' props. So what? None of these things have
22 ever harmed anyone. And that is because none of these
23 things are dangerous. Sea Shepherd trains its crews to
24 avoid injury, and that training has paid off.

25 We have talked a bit about the butyric acid. The

1 plaintiffs have admitted that they had have no evidence it
2 is harmful. We have submitted evidence that it is
3 harmless.

4 The paint bombs. Come on. It is paint. Not only
5 that, and plaintiffs fail to mention this, the paint bombs
6 have never been thrown at anyone. They are thrown at the
7 side of the whaling vessels where the big, giant signs say
8 research. It is red paint to bloody the sign that says
9 research.

10 The prop fouling. The prop fouling sounds bad. When
11 it works, it could be bad. It could be bad if these were
12 small ships. What we are dealing with here is small
13 amounts of ropes, and a volunteer crew -- The reality is
14 that Sea Shepherd has never really succeeded in fouling
15 anyone's props. There have been a time or two where the
16 rope has gotten tangled and the vessels have had to slow
17 down for maybe 15 to 30 minutes. But talking about a ship
18 being stopped with icebergs and all that, that is pure
19 speculation. There is no evidence of that.

20 THE COURT: Counsel, let me stop you and ask a
21 question. I thought I saw in the exhibits a clear
22 indication that a prop had been completely entangled in a
23 considerably large rope. Are you representing to the
24 court that that was not an accurate depiction of what took
25 place, or that wasn't the activities of your client?

1 MR. HARRIS: No, your Honor. What I am
2 representing to this court is that there has never been a
3 time where a Japanese whaling vessel has been forced to a
4 complete stop by prop fouling. All that has ever happened
5 is they have been slowed down. These Japanese whaling
6 vessels are some of the most sophisticated high tech
7 vessels ever made. Sea Shepherd's attempts at prop
8 fouling are really more symbolic than anything else. It
9 would not be right to issue a preliminary injunction based
10 on that without there being any solid evidence of any
11 potential harm from that.

12 As your Honor well knows, Sea Shepherd has filed
13 extensive briefing seeking a dismissal of plaintiffs'
14 entire case as a matter of law. I am not going to rehash
15 that briefing, but I will note that we, again, call on
16 this court to honor international comity by honoring the
17 Australian federal court's decision finding plaintiffs'
18 whaling illegal.

19 We also ask this court to defer ruling on anything in
20 favor of the pending World Court case between the nations
21 of Australia and Japan regarding the legality of whaling.

22 We also note that the Ninth Circuit has stated that
23 there can be no preliminary injunctions in admiralty, and
24 that no court has ever granted a preliminary injunction
25 under the Alien Tort Statute.

1 As your Honor knows, there are four elements
2 plaintiffs must satisfy to get their injunctive relief.
3 The first of which is, they must prove a likelihood of
4 succeeding on the merits. They are not going to succeed
5 on the merits. They have no chance of prevailing on their
6 interference with navigation claim. And the reason for
7 that is because there has been no interference with
8 navigation. Plaintiffs are freely navigating.

9 In fact, even as we speak, plaintiffs ships are out
10 cruising the southern ocean in pursuit of Sea Shepherd's
11 vessels. Sea Shepherd does not seek to interfere with
12 plaintiffs' navigation. Sea Shepherd seeks only to
13 interfere with plaintiffs' illegal killing of whales.

14 THE COURT: Let me stop you there, counsel. Two
15 of the video clips I have seen show an incident from the
16 past season where the vessel, I believe named Steve Irwin,
17 was, what I would characterize as, basically smashing into
18 the side of one of the whaling ships. I don't think there
19 is any question, counsel, it was your client's ship that
20 maneuvered into the plaintiffs's ship. Now, in the briefs
21 you portrayed this as a whaling ship maneuvering into your
22 vessel or smashing into your vessel. It doesn't look that
23 way in the video. Is there something I am missing in the
24 video?

25 MR. HARRIS: I am not sure of the particular video

1 to which you are referring, but I do know that there has
2 been a lot of smashing that has gone on between the
3 vessels out at sea. I will concede that some of that
4 smashing has been brought about by Sea Shepherd. But what
5 I will also point out is that none of that smashing has
6 ever impeded a Japanese whaling vessel.

7 And our expert, your Honor, Captain James Cushman, who
8 was a captain in the U.S. Coast Guard, has testified that
9 what Sea Shepherd does out there is safe.

10 If we are talking about the same video, it would be
11 like an eight year old -- it would be like a tiny car
12 bumping into a building. The Japanese whaling ships are
13 huge, the Sea Shepherd's ships are tiny. Bumping the
14 Japanese whaling ships has never impeded their navigation.

15 THE COURT: Just so we are clear, counsel, I am
16 not talking about one of the rubberized vessels. I am
17 talking about a steel vessel that maneuvered into the left
18 quarter panel of the vessel. It seemed like it was a
19 pretty hard knock at that point in time.

20 MR. HARRIS: Those hard knocks happen all the time
21 up in Alaska with fishing, certainly in the old days
22 before the quota system.

23 It is my understanding in that video the Japanese
24 whaling vessel went forward as though nothing had ever
25 happened. It is also not clear to me that bumping was

1 deliberate on the part of the Sea Shepherd.

2 Turning now to the piracy claim. Piracy requires
3 violence. It requires intentional violence. It requires
4 intentional violence for private gain. What is private
5 gain? Private gain is monetary gain. Sea Shepherd is not
6 out there for monetary gain. Yes, it makes money off the
7 Whale Wars show, but that money is used for the real goal,
8 and that is to stop the whaling. That is why Sea Shepherd
9 is out there. That is not a private gain, that is a
10 public good.

11 The Netherlands, Australia, New Zealand, Japan and
12 Chili are all signatories to the United Nations law of the
13 sea. And that law gives each of those countries the
14 right -- In fact, it imposes upon them the duty to stop
15 piracy. None of these countries have ever sought to stop
16 Sea Shepherd from doing anything. Sea Shepherd boats go
17 to port in most of these countries every year. Not once
18 has a Sea Shepherd boat ever been prevented from leaving.

19 Would this really be the case if Sea Shepherd were
20 engaging in violence -- I'm sorry, in piracy? Of course
21 not. Not even the Japanese Coast Guard, as your Honor
22 himself pointed out, has ever sought to stop the Sea
23 Shepherd. And that's because the Sea Shepherd is not
24 engaging in piracy.

25 Plaintiffs talk about three people having boarded a

1 Japanese whaling vessel this past season. That is unfair,
2 and that is a red herring. Those three people were not
3 Sea Shepherd personnel. They were from some other -- some
4 newly formed timber, or something like that, environmental
5 group out of Australia. Sea Shepherd is not responsible
6 for everybody in the world.

7 The plaintiffs skipped over their terrorism claim,
8 probably with good reason. They know they have no chance
9 of prevailing on that. They really ought to be ashamed
10 for even bringing it. Calling what Sea Shepherd does
11 terrorism is an insult to the thousands of Americans and
12 others who have died at the hands of real terrorists.

13 Terrorism is defined as the intentional use of death
14 or serious bodily injury to terrorize people so as to
15 exert influence on their government. Your Honor correctly
16 called it when he stated that Sea Shepherd has
17 consistently made clear their efforts to avoid any sort of
18 harm to anyone. If Sea Shepherd were terrorists, why
19 would they advertise that they are trying not to harm
20 anyone? That is a ridiculous claim.

21 And I note that plaintiffs, working with the Japanese
22 government, made that same sort of claim a couple of years
23 ago, and then dropped it.

24 Plaintiffs' state law claims are so vague that there
25 is no way even to know what they are, so there is no way

1 even to talk about that today.

2 Moving on to the second factor, the likelihood of
3 irreparable harm. If what Sea Shepherd is doing is so
4 horrible and so needing of rapid fire relief, why did
5 plaintiffs wait eight years to do anything about it? And
6 even then, why did plaintiffs wait until the beginning of
7 whaling season to file this lawsuit?

8 Plaintiffs' answer to that is that their culture made
9 them do it. No way. What made them do it was that they
10 now have \$30 million in tsunami relief funds burning a
11 hole in their pockets. They wanted to bring this action
12 right when they knew Sea Shepherd would be least able to
13 defend against it. Plaintiffs waited until all of Sea
14 Shepherd's key personnel and assets were diverted out at
15 sea, and then they pounce. Plaintiffs delay in filing
16 this case, standing alone, is conclusive proof of no
17 likelihood of irreparable harm.

18 Now, your Honor asked plaintiffs why they waited.
19 Plaintiffs never answered. Instead, plaintiffs flashed a
20 video from two, three years ago. That is not an answer.
21 In fact, that is an answer of why didn't -- That just
22 leads to another question. Why didn't they file it two or
23 three years ago right after that video came out?

24 And let's talk about the videos for a moment.
25 Plaintiffs have been filming Sea Shepherd every single day

1 for the last eight years. All they can come up with are
2 those two videos? That is not a lot.

3 What are the whalers claiming will be the irreparable
4 harm anyway? Your Honor asked that question, and
5 rightfully so. Are they seeking lost profits? That is
6 something that would be irreparable harm. No, they are
7 not. They are not because they are supposedly killing
8 these whales for research.

9 What about the irreparable harm to the research? No,
10 they are not seeking that either. Why? Because that
11 would require that they actually come up with evidence
12 that they are conducting research, and they cannot.

13 Their only claim of irreparable harm is damage to
14 their vessels for which there is clearly a monetary
15 remedy, and speculative discussion regarding what might
16 some day happen to their crews. Not to themselves, but to
17 their crews. There is no irreparable harm here.

18 The third factor, balance of hardships. If Sea
19 Shepherd is liable for all that the whalers claim,
20 plaintiffs or their crew would have all sorts of remedies.
21 They could sue Sea Shepherd for monetary damages, for any
22 damages to their vessels, and their crew could sue for
23 their personal injuries. They can seize Sea Shepherd's
24 ships around the world. They can seize Sea Shepherd in
25 Japan.

1 Mr. Neupert stood up here and said there is no
2 jurisdiction -- Japan doesn't have jurisdiction over Sea
3 Shepherd. That cannot be true. If Sea Shepherd is
4 directing activities against a Japanese vessel, surely
5 Japan would have jurisdiction over that.

6 They can also seek or secure diplomatic relief, which
7 they have been trying to do for the last eight years. But
8 nobody wants anything to do with them.

9 More importantly, what plaintiffs are doing is
10 illegal. That alone means that the balance of hardships
11 tips in favor of the defendants.

12 Sea Shepherd will be devastated if it can no longer
13 seek to stop plaintiffs from engaging in their
14 slaughtering of whales. And that's all Sea Shepherd wants
15 here. They don't care about distance. They don't care
16 about filming. They don't care about throwing bottles,
17 throwing paint. What Sea Shepherd wants to do is get in
18 the way of the Japanese whalers who are illegally and
19 brutally slaughtering whales.

20 And let's now talk about the public interest which
21 defendants --

22 THE COURT: Counsel, before you go into public
23 interest, let's take our morning recess.

24 (At this time a short break was taken.)

25 THE COURT: Please continue.

1 MR. HARRIS: Thank you, your Honor. At the
2 beginning of this hearing your Honor made clear that the
3 court considered the illegality of whaling at issue in
4 this case. And in response to that, plaintiffs counsel
5 stood up here and stated that no matter how this court
6 rules, plaintiffs whaling will continue regardless. That
7 is not really true.

8 The reason that is not true is the very same reason
9 plaintiffs have brought this action. Last year Sea
10 Shepherd was unbelievably effective in stopping defendants
11 (sic) from killing whales -- I'm sorry, stopping
12 plaintiffs from killing whales. Plaintiffs sought to kill
13 more than a thousand whales last year, and Sea Shepherd
14 was able to reduce that count to 17 percent. That's how
15 effective Sea Shepherd was.

16 So a ruling here will have an impact on the killing of
17 whales. A ruling here will likely mean that the next year
18 there will be -- and my math is probably wrong on this,
19 but there will probably be something like 83 percent more
20 whales killed if Sea Shepherd is not allowed out there.

21 Plaintiffs are not here for speculative safety
22 reasons. They are here to stop Sea Shepherd from going
23 out at all. That's the 800 meters that their expert
24 claims is necessary.

25 And let me talk very briefly about their expert.

1 Their expert is in London. They would not let us depose
2 him here in Seattle. Why did they pick an expert in
3 London? I don't know. Why did they pick an expert whose
4 entire career has been in the freight industry? He
5 doesn't have a bit of experience in the fishing industry,
6 which is exactly what we are dealing with here.

7 If I could, your Honor, I would like to make one
8 correction. During the break I was able to talk with
9 someone from Sea Shepherd, and they explained to me that
10 incident where it appears as though the Steve Irwin
11 intentionally collided with -- I forget which Japanese
12 whaling vessel. The explanation for that is that it was
13 not intentional, that the two vessels came close to each
14 other, and the propulsion from the giant Japanese whaling
15 vessel literally sucked the Sea Shepherd in, and that's
16 what caused them to bump. But it was really nothing more
17 than a fender bender.

18 Turning now to the public interest element, and this
19 is surely the element on which I could talk all day. But
20 I promise I am not going to. Plaintiffs are engaging in
21 illegal whaling. Both Chili and Australia have told
22 plaintiffs never to enter their waters, and have told them
23 if they do so they will be arrested. Plaintiffs are
24 outlaws. The public interest is never served by siding
25 with the outlaw.

1 The public interest will not be served by allowing
2 plaintiffs to continue brutally killing whales and
3 threaten to push them to the brink of extinction. The
4 world public has made its views on this known.

5 In 1986 the International Whaling Commission issued a
6 moratorium on commercial whaling so as to stop the
7 killings. At various times governments of the United
8 States, Australia, New Zealand, the Netherlands, Argentina
9 Brazil, Chili, Costa Rica, Ecuador, Mexico, Panama, Peru,
10 Uruguay, and many others, have all called on plaintiffs to
11 stop killing whales for commercial purposes, and to stop
12 lying about their research.

13 The plaintiffs killing of whales is wreaking a
14 permanent and irreparable harm to the ocean, to the
15 whales, to the marine ecosystem, and to those human beings
16 who see such slaughters as demeaning to us as human
17 beings.

18 I saw that one of our nation's leading ocean
19 conservation organizations filed an amicus brief this week
20 that sets out in great detail the harm plaintiffs are
21 causing with their unrelenting killing of whales, and how
22 those killings fly directly in the face of public
23 interest. I hope this court considers that brief in
24 making its ruling.

25 Plaintiffs' retort on the public interest prong is

1 simply that the world needs order, order above all else.
2 Plaintiffs not only place order above morality in the
3 public interest, they also completely ignore that it is
4 them who are causing the chaos, it is them -- it is the
5 Japanese whalers who are acting in contravention of
6 international law and an Australian federal court order.
7 If they want order, all they need do is stop.

8 Most importantly, a Seattle court should not be tasked
9 with preserving order in the southern ocean among foreign
10 flagged vessels. An American court should not be
11 refereeing the interaction of foreign-flagged vessels way
12 out there.

13 Our constitution reserves foreign policy to the
14 executive branch. It would go against the public interest
15 were this court to involve itself in foreign policy
16 matters that are already being handled by our Secretary of
17 State.

18 In addition to the four elements specifically required
19 for a preliminary injunction, plaintiffs also must have
20 done equity to get equity. Put another way, plaintiffs
21 cannot get the equitable relief they seek with unclean
22 hands. And plaintiffs' hands are anything but clean.
23 They are literally and figuratively stained with blood.

24 Plaintiffs have lied about conducting research. They
25 are killing whales for commercial gain and to advance an

1 ultranationalist agenda. We submitted multiple articles
2 from the world's leading whale scientists, including
3 leading whale scientists from NOAA, all of whom agree that
4 the best way to research whales is to keep them alive for
5 additional research. All of them agree that the Japanese
6 whalers are perpetuating a fraud by claiming to engage in
7 research.

8 Plaintiffs are killing threatened and endangered
9 species, specifically humpback and fin whales. That can
10 not be in the public interest.

11 Governments around the world see the whalers for the
12 brutal killers that they are, and they have condemned them
13 again and again.

14 It is plaintiffs who are out there engaging in
15 intentional violence. It is plaintiffs who attack Sea
16 Shepherd volunteers. They have attacked Sea Shepherd
17 volunteers with grappling hooks, with bamboo poles, with
18 nuts, with bolts, with long-range acoustical devices that
19 can cause all sorts of problems, high-pressure water
20 canons and concussion grenades. They cannot come in here
21 and complain about Sea Shepherd.

22 In fact, there is a Sea Shepherd crew member who was
23 injured by a Japanese whaler who swatted at him, beat him
24 about the face with a bamboo stick. And it is my
25 understanding that Sea Shepherd crew member will very soon

1 be intervening in this lawsuit to bring a personal injury
2 action against the plaintiffs. In fact, the lawyer for
3 that injured party is in the courtroom here today.

4 In early 2010 plaintiffs used one of their massive
5 vessels to split a Sea Shepherd vessel in two. Now, whose
6 fault that was is inconclusive. As near as I can tell at
7 this point, the New Zealand maritime report essentially
8 blamed both sides. But if you look at the video, what is
9 clear is that after the Japanese whaling vessel split the
10 Sea Shepherd vessel in two, and this is the Ady Gil that
11 we are talking about, as that vessel was sinking the
12 Japanese whaling ship was spraying the crew of the Ady Gil
13 with water cannons to prevent them from getting off
14 safely. That is the unclean hands we are dealing with
15 here.

16 Plaintiffs should not be asking this court to rule on
17 these issues. This is not your fight. This is not our
18 fight. The world sees plaintiffs for what they are. And
19 the world has told plaintiffs time and time again to stop.
20 The law and facts should compel this court to reach the
21 same conclusion.

22 THE COURT: Counsel, does that complete your
23 presentation?

24 MR. HARRIS: It does, your Honor.

25 THE COURT: I have a few questions. One question

1 that I will ask you and plaintiffs' counsel is, what is
2 your understanding of when the whaling season will finish
3 this year? I know that is an unpredictable determination,
4 a lot depends on the weather. What is your best guess?

5 MR. HARRIS: My best guess, which is probably not
6 all that good a guess, would be that the season will end
7 early to mid-March.

8 THE COURT: We are talking about a matter of weeks
9 at this point?

10 MR. HARRIS: That is my understanding.

11 THE COURT: Counsel, has any government ever
12 actually indicated its support or approval of your
13 activities in the southern oceans?

14 MR. HARRIS: It depends on how you define that.
15 The governments of New Zealand -- I would argue this most
16 governments have. The governments of New Zealand,
17 Australia, United States, have all in various ways helped
18 Sea Shepherd.

19 When Mr. Bethune was wrongly imprisoned in Japan on
20 terrorism charges a couple of years ago, the New Zealand
21 government spoke out about that. I believe the Australian
22 government did as well.

23 But, generally, governments have pretty much said we
24 don't like what is going on out there, and said very
25 little more. Meaning, they don't like the fact that the

1 Japanese whalers are out there killing whales.

2 THE COURT: But there is no government endorsement
3 of the specific tactics that have been utilized by your
4 clients; is that correct?

5 MR. HARRIS: That is almost certainly correct. I
6 don't know why a government would ever necessarily endorse
7 the actions of a relatively small not-for-profit one way
8 or the other.

9 THE COURT: Counsel, there are several references
10 in the record to Sea Shepherd entities. This morning I
11 asked counsel about the composition. But based on your
12 understanding of the structure, can you tell me about Sea
13 Shepherd's corporate structure, in other words, how the
14 U.S. Sea Shepherd entity fits in? That is not real clear
15 from what is before me.

16 MR. HARRIS: It is not clear from what I have
17 seen. What I will say is, if this court issues an
18 injunction against Sea Shepherd U.S.A., Sea Shepherd
19 U.S.A. intends to fully abide by that injunction.

20 What I will also say is, based on what I have seen,
21 that injunction will be toothless. The reason it will be
22 toothless is, though it is true that Sea Shepherd U.S.A.
23 gets a lot of funding in the U.S., it is also true that
24 these vessels are owned by foreign entities, registered in
25 foreign countries to foreign entities. It would be

1 nothing for the Sea Shepherd corporate structure to shift
2 in such a way as to make it so that the U.S. entity does
3 nothing more than serve as a funding organization to buy
4 vessels. In fact, near as I can tell, that is a lot of
5 what the U.S. organization does. And most of what goes on
6 out in the southern ocean is directed by Sea Shepherd
7 Australia.

8 Now, whether Sea Shepherd Australia has 6,000 or
9 60,000 or 6 million in its bank account, I don't know.
10 What I do know is that Paul Watson is the president of Sea
11 Shepherd Australia, sits on the board of Sea Shepherd
12 Australia. Every single time I have talked to a leading
13 figure on one of the Sea Shepherd boats, that person has
14 an accent, and that person is not an American, and that
15 person got on the ship in Australia, and those ships go to
16 port in Australia. That is really where this case should
17 have been brought.

18 And plaintiffs no doubt would have brought that case
19 if they weren't forum shopping. They know that the
20 Australian courts do not like them. They know that the
21 Australian courts have already issued rulings that they
22 have completely ignored. They know that the Australian
23 public doesn't like them. This case should be in
24 Australia or Japan.

25 THE COURT: Thank you, counsel.

1 MR. HARRIS: Thank you, your Honor.

2 THE COURT: Counsel, for the plaintiffs, I will
3 give you just a few minutes for rebuttal. Also, counsel,
4 if you could begin -- I will ask you, do you have any
5 different read in terms of when the whaling season will
6 end this year?

7 MR. NEUPERT: Yes. The permit, which is Exhibit 1
8 to the complaint, expires at the end of March. And I
9 believe the expectation is to use the permit in accordance
10 with its terms. So the season will end when the
11 authorization of the permit ends.

12 The court asked some questions about corporate
13 structure. During the time I was listening to counsel's
14 argument I found the citation I wanted to give the court,
15 which is found in my declaration, Docket Number 52.
16 Attached to that as Exhibit 2 and Exhibit 3 are filings
17 with the Oregon Department of Justice, and the Washington
18 authorities. This document is dated October 27th, 2011,
19 just a few months ago. This document, Exhibit 2, Page 6,
20 notes that the Sea Shepherd, the defendant here, had
21 expenses of \$6.1 million, which they used to take our
22 ships, the Steve Irwin, Bob Barker and a charter vessel,
23 the Ady Gil down to the southern ocean. That is "our
24 ships."

25 Exhibits 2, at Page 31 has reference to the 2010/11,

1 just last season, the Antarctic Whale Defense Campaign, in
2 which they state here, "At this time we took our ships,
3 the Steve Irwin, the Bob Barker and the Gojira, down
4 there,".

5 They also appreciate "our ships" on their U.S. tax
6 forms. The ownership of these ships on this record, we
7 have established, is more likely than not the defendant
8 who is before the court.

9 I want to put this in context, which is, this is a
10 motion for preliminary injunction. We have had no
11 discovery conducted. Based on the tax filings, based on
12 the depreciation on U.S. tax returns of these ships, these
13 ships are these defendants', before the court, ships.

14 I also want to point out that Paul Watson is before
15 this court. Paul Watson is the person who directs all of
16 the activities of all of these entities, whatever they
17 are. So the court has in personam jurisdiction over
18 Mr. Watson.

19 I just heard counsel say if an injunction is issued,
20 the injunction will be abided, which is, in my view, good
21 news.

22 The court asked questions about has any governmental
23 agency endorsed --

24 THE COURT: Counsel, let's to be clear. I think
25 he said it would be abided by the entity in the United

1 States. I don't think he made any representation that
2 went beyond that, particularly referencing the entity that
3 exists in other countries.

4 MR. NEUPERT: I didn't take his statement to have
5 any binding effect on any entity or party other than those
6 before this court.

7 You asked whether there was any endorsement by any
8 governmental agency of the conduct of the Sea Shepherd.
9 The answer was basically no.

10 We heard a lot about whaling. I can't address all of
11 the rhetoric about whaling. I can point the court to the
12 resolution of the International Whaling Convention in July
13 of last year. The International Whaling Commission
14 stated, quote, "The resolution of differences on issues
15 regarding whales and whaling should not be pursued through
16 violent actions that risk human life and property at sea."
17 That's my declaration, Docket Number 19, Exhibit 4,
18 Exhibit 2, at Page 2.

19 The entity who these defendants say they are promoting
20 the interest of, the entity who has authority over whaling
21 in accordance with the convention, the entity that has --
22 must have as much, if not more, at stake in this
23 controversy, it has specifically said it condemns the
24 actions of these defendants, that these matters should be
25 resolved by means other than through violent actions that

1 risk human life and property at sea. And that's why we
2 are here.

3 There was this comment about delay. The court had a
4 similar comment earlier, which I hope I adequately
5 addressed. But there is no coast guard in the southern
6 ocean. There is no police force in the southern ocean.
7 The way to get relief is to come before a court with
8 jurisdiction to enforce the rule of law. That is what we
9 are seeking here.

10 The court made reference to the Fourth Circuit case in
11 which an injunction on the high seas was issued. That was
12 in a salvage case. If a court in a salvage case, where
13 the only thing at risk is the ability to control a wreck
14 site, and to salvage the ship in an efficient, economic
15 way, if the only issue at risk in that case is a property
16 interest in the salvage operation, and a court in the
17 Fourth Circuit would issue an injunction to prevent
18 lawlessness, which is the court's words, on the high seas,
19 if a court will do that where a property interest is at
20 risk, a court should, where life and property is at risk
21 on a daily basis, do so, when we have demonstrated beyond
22 a doubt that there is serious risk.

23 The videos that I showed you of the throwing of the
24 bottle at the ship was less than a month ago. The video
25 that I showed you of the launching of the incendiary

1 devices was February of 2011. Those facts were
2 established in this record.

3 The recent activity of the defendants demonstrate that
4 they are putting the plaintiffs at serious risk. Counsel
5 himself said that the prop fouling, "When it works, could
6 be bad." "When it works, it could be bad."

7 We are here to make sure it doesn't work, because they
8 have repeatedly engaged in prop fouling this season, like
9 they have in past seasons.

10 The court said haven't you seen a picture of a fouled
11 prop? Well, Exhibit 8 to the complaint is a picture of a
12 fouled prop from last season. There is a substantial
13 basis in this record for the contingents that we have
14 made.

15 There is one final point I want to make, unless the
16 court has some other questions. The court has obviously
17 seen the ramming which occurred in 2009. And there has
18 been a contention made in this case that that ramming was
19 somehow accidental. That is a photograph of the side of
20 the Steve Irwin in which he has visibly portrayed ships
21 rammed. Those are his words, not ours. Those are his
22 words.

23 And the left flag, Japanese flag, is the Yushin Mura
24 No. 3. That is the vessel that was rammed in the video,
25 in which we see Mr. Watson turning the wheel of the Steve

1 Irwin sharply to the right, saying, "Let's get those
2 bastards." We put that evidence into the record. They
3 responded to our evidence. They did not deny the words of
4 Mr. Watson, "Let's get those bastards." He himself admits
5 that he caused his ship to ram the Yushin Mura No. 3.

6 The last and final point. This notion that somehow
7 Seaman Abe, who is getting his head thrown at, should be
8 before this court, as opposed to the master of the ship,
9 or the owner of the ship, or the employer of the crew.
10 Seaman Abe doesn't need to be here. We have alleged in
11 our complaint in Paragraph 4 that Captain Ogawa and
12 Captain Miura, as masters, are responsible for the safety
13 of the crews of their vessels while at sea. They are. So
14 are the masters' employers, who are before this court.

15 The people before this court are the people
16 responsible for the safety of people like Seaman Abe. And
17 they are here before the court to ask this court to enjoin
18 conduct which is illegal, which poses a risk daily to
19 people at sea. It violates every tenet of the laws of
20 admiralty. The plaintiffs ask this court to enjoin that
21 conduct.

22 Yes, there is only a few weeks left in this season,
23 but in those few weeks lots of harm can occur if they are
24 not enjoined.

25 THE COURT: Thank you, counsel. If there is

1 nothing further from the parties, the court has given each
2 side the opportunity to make oral argument, and I do
3 appreciate the responses that have been provided by each
4 of the parties to this court.

5 The question is, where do we go from here by way of a
6 ruling from this court? Now, I have already shared with
7 you the fact that the courts of appeal that have had the
8 opportunity to address these issues have authored 100-plus
9 pages in their opinions. There is, however, in this
10 particular case a certain amount of urgency and need for
11 resolution of the issues and motions before this court.

12 The reason I asked the parties how long the whaling
13 season would last is for a very specific purpose, because
14 that would test the urgency of the need for resolution of
15 this issue.

16 I think it would be unrealistic for the parties to
17 believe that this court would give you its written opinion
18 today with details and specifics of the actual ruling from
19 this court.

20 I believe, however, it is appropriate to give the
21 parties a tentative ruling from this court to give you
22 some idea of what direction you should take from this day
23 forward, at least through the balance of the whaling
24 season.

25 Now, I have indicated at the very beginning of this

1 process the two areas of greatest concern for this court
2 as to whether or not a preliminary injunction should be
3 issued at this time. It is this court's ruling,
4 considering the public interest and the hardships, that
5 the court is going to deny the motion for preliminary
6 injunction.

7 The court will give the details and specifics of that
8 ruling at the appropriate time when an order is actually
9 authored. I expect that the details will be forthcoming
10 in the next few weeks. We will give it our very best
11 effort to have it done in a modest amount of time. But,
12 again, with the timing and the delays that were caused
13 because of the actual date that this was filed, I believe
14 it was December 22nd, we are not in a position to advance
15 this any further or quicker than we actually will be
16 doing.

17 Now, the court is not going to give a tentative ruling
18 on the motion to dismiss at this point in time. The court
19 needs a little bit more time to go through the specific
20 issues that have been raised and the argument provided by
21 counsel. So the court will address that in the same order
22 when the court addresses the motion to deal with the
23 preliminary injunction.

24 Again, from the court's perspective, the motion for
25 preliminary injunction has been denied, an order will be

1 forthcoming in a relatively short period of time.

2 With that, thank you. We will be in recess.

3 (Adjourned.)

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I, Barry L. Fanning, Official Court Reporter, do hereby
certify that the foregoing transcript is true and correct.

S/Barry L. Fanning

Barry L. Fanning