

No. _____

In the Supreme Court of the United States

HARLEY MARINE FINANCING, LLC,
PETITIONER,

v.

TUG CONSTRUCTION, LLC,
RESPONDENT.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit violated the fundamental principle of appellate review that a finding of fact is clearly erroneous if there is no evidentiary support for it in the trial record by affirming the trial court's finding that Harley Marine Financing, LLC breached the subject bareboat charter agreements by failing to return the chartered vessels in the same condition as they were upon delivery, less ordinary wear and tear, even though there was no evidence establishing the conditions of the Vessels upon their delivery?

PARTIES TO THE PROCEEDING

The caption contains the names of all the parties to the proceeding below.

RULE 29.6 STATEMENT

Defendant-Appellant Harley Marine Financing, LLC is owned 100% by Harley Marine Intermediate Holdings, LLC, a privately held limited liability company. Harley Marine Intermediate Holdings, LLC is owned 100% by Harley Marine Holdings, LLC, which is owned 100% by Centerline Logistics Corporation. No publicly held corporation owns 10% or more of the stock of Centerline Logistics Corporation.

RELATED PROCEEDINGS

Pursuant to Supreme Court Rule 14.1, Petitioner states that the following proceedings are directly related to the action that is the subject of this Petition.

United States District Court (W.D. Wash.):

Tug Construction, LLC v. Harley Marine Financing, LLC, No. 2:19-cv-00632-BAT (Sept. 24, 2019) (order denying Defendant's motion for judgment on the pleadings)

Tug Construction, LLC v. Harley Marine Financing, LLC, No. 2:19-cv-00632-BAT (Oct. 27, 2022) (findings of fact and conclusions of law in favor of Plaintiff)

Tug Construction, LLC v. Harley Marine Financing, LLC, No. 2:19-cv-00632-BAT (Nov. 28, 2022) (order awarding attorneys' fees, interest, costs and damages to Plaintiff)

Tug Construction, LLC v. Harley Marine Financing, LLC, No. 2:19-cv-00632-BAT (Nov. 28, 2022) (judgment in favor of Plaintiff)

United States Court of Appeals (9th Cir.):

Tug Construction, LLC v. Harley Marine, Financing, LLC, No. 22-36049 (Feb. 15, 2024) (affirming judgment in favor of Plaintiff)

Tug Construction, LLC v. Harley Marine Financing, LLC, No. 22-36049 (Mar. 22, 2024) (order denying petition for panel rehearing and rehearing *en banc*)

Tug Construction, LLC v. Harley Marine Financing, LLC, No. 22-36049 (Apr. 2, 2024) (order

granting motion to stay mandate pending filing and adjudication of petition for a writ of certiorari)

Tug Construction, LLC v. Harley Marine Financing, LLC, No. 22-36049 (May 7, 2024) (order denying motion for reconsideration of order staying mandate)

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JURISDICTION

On November 28, 2022, the trial court entered an Order on Attorney Fees, Interest, Costs and Award of Damages and a Judgment in which it awarded Tug Construction, LLC a total of \$2,753,561.89, consisting of: (i) \$612,239.00 in attorneys' fees; (ii) \$595,740.92 in pre-judgment interest; (iii) \$23,438.97 in costs; (iv) \$1,280 in per diem costs; and (v) \$1,520,863 for repair costs, continuing charter fees and insurance costs. In a Memorandum of Disposition dated February 15, 2024, the court of appeals affirmed the trial court's judgment in its entirety. On March 22, 2024, the court of appeals denied Harley Marine Financing, LLC's petition for rehearing and for rehearing en banc. This Court has jurisdiction under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

A. Introduction

This petition was prompted by the Ninth Circuit's disregard of the fundamental principle of appellate review that a factual finding constitutes clear error and must be reversed when there is no evidence in the trial record to support it. In affirming the trial court's judgment awarding Tug Construction, LLC ("Tug Construction") damages, attorneys' fees, interest, and costs in the amount of \$2,743,561.89, the panel overlooked and misapprehended the primary trial-court error raised by Harley Marine Financing, LLC ("HMF") on appeal: that there was no evidence at trial establishing the conditions of the vessels at issue upon delivery to HMF and thus no evidentiary basis

for the finding—on which the trial court’s judgment was based—that HMF breached the governing charter agreements by not returning the vessels “in the same good condition, repair and working order as upon delivery, less ordinary wear and tear.”

In its Memorandum of Disposition, the Ninth Circuit held that the trial court did not commit clear error by finding that periodic inspections of the vessels during construction constituted the “on-hire surveys” required by the charter agreements. That finding was clearly erroneous because (a) the charter agreements at issue expressly required that on-hire surveys include photographic or documentary evidence; and (b) the trial record included no such evidence.

The panel’s affirmance of the trial court’s judgment conflicts with decisions of the Ninth Circuit and every other court of appeals standing for the settled principle that a factual finding is clearly erroneous when there is no evidence in the record to support it. The panel’s disregard of that fundamental principle of appellate review departs so significantly from the accepted and usual course of judicial proceedings, and sanctions such a departure by the trial court, as to call for an exercise of this Court’s supervisory power. Because the principle of appellate review the Ninth Circuit ignored arises frequently in a broad range of legal settings, this Court’s intervention is required to restore uniformity in the application of law. As a result, HMF’s petition for writ of certiorari should be granted.

B. Harley Franco Was On Both Sides Of The Bare-boat Charters.

This action centers on five tugboats (the “Vessels”) that HMF chartered from Tug Construction pursuant to five virtually identical bareboat charter agreements (the

“Bareboat Charters”). HMF is a subsidiary of Harley Marine Services, Inc. (“HMS”), a marine transportation company located in Seattle, Washington. App. 6a; Excerpts of Record (“ER”), ECF No. 15, 2-ER-103.¹ Harley Franco is HMS’s founder and former Chairman, President, CEO and majority owner. App. 6a; 3-ER-216, 5-ER-990. HMS’s Board of Directors terminated Franco’s employment in late March 2019, after placing him on administrative leave in January 2019. App. 6a; 5-ER-939, 3-ER-396.

Franco also owns 85% of Tug Construction, the remaining 15% of which is owned by Kurt Redd (“Redd”). 2-ER-103, 5-ER-919, 4-ER-500. Franco formed Tug Construction with Redd for the sole purpose of selling and chartering vessels to HMS, one of his other companies, at a profit. App. 6a; 3-ER-218, 4-ER-504, 4-ER-524, 5-ER-926. From Tug Construction’s formation in 2010 to Franco’s removal as HMS’s President and CEO in early 2019, HMS was Tug Construction’s only customer. 3-ER-218, 3-ER-221, 3-ER-303, 4-ER-524. At the time the Vessels were built and delivered to HMF and the Bareboat Charters were executed, Franco was Tug Construction’s managing member, controlled its operations, and represented it in its business dealings. 3-ER-273, 4-ER-515.

In addition to owning 15% of Tug Construction, Redd also owns 90.1% of Diversified Marine, Inc. (“Diversified”), a vessel construction company in Portland, Oregon. App. 6a; 2-ER-103, 4-ER-500. Diversified constructed the Vessels—the EARL W REDD, the RICH PADDEN, the DR HANK KAPLAN, the LELA FRANCO, and the

¹ Unless otherwise indicated, all docket citations refer to Case No. 22-36049 in the proceeding before the Ninth Circuit below. Citations to the Excerpts of Record are in the format “ -ER- ”, with the first number indicating the volume and the second number indicating the page or pages in the volume.

MICHELLE SLOAN—and sold them to Tug Construction, which immediately chartered them to various HMS subsidiaries pursuant to the Bareboat Charters, which were later assigned to HMF. 2-ER-103 *see also* App. 6a-7a.

C. The Relevant Terms Of The Bareboat Charters.

Except for the charter rates, delivery dates and insured values, the Bareboat Charters for the Vessels are identical to one another. *See* App. 7a; 6-ER-1164, 6-ER-1249, 7-ER-1398, 7-ER-1546, 8-ER-1649. The Bareboat Charters recognized that HMF would put the Vessels to normal maritime use, *id.*, § 4, and thus did not require HMF to keep the Vessels in new condition; rather, HMF was only required to “make all repairs, replacements and maintenance necessary to keep the Vessel[s] ***in the same good condition***, repair and working order ***as when delivered, less normal wear and tear***, (which does not include any damage or deterioration correctible through routine maintenance),” *id.*, § 5 (emphasis added); *see also* App. 10a-11a.

Accordingly, the Bareboat Charters required HMF, in the event the charters were terminated, to return the Vessels not in new condition, but rather in the same condition as they were upon delivery, less ordinary wear and tear (the “Contract Condition”). Specifically, Section 6 of each Bareboat Charter provided: “The Vessel shall not be deemed redelivered until at the agreed redelivery location and ***in the same good condition***, repair and working order ***as upon delivery, less ordinary wear and tear***.” *Id.*, § 6 (¶ 3) (emphasis added); *see also* App. 11a-12a.

The Bareboat Charters also required that each Vessel be subject to both (1) an on-hire survey at or before delivery to HMF using an agreed-upon method that included written and photographic documentation memorializing

the Vessel's condition upon delivery; and (2) an off-hire survey at the end of the charter using the same method as the on-hire survey to establish the Vessel's condition on redelivery to Tug Construction. Specifically, Section 6 of the Bareboat Charters provided as follows:

Prior to or at delivery, the Vessel shall be surveyed to comprehensively document its condition. The parties may agree upon an appropriate method by which to survey the Vessel and establish its condition, including drydocking and/or underwater inspection, but ***any method agreed must include written and photographic documentation.***

At the conclusion of the charter term (or sooner, at Owner's option in the event of default), ***an off-hire survey of the Vessel shall be conducted upon the same method utilized for the on-hire survey,*** to establish the condition of the Vessel for purposes of redelivery. Every effort shall be made to have the off-hire survey conducted by the same person who conducted the on-hire survey.

Id., § 6 (emphasis added); *see also* App. 11a–12a.

D. Because Franco Was On Both Sides Of The Transactions, There Were No On-Hire Surveys.

As noted above, the Bareboat Charters required that each Vessel, prior to or at its delivery, be subject to an on-hire survey that was (i) performed according to an agreed-upon method; and (ii) memorialized by written and photographic documentation. *See, e.g.*, 6-ER-1165 (§ 6, ¶ 1), 3-ER-299 *see also* App. 11a–12a. The evidence at trial, however, demonstrated that there was no on-hire survey of any kind—much less one involving a drydock or underwater inspection—performed on any of the Vessels. 3-ER-304–305, 3-ER-324, 3-ER-339, 3-ER-424–425, 3-ER-430,

4-ER-512, 5-ER-994, 5-ER-996. As a result, Tug Construction did not—because it could not—introduce into evidence at trial a written on-hire survey report or any other written or photographic documentation memorializing an on-hire survey conducted prior to or at delivery of any of the Vessels.

William Kelley—who was both Tug Construction’s owner’s representative when the Vessels were returned and its expert witness at trial—admitted in his Off-Hire Condition Survey reports that there were no formal on-hire surveys of the Vessels conducted in connection with their delivery to HMF, stating: “It was reported by Owner and Charterer that no formal On Hire Survey was conducted as the vessel was delivered by the builder and Owner to the Charterer in ‘As New’ condition.” 6-ER-1174, 6-ER-1254, 7-ER-1403, 7-ER-1549, 8-ER-1652. At trial, Kelley confirmed that, as noted in his off-hire survey reports, no formal on-hire surveys of the Vessels were conducted when they were delivered to HMF. 4-ER-727.

Both Matthew Godden (“Godden”—who was HMS’s COO during much of the relevant period and is now CEO of HMS’s successor, Centerline Logistics Corporation—and Steven Carlson (“Carlson”—who was first HMS’s Vice President of Engineering and then its senior Vice President of Engineering during the relevant period—testified that no on-hire surveys of the Vessels were conducted in connection with their delivery to HMF. 5-ER-949, 5-ER-961, 5-ER-994, 5-ER-987. Godden explained that there were no on-hire surveys because Franco was on both sides of the transactions—as the majority owner and senior-most executive of both Tug Construction and HMS—and thus neither party expected the Vessels would ever be returned or the Bareboat Charters ever terminated. 5-ER-933. In fact, until Godden informed Carlson

in January 2019 that the charters were being terminated, Carlson thought Tug Construction was an HMS subsidiary (and thus that HMS owned the Vessels) and did not know the Vessels were subject to Bareboat Charters. 5-ER-990-991. Finally, Franco, Redd, and Brian Appleton (“Appleton”—a former HMS employee fired for trading company secrets, 3-ER-388—all testified that they had no knowledge of an on-hire survey on any of the Vessels in connection with their delivery to HMF. 3-ER-304-305, 3-ER-324, 3-ER-339, 3-ER-424-425, 3-ER-430, 4-ER-512.

E. Because Franco Was On Both Sides Of The Transactions, HMF Accepted Delivery Of The Vessels Even Though They Had Significant Problems.

The trial evidence demonstrated that the Vessels had significant defects at the time of delivery and that Franco knew this but directed HMS employees to accept them anyway. For example, the trial evidence revealed that when HMF took possession of the DR HANK KAPLAN, that Vessel had many problems, including a severe vibration issue. 3-ER-255-256, 5-ER-929, 5-ER-992. In fact, on June 22, 2017, Franco emailed Caterpillar, the engine manufacturer, to advise that the KAPLAN’s vibration problem was so severe that it “Konked out” nine times on the trip from Diversified in Portland to HMS in Seattle. 8-ER-1863-1864, 5-ER-930. The vibration was so intense that it caused hoses and fittings to shake loose and resulted in broken brackets and welds. 8-ER-1866, 5-ER-997.

On August 2, 2017, Appleton emailed Franco, Godden and Carlson to warn that the DR HANK KAPLAN “still ha[d] many issues,” was “not ready to work,” and already had “electrolysis and premature anode wastage” issues. 8-ER-1866. Appleton advised that Diversified (which, again, was owned by Kurt Redd, Tug Construction’s minority

owner) was pushing for HMS to sign off on delivery even though “there are a lot of items still to fix” and they would not know for some time if recent repairs/modifications had fixed the vibration problem. 8-ER-1866. Carlson likewise advised Franco that HMF should not accept delivery of the KAPLAN because of the vibration issue and other serious problems. 5-ER-992. Godden similarly advised Franco that the KAPLAN “was not suitable for service” because “it had serious vibration issues,” as well as other serious problems. 5-ER-929.

Franco ignored those warnings and instructed Carlson and Godden to accept the KAPLAN, despite its myriad deficiencies, as he needed to get it on charter because “Diversified needed to be paid” for the construction costs. 5-ER-931-932, 5-ER-992, 3-ER-311. Franco admitted at trial that another reason HMF needed to accept delivery of the KAPLAN despite its many problems was that he had planned an elaborate vessel christening celebration that would be attended by members of the clergy and various dignitaries. 3-ER-256-257, 5-ER-930. As a result, Appleton signed the Certificate of Acceptance for the KAPLAN on August 4, 2017, 6-ER-1116-1117, 3-ER-316, just two days after he had advised Franco that the Vessel had “many issues,” “a lot of items still to fix,” and “electrolysis and premature anode wastage” issues, and was “not ready to work,” 8-ER-1866. Despite costly efforts after taking delivery, HMF was never able to correct the vibration problem on the DR HANK KAPLAN. 5-ER-997.

Carlson also advised Franco that HMF should not accept delivery of the EARL W REDD because of various issues, including substantial unfinished work, peeling of the laundry-room deck, a leak in the aft deck hatch, and peeling paint on the back deck. 5-ER-993. As with the

KAPLAN, Franco advised Carlson to accept delivery of the REDD despite its deficiencies. 5-ER-993.

Further, the MICHELLE SLOAN and LELA FRANCO experienced severe premature deterioration of their sacrificial zinc anodes, which are large pieces of zinc attached to a vessel's hull to provide "cathodic protection" from electrolysis corrosion, 3-ER-377, and thereby shield the hull and other equipment by sacrificing themselves for corrosion, 6-ER-1046. Approximately two years after accepting delivery of the MICHELLE SLOAN and LELA FRANCO 7-ER-1397, 7-ER-1427, HMS discovered that their zinc anodes had almost completely wasted away. 5-ER-997-999 (163:19-25, 164:7-165:2), 5-ER-966. The zinc anodes on those Vessels should not have wasted away and required replacement after just two years, as their construction specifications called for the zines "to last a minimum of 36 months." 5-ER-998, 5-ER-997, 5-ER-1023, 3-ER-448.

In sum, the record evidence demonstrated that even though the Vessels, which were custom-built commercial maritime tugboats, were newly constructed, they were not in perfect or pristine condition when HMF accepted delivery of them.

F. Tug Construction Sued HMF After the Charters Were Terminated And The Vessels Returned.

As noted above, HMS placed Franco on administrative leave from his positions as CEO and President in early January 2019 and terminated him for cause on March 29, 2019. 5-ER-939, 3-ER-396 *see also* App. 6a. Also in early 2019, after Franco was no longer running HMS, the charters for the Vessels were terminated and the Vessels were returned to Tug Construction. App. 7a-8a; 3-ER-396, 5-ER-939, 6-ER-1166, 6-ER-1251, 7-ER-1400.

Shortly thereafter, on April 29, 2019, Tug Construction filed the Complaint in this action in the United States District Court for the Western District of Washington, pursuant to 28 U.S.C. § 1333 and Federal Rule of Civil Procedure 9(h), alleging that HMF breached the Bareboat Charters by failing to (i) return the Vessels in “the proper condition”; (ii) “pay for necessary repairs” to bring them into “the condition required for their redelivery”; and (iii) “pay continuing charter hire accruing until” they were “brought into the condition required for their redelivery.” 8-ER-1689. Tug Construction’s theory of liability was that HMS did not redeliver the Vessels in their Contract Condition—the same good condition as upon delivery, less ordinary wear and tear—and thus is obligated to pay for the repair work necessary to bring the Vessels to that condition and the continuing charter fees and insurance costs incurred while the repairs were completed. (*Id.*)

G. The District Court’s Judgment In Favor Of Tug Construction.

On October 27, 2022, after a five-day bench trial, the Honorable Brian A. Tsuchida, U.S.M.J., entered Findings of Fact and Conclusions of Law (the “October 27 Ruling”) in which he found that “HMF breached each of the Bareboat Charter Agreements by failing to redeliver each of the Tugboats in the condition required under the Bareboat Charter Agreements” because “HMF did not tender the Tugboats in the same good condition, repair and working order as upon delivery, less ordinary wear and tear.” App. 31a–32a. Based on that finding, Judge Tsuchida awarded Tug Construction damages totaling \$1,408,502.16 for repair costs, continuing charter fees and insurance costs, as well as interest and attorneys’ fees in amounts to be determined after further briefing. App. 32a. In so ruling, the trial court awarded Tug Construction all the damages it

sought, except the costs to rebuild the LELA FRANCO’s engines, which its expert admitted at trial—after taking the contrary position in his expert reports—were not HMF’s responsibility. App. 24a–27a.

On November 3, 2022, Tug Construction (i) applied for awards of prejudgment interest, legal fees and costs; and (ii) requested that the Court amend its damages award to include certain expenses that had been omitted from its earlier demand. On November 28, 2022, the trial court entered an Order on Attorney Fees, Interest, Costs and Award of Damages and a Judgment in which it awarded Tug Construction \$2,753,561.89, consisting of: (i) \$612,239.00 in attorneys’ fees; (ii) \$595,740.92 in prejudgment interest; (iii) \$23,438.97 in costs; (iv) \$1,280 in per diem costs; and (v) \$1,520,863 for repair costs, continuing charter fees and insurance costs. 1-ER-2, 1-ER-4.

H. The Ninth Circuit Affirmed The October 27 Ruling And Denied HMF’s Petition For Panel Re-hearing Or Rehearing En Banc.

On HMF’s appeal, a panel of the Ninth Circuit issued a Memorandum of Disposition affirming the October 27 Ruling in its entirety. (McKeon, Bybee and Bress, J.J.) In so ruling, the panel did not address the primary error identified by HMS—that the trial court committed clear error in finding that HMS breached the Bareboat Charters by failing to return the Vessels in the same good condition as upon delivery because there was no evidence at trial establishing the conditions of the Vessels upon delivery. Rather, the panel held only that Judge Tsuchida did not commit clear error in finding that the parties did conduct the on-hire surveys required by the Bareboat Charters because there was evidence to support the finding that Appleton’s construction inspections “qualified as an on-hire survey.” App. 2a–3a.

REASONS FOR GRANTING THE PETITION

A. The Court Should Grant Certiorari Because The Ninth Circuit’s Ruling Conflicts With Substantial Federal Precedent Regarding A Fundamental Principle Of Appellate Review.

The factors this Court considers in deciding whether to grant a petition for writ of certiorari include whether the court of appeals (1) “has entered a decision in conflict with the decision of another United States court of appeals on the same important matter;” and/or (2) “has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of [the Supreme] Court’s supervisory power.” S. Ct. R. 10(a). Both of those factors are present here and warrant granting HMF’s petition for writ of certiorari because, in affirming the district court’s judgment in favor of Tug Construction, the Ninth Circuit ignored and contradicted the bedrock principle of appellate review—which has been embraced by every federal court of appeals, including the Ninth Circuit—that a factual finding is clear error when there is no record evidence to support it. Because that principle is implicated in innumerable cases and arises in every conceivable legal context, this Court’s intervention is required to restore uniformity and consistency.

The first “Issue Presented” in HMF’s opening appeal brief before the Ninth Circuit was the following:

Whether the trial court’s finding that HMF breached the Bareboat Charters by failing to return the Vessels in the same condition as they were upon delivery, less ordinary wear and tear, ***was clearly erroneous because there was no evidence at trial establishing the conditions of the Vessels upon their delivery.***

ECF No. 14 at 6. The Panel held that “[t]he trial court’s determination that the parties conducted an on-hire survey under the Bareboat Charter Agreements was not clearly erroneous” because there was evidence to support the finding that inspections conducted periodically by former HMS employee Brian Appleton during construction “qualified as an on-hire survey.” App. 2a–3a. Indeed, that determination *was* clearly erroneous. Examinations done during construction, unsupported by any photographs or documents, were no substitute for evidence establishing the conditions of the Vessels upon delivery to HMF. ECF No. 14 at 26-39. That evidentiary deficiency is fatal because the central premise of Tug Construction’s breach-of-contract claim was that HMF did not return the Vessels in the condition required by the Bareboat Charters—specifically, in “***the same good condition ... as upon delivery***, less ordinary wear and tear,” (*see, e.g.*, 6-ER-1165 (§ 6) (emphasis added); *see also* App. 11a–12a)—and thus is liable for the repair costs necessary to return the Vessels to that condition, as well as continuing charter fees and insurance costs while those repairs were being performed. 8-ER-1689.

To prevail on its contract claim, Tug Construction had to establish the condition of each Vessel “upon delivery” to HMF. That was the benchmark against which their condition upon return was to be judged, as numerous witnesses (including Harley Franco himself) testified. 3-ER-269, 5-ER-948–953, 5-ER-1010–1011. Without that benchmark, it was impossible for Tug Construction to discharge its burden of proof to demonstrate that HMF failed to return the Vessels in the “same good condition” as upon delivery, less ordinary wear and tear. *See Marine Equipment, Inc. v. Martin*, 184 F. Supp. 111, 113 n.3 (E.D. La. 1960) (finding that a vessel charter constitutes a bailment

and “the burden is on the bailor to prove the condition of the vessel at the beginning of the bailment”).

Because there was no evidence establishing the conditions of the Vessels upon delivery to HMF, there was no evidentiary basis for the trial court’s finding that “[t]he conditions later found below the water line on each Tugboat when each vessel was tendered for redelivery ... did not exist when HMS accepted the Tugboats.” App. 16a. The trial court could not have known that because there was no evidence at trial memorializing the conditions of the Vessels below the waterline when HMF accepted them.

Nonetheless, in entering judgment in Tug Construction’s favor and awarding it \$1,520,863 for repair costs, continuing charter fees and insurance costs (plus attorneys’ fees, interest and costs), the trial court found that “HMF breached each of the Bareboat Charter Agreements by first failing to redeliver each of the Tugboats in the condition required under the Bareboat Charter Agreements” because “HMF did not tender the Tugboats in the same good condition, repair and working order as upon delivery, less ordinary wear and tear.” App. 31a–32a. That finding was clearly erroneous because, in the absence of evidence establishing the conditions of the Vessels upon delivery to HMF, there was no evidentiary basis to find either that (i) HMF failed to return the Vessels in the same condition, less ordinary wear and tear or (ii) any alleged damage or deterioration on any of the Vessels upon its return was a deviation from its condition upon delivery. *Holmes v. Miller*, 768 Fed. Appx. 781, 784 (9th Cir. 2019) (“A district court’s factual finding is clearly erroneous if it is ‘(1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from facts in the record.’”) (quoting *Crittenden v. Chappell*, 804 F.3d 998, 1012 (9th

Cir. 2015) (emphasis added). That error was the first and primary issue that HMF presented to the panel on appeal.

In affirming the October 27 Ruling and the trial court's judgment in Tug Construction's favor, the Ninth Circuit ignored that clear error. Its ruling that the trial court did not commit clear error in finding that Appleton's construction inspections "qualified as an on-hire survey," App. 2a–3a, does not address this reversible error. That is because, even accepting that the construction inspections constituted on-hire surveys—which of course they could not, as they took place before construction of the boats was complete—none of the photographs and reports Appleton claimed he created during those inspections to document the Vessels' conditions were admitted into evidence at trial. As a result, deeming Appleton's construction inspections to be the requisite on-hire surveys does not cure the absence of any evidence in the trial record establishing the conditions of the Vessels upon delivery to HMF.

The Panel also held that there was "no clear error in the trial court's determination that HMF failed to return the Vessels 'in the same good condition ... less ordinary wear and tear' because "[m]ultiple witnesses testified that the inspection and testing of the Vessels were more rigorous than typical on-hire surveys of mature or used tug-boats." App. 3a. But regardless of how rigorous or comprehensive the construction inspections of and testing performed on the Vessels may have been, no photographs or written documentation from them was admitted into evidence. As a result, the Panel's ruling does not address the core error that compelled reversal of the judgment in favor of Tug Construction: there was no evidence at trial establishing the conditions of the Vessels upon delivery to HMF and thus no evidentiary basis supporting the finding

that HMF did not return the Vessels in the same condition, less ordinary wear and tear.

Finally, the Panel commented that HMF offered a “weak alternative hypothesis that the damage occurred as the Vessels were removed from drydock after construction, during sea trials, or in the weeks or months that the Vessels sat in the water before being delivered to HMF,” noted that “[t]he trial court found this theory to be ‘unsupported,’” and held that that finding was not “clear error.” App. 3a. That finding misapprehends HMF’s argument and ignores bedrock legal principles. As a threshold matter, HMF did not offer alternative theories to explain the alleged damage to the Vessels. Rather, it demonstrated that even if photographic and written documentation from Appleton’s construction inspections had been admitted into evidence (and it was not), that documentation could not have established the condition of the Vessels upon delivery to HMF because the inspections took place many months (likely six or more) before delivery, when substantial construction still needed to be completed.² Moreover, Tug Construction had the burden to demonstrate that

² The trial evidence demonstrated that the Vessels went into the water weeks, if not months, before HMF took delivery of them, at a time when significant construction work was still to be completed. 3-ER-412, 5-ER-932-933, 5-ER-995-996. Indeed, Redd admitted that the Vessels could have been in the water for 45 days or more before HMF took delivery of them. 4-ER-526. In fact, the MICHELLE SLOAN went into the water three months before it was delivered to HMF. 5-ER-996. Likewise, the DR HANK KAPLAN was in the water by no later than mid-June 2017 and HMF did not accept delivery of it until August 2017. 8-ER-1864, 6-ER-1116-1117. Further, because the construction process took ten to fourteen months to complete, 3-ER-303, photographs taken at various unspecified points throughout that lengthy process could have been taken six, eight, ten or even twelve months before HMF took delivery of the Vessels, 3-ER-353.

HMF breached the Bareboat Charters by not returning the Vessels in the same condition as they were upon delivery, less ordinary wear and tear; it was not HMF’s burden to prove that it did not breach the Bareboat Charters. *See, e.g., Stockton East Water Dist. V. United States*, 583 F.3d 1344, 1360 (Fed. Cir. 2009) (stating that it is “elementary” that the plaintiff has the burden on all elements of its breach-of-contract claim) (quoting 23 Richard A. Lord, *Williston on Contracts* § 63:14 (4th ed. 1999)) (“The plaintiff or party alleging the breach has the burden of proof on all of its breach of contract claims.”).

In sum, the panel failed to address the primary trial-court error raised by HMF on appeal: that there was no photographic or documentary evidence admitted at trial establishing the conditions of the Vessels upon delivery to HMF and thus no evidentiary basis for the trial court to find that HMF failed to return the Vessels in the same condition, less ordinary wear and tear. Instead, the Panel affirmed the trial court’s judgment in favor of Tug Construction and the finding on which that judgment is based—that HMF breached the Bareboat Charters by failing to return the Vessels in the same condition as they were upon delivery to HMF, less ordinary wear and tear. App. 3a.

That ruling conflicts with decisions of the Ninth Circuit and other courts of appeals holding that a factual finding is clear error when there is no record evidence to support it.³ The Panel’s disregard of this bedrock principle of

³ *See, e.g., Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 820 (9th Cir. 2018) (“A finding of fact is clearly erroneous ... if the record contains no evidence to support it.”); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119 (9th Cir. 2009) (“We consider a finding of fact to be clearly erroneous ... if the record contains no evidence to support it.”) (cleaned up); *Holmes*, 768 Fed. Appx. at 784 (“A district court’s factual finding is clearly erroneous if it is ... without support in

appellate review so far departs from the accepted and usual course of judicial proceedings and sanctions such a departure by the trial court as to call for an exercise of the Supreme Court’s supervisory power. Appellate courts have an absolute duty to ensure that trial courts properly apply the correct legal standards and to correct any failure to do so. *Engebretsen v. Fairchild Aircraft Corp.*, 21 F.3d 721, 728 (6th Cir. 1994) (stating that “it is the duty and right of appellate courts to determine whether, in the exercise of the discretion committed to it, the trial judge applied correct legal standards”) (quoting *Mannino v. International Mfg. Co.*, 650 F.2d 846, 849 (6th Cir. 1981)); *United States v. Johnson*, 318 F.3d 821, 826-27 (8th Cir. 2003) (stating that the court’s discretion “must be exercised on the basis of a finding fairly supported by facts in the record, ... and when that factual support is lacking we on the appellate courts have a duty to correct what we perceive to be error”). Further, “[i]t is important for [courts of appeals] to apply the clearly erroneous standard properly and consistently when [they] are called upon to

inferences that may be drawn from facts in the record.”); *United States v. Rico*, 3 F.4d 1236, 1238 (10th Cir. 2021) (“Clear error exists when a factual finding lacks any factual support in the record....”) (citation and quotation omitted); *Ghahan, LLC v. Palm Steak House, LLC*, 745 F. App’x 302, 306 (11th Cir. 2018) (“A finding is clearly erroneous if the record lacks substantial evidence to support it”) (citation and quotation omitted); *Kristensen v. United States*, 993 F.3d 363 (5th Cir. 2021) (“A finding of fact is clearly erroneous if it is without substantial evidence to support it....”) (quoting *Becker v. Tidewater, Inc.*, 586 F.3d 358, 365 (5th Cir. 2009)); *Wu Lin v. Lynch*, 813 F.3d 122, 127 (2d Cir. 2016) (explaining that district courts commit clear error when there is “no evidence at all to support a finding of fact”); *Gold v. First Tenn. Bank Nat'l Ass’n (In re Taneja)*, 743 F.3d 423, 435 (4th Cir. 2014) (“A finding is clearly erroneous if no evidence in the record supports it.”) (cleaned up).

review factual findings.” *Libman Co. v. Vining Indus.*, 69 F.3d 1360, 1367 (7th Cir. 1995) (dissent, Coffey, J.).

The legal principle the Ninth Circuit disregarded is fundamental to appellate review. Accordingly, the Court should grant HMF’s petition for writ of certiorari and reinforce that core principle.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 20, 2024

APPENDIX

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APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22-36049

TUG CONSTRUCTION, LLC,
RESPONDENT-APPELLEE,

v.

HARLEY MARINE FINANCING, LLC,
PETITIONER-APPELLANT.

February 15, 2024

Appeal from the United States District Court for the
Western District of Washington (Tsuchida, *M.J.*).

Before: MCKEOWN, BYBEE, AND BRESS, Circuit
Judges.

MEMORANDUM

This appeal concerns the cost of repairs on five tug-boats and which entity—the owner or the charterer—should shoulder it. Tug Construction, LLC (“Tug”) owned the newly constructed tugboats (“Vessels”) and chartered them to Harley Marine Financing, LLC (“HMF”). The Bareboat Charter Agreements required HMF to return the Vessels to Tug after the charter term “in the same good condition ... less ordinary wear and tear.” To

determine the “same good condition,” the Bareboat Charter Agreements required on-hire and off-hire surveys. The “method” for the on-hire survey needed to include “written and photographic documentation.” Tug claimed that HMF did not return the Vessels “in the same good condition . . . less ordinary wear and tear.”

After a five-day bench trial, relying in part on the expert testimony of William Kelley, the trial court found “that Defendant HMF breached each of the Bareboat Charter Agreements by first failing to redeliver each of the Tugboats in the condition required under the Bareboat Charter Agreements.”

We review the trial court’s factual findings for clear error. *See Kohler v. Presidio Int’l, Inc.*, 782 F.3d 1064, 1068 (9th Cir. 2015). The parties agree that the clearly erroneous standard applies to the trial court’s determination that the Vessels were not returned in the “same good condition . . . less ordinary wear and tear.” “Special deference is paid to a trial court’s credibility findings.” *Exxon Co. v. Sofec, Inc.*, 54 F.3d 570, 576 (9th Cir. 1995), *aff’d* 517 U.S. 830 (1996).

The trial court’s determination that the parties conducted an on-hire survey under the Bareboat Charter Agreements was not clearly erroneous. Both parties agree that a representative for HMF, Brian Appleton, was present for the construction and testing of the Vessels and documented his inspections with photographs and reports. The Vessels were not, however, drydocked and further inspected after being tendered to HMF. Tug argues that Appleton’s inspections and documentation qualified as an on-hire survey; HMF argues that they did not. The trial court agreed with Tug. Because the Bareboat Charter Agreements specified only that the on-hire survey include written and photographic documentation, there was no

clear error in finding that Appleton’s inspections qualified as an on-hire survey.

There was likewise no clear error in the trial court’s determination that HMF failed to return the Vessels “in the same good condition … less ordinary wear and tear.” Multiple witnesses testified that the inspections and testing of the Vessels were more rigorous than typical on-hire surveys of mature or used tugboats. After hearing all the testimony, the trial court found, “For newly constructed vessels that have been accepted for bareboat charter following inspection during construction, launch, and sea trials, another dry-dock inspection is normally not performed following sea trials.” Further, HMF provides a weak alternative hypothesis that the damage occurred as the Vessels were removed from the drydock after construction, during sea trials, or in the weeks or months that the Vessels sat in the water before being delivered to HMF. The trial court found this theory to be “unsupported.” We find no clear error.

Nor did the trial court err by crediting Kelley’s testimony. HMF argues that Kelley’s expert reports contained a false statement about HMF’s liability for engine repairs on one of the tugboats, and, therefore, his testimony should have been discredited in full. Yet, HMF was not ordered to pay the engine repair damages because Tug abandoned the claim. Thus, the particular alleged falsehood was not material to the decision below. HMF invokes the *falsus in uno, falsus in omnibus maxim*. This allows a court to discredit a witness’s entire testimony, but it does not require a court to do so. *See Hughes v. Rodriguez*, 31 F.4th 1211, 1219 n.2 (9th Cir. 2022). Here, the trial court expressly found that Kelley was credible. Even accepting HMF’s characterization of Kelley’s allegedly false statement, we find no error in the court’s reliance on Kelley’s

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opinions, which trial court found to be well supported.
Thus, we conclude that there was no reversible error.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. 2:19-cv-00632-BAT

TUG CONSTRUCTION, LLC,
PLAINTIFF-APPELLEE,

v.

HARLEY MARINE FINANCING, LLC,
DEFENDANT-APPELLANT.

October 27, 2022

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

TSUCHIDA, Magistrate Judge:

In 2019, Plaintiff Tug Construction, LLC (“Tug Construction”) commenced an action against Defendant Harley Marine Financing, LLC (“HMF”). Dkt. 1. Tug Construction alleged HMF breached its maritime bareboat charter contracts with respect to the following vessels: DR. HANK KAPLAN, EARL W. REDD, LELA FRANCO, MICHELLE SLOAN, and RICH PADDEN. *Id.* The parties consented to Magistrate Judge Brian A. Tsuchida, Dkts. 14, 16, and Judge Tsuchida conducted a Court Trial between August 22, 2022, and August 26, 2022. Dkts. 97-101. Following trial, the parties submitted post-

trial pleadings and proposed findings of fact and conclusions of law.

The Court has considered the parties' submissions and the record and makes the following findings of fact and conclusions of law under Federal Rule of Civil Procedure 52(a). Any finding of fact that constitutes a conclusion of law is hereby adopted as a conclusion of law, and any conclusion of law that constitutes a finding of fact is hereby adopted as a finding of fact.

FINDINGS OF FACT

1. Tug Construction is a Washington State Limited Liability Company with its principal place of business in Seattle. Tug Construction owns the five tugboats at issue in this case, the DR. HANK KAPLAN, EARL W. REDD, LELA FRANCO, MICHELLE SLOAN, and RICH PADDEN (the "Tugboats"). Dkt. 87 (Joint Pretrial Order -Admitted Facts). Diversified Marine Services, Inc. ("DMS"), located in Portland, Oregon, constructed the Tugboats. *Id.* Tug Construction was created by Harley Franco and Kurt Redd to construct tugboats to charter to Harley Marine Services, Inc. ("HMF") and its subsidiaries. Verbatim Report of Proceedings ("VRP") 8/22/22 p. 13-15 and 46.

2. HMF, a subsidiary of Harley Marine Services, Inc. ("HMS"), is a Delaware Limited Liability Company with its principal place of business located in Seattle Washington. *Id.* Harley Franco was HMF's chief operating officer from 1987 to March 31, 2019. VRP 8/22/22 p. 44-45.¹

¹ The Court's Findings and Fact and Conclusions of Law refer to both Defendant HMF and HMS depending on the testimony, relevant exhibits, and timing of conduct before and after the undisputed assignment of the Bareboat Charter Agreements from HMS to HMF.

3. The Tugboats were newly constructed by DMS, delivered to, and accepted by HMS for charter under identical Bareboat Charter Agreements. The Bareboat Charter Agreements were later assigned to and assumed by HMF (in 2018). VRP 8/22/22 p. 46-49; 86; Admitted Facts, ¶ 8.

4. The Bareboat Charter Agreement for the MICHELLE SLOAN dated March 27, 2015, between Plaintiff and Millennium Maritime, Inc. (a wholly owned subsidiary of HMS), was assigned to and assumed by HMF. VRP 8/22/22 p. 57; Ex. 70, 71. The Bareboat Charter Agreement for the LEILA FRANCO dated June 19, 2015, between Plaintiff and Millennium Maritime, Inc., was assigned to and assumed by HMF. VRP 8/22/22 p. 78; Ex. 41, 43. The Bareboat Charter Agreement for the EARL W REDD dated January 30, 2017, between Plaintiff and Olympic Tug & Barge, Inc., was assigned to and assumed by HMF. Ex. 25, 26. The Bareboat Charter Agreement for the DR HANK KAPLAN dated June 9, 2017, between Plaintiff and SMS PNW, was assigned to and assumed by HMF. Ex. 5, 7. The Bareboat Charter Agreement for the RICH PADDEN dated October 25, 2017, between Plaintiff and Starlight Marine Services PNW, Inc., was assigned to and assumed by HMF. Ex. 85, 86. HMS accepted the MICHELLE SLOAN, LEILA FRANCO, EARL REDD, and RICH PADDEN at DMF in Oregon. VRP 8/22/22 p. 54, 72, 76; VRP 8/25/22 p. 145, 17-25, 146, 1-5, 179; Exhibits 1, 2, 38, 66, 82. HMS accepted the HANK KAPLAN in Seattle after a christening run from Portland. VRP 8/22/22 p. 85.

5. In 2019, Tug Construction provided HMF with written notice of intent to terminate each Bareboat Charter Agreement. Notice of Termination was given on January 3, 2019 that the DR. HANK KAPLAN be redelivered on or about January 31, 2019 (Ex. 8); Notice of Termination

was given on January 3, 2019 that the EARL W. REDD be redelivered on February 28, 2019 (Ex. 27); and Notice of Termination was given on February 12, 2019 that the RICH PADDEN, MICHELLE SLOAN, and LELA FRANCO be redelivered on February 28, 2019 (Ex. 44); *see also* Admitted Facts, ¶¶ 14-18.

6. HMF tendered for redelivery, the DR. HANK KAPLAN on February 1, 2019; and the EARL REDD, MICHELLE SLOAN, and RICH PADDEN on February 28, 2019. HMF tendered for redelivery these four Tug-boats at the HMS facility in Seattle, Washington. HMF agreed to tender for redelivery the LELA FRANCO in the Port of Los Angeles by March 8, 2019. Ex. 45. After redelivery did not occur, Tug Construction initiated a possessory action, and the LELA FRANCO was arrested and tendered for delivery to Plaintiff by the U.S. Marshal to Plaintiff on April 3, 2019. Ex. 48-49.

7. The Bareboat Charter Agreements were drafted by counsel for HMS at the direction of its CFO Todd Prophet. Mr. Franco recused himself as a representative for HMS, as to the Bareboat Charter Agreements, and Mr. Prophet approved and signed each Bareboat Charter Agreement on behalf of HMS for each Tugboat except for the RICH PADDEN. VRP 8/22/22 p. 60, 19-25, 61, 25, 62, 66, 83. Matt Godden, the current chief operating officer of HMS, signed the Bareboat Charter Agreement for the RICH PADDEN. VRP 8/25/22 p. 88, 89, 92; Exhibit 85. The Bareboat Charter Agreements for each Tugboat is identical, other than the names of the charterer, vessel identification information and charter hire rates. Each Bareboat Charter Agreement states, in pertinent part:

The Charter shall automatically renew and extend in perpetuity until and unless terminated by either party in writing. This is a triple net lease which

includes back fees and other miscellaneous charges.

1. BASIC AGREEMENT

Owner agrees to let and Charterer agrees to hire, on a bareboat charter basis, the Vessel² identified above pursuant to the terms and conditions of this agreement; the term Vessel shall include the Vessel identified above as well as all machinery, equipment, consumables, stores, furnishings and gear aboard the Vessel at the time of delivery to Charterer.

The bareboat charter term shall commence on the delivery date/time identified above or the actual date/time on which the Charterer accepts and assumes control of the Vessel, whichever shall first occur, and continue until the Vessel has been rede-livered as set forth herein.

2. HIRE, CHARGES AND INTEREST

Charterer shall pay hire, at the rate identified above, from delivery to redelivery, with payment due monthly in advance on the first day of each month, unless otherwise agreed. In the event of total or constructive total loss, hire shall continue until Owner has received full payment of the Vessel's agreed value under its hull and machinery policy.

Charterer shall be responsible for all charges and expenses of every kind and nature whatsoever relating to the Vessel/and or its use or operation

² The Bareboat Charter Agreement refers to each of the Tugboats as the "Vessel" covered by the agreement. For ease of reference, the Court has referred to the specific vessels as Tugboats throughout these Findings of Fact and Conclusions of Law.

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during the charter term. Charterer shall be responsible for all taxes, except such taxes as are specifically applicable to Owner by virtue of its receipt of hire under this agreement.

Amounts due to Owner shall be paid in US currency without discount or set-off; sums not paid shall accrue interest at a rate of (1%) per month.

In the event of total or constructive loss of the Vessel during the charter term, Charterer shall be obligated to pay hire until Owner has received full value under the Vessel's hull and machinery policy identified below.

3. WARRANTIES AND REPRESENTATIONS

The Vessel is bareboat chartered on an "AS-IS" basis with no Warranty or representation of any kind or nature whatsoever by Owner. Charterer shall have full opportunity to inspect Vessel prior to delivery to determine its condition and suitability for service and may additionally arrange for separate inspection by a maritime surveyor or similar technical representative at its expense.

IT IS SPECIFICALLY ACKNOWLEDGED AND AGREE THAT OWNER MAKES NO WARRANTIES OR REPRESENTATIONS WHATSOEVER, EXPRESS OR IMPLIED, REGARDING THE CAPABILITY, CONDITION, SEAWORTHINESS, FITNESS OR SUITABILITY OF THE VESSEL.

5. REPAIRS, MAINTENANCE AND ALTERATIONS

Charterer shall make all repairs, replacements and maintenance necessary to keep the Vessel in the

same good condition, repair and working order as when delivered, less normal wear and tear (which does not include any damage or deterioration correctible through routine maintenance). Charterer shall not install any gear or equipment on or make any alterations or additions to the Vessel without Owner's prior written consent. Any additional gear, equipment, alterations or additions allowed by Owner shall be Charterer's property and removed at Charterer's expense prior to redelivery.

6. SURVEYS; DELIVERY AND REDELIVERY

Prior to or at delivery, the Vessel shall be surveyed to comprehensively document its condition. The parties may agree upon an appropriate method by which to survey the Vessel and establish its condition, including drydocking and/or underwater inspection, but any method agreed must include written and photographic documentation. At the conclusion of the charter term (or sooner, at the Owners' option in the event of default), an off-hire survey of the Vessel shall be conducted upon the same method utilized for the on-hire survey, to establish the condition of the Vessel for redelivery. Every effort shall be made to have the off-hire survey conducted by the same person who conducted the on-hire survey.

The Vessel shall not be deemed redelivered until at the agreed redelivery location and in the same good condition, repair and working order as upon delivery, less ordinary wear and tear. If Charterer tenders the Vessel damaged and/or in need of repair, hire shall continue during the time required for such repairs and the Vessel shall not be deemed redelivered until restored to the same good condition,

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repair and working order as upon delivery, less ordinary wear and tear.

7. INSURANCE

Charterer shall procure and maintain, at its expense, the following insurances upon the Vessel during the charter term:

- a. hull and machinery insurance pursuant to Pacific Coast Tug/Barge Form (1979), to its full market value;
- b. protection indemnity insurance pursuant to Form SP-23 (I/56), with limits of no less than \$5,000,000 per occurrence;
- c. pollution and environmental liability insurance, including certificate of financial responsibility, to the extent and with limits as required by law; and
- d. if required by Owner and Owner's lender holding a mortgage on the Vessel, breach of warranty insurance in the amount required by such mortgage.

Each insurance shall be subject to Owner's approval name Owner as insured, be endorsed as primary to any insurance of Owner, and endorsed to require thirty (3) days written notice to each insured (including Owner) in the event of cancellation, nonrenewal or other material change in policy terms or conditions.

All deductibles, premiums and other policy changes shall be for Charterer's account. Owner and Charterer shall be co-loss payees on the hull policy except Owner shall be sole loss payee in the event of a total or constructive loss. If required, Owner's

lender shall be sole insured and sole loss payee upon the breach of warranty policy.

Charterer shall indemnify and hold Owner harmless (including legal fees and costs) of and from any loss, damage, expense, liability, claim or suit resulting from the failure to procure and/or maintain any insurance as required herein and/or for failure of any such insurance, including exposure to any loss, damage, expense, liability, claim or suit which would have been covered had the insurance been procured and maintained as required herein.

9. MISCELLANEOUS PROVISIONS

d. This agreement shall be governed by the general maritime law of the United States, or, in the absence of an applicable general maritime rule of law, by the laws of the State of Washington. Any suit filed relating to this agreement must be filed in Seattle, Washington, with the substantially prevailing party to recover its legal fees and costs.

f. Entire Agreement Charterer shall not sub-charter the Vessel or assign this agreement without Owner's prior written consent. This agreement may not be modified except through a writing signed by both parties. This agreement constitutes the entire agreement between the parties and replaces all prior contemporaneous agreements, written and oral.

Exhibits. 5, 25, 41, 70, 85.

8. The parties' dispute arises from the condition of each Tugboat when HMF tendered them for redelivery to Tug Construction. Tug Construction contends HMF breached each Bareboat Charter Agreement by failing to properly maintain each Tugboat and failing to return each

Tugboat in the condition required by the Bareboat Charter Agreements. Tug Construction consequently seeks damages for unpaid hire (rental payments), repair costs, and other associated costs, fees, and insurance. HMF contends it tendered each Tugboat in a condition that met the requirements of each Bareboat Charter Agreement, and that the costs and fees claimed by Plaintiff are excessive or are not required under the Bareboat Charter Agreements. Tug Construction contends the Court should award it damages against HMF for breach of contract in the amount of \$1,408,970.27 for the costs related to repairing the Tugboats and continuing charter hire. Tug Construction also seeks incidental expenses of \$49,429.59 and prejudgment interest at the rate of 1% per month for continuing hire expenses. HMF contends the Court should award \$54,073.22.

9. DMS constructed each Tugboat per specifications provided by HMS. Dkt. 87; 8/22/22, p. 49. Each Tugboat was inspected during its construction by a team that included DMS employees and Brian Appleton, then an HMS employee and its Director of Tug Systems and Tug Special Projects. 8/22/22 VRP p. 177. Mr. Appleton and Mr. Nelson (also an HMS employee) served as representatives to the Owner, Tug Construction, and Mr. Appleton served as a representative to both Tug Construction and the Charterer, HMS, while each of the Tugboats were being constructed, inspected and subject to sea trials. VRP, Aug. 23, 2022, p. 8.

10. Representatives of manufacturers for certain components also inspected each Tugboat. Mr. Appleton participated in inspecting the Tugboats during construction and inspected each Tugboat's hull pre-launch and found no problems. Mr. Appleton took photos and notes Case 2:19-cv-00632-BAT Document 115 Filed 10/27/22 Page 8 of 27

regarding the condition of each Tugboat, which he submitted to HMS. 8/22/22 VRP 182, p. 83. Mr. Appleton also prepared for each Tugboat a written report following each Tugboat's sea trial. *Id.* Mr. Appleton's inspection of each Tugboat found nothing wrong with each Tugboat when each Tugboat was accepted by HMS under the Bareboat Charter Agreements except for the DR. HANK KAPLAN. *Id.* at 190. The DR. HANK KAPLAN was conditionally accepted subject to exceptions set forth on a "punch-list" that Mr. Appleton created after sea trials were conducted. The punch-list set forth repairs that HMS requested DMS perform as an "exception" to acceptance of the Tugboat. The deficiencies listed on the punch-list were corrected, and HMS accepted the DR. FRANK KAPLAN. VRP 8/23/22, p. 82-83. For newly constructed vessels that have been accepted for bareboat charter following inspection during construction, launch, and sea trials, another dry-dock inspection is normally not performed following sea trials. VRP 8/23/22, p. 126, 152, 153, 162; VRP 8/24/22, p. 90. Other than the inspection process during construction, launch and the sea trials, no separate independent prelaunch or "on-hire" survey of the Tugboats was performed. A dry dock inspection of each Tugboat was also not performed after the sea trials were completed. VRP 8/24/22, p. 95-96.

11. Steve Carlson, the Vice-President of HMS's engineering department when the Tugboats were constructed, delivered, and accepted by HMS, also visited DMS about ten times. Mr. Carlson testified he discussed with Mr. Appleton that each Tugboat had been inspected before HMS accepted the Tugboats for delivery, VRP 8/25/22, p. 153, 190-191, and that HMS accepted the Tugboats at DMS in Oregon, except for the DR. HANK KAPLAN. *Id.* at 182.

12. At the time HMS accepted each Tugboat, each Tugboat was newly constructed by DMS. Each Tugboat had been inspected and tested as set forth above. The conditions later found below the water line on each Tugboat when each vessel was tendered for redelivery and the need for dry dock repair work did not exist when HMS accepted the Tugboats but developed at some point later during the term of the Bareboat Charter Agreements. The suggestion the Tugboats were damaged before HMS accepted the vessels or already had below the water line (each of the conditions that were later repaired when the vessels were tendered for redelivery), are unsupported.

13. During the time each Tugboat was under the Bareboat Charter Agreement with HMS and thereafter HMF, each vessel was subject to periodic inspection for all types of equipment on the vessel and the condition of each Tugboat above and below the water line. 8/22/22 VRP 191-192. HMS had a predictive and reactive maintenance program that was kept on a computer which the Court shall refer to as “E-maintenance system.” *Id.* at 192-93. Predictive maintenance involves maintenance performed on a schedule to avoid component failure. *Id.* at 196.

14. The accuracy of the information contained in the E-Maintenance system relied upon the accuracy of the information an employee input into the system. VRP 8/25/22, p. 132. Mr. Appleton observed alterations to predictive or scheduled maintenance on the E-maintenance system. *Id.* at 196-198. Predictive maintenance also required certified Caterpillar (CAT) mechanics to inspect and service CAT equipment and this was not done. *Id.* at 199-200. The E-maintenance records showed predictive maintenance work that was supposed to be done by a certified CAT mechanic was being performed by crew members of the Tugboats who were not qualified to perform

such work. *Id.*

15. The E-maintenance system is a computerized program that was tailored to maintaining older conventional Tugboats, not the five Tugboats at issue, which were newer tractor tugs with Z-drives requiring much more maintenance. *Id.* at 195. The Tugboats were on a two and a half-year predictive Zinc (cathode protection) inspection plan, but HMS placed them on a five-year inspection plan. *Id.* at 206-207. The records contained in the E-maintenance program relied upon input from an HMS employee, normally Ravi Sakho, Greg Nelson, or Brian Appleton. *Id.* at 193. Mr. Appleton did not trust E-maintenance records because he found discrepancies between maintenance work on a Tugboat that was logged into the E-maintenance system as performed or completed, when his visual inspection of the Tugboat revealed the work logged into the E-maintenance system had not been done. *Id.* at 194.

16. During the term of the Bareboat Charter Agreements, the LELA FRANCO and MICHELLE SLOAN were inspected when a line was tangled in its wheel (propeller) and found to have 85-90 percent Zinc loss. *Id.* at 204-205; VRP 8/25/22, p. 164. A Zinc is a piece of Zinc metal that is attached to the hull of the Tugboats to provide cathodic protection related to electrolysis. *Id.* at 205. Stray voltage is one cause of Zinc loss and HMS did not perform any inspection to diagnose whether any of the Tugboats had stray voltage problems. *Id.* at 207. The inspection revealed in addition to Zinc loss, the LELA FRANCO had corrosion and pitting to the hull weld seams which potentially can result in a rupture of the hull. *Id.* at 205-206; VRP 8/25/22, p. 163-164. Although HMS should have placed the LELA FRANCO into dry dock to replace the ZinCs and effect hull repair, including grinding the hull paint, recoating the hull and rewelding hull seams, no

repair work was performed. *Id.* at 206.

17. The DR. HANK KAPLAN was also inspected below the water line when it was placed into dry dock to re-patch its wheels (propellor). *Id.* 208. Nothing was done to replace Zinks that had significant wastage and loss, and no investigation of Zinc failure was performed. *Id.*

18. Mr. Carlson testified that the DR. HANK KAPLAN was the only Tugboat that had zinc or electrolysis issues early on and that the zinc issues were discovered “much later” on the LELA FRANCO and MICHELLE SLOAN, “and the other vessels were not inspected until return.” VRP 8/25/22, p. 192.

19. HMF normally prepared boats that it chartered and were being redelivered to an owner by inspecting and effecting needed repairs. *Id.* at 214. Usually when a boat is redelivered to the owner, the charterer will place the boat into dry dock to examine the hull and perform needed repairs. 8/22/22 p. 212-213. This is normally done in advance because it can be hard to schedule dry dock time. *Id.* HMF did not schedule dry dock inspection and did not perform any work to prepare any of the Tugboats for redelivery to Tug Construction. *Id.* at 214. Mr. Appleton was involved in the redelivery of about 15 other vessels chartered by HMF and the redelivery of each of these vessels involved an inspection and performance of needed repairs. VRP 8/22/22. p. 214. Mr. Appleton discussed the need to inspect the Tugboats upon redelivery with HMF employees Matt Godden and Steve Carlson and was told HMF was not doing anything, other than to remove HMF property from each Tugboat. *Id.* at 214-215. HMF did not perform inspections below the waterline of the Tugboats after notices of termination of the Bareboat Charter Agreements were issued and before each vessel was tendered for redelivery. VRP 8/25/22, p. 188. Mr. Carlson discussed

redelivery with Mr. Godden separately and only discussed equipment HMF would remove. VRP 8/24/22, p. 185-186.

20. After Tug Construction sent HMF notices of termination of the Bareboat Charter Agreements, Tug Construction and HMF agreed to engage William Kelley to serve as the parties' off hire surveyor. A joint off hire surveyor represents both parties, and each party is bound by the joint surveyor's findings and recommendations regarding needed repairs. VRP 8/23/22, p. 85-88; VRP 8/25/22, p. 136.

21. Mr. Kelley is an expert in performing surveys of vessels for redelivery with many years of experience to both on hire and off hire, and his expertise was acknowledged by another expert, Charles Walther. VRP 8/23/22, p. 145-154; VRP 8/26/22, p. 41-42.

22. Mr. Kelley reviewed each Bareboat Charter Agreement. VRP 8/23/22, p. 155-159. He went to DMS and examined its records regarding the construction, inspection, testing and acceptance of each of the Tugboats chartered to HMF. VRP 8/23/22, p. 160-162. Mr. Kelley also began to search for dry dock facilities capable of handling tractor tugs such as the five Tugboats that would be available on short notice. VRP 8/23/22, p. 163-164. Using past connections, Mr. Kelley arranged to have the DR. HANK KAPLAN, EARL WE. REDD, MICHELLE SLOAN, and RICH PADDEN drydocked at Foss Shipyards. VRP 8/23/22, p. 166-167. Mr. Kelley made these arrangements independent of any direction from the parties. *Id.* at 168-169. Mr. Kelley also arranged for dry docking of the LELA FRANCO, which was seized by the U.S. Marshal in Los Angeles, California.

23. Mr. Kelley arranged for dry docks because he knew some of the Tugboats had electrolysis issues to their hulls which required inspection and the need for the hull

to be grinded, painted and rewelded. VRP 8/25/22, p. 169, 179.

24. After arranging for dry docking, Mr. Kelley had the DR. HANK KAPLAN, EARL W. REDD, MICHELLE SLOAN, AND RICH PADDEN towed from Seattle to the Foss Shipyard dry dock facilities because the HMF crews for each vessel declined to move them to dry dock. VRP 8/23/22, p. 167, 168, 179.

25. After each of these four Tugboats were towed to Foss Shipyard, Mr. Kelley had a preliminary underwater inspection of each Tugboat's hull performed by a remote operating vehicle ("ROV") to assess the need for dry docking and the potential scope of work. VRP 8/23/22, p. 180. Based upon the ROV inspection, Mr. Kelly concluded dry docking was needed to complete a thorough inspection of the hull of each Tugboat and to effect necessary repairs. VRP 8/23/22 p. 181-182; 189-193; 201-202, 204-204; and Exhibits 11,12,29 and 74.

26. Mr. Kelley inspected the LELA FRANCO in Los Angeles after it was arrested by the U.S. Marshal. VRP 8/23/22, p.9, 94-95. Mr. Kelley had a dive survey performed and concluded the LELA FRANCO needed to be placed into dry dock for necessary repairs. VRP 8/23/22, p. 206, 208-209; and Exhibit 51.

27. Although HMF originally agreed that Mr. Kelley would perform a joint off hire survey of each Tugboat, HMF terminated the agreement. VRP 8/25/22, p. 136. HMF did not discuss with Tug Construction the retention of a different joint off hire surveyor and independently hired Scott Duncan to serve as HMF's off hire surveyor. Mr. Kelley first learned Mr. Duncan was HMF's off hire surveyor when Mr. Duncan appeared for an inspection of the DR. HANK KAPLAN and informed Mr. Kelly that he was retained as HMF's surveyor. VRP 8/23/22, p. 177-178;

VRP 8/24/22, p. 59-60. Mr. Kelley advised Tug Construction that HMF had hired its own off hire surveyor and was instructed by Tug Construction to continue with the redelivery process including performance of any work necessary to return each Tugboat to the condition set forth in each Bareboat Charter Agreement. VRP 8/23/22, p. 88-90. Tug Construction did not direct the redelivery inspection and repair process and instead relied upon Mr. Kelley's judgment and decisions in this regard. VRP 8/23/22, p. 90.

28. Mr. Kelley first inspected the DR. HANK KAPLAN. HMF representative Steve Carlson was present but did not participate in the inspection and declined to provide Mr. Kelley with the Tugboat's engine room and deck logs that are normally reviewed to confirm what maintenance has been performed. VRP 8/23/22, p. 173-174; VRP 8/24/22, p. 166-167. When Mr. Kelley was hired to perform a joint survey, Mr. Kelley reached out to Mr. Carlson at HMF to discuss the survey. VRP 8/25/22, p. 187-188. Mr. Carlson did not engage or communicate with Mr. Kelley other than indicating when he was on the DR. HANK KAPLAN that he felt drydocking the DR. HANK KAPLAN was not needed and would not be conducted. VRP 8/23/22, p. 176.

29. After each Tugboat was placed into dry dock at Foss Shipyards, a Condition Found Report ("CFR") was generated for each Tugboat. Mr. Kelley reviewed each Condition Found and would either authorize work to address the condition as beyond ordinary wear and tear or reject the work request as falling within ordinary wear and tear, and outside the Bareboat Charter Agreement. *See e.g.* VRP 8/23/22, p. 195-196, 198, 215-216. Mr. Kelley provided each of the CFRs to Mr. Carlson of HMS, but Mr. Carlson would not discuss them with Mr. Kelley. VRP 8/23/22, p. 194-195.

30. Mr. Kelley hired certified mechanics from Caterpillar (“CAT”) the manufacturer of each Tugboat to inspect the Tugboats’ engines and generators. Their inspection indicated these components were in an acceptable condition, but the components’ computer systems revealed HMS had not performed periodic tune-ups needed to maintain the components’ warranties. Mr. Kelley ordered the tune-up be performed. VRP 8/23/22, p. 198, 201.

31. After the repairs on each Tugboat were completed, Foss Shipyard created Work Complete Reports (“WCR”) for each Tugboat that included initial work orders; Foss Shipyard invoices for the costs of the repair work performed and completed; and photographs of the Conditions Found and work done. *See* Exhibits 111-117. Mr. Kelley confirmed the WCRs as to the cost, scope and necessity of repair work performed on the Tugboats needed to return them to the condition set forth under the Bareboat Charter Agreements. VRP 8/23/22, p. 218, 222; VRP 8/24/22, p 5-43.

32. Mr. Kelley reviewed all the work performed and invoices by the Al Larson Boat Shop in Los Angeles for repairs done on the LELA FRANCO. VRP 8/24/22, p. 43-44, and Exhibit 53. Mr. Kelley also billed Tug Construction for the services he provided, and Tug Construction paid his bill in the amount of \$49,429.59. VRP 8/24/22, p. 44-45; Exhibits 96-99.

33. The repair work that Mr. Kelley detailed and the costs for such work occurred while each Tugboat was still under charter to HMF pursuant to the Bareboat Charter Agreements. Each Bareboat Charter Agreement provided: (1) each charter term commenced no later than the date HMS accepted and assumed control of the Tugboat and continued until the Tugboat is redelivered as set forth in the charter agreement; (2) HMF as Charterer is

responsible for all charges and expenses relating to the Tugboat and its operation during the charter term; (3) HMF as charterer shall make all repairs, replacements and maintenance necessary to keep the Tugboat in the same good condition, repair and working order as when delivered, less normal wear and tear; (4) each Tugboat is not deemed redelivered until at the agreed redelivery location and in the same good condition, repair and working order as upon delivery, less ordinary wear and tear. If HMF as charterer tenders the Tugboat damaged and/or in need of repair, hire shall continue during the time required for such repairs and the Tugboat shall not be deemed redelivered until restored to the same good condition, repair and working order as upon delivery, less ordinary wear and tear; (5) HMF as "Charterer shall procure and maintain, at its expense, the following insurances upon the Tugboat during the charter term"; and (6) HMF as charterer must pay hire, at the rate contained in the Bareboat Charter Agreements, from delivery to redelivery, with payment due monthly in advance on the first day of each month, unless otherwise agreed.

34. Prior to redelivery, as defined by the Bareboat Charter Agreements, Tug Construction incurred the following insurance costs: DR. HANK KAPLAN, \$15,960; MICHELLE S. SLOAN, \$13,611; RICH PADDEN, \$15,679; EARL W. REDD, \$26,869; and LELA FRANCO, \$9,813. VRP, 8/25/22, p. 9, l. 10 – 14.

35. Prior to redelivery, as defined by the Bareboat Charter Agreements, bareboat charter hire continued to accrue for the following durations and amounts: DR. HANK KAPLAN: March 1, 2019 – April 12, 2019, \$136,684.67 (Ex. 14, 15, 17); EARL W. REDD: March 1, 2019 – April 29, 2019, \$213,471 (Ex. 31, 32, 33); LELA FRANCO, April 1, 2019 – May 6, 2019, \$76,092 (Ex. 57, 58,

59*); MICHELLE S. SLOAN, March 1, 2019 – April 12, 2019, \$87,129.56 (Ex. 76, 75, 77); RICH PADDEN, March 1, 2019 – April 25, 2019, \$152,445.60 (Ex. 89, 90, 91); VRP, 8/25/22, p. 15, l.11-22, p. 16, l.20 – p. 17, l.19; p. 21, l.11 – p. 24, l.27, p. 52, l.1-12.

36. Mr. Kelley summarized the costs that Tug Construction incurred pursuant to the Bareboat Charter Agreements prior to redelivery, inspection, and repair work to the Tugboats in an expert report. Exhibit 94. Mr. Kelley made two corrections at trial. The cost for the repair of the MICHELLE SLOAN was \$161,168, and the costs for engine repairs to the LELA FRANCO of \$300,000 should be \$8,551. VRP 8/24/22, p. 46, 52, 54-55. In his written report, Mr. Kelly placed an asterisk next to the \$300,000 costs for engine repair for the LELA FRANCO. Mr. Kelley explained that cost was provisional, which is why an asterisk was placed next to it, and subject to testing which later revealed \$8,551 in repairs were needed.

37. Tug Construction paid the costs set forth by Mr. Kelley with the adjustments he noted at trial. Id., VRP 8/25/22, p. 6-8. Mr. Kelley set forth the total amount of costs incurred by Tug Construction as follows:

DR. HANK KAPLAN

Berth charges pre-drydock	283.20
ROV survey	3,500.00
International Paint	2,235.00
Drydocking, and repairs including CAT	116,318.71
Western Towboat	2,620.00
Continuing charter hire 2/1-4/1/19	136,684.67
Insurance 2/1-4/1/19	15,960.00
TOTAL	277,601.58

MICHELLE SLOAN

Berth charges pre-drydock 283.20
ROV survey 3,500.00
International Paint 2,419.00
Drydocking, and repairs including CAT 161,168.71
Western Towboat 2,620.00
Continuing charter hire 2/1-4/12/19 87,129.56
Insurance 2/1-4/12/19 13,611.00
TOTAL 270,731.36

RICH PADDEN

Berth charges pre-drydock 1,557.60
ROV survey 3,500.00
International Paint 2,785.00
Drydocking, and repairs including CAT 138,489.91
Western Towboat 2,620.00
Continuing charter hire 2/1-4/25/19 152,445.60
Insurance 2/1-4/25/19 15,679.00
TOTAL 317,077.11

EARL W. REDD

Berth charges pre-drydock 3,427.60
ROV survey 3,500.00
International Paint 3,993.00
Drydocking, and repairs including CAT 68,467.06
Western Towboat 2,329.60
Continuing charter hire 3/1-4/12/19 213,471.00
Insurance 3/1-4/12/19 26,869.00
TOTAL 322,057.26

The total set forth by Mr. Kelley is **\$1,408,970.27**.

38. Charles Walter, an expert retained by HMF, disputed the costs incurred by Tug Construction that were based upon Mr. Kelley's survey and ordered repair work. Mr. Walter did not inspect the Tugboats and did not

participate in the surveys or repair work performed on the Tugboats. VRP 8/26/22, p. 12-16. Mr. Walter opined when HMF tendered the Tugboats for redelivery, none had to be towed or placed into Dry Dock and none of the repairs were necessary. VRP 8/25/22, p. 201. Mr. Walter's opined the only repairs for which HMF is responsible are for items above the waterline and in the following amounts: LELA FRANCO (\$10,169.11); DR. HANK KAPLAN (\$236.11); RICH PADDEN (0\$); EARL W. REDD (13,276.64) and MICHELLE SLOAN (\$9,763.74). VRP 8/25/22, p. 206-210, Exhibits 53, 118, 120, and 121. Although he did not identify a design defect in any Tugboat, he suggested the wastage to the Zincs on the Tugboats' hull and other damage was caused by a design defect. There is no factual support for this suggestion and thus no basis to accept it as a cause of the damage set forth above that was found below the water line of the Tugboats and which required repairs. Moreover, under each Bareboat Charter Agreement, each Tugboat was bareboat chartered to and accepted by HMS on an "AS-IS" basis with no Warranty or representation of any kind or nature whatsoever by the owner, Tug Construction. Under each Bareboat Charter Agreement, HMS specifically acknowledged and agreed the owner, Tug Construction, chartered the Tugboats to HMS without warranty of any kind regarding the condition or fitness of each Tugboat.

39. Additionally, although Mr. Walter opined the Tugboats did not need to be placed into dry dock for repairs, the opinion is not supported by the evidence regarding the actual condition of the Tugboats' hulls below the water line. The actual condition of each Tugboat's hull supports Mr. Kelley's determination that each Tugboat needed to be placed into dry dock for further assessment, and following that assessment, repairs to the hulls of each Tugboat were required as set forth in Mr. Kelley's expert report,

the work orders and the invoices for work performed.

40. The parties spar over whether Mr. Kelley or Mr. Walter is more credible. The Court finds the testimony and evidence presented by Mr. Kelley more accurately sets forth what inspections needed to be performed upon the Tugboats when they are being prepared for redelivery to an owner, the actual condition of each Tugboat when they were tendered by HMF or seized by the U.S. Marshal, the need to dry docking each Tugboat to inspect and repair them, and the scope and costs of repairs that were performed to return each Tugboat to the condition set forth in the Bareboat Charter Agreements. The Court finds Mr. Kelley did not improperly increase costs to HMF by delaying or slowing the time to find dry dock space for the Tugboats or in the time to repair each Tugboat, and that he appropriately rejected requests for repair work requests outside the scope of each Bareboat Charter Agreement.

41. The Court finds Mr. Kelley reviewed the work requests, properly authorized, and denied work requests, and submitted the invoices for the work that he authorized to Tug Construction which then paid each of the invoices. The Court finds the invoices are proper in their amounts and not excessive for the work done.

42. The Court rejects HMF's request to exclude or disregard all evidence presented by Mr. Kelley. That request largely hinges on the argument that because Mr. Kelley's initial expert report indicated \$300,000 in costs for engine work on the LELA FRANCO, all his testimony should be rejected. Mr. Kelley's report noted the \$300,000 item with an asterisk because it was contingent on further testing by the manufacturer, CAT. Subsequent testing showed repair work of \$ 8,551.00 and \$300,000 was needed and Mr. Kelley so testified.

CONCLUSIONS OF LAW

43. Generally, admiralty law applies to all maritime contracts. *Aqua-Marine Constructors, Inc. v. Banks*, 110 F.3d 663, 670 (9th Cir. 1997); *see also* 28 U.S.C. § 1333(1). Under admiralty law, a bareboat charter constitutes a near “outright transfer of ownership.” *Tidewater Barge Lines, Inc. v. The Port of Lewiston, et al.*, No. 03-CV-1225-ST, 2005 WL 3992463, at *7 (D. Or. Oct. 21, 2005) (quoting *Guzman v. Pichirilo*, 369 U.S. 698, 700 (1962)). “Under a bareboat charter, the owner gives the charterer full possession and control of the vessel for a period of time.” *Amoco Egypt Oil Co. v. Leonis Navigation Co., Inc.*, 1 F.3d 848, 849 n.1 (9th Cir. 1993). In a bareboat charter, the charterer “is personally liable for the unseaworthiness of a chartered vessel ...” *Reed v. S.S. Yaka*, 373 U.S. 410, 412 (1963), *reh’g denied*, 375 U.S. 872 (1963) (superseded by statute on other grounds), and the owner is not liable to the bareboat charterer for any claims of unseaworthiness.

44. The parties entered into Bareboat Charter Agreements for the DR. HANK KAPLAN, EARL W. REDD, LELA FRANCO, MICHELLE SLOAN, and RICH PADDEN, that are governed by the law of admiralty. The Court accordingly has jurisdiction over the matter under 28 U.S.C. § 1333, and venue is proper under 28 U.S.C. §1391(b).

45. The EARL W. REDD, LELA FRANCO, MICHELLE SLOAN, and RICH PADDEN were newly constructed, delivered to, and accepted by HMS pursuant to Bareboat Charter Agreements at DMS where they were built and were under HMS control from that point. The DR. HANK KAPLAN was also newly constructed and accepted for delivery but subject to exceptions set forth in a punch-list that involved vibration issues, which

issues were subsequently completed by DMS.

46. Under each Bareboat Charter Agreement, prior to or at delivery, each Tugboat shall be surveyed to comprehensively document its condition. Under each Bareboat Charter Agreement, the parties may agree upon an appropriate method by which to survey the Tugboat and establish its condition, including drydocking and/or underwater inspection, but any method agreed must include written and photographic documentation.

47. Each Tugboat was subject to an on-hire survey during construction and following construction before HMS accepted each Tugboat for delivery. The on-hire surveys on each Tugboat were conducted by Mr. Appleton representing HMS and Tug Construction, DMS, and CAT representatives. The parties' conduct establishes the on-hire survey was agreed upon and there is no evidence to the contrary. Each of the on-hire surveys performed by this group of individuals met the terms of each Bareboat Charter Agreement because each Bareboat Charter Agreement does not specifically state and thus does not require that another separate on-hire survey be performed by another individual before HMS accepted each of the Tugboats.

48. Each Bareboat Charter Agreement states that, at the conclusion of the charter term (or sooner, at the Owners' option in the event of default), an off-hire survey of the Tugboat shall be conducted upon the same method utilized for the on-hire survey, to establish the condition of the Tugboat for redelivery and that every effort shall be made to have the off-hire survey conducted by the same person who conducted the on-hire survey. This language requires that an off-hire survey be performed to establish the condition of the Tugboat using the same "method" used during the "on-hire" survey. "Method" under each Bareboat

Charter Agreement is defined as a way of examining each Tugboat “including drydocking and/or underwater inspection.” “Method” is not defined under the Agreement and does not mean that a separate survey must be performed by an independent on-hire surveyor, in addition to any other surveys performed. That a separate on-hire survey, in addition to the survey of each Tugboat was not performed, thus does not obviate, or void the requirement that an off-hire survey is required under each Bareboat Charter Agreement to determine the condition of each Tugboat tendered for redelivery by HMF to Tug Construction, or that Tug Construction breached each Bareboat Charter Agreement.

49. Each Bareboat Charter Agreement also included a provision that “every effort shall be made to have the off-hire survey conducted by the same person who conducted the on-hire survey.” Here, Tug Construction and HMF initially agreed that Mr. Kelley would perform a joint off-hire survey. HMF backed out of the agreement to utilize Mr. Kelley as a joint surveyor and hired Mr. Scott Duncan to inspect the vessels solely for HMF, and without consultation with Tug Construction. Mr. Appleton, the HMS employee who was central to the survey performed on each vessel before acceptance by HMS, indicated he discussed the need inspect each of the vessels before redelivery with Mr. Carlson and Mr. Godden and was told HMF was not doing anything, other than to remove HMF property from each Tugboat. Under these circumstances, Tug Construction cannot be said to have breached the Bareboat Charter Agreements’ language that every effort should be made to have the off-hire survey performed by the same person who conducted the on-hire survey. Additionally, the language of each Bareboat Charter Agreement does not require that only an agreed upon off-hire surveyor can perform the survey of each Tugboat when tendered for

redelivery. Rather, each Bareboat Charter Agreement states “every effort shall be made,” and for this reason also, the Court finds Tug Construction did not violate the terms of the Bareboat Charter Agreements in regard to the off-hire survey.

50. The Court finds that Defendant HMF breached each of the Bareboat Charter Agreements by first failing to redeliver each of the Tugboats in the condition required under the Bareboat Charter Agreements. Under each Bareboat Charter Agreement, HMF was required to redeliver each vessel “in the same good condition, repair and working order as upon delivery, less ordinary wear and tear, which did not include any condition that was avoidable or correctable through routine maintenance.” Each Tugboat was tendered for redelivery in a condition inconsistent with the terms of the Bareboat Charter Agreements and which required substantial work and expense to return each vessel to the condition set forth in the Bareboat Charter Agreements.

51. Additionally, the term “redeliver” in the Bareboat Charter Agreements is a term of art. Under each agreement, a Tugboat is not deemed redelivered until it is tendered at the agreed redelivery location and in the same good condition, repair and working order as upon delivery, less ordinary wear and tear. If the charterer tenders the Tugboat damaged and/or in need of repair, hire shall continue during the time required for such repairs and the Tugboat shall not be deemed redelivered until restored to the same good condition, repair and working order as upon delivery, less ordinary wear and tear. HMF did not tender the Tugboats in the same good condition, repair and working order as upon delivery, less ordinary wear and tear as required by each Bareboat Charter Agreement and thus, HMF was required to pay the charter hire rates and

insurance set forth above and which accrued until the vessels were restored to the same good condition mandated by the Bareboat Charter Agreements.

52. Because HMF breached the Bareboat Charter Agreements, HMF is responsible for the costs and expenses that Tug Construction incurred to bring each Tugboat back to the condition each Bareboat Charter Agreement required and for the hire fees and insurance costs that continued for each Tugboat until each met the redelivery terms and requirements set forth in the Bareboat Charter Agreements. Those costs and expenses total \$1,408,502.16.

53. Each Bareboat Charter Agreement also provides that charterer, HMF is responsible for all charges and expenses during the charter term and amounts due to the owner, Tug Construction shall accrue interest at the rate of one percent (1%) per month. Tug Construction has paid all the costs related redelivery, repair, and insurance and is thus entitled to 1% per month interest on these costs and expense as well as the continuing charter hire charges set forth in the Bareboat Charter Agreements.

54. Each Bareboat Charter Agreement further states any suit filed relating to this agreement must be filed in Seattle, Washington, with the substantially prevailing party to recover its legal fees and costs. Each Bareboat Charter Agreement directs that fees and costs shall be awarded to the “substantially prevailing party.” HMF argues Tug Construction is not the “substantially prevailing party” because HMF did not breach the Bareboat Charter Agreements and is responsible for only \$54,073.22 of the \$1,408,502.16 that Tug Construction seeks for repair and hire fees. The Court has found otherwise as discussed above.

55. HMF notes federal courts have not considered the definition of “substantial prevailing” in maritime cases. Each Bareboat Charter Agreement states that in the absence of an applicable general maritime rule of law, disputes shall be governed by the laws of the State of Washington. In Washington, determining the “substantially prevailing party … depends upon the extent of relief afforded the parties.” *Riss v. Angel*, 131 Wn.2d 612, 633 (1997). The Court finds Defendant HMF breached each of the Bareboat Charter Agreements and as a result of these breaches, Tug Construction is owed by HMF, \$1,408,502.16 for repair costs, hire fees and insurance costs. Based on the “extent of relief” standard, the Court finds that Tug Construction is the “substantially prevailing party” and entitled to recover reasonable attorney’s fees and costs.

56. Therefore, Tug Construction shall submit to the Court proposed fees and cost, keeping in mind that in Washington, the “lodestar” method is the starting point for fee calculations. The lodestar fee is determined by multiplying the hours reasonably expended in the litigation by each lawyer’s reasonable hourly rate of compensation. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597 (1983). The burden of demonstrating that a fee is reasonable is on Tug Construction, who must provide documentation sufficient to “inform the court, in addition to the number of hours worked, of the type of work performed and the category of attorney who performed the work (i.e. senior partner, associate, etc.).” *Bowers*, 100 Wn.2d at 59.

57. In evaluating the reasonableness of a fee award, the Court may consider the relationship between the amount in dispute and the fee requested and the hourly rate of opposing counsel. *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 66 (1987). Although the reasonableness of a

fee request depends on the circumstances of each individual case, the determination of a fee award should not become an unduly burdensome proceeding for the court or for the parties. An explicit hour-by-hour analysis of each lawyer's time sheets is unnecessary if the award is made with a consideration of the relevant factors and reasons sufficient for review are given for the amount awarded.

58. In sum, the crux of this case is whether HMF breached the requirements set forth in each Bareboat Charter Agreement to redeliver each Tugboat in a condition in compliance with the terms of each Bareboat Charter Agreement. The Court finds that Defendant HMF breached each of the Tugboats' Bareboat Charter Agreements and that as a result, Tug Construction incurred significant repair and other costs. Under the Bareboat Charter Agreements, HMF is also liable for and responsible for each Tug Construction's hire fees, insurance costs and interest for the period of time it took to meet the requirements set forth for redelivery of each Tugboat. The Court awards \$1,408,502.16 to Tug Construction, not including the 1% interest that is yet to be calculated. Each Bareboat Charter Agreement directs that a substantially prevailing party is entitled to fees and costs. The Court finds that under the extent of relief standard, Tug Construction is the substantially prevailing party and entitled to attorney fees and costs.

For the reasons above, the Court finds Tug Construction is entitled to entry of judgment in its favor and against HMF in the amount of:

1. \$1,408,502.16 for repair costs, hire fees and insurance costs, along with interest under the Bareboat Charter Agreements, and reasonable attorney fees.
2. Tug Construction shall provide its request for interest and attorney fees to the Court by November 3, 2022.

HMF may respond to Tug Construction's request for interest and attorney fees no later than November 10, 2022. The Clerk shall note the matter for November 17, 2022 as ready for the Court's consideration.

3. After determining interest, attorney fees and costs to be awarded, the Court will direct the Clerk to enter final judgement.

DATED this 27th day of October, 2022.

/s/ Brian A. Tsuchida
BRIAN A. TSUCHIDA
United States Magistrate Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22-36049

TUG CONSTRUCTION, LLC,
RESPONDENT-APPELLEE,

v.

HARLEY MARINE FINANCING, LLC,
PETITIONER-APPELLANT.

March 22, 2024

Appeal from the United States District Court for the
Western District of Washington (Tsuchida, *M.J.*).

ORDER

Before: MCKEOWN, BYBEE, AND BRESS, Circuit
Judges.

Judges McKeown and Bybee voted to deny the petition for panel rehearing and recommended denying the petition for rehearing en banc. Judge Bress voted to deny the petition for panel rehearing and the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear

the matter en banc. Fed. R. App. P. 35.

Appellant's petition for panel rehearing and re-hearing en banc, Dkt. No. 46, is **DENIED**.