THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THE INSTITUTE OF CETACEAN RESEARCH, a Japanese research foundation; KYODO SENPAKU KAISHA, LTD., a Japanese corporation; TOMOYUKI OGAWA, an individual; and TOSHIYUKI MIURA, an individual, Plaintiffs, v. SEA SHEPHERD CONSERVATION SOCIETY, an Oregon nonprofit corporation, and PAUL WATSON, an individual, Defendants.	Case No.: 2:11-cv-02043-RAJ **DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)** NOTE ON MOTION CALENDAR: JANUARY 27, 2012, without oral argument

I. INTRODUCTION

This dispute is improperly before the Court. Plaintiffs seek to prevent Defendants from engaging in lawful activities to protect threatened and endangered whales in the Southern Ocean Whale Sanctuary. Plaintiffs' Complaint purports to create causes of action where none exist, seeks protection under treaties not meant to protect Plaintiffs, and asks this Court to further Plaintiffs' illegal whaling activities. For these reasons and for the reasons set forth below, Plaintiffs' Complaint should be dismissed.

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II. FACTUAL BACKGROUND

Defendant Sea Shepherd Conservation Society is a non-profit organization established in Oregon in 1981. Sea Shepherd is dedicated to protecting marine wildlife around the world. *See* Dan Harris Declaration, Exhibit 1. It is a conservation organization, not a political organization, and it has never sought to influence Japanese policy. *See* Peter Hammarstedt Declaration at ¶ 9. Sea Shepherd conducts conservation activities around the world, but only its whale defense campaigns are at issue in this case.

Though Sea Shepherd maintains an office in Friday Harbor, Washington, the alleged activities of which Plaintiffs complain occurred in Australia, Japan and the Southern Ocean. Planning for these Antarctic whale defense campaigns takes place on the vessels themselves, either at port in Australia, or while at sea. Hammarstedt Declaration at ¶ 5. The vessels at issue in this case are Australian and Dutch flagged and are registered to Australian and Dutch entities. Harris Declaration, Exhibit 2. Well under half of the captains and crewmembers of the three Sea Shepherd vessels at issue in this case are United States citizens, and all crewmembers report to Sea Shepherd's vessels in Australia when they volunteer for the whale defense campaigns. Hammarstedt Declaration at ¶ 4-6.

The primary method Sea Shepherd employs in its whale defense campaigns is interference with Plaintiffs' illegal whale slaughter. Hammarstedt Declaration at ¶ 9. This is accomplished by strategically navigating Sea Shepherd vessels to prevent Plaintiffs from transferring and butchering caught whales and by using "stinky butter" to annoy and deter the poachers. Hammarstedt Declaration at ¶¶ 9, 10. These methods are employed to ensure maximum safety to all those involved. Sea Shepherd adheres to a strict non-violence policy. *Id*. at ¶ 8.

Defendants have never injured anyone, and Plaintiffs have not produced a single document to substantiate their allegations of injury, despite Defendants' multiple requests that they do so. *See* Harris Declaration at ¶ 2; Hammarstedt Declaration at ¶ 8. Plaintiffs have refused even to name the

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individuals they allege were injured. *Id.*

The UN World Charter for Nature authorizes groups such as Sea Shepherd to act as a private Coast Guard on behalf of international conservation law, and to take actions to prevent whaling. *See* World Charter for Nature (1982) UN GA RES 37/7, Art. III, ¶ 21(e) ("States and, to the extent they are able, other public authorities, international organizations, individuals, groups and corporations shall . . . [s]afeguard and conserve nature in areas beyond national jurisdiction.").

It is Plaintiffs who operate in contravention of international law and norms. Their whaling has been condemned by the international community and by courts of law. *See e.g., Humane Society International, Inc. v. Kyodo Senpaku Kaisha, Ltd.*, [2008] FCA 3 (15 January 2008) (Harris Declaration, Exhibit. 3 (decision)). Australia has brought an action against Japan in the International Court of Justice to prohibit Plaintiffs from whaling. *Id.* at Exhibit 4. Japan's briefing in this case is due on March 9, 2012. *Id.* at Exhibit 5. The International Whaling Commission (IWC) has repeatedly condemned Plaintiffs' whaling. IWC Resolutions 2007-1 and 2005-1. *Id.* at Exhibits 6-7. Recently, Plaintiffs' activities have even provoked the ire of those outside the conservation community, as it was revealed that the whalers had used $30 million in tsunami relief funds for their operations.[1]

III. ARGUMENT & AUTHORITIES

A. This Case Should be Dismissed for Lack of Subject Matter Jurisdiction and for Failing to State A Claim Under FRCP 12(b)(1) and 12(b)(6).

The plaintiff bears the burden of proof on the necessary jurisdictional facts. *In re Ford Motor and Citibank*, 264 F.3d 952, 957 (9th Cir. 2001). In determining their jurisdiction, courts are not confined to the four corners of the complaint; they may consider other evidence properly before the court and they need not assume the truthfulness of the complaint. *See Americopters, LLC v. FAA*, 441 F.3d 726, 732 n.4 (9th Cir. 2006). Disputed material facts do not preclude a court from

[1] *See* http://www.bbc.co.uk/news/world-asia-16064002.

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evaluating the merits of a challenge to subject matter jurisdiction under FRCP 12(b)(1). *See Thornhill Pub. Co. v. General Tel. & Electronics Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). A complaint also must provide more than a formulaic recitation of the elements of a cause of action, and it must assert facts that "raise a right to relief above the speculative level," or it will be subject to dismissal under FRCP 12(b)(6). *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

1. This Court Lacks Diversity Jurisdiction.

Federal district courts may not exercise diversity jurisdiction unless the parties are diverse and the amount in controversy equals or exceeds $75,000. 28 U.S.C. § 1332(a)(2). The party asserting diversity jurisdiction bears the burden of proof. *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857-58 (9th Cir. Cal. 2001). Plaintiffs have not met the amount in controversy requirement because the Complaint requests only declaratory and injunctive relief, repeatedly stating that Plaintiffs "have no adequate remedy at law." Complaint at ¶¶ 25, 33, 38, and 42. Accordingly, Plaintiffs have admitted there are no damages to sustain the $75,000 jurisdictional limit.

Furthermore, in cases involving injunctive relief, the test for determining the amount in controversy is the pecuniary result that a judgment would directly produce to either party. *In re Ford Motor Company*, 264 F.3d at 958. Plaintiffs have conceded that an injunction will have no dollar impact on Defendants because "there is no realistic likelihood of harm to the defendants from enjoining [the defendants'] conduct." Plaintiffs' Proposed Order on Preliminary Injunction, Dkt. 13. Plaintiffs' requested relief has no dollar value because Plaintiffs' whaling activities are illegal and have produced no "research" of scientific value. *See* Harris Declaration, Exhibit 7, IWC Resolution 2007-1 on JARPA (finding that the Japanese whalers do not "address critically important research needs"). If a dollar value cannot be assigned to the issues at stake, diversity jurisdiction does not attach.

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2. This Court Lacks Federal Question Jurisdiction.

Under 28 U.S.C. § 1331, a district court has subject matter jurisdiction over civil actions "arising under the Constitution, laws, or treaties of the United States." Here, none of Plaintiffs' four claims state a cause of action properly characterized as "arising under" U.S. law, and each claim should be dismissed.

Claim 1: Freedom of Safe Navigation: Plaintiffs' first claim for "Freedom of Safe Navigation" relies on four international treaties: The United Nations Convention on the Law of the Sea (UNCLOS); The Convention on the High Seas; The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA); and The Convention on the International Regulations for Preventing Collisions at Sea (COLREGS). Complaint at ¶¶ 21.1-21.4. None of these treaties create federal question jurisdiction.

UNCLOS: The United States is not a party to the United Nations Convention on the Law of the Sea (UNCLOS), and thus it is not bound by it.[2] This fact alone establishes that Plaintiffs' UNCLOS navigation claim does not "arise under" the laws of the United States. Moreover, if the United States is not bound by UNCLOS, private parties are certainly not bound by it either.

Further, in attempting to invoke the freedom of navigation provision of Article 87 of UNCLOS, Plaintiffs ignore subsection 2, which provides, "These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas . . . ." This language is significant because the treaty speaks in terms of "states," not private individuals and entities. As previously mentioned, and as will be explored in greater depth below, Plaintiffs' whaling activities are illegal and have been condemned by the international community. Plaintiffs cannot invoke Art. 87 of UNCLOS while simultaneously violating it. Those who seek equity must have clean hands.

[2] The United States would be bound by those provisions that reflect customary international law, but because Plaintiffs do not provide any meaningful evidence that UNCLOS codifies customary international law, nor state the elements establishing customary international law, Defendants do not address the issue here.

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High Seas Convention: Plaintiffs also improperly invoke the Convention on the High Seas ("High Seas Convention"). Treaties that are not self-executing cannot create private rights of action in the absence of implementing legislation. *See, e.g., Foster v. Neilson,* 27 U.S. (2 Pet.) 253, 314 (1829); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808 (D.C. Cir. 1984) (held that absent authorizing legislation, individuals only have access to the courts if a treaty is self-executing). If a treaty is not self-executing, implementing legislation must be passed before courts may use it to enforce substantive rights. *See Tel-Oren*, 726 F.2d at 808-10; *Mannington Mills, Inc. v. Congoleum Corp*., 595 F.2d 1287, 1298 (3d Cir. 1979). The presumption is that treaties are not self-executing. *Medellin v. Texas,* 552 U.S. 491, 506 n.3 (2008) (Noting the presumption that "treaties do not create privately enforceable rights in the absence of express language to the contrary.")

Even a self-executing treaty must be examined for its specific directives to determine whether it creates a private right of action. *Medellin,* 552 U.S. 491, 506 n.3. (The background presumption underlying even self-executing treaties is "[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts."); *McKesson Corp. v. Islamic Republic of Iran*, 539 F.3d 485, 488-89 (D.C. Cir. 2008) (whether a treaty is self-executing is distinct from whether it creates private rights or remedies.).

In *U.S. v. Postal,* 589 F.2d 862 (1979), the Fifth Circuit held that Article 6 of the Convention on the High Seas did not create a private right of action. The Court noted that treaties may provide expressly for legislative execution, identifying Articles 27 through 29 of the Convention on the High Seas as containing such language: "Every State shall take the necessary legislative measures to . . . ." *Id.* at 876-77. Though Article 6 lacks such phrasing, the court found its language bore a "self executing construction" on its face. *Id.* Yet the court decided it must interpret the treaty in the context of its promulgation, and went on to consider the history of U.S. courts' exercise of jurisdiction over foreign vessels. As evidence that the treaty was not intended to be self-executing,

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the court cited both the testimony of the Chairman of the U.S. Delegation to the 1958 Law of the Sea Conference stating that he did not believe the treaty superseded any existing domestic legislation and also the State Department stating that "[i]t does not appear that any of the convention provisions conflict with existing legislation. It does appear that some supplementary and new implementing legislation may be necessary or desirable." *Id.* at 881-82. No federal court since *U.S. v. Postal* has addressed whether any other Articles of the Convention on the High Seas are self-executing.

Since Article 6 of the Convention on the High Seas was found not self-executing (thereby providing no private right of action), under the analysis employed by the *Postal* court, Article 2 (cited in Complaint at ¶ 21.1) clearly is not. Unlike the mandatory language of Article 6, the bulk of the text in Article 2 is aspirational, descriptive, and largely limits acts of State sovereignty on the high seas. *See* Convention on the High Seas, Art. 2, 6, April 29, 1958, T.I.A.S. 5200, 450 U.N.T.S. 82. Though Article 6(1) issues a directive, repeatedly using the word "shall," the Article 2 provisions cited by Plaintiffs contain no such directive language. *See* Complaint at ¶ 21.1. Under the analysis employed by the *Postal* court, Article 2 of the High Seas Convention is also not self-executing and cannot provide a private cause of action. Given that the treaty was held not to be self-executing and Congress declined to pass implementing legislation, Plaintiffs are without a cause of action under the High Seas Convention.

SUA: Plaintiffs also rely on the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("SUA") even though this Convention does not provide for a private right of action. Plaintiffs seek to assert claims under SUA's 4th Preamble and Articles 3 §§ 1 and 2, and 6 § 1(c).

Article 5 of that treaty contains the mandate that "[e]ach State Party shall make the offences set forth in Article 3 punishable by appropriate penalties which take into account the grave nature of those offences." SUA, art. 5, Mar. 10, 1988, 27 I.L.M. 668, 1678 U.N.T.S.221. Thus, Article 5 makes clear the criminal nature of the acts set forth in Article 3. The United States' codification of

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SUA reflects the criminal character of the treaty, and is found in Chapter 111 (Shipping) of the U.S. Code at 18 U.S.C. § 2280. *See U.S. v. Lei Shi*, 525 F.3d 709, 719-20 (9th Cir. 2008). Title 18 is the U.S. criminal code. The text of 18 U.S.C. § 2280(a) quotes SUA's Article 3 almost exactly, while § 2280(b) quotes Article 6 of SUA. SUA is thus codified as criminal law and the federal cases citing this provision are criminal or military in nature. *See, e.g., U.S. v. Holmes*, 646 F.3d 659 (9th Cir. 2011); *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000 (7th Cir. 2002); *U.S. v. Acosta-Martinez*, 252 F.3d 13 (1st Cir. 2001); *U.S. v. Hasan*, 747 F. Supp. 2d 599 (E.D. Va. 2010); *U.S. v. Said*, 757 F. Supp. 2d 554 (E.D. Va. 2010); *U.S. v. Beckford*, 966 F. Supp. 1415 (E.D. Va. 1997).

In determining whether a statute creates a private right of action, the "ultimate issue is whether Congress intended to create a private cause of action. Unless such congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist." *Karahalios v. National Federation of Federal Employees, Local 1263*, 489 U.S. 527, 532-33 (U.S. 1989). "[I]n the absence of strong indicia of contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Middlesex County Sewerage Authority v. Sea Clammers*, 453 U.S. 1, 15 (1981). 18 U.S.C. § 2280(a) contemplates the remedy of federal criminal prosecution, including fines and imprisonment, not a civil suit. *See e.g., Smith v. Gerber*, 64 F. Supp. 2d 784 (N.D. Ill. 1999) (declining to create a private right of action under a federal criminal statute). There is no indication in the statutory regime codifying SUA that Congress had any intent other than to create a criminal statute. Thus, where Congress provided no civil remedies, none were intended, and Plaintiffs' navigation claim under SUA fails.

COLREGS: The International Regulations for Preventing Collisions at Sea ("COLREGS") is codified under 33 U.S.C. §§ 1602 *et. seq.* COLREGS and its implementing statutes are distinct, but represent the same rules. *See, e.g., Omega Protein v. Samson Contour Energy E&P LLC (In re Omega Protein)*, 548 F.3d 361, 366 (5th Cir. 2008). For COLREGS to apply, the vessels must be

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"subject to the jurisdiction of the United States." 33 USC 1603(1). 33 USC §1604(b) makes this same limitation clear:

> [w]henever a vessel subject to the jurisdiction of the United States is in the territorial waters of a foreign state the International Regulations shall be applicable to, and shall be complied with by, that vessel to the extent that the laws and regulations of the foreign state are not in conflict therewith.

For district courts in the U.S. to exercise jurisdiction over a vessel on the high seas, the vessel must bear some relationship to the United States. *See United States v. McRary*, 665 F.2d 674, 678 (5th Cir. 1982) (holding an extension of domestic jurisdiction to include acts committed in international waters where the vessel has no connection to the United States would clearly violate international law). All of the ships involved in this case are foreign flagged and registered to foreign companies, and they all operate exclusively outside the United States with mostly foreign captains and crew. Plaintiffs do not contend otherwise in their Complaint. Because Defendants' vessels are not subject to the jurisdiction of this Court, Plaintiffs' COLREGS claim must fail.

Claim 2: Freedom from Piracy: Plaintiffs rely on three international agreements as the basis for their freedom from piracy claim: (1) Fourth Preamble, Art. 3 §§ 1(b)-(c) and 2 of SUA; (2) Art. 15, §§ 1-3 of the High Seas Convention; and (3) Art. 101 of UNCLOS. Plaintiffs' Complaint at ¶¶ 28.1-29.

As previously discussed on pages 7-8, *supra*, Article 3 of SUA does not create a private right of action and thus cannot form the basis of any claim. Likewise, Article 15 of the High Seas Convention does not provide Plaintiffs a cause of action because Article 15 merely defines the scope of piracy and is descriptive in nature. It is not self-executing, and lacks implementing legislation. *See Postal*, 589 F.2d at 877, 881-82. *See* pages 6-7, *supra*.

The United States Code provisions pertaining to piracy, 18 U.S.C. §§ 1651-1661, predate the U.S. ratification of the High Seas Convention. No implementing legislation was created nor was U.S

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law regarding piracy altered after ratification of the High Seas Convention. According to the Code's Historical and Revisions notes, §§ 1651-1661 have not been amended in any significant way since 1948—thirteen years before ratification of the High Seas Convention by the United States. Plaintiffs thus cannot make out a claim under Art. 15 of the High Seas Convention regarding Defendants' alleged acts of "piracy." The Fifth Circuit's reasoning in *Postal* fully supports such a conclusion.

Beyond the fact that Article 15 is not self-executing and does not create a private right of action, Part I of Title 18 of the U.S. Code, containing U.S. law related to piracy, covers crimes. A survey of case law on these statutes suggests that the lawsuits were all military or criminal. *See generally Ex parte Quirin, 317 U.S. 1, 29* (1942); *U.S. v. Hasan,* 747 F. Supp. 2d 599 (E.D. Va. 2010); *U.S. v. Said,* 757 F. Supp. 2d 554 (E.D. Va. 2010). There is no private right of action for damages under 18 U.S.C. § 1651. *Hanoch Tel-Oren v. Libyan Arab Republic,* 517 F. Supp. 542, 545 (D.D.C. 1981) (finding Congress did not intend for the statutes to be anything more than criminal).

Plaintiffs also fail to state a claim under Article 15 because this definition of piracy requires "illegal acts of violence, detention or any act of depredation, *committed for private ends*." Art. 15 of the Convention on the High Seas, 13.2 U.S.T. 2312 (1962), 450 U.N.T.S. 82 (emphasis added). Defendants do not engage in acts committed "for private ends." Sea Shepherd has been a non-profit entity for over thirty years, and it engages in activities to preserve marine wildlife, an inherently public purpose.

Plaintiffs also appear to rely on UNCLOS, to which the United States is not a party (see previous discussion pages 5-6, *supra*), to form the basis of their piracy claim. Complaint at ¶ 29. To support their assertion that the definition of piracy set forth in UNCLOS is customary international law, Plaintiffs cite *U.S. v. Hasan,* 747 F. Supp. 2d 599, 640 (E.D. Va. 2010). Aside from the fact that this case is not binding on this court and that one U.S. case standing alone is hardly evidence of customary international law, the definition of piracy under international law is unsettled and does not reflect a coherent definition of piracy under the law of nations.

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Just a few months before the *Hasan* decision, the same court catalogued a number of authorities on piracy and noted that there was "plenty of debate as to whether the definition in UNCLOS 'adequately and accurately codified piracy.'" *See U.S. v. Said*, 757 F. Supp. 2d 554, 564-65 (E.D. Va. August 17, 2010). The *Said* court concluded that no court could put order to the chaos surrounding the definition because "enforcement actions against pirates and criminal prosecutions of pirates are left to individual countries, many of which have different penalties for the crime of piracy . . . ." *Id.* at 565. The court determined that reliance on international sources would be erroneous, and turned instead to 200 year-old Supreme Court precedent in *U.S. v. Smith*, 18 U.S. 153 (1820). *Id.* at 564. The Court found that the law of nations does not encompass any "unauthorized violent acts or attacks committed on the high seas without lawful authority against another ship." *Id.* at 558-59. Rather, the definition of piracy embodied in the statute has remained consistent since 1820 and it requires "robbery or forcible depredations committed on the high seas." *Id.* at 558-60. According to the Court, construing the statute otherwise deprives criminal defendants of due process. *Id.* at 566-67.

Had the U.S. intended to adopt the definition of "piracy" set forth in UNCLOS, or any in other piece of international law, it would have implemented legislation to do so. By explicitly adopting UNCLOS into their domestic laws, "dualist" States—those states that require incorporation of international law into domestic law—have acknowledged that the treaties are not self-executing, and have opted to incorporate particular meanings into their own State laws. Even if international law is customary, in the absence of a universal forum, it still relies on individual States' incorporating and defining the treaty to enforce it. In other words, for dualist states, such as the U.S. and England, the international law of piracy must be incorporated into domestic law to have meaning and effect. In contrast to the U.S., England has specifically incorporated UNCLOS into English law by the Merchant Shipping and Maritime Security Act 1997 (MSMSA). Under the law of nations, individual States define piracy, and there may never be one clear and universal definition of piracy.

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Pirates may be arrested and captured for international crimes, but they are prosecuted and sentenced according to the laws of individual nations. UNCLOS thus cannot supply the definition and cause of action for piracy in this case.

The definition of piracy under UNCLOS does not comport with the definition of piracy under U.S. law, which requires an act of robbery. *See* 18 U.S.C. § 1652; *U.S. v. Smith*, 18 U.S. at 164; *Said*, 757 F. Supp. 2d at 564-65. Plaintiffs have not alleged Defendants committed acts of robbery, and thus their claim fails under the U.S. statutory definition of piracy as well. The Court may not simply look to international law to supply a different definition: "The idea that international norms hang over domestic law as a corrective force to be implemented by courts is not only alien to our caselaw, but an aggrandizement of the judicial role beyond the Constitution's conception of the separation of powers. *See United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991) "[T]he role of judges . . . is to enforce the Constitution, laws, and treaties of the United States, not to conform the law of the land to norms of customary international law." *Ghaleb Nassar Al-Bihani v. Obama*, 619 F.3d 1, 4 (D.C. Cir. 2010) (Brown, J., concurring).

The mere fact that the same U.S. district court produced two divergent opinions in 2010 defining "piracy" is persuasive evidence of the unsettled nature of the definition of "piracy." Defendants never engaged in acts of robbery, nor do Plaintiffs contend otherwise. Defendants' conduct does not fall within the accepted definition of piracy under U.S. law. Plaintiffs' Complaint both fails to state a claim regarding piracy and fails to establish federal question jurisdiction over the piracy claim, and it should be dismissed pursuant to FRCP 12(b)(1) and 12(b)(6).

Claim 3: Freedom from Terrorism: Plaintiffs rely on the International Convention for the Suppression of the Financing of Terrorism (the Financing Convention) as the basis of their third claim. The Financing Convention is codified under the Suppression of the Financing of Terrorism Convention Implementation Act of 2002, Public Law 107-197, Title II, §202(a), June 25, 2002, 116 Stat. 724 (18 U.S.C. §2339(C)), with some deviations. *See* International Convention for the

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Suppression of the Financing of Terrorism, art. 2, Dec. 9, 1999, 39 I.L.M. 270, 2178 U.N.T.S. 38349; 18 U.S.C. §2339C(1), (2). Plaintiffs' cited language has largely been incorporated in U.S. law, thus Plaintiffs' reliance on the treaty language itself is inappropriate as Congress' codification should control.

Courts have construed 18 U.S.C. §2339 to create private civil rights of action under 18 U.S.C. §2333, which authorizes a person to sue for damages in district court for injury to his person, property, or business "by reason of an act of terrorism." 18 U.S.C. §2333(a). However, 18 U.S.C. §2333 codifies the American Terrorism Act, and that statute authorizes suit only by U.S. nationals. *Id.* Since Plaintiffs are not U.S. nationals, they cannot sue under the American Terrorism Act. Plaintiffs' reliance on SUA violations under its Financing Convention claims also fails because SUA does not provide for civil claims. *See* pages 7-8, *supra.*

Even if Plaintiffs had standing to assert a claim under The American Terrorism Act, their claim fails on the facts. 18 U.S.C. §2339(C)(a)(1)(B) labels as criminal anyone who collects funds with the intention of carrying out an "act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities ... when the purpose of such act ... is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act." 18 U.S.C. §2339C(a)(1)(B). Defendants never intended to cause death or serious bodily injury to anyone, nor have they ever done so. Nor have Defendants ever sought to intimidate a population or to compel a government to do or to abstain from doing any act.

The Alien Torts Statute (ATS), 28 U.S.C. §1350, is thus the only statute available to foreigners where a private right of action could be brought for violation of 18 U.S.C. §2339C. *See, e.g., Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257 (E.D.N.Y. 2007). As will be detailed below, ATS also does not confer jurisdiction over Plaintiffs' claims in this case.

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3. Plaintiffs Fail to State a Claim or Obtain Jurisdiction Under the ATS.

The Alien Tort Statute (ATS), 28 U.S.C. §1350, is a jurisdictional grant to the federal courts to hear limited common law claims based on a violation of the law of nations. *Sosa v. Alvarez-Machain,* 542 U.S. 692 (2004). The ATS requires a showing that the plaintiff is an alien, that the claim is for a tort, and that the tort was committed in violation of the law of nations or a treaty of the United States. *Burnett v. Al Baraka Investment and Development Corp.,* 274 F. Supp. 2d 86, 99-100 (D.D.C. 2003). Failing to meet any of these elements amounts to failure to state a claim and simultaneously divests the court of jurisdiction. *See* 28 U.S.C. §1350.

As an initial matter, Plaintiffs' request for preliminary injunctive relief is simply not cognizable under the ATS. The statute was passed by the First Congress as part of the Judiciary Act of 1789 (*Aziz v. Alcolac, Inc.*, 658 F.3d 388, 394 (4th Cir. 2011)) and has been held not to encompass preliminary injunctive relief. In *Grupo Mexicano De Desarrollo v. Alliance Bond Fund*, 527 U.S. 308 (1999), the Supreme Court was presented with the question of whether a preliminary injunction under FRCP 65 was an available remedy under the Judiciary Act of 1789. The Court found the answer depended on whether preliminary injunctions were considered equitable remedies available at the time of the Judiciary Act of 1789:

> [T]he equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act, 1789. 'The substantive prerequisites for obtaining an equitable remedy as well as the general availability of injunctive relief are not altered by [Rule 65] and depend on traditional principles of equity jurisdiction.'

Id. at 318-19 (some internal citations omitted). The Court held that the "equitable powers conferred by the Judiciary Act of 1789 did not include the power to create remedies previously unknown to equity jurisprudence." *Id.* at 332. Because preliminary injunctive relief was not traditionally accorded to courts of equity in 1789, the Court held it was unavailable now, and the District Court lacked the authority to issue a preliminary injunction. *Id.* at 308, 332-33.

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The ATS is part of the Judiciary Act of 1789 and so the same principles apply. As the party seeking to invoke this Court's jurisdiction, Plaintiffs bear the burden to prove jurisdiction is proper. *In re Ford Motor Co.*, 264 F.3d at 957. Plaintiffs' request for a preliminary injunction is an improper invocation of the ATS because the relief they seek exceeds the scope of the authority granted by the Judiciary Act of 1789.

Further, the ATS was intended to provide civil damages, not injunctive relief:

> [I]n 1781 the Congress implored the States to vindicate rights under the law of nations. In words that echo Blackstone, the congressional resolution called upon state legislatures to "provide expeditious, exemplary and adequate punishment" for "the violation of safe conducts or passports, . . . of hostility against such as are in amity . . . with the United States . . . infractions of the immunities of ambassadors and other public ministers . . . [and] infractions of treaties and conventions to which the United States are a party." The resolution recommended that the States "***authorise* [sic] *suits . . . for damages by the party injured, and for compensation to the United States for damage sustained by them from an injury done to a foreign power by a citizen.***"

Sosa, 542 U.S. at 715-16 (emphasis added, internal citation omitted). "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395 (1971). Any other conclusion regarding remedies available to international parties is impracticable, as issuance of injunctions and declaratory judgments may infringe upon matters of sovereignty and foreign relations. *See, e.g., Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 124 (2d Cir. 2008) (affirming the District Court's dismissal of request for injunctive relief where the extraterritorial injunction Plaintiffs sought raised concerns over Vietnam's sovereignty and was rendered "wholly impracticable" by the difficulties of enforcing an order regarding vast areas of land over which it had no jurisdiction.) The same issues confront this Court in issuing an injunction pertaining to activities in Australia and the Southern Ocean against vessels, registered owners, and captains and crew with no real connection to the United States.

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a. Plaintiffs Fail to State a Claim for Violation of the Law of Nations.

Plaintiffs' Complaint also fails to show that Defendants engaged in any act in "violation of the law of nations or a treaty of the United States" such that jurisdiction under the ATS is appropriate. The ATS provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. §1350. The statute incorporates only a "narrow set of common law actions derived from the law of nations[.]" *Sosa*, 542 U.S. at 721. Novel rights of action under the ATS are rarely entertained and there is a "high bar to new private causes of action for violating international law [and] . . . a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *Id* at 727. Deference to legislative judgment is especially prudent given "the potential implications for the foreign relations of the United States of recognizing such causes." *Id*. *See also Aziz v. Alcolac, Inc.*, 658 F.3d 388, 394-95 (4th Cir. Md. 2011) *(*"Although the 'door is still ajar' for the recognition of violations of the law of nations, it is 'subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.'").

Plaintiffs' ATS claims are at odds with the intended objective of the statute as well. In discussing the norms of customary international law, the Supreme Court in *Sosa* noted that the limited category of claims that federal courts could entertain at the time the ATS was enacted were "defined by the law of nations and recognized at common law." *Sosa,* 542 U.S. at 712. Offenses against the law of nations principally involved the rights or interests of whole states or nations, not the private interests of individuals seeking relief in court. *Id.* at 720.

No case supports an ATS claim involving "navigation." To the contrary, ATS claims are highly limited and typically involve heinous acts such as torture or crimes against humanity. *See, e.g.*, *Kadic v. Karadzic,* 70 F.3d 232, 241-42 (2d Cir. 1995) (recognizing genocide as a violation of the law of nations); *Almog v. Arab Bank, PLC,* 471 F. Supp. 2d 257, 275 (E.D.N.Y. 2007) (discussing genocide and crimes against humanity as cognizable under the ATS); *Flores v. S. Peru*

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Copper Corp., 414 F.3d 233 (2d Cir. 2003) (acknowledging war crimes and genocide as sufficient for ATS claims, but denying jurisdiction under the ATS where alien plaintiffs sued for environmental pollution). Even if Plaintiffs' allegations about Defendants' navigational conduct were true, these allegations do not give rise to a plausible cause of action under the ATS. In light of *Sosa's* strong admonishment that courts should be reluctant to create new causes of action under the ATS, creating a "navigation" claim is not warranted here.

b. Allegedly Financing Terrorism Does Not Create an ATS Claim.

Plaintiffs' terrorism claims also are not cognizable under the ATS. As the Supreme Court dictated in *Sosa*, courts entertaining a claim based on current law of nations must require that the claim "rest on a norm of international character accepted by the civilized world and defined with specificity comparable to the features of the 18th-century paradigms we have recognized." *Sosa*, 542 U.S. at 725. Those paradigms, recognized in 1789, are offenses against ambassadors, violation of safe conducts, and piracy. *Id.* at 730. Terrorism was not among the recognized ATS claims at the time the statute was passed.

Terrorism is not defined with the specificity required by *Sosa.* Indeed, the courts that have addressed terrorism claims under the ATS have done so with extreme caution because the law of nations is intensely variable when it comes to terrorist activities, especially regarding the use of violence. Even before *Sosa*, the D.C. Circuit, in three concurring opinions, found it could not conclude that terrorism was a violation of the law of nations. *See Tel-Oren*, 726 F.2d 775 (at 775, Edwards, J., concurring, at 799, Bork, J., concurring, at 823, Robb, S.C.J., concurring). In *Saperstein v. Palestinian Auth*., 2006 U.S. Dist. LEXIS 92778 at *28, *31 (S.D. Fla. 2006), the Court voiced concerns about the inherent risks of interpreting vague standards to assert subject matter jurisdiction over a terrorism claim, particularly because *Sosa* outlined a strict approach to expanding cognizable torts in violation of the law of nations under the ATS. The *Saperstein* Court went on to hold that because terrorism is not recognized as a violation of the law of nations, the Court lacked subject

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matter jurisdiction over the action under the ATS.

Plaintiffs rely on *Almog* for the proposition that, because 130 nations have adopted the Financing Convention, the treaty reflects the law of nations and thus creates a vehicle for a valid claim under ATS. *See* Complaint at ¶ 35. Though the court in *Almog* did state that treaties constitute primary evidence of the law of nations, it did not hold that terrorism *per se* violates the law of nations. Rather, it stated that there was "no need to resolve any definitional disputes as to the scope of the word 'terrorism' ...." 471 F. Supp. 2d at 281. It was enough that the *acts* Almog alleged (which the court determined amounted to genocide and crimes against humanity) were universally condemned and thus violated the law of nations. *Id.* The *Almog* court did not explicitly decide whether and under what circumstances terrorism violates the law of nations.

At least one court interpreting *Almog* has rejected the idea that the Financing Convention codifies or creates an international law norm against terrorism or financing terrorism. "The Financing Convention does not establish a universally accepted rule of customary international law." *In re Chiquita Brands Int'l, Inc*., 792 F. Supp. 2d 1301, 1318 (S.D. Fla. 2011). In reaching that conclusion, the Court relied on *Tel-Oren* and *Saperstein. Id.* at 1316. Other cases citing *Almog* have done so for the proposition that crimes against humanity violate the law of nations. Plaintiffs' reliance on *Almog* is misleading because that case does not stand for the contention that all terrorism violates the law of nations—and even its limited holding has come under considerable criticism. Moreover, *Almog* is not binding on this court, whereas *Sosa*'s stringent requirements are.

Plaintiffs fail to demonstrate Defendants' conduct amounts to terrorism, thus failing to state a claim (as discussed in greater detail below), and they have failed to show that terrorism is a cognizable claim under the ATS. Their terrorism claim under the ATS should therefore be dismissed pursuant to FRCP 12(b)(1) and 12(b)(6).

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c. Plaintiffs Fail to Establish a Piracy Claim Under the ATS.

Plaintiffs' second claim, Freedom from Piracy, also fails under the ATS for a lack of definiteness. As discussed above, (pages 9-12, *supra*), the definition of "piracy" under international law is unsettled, and Plaintiffs' Complaint fails to establish that any of the cited definitions of piracy reflect the "law of nations," as required by the ATS. Further, the definition of piracy under U.S. law, which controls in this case, includes the requirement of acts of robbery. 18 U.S.C. §1652. Defendants have never committed robbery. Given these ambiguities, as well as the factual weakness of Plaintiffs' Complaint related to Defendants' alleged acts of "piracy," Plaintiffs' Complaint fails to state a claim for piracy cognizable under the ATS and Plaintiffs' piracy claims should be dismissed.

d. This Court Should Delay Decision in this Case Pending Decision by the U.S. Supreme Court Regarding the ATS.

Even if this Court were to find Plaintiffs' ATS claims cognizable, these claims should be stayed until the Supreme Court issues its ruling in *Kiobel v. Royal Dutch Petroleum Company*, 621 F.3d 111 (2nd Cir. 2010) (*cert. granted*, 181 L. Ed. 2d 292 (2011). That case involves an issue controlling to the action at hand. Currently, the circuit courts are split as to whether the ATS statute, 28 U.S.C. §1350, creates a private cause of action against corporate defendants. The Supreme Court will squarely address this issue during its current term. A decision answering that question in the negative would impact Plaintiffs' ability to obtain an injunction against Sea Shepherd, a non-profit corporation.

Staying a case pending a controlling ruling by the Supreme Court is within this Court's discretion. *See Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936) ("the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes in its docket with economy. . . ."); *LG Elecs., U.S.A., Inc. v. Whirlpool Corp.*, 597 F.3d 858 (7th Cir. Ill. 2010) (stayed case pending decision of Supreme Court in *Mohawk Indus., Inc. v. Carpenter*, 130

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S. Ct. 599 (2009)); *U.S. v. Urrutia*, 897 F.2d 430, 433 n.2 (9th Cir. 1990) (directed district court to consider staying proceedings pending controlling Supreme Court decision).

4. This Court Lacks Supplemental Jurisdiction over Plaintiffs' State Law Claims.

Plaintiffs' state law claims are not properly before this court because Plaintiffs have failed to adequately raise any federal claims. Supplemental jurisdiction is improper under 28 U.S.C. §1367, because "[u]nless there was an initial basis for jurisdiction in the first instance, there can be no supplemental jurisdiction over the state claims." *See, e.g.*, *Herman Family Revocable Trust v. Teddy Bear*, 254 F.3d 802, 806 (9th Cir. 2001) ("If the district court dismisses all federal claims on the merits, it has discretion under §1367(c) to adjudicate the remaining [state law] claims; if the court dismisses for lack of subject matter jurisdiction, it has no discretion and must dismiss all claims.").

B. This Case Should Also be Dismissed for Failure to State a Claim Under 12(b)(6).

To survive a motion to dismiss, a complaint must contain sufficient factual matter, which, if accepted as true, states a claim to relief that is "plausible on its face." *Ashcroft v. Iqbal,* 129 S. Ct. 1937, 1949 (2009). A complaint must provide more than a formulaic recitation of the elements of a cause of action. *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007). A complaint's "non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Iqbal,* 129 S. Ct. at 1949. "Where a complaint pleads facts that are 'merely consistent' with a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* The Court does not have to accept as true a legal conclusion couched as a factual allegation. *Papasan v. Allain,* 478 U.S. 265, 286 (1986).

1. Plaintiffs Fail to State a Terrorism/Financing Terrorism Claim.

Even if this Court finds it has jurisdiction over Plaintiffs' claims regarding Defendants' alleged terrorist activities, the claim should be dismissed pursuant to FRCP 12(b)(6) for failure to state a claim. Plaintiffs' Complaint alleges that the Financing Convention provides a cause of action

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if a person collects funds with the knowledge or intention that they be used to carry out an "offence within the scope of the SUA Convention." Complaint at ¶ 35.1. It further alleges that it is an offense under the Financing Convention if a person provides or collects funds with the intention or knowledge that they will be used to carry out "[a]ny other act intended to cause death or serious bodily injury to a civilian . . . when the purpose of such act, by its nature or context, is . . . to compel a government . . . to do or to abstain from doing any act." *Id.* at ¶ 35.2. Plaintiffs' Complaint then goes on to baldly re-state these elements as applied to Defendants, without putting forth any evidence to support these claims. Id. at ¶¶ 36.1-36.3.

As discussed above (pages 7-8, *supra*), Plaintiffs' Complaint fails to demonstrate that Defendants acted in violation of the SUA convention, or that SUA's definitions, codified as a criminal statute, even apply here. Plaintiffs' Complaint also fails to establish either prong of the Financing Convention as it is devoid of any names, declarations, or medical records to prove that anyone was ever injured by Defendants, let alone the requirement that they establish intent by Defendants to cause "serious bodily injury" or "death." That nobody has been seriously injured is conclusive proof that Defendants never had and do not have any such intent. Second, Plaintiffs fail to substantiate their claim that Defendants seek to influence the Japanese government with any facts whatsoever. Their threadbare, conclusory allegation that "Defendants actions are being done in an effort to compel the government of Japan to cease its authorizations of research whaling" (cited in Complaint at ¶ 36.2) falls far short of the *Twombly/Iqbal* requirement that a pleading provide more than a recitation of the elements of a claim. Without additional facts to lift Plaintiffs' claims to the level of "plausible," this Court should dismiss Plaintiffs' Complaint under Rule 12(b)(6).

2. Plaintiffs' State Law Claims do not Meet FRCP 8 Pleading Standards

To survive a 12(b)(6) motion for failure to state a claim, a complaint must meet the requirements of FRCP 8(a)(2). *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007). Rule 8(a)(2) requires a "short and plain statement of the claim showing that the pleader is entitled to

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relief." The purpose of this rule is to provide defendant "fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555.

Plaintiffs' Fourth Claim, ambiguously entitled "State Law Claims," fails to state any specific facts or any legal theory upon which Plaintiffs intend to pursue this claim. *See* Complaint ¶¶ 39-42. This claim is so vague and ambiguous as to deprive Defendants of notice of Plaintiffs' claim. The Complaint does not state which state's law applies or even which state law claims Plaintiff intends to pursue, let alone provide any facts that might support a state law claim. Defendants are thus denied a meaningful opportunity to defend against these allegations. Plaintiffs' "state law claims" do not comply with FRCP 8(a)(2) and they should be dismissed pursuant to FRCP 12(b)(6).

C. This Court is an Inconvenient Venue.

This case should be dismissed on the basis of *forum non conveniens*. Under the doctrine of *forum non conveniens*, the Court has discretion to decline jurisdiction where various enumerated factors favor litigation in a foreign forum. *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1142 (9th Cir. 2001). In considering dismissal on this basis, the Court must examine whether an adequate alternative forum exists, and whether the balance of public and private interests favors dismissal. *Id.*

Choice of Law: Before considering the proper venue, the Court must make an initial choice of law determination. *Id.* at 1143. Because Plaintiffs do not provide citation beyond the international treaties in their Complaint, they send mixed signals about whether the laws, Japan, Australia or the United States should apply to Plaintiffs' claims. However, Plaintiffs' Complaint invokes the Court's admiralty jurisdiction and primarily appears to complain of future personal injuries on the high seas. Complaint at ¶ 7.3. The Court's maritime choice of law provisions as laid out in *Lauritzen v. Larson*, 345 U.S. 571 (1953) should thus be applied here.

The governing law in a maritime case is determined by applying the seven *Lauritzen* factors: (1) the place of the wrongful act; (2) the flag of the vessels; (3) the allegiance or domicile of the injured party; (4) the allegiance of the shipowner; (5) the place of the contract; (6) the inaccessibility

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of the foreign forum; and (7) the law of the forum. *Pereira v. Utah Transport, Inc*., 764 F.2d 686, 689 (9th Cir. 1985). The Supreme Court has also directed courts to consider the shipowners' base of operations. *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 309 (1970). These factors are not exhaustive, and a court should apply them flexibly in consideration of the circumstances that each case presents. *Pereira*, 764 F.2d at 689.

As to the first factor, there is no dispute that all of the matters of which Plaintiffs complain occurred in either international or Australian waters (including the Australian Whale Sanctuary) or in Japan or in Australia.[3] Courts do not ordinarily emphasize this factor, because ships sailing the open sea may navigate over many nations' waters, and choice of law should not depend on the fortuity of where the ship was located at the time of the incident. *See Zipfel v. Halliburton Co*., 832 F.2d 1477, 1480 (9th Cir. 1987). In this case, however, the Plaintiffs' allegations establish that both Plaintiffs and Defendants and their respective crews knew that they would be operating entirely in Australian or international waters and docking at ports in Japan or Australia. This factor thus favors application of Australian, or perhaps, Japanese law.

We presume that all of Plaintiffs' vessels are flagged in Japan. Sea Shepherd has provided registry documents showing that its three vessels are flagged in Australia and in the Netherlands and are registered to entities from those two countries. *See* Harris Declaration, Exhibit 2. Courts must give heavy weight to a ship's flag. *Lauritzen*, 345 U.S. at 584-86; *Pereira*, 764 F.2d at 689. The second *Lauritzen* factor does not favor applying U.S. law to this dispute.

The third and fourth *Lauritzen* factors address the allegiance of the parties. It is uncontested that Plaintiffs and their vessels are all Japanese. As for Defendants, the acts about which Plaintiffs complain were all undertaken on foreign-flagged vessels that are based in Australia and the

[3] See Australian Federal Court decision, *Humane Society International, Inc. v. Kyodo Senpaku Kaisha, Ltd.*, [2008] FCA 3 (15 January 2008), Exhibit 3 to the Harris Declaration, finding that Plaintiffs have engaged in illegal whaling activities within the Australian Whale Sanctuary in contravention of sections 229, 229A, 229B, 229C, 229D, 230, 231, 232, and 238 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

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Netherlands, and that are mostly captained and crewed by citizens of countries other than the United States. Neither Plaintiffs' nor Defendants' allegiance is vested in the United States.

The fifth *Lauritzen* factor relates to contracts, and is inapplicable here. The sixth factor evaluates the accessibility of a foreign forum, and the seventh factor evaluates the law of that forum. Australia has an advanced legal system and provides a readily accessible forum for Plaintiffs' Complaint. As Plaintiffs' Complaint relies entirely on international law, there is no reason why Australian courts could not address these issues. Plaintiffs could obtain similar equitable and injunctive relief in an Australian court. Declaration of Mathew Alderson at ¶ ¶ 5-6.

In addition to the *Lauritzen* factors, the Court should consider the shipowners' bases of operations. *Hellenic Lines*, 398 U.S. at 309. The flags of the ships are relevant in this analysis as well, and none of those flags belong to the U.S. Plaintiffs' ships are based in Japan and Defendants ships are based in Australia and registered to entities based in Australia and the Netherlands. This factor also counsels against applying U.S. law.

The *Lauritzen* factors favor application of either Australian or Japanese law. There is nothing to indicate that anyone would expect U.S. law to apply to incidents occurring aboard any of the vessels involved in this case. The Court need not make a final determination about which nation's body of law applies. However, what is apparent is that applying U.S. law is inappropriate here.

Forum Non Conveniens: A party seeking dismissal on *forum non conveniens* grounds must make two showings: (1) there exists an "adequate alternative forum" for the dispute; and (2) "the balance of private and public interest factors favors dismissal." *Loya v. Starwood Hotels & Resorts Worldwide, Inc.*, 583 F.3d 656, 664 (9th Cir. 2009). In a case where a U.S. plaintiff chooses its home forum, there is a "strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981). However, because Plaintiffs are all Japanese, the usual presumption does not apply here.

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As to the first inquiry under a *forum non conveniens* analysis, Australia would be a more than adequate forum for this case. Australia is a highly developed country with a sophisticated legal system eminently capable of applying international law and granting similar relief to that which Plaintiffs seek here. *See* Alderson Declaration at ¶ ¶ 5-6. The record shows Plaintiffs served Mr. Watson with process in Australia, thus demonstrating they are capable of availing themselves of the Australian forum. *See* Dkt. 23. If Plaintiffs prevail against Defendants in Australia, they would be better able to secure the relief they seek in this case. The Australian Coast Guard is better positioned than the U.S. Coast Guard to limit the operations of ships in Australian ports and Australian waters.

The second *forum non conveniens* inquiry relates to the public and private interests at stake. The factors considered in the public interest inquiry are: (1) local interest in the action; (2) the Court's familiarity with the governing law; (3) the burden on local courts and juries; (4) congestion in the court; and (5) the costs of resolving a dispute unrelated to this forum. *Lueck,* 236 F.3d at 1147. Local interest in this action is low as the alleged conduct of which Plaintiffs complain involves foreign parties, occurs on the high seas and/or within the territorial waters of Australia, and is based from Australian and Japanese ports. Additionally, and as drafted in the Plaintiffs' Complaint, U.S. law does not apply to this case. The witnesses in this case are presently in the Southern Ocean and most if not all of them will be returning to either Australia or Japan. None of the Plaintiffs are American and only a small percentage of Defendants' crew come from the United States. Litigating a case in the U.S. when nearly all the evidence and witnesses must be brought in from Japan and Australia makes little sense and substantially increases the cost of resolving this action.

The private interest factors are: (1) residence of the parties and witnesses; (2) forum's convenience to the litigants; (3) access to evidence and sources of proof; (4) whether unwilling witnesses can be compelled to appear; (5) the cost of bringing all witnesses to trial; (6) the enforceability of a judgment; and (7) any other practical problems. *Id.* at 1145. As discussed, the alleged activities at issue did not and will not take place in the United States, and the witnesses to

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those activities are not here either. Australia is much closer to the events at issue and the Australian Coast Guard is better positioned to enforce a judgment if Plaintiffs were to prevail.

In this case, where the interests of both parties are more firmly rooted in Japan and Australia, the majority of evidence and witnesses are found far outside this jurisdiction, and U.S. law does not apply, this Court should exercise its discretion and decline jurisdiction on *forum non conveniens* grounds. For this reason too, dismissal of Plaintiffs' Complaint is proper.

D. Other Factors Weigh in Favor of This Court Dismissing this Case.

1. This Court Should Decline to Hear This Case on International Comity Grounds.

Comity "is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protections of its laws." *Hilton v. Guyot*, 159 U.S. 113, 164 (1859). The rationale for this deference lies in the inescapable reality that sovereign nations exist within a broader international community:

> The central precept of comity teaches that, when possible, the decisions of foreign tribunals should be given effect in domestic courts, since recognition fosters international cooperation and encourages reciprocity, thereby promoting predictability and stability through satisfaction of mutual expectations. The interests of both forums are advanced-the foreign court because its laws and policies have been vindicated; the domestic country because international cooperation and ties have been strengthened. The rule of law is also encouraged, which benefits all nations.

Laker Airways Ltd. v. Sabena Belgian World Airlines, 731 F.2d 909, 937 (D.C. Cir. 1984).

Plaintiffs' whaling activities have already been deemed illegal by an Australian federal court. Harris Declaration, Exhibit 3, *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA. Contrary to that court's order, Plaintiffs have acted and have continued to act in violation of the laws of Australia (and of the international community) by whaling within an internationally recognized whale sanctuary. *Id.* Plaintiffs seek equity with unclean hands by requesting that this Court enter an order enjoining Defendants' whale defense campaign and allowing Plaintiffs to

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continue illegally whaling in the Southern Ocean Sanctuary. Such an order cannot issue without this Court showing significant disregard for the laws of Australia and for the findings of its federal court.

Australia is not alone in having condemned Plaintiffs' whaling practices—the international community has done so as well. In 1946, the International Convention for the Regulation of Whaling (ICRW) established international whaling regulations and created the International Whaling Commission (IWC) to administer these regulations.[4] The IWC issued a moratorium on all commercial whaling in 1986.[5] This moratorium remains in effect and is binding on Japan. In an attempt to circumvent the moratorium, Japan established two extensive "research" programs (JARPA and JARPA II) using the ICRW's exception for scientific research permits.[6]

Despite claiming to have conducted "scientific research" under special permits for more than 22 years, Plaintiffs have never produced any results of scientific value. Because of this, the IWC has twice passed resolutions calling on Japan to discontinue the JARPA II program. In 2005, the IWC voted in favor of Japan either discontinuing the JARPA II program entirely or revising it to use non-lethal methods. Harris Declaration, Exhibit 6, 2005-1 resolution. In 2007, the IWC called on Japan to cease the lethal aspects of its JARPA II program. *Id.* at Ex. 7. Even more recently, the governments of the U.S., Australia, the Netherlands, and New Zealand issued a joint statement saying "We remain resolute in our opposition to commercial whaling, including so-called 'scientific' whaling." The statement goes on to reaffirm those nations' commitment to the IWC moratorium.[7]

Additionally, Australia has sued Japan in the International Court of Justice for Japan's breach of its international obligations concerning whaling. *Id.* at Ex. 4. This case is currently pending, with Japan's brief due to the court by March 9, 2012. *Id.* at Ex. 5. Any assertion of jurisdiction by this Court would disregard international comity and would contravene ongoing international efforts to

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[4] International Convention for the Regulation of Whaling (1946), 62 Stat. 1716, 161 U.N.T.S. 72, 4 Bevans 248 (1968).
[5] International Whaling Commission Schedule, Article III paragraph 10(e) (1982) (www.iwcoffice.org/commission/schedule.htm).
[6] ICRW, art. VIII, § 1.
[7] *See* December 13, 2011 Joint Statement on Whaling, available at http://www.state.gov/r/pa/prs/ps/2011/12/178704.htm.

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bring Plaintiffs to justice.

2. This Case Presents a Non-Justiciable Political Question.

Plaintiffs' whaling is extremely controversial and involves sensitive matters of international relations. Under the political question doctrine, U.S. Courts are very hesitant to decide issues that might infringe on the Executive Branch's autonomy. *Sarei v. Rio Tinto*, 2011 U.S. App. LEXIS 21515 (9th Cir. October 25, 2011). The political question doctrine "derives from the judiciary's concern for its possible interference with the conduct of foreign affairs by the political branches of the government." *De Roburt v. Gannett Co.*, 733 F.2d 701, 703 (9th Cir. 1984). Cases raising political questions are nonjusticiable. *Marbury v. Madison*, 5 U.S. 137, 170 (1803).

In evaluating whether a case involves a non-justiciable political question, it must first be determined whether the matter is entrusted to another governmental branch. *Baker v. Carr*, 369 U.S. 186 (1962). Foreign policy questions, like the international whaling issues involving Australia and Japan in this case, belong to the executive branch, not to the courts. *Sarei v. Rio Tinto*, 2011 U.S. App. LEXIS 21515 at *41 ("In evaluating whether this case involves matters entrusted to another branch, the first *Baker* factor, we are mindful that the conduct of foreign policy is not the role of the courts."); *Alperin v. Vatican Bank*, 410 F.3d 532, 549 (9th Cir. 2005) (held that "the management of foreign affairs predominantly falls within the sphere of the political branches and the courts consistently defer to those branches.")

The United States Supreme Court addressed the issue of whaling in *Japan Whaling Assoc. v. American Cetacean Soc.*, 478 U.S. 221 (1986), and it chose to defer to the executive and legislative branches. Suit was brought by conservation groups to compel the Secretary of Commerce to exercise its Congressionally-authorized power (through the Pelly and Packwood Amendments) to certify to the president that Japan was violating the IWC sperm whale quota. *Id.* at 228-29. Such an action would allow the president to issue sanctions against Japan. *Id.* at 227. Instead of certification, the Secretary had secured an executive agreement with Japan's Charge d'Affaires, limiting and

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eventually ending Japan's whale slaughter. *Id.* at 227-28. Plaintiffs objected to this course of action, arguing that any whaling activities by Japan diminished the effectiveness of the ICRW and that the Secretary should have certified Japan and sanctions should have been issued. *Id.* at 229-30.

The Supreme Court ultimately determined the case did not present a political question, but that holding rested on its determination that the case hinged on the statutory interpretation of the Pelly and Packwood amendments, a task that is properly judicial. 478 U.S. at 230. However, the Court noted throughout its decision the strong interest of Congress in conservation of whales, salmon, and other species. *Id.* at 238-39, 241. The court also explicitly acknowledged that matters of whaling lie within the realm of Congressional and Executive power. "We are cognizant of the interplay between these Amendments and the conduct of this Nation's foreign relations, and we recognize the premier role which both Congress and the Executive play in this field." *Id.* at 230.

The Court's reasoning supports a finding of political question here. This case demonstrates that international whaling is an intensely sensitive international political issue that is the province of the Executive branch, not the Courts. As noted above, the U.S. Secretary of State's December, 2011, joint statement evidences the State Department's ongoing concern for Japan's violations of the moratorium and the continued diplomatic efforts to end Plaintiffs' whaling program. Indeed, Plaintiffs conceded in the December 19, 2011, telephonic hearing that they had attempted to handle this matter via "diplomatic means" and were unsuccessful in obtaining the results they desired.

IV. CONCLUSION

The world is horrified by Plaintiffs' slaughter of threatened and endangered species under the guise of scientific research. Japan has consistently ignored international law and diplomacy, the world community, and court rulings. This case is Plaintiffs' last-ditch effort to obtain a result they could not achieve anywhere else. This dispute does not belong before this Court; it belongs in the international arenas capable of addressing the unique interests at stake.

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Based on the foregoing Plaintiffs' Complaint should be dismissed. This dispute is improperly before the Court and Plaintiffs' Complaint fails as a matter of law and fact to state any justiciable claim for relief.

DATED this Thursday, January 5, 2012.

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