

THE HONORABLE JAMES L. ROBERT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THE INSTITUTE OF CETACEAN)
RESEARCH, a Japanese foundation;)
KYODO SENPAKU KAISHA, LTD., a)
Japanese corporation; and TOMOYUKI)
OGAWA, an individual,)

Plaintiffs,)

v.)

SEA SHEPHERD CONSERVATION)
SOCIETY, an Oregon nonprofit corporation;)
and PAUL WATSON, an individual,)

Defendants.)

No. C11-2043JLR

**DEFENDANTS' ANSWER TO THE
FIRST AMENDED AND
SUPPLEMENTAL COMPLAINT,
AFFIRMATIVE DEFENSES, AND
FIRST AMENDED
COUNTERCLAIMS**

SEA SHEPHERD CONSERVATION)
SOCIETY, an Oregon nonprofit corporation;)
and PAUL WATSON, an individual,)

Counterclaim Plaintiffs,)

v.)

THE INSTITUTE OF CETACEAN)
RESEARCH, a Japanese foundation;)
KYODO SENPAKU KAISHA, LTD., a)
Japanese corporation; TOMOYUKI)
OGAWA, an individual; and HIROYUKI)
KOMURA, an individual,)

Counterclaim Defendants.)

1 personnel who have been aboard Plaintiffs' vessels at various times. Defendants deny the
2 remaining allegations in paragraph 12.

3 13. Defendants admit Watson established a predecessor of SSCS in 1977. The news
4 report referenced by Plaintiffs speaks for itself, and Defendants refer the Court thereto for its
5 true and correct contents. Defendants deny the remaining allegations in paragraph 13.

6 14. Defendants lack knowledge or information sufficient to form a belief as to the
7 truth of allegations regarding claims made by Watson and SSCS, as Plaintiffs identify no
8 source or basis for such allegations; Defendants therefore deny these allegations. Defendants
9 do not own, charter or otherwise have control over or access to the STEVE IRWIN, and thus
10 lack knowledge or information sufficient to form a belief as to the truth of allegations regarding
11 any insignia or flags which currently appear on that vessel; Defendants therefore deny these
12 allegations. Defendants deny the remaining allegations in paragraph 14.

13 15. Defendants deny the allegations in paragraph 15, including in subparagraphs
14 15.1-15.5.

15 16. Defendants lack knowledge or information sufficient to form a belief as to the
16 truth of allegations regarding Defendants' characterization of the 2010-2011 "No Compromise"
17 campaign, as Plaintiffs identify no source or basis for such allegations; Defendants thus deny
18 these allegations.

19 17. Defendants admit the 2011-2012 whale-protection campaign in the Southern
20 Ocean was dubbed "Operation Divine Wind." Defendants lack knowledge or information
21 sufficient to form a belief as to the truth of allegations regarding statements made by Watson or
22 SSCS crew members, as Plaintiffs identify no source or basis for such allegations; Defendants
23 thus deny these allegations. Defendants deny the remaining allegations in paragraph 17.

24 18. Defendants admit Plaintiffs filed a complaint in this Court on December 8, 2011.
25 Plaintiffs' original complaint in this matter speaks for itself, and Defendants refer the Court
26 thereto for its true and correct contents. To the extent paragraph 18 contains other allegations
27 requiring a response, Defendants deny those allegations.

1 19. Defendants admit oral argument on Plaintiffs' motion for a preliminary
2 injunction was held in this Court on February 16, 2012, and admit Plaintiffs' motion was
3 denied in an order dated March 19, 2012.

4 20. Defendants admit that they employed three vessels in the Southern Ocean during
5 Operation Divine Wind, namely the BRIGITTE BARDOT, BOB BARKER, and STEVE
6 IRWIN, and that rigid inflatable boats ("RIBs") were launched from these vessels at various
7 times. Defendants deny the remaining allegations in paragraph 20.

8 21. Defendants admit Plaintiffs appealed the District Court's order denying
9 Plaintiffs' motion for a preliminary injunction on April 10, 2012, and that oral argument took
10 place before the Ninth Circuit on October 9, 2012. Defendants admit that on December 6,
11 2012, Plaintiffs filed a motion in the Ninth Circuit seeking to expedite the appeal; that motion
12 speaks for itself, and Defendants refer the Court thereto for its true and correct contents.
13 Defendants lack knowledge or information sufficient to form a belief as to the truth of
14 allegations regarding statements made by Defendants, as Plaintiffs identify no source or basis
15 for such allegations; Defendants thus deny these allegations. Defendants deny the remaining
16 allegations in paragraph 21.

17 22. Defendants admit the Ninth Circuit issued the Injunction on December 17, 2012.
18 The Ninth Circuit's Injunction speaks for itself, and Defendants refer the Court thereto for its
19 true and correct contents. To the extent paragraph 22 contains other allegations requiring a
20 response, Defendants deny those allegations.

21 23. Defendants admit the BRIGITTE BARDOT, BOB BARKER, SAM SIMON
22 and STEVE IRWIN approached Plaintiffs' vessels within 500 yards between January 29, 2013
23 and February 28, 2013, and that RIBs from the STEVE IRWIN and BOB BARKER also
24 approached Plaintiffs' vessels within 500 yards during this period. Defendants deny the
25 remaining allegations in Paragraph 23, including subparagraphs 23.1-23.10.

26 24. Defendants admit that Watson relinquished his captaincy of the STEVE IRWIN
27 following the issuance of the Injunction, and that the STEVE IRWIN subsequently approached

1 one of Plaintiffs' vessels closer than 500 yards. Defendants deny the remaining allegations in
2 paragraph 24.

3 25. Defendants admit that the Ninth Circuit issued an opinion on February 25, 2013
4 reversing the District Court's denial of a preliminary injunction, and that the Ninth Circuit's
5 ruling was amended on May 24, 2013. The Ninth Circuit's opinion speaks for itself, and
6 Defendants refer the Court thereto for its true and correct contents. To the extent paragraph 25
7 contains other allegations requiring a response, Defendants deny those allegations.

8 26. Defendants admit that Plaintiffs initiated contempt proceedings against SSCS in
9 the Ninth Circuit on February 11, 2013, and filed an amended motion for contempt on March 6,
10 2013 seeking a contempt ruling against Watson and others, in addition to SSCS. Defendants
11 admit that Plaintiffs filed a second amended motion for contempt on April 12, 2013. These
12 motions speak for themselves, and Defendants refer the Court thereto for their true and correct
13 contents. To the extent paragraph 26 contains other allegations requiring a response,
14 Defendants deny those allegations.

15 27. Defendants admit that the Ninth Circuit referred the matter of contempt to
16 Appellate Commissioner Peter Shaw on February 21, 2013, and that Commissioner Shaw
17 conducted a contempt hearing on Plaintiffs' second amended motion for contempt from
18 October 28, 2013 to November 6, 2013. Defendants admit that Commissioner Shaw filed a
19 report on January 31, 2014 recommending that there be no finding of contempt. The evidence
20 presented at this hearing, the pre- and post-trial briefing filed by all parties and non-parties, and
21 the report issued by Commissioner Shaw speak for themselves, and Defendants refer the Court
22 thereto for their true and correct contents. Defendants deny the remaining allegations in
23 paragraph 27.

24 28. Defendants deny the allegations in paragraph 28, including subparagraphs 28.1-
25 28.4.

26 29. Defendants admit that the Ninth Circuit issued an opinion on December 19,
27 2014 that rejected Commissioner Shaw's recommendation and held Defendants and others in

1 contempt. The Ninth Circuit’s opinion speaks for itself, and Defendants refer the Court thereto
2 for its true and correct contents. To the extent paragraph 29, including subparagraphs 29.1-
3 29.3, contains other allegations requiring a response, Defendants deny those allegations.

4 30. Defendants admit that on March 31, 2014, the International Court of Justice
5 (“ICJ”) issued an opinion in the case of *Whaling in the Antarctic* (Austl. v. Japan: N.Z.
6 intervening), 2014 I.C.J. 148 (March 31), ruling that Japan’s use of “research” permits to kill
7 whales for commercial purposes was in violation of international law. The ICJ opinion speaks
8 for itself, and Defendants refer the Court thereto for its true and correct contents. To the extent
9 paragraph 30 contains other allegations requiring a response, Defendants deny those
10 allegations.

11 31. Defendants admit that Plaintiffs have proposed a new lethal “research” program
12 called the Proposed Research Plan for New Scientific Whale Research Program in the Antarctic
13 Ocean (“NEWREP-A”). The content of NEWREP-A speaks for itself, and Defendants refer
14 the Court thereto for its true and correct contents. Defendants admit that Plaintiffs have
15 announced their intention to resume whaling in the Southern Ocean during the 2015-2016
16 season, and that Plaintiffs did not kill whales in the Southern Ocean during the 2014-2015
17 season. Defendants deny the remaining allegations in paragraph 31.

18 32. Defendants admit they oppose Plaintiffs’ unlawful killing of whales in the
19 Southern Ocean. To the extent Plaintiffs attempt in this paragraph to characterize the ICJ
20 opinion, that opinion speaks for itself, and Defendants refer the Court thereto for its true and
21 correct contents. Defendants deny the remaining allegations in paragraph 32.

22 33. Deny.

23 **CLAIMS**

24 **FIRST CLAIM**
25 **(Freedom of Safe Navigation on the High Seas – Declaratory and Injunctive Relief)**

26 34. Defendants incorporate each and every response set forth above in paragraphs 1
27 through 33, and deny the allegations in paragraph 34.

1 35. Paragraph 35 contains Plaintiffs' legal conclusions and characterizations and
2 interpretations of international law, to which no response is required. To the extent paragraph
3 35 contains other allegations requiring a response, Defendants deny those allegations.

4 35.1. The Convention on the High Seas ("High Seas Convention") speaks for
5 itself, and Defendants refer the Court thereto for its true and correct contents. To the extent
6 paragraph 35.1 contains any allegations requiring a response, Defendants deny those
7 allegations.

8 35.2. The Convention on the Law of the Sea ("UNCLOS") speaks for itself,
9 and Defendants refer the Court thereto for its true and correct contents. To the extent
10 paragraph 35.2 contains any allegations requiring a response, Defendants deny those
11 allegations.

12 35.3. The Convention for the Suppression of Unlawful Acts Against the Safety
13 of Maritime Navigation ("SUA Convention") speaks for itself, and Defendants refer the Court
14 thereto for its true and correct contents. To the extent paragraph 35.3 contains any allegations
15 requiring a response, Defendants deny those allegations.

16 35.4. The Convention on the International Regulations for Preventing
17 Collisions at Sea ("COLREGS") speaks for itself, and Defendants refer the Court thereto for its
18 true and correct contents. To the extent paragraph 35.4 contains any allegations requiring a
19 response, Defendants deny those allegations.

20 36. Deny.

21 37. Deny.

22 38. Deny.

23 39. Defendants deny the allegations in paragraph 39, including subparagraphs 39.1-
24 39.3.

SECOND CLAIM
(Freedom From Piracy – Declaratory and Injunctive Relief)

40. Defendants incorporate each and every response set forth above in paragraphs 1 through 39, and deny the allegations in paragraph 40.

41. Paragraph 41 contains Plaintiffs’ legal conclusions and characterizations and interpretations of international law, to which no response is required. To the extent paragraph 41 contains other allegations requiring a response, Defendants deny those allegations.

42. Paragraph 42 contains Plaintiffs’ legal conclusions and characterizations and interpretations of international law, to which no response is required. To the extent paragraph 42 contains other allegations requiring a response, Defendants deny those allegations.

42.1. The High Seas Convention speaks for itself, and Defendants refer the Court thereto for its true and correct contents. To the extent paragraph 42.1 contains any allegations requiring a response, Defendants deny those allegations.

42.1. The SUA Convention speaks for itself, and Defendants refer the Court thereto for its true and correct contents. To the extent paragraph 42.2 contains any allegations requiring a response, Defendants deny those allegations.

43. Paragraph 43 contains Plaintiffs’ legal conclusions and characterizations and interpretations of case law and international law, to which no response is required. The Ninth Circuit’s opinions speak for themselves, and Defendants refer the Court thereto for their true and correct contents. To the extent paragraph 43 contains allegations requiring a response, Defendants deny those allegations.

44. Deny.

45. The Facebook posting to which Plaintiffs refer speaks for itself, and Defendants refer the Court thereto for its true and correct contents. Defendants deny the remaining allegations in paragraph 45.

46. Deny.

47. Deny.

1 **AFFIRMATIVE DEFENSES**

2 Defendants allege the following separate and affirmative defenses to the Amended
3 Complaint, and do not in doing so assume the burden to establish any fact, proposition, or legal
4 conclusion necessary to that affirmative defense where such burden is properly imposed on
5 Plaintiffs. Defendants do not in any way waive or limit any defenses which are or may be
6 raised by their denials, allegations, and averments set forth herein. These defenses are pled in
7 the alternative, and are raised to preserve the rights of Defendants to assert such defenses, and
8 are asserted without prejudice to Defendants' ability to raise other and further defenses.

9 **First Affirmative Defense**
10 **(Lack of Subject-Matter Jurisdiction)**

11 This Court lacks subject-matter jurisdiction over Plaintiffs' claims.

12 **Second Affirmative Defense**
13 **(Failure to State a Claim)**

14 Plaintiffs fail to state claims upon which relief can be granted.

15 **Third Affirmative Defense**
16 **(Failure to Comply with Pleading Requirements)**

17 Plaintiffs fail to comply with the pleading requirements set forth in the Federal Rules of
18 Civil Procedure.

19 **Fourth Affirmative Defense**
20 **(No Private Right of Action)**

21 Plaintiffs cannot maintain claims under treaties, conventions or statutes that do not give
22 rise to a private right of action. Such treaties, conventions or statutes include the Financing
23 Convention, the High Seas Convention, UNCLOS, and the SUA Convention.

24 **Fifth Affirmative Defense**
25 **(Unclean Hands)**

26 Plaintiffs' request for equitable relief is barred in whole or in part because Plaintiffs
27 engaged in illegal and inequitable conduct in relation to the subject matter of their claims
against Defendants, implicating the doctrine of unclean hands.

1 Counterclaim Plaintiff Sea Shepherd Conservation Society, while “Sea Shepherd” refers
2 generally to those entities with some version of the name “Sea Shepherd,” which form a loosely
3 organized global conservation movement.

4 4. Until December 17, 2012, when the Court of Appeals for the Ninth Circuit issued a
5 preliminary injunction (“the Injunction”) on appeal from this action, SSCS joined other Sea
6 Shepherd entities in participating in the interactions in the Southern Ocean described below.
7 The Injunction enjoined SSCS and Watson from physically attacking any vessel engaged by
8 Plaintiffs in the Southern Ocean, navigating in a manner likely to endanger the safe navigation
9 of such vessels, or approaching Plaintiffs within 500 yards on the open sea. Following the
10 Injunction, SSCS withdrew from the Southern Ocean whale-protection campaigns, which
11 continued during the 2012-2013 and 2013-2014 whaling seasons with the leadership and
12 participation of foreign Sea Shepherd entities.

13 5. Despite SSCS’s withdrawal from the Southern Ocean whale-protection campaigns
14 following the Injunction, the Ninth Circuit has found both SSCS and Watson to be in contempt
15 of the Injunction, as a result of actions taken by foreign Sea Shepherd entities that SSCS and
16 Watson do not control. Although SSCS and Watson do not plan to ever participate again in a
17 Southern Ocean whale-protection campaign (regardless of whether or not they are enjoined),
18 Plaintiffs are nevertheless continuing to pursue both a permanent injunction against them and
19 coercive sanctions for contempt based on the actions of other Sea Shepherd entities that SSCS
20 and Watson do not control. As long as Plaintiffs are seeking to enjoin the conduct of
21 Defendants in the Southern Ocean, and attempting to hold Defendants responsible for the
22 actions of other entities in the Southern Ocean, Defendants continue to have a direct interest in
23 pursuing declaratory and injunctive relief against Plaintiffs in relation to those same activities.
24 Separate and apart from this continuing interest in declaratory and injunctive relief, SSCS and
25 Watson remain dedicated to halting the illegal killing of marine life around the globe.

26 6. Counterclaim Plaintiff Paul Watson (“Watson”) is the founder of SSCS, and was its
27 executive director and a member of its board of directors until the Injunction issued. Watson

1 has not served as a director or officer of SSCS since that time, but recently became associated
2 with SSCS as a strategic advisor to the board.

3 7. As Counterclaim Defendants assert in their Amended Complaint, The Institute of
4 Cetacean Research (“ICR”) is now, and has been at all relevant times, a “public benefit
5 corporation” formed under the laws of Japan. The Amended Complaint also asserts that ICR
6 charters fully-manned vessels from Kyodo Senpaku Kaisha, Ltd. (“Kyoto Senpaku”) to engage
7 in the operations described below.

8 8. According to the Amended Complaint, Counterclaim Defendant Kyodo Senpaku is,
9 and has been at all relevant times, a corporation organized under the laws of Japan. The
10 Amended Complaint also asserts that Kyodo Senpaku is the owner of most of the vessels used
11 by ICR in its Southern Ocean whaling operations, and the employer of the masters and crew of
12 those vessels.

13 9. According to the Amended Complaint, Counterclaim Defendant Tomoyuki Ogawa is
14 a citizen of Japan, and currently the master of the NISSHIN MARU, a factory processing ship
15 which Counterclaim Defendants characterize as the “mother ship” of ICR’s whaling fleet.

16 10. Upon information and belief, Counterclaim Defendant Hiroyuki Komura is a citizen
17 of Japan. Captain Komura was the master of the SHONAN MARU NO. 2 during the 2009-
18 2010 Southern Ocean whaling season.

19 **JURISDICTION**

20 11. SSCS and Watson dispute that the Court has jurisdiction over Plaintiffs’ claims
21 asserted under the laws or treaties of the United States or customary international law under 28
22 U.S.C. § 1331, through diversity jurisdiction under 28 U.S.C. § 1332(a)(2), or under the Alien
23 Tort Statute, 28 U.S.C. § 1350, and assert that admiralty jurisdiction under 28 U.S.C. § 1333
24 does not support the relief that Plaintiffs seek.

25 12. If the Court finds that it has jurisdiction over Plaintiffs’ claims, however, then it also
26 has federal-question jurisdiction over these counterclaims under 28 U.S.C. § 1331, as these
27

1 counterclaims arise under the laws or treaties of the United States and customary international
2 law. If the Court finds that it has jurisdiction over Plaintiffs' claims, then it also has
3 supplemental jurisdiction under 28 U.S.C. § 1367, as these counterclaims form part of the same
4 case or controversy as the claims asserted by Plaintiffs.

5 13. In addition, certain of these counterclaims arise under the Court's admiralty and
6 maritime jurisdiction under 28 U.S.C. § 1333, as Counterclaim Defendants' actions occurred on
7 the high seas or navigable waters.

8 14. Venue for these counterclaims is proper in this Court under 28 U.S.C. § 1391, as
9 Plaintiffs filed this action here and are subject to the personal jurisdiction of this Court, and the
10 actions giving rise to these counterclaims caused injury to Counterclaim Plaintiffs in this
11 district.

12 **FACTS**

13 **Illegal Killing of Whales by Counterclaim Defendants**

14 15. Japan and the United States are among the 88 nations that are signatories to the
15 International Convention for the Regulation of Whaling ("Whaling Convention"), signed at
16 Washington Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72, 4 Bevens 248 (1968) (ratified by the
17 United States on July 18, 1947, and entered into force Nov. 10, 1948). The Whaling
18 Convention established the International Whaling Commission ("IWC"), which was created to
19 "provide for the proper conservation of whale stocks" that had become severely depleted as a
20 result of several centuries of unrestrained commercial whaling, and which gives the IWC the
21 authority to institute moratoria on commercial whaling and designate whale sanctuaries as
22 needed to safeguard vulnerable species. In addition, the Whaling Convention allows member
23 states to grant nationals "special permits" authorizing the permit-holder to "kill, take and treat
24 whales *for purposes of scientific research . . .*" Whaling Convention, art. VIII, § 1 (emphasis
25 added).

1 16. In 1982, the IWC voted in favor of a global moratorium on commercial whaling, in
2 light of alarming data regarding the rapid decline of whale populations around the world. For
3 example, the estimated population of fin whales in 1983 was approximately 15,000, down from
4 a pre-whaling estimate of nearly 400,000. The moratorium took effect in 1986.

5 17. Although Japan originally lodged an objection to the commercial whaling
6 moratorium, it withdrew that objection in 1986 in response to diplomatic pressure, and instead
7 sought to take advantage of the “scientific research” loophole to continue its commercial
8 whaling industry. After the moratorium issued, a Japanese official openly admitted that
9 Japan’s goal was to “ensure that our whaling can continue in some form or another.”

10 18. ICR, which is based in Japan, claims that its mission is to conduct “scientific
11 research” relating to whales, including in the Southern Ocean. ICR was established in 1987,
12 the year after the IWC moratorium went into effect, and the government of Japan soon began
13 awarding it “special permits” to slaughter whales under the “scientific research” exception to
14 the moratorium. The ostensible goal of the first ICR “research” program in the Southern Ocean
15 was to establish the natural mortality rate of Antarctic minke whales, so as to demonstrate to
16 the international community that the IWC moratorium on commercial whaling was
17 unnecessary.

18 19. From the beginning of their “research” programs, ICR and Kyodo Senpaku have
19 processed the whales that they kill, packaged their meat, and sold the meat on the commercial
20 market. The commercial processing of the whales starts soon after they are killed and
21 transferred from the whaling fleet’s harpoon vessels onto the NISSHIN MARU, which serves
22 as a floating slaughterhouse and meat packing plant for the ICR fleet. *See* Exhibit 1 (still from
23 video footage taken in January 2014 by Sea Shepherd Australia Limited, showing whale meat
24 being butchered and packaged for sale on the NISSHIN MARU); *see also* Video Exhibit A,²
25 “Excerpt from Whale Wars Season 9.mp4,” (excerpt from the television show *Whale Wars*,
26 Season 2, Episode 10, showing the butchering of whale meat aboard the NISSHIN MARU).

27 ² Video Exhibits A and B have been submitted to the Court separately via DVD.

1 20. In reality, there has never been any genuine scientific basis for ICR's killing of
2 whales in the Southern Ocean. The IWC has indicated that lethal methods of population
3 "research" are unreliable, and Japan is the only IWC member that insists on using such
4 methods. Since the institution of the moratorium, the IWC has repeatedly requested that Japan
5 refrain from issuing research whaling permits pending the resolution of disputes regarding the
6 scientific merit of its "research" plans, but Japan has refused. Instead, Japan has continued to
7 issue research whaling permits to ICR and to subsidize its operations, even though the
8 Scientific Committee of the IWC has consistently rejected ICR's "research" proposals, and the
9 United States, Australia, and other members of the IWC have repeatedly condemned Japan's
10 abuse of the scientific whaling permit.

11 21. In 1995, the IWC exercised its authority under the Whaling Convention to establish
12 the Southern Ocean Whale Sanctuary, which covers much of the ocean encircling Antarctica.
13 The IWC determined that all commercial whaling should be barred within the Southern Ocean
14 Whale Sanctuary even if the worldwide moratorium on commercial whaling should someday
15 be lifted, because the waters surrounding Antarctica are one of the world's most important
16 feeding grounds for large cetaceans.

17 22. Japan has repeatedly tried and failed to persuade the IWC to abolish the Southern
18 Ocean Whale Sanctuary. Regardless, ICR has admitted that it has continued to kill whales
19 under its so-called "research" permits within the boundaries of the Southern Ocean Whale
20 Sanctuary.

21 23. In 1999, Australia established the Australian Whale Sanctuary, a non-contiguous
22 zone which includes (1) Australia's Exclusive Economic Zone ("EEZ"), extending 200 nautical
23 miles beyond the coasts of the Australian continent and Australia's overseas dependencies; and
24 (2) Australia's claimed EEZ extending 200 nautical miles beyond the coast of the Australian
25 Antarctic Territory, a portion of Antarctica over which Australia asserts sovereignty.

26 24. ICR has acknowledged that between 1988 and 2005, under a "research" plan known
27 as Japanese Whale Research Program under Special Permit in the Antarctic ("JARPA"), it

1 killed more than 6,700 minke whales in the Southern Ocean. In 2005, JARPA was replaced by
2 JARPA II, which authorized ICR to kill up to 935 minke whales annually. Under JARPA II,
3 ICR was also permitted to annually kill up to 50 fin whales, one of the largest animals on earth
4 and a species identified as “endangered” by the International Union for the Conservation of
5 Nature (“IUCN”), as well as 50 humpback whales, which were once hunted to the brink of
6 extinction. All told, ICR killed about 3,600 minke whales and 18 fin whales under JARPA II.

7 25. In 2008, the Federal Court of Australia ruled that ICR’s ongoing commercial
8 whaling activities in the Australian Whale Sanctuary violate Australian law, and issued an
9 injunction barring Kyodo Senpaku from “killing, injuring, taking or interfering with any
10 Antarctic minke whale . . . fin whale . . . or humpback whale . . . in the Australian Whale
11 Sanctuary, or treating or possessing any such whale” killed within the Sanctuary. *Humane*
12 *Soc’y Int’l, Inc. v. Kyodo Senpaku Kaisha, Ltd.*, [2008] FCA 3 (Austl.). ICR and Kyodo
13 Senpaku have refused to comply with the Australian injunction, and have continued to kill
14 whales within the Australian Whale Sanctuary.

15 26. In 2010, Australia (later joined by New Zealand) sued Japan in the International
16 Court of Justice (“ICJ”) for its misuse of research permits, its violation of the commercial
17 whaling moratorium, and its continued killing of whales in the Southern Ocean Whale
18 Sanctuary. The ICJ ruled that Japan had failed to provide a legitimate scientific justification for
19 the lethal yield quotas established under JARPA II, and that ICR’s whaling was in thus in
20 violation of the commercial whaling moratorium and the prohibition on commercial whaling in
21 the Southern Ocean Whaling Sanctuary. The ICJ held that Japan must revoke existing permits
22 and refrain from granting any more permits under JARPA II.

23 27. Notwithstanding the ICJ’s ruling, ICR has already announced its intention to
24 continue commercial whaling in the Southern Ocean under the auspices of scientific research.
25 Japan suspended the killing of whales in the Southern Ocean during the 2014-2015 season,
26 while it developed a revised lethal “research” whaling program. In September 2014, the
27 Japanese government introduced a new “research” plan, the Proposed Research Plan for New

1 Scientific Whale Research Program in the Antarctic (“NEWREP-A”) which will allow for the
2 slaughter of as many as 333 minke whales annually, with any whales not killed under one
3 year’s quota added to the quota for the following year. In February 2015, a 10-person expert
4 panel selected by the IWC’s Scientific Committee, including four U.S. representatives,
5 determined that NEWREP-A also lacks a legitimate scientific basis — meaning that a whale
6 hunt conducted under NEWREP-A would also violate the commercial whaling moratorium.
7 Japan and ICR have nonetheless indicated their intent to pursue NEWREP-A, and resume
8 whaling in the Southern Ocean during the 2015-2016 season.

9 **SSCS’s Actions in the Southern Ocean**

10 28. From 2005 until 2012, SSCS collaborated with foreign Sea Shepherd organizations
11 on campaigns aimed at exposing and impeding ICR’s illegal killing of whales in the Southern
12 Ocean. Manned by an international crew consisting largely of volunteers, Sea Shepherd
13 vessels attempted to locate and follow ICR’s fleet, and frustrate its illegal whale hunt. The
14 volunteer Sea Shepherd crew, funded by donations, was unquestionably the underdog in these
15 encounters, as it confronted the larger ICR fleet, manned by professional sailors, subsidized by
16 the Government of Japan, and operating with vessels that were vastly superior in terms of
17 technology, size, and speed. For example, the factory whaling ship NISSHIN MARU is less
18 than 30 years old and weighs in at 8,145 gross tons, while the Sea Shepherd vessel BOB
19 BARKER was built in 1950 and weighs only 488 gross tons. Sea Shepherd’s whale-protection
20 campaigns have garnered particular attention thanks to the documentary television show *Whale*
21 *Wars*, which began airing on Animal Planet in 2007, and which dramatized the encounters
22 between Sea Shepherd vessels and the ICR whaling fleet.

23 29. At various times since 2005, the Sea Shepherd vessels have included the ADY GIL
24 (which was operated by SSCS under a very favorable charter arrangement), the STEVE IRWIN
25 (previously named the ROBERT HUNTER), the BOB BARKER, the SAM SIMON, and the
26 BRIGITTE BARDOT (previously named the GOJIRA). As described below, these vessels and
27

1 their crew have been attacked, and their safe navigation endangered, by vessels owned by
2 Kyodo Senpaku and chartered by ICR.

3 30. As asserted in the Amended Complaint, over the years the ICR whaling fleet has
4 included one large factory processing ship, the NISSHIN MARU, and three harpoon vessels,
5 the YUSHIN MARU, the YUSHIN MARU NO. 2 and the YUSHIN MARU NO. 3. According
6 to the Amended Complaint, ICR has chartered all four of these vessels from Kyodo Senpaku,
7 and they have been operated by Kyodo Senpaku employees. In addition, the ICR whaling fleet
8 has often been accompanied by two “spotter” vessels, the SHONAN MARU and the SHONAN
9 MARU NO. 2, which have been used to find whales and to locate and attack Sea Shepherd
10 vessels. Counterclaim Defendant Tomoyuki Ogawa is currently the master of the NISSHIN
11 MARU, and was the master of that vessel during prior Southern Ocean whaling seasons,
12 including the 2012-2013 season. Counterclaim Defendant Hiroyuki Komura was the master of
13 the SHONAN MARU NO. 2 during the 2009-2010 Southern Ocean whaling season. ICR has
14 also chartered the Korean tanker SUN LAUREL, which it has used to refuel its vessels at sea.

15 31. Sea Shepherd vessels have used various tactics over the years to impede ICR’s
16 illegal killing of whales, the most successful of which has been to follow the NISSHIN MARU,
17 in order to prevent the transfer of whales from the harpoon ships to the NISSHIN MARU for
18 commercial processing. In the past, Sea Shepherd has approached the ICR ships and attempted
19 to throw onto their decks bottles of butyric acid — a harmless substance that does not sting or
20 burn, but which has a strong and unpleasant odor like rotten butter — in order to make the
21 continuation of whaling difficult and unpleasant, and potentially spoil the whale meat being
22 processed. Sea Shepherd ceased using butyric acid following a request by the Dutch Registry
23 of Shipping (the flag state for many of its ships). In employing tactics to frustrate ICR's illegal
24 whaling, Sea Shepherd has never targeted people, has never harmed any people, and has taken
25 safety precautions to prevent people from being harmed.

26 32. After the Injunction was imposed in December 2012, SSCS withdrew from
27 participation in the Southern Ocean whale-protection campaigns, and has not participated in

1 their planning, management, funding, or execution since its withdrawal. Other Sea Shepherd
2 entities, including Sea Shepherd Australia Limited and Sea Shepherd Netherlands, continued to
3 participate in these campaigns during the 2012-2013 and 2013-2014 seasons.

4 **Counterclaim Defendants' Attacks on Sea Shepherd**

5 33. In response to efforts by SSCS and other Sea Shepherd entities to expose and impede
6 their illegal whaling, ICR vessels and crew have repeatedly launched attacks upon, and
7 endangered the safety of, Sea Shepherd vessels and crew. In doing so, ICR vessels, masters
8 and crew have routinely departed from the International Maritime Organization's International
9 Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 28 U.S.T. 3459 (entered into force
10 Jul. 15, 1977) ("COLREGS"), to which the United States and Japan are both parties.
11 COLREGS obligates the masters and crew of seagoing vessels to take specific measures to
12 avoid collisions.

13 34. The following paragraphs set forth examples of the conduct by Counterclaim
14 Defendants since 2010, but are by no means comprehensive. These examples are arranged
15 chronologically, and are organized under the names of the annual Southern Ocean whale-
16 protection campaigns undertaken by SSCS and other Sea Shepherd entities.

17 ***Operation Waltzing Matilda (2009-2010)***

18 35. During Operation Waltzing Matilda, which was launched in late 2009 and continued
19 into early 2010, Sea Shepherd vessels and crew were attacked on a number of occasions by
20 ICR vessels and crew. These attacks damaged Sea Shepherd vessels, endangered their safe
21 navigation, and endangered the safety of their crew — one vessel participating in Operation
22 Waltzing Matilda was lost at sea, and the lives of its crew placed in serious peril.

23 36. During several attacks, ICR crew employed Long-Range Acoustic Devices
24 (LRADs), powerful sonic weapons which can incapacitate their victims and cause severe
25 headaches and permanent hearing loss. During one of ICR's attacks, the YUSHIN MARU NO.
26 3 rammed the BOB BARKER and pierced its hull.

1 37. On or about January 6, 2010, the SHONAN MARU NO. 2 rammed the ADY GIL, a
2 New Zealand-flagged vessel participating in Operation Waltzing Matilda. *See* Video Exhibit
3 B, “SSCS Footage of Ady Gil Collision.mpg” (video shot from the BOB BARKER on or about
4 January 6, 2010, showing the SHONAN MARU NO. 2 ramming the ADY GIL). The ADY
5 GIL, a lightweight carbon-composite trimaran, suffered catastrophic damage during the
6 collision with the vastly larger and heavier SHONAN MARU NO. 2, and the bow of the ADY
7 GIL was severed from the rest of the vessel. *See* Exhibit 2 (photograph taken from the BOB
8 BARKER of the badly damaged ADY GIL soon after it was hit by the SHONAN MARU NO.
9 2). The SHONAN MARU NO. 2 trained its high-powered water cannons and LRADs on the
10 ADY GIL before, during, and after the collision, increasing the risk of injury to the ADY GIL
11 crew. *See* Video Exhibit B. One of the ADY GIL crew members sustained a rib injury as a
12 result of the collision, and the crew had to be rescued by the nearby BOB BARKER. The
13 master of the ADY GIL later described the impact rendered by the SHONAN MARU NO. 2 as
14 “massive,” and stated that “we were very lucky” that none of the crew members aboard the
15 ADY GIL were killed.

16 38. In a report on the January 6, 2010 collision, Maritime New Zealand, a government
17 body responsible for safety at sea, concluded that the SHONAN MARU NO. 2 was coming up
18 from more than 22.5 degrees abaft the beam of the ADY GIL, and was thus the overtaking
19 vessel as defined by Rule 13 of COLREGS. Overtaking vessels are obligated to keep clear of
20 an overtaken vessel and pass at a safe distance. The failure to do so creates a serious risk of a
21 violent collision. Counterclaim Defendant Komura, the master of the SHONAN MARU NO. 2
22 at the time it rammed the ADY GIL, failed to observe these basic rules of maritime safety, and
23 is thus responsible for the endangerment of the free navigation of the Sea Shepherd vessel as
24 well as the collision which resulted in the ADY GIL being scuttled.

25 39. SSCS chartered the ADY GIL under a very favorable charter agreement, which
26 required SSCS to reimburse the vessel’s owner if the boat was lost at sea.
27

1 ***Operation No Compromise (2010-2011)***

2 40. During Operation No Compromise, which was launched in late 2010 and continued
3 into early 2011, Sea Shepherd vessels and crew were attacked on a number of occasions by
4 ICR vessels and crew. These attacks damaged the Sea Shepherd vessels, endangered their safe
5 navigation, and endangered the safety of their crew.

6 41. The acts committed by ICR vessels and crew during this campaign included, but
7 were not limited to: training high-powered water cannons on Sea Shepherd vessels with the
8 intention of limiting their visibility and flooding their engine rooms; knocking a Sea Shepherd
9 crew member off of a jet ski with a water cannon; and failing to abide by well-established
10 maritime rules regarding safe navigation on the high seas.

11 ***Operation Divine Wind (2011-2012)***

12 42. During Operation Divine Wind, which was launched in late 2011 and continued into
13 early 2012, Sea Shepherd vessels and crew were attacked on a number of occasions by ICR
14 vessels and crew. These attacks damaged the Sea Shepherd vessels, endangered their safe
15 navigation, and endangered the safety of their crew.

16 43. The acts committed by ICR vessels and crew during this campaign included, but
17 were not limited to: attempting to ram small RIBs operated by Sea Shepherd crew members;
18 throwing grappling hooks at Sea Shepherd crew members aboard the RIBs and also stabbing
19 them with bamboo poles, inflicting physical injury; hurling stun grenades (also known as
20 concussion grenades) at Sea Shepherd crew members aboard the RIBs; training high-powered
21 water cannons on Sea Shepherd vessels with the intention of limiting their visibility and
22 flooding their engine rooms; attempting repeatedly to foul the rudders and propellers of Sea
23 Shepherd vessels by trailing nylon line or steel cable in front of these vessels; and failing to
24 abide by well-established maritime rules regarding safe navigation on the high seas.

25 ***Operation Zero Tolerance and Operation Relentless (2012-2014)***

26 44. SSCS was not involved in any Southern Ocean whale-protection campaign following
27 the issuance of the Injunction in December 2012. Operation Zero Tolerance and Operation

1 Relentless were planned, led and conducted by independent foreign Sea Shepherd entities, and
2 the allegations regarding these campaigns are based on information and belief, including
3 information provided by these entities, as well as the evidence obtained during litigation related
4 to this action.

5 45. During Operation Zero Tolerance, which was launched in late 2012 and continued
6 into early 2013, Sea Shepherd vessels and crew were attacked on a number of occasions by
7 ICR vessels and crew. These attacks damaged the Sea Shepherd vessels, endangered their safe
8 navigation, and endangered the safety of their crew.

9 46. The acts committed by ICR vessels and crew during Operation Zero Tolerance
10 included, but were not limited to: repeatedly ramming Sea Shepherd vessels with sufficient
11 force to cause significant damage to these vessels; training high-powered water cannons on Sea
12 Shepherd vessels with the intention of limiting their visibility and flooding their engine rooms;
13 throwing concussion grenades onto the decks of Sea Shepherd vessels; attempting repeatedly to
14 foul the rudders and propellers of Sea Shepherd vessels by trailing nylon line or steel cable in
15 front of these vessels; and failing to abide by well-established maritime rules regarding safe
16 navigation on the high seas.

17 47. In two particular incidents, in or around February 2013, the NISSHIN MARU
18 rammed the BOB BARKER multiple times, and pushed the BOB BARKER into the SUN
19 LAUREL fuel tanker, trapping it between the two much larger and heavier vessels, while
20 simultaneously attempting to flood the engine room of the BOB BARKER using water
21 cannons. The actions of the NISSHIN MARU and other ICR vessels during this and related
22 incidents resulted in severe damage to the BOB BARKER, and also resulted in damage to the
23 STEVE IRWIN and the SAM SIMON. Counterclaim Defendant Ogawa, the master of the
24 NISSHIN MARU in February 2013, failed to observe essential rules of safety, and is thus
25 responsible for the endangerment of the Sea Shepherd vessel.

26 48. During Operation Relentless, which was launched in late 2013 and continued into
27 early 2014, vessels operated by foreign Sea Shepherd entities and their crew were attacked on a

1 number of occasions by ICR vessels and crew. These attacks damaged the Sea Shepherd
2 vessels, endangered their safe navigation, and endangered the safety of their crew.

3 49. The acts committed by ICR vessels and crew during this campaign included, but
4 were not limited to: ramming Sea Shepherd vessels with sufficient force to cause significant
5 damage to these vessels; training high-powered water cannons not only on Sea Shepherd
6 vessels, but also on RIBs and a helicopter; throwing grappling hooks, balls of weighted chain
7 and metal valves at Sea Shepherd crew aboard RIBs; jabbing the RIBs with bamboo poles;
8 attempting repeatedly to foul the rudders and propellers of Sea Shepherd vessels by trailing
9 nylon line or steel cable in front of these vessels; and failing to abide by well-established
10 maritime rules regarding safe navigation on the high seas.

11 **COUNTERCLAIMS**

12 **First Counterclaim**

13 **(Against All Counterclaim Defendants for Violation of International Norm against
14 Whaling—Declaratory and Injunctive Relief)**

15 50. Counterclaim Plaintiffs reallege paragraphs 1 through 49 and incorporate them by
16 reference.

17 51. Counterclaim Plaintiffs contend that this Court lacks jurisdiction to adjudicate the
18 claims asserted in Counterclaim Defendants' Amended Complaint based on violations of
19 alleged norms of customary international law. If, however, the Court finds that it does have
20 jurisdiction to adjudicate claims based on such alleged norms of customary international law,
21 the Court also has jurisdiction to adjudicate this counterclaim.

22 52. Whaling for commercial purposes, and the killing of endangered species, are
23 violations of specific, universal, and obligatory norms of international law. Among other
24 things, these norms are recognized as follows:

25 53. UNCLOS. Articles 65 and 120 of UNCLOS provide that, with respect to the high
26 seas and exclusive economic zones, nations must "cooperate with a view to the conservation of
27 marine mammals and in the case of cetaceans shall in particular work through the appropriate
international organizations for their conservation, management and study."

1 54. Article 117 of UNCLOS provides that all nations “have the duty to take, or to
2 cooperate with other States in taking, such measures for their respective nationals as may be
3 necessary for the conservation of the living resources of the high seas.”

4 55. The Whaling Convention. The Whaling Convention was created to “provide for the
5 proper conservation of whale stocks,” and provides that whales may be killed only if there is
6 authorization to do so for limited purposes, including “for purposes of scientific research.” A
7 total of 88 nations are parties to the Whaling Convention, including Japan and the United
8 States.

9 56. The IWC in 1986 issued a global moratorium against commercial whaling,
10 prohibiting the killing of whales for commercial purposes.

11 57. The IWC in 1995 established the Southern Ocean Whale Sanctuary, which covers
12 much of the ocean encircling Antarctica, in which all commercial whaling is permanently
13 barred because the waters surrounding Antarctica are one of the world’s most important
14 feeding grounds for large cetaceans.

15 58. The Convention on International Trade in Endangered Species of Wild Fauna and
16 Flora (CITES), 27 U.S.T. 108 (entered into force January 7, 1975). The United States has
17 ratified this treaty, to which more than 180 nations are parties. CITES regulates the import of
18 certain species of animals, and provides that species “threatened with extinction” must not be
19 imported for commercial purposes or for any purpose “detrimental to the survival of the
20 species[.]” CITES identifies minke, fin, and humpback whales as species “threatened with
21 extinction.”

22 59. The World Charter for Nature. The World Charter for Nature was adopted by the
23 General Assembly of the United Nations in 1982. It provides, among other things, that “[a]ll
24 areas of the earth, both land and sea, shall be subject to these principles of conservation: special
25 protection shall be given to unique areas, to representative samples of all the different types of
26 ecosystems and to the habitat of rare or endangered species.” It further provides that “[e]very
27

1 form of life is unique, warranting respect regardless of its worth to man, and, to accord other
2 organisms such recognition, man must be guided by a moral code of action[.]”

3 60. Since 1987, Counterclaim Defendants have violated the international norms against
4 commercial whaling in the Southern Ocean, and against the killing of endangered species, by
5 killing whales within the Southern Ocean Sanctuary, including endangered or threatened
6 whales, and processing their meat for sale. Although ICR has operated under permits issued by
7 Japan for “research” purposes, it has long been clear that ICR’s activities are not “research,”
8 but are in fact undertaken for commercial purposes. The IWC has repeatedly called for an end
9 to ICR’s whaling as a violation of both the moratorium and the Southern Ocean Sanctuary. In
10 2014, the ICJ ruled that ICR’s whaling lacked a scientific basis and the permits under which it
11 has been operating are unlawful. In 2015, an expert panel of the IWC’s Scientific Committee
12 found that the new research program under which ICR intends to continue whaling later this
13 year also lacks a scientific basis.

14 61. Counterclaim Plaintiffs have been injured by ICR’s unlawful whaling because they
15 routinely traveled to the Southern Ocean to protect whales from ICR, at great personal and
16 financial cost, and at risk to their lives. Counterclaim Plaintiffs have an aesthetic interest in
17 continuing to observe and protect these whales, which will be adversely affected by ICR’s
18 continued whale killing. Counterclaim Plaintiffs also have an aesthetic interest in seeing the
19 whales living happily in their natural environment, without being slaughtered by ICR in ways
20 that are not only brutal and violent, but often cause prolonged suffering as the whales slowly
21 die from injuries caused by harpoons and automatic weapons. Counterclaim Plaintiffs have
22 suffered severe emotional distress when observing ICR’s violent slaughter of the whales,
23 because Counterclaim Plaintiffs have emotional attachments to the whales and make great
24 efforts to protect them. *See Video Exhibit A (Whale Wars excerpt, showing reaction of Sea*
25 *Shepherd crew to watching the ICR fleet kill and butcher whales).*

26 62. Counterclaim Plaintiffs also assert this claim as next friend on behalf of the whales
27 targeted by ICR, who are obviously injured by ICR’s brutal and unlawful violence against

1 them. The whales, by virtue of their advanced cognitive abilities, autonomy, self-awareness,
2 emotional sophistication, and culture, among other attributes, have a fundamental interest in
3 their own lives and the lives of their families.

4 63. Each whale is an individual being with a highly developed capacity for awareness of
5 self and who participates in a social community. Whales are cognitively sophisticated, much in
6 the same way that primates are, as evidenced by (among other things) their mirror self-
7 recognition, comprehension of symbols and abstract concepts, and learning ability — including
8 learning of transmitted behaviors (*i.e.*, culture). Whales have complex social relationships,
9 exhibit empathy and profound mourning, and engage in sophisticated communication.

10 64. Whale communities are heavily dependent on cultural and social bonds. As a
11 result, the disruption of whale cultures by, for example, the massacre of older members of the
12 group — particularly whale matriarchs — leaves the survivors in a state of confusion and
13 vulnerability, unable to face famine or critical migrations without the benefit of such stored
14 knowledge as food distribution and behavioral traditions.

15 65. The whales targeted by ICR experience intense pain and suffering when shot with
16 grenade-tipped harpoons and firearms or otherwise violently killed, maimed, or injured by
17 ICR's weapons. It can take up to 45 minutes for a whale to die after being shot by a grenade-
18 tipped harpoon, which prolongs their intense pain and suffering, both physical and emotional
19 — especially in light of their self-awareness and conception of death. *See* Video Exhibit A
20 (*Whale Wars* excerpt, showing prolonged death of whale harpooned and then repeatedly shot
21 by ICR). Whales experience intense emotional pain and suffering when they see their family
22 members — sometimes their own offspring — killed, maimed, or injured by ICR, and ICR
23 vessels will harpoon parents and children swimming together, one by one. *See* Exhibit 3
24 (photograph taken by Australian Customs in 2008, showing a slaughtered minke whale mother
25 and her calf being pulled up the slipway of the NISSHIN MARU for butchering). Entire pods
26 suffer and are put at existential risk as a whole when their older members are killed.

1 66. Counterclaim Plaintiffs have no speedy or adequate remedy at law. Counterclaim
2 Defendants have announced their intention to continue their illegal whaling program despite the
3 ruling by the ICJ, the findings regarding the new proposed whaling program by the expert panel
4 designated by the IWC's Scientific Committee, and the injunction imposed by the Australian
5 Federal Court. Counterclaim Plaintiffs request that this Court grant declaratory and injunctive
6 relief declaring Counterclaim Defendants' whaling to be a violation under international law,
7 and enjoining Counterclaim Defendants from continuing to engage in this illegal activity.

8 **Second Counterclaim**
9 **(Against All Counterclaim Defendants for Freedom from Piracy—**
10 **Declaratory and Injunctive Relief)**

11 67. Counterclaim Plaintiffs reallege paragraphs 1 through 66 and incorporate them by
12 reference.

13 68. Counterclaim Plaintiffs contend that this Court lacks jurisdiction to adjudicate the
14 Freedom from Piracy claim asserted in Counterclaim Defendants' Amended Complaint. If,
15 however, the Court finds that it does have jurisdiction to adjudicate Counterclaim Defendants'
16 claim, the Court also has jurisdiction to adjudicate this counterclaim.

17 69. As alleged in the Amended Complaint, piracy is recognized as an offense against the
18 law of nations, and has been condemned in multiple treaties to which the United States is a
19 party, including both the High Seas Convention and SUA.

20 70. In this action, the Ninth Circuit has defined piracy as "illegal acts of violence,
21 detention or any act of depredation [which are] committed for private ends" *Inst. of*
22 *Cetacean Research v. Sea Shepherd Conservation Soc'y*, 725 F.3d 940, 943 (9th Cir. 2013)
23 (quoting UNCLOS, Art. 101). The Ninth Circuit has indicated that "acts of violence," in this
24 context, includes "ramming ships, fouling propellers and hurling fiery . . . projectiles." *Id.* at
25 944.

26 71. As alleged above, Counterclaim Defendants have, in furtherance of illegal, for-profit
27 whaling activities not taken on behalf of any state, repeatedly engaged in "acts of violence"

1 against ships owned and operated by SSCS and other Sea Shepherd entities, including ramming
2 and causing serious damage to other vessels; fouling rudders and propellers; hurling stun
3 grenades, grappling hooks and other dangerous projectiles; employing bamboo poles as spears;
4 and firing water cannons at seagoing vessels and helicopters.

5 72. Counterclaim Plaintiffs have no speedy or adequate remedy at law. If the Court
6 grants the relief requested by the Amended Complaint pursuant to 28 U.S.C. § 2201, it should
7 also declare that Counterclaim Defendants must abide by the same norms alleged in the
8 Amended Complaint; must not engage in any acts of violence against Sea Shepherd vessels;
9 and must abide by the same terms of any injunctive relief granted to the Counterclaim
10 Defendants.

11 **Third Counterclaim**
12 **(Against all Counterclaim Defendants for Pirate Whaling—
Declaratory and Injunctive Relief)**

13 73. Counterclaim Plaintiffs reallege paragraphs 1 through 72 and incorporate them by
14 reference.

15 74. Counterclaim Plaintiffs contend that this Court lacks jurisdiction to adjudicate the
16 Freedom from Piracy claim asserted in Counterclaim Defendants' Amended Complaint. If,
17 however, the Court finds that it does have jurisdiction to adjudicate Counterclaim Defendants'
18 claim, the Court also has jurisdiction to adjudicate this counterclaim.

19 75. The universally accepted definition of piracy, which was in force at the time the
20 United States enacted the Alien Tort Statute ("ATS"), under which Counterclaim Defendants
21 have asserted jurisdiction in this case, is "robbery at sea." *Kiobel v. Royal Dutch Petroleum*
22 *Co.*, 133 S. Ct. 1659 (2013), 1677 (citing W. Blackstone, Commentaries on the Laws of
23 England 68 (1769), 72).

24 76. Whales, particularly whales in the Southern Ocean and endangered whale species,
25 are a valuable natural resource protected under international law from being killed without
26 legal authorization.

27 a. There is a global moratorium on commercial whaling, as established by the

1 IWC, the authority of which is recognized by the United States and Japan.

2 b. All commercial whaling is permanently barred within the Southern Ocean
3 Whale Sanctuary established by the IWC.

4 c. The Federal Court of Australia enjoined Counterclaim Defendant Kyodo
5 Senpaku on January 15, 2008 from “killing, injuring, taking or interfering with” any Antarctic
6 minke whale, fin whale or humpback whale in the Australian Whale Sanctuary, or “treating or
7 possessing any such whale” killed or taken in the Sanctuary” *Humane Soc’y Int’l, Inc. v.*
8 *Kyodo Senpaku Kaisha Ltd.* [2008] FCA 3 (Austl.).

9 d. The ICJ ruled on March 31, 2014, that ICR’s whaling program in the Southern
10 Ocean is not conducted for the purposes of “scientific research,” and therefore is violation of
11 the global moratorium on commercial whaling, and the ban on whaling within the Southern
12 Ocean Whale Sanctuary.

13 77. Counterclaim Defendants have repeatedly engaged in acts of robbery at sea by
14 pillaging and poaching valuable natural property — namely, whales — to which they enjoy no
15 legal right of ownership, and doing so in direct violation of rulings by the Federal Court of
16 Australia and the ICJ. As a party to the IWC, Japan, and the entities that it licenses, have an
17 obligation to the other members of that treaty not to unilaterally misappropriate natural
18 resources, where the parties have agreed that the rules for any use of such resources shall be
19 determined under the terms of that treaty.

20 78. Counterclaim Defendants have repeatedly engaged in acts of “violence, detention
21 [and] depredation” in furtherance of “private ends,” *Inst. of Cetacean Research*, 725 F.3d at
22 943 (quoting the definition of piracy set forth in UNCLOS, Art. 101), in illegally slaughtering
23 whales in the Southern Ocean. The slaughter of whales is inherently violent, and “depredation”
24 includes “plundering” and “pillaging.” *Black’s Law Dictionary*, 9th ed. As the ICJ ruled,
25 Counterclaim Defendants have had no legitimate scientific basis for their supposed “research,”
26 which has served merely as a guise for the continuation of commercial whaling for profit — a
27 classic “private end.”

1 79. Counterclaim Plaintiffs have no speedy or adequate remedy at law. Counterclaim
2 Defendants have announced their intention to continue their whaling program despite the ruling
3 by the ICJ, the findings regarding the new proposed whaling program by the expert panel
4 designated by the IWC's Scientific Committee, and the injunction imposed by the Australian
5 Federal Court. Counterclaim Plaintiffs request that this Court grant declaratory and injunctive
6 relief declaring Counterclaim Defendants' illegal whaling to be piracy under international law,
7 and enjoining Counterclaim Defendants from continuing to engage in this illegal activity.

8 **Fourth Counterclaim**
9 **(Against all Counterclaim Defendants for Freedom of Safe Navigation on the High Seas—
Declaratory and Injunctive Relief)**

10 80. Counterclaim Plaintiffs reallege paragraphs 1 through 79 and incorporate them by
11 reference.

12 81. Counterclaim Plaintiffs contend that this Court lacks jurisdiction to adjudicate the
13 Freedom of Safe Navigation on the High Seas claim asserted in Counterclaim Defendants'
14 Amended Complaint. If, however, the Court finds that it does have jurisdiction to adjudicate
15 Counterclaim Defendants' claim, the Court also has jurisdiction to adjudicate this counterclaim.

16 82. The Amended Complaint alleges that freedom of safe navigation on the high seas is
17 a specific, universal, and obligatory international norm, which is recognized through the SUA
18 Convention, the COLREGS, the High Seas Convention, and UNCLOS.

19 83. If the Court recognizes the existence of the norms alleged in the Amended
20 Complaint, Counterclaim Defendants have flouted these norms by intentionally and unlawfully
21 interfering with Sea Shepherd's right to freedom of navigation, causing damage to Sea
22 Shepherd vessels, and endangering the safety of Sea Shepherd crew.

23 84. Counterclaim Plaintiffs have no speedy or adequate remedy at law. If the Court
24 grants the relief requested by the Amended Complaint pursuant to 28 U.S.C. § 2201, it should
25 also declare that Counterclaim Defendants must abide by the same norms alleged in the
26 Amended Complaint; must not engage in any conduct that is likely to endanger Sea Shepherd's
27

1 vessels or crew or endanger the safe navigation of those vessels; and must abide by the same
2 terms of any injunctive relief granted to the Counterclaim Defendants.

3 **Fifth Counterclaim**

4 **(By Counterclaim Plaintiff SSCS Against Counterclaim Defendants ICR, Kyodo
5 Senpaku, and Hiroyuki Komura for Intentional and/or Negligent Destruction of
6 Property)**

7 85. Counterclaim Plaintiff SSCS realleges paragraphs 1 through 84 and incorporates
8 them by reference.

9 86. Counterclaim Defendants ICR, Kyodo Senpaku and Hiroyuki Komura, their crews,
10 and/or other agents of the Counterclaim Defendants named in this counterclaim intentionally
11 and/or negligently rammed and destroyed the ADY GIL in January 2010.

12 87. The collision of the SHONAN MARU NO. 2 with the ADY GIL was a result of
13 violations by the Counterclaim Defendants named in this counterclaim of the same principles
14 and international conventions regarding safe navigation on the high seas that they have asserted
15 in the Amended Complaint. In particular, the Counterclaim Defendants named in this
16 counterclaim violated multiple provisions of COLREGS, including: Rule 6, which relates to
17 safe speed; Rules 7 and 8, which relate to collisions; Rule 13, which governs the navigation of
18 overtaking vessels; and Rule 16, which governs the conduct of give-way vessels.

19 88. The Counterclaim Defendants named in this counterclaim had the same duty that
20 they allege was owed by Counterclaim Plaintiffs to operate the SHONAN MARU NO. 2 in a
21 safe and responsible manner, in accordance with COLREGS and other applicable conventions,
22 and to train and supervise their captains and crews so as to ensure safe navigation.

23 89. The Counterclaim Defendants named in this counterclaim knew, or should have
24 known, that their breach of these duties could damage Sea Shepherd vessels and crew,
25 including the ADY GIL and its crew.

26 90. The breach of these duties by the Counterclaim Defendants named in this
27 counterclaim directly and proximately caused damage to the ADY GIL, causing SSCS to
sustain damages in an amount to be proven at trial.

1 91. Counterclaim Defendants named in this counterclaim are liable to SSCS for the
2 expenses and damages that it incurred as a result of the ADY GIL collision.

3 **Sixth Counterclaim**

4 **(By Counterclaim Plaintiff SSCS Against Counterclaim Defendants ICR, Kyodo
5 Senpaku, and Tomoyuki Ogawa—Intentional and/or Negligent Destruction of Property)**

6 92. Counterclaim Plaintiff SSCS realleges paragraphs 1 through 91 and incorporates
7 them by reference.

8 93. Counterclaim Defendants ICR, Kyodo Senpaku, and Tomoyuki Ogawa, their crews,
9 and/or other agents of the Counterclaim Defendants named in this counterclaim intentionally
10 and/or negligently inflicted damage on the BOB BARKER, STEVE IRWIN, and SAM
11 SIMON, and also on RIBs deployed from these vessels.

12 94. This damage was a result of violations by the Counterclaim Defendants named in
13 this counterclaim of those principles and international conventions regarding safe navigation on
14 the high seas that are alleged in the Amended Complaint. In particular, the Counterclaim
15 Defendants named in this counterclaim violated multiple provisions of COLREGS, including:
16 Rule 6, which relates to safe speed; Rules 7 and 8, which relate to collisions; Rule 13, which
17 governs the navigation of overtaking vessels; and Rule 16, which governs the conduct of give-
18 way vessels.

19 95. The Counterclaim Defendants named in this counterclaim had the same duty that
20 they allege was owed by Counterclaim Plaintiffs to operate their vessels in a safe and
21 responsible manner, in accordance with COLREGS and other applicable conventions, and to
22 train and supervise their captains and crews so as to ensure safe navigation.

23 96. The Counterclaim Defendants named in this counterclaim knew, or should have
24 known, that their breach of these duties could damage Sea Shepherd vessels and crew.

25 97. The breach of these duties by the Counterclaim Defendants named in this
26 counterclaim directly and proximately caused damage to the BOB BARKER, STEVE IRWIN,
27 and SAM SIMON, and also on RIBs deployed from these vessels.

1 98. Much, but not all, of the damage sustained to these vessels was incurred during
2 Operation Zero Tolerance and Operation Relentless, after Counterclaim Plaintiffs had
3 withdrawn from participation in the Southern Ocean whale-protection campaigns. By this
4 point, SSCS no longer had any ownership interest in, or control over, the BOB BARKER,
5 STEVE IRWIN, or SAM SIMON, and Watson had stepped down as captain of the STEVE
6 IRWIN. Nevertheless, Counterclaim Defendants have asserted a claim for coercive sanctions
7 based on allegations that SSCS continues to have legal rights to ownership, possession and
8 control of these vessels. Should Counterclaim Defendants succeed in this claim, SSCS would
9 also have the right to an action against the Counterclaim Defendants named in this
10 counterclaim for damage to these vessels caused during Operation Zero Tolerance and
11 Operation Relentless, in an amount to be proven at trial.

12 **Seventh Counterclaim**
13 **(Against Counterclaim Defendants ICR and Kyodo Senpaku for Freedom from**
14 **Terrorism—Declaratory and Injunctive Relief)**

15 99. Counterclaim Plaintiffs reallege paragraphs 1 through 98 and incorporate them by
16 reference.

17 100. The Amended Complaint alleges a private right of action based on the International
18 Convention for the Suppression of the Financing of Terrorism, *done at New York* Dec. 9, 1999,
19 T.I.A.S. No. 13075, 2178 U.N.T.S. 229 (entered into force April 10, 2002; ratified by the
20 United States on Dec. 5, 2001, and entered into force by United States on July 26, 2002)
21 (hereinafter, “Financing Convention”). According to the Amended Complaint, the Financing
22 Convention that provides that it is an offense if a person “by any means, directly or indirectly,
23 unlawfully and willfully, provides or collects funds with the intention that they should be used
24 or in the knowledge that they are to be used, in full or in part, in order to carry out . . . [a]n act
25 which constitutes an offense within the scope of [the SUA Convention, Art. 2, § 1(a)].”

26 101. Counterclaim Plaintiffs contend that the Financing Convention does not establish a
27 private right of action, and that this Court lacks jurisdiction to adjudicate the Freedom from

1 Terrorism claim asserted in Counterclaim Defendants' Amended Complaint. If, however, the
2 Court finds that it does have jurisdiction to adjudicate Counterclaim Defendants' claim, the
3 Court also has jurisdiction to adjudicate this counterclaim.

4 102. By the standard alleged in the Amended Complaint, the Counterclaim Defendants
5 named in this counterclaim have engaged in violations of the Financing Convention and, unless
6 enjoined, are likely to continue to do so.

7 103. Specifically, the Counterclaim Defendants named in this counterclaim have
8 unlawfully and willfully provided or collected millions of dollars intending that they be used to
9 carry out acts in violation of the SUA Convention — namely, to perform acts of violence
10 against persons aboard Sea Shepherd vessels such as are likely to endanger the safe navigation
11 of those vessels, and to destroy or cause damage to Sea Shepherd vessels and their cargo which
12 is likely to endanger the safe navigation of these vessels. Such conduct is a violation of the
13 SUA Convention, Art. 3, ¶ 1(b)-(c).

14 104. In late 2011, the Japanese government admitted that tens of millions of dollars
15 designated for relief efforts relating to the earthquake and tsunami which hit Japan in March of
16 that year had been diverted to the whaling industry, and that some of these funds were used to
17 provide extra “security” for the ICR whaling fleet.³ Upon information and belief, this
18 “security” funding was used to facilitate violations of the SUA Convention by ICR and Kyodo
19 Senpaku, which are financed by the Japanese government. Substantial funds for tsunami relief
20 were collected within the United States through a wide variety of charitable organizations, and
21 the United States was the largest contributor of monetary aid to Japan for tsunami relief.

22 105. Counterclaim Plaintiffs have no speedy or adequate remedy at law. If the Court
23 recognizes Counterclaim Defendants' action for Freedom from Terrorism, then pursuant to 28
24 U.S.C. § 2201, the Court should also declare that the conduct of the Counterclaim Defendants
25 named in this counterclaim violates the Financing Convention, and enjoin the Counterclaim
26

27 ³ Krista Mahr, “Blood Money: Tsunami Recovery Funds Go to Japan’s Whaling Industry,”
TIME, Dec. 12, 2011.

1 Defendants named in this counterclaim and their respective officers, agents, servants,
2 employees, attorneys and other persons who are in active concert or participation with any of
3 them from collecting, providing or expending any money to fund violations of the SUA
4 Convention in contravention of the Funding Convention

5 **JURY DEMAND**

6 Counterclaim Plaintiffs hereby request a jury trial for all issues properly tried by a jury
7 in this case.

8 **PRAYER FOR RELIEF**

9 WHEREFORE, Counterclaim Plaintiffs respectfully request that the Court enter judgment, in
10 the alternative as appropriate:

11 (1) Dismissing the claims in the Amended Complaint, and denying the requests for
12 declaratory and injunctive relief set forth in the Amended Complaint;

13 (2) Declaring the respective rights and obligations of the parties as outlined in the
14 Counterclaim, and awarding Counterclaim Plaintiffs declaratory injunctive relief, money
15 damages, attorneys' fees and costs of suit; and

16 (3) Granting such further relief as the Court deems just and proper.

17 DATED: May 15, 2015

18 LANE POWELL PC

19
20 By /s/ Claire Loeb Davis

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25 *Attorneys for Defendants-Counterclaim*
26 *Plaintiffs Sea Shepherd Conservation Society and*
27 *Paul Watson*

CERTIFICATE OF SERVICE

Pursuant to RCW 9.A.72.085, the undersigned certifies under penalty of perjury under the laws of the State of Washington and the United States that on the 15th day of May, 2015, the document attached hereto was presented to the Clerk of the Court for filing and uploading to the CM/ECF system, which will send notification of such filing to all counsel of record, and that the DVD referenced in the document attached hereto was caused to be served on counsel of record by private courier.

Executed on the 15th day of May, 2015, at Seattle, Washington.

/s/ Claire Loeb Davis

Claire Loeb Davis