No. 12-35266

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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-Appellants,

v.

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

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
DISTRICT COURT NO. 2:11-cv-02043-RAJ

PAUL WATSON'S JOINDER OF SEA SHEPHERD CONSERVATION SOCIETY'S AND THE DIRECTORS' PETITIONS FOR REHEARING EN BANC AND PETITION FOR REHEARING EN BANC

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I. RULE 35(B) STATEMENT

Rehearing en banc is necessary because the Panel's opinion conflicts with decisions of this Court, the law of other circuits, and the rules of procedure. Specifically, the decision conflicts with Fed. R. App. P. 48, *NLRB v. FMG Indus.*, 820 F.2d 289 (9th Cir. 1987), *NLRB v. Local 3, Int'l Bhd. of Elec. Workers*, 471 F.3d 399 (2d Cir. 2006), and *NLRB v. Monfort, Inc.*, 29 F.3d 525, 528 (10th Cir. 1994) (quoting *NLRB v. Sequoia Dist. Council of Carpenters*, 568 F.2d 628, 631 (9th Cir. 1977)), all of which require that findings of appellate Special Masters be adopted unless clearly erroneous.

II. INTRODUCTION AND JOINDER

After hearing eight days of testimony from fifteen witnesses, receiving 500 exhibits, and considering the evidence for nearly three months, Appellate Commissioner Shaw concluded in a 79-page report containing 38 pages of Findings of Fact that Paul Watson should not be held in contempt. He found that Watson took "all reasonable steps within his power to comply with the injunction," that Operation Zero Tolerance ("OZT") would have proceeded as it did "regardless of any act or pleas by Watson," and that Watson "had no way of disembarking" and "had no control over the ship" when it came within 500 yards of the whalers. The Panel ignored these findings and found Watson in contempt.

Watson joins Sea Shepherd Conservation Society (SSCS)'s and the Directors' petitions for rehearing en banc, and submits this separate petition to address two issues that are specific to him: (1) the Panel's failure to give proper deference to the Commissioner's findings relating to Watson; and (2) the Panel's error insofar as it relied on statements made by the other defendants' counsel at oral argument as a basis for holding Watson in contempt.

III. ARGUMENT

A. The Panel Disregarded the Commissioner's Finding That Watson Took All Reasonable Steps Within His Power to Comply With the Injunction in Contravention of This and Other Circuits' Precedent and the Rules of Appellate Procedure.

While there appeared to be some confusion at the hearing about the role the Commissioner was assigned,[1] the Panel appointed the Commissioner as a Special Master in response to a motion by plaintiffs "request[ing] that the Court appoint a Special Master" "[i]n accordance with Federal Rule of Appellate Procedure 48." Dkt. 37 at 2; *see also* Dkt. 44 (order granting motion). The Panel ignored the Commissioner's findings in violation of Ninth Circuit law and the rules of appellate procedure on the standard of review for the findings of appellate special

[1] *Compare* Question of Judge Tashima ("We didn't refer this to a special master, did we, in so many words?"), *with* Question of Judge Smith ("The special master that we appointed, our Appellate Commissioner, determined that there was not clear and convincing evidence that this was done. What – what role, if any, does

masters. An appellate special master's findings are reviewed for clear error. *See, e.g., NLRB v. FMG Indus.*, 820 F.2d 289, 291 (9th Cir. 1987); *NLRB v. Local 3, Int'l Bhd. of Elec. Workers*, 471 F.3d 399, 403 (2d Cir. 2006); *NLRB v. Monfort, Inc.*, 29 F.3d 525, 528 (10th Cir. 1994) (quoting *NLRB v. Sequoia Dist. Council of Carpenters*, 568 F.2d 628, 631 (9th Cir. 1977)).[2] In addition, the Panel contravened the requirement that "it is ordinarily from the testimony credited by the Master that [the] assessment of whether clear and convincing evidence exists must be made." *NLRB v. Local 3*, 471 F.3d at 403 (internal quotations and citations omitted) (emphasis added). The Panel did not claim to find "clear error" in the Commissioner's findings about Watson and did not assess whether the

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his determination on that level play in our consideration?").

[2] Fed. R. App. P. 48 does not specify the standard of review, but clear error review was the law when the rule was promulgated. *See* Fed. R. App. P. 48 advisory committee's note (1994) (citing cases applying clear error standard for review of fact findings). Although Fed. R. Civ. P. 53 was amended in 2003 to require district courts to review special masters' findings de novo, Fed. R. App. P. 48 was not. Every circuit to address the issue has held that the findings of special masters appointed pursuant to Fed. R. App. P. 48 continue to be reviewed for clear error. *See, e.g., NLRB v. Local 3, Int'l Bhd. of Elec. Workers*, 471 F.3d 399, 403 (2d Cir. 2006); *Palm Beach Metro Transp., LLC v. NLRB*, No. 08-13447, 2011 U.S. App. LEXIS 23073, at *2 (5th Cir. Aug. 16, 2011) (per curiam). This distinction makes sense: district court judges are fact-finders, with appellate review readily available at the circuit courts, a structural component not available were a circuit court to make fact findings. Here, the Panel did not even make fact findings. Instead, the Panel parsed the evidentiary record and found support (sometimes in exhibits that were never addressed at trial or argued in briefing) for points that the Commissioner, who did make fact findings, had rejected.

burden of clear and convincing evidence had been met based on those findings. Rather, the Panel ignored the Commissioner's findings altogether.

1. The Commissioner's findings that Watson took all reasonable steps in his power to comply with the injunction were not clearly erroneous.

The Commissioner found "there was no obvious way to comply with the injunction," and that the injunction "did not require Sea Shepherd to withdraw from OZT, nor did it outlaw OZT itself [but instead] laid out a set of ground rules in the event that the opposing vessels encountered each other." Report & Recommendation (Jan. 31, 2014) (Dkt. 314) at 53 ("Report").[3] The Commissioner detailed the findings which established that the "separation strategy" adopted in response to the injunction was reasonable in light of the futility of any other action:

> [T]he weight of the evidence suggests that the whale defense campaign would have proceeded in substantially the same manner no matter what Watson did. The testimony of the other captains and crew and the documentary evidence show that the foreign participants in OZT were committed to going forward under the leadership of SSAL, and nothing Watson would have said would have deterred them. It is also clear that SSAL would have taken charge of OZT regardless of any action by Watson or anyone else with SSCS. . . . [I]t was inevitable that SSAL would take over. Watson could not have prevented that from occurring.

[3] The evidence established that the ships' captains anticipated that OZT could occur without violating the injunction; in the prior two years no acts delineated in the injunction occurred. Watson 1862:18-1863:4, 1779:6-19; Hansen 1655:16-23.

Report at 67-68. The Panel did not reject or even address this evidence and these findings; it ignored them. Instead the Panel focused on just a few snippets of evidence from within the vast record carefully considered and rejected by the Commissioner:

- The Panel found that Watson "did not use his authority" to stop OZT, citing what it characterized as Watson's testimony that "he could have remained in control of the OZT vessels after the injunction and tried to make sure that they complied." Panel Opinion (Dec. 19, 2014) (Dkt. 360) at 19 ("Op."). But, as the Commissioner found, any such efforts by Watson would have been futile: "SSAL would have taken charge of OZT regardless of any action by Watson or anyone else with SSCS. . . . [I]t was inevitable that SSAL would take over. Watson could not have prevented that from occurring." Report at 67-68 (emphasis added). This was based in part on Watson's testimony (not noted by the Panel yet confirmed by the other captains), "I knew that if when push comes to shove and if the Japanese tried to illegally kill a whale in the South – Southern Ocean, I could not control those captains," and could not "prevent[] them from going within the 500-yard perimeter." Watson 1864:13-16, 1913:9-10; Hammarstedt 886:13-16. As the Commissioner found, "Defendants' worries about 'control' were vindicated." Report at 57. The Commissioner's findings on this point concluded: "The injunction did not compel [Watson] to remain in charge to police the ongoing

events in OZT, and he was entitled to remove himself from direct command – and responsibility – when he reasonably concluded that he ultimately could not prevent violations of the injunction by others." Report at 68. These findings, like most of the findings of the Commissioner, were ignored by the Panel.

- The Panel cited to the fact that Watson "appeared by phone on a radio show in March of 2013" in support of its finding that "Watson was not a mere passive participant in OZT." Op. at 9-10. But the injunction did not purport to bar Watson from expressing his opinions (and could not without presenting First Amendment problems), and the Commissioner found evidence of this nature immaterial: "Watson's expression of support for the campaign and his actions in observing, chronicling, and reporting on the events in the Southern Ocean do not provide a basis for liability." Report at 69.

- The Panel emphasized that Watson "was consulted for advice about logistical aspects of the campaign on several other occasions after the injunction was issued," relying solely on a December 28, 2012 email (Ex. 164) wherein Watson was asked to approve a hull inspection of the *Brigitte Bardot*. Op. at 10. But this is in no way probative of contempt, as the plaintiffs' whaling fleet had left Japan only the day before and Watson's resignations were not yet effective. *See* Pre-Hearing Order, Admitted Facts ¶ 23 (Dkt. 245 at 13); Watson 1802:20; Chakravarty 1432:21-24. More importantly, the Commissioner found Watson

"exerted no control over the *Steve Irwin* or the other ships after stepping down as captain and campaign leader." Report at 30. As with most other findings of the Commissioner, this finding was ignored by the Panel.

- The Panel cited the fact that Watson "chaired" the December 27, 2012 SSAL board meeting where SSAL voted to assume responsibility of OZT. Op. at 8. Yet the evidence was that the "chairing" was a procedural notation on the minutes and that Watson did not participate in the meeting except to resign his position. McMullan 1097:16; Watson 1804:9-20; Hansen 1665:1-2.

2. The Panel substituted its findings for that of the Commissioner's in holding Watson in contempt for coming within 500 yards of the plaintiffs' whaling ships.

Watson remained aboard the *Steve Irwin* in the Southern Ocean after the Panel issued its injunction. He did so, as the Panel noted, "because he believed that he risked detention [to Japan] or extradition if he [left the ship] in Australia or New Zealand, the only two countries within 1000 miles of the *Steve Irwin's* position" and believed that by doing so, he could remain in compliance with the injunction. Op. at 46. Siddharth Chakravarty, the captain of the *Steve Irwin*, "assured Watson that the ship would not approach within 500 yards of the whaling vessels," and, furthermore, he and Watson "developed a contingency plan" whereby Watson would be removed from the ship "in the event that the *Steve Irwin* looked like it might breach the 500-yard safety perimeter." Op. at 46. But

removing Watson from the vessel "proved unworkable in practice" and, thus, when the *Steve Irwin* later came within 500 yards of plaintiffs' ships, Chakravarty refused to implement the plan. Op. at 46.

The Commissioner concluded Watson did not commit contempt by being present on the *Steve Irwin*, based on his finding that Watson "had no control over the ship at that point, and he had no way of disembarking." Report at 68-69. The Commissioner further found that Watson had proved that he had taken "all reasonable steps" to comply with the injunction, necessarily finding that Watson reasonably relied upon Chakravarty's assurances and the contingency plan in deciding to remain on the ship. *Id*.

The Panel rejected the Commissioner's findings on the premise that, "A reasonable person in Watson's position would not have tried to evade a warrant for his arrest while also risking being held in contempt. To hold otherwise would be to condone as reasonable Watson's attempt to evade the criminal charges he was facing." Op. at 46-47.[4] Yet there was no evidence to suggest that Watson's

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[4] The Panel relied on what it characterized as "strong evidence that "Watson was unlikely to be extradited from Australia, and that he knew it." Op. at 46. The Panel ignored the Commissioner's finding to the contrary, that Watson's fears of detention "were confirmed." Report at 29; *see also* Watson 1824:11-1825:7 (after consulting with a lawyer Watson "concluded that it would be too risky to land" in Australia).

staying aboard was unlawful or that he was required to submit to extradition to Japan. The Commissioner found precisely the opposite of the Panel: that Watson's decision to stay aboard was reasonable.

3. Deference to the Commissioner's findings precludes finding contempt by clear and convincing evidence.

The Commissioner was in the best position to evaluate the testimony "in light of its rationality or internal consistency and the manner in which it hangs together with other evidence." *Carbo v. United States*, 314 F.2d 718, 749 (9th Cir. 1963). The law affords deference to decisions by fact-finders because of their enhanced ability to make these judgments. The Commissioner's finding that Watson took all reasonable steps to comply with the injunction should preclude the Panel from coming to the opposite conclusion, *see In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir. 1993) (there is no contempt "where every reasonable effort has been made to comply"), especially in light of the requirement that contempt be found by clear and convincing evidence. *Id*. It is indefensible that decisions found reasonable by the Commissioner could be found unreasonable by clear and convincing evidence by the Panel. *See, e.g.*, *Hazen v. Reagen*, 16 F.3d 921, 925 (8th Cir. 1994) (plaintiff failed in its "burden of proving [contempt] by clear and convincing evidence" given "the court's findings, to which we must defer"). Rehearing en banc is necessary to ensure that this Court's decisions remain consistent as to the deference afforded fact-finders.

B. The Panel Held Watson in Contempt Based on a "Concession" Made by an Attorney Who Did Not Represent Him and That Completely Contradicted the Record Evidence.

As characterized by the Panel, at oral argument counsel for the volunteer directors "conceded" that in transferring the *Bob Barker* to foreign Sea Shepherd entities the SSCS board "knew that the equipment would be used in OZT, and that there was a 'very high risk' that the *Bob Barker* would violate the injunction." Op. at 25. Based on this purported "concession," the Panel held that SSCS, the volunteer directors, and Watson were in contempt because they "provide[d] a non-party with the means to violate [the injunction], knowing the non-party will be likely to do so." Op. at 34.

The directors' counsel's statement was not a binding admission on Watson: he was not Watson's counsel nor was he authorized to speak on Watson's behalf. Furthermore, Watson's counsel explicitly disavowed this so-called concession:

> The Panel: Your narrative is a little bit different from your co-counsel's. I think he virtually admitted that Sea Shepherd U.S. knew it was highly likely that the injunction would be violated, going beyond just conducting OZT. Right? They knew that. Do you agree with that?
>
> Watson Counsel: Well, I don't – no, I don't agree with that and I actually don't think that's what Mr. Taylor said. I think that what he said was that we knew that OZT was going to go forward and that they expect – they anticipated a risk that there would be violations.
>
> The Panel: A risk, a high risk.
>
> Watson Counsel: A high enough risk that the board and Mr. Watson concluded that "we need to be away from this thing because we don't want

> to be down in front of Your Honors saying, you know, well, we tried to stop them and I stayed on as leader of Sea Shepherd but I couldn't stop them," because that would be an even more difficult situation.

Not only was the "concession" disavowed by Watson's counsel, the statement cannot be considered evidence of Watson's knowledge because it is contrary to the record. *See Perez-Mejia v. Holder*, 663 F.3d 403, 411-12, 416 (9th Cir. 2011) (concession not binding where plainly contradicted by record evidence) (citing *Hoodho v. Holder*, 558 F.3d 184, 187 (2d Cir. 2009)); *Brown v. Williams*, No. 2:10-CV-00407-PMP, 2013 WL 5370749, *21 n.96 (D. Nev. Sep. 24, 2013) (answers not binding because "the underlying premises [of the question] [we]re belied by the record"). Watson testified that he had no expectation that the injunction's 500-yard perimeter would be violated since in the two preceding campaigns the Japanese vessels fled as soon as the Sea Shepherd vessels found them:

> ICR Counsel: [W]hen you resigned from all of these various positions, didn't you fully expect Sea Shepherd Australia to engage in conduct that would violate the safety perimeter?
>
> Mr. Watson: No.
>
> ICR Counsel: How did you think Sea Shepherd Australia was going to interfere with the operations and make it a success?
>
> Mr. Watson: The same way we had done the previous two years: show up. Show up, they stop whaling, they start running, we start chasing. There was no need to come within 500 yards.

Watson 1862:18-1863:4; *see also* Watson 1779:6-19.

Furthermore, ascribing to Watson the grant of the *Bob Barker* is wholly unsupported: the uncontradicted evidence was that Watson did not direct or participate in SSCS's decision to transfer the ship. The SSCS board voted on January 8, 2013, to grant the *Bob Barker* to SSAL (Exs. 142, 197), by which time Watson had resigned from all SSCS positions. Ex. 592; Watson 1801:1-1802:17. After resigning, Watson did not participate in SSCS board meetings and had no input into the board's decisions. Zuckerman 533:3-8; Gaede 656:18-20.

Finally, the Commissioner found that the grant of the *Bob Barker* had no effect on OZT: "the January 2013 grant of the Bob Barker and certain equipment aboard the other ships . . . merely formalized the de facto situation." Report at 64 n. 185. This was in part because Sea Shepherd Netherlands ("SSNL") – the entity granted the *Bob Barker* – "already possessed an ownership interest in the Dutch-flagged *Bob Barker* when the injunction issued." *Id.* It was also because the ship's captain was going to participate in OZT irrespective of the assent of Watson or SSCS. Hammarstedt 886:13-16 ("regardless of what Paul could have or would have said, the campaign would have proceeded, and nothing was going to stop me [the captain of the ship] from leaving Wellington with the *Bob Barker*"). The *Bob Barker* – captained and crewed by non-Americans, Dutch-flagged, fueled, crewed, and ready to go in the Southern Ocean, and of which the SSNL already claimed

ownership – was going to be used in OZT whether or not it was granted by SSCS. Report at 64 n. 185; Hammarstedt 875:14-17, 886:13-16. Its grant was irrelevant.

The Panel held that one may be in contempt "by giving others it knew were highly likely to violate the injunction the means to do so." Op. at 26 (emphasis added). There was no evidence – let alone clear and convincing evidence – Watson (1) knew anyone was "highly likely to violate the injunction"; or (2) gave anyone the means to do so. The finding of contempt – based largely on the "concession" of counsel – is in error.

IV. CONCLUSION

For the foregoing reasons, Paul Watson respectfully petitions for rehearing by the Court of Appeals en banc.

Respectfully submitted this 2nd day of January, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 2, 2015.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

By *s/ Timothy G. Leyh*
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