

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
KEY WEST DIVISION
"IN ADMIRALTY"

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CASE NO. 92-10027 CIV-DAVIS

MELVIN A. FISHER, KANE FISHER,
SALVORS, INC., a Florida corporation
in personam; M/V BOOKMAKER, M/V
DAUNTLESS, M/V TROPICAL MAGIC,
their engines, apparel, tackle,
appurtenances, stores and cargo. *in rem*,

Defendants.

CONSOLIDATED FOR DISCOVERY WITH

MOTIVATION, INC., a Delaware
Corporation,

Plaintiff,

CASE NO. 95-10051 CIV-DAVIS
MAGISTRATE JUDGE GARBER

vs.

THE UNIDENTIFIED, WRECKED
and ABANDONED VESSEL, her tackle,
armament, apparel, and cargo, located
in the Atlantic Ocean within a circle
with a radius of 1,000 yards of a point
located at 24 4113011 North Latitude
and 080 5611811 West Longitude,

Defendant.

**MELVIN A. FISHER, ET AL., &
MOTIVATION, INC.'S RESPONSE IN
OPPOSITION TO THE UNITED STATES'
MOTION FOR SUMMARY JUDGMENT**

MELVIN A. FISHER, KANE FISHER, SALVORS, INC., & MOTIVATION, INC.,
(hereinafter "FISHERS") through the undersigned counsel and pursuant to Rule 56,
Fed.R.Civ.P., submit this Response in Opposition to the United States' Motion for
Summary Judgment and respectfully request this Court deny the Motion.

Introduction

This case has a long history that minimally dates back to Judge Aronovitz' order in 1986. Judge Aronovitz ordered, "Both MDM and EMI (as well as other salvors) shall hereafter be permitted to salvage in [Coffins Patch]" MDM Salvage, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 631 F.Supp. 308, 314 (S.D.Fla. 1986). Within a few months after salvage activities began within Coffins Patch in January 1992, pursuant to the Aronovitz permit and after getting approval for the activities from officials of the National Oceanic and Atmospheric Agency (NOAA), NOAA filed a law suit seeking damages under the National Marine Sanctuaries Act and the Florida Keys National Marine Sanctuary Act, 16 U.S.C. 1431 et seq. (hereinafter NMSA and FKNMS respectively) for the salvage activities within Coffins Patch. Mel Fisher, Kane Fisher, and Salvors, Inc. entered into a stipulation with NOAA solely as a test case for the preliminary injunction that NOAA had no standing since the FKNMS had not been implemented. There were no stipulations for liability or damages for this case. (See Docket #22). The preliminary injunction was granted to NOAA on the use of propwash deflectors (see Docket #32) and after appeal was affirmed only as to the use of propwash deflectors. United States v. Fisher, 22 F.3d 262 (11thCir. 1994).

Motivation, Inc. then in a separate action sought title to the artifacts recovered from Coffins Patch. NOAA, after the collapse of protracted settlement negotiations in the United States v. Fisher, et al. case, then successfully sought to intervene in the Motivation, Inc. case and assert the same cause of action against Motivation, Inc. that it was seeking against Mel Fisher, Kane Fisher, and Salvors, Inc. These cases have been consolidated for discovery (see Omnibus Order, filed June 18, 1996) and are set for a status conference on April 14, 1997.

There are several genuine and material factual disputes:

1. There is a genuine issue of material fact whether Melvin Fisher was involved in or directed the destruction of seagrass.
2. There is a genuine issue of material fact whether Kane Fisher was involved in or directed the destruction of seagrass.
3. There is a genuine issue of material fact whether Salvors, Inc. was involved in or directed the destruction of seagrass.
4. There is a genuine issue of material fact whether Motivation, Inc. was involved in or directed the destruction of seagrass.
5. There is a genuine issue of material fact whether any seagrass meadows were destroyed or the damage was de minimis.
6. There is a genuine issue of material fact whether Kane Fisher, Mel Fisher, Salvors, Inc. and Motivation, Inc. have a preexisting right of salvage within the Sanctuary.

The United States Supreme Court has determined that an award of summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). "The moving party must demonstrate that the facts underlying **all the relevant legal questions** raised by the pleadings or otherwise are not in dispute, or else summary judgment will be denied notwithstanding that the non-moving party has introduced no evidence whatsoever." City of Delray Beach, Fla. v. Agriculture Ins. Co., 85 F.3d 1527, 1529-30 (11th Cir. 1996) (citations omitted)(emphasis added). Thereafter, the burden shifts to the non-movant to bring out evidence demonstrating the existence of a genuine issue of material fact.¹ Mize v. Jefferson City Bd. of Educ., 93 F.3d 739,742-43 (11th Cir. 1996)

¹The non-movant's evidence can even be circumstantial. Farmer v. Brennan, 511 U.S. 825, ---, 114 S.Ct. 1970, 1981, 128 L.Ed.2d 811 (1994)(cited with approval in Steele v. Shah, 87 F.3d 1266, 1269 (11th Cir. 1996)).

Summary judgment must be denied in the event that a reasonable fact finder "might return a verdict" in the non-movant's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257(1986)(emphasis added). "Where a non-movant presents direct evidence that creates a genuine issue of material fact, the only issue is one of credibility; thus, there is no legal issue for the court to decide. . . . It is not the court's role to weigh conflicting evidence or to make credibility determinations; the non-movant's evidence is to be accepted for purposes of summary judgment . . . [and] all inferences drawn from the evidence must be viewed in the light most favorable to the non-moving party." Mize, 93 F.3d at 742-43 (citations omitted). Using this standard, the Court must deny NOAA's motion for summary judgment based upon the record evidence before the Court.

The FISHERS hereby incorporate by reference, as if set forth fully within, the depositions and exhibits filed separately in opposition to NOAA's motion for summary judgment, the Interrogatories to and from each party and Answers to same, the Request for Admissions to and from each party and Responses to same, the Requests to Produce to and from each party and Responses with documents to same, the Exhibits filed by NOAA as an attachment to its memorandum of law in support of its motion for summary judgment, and the supporting exhibits attached hereto. The FISHERS also request leave to file in the record any and all such needed documents after the Court order site visit on NOAA's alleged damage locations.

1. The record evidence disputes whether Mel Fisher is liable.

The record evidence is that Mel Fisher is the president of both Salvors, Inc. And Motivation, Inc. but does not direct the day to day operations or salvage activities. He is

a well known personality and world renowned for his salvage activities. Personal fame does not equate personal liability.

Mel Fisher went to Coffins Patch on the BOOKMAKER one time. Deposition of Mel Fisher, Jan. 8, 1997 (hereinafter Depo. of M.Fisher, 1/8/97), p.57, ln.9 - p.58, ln.4; Deposition of Mel Fisher, Jan. 9, 1997 (hereinafter Depo. of M.Fisher, 1/9/97) p.4, ln.21-p.5, ln. 2. In viewing the Vessel Log for the BOOKMAKER, there is no indication that any salvage activities were done in seagrass. Every record of bottom terrain explored by the BOOKMAKER is sand and rubble. NOAA Mem., Exhibit C. NOAA has put forward no evidence that Mel Fisher personally destroyed seagrass. Depo. of M.Fisher, 1/8/97, p.60, lns.4-18. Reference is made to an alleged "admission" in Mel Fisher's Answer to NOAA's complaint. NOAA Mem. p.10. However, the Court cannot rely upon NOAA's representations. Paragraph 25 of NOAA's complaint alleged:

25. At all material times including without limitation, numerous days in March and April 1992, Melvin A. Fisher and Kane Fisher participated in, directed, and used Salvors, Inc. and the vessels BOOKMAKER, DAUNTLESS, and TROPICAL MAGIC in operations and activities that caused removal, actual destruction of, loss of, or injury to sanctuary resources as more fully set forth below.

The original answer² filed on behalf of Mel Fisher, Kane Fisher, and Salvors, Inc. answered paragraph 25 of NOAA's complaint as follows:

25. Search and salvage activities under 46 U.S.C. sec. 721 et seq. are admitted and it is admitted that a small amount of seagrass was displaced/damaged. It is denied that the Defendants activities were in any way illegal or prohibited by the MPRSA or the Florida Keys Sanctuary Act.

²This answer was subsequently amended by the filing of a later answer served upon NOAA November 4, 1994. NOAA never objected to this amended answer. In this amended answer, NOAA's allegation in paragraph 25 was generally denied.

This does not support NOAA's statement to the Court that "[t]he Fishers admitted that in January, February and March of 1992 they injured, destroyed and caused the loss of seagrass meadows within the Sanctuary." NOAA Mem., p.10. This is especially true since Motivation, Inc. is included in NOAA's definition of "the Fishers", but Motivation, Inc. is not a party to that original lawsuit filed by NOAA. NOAA Mem., p.1, n.1; see also Docket # 1.

Mel Fisher has never admitted to violating the NMSA, nor to directing the activities of others to violate the NMSA. When asked by NOAA whether he was "in charge of the salvage companies", Mel Fisher responded:

A. I don't know what you mean by 'in charge'. I don't -- all of my boat captains and contractors are on their own free will and spirit. I don't tell them when to go, where to go, when to come back, and what to do out there. They use their own brains, and they do what they think is right.

Depo. of M.Fisher, 1/9/97, p.48, Ins.3-7. Mel Fisher's unrefuted testimony is that he is "just a figurehead" of Salvors, Inc. who signs checks, gives out autographs to tourists and poses for pictures. Depo. of M.Fisher, 1/9/97, p.48, Ins.20-23. To the extent that NOAA is trying to pierce the corporate veil of Salvors, Inc. or Motivation, Inc. and hold Mel Fisher personally liable for any alleged wrong doing by these corporations, then NOAA has failed not only to plead such, but also to put forward the requisite proof for such an extraordinary remedy. Depo. of M.Fisher, 1/8/97, p.30, Ins.19-22; p.35, Ins.20-22. Neither Mel nor Kane Fisher own any of the vessels mentioned in NOAA's complaint and counterclaim. Depo. of M.Fisher, 1/9/97, p.38, Ins.3-25.

Mel Fisher's testimony is that he personally spoke with two officials of NOAA in an effort to obtain a permit for the corporations' salvaging if one were needed. Depo. of M.Fisher, 1/9/97, pp.13-18. This was in spite of his belief that a new permit was not

needed under Judge Aronovitz' order, MDM Salvage, 631 F.Supp. 308, and under the prior contract with the State of Florida. Depo. of M.Fisher, 1/9/97, p.8, ln.10 - p.9. ln.8, p.95, ln.7 - p.96, ln.9. The evidence is that NOAA told Mel Fisher the salvage companies could continue their activities as "business as usual" which they did. Depo. of M.Fisher, 1/9/97, pp.13-18. Thus the record evidence establishes no personal liability of Mel Fisher and NOAA's motion should be denied.

2. The record evidence disputes whether Kane Fisher is liable.

Once the Court gets past the unreliable statements by NOAA as to "admissions" about certain activities within Coffins Patch³, the record shows that it is disputed whether Kane Fisher personally violated the NMSA. Kane Fisher testified that he was the operations manager of Salvors, Inc. and the captain of the DAUNTLESS. Deposition of Kane Fisher, May 2, 1995 (hereinafter Depo. of K.Fisher '95), p.4, ln. 1, p.8, lns.6-8. The record evidence in the DAUNTLESS vessel logs is that only once, February 27, 1992, did the DAUNTLESS conduct salvage operations in areas of sand and seagrass within Coffins Patch. NOAA Mem., Exhibit C ⁴. He testified that he did not know who owned the DAUNTLESS. Deposition of Kane Fisher, January 8, 1997 (hereinafter Depo. of K.Fisher

³See infra, sec. 1., regarding the actual text of the complaint and answers in response.

⁴To the extent Kane Fisher may have directed the activities of the TROPICAL MAGIC, the record evidence shows that only once, March 14, 1992, did the TROPICAL MAGIC conduct salvage activities in areas of sand and seagrass bottom. The vessel logs of the TROPICAL MAGIC show that to the extent any activities made depressions around the edges of seagrass beds, those depressions were filled and that any sand and debris that accumulated on the seagrass as a result of those activities were removed from the seagrass on April 4-5, 1992. NOAA Mem., Exhibit C. In fact the totla activities of all the vessels were only from January 29, 1992 to March 17, 1992. Depo. of K.Fisher '95, p.69, lns. 1-8.

'97), p.59, Ins.8-13. NOAA has not alleged that Kane Fisher is an owner of any of the vessels. Accordingly, Kane Fisher can have no personal liability for the vessels' activities as a vessel owner.

Kane Fisher testified about the slumping of seagrass along the edge of sand depressions made with mail boxes; however, there has been no quantitative evidence of the location of such activities or the extent of such activities. Depo. of K.Fisher '95, p.79, Ins.16-21. Taking the evidence in a light only slightly favorable to Kane Fisher, the most that can be said is that four depressions possibly could have been near seagrass beds. NOAA Mem., Exhibit C. However, NOAA has not put forward any evidence that these depressions had slumping seagrass, that any seagrass slumped because of Kane Fisher's independent activities, or that slumping seagrass is a damaged seagrass meadow. In fact, when shown certain photographs of seagrass around a sand depression taken by NOAA's expert Curtis Kruer, Kane Fisher testified that those photographs did not depict the scenario he described of slumping grass because there was still sand around the edges of the depression. Depo. of K.Fisher '95, p.81, Ins.4-19; see also, Deposition of Dr. Harold Wanless, March 4, 1997, p.88, Ins.12-21. This is further supported by the testimony of Dr. Anitra Thorhaug regarding alleged damage around the edges of the seagrass beds.⁵

Kane Fisher testified that when he went to Coffins Patch there were already holes there, some possibly of recent origin. Depo. of K.Fisher '95, p. 29, In.24 -p.30, In.22, p.77, In.14 - p.78, In.17. Depo. of K.Fisher '97, p.49, In.18 - p.51, In.10. Some of the

⁵"I did not see evidence looking at edges of beds and at beds that something as substantial as close to an acre had been removed. However -- so I guess the answer to your last question is substantially less than an acre would be de minimis." Deposition of Anitra Thorhaug, February 14, 1997(hereinafter Depo. of Thorhaug), p.93, Ins.18-22.

depressions which he made even overlapped the old holes. Depo. of K.Fisher '95, p.50, Ins.1-22. NOAA has no undisputed proof that the alleged damage it has claimed was done exclusively in each location by Kane Fisher, individually. Just like his father, Kane Fisher believed that Judge Aronovitz' order was a sufficient permit for his activities in Coffins Patch. Depo. of K.Fisher '97, p. 57, Ins.10-16. If NOAA is trying to pierce the corporate veil of Salvors, Inc. or Motivation, Inc. and hold Kane Fisher personally liable for any alleged wrong doing by these corporations, then NOAA has failed not only to plead such, but also to put forward the requisite proof for such an extraordinary remedy.

3. The record evidence disputes whether Salvors, Inc. or Motivation, Inc. is liable.

The only ties to the corporations of Salvors, Inc. and Motivation, Inc. are through the activities of Mel Fisher, Kane Fisher, and the vessels TROPICAL MAGIC, BOOKMAKER, and DAUNTLESS. As shown above, there is record evidence that disputes whether the individuals Mel and Kane Fisher violated the NMSA. The vessel logs show that the BOOKMAKER did not engage in any salvage activities in areas of a seagrass bottom; that the DAUNTLESS on only day made four depressions in areas around seagrass beds; and that the TROPICAL MAGIC made four depressions around seagrass beds; and that when holes were made against the edge of seagrass, these were filled and the area was cleaned. NOAA Mem., Exhibit C.

Moreover, NOAA has failed to establish undisputed proof for which corporation the vessels were working as well as ownership. Kane Fisher and Mel Fisher dispute each other as to Kane Fisher's relationship to Salvors, Inc. and to Motivation, Inc., yet NOAA shrugs this off as uneventful. See NOAA Mem., p. 4. NOAA has yet to establish which

corporation was in charge of the salvage operations within Coffins Patch. The record evidence is conflicting from the different parties. Depo. of K.Fisher '97, p.30, Ins.15-21. Resolving this dispute involves weighing the evidence which requires a denial of NOAA's motion. Mize, 93 F.3d at 742.

4. The record evidence disputes whether there was any damage to sanctuary resources.

NOAA's argument in support of its motion rests like an upside down pyramid upon a single point of alleged damage to "approximately"⁶ 1.63 acres of seagrass. Even if this Court believes that one, some, or all of the FISHERS are liable, if this point of 1.63 acres gives way, then like the pyramid, NOAA's argument crumbles and falls. Based upon the record evidence before this Court, that single point does fail. See Depo. of Wanless, p.69, Ins.1-3, 23-24

A. No one can locate the damage.

This issue has already been before the Court, so it recognizes that there has been no definitive indication by NOAA of the location of the damage.⁷ When testimony or proof are speculative, it is proper for the Court to deny summary judgment. Indiana Ins. Co. v. Cigna Ins. Co., 39 F.3d 1187 (9th Cir. 1994)(Table Decision).

⁶See, United States' Corrected Memorandum of Law in Support of Motion For Summary Judgment, (hereinafter "NOAA M.S.J.") p.10, III.A.

⁷The record evidence is that the locations created by the FISHERS where any damage may have occurred is in dispute. Depo. of Thorhaug, p.93, Ins. 18-22; Depo. of K.Fisher '95, p. 29, In.24 -p.30, In.22, p.77, In.14 - p.78, In.17. The FISHERS respectfully request leave to file any supplemental memoranda that may be needed after the parties site visit scheduled, subject to confirmation, for Friday, April 11, 1997.

NOAA's experts rely upon these approximate damage locations to provide their expert testimony.⁸ Since NOAA cannot place the location of the damage, these experts are simply providing speculative opinions on damages.⁹ These speculative opinions are insufficient to support a motion for summary judgment. Amerinet, Inc. v. Xerox Corp., 972 F.2d 1483, 1491 (8th Cir. 1992). A Court must deny a motion for summary judgment when the moving party relies upon "expert testimony which was not grounded upon specific facts and which would have failed to provide to the trier of fact a factual basis upon which to determine the amount of [movant's] alleged damages without engaging in speculation or conjecture." Amerinet, 972 F.2d at 1491.

B. No one knows how much, if any, seagrass was actually damaged.

NOAA attempts to use the report of McIntosh and its estimates of damage as the basis for its assertion that it is "undisputed" that "approximately" 1.63 acres of seagrass were damaged. NOAA M.S.J., p.11 & Exhibit G. NOAA fails to point out that the report characterizes itself as providing "[e]stimates of seagrass damage". See, NOAA M.S.J., Exhibit G, p.2. The report gives an "estimate that approximately . . . [1.63 acres] . . . of seagrass bed" was lost. See, NOAA Mem., Exhibit G, pp.2-3. NOAA's own experts have conflicting amounts of alleged seagrass loss. Deposition of Joseph Ziemann, February 28, 1997, p.153, ln.16 - p.154, ln.18.

⁸See Depo. of Wanless, p.127, ln.12 - p.128, ln.2 (explaining the unreliability of damage assessment process used by McIntosh and relied upon by NOAA).

⁹Dr. Julius, NOAA's expert testified that if the measurement of the alleged damage areas were incorrect or vague, then his assessment of monetary damages would be incorrect. Deposition of Brian Julius, February 27, 1997, p.63, lns.5-15

The speculative nature of this alleged damage is further shown by the methods used in determining the approximate estimate of the loss of seagrass bed. See infra fn.9 The method used by McIntosh is set forth in detail on pages 2 and 3 of the report, but basically, an aerial photograph was taken of a section of Coffins Patch where the Fishers, and others, had been operating salvage vessels. McIntosh then looked at the photograph and measured the area of the prop wash depressions by approximating the diameter of the depressions and multiplying that approximation to the counted number of depressions. This resulted in an approximate ratio of depression area to the entire area. Then, using this approximation of area, an adjacent section of Coffins Patch was overlaid and the approximate ratio was applied to determine the final estimate of approximate loss of seagrass bed. Put simply, the McIntosh affidavit does not indicate any actual damage to existing seagrass beds in the areas where the FISHERS were operating. The report is an approximate estimate and is "based upon many (as yet untested) assumptions." NOAA Mem., Exhibit F, p.2. Dr. Zieman testified that he used this same speculative method in his assessment as well. Deposition of Zieman, p.162, Ins. 3-24.

There is no definitive statement that any of the depressions discussed in the McIntosh affidavit or in the McIntosh report resulted in the direct loss of seagrass beds. In a memorandum of comments by McIntosh, there is evidence that there were "[m]any of what appeared to be old craters . . . present [in Coffins patch]." McIntosh Comments, p. 4. Dr. Zieman, NOAA's expert, agreed that if a portion of the depressions which he counted in his calculations of damage were old depressions, not made the FISHERS, then the damage would be proportionately less. Deposition of Zieman, p.162, In.25 - p.163, In.12.

The record evidence is that even if sediment was removed in areas with seagrass, this did not damage 1.63 acres of seagrass. Dr. Anitra Thorhaug, who made an on-site examination of these areas stated:

There's very little question in my mind that there was a lot of sediment in those concavities prior to the alleged impact, and sediment came back into the concavity after the alleged impact. The question of whether *Thalassia* root and rhizome was taken out, **was there were no things that I saw on these visits that convinced me that this amount, 1.33, or whatever, of *Thalassia* root and rhizome was taken off of the beds by this alleged impact.** So that's why I'm concluding that sediment was removed, certainly sediment was moved according to the reports from the experts. I see no convincing evidence that 1.33 or 1.68 or 2., and whatever other, evidently different people say different amounts, of *Thalassia* root and rhizome was removed.

Depo. of Thorhaug, p. 89, Ins. 5-18 (emphasis added).

C. No one knows what kind of damage, if any, occurred.

NOAA tries to claim that depressions in the sand and around seagrass, all of which were allegedly made by the FISHERS, are compensable damage to the FKNMS. NOAA's expert Dr. Zieman, however, could not testify that each of the depressions he counted in his damage calculations actually had live seagrass damage. He estimated that as much as seventy percent of the "holes" had "some involvement" with seagrass, but when asked if he could quantify the amount of "involvement" he replied, "No, I can't at this point." Deposition of Zieman, p.178, ln.24 - p.179, ln.25. If the Court were to look at the testimony of Dr. Anitra Thorhaug and the one conclusive portion of the McIntosh affidavit about the abundant hard-bottom life found in the depressions, it is evident that there has been no damage at all. Even if the Court were to examine the speculative estimate of damage contained in the McIntosh report, those figures give a maximum approximation loss of seagrass bed in the FKNMS of **less than one thousandth of one percent.** NOAA Mem.,

Exhibit F, p.2. Taking the evidence in the light most favorable to the FISHERS, one can infer that the depressions were made in bare sand bottom areas and that no seagrass was damaged. In 1995 Dr. Anitra Thorhaug, the FISHERS expert, examined these same areas NOAA alleged were damaged and stated that "the seagrass beds in and around the navigational fixes provided by the Government appeared **healthy and expanding.**" Depo. of Thorhaug, p.71, ln.24 - p.72, ln.1.

The McIntosh affidavit supports the inference that these bare areas where salvage activities occurred are "relatively non-productive and much less valuable." NOAA Mem., Exhibit G, p.3. After removal of the soft sand bottom and conversion to a hard bottom, the McIntosh affidavit also supports the inference that this new habitat created in the depressions have "live-bottom communities . . . including well-established examples of soft corals, sponges and other invertebrates and seaweeds." NOAA Mem., Exhibit G, p.3.

Even if some seagrass were lost, the reasonable inference to be drawn in the light most favorable to the FISHERS from the evidence is that this de minimis damage (less than one thousandth of one percent according to the McIntosh report and affidavit) has been offset by the creation of a new viable habitat within the FKNMS. NOAA's attorney, James Lofton, Esq., established that any damage was de minimis. Dr. Thorhaug was asked by Mr. Lofton if any damage she saw was de minimis and she responded, "It is my testimony that my observations show that apparently **damages to seagrass in these areas was de minimis.**" Depo. of Thorhaug, p.92, lns. 14-16 (emphasis added). When later asked by Mr. Lofton as to define de minimis, Dr. Thorhaug responded that "substantially less than an acre would be de minimis." Depo. of Thorhaug, p.93, lns. 21-22.

The next type of alleged damage is the supposed loss of historic artifacts and contextual information. The record evidence before the Court is that while artifacts have been salvaged from the ocean floor and preserved by the FISHERS, no artifacts have been lost. The FISHERS have taken great extent to see that these artifacts are preserved and restored. If left to the elements, these artifacts and their history would be lost forever to humankind. Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 546 F.Supp. 919, 927-28 (S.D. Fla. 1981). The FISHERS have a marine archeologist whose job it is to preserve the contextual information relative to the artifacts. Depo. of K.Fisher '95, p.53, Ins.15-19. The FISHERS used the same archeological plan and format that was highly acclaimed by Judge Aronovitz.¹⁰ Depo. of K.Fisher '97, p.38, In.17 - p.39, In.4. The salvage efforts by the FISHERS are designed to protect artifacts from the peril of continued exposure to the forces of nature. Depo. of K.Fisher '95, p.53, Cobb Coin Co. v. Unidentified, Wrecked & Abandoned Sailing Vessel, 549 F.Supp. 540, 557 (S.D.Fla.1982). NOAA agrees that the FISHERS' preservation efforts are sufficient. "NOAA does not take issue with the Fishers' conservation efforts. Murphy report, p.11." NOAA Mem., p.12.

The FISHERS preserved the contextual information of the salvaged artifacts. NOAA admits that the FISHERS' recording of information in the vessel logs and maintenance of the Conservation Lab Records provides archeological information. NOAA Mem., p.12. The question then is whether those efforts were sufficient and that requires a weighing of the

¹⁰ "The uncontroverted evidence shows that plaintiffs have exhibited a keen awareness of the historic and archeological importance attributed in general to old wreck sites" Treasure Salvors, 546 F.Supp. at 927.

evidence which means that NOAA's motion should be denied. "It is not the court's role to weigh conflicting evidence or to make credibility determinations . . ." Mize, 93 F.3d at 742.

D. No one knows who actually created the depressions in the sand.

NOAA has failed to bring any conclusive proof before this court that the FISHERS did all of the damage alleged. The record evidence is that there were other salvors in the same area before the FISHERS. Depo. of K.Fisher '95, p. 29, ln.24 -p.30, ln.22, p. 32, Ins. 12 -24, p.77, ln.14 - p.78, ln.17. Depo. of K.Fisher '97, p.49, ln.18 - p.51, ln.10; McIntosh Comments, p. 4. The Court should take judicial notice of the fact that other salvors have explored and conducted salvage activities in the Coffins Patch area. See MDM Salvage, 631 F.Supp. 308. Accordingly, it is unsupported speculation when NOAA tells this Court that the FISHERS made all of the depressions that have been found within Coffins Patch.

The reasonable inference from the evidence is that this alleged damage, if any, was caused by others. NOAA Mem., Exhibit E, p.3, Defendants Answer to Interrogatory 7(at least seven other salvors working in the area); Depo. of K.Fisher '95, p. 29, ln.24 -p.30, ln.22, p77, ln.14 - p.78, ln.17. Depo. of K.Fisher '97, p.49, ln.18 - p.51, ln.10. NOAA has no direct evidence that the FISHERS made depressions in areas that were covered by seagrass¹¹. In fact, NOAA's own record evidence reveals that the FISHERS did not use mailboxes in areas where there was seagrass because the mailboxes were ineffective in

¹¹In the Deposition of Dr. Mark Fonseca, NOAA's expert, he was asked if he had "any personal knowledge from [his] observation [of the alleged damage] . . . that the damage had to be caused by one of the Defendants in this lawsuit rather than by some third party" and he answered, "I don't know that." Depo. of Fonseca, p.145, Ins.4-9. Dr. Fonseca even testified that it was possible to repair the alleged damage he saw. Depo. of Fonseca, p.188, ln.8 - p.189, ln.4.

the seagrass, but proper in sand and rubble¹². NOAA Mem., Exhibit E, p.3, Defendants Answer to Interrogatory 7. Therefore, since the Court must weigh the conflicting evidence in order to determine who created the depressions, if any, in the areas of seagrass, it must deny NOAA's motion. "It is not the court's role to weigh conflicting evidence or to make credibility determinations" Mize, 93 F.3d at 742.

5. The record evidence disputes whether the FISHERS had a preexisting right of salvage in Coffins Patch.

NOAA's position that the NMSA supersedes general maritime law is unsupported by general maritime law and by the very wording of the NMSA. Nowhere in the NMSA does it say that a validly existing right of salvage is abolished by the statute. Unless a statute is openly hostile to a point of general maritime law, the courts should not read such an intent into the statute. Miles v. Apex Marine Corp., 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990); see also Yamaha v. Calhoun, ___ U.S. ___, 116 S.Ct. 619, 133 L.Ed.2d 578 (1996) ("[I]t better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules." Moragne v. States Marine Lines, Inc., 398 U.S. 375, 387, 90 S.Ct. 1772, 1781, 26 L.Ed.2d 339 (1970)(quoting The Sea Gull, 21 F.Cas. 909, 910 (C.C.Md.1865)" Id. at 627).

¹²In the Deposition of the expert Larry Murphy he was asked, "Would you use a mail box [in the terrain in Coffins Patch]?" He answered, "In this case I would probably use a mail box. I think that is a reasonable way to do it." Deposition of Larry Murphy, February 26, 1997, p.223, Ins. 12 - 15.

Salvage has long been recognized as a property right under federal general maritime law. Great Lakes Towing Co. v. St. Joseph-Chicago S.S. Co., 253 F. 635 (7th Cir. 1918). Judge Aronovitz' Order¹³ allowed the FISHERS to engage in salvage operations within Coffins Patch. The Court specifically allowed salvors to seek appropriate remedies as to the artifacts after they had "engaged in more sustained salvage activity." MDM Salvage, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 631 F.Supp. 308, 313 (S.D.Fla. 1986)("Both MDM and EMI (as well as other salvors) shall hereafter be permitted to salvage in [Coffins Patch]" Id. at 314). Such activities are permitted under the NMSA:

(1) Nothing in this chapter shall be construed as . . . to terminate any valid lease, permit, license, or right of subsistence use or of access that is in existence on the date of designation of any national marine sanctuary.

16 U.S.C. §1434. NOAA would have this Court reason that this does not include salvage activities since these activities allegedly damage sanctuary resources. In fact, the opposite is true for the act permits "the destruction, loss, or injury [of any sanctuary resource which] was caused by an activity **authorized by Federal or State law.**" NMSA, 16 U.S.C. §1443(a)(3)(B)(emphasis added). Accordingly when the record evidence is viewed in the light most favorable to the FISHERS, is a well supported proposition that the FISHERS had a preexisting right of salvage.

NOAA tries to rely upon Klein v. Unidentified Wrecked and Abandoned Sailing Vessel, 758 F.2d 1511 (11th Cir. 1985) and Lathrop v. Unidentified Wrecked &

¹³The Order, dated March 24, 1986, has neither been vacated nor rescinded and was and is in effect at all times, clearly showing that the FISHERS were legally in Coffins Patch to perform salvage operations. NOAA, until now, did not seek to assert any claim of sovereignty over artifacts salvaged pursuant to such order.

Abandoned Vessel, 817 F.Supp. 953 (M.D. Fla. 1993) to support its claim that the NMSA has modified general maritime law. The argument fails when the Court examines the basis of each would-be salvor's claim in those cases. In Klein, the United States had previously identified the salvaged wreck before the would-be salvor attempted a claim. Klein, 758 F.2d at 1514. More importantly, the would-be salvor did not have a preexisting right to conduct salvage activities in the area designated as a national park. This same key fact of a preexisting right of salvage is missing in Lathrop as well. In each, there was a preexisting law that prohibited the would-be salvors activities. The opposite is true in the present case. The FISHERS had a preexisting right of salvage in the area before the creation of the FKNMS. MDM Salvage, 631 F.Supp. at 314; Depo. of K.Fisher '97, p. 57, Ins.10-16; Depo. of M.Fisher, 1/9/97, p.8, ln.10 - p.9. ln.8, p.95, ln.7 - p.96, ln.9; pp.13-18. With a preexisting right of salvage, protected by the NMSA, NOAA cannot prosecute the FISHERS for their lawful activities within Coffins Patch.

Conclusion

Based upon the record evidence before the Court and the reasonable inferences to be made in the light most favorable to the FISHERS, this Court must deny NOAA's motion for summary judgment since there are genuine disputes as to numerous material facts and since NOAA is not entitled to judgment as a matter of law.

Respectfully Submitted,

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by over night mail to: **James A. Lofton**, U.S. Department of Justice, Environmental and Natural Resources Division, Environmental Section, 1425 New York Ave., N.W., Washington, D.C. 20005; and to **Caroline M. Zander**, United States

Department of Justice, Environment & Natural Resources Division, 601 Pennsylvania Avenue, N.W., Room 5614, Washington, D.C. 20004, this 8th day of April, 1997.

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AFFIDAVIT
KANE FISHER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Key West Division

UNITED STATES OF AMERICA,
Plaintiff,

"IN ADMIRALTY"

vs.

Case No. 92-10027-CIVIL-DAVIS

MELVIN A. FISHER, KANE FISHER,
SALVORS, INC.; a Florida Corporation,
in personam; M/V BOOKMAKER, M/V
DAUNTLESS, M/V TROPICAL MAGIC,
their engines, apparel, tackle, appurtenances,
stores and cargo, *in rem*,

Defendants

_____ /
and

MOTIVATION, INC., a Delaware
Corporation,)

Plaintiff,

vs.

Case No. 95-10051 CIV-DAVIS

The Unidentified, Wrecked and
Abandoned Vessel, her tackle,
armament, apparel, and cargo
located in the Atlantic Ocean
within a circle with a radius
of 1,000 yards of a point
located at 24° 41'30" North
Latitude and 080° 56'18" West
Longitude,

Defendant.
_____ /

AFFIDAVIT

STATE OF FLORIDA
COUNTY OF MONROE

BEFORE ME personally appeared KANE FISHER, who being by me first duly sworn, deposes and says that:

1. I am a defendant in the above-styled action.

2. I have reviewed my deposition taken in this case and my testimony at the Preliminary Injunction. I have also reviewed the log sheets of the salvage vessel the "DAUNTLESS".

3. Virtually all of the dusting I did was on sandy bottom or in some instances sand over hard bottom or coral rubble. There were four (4) holes that I noted in the log sheets that were next to sea grass beds. As previously testified, in some instances where the dusting was next to the sea grass beds, some slumping occurred. I was not previously requested at the preliminary injunction hearing or in the government depositions to quantify or estimate the area in square footage of the slumping. There were four (4) or five (5) holes in which there was a slumping along one side of the perimeter for maybe one or two feet. There are some other occasions of maybe four (4) or five (5) in which there was a slumping of a couple feet along a small portion of the perimeter. It is my opinion that the total amount of sea grass that slumped into the depressions would be less than an average size room or a total area less than 400 square feet and possibly less than 200 square feet. Based upon my personal observations in the dusted areas, it would be impossible to have damaged 1.63 acres from January 29, 1992 to March 17, 1992.

FURTHER AFFIANT SAYETH NAUGHT.

KANE FISHER

STATE OF FLORIDA
COUNTY OF MONROE

The foregoing instrument was acknowledged before me this _____ day of April, 1997, by KANE FISHER, who is personally known to me and who did take an oath.

Gail A. Roberts
Notary Public

My commission expires:

AFFIDAVIT
WARRANTLESS

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