Abandoned Vessel, 435 F.3d 521, 532 n.3 (4th Cir. 2006)); *see also Unione Mediterranea Di Sicurta*, 220 F.3d at 671 (discussing abandonment requirement under law of finds).

(i) Unowned or Abandoned Property

153. The Court first addresses the third element of the law of finds, the requirement that any property claimed under the law of finds must be unowned or abandoned by its original owner. *See Odyssey Marine*, 2006 WL 3091531, at *3; *Unione Mediterranea Di Sicurta*, 220 F.3d at 671; *Columbus-Am. Discovery Group*, 974 F.2d at 460–61.

154. Courts generally are hesitant to find abandonment. *See, e.g.*, *Columbus-Am. Discovery Group*, 974 F.2d at 463.

155. In fact, "[t]he [United States Court of Appeals for the] Fifth Circuit has noted that even when a vessel is abandoned the original owner is not divested of title 'except in extraordinary cases . . . where the property has been lost or abandoned for a very long period.'" *Unione Mediterranea Di Sicurta*, 220 F.3d at 671 (citing *Treasure Salvors, Inc. v. The Unidentified Wrecked & Abandoned Sailing Vessel*, 640 F.2d 560, 567 (5th Cir. 1981)).

156. Nonetheless, "[w]hether a sunken wreck has been abandoned is a question of fact." *Nunley v. M/V Dauntless Colocotronis*, 863 F.2d 1190, 1198 n.11 (5th

Cir. 1989).

157. As other courts have noted, there are two types of cases in which courts apply the law of finds: (1) cases in which "items are recovered from ancient shipwrecks and no owner appears in court to claim them"; and (2) cases in which "owners have expressly and publicly abandoned their property." *Unione Mediterranea Di Sicurta*, 220 F.3d at 671; *Columbus-Am. Discovery Group*, 974 F.2d at 461.

158. Abandonment under the law of finds must be shown by clear and convincing evidence. *Unione Mediterranea Di Sicurta*, 220 F.3d at 671 (quoting *Falgout Brothers, Inc. v. S/V Pangaea*, 966 F. Supp. 1143, 1145 (S.D. Ala. 1997)).

159. Here, there is no evidence of any express abandonment of an alleged shipwreck in this lawsuit. Furthermore, Smith produced no items recovered from any alleged shipwreck so as to trigger a former owner's duty to make a claim for them. *See id.*

160. Smith points to *Marex* to support his proposition that Sorenson's failure to assert a verified claim for the alleged vessel constitutes abandonment by the owner. *See Marex Int'l*, 952 F. Supp. at 828. However, Smith's reliance upon *Marex* is misplaced.

161. First, in *Marex*, as in nearly every other admiralty salvage case, the plaintiff-

salvor actually recovered items from the wrecked vessel, which would allow identification of the wreck or its cargo, and brought the items into the Court's jurisdiction. *See id.* (stating plaintiff actually recovered and brought to court "pieces of the vessel's engines and boilers, ornate fittings from the passengers' cabins, china and dishware, brass spikes and nails, a collection of 18 U.S. gold Quarter Eagles, half dollar denomination coins minted from the years 1834 until 1840, and two ornate gold pocket watches").

162. Here, however, Smith brought nothing before the Court by which a former owner could identify the alleged ship or its cargo and thus make a claim.

163. Secondly, Sorenson has made no claim of ownership in the alleged abandoned vessel. Indeed, Sorenson argues, quite vociferously, that there *is no* vessel located where Smith claims one to be located. Thus, there is nothing to claim.

164. Finally, if, as Smith seems to contend, the alleged vessel is a Spanish barkentine, title would remain with, presumably, the Kingdom of Spain. The Court notes, however, that Spain has not attempted to enter this contest and has made no claim to Smith's alleged discovery. *See Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Vessel*, 556 F. Supp. 1319, 1334 n.2 (S.D. Fla. 1983); *Cobb Coin Co., Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 525 F. Supp. 186, 198 (S.D. Fla. 1981).

165. Yet, courts have found that where, as here, "the property encompass[es] an ancient and longlost shipwreck, a court may infer an abandonment." *Columbus-Am. Discovery Group*, 974 F.2d at 464–65.

166. Consequently, the Court determines that to the extent a vessel exists upon the location Smith claims, it is abandoned by its original owner.

167. Nevertheless, in order to recover on a claim under the law of finds, Smith still must satisfy all three requisite elements. *See Odyssey Marine*, 2006 WL 3091531, at *3.

(ii) Intent to Reduce Property to Possession

168. The Court next addresses the first element of the law of finds, the requirement that the finder establish his intent to reduce the found property to his possession. *See id.*

169. It is clear Smith possesses the requisite intent to possess whatever abandoned property he believes rests below the surface of the area in which he claims he has discovered an abandoned vessel. Smith has made numerous trips to the location, taken metal detector readings, filed the appropriate applications for excavation with the Corps, and has filed this suit in an attempt to secure his rights to the alleged bounty.

170. However, "the law of finds requires a finder to demonstrate not only the intent

to acquire the property involved, but also possession of that property, that is, a high degree of control over it." *Hener*, 525 F. Supp. at 356; *see also R.M.S. Titanic*, 435 F.3d at 532 n.3.

171. "If either intent or possession is found lacking, the would-be finder receives nothing." *Hener*, 525 F. Supp. at 356.

172. Consequently, the Court must determine, in addition to his intent to possess property from the alleged abandoned vessel, whether Smith actually reduced the property to his possession. *See id.*

(iii) Actual or Constructive Possession

173. Finally, under the law of finds, "title to abandoned property vests in the person who reduces that property to his or her possession." *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Vessel*, 569 F.2d 330, 337 (5th Cir. 1978).

174. "As a general rule, under the law of finds, a finder acquires title to lost or abandoned property by 'occupancy', i.e. by taking possession of the property and exercising dominion and control over it." *Treasure Salvors*, 640 F.2d at 571, 572–73 ("Persons who actually reduce lost or abandoned objects to possession and persons who are actively and ably engaged in efforts to do so are legally protected against interference from others, whereas persons who

simply discover or locate such property, but do not undertake to reduce it to possession, are not."); *cf. Brady v. The African Queen*, 179 F. Supp. 321, 324 (D. Va. 1960) (holding that a claimant who boarded a derelict vessel and published a newspaper advertisement claiming salvage rights, but made no attempt to salvage the vessel, was not entitled to possession of the vessel).

175. Here, Smith presents no credible evidence that he has reduced to his possession any abandoned property so as to entitle him to ownership of any alleged shipwreck.

176. Indeed, the only evidence of an abandoned shipwreck Smith offered at trial was his own testimony and a photocopy of a photograph of a small object that Smith claims is a piece of wood from the alleged barkentine vessel.[11]

177. The Court finds this evidence to be insufficient to establish that the alleged vessel or any part of it or its armament, apparel, tackle or cargo exists at all or, if it does, that it lies in the location at which Smith claims.

178. Moreover, even assuming Smith has discovered an actual shipwreck, as he alleges, he has presented no evidence that he has reduced the shipwreck to his

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[11] As previously noted, Smith testified he knows the object to be a piece of the abandoned ship because he tested it by placing it in the microwave for thirty to forty seconds. The object began to smoke, which Smith said is the creosote in which wood used to build ships of this era was soaked. Smith admits that he no longer knows where the actual object is because it became lost when his friend moved his company warehouse.

possession. *Cf. Deep Sea Research*, 523 U.S. at 496 (noting that petitioner sought salvage award "[b]ased on its possession of several artifacts from the [sunken vessel], including china, a full bottle of champagne, and a brass spike from the ship's hull").

179. Simply put, Smith has not proven that he has discovered an abandoned shipwreck and has certainly not reduced anything from his discovery to his possession. *See Treasure Salvors*, 640 F.2d at 571.

180. Accordingly, the Court finds as a matter of law that Smith is not entitled to a declaration of right to title to any alleged abandoned vessel under the law of finds.[12]

D. Law of Salvage

181. Alternatively, Smith asserts he is entitled to the right to salvage the object of his discovery to the exclusion of all others and to receive an award under the law of salvage.

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[12] The Court notes that under the common law of finds, "when the abandoned property is embedded in the soil, it belongs to the owner of the soil." *United States v. Shivers*, 96 F.3d 120, 124 (5th Cir. 1996) (quoting *Klein v. Unidentified Wrecked & Abandoned Sailing Vessel*, 758 F.2d 1511, 1514 (11th Cir. 1985)). Moreover, "when the owner of the land where the property is found (whether on or embedded in the soil) has constructive possession of the property such that the property is not 'lost,' it belongs to the owner of the land." *Klein*, 758 F.2d at 1514. Consequently, even assuming, *arguendo*, that Smith has indeed located an abandoned barkentine vessel submerged in the soil at the location at which he claims, to the extent the vessel lies on private property, Smith's claim may be preempted by that of the landowner. *Id.*

182. It is well-settled under the law of salvage that in order to earn entitlement of a salvage award, a salvor must prove three elements: (1) a marine peril; (2) voluntary service rendered when not required as an existing duty or from a special contract; and (3) success in whole or in part, or contribution to, the success of the operation. *The Sabine*, 101 U.S. 384, 384 (1879); *United States v. Ex-USS Cabot/Dedalo*, 297 F.3d 378, 381 (5th Cir. 2002); *Margate Shipping Co. v. M/V JA Orgeron*, 143 F.3d 976, 984 (5th Cir. 1998) ("An award of salvage is generally appropriate when property is successfully and voluntarily rescued from marine peril."). The Court addresses each element in turn.

(i) Maritime Peril

183. "[T]he peril required in a salvage service need not necessarily be one of imminent and absolute danger. The property must be in danger, either presently or reasonably to be apprehended." *Treasure Salvors*, 569 F.2d at 337 n.13 (quoting NORRIS, THE LAW OF SALVAGE § 185 (1958)); *see The Leonie O. Louise*, 4 F.2d 699, 700 (5th Cir. 1925) (articulating the standard for marine peril as danger "reasonably to be apprehended").

184. Courts have found maritime peril to exist in cases of ancient, abandoned shipwrecks. *See Cobb Coin Co. v. The Unidentified, Wrecked & Abandoned*

Sailing Vessel, 549 F. Supp. 540, 557 (S.D. Fla. 1982) (citing *Platoro Ltd. v. Unidentified Remains of a Vessel*, 614 F.2d 1051, 1055 (5th Cir. 1980)).

185. And, where the location of an abandoned shipwreck is unknown, it is said to be at marine peril as a matter of law. *See Platoro Ltd., Inc. v. Unidentified Remains of a Vessel*, 695 F.2d 893, 901 & n.9 (5th Cir. 1983).

186. Moreover, a vessel in peril of being lost through the action of the elements or of pirates, and not being salvaged, is subject to maritime peril. *Cobb Coin*, 549 F. Supp. at 557.

187. Smith testified that, according to his metal detector readings, the vessel has listed to the side and its cargo has spread northward under Melon Lake.

188. Moreover, Smith believes expanding clay has contributed to wide distribution of the wreckage in the Work Area and that the alleged vessel is at risk of liquification due to the expanding clay in which the alleged vessel is submerged.

189. Assuming, without deciding, that the alleged vessel exists where Smith claims it exists, the Court determines that it is in marine peril and subject to loss to the elements. *See Platoro Ltd.*, 695 F.2d at 901 & n.9; *Cobb Coin*, 549 F. Supp. at 557.

(ii) Voluntary Efforts to Salvage

190. Next, in order to recover under the law of salvage, a salvor also must prove that the efforts undertaken to salvage the property at peril were undertaken voluntarily and not pursuant to some other obligation or duty. *See, e.g.*, *Legnos v. M/V Olga Jacob*, 498 F.2d 666, 672 (5th Cir. 1974); *Cobb Coin*, 549 F. Supp. at 557.

191. There appears to be no dispute that any efforts Smith expended in his belief that an abandoned vessel exists were made voluntarily, and he is under no contractual obligation or other duty to make such undertaking.

192. The Court must determine, then, whether Smith's actions have contributed to the successful salvage of the abandoned property for which he seeks a salvage award.

(iii) Salvage Success

193. It is axiomatic that success is a prerequisite to earning a salvage award. *The Blackwall*, 77 U.S. (10 Wall.) 1, 12 (1869) ("Success is essential to the claim."); *W. Coast Shipping Brokers Corp. v. The Ferry "Chuchequero,"* 582 F.2d 959, 960 (5th Cir. 1978) ("The rule in salvage cases has always been that only success is rewarded.").

194. This rule necessitates some showing that the would-be salvor has saved

property from peril. *See The Sabine*, 101 U.S. at 384.

195. In a case such as this involving an alleged sunken treasure ship, this showing no doubt is made by bringing before the Court some portion of the *res* or fruit of the salvage operation.[13] *See e.g., Treasure Salvors*, 569 F.2d at 337; *Yukon Recovery, L.L.C. v. Certain Abandoned Property*, 205 F.3d 1189, 1195 (9th Cir. 2000); *Platoro Ltd.*, 695 F.2d at 901; *Cobb Coin*, 549 F. Supp. at 557.

196. Moreover, to maintain an action to exclude all others from salvaging the property, the petitioner must demonstrate the "intention and *capacity* to save the property involved." *Hener*, 525 F. Supp. at 357 (emphasis added).

197. Smith contends that without his efforts, the location of the vessel would still be unknown.[14]

198. Smith asserts that he has researched the history of the vessel, the history of the area, been to the alleged vessel's location, made appropriate application with

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[13] The Court undertook an extensive review of the cases in which courts applied the law of salvage to lost and abandoned shipwrecks. The Court found no case, and Smith offers none, in which a court granted a salvage award to a potential salvor who offered no proof that property was salvaged and presented no evidence in the way of tangible artifacts taken from the wreck to be salvaged. Indeed, in every case, the petitioning salvor presented artifacts salvaged from the wreckage to which he sought a salvage award.

[14] The Court is not persuaded by this assertion. Indeed, because Smith presents no credible evidence that a vessel exists where he claims one to exist, it can be said that even despite Smith's efforts, the location of the barkentine of Barkentine Creek legend is in fact still unknown.

the Corps to conduct salvage operations, and has obtained a determination of jurisdiction from the Corps.

199. Smith claims he has consulted with the project manager responsible for salvage operations of the Titanic. Moreover, Smith contends he has a salvage company ready to conduct salvage operations when and if the Corps issues its permit.

200. However, Smith has recovered no artifacts, and presents no evidence, other than his own testimony regarding metal detector readings, that anything of value or historical significance actually exists where he claims it exists. *See The Sabine*, 101 U.S. at 384 ("Proof of success, to some extent, is as essential as proof of service, for if the property is not saved, or if it perishes, or, in case of capture, if it is not retaken, no compensation will be allowed."). Simply put, Smith presents no credible evidence that he has actually saved any property from peril. *See id.*

201. Here, the Court finds that, although Smith took some voluntary efforts to salvage what he thought to be an ancient and abandoned shipwreck subject to marine peril, Smith nonetheless fails to demonstrate that those efforts, in any

way, contributed to any successful salvage of lost or abandoned property.[15] *Cf. Legnos*, 498 F.2d at 672 (finding salvors entitled to award when actions "bore directly on the successful efforts" to save vessel).

202. Thus, the Court determines Smith is not entitled to an award under the law of salvage.

E. Attorneys' Fees

203. Sorensen argues that Smith's prosecution of this case to trial is vexatious and in bad faith and therefore Sorenson is entitled to recover attorneys' fees and costs from Smith.

204. Sorenson asserts that Smith's conduct in filing this lawsuit was frivolous and in bad faith because, Sorenson argues: (1) Smith's only evidence of a vessel being at the location at issue is a fuzzy and indefinite satellite image, which when converted to actual surface measurements is nearly ten times the size of the alleged vessel; (2) Smith failed to use any maps or other navigation aids

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[15] Sorenson also contests Smith's capacity to mount such an ominous salvage operation and points to Smith's own testimony regarding his inability to procure a profit in various business ventures since 1990. Even assuming, *arguendo*, Smith's sunken treasure ship does exist, the Court questions Smith's capacity to secure the "financial and professional resources required to salvage" it or its alleged hordes of loot, particularly given his lack of experience and training in such recovery and his own admission that he has failed to earn any money from any of his numerous business ventures since 1990. *See Yukon Recovery*, 205 F.3d at 1192–93; *Hener*, 525 F. Supp. at 357. However, the Court need not determine the scope of Smith's capacity because the Court finds Smith has failed to demonstrate that he ever has successfully salvaged anything.

to actually locate the site; (3) Smith failed to document the site with photographs, videotapes, or even other witness testimony; (4) Smith concocted testimony, such as the inaccuracy of the federally operated GPS so as to cast aspersions on Sorenson's witnesses who went to and documented the actual location using GPS; and (5) Smith continued to pursue his claims to trial without credible evidence.

205. "According to the general 'American Rule' applied in admiralty cases, attorney fees are not awarded absent a statutory or contractual authority." *Unione Mediterranea Di Sicurta*, 364 F.3d at 656–57 (citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 268–69 (1975)).

206. However, it is within the inherent power of the Court to "assess attorneys' fees . . . when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Alyeska Pipeline*, 421 U.S. at 258–59; *Vaughan v. Atkinson*, 369 U.S. 527, 530–31 (1962).

207. Despite his failure to provide the Court with credible evidence that an abandoned vessel exists where he claims one exists, the Court finds that Smith genuinely believes in his own mind that he actually has discovered the resting place of an ancient shipwreck.

208. As fanciful as Smith's claims may seem, the Court does not find them

vexatious or made in bad faith. *See Aleyska Pipeline*, 421 U.S. at 258–59.

209. In short, the Court finds that Smith's conduct was not "so abusive of the litigation process that [his] conduct could be described as callous and recalcitrant, arbitrary and capricious, or willful, callous and persistent." *See Galveston County Nav. Dist. No. 1 v. Hopson Towing*, 92 F.3d 353, 359 (5th Cir. 1996) (internal citation omitted).

210. Therefore, the Court determines Sorenson is not entitled to recover attorneys' fees from Smith.

CONCLUSION

Given all the foregoing, the Court hereby

ORDERS that Plaintiff's claims are DISMISSED. The Court further

ORDERS that Intervenor's request for attorneys' fees is DENIED. The parties shall pay their own costs.

SIGNED at Houston, Texas, on this 27 day of April, 2009.

David Hittner

DAVID HITTNER
United States District Judge