

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
Docket No. 10-10269J***

Odyssey Marine Exploration, Inc.
Plaintiff-Appellant

v.

The Kingdom of Spain
Claimant-Appellee.

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
The Hon. Steven D. Merryday, Presiding

APPELLANT'S REPLY BRIEF

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**Related cases:* This appeal is the lead case and is related to the following docketed appeals: 10-10317, 10-10318, 10-10319, 10-10320, 10-10374, 10-10375.

TABLE OF CONTENTS

TABLE OF CONTENTSi

TABLE OF AUTHORITIES iii

STATEMENT OF FACTS (AND FICTION) 1

I. The Tale According to Spain. 1

II. True Facts as Opposed to Spain’s Story......2

 A. *Odyssey as the villain.*2

 B. *Historical inaccuracies and misrepresentations made by Spain.*5

STANDARD OF REVIEW 10

ARGUMENT..... 11

I. Regardless of the appropriate standard of review, findings of “facts” by the district court were clearly erroneous...... 11

II. Spain’s attempt to distinguish this case from *Aqua Log* fails...... 13

III. The FSIA is no impediment to *Odyssey’s in rem* admiralty action. 14

 A. *FSIA Section 1609 Is Inapplicable.*..... 15

 B. *Under FSIA Section 1605(b), Spain Has No Immunity In This Case.* ..18

 1. *Nexus.* 19

 2. *Retroactivity.* 19

 3. *Notice.* 19

 4. *Based Upon.*20

 5. *Applicability to Warships.*.....21

6. *Refusal of Salvage*.....23

IV. The FSIA does not do away with Odyssey’s right to due process.24

V. If the district court does not have jurisdiction over the property, it does not have authority to transfer the property to Spain.....27

VI. As for Comity28

FRAP 32(A)(7) CERTIFICATE OF COMPLIANCE30

CERTIFICATE OF SERVICE31

BRIEF SERVICE LIST32

TABLE OF AUTHORITIES

Cases

<i>Acree v. County Bd. of Educ.</i> , 533 F.2d 131 (5th Cir. 1976)	26
<i>Alfred Dunhill of London, Inc. v. Republic of Cuba</i> , 425 U.S. 682 (1976).....	15
* <i>Aqua Log, Inc v. Georgia</i> , 594 F.3d 1330 (11 th Cir. 2010)	13, 14
<i>Breard v. Greene</i> , 523 U.S. 371 (1998).....	21
<i>China Nat’l Chem. Imp. & Exp. Corp. v. M/V LAGO HUALAIHUE</i> , 504 F. Supp. 684 (D. Md. 1981).....	17, 20
<i>Compania Espanola De Navegacion Maritima, S.A. v. The Navemar</i> , 303 U.S. 68 (1938).....	13
<i>Consol. Edison Co. of N.Y., Inc. v. The Aircraft Carrier FOCH</i> , 1979 U.S. Lexis 15274 (S.D.N.Y. 1979).....	22
<i>Goldberg v. Kelly</i> , 397 U.S. 254 (1970).....	24
<i>Guevara v. Peru</i> , 468 F.3d 1289 (11 th Cir. 2006)	15
<i>International Aircraft Recovery, L.L.C. v. Unidentified, Wrecked and Abandoned Aircraft</i> , 218 F.3d 1255 (11 th Cir. 2000)	24
<i>J. Aron & Co. v. M/V Tuzla</i> , 1994 U.S. Dist. LEXIS 6589 (E.D. La., 1994).....	18

<i>Jackson v. People’s Republic of China,</i> 794 F.2d 1490 (11 th Cir. 1986)	19
<i>Mangattu v. M/V IBN HAYYAN,</i> 35 F.3d 205 (5th Cir. 1994)	17
<i>Moran v. Kingdom of Saudi Arabia,</i> 27 F.3d 169 (5th Cir. 1994)	11
<i>Nicholas E. Vernicos Shipping Co. v. United States,</i> 349 F.2d 465 (2d Cir. 1965)	22
<i>R.M.S Titanic, Inc. v. The Wrecked and Abandoned Vessel,</i> 435 F.3d 521 (4 th Cir. 2006)	27
<i>R.M.S. Titanic, Inc. v. Haver,</i> 171 F.3d 943 (4 th Cir. 1999)	23
<i>Ramsey v. The POHATCONG,</i> 77 F. 996 (S.D.N.Y. 1896)	24
<i>Reiss v. Societe Centrael du Groupe des Assurances Nationales,</i> 235 F.3d 738 (2d Cir. 2000)	26
<i>Republic of Austria v. Altmann,</i> 541 U.S. 677 (2004).....	19
<i>Republic of Mexico v. Hoffman,</i> 324 U.S. 30 (1945).....	13
<i>Rippon v. United States,</i> 348 F.2d 627 (2d Cir. 1965)	22
<i>Samantar v. Yousuf,</i> 130 S. Ct. 2278 (2010).....	15
<i>Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels,</i> 221 F.3d 634 (4th Cir. 2000)	21

<i>Stevens Technical Servs. v. United States</i> , 913 F.2d 1521 (11 th Cir. 1999)	22
<i>Stuart v. United States</i> , 813 F.2d 243 (9th Cir. 1987), rev'd on other grounds, 489 U.S. 353 (1989).....	28
<i>The BLACKWALL</i> , 77 U.S. 1 (1869).....	5
* <i>The Davis</i> , 77 U.S. 15 (1869).....	14
<i>The SABINE</i> , 101 U.S. 384 (1879).....	5
* <i>The SANTISSIMA TRINIDAD</i> , 20 U.S. (7 Wheat.) 283 (1822)	23
<i>The SCHOONER EXCHANGE v. McFadden</i> , 11 U.S. (7 Cranch) 116 (1812)	15
* <i>United States v. \$270,000.00 in United States Currency</i> , 1 F.3d 1146 (11 th Cir. 1993)	27
<i>Washington v. Norton Mfg., Inc.</i> , 588 F.2d 441 (5th Cir. 1979)	26
<i>World Holdings, LLC v. Fed. Republic of Germany</i> , 2010 U.S. App. LEXIS 16441 (11th Cir. 2010).....	21
Statutes	
28 U.S.C. § 1333	10
28 U.S.C. § 1605(a)	19
28 U.S.C. § 1605(b)	18, 20

28 U.S.C. § 1609	17
28 U.S.C. § 1610(a)	17
Public Vessels Act, 46 U.S.C. §§ 31101	22
Sunken Military Craft Act (SMCA), § 1408(3)(A)	21

Other Authorities

Commander's Handbook, section 2.1.1, available at http://www.usnwc.edu	21
U.S. Const., amend. V	24
U.S. Const., art. III, § 2, cl. 1	10

STATEMENT OF FACTS (AND FICTION)

I. The Tale According to Spain.

Spain's Brief in response to Odyssey's Appeal in this case is a well written work, but like the fictional historical accounts Spain actually cites, it is just that – fiction. The Brief is a cleverly worded, emotional plea that navigates around the actual facts and the most applicable legal issues. Like the story presented to the district court, it is captivating and interesting, which may be why the court below failed to see the inaccuracies of many of the allegations presented.

Spain paints the picture of Odyssey, the evil treasure hunters, who set out to rob the sacred burial ground of Spanish sailors. (Spain uses the words “grave” or “gravesite” no less than a dozen times despite the undisputed absence of any human remains whatsoever). Odyssey “covertly” (that word is also used frequently) launches an operation to find the sacred underwater “gravesite.” It turns out to be exactly where the Spanish have known it was for over 200 years! Odyssey “strips” the sunken vessel of treasures, and quickly but “illicitly” ships the booty back to its Tampa home. Odyssey lies to the court and to Spain and pretends it does not know the identity of the “gravesite” which was somehow very clear despite the fact that no vessel actually existed at the site. But the ghost of that vessel is enough for Spain to know without a doubt that it owns everything. And Spain is so certain, and Odyssey so evil, that Spain is not even required to prove its

claims in court, and Spain sails into the sunset with the treasure. A fascinating fictional tale.

II. True Facts as Opposed to Spain's Story.

A. Odyssey as the villain.

Much of Spain's Brief is dedicated to its attempt to vilify Odyssey and Odyssey's salvage efforts. Odyssey is not a villain. The district court found no wrongdoing on Odyssey's part.¹ In fact, it was Spain who wrongfully boarded and seized Odyssey's vessels following the Black Swan recovery.²

Odyssey is a world leader in shipwreck exploration and archaeological recovery. Odyssey is a publicly traded American company which conducts its business with full disclosure in compliance with all federal and international laws. Furthermore, Odyssey uses the services of highly acclaimed and internationally recognized historians, archaeologists, conservators and curators. (*See generally* Doc. 27.) Spain's allegation that Odyssey's salvage efforts revealed a "striking disregard for archaeological practice" (Spain's Brief ("Spain Br.") 33) (citing nothing more than its own allegation in the pleadings below) is a slanderous

¹ All of Spain's references to wrongdoing on Odyssey's part are citations to Spain's own allegations made below – not factual findings by the district court.

² A recent ruling in the Spanish courts cleared Odyssey's captain of all charges related to his refusal to allow an unauthorized Spanish search associated with the Black Swan recovery. (Administración De Justicia, Sentencia N°147, Juzgado de lo Penal N°4 Algeciras, 24 de mayo de 2010.)

fabrication. No evidence was presented to the district court to support such an inflammatory misrepresentation.

Spain also attempts to depict Odyssey as being disingenuous and even deceitful by failing to prematurely identify the recovered cargo as originating from the *Mercedes*. In fact, Odyssey's efforts to consider all possible origins of the *res* including the possibility that the cargo had been jettisoned (a theory which naturally would be considered by any responsible archaeologist given the lack of a vessel at the site) shows no failure on Odyssey's part, but to the contrary, demonstrates Odyssey's professionalism and archaeological integrity.

Spain purports to know beyond a doubt that the recovered cargo originated from the *Mercedes*, but this conclusion is based upon the same "expert" opinions which wrongfully concluded that the dolphin-handled cannon from the site could only have come from the *Mercedes*. Spain's "expert" and the court below clearly overlooked that an identical cannon was found on a British shipwreck (Doc.179-2), and such cannon were common to many countries of the period. (Doc.138-2:29.) Also quite clearly wrong was Spain's "expert's" opinion, based on nothing more than ripples on the seabed, that a hull could have been buried underneath the sediment. In fact, the sediment at most of the site was less than an inch deep. (Doc.138-2:14.) Even coins were too large to be buried in it! If Spain's "expert" was wrong in making such basic archaeological conclusions, it only stands to

reason that all other “expert” opinions must be called into question and must, at the very least, prevent dismissal of the entire case based upon acceptance of Spain’s inaccurate version of “facts.”

Spain alleges on appeal, as it did below, that Odyssey met with Spanish officials prior to its Amsterdam Project (a project which involved a heavily trafficked area including several shipwreck targets, but not focused on any one target) (Spain Br.4) in order to seek Spain’s “consent” to the project. This is false. The district court specifically noted that there were different accounts of the meeting in Spain, but found only that Spain did not give express consent to the project. (Doc.209:2.)³ Notably, however, neither did Spain request that Odyssey refrain from its search nor issue any warning to Odyssey regarding the project. (Doc.138-28:6 ¶12; 138-29:4 ¶4.) There would have been no reason for Odyssey to request Spain’s permission, as Odyssey was not venturing into Spanish waters and had no intent of searching for or salvaging sovereign warships of Spain. Regarding the *Mercedes* specifically, Odyssey knew that vessel was lost while on a commercial voyage loaded with private cargo. The same researcher whom Spain credits with informing Odyssey that the *Mercedes* was once on the Spanish naval register also helped confirm the commercial nature of the voyage. (Doc.138-29:9

³ In this brief record references will be cited as “Doc.{a}:{b},” where field {a} is the district court docket (or sub-docket) number, and field {b} is the relevant page, based on the district court’s pagination of the document.

¶22.) Moreover, the meeting itself which Odyssey convened, and subsequent communications contradict Spain's allegation that Odyssey operated "covertly."

In short, although it makes for interesting reading, there was no diabolical plot on the part of Odyssey to rob gravesites or strip sovereign vessels of their treasures. Odyssey rescued the recovered cargo from marine peril. Such marine peril (potential looters, fishermen, tides and the general conditions of the deep sea) is recognized in longstanding admiralty law which rewards heroic (not villainous) salvors for their efforts, and recognizes the dangers and risks involved in their work. *See The BLACKWALL*, 77 U.S. 1, 14 (1869); *The SABINE*, 101 U.S. 384, 384 (1879).

B. *Historical inaccuracies and misrepresentations made by Spain.*

Odyssey, in the space and time allowed by the Rules, cannot possibly identify each and every instance of Spain's misdirection and legerdemain in its Brief. Many, if not most of Spain's legal citations and case references are as inaccurate as its factual assertions. Because this Court may review the facts of the case *de novo*, each factual assertion and reference to the record should be thoroughly vetted and not blindly accepted. Cases cited by Spain more often than not have nothing to do with the legal conclusions for which they are advanced.

Spain alleges that Odyssey's account of the history of Spain and of the *Mercedes* is a "revisionist contention." (Spain Br.22 n.6.) In fact, it is Spain's

retelling of the tale that is not only “revisionist,” but also very simply inaccurate. Spain describes the *Mercedes* as a fully armed Spanish naval vessel going into battle. As noted in Odyssey’s Brief, Spain’s version of the *Mercedes* was quite different 200 years ago when it expressed outrage at England for its destruction of a ship that was not engaged in war but was transporting passengers and private commercial cargo in a time of much-desired peace. (Odyssey Br.9; Doc.131-6:48.) Of course, Spain’s contemporaneous account was the accurate one. Spain’s own expert in his book published prior to this litigation described the *Mercedes* as being laden with private cargo – wool, bark, cocoa, animal skins and other goods as well as privately owned specie. (Doc.163-8:37.) Cargo clogged decks and passageways. The gun decks had been reconstructed to accommodate paying passengers. (Doc.138-30:20 ¶12; *Id.* at 24-25 ¶14.) The vessel’s crew included civilian officers, which was forbidden by Spanish Naval regulations during wartime military missions. Even the master listed on the cargo manifest was a civilian. (Doc.138-30:9 ¶6; *Id.* at 28 (n.61).)

The *Mercedes* and her sister ships were neither configured for, nor expecting military action. The employment of a civilian silver master, the character of the commercial cargo, the freight charges, and the passenger tariffs charged were all consistent with a commercial voyage of the *Correos Maritimos*. (Doc.138-30:20-23 ¶13; 138-63:5-13.) *Correos Maritimos* ships were all drawn from the navy, and

when sailing, the ships were used as armed merchantmen operating for profit under ultimate civilian command in competition with the private sector. (*Id.*) In 1802, Spain specifically limited the immunities available to navy ships on *Correos Maritimos* expeditions. (Doc.138-30:21.) This has never been contested by Spain.

Interestingly, Spain alleges that the only “documented” passengers aboard the *Mercedes* were relatives of Captain de Alvear (Spain Br.21), but Spain is wrong. Spain reasserts the allegation on appeal despite Odyssey’s presentation of passenger complements and data recovered from primary sources. (Odyssey Br.8.) This documentation does not rely upon “expert” interpretation.

Spain also asserts that the *Mercedes* was armed with the standard complement of cannon and other armament specified by Spanish Navy regulations for frigates of war. That reference, however, does not apply to the *Mercedes* on her final voyage. (Doc.138-30:20 ¶12.) Spain even misses the number of crew aboard the *Mercedes* by nearly 100. (Doc.179-1:12-13.) Primary sources reveal that the *Mercedes* could have had no more than 250 officers and crew aboard upon sailing from Montevideo – a complement nearly 100 people below the standard wartime level of staffing.⁴ (Doc.138-30:25 (n.52); 138-56.) Furthermore, the

⁴ Odyssey presented evidence that the *Mercedes*’ fleet was “half manned” and that most of the crews were inexperienced landsmen. Many similar accounts disproving Spain’s current self-serving historical analysis were presented by Odyssey’s experts but not considered by the district court. (Doc.138-30:20; 138-36:7.)

manifest of the *Mercedes* and all Bills of Lading for the cargo were actually titled “*Commercio Libre*,” translated to English as “**Free Commerce**.” (Doc.232-2:15; Doc.232-3:15; Doc.138-30:19 (n.33), 32 (n.45), 27 (n.59), 28¶18 & (n.60, 61).) In short, this was a commercial voyage during a time of peace, not a military mission. Spain’s current self-serving denial of the commercial activity is as absurd as pretending to see a vessel where none exists.

Finally, Spain minimizes the relevance of the commercial activity of the *Mercedes* by declaring that the carriage of specie and other privately owned articles was similarly authorized by the U.S. Navy (Spain Br.19), and Spain shamelessly compares the *Mercedes* to the *U.S.S. Arizona* and the *U.S.S. Monitor*. Spain’s historical references here, as elsewhere in its Brief, actually demonstrate that the activity in which the *Mercedes* was engaged was **prohibited** by the U.S. Navy and resulted in severe penalties to offending officers. *See* Articles XXII and XXIII, 2 Stat. 45, 48 (1800) at Doc.131-9:5.

In truth, U.S. naval vessels have never conducted the type of commercial voyage as was undertaken by the *Mercedes* in 1804. The United States Navy has never engaged its vessels in exclusively or even primarily commercial ventures **advertising** its services to carry goods and passengers. If it had, those vessels would not be sovereign immune “warships on exclusively non commercial missions.” (*See* Doc.259:9-11.) Whether Spain is intentionally obfuscating the

facts or is simply remiss in its research is unclear, but what is clear is that the district court's blanket acceptance of incorrect facts as presented by Spain without an evidentiary hearing must be overturned by this Court especially because that acceptance resulted in the erroneous dismissal of the entire case.

STANDARD OF REVIEW

Spain seemingly agrees with Odyssey (Odyssey Br.13-15, 24) that this Court owes no deference to the factual findings of the district court. Moreover, the jurisdictional factual findings, issued in an FRCP 12(b)(1) ruling, were clearly intertwined with the merits of Odyssey's claim. However viewed, Odyssey's substantive claims are intertwined with the jurisdictional analysis under the FSIA so as to prevent dismissal absent a trial on the merits.

Spain asserts that there is no legal "intertwinedness" because the jurisdictional facts are not related to the "claim" in the case. This is wrong.⁵ Odyssey's Complaint in this case is an *in rem* admiralty arrest (brought to enforce a maritime salvage lien on recovered property) seeking adjudication of ownership rights to cargo recovered from the sea bed in the Atlantic Ocean. It is a claim over which the U.S. federal courts have undisputed jurisdiction under the United States Constitution. *See* U.S. Const., art. III, § 2, cl. 1. Ownership of the *res* is **exactly** the same issue which the court must determine in ruling on the jurisdictional

⁵ Spain mistakenly argues that the "intertwinedness" rule should not apply because the FSIA does not provide the basis for Odyssey's claim. The basis for Odyssey's claim is the general maritime law of the United States. The U.S. Supreme Court's jurisdiction over such admiralty and maritime claims under the U.S. Constitution was extended to the Districts Courts, *see* 28 U.S.C. § 1333. Spain fails to appreciate that the FSIA is merely a defense to the court's exercise of jurisdiction.

motion to dismiss. The district court in this case did not merely weigh the evidence to make jurisdictional findings of fact. The court actually accepted jurisdiction of the case to make a determination that Spain's claim, and Spain's claim alone, was the only claim of ownership that had any merit.⁶

ARGUMENT

I. Regardless of the appropriate standard of review, findings of “facts” by the district court were clearly erroneous.

Although there is a dispute in the case as to which standard of review should apply – Rule 12(b)(1) or Rule 56 – Spain correctly states that the district court declared (without an evidentiary hearing) that dismissal of the entire case was warranted based upon the Rule 56 summary judgment standard (there were no disputed genuine issues of material fact). This ruling, however, was erroneous. That the district court found the record to be “encyclopedic,” yet “one-sided,” reveals only that, rather than carefully evaluate the evidence point by point, the

⁶ In arguing that the district court could weigh jurisdictional facts which are intertwined with the merits of the case, Spain cites *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 172-73 (5th Cir. 1994), but neither the Eleventh Circuit nor any district court in this Circuit has applied the unprecedented *Moran* exception to FSIA jurisdictional challenges, and *Moran* is clearly distinguishable from this *in rem* case. There is no foreign sovereign defendant in this case, nor is a foreign sovereign the undisputed owner of property before the Court. Spain is but one claimant of many in this case. The question of Spain's rights, if any, necessarily involves a resolution of disputed facts as to its rights versus those of every other claimant.

district court chose to accept one party's interpretation of the facts over those of all other parties.

The district court made such clear and fundamental errors as actually misidentifying the parties in the case. The court referred to the descendant claimants as descendants of those aboard the *Mercedes*. The misidentification could not be more relevant to the jurisdictional dispute – the descendants, in fact, are **not** descendants whose ancestors were aboard the *Mercedes*, but rather descendants of the private property owners who placed their goods (the property which may be the *res* in this case) aboard the *Mercedes* for commercial transport. Their identification in this case is central to their claims of ownership, yet the district court missed that entirely. Furthermore, the district court accepted as true such false statements (presented with no supporting evidence, and actually reiterated by Spain on appeal) that the *Mercedes* remains on the current Spanish naval roster. This finding was pivotal to the district court's dismissal, but it is wrong. (Doc.260:7.)

The court's acceptance of one party's expert opinions over another's, absent an evidentiary hearing, is also erroneous. As noted, many of the opinions accepted by the district court as well as many facts accepted as true were demonstrated to be false.

II. Spain's attempt to distinguish this case from *Aqua Log* fails.

Buried on page 78 of Spain's Brief is its passing argument that this Court's ruling in *Aqua Log, Inc v. Georgia*, 594 F.3d 1330 (11th Cir. 2010), is not relevant to the case at hand. Spain argues that *Aqua Log* is an Eleventh Amendment case, not an FSIA case, and because the FSIA does not specifically require possession, *Aqua Log* is distinguishable. Spain, however, fails to note that the Eleventh Amendment, like the FSIA, does not include a specific requirement of possession. As this Court held, that requirement is implied as there is no basis for sovereign immunity in an *in rem* action if the sovereign's possession has not been disturbed, and this Court was very clear that **actual** possession by the sovereign is required. Moreover, this Court's analysis considered case law regarding the possession requirement for **all** sovereign governments, not just states like Georgia. Indeed, this Court relied upon the pre-FSIA common law of foreign sovereign immunity to establish an actual possession doctrine. *See* 594 F.3d at 1335 & n.8 (citing *Compania Espanola De Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68 (1938); and *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945), as well as numerous courts of appeals' decisions).

In this case, as in *Aqua Log*, the sovereign alleging ownership has neither been ousted of its possession nor named as a Defendant in a lawsuit. Rather, Spain voluntarily filed its claim to property recovered by Odyssey and brought within the

court's jurisdiction. Spain, like the other claimants, must prove its ownership interest in the property arrested.

Spain also implies that because Spain may have had possession of the property over 200 years ago, that would somehow fulfill the possession requirement. This argument clearly fails. The possession requirement enunciated by this Court in *Aqua Log* is possession at the time of the arrest. *See* 594 F.3d at 1334-35. As the Supreme Court explained in *The Davis*, 77 U.S. 15 (1869), cited by this Court, “an in rem action may be maintained against government property when the suit does not require that the property shall be taken out of the possession of the [government].” 77 U.S. at 21. (*The Davis*, like this case, was not an Eleventh Amendment case; the “sovereign” in that case was the United States.)

Affirming dismissal of this case where Spain did not have possession of the *res* would be a declaration that the FSIA gives greater rights to foreign states than the Eleventh Amendment of the Constitution gives to states within the United States. Such a finding is unreasonable and unsupported by history or law.

III. The FSIA is no impediment to Odyssey's *in rem* admiralty action.

Spain's argument notwithstanding (Spain Br.65-77), Odyssey's *in rem* admiralty action is not barred by the Foreign Sovereign Immunities Act (FSIA). Odyssey's action is consistent with the text of the FSIA, with the pre-FSIA

common law of foreign sovereign immunity (which incorporates the actual possession doctrine),⁷ and with the legislative history of the FSIA.

A. *FSIA Section 1609 Is Inapplicable.*

The *res* in this case is not the property of Spain.⁸ Spain's argument as to ownership of the property rests on two theories, both unsupported by factual evidence or legal basis. First, Spain argues that because the *res* came from the *Mercedes*, it must be considered legally as the *Mercedes*, itself, and thus, it belongs to Spain. Odyssey has addressed this issue in its initial Brief. It is clear that a vessel and its cargo may be separated legally for determination of ownership rights to each (Odyssey Br.43-46), and certainly where no vessel exists. Spain's

⁷ See, e.g., *Samantar v. Yousuf*, 130 S. Ct. 2278, 2284 (2010) (“The doctrine of foreign sovereign immunity developed as a matter of common law long before the FSIA was enacted in 1976.”); *Guevara v. Peru*, 468 F.3d 1289, 1295-96 (11th Cir. 2006).

Spain's reliance (Spain Br.47-48), on *The SCHOONER EXCHANGE v. McFadden*, 11 U.S. (7 Cranch) 116 (1812), for “blanket immunity” for all foreign warships is misplaced. Even that case acknowledges a difference between a foreign sovereign acting in a private capacity (as in the carrying of cargo for freight) and a military capacity. See *id.* at 145; see also *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711-13 (1976) (“the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)”).

⁸ Spain continues to assert that the *res* in this case is a vessel, but concedes that the Amended Verified Complaint caption states, “. . . vessel, **if any**,” (Spain.Br.8) an indication that no vessel was found. Spain also misquotes Odyssey's expert as acknowledging that the site is “a vessel that has broken up at the surface” (Spain Br.32.) The expert's actual statement, however, was “the **scattering** that I observed is **consistent with** a vessel that has broken up at the surface” spilling out cargo onto the seabed. (Doc.138-27:11.) (emphasis added.)

unsubstantiated, inflammatory allegation that Odyssey “stripped” a vessel to recover the cargo does nothing for its cause. There was no vessel and no “stripping.” The truth is that prior to this case, no court had ever used the FSIA as a basis to dismiss an admiralty claim for salvage against cargo recovered from international waters. There has been no evidence presented, and no novel legal theory advanced, which would give this Court reason to be the first.

Spain’s second theory of ownership is based upon an allegation which was not pled in Spain’s Verified Claim, but actually advanced quite late in the pleadings when the claimants underscored that nowhere had Spain alleged any actual basis for ownership of the recovered cargo. (Doc.163:9.) Spain claims that after loss of the *Mercedes*, “claimants who had shown entitlement to indemnification for losses were paid in the form of interest-bearing Public Debt of Spain.” (Spain Br.27.) This allegation is unsubstantiated and misleading. Other than Spain’s “expert’s” declaration, no evidence was presented that these “Public Debts of Spain” were ever issued. Furthermore, these “Public Debts” would have been nothing more than IOUs, or mere promises to pay. There is no evidence at all to suggest that any of the actual property owners were compensated for their losses or that they assigned their legal rights to their property to Spain. In any event, the district court declined to base Spain’s rights to the *res* on this theory. Spain’s

position that it offered private owners IOUs for their lost cargoes only makes the case that the property did not, in fact, belong to Spain.

Regardless of the fact that the property has not been proven to belong to Spain, the district court, in framing its decision, considered FSIA section 1609 to be decisive for this case, and not the FSIA provision concerning jurisdiction over maritime claims (section 1605(b)).⁹ *See* Doc.209:26-28; 270:31-33. FSIA section 1609 provides that “property in the United States *of a foreign sovereign* shall be immune from attachment arrest and execution” 28 U.S.C. § 1609 (emphasis added). This provision must be read coordinately with the following FSIA section which provides that “property in the United States of a foreign state . . . shall not be immune from *attachment in aid of execution, or from execution, upon a judgment* entered by a court of the United States.” *Id.* § 1610(a) (emphasis added).

⁹ Insofar as the district court relied on the Fifth Circuit’s decision in *Mangattu v. M/V IBN HAYYAN*, 35 F.3d 205 (5th Cir. 1994), *see* Doc.270:32, that decision is inapposite since at issue there was an attachment of a foreign vessel under Supplemental Admiralty Rule B, in which the possession of the foreign sovereign was ousted by the plaintiff. *See* 35 F.3d at 207, 209-10. Here, Odyssey sought relief under Supplemental Rules C (arrest), Doc.1:7(¶20) (salvage count), and D (petitory actions), Doc.1:6(¶16) (finds count).

Spain relies on *China Nat’l Chem. Imp. & Exp. Corp. v. M/V LAGO HUALAIHUE*, 504 F. Supp. 684 (D. Md. 1981) (Spain Br.75). A careful reading of this case indicates, however, that FSIA section 1605(b) prevails in application over section 1609. *See id.* at 689 (“But the concern of Congress has not been as narrow as [the foreign sovereign] defendants’ argument suggests. The provisions of the FSIA, particularly §§ 1605(b) and 1603(d), and the legislative history of the Act, show a broader interest.”).

Odyssey's *in rem* admiralty arrest was intended to enforce a maritime lien against property as referenced in § 1605(b), not to “attachment in aid of execution” of an existing judgment.

B. *Under FSIA Section 1605(b), Spain Has No Immunity In This Case.*

As previously briefed, Odyssey's *in rem* admiralty action is specifically permitted by FSIA section 1605(b) (Odyssey Br.29-34, 49-54).¹⁰ FSIA section 1605(b) provides: “A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state.” 28 U.S.C. § 1605(b). In response to the clear text of the FSIA section 1605(b) and its legislative history, Spain launches a fusillade of spurious – and unavailing – arguments. (Spain Br.66-77.) Spain ignores that Congress significantly amended §1605(b) & (c) to its current form in 1988. These changes, taken together, reinstated the traditional *in rem* admiralty process to enforce maritime liens, absent actual possession by a foreign sovereign. The limitation to an *in personam* remedy present in the earlier version of the statute and espoused by Spain was removed in the amendment. *See J. Aron & Co. v. M/V Tuzla*, 1994 U.S. Dist. LEXIS 6589, at 7-8 (E.D. La., 1994).

¹⁰ Dismissal of the *in personam* claims is irrelevant to this appeal.

1. *Nexus*. Despite Spain’s lengthy assertion (Spain Br.68-70), there is no nexus requirement under FSIA section 1605(b) as in FSIA section 1605(a)(2) that a commercial activity be “carried on in the United States” or “causes a direct effect in the United States.” 28 U.S.C. § 1605(a)(2). This is consistent with the rest of the FSIA’s admiralty provisions which allow an action to enforce a maritime lien against the vessel or cargo of a foreign state.

2. *Retroactivity*. Spain argues that FSIA section 1605(b) cannot be retroactively applied (Spain Br.67-68, 77). It relies on this Court’s decision in *Jackson v. People’s Republic of China*, 794 F.2d 1490, 1497-98 (11th Cir. 1986). Regrettably, Spain has failed to advise this Court of supervening U.S. Supreme Court precedent. In *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), the Supreme Court held that the FSIA applied retroactively. *See id.* at 697-98 (“Immunity ‘claims’ – not actions protected by immunity, but assertions of immunity to suits arising from those actions – are the relevant conduct regulated by the Act; those claims are ‘henceforth’ to be decided by the courts. As the District Court observed, this language suggests Congress intended courts to resolve all such claims ‘in conformity with the principles set forth’ in the Act, regardless of when the underlying conduct occurred.”).

3. *Notice*. Spain asserts that Odyssey has failed to satisfy the notice requisites of FSIA section 1605(b)(1) (Spain Br.73-74). As Odyssey has

previously briefed (Odyssey Br.49-52), because the *res* was not in the actual possession of Spain and thus there was no “person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted” to “deliver[] . . . a copy of the summons and of the complaint to,” 28 U.S.C. 1605(b)(1), the FSIA allows an *in rem* action to proceed. In any event, Spain had actual notice of the proceeding. A copy of the *in rem* complaint was served on Spain. (Doc.69.)

4. “*Based Upon.*” Spain argues (Spain Br.75-76) that Odyssey has failed to demonstrate that its “maritime lien . . . is *based upon* a commercial activity of the foreign state.” 28 U.S.C. 1605(b) (emphasis added). Section 1605(b) requires that the underlying admiralty lien arises from a commercial, as compared to a non-commercial and therefore immune, activity of a foreign state. *See China National*, 504 F. Supp. at 689 (“Congress did not intend to limit § 1605(b) to cases where there is a commercial relationship between the injured party and the foreign state; rather, . . . Congress intended to allow plaintiffs . . . to bring an action under § 1605(b) where the alleged maritime tort lien arises out of a commercial activity of a foreign state.”). Odyssey has demonstrated clear commercial activity, and Spain has not denied that the vast majority of the cargo carried on board the *Mercedes* was privately owned and being carried as freight for

pay. (See Spain Br.18 conceding that the property on the *Mercedes* was “specie and other articles of Spanish citizens.”)¹¹

5. *Applicability to Warships.* Most of Spain’s rhetoric regarding the “absolute independence” of military ships (Spain Br.48) is uncontested by Odyssey. It serves as a distraction from the clear exclusive commercial nature of the *Mercedes* and the fact that no vessel was found or disturbed in this case.¹²

Spain cites to the Fourth Circuit *Sea Hunt* case (*Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634 (4th Cir. 2000)) to support its assertion that Spanish naval vessels are “sovereign.” Odyssey has thoroughly

¹¹ The Eleventh Circuit recently examined sovereign immunity where there was a relevant treaty predating the FSIA and found that neither the statute nor the treaty provided immunity where there was commercial activity of the sovereign. (*World Holdings, LLC v. Fed. Republic of Germany*, 2010 U.S. App. LEXIS 16441 (11th Cir. 2010).)

¹² Similarly, the Amicus Brief submitted by the United States Department of Justice takes no position on the district court's resolution of factual issues. Instead, it supports Spain's interpretation of relevant international agreements “If the subject of Odyssey's lawsuit is a Spanish warship.” The United States relies on treaties pre-dating the SMCA, but the SMCA is “last-in-time” and clearly governs the status of foreign warships. See *Breard v. Greene*, 523 U.S. 371, 376 (1998). The subject of this case is not a Spanish warship, even if the coins recovered came from the *Mercedes*, that vessel is not a “warship” as defined by U.S. or international law for the purposes of sovereign immunity. The United States ignores its past practice which has eschewed a formalistic definition of a warship, and focused on the vessel's actual function and activities at the time of the applicable incident. See Commander's Handbook, section 2.1.1, available at <http://www.usnwc.edu>. Furthermore, the SMCA requires that for a warship to be cloaked with immunity, it must have been “on military noncommercial service when it sank.” SMCA, section 1408(3)(A).

distinguished the *Sea Hunt* case (Doc.138:30-31), but it bears repeating that *Sea Hunt* was not an FSIA case, and the district court in *Sea Hunt* **accepted** jurisdiction in order to properly consider the factual and legal issues presented. To the extent *Sea Hunt* applies at all to the issue before this Court, it applies most notably to demonstrate that the district court does have jurisdiction.¹³

Spain asserts that there is “no case in which a warship . . . has been denied immunity by a U.S. court.” Spain Br.60 n.18. But under the Public Vessels Act, 46 U.S.C. §§ 31101 *et seq.*, the United States’ public vessels are subject to claims “for compensation for towage and salvage services” *Id.* § 31102(a)(2), and U.S. courts have consistently allowed claims against United States public vessels for salvage services provided by private salvors. *See Stevens Technical Servs. v. United States*, 913 F.2d 1521, 1526 (11th Cir. 1999); *Nicholas E. Vernicos Shipping Co. v. United States*, 349 F.2d 465, 469-70 (2d Cir. 1965); *Rippon v. United States*, 348 F.2d 627, 628-29 (2d Cir. 1965).

As for foreign “public armed ships,” a number of U.S. cases have indicated that immunity would be denied if it were found that the vessel was engaged in non-military activities. *See, e.g., Consol. Edison Co. of N.Y., Inc. v. The Aircraft Carrier FOCH*, 1979 U.S. Dist. Lexis 15274, at 8 (S.D.N.Y. 1979) (“This circuit has included among the acts entitled to such immunity those concerning the armed

¹³ The U.S. Amicus Brief declines to cite the *Sea Hunt* case at all.

forces. The carrier Foch was in this country on a public mission; *no commercial transaction was involved*. Hence, under the facts of this case, this court is without jurisdiction over the Republic of France”) (citations omitted) (emphasis added). Moreover, no less an authority than the U.S. Supreme Court has ruled that even if a foreign warship might be entitled to immunity, such may not extend to private cargo on-board. *The SANTISSIMA TRINIDAD*, 20 U.S. (7 Wheat.) 283, 354 (1822) (“whatever may be the exemption of the public ship herself, and of her armament and munitions of war, the prize property which she brings into our ports is liable to the jurisdiction of our Courts”).

6. *Refusal of Salvage*. Finally, Spain argues that Odyssey has no salvage lien here since Spain has refused salvage services. (Spain Br.76-77.) Aside from the fact that this is a substantive defense to a salvage claim and has no place in Spain’s motion to dismiss for lack of subject matter jurisdiction, Spain’s assertion is meritless.

The burden is on Spain to show that it has effectively and properly refused salvage. The law presumes that an owner of property lost at sea desires to have its property rescued. *See R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 963 (4th Cir. 1999) (salvage law “presumes that the owner desires the salvage service.”). This principle has been accepted by this Circuit. *See International Aircraft Recovery, L.L.C. v. Unidentified, Wrecked and Abandoned Aircraft*, 218 F.3d 1255, 1261

(11th Cir. 2000) (“*IAR*”). Furthermore, an owner of a vessel cannot purport to refuse salvage for the cargo interests. *See IAR*, 218 F.3d at 1262; *Ramsey v. The POHATCONG*, 77 F. 996, 997 (S.D.N.Y. 1896). The descendant claimants in this case have acknowledged Odyssey’s right to salvage. (Doc.164, 168, 169, 176.)

IV. The FSIA does not do away with Odyssey’s right to due process.

Spain actually argues that Odyssey and the other claimants in this case are not entitled to due process. Spain states, “Odyssey cites no pertinent authority in the FSIA or in case law that there is any such right on a Rule 12(b)(1) motion because there is none.” (Spain Br.44.)

The United States Constitution provides that, “No person shall be . . . deprived of life, liberty, or property, without due process of law.” U.S. Const., amend. V. The Supreme Court has held where property interests are at stake due process of law includes the right to confront witnesses. “In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses,” *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (citing cases).

To take property which Odyssey recovered from the deep ocean and to dismiss the claims of Peru and all other claimants to that property without affording the parties an opportunity to cross examine Spain’s “experts” in open court, is a violation of due process. Had Odyssey the opportunity to present

evidence at trial, it could have directed the court's attention to the inaccuracies in Spain's allegations, most importantly regarding the Black Swan site and the commercial nature of the *Mercedes'* mission. It could have called as a witness Captain J. Ashley Roach, JAGC, USN (retired), the primary drafter of the Sunken Military Craft Act who would have testified that the Act (under which the parties agree the FSIA must be construed) was **not** intended to grant sovereign immunity to naval ships engaged in commercial activity and on commercial voyages.¹⁴ (Doc.248.)

Enlarged photographs of the site showing **no vessel** and the **manifest** of the *Mercedes* actually naming the property owners would have exposed Spain's "experts" and caused the court below to rule differently. Odyssey's live testimony and animate presentation of evidence would have supported only one conclusion – that the *res* in this case is not subject to sovereign immunity. In any event, the record presented on appeal would have been complete, with all parties having had the opportunity to confront the witnesses against them. That opportunity was not granted below.

Spain cites two cases in support of its argument that the district court was free to dismiss the case without an evidentiary hearing. One of those had nothing

¹⁴ The district court refused to accept Captain Roach's written affidavit (Doc.252).

at all to do with jurisdiction (*Acree v. County Bd. of Educ.*, 533 F.2d 131, 132 (5th Cir. 1976)), and actually did **not** hold that the court had broad discretion to determine whether to conduct a hearing, but rather discretion as to the “scope and timing” of a hearing. In the other, the lack of jurisdiction was determined based upon a lack of service and a lack of diversity (*Washington v. Norton Mfg., Inc.*, 588 F.2d 441, 443 (5th Cir. 1979)), not where disputed factual evidence existed as to the very question of jurisdiction, as in this case.

Yet another example of Spain’s inaccurate conclusions and case references is found on page 75 of its Brief. Spain cites *Reiss v. Societe Centrael du Groupe des Assurances Nationales*, 235 F.3d 738, 747 (2d Cir. 2000), regarding salvage claims, but that case has nothing at all to do with a salvage claim, and in fact the case supports Odyssey’s position that the district court erred in its failure to conduct an evidentiary hearing. The Second Circuit in *Reiss* specifically addressed the need for an evidentiary hearing in an FSIA case when the jurisdictional facts were disputed, noting that “it [is] essential for the district court to afford the parties the opportunity to present evidentiary material at a hearing on the question of FSIA jurisdiction.” *Id.* at 748.

The district court’s failure in this case to conduct an evidentiary hearing where the jurisdictional issues were disputed was clear error and must result in reversal of the dismissal of this case.

V. If the district court does not have jurisdiction over the property, it does not have authority to transfer the property to Spain.

Odyssey brought the *res* into the court for adjudication of claims. The district court erred in ordering Odyssey to “return it to Spain’s custody.” (Doc.270:4-6.) As noted, the arrested property was not in Spain’s custody at the time this case was brought, therefore it cannot be properly and legally “returned” to Spain. To refute this position, Spain cites Supplemental Rule E(5)(c) regarding the release of a vessel in the custody of the U.S. Marshal. Spain again refuses to acknowledge that no vessel has been arrested in this case – only property which was not in the possession of Spain. The case cited by Spain in support of its argument (*United States v. \$270,000.00 in United States Currency*, 1 F.3d 1146 (11th Cir. 1993)) actually supports Odyssey’s position. (Spain Br.107.) The court in that case, upon a finding of no federal jurisdiction, declined to order disposition of the *res* (money seized without probable cause). Instead, it returned the *res* to exactly the same place it was prior to the federal suit – with the state court – noting that the state court, because it **did** have jurisdiction, could enter an order directing disposition of the *res*.

In a case even more on point, *R.M.S Titanic, Inc. v. The Wrecked and Abandoned Vessel*, 435 F.3d 521, 528-530 (4th Cir. 2006), the Fourth Circuit declared that absent *in rem* jurisdiction there was no jurisdictional basis upon

which it could enter a declaratory judgment as to ownership of artifacts recovered from a shipwreck. Absent jurisdiction, the district court in this case may not properly order disposition of the *res*. Transfer of the property by the district court to Spain (not “return” or “release” as Spain did not have possession) is a decision based upon the merits of the claims. It is something the court is powerless to do absent jurisdiction over the property.

VI. As for Comity . . .

Spain argues that the interest of international comity should prevail, and that the rights and laws of Spain should be respected by this Court. Spain, however, has no ownership claim to the *res* under its own laws. (*See* Doc.138-89.) Under Spanish law, when a vessel and/or property “ceases to exist,” by sinking or other loss, the rights to that vessel and property also cease to exist. (Doc.138-89 ¶10, at 10-11.) In the interest of comity, this Court is certainly free to consider the law of the country seeking relief. (*See Stuart v. United States*, 813 F.2d 243, 251 (9th Cir. 1987), *rev’d* on other grounds, 489 U.S. 353 (1989); Fed. Rule Civ. P. 44.1.) Under Spanish law, Spain would be entitled to nothing in this case.

Respectfully submitted,

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Submitted: August 18, 2010

FRAP 32(A)(7) CERTIFICATE OF COMPLIANCE

The applicable portions of this brief are proportionately spaced, has a typeface of 14 points or more, and contains 6,878 words, and were otherwise prepared in compliance with 11th Cir. R. 32-4.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 18, 2010, a true and correct copy of this document has been served by U.S. Mail to those on the attached Service List.

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