

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

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**Odyssey Marine Exploration, Inc.**  
*Plaintiff-Appellant*

v.

**The Kingdom of Spain**  
*Defendant-Appellee.*

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

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**BRIEF AMICUS CURIAE OF  
THE HISTORIC SHIPWRECK SALVORS POLICY COUNCIL,  
THE INSTITUTE OF MARINE ARCHAEOLOGICAL CONSERVATION,  
AND FATHOM EXPLORATION, LLC.**

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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.

**CERTIFICATE OF INTERESTED PERSONS AND  
CORPORATE DISCLOSURE STATEMENT**

The undersigned counsel of record for the *Amici*, David P. Buehler, Esq., in compliance with Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, certifies that the following listed persons and parties, in addition to those named in the caption, have an interest in the outcome of this case:

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Odyssey Marine Exploration, Inc. – Stock Symbol **OMEX**

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## STATEMENT OF INTEREST OF *AMICI CURIAE*

*Amici curiae* are professional companies and/or organizations engaged in the exploration and recovery of shipwrecks and their cargoes. The District Court's unprecedented decision awarding cargo found and recovered in international waters to Spain represents a dramatic departure from the time honored precepts governing historic shipwreck salvage.

*Amici* seek leave to submit this brief as they have a vested interest in the protection of the traditional – indeed, ancient – freedom of the seas to search for and rescue distressed property from marine peril. Moreover, *amici* seek to protect the law of finds and salvage itself: the venerable balance between legitimate ownership rights and the incentive pledged the salvor who risks his time, capital, labor – and often, his very life – in the discovery and recovery of underwater antiquities. Modern American admiralty jurisprudence has – in no small measure due to the contributions of the undersigned *amici* – incorporated a duty of archaeological care: an additional incentive ensuring that the finders and salvors of historic shipwrecks make a record of what is found and use appropriate methods to preserve and document the artifacts recovered.

If three thousand years of admiralty law governing the rights and concomitant obligations of salvors to protect and preserve wreck sites is foisted to

the breeze, gone with the wind will be any incentive for future finders and salvors to adhere to archeological protocols. Perversely enough, should the punitive recourse proposed by the District Court be affirmed on appeal, an historic shipwreck finder's incentive will no longer be that of archaeological diligence, but rather a quick pillage and escape.

Far from simply seeking to protect the emerging industry of historic shipwreck salvage from chronic and pervasive governmental efforts to assert title to all undiscovered property awaiting discovery on the seafloor, *amici* point to the inherent dangers posed to the preservation and conservation of salvaged artifacts if the District Court's ruling below is allowed to stand. If the rationale of the District Court is adopted, there will be no incentive for legitimate and preservation-minded salvage operations, and the effect will be to encourage those with a plunder and run mentality.

The Historic Shipwreck Salvors Policy Council, "HSSPC", was established in the 1990's in response to the effort by the federal government to establish the Florida Keys National Marine Sanctuary, then the largest such marine sanctuary ever envisioned. Sweeping restrictions and prohibitions of long-standing salvage traditions and practices were proposed across the very waters which fueled the development and refinement of this nation's law of wreck and salvage during the

early 1800's. And during the modern era, these shipwreck-laden waters would yield magnificent treasures and historical artifacts from ancient wrecks, including at least two fleets of Spanish treasure galleons.

The epic search for, and the ultimate discovery in the 1980's of the 1622 galleons *ATOCHA* and *SANTA MARGARITA* would usher in a new era of admiralty litigation, constituting the wellspring of today's historic shipwreck salvage law. Adopting the venerable principles of salvage law – a legal tradition stretching unbroken since the ancient Rhodian Sea Codes dating back to 1,000 BC – to the archaeological recovery of historic shipwrecks and their cargoes has proven to be the most effective and efficient means of ensuring that the cultural, historical, and archeological value of these submerged time capsules is recorded and preserved while the artifacts recovered therefrom are properly conserved and studied.

And yet as the tally of marvelous discoveries by privately-funded salvors grew, so too arose increasing bureaucratic intransigence and outright hostility as the revenue seeking agents of the state, federal – and now, even foreign – sovereigns eagerly sought to wrest from their finders the magnificent treasures and artifacts they had rescued from marine peril. HSSPC was created to provide a collective voice to the salvage community which had – at enormous cost and

substantial bodily risk – returned these historic artifacts and treasures to the stream of commerce.

HSSPC's members include many of the plaintiff salvors in the most important and influential historic shipwreck salvage cases ever decided. Among its membership are employees, associates and alumnus of Mel Fisher's renowned Treasure Salvors, Inc., the company which single-handedly searched for, located and salvaged the lost *and abandoned* 1622 Spanish galleons *ATOCHA* and *SANTA MARGARITA* – thereby finding the richest treasure ever recovered from the ocean while winning a truly epic legal battle over its ownership. The Treasure Salvors litigation established the bedrock of modern American admiralty law governing historic shipwreck salvage while demonstrating the inherent adaptability of the venerable principles of salvage law to the recovery of shipwrecks of archaeological significance.

HSSPC members were also party to the Cobb Coin litigation in which federal admiralty law was found to supercede conflicting Florida law which purported to regulate the recovery of the archaeological treasures of the 1715 Spanish Plate Fleet, abandoned along Florida's Atlantic "Treasure Coast". Thus, HSSPC and its members have been at the forefront of advocacy on behalf of

historic shipwreck finders and salvors battling proposed restrictions and outright expropriation of their livelihood at the state, federal and international levels.

The Institute of Marine Archaeological Conservation, or IMAC, publishes the online IMAC Digest, a leading clearinghouse and archive of information, discussion and news concerning undersea exploration and the search for and recovery of historic shipwrecks. IMAC Digest was conceived as an informational news forum for the responsible recovery of historic shipwrecks based on sound archaeological principles. It covers a variety of subjects involving the political, legal and ethical issues engendered by the recovery and conservation, and the allocation, of marine cultural resources.

IMAC's objectives range from the protection of the incentive-based legal regimen that is the maritime law of salvage and finds to the promulgation of operational standards governing shipwreck site recordation, artifact conservation, as well as standards and guidelines for the publication, exhibition and dissemination of the artifacts found and information gleaned through historic shipwreck recovery operations.

*Amici* Fathom Exploration, LLC, has been granted exclusive search and recovery permits by the state of Alabama, while seeking out valuable and/or historically significant vessels and their cargoes believed lost in the coastal waters

of that state. Fathom has further placed its locus of operations under federal admiralty arrest, an action to which the State of Alabama is an Intervenor while remaining closely aligned with the legal posture taken by its permittee.

Fathom sees the dangerous precedent of non-abandonment – and the attendant abrogation of Odyssey’s right to seek any salvage award whatsoever – as presenting a clear and present danger to not only its own substantial investments of time and money into archival research, electronic search operations, and actual recovery operations – but also to the entire emerging industry of historic shipwreck salvage.

Thus, the *amici* who are parties to this brief each have a long history of hands-on involvement in historic shipwreck search and recovery operations as well as extensive experience as litigants in admiralty litigation such as the appeal at issue herein. Their collective expertise can and should prove invaluable to this Honorable Court as it wrestles with the knotty factual and legal questions raised by virtue of Odyssey’s remarkable discovery and salvage of a treasure trove of silver from the abyssal depths of international waters.

## **I. SPAIN CANNOT INTERFERE IN THE SALVAGE OF VESSELS OR PROPERTY NOT IN ITS ACTUAL POSSESSION**

Years of litigation between finders and (primarily state) governments over the power of the sovereign to enjoin the salvage of shipwrecks to which it asserted a "colorable" claim of title eventually found its way to the United States in California v. Deep Sea Research, Inc., 118 S. Ct. 1464 (1998) ("DSR"). An unanimous Supreme Court swept away a decade of confusing precedent in establishing a bright-line rule: where the property was *not in the actual possession* of the sovereign, that sovereign – be it a U.S. state, the federal government or U.S. Navy, or even a foreign nation like Spain – cannot interfere with the salvor's *in rem* salvage action. DSR, *Id.* at 1468.

This Court has twice since construed the application of DSR; in each, the sovereign claimant was enjoined from interfering with the salvor's possession of the recovered property. The Eleventh Circuit ordered the State of Florida to release to the plaintiff salvor a derelict vessel wrongfully seized by its Marine Police on suspicion of drug smuggling. Finding that Florida did not have lawful possession of the vessel, the Court of Appeals noted that pursuant to DSR, the Eleventh Amendment did not bar the salvor's admiralty action. Sea Services of the Florida Keys, Inc. v. State of Florida, 156 F.3d 1151, 1153 (11th Cir. 1998).

Earlier this year, this Court ruled that in the absence of *actual* possession of the property at issue in a salvage action, the State of Georgia was powerless to assert sovereign immunity in order to deprive the United States District Court of admiralty jurisdiction over sunken logs raised from Georgia riverbeds. Aqua Logs, Inc. v. Georgia, 594 F.3d 1330 (11<sup>th</sup> Cir. 2010).

Concluding that it was bound to follow the unanimous decision of the United States Supreme Court in Deep Sea Research, *supra.*, this Court dived deeper into the venerable history of admiralty law, finding Deep Sea Research consistent with hundreds of years of maritime precedent. Aqua Logs, *supra.* at 1335. Yet Georgia's claim to the sunken logs was considerably stronger than the claim of Spain to the cargo involved in the instant case. The logs under admiralty arrest were recovered from Georgia's submerged lands: arguably in the constructive possession of that State at the time of their discovery and salvage. Spain, on the other hand, asserts ownership of: 1) privately-owned cargo; 2) reportedly lost from a destroyed Spanish naval vessel engaged in merchant shipping; and, 3) sunk at some unknown location in international waters. None of the private property under admiralty arrest had ever been in the constructive possession of Spain – much less the requisite *actual* possession threshold.

Deep Sea Research and Aqua Logs have decided the key issue herein: Spain is not entitled to assert sovereign immunity over property under admiralty arrest unless such property had been taken from its *actual* possession. The Foreign Sovereign Immunities Act never even enters the analysis; that statute is designed to protect government property from legal attachment. It was never designed to shield a nation so that it can expropriate private property rescued by salvors from marine peril on the high seas.

## **II. THE SUNKEN MILITARY CRAFT ACT DOES NOT APPLY TO THE MERCEDES**

The Opening Briefs make much of the effect of the Sunken Military Craft Act (SMCA), 10 U.S.C.A. Section 113 (2004) on the entitlement of the Kingdom of Spain to assert sovereign ownership over the vessel asserted to be the MERCEDES. The Kingdom of Spain and the United States contend that a “warship,” as defined by the SMCA, while actually engaged in commercial activities, is still entitled to sovereign immunity and protection under the SMCA. In fact, this statute, which was attached as a rider to the 2005 Military Appropriations Act, in the rush to provide emergency funding for the war in Iraq, was not intended, and should not be interpreted, to provide sovereign immunity and protection to the Kingdom of Spain in the context of an abandoned vessel located in international waters.

Moreover, in addition to the fact that the SCMA was enacted without the usual public scrutiny afforded by congressional hearings, debate, and committee deliberations, it was never intended to extend to the situation herein presented. The very limited legislative history of this “stealth” statute indicates that the over-riding intent was to protect “sunken United States military vessels, aircraft and spacecraft,” and only as an ancillary right, to provide reciprocal protection to the same type of foreign vessels, provided only that they are “located in U.S. waters.”

Defense Appropriation Act for Fiscal Year 2005, H.R. Rep. 108-491, 2004 U.S.C.C.A.N. at 359; H.R. Conf. Rep 108-767, 2004 U.S.C.C.A.N. at 2139.

By a clear and untortured reading of the relevant statutory definitions contained in the Act, a vessel subject to protection under the SMCA must have been “operated by a government on military noncommercial service when it sank.” SMCA, Section 1408(3)(A). Secondly, the statute makes an exception for the associated contents of a craft, the title to which has been abandoned by the government concerned. SMCA, Section 1403(3)(C). The clear and uncontroverted abandonment of the vessel by the Kingdom of Spain thus invalidates its argument under the SMCA.

Moreover, in addition to the fact that the SCMA was enacted without the usual public scrutiny provided by public and executive agency comments, congressional hearings, debate and committee deliberations, the enabling regulations contemplated by the Act have never been promulgated, subject to the requisite public comment period, and published as final regulations in the Code of Federal Regulations. In the absence of same, and so as to not pre-empt the rule promulgation process, this Court should not interpose an interpretation which may be wholly in conflict with those regulatory provisions which will ultimately be adopted.

Finally, since the factual record below is insufficiently developed, there is also a lack of evidence as to the nature of the MERCEDES' final voyage and the amount of its cargo which was privately owned and consigned. *Amici* submit that in the absence of such determinations, there cannot be a sufficient basis to argue that the military mission and cargo of the vessel predominated over any commercial service in which it was engaged, even assuming, arguendo, that the SMCA is even applicable, and that even if it is, that the Act extends to situations in which the vessel has been abandoned.

### **III. THE SUNKEN MILITARY CRAFT ACT WAS NEVER INTENDED TO ALLOW SPAIN TO EXPROPRIATE ABANDONED PROPERTY FROM SHIPWRECK SALVORS**

Beginning with the famous Treasure Salvors cases over title to the 1622 galleons *ATOCHA* and *SANTA MARGARITA*, U.S. admiralty courts have found – with the sole exceptions of Sea Hunt case and the decision on appeal herein – that these shipwrecks have long since been abandoned by Spain. The U.S. Fifth Circuit Court of Appeals has noted that the "disposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches the fiction to absurd lengths." Treasure Salvors, Inc. v. Unidentified, etc. Vessel, 569 F.2d 330, 337 (5th Cir. 1978); *See also*, Treasure Salvors v. Jordan, 556 F.Supp. 1319, 1325 (S.D. Fla. 1983) [*SANTA MARGARITA* abandoned].

These contested cases finding abandonment of Spanish shipwrecks include: the 1554 Spanish fleet lost off Padre Island, Texas [Platoro v. Unidentified Remains, 614 F.2d 1051, 1055 (5th Cir. 1980)]; the 1690 Manila galleon *PILAR*, lost off Guam [Marx v. Government of Guam, 866 F.2d 294, 300 (9th Cir. 1988)]; a late seventeenth century shipwreck wrecked off Jupiter Inlet, Florida [Jupiter Wreck, Inc. v. Unidentified, etc. Wreck, 691 F.Supp. 1377 (S.D. Fla. 1988)]; the 1715 Plate Fleet off Florida's "Treasure Coast" [Cobb Coin Co., Inc. v. Unidentified, etc. Vessel, 525 F.Supp 186, 197 (S.D. Fla. 1981)]; the 1733 Fleet in

Florida's Middle Keys [MDM Salvage v. Unidentified, etc. Wreck, 631 F.Supp. 308, 310 (S.D. Fla. 1986)]; three eighteenth century Spanish shipwrecks abandoned in Maryland's territorial water – including *LA GALGA*. [Subaqueous Exploration & Archeology, Inc. v. Unidentified Vessel, 577 F.Supp. 597, 600 & n.2 (D.Md. 1983)]; an unidentified Spanish wreck from the 1770's discovered in Cape Canaveral National Seashore [Lathrop v. Unidentified Vessel, 817 F.Supp. 953, 965 (M.D. Fla. 1993)]; and even an unidentified Spanish wreck of unknown vintage [Lopez Soba v. Fitzgerald, 1993 AMC 120 (P.R. 1992)].

These judicial conclusions were not a surprise to Spain. Indeed, its own Ambassador to the United States, the Marquis de Morry del Val, admitted quite candidly when asked in 1965 if his nation had a claim upon the then newly-discovered 1715 Plate Fleet: he stated that Spain had lost its claim to the treasure when it abandoned all efforts at recovery; now its ownership was strictly a matter of Florida law. <http://www.imacdigest.com/spainarticle.html>.

For centuries, Spain has recognized its abandonment of long lost shipwrecks and their precious cargoes. Today, however, Spain seeks to rewrite history and assert that these sites are war graves clothed in immunity. And yet the claim of Spain is plainly vain: without *actual possession* of any site, no sovereign can assert immunity. The finder – the only party with the ability to protect the site and ensure

that its archaeological and historic attributes are properly documented – is made the key stakeholder by the admiralty court precisely for this reason: to provide an appropriate incentive to ensure that the best possible practices are employed as the artifacts are rescued from marine peril and returned to the stream of commerce. The incentive-based legal regimen which is the law of finds and salvage has endured without interruption for three millennia because it works. Spain's efforts to undo centuries of U.S. admiralty precedent must likewise founder.

Thus, the question of title to cargo recovered from deep below international waters need not turn upon the modern interpretation of archaic treaty language, determining the legal consequences of multiple wars and peaces between Spain and the United States, or even in judicial scrutiny of arcane arenas of international law. Admiralty law has always taken a common sense approach to the concept of abandonment: when the owner knows of the location of his property and has the technology reasonably at hand with which to recover it, but does not, it is considered to have been legally abandoned. In Wiggins v. 1100 Tons of Italian Marble, 186 F.Supp.452, 456 (E.D.Va.1960) [Norwegian Barque *CLYTHIA* abandoned after remaining visible but unsalvaged in Virginia surf zone]. *See also*, Sindia Expedition, Inc. v. The SINDIA, 895 F2d 116, 117 (3d Cir. 1990) [Windjammer *SINDIA* abandoned in surf zone off Ocean City, New Jersey];

Moyer v. ANDREA DORIA, 836 F.Supp. 1099 (D.N.J. 1993) [location of sunken Italian luxury liner never lost; deemed abandoned by underwriters in face of indifference to persistent and successful salvage]; Bemis v. RMS LUSITANIA, 884 F.Supp. 1042, 1049 (E.D. Va. 1995) [same].

This is precisely the scenario that the Spanish Ambassador was referring to concerning the contemporary Spaniards' abandonment of their effort to recover treasures from Florida's 1715 Plate Fleet. IMAC Digest, *supra*. There was *actual* abandonment of the shattered ship and its privately-owned cargo by the master of *MERCEDES* itself.

#### **IV. WARSHIPS CAN BE ABANDONED AS READILY AS COMMERCIAL VESSELS**

Spain and the United States have each place great emphasis upon the premise that the *MERCEDES* was a military vessel at the time of its destruction, as if such status (if in fact true) would confer upon the vessel special protection against salvage not available to commercial shipwrecks. Admiralty law has never made such a distinction: this Circuit should not reverse prior appellate precedent to create one now.

In Baltimore, Crisfield & Onancock Line, Inc. v. U.S., 140 F.2d 230, 233 (4th Cir. 1940), and subsequently in Somerset Seafood, Inc. v. U.S., 193 F.2d 631 (4th Cir. 1951), the Fourth Circuit found that no formal act was required of the United States Navy to abandon its warship, much less an Act of Congress. Both cases concerned the former U.S.S. *TEXAS*, a battleship sunk in the Chesapeake Bay whose wreckage, a hazard to navigation, later damaged the appellants' vessels. The United States avoided liability for the damage by successfully asserting that the shipwreck had been abandoned by its mere conduct and nothing more: it was not necessary for the United States to take "positive action to that end by sending itself written notice or some similar act." Baltimore, supra. at 234. *See also, State by Ervin v. Massachusetts Co.*, 95 So.2d 902 (Fla. 1956) [Navy battleship deemed abandoned by mere passage of time].

The recognition of the abandonment of naval vessels is consistent with precedent reaching back for centuries. From cases as early as Deklyn v. Davis, 1 Hopk. Ch.154, 162 (N.Y. Ch. 1824) – a dispute over the salvage rights to the 1782 British frigate HMS *HUSSAR*, lost near Manhattan's notorious "Hell Gate," U.S. courts were finding "warships" to be abandoned property open to the first salvor ready, willing and able to salvage the sunken vessel. Even in our own modern era of treasure salvage, the United States District Court in Delaware found the 1798 British Brig-of-War HMS *DEBRAAK* to have been abandoned by its sovereign owner. Sub-Sal, Inc. v. HMS DEBRAAK, C.A. No. 84-296-CMW (D.Del. 1992).

Curiously, the federal government's own attitude toward the abandonment of so-called "war graves" seems to depend upon whose territory the sunken warship is discovered. When a potentially valuable "sovereign warship" is found wrecked on federal submerged lands, the United States has consistently claimed abandonment – and hence, in one case a shipwreck was found to be the exclusive property of the National Park Service. Klein v. Unidentified, etc. Vessel, 785 F.2d 1511 (11th Cir. 1985). (Eighteenth century frigate HMS *FOWEY* found by diver in Key Biscayne National Seashore near Miami; the United States successfully argued the embedded and abandoned British warship belonged to the National Park Service.)

The United States successfully argued that an abandoned shipwreck belonged exclusively to the National Park Service in Lathrop, *supra*, involving litigation over coins and artifacts recovered from the site of a late 18th Century Spanish shipwreck found embedded in the submerged lands of Cape Canaveral National Seashore. In neither case was there any assertion by the United States that the shipwrecks were the sovereign property of the United Kingdom and/or Spain: these sunken warships were abandoned on federal submerged lands and hence, belonged exclusively to the United States.

Appellate courts have recognized the inconsistency in U.S. policy toward the abandonment of warships. In determining title to the ship's bell recovered from the heralded sea raider, the C.S.S. *ALABAMA*, the Third Circuit noted that, "[I]n recent times, the Deputy Legal Advisor of the Department of State has recognized the practice of treating warships from the 17th and 18th centuries [i.e., *LA GALGA* and *JUNO*] as abandoned by implication of the long passage of time. United States v. Steinmetz, 973 F.2d 212, 222 (3rd Cir. 1992). [citing Opinion of the Office of the Legal Advisor to the U.S. Department of State, Dec. 30, 1980: concluding that "title to [warships] sunk in the more distant past (such as the 17th and 18th centuries) would, of course, still be determined by the more conventional interpretations of abandonment *of that period*." [Emphasis supplied.]

In Steinmetz, the Third Circuit concluded that the *ALABAMA* had passed from the Confederacy to the United States by succession with the South's surrender at the end of the Civil War. Yet this conclusion – that Confederate warships are *not* abandoned, is the exception rather than the rule. For example, in Chance v. Certain Artifacts Recovered from the C.S.S. NASHVILLE, 606 F.Supp 801 (S.D. Ga. 1984), the court found that the Confederate warship *NASHVILLE* was abandoned and embedded in Georgia's submerged lands, and hence, the property of that state. *See also*, North Carolina v. Flying "W" Enterprises, 273 N.C. 399, 407-8 (1968) [several Confederate blockade runners and a Spanish privateer were abandoned and now are the property of the State].

Inconsistency in legal posture notwithstanding, hypocritically, it is the United States itself that is the most flagrant violator of the sanctity of foreign subsea graves in recent memory. Its unclean hands should preclude the United States from proclaiming the non-abandonment of warships simply because in the instant litigation, the "sovereign" shipwrecks lie in international – as opposed to U.S. – waters.

In 1974, only seven years after the sinking of a Soviet nuclear submarine, the U.S. Central Intelligence Agency outfitted a deepwater salvage vessel, *GLOMAR EXPLORER* for the express purpose of clandestine recovery of this

Russian submarine. Over the vehement protest of the U.S.S.R. – who claimed that the sunken warship remained exclusively their own sovereign property – the submarine was salvaged by the Central Intelligence Agency.

This hypocritical salvage operation featured the wrenching apart of the submarine hull with its contents of deceased Soviet sailors dumped unceremoniously into the abyssal depths of the Pacific. *See*, Collins, *The Salvage of Sunken Military Vessels*, 10 Int'l. Law. 683 (1976); Rubin, *Sunken Soviet Submarines and Central Intelligence: Law of Property and Agency*, 69 Am. J. Int'l. L. 855 (1975); Eustis, *The Glomar Explorer Incident: Implications for the Law of Salvage*, 16 Va. J. Int'l. L. 177 (1975).

Warships – whether treasure-laden Spanish frigates lost while carrying privately-owned cargo or more traditional military vessels lost in armed conflict – have never been recognized in most jurisdictions as a special class of vessels which are not subject to the ordinary rules of abandonment. This Court should resist the exhortations of Spain and the United States to change hundreds of years of admiralty precedent to do so here.

In International Aircraft Recovery, LLC v. Unidentified, etc. Aircraft, 54 F.Supp.2d 1172 (S.D.Fla. 1999), the district court found that the even if the United States Navy were still the owner (which it was not) of a rare World War II Douglas

Torpedo Bomber wrecked in international waters off Miami, it could still not refuse the salvage of an aircraft for which it had neither the means or funding to recover itself: "[N]umerous cases hold that an owner may not refuse salvage services if no other provisions for rescue has been made and marine peril exists." *Id.* at 1179. More fundamentally, however, the district court noted that in light of DSR, it could not be disputed that ". . . the issue of abandonment and ownership are secondary to the question of whether this Court can protect the Plaintiff's ongoing federal salvage rights." *Id.* at 1179. *Rev'd on other grounds*, 218 F.3d 1255 (11<sup>th</sup> Cir. 2000). There, this Court stated that "[w]e interpret the law of salvage to permit the owner of a vessel in marine peril to decline the assistance of others as long as only the owner's property interests are at stake." 218 F.3d 1255 at 1262. [This Circuit's rationale in International Aircraft, *supra*, has since been overruled by its recognition in Aqua Logs, *supra*, of the Supreme Court's standard of actual possession as a threshold finding to a sovereign's claim immunity.]

This Court found that this view is consistent with the Supreme Court's statement in Merrit & Chapman Derrick & Wrecking Co., v. United States, 274 U.S. 611, 613, 47 S. Ct. 663, 664 (1927) that "salvage cannot be exacted for assistance forced upon a ship." 218 F.3d 1255 at 1262. It follows that the

Kingdom of Spain cannot refuse the salvage of property owned by private individuals in private commerce.

There is no question that neither *MERCEDES* or any of its cargo has been in the possession of Spain for well over two centuries. Nevertheless, the District Court below ruled, in effect, that Spain had lawfully rejected Odyssey's salvage services. This is plain error. Although the District Court cited numerous authorities for the proposition that the owner may refuse an offer of salvage, ironically, in each of these cases the owner was the state or federal government in whose submerged lands an *abandoned* Spanish shipwreck had been found! See, Platoro, 695 F.2d 893, 901 (5th Cir. 1983); Lathrop, *supra.* 817 F.Supp. at 964; Klein, *supra.* ) at 1515; Jupiter Wreck, Jupiter Wreck, Inc. v. Unidentified, etc. Wreck, 691 F.Supp. 1377 (S.D. Fla. 1988) *supra.*, 691 F.Supp. 1377, 1389 (S.D. Fla. 1988).

The U.S. Fourth Circuit Court of Appeals recently noted that, [T]he law of salvage presumes that the owner desires the salvage service." RMS Titanic, Inc. v. Haver, 171 F.3d 943, 963 (4th Cir. 1999). Presumptions notwithstanding, an unanimous Supreme Court has made it clear that irrespective of Spain's desires, without *ACTUAL POSSESSION* of a wreck site, a sovereign cannot unilaterally enjoin the salvage of the property that Odyssey has discovered. DSR, *supra.*

## V. SPAIN CANNOT ASSERT OWNERSHIP OF UNIDENTIFIED SHIPWRECK SITES

*Amici* are troubled by the "rush to judgment" nature of the Odyssey litigation. The court has not convened any evidentiary hearings. Nor was any testimony taken as to the identity and physical parameters of the wreck site. In fact, dozens of contradictory declarations have been filed by the litigants, raising countless questions of fact as to the identity of the site and its status as a sovereign war grave. Although the facts as pled by the plaintiff salvor must be assumed to be true, the district court nevertheless concluded that the cargo salvaged was in fact from the warship *MERCEDES* which had been engaged on an exclusively non-commercial voyage. Doc.270, p.32.

The few non-cargo artifacts recovered from the alleged *MERCEDES* site hardly supports a conclusive finding that any specific wrecksite has been discovered. The district court was not satisfied that the Spanish treasure galleon *ATOCHA* had been discovered without reviewing the results of decades of onsite searching and diving, the recovery of literally tens of thousands of artifacts, and ultimately, the matching of several of those items with their description, serial number and weight as found on the ship's original cargo manifest. Treasure Salvors, Inc. v. Unidentified, etc. Vessel, 549 F.Supp. 919, 924-26 (S.D. Fla. 1981). Several years' of litigation along with a hearing of nearly two weeks'

duration was required to establish a factual record sufficient to support a judicial conclusion that it was in fact the shipwreck of the *ATOCHA* that had been found.

*Id.* None of this has occurred in the instant litigation.

At best, Odyssey can conclude that the wreck site it has discovered may, at some time in the future, prove to be the remnants of the cargo of long-lost Spanish frigate. For Spain to be asserting that it is the *MERCEDES* that has been found at this preliminary juncture is even more mystifying. Nor should this Court be willing to catapult to such a conclusion in the absence of a full evidentiary hearing on the identity of the shipwreck sites.

Moreover, the record is devoid of the evidence ordinarily compiled in assessing the salvage award due the finder. In Columbus-America Discovery Group v. Atlantic Mutual Ins. Co., et al., 974 F.2d 450, 468-69, (4th Cir. 1992) ("CADG"), the Court of Appeals remanded the case to the district court for a full evidentiary hearing on the quantum of the salvage award to be paid to the intrepid finders of the S.S. *CENTRAL AMERICA*. On remand, the district court was instructed to assess the six ingredients of the salvage award as set forth in the venerable case of The BLACKWALL, 77 U.S. (10 Wall.) 1, 13-4 (1869) – i.e., the salvor's labor and skill, the cost and difficulty of the operations, the degree of

danger encountered, and the value of the property saved. There is no testimony on the record whatsoever as to any of these factors in the Odyssey litigation.

Following such an evidentiary hearing, the appellate court affirmed a salvage award to the plaintiff salvor CADG of 90% of the value of the insured shipments of gold recovered from the *CENTRAL AMERICA*. CADG II, 56 F.3d 556, 562 (4th Cir. 1995). Compare and contrast the voluminous record before both the district court and the Fourth Circuit which supported this unprecedented, but fully deserved salvage award with the utter lack of evidence to support the equally unprecedented effective salvage award of zero percent (0%) granted to Odyssey for deepwater operations as least as daunting and challenging as those of CADG.

At a minimum, if this Court is satisfied with Spain's assertion that the site of the *MERCEDES*' destruction has been discovered by Odyssey, appellate review nevertheless compels a remand for a full evidentiary hearing on the salvage award due Odyssey. But because it cannot be disputed that Spain does not have possession of the *MERCEDES* site, this salvage hearing cannot take place until Odyssey has completed its archaeological recovery operations, which include conservation, artifact analysis, appraisal and publication. Then and only then is any non-possessory sovereign allowed to litigate its claim to whatever property remains after the payment of a liberal salvage award.

## VI. CONCLUSION

As a legal matter, left undisturbed, the District Court's decision tramples the well-settled law as enunciated by a unanimous U.S. Supreme Court and expressly endorsed as the law of this Circuit earlier this year.

As a matter of public policy and precedent, the decision below upsets the delicate balance of interests which has successfully overseen the rescue of distressed property from marine peril for three millennia.

For the foregoing reasons, the decision of the District Court should be REVERSED, and this action REMANDED for a full evidentiary hearing as to the identity and ownership of the cargo so expertly salvaged by Odyssey from the abysmal depths of international waters.

Respectfully submitted,

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Submitted: May \_\_\_\_, 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 5,421 words, and were otherwise prepared in compliance with 11<sup>th</sup> Cir. R. 32-4.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on May \_\_\_\_, 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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