

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

APPEAL NO. 10-10320-JJ

ODYSSEY MARINE EXPLORATION, INC.,

Plaintiff,

vs.

THE UNIDENTIFIED SHIPWRECKED VESSEL,  
its apparel, tackle, appurtenances and cargo located  
within center point coordinates, In Rem,

Defendant,

SANTIAGO DE ALVEAR, EMILIO DE ALVEAR,  
MARIA EUGENIA SOLVEYRA, ALEJANDRO JULIAN  
PERA BARTHE', AUGUSTINA SOLVEYRA, and  
IGNACIO SOLVEYRA,

Claimants - Appellants,

KINGDOM OF SPAIN,

Claimant - Appellee.

On Appeal from the United States District Court  
for the Middle District of Florida, Tampa Division  
District Court Case No.: 8:07-00614-T-23MAP  
Hon. Steven Merryday, United States District Judge

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REPLY BRIEF OF APPELLANTS

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Date: August 4, 2010

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## ARGUMENT

### **THIS COURT’S RECENT OPINION IN *AQUA LOG* APPLIES TO THE REPUBLIC OF SPAIN’S CLAIM OF SOVEREIGN IMMUNITY UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT**

Appellants Santiago de Alvear, et al., are a group of claimants in the underlying admiralty action. They are descendants of Spanish Naval Captain Diego de Alvear. According to the “Declaration of Admiral Teodoro de Leste Contreras, Director General of the Institute of Naval History and Culture, the Naval Museum, and the Archives of the Royal Spanish Navy,” filed by the Kingdom of Spain in the district court as Doc. 131-2, Captain de Alvear and his family served the Spanish King for “many years” in his colonies in South America, in present-day Argentina, Bolivia, Uruguay, and Paraguay. *Id.* at ¶ 19. They left Montevideo on March 31, 1804. *Id.* at ¶¶ 18-19. Captain de Alvear and his family were assigned to the *Mercedes*. *Id.* at ¶ 19. One day before the return voyage, however, Captain Ugarte of one of the *Mercedes*’ sister ships fell ill, and Captain de Alvear replaced him on the *Medea*. *Id.*

The British attacked the four-ship Spanish convoy as it approached the European coast on October 5, 1804. *Id.* at 23. The *Fama* was in the lead, the *Medea* and the *Mercedes* were side by side, and the *Clara* was behind. *Id.* at 23. Captain de Alvear later recalled that minutes after the start of the battle, “the *Mercedes* suffered a catastrophic explosion.” *Id.* at ¶ 24. According to Captain de Alvear, “The

*Mercedes*, jumped through the air making a horrible racket, covering us [on the *Medea*] with a thick rain of debris and smoke.” *Id.* (bracket added by claimant Kingdom of Spain).

Thus, Captain de Alvear was close enough aboard the *Medea* to witness the demise of his family. According to his diary, deaths aboard the *Mercedes* included his wife; four daughters and three sons, all younger than seventeen; and a nephew. *Id.* at ¶ 25.

In their initial brief, appellants argued that this Court’s recent decision in *Aqua Log, Inc. v. State of Georgia*, 594 F. 3d 1330 (11<sup>th</sup> Cir. 2010), reaffirmed the long-standing principle that any assertion of sovereign immunity in an *in rem* admiralty action requires a demonstration of actual possession of the *res*. In response, the Kingdom of Spain’s argument on this point is limited to the following:

Appellants also seek to rely on U.S. Eleventh Amendment decisions that a state is not immune from federal jurisdiction merely by asserting that immunity as to property not in the state’s possession. The FSIA [Foreign Sovereign Immunity Act], not the Eleventh Amendment, controls jurisdiction as to foreign nations and their vessels, and the district court properly refused to rewrite or amend the FSIA. Eleventh Amendment jurisprudence has no application to this case.

Brief of Kingdom of Spain, p. 39.

Yet, appellants’ argument is not limited to the type of sovereign immunity embraced by the Eleventh Amendment. To be sure, the *Aqua Log* decision itself

involved the State of Georgia's claim, based on the Eleventh Amendment, of sovereign immunity. But the "actual possession of the *res*" requirement is not limited only to Eleventh Amendment immunity.

In *Aqua Log*, Georgia, like the Kingdom of Spain in this case, intervened in a private party's *in rem* admiralty action against submerged property brought in a United States district court. *Id.* at 1331. Georgia, like the Kingdom of Spain, then asserted, in a motion to dismiss, that the district court lacked subject matter jurisdiction because Georgia was immune. *Id.* Instead of invoking the FSIA, of course, Georgia invoked Eleventh Amendment<sup>1</sup> immunity. The *Aqua Log* court held that the district court correctly denied Georgia's motion to dismiss. *Id.* at 1331. Specifically, this Court held that Georgia could not assert Eleventh Amendment immunity because it could not satisfy one of its prerequisites, namely actual possession of the *res*, which in that case were submerged old growth logs recovered by a private salvage company from the bottom of two Georgia rivers. *Id.* at 1338.

The *Aqua Log* court relied in part on the Supreme Court's opinion in *California v. Deep Sea Research*, 523 U.S. 491 (1998). In *Deep Sea Research*, the Supreme

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<sup>1</sup>The Eleventh Amendment provides, in its entirety, as follows: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by Citizens or subjects of any foreign state." U.S. Const., amend. 11. In *Hans v. Louisiana*, 134 U.S.1 (1890), the Supreme Court extended Eleventh Amendment immunity to apply to suits against a state by its own citizens.

Court addressed and rejected a similar claim of immunity by the State of California. *Deep Sea Research* involved another *in rem* admiralty action brought in United States District Court by a private salvor against a shipwrecked vessel and its contents. *Id.* at 495. California, like Spain in this case, intervened, but on the basis of the Abandoned Shipwreck Act of 1987, by which the federal government transferred title to the state of any abandoned shipwreck found within the state's waters. *Id.* at 496. California then moved to dismiss the *in rem* action on the argument that California was immune from suit in federal court by virtue of the Eleventh Amendment. *Id.* at 496-97.

The issue before the *Deep Sea Research* Court was whether Eleventh Amendment immunity applies when a State asserts a claim in admiralty to a *res* not in its possession. *Id.* at 500. According to *Deep Sea Research*, “this Court’s decisions in cases involving the sovereign immunity of the Federal Government in *in rem* admiralty actions provides guidance, for this Court has recognized a correlation between sovereign immunity principles applicable to States and the federal Government.” *Id.* at 506-07. The *Deep Sea Research* Court noted the “analogy between immunity in ‘*in rem* actions brought against vessels in which an official of the State, the Federal Government, or a foreign government has asserted an ownership of the *res*.’” *Id.* at 507 (quotations omitted; emphasis added). The Supreme Court explained further,

In one such case, *The Davis*, 10 Wall. 15 (1870), the Court explained that “proceedings *in rem* to enforce a lien against property of the United States are only forbidden in cases where, in order to sustain the proceeding, *the possession of the United States* must be invaded under process of the court.” The possession referred to was “an *actual possession*, and not that mere constructive possession which is very often implied by reason of ownership under circumstances favorable to such implication”; *See also The Siren*, 7 Wall. 152, 159 (1869)(describing “exemption of the government from a direct proceeding *in rem* against the vessel whilst in its custody.”) The Court’s jurisprudence respecting *the sovereign immunity of foreign governments has likewise turned on the sovereign’s possession of the res at issue. See e.g., the Pesaro*, 255 U.S. 216, 219 (1921)(federal Court’s *in rem* jurisdiction not barred by mere suggestion of foreign government’s ownership of vessel).

*Id.* (emphasis added; citations omitted). The *Deep Sea Research* Court concluded that, “Based on longstanding precedent respecting the federal courts’ assumption of *in rem* admiralty jurisdiction over vessels that are not in possession of a sovereign, we conclude that the Eleventh Amendment does not bar federal jurisdiction over the [shipwreck] and, therefore, that the District Court may adjudicate [Deep Sea Research]’s and the State’s claims to the shipwreck.” *Id.* at 507-08.

Thus, although *Deep Sea Research* involved a state’s claim of immunity under the Eleventh Amendment, the Supreme Court relied on long-standing authority assessing claims of immunity by the federal and foreign governments, neither of which (of course) enjoys Eleventh Amendment immunity. Again, appellants rely not

on the Eleventh Amendment, but on the “actual possession” requirement that exists as a prerequisite to any claim of sovereign immunity.

Another case the *Aqua Log* court relied upon, *Compania Espanola de Navegacion Maritima S. A. v. The Navemar*, 303 U.S. 68 (1938), obviously does not involve an assertion of Eleventh Amendment immunity. In *The Navemar*, a Spanish corporation brought suit in United States district court in admiralty against a Spanish steamship to recover possession of it from its crew. *Id.* at 70. The Republic of Spain sought leave to intervene as a claimant, asserting that the steamship in fact belonged to the Republic of Spain. *Id.* Spain claimed that the *Navemar* was a public vessel of Spain, that the ship was not subject to the judicial process of the district court, and requested its immediate delivery to Spain’s New York consul. *Id.* at 70-71.

The Court in *The Navemar* conceded that a public vessel in the service and possession of a friendly government like Spain is immune from suit in admiralty in United States courts. *Id.* at 74. Such foreign governments are free to assert their immunity to the courts, or to the Executive Branch. However, in *The Navemar* the executive branch did not intercede, and therefore it became appropriate for the district court to adjudicate Spain’s claim that the *Navemar* was a public vessel of the Republic of Spain, and not merely a private vessel. *Id.* at 75. According to the Supreme Court, the district court correctly concluded that there was insufficient evidence to “support the claim of the suggestion that *The Navemar* had been in the

possession of the Spanish government.” *Id.* “[A]ctual possession by some act of physical dominion or control on behalf of the Spanish government was needful . . .” *Id.* (emphasis added). The *Navemar* Court concluded that the Republic of Spain was welcome to intervene in the admiralty action as a claimant and attempt to prove that the *Navemar* was, in fact, a public, not private, vessel. *Id.* Yet, without possession, the claim of absolute immunity from the admiralty suit was unavailing.

In summary, the Kingdom of Spain mischaracterizes the de Alvear claimants’ argument. They do not contend that Spain has failed to demonstrate that it is entitled to Eleventh Amendment immunity. Instead, these claimants contend that any assertion of sovereign immunity has an important prerequisite, namely actual possession of the *res*. That is not to say that the Kingdom of Spain, as permitted by *The Navemar* Court, may not intervene as a claimant and litigate the issue - much like the de Alvear claimants - of its entitlement to the *res* or a portion thereof. However, *Aqua Log* is significant because it embraces a long line of authority that provides that any sovereign - state, federal, or foreign - claiming immunity must first have actual possession of the *res*.

Finally, in its brief the King Spain suggests, without elaboration, that the de Alvear claimants enjoyed an opportunity to seek indemnification for their losses on October 5, 1804. *See* Kingdom of Spain’s Brief, p. 26. Spain cites an August 1824 Royal Order providing an opportunity to make any claim for losses caused by British

warships. *Id.* Assuming this is true, however, the Kingdom of Spain has provided no evidence that Captain de Alvear or his descendants made any such claim or, if they did not, that this failure would preclude all claims forever in any forum. It is reasonable to conclude that, had Captain de Alvear's descendants made such a claim, the Kingdom of Spain would so allege.

CONCLUSION

For the foregoing reasons, the district court's order granting the Kingdom of Spain's motion to dismiss should be reversed, and the timely claims by Captain de Alvear's descendants should be remanded for further consideration by the district court.

## **CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 2287 words, excluding the pages of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Wordperfect 8.0 in 14 point Times New Roman font.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of this brief was furnished by U.S. mail on the \_\_\_\_\_ day of August, 2010 to:

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