

CORRECTED

Nos. 10-10318-J and 10-10374-J

(Consolidated Case Nos. 10-10269-J, 10-10317-J, 10-10318-J,
10-10319-J, 10-10320-J, 10-10374-J, 10-10375-J)

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELSA DORCA WHITLOCK, Cargo Claimant-Appellant

v.

The Kingdom of Spain, Claimant-Appellee

and

JAIME DURAND PALACIOS, Cargo Claimant-Appellant

v.

THE KINGDOM OF SPAIN, Claimant-Appellee

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

APPELLANTS' OPENING BRIEF

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Nos. 10-10318-J and 10-10374-J

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELSA DORCA WHITLOCK and	*
JAIME DURAND PALACIOS	*
Cargo Claimants-Appellants	* Appeal Nos. 10-10318-J and 10-10374-J
	*
v.	*
	*
THE KINGDOM OF SPAIN	* Dist. Ct. No. 8:07-cv-614-T-23MAP
Appellee	

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

The undersigned counsel of record for the Appellant, William VanDercreek, 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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REQUEST FOR ORAL ARGUMENT

The consolidated cases present significant issues of first impression that involve claims by the Kingdom of Spain, the Republic of Peru, the salvor Odyssey who recovered the 594,000 coins, multiple cargo claimants, and an individual whose family has a special 18th century grant from the Kingdom of Spain. Appellants Whitlock and Palacios have verified claims to cargo documented by the manifest. The district court dismissed for want of subject matter jurisdiction but ordered the coins recovered by Odyssey be awarded to Spain who was not in possession or had shown ownership. The court's interpretation of §1609 of the FSIA would repudiate and nullify other sections of the FSIA and Supreme Court and Eleventh Circuit cases concerning *in rem* admiralty jurisdiction.

It is respectfully suggest that the Court allow 90 minutes for oral argument to be allocated 20 minutes to Appellant Odyssey, 20 minutes to cargo claimants, 20 minutes to Peru, and 30 minutes to Appellee Spain.

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JURISDICTIONAL STATEMENT

Odyssey Marine Expedition filed an *in rem* admiralty action invoking 28 U.S.C. §§1331, 1333 and 1602, *et seq.* Cargo claimants Whitlock and Palacios filed verified claims in the district court. The order of dismissal of all claims for lack of subject matter jurisdiction was entered on December 22, 2009 (Doc 270). The final judgment was entered on December 28, 2009 (Doc. 271). The Notice of Appeal (Doc. 275) in No. 10-10318-J (Whitlock) was filed on January 19, 2010. The Notice of Appeal (Doc. 278) in No. 10-10374-J (Palacios) was filed on January 22, 2010. This Court has jurisdiction under 28 U.S.C. §1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

- I. Whether the Court upon ruling no subject matter jurisdiction exists over Odyssey's salvage and cargo shippers' ownership claims erred by then ordering the 594,000 coins delivered to Spain who was not in possession or shown, proved or found to be the owner of any of the salvaged coins.
- II. Whether the Court erred in holding FSIA §§1609 and 1610 bars FSIA §1605(b) and admiralty jurisdiction over cargo salvaged from international waters unless "the claims are based on commercial activity of the vessel in the United States."
- III. Whether the Sunken Military Craft Act bars salvage of cargo from naval vessels engaged in the commercial carriage of cargo.

STANDARD OF REVIEW

The district court's factual findings and legal rulings that the district court lacked subject matter jurisdiction is subject to *de novo* review by this Court. *Bishop v. Reno*, 210 F.3d 1295, 1298 (11th Cir. 2000).

STATEMENT OF THE CASE

Pursuant to Eleventh Circuit Rule 28-1(f), the Statement of the Case by Odyssey in No. 10-10269-J is adopted. The following summary is relevant to Appellants Whitlock and Palacios.

1. Appellants Whitlock and Palacios filed verified claims to the cargo salvaged by Odyssey that is now before the Court. (Docs. 168 and 176)

2. Appellants Whitlock and Palacios filed Objections to the Magistrate's Report (Doc. 227).

3. The actual *in rem* jurisdiction before the Court consisted of articles of salvage, including approximately 594,000 coins recovered in international waters and brought into the Middle District of Florida by Odyssey, i.e., the recovered *res*, for adjudication under admiralty and maritime law.

4. At the time of the constructive admiralty arrest, the articles of salvage were not in the possession of the Kingdom of Spain and had not been for two hundred years.

5. Under the maritime law of salvage, Odyssey perfected its lien against the 594,000 coins at the time when it obtained actual possession and custody of the articles of salvage from the site.

6. The recovery site was in international waters more than 24 miles but less than 200 miles from the coast of Portugal.

7. The vessel MERCEDES was destroyed by an explosion and does not exist as a vessel.

8. The force of the explosion separated the several tons of coins that sank 3,500 feet to the ocean floor.

9. The recovery site of the salvaged coins contained no identifiable structural remains of any vessel.

10. The recovery site of the salvaged coins contained no human remains.

11. The *res* recovered by Odyssey and subject to its perfected salvage lien was duly and lawfully brought into the Middle District for adjudication of rights and claims.

12. The *in rem* claim of Odyssey for an award under the admiralty law of salvage is against the recovered *res* of coins and not against the vessel MERCEDES nor the Kingdom of Spain.

13. The Kingdom of Spain's claim of ownership of the *res* is based upon the cargo having been transported by a sunken Spanish naval vessel, the MERCEDES, and not upon proof of ownership of the 594,000 coins that comprise the actual *res* before the Court.

14. Whitlock's and Palacios' ownership claims assert they are descendents of parties named in the manifest (Docs. 232-235) that lists the amount of coins shipped. (Docs. 168 and 176)

15. Whitlock's and Palacios' claims recognize that Odyssey is entitled to a liberal and generous salvage award. (Docs. 168 and 176)

16. Odyssey has diligently conserved, restored and protected all articles of salvage in keeping with the maritime obligations of a salvor.

17. Odyssey has carefully and meticulously made detailed archaeological and photographic records of the entire recovery site and the articles of salvage that were recovered.

18. Whitlock and Palacios filed a Reply to the Kingdom of Spain's Response to Odyssey Marine and Individual Claimants' Objections to the Magistrate's Report and Recommendations. (Doc. 261)

19. The district court dismissed the claims of Whitlock and Palacios for want of subject matter jurisdiction. (Doc. 270)

20. Whitlock and Palacios filed timely Notices of Appeal from the final judgment of the district court. (Docs. 275 and 278)

SUMMARY OF THE ARGUMENT

The court held no subject matter jurisdiction existed and awarded the 594,000 coins to Spain because the MERCEDES was owned by Spain. The only actual *res* before the court was the salvaged 594,000 coins. The MERCEDES exists in name only. The privately owned salvaged cargo does exist and is before the Court. The MERCEDES is not. The grounds for “returning” the privately owned cargo to Spain was because the coins had been shipped aboard the MERCEDES. Spain was not in possession of the salvaged coins and had not been for over 200 years. If no jurisdiction exists and the status quo restored, the coins must remain with Odyssey.

The district court’s ruling that the *res* of 594,000 salvaged coins and the “vessel” MERCEDES are one and the same (“inextricably intertwined”) is a fiction, which defies law, logic and is irreconcilable with the known facts. As Chief Justice Marshall opined in 1815, “The character of the vessel and cargo remain as distinct in this as in any other case.” *The Nereide*, 13 U.S. 388, 431 (1815). A mere showing of sovereign ownership of a vessel does not constitute proof of the ownership of her cargo.

Cargo claimants have properly asserted ownership rights to the recovered cargo that is documented and proved by the ship’s manifest. To take this property of 594,000 coins and order it delivered to Spain without just cause, or without any

recognized jurisdiction to do so, violates claimants' federal due process rights as claimants duly asserted to the court. (Doc. 270, p. 5) Without jurisdiction, Odyssey cannot be directed to deliver the coins back into the ocean no more than it can be ordered to deliver them to Spain. If the court lacks jurisdiction to adjudicate cargo claims, the court lacks jurisdiction to adjudicate that Spain is entitled to be awarded the *res* in contravention of cargo claims.

As held in *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868):

Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.

In maritime *in rem* cases if the sovereign does not have possession of the *res* there is no violation of sovereign immunity. The *in rem* claim against the cargo is not a claim against Spain or the vessel MERCEDES. *California v. Deep Sea Research*, 523 U.S. 491 (1998); *Aqua Log, Inc. v. State of Georgia*, 594 F.3d 1330 (11th Cir. 2010); *Santissima Trinidad*, 20 U.S. (7 Wheat.) 283 (1822).

The district court held jurisdiction over the salvaged *res* of 594,000 coins under FSIA §1605(b) and federal admiralty law was barred by §§1609 and 1610. This is error for five fundamental reasons: (a) the MERCEDES and her cargo are separate interests and are not “inextricably intertwined”; (b) the court’s application of §1609 would effectively repudiate §§1602 and 1605(b); (c) the court’s interpretation of §1609 would disregard and nullify controlling Supreme Court

precedent; (d) even if §1609 were to apply, Spain has failed to prove ownership of any of the coins that comprise the *res* of 594,000 coins that are within the court's jurisdiction; and (e) the district court erred in holding the commercial activity outside of the United States was irrelevant.

The court's application of §1610 resulted from the misinterpretation of §1609, which states:

§1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act *the property in the United States of a foreign state* shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter. [Emphasis added.]

By its terms, §1609 bar of immunity applies only to “the property in the United States of a foreign state.” Here it is undisputed that the salvage lien to the recovered *res* of 594,000 coins was perfected outside the United States on property not in possession of Spain and only then lawfully brought into the United States by the salvor for adjudication of the rights and interests of all claimants. The lien was not perfected on property in the United States or on property in possession of Spain. The salvage lien was perfected at the time the articles were taken aboard the recovery vessel in international waters off the coast of Portugal. For purposes of interpreting §1609, there is a fundamental difference between (a) property that a foreign state had possession and caused to be brought into the United States and

(b) property not in possession of the foreign state and that was not brought into the United States by the foreign state. The application of §1609 to the former is in full accord with the text and purpose of the section. The application to the latter instance would not be within the text and the purpose of the FSIA.

The magistrate's report (Doc 209, p. 20) claimed the FSIA made Odyssey's possession argument irrelevant:

When Congress enacted the FSIA, it did not include an actual possession requirement in the language of the statute. Rather, it simply stated that "the property in the United States *of a foreign state* shall be immune" 28 U.S.C. §1609 (emphasis added) No section of the FSIA imposes the possessory requirement Odyssey advances, and I refuse to read one into the statute.

There is a difference between using absence of possession to defeat immunity and using absence of possession to grant immunity. The purpose of the FSIA was to restrict sovereign immunity, not to grant immunity where it had been denied. The magistrate would grant immunity where it had been definitively denied. This is directly contrary to the restrictive theory of sovereign immunity recognized in the Act's purpose, §1602 and the congressional reports and decisions of this Court and the Supreme Court.

The magistrate's report claimed Odyssey's cargo versus vessel argument "subverts the plain meaning of §1609." Far from subverting the language of §1609, the difference between cargo and vessel is expressly set out in §1605(b) providing for "a maritime lien against a vessel *or* cargo." (Emphasis added.)

Neither the statutory purposes of §1602 or subsection §1605(b), that expressly covers admiralty claims, require the commercial activity to be “carried on in the United States.” These sections, unlike §1605(a) and §1610, only require “commercial activity.” The judge’s ruling that commercial activity outside the United States is relevant would change the statutory use of defined terms in §1605(b) and replace it with a different and separate statutory defined term used for §1605(a). This is clearly error. Under the district court’s order, quoted *supra*, the MERCEDES extensive commercial activity in the shipping and transportation of privately owned property to private parties was deemed irrelevant and was totally ignored in the court’s analysis.

ARGUMENT

I. THE COURT UPON RULING NO SUBJECT MATTER JURISDICTION EXISTS OVER ODYSSEY'S SALVAGE AND CARGO SHIPPERS' OWNERSHIP CLAIMS ERRED BY THEN ORDERING THE 594,000 COINS DELIVERED TO SPAIN WHO WAS NOT IN POSSESSION OR SHOWN, PROVED OR FOUND TO BE THE OWNER OF ANY OF THE SALVAGED COINS.

The court held no subject matter jurisdiction existed and awarded the 594,000 coins to Spain because the MERCEDES was owned by Spain. The only actual *res* before the court was the salvaged 594,000 coins. The MERCEDES exists in name only. The privately owned salvaged cargo does exist and is before the Court. The MERCEDES is not. The grounds for "returning" the privately owned cargo to Spain was because the coins had been shipped aboard the MERCEDES, a naval vessel on a commercial voyage. Spain was not in possession of the salvaged coins and had not been for over 200 years. If no jurisdiction exists and the status quo restored, the coins must be returned to Odyssey.

If there is no jurisdiction, as the district court ruled, and the order of arrest and substitute custodian are vacated, there should be a return to the *status quo* -- in this case, Odyssey's possession of the 594,000 coins. The salvage occurred in international waters where the Kingdom of Spain enjoyed no sovereign rights. The court erred in failing to recognize that the articles of salvage recovered were not in the possession or control of Spain. The order of arrest did not oust the Kingdom of Spain of either possession or control.

If the maritime arrest had ousted a party from possession, then vacating the arrest would return that possession. *Odyssey*, in good faith, brought the coins to the United States for adjudication of rights by an admiralty court. In keeping with the highest principle of admiralty law, *Odyssey*, as salvor, has preserved and protected the *res*. Cargo claimants recognize the valuable service that *Odyssey* has performed. The cargo claimants have filed ownership claims to the recovery cargo. The ship's manifest proves these claims have a valid basis. Spain has not claimed or proven ownership of any of the recovered coins. Spain claims ownership of the MERCEDES mandates ownership of the cargo.

Spain's argument at Doc. 236, pp. 40-41, depends on a fiction and hypothetical which did not happen or occur. If the MERCEDES had sailed into Philadelphia in 1804 with flags flying and had been libelled like the SCHOONER EXCHANGE as reported in *Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116 (1812), then of course, dismissal of her arrest and libel would leave the vessel under the control and possession of the captain and crew. What did happen was *Odyssey's* chartered plane flew the recovered cargo to Florida. In the reality of the present case, the status quo requires *Odyssey* to remain in possession. Spain did not and has not shown ownership of the recovered cargo. (Spain has claimed ownership and the right of the MERCEDES mandate ownership of the privately owned cargo.) At best, Spain has a possible claim based upon the manifest to

some items of the recovered cargo, a claim that has not been asserted. Cargo claimants have properly asserted ownership rights to the recovered cargo that is documented and proved by the ship's manifest.

The court's and the magistrate's error in ruling the vessel and the cargo are "inextricably intertwined" undermines both the ruling that there is no subject matter jurisdiction and the ruling, that if no jurisdiction exists, the recovered cargo of 594,000 coins must be awarded to Spain. The sole thesis for the court's taking the coins from Odyssey is that cargo and vessel are one and the same; therefore, ownership of vessel mandates the owner of the vessel to be the owner of the cargo.

The magistrate's report states:

Odyssey's cargo versus vessel approach also departs from traditional admiralty precepts and subverts the plain reading of §1609. A vessel and its cargo are inextricably intertwined.

Doc. 209, p.23.

This theory of the magistrate's report that cargo and vessel are one single *res* incapable of division, separation, or, indeed, even a separate existence, is contrary to the entire history of maritime law. The vessel and her cargo are not "inextricably intertwined." In 1815, Chief Justice Marshall in a prize case involving libel by owners of condemned cargo, which had been transported on a vessel that had been condemned, ruled:

In this it is the opinion of the majority of the Court there is nothing unlawful. *The characters of the vessel and cargo remain as distinct in*

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this as in any other case. The sentence, therefore, of the Circuit Court must be reversed, and the property claimed by Manuel Pinto for himself and his partners, and for those other Spaniards for whom he has claimed, be restored, and the libel as to that property, be dismissed. (Emphasis added.)

The Nereide, 13 U.S. 388, 431 (1815).

The *Santissima Trinidad*, 20 U.S. (7 Wheat.) 283 (1822), involved a national ship of a foreign power and the commercial cargo that she had acquired by unlawfully taking the cargo from Spanish merchant ships. The libel was against “nine bales of cochineal” and other specific items of cargo. Even though the *SANTISSIMA TRINIDAD* was a foreign public vessel, she had violated neutrality by certain prior actions within the United States. The libel against the cargo property was upheld and ordered released to the Spanish owners. Likewise, the ownership of the vessel *MERCEDES* is not the same as the ownership of the cargo shipped aboard.

In the *United States v. The Armisted*, 40 U.S. 518 (1841), a Spanish schooner carried a cargo of slaves who had revolted. The vessel, cargo and slaves had been libelled for a salvage award. The ownership of all was formerly claimed by the Queen of Spain. Interestingly, the Attorney General supported Spain like in this case. The Supreme Court directed the slaves to be freed and not returned to Spain.

In salvage cases involving only cargo, the claim is against the cargo, not the vessel or the vessel's owner. This is the clearly established law in this Circuit. "If the service is rendered to cargo alone – as the rescue of goods floating upon the sea [here, resting on the bottom of the sea] – then cargo solely must make good the award." *India v. International Marine Development Corp.*, 451 F.2d 763, 766 (5th Cir. 1971) citing *Norris, The Law of Salvage*, p. 331 (1st ed. 1958).

Where cargo alone is salvaged, cargo alone is responsible for the salvage claim. If salvage service is successfully rendered both to ship and to cargo, the claims are separate and the ship is not liable for the claim against saved cargo and *vice versa*. These admiralty principles are well recognized and long-standing. Neither the vessel nor the vessel's owner are liable for cargo salvage claims. See, *Benedict on Admiralty*, §205, *Cargo's Contribution*, §206, *Cargo Apportionment*, pp. 16-4 to 16-5, and §207, *Several Liability of Vessel and Cargo*, pp. 16-5 to 16-7 (7th Ed. rev. 2008).

The magistrate cited the Sunken Military Craft Act and *R.M.S. Titanic, Inc.*, 171 F.3d 943 964 (4th Cir. 1999). The cited authorities do not support the supposition of "inextricable intertwined." The separation of ship and cargo is acknowledged in FSIA §1605(b): "a maritime lien against a vessel or cargo of a foreign state."

The Report relies on the constructive fiction applicable for the purpose of enjoining interference from rival salvage operations within a specified *geographic area*, the constructive *res*. This fiction is not the basis for adjudication of title, ownership and salvage liens to recovered articles physically brought within the jurisdiction of the court. It is well recognized that the court, in treating the injunctive geographic area of the wreck or recovery site to be a single unitized integral constructive *res*, does not bar individual claimants from asserting separate rights to actual property salvaged and recovered. *See* competing cargo claims regarding the recovered *res* in the S. S. CENTRAL AMERICA litigation, *Columbus-America Disc. Group v. Atlantic Mutual Insurance*, 203 F.3d 291 (4th Cir. 2000).

This Court's jurisdiction is based upon the actual *res* before the court -- specific jurisdiction over the recovered 594,000 coins -- not constructive jurisdiction over a recovery site off the coast of Portugal.

Filing an *in rem* arrest of recovered items merely confers *in rem* jurisdiction in the district court over the recovered property. *See Martha's Vineyard Scuba Headquarters, Inc. v. The Unidentified, Wrecked and Abandoned Steam Vessel*. Filing an *in rem* petition for arrest of artifacts does not automatically confer exclusive rights to a site [geographic area] as salvor in possession.

Yukon Recovery v. Certain Abandoned Property, 205 F.3d 1189, 1195 (9th Cir. 2000).

Odyssey's and cargo claimants' claims do not depend upon a constructive fiction for exclusive injunctive rights to the recovery site of the coins. Claimants'

rights are to the actual physical *res* that Odyssey brought within the Middle District of Florida for fair, proper and just adjudication. This *in rem* action is against the recovered coins salvaged by Odyssey, not against Spain or the vessel MERCEDES.

To take this property of 594,000 coins and order it delivered to Spain without just cause, or without any recognized jurisdiction to do so, violates Claimants' federal due process rights as claimants duly asserted to the court. (Doc. 270, p. 5) Without jurisdiction, Odyssey cannot be directed to deliver the coins back into the ocean no more than it can be ordered to deliver them to Spain. If the court lacks jurisdiction to adjudicate cargo claims, the court lacks jurisdiction to adjudicate that Spain is entitled to be awarded the *res* in contravention of cargo claims.

As held in *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868):

Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.

II. THE COURT ERRED IN HOLDING FSIA §§1609 AND 1610 BARS FSIA §1605(B) AND ADMIRALTY JURISDICTION OVER CARGO SALVAGED FROM INTERNATIONAL WATERS UNLESS “THE CLAIMS ARE BASED ON COMMERCIAL ACTIVITY OF THE VESSEL IN THE UNITED STATES.”

The district court held jurisdiction over the salvaged *res* of 594,000 coins under FSIA §1605(b) and federal admiralty law was barred by §§1609 and 1610. This is error for five fundamental reasons: (a) the MERCEDES and her cargo are separate interests and are not “inextricably intertwined”; (b) the court’s application of §1609 would effectively repudiate §§1602 and 1605(b); (c) the court’s interpretation of §1609 would disregard and nullify controlling Supreme Court precedent; (d) even if §1609 were to apply, Spain has failed to prove ownership of any of the coins that comprise the *res* of 594,000 coins that are within the court’s jurisdiction; and (e) the district court erred in holding the commercial activity outside of the United States was irrelevant.

The district court ruled:

Finally, I note my emphatic agreement with both the Magistrate Judge and Spain, which states at page twenty-one of the response (Doc. 236) that:

Odyssey’s rehash of “commercial activity” arguments conspicuously fails to acknowledge that the exception expressly applies only to “property used for a commercial activity in the United States,” if it “is or was used for the commercial activity upon which the claim is based.” 28 U.S.C. §§1610(a), 1610(a)(2). Moreover, the FSIA defines “commercial activity in the United States” as “commercial activity carried on by such

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state and having substantial contact with the United States.” 23 U.S.C. §1603 (e). It is undisputed that *the MERCEDES had nothing to do with the United States*: “the *res* lacks any nexus to our nation’s sovereign boundaries.” (R&R at 29) [Emphasis added.]

...

To defeat a *showing of sovereign ownership* and invocation of the FSIA, the claimant must show its claims are based on commercial activity *by the vessel in the United States* and/or a waiver of sovereign immunity. Odyssey has done neither. [Emphasis added.]

Order of District Court [Doc. 270 at 3]

A. THE MERCEDES AND HER CARGO ARE SEPARATE INTERESTS AND ARE NOT “INEXTRICABLY INTERTWINED”

The only *res* before the court is the 594,000 coins – a vessel and her cargo are not “inextricably intertwined.” The court is quite right of course that the “MERCEDES had nothing to do with the United States.” Indeed, this is one of the most compelling reasons why the court erred. The only *res* before the court is the 594,000 coins. There is no pending claim against the MERCEDES and certainly no claim has been made by cargo claimants against the vessel. The vessel MERCEDES was destroyed by an explosion in 1804 and has not been found nor will it ever be found, as by all accounts it was completely destroyed. What has been recovered and before this Court is part of the commercial cargo that was found to have been shipped on the MERCEDES. The articles of salvage recovered by Odyssey do not

include the hull, rigging or armament of the MERCEDES. Not a single item before the district court is any remnant of any part of the vessel.

The district court's ruling that the *res* of 594,000 coins is somehow considered to be the "vessel" MERCEDES is a fiction, which defies logic and is irreconcilable with the known facts, mandating reversal. As Chief Justice Marshall opined in 1815, "The character of the vessel and cargo remain as distinct in this as in any other case." *The Nereide*, 13 U.S. 388, 431 (1815). A mere showing of sovereign ownership of a vessel does not constitute proof of the ownership of her cargo. As discussed in this Brief at page 12 to 16, the court's ruling that the vessel and cargo are "inextricably intertwined" is wrong in law and in fact. It contravenes long-standing precedent of the Supreme Court of the United States and runs counter to the entire history of the maritime law of salvage, as well as the fundamental laws of physics. The MERCEDES was blown apart by a tremendous explosion, most likely her powder magazine. The several tons of coins were separated from the vessel structure and sank 3,500 feet to the ocean floor. Not a single identifiable part of the vessel's structure was found at the recovery site of the coins, some 3,500 feet below the surface. No human remains were found at the recovery site and it is not probable that any remains would have been at this site as there was no entrapping vessel structure. Indeed, the identity of the missing vessel could not be determined from any recoverable artifact and was not ever objectively

determined, but rather assumed and inferred after the recovered cargo had been examined, to establish the dates of those coins and the ratio of silver to gold coins to confirm they were consistent with the manifest of the MERCEDES.

**B. THE COURT'S APPLICATION OF §1609 REPUDIATES
§§1602 AND 1605(B)**

The court's application of §1610 resulted from the misinterpretation of §1609, which states:

§1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act *the property in the United States of a foreign state* shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter. [Emphasis added.]

By its terms, §1609 bar of immunity applies only to “the property in the United States of a foreign state.” Here it is undisputed that the salvage lien to the recovered *res* of 594,000 coins was perfected outside the United States on property not in possession of Spain and only then lawfully brought into the United States by the salvor for adjudication of the rights and interests of all claimants. The lien was not perfected on property in the United States or on property in possession of Spain. The salvage lien was perfected at the time the articles were taken aboard the recovery vessel in international waters off the coast of Portugal. For purposes of interpreting §1609, there is a fundamental difference between (a) property that a

foreign state had possession and caused to be brought into the United States and (b) property not in possession of the foreign state and that was not brought into the United States by the foreign state. The application of §1609 to the former is in full accord with the text and purpose of the section. The application to the latter instance would not be within the text and the purpose of the FSIA.

The magistrate's report (Doc 209, p. 20) claimed the FSIA made Odyssey's possession argument irrelevant:

When Congress enacted the FSIA, it did not include an actual possession requirement in the language of the statute. Rather, it simply stated that "the property in the United States *of a foreign state* shall be immune" 28 U.S.C. §1609 (emphasis added) No section of the FSIA imposes the possessory requirement Odyssey advances, and I refuse to read one into the statute.

There is a difference between using absence of possession to defeat immunity and using absence of possession to grant immunity. The purpose of the FSIA was to restrict sovereign immunity, not to grant immunity where it had been denied. The magistrate would grant immunity where it had been definitively denied. This is directly contrary to the restrictive theory of sovereign immunity. See discussion, *infra*, at pages 29 to 30. In maritime *in rem* cases if the sovereign does not have possession of the *res* there is no violation of sovereign immunity. See *California v. Deep Sea Research*, 523 U.S. 491 (1998) and *Aqua Log, Inc. v. State of Georgia*, 594 F.3d 1330 (11th Cir. 2010).

The magistrate's report (Doc. 209, p. 20) claims Odyssey's cargo versus vessel "subverts the plain meaning of §1609." Far from subverting the language of §1609, the difference between cargo and vessel is expressly set out in §1605(b) providing for "a maritime lien against a vessel *or* cargo." (Emphasis added.)

The purpose of §1609 was to effectively curb the use of quasi *in rem* jurisdiction to acquire personal jurisdiction. Historically, because of limited personal jurisdiction over non-residents [as in *Pennoyer v. Neff*], plaintiff would attach property of the non-resident who was not subject to personal jurisdiction in the forum state. If the non-resident then did not appear, the property could be lost.

In rem admiralty jurisdiction is entirely different from so called quasi *in rem*. Odyssey's *in rem* action was against the salvaged coins it recovered and possessed, and was not employed as a substitute to acquire personal jurisdiction over Spain. Sections 1609 and 1610 are not applicable to Odyssey's *in rem* claim to the 594,000 coins. The magistrate and district court's misinterpretation of §1609 also would nullify the purpose of the FSIA as stated in §1602 and the provision in §1605(b), which provide:

§1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. *Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned,*

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and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter. (emphasis added)

. . .

§1605. General exceptions to the jurisdictional immunity of a foreign state

(b) 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*: Provided, That— (emphasis added)

Both §1602 and §1605(b) refer to commercial activity, but do not limit the commercial activities to those occurring within the United States, contrary to the opinion of the district court. The definition section of §1603 separately defines “commercial activity” and “commercial activity in the United States,” evidencing a statutory distinction which must be recognized in this action. The district court failed to do so. As noted in the definition section:

§1603. Definitions

For purposes of this chapter—

(d) A “commercial activity” means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A “commercial activity carried on in the United States by a foreign state” means commercial activity carried on by such state and having substantial contact with the United States.

Neither the statutory purposes of §1602 or subsection §1605(b), that expressly covers admiralty claims, require the commercial activity to be “carried on in the United States.” These sections, unlike §1605(b) and §1610, only require “commercial activity.” The judge’s ruling would change the statutory use of defined terms in §1605(b) and replace it with a different and separate statutory defined term. This is clearly error. Under the district court’s order, quoted *supra*, the MERCEDES extensive commercial activity in the shipping and transportation of privately owned property to private parties was deemed irrelevant and was totally ignored in the court’s analysis.

C. THE COURT’S INTERPRETATION OF §1609 NULLIFIES APPLICABLE RULINGS BY THE SUPREME COURT

Properly construing §1609 to be inapplicable when the property in the United States was not in possession of a foreign state and had been brought into the United States by a private party to enforce a maritime admiralty lien on the property would be fully in accord with the Supreme Court’s rulings in *California v. Deep Sea Research*, 523 U. S. 491 1185 S.Ct. 1464 (1998) and this Court’s recent ruling in *Aqua Log, Inc. v. State of Georgia*, 594 F.3d 1330 (11th Cir. 2010). Spain and the Magistrate gave short shrift to *Deep Sea Research*.

The unanimous Supreme Court in *Deep Sea* explained *in rem*:

Proceedings *In Rem* to enforce a lien against property of the United States are only forbidden in cases where, in order to sustain the

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proceeding, the possession of the United States must be invaded under process of the Court. (citation omitted) The possession referred to was actual possession, and not that mere constructive possession which is very often implied by reason of ownership under circumstances favorable to such implication. [And that] The Court's jurisprudence respecting the sovereign immunity of foreign governments has likewise turned on the sovereign's possession of the *res* as issue.

Deep Sea, 523 U.S. at 507.

Both the Magistrate and Spain implicitly recognize that application of the Supreme Court's holding in *California v. Deep Sea Research*, *supra*, would defeat the sovereign immunity and FSIA claims. *Deep Sea* is the Supreme Court's most important ruling on maritime salvage and sovereign immunity. The Magistrate, in attempting to distinguish *Deep Sea* as addressing an Eleventh Amendment issue only, failed to recognize the very basis of the Court's ruling:

Based on longstanding precedent respecting the federal courts' assumption of *in rem* admiralty jurisdiction over vessels that are not in the possession of a sovereign, we conclude that the Eleventh Amendment does not bar federal jurisdiction.

523 U.S. at 507.

That is precisely cargo claimants' position in this case. Admiralty jurisdiction *does* exist over the maritime claims and is not divested by sovereign immunity or the FSIA. The *Deep Sea* opinion is a re-affirmation of the court's prior holdings in foreign sovereign immunity cases. *The Davis*, 77 U.S. 15 (1869); *The Pesaro*, 255 U.S. 216 (1921); *United States v. Armisted*, 40 U.S. 518 (1841);

Santissima Trinidad, 20 U.S. 283 (1822); and this Court's recent decision in *Aqua Log, Inc. v. State of Georgia, supra*.

D. FINALLY, EVEN IF §1609 WERE TO APPLY, SPAIN HAS FAILED TO PROVE OWNERSHIP OF ANY OF THE COINS THAT COMPRISE THE *RES* OF 594,000 COINS THAT IS IN THE UNITED STATES.

For reasons previously stated, we respectfully, but emphatically, disagree with the district court's emphatic blanket endorsement of Spain's §1609 argument that claimants "must show its claims are based on commercial activity by the vessel in the United States," quoted *supra*. However, even if this Court were to approve the district court's interpretation and application of §1609, the result below still must be reversed.

The final problem in applying §1609 is the requirement that the *res* of 594,000 coins must be proved to be the property *of a foreign state.*" (emphasis added) The salvaged coins have not been found to be the property of Spain. In fact, it is unlikely Spain can prove any of the coins recovered are the lawful property of Spain. Spain only can prove some of the coins shipped on the *MERCEDES* were owned by Spain. Over 900,000 coins were shipped. Over 700,000 were owned by private parties. Spain should be treated no differently than the other cargo shippers who have filed claims subject to Odyssey's right to a generous reward for the successful salvage.

The district court did not even discuss this critical point that §1609 requires proof the *res* of coins was the property of Spain, apparently because the court considered the MERCEDES and cargo to be “inextricably intertwined,” and expressly viewed the *res* as the MERCEDES herself. In law and fact, her cargo was the only *res* before the court. As previously stated, this error alone that vessel and cargo are inextricably intertwined requires reversal.

E. THE DISTRICT COURT ERRED IN HOLDING
COMMERCIAL ACTIVITY OUTSIDE OF THE UNITED
STATES WAS IRRELEVANT

The district court’s order held Odyssey “rehash” of commercial activity to irrelevant because it did not occur in the United States. This was based on §1610. Commercial activity outside the United States *is relevant* under the very terms of §1605(b), the Sunken Military Craft Act, and admiralty and maritime law.

In *Bank of the United States v. Planters Bank of Ga.*, 22 U.S. (9 Wheat.) 904, 907 (1824), Chief Justice Marshall states:

It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to the level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.”

When Spain took on passengers, including women and children, and contracted with numerous private shippers, it acted as a private citizen or merchant, not in the role of a sovereign.

In 1952, the State Department changed United States policy to one embodying the “restrictive theory” of sovereign immunity. The State Department first signalled this shift in policy is a letter from Jack B. Tate, Acting Legal Adviser, United States Department of State, to Philip B. Perlman, Acting Attorney General. (May 19, 1952), *as reprinted in* 26 Dept. of State Bull., 984-8 5 (1952).

Tate wrote in part:

A study of the law of sovereign immunity reveals the existence of two conflicting concepts of sovereign immunity, each widely held and firmly established. According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the Courts of another sovereign. According to the new or restrictive theory of sovereign immunity, 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*). . . it will hereafter be the Department’s policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.

In *Alfred Dunhill v. Republic of Cuba*, 425 U.S. 682, 698 (1976), the Supreme Court recognized the “shift” in the official policy of our government to the “restrictive” approach to sovereign immunity. Rather than have the State Department make sovereign immunity decisions, Congress passed the FSIA giving the Federal Courts the power of making sovereign immunity determinations. See

28 U.S.C. §1602 (the determination of immunity by the Courts will “serve the interests of justice”).

The FSIA retained the restrictive theory of immunity. The Legislative History of the FSIA confirmed that:

... the bill would codify the so-called “restrictive” principle of sovereign immunity, as presently recognized in international law. Under this principle, the immunity of a foreign states is “restricted” to suits involving a foreign state’s public acts (*jure imperii*) and does not extend to suits based on its commercial or private acts (*jure gestionis*).

H.R. Rep. No. 94-1487, at 6 (1976) *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605.

Commercial activities and private activities are outside the bounds of sovereign immunity, whereas sovereign public acts are not. In *Republic of Argentina v. Weltover, Inc.*, 504 U.S. at 613, the Court noted “... the distinction between state sovereign acts, on the one hand, and state commercial and private acts, on the other, was not entirely novel to American law.” The Supreme Court went on to instruct the United States District Courts in how to decide questions of foreign sovereign immunity:

[W]hen a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign’s actions are “commercial” within the meaning of the FSIA.... [B]ecause the Act provides that the commercial character of an act is to be determined by reference to its “nature” rather than its “purpose” 28 U.S.C. §1603 (d), the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objections. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party

engages in “trade and traffic or commerce.” *Black’s Law Dictionary*, 270 (6th Ed. 1990).

Weltover, 504 U.S. at 614.

In *Honduras Aircraft Registry, Ltd. v. Gov’t of Honduras*, 129 F.3d 543 (11th Cir. 1997), the Court discussed the *Weltover* decision and held that a “foreign state loses its immunity if it engages in commercial activity . . . because then it is exercising the same powers that a private citizen might be exercising . . . [a] foreign state is commercially engaged when it acts like an ordinary private person, not like a sovereign, in the market.” 129 F.3d at 548. In *Honduras*, the government contracted for origination of a computer database allowing for Honduran aircraft registry. This contracting with private parties was held to be a “commercial act” and the private parties were allowed to bring suit to enforce the contract. *Honduras*, 129 F.3d at 548. The Court held that . . . [a]ll of those underlying activities were commercial in nature and of the type negotiable among private parties.” *Id.* at 547.

When the private owners/shippers consigned the gold and silver coins to be shipped to Spain, the contract provided Spain with the contractual obligation of performing a service. (i.e. Transporting a private/commercial shipment.) The consignment/shipping contract for the commercial cargo mandated Spain’s performance. The FSIA states that . . . “[t]he commercial character of an activity

shall be determined by reference to the nature of the . . . act, rather than by reference to its purpose.” 28 U.S.C. §1603 (d). *Weltover*, 504 U.S. at 614.

III. WHETHER THE SUNKEN MILITARY CRAFT ACT BARS SALVAGE OF CARGO FROM NAVAL VESSELS ENGAGED IN THE COMMERCIAL CARRIAGE OF CARGO

The district court’s ruling of no jurisdiction appears to be entirely based upon the FSIA and not to be based upon the Sunken Military Craft Act. Indeed, the district court expressly ruled Odyssey’s rehashing commercial activity was irrelevant because the MERCEDES had no nexus with the United States. Commercial activity, whether connected or not connected to the United States, is relevant to the Sunken Military Craft Act, 10 U.S.C. § 113 note, that provides in part:

(3) Sunken military craft -- The term “sunken military craft” means all of any portion of –

any sunken warship, naval auxiliary, or other vessel that was owned or operated by a government on *military non-commercial service* when it sank; (emphasis added)

As detailed in Odyssey’s Brief, pp. 29 to 32, the commercial activities appear so well documented that it would be difficult in good faith to contest. We note that immediately following the destruction of the MERCEDES, the Kingdom of Spain complained to England that the MERCEDES and accompanying vessels were engaged in commercial and not military activities. (See Odyssey’s Opening Brief, No. 10-10269-J at pages 9-10 where Odyssey demonstrates that Spain, in the

aftermath of the sinking of the MERCEDES, protested to Britain that its attack was unwarranted because the vessel was being used to transport passengers; that the MERCEDES was not being used as a warship.)

Governments and Kings, however, often reserve the special privilege to take conflicting positions depending upon the political policy. We suggest Spain's contemporary complaint to England is closer to the truth, than a contradictory claim 200 years later of no commercial activity made for purposes to claim rights to the entire *res* of 594,000 coins.

Although actual possession of the sunken craft is not required, commercial activity is of vital importance for applying the Sunken Military Craft Act. The magistrate and the district court made selective use of the non-possession aspect of the Act, but failed to recognize the act was not applicable because of the MERCEDES' commercial activities.

The district court's conclusion to its order adopting Spain's patrimony is an example of selective use of Sunken Military Craft Act principles.

The district court opined:

The ineffable [sic] truth of this case is that the MERCEDES is a naval vessel of Spain and that the wreck of this naval vessel, the vessel's cargo, and any human remains are the natural and legal patrimony of Spain and are entitled in good conscience and in law to lay undisturbed in perpetuity absent the consent of Spain and despite any man's aspiration to the contrary. That the MERCEDES is now irreparably disturbed and her cargo brought to the United States, without the consent of Spain and athwart venerable principles of law,

neither bestows jurisdiction on the United States to litigate conflicting claims of ownership (to all or part of the cargo) nor empowers the United States to compel the sovereign nation of Spain to appear and defend in a court of the United States.

Doc. 270, p. 4.

The district court's prose is so beautiful it is almost sacrilegious to analyze its faults. First, there were no human remains found at the recovery site and no probability that the site ever contained any human remains. Spain's unwarranted suggestion is highly prejudicial and inflammatory. Second, the district court's order in the previous page viewed Peru's patrimony argument with great respect but found it not to be a useful tool for consideration in this case. If Peru's patrimony is not a useful tool, neither should be the patrimony of Spain, which also would invoke colonial exploitation and subjugation that destroyed indigenous cultures. Spain's patrimony does not include the right to ownership of private property commercially shipped for a fee on a vessel that had been engaged in significant commercial activities for purposes of FSIA, the Sunken Military Craft Act, and traditional admiralty and maritime jurisdiction. Ownership of cargo should be based on the manifest not patrimony.

Instead of being panned, Odyssey should be praised and congratulated for outstanding salvage and archaeological accomplishments. Not only has the *res* of 594,000 coins been returned to commerce, the project reflected the highest level of skill and dedication. The cost to Odyssey has been enormous, not only in millions

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of dollars, but in the time and work of dedicated professionals who set the highest standards for maritime salvage and archaeology of deep water wrecks. Odyssey has produced thousands of documents and research attesting to its good offices. Cargo claimants Whitlock and Palacios are grateful for without the continuing courageous efforts of Odyssey there would be no benefit to the claimants and perhaps of greater importance no benefit to the public.

CONCLUSION

Subject matter jurisdiction of Odyssey and cargo shippers claims to the *res* of 594,000 coins exists under traditional admiralty jurisdiction and under FSIA §1605(b). If subject matter does not exist, the status quo leave the cargo of recovered coins in Odyssey's possession.

Respectfully submitted,

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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 8,078 words, and were otherwise prepared in compliance with 11th Cir. R. 32-4.

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