

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION  
IN ADMIRALTY

ODYSSEY MARINE EXPLORATION, INC.

Plaintiff,

v.

THE UNIDENTIFIED, SHIPWRECKED VESSEL,  
if any, its apparel, tackle, appurtenances and  
cargo located within a five mile radius of the  
center point coordinates provided to the Court  
under seal,

Defendant;  
*in rem*

and

The Kingdom of Spain and the Republic of Peru,

Claimants,

and

(Gonzalo de Aliaga (the Count of San Juan  
de Lurigancho), et. al.

Claimants.

CIVIL ACTION

Case No: 8:07-CV-00614-SDM-MAP

**PLAINTIFF, ODYSSEY MARINE EXPLORATION, INC.'S RESPONSE TO  
CLAIMANT, KINGDOM OF SPAIN'S MOTION TO DISMISS OR FOR  
SUMMARY JUDGMENT**

COMES NOW the Plaintiff, Odyssey Marine Exploration, Inc. ("Odyssey"), and files this, its Response to Claimant, Kingdom of Spain's ("Spain"), Motion to Dismiss or for Summary Judgment and in support thereof states as follows:

This Honorable Court has jurisdiction to hear this case and jurisdiction over the Defendant in this case. Therefore, Spain's Motion to Dismiss must be denied. Neither the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602 *et seq*, nor any other treaties or statutes will apply to defeat this Court's jurisdiction. The FSIA requires a claimant, here Spain, to bear the ultimate burden to prove that sovereign immunity exists and that no exception applies. Given the unsettled evidence surrounding, among other critical matters, the existence of any sovereign vessel at the site and the origin and ownership of the recovered coins, and necessarily construing those facts in favor of the non-moving party, Spain has failed to meet its burden. The record at least warrants further factual inquiry by the Court, including jurisdictional discovery as appropriate. Even if FSIA Section 1609 had any proper application here, which it does not, FSIA Section 1605(b) still permits this Court to conduct *in rem* proceedings to adjudicate the parties' respective rights to the *res* in this case, where Spain (as the claimant) seeks title to artifacts in Odyssey's actual possession.

The Defendant in this case is comprised of a site in the Atlantic Ocean which, at the time it was discovered by Odyssey, consisted mostly of piles of coins lying on the ocean floor, as well as the recovered coins that were properly brought into this Court's jurisdiction. Although Odyssey continues to investigate its hypothesis that various items at the site may have come from the *Nuestra Senora de las Mercedes* (the "*Mercedes*"), there is no conclusive evidence which verifies the identity of a vessel related to the site. In fact, there is evidence which suggests that the related vessel may not be the *Mercedes*. (See Reports of Sean Kingsley and James Sinclair attached hereto as Exhibits A and B.) There is no coherent vessel at the site, and the Defendant *res* in this case is **not** one and the same as the *Mercedes*.

Even if this Court were to determine that the Defendant Site contains parts of what once was the *Mercedes*, and that the cargo recovered from the site originated from the *Mercedes*, there would be no legal basis for dismissal of the case. First, the *Mercedes* was not a sovereign immune vessel. The *Mercedes*, while government-owned, was not on exclusively noncommercial service at the time of its sinking. In fact, the *Mercedes* set sail at a time of peace on a voyage that was predominantly for the carriage of commercial cargo (mostly privately owned merchant goods) and passengers. Moreover, the vast majority of specie carried aboard the *Mercedes* was privately owned commercial cargo that would not itself be subject, in any event, to sovereign immunity.

To the extent Spain's filing is considered a Motion for Summary Judgment, it must likewise be denied as a matter of law because there are many disputed genuine issues of material fact.

### **MEMORANDUM OF LAW**

#### **STATEMENT OF RELEVANT FACTS**

Odyssey submits that the majority of facts asserted in Spain's Motion to Dismiss are either false or irrelevant to a motion purportedly based upon a lack of jurisdiction primarily under the FSIA. Moreover, as the disputed facts clearly demonstrate, Spain's Motion for Summary Judgment must fail as a matter of law. The true facts are as follows:

Odyssey is the world's leader in deep-ocean shipwreck exploration and recovery. As more fully described in the Affidavit of Gregory Stemm, Odyssey's CEO and Chairman, attached as Exhibit D, Odyssey retains the services of many researchers and consultants to review historical archival documentation for information about various shipwrecks. Spain

attached the declaration of one such researcher, Victoria Stapells Johnson, but mischaracterizes its relevance to this case. (Dkt. 131-17.) Ms. Johnson researched the *Mercedes* as well as other vessels as early as 2005. She also determined that the *Mercedes* was listed on the Spanish Naval Registry. At least five other researchers for Odyssey, however, had determined based on historical research that the *Mercedes* was not on exclusively noncommercial service at the time of its sinking, but instead was predominantly involved in transporting private passengers and merchant cargo. Odyssey thus knew that the *Mercedes*, itself, as well as its cargo in particular would not be entitled to immunity from arrest and salvage. Furthermore, despite Spain's declaration otherwise (Dkt. 131, p. 7), Odyssey knew Spain to have an express interest in locating and recovering vessels which may be of Spanish cultural interest.<sup>1</sup>

In 2006, Odyssey developed the "Amsterdam" project, which involved searching for targets in an area known to be heavily traveled by vessels believed to have been carrying valuable cargo. Odyssey developed a target list of no less than 30 vessels that may have sunk in the Amsterdam area and compiled information it had obtained through research about those vessels. One of the vessels on the Amsterdam project list was the *Mercedes*. Recognizing that Spain may have had a cultural (if not legal) interest in vessels that may be located within the Amsterdam area, Odyssey invited Spain to participate in the project.

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<sup>1</sup> In 2006, Odyssey was involved in a project regarding another of its discoveries, a site believed to be that of the British warship HMS *Sussex*. Spain was also involved in that project, and the parties worked amicably together toward a plan for recovery which included salvage rights of Odyssey. Odyssey had previously participated in many meetings with Spanish representatives as detailed in the Affidavits of José Luis Goffi and Gregory Stemm, attached hereto as Exhibits C and D, which exhibited Spain's willingness and even enthusiasm for working with Odyssey. Spain never communicated to Odyssey a blanket refusal of salvage of Spanish vessels. In fact, the *Sussex* plan included the appointment by Spain of archaeologists to participate in the project.

Greg Stemm, Odyssey's CEO and Chairman, and Odyssey's counsel in Madrid, José Luis Goñi Etchevers, met with Elisa de Cabo<sup>2</sup> on November 17, 2006. This is the meeting referenced in Ms. de Cabo's declaration, submitted by Spain. Many of the assertions made by Ms. de Cabo and her characterization of the meeting as a whole are false or misleading.

As clearly indicated in the Goñi and Stemm Affidavits, the meeting was cordial in nature and at no time did Ms. de Cabo state or imply that Spain "objected to and refused any salvage or other disturbance by Odyssey with respect to any shipwreck in which the Government of Spain has an interest." Had Ms. de Cabo or any representative of Spain throughout its dealings with Odyssey ever wished to express such a specific declaration in regard to Odyssey's Amsterdam project, it would have been put in writing and officially documented. It never was. Such an objection to Odyssey's efforts would have been contrary to Spain's actions in dealing cooperatively and amicably with Odyssey over the last ten years to locate shipwrecks with a potential Spanish interest. (See generally Exhibits C and D.)

In March 2007, when Odyssey's survey vessel was in the Amsterdam area, in the Atlantic Ocean beyond the territorial or contiguous waters of Spain or any other nation, Odyssey's side scan sonar revealed images which to many would resemble normal underwater geology. Odyssey's experts, however, noted a potential distinction worthy of further investigation. Odyssey deployed its sophisticated equipment to get a closer look, revealing not rocks or coral but piles of coins. Initial investigation of the surrounding area showed more piles of coins, but no hull or other identifiable vessel structure. Nevertheless, in

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<sup>2</sup> Ms. De Cabo was the Assistant Subdirector General for the Protection of Historical Heritage in the Directorate General for the Protection of Fine Arts and Cultural Assets of the Ministry of Culture of the Government of Spain.

adhering to its strict policies of proper archaeology, Odyssey immediately began its predisturbance survey and recovered a bronze block to use for the symbolic arrest of the site. A photomosaic of the site was prepared by slowly and methodically running systematic lines over the site and taking individual photographs which could later be pieced together to depict the entire area's archaeological contexts. Once the pre-disturbance photomosaic was complete, Odyssey's experts were surprised as to what was **not** revealed. No ship existed. No hull. No keel. No intact structure suggesting the presence of a vessel.<sup>3</sup>

Several scattered seemingly "ship-related" objects were visible, as well as a number of cannon. Contrary to assertions made by James Delgado, an archaeologist asked by Spain to prepare an opinion based on review of video and photographs, the cannon were absolutely not indicative of any particular vessel. In fact, cannon bearing the supposedly diagnostic "dolphins" virtually identical to those at the Defendant Site have been found by Odyssey at sites of wrecks which were definitely not Spanish. (*See* Exhibit D attached hereto.)

Upon discovery of the coins, Odyssey immediately initiated legal proceedings in order to protect its rights to the site and to properly bring the matter before this Court.<sup>4</sup> The initial Complaint assumed a "shipwrecked vessel" would be found, but the Amended Verified Complaint identified the Defendant as "the Unidentified Shipwrecked Vessel, **if any**, its apparel, tackle, appurtenances and cargo...." (Dkts. 1 and 21.) The phrase "if any"

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<sup>3</sup> *See* Kingsley Affidavit, Exhibit A, and attached photomosaic which reveal that the absence of a vessel at the subject site is truly unique.

<sup>4</sup> The Verified Complaint in Admiralty was filed on April 9, 2007. Odyssey completed an initial application for an export license on April 10, 2007. Spain seemingly asserts that these dates somehow reveal deception on Odyssey's part because Odyssey began recovery at the site before receiving the Court's Order Directing the Issuance of a Warrant of Arrest. However, Spain ignores that recovery of an artifact is obviously necessary prior to the arrest, and there is no legal obligation to file anything with the Court prior to recovery. Nevertheless, Odyssey began the procedure to arrest **immediately** upon discovery of the site – including recovering the block which was used to arrest it. (Exhibit D.)

was included because no vessel had been discovered. None has since been located. No vessel or hull was disturbed in any way in Odyssey's recovery of coins and artifacts from the site.

Spain implies that Odyssey knew, but chose not to reveal, the identity of a vessel related to the site, and alleges "covert" activity on the part of Odyssey. (Dkt. 131, p. 34.) These allegations are not only irrelevant to the subject motion but are also utterly unfounded. Odyssey would of course have preferred to announce that it had discovered the *Mercedes* – or whatever identifiable vessel it had located. As responsible archaeologists and as an accountable public corporation, Odyssey had and continues to have an ethical and fiduciary responsibility to confirm the identity of any shipwreck it recovers before announcing the identity to the world. The fact that no vessel was found at the site, combined with other factors suggesting that the site may **not** be related to the *Mercedes*, prevented Odyssey from making such a declaration. (See generally Exhibits A & B.) While Odyssey's leading hypothesis is that the recovered cargo came from the *Mercedes*, at the current level of site reconnaissance and study, there is no definitive archaeological evidence and all evidence pointing toward that theory remains circumstantial. (See Exhibit A, p. 4.) Responsible archaeologists, and this Court, must reach the same conclusion.

### LEGAL ARGUMENT

Spain's Motion to Dismiss this case, based primarily upon a lack of jurisdiction under the Foreign Sovereign Immunities Act (FSIA), must be denied.

#### I. Summary

The United States Supreme Court, as well as the Eleventh Circuit, have ruled that the U.S. District courts do have jurisdiction as regards to any salvaged items, that were not at the

time of the salvage in the actual possession of a foreign government claiming immunity. *California v. Deep Sea Research*, 523 U.S. 491, 118 S.Ct. 1464, 149 L.Ed.2d, 626 (1998), *International Aircraft Recovery LLC v. the Unidentified Wreck and Abandoned Aircraft*, 218 F.3d 1255, 2000 A.M.C. 2345 (11<sup>th</sup> Cir. 2000). Moreover, the Defendant in this case is not an entity to which sovereign immunity would apply. There is no vessel located at the Defendant Site, and there is insufficient evidence to conclude that the vessel related to the cargo found is the *Mercedes*. Furthermore, the *Mercedes* is not a sovereign immune vessel, and even if it were, the vast majority of the cargo aboard was privately owned and not the property of a foreign sovereign.

## II. Admiralty Jurisdiction Generally

In this case involving an admiralty and maritime claim, this Court has exclusive subject matter jurisdiction pursuant to U.S. Const. art. III, § 2, cl. 1, 28 U.S.C. § 1333, and Rule 9(h) of the Federal Rules of Civil Procedure and Supplemental Admiralty Rules C and D. In addition, the Court has *in personam* jurisdiction over the Plaintiff and constructive *quasi in rem* jurisdiction over the Defendant Site. Claims arising out of salvage operations, including those that occur on the high seas, are unquestionably within the admiralty jurisdiction of the federal courts. See *Treasure Salvors, Inc. v. Unidentified, Wrecked and Defendant Sailing Vessel*, 640 F.2d 560, 566-67 (5<sup>th</sup> Cir. 1981) (*Treasure Salvors III*).

The FSIA cannot defeat the Court's jurisdiction in this case. As explained further below, Section 1609, which under certain circumstances prevents the arrest of "property in the United States of a foreign state," is inapplicable to the site and coins at issue in this case. 28 U.S.C. § 1609. In any case, even if properly invoked by Spain, Section 1609 is insufficient to

dispose of this case on immunity grounds. Under FSIA Section 1605(b), the Court may preside under *in rem* principles over a foreign state 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. 28 U.S.C. § 1605; see *MariTrend, Inc. v. M/V Sebes*, 1997 U.S. Dist. LEXIS 23594 (E.D. La. Oct. 16, 1997); *Silver Star Enterprises, Inv. v. Saramacca MV*, F.3d 666, 668 n.1 (5<sup>th</sup> Cir. 1996).

### III. Standard of Review

When the jurisdictional basis of a claim is intertwined with the merits, the court should apply a summary judgment standard when ruling on a motion to dismiss. That is, there must be an absence of any disputed material fact, and all reasonable inferences must be drawn in favor of the non-moving party. See *Lawrence v. Dunbar*, 919 F.2d 1525 (11<sup>th</sup> Cir. Fla. 1990), *Williamson v. Tucker*, 645 F.2d 404 (5<sup>th</sup> Cir. 1981), *cert. denied*, 454 U.S. 897; *Shotz v. City of Plantation, Fla.* 344 F.3d 1161 (11<sup>th</sup> Cir. 2003).

Jurisdiction of this Court is fundamentally a necessary and critical prerequisite to determine the respective interests of the parties involved, including Claimant Spain, to the *res* before the Court. Indeed, Spain recognized as much when it submitted to federal court jurisdiction to adjudicate its ownership rights to two other vessels, albeit on dissimilar facts. See *Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 47 F. Supp.2d 678, (E.D. Va. 1999), *aff'd in part and rev'd in part*, 221 F.3d 634 (4th Cir. 2000). Facing a motion to dismiss for lack of such jurisdiction, this Court cannot merely accept an assertion of immunity, but rather has the power and duty to closely scrutinize allegations of sovereign immunity, resolve factual disputes, and reach its own jurisdictional conclusion. See, e.g., *The Pesaro*, 255 U.S. 216, 219 (1921); *Malewicz v. City of Amsterdam*, 517 F. Supp. 2d 322, 326

(D.D.C. 2007). When the jurisdictional facts bearing on an FSIA claim are in dispute, the Court should at least afford the parties opportunity to engage in jurisdictional discovery and participate in an evidentiary hearing. *See, e.g., Reiss v. Societe Centrale Du Groupe Des Assurs. Nationales*, 246 F. Supp. 2d 285, 287 (S.D.N.Y. 2003) (citation omitted).

#### IV. Burden of Proof for Sovereign Immunity

The “ultimate burden of persuasion” rests with Spain to demonstrate by a preponderance of the evidence the presence, its ownership, and the immunity of both a vessel and the recovered cargo, and that there are no applicable exceptions to immunity which would apply to the vessel or the cargo recovered. *Byrd v. Corporacion Forestal y Indus. de Olancho S.A.*, 182 F.3d 380, 388 (5th Cir. 1999); *Aquamar S.A. v. Del Monte Fresh Produce N.A.*, 179 F.3d 1279, 1289-90 (11th Cir. 1999). Spain’s own cases do not suggest otherwise.

Spain incorrectly asserts that it has shown that “the Defendant is a sovereign vessel of Spain.” (Dkt. 131, p. 16.) The Defendant in this case, however, is **not** a vessel at all. The Defendant is an underwater site which was composed mostly of piles of coins and the recovered coins and miscellaneous artifacts themselves. Moreover, based on the proportion of privately owned cargo that was known to be on the *Mercedes*, the vast majority of *res* that is within the jurisdiction of the Court – assuming it is from the *Mercedes* at all – was private property that was never owned by the Kingdom of Spain.

Spain is also mistaken that “Odyssey bears the burden to show that an exception to sovereign immunity applies in this case.” (Dkt. 131, p. 17.) Indeed, Spain’s own cited cases impose that burden on Spain. In *Alberti v. Empresa Nicaraguense de la Carne*, 705 F.2d 250,

