

EXHIBIT F

DR. WILLIAM H. FLAYHART, III

EXHIBIT F-1

DR. WILLIAM H. FLAYHART, III

PART 1

AFFIDAVIT AND REPORT

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.

CIVIL ACTION

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

AFFIDAVIT OF DR. WILLIAM HENRY FLAYHART, III
IN SUPPORT OF ODYSSEY MARINE EXPLORATION, INC.'S RESPONSE TO
CLAIMANT, SPAIN'S, MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

This AFFIDAVIT is being filed in case 8:07-CV-00614-SDM-MAP.

1. My full name is Dr. William Henry Flayhart, III. My legal address is 39 Stuart Drive, Pennwood, Dover, Delaware, 19901. I am competent to testify as to all facts and issues addressed in the report attached hereto as Exhibit F.

2. I prepared the attached report for Odyssey Marine Exploration Inc. in support of its Response to Claimant, Spain's, Motion to Dismiss or for Summary Judgment in this case.

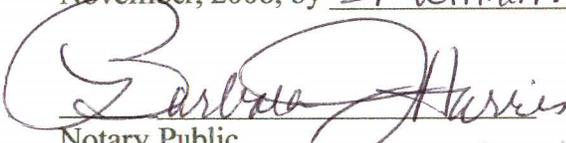
3. I have personal knowledge regarding the information contained herein and hereby swear that the information is true and accurate to the best of my knowledge.

I CERTIFY THAT THE ABOVE IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE


Dr. William Henry Flayhart, III

STATE OF Delaware)
COUNTY OF Kent)

The foregoing instrument was acknowledged before me this 13th day of November, 2008, by Dr. William Henry Flayhart III who is personally known by me.


Notary Public
My Commission expires: 2/17/10

HISTORICAL BRIEF:**WILLIAM HENRY FLAYHART III, *PROFESSOR EMERITUS*****PROFESSIONAL BACKGROUND:**

I am a *Professor Emeritus* of History at Delaware State University where I have undertaken research and taught since 1970. My M.A. (1968) and Ph.D. (1970) are from The University of Virginia, Charlottesville, Virginia. In the course of my career I have become one of the acknowledged international experts on maritime and naval history, and on the history of the French Revolution and Empire. I have been awarded Danforth Foundation, Ford Foundation (through WWF), Kellogg Foundation, NDEA and Woodrow Wilson Foundation Fellowships. In 1994 The University of Leiden, The Netherlands, the oldest of the Dutch universities, invited me to be the “Visiting Professor of Maritime History” for the Academic Year 1994-1995. During that time I also served as the Visiting Lecturer at The Netherlands Scheepvaart Museum, Amsterdam, and the Royal Museum of Antiquities, Leiden.

In recognition of my work in maritime and naval history I was elected by the International Maritime Economic History Association (2000) at the International Congress (Oslo, Norway) to represent the IMEHA on the International Commission on Maritime History (ICMH) (UNESCO). In March 2000 I also received the prestigious *Legion de Merit* of *La Societe Napolleonienne Internationale* (The International Napoleonic Society) for research and publications in the field of the French Revolution and Empire.¹ In May 2001 I received the “Lyman Award” of the North American Society for Oceanic History (NASOH) for my book The American line 1871-1902 which was described as the best study on American maritime and naval history published in 2000.² Subsequently in 2004 I was appointed one of the three scholars comprising the

“Lyman Award” Committee (NASOH) and continue to serve in that capacity evaluating between 40-75 titles published every year in the areas of American and Canadian maritime and naval history. I have been a member of the Canadian Nautical Research Association for some twenty years. Upon occasions I have served as a guest lecturer in the Graduate Program in Maritime and Naval History at the University of Greenwich, Greenwich, England.

In the United States I am an elected member of the Board of Directors of the Steamship Historical Society of America (2002) and since 2006 serve as the Secretary to the Board of Directors (SSHSA). I also continue to serve as one of the principal lecturers in the Visiting Scholars Program of the Delaware Humanities Forum providing between 20-40 lectures in the public school systems. I have served a number of terms on the Delaware State Archives Commission at the appointment of both Democratic and Republican Governors. I am a past-president of The Friends of Old Dover (The Dover Historical Society) and of the Kiwanis Club of Dover, Inc. As a maritime and naval scholar, I have lectured around the world on ships. I have co-authored the first biography of the Cunard liner QE2 (1985) and am the “Senior Scholar in Residence” of the Cunard Line having traveled and lectured on their ships for over forty years.³ I am the author of six books and am working on an additional three titles.

HISTORICAL BRIEF:

Any assessment of the status of an archaeological discovery must involve a detailed analysis of the employment of that vessel if subsequent interpretation is to be accurate and contribute to the realm of historical and scientific knowledge. Any vessel at

any time in history can have a number of potential uses. The present is no different as container ship lines are scrambling to find alternative uses for some 200 hulls initially ordered as container ships, which are under construction in shipyards all over the world, and for which the present economic situation indicates there is no possibility of employment. Many will be scrapped where they lie, while a few hulls will find employment as radically different ships (passenger liners, etc.).⁴

In interpreting the “Black Swan” site, knowing what trade this ship was engaged in is fundamental to evaluating any of the conflicting claims and is imperative in discounting dogmatic, and sometimes emotional, assertions. If the “Black Swan” site represents debris from the frigate *Nuestra Senora de las Mercedes*, hereafter referred to as *Mercedes*, that vessel may have been an armed warship of the Spanish Navy from the time she was launched in Havana (1788) until 1802, but in the year 1802 she became a commercial vessel sailing for the “*Correos Maritimos*” (Maritime Mail Service) and, as such, indisputably assumed the role of a “commercial vessel” regardless of whatever armament was left on board.⁵ In the historical period concerned, merchant vessels frequently were heavily armed (as in the case of British East Indiamen), and it can be argued that the armament of the *Mercedes* may have been only for defensive purposes. As part of the reorganization of their military and naval operations, the Spanish Government in 1802 ordered the Maritime Mail Service to turn over all the physical assets of the Maritime Mail fleet (men, ships, supplies, etc.) to the Navy for operational management, and established a protocol for civil services to be provided by the Navy to meet the needs of the Maritime Mail. The *Correos Maritimos*, through the Ministry of State, was to ask the Navy for “all the ships needed for one year in advance” and the

Navy Department would supply all these ships “equipped and armed according to the regulations. . .”.⁶ When assigned for this purpose to Maritime Mail service, *Mercedes*’ warship status irretrievably was compromised by her peace time employment as a commercial vessel.⁷ This was acknowledged by the Spanish Government in many ways, but most emphatically when she was permitted to carry fare-paying passengers as well as all manner of commercial goods.⁸ Any such activities specifically were forbidden to vessels serving in the Spanish Navy.⁹ Outward bound the *Mercedes* and her accompanying vessels delivered troops, administrative personnel, and a broad general cargo which even included quantities of official stationery (cargo specifically described in the regulations governing the reformed Maritime Mail operations). Homeward bound the vast majority of the cargo carried by the commercial Maritime Mail Service to the Iberian Peninsular was consigned by merchants wishing to obtain passage for themselves, their families and/or their possessions.¹⁰ This is well documented in the manifests of the commercial vessels sailing in the squadron that included the *Mercedes*.¹¹ The vast majority of the cargo was commercial in its nature and not public or Royal.¹²

In addition, any objective inspection of the ocean floor where the debris lies reveals that there is no ship at this site and, therefore, with all due respect to sensitivities, no valid claim can be made to this being any form of cemetery or memorial to the honored dead. Furthermore, the Spanish Navy abandoned the right to regard the *Mercedes* and her sister vessels as warships when the ships were assigned to the Maritime Mail for utilization on voyages of commerce dedicated to commercial purposes. There is no latter-day recrimination involved in this statement because, in the eighteenth and nineteenth century, the cost of maintaining warships during peacetime was enormous and

if they were laid up they decayed rapidly through neglect. The Spanish Navy was one of the largest in Europe during the Wars of the French Revolution and Napoleon and an enormously desirable asset to France. In 1803 the Spanish Navy included 76 ships-of-the-line, 51 frigates and 160 ships of lesser size, leading one Jean Lambert Tallien, a tribune in the Legislative Corps of the Council of 500 to declare: “with the navies of Holland and Spain we can strike hard at the coasts of the new Carthage.”¹³

The expense of maintaining such a huge fleet was horrendous and threatened the very financial foundations of the Kingdom of Spain. If there was any way in which a warship could be utilized in peacetime to meet her expenses, it had to be considered, particularly if it also could provide useful services to the state. Thus the use of these frigates beginning in 1802 as commercial vessels establishes the fact that the *Mercedes*, from 1802 until the time of her loss, *was not* serving as a warship. Her previous military service has nothing to do with her employment in 1802-1804 and has no validity in evaluating her final status. Just because in later time Spanish bureaucrats left the *Mercedes* on the rolls of naval warships, the historical facts remain unchanged. She was lost while on a civilian commercial mission.

Unemployed men in the Spanish Navy during peacetime have to earn a living in order to support themselves and their families. Therefore, there is nothing unusual about their service on the *Mercedes*. At the same time the period of peace also allowed the Spanish Government to continue its established program of combining civilian and military positions in the colonies and the mother country by merging the assets of the civilian Maritime Mails with naval operations. Both the Spanish Navy and the Maritime Mail Service had suffered greatly during the last years of the previous war. At a time

when Spain was struggling to recover from years of war, it made sense for purposes of economy and efficiency to streamline services from Spain to her colonial empire in the Western Hemisphere. Common sense dictated the value of utilizing the skills and resources of the Navy in the management of ships, while retaining the bureaucracy and administrative supervision of the civilian mail service. Public penury made efficiency absolutely necessary. One economical move involved the combination of civilian, military and political offices in the Western Hemisphere. This removed duplicating of assets such as administrative offices, shipyards, and supply warehouses.

The Kingdom of Spain in October 1804 was a neutral power which had reorganized during the brief Peace of Amiens a number of commercial services from the mother country to her colonial empire in the Western Hemisphere. These commercial services under the *Correos Maritimos* (Maritime Mail Service) ran to the Caribbean (Havana, et.al.), the East Coast of South America (Viceroyalty of the Rio de la Plata [Montevideo]), and the West Coast of South America (Viceroyalty of Peru [Callao]).¹⁴ It was stated in the document describing this activity of April 7, 1802, that: “the Ministry of the Navy may provide as many of the State’s equipped and armed ships as necessary for this, which seems more appropriate than not having the Ministry of State indicating so, as stated in the Second Rule.”¹⁵ Prior to this naval vessels had been explicitly ordered not to carry commercial cargo of any nature.

Former officers of the Maritime Mail, following the reforms of 1802, were granted adjustments of pay and rank to enjoy equality with naval personnel. In some instances the adjustments had to be applied for if an officer, such as former Maritime Mail Frigate-ensign Luis Abello, was transferred to naval service.¹⁶ Abello stated: “that

he has been advanced to the class in which he has the honor of serving Your Majesty as a Maritime Mail Lieutenant, such service having been added to the Spanish Navy. The salary that Your Majesty has indicated with such official nature in this incorporation seems to have been the cause of the petitioner, embarking on the Frigate *Mercedes* destined for Lima,” and, in so many words, therefore may he have the same benefit package as the other officers.¹⁷

The reformed commercial services were established formally by the Government of Carlos IV (1788-1808) in 1802 with a number of goals. These goals included the transportation of the mails (both public and private) on a regular basis, the transportation of passengers who paid a fare for the voyage in order to secure passage, and the movement of valuable cargo. The Eastbound cargoes included, but were not limited to, gold and silver, since, as contemporary manifests indicate, the valuable cargo could include bales of vicuna wool, precious woods, oils, and a broad variety of commodities and goods.¹⁸ Freight was charged for all commercial goods carried.

Among the valuable cargoes specified in the terms of the Maritime Mail reform regulations Westbound to the Americas was mercury, a critical and fundamental part of the process for the extrapolation and/or refining of precious metals. The vessels so designated also were to carry the outward bound cargoes of supplies and official mail. Eastbound the manifests of the ships predominantly consisted of the homeward bound fortunes of successful Spanish merchants, fare-paying passengers and government employees preparing to retire to Spain at the conclusion of long service in the Americas.¹⁹ The descriptions of the cargo carried on the four vessels that comprised the fleet which included the *Mercedes* clearly defines their commercial nature.²⁰ A classic

example of this type of passenger would be Don Diego de Alvear who in the summer of 1804 elected to return to Spain with his accumulated fortune (worth some twelve thousand pounds sterling), his wife, five daughters, four sons, and four black slaves who served as servants to the large family.²¹

In order to provide fast, well-armed merchant ships (of frigate design) the Spanish Government assigned some of its naval tonnage to the “*Correos Maritimos*” during peacetime in order: 1) to secure income from these ships with which to underwrite their maintenance; and 2) to avoid having to lay-up these ships and watch them rot away. Selection of a medium-sized ship was not unusual for commercial voyages – the “frigate” ship design was in many European countries as common for merchant ships as for naval vessels. The *Correos Maritimos* not only operated frigates of its own prior to the reforms of 1802, but occasionally chartered “*fregata comercial*” for some of its voyages.²² In fact one reference to the *Mercedes* termed her a *navio de correos*, or mail ship. However, naval frigates were not as roomy as commercial frigates, and with a large cargo plus numbers of passengers, space could become very restricted on the trimmer naval version of a frigate.

Significant modification of the interior naval architecture of the frigates assigned for the private service occurred or they never would have been able to fulfill their roles as fare-earning passenger and cargo ships. These modifications almost assuredly involved the creation of private passenger cabins along the interior of the gun deck. Such private facilities could be assembled, or knocked down, at will according to circumstances but if the ships were going to carry important personages and their numerous group of family and retainers, the masters had to provide the passengers with suitable accommodations.

At times cannon were removed and utilized for other purposes as when the Spanish frigate *Medea* left some of her cannon at Montevideo to reinforce the fortifications there. Remaining cannon on the gun deck could be lashed parallel to the sides of the ship instead of facing outward. As such they were far less useful and would have needed considerable labor and effort to place in firing position. A frigate adapted to commercial service was not left defenseless as there were other cannon and mortars on the upper deck which could be utilized to fight off any unwanted piratical intentions.

In addition to the newly installed passenger cabins running down the center of the gun deck of these frigates adapted for the trans-Atlantic commercial service, the most valuable bulk cargo, such as the precious bales of vicuna wool, would have to be kept relatively free from dampness, and this meant that such cargo could not be placed in the depths of the holds where it would depreciate in value if it was subjected to sea water and/or waste water. In order to prevent contamination of the bales of wool they could be placed on the gun deck where conditions would be better. The presence of highly flammable cargoes on the gun decks of these converted naval vessels was viewed as an acceptable hazard for a commercial voyage, and is a measure that never would be permitted on a ship serving in the Spanish Navy in wartime. This further underlines the fact that the commercial nature of these vessels significantly had modified the nature of service on them and, also, their fundamental character as ships.²³

Republican France and Great Britain were at war for most of the quarter century from 1792-1815. Only one significant period of uneasy peace occurs with the signing of the Peace of Amiens in 1802. The Peace of Amiens has the historical notoriety of taking longer to negotiate (2+ years) than it lasted between the two principal antagonists, Great

Britain and France (13 months).²⁴ By May 1803, insofar as the British Government was concerned, the uneasy peace with a France controlled by the First Consul Napoleon Bonaparte was more dangerous than a state of open warfare. Therefore, King George III (1760-1820) declared war on Republican France (May 18, 1803) and the quarter-century of warfare resumed after a brief respite. Spain managed to stay out of the conflict until December 1804. This stage of the renewed conflict is known as the War of the Third Coalition (the third of six “Coalitions”). (A “Coalition” normally is described as involving an international array of allies on both sides of the struggle.)

The Kingdom of Spain by virtue of the Treaty of Ildefonso (1796), and the Second Treaty of San Ildefonso (October 1, 1800) was required to render assistance to France whenever the latter found herself at war. In the new treaty the Kingdom of Spain was required to provide France with at least six ships-of-the-line (74-guns or better) and a number of other services (dockyards, ports, artillery, cavalry, etc.).²⁵ Regardless of other French views Charles Marquis de Talleyrand-Perigord, Foreign Minister of France, and his master Bonaparte did not have any great desire for the active involvement of the Spanish military or navy in the new struggle.²⁶ The First Consul expressed his views when he said: “If the Spaniards were Frenchmen or had our national courage it would be well for them and for us, but as things stand they are worse than useless.”²⁷ The French leaders did have a compelling desire for the prompt and regular payment of the monetary compensation which Spain was obligated to give to France (in lieu of military support). This sum was pegged at seventy-two million francs a year, divided into quarterly payments to be made directly to the French treasury.²⁸ The annual subsidy demanded of Spain was wildly beyond the ability of the government of King Carlos IV to pay. In the

French view the regular transfer of funds from Madrid to Paris would help Bonaparte to underwrite the expenses of the “Grand Army” which he had moved to positions along the French-Belgian-Dutch coastline nearest the British Isles. The Grand Army of between 90,000-130,000 troops specifically was being trained for a military invasion of the British Isles aimed at the conquest and defeat of that “nation of shop keepers” whose Royal Navy and financial wealth were such a thorn in the side of the First Consul of France.

Negotiations were underway between London and Madrid in which the British sought Spanish guarantees of neutrality (no payments to France, no Spanish warships to enhance the French Navy, and no war preparations of any nature). Britain wanted assurances that no Spanish warships would be sent out against her over-strained and over-stretched Royal Navy which was seeking to blockade all the ports along the French coastline. London also sought assurances that as a neutral Spain would permit any British-flag ship (naval or commercial) to have the untrammelled use of any Spanish port for repairs. The Bay of Biscay and the North Atlantic could be violent bodies of water and friendly, or at least neutral, ports always were in demand. Finally, Great Britain regarded the Spanish commitment to transfer a monthly “bribe” to Bonaparte in order to have her neutrality respected as intolerable.²⁹ Somehow the transfer of funds from Madrid to Paris had to be interrupted or stopped altogether if peace was to be preserved and Spanish neutrality respected by Britain.

The Kingdom of Spain needed every possible source of income to meet the demands of the French Government. The alternative was to experience the horrors of another French Army rampaging across the Pyrenees Mountains (a French invasion during the War of the First Coalition had led to Spain’s 1795 abandonment of Great

Britain and the 1796 Treaty of San Ildefonso). At the same time the Spanish Government under the leadership of Godoy, the Prince of Peace, did not want to sacrifice its highly valued neutrality. Spain found herself in an impossible position after the outbreak of war between France and Great Britain.

The British Government demanded that Spain must not support France either militarily, or through the payment of the monthly treasure. The French demanded that their erstwhile ally honor her treaty commitments—ships and men, or money. Spain vacillated and tried to buy time. Every last possible shipment of bullion from the Spanish colonial empire, and, particularly the gold and silver mines of Peru, was imperative. The most convenient means of accomplishing these shipments was through the utilization of the “*Correos Maritimos*” (Maritime Mail) commercial mail service between Spain and the Western Hemisphere.³⁰

Incredibly, the government in Madrid in its frustration over how to meet Bonaparte’s demands forgot how much bullion already had been shipped from Lima, Peru. Royal letters ordered the Viceroy of Peru to remit an additional seven million pesos. These demands were wildly beyond the Viceroy’s capacity since his predecessor already had sent to Spain large sums and thus only had around two million pesos on hand. This mistake played a significant role in Britain’s ultimate decision to intercept the homebound fleet, for news leaked out describing an expected shipment of a gigantic sum of state money to be paid to France.

The normal Westbound sailing of the *Mercedes* on behalf of the Maritime Mail Service in the company of two other ships left El Ferrol for the voyage to the Western

Hemisphere (Montevideo, around Cape Horn, to Callao, Peru) in 1803 well before hostilities broke out in Europe.

During 1804 the international atmosphere between London and Madrid steadily deteriorated. When Rear-Admiral Alexander Cochrane was ordered to cruise off Ferrol, a steady stream of strongly worded communications began to flow to London about what Cochrane considered to be the duplicity of the Spanish authorities. "The activity at Ferrol at the time was very great, and Cochrane had not any doubts as to the hostile intentions of the Spanish. He protested to the Captain-General against the fitting out of squadrons in the various ports, as was being done at Ferrol, and he demanded an explanation. He declared that if the French squadron, consisting of five sail of the line, should come out it was his determination to attack it, and he hoped in this he should not be opposed by the Spanish Squadron."³¹ A British assessment at the time, "Statement of the Spanish Navy at Ferrol," on August 22, 1804, seemed to underline the Spanish measures designed to prepare the Spanish Navy for action.³²

Admiral Cochrane's warnings to London combined with intelligence of the fleet sailing for home from Montevideo created fear that Spain was readying itself to support Bonaparte. When the intelligence reached London that the homeward bound commercial fleet vessels was transporting the colossal sum of seven million pesos for the Government of Spain, the decision was made that somehow the treasure fleet had to be stopped from reaching a Spanish port. Lord Hawkesbury, Secretary of State, referred to the homeward bound Spanish convoy as consisting of the "Spanish auxiliary ships."³³ Subsequently the assertion that the majority of this treasure belonged to Spain's King (and thus available to pay the French subsidy) was found to be false since most of it was being shipped by

commercial or private interests.³⁴ In the orders that were drawn it was stated that the Spanish ships were to be intercepted and escorted into a British port without harm to them, their passengers, or cargo.

The Kingdom of Great Britain and the Kingdom of Spain still were at peace in the fall of 1804 when an order of Sir William Cornwallis, Vice-Admiral of the White instructed Captain Graham Moore (*HMS Indefatigable*) to gather a force of three additional Royal Navy frigates in order to intercept the homeward bound squadron of Spanish vessels and to escort them peacefully into a British port.³⁵ Hopefully, no act of belligerency would be involved in accomplishing this peaceful interdiction of a commercial fleet in time of peace.

Moore in the *Indefatigable* (44 guns) was joined by three other British frigates, *Amphion* (Captain Samuel Sutton, 32 guns), *Lively* (Captain Graham Eden Hammond, 38 guns) and *Medusa* (Captain John Gore, 32 guns). Admiral Lord Horatio Nelson also dispatched a 74-gun cruiser to reinforce the frigates but that vessel was delayed in joining Moore's squadron until after the encounter on October 5. The Admiralty may have felt that four Royal Navy frigates outfitted for wartime service and with well trained crews would have been more than an adequate force to command the respect of the Spanish vessels, which, whatever their original construction and outfitting at present were employed in what was essentially a commercial service. The final orders to Moore were issued by Admiral Sir William Cornwallis, commanding the Channel defenses.³⁶

Intelligence had been received at the Admiralty that the Spanish Treasure Fleet had left Peru and, after a stop at Montevideo to collect the trade and passengers from the Rio de la Plata area, was homeward bound across the Atlantic.³⁷ In mid-September,

Indefatigable began to patrol the waters off Cadiz and on September 29, 1803, Cornwallis' orders reached Moore.³⁸ The *Medusa* was nearby and fell in with the *Indefatigable* the next day, bringing news that the *Amphion* was nearby patrolling the Straits of Gibraltar. A large British convoy coming through the Straits of Gibraltar under the command of Sir Robert Barlow intended to put into Cadiz for any British vessels ready to sail from that Spanish port. Therefore, Barlow immediately was informed of the British intentions toward the Spanish squadron so that he could make a decision about avoiding any Spanish port.³⁹

Early on the morning of October 5 Captain Gore signaled from the *Medusa* that four sail were in sight to the south-west. The British squadron's position near Cape St. Mary had proved perfect for the interception. Moore in the *Indefatigable* immediately gave the signal for a general chase and the four British frigates raced toward the unsuspecting Spanish vessels. On sighting the approaching British frigates the Spanish immediately drew into a line-astern formation and continued to sail for Cadiz and safe harbor. The Spanish vessels were the *Medea*, *Fama*, *Clara*, and *Mercedes*.

Since the goal of the British squadron in time of peace was to intercept and detain the Spanish fleet with no loss of life or damage if possible, Lt. Ascott of the *Indefatigable* was sent across to the *Medea* to inform Don Joseph Bustamante of the British orders to escort the Spanish ships into a British port. Moore informed Bustamante that "his orders were to detain his squadron, and that it was his earnest wish to execute them without bloodshed; but that his determination must be made instantly."⁴⁰ Moore later wrote to Admiral Cornwallis in the same vein.⁴¹

Lt. Ascott remained on the *Medea* an intolerably long time in Moore's view and he made a signal for his lieutenant to return, while at the same time firing another shot across the bow of the Spanish flagship in hopes of intimidating him. As soon as Lt. Ascott was again on board the *Indefatigable*, Moore ordered yet another shot fired ahead of the Spanish frigate and bore down on the *Medea*'s weather bow. At the same time the Spanish Admiral Bustamante elected to refuse to comply with the British request even though it was acknowledged that the four Royal Navy frigates were far superior to the Spanish frigates modified for commerce and engaged in a commercial service.⁴²

The naval engagement erupted with a roar as the *Mercedes* let loose with a broadside into the *Amphion*, and the Spanish flagship seconded her with a round into the *Indefatigable*. Moore gave the signal for "close battle" which, he notes: "was instantly commenced with all the alacrity and vigour of English sailors."⁴³ Broadside was exchanged for broadside during the space of 10 minutes, when the *Mercedes* blew up with a violent explosion that utterly destroyed the vessel. It is unlikely that the immediate cause of the explosion ever will be known. Whatever the cause of the explosion the *Mercedes* was blown to smithereens with debris raining down on the *Amphion*. One of the Spanish cannon even lodged in the rigging of the British frigate as the few remaining pieces of the hull drifted away on the current.

The battle with the *Medusa* having been won, *Indefatigable* and *Amphion* returned to the scene of the *Mercedes* catastrophe to rescue as many as possible of the unfortunate passengers and crew who had been blown overboard and remained alive.⁴⁴ The Second Officer and 40 individuals out of the 280 on board the *Mercedes* were rescued.⁴⁵ Since the normal manning complement of a Spanish frigate ready for war was around 350, this

remarkably low figure, which also includes passengers, underlines the fact that the *Mercedes* was employed on a commercial voyage for the Maritime Mail Service. The Spanish losses totaled over 260 dead and some 70 wounded, while British casualties were two killed and eight wounded.⁴⁶ The remaining units of the Spanish squadron were escorted into British ports after battle damage repairs, which consumed several days at sea.

Captain Moore when he visited the *Medea* during the repair of the ship at sea on October 11, 1804, refused to accept Spanish Admiral Bustamante's sword and also expressed his displeasure that the British flag had been raised over the Spanish flag by the officer who had taken command of the Spanish frigate immediately after the battle. An apology was issued over the insulting error about the flags. The offer of Bustamante's sword was refused because Spain and Britain were at peace and any such actions were unacceptable.⁴⁷ Moore with the *Indefatigable* and the *Amphion* escorted the *Medea* and the *Clara* to England where they arrived in Plymouth Sound on October 19, 1804.⁴⁸ "A General Statement of the Goods and Effects brought by the Frigates of this Division, commanded by Don Joseph Bustamante y Guerra, Chief of the Squadron of the Royal Navy," also was sent by Captain Moore to Admiral Cornwallis from Plymouth Sound.⁴⁹

The British diplomatic representative in Madrid, John Hookham Frere, who served as envoy Extraordinaire and Minister Plenipotentiary—one step below an ambassador (1802-1804), already had asked for his passports before the naval incident occurred since negotiations about Spanish neutrality had reached a dead end. Lord Harrowby, H.M. Foreign Minister, wasted no time in informing his representative in

Madrid of the naval engagement between the Spanish commercial frigates and the Royal Navy squadron.⁵⁰ A frank audience between the Spanish Minister and Lord Harrowby occurred in London immediately after the seizure of the Spanish ships. “The Spanish Minister then observed, that his court was not apprised of the orders given to detain the ships laden with treasure.....”⁵¹ Harrowby’s response was that His Majesty’s position was quite clear and that it was the responsibility of the Spanish Government to ensure that any of its ships which were stopped by the Royal Navy took no violent exception to that act. In this regard, the British asserted, the fault for the loss of the *Mercedes* lay solely at the Spanish Court.⁵² A hawkish British assessment of the international climate after the engagement of October 5 was that “though there had not been a declaration of war, yet there were such *hostile* acts [sic] which were tantamount to a declaration of war.”⁵³ According to the British war party’s view, stated long after the fact, the simple facts of the matter were: “No genuine neutral could subsidize the Napoleonic war chests with payments of six million francs a month; no genuine neutral could permit the entry of belligerent prizes of war into her ports and their disposal there; no genuine neutral could aid the repair and rearmament of French warships at Ferrol; no genuine neutral could so favor the war effort of one power and expect to escape the wrath of the other belligerent forever.”⁵⁴ These justifications echoed precisely the British demands and complaints during the long negotiations about Spanish neutrality – at the time when Britain accepted that neutrality – as well as the claims of Admiral Cochrane in his war warning that Spain had violated the terms and was only waiting for the money to arrive before taking sides with France. These were the same claims Spain had repeatedly denied in that long diplomatic exchange, but her protests of sincerity had not been accepted in London.

When the news reached Madrid of the British action against the squadron in time of peace, King Carlos IV vacillated for a month before finally declaring war against Great Britain on December 12, 1804.⁵⁵ It had proven impossible for Spain to maintain her neutrality in the face of her treaty obligations to France. Great Britain responded with a declaration of war on Spain on January 24, 1805, and Spain, once again, was involved in the long struggle.

The present day situation shows that the seabed in the area of the disaster off Cape St. Mary essentially is a heavy clay, if not sedimentary rock. Therefore, there is little sand to billow up or shift around in order to bury any object descending the 3000' (1000 meters) to the ocean floor. Furthermore, there is little or no current in the immediate area. The result is that whatever object descends to the ocean floor—be it modern beer can or bikini, or ancient general wreckage—remains there relatively exposed in its virginal condition un-obscured by sand or any other covering. Therefore, the man-made debris on the “Black Swan” site—whether or not the site is related to the *Mercedes*--- exists virtually as it was when it descended there. In addition, and remarkably, there is no evidence of the hull of any sunken ship. The ship, whatever it was, does not exist in any recognizable form at the site which essentially only can be described as a “debris field.” Any claim evolving from any assertion about the character and nature of the original vessel no longer has any credence, if, in fact, it ever did. A “debris field” may provide evidence of a disaster, but it cannot be regarded as a “sunken wreck” nor “memorial” of any kind.

The ocean depths are littered with thousands of wrecks from which historians and archaeologists can learn a great deal about the nature of mankind and the development of

civilization as long as careful, precise, scientific techniques are utilized to obtain knowledge. The recent rape of the “*Debraak*” site just off Lewes, Delaware, in the waters of Delaware Bay, vividly underlines the horrendous results to be obtained by an unscientific exploration of a site which results in its complete and total destruction. Unfortunately much of what had been discovered since the end of World War II has succumbed to the obliterating influence of the grab bucket operated by modern-day pirates of the past.

The careful, conscientious, conservatorship of Odyssey Marine Exploration, Inc. represents the only sensible way to obtain and preserve knowledge from the past that lies beneath the seas so that it can be preserved for the enrichment and knowledge of the future. Both common sense and legitimate historical concern demand that the “Black Swan” site remain under the judicious care of Odyssey Marine Exploration, Inc

ENDNOTES:

¹ William Henry Flayhart III, Counterpoint to Trafalgar, The Anglo-Russian Invasion of Naples 1805-1806 (University of South Carolina Press: Columbia, S.C., 1992; Second Edition, University Press of Florida: Gainesville, Florida, 2005). Numerous articles in the history of the French Evolution and Empire, also were published in due course between 1970-2000, see attached VITA). ANNEX 1

² William Henry Flayhart III, The American Line, 1871-1902 (W. W. Norton & Company, Inc.: New York, 2000) recipient of the "Lyman Award" for 2000. ANNEX 2

³ Commodore Ronald Warwick and William Henry Flayhart III, QE2 (W. W. Norton & Company, Inc., New York, 1985). Dr. Flayhart was one of the first lecturers requested by Cunard for the *Queen Mary 2*.

⁴ John W. Miller, "Shipping Lines Sail Uncertain Seas, Weak Demand Sends Rates Tumbling With New Boats on the Way: Some vessels May Become Cruise Ships," The Wall Street Journal, October 8, 2008, B1.

⁵ Manuel Godoy, Prince of Peace, "Regulations of the Maritime Mail," AGI, April 6, 1802, "Rules by Which According to S.M., the Maritime Mail Will Integrate with the Royal Navy." ANNEX 3

⁶ Manuel Godoy, Prince of Peace, "Regulations of the Maritime Mail," AGI, April 6, 1802, "Rules by Which According to S.M., the Maritime Mail Will Integrate with the Royal Navy." Rule No.2. ANNEX 3

⁷ Betancourt, Agustin de, Francois Nogues, et.al., "Letter to The Honorable Pedro Cevallos," (April 7, 1802) defining the nature and organization of the Spanish Mail Ships, the services they shall provide, and the officers and staff/crew members to be transferred to the Mail Service and employed by it in its commercial manifestation. ANNEX 4

⁸ Betancourt, Agustin de, Francois Nogues, et.al., "Letter to The Honorable Pedro Cevallos," (April 7, 1802) ANNEX 4

⁹ Standing Orders, "Second Rule," Spanish Navy reiterated throughout the Eighteenth Century ANNEX 5

¹⁰ "Records of Money, Raw Materials and Personal Effects Which Have Been Taken Out of the Callao's Port in Lima Aboard the War and Trade Frigates, 1801-1805." ANNEX 6

¹¹ Joaquin de Anduaga to the Spanish Government, London, December 10, 1804, expressly commenting on the fact that the British authorities thought most of the cargo on the Spanish ships was consigned to the King, and not for and by merchants. That this was a major surprise. ANNEX 7

¹² Captain Graham Moore to Sir William Cornwallis, *Indefatigable*, Plymouth Sound, October 19, 1804, Publications of the Navy Record Society, Vol. XXI, Blockade of Brest, 1803-1805 (London, 1902), edited by John Leyland, No. 364, II, 98-100. "A General Statement of Goods and Effects," delivered by the Second Major of the Spanish Squadron to Moore. ANNEX 8

¹³ Jean Lambert Tallien, Motion d'ordre de Tallien, Corps Legislative, Conseil des cinq-cents, 14 February 1798, ed. James Hardy Jr., and John Hansen and Martin Wolfe (Philadelphia, 1966). Cited in Michael W. Jones, "Fear and Domination: Pierre Riel, the Marquis de Beurnonville at the Spanish Court and Napoleon Bonaparte's Spanish Policy, 1802-05," Florida State University, Tallahassee, Florida, 2004. While as noted subsequently Bonaparte did not necessarily share this opinion, the British most certainly did – it was fear of such a major naval force coming to the aid of France that motivated Britain's reluctant and suspicious terms for Spanish neutrality, rather than see the Spanish Navy immediately inserted into the war. And similarly, it was fear of Spanish aid for a looming French invasion that kept Britain and Spain in negotiations to avert war long after the events of October 5, 1804. ANNEX 9

¹⁴ Betancourt, Agustin de, Francois Nogues, et.al., "Letter to The Honorable Pedro Cevallos," (April 7, 1802) defining the nature and organization of the Spanish Mail Ships, the services they shall provide, and the officers and staff/crew members to be transferred to the Navy and employed by it in its commercial manifestation. ANNEX 4

¹⁵ Betancourt, "Letter to The Honorable Pedro Cevallos," (April 7, 1802). ANNEX 4

¹⁶ Abello, Luis, "Petition to the King"(requesting the additional normal compensation for an individual engaged in the Maritime Mail service as a newly-transferred member of the Navy), "On Board the Frigate *Mercedes* at Ferrol, February 19, 1803. ANNEX 10

¹⁷ Abello, "Petition to the King," February 19, 1803. ANNEX 10

¹⁸ Don Diego de Alvear, "List of Belongings Loaded on the *Medea, Fama, Mercedes, and Clara*. On the King's Account: Raw Materials, Silver, Gold and copper. On the Merchants' Account: Silver, Gold, and Raw Materials." ANNEX 11

¹⁹ “Register of Loads Conformed with a Key showing Merchant Goods and Highlighting Business Names. List of Claims Aboard the *Mercedes, Medea, Fama, and Clara* that Were Seized by the English at Cape St. Mary’s Carrying Precious Metals from Callao, Lima,” October 5, 1804. ANNEX 12

²⁰ Don Diego de Alvear, “Statement of Cargo on the Four Vessels of the Squadron,” Plymouth, England, October 20, 1804, *Archives General de Indias, Sevilla, Espana (AGI Estao 8283, and 8286*. The vast majority of the cargo is “*Por Cuenta del Comercio.*”) ANNEX 13

²¹ Sabina deAlvear y Ward, *Historia de D. Diego de Alvear y Ponce de Leon* (Madrid, 1891), opening of Chapter 9. The Lord Commissioners of His Majesty’s Treasury Letter to Don Diego De Alvear authorizing payment to him of six thousand pounds as one-half of his loss of twelve thousand pounds, the remainder payable upon suitable documentation. Signed William Huskison, Treasury Chambers, London, August 10, 1805, ANNEX 14

²² Francisco Garay Unibaso, *Correos Maritimos Espanoles*, Vol. I (Ediciones Mensajero, Bilbao), 154, among other examples of private commercial frigates chartered by the Maritime Mail. ANNEX 15

²³ Cesareo Fernandez Duro, *Armada Espanola*, p. 265. A.R. Rodriguez Gonzalez, *Trafalgar y el conflicto naval anglo espanol del siglo XVIII* (Madrid: San Sebastian de los Reyes, Actas, 2005), p. 309 [ANNEX 16] Also, since 1785, Spain’s Navy was officially *La Armada Espanola* (Spanish Navy), rather than *Armada Real* (Royal Navy), denoting a significant shift of status as an arm of the State rather than a personal force of the Crown. While common usage persisted in using the term “Royal Navy,” it was an incorrect if familiar terminology, and significant in terms of the character of the vessels and their appurtenances as distinct from any former “ownership” by an absolutist Crown – John D. Harbron, *Trafalgar and the Spanish Navy* (Naval Institute Press, Annapolis, MD, 1988), 93.

²⁴ William Henry Flayhart III, *Counterpoint to Trafalgar, The Anglo-Russian Invasion of Naples 1805-1806* (University of South Carolina Press: Columbia, S.C., 1992), 5. ANNEX 1

²⁵ Andres Muriel, *Historia de Carlos IV*, in Memorial Historico Espanol Coleccion de Documentos, Opusculos y Antiquedades (Mardir, 1894, XXXIV, 82-87). As cited in: Michael W. Jones, “Fear and Domination: Pierre Riel, the Marquis de Beurnonville at the Spanish Court and Napoleon Bonaparte’s Spanish Policy, 1802-05,” Florida State University, Tallahassee, Florida, 2004. ANNEX 9

²⁶ Jose Martinez de Hervas (Spanish *charges d’affaires*, Paris), Letter of June 1, 1803, to Godoy enlarging upon his unofficial discussions with Talleyand, Archivo de la Real Casa Y Patrimonio, *Correspondance privee de Godoy aver Hervas (1803-1804)*, 100, cited in: Andre Fugier, *Napoleon et l’Espagne, 1799-1808*, (Paris, 1930), II, 205-206.

²⁷ Bonaparte to Truguet, cited in Antoine Thibaudeau, *Bonaparte and the Consulate* (New York, 1908), 92.

²⁸ Henri Martin, *A Popular History of France* (Boston, 1878), II, 193-194.

²⁹ Lord Harrowby to B. Frere, September 29, 1804, *Papers Relative to the Discussion with Spain in 1802, 1803, and 1804* (London, 1803), Foreign Office Papers., No.40, 179-183. The terms of Britain’s unwilling acceptance of Spanish neutrality became the basis on which later war warnings (discussed subsequently) from Royal Navy officers claimed that Spain was not keeping her word, thanks to misunderstandings of some Spanish troop movements and ship preparations in Ferrol in mid-1803 as part of a move to put down internal unrest. The terms of the understanding about neutrality also were cited regularly in diplomatic exchanges between the countries leading up to the events of October 5, 1804, and even in the declaration of a state of war proclaimed by Spain in December of 1804. ANNEX 17

³⁰ “Records of Money, Raw Materials, and Personal Effects Which Have Been Taken Out of the Callao’s Port in Lima Abroad the War and Trade Frigates.” Another list of who shipped what, when, and on which vessels. ANNEX 6

³¹ John Leyland, ed., *Publications of the Navy Record Society, Vol. XXI, Blockade of Brest, 1803-1805* (London, 1902), II, xxiv. The French ships mentioned were the reason Cochrane and an earlier commander had been sent to patrol off Ferrol, in addition to verifying Spanish compliance with neutrality terms. At the time England and France returned to war in mid-1803, the French squadron had been enroute home from the West Indies, and fled to the haven of the Spanish port after British warships threatened them. There the French stayed, repairing their vessels, resting the crews, taking on supplies and provisions, and eventually receiving reinforcement personnel marched overland. When England and Spain began talks about Spanish neutrality, it was the very presence of the French at Ferrol that set the tone of negotiations, and defined Britain’s complaints about Spanish preferential treatment for an erstwhile ally – as well as British demands that the same privileges be accorded English ships. Those demands were met by Spain. ANNEX 8

- ³² A. Hodge, Lieutenant of the *Northumberland*, (off Ferrol), to Admiral Alexander Cochrane. "Statement of the Spanish Navy at Ferrol," 22 August, 1804, Publications of the Navy Record Society, Vol. XXI, Blockade of Brest, 1803-1805 (London, 1902), edited by John Leyland, (No.316) II, 45-46. ANNEX 8
- ³³ Robert Jenkinson, Lord Hawkesbury, "Extract of a Dispatch from Lord Hawkesbury to J. H. Frere (June 2, 1803), The Times, Papers relative to the Discussion with Spain in 1803-1804, (1805). ANNEX 18
- ³⁴ Joaquin de Anduaga, London, to the Spanish Court, December 10, 1804, mentioning that there was a mistaken idea that most of the cargo on the treasure ships was the property of the King. ANNEX 19
- ³⁵ Sir William Cornwallis to Captain Graham Moore, *Ville De Paris*, Off Ushant, September 22, 1804, includes the secret orders to intercept the Spanish Treasure Ships. Publications of the Navy Record Society, Vol. XXI, Blockade of Brest, 1803-1805 (London, 1902), edited by John Leyland, (No.346) II, 75. ANNEX 8
- ³⁶ Sir William Cornwallis to Captain Graham Moore, *Ville De Paris*, Off Ushant, September 22, 1804, includes the secret orders to intercept the Spanish Treasure Ships. Publications of the Navy Record Society, Vol. XXI, Blockade of Brest, 1803-1805 (London, 1902), edited by John Leyland, (No.346) II, 75-76. ANNEX 8
- ³⁷ Mr. Duff, British Consul, Cadiz, Spain to the Foreign Office, "Naval Occurences at Cadiz for August 1804, Papers Relative to the Discussion with Spain in 1802, 1803, and 1804 (London, 1803), Foreign Office Papers., No.105, 364. ANNEX 17
- ³⁸ Sir William Cornwallis to Captain Graham Moore, *Ville De Paris*, Off Ushant, September 22, 1804, includes the secret orders to intercept the Spanish Treasure Ships. Publications of the Navy Record Society, Vol. XXI, Blockade of Brest, 1803-1805 (London, 1902), edited by John Leyland, II, 75-76. ANNEX 8
- ³⁹ Captain Graham Moore to Admiral Sir William Cornwallis, Dispatch, October 6, 1804, 354. Describing background to the battle and the actual conflict. ANNEX 20
- ⁴⁰ Henry Maddock, Thoughts on the Order to Detain the Spanish Frigates (London, 1803), 2. A remarkably balanced contemporary analysis of the situation. ANNEX 21
- ⁴¹ Captain Graham Moore to Sir William Cornwallis, Admiral of the White , October 6, 1804, The London Gazette (London, England), October 20-23, 1804, Number 15747, 1309. ANNEX 20
- ⁴² Don Diego de Alvear, "Diary of Navigation of the Division of the four frigates "*Medea*", "*Fama*", "*Mercedes*" and "*Clara*," Under the Command of Royal Navy Squadron Leader, Mr. D. Jose Bustamante y Guerra, Knight of the Military Order of Santiago," Claimant's Document 131-5, Appendix Number 6, 390, Acknowledge the great superiority of the Royal Navy warships over the Spanish commercial frigates when he refers to the fact that the British victory was obtained when the *Mercedes* blew up and "the Lord of Victories desired to award to our enemy a decisive advantage that they had not been able to acquire up until then with their great superiority of forces . . ."
- ⁴³ Moore to Cornwallis, October 6, 1804, The London Gazette (London, England), October 20-23, 1804, Number 15747, 1309. ANNEX 20
- ⁴⁴ Moore to Cornwallis, October 6, 1804, The London Gazette (London, England), October 20-23, 1804, Number 15747, 1309. ANNEX 20
- ⁴⁵ Moore to Cornwallis, October 6, 1804, The London Gazette (London, England), October 20-23, 1804, Number 15747, 1309. "Force of the Spanish Squadron." Moore to William Marsden, October 21, 1804, reports the number of Spaniards rescued from the sea as 45. The London Gazette (London, England), October 20-23, 1804, Number 15747, 1310. ANNEX 20
- ⁴⁶ William Cobbett, Cobbett's Parliamentary Debates (London, 1804-1805), III covers the complete debate in Parliament over the action against the Spanish fleet and the subsequent declaration of war. ANNEX 22
Among British historians dealing with the seizure of the Spanish fleet are:
John Steven Watson, Reign of George III, 1760-1815 (Oxford, 1960), 423;
Sir Julian Corbett, The Campaign of Trafalgar (London, 1910), 60, stated that: "A blow at the rich treasure trade of Spain before declaration of war had been our regular procedure in like circumstances ever since Drake set out to strike it in 1585, and failed."
J.W. Fortescue, A History of the British Army (London, 1921), V, 238, stated that: "Spain equally afraid of France and England, and longing only to remain perfectly neutral, had so far yielded to the stronger pressure of Napoleon that the British Government lost patience with her undisguised, though unwilling, inclination toward the French cause."
- ⁴⁷ Alvear, "Diary of Navigation of the Division of the four frigates "*Medea*" etc., 394. ANNEX 23

⁴⁸ Moore to Cornwallis, October 6, 1804, The London Gazette (London, England), October 20-23, 1804, Number 15747, 1310. ANNEX 20

⁴⁹ Moore to Cornwallis, October 19, 1804, Plymouth Sound, The London Gazette (London, England), October 20-23, 1804, Number 15747, 1310. ANNEX 20

⁵⁰ Lord Harrowby, "Copy of a Dispatch from Lord Harrowby to John Hookham Frere," October 22, 1804, Naval Chronicle, III, 74-78. "Naval State Papers" Laid Before Parliament, January 24, 1808. "That Spain having violated one of the conditions upon which the forbearance of his Majesty depended, it became immediately necessary for him to prevent the continuance of those succors, which were furnished by Spain to France" III, 75. ANNEX 24

⁵¹ Lord Harrowby, Foreign Secretary, to John Hookham Frere, Esq., Envoy to the Court of Spain, Downing Street, October 22, 1804, Naval Chronicle, III, 74-77. ANNEX 24

⁵² Lord Harrowby, Foreign Secretary, to John Hookham Frere, Esq., Envoy to the Court of Spain, Downing Street, October 22, 1804, Naval Chronicle, III, 74-77. ANNEX 24

⁵³ Maddock, Thoughts on the Order to Detain the Spanish Frigates (London, 1803), 25. ANNEX 21

⁵⁴ Flayhart, Counterpoint to Trafalgar, 44-45. ANNEX 1

⁵⁵ Don Pedro Cevallos, First Secretary of State and of Dispatches, Communication of Royal Orders, December 14, 1804, of Spanish State Papers, December 12, 1804. ANNEX 25