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P. 01/02

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

IN ADMIRALTY

ODYSSEY MARINE EXPLORATION, INC.

Plaintiff,

v.

CIVIL ACTION

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

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

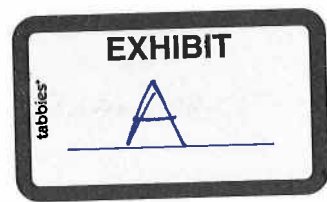
Gonzalo de Aliaga (the Count of San Juan
de Lurigancho), et al., Santiago de Alvear, et al.,
Elsa D. Whitlock f/k/a Elsa Dorca Ruiz,
Jose Antonio Rodriguez Menendez aka Joseph
Anthony Rodriguez, and Dr. Jaime Durand Palacios

Claimants.

_____ /:

**AFFIDAVIT OF
DR. WILLIAM HENRY FLAYHART III, PROFESSOR EMERITUS,
IN SUPPORT OF PLAINTIFF, ODYSSEY MARINE EXPLORATION, INC.'S
RESPONSE TO THE KINGDOM OF SPAIN'S REPLY TO ODYSSEY'S RESPONSE
TO 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 A.

2. I prepared the attached report for Odyssey Marine Exploration, Inc. in support of its Response to the Kingdom of Spain's Reply to Odyssey's Response to 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

William H Flayhart III
Name

STATE OF Delaware
COUNTY OF Kent

The foregoing instrument was acknowledged before me this 13th day of February, 2009, by William H Flayhart III who is personally known by me.

Lynda Brown 2/13/09
Notary Public
My Commission expires: 5/31/2010



RESPONSE TO HISTORICAL BRIEF

DECLARATION OF DR. WILLIAM HENRY FLAYHART III, *PROFESSOR EMERITUS*

Dated 02/10/2009

RE. "CLAIMANT KINGDOM OF SPAINS REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS OR FOR SUMMARY JUDGMENT"

Case No. 8:07-cv-00614-SDM-MAP, Document 163, Filed 01/26/2009

INTRODUCTORY STATEMENT:

As a result of the Spanish response to the brief of Odyssey, it is felt that there exist a number of inaccuracies which must be dealt with in the interest of historical truth. Every professional historian is taught during the earliest stages of professional education and development that when conflicting information is uncovered it must be acknowledged and addressed in any historical narrative.

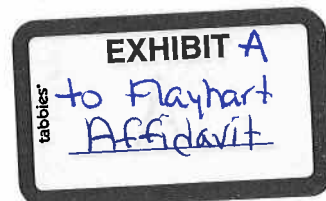
A. Commercial Character of the Last Voyage of the *Mercedes*

In both my own earlier Declaration, dated November 13, 2008,¹ and that of Dr. Rodney Carlisle² regarding the *Nuestra Señora de las Mercedes*, extensive discussion was devoted to the *Correos Maritimos*, and the evidence that on her final voyage, *Mercedes* was conducting commercial transport on behalf of that service. The evidence, as a whole, is conclusive. O'Donnell,³ in answering those declarations, did not choose to substantively dispute the point. Rather, he seems to hope to drown out factual discussion and cloud the historical record.

¹ Declaration of Dr. William Flayhart Dkt. 138-64 – Dkt. 138-89

² Declaration of Dr. Rodney Carlisle Dkt. 138-31 – Dkt. 138-63

³ Declaration of Hugo O'Donnell Y Duque de Estrada, Dkt. 163-3 – Dkt. 163-9



Dr. Carlisle's Declaration explains how the Maritime Mail in 1802 had transferred all of its sea-going assets (men, ships and material) to the Spanish Navy. (Carlisle, pp. 16-19). In return, as Dr. Carlisle detailed, the civilian Maritime Mail then directed the Navy to provide crews and vessels under the civilian bureau's ultimate authority for any voyages required. The Navy was to keep a strict accounting of these services to charge the Maritime Mail for them. In 1804, for example, the Navy was already pressing the Maritime Mail for payment of services rendered in 1803. Spain's expert, Mr. O'Donnell, tries to make great mileage out of referencing orders by Spain's then-Minister of the Navy, Domingo de Grandallana⁴ which in all events would have been issued in order to carry out obligations to turn ships over for hire to the Maritime Mail. It was also, as has been described in undisputed content in Dr. Carlisle's report, a function of the Maritime Mail to deliver official cargo both outbound and homebound, and thus Godoy's insistence on retrieving whatever was to be found in America is hardly a surprise. The orders cited by O'Donnell are misdirection rather than evidence refuting the conditions governing the *Mercedes'* voyage.

O'Donnell avoids the remainder of the record about Grandallana and the Navy's trade missions for the Maritime Mail. On May 8, 1804, Grandallana was informed by First Secretary of State Pedro Cevallos (whose department included the Maritime Mails), that he had arranged for "...200,000 reales deposited monthly to compensate the Navy for any expenses it may have incurred on behalf of the Navy."⁵ And then, on May 19, 1804, one of the Maritime Mail officials in Ferrol, Luis M. Salazar, wrote to Grandallana to confirm the

⁴ O'Donnell (Dkt. 163-3, pp. 2, 3 n. 1, 11)

⁵ Correspondence, Cevallos to Grandallana, AGM, Leg. 1722/1, Asuntos Particulares, 1804-1810 ANNEX 1

payment had been made.⁶

When a Navy ship puts to sea to provide transport for profit – a function of the Maritime Mail since its reorganization in 1767 - that ship is not on a military voyage exercising the power of the State. The *Mercedes*, on her last mission, was a vessel and crew on hire to a monopoly enterprise for the benefit of that enterprise and commercial customers.

In the O'Donnell Declaration (Dkt. 163-3, footnote 8, p. 11) there is another example of a misrepresentation of the record. As was noted in Dr. Carlisle's Declaration and cited by O'Donnell, a letter by Captain-General Felix Tejada described the voyage of the *Mercedes* as one for the Maritime Mail. O'Donnell attempts to invert the record, although the text of the letter specifically says, "...the nature of this trip varies from other sea-bound trips since maritime mail is involved."⁷ Further, in footnote 8, O'Donnell attempts to confuse the date of the correspondence, referring to Godoy's message of April, 1802, in an effort to suggest the correspondence pre-dated the Maritime Mail and Navy reforms. First, Godoy himself led the reform project leading to Maritime Mail hiring of Navy ships for commercial voyages, and had begun that process months earlier. Then, the reforms took effect in April, 1802. And for clarity's sake, it is necessary to point out that Tejada's letter was dated February 23, 1803. This is just prior to the date the *Mercedes* sailed from Ferrol – February 27, 1803.

⁶ Correspondence, Salazar to Grandallana, AGM, Legajo 7522/L, Asuntos Particulares, 1804-1810 ANNEX 1

⁷ Attached ANNEX 2 is the original Spanish copy of Tejada's letter, a certified transcription of Tejada's letter, and a certified translation. O'Donnell's submission changes the essential text referring to the Maritime Mail: In the O'Donnell translation, Tejada's text is rendered as "... This voyage and those of the Americas are viewed with respect to the others already mentioned [*i.e.*, those of Maritime Mails] ...". However, the original Spanish does not approximate that translation, which is rendered in the Annex faithfully as cited above. This minor revision of the language gives O'Donnell an attempt to deny that this voyage, identified as one for the Maritime Mail by the principal officer responsible for liaison between the Navy and Maritime Mail, was what it was.

Spain asserts that the mere presence of weapons on the ship – weapons reduced in number and stowed amid a host of passengers and mounds of cargo⁸ – shows that *Mercedes* was functioning as a warship, even though merchant ships sailed with armament equal to or greater than that on the *Mercedes* for hundreds of years. “Warship” may have been a convenient means of describing or identifying this *Mercedes* from a number of other ships of the same name, but “trader” and “passenger liner” (of a primitive sort) was her purpose in 1803-1804. People have long understood the difference between form and function, and nowhere is there a more distinctive example than in the form of *Mercedes*, a frigate, and her function as a commercial trading vessel for that time in which she sailed under *Correos Maritimos* orders.

Spain produced a list of ships that sailed for the Maritime Mail, published in a work cited by Odyssey’s declarants and claimed this was some kind of definitive evidence which disputed the voyage of the *Mercedes* for the *Correos Maritimos*.⁹ The supposed omission proves nothing because no serious historian should claim that any list from the period concerned is perfect and infallible. “Lists” by their very nature have been created by the hand of man and are subject to editing and revision. Further, other lists of a comparable nature from other sources disagree with each other. Finally, at the time of the 1802 reforms of the Maritime Mail, when a list was created of selected officers and personnel to be transferred to the Navy, and of ships to be named on the rolls of Maritime Mail services, authors Augustin Betancourt and Francisco Nogues as well as three other signators state that

⁸ Carlisle, (Dkt. 138-55, Annex 24)

⁹ O’Donnell, (Dkt. 163-4, pp. 7 – 10, Annex 4)

it is impossible to provide a complete list due to conditions at the time.¹⁰ Then, as now, a best effort is never a complete effort.

B. “Frigate:” Merchant and Military Ship Type

The “mere description” of the *Mercedes* as a “frigate” simply defines the nature of the vessel in terms of her construction. By 18th century standards she was not a “ship-of-the-line,” nor a “cruiser,” nor a “sloop,” nor any other of the possible descriptions available in the days of the sailing navy. She was a frigate - a fast, medium-sized, sailing ship - which could be employed for an enormous variety of purposes. At the time of her loss she was sailing a commercial mission on hire to the Spanish Maritime Mail. In the chart from Unibaso History of the Maritime Mail for example, several ships chartered by the enterprise were described as “fragata commercial,” or “merchant frigate.” Although Spain cites the same sources,¹¹ this point is overlooked.

C. Private Commercial Cargo and Fare-Paying Passengers

Spain’s attorney and historian argue that there was no private, merchant cargo aboard *Mercedes*, and that the only documented passengers aboard were the family and servants of Diego de Alvear.¹²

O’Donnell appears to dismiss the existence of 173 pages of individual receipts for private shipments to merchants and individuals aboard the *Mercedes*,¹³ and seems to ignore the very shipment of the freight charges paid to carry those commercial goods consigned by

¹⁰ Flayhart, (Dkt. 138-68, Annex 4) Memorandum, April 7, 1802, AGM, Expediciones a Indias, 7511/L 1781-1803

¹¹ O’Donnell, (Dkt. 163-4, pp. 7 – 10, Annex 4)

¹² O’Donnell, (Dkt. 163-3, 17, pp. 13-14)

¹³ O’Donnell, (Dkt. 163-3, 14, pp. 11-12)

the *Rentas de Correos* (a shipment only carried on Maritime Mail vessels).¹⁴ In fact, O'Donnell refuses to acknowledge that this information has any significance at all. In fact he doesn't even acknowledge its existence.¹⁵ Whether the omission is an oversight or a matter of convenience, the historical record is clear on this point.

O'Donnell does not in any substantive way answer the evidence, instead quibbling over the meaning of a word that Spain's declarations initially refused to translate at all because – as with other historical evidence either ignored or mis-construed - the truth confronts bias. The names of the persons or companies to which those shipments were sent, as well as of those who placed the consignments aboard the ship, are listed as among the most prominent in Spanish colonial America or Peninsular Spain – names which in most cases persist today in the directories of Spain's most famous and important families.¹⁶ But O'Donnell asserts, “*Other analytical errors about the cargo of the Mercedes ... the incorrect assertion ... were funds of “merchants.”*”¹⁷ This has been extensively documented in Carlisle's declaration¹⁸ and serves now to reinforce that undeniable commercial character of the ship's voyage.

In his reference to the “*caja de soldadas,*” or “soldiers' strongbox,”¹⁹ O'Donnell seems to believe that pointing out that it was a “private” consignment somehow means that

¹⁴ Carlisle, (Dkt. 138-62, Annex 31)

¹⁵ O'Donnell, (Dkt 163-3, 14, 15, pp. 11-12)

¹⁶ Ruiz Rivera, Julian B., *El Consulado de Cadiz, Matricula de Comerciantes 1730-1823*, La Voz, San Fernando, Spain 1988; Balmoria, Diana, Voss, Stuart F., Wortman, Miles, *Notable Family Networks in Latin America*, University of Chicago Press, Chicago 1984; Mazzeo de Vivo, Cristina Ana, et al, *Los Comerciantes Limenos a Fines del Siglo XVIII*, Pontifica Universidad Catolica del Peru, 2000

¹⁷ O'Donnell, (Dkt. 163-3) p. 12 n. 10

¹⁸ Carlisle, (Dkt. 138-62, Annex 31)

¹⁹ *Id.*

anything else consigned for "*particulares*" is, like the soldiers' strongbox, some special concern of individuals as if that would be different than commercial cargo sent by merchants, business agents remitting the company's receipts or family members sending home the proceeds of trading ventures.

O'Donnell appears to deny that the Crown in 1804 enjoyed private accounts separate from those of the State. Spanish royal monopolies and revenues had been established since the voyages of Columbus. The specific citation of some public monies in the cargo of *Mercedes*, such as the receipts of the *Renta de Correos*, were an example of separate funds consigned to specific fiscal departments apart from the Crown's personal account. In fact, as Jacques A. Barbier wrote in "Peninsular Finance and Colonial Trade: The Dilemma of Charles IV's Spain,"²⁰ by 1804 the Spanish Crown was effectively separate from the State. One of the primary efforts of the brief time of peace of 1802-1804 was a failed effort to reassert authoritarian control over peninsular and colonial Spain. This unsuccessful drive to restore the power of the Crown was a significant motivating factor in Spain's wish to remain at peace with Britain, as well as restore a vigorous flow of commerce with Maritime Mail shipping schedules.

When historian O'Donnell asserts, in respect to passengers on the *Mercedes*, that *historical records indicate that the passengers who were on the Mercedes when it sank were authorized by the Viceroy of Buenos Aires or by the Governor of Montevideo and Squadron Leader José de Bustamante,*²¹ he offers no substantive support of his claim. The fact is that

²⁰ *Journal of Latin American Studies*, Vol. 12, No. 1 (May, 1980), pp. 21-37

²¹ O'Donnell, (Dkt. 163-3) 16, pp. 11-12

no records of any such authorizations by any person at any time have ever appeared in any archives or published accounts thus far available in the exhaustive research conducted by all Parties to this action. O'Donnell's citation of the naval regulations²² repeats the same mention by Flayhart in November, 2008,²³ and agrees with Flayhart that if this had been a naval and military voyage, that approval was mandatory. There is no evidence of such approval. The existence of a regulation or proclamation is proof of nothing more than its existence.

Hugo O'Donnell, Duke of Estrada, seems to ignore the presence of no less than 20, and perhaps as many as 40 passengers in total when the *Mercedes* sailed. Most of those passengers were unimportant people, wives and relatives of some ordinary soldiers and sailors. Some passengers such as a close friend of the de Alvear family, attorney Don Antonio Gil Taboada, were wealthy enough to pay the fare, but apparently not prominent enough for O'Donnell to notice. Another passenger was Don Manuel Vargas, a Lima merchant, who was loaned 1,000 pesos to help pay his passage from Lima to Spain on the *Mercedes* – a very large sum indeed. Even Captain Gocoia's family seemed to escape O'Donnell's notice. Jose Vicente Gocoia, the captain's brother, was among the passengers killed on the ship.²⁴

Subsequently in this Report is a discussion of the ship's crew, the losses when *Mercedes* exploded, and the ship's readiness for combat. The presence of these many

²² O'Donnell, (Dkt. 163-3) 15, p. 12

²³ Flayhart, (Dkt. 138-69, Annex 5)

²⁴ Flayhart, (Dkt. 138-78, Annex 14): de Alvear Y Ward, Sabina, *Historia de D. Diego de Alvear Y Ponce de Leon*, pub. Luis Aguado, Madrid, 1891

passengers, the huge volume of cargo on the ship, and the commercial freight value all demonstrate this vessel was indeed on hire to the *Correos Maritimos*.

D. Peace Between “Neutral” Spain and Suspicious England

Even as the British and Spanish squadrons drew toward each other, King Carlos IV sent a message through the British envoy to King George III on October 3, 1804, in which he stated that he strongly wished to preserve the state of peace with Great Britain.²⁵ During the period 1803-1804 the British had made considerable demands upon the Spanish with regard to what they considered to be hostile or potentially hostile activities. As noted by Dr. Carlisle, the British persisted in demanding that the Spanish cease such activities if peace was to be maintained. Nevertheless, the peace had been preserved and Spain was prepared to discuss the outstanding problems.²⁶ The unfortunate loss of the *Mercedes* clearly occurred during a time of peace no matter how uneasy it might have become.

Also as discussed in detail in Dr. Carlisle’s declaration, as noted above, both Spain and England saw practical reasons to acknowledge Spain’s neutrality. The British were well aware of the threat posed by a combination of the Spanish Navy with the resources already controlled by France. Spain also realized that it was in no condition to go to war.²⁷

O’Donnell asserts that the squadron was stopped literally because the vessels were “ships of war.”²⁸ That same record makes it abundantly clear that English agents in Montevideo had identified the vessels to be intercepted as those laden with treasure, not ships

²⁵ *Papers Relative to the Discussion with Spain*, No. 43, p. 188, London, 1805 ANNEX 3

²⁶ Carlisle, (Dkt. 138-31) 8, pp. 6-8, and 9, pp.10-11

²⁷ *Id.*

²⁸ O’Donnell, (Dkt. 163-3) 6, p.5

of war.²⁹ When the English sent their Lieutenant aboard the *Medea* to meet the Spanish officers, the intent was to confirm that the proper squadron, laden with the treasure from Montevideo, was being interdicted – not to confirm that the vessels were ships of war. Then, when properly identified, the Spanish were told to come peacefully to Britain, in the interests of peace.³⁰

E. Spain's Ill-Prepared Ships Defy the British Blockade

O'Donnell attempts to construe that a manifest of personnel arriving at a port is equivalent to that of a crew and passenger list for a ship later departing from the port which the actual record rebukes. Some of the people O'Donnell assume had stayed aboard the *Mercedes* after her arrival at Montevideo wrote some fascinating letters years after 1804 – when, according to O'Donnell's thesis, those people would have died in the Battle of Cape St. Mary.

Admiral Bustamante's own initial report asserted that the crew of the *Mercedes* was lacking both in numbers and in training. The lack of discipline which saw the first exchange of gunfire from the *Mercedes* against the British vessels may have been far more the result of a serious breach of discipline, rather than any other cause.³¹

The citation of the manifest to which O'Donnell refers – claiming it proves the size of the crew - is for the ship's arrival at Montevideo from Lima.³² Unfortunately, O'Donnell ignores the record cited in Carlisle's declaration that shows many people disembarked at that

²⁹ Flayhart, (Dkt. 138-64) p.14

³⁰ Flayhart, (Dkt. 138-64) pp.15-16

³¹ Admiral Bustamante's account of the engagement with the British, quoted in M. Marliani, *La Combate de Trafalgar*, 1851, pp. 135-143

³² Declaration of Admiral Teodoro de Leste Conteras, (Dkt. 131-3) 20, 21 pp. 11-12

port and never got back on.³³ Among these are a number of naval officers and people who later wrote letters long after the ship had been lost.³⁴ O'Donnell attempts to place an immense number of people aboard this ship – greater than 327 officers and crew. He totally ignores the substantial number of passengers, perhaps as many as 40, whose presence increases the population of the vessel to as great as 367. He fails in the impossible mathematics of this figure – between 40 and 50 survivors recorded from her loss, and according to Spanish reports, 250 persons lost – no more than 300 in total.³⁵

Some reduction in crew members in all likelihood was necessary in order to provide accommodations for some of the passengers the vessel would carry back to Spain. These accommodations were made known to the public in Peru and the Rio de la Plata in advance of the departure of the commercial vessel as was mandated in the operations of ships sailing for the *Correos Maritimos*.³⁶ There also is testimony to the effect that additional cabins had been constructed along the inside of the decks of the *Mercedes* for the accommodation of de Alvear's family and more important male passengers.³⁷ Similarly, O'Donnell dismisses without any substantive rebuttal the comments of Spanish historians about the lack of combat readiness of the ships in the squadron.³⁸

Since the goal of the British squadron was to intercept and detain the Spanish

³³ Carlisle, (Dkt. 138-57, Annex 26)

³⁴ AGM, General Corp of the Navy, 620/2,353, 443, 574, 603, 813, 1160, 1223, 1275, 835, 1110 ANNEX 4.

³⁵ Flayhart, (Dkt. 138-83, Annex 19); Marliani, *Combate de Trafalgar*, pp. 135-143

³⁶ Ministry of Foreign Affairs, LCT – case 394, folio 242, Lima, February 24, 1804: Announcements in public places were made that the ships in port would to sail for Cadiz, “this information to be notified to commerce,” so that merchants might load their goods.

³⁷ Carlisle, (Dkt 138-31) 14, pp. 19-21, references to the crowding, heavy commercial load, and reconfiguration of the gun deck

³⁸ Carlisle, (Dkt 138-31) 14, pp. 19-21, additional references to stowing or removal of weapons

merchant vessels with as little loss of life or damage as possible, Lt. Ascott of the *Indefatigable* was sent across to the *Medea* to inform 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.”³⁹ Bustamante records that his squadron only began preparation for combat after this event – another demonstration that the Spanish were entirely unprepared and ill-equipped to go into battle.

Certainly, the probable crew list of the *Mercedes* on this voyage did not compare with a standard combat complement as defined by the Spanish Navy. This has already been documented in a previous declaration.⁴⁰ In fact, in Spain’s original declarations, a detailed crew list was supplied from one of *Mercedes*’ earliest combat missions.⁴¹ That crew list in no way compares with that of *Mercedes* when she left Montevideo – the former complement was clearly better-suited for combat rather than keeping a crowded vessel sailing smoothly on a peacetime commercial voyage.

F. Reimbursement Claims, “Prize” Rules

Spain’s assertion that a Royal Decree of 1824 inviting claims for compensation caused by the loss of *Mercedes* automatically assigns present-day rights of subrogation to the State is totally unsupported. Furthermore, that insupportable conclusion is belied by the historical record of three generations’ worth of repeated calls for claims, failure to pay claims, and most significantly of all, repeated failure of Spain to assert any sovereign

³⁹ Henry Maddock, *Thoughts on the Order to Detain the Spanish Frigates* (London, 1805)

⁴⁰ Carlisle, (Dkt 138-57, Annex 26)

⁴¹ De Leste, (Dkt. 131-3, Annex 7) p. 98

responsibility regarding the *Mercedes* because the claims were then forwarded for consideration by Great Britain.

Compounding this brazen misinterpretation of the historical record and allied misdirection, O'Donnell ignores the actual text of the 1824 Royal Decree, which directly names the *Mercedes* as a British “prize” – thus specifically abandoning authority over the ship.⁴² In England, prize bounties were paid even when a ship was sunk, or crew upon whom a “head count” payment was also made, were killed. Although, as previously discussed by Carlisle, the capture of the three ships and loss of the *Mercedes* was adjudged a “*droit* of the Crown” so that prize bounties came as a gift of the King rather than under Admiralty law (reflecting the condition of peace when the Oct. 4, 1804, action occurred), certainly England also regarded the lost ship as a “prize.”⁴³

Early in the Nineteenth Century, between 1804 and 1810, the Spanish Government refused to honor any claims from the loss of the vessel. Instead, reflecting a view that does not extend “sovereign immunity” to this issue, and in keeping with *Mercedes*’ status as a “prize” the Spanish Government simply forwarded all claims to Great Britain with the view that it was Britain’s problem⁴⁴

Even an effort by Manuel Godoy, the First Minister of Spain (known as the “Prince of

⁴² Declaration of Agustin Torreblanca Lopez, (Dkt 163-10) p. 4

⁴³ Carlisle, (Dkt. 138-31) 10, pp. 11,12; Carlisle (Dkt. 138-41, Annex 10)

⁴⁴ Carlisle, (Dkt. 138-31) p. 22, footnote 56; Martin A.S. Hume, pp. 84-86, p. 123, *Modern Spain, 1788-1898*, Putnam & Sons, London 1900; Frederick H. Black, Jr., “Diplomatic Struggles: British Support in Spain and Portugal, 1800-1810,” p. 99, p. 104, PhD dissertation, Florida State University, 2005; in a Parliamentary debate in the House of Commons, on July 15, 1828, it was revealed that the Spanish had been cynical in their call for claims, and both unable and uninterested in actually paying any – no payment was ever made (“Hansard’s,” vol. 19, pp. 1697-1704: <http://hansard.millbanksystems.com/commons/1828/jul/15/british-merchants-claims-on-spain>); Peter Pierson, p. 86, pp. 97-98, pp. 100-101, pp. 103-104 “*The History of Spain*,” p. 86 Greenwood Press, Westport, Connecticut 1999

Peace”) to persuade Spanish King Carlos IV to allot a small sum still available from one of the captured sailors’ *caja* for widows and orphans of *Mercedes* casualties, was turned down.⁴⁵ Widows and orphans were left as bereft of satisfaction as private merchants and individuals.

It is astonishing that today counsel for Spain and its “expert” historian think the fact that a call for claims means or proves anything, other than a recognition that the *Mercedes*’ last mission was indeed commercial. Spain’s reference to the 1824 Royal Decree made the assumption that if such a decree was published, then automatically, claims were received and at least recognized with an interest-bearing debenture, or “IOU,” payable by the State. However, there is no historical evidence at all that such claims were received, that debentures were issued, or that debentures were ever paid. As detailed in footnote 44 above, the call for claims was exposed in 1828 as cynical. The fact that calls for claims regarding the loss of the *Mercedes* were issued over a period spanning three generations⁴⁶ very clearly indicates that Spain did not consider the cargo aboard the *Mercedes* to be “sovereign.” The fact that there is no proof of any sort that any of these claims were satisfied indicates that the point of subrogation is moot.

G. Spain Belatedly Recognizes the Heroics of Oct. 5, 1804

Until Odyssey announced the discovery of the “Black Swan” site, there had been virtually no attention in Spain’s popular histories or schoolbooks to the Battle of Cape St. Mary or loss of the *Mercedes*. O’Donnell himself, in a 700-plus-page tome about Trafalgar,

⁴⁵ Nov. 21, 1805, correspondence, Godoy to Francisco Gil, AGM

⁴⁶ Claims presented or sought between 1804 and 1870, documented in sources cited, footnote 44

devotes fewer than three pages to the entire episode, which he attached to his declaration.⁴⁷

Whether the “Black Swan” relates to the *Mercedes* or not, throughout its presentation of historical information, reflecting what is the most comprehensive research project ever conducted into this ship and her context, Odyssey has demonstrated respect and admiration for the Spanish nation and the officers and crews of Bustamante’s squadron. It is thanks to Odyssey’s work that historians and the public worldwide today enjoy a renewed appreciation of the significance of the *Mercedes*.

⁴⁷ O’Donnell Declaration, (Dkt 163-9, pp. 36-38, Annex 13)

ANNEX 1

In document No. 209, Don Luis María de Salazar states that "by order of Your Excellency on the 10th of the present month he became aware of the two hundred thousand Rs. per month that must be given by the Post Revenue in Coruña on account of what must be paid to the Navy for now being under its charge. May God protect Your Excellency for many years. Ferrol May 19, 1804."

The other document is signed by Don Pedro Cevallo in Aranjuez and dated May 8, 1804. It states that "*on the 1st of the present month I have notified the Post's General Directors by Royal Order that while the corresponding arrangement is formed with regard to what the Revenue must pay to the Royal Navy in compensation for what is saved by having the Maritime Post under its charge, place in the Treasury in Coruña two hundred thousand Rs. per month on account, and at Your Excellency's disposition. The information I have communicated to Your Excellency is for your knowledge. May God protect Your Excellency for many years.*"

Legajo 752Z/L, Asuntos particulares 1804-1810

En el documento nº 209 Don Luis María de Salazar dice que por la orden de V.E. de 10 del corriente quedó enterado de los doscientos mil r.s mensuales que ha de dar la Renta de Correos en la Coruña a buena cuenta de lo que deva contribuir a la Marina por estar ahora en el cargo de ésta. Dios guarde a V.E. por muchos años. Ferrol 19 de Mayo de 1804

El otro documento está firmado por Don Pedro Cevallo en Aranjuez y con fecha de 8 de mayo de 1804, dice que con fecha de 1º del corriente he prevenido de Real Orden a los Directores Generales de Correos que mientras se forma el arreglo correspondiente sobre lo que la Renta debe contribuir a la Marina Real en compensación de los que ahorra por ser del cargo de la Marina los Correos Marítimos, pongan en la Tesorería de la Coruña doscientos mil r.s mensuales a buena cuenta, y a la disposición de V.E. Lo que comunico a V.E. para su inteligencia. Dios guarde a V.E. muchos años

Como por

Con fha de 1.^o del corr.^{to}
he prevenido de N.^o orden
a los Directores de

Consolidacion de la Marina Real que mientras se
considere para un tanto y que
canon

forma el arreglo corres

Indicaciones a la Intendencia
Consolidacion de la Marina Real
1804

pond^{te} sobre lo que la

Marina debe contribuir a

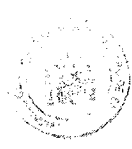
la Marina Real en con

pensacion de lo que aho

ra y ser del cargo de

la Marina los Correo

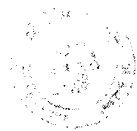
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la tesorería de los Comu-
na doscientos mil r. men-
uales a buena cuenta,
y a la disposición de
V. E. lo que comunico
a V. E. p.^a su intelig.
Dios que a V. E. m.
d. San Juan 8 de Mayo
de 1804.

Pedro Levatto

Don J. Don P. Grandallera



ANNEX 2

October 17, 2008

CERTIFICATION

To Whom It May Concern:

The attached translations of the following documents were prepared by a team of translators qualified to read and translate this material:

- Correspondence dated April 7, 1802
- Correspondence dated April 7, 1802 signed by Agustin de Betancourt, et al.
- Personnel listing dated April 10, 1802
- List of Ships list dated April 10, 1802
- Correspondence dated February 23, 1803 (with side notation dated March 14)

The documents are accurately translated from Spanish to English, to the best of our knowledge and belief.

Sincerely,

TRUSTED TRANSLATIONS, INC.

Liliana E. Ward, Esquire
Director of Operations

County of Fairfax
Commonwealth of Virginia

The foregoing instrument was acknowledged before me this 17 day of October, 2008, by
Liliana E. Ward.

WILSON R. MARROQUIN
NOTARY PUBLIC
COMMONWEALTH OF VIRGINIA
MY COMMISSION EXPIRES 05/31/2010

Notary Public

My Commission Expires

12/31/2010
2010 07 18



Honorable Sir

The Frigate-ensign, Luis Abello, originating from maritime mail and embarking on the Frigate Mercedes destined for Lima has delivered the attached Official Request for Your Majesty, expressing that the four months of payment received as a salary were issued in *vellón*¹; resolved in the Royal Ordinance of August 31st and communicated to this Navy Governor. While the nature of this trip varies from other sea-bound trips since maritime mail is involved, in this case it should have the same salary increases as the other living officials in the Navy have. I thus find this request to be well-founded, as the difference is clear as to how this trip and the Asian ones are perceived regarding the other trips already mentioned. I herein place this matter in Your Excellency's hands for a resolution that is of Royal liking. Nevertheless, I further wish to express to Your Excellency that the most equitable solution for the above-mentioned Abello and the others found in similar situations would be to increase the salary in such a way that they may enjoy the same salary benefits as the other Navy officials with the same ranking on these trips.

May God keep Your Excellency many years, Ferrol, February 23, 1803.

Honorable Sir
Félix de Texada

Honorable Sir, S.D. Domingo de Grandallana

¹ A *vellón* is a monetary unit that was used in Spain, either in copper or silver

Exmo. Sr.

El alférez de Fragata D. Luis Abello procedente de los correos marítimos y embarcado en la Fragata Mercedes con destino para Lima, me ha presentado la adjunta Instancia para S.M., exponiendo que los quatro meses de anticipación que ha recibido como sueldo, se le han librado en Vellon; con arreglo a los resuelto en Rl Ord en 31 Agosto ultimo comunicada a este Intendente Marina y que Variando la naturaleza de este viaje de los de mar en que se emplean los correos marítimos, comprende debe disfrutar en este caso de los mismos aumentos a sueldo que gozan los demás oficiales vibos de la Armada; y hallando yo fundada esta solicitud por quanto es clara la diferente consideración con que se mira este viaje y los de la Asia con respecto a los otros ya expresados; la dirijo a manos de V.E. para la resolución que fuere del R. agrado, pareciendome no obstante digno de manifestar a V.E. que la gracia más equitativa que pudiera hacersele al citado Abello y demás que se hallen en semejante caso, seria la de aumentarle el sueldo de modo que lograrse disfrutarlo igual al que disfrutaban los otros oficiales de la Armada con su misma clase en estos viajes.

Dios guarde a V.E. m. a. Ferrol 23 de Febrero de 1803.

Exmo. Sr.
Félix de Texada

Exmo. Sr. S.D. Domingo de Grandallana

1007
Smo P

El Cap. Don. Manuel de Sotomayor, Director de la Armada de la Flota de España, en que solicita que se le conceda el goce de sus sueldos, con igualdad a los de su clase que van a hacer viaje a Lima; y lo considera necesario a una gracia.

El Ateneo de Praga Don Luis Estrella, procedente de los puertos maritimos y embarcado en la fragata Entendidos con destino para Lima, me ha prevenido la adjunta Memoria para S.M., exponiendo que los que van a hacer viaje a Lima, solo han tenido anticipacion que ha recibido don Juan de Dios en Odessa; con arreglo a lo resuelto en R. O. de 31 de Agosto ultimo comunicada a este Superintendente de Marina; y que variando la naturaleza de este viaje solo de mar en que se emplean los buques maritimos, conviene debe disputar en este caso de los mismos aumentos de sueldo que gozan los demas oficiales de la Armada; y hallando ya fundada con solicitud por quanto es clara la diferente consideracion con que se mira este viaje y los de la tierra con respecto a los otros ya expresados, lo dirijo a S.M. para la resolution que fuere de R. O. agrado, pareciendome no obstante digno de manifestar a S.M. que la gracia mas equitativa que pudiera hacerse al citado Estrella y demas que se hallen en semejante caso, seria la de aumentarle el sueldo del modo que logran disfrutar igual al que disfrutan los otros oficiales de la Armada en su misma clase en otros viajes.

Siendo mayor el que si de una guerra y disputada por como esta la decision es la por esta en la misma memoria por esta

M. O. en 9 de Enero de 1743

Que por R. O. de 17 de Julio de 1743 se le conceda

Exmo P

Felipe de Heredia

Mo O. P. Domingo de Gandallana



(Second Inclosure referred to in No. 42.)

Note from Don Pedro Cevallos to B. Frere
Esquire, dated Escorial, 3d October 1804.

Sir,

I HAVE made a Report to the King my Master, of the Contents of your Note of the 27th ultimo, in which you speak of a Naval Armament which you suppose to be fitting out in Ferrol. His Majesty, being informed of your Representations, orders me to answer, that he has never thought of being wanting to the Agreements entered into with the British Government—that the Cessation of all Naval Armament against Great Britain shall be observed as it has been hitherto; and that whatever Information to the contrary may have reached you, is wholly unfounded, and offensive to the Reputation which the Spanish Government justly enjoys. I take this Opportunity of renewing to you the Assurances of my Wishes to oblige you, and I pray God to preserve your Life many Years.

(Signed) P. CEVALLOS.

To the Chargé d'Affaires
of His Britannic Majesty,
&c. &c. &c.

AGM, GENERAL CORP SECTION

ANNEX 4

Alphabetical index of General Corp of the Navy

620/443, Don Juan Patricio García

NOTE: He was shown on the crew list arriving in Montevideo aboard the *Mercedes*, and was assumed by Spanish historian Hugo O'Donnell to have been killed on the *Mercedes*, Oct. 5, 1804.

His file contains the following information:

1st of February of 1803, Mercedes frigate (Don José Goicoa). From Ferrol to Lima and Montevideo, returned to Cadiz in the frigate, ***transferred to the frigate Medea*** (Don José Bustamante y Guerra). Took prisoner by the English in view of the Cape Santa Maria, led to Plymouth, ***returned to Ferrol on May 27th of 1805***

1º febrero 1803, fragata Mercedes (D. José Goicoa). De Ferrol a Lima y Montevideo, regresó para Cádiz en la fragata transbordado a la fragata Medea (D. José Bustamante y Guerra). Apresado por los ingleses a la vista del Cabo de Santa María, conducido a Plymouth, regresó a Ferrol el 27 de mayo de 1805

620/574, Miguel Iriarte

NOTE: He was shown on the crew list arriving in Montevideo aboard the *Mercedes*, and was assumed by Spanish historian Hugo O'Donnell to have been killed on the *Mercedes*, Oct. 5, 1804. He was replaced on Mercedes by the sole surviving officer, Pedro Afán.

In his dossier we can read:

D. Miguel Iriarte Rezabal: as a ship lieutenant was boarded in 1804 at the frigate Mercedes commander by the Captain of ship D. Jose Goycoa and in July of the same year he landed from the frigate in Montevideo at the request of the Head of the Squad D. Tomás de Ugarte y Liaño who named him his assistant, where he lived until his death (Montevideo)

D. Miguel Iriarte Rezabal: como teniente de navío fue embarcado en 1804 en la fragata Mercedes del mando del capitán de navío D. José Goycoa y en julio del mismo se desembarcó de ella en Montevideo a petición del jefe de escuadra D. Tomás de Ugarte y Liaño que lo nombró ayudante suyo, en cuyo destino subsistió hasta su fallecimiento (Montevideo)

620/603, D. Pedro Landazuri

NOTE: He was shown on the crew list arriving in Montevideo aboard the *Mercedes*, and was assumed by Spanish historian Hugo O'Donnell to have been killed on the *Mercedes*, Oct. 5, 1804.

His record states that on January 29, 1803, embarked on La Mercedes, and as was warned from Ferrol went to Lima, on June 5th of 1804 he returned to Montevideo and changed to the frigate Astrea.

620/813, Don Pedro Mosti Arambide

NOTE: He was shown on the crew list arriving in Montevideo aboard the *Mercedes*, and was assumed by Spanish historian Hugo O'Donnell to have been killed on the *Mercedes*, Oct. 5, 1804.

Ship Lieutenant

In December of 1803 he embarked on the Mercedes until the 1st of March of 1804, leaving on March 31st of 1804 with the frigate Asunción and Clara with revenues to Spain, in Montevideo came to the Medea as an assistant, left for Spain, was captured on 5th of October by the English, led to Farristock and returned to Spain in June 1805

On September 28th of 1805 he requests a license to go to Madrid and San Sebastian where he has relatives with whom he is interesting to settle accounts and the General Captain of Cadiz, Don Juan Francisco Moreno, considers creditor of four months of license without pay because he does not enjoy being a prisoner and because of his sick condition

The original letter of Pedro Mosti says: suffers the misfortune of being a prisoner of the English from the loss of the four frigates of His Majestic coming from Montevideo, and therefore can not be used in the relief of the Crown until be exchanged and not having seen in 21 years of service his relatives in Madrid and San Sebastian with whom he is particularly interesting to clarify accounts with them, because of give temporary license for the purposes expressed In San Fernando on September 16th of 1805

Teniente de navío

En Diciembre de 1803 embarcó en la Mercedes hasta 1º de marzo de 1804, saliendo el 31 de Marzo de 1804 con la fragata Asunción y Clara con caudales para España, en Montevideo pasó a la Medea como ayudante, salió para España, fue apresado el 5 de octubre por los ingleses, conducido a Farristock y devuelto a España en Junio de 1805

El 28 de septiembre de 1805 pide licencia para Madrid y San Sebastián *donde tiene parientes con quien le es interesante ajustar cuentas* y el Capitán General de Cádiz, Don Juan Francisco Moreno, lo considera acreedor a cuatro meses de licencia *sin*

goze de sueldo pues no está enfermo y por su condición de prisionero sufre la desgracia de ser prisionero de los Yngleses desde la pérdida de las cuatro fragatas de S.M. procedentes de Montevideo, por lo que no puede emplearse en el desagravio de la Corona hasta ser cangeado y no habiendo visto en 21 años de servicio que tiene a sus parientes que tiene en Madrid y San Sebastián con quienes le es interesante aclarar cuentas particularmente por lo tanto se digne conceder la licencia temporal para los fines expresados
En la Isla de León 16 de septiembre de 1805

620/1160, Miguel de la Sierra Donesteve

NOTE: He was shown on the crew list arriving in Montevideo aboard the Mercedes, and was assumed by Spanish historian Hugo O'Donnell to have been killed on the Mercedes, Oct. 5, 1804.

In September of 1803 he embarked like official of orders of the three frigates of the Head of Squad Don Tomas de Ugarte who headed from Lima to Montevideo. In July 1804 was transferred to the Medea to serve as assistant of the of the division of the frigates under the command of Head Squad Don Jose de Bustamante y Guerra, whom in the way from Montevideo to Europe were captured and taken as prisoners to England. In October 1805 he was exchanged and assigned to command the frigate Santa Maria Magdalena

En septiembre de 1803 se embarcó de oficial de órdenes de las tres fragatas del Jefe de Escuadra D. Tomás de Ugarte que desde Lima se dirigieron a Montevideo. En julio de 1804 se transbordó a la Medea para servir de ayudante de la mayoría de la división de fragatas del mando de Jefe de Escuadra D. José de Bustamante y Guerra que de Montevideo a Europa fueron apresados y llevados como prisioneros a Inglaterra. En octubre de 1805 fue canjeado y mandó la fragata Santa María Magdalena

620/1223, Tomás de Ugarte y Liaño

NOTE: He was shown on the crew list arriving in Montevideo aboard the Mercedes, and was assumed by Spanish historian Hugo O'Donnell to have been killed on the Mercedes, Oct. 5, 1804. He died in Montevideo days alter the squadron sailed for Cadiz.

1803

Navy Commander of El Callao, Lima, all the year. By Royal Order of October 5th should be relieved by the Brigadier Don Joaquin de Molina to return to Europe. By Royal Order of June 18^t of 1797 he was appointed Commander of the Navy in the port of Callao, with the rank of Brigadier

In a letter sent to the King, responding in accordance to the Royal Order reserved on July 31st of 1803 on carrying cargo/revenues for the Viceroyalty in the frigates under his command Mercedes, Clara and Asunción

1803

Comandante de Marina del Callao de Lima, todo el año. Por Real Orden de 5 de octubre debe relevarle el Brigadier D. Joaquín de Molina para que regrese a Europa. Por Real Orden de 18 de junio de 1797 se le nombra Comandante de Marina en el puerto del Callao, con grado de Brigadier

En carta enviada al Rey, en respuesta a poder cumplir la Real Orden reservada de 31 de julio de 1803 sobre conducción de caudales y frutos que embarque el Virreinato en las fragatas a su mando Mercedes, Clara y Asunción

620/1275, Joaquín Villalba

NOTE: He was shown on the crew list arriving in Montevideo aboard the Mercedes, and was assumed by Spanish historian Hugo O'Donnell to have been killed on the Mercedes, Oct. 5, 1804.

Lieutenant of frigate

1 year and 9 months in the Mercedes, being transferred to the Astrea before the Mercedes returned to Spain

Teniente de fragata

1 año y 9 meses en la Mercedes, siendo transbordado a la Astrea antes de que la Mercedes volviese a España

620/835, Juan Noboa

NOTE: He was shown on the crew list arriving in Montevideo aboard the Mercedes, and was assumed by Spanish historian Hugo O'Donnell to have been killed on the Mercedes, Oct. 5, 1804.

Like Alferez/second lieutenant of frigate was in the battle of the four frigates aboard the Medea, was taken prisoner and taken to England, Plymouth

The names Don Manuel Vargas, Don Ignacio de la Carcova, Don Vicente Murrieta, Don Jacinto Rivera, Don Pedro Pardo, Don Isidro Caycoya, Don José de Castro, Don Gaspar Botest, Don Gerónimo Agustino, Don Pedro Navarrete and Don Miguel de Altuna do not appear in the records of the General Corps General

These all appear to have been non-Naval people lost on Mercedes, some apparently serving as officers or officials.

Medical corp

Legajo 2898/23

NOTE: He was shown on the crew list arriving in Montevideo aboard the *Mercedes*, and was assumed by Spanish historian Hugo O'Donnell to have been killed on the *Mercedes*, Oct. 5, 1804.

Relationship of the Service of the 1st surgeon of the Royal Navy Don Gaspar Botest, son of Don Carlos and Doña Maria Vila, a native from the Village of Planas, Bishop of Gerona, 46 years old, unmarried status

Relación de servicios el 1er cirujano de la Real Armada D. Gaspar Botest hijo de Don Carlos y de Doña María Vila, natural de la Villa de las Planas, Obispado de Gerona, de edad 46 años, estado soltero

The document is dated in Montevideo on September 19 of 1811, signed by himself, and says that he was 2 years and 24 days in the frigate Mercedes to Lima and Montevideo, and after that he was 2 months and 16 days in the Asuncion to the Corsican in the River Plate. So although Don Gaspar Botest made the outward journey to America aboard the Mercedes, he did not return to the peninsula aboard it, he stayed at Montevideo and served on the frigate Asuncion for a few more months

Chaplains/Personal Affairs

Legajo 3340/47

NOTE: He was shown on the crew list arriving in Montevideo aboard the *Mercedes*, and was assumed by Spanish historian Hugo O'Donnell to have been killed on the *Mercedes*, Oct. 5, 1804.

Don Pedro Pardo de Lago, appears as a chaplain of the Navy at that time but in his case there is no reference to his death in the Mercedes, there is also data about his life after the English attack in the Cape Santa Maria, so this chaplain could not have been traveling aboard the Mercedes when she sank

About the other chaplains we have found no references

Intendencia/Corp of the Ministry

Legajo 3268/48

NOTE: He was shown on the crew list arriving in Montevideo aboard the Mercedes, and was assumed by Spanish historian Hugo O'Donnell to have been killed on the Mercedes, Oct. 5, 1804.

About Don Ignacio de la Cárcova Rubalcaba, accountant of the frigate, there is a letter that says:

Josef Don Manuel de Goycoa, Captain of the Royal Navy and commander of the frigate of H.M. named Nuestra Señora de las Mercedes: I certify that the Official the fourth of the Ministry of the Navy Don Ignacio de la Cárcova Rubalcaba has been embarked on this ship since the month of November of 1802, which was at the Royal Arsenal of Ferrol from which she has sent to the Port of Callao, Lima, and return to that having played the employment of accountant, who has served with the best conduct, zeal, implementation, and disinterest until the date, when he transferred to the sloop of war named the Atrevida

It is a copy of the original certificates that are in my power, and to which I refer as necessary to certify, Soledad of Malvinas, 28 of July of 1805. Ignacio de la Cárcova

Don Josef Manuel de Goycoa, capitán de navío de la Real Armada y Comandante de la fragata de S.M. nombrada Nuestra Señora de las Mercedes: certifico que el Oficial quarto del Ministerio de Marina Don Ignacio de la Carcova Rubalcaba ha estado embarcado en este Buque desde el mes de Noviembre de 1802, que se armó en el Real Arsenal del Ferrol en el que ha hecho campaña al Puerto del Callao de Lima, y regresado a este habiendo desempeñado el empleo de Contador, que ha servido con la mejor conducta, zelo, aplicación, y desinterés hasta esta fecha, que ha sido transbordado a la corbeta de Guerra nombrada la Atrevida, por lo que le considero digno de las piedades de S.M. y a fin de que lo pueda hacer constar le doy la presente a bordo de la fragata Mercedes en a rada de Montevideo a primero de Julio de 1804: Josef Goycoa

Es copia de las certificaciones originales que paran en mi poder, y a las que me refiero en lo necesario, de que certifico, Soledad de Malvinas, 28 de julio de 1805. Ignacio de la Carcova.

So, Don Ignacio de la Carcova was not aboard the frigate Mercedes in her return trip to Spain.