

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division**

SEA HUNT, INC.,

Plaintiff,

v.

CIVIL NO. 2:98cv281

**THE UNIDENTIFIED SHIPWRECKED
VESSEL OR VESSELS, ETC., *in rem*,**

Defendants.

**BRIEF OF THE COMMONWEALTH OF
VIRGINIA
IN SUPPORT OF SEA HUNT'S MOTION FOR
RECONSIDERATION OF ORDER OF DECEMBER
6, 2000**

As this Court is aware, the Fourth Circuit ruled on July 21, 2000 that the Kingdom of Spain had not

expressly abandoned *La Galga* and *Juno*, and thus both wrecks remained Spanish property. On February 20, 2001, the United States Supreme Court denied petitions for writs of *certiorari* filed by Sea Hunt and Virginia. Since the Fourth Circuit's decision, Sea Hunt and Spain have filed several motions with this Court. On October 23, 2000, Spain asked this Court to terminate Sea Hunt as the substitute custodian of the artifacts recovered so far, and to enforce judgment. Although Spain declined to acknowledge that Sea Hunt had in fact found *La Galga* or *Juno*, it nevertheless sought turnover of all artifacts recovered by Sea Hunt. In response, Sea Hunt filed a motion on November 17, 2000 asking this Court for

clarification, or, in the alternative, for Rule 60(b)(6) relief. Virginia filed a response in opposition to Spain's motion.

On December 6, 2000 this Court withheld ruling on the motions before it because of the pendency of the *certiorari* petitions before the Supreme Court. Dec. 6, 2000 Order at 5. Still, this Court stated that the question of whether the recovered artifacts came from *La Galga* or *Juno* needed resolution independently of the Supreme Court petitions. *Id.* at 6. This Court therefore issued two directives to Sea Hunt: 1) make available to counsel for Spain artifacts in Sea Hunt's possession retrieved from the permit areas,¹ and 2) provide "for study by all parties,

¹ In 1997 Virginia issued to Sea Hunt two exclusive salvage permits each covering approximately six square miles of underwater coastal lands of the Commonwealth.

the precise locations within the Virginia permit areas where it salvaged the artifacts.” *Id.* at 6-7.²

Spain and Sea Hunt were unable to agree on the date for the artifact inspection, until this Court ordered the inspection to take place on February 5, 2001. Sea Hunt made the artifacts³ available for inspection to not only

The two salvage areas, designated Salvage Area I and Salvage Area II, are located immediately off Assateague Island in Accomack County, Virginia. Neither permit was granted for any particular vessel, and in particular, neither mentions *La Galga* or *Juno*. Among the many terms of those permits are provisions designating all objects recovered to be the property of the Commonwealth of Virginia, pursuant to Virginia Code § 10.1-2214.

² The Order for disclosure of location information was not a result of a request of any party, although Spain so asserts in its February 7, 2001 letter.

³ An ancillary issue has arisen as to whether Sea Hunt has revealed all of the recovered artifacts to Spain and Virginia. While such allegations concern Virginia, they

counsel for Spain, but to a representative of Spain, counsel for the Commonwealth, and representatives of the Virginia Marine Resources Commission and the Virginia Department of Historic Resources. Sea Hunt also made available limited location information, linking each artifact to one of three separate recovery spots designated by a numerical prefix. No information has yet been revealed which links the recovery spots to permit areas or relates the recovery spots to each other or to latitude and longitude.

On February 7, 2001, Spain wrote to this Court advising that Sea Hunt had not disclosed the location

are not germane to whether this Court should clarify the type of location information it desired released by Sea Hunt.

information, and asserted that the Virginia permits required disclosure of such information. On February 12, 2001 Sea Hunt filed its motion for reconsideration of this Court's December 6, 2000 Order on the issue of disclosing the location information. Spain filed its Reply Memorandum on February 23, 2001, seeking the immediate turnover of all artifacts and precise location information. This Reply addresses both of these pending motions.⁴

⁴ The memoranda of both Sea Hunt and Spain, particularly Spain, contain numerous allegations of contumacious conduct and *ad hominem* attacks. Virginia prefers to address the legal issues before the Court, namely whether Sea Hunt has located, and recovered artifacts from, *La Galga* and *Juno*, and whether precise location information should be disclosed at this time.

**VIRGINIA OPPOSES SPAIN'S MOTION FOR THE
IMMEDIATE TURNOVER OF ALL ARTIFACTS
FOUND BY SEA HUNT**

In its June 25, 1999 Opinion and Order denying a salvage award to Sea Hunt, this Court noted Sea Hunt's argument that "the wreck of JUNO is not in a single location but rather scattered about the ocean floor among several other shipwrecks, it is impossible to determine if a particular artifact belongs to JUNO without first salvaging the artifact." June 25, 1999 Opinion and Order at 18. Recognizing this difficulty, this Court ordered Sea Hunt:

to deliver to Spain any artifacts salvaged from JUNO which are currently in Sea Hunt's possession. Should Sea Hunt inadvertently salvage artifacts from JUNO during the course of other salvage operations in the designated salvage areas, such artifacts will be turned over to Spain as owner of JUNO, and no salvage award will be required.

Id. at 25.

The Fourth Circuit subsequently held that *La Galga* and *Juno* belong to Spain. Recovered artifacts *not* from these ships belong to Virginia. No court has ruled that *La Galga* and *Juno* have in fact been found or that their remains lay within the two search areas. So, what Sea Hunt and Spain seem to forget is that no one knows whether the recovered artifacts came from *La Galga* or *Juno*, nor does anyone know whether Sea Hunt has located either *La Galga* or *Juno*. Without that knowledge, at a minimum, no one knows whether any given artifact belongs to Spain or to Virginia, and no one knows whether the recovery spots identify wreckage that belongs to Spain or Virginia. What Spain ignores is that

turning over artifacts and location information to Spain, without the predicate finding that those things belong to Spain, places Sea Hunt in the untenable position of possibly having to answer to Virginia for giving away Virginia's property.

A formal adjudication of whether the recovered artifacts belong to Spain, and whether Sea Hunt has indeed located *La Galga* and *Juno*, is more important than ever. The ownership contest is not between Sea Hunt and Spain, but between Virginia and Spain, as Sea Hunt has no ownership interest in either the artifacts or the vessels, except as contractually provided in the permits. Adjudication is important, because both Sea Hunt and Spain have changed their positions on these issues.

Sea Hunt has not unequivocally asserted it has possession, actually or constructively, of *La Galga* or *Juno*. At the first hearing held in this matter, on March 11, 1998, counsel for Sea Hunt stated that “[a]t this point in time, we can’t say conclusively that it’s even the JUNO or LA GALGA. We believe that there is strong evidence that those are the vessels that have been discovered.” Transcript of March 11, 1998 hearing at 5. When the United States sought to intervene on behalf of Spain, this Court conducted another hearing, on September 15, 1998. During that hearing, counsel for Sea Hunt stated “though there are some artifacts, there is not at this time any assertion by any party that these artifacts indeed are the two ships, Spanish ships in question.” Transcript of

September 15, 1998 hearing at 120. Sea Hunt's counsel also stated "but there are other artifacts down there. I mean, we are talking about artifacts beyond just the two Spanish vessels." *Id.* at 121.

Likewise, Spain has never admitted, even now, that Sea Hunt has found *La Galga* and/or *Juno*; indeed, Spain vehemently denied that Sea Hunt had located *Juno* when this Court considered a salvage award as to *Juno*. At the April 1, 1999 hearing on cross-motions for summary judgment, counsel for Spain stated "[o]ur position, of course, is that these ships have not been abandoned, and it also appears to be the case that nobody knows where the JUNO is and whether it's embedded or not, Your Honor."

Transcript of April 1, 1999 hearing at 67. Later in that same hearing the Court initiated the following exchange:

THE COURT: Let me ask you something else. And I should have asked this same question of Sea Hunt, so I can take that up with them when they reply to your response.

Mr. Cook of Alpha, whatever it was, has claimed or made the statement that he doesn't think that the vessel that you and Sea Hunt are referring to is actually the JUNO, and the Quicksilver people, I thought, today said the same thing.⁵

Can I assume from both parties here to this case that you all are satisfied that I should rule upon this matter on the agreement of counsel that the vessel is the JUNO?

MR. GOOLD: Yes. We believe that the court can rule, affirm Spain's ownership of the JUNO regardless of which place it happens to be.

⁵ Alpha Quest/Cook had intervened in this case, and the Court invited Quicksilver International, Inc. ("Quicksilver") to attend the April 1, 1999 hearing.

The legal principles that establish Spain's ownership do not depend on where it came to rest.

THE COURT: Well, I understand that. But these people said it was not the JUNO, regardless of where it came to rest, as I understood their statements here this morning.

MR. GOOLD: Well, I'm here because Sea Hunt claimed they found what they believed to be the JUNO and claimed that there was an ample factual record for the court to decide ownership of the JUNO.

Id. at 99-100.

After rendering its ruling as to ownership of *La Galga* and *Juno*, this Court allowed Sea Hunt and Spain to brief the issue of whether Sea Hunt was entitled to a salvage award for its efforts regarding *Juno*. As part of its opposition to a salvage award, Spain submitted a May 26, 1999 Affidavit from David Beltran Catala. Mr. Beltran

denied that Sea Hunt had recovered anything from *Juno*.

Specifically, Mr. Beltran testified that:

Based on the information contained in Sea Hunt's filings in this Court and the attached exhibits prepared by Sea Hunt as reports of its activities it is evident that Sea Hunt has provided no credible information identifying the actual site of the *Juno*....

Attached as Exhibit 2 is a September 1997 document signed by the President of Sea Hunt in which it is stated as to the location of *Juno* only that Sea Hunt believes there is a "*possibility* that *Juno* may indeed lie along the southern shore of Assateagua (sic) Island."

Insofar as the location of *Juno* is concerned, I also state that the records of the Navy demonstrate that inquiries made by the Consul of Spain along the Eastern United States immediately after the loss of the *Juno* produced no information as to where she sank.... If the *Juno* were in an identifiable location, reports of sighting of wreckage or victims would be expected.

Attached as Exhibit 3 is a copy of a December 15, 1998 report to the Commonwealth of Virginia on Sea Hunt's "target verification activities." It also confirms that Sea Hunt has *not* located the *Juno*. It states that Sea Hunt has not found "even significant definable concentrations of wreck material." (p. 2). Sea Hunt also reports that "The targets investigated by Sea Hunt cannot be considered to be shipwrecks or even specific shipwreck sites." (p. 3). In short, Sea Hunt has itself submitted official reports acknowledging that it has not been successful.

Beltran Affidavit at 3-4.

In the concluding paragraph of his Affidavit, Mr. Beltran states: "In summary, I state that Spain objects to any salvage award concerning *Juno* on grounds that... Sea Hunt has not located the *Juno* or otherwise achieved success that could merit a salvage award, if Spain had consented to salvage." *Id.* at 5.

It is therefore misleading for Spain to rely on Sea Hunt's initial pleading, when its own witness denies that Sea Hunt has found *Juno*. Moreover, Sea Hunt's pleading could not, in any case, bind Virginia.

Further complicating this issue is the *Quicksilver* case, pending in this same Court. Quicksilver filed a verified *in rem* action against an unknown shipwreck in September 1988. *Quicksilver International, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, No. 88-618-N (E.D. Va. Filed Sept. 13, 1988). Quicksilver was appointed substitute custodian of the unknown wreck in October 1988. Since then, Quicksilver

has consistently asserted that it has located *Juno*.⁶ Both Spain and Sea Hunt conveniently ignore Quicksilver, but Virginia is troubled by the possibility of inconsistent rulings unsupported by expert testimony, *i.e.* that representations by counsel can lead the same Court to rule that both Sea Hunt and Quicksilver having found *Juno* in areas many miles apart.

In light of the foregoing, the Commonwealth believes that, rather than ordering everything to be turned over to Spain, this Court should order that an item-by-item inquiry be conducted to determine factually which artifacts came from *La Galga* and *Juno* – and thus belong

⁶ See excerpts from Quicksilver's quarterly reports set forth in Virginia's November 17, 2000 Response to

to Spain – and which came from some other ships – and thus belong to the Commonwealth. Since all artifacts are in the possession of Sea Hunt – Virginia’s permittee – the burden of proof lies with Spain.

**VIRGINIA SUPPORTS SEA HUNT’S MOTION
FOR RECONSIDERATION**

Virginia supports Sea Hunt’s motion for reconsideration of this Court’s *sua sponte* order requiring disclosure of location information. Virginia can envision two different types of location information – (1) information that will allow one to go to the recovery spots, and (2) information that relates each artifact to others from the same recovery spot, without revealing the

Spain’s Motion to Terminate Appointment of Substitute Custodian and to Enforce Judgment.

precise latitude and longitude of that spot. Virginia opposes disclosure of the first type, but not the second.

Specific Recovery Location Information

Specific recovery location information is the exact latitude and longitude where each artifact was recovered; what Sea Hunt calls “X marks the spot.” Assuming that this information would delineate tiny areas of artifact recovery within the two search areas, revealing this “latitude and longitude” information also identifies the location of the wrecks, whether they turn out to be *La Galga* and *Juno* or not. Virginia agrees that this information is a record collected as a part of this project which shall become the property of the Commonwealth and ultimately be cared for in a repository approved by

the Virginia State Historical Preservation Officer (VA SHPO) as required by the Virginia Marine Resources permits issued to Sea Hunt.⁷ Virginia is concerned that if this information is publicly released prior to the completion of the archaeological recovery from the site, that the integrity of the site would be compromised and it would be exposed to looters. The Commonwealth has no need for this information at this time and prefers that it be protected by Sea Hunt until the conclusion of the project, at which time it must be provided to the Commonwealth. If the site has not then been completely excavated, the

⁷ See Paragraph (q) of Permit #97-0163 previously filed with the Court by Sea Hunt as Exhibit B to its Memorandum in support of its Motion for Relief filed November 17, 2000, and reproduced here in footnote 9.

Commonwealth will make sure that the information is only released to those who will properly protect the site.

Additionally, the forced disclosure of “latitude and longitude” information – developed by Sea Hunt as Virginia’s permittee – unduly infringes on Sea Hunt’s exclusive permits and Virginia’s ownership interests in that information. Assuming *arguendo* that Sea Hunt found *La Galga* and *Juno*, Spain’s right of ownership of the vessels does not carry with it the right to compel Sea Hunt or Virginia to disclose where the vessels are.⁸

⁸ Prior to its latest pleading, Spain disclaimed any interest in conducting salvage operations on *La Galga* or *Juno*. In a verbal note from the Spanish Embassy in Washington, D.C. to the United States Department of State, Spain stated its wish “that the remains of these vessels be treated as maritime graves and that their salvage not be

Permit Requirements

Virginia also asserts that Spain's recital of paragraph (q) of Sea Hunt's permits from Virginia is a red herring.⁹ Virginia has not alleged a violation of the permits. Spain is not a party to the permits. Sea Hunt has not completed its archaeological activities, and so has not yet provided location information to Virginia (and Virginia has not

authorized at this time." Verbal Note, May 8, 1998, attached to Spain's Verified Claim.

⁹ Paragraph (q) states in its entirety: "All field and research notes, maps, drawings and photographic records collected as part of this project shall become the property of the Commonwealth and shall be cared for in a repository approved by the VA SHPO. All such records will be made available to educational institutions and individual scholars for appropriate exhibit and/or research under the operating policies of the selected repository." Both permits contain identical language.

asked for that information). So Spain's invocation of the permits is a hollow argument.

Nevertheless, Virginia denies that location information becomes "public information" as argued by Spain.¹⁰ Location information becomes property of the Commonwealth, and the Commonwealth can decide how best to disseminate that information. Clearly, such discretion can be exercised to avoid looting or other

¹⁰ Spain argues that there "is no provision in the permit for Sea Hunt to withhold the [location] information from Spain." Spain's February 23, 2001 Response at 4. This mischaracterizes the permits, which do not require Sea Hunt to provide information to Spain. Sea Hunt is obligated, under the permits, to provide information to Virginia only, although no timetable is set forth. The permit then creates a mechanism for placing that information in a suitable repository for appropriate dissemination. The claim that Spain is entitled, under the

unauthorized access to the sites.¹¹ Indeed, such location information is specifically excluded from Virginia's Freedom of Information Act, § 2.1-342.01(36), which exempts "Records containing information on the site specific location of ... significant, historic and archaeological sites if, in the opinion of the public body which has the responsibility for such information, disclosure of the information will jeopardize the continued existence or integrity of the resources."

terms of the permits, to location information now is not supported by the permit language.

¹¹ Of course, if Spain now believes Sea Hunt has located *La Galga* and/or *Juno*, those sites remain within Virginia's territorial waters. Spain can apply for any necessary permits from the Commonwealth. But this Court has not been asked to, nor can it, exclude Spain from Virginia's permitting power.

In sum, Spain has no right to obtain the location information it seeks.

Relative Position Information

Virginia believes that diagrams for each of the three recovery spots can be generated so as to provide the relative locations of artifacts to each other without divulging latitude and longitude or otherwise relating those locations to the larger world. The relative position of an artifact to other artifacts may assist in determining whether the artifacts came from the same ship. Virginia would not object to a requirement that this sort of information be disclosed to Spain.

Conclusion

For the foregoing reasons, the Commonwealth of Virginia urges this Court to deny Spain's motion for the transfer to it of all artifacts recovered by Sea Hunt and for disclosure of location information other than relative location information within each of the three recovery spots. The Commonwealth also urges this Court to grant Sea Hunt's motion to reconsider the December 6, 2000 Order as it relates to disclosing location information.

THE COMMONWEALTH OF VIRGINIA

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Response of the Plaintiff, The Commonwealth of Virginia, to Sea Hunt's Motion for Reconsideration and Spain's Motion for Turnover of Artifacts by telecopier and U.S. Mail, postage pre-paid on this 1st day of March, 2001 on Ralph M Muoio, Esquire, Covington & Burling, 1201 Pennsylvania Avenue, N.W., P.O. Box 7566, Washington, D.C. 20044-7566, Fax number (202) 778-5216, and to Anthony F. Troy, Esquire, Mays & Valentine, L.L.P., P.O. Box 1122, Richmond, Virginia 23218, Fax number (804) 697-1339.

Frederick S. Fisher by Ch. J. Wilkerson
Frederick S. Fisher

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Norfolk Division

SEA HUNT, INC.,

Plaintiff

Civil No. 2:98cv281

v.

THE UNIDENTIFIED SHIPWRECKED
VESSEL OR VESSELS, ETC., *in rem*

Defendants.

DECLARATION OF BEN BENSON

Ben Benson declares as follows:

1. My name is Ben Benson and I make this declaration based on my first-hand knowledge of the matters addressed herein.
2. I am the former President of the Plaintiff corporation, Sea Hunt, Inc., in the above captioned admiralty action.
3. In my affidavit dated November 29, 2000, I made reference to a pewter spoon that was undergoing final conservation by experts in a museum laboratory in Delaware. In response to the Court's December 6, 2000 order, that spoon will be returned to the Commonwealth of Virginia upon completion of the preservation process.
4. I am aware that an amicus curiae brief filed with the United States Supreme Court in connection with an appeal of this case made a reference to a corroded cannon. The object in question was a concretion that we thought might possibly contain a rail gun. When the concretion was dissolved, it was determined that it contained no artifacts whatsoever.

EXHIBIT

C

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BEN BENSON, N - VIRGINIA

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5. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on January 25, 2001


Ben Benson

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