Maurice Welsh Legal Argument on SPA Coverage

My client, Maurice "Maury" Welsh, is a life-long seaman. He comes from a family of seamen, and now his son is in maritime studies. His case is now poised to change the scope of protection for all seaman working on U.S.-flagged carriers. (Welsh has given permission for me to post this information about his case, something lawyers cannot do without their client's permission.) On October 28, 2014, an Administrative Law Judge of the U.S. Department of Labor overruled the shipping company's motion to dismiss to allow Welsh to collect more information about the company.

Welsh began his career in the U.S. Merchant Marine after graduating high school in 1976. He studied at the Massachusetts Maritime Academy and the MEBA School of Engineering. By 1984, he was working as a seaman. Since 1990, Welsh has received extensive and wide-ranging continuing education. He holds training certification through Military Sealift Command. In 2003, he upgraded to Chief Engineer for three modes of propulsion. His U.S. Coast Guard (USCG) Merchant Marine Credential shows endorsements to serve as Officer, Chief Engineer (of steam, motor or gas turbine vessels of any horsepower), Engine, Lifeboatman, Ordinary Seaman, First Aid Provider, Advanced Oil and Chemical Tanker Cargo Operations, Advanced Firefighting, Basic Safety Training, Vessel Personnel, Security Duties and Security Awareness.

In November, 2013, one of the historic U.S. shipping companies hired Welsh to work on a container ship as 2nd Assistant Engineer. The ship flies a U.S. flag and participates in the U.S. government's Maritime Security Program (MSP). The company advertises the ship as part of its "U.S. Flag Services" and a critical link for many U.S. Government efforts worldwide.

Soon after setting sail, Welsh started raising concerns about the lock-out tag-out

procedures. The 1st Engineer told him that each tag required a separate piece of paper and he did not want to keep track of all that paperwork.

On December 23, 2013, Welsh followed the manufacturer's instructions for maintenance of the #2 Diesel Generator and turned on the generator and warmed it up to reach the required exhaust temperature. The 1st Engineer countermanded Welsh and shut it off. The company then terminated Welsh on December 25, 2013, citing the disagreement over the engine maintenance as a reason.

When Welsh came to me, I recognized that he had been fired for raising safety issues. I file a complaint with the Department of Labor under the Seamans Protection Act (SPA). OSHA closed the complaint without conducting any interview of Welsh, and without receiving any response from the company.

So, I requested a hearing from the Department of Labor's Office of Administrative Law Judges (OALJ). The company moved to dismiss the case citing an OSHA regulation that says a "seaman" is someone working for a "U.S. citizen." The company says that since it was bought by an overseas company a few years ago, it is not covered by the SPA. I disagreed. Now the ALJ is allowing discovery to commence. I am hopeful that my research on this issue will help the Department of Labor to recognize that the SPA protects American seaman working on U.S. flag vessels, no matter who owns them.

I. Introduction.

The Seaman's Protection Act ("SPA"), 46 U.S.C. § 2114(a), provides in part as follows:

> (a)(1) **A person** may not discharge or in any manner discriminate against a seaman because-
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> (B) the seaman has refused to perform duties ordered by the seaman's employer because the seaman has a reasonable apprehension or

> expectation that performing such duties would result in serious injury to the seaman, other seamen, or the public; [Emphasis added].

While the Department of Labor has added a regulation defining a "citizen of the United States," and a "seaman" as an employee of such a citizen, these definitions have no basis in text of the statute itself. The statute gives the Department no authority to promulgate substantive regulations, and the Department's own statement indicates no intent to make any substantive change. Moreover, the caselaw on extraterritorial application of whistleblower protection laws has advanced considerably in recent years.

Welsh objected to the company's motion to dismiss on the following grounds:

1. The plain text of the SPA applies to **any** "person."
2. The remedial purpose of the SPA urges in favor of finding coverage.
3. The regulation is not substantive and cannot alter the statutory scope of coverage.
4. The ship flies a U.S. flag and is thereby subject to U.S. law.
5. The adverse actions in this case occurred within the jurisdiction of the United States, and U.S. law properly applies. Finding coverage in this case is consistent with the developing law on extraterritoriality.
6. The company in this case is a U.S. corporation, and faces liability here for its actions within the U.S., even if it is owned by a corporation of another country.
7. Welsh had a reasonable belief that he was working with the scope of U.S. law which includes the SPA.
8. Discovery is necessary and appropriate before making a finding of lack of jurisdiction.

II. The plain text of the statute controls.

As set out in the introduction, the plain text of the SPA applies to any "person." 46 U.S.C. § 2114(a). Congress also enacted a definition of "seaman." "[S]eaman" means "an individual (except scientific personnel, a sailing school instructor, or a sailing school student) engaged or employed in any capacity on board a vessel." 46 U.S.C. § 10101(3). This definition is at odds with the OSHA regulation at 29 C.F.R. § 1986.101(m). The statute provides no support for limiting "seaman" to those employed by U.S. citizens.

"In determining the meaning of a statutory provision, 'we look first to its language, giving the words used their ordinary meaning.'" *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1165 (2014); quoting *Moskal v. United States*, 498 U.S. 103, 108 (1990). For the SPA, as for SOX in *Lawson*, "the statute's text is clear[.]" *Id*. at 1177 (J. Scalia, concurring).

The statutory text here covers a "person" who retaliates against a "seaman." These words establish coverage. "What Congress has plainly granted we hesitate to deny." *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 357 (1971).

III. Finding coverage here comports with the remedial purpose of the law.

In *Lawson v. FMR LLC*, 134 S.Ct. 1158, 1169 (2014), the Court looked for a "textual analysis" that "fits the provision's purpose." As all whistleblower protection statutes serve remedial purposes, there is a need for "broad construction" of the statutes to effectuate their purposes. *DeFord v. Secretary of Labor*, 700 F.2d 281, 286 (6th Cir. 1983). "Narrow" or "hypertechnical" interpretations to these laws, are to be avoided as undermining Congressional purposes. *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1512 (10th Cir. 1985).

As to the particular remedial purpose of a law protecting seaman, the Supreme Court

holds to a classic passage by Justice Story in *Harden v. Gordon*, *C.C.*, Fed.Cas.No. 6047:

> The protection of seamen, who, as a class, are poor, friendless and improvident from the hazards of illness and abandonment while ill in foreign ports; the inducement to masters and owners to protect the safety and health of seamen while in service; the maintenance of a merchant marine for the commercial service and maritime defense of the nation by inducing men to accept employment in an arduous and perilous service.
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> *Calmar S. S. Corp. v. Taylor*, 303 U.S. 525, 528 (1938).

More broadly, one court observed as follows:

> The official concern for seamen, this very useful band of men, is motivated more by practical than by romantic considerations. Their contribution is seapower and manifests itself in commerce and national defense.[1] To assume their special position in the scheme of things judicial, seamen are treated as wards of the admiralty.
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> *Arguelles v. U.S. Bulk Carriers, Inc.*, 408 F.2d 1065, 1069-70 (4th Cir. 1969) *aff'd*, 400 U.S. 351 (1971).

These remedial purposes of protecting seamen, the channels of maritime commerce, and our national security, are furthered by broader coverage, not narrower coverage. Particularly when the remedial purpose aligns with the words used by Congress, there is no need to look for any different interpretation of the statute. The company's motion to dismiss should be overruled because being a "citizen of the United States" is not a requirement under the SPA.

IV. The OSHA regulation is not substantive.

Rather than relying on, or even citing 46 U.S.C. § 10101(3), the company relies on 29 C.F.R. § 1986.101(m). In the Interim Final Rule, 78 Fed. Reg. 8390 (Feb. 6, 2013), at p. 8401, the Department stated that, "this rule is procedural and interpretative rather than substantive[.]" The SPA does not give the Department authority to promulgate substantive regulations the way

1 In a footnote, the court noted that, "A well documented discussion by Judge Frank concerning the historical protection of seamen is found in *Hume v. Moore-McCormack Lines*, 121 F.2d 336 (2d Cir. 1941), cert. denied, 314 U.S. 684."

that the FLSA or other laws do. It is, therefore, the text of the statute that controls, and not the regulation. "Deference in accordance with *Chevron*, however, is warranted only 'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority[.]'" *Gonzales v. Oregon*, 255-56 (2006) (quoting *United States v. Mead Corp*., 533 U.S. 218, 226-27 (2001). Here, there is no statutory authority for substantive rules, and no OSHA claim that its rule is substantive. It is the statute that controls SPA coverage, not the regulation.

Notably, OSHA has yet to issue its final version of 29 C.F.R. Part 1986. It remains possible that while this case is pending, OSHA may reconsider the text of the SPA and conform its regulations to match the statutory scope of coverage. If so, it would be the final regulation that has any application, and not the interim regulation it will replace. *FCC v. Fox Television Stations, Inc*., 556 U.S. 502 (2009). Indeed, the outcome of this motion, and this case, may influence OSHA's deliberations on the final regulations.

V. The ship flies a U.S. flag, accepts U.S. cabotage rights, and thereby becomes subject to the jurisdiction of United States law.

The ship here sails under the U.S. flag. As such, it is eligible to participate in the Maritime Security Program (MSP) which pays the company millions of dollars every year for maritime services on behalf of our national security. U.S. shipping companies also get operating-differential subsidies under the Merchant Marine Act of 1936. This program provided domestic shipowners with a subsidy to offset the higher costs of using American crews. See *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 573-76 (1980).

By using ships made in the U.S.A., being a citizen of the U.S., using a U.S. crew and

flying a U.S. flag, such companies have the advantage of "cabotage" under Section 27 of the Jones Act, now codified at 46 U.S.C. § 55102. By seeking and accepting cabotage certification, the company had to establish that it was a U.S. corporation. By flying a U.S. flag, it accepts U.S. law as one of the conditions of eligibility. Ships built outside the U.S., owned by foreign entities, staffed outside the U.S., or eligible to fly other flags, have to travel from a U.S. port to a foreign port before returning to any U.S. port again. This is a competitive advantage for for the U.S. carriers, the one precisely intended by the Jones Act. Section 27 of the Jones Act now provides:

> (b) Requirements.--Except as otherwise provided in this chapter or chapter 121 of this title, a vessel may not provide any part of the transportation of merchandise by water, or by land and water, between points in the United States to which the coastwise laws apply, either directly or via a foreign port, unless the vessel--(1) is **wholly owned by citizens of the United States** for purposes of engaging in the coastwise trade; and (2) has been issued a certificate of documentation with a coastwise endorsement under chapter 121 or is exempt from documentation but would otherwise be eligible for such a certificate and endorsement. [Emphasis added.]

For purposes of the Jones Act, Congress defines a "citizen of the United States" at 46 U.S.C. § 50501. At 46 U.S.C. § 12103, Congress set out the eligibility requirements for a cabotage certificate. They include a requirement to be "a citizen of the United States."

The Supreme Court found Section 27 of the Jones Act constitutional in *Territory of Alaska v. Troy*, 258 U.S. 101, 109-10 (1922), where it described the original law in relevant part as follows:

> The act purports among other things 'to provide for the promotion and maintenance of the American merchant marine,' and section 27 forbids transportation of merchandise over any portion of the route between points in the United States including Alaska 'in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States, or vessels to which the privilege of engaging in the coastwise trade is extended by sections 18 or 22 of this act, ***.

See also *Douglas v. Seacoast Products, Inc*., 431 U.S. 265 (1977) (Virginia statutes were

preempted by the Federal Enrollment and Licensing Act).

Courts have explained the standards for applying U.S. law to ships as follows:

> Because this is an admiralty case, the *Lauritzen-Rhoditis* factors govern the choice of law: (1) the place of the wrongful act; (2) the law of the flag; (3) the allegiance or domicile of the injured worker; (4) the allegiance of the defendant shipowner; (5) the place of the contract; (6) the inaccessibility of the foreign forum; (7) the law of the forum; and (8) the shipowner's base of operations. *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 308-09, 90 S.Ct. 1731, 1733-34, 26 L.Ed.2d 252 (1970); *Lauritzen v. Larsen*, 345 U.S. 571, 583-91, 73 S.Ct. 921, 928-33, 97 L.Ed. 1254 (1953).

"The law of the flag has traditionally been of cardinal importance in determining the law applicable to maritime cases." *Lauritzen*, 345 U.S. at 583-84, 73 S.Ct. at 928-29. The law of the flag is "[p]erhaps the most venerable and universal rule of maritime law[.]" *Lauritzen*, 345 U.S. At 585, n. 11. When a carrier chooses to register a ship in the U.S. (and receive the substantial financial benefits that flow from U.S. registration), it also accepts the application of U.S. law to the transactions arising on its ship.

U.S. flag carriers also benefit from flying the U.S. flag through its relationship with the U.S. Coast Guard. The USCG enforces the Port State Control measures. The carriers have their inspection records with the USCG and this streamlines entry and exit procedures in and out of U.S. ports through the development of a ship's profile. It is appropriate to estop a carrier from denying U.S. "citizenship" after it has derived so much benefit from that "citizenship."

It is understandable that OSHA, in drafting regulations for the SPA, would not want to limit the SPA's coverage to only ships flying the U.S. flag. Doing so would exclude from SPA coverage the many many ships whose owners chose to fly under a "flag of convenience." For purposes of the whistleblower protection, it would be more suitable to view the OSHA regulation at 29 C.F.R. § 1986.101(m) as a supplement to the jurisdiction that flows naturally from the text

of the SPA or from flying a U.S. flag. No remedial purpose is served by denying SPA coverage to American seamen employed in the United States to work on a ship flying the American flag.

VI. The company hired and fired Welsh in the United States and no extraterritorial application of the SPA is required to find coverage.

The company's motion to dismiss relies entirely on its contention about its ownership, and does not claim that adjudication of this case would require any extraterritorial application of the SPA. Indeed, it could not. It hired Welsh here in the U.S., and fired him as the ship was docking in the Port of Los Angeles. It kept him on the ship until docking in Los Angeles was completed.

On January 11, 2013, Chief ALJ Stephen L. Purcell overruled the respondent's motion to dismiss based on extraterritoriality in *Dos Santos v. Delta Airlines, Inc.*, 2012-AIR-00020, Order Denying Respondent's Motion to Dismiss (Jan. 13, 2013).[2] Although Jose Dos Santos worked in Paris during the relevant times, Judge Purcell noted that the retaliation involved denials of his requests for promotions to positions in Atlanta, Georgia.

Chief Judge Purcell, at p. 19, also considered the case-by-case approach found in *Villanueva v. Core Laboratories, NV*, ARB No. 09-108, ALJ No. 2009-SOX-6 (ARB Dec. 22, 2011), *aff'd* 743 F.3d 103 (2014). "Just as the ARB did in *Villanueva*, I decline the invitation to manufacture my own test for determining the territoriality of all complaints filed under Section 42121 of AIR21." *Id*. at 20. He then looked to AIR 21's remedial purpose. "I find that the general focus of AIR21 is to ensure the safety of the air traveling public by strengthening the United States' aviation system." *Id*. at 22. "So while the legislative history supports that the

2 Available at http://www.oalj.dol.gov/Decisions/ALJ/AIR/2012/DOS_SANTOS_JOSE_v_DELTA_AIR_LINES_INC_2012AIR00020_(JAN_11_2013)_072345_ORDER_SD.PDF

general focus of AIR21 is to bring about fundamental improvements in air safety, it also suggests that Congress intended to achieve that goal by regulating the air carriers that operate within the domestic aviation system and under the purview of FAA regulations." *Id*. Chief Judge Purcell looked to an earlier SOX case:

In a pre-Morrison Sarbanes-Oxley (SOX) case brought by a foreign-based employee of a foreign subsidiary of a publicly-traded company listed on the New York Stock Exchange, the ALJ in *Walters v. Deutsche Bank AG*, ALJ No. 2008-SOX-070, slip. op. at 2, 25 (ALJ Mar. 23, 2009) considered the extent to which a multinational company may be held liable under SOX for a retaliatory termination of an employee stationed overseas. In denying the respondents' motion for summary decision, the ALJ spent considerable time expounding on the predominant purpose of SOX's Section 806 (the whistleblower protection), concluding that because "the predominant purpose of Section 806 is fraud detection, not worker protection," it is improper to treat Section 806 as a traditional labor law. *Walters*, ALJ No. 2008-SOX-070, slip. op. at 11.

Chief Judge Purcell continued at p. 24 of *Dos Santos*: "As with Section 806 of SOX, Section 42121 of AIR21 provides an incentive to airline workers which promotes aviation safety inasmuch as 'it provides job security … as a means of encouraging employees voluntarily to take an action Congress deems in the public interest.'" Quoting *Walters* at 13. In applying this approach to the Dos Santos case, Chief Judge Purcell observed at p. 26 that his aviation safety complaints addressed the safety of aircraft that fly between Paris and the U.S. Dos Santos also made complaints about retaliatory harassment to Delta officials in the U.S., and those officials did nothing to abate that harassment. However, "Neither the location of the employee's job, nor the location of the employer, is conclusive of the territoriality of this complaint, because, as explained above, Section 42121 is not chiefly a labor law." *Dos Santos* at 28. At page 29, Chief

Judge Purcell concluded as follows:

> In sum, virtually all of the key elements of Complainant's complaint demonstrate a substantial connection with the United States' domestic aviation system, as he complained to U.S-based officials regarding violations of Federal aviation safety laws by an American air carrier, and he suffered retaliatory adverse actions that may be attributable to Respondent's management-level employees in the United States. As a U.S.-based airline that is indisputably subject to FAA regulations, Delta's alleged violation of FAA safety regulations is exactly the kind of non-compliance that Section 42121 aims to deter by empowering airline employees to report misconduct without fear of retaliation, and the ordinary enforcement of the instant complaint fits squarely within the AIR21's focus of ensuring aviation safety. Contrary to Respondent's belief, the physical location of Complainant's job is not decisive as to this complaint's territoriality.

This type of reasoning points the way to finding coverage for Mr. Welsh, too. He sought to uphold the safety standards (lock-out-tag-out and engine maintenance) for an American ship, thereby protecting American waters and American workers. These purposes are within the scope of the SPA and protected.

VII. Welsh had a reasonable belief that he was working with the scope of U.S. law which includes the SPA.

By accepting employment here in the U.S. and by seeing the the U.S. flag fly over the ship, Welsh could reasonably believe that U.S. law applied to his employment on board. It is Welsh's reasonable belief that determines the legal protection for raising his safety concerns.

On May 25, 2011, the current Administrative Review Board (ARB) issued its landmark decision construing the scope of protected conduct, *Sylvester v. Parexel International, LLC.*, ARB No. 07-123, 2007-SOX-039, 042, 2011 WL 2165854, at *18 (ARB May 25, 2011). After inviting and receiving supplemental *amicus* briefs from divergent stakeholders, the ARB issued an *en banc* decision that swept away years of restrictive applications of SOX and protected

activities in general. Gone is the rule that protected activity is limited to disclosures of conduct that "definitively and specifically" relates to unlawful acts set forth in the statute. In place of the old "definitive and specific" standard for determining if activity is protected, the ARB now uses the "reasonable belief" standard. The ARB noticed that the Senate Committee Report for SOX actually adopted this standard from *Passaic Valley Sewerage Commissioners v. Department of Labor*, 992 F. 2d 474, 478 (3d Cir. 1993). S. Rep. 107-146 at 19 (May 6, 2002). To be "reasonable," a belief must be sincerely held (subjective test) and objectively reasonable (objective test). Objective reasonableness "is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." *Harp v. Charter Commc'ns*, 558 F.3d 722, 723 (7th Cir. 2009).

A "reasonable belief" is determined based on the complainant's experience and observations, and not on what the complainant communicated to the employer. *Sylvester*, p. 15, citing, *Knox v. U.S. Dept. of Labor*, 434 F.3d 721, 725 (4th Cir. 2006). "Certainly, those communications [to the employer] may provide evidence of reasonableness or causation, but a complainant need not actually convey reasonable belief to his or her employer." *Id*. citing, *Collins*, 334 F. Supp. 2d 1365, 1377-78 (N.D. Ga. 2004) (it is sufficient that the recipients of the whistleblower's disclosures understood the seriousness of the disclosures).

In a concurring opinion, Judge E. Cooper Brown said of the reasonable belief standard that, "This is not a demanding standard." *Sylvester*, p. 33. Employees are protected when they raise concerns about future violations, too. "As we explained in *Sylvester*, disclosures concerning violations about to be committed (or underway) are covered as long as it is reasonable to believe that a violation is likely to happen." *Funke v. Federal Express*, ARB No. 09-004, ALJ No. 2007-SOX-043, slip op. 11 (ARB July 8, 2011),[3] citing *Sylvester*, ARB No. 07-123, slip op. 16.

3 Available at:

A complainant can be protected even if their understanding is flat wrong under the law. The Consumer Product Safety Act excludes food (and tobacco, pesticides, firearms, aircraft, boats, drugs, medical devices and cosmetics). 15 U.S.C. § 2052(a)(5). However, the ARB has held that a food safety whistleblower can find protection based on a reasonable belief that the CPSIA provided protection. *Saporito v. Publix Super Markets, Inc*., ARB No. 10-073, ALJ No. 2010-CPS-1, Decision and Order of Remand (ARB Mar. 28, 2012). The distance here between the ship's U.S. flag and coverage under the SPA is shorter than the distance between Saporito's food safety concerns and the text of the CPSIA.

VIII. The company is a U.S. corporation.

The company's motion is focused on the ownership of its parent company. Yet, both companies have headquarters in the US. Its registration with the State of California shows that it is a Delaware corporation with principal offices in the U.S. Regardless of its ultimate controlling interest, by choosing to operate in the U.S., respondent is subject to U.S. law. Except for foreign diplomats, all persons doing business in the U.S. are subject to U.S. law. Supremacy Clause, U.S. Constitution, Article Six, Clause 2. The OSHA regulation does not change the application of the SPA to corporations doing business here in the U.S.

IX. Discovery is needed before granting respondent's motion.

The ARB addressed motions to dismiss in *Evans v. United States Environmental Protection Agency*, ARB No. 08-059, 2012 WL 3164358 (ARB July 31, 2012), and *Sylvester v. Parexel Int'l*, ARB No. 07-123, 2011 WL 2165854 (ARB, May 25, 2011). In *Sylvester*, the ARB

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http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/SOX/09_004.SOXP.PDF

narrowed the grounds on which ALJs could grant motions to dismiss. "SOX claims are rarely suited for Rule 12 dismissals." *Id*. at 13. The ARB explains:

> They involve inherently factual issues such as "reasonable belief" and issues of "motive." In addition, we believe ALJs should freely grant parties the opportunity to amend their initial filings to provide more information about their complaint before the complaint is dismissed, and dismissals should be a last resort.

In *Evans*, p. 6, the ARB stated, "as we ruled in *Sylvester*, federal litigation materially differs from administrative whistleblower litigation within the Department of Labor. These differences require a different legal standard for stating a claim." The ARB explained, "Unlike in federal court, there is no pleading requirement for whistleblower complaints investigated by OSHA or litigated within the Office of Administrative Law Judges (OALJ)." The ARB concluded that "Administrative whistleblower complaints that provide 'fair notice' of the alleged protected activity and adverse action can withstand a motion to dismiss for failure to state a claim[.]"

As the OALJ Rules of Practice have no counterpart to FRCP 12, respondent's motion is appropriately adjudicated under 29 CFR §18.40(d). Paragraph (d) thereunder provides in part, "The administrative law judge may deny the motion whenever the moving party denies access to information by means of discovery to a party opposing the motion." This rule applies to the present situation.

Welsh served discovery requests and the company now says that it would make no responses at all due to its claim of lack of jurisdiction. The discovery at issue is germane to the issues raised in this motion to dismiss. They address the company's legal status, its relationship to the U.S., coverage under the SPA, the location of the transactions in this case, and the nature and location of its owners and officers. Discovery is necessary to ascertain how it qualifies for

cabotage rights in the U.S. while simultaneously claiming foreign ownership to avoid SPA coverage. Those reviewing any decision on this motion deserve to have a record setting out all the germane facts.

In federal court procedure, the non-moving party's duty to respond specifically to a summary judgment motion is qualified by Rule 56(d)'s requirement that "summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his [sic] opposition." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 250 n. 5. (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (noting that summary judgment is appropriate only "after adequate time for discovery"). The Supreme Court has explained, "[b]efore discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required *prima facie* case in a particular case." *Swierkiewicz v. Sorema*, 534 U.S. 506, 512 (2002); see also *Americable Int'l, Inc. v. Dep't of Navy*, 129 F.3d 1271, 1274 (D.C. Cir. 1997) ("[S]ummary judgment ordinarily is proper only after the plaintiff has been given adequate time for discovery."). In the alternative to denying this motion, Welsh asks for a denial without prejudice until the completion of discovery.

X. Conclusion.

Maurice Welsh asks for an order overruling the motion to dismiss. In the alternative, he asks for a denial without prejudice until the completion of discovery. He also asks for a date by which respondent must serve its initial disclosures, attend its deposition and answer the discovery requests.

Respectfully submitted by:

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