

**IN THE UNITED STATES COURTS OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

---

**No. 10-14129-E**

**No. 10-14253-E**

**QUAIL CRUISES SHIP MANAGEMENT, LTD.,  
Plaintiff-Appellant/Cross-Appellee,**

**v.**

**LLOYD'S REGISTER NORTH AMERICA, INC.,  
Defendant-Appellee/Cross-Appellant**

**AGENCIA DE VIAGENS CVC TUR LIMITADA,  
VALTER PATRIANI, SEAHAWK NORTH AMERICA, LLC,  
RODOLFO SPINELLI  
Defendants-Appellees.**

---

**ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE SOUTHERN DISTRICT OF FLORIDA**

---

**BRIEF OF DEFENDANT-APPELLEE/CROSS-APPELLANT  
LLOYD'S REGISTER NORTH AMERICA, INC.**

---

**Respectfully submitted,**

**Allan R. Kelley  
Helaine S. Goodner  
FOWLER WHITE BURNETT, P.A.  
1395 Brickell Avenue, 14<sup>th</sup> Floor  
Miami, Florida 33131-3302  
Telephone: (305) 789-9200  
Facsimile: (305) 789-9201  
*Counsel for Appellee/Cross-Appellant  
Lloyd's Register North America, Inc.***

**No. 10-14129-E**  
***QUAIL CRUISES SHIP MANAGEMENT, LTD. v. AGENCIA DE VIAGENS***  
***CVC TUR LIMITADA***

**CERTIFICATE OF INTERESTED PERSONS AND  
CORPORATE DISCLOSURE STATEMENT**

In accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and Rules 26.1 and 26.1-2 of the Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for Appellee/Cross-Appellant Lloyd's Register North America, Inc. ("LRNA") advises the court that:

1. LRNA's parent corporation is Lloyd's Register Americas, Inc.
2. LRNA and Lloyd's Register Americas, Inc. are Delaware corporations.

Lloyd's Register Americas, Inc. is a subsidiary corporation of Lloyd's Register, which is a charitable entity under the laws of the United Kingdom.

3. No publicly held corporation owns 10% or more of LRNA's stock;
4. The following is a complete list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the above-captioned matter:

Briz, Brian A., Appellant

**No. 10-14129-E**  
***QUAIL CRUISES SHIP MANAGEMENT, LTD. v. AGENCIA DE VIAGENS***  
***CVC TUR LIMITADA***

Ferry, Amber Elaine, counsel for Defendants/Appellees Agencia de Viagens  
CVC Tur Limitada, Valter Patriani, Seahawk North America, LLC, and Rodolfo  
Spinelli

Foley, Vincent J., counsel for Appellant

Fowler White Burnett P.A., counsel for Appellee Lloyd's Register North  
America, Inc.

The Honorable Barry L. Garber, Magistrate Judge

Goodner, Helaine S., counsel for Appellee Lloyd's Register North America, Inc.

Gordon, Kenneth E., counsel for Appellee Lloyd's Register North America, Inc.

Gordon, Gordon & Schnapp, P.C., counsel for Appellee Lloyd's Register North  
America, Inc.

Holland & Knight LLP, counsel for Appellant

The Honorable Paul C. Huck, District Court Judge

Kelley, Allan R., counsel for Appellee Lloyd's Register North America, Inc.

Lloyd's Register North America, Inc., Appellee

Mencio, George Jr, counsel for Appellant

**No. 10-14129-E**  
***QUAIL CRUISES SHIP MANAGEMENT, LTD. v. AGENCIA DE VIAGENS***  
***CVC TUR LIMITADA***

Moore, Michael T., counsel for Appellees Agencia de Viagens CVC Tur Limitada, Valter Patriani, Seahawk North America, LLC, and Rodolfo Spinelli Moore & Company, counsel for Appellees Agencia de Viagens CVC Tur Limitada, Valter Patriani, Seahawk North America, LLC, and Rodolfo Spinelli Naughton, Clay Michael, counsel for Appellees Agencia de Viagens CVC Tur Limitada, Valter Patriani, Seahawk North America, LLC, and Rodolfo Spinelli  
The Honorable John J. O'Sullivan, Magistrate Judge

Patriani, Valter, Appellee

Quail Cruises Ship Management Ltd., Appellant

Schnapp, Elliot, counsel for Appellee Lloyd's Register North America, Inc.

Agencia de Viagens CVC Tur Limitada, Appellee

Seahawk North America, LLC, Appellee

Spinelli, Rodolfo, Appellee

Vila, Monica, counsel for Appellant

Wagner, Scott Andrew, counsel for Appellees Agencia de Viagens CVC Tur Limitada, Valter Patriani, Seahawk North America, LLC, and Rodolfo Spinelli

**No. 10-14129-E**  
***QUAIL CRUISES SHIP MANAGEMENT, LTD. v. AGENCIA DE VIAGENS***  
***CVC TUR LIMITADA***

Respectfully submitted,

By: /s/ Allan R. Kelley  
Allan R. Kelley  
Fla. Bar. No. 309893  
Helaine S. Goodner  
Fla. Bar No. 462111  
FOWLER WHITE BURNETT P.A.  
1395 Brickell Avenue  
Miami, Florida 33131-3302  
Telephone: (305) 789-9200  
Facsimile: (305) 789-9201  
*Counsel for Appellee/ Cross-Appellant*  
*Lloyd's Register North America*

**STATEMENT REGARDING ORAL ARGUMENT**

Given the importance of the jurisdictional issue presented by this appeal, Appellee/Cross-Appellant Lloyd's Register North America, Inc. respectfully submits that oral argument would be helpful to the Court.

**TABLE OF CONTENTS**

CERTIFICATE OF INTERESTED PERSONS AND  
CORPORATE DISCLOSURE STATEMENT..... C-1

STATEMENT REGARDING ORAL ARGUMENT..... i

TABLE OF CITATIONS. .... iv

STATEMENT OF JURISDICTION..... vi

STATEMENT OF THE ISSUES. .... 1

STATEMENT OF THE CASE..... 2

STANDARD OF REVIEW..... 6

SUMMARY OF ARGUMENT..... 7

ARGUMENT ..... 8

    I.    THE DISTRICT COURT CORRECTLY RULED THAT  
          THE AMENDED COMPLAINT FAILED TO STATE A  
          CLAIM UNDER §10(b) OF THE 1934 ACT. .... 8

    II.   THE DISTRICT COURT CORRECTLY RULED THAT IT  
          LACKED MARITIME JURISDICTION OVER QUAIL’S  
          FRAUD AND RECKLESSNESS CLAIMS. .... 9

    III.  IN VIEW OF THE FACT THAT THE DISTRICT  
          COURT HAD SUBJECT-MATTER JURISDICTION,  
          IT HAD THE AUTHORITY TO DECIDE LRNA’S  
          THRESHOLD VENUE MOTION..... 11

IV. THE CASE SHOULD BE REMANDED TO AFFORD  
THE DISTRICT COURT THE OPPORTUNITY TO RULE  
ON LRNA’S VENUE MOTION. . . . . 12

CONCLUSION. . . . . 14

CERTIFICATE OF COMPLIANCE. . . . . 16

CERTIFICATE OF SERVICE. . . . . 17



**TABLE OF CITATIONS**

**Cases:**

*Camper & Nicholsons, Ltd., the Yacht "Fontainebleau II",*  
 292 F. Supp. 734 (S.D. Fla. 1968). . . . . 10

*Carnegie-Mellon University v. Cohill,*  
 484 U.S. 343 (1988). . . . . 13

*In re CP Ships Ltd. Securities Litigation,*  
 578 F. 3d 1306 (11th Cir. 2009). . . . . 4

*Jerome B. Grubart, Inc., v. Great Lakes Dredge & Dock Co.,*  
 513 U.S. 527 (1995). . . . . 9

*Kuehne & Nagel v. Geosource, Inc.,*  
 874 F. 2d 283 (5th Cir. 1989). . . . . 10

*McElmurray v. Consolidated Government of Augusta-Richmond County,*  
 501 F. 3d 1244 (11th Cir. 2007). . . . . 6

*Morrison v. National Australia Bank, Ltd.,*  
 200 U.S. 321 (2010). . . . . 4, 5, 7, 11

*Richard Bertram & Co. v. The Yacht, Wanda,*  
 447 F. 2d 966 (5th Cir. 1971). . . . . 10

*Rosado v. Wyman,*  
 397 U.S. 397 (1970). . . . . 13

*Sinochem International Co., Ltd. v. Malaysia International Shipping Corp.,*  
 549 U.S. 422 (2007). . . . . 13

*Speaker v. United States HHS CDC,*  
 2010 U.S. App. LEXIS 22422 (11th Cir. Oct. 22, 2010). . . . . 6

*Wilkins v. Commercial Investment Trust Corp.*,  
153 F. 3d 1273 (11th Cir. 1998)..... 10

**Statutes:**

28 U.S.C. § 1291..... vi  
28 U.S.C. §1367(c)(3)..... 13  
Securities Exchange Act of 1934  
15 U.S.C. § 78a, et seq..... passim

**Rules:**

Fed. R. App. P. 26.1. .... C-1  
Fed. R. Civ. P. 1..... 7  
Fed. R. Civ. P. 12(b)(1)..... 5  
Fed. R. Civ. P. 12(b)(6)..... 4, 5

## **STATEMENT OF JURISDICTION**

This Court has jurisdiction under 28 U.S.C. § 1291 because the Order under review is a final order of dismissal as to all claims and parties.

## STATEMENT OF THE ISSUES

I. Whether the district court erred in concluding that Quail failed to state claims upon which relief could be granted under §10(b) of the Securities Exchange Act of 1934 (“1934 Act”).

II. Whether the district erred in ruling that it lacked maritime jurisdiction over the claims for fraud and recklessness asserted by the Appellant (Plaintiff)/Cross-Appellee, Quail Cruises Ship Management, Ltd. (“Quail”), where those claims were based upon representations relating to the purchase and sale of stock in a company that owned the vessel, no tort was committed on navigable waters, and the alleged fraud in the negotiation of the contract lacked a maritime nexus.

III. Whether the district court erred in holding that it lacked subject-matter jurisdiction with respect to Quail’s claims under §10(b) of the 1934 Act.

IV. If question 3 is answered in the affirmative, did the district court also err in denying the motion to dismiss by Appellee (Defendant)/Cross-Appellant Lloyds’ Register North America, Inc. (“LRNA”) on the basis of a binding forum-selection clause as moot.

## STATEMENT OF THE CASE

Quail, a Bahamian corporation, commenced this action in October, 2009. Quail's Complaint alleged statutory fraud under the 1934 Act, fraudulent inducement, maritime recklessness, and negligent misrepresentation, all in connection with Quail's purchase of the stock of Templeton International, Inc. ("Templeton"), a Bahamian corporation that owned a passenger ship known as the *Pacific*. Quail claimed that alleged misrepresentations by the various defendants about the condition of the ship induced Quail to purchase the Templeton stock. (Doc 90).<sup>1</sup>

On December 24, 2009, LRNA filed a motion to dismiss Quail's claims against it on the ground, *inter alia*, that pursuant to a binding forum-selection clause in LRNA's contracts and its parent corporation's Rules, Quail was obligated to litigate its claims against LRNA, if at all, in England. (Doc 43). After extensive briefing on LRNA's motion, the district court stated at a hearing on the motion on April 8, 2010, that the forum-selection clause was binding on Quail, and would require dismissal of the claims against LRNA. (Doc 146 - Pg 6-16). Facing imminent dismissal of Quail's claims against LRNA, Quail asserted *for the first time* at the hearing that

---

<sup>1</sup>Although irrelevant to the narrow issues raised on this appeal, LRNA emphatically denies Quail's allegations insofar as they relate to LRNA and further asserts that Quail lacks any viable or good faith basis on which to seek recovery from LRNA.

enforcement of the forum-selection clause would be “unconscionable.” (*Id.* at 16-19) The district court expressed skepticism about this eleventh-hour contention, but announced that it would nonetheless give Quail one last opportunity to assert, via an amended complaint, that enforcement of the forum-selection clause would be unconscionable. (*Id.* at 21, 64; *see also* Doc 148 - Pg 2).

In a written Order dated April 14, 2010, the district court ruled that the forum-selection clause was binding on Quail, but granted Quail leave to assert in an amended complaint that enforcement of the forum-selection clause would be “unconscionable in this situation because a classification society owes no duty to third parties – and Quail would therefore have no remedy for any misconduct by [LRNA] – under English law,” (Doc 87 - Pg 7) as had been claimed by Quail at the hearing.

Quail then filed an Amended Complaint. (Doc 90). Pursuant to a separate Order (Doc 96), LRNA’s motion to dismiss the Amended Complaint was limited to the issue of whether it would be “unconscionable” to enforce the forum-selection clause. (Doc 107). Quail responded (Doc 132) and LRNA filed a reply on June 25, 2010. (Doc 134). After six months of extensive briefing by the parties and many hours of judicial labor devoted to consideration of the threshold venue issue, it was fully briefed and ripe for final disposition, with only the slender thread of Quail’s

belated “unconscionability” argument tying its claims against LRNA to a Florida forum – a forum which, as the district court had already ruled, was improper under the forum-selection clause.

Motions to dismiss had also been filed by all of the co-defendants (“non-LRNA defendants”). They argued *inter alia* that the district court lacked subject-matter jurisdiction over Quail’s claims under §10(b) of the 1934 Act. At that time the prevailing view among the circuit courts was that the question of whether §10(b) extended to a “transnational” securities transaction, such as the subject transaction, presented an issue of subject-matter jurisdiction, the outcome of which depended on whether the wrongful conduct occurred, and the effects were felt, in the United States. *See, e.g., In re CP Ships Ltd. Sec. Litig.*, 578 F. 3d 1306, 1313 (11th Cir. 2009).

On June 24, 2010, the legal theory on which the non-LRNA defendants’ §10(b) jurisdictional argument was based was rejected by the United States Supreme Court in *Morrison v. National Australia Bank, Ltd.*, 200 U.S. 321, 130 S. Ct. 1869, 177 L. Ed. 2d 535 (2010). *Morrison* held that: a) federal district courts have subject matter jurisdiction over *any* claim asserted under §10(b) of the 1934 Act; b) the issue of the extraterritorial reach of §10(b) is *not* one of subject-matter jurisdiction, but rather a merits question to be decided under Fed. R. Civ. P. 12(b)(6); and c) the determination of that issue under Fed. R. Civ. P. 12(b)(6) rests solely on the geographic situs of the

securities transaction itself, regardless of where the allegedly fraudulent conduct occurred, or its effects were felt. *Id.*, 130 S. Ct. at 2877.

In its Order of August 6, 2010, the district court decided the non-LRNA defendants' motions to dismiss before ruling on "unconscionability" – the only issue left to be decided on LRNA's venue motion. (Doc 148). Addressing the viability of Quail's §10(b) claim, the district court followed *Morrison's* holding that the "conduct" and "effect" test previously applied had been "retired," and that a "transactional" test now was to be used, under which fraud would be actionable only if committed in connection with the purchase or sale of securities traded on a U.S. exchange or in connection with the purchase or sale of securities that actually took place in the U.S. (*Id.* at 3). Applying this test, the district court correctly held that Quail's putative §10(b) claim was deficient because the Amended Complaint did not allege the purchase or sale of a security listed on a U.S. exchange, or the purchase or sale of a security in the U.S. (*Id.*).

Significantly, in its August 6th, Order, the district court referred specifically to *Morrison's* holding that the "issue of extraterritoriality is properly considered a merits issue under Rule 12(b)(6), not a question of subject-matter jurisdiction under Rule 12(b)(1). (Doc 148 - Pg 3). Nevertheless, and despite the district court's own clear and correct statement of the law, the first decretal paragraph of the August 6th



Order granted the motion to dismiss Quail's §10(b)-securities-fraud claim for lack of subject-matter jurisdiction, and not on the merits. (Doc 148 - Pg 9). Because the district court also found that the conduct alleged in the Amended Complaint did not confer federal maritime jurisdiction and that there was no basis for diversity jurisdiction, it concluded that it "lack[ed] subject matter jurisdiction over this litigation." (*Id.* at 10). Having concluded that it lacked subject-matter jurisdiction, the district court denied LRNA's motion to dismiss for improper venue "as moot." (*Id.*)<sup>2</sup>

### STANDARD OF REVIEW

Review of an order dismissing an action for lack of subject-matter jurisdiction is *de novo*. *McElmurray v. Consol. Gov't of Augusta-Richmond Cnty*, 501 F. 3d 1244, 1250 (11th Cir. 2007). Review of an order dismissing a claim pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim for relief is *de novo*. *Speaker v. United States HHS CDC*, 2010 U.S. App. LEXIS 22422, at \*16 (11th Cir. Oct. 22, 2010).

---

<sup>2</sup>LRNA timely filed a motion for reconsideration of the District Court's Order to the extent it held that there was no subject matter with respect to the securities claim and held that LRNA's venue motion was now moot. (Doc 152). The motion for reconsideration was denied. (Doc 164).

## SUMMARY OF ARGUMENT

The district court's ruling that it lacked subject-matter jurisdiction to adjudicate Quail's §10(b) claims is contrary to *Morrison*, 130 S. Ct. 1869. The district court appeared to recognize that it had jurisdiction to rule on Quail's securities-fraud claims, citing the portion of the *Morrison* opinion in which the Supreme Court explicitly held that questions regarding the extraterritorial reach of the 1934 Act go to the merits, rather than to subject-matter jurisdiction, and that district courts have subject-matter jurisdiction to determine any claim that is *pleaded* under the 1934 Act. Although Quail pleaded a violation of the 1934 Act, thereby conferring subject-matter jurisdiction on the district court, the district court erroneously ruled that it lacked subject-matter jurisdiction. Therefore, in the interest of judicial economy, the district court should have addressed LRNA's motion to dismiss for improper venue. LRNA's venue motion, to which the parties and the Court had devoted a significant amount of time and resources, was ripe for final disposition. The final resolution by the district court of LRNA's venue motion would have served to "secure the just, speedy and inexpensive determination" of Quail's claims against LRNA. Fed. R. Civ. P. 1.

## ARGUMENT

### **I. THE DISTRICT COURT CORRECTLY RULED THAT THE AMENDED COMPLAINT FAILED TO STATE A CLAIM UNDER §10(b) OF THE 1934 ACT**

The district court correctly determined that the Amended Complaint failed to state a claim under §10(b) of the 1934 Act because Quail alleged fraud in connection with a “transaction” that did not take place in the U.S. As pleaded in the Amended Complaint, the transaction that triggered Quail’s fraud claims consisted of: I) a proposal for the sale of stock made in late May, 2008 in Brazil (Doc 90, ¶60); ii) an agreement for the purchase and sale of that stock in late May or early June, 2008, that was entered into outside of the U.S. by two entities, neither of which was organized or based in the U.S. (*id.*, ¶63); iii) a “formal stock purchase agreement” that was entered into outside the U.S. in June, 2008, between two entities, neither of which is even a party to this action (*id.*, ¶65); and iv) a so-called “closing” in Florida that, as described in the Amended Complaint, consisted of nothing more than the transmission of previously executed and effective transaction documents to the Florida offices of Quail’s counsel. (*Id.*, ¶66).

As the district court properly held, these allegations do not describe a “transaction” that actually occurred in the U.S. To have held otherwise would mean that foreign parties to a securities transaction consummated outside the U.S. could

give the 1934 Act a reach that Congress never intended it to have simply by mailing previously executed and effective documents to an office in the United States and applying the label “closing” to the act of opening an envelope and placing the enclosed documents into a filing cabinet.

Accordingly, the district court Order should be affirmed to the extent that it held that Quail did not state a claim under the 1934 Act.

## **II. THE DISTRICT COURT CORRECTLY RULED THAT IT LACKED MARITIME JURISDICTION OVER QUAIL’S FRAUD AND RECKLESSNESS CLAIMS**

Applying the analysis for determining whether a tort claim falls within maritime jurisdiction as set forth in *Jerome B. Grubart, Inc., v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534, 115 S. Ct. 1043, 130 L. Ed. 2d 1024 (1995), the district court properly concluded that Quail’s “maritime” claims for fraud in the inducement and recklessness did not satisfy the “locality” or “nexus” tests.

First, although Quail contended that the torts occurred on navigable waters because some pre-Templeton-stock-sale misrepresentations were made aboard the vessel and the alleged repair and maintenance problems forced the vessel out of service for repairs after the sale, the district court correctly concluded that Quail did not satisfy locality test because fraud in connection with a sale of the vessel – the gravamen of Quail’s “maritime” claims – occurs on land, where the contract is

consummated. (Doc 148 - Pg 7). *See, e. g., Wilkins v. Commercial Inv. Trust Corp.*, 153 F. 3d 1273, 1275 & n.14, 1278 (11th Cir. 1998); *Kuehne & Nagel v. Geosource, Inc.*, 874 F. 2d 283, 289 (5th Cir. 1989).

Second, the district court correctly concluded that there was no maritime “nexus” because the general character of the incident that gave rise to Quail’s tort claims – alleged fraud in connection with the negotiation and sale of Templeton stock – had no connection with traditional maritime activity. (*See* Doc 148 - Pg 8). In the words of the district court: “Quail cannot invoke federal admiralty jurisdiction by recasting a fraudulent sale claim as a claim for damages to the vessel.” *Id.* Neither fraud in connection with the sale of a vessel, nor a contract for the sale of a vessel, has a sufficient maritime nexus. *See, e.g., Richard Bertram & Co. v. The Yacht, Wanda*, 447 F. 2d 966, 967 (5th Cir. 1971); *Camper & Nicholsons, Ltd., the Yacht "Fontainbleau II"*, 292 F. Supp. 734, 735 (S.D. Fla. 1968) (and cases cited) (holding that a counterclaim by the owner of a yacht against the seller for misrepresentation in connection with the sale of the yacht was not within maritime jurisdiction).

Based upon the foregoing analysis and authorities, the Order of the district court dismissing Quail’s “maritime” claims for lack of subject-matter jurisdiction should be affirmed.

**III. IN VIEW OF THE FACT THAT THE DISTRICT COURT HAD SUBJECT-MATTER JURISDICTION, IT HAD THE AUTHORITY TO DECIDE LRNA'S THRESHOLD VENUE MOTION**

In light of the Supreme Court's decision in *Morrison*, it is clear that the district court had subject-matter jurisdiction to adjudicate Quail's § 10(b) claim on the merits. Once the court had this jurisdiction, it had the authority to rule on LRNA's motion to dismiss for improper venue.

Writing for the majority in *Morrison*, Justice Scalia observed that "to ask what conduct § 10(b) reaches . . . is a merits question," and held that the district court, by definition, had federal-question jurisdiction over a claim that was *pleaded* under a federal statute such as the 1934 Act. *Morrison* explicitly held that both the district court and the Second Circuit committed "threshold error" by having "considered the extraterritorial reach of § 10(b) to raise a question of subject matter jurisdiction." *Id.*, 130 S. Ct. at 2876-77.

Based upon *Morrison* the district court had subject matter jurisdiction over the subject action because Quail unquestionably "pleaded" claims pursuant to § 10(b) of the 1934 Act. Accordingly, the district court had the power to address all issues raised in the case, including all threshold issues, such as venue, and had supplemental jurisdiction to adjudicate any nonfederal claims. The district court committed error in ruling otherwise.

Given the fact that LRNA's improper-venue motion was on the verge of resolution at the time that the district court erroneously ruled that it lacked subject-matter jurisdiction, remand would serve the salutary and substantive purpose of affording the district court the opportunity to decide the remaining issue of unconscionability on LRNA's venue motion. This Court should reverse the Order insofar as it held that the district court lacked subject-matter jurisdiction under §10(b) of the 1934 Act, and remand for further proceedings in the district court.

**IV. THE CASE SHOULD BE REMANDED TO AFFORD THE DISTRICT COURT THE OPPORTUNITY TO RULE ON LRNA'S VENUE MOTION**

Reversal on the issue of subject-matter jurisdiction and remand would give the district court the opportunity to decide LRNA's threshold motion, which, after months of briefing and considerable judicial labor, had become ripe for final determination just before the district court entered its Order on the non-LRNA defendants' motions to dismiss for lack of subject-matter jurisdiction. Interests of judicial economy strongly militate in favor of giving the district court another opportunity to "close the circle" by resolving the last remaining issue on LRNA's venue motion. The parties have already devoted considerable time, effort, and expense to briefing the issues raised by that motion, and the district court itself devoted substantial time and effort in reaching the conclusion that the forum-selection

clause was binding on Quail under the theory of direct-benefit estoppel, thus resolving the most difficult question presented by the motion. All that remains is for the district court to decide Quail's patently flawed claim – as to which the district court had expressed skepticism– that requiring Quail to litigate its claims against LRNA in England would be unconscionable.

By contrast, if this Court fails to remand the case, notwithstanding the District Court's erroneous conclusion that it lacked subject-matter jurisdiction, Quail may seek to keep these proceedings in Florida state court, thereby triggering a venue motion by LRNA based upon the forum-selection clause and the whole briefing process will start again. Thus, the parties may be back to square one, and all of the time, effort, expense, and judicial labor devoted to litigating the issue, will have been wasted.

“When considerations of convenience, fairness and judicial economy so warrant,” *Sinochem Int’l Co., Ltd. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 432, 127 S. Ct. 1184, 1192 (2007), a district court may address a threshold venue issue before deciding the issue of subject-matter jurisdiction.<sup>3</sup>

---

<sup>3</sup>In a related vein, even after jurisdiction-conferring claims are dismissed, a district court may, in the interest of judicial economy, convenience, and fairness adjudicate pendent state law claims. 28 U.S.C. §1367(c)(3). *See also Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350, 108 S. Ct. 614 (1988); *Rosado v. Wyman*, 397 U.S. 397, 405, 90 S. Ct. 1207, 25 L. Ed 2d 442 (1970) (holding that jurisdiction



The rationale underpinning the *Sinochem* rule – that of judicial efficiency – would be well-served in the instant case were the district court to have, and to take, the opportunity to resolve the last- remaining issue on LRNA’s venue motion.

Accordingly, this Court should reverse and remand.

### CONCLUSION

Based upon the foregoing authorities and argument, Appellee/Cross-Appellant Lloyd’s Register North America, Inc., requests that this Court reverse the district court’s Order concluding that it lacked subject-matter jurisdiction over Quail’s securities-fraud claims, affirm the district court’s Order concluding that it lacked maritime jurisdiction over Quail’s fraud and recklessness claims, and instruct the district court to render a final decision on LRNA’s venue motion.

---

over a federal claim does not need to exist at all stages of litigation to resolve pendent claim and emphasizing that the “commonsense policy of pendent jurisdiction – the conservation of judicial energy and the avoidance of multiplicity of litigation.”)

Respectfully submitted,

By: /s/ Allan R. Kelley  
Allan R. Kelley  
Fla. Bar. No. 309893  
Helaine S. Goodner  
Fla. Bar No. 462111  
FOWLER WHITE BURNETT P.A.  
1395 Brickell Avenue  
Miami, Florida 33131-3302  
Telephone: (305) 789-9200  
Facsimile: (305) 789-9201  
*Counsel for Appellee/ Cross-Appellant  
Lloyd's Register North America*

and

Kenneth E. Gordon  
Elliott Schnapp  
Gordon, Gordon & Schnapp, PC  
437 Madison Avenue, 39<sup>th</sup> Floor  
New York, NY 10022  
*Co-Counsel for Appellee/  
Cross-Appellant Lloyd's Register North  
America*

## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7). This brief contains 3,291 words.

By: /s/ Allan R. Kelley  
Allan R. Kelley  
Fla. Bar. No. 309893

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of November, 2010, I served a true and correct copy of the foregoing document via first class mail on the following counsel of record.

By: /s/ Allan R. Kelley  
Allan R. Kelley  
Fla. Bar. No. 309893

**Brian A. Briz, Esq.**  
Holland & Knight LLP  
Suite 3000  
701 Brickell Avenue  
Miami, Florida 33131  
Telephone: (305) 789-7723  
Facsimile: (305) 789-7799  
Email: [brian.briz@hklaw.com](mailto:brian.briz@hklaw.com)  
*Attorneys for Plaintiff Quail Cruises Ship  
Management Ltd.*

**George Mencio, Jr., Esq.**  
Holland & Knight LLP  
Suite 3000  
701 Brickell Avenue  
Miami, Florida 33131  
Telephone: (305) 789-7702  
Facsimile: (305) 789-7799  
Email: [george.mencio@hklaw.com](mailto:george.mencio@hklaw.com)  
*Attorneys for Plaintiff Quail Cruises Ship  
Management Ltd.*

**Vincent J. Foley, Esq.**  
Holland & Knight LLP  
195 Broadway  
24<sup>th</sup> Floor  
New York, NY 10007  
Telephone: (212) 513-3200  
Email: [vincent.foley@hklaw.com](mailto:vincent.foley@hklaw.com)  
*Attorneys for Plaintiff Quail Cruises Ship  
Management Ltd.*

**Clay Michael Naughton, Esq.**  
Moore & Company  
355 Alhambra Circle  
Suite 1100  
Coral Gables, Florida 33134  
Telephone: (786) 221-0600  
Facsimile: (786) 221-0601  
Email: [mmoore@more-and-co.net](mailto:mmoore@more-and-co.net)

*Attorneys for Defendant Seahawk North America, LLC  
and Agencia De Viagens CVC Tur Limitada and Rodolfo Spinelli*

**Michael T. Moore, Esq.**  
Moore & Company  
355 Alhambra Circle  
Suite 1100  
Coral Gables, Florida 33134  
Telephone: (786) 221-0600  
Facsimile: (786) 221-0601  
Email: [mmoore@more-and-co.net](mailto:mmoore@more-and-co.net)  
*Attorneys for Defendant Seahawk North  
America, LLC*

W:\79426\BRIEF537.HSG