

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA)	CRIMINAL NOS.
)	08-10274-DPW
v.)	09-10049-DPW
)	
CONSULTORES DE NAVEGACION,)	
S.A.,)	
)	
Defendant.)	
)	

RESPONSE TO AMANCIO NUNEZA'S APPLICATION FOR AWARD

The United States, by and through Acting United States Attorney Michael K. Loucks and Assistant United States Attorney Linda M. Ricci, and U.S. Department of Justice Environmental Crimes Section Trial Attorney Todd S. Mikolop, hereby files this Response to the Application of Amancio C. Nuneza for an Award Pursuant to 33 U.S.C. § 1908(a).

As set forth more fully below, the United States agrees that Amancio Nuneza ("Nuneza") provided important information to the government during the investigation of this matter. In the event that this Court determines that an award should be granted to Nuneza, the United States respectfully suggests that it also would be appropriate to consider granting an award to Third Assistant Engineer Jose Piamonte ("Piamonte")¹, who is very similarly situated to Nuneza. Piamonte provided information to Nuneza with

¹ The United States understands that Jose Piamonte, who resides in the Philippines, is not represented by counsel.

the intent of notifying the United States Coast Guard about suspected environmental crimes taking place on board the *M/T Nautilus*.

While the Court has unfettered discretion to make an award of up to one half of the fine collected pursuant to the Act to Prevent Pollution from Ships, the United States respectfully suggests that a more modest amount be awarded in this case in light of the nature, extent, and value of the information provided by Nuneza and Piamonte. As set forth below, the United States recommends that this Court issue an award of \$150,000 to be shared equally by Nuneza and Piamonte.

I. Award Authority

The Act to Prevent Pollution from Ships ("APPS"), 33 U.S.C. § 1901 et seq., grants a Court discretion to issue a monetary award of up to one half of any criminal fine imposed to those who provide information which leads to a conviction under the Act. 33 U.S.C. § 1908(a).

The purpose of APPS is to implement an international treaty known as the MARPOL Protocol setting forth international standards to protect the marine environment. Upon review of the investigative record in this case, the United States believes that Piamonte and Nuneza each provided important information - most critically, during the earliest phases of the investigation - that

significantly contributed to the conviction of defendant Consultores de Navegacion, S.A. ("Consultores"). Awards to these two individuals would be consistent with the manifest purpose of the statute to encourage those with information about unlawful conduct to come forward and disclose that information to authorities. Information of this nature is otherwise difficult, if not virtually impossible, to obtain. APPS provides:

A person who knowingly violates the MARPOL Protocol, this chapter, or the regulations issued thereunder commits a class D felony. In the discretion of the Court, an amount equal to not more than ½ of such fine may be paid to the person giving information leading to conviction.

33 U.S.C. § 1908(a). The regulations implementing the statute contain the same provision. See 33 C.F.R. § 151.04(c).

Consultores entered guilty pleas to two counts charging violations of APPS, among other counts. At sentencing on July 23, 2009, the Court imposed a criminal fine in the amount of \$2,083,333 on Consultores, apportioning \$500,000 to each of the APPS counts as to which Consultores pled guilty.² For that reason, a maximum of \$500,000 (one half of the \$1 million apportioned to APPS violations) is available for whistleblower awards in connection with this case.

² Specifically, the Court apportioned \$500,000 to Count Two in Docket No. 08-10274 and \$500,000 to Count One in Docket No. 09-10049.

II. Initiation of the Investigation

The government's investigation was initiated solely on the basis of two handwritten notes prepared by Chief Cook Amancio Nuneza, which largely conveyed information supplied by Piamonte. Prior to the ship's arrival in St. Croix in March 2008, Piamonte enlisted Nuneza to prepare a summary of the portions of his previously-prepared journal entries reflecting alleged illegal overboard discharges of oil-contaminated waste. Piamonte and Nuneza together planned to report the alleged illegal discharges to the Coast Guard. The summary, entitled "Statement of Facts," was written in the handwriting of Nuneza (who was more skilled in written English), and signed by both Piamonte and Nuneza.

1. St. Croix Boarding

On or about March 12, 2008, the *M/T Nautilus* arrived in St. Croix, United States Virgin Islands, and was boarded by the United States Coast Guard and subjected to a routine port state control inspection. On the same day, the United States Coast Guard received information indirectly from, and initiated by, Nuneza concerning alleged MARPOL violations relating to the *M/T Nautilus*. Three days later, while the vessel remained in St. Croix, the United States Coast Guard received additional information concerning the alleged MARPOL violations from Nuneza in the form of a multi-page handwritten note, together with a digital camera

containing images from the vessel. As a result of the information received from Nuneza, the United States Coast Guard re-boarded the vessel in St. Croix to conduct additional inspection procedures. Among other things, the Coast Guard discovered the existence of an unapproved cross-over pipe connecting the bilge and ballast systems. The *M/T Nautilus* departed St. Croix on March 16, 2008 and commenced its voyage to Boston across the Atlantic Ocean.

2. Boston Boarding

On or about March 22, 2008, the *Nautilus* moored in Boston Harbor and was boarded by the Coast Guard and subjected to an inspection, during which the unapproved cross-over pipe was physically removed from the vessel. During the Boston boarding, Nuneza provided the United States Coast Guard with another handwritten note concerning an illegal discharge that allegedly occurred during the voyage between St. Croix and Boston on March 18, 2008.³

³ During the sentencing of Chief Engineer Carmelo Oria, the Court found that the United States did not meet its burden of establishing that the event that occurred on the *M/T Nautilus* on March 18, 2008 was an actual discharge, rather than a "simulated" discharge as contended by Oria.

B. Jose Piamonte's Assistance

Piamonte served as the Third Assistant Engineer on the *M/T Nautilus* between May 2007 and March 2008. Piamonte's employment contract reflects that he received a salary of approximately \$15,132 for his work over a nine-month contract of employment, including guaranteed overtime and vacation pay.

Piamonte reported to the Chief Engineer. While working on the *M/T Nautilus*, Piamonte initially reported to Chief Engineer Vadym Tumakov and, during the latter part of his contract, he reported to Chief Engineer Carmelo Oria.⁴ Both Tumakov and Oria were convicted of APPS violations relating to their conduct aboard the *M/T Nautilus*.

While Piamonte was working on the *M/T Nautilus*, he made it a practice to record daily entries relating to the work he performed in a composition notebook that he received from his predecessor on the vessel. Piamonte reported to the Coast Guard that, during this period, he made an entry after he finished his work each day and maintained the log in his cabin. At the end of his contract on board the *M/T Nautilus*, Piamonte returned home to the Philippines and maintained possession of his notebook.

Later in time, after the *M/T Nautilus* arrived in Boston and

⁴ He also reported to Chief Engineer Jaime Lemos, who succeeded Tumakov and preceded Oria.

the information was received by the authorities, the United States Coast Guard contacted Piamonte during his period of leave at his home in the Philippines. During the Coast Guard's investigation, Piamonte made himself available by telephone, and later in person, for interviews with government investigators. Piamonte was interviewed several times with the assistance of a Tagalog interpreter. In addition, Piamonte mailed the case agent his original composition notebook, which was the primary source material for "Summary of Facts" written by Nuneza that was provided to the United States Coast Guard.⁵ Eventually, Piamonte traveled to the United States and participated in a lengthy in-person interview with government investigators and testified before the grand jury. Information obtained by the government from Piamonte during these conversations and interviews was instrumental in initiating the government's case against defendants Oria, Tumakov, and Consultores.

C. Amancio Nuneza's Assistance

Nuneza served as the Chief Cook on the *M/T Nautilus* for nearly six months before the vessel arrived in Boston. Nuneza's

⁵ As the United States previously informed the Court, when the notebook was received by the Coast Guard, it appeared that Piamonte had made some annotations in his original notebook, apparently in an effort to assist the United States in understanding certain entries. See Transcript of Sentencing Hearing for Carmelo Oria, May 5, 2009 (Day 2), at 282-89.

employment contract reflects that he received a salary of approximately \$10,057 for his work over a nine-month contract of employment, including guaranteed overtime and vacation pay.⁶

As described above, Nuneza recorded the information concerning alleged illegal discharges provided to him by Piamonte and conveyed it to the Coast Guard by physically turning over the written summary and his digital camera containing images from the vessel, including images of the unapproved cross-over pipe. Nuneza also provided the Coast Guard with certain additional information, including a description of an apparent discharge using the cross-over pipe that occurred on March 18, 2008 during the voyage from St. Croix to Boston (Oria's "simulated" discharge) as well as alleged discharges using a black hose.

Nuneza, who is a Filipino citizen, agreed to remain in the United States after disembarking in Boston in order to assist with the investigation and provide testimonial evidence if necessary. Nuneza did so even though he had been separated from his family for many months. He remained in the United States from March 2008 until April 2009 in order to be available to testify at trial, if

⁶ In his Application for a Whistleblower Award, Nuneza reports that his gross monthly income, including all overtime pay, was \$1,771 in 2007 and \$1,882 in 2008. Docket No. 168, at 8. The United States does not have sufficient information to identify the reason for the difference in Nuneza's reported income versus the salary figure reported in his employment contract.

necessary. During that period, he lived in a hotel room in a foreign country, separated from his friends and family.⁷

III. Recommended Awards

As a result of the government's investigation, two Chief Engineers were convicted of APPS violations and received custodial sentences and the ship's operator, Consultores, was convicted of two counts of APPS violations for failing to maintain an accurate oil record book in which overboard discharges had been accurately recorded. All of these convictions were obtained by guilty pleas.

Accordingly, in the opinion of the United States, it is appropriate to consider Piamonte and Nuneza for an award pursuant to 33 U.S.C. § 1908(a). In particular, these two whistleblowers served a critical role by alerting the United States to the existence of the cross-over pipe and initiating the investigation that culminated in the conviction of two Chief Engineers and Consultores. The issuance of an award would fall within the scope of the Court's discretion in this case and would be consistent with the legislative intent of the APPS award provision.

The fact that Nuneza and Piamonte were valuable informants for the Coast Guard insofar as they initiated the investigation of

⁷ The United States notes that additional mariners, who do not qualify for whistleblower awards, faced essentially the same privations - being held as material witnesses until the completion of their Rule 15 deposition testimony in December 2008.

conduct aboard the *M/T Nautilus* supports the issuance of an award. In order to provide the Court with full information, the United States notes that (as the government earlier related to the Court orally) it was unable to corroborate certain of the information provided by these informants. In particular, Piamonte's notebook and the "Statement of Facts" authored by Nuneza identified many specific instances of alleged illegal discharges using a bypass pipe and a black hose. Although the illegal discharges using the cross-over pipe that were reported by Piamonte and Nuneza are consistent with the presence and configuration of the unapproved cross-over pipe, the United States has not been able to find evidence that would corroborate the information provided by Piamonte and Nuneza as to the precise days and dates on which the cross-over pipe was used. Nevertheless, the existence of the pipe, which was configured to be uniquely suited for conducting illegal discharges, powerfully suggests that such discharges occurred and that they occurred with sufficient regularity to warrant the effort of installing such a device. While pinning down any specific date of use may be difficult, the physical evidence and the reasonable inferences to be drawn from that evidence are broadly consistent with the specific entries in the Piamonte notebook to warrant an inference that the notebook contains genuine, contemporaneous notations of illegal discharges.

It is noteworthy that, with respect to Nuneza in particular, the Court's finding during the sentencing hearing for Carmelo Oria that the United States did not meet its burden of establishing that the event that occurred on March 18, 2008 was an actual discharge does not contradict the report of such incident provided by Nuneza to the Coast Guard. Even if Oria was conducting an elaborate charade, Nuneza's report was accurate in his description of the particular individuals involved, the furtiveness of their actions, and their use of the cross-over pipe. He appears to have accurately and truthfully reported these matters and can hardly be faulted for failing to imagine that what he was seeing was all a ruse.

Apart from the reports about the cross-over pipe, the United States was unable to substantiate some of the other information provided by Piamonte and Nuneza. In particular, with respect to the alleged illegal discharges of oily sludge using a flexible hose, the investigation yielded only limited corroboration to their reports based on the existence of a hose with sludge residue.

Accordingly, while the United States believes it is appropriate for the Court to grant awards to these individuals, the United States suggests that the amount be less than the maximum permitted by statute, i.e., 50% of the APPS fine. The United States respectfully suggests that the Court consider granting an

award of \$150,000 to be shared equally by Nuneza and Piamonte, which is 30% of the maximum available award.

The whistleblower award provision in APPS serves a valuable law enforcement purpose. Deliberate violations of MARPOL and United States law are far too common. Criminal conduct that takes place within the small community of those living and working aboard vessels is difficult to detect. The availability of the APPS award fairly reflects the realities of life at sea and the pollution of the oceans. Because the pollution may take place in the middle of the ocean and usually at night, the only people likely to know about the conduct itself and about the falsification of ship records used in port are the employees in the engine room. The government's success in identifying the activity and obtaining sufficient evidence to support investigations is dependent on the willingness of lower-level crew members to step forward.

Any individual mariner weighing whether to step forward must consider the likelihood that the cooperating crew member will forever be barred from working in the marine shipping industry and may be subject to harm. Cooperating crew members face the prospect of losing future employment in the maritime industry, by being "blackballed" as a result of their cooperation with the government. A meaningful monetary award rewards crew members for taking that risk and provides an incentive for fellow crew members to alert

inspectors and investigators of similar conduct on other ships.

A. Historical Awards

The case presently before this Court is only one of a recent collection of prosecutions involving the illegal discharge of oil-contaminated waste from marine vessels. In nearly every case, lower-level crew members were directed by vessel engineers to bypass required pollution prevention equipment and pump oil-contaminated waste directly overboard. The same is true in this case.

The awards recommended by the United States in this case are intended to take into account the assistance provided by Piamonte and Nuneza, with an eye to awards that historically have been issued in cases prosecuted under 33 U.S.C. § 1908. By way of example, courts have made the following awards in APPS cases charged between 2006 and the present:

- United States v. General Maritime Management (S.D. Tex. 2008) (court awarded \$250,000 to be divided proportionally among five whistleblowers who provided information and photographs to the Coast Guard regarding an illegal bypass hose);
- United States v. Ofer (S.D. Ga. 2008) (court awarded \$126,000 to one crew member and \$7,000 each to two other crew members who had been directed to install a bypass pipe and who provided assistance to the Coast Guard);
- United States v. Diamlemos Shipping Corporation (C.D. Cal. 2008) (court awarded \$93,750 to each of two whistleblowers);
- United States v. Polar Tankers (D. Alaska 2007) (court

awarded \$250,000 to whistleblower who reported the faking of a man overboard drill to allow crew to clean oily sludge that had leaked onto the side of the vessel);

- United States v. Nicanor Jumalon (D.P.R. 2007) (court awarded \$50,000 to each of five whistleblower crew members);
- United States v. Calypso Maritime Corporation (W.D. Wash. 2007) (court awarded \$125,000 to each of two employee whistleblowers);
- United States v. Kassian Maritime Navigation Agency (M.D. Fla. 2007) (court awarded \$230,000 each to wiper and cook and \$20,000 to each of two third engineers)
- United States v. Overseas Shipholding Group (D. Mass., C.D. Calif., N.D. Calif., D. Me., E.D.N.C., E.D. Tex. 2006) (court awarded \$437,500 to each of twelve employee whistleblowers in case involving deliberate vessel pollution that resulted in \$37 million plea agreement);
- United States v. Irika Maritime SA (W.D. Wash. 2006) (court awarded \$250,000 to second engineer whistleblower who objected to waste dumping);
- United States v. Sun Ace Shipping Co. (D.N.J. 2006) (court awarded \$200,000 to be divided among three crew member whistleblowers who reported use of bypass hoses to discharge oily wastes);
- United States v. MK Shipmanagement Company (D.N.J. 2006) (court awarded \$25,000 to the ship's cook who contacted investigators with information that the crew was regularly bypassing the oil water separator and \$75,000 to a third engineer who later presented photos and documents of the illegal discharges); and
- United States v. Wallenius Ship Management (D.N.J. 2006) (court awarded \$2.5 million to be equally divided among four whistleblowers).

In this context, the United States believes that its recommended awards for Piamonte and Nuneza are appropriate and

meaningful.

IV. Conclusion

The illegal activities disclosed by Piamonte and Nuneza would not have been discovered but for their efforts, and the government respectfully submits that the record shows that they provided information leading to conviction. For that reason, the United States respectfully submits that an award of \$150,000 to be shared equally by Nuneza and Piamonte in this case would be consistent with the manifest purpose of the statute of encouraging those with information about unlawful conduct to come forward and disclose that information to authorities.

Respectfully submitted,

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Dated: September 22, 2009

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ Linda M. Ricci
Linda M. Ricci

Dated: September 22, 2009