UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	)	
	)	**Criminal No. MJG-11-0652**
v.	)	
	)	
EFPLOIA SHIPPING CO., S.A.	)	
	)	
Defendant	)	
	)	

UNITED STATES OF AMERICA	)	
	)	**Criminal No. MJG-11-0671**
v.	)	
	)	
AQUAROSA SHIPPING, A/S	)	
	)	
Defendant	)	
	)	

GOVERNMENT'S
MOTION FOR WHISTLEBLOWER AWARD

The United States, by and through undersigned counsel, respectfully files this motion proposing, pursuant to the Act to Prevent Pollution from Ships, 33 U.S.C. § 1908(a), that this Court should grant one half of any criminal fines in the above captioned cases to the crew member of the *M/V Aquarosa* that notified the Coast Guard of the criminal conduct on board and whose information led directly to the charges against both defendants, as well as the conviction of the ship's Chief Engineer. Congress provided the Court with sole discretion in whether to grant an award of up to give up to one-half of criminal fines to persons providing information that results in a conviction. 33 U.S.C. § 1908(a). It is undisputed that the whistleblower's actions and information led to the charges and convictions in this case.

I. Introduction

On January 25, 2012, the Court has scheduled arraignment, plea and sentencing hearings in *United States v. Efploia Shipping Co, S.A.* (Criminal No. MJG-11-0652) and *United States v. Aquarosa Shipping A/S* (Criminal No. MJG-11-0671). Defendant Efploia Shipping, a Marshall Islands corporation doing business in Greece, was the technical manager of the *M/V Aquarosa*, a 33,005 gross ton cargo ship, registered in Malta. Defendant Aquarosa Shipping, a company based in Denmark, was the owner of the vessel. Each defendant has signed a plea agreement pursuant to Rule 11(c)(1)(C) that includes, as attachments, a detailed joint factual statement and a comprehensive environmental compliance program, copies of which have been provided to the Court. The United States fully supports the plea agreements and recommends that the Court impose sentence as jointly proposed. Each defendant has indicated that it intends to seek sentencing at the same time as the plea. The government has no opposition to this proposal in this case given the nature and scope of the plea agreements.

The United States respectfully recommends that at sentencing, this Court issue an award to the 3rd Engineer of the Aquarosa of one half of any criminal fines collected under the Act to Prevent Pollution from Ships ("APPS"), 33 U.S.C. § 1908(a), based on the **undisputed fact**, as set forth below and in the joint factual statements, that the information and evidence that he provided was the impetus for a criminal investigation, led to the successful seizure of evidence, led other witnesses to cooperate, and resulted in the conviction of the defendants. While the government does not think that a criminal defendant has or should have any standing to assert whether or how the Court should issue a whistleblower award under APPS, the government nevertheless asked the defendants if they have a position on this issue. As set forth below,

defense counsel for defendant Efploia Shipping has indicated that it will oppose any whistleblower award. The government has not received a response from defendant Aquarosa Shipping.

The criminal penalty provision in APPS authorizes payment of a whistle-blower award. Specifically, the statute states:

> Criminal penalties. A person who knowingly violates the MARPOL Protocol, Annex IV to the Antarctic Protocol, this Act, 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) (emphasis added).

The employees in this case, like those in other similar prosecutions, have indicated that they fear retaliation not just by their employer, but by manning agencies and other companies. The primary goals of the statute can best be achieved by placing emphasis on recognizing those that inform the government about crimes that would otherwise go undetected.

The APPS whistle-blower award provision serves a valuable law enforcement purpose. Deliberate violations of MARPOL and United States law are far too common. There have been multiple prosecutions in virtually every major port city in the United States, including five in Baltimore alone. Criminal conduct that takes place within the small community of those living and working aboard vessels is very difficult to detect. This reward provision has proved to be a valuable tool for uncovering this crime, and, it is by no means unique to the maritime industry.[1]

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[1] *See, e.g.,* Refuse Act, 33 U.S.C. § 411; CERCLA, 42 U.S.C. § 9609(d); Endangered Species Act of 1973, 16 U.S.C. §1540(d); Bald and Golden Eagle Protection Act, 16 U.S.C. § 668(a); Internal Revenue Service, 26 U.S.C. § 7623; Tariff Act, 19 U.S.C. § 1619. A more recent enactment pertaining to the operation of cruise ships in Alaska also has a similar provision, demonstrating continued Congressional interest in creating incentives to reward those

The availability of the APPS award aptly reflects the realities of life at sea and the pollution of the oceans. Because the pollution takes place in the middle of the ocean and usually at night, the only people likely to know about the conduct and the falsification of ship records used in port are the employees in the engine room. Each year, thousands of seafarers participate in or are aware of illegal conduct aboard their vessels. A tiny minority choose to take active measure to stop the wrongdoing and bear witness. The government's success in identifying the activity and obtaining sufficient evidence to support investigations and prosecutions is partly based upon on the willingness of lower level crew members to step forward. The decision to step forward, however, must be weighed against the likelihood that the cooperating crew member will forever be barred from working in the marine shipping industry and may be subject to physical harm and abuse. As with other cases, the fears of these individuals, whether justified or not, were readily observable during debriefings with government representatives, even with the assistance of Court appointed counsel. A monetary award both rewards the crew member for taking that risk and may provide an incentive for other crew members on other vessels to alert inspectors and investigators regarding similar crimes.

Accordingly, numerous courts have ordered whistleblower awards in vessel pollution cases where the facts supported a reward. In this district, Judge Legg ordered that two crew members receive half of the criminal fine for slipping a handwritten note to a Coast Guard inspector in *United States v. D/S Progress*, Criminal No. L-00-0318. In *United States v. Irika Shipping, S.A.*, Criminal No. JFM-10-0371, Judge Motz ordered that four crew members share

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who assist the government in bringing criminal prosecutions. Pub. L. 106-554, § 1(a)(4) [Div. B, Title XIV, § 1409(e)], Dec. 21, 2000, 114 Stat. 2763, 2763a-315, enacting provisions set out as Historical and Statutory Notes to 33 U.S.C. § 1901.

half of the $1 million in APPS criminal fines for notifying the Coast Guard in Baltimore of violations. In his Order, Judge Motz wrote "this Court finds an award to these witnesses would further the purpose of the Act to Prevent Pollution from Ships and 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." (Doc. 21) (Filed 11/08/10) (Attachment A).

II. Factual Background

On February 19, 2011, the *M/V Aquarosa* arrived in Baltimore, Maryland, after a voyage from Europe. The Maltese registered 623 foot long 33,005 gross ton ship was new, having been completed in China in June 2010. The ship was slated for inspection by the U.S. Coast Guard Sector Baltimore because this was its first visit to the United States and it was sailing on an interim environmental and safety certificates. During the inspection, Salvatore Lopez, the ship's Third Engineer, handed a note to the Coast Guard inspectors. The note stated: "I HAVE SOMETHENG TO TILL YOU BUT SECRET." When the Coast Guard met privately with Mr. Lopez on board, he alleged that crew members had been instructed to discharge waste oil and plastic overboard at the direction of senior ship engineers. The 3rd Engineer also showed the Coast Guard documentary evidence of the illegal activities, including approximately 300 photographs stored on his cell phone.

As set forth in the charging documents, Mr. Lopez worked within a military-like chain of command that involved an engine department headed by a Chief Engineer, and assisted by a 2nd Engineer, 3rd Engineer, 4th Engineer, Wiper, Oiler, Electrician and Fitter. As a lower level Filipino employee, Mr. Lopez was contracted by a manning agency in the Philippines on behalf

of Efploia Shipping. Counsel for Mr. Lopez has indicated that unlike other members of the crew, Mr. Lopez has not been invited to return to work. As a 3rd Engineer, Mr. Lopez worked under and at the direction of the Chief Engineer and the 2nd Engineer, both of whom were contracted by and reported directly to Efploia Shipping. He was paid approximately $27,000 per year, roughly a quarter of the Chief Engineer's salary. While the Master, Chief Engineer and 2nd Engineer were Greek nationals employed by Efploia Shipping, a Greek based corporation with Greek shore-side employees, Mr. Lopez and the lower level crew members were from the Philippines. (A former 2nd Engineer was also from the Philippines.) The Greek 2nd Engineer, who was Mr. Lopez's most recent and immediate superior, had worked on four other Efploia managed ships and was the company's hand picked representative in the shipyard in China when the ship was being completed. He admitted that he directed that oily bilge waste be discharged overboard on the ship's first voyage, that he taught the replacement 2nd Engineer the same method, and that the practice continued when he returned to the ship prior to its voyage to Baltimore, and that this was done with the knowledge and/or direction of the Chief Engineer. In short, this case involves the highest level supervisory engineers, who were the technical manager's representatives onboard, directing the lowest level employees to commit crime.

As a result of Mr. Lopez' assistance, the Coast Guard located and seized evidence of the dumping from the vessel, including the "magic pipe" itself consisting of flanges and hoses. The Coast Guard also obtained the Oil Record Book, a required log regularly inspected by the Coast Guard that had been falsified to conceal the misconduct, and other records. Mr. Lopez was interviewed three times while on board the vessel and also agreed to provide a written statement. The rest of the crew was interviewed as well. While several corroborated the allegations, others,

including a crew member that was instructed to lie, did not. Among the documents provided by Mr. Lopez was a copy of the ship's sounding log that recorded the volume of fluid in various tanks including the bilge and sludge tanks. This record was critical proof that the Oil Record Book had been falsified. On February 28, 2011, Mr. Lopez executed a consent form providing the government with his consent to search and download information from his cell phone. The cell phone contained approximately 300 photographs of the vessel, including photos showing the use of a "magic pipe" at sea to bypass the Oily Water Separator. A Coast Guard inspector assisted by a CGIS Special Agent interviewed Mr. Lopez again on February 22, 2011. Examples of some of the evidence supplied by Mr. Lopez are included in Attachment B.

During his initial interview on the ship, Mr. Lopez indicated his awareness of the potential for an award under the Act to Prevent Pollution from Ships, 33 U.S.C. § 1908(a), and asked that he be considered for such an award which allows for up to ½ of a criminal fine to be awarded to those providing information leading to conviction. Mr. Lopez was advised that any such determination would be made by the Court. He nevertheless continued to cooperate fully with law enforcement without condition and without being made any promises.

On March 7, 2011, this Court appointed defense counsel to represent Mr. Lopez pursuant to the Criminal Justice Act ("CJA Counsel") after Mr. Lopez requested counsel. Pursuant to a surety agreement with the Coast Guard, the *M/V Aquarosa* was permitted to travel to Delaware before Mr. Lopez and other witnesses were removed from the ship and returned to Baltimore on February 26, 2011. Under the terms of the agreement, the vessel owner and operator posted a bond and agreed to pay the salary, per diem, housing and repatriation costs for Mr. Lopez and several other crew members so that they could remain in Baltimore during the pendency of the

investigation. Mr. Lopez also informed the government that he had hidden some additional evidence on the ship in order to prevent it from being destroyed. Thanks to this information, the government was able to obtain these records.

On March 21, 2011, CJA Counsel and Mr. Lopez met with government investigators at the U.S. Attorney's Office in Baltimore for a witness interview. The interview was conducted with the aid of a Tagalog interpreter which proved absolutely necessary. At the conclusion of this interview, Mr. Lopez provided a copy of a personal notebook that contained a summary of evidence and allegations. On March 30, 2011, CJA Counsel and Mr. Lopez met with government investigators for a second interview. Prior to the start of this interview, CJA Counsel indicated that Mr. Lopez had apparently been contacted by another attorney and that it was not clear to him whether or not his client wished to be represented by another attorney. After speaking with his client and the other attorney, CJA Counsel indicated that he still represented Mr. Lopez. Prior to the interview starting, Mr. Lopez indicated that he wanted to go forward with CJA Counsel as his attorney. During this interview, Mr. Lopez as asked to review the photographs that he had taken on board. Mr. Lopez also provided an additional piece of documentary evidence which he had removed from the ship in order to preserve it for any investigation. The interview was conducted with the aid of a Tagalog interpreter which proved absolutely necessary.

On Friday, April 8, 2011, J. Stephen Simms contacted government counsel and sent an email indicating that he would be representing Mr. Lopez. By email dated April 12, 2011, government counsel asked whether Mr. Simms intended to pursue a contingency fee agreement and the terms of any such agreement. Mr. Simms was also advised in writing that

the government has previously opposed a contingency fee agreement in this type of prosecution as unethical. Furthermore, the government warned: "Mr. Lopez has already provided the assistance he has to provide in this matter. He has produced evidence and met with the Coast Guard, Special Agents and Prosecutors prior to your involvement with this matter." In a telephone conversation on April 27, 2011, Assistant U.S. Attorney P. Michael Cunningham advised Mr. Simms that the government had concerns regarding his representation and possible conflict of interest in this matter. In summary, Mr. Simms was advised on multiple occasions that in the event that the investigation led to convictions and Mr. Lopez were to be considered for an award by the Court, that the government would oppose any contingency fee. On April 29, 2011, Mr. Simms advised government counsel that he had a contingency fee agreement with Mr. Lopez, but declined to inform the government of its terms.

IV. Government's Recommendations, Defense Position and Government's Response

The United States recommends that the Court exercise its discretion and grant an award of one half the amount of all fines collected pursuant to the Act to Prevent Pollution from Ships to Mr. Lopez. That Mr. Lopez provided substantial information that led to the investigation and conviction of all defendants in this matter is beyond dispute. He took all the risk, including taking photographs at sea and slipping a note to the government. He informed the United States about a crime that was underway. The government was otherwise unaware of this crime and unlikely to learn about it because the very essence of the offense was obstructive and involved concealment and use of false records to avoid detection. Mr. Lopez was the lone whistleblower in this case. Other members of the crew were unaware that he planned to inform the authorities. However, the quality of the evidence that he provided made it impossible for the rest of the crew

(and the defendants) to deny the truth of his allegations. For example, the photographs that he took and provided to the government showed that the ship's piping had been disassembled at sea and re-configured with a magic pipe. They also showed, internal transfers that were not recorded in the Oil Record Book. The sounding log and alarm printouts from the ship's computer helped to prove that the Oil Record Book had been intentionally falsified. These photographs and documents were essential tools in the interviews of other witnesses and in securing guilty pleas from the defendants. Absent Mr. Lopez's assistance and cooperation, there would not have been a criminal case. Even further, the quality of the evidence helped to ensure that all defendants pleaded guilty thus saving judicial and prosecutorial resources.

The United States does not believe that defendants have any standing to contest a whistleblower award. They will pay the same fine regardless. Mr. Lopez was their agent and/or employee and, as such, they have an obvious bias and conflict of interest. That said, the government informed counsel for the defendants of the government's intention to file this motion. While we have yet to learn the position of Aquarosa Shipping, Counsel for Efploia Shipping has stated that he opposes any award to the 3rd Engineer. Among the reasons offered are that the 3rd Engineer had an obligation and opportunity to provide the allegations to Efploia Shipping and failed to so inform the company or to notify other port state authorities in other countries prior to the ship's arrival in Baltimore.

These arguments fail to take into account the reality faced by whistleblowers in the maritime context. Mr. Lopez would have little if any reason to suspect that the defendant corporation was not already aware of the practices on board the ship or, that even if they were not, that they would take his allegations seriously rather than rally around the Greek Chief

Engineer and 2nd Engineer, who had worked for the company for many years. According to crew members in this investigation, as well as many other cases, under the military-like chain of command in which they work, they believed that no major decision occurs without the knowledge and approval of the Chief Engineer. The Chief Engineer reports directly to shore based managers and to the Master of the ship. Other crew members typically have no contact with these shore side superintendents and little ability to communicate with them directly. Indeed, in this case, when attorneys for the vessel first boarded the ship and interviewed Mr. Lopez, they did so in the presence of the now convicted Chief Engineer who was directly involved in the obstruction of justice, including witness tampering. No wonder Mr. Lopez and some of these crew members did not feel safe in telling the whole truth even then. He took a risk that he would be retaliated against and continued to cooperate without any promise of compensation. It is true that Mr. Lopez knew that there was a potential award in the United States, but he should not be penalized for being truthful about that fact. He also believed that what he was doing was dangerous and that he might well lose his job and be unable to find other work.

This is not mere speculation. The undersigned prosecutors are aware of other matters in which employees have brought matters to shoreside employees only to have their concerns swept under the rug or subject to unfavorable work conditions. In certain instances, employees that have come forward internally with environmental concerns have been rehired. A common threat on board vessels is that if a crew member does not do as directed, he will be sent home or receive an adverse personnel evaluation that could damage his future ability to gain employment.

Efploia's position ignores cultural, political and economic realities. A law abiding corporation that truly wants its employees to comply with the law, must take far more active measures to achieve compliance and to win the hearts, minds and loyalty of their employees. For example, best practices include making environmental compliance a positive factor in employee evaluations, having environmental officers on board each ship, having an environmental budget that takes into account the actual needs of the ship, having shore side managers speak with individuals in the engine department rather than just the Master and Chief Engineer, having shore side managers regularly test the operation of pollution prevention equipment under actual operating conditions, having onboard methods to make anonymous reports to shore, and conducting training and instituting policies to persuade employees that whistleblowers will be protected by the company and not retaliated against.

While there are other countries that are similarly enforcing MARPOL, the United States is clearly a world leader in the area of MARPOL enforcement and it has developed unique legal and investigative tools. Seafarers know that the United States is serious about vessel source pollution and the intentional falsification of official ship records. By coming forward in the United States, Mr. Lopez did not need to worry that law enforcement would immediately reveal his identify or uncritically rely on the response of his boss or employer. His actions may have been at least partly financially motivated, but they were also oriented toward successfully stopping the ongoing criminal practices onboard.

In fashioning an award, the United States also recommends that the Court issue an Order in a manner that prevents the private law firm from receiving excessive attorney fees for acts and cooperation that took place prior to their involvement. As set forth above, Mr. Lopez's present

counsel was advised when they came into the case that the government would oppose a contingency fee and that Mr. Lopez's cooperation was essentially completed. Mr. Lopez and prior CJA Counsel had done all the work. Furthermore, Mr. Lopez' new counsel's interest in securing an award resulted in his taking actions that ultimately would have detracted from the strength of Mr. Lopez as a trial witness. Some of counsel's actions were counterproductive to the criminal prosecution. Accordingly, the government proposes that the Court issue an order that limits attorney fees to not more than $10,000, or, or to at least $10,000, absent notice to the government and approval by the Court. A similar award was issued in *United States v. Irika Shipping, S.A.*, Criminal No. JFM-10-0372, which appears as Attachment A to this pleading. This will provide the Court and the government an opportunity for oversight and review in the event that counsel seek a larger amount.

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