

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

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UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	Crim. No. 08-CR-10274-DPW
CARMELO ORIA,	)	
CONSULTORES DE NAVEGACION, S.A., and	)	
ICEPORT SHIPPING COMPANY, LTD.	)	
_____	)	

MEMORANDUM IN SUPPORT OF APPLICATION  
OF AMANCIO C. NUNEZA FOR AN AWARD  
PURSUANT TO 33 USC § 1908(a)

This memorandum is submitted in support of Amancio C. Nuneza’s application for an award of a portion of the fine imposed on the defendant Consultores de Navegacion, S.A. (“Consultores”)

*The Statute and Considerations Regarding Its Application*

The Act to Prevent Pollution from Ships (“APPS”) authorizes an award to be made to a person who gives information leading to a conviction for violation of APPS. The pertinent provision is the second sentence of 33 U.S.C. § 1908(a), which provides:

A person who knowingly violates the MARPOL Protocol, Annex IV to the Antarctic 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 [sic<sup>1</sup>] may be paid to the person giving information leading to conviction.

The provision is similar to that found in a number of other statutes, both in the area of environmental protection and more generally where the Congress has determined that the encouragement of whistleblowers is an important element of a meaningful enforcement scheme.<sup>2</sup>

<sup>1</sup> There is no antecedent reference to a “fine” in the statute. In practice, “such fine” has been understood to refer to criminal fines imposed in connection with APPS violations.

<sup>2</sup> The Refuse Act, 33 U.S.C. § 411, dating from 1899, is the most likely source of the second sentence’s language; it provides in pertinent part that “in the discretion of the court, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction.” See also CERCLA, 42 U.S.C. § 9609(d); Endangered Species Act of 1973, 16 U.S.C. § 1540( d); Bald and Golden Eagle

The statute is broadly phrased to authorize awards to any “person giving information leading to conviction.” “Information,” of course, is broader than “evidence.” Hence, the information rewarded by the statute need not be based on personal knowledge or be otherwise admissible or formally offered in evidence. Nor need the information pertain to the particular APPS violation upon which the conviction is based. It is enough that the applicant have given information that ultimately leads to a conviction, as by causing the initiation of a boarding, an investigation, or other enforcement action that uncovers facts of an APPS violation on which a conviction is ultimately obtained.

There is little doubt that § 1908(a) confers discretion on the Court, both to make an award and to determine the amount of the award, limited only by a ceiling equal to 50% of an APPS fine. Accordingly, there is no *entitlement* to an award of the kind that would trigger due process procedures.<sup>3</sup> This is not to say, however, that the discretion conferred may be exercised without regard to meaningful standards. The exercise of discretion must be consistent with the obvious purpose of Congress which is to encourage persons who would otherwise be deterred by fears of jeopardizing their livelihoods and personal safety to come forward with information concerning marine pollution. *See, e.g., U.S. v. Overseas Shipholding Group, Inc.*, 547 F.Supp. 2d 75, 86 (D.Mass. 2008) (purpose of the APPS whistleblower provision “is to remunerate those willing to risk their jobs”). Thus, the provision does not exist simply to reward virtue, but to compensate those taking serious risks in order to bring to the attention of the authorities information that leads to an APPS conviction. In exercising discretion under the provision, this consideration cannot be overemphasized, not only because it is fair, appropriate and consistent with Congressional policy to reward individuals who have already acted to their personal detriment in alerting authorities to an APPS violation, but because the future willingness of persons to come forward will be chilled by news of awards that are denied or perceived as inadequate in amount.<sup>4</sup>

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Protection Act, 16 U.S.C. § 668(a); Internal Revenue Code, 26 U.S.C. § 7623; Tariff Act, 19 U.S.C. § 1619.

<sup>3</sup> *But see Miller v. United States*, 455 F.2d 833, 834 (4<sup>th</sup> Cir, 1971) (due process requires that claimants to whistleblower award under Refuse Act should be “given an opportunity to litigate their claim,” i.e., to confront witnesses, adduce evidence, etc.).

<sup>4</sup> There are those who may harbor a personal distaste for rewarding “snitches,” or may suspect that an applicant was motivated in whole or part by pecuniary considerations and not solely by a more noble desire to protect the marine environment. While such personal feelings may be understandable, they are to be set aside if the obvious Congressional intent is to be carried out. There can be no doubt that Congress intended precisely to induce the provision of information by means of offering substantial monetary rewards and, given that discharges of pollutants on the high seas are especially difficult to detect directly by law enforcement authorities, one cannot say the Congressional policy is not rational.

Similarly, with respect to the magnitude of awards, the percentage of the APPS fines awarded must be sufficient to overcome the real prospects of loss of livelihood, not to mention personal danger, that one must presume were known by Congress to be obstacles to obtaining actionable information. Since an upper limit on an award is tied to the magnitude of the fine, which Congress could reasonably presume to be a measure of the magnitude and seriousness of the violation, it is unnecessary for the Court to adjust the award based on his or her assessment of the seriousness of the offense. The detrimental employment effects and personal danger that might be expected by a person with information concerning an illegal discharge will likely be the same whether the magnitude of the discharge or other violation that becomes the basis for a conviction is characterized as small or large.

Another appropriate consideration in determining the amount of an award is how a particular award will be perceived by the relevant community of mariners. No two cases will likely ever be the same and lawyers will always be able to identify distinguishing factors in aid of arguments to increase or decrease the amount of an award in any given case. Overly fine calibrations of this kind may disserve the Congressional purpose to obtain information from the only group able to provide it, however. The relevant target community – sea-faring workers, often non-English-speaking, and often occupying the lower ranks of the quasi-military hierarchy characteristic of the marine shipping industry – are not likely to appreciate carefully crafted nuance in support of what this target audience might perceive as a stingy award.

For these reasons, it appears to be common, if not the presumptive rule, to award the maximum (i.e., 50% of APPS-related fines) to eligible whistleblowers,<sup>5</sup> as indicated in the following cases:<sup>6</sup>

<u>Case</u>	<u>APPS Fines</u>	<u>Percent Awarded</u>	<u>Number of Awardees</u>
U.S. v. Princess Cruise Lines (S.D. Fla., 1993)	\$500,000	50%	1
U.S. v. Regency Cruises, Inc. (M.D. Fla., 1995)	\$250,000	50%	2

<sup>5</sup> Of course, in the case of multiple whistleblowers to be rewarded in a single case, the maximum award must be divided amongst them.

<sup>6</sup> The data are derived from the Government's memorandum (dated March 25, 2009) filed in U.S. v. Ionia Management, S.A., No. 3:07CR134(JBA), D. Conn. It is not clear from the memorandum whether the list presents the universe of awards made as of March 2009 or was offered as a representative sample. In either case, the list offers useful guidance as to the amounts generally awarded under § 1908(a). The Ionia Court issued an order inviting award applications to be filed by October 15, 2009, and so no disposition in that case can be reported at this time.

U.S. v. Crescent Ship Services (E.D. La., 1995)	\$250,000	50%	1
U.S. v. Holland America, (D. Alaska, 1999)	\$1,000,000	50%	1
U.S. v. D/S Progress (D. Md., 2002)	\$250,000	50%	2
U.S. v. Norwegian Cruise Lines (S.D. Fla., 2002)	\$1,000,000	25%	1
U.S. v. Botelho Shipping Corp., (D. Ore., 2003)	\$450,000	50%	1
U.S. v. Sabine Transportation, (D. Iowa, 2004)	\$2,000,000	50%	3
U.S. v. OMI, (D.N.J., 2004)	\$4,200,000	50%	1
U.S. v. MK Shipmanagement Company, Ltd., (D.N. J., 2006)	\$200,000	50%	2
U.S. v. Sun Ace Shipping Co., (D.N.J., 2006)	\$200,000	50%	3
U.S. v. Wallenius, (D.N.J., 2006)	\$5,000,000	50%	4
U.S. v. Irika Maritime, S.A., (W.D.Wash., 2007)	\$500,000	50%	1
U.S. v. Kassian Maritime Navigation Agency, Ltd., (M.D. Fla., 2007)	\$1,000,000	50%	4
U.S. v. Calypso Maritime Corp., (W.D. Wash, 2007)	\$1,400,000	17.9%	2
U.S. v. Accord Ship Management, (D.P.R., 2007)	\$1,750,000	14.3%	5
U.S. v. Polar Tankers, (D. Alaska, 2007)	\$500,000	50%	1
U.S. v. Overseas Shipholding Group, (D.Mass., 2007)	\$10,500,000	50%	12

Based on these data, a total of \$30,950,000 in APPS fines has been levied, \$14,150,850 (or 45.7%) of which has been awarded to 47 whistleblowers, an average of **\$325,251** per awardee.

***Nuneza Gave Information That Led to an APPS Conviction.***

The applicant Amancio C. Nuneza is a 54 year old Filipino national. He has served in the maritime shipping industry since 1992. He originally served as a radio operator, but after demand for radio operators waned as sea-based communications technology evolved, he obtained training and certification as a Chief Cook in 1998-1999 and has served as such from

2000 until March 2008, when the *M/T Nautilus* was boarded in Boston and Nuneza was removed from the vessel along with other crew members.

Nuneza joined the *M/T Nautilus* as Chief Cook on or about October 2, 2007, in Freeport, Texas. This was his first engagement on a Consultores-managed vessel. The *M/T Nautilus* proceeded from Texas to Canada and thereafter made various international and trans-Atlantic voyages, returning to the United States in March 2008 with port calls in St. Croix, U.S. Virgin Islands, and in Boston, Massachusetts.

Prior to these port calls, Nuneza developed information (largely provided by Third Engineer Piamonte), summarized it in a writing (in English) and took photographs of piping arrangements identified by Piamonte, including the so-called crossover or “magic pipe” hidden beneath engine room deck plates, which were used to discharge contaminated waste oil. On or about March 12, 2008, the Coast Guard boarded the *M/T Nautilus* in St. Croix and Nuneza secretly gave his written summary to a Coast Guardsman passing by the messroom.<sup>7</sup> After a while, the Coast Guardsman returned to the galley (apparently having read the material provided by Nuneza) and asked Nuneza if he could borrow his camera to view the photos. Nuneza gave him the camera. Before leaving the vessel, the Coast Guardsman returned to the messroom and told Nuneza that he wanted to take the camera to the Coast Guard office and would return it the next day. The next morning, Nuneza was taken to the Coast Guard office (after first being summoned to the Immigration office at the airport). His camera was returned, but with the photographs (apparently inadvertently) deleted. (Later, in Boston, Nuneza was requested to provide his camera once again to the Government and the photos thought to be deleted were forensically recovered from the camera’s memory.) In any event, prompted by Nuneza’s information, the Coast Guard discovered the crossover pipe.

From St. Croix, the *M/T Nautilus* proceeded to Boston, arriving on or about March 22, 2008. The vessel was again boarded several times over approximately five days and various records, including the Oil Record Book, and the crossover pipe were further examined. The crossover pipe was eventually ordered removed and was found to contain oil residue on both sides of its ball valve. Nuneza, among other crew members, was replaced and remained in Boston to cooperate in the investigation. Thereafter, in the course of the investigation, Nuneza was interviewed extensively by the Government and provided testimony to the grand jury.

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<sup>7</sup> The *M/T Nautilus* was originally scheduled to put in at New Orleans prior to St. Croix. Nuneza communicated with a friend in the New Orleans area to alert the Coast Guard there that he had illegal discharge-related information to provide and that its agents should board to conduct an investigation there. As it happened, the *M/T Nautilus* did not stop at New Orleans and the first relevant boarding took place at St. Croix.

Exactly one year after Nuneza joined the crew of the *M/T Nautilus*, on October 2, 2008, the grand jury returned a Superseding Indictment against Consultores, as well as an individual defendant (Carmelo Oria) and another corporate defendant (Iceport Shipping Co., Ltd.). Shortly after the return of the Superseding Indictment, the Government applied for material witness arrest warrants for seven former crewmen, including Nuneza. A supporting affidavit by Coast Guard Special Agent Peter G. Mallett (Doc. 29, Oct. 20, 2008) states that two galley staff, including Nuneza, “were witness to statements made by Oria that are material to the United States meeting its evidentiary burden and proving its case at trial.” *Id.* at 3, ¶ 5. Referring to Nuneza specifically, Special Agent Mallett stated as follows:

**Chief Cook Amancio Nuneza is one of two whistleblowers who brought the discharge of oil-contaminated waste by the *M/T Nautilus* to the attention of the USCG.** The United States expects that, based upon his grand jury testimony and statements made by him during his interview, Nuneza will testify as follows: Shortly after an inspection of the vessel in St. Croix during which the USCG made observations concerning the bilge tank/overboard pipe, Nuneza heard Oria make certain statements in the galley at breakfast-time expressing his dislike of the USCG and its boardings. Nuneza also took photographs of certain equipment located inside the engine room of the *M/T Nautilus*, including of the unauthorized bilge tank/overboard pipe, with his digital camera. He provided the camera with the digital images to the USCG in St. Croix. *Id.* at 12, ¶ 26 (emphasis added).

Magistrate Collings issued the warrants and Nuneza was detained in the United States for a total of thirteen months (March 2008-April 2009). He was listed on the Government’s Preliminary Witness List (filed Dec. 8, 2008) and was not released to return to his home and family in the Philippines until after the Consultores plea agreement was accepted and there was no longer a need for his testimony at trial.

On July 28, 2009, the Court entered judgment against Consultores on four counts, including one count of violating APPS. Consultores was ordered to pay an aggregate criminal fine of \$2,083,333. Counsel is advised by the Government that \$1,000,000 of this aggregate fine is allocable to the APPS violation (Count 2). The APPS count in the Consultores indictment as to which it pleaded guilty and was convicted was directly related to the use of the unauthorized crossover pipe to discharge contaminated bilge water.<sup>8</sup>

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<sup>8</sup> In its Memorandum in Support of Proposed Disposition (Doc. 152), filed on July 22, 2009, in connection with the revised plea agreement, the Government stated that while it proved unable to prosecute specific individual discharges, “The fact of the matter is that the *M/T Nautilus* was specially outfitted with a pipe that was uniquely suited for illegal discharges. It is difficult, and perhaps even impossible, to establish the precise acts of any one engineer in what this Court termed a “long grey line” of engineers. But, plainly, the ship was configured to enable, if not encourage, illegal dumping. Those who were entrusted with the ship’s operation were well aware of the ease of that patently illegal option.” *Id.* at 3.

***Consequences of Nuneza's Provision of Information to the Coast Guard.***

The personal consequences to Nuneza of giving information to the Coast Guard were predictable. As recounted in the Mallett Affidavit, the Government expected to prove that, following the boarding in Boston, Chief Engineer Oria offered to pay one of the messmen \$200 in return for the identity of persons whom he suspected were responsible for causing him difficulties by tipping off the Coast Guard. He later increased his offer to \$500. Mallet Aff. at 12-13, ¶ 27. While the Government would offer evidence of this conduct to prove consciousness of guilt, it is also relevant here to show that the whistleblower(s), once identified, could expect retribution. The Government, to its credit, was sensitive to the dangers to Nuneza, and took steps to house him separately from the other detainees.

While still in the United States, Nuneza expected that his ability to obtain employment in the marine shipping industry was likely at an end, based on the experiences of other *M/T Nautilus* crewmen, who had already returned to the Philippines. He has applied for employment in marine shipping, but has received no response. He is *persona non grata* at the Philippine manning agency in Manila, Philippine Transmarine Carriers, Inc. ("PTC"), as evidenced by its persistent refusal to pay him his accrued vacation pay (approximately \$5,000) after his return to the Philippines. Because of fears for his personal safety, Nuneza avoided travel to Manila and sought to deal with PTC through an intermediary, his nephew, Numer de los Santos, who resides in Manila and to whom Nuneza had given a special power of attorney. PTC's Marine Personnel Officer, Mr. Daniel G. Reyes, demanded to know why Nuneza hadn't appeared personally and told Mr. de los Santos that Nuneza's "friends" and their "police relatives" were looking for him.<sup>9</sup> More recently, because of the financial difficulties stemming from his inability to find work, Nuneza and his wife were forced to withdraw his AMOSUP<sup>10</sup> retirement contributions, which requires an endorsement of certain documents by PTC. Nuneza again gave a special power of attorney to his nephew for this purpose. Before signing the endorsement, Mr. Reyes asked where Nuneza was and why he didn't appear personally. Returning the document to Mr. de los Santos, Mr. Reyes added "Isinusumpa ko siya" (meaning, "kindly tell him I cursed him"). Clearly, Nuneza's career in the marine shipping industry is at an end as a direct result of his providing information to the Coast Guard that led to Consultores' conviction of APPS violations.

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<sup>9</sup> Shortly before Consultores was due to be sentenced, counsel asked counsel for Consultores to look into the matter. The vacation pay was released days later.

<sup>10</sup> AMOSUP is the Associated Marine Officers and Seamans Union of the Philippines.

The loss of income from being blacklisted, particularly by Philippine standards, is substantial. Nuneza's 2007 gross monthly income, including all overtime pay, was \$1,771.<sup>11</sup> Due to AMOSUP/TCCC wage scale increases effective January 1, 2008, the comparable monthly income figure is \$1,882. Assuming a 1% annual increase and an average of 11 months employment per year for the next 12 years (Nuneza is 54 years old), the anticipated lost income amounts to a total of \$265,178.70. Particularly at Nuneza's age, there is no alternate employment in the Philippines that offers more than a small fraction of that income.

***Proposed Award***

The reward authorized by § 1908(a) being discretionary, there is no single mathematically ascertainable amount that is compelled by APPS to be awarded to Nuneza. Based on the considerations identified above that stem from the statutory purpose, as well as the judicial value in maintaining a measure of consistency among the district courts and over time, and the monetary impact of Nuneza's response to the inducement offered by Congress, a number of different measures can offer the Court guidance. As indicated above, most courts have awarded the full 50% to eligible whistleblowers and Nuneza would certainly welcome that amount. In the event the Court looks to other measures, the following methodologies and the amounts they yield in this case are as follows:

<b>Methodology</b>	<b>As Applied Here (assuming Nuneza is the only awardee)</b>
Average Percentage of APPS Fines Awarded (45.7%)	\$457,000
Average Amount Per Awardee	\$325,251
Actual Projected Lost Income	\$265,178
Average of Three Methodologies	\$349,143

For the reasons set forth in this memorandum, it is submitted that a fair reward would be approximately \$350,000, and Nuneza therefore requests an award not less than that amount pursuant to 33 U.S.C. § 1908(a).

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<sup>11</sup> The components of this compensation include base pay, guaranteed overtime, 10 days vacation leave pay, and extra overtime onboard, the rates of which are set in a collectively bargained AMOSUP/TCCC wage scale. In addition, PTC paid a Service Incentive and a Seniority Maintenance Bonus.



**Conclusion**

Amancio Nuneza responded to our Nation's request that he provide information regarding APPS violations with the understanding that if the information leads to a conviction, he will be fairly rewarded for the substantial risks he undertook. While the statutory inducement may not amount to a legal entitlement, past practice under § 1908(a) has generally honored the Congressional policy underlying the statute, both to reward those who respond and to signal to future would-be whistleblowers that their cooperation is valued. Nuneza asks the Court, in its discretion, to follow that practice.

Respectfully submitted,

**AMANCIO C. NUNEZA**

By his attorney,

/S/ Carl Valvo

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Dated: September 8, 2009

**Certificate of Service**

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

s/Carl Valvo  
Carl Valvo

Dated: September 8, 2009