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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,)	No. CR 11-0828 JW
Plaintiff,)	
v.)	GOVERNMENT’S MOTION FOR
DIANIK BROSS SHIPPING CORP., S.A.,)	WHISTLEBLOWER AWARD
Defendant.)	

The government moves this Court to authorize payment of Two Hundred and Fifty Thousand Dollars (\$250,000.00), or one-half of the criminal fine imposed against Defendant DIANIK BROSS SHIPPING CORP., S.A. (“Dianik Bross”), to Mr. Francisco Engay. Mr. Engay served as a crew member onboard the *M/V Kostas N*, a bulk carrier vessel operated by Dianik Bross. Mr. Engay provided critical information to government inspectors and prosecutors leading to discovery of illegal activities and a successful prosecution. The illegal activities disclosed by Mr. Engay would not have been discovered and would be continuing today but for his efforts.

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GOVT MOTION FOR
WHISTLEBLOWER AWARD

I. LEGAL ANALYSIS

1 It is anticipated that Dianik Bross will plead guilty to one count of violating the Act to
2 Prevent Pollution from Ships (APPS), Title 33, United States Code, Section 1908(a). If the
3 parties' plea agreement is accepted by this Court, Dianik Bross will pay a five hundred thousand
4 dollar (\$500,000) criminal fine for the APPS violation.¹

5 The criminal penalty provision in APPS authorizes payment of a whistleblower award.
6 Specifically, the statute states:

7 (a) Criminal penalties. A person who knowingly violates the MARPOL Protocol,[,] Annex
8 IV to the Antarctic Protocol, this Act, or the regulations issued thereunder commits a class D
9 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.

10 33 U.S.C. § 1908(a).

II. ARGUMENT

11 The case presently before this Court is factually similar to a number of federal
12 prosecutions in this district and throughout the country involving the illegal discharge of wastes
13 from marine vessels. In nearly every case, lower level crew members are either directed by
14 senior officers to disregard international rules and regulations intended to prevent the discharge
15 of environmental pollutants or they observe others disregard these rules. Typically, these crew
16 members comply with those directives or turn a blind eye to what they observe because of both
17 real and perceived threats of termination and risk of losing their ability to work in the maritime
18 industry. Here, Mr. Engay observed continuous violations of anti-pollution laws and finally
19 decided to come forward when the ship came into U.S. waters.

20 Mr. Engay served as an oiler aboard the *M/V Kostas N*. He worked on this ship twice –
21 from April 20, 2010 to April 16, 2011, and then again from June 7, 2011 to August 11, 2011.
22 For this most current voyage, Mr. Engay served under Chief Engineer Vassili Samoilenko, who
23 will also be pleading guilty to obstruction charges stemming from his concealment of the illegal
24 activity by falsifying records that were presented to the United States Coast Guard (“USCG”) to
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27 ¹ Under the plea agreement, Dianik Bross would also pay \$150,000.00 as a
28 community service payment which would go to environmental projects in the Bay Area.

1 show compliance with anti-pollution laws. Mr. Engay first witnessed violations of anti-pollution
2 laws on his first voyage. For his first voyage on the *M/V Kostas*, he worked under another chief
3 engineer. Mr Engay informed the government that he observed the same unlawful activity
4 discussed further below on his earlier voyage. Other crew member witnesses have corroborated
5 this testimony.

6 On this last voyage, when the vessel left the Philippines and was destined for the United
7 States, Mr. Engay decided to document the illegal activity he was observing. Specifically, he
8 videotaped two separate incidents of unlawful activity.

9 Approximately three weeks before the vessel came to the United States, Mr. Engay
10 videotaped the Oily Water Separator, the pollution control equipment designed to ensure oily
11 water is not discharged overboard, being operated in a tricked position. In particular, a device
12 was inserted near the Separator's Oil Content Meter, a meter used to sample and detect when
13 water going overboard has more than the allowed 15 parts per million (ppm) of oil. The inserted
14 device tricked the meter so that it did not read the actual effluent going to the overboard
15 discharge pipe and instead read from a sample line that contained fresh water (used to clean or
16 calibrate the meter). As a result, the meter did not signal to redirect the effluent back to a storage
17 tank if the water contained more than 15 ppm of oil. "Tricking" of the sensor thus allowed water
18 that contained more than 15 ppm of oil to be discharged overboard in violation of law. The
19 Chief Engineer has admitted to operating the Oily Water Separator in this tricked position and
20 will be pleading to charges related to this wrongful conduct.

21 The second videotape involved a one-time unlawful discharge of sludge overboard. On
22 or about July 22, 2011, Chief Engineer Samoilenko set up an unlawful connection between the
23 sludge tank and the boiler blowdown pipe which discharges sea water overboard. Samoilenko
24 set up this illegal connection to address what he perceived as a problem with volume in the
25 sludge tank. While it is unclear how much sludge was released (Samoilenko has stated he was
26 trying to decant water from sludge tank), the act itself was illegal and a serious breach of
27 MARPOL. Mr. Engay videotaped the pipe used to make the illegal connection after it was
28 disconnected. The video showed the pipe full of sludge and being emptied into the sludge tank

1 after the fact. Other witnesses, including Samoilenko, have corroborated what the oiler
2 videotaped on July 22, 2011 and what occurred that day – the illegal discharges of sludge
3 overboard.

4 When the *M/V Kostas N* arrived in U.S. waters, the USCG boarded the vessel to conduct
5 a routine inspection. They noticed certain deficiencies and returned days later for further
6 inspection. At this later inspection, Mr. Engay placed a handwritten note, attached hereto, which
7 laid out various possible violations of law. Because of this note, the USCG decided to conduct
8 an expanded MARPOL examination. This expanded MARPOL examination resulted in a
9 criminal referral to the U.S. Attorney's Office. As part of a criminal investigation, seven crew
10 members were removed from the ship, in addition to Mr. Engay.² Dianik Bross entered into a
11 bond agreement with the USCG which allowed the ship to continue on its next voyage, but
12 required the seven crew members to stay in the U.S. As part of the bond, Dianik Bross has paid
13 and continues to pay for the food and lodging of these crew members. The criminal investigation
14 uncovered that both oily water was being discharged routinely through the use of a tricked Oily
15 Water Separator and that on or about July 22, 2011, sludge was unlawfully discharged overboard.

16 At no time during the investigation did Mr. Engay mention the prospect of receiving a
17 monetary payment for providing information. That said, because many crew members who work
18 in engine rooms of large ships are now aware of the whistleblower reward, the government did
19 ask Mr. Engay if he was aware of such a reward. Mr. Engay stated he was aware of the award.
20 Because of possible credibility issues, the government interviewed all other crew members as
21 well as reviewed documents and logs, to ensure other evidence corroborated Mr. Engay's
22 testimony. It did. Moreover, the government interviewed a technical consultant who observed
23 the Oily Water Separator on the vessel, and would testify that the Separator could not operate in a
24 lawful manner, which further corroborated Mr. Engay's testimony and videotape.

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27 ² It is the government's understanding that Mr. Engay was immediately relieved of
28 duty with Dianik Bross. That said, Dianik Bross has paid and continues to pay not only for Mr.
Engay's food and lodging, but his salary as well. To this date, Mr. Engay does not have counsel.

1 The whistleblower award provision in APPS serves a valuable law enforcement purpose.
2 The illegal dumping documented by Mr.Engay occurred routinely on the high seas where it
3 would be impossible to detect. Similar illegal dumping activity has historically occurred on the
4 high seas, several days after a vessel departs a port en route to a distant destination. This practice
5 has been largely successful because there is no reliable effective monitoring equipment capable
6 of discovering dumping conducted on the high seas or linking the waste to a particular vessel.
7 The government's success in identifying the activity and obtaining sufficient evidence to support
8 investigations and prosecutions is often dependent on the willingness of lower level crew
9 members to step forward and admit the wrongdoing.

10 The decision to step forward, however, must be weighed against the likelihood that
11 cooperating crew members will no longer be able to work in the marine shipping industry and
12 may be subject to physical harm and abuse. In this instance, Mr. Engay requested to be taken off
13 of the ship during the USCG inspections because of safety concerns. Upon Mr. Engay's request,
14 the USCG immediately removed him from the vessel and secured lodging and food for him. It is
15 unlikely Mr. Engay will be able to work in this industry again.³ A substantial monetary award
16 both rewards the crew member for taking that risk and may provide an incentive for similarly
17 situated crew members to alert inspectors and investigators of similar conduct on other ships.

18 An award of this magnitude is not without precedent. A review of similar cases involving
19 marine vessel pollution and whistleblowers indicates the following awards have been given:

20 *United States v. Calypso Marine Corporation*, (W.D. WA) (court awarded two crew
21 members each \$125,000 or one-half of the \$500,000 APPS criminal fine)

22 *United States v. Irika Marine S.A.*, (W.D. WA) (court awarded lower level crew member one-
23 half of \$500,000 APPS criminal fine);

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26 ³ When Mr. Engay disembarked from the ship, the company filled out his seamen's
27 log in red ink. Crew members have testified that red ink is code in the industry for a bad
28 employee. If true, it appears that no matter what Mr. Engay will have difficulty trying to secure
employment again in the maritime industry.

1 *United States v. Hoegh Fleet Services*, (W.D. WA) (court awarded lower level crew member
\$300,000);

2 *United States v. OMI*, (D. N.J.) (court awarded one-half of a \$4.2 million criminal fine to a
3 second engineer who reported illegal discharges and falsified records to local police);

4 *United States v. Sabine Transportation*, (D. Iowa) (court awarded one-half of \$2.0 million
5 criminal fine to three employee whistleblowers);

6 *United States v. Botelho Shipping Corp.*, (D. Or.) (crew member who passed note to
7 investigators disclosing overboard discharges of oil contaminated waste water awarded
8 \$225,000, or one-half of the criminal fine issued for an APPS violation);

9 *United States v. Princess Cruise Lines* (S.D. Fla.) (cruise ship passenger awarded one half of
10 the \$500,000 criminal fine for providing the government with a video tape of crew members
11 dumping plastic bags of garbage into the ocean);

12 *United States v. Regency Cruises, Inc.* (M.D. Fla.) (court split one half of the \$250,000 fine
13 among two different witnesses who reported the pollution to the government);

14 *United States v. Crescent Ship Services* (E.D. La.) (court rewarded a company whistleblower
15 with half of the \$250,000 fine for conspiracy to violate APPS);

16 *United States v. Holland America*, (D. Alaska) (court awarded a whistleblower crew member
17 with one half of the \$1 million criminal fine for informing the government of the unlawful
18 discharges of waste oil in violation of APPS);

19 *United States v. D/S Progress* (D. Md.) (court awarded two employee whistleblowers with
20 half of the \$250,000 criminal fine under APPS for slipping a handwritten note to a U.S. Coast
21 Guard inspector that disclosed a crack in the hull of an oil tanker and which resulted in the
22 discovery of other violations); and

23 *United States v. Norwegian Cruise Lines* (S.D. Fla.) (court awarded a former employee
24 whistleblower \$250,000, which was one quarter of the \$1 million criminal fine, for informing the
25 EPA about unlawful discharges and false statements in the Oil Record Book of the *S.S. Norway*
26 cruise ship.

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III. CONCLUSION

1 Mr. Engay took an exceptional risk when he chose to alert government authorities of the
2 illegal dumping activity. His efforts should be rewarded by granting him a Two Hundred Fifty
3 Thousand Dollar (\$250,000.00) APPS award, or one-half of the criminal fine imposed on Dianik
4 Bross Shipping Corp., S.A., for violating the Act to Prevent Pollution from Ships.
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6 Dated this 15th day of November, 2011.
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8 MELINDA HAAG
9 United States Attorney

10 Dated: November 15, 2011

11 /s/
12 STACEY GEIS
13 Assistant United States Attorney
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